Neutral Citation Number: [2018] EWHC 3478 (Ch)

Case No: PT-2018-000345

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
Property Trusts and Probate List

Rolls Building
London. EC4A 1NL

Date: 14/12/2018

Before :

MASTER SHUMAN

- -

Between :

JANET ANN WHITTAKER **As Attorney for Margaret Ann Parker**	**Claimant**
- and -	
(1) CHRISTINE HANCOCK **(2) MARGARET ANN PARKER** **As Executrices of the Estate of John Sidney Parker deceased** **(3) LINDA ANN DAVIDSON**	**Defendants**

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- -

Richard Devereux-Cooke (instructed by **Anthony Gold Solicitors**) for the **Claimant**
Julian Reed (instructed by **Contested Wills and Probate Lawyers**) for the **Third Defendant**

Hearing dates: 11 October 2018

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MASTER SHUMAN

MASTER SHUMAN :

1. The claimant has brought a claim under section 50 of the Administration of Justice Act 1985 ("the 1985 Act") to be appointed as substitute personal representative of the estate of John Parker ("the deceased") in place of the second defendant, her mother, and for a caveat entered by the third defendant on 20 July 2016 to be removed. The claim is supported by three witness statements from the claimant dated 19 April 2018, 13 July 2018 and 8 October 2018.

2. The third defendant is the deceased's daughter and opposes the claim. Her solicitor, Mahvish Pirzada has filed two statements dated 13 June 2018 and 17 July 2018. The third defendant has filed one statement dated 30 September 2018. She lives permanently in Australia and has Australian citizenship.

3. The first defendant has filed an acknowledgement of service dated 5 July 2018 stating that she does not intend to contest the claim. Although she does go on to make it clear in a statement to be read with her acknowledgement that she wishes to act in the administration of the deceased's estate. The first defendant is the deceased's niece.

THE FACTUAL BACKGROUND

4. On 23 September 2003 the deceased executed a will appointing the first and second defendants as joint executrices ("the 2003 will"). The sole beneficiary of his estate is the second defendant, who was his second wife. They were married on 9 September 1987. In a statement accompanying the Will, signed by the deceased and witnessed by a legal secretary the deceased explains that he has made no provision for the third defendant because:

> "(i) She is not financially dependent upon me.
>
> (ii) She and I have had no contact for the past two and a half years.
>
> (iii) The daughter/father relationship has completely broken down."

5. On 13 September 2013 the second defendant left the family home to be better cared for by the claimant. On 29 October 2013 the second defendant executed a lasting power of attorney in favour of the claimant ("the LPA"). The power was witnessed by Nathan Bowles a solicitor specialising in wills, probate, powers of attorney and court of protection matters at 12/14 Queen Street, Deal, Kent. He also certified that the second defendant understood the purpose of the lasting power of attorney and the scope of authority conferred under it, there was no fraud or undue influence being used to induce her to create the power and that there was nothing else which would prevent the lasting power of attorney from being created.

6. The LPA was registered on 16 January 2014. In 2015 the second defendant moved into full time residential care. The claimant says that the second defendant has been

diagnosed with triple dementia, vascular, Alzheimer's and Lewy Bodies and has very little comprehension of the world around her.

7. On 4 March 2016 the deceased died. The first defendant completed the relevant probate forms and swore the executor's oath. The deceased's interest in the family home and two joint accounts have passed to the second defendant under the doctrine of survivorship. The claimant says that the family home is rented out and provides a gross monthly income since 8 August 2017 of £775 per month, this covers part only of the second defendant's care home fees. The total value of the two accounts were £27,330. The deceased's estate has a net value for probate purposes of approximately £60,000, this principally comprises cash in bank and building society accounts.

8. On 20 July 2016 the third defendant caused a caveat to be entered. She subsequently entered an appearance to the claimant's warning asserting that the 2003 Will may be invalid due to the deceased lacking testamentary capacity, being subject to undue influence and want of knowledge and approval. The third defendant has brought no claim challenging the validity of the 2003 Will. The first defendant in her statement states that she had taken legal advice "but due to financial reasons I am not prepared to pay for any legal action to remove the caveat". The caveat had the effect of preventing a grant of probate being sealed and I accept the claimant's evidence that this has caused prejudice to the second defendant. As her health deteriorates the cost of her care increases but the second defendant cannot access the funds that are locked in the deceased's estate. The claimant funded the deceased's funeral and refurbished the family home so that it could be rented out. She also funds the shortfall in the second defendant's care costs.

THE PROCEEDINGS AND POTENTIAL CLAIMS

9. On 22 July 2016 the third defendant's solicitors sent a letter of claim to the second defendant, at her care home, stating that the deceased had an obligation to provide for the third defendant, who lives in Australia with her husband and is in a difficult financial position. The claim was said to be made under section 2 of the Inheritance (Provision for Family and Dependants) Act 1975 ("the 1975 Act"). Save for stating that the third defendant and her husband had an income of £15,000 per annum no financial information was provided. There was a paucity of information and no accompanying documents. The letter included assertions that: the second defendant had deserted the deceased in 2013; that the second defendant would now be entitled to government care and had no financial need; the third defendant had reconciled with the deceased; and the deceased was neglected by the second defendant and her family. The solicitors stated in the letter that they were instructed to issue a claim forthwith: no claim was issued. There was also no suggestion within this letter that the validity of the 2003 will was being challenged.

10. The claimant's solicitors responded in two letters dated 5 August 2016 and 12 August 2016. The former asked in terms that the third defendant remove the caveat. The latter was a detailed response to the letter of claim. It set out in very clear and measured terms the response to the assertions and why they were factually wrong. The letter also set out by reference to the statutory factors in section 3 of the 1975 Act the relevant information from the claimant on behalf of the second defendant and what information should be provided by the third defendant; although this should have been set out in the letter of claim. There was no substantive response to this letter. On 15

September 2016 the claimant's solicitors asked if the third defendant was intending to challenge the 2003 will; there was no substantive response to this letter either. The third defendant's solicitors elected to correspond with the first defendant, although matters were not progressed.

11. In a further detailed letter from the claimant's solicitors dated 6 March 2017 the third defendant was asked to set out her claims and to provide specific information about her 1975 Act claim. The third defendant failed to do so.

12. It is therefore unsurprising that in light of the first defendant refusing to incur costs and the third defendant showing no signs of progressing matters that this claim was brought by the claimant.

13. By application notice dated 13 June 2018 the third defendant sought a stay of the claim for the purposes of alternative dispute resolution and to enable her to set out her evidence. This was supported by a statement from her solicitor. The third defendant was about to travel across central Queensland, Australia, by road to deal with a personal emergency, had sold her belongings to fund the trip and would apparently have no means of contacting anyone as nowhere would have Wi-Fi connection. At the subsequent hearing counsel for the third defendant was unable to give any specific or general location other than central Queensland.

14. The application was opposed by the claimant given the lack of engagement and any progress by the third defendant.

15. On 20 July 2018 I made an order providing for generous timing within the timetabling for a disposal hearing to enable the third defendant to set out her case and moreover for the parties to attempt alternative dispute resolution hearing. I reserved costs. I am told that a meeting took place on 10 September 2018 but did not achieve a settlement.

16. On 30 September 2018 the third defendant filed a witness statement stating that she did not intend to challenge the validity of the 2003 will. She then took no steps to remove the caveat. The third defendant set out her financial position in that statement and confirmed that she owns a 3 bedroom house with her husband set on 2.5 acres of paddocks with a value of £130,566 to £141,920. She also stated that she had a combined income with her husband for the tax year to June 2017 of £11,994. Both have no savings, are elderly and her "financial needs are substantial".

17. On 11 October 2018 the claimant and third defendant's counsels made submissions at the disposal hearing. I ordered that the third defendant's caveat be removed, directed that the third defendant was to issue and serve her claim under the 1975 Act with supporting evidence by 4pm on 15 November 2018, whereupon it was to be transferred to Central London County Court. I said that I would give judgment at a later date and deal with the issue of costs.

THE ISSUE BETWEEN THE PARTIES

18. Mr Devereux-Cooke submits that I should make an order appointing the claimant as substitute personal representative for the second defendant. The claimant is the attorney for the second defendant, the LPA having been registered on 16 January

2014. The second defendant cannot consent to the claim as she lacks capacity. The first defendant does not oppose the claim.

19. The claim is brought under section 50 of the 1985 Act, which provides that:

> " "(1) Where an application relating to the estate of a deceased person is made to the High Court under this subsection by or on behalf of a personal representative of the deceased or a beneficiary of the estate, the court may in its discretion—"
>
> (a) appoint a person (in this section called a substituted personal representative) to act as personal representative of the deceased in place of the existing personal representative or representatives of the deceased or any of them; or
>
> (b) if there are two or more existing personal representatives of the deceased, terminate the appointment of one or more, but not all, of those persons."

20. In Thomas & Agnes Carvel Foundation [2008] Ch 395 the claimant had issued proceedings in the United States of America to enforce a reciprocal will agreement. The American court found that the reciprocal will agreement was valid and enforceable and the claimant was entitled to the wife's estate. Notwithstanding that judgment and the first defendant being a party to those proceedings she issued a claim in the High Court and obtained an order that a substantial sum be paid to her by the wife's estate on the basis that the second defendant as residuary beneficiary consented. The first defendant was unsuccessful in her attempts to register that judgment in the American court. The claimant issued a claim against the defendants seeking to replace the first defendant as sole personal representative on the basis of her conduct with a neutral, independent professional person pursuant to section 50 of the Administration of Justice Act 1985.

21. Lewison J, as he then was, granted the application for summary judgment and ordered the removal of the first defendant as personal representative. At paragraphs 44 to 47 he set out the principles that the court should act on.

> "44. It is common ground that, in the case of removal of a trustee, the court should act on the principles laid down by Lord Blackburn in Letterstedt v Broers (1884) 9 App Cas 371, and that in the case of removing a personal representative similar principles should apply. Whether I am right in concluding that Pamela is a trustee; or whether she is no more than a personal representative, the principles are therefore the same. Lord Blackburn, at pp 385–386, referred with evident approval to a passage in Story's Equity Jurisprudence, s 1289: "
>
> "But in cases of positive misconduct, courts of equity have no difficulty in interposing to remove trustees who have abused their trust; it is not indeed every mistake or neglect of duty, or inaccuracy of conduct of trustees, which will induce courts of equity to adopt such a course. But the acts or omissions must be

such as to endanger the trust property or to shew a want of honesty, or a want of proper capacity to execute the duties, or a want of reasonable fidelity."

45. He continued, at p 386:

"It seems to their Lordships that the jurisdiction which a court of equity has no difficulty in exercising under the circumstances indicated by Story is merely ancillary to its principal duty, to see that the trusts are properly executed. This duty is constantly being performed by the substitution of new trustees in the place of original trustees for a variety of reasons in non-contentious cases. And therefore, though it should appear that the charges of misconduct were either not made out, or were greatly exaggerated, so that the trustee was justified in resisting them, and the court might consider that in awarding costs, yet if satisfied that the continuance of the trustee would prevent the trusts being properly executed, the trustee might be removed. It must always be borne in mind that trustees exist for the benefit of those to whom the creator of the trust has given the trust estate."

46. The overriding consideration is, therefore, whether the trusts are being properly executed; or, as he put it in a later passage, the main guide must be "the welfare of the beneficiaries". He referred to cases in which there was a conflict between trustee and beneficiary and continued:

"As soon as all questions of character are as far settled as the nature of the case admits, if it appears clear that the continuance of the trustee would be detrimental to the execution of the trusts, even if for no other reason than that human infirmity would prevent those beneficially interested, or those who act for them, from working in harmony with the trustee, and if there is no reason to the contrary from the intentions of the framer of the trust to give this trustee a benefit or otherwise, the trustee is always advised by his own counsel to resign, and does so. If, without any reasonable ground, he refused to do so, it seems to their Lordships that the court might think it proper to remove him; but cases involving the necessity of deciding this, if they ever arise, do so without getting reported."

47. He added, however, at p 389:

"It is quite true that friction or hostility between trustees and the immediate possessor of the trust estate is not of itself a reason for the removal of the trustees. But where the hostility is grounded on the mode in which the trust has been administered, where it has been caused wholly or partially by substantial

> overcharges against the trust estate, it is certainly not to be disregarded."

22. Helpful guidance as to the court's role in an application under section 50 is also set out in Williams, Mortimer and Sunnucks on Executors, Administrators and Probate 21st Ed (2018) at 57-20.

23. It is accepted by the parties that I have power to appoint a substitute personal representative before probate is granted.

24. Mr Reed's principal complaint is a technical one, that the claimant has no standing to bring this claim. He also submits that the claimant's position is disingenuous because she criticises the first defendant and seeks to deal with the estate by herself. The court is being faced, in effect, with an attempt to "overlook" the first defendant.

25. As to the criticism whilst the claimant has complained about the 'stale-mate' that has existed since the third defendant's caveat was entered on 20 July 2016, that was understandable and justified. She was faced with the second defendant having increasing care costs and no capacity to act, the first defendant not willing to incur legal costs and progress matters given that she did not have the resources to do so, the third defendant failing to take any steps to progress matters and the administration of the estate being in limbo. I do not accept that the claimant has been in any way disingenuous. It was made clear in Mr Devereux-Cooke's skeleton arguments and his submissions before me that the claimant was seeking to be substituted for the second defendant, indeed that is how the claim is pleaded. Historically the first defendant was asked in correspondence to renounce her executorship as a means of progressing this claim but that was not the claimant's case when the claim form was issued. Equally understandably the first defendant feels very strongly that it was the deceased's wish that she administered his estate, albeit with the second defendant, and that she could not renounce as she had taken steps, albeit limited ones, in the administration.

26. I simply do not accept Mr Reed's submission that this claim is in reality seeking to remove the first defendant: it is clearly not. The issue before me is whether the claimant should be substituted for the second defendant, who has no capacity. He also argued that I must place weight on the deceased's wishes. The deceased did not appoint the claimant to act, he appointed only the first and second defendants. I was refereed to Kershaw v Micklethwaite [2010] EWHC 506, specifically paragraphs 12 and 13. Other than it concerned a claim under section 50 there were no other factual similarities in this case. Newey J at paragraph 14 made the point that, "a testator's choice of executors is capable of being of relevance, if on no other basis then because the testator may be expected to have had knowledge of the characters, attitudes and relationships involved which a court will lack". Here the first defendant, who the deceased expressly appointed to act as joint-executrix will continue to act. The second defendant cannot act as the deceased had wished, because she now lacks capacity. She did not lack capacity when the deceased executed the 2003 will.

27. The real issue that Mr Reed takes is a technical one. This was dealt with rather succinctly in his skeleton argument but expanded upon in submissions before me.

28. Mr Reed questions the claimant's power to act under the LPA. He obliquely questions whether the second defendant had capacity to execute the LPA. He refers to a

safeguarding vulnerable adults assessment by Dr O'Donovan dated 13 September 2013 which suggests that she did not have capacity at that time: six weeks before the LPA was executed. Save for this point no evidence has been adduced by the third defendant in support of this. I have before me the LPA witnessed by the solicitor, Nathan Bowles, with the certificate that I have set out in paragraph 4 above. I accept that evidence and that the LPA was validly made.

29. Mr Reed then goes on to submit that the LPA only gives certain powers about "your property and financial affairs" and that this does not include the financial affairs of the deceased. In effect he asks me to read the LPA in a narrow and restrictive way. All the second defendant is is a beneficiary under the 2003 will and simply has an entitlement to a distribution of the deceased's estate. He therefore argued that the claimant had no standing to bring this claim. When I posed the question whether on his analysis the situation could be corrected by joining the second defendant as a claimant and appointing the claimant to act as her litigation friend Mr Reed replied, "it might do". He then went back to the correspondence and seeking to argue that the claimant wished to act alone as personal representative and not jointly with the first defendant.

30. Mr Devereux-Cooke's analysis of the standing of the claimant is as follows. Under the LPA the claimant was entitled to "make decisions about your property and financial affairs", he emphasised "your property". As there is no other beneficiary to the deceased's estate the second defendant has an interest in that estate and this is embraced within the definition of "property and financial affairs". It therefore falls upon the claimant as attorney to act on the second defendant's behalf. Section 50 of the 1985 Act can be read to include the claimant as a party who may bring an application, whether as attorney for the second defendant who is a joint executrix, or as attorney for the second defendant who is the sole beneficiary. What the claimant is not doing is seeking to act in her own right but in a representative capacity as attorney.

31. In an alternative argument Mr Devereux-Cooke also submits that under rule 35(2)(b) of the Non-Contentious Probate Rules 1987 where a person who is entitled to a grant lacks capacity the district judge or registrar may grant probate to the person authorised by the Court of Protection to apply for a grant (which does not arise here) or where there is no person so authorised to the lawful attorney of the person who lacks capacity and who is acting, as in this case, under a registered LPA. Mr Devereux-Cooke accepts that such a grant may be limited in accordance with rule 31 until further representation be granted or in such other way as the district judge or registrar may direct. He also makes the point that until 30 September 2018 this was a contentious probate matter in that the third defendant had a caveat entered on the basis that the 2003 will was invalid.

32. The LPA is not technically created and is therefore unusable until the Court of Protection registers it, regardless of whether the donor lacks capacity or not. The LPA granted by the second defendant was in the standard terms of a lasting power of attorney in respect of property and financial affairs and was not restricted in anyway.

33. In Tristram and Coote's Probate Practice 31st Ed (2015) at paragraphs 11.35 to 11.37 the authors make the following points,

(1) It should be shown in the power of attorney that the purpose of the power is to obtain representation to the estate of the deceased, and the name of the deceased should be specifically stated.

(2) But there are circumstances in which a general power of attorney containing very extensive authority for the donee may be accepted although the power of attorney was given before the death of the deceased.

Reference was made to Re Barker's Goods [1891] P 251. The headnote reads "an executor who was absent from the country, and who is expected to be absent for two years, had before his departure executed a power of attorney, in general terms, enabling the persons named in it to act for him about all his concerns or business of every kind whatsoever as fully and effectually as he himself could do, and also to appear for him in any court of justice in any action or proceeding to which he might be a party". It was held that the power was sufficiently wide to justify the court in making a grant with the will annexed to the parties named in the power of attorney for the use and benefit of the executor.

34. I do not construe the LPA restrictively as Mr Reed contends. It is a general LPA in respect of property and financial affairs that is in wide terms enabling the claimant, as attorney, to make decisions about the second defendant's property and financial affairs. There are no conditions or restrictions specified in the instrument. The scope of the claimant's authority is therefore only subject to the provisions of the Mental Capacity Act 2005, specifically the principles under section 1 and acting in best interests under section 4, and any excluded decisions under the act. Counsel did not refer me to any that arise here or indeed to provisions of any other enactment that would limit the claimant's authority to act. It is also relevant that the second defendant is the sole beneficiary under the 2003 will. She is in a different position to a case where there are a number of beneficiaries.

35. I accept Mr Devereux-Cooke's analysis that the claimant has standing to bring this claim under section 50. If I am wrong in my analysis I consider that the position could be remedied by adding the second defendant as a claimant and appointing the current claimant as her litigation friend. I also accept Mr Devereux-Cooke's analysis of rules 31 and 35 of the Non-Contentious Probate Rules 1987 and would have been prepared to treat the claim as including this as an alternative legal route, had it been necessary.

36. The administration of the deceased's estate now needs to proceed. The third defendant's stance has caused an unjustified and unnecessary delay of over two years. This is unacceptable and particularly so when the second defendant is the sole beneficiary under the 2003 will, is elderly and has undoubted financial needs to assist with her care costs. It is important now having directed the third defendant to issue a claim under the 1975 Act that that claim is progressed promptly.

37. The third defendant, save for the technical ground that I have referred to above and rejected, has set out no substantive grounds for opposing the substitution of the claimant as personal representative. The first defendant does not oppose that appointment. I can infer from that there is no reason to believe that the claimant and the first defendant cannot work together to administer the deceased's estate. Given that the second defendant is the sole beneficiary of that estate, unless and until an order is made under section 2 of the 1975 Act in favour of the third defendant, and

historically the first defendant has considered herself impotent to act without financial resources and in the face of asserted but not issued claims by the third defendant I consider that in order for the deceased's estate to be administered it is necessary to substitute the claimant as personal representative in place of the second defendant.