Neutral Citation Number: [2021] EWHC 1400 (Ch)

Case No: PT-2020-000516

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES (ChD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 1/6/2021

Before:

MASTER CLARK

- -

Between:

SHARON MARIE HUDMAN
(as executrix of Barry Leonard Morris deceased
and in her personal capacity) **Claimant**

- and -

ALAN WAYNE MORRIS
(as executor of Barry Leonard Morris deceased
and in his personal capacity) **Defendant**

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Nathan Wells (instructed by **Gardner Leader LLP**) for the **Claimant**
Matthew Wales (instructed by **JCP Solicitors**) for the **Defendant**

Hearing date: 12 May 2021

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Approved Judgment

I direct that this approved judgment, sent to the parties by email on 27 April 2021, shall deemed to be handed down on that date, and copies of this version as handed down may be treated as authentic.

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Master Clark:

1. This is my judgment in a Part 8 claim seeking the removal of the defendant as executor under s. 50 of the Administration of Justice Act 1985, alternatively that he be passed over as executor pursuant to s.116 of the Senior Courts Act 1981.

2. The claim concerns the estate of Barry Leonard Morris, who died on 2 February 2019, in his early 90s, leaving a will dated 10 April 2013 ("the Will"). The Will divides his residuary estate between his 5 named children: Alan Morris, Sharon Hudman, Roger Morris, Kim Morris and Karl Morris (to whom I refer by their first names). It makes no provision for the deceased's (third) wife, stating that the deceased considers that she will be adequately provided for from her own assets. Alan and Sharon are the executors of the Will.

3. Sharon is the claimant. Alan is the defendant, whose removal is sought. Kim, sadly, died before the deceased. Sharon is supported in her claim by the remaining siblings and by Kim's son Aaron, who takes his father's share under the Will.

4. Sharon seeks the appointment of an independent administrator. She does not accept that there are any grounds for her removal, but is willing to step down if Alan is removed. Alan resists his removal. Although there is no formal counterclaim, he seeks Sharon's removal, and the appointment of an independent administrator to act with him.

5. This case is regrettably yet another example of Tolstoy's observation that each unhappy family is unhappy in its own way. It is common ground that Alan and his siblings are completely estranged. This family's dysfunctionality has resulted in legal costs that are on any basis disproportionate to the size of the estate and the nature of the disputes. As set out below, the deceased's estate has already been burdened with nearly £100,000 in costs of disputed Court of Protection proceedings, reducing the net estate to about £350,000. The claimant's costs of this claim total £87,102.00 (inc. VAT); the defendant's £36,600 (inc. VAT); making a total of £123,702.

Background

6. I set out as briefly as possible the background to the claim. As is usual in the final hearing of claims under s.50, all the evidence was in written form, and there was no oral evidence. The evidence comprised:
   (1) Sharon's witness statement dated 7 July 2020
   (2) the witness statement dated 30 June 2020 of Nia Wharry (Sharon's proposed personal representative)
   (3) Alan's witness statement dated 7 August 2020
   (4) the witness statement dated 6 August 2020 of James David Jones (Alan's proposed personal representative).

7. In July 2013, the deceased was diagnosed with dementia of mixed aetiology. In May 2014, the deceased's brother, Alan Denzil Morris ("the Uncle"), who lived in Australia, died intestate, and the deceased became entitled to about £300,000 from his estate. Roger says (in an email dated 2 May 2018) that the deceased asked him to go to Australia to help deal with that estate, and to bring back mementos. This is

supported by contemporaneous correspondence. It is also evidenced by a document entitled "Summary of NPTCBC involvement with [the deceased]", exhibited to the witness statement dated 28 February 2017 of Sean Haran (a Community Social Worker) made in the Court of Protection proceedings referred to below. This records the deceased's solicitors informing Mr Haran's colleague on 1 August 2014 that Roger would be going to Australia on the deceased's behalf. Alan disputes that the deceased asked Roger to go to Australia on his behalf, or agreed to pay the costs of the trip.

8. In August 2014, Roger travelled to Australia for 2 weeks. His expenses for that trip ("the Expenses") total £2,836.48.

9. On 11 January 2016, the deceased executed a Lasting Power of Attorney ("the LPA") in respect of his property and affairs in favour of Alan. The other children were unaware of this. When Roger found out about it, he applied, on 26 June 2016, to the Court of Protection ("COP") to revoke the LPA, and for the appointment of a deputy for property and affairs for the deceased.

10. At the initial directions hearing on 11 January 2017 in the COP, Alan accepted that a deputy should be appointed for the deceased in respect of his property and affairs, and health and welfare. Necessarily, this would have involved revoking the LPA.

11. However, in his witness statement dated 24 May 2017 in the COP proceedings, Alan resiled from this position, and opposed the appointment of a deputy. By 9 August 2017, he had again changed his mind, and was willing to retire as attorney and disclaim the LPA. By a consent order made on that date, the COP formally revoked the LPA, appointed Nigel Jones of JMD Law ("the Deputy") as the deceased's deputy for his property and affairs, and ordered Alan's and Roger's costs (to be assessed) to be paid from the deceased's funds. This order included the grant to the Deputy of authority to:

> "reimburse [Roger] for expenses incurred by him in travelling to Australia in August 2014 if the Deputy considers it is in [the deceased's] best interests to do so."

12. On 11 September 2017, the COP made a further order which again appointed Mr Jones as deputy (it is unclear why this was ordered again), and conferred authority on him to expend such sums as he considered reasonable having regard to all the circumstances on, amongst other things,

> "the reimbursement of [Roger] for sums already incurred by him in travelling to Australia in August 2014 in connection with matters relating to the estate of [the Uncle]."

13. The costs of the COP proceedings were considerable:

Roger's assessed costs	£52,790
Official Solicitor's costs	£12,351.60
Alan's assessed costs	£8,556.58
Deputyship costs	£25,869.84
Total	£99,568.02

14. In March 2018, a Best Interests meeting was held to decide whether the deceased (by then aged 91) should continue to live in his own home. It was decided that the deceased should move to residential care. Alan and Kim disagreed with this.

15. On 1 October 2018, Kim died. 4 months later, on 2 February 2019, the deceased died. Shortly thereafter, Sharon instructed Mr Jones's firm, JMD Law, to act on her behalf in the administration of the estate. Mr Jones wrote to Alan asking whether he would agree to him (Mr Jones) acting on his behalf in applying for probate. Alan's reply fell short of agreeing to instruct Mr Jones, but did agree to engage with him on those matters.

16. On 14 March 2019, Mr Jones in his capacity as former Deputy, wrote to Sharon and Roger confirming that he had been about to make the formal decision that Roger should be reimbursed the Expenses (having heard representations from both sides), but that before he could organise the payment, the deceased had died.

17. It would appear that on 5 June 2019, JMD Law sent Alan a letter of engagement (this was not in the bundle), enclosing an authority to act; and that although Alan raised various queries and objections, he did ultimately instruct them.

18. On 28 August 2019, JMD Law produced interim estate accounts. These showed (as item 3) the Expenses as a liability of the estate. Alan's response to this in his email of 17 October 2019 was vigorous:

> "I do <u>not</u> regard item 3 (i.e. Roger Morris – Administrator's Expenses) to be a liability to [*sic*] the Estate – as this is not justified/tantamount to **financial abuse**/potentially fraudulent (!) and I instruct you to remove this accordingly."

19. JMD Law replied on 12 November 2019 stating that their advice was to include the Expenses as a debt of the estate at the stage of applying for probate, since it had been notified. Alan was unwilling to accept this advice, and in his email of 26 November 2019 set out a number of grounds on which, he said, the Expenses were not payable. He confirmed his position in an email of 17 December 2019.

20. On 19 December 2019, JMD Law terminated their retainer on the grounds that the instructions of the two executors were contradictory.

21. This claim was commenced on 8 July 2020. The details of claim state that its basis is that Alan, by his words and conduct, has shown that he cannot be expected to carry out the administration of the deceased's estate fairly, properly and effectively in the interests of all the beneficiaries. Specific grounds are set out which can be summarised under the following headings:

    (1) Hostility by Alan towards Sharon, Roger and Karl;
    (2) Hostility by Alan towards Aaron; Alan telling Aaron that his father, Kim, did not want him to benefit from the deceased's estate;
    (3) Alan's previously expressed doubts as to the validity of the deceased's will;

(4) Delays by Alan in the instruction of JMD Solicitors and preparation of the application for probate;
(5) Alan's refusal to agree to the Expenses claim;
(6) Alan's conduct as the deceased's attorney under the LPA;
(7) Alan seeking payment of his Court of Protection costs from the estate without first obtaining an assessment – following assessment of Alan's costs, this ground is no longer relied upon;
(8) The wishes of all the beneficiaries other than Alan.

Legal principles

22. The relevant legal principles are summarised by Chief Master Marsh in *Harris v Earwicker* [2015] EWHC 1915 (Ch) at [9]:

> "i. It is unnecessary for the court to find wrongdoing or fault on the part of the personal representatives. The guiding principle is whether the administration of the estate is being carried out properly. Put another way, when looking at the welfare of the beneficiaries, is it in their best interests to replace one or more of the personal representatives?
> ii. If there is wrongdoing or fault and it is material such as to endanger the estate the court is very likely to exercise its powers under section 50. If, however, there may be some proper criticism of the personal representatives, but it is minor and will not affect the administration of the estate or its assets, it may well not be necessary to exercise the power.
> iii. The wishes of the testator, as reflected in the will, concerning the identity of the personal representatives is a factor to take into account.
> iv. The wishes of the beneficiaries may also be relevant. I would add, however, that the beneficiaries, or some of them, have no right to demand replacement and the court has to make a balanced judgment taking a broad view about what is in the interests of the beneficiaries as a whole. This is particularly important where, as here, there are competing points of view.
> v. The court needs to consider whether, in the absence of significant wrongdoing or fault, it has become impossible or difficult for the personal representatives to complete the administration of the estate or administer the will trusts. The court must review what has been done to administer the estate and what remains to be done. A breakdown of the relationship between some or all of the beneficiaries and the personal representatives will not without more justify their replacement. If, however, the breakdown of relations makes the task of the personal representatives difficult or impossible, replacement may be the only option.
> vi. The additional cost of replacing some or all of the personal representatives, particularly where it is proposed to appoint professional persons, is a material consideration. The size of estate and the scope and cost of the work which will be needed will have to be considered."

23. In *Schumacher v Clarke* [2019] EWHC 1031 (Ch), Chief Master Marsh reiterated that "the core concern of the court is what is in the best interests of the beneficiaries looking at their interests as a whole" (para.18).

24. Sharon's counsel relied upon the following further propositions, which were not disputed by Alan's counsel, although their application was, in certain respects which are discussed below.

25. In *National Westminster Bank plc v Lucas* [2014] EWHC 653 (Ch), para.80, the helpful working test adopted by Sales J was that it will be appropriate to remove a personal representative if there is a real risk that they will not act fairly and conscientiously in that office or if they cannot be expected to carry out the administration in an effective and proper manner.

26. The Court's discretion under s 50 is to be exercised in a pragmatic way: see *Long v Rodman* [2019] EWHC 753 (Ch), at para.19.

27. "The power to remove a representative is not dependent on making adverse findings of fact and it is not necessary for the claimant to prove wrongdoing. It will often suffice for the court to conclude that a party has made out a good arguable case about the issues that are raised. If there is a good arguable case about the conduct of one or more of the executors…, that may well be sufficient to engage the court's discretionary power under s 50…and make some change of [representative]…inevitable": see *Schumacher v Clarke* [2019] EWHC 1031 (Ch), at para.18.

28. The removal of a representative will be justified where they display inappropriate hostility towards beneficiaries: see *National Westminster Bank plc v Lucas* [2014] EWHC 653 (Ch) (where such hostility was not, however, established on the facts).

29. The removal of a representative will be justified where they throw doubt on the Will by which they are appointed and pursuant to which they are to administer the estate. Thus in *Heath v Heath* [2018] EWHC 779 (Ch), Carr J removed an executor who claimed – but who had not to date been able to prove – that the deceased had made a later Will leaving the entire estate to him.

30. It is "undoubtedly right" that the wishes of the estate beneficiaries may be relevant to the Court's consideration of the exercise of its discretion. The beneficiaries cannot demand replacement of a representative, but "the unanimous views of the beneficiaries [are] important where the primary test is their welfare": see *Long v Rodman* [2019] EWHC 753 (Ch), at para.23.

Grounds for removal

Expenses claim

31. Alan's conduct in respect of the Expenses claim was at the forefront of Sharon's counsel's submissions.

32. My task is not to decide whether the claim to the Expenses is justified. The claim seems to have some basis in fact: Roger travelled to Australia in connection with the estate, and the deceased's solicitors' correspondence indicates that the deceased intended him to go there on his behalf, and instructed his solicitors to draft a power of attorney for that purpose. Roger's email of 2 May 2018 says the deceased asked

him in the presence of his (the deceased's) solicitor to go to Australia to help deal with the estate and bring back mementos.

33. Alan disputes that the deceased asked Roger to go to Australia. He relies on the fact that the contemporaneous documentation does not indicate that the deceased agreed to reimburse Roger. He also relies on Roger's delay in making the claim until January 2017, some 2½ years after the trip and after the deceased had lost capacity.

34. Alan's position before the COP in 2017 was to suggest payment of 50% of the claim but also to acknowledge that "If the Court considers that Court approval is needed, I shall take a neutral position in relation to the requests for such payments".

35. Subsequently, however, as Sharon's counsel submitted, he has devoted much time and effort to raising a wide range of arguments against the payment of any part of the claim:

    (1) In his e-mail of 18 March 2019, Alan asserts that the expenses were not "reasonably incurred" and that they involved some taking of advantage of "our elderly mentally ill father". He goes on to allege that Roger misled the Court of Protection in relation to the Uncle's ashes, and then states that the reimbursement application is "tantamount to fraud!".

    (2) In his e-mail of 17 October 2019, he repeats the general allegation that the claim is "not justified/tantamount to financial abuse/potentially fraudulent(!)".

    (3) In his e-mail of 26 November 2019, Alan says that the deceased's solicitors (REL Thomas & Co) support the position that the deceased did not ask Roger to travel to Australia. This is repeated in his witness statement at para. 80. However, this is contradicted by the solicitors' letters themselves.

    (4) In the same e-mail, Alan claims that he considered and rejected Roger's claim in his capacity as the deceased's attorney under the LPA. This is repeated in his witness statement at para. 81, where he says he was expressly invited "as attorney" in the course of the COP proceedings to consider the claim. Even if this is so, that decision cannot have been binding or final, and was superseded by the Court of Protection's orders dated 9 August 2017 and 11 September 2017, which specifically empowered and directed the Deputy to consider the Expenses claim.

36. In his witness statement, Alan develops his argument for excluding the Expenses as a debt of the Estate:
    (1) because in the absence of agreement by the deceased to the liability, any agreement by the executors to it would be gratuitous and for past consideration;
    (2) to include the Expenses in the IHT Return would therefore be "tantamount to tax evasion".

37. Finally, I note that in his solicitors' letter dated 21 April 2020, it is stated that Alan does not believe that the deceased would have had the capacity to agree to pay the

expenses. This sits ill with Alan arranging for the LPA to be executed by the deceased 2 years after the Australian trip.

38. Sharon's counsel submitted that Alan has become over the years fixated with the Expenses claim. Alan, he said, treats his own position as conclusive and appears not to understand that there is a factual dispute about the basis of the claim which will need to be resolved in the course of the administration.

39. Alan's counsel submitted that his objections to the acceptance of the Expenses claim were well-founded, putting forward 11 points in support of that submission, which I now consider.

40. I accept that there is a factual dispute as to whether the deceased agreed to reimburse the Expenses. The balance of the evidence shows that the deceased asked Roger to go to Australia on his behalf. In those circumstances, even in the absence of an express agreement, the Expenses would arguably be recoverable as agent's expenses incurred in carrying out his duties as agent, or on a quantum meruit basis.

41. Alan's determination whilst he was attorney under the LPA that the Expenses claim was not a legitimate claim was not, as noted, binding on the Deputy, nor on the executors of the Will.

42. I accept that the orders of the COP do not establish that the Expenses claim is a debt of the estate. However, they also do not show that it is not a debt – they are not directed to that issue.

43. Similarly, I accept that the executors are not entitled to make a wholly gratuitous payment without the consent of all the beneficiaries, or to include such a claim as a liability of the estate in the IHT Return. I am not satisfied that JMD Law's advice that the claim should be included was wrong. As noted, there are proper grounds, albeit disputed, for making the claim. If it was found not to be payable, then HMRC would be informed and the IHT liability revised.

44. Alan's counsel submitted that the proper course to resolve this dispute would have been for Roger to issue a small claim against the estate, and for Alan to represent the estate in that claim. However, Roger is not a party to this claim, and this course would not prevent a conflict between the executors as to how the claim should be resolved. Alternatively, Alan's counsel submitted that Sharon could have applied for directions pursuant to CPR Pt 64, and joined Alan and Roger to that application. This would not, in my judgment, have been an appropriate course. As Sharon's counsel submitted, the administration of an estate does not require litigation to be brought before the grant. Executors have power under section 15 of the Trustee Act 1925 to accept, reject or compromise claims against the estate; there is no need for this to be done before the grant.

45. Finally, Alan's counsel suggested that the other 4 beneficiaries could have simply agreed to bear Alan's share of the Expenses between them, at a "cost" of £141.80 each. This, in my view, cuts both ways: Alan's agreement to the Expenses being

paid would have reduced his entitlement in the estate by £567, a small sum in comparison to the cost of any type of court proceedings.

46. In my judgement, Alan's refusal to contemplate the inclusion of the Expenses claim as a claim notified to the executors, and refusal to accept JMD Law's advice that it should be included were both wrong and unreasonable; and have led directly to the deadlock in the administration of the deceased's estate. His conduct shows him putting his own personal views and own interests above those of the estate.

Hostility to other beneficiaries

47. A poor relationship between the executor and the beneficiaries is insufficient of itself to justify the executor's removal. However, as Sharon's counsel submitted, Alan has shown sustained, overt and substantial hostility towards his siblings. They include allegations that:
    (1) his siblings cannot be trusted;
    (2) they have tried to take advantage of the deceased's vulnerability for their personal financial gain;
    (3) he and Kim have been treated with contempt by the other siblings;
    (4) the other siblings tried to impose their own will on the deceased, to the detriment of his wellbeing, and "putting his health, safety and life (!) at risk";
    (5) Roger and Sharon took advantage of the deceased's "mental illness" and separation from his wife for financial gain;
    (6) Roger and Sharon coerced the deceased into signing a "Notice of Withdrawal of Caveat" in relation to the Uncle's estate;
    (7) It was "more than likely" that Sharon unduly influenced the deceased in the making of the Will;
    (8) Roger bullied "our elderly mentally ill father – by having him prosecuted in the Court of Protection, thereby giving himself an opportunity to be 'involved in his financial affairs'" and that Roger's actions were "absolutely disgraceful";
    (9) Roger posed a serious risk to the deceased's inheritance affairs and is reckless, irresponsible and has a 'serious misbehaviour problem';
    (10) Sharon has a "particularly venomous opinion of everything I have said and done in relation to the affairs of the deceased";
    (11) Sharon has a "longstanding personal vendetta against me".

48. Alan's counsel submitted that this material showed only that there was what he referred to as a difficult family dynamic. He said that family relationships were often red in tooth and claw. He invited me to take what he called a robust view in applying the criterion of whether Alan's conduct justified concluding that he continuing to be an executor endangered the interests of the beneficiaries. He submitted that Alan's conduct did not show that he was not capable of selling the house, and distributing the estate.

49. I do not accept these submissions. In my judgement, the evidence shows real and significant hostility of Alan towards his siblings. It is significant that his counsel did not try to justify Alan's hostility to his siblings, or suggest that it was appropriate. Its level is such that Alan cannot in my judgement, be trusted to act fairly and conscientiously, and to administer the estate impartially in the interests of all the beneficiaries.

50. I also reject the submission that all that remains to be done in this estate is to sell the deceased's house and distribute the funds. For example, in addition to the issue as to the Expenses, Alan seeks the repayment to the estate of funds spent on a Smart TV for him when in his residential home, on the basis that the deceased did not know how to use it. This is another potential flashpoint in the administration.

Conduct towards Aaron

51. Alan has claimed that Kim had disowned Aaron, and did not want his share in the deceased's estate to go to Aaron. His witness statement sets out that he told Aaron this. Alan's siblings dispute that Kim was estranged from Aaron, and there is detailed evidence before me as to why. I am not however able or required to resolve this issue. In his evidence in this claim, Alan acknowledges that Aaron is entitled to Kim's share.

52. Even if Alan's allegation is true, his conduct is another instance of insensitive and intemperate behaviour towards a member of his family. Whilst not sufficient of itself to justify his removal, it is another factor casting doubt on his fitness to act as executor.

Alan's previously expressed doubts as to the validity of the deceased's will

53. On several occasions, Alan has made clear allegations that the Will was affected by incapacity and undue influence. However, in his witness statement, he now says that he had "former doubts", and that it must be plain that he is now satisfied as to the validity of the Will. His position at the hearing was that he acknowledges the validity of the Will.

54. Sharon's counsel submitted that the effect of this evidence is that Alan must personally believe that the Will is not valid, and that this places him in a position of obvious conflict such that he must be removed from office. I do not accept this submission. The effect of Alan's evidence is in my judgement that he is not challenging the validity of the Will, and therefore, would act in accordance with it as executor.

Delays by Alan in the instruction of JMD Law and preparation of the application for probate

55. Sharon relies upon delays by Alan in instructing JMD Law from February 2019 when Mr Jones first wrote to Alan, to May 2019; and then in responding to JMD Law's letter of instruction in June 2019. This delay is not in my judgement sufficient to justify Alan's removal.

Alan's conduct as the deceased's attorney under and in relation to the LPA

56. Alan has been involved, in recent years, in a number of issues/disputes concerning the property and welfare of the deceased. Sharon relies on his conduct in those disputes as showing that he cannot be expected to carry out the estate administration in an effective and proper manner. Her counsel submitted that the approach adopted by him to these previous issues has been prolix, argumentative and contradictory, and that he has displayed an obvious inability to deal with family issues and with his siblings constructively and objectively.

57. I shall not review all of these instances in detail. They include:
    (1) procuring or allowing the deceased to execute the LPA and acting under it without obtaining a medical assessment of his capacity to grant it – despite being advised by his solicitor that it was essential to do so;
    (2) maintaining that the deceased had capacity to grant the LPA in 2016, whilst repeatedly referring to him as having been "mentally ill" and unable to manage his affairs in 2014, as well as having a "mental capacity issue", and having dementia which meant he could no longer operate 'anything' as a consequence of his mental illness;
    (3) having formally disclaimed the LPA in 2017, continuing to insist that there was no justification to revoke it and that he was the most suitable person to have been the deceased's attorney;
    (4) lengthy and fruitless correspondence seeking to re-open with the Deputy the deceased's move to residential care and the sale of the property – when the Deputy is an independent professional and the relevant decisions had been his to make;
    (5) a 13 page email in February 2020 dealing with a whole range of past issues relating to the deceased's capacity, care requirements and wellbeing, including, for example, in minute detail whether the deceased could operate a gas fire.

58. Alan's counsel submitted that it was not irrational for Alan to regret the outcome of the COP proceedings, or to have preferred that the deceased had moved into his house. This, he said, was common or garden between family members, and did not relate to Alan's ability to administer the estate going forward. I agree that Alan's views were not irrational. What casts doubt on his ability to administer the estate is his inability to accept the Deputy's decisions on these points, and to move forward; and his insistence on repeatedly trying to reopen these matters.

59. In addition, the above email demonstrates Alan's unbalanced and at times strident and discourteous approach to his siblings. For example, Alan refers to Roger's "petty, childish, pathetic, malicious, vindictive (and sometimes) preposterous nonsense", while describing his own responses as "entirely appropriate and logical". Similarly, Alan says that his siblings are "inclined to misunderstand/misjudge/misrepresent everything that they choose to comment on", before going on to commend himself and Kim for displaying "integrity…beyond reproach". As Sharon's counsel submitted, although Alan says in his witness statement that the basic problem is that Sharon cannot recognise and accept that he might have a valid view which is different to hers, this is the problem that one sees with Alan himself.

60. I therefore accept Sharon's counsel's submission that Alan cannot be expected to display the reasonable, structured and objective approach to matters involving the deceased's estate and his siblings' entitlements under the estate which is essential to the proper and effective administration of the estate.

Wishes of all the beneficiaries other than Alan

61. There is no dispute that the majority of the beneficiaries, the value of whose interests is 80% of the residuary estate wish Alan to be removed. The beneficiaries are not therefore unanimous.

62. In *Long v Rodman*, at para 23, Chief Master Marsh discusses the difference between applications under s.50 and s.116 of the Senior Courts Act 1981, in the context of counsel's submission (based on *Khan v Crosland* [2012] WTLR 841 at [32]) for the proposition that where the beneficiaries are all of full age and capacity and unanimous in their wish for the personal representative to be replaced, this will be a "very powerful factor":

> "To my mind this overstates the position for two reasons:
> (1) Section 116 operates in a narrower compass than section 50. It applies only prior to a grant and at that point the estate has not been administered. The jurisdiction under section 50 may be invoked, as in the present case, some considerable period after the grant has been obtained and after the administration of the estate to a greater or lesser degree.
> (2) At paragraph [32] the judge records his acceptance of the unsurprising proposition that each case turns on its own facts and goes on to record that the unanimous wishes of the beneficiaries are a very powerful factor in that case. It is not right to draw the conclusion that their wishes will always be a very powerful factor, albeit I accept that the unanimous views of the beneficiaries is important where the primary test is their welfare."

63. Sharon's counsel relied upon *In the Goods of Sarah Stainton* (1871) LR 2 P&D 212 as authority for the proposition that the practice of the Probate Court under what is now s.116 is to grant administration to the nominee of the majority of the beneficial interests. Alan's counsel submitted that this principle only applies to applications under s.116, and is irrelevant to an application under s.50. As to this, the first point is that this claim is also brought under s.116. Secondly, as in a s.116 application, the claim is brought before the grant has been made or the estate administered, so that even so far as it is made under s.50, it is analogous to a s.116 claim. Finally, the claim is based on the welfare of the beneficiaries – the need to have the estate administered without further delay and by an administrator who can deal professionally and objectively with any outstanding issues. I accept therefore that the wishes of the majority of the beneficiaries are a weighty and important factor in favour of Alan's removal.

Alan's position

64. As noted, Alan does not agree to Sharon's proposal that they should both be replaced by an independent administrator. He argues that Sharon alone should be removed and replaced by an independent professional. The only grounds on which he seeks her removal are her conduct in bringing this claim. He does not rely on any of the complaints made in Alan's correspondence about Sharon, which, as I have observed, his counsel did not seek to justify. It follows, that if I conclude that Sharon was justified in bringing the claim, there are no grounds for her removal.

65. In opposing Alan's removal, his counsel relied on the deceased's wish that Alan and Sharon should be his executors. The deceased must, he said, have been aware of the family dynamic. The deceased's wishes are a relevant consideration, but they are a factor present in every s.50 application involving a will. They are plainly not

sufficient in themselves or capable of outweighing the other factors discussed above.

66. Alan's counsel also relied on the fact that no claim is made against Alan arising out of his conduct under the LPA, or in the conduct of the administration. In particular, he submitted, there was no finding of wrongdoing in the grant of the LPA by the deceased, and no finding as to the validity of the LPA or the deceased's capacity when he made it. Alan stepped down, he said, for purely pragmatic reasons. Although he equivocated, this was, he submitted, not a serious matter and did not have any consequences. I do not accept this last submission. Alan's equivocation in the COP proceedings would have caused the costs of those proceedings to have increased. Similarly, his reluctance to accept the Deputy's decisions and his challenges to them in correspondence would have caused the Deputy's costs to increase.

67. In any event, showing that a claim for wrongdoing could be made against Alan is not a necessary precondition for his removal. The test is, as stated above, the welfare of the beneficiaries.

68. Alan's counsel submitted that the additional costs of an independent executor were not justified by the modest size of the estate. However, this is a simple estate and the remaining steps to be taken are straightforward: submitting the HMRC return, obtaining probate, selling the deceased's house, paying any outstanding liabilities, collecting in any payments due, and making the final distributions. The costs of a competent solicitor in carrying out these tasks are dwarfed by the parties' costs in these proceedings.

Conclusion

69. As explained above, I am satisfied that Alan's conduct in relation to the Expenses claim, his intense and ill-founded hostility towards his siblings, and his conduct under the LPA show that the proper and effective administration of the estate is threatened by his continuing to be an executor. This justifies his removal, notwithstanding the other factors relied upon by Alan.

70. If I am wrong about this, in any event I consider that the wholesale breakdown of relations between Alan and his siblings would justify the appointment of an independent administrator, as this breakdown has made the task of the executors impossible.

71. For the reasons set out above, therefore, I will remove both Alan and Sharon as executors, and appoint Ms Wharry as the substitute personal representative.

Postscript

72. The bundle in this claim comprised 362 pages. Many of the relevant documents were contained in exhibits to the parties' witness statements, and were in no particular order. For example, the 3 orders made in the COP proceedings were scattered through the bundle; and no attempt was made to order other documents chronologically. This substantially impaired the accessibility and usability of the bundle.

73. In a Pt 8 claim of any substance, active consideration should be given to producing a disposal hearing bundle that orders relevant documents chronologically and, where appropriate, groups them in categories. This will mean that the bundle will not preserve the exhibits to the witness statements. In most cases, by which party a document was exhibited will not be significant, but where it is, that can be managed in other ways.