

(Avoiding) claims against personal representatives

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The basic tension

"the general rule as to the duty of an executor [is] founded upon two principles: 1st, that, in order not to deter persons from undertaking these offices, the Court is extremely liberal: 2dly, that care must be had to guard against abuse."

-- Raphael v Boehm (1807) 13 Ves Jr 407, at 410
per Lord Chancellor Erskine

Our topics

Part 1: when a personal representative will be liable for:

1. Their own breach of duty ('devastavit')
2. Breaches of duty by their co-representatives

Part 2a: proactive steps which PRs can take:

1. Renounce probate
2. Advertise for claims
3. Obtain insurance
4. Retain a contingency fund
5. Obtain an indemnity from the beneficiaries
6. Seek directions from the court

Part 2b: reactive steps which PRs can take:

7. Exclusion clauses in wills

8. Concurrence or acquiescence

9. Limitation

10. Section 61 Trustee Act 1925

1. Claims against PRs

Devastavit: the definition

- 'Devastavit' literally means 'he has laid waste'
- In practice, it means a failure to do one of 3 key things:
 1. Collect in all of the estate assets
 2. As far as possible, pay all estate liabilities
 3. Distribute the estate in accordance with the will or the intestacy rules
- Devastavit may also be accompanied by a removal claim. See my earlier webinar on removal claims on [YouTube](#)

Devastavit: standing

- No reported decision which definitively establishes the position
- But it seems settled that a beneficiary or a creditor who has suffered loss can sue: Re Yorke [1997] 4 All ER 907
- Also, by analogy with removal claims, the PRs of a deceased beneficiary or creditor can sue: Tebb v Patten [2003] EWCA Civ 82, at [17]-[18] per Jonathan Parker LJ

Devastavit: examples

- Examples of successful devastavit claims:
 1. Distributing to someone who is not truly a creditor or beneficiary: Shallcross v Wright (1850) 12 Beav 558 and Re Hulkes (1886) 33 Ch D 552, respectively
 2. Failing to pay all estate debts before distributing the estate: Taylor v Taylor (1870) LR 10 Eq 477
 3. Paying IHT out of the wrong part of the estate: Re Rosenthal [1972] 1 WLR 1273
 4. Failing to get in or convert the estate assets promptly: Hiddingh v Denyssen (1887) 12 App Cas 624
 5. Failing to pay interest-bearing debts promptly: Hall v Hallet (1784) 1 Cox Ch Cases 134

Devastavit: examples

6. Calling in interest-earning investments without reason: Taylor v Gerst (1729) Mosely 98
7. Failing to pursue a claim on behalf of the estate: Hayward v Kinsey (1706) 12 Mod 568
8. PR using estate funds for their own benefit: Vyse v Foster (1872) LR 8 Ch App 309
9. PR purchasing estate assets without beneficiaries' consent or court approval: Holder v Holder [1968] Ch 353

However:

- a) Paying a debt barred by limitation is not always devastavit: Re Midgley [1893] 3 Ch 282
- b) Delay in obtaining the grant is not devastavit: Re Stevens [1898] 1 Ch 162

Devastavit: remedies

- Three main remedies for devastavit:
 1. Damages
 2. Account of profits
 3. Avoiding a transaction which the PR entered
- A beneficiary may also have a proprietary claim against the wrongful recipients of estate assets: Re Diplock [1948] Ch 465

Liability for the acts of co-PRs Radcliffe Chambers

- General rule: one PR ('A') is not vicariously liable for the actions of their co-PR ('B'): Williams v Nixon (1840) 2 Beav 472
- However, A can be liable if they know that B is mismanaging the estate and A does not intervene

"it is the duty of all executors to watch over, and, if necessary, to correct the conduct of each other"

-- Styles v Guy (1849) 1 M & G 422, at 433 per Lord Chancellor Cottenham

2a. Minimising the risks: proactive steps

Option #1: renounce

- If someone renounces, they cannot be liable in devastavit for either their own acts or the acts of the other PRs:
Dove v Everard (1830) 1 Russ & Myl 231
- But a person cannot renounce if they have intermeddled in the estate: Re Biggs [1996] P 118
- Renunciation should be in writing but need not be by deed: Re Boyle (1864) 3 Sw & Tr 426

Option #2: advertise

- Section 27 Trustee Act 1925
- Advertise the estate for at least two months in (a) the Gazette, (b) a newspaper local to any land in the estate, and (c) in any other appropriate place
- If the estate is properly advertised, the PR is protected from claims by unknown beneficiaries or creditors: Re Aldous [1955] 1 WLR 459
- Caveats to the general rule:
 1. Does not stop the claimant suing the recipients of the estate assets: section 27(2)
 2. The notice must strictly comply with section 27: e.g. Wood v Weightman (1872) LR 13 Eq 434

Option #2: advertise

3. The adverts must be placed promptly after the deceased's death: Re Kay [1897] 2 Ch 518, at 523 per Romer J
4. It is no defence for a PR to say they forgot about a claim: MCP Pension Trustees Ltd v Aon Pension Trustees Ltd [2010] EWCA Civ 377
5. If the PR receives notice of a claim after the period in the advert expires, but before distributing the estate, they should still consider that claim: National Westminster Bank plc v Lucas [2014] EWHC 653 (Ch), at [12] per Sales J
6. Section 27 does not apply if the PR never had the right to administer the estate: Guardian Trust & Executors Company of New Zealand v Public Trustee of New Zealand [1942] [UKPC 1](#), at 4 per Lord Romer

Option #3: insurance

- Obtain 'missing beneficiary insurance' or 'unknown creditor insurance': e.g. Re Evans [1999] 2 All ER 777
- More appropriate for small estates and/or low risk cases
- The PR's protection is only as good as the insurance policy: *Re Yorke* [1997] 4 All ER 907, at 913 per Lindsay J.

Option #4: contingency fund

- Retain a contingency fund to pay future claims: e.g. Re Yorke [1997] 4 All ER 907, at 918-921 per Lindsay J
- When deciding whether to retain a fund, PRs should balance (1) the interests of the known beneficiaries and (2) the risk of further claims: Ingrey v King [2015] EWHC 2137 (Ch), at [12]
- Undertake a "*rational assessment of what sum should be retained [and] for how long*" based on the evidence: Re K [2007] EWHC 622 (Ch), at [68] per Arnold J
- It is not always appropriate to retain 100% of the funds at risk: Re Yorke [1997] 4 All ER 907, at 919 per Lindsay J
- The fund should be kept in an interest-bearing account: Re K [2007] EWHC 622 (Ch), at [68] per Arnold J

Option #5: indemnity

- Ask for a written indemnity from the beneficiaries prior to distribution: e.g. Re Yorke [1997] 4 All ER 907, at 921 per Lindsay J
- Principles applicable to contingency funds also apply to indemnities:
 1. PRs should balance (a) the interests of the known beneficiaries and (b) the risk of further claims
 2. It will not always be appropriate for the indemnity to cover 100% of the PR's potential liability
- Check that the beneficiaries are good for the money

Option #6: court directions

- Issue a claim for directions under Part 64 CPR
- A PR will not be liable if they disclose all relevant information and act on the court's order: Dean v Allen (1855) 20 Beav 1
- The Part 64 procedure is flexible:
 1. Confidentiality orders: MN v OP [2019] EWCA Civ 679
 2. Representation orders: rule 19.7 CPR
 3. 'Benjamin' orders: Re Benjamin [1902] 1 Ch 723
- PRs should take all reasonable steps to resolve the issue out of court: Re Rex [\[2015\] NSWSC 841](#), at [5]-[7] per Kunc J
- Don't incur unnecessary costs: Howell v Lees-Millais [2011] EWCA Civ 786, at [42]-[44] per Lord Neuberger MR

2b. Minimising the risks: reactive steps

Option #7: exclusion clauses Radcliffe Chambers

- E.g. STEP [Standard Provisions](#) (2nd ed, 2011), clause 12
- Exclusion clauses cannot exclude liability for fraud or unconscionable behaviour: *Armitage v Nurse* [1998] Ch 241
- The solicitor who drafts the will can rely on an exclusion clause if they are PR: *Bogg v Raper* (1998/99) 1 ITELR 267
- The court will interpret exclusion clauses restrictively: *Bogg*
- Exclusion clauses will not directly protect the PR from claims by creditors or other third parties

Option #8: concurrence and acquiescence

- Concurrence = *prior* agreement
- Acquiescence = *later* ratification
- Apply whether or not the beneficiary benefitted from the PR's breach of duty: Chillingworth v Chambers [1896] 1 Ch 685

"the Court must inquire into the circumstances which induced concurrence or acquiescence; recollecting in the conduct of that inquiry, how important it is on the one hand, to secure the property of the cestui que trust; and on the other, not to deter men from undertaking trusts, from the performance of which they seldom obtain either satisfaction or gratitude."

-- Walker v Symonds (1818) 3 Swans 1, at 64 per Lord Eldon

Option #8: concurrence and acquiescence

- Delay *by itself* will only amount to acquiescence in extreme cases: e.g. *Sleeman v Wilson* (1871-72) Lr 13 Eq 36 (38 years)
- The court will only find acquiescence if the beneficiaries were fully informed of the facts and the legal effect of their actions: *Sheffield v Sheffield* [2013] EWHC 3927 (Ch), at [120] per HHJ Pelling QC

Option #9: limitation

1. Claims brought by people *other than* beneficiaries are subject to the usual limitation periods
2. Limitation runs as normal for a claim based on what the deceased did during their life: Boatwright v Boatwright (1873-74) LR 17 Eq 71
3. A *creditor's* devastavit claim is likely to be barred after 6 years: Re Blow [1914] 1 Ch 233; section 21(3) Limitation Act 1980
4. A *beneficiary's* devastavit claim is likely to be barred after 12 years: section 22(a) Limitation Act 1980
5. For residuary beneficiaries, time starts when the administration of the estate is complete: Green v Gaul [2006] EWCA Civ 1124
6. But beneficiaries can only claim 6 years of interest: section 22(b) Limitation Act 1980

Option #10: s61 Trustee Act

- The court *may* relieve a PR of personal liability if the PR:
 1. Acted honestly;
 2. Acted reasonably; and
 3. Ought fairly to be excused
- The PR bears the burden of proving these points: Re Stuart [1897] 2 Ch 583, at 590 per Stirling J
- The PR should provide a full and frank account of their actions: Santander UK plc v RA Legal Solicitors [2014] EWCA Civ 183, at [112] per Sir Terence Etherton C

Option #10: s61 Trustee Act

1. Honesty is assessed objectively: *Royal Brunei Airlines v Tan* [1995] UKPC 4
2. Generally, acting reasonably means acting as an ordinary man of business would act with their own property: *Re Grindey* [1898] 2 Ch 593, at 601 per Chitty LJ
3. The court will consider (a) the effect of a judgment on the PR and (b) the effect of relief on the beneficiaries
4. Relying on legal advice will not automatically lead to relief for the PR: *Marsden v Regan* [1954] 1 WLR 423
 - a) Failing to take advice when appropriate is unlikely to lead to relief: e.g. *Chapman v Browne* [1902] 1 Ch 785
5. The court will take into account whether the PR is being paid, and if so how much: *Re Pauling* [1964] Ch 303, at 338-339



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