Removing a Trustee or Executor in a Testamentary Setting

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"*For I have sworn thee fair*

And thought thee bright,

Who art black as hell,

And dark as night."

- William Shakespeare, Sonnet 147

Executors and Trustees in a testamentary setting

1. Removal of an executor or trustee can be a convoluted, and complex process. There are manifold considerations when contemplating a removal action. It is not to be lightly considered or cavalierly undertaken. Whilst it is outside of the scope of this paper to delve into all of the ramifications of an action for removal, this paper attempts to highlight the key considerations.

2. The offices of executor and trustee are distinctly different.

3. However, *"in modern times, largely as the result of statute, the two offices have a greater similarity than before. An executor, like a trustee, is in a fiduciary relation with the beneficiary and the essential elements of a trust are all present in executorship. However, although there are great similarities between the two offices, it is not possible to identify the position of an executor with that of a trustee."*[1]

4. The offices of executor and trustee differ for many reasons. *"The functions and duties of an executor are different from the functions and duties of the same person who becomes trustee when the estate is administered. So in a complex estate it is possible for an executor to hold executorial functions in relation to some assets, and at the same time be trustee for different assets and for different beneficiaries."*[2]

5. There is a kind of liquid interchangeability between the roles of executor and trustee. *"The principal duties of an executor are to get in the assets of the deceased, to pay debts, to pay the legacies given by the will, and to distribute the assets. If a testator appoints the same person as executor and trustee, which is usual nowadays, then that person acts as executor when performing executorial duties, and thereafter while continuing to hold the property as a trustee. However, if called upon at any future time to deal with assets in the estate which may be subsequently discovered, the person, although a trustee in respect of the balance of the property, will take the new*

[1] Heydon, J. D. & M.J. Leeming, *Jacob's Law of Trusts in Australia*, (2010, LexisNexis Butterworths, 7th ed.) at 34.
[2] Sundar, V., C. Rowland & P. Bailey, *Testamentary Trusts: Strategies and Precedents* (2016, LexisNexis Butterworths, 2nd ed.) at 9.

assets as executor."[3]

6. *"Thus the same person may be both the executor and trustee in respect of different assets in the same estate."*[4]

7. Although the same person may carry out functions of the two offices simultaneously, the two offices are *"mutually distinct."*[5]

8. The transition point is oftentimes difficult to pinpoint precisely. *"The test is clear – have the person's executorial duties in respect of that property ended; but the difficulty in practice is to ascertain precisely whether that is the case."*[6]

9. For the above reasons, and as shall become clear, this paper will address the differing offices and their removal separately.

Why remove an executor or trustee?

10. As is often the way with human relationships bound by financial considerations, enmity can foment, and legal assistance is sought to rectify what are considered to be unreasonable actions or to breach the impasse that emotional warfare has heavily fortified.

11. During the examination of this topic, it is worth remembering that trusts are not separate legal entities. A trust exists in a conceptual, yet often ephemeral, equitable landscape bound by fiduciary principles and obligations.[7]

12. The importance of the awareness of the legal architecture that is represented by a trust will become increasingly important for the practitioner as awareness and demand grows for greater proficiency with testamentary devices such as Testamentary Trust Wills.

13. One of the features of a Testamentary Trust Will is that they are often deployed in circumstances where a beneficiary is to receive a benefit - but not directly – amidst fears that addiction, mental health issues, or circumstantial challenges that beset a beneficiary, will lead to the dissipation of their legacy.

14. So what can a party, bonded into a relationship not of their choosing with a trustee/executor - for a period of time (of at least the Executor's year) - do to exact a severe change in position such as removal of the officeholder?

15. To begin to answer this question, it bears attention that the officeholder of the position of trustee or executor is bound to act in trust and is beholden to fiduciary

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[3] Note 1 at 34.
[4] Note 1 at 34.
[5] Ong, D., *Trusts Law in Australia*, (2007, The Federation Press, 3rd ed.) at 46.
[6] Note 1 at 36.
[7] Note 1 at 1.

obligations, yet is mostly a layperson.

16. An unfortunate outcome of this situation is that they are often not aware of their obligations at law. An opportune reminder for us as legal professionals of the critical step of setting expectations for the officeholder; and to provide them awareness of the legal framework within which they will be bound to operate. That is our fiduciary duty.

17. Anyone who is capable, at law, to hold property in their own right, is capable of holding the office of trustee – *"A person's capacity to be a trustee coincides with the capacity to hold a legal estate."*[8]

18. The law often presides over conflict within our society. The client often comes to legal representation because they are unable to resolve a bitter dispute by any other means. Whilst testamentary resolutions are a particularly fertile field for acrimony - even more so since the effects of blended families arising from the no-fault divorce consequences of the *Family Law Act 1975* (Cth) - there must be present one of only a small array of causes present, in order to remove an executor or trustee.

19. Hostility between the trustee or executor and the beneficiary/s is not a valid reason for their removal.[9] Conflict with beneficiaries is not sufficient cause for removal. Indeed, viewed objectively, it is not even good grounds.

20. It doesn't require a large leap to conjure up situations in which the conflict and enmity of a beneficiary/s might be indicative of the trustee having done an exemplary job. Think, for example, of that the trustee that presides over a trust for a beneficiary who is drug addicted. The complaint of the beneficiary might arise as a consequence of the beneficiary's inability to liquidate their legacy – evidence of a role charged and faithfully fulfilled by the testamentary trustee in satisfaction of the testator's direction.

21. Conflict arising from inter-trust friction is not a cause for removal.[10]

22. An executor might be removed due to conflict of interest.[11]

23. They may be removed due to *"inaction and delay…"* of an estate's administration."[12]

24. They may also be removed due to incapacity, such as *"mental infirmity, ill health, or by virtue of the proof of other matters which established that the executor was not a fit and proper person to carry out [their duties]…"*[13]

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[8] Note 1 at 306.
[9] Note 1 at 352.
[10] Note 1 at 352.
[11] *Monty Financial Services Ltd (formerly known as Inscorp Holdings Ltd) and Anor v Delmo* (1996) 1 VR 65.
[12] *Mavrideros v Mack* (1998) 45 NSWLR 80 at 107.
[13] *Juul v Northey* [2010] NSWCA 211 at [238].

25. An executor may be removed where it is essential "to ensure the due administration of the estate in the interests of the beneficiaries."[14]

26. It has been stated that, *"the real object which the Court must always keep in view is the due and proper administration of the estate and the interests of the parties beneficially entitled thereto; and I can see no good reason why the Court should not take fresh action in regard to an estate where it is made clear that its previous grant has turned out abortive or inefficient."*[15]

27. Removal of an executor must only be pursued for "serious reason".[16]

28. Measured against the above causes for removal by the Court will be the weight belonging to the fact that the testator chose the executor and trustee for a particular reason, and may well have been aware of any potential conflicts.[17]

29. In some instances, the testator may well have known and approved of the conflict of interest that the executor would be placed in. In such a case, the Court will not enable their removal – *"It is not every conflict of duty and interest which should result in removal of an executor. The intention of the testator that the executor be a particular person should not lightly be set aside – whether before or after the grant."*[18]

Removal of an executor

30. Once appointed executor by a will, unless the nominated executor renounces the office, they are obliged to undertake the duties expected of them in this role (including proving the will, calling in assets, obtaining a grant of probate, pay liabilities and expenses, then distribute correctly)[19] and to *faithfully* discharge those duties (as would be the expectation placed upon a trustee).[20]

31. The law, however, does not prescribe a standard of conduct resembling perfection.[21]

32. A greater expectation is placed upon the executor that is a professional however,[22] and the highest standards have been attributed to the Public Trustee when acting in the role of executor and charging for its services.[23]

33. The circumstances that require the removal of an executor, revocation of the grant and appointment of another administrator, are at the Court's discretion.[24] These

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[14] *Bates v Messner* (1967) 67 SR (NSW) 187.
[15] *In the Goods of William Loveday* [1900] P 154 at 156, per Jeune P.
[16] (1996) 1 VR 65 at 20 per Ashley J.
[17] (1996) 1 VR 65; *Tuohey v Tuohey* [2002] VSC 180.
[18] (1996) 1 VR 65 at 38 per Ashley J.
[19] Dal Pont, G.E. & K.F. Mackie, *Law of Succession* (2017, LexisNexis Butterworths, 2nd ed.) at 411-412.
[20] Note 19 at 412.
[21] *Hill and Ors v Roberts and Anor*, (Supreme Court of Victoria, Ashley J, September/October 1995) at 43.
[22] Note 19 at 413.
[23] Note 19 at 413; *MacDonald v Public Trustee* [2010] NSWSC 684 at [89] per McLaughlin J.
[24] *Rutter v McCusker* [2008] NSWSC 1289 at [23].

circumstances are dependent on the facts of the case and are not contained with specific closed categories.[25]

34. Executors, "like trustees and others to whom fiduciary duties apply, must abide by the fiduciary 'no conflict' and 'no profit' rules."[26]

35. The 'no conflict' rule demands that an executor or trustee not place themselves in a position where their own interests are in conflict with their fiduciary obligations.[27]

36. The rule imposes a requirement that the matter must be something more than simply potential conflict - potential conflict of interest must have crossed into actuality for the breach of "conflict of interest and duty" to have crossed into the Court's present consideration.[28]

37. The question becomes, **do the actions of the executor place the administration of the estate in jeopardy**?[29]

38. As is so often the case when contemplation of the removal of an executor occurs, there is a history, or at least present atmosphere, of animosity. However, the beneficiaries of the estate, despite any animosity, *"are entitled to have [the estate] administered fairly and impartially in the interests of all beneficiaries."*[30]

39. Indeed, beneficiaries have a fundamental entitlement to have the estate administered by someone who is not tainted with a conflict of interest and duty.[31]

40. The 'no profit' is described by Dal Pont & Mackie as a "subset of the former' rule, and it *"proscribes persons from profiting from their position as personal representatives."*[32] Both are subject to the terms of the will.[33] Regardless, the role *"places that person under strict obligations and duties as to the manner in which they deal with the estate".*[34]

41. The extension of the duties imposed upon the executor or trustee is that should they transgress those duties, it is open to prosecute a remedy under a breach of duty.[35]

42. The executor or trustee is *"accountable to all the beneficiaries of the estate…"*[36]

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[25] [2008] NSWSC 1289 at [23].
[26] Note 19 at 423.
[27] Note 19 at 423.
[28] [2008] NSWSC 1289 at [26]; (1996) 1 VR 65.
[29] [2008] NSWSC 1289 at [28].
[30] [2008] NSWSC 1289 at [29].
[31] [2008] NSWSC 1289 at [32].
[32] Note 19 at 424.
[33] Note 19 at 424.
[34] *In the matter of the Estate of Ward; Marsden and anor v Ward* (Supreme Court of Western Australia, Owen J, 9 April 1998) at 17.
[35] Note 19 at 434.
[36] *In the matter of the Estate of Ward; Marsden and anor v Ward* (Supreme Court of Western Australia, Owen J, 9 April 1998) at 17.

43. At first instance, the *"remedy for a breach of fiduciary duty is equitable compensation…"*[37] Also, unauthorised profit by an executor or trustee may open an action for account of profits,[38] and misappropriation may result in a constructive trust.[39]

44. In the midst of a suit against the executor, perceived or pleaded misconduct will likely prove insufficient cause, "*proved* misconduct is very different from *pleaded* misconduct."[40]

45. In New South Wales, an executor can also be removed by the court for failing to take probate.[41]

46. The required and correct procedure for *"the removal of executors differs from that for the removal of trustees."*[42]

47. The power of the Court under statute to appoint a new trustee does not provide authority for the appointment of a new executor.[43]

48. An executor is removed by the revocation of the grant.[44]

49. A grant of probate is an order of the Supreme Court. As an order of the court, the court is vested within its inherent jurisdiction with the authority to revoke it.[45]

50. The Court will take this option if it comes to the conclusion that the Executor has not upheld their duty to ensure the "due and proper administration" of the estate, or if the executor has served to *"prevent or frustrate"* the estate's administration.[46]

51. Section 66 of the *Probate and Administration Act* provides that
"the Court may, at any time, upon the application of any person interested in the estate:
(a) revoke the administration already granted…"[47]

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[37] Note 19 at 435.
[38] Note 19 at 436.
[39] Note 19 at 436.
[40] *Re Estate of Ritchie; Uniting Church in Australia Property Trust (NSW) v Millane* [2002] NSWSC 1070 at [7]-[8] per Windeyer J; M. Meeks SC & P. Studdert, 'Grants in administration of deceased estates', (2016) 43 *Australian Bar Review* 115 at 133.
[41] *Probate and Administration Act 1898* (NSW), s 69(c) (which is slightly different to the effect of s 75).
[42] [2010] NSWCA 211 at [238].
[43] Note 1 at 335; *Trustee Act 1925* (NSW), ss 6 & 70.
[44] [2010] NSWCA 211 at [238].
[45] [2008] NSWSC 1289 at [22] per Palmer J.
[46] [2008] NSWSC 1289 at [22].
[47] *Probate and Administration Act 1898* (NSW), s 66(a). For the consequences of the process of grant revocation, see *Re Estate Kouvakas; Lucas v Konakas* [2014] NSWSC 786 at [228]-[235] per Lindsay J; and *Supreme Court Rules 1970* (NSW) Pt 78, Div 7.

52. The reason that the grant should be revoked, in the first instance, is that the grant serves *"as an instrument of title".*[48]

53. Further, it is worth noting *that "upon an exercise of probate jurisdiction the Court exercises a vigilance beyond that necessary, or appropriate, in ordinary adversarial litigation."*[49]

54. One of the ways to avoid the conflict (and the liability imposed by litigation cost) over the actions of an executor is to consider the appointment of an independent administrator.[50]

55. Practitioners should also be aware of the utility of the Notice to Apply for Probate - the old 'citation' process – wherein a delinquent executor can be required by notice to take probate.[51] Failure to comply will result in a loss of executor's rights.[52]

Removal of a trustee

56. "A trustee is in a fiduciary relationship with the beneficiaries of the trust. Owing to his fiduciary status the trustee is under a duty to avoid entering into transactions where there is a real conflict or a real sensible possibility of conflict between his duty to render paramount devotion to the trust (ie, the beneficiaries), on the one hand, and his personal interests, on the other."[53]

57. When considering the removal of a trustee, the Court will place weight on evidence expressing that the testator understood a potential conflict of interest existed.[54]

58. "The trustees' fiduciary obligations are enforceable by the beneficiary, and the beneficiary's right to remedy any wrongdoing by the trustees evidences the beneficiary's underlying property right."[55]

59. Initially, the grounds for removal of a trustee include considerations such as: lack of capacity, infirmity, or the person being of considerably advanced longevity.[56]

60. It is worth noting that these are grounds for removal, not grounds for the failure of the appointment which maintains its validity[57] (as a relevant aside, the appointment of an

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[48] *Re Estate Kouvakas; Lucas v Konakas* [2014] NSWSC 786 at [230] per Lindsay J.
[49] [2014] NSWSC 786 at [290].
[50] M. Meeks SC & P. Studdert, 'Grants in administration of deceased estates', (2016) 43 *Australian Bar Review* 115 at 137.
[51] *Supreme Court Rules 1970* (NSW), r 55 – currently Form 138.
[52] *Probate and Administration Act 1898* (NSW), s 69.
[53] Note 5 at 239
[54] *Titterton v Oates and Ors* [1998] ACTSC 23 at 68 per Crispin J.
[55] Langbein, J.H., *Equity and Administration*, edited by P.G. Turner (2016, Cambridge University Press) at 195.
[56] Note 1 at 306.
[57] Note 1 at 306.

infant in New South Wales lacks validity.[58]).

61. A trustee might be subject to removal if they have breached their fundamental, fiduciary obligations – e.g. for breach of trust.[59]

62. *"Although the normal rule is that the trustee is the person to sue on behalf of the trust estate, the position is necessarily otherwise where the person to be sued is the trustee himself."*[60]

63. It is an old principle, well enunciated, that Equity *"can be thought of as a decision-making mode that aims to counter opportunism…"*[61] and of utility in *"many cases of penalties and forfeitures; many cases of impending irreparable injuries, or meditated mischiefs; and many cases of oppressive proceedings, undue advantages and impositions, betrayals of confidence, and unconscionable bargains; in all of which Courts of Equity will interfere and grant redress; but which the Common Law takes no notice of, or silently disregards."*[62]

64. Young and Heydon state that a Trustee can be removed in the following ways:

    a. By express power contained within the Trust instrument;[63]

    b. By statutory power on the appointment of a new trustee out of court;[64]

    c. By statutory power accorded to the court;[65]

    d. By the court through its inherent jurisdiction.[66]

65. A trustee may be removed due to *"positive misconduct."*[67]

66. The Court will utilise its inherent jurisdiction to undertake the removal of a trustee *"where the welfare of the beneficiaries and of the trust estate requires such a remedy."*[68]

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[58] And only in New South Wales, Note 1 at 306-7; *Conveyancing Act 1919* (NSW), s 151A.
[59] Note 1 at 352-353.
[60] Note 5 at 239.
[61] Smith, H.E., *Equity and Administration*, edited by P.G. Turner (2016, Cambridge University Press) at 330.
[62] Story, J. *Commentaries on Equity Jurisprudence, as administered in England and America* (1846, Little & Brown, 4th ed) at 29.
[63] Note 1 at 351.
[64] Note 1 at 351; *Trustee Act 1925* (NSW), s 6.
[65] Note 1 at 335; *Trustee Act 1925* (NSW), s 70.
[66] Note 1 at 352.
[67] Note 1 at 352.
[68] Note 1 at 352.

67. When considering whether it would be appropriate to remove a trustee, the *"court will regard the welfare of the beneficiaries as the dominant consideration".*[69]

68. There is no "general rule" regarding the removal from office of a trustee.[70]

69. A decision of this nature is one that the Court will not make lightly.[71]

70. The question must be, is the order *"clearly right, and indeed necessary, for the protection of the trust estate."*[72]

71. Dixon J (as he then was) expanded the depth of the considerations of the welfare of the beneficiaries to include*, "the security of the trust property, and to an efficient and satisfactory execution of the trusts and a faithful and sound exercise of the powers conferred upon the trustee."*[73]

72. His Honour identified that the court *"forms a judgment based upon considerations, possibly large in number and varied in character, which combine to show that the welfare of the beneficiaries is opposed to his continued occupation of the office. Such a judgment must be largely discretionary."*[74]

73. What if the trustee is disqualified due to bankruptcy – does this prevent them from holding the office?

74. Latham CJ in the case of *Miller v Cameron* stated, *"even though he has been guilty of no misconduct, if a trustee is in a position so impecunious that he would be subject to a particularly strong temptation to misapply the trust funds, the court may properly remove him from his office as trustee."*[75]

75. Further it was highlighted, that it may well be that *"the principal element in the welfare of the beneficiaries is the safety of the trust estate."*[76]

76. Is it the case that misconduct demonstrating *"unfitness to retain the office of trustee"* is required?[77]

77. It is trite to say that every case will turn on its particular facts, but the court's discretion within its inherent jurisdiction[78] will be enlivened when the trustee's acts (or omissions) are *"such as to endanger the trust property or to show a want of honesty or a want of proper capacity to execute the duties, or a want of reasonable*

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[69] *Miller v Cameron* (1936) 54 CLR 572 per Latham CJ.
[70] (1936) 54 CLR 572 per Starke J.
[71] *O'Neill v O'Neill* [2015] NSWSC 644 at [23] per Darke J.
[72] (1936) 54 CLR 572 per Starke J
[73] (1936) 54 CLR 572 per Dixon J.
[74] (1936) 54 CLR 572 per Dixon J.
[75] (1936) 54 CLR 572 per Latham CJ.
[76] (1936) 54 CLR 572 per Latham CJ.
[77] *Hancock v Rinehart* [2015] NSWSC 646 at [38].
[78] McGhee, J., *Snell's Equity* (2005, Sweet and Maxwell Limited, 31st ed) at 610.

fidelity."[79]

78. There is an important warning for trustees that arises when all beneficiaries of the trust demand their resignation. Close regard to ss 56-60 of the *Civil Procedure Act 2005* (NSW) should be had.

79. In *Miller v Cameron*, whilst Latham CJ stated there had been no misconduct, it was the opinion of the Chief Justice that upon such a demand the trustee *"would have acted wisely and properly in resigning as soon as he was asked. In defending this action [of remaining as trustee] … [he] has failed to show that his interests coincide with the interests of the trust estate. In such a case I consider it quite proper that he should pay the plaintiffs' costs of the action…"*[80]

80. Remember that *"a trustee is allowed his costs out of the trust estate if his conduct has been honest, even though it may have been mistaken."*[81]

81. In litigation, the first presumption of the trustee may well be that they need to contest *"legal proceedings on behalf of the trust, and not on his own behalf. He is often a necessary party to proceedings where he ought to be present, even though he may do no more than submit to the judgment of the court. In such a case the trustee receives his costs."*[82]

82. *"The position is admittedly different in a case of misconduct."*[83]

83. In the case of *Miller v Cameron*, the Court found that in resisting calls for his resignation, the trustee had been "representing and supporting his own interests, and not those of the trust estate."[84] Costs were awarded against him.

84. What are all of the potential options prior to removal?

85. The parties should consider a negotiation. Alternative Dispute Resolution ("ADR") is not just for litigation that is on foot, it is often very effective when employed pre-litigation.

86. What if there are multiple trustees and their lack of cooperation is hampering their duties as trustees? Be mindful that *"trustees must act jointly."*[85]

87. This is a situation ripe for ADR, and the prudent practitioner might make the recommendation to the testator that this is a potential safety net that can be expressly drafted into the will, when there is appointment of multiple trustees.

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[79] Note 1 at 352.
[80] (1936) 54 CLR 572 per Latham CJ.
[81] (1936) 54 CLR 572 per Latham CJ.
[82] (1936) 54 CLR 572 per Latham CJ.
[83] (1936) 54 CLR 572 per Latham CJ.
[84] (1936) 54 CLR 572 per Latham CJ.
[85] Note 50 at 141.

88. Pre-litigation ADR is certainly a worthwhile contemplation for the practitioner drafting a will as a directed self-help remedy in anticipation of future conflict in any longstanding trust relationship.

89. A step prior to removal might well be to invite the trustee to resign explaining the lack of confidence and damage believed to be occurring under their stewardship (or any allegations an applicant will formally put to the trustee in any proposed litigation).

90. The court *"has a general jurisdiction in regard to the appointment of new trustees where the court considers it expedient to appoint."*[86]

91. Should a trustee be removed from office, *"that trustee is not allowed his or her costs out of the trust estate*"; indeed, they may be the recipient of an order for the costs of all parties in the proceedings.[87]

Conclusion

92. Removal of trustees can be complex; it can be convoluted; and it can be protracted.

93. The legal practitioner will find no lack of beneficiaries that claim disaffection and lacking confidence in the administration of the executor or trustee with which they are forced to interact.

94. Litigation should not be the preferred option, as it will deplete the resources of the parties and/or the trust. It is always the recommendation that litigation should be the path of last resort.

95. However, the above has highlighted that there might prove to be situations where legal intervention is necessary to protect and uphold the rights of beneficiaries.

96. In such circumstances, it is correct to rely on this remedy, which at its heart accords with the fundamentals of Equity.

Thank you.

KM Francis

[86] Note 1 at 335; *Trustee Act 1925* (NSW), s 70.
[87] Note 1 at 354.