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XXIV Old Buildings Probate Conference 2025

Wednesday 12th November 2025 | 14.00-21.00
The Law Society, 113 Chancery Lane, London

“The set is a high quality outfit and a leading voice in the trusts and estates field”

Legal 500

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Probate Conference 2025

We are delighted you are able to attend our annual Probate Conference taking place at The Law Society, London.

We hope you find the event enjoyable and informative.

Agenda

13.30-14.00	Registration and refreshments
14.00-14.10	Introduction from the Chair **Elizabeth Weaver**
14.10-14.35	Infamy, infamy, they've all got it in for me! **Sarah Bayliss** and **James Kane** explore the court's approach to insane delusion and want of knowledge and approval in probate claims.
14.35-15.00	Everything you wanted to know about Independent Administrators … **Elizabeth Weaver** and **Niamh Davis** provide some practical guidance on the appointment and role of independent administrators and the issues they may face.
15.00-15.20	The construction of gifts to unincorporated charities **Owen Curry** will iscuss failure and other issues arising out of the recent case of *Re Midworth* [2025] EWHC 2255.
15.20-16.00	Afternoon Tea Networking Session
16.00-16.40	Juniors debate - put up or shut up orders and sham trusts Four top up-and-coming juniors, **Alex Peplow, James Kane, Tim Koch** and **Kyle Bonnell** battle it out in a series of debates on hot issues of law. Who will win?… You decide!

16.40-17.05	What's in a name? Distinguishing between executorship and trusteeship in estate administration It is common that a will appoints the same people to act as executors and will trustees. But while the difference between the two offices may appear subtle, it can give rise to significant challenges in estate administration if the distinction is not properly observed. In this talk, **Harry Samuels** unpacks the law and gives practical tips on how to avoid the bear traps.
17.05-17.25	Devolution of Property- Partnership or Estate Asset **Helen Galley** discusses the interaction between probate and partnership assets on death and dissolution.
17.25-17.30	Q&A and Closing Remarks
17.30-21.00	Drinks reception

"XXIV Old Buildings is a fantastic set for chancery work"

The Legal 500

Our speakers

Elizabeth Weaver

Elizabeth Weaver is "*a specialist in trust litigation with a practical and commercial understanding of a client's case*". An "*eminent junior*", she has a broad commercial chancery practice, focusing mainly on contentious work in the area of trusts, estates and property disputes, company law and insolvency and business disputes. Elizabeth has considerable experience of working on large-scale commercial claims (both High Court litigation and arbitrations) and trust disputes which have an international element or raise issues of foreign law and conflicts of law.

As a highly respected senior junior, clients comment she is "*absolutely first-class, very clear thinking. Her advocacy is excellent. She brings out the strengths in any case effectively, and is great at attacking weaknesses of the other party*", Elizabeth has the technical knowledge needed to analyze the issues arising in complex legal disputes (her cases often involve overlapping areas of law) and the experience to provide commercial advice and ensure the effective and efficient presentation of a client's case.

Elizabeth is a contributor to *International Trust Disputes* published by Oxford University Press.

Helen Galley

Helen has built up a reputation as a well-respected commercial Chancery practitioner with an emphasis on property, probate and trusts related issues. Helen has acted in numerous cases in the Court of Protection including applications for statutory wills; revocation of the appointment of a panel deputy; the discharge of an interim deputy; and the revocation of a Lasting Power of Attorney for Property and Affairs. She has been instructed in many contentious probate disputes and has advised and appeared in court on numerous 1975 Act claims for both Claimants and Defendants. She is experienced in cases involving the assessment of capacity to make gifts. Helen is a member of the Court of Protection Bar Association ACTAPS and a full member of STEP.

Helen is recognised in the leading legal directories for trusts. A Tier 1 barrister in Chambers and Partners clients praise her as being *"really on top of the law and her drafting is excellent. She is unflappable and gets documents turned around quickly, even in fraught situations".* The Legal 500 state she is *"excellent with the clients themselves, able to explain complex issues in an understandable way".*

Sarah Bayliss

Sarah's work encompasses a broad range of private client disputes in the UK - including construction and probate disputes, 1975 Act claims and disputes about ownership of domestic property - as well as large scale multi-national trust litigation offshore. Sarah's company/insolvency, banking/investment expertise and niche practice in art and digital asset law feed into her private client work. She is co-author of the disputes chapter of Digital Assets Law and Regulation published by Sweet and Maxwell.

Sarah is recognised as a leading junior in Chambers and Partners and Legal 500. Testimonials include: *"Very easy to work with and very bright"* and *"Clients love Sarah and she is very persuasive in court. She is also someone you want on your side in a mediation. She is not your traditional barrister; she is incredibly down to earth."*

Owen Curry

Owen advises on and appears in disputes involving trusts, secret and half secret trusts, deathbed gifts, the administration of estates, probate claims, and on questions of the construction of wills and trusts. He also has experience of applications made under the Inheritance (Provision for Family and Dependants) Act 1975. He also advises and acts for charities in the context of contentious probate disputes, construction questions, schemes and technical charity law questions. He has advised and acted in application under the Variation of Trusts Act 1958.

Alex Peplow

Alex's traditional and commercial chancery practice covers a wide range of trust and probate disputes, and he has acted for trustees/executors (both private client and institutional) and beneficiaries. Alex regularly appears, both led and unled, in the High Court and County Court. He enjoys working with clients to solve the practical problems often thrown up in a trust dispute context, including those involving trust structures with a corporate element, and has a particular interest in cases involving breach of duty and/or fraud.

His recent work includes: advising on enforcement against a judgment debtor's interest as the beneficiary of a discretionary power, advising the beneficiaries in a complex probate dispute involving arguments about the invalid exercise of a power and professional negligence by solicitors, and a dispute between the estates of an estranged married couple as to the beneficial ownership of properties acquired during the marriage.

Harry Samuels

Described in the directories as *"one to watch"*, *"a brilliant advocate"* and *"a delight to instruct"*, and the only barrister of his year of call to be ranked in the most recent edition of the Chambers & Partners High Net Worth Guide, Harry is rapidly developing a reputation as a go-to junior for trusts and probate work.

He regularly acts both led and as sole counsel, and is comfortable with all forms of property, trusts and probate disputes. His recent experience includes acting for representative beneficiaries in a major High Court blessing application, advising multiple national charities on probate and 1975 Act disputes, and acting in several offshore jurisdictions, including Jersey, Guernsey, the Isle of Man and the Cayman Islands.

James Kane

James has a busy commercial chancery practice and regularly appears in the High Court and the County Court. His recent experience in the trusts and probate field includes acting (as sole counsel) for the defendant beneficiary in a four-day High Court trial of a claim to set aside a will for want of knowledge and approval; acting (as sole counsel) for multiple beneficiaries in a complex interest claim involving issues of Zambian law; acting in numerous claims under the Inheritance (Provision for Family and Dependants) Act 1975; and advising in relation to a complex trust structure in the Bahamas and the Cayman Islands.

James studied Japanese at Oxford before converting to law and during his studies won the Inner Temple's top scholarship as well as the Times Law Awards.

Niamh Davis

Niamh has a busy commercial chancery practice, encompassing trust disputes, probate and estate administration, civil fraud, insolvency and company disputes, and commercial litigation, both domestically and offshore. Niamh regularly acts for trustees, personal representatives and beneficiaries, both as sole counsel and with a leader, in complex private client litigation.

Her recent experience in the private client sphere includes acting for a residuary beneficiary in a disputes over the ownership of UK and international assets worth c.£5 million; acting (as sole counsel) on a challenge to a will on the basis of want of knowledge and approval; advising a Jersey-trustee in relation to the administration of trust assets; and acting on behalf of heirs in relation to a judgment obtained against their deceased relative, raising conflicts of laws questions and jurisdictional issues.

Tim Koch

Tim specialises in commercial and private client disputes. Recent and ongoing instructions in the probate sphere include acting for a former executor in contentious High Court proceedings regarding the alleged maladministration of a high-value estate (as sole counsel); applications for pre-action disclosure; and advising on a dispute concerning the devolution of real property in Poland.

Tim holds undergraduate and postgraduate degrees in law at the University of Oxford, graduating with a Distinction from the BCL in 2020. Prior to joining chambers, Tim supervised undergraduate tutorials at various Oxford Colleges and worked as a Research Assistant at the Law Commission of England and Wales. In 2025, Tim was nominated as Pro Bono Junior of the Year.

Kyle Bonnell

Kyle joined XXIV Old Buildings in March 2025. During pupillage, he experienced the full range of Chambers' work and he is now building a broad Commercial and Chancery practice, including Trusts, Probate & Estates, Crypto & Digital Assets, Insolvency, Company & Partnership Law, Civil Fraud, Aviation and Commercial Litigation. Kyle is happy to be instructed as sole counsel or as part of a team.

Before coming to the Bar, Kyle was a college lecturer at the University of Oxford, where he taught Greek and Latin literature.

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Chair's opening remarks

Elizabeth Weaver

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Infamy, Infamy, they've all got it in for me!

Sarah Bayliss and **James Kane** explore the court's approach to insane delusion and want of knowledge and approval in probate claims.

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Insane delusions and want of knowledge and approval

- Two distinct concepts: insane delusion is a subset of testamentary capacity, while knowledge and approval is a separate requirement for the substantive validity of a will
- As Lloyd LJ explained in *Gill v Woodall* [2011] Ch 380 at [70]:
  - '*It is one thing to say that on a relevant date [the testatrix in that case] had the necessary understanding of the nature and extent of the property of which she could dispose by her will, and of the claims of relevant persons on her benevolence. It is quite another to examine whether, in particular circumstances, she did in fact understand what was said to her at a given meeting and what was in the document which she signed.*'

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Insane delusions

- Fourth limb of the test in *Banks v Goodfellow* (1869-70) LR 5 QB 549:
  - *'...that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that* ***no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties – that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made****.'*
- Affirmed and broken down in *Sharp v Adam* [2006] EWCA Civ 449
- Three components:
  - There must be a 'delusion' or 'disorder of the mind'
  - That delusion must be 'insane'
  - The delusion must have affected the will

There must be a delusion

- A delusion is a fixed belief in the existence of something which no rational person could believe. See *Boughton v Knight* (1872-75) LR 3 P&D 64, 68:
  - '*But you must of necessity put to yourself this question, and answer it: Can I understand how any man in possession of his senses could have, believed such and such a thing? And if the answer you give is, I cannot understand it, then it is of the necessity of the case that you should say the man is not sane.'*
- Not to be equated to an unreasonable, unfair, or even incoherent decision. See *Reeves v Drew* [2022] EWHC 159 (Ch) at [5]:
  - *'It is trite that in this country testators have complete testamentary freedom and they can do as they please. They can act out of pure spite, irrationally, nastily and capriciously, and they do not need to justify their dispositions by reference to any notions of fairness, reasonableness or morality. That means that those seeking to uphold a will do not need to prove that the dispositions can be explained or justified as fair, reasonable or coherent.'*

There must be a delusion

- Delusion itself is not mental illness. *Clitheroe v Bond* [2021] EWHC 1102 (Ch) at [107]:
  - '*Put another way, as I understand the expert evidence a delusion (in the clinical sense) is not itself a medical disorder, although it may be evidence of one. In this case, and as discussed further below, the Deputy Master's conclusion was that Jean was suffering from an affective disorder*.'
- Nor is mental illness the same as delusion:
  - *Vegetarian Society v Scott* [2013] EWHC 4097 (Ch): the testator is schizophrenic and takes an eccentric decision to leave all his property to the Vegetarian Society despite being a carnivore – no delusion
  - *Chambers v Queen's Proctor* (1840) 2 Curt 415: testator suffered from mental illness and died by suicide day after will – but will was made in a lucid interval without delusion

The delusion must be 'insane'

- Many people hold fixed false beliefs without being mentally ill. See *Smith v Tebbitt* (1867) LR 1 P & D 398 at 402.
  - *'For what is a mental "delusion"?... "A belief of facts which no rational person would have believed," says Sir John Nicoll. "No rational person." This, too, appears open to a like objection, for what are the limits of a rational man's belief? And to say that a belief exceeds them, is only to say that it is irrational or insane. "The belief of things as realities which exist only in the imagination of the patient," says Lord Brougham, in Waring v. Waring. But surely, sane people often imagine things to exist which have no existence in reality, both in the physical and moral world. What else gives rise to unfounded fears, unjust suspicions, baseless hopes, or romantic dreams?'*
- Must be some diagnosable mental illness. This is apparent from *Banks v Goodfellow* in referring to 'delusions arising from mental disease' at 555 (emphasis added) and at 560:
  - '*No doubt when delusions exist which have no foundations in reality; and spring only from a diseased and morbid condition of the mind, to that extent the mind must necessarily be taken to be unsound*.'

The delusion must be 'insane'

- Mistaken belief is not sufficient. In *Re Belliss* (1929) 141 LT 245, the testatrix had a fixed belief that she had already benefited one of her daughters more than the other and so should make a will to correct the situation.
- The court pronounced against the will – not because she was delusional, but because her mistaken belief could only have been formed if she lacked '*the sound memory which in testamentary matters is essential to a disposing mind and understanding*'.
- Not authority for the proposition that false belief per se amounted to an insane delusion, without evidence of mental illness. See *Re Templeman* [2020] EWHC 632 (Ch) at 142:
  - '*I therefore reject the suggestion that* Re Belliss *stands as authority for the proposition that a mere mistaken belief, which is the product of forgetfulness, is inimical to testamentary capacity*.'

The delusion must be 'insane'

- Eccentricity is not insanity. See *Vegetarian Society v Scott*.
- Religious belief? *Williams on Wills* at 4.12 says that '*religious beliefs may amount to delusions which justify a finding of incapacity*' – but highly questionable given authorities cited:
  - In *Smith v Tebbitt*, the testatrix believed that she was the third person of the Trinity and the residuary beneficiary was either the second or (still more mysteriously) the fourth.
  - In *Hope v Campbell* [1899] AC 1, the testator left the bulk of his fortune on trust for the purposes of encouraging teetotalism and discouraging Roman Catholicism. The case was an interlocutory appeal and turned on a pleading point anyway, but the testator's religious beliefs apparently included God telling him to make his will in that way.

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The delusion must have affected the will

- Not enough to show that testator suffered from insane delusions. See *Banks v Goodfellow* itself:
  - Testator repeatedly detailed in (what Victorians called) a lunatic asylum
  - Believed that his nemesis, Featherstone Alexander, was pursuing him from beyond the grave
  - Believed that he was '*was pursued and molested by devils or evil spirits, whom he believed to be visibly present*'
- But none of those affect the will, which just left his property to his closest relative (a niece)
- *Banks v Goodfellow* thus:
  - Puts an end to the idea of 'universal insanity'
  - Protects autonomy of those suffering from mental illness – cf s. 1 Mental Capacity Act 2005?
- Same in *Re Boyes* [2013] EWHC 4027 (Ch):
  - Testator had hallucinations and Lewy body dementia.
  - But no evidence that mental illness had actually affected his testamentary dispositions
  - The will was upheld

The delusion must have affected the will

- But may still be of evidential weight. See *Banks v Goodfellow* at 570:
  - '*No doubt, where the fact that the testator has been subject to any insane delusion is established, a will should be regarded with great distrust, and every presumption should in the first instance been made against it. Where insane delusion has once been shown to have existed, it may be difficult to say whether the mental disorder may not possibly have extended beyond the particular form or instance in which it has manifested itself. It may be equally difficult to say how far the delusion may not have influenced the testator in particular disposal of his property. And the presumption against a will made under such circumstances becomes additionally strong where the will is … one in which natural affection and the claims of near relationship have been disregarded.*'
- And there is always the burden of proof. See *Ledger v Wootton* [2007] EWHC 2599 (Ch):
  - No direct evidence that testator's mental health influenced the will
  - Will was found to be '*rational on its face and has due regard to what may be anticipated to be natural affection and the claims of near relationship upon the Deceased*' (para 6)
  - But where the deceased had a history of depression, schizoid disorder and paranoid delusions that had lasted over 50 years, there was a burden on the propounders of the will to prove capacity affirmatively – they failed to do so

The delusion must have affected the will

- Can a delusion invalidated only *part* of a will?
- Only one case in which it has: *Re Bohrmann* [1938] 1 All ER 271.
  - Testator executed a codicil making several changes to his will
  - One substitutes American for English charities in a charitable bequest.
  - The court found that he had done this because of his delusional belief that he was being persecuted by the London County Council: '*from 1932 onwards… this campaign against the London County Council was the over mastering motive of his life*'.
  - The court therefore rejected that clause while approving the rest.
- Open question, but conceptually problematic.

Want of knowledge and approval

- Conceptually different from testamentary capacity
- Testamentary capacity includes the ability to make choices, whereas knowledge and approval requires no more than the ability to understand and approve choices that have already been made
- So there may be:
  - Capacity without knowledge and approval (e.g. competent testator who is blind, illiterate, or doesn't speak English)
  - Knowledge and approval without capacity (under the rule in *Parker v Felgate* (1883) 8 PD 17)

No general need to prove knowledge and approval

- Knowledge and approval does not in the ordinary run of cases need to be proved specifically:
  - *'In ordinary circumstances [knowledge and approval] is established by proof of testamentary capacity and of due execution, from which it is assumed that the testator did know and approve the contents of the will. However, where the circumstances attending the execution of a will are such as to "excite the suspicion of the court", the court will pronounce against the will unless the suspicion is removed': Sherrington v Sherrington* [2005] WTLR 587 at [68].

Exciting the suspicion of the court

- Classic case: drafter or procurer of the will is main beneficiary:
  - '*If a party writes or prepares a will under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the court, and call upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased*': *Barry v Butlin* (1838) 2 Moo PC 480 at 481.
- But also:
  - Testator is blind (*Fincham v Edwards* (1842) 3 Curt 63) or deaf-mute (*Re Geale* (1864) 3 Sw & Tr 431)
  - Testator does not speak English: *Chin v Chin* [2019] EWHC 523 (Ch)

Exciting the suspicion of the court

- Every case turns on its facts, but can include:
  - radical departure from previous testamentary wishes
  - exclusion of (some of) the testator's children
  - the absence of a professional will writer, especially where one has been used
  - unnecessary haste of a will being prepared and executed
  - fact that a person who takes benefit under the will plays a part in the preparation of a will
  - mistakes and errors in the drafting
- But irrelevant circumstances must be excluded. See *Wharton v Bancroft* [2011] EWHC 3250 (Ch) at [9]:
  - '*The task of the probate court is to ascertain what (if anything) was the last true will of a free and capable testator. The focus of the enquiry is upon the process by which the document which it is sought to admit to proof was produced. Other matters are relevant only insofar as they illuminate some material part of that process. Probate actions become unnecessarily discursive and expensive and absorb disproportionate resources if this focus is lost.*'

Dispelling the suspicion

- Burden lies on those propounding the will, and can be heavy:
  - '*In all cases the court must be vigilant and jealous. The degree of suspicion will vary with the circumstances of the case. It may be slight and easily dispelled. It may, on the other hand, be so grave that it can hardly be removed*': *Wintle v Nye* [1959] 1 WLR 284, 291
- But the proof required is '*merely sufficient proof that the testator intended to make the dispositions contained in the will*': *Perrins v Holland* [2010] EWCA Civ 840 at [63]
- And even highly suspicious circumstances can be rebutted. See *Hart v Dabbs* [2001] WTLR 527: the propounder of the will:
  - was the main beneficiary
  - had been closely involved in preparing the will
  - was subsequently alleged to have killed the testator

Dispelling the suspicion

- The standard of proof remains the ordinary civil standard of the balance of probabilities: *Fuller v Strum* [2001] EWCA Civ 1879 at [72]
- The core focus is on whether the testator knew and approved the will, not rebutting the suspicious circumstances. See the Hong Kong case of Hung v Chiu (2007) 10 ITELR 707 at [74]:
  - '*One must not be misled by the requirement that the court's "suspicion" be dispelled into thinking that unless each and every relevant or "suspicious" circumstance has been satisfactorily explained, a will can never be successfully propounded, or more particularly, the court can never be satisfied that the testator has known and approved of the contents of the will. To do so would be to forget the ultimate aim of the exercise, namely to find out whether the testator really knew and approved of the contents of the will. Relevant or "suspicious" circumstances are pointers. They are not the end in themselves*.'
- And the fact '*that the terms of a will are surprising or worse should not, without more, raise a presumption that the testator did not know or approve of the will*': *Gill v Woodall* at [46]

Dispelling the suspicion

- And the reason for this is clear. See *Gill v Woodall* at [16]:
  - '*Wills frequently give rise to feelings of disappointment or worse on the part of relatives and other would-be beneficiaries. Human nature being what it is, such people will often be able to find evidence, or to persuade themselves that evidence exists, which shows that the will did not, could not, or was unlikely to, represent the intention of the testatrix, or that the testatrix was in some way mentally affected so as to cast doubt on the will. If judges were too ready to accept such contentions, it would risk undermining what may be regarded as a fundamental principle of English law, namely that people should in general be free to leave their property as they choose, and it would run the danger of encouraging people to contest wills, which could result in many estates being diminished by substantial legal costs*.'

Everything you wanted to know about Independent Administrators...

Elizabeth Weaver and **Niamh Davis** provide some practical guidance on the appointment and role of independent administrators and the issues they may face.

Types of Grant

Ad Colligenda Bona/Preservation Grant

- Urgent grant required to preserve the estate assets or take other action until a full grant can be obtained

Pendente Lite/Pending Suit

- Interim administration pending the outcome of a probate claim

Ad Litem/For litigation

- Grant of administration limited to commencing, defending or carrying on proceedings

Haastrup v Haastrup [2016] EWHC 3311

Senior Courts Act 1981 sections 25 and 113

High Court's general jurisdiction to make grants of administration

Sections 25 and 113(1)

Section 25

The High Court ...shall have the following probate jurisdiction, that is to say all such jurisdiction in relation to probates and letters of administration as it had immediately before the commencement of this Act

Section 113(1)

The High Court may grant probate or administration in respect of any part of the estate of a deceased person limited in any way the court thinks fit

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Section 116 Senior Courts Act 1981

Power of court to pass over prior claims to grant

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Section 116

Power of court to pass over prior claims to grant

(1) If by reason of any special circumstances it appears to the High Court to be necessary or expedient to appoint as administrator some person other than the person who, but for this section, would in accordance with probate rules have been entitled to the grant, the court may in its discretion appoint as administrator such person as it thinks expedient.

(2) Any grant of administration under this section may be limited in any way the court thinks fit.

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Section 117 Senior Courts Act 1981

Until Probate Claim determined

Section 117

(1) Where any legal proceedings concerning the validity of the will of a deceased person or for obtaining recalling or revoking any grant are pending the High Court may grant administration of the estate...to an administrator pending suit

Obtaining a limited grant: Procedure

Probate Registry
NCPR Rule 52(b): *Ghafoor v Cliff [2006] 1 WLR 3022*

High Court
In existing proceedings
Part 8 Claim
CPR 57PD para 8

Order for expedition
IHT 400

Which court ?

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Common situations when an interim administrator is needed

- Protection/sale of assets
- Uncertainty over the composition/solvency of the estate
- Uncertainty over the will
- Conflicted executor – claims against the estate

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When an interim grant comes to an end...

Pros and Cons

- Momentum
- Maximising the Estate
- Transparency
- Cost
- Time

The construction of gifts to unincorporated charities

Owen Curry will discuss failure and other issues arising out of the recent case of *Re Midworth* [2025] EWHC 2255.

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A 'nightmarish exam question'?

Initial or subsequent?

Is the problem with (a) the charitable purpose or (b) the description or identification of the charity?

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"upon trust for such of the following that exist at the date of my death and if more than one in equal shares absolutely"

The beneficiaries were:

two companies; and

three unincorporated charities that had since changed their legal form (ie. by incorporating).

Where does this leave the gifts in the will?

Can they be saved by statue: s. 311 of the Charities Act 2011 and *Berry v IBS-STL (UK Ltd)* [2012] EWHC 666. The key date is 7 March 2024

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Some cases:

- *Dryden v Young* [2024] WTLR 843 – a good summary of the law
- *Re Vernon's Will Trust* [Note] [1972] Ch 300
- *Re Fingers Will Trust* [1972] 1 Ch 286 – the two classic cases.

Some hopeful words from the Court of Appeal in 1912 (in *Re Watt* [1932] 2 Ch 243 (Note) regarding problems with gifts to merged or misdescribed charities:

"On the facts of this case, which are peculiar and not likely to exist again…..'

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Afternoon Tea

15.20 – 16.00

Juniors Debate - put up or shut up orders and sham trusts

Four top up-and-coming juniors, **Alex Peplow**, **James Kane**, **Tim Koch** and **Kyle Bonnell** battle it out in a series of debates on hot issues of law. Who will win... you decide!

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‘Put up or Shut up’ Orders

Kyle Bonnell

Tim Koch

Kyle and Tim examine ‘put up or shut up’ orders and ask how ready the courts should be to make them. Are such orders valuable means of supporting trustees in the exercise of their duties, or do they risk barring genuine claims?

The courts should be very ready to make ‘put up or shut up’ orders

Kyle Bonnell

1. ‘Put up or shut up’ (**PUSU**) orders are straightforward. A party who threatens but has failed to issue a claim to trust property is ordered to issue it within a specified period, failing which the trustee is authorised to distribute the property without regard to the threatened claim.

2. PUSU orders respond to a real difficulty in trust administration. A trustee with notice of a potential claim may be personally liable for wrongful distributions of trust property: the so-called ‘*Guardian Trust* principle’.[1] Prudent trustees threatened with, or merely aware of circumstances giving rise to, third-party claims will, therefore, often be reluctant to distribute property. This has the potential to paralyse a trust for long periods, prejudicing beneficiaries and empowering troublesome third parties.

3. In addressing these difficulties, PUSU orders are practical and principled examples of the court’s inherent jurisdiction (a) to prevent abuse and delay, and (b) to give practical effect to trusts. The court will normally require behaviour of the third-party challenger which is vexatious or unfair to the trustee or the beneficiaries, especially any significant and unreasonable delay in bringing the claim.[2]

[1] Guardian Trust and Executors Company of New Zealand Ltd v Public Trustee of New Zealand [1942] A.C. 115, 127.
[2] Sherman v Fitzhugh Gates (a firm) [2003] EWCA Civ 886, [57]; Representation of BNP Paribas Jersey Trust Corp Ltd [2010] JRC 199, [22]; Re Thomas (deceased) [2021] EWHC 937 (Ch), [17].

4. PUSU orders do not unfairly prejudice the claims of potential challengers. The challenger's loss of any recourse against the trustee personally, under the *Guardian Trust* principle, is justified by their vexatious or unreasonable behaviour. But a PUSU order will not prevent the challenger from bringing a valid claim against beneficiaries who have received property to which they were not in fact entitled.[3]

5. The court's refusal to make a PUSU order in *Parsons v Reid* [2022] EWHC 755 (Ch), on the grounds that the court had to consider all material relevant to the merits of the claim following disclosure by the executor, is regrettable. As in previous cases, the court's focus ought to have been the challenger's behaviour and not the merits of the potential claim. If trustees are to be subject to burdensome and expensive disclosure requirements, PUSU orders will lose one of their main attractions.[4]

The Court should be very wary before granting 'put up or shut up' orders, to minimise the risk of barring genuine third-party claims

Tim Koch

1. It is long established, per ***Guardian Trust and Executors Company of New Zealand Ltd v Public Trustee of New Zealand*** [1942] AC 115, 127, that *"...if a trustee or other person in a fiduciary capacity has received notice that a fund in his possession is, or may be, claimed by A, he will be liable to A if he deals with the fund in disregard of that notice should the claim subsequently prove to be well founded."*

2. That principle reflects the core function of the trustee to safeguard the trust property for the benefit of the persons properly entitled to it.

3. Further, art. 6 ECHR guarantees the fundamental right of access to the Court. That right must not be impaired by limitation periods which are unduly short, or which restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired, or which do not pursue a legitimate aim with a reasonable relationship of proportionality between the means employed and the aim sought to be achieved[5].

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[3] *Cobden-Ramsay v Sutton* [2009] WTLR 1303, [13].
[4] See further J. de Lacey and N. Herrett, '*Guardian Trust* revisited', *Trusts & Trustees*, vol. 29, no. 2, March 2023, pp. 143-57.
[5] *Stubbings v United Kingdom* [1996] ECHR 44 at [50]-[53]

4. Against this background, it is important to consider what a 'put up or shut up' order actually does. A bad claim would fail on its own merits in any event. A claim barred by lapse of a limitation period[6], or by laches or acquiescence in equity, would fail in any event. Therefore, the effect of a 'put up or shut up' order is to deprive a person with a genuinely good claim against a trust or an estate, of which the trustee or personal representative is on notice, from pursuing it against the fund at all (or, in the event of wrongful distribution, the trustee) unless they do so within the (generally short) window set by the Court on an ad hoc basis. They are, instead, left to take their chances with trying to follow the fund to wherever it has been distributed, with all the additional difficulties that would bring.

5. These orders should be reserved for the clearest cases of abusive or bad faith conduct by a prospective claimant in the non-issuing of their claim, taking into account its substantiality. If this cannot be shown, and the trustee is unprepared to wait, then they should seek a negative declaration so that the prospective claim can be determined on its merits, not artificially time-barred. Further, when an order is made, it must err on the side of allowing a proper opportunity for the claim to be issued.

6. It will rarely be necessary to bar claims pre-emptively, in light of the Court's inherent power to control abuse of its process (including via unreasonable delay). This power was recognised by the Court in ***Sherman v Fitzhugh Gates (A Firm)*** [2003] PNLR 39.

7. In ***Parsons v Reid*** [2022] EWHC 755, Master Clark adopted a suitably cautious approach. The trustees of a set of discretionary will trusts had made various interim distributions between the deceased's two children, and made a final Deed of Appointment for distribution of the remaining balance of the fund between them. The child who was to receive less (Judith) sent a letter of claim challenging the Deed of Appointment, but did not issue a claim. The trustees applied for a put up or shut up order 8 months later, complaining that they were at risk if they distributed the fund. The Court was effectively being asked pre-emptively to find that any challenge was effectively barred by laches and/or would be abusive.

8. The Master identified that the trustees were not applying for the Court's blessing of an exercise of discretion (i.e. *Public Trustee v Cooper* category 2, which would have entailed an obligation to give full and frank disclosure). She cited commentary on Lewin to the effect that the Court may authorise trustees to distribute without regard to an adverse claim to the trust assets where there is reason to think that the claim is insubstantial, and held that before making such an order she would need to consider whether the proposed claim was *"insubstantial, remote or speculative"*, and gave directions for disclosure and witness evidence so that there could be a trial of the application at which the

[6] Albeit certain claims against trusts or estates would not be subject to a statutory limitation period

merits of the proposed claim would be considered. There was no finding that the proposed claimant was acting abusively or in bad faith; she had a potentially meritorious claim and the trustees merely complained about delay.

9. It was pre-emptively held in ***Representation of BNP Paribas Jersey Trust Corp Ltd*** [2010] JRC 199 that a prospective claimant against a trust would not be able to get around a 'put up or shut up' order unless they could show that *that the trustee had acted intentionally, recklessly or with gross negligence in misleading the court"* when applying for the order. This is far too strict, and pays no heed to the substantiality of the claim that might, in due course, be pursued.

10. ***Cobden-Ramsay v Sutton*** [2009] WTLR 1303 represents a rare situation in which an order was justified. The distinguishing factor was that the prospective claimant had not only delayed issuing proceedings to challenge a codicil and revoke a grant of probate, but had positively refused to do so, and insisted instead that the executor should bring their own claim to prove the codicil's validity. This was despite the fact that the prospective claimant had been given all material which was thought to be relevant to the issue of capacity.

11. Further, in cases with an international dimension, an unintended consequence of such an order may also be that the prospective claimant is barred from pursuing their claim in the most appropriate forum, and then attempts to pursue it in a different and less appropriate jurisdiction.

Sham trusts

Alex Peplow

James Kane

Alex and James examine whether the law of sham is fit for purpose in the trust context. Should it be reformed so that only the settlor's intention matters, or would that cause more problems than it solves?

It should not matter if the trustee is in on it – a trust should be held to be a sham even if only the settlor has the requisite intention

Alex Peplow

1. Discretionary trusts, with wide ranging powers reserved to the settlor (directly or in a protector role) are a familiar occurrence. They are a particular thorn in the side of judgment creditors. An apparently wealthy judgment debtor, with access to and use of valuable assets (e.g. houses, cash, yachts, corporate interests) cannot be made to pay their debts via the realisation of those assets, because in law the debtor no longer owns them.

2. It is trite to say that judgments of the Court should be enforced. A bona fide creditor's inability to penetrate a discretionary trust structure, where it can be shown that the settlor did not subjectively intend to divest beneficial ownership, makes a mockery of that principle.

3. The law of sham, at least in a trust context, should be reformed so that there is no need to establish a subjective shamming intent on the part of anyone but the settlor. That alone should be sufficient to unwind the trust entirely and recognise that the assets remain vested in the settlor, and as such are available for attack by third party creditors. This reform would reflect the reality that the settlor is the one who sets up and defines the scope of the trust; it is their intention to which the trust gives effect. The trustee simply receives the trust property on the terms dictated to them.

4. As noted by Arden LJ (as she then was) in ***Hitch v Stone (Inspector of Taxes)*** [2001] EWCA Civ 63, concerning the current test for whether a document is a sham:

    a. The shamming intent, for the document to give a false impression of the rights and obligations which they actually intended to create, must be subjectively held as a common intention by the parties thereto;

    b. The court may look to extrinsic evidence (including the parties' explanations, subsequent conduct, and other circumstantial evidence) to establish that intent;

    c. However, mere subsequent departure from the strict terms of the document will not (alone) be sufficient to establish intent.

5. In ***JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev*** *[2017] EWHC 2426 (Ch)*, Birss J accepted that recklessness on the part of a trustee, having no intent independent from that of the settlor, will suffice. However, it will often be impossible to prove the requisite intent (or even recklessness) on the part of the professional trustee. It should not be necessary to do so, whether in the case of a bona fide trustee acting in good faith, or an unscrupulous trustee who accepts the arrangement "knowing what is required of them". Further, in Jersey, the trustee must be shown to have a positive intention to mislead third parties or the Court[7].

6. Trustees' interests can be protected by establishing that trustees will be protected from liability and entitled to retain any previously paid remuneration, where they have acted in good faith in reliance on (and in accordance with) the apparent trust document. The same protection can be given to prior good faith distributions to beneficiaries.

7. Other routes for judgment creditors to attack, and realise assets from, discretionary trusts do not go far enough. For example:

    a. The courts will take a strict approach to the fact that a discretionary beneficiary (or the object of a discretionary power) has no entitlement to the property save insofar as the trustees exercise the benefit in their favour.

    b. In ***Re Esteem Settlement*** (2001) 3 ITELR 467, the Jersey Royal Court disapproved the notion that a trustee could be required or encouraged to exercise their discretion in favour of a beneficiary by making a payment to

[7] Cohen v Arbitrage Research and Trading Ltd S.A. [2021] JRC 319; 25 I.T.E.L.R. 701

that beneficiary's creditors. The argument that a payment to reduce the beneficiary's debts is necessarily to their benefit did not find favour.

c. In the UK, a creditor could challenge the settling of property on trust under s. 423 of the Insolvency Act 1986, but only if they could prove an intention to defraud creditors in doing so. Mere intention to retain control or "ownership" of the asset would not itself suffice.

d. A Pauline action in Jersey, for example, presents even more of a difficulty because of the need to prove insolvency at the time of, or resulting from, the settlement of property on the trust.

8. The alternative finding of a sham in *Pugachev* provides no comfort. Birss J found at [424] that *"... concerning Mr Pugachev: I find that at all material times he regarded all the assets in these trusts as belonging to him and intended to retain ultimate control. The point of the trusts was not to cede control of his assets to someone else, it was to hide his control of them"*, i.e. a shamming intent.

9. His primary finding on the effect of the trusts was that *"on their own terms these trusts do not divest Mr Pugachev of the beneficial ownership he had of the assets transferred into them"* and that the powers he had reserved to himself were *"tantamount to ownership"*. He went on to find, in the alternative, that if the proper construction of the trust deeds was that the protector's powers were fiduciary rather than personal, then the deeds were a sham because the trustee had recklessly gone along with the settlor's intention incorrectly to record what he actually intended. However, on the facts of that case, this finding was really doing no more than refusing to allow Mr Pugachev to escape the consequences of the trusts which he had actually set up. It does not represent a watering down of the common intention requirement for sham.

The law of sham should not be reformed in this way, and to do so would put innocent trustees in an impossible position

James Kane

1. This reform is unnecessary, and would undermine the principal purpose of the law of sham, which is to give effect to reality where a document does not represent the true intent of anyone who was party to it. A sham document is a mere fiction to disguise the true reality. That breaks down entirely if only one party's subjective attitude is relevant.

2. The requirement to show a common shamming intention, before a trust document is declared to be a sham, ought not to be watered down. It would place trustees in an impossible position. They could not simply take up their role in good faith, in reliance on the trust instrument at face value. They would, instead, have to second-guess whether the settlor is hiding an alternative motivation, knowing that the whole arrangement could be set aside at any time, with wide-ranging and disastrous consequences:

    a. Complex tax advice may have been obtained, and steps taken, in reliance on the existing structure.

    b. Apparent discretionary beneficiaries, while not having an absolute right to receive any property, may have been misled as to their right to be considered, and taken steps in reliance on such limited rights as they did (putatively) have.

    c. Distributions may have been made to discretionary beneficiaries in the meantime. Would the trustees have to warn them of the possible consequences if the whole trust were to be set aside?

3. It is no answer to say that steps taken before the declaration of sham could effectively be validated by the Court, subject to a good faith requirement. Would every exercise of discretion have to take into account the possibility that the whole trust may be set aside? What additional cost and administrative burden would result from trustees feeling the need to cover themselves at all times? What level of suspicion, or mere speculation, as to possibility of the settlor's "true" intention might justify unwinding prior distributions from the trust? Trustees could not simply rely on the express terms of the trust document, upon which they accepted their appointment.

4. The practical difficulties continue. How is the Court do deal with a situation in which the settlor originally had a shamming intention, but they then dealt with the trustees apparently in accordance with the terms of the trust?

5. Further, a reform of this nature would allow the doctrine of sham to be abused, perversely, by the very kind of unscrupulous settlor against whom the reform is targeted. They could set up what is, on its face, a perfectly valid trust arrangement, and then undermine it later by letting it be known that they had a different subjective intention (unbeknownst to anyone else) at the time of setting up the trust, with the effect that they remained the beneficial owner at all times.

6. The routes of attack available to creditors at present provide sufficient protection, without fundamentally undermining the institution of the discretionary trust:

a. If the trust is fundamentally defective, then it may be set aside, but the trustees ought to have been able to identify the defect from the outset.

b. The *Pugachev* decision shows that the Court will seek to give effect to the substance of what the settlor has actually put in place, including recognising where (in extreme cases) the settlor has not substantially divested themselves of ownership at all. Further, a sham may be established where the trustees' subjective state of mind was reckless.

c. In the UK, a s. 423 Insolvency Act 1986 claim can be supported by proof of an intention to defraud creditors in the abstract. The transferor need not have knowledge of any actual or potential creditors at the time[8]. This is likely to overlap almost entirely with cases in which the settlor is shown to have a shamming intent, and the intent to defraud creditors can be inferred. The discretionary nature of the remedy provides a safety valve to protect against unfair outcomes to trustees and other beneficiaries in this context.

[8] *Malik v Messalti* [2024] EWHC 2713 (Ch)

What's in a name?

Distinguishing between executorship and trusteeship in estate administration. In this talk, **Harry Samuels** unpacks the law and gives practical tips on how to avoid the bear traps.

Outline

1. Introduction
2. Trusteeship vs executorship
3. Who cares? Possible pitfalls
4. Conclusion

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Trusteeship vs executorship

- "Pure trustees"
  - Separate legal/beneficial interests
  - (True) beneficiaries have specific rights
- Personal representatives: duties, but not office
  - Property is held in *auter droit,* subject to statutory/equitable duties
  - No separation between legal and equitable interest in PR's hands
  - Beneficiaries have only a right to compel due administration

Trusteeship vs executorship

- Distinction is narrower as a result of statute.
  - TOLATA 1996, section 18
  - Trustee Act 1925, section 68; Trustee Act 2000, section 35
- Administration of Estates Act 1925, section 33?

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Who cares?

Basically the same?

Basically the same?

The importance of assent.

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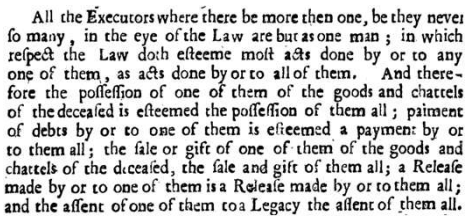
Smaller differences

- Removal or replacement in court
  - Trustee Act 1925, s. 41; Administration of Justice Act 1985, s. 50
- Limitation periods
  - *Prima facie* 12 years against executors, 6 years against trustees
- Duty to inform

Major difference 1: unanimity?

- Unanimity requirement
  - Required for trustees
  - **Not required** for personal reps. Just one can bind the estate!



All the Executors where there be more then one, be they never ſo many, in the eye of the Law are but as one man; in which reſpect the Law doth eſteeme moſt acts done by or to any one of them, as acts done by or to all of them. And therefore the poſſeſſion of one of them of the goods and chattels of the deceaſed is eſteemed the poſſeſſion of them all; paiment of debts by or to one of them is eſteemed a payment by or to them all; the ſale or gift of one of them of the goods and chattels of the deceaſed, the ſale and gift of them all; a Releaſe made by or to one of them is a Releaſe made by or to them all; and the aſſent of one of them to a Legacy the aſſent of them all.

Sir William Sheppard, *The Touchstone of Common Assurances* (1648), p.484

Major difference 1: unanimity?

- Other cases:
  - *Owen v Owen* (1738) 1 Atk 494
  - *Morris v Wentworth-Stanley* [1999] QB 1004
- Pitfalls:
  - Binding of the estate by single (rogue?) executors
  - No action against a creditor if debt is repaid by one

Major difference 2: replacement

- Case study: life interest
  - Will grants life interest in property to X, remainder to children
  - **No assent**
  - Executor decides to retire: completes DORAT under section 36 Trustee Act 1925
  - Purports to transfer property to new trustees A and B **during lifetime of X**.

Problems: no assent

1. Executor does not become trustee:

   Re King's Will Trusts [1964] Ch 542, Pennycuick J

   Nazir v Begum [2025] EWCA Civ 587 at [72], Zacaroli LJ:

   "It is no more anomalous because the executors might delay for many years before they assent the property to themselves as trustees, in compliance with s.36(4) AEA 1925 and that, until they do so, they continue to hold the property as personal representatives, under the Section 33 trust..."

2. Assent of land must be in writing

Problems: life interest still active

1. Trusteeship only live once administration otherwise complete:

   National Westminster Bank plc v Ludlow Trust Co Ltd [2023] EWHC 2532 (Ch) at [37]

2. Senior Courts Act 1981, section 114(4)

   Allows the court to appoint additional personal representatives where there is a subsisting life interest, "until the estate is fully administered".

Consequences

- No trusteeship arises. And **executors cannot retire.**
- DORAT *prima facie* invalid.
- Property transferred under a mistake of law.
- Potential *devastavit* or breach of trust?
- Consequences under s. 29 LRA 2002?
- Real complexity.

Conclusion

- Be clear about whether you are dealing with an executor or a trustee. If both, in what capacity?
- Ensure assenting process is not forgotten.
- Remember that the offices have **real differences**.
- If in doubt...

Devolution of property- partnership or estate asset?

Helen Galley discusses the interaction between probate and partnership assets on death and dissolution.

What is a partnership?

- Partnership is defined as “the relation which subsists between persons carrying on a business in common with a view of profit”. See Section 1(1) of the Partnership Act 1890.
- So there are three elements: (a) a business; (b) carried on by two or more persons in common, and (3) with a view to profit.

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Section 33(1) Partnership Act 1890

- Subject to any agreement to the partners, every partnership is dissolved as regards all the partners by the death or bankruptcy of any partner.
- A well drafted partnership agreement will deal with this issue and usually prevent dissolution and deal with the valuation of a deceased partner's share of partnership assets and how and when it will be paid to his estate.
- The general rule is, however, applied strictly so that even where the partnership was entered into for a fixed term will not prevent dissolution on the death of a partner before the expiry date
- In many cases there is no partnership agreement at all let alone a well drafted and comprehensive one

Partnership assets or assets of deceased partner

- Where a partner pays a premium as a term of entering into the partnership i.e. it is a price paid for entry into the partnership and not purchase price for a share of goodwill etc. and the partnership is dissolved on death then as "*Death is a contingency which all persons entering into partnership know may unexpectedly put an end to it"* in the absence of fraud the premium is not returnable. See section 40 of the Act and Cronin v Kehoe [2012] IEHC at 37
- Dr Cronin agreed to pay a premium to Dr Kehoe in instalments which was not fully paid on Dr Cronin's death when the partnership dissolved. Court held Dr Cronin's estate liable to pay the balance of the premium

Post dissolution profits - section 42 of the Act

- Where any member of a firm has died or otherwise ceased to be a partner, and the surviving or continuing partners carry on the business of the firm with its capital or assets without any final settlement of accounts as between the firm and the outgoing partner or his estate, then, in the absence of any agreement to the contrary, the outgoing partner or his estate is entitled at the option of himself or his representatives to such share of the profits made since the dissolution as the Court may find to be attributable to the use of his share of the partnership assets, or to interest at the rate of five per cent. per annum on the amount of his share of the partnership assets.
- (2)Provided that where by the partnership contract an option is given to surviving or continuing partners to purchase the interest of a deceased or outgoing partner, and that option is duly exercised, the estate of the deceased partner, or the outgoing partner or his estate, as the case may be, is not entitled to any further or other share of profits; but if any partner assuming to act in exercise of the option does not in all material respects comply with the terms thereof, he is liable to account under the foregoing provisions of this section.

Distribution of Assets –Sections 43 and 44 of the Act

- 43 Subject to any agreement between the partners, the amount due from surviving or continuing partners to an outgoing partner or the representatives of a deceased partner in respect of the outgoing or deceased partner's share is a debt accruing at the date of the dissolution or death.
- 44 In settling accounts between the partners after a dissolution of partnership, the following rules shall, subject to any agreement, be observed:

(a)Losses, including losses and deficiencies of capital, shall be paid first out of profits, next out of capital, and lastly, if necessary, by the partners individually in the proportion in which they were entitled to share profits:

(b)The assets of the firm including the sums, if any, contributed by the partners to make up losses or deficiencies of capital, shall be applied in the following manner and order:

1. In paying the debts and liabilities of the firm to persons who are not partners therein:
2. In paying to each partner rateably what is due from the firm to him for advances as distinguished from capital:
3. In paying to each partner rateably what is due from the firm to him in respect of capital:
4. The ultimate residue, if any, shall be divided among the partners in the proportion in which profits are divisible.

# Where capital not contributed equally

- Straightforward where capital contributed equally but if not then any loss of capital will be shared in the same proportions as the partners shared profits and losses of share profits equally and one partner A contributed twice as much capital (e.g. £10k to £5k) as the other B and there is a surplus of £10k then loss of capital of e.g. £5k shared equally so £2.5k each
- If equality cannot be achieved in this way say because the surplus is only £3k and there is a loss of capital of £12k then A takes all the surplus and B has to contribute a further £1k to A
- If agreement was reached that surplus assets be divided in proportion to their original capital contributions then those partners with the largest capital contributions will bear the majority of the loss

Partnership property – section 20 of the Act

- All property and rights and interests in property originally brought into the partnership stock or acquired, whether by purchase or otherwise, on account of the firm, or for the purposes and in the course of the partnership business, are called in this Act partnership property, and must be held and applied by the partners exclusively for the purposes of the partnership and in accordance with the partnership agreement.
- (2) Provided that the legal estate or interest in any land, or in Scotland the title to and interest in any heritable estate, which belongs to the partnership shall devolve according to the nature and tenure thereof, and the general rules of law thereto applicable, but in trust, so far as necessary, for the persons beneficially interested in the land under this section.
- (3) Where co-owners of an estate or interest in any land, or in Scotland of any heritable estate, not being itself partnership property, are partners as to profits made by the use of that land or estate, and purchase other land or estate out of the profits to be used in like manner, the land or estate so purchased belongs to them, in the absence of an agreement to the contrary, not as partners, but as co-owners for the same respective estates and interests as are held by them in the land or estate first mentioned at the date of the purchase.

Partnership property – land

- In some cases land used by the partnership may belong to one partner or to some or all of the partners as common owners without it becoming partnership property.
- The mere use of land without more is unlikely to result in it being partnership property . This is so even though the land forms the basis of the partnership business such as in farm land or where the partnership pays the outgoings including rent or even for improvements. *Ham v Bell* [2016] EWHC 1791 Ch and *Williams v Williams* [2022] EWHC 1717 (Ch) *Willd v Wild* [2018] EWHC 2197 (Ch)

Partnership property – land

- Where a partner has brought an asset into the firm so that is becomes a partnership asset the original owner even if the continues to be the legal owner will cease to have a beneficial interest or entitlement different from that of his co-partners.
- Section 2 of the Law of Property Miscellaneous Provisions Act 1989 requires a contract for the sale or other disposition of land to be in writing and signed by both parties to the contract. The section specifically provides that is does not affect the creation or operation of resulting, implies or constructive trusts.
- Authorities decided under the Statute of Frauds or Section 40 of the Law of Property Act determined that if the existence of a partnership could be established then it can be shown by parol evidence that its property comprises land. See *Forster v Hale* (1800) 5 Ves. Jr.308 at 309.
- Under the previous statutes the position seems to be that if the existence of the partnership can be proved then the statutory provisions will not apply.
- Under the current provisions the position is less certain but seems to be that the same position will apply but whether as non statutory exceptions to section 2 or on the basis of constructive trust is unclear.

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Partnership property (cont.)

- Farming partnership
- A owns farm land
- Partnership formed with sons
- Accounts consistently show land as a partnership asset
- A's capital account shown in accounts
- Was the asset both used and treated as a partnership asset?
- Mere use on its own is usually insufficient the bring about a change in the status of such an asset. See *Geary v Rankine* [2012] 2 FCR 461 CA and *Wild v Wild* [2018] EWHC 2197 (Ch)
- If it is a partnership asset then none of the partners have a direct beneficial interest in it. It will be treated as personal property and on dissolution it will be sold and the legal oner will be paid out by reference to his capital account all liabilities of the partnership having been satisfied as set out in an earlier slide
- See *Bieber v Teathers Limited* [2012] BCLC 585 where it was sought to be argued unsuccessfully that capital, once contributed, continued to be held on trust for the contributing partner

Q&A and closing remarks

Elizabeth Weaver

Notes

Members

- Elspeth Talbot Rice KC (1990, 2008)
- Stephen Moverley Smith KC (1985, 2002)
- Francis Tregear KC (1980, 2003)
- David Brownbill KC (1989, 2008)
- Steven Thompson KC (1996, 2015)
- Lyndsey de Mestre KC (1999, 2018)
- Edward Cumming KC (2006, 2018)
- Adam Cloherty KC (2005, 2023)
- Oliver Assersohn KC (2003, 2024)
- Professor Graham Virgo KC (Hon) (1989, 2017)

- Michael King (1971)
- Elizabeth Weaver (1982)
- Helen Galley (1987)
- Ian Meakin (1991)
- Arshad Ghaffar (1991)
- Stuart Adair (1995)
- Alexander Pelling (1995)
- Bajul Shah (1996)
- Jessica Hughes (1997)
- Nicole Langlois (2008)
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- Andrew Holden (2007)
- Owen Curry (2009)
- Daniel Warents (2006)
- Hugh Miall (2009)
- Heather Murphy (2009)
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- Tom Stewart Coats (2014)
- Max Archer (2014)
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