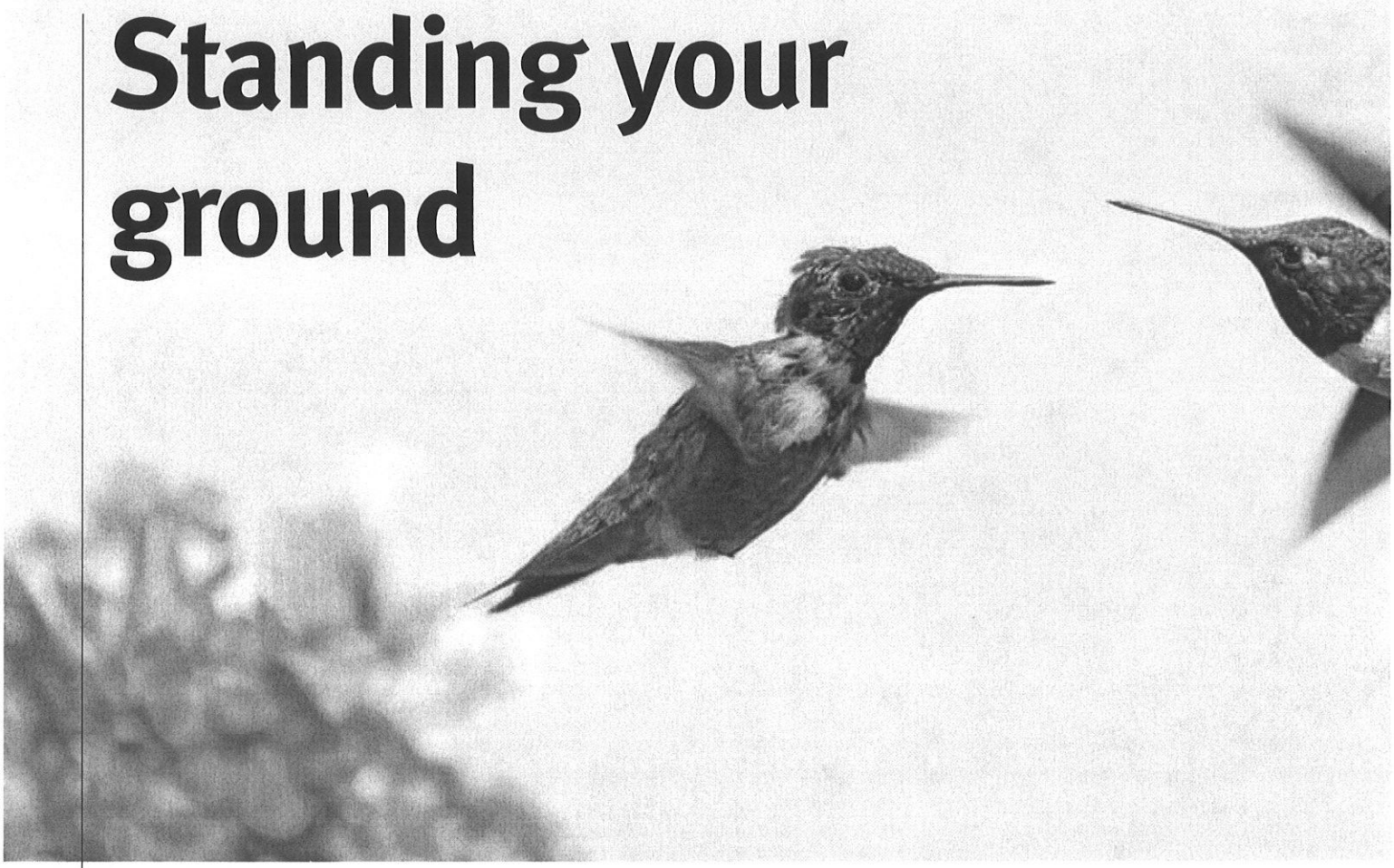
Standing your ground



Nicholas Asprey considers the jurisdiction to pass over executors, as highlighted in *Khan v Crossland*

Until recently, it was not thought that a duly appointed executor could be passed over – in effect removed – by the court, simply at the request of the adult beneficiaries. A recent decision suggests this may be an incorrect view of the law.

Passing over

Rule 20 of the Non-Contentious Probate Rules 1987 provides that the person or persons entitled to a grant in respect of a will shall be determined in accordance with the order of priority set out there, and the first in line is the executor.

In the result, the executor is entitled, i.e. as of right, to a grant of probate. This is the way in which the law gives effect to the testator's choice of executor set out in his will.

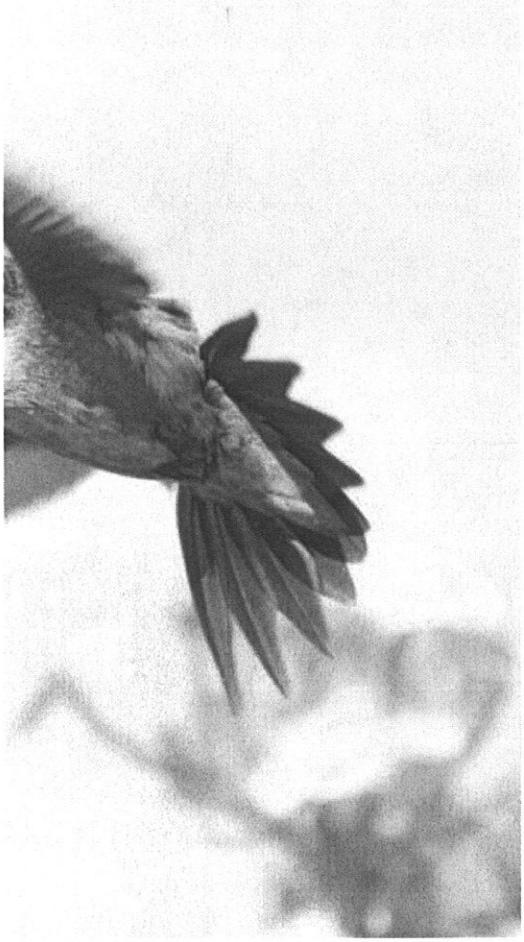
However, the right of an executor to a grant of probate is not absolute. It is subject to the jurisdiction of the court to pass over the executor and appoint an administrator in his place.

The jurisdiction is contained in section 116 of the Senior Courts Act 1981, which is in the following terms: "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."

It follows from the wording of this section that, for the court to pass over an executor, there must be special circumstances making it necessary or expedient to appoint some other person as administrator. There are two separate and distinct requirements: there must be 'special circumstances', which make it 'necessary or expedient' to appoint some other person.

Unless both requirements are satisfied, the court has no discretion to appoint another person in place of the executor.

Whether those requirements are satisfied must be judged against the background that an executor is entitled to a grant of probate. Thus, the special circumstances must be such as to disentitle him. The jurisdiction is usually exercised in cases where the person entitled to the grant is in prison, of unsound mind, bankrupt or refuses to act. But there is no limit on the special



"There was ample evidence to show that the executors were disentitled from obtaining a grant of probate"

circumstances which might suffice, except that they must be such as to displace or remove the executor's entitlement to a grant.

Special circumstances

In the case of *A-B v Dobbs* [2010] WTLR 931 the applicant and the deceased had been business partners. It is unnecessary to set out the facts here. The application under section 116 was refused by the district judge and the appeal was dismissed.

Mr Justice Coleridge said this: "The point of the section is to ensure that a testator who takes the trouble to name people to administer his or her estate after his death should not have his intentions lightly set aside unless the people he chooses by the time of his death, for one reason or another, have, more or less, *disentitled* themselves from carrying out the task."

If this is correct – and it is hard to see how in logic it could not be correct – a mere request by the adult beneficiaries that the executor should renounce probate could not constitute 'special circumstances' under section 116, let alone special circumstances making it 'necessary or expedient' to appoint someone else as administrator.

However, this approach was not followed by the judge in the recent case of *Khan v Crossland* [2012] WTLR 841.

In that case HHJ Behrens, sitting as a deputy High Court judge, preferred the approach of Mr Justice Ewbank in *Re Clore deceased* [1982] Ch 456 and Mrs Justice Hale in *Buchanan v Milton* [1999] 1 FLR 844.

Neither case was cited in *A-B v Dobbs*, but on the authority of those cases, HHJ Behrens said: "In my view, there is a wide discretion as to the circumstances relevant to the question posed in section 116." He did not identify the question in section 116 to which he was referring.

In *Re Clore* Mr Justice Ewbank said: "Speaking for myself, since this is a section giving discretion to the court, I would not impose any limitation on the words 'special circumstances'. I would say that the words 'special circumstances' are not necessarily limited to circumstances in connection with the estate itself or its administration, but could extend to any other circumstances which the court thinks are relevant, which lead the court to think that it is necessary, or expedient, to pass over the executors."

The judge did not say that the special circumstances must be such as to disentitle the executors to a grant of probate. But he was dealing with a different point, namely an argument that the special circumstances required to found the jurisdiction are not limited to circumstances connected with the estate or its administration.

He rejected that contention, saying that the special circumstances can extend to any other circumstances which are relevant. Once he had done that, there was ample evidence to show that the executors were disentitled from obtaining a grant of probate. He did not use the word 'disentitled' but he did not need to do so.

Flawed procedure

Buchanan v Milton was a different case altogether. The deceased was born of aboriginal parents but was adopted and brought up in the UK.

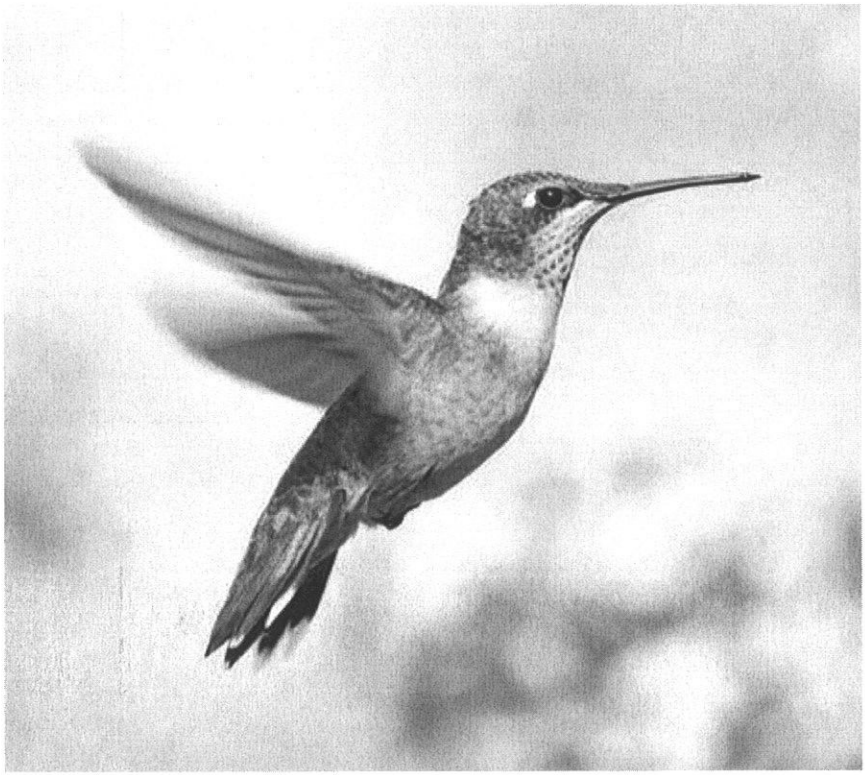
He died in a road accident, survived by his adoptive mother and the mother of his daughter who were entitled to letters of administration.

The applicant was his birth mother, an aborigine who wished him to be buried in Australia. The application was for a grant limited to that purpose. As the judge said, it would be quite wrong to displace the respondents for any other purpose connected with the administration of the estate.

The circumstances said to constitute 'special circumstances' included factors such as the flawed procedure whereby the deceased had been adopted at birth, the deceased's aboriginal heritage, including the importance attached to burial procedures, and his daughter's interest in knowing in due course that things were done properly in accordance with her father's birthright.

Taking the broad view of special circumstances adopted by Mr Justice Ewbank in *Re Clore*, the judge was prepared to hold that this very unusual set of circumstances was capable of amounting to special circumstances for the purposes of section 116; but the circumstances did not make it necessary or expedient to displace the personal representatives for the purpose of determining where the deceased should be buried.

She therefore adopted the view of Mr Justice Ewbank that special



circumstances for the purposes of section 116 are not limited to circumstances connected with the estate itself or its administration, but can extend to any other circumstances which the court considers relevant.

But this leaves open the question: relevant to what? The answer to this must be relevant to the question whether the respondent's entitlement to a grant of probate or letters of administration under rule 20 of the Non-Contentious Probate Rules has been displaced.

This point is reinforced by section 116 itself, which refers to special circumstances making it necessary or expedient to appoint some person other than the person who, but for the section, would in accordance with probate rules have been entitled to the grant. This precisely reflects the right of an executor to a grant of probate under the rules.

In *Khan v Crossland*, the judge described the testator's choice of executor as being a 'relevant factor'; but he said it is not a decisive factor. He said the fact that the beneficiaries are of full age, full mental capacity and united in their wish for the executors to renounce probate is capable of being a special circumstance, and that the court has to balance the unanimous wish of the beneficiaries against the fact that the testator chose to appoint the respondents as his executors.

> **"It opens the way for disputes where executors are asked to stand down, but decide to stand their ground"**

This approach is consistent with his view that "there is a wide discretion as to the circumstances relevant to the question posed in section 116". But no discretion is conferred on the court by the section until it is established that there are 'special circumstances' making it 'necessary or expedient' to disentitle the person who, but for the section, would be entitled to the grant.

This was exactly the point made by Mr Justice Coleridge in *A-B v Dobbs*. The dicta of Mr Justice Ewbank and Mrs Justice Hale are not authority to the contrary and they could not in any event overrule the effect of the section.

Relationship breakdown

There were indeed other factors relied on by the judge in *Khan v Crossland*. Thus he considered that cases under section 50 of the Administration of Justice Act 1985 can be of assistance in an application under section 116. But those cases cannot displace the requirement to establish special circumstances under section 116, without which the court has no jurisdiction.

On the question whether a mere request for the executors to stand down can suffice to found the jurisdiction under section 116, those cases have no relevance at all.

He also relied on the breakdown in relations between the executors and the beneficiaries. He did not analyse the reasons for the breakdown and accepted that it was not a conclusive reason for removing the executors. He simply coupled it with the wishes of the beneficiaries that the executors should stand down, which he regarded as the main reason for removing them.

Does any of this matter? The answer must be yes, for two reasons.

1. First, the decision undermines the right of a testator to choose his executors. A testator may, with very good reason, which he is not bound to disclose, decide to appoint persons (professional or otherwise) other than his beneficiaries to be his executors. If the beneficiaries can simply require the executors to stand down, his decision becomes meaningless.

2. Second, it opens the way for disputes in the future, where executors are asked to stand down, but decide to stand their ground. Is the court to decide whether the testator's reasons for appointing them were sufficient? And how could the court know whether his decision was wise or unwise?

It is a decision he is entitled to make and, until recently, it was a decision which the law respected. ■

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