Khan v Crossland
s.116 Senior Courts Act 1981 and passing over executors
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In Khan v Crossland (25th Nov 2011, soon to be reported in WTLR) the court was asked to pass over the named executors in favour of the beneficiaries of the will.

The testator's will was prepared nine years before his death by `will drafters' (a firm of will writers). Two members of that firm were appointed as the executors. The estate was estimated at £450,000. The beneficiaries sought the passing over the named executors and instead a grant in favour of one of the beneficiaries under the court's discretionary power in s.116.

It was contended on behalf of the executors that in order for a grant to be made under s.116 that the executors must have disentitled themselves in some way (which they had not). The court preferred to approach the application of s.116 by way of analogy with s.50 Administration of Justice Act 1985 (removal of executors after Grant, on which there have been several decisions recently - see note below) and place the emphasis on the proper administration of the estate and the welfare of the beneficiaries. In following the analogy with s.50 the court should then have regard to the factors taken into account when exercising the discretion under s.50.

We know from recent decisions on s.50 (see note below) that the testator's choice of executor is not only relevant, but is a factor that should not be lightly discarded. Here the testator's reasons for appointing the executors were

a) unknown and
b) there had been limited contact with the executors named by the testator

And for both these reasons, the testator's choice would carry less weight than normal.
However, what was of more importance here was that the beneficiaries were of full age, full capacity and united in their wish that the named executors should not act. When this was coupled with the breakdown in trust between the beneficiaries and the executors there was, on balance, a case for passing over the executors that was stronger than the testator's wish that the executors act. There were two other points worth noting.

Much was made of the executors' initial estimate that the administration fees would be 3-4% of the estate (although the executors later revised this to 1.75%). That the estimate was excessive and amounted to a special circumstance warranting passing over the executors was not accepted by the court. Given the lack of reliable national statistics on the fees for estate administration that seems particularly wise of the Court.

The beneficiaries had approached `final duties' (advertised as "Independent Probate Brokers" and "the UK's leading probate specialists") to arrange for administration of the estate instead. When it became clear that the executors would not renounced final duties provided the beneficiaries with a limited indemnity against the costs of court action over s.116. The executors alleged that this agreement was evidence of an ulterior motive in bringing the action and that the action was being

pursued for collateral purpose and was an abuse of process. The judge disagreed. However there were critical remarks as to the way the litigation had been conducted and it was suggested that the conduct of the litigation by the claimant may well have led to increased costs. Notwithstanding this, the proceedings were not an abuse of process.

The court did not attach much weight to the testator's appointment of executors as there was nothing recorded in the will instructions as to why he preferred them to adult members of his close family. It is good practice for the discussion and advice regarding executors to be recorded on the will file and this would have assisted the court in this instance. However, care should be taken with the accuracy of this note, in particular the views of the testator.

Note: Alkin v Raymond [2010] WTLR 1117; Angus v Emmott [2010] EWHC 154 (Ch); Kershaw v Micklethwaite [2010] EWHC 506 (Ch); Dobson v Heyman [2010] WTLR 1163