

Updating a company's register before a grant of probate

In *Williams v Russell Price Farm Services*, the High Court ordered the rectification of a company's register of members to replace a deceased sole member and director with his executors before an application for a grant of probate had been submitted, subject to the executors providing certain undertakings to the court, including to apply for probate as soon as possible and to pay all necessary taxes as required to enable probate to be granted.

A court can only order the rectification of a company's register of members under s.125 Companies Act 2006 in 'exceptional circumstances'.

This case was considered to be exceptional because the executors were unable to appoint a new director of the company which was necessary for commercial reasons as a matter of urgency. The court held that it was not appropriate to wait for probate to be granted and made an order to rectify the register of members to allow a new director to be appointed.

Background

The testator died in March 2020. The claimants were the three named executors in his Will and the testator was the sole shareholder and director of the defendant company ("the company"). Ninety percent of the shares in the company and the residuary estate were left equally to the testator's daughter and son.

The estate included personal assets in addition to two business interests and a farm. A full inheritance tax return would have to be submitted before the probate application could be made, but that return required detailed information about assets and liabilities. That would involve formal valuations, including for the company, which in turn would require input from third parties.

There was no provision in the company's articles of association for the executors to appoint a director in the event of the death of the sole director and shareholder. Only members could do that. However, the claimants were not members, because their names were not on the register of members of the company. Once the claimants were able to secure their entry on the register of members, they could pass a written resolution to appoint a director or directors. So, until the claimants' names were on the register, the company would have no director. The claimants applied to the court to rectify the register.

The Law

A Will speaks from death, and executors appointed by a Will have authority to deal with the deceased's estate from that time, even though third parties will not be completely protected in dealing with the executors until probate is subsequently granted.

As stated in *Goodman v Goodman*: “an executor derives title from the Will, and the property of the deceased vests in him from the moment of the testator's death...”

The grant of probate dates back to the date of death thus, in effect, ratifying the executors' actions in the meantime.

Issues and decisions in the case

On whether an order should be made to allow rectification of the company's register, the fact that the executors had not yet applied for probate, although it had been their intention to do so, was significant. The executors would have to provide an undertaking that: (i) they would not renounce probate; (ii) they would apply for it as soon as possible, making all reasonable efforts to obtain the necessary information for that purpose; and (iii) they would pay all necessary taxes as required so that probate could issue.

The circumstances of this case are quite exceptional. There was no power, without the intervention of the court, to enter the executors in the register or for any director to be appointed in place of the sole deceased director. There was also no company secretary. In these circumstances and given the imminent failure to be able to draw sufficient funds to pay salaries to employees and to account for unpaid VAT due to HMRC, the judge deemed it inappropriate to wait until the grant of probate had been obtained.

The executors ultimately gave the undertaking sought by the court, and the order was made, thus allowing them to safeguard the company as an asset of the estate.

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This article was produced on the 27 May 2020. It should not be relied on as legal advice as individual circumstance

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