

Contentious probate: overview

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This note provides an overview of the law and procedures which apply when there is a challenge to a will or entitlement to a grant of representation.

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Contentious and non-contentious business

There has for many years been a division between contentious and non-contentious **probate** (www.practicallaw.com/6-382-6118) business in the courts. "**Non-contentious or common form probate business**" is defined as "the business of obtaining probate and administration where there is no contention as to the right thereto" and includes "all businesses of a non-contentious nature in matters of **testacy** (www.practicallaw.com/0-502-2474) and **intestacy** (www.practicallaw.com/0-382-6055) not being proceedings in any action" (*section 128, Senior Courts Act 1981 (formerly Supreme Court Act 1981) (SCA 1981)*). That is, non-contentious probate business relates to estates where the validity of a will is not at issue and there is no dispute about who is entitled to a **grant of representation** (www.practicallaw.com/7-382-5632).

The Non-Contentious Probate Rules 1987 (NCPR 1987), made under section 127 of the SCA 1981 regulate applications for non-contentious **grants of probate** (www.practicallaw.com/2-383-5148) and **administration** (www.practicallaw.com/3-382-5549). Where there is no challenge or question as to the validity of a will, a grant of probate is made; the grant is said to be made "in common form". The person entitled to take out a grant under NCPR 1987 applies to the probate registry for a grant in accordance with those rules. No other parties are involved and, generally, the oath of the applicant is the only evidence relied upon. A grant in common form is revocable. Also, a person adversely affected by it can apply to the court, to compel the person who obtained the grant to prove the will in solemn form (*Knight v Blake (1843) 3 Curt 547*).

The expression "**contentious business**" is undefined, but involves business of a contentious nature (*Re Clook (1890) 15 PD 132*). Where the validity of a will is questioned, or challenged, the executor, or a person interested under the will, propounds it in a contentious claim before the court, joining any persons prejudiced by the proceedings as parties. If the claimant is successful, the court pronounces in favour of the will and orders the issue of a grant. In these circumstances, the will is said to be proved "in solemn form".

The act of putting the will forward for probate, whether in a contentious or non-contentious process, is known as "propounding" the will.

Provided proper notice has been given to all persons interested, a probate that has been granted in solemn form, is irrevocable. This is subject to two exceptions:

- ▣ If a will of later date is discovered to exist after the order has been made, a probate granted in solemn form may be revoked in favour of the later will.
- ▣ If the order has been obtained by fraud, it may be set aside, not just as against the perpetrator of the fraud, but as against all the world (*Birch v Birch* [1902] P 130).

A probate claim can be seen as an action in rem: the order binds all those with a sufficient interest and who are aware of the proceedings and of their interest in them.

Civil Procedure Rules Part 57

Types of claim

The current rules are in the Part 57 of the Civil Procedure Rules (CPR 57) which is entitled "Probate and Inheritance". Section 1 of CPR 57, and the associated Practice Direction (PD) (PD 57), deal with Probate Claims (further information can be found in the *Chancery Guide*, particularly in chapter 24). It covers probate claims, claims for rectification of wills, claims and applications to substitute or remove a **personal representative** (www.practicallaw.com/1-382-6088) and claims under the Inheritance (Provision for Family and Dependents) Act 1975.

CPR 57.1.2 defines a probate claim as "a claim for:

1. the grant of probate of the will, or letters of administration of the estate, of a deceased person;
2. the revocation of such a grant; or
3. a decree pronouncing for or against the validity of an alleged will,

not being a claim which is non-contentious (or common form) probate business".

These involve three different types of claim:

- ▣ *Interest actions.*
- ▣ Claims to *pronounce for or against a will in solemn form.*
- ▣ Claims for *revocation* of a grant already made.

See *Resources* for a link to the Civil Procedure Rules and Practice Directions generally.

Interest actions

An interest action resolves a dispute as to the interest of someone claiming an entitlement to a grant of some kind in connection with the **estate** (www.practicallaw.com/2-382-5620) of a deceased person, such as a right to a grant of probate or to **letters of administration** (www.practicallaw.com/9-382-5711). It can arise as the only issue in a claim concerning the right to administer the estate, or as a side issue in a larger claim involving the

validity of a will. It might involve considerations of legitimacy and of pedigree, that is concerning family succession or ancestry. For instance, if the named executor of a will has died and a person claims to be entitled to take out a grant of **letters of administration with will annexed** (www.practicallaw.com/7-382-5712), there might be a dispute as to his entitlement if **residue** (www.practicallaw.com/9-382-5872) is given to children and there is an issue as to whether the applicant is a child of the deceased. The determination of the issue is binding on the parties and those claiming through them (*Spencer v Williams (1871) LR 2 P & D 230*).

Pronouncing for or against a will in solemn form

Here the court determines whether, and the extent that, a will or other document is valid as a testamentary instrument. A claim might be brought by the executor, or some other person interested under the document, for probate in solemn form, either on his own initiative or after some action taken by someone disputing the validity of the document as a will, such as the entry of a caveat (*rule 44, NCPR 1987*). A caveat is a notice in writing, given by someone (the caveator) wishing to show that a grant should not be issued in the estate of a deceased person and lodged with the Principal Probate Registry. The entry of the caveat prevents the grant of probate or letters of administration without notice to the caveator. Once a probate claim has been brought, notice of the action will be given to every caveator, other than the claimant in the action, in respect of each caveat that is in force (*rule 45, NCPR 1987*).

Alternatively, a person who disputes the validity of the document as a will might bring the claim himself. This could be done where an executor refuses to prove the will and there are persons who wish to challenge its validity; they need to make a claim so that they can enjoy their entitlement under an earlier will document or an intestacy.

If a document is found to be valid as a will, the court pronounces for its validity and the executor or other party entitled may apply in the usual way for a grant of probate or letters of administration with will annexed in a probate registry.

Revocation

Where a will has already been proved in common form and there is an allegation that it is invalid, or that the grant, either of probate or of administration with the will annexed, ought not to have been made, a claim can be made for revocation of the grant. If the allegation is that the will is invalid and it is defended, the claim becomes a claim for proof of the will in solemn form.

Similarly, a claim for revocation of letters of administration can be made on the grounds that:

- ▣ They were granted to someone without sufficient title to it; if defended it becomes an *interest action*.
- ▣ A will is discovered; if defended, it becomes a claim for revocation of the grant and for *pronouncement for the will in solemn form*.

See box, *Claims involving mutual wills or proprietary estoppel* for a special type of claim, outside CPR 57, which is not about the validity or otherwise of the will but about the trusts on which, despite the provisions of the will, the executors hold the estate.

Jurisdiction of the court

High Court

By section 25(1) of the SCA 1981, the High Court has unlimited jurisdiction in relation to probates and letters of administration. By section 61(1) of the SCA 1981 and paragraph 1(h) of Schedule 1 to the SCA 1981, contentious probate business in the High Court is assigned to the Chancery Division.

County Court

The County Court's jurisdiction can arise after an application for a grant or revocation has been made through the *Principal Registry* (www.practicallaw.com/5-382-6114) or a *district probate registry* (www.practicallaw.com/8-382-5617). If the value of the net estate, which means free estate after deduction of expenses and debts, does not exceed £30,000, the county court has the same jurisdiction as the High Court in respect of any contentious matter arising in connection with the grant or revocation (*section 32, County Courts Act 1984* and *article 2, County Courts Jurisdiction Order 1981 (SI 1981/1123)*). Few claims are brought in the County Court and this overview concentrates on the procedure in the High Court.

Contentious process

Parties

A person cannot be a party to a probate claim unless he has a sufficient interest. For this purpose, the word "interest" should be construed broadly and includes a potential applicant of a claim under the Inheritance (Provision for Family and Dependents) Act 1975 (for example, *O'Brien v Seagrave and another* [2007] 1 WLR 2002).

Where the claim is for the revocation of a grant of probate or letters of administration, every person who is entitled, or claims to be entitled, to administer the estate under that grant must be made a party to the claim (*CPR 57.6.1*).

Any number of claimants or defendants may be joined as parties to a claim (*CPR 19.1*). The rules that all persons jointly entitled to a remedy must be joined as parties, and that any person who does not agree to be a claimant must be joined as a defendant, do not apply to probate claims (*CPR 19.3.3*). Nonetheless, in a probate action, all persons interested in the estate, particularly those whose interests might be adversely affected, need to be bound by the order of the court.

- If the parties are potentially numerous, an order can be made under *CPR 19.8A*, for notice of the claim to be served on any person who is not a party but who is or might be affected by it. If a person served with notice of a claim files an acknowledgment of service of the notice within 14 days, he becomes a party to the claim. If a person served with notice of a claim does not acknowledge service of the notice he is bound by any judgment given in the claim as if he were a party.

- Where several persons have the same interest, the claim may be begun by or against one of them as representatives of the others. The court can also direct that the claim be continued by or against one of them as representative. Any order will, unless the court orders otherwise, be binding on those being represented as if they were parties to the claim (*CPR 19.6*).
- Where persons who are not yet born or cannot easily be ascertained would, when born or ascertained, have a sufficient interest, the court can direct a person to represent them in an action. Unless the court orders otherwise, any order made is binding on those being represented as if they were parties to the claim (*CPR 19.7*).

Pre-action protocol

Pre-action protocols are defined in the CPR glossary as "statements of understanding between legal practitioners and others about pre-action practice and which are approved by a relevant practice direction". They are designed for use before the commencement of any proceedings (see *PLC Dispute Resolution, Practice note, Pre-action protocols: an overview (www.practicallaw.com/5-204-9196)*).

No protocol is officially approved for probate actions but "the court will expect the parties, in accordance with the overriding objective and the matters referred to in CPR 1.1.2(a), (b) and (c), to act reasonably in exchanging information and documents relevant to the claim and generally in trying to avoid the necessity for the start of proceedings" (*Practice Direction Protocols: PRO 4.1*). A draft form of pre-action protocol has been devised by the Association of Contentious Trust and Probate Practitioners (ACTAPS), called "*The ACTAPS Practice Guidance Notes for the Resolution of Trust and Probate Disputes*".

The testator's solicitor may be called upon to give a statement to any interested party about the circumstances of the execution of the will (*Larke v Nugus [2000] WTLR 1033*).

Bringing a claim

A probate claim in the High Court is brought by claim form issued out of Chancery Chambers in London or out of one of the Chancery District Registries (*CPR 57.3*), using the procedure in CPR Part 7. All probate claims are allocated to the multi-track (*CPR 57.2.4*), which is generally the allocation for claims of higher value or complexity; the High Court only deals with multi-track claims. The court gives directions for case management of the case. A case management conference is usually fixed to set a timetable for the various steps to be taken.

Once a probate claim has been issued, it prevents any grant of probate or letters of administration being made until the probate claim has been disposed of, unless a court directs otherwise (*paragraph 2.4, PD 57*).

Where the claim seeks the revocation of a grant of probate or letters of administration, the probate or letters of administration must be lodged at court, if that has not already been done (*CPR 57.6*).

Claim form

The claim form and all subsequent court documents relating to a probate claim must be marked at

the top "In the estate of [name] deceased (Probate)" (*paragraph 2.1, PD 57*). It must contain a statement of the nature of the interest of the claimant and of each defendant in the estate; and if a party disputes another party's interest in the estate he must state this in his statement of case and set out his reasons (*CPR 57.7.1 and 57.7.2*).

Particulars of claim

Particulars of claim must include a concise statement of the facts on which the claimant relies (*CPR 16.4*). For example, if there are no unusual circumstances, the identity of the testator, the date of death and the date of the will and the appointment as executor are sufficient facts to plead. Any unusual factors, such as foreign execution and foreign domicile must be dealt with in the statement of case.

Testamentary documents

Testamentary documents of the deceased person in the possession or control of any party must be lodged with the court. Subject to any order of the court, the claimant must lodge them when he issues the claim form, and the defendants when they acknowledge service. The claimant and every defendant who acknowledges service of the claim form must also provide written evidence disclosing details of any testamentary document of the deceased of which he has any knowledge or, if he does not know of any such testamentary document, state that fact (*CPR 57.5*). A specimen form for the written evidence about testamentary documents is annexed to *PD 57*.

The expression "testamentary document" is defined to mean "a will, a draft of a will, written instructions for a will made by or at the request of, or under the instructions of, the testator, and any document purporting to be evidence of the contents, or to be a copy, of a will which is alleged to have been lost or destroyed" (*CPR 57.1*).

It should be noted that, where it appears that any person has in his possession, custody or power any document which is or purports to be a testamentary document, the High Court may, whether or not any legal proceedings are pending, issue a witness summons requiring him to bring in the document in such manner as the court may direct in the summons (*section 123, SCA 1981 and CPR 34.2*).

Acknowledgment of service

A defendant who is served with a claim form is required to file an acknowledgment of service, even if he does not intend to defend the claim. It must be filed within 28 days after service of the particulars of claim, whether served together with the claim form or later. The usual time to acknowledge service where the claim form is served out of the jurisdiction is extended by 14 days (*CPR 57.4*).

If no acknowledgment of service is filed, the claimant is unable to seek default judgment but he can apply for an order that the claim is to proceed to trial, on written evidence (*CPR 57.10*).

For advice on service generally, see *PLC Dispute Resolution, Practice note, Service: a quick guide* (www.practicallaw.com/1-383-3079).

Defences in probate claims

If a defendant does not wish to raise any positive case, but wants the will to be proved in solemn form and, for that purpose, to cross-examine the witnesses who attested the will, he may give notice of this in his defence. In these circumstances, the court will not make an order for costs against him unless it considers that there was no reasonable ground for opposing the will (*CPR 57.5*).

In his defence, the defendant must state:

- ▣ Which of the allegations in the particulars of claim he denies;
- ▣ Which he is unable to admit or deny, but which he requires the claimant to prove; and
- ▣ Which he admits.

Where the defendant denies an allegation, he must state his reasons for doing so; and if he intends to put forward a different version of events from that given by the claimant, he must state his own version (*CPR 16.5*).

The period for filing the defence is 28 days after service of the particulars of claim (*CPR 15.4* and *CPR 57.4*).

The person seeking to propound a will has the burden of proving that it was duly executed. He may prove this by showing due execution and, if it is not irrational on its face and there are no suspicious circumstances, he will discharge that burden of proof. If a defendant (either to the claim or to a counterclaim) raises some issue that raises some doubt, the burden might shift onto the other party. Where testamentary capacity and want of knowledge and approval are put in issue, the burden remains with the person seeking to propound the will; in all other cases, the burden usually shifts to the person raising the issue.

The following are common defences:

- ▣ *Want of due execution*
- ▣ *Capacity*
- ▣ *Undue influence*
- ▣ *Fraud*
- ▣ *Knowledge and approval*
- ▣ *Sham*
- ▣ *Revocation*

- ▣ *Forfeiture*

- ▣ *Interest*

Want of due execution

Under section 9 of the *Wills Act 1837* (www.practicallaw.com/resource.do?item=:42643566), no will is valid unless it is in writing and was signed in a particular manner. In most cases this involves the testator signing at the end of the document and his signature being made in the presence of two or more witnesses who are present at the same time, and who sign the will in the presence of the testator. The person seeking to propound a will can prove due execution by showing that the provisions of section 9 of the *Wills Act 1837* were complied with. If any allegations are to be made that tend to disprove any of the requirements of the section (such as forgery, or that the witnesses were not present when the testator signed the will) they must be pleaded specifically and particulars of the facts and matters relied on must be given (*CPR 57.7.4*). This is likely to alter the burden of proof.

In *Marley v Rawlings* [2011] EWHC 161 (Ch), mirror wills were prepared for a husband and wife to execute. Unfortunately, each signed the wrong will. It was held that they had not intended to give effect to the wills that they had signed and so they were invalid (see *Legal update, Mirror will signed by wrong spouse can't be rectified* (www.practicallaw.com/6-504-7259)).

Capacity

When a person executes his will, he must at that time have the requisite mental capacity to do so. This means that he must understand what he is doing, and the extent of the property which he is giving away in the will. He needs to be able to comprehend and appreciate the claims to which he ought to give effect; and for this purpose, no disorder of the mind must poison his affections, pervert his sense of right or prevent the exercise of his natural faculties. No insane delusion must influence his will in disposing of his property. (See Cockburn CJ in *Banks v Goodfellow* (1870) LR 5 QB 549, at page 565.) This well established test for capacity has been developed further in *Key and another v Key and others* [2010] EWHC 408 (Ch) where Briggs J took into account the testator's powers of decision-making as well as his powers of comprehension and concluded that the testator lacked testamentary capacity because he was unable to exercise his decision-making powers. For further information, see *Legal update, Testator lacks testamentary capacity if unable to exercise decision-making powers* (www.practicallaw.com/8-501-6780).

The test for capacity has been put on a statutory footing, by sections 1 to 4 of the *Mental Capacity Act 2005* (www.practicallaw.com/7-201-8679) (MCA 2005), although the MCA 2005 is not directly concerned with the execution of wills. The intention appears to be a codification of the existing law that is applicable to wills and, although the courts might not apply the provisions directly (see *Scammell and another v Farmer* [2008] WTLR 1261), the courts are likely to develop this existing law in light of the new statutory provisions. For further information on the test for mental capacity, see *Practice note, Assessing mental capacity* (www.practicallaw.com/8-383-2972).

Section 2 of the MCA 2005 provides that a person lacks capacity in relation to any matter if at the material time he is unable to make a decision for himself in relation to it because of an impairment

of, or a disturbance in the functioning of, the mind or brain, whether the impairment or disturbance is permanent or temporary.

The approach to be taken in determining capacity is in section 1 of the MCA 2005:

- ❑ A person must be assumed to have capacity unless it is established that they lack capacity.
- ❑ A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.
- ❑ A person is not to be treated as unable to make a decision merely because he makes an unwise decision.
- ❑ An act done, or decision made, under the MCA 2005 for or on behalf of a person who lacks capacity must be done, or made, in his best interests.
- ❑ Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.

The factors relevant to whether a person is able to make a decision are set out in section 3 of the MCA 2005. He should be able:

- ❑ To understand the information relevant to the decision.
- ❑ To retain that information, even if for only a short period.
- ❑ To use or weigh that information as part of the process of making the decision.
- ❑ To communicate his decision (whether by talking, using sign language or any other means).

The information relevant to a decision includes information about the reasonably foreseeable consequences of deciding one way or another, or failing to make the decision. Further guidance is to be found in the Code of Practice to the MCA 2005 (see *Code of Practice for the Mental Capacity Act 2005* (www.practicallaw.com/3-376-4490)).

If a will, rational on its face, is shown to have been executed and attested in the manner prescribed by law, it is presumed, in the absence of any evidence to the contrary, that it was made by a person of competent understanding. But if there are circumstances in evidence which counterbalance that presumption, the decree of the court must be against its validity, unless the evidence on the whole is sufficient to establish affirmatively that the testator was of sound mind when he executed it (see Sir C Cresswell in *Symes v Green* (1859) 1 Sw & Tr 401, at 402). If the issue of the testator's capacity is raised, the burden of proof remains with those seeking to propound the will.

Any allegations relating to the testator's capacity must be pleaded specifically and particulars of the facts and matters relied on must be given (CPR 57.7.4).

Undue influence

Where it is alleged that the testator executed an otherwise valid will as a result of some undue influence, the burden of proof shifts onto the person making the allegation. A plea of undue influence "ought never to be put forward unless the party who pleads it has reasonable grounds upon which to support it" (Sir Gorell Barnes P in *Spiers v English* [1907] 1 P 122, at 124). Any allegations that the execution of a will was obtained by undue influence must be pleaded specifically and particulars of the facts and matters relied on must be given (CPR 57.7.4).

An example is a frail and vulnerable testatrix, who is frightened of one of her sons. In the period before the testatrix made a new will, that son deliberately poisoned the testatrix' mind by making deliberately untruthful accusations against her other son and his wife. The effect of his doing this was to cause the testatrix' own discretion and judgment to be overborne, which is undue influence. (*Re Edwards, deceased*, 3 May 2007, unreported.)

Fraud

Any allegations of fraud should be pleaded specifically and particulars of the facts and matters relied on must be given. A practising barrister should not make allegations of fraud without clear instructions so to do and credible evidence in support (*paragraph 606, Code of Conduct of the Bar (February 2000)*).

For example, a claim of fraud was established when a person made false representations to a testator about the character of another person, for the purpose of inducing him to revoke, by codicil, a gift made to the other person in the testator's will (*Allen v M'Pherson* (1847) 1 HL Cas 191).

Knowledge and approval

The following rules apply here:

- ▣ The burden of proving the validity of the will (called the *onus probandi*) lies in every case upon the party propounding the will. He must satisfy the court that the instrument that he is propounding is the last will of a free and capable testator. Proof of testamentary capacity of the testator and the due execution of the will, without more, gives rise to a proper inference of knowledge and approval but in certain cases, affirmative proof of knowledge and approval is required. In *Gill v Woodall and others* [2010] EWCA Civ 1430, the circumstances of the execution of the will appeared in line with authorities in which there was a strong presumption of knowledge and approval. However, the Court of Appeal found that the testator did not know and approve the contents of her will. In the leading judgment, Lord Neuberger MR stressed that the facts of the case were exceptional (arising from the testator's unusual mental condition). For further information, see *Legal update, RSPCA appeal: Court of Appeal holds testator did not know and approve contents of will* (www.practicallaw.com/6-504-2916).
- ▣ Where a party writes or prepares a will under which he takes a benefit, this will "excite the suspicion of the court"; in other words, the court will be vigilant in examining the evidence in

support of the instrument. It is unlikely to pronounce it to be valid unless that suspicion is removed; affirmative evidence of knowledge and approval is needed to prove that the instrument does express the true will of the testator (*Barry v Butlin* 2 Moo PC 480). In *Gill v Woodall and others* (see above) it was stated that, where a judge has heard evidence of fact and expert opinion over a period of many days relating to the deceased and the execution of the document being put forward as a valid testamentary disposition, this two stage approach, of asking whether the preparer had caused suspicion and then examining the evidence to contradict it, is questionable; it is better in such circumstances for the court to consider all the relevant evidence available and then, drawing such influences as it can from the totality of that material, to come to a conclusion whether or not the burden of establishing knowledge and approval of the contents of the document has been discharged (see *Legal update, RSPCA appeal: Court of Appeal holds testator did not know and approve contents of will: High Court's two-stage approach questioned* (www.practicallaw.com/6-504-2916)).

- The court also needs affirmative evidence of knowledge and approval where the testator is deaf, dumb or blind.
- The burden of proof is a balance of probabilities (*Fuller v Strum* [2002] 1 WLR 1097) but the extent of the burden depends on the seriousness of the suspicion that has been aroused.

Sham

It is an essential requirement of a valid will that the testator at the time of its execution intends that it shall take effect as a testamentary document; there must be an *animus testandi*, or testamentary intention, which means an intention to make "a revocable ambulatory disposition of the maker's property which is to take effect on death" (per Mustill LJ in *Re Berger (decd)* [1990] Ch 118 at 129), and the absence of it may be proved by **parol evidence** (www.practicallaw.com/1-107-6965) or oral evidence in relation to an instrument which on the face of it appears to be a valid and properly executed will (*Lister v Smith* (1863) 3 Sw & Tr 282).

For instance, a testatrix executed a will document but left it undated, believing, wrongly, that it did not take effect as a will until it was dated. She instructed her solicitor to date it after certain transactions had been completed. It was held that the will was invalid, not having been executed with the intention that it be immediately effective, even though the will was later dated after the completion of the transactions (*Corbett v Newey and others* [1998] Ch 57).

Revocation

This can be proved by:

- The fact of a marriage or **civil partnership** (www.practicallaw.com/2-201-6423) of the testator, subject to exceptions (*sections 18 and 18B, Wills Act 1837*);
- The annulment or dissolution of a marriage or civil partnership of the testator (*sections 18A and 18C, Wills Act 1837*);

- ▣ The fact of a later testamentary document (*section 20, Wills Act 1837*); any later will should be propounded in the counterclaim; or
- ▣ The destruction of the will (*section 20, Wills Act 1837*).

Any apparent revocation might be conditional, either on the happening of some event, or dependent on the assumption that certain facts (such as the validity of a later will) are true. This should be raised by way of reply, so that the claimant's own version of events is put in issue.

Forfeiture

A beneficiary cannot take under a will if he has unlawfully killed the testator, or unlawfully aided, abetted, counselled or procured his death. The effect of this rule can be modified by the court if it is satisfied that, (other than where the beneficiary has been convicted of murder) having regard to the conduct of the beneficiary and of the deceased and to such other circumstances as appear to the court to be material, the justice of the case requires it (*section 2(2), Forfeiture Act 1982*). So, for instance, during a suicide pact between two people, one died and the other, who benefited from the death, survived. It was held that the public interest would not normally call for forfeiture where the beneficiary had aided and abetted a suicide (*Dunbar (administrator of the estate of Dunbar (deceased)) v Plant [1998] Ch 412*).

When it comes into force, the Estates of Deceased Persons (Forfeiture Rule and Law of Succession) Act 2011 will (amongst other things) clarify the law in relation to determining who may inherit a beneficiary's interest that is forfeited under the forfeiture rule (see section 1 of the Forfeiture Act 1982). For further information on the Estates of Deceased Persons (Forfeiture Rule and Law of Succession) Act 2011 and its passage through Parliament as a Private Member's Bill, see *PLC Private Client legislation tracker: Estates of Deceased Persons (Forfeiture Rule and Law of Succession) Bill 2010-11* (www.practicallaw.com/7-383-4113).

Interest

The claimant is unable to propound a will if he is shown not to have a sufficient interest (see *Interest actions*). This would also apply to a person named as a beneficiary but, because he (or his spouse) was a witness to the will, the gift to him is void under section 15 of the Wills Act 1837.

Counterclaim

A defendant in a probate claim might himself have a claim in relation to the grant of probate of another will document, or of a grant of administration of the deceased. For instance, he might be named as executor or beneficiary in an earlier will, which would take effect if the will being challenged were invalid. Similarly, if there was no earlier will, the counterclaim might be in respect of an intestacy. Such a defendant must bring a counterclaim in the same action.

If the claimant fails to serve particulars of claim within the time allowed (either contained in or served with the claim form or served within 14 days after service of the claim form), a defendant may, with the permission of the court, serve a counterclaim and the probate claim will proceed as if

the counterclaim were the particulars of claim (*CPR 57.8*). Such a counterclaim may be brought in proceedings that are not themselves probate proceedings (*CPR 57.9*).

Reply and subsequent pleadings

If no reply to the defence is served, the claimant is not taken as admitting the allegations in the defence. If he files a reply but does not deal with some matter raised in the defence, he is taken as requiring that matter to be proved (*CPR 16.7*). If some new allegations are raised in the defence, the claimant should set out his own version of the events in question.

A reply should be filed and served at the same time that the claimant files his allocation questionnaire (*CPR 15.8*). The allocation questionnaire will have been served on each of the parties when the defendant filed the defence (*CPR 26.3*). It is a form (see *Form N150*) that indicates how the parties see the probable progression of the case, and includes questions about the possibility of settlement, possible applications, witnesses, expert evidence, and compliance with the pre-action protocol.

If a defendant has served a counterclaim, the defendant to the counterclaim (usually the claimant) should file a defence to the counterclaim if he wishes to defend it, within 28 days after service of the counterclaim. A reply and defence to counterclaim should normally form one document, with the defence to counterclaim following on from the reply (*paragraph 3.2, PD 15*).

Case management

The general rules relating to case management, such as *CPR 23 (applications)*, *CPR 25 (interim remedies)*, *CPR 29 (multi-track)*, *CPR 31 (disclosure and inspection)* and *CPR 32 (evidence)*, apply to probate claims. In giving case management directions in a probate claim the court gives consideration to the questions about *joinder* (www.practicallaw.com/9-205-5166) of, or the giving of notice of the claim to persons who may be affected by the claim and whether to make a representation order (*paragraph 4, PD 57*).

Interim applications

Administration pending the determination of a probate claim

An application under section 117 of the SCA 1981 for an order for the grant of administration pending the determination of a probate claim is made by application notice in the probate claim. Such applications are generally made when something needs to be done in the estate, but there is no one with the power to do it.

If the order is made, *CPR 69.4 to 69.7* apply as if the administrator were a receiver appointed by the court. The administrator must apply to the Principal Registry for a grant of letters of administration. His appointment ceases automatically when a final order in the probate claim is made but continues pending any appeal (*paragraph 8, PD 57*).

Discontinuance and dismissal

CPR 38, which is concerned with discontinuance generally, does not apply to probate claims. Under CPR 57.11, at any stage of a probate claim the court may order that the claim be discontinued or dismissed on such terms as to costs or otherwise as it thinks just; and that a grant of probate of the will, or letters of administration of the estate, of the deceased person be made to the person entitled to the grant, which will be made in common form. An application for the claim to be discontinued or dismissed can be made by the claimant or by any defendant who has acknowledged service.

Compromise

If the parties agree to settle a probate claim, the court has power to:

- ▣ Order the trial of the claim on written evidence, leading to a grant in solemn form.
- ▣ Order that the claim be discontinued or dismissed under CPR 57.11, leading to a grant in common form.
- ▣ Pronounce for or against the validity of one or more wills under section 49 of the Administration of Justice Act 1985 (AJA 1985).

Section 49 of the AJA 1985 applies where every person beneficially interested in the testator's estate, whether under a will or on intestacy (so far as relevant) consents to the proposed order. It is only available in the High Court.

Summary judgment

The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if it considers that:

- ▣ The claimant has no real prospect of succeeding on the claim or issue; or
- ▣ The defendant has no real prospect of successfully defending the claim or issue;

and there is no other compelling reason why the case or issue should be disposed of at a trial (CPR 24.2).

In a probate claim, if an order pronouncing for a will in solemn form is sought on an application for summary judgment, the evidence in support of the application must include written evidence proving due execution of the will. If a defendant has given notice in his defence under CPR 57.7.5 that he raises no positive case but insists that the will is proved in solemn form, and intends to cross-examine the witnesses who attested the will, his rights are preserved (*paragraph 5, PD 57*).

Trial

The trial of a probate claim follows the ordinary course of contentious litigation (see *PLC Dispute Resolution, Practice note, Trial: an overview* (www.practicallaw.com/1-204-0174)). The hearing is in public unless there are good reasons for it to be in private (*CPR 39.20*). On the hearing of the claim the personal representative must produce to the court the grant of representation to the deceased's estate (*paragraph 14.1, PD 57*).

Matters following judgment

Unless the court orders otherwise, if a testamentary document is held by the court (whether it was lodged by a party or it was previously held at a probate registry), when the probate claim has been disposed of the court sends it to the Leeds District Probate Registry (*paragraph 3.1, PD 57*).

If an order is made substituting or removing the personal representative, the grant (together with a sealed copy of the order) must be sent to and remain in the custody of the Principal Registry of the Family Division until a memorandum of the order has been endorsed on or permanently annexed to the grant (*paragraph 14.2, PD 57*).

The person entitled to take out a grant in respect of the order that has been made should obtain a sealed copy of the order and apply for a grant in the usual way. The testamentary documents can be obtained from the Leeds District Probate Registry, unless an application is being made in it. Any caveats will cease to have effect (*rule 45(4), NCP 1987*).

Costs

General rule

Section 51(1) of the SCA 1981 provides that the costs of and incidental to all proceedings in the civil division of the Court of Appeal, the High Court and any County Court, is in the discretion of the court. "Proceedings", for this purpose, includes the administration of estates and trusts (*section 51(4), SCA 1981*). The rules about exercising that discretion are in *CPR 44.3*. If the court decides to make an order about costs, the general rule is that the unsuccessful party is ordered to pay the costs of the successful party.

Exceptions to the general rule

The court does not make an order for costs against a defendant who in his defence gave notice that he required the will to be proved in solemn form, unless it appears that there were no reasonable grounds for opposing the will (*paragraph 8.2, PD 44*).

Apart from this restriction, there are exceptions to the general rule in probate claims:

- A person who, as executor, succeeds in propounding the will is entitled to his costs out of the estate (*Headington v Holloway (1830) 3 Hag Ecc 280*). He has a right to take them as a charge

on the estate of the testator.

- ❑ An executor is not bound to propound a testamentary document. If he has any doubts as to its validity, it is reasonable for him to obtain an indemnity or some other security for the costs of the application from those interested in upholding the will. If he fails to prove the will and he has not obtained such security, he is likely to be ordered to pay the costs personally. (*Rennie v Massie and others* (1866) LR 1 P&D 118.)
- ❑ A legatee who successfully propounds a will is allowed his costs out of the estate (*Williams, formerly Cook v Goude and Bennett* (1828) 1 Hag Ecc 577). He is not, however, entitled to take the costs out of the estate, unless he takes a grant of administration with the will annexed.
- ❑ If the testator, or those interested in residue, were really and substantially the cause of the litigation, the costs are payable out of the estate (*Spiers v English* [1907] P 122). For instance, a claimant challenged the validity of a will on the ground that the testator lacked testamentary capacity, and propounded an earlier will made when there was no doubt about his capacity. The claimant succeeded. In the action, the later wills were supported by a defendant beneficiary, who had carried out a reasonable investigation into the testator's testamentary capacity at the time of the will. The defendant was held to have been fully justified in investigating the issue of testamentary capacity after a formal challenge was made in relation to the later will. The defendant was allowed its costs out of the estate, but only until it had been shown very strong evidence against the validity of the later will (Henderson, J in *Kostic v Chaplin and others*, 7 December 2007, [2007] EWHC 2909 (Ch), unreported). See also *Shovelar v Lane* [2011] EWCA Civ 802, unreported. For further information on the decision on costs in *Shovelar v Lane* [2011], see *Legal update, General costs rule applies to claim for constructive trust under mutual will* (www.practicallaw.com/4-506-9761).
- ❑ If the circumstances lead reasonably to an investigation of the matter, then the costs may be left to be borne by those who have incurred them (*Spiers v English*). For instance, a named executor might reasonably propound a will that is later discovered by expert evidence to have been a forgery. Until that discovery or, if earlier, such time as such a discovery should reasonably have been made, the claimant was acting properly and no order for costs is made if the claimant seeks to discontinue (Norris, J in *Smith and another v Springford and others* [2007] EWHC 3446 (Ch) (www.practicallaw.com/8-385-0942)).

Review of civil litigation costs

Jackon LJ's final report on civil litigation costs made no specific recommendations regarding amending CPR 57 but it did recommend that practitioners turn their minds to alternative dispute resolution in settling contentious probate claims. For further information, see *Legal update, Civil litigation costs review final report: issues for private client practitioners* (www.practicallaw.com/4-501-3552).

Timeline

A simple timeline for a contentious probate action is as follows:

- Pre-action protocol procedure.
- Claim form issued.
- Claimant lodges testamentary documents or, if the application is for revocation of the grant, the grant.
- Defendant files acknowledgment of service within 28 days after service of claim form.
- Claimant and defendant file their written evidence and testamentary documents not already filed. They may inspect each other's evidence and documents.
- Unless sufficient particulars are in the claim form, claimant serves particulars of claim on each defendant who has acknowledged service.
- Defendant serves defence and, if appropriate, a counterclaim.
- Claimant serves a reply to the defence (or a reply and a defence to a counterclaim) when filing the allocation questionnaire.
- Defendant serves any reply to defence to counterclaim.
- Court gives case management directions. Depending on the complexity of the case, this may be before, or at, a case management conference.
- The parties give disclosure, if ordered.
- Trial is fixed and held.
- Application is made for grant of probate or letters of administration, as appropriate.

Claims involving mutual wills and proprietary estoppel

A special type of claim, outside CPR 57 and described here by way of contrast, involves mutual wills or proprietary estoppel. Such a claim is not about the validity or otherwise of the new will, but about the trusts on which the estate is held by the executors of it, despite the provisions of that will.

If two individuals agree on the disposal of their property and execute mutual wills in pursuance

of the agreement, on the death of the first to die, the property of the survivor, which was the subject matter of the agreement, is held on an implied trust for the beneficiary named in the wills. The survivor may thereafter alter his will, because a will is inherently revocable, but if he does so, his personal representatives take the property subject to the trust (*Re Dale (decd)* [1994] Ch 31). The executors of the second will must take a grant of that will but administer the estate in accordance with the provisions of the original mutual will, insofar as they are covered by the original agreement. The decisions in *Fry v Densham-Smith* [2010] EWCA Civ 1410 and *Charles and others v Fraser* [2010] EWHC Civ 2154 (Ch) are salutary reminders that practitioners who are preparing wills for testators who wish to provide for each other need to ensure that the testators understand the nature of mutual wills and that each testator considers whether the survivor is free to revoke his or her will. It is necessary that the testators reach what amounts to a legally binding contract that both wills will be irrevocable and remain unaltered. For further information on these decisions, see *Legal update, Mutual wills upheld by Court of Appeal despite lack of direct evidence* (www.practicallaw.com/2-504-3098) and *Legal update, Mutual wills upheld in absence of documentary evidence* (www.practicallaw.com/0-503-0841) respectively.

Similarly, under the principles of proprietary estoppel, a claimant may be granted relief where there was a "representation or assurance made to the claimant pertaining to an interest in identified property; reasonable reliance on it by the claimant; and detriment to the claimant in consequence of that reliance. The claimant has to show that it would be unconscionable for the person who made the assurance or representation to go back on his word, and deprive the claimant of the proprietary interest he had been led to expect." (Geraldine Andrews QC (sitting as a Judge of the High Court), *Macdonald v Frost* [2009] WTLR 1815, at paragraph 9. For further information, see *Legal update, High Court dismisses claim of proprietary estoppel (detailed update)* (www.practicallaw.com/1-500-5775). Again, the issues are about the rights of parties in the estate, despite the provisions of the will. The case of *Macdonald v Frost* applied the ruling in *Thorne v Majors and others* [2009] UKHL 18, where the House of Lords (now the Supreme Court) found that assurances on which a person relies that were oblique or implied were sufficient to establish a proprietary estoppel claim. For further information, see *Legal update, House of Lords allows proprietary estoppel claim (detailed report)* (www.practicallaw.com/4-385-5994).

Resources

- *Non-Contentious Probate Rules 1987* (SI 1987/2024) (www.practicallaw.com/7-383-8955).
- *Civil Procedure Rules and Practice Directions* (www.practicallaw.com/0-205-5302).
- *Civil Procedure Rules, Part 57*.
- *Practice Direction 57*.
- *Senior Courts Act 1981 (formerly Supreme Court Act 1981)* (www.practicallaw.com/resource.do?item=:46438018).

Resource information

Resource ID: 3-383-6821

Products: PLC Dispute Resolution, PLC Private Client, PLC Public Sector

This resource is maintained, meaning that we monitor developments on a regular basis and update it as soon as possible.

Resource history

Want of due execution

We have updated this section (), to refer to the decision in *Marley V Rawlings [2011] EWHC 161 (Ch)*.

Estates of Deceased Persons (Forfeiture Rule and Law of Succession) Act 2011

In this section () we have recorded that the Estates of Deceased Persons (Forfeiture Rule and Law of Succession) Act 2011 (when it comes into force) will change the law in relation to who may inherit a beneficiary's interest which is forfeited under the Forfeiture Act 1982.

Claims involving mutual wills and proprietary estoppel

We have updated this section to refer to the decisions in *Fry v Densham-Smith [2010] EWCA Civ 1410* and *Charles and others v Fraser 2010 EWHC Civ 2154 (Ch)*.

Defences in probate claims: Knowledge and approval

We have updated this section to refer to the Court of Appeal decision in *Gill v Woodall and others [2010] EWCA Civ 1430*.

Defences in probate claims: Capacity

We have referred to the decision in *Key and others v Key and others [2010] EWHC 408 (Ch)* which has developed the test in *Banks v Goodfellow (1870) LR 5 QB 549*.

Related content

Topics

After death (<http://editorial.practicallaw.com/topic8-383-2284>)

Substantive law (<http://editorial.practicallaw.com/topic6-204-9134>)

Practice note: overview

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(<http://editorial.practicallaw.com/topic6-383-8296>)

Executing wills and codicils (<http://editorial.practicallaw.com/topic5-383-7909>)

Legal update: archive

Disputed wills: new guidance from the Law Society (<http://editorial.practicallaw.com/topic6-385-6539>)

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