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LITIGATION PROCEDURE – PROBATE ACTIONS

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Grounds to challenge a will
This notes sets out the grounds to challenge a Will and the factors to consider.
Probate claims are usually issued in the High Court, Business & Property List, Chancery Division, and are governed by Parts 7 and 57 of the Civil Procedure Rules.

This guidance note explains the court process (i.e., once court proceedings have been issued) in a probate claim.

There are several stages to litigation:

1. Pre-Action
2. Issue and Service of Proceedings
3. Response to the claim
4. Costs and Case Management
5. Expert Evidence and Witness Statements
6. Pre-Trial
7. Trial Preparation and Trial
8. Costs
9. Alternative Dispute Resolution

We have explained each stage below.

Pre-Action

This comprises of the investigatory and correspondence stage of litigation. During this stage, the party seeking to challenge a will (the "Claimant") carries out investigations by obtaining evidence such as:

- The will and previous wills
- The will writing file
- Medical, social services and any other relevant records
- Witness evidence
- Expert evidence

Once investigations are complete, the Claimant will prepare a letter setting out their claim ("Letter of Claim") and send it to the executors and beneficiaries of the will ("the Defendants").

The Defendants will then respond to the Letter of Claim. Generally speaking, executors adopt a neutral role in disputes, and let the Claimant and beneficiaries of the estate engage in the dispute.

There is no formal procedure for pre-action correspondence, but most legal professionals will act in accordance with the Code of Conduct set out by the Association of Contentious Trusts and Probate Specialists ("ACTAPS").

The ACTAPS code states that the Defendant should respond to the Letter of Claim within 21 days stating whether they admit or deny the claim.

There is no timescale for pre-action correspondence, and parties may engage in correspondence for some time. It is not unusual to resolve the dispute through mediation at this early stage.

If, however, it is not possible to resolve the dispute, the Claimant may issue court proceedings, for example, challenging the validity of a will.

Issue and Service of Court Proceedings

There are two parts to this stage:

1. Preparing the court documents setting out the Claimant's legal case; and

2. Serving the claim on the Defendants

We will usually instruct Counsel (a barrister) to draft the court papers. There are two documents – the Claim Form, which provides the parties' details and a brief summary of the claim, and the Particulars of Claim, which sets out the legal basis of your case.

Probate claims are dealt with the Business & Property courts, which has special rules for disclosure of documents. We refer you to our separate Guidance Note about this.

Initial Disclosure, as explained in that Guidance Note, is filed with the court and served on the Defendants with the Claim Form and Particulars of Claim.

Once approved by the Claimant, they will be filed with the court using the court's online system, where the court will open a file for the case, register the Claimant and Defendant details, and allocate a claim number to the case. The court will seal (stamp) the documents to confirm that the claim has been issued and return it to us for service. This is all done electronically.

A claim must be served within four months from the date it is issued by the court. We may serve court proceedings immediately, or we may decide to wait. This is something that we will discuss with you, as what course of action we take is dependant upon the circumstances of each case.

Serving the claim means sending it to the Defendants. We can send the claim to the Defendants' solicitors if they have confirmed that they are instructed to accept service of court proceedings, or send them to the Defendants directly.

A "Response Pack" is sent with the court papers, containing the documents that the Defendants need to complete in order to respond to the claim.

Part 6 of the Civil Procedure Rules governs the dates on which the court proceedings are deemed to be served on the Defendants. The deemed date of service varies according to the method of service, i.e. by post, next day delivery, or email. We will advise you of the deemed date of service.

Responding to the Claim

The Response Pack contains notes for Defendants on how to respond to the claim, and a Acknowledgment of Service form ("AOS").

The Defendants must file the AOS with the court within 14 days of the deemed date of service. We will advise you of the relevant date.

The Defendants can either admit or deny the claim in the AOS. If they admit the claim, the court is likely to make a declaration that the will is invalid (if that is the remedy you are seeking). The course of action the court takes depends on the type of probate claim being pursued. This is something we will discuss with you at the relevant time.

If the Defendants file the AOS stating their intention to defend the claim, they have a further 14 days from the date the AOS was due to be filed (i.e. 28 days from the deemed date of service of the claim) to file a defence with the court and serve it on the parties.

The issue and response to the claim stage of the litigation is known as “Pleadings”.

Costs and Case Management

Once the Pleadings stage of the litigation has ended, the court will give a date for the parties to complete a Directions Questionnaire. This provides basic information to the court to help manage the case – such as the number of witnesses that each party intends to call, their names, whether expert evidence is required, and how long the parties think the trial will take.

Once the court has this information, it will set a hearing called a Costs and Case Management Conference (“CCMC”). The purpose of this hearing is to set steps that the parties must take in preparation for trial. These steps are known as “Directions”. The parties will have been encouraged to try and agree directions before the CCMC.

There are steps that the parties must take in preparation for the CCMC:

1. Exchange Costs Budgets. This is a document that sets out all incurred costs and future estimated costs to trial. Each party then comments on the others’ budget, and the parties are encouraged to agree each others’ budgets prior to the CCMC.

   The purpose of a Costs Budget is to set a limit over which a party cannot recover legal fees. This does not mean that the successful party will recover the full set budget amount if they are successful, it sets the maximum that they can recover.

   The courts will set the parties’ costs budgets at the CCMC if the parties have not been able to agree them.

   Costs in probate cases are dependant on the nature of the dispute, as each case is different. It is not unusual for costs in probate claims to be around £120,000 - £150,000 plus VAT per party.

2. Disclosure. The parties will have already indicated whether they intend to apply for Extended Disclosure (please see our Disclosure Guidance Note). If extended disclosure takes place, the parties will go through a process of completing a Disclosure Review Document. Ultimately, the parties are encouraged to agree the extent and disclosure model, but the court will make a decision if it has to.

We will advise you of the timescales for Costs Budgeting and Disclosure once we have been informed of the date of the CCMC.

Directions set by the court at the CCMC will govern progress of the case to trial.

Expert Evidence and Witness Statements

The parties will have dates by which expert evidence must be filed with the court and served on the other parties, and also the date for the simultaneous exchange of witness statements.

We may summons witnesses to require them to attend court. This is something we will discuss with you.

Pre-Trial Review

The parties are required to complete a further document called a “Pre-Trial Checklist” and file it with the court.

The Pre-Trial Checklist provides the court with information as to where the parties are in terms of trial preparation, and whether any further directions are required.

The court may hold another hearing called a “Pre-Trial Review” if appropriate, to ensure that the parties will be ready for trial. This very much depends on the complexity of the case.

It is after this stage that a trial date will be set.

Trial Preparation and Trial

This stage of the litigation process involves:

- Preparing and agreeing a bundle of documents for use by the court and all parties at the trial;
- Preparing and agreeing a chronology of events and case summary;
- Having a pre-trial conference with Counsel; and
- Instructing Counsel to represent you at the trial.

The trial itself will then take place. The Chancery Master (the level of judge that will hear the case) may not give a judgment straightaway, and it may be several weeks before judgment is handed down.

Costs

Once the court has decided who has been successful, it will decide which party is entitled to recover their costs. The general rule is that the successful party recovers their costs from the unsuccessful party.

The court will not usually order that amount of actual costs to be paid to the successful party. Instead, it will order “costs to be assessed if not agreed”. This means that the successful party can apply to the court to have their costs assessed if the parties cannot agree the amount between them. This is a separate court process.

As a rule of thumb, a successful party can expect to recover around two-thirds of their costs from the unsuccessful party, subject to the costs budget.

It is a common misconception that all parties’ costs come from the estate. In fact, only executors are able to recover their reasonable costs from the estate. All other parties must pay their costs personally.

Alternative Dispute Resolution (“ADR”)

It is possible to settle a dispute at any stage in the litigation.

Litigation is an expensive and stressful process and we encourage ADR wherever possible. It is possible for the court to order a “Stay of Proceedings” – that is, to put the court proceedings on hold, for a period of time, to allow the parties to engage in ADR.

ADR is a very important part of the litigation process and is actively encouraged by the courts. A party that unreasonably refuses to engage in ADR, such as mediation is likely to be penalised through payment of costs.

Conclusion

As your lawyers, we have a duty to act in your best interests. We will provide objective and impartial advice and guide you through the litigation process.