



Vantage Park, 22 High View Close
Hamilton, Leicester, LE4 9LJ
Telephone Number: 0330 0169200
Email: Info@rothleylaw.com

PRE-ACTION PROCEDURE GUIDANCE NOTES

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The process by which you try to persuade the court to decide a claim in your favour is called “proving your claim”.

Courts make decisions by:

- Listening to and reading evidence;
- Hearing arguments from your barrister or solicitor (called “submissions”) in light of the relevant law; and
- Deciding on the balance of probability.

LISTENING TO AND READING EVIDENCE

In order to prove your claim, you will have to present evidence that supports what you say. For instance, if you are challenging the validity of a will on the grounds of undue influence, you will need to produce strong evidence showing the influence you say was put on the deceased. As a further example, in a claim under the Inheritance (Provision for Family and Dependents) Act 1975, you will need to provide evidence showing your financial position to help the court determine what (if any) reasonable financial provision from the estate should be made for you.

Documents are also very important. The Deceased’s medical records, communications, diary entries, bank statements may form part of your evidence. This is not an exhaustive list.

HEARING ARGUMENTS

Often, the evidence that the judge hears will not be accepted by the parties. The judge must decide which evidence he/she thinks is correct and which evidence he/she thinks is incorrect. Your barrister or solicitor will try to persuade the judge to accept your evidence.

DECIDING ON THE BALANCE OF PROBABILITY

The Claimant (the person bringing the claim) has to show that he/she is correct before the judge can decide in his or her favour. The way the judge will decide the claim is “on the balance of probability”. In order to accept a Claimant's version of events, the judge will have to come to the conclusion that on balance he or she has given evidence of the most likely sequence of events. The judge will have to be just over 50% sure that what the Claimant says is correct before deciding in the Claimant's favour.

THE PRE-ACTION PROCEDURE

Given how the court system operates (as detailed above), the court encourages everyone who is considering making a legal claim to act reasonably and to co-operate with the other prospective parties involved. The court aims to ensure that any legal action taken is proportionate to the amount of loss or the extent of the injury concerned. The early steps set out below can be undertaken before court proceedings are issued. This will show that you have tried to co-operate and behave reasonably. The pre-action process also allows you to gather all the evidence so you are better prepared for court proceedings.

INVESTIGATING YOUR CLAIM

You have spoken to a solicitor and together you have discussed the circumstances of your case. The solicitor will probably have asked you to send all the papers and documents in for him/her to see. These documents may be critical in helping you to win your case.

Your solicitor may also request further evidence from third parties, such as copies of the deceased's medical records or similar, or the Will writing file as part of the investigation.

LETTER OF CLAIM

Before any formal steps towards issuing legal proceedings are taken, you and the other prospective parties are required to co-operate and exchange information about your claim. In effect, this means that you tell the other side (i.e. the Defendant) about your claim in as much detail as you can, at the earliest opportunity. This is usually done by sending a "Letter of Claim", which contains a clear summary of the facts; sets out the basis upon which you are bringing your claim; and the outcome you are looking to achieve.

Copies of any documents which you may already have which support your claim and your loss may also be sent with this letter.

The court encourages both sides to "show their hand" at an early stage so that everyone knows what is being claimed and the circumstances of the claim.

RESPONSE

The Defendant has to respond to this letter within a certain time. Once your solicitor has received this response, they will discuss the next steps with you.

NEXT STEPS

Your solicitor will discuss the possibility of mediation or settlement negotiations with you, and what further evidence may be required in support of your claim. They may also continue to correspond with the Defendant and other relevant parties, such as the Personal Representatives of the estate, in order to obtain any further information that they may require.

OFFERING TO SETTLE

Litigation is a stressful and costly process. Settlement of disputes prior to litigation is encouraged wherever possible. Your solicitor will discuss this with you as your claim progresses.

ALTERNATIVE DISPUTE RESOLUTION

Litigation is really a last resort, and the court encourages resolution of disputes by other means, for example: discussion and negotiation, mediation, arbitration. Your solicitor will tell you more about these means of alternative dispute resolution.

ISSUING PROCEEDINGS

It may be necessary to issue court proceedings to protect your legal position as there are short time limits within which court proceedings have to be issued on certain types of claim. In most cases, this does not mean that you are going to go to court; this step is taken to protect your claim. Your solicitor will discuss this further with you if such a course of action is necessary.

SUMMARY

There are many stages to a dispute, even before court proceedings are issued. We will guide you through the process and discuss the most appropriate course of action with you. The courts require legal costs to be proportionate to the claim, and this is an important factor that is central to our advice. Litigation is a costly and stressful process, and we are mindful that our clients want to try and resolve their dispute as quickly and cost-effectively as possible.