

# PRACTICE DIRECTION – CONTENTIOUS PROBATE PROCEEDINGS

**THIS PRACTICE DIRECTION SUPPLEMENTS PART 49 OF THE  
CPR AND REPLACES RSC ORDER 76 AND CCR ORDER 41.**

## GENERAL

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- 1.1 This Practice Direction applies to contentious probate proceedings and to applications for the rectification of a will both in the High Court and in the county court.

(For the rules and procedure relating to non-contentious probate proceedings, see the Non-Contentious Probate Rules 1987 as amended. The Non-Contentious Probate Rules deal, among things, with the procedure for entering a caveat, for warning-off a caveat and for entering an appearance to a warning. If an application for the rectification of a will is not contentious, the application may be made to the Family Division: see Non-Contentious Probate Rules 1987, rule 55.)

(For the jurisdiction of a county court in respect of contentious probate proceedings and proceedings for the rectification of a will, see s.32 County Courts Act 1984.)

- 1.2 In this Practice Direction:-

- (i) “probate claim” means a claim in respect of any contentious matter arising in connection with an application for the grant or revocation of probate or letters of administration and includes a claim for an order pronouncing for or against the validity of an alleged will, “claim form” means a claim form by which a probate claim is begun and “probate proceedings” means the proceedings in which a probate claim is brought.
- (ii) “relevant office” means:-
  - (a) in the case of High Court proceedings in a Chancery district registry, that registry,
  - (b) in the case of any other High Court proceedings, Chancery Chambers at the Royal Courts of Justice, Strand, London, WC2A 2LL; and
  - (c) in the case of county court proceedings, the office of the county court in question.
- (iii) “testamentary script” means a will or draft thereof, written instructions for a will made by or at the request, 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.

## COMMENCEMENT OF PROCEEDINGS

- 2.1 If a probate claim is to be commenced in the High Court, the claim form must be issued out of Chancery Chambers or one of the Chancery district registries.  
  
(There are Chancery district registries at Birmingham, Bristol, Cardiff, Leeds, Liverpool, Manchester, Newcastle upon Tyne and Preston).
- 2.2
  - (i) If a claim form is wrongly issued out of a district registry other than a Chancery district registry, an application for the transfer of the claim to the Royal Courts of Justice or to a Chancery district registry should be made forthwith.
  - (ii) The court may, in a case to which paragraph 2.2(i) applies, order the transfer on its own initiative.
- 2.3 On the issue of a claim form the relevant office will send a notice to the principal registry of the Family Division requesting that all testamentary scripts and other relevant documents in the principal registry or any district probate registry be sent to the relevant office.
- 2.4 A claim form must, before it is issued, contain a statement of the nature of the interest of the claimant and of the defendant in the estate of the deceased to which the claim relates.
- 2.5 Every person who may be affected by a probate claim, either as a beneficiary under a will in issue or on an intestacy, and who is not joined as a party to the probate claim, should be given notice of the proceedings. It may in some cases be appropriate for a representation order to be sought under RSC Order 15, rule 13 (Schedule 1 to the CPR) or CCR Order 5, rule 6 (Schedule 2 to the CPR).
- 2.6 The court may direct that notice of the probate claim be served on any such person as is mentioned in paragraph 2.5 and, for that purpose, rule 13A of RSC Order 15 (Schedule 1 to the CPR) applies to probate claims in the county court as well as to probate claims in the High Court.
- 2.7 Every person who is entitled, or claims to be entitled, to administer the estate of a deceased person under an unrevoked grant of probate or letters of administration must be made a party to any probate claim seeking revocation of a grant.
- 2.8 The commencement of a probate claim will, unless a court otherwise directs, prevent any grant of probate or letters of administration being made until the probate claim has been disposed of (see rule 45 of the Non-Contentious Probate Rules 1987: but see also s.117, Supreme Court Act, 1981 and paragraph 14 below).

## **LODGMENT OF GRANT IN ACTION FOR REVOCATION**

- 3.1 Where, on the issue of a claim form seeking revocation of a grant of probate or letters of administration, the probate or letters of administration, as the case may be, have not been lodged in court, then -
  - (a) if a person to whom the grant was made is a claimant, he must lodge the probate or letters of administration in the relevant office within 7 days after the issue of the claim form;
  - (b) if a defendant to the action has the probate or letters of administration in his possession or under his control, he must lodge it or them in the relevant office within 14 days after the service of the claim form on him.

In this paragraph "court" includes the principal registry of the Family Division or a district probate registry.

- 3.2 Any person who fails to comply with paragraph 3.1 may, on the application of any party to the probate claim, or by the court on its own initiative, be ordered to lodge the probate or letters of administration in the relevant office within a specified time.
- 3.3 Any person against whom an order is made under paragraph 3.2 shall not be entitled to take any step in the probate proceedings without the permission of the court until he has complied with the order.

## **ACKNOWLEDGMENT OF SERVICE**

4. A defendant on whom a claim form is served must, subject to CPR rule 10.3(2), file an acknowledgment of service within 14 days after service of the claim form on him.

## **TESTAMENTARY SCRIPTS**

- 5.1 Unless the court otherwise directs, the claimant and every defendant who has acknowledged service of the claim form must by affidavit or witness statement:
  - (a) describe any testamentary script of the deceased person, whose estate is the subject of the action, of which he has any knowledge or, if such be the case, state that he knows of no such script, and
  - (b) if any such script of which he has knowledge is not in his possession or under his control, give the name and address of the person in whose possession or under whose control it is or, if such be the case, state that he does not know the name or address of that person.
- 5.2 Any affidavit or witness statement required by paragraph 5.1 must be filed, and any testamentary script referred to therein which is in the possession or under the control of the deponent must be lodged in the relevant office within 14 days after the acknowledgment of service by a defendant to the claim or, if

no defendant acknowledges service and the court does not otherwise direct, before an order is made for the trial of the claim.

- 5.3 Where any testamentary script required by paragraph 5.2 to be lodged in the relevant office or any part thereof is written in pencil, then, unless the court otherwise directs, a facsimile copy of that script, or of the page or pages thereof containing the part written in pencil, must also be lodged in the relevant office and the words which appear in pencil in the original must be underlined in red ink in the copy.
- 5.4 Except with the permission of the court, a party to a probate claim shall not be allowed to inspect an affidavit or witness statement filed under paragraph 5.2 or any testamentary script lodged under paragraph 5.3 unless and until an affidavit or witness statement sworn or made by him containing the information referred to in paragraph 5.1 has been filed.
- 5.5 Copies of testamentary scripts lodged under paragraph 5.2 should be filed with the originals. The testamentary scripts will remain in the relevant office until the probate claim has been disposed of.
- 5.6 It is important that testamentary scripts should not be marked in any way; nor should they be stapled or folded.
- 5.7
  - (i) Any party desiring to have any testamentary script subjected to examination by an expert should make an application in accordance with CPR Part 23.
  - (ii) The application notice or the written evidence in support should explain the nature and purpose of the examination and the points to which the examination should be directed.
  - (iii) The court may order such an examination on its own initiative.

## **FAILURE TO ACKNOWLEDGE SERVICE**

- 6.1 A default judgment cannot be obtained on a probate claim and CPR rule 10.2 and Part 12 do not apply to probate claims.
- 6.2 Where any of several defendants to a probate claim fails to acknowledge service of the claim form, the claimant may, after the time for acknowledging service has expired and upon filing an affidavit or witness statement proving due service of the claim form on that defendant proceed with the probate claim as if that defendant had acknowledged service.
- 6.3 Where the defendant, or all the defendants, to a probate claim, fails or fail to acknowledge service of the claim form then, unless on the application of the claimant the Court orders the claim to be discontinued, the claimant may after the time for acknowledging service has expired apply to the court for an order for trial of the claim.
- 6.4 Before applying for an order under paragraph 6.3 the claimant must file an affidavit or witness statement proving due service of the claim form on the

defendant or defendants and, if no particulars of claim were contained in or served with the claim form, he must file particulars of claim in the relevant office.

- 6.5 Where the court makes an order under paragraph 6.3, it may direct the claim to be tried on written evidence. (see also paragraph 10.3 below).

(For rules about written evidence, see Part 32 and the Practice Direction supplementing that Part).

## **SERVICE OF PARTICULARS OF CLAIM AND DEFENCE**

- 7.1 The claimant in a probate claim must, unless the court gives permission to the contrary or particulars of claim were contained in or served with the claim form, serve particulars of claim on every defendant who acknowledges service of the claim form and must do so before the expiration of 28 days after acknowledgment of service by that defendant or of 8 days after the filing by that defendant of an affidavit or witness statement under paragraph 5.1, whichever is the later.
- 7.2 If particulars of claim were contained in or served with the claim form or are served before the claimant has complied with paragraphs 5.1 and 5.2 above, the time for filing a defence shall, subject to CPR 15.4(2), be 28 days after the affidavit or witness statement required by paragraph 5.1 has been filed and the testamentary scripts have been lodged.

## **DEFENCE AND COUNTERCLAIM**

- 8.1 A defendant to a probate claim who alleges that he has any claim or is entitled to any remedy relating to the grant of probate of the will, or letters of administration of the estate, of the deceased person must add to his defence a counterclaim in respect of that matter.
- 8.2 If the claimant fails to serve particulars of claim, any such defendant may, with the permission of the Court, serve a counterclaim and the probate proceedings shall then continue as if the counterclaim were the particulars of claim and the counterclaiming defendant were the claimant.
- 8.3 A defendant may in his defence give notice that he will raise no positive case but will insist on the will being proved in solemn form of law and, for that purpose, will cross-examine the witnesses who attested the will.

(Attention is drawn to paragraph 2.2 of the Costs Practice Direction Relating to CPR Part 44 and supplementing CPR 44.3).

## **CONTENTS OF STATEMENTS OF CASE**

- 9.1 Where the claimant in a probate claim disputes the interest of a defendant, he must state in his particulars of claim that he denies the interest of that defendant.

- 9.2 In a probate claim in which the interest by virtue of which a party claims to be entitled to a grant of letters of administration is disputed, the party disputing that interest must show in his statement of case that if the allegations he makes in it are proved he would be entitled to an interest in the estate.
- 9.3 Any party who wants to contend that at the time when a will, the subject of the probate claim, was alleged to have been executed the testator did not know and approve of its contents must specify in his statement of case the nature of the case on which he intends to rely, and no allegation in support of that contention which would be relevant in support of any of the following other contentions, that is to say:
- (a) that the will was not duly executed,
  - (b) that at the time of the execution of the will the testator was not of sound mind, memory and understanding, and
  - (c) that the execution of the will was obtained by undue influence or fraud,
- shall be made by that party unless that other contention also is made in his statement of case.

## DEFAULT OF PLEADINGS

- 10.1 A default judgment cannot be obtained on a probate claim (see paragraph 6.1 above).
- 10.2 Where any party to a probate claim fails to serve on any other party a pleading which he is required by the CPR or this Practice Direction to serve on that other party, then, unless the court orders the claim to be discontinued or dismissed, that other party may, after the expiration of the period fixed by the CPR or this Practice Direction for service of the pleading in question, apply to the court for an order for trial of the probate claim; and if an order is made the court may direct the probate claim to be tried on written evidence.
- 10.3 If a trial is ordered under paragraph 10.2 (or under paragraph 6.2), the hearing may lead to an order pronouncing for the will in solemn form.

## SUMMARY JUDGMENT

11. Where 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 an affidavit or a witness statement proving due execution of the will. (CPR Part 24 and the practice direction supplementing Part 24 deal with summary judgment applications).

## DISCONTINUANCE AND DISMISSAL

- 12.1 CPR Part 38 does not apply to a probate claim.

- 12.2 At any stage of probate proceedings the court may, on the application of the claimant, or of any party to the probate claim who has acknowledged service of the claim form, order the claim to be discontinued or dismissed on such terms as to costs or otherwise as it thinks just, and may further order that a grant of probate of the will, or letters of administration of the estate, of the deceased person, as the case may be, which is the subject of the claim, be made to the person entitled thereto.
- 12.3 An application for an order under this rule may be made by application notice in accordance with CPR Part 23.
- 12.4 An order for the discontinuance or dismissal of a probate claim under paragraph 11.2 will normally lead to a grant of probate or of letter of administration in common form.

## COMPROMISE OF ACTION

- 13.1 Where, whether before or after the service of the defence in a probate claim, the parties to the claim agree to a compromise, the Court may order the trial of the claim on written evidence.  
  
(For a form of order which is also applicable to discontinuance and which may be adapted as appropriate, see Practice Form No. CH38).
- 13.2 Section 49 of the Administration of Justice Act 1985 permits a probate claim to be compromised without a trial if every "relevant beneficiary" has consented to the proposed order.
- 13.3 Applications under section 49 may be heard by a master or district judge and should be supported by affidavit or witness statement identifying the "relevant beneficiaries" and exhibiting their respective consents. Affidavits or witness statements of testamentary scripts (see paragraph 5 above) will still be necessary.

## APPLICATION FOR ORDER TO BRING IN WILL, ETC.

- 14.1 Any application in a probate claim for an order under section 122 of the Supreme Court Act 1981 shall be for an order requiring a person to bring a will or other testamentary paper into the relevant office or to attend in court for examination.
- 14.2 An application under paragraph 13.1 shall be made by application notice in accordance with CPR Part 23. The application notice must be served on the person against whom the order is sought.
- 14.3 Any application in a probate claim for the issue of a witness summons under section 123 of the Act shall be for the issue of a witness summons requiring a person to bring into the relevant office a will or other testamentary paper.

- 14.4 An application under paragraph 13.3 may be made without notice and must be supported by an affidavit or witness statement setting out the grounds of the application.
- 14.5 An application under section 122 or 123 of the 1981 Act should be made to a master or district judge.
- 14.6 Any person against whom a witness summons is issued under section 123 of the 1981 Act and who denies that the will or other testamentary paper referred to in the witness summons is in his possession or under his control may file an affidavit or witness statement to that effect.
- 14.7 Section 32 of the County Courts Act 1984 enables orders under section 122 and 123 of the 1981 Act to be made in county court proceedings.

## **ADMINISTRATION PENDING THE DETERMINATION OF A PROBATE CLAIM**

- 15.1 An application under section 117 of the Supreme Court Act 1981 for an order for the grant of administration may be made by application notice in the probate proceedings in question.
- 15.2 Where an order for a grant of administration is made under the said section 117, RSC Order 30 (Receivers) rules 2, 4 and 6 and (subject to subsection (3) of the said section) rule 3 (Schedule 1 to the CPR), shall apply as if the administrator were a receiver appointed by the court; and every application relating to the conduct of the administration shall be made by application notice in the probate proceedings in question.
- 15.3 An order under section 117 may be made by a master or district judge.
- 15.4 If an order is made under section 117 an application for the grant of letters of administration should be made at the principal probate registry of the Family Division.
- 15.5 The appointment of an administrator to whom letters of administration are granted following an order under section 117 will cease automatically when a final order in the probate proceedings is made but will continue pending any appeal.

## **PROBATE COUNTERCLAIM IN OTHER PROCEEDINGS**

- 16.1 In these paragraphs "probate counterclaim" means a counterclaim by which the defendant makes a probate claim in any proceedings other than probate proceedings.
- 16.2 Subject to the following paragraphs, this Practice Direction shall apply with the necessary modifications to a probate counterclaim as it applies to a probate claim begun by a probate claim form.



- 16.3 A probate counterclaim must contain a statement of the nature of the interest of the defendant and of the claimant in the estate of the deceased to which the counterclaim relates.
- 16.4 Unless within seven days after the service of a probate counterclaim in High Court proceedings an application is made for an order under CPR 3.2(e) or 3.4 for the probate counterclaim to be struck out or dealt with in separate proceedings and the application is granted, the court shall, if necessary on its own initiative, order the transfer of the proceedings to the Chancery Division (if it is not already assigned to that Division) and to either the Royal Courts of Justice or a Chancery district registry (if it is not already proceeding in one of those places).
- 16.5 If an order is made that a probate counterclaim be dealt with in separate proceedings, the order shall (if the proceedings are in the High Court) order the transfer of the probate counterclaim as required under paragraph 15.4.

## **RECTIFICATION OF WILLS**

- 17.1 Where an application is made for the rectification of a will and the grant has not been lodged in court, paragraph 5 of this Practice Direction shall apply, with the necessary modifications, as if the proceedings were probate proceedings.
- 17.2 A copy of every order made for the rectification of a will shall be sent to the principal registry of the Family Division for filing, and a memorandum of the order shall be endorsed on, or permanently annexed to, the grant under which the estate is administered.

