Bringing non-contentious probate into the twenty-first century

Private Client analysis: Will the government's attempt to modernise non-contentious probate be a blessing or a curse? Jody Atkinson, a barrister specialising in probate, wills and trusts at St John's Chambers, believes the proposed new rules will assist lawyers, particularly those coming to probate practice for the first time, but could have some less-desirable effects.

Original news

Consultation: Draft rules in relation to non-contentious probate business in England and Wales

The Ministry of Justice (MoJ) is seeking views on changes to the Non-Contentious Probate Rules 1987, SI 1987/2024 (the 1987 Rules), and a draft set of new rules, the Probate Rules 2013. The proposals include a statement of truth for probate practitioners. The consultation is aimed at those interested in the administration of estates, members of the public and probate practitioners in England and Wales. The consultation will end on 9 August 2013.

What are the problems with the existing rules on non-contentious probate?

The 1987 Rules pre-date the substantial changes in substance and approach of the Civil Procedure Rules 1998, SI 1998/3132 (CPR), and now the Family Procedure Rules 2010, SI 2010/2955. It is not surprising, after such a long lifespan, that it has been decided the rules need to be updated and revised to bring them in line with modern procedure rules.

The primary problem with the 1987 Rules is the language in which they are expressed. The 1987 Rules are littered with legal jargon ('citation', 'cleared off', 'mark the will'). They also represent one of the last holdovers of Latin in the modern law of England and Wales. Unsurprisingly, the rules revision committee wish to create rules that are intelligible to the 'man on the street' should he decide to undertake a family member's probate himself.

However, the fact the 1987 Rules have survived so long (without major issues arising), demonstrates that there are probably not major issues of substance, as opposed to form, with the rules. If the rules had created miscarriages of justice, or serious difficulties for users, we would have heard about them, and the rules would have changed much earlier. The rules committee appear to have reached the same conclusion. Although the rules have been re-written to make them clearer, in most cases the substance of the new rules will remain the same.

What are the key changes being proposed?

The greatest changes are to the language of the rules. Previously, those who objected to a grant being made to a certain person lodged a 'caveat' to prevent this taking place without their involvement. Now they will lodge an 'objection'. Similarly a 'citation' (which is when a person wishes to force another person to prove the will, or make way for them to do so), will now be called a 'notification'. Somewhat less colourful language, but it will probably make the rules easier for non legally qualified users to understand.

The biggest headline change is the removal of the requirement to swear an oath. This required personal applicants to physically attend their local probate office (or otherwise engage the services of somebody able to act as a Commissioner for Oaths) to swear an oath before a grant could be made to them. Now personal applicants will simply complete a prescribed form (yet to be published) and sign a statement of truth. This is in line with the way the CPR works, and will save time and money for applicants.

Would the introduction of these changes be a desirable development?

The simplification and clarification of the rules is a laudable aim. However, it may be that the removal of some of the terms previously used in the rules obfuscates rather than clarifies the position, as those old terms had a fixed meaning (as citation did) and the new word ('notification') is rather more vague.

My principle concern is the removal of the requirement for personal attendance at the probate registry (to swear an oath) will be used by the MoJ to justify the closure of numerous probate registries. Any gains by clarifying procedure would rapidly be eclipsed if the closure of probate offices reduced the level of service provided.

What impact will the changes have on lawyers and their clients?

I think the new rules will assist lawyers, particularly those coming to probate practice for the first time. The use of a standard application form also makes it easier for lawyers to ensure they have answered the questions that need to be answered. Even for established lawyers, the publication of the new rules makes some matters, which previously may have been opaque, far clearer.

Hopefully the new rules will also enable many more matters to be dealt with without a hearing. One change is that it will be easier for those interested in an estate to obtain a probate inventory (the estate accounts) from the executors, as the rules state that the court will generally make an order for this to be done without a hearing.

The new rules are still in draft form, and practitioners will wish to obtain a copy of the rules once they are finalised, and keep an eye out for the date when they will come into force.

Are there any patterns or trends emerging in the law in this area?

These rules, to some extent, mark probate practice entering the twenty-first century, sometime after family and other civil matters have done. There are likely to be other reforms in the area of contentious probate when Lord Justice Briggs completes his report on the modernisation of the Chancery Division later this year.

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