TEN COMMON PROBLEMS IN CONTENTIOUS PROBATE

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Ten common problems in contentious probate

1. Rip it up and start again – Part 1 (EP)
2. Rip it up and start again – Part 2 (EP)
3. Missing presumed revoked? (EP)
4. Disputes over grants (MS)
5. Hurrah for Limited Grants (MW)
6. Unmeritorious appearances (MW)
7. Protection when distributing (MS)
8. Claims against estates (MS)
9. Fighting over the corpse (MW)
10. Fighting over the headstone (TW)

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1. Rip it up and start again...Part 1

Section 20 Wills Act 1837:

"No will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid [i.e. s18-18C; automatic revocation on marriage or civil partnership], or by another will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is herein-before required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator, **or by some person in his presence and by his direction**, with the intention of revoking the same."

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“In his presence”?

- *In the Estate of de Kremer* (1965) 110 Solicitors Journal p18 (High Court, Chancery Division; Wrangham J.)
- “considerable professional error”: Law Soc Handbook para. 7.3
- But a little old fashioned in light of modern technology and practice?
- What if testator is infirm or on last legs, late change of heart?

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2. Rip it up and start again..part 2

- What if *some* evidence that there was another will executed, but it can't be found and admitted to probate itself? Effect on previous will?

- Enough evidence to prove revocation of previous will, and establish intestacy?

- Possible, but must be "stringent and conclusive": see *Broadway v. Fernandes* [2007] EWHC 684 (Ch.); and *Re. Wyatt* [1952] 1 AER 1030 reviewing older cases

- Is evidence of "usual practice" in will drafting enough?

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3. Missing presumed revoked?

- Presumption of revocation if original, last known to be in custody of T, is missing? *Lord St. Leonards* case and others..

- *Is* there really a “presumption” any more that “ if a will traced to the possession of the deceased and last seen there is not forthcoming on his death, it is presumed to have been destroyed by himself: and that presumption must have effect unless there is sufficient evidence to rebut it." [per Lord Davey in *Allan v. Morrison* [1900] AC 604, 609, citing older cases]

- Probably not; or only if there’s no other evidence at all: see see e.g. *Nicholls v. Hudson* [2006] EWHC 3006 (Ch. D, Judge Kaye QC), “presumption” as mere working tool or evidential default
- very recent approach of e.g. Master Teverson in *Re. Lutchmadoo* [2016] EWHC (Ch.) 114 is instructive

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4. Disputes over grants

- How does the court select a person to receive a grant of administration in relation to an intestate estate where there is a dispute between (a) persons equally entitled to the grant, or (b) a person seeking to pass over those entitled to the grant?
- What about selecting for a grant between executors in a testate estate?

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Non-Contentious Probate Rules 1987, r.27

(4) A grant of administration may be made to any person entitled thereto without notice to other persons entitled in the same degree.
(5) Unless a district judge or registrar otherwise directs, administration shall be granted to a person of full age entitled thereto in preference to a guardian of a minor, and to a living person entitled thereto in preference to the personal representative of a deceased person.
(6) A dispute between persons entitled to a grant in the same degree shall be brought by summons before a district judge or registrar.
(7) The issue of a summons under this rule in the Principal Registry or a district probate registry shall be notified forthwith to the registry in which the index of pending grant applications is maintained.
(8) If the issue of a summons under this rule is known to the district judge or registrar, he shall not allow any grant to be sealed until such summons is finally disposed of.

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Senior Courts Act 1981, s.116

(1) If by reason of any special circumstances it appears to the High Court to be necessary or expedient to appoint as administrator some person other than the person who, but for this section, would in accordance with probate rules have been entitled to the grant, the court may in its discretion appoint as administrator such person as it thinks expedient.

(2) Any grant of administration under this section may be limited in any way the court thinks fit.

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Khan v Crossland [2012] WTLR 841 (headnote):

‘The discretion of the court on an application under s.116 SCA 1981 was wide and the approach in *Re Clore (decd)* [1982] Ch 456... was preferred to that in *AB v Dobbs* [2010] WTLR 931. Thus, it was not necessary for executors to have disentitled themselves to a grant before an order could be made. Assistance could be drawn by way of analogy to the cases dealing with applications under s.50 of the Administration of Justice Act 1985 as they emphasise the overriding consideration as being whether the trust was being properly administered or the welfare of the beneficiaries. While the testator’s choice of executors was a relevant factor, it was not decisive and had to be balanced against the united wish of the beneficiaries, who were of full age and capacity, that the respondents renounced probate. That was capable of amounting to a special circumstance, and when coupled with the plain fact that the relationship between the parties had broken down (although that circumstance was not in itself conclusive), together they tipped the balance in favour of the application making it expedient to appoint the applicant as administrator...’

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5. Hurrah for Limited Grants (MW)

- Commonly show Courts at their flexible best
- Common form grants
- Can be obtained in a few weeks in some areas
- More complex estates may cause delays in submitting the application – and by their very nature need some interim measures.
- Recollect the wide powers of executors (but not administrators) to act from date of death.

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Types (most)

Lost/damaged wills
Grants to Attorneys & Consular Offices
Grants for use of Minors
Person entitled under a disability
For persons in prison
Grant limited to property
Grant limited to terms of will
Remainder Grants
Grant limited to time and place
Grant limited to proceedings
Absentee grants
Preservation grants
Pending determination of probate claim

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Example – grants for prisoners

- Prisoner not debarred from a grant but practicality may dictate his appointed attorney as appropriate
- Court could pass over a prisoner as an unsuitable PR (s 116 Senior Courts Act 1981).
- A murder forfeits all rights in the estate including any right to a grant – *Re Crippen* [1911] P 108.

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Commonplace Situations

- Death between contract and completion
- Death of a partner with option in partnership agreement
- Death of party in middle of profitable supply contract
- Death of businessman
- Competing claims to assets of deceased e.g. family home.

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The Usual Recourse

- Grant Ad Colligenda Bona - preservation grants

- Grant Pendente Lite - pending determination of a probate claim

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Ad Colligenda Bona

Key aspect – its simply holding the ring

Usually an independent but invariably responsible party given a PR title to:

(i) Collect in; and
(ii) Preserve
assets of the estate

Note: vests deceased's title in PR

Note: no power to distribute

Simple applications to registrar otherwise Judge.

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Pendente Lite

Application after probate proceedings started (S117 Senior Courts Act 1981 – also deals with remuneration). Application by notice in the claim (Master or DJ).

Again idea is to preserve assets

Can pay out with either consent of affected parties or the Court – but not otherwise.

Where in doubt applies to Court for directions e.g. sale of wasting assets where beneficiaries disagree about sale.

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Conclusion

Probate practitioners are rarely litigators

When these sorts of issues arise – seek assistance of Counsel at once.

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6. Unmeritorious appearances

- Caveat warned, appearance entered, but is a probate action at this stage a necessary sledgehammer to crack a nut?

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Early Stages

A person has lodged a caveat (soon an “objection”)

Consequently no grant may issue (save ad colligenda bona or pending determination of a probate claim).

It has gone into the index of caveats & maybe been extended.

The caveat is warned.

The caveator has entered an appearance (Form 39 – does not require any justification to be expressed or evidenced).

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Non-Appearance

This may well happen when the caveator just wished to be sure about when time might be about to start to run under the 1975 Act.

The warning party then needs to file an affidavit with the Leeds District Probate Registry as to service.

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Post Appearance – the Problem

Maybe a litigant in person

Maybe prior correspondence raises a raft of spurious objections:

(i) Will destroyed by Deceased – yet the original will is intact and available.

(ii) Deceased lacked capacity – yet a consultant geriatrician was one of the witnesses to the will

(iii) The beneficiaries named are undeserving/not family

(iv) What did she ever do for him?

(v) She was a gold digger!

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The Two Solutions

Serve draft proceedings with stringent warnings as to costs (include challenge as to basis for objection – c/f next solution).

Issue Probate Claim and seek summary judgement.

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Default & Summary Judgement

Default judgement is not available CPR 57.10(1).

Consequently (in default) one proceeds to an unopposed trial – but (CPR 57.10(5) – the Court can decide the proceedings on paper.

Summary Judgement under Part 24 is available.

It will be rare cases when it can be successfully utilised.

But when the position is clear it will save time and costs.

The Court may only be willing to grant probate in common form.

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Conclusion

If the objection is misconceived; or

So weak as obviously suitable for Summary Judgement.....

Part 24 is worth thinking about seriously.

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7. Protection when distributing

How can personal representatives protect themselves when they wish to make transactions or distributions from the estate but have notice of a possible challenge to the validity of their grant of probate or administration which has not been pursued by legal proceedings?

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Administration of Estates Act 1925, s.27

(1) Every person making or permitting to be made any payment or disposition in good faith under a representation shall be indemnified and protected in so doing, notwithstanding any defect or circumstance whatsoever affecting the validity of the representation.

(2) Where a representation is revoked, all payments and dispositions made in good faith to a personal representative under the representation before the revocation thereof are a valid discharge to the person making the same; and the personal representative who acted under the revoked representation may retain and reimburse himself in respect of any payments or dispositions made by him which the person to whom representation is afterwards granted might have properly made.

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Two cases

- *Fitzhugh Gates v Sherman* [2003] WTLR 973
- *Cobden-Ramsay v Sutton* [2009] WTLR 1303

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8. Claims against estates

- Where a person wishes to bring a claim against the estate of a deceased person, against whom should the claim be brought if: (a) someone has obtained a grant of probate or administration in relation to the estate; or (b) no-one has done so?

- What should be done if a party to a claim dies during the course of it?

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Civil Procedure Rules r.19.8(2)(a)

- “Where a defendant against whom a claim could have been brought has died and... a grant of probate or administration has been made, the claim must be brought against the persons who are the personal representatives of the deceased.”

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CPR 19.8(2)(b) and (3): dead Defendant and no PR: pre-action

- **r.19.8(2)(b)**: Where a defendant against whom a claim could have been brought has died and... a grant of probate or administration has not been made –

  (i) the claim must be brought against 'the estate of' the deceased; and
  (ii) the claimant must apply to the court for an order appointing a person to represent the estate of the deceased in the claim.

- **r.19.8(3)**: A claim shall be treated as having been brought against 'the estate of' the deceased in accordance with paragraph (2)(b)(i) where –
  (a) the claim is brought against the 'personal representatives' of the deceased but a grant of probate or administration has not been made; or

  (b) the person against whom the claim was brought was dead when the claim was started.

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CPR 19.8(1): dead party, no PR: existing action

r.19.8(1): Where a person who had an interest in a claim has died and that person has no personal representative the court may order (a) the claim to proceed in the absence of a person representing the estate of the deceased; or (b) a person to be appointed to represent the estate of the deceased.

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Notice and effect of order

r.19.8(4): Before making an order under this rule, the court may direct notice of the application to be given to any other person with an interest in the claim.

r.19.8(5): Where an order has been made under paragraphs (1) or (2)(b)(ii) any judgment or order made or given in the claim is binding on the estate of the deceased.

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9. Fighting over the corpse, or....

- Who owns the body?

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Corpse claimants: The Usual Suspects ....

The Widow

The Mistress(es)

The Children

The PR's

Others – parents, friends, admirers, co-religionists etc.

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“There is no property in a dead body”

- A thoroughly misleading proposition
- Bodies or body parts once worked on (e.g. stuffing or mounting) can be property for which conversion will lie. Curiously this appears to cover embalming
- It is the right or duty to intern that is key to possession.

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Those Obliged to Inter

- 1st Executors or administrators
- 2nd Common law obligees – the hospital holding the body and even a householder where the death occurred
- 3rd possibly next of kin – but this is debatable
- Note that executors can act immediately on death and have wide powers.

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Powers of the Court

- S 116 Senior Courts Act 1981
- Commonly used to appoint administrators
- Can also be used to manipulate who is the administrator entitled to the body so as to control the burial/cremation.
- Section 50 of the Administration of Justice Act 1985 could be used in the same way.

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Conclusion

- Taking control early gives a real advantage
- Court proceedings may involve a Judgement of Solomon
- Evidence of the deceased wishes is not conclusive but can be expected to be highly persuasive.
- Some thought in a will about burial/cremation is therefore a good idea.

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10. Disputes over inscriptions

How is an impasse between personal representatives or relatives over the terms of an inscription on a headstone resolved?

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The inscription..

In loving Memory of
BRIAN MALCOLM ATKINSON

died tragically on December 2nd 1978
Aged 45

“He loved those who loved him"

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