



MANAGING PROBATE CLAIMS

1. Claims involving probate, Wills or the administration of an estate are not the easy ride that some more commercial litigators might perceive. When individuals fall out over such matters they almost invariably do so in a family context. All the old family resentments and grudges are concentrated into the only open warfare permitted in a civil society, that of litigation.
2. This litigation is bad enough for those representing the parties, who must manage the clients and their expectations as well as trying to win the case. For the poor probate practitioner, who perhaps obtained a grant of probate in blissful ignorance and whose prior introduction to the family was a ten minute appointment to draft a Will leaving all to the Dogs Home, it is bewildering.
3. It should also not be forgotten, as it occasionally is, that claims of this kind are subject to specialist rules and procedures. Failure to know and understand these can lead to extra expense for the parties and on occasion adverse costs orders.
4. This talk aims to provide a guide to managing probate claims with particular attention on the position of the personal representative. It cannot, of course, cover every aspect of litigation but it is hoped will deal with many of the more difficult issues that arise in claims of this kind.

THE CLAIMS

The Types of Claims

5. There are broadly three kinds of claims that can involve an estate and be described broadly as a probate claim. These are (note *Alsop Wilkinson (a Firm) v Neary* [1996] 1 WLR 1220):
 - (1) A dispute regarding the terms on which the estate is held.
 - (2) A claim by or against the estate.
 - (3) A claim against the personal representatives themselves. This includes claims for an account, to substitute the PRs, or for damages for wrongful administration.
 - (1) Claims regarding beneficial interests
6. The most frequently encountered claims will be:
 - Those regarding the validity of Wills. These may involve allegations regarding the formalities of the execution of the Will, the capacity of the testator to make a Will, his knowledge and approval of it or (occasionally) of undue influence.
 - A claim for reasonable financial provision under the Inheritance (Provision for Family and Dependents) Act 1975.
 - A claim for rectification of the Will under section 20 of the Administration of Estates Act 1982.
 - A dispute regarding the meaning of interpretation of the Will.
7. As explained below only the first is a "Probate Claim" within the meaning of the Civil Procedure Rules. However, all are governed by CPR Part 57 and careful attention should be given to the requirements of that Part and of the Practice Direction.



8. All these claims are essentially claims as to how the estate should be distributed once it has been administered. Therefore, aside from the burdens imposed by the Rules themselves the PR should play no more than a neutral role in these disputes.

Claims By or Against the Estate

9. A claim by an estate can include just about any claim that an individual might himself make. Thus, they can include claims to recover debts owed to the deceased, damages for personal injury (perhaps arising out of the death) and so on.
10. Claims against the estate can be just as diverse. However, a claim that is commonly experienced in the probate context is a claim by some person (perhaps a disappointed non-beneficiary) that all the estate, or the whole of some property in the name of the estate, is held by the estate on constructive trust, or subject to a proprietary estoppel, in favour of that person.
11. Claims of this kind are made by or against the personal representative. They therefore require the PR to take an active stance. Since the PR only has an indemnity against the estate for costs that were properly incurred, and because an adverse claim may "swamp" the whole estate, they also give the PR's a personal risk as to costs. This risk needs to be identified early on and addressed. As discussed below, this can either be by way of an indemnity from one or more of the beneficiaries of the estate or, if not possible, directions and guidance from the Court in ancillary proceedings (the Beddoes application).

Claims Adverse to the Personal Representative

12. Claims against PR's are not uncommon. Professional PR's can forget that it their duty includes providing clear and logical accounts and being able to justify (to a reasonable extent) their provisions. Both lay and professional PRs have been known to charge exorbitant and unjustified fees and expenses particularly where charities are the residuary beneficiaries. Even cases where the (normally lay) PR simply keeps hold of some large part of the estate are not that unusual. Nevertheless, applications for accounts or to substitute PRs can just as often arise out of some other battle, perhaps between the beneficiaries, over which the PR has no control and even less interest.
13. Most claims, meritorious or otherwise, can be resolved without a full hearing and indeed full hearings are rare. Most often a robust defence of criticism together with an attitude of unwavering reasonableness is the key to doing this at as early a stage as possible.
14. Claims of this kind are adverse to the PR personally. The PR is at risk of an order for damages etc and for costs against him with no recourse to the estate. Whilst a successful PR may be ordered his costs from the estate or from the litigant personally he has no right, prior to the conclusion of the claim, to seek approval or protection from the court of the stance he is taking.

Limitation, Laches and other Defences

15. A personal representative who has carefully administered and then distributed the estate may be faced by a claimant "appearing" some years later asserting that they are entitled to some part of the estate, whether as the missing prodigal child or on the basis that the Will was not in fact valid. The biggest concern for the PR will be that they may be found to be personally liable for the money that was wrongfully distributed.
16. If it becomes clear that the claim is, for whatever reason, justified there remain a number of defences open to the PR that will relieve, wholly or partly, the liability. These include:
 - Where advertisements were used section 27 Trustee Act 1925 will protect the PRS from claims by persons asserting an interest in the estate of which the PRs did not have notice.



- There is no limitation defence against a Will claim and a claim to revoke a grant of probate can be made at any time. However, claims for the property itself can be subject to defences such as change of position as well as to the Limitation Act 1980 (next bullet).
- No action can be brought for a share or interest in an estate more than twelve years after the date on which the right to receive the share or interest accrues (section 22 Limitation Act 1980). For claims for interests in an estate that probably means twelve years from the time when the administration is properly regarded as complete and therefore at least thirteen years (i.e. twelve years plus the "executor's year") from the date of the deceased's death (Re Loftus [2005] 1 WLR [2007] 1 WLR 591).

That is subject to the exceptions in section 21, including those for fraudulent breaches, for those cases where the property is converted to the PR's own use and where the PR as also received property as a beneficiary of the estate.

- Even in cases where the Limitation Act 1980 does not apply it is still possible for a defence of laches or acquiescence to arise (Re Loftus [2007] 1 WLR 591).
- As well as any other clauses limiting or excluding liability in the Will the PR can ask the Court to relieve his liability for any alleged breach of trust under section 61 Trustee Act 1925.

The Opening Salvos

17. Claims rarely begin with the issue of proceedings and most commonly involve increasingly antagonistic correspondence finally leading to the issue of proceedings. This stage (which was intended by the Woolf reforms to conclude claims early not to encourage them!) is often wasted. Arguing a clients' viewpoint, however gratifying, is rarely productive. Sending draft particulars of claim may "tick the box" but rarely leads to much useful discussion.
18. On the other hand setting out a good claim carefully and exploring another parties strengths and weaknesses can give important guidance on how a claim should be conducted. Early disclosure can resolve disputes or at least provide reassurance that there are no major "holes". Obtaining expert reports earlier rather than later is almost always useful (particularly if unhelpful).

The ACTAPS Code

19. The most frequent difficulty at the pre-action stage is the "bullish" or unhelpful opponent who refuses to take part in any discussion, making all those carefully drafted letters completely wasted. Frequently the only answer is to issue proceedings and complain later but a useful push can be made by directing him/her to the ACTAPs code (www.actaps.com)
20. This began life as a draft pre-action protocol. For reasons that are not entirely clear it has not been accepted as an actual pre-action protocol and so has become a "code". That said, parties are obliged to "act reasonably in exchanging information and documents relevant to their claim and in trying to avoid the necessity for the start of proceedings" (Para 4 PD on pre-action protocols) and the Code provides a useful set of guidelines as to how to do this.
21. The principal steps highlighted by the Code, and which are useful for all of these claims, are:
 - Identifying those persons who must be parties to the claim or whose interests will need to be represented.
 - Letters of claim together with responses.



- Disclosure of documents, including joint approaches to obtain such documents as medical records.
- Obtaining (possibly jointly) expert evidence.
- Negotiations and Mediation, including prior to the issue of proceedings. As the code points out these are possible even where a future application to the court (to approve or sanction the compromise) will still be essential.

Early ADR

22. Mediations are most often attempted in the weeks before trial. In those circumstances (i) the mediation can be almost as expensive as the trial and (ii) negotiations frequently break down because of the amounts of costs already incurred. The problem then is that the trial becomes an "all or nothing" scramble with the loser left very badly off indeed. This makes early negotiations or mediations are highly desirable
23. Prior to undertaking any mediation or negotiation the question should be asked; will it actually be possible to settle the claim at this stage? Some of the perceived difficulties should not be seen as such. For example, issues of expert valuation can sometimes be put to one side to await agreement in principle. Similarly, just because court approval will be required does not mean that the principles of an agreement cannot be agreed upon subject to a future application. However, some issues will inevitably cause a mediation or negotiation to fail. In particular all parties need to be in possession of the relevant documents in advance as well as having a good idea of what their expert evidence will (or does) say. Without that expectations can be too high or suspicions raised.
24. The key to ADR, at whatever stage it is attempted, is preparation combined with a critical consideration of the clients' claim. This is best done prior to the mediation/negotiation itself, rather than in frantic and pressured discussions with the client during the day (night!) itself. That said, surprises and anxious talks are inevitable and it is rare for everyone to feel happy about the deal that has been done.

PRs as Mediators/intermediaries

25. The temptation for a PR faced with a Probate or 1975 Act claim is to interpose between the parties and attempt to find some basis on which the claim can be settled. The desire is understandable and admirable, no one likes to see the estate eaten way by the efforts of the parties' lawyers. However, it is also fraught with difficulty. In reality the PR is usually regarded with suspicion by at least one of the parties and once he/she descends into the arena that suspicion rises. The result can be that no deal is reached and the PR is faced with a hostile claim to remove him/her.
26. Any PR should maintain a "saintly" neutral stance promptly (and sometimes voluntarily) providing any information needed to resolve the dispute but otherwise keeping as far out of the claim as possible!

Beddoes Applications, Indemnities and Pre-emptive Costs Orders

27. A Beddoes application is an application by a PR for directions as to whether, and how, to issue or defend proceedings by or against him.
28. Their purpose is to give the PR protection from costs incurred by him or ordered to be paid by the estate since otherwise the PR could face a personal liability for those costs.



29. The applications are not suitable for low value estates where the costs of making the application will erode any advantage that could be gained from them. Neither are they really suitable in simple or straightforward claims where the PR can have a reasonable expectation of obtaining his costs from the estate in any event. They are, however, very useful where the claim is difficult and where the PR might wish to reach a compromise to which the other beneficiaries might disagree.
30. Prior to making any application the PRs must consider what alternatives are open to them. In situations where the litigation is supported by the beneficiaries of the estate the PR can consider indemnities by the beneficiaries or even assignments of the claim itself to those beneficiaries. In other cases the PR may be able to make or defend a claim using a CFA and ATE Insurance (see below) so avoiding the risk of having to meet the costs personally.
31. If a Beddoes application is made careful regard must be had to the relevant rules (CPR 64). In particular note:
 - The claim must be brought in separate proceedings to the claim itself.
 - The parties include all the affected beneficiaries of the estate. If there is a desire to exclude one or more beneficiary (e.g. because they are the proposed defendant) then that will need to be justified.
 - The Judge (and save in plain cases it will be a Judge) will normally require sight of an Opinion on the merits of the claim
 - Careful thought should be given to the direction that are wanted. If the PR wishes to settle within a "range" then seek permission to do so. This avoids having to make a number of applications.
32. A pre-emptive costs order is distinct from a Beddoes Application. Such an application is made in the proceedings themselves and on the basis that whatever happens the applicant will be entitled to their costs. Even for neutral PRs such applications are difficult since the court will usually wish to satisfy itself at the end of the proceedings that the PR did indeed act neutrally and properly. Such applications are therefore more useful in "friendly" litigation, for example regarding the meaning of some phrase in the Will, where it is accepted that in the normal course all parties will receive their monies from the estate. Equally, though, once all parties accept that this will happen it is not often clear why a confirmatory order from the court is needed.

The Non-Contentious Probate Jurisdiction

33. Much early skirmishing goes on in the (inaptly named) non contentious probate jurisdiction using the systems of caveats, citations and subpoenas.
34. Caveats (NCPR 44) are a system of preventing common form grants of probate. They are important where there are legitimate doubts about either (i) the validity of a Will or Wills or (ii) the appropriateness of a particular person acting as executor or administrator. In both these cases they can prevent the full administration of an estate. Note, however, they do not wholly prevent inappropriate dealings with estate assets and so are no replacement, in appropriate cases, for freezing injunctions. Citations are not appropriate where the only desire is to have notice of a grant of probate/letters of administration in order to bring a 1975 Act claim. In those circumstances the standing search procedure should be used.
35. Entering a caveat is a simple and relatively informal process and does not even require the caveator to identify their interest. Once a caveat is entered a grant will not be made until some person has warned the caveat and unless the caveator fails to enter an appearance. It is at this stage that the caveator is required to establish their interest in maintaining the caveat.



If their only interest is in preventing a grant to that person (i.e. they question the integrity of that person) then rather than entering an appearance they should issue a summons for directions. Otherwise, the interest must be set out in an appearance. The time periods here are very tight: any appearance or summons must be made within eight days of the warning.

36. If an appearance is entered to a caveat then the other party has two options. First, they can apply for directions. In the normal course if the District Judge or Registrar believes that there is a genuine dispute then he will direct that the caveat remain in place pending a formal Probate Claim. The alternative, therefore, is to simply issue a formal Probate Claim, perhaps after taking the pre-action steps highlighted above.
37. Caveats expire automatically (and without warning) after six months and must be renewed by the Caveator.
38. Citations can be used to require someone to take a grant or to propound a Will. In most cases they are used to urge someone to either take a grant or to renounce their appointment. A failure to appear to the citation causes that person's rights as executor to cease so that the person next entitled becomes able to take out a grant. Thus, if the citor is a residuary beneficiary of the estate he may cite the recalcitrant executor as a means of either forcing a grant to be obtained or to permit him to obtain a grant for himself.
39. The citor must enter a caveat at the same time as issuing the citation and the application for a citation must be accompanied by an affidavit. In order to obtain a citation the original of the Will must be filed with the Registry.
40. The absence of the original Will may make it impossible for a person to apply for a grant of probate or to issue a citation (see above). That is why there is a power to subpoena a person to require them to bring in a Will. To issue a subpoena two copies of a supporting affidavit together with two draft subpoenas are filed and, if in Order, the Registrar will then direct their service. This is then carried out by the citor (personally).

Funding

41. When considering how to fund a probate claim the most significant difference between this kind of claim and other forms of litigation is the possibility of costs later being met from the estate of the deceased.
42. This has different implications for different parties. For a claimant who otherwise has no interest in the estate it is of major benefit, since it may be the source from which his costs will be met. The possibility of receiving costs from the estate may be a deciding factor in making a claim. It should also influence how the claim is run since it will be necessary to show that the case has been brought as part of a reasonable investigation into the deceased's affairs.
43. For a defendant, who might be the sole beneficiary of the estate, it is a potential disaster since win or lose he may find his entitlement reduced by the costs incurred. That tends to put unfair pressure on such defendants to settle the claim.
44. The fact that costs may be recovered from the estate means that conditional funding agreements and associated ATE insurance are rarer in probate claims. Their use can raise some difficult issues that are unique to probate claims and if they are used they must be drafted carefully. Consider in particular:
 - How will a win be defined? In a 1975 Act claim the deserving claimant may have an easy claim for some part of the estate so shouldn't the "win" be set higher?
 - How will the CFA work in the event of the claim failing but a favourable costs order being made? Unless drafted carefully the costs order will be useless because no liability to pay any costs arises under the CFA.



- In low value cases the "uplift" in the CFA can make settlement all but impossible because the other side simply cannot countenance paying it. That creates a very awkward solicitor/client relationship with the client hoping that the solicitor will waive all or part of an uplift in order to settle the claim.

War is Declared

Procedure: Will Claims

45. For CPR Part 57 Probate Claims are defined as:

- (i) the grant of probate of the will, or letters of administration of the estate, of a deceased person;
- (ii) the revocation of such a grant; or
- (iii) a decree pronouncing for or against the validity of an alleged will, not being a claim which is non-contentious (or common form) probate business.

Whilst other claims are governed by CPR Part 57 they are not within the definition of CPR Part 57.

46. Most Probate Claims can only be brought in the High Court (Chancery Division) or in a District Registry. The County Court has jurisdiction only in estates lower than £30,000 and even then claims can only be commenced where there is a Chancery District Registry or Central London County Court.
47. The claim must be commenced in Part 7 but using the special Probate Claim Form (N2) and headed "in the estate of ... (Probate)". The particulars of claim must be accompanied by a statement setting out all the testamentary documents (as defined) of which the Claimant is aware and at the same time the original of these documents must be lodged. Similarly, any respondent to a claim must file a testamentary statement and lodge any testamentary documents in his possession.
48. The time for acknowledging service and for filing a defence is 28 days from the service of particulars of claim.
49. There are rules regarding the contents of statements of case, including that the Claimant must set out the interest that he has in the estate and reasons for disputing any other party's interest. Allegations that a Will is invalid must be set out "specifically" together with the facts and matters relied upon.
50. An option that is unknown in any other claim is for a defendant to set up no positive case but to merely reserve the right to cross examine the witnesses to the Will. Such a position, if strictly adopted should prevent that party being ordered to pay the costs of any other although will not necessarily lead to his costs being met by the estate.
51. Where a probate claim is commenced but is then not defended or no acknowledgement of service is entered it is not possible to obtain a default judgment. Instead the court will still need to be persuaded that a grant can be made and for this purpose a solemn form probate hearing will usually be held. Unless a party wishes the witnesses to be cross examined such a hearing will usually be held on the written evidence. The mere fact that the hearing may be brief and unopposed does not mean that it will be inevitably successful, indeed great care must be taken to ensure that all the evidence necessary to establish the entitlement is before the court and is presented properly.



Procedure: Other Claims

52. The following claims are also governed by CPR Part 57, although not defined as Probate Claims:

- The rectification of Wills.
- Claims for the removal or substitution of Personal Representatives
- Claims under the Inheritance (Provision for Family and Dependants) Act 1975.

53. Rectification claims are normally commenced in Part 8. At the same time as issuing the claim the grant of probate must be lodged with the court. If in the possession of the defendant it must be lodged when the defence is filed.

54. Claims for the removal of a PR must be made in the High Court and are assigned to the Chancery Division. They are usually made in Part 8 form or by application in existing proceedings and must anyway be accompanied by written evidence setting out the grounds of the claim together with the following information:

- Brief details of the property comprised in the estate, with an approximate estimate of its capital value and any income that is received from it;
- Brief details of the liabilities of the estate;
- The names and addresses of the persons who are in possession of the documents relating to the estate;
- The names of the beneficiaries and their respective interests in the estate; and
- The name, address and occupation of any proposed substituted personal representative.

55. The claim form must also be accompanied by a sealed or certified copy of the grant of probate. At the hearing of the application the original must be produced in order for any order to be endorsed or permanently annexed to the grant itself

56. Where the claim is made for the substitution of a PR it should also be accompanied by a signed consent to act together with written evidence as to the fitness of the proposed substituted personal representative, if an individual, to act. In practice this is often best done a witness statement from the proposed PR setting out their qualifications and agreement to act.

57. Claims under the 1975 Act are always commenced in Part 8. The most important document, and one to which much care and attention should be paid, is the accompanying witness statement. This may be the only opportunity the Claimant will get to set out their case and their needs. It should exhibit all the documents on which they are likely to rely.

58. The claim form should be accompanied by a sealed or certified copy of the grant of probate or letters of administration and at the hearing of the claim the original must be produced for the court. This is because any order must be endorsed or permanently annexed to the grant.

Time Limits

59. Both claims under the 1975 Act and claims for rectification of a Will must be commenced within 6 months of the grant of probate/letters of administration. Neither claim can be commenced without such a grant occasionally necessitating the claimant to either force a person to take a grant (note the system of citations above) or to take a grant for themselves.



The Parties

60. It is essential to identify the correct parties as early as possible. Whilst a claim and even a trial may proceed without difficulty involving only the protagonists problems will quickly be encountered as soon as any settlement is reached or following a judgment. That is because all affected parties will need to be bound by the compromise or by the order of the court if it is not to be subsequently set aside. Obtaining that agreement after the event, or persuading the court to overlook it, can be very difficult. For those reasons it is recommended that all persons who could conceivably be affected be made parties to the claim.
61. This will not resolve all problems. Problems, most commonly encountered in probate claims, involve potential parties who cannot be ascertained, are unborn or whose class is too large to practically serve them all or for parties who are minors. In both cases there are solutions:
- The court has power to make a party a representative for other persons or for a class of persons who share his/her interest (CPR 19.6 and 7 on).
 - Minors can be represented by litigation friends.
 - The court has power to make a judgment or order binding upon non-parties under CPR 19.8A. The process gives the non-parties the opportunity to object.
62. Compromise reached where litigation friends or representative beneficiaries are appointed will require the approval of the court. This will usually involve a separate hearing where the court is asked to consider an Opinion setting out the merits of the settlement.
63. Where the outcome of the claim may affect the amount of taxation to be paid by the estate consideration must be given to joining HMRC. It is generally unwise to inform HMRC of the claim only after a decision is made since they could seek to set it aside. In most cases the need to join HMRC is avoided by writing to them setting out the issues in the claim and asking if they wish to be made a party. The typical response is a polite refusal together with a request that certain cases are cited.

Disclosure: "The File" and Other Issues

64. A claim regarding the validity or rectification of a Will will normally raise questions regarding the instructions given by the testator for the drafting of the Will as well as the advice given about its contents and execution. A claim regarding the administration of the estate will normally raise issues for which the estate file will be relevant.
65. When and to whom can such files be disclosed? Both files (i.e. the Will file and the estate administration file) belong to the estate and so the personal representatives. Without a court order they should therefore only be disclosed to an appointed PR or to (or with) the consent of all the beneficiaries of the estate. In a case where there is a dispute as to who those beneficiaries actually are it will normally only be possible to disclose the file with a court order unless all the potential beneficiaries jointly request disclosure. In some case it is possible to "encourage" an objecting beneficiary to consent to a disclosure since an unreasonable refusal will usually lead to an adverse costs order.
66. Similar problems occur in respect of the files of other professionals, particularly doctors and social services. Some will disclose such evidence only with a court order, others will happily send copies to anyone who consents. In most cases a joint approach by the affected persons (and included any appointed PRs) will be sufficient.



The Use of Experts

67. Some experts play a peripheral role. For example, the valuation of the deceased's property is unlikely to be significantly material in resolving any probate claim (save, perhaps, a claim for a sale at an undervalue). Other experts are central and perhaps the central basis for a claim.
68. If a claim is going to centre on expert evidence:
- Never agree a joint expert. The danger of the expert coming down on the "wrong" side" is enormous and very difficult to resolve subsequently.
 - Instruct as early as practical. This is when most of the relevant documents (e.g. medical notes) are available. It is not normally necessary to provide witness statements, a summary of the rival contentions is sufficient.
 - Set out clearly in the instructions what the issues are and what is expected of the expert. If there are various contentions which the expert will need to consider (e.g. "if this then what about ?") then set them all out.
 - Ensure that you will have the time and opportunity to ask questions of the expert, if necessary in conference.
 - Even if there has been no permission for oral evidence ensure that the expert could be available. It is not uncommon for permission to cross examine experts to be given at trial.

Interim Grants

69. If it is necessary to administer all or some part of the estate pending a resolution of a dispute it is possible to obtain an interim grant.:
- Where the estate may be endangered by delay a grant "ad colligenda bona" can be obtained from the Probate Registry. This limits the steps that can be taken to getting in an preserving the assets of the deceased. If the grant is sought for some specific purpose (such as the sale of a house) then it is wise to seek an express power to do so.

The application is normally made without notice but great care must be taken in setting out all the relevant facts and in making all concerned persons aware (so far as practical) of the application. Adverse costs orders can be made if these requirements are not met (see *Ghafoor v Cliff* [2006] EWHC 825).

- A grant pending determination of the claim can be ordered by the Chancery Division during the course of any probate claim. The Order is made by the Court but it is then necessary to seek a formal grant from the Probate Registry. The grant confers all the powers of an administrator subject to the control of the court.

The Peace

Settlement

70. Reaching an agreement may seem a simple matter compared to drafting the terms and ensuring that any necessary Orders and approvals are made.
71. The most common form of compromise is a Tomlin Order annexing the terms of the agreement to a schedule.



72. If the settlement affects the interest of minors, unborn or unascertained persons it will be necessary to obtain representation for them (see above) and court approval of the terms of the settlement. If it affects non-parties who can be found they will need to be served with notice of the Order for it to be binding upon them (see above).
73. Compromises of a probate claim will require a grant of probate to be made. The choices are not easy and must be carefully considered. In essence:
- The court can be asked to make a solemn form grant of probate based upon written evidence. Such a grant can only be made if the court can be persuaded that it should be. It is therefore inappropriate for cases where there was significant doubt about the validity of the Will.
 - The claim for a grant or revocation of probate can be discontinued and the court asked to make an order for a common form grant of probate or to the continuation of the existing grant.
 - The court can be asked to pronounce for or against a Will under section 49 of the Administration of Justice Act 1985. The principal problem with this section is that the consent of all "relevant beneficiaries" is required and this includes almost every person who could benefit under any Will or intestacy of the deceased.
74. Where the compromise is of a claim under the 1975 Act certain formalities need to be made. In order to be effective for IHT and CGT the Court must order the PR to carry out the terms of the agreement (usually set out in the Schedule). That means that the Order must be the kind of order that the court could make under section 2 of the Act. It also means that the court must be satisfied that the Will or intestacy failed to make reasonable financial provision for the claimant since otherwise those powers are not available (see section 2(1)).

Tax Efficient Terms and the Approach of the Revenue

75. Agreements (or Orders) can lead to a net saving in tax for the estate or for one or more of the parties. This can itself be an important consideration in reaching the settlement.
76. Care must be taken that the Order does have the desired effect. A variation of the provisions of the estate made under the 1975 Act must follow the provisions of the Act and of section 146 IHTA 1984. A compromise of a probate claim that varies the provisions of the estate will only be effective if the Order is made by the Court with the necessary approvals given. Where it is unclear whether an Order can be drafted that will be effective for tax consider, in cases where the death occurred more than 2 years ago, a deed of variation.
77. Broadly speaking HMRC try to avoid becoming involved in disputes merely because their outcome may lead to a saving in tax. That said, as set out above, they should normally be approached at an early stage of the case in order to ascertain whether they wish to be made a party to the claim. Once an Order or compromise is reached they should be given notice of it, preferably with time to make an objections or further representations.

Court Approval

78. Where a representation order has been made or where a litigation friend has been appointed the approval of the court will be required for any approval. The Court will normally hold a separate hearing (without the presence of the other parties) and will require an Opinion from the person representing the person(s) setting out the merits of the compromise. This is no "rubber stamp" and the court does on occasion refuse its consent or insist upon additional terms being inserted.



Costs

79. All probate claims are adverse litigation and the usual rule is that the losing party will pay the costs.
80. That said there are well recognised exceptions to the usual costs rules:
- A beneficiary who successfully proves a Will will normally have his costs paid from the estate.
 - A party who unsuccessfully opposed a grant of probate may (i) receive their costs from the estate if the testator or the persons interested were the cause of the litigation or (ii) be left to pay their own costs, but not those of the other parties, if the affairs of the testator led to a reasonable investigation of the circumstances surrounding the execution.
 - An order for costs against a party will not normally be made against a party who merely seeks to cross examine the witnesses to the Will.
81. The exceptions are relatively limited and by no means amount to an automatic rule that costs will be paid from the estate. An adverse order will almost always be made against a person who unsuccessfully makes allegations of fraud, undue influence or other bad conduct and a favourable order will not be made in respect of issues that were wrongly or improperly raised.
82. A PR who (appropriately) maintains a neutral stance can always expect to receive his or her costs from the estate.
-