3PB BARRISTERS

PUT UP OR SHUT UP: HOW TO PROGRESS ESTATE ADMINISTRATION

An overview into the options available to PRs who need to progress the estate administration when there are adverse or competing claims from outside the estate.

Lydia Pemberton

Issues for consideration

1. Probate claims pre-grant
2. Probate claims post-grant

Probate challenges (pre-grant)

Options

- Rule 44(13) - Unless a registrar of the Principal Registry by order made on summons otherwise directs, any caveat in respect of which an appearance to a warning has been entered shall remain in force until the commencement of a probate action

- Executor (or beneficiary) can seek to prove the will in solemn form **(but an executor cannot be compelled to do so);**

- Executor (or beneficiary) can cite the executor of (and persons interested under) the later purported will to propound it;

- Persons under the previous will can issue probate proceedings for an order pronouncing for the earlier will but if he fails, he can ask the Court to admit the will he propounds to probate in common form (less common!);

- When an executor doubts the validity of a **codicil**, the correct course is to prove the Will in solemn form and seek a decree pronouncing against the Codicil.

Probate challenges (post-grant)

There is no statutory limitation period for revocation claims; so that a representative who distributes the estate when aware that a person is alleging grounds for revocation may be liable to the rightful representative if a successful revocation claim is later made.

Section 27(1) Administration of Estates Act 1925 provides protection for PRs who act in "good faith":

(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.

What to do??

Suggestion 1: the executor can seek a grant in solemn form "*for their own convenience*" but cannot be compelled to do so. **(*Re Jolley*** [1964] P 262) but if on information and advice the executor has no reason to doubt the validity of a will, why should they incur the costs of a fully-fledged probate claim?

Suggestion 2: seek a **"Put up or shut up!"** order. Similar to a Benjamin Order (***Re Benjamin*** [1902] 1 Ch 723) permitting/sanctioning the PRs to distribute the estate on the footing that an event has or has not happened.

- ***Sherman v Fitzhugh Gates (a firm)*** [2003] EWCA Civ 886

- ***Cobden-Ramsay v Sutton*** [2009] WTLR 1303

Sherman v Fitzhugh Gates (a firm) [2003] EWCA Civ 886

- Deceased died in 1994. Claudia Sherman indicated in 1994 that she challenged his last will on the grounds of incapacity.

- In 1999, when no formal challenge had been made, the executrix by originating summons, sought an inquiry as to whether and, if so, what interest Claudia had in the Deceased's estate;

- The Master refused to rule on the capacity challenge:

"I think that it is not possible for me under the guise of an inquiry to decide the question whether or not the 1993 will is invalid … At the moment that will is a valid will as seemingly it has been admitted to probate… If the executor is not confident or not willing to act on a grant in common form, then it is necessary to apply for a grant in solemn form, though after this long delay it is much to be hoped that that will not be seen as necessary" (para. 23)

Carnworth LJ (para. 57) said:

*"The textbooks do not appear to offer an easy solution in such circumstances. There is no statutory time-limit for proceedings to challenge the validity of a will. It seems that an action may be struck out if there has been unreasonable delay, but the cases offer little guidance as to what this means in practice (see Williams op cit para 35–03; Re Flynn [1982] 1 WLR 310), or as to what directions the court can give…. The powers of the court to control abuse and delay have been strengthened by the new CPR…I see no reason why they could not have been used to impose a time-limit on a potential challenge to the probate — in effect a direction to "**put up or shut up**" — following which the executor would be free to distribute under the will"*

Cobden-Ramsay v Sutton [2009] WTLR 1303

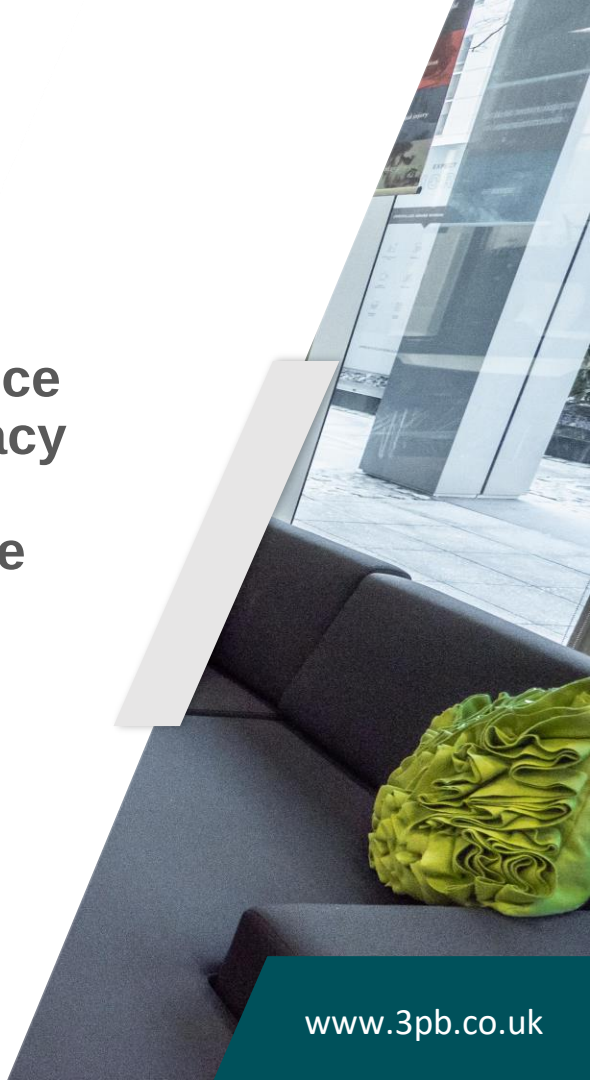
- The executor proved the will and codicil in common form.
- S (residuary beneficiary under the will) later alleged that the codicil was invalid on the basis that the deceased had lacked testamentary capacity. However, rather than bringing an action to seek revocation of the grant of probate in respect of the codicil, he insisted that B make an application to prove its validity.
- The executor applied for an order permitting him to distribute an estate unless the defendant issued proceedings, within 28 days, for the revocation of the grant of probate.

- If, acting in **good faith**, the executor had distributed the £120,000 under the codicil, he was protected under the s27 AEA 1925 ***but*** if he distributed that money knowing of an allegation that the deceased lacked testamentary capacity, he left himself open to the charge that he was not acting in good faith.

- The executor sought a “put up or shut up” order but S argued that such a “debarring” order could not be made without a statutory basis.

- The judge disagreed. S was not debarred from bringing a claim for revocation and recovery against the beneficiaries.

This document is not intended to constitute and should not be used as a substitute for legal advice on any specific matter. No liability for the accuracy of the content of this document, or the consequences of relying on it, is assumed by the author. If you seek further information, please contact the 3PB clerking team.



THE END