MINISTRY OF JUSTICE CONSULTATION ON DRAFT PROBATE RULES

.

RESPONSE ON BEHALF OF CHANCERY BAR ASSOCIATION

Introduction

1. This is the response of the Chancery Bar Association ("the ChBA") to the Ministry of Justice's consultation on the draft Probate Rules.

2. The ChBA is one of the longest established Specialist Bar Associations and represents the interests of some 1200 members handling the full breadth of Chancery work, both in London and throughout the country. Membership of the Association is restricted to those barristers whose practice consists primarily of Chancery work. It is recognised by the Bar Council as a Specialist Bar Association.

3. The ChBA operates through a committee of some 17 members, covering all levels of seniority. It is also represented on the Bar Council and on various other bodies including the Chancery Division Court Users' Committee and various Bar Council committees.

4. This reply to the consultation by the Ministry of Justice on the draft Probate Rules has been produced by a sub-committee consisting of David Rees, Alana Graham, Georgia Bedworth and Joseph Goldsmith.

Question 1: Do you agree that the rules should be called the "Probate Rules"?

No. We consider that using this label would cause significant confusion. Although the current label "Non-Contentious Probate Rules" is potentially misleading, because the matters dealt with under the rules can give rise to disputes and so be contentious in this sense, renaming the rules as the "Probate Rules" will cause confusion of a different sort. These rules do not apply to probate claims i.e. contentious probate properly so-called, which are dealt with by the Chancery Division under CPR Part 57. By renaming the rules applicable to common form business as the "Probate Rules", this will give a misleading impression that the rules are applicable to probate claims. As an alternative, we would suggest that the rules be known as the "Probate (Common Form Business) Rules", which reflects the business dealt with under the rules or alternatively the "Probate Registry Rules" which reflect the forum in which these rules apply.

Question 2: Do you agree that the structure of the rules is sensible?

Yes.

Question 3: Do you agree that a useful distinction is provided between contentious and non-contentious business?

It is not entirely clear what this question is aimed at. The Rules do not provide (or attempt to provide) any distinction between contentious and non-contentious business. The distinction between contentious and non-contentious business arises under section 128 of the Senior Courts Act 1981. The fact that some business is assigned to the Chancery Division and some business is assigned to the Family Division of the High Court is unhelpful. Although it is far beyond the scope of this consultation to suggest amendments to the Senior Courts Act 1981, we consider that there is some significant merit in all probate business (or at least all contested probate business, whether "contentious" properly so called or contested "non-contentious business") being dealt with in the Chancery Division.

The distinction between contentious and non-contentious business as defined by the Senior Courts Act 1981 is unhelpful. The term "non-contentious" suggests that there are no disputes in relation to those matters. Experience shows that that is not always the case. There are, it seems to us, three distinct types of business:

(1) General common form probate business where there is no dispute as to the document which is to be admitted to probate, the entitlement of the person seeking the grant or that a grant should issue to the person applying for it

(2) Contested common form business where there is potentially a dispute: for example, a case where there is no dispute as to the devolution of the estate (eg which will is to be admitted to probate) but there is a dispute as to whether the executor is a fit and

proper person to take the grant. Applications for grants *ad colligenda bona* also fall within this category

(3) Contentious probate properly so called (ie probate claims) where there is a dispute as to which document should be admitted to probate.

In addition, there are actions to remove personal representatives under section 50 of the Administration of Justice Act 1985. These applications (which may be brought before a grant has been issued - *Goodman v Goodman* [2013] EWHC 758 (Ch)) are assigned to the Chancery Division (CPR Part 57.13). They often raise similar questions to applications to pass over a personal representative under section 116 SCA 1981.

The fact that the distinction between contentious probate claims and contested non-contentious common form probate business is ill defined in the existing rules gives rise to significant confusion. The proposed rules, as presently drafted, do not deal with this distinction although they might usefully do so in the interest of clarity and saving cost and expense. For example, it would be helpful if a practice direction to the new rules set out the circumstances in which it was appropriate to bring a section 116 application in the Principal Registry, and when it would be appropriate to bring it in the Chancery Division.

Question 4: Do you agree that the overriding objective as drafted is appropriate?

We agree that the inclusion of an overriding objective is useful. The objective set out in the Consultation Paper does not reflect that set out in the draft Rules. We agree with the drafting as set out in the draft Rules. We would suggest that "authorised officers" are also referred to specifically in the Overriding Objective as such officers are given power to seal grants. It is also important that staff in the registries deal with matters expeditiously.

Question 5: What are your views on the meanings and content of the defined terms?

We consider that having defined terms is useful.

We have the following comments on the definitions:

"Capacity"

This is defined as "capacity within the meaning of the Mental Capacity Act 2005". The Mental Capacity Act 2005 does not contain a definition of "capacity": that Act sets out the circumstances in which a person is to be treated as lacking capacity. It would be more helpful and accurate if the definition was as follows:

> ""lacks capacity" means lacks capacity within the meaning of the Mental Capacity Act 2005."

As set out in our comments on Rule 39(3) below, because capacity under the Mental Capacity Act 2005 is decision specific, it is important that this phrase is not used in isolation but is used in relation to a specific decision.

"Collection grant".

Although we understand that the term *ad colligenda bona* is obscure, we do not consider that the term "collection grant" accurately encapsulates the grant *ad colligenda bona*. For example, a person holding a grant *ad colligenda bona* may need to expend funds to repair property in order to preserve it. A preferable term would be "Interim grant"

"Notification"

We consider that this change of name is misleading, as the person cited / notified has to take action following a citation / notification.

"Objection"

Although we welcome the change of nomenclature to provide greater clarity and agree with the rationale, the term "caveat" is used in section 108 Senior Courts Act 1981 and it can cause confusion if the terms used in the rules do not correspond with those used in the statute.

As per our response to Question 15, we consider that a useful distinction could be made between an objection to a grant issuing at all (which will usually give rise to a probate claim) and an objection to a grant being issued to a particular person on grounds of suitability (where there is no dispute as to the right to the grant)

"Probate Practitioner"

This is presently defined by reference to section 23 of the Solicitors Act 1974 and section 55 of the Courts and Legal Services Act 1990. These provisions have been repealed by the Legal Services Act 2007.

"Settled land"

In our view, "settled land" should be defined with reference to the Settled Land Act 1925. We suggest: "land held on a settlement within the meaning of section 1 Settled Land Act 1925." Unless "settled land" is defined in this way, there is a risk of confusion between "settled land" requiring a special grant and "settled property" for the purposes of the Inheritance Tax Act 1984. This confusion is more likely to arise given that the applicant for a grant will have recently completed and submitted an IHT 400 to HMRC which refers to settled property.

"Will"

The words "for the purposes of these rules" are unnecessary.

Glossary

With regard to the Glossary, we are concerned that the definition of domicile is inaccurate. Although we appreciate that the Glossary does not seek to define terms which have a distinct legal meaning, domicile is not necessarily the place of a person's fixed residence. We also consider that it would be helpful to make clear that England and Wales, Scotland and Northern Ireland have distinct systems of law from one another. We would suggest:

""domicile" means the place with a distinct system of law with which a person is most closely connected. England and Wales, Scotland and Northern Ireland each have distinct systems of law, as do foreign countries such as France or Spain".

Question 6: Should any other terms be defined?

It would be helpful to include a definition of "degree" in order to assist in the understanding of rules 13 and 14 which make reference to persons being entitled variously "in the same degree", in a "lower degree" or a "higher degree". Alternatively, those rules can be redrafted to refer to persons being entitled in the same priority.

The term "beneficial interest" could also be usefully defined for the purpose of understanding the rules of priority in relation to intestate succession.

Although referred to in the Consultation Paper, neither the term nuncupative wills nor oral wills appears in the definitions section of the draft rules and we consider that a definition could usefully be included. We agree that "oral will" is clearer, however the term "nuncupative will" is used in the Senior Courts Act 1981.

We would suggest including a definition that "witness summons" includes a subpoena to bring in a testamentary document under section 123 SCA 1981. "Subpoena" is the word used in the statute (see also comments on Rule 75).

Question 7: Do you agree that the oath should be replaced by a witness statement verified by a Statement of Truth?

On balance, no. Although we entirely see the force in adopting a less cumbersome procedure for verifying the truth of the information provided in support of an application for a grant, we are concerned that as matters currently stand, a witness statement supported by a statement of truth will not provide sufficient protection against fraud.

The Court's primary interest must be to obtain truthful evidence from Applicants. In our view the method which it uses to achieve this must fulfil two roles:

(1) It must bind the conscience of the Applicant; and

(2) It must provide for effective and enforceable sanctions against those who provide false information.

Making a false statement on oath is a criminal offence under the Perjury Act 1911, carries a maximum sentence of seven years imprisonment and is a matter which can be referred to the Police and DPP for investigation and subsequent prosecution.

The position regarding statements of truth is different. CPR Part 32.14 provides that contempt proceedings may be brought against a person who makes a statement of truth without an honest belief in its truth. Committal applications in relation to false statements of truth are governed by CPR Part 81.17 to 81.19 and can only be brought with permission from the Court dealing with the proceedings in which the false statement was made or by the Attorney-General. The maximum sentence for civil contempt is two years imprisonment.

In our view the language of CPR Part 81 ("proceedings in which the false statement ...was made") is not apt to cover the position of a statement of truth made in support of a common form application for a grant of probate. However our principal concern is that the procedures for committal therein set out are primarily designed for *inter partes* proceedings and rely upon the assumption that a party who has been aggrieved by a false statement of truth will pursue a committal application. In our view this assumption does not hold good for common form probate applications. If an applicant for a common form grant makes a false statement on an oath, the only way in which a sanction could be imposed would be if an aggrieved person (presumably a beneficiary of the estate) were prepared to expend costs in applying to the Court for permission to pursue a committal application and then pursuing the same or if the Attorney General were prepared to take action. In our view it is unlikely that these routes will

in practice be followed, and there is a real risk that Applicants will become aware that the risk of being punished for making a false statement is slim.

Until Parliament provides for a more effective mechanism for punishing the making of a false statement of truth, we consider that the information given in support of a grant should continue to be given on oath. This will ensure that criminal sanctions will remain available for the provision of false information.

We do however support the replacement of affidavits with witness statements in contested common form business. This is *inter partes* litigation and the Court can have a greater expectation that the parties will police each other's behaviour.

Question 8: Do you have any comments on, or suggestions about the Statement of Truth for personal applicants?

We consider that the oath should be retained for all applicants: see answer to Question 7 above. If the use of statements of truth is adopted, we would suggest that the penalties for making a false statement should be clearly set out on the relevant forms.

Question 9: Do you agree this approach?

We agree with the matters to be included in the witness statements. As set out in our answer to Question 7 above we consider that the oath should be kept and not replaced with a Statement of Truth.

Question 10: Do you agree that the location of District Probate Registries should no longer be set out in secondary legislation?

Yes.

Question 11: Do you agree that the redrafted rule is clearer?

Up to a point. We agree that the word "engrossment" is not easily understood and should be replaced. However, we are concerned that the current drafting does not attain sufficient clarity:

(1) In Rule 30(2) we wonder whether the words "a facsimile copy" should be replaced with "a photocopy or other facsimile copy";

(2) Rule 30 does not have a provision replicating rule 11(1) of the NCPR 1987. We would suggest that this is a useful power and would propose adding:

> "(2A) If the court considers that in any particular case the will or copy thereof that has been exhibited would not be satisfactory for the purposes of record it may require a typed (or as the case may be retyped) version of the will to be lodged."

(3) In Rule 30(3) we would suggest replacing the words "a copy or reproduction" with "a typed version".

(4) In Rule 30(4) replace "version" with "typed version".

Question 12: The working group would like views on the following options for attorney applications:

- **do nothing and keep the rule as currently drafted,**
- **exclude attorney applications from the personal application process,**
- **allow only family members to act as attorneys,**
- **allow only probate practitioners to act as attorneys, or**
- **allow only family members and probate practitioners to act as attorneys.**
- **Other.**

In our view the reasons why a person may wish to appoint an attorney to administer an estate on their behalf are likely to be many and various. We consider that a person should be free to appoint who they choose as their attorney and it would be undesirable to restrict the classes of permissible attorney to family members and / or probate practitioners. To do so would also introduce further difficulties in defining who is a "family member" for these purposes - does it include an unmarried partner? If so, what length of relationship is needed to qualify?

We have not personally encountered the problem described at paras 67-69 of the Consultation (viz personal applicants appointing probate "agents" as attorneys to avoid the need for

personal attendance at the registry. If the problem identified at paras 67-69 is thought to be widespread, then we would suggest that attorney applications should be excluded from the personal applications process altogether. However, we recognise that this could cause hardship in small estates and our preferred option would be to do nothing and keep the rule as currently drafted.

Question 13: Do you have any comments on the revised rule 43?

(1) Under section 16 of the Mental Capacity Act 2005 the jurisdiction of the Court of Protection extends to making a decision on behalf of the incapacitated person ("P"), or appointing someone to take the decision on P's behalf. We would suggest that rule 43(1)(a) should be amended to read "to the person authorised to apply for a grant *on behalf of the person lacking capacity*" to more accurately reflect the nature of the order that will have been made by the Court of Protection.

(2) To take effect as a lasting power of attorney an instrument must have been registered with the Public Guardian (MCA 2005 s9(2)(b)). The reference in Rule 43(1)(b) to a "*registered* lasting power of attorney" is therefore tautologous. We note that Rule 39(3) simply refers to a "lasting power of attorney". We would suggest that the word "registered" is deleted from Rule 43(1)(b).

(3) We would also suggest that the rule should provide for the manner in which suitable evidence establishing that the person entitled to a grant lacked capacity to act as

personal representative should be lodged. The relevant capacity may vary depending upon the complexity and value of the estate. We would suggest it may be appropriate to have a specific form which makes reference to the relevant test of capacity for this purpose.

Question 14: Do you agree that settled land should be excluded as a matter of course from the new statement of truth?

Yes. The number of cases where settled land was vested in the deceased as tenant for life are likely to be few in number. We consider that requiring all applicants to include within their oath / witness statement a statement that the estate does not include settled land would be an unnecessary complication. There is also the risk of confusion between settled land and "settled property" as defined in the Inheritance Tax Act 1984 and referred to in the HMRC account (see also response to Question 5 above).

Question 15: Do you agree with the revised proposals for caveats and the new nomenclature?

Up to a point. We support the changes to nomenclature. However we are concerned that the new procedures for responses will not solve the problems that we have experienced with the existing rules, and in some respects will be less useful.

(1) In practice there are two bases upon which a person might lodge a caveat / objection:

(a) Because he wishes to stop any grant issuing at all (because there is a dispute as to whether a will or codicil should be admitted to probate); or

(b) Because he wishes to stop a grant issuing to a particular person (for example where everyone is agreed that the deceased died intestate, but there is a dispute as to whether the person primarily entitled to the grant is a fit and proper person to administer the estate).

These two grounds of objection have different consequences. The first leads to a contentious probate action to be determined in the Chancery Division or county court. The second will be determined by a district judge or registrar under the Probate Rules.

(2) We have found the warning / appearance procedure in the current rules to provide a useful way of testing whether a caveator genuinely wishes to pursue his objection to a grant of probate. The issue of a warning requires the caveator to decide whether he really wishes matters to proceed to an inevitable probate action. In our experience the issue of a warning not infrequently results in a caveat being removed. There is no equivalent of the old "appearance" in the new rules. The filing of a response does not require a caveator to take any positive step to keep the caveat in place, but instead points to an application under Rule 57(3). We are concerned that the removal of the requirement to enter an "appearance" will increase costs in a number of cases which (under the current rules) would have been resolved at this stage.

(3) A problem that we often encounter under the current rules is that once someone has sought to warn off a caveat and the caveator has entered an appearance, the party who wishes to remove the caveat will then issue a summons for directions. However, in cases where the dispute is to the issue of a grant at all, unless it is clear that the caveat is vexatious or otherwise wholly unmeritorious (for example where the caveator has no interest in the estate), nothing is achieved by such a summons save for the expenditure of costs and a direction that one side or another should issue a probate action.

(4) We are concerned that Rule 57 will perpetuate this problem. This Rule directs a person who takes issue with an objection to file a response and then issue an application. However, it seems to us that in cases where the objection is to the issue of a grant at all, unless a person is certain that an objection is plainly frivolous or that the person who lodged it has no interest in the estate, there is little point in taking either of these steps. The filing of the response does not offer an opportunity to remove the objection (cf the current warning / appearance procedure), and the issue of an application will not assist in resolving matters; the parties will simply be told to launch contentious probate proceedings. We are concerned that the procedure proposed directs parties into taking steps which will incur costs but will be unlikely to resolve matters.

(5) Accordingly we would suggest that thought should be given to:

(a) making explicit in the rules the distinction between objections to a grant in any form, and objections to a grant to a particular person;

(b) introducing a step similar to that of the old "appearance" to enable the "response" procedure to be used to weed out cases where the objector has no interest in continuing his objection; and

(c) making clear that in cases where there the objection is to a grant in any form, the usual step once an objection has been lodged should be to issue a contentious probate claim, rather than filing a response and issuing an application for directions.

Question 16: The working group would welcome views on what information should be included in the calendar of grants, specifically in relation to the value of the estate. Of the follow options which do you think is most appropriate:

1. No change to the current process- the value of the estate shown on the grant and calendar, or

2. the value of the estate would be shown on the calendar but not the grant, or

3. the value of the estate could be shown on the grant but not the calendar, or

4. the value of the estate would only be available on application to the court, or

5. other, please specify?

Option 1. In our experience it is extremely helpful in a range of matters (for example the enforcement of debts, administration actions and proceedings under the Inheritance (Provision for Family and Dependants) Act 1975) to be able to quickly establish the approximate value of

an estate from information presented in a grant. In our view this information should remain publicly available and we do not consider that there is any reason to change the current practice of including this information in both the grant and calendar.

Question 17: Do you agree that copies stamped with the seal of the court should be limited to executors or administrators and those who can demonstrate a valid reason for being provided with a copy?

We can see the merit from a fraud-prevention perspective of requiring a person (other than an executor or administrator) to demonstrate the need for a sealed copy.

Question 18: In what circumstances do you think some [person] other than the executor / administrator would require such a copy?

A person other than an executor or administrator may require a sealed copy in order to establish the devolution of title or an estate in Court or in some other formal situation (such as at HM Land Registry). Section 132 of the Senior Courts Act 1981 provides that every document purporting to be sealed with the seal of the Senior Courts or any office of the Senior Courts shall be received in evidence in all parts of the United Kingdom without further proof, so where evidence is needed in legal proceedings of the devolution of an estate a sealed copy will be needed. There are a number of situations that occur to us where such a sealed copy may be required:

- CPR Part 57.16(3) requires a Claimant in proceedings under the Inheritance (Provision for Family and Dependants) Act 1975 to exhibit to his evidence an official copy of the grant .
- A beneficiary of an estate might require a sealed copy in order to demonstrate that he is the residuary beneficiary of a deceased person and, hence entitled to bring proceedings to enforce the estate's administration.
- A trustee appointed under section 36 of the Trustee Act 1925 by the personal representatives of the last surviving trustee may require a sealed copy of the grant to establish within legal proceedings that he has been validly appointed.
- A will may create trusts that have different trustees from the personal representatives. They may require a sealed copy of the grant and will to establish the terms of the trust in legal proceedings.

We consider that the rules should not seek to define or illustrate what does or does not constitute a valid reason for needing a sealed copy: the words in parentheses ("or someone who can demonstrate they need a sealed copy") are sufficient.

Question 19: Do you agree with the proposals in respect of "sealed and certified" copies?

Subject to the comments below regarding the inconsistent use of defined terms in Rule 66, we have no objection to the sealing and certification of copies by an authorised person.

In terms of its drafting, we are concerned that Rule 66 contains expressions that are inconsistent with the defined terms in Rule 2. In particular, it refers to the issue of copies "as unsealed office copies", which is a contradiction in terms given that the expression "office copy" is defined to mean "a copy bearing the seal of the Court".

As an alternative to the issue of so-called "unsealed office copies", the rule envisages the issue of "copies sealed with the seal of the court" (which should simply be referred to as "office copies") or "copies sealed with the seal of the court certified by an authorised officer to be true copies". As to the latter, it is unclear to us why a copy sealed with the seal of the court (i.e. an "office copy", as defined) should need to be certified as a true copy. Section 132 of the Senior Courts Act 1981 (see answer to Question 17) will mean that a sealed copy should suffice.

Question 20: Do you agree the routes of appeal?

Yes. We note, however, that there is no provision in the rules for an appeal from a judge to the Court of Appeal (whether from a first instance decision or from a decision which itself was made on an appeal).

We note, however, that neither Rule 73 nor any other provision of the rules refers to, or otherwise defines, the expression "notice of appeal". It is also not an expression used in the Civil Procedure Rules: the closest analogue is the expression "appeal notice", which is defined by Rule 52.1(3)(f) thereof.

We would suggest making clear that the destination of appeals provisions in Part 52 CPR and PD 52A do not apply (or are subject to paragraph (1)).

We are not sure why paragraph (4) of Rule 73 effectively removes the requirement for permission to appeal. We consider that a requirement to obtain permission to appeal is appropriate and would further the overriding objective.

Question 21: Do you agree with the new procedures for requesting an inventory and account?

We agree that a simplified procedure for obtaining an inventory and account is sensible. The consultation document states (at paragraph 93) that "[u]nless the personal representative objects to the order being made (in which case a hearing could be held) the order will be made". This does not appear to be reflected in Rule 76, which makes no provision for objection by the personal representative and appears to proceed on the assumption that an order will be made as a matter of course to an entitled applicant. We consider that a personal representative might object to making of an order on grounds other than that the applicant has no interest in an estate. For example, an account might already have been provided to the best of the representative's ability, in which case an order for a further account by an unsatisfied beneficiary would be futile and wasteful of costs.

Question 22: Do you agree that a fee should be charged for pre-lodgement advice?

We have no strong views on whether or not a fee should be lodged but we do recognise that pre-lodgement advice is often very useful and, accordingly, suggest that applicants (particularly, but not only, personal applicants) should not be unduly discouraged from seeking it.

OTHER COMMENTS

General

Whilst we are generally supportive of the attempt that has been made to update archaic language in the existing rules, there are a number of expressions eg "caveat" and "subpoena" which are used in the Senior Courts Act 1981. We are concerned that the use of different language from that used in the governing statute may be a source of confusion. We do however accept that amendment of the Act would be difficult.

Rule 3: Application of the CPR

We consider that it may be preferable if the Court is given a discretion as to the application of the CPR to probate matters (as is the case under rule 9 of the Court of Protection Rules 2007) by making the provision "may" rather than "shall". However, we do consider that it will be useful for the Court to have recourse to the CPR (for example to strike out hopeless cases). If the final version of the Rules does replace oaths with witness statements then CPR Part 32.14 and Part 81 will need to apply.

We do not consider that it is particularly helpful if amendments to the CPR are not automatically incorporated into the rules if the CPR is to apply in the case of a lacuna. One of the problems with the current rules is that they have failed to keep pace with changes in civil procedure rules. That will simply be perpetuated if amendments are not incorporated automatically. In addition, because the CPR are amended frequently and because books and websites containing the CPR are updated at frequent intervals it will rapidly become difficult to find the version of the CPR as they existed at the date that the Probate Rules were brought into force.

Rule 8: Notices

We note that this applies Part 6 of the Civil Procedure Rules in relation to service. We have a number of points in this regard:

(1) If the CPR apply automatically (see Rule 3), is this provision required at all?

(2) CPR Part 6 has different provisions for the service of claim forms and other documents. We assume that the CPR provisions for the service of documents other than claim forms are intended to apply to all documents to be served under the Probate Rules (even applications which are themselves originating processes). We would suggest that this is clarified.

(3) The provisions of CPR Part 6 include provisions for the service out of the jurisdiction which are very involved. It is often necessary to know whether permission would be

needed to serve a claim form out of the jurisdiction, before it can be decided whether permission is also required to serve another document. These provisions are not apt to cover many of the documents which would fall to be served under the probate rules (for example a notice under Rule 13(1) to an executor that other executors are applying for a grant with power reserved). The service out requirements contained in the Family Procedure Rules 2010 (which are used by the Court of Protection Rules) are much less involved (see also the comments on Rule 72 below).

Rule 16: Grants to Attesting Witnesses

There is no definition of "beneficiary" which, in any event, is not the term used in Rule 10 to describe entitlement to a grant. It would be preferable if this rule referred to "legatee or devisee".

Rule 17: Exceptions to Rules of Priority

This rule could usefully be phrased in more general language so that it says:

"nothing in rules 10, 11, 13 or 14 shall prejudice any rights or entitlements to take a grant under any enactment"

Rule 33: Due Execution

We are concerned by the provisions of Rule 33(4). In our view a decision by a district judge or registrar under Rule 33 not to admit a will to probate in common form should not prevent an applicant from subsequently seeking to have the will admitted to probate in solemn form by bringing a contentious probate action. We would suggest that the rule should be amended to make clear that a decision under Rule 33(4) does not act as a bar to subsequent probate claim.

Rule 35: Obliterations, alterations etc

We are aware that the Court has from time to time issued Practice Directions that standard form administrative provisions referred to in a will (such as the STEP Standard Administrative Provisions 1st and 2nd Editions) need not be produced on an application for probate. We note that Rule 35(3), as drafted, imposes a mandatory obligation on the Court to require production of documents that have been incorporated by reference into a will and we would suggest that an additional paragraph was added to the rule to release the Court from this requirement in respect of documents that are either set out in a Practice Direction or are on a list kept by the senior district judge (to which the STEP Provisions and any other similar standard form documents can be added).

Rule 39: Grants to Attorneys

Capacity under the Mental Capacity Act 2005 is decision specific. We would suggest that Rule 39(3) was amended to make this clear. For example: "Where the donor referred to in paragraph (1) lacks capacity *to act as personal representative...*"

Rule 48: Grants of Administration under Discretionary Powers of the Court and Collection Grants

We would suggest that an application form should be required for any application for a discretionary grant.

Rule 54: Notification to Have a Will Proved in Solemn Form

This is entitled "Notification to have a will proved in solemn form". "Solemn Form" is not a defined term. We would suggest "Notification to have a will proved by a probate claim".

Rule 61: Probate Claims

(1) As the word "court" is a defined term in the rules, we consider that the reference to it in a different context in rules 61(1) and (3) should be avoided. We would suggest that Rule 61(1) was amended "Upon being advised *of the issue of a probate claim*..." and Rule 61(3) amended " .... until an application for a grant is made by the person shown to entitled thereto by the decision *in the probate claim*."

(2) We assume that suitable procedures are (or will be) in place to ensure that the issue of a probate claim is notified to the relevant registry.

(3) Whilst we accept that it would probably not be appropriate to refer to CPR Part 57 within Rule 61 we would suggest that any Practice Direction accompanying the Rules should make specific reference to the provisions that govern contentious probate claims.

Rule 65: Inspection of Copies of Original Wills and Other Documents:

(1) At present, the power to seal a will may be exercised by any district judge or registrar if inspection "would be undesirable or otherwise inappropriate". We agree that it is appropriate to limit the jurisdiction so that it is exercisable only by a more senior judge. The current proposal is that only the President of the Family Division may make such an order. Unlike the expression "senior district judge" (which, in the absence of the Senior District Judge of the Family Division, is defined to mean the senior of the district judges in attendance at the Principal Registry), there is no provision for a substitute or deputy to act in the absence or unavailability of the President (or in the event that the office should be vacant). We suggest that the rule should be amended so that the jurisdiction may be exercised by any judge of the High Court (or, at least, by any judge of the High Court nominated by the President for that purpose or, if the office of President should be vacant, by the senior puisne judge assigned to the Family Division).

(2) In paragraph (3), the expression "a Sovereign" is contrasted with that of "former Sovereign". Given that there is only one sovereign (as opposed to former sovereign) at any given time, we suggest that the definite article be used for the sovereign and the indefinite article for former sovereigns: "of the Sovereign or a former Sovereign".

(3) Paragraph (3) confers no discretion upon the President: he "shall make an order" if the will is the will of a person within the defined classes. Therefore, other than on an application on behalf of the estate to set aside the order, it is difficult to see on what grounds anyone else would be able to apply under paragraph (7) to set aside an order made under paragraph (3).

(4) The drafting of paragraph (4) seems to have gone awry. At present, sub-paragraph (b) refers to the sealing of the will of a person whose article 2 rights may be infringed: in other words, it seeks to protect the right to life of a deceased person. The intention, we assume, was to protect the article 2 rights of (living) beneficiaries or (living) others named in a will of a deceased person. The drafting should be amended to make this clear. In addition to amending sub-paragraph (b), we suggest a general, "catch-all" provision that allows for the sealing of wills in exceptional circumstances or where the court is required to do so by an enactment or to comply with any statutory duty or obligation.

Rule 68: Applications

This rule requires an application to be made by application notice where any rule or Practice Direction so requires or where the court so directs, i.e. the default position is that an application notice is not required. In the current draft, very few rules require an application to be made by application notice: two examples are Rule 57(3) (response to an objection) and Rule 65 (inspection of copies or original wills and other documents). We suggest that the default position should be that an application notice is required for all applications. Practitioners are used to the concept of application notices under the Civil Procedure Rules and their role is easily understandable by litigants in person. In practice, we have found that the absence under the present rules of any form of originating process is confusing. In addition to being originating processes, application notices have the benefit of making clear who is a respondent to an application and what is being sought by the applicant (in a way that is sometimes not clear at present if the application is by way of a summons).

Paragraph (2) of the rule refers to Rule 50(2), which deals with the situation where a registrar considers that a grant ought not to be made without the direction of a district judge or judge. It is not clear to us why it is relevant in this context.

In paragraph (7) we note that there is no requirement for a respondent to acknowledge service (even where the application is a form of originating process). There is however a reference to acknowledgments of service at Rule 9. We consider that a requirement to acknowledge service

(or at least file some formal document other than a witness statement) plays a useful role in defining the issues and identifying the active parties to an application.

In paragraph (11), we wonder whether there should be a requirement that any application for re-listing by a non-attending party should be made within a stipulated period (or, perhaps, "promptly" or "as soon as reasonably practicable"), albeit that we recognise that the provision simply repeats Rule 23.11 of the Civil Procedure Rules, which imposes no such time limit.

Rule 71: Transfer of Applications

We consider that, in addition to the power to transfer an application to another district probate registry or to the Principal Registry, it would be sensible (and would save time and costs) if the court had the power to transfer the application to the Chancery Division. For example, this would be appropriate if an application for rectification under section 20(1) of the Administration of Justice Act 1982 that initially appeared to be unopposed should subsequently become an opposed application (for example, after the joinder of additional, non-consenting parties).

Rule 72: Service of Applications

We consider that it might be appropriate to make provision for the service of applications out of the jurisdiction. We suggest that the Probate Rules adopt the rules in Chapter 4 of Part 6 of the Family Procedure Rules 2010. This is the approach adopted by Rule 39 of the Court of

Protection Rules 2007 and is less cumbersome than the rules for service out of the jurisdiction contained in the Civil Procedure Rules. The Family Procedure Rules would need to be modified to delete references to the Hague Convention and Hague Convention countries and for references therein to the Senior Master of the Queen's Bench Division to be read as references to the senior district judge.

Rule 74: Application for leave to swear death

Given that the proposed Rules seek to update language, we would suggest "permission" rather than "leave".

Rule 75: Application for order to attend for examination or for witness summons to bring in a will

The statutory language of section 123 SCA 1981 refers to a "subpoena" to bring in a testamentary document. We would at the very least suggest adding a definition of "witness summons" in Rule 2 making clear that a "witness summons" includes a subpoena under section 123 SCA 1981. We are however concerned whether, in the absence of an amendment to section123 1981, the underlying form of the document actually issued by the Court can be changed from a writ of subpoena to that of a witness summons.

Rule 78: Application for Rectification of a Will

Paragraph (4) provides that, if the court is satisfied that a rectification application is unopposed, "it may order that the will be rectified accordingly". Given that the district probate registries (or the Principal Registry) are not the appropriate fora for determining contested rectification claims, we consider that the rule should provide that, if it appears that the application is opposed, the court should not make any order that the will be rectified but rather should transfer the same to the Chancery Division.

Rule 81: Basis of Assessment

Paragraph (2) of Rule 81 states (in parentheses) that the factors which the court may take into account "are set out in rule 81". We assume that the latter was intended to refer to Rule 80 and / or Rule 82.

Paragraph (5) provides that costs incurred are proportionate if they bear a reasonable relationship to, inter alia, "the sums in issue in the proceedings". In the non-contentious probate context, sums of money are not (or not normally) "in issue". We consider that it may be more appropriate to refer to the value of the estate or the value of that part of the estate in issue in the proceedings.

Other Points

The Rules are silent as to the procedure to be adopted on applications for grants *de bonis non*, for cessate grants and for grants of double probate. It would be helpful if the procedure to be adopted in such cases was made clear, either in the Rules or in an accompanying practice direction.

David Rees

Alana Graham

Georgia Bedworth

Joseph Goldsmith