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Costs in Disputed Probate Claims

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Contents

Costs incurred in litigation

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- What is a probate claim? Does the general rule for costs apply in probate claims?
Exceptions to the general rule for costs incurred in litigation
- Are costs treated differently in reasonable financial provision claims?

Other factors and considerations

- What about the role of executor when considering costs?
- Can costs be recovered against third parties?
- Costs provisions in the Court of Protection
- Funding options available
- Other considerations and updates

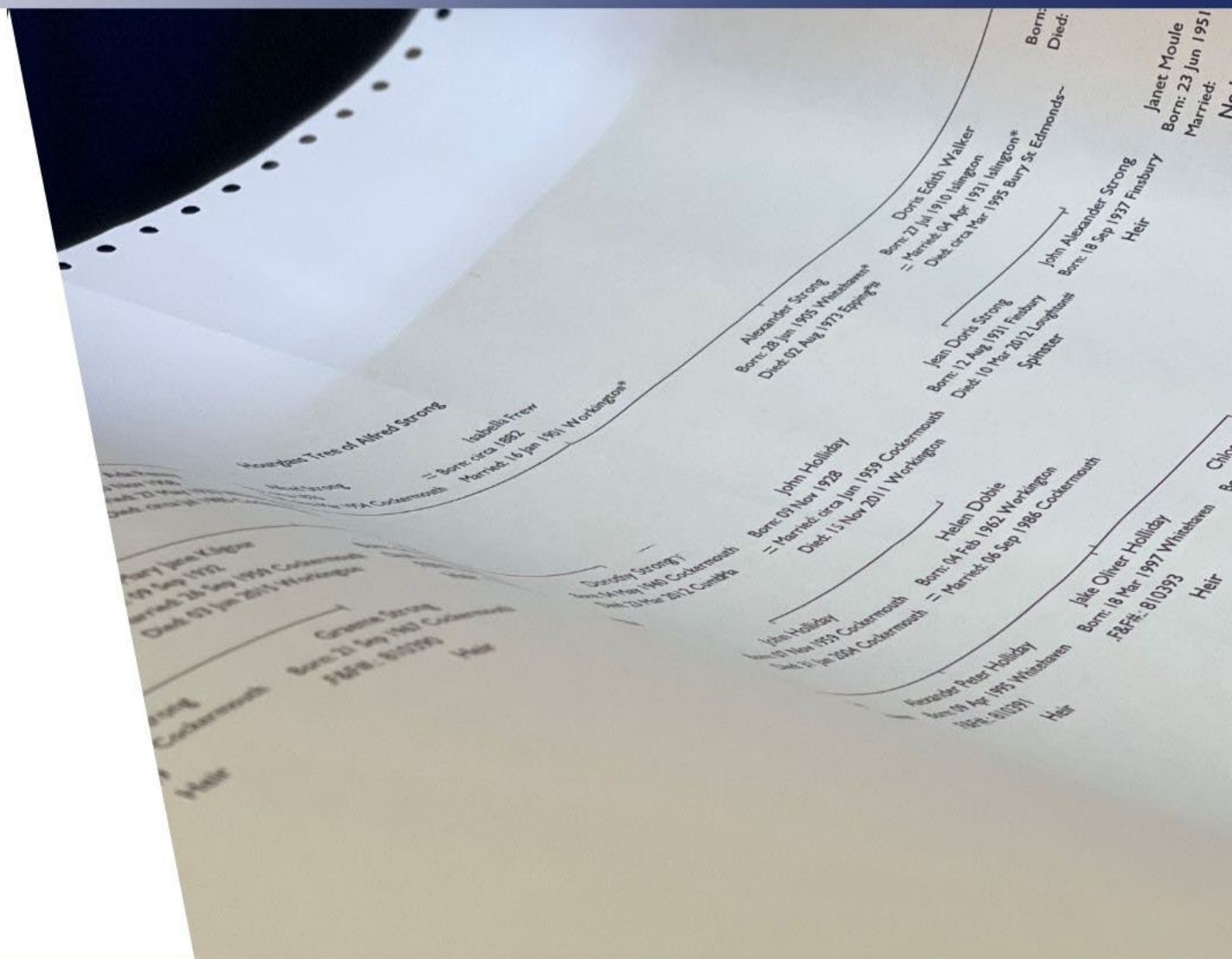
General rule for costs in litigation

- Litigation is often very expensive.
- What is meant by legal costs?
- Power of the Court to award costs: Section 51 of the Senior Courts Act 1981
- Save for limited circumstances, awards of costs in litigation always the discretion of the Court.
- General rule = losing party is ordered to pay the winning party's costs.
- Starting point = Court must have regard to all circumstances of the case, including conduct of the parties.
- Court can, and does, reduce the winning party's costs if, amongst other things, conduct is unreasonable.

What is a probate claim?

Does the general rule for costs apply?

- Non-Contentious Probate Business: Section 128 of the Senior Courts Act 1981 and Non-Contentious Probate Rules 1987 (as amended in 2018)
- Probate claims and Part 57 of the Civil Procedure Rules 1998
- Probate claims: Part 57.1(2) of the CPR
- Claims for rectification of wills
- Claims under the Inheritance (Provision for Family and Dependants) Act 1975
- Claims for a declaration of presumed death or an order varying or revoking a declaration of presumed death
- General misconception that costs will be paid from estate.
- Starting point is the same as general litigation.
- Mutual wills and claims arising in proprietary estoppel



Exceptions to the general rule

(1) Testator or the residuary beneficiaries are the cause of the litigation

- *Spiers v English* [1907] P 122: first limb and exception
- Where exception applies, Court may order that the losing party's costs are paid out of the estate

| *Wharton v Bancroft* [2012] EWHC 91

| *Kostic v Chalpin* [2007] EWHC 2909

Exceptions to the general rule

(2) Circumstances lead reasonably to an investigation of the validity of the will

- **Spiers v English [1907] P 122:** second limb and exception
- Where neither the testator or residuary beneficiaries are to blame for the litigation, but investigation warranted. Should continue to show that bona fide belief there was good grounds for impeaching the will.
- Where exception applies, Court usually makes no order as to costs (each party bears their own costs)

| **Kostic v Chalpin [2007] EWHC 2909**

| **James v James [2018] EWHC 43**

| **Smith v Springford [2008] EWHC 3446**

Exceptions to the general rule

(3) Proving a will in solemn form

- Alternative to seeking to challenge the validity of a will and may afford costs protection of CPR 57.5.
- If shown, Court will not make an order for costs against the person seeking to prove the will in solemn form unless it considers that there were no reasonable grounds for opposing/challenging the will.

| Elliot v Simmonds [2016] EWHC 732

| Lumb v Lumb [2023] EWHC 2052

| Headington v Holloway (1830) 3 Hag Ecc 280

| Rennie v Massie (1866) LR 1 P&D 118

| Williams v Goude and Bennett (1828) 1 Hag Ecc 577

Exceptions to the general rule

(4) Unsuccessful claims – pleading undue influence

- Courts may choose to penalise a party in costs if they unsuccessfully plead undue influence.
- Undue influence: ought not to be put forward unless the party pleads it has reasonable grounds on which to support it.
 - | [Re Edwards \[2007\] EWHC 1119](#)
 - | [Re Chin \[2019\] EWHC 523](#)
- One of the hardest claims to plead and succeed in. Should not be done lightly:
 - | [Wharton v Bancroft \[2011\] EWHC 3250](#)
 - | [Goodwin v Avison \[2021\] EWHC 2356](#)

Costs in claims for reasonable financial provision

Inheritance (Provision for Family and Dependents) Act 1975

- Claims for reasonable financial provision fall under Part 57 of the CPR.
- General rule applies – loser pays the winner's costs.
- What is a success fee?
- Section 58A(6) of the Courts and Legal Services Act 1990 and recoverability of success fees
 - | Clarke v Allen [2019] EWHC 1193 and 1194
 - | Bullock v Denton [2020]
 - | Re H (deceased) EWHC 1134 and Hirachand v Hirachand [2021] EWCA Civ 1498

Role of Personal Representatives

(1) Remaining neutral in litigation

- What is the role of a personal representative?
- Executor is entitled to be paid their costs from the estate (on an indemnity basis) under Part 46.3 of the CPR on the basis that a will is being admitted to probate.

| **Alsop Wilkinson v Neary [1996] 1 WLR 1220**

| Executor's role is to remain neutral where dispute arises

| General costs risk if stray from being neutral

| **Richefond v Dillon [2023] EWHC 2796**

Role of Personal Representatives

(2) Challenge of costs by beneficiaries

- Costs, and their recovery, incurred by an executor are governed by the Non-Contentious Probate Rules 1987.
- Costs must be fair and reasonable. Executors are entitled to be reimbursed by the estate for their reasonable out of pocket expenses. Limits to this:
 - | Professional executors, such as solicitors who specialise in estate administration
 - | Lay executors
- Section 71 of the Solicitors Act 1974 – ability to seek third party assessment of costs (residuary beneficiary)
 - | Kenig v Thomson Snell & Passmore [2023] EWHC 181, SCCO
 - | MasterCigars Direct Ltd v Withers [2007] EWHC 2733
 - | Wong v Vizards [1997] 2 Costs LR 46

Can costs be recovered from third parties?

- Where litigation costs incurred as a result of negligence of a third party:

- | Where negligence claim still to be determined

- | Where negligence claim accepted

- | Key v Key [2010] EWHC 408

- | Marley v Rawlings [2014] UKSC 2

- | Feltham v Freer Bouskell [2013] EWHC 1952

Costs in the Court of Protection

- Costs are set out in the Court of Protection Rules 2017. General rules:
 - | Where proceedings concern a protected party's property and affairs, costs paid for by the protected party from their own estate.
 - | Where proceedings concern a protected party's health and welfare, there is no order for costs.
- Court will depart from the general rule in some circumstances, as set out in Rule 159 of the Court of Protection Rules 2017.



Funding options in probate claims

- Clients will need to consider how they are intending to fund:
 - | Fees incurred with solicitors, including charges and VAT
 - | Expenses and disbursements: barrister, expert fees, and court fees
 - | Costs incurred by opponent in defending/pursuing a claim, which may agree to pay and/or ordered to pay
- Paying privately from client's financial resources
- Litigation loan
- No win no fee (conditional fee arrangement)
- Deferred fee arrangement
- Legal expenses insurance (before the event insurance)
- After the event insurance
- Third party funding

Other considerations

- Considerations for legal practitioners
- Focus on alternative dispute resolution
 - | Perrins v Holland [2009] EWHC 1945
 - | James v James [2018] EWHC 242
- Costs budgets
- Fixed Costs Regime: 1 October 2023 onwards
- Summary and Detailed Assessment of Costs: **Re (Isah) v SSHD [2023] EWHC Civ 268**
- Recovery from the party liable to pay the costs award

Questions?



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