THE INSTITUTE OF LEGACY MANAGEMENT

ILM FACTSHEET

Costs in Probate Litigation

An overview

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August 2023

This factsheet provides a broad overview of the current rules on costs in probate and trust litigation. It aims to assist charities in dealing with a claim.

THE INSTITUTE OF LEGACY MANAGEMENT

Introduction

Costs in probate litigation

In August 2016, the Charity Commission issued guidance for charities involved in litigation. One of the factors that any litigant weighs up before embarking on litigation is the likely financial outcome. This can be heavily impacted by what happens to the parties' costs of the litigation.

The purpose of this note is to provide a broad overview of the current rules on costs in probate and trust litigation (derived from the Court's Civil Procedure Rules and case law), and to assist charities with their strategic consideration of how to deal with a claim.

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1. The general rule and assessment of costs

The usual rule in any litigation is that the loser pays the winner's costs. This is also the starting point in any probate litigation, but there are exceptions where costs can be paid from estate funds.

For example:

- if the litigation is the fault of the deceased (for example if they have left their affairs in a muddle); or
- if an investigation was reasonable and necessary (but this usually only allows the investigating party to recover his costs from the estate up to the point that evidence has been produced).

The Court has a wide discretion in relation to payment and recovery of costs. The Court will usually assess the costs on the 'standard basis'. This means that the costs judge will only allow the successful party to recover costs which are proportionate (i.e. in comparison to the value of the claim and work required to bring it) and either:

- reasonably incurred; or
- reasonable in amount.

Any doubt will be resolved in favour of the party paying costs. This usually results in the successful party recovering no more than 60-70% of his costs and often less.

In some cases the successful party will ask the Court to assess costs on the more generous basis, called the 'indemnity basis'. This is usually where the successful party believes the paying party ought to be further penalised in costs because of his conduct during the litigation.

If the Court assesses costs on the indemnity basis then there is no requirement for costs to be proportionate, however the costs must still be either reasonably incurred or reasonable in amount. Any doubt is resolved in favour of the successful party receiving costs. This usually results in the successful party recovering a higher proportion of their costs than they would have recovered on the standard basis. However, the successful party cannot recover more than they have actually spent on costs.

2. Costs of Personal Representatives

Executors and Personal Representatives (PRs) who do not have a financial interest in the estate should remain neutral in any claim against the estate, unless the claim is brought against them personally (e.g. on the basis they have failed in their duties). It is proper for the beneficiaries to respond to a claim that concerns their legacy (e.g. a claim against the estate for financial provision).

If an executor or PR adopts a neutral position they will be entitled to their costs of the litigation from the estate on the indemnity basis (and it is therefore likely that they will recover the majority of their costs). However, if an executor or PR takes a partisan approach to any claim, they are vulnerable to the same costs consequences as an active litigant and might be ordered to bear their costs and/or another party's costs from their personal resources.

If the claim is against the executor or PR, for example an allegation that they have failed to perform their duties, any award of costs will be dependent on the outcome of the litigation.

If the parties incur litigation costs as a result of the negligence of a third party, for example where a poorly drafted Will has to be rectified, then if the negligent party has admitted liability, the Court can order the negligent party to meet the litigation costs.

If the negligence claim is still to be determined (for example because the alleged negligent party has not admitted liability) and the Court orders the litigation costs to be met from the estate, the residuary beneficiaries (who have effectively had their entitlements reduced by costs) can pursue the negligent party for those costs.

3. Beddoes Order

A mechanism exists that allows trustees and executors to seek approval from the Court to their costs being met from the estate or trust fund (a Beddoes Order). This provides useful protection where there is any doubt as to whether they should or could recover their costs. It is generally not appropriate in a dispute between competing beneficiaries as executors have a general indemnity for their costs of litigation (subject to remaining neutral in any dispute). However, it is often used by trustees before embarking on litigation.

4. Special situations

In addition to the specific exceptions set out above relating to probate and trust litigation the court rules also provide for specific scenarios when costs will be dealt with in a different way.

In a probate claim (a dispute as to the validity of a will or codicil) a party can limit their involvement to cross examining any witnesses to the document in question without advancing a positive claim or defence. By taking this course of action they will not be subject to the usual rules of litigation and can therefore avoid an order for costs being made against them.

Also, a party can discontinue a probate claim without the usual consequences. Instead, the Court may order such terms as to costs as it considers just and order a grant to be made to the person(s) entitled to a grant.

5. Costs, budget and management

In the majority of disputes relating to estate and trusts parties are required to file a comprehensive costs estimate (called a Costs Budget or a Precedent H) with the Court setting out the likely costs of the litigation. This is not currently a requirement for claims under the Inheritance (Provision for Family and Dependants) Act 1975, claims to remove executors or trustees, or probate disputes valued over £10 million.

The parties will submit their Costs Budgets to the Court and the Court will approve the Costs Budget. This essentially means that the Court will set a budget for what should be incurred by each party in each stage of the case.

Once the Costs Budget is set it is very difficult to depart from this as the parties are meant to "cut their cloth" and ensure that the costs incurred remain within budget. If there is a significant development in the litigation and the Costs Budget requires amendment for any reason after it has been approved, those revisions must be submitted to the Court in a form called a Precedent T.

For example, a budget may need to be amended if the value of the claim has increased. Failure to do so may result in the costs incurred in excess of the budget being disallowed. The Court will review the revisions and decide whether to approve it or, whether to vary it having regard to the developments which have occurred since it was initially submitted. If the Court does not approve the variations at this stage, a party who obtains an order for its costs is not precluded from seeking these costs at Detailed Assessment.

The purpose of filing a Costs Budget is to enable the Court to keep a careful eye on the parties' costs at every stage of the proceedings, rather than leaving this task until the end. The Court is keen to ensure that costs are proportionate, which essentially involves considering the amount of costs that will be incurred versus the benefit that any of the parties might obtain as a result of the litigation.

6. Fixed costs

The Ministry of Justice announced that they "are keen to extend the fixed recoverable costs regime to as many civil cases as possible". The future for contentious trust and probate litigation is very likely to involve fixed costs for particular claims.

7. Proportionality

On 1st April 2013 a new proportionality test was introduced. Proportionality is an overriding objective in the Civil Procedure Rules.

When assessing costs on the standard basis, the Court applies a two stage test. Firstly, the Court will undertake a "line by line" assessment, looking at each item and only allowing costs which are proportionate in amount and reasonably incurred. Then, after the line by line assessment, the assessing Judge will "stand back" and consider whether the assessed sum is proportionate. If the sum is not considered proportionate then the assessing Judge will make global reductions to ensure that the costs are proportionate.

When the Court is setting a Costs Budget it has a mandatory direction to consider proportionality and will only set future costs which are within a reasonable and proportionate range.

It is important to bear in mind that proportionality will trump necessity. So, even if costs were reasonably and necessarily incurred, they can still be reduced or even disallowed if they are not considered proportionate.

Each case will be assessed on its own merit but, when considering proportionality, the Court will take the following factors into account:

1. The sums in issue in the proceedings (not damages)
2. The value of any non-monetary relief
3. The complexity of the litigation
4. Any additional work generated by the conduct of the paying party
5. Any wider factors involved in the litigation, such as reputation or public importance; and
6. Any additional work undertaken or expense incurred due to the vulnerability of a party or any witness

Even though the proportionality test has been in existence for over a decade there is still limited guidance on its application and it is a very subjective test.

The proportionality test does not apply to indemnity basis costs, but these costs do still need to have been reasonably incurred to be recoverable.

8. Settlement

As costs awards hinge on judicial discretion, it is important to consider what might persuade a Judge to make an order for costs and how generous they should be. A major factor in any Judge's decision making is likely to be whether the parties engaged in any attempts to resolve the dispute without resorting to litigation.

If an offer of settlement is made by one party to another, it is likely that there will be costs consequences if the offer is unreasonably rejected. If later at trial, the party who made the offer obtains a judgment at least as advantageous as the terms of its offer, the rejecting party could face a penalty for not accepting the earlier offer. Usually that the claimant has to pay the defendant's costs and interest on that sum.

Part 36 of the Court's Civil Procedure Rules provides that where a claimant makes an offer in accordance with Part 36 and it is rejected by the defendant, the claimant will be entitled to:

- interest on the awarded sum;
- recovery of their costs on the indemnity basis;
- interest on their costs; and
- a 10% uplift on the money awarded.

A Part 36 offer will continue to be open for acceptance unless it is withdrawn, even if later offers are made.

A party can gain protection against a costs order if it makes a sensible Part 36 offer. Such offers can be particularly useful in dealing with any claim under the Inheritance (Provision for Dependants) Act 1975 where the claimant is likely to succeed and the amount of the award to them is in dispute.

Due to the costs consequences of Part 36 offers, they are less useful in probate claims as the outcome is "all or nothing". However the Court will still want to see that the parties have engaged in attempts to resolve the dispute, whether through offers in correspondence or through mediation.

Any offers of settlement set out in correspondence should be marked "without prejudice save as to costs" to ensure that the offers cannot be brought to the attention of the Judge before he or she has made their Judgement about the outcome of the case. The offers can be shown to the Judge after he or she has delivered their Judgement to demonstrate the reasonable conduct of the party.

9. Costs in the Court of Protection

The costs of a Court of Protection application, such as a statutory will, are set out in the Court of Protection Rules 2007.

The general rules are:

- where proceedings concern the protected party's property and affairs, the costs are paid by the protected part or out of their estate;
- where proceedings concern the protected party's health and welfare, there is no order for costs; and
- the Court will depart from the general rules in some circumstances in accordance with rule 159 of the COPR 2007.