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Our ref: ICAEW Rep 111/13

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By email: ncpr@hmcts.gsi.gov.uk

Dear Ms Baker

Probate Rules

ICAEW welcomes the opportunity to comment on the consultation paper *Probate Rules: Invitation to comment on draft rules in relation to non-contentious probate business in England and Wales* published by the President of the Family Division's Working Group on the Non-Contentious Probate Rules 1987on 28 June 2013, a copy of which is available from this link.

ICAEW is a world-leading professional accountancy body. We operate under a Royal Charter, working in the public interest. ICAEW's regulation of its members, in particular its responsibilities in respect of auditors, is overseen by the UK Financial Reporting Council. We provide leadership and practical support to over 140,000 member chartered accountants in more than 160 countries, working with governments, regulators and industry in order to ensure that the highest standards are maintained.

ICAEW members operate across a wide range of areas in business, practice and the public sector. They provide financial expertise and guidance based on the highest professional, technical and ethical standards. They are trained to provide clarity and apply rigour, and so help create long-term sustainable economic value. Our application to become a authorising and licensing body for the reserved legal activity of probate activities has been accepted by the Legal Services Board, and is currently undergoing statutory consultation.

Main Points

We welcome the proposals, and congratulate the committee on their attention to the need for continuous work to ensure that the probate office is enabled to provide a service which is flexible and fit for purpose. The current proposals help to promote this. We are particularly impressed by the inclusion of the Objective in the draft Rules, which helps define their overall purpose and is a useful mechanism to assist in ensuring that the provision of this service remain robust in the light of future changes in the environment in which it is provided. The modernisation of some of the language of the draft Rules also help in making them more usable, though it must be recognised that the language will still be inaccessible to even well-educated non-lawyer applicants. Resources given to the provision of Plain English Guidance for the assistance of personal applicants should not be reduced.

We also welcome the thought that has been given for ways in which procedures have been made as easy as possible for personal and professional applicants, while trying to ensure that safeguards for the testator's intended beneficiaries are as robust as possible. In furtherance of this:

- We agree that it should not be necessary for personal applicants to attend at a registry in person as a matter of routine but that they should be able to communicate with the Probate Service by letter, telephone or electronically. However, we agree that the Probate Service should have reserve powers for use where necessary. These could perhaps provide for alternatives, such as the right to either call a personal applicant to attend in person where appropriate or else to employ an authorised probate practitioner to provide any necessary additional assurance to the Probate Office.

- With this lightening of the obligation for personal applicants to travel to the nearest probate office we do not consider that it is necessary to retain the option for executors to appoint an attorney to apply for probate clearance. Rather, requiring the grant to be applied for either by an executor explicitly chosen by the testator or by an authorised probate practitioner helps provide protection against the possibility of the testator's wishes not being implemented. The use of an attorney effectively provides a means of completely circumventing the reservation of probate activities, so the removal of this option must be consistent with the public policy intentions behind the continued reservation of probate.

- The opportunity should also be taken to clarify the boundaries of the reservation of 'probate activities', which we consider ambiguous in the delineation of those services which can only be provided by persons authorised under the Legal Services Act. The current reservation extends to 'papers prepared on which to found or oppose a grant of probate', but this language has been brought forward through successive iterations of statute, with origins which date back many years to before it was common practice for executors to apply for their own grant. For example, for many years we have advised our members that it is permitted for them to complete a copy of HMRC's IHT 400 form without a probate authorisation, though legal opinion on this matter appears to be divided. HMRC itself appears to agree with our interpretation, as confirmed in their Guidance available from http://www.hmrc.gov.uk/inheritancetax/iht400-notes.pdf. Page 11 refers to 'accountant or solicitor' in a context which gives equivalence to the roles of the two professions in this respect. In any case, however, there can be little doubt that in most cases the most appropriate person to assist executors in completing this form will be the chartered accountant who has dealt with the tax affairs of the testator for many years, and that in most cases the supervision of a solicitor over this would be entirely redundant.

The definition of 'probate practitioner' contained in Rule 2 should be updated to refer to any probate practitioner authorised as such under the Legal Services Act 2007.

Responses to the specific queries outlined in the consultation paper are given in the Appendix to this letter. If there is anything else we can do to assist the committee in this important task, please let us know.

Yours sincerely

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APPENDIX

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

Yes, we agree that it is more helpful for the Rules to be called the 'Probate Rules' than the 'Non-Contentious Probate Rules'.

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

We have no problems with the structure of the Rules, but we do consider that it would be sensible for a contents list to be added to them. At present, there is one given in the consultation paper, on page 7, but none on the draft rules themselves.

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

We think that this distinction is useful, but more clarification of both the distinction and its implications should be made in the Rules. 'Probate matters' is defined in section 2 of the draft Rules to 'mean non-contentious or common form probate business within the meaning of sections 127 and 128 of the Act, that is any matters relating to obtaining probate or administration in accordance with the Act and these Rules'. If Probate is defined as anything that is not contentious, it would be clearer to have a definition of what contentious probate is, preferably within the Rules themselves, rather than by reference to other sources.

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

Yes. This provides a useful focus, to ensure that those applying the Rules do so with a consistent approach, avoiding unnecessary bureaucracy.

Question 5: What are your views on the content of the terms defined in the meanings section?
Question 6: Should any other terms be defined?

We are content for these definitions to be included in the Rules. However, the committee should be aware that these definitions are still couched in language more familiar to lawyers than to even the best educated of lay persons. The inclusion of definitions in the Rules, and the removal of some outdated language, will not obviate the need for less formal Guidance for lay executors seeking probate clearance. See also our response to question 3 above, on the need for a definition of contentious probate.

The definition of 'probate practitioner' should be updated to refer to any probate practitioner authorised as such under the Legal Services Act 2007.

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

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

Yes. This is a positive reform, which opens the market to appropriate probate practitioners other than solicitors, authorised under the Legal Services Act. As a profession we are used to producing documents that contain statements of truth, such as tax returns. We suggest that the application, including the statement of truth, is incorporated into a standard suite of documents available through various government websites, including that of HMRC, which already contains a comprehensive section on probate.

The consequent removal of the requirement for most executors to attend in person will result in a very significant reduction in cost and administrative inconvenience for many executors, though we agree that there should be a reserve power for applicants to be required to attend in person, if required.

Question 9: Do you agree this approach [to witness statements and statements of truth for probate practitioners]?

We agree that there would be a significant benefit to the standardisation of the layout and content required from probate practitioners.

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

Yes. With the increased opportunities for applications on-line and by post, there will be less need for carefully controlled access to a reasonably local District Registry. The Probate Service should be allowed more flexibility in where they are located.

The possibility should also be considered, of giving a role to alternative options for personal appearances such as the Registries of Births, marriages and deaths. If, with increased electronic access to Guidance, the main reason for attendance in person might be to ensure that personal applicants do not apply for probate clearance frivolously or too early, would not any 'registrar' be sufficient, particularly for small (excepted) estates?

Question 11: Do you agree that the redrafted rule 30 is clearer?

We are content with the redrafting of this Rule.

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**

The logic of Probate Activities remaining a reserved service under the Legal Services Act is completely undermined if it is easy to avoid through the appointment of an Attorney to carry out a function that would otherwise have to be carried out either by an authorised person, or by an executor. For this reason alone, it is appropriate to tighten up or remove completely the option to use an attorney other than an authorised probate practitioner. Our preference would be for its complete removal, as one of the controls to ensure that the testator's wishes are respected. The use of an attorney provides an opportunity for fraud.

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

We agree that clarification of the Rules dealing with lack of mental capacity on the part of an executor is helpful.

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

Yes.

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

The use of Latin has largely disappeared from the court process. The change in name may also result in a proper understanding of the process and effect. We support the revised proposals.

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?

On balance, we do not consider any change to be necessary.

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 such a copy?

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

Yes. Official copies are required by banks, financial institutions and government agencies, but their circulation amongst third parties does need to fall under the control of the executors or their nominated agents.

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

Yes.

Question 20: Do you agree the routes of appeal?

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

We have no comments to make, in response to these questions.

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

It is entirely appropriate that the Probate Office should be entitled to charge an appropriate fee for pre-lodgement advice, and other significantly onerous additional services. We suggest that rather than being enshrined in the Rules, that the Probate Office should be given a general right to charge fees in appropriate circumstances, subject to prior consultation. The scale of fees should be published and readily available to the public.