

OPPOSING AN APPLICATION FOR PROBATE OR ADMINISTRATION

Response

3.1 (1) A person who opposes the grant of probate or administration to the applicant must file a response within 28 days after the advertisement required by Rule 2.5 was last broadcast or published.

[3.1.1] **Function of response** It is important for lawyers to understand that the function of a response is limited to generating consideration of the question of the grant. Other issues, such as the property of the estate, must be dealt with by separate and different proceedings and are not necessarily grounds for opposing the grant: *In re Estate of Kalsakau* [2007] VUSC 103; Prob Cas 1 of 2007 at [6], [7], [10]; *In re Estate of Molivono* [2007] VUCA 22; CAC 37 of 2007.

(2) A response must:

- (a) state that the person opposes the grant of probate or administration to the applicant; and
- (b) state the person to whom probate or administration should be granted; and
- (c) set out the address that is the person's address for service of documents; and
- (d) be in Form 12.

[3.1.2] **Costs** A party may be ordered to pay costs resulting from an improper response: *In re Estate of Kalsakau* [2007] VUSC 103; Prob Cas 1 of 2007 at [8] - [10].

Application of Civil Procedure Rules to opposition proceedings

3.2 (1) After a Response has been filed, the procedure to be used is the procedure set out in the Civil Procedure Rules, unless:

- (a) these Rules provide otherwise; or
- (b) the Court orders otherwise.

[3.2.1] **Scope of rule** It is important to note that this rule is not comprehensive of all proceedings under the *Queen's Regulation* (see [1.2.2]) or otherwise relating to the administration of estates. It applies only where an application under Part 2 has met with opposition.

(2) In particular, the Civil Procedure Rules apply as if:

- (a) the application is a claim; and

[3.2.2] **Whether application stands as claim** This paragraph generates confusion. A superficial reading of this paragraph suggests that an application made under Part 2, if contested, stands as the claim. That interpretation does not seem to be viable. Alternatively, the rule could be intended to mean that a person making an application under Part 2 (ie. an "applicant" as defined in r.1.5) is to be the applicant in any subsequent litigation. This seems to be a viable interpretation but of course it may be a different person who decides to initiate proceedings, such as a person who seeks a pronouncement against a will. In such a case, there having been no application under Part 2, this rule will not apply.

(b) the applicant is the plaintiff; and

- [3.2.3] Meaning of “plaintiff” The word “plaintiff” is not used in the *Civil Procedure Rules*. This is probably a typographical error intended to refer to “claimant”.

(c) the respondent is the defendant.

- [3.2.4] Meaning of “respondent” The word “respondent” is not defined, or used elsewhere, in these *Rules*. It is presumably intended as a reference to the person lodging opposition under r.3.1.
- [3.2.5] Additional defendants In many types of proceedings it will be appropriate for all potentially interested parties to be joined as defendants, not just the person filing a response.
- [3.2.6] Persons bound by judgment A judgment obtained in contested probate is in the nature of a judgment: *Young v Holloway* [1895] P 87 at 90; *Re Millen* [1975] 2 NZLR 605 at 607. It is binding against parties and, uniquely, against interested persons cognisant of the proceedings, even if never served: *In the Estate of Langton* [1964] P 163 at 179. Of course, it might be wise to join all interested persons for the avoidance of doubt: *Wytcherley v Andrews* (1871) 2 P&D 327 at 329.

(3) A document filed in the Court under the Civil Procedure Rules as applied by this Rule must have the same heading as in the forms in Schedule 1 to these Rules.**(4) The fees set out in Schedule 1 of the Civil Procedure Rules are payable.****Grant of probate and administration****3.3 Where the Court grants probate or administration in contested proceedings:**

- (a) the grant of probate must be in Form 9; and**
- (b) the grant of administration must be in Form 10 or 11.**

Caveats**3.4 (1) A caveat must be in Form 13**

- [3.4.1] Who may lodge caveat Reg.47(1) provides that “any person” may lodge a caveat. It is suggested, however, that only a person having or asserting an interest in the estate may lodge a caveat: *Re Devoy; Fitzgerald v Fitzgerald* [1943] St R Qd 137 at 143, 145-6, 148.
- [3.4.2] When caveat may be lodged Reg.47(1) provides that a caveat may be lodged at any time before probate or administration is granted or sealed.
- [3.4.3] Nature and duration of caveat Reg.47(1) provides that a caveat may be lodged against any application for probate or administration, or for the sealing of any probate or letters of administration. It is important to note that the lodgement of a caveat does not itself commence any litigation or proceedings: *Moran v Place* [1896] P 214; *Re Emery* [1923] P 184. The effect of the caveat is to prevent anyone but the caveator from receiving a grant or reseal until the caveat is removed under reg.48 or withdrawn under subr.(2).
- [3.4.4] Costs It is conventional elsewhere to treat the costs associated with lodging a caveat as costs in the cause of subsequent litigation. A person filing a caveat without reasonable grounds will usually be ordered to pay costs: *In Will of O'Driscoll* (1929) 29 SR (NSW) 559; 47 WN (NSW) 176.

(2) An application to withdraw a caveat must be in Form 14.

- [3.4.5] Discretion The *Queen's Regulation* does not refer to the possibility of withdrawing a caveat. This subrule refers to an application to withdraw a caveat, implying that removal is not automatic. It is noted, however, that Form 14 does not require reasons to be stated, nor is it required that the

application be accompanied by a sworn statement. It appears that a caveator can apply to remove the caveat at any time. The circumstances in which the court will grant the application are unknown. Presumably the court will be concerned to enquire into the circumstances of lodgement to ensure that appropriate consequential orders (including as to costs) are made.

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