

Wills, Trusts and Tax Team



## Contentious Probate Update

**Alex Troup, St John's Chambers**  
**Thursday 10<sup>th</sup> November 2016**

*"Alex is a rising star of the Chancery Bar specialising in contentious probate litigation who is helpful, robust and clear in his advice." Chambers UK (2017)*

## Standing



Randall v. Randall [2016] EWCA Civ  
494

## CPR r.57.7(1)



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“the claim form must contain a statement of the nature of the interest of the claimant and of each defendant in the estate”

## Creditor of beneficiary vs. creditor of estate



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“...the interests of the two types of creditor are fundamentally different. The interest of the creditor of a beneficiary is to ensure that the beneficiary receives what is due to him or her under the will or on an intestacy. The interest of a creditor of an estate is to ensure that there is due administration of the estate. The creditor of an estate is not interested in which beneficiary receives what.”

## CPR r.57.7(5)(a)



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A defendant may give notice in his defence that he does not raise any positive case, but insists on the will being proved in solemn form and, for that purpose, will cross examine the witnesses who attended the will

## CPR r.57.7(5)(b)



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If the defendant gives such a notice, the court will not make an order for costs against him unless it considers that there was no reasonable ground for opposing the will

## Some modern case law (at last!)



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Elliott v. Simmonds [2016] EWHC  
962 (Ch)

## The principles



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- No order = each party bears own costs
- Executor's costs out of estate
- Not unreasonable just because will is upheld
- Reasonable if draftsman is dead and witness is vague

## The cut off date



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The date “on which she, with her advisers, had sufficient material on which to form a view...”

## A salutary lesson



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Burns v. Burns [2016] EWCA Civ 37

## The evidence



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- Dementia
- MMSE – 19/30 and 20/30
- Solicitor draftsman fails to follow golden rule and makes no attendance notes

## Yet the will is upheld



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- Capacity
  - Will is rational, and simple
  - Deceased's letters
  - Ability to attend offices in person
- Knowledge and approval
  - Sol's evidence that read will out to her
  - Sol's opinion that she knew and approved

## Lack of knowledge and approval (1)



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Will drafted by a solicitor –  
Fitzgerald v. Henerty [2016] EWCA  
Civ 701

## Lack of knowledge and approval (2)



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Will not drafted by a solicitor –  
Poole v. Everall [2016] EWHC 2126  
(Ch)

## Fulton v. Andrew (1875) LR 7 HL 448, 471



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- "...it was perfectly competent for the jurors ... to say, we are satisfied that the testator was in a condition to make such a disposition as he has made with reference to his friends and relatives, but we are not satisfied, having only the evidence of the persons interested, that the effect of the clause with regard to the gift of residue was made clear to him."

## Additional factors



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- Change from previous wills
- Unsatisfactory explanation of will
- Isolating David from others
- Hostility to deputy