

Rules of the High Court (Amendment) Rules 2008

The Rules of the High Court (Cap. 4A)

Order 76 – CONTENTIOUS PROBATE PROCEEDINGS

Remarks:

Adaptation amendments retroactively made – see 25 of 1998 s. 2

Remarks

1. Application and interpretation (O. 76, r. 1)

(1) This Order applies to probate causes and matters, and the other provisions of these rules apply to those causes and matters including applications for the rectification of a will subject to the provisions of this Order.

(2) In these rules “probate action” (遺囑認證訴訟) means an action for the grant of probate of the will, or letters of administration of the estate, of a deceased person or for the revocation of such a grant or for a decree pronouncing for or against the validity of an alleged will, not being an action which is non-contentious or common form probate business.

(3) In this Order, “will” (遺囑) includes a codicil.

2. Requirements in connection with issue of writ (O. 76, r. 2)

(1) A probate action ~~must be~~ **may be** begun by writ.

Rule 55
Rec 12

(2) Before a writ beginning a probate action is issued it must be indorsed with a statement of the nature of the interest of the plaintiff and of the defendant in the estate of the deceased to which the action relates.

3. Parties to action for revocation of grant (O. 76, r. 3)

Every person who is entitled or claims to be entitled to administer the estate of a deceased person under or by virtue of an unrevoked grant of probate of his will or letters of administration of his estate shall be made a party to any action for revocation of the grant.

4. Lodgment of grant in action for revocation (O. 76, r. 4)

(1) Where, at the commencement of an action for the revocation of a grant of probate of the will or letters of administration of the estate of a deceased person, the

probate or letters of administration, as the case may be, have not been lodged in court, then –

- (a) if the action is commenced by a person to whom the grant was made, he shall lodge the probate or letters of administration in the Registry within 7 days after the issue of the writ;
- (b) if any defendant to the action has the probate or letters of administration in his possession or under his control, he shall lodge it or them in the Registry within 14 days after the service of the writ upon him.

(2) Any person who fails to comply with paragraph (1) may, on the application of any party to the action, be ordered by the Court to lodge the probate or letters of administration in the Registry within a specified time; and any person against whom such an order is made shall not be entitled to take any step in the action without the leave of the Court until he has complied with the order.

5. Affidavit of testamentary scripts (O. 76, r. 5)

(1) Unless the Court otherwise directs, the plaintiff and every defendant who has acknowledged service of the writ in a probate action must swear an affidavit –

- (a) describing any testamentary script of the deceased person, whose estate is the subject of the action, of which he has any knowledge or, if such be the case, stating that he knows of no such script; and
- (b) if any such script of which he has knowledge is not in his possession or under his control, giving the name and address of the person in whose possession or under whose control it is or, if such be the case, stating that he does not know the name or address of that person.

(2) Any affidavit required by this rule must be filed, and an office copy thereof and any testamentary script referred to therein which is in the possession or under the control of the deponent, must be lodged in the Registry within 14 days after the acknowledgment of service by a defendant to the action or, if no defendant acknowledges service and the Court does not otherwise direct, before an order is made for the trial of the action.

(3) Where any testamentary script required by this rule to be lodged in the Registry or any part thereof is written in pencil, then, unless the Court otherwise directs, a facsimile copy of that script, or of the page or pages thereof containing the part written in pencil, must also be lodged in the Registry and the words which appear in pencil in the original must be underlined in red ink in the copy.

(4) Except with the leave of the Court, a party to a probate action shall not be allowed to inspect an affidavit filed, or any testamentary script lodged, by any other party to the action under this rule, unless and until an affidavit sworn by him containing the information referred to in paragraph (1) has been filed.

(5) In this rule “testamentary script” (遺囑性質的文稿) means a will or draft

thereof, written instructions for a will made by or at the request or under the instructions of the testator and any document purporting to be evidence of the contents, or to be a copy, of a will which is alleged to have been lost or destroyed.

6. Failure to acknowledge service (O. 76, r. 6)

- (1) Order 13 shall not apply in relation to a probate action.
- (2) Where any of several defendants to a probate action fails to acknowledge service of the writ, the plaintiff may, after the time for acknowledging service has expired and upon filing an affidavit proving due service of the writ, or notice of the writ, on that defendant proceed with the action as if that defendant had acknowledged service.
- (3) Where the defendant, or all the defendants, to a probate action, fails or fail to acknowledge service of the writ, then, unless on the application of the plaintiff the Court orders the action to be discontinued, the plaintiff may after the time limited for acknowledging service by the defendant apply to the Court for an order for trial of the action.
- (4) Before applying for an order under paragraph (3) the plaintiff must file an affidavit proving due service of the writ, or notice of the writ, on the defendant and, if no statement of claim is indorsed on the writ, he must lodge a statement of claim in the judge's chambers.
- (5) Where the Court grants an order under paragraph (3), it may direct the action to be tried on affidavit evidence.

7. Service of statement of claim (O. 76, r. 7)

The plaintiff in a probate action must, unless the Court gives leave to the contrary or unless a statement of claim is indorsed on the writ, serve a statement of claim on every defendant who acknowledges service of the writ in the action and must do so before the expiration of 6 weeks after acknowledgment of service by that defendant or of 8 days after the filing by that defendant of an affidavit under rule 5, whichever is the later.

8. Counterclaim (O. 76, r. 8)

- (1) Notwithstanding anything in Order 15, rule 2(1), a defendant to a probate action who alleges that he has any claim or is entitled to any relief or remedy in respect of any matter relating to the grant of probate of the will, or letters of administration of the estate, of the deceased person which is the subject of the action must add to his defence a counterclaim in respect of that matter.
- (2) If the plaintiff fails to serve a statement of claim, any such defendant may,

with the leave of the Court, serve a counterclaim and the action shall then proceed as if the counterclaim were the statement of claim.

9. Contents of pleadings (O. 76, r. 9)

(1) Where the plaintiff in a probate action disputes the interest of a defendant he must allege in his statement of claim that he denies the interest of that defendant.

(2) In a probate action in which the interest by virtue of which a party claims to be entitled to a grant of letters of administration is disputed, the party disputing that interest must show in his pleading that if the allegations made therein are proved he would be entitled to an interest in the estate.

(3) Without prejudice to Order 18, rule 7, any party who pleads that at the time when a will, the subject of the action, was alleged to have been executed the testator did not know and approve of its contents must specify the nature of the case on which he intends to rely, and no allegation in support of that plea which would be relevant in support of any of the following other pleas, that is to say –

- (a) that the will was not duly executed;
- (b) that at the time of the execution of the will the testator was not of sound mind, memory and understanding; and
- (c) that the execution of the will was obtained by undue influence or fraud, shall be made by that party unless that other plea is also pleaded.

10. Default of pleadings (O. 76, r. 10)

(1) Order 19 shall not apply in relation to a probate action.

(2) Where any party to a probate action fails to serve on any other party a pleading which he is required by these rules to serve on that other party, then, unless the Court orders the action to be discontinued or dismissed, that other party may, after the expiration of the period fixed by or under these rules for service of the pleading in question, apply to the Court for an order for trial of the action; and if an order is made the Court may direct the action to be tried on affidavit evidence.

11. Discontinuance and dismissal (O. 76, r. 11)

(1) Order 21 shall not apply in relation to a probate action.

(2) At any stage of the proceedings in a probate action the Court may, on the application of the plaintiff or of any party to the action who has acknowledged service of the writ therein, order the action to be discontinued or dismissed on such terms as to costs or otherwise as it thinks just, and may further order that a grant of probate of the will, or letters of administration of the estate, of the deceased person, as the case may be, which is the subject of the action, be made to the person

entitled thereto.

(3) An application for an order under this rule may be made by ~~motion or~~ summons or by notice under Order 25, rule 7.

Rule 56
Rec 12

12. Compromise of action: trial on affidavit evidence (O. 76, r. 12)

Where, whether before or after the service of the defence in a probate action, the parties to the action agree to a compromise, the Court may order the trial of the action on affidavit evidence.

13. Application for order to bring in will, etc. (O. 76, r. 13)

(1) Any application in a probate action for an order under section 7(1) of the Probate and Administration Ordinance (Cap. 10) shall be for an order requiring a person to bring a will or other testamentary paper into the Registry or to attend in court for examination.

(2) An application under paragraph (1) shall be made by summons in the action, which must be served on the person against whom the order is sought.

(3) Any application in a probate action for the issue of a subpoena under section 7(3) of the Probate and Administration Ordinance (Cap. 10) shall be for the issue of a subpoena requiring a person to bring into the Registry a will or other testamentary paper.

(4) An application under paragraph (3) may be made ex parte and must be supported by an affidavit setting out the grounds of the application.

(5) An application under paragraph (3) shall be made to a master who may, if the application is granted, authorize the issue of a subpoena accordingly.

(6) Any person against whom a subpoena is issued under section 7(3) of the Probate and Administration Ordinance (Cap. 10) and who denies that the will or other testamentary paper referred to in the subpoena is in his possession or under his control may file an affidavit to that effect.

14. Administration pendente lite (O. 76, r. 14)

(1) An application under section 40 of the Probate and Administration Ordinance (Cap. 10) for an order for the grant of administration may be made by summons.

(2) Where an order for a grant of administration is made under the said section 40, Order 30, rules 2, 4 and 6 and (subject to section 60 of the Probate and Administration Ordinance (Cap. 10)) rule 3 shall apply as if the administrator were a receiver appointed by the Court.

15. Probate counterclaim in other proceedings (O. 76, r. 15)

- (1) In this rule “probate counterclaim” (遺囑認證反申索) means a counterclaim in any action other than a probate action by which the defendant claims any such relief as is mentioned in rule 1(2).
- (2) Subject to the following paragraphs, this Order shall apply with the necessary modifications to a probate counterclaim as it applies to a probate action.
- (3) A probate counterclaim must contain a statement of the nature of the interest of the defendant and of the plaintiff in the estate of the deceased to which the counterclaim relates.
- (4) Before it is served a probate counterclaim must be indorsed with a memorandum signed by a master showing that the counterclaim has been produced to him for examination and that three copies of it have been lodged with him.

16. Rectification of wills (O. 76, r. 16)

- (1) Where an application is made for rectification of a will, and the grant has not been lodged in court, rule 4 shall apply, with the necessary modifications, as if the proceedings were a probate action.
- (2) A copy of every order made for the rectification of a will shall be sent to the principal Registry for filing, and a memorandum of the order shall be endorsed on, or permanently annexed to, the grant under which the estate is administered.

(Enacted 1988)