

# Probate and the Administration of Estates

## Introduction

If you have been appointed as an executor in a deceased person's will, or are entitled to be an administrator if there was no will, we hope this guide will help you to understand what steps are required. In the event of a death, most families will wish to attend to such matters as the funeral or memorial service before dealing with estate business and this is entirely proper. However, we have noticed that if administration starts reasonably promptly and efficiently, problems of delay are avoided later.

## The Legal Right to Representation

The persons with lawful control over a deceased person's estate are the executors named in the will. If there was no will, then certain classes of relatives will have the right to apply for letters of administration, but may not take action until these are granted. Executors may on the other hand be able to act immediately but it is usually advisable for them to prove their lawful rights by obtaining a grant of probate – the words “prove” and “probate” having the same root. The term “personal representative” covers both an executor and administrator.

## Applying for a Grant

Special rules apply to intestacies and since they are (thankfully) rare, we shall describe the procedure where there is a will in these notes. In very broad terms the duties of the executor when applying for a grant of probate are:

- To determine the validity of the deceased's last will;
- To ascertain the extent of the deceased's assets and liabilities;
- To enquire as to whether the deceased made any recent lifetime gifts of capital (in particular during the last 7 years of the deceased's lifetime), and to obtain details; and
- To inform all relevant organisations connected with the deceased such as : the DSS, the deceased's former employer (who may have paid a pension), the deceased's bank(s) and the HM Revenue and Customs since it will be the executors' duty to agree any income or capital gains tax liability to the date of death.

This, in outline, is what the executors must do before a grant can be applied for, since there is a legal duty to make an accurate and factual return (called an Inheritance Tax account) of all relevant information to the HM Revenue and Customs when an application is made. Indeed an oath must be sworn by all the executors to this effect. In smaller estates, or in some cases if no inheritance tax is payable, the estate will fall into the provisions of an “excepted estate” in which case a full HM Revenue and Customs account is not required, although it is necessary to complete a short return and swear an executors' oath.

Of course, we shall assist with many if not all of these matters if we have been appointed by the executors to act in the administration of the estate.

### Who Should Apply for a Grant?

All the executors named in the will may usually apply to the Probate Registry for a grant of probate. However, it is not obligatory to do so, and there are two common ways to avoid applying if an executor does not wish to be involved.

The first is to agree to renounce probate. In this case, the right to control (or to share in control) over the estate is lost forever.

The second option is for an executor to have “power reserved” - this means that he will not apply for a grant initially but that his right to do so later is not totally extinguished.

Sometimes having several executors merely increases the paperwork (and postage!) without any obvious benefit to the estate, but it should be stressed that it is the right of all the executors named to prove if they wish.

### Executors' position

If an executor appointed by will decides to act then he or she must continue to act until the conclusion of the administration of the estate as it is not possible for an executor to retire (unless removed by a Court order).

Executors should be aware of their personal liability to the estate, although this extends only to the extent of assets received by them (or those that should have been received if the estate had been administered properly). For example, executors could be personally liable to pay tax, if (say) they had distributed assets to beneficiaries without keeping a sufficient tax reserve (and if they could not recover those assets from the beneficiaries). Although this appears onerous, it is extremely rare for a claim to be made against executors personally, and especially in cases when solicitors are instructed to act in the administration and their advice is followed.

### Inheritance Tax

Once the probate papers have been signed (the Inheritance Tax account) and sworn (the oath), they are ready to be submitted to the HM Revenue and Customs and the Probate Registry. It may at this stage be necessary to raise money to pay the inheritance tax (IHT) due. In cases where tax is due, it must be paid before a grant of probate can

be issued and if the tax is not paid within 6 months of the end of the month of the deceased's death interest will be charged. In some cases and, in particular in relation to land, it is possible to elect to pay IHT by instalments.

The full amount of tax is payable that relates to that proportion of the estate that lawyers call “personalty”. Personalty includes things such as furniture and jewellery, shares, cash, policies, and most other things except for land.

Money for the tax will usually need to be raised by way of an executors' bank loan (which we can organise), although a building society or bank where the deceased had an account will sometimes advance the balance on the account to assist.

### The Grant of Probate

Once the initial tax due is paid and the Probate Court is satisfied on the validity of the will and the identity of the executors, a grant of probate will be issued, usually about 3 to 4 weeks after lodging the probate papers.

The business of administering the estate can now begin in earnest. It is the executors' basic duty to reduce the estate to cash, pay legacies, debts and administration expenses, and distribute what is left to those entitled. This is sometimes the method adopted – but not always. It is always open to the executors to listen to the needs and wishes of the beneficiaries and to preserve certain assets which would otherwise be sold. (Indeed, the deceased may have expressed the wish that certain items be preserved).

Administering the estate may also involve dealing with the deceased's digital assets and online presence. There is no law governing this issue at present, but personal representatives should be aware of the various procedural demands they may face depending on the extent of the deceased's “digital legacy”.

In handling these situations, we shall always attempt to deal with matters as flexibly as possible, balancing the executors' strict legal duties with the wishes of the beneficiaries.

### Agreeing Tax Liabilities

The agreement of tax liabilities will often take longer than anything else. We have already mentioned the requirement for the executors to agree pre-death liabilities to income tax and capital gains tax ("CGT"). This is important, since these liabilities will generally be a debt in the estate, thus reducing its value for IHT.

Agreement of the IHT liability is also the duty of the executors. This may require valuations of all major assets, which in some cases may be conclusive (as in the case of stock exchange securities), but which may be open to argument (such as with land or private company shares). In these latter cases, protracted negotiations with HM Revenue and Customs agents will be necessary to arrive at the value of these assets for IHT purposes.

Where a will is written in favour of a surviving spouse, or charity, it will not normally be necessary to haggle over values – since no IHT will be payable. However, the probate value will be taken as the beneficiary's acquisition value for CGT if the asset is ever sold – and in any event the executors are required to establish a reasonably accurate value at the time of death.

Tax liabilities during the administration period will also be the responsibility of the executors, since income will be flowing into their hands, and sales may raise questions of CGT where assets have risen in value since death. A tax return has to be filed for each fiscal year (or part thereof) from the date of the death to the one in which the administration ends, and for this purpose we will prepare estate accounts, showing capital and income movements in the estate.

### Advertising for Creditors

If executors receive no notice of claims against the estate from creditors following placement of appropriate advertisements or notices in the London Gazette, local papers where the deceased owned property and other relevant papers (within a stated period of not less than 2 months from the date of the advertisement), the executors may distribute the estate without being liable to any such creditors. Following the placement of advertisements any creditors would have to make their claim against the beneficiaries directly rather than the executors.

If the executors do not advertise, creditors would be able to claim against them personally if there are no estate assets with which to pay liabilities.

### Claims against the Estate under the Provisions of the Inheritance (Provision for Family and Dependants) Act 1975

Certain persons including spouses, children, dependants and people who have lived with the deceased for a period of at least 2 years prior to the death may claim against the estate for financial provision. Such claims must be made within 6 months of the issue of a grant of probate or letters of administration. If executors have distributed assets within this time they may be personally liable if a successful claim is made against the estate.

### Estate Accounts

We believe that accurate estate accounts are one of the keys to professional estate administration. They enable the executors to:

- Ensure due administration of all assets and payments of all debts;
- Agree their liabilities with HM Revenue and Customs for income tax and CGT arising during the administration period and to agree IHT if necessary;
- Account to the beneficiaries in accordance with their fiduciary duties as trustees; and
- To make strategic decisions during the course of administration with regard to financial management and tax planning, if these are appropriate.

### Post-Death Tax Planning

This moves slightly away from the executors' main role of efficient administrators, to examine the larger questions which may arise.

Although a death is clearly a sad personal loss for those concerned, it does sometimes give the family a chance to consider longer-term financial planning. A measure of financial planning, provided it fits in with the surviving relatives' wishes and needs, can very often produce quite considerable tax savings – which in turn make other plans possible.

The legislation recognises that a certain amount of time is very often required to take stock – particularly if it is one’s husband or wife who has died. Tax concessions are therefore available for two years following the death, although it may be possible to take action after this if necessary. Some wills are drafted with these tax concessions in mind, but even if they are not, there are very often opportunities for arranging matters to the family’s better advantage. We shall advise on these, and will try where appropriate to bring forward suggestions where we think it is our professional duty to do so.

### Conclusion

It is for all the executors to decide whom they would like to appoint as solicitors to the estate. If you would like to instruct us, we shall provide you with further information regarding our working methods and our fees on request.

During the administration of the estate you should not hesitate to contact us, or to call a meeting, should any matter require discussion or clarification. It is our duty to assist you to complete the administration as quickly as possible, and we generally find that teamwork between the client and his or her professional advisers is the best way to achieve this.

**For further information, please contact:**



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