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Wills, Trusts and Probate

## A Guide to the Probate Process



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## When a person dies their personal representative (PR) is responsible for obtaining a grant of representation from the court, sometimes referred to as a grant of probate, from the court.

This gives them the legal authority to deal with the deceased estate and ensure that the person's wishes are met.

To help give you a better idea of the probate process we have prepared this guide to help you through the various stages involved in obtaining a grant of representation and the conducting of probate.

### What is a personal representative?

When somebody dies, they will normally have appointed a person to deal with their estate, which may include assets such as their home, finances, outstanding debts or liabilities and personal possession.

It is their role to:

- Collect in all the assets of the deceased.
- Pay the liabilities.
- Distribute the balance according to the deceased Will or the intestacy rules, in the absence of a Will.

The legal authority to undertake these tasks is granted through the grant of representation from the court.

### What is probate?

Determining who is entitled to the grant and whether any Will or codicil is valid is known as probate.

In most cases, there is not likely to be a dispute during this process and this is referred to as non-contentious probate.

However, if a challenge as to who is entitled to a grant or the validity of a Will or codicil is questioned, the matter becomes contentious.

In this guide we will predominantly focus on non-contentious probate matters, but if a dispute does arise it is important that you seek legal assistance at the earliest opportunity.

To find out how our experienced contentious probate team can assist if a dispute arises, please call **+44 (0) 20 7240 0521**.

### Grant of representation

A grant of representation proves that the PR has the authority to administer the estate by establishing the PR's title to the assets of the estate, so enabling the PR to collect in and deal with those assets.

*Almost every institution, such as a bank or the land registry, will not release the assets to the PR without seeing proof of the PR's title, in either the form of the grant or a copy of it, bearing the court's seal. A grant will also be needed if suing or taking legal action on behalf of the deceased estate.*

There are some assets which do not require the issue of a grant but unless the estate consists of these assets exclusively, a grant of representation is still required to deal with the other elements.

### Acting as a personal representative

The question of who may act as PR and apply for a grant depends on whether or not the deceased left a Will which is valid and which contains an effective appointment of executors.

### Executors

If the deceased made a valid Will it is likely to authorise a group of executors to act for the estate and the deceased assets vest in the executors at the date of death.

While this means that an executor could technically administer an estate without a grant, in practice, executors will still require a grant to prove title.

When dealing with an estate in which there is a Will appointing executors, it is necessary to:

- **Identify the executors**  
The appointment clauses of a Will identify the executor or executors. Wills appoint executors in a variety of ways.
- **Identify the scope of the executor's authority**  
The appointment clauses of a Will indicate the extent to which the executor can deal with the deceased estate.

## Administrators

Where a deceased individual did not make a Will or there is a Will but not an effective appointment of executors, the person intending to act as PR is referred to as an administrator. However, they have no authority until a grant of representation is obtained. A deceased assets will be vested in the Public Trustee until then.

In some cases, there may be a Will but no effective appointment of executors. This can occur when:

- The Will does not appoint any executors.
- All the executors die before the deceased and there are no substitute executors.
- The executors do not want to act.

The law sets out the order of priority of the persons who may apply for a grant of letters of administration. Those handling an estate must also consider whether or not the PRs who are entitled to apply for the grant are actually willing and able to do so. If a person is living abroad or is unwell, they may be unable or unwilling to take on this role.

## How many personal representatives may apply for the grant of representation?

Up to four people can apply for a grant of representation. However, typically only two PRs will apply for a grant to ensure that if there is a change of circumstance for one PR the remaining person can proceed with administering the estate.

Where the PR is an administrator, it is usually required to have a second administrator where the estate has:

- A minor who is entitled to benefit from the residuary estate.
- A beneficiary who has an interest in possession (IIP).

## Reporting to HM Revenue & Customs (HMRC)

As part of an application for a grant of representation, a PR will need to value the deceased estate and may need to report it to HMRC.

If it is not an excepted estate (see separate section) the High Court cannot issue a grant of representation unless HMRC has certified or given a receipt of an account of the estate to show that Inheritance Tax is either not due or has been paid.

The assets that must be reported to HMRC, can be broken down into three broad categories:

- Assets which the deceased could dispose of via a Will or which pass according to the intestacy rules, in the absence of a Will.
- Assets passing outside a Will or the intestacy rules.
- Assets liable to IHT by the operation of special statutes.

HMRC will use the value of an estate to assess whether any liability to IHT arises as a result of the deceased death. Any assets passed to beneficiaries is considered a transfer of value of the estate and therefore it must be assessed and any tax paid. The rules around IHT are complex and there are a number of reliefs and allowances which allow can allow a person to reduce their beneficiaries' exposure to IHT.

A PR must deliver the account within twelve months of the end of the month in which the deceased died or within three months of taking up the appointment, otherwise a penalty maybe levied. If a PR reports a taxable estate after the six-month period beginning from the end of the month in which the deceased died, interest is added to any IHT due.

To complete this report a PR must submit one of two forms:

- Where an estate meets all the conditions to qualify as an excepted estate, the form required is an IHT205.
- In all other cases, the report to submit is an IHT400 account.

## IHT on an estate

An estate is liable to IHT where the following conditions are met:

- Its value exceeds the applicable IHT nil rate band (nil rate band) in the tax year in which the deceased died (that is, from 6 April in one calendar year to 5 April in the following calendar
- The excess, or part of it, is not exempt from IHT. The exemption from IHT applies where the excess, or part of it, passes to:
  - the spouse or civil partner of the deceased;
  - a charity; or
  - another qualifying body recognised by HMRC as exempt from IHT.

IHT is charged at the following rates:

- Below the nil rate band allowance, the rate of tax is 0 per cent.

- On the balance, the rate of tax is:
  - 20 per cent for chargeable lifetime gifts;
  - 40 per cent on estates on death or 36 per cent where 10 per cent or more of the net estate is given to charity.

An estate or that part of it which is within the nil rate band (currently £325,000 per person) is not charged IHT. However, the nil rate band or part of it may be not available to the estate if the deceased used it up during their lifetime, for example by making:

- Gifts or transfers of value to trusts and companies which are chargeable to IHT.
- Potentially exempt transfer (PET) which have not become exempt transfers because the deceased has not survived seven years after making the transfers.

Any part of an estate that passes to a spouse or civil partner is exempt from IHT provided that both parties were domiciled or deemed domiciled in the UK or neither were domiciled nor deemed domiciled in the UK.

In addition to a deceased own nil rate band, where the deceased died on or after 9 October 2007, having survived their spouse or civil partner, the estate may take advantage of the unused percentage of the previously deceased spouse's or civil partner's nil rate band. This combined allowance will total £650,000 across both estates.

Individuals who die on or after 6 April 2017 can also benefit from an additional main residence nil rate band (residence nil rate band (RNRB)) if they leave their main residence to their direct descendants. The current RNRB is £175,000 and can be transferred to a surviving spouse or civil partner, meaning that a couple can pass on up to £1 million tax-free.

The RNRB also applies to estates where the deceased downsized by moving to a less valuable property or ceased to own property altogether, and where their direct descendants inherit other assets equivalent to the value of the residence at the date of sale.

## The assets of an estate

Assets that pass to beneficiaries according to the terms of a Will or the intestacy rules include those which the deceased:

- Owned outright.
- Owned jointly with others as a tenancy in common.
- May not have received by the time he died, such as an outright gift to him in the Will of someone else who died before him.

There are also assets outside a Will or the intestacy rules that can be passed on, which include:

- Any asset owned jointly by the deceased and other(s) as beneficial joint tenants, that is owned in such a way that, when the deceased dies, the surviving owner(s) own the asset automatically. This is called the right of survivorship where neither the terms of the deceased Will nor can the intestacy rules dictate who will inherit the asset.
- Nominated assets, that is, any asset which benefits an individual named by the deceased, regardless of the terms of the deceased Will or the rules of intestacy.
- Any gift made by the deceased which is conditional on their death (that is, a *donatio mortis causa*).

PRs will need to report any assets to HMRC which the deceased is considered to be beneficially entitled to, because of the meaning of certain statutory provisions. These include:

- Assets which are held in trusts in which the deceased had a qualifying IIP (section 49(1), IHTA 1984) or a purchased IIP (as defined by section 5(1B) of IHTA 1984) which the deceased became entitled to on or after 9 December 2009.
- Assets which the deceased gave away but from which he continued to benefit.

Some assets do not need to be reported for IHT purposes, which the legislation refers to as "excluded property". These are assets which the deceased was not entitled to benefit from during their lifetime and include:

- A discretionary lump sum from a deceased pension fund provided certain conditions are met.
- A life assurance policy written in trust for a named beneficiary who is not the deceased.

## Estate valuations

To calculate potential IHT liabilities, PRs will need to have the estate valued. This will initially be done via the deceased personal records, in both paper and electronic format, which will form part of the initial valuation.

This formal valuation will typically be gathered by contacting the various institutions which hold the assets of an estate, to request a valuation.

The value required for each asset is the value it would have had on the day the deceased died if sold on the open market.

PRs also need to take into consideration whether the deceased was a beneficiary of an estate of another deceased person which is still being administered.

To obtain the value of this estate they should make enquires to that estate's PR regarding the value of the current deceased entitlement at the date of their death.

Trustees of any trusts, where the deceased had an interest, should also advise the PR of the trust and the deceased entitlement as the value of the latter may be considered an asset of the deceased estate.

Enquiries must also be made into gifts made by the deceased. PRs should speak with the deceased family, or professional advisers that may have advised the deceased on financial matters or estate planning.

At this point, any debts owed by a person who dies can be deducted from the value of all the estate's assets. These will lower the value of the estate and could reduce the estate's IHT liability. It is, therefore, important to obtain any information about these liabilities.

## The seven year rule

One of the reliefs offered to an estate is commonly known as the seven-year rule. This states that assets will no longer be taken into account for IHT if the transfers of value made by the deceased was undertaken in the last seven years of their life.

The relief offered under this rule is tapered so that even gifts made within this seven-year period are taxed at a lower rate. Included within this rule are:

- An outright transfer or gift and the element of a gift which is present when an asset is sold for less than its real value. This type of transfer is called a Potentially Exempt Transfer (PET) because it is exempt from an IHT charge if the deceased made the transfer more than seven years before he died.
- A transfer of assets into a trust or a company, which is a chargeable lifetime transfer.

In addition, any chargeable lifetime transfer made by the deceased within seven years of a PET is taken into account due to the way in which the rate of IHT on a PET is calculated.

The reason for including an asset which a person no longer had by the time they died is that, by making a gift or transfer, the deceased reduced the value of their estate and they may have disposed of the asset in either way to minimise the estate's liability to IHT or to avoid it completely.

## Excepted estates

IHT is not due from an excepted estate, which includes:

- **Low-value estates**

The gross value of which does not exceed the applicable IHT nil rate band in the tax year in which the deceased died.

- **Exempt estates**

Where the aggregate gross value of the estate and certain lifetime chargeable transfers does not exceed £1,000,000 and the exemption from IHT available for a spouse or civil partner or a charity applies.

- **Non-domiciled**

A person who died domiciled outside the UK is not liable to IHT, provided the gross value of the estate in the UK is not greater than £150,000.

For expert advice on IHT planning when preparing a Will or administering an estate, please speak to our specialist private client team by calling **+44 (0) 20 7240 0521**.

## IHT liability

When a person dies the liability will usually pass to four classes of person, which include:

- The PR, who is liable for IHT on the free estate.
- The trustees of trusts in which the deceased had a qualifying interest.
- A person in whom the asset vests, for example, a beneficiary under a Will or the intestacy rule.
- An individual who has benefited from assets transferred to a trust before the deceased died or income from those trust assets.

The PR will usually only become liable if no one else comes within the categories of liability for the tax or it is unpaid 12 months after the end of the month in which the person died.

In which case, the PR's liability is limited to the value of the assets which they received or would have received but for their own neglect or default. Additionally, the PR becomes liable for IHT unpaid after that 12-month period on assets the deceased gave away but from which he continued to benefit.

The time allowed to pay the tax due is determined by one of two asset types. These are:

### Assets with the non-instalment option

This includes most assets and will need to be paid full six months after the end of the month in which an individual died.

### Assets with the instalment option

Where an estate includes any of the following types of assets, the IHT attributable to these assets may be paid in 10 equal yearly instalments:

- Land and buildings (most commonly the deceased home).
- Certain shares and securities.
- Farms.
- Farming business.
- Business or interest in a business (the net value).
- Timber.

The first instalment of IHT arising on the above types of asset is due at the end of the six-month period. The following nine instalments must be paid at yearly intervals on the same date.

Some institutions are willing to release funds for the payment of IHT before the court issues a grant of representation. These are usually institutions where the funds are easily accessible and tend to include:

- Bank and Building Society accounts.
- National Savings products, such as accounts, certificates, bonds.
- Cash held in a portfolio of investments.
- Investments held in a stockbroker's or investment manager's nominee account, which is held in the firm's name on behalf of the deceased.
- Gilt-edged securities.
- A loan from people who have already received assets from the estate without the need for a grant, for example, joint accounts or the proceeds of a life insurance policy held in trust for them.
- A bank loan. Other sources of funds should be considered before taking a loan as the arrangement fees and interest on the loan make it an expensive option.

Many of these institutions can cooperate with HMRC via a direct payment scheme where the funds are transferred directly to the tax authority or they can issue a cheque to the PR or their legal adviser but payable to the tax authority.

### Application for a grant of representation

Having established who will act as a PR and reporting IHT to HMRC it should be possible, in most cases, to make an application a grant of representation. This can be made when either:

- The PR has approved and signed the completed IHT205 form (where the estate is an excepted estate); or

- HMRC has returned schedule IHT421 bearing its stamp as evidence of the delivery of the account and, where relevant, payment of IHT. This is now an online application.

Firstly you report the value to in detail to HMRC online. HMRC will then inform you whether you can report everything online or you'll need the paper form.

For professionals they are still required to submit a IHT205 or IHT400. If you are doing an application in person please follow the guidance on the GOV.uk website.

The PR's application must be verified by a statement of truth, whether the application is made by post or online.

The document used to apply for a grant differs in detail depending on whether the deceased left a Will or died intestate. However, all grant applications require:

- The deceased details such as the deceased full name (and any other names the deceased used or was known by), address and former addresses (if relevant), and dates of birth and death.
- The PR's full name and address.
- The basis of the PR's right to apply for and take the grant of representation.

### Documents to submit when applying for grant

When the PR has signed the statement of truth, the papers to submit are:

- The application for the grant.
- The executed Will or executed Will and codicil(s) (where a Will or Will and codicil exist). All applications should include two A4 sized copies of the executed Will and any codicils.
- Schedule IHT421 where the estate is not an excepted estate and HMCTS forms have not been used in the grant application.
- Form IHT205 where the estate is an excepted estate.
- A probate court fee for the application. Currently, a non-contentious application for a grant where the deceased estate is valued at over £5,000 is subject to a fixed fee of either £155, if the application is made by a solicitor, or £215 for a personal application. There is no probate application fee for estates worth £5,000 or less and, under the fees remission scheme, applicants with limited financial means may apply for the fee to be reduced or waived in full.

## How we can help

Obtaining a grant of representation and handling the probate process can be complex and time-consuming, as well as emotional if the PR(s) and the deceased were closely related.

Seeking out support from a specialist solicitor can offer peace of mind and help to ensure the process is handled properly.

If you have any queries about the probate process or would like assistance please contact Jeffrey Cohen at [Jeffrey.Cohen@mackrell.com](mailto:Jeffrey.Cohen@mackrell.com)



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Jeffrey a highly experienced private client lawyer and focuses on all aspects of private client law, wealth management, tax and trust law including estate and inheritance tax planning. Jeffrey also deals with contentious probate and trust issues.

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