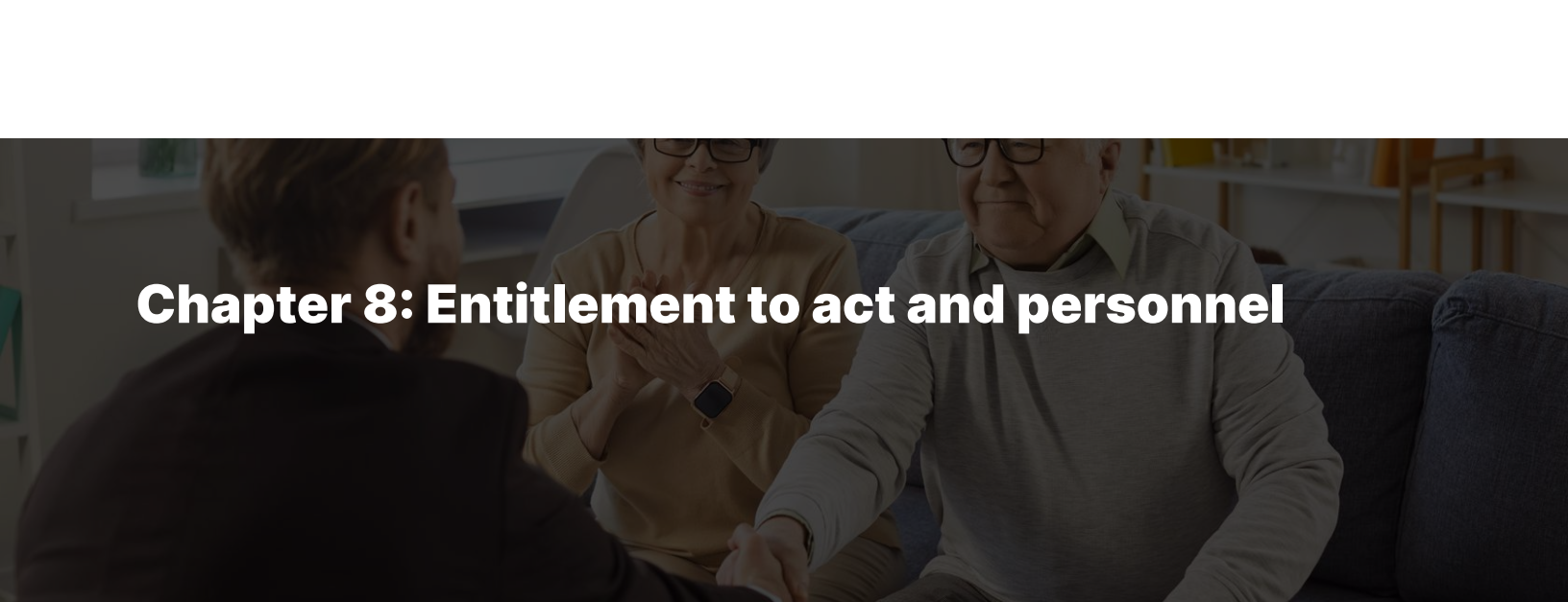




Chapter 8: Entitlement to act and personnel

Aims of this Chapter

8.1 Personal representatives

8.2 The different types of grant

8.3 The seller in a conveyancing transaction

8.4 Attorneys

8.5 The risks of parties who are not clients of the firm

Knowledge check

8.6 Chapter summary

Aims of this Chapter

A trainee in the private client department must be able to recognise the difference between an executor and an administrator and their authority to act because this will determine the type of grant of representation applied for. The trainee must also understand whether a seller has the legal entitlement to sell the property in question. In many cases, a person will appoint others to “step into their shoes” from a legal point of view. This is the process of appointing an attorney. At all times and throughout all transactions, practitioners must be aware of possible matters of professional conduct which could cause difficulties in a transaction including conflict of interest, the duty of confidentiality and undue influence.

This chapter will cover:

- appointment of personal representatives and authority to act
- grants of representation
- who is entitled to sell a property?
- powers of attorney, and
- parties who are not clients of the firm.



CONTINUE

8.1 Personal representatives

8.1.1 Appointment under the will – executors

An executor accepts the office (role) by making an application to the probate registry for the grant of probate. An executor named in a will cannot be forced to take out a grant. If such a person does not wish to be an executor, they must **renounce** probate under **s5 AEA 1925**.

To renounce the office, an executor must sign a written renunciation, which is filed at the probate registry. Generally, the executor must renounce the whole of the job: they cannot partially accept or renounce. It is possible to resign from the office of executor but remain a trustee appointed under the will.

If a person wants to renounce probate, it is extremely important to ensure that they do not do anything in relation to the winding up of the estate. By gathering the assets or paying the debts, they are said to be **intermeddling** in the estate. Such acts can be sufficient to make the person liable as an executor (or executrix) even if they do not want to do it, and they can incur personal liability for their actions.



Activity

Follow the link below to form PA15 – you will see that it is quite a straightforward form that is used to renounce probate. You will note that the executor must give a declaration that they have not “intermeddled” but they do not need to give a reason why they wish to renounce.

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Give up probate executor or administrator rights: Form PA15

Executors and administrators can use this form to give up their legal responsibility and role permanently (also known as 'renunciation') to apply for probate.

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Not all acts typically carried out by executors will constitute intermeddling: everything will depend on the intention with which they were done. In ***Long and Fever v Symes and Hannam [1832]***, the executors advertised in a local paper for claims against the estate but failed to apply for probate. It was held that they had accepted the office by intermeddling. A person may intermeddle in the estate without any authority under the will. This person is called an ***executor de son tort*** (literally, “as a result of his own wrongdoing”) and may incur

personal liability for carrying out these actions. Should a person intermeddle with an estate in such a way as to indicate that they do have the authority of an executor, they are accountable just as if they were an executor. Someone who carries out “humanitarian” acts, such as arranging a funeral or looking after the deceased’s pets, will not be regarded as an executor *de son tort*. An executor who does such things may still renounce.

If there are two or more executors, and one of them does not want to take up their appointment, an alternative to renouncing (which is irreversible) may be for them to have **power reserved**. This means that they would not take up the appointment at the outset of the administration – the other executor(s) would take the grant – but they would reserve the right to step in and take up the appointment later on if they so wished.

An application for a grant of probate by legal professionals must be made online see the link below.

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This guide is for probate practitioners using MyHMCTS. Before you can use MyHMCTS, you and your organisation must have completed other steps: 1. Set up HMCTS Payment by Account (PBA). 2. Registered your organisation with MyHMCTS.

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CONTINUE

8.1.2 Where there is no will – administrators

8.1.2.1 Who are the personal representatives on intestacy?

Clearly, it is necessary to identify someone who can deal with the administration of the estate. In the event of an intestacy, the personal representatives (PRs) are referred to as “**administrators**”. They are appointed by the court and derive their authority to deal with the estate from the grant of letters of administration issued by the probate registry. The persons entitled to apply for the grant of letters of administration are those who have a beneficial interest in (i.e. will inherit from) the estate of the intestate. The order of priority for obtaining the grant is contained in **r22 Non-Contentious Probate Rules 1987 (NCPR 1987)** and follows the order of entitlement to the intestate’s estate.

This order of priority is strictly applied and is as follows:

- surviving spouse/civil partner;
- children of the intestate, and issue of any child who predeceased the intestate;
- parents of the deceased;

- brothers and sisters of the whole blood (sharing both parents with the deceased) or their issue;
- brothers and sisters of the half-blood (sharing only one parent with the deceased) or their issue;
- grandparents;
- uncles and aunts of the whole blood or their issue;
- uncles and aunts of the half-blood (the half-brother or half-sister of the intestate's father or mother) or their issue;
- Treasury Solicitor on behalf of the Crown.

A person entitled under the rules does not have to apply, but anyone applying from a lower category has to explain why those higher up the list are not applying. Those higher in the list are "cleared off". For example, if a child of the deceased is applying, and the deceased had been married, the child will have to clear off the spouse by stating in their statement of truth that the couple had divorced, or that the spouse died before the deceased, or has renounced. Again, the maximum number of applicants is four, and if there are minor beneficiaries (under 18 at the date of the intestate's death) there must normally be at least two administrators (**s114(2) Senior Courts Act 1981**). Where there is more than one person in a particular category who is entitled to apply, any one of them can make an application to the probate registry for a grant of letters of administration without reference to the others. Where a person has a right to apply but does not wish to do so, they can renounce their right, and the next person in order can make an application for the grant.

If all the persons listed earlier have been cleared off, a creditor (someone who was owed money by the deceased) is entitled to apply for a grant.

As with executors, the court has the power to pass over (not appoint) a person who has priority to make an application for a grant where that person is unsuitable or unfit to act.

An application for a grant of letters of administration by legal professionals must be made online through the link below.

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This guide is for probate practitioners using MyHMCTS. Before you can use MyHMCTS, you and your organisation must have completed other steps: 1. Set up HMCTS Payment by Account (PBA). 2. Registered your organisation with MyHMCTS. 3. Set up your MyHMCTS user account. For further information and instructions, read the MyHMCTS registration guidance.

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8.1.2.2 Administration with will annexed

Administration with will annexed applies if there is a valid will and:

- there is no executor named in the will at all; or

- the executor has died before obtaining a grant; or
- the executor named does not want to act.

Clearly, someone has to deal with the testator's estate. Authority to act is obtained by applying for a **grant of letters of administration with will annexed**. If anyone other than an executor obtains a grant, either because there is no valid will at all or there is a will but the executor is not taking the grant, the person appointed as a PR is called an **administrator**.

r20 Non-Contentious Probate Rules 1987 (NCPR 1987) lists who is entitled to apply for a grant of probate, or a grant of letters of administration with the will annexed.

The order of priority is as follows:

- an executor named in the will (whose application will be for a grant of probate; the other applicants listed below will apply for a grant of letters of administration with the will annexed);
- trustees of the residuary estate (who are often the same people as the executors);

- a residuary beneficiary (including a person who has been left a life interest in the residue), or any person entitled to share in any residue not disposed of by the will;

- the PR of a residuary beneficiary (but not including a person who has been left a life interest in the residue) or of any person entitled to share in any residue not disposed of by the will;

- any other legatee, devisee or creditor of the deceased; and

- a PR of any other legatee, devisee or creditor of the deceased.

The list is applied to the terms of the will until someone is found with the right to apply. The order of priority indicates that (assuming there is no executor willing and able to apply for a grant of probate or a trustee of the residue) it is the residuary beneficiary who has the prior right to apply for a grant of letters of administration with will annexed. The rest of the order of priority is based on the degree of entitlement to the testator's estate.

An application for a grant of letters of administration with will annexed by legal professionals must be made online:



Apply for probate with MyHMCTS

This guide is for probate practitioners using MyHMCTS. Before you can use MyHMCTS, you and your organisation must have completed other steps: 1. Set up HMCTS Payment by Account (PBA). 2. Registered your organisation with MyHMCTS. 3. Set up your MyHMCTS user account. For further information and instructions, read the MyHMCTS registration guidance.

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Since an administrator obtains authority from the grant of letters of administration, they must await the issue of the grant before commencing the administration of the estate.

CONTINUE

8.1.3 Executor's authority to act

There is a **difference** between the ways in which executors and administrators receive their authority to deal with a deceased person's estate, and this gives rise to a difference in the

time at which they can start to deal with the assets.

An executor's authority is derived from the will itself. This means that when a testator dies, their executor is immediately entitled to deal with the deceased's assets and, in theory, needs no further documentation to appoint them. (Contrast this with the appointment of an administrator.)

Why, then, does the executor need to obtain a grant of probate?

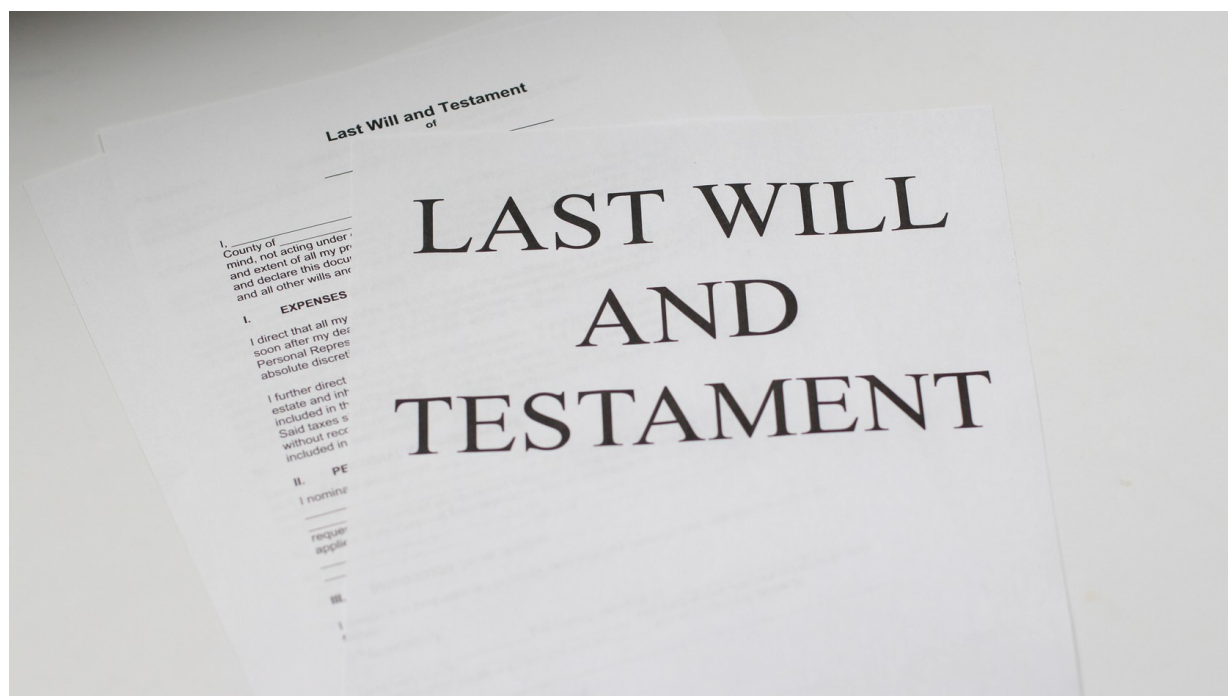
The purpose of the grant is to serve as sufficient evidence to relevant parties, such as the deceased's bank, that the deceased has died, that the will under which the executor is appointed was the last will (and was validly executed), and that the person claiming to be the executor **is** the executor. Once the bank has seen the grant, it can pay out the money, confident that it has paid the right person. However, it could be that all the deceased's assets were in such a form that no grant is needed – they might, for example, have owned only cash (i.e. actual notes and coins), some paintings and a few pieces of domestic furniture. In that case, an executor would be able to deal with the estate without obtaining a grant of probate. In other words, the grant of probate is **proof** of an executor's authority, not the source of it.

CONTINUE

8.2 The different types of grant

A grant of representation is the generic term for the legal order issued by the probate registry in the estate of a deceased person in England and Wales. The grant gives legal authority to prove that the personal representative can administer the estate and carry out tasks to administer the estate such as closing bank accounts, selling a property and selling shares.

The **two most common** forms of grant of representation are a grant of probate and a grant of letters of administration.



8.2.1 Grant of probate

A grant of probate is issued when a person has left a will naming an executor who proves the will through the probate court.

8.2.2 Grant of letters of administration

A grant of letters of administration is issued when a person has not left a will and the person entitled under the rules of intestacy applies to administer the estate.

8.2.3 Grant of letters of administration with will annexed

A grant of letters of administration with will annexed is used where a will is being proved but not by the executor named in the will or if no executor has been named. For example, a grant could be taken out by a named beneficiary. So, this type of grant is obtained if there is a will but no executor to administer the estate.

8.2.4 Other types of grant

There are other types of grants of representation which are used in more specific situations. An example might be where there has been a previous grant issued but the last surviving personal representation has died without completing the administration of the estate; in this case a grant of administration *de bonis non* is obtained.

8.2.5 The significance of the grant when dealing with the sale of a property in a probate matter

You may have to deal with the sale of a property which forms part of a deceased person's estate. This is commonly referred to as a "**probate sale**". You might be in the private client department or, more likely, you will be in the conveyancing department and will receive a request from a private client colleague to deal with the probate sale.



A partner in your firm might be the personal representative of the estate. Alternatively, your firm might be advising a personal representative who is the client of the firm in the administration of the estate.

Often, a property is the main asset in an estate, and the personal representatives will be keen to market the property for sale with an estate agent. The more swiftly a buyer can be found and the sale completes, the quicker the administration of the estate can proceed, and the beneficiaries receive their entitlement. It is this desire for speed that often means that a buyer will be found quite quickly, often before the grant is obtained. It is tempting to proceed quickly with the conveyancing but it is essential to remember that, strictly, the

contract should not be drafted until the grant is obtained because it is only at this point that the seller of the property can be identified for insertion into the contract.

Whilst the technical position is that an executor derives their authority from the will, and thus could deal with a property sale prior to the issue of the grant of probate, in practice, the sale is not going to proceed to exchange of contracts until the grant is issued.

CONTINUE

8.3 The seller in a conveyancing transaction

One of the first jobs when instructed in a conveyancing transaction is for the conveyancer to carry out identification and due diligence procedures as we have discussed earlier. One of the key reasons for doing this is for the conveyancer to be satisfied that the person instructing the firm is entitled to sell the property.

The conveyancer then needs to establish that the purported seller holds the legal estate to the property which is being sold and can thus sell the property or that they are entitled to sell the property (for example, because they are a personal representative acting in the estate of someone who has died).

How does the conveyancer establish that the seller is the owner of the property and entitled to sell? The answer to this will depend on whether the title to the property is registered or unregistered land.

8.3.1 Is the seller the owner of the property and entitled to sell?

As we have seen, if the title is registered at HMLR, the conveyancer will be able to download a copy of the register of title, usually via the HMLR portal. They will then need to inspect the register.

Remember that the register is in three sections:

(1) The property register —

This part of the register contains a description of the land and reference to the title plan, which is based on a large-scale Ordnance Survey map. The title plan accurately identifies the location of the registered property and shows the general position of the boundaries to the property.

The estate held will be stipulated as being freehold or leasehold. In addition, the register may contain details of any easements or covenants that exist for the benefit of the land (there are several rights shown in the sample register in **Chapter 3**).

If it is a leasehold title, the register will contain further entries, but these are outside the scope of this course book.

There may also be other entries in this part of the register.
In some cases, the entries may be linked to the title plan, with references to colourings on the plan.

(2) The proprietorship register —

This is headed with the category or grade (class) of title. The class of title determines the extent of the state guarantee. The Land Registry checks the title on first registration before deciding what category to award. There are different classes, depending on whether the land is freehold or leasehold.

The first entry in the proprietorship register is the name, address and date of registration of the registered proprietors (i.e. owners). The owner can list up to three addresses. One must be a postal address, but the others can be DX or email addresses. The address or addresses (termed the 'addresses for service') are the ones used by HMLR if it needs to contact the owners or serve any formal notices on them. It is therefore important that all addresses for service are kept up to date. HMLR enters postal addresses on the register in a format that matches official sources such as Royal Mail. In some cases, this means that postal addresses entered on the register can vary very slightly from addresses in application forms or deeds.



Link to Practice

If the registered proprietor wishes to have more than one type of address entered in the register, the Land Registry will enter the postal address first, followed by any DX address, followed by any email address.

An example of an entry with all the different types of addresses for service would be:

MEGHAN VICTORIA TAYLOR of 99 Town Street, Trowbridge,
Wiltshire BA14 5RF and of DX43111, Trowbridge and of mags-
vic1@brinternet.com.

It is important for a buyer's conveyancer to check that the registered owners are the persons stated to be selling in the contract. Where a different person is shown as seller, further enquiries will be needed. It may be, for instance, that one joint proprietor has died and the survivor is selling. If they were legal and beneficial joint tenants, the death certificate will be needed to prove the death – the buyer can then buy from the survivor. Title checks are explained in [Chapter 12](#).

There may be register entries to record the rights of third parties, notably any restrictions on the registered proprietor's powers to deal with the land. One common restriction is where joint owners hold the property as beneficial tenants in common. Upon registration by tenants in common, HMLR will enter a standard form restriction to show that the survivor alone cannot deal with the land (see [Chapter 6](#)).

(3) The charges register —

This part of the register shows any charges on the property, such as mortgages. The entry will show the name and address of the lender, but not the amount of the mortgage.

The charges register also contains notices of third-party rights, such as restrictive covenants, adverse easements and certain leases affecting the registered title (see [Chapter 3](#)). There are examples of covenants and an adverse right of way in the sample register in [Chapter 3](#).

Covenants may be set out in the register in full, or they may be referenced to the deed creating them if the wording is very extensive. In the latter case, the register will refer to the deed containing the covenants as being “**copy filed**”. The deed must then be obtained to see the actual wording of the covenants.

CONTINUE

8.3.2 How to identify the seller if the title is unregistered

Under the unregistered system, the title (ownership) of the seller is traced through title deeds belonging to the property and held either by the owner or by the owner's mortgage lender. The seller must demonstrate good title (called deducing title) by showing a good root (a sound legal starting point) of title which is at least 15 years old, and the title must then be proved from that root to the present. For instance, the seller could show that they bought the property in 1985 (over 15 years ago) and would produce the 1985 deed as the root of title, along with any later documents affecting the title such as mortgage deeds.

The following example shows a chain of title.

EXAMPLE OF A CHAIN OF UNREGISTERED TITLE

A builds a new house on a plot of land

A sells the house to **B**

B sells the house to **C**

C dies and leaves the house to **D** in his will

D sells the house to **E**

E gives the house to his daughter, **F**

F mortgages the house to the bank

At each stage there will be a deed or document dealing with the ownership of the house, so that a chain of title builds up. If F sells the house, the buyer will have to examine the chain of title as described earlier, for a minimum period of 15 years.

The title must be carefully examined by the buyer's conveyancer to ensure that there is no break in the chain of documentation showing the passing of the ownership from one person to another (e.g. a missing document). If the chain is broken in some way, this will cast doubt on the title and the seller's right to sell. As the title deeds are not registered in any central records, they are vulnerable to loss, damage or fraud.

The registered system is taking over, but both systems are currently in operation as there are still some unregistered titles in existence. This is because an unregistered title does not have to be registered until a specified event, such as a sale, takes place.

(1) Registration of land

From 13 October 2003, previously unregistered land must be registered when one of the following events take place ("triggering" events):

- a conveyance/transfer of the freehold, or a leasehold having more than seven years left to run – this includes transfers for value, by gift, by court order or by assent (on death);
- the grant of a new lease for more than seven years;

- the grant of a reversionary lease (a lease taking effect in the future) for a term commencing more than three months after the date of the lease, irrespective of the length of lease (e.g. a lease to a student for an academic year, granted in March to take effect in September); and
- the grant of a first legal mortgage.

HMLR's aim is to increase registration of land and to progress towards a comprehensive land register.

First registration occurs when unregistered land is registered for the first time.

For compulsory first registration, the requirement is that the application must be made within two months of the relevant event (e.g. sale). The Registrar has power to extend this period if there is a good reason to do so.

An application to HMLR for first registration must be accompanied by all the title deeds which relate to the unregistered land. HMLR will examine them and create a new register of title with a new title plan. In this way, the land is converted to the registered system, and the register takes the place of the title deeds as proof of title for all future dealings with the land.

We have seen that the conveyancer who is acting for a seller will often check whether the title to the land being sold is registered or unregistered by using HMLR's Map Search facility. If the title is registered, the conveyancer can obtain the title number and download the official copies. However, if the title is unregistered no title number will of course be available, and the conveyancer must establish the whereabouts of the title deeds. We have seen that the unregistered deeds are often held by a lender and that the conveyancer will obtain the title deeds by giving an undertaking to hold the deeds to the lender's order pending redemption of the mortgage.

The conveyancer must then check the title deeds to ensure that they can prove the seller's title by the production of an unbroken chain of ownership. The most recent holder of the legal estate in an unregistered title must be the seller (if the seller is still alive) or, the personal representative of the most recent holder of the legal estate if the seller has died.

The detail of this process of investigating an unregistered title is outside the scope of this course book. However, typically, the conveyancer will locate a conveyance which demonstrates that the seller holds the legal estate and is entitled to sell the property.

CONTINUE

8.3.3 The importance of obtaining instructions from all co-owners

If a conveyancer is instructed on a sale where the legal title is held by more than one party (remember that the legal estate can only be held by a maximum of four trustees), then the conveyancer must ensure that they obtain instructions from all of the co-owners to sell the property. This involves more than just taking identification documents and carrying out the usual due diligence in relation to all seller clients. In addition to doing these things, the conveyancer must ensure that they have liaised with all co-owners and received confirmation from all of them that they would like to sell the property for the agreed price and instruct the conveyancing firm to act.

Once the conveyancer is satisfied that all co-owners want to sell, it is possible for one client to take the lead and be the main point of contact for the conveyancer on the assumption that all co-owners are in agreement with this approach. The key point is that the conveyancer does not assume that this is the case.

We have seen that conveyancers must always look out for a conflict of interest or a significant risk of a conflict. If either of these situations arise, the conveyancer must decline to continue to act. Being satisfied that all parties want to proceed at the outset of a transaction is important, and the conveyancer must be satisfied that there is no conflict. This means that the conveyancer should be in no doubt that all co-owners want to sell.



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A common scenario where these problems might arise is where a firm is instructed by a husband and wife who want to sell their property. Sometimes, the husband will “take the lead” and will deal with the couple’s affairs. This can often mean instructing the estate agent and agreeing a sale and instructing a conveyancer. Many conveyancing firms now insist both parties come into the office with their identification documents to instruct the firm. Furthermore, many firms will also not accept identification documents from anyone other than the holder of those

documents. So, for example, a conveyancing firm may insist that a wife comes in with her documents and will not accept them from her husband. In this way, the firm can meet the wife and be assured that she also wants to sell the property.

Look out for matrimonial situations!

When a couple is going through a relationship breakdown, there is often a house sale involved. A conveyancer can act for both parties in this circumstance but you must be on the lookout for a conflict of interest. The conveyancer should carefully take instructions from both parties to be sure that they agree on the sale, the sale price and how the sale proceeds will be split between the couple when the sale completes. Sometimes a couple may each have a matrimonial lawyer to assist them with whom the conveyancer can liaise. However, if a conveyancer is in any doubt at all as to whether the couple can fully agree on all aspects of the sale, the conveyancer should decline to act for both of them as the risk of a conflict of interest will be too great.

CONTINUE

8.3.4 Is a surviving co-owner entitled to sell?

We have seen that the first important step for a conveyancer instructed on a sale is to be satisfied that the seller is entitled to sell. It is equally important for the buyer's conveyancer to check this point when they receive the contract papers, as we will see later in this course book.

Whether someone is entitled to sell a property can be complex, particularly if one party has died and the co-owners held as tenants in common and the survivor has lost mental capacity. Those more complex situations are outside the scope of this course book but we

do need to consider the more straightforward situation of what happens if we had two co-owners, one of whom has died.

Let's take this step by step.

As ever, the starting point is for the conveyancer to download official copies of the register entries and title plan when dealing with registered land.

The conveyancer should then check the proprietorship register because this will indicate who holds the legal estate.

If the proprietorship register is in two or more names, this tells the conveyancer that there is a co-ownership situation.

The conveyancer will then consider the proprietorship register to look for the Form A restriction. Remember if there is no restriction, the co-owners held the legal and beneficial interest as joint tenants, if there is a Form A restriction, they hold the beneficial interest as tenants in common.

If the conveyancer is faced with a situation where they are instructed by someone who is the sole surviving co-owner, the conveyancer must ask for the evidence of the death of the other co-owner which will usually be the production of the death certificate.

The conveyancer can make an application to HMLR via the portal (or by post if necessary) using form DJP (death of joint proprietor). If this form together with the death certificate is submitted, HMLR will remove the name of the deceased co-owner from the proprietorship register. Thus, this is how the surviving co-owner will end up being the sole holder of the legal estate.



Activity

Follow the link below and download HMLR's form DJP. Read the form. You will see that it is a very straightforward way of removing a deceased co-owner from the proprietorship register. You will use this form for the specific purpose instead of an AP1.



Deceased joint proprietor (DJP)

Application form DJP: remove the name of a joint proprietor from the register, after a death.

[READ MORE GOV.UK](#)

However, the steps discussed earlier are only **half** of the story. If the conveyancer is left with one co-owner on the legal title, it is then necessary to deal with the beneficial interest.

As we have seen, if there is no Form A restriction on the proprietorship register, the surviving co-owner is entitled to the entire legal and beneficial interest from the deceased co-owner and no further steps are required to perfect the title from a conveyancing point of view. A buyer can purchase the property from the surviving co-owner without further complications.

You will remember that if there is a Form A restriction on the proprietorship register, this means that the co-owners held as beneficial tenants in common. This could mean that the surviving co-owner is not entitled to the share in the property of the deceased. As we have seen, the parties may have severed the joint tenancy to enable them to leave their share in the property to someone other than their co-owner.

You will also remember that the answer to this problem from a conveyancing point of view is overreaching. This is the legal mechanism whereby if a second trustee is appointed in the transfer, this will have the effect of transferring the interests of any behind-the-scenes beneficiary from the land to the proceeds of sale. Thus, if a buyer pays their purchase money to two or more trustees, they will take the land free of any beneficial interests.



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The second trustee does not need to be registered as a co-owner on the proprietorship register. They simply need to be appointed as a second trustee in the transfer document, and they will sign the transfer along with the seller.

Remember that it will be necessary for the seller's conveyancer to also obtain identification documents and carry out due diligence on the person who is to be appointed the second trustee.

CONTINUE

8.4 Attorneys

The detail of the appointment of an attorney is outside the scope of this course book. However, the basic legal principle is that a person is entitled to appoint others to “step into their shoes” from a legal point of view. The mechanism to allow this is the appointment of an attorney. The person making the appointment is called the “**donor**”, and the person/s who take some responsibility for dealing with the affairs of the donor is the attorney.

Prior to October 2007, the most common way to appoint an attorney was to use an Enduring Power of Attorney (EPA). The key features of the EPA were first its simplicity, and second it could be used to enable the attorney to handle the affairs of the donor even if the donor still had mental capacity. Thus, it was very useful if the donor was going abroad for a period of time or was otherwise unavailable. In these circumstances the attorney could sign documents on the donor’s behalf and deal with their banking affairs with relatively little formality. If the donor became mentally incapable, it was then necessary to register the EPA with the Office of the Public Guardian (OPG).



It has not been possible to make an EPA since 1 October 2007, although EPAs made before then are still valid.

From that date, a donor can make two forms of Lasting Powers of Attorney (LPA):

- a health and welfare LPA; and/or
- a property and financial affairs LPA.

It is the second of these two which a donor would use to appoint an attorney to deal with the sale of their house, for example. There is a process to be followed to make an LPA and, unlike the EPA, it must be registered with the OPG before it can be used.

There are also other forms of power of attorney, such as a general power of attorney but these are outside the scope of this course book.

If a conveyancer is instructed on the sale of a property by an attorney and behalf of the owner of the property, the conveyancer must obtain the document appointing the attorney to be satisfied that the appointment is valid. The conveyancer will usually keep a certified copy of the power of attorney and will return the original document.

It will be necessary to demonstrate the attorney's authority to act for the buyer's conveyancer, accordingly it is prudent to include a copy of the certified power of attorney with the contract papers.

The conveyancer's client will be the owner of the legal estate, even if they lack mental capacity. It will be necessary to obtain identification documents for the owner of the legal estate and the attorney.



Link to Practice

Conveyancers who act for a buyer where an attorney is involved sometimes get caught out. When their client's purchase is complete, as we will see, the buyer's conveyancer must make an application to HMLR to register the buyer's title to the property. Part of the antifraud measures in this regard is to indicate on the HMLR application form (AP1 if the property is registered, FR1 if the property is unregistered and subject to first registration) that conveyancers have obtained identification for all of the parties to the transaction.

Note that HMLR requires the buyer's conveyancer to indicate that both the seller AND the seller's attorney have been subject to identification and due diligence procedures. Thus, it is prudent for a buyer's conveyancer to make an enquiry prior to exchange of contracts seeking confirmation that the seller's conveyancer has carried out these identification procedures.

CONTINUE

8.5 The risks of parties who are not clients of the firm

You have seen that practitioners must always be aware of the possibility of a conflict of interest arising between clients and/or ensuring that no one in the firm breaches the firm's duty of confidentiality to the client. There are some particular risks to firms relating to private client and conveyancing matters which we will consider briefly.

8.5.1 The beneficiary of an estate

If a firm is instructed by the personal representative of an estate, then the personal representative is the client of the firm. This will be the case where partners in the firm or laypeople are personal representatives. When someone dies, it is often the case that the beneficiaries of the estate are interested to know when the administration of the estate is concluded because it is generally only at this point that the beneficiary will receive their entitlement. Beneficiaries are entitled to be kept up-to-date as to progress of the administration of the estate but this must be with the agreement of the personal representatives.

A firm should **not** give information to beneficiaries without the consent of the personal representatives, otherwise the firm risks breaching their duty of confidentiality to their client. A firm should also take care not to lose sight of who it is acting for. Sometimes the interests of the personal representative and the beneficiary can become muddled, particularly if they are the same person.



CONTINUE

8.5.2 The non-owning occupier on a sale

Often an adult person will live with their family, whether a parent of property owners or adult child. We have seen that if someone is a non-owning occupier of a property, a conveyancer must be cautious and ensure that no advice is given to the non-owning occupier by the firm if the firm is already acting on the sale transaction. This is because of the risk of a conflict of interest. You will see in **Chapter 13** that a non-owning occupier will be asked to sign the sale contract to confirm that they will vacate the property on completion. The seller's conveyancer must ensure that the occupier is advised to take their own independent legal advice.



CONTINUE

8.5.3 Parents or family members gifting a deposit on a purchase

You have seen in **Chapter 7** that a conveyancer must ensure that they comply with all regulatory and money-laundering requirements including establishing a buyer client's source of funds and source of wealth in relation to a purchase. This investigation will often reveal that a family member is gifting part of the purchase price to the buyer. This is acceptable provided that the gift is declared to any lender involved. It is also important for the buyer's conveyancer to ensure that they do not advise the person/s making the gift due to the possibility of a conflict of interest.

CONTINUE

8.5.4 The lenders

When a buyer client is obtaining a mortgage, it is often the case that the buyer's conveyancer will also act for the lender. In this instance, the lender will also be a client of the firm and duties are owed to the lender as a result. The conveyancer must ensure that they maintain their duty of confidentiality to their buyer client and must be on their guard for potential conflict of interest. This is considered in more detail in [Chapter 15](#).

CONTINUE

8.5.5 Family members and elderly or vulnerable clients

All practitioners must ensure that their clients have sufficient mental capacity to instruct them, and that the client is not being subject to any pressure from a third party, such as a family member or carer. This is particularly important for practitioners in the private client department who tend to be acting for older and more vulnerable clients.

Refer to [Chapter 5](#) for the interrelationship between the requirements of the test for mental capacity to make a will (***Banks v Goodfellow***) and the **Mental Capacity Act 2005**.

There are various circumstances which could make a client “**vulnerable**” which includes clients who lack mental capacity to provide instructions, those who do have capacity but need extra support due to mental and/or physical disabilities and those who might be vulnerable to undue influence or pressure.



A particular example of this is where a testator may have been pressured or coerced into changing their will in favour of the person/s applying the pressure. This is very important in the context of making a will because it might be possible to challenge someone's will after their death on the basis that the will was made under undue influence.



Activity

Follow the links below to the CILEX Regulation guidance *Risk Management: Recognising and Responding to Consumer Vulnerability* and the Law Society's practice note on acting for vulnerable clients.

Please read the guidance documents and think about the issues and concerns that they highlight.

Risk Management: Recognising and Responding to Consumer Vulnerability



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Introduction

VIEW ON CILEXREGULATION

The **guidance from the Law Society** can be found at:

 **LAWSOCIETY**

Meeting the needs of vulnerable clients

This guidance will help solicitors adapt their practices to identify and meet the needs of vulnerable clients.

READ MORE LAWSOCIETY



Link to Practice

Working out whether someone has the capacity to instruct a lawyer can be a complex task. It is very important if you are at the beginning of your legal career to ensure that you are not in a position where you are asked to see a client alone who might not be in a position to instruct you properly. Please ensure that you ask for support and assistance if you are placed in this position. If you are uncertain about whether a client is able to instruct you for any reason, always seek the assistance of a more experienced colleague and do not see the client alone.

This is an area of practice where making comprehensive attendance notes of meetings and discussions is essential.

CONTINUE

8.5.6 Dealing with an aggrieved party

As you will see, conveyancing is stressful for the practitioner and the client. Sometimes, the client on the other side of the transaction is not able to contact their own conveyancer and will try to contact other professionals involved in the chain. This could mean that you find yourself taking a telephone call or receiving an email from a party on the other side of your transaction who is not your client. It might be tempting to try to calm the caller down and to tell them how the matter is progressing or even give them some outline advice.

However, you **must not** do this due to the conflict of interest that would arise. In this circumstance, all you can do is politely, but firmly tell the caller that you are unable to help them and suggest that they contact their own conveyancing firm and/or any estate agent involved. Ensure that you keep a detailed attendance note of any such conversation and tell a more experienced colleague.



CONTINUE

8.5.7 Mortgage brokers; other estate agents

Many people and professionals involved in a conveyancing chain including conveyancers acting for their respective clients, estate agents, mortgage brokers and managing agents to name but a few. Conveyancers will frequently receive telephone calls and emails from these parties chasing for progress on the transaction.

If you are in any doubt as to whether or not you have your client's authority to deal with this particular caller or email, decline to comment.

If you do give information about your client which they did not want you to disclose, your firm will be in breach of its duty of confidentiality to that client. You must always seek specific authority from your client to deal with a particular caller.



CONTINUE

Knowledge check

This knowledge check is a self-assessment to see how well you understood the content of this chapter and it does not count towards your course mark.

There are 3 questions in this knowledge check.

1. Joshua has recently died. His neighbour Sylvester, who is not Joshua's executor, has carried out the following actions. Which of them would be treated as intermeddling in the estate?

(Select 2 correct answers)

-
- ☐ a. Arranging the funeral
 - ☐ b. Feeding Joshua's dog
 - ☐ c. Selling Joshua's furniture
 - ☐ d. Paying Joshua's outstanding plumber's bill

SUBMIT



Complete the content above before moving on.

2. Michaela has recently died in Chesterfield without a will. She never married or entered into a civil partnership. She has no children but her father Peter and her cousin Spenser are still alive. How will her estate be distributed?



a. All to Peter



b. All to Spenser



c. Half each to Peter and Spenser



d. All to the Crown

SUBMIT



Complete the content above before moving on.

3. 31 Church Street is a house on registered land. It includes a driveway over which the owners of 32 Church Street have an easement. In which of the following registers at the Land Registry will this easement be described?

- ☐ a. Property
- ☐ b. Proprietorship
- ☐ c. Charges

SUBMIT



Complete the content above before moving on.

8.6 Chapter summary

(1) An executor is appointed in a will and takes out a grant of probate.

(2) If there is no will, an intestacy arises.

(3) The personal representative on an intestacy is called an administrator, and the order of priority for obtaining the grant of letters of administration is in **r22 Non-Contentious Probate Rules 1987**.

(4) If there is a valid will but no executor, the administrator will take out a grant of letters of administration with will annexed, and the order of entitlement is contained in **r20 Non-Contentious Probate Rules 1987**.

(5) The executor's authority to act derives from the will, despite this, a grant of probate will be required to confirm authority if there is a sale of a property within the estate.

(6) In a registered title, the registered proprietor is entitled to sell the property.

(7) In an unregistered title, the seller is traced through the title deeds and the title must start with a good root.

(8) When an unregistered title is sold, an application to HMLR for first registration of the title must be made within two months of completion.

(9) A conveyancer must ensure that they take instructions from all owners of a property on a sale and must avoid a conflict of interest.

(10) If a Form A restriction appears on the proprietorship register, this denotes that the registered proprietors hold the beneficial interest as tenants in common; if there is a sole surviving tenant in common, a second trustee must be appointed to overreach the beneficial interest.

(11) If there is no Form A restriction on the proprietorship register, this denotes that the registered proprietors hold the beneficial interest as joint tenants and a sole survivor can give a valid receipt for purchase money.

(12) A person is entitled to appoint others to “step into their shoes” to enable someone else to deal with their affairs. They will make a power of attorney and the person appointing the attorney is called the donor.

(13) Enduring powers of attorney are still valid but it has not been possible to make a new one since 1 October 2007.

(14) From 1 October 2007, a donor can make two forms of LPA:

- (a) health and welfare LPA; and/or
- (b) a property and financial affairs LPA.

(15) Practitioners must be wary of conflicts of interest arising, particularly in relation to parties who are not clients of the firm such as:

- (a) the beneficiary of an estate
- (b) the non-owning occupier on a sale
- (c) parents or family members gifting a deposit on a purchase

(16) Practitioners must ensure that their clients have sufficient mental capacity to instruct them and that the client is not subject to undue influence from another.

You have completed Chapter 8.

EXIT