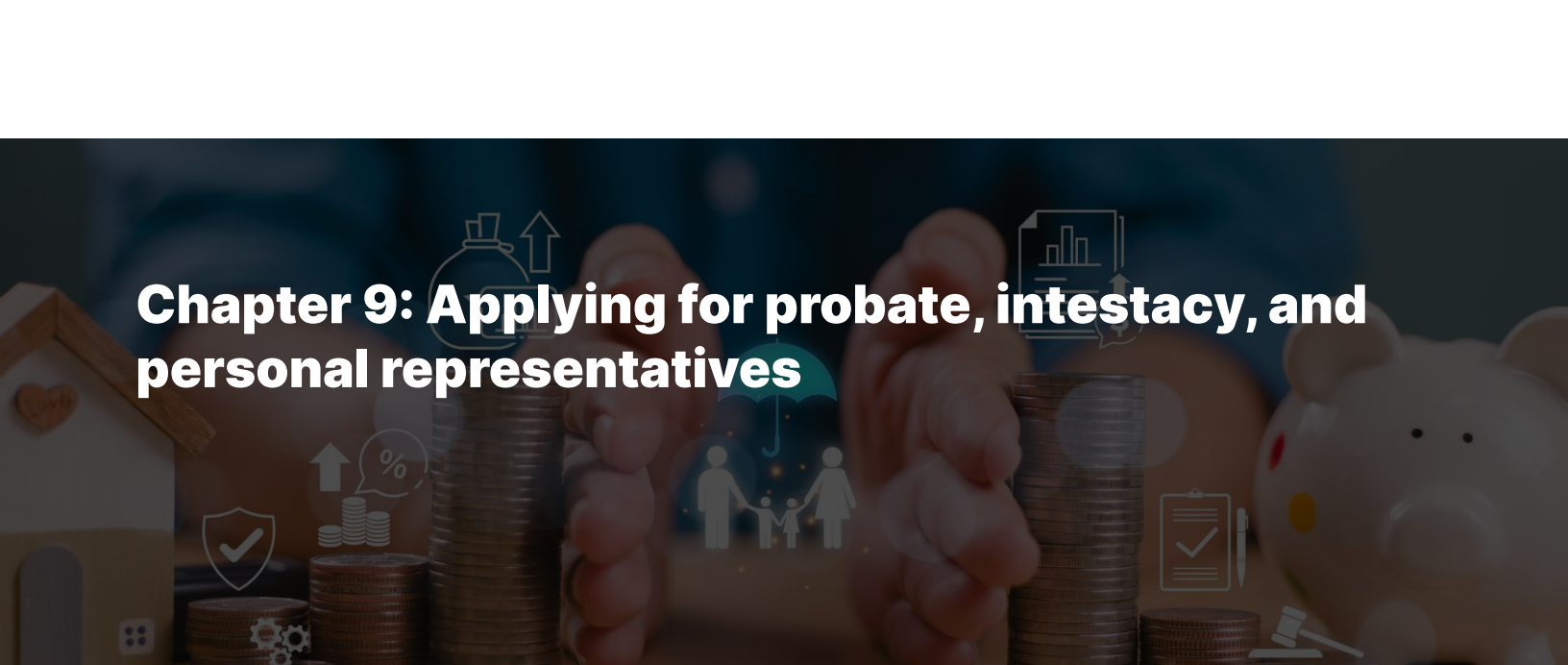




Chapter 9: Applying for probate, intestacy, and personal representatives

- ≡ Aims of this Chapter
- ≡ 9.1 Preliminary steps when someone has died
- ≡ 9.2 Circumstances where a grant is not required
- ≡ 9.3 Applying for a grant of probate – in outline
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- ≡ Knowledge check
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Aims of this Chapter

A trainee in the private client department must know the key steps to take when someone has died. The trainee must know the basic procedure to obtain a grant, by making an application both online and by post. It is important to recognise what assets fall within an estate and those that do not. They must be able to recognise when an intestacy or partial intestacy might arise.

This chapter will cover:

- key steps to take when someone has died
- circumstances where a grant is not required
- how to apply for a grant
- intestacy in outline, and
- powers duties and responsibilities of personal representatives (PRs).

We will consider in outline the key steps to take when someone has died. This is a complex area, and the detail is beyond the scope of this course book.



[CONTINUE](#)

9.1 Preliminary steps when someone has died

When someone dies, the immediate priority of family members is usually arranging the funeral. Unless the will has to be checked for details of funeral wishes, in the majority of cases the relatives will only consult a solicitor afterwards. In many cases, though not all, the relatives have passed the stage of the rawest grief and are starting to focus on practical arrangements and money issues by the time of the first interview with the legal adviser. Sometimes, family feuds, which may have been suppressed during the deceased's lifetime, will already have started to emerge. The legal adviser must first identify their client.



Where the deceased left a will, the executors will be the clients, and the legal adviser must carry out the standard client care requirements, including the money-laundering checks. In this chapter we will consider the procedures for obtaining a grant of probate but many of the same steps are required to obtain other types of grants.

It is likely that some tasks will have been carried out by the family or personal representatives before a solicitor is instructed, such as:

- registering the death;
- arranging the funeral;
- notifying government organisations, banks, building societies of the death; and
- locating the will if there is one.

CONTINUE

9.1.1 Initial steps

When a personal representative instructs a firm, the steps to take when the client comes to see you are as follows:

1

See the executors

See the executors and other appropriate relatives for an initial interview. This may be conducted at the office or you might visit an elderly client, or one personally known to the firm, at home. This interview is an information-gathering exercise, and it is helpful if the executors and relatives have been asked beforehand to put together as much of the deceased's financial documentation as possible. This will include the will (if your firm does not already hold it), the death certificate, building society passbooks, bank statements, insurance policies, utility bills, etc. In some cases, the client will have kept their affairs in meticulous order – in others, the legal adviser will be presented with a suitcase of jumbled paperwork covering several decades. It is helpful to use a checklist to make sure that all possible assets and documents are obtained.

You will also need to take copies of forms of identification (e.g. copy passports) from the executors (or, if partners in your firm are the executors, possibly from the residuary beneficiaries).



Practice Point – digital assets

As people have moved their financial affairs online in recent years, new challenges have arisen for probate lawyers who are seeking to find out what the deceased owned. Bank accounts and other investments may have been dealt with entirely online with no physical paper trail to follow. It is important to obtain copies of the deceased's bank statements (preferably going back six years) as soon as possible and then investigate transactions which may lead you to other institutions with which the deceased may have had accounts. The death notification service allows you to notify banks and other organisations with whom the deceased had online accounts. **Note**, however, that not all financial institutions participate in this service.

DEATHNOTIFICATIONSERVICE



The Death Notification Service

Internet Explorer was retired on 15 June 2022. It is no longer supported by Microsoft and may not be secure.

READ MORE DEATHNOTIFICATIONSERVICE

Crypto-currency and other digital assets may be difficult to access when a person has died. There may also be non-financial assets such as photos and social media accounts which the executors and family may wish to access. It is important to access the deceased's mobile phone and other devices.

Some suggested approaches for unlocking a deceased person's iPhone are set out at:

TRUSTWORTHY

Trustworthy.

How to Unlock an iPhone When Someone Dies (5 Things to Try) - Trustworthy: The Family Operating System®

When a loved one passes away, you may need to access crucial information kept on the deceased one's iPhone. But can you unlock an iPhone after someone dies?

[READ MORE TRUSTWORTHY](#)

A wider discussion of these issues is available at:

 **THE GAZETTE**



THE GAZETTE

OFFICIAL PUBLIC RECORD

Can you legally access someone's phone when they die...

Following the second reading of the Digital Devices (Access for Next of Kin) Bill in parliament, Charlotte Huxley of Stephenson's explains whether you can access someone's digital assets when they die.

[READ MORE THE GAZETTE](#)

Probate practitioners are still developing strategies to deal with this fast-moving area, but it is really important to remind testators to give as much information as possible to their executors and family beforehand. This may be by way of a separate memorandum which may include instructions as to the testator's wishes in respect of their social media accounts as well as details of the deceased's digital wallet required to access their cryptocurrency.



2

Obtain approval of your fees

If you carry out work for which your fees have not been agreed in advance, you cannot expect to be paid.

It is therefore essential to discuss the question of your fees as soon as possible. Initially, this might be done verbally, but you will need to confirm the details in writing before carrying out any substantial amount of work. The normal practice is to prepare a “**terms of business**” letter, in which you explain how your fees are worked out (such as your and colleagues’ hourly rates), and give an estimate of the likely costs, either for dealing with the entire administration, or for work up to a certain point, such as applying for the grant. The client will sign one copy of the letter and return it to you as confirmation that they accept your terms.

If (as often happens) unforeseen complications arise during the administration, and it looks likely that your costs will exceed your initial estimate, you must explain this to the client and let them have a revised estimate **before** you do the work.

If you carry out a significant amount of work before sending your client the terms of business letter, or if your costs substantially exceed the agreed estimate, the client may refuse to pay. Remember the requirements of **Outcome 5.7 CILEX Code of Conduct and para 8.7 SRA Code of Conduct for Solicitors 2019**.

3

Open a file

You will write standard letters to the relevant asset holders (e.g. to the building society) to obtain details of amounts due with accrued interest to the date of death. You will send a certified copy of the death certificate with the letter. As details of assets come in, you can write them either on a checklist or directly onto an Inheritance Tax Account or IHT

worksheet form together with details of the debts. Some firms use specialised probate case management software. You will write to creditors indicating that you have their accounts and that payment will be made in due course. If appropriate, you can write to legatees (e.g. more distant relatives) telling them of the legacy and saying that it will be paid in due course.

4

Value the estate

Professional valuations may be needed in the case of a house or shares – you might instruct a broker in the latter case.

If there is, for example, a lot of antique furniture or jewellery in the estate, you will need to instruct an expert who will prepare a valuation for probate purposes.



These advertisements are to protect the PRs against personal liability if an unknown claimant comes forward later. In law, the PRs who have distributed the assets of the estate remain personally liable to any unpaid beneficiary or creditor, even though they are unaware of their claim at the time of distribution. The object of **s27** is to protect PRs against such liability. The PRs will give notice of intention to distribute, requiring any person interested as beneficiary or creditor to send particulars to the PRs within a stated time limit (minimum two months from date of notice).

The notice is given by:

- (a) advertisement in the *London Gazette*; and
- (b) advertisement in a newspaper circulating in the district in which any land to be distributed is situated (in practice, often a local paper and usually ignored if there is no land in the estate); and
- (c) advertisement in any local or national papers which might be appropriate in the circumstances (e.g. if the deceased had a business in Swansea, it might be best to advertise in the local paper there in case of creditors). If in doubt as to what advertisements are appropriate, the PRs should apply to the court for directions.

Once the time limit has expired, PRs may distribute the estate, having regard only to the claims of which they then have notice. They will not be personally liable to any claimant who subsequently appears and of whom they had no knowledge or notice.

It is important to appreciate that **s27** affords protection only to the **PRs**. A disappointed claimant may still try to recover from the persons to whom the PRs have distributed the assets (including the PRs themselves, if entitled as beneficiaries).

Bear in mind that administrators (with or without a will) obtain their authority from the grant, so they should not run the statutory notices until the grant has been issued. Executors can run them as soon after the date of death as they wish.

CONTINUE

9.1.2 Caveats

If a person has a concern about whether someone who applies for grant has the right to do so, they can make a court application (not the probate registry) to consider the matter. The applicant will enter a **caveat** (pronounced “cav-ee-at”) to temporarily stop the grant being issued. They are often used to create a “breathing space” when someone has a legal question about a will or a probate applicant. This gives the person entering the caveat the time to check if there are grounds to oppose an application for a grant.

To enter a caveat, the applicant must be 18 years or over and have an address in England and Wales and must be able to show that they have one of the following interests in the application:

- an interest – that is, they are entitled to share in the estate; or
- a contrary interest – that is they have a different interest from the applicant for the grant.

CONTINUE

9.1.3 Citation

Generally, personal representatives have the “**executor’s year**” from the date of death within which to administer an estate. This is not a binding or legal timeframe but is taken as the generally accepted length of time that it will take to deal with the administration.

Unsurprisingly, a potential beneficiary will want the administration dealt with in a timely fashion to ensure that they receive their entitlement. In general terms, a citation is a method to try to advance the estate administration by forcing a party with a right to the grant to act.

CONTINUE

9.1.4 Administration of the deceased’s property

The deceased’s estate is administered in accordance with the rules contained in AEA 1925.

The PRs are responsible for dealing with the entire administration of the estate. This can be broken down into two main stages: pre-grant and post-grant.

The main stages are listed below.

Before the grant is issued, the PRs will:

- establish whether or not the deceased left a will;
- contact all relevant financial institutions (banks etc.) to advise them of the death and obtain values of assets and liabilities; obtain valuations of any house, chattels, etc.;
- advise beneficiaries of their entitlement; and
- prepare inheritance tax forms, arrange payment of appropriate tax, and apply for the grant.

Once the grant has been issued, the PRs will:

- collect in the assets;
- pay liabilities;
- prepare estate accounts, setting out details of all sums received and paid out, for beneficiaries to approve; and
- distribute the estate.

Provided they act in accordance with their statutory powers, PRs incur no personal liability in administering the estate.

CONTINUE

9.2 Circumstances where a grant is not required

A grant is not always necessary. In some cases, the PRs may deal with the estate without a grant.

9.2.1 Small payments

One such instance is where the estate consists only of certain small sums. Small sums registered in the name of the deceased may be paid over without production of a grant where orders have been made under the **Administration of Estates (Small Payments) Act 1965 (AE(SP)A 1965)** permitting this to be done.

AE(SP)A 1965 confers a discretion only, and this is subject to an upper limit (currently £5,000 in relation to each item: if this figure is exceeded, a grant is needed for the full amount, not just the excess over £5,000). In practice, banks often allow larger sums to be paid out.

Subject to this, payment can be made to the PRs or beneficiaries in respect of:

- money held in the National Savings Bank, National Savings Certificates or Premium Bonds;
- money invested in a building society (**Building Societies Act 1986**); and
- sums payable on the death of a member of a trade union, industrial or provident society or a friendly society.

Some other types of property do not need a grant in order to be dealt with; where the estate consists solely of these types of property, no grant will be necessary.

CONTINUE

9.2.2 Property held as joint tenants

Where the deceased owned property with another (e.g. spouses or civil partners owning a house or bank account together) as a **beneficial joint tenant**, it will pass automatically on their death to the surviving joint tenant. This is known as the “**right of survivorship**”. The property does not pass to the PRs or pass under the will (compared with a beneficial tenancy in common) and no grant is required. Note that the deceased's share of the property does form part of the estate for IHT purposes.

NB Do not confuse the **right of survivorship** with a **survivorship clause**.

Note the following points:

- A grant is usually necessary to enable the PRs to deal with the estate.
- The property (estate) passing under the grant does not include joint property passing by survivorship, or nominated property, as no grant is needed to deal with these. The estate passing under the grant (also called the estate for probate purposes) includes assets and liabilities in the deceased's own name which are not jointly held or nominated.
- The deceased's share of joint property and nominated property **do** have to be taken into account for IHT purposes. This means that the estate for IHT purposes will be larger than the estate passing under the grant (for probate purposes) if nominated or joint property has to be added on.

The terminology is summarised in **Figure 9.2**.

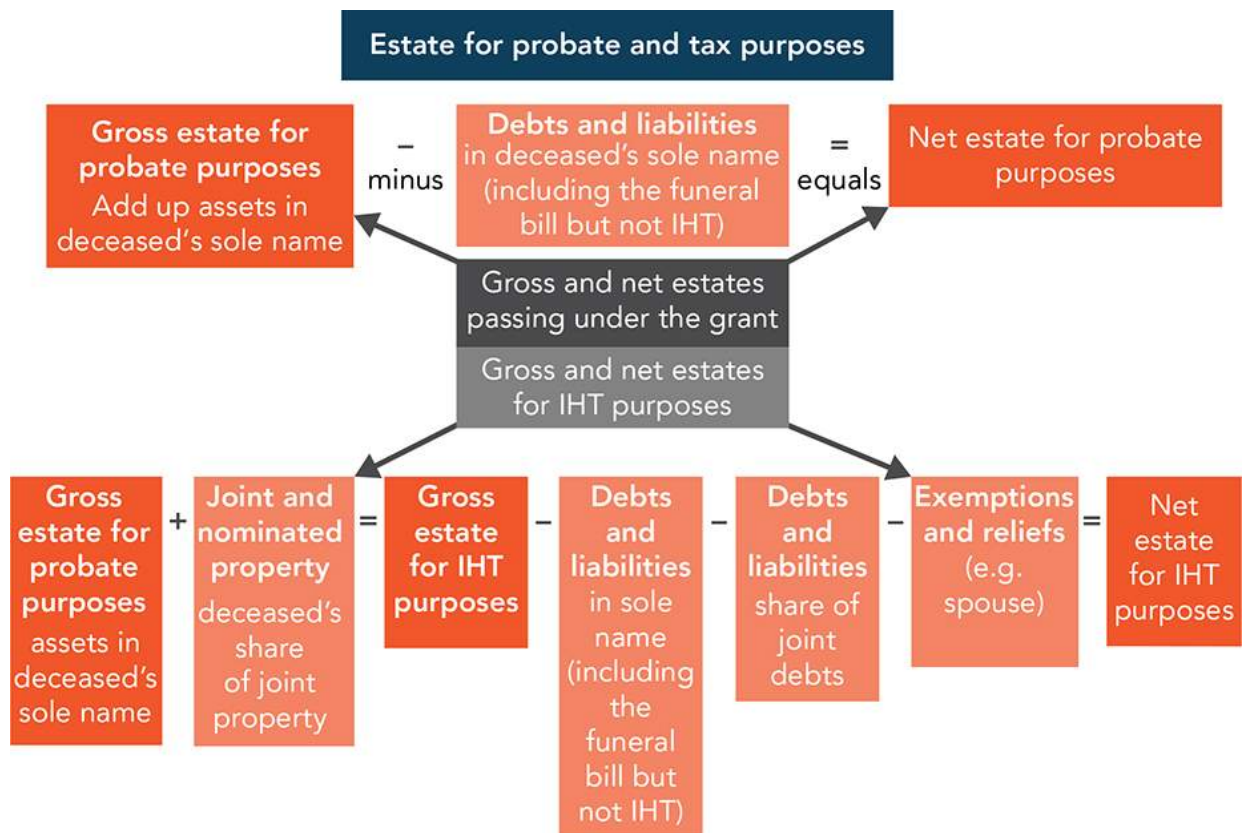


Figure 9.2

CONTINUE

9.2.3 Life assurance policies

9.2.3.1 Trust policies

Under **s11 Married Women's Property Act 1882**, a policy of life assurance expressed to be for the benefit of a spouse/civil partner and/or children creates an immediate trust in their favour. On death, the sum insured is paid to trustees for the named beneficiaries directly.

9.2.4 Pension schemes

Production of a grant will not be necessary for certain policies because the property is not part of the calculation of the estate assets for either probate or IHT purposes. Certain categories of property may form no part of the deceased's estate whatsoever (because they had no beneficial interest) and may therefore be dealt with on production of a death certificate.

Pension scheme benefits. Many occupational pension schemes are drafted so that the benefits payable do not form part of the member's estate on their death. They are payable at the discretion of the trustees of the scheme – sometimes the member may indicate their wishes, though this is not binding on the trustees.



CONTINUE

9.2.5 Life interests in trust property

Where a beneficiary is given an interest in trust assets which is only for the beneficiary's lifetime, that usually gives them the right to receive income for the property for their lifetime and/or to live in the trust property. However, as this is only an interest given to the beneficiary for life, this entitlement does not form part of the estate of the beneficiary when they die.

CONTINUE

9.2.6 Statutory nominations

This is property nominated independently of any will by one person to another. It is now only possible to make a statutory nomination in respect of deposits in friendly societies and industrial and provident societies up to a limit of £5,000 each.

To be effective, a nomination must be in writing, attested by a witness and made by a person aged 16 or over. It is not revoked by a later will. On the nominator's death, payment will be made to the nominee directly on production of the death certificate.

NB Even if property is the subject of a nomination, it still forms part of the estate for IHT purposes. It is not,

however, part of the estate for probate purposes.

CONTINUE

9.3 Applying for a grant of probate – in outline

In order to apply for a grant of probate, the executors will need to provide you with details of the values of all the deceased's assets, or at least estimates, as well as their debts at the date of death. The size and nature of their assets determines which forms must be completed.

9.3.1 Overview

There is a lot of paperwork involved in applying for a grant of probate, not least because you are having to deal simultaneously with HM Revenue & Customs (HMRC) and the probate registry, and it is easy to lose track of the underlying structure. Before looking at the process in detail, the following summary might help anchor each of the forms and options in their proper place.

You must first decide which tax form you need.

If it is a large or complex estate, or if IHT has to be paid, an IHT400 will be needed.

Note that, for deaths on or after 1 January 2022, a form IHT400 is required if the estate exceeds £3,000,000.

1

If you have to complete an IHT400, you will first need to obtain an IHT reference number which you get from HMRC.

2

If tax has to be paid, you can often arrange for the money to be sent direct to HMRC from the deceased's bank. You do this by sending the bank a form code.

3

Once HMRC have received (a) completed form IHT400, and (b) the tax due (if any), they will send you a code. You will not be able to apply for a grant until you have the code.

(a) form PA1P; (legal professionals are now required to apply online instead);

(b) the will;

(c) any affidavit evidence, for example, explaining any physical damage to the will;

(d) the registry fee; and

(e) the stamped IHT421.

You will then be given the grant.

We will now look at the process in more detail.

CONTINUE

9.3.2 HM Revenue & Customs forms

The legal adviser must first decide whether or not the estate is an “excepted estate”.

Different forms are required for excepted and non-excepted estates.



The “default” position is that an IHT400 is required. However, this is a lengthy document, which it takes HMRC a lot of time and effort to process. Clearly, there is little point in them doing this if there is no prospect of them getting any tax out of the estate. For smaller, simpler estates, where no tax will be paid, PRs were allowed to use the much simpler form IHT205 instead. These simpler estates are “excepted”.

Note that for deaths on or after 1 January 2022, no form IHT205 is required.

However, you will need to calculate figures for the gross and net estate as these will be needed in the grant application. The detail of excepted estates is outside the scope of this course book.

Note that most estates which are free of IHT will also be excepted. (HMRC will not want to wade through 30 plus pages of an IHT400 with all its schedules if they are not going to get any tax out of the estate!) However, if the estate is very large (over £3,000,000), or if there are any complicating factors (a partial nil-rate band transfer from a predeceasing spouse, or valuable assets in a trust or overseas), then they will want the full details set out in an IHT400.

9.3.2.1 Form IHT400

If the estate is not excepted, form IHT400 (the Inheritance Tax Account) must be completed together with any appropriate supplementary forms.

There are many supplementary forms which may be required alongside the IHT400 itself.

Essentially, form IHT400 sets out:

- formal details of the deceased and the estate (e.g. name of deceased, identity of PRs);
- details of which supplementary pages are required (these must be provided with IHT400);
- details of the assets in the estate;
- details of the liabilities in the estate;
- a summary of the estate values and any exemptions/reliefs from IHT; and
- calculation of the tax liability.

Form IHT400 is sent to HMRC. Many banks and building societies will release money from the deceased's account to pay IHT.

Alternatively, the HMRC IHT direct payment scheme may be used. Before making a payment by this method, it is essential to obtain an HMRC reference number for the estate. Reference numbers can be obtained online by completing the IHT reference request form on HMRC's website, but the form requires the deceased's national insurance number: if that is not known, form IHT422 has to be used instead, and is submitted by post. It usually takes about two weeks for a number to be issued.

Once a reference number has been obtained, form IHT423 (on which the reference number must be quoted) can be sent to the deceased's bank or building society, which will then forward the payment directly to HMRC. If IHT is due but the deceased did not have enough cash in bank or building society accounts, it may be necessary for the executors to take out a loan to be repaid after the grant of probate is obtained, and other assets can be sold.

For some assets – the main example being a house or other land – HMRC recognises that it may be very difficult for PRs to raise the tax relating to that asset before the grant is issued. It is something of a "chicken and egg" problem – the PRs cannot sell the house until they have got the grant, but they cannot get the grant until they have paid the tax. For these assets, HMRC allows the IHT to be paid in instalments, spread over the 10 years following

the death, although if the asset is sold, all the outstanding tax will have to be paid off. This method of paying IHT is called the **instalment option**.

CONTINUE

9.3.3 Documents sent to probate registry

(1) Form PA1P —

This is a standard form signed by the executors. It is not normally used by legal professionals who are required to apply online. The essential purpose of form PA1P is to establish the applicant's title to the grant.

(2) Original will and codicils —

The original will/codicil needs to be sent to the probate registry along with form PA1P. If the original will has been lost, a copy or draft may be accepted – you will need to file an affidavit to explain what has happened. The Registrar will then issue an order authorising the use of the copy will; the order will need to be referred to in form PA1P.

(3) Affidavits —

In most cases, these will not be necessary, but you may have to recognise from a set of facts when they will be needed.

Some common affidavits are as follows.

- (a) **Due execution:** where the will does not contain an attestation clause or there is some doubt about the execution. Ideally, this affidavit should be sworn by one of the original witnesses –

hence the earlier remarks on suitability. If they have died or cannot be found, then other options may be considered (e.g. an affidavit from someone who was present when the will was signed or who was familiar with the testator's writing/signature).

- (b) **Plight and condition:** where there is something about the condition of the will which needs to be explained. Examples are marks, alterations, tears or burns.
 - (i) **Marks.** These may be caused by paper clips or staples. The court will need to be satisfied of the reason (e.g. the will was clipped to the file). The court wants to be satisfied that no later will or codicil was attached. Sometimes, a letter will suffice if there is a simple explanation (e.g. a secretary fastened all the papers together when dealing with them).
 - (ii) **Alterations.** If there are material alterations which are unattested, evidence will be required to rebut the presumption that the alterations were made **after** the will was executed. The best way to avoid this problem is to make sure that there are no alterations – print another will! Alternatively, at least make sure that any alterations are initialled in the margin by the testator and the witnesses. If the alteration can be shown to have been made before the will was executed, the altered will can be admitted to probate. Otherwise (if the alterations were presumed to have been made after execution), the will has to be admitted unaltered. If alterations have obliterated a word or words, so that they cannot be detected by natural means (e.g. by holding the will up to the light), then the will has to be admitted with a blank space, for example, “*I leave a [] to Olivia*”.
 - (iii) **Torn will or burns.** The Registrar has to be satisfied that there was no attempted revocation (destruction) of the will. An affidavit must therefore explain the tearing or the burns (e.g. the testator tore the corner when he was trying to put it in an envelope for safe keeping, or the executor accidentally tore the will when he was collating all the papers, or the executor accidentally dropped his cigarette on it while going through the papers).
- (c) **In support of a copy will** (e.g. if the original has been lost).

(4) Fees —

Fees are currently prescribed by the **Non-Contentious Probate Fees Order 2004**.

- (a) where the value of the estate does not exceed £5,000, there is no fee;
- (b) where the value of the estate exceeds £5,000, the fee is £273 irrespective of the size of the estate, plus £1.50 per office copy grant requested.

It is useful to get one office copy (a photocopy of the grant, embossed with the court's seal) for each bank etc., where the deceased held assets.

Payment is by cheque, payable to “HMCTS” or by credit or debit card, or your firm can set up an account for payment.

Where the deceased was a member of the armed forces and died in active service and the estate is therefore exempt from IHT under **s154 Inheritance Tax Act 1984**, the fee is £10.

An appropriate number of office copies must be asked for so that they can be sent to the banks and other institutions holding the deceased’s assets. The probate registry will examine the papers carefully and check that no “caveat” has been entered. The grant will be sealed and a photocopy of the will attached. It will then be sent to the solicitor with the requested number of office copies, usually within 14 days.

CONTINUE

9.3.4 Online applications

Since January 2021 all law firms have been required to sign up to make online applications for grants of probate, letters of administration, and letters of administration with the will annexed. Online applications for the issue of a caveat are also possible. Firms are able to manage their own accounts, view all their probate applications in a single dashboard and monitor the progress of applications. Applications can be submitted at any time of the day and are uploaded to the system immediately. The original will and IHT documentation must still be sent in paper form, to be scanned and uploaded to the relevant matter by the court service.



Grants of probate

Probate practitioners must normally apply for a grant of probate using the online service MyHMCTS – see:

 **GOV.UK**



Register for MyHMCTS: online case management for professionals

How to create an MyHMCTS organisation account to manage, submit and pay for certain civil, family and tribunal cases.

[READ MORE GOV.UK](#)

In very limited circumstances, for example where an attorney is applying for a grant, a paper application is required. Where the applicant is a trust corporation, for example a bank which was appointed as executor in the will, the probate practitioner can apply online or using a paper form PA1P.

Grants of letters of administration

Probate practitioners may choose to apply online with MyHMCTS if all the following conditions are met:

- there is only one applicant and they are the only person entitled to the estate (the applicant is the person who will be named on the grant);
- the applicant is a spouse/civil partner or sole child/adopted child of the deceased;
- where the deceased was domiciled outside of England and Wales, the estate in England and Wales only consists of immovable property;
- there is no other claim on the estate;
- there is no minority interest (child beneficiary);
- the applicant is able to make their own decisions;
- the deceased died after 1 October 2014.

Probate practitioners **must** apply for a grant using a paper form PA1A in limited circumstances including where the applicant is represented by an attorney.

Letters of administration with will annexed

Probate practitioners may choose to apply online with MyHMCTS if all the following conditions are met:

- there is only one applicant and they are the only person entitled to the estate (the applicant is the person who will be named on the grant);
- all the beneficiaries in the will (both who receive a specific gift and who get the residue) are over 18;
- the applicant is named in the will as the only residuary legatee or devisee or residuary legatee and devisee;
- all executors, residuary legatees and devisees holding the estate in trust have died or chosen not to apply.

Probate practitioners **must** apply using a paper form PA1P in limited circumstances including where there is a life interest.

Further information is available at:



Apply for probate on paper as a practitioner

How to make probate applications that are exempt from using MyHMCTS.

[READ MORE GOV.UK](#)

If the estate is not large/complex/tax-paying, you can skip the stages set out above. For deaths occurring on or before 31 December 2021 you will prepare an IHT205 instead. This is sent directly to the Probate Registry, not to HMRC. For deaths on or after 1 January 2022 there is no tax form required.

CONTINUE

9.4 Intestacy

This section will consider the following:

- 1 What does “intestate” mean?
- 2 Who are the personal representatives on intestacy?
- 3 Who is entitled to the intestate's estate?

9.4.1 The difference between property passing under a will and on intestacy

The majority of people in England and Wales die without leaving a valid will (**wholly intestate**). Naturally, the usual reason for a person not leaving a valid will is that they never made one, but it is not unknown for a person to make a perfectly valid will which, much to the dismay of close relatives, is rendered invalid by the time the person dies. This is because marriage, or entry into a civil partnership, automatically revokes a will unless the will was specifically made in expectation of that marriage, regardless of whether the testator intended this to happen (or was even aware that it could).



Link to Practice 

Suppose, for example, that Rita and Simon are elderly, both have been married and widowed before, and both have children from their previous marriages. They have formed a close relationship. Both have wills leaving their whole estates to their respective children. Simon is seriously ill, and in the last months of his life he and Rita decide that they would like to marry. They do so, and Simon dies a few weeks later. Due to the marriage, his will is revoked, he has died intestate, and the majority of his estate now passes to Rita.

In these circumstances, the law provides that the deceased's property is divided between his relatives under fixed rules which are listed in **s46 Administration of Estates Act 1925 (AEA 1925)** (as amended). Spouses and civil partners are given a high priority under these rules but do not automatically inherit the entire estate. In order to identify who is entitled to receive what, the legal adviser must find out as soon as possible:

- the names and relationships of the relatives of the deceased; and
- the approximate size of the estate.



In these circumstances, one or more of the relatives will have to apply for a grant of letters of administration. Sometimes, if there are no close relatives, it is necessary to instruct genealogists to compile a full family tree.

There are special rules for surviving spouses and civil partners.

For deaths from 26 July 2023 onwards the following rules apply.

- If there is a spouse or civil partner, but no children or remoter issue (e.g. grandchildren), then the spouse or civil partner takes the entire estate.
- If there are children or other issues,
 - the spouse or civil partner takes:
 - a statutory legacy of £322,000;
 - personal chattels; and
 - half of the rest of the estate outright.
 - The children (or, more correctly, the issue) take the remaining half of the estate.

CONTINUE

9.4.2 Effect of grant

Unlike an executor, who derives his authority from the will, the administrator derives their authority directly from the **grant**.

Before the grant is issued, they can do only acts necessary to obtain the grant and safeguard the assets (e.g. they could not sell property or start a court action).



9.4.3 Entitlement to grant

The persons entitled to a grant are those having a **beneficial interest** in the estate of the intestate.

So, the order of entitlement set out in **r22 NCPR 1987** follows the order of entitlement to share in the estate on intestacy. The applicant must be someone who either has a current beneficial interest in the estate or would have if the estate were larger.

r22 NCPR 1987 lists those who are entitled to apply. The detailed list of entitlement is in **8.1.2.1**.

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. An administrator can renounce their right to apply and, if they do this, the renunciation should be filed with the other papers at the registry. Similarly, an administrator can be cited in the same way as an

executor (i.e. an application is made by someone in another lower category who wants to be administrator, telling the person higher up the list to make up their mind whether they will act or not). As with the other grants, the maximum number of applicants is four. If a minority or life interest arises as a result of the intestacy, there must, normally, be at least two applicants.

The rules also deal with **partial intestacies**, where a will is made but does not effectively dispose of all the assets of the estate.

An example of this would be where a will appoints executors but leaves the entire estate to the testator's friend. The friend dies before the testator, and the will does not say who should take the estate under those circumstances. The property not disposed of under the will passes under the intestacy rules but the appointment of executors (and any other gifts, such as legacies) are still effective.



Another example would be where there is no residue clause in the will. In the case of a partial intestacy, a grant of letters of administration with the will or a grant of probate will be required, depending on whether or not there is an executor able and willing to act.

9.4.4 The operation of the statutory trust of land

On the death of an intestate all the property of the deceased (including land and other property) is made subject to a statutory trust under **s33 AEA 1925** (as amended by the **Trusts of Land and Appointment of Trustees Act 1996**). If the estate contains land, the trust will be called a trust of land. Under the statutory trust all funeral and administration expenses, debts, etc., are paid before the balance is distributed under the statutory order of entitlement.

CONTINUE

9.4.5 Who is entitled to the intestate's estate?

In order to decide who inherits an intestate's assets, you must first find out who their relatives are and how much they owned. Drawing a family tree is often very helpful.

s46 AEA 1925 lists the order of priority for the division of a person's estate if they die intestate. If the only surviving relative is the spouse/civil partner, the entire estate will pass to him or her. The spouse/civil partner will not necessarily be entitled to everything if there are also children (or other issue). The entitlement is shown in **Figure 9.4**. (see below).

9.4.6 The entitlement of spouses/civil partners

s46(2A) AEA 1925 provides that all benefits in favour of a surviving spouse/civil partner are subject to the spouse/civil partner surviving the intestate for a period of 28 days beginning with the day on which the intestate dies. If a spouse/civil partner survives the intestate, but dies before the end of the 28-day period, the spouse/civil partner is treated as if she or he had not survived the intestate.

“Personal chattels” is defined by **s3 ITPA 2014** as including any tangible movable (i.e. non-land) property other than money, business assets or assets held solely as an investment. It would therefore include such items as furniture and household contents, a car, clothes, jewellery and antiques, unless owned as an investment or as part of a business.

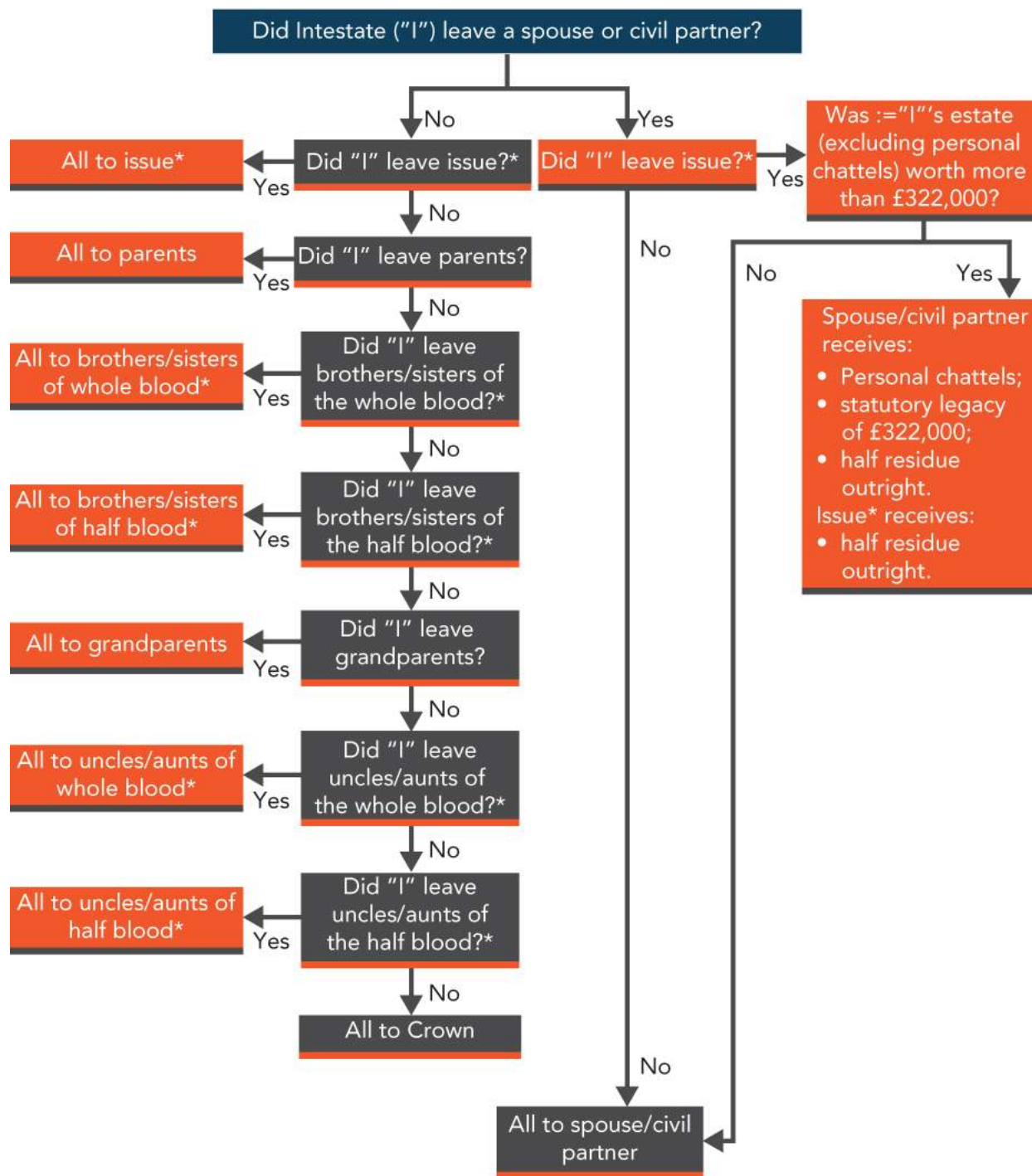
In summary – as shown in the flowchart in **Figure 9.4** – if the deceased left a spouse, and no issue, then the spouse takes the entire estate.



If the deceased left a spouse and issue, then the spouse takes:

- personal chattels;
- the first £322,000 of the estate;
- half of the remainder; and
- the issue take the other half of the remainder *per stirpes* (see later).

Intestacy entitlement (deaths 26 July 2023 onwards)



* On statutory trusts – so if any member of this category died before "I", but left issue, then those issue take their deceased parent's share

Figure 9.4

Remember also that any jointly owned property, such as joint bank accounts, will pass immediately to the surviving joint owner (often the spouse or civil partner) and does not count towards the survivor's entitlement under the intestacy rules. (The exception to this would be a house or land held as tenants in common.)

Note that the *per stirpes* rule applies to shares of an intestate's estate passing to issue. This means that if a child or other direct descendant of the intestate dies before the intestate, leaving children, then those children take the share which the deceased issue would have taken if they had survived.

CONTINUE

9.4.7 The family home on intestacy

Unless the property is held as joint tenants (a type of land ownership under which land owned by one joint owner passes automatically to the surviving joint owner(s) on death), a surviving spouse/civil partner does not automatically inherit the family home which was owned by the intestate prior to death.



It is possible for the surviving spouse/civil partner to acquire the family home in one of the following ways:

1

The administrators have the power to appropriate (take and transfer in kind (without selling it)) any asset of the deceased towards the satisfaction of any person's interest in the estate (**s41 AEA 1925**). The power under **s41 AEA 1925** can be used only where the value of the family home is less than or equal to the sum the beneficiary was due to inherit.

2

Under **Sch 2 Intestates' Estates Act 1952 (IEA 1952)** a surviving spouse/civil partner resident in the family home can require the administrators to appropriate (transfer) the intestate's interest in the family home to the spouse/civil partner in satisfaction of their share of the estate. If the house is worth more than the share due to the spouse/civil partner, they will be required to pay "**equality money**" to

make up the difference. The value of the house is calculated at the date of the appropriation, **not** the date of death.

If a surviving spouse/civil partner wishes to require the administrators to appropriate the family home to them under **Sch 2 IEA 1952**, the surviving spouse/civil partner must do so within **12 months** of the date of the grant of letters of administration, although the time limit may be extended by the court. During that 12-month period, the administrators can dispose of the family home only with the written consent of the surviving spouse/civil partner.

CONTINUE

9.5 Duties, powers and remedies

9.5.1 Introduction

Personal representatives (PRs) have tasks to carry out that are similar to those of trustees, and they may have trust obligations conferred on them expressly or by implication, either by the will or the intestacy rules.

We will consider the legal nature of their role, how the law gives them the powers and rights to carry out their obligations and how the exercise of their powers can be controlled by those affected.

9.5.2 PRs' duties

The fundamental duty of PRs is to **collect and get in** the deceased's real and personal estate with due diligence and then **to administer it according to law (s25 Administration of Estates Act 1925 (AEA 1925))**. Other duties imposed by this section relate to the preparation (when required to do so by the court) of an inventory and account and the delivery up to the court of the grant issued (e.g. so that it can be revoked and a new grant issued) if called upon to do so. Forms PA1P and PA1A contain legal statements of these duties, which the applicants for the grant must sign, and the online application generates a similar statement.

With due diligence – that is, within a reasonable time, taking such steps as may be reasonably necessary – the PRs must collect the sums due and other assets belonging to the deceased which devolve upon them, at death in the case of an executor, otherwise, on the issue of the grant. Only interests in property which continue after the death so devolve.

A life interest does not, nor does the deceased's interest in joint property that accrues beneficially by survivorship (compare their interest as a beneficial tenant in common).

The legal title to property held by the deceased as a trustee devolves on their PRs only if they were the sole trustee, otherwise, it devolves upon the remaining trustees.

Reasonable steps must be taken to preserve the deceased's estate and, within a reasonable time (prima facie, within the executor's year), the PRs must realise any investments that it is not proper for them to retain.

The remainder of the administration of the estate involves the payment of debts etc., and any legacies, and the distribution of the residue according to the terms of the will and/or the intestacy rules.

CONTINUE

9.5.3 Administration of Estates Act 1925 powers

AEA 1925 confers on PRs a number of powers in connection with the administration of an estate.

(1) Alienation of property —

s39 confers on PRs the same powers, duties and discretions in dealing with the deceased's personal estate as they had before 1925, including a power to mortgage or charge property. As regards real estate, they have all the functions of trustees conferred on them by **Part I Trusts of Land and Appointment of Trustees Act 1996**.

(2) Appropriation —

s41 provides that PRs may appropriate any part of the estate in or towards satisfaction of any legacy or interest or share in the estate, provided that no specific beneficiary is prejudiced. PRs can appropriate, for example, some personal chattels to a beneficiary in partial satisfaction of a pecuniary legacy or their share of residue, as long as that beneficiary consents and provided the chattels in question were not specifically given to another beneficiary.

The asset to be appropriated must be valued for this purpose at the date of appropriation.

(3) Appointment of trustees of minors' property —

s42 allows PRs, if a minor is absolutely entitled to property (but not if they have only a contingent interest), to appoint a trust corporation, or two to four individuals, to be trustees of the property for the minor, in order to obtain a good discharge.

(4) Postponement of distribution —

s44 provides that PRs are not bound to distribute the estate before the expiry of one year from the death (the executor's year), so that a beneficiary cannot insist on earlier payment.

CONTINUE

9.5.4 Trustee Act 1925 powers

Both the following powers apply to PRs/trustees subject to any exclusion or modification in the will.

(1) Maintenance —

s31 Trustee Act 1925 (TA 1925) provides that if property is held for a beneficiary who is a minor and the gift carries the right to the intermediate income, the PRs/trustees may apply the **income** for the **maintenance, education or benefit** of the minor and must accumulate the income not so applied.

It does not matter whether the minor's interest is vested or contingent. In exercising their discretion, the PRs/trustees can pay out as much income as they think fit.

Once the beneficiary attains the age of 18, accumulated income is normally added to capital and devolves with it. If, although the minor has attained 18, their interest remains contingent, the discretion to use income for maintenance etc., ceases and the income **must** be paid to the beneficiary until such time as the contingency is fulfilled or the interest fails.

(2) Advancement —

s32 gives PRs/trustees a discretion to apply **capital** for the **advancement or benefit** of a beneficiary (whether or not a minor) who has a **vested or contingent interest** in capital.

Up to the **whole** of the beneficiary's vested or presumptive share may be advanced under this power either as cash or property. Any advance made must be brought into account when the beneficiary becomes absolutely entitled. However, if a beneficiary contingently entitled receives an advance but fails to fulfil the contingency (e.g. because they die before attaining the age specified for vesting), the amount advanced is not recoverable from the beneficiary's estate.

CONTINUE

9.5.5 Trustee Act 2000 powers

The **Trustee Act 2000 (TA 2000)** imposes duties on PRs/trustees and provides them with extensive powers which apply by default if a will or trust deed makes no, or insufficient, provision.

These powers include the following:

(1) Investment —

s3 gives authority to make any kind of investment which could be made if the trustee were absolutely entitled to the assets of the trust or the estate. Standard investment criteria are set out under **s4**; **s8** allows the acquisition of land in the United Kingdom. A PR who acquires land under this section has all the powers of an absolute owner in relation to the same. The power of investment applies irrespective of when a will was made.

(2) Delegation —

ss11–23 provide that trustees may delegate certain specific powers to an agent. Such remuneration as the PR thinks fit can be agreed for the agent.

The liability of PRs in respect of (a) the use of agents, custodians and nominees and (b) their obligation under **s22** to review the arrangements for using agents, is governed by the statutory duty of care under **s1**, applicable to all trustees (see later). The type of situation in which PRs are likely to be in breach of the **s1** duty would be, for example, where they fail to ensure that they retain adequate powers to intervene when delegating to an agent or appointing unsuitable agents.

(3) Insurance —

s34 gives the same power to insure as that of a beneficial owner, so that insurance can extend to the full value of a property and cover can be comprehensive.

(4) Duty of care —

By **s1 TA 2000**, a duty is imposed **to exercise such care and skill as is reasonable in the circumstances**. The duty of care applies to situations where a PR exercises a general power of

investment or acts in relation to investments, where land is acquired, where an agent is appointed or where insurance is arranged.

CONTINUE

9.5.6 Deceased's business

If the deceased was sole proprietor of a business, **can their PRs carry it on after death?**

The general rule is that they have no authority to do so, but as an exception, they may do so with a view to the proper realisation of their estate – for example, to enable it to be sold as a going concern. This would not normally enable them to carry on the business beyond the end of the executor's year, however.

In exercising this implied power, it seems that PRs can use only those assets in the business at the date of death, so they cannot resort to any other part of the estate.

Often, the will gives PRs express authority to carry on the deceased's business and may give them power to use other assets in the estate for that purpose.

PRs are personally liable for debts incurred in running the deceased's business, though they are entitled to an indemnity from the estate. If they are carrying on the business for the purpose of realisation (i.e. under the implied power), this right of indemnity takes priority over the rights of general creditors of the deceased and beneficiaries.

Otherwise, if acting under an express power, the right of indemnity has priority over the rights of beneficiaries but not of creditors of the deceased, unless the latter have expressly consented to the carrying on of the business.

9.5.7 Powers in will

It is common practice in drafting wills to modify and extend the statutory and other powers outlined earlier and to confer certain additional powers.

9.5.8 Exercise of powers

A sole PR (whether originally so appointed or by survivorship) has the same powers as two or more PRs. They may give a valid receipt for the proceeds of sale of land (**s27 Law of Property Act 1925**). Joint PRs generally have joint and several authority, so that the act of one binds the others and the estate.

There are statutory exceptions in relation to the conveyance of land and the transfer of shares. In these cases, the conveyance/transfer will normally require **all** living PRs (i.e. to whom a grant has been issued) to join in.

PRs' powers are fiduciary in nature, so must be exercised in good faith in the interests of the estate as a whole.

A trustee (including a PR) cannot purchase trust property either from themselves or from themselves and a co-trustee. This is known as the self-dealing rule.

The effect of this rule (which derives from a trustee's status and position rather than their conduct) is that such purchases are **voidable** within a reasonable time at the option of any beneficiary. The right to avoid the sale is effective against a subsequent purchaser with notice of the circumstances. The rule also applies where the trust property is sold to close relatives or nominees of the trustee (PR).

NB The rule does **not** apply where the trust instrument (here, the will) expressly authorises the purchase by the trustee/PR.

CONTINUE

9.5.9 Position of beneficiaries

The deceased's assets vest in the PRs

"in full ownership without distinction between legal and equitable interests"

- ***Commissioner of Stamp Duties (Queensland)*** v Livingston [1965]

So, until the administration is complete, the beneficiary (under the will or intestacy rules) has neither a legal nor an equitable interest in the deceased's assets. The beneficiary does, however, have a chose in action – the right to have the deceased's estate properly administered. This is true even of specific beneficiaries (*Re Hayes's Will Trusts [1971]*), despite earlier suggestions that they might have an equitable interest from the date of death.

CONTINUE

9.5.10 Remedies

If difficulties arise during the administration of an estate, there are a number of formal remedies available to a beneficiary. Essentially, they fall into two categories.

1

First, there are administration proceedings, designed to ensure that the administration of the estate is properly conducted. Such actions may be general or for specific relief, and need not be, of necessity, contentious, in that the PRs are equally entitled to seek the court's assistance in this way.

2

Second, there are actions to recover loss suffered (see later).

CONTINUE

9.5.11 General administration actions

If a party affected by the administration of an estate wishes the court to take over the administration, either in respect of a particular issue or generally, they should commence a claim under **CPR Part 64** and its associated Practice Directions (**PD64**, **PD64A** and **PD64B**).

Claims may be made under **Part 64** in respect of estates, trusts and charities and are not confined to claims concerning grants. Claims can be made for the court to determine any question arising in the administration of an estate or the execution of a trust, as well as claims for an administration order, defined as ***an order for the administration of the estate of a deceased person ... to be carried out under the direction of the court.***

Examples of claims under **Part 64**:

- claims to determine who falls into a class of beneficiaries and the extent of any beneficial interest;
- claims concerning the rights or interests of any person claiming:
 - – to be a creditor of the estate, or
 - – to be entitled under a will or intestacy;
- claims requiring a trustee (including a PR):
 - – to provide and, if necessary, verify an account,
 - – to pay into court money held by them in their capacity as trustee, or
 - – to do or not to do any particular act;
- claims for an order approving any sale, purchase, compromise or other transaction by a trustee; and

- claims for an order directing any act to be done which the court could order if a general administration order had been made.

If the claimant is seeking an account, the court has power to stay the proceedings for a specified period and order the trustees to file and serve proper accounts within that period, or if necessary, to prevent proceedings by other creditors or persons claiming to be entitled to the estate or fund, make an administration order and include in it an order that no such proceedings are to be taken without the court's permission.

With particular respect to administration orders in respect of estates, if a claim is made against the estate by any person who is not a party to the proceedings, no party other than the PRs may take part in any proceedings relating to the claim without the court's permission, but the court may direct or permit any other party to take part in the proceedings on such terms as to costs or otherwise as it thinks fit.

The costs of the PRs would normally be payable out of the estate, unless they had acted unreasonably, while the costs of other parties are in the court's discretion.

In order to avoid the expense of an administration action where the administration by the PRs out of court has, for some reason, broken down, they or the beneficiaries may apply to the Chancery Division for the appointment of a Judicial Trustee to complete the administration. Such appointment may be to act alone, or jointly with others, or (if sufficient cause is shown) in place of the existing PRs. As an officer of the court, such a trustee, once appointed, does not require the court's consent before exercising their powers.

CONTINUE

9.5.12 Personal action against PRs

A failure by a PR to carry out the duties of their office is a **devastavit**, for which the PR is personally liable to the beneficiaries or creditors, unless they have acquiesced in, or encouraged, the breach.

PRs may be relieved from liability by a provision of the will protecting them from mistakes made in good faith. In addition, under **s61 TA 1925**, the court may relieve the PR (wholly or partly) from personal liability where it is satisfied that they acted ***honestly, reasonably and ought fairly to be excused*** (e.g. ***Re Kay [1987]*** where a PR paid a legacy which appeared small in comparison to the apparent total value of the estate at a time when he was unaware of liabilities which exceeded the total value of the estate).



Alternatively, by agreement with the beneficiaries, being *sui juris* and fully aware of the breach, the PR may be released from liability.

CONTINUE

9.5.13 Tracing

A beneficiary (under a will or the intestacy rules) or a creditor may have the right to trace and recover property of the estate (or property representing such property) from the PRs or any other recipient of it, other than a bona fide purchaser for value or person deriving title from such purchaser. The right to trace is also lost if the property has been dissipated or if to allow tracing would be inequitable. This remedy may be sought whether or not a personal action has been brought against the PR, though to the extent that such action has been successful, the right to trace is lost.

9.5.14 Personal action against recipients

If all other remedies of a beneficiary or creditor have been exhausted, a personal action may be brought against a person who has wrongly received the assets of the estate.



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. In which of the following estates will **no** grant be required?
(Select 3 correct answers)

-
- ☐ a. Barry dies owning personal chattels worth £1,000 and National Savings Premium Bonds worth £4,000
 - ☐ b. Jocelyn dies owning a house worth £700,000 jointly with her husband Perry. All her other personal possessions are owned jointly with Perry
 - ☐ c. Katya dies owning a life insurance policy under s11 Married Women's Property Act 1882 expressed to be for the benefit of her son Liam. She owns personal chattels worth £2,000
 - ☐ d. Piet dies owning personal chattels and a house worth £600,000

SUBMIT



Complete the content above before moving on.

2. Kemi dies intestate on 1 August 2024. She owns personal chattels worth £5,000 and investments worth £522,000. She has a surviving civil partner, Priti, and a son, Sunil. How will her estate be distributed?

- ☐ a. All to Sunil
- ☐ b. All to Priti
- ☐ c. Personal chattels and a statutory legacy of £322,000 to Kemi, £200,000 to Sunil

SUBMIT



Complete the content above before moving on.

3. Within what period from the date of death of an intestate must a surviving spouse require the administrator to appropriate the family home to them?

- ☐ a. 12 months
- ☐ b. Six months
- ☐ c. One month
- ☐ d. 18 months

SUBMIT



Complete the content above before moving on.

9.6 Chapter summary

Key steps to take when someone has died:

- initial interview;
- agree firm's legal fees and the basis of charging;
- arrange for valuations of assets in the estate; and
- arrange statutory advertisements under **s27 Trustee Act 1925**.

Circumstances where a grant is not required

- small payments (£5,000) under the **Administration of Estates (Small Payments) Act 1965**;
- property held as joint tenants;
- life assurance policies under **s11 Married Women's Property Act 1882**;
- certain pension schemes/pension benefits;
- life interests in trust property; and

- statutory nominations.

Application for a grant

1. Pre-grant work in arranging the administration of an estate involves obtaining details of the value of all the deceased's assets.
2. Valuations of land, shares and valuable furniture or antiques will be required.
3. Statutory advertisements under **s27 TA 1925** may be required.
4. Documents required for a probate application are:
 - (a) form PA1P/online applications for law firms;
 - (b) will (and any codicils);
 - (c) affidavits (if needed); and
 - (d) fee.
5. Any IHT due may be made using the IHT direct payment scheme (form IHT423).
6. No Inheritance Tax Account (form IHT400) is required where the estate is an excepted estate – essentially, a smaller and uncomplicated estate where no IHT will be due.

Intestacy

1. If a person dies and leaves no will or an invalid will, they are intestate.

2. As there is no executor appointed in a will, those with a beneficial entitlement to the estate can apply in strict order to be an administrator of the estate (**r22 NCPR 1987**).
3. The list of the persons entitled to inherit the estate on intestacy is given in **s46 AEA 1925**.
4. There is a 28-day statutory survivorship clause for a spouse/civil partner of an intestate.
5. The surviving spouse/civil partner is not automatically entitled to the family home on an intestacy.

Personal representatives

1. An executor derives their authority from the will.
2. An administrator derives their authority from the grant.
 - a. A PR is not a trustee, although the two roles have much in common.
 - b. The basic duties of a PR are: acting with due diligence, to collect the assets in the estate; and to administer the estate according to law.
3. Some of the PRs' powers derive from statute, especially **AEA 1925**, **TA 1925** and **TA 2000**.

The key statutory powers include.

 - a. Appropriation (**s41 AEA 1925**). Assets may be transferred to a beneficiary in (part-) settlement of their entitlement. For this purpose, the asset is valued at the date of transfer, not death.
 - b. Maintenance (**s31 TA 1925**). Income arising on funds due to a minor can be accumulated or, at the discretion of the PRs, paid out for the minor's maintenance.
 - c. Advancement (**s32 TA 1925**). PRs can advance capital being held to a minor, or an adult beneficiary with a vested or contingent interest.

d. Investment (**s3 TA 2000**). PRs may select investments in which to place funds as if they were the absolute owners.

e. Insurance (**s34 TA 2000**). PRs have the same power to insure as a beneficial owner.

(i) Note the following rules regarding income, but bear in mind all can be varied by the terms of the will.

4. An administration action may be commenced by a party affected by the administration of an estate (including the PRs) who wishes to seek the court's assistance or apply for relief.
5. Actions may be maintained against PRs who are liable for loss resulting from a failure to carry out their duties.

You have completed Chapter 9.

EXIT