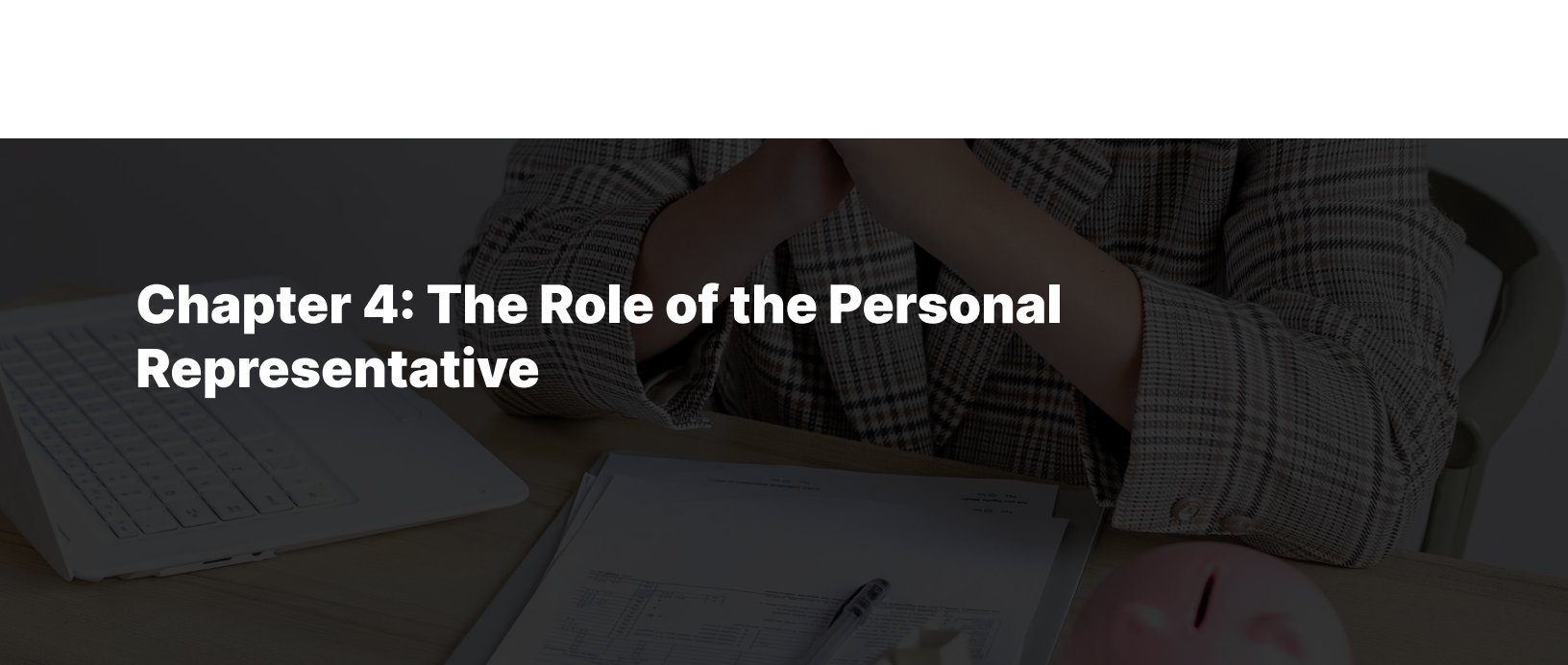




Chapter 4: The Role of the Personal Representative



4.1 Introduction



4.2 Powers, duties and liabilities of personal representatives



4.3 Protection available to personal representatives



Knowledge check



4.4 Summary

4.1 Introduction

Example

You have been asked by one of the private client lawyers in the firm you work at to join a meeting with Miss Jasmine Endecott. Jasmine informed your receptionist that she has been named as the executor of her neighbour's will who died two weeks ago.

Jasmine explains that she used to look after her neighbour, Olivia Willems, an elderly woman, by doing her shopping, collecting medication, taking her to and from medical appointments, and cooking her meals on occasion. This really started in March 2020 after the first lockdown as a result of Covid-19.



It has come as a surprise to Jasmine that she was named in the will.

The will leaves a legacy to Jasmine for £10,000 and the rest of the estate to two nephews (Carlos and Paulo) and one niece (Adriana) of the deceased to inherit their respective shares when they reach the age of 25; all three are currently under the age of 18.

Jasmine is at a loss where to start and would like professional advice and assistance.

The first thing Jasmine wants to understand is what it means to be an executor and what she needs to do to fulfil that role and administer her neighbour's estate.

Consider how you would answer these questions after you have read this chapter.

A grant of representation is a court order that names the **personal representative (PR)** as the **individual entitled to administer the deceased's estate**. Consider the grant to be the court order that unlocks the assets of the estate.

There are three main grants of representation:

1. **probate** – issued to the executors who prove the will;
2. **administration with will annexed** – issued to administrators where there is a will but no proving executors (executors willing and able to apply for a grant of probate); and
3. **administration on intestacy** – issued to administrators.

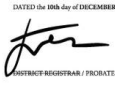

HM Courts &
Tribunals Service

Grant of Probate

Changes to grant certificate design



Grants of probate are changing. **Both the new and old styles are valid.** These are some of the differences between them

Old style grant (still valid)		New style grant
 COPIES OF THIS GRANT ARE NOT VALID UNLESS THEY BEAR THE EMBOSSED SEAL OF THIS COURT. IN THE HIGH COURT OF JUSTICE Principal Registry of the Family Division BE IT KNOWN that JOHN DAVID SMITH of 22 Green Street, Any Town Somerscote TF20 9BB died on the 18th day of October 2019 domiciled in England and Wales INTESTATE AND BE IT FURTHER KNOWN that Administration of all the estate which by law devolves on and vests in the personal representative of the said deceased was granted by the High Court of Justice on this date to JULIE ANN SMITH of 22 Green Street, Any Town Somerscote TF20 9BB It is hereby certified that it appears from information supplied on the application for this grant that the gross value of the real estate in the United Kingdom does not exceed £250,000 and the net value of such estate does not exceed £100k. DATED the 10th day of DECEMBER 2019  DISTRICT REGISTRAR / PROBATE OFFICER Extracted personally ADMINISTRATION	1.  Digital seal instead of embossed one on old grant. 2.  Standard digital signature instead of wet signature on old grant 3.  Validation phone number for stakeholders to call and validate grant if required 4.  High security hologram appears on bottom right of new grant	 High Court of Justice England and Wales Probate Registry Crested Court Building 25 Victoria London EC1A 1BB United Kingdom 020 301 0648 Grant of Probate Case Reference: U2019040121136 Date of Issue: 10th January 2020 John Doe made an application to this Court for a grant of probate and declared the following information. John Doe of 12 Watton Avenue Sutton Surrey SM1 9QZ Died on 1st January 2019 domiciled in England and Wales The Last Will and Testament of John Doe (an official copy of which is available from the Courts was proved and registered before the High Court of Justice. The Administration of John Doe's estate is granted by this court to the following Executors JANE DOE of 12 Watton Avenue Sutton Surrey SM1 9QZ and PETER DOE of 12 Watton Avenue Sutton Surrey SM1 9QZ Power reserved to another Executor The application has stated that the gross value of the estate in the United Kingdom amounts to £5,567.99 and the net value amounts to £3,325  DISTRICT REGISTRAR Extracted personally If you wish to validate the information contained within this document please call 0300 300 0648 3. 4. 

An example of a grant of probate.

Examples

Grant of letter of administration with will annexed

Gabriel has died recently and in his safe his family finds a homemade will which fails to appoint any executors.

While the will is valid, as there are no named executors, when the will is admitted to probate the Probate Registry will issue a grant of letters of administration with will annexed.

Intestacy

Mia died recently without making a will.

When the application for the grant is made, the Probate Registry will issue a grant of letters of administration.

Until a grant of representation has been issued to the PRs of the deceased, there is relatively little they can do to progress the actual administration of the estate. The grant is confirmation of the validity of any will and the appointment of the executors named in it, or that the deceased died intestate. If there are no executors, the grant also constitutes the court's authorisation of one or more administrators to deal with the estate.

In this chapter, we will consider what it means to be a PR, and will look at what powers, obligations and potential liabilities a person who accepts the role of PR takes on and the protections available to them as a PR.

CONTINUE

4.1.1 Executors

Executors take their authority from the will, since they are appointed by the will. The effect of the grant of probate is to confirm the executor's authority. Proof of the executor's authority may be required by the court, by those holding assets of the estate or by those purchasing assets from the executors. The only situations in which it is absolutely essential to produce the grant are when it is required by the court and in order to prove title to land. This means that the executors could issue proceedings or exchange contracts for the sale of land prior to the grant, so long as the grant is produced before the action is concluded or the sale is completed. Although, in theory, the executors can carry out all acts in the administration of the estate prior to the issue of the grant, apart from obtaining judgment or completing a sale of land, in practice, most institutions holding substantial assets will insist on seeing the grant before money is released.

The property of the deceased vests in the executors when the deceased dies (**s1(3) Administration of Estates Act 1925 (AEA 1925)**) in relation to real property and personal property (*Woolley v Clark [1822]*). **s1(1)** provides that the deceased's estate shall devolve on the deceased's PRs for the time being, which means that if the PRs change (e.g. on revocation of the original grant), the assets will devolve automatically on the new PRs.

CONTINUE

4.1.2 Administrators

Administrators derive their authority from the grant, whether or not there was a will, so have no authority to act until the issue of the grant. On the death of the deceased, the estate vests in the Public Trustee (**s9(1) AEA 1925**, as amended by **s14 Law of Property (Miscellaneous Provisions) Act 1994**). It follows that, until the grant is issued, the administrators have power to do only what is necessary to obtain the grant.

Once the grant has been issued, the doctrine of relation back may apply to protect the lawful acts of the administrators. This would permit the administrators to sue for trespass to

the deceased's land or to sue for recovery of any of the deceased's assets which have been misappropriated by a third party. This doctrine is limited to action taken to protect the estate. In ***Ingall v Moran [1944]*** the prospective administrator issued proceedings to recover damages under the **Fatal Accidents Acts** in respect of the deceased's death in a motor accident. It was held that the later issue of the grant did not validate the issue of the proceedings because they were not issued for the protection of the estate and so the action was struck out. The action could have been validly commenced under a limited grant taken out prior to the proceedings.

In ***Milburn-Snell and Others v Evans [2011]*** the Court of Appeal upheld this principle by striking out an action started before a grant had been obtained by the daughters of a deceased who claimed as his "administrators" acting on behalf of his estate. Furthermore, because the proceedings were a nullity from the outset, the court refused to allow the pleadings to be amended using a provision in the **Civil Procedure Rules 1998 (CPR)**, which was available only where proceedings had been validly constituted.



Do you think it is right that an administrator has to wait until obtaining the grant before they can act, while an executor can act as soon as the testator dies?

Why do you think there is this distinction between the two types of PR?

CONTINUE

4.2 Powers, duties and liabilities of personal representatives

4.2.1 s25 Administration of Estates Act 1925

The duties of the PRs are set out in **s25 AEA 1925** (as amended by **s9 Administration of Estates Act 1971 (AEA 1971)**) and in the **Trustee Act 2000 (TA 2000)**. These duties must be performed with due diligence, and **s1 TA 2000** imposes a duty *to exercise such care and skill as is reasonable in the circumstances*.

In general, the duties of a PR are:

- to collect and safeguard the assets;
- to pay the debts of the deceased;
- to distribute the estate to the beneficiaries correctly entitled.

s25(1) AEA 1925 imposes the duty to collect and get in the real and personal estate of the deceased and administer it according to law. The assets must be collected by taking legal action, if need be. This would include suing for recovery of debts owed to the deceased. They must collect the assets as soon as reasonably possible, although secured debts need not be collected immediately if the security is adequate, unless the money is required for payment of debts. This duty relates only to those assets that devolve on the PRs.

How far a beneficiary can insist on a PR litigating on their behalf was considered in **Re Clough-Taylor, Coutts & Co v Banks [2003]**. The deceased had been an artist. A friend

removed a screen from the deceased's house after her death, claiming that she had given it to him during her lifetime. The first defendant claimed that it had belonged to the deceased at the date of her death and therefore passed to the first defendant under the deceased's will. She also claimed that the executor bank was under a duty, by virtue of **s25 AEA 1925**, to take proceedings to recover the screen. The court held that the executor was entitled not to commence a claim against the deceased's friend given that there was a real risk that it would be unsuccessful, incurring significant costs for the estate. Instead, the executor could assign the screen and the claim itself to the first defendant (the specific beneficiary of the screen). The first defendant would then be able to make the claim but would bear the financial risk of losing.

4.2.1.1 Collection of assets

s1(1) AEA 1925 provides that land owned by the deceased will devolve on his PRs (i.e. give them the legal right to control) unless the deceased's interest came to an end on their death; this is also generally true of assets other than land. Applying this rule means that certain property in which the deceased had an interest or connection at their death will not devolve on the PRs. If property does not devolve on them, they do not have any duty to collect it because it will not pass under the terms of the deceased's will or intestacy.

Property that does **not** devolve on the PRs includes the following.

1. Property held by the deceased as a beneficial joint tenant – provided that there has been no severance, the property will pass to the survivor under the right of survivorship. If the property is held as tenants in common in equity, then, on the death of the deceased, the deceased's severable share passes to the PRs.
2. Property held or enjoyed by the deceased under a life tenancy – where the deceased was a life tenant, the property will devolve according to the terms of the trust instrument and not to the deceased's PRs.
3. Property which is the subject matter of a *donatio mortis causa* – this is held on trust by the donee until the donor dies.
4. Money arising under insurance policies on the life of the deceased but written in favour of others, either by means of the implied trust under **s11 Married Women's Property**

Act 1882 or by means of an express trust, which names the beneficiary without the need for a grant of representation.

5. Lump sum payments under the deceased's pension scheme (the death in service benefit) – such schemes are generally discretionary, and the pension money is paid directly to those nominated by the deceased.

6. Foreign property.

Note that, under the **Law Reform (Miscellaneous Provisions) Act 1934 (LR(MP) A 1934)**, all causes of action vested in the deceased at their death survive for the benefit of their estate. Exemplary damages (damages awarded as a punishment for particularly bad conduct) will not be awarded to the estate. However, if the action relates to the cause of the death, damages are calculated without reference to any gain or loss to the estate caused by death, except that a reasonable sum is allowed for funeral expenses. Actions in contract and tort survive, apart from an action for defamation and a contract for personal services (such as a jockey's contract of employment which ended on the death of the racehorse owner who employed him, as in ***Graves v Cohen [1930]***). In addition, the PRs may bring an action under the **Fatal Accidents Act 1976** on behalf of the dependants of the deceased, where the death of the deceased was caused by an event in respect of which the deceased could have sued if they had lived. Any damages recovered under such a claim belong to the dependants and do not form part of the estate.

Note that the danger here is that if the PRs are seen to have delayed, they can be made personally liable for failing to collect if loss is suffered by the estate. In ***Caney v Bond [1843]*** the testator had lent £500 to a friend on a promissory note. After the death of the testator, the PR did not call in the loan immediately, believing the friend to be good for the money. £100 was paid voluntarily by the debtor and he would have paid the balance if he had been asked to do so. Two years elapsed and the debtor died insolvent. The executor was held to be personally liable for the loss. He should have acted earlier by calling in the whole of the outstanding debt.

If the security is inadequate, then the PRs will have to consider a favourable time for realisation. Provided that they act honestly and prudently, they will not be personally liable for loss.

In ***Re Chapman [1896]*** the estate consisted of several mortgages on agricultural land. Owing to a depression, the value of the land fell and, at death, the value was insufficient to cover the mortgages. The executors were held not liable for the financial losses arising because of their decision to wait for a more favorable time to cash in the mortgages.

Under **s15 Trustee Act 1925 (TA 1925)**, PRs have wide powers to compound liabilities or compromise claims. These include powers to:

- accept any property, real or personal, before the time at which it is transferable or payable;
- pay or allow any debt or claim on any evidence that they think sufficient;
- accept any composition (agreement with a debtor) or security (item of value handed over pending payment of a debt), real or personal, for any property claimed;
- allow time for payment of any debt;
- compromise, compound, abandon, submit to arbitration, or otherwise settle any debt, account, claim, or thing whatever relating to the estate.

The exercise of the discretion under **s15** must be active. A PR who has failed to collect a debt owing to negligence or carelessness cannot rely upon **s15** for protection from liability.

Once the PRs have collected in the assets, they owe a duty to take reasonable care to preserve them. This means that they should consider exercising their power to insure.



Link to Practice

Ascertaining assets is a methodical review of the deceased's papers and effects. A main source of information will come from bank statements. Regular payments to financial institutions can indicate other investments, life or pension policies.

Write to all known financial institutions to obtain a list of assets held in the deceased's name with balances as at the date of death.

4.2.1.2 Payment of debts

It is the responsibility of the PRs to pay the funeral expenses, testamentary and administration expenses, and debts and liabilities incurred by the deceased in their lifetime.

The PRs must be aware of which assets are available to them for the payment of debts. These are defined in **s32(1) AEA 1925** and include:

- property in which the deceased had a beneficial interest;
- property subject to a general power of appointment exercisable by will;
- income and assets arising after death.

Property not available to PRs for the payment of debts includes:

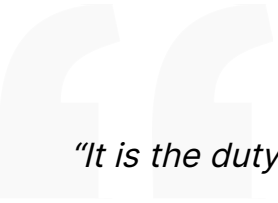
- property in respect of which the deceased was a beneficial joint tenant;
- property not passing into the hands of the PRs, for example, where the property has perished or has been stolen and no blame can attach to the PRs;
- trust property, such as a life policy in favour of a named beneficiary;
- foreign property.

The liabilities must arise out of the obligations entered into by the deceased and not as a result of obligations incurred by the PRs (***Homer's Devisees Case [1852]***).

Inheritance tax due on the free estate must be paid to HM Revenue & Customs before applying for the grant unless the instalment option applies. This creates a short-term

cashflow problem since, until the grant is obtained, balances on bank accounts or investments in the name of the deceased cannot be transferred to the estate account operated by the PRs. The PRs can be held personally liable for the inheritance tax due (***IRC v Stannard [1984]***). In practice, a bank or building society where the deceased held an account may be prepared (subject to the account balance being sufficient and against an indemnity from the PRs) to make funds available to pay the inheritance tax.

The debts must be paid promptly (***Re Tankard [1942]***). Uthwatt J said:



"It is the duty of the personal representatives to pay the debts with due diligence having regard to the assets in their hands. They should have special regard to the debts which carry interest and can be personally liable for an unnecessary order for costs made against the estate."

This means that the PRs should give priority to the payment of debts that carry interest so as to minimise the loss to the estate and should not unnecessarily defend actions for debt brought against the estate. Actions in contract and tort survive by and against the estate. The PRs would be liable if they paid debts that were unenforceable (e.g. a claim under a contract for land which was unenforceable for not being in writing) or a claim that was statute-barred. The limitation period for actions in contract or tort is six years, and 12 years in relation to land and covenants.

There is no rule that the debts should be paid within the executor's year (one year from death). **"Due diligence"** means that they should be paid as soon as assets are available to pay them and the full extent of the liabilities has been ascertained. After the end of the

executor's year, the PRs may still be justified in not making payment (perhaps because no assets are yet available), but in this case the onus is on the PRs to justify the delay.

The PRs must ensure that they have taken all reasonable steps to ascertain the debts payable. Failure to do so can render them personally liable. In order to gain protection from the claims of creditors or beneficiaries of whom they may not be aware, the PRs must advertise in the manner laid down by **s27 TA 1925**, which requires:

- advertisement in the *London Gazette*;
- advertisement in a newspaper in the area where any land that belonged to the deceased is situated; and
- such other advertisements as the court would have directed in an administration action. If, for example, the deceased carried on a business, it would be usual to advertise in a newspaper circulating in the area where the business was situated.

A time limit of not less than two months must be stated in the notice for claims to be made. Only when the time limit specified in the advertisement has expired can the PRs distribute the estate without being personally liable for claims of which they are unaware. The PRs must also make the searches that a purchaser of land would have made. Even then, a disappointed creditor or beneficiary can recover assets by tracing them into the hands of the beneficiary who wrongfully received them (**s27(2) TA 1925**).

s27 TA 1925 also protects the PRs against claims by unknown beneficiaries, but not where a beneficiary is known about but cannot be found.

s27 TA 1925 was discussed in ***Aon Pension Trustees v MCP Pension Trustees [2010]***, which concerned the extent to which trustees of a pension scheme that was being wound up were protected by **s27** advertisements. Here, the trustees had forgotten the existence of 32 members of the scheme. The Court of Appeal held that the trustees were not protected by the **s27** advertisements, even though none of the members concerned responded to them. The trustees were treated as having had notice of the members' existence, so **s27** offered no protection.



Link to Practice

Ascertaining liabilities and debts is a similar exercise to ascertaining assets. You must ensure a debt is just and properly payable. A mortgage secured on a home, credit card debts and bank loans are fairly straightforward and will need little supporting evidence. However, a family member or friend suggesting the deceased owed them money will require additional supporting evidence. In addition, a PR must discharge their duties to ensure money is not passed to a creditor who has not satisfied the PR that the debt is properly payable.

4.2.1.3 Distribution

s44 AEA 1925 provides that the PRs do not have a duty to distribute before the end of the executor's year. This means that any direction to make earlier payment contained in the will (e.g. to pay a legacy "as soon as convenient after the date of my death") may be ignored by the PRs. Indeed, it may be most unwise to rush into making payment in case the estate turns out to be insolvent. The effect of such a direction is only to make interest on the legacy payable from the time that the will directed payment.

It is also essential that the PR identifies beneficiaries (not always easy in circumstances in which the description of a beneficiary is not entirely clear).



Link to Practice

1. All beneficiaries should provide identification to ensure payment is made to the correct person.
2. A PR should also ensure the beneficiary is not subject to bankruptcy and bankruptcy searches should be carried out against all individual beneficiaries before estate funds are distributed to them.
3. The above points are where you start in answering Jasmine's questions (see Scenario 1 at 4.1). Before going into technical explanations about what a PR can and cannot do and referring to powers they may use during the course of the administration, it is essential every PR understand the above. If a PR does not understand their duties at the outset, how can they make an informed decision on whether or not to accept the role?

CONTINUE

4.2.2 Appropriations

s41 AEA 1925 gives the PRs power to appropriate (transfer in kind) any asset of the estate in full or part satisfaction of a legacy, provided this does not prejudice a specific legacy.

The asset is valued at the date of appropriation, but if its value exceeds the legacy, the power is not available (***Re Phelps [1980]***), although the asset may be transferred for full value; it is treated as a sale. The PRs must employ a qualified valuer where necessary. The power of appropriation saves the PR the trouble and expense of realising assets if they do not wish to do so and the beneficiary agrees to accept the assets in lieu of a cash legacy left to them.

Obviously, the PR does **not** have power to appropriate an asset that is already bequeathed specifically to another beneficiary. Apart from this restriction, the power may be exercised to satisfy a settled legacy (a legacy where the gift is not absolute, e.g. a gift to X for life, remainder to Y), including one which is contingent or deferred.

The PRs must obtain the consent of the beneficiary in whose favour the appropriation is to be made.

- If the beneficiary is an infant or is mentally incapable, the consent and receipt of their parent, guardian or receiver are needed.
- If the legacy is held on trust, the consent of the trustee or the person entitled to income is needed.

When exercising the power, the PRs must take into account the interests of all the beneficiaries, including those whose consent is not required, and unborn beneficiaries (**s41(5) AEA 1925**). The practice when drafting a will is to exclude the need to obtain the consent of the beneficiary.

Example

Andriana would like to receive her Aunt Olivia's jewellery as part of her share of the estate. Carlos and Paulo have no objection to this, and Jasmine can appropriate the jewellery to Adriana as part distribution of her share of Olivia's estate.



CONTINUE

4.2.3 s31 and s32 Trustee Act 1925

Where the estate includes trusts for minor beneficiaries, **s31 TA 1925** (as amended by **s8 Inheritance and Trustees' Powers Act 2014 (ITPA 2014)**) gives power to the PRs to make payments from the income of the estate to the parent or guardian, or to apply the income or any part of it for the maintenance, education or benefit of the minor. For the power to apply,

there must be no prior life interest. Even if the life tenant is willing to consent to a payment of income, trustees have no power to do so under **s31**.

To the extent that the PRs do not distribute the income for the benefit of the child, it must be accumulated. Accumulated income is available for maintenance in later years. **s31(2) TA 1925** provides that an adult or a married minor beneficiary who has a contingent gift is entitled to income, including the accumulations. It should be noted that the power in s31 applies only if the gift carries interest or income.

Note, before **ITPA 2014** came into force in October 2014, the previous version of **s31** had contained a number of restrictions and limitations on the trustees' power to maintain. These limitations were commonly removed in professionally drafted wills to give the trustees more flexibility. Wills containing such clauses will be encountered for some years to come.

Under **s32 TA 1925** (as amended by **s9 ITPA 2014**), PRs may advance up to the **whole** of a beneficiary's vested entitlement to them or for their benefit. The consent of anyone with a prior interest is required, and the beneficiary must bring the advancement into account when the estate is distributed (so that the amount they receive in the end is reduced by the amount they have received already). The advance must be for the benefit of the beneficiary and could take the form of a further trust for their benefit. The trustees are able to advance cash and/or other assets to beneficiaries, the value of which are to be brought into account as part of the beneficiary's share if and when he or she becomes absolutely entitled. Note also that a wide definition of "benefit and advancement" was given by the House of Lords in ***Pilkington v IRC [1962]***. If the beneficiary who is given the advance dies, there is no duty to refund the advance.

Before **ITPA 2014** came into force, the previous version of **s32 TA 1925** limited the trustees to advancing up to one-half of the beneficiary's share. Professionally drafted wills commonly removed this restriction so that the trustees could advance up to the whole value of the beneficiary's share.

Professionally drafted wills will usually provide that the receipt of the parent or guardian of the beneficiary, or even the beneficiary if aged 16 or over, will be a good receipt for the PRs.



Link to Practice

The power to advance income and more particularly capital to a beneficiary with a vested share before the beneficiary becomes absolutely entitled to that share is very important for a trustee to understand.

Jasmine needs to understand that although the nephews and nieces cannot take their respective shares until they reach the age of 25, Jasmine does have the power to use the trust fund to assist them each financially for their benefit and advancement. A classic example might be to pay for school fees.

Jasmine will have to account for any funds advanced in the final distribution when each beneficiary attains the required age.

CONTINUE

4.2.4 Trustee Act 2000 powers

4.2.4.1 Duty of care

Under **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.

4.2.4.2 Investment

Under **s3 TA 2000**, trustees are empowered to undertake a wider range of investments than was previously authorised. Trustees can invest in investments that they might choose if they were absolutely entitled to the assets. In making investments, trustees must have regard to the duty of care imposed by **s1** – trustees must exercise ***such care and skill as is reasonable in all the circumstances***. They must also take account of the standard investment criteria set out in **s4**, which directs the PRs to consider the suitability and diversification of the investments. **s5** requires that trustees take appropriate advice before exercising their powers of investment unless they reasonably conclude that it is unnecessary.

In respect of land, **s8** gives PRs the power to buy freehold or leasehold land in the UK either as an investment or for occupation by a beneficiary. This duty can be restricted by a provision in the testator's will.

The duties of professional solicitor trustees in managing investments on behalf of a trust were considered in ***Daniel and Another v Tee and Others [2016]***. Here, the solicitors relied on the advice of independent financial advisers and invested heavily in technology/IT shares prior to their collapse in value in 2000/2001. Although the court held that the claimants had breached their duty of care by not adopting a realistic investment strategy and investing in a wider range of investments, it was not possible to show that the losses incurred had been caused by the breach of duty. The importance of periodic reviews of investment decisions was emphasised, as well as recording the results of those discussions.

4.2.4.3 Delegation

ss11–23 TA 2000 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 4.2.4.3). 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.

4.2.4.4 Insurance

s34 TA 2000 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.

CONTINUE

4.2.5 The administrative year

When the deceased's assets have been collected in and realised and all the debts and expenses have been either paid or provided for, the PRs are in a position to distribute the estate to those entitled, under the valid provisions of the will or according to the rules of intestate succession.

There are no time limits as to when distribution must take place. **s44 AEA 1925** says that a PR is not bound to distribute the estate before the expiration of one year from the death (although it is possible for distribution to take place within the year). A legatee could not compel distribution of a legacy during the executor's year, or even afterwards, if there is a good reason for non-payment, but the PR must deal with the estate promptly. Undue delay

could render him liable to a *devastavit* action, brought by an aggrieved beneficiary or creditor.

However, PRs must allow for the payment of interest on pecuniary legacies.

As a general rule, a pecuniary legatee is entitled to interest from the date on which the legacy is payable. In the absence of any contrary direction in the will, a legacy is payable at the end of the executor's year. Any interest payable is an administration expense, payable normally from residue.



Exceptionally, interest on such a legacy is payable from the date of death, unless the will provides otherwise. This is so if the legacy is in satisfaction of a debt, if the legacy is charged on realty, if the legacy is to the testator's infant child or to an infant to whom they stand *in loco parentis*; or if the legacy is to any infant with the intention to provide for that child's maintenance.

As regards the rate of interest payable, if not prescribed by the will, it is that which would be applied by the court. **CPR para 15 PD 40A** states:

Where an account of legacies is directed by any judgment, then, subject to:

- *any directions contained in the will or codicil in question; and*
- *any order made by the court;*

interest shall be allowed on each legacy at the basic rate payable for the time being on funds in court or at such other rate as the court shall direct, beginning one year after the testator's death.



As it is currently taking a lot longer to obtain a grant, partly due to the changes made to the Probate Registries and partly due to Covid-19, should reference to the executor's year be increased to take account of this increased time?

CONTINUE

4.2.6 Charging to act

Professionally drafted wills normally include a clause permitting professional trustees, including lawyers, to charge for their professional services. Until **TA 2000** came into force there were two key problems which made the inclusion of such a clause particularly important.

Express trustee charging clauses were construed restrictively by the courts. First, in the absence of express words, no payment could be charged by a trustee for work that could have been done by a lay trustee. This limitation has now (subject to any inconsistent provision in the will) been removed by **s28(2) TA 2000**, which permits trustees to charge for work that could have been done by a lay person.

Second, the charging clause was treated as a testamentary gift to the trustee; a trustee who also signed the will as a witness to the testator's signature would, by virtue of **s15 Wills Act 1837 (WA 1937)**, lose their gift, that is, their payment. **s28(4) TA 2000** removes this limitation so that a payment clause is no longer treated as a gift to the trustee but is now a debt on the estate.

s31 TA 2000 provides that PRs are entitled to reimbursement for all expenses that they properly incur.

s29 TA 2000 would appear, on the face of it, to remove the need for professionally drafted wills to include a charging clause. **s29** provides that, in the absence of a charging clause, a professional trustee may claim reasonable payment provided that the other trustees agree in writing. In practice, however, will-writers continue to include charging clauses which provide that the professional trustees do not have to obtain the written consent of the other trustees. It is also desirable that the beneficiaries and lay trustees are very clear, from the content of the will, that the professional trustee can charge for their services.

Where no charging clause has been included, the court does have an inherent jurisdiction to award payment to a trustee who has done work over and above what was contemplated. The court has this power even if there is a trustee charging clause that is inadequate for meeting the costs of services rendered. Remuneration can therefore be awarded in addition to that claimable under the trust instrument (***Re Duke of Norfolk Settlement Trust [1982]***).



Link to Practice

Gavriel & Anor v Davis [2019] is a cautionary tale for any lay PR who wants to charge for their time in the administration of an estate. The claimant, Hope Davis, claimed for £27,300 representing her time spent in connection with administration. She asserted that the hourly rate of £250, which was reduced to £230 as a result of her friendship with the family, had been agreed, and that if it had not been agreed that she could charge for the work undertaken she would never have accepted the appointment. Chief Master Marsh refused to exercise the court's discretion in Ms Davis' favour finding her evidence to be entirely unsatisfactory. Ms Davis has been granted permission to appeal.



Taking into account the amount of time required to administer an estate, do you think it is right that lay PRs cannot charge anything for the time spent?

CONTINUE

4.3 Protection available to personal representatives

4.3.1 s27 Trustee Act advertisements

PRs who have distributed the assets of the estate remain personally liable to any unpaid beneficiary or creditor, even though they were not aware of their claim at the time for distribution (*Knatchbull v Fearnhead [1837]*). The object of **s27 TA 1925** is to protect PRs against such liability.

Under **s27**, PRs may give notice of their intention to distribute, requiring any person interested, whether as beneficiary or creditor, to send particulars to the PRs within a stated time, which must not be less than two months from the date of the notice.

The notice is given by:

1. an advertisement in the *Gazette* (formerly the *London Gazette*); and
2. an advertisement in a newspaper circulating in the district in which any land to be distributed is situated (this will, in practice, be a local newspaper); and
3. such other like notices, including notices elsewhere than in England and Wales, as would, in any special case, have been directed by a court of competent jurisdiction in an action for administration.

In practice, this usually involves an advertisement in such local or national newspapers as might be appropriate, having regard to the circumstances of the case. If in doubt, PRs should apply to the court for directions.

Executors should arrange to give such notices as soon as possible after death; administrators as soon as possible after the issue of the grant conferring their authority to act.

In addition, the PRs should make such searches as a purchaser of land would make in the Land Registry or Land Charges Registry, as appropriate; in the local land charges register; and a bankruptcy search against the deceased and any beneficiary receiving assets and known to the PRs to be in financial difficulties.

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

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

If PRs distribute the estate with knowledge that there was a future or contingent liability, a **s27** notice will not be sufficient to protect them. They should take the following steps.

In the case of a known future liability, the PRs should set aside a fund to meet it. In the case of a contingent liability (e.g. where the deceased has guaranteed a debt or where there is the threat of possible proceedings against the estate), there are several courses of action open to the PRs. They may set aside a fund to meet the possible liability and distribute the remainder of the estate. Alternatively, they may distribute the whole of the estate but obtain the beneficiaries' agreement to indemnify the PRs if the liability arises. Although doubtless attractive to the beneficiaries, this course carries considerable risk for the PRs and is not generally to be recommended.

An option which is being used more often these days, due to the relatively high cost of placing **s27** advertisements, is for PRs to obtain insurance cover against unpaid liabilities. This would provide less of a risk to PRs when set against an indemnity from beneficiaries.

In all cases, if the deceased was in receipt of income support or other state benefit, the PRs should be warned that they should not make any distribution until the Department for Work and Pensions has confirmed that no refund of benefit is due or has computed its claim.

Alternatively, they might apply to the court for directions. Such an application should certainly be made if the potential liability is large.

Note, **s27 TA 1925** affords no protection against claims under the **Inheritance (Provision for Family and Dependants) Act 1975 (I(PFD)A 1975)**.



Activity

Below is a link to the *Gazette*; go to the Wills and Probate notices and find a s27 notice and identify the deceased's name, date of death and the claims date.

 **THE GAZETTE**



THE GAZETTE

OFFICIAL PUBLIC RECORD

The Gazette | Official Public Record...

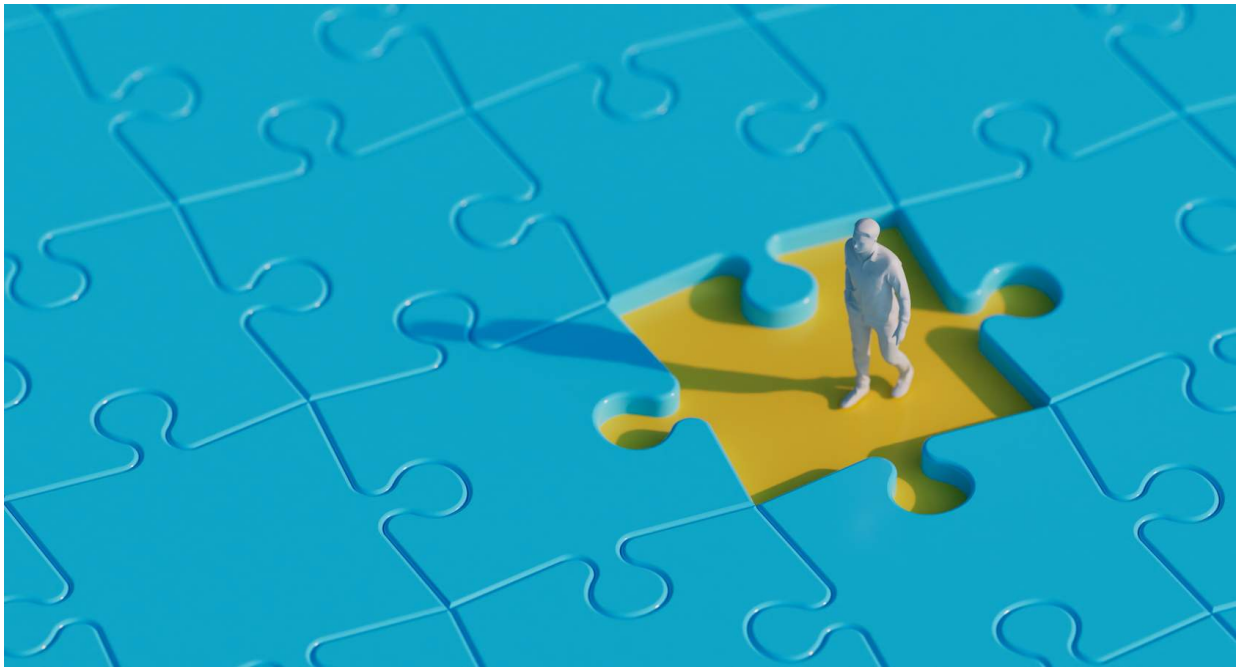
The Gazette - the UK's official public record since 1665...

[READ MORE THE GAZETTE](#)

CONTINUE

4.3.2 Missing beneficiaries

The PRs must correctly identify and find those entitled to benefit as well as ascertain the extent of their entitlement. If the existence of a beneficiary was unknown to the PRs, such as in the case of unknown illegitimate relatives, the PRs will be protected if they advertise and search under **s27 TA 1925**. Distribution may be delayed because the PRs cannot be sure who is entitled.



For example, it may be that they know of the existence of a beneficiary whom they cannot find. In such circumstances, since they are aware of the beneficiary, **s27** will not protect them.

In these circumstances the PRs have a number of options open to them.

1

The PRs might consider distributing to the known beneficiaries, taking an **indemnity** from them. However, there are considerable risks.

- Will the known beneficiaries honour the indemnity if the missing beneficiary later turns up and the PRs have to pay out from their own resources?
- What if, for example, a beneficiary has since become bankrupt?

2

The PRs may obtain **insurance cover** against the risk of the missing beneficiary appearing and distribute accordingly. To obtain cover, it

is normally necessary to place similar advertisements etc. However, if the risk is not great (e.g. because the sums involved are not large), this may be a quicker and cheaper solution than a court application.

In ***Evans v Westcombe [1999]*** the court recommended that PRs, particularly of small estates, should not be discouraged from obtaining missing beneficiary insurance cover. Such indemnity insurance offers a fund to meet the claim of a missing beneficiary in exoneration of the PRs or the beneficiary who has been overpaid.

An insurance policy can be more effective than a ***Benjamin order (Re Benjamin [1902])***, and in a small estate the insurance premium can be less than the costs incurred in the ***Benjamin*** order procedure. If a ***Benjamin*** order is not sought, taking insurance cover can avoid sums of money being tied up indefinitely to await the claim of a long-lost beneficiary.

3

A further option is to engage the services of a **genealogist** with experience in tracing missing heirs. There are a number of firms offering such a service, many of which work on commission if successful.

4

Alternatively, the PRs can apply to court.

CONTINUE

4.3.3 Court applications

The PRs have a number of options for dealing with the share to the missing beneficiary. We will look at those options below.

4.3.3.1 Pay the share of the missing beneficiary into court

The PRs can pay the share of the missing beneficiary into court and distribute the remainder of the estate, though this is not an ideal solution as the money could end up remaining there unclaimed.

4.3.3.2 Apply to the court for a Benjamin order

In *Re Benjamin [1902]* the testator left a residuary gift to X, who disappeared nine months before the testator died. Despite advertisements, X did not come forward to claim his share. The court permitted the distribution of the estate on the footing that the beneficiary had predeceased the testator. The principle in *Re Benjamin* can be extended to the ascertainment of creditors as well as beneficiaries.

The court may include other terms, such as ordering distribution where a child has predeceased the testator, on the basis that the child did not leave issue who survived the testator (thereby excluding the operation of **s33 WA 1837**).

In *Re Gess [1942]* the administrators of a Polish national who died domiciled in England were unable to advertise for Polish claimants because Poland was occupied by the Germans during World War II. They knew of some debts and applied to distribute the remainder of the estate. The court allowed distribution subject to a contingency fund to meet known Polish liabilities without the requirement of further advertisements.

The court will direct what, if any, enquiries are to be made by the PRs, which usually involves placing **s27** advertisements. If **s27** advertisements have been placed and no claimants have responded before the claims date has ended, the court will direct the estate to be distributed in accordance with the terms of the order. This may, for example, direct the PRs to distribute the estate on the basis that the missing beneficiary had died before the deceased and had left no issue of their own.

The PRs are then authorised to distribute the estate to the existing beneficiaries and are protected from liability for doing so. If the missing beneficiary later appears, they may recover their share from any overpaid beneficiary.

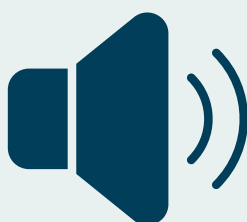
4.3.3.3 Obtain a declaration from the High Court

Finally, the PRs can apply to the court under the **Presumption of Death Act 2013 (PDA 2013)**, which sets out a court-based procedure that enables those left behind when someone goes missing to obtain a declaration from the High Court that the missing person is deemed to have died. The High Court can make that decision if satisfied that the missing person has died or is not known to have been alive for a period of at least seven years. The court can also say when the person is deemed to have died, which could be extremely important in determining rights to property interests. The procedures for an application under **PDA 2013** are set out in **Practice Direction (PD) 57B**.

In ***Greathead v Greathead [2017]*** the High Court identified factors supporting its determination that a missing person could be presumed to have died on the day they disappeared, including:

- they were suffering from a clinical mental illness;
- they were not able to look after themselves properly;
- they were in a very low mood having previously suffered suicidal ideation (thoughts);
- they may not have been taking any necessary medication;
- they disappeared without warm clothes, access to money, a passport or mobile phone;
- they had nowhere else to go (so far as known);
- there were severe frosts and heavy snow shortly after they disappeared;
- they had a sore knee and limp, meaning they could not have travelled far on foot;
- their money remained untouched since their disappearance;
- they had not been seen or heard of since 2005, despite extensive searches.

When such a declaration has been made, a copy will appear in a new register of presumed deaths, which will be linked to the register of actual deaths. This certificate will be conclusive as to the presumed death, and is effective for all purposes and against all persons. Therefore, PRs trying to find a missing beneficiary could, in appropriate cases, rely on a declaration of presumed death obtained by a third party in other proceedings, rather than seeking further protection through a **Benjamin** order or indemnity insurance. Such a declaration would also, presumably, allow a death to be sworn by those seeking to obtain a grant of representation.



Law Explained: The role of the personal representative

In this recording we examine the role of personal representatives: executors and administrators, focussing on their duties in respect of missing and unknown beneficiaries and creditors.



Audio Transcript

Hello. Following Chapter 4 of your book, in this recording I'm going to look at the role of the personal representative. Don't forget that when we use the term "personal representative", or "PR", this includes both executors and administrators. (You may also come across the terms "executrix" and "administratrix" – these are the female versions.)

It's important to remember that broadly the same duties apply to both categories of PRs.

You will see from Chapter 4 that PRs have an important role in administering the deceased's estate, and you may feel it is slightly surprising that, unless the PR is a professional, largely there is no pay for taking on this fairly onerous responsibility.

Rather than dealing with personal representatives' powers and duties in general, in this recording I am going to concentrate on their role with regard to unknown and missing beneficiaries. This is an area that often causes confusion.

Before the personal representatives can start to consider the distribution of the estate, one of their duties is to ensure that they are aware of, and have settled all the deceased's liabilities. In some cases this is very easy; some individuals are very good at keeping careful records and the PRs will have no difficulty in discovering who is owed money and how much they are owed. However, this is not always the case and sometimes the deceased's lifestyle has been fairly chaotic, and there is a real concern that creditors will be missed. Remember, creditors (and beneficiaries) do not lose their rights just because they have not come forward quickly enough.

This is where section 27 of the Trustee Act 1925 comes into its own. Whilst section 27 will not prevent creditors or beneficiaries coming forward after the estate has been distributed, it does provide some protection for the PRs against personal liability.

The way that section 27 works is this: PRs who have advertised in appropriate media for anyone interested in the estate (i.e. creditors or beneficiaries) to make themselves known, and have given the statutory amount of time for this to happen, are protected against personal liability towards a person who does not come forward in the specified period – which must be at least two months. So, if the PRs place their advertisement on the 1st of June, stating that interested parties have until the 31st of August to come forward, and Robin, a potential creditor, does not contact the PRs until the end of September, whilst the PRs may well have to find a way of satisfying Robin's debt, they will not be personally liable for having already distributed the estate. It's important, as I said previously, to remember that section 27 applies to both creditors and beneficiaries. This does not generally mean named beneficiaries, but instead those who satisfy a class description. So, for example, if the testator has left a sum of money to be shared between his children, and there is a suspicion that his philandering lifestyle means that there may be children in existence that the PRs are not aware of, a section 27 advertisement is essential.

Contrast this with the procedure where a beneficiary is known but not traceable. For example, Kevin has left a gift in his will to his old friend, India, but the executors do not have an address for India and have tried and failed to find her. Whilst a section 27 advertisement might help in such a circumstance because India might see it and be prompted to get in touch, it will not provide any sort of protection for the PRs if they distribute without taking India's entitlement into account.

There are various methods of protecting the estate in a situation where a known beneficiary is missing, ranging from court orders to indemnities from the beneficiaries, to simply retaining a fund to pay the legacy should the beneficiary emerge. Each has its pros and cons, but it's very important to remember that the solution you choose should be proportionate to the value of the gift and the value of the estate – so if the gift in question is a few hundred pounds, it is unlikely that a court order would be justified.

So, in conclusion, this recording serves as a reminder that whilst a section 27 advertisement is very important in order to protect the PRs from personal liability against unknown creditors and beneficiaries, it will have little efficacy in the case of a known but missing beneficiary, and the PRs will need to explore which of the range of solutions is best in the circumstances 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 8 questions in this knowledge check.

Question 1 of 8

Which of the following statements about administrators are correct:

(Select 2 correct answers)

- ☐ They can enter into contracts from the date of death.
- ☐ They get their authority from the date of the grant.
- ☐ On death, where there is no will or where there are no surviving executors under the will, the deceased's assets vest in the administrators.
- ☐ On death, where there is no will or where there are no surviving executors under the will, the deceased's assets vest in the Public

Trustee.

SUBMIT



Complete the question above before moving on.

Question 2 of 8

Which of the following grants of representation would be most appropriate in the estate of the following individual who has died recently?

Daniella, who had never made a will.

- ☐ Letters of administration
- ☐ Letter of administration with will annexed
- ☐ Probate

SUBMIT



Complete the question above before moving on.

Question 3 of 8

Which of the following grants of representation would be most appropriate in the estate of the following individual who has died recently?

Barry, who had made a valid will appointing his brother Caleb as sole executor. Caleb died last year.

- ☐ Letters of administration
- ☐ Letter of administration with will annexed
- ☐ Probate

SUBMIT



Complete the question above before moving on.

Question 4 of 8

Which of the following grants of representation would be most appropriate in the estate of the following individual who has died recently?

Azma, who left a valid will appointing her parents Umran and Lafiza as executors. Umran predeceased Azma.

- ☐ Letters of administration
- ☐ Letter of administration with will annexed
- ☐ Probate

SUBMIT



Complete the question above before moving on.

Question 5 of 8

Which of the following grants of representation would be most appropriate in the estate of the following individual who has died recently?

Henry, who left a valid will appointing his wife Mary as sole executrix.

- ☐ Letters of administration

☐ Letter of administration with will annexed

☐ Probate

SUBMIT



Complete the question above before moving on.

Question 6 of 8

Which of the following grants of representation would be most appropriate in the estate of the following individual who has died recently?

Judith, whose only will was not validly executed.

☐ Letters of administration

☐ Letter of administration with will annexed

☐ Probate

SUBMIT



Complete the question above before moving on.

Question 7 of 8

Which of the following grants of representation would be most appropriate in the estate of the following individual who has died recently?

Kelvin, who had made a valid will appointing Lenny as sole executor. Kelvin's sole beneficiary has predeceased him.



Letters of administration



Letter of administration with will annexed



Probate

SUBMIT



Complete the question above before moving on.

Question 8 of 8

Match the the relevant sections with the following trustee powers.

⋮ Power to appropriate	s25(1) AEA 1925
⋮ Power to invest	s32 TA 1925
⋮ Advertising to protect PRs	s27 TA 1925
⋮ Duty to collect in the estate	s3 TA 2000
⋮ Power to advance capital	s41 AEA 1925

SUBMIT



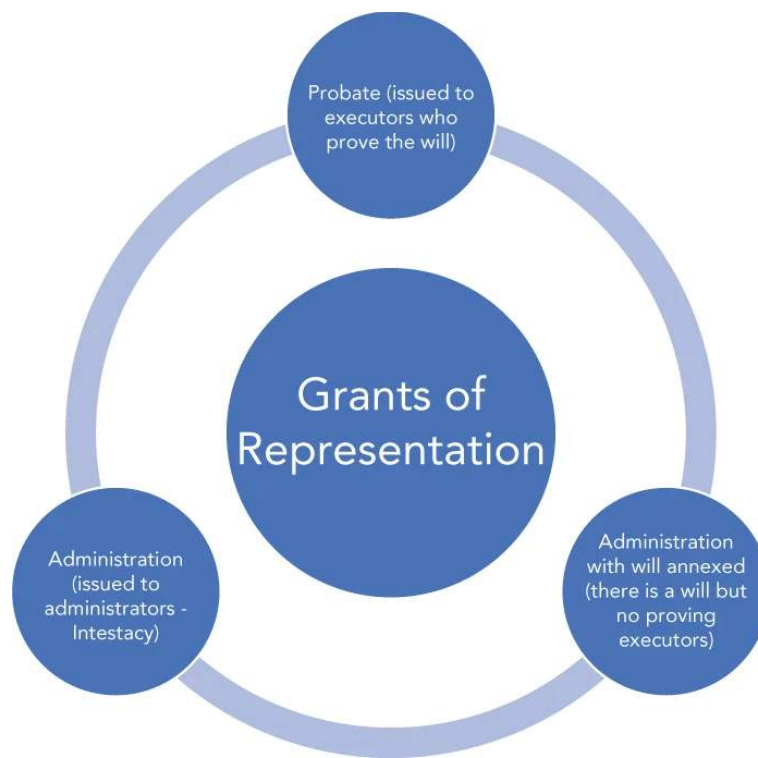
Complete the question above before moving on.

4.4 Summary

Grants of Representation

- Probate: issued to executors who prove the will
- Administration with will annexed: there is a will but no proving executors
- Administration: issued to administrators - intestacy

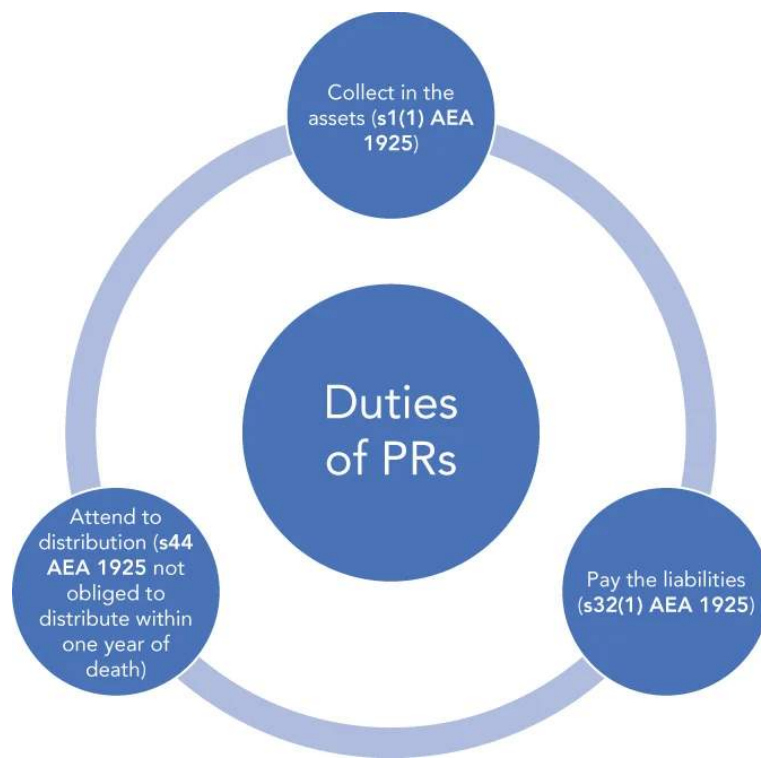
Figure 4.4a



Duties of PRs

- Collect in the assets (s1(1) AEA 1925)
- Pay the liabilities (s32(1) AEA 1925)
- Attend to distribution (s44 AEA 1925 no obliged to distribute within one year of death)

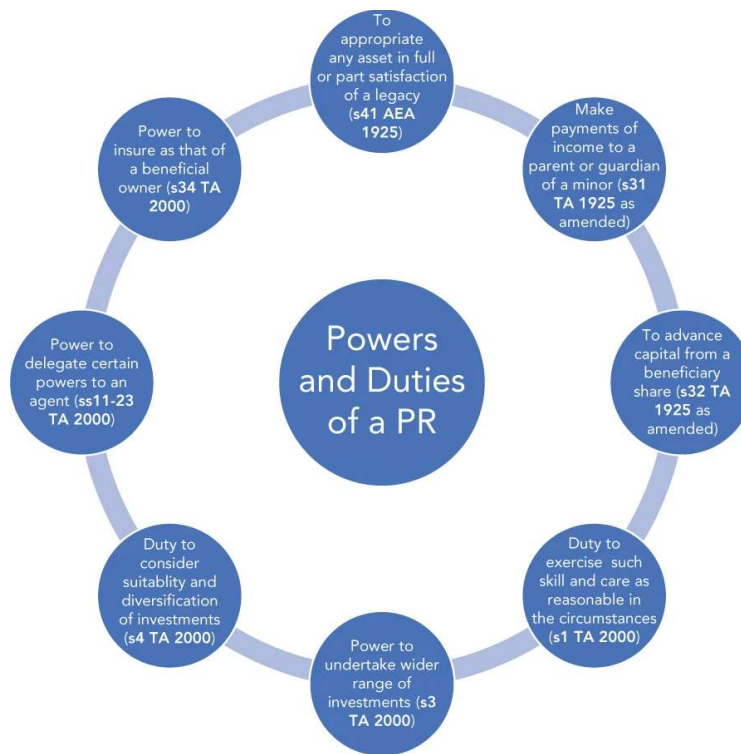
Figure 4.4b



Powers and Duties of a PR

- To appropriate any asset in full or part satisfaction of a legacy (s41 AEA 1925)
- Make payments of income to a parent or guardian of a minor (s31 TA 1925 as amended)
- To advance capital from a beneficiary share (s32 TA 1925 as amended)
- Duty to exercise such skill and care as reasonable in the circumstances (s1 TA 2000)
- Power to undertake wider range of investments (s3 TA 2000)
- Duty to consider suitability and diversification of investments (s4 TA 2000)
- Power to delegate certain powers to an agent (ss11-23 TA 2000)
- Power to insure as that of a beneficial owner (s34 TA 2000)

Figure 4.4c



Protection available to PRs

- Advertisement under s27 TA 1925
- Indemnity from known beneficiaries to cover missing beneficiary's share (high risk – not recommended)
- Insurance policy to cover against the risk of a missing beneficiary appearing
- Engaging a genealogist to assist in locating a missing beneficiary
- Apply to the court for a Benjamin order
- Apply to pay the missing beneficiary's share into court (not ideal and funds may never be claimed)
- Apply to the court under the Presumption of Death Act 2013

Figure 4.4d



You have completed Chapter 4.

EXIT