

AN INTRODUCTION TO BEING AN EXECUTOR

This note is intended to provide to those appointed as executors under a will a brief guide as to their duties and responsibilities. Much of what is said also applies to administrators dealing with an estate where there is no will (an intestacy). Separate, dedicated notes are available which go into greater detail about the duties of a trustee, the probate process and post-death tax planning.

WHAT IS AN EXECUTOR?

An executor is a person appointed by the maker of a will (the testator if male or testatrix if female) to carry out wishes and administer his estate.

WHEN DO I BECOME AN EXECUTOR?

An executor is given authority by the deceased to act in his place in administering the assets he leaves behind. A Grant of Probate confirms that authority. Although executors have full power to act from death, there are certain transactions (e.g. the sale of real estate) which in practice they are unable to undertake without producing a Grant to show they have authority.

CAN I AVOID IT?

Any person who has not yet taken a Grant may renounce the right to be an executor. A trap for the unwary is the possibility of "intermeddling" with the estate. A person has intermeddled with an estate when he has carried out the sort of tasks an executor might do (e.g. letting a bank know of the death). Arranging a funeral is not intermeddling. Once there has been intermeddling, an executor can be forced to take a Grant.

WHAT ARE THE FIRST STEPS AFTER THE DEATH OF THE TESTATOR?

- ◆ Obtain the death certificate.
- ◆ Obtain at least a copy of the will (ensuring the original is secure) and make contact with any other executors.
- ◆ Often the first concern is arranging the funeral or memorial service, details for which may have been specified by the testator in the will, by a letter of wishes or orally.
- ◆ On a practical level, you need to ensure that the deceased's property is secure and that there is appropriate insurance in place. Occasionally, valuable assets are left in an empty house, which may pose a security risk.
- ◆ If appropriate, a temporary loan should be obtained from a bank to provide for immediate members of the family who might otherwise have no money to pay staff wages etc.

POTENTIAL LIABILITIES OF AN EXECUTOR

An executor can be personally liable for losses to the estate that result from a breach of duty by him, an example of which is the wasting of assets. This can occur by:

- ◆ omission to safeguard assets (this includes not preserving the value of assets);
- ◆ the maladministration of the estate (e.g. paying money to those not entitled under the will or as a matter of law); or
- ◆ misappropriation of assets.

Although executors are generally not liable for acts or omissions of their co-executors, they may be liable if they fail to prevent a co-executor from committing a breach of duty, if the breach was known of or should have been.

APPLICATION FOR A GRANT

- ◆ The Executors must submit a tax return to HMRC (see overleaf).
- ◆ Executors must submit an oath when applying for Grant of Probate. The oath basically states that the executors believe that the will they are seeking to prove is the last will and that they will administer the estate correctly. Before an oath is submitted to the Probate Registry (of the Court), it must be sworn and signed before a solicitor.
- ◆ To be eligible as an executor, a person must be of sound mind and be an adult.
- ◆ If a spouse or civil partner is appointed as executor but divorces the testator, the appointment is renounced, unless contrary intention is shown in the will.
- ◆ Subject to what is said above about intermeddling, it is always open to an executor named in the will either to:
 - renounce probate – in this case his right to act over the estate is lost forever; or
 - have "power reserved"; this means that he will not apply for a Grant initially, but that his right to do so later is not totally extinguished.

THE MAIN ELEMENTS OF ADMINISTRATION

The initial duties of an executor are to:

- ◆ determine the validity of the testator's last will;
- ◆ ascertain the extent of the testator's assets and liabilities (from mundane housekeeping bills to mortgages and business liabilities);
- ◆ enquire as to whether the testator may have made any recent lifetime gifts;
- ◆ inform all relevant organisations, such as former employers, the DWP and HM Revenue & Customs that the death has occurred and agree any income or capital gains tax (CGT) liability incurred by the testator prior to the date of his death; and
- ◆ make the necessary return to HMRC Trusts & Estates and pay any inheritance tax (IHT) due.

THE EXECUTORS THEREFORE NEED TO:

- ◆ collect in the assets of the deceased;
- ◆ pay the funeral and testamentary expenses and other debts;
- ◆ pay any legacies specified in the will and distribute any chattels specified in the will; and
- ◆ distribute the rest of the estate in accordance with the will.

ACCOUNTS AND RECORDS

Executors must arrange for a full schedule of all the assets and liabilities in the estate to be drawn up as well as estate accounts for the period of administration. The keeping of good records is vital to the efficient administration of an estate.

PAYING IHT

Once the probate papers have been signed and sworn, they are ready to be submitted to HMRC and the Probate Registry.

It may at this stage be necessary to raise money to pay IHT. In cases where tax is due, it must be paid before a Grant can be issued. If the application is made within six months of the end of the month in which the death took place (which is normal), then only part of the tax bill may have to be paid.

This is the tax that relates to that proportion of the estate that lawyers call "personalty". "Personalty" includes things such as furniture and jewellery, shares, cash, policies, and most other things except for land.

Money for the tax usually needs to be raised by way of an executors' bank loan (which your solicitor can help organise), although the testator's Building Society will sometimes assist by advancing directly to HMRC funds from the balance on the account.

The tax due on land (houses, flats etc) and private company shares can be paid by instalments.

AGREEING TAX LIABILITIES

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

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

Where a will is written in favour of a surviving spouse or a charity, it will not normally be necessary to haggle over values – since no IHT will be payable. However the probate value will normally be taken as the beneficiary's acquisition or "base" cost for CGT if the asset is ever sold, so it is still useful to have a reasonably accurate value at the time of death. The strategy here will depend on circumstances and family intentions.

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

FAMILY TAX PLANNING

Although tax planning is not a specific duty of an executor, it is often worthwhile giving it some thought since legislation currently permits a will (or rather the impact of the legacies it ordains) to be varied within two years of death. A measure of financial planning can therefore be undertaken, provided it accords with the wishes of surviving family and beneficiaries. Significant tax savings can sometimes be achieved by post death planning in this way.

FINALLY

The executors together decide whom they will appoint as solicitors of the estate. If appointed, a solicitor must help the executors complete the administration as quickly as possible. To this end, executors should not hesitate to ask the solicitor a question or call a meeting.

CONTACT DETAILS

If you would like further information or specific advice please contact:

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