Wills and Administration of Estates

Workbook

BPP

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Contents

Introduction to Wills and Administration of Estates

With the availability of free will templates on the internet, it is becoming increasingly tempting for individuals to avoid seeking legal advice when writing their will (being the formal document that determines how someone's assets are distributed after their death). Many people do not leave a will at all. They may also be surprised to discover that the amount of inheritance tax payable on their estate can be affected by things that they do during their lifetime. Wills and Administration of Estates focuses on the rules and procedures relating to wills and the administration of an estate (being the process of carrying out the distribution of a person's assets after they die) including the associated taxation, ethical and professional conduct issues that arise in this area of the law.

1 Distribution of Estates and Intestacy

1 Introduction

When a person dies it is necessary to consider two key issues before you can ascertain how, and to whom, their estate will pass:

- Whether the deceased left a valid will. If so, they are known as a '**testator**' and the will determines how their assets are distributed. If not, the **intestacy rules** are followed. (In some cases, it is necessary to look at both the will and the intestacy rules, because the will does not deal with all the assets that it should.)
- The nature of the assets owned by the deceased. Assets capable of passing under a will or by intestacy are referred to collectively as the deceased's '**succession estate**' or '**distribution estate**'. A number of assets are excluded from the succession estate and are distributed in accordance with their own specific rules.

KEY TERM

Testacy: If the deceased's will covers their entire succession estate, they are **'testate'**. Only the will is relevant when determining how to distribute their succession estate.

Intestacy: A person who dies without making a valid will is said to have died **'intestate'**. The intestacy rules apply to their entire succession estate.

Partial intestacy: If the will does not cover the entire estate, the deceased is **'partially intestate'**. Partial intestacy often arises as a result of poor will drafting rather than intentionally. The will is followed but the intestacy rules apply to any remaining property.

The 'intestacy rules' are found in the Administration of Estates Act 1925 ('AEA') (as amended by the Inheritance and Trustees' Powers Act 2014 ('ITPA')).

They determine **who inherits** and **what each beneficiary receives**.

Partially intestate estate

Cassie drafted her own valid will which contains only the following gifts:

(a) The house I own at the date of my death to my sister Siobhan

(b) The balance of my Nat West account to my nephew Rylan

Siobhan and Rylan inherit the house and bank account respectively under the will.

Cassie's succession estate comprises the following assets:

- Her house
- The balance on a current account at Nat West Bank
- Other personal possessions

As Cassie had personal possessions which are not disposed of by the will, she died **partially intestate**. The personal possessions will pass in accordance with the intestacy rules.

2 Identifying the succession estate

Some types of property that the deceased owned during their lifetime do not form part of the succession estate.

The destination of this property is governed by other rules and therefore will not be distributed under the will or the intestacy rules.

It is possible to deal with such assets before obtaining a **grant of representation**.

This is helpful because it allows you to distribute some assets very early on in the administration of an estate.

The main types of property which will **not** pass to the succession estate are:

- Donationes mortis causa
- Discretionary pension scheme benefits
- Insurance policies written in trust
- Statutory nominations
- Property held as beneficial joint tenants
- Some other beneficial interests under trusts & property held in a trust

2.1 Donationes mortis causa

A donatio mortis causa ('**DMC**') is a gift made in contemplation of death. A valid DMC has 3 requirements:

- The gift is made because the donor believes they may die imminently of a particular cause.
- The donor makes it clear that the gift is conditional upon them dying, and that the property reverts to them if they survive.
- The donor either parts with the property or something representing ownership of it.

Donatio mortis causa

Kian is in hospital with a terminal illness. He hands his designer watch to his friend, Caitlyn and tells her that he wishes her to keep it if he dies.

If Kian dies as expected, the condition is satisfied and Caitlyn becomes the owner of the watch (but if he recovers, she must return it).

The watch does not form part of Kian's succession estate as it has already been validly disposed of.

2.2 Discretionary pension scheme benefits

If the deceased was a member of an employer's discretionary pension scheme then payments made by the trustees will not be included in his or her estate for distribution purposes. These rules only apply to discretionary pension schemes.

Many pension schemes allow contributors to 'nominate' a third party to receive any benefits due after the contributor's death (often by completing an 'Expression of Wish' form). Such a nomination is not binding on the trustees (although in practice they almost always make it). As payment is entirely at the discretion of the trustees, the deceased is not deemed to have any entitlement to any payment from the scheme and any payment which is made does not form part of the deceased's estate for distribution purposes.

The benefit of the discretionary pension scheme will be released upon the production of a death certificate.

2.3 Insurance policies

Insurance policies must be looked at carefully to see whether the proceeds form part of the succession estate.

- If the deceased had a simple life insurance policy, the proceeds of the policy pass to the succession estate.
- If the benefit of the policy was **written in trust** for another person, the proceeds will not form part of the succession estate. The insured has no beneficial interest under the policy. The proceeds belong to the beneficiaries nominated in the policy and **vest** on the insured's death.

Life policies can be written in trust in three ways:

- Under s.11 Married Woman's Property Act 1882 for the benefit of spouse and/or children.
- Expressly for the benefit of any nominated third party, eg grandchildren.
- Into an existing trust for the benefit of the named beneficiaries in the trust deed.

Benefits are released on production of a death certificate.

2.4 Statutory nominations

A person can make a nomination in any of the following accounts:

- Friendly Society
- Industrial Society
- Provident Society

The amount nominated cannot exceed £5,000

On the death of the deceased, the monies in the relevant account(s) pass to the nominee rather than under the will or intestacy of the deceased.

The benefit of the nominated account will be released upon the production of a death certificate.

2.5 Beneficial co-ownership

KEY TERM

Joint Tenants: If the deceased was a beneficial joint tenant, the property will automatically pass to the other joint tenant(s) by **survivorship**. It therefore **does not** pass into the succession estate.

Tenants in Common: If the deceased was a beneficial **tenant in common**, they have a separate, divisible share in the trust property which is not extinguished upon their death. This share **will** pass into the succession estate.

2.5.1 Beneficial co-ownership: The family home

The most obvious (and typically the most valuable) type of property that a deceased owned jointly is the family home.

Land can only be registered at the Land Registry in the name of an individual or up to four joint tenants. It cannot be held as tenants in common at law.

It is important to consider not just the legal ownership but also the equitable and beneficial ownership of the land. Do the legal owners hold the land legally and beneficially, or do they hold it on trust?

Even if the land is held by the legal owners as joint tenants, they may have chosen to hold it on trust for themselves (and/or others) as equitable tenants in common.

Usually there will be an express trust declared over the land which sets out the equitable and beneficial ownership. This will be clear from the register of title and will be conclusive.

If there is no such express trust, there may still be an implied trust, so it is important to take particular care when advising on the beneficial ownership of the family home.

2.5.2 Beneficial co-ownership: Bank accounts

Another asset which is commonly owned jointly is the deceased's bank account.

The law relating to joint bank accounts is similar to family homes. The account holders will be legal joint tenants.

The account opening documents will usually make it clear that the account is held as beneficial joint tenants. Where there is an express declaration as to the beneficial ownership of the funds in the bank account, that will be conclusive.

If there is no declaration of beneficial ownership, it will again be necessary to consider whether an implied trust has arisen. Unlike in family homes cases, the doctrine of presumed resulting trusts may still apply here.

The key English law authority on beneficial ownership of joint bank accounts is *Aroso v Coutts & Co* [2002] 1 All ER (Comm) 241.

2.6 Other beneficial interests in trust property

If the deceased was a beneficiary under a trust, their beneficial interest will not necessarily form part of their succession estate.

It depends on the nature of the interest and whether it survives their death.

We have seen an example of this already with property held as beneficial joint tenants.

- The right of survivorship applies upon the deceased's death, meaning their interest no longer exists and cannot be left in their will.
- In contrast, a tenant in common has a distinct share in the property, which survives their death.

To take another example, if the deceased was a life tenant under a life interest trust, their beneficial **life interest** does not form part of their succession estate.

The life interest expires on their death and the remainder interest usually vests in possession.

In contrast, the **remainder interest** (the future right to receive trust capital) can survive the remainderman's death provided the remainder interest is vested 'in interest' ie the remainder interest is not contingent on the remainderman outliving the life tenant.

In this case, when the remainderman dies, their remainder interest passes to their estate.

The trustee then holds for the life tenant for life, remainder to those entitled under the remainderman's will or the intestacy rules.

2.6.1 Distribution of trust property

When identifying a deceased person's succession estate you would not usually include the value of assets held in a trust in which the deceased had a beneficial interest.

This is because assets held in trust are usually distributed in accordance with the terms of the **trust deed**, not the will of a deceased beneficiary or the application of the intestacy rules. For example:

- The death of an object of a discretionary trust does not usually result in the distribution of trust assets. The distribution of the trust fund is at the discretion of the trustees.
- The death of a life tenant may trigger a distribution of the remainder interest to the remainder beneficiary, but the life tenant does not determine **who** the remainder beneficiary is ie the destination of the assets is not within the control of the life tenant.

An exception would be if a deceased (by will) exercises a **power of appointment** in respect of trust assets ie has the power to determine the distribution of the trust fund.

2.7 Summary

- In order to distribute a deceased's estate, it is necessary to determine whether they have died testate, intestate or partially intestate.
- If the deceased died testate, their will determines what happens to their estate.
- If the deceased died intestate, the intestacy rules apply.
- If the deceased died partially testate, the will applies to the extent possible and any remaining property is dealt with under the intestacy rules.
- The deceased's succession estate comprises of all property that they own beneficially at the date of their death and are capable of passing to their personal representatives (PRs) via will or the intestacy rules.

- When identifying the succession estate, it is important to look carefully at the nature of any property held on trust, as well as pension scheme and insurance benefits, as these do not always pass to the succession estate. Nor do statutory nominations or donationes mortis causa.

3 The Intestacy Rules

As you know, the rules which determine how to distribute the succession estate depend on whether the deceased died testate, intestate or partially intestate.

KEY TERM

Testate: The deceased has left a valid will which deals with all property forming part of their estate. The intestacy rules do not apply.

Intestate: None of their property is disposed of by will. The intestacy rules apply to their **entire estate**.

Partially intestate: Some, but not all, of their property is disposed of by will. The intestacy rules apply to any property which is **not** disposed of by will.

The PRs of an intestate deceased hold the undisposed of property on trust with power to sell under s 33 AEA.

3.1 Entitlement to the estate

Entitlement to the estate on intestacy is based on which relatives survive the deceased. The statutory order of entitlement is set out in s 46 AEA.

If the deceased has been survived by a spouse or civil partner (by at least 28 days) and/or issue, they are the only class of relatives that you need to consider. For the remainder of this workbook, we use 'spouse' as shorthand to mean 'spouse or civil partner'.

If the deceased leaves no spouse or issue, it is necessary to consider a wider class of relatives. The intestacy rules set out a clear priority order for inheritance here.

Issue means children and remoter linear descendants eg grandchildren, and includes those who are legitimate (born to married parents), illegitimate (born to unmarried parents), legitimated (born to unmarried parents who later marry) and adopted children. It includes children who are conceived but not yet born at the date of death.

3.1.1 Entitlement of spouse and issue

If the intestate leaves a **spouse but no issue**, the spouse inherits the entire succession estate absolutely.

If the intestate leaves **issue but no spouse**, the issue inherit the entire succession estate on the **statutory trusts**.

If the intestate leaves **both spouse and issue**, the position is more complicated and depends upon the nature and value of the assets forming the succession estate.

The spouse's entitlement is dependent upon them surviving the deceased by 28 days (s 46 (2A) AEA).

If the spouse does not survive by 28 days, the rules apply as if the deceased was not survived by their spouse. (This means the spouse has no entitlement under the intestacy rules and therefore cannot pass their interest to their own estate.)

This rule is specific to spouses. There is no requirement for any other beneficiary to outlive the deceased by 28 days.

If the intestate leaves a **spouse and issue**, their entitlements are:

Spouse	Issue
Personal chattels absolutely.	

Spouse	Issue
Statutory legacy of £322,000 free of tax and costs plus interest from the date of death to the date on which payment is made.	Other half of the residue (if any) on the **statutory trusts**
One half of the residue (if any) absolutely.	

3.1.2 Surviving the deceased

As we have already seen, the spouse's entitlement under the intestacy rules is dependent upon them surviving the deceased by 28 days (s 46(2A) AEA).

If the spouse does not outlive the deceased by 28 days, the rules apply as if the deceased was not survived by their spouse at all.

This rule is specific to spouses. There is no requirement for any other beneficiary to outlive the deceased by 28 days.

Different rules apply to the issue, who take their interests on the statutory trusts (s 47 AEA).

- If they do not survive the deceased, their own issue may still inherit their entitlement under the 'substitution limb' of the statutory trusts.
- If they do survive the deceased, there is no requirement that they do so by 28 days, but they will need to satisfy the 'contingency limb' before obtaining a vested interest.

The Statutory Trusts

Contingency Limb	Substitution Limb
Each entitled beneficiary must survive the intestate **and** reach the age of 18 in order to inherit. Until this requirement is satisfied, the beneficiary has a **contingent interest**.	If an entitled beneficiary dies before the intestate that beneficiary's own issue can inherit in their place, provided the beneficiary's issue themselves satisfy the contingency limb (ie reach the age of 18).
If a beneficiary is already 18 or older when the intestate dies they will inherit absolutely and immediately, as the contingency is already satisfied. In this case the beneficiary has a **vested interest**.	This would also apply in the rare scenario where a beneficiary survives the intestate but subsequently dies before attaining a vested interest, eg before reaching 18.

Intestacy distribution - spouse only

A dies intestate, leaving an estate worth £500,000. A has no children but is survived by a spouse, B.

B inherits A's entire estate under the intestacy rules.

Intestacy distribution - adult issue only

A dies intestate, leaving an estate worth £500,000. A leaves no spouse but is survived by her daughter, B (18).

B inherits A's entire estate under the intestacy rules. B's interest has vested because B is 18.

Intestacy distribution - minor issue only

A dies intestate, leaving an estate worth £500,000. A leaves no spouse but is survived by her daughter, B (14).

B inherits A's entire estate under the intestacy rules. B's interest is contingent upon reaching age 18.

Intestacy distribution - minor and adult issue

A dies intestate, leaving an estate worth £500,000. A leaves no spouse but is survived by her sons, B (18) and C (14).

B and C share £250,000 each on the statutory trusts. B's interest has vested. C's interest is contingent upon reaching age 18.

Intestacy distribution - spouse and adult issue

A dies intestate, leaving an estate worth £530,000 (including personal chattels worth £10,000). A is survived by a spouse, B and daughter, C (18).

Spouse's entitlement

B receives:

- A's personal chattels (worth £10,000)
- Statutory legacy: £322,000
- Half the residue: £99,000.

Issue's entitlement

C receives the remaining £99,000. C's interest has vested because C is 18.

Residue calculation

£530,000 (net estate) - £10,000 (personal chattels) - £322,000 (statutory legacy) = **£198,000**

Half residue: £198,000 / 2 = **£99,000**

Intestacy distribution - adult issue and minor grandchildren

A dies intestate, leaving an estate worth £500,000. A leaves no spouse but is survived by daughter, B (50). A's son, C died last year, leaving a son, D (16).

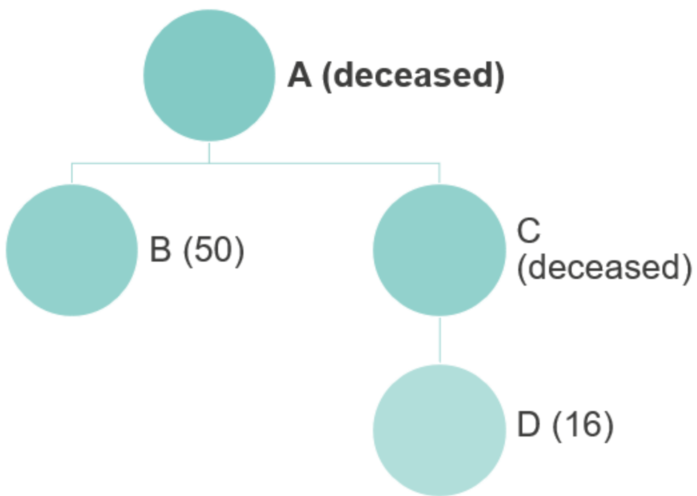


Figure 1.1: A's family tree

Issue's entitlement

B and C are A's issue and entitled to share the estate equally on the statutory trusts.

Each is entitled to £250,000.

- B's interest is vested because she is over 18.
- As C predeceased A, D inherits C's share via the substitution limb of the statutory trusts.
- D's interest is contingent on reaching age 18.

Intestacy distribution - adult issue, adult and minor grandchildren

A dies intestate, leaving an estate worth £500,000. A leaves no spouse but is survived by her daughter, B (50). A's son C died last year, leaving a daughter, D (18) and son, E (16).

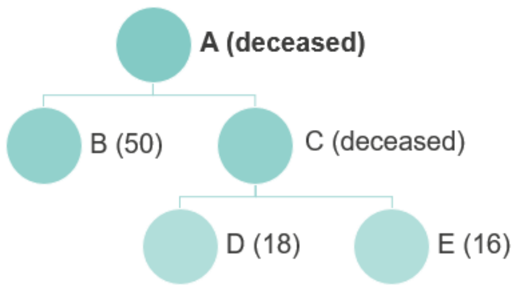


Figure 1.2: A's family tree

Issue's entitlement

B and C are A's issue and entitled to share the estate equally on the statutory trusts.

- B receives £250,000: Vested because she is over 18.
- As C predeceased A, D and E inherit C's £250,000 share via the substitution limb of the statutory trusts.
  - D receives £125,000: Vested because she is over 18.
  - E receives £125,000: Contingent on reaching age 18.

3.1.3 Distribution where intestate dies without leaving spouse/civil partner or issue

If the intestate is not survived by a spouse/civil partner or issue, section 46 AEA sets out the following order of entitlement to the succession estate:

(a) Parents
(b) Siblings of whole blood (share both parents) on the statutory trusts
(c) Siblings of half blood (share one parent) on the statutory trusts
(d) Grandparents
(e) Uncles and aunts of whole blood (whole blood siblings of a parent) on the statutory trusts
(f) Uncles and aunts of half blood (half blood siblings of a parent) on the statutory trusts
(g) The crown as bona vacantia

Where there is more than one person in the relevant category (eg if the intestate is survived by both parents), the succession estate is divided equally.

Intestacy distribution - mother and sister

A dies intestate, leaving no spouse or issue. A is survived by mother, B and sister, C.

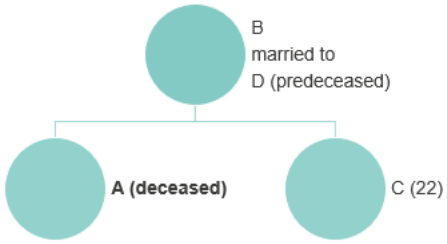


Figure 1.3: A's family tree

B is highest in the statutory order so is entitled to the entire estate. C has no entitlement as siblings rank below parents in the statutory order.

Intestacy distribution - grandfather, aunt and cousin

H dies intestate, leaving no spouse or issue. H is survived by his grandfather, D, aunt F and cousin, G.

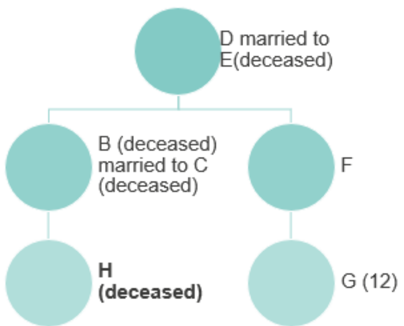


Figure 1.4: H's family tree

D inherits the entire estate under the intestacy rules. F and G have no entitlement because they are lower in the statutory order.

Intestacy distribution - brother and nieces/nephews

D dies intestate, leaving no spouse or issue. D is survived by brother, F. D's sister E died last year, leaving children, G (7) and H (18).

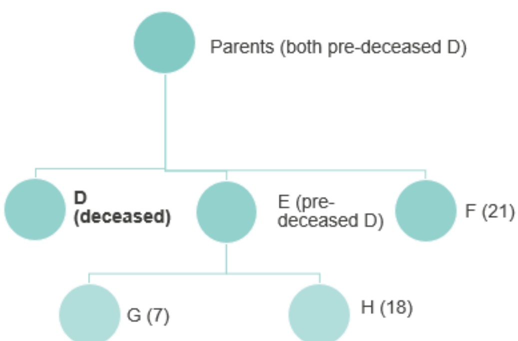


Figure 1.5: D's family tree

If E and F had both survived D, they would share the estate equally on the statutory trusts.

- F is over 18 so the contingency limb is satisfied. F has a vested interest in half the estate.
- As E predeceased D, the substitution limb applies.
  - G and H take E's half share equally (ie they each receive a quarter of the estate).

- H has a vested interest as they are over 18. G's is contingent because they are under 18.

You should now be able to put all these rules together and work out how to distribute any intestate estate. Use the following structure:

Step 1 If there is a surviving spouse, work out their entitlement first.

Step 2 If the deceased left issue, work out their entitlement (if any).

Step 3 If the deceased did not leave a spouse or issue, identify who is next in the statutory order and work out their entitlement.

You may also find it helpful to use the intestacy flowchart below.

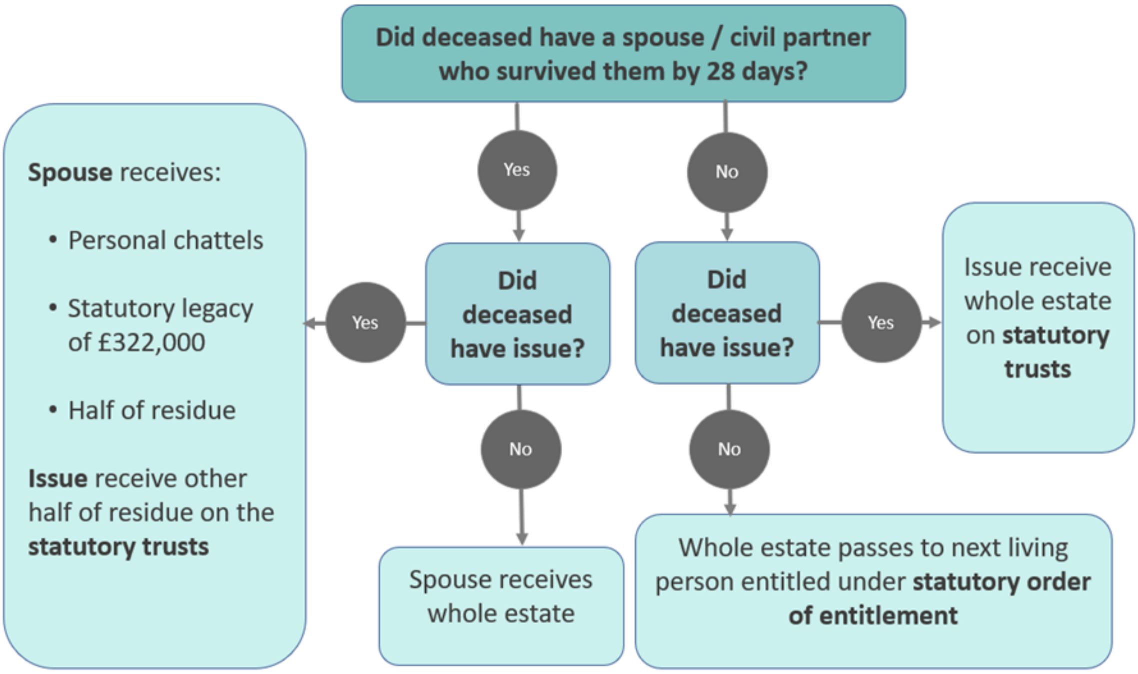


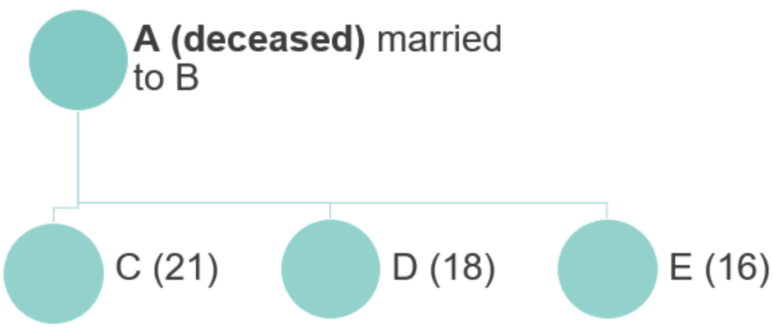
Figure 1.6: Intestacy flowchart

Activity 1: Intestacy distribution

A dies intestate. She is survived by her spouse, B and children, C (21), D (18) and E (16). A's net estate has been valued at £579,000 and includes personal chattels worth £5,000.

Required

Calculate how A's estate will be distributed before moving on.



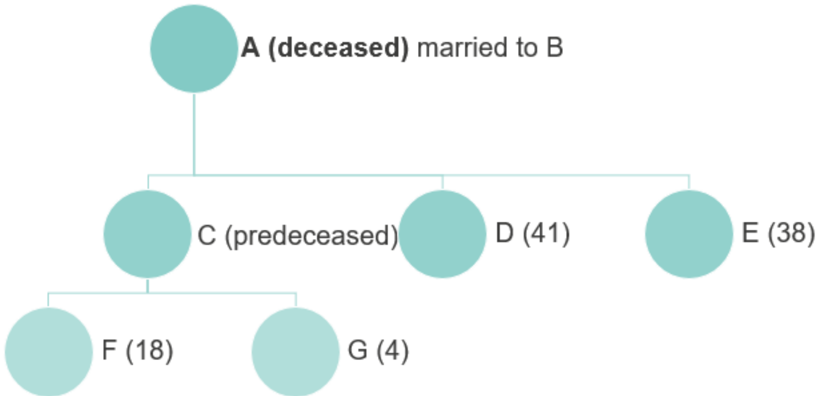
A's family tree

Activity 2: Intestacy distribution 2

A dies intestate. She is survived by her spouse, B and two adult children, D and E. Her daughter, C died last year, leaving two children, F (18) and G (4). A's net estate has been valued at £596,000 and includes personal chattels worth £10,000.

Required

Calculate how A's estate will be distributed before moving on.



A's family tree

3.2 Distributing the assets

As we have already seen, if the deceased was survived by their spouse, the spouse will be entitled to receive the personal chattels.

The remaining beneficial entitlements (ie the £322,000 statutory legacy) and the residue are distributed at the discretion of the PRs.

There is no obligation to distribute particular assets to particular individuals. It is up to the PRs to appropriate assets as they see fit, in fulfilment of the individuals' entitlements.

There is a statutory definition of 'personal chattels' in s55 AEA.

It means 'tangible movable property' but excludes the following:

(a) Money or securities for money

(b) Property used by the intestate at their death solely or mainly for business purposes

(c) Property held at the death of the intestate solely as an investment

3.2.1 Appropriation of the marital home

The surviving spouse of the intestate will clearly be concerned about what happens to their shared home.

If they held the home as beneficial **joint tenants**, this is not a problem because the right of survivorship will apply.

If the deceased was the sole owner of the home, or a beneficial **tenant in common**, the deceased's interest will form part of the succession estate and will be distributed in accordance with intestacy rules.

The spouse has no automatic right to receive the deceased's share of the marital home.

However, they may make an election which enables them to appropriate the home in full or partial satisfaction of their statutory entitlements (Schedule 2 Intestate Estates Act 1952).

In effect, they have the right to 'buy' the deceased's share of the property from the PRs using the money they would have received from the estate.

The surviving spouse/civil partner must make an election in writing to the PRs within 12 months of the date of the grant. During that period the PRs cannot normally sell the home without the spouse's consent.

Where their entitlement under the intestacy rules is lower than the value they are appropriating (eg where the home is the only or main asset of the estate) the spouse/civil partner must pay the difference from their personal funds. The home is valued as at the date of appropriation not the date of death.

There are some restrictions on the right to appropriate. The consent of the court is required where the home is only part of a building owned by the deceased or when the home is part of a farm or other business premises.

3.3 Summary

- The intestacy rules are relevant where the deceased has not left a valid will (intestacy) or their will does not dispose of their entire estate (partial intestacy).
- S 46 AEA sets out the statutory order of entitlement to the estate:
  - The deceased's spouse and issue are the highest ranking class of relatives.
  - If the deceased left a spouse but no issue, the spouse inherits the estate.
  - If the deceased left issue but no spouse, the issue inherit the estate on the statutory trusts.
  - If the deceased left a spouse and issue, the spouse is entitled to the personal chattels, a statutory legacy of £322,000 and half the residue (if any). The issue receive the other half of the residue (if any) on the statutory trusts.
  - If the deceased leaves no spouse or issue, the estate passes to the relative(s) who rank highest in the statutory order. Relatives other than parents and grandparents take on the statutory trusts.
- The deceased's spouse has a statutory right to appropriate the marital home in satisfaction of their entitlement under the intestacy rules.

Activity answers

Activity 1: Intestacy distribution

Step 1 Spouse's entitlement

A was survived by her spouse, B. If B survives A by 28 days, B receives:

Personal chattels: £5,000

Statutory legacy: £322,000

Half of the residue: £126,000

In total B receives assets worth £5,000 + £322,000 + £126,000 = **£453,000**

Residue calculation

£579,000 (net estate) – £5,000 (personal chattels) – £322,000 (statutory legacy) = £252,000

Half residue = £252,000 / 2 = £126,000

Step 2 Issue's entitlement

A's issue take the remaining half of the residue on the statutory trusts.

Each of C, D and E (A's children) each have an interest in one third of the remaining £126,000 (ie £42,000 each).

- C (21) has a vested interest. The contingency is satisfied because C is over 18.
- D (18) also has a vested interest. The contingency is satisfied because D is 18.
- E (16) has a contingent interest. E's interest will vest upon reaching age 18.

Activity 2: Intestacy distribution 2

Step 1 Spouse's entitlement

A was survived by her spouse, B. If B survives A by 28 days, B receives:

Personal chattels: £10,000

Statutory legacy: £322,000

Half of the residue: £132,000

In total B receives assets worth £10,000 + £322,000 + £132,000 = **£464,000**

Residue calculation

£596,000 (net estate) – £10,000 (personal chattels) - £322,000 (statutory legacy) = £264,000

Half residue = £264,000 / 2 = £132,000

Step 2 Issue's entitlement

A's issue take the remaining half of the residue on the statutory trusts.

D and E (A's surviving children) each have a **vested** interest in one third of the remaining £132,000 because they are over 18 (ie a £44,000 share each).

As C (A's deceased child) predeceased A, the substitution limb applies to C's 1/3 share.

- F (18) has a vested interest in half C's share (ie £22,000).
- G (4) has a contingent interest in £22,000. G's interest will vest upon reaching age 18.

2 Will Validity and Will Amendment

1 Validity of a will

When a person dies it is necessary to establish how their assets will be distributed and who is entitled to inherit.

If the deceased made a valid will the assets capable of passing by will (collectively known as the 'distribution' or 'succession' estate) are distributed in accordance with the terms of the will. To the extent a will fails to dispose of all of the assets, or if the deceased did not make a valid will, the intestacy rules will determine who will inherit.

To make a valid will no specific wording or form is required and a testator (person who makes a will) can leave their property to whomever they choose (known as testamentary freedom). This is not necessarily the case in other jurisdictions, many of which require a testator to make specific provision for family members (known as forced heirship). In this module we consider the law applicable in the common law jurisdiction of England & Wales.

A testator must be aged 18 or over (s 7 Wills Act 1837 (WA)) to make a valid will, with the exception of those in military service, and satisfy all of the following legal requirements:

Figure 2.1: The requirements for a valid will

1.1 Testamentary capacity

1.1.1 The test for testamentary capacity

KEY TERM

Testamentary capacity: A testator must be mentally capable of making a will, referred to as 'testamentary capacity'.

Key case: *Banks v Goodfellow* (1870) LR 5 QB 549

The common law test for testamentary capacity is set out in the case of *Banks v Goodfellow* and provides that a testator must:

- Understand the nature of the act and its effects;
- Appreciate the extent of the property of which they are disposing;
- Understand and appreciate the moral claims to which they ought to give effect; and have no disorder of the mind that perverts their sense of right or prevents the exercise of their natural faculties in disposing of property by will.

'Nature of the Act'

A testator must understand that they are signing a document that takes effect on death and disposes of their property.

A testator should be able to understand the broad effects of the will but is not required to understand every detail.

'Extent of Property'

A testator should have a general recollection of what they own and appreciate the approximate value of their estate and relative value of its assets.

A testator is not required to recall every item or know the precise value of each.

The test is one of general understanding rather than perfect memory.

'Moral claims'

When deciding who to benefit and to what extent the testator should be able to appreciate anyone to whom they owe a moral responsibility.

In *Banks v Goodfellow* it was thought most testators would make provision for those "nearest to them in kindred and who in life have been the objects of their affection" but there is no requirement for the testator to leave those people anything.

'Disorder of the mind'

A testator suffering from insane delusions, affecting their judgement generally or in relation to specific dispositions in the will, lacks testamentary capacity.

A testator may be suffering from an insane delusion and still have testamentary capacity if the delusion is unconnected with and has no effect on the terms of the will.

1.1.2 Timing Requirements

A testator must have testamentary capacity at the time the will is executed.

Key case: *Parker v Felgate* (1883) LR 8 PD 171

A limited exception to this timing requirement was established by *Parker v Felgate*, where a testator who lacks testamentary capacity at the time of execution can still make a valid will provided they:

- Had testamentary capacity at the time they gave instructions for the preparation of the will; and
- The will was prepared in accordance with those instructions; and
- At the time of execution the testator understood they were signing a will for which they had previously given instructions.

This exception may apply where a testator's testamentary capacity fluctuates over time (usually as a result of illness), or, an unexpected event occurs between giving instructions and executing the will which means a person no longer satisfies the test.

Fluctuating capacity

It is possible for a testator's capacity to fluctuate over time. This may be due to the nature of a particular illness or the testator's circumstances.

A testator may have intermittent capacity; for example someone with dementia may have 'lucid' days on which it would be possible to satisfy the test for testamentary capacity and other days not.

A testator may temporarily lack capacity as a consequence of a particular life event. In *Key v Key* the testator's wife died a week before he made his will and the testator was found to lack capacity due to the effect of grief on his mental state.

The effect of depression and other mental health conditions which may affect the decision making abilities of a testator should be taken into account when assessing their testamentary capacity.

1.1.3 Golden Rule

The case of *Kenward v Adams* established the "golden rule", stating that when taking instructions for a will from a client who is elderly or seriously ill a medical practitioner should be instructed to make an assessment of the testator's capacity, and a contemporaneous record of the assessment and conclusion should be made.

The golden rule is not a legal obligation but is considered best practice. Following the rule does not confirm the testator definitely did have testamentary capacity; the purpose of the rule is to reduce the likelihood of later disputes.

Complying with the rule may involve an awkward conversation with a client but this is not an excuse to avoid the issue.

The practical complications involved e.g. finding a medical practitioner willing to carry out the assessment have been acknowledged (*Wharton v Bancroft*) and a failure to comply will not automatically demonstrate poor practice.

1.1.4 Presumption of capacity

The burden of proof of capacity technically lies with the propounder of the will (person seeking to admit the will to probate, usually the executor). However, capacity is presumed if the will on the face of it appears rational and has been duly executed.

Anyone who wishes to challenge the validity of the will on the grounds of lack of capacity must provide evidence sufficient to raise doubt. If such evidence is provided the presumption is rebutted and the burden of proof reverts to the propounder of the will to demonstrate the testator satisfied the *Banks v Goodfellow* test.

The threshold to satisfy the test in *Banks v Goodfellow* is relatively low. A person may lack the ability to manage their own affairs and require help with day-to-day activities and still have testamentary capacity to make a will.

1.1.5 Relationship with Mental Capacity Act 2005

A general statutory test of a person's capacity to make decisions was introduced by the Mental Capacity Act 2005 (MCA).

The statutory test was intended to tie in with the common law test for testamentary capacity in *Banks v Goodfellow* rather than replace it.

The statutory test does not override or modify the specific common law test. The rule in *Banks v Goodfellow* and subsequent case law remains correct and if an application of the two tests would produce a different outcome the common law test prevails.

1.1.6 Statutory Wills

If a client lacks testamentary capacity they cannot make a valid will and a solicitor should not accept their instructions for the preparation of a will.

However, it is possible for the court to authorise the execution of a will on behalf of an adult who lacks capacity to make one for themselves (s 18(1) MCA). The court must be persuaded there are grounds to diverge from the existing testamentary position and it is in the person's best interests to do so.

This could be because the person has never made a will and the intestacy rules would otherwise apply, or because a change in circumstance means it is likely the testator would have reviewed his current position.

1.1.7 Summary

- To make a valid will the testator must have testamentary capacity, know and approve of the contents of the will and comply with s 9 WA
- Following *Banks v Goodfellow* a testator will have testamentary capacity if they:
  - Understand the nature of the act
  - Appreciate the extent of their property
  - Are aware of moral claims against their estate

- Testamentary capacity must be present at execution (unless the rule in *Parker v Felgate* applies)
- Testamentary capacity is presumed where the will is rational and has been duly executed

1.2 Knowledge and approval

A testator must have a general intention to make a testamentary document which disposes of their property and should take effect following their death.

A testator is also required to have a specific intention to make the particular will they sign. This means they must know and approve of its contents and understand the choices they have made. It is possible to satisfy the test for testamentary capacity but lack knowledge and approval.

Practically, a testator must read their will and understand it, and by their signature intend to give effect to its terms.

Similarly to testamentary capacity, knowledge and approval must be present at the time of execution, unless the exception in *Parker v Felgate* applies.

1.2.1 Presumption

Knowledge and approval are presumed if the testator had testamentary capacity and the will was executed in accordance with the requirements of s 9 WA.

The courts are generally cautious in accepting claims the testator lacked knowledge and approval. However, if there is evidence which raises doubt as to knowledge and approval the presumption is rebutted and the burden of proof shifts to those seeking to enforce the will to demonstrate it was present.

Note in particular that there is no presumption of knowledge and approval if:

- The testator is blind or illiterate (i.e. unable to read the will)
- The will was signed by someone on behalf of the testator
- There are suspicious circumstances (e.g. the will was prepared by someone who receives significant benefit from it)

If there is no presumption of knowledge and approval, and the attestation clause (which explains the circumstances under which the will was executed) does not address this, an affidavit of knowledge and approval would usually be needed when submitting the will to probate.

If the presumption of knowledge and approval does not apply, it may be possible to take steps in advance to mitigate the risk of having to prove that it was present at a later date. For example, if a client has a medical condition which renders them unable to read, or the will is written in a language they do not read fluently, the attestation clause can be drafted to reflect the steps taken to ensure the testator fully understood the document they were signing.

Activity 1: Attestation clauses

Which of the following example attestation clauses would be used where a testator (T) is a) blind, b) unable to read English or c) physically unable to sign? [All refer to the will being witnessed as required by s 9 WA].

Required

Clause 1

Signed by T (who understands French but cannot read English) in the presence of both of us, and then by us in T's presence, after the will had been read aloud to T in English and accurately translated by A who understands English and French in our presence, when T seemed thoroughly to understand and approve the contents.

Clause 2

Signed by A in T's name and on behalf of T (who is physically incapable of signing), in the presence of both of us and at T's direction, and then by us in their presence, when T seemed thoroughly to understand and approve the contents.

Clause 3

Signed by T in the presence of both of us, and then by us in T's presence after this document had been read over by A to T, when T seemed thoroughly to understand and approve the contents.

1.2.2 Undue influence and duress

Even where a testator has knowledge and approval, if the will was made as a result of undue influence or duress it will not be valid because the will does not reflect the testator's true intention.

A testator may have been unduly influenced in respect of a particular gift within the will or the will as a whole.

Where the whole of the will was made as a result of undue influence the will is invalid. Where part of a will was made as a result of undue influence, the remainder may be given effect to provided that the omissions do not "upset the whole tenor of what remains", but the court cannot add or substitute words.

The key principles regarding undue influence in relation to wills were summarised in *Re Edwards*:

- Undue influence occurs where a testator is coerced into making a will, or including particular terms, against their judgement and contrary to their true intention. The testator does not genuinely exercise choice but has surrendered to pressures they were not able to withstand.
- Undue influence goes beyond persuasion. It is not unlawful to encourage someone to make a will or persuade them that certain provisions should be included e.g. by appealing to "ties off affection" or "pity for future destitution". With persuasion the testator's judgement is 'convinced'.

The distinction between someone who makes a convincing argument and persuades the testator to take action, and someone who coerces a testator into a course of action, is not always clear.

There is no presumption of undue influence in relation to testamentary dispositions (which differs to lifetime arrangements) and whether undue influence has occurred is a question of fact.

The burden of proving undue influence lies with the person making the allegation and the court requires evidence -

> "It is not enough to prove that the facts are consistent with the hypothesis of undue influence. What must be shown is that the facts are inconsistent with any other hypothesis".

It is often difficult to provide such evidence which makes bringing a successful undue influence claim difficult.

The physical and mental strength of the testator are relevant when determining how much pressure would be necessary to overbear the will. A weak or ill testator may be more susceptible and for the sake of a quiet life may be induced to do anything.

Whether or not the court considers the testator's will to be fair is irrelevant. The question is whether, in executing the will, the testator acted "as a free agent".

1.2.3 Summary

- A testator must intend to make a will and intend to make the will they sign – this requires knowledge and approval of its contents.
- Knowledge and approval is presumed where the testator has testamentary capacity unless the testator is blind, illiterate, someone signs on their behalf or there are suspicious circumstances.
- A will (or gift within it) made as a result of undue influence will be invalid.
- Undue influence requires evidence that the testator did not intend to make the will they signed. Persuasion does not amount to undue influence.

1.3 Formal Requirements

To be valid a will must comply with s 9 WA which states:

> "No will shall be valid unless—
>
> (a) it is in **writing**, and **signed by the testator**, or by some **other person in his presence and by his direction**; and

(b) it appears that the testator **intended** by his signature to give effect to the will; and

(c) the signature is **made or acknowledged** by the testator in the presence of **two or more witnesses present at the same time**; and

(d) each witness either

(i) **attests** and signs the will; or

(ii) **acknowledges** his signature,

in the **presence of the testator(but not necessarily in the presence of any other witness)**, but no form of attestation shall be necessary".

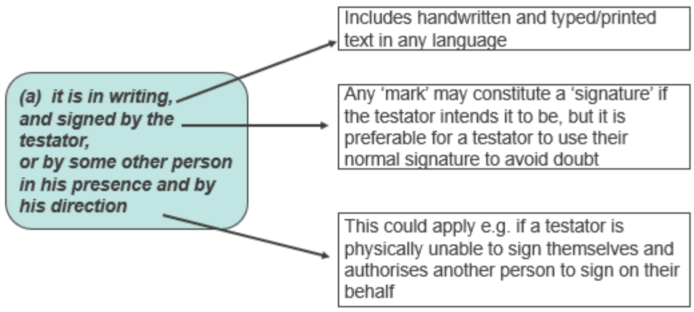


Figure 2.2: s 9(a) WA 1837

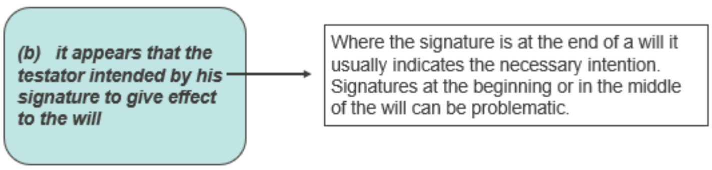


Figure 2.3: s 9(b) WA 1837

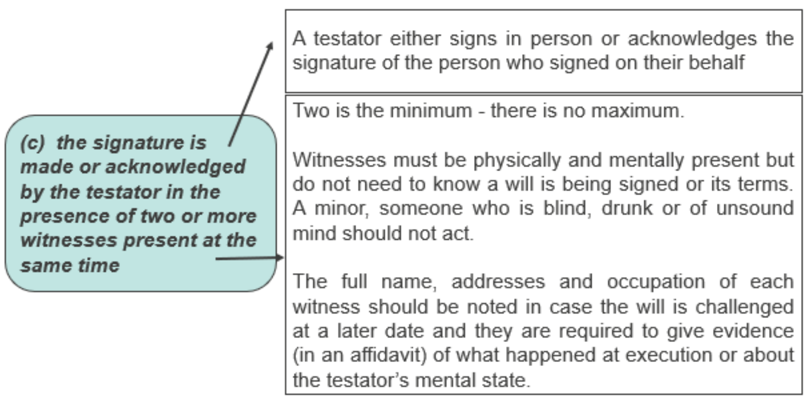


Figure 2.4: s 9(c) WA 1837

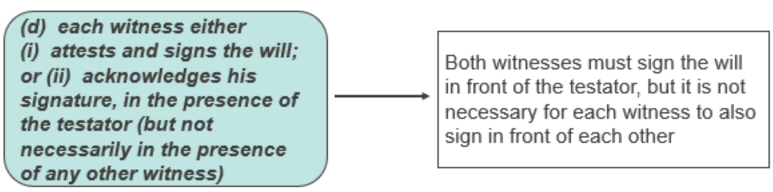


Figure 2.5: s 9(d) WA 1837

1.3.1 Attestation

An attestation clause describes the circumstances under which the will was executed.

For example:

Signed by the above named) **[*testator*] in our joint presence)** **and then by us in his/hers)**

Figure 2.6: Example attestation clause

There is no legal obligation to include an attestation clause nor is any specific form of attestation required.

However, a properly drafted attestation clause raises a presumption that the will was executed in accordance with the requirements of s 9 WA (a presumption of due execution).

In the absence of, or a poorly worded attestation clause proof of proper execution is required. Usually, this is an affidavit of due execution sworn by the witnesses.

If the will is executed in special circumstances (e.g. the will is signed on behalf of the testator, or, the testator is blind or illiterate) the attestation clause should be amended to reflect these special circumstances and to provide evidence of the requisite knowledge and approval. The example below could be used where a testator cannot read the will.

Signed by the above named [*testator*] in our joint presence and then by us in his/hers all signatures having been added after this document had been read to [*testator*] by [*name*] when [*testator*] seemed thoroughly to understand and approve its contents.

Figure 2.7: Example attestation clause where testator cannot read

It is very important for a solicitor to ensure the correct execution process is followed and failure to do so may constitute negligence. Solicitors should provide specific advice on this point and ideally arrange for the will to be executed in the office so that the process can be overseen.

1.3.2 Attestation: Section 15 Wills Act 1837

Under this section any gifts to an attesting witness (or their spouse) are void. Therefore, if a beneficiary, or their spouse at the time of execution, acts as a witness, the beneficiary cannot inherit under the will. A beneficiary is anyone who gains any benefit under the will.

The will remains valid but a solicitor may be negligent if they do not provide advice on the effect of s 15 WA.

If a professional executor (who is entitled to charge for their services) witnesses a will, s 28(4)(a) Trustee Act 2000 confirms s 15 WA will not apply to the remuneration the professional executor will receive for acting in this role.

The appointment of the beneficiary as an executor remains effective even if s 15 WA applies to deny them their inheritance.

If there are at least two other witnesses not caught by s 15 WA, or if the will is subsequently confirmed by a properly executed codicil, the effect of s 15 WA can be disregarded; the will would be properly executed without the beneficiary (or their spouse) witnessing the will.

1.3.3 Summary

- To make a valid will a testator must have testamentary capacity, know and approve of the contents of their will and comply with the requirements of s 9 WA
- To comply with s 9 WA the will must be in writing and signed by the testator (or by someone else on his behalf)
- The testator's signature must be made or acknowledged in the presence of two adult witnesses with capacity
- The witnesses must each sign the will in the presence of the testator but not necessarily in the presence of each other

- The attestation clause in a will describes the circumstances under which the will was signed.
- If a beneficiary (or their spouse/civil partner) acts as a witness, the will as a testamentary document remains valid but under s 15 WA the gift to the beneficiary is void
- S 15 WA has no effect on the appointment of a witness as an executor

2 Will Amendment

A testator may wish to amend their will if its current form does not reflect their wishes.

A number of options are available for such a testator. They may choose to:

- make manuscript amendments to their original will
- make a codicil to an existing will (a formal testamentary document amending a will)
- revoke their existing will.

2.1 Manuscript alterations

If a testator wants to alter their will they should usually be advised to make a new will rather than making a codicil or hand amendments to their existing will.

The cost of making a new will is minimal compared to the costs incurred later if the terms of the will are disputed because of a poorly drafted codicil or because manuscript amendments are unclear or ineffective. The law governing the effect of manuscript amendments is complex and there is a risk that the overall result is not what the testator would have planned.

This workbook considers manuscript alterations made by the testator personally. Alterations made by another person are invalid (unless intended by the testator and made in their presence and at their direction).

If a testator does decide to amend their will (or codicil) by hand the effect of any alteration is governed by s 21 WA:

> "No obliteration, interlineation, or other alteration made ... after the execution ... shall be valid or have any effect... except so far as the words .... before such alteration shall not be apparent, unless the alteration shall be executed in like manner as ... required for the execution of a will"

Each aspect of this section will be considered in the context of different examples.

2.1.1 Types of amendment

> "No obliteration, interlineation, or other alteration made ... "

In the context of alterations to a will these words refer to the types of amendment you may see:

- Obliteration: where the text has been crossed out in such a way that the original text is illegible
- Interlineation: where writing has been inserted between the existing lines of the document, often to add something that was previously omitted
- Other alterations: include additions added to the end of the will, a strike through of text which is still legible

2.1.2 Post-execution alterations

> " made ... after the execution ... shall be valid or have any effect"

The general rule is that amendments made **after** the will is executed are invalid and unenforceable. The alteration has no effect and the original wording is given effect to.

In the example below if the line strike through was made after execution it would be an invalid alteration. The alteration is ignored and the will with original wording apparent is submitted to probate. John would receive the original gift of 100 Tesco shares.

> 'I give to my cousin John Taylor of [address]~~100 ordinary shares in Tesco plc~~'

If the alteration was made **before** execution with testator's knowledge & approval then it would be valid.

Presumptions on timing

It is only alterations made after execution that are invalid. Alterations made prior to execution form part of the will and are enforceable.

However, in many cases it will be difficult to know from the face of the will when the alteration occurred and the PRs would encounter difficulties when the will was admitted to probate. Therefore, there is a rebuttable presumption that an alteration was made after execution (which would render the alteration invalid) (*Cooper v Bockett*).

The PRs could produce affidavit evidence of the state and condition of the will at the time of execution (confirming when the alteration was made) although this would require the witnesses to accurately recall what the will looked like at execution.

2.1.3 Attested alterations

> "unless the alteration shall be executed ...as ... required for the execution of a will...such alteration shall be deemed duly executed if the signature of the testator and ...the witnesses be made in the margin or on some other part of the will opposite or near to such alteration..."

If an alteration is executed like a will (signed by the testator and two witnesses in accordance with s 9 WA) alongside the alteration it is valid. The witnesses do not have to be the same people who witnessed the will.

Example: Attested alterations

Boots

'I give my cousin John Taylor of [address] 100 ordinary shares in ~~Tesco~~ plc'

TR AB PF

In the example above, John would receive shares in Boots plc. The initials (rather than full signatures) of the testator and two witnesses are sufficient.

A testator who needs to make manuscript amendments to their will should be instructed to execute the amendments in the same way as a will.

This is the case even if the amendments are made before the will as a whole is executed and would be valid in any event.

Because attested alterations are given effect to ensuring all changes are attested removes the requirement to prove when the alterations were made and can avoid unnecessary dispute.

If the manuscript amendment itself is not specifically attested, a testator may instead confirm manuscript amendments by:

- re-executing the amended will as a whole
- executing a subsequent codicil that affirms the will it amends

Note that in both cases, express reference to the manuscript amendments is required to ensure the presumption that the alterations were made after execution is rebutted.

2.1.4 Exceptions

There are a couple of exceptions to the general rule that unattested alterations are invalid as they are presumed to have been made after execution.

Blank space

Where a blank space has been completed there is a presumption that this occurred **before** execution. In the example below, Kelli would receive £750.

Example: Completion of a blank space

'I give to my wife Kelli the sum of £ [750] '

This presumption on timing can be rebutted by internal evidence from within the will or by external evidence (i.e. affidavit of plight and condition signed by witnesses).

Obliteration

> "except so far as the words …. before such alteration shall not be apparent…"

If the original wording is not apparent because it has been obliterated, covered over or cut out, the obliteration is treated as having been made by the testator with an **intention to revoke** and the alteration will be effective.

Example: Obliteration

'I give to my cousin John Taylor of [address] [redacted]

In the example above, John would receive nothing.

In this context 'apparent' means the original wording can be deciphered by natural means (reading it or holding it to the light etc. but not e.g. infra-red technology) and without the need for extrinsic evidence (e.g. draft documents).

If the testator did not intend to revoke the gift or a third party made the amendment extrinsic evidence can be used to establish the original gift and infra-red technology would be permitted. If the original gift could be determined the beneficiary would take their entitlement.

Conditional revocation

If the testator made the obliteration with a conditional intent to revoke the gift then extrinsic evidence is permitted to show the original wording. A fresh copy of the will containing the original wording would be admitted to probate.

A conditional intention to revoke is usually found where the testator attempted to substitute another figure (here £100) for the original wording (here unknown) and the attempt at substitution has failed.

Example: Conditional revocation

'I give to my cousin John Taylor of [address] [redacted]
£100

The court can find that the testator only intended to revoke the original gift if the substitution (£100) was successful.

However, if the addition of £100 is not a valid alteration (i.e. it was made after execution or cannot be proved to have been made before) then the substitution is unsuccessful, and if the substitution is not successful there is no valid revocation of the original gift.

The original gift, if it can be ascertained, should be given effect to and extrinsic evidence is permitted to establish the original wording.

2.1.5 When are manuscript changes appropriate?

As previously noted, clients should be advised against making any manuscript alteration to their will (or codicil) to avoid any issues or dispute regarding the effect of the changes and the application of s 21 WA.

However, manuscript alterations may sometimes be appropriate where:

- The amendments have no impact on the interpretation or meaning of the will. This could include correction of a typo, change to a beneficiary's address or correction to the spelling of a name.
- The changes must be made urgently and a codicil or new will cannot be prepared. This may arise where a testator requires urgent hospital treatment or is due to travel abroad.

If any amendments are made, the testator and witnesses should initial the alterations even if making these before execution and even if the amendments are unimportant. This will avoid the requirement to rebut the presumption on timing.

2.1.6 Summary

Alterations given effect to	**Alterations not given effect to**
Made **before** execution of the will/ codicil	Made **after** execution of the will/codicil *(provided original gift still apparent)*
Obliterations with intent to revoke	Obliterations **without intent to revoke** Obliterations **by 3rd parties** Obliterations as **conditional revocation** *(provided extrinsic evidence of the original gift can be found)*
Attested alterations	**Unattested** alterations *(presumed to have been made after execution)*
Completion of a **blank space** *(presumed to have been completed before execution)*	
Subsequently confirmed by **re-execution** or codicil, with reference to the alteration	

2.2 Codicils

A properly drafted will usually replaces any previous wills so the testator has only one valid will at a time. A codicil is a formal testamentary document that amends an earlier will, rather than replaces it, and both documents remain active and are intended to be read together.

The rules relating to the validity of a will also apply to any codicil. To make a valid codicil a testator must have testamentary capacity, knowledge and approval (of the codicil, and the will and any previous codicils referred to) and comply with s 9 WA.

A codicil must be drafted carefully with reference to the original will it amends. Following the testator's death it is the instructions in the original will, as amended by any codicils, which are given effect to.

2.2.1 When are codicils appropriate?

Codicils may be used to:

- create new provisions in a will e.g. add a legacy for a new beneficiary
- edit existing provisions in a will e.g. change the value of a pecuniary legacy
- revoke provisions in a will e.g. remove a particular beneficiary's entitlement

If the testator wants to make significant or multiple changes it is usually advisable to execute a new will rather than make a codicil to remove the risk of inconsistency between the documents.

There is no legal maximum number of codicils a person can make but given the potential for confusion it is usually advisable to limit the number of codicils made to an original will. Historically, making a codicil was easier and cheaper than making a new will but advances in technology mean this is no longer necessarily the case.

Take the following example

Example: A will and two codicils

Will – 1 January 2002	First Codicil – 1 June 2010 (amending Will dated 1.1.02)	Second Codicil – 1 May 2015 (amending will dated 1.1.02 & first codicil dated 1.6.10)
3a. I give £300 to X 3b. I give £500 to Y 3c. I give £1,000 to Z	3d. I give £200 to A	3e. I give £300 to B

When the testator dies the will and both codicils will be read together so that X, Y, Z, A and B will all benefit. In this case, only clause 3 of the original will was amended and the numerical referencing can remain consistent. This is more difficult where standalone clauses are added or others revoked.

2.2.2 Drafting pitfalls

There is a significant risk of error when drafting codicils. The following are some of the issues which can occur:

- Not expressly noting a change to the testator's name or address
- Not affirming the parts of the original will which remain unchanged
- Missing or incorrect cross reference to the date of the original will or earlier codicil
- New codicil that refers only to the original will and not the previous codicil(s)
- The effect of the codicil does not make sense when read in conjunction with the original will and/or fails to take into account changes made by a previous codicil
- Incorrect references to clause numbering (this is more likely when freestanding clauses are added rather than changes made to existing clauses)

A properly drafted codicil should not give rise to any inconsistency or ambiguity when read together with the will.

For the avoidance of doubt the codicil should expressly state the extent to which the testator confirms or revokes their earlier will (and any previous codicils).

If there are no express words of revocation there is a presumption (which can be rebutted) that the terms of the original will remain where possible. The codicil will only revoke an earlier will to the extent there is inconsistency between them (*Lemage v Goodban*).

Where inconsistencies arise with regards references to the date of the will (or earlier codicil), or the number of codicils that exist, affidavit evidence can be provided to explain the discrepancy.

2.2.3 Republishing a will

When a testator executes their codicil this acts to 'republish' the will (and any codicils) to which it expressly refers. The will is given effect to as if it had been executed on the date on which the **codicil** was executed.

When applying general rules of construction to clauses in the original will, whether or not they were amended by a later codicil, the date of the codicil would be used.

For example, when considering the clause below, careful thought is needed regarding which picture is given and who is entitled to it.

> "I leave the picture hanging in the hallway at the date of my will to the youngest son of my brother Alan."

The effect of 're-executing' the original will means if the:

- testator's brother Alan had two sons at the date of the will but three sons at the date of the codicil, the youngest son at the date of the codicil would benefit.
- testator had an expensive painting in the hallway of his house when the will was executed but had replaced this with a cheap print by the time the codicil was executed, the beneficiary would inherit the print.

It is essential that the effect of the will being republished is considered when drafting a codicil to ensure the overall effect meets the testator's intention.

Correcting problems by codicil

As the execution of a codicil re-executes the will (or previous codicils it refers to) the codicil can 'correct' problems with an earlier testamentary document.

If a beneficiary (or their spouse) witnesses a will, s 15 WA has the effect of denying the beneficiary their inheritance. However, if a later codicil is witnessed by different people, the gift under the will to the original witness can be given effect to and the effect of s 15 WA is avoided.

Section 15 WA applies to a codicil in the same way as a will. So a witness to a codicil (or their spouse) must not benefit under either the original will or codicil.

If the will (or previous codicil) contains unattested manuscript amendments, which would not have effect under the general rule in s 21 WA because they were made (or deemed to be made) after execution, these can be confirmed by a later codicil.

The amendments must be made before the codicil is executed, and the codicil must expressly refer to the alterations it confirms. Otherwise, additional evidence is needed to prove the amendment was made before the codicil was executed.

If a will (or previous codicil) was not properly executed in accordance with the requirements of s 9 WA then due execution of the codicil will validate the original will (or previous codicil) to which it refers. Technically this is not a "re" execution as due execution of the original document did not occur.

2.2.4 Revocation and revival

Revocation

A codicil may revoke only part of an earlier will (or codicil), or it may revoke the document in full. If a codicil expressly revokes a previous will (and codicils to it) in full, unless the codicil contains new terms, the testator will effectively be intestate.

Revival

A codicil can re-publish a will that is currently valid and has not previously been revoked. However, a codicil can also revive a will that was revoked previously if this is the testator's intention (s 22 WA).

It is usually preferable to make a new will rather than revive a will that has been revoked as there may be confusion regarding testamentary documents made in the interim, and if the original was destroyed it cannot be revived.

If a codicil revokes all/part of a will, and the codicil itself is then subsequently revoked, this would not automatically re-instate the terms of the will that had been revoked by the codicil.

2.2.5 Summary

- A codicil is a testamentary document – to be valid it must satisfy the same legal requirements as a will
- A codicil amends rather than replaces an original will
- Executing a codicil re-publishes the will it refers to; this can have unintended consequences re the interpretation of the original will but potentiality correct historic issues
- A codicil may revoke a will in whole or in part
- A codicil may revive a will that was previously revoked (unless the method of revocation was destruction)
- It is often preferable for a testator to make a new will rather than a codicil due to the risks of inadvertent errors when drafting

2.3 Revocation

Having made a valid will a testator may decide they want to revoke (cancel) it.

A will (or clauses within it) may be revoked by:

- Destruction/an effective alteration

- Revocation by a later will
- Revocation by later codicil
- Testator's subsequent marriage
- Testator's divorce

2.3.1 Revocation by destruction

By s 20 WA a will may be revoked by the testator:

- 'burning, tearing or otherwise destroying' it
- provided there is also an intention to revoke the will.

One without the other is ineffective.

The testator requires the same testamentary capacity to revoke a will as to make a valid will.

A physical act of destruction is needed; writing 'revoked' on the will would not be effective.

Complete destruction of the original will by a testator who lacks capacity or intention is not effective and the will remains valid.

Affidavit evidence would be required for a copy of the will to be admitted to probate.

The intention to revoke may be:

- absolute (in which case the revocation is effective immediately)

or

- conditional (for example on getting divorced) in which case the revocation will not be effective until the condition is satisfied.

KEY TERM

Dependent relative revocation: If a testator amends their will by hand to substitute a new legacy/gift for an existing beneficiary, they may intend to revoke the original gift but only if the new/amended version is valid.

If the amendment is not valid the original gift has not been revoked. Therefore, evidence of the original gift may be submitted to the probate registry.

The original will must be destroyed rather than a copy.

If a testator does not destroy all parts of the will the effect depends on the parts that remain. The revocation is only partial if the will can operate effectively with the sections that remain.

If another person destroys the will this will not be effective unless it is at the direction of the testator and in his presence.

If the parts that remain are not sufficient for the will to operate then the will would effectively be revoked.

Missing or damaged wills

There are presumptions as to revocation that arise where a will is missing or damaged.

If it is known that a testator had made a will or codicil and that they kept it in their possession, but after the testator's death the original document is:

- Missing - the testator is presumed to have destroyed their will with an intention to revoke it, unless evidence is presented to suggest otherwise
- Damaged - the testator is presumed to have carried out the act of damage/destruction with the intention to revoke, unless evidence suggests otherwise

Those administering the estate of the deceased will have the burden of rebutting a presumption of revocation by showing:

- a valid will existed when the deceased died but was lost/damaged after death
- the deceased did not intend to revoke their will
- the deceased did not carry out or give instruction for the act of destruction

If sufficient evidence can be provided to rebut the presumption, a copy of the will may be admitted to probate (NCPR 54).

2.3.2 Revocation by will

An express revocation clause is usually included in every will as standard (even where a testator tells their solicitor they have not made a will before). This ensures that all previous wills are revoked and there is only one valid will at any one time. To be effective express words of revocation are required.

I hereby declare this to be my last will

Figure 2.8: Ineffective revocation clause

I hereby REVOKE all former wills and testamentary dispositions and declare this to be my last will

Figure 2.9: Effective revocation clause

Note. It may be appropriate for a testator to have more than one valid will if they own assets abroad. It is common for a testator to make a will in relation to their UK assets and another will in the jurisdiction where their foreign assets are located. If this applies the wills should not attempt to distribute the same assets and neither should revoke the other.

Implied Revocation by Will

A will is valid without a revocation clause but one should be included as a matter of good drafting. If a later will does not contain an express revocation clause the testator will have more than one valid will. In this situation the combined effect is followed but, to the extent they are inconsistent, the later will impliedly revokes the earlier, so the later will is given priority.

Example: Implied revocation by will

- Will dated 18 months ago includes: **I GIVE my book collection to Mary**
- Will dated 6 months ago includes: **I GIVE my book collection to Jessica**

The later will revokes this clause in the earlier one and the book collection will go to Jessica.

In practice this makes construction of the documents complex and can result in an unintended distribution. Solicitors can avoid the issue by always including an express revocation clause when drafting a will for their clients.

2.3.3 Revocation by Codicil

A codicil (a testamentary document that amends rather than replaces a will) may revoke a will or clauses within in it.

A codicil will usually only revoke part of a will, and do so by express wording. A codicil should state the extent to which it revokes or confirms the previous will.

If express words of revocation are missing, the codicil only revokes the will to the extent it is inconsistent with the will.

Revocation of a will by destruction will not necessarily revoke any codicils to it.

Example: Clauses in a Codicil

I, [Testator] of [ ] hereby declare this to be the First Codicil to my last Will dated [ ].

By this codicil I revoke clause 3 of my Will and replace it with the following:

> "I give £300 to my mother"

In all other respects I confirm my will.

2.3.4 Mutual wills

After making a will a testator is free to change it and a will cannot be made 'irrevocable'.

However, it is possible to make a mutual will: where one testator agrees with another testator to each make a will on terms agreed between them. Both testators also agree that neither of them will amend their will without the consent of the other. If a testator attempts to revoke their will, contrary to the previous agreement, equity may impose a constructive trust over that testator's property on the terms previously agreed and limit the effect of any new will.

For example: a married couple make wills on terms where the survivor of them inherits the estate of the first to die, and on the 2nd death everything passes to their children. If both parties intended the survivor to be bound by the agreement, and it would be unconscionable for the survivor to change the terms of their will after the death of their spouse, equity can impose a constructive trust.

Mutual wills are not common and should be approached with care.

2.3.5 Mirror wills

Do not confuse mutual wills and mirror wills.

Mirror wills are common and are the wills of a couple which mirror each other.

For example, each couple makes a will that leaves their estate to the survivor of them, but if the other does not survive the assets pass to their children.

Executing a mirror will does not imply that there is an agreement not to revoke the will later and there is no constructive trust imposed.

The survivor of the couple is free to revoke their will at any time prior to the death of either of them.

2.3.6 Revocation by marriage

By s 18 WA when a person marries this automatically revokes in full any will (and codicil) made prior to the marriage, even if this is not the testator's intention. This would be the case whether the testator marries someone of the same or opposite sex.

Section 18B WA has the equivalent effect for a testator who enters into a civil partnership.

The effect of s 18 WA is significant and many clients will be unaware of its effect.

Therefore, when meeting a client it is important to identify whether or not they plan to get married in the near future.

Even if your client does not, you should advise on the effect of s18 WA in case their circumstances change.

Wills in contemplation of marriage

If your client plans to marry/enter a civil partnership after signing their will, and does not wish their will to be revoked as a result, it is possible to avoid the effect of s 18/18B WA by drafting the will in contemplation of marriage/civil partnership.

The will must name the future spouse/civil partner and identify the intended ceremony.

It must also include express wording confirming that the testator does not want their will to be revoked on the event of their subsequent marriage/civil partnership.

It is not possible to avoid revocation by making a will in contemplation of:

- a hypothetical marriage
- a marriage/civil partnership to one person but then marry/enter a civil partnership with someone else

Consider the effect of the following example clauses:

Example: Specific civil partnership clause

At the time of making this will I expect to enter a civil partnership with [ ] and intend that this my will shall not be revoked by my civil partnership with [ ]

Example: Generic civil partnership clause

I intend that this my will shall not be revoked by any subsequent civil partnership that I choose to enter.

Only the first clause is effective to preserve the will in the event of the civil partnership. The second is not effective because it is not made in contemplation of a specific civil partnership.

It is common for a testator to make a will in contemplation of a marriage/civil partnership in order to make provision for their future spouse/civil partner. A testator may want to execute the will before the ceremony so their will is finalised before they travel abroad on honeymoon.

If the will includes a clause ensuring its survival following the marriage or civil partnership, you should also take instructions re the effect of the ceremony not taking place (e.g. due to the testator's death or the couple's separation).

In essence, is the testator's new will (and any revocation of a previous will) also intended to be conditional upon the marriage/civil partnership? In the absence of express wording to the contrary the new will takes effect even if the ceremony does not. The testator may want this if they have died but not if the couple have separated. The will should expressly state the testator's intention.

Consider the effect of the following example clauses:

Example: Will effective from execution

At the time of making this will I expect to marry [ ] and intend that this will shall not be revoked by my marriage to [ ] . I intend for this will to remain effective even if I die before marrying [ ] [but not if ………].

Example: Will effective from marriage

At the time of making this will I expect to marry [ ] and intend that this will shall not be revoked by my marriage to [ ] . I intend for this will to be effective only upon my marriage to [ ] and not before.

A will containing the first clause is effective from execution and not revoked by the testator's later marriage. This could be amended to provide for scenarios other than the testator's death.

A will containing the second clause ensures the will is not revoked by the testator's later marriage but is not effective until the marriage takes place.

2.3.7 Revocation by divorce

If a married testator divorces their spouse (or there is a dissolution of their civil partnership) the court order confirming the divorce (decree absolute) or dissolution automatically operates as a limited/partial revocation of their will.

By virtue of s 18A WA (s 18C WA for civil partnerships) the will takes effect as if the former spouse or civil partner had died on the date of the court order unless the will expressly states otherwise. This means:

- an appointment of the former spouse/civil partner as executor or trustee

  is not effective; **and**
- a gift in the will to the former spouse or civil partner will fail.

It is sensible to advise married clients of this effect when taking instructions for their will

The consequential effect of s 18A/C WA depends upon the wording of the rest of the will. For example, if more than one executor is named in the will the executor who remains can be appointed. However, if the spouse or civil partner was the sole executor, a statutory order is followed and an administrator will be appointed in the absence of any executor who can act.

If a gift to the former spouse/civil partner fails, the items may pass to a named alternative beneficiary, and in the absence of this may pass under the general gift of residue. In some scenarios, the failure of the gift to a spouse may result in a full or partial intestacy.

The effect of ss 18A and 18C WA is subject to any contrary intention expressed in the will i.e. the testator could expressly state that he/she wants a spouse or civil partner to inherit, notwithstanding any divorce or dissolution of the civil partnership.

Example: The effect of s 18A WA

Consider the effect of s 18A WA on the extract of the will below. Assume the testator divorced their wife after having made the will.

> **Clause 1**: "I appoint my wife to be the sole executrix and trustee of this my will but if she shall predecease me or be otherwise unwilling or unable to prove my will before the expiration of 3 months after my death I APPOINT my brothers X and Y to be the executors and trustees of this my will in her place"
>
> ...
>
> **Clause 4**: "I give the Residue of my estate to my wife"

By s 18A WA the spouse is deemed to have died before the testator.

Clause 1: The appointment of the spouse as executor is not effective but an alternative is provided and the testator's brothers will be appointed instead.

Clause 4: The spouse receives nothing. In the absence of any express substitution this gift fails and the testator will die partially intestate. This outcome should be avoided!

Section 18A/C WA only affects wills made prior to a divorce or dissolution of a civil partnership. Any will made afterwards is unaffected and the testator can make whatever provision they think fit for their former spouse/civil partner.

Section 18A/C WA does not affect the right of the former spouse or civil partner to bring a claim against the deceased's estate under the Inheritance (Provision for Family and Dependants) Act 1975 (although the court order re divorce/ dissolution might).

A testator may be informed about the effect of s 18 A/C WA by the lawyer advising on their divorce. A client who gets divorced is often better placed to make a new will, rather than relying on implied partial revocation by statute, the consequences of which may not reflect their wishes. It is common for a private client department to receive referrals from the firm's family lawyers.

2.3.8 Summary

- A will or codicil may be revoked by:
  - Destruction by the testator of the original with an intention to revoke
  - Destruction by a third party if at the testator's direction and in their presence
  - An express revocation clause included in a later will
  - Express wording in a codicil
  - Implication if a later will or codicil contain no express words of revocation – but the earlier will is only revoked to the extent it is inconsistent with the later will or codicil
  - Presumption if the original document is missing
  - A testator's subsequent marriage or civil partnership under s 18 and s 18B WA
- It is possible to avoid revocation by making a will in contemplation of a particular marriage/civil partnership

- A testator's divorce or the dissolution of their civil partnership by virtue of s 18A and s 18C WA has the effect of treating the former spouse/civil partner as having died before the testator - this is a partial revocation of the will
- Section 18A/C WA apply to all references to the former spouse/civil partner in the will and renders their appointment as an executor and/or trustee ineffective, as well as any gift to them void
- Section 18A/C WA only affect wills/codicils made before the divorce/dissolution and do not affect any made subsequently
- If a testator has signed a mutual will their property will be subject to a constructive trust should they attempt to revoke or change that will at a later date. There is no obligation to avoid revocation where a couple make mirror wills.

Activity answers

Activity 1: Attestation clauses

Clause 1

Signed by T (who understands French but cannot read English) in the presence of both of us, and then by us in T's presence, after the will had been read aloud to T in English and accurately translated by A who understands English and French in our presence, when T seemed thoroughly to understand and approve the contents. **[B]**

Clause 2

Signed by A in T's name and on behalf of T (who is physically incapable of signing), in the presence of both of us and at T's direction, and then by us in their presence, when T seemed thoroughly to understand and approve the contents. **[C]**

Clause 3

Signed by T in the presence of both of us, and then by us in T's presence after this document had been read over by A to T, when T seemed thoroughly to understand and approve the contents. **[A]**

3 Will Drafting

1 Introduction

Professionally drafted wills tend to follow a similar structure and style. Precedents from practitioner texts or a firm's precedent bank are used to create the basic structure of the will.

When preparing a will the wording should be clear, concise and unambiguous. Colloquial and technical language (unless needed for precision) should be avoided.

Wills are traditionally drafted without punctuation.

It is common to capitalise the words which explain the purpose of the clause: eg I GIVE; I APPOINT.

Numbered paragraphs and the use of sub-clauses make it easier to read and cross reference.

Precedents are an aid to drafting and may not reflect what is required without amendment.

The basic overview of a standard will is shown below.

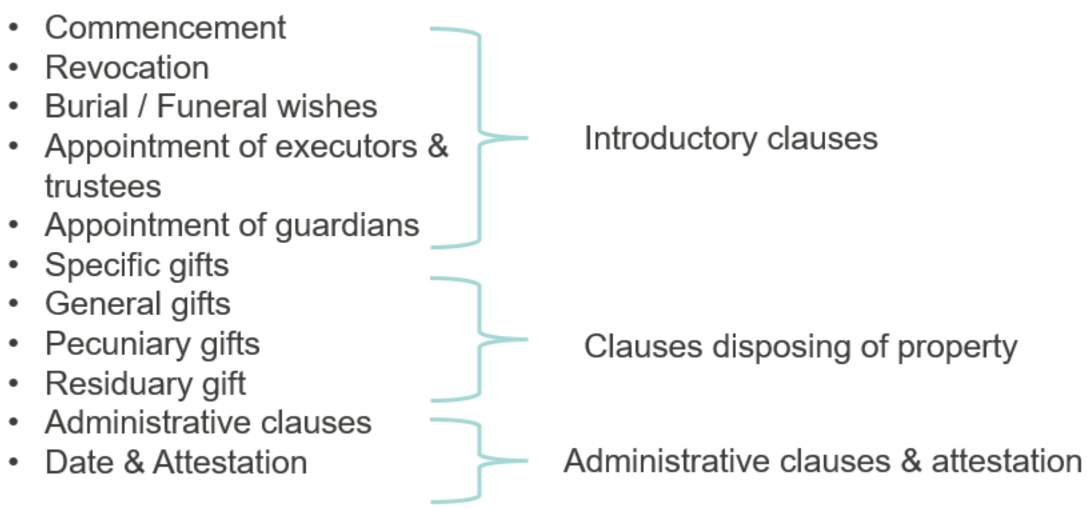


Figure 3.1: Basic overview of a standard will

2 Non dispositive clauses

2.1 Commencement

Example: Commencement clause

I TOM JAMES JONES sometimes known as JAMES JONES of [ ] a solicitor declare this to be my last will and testament

- Purpose is to identify the testator (stating their full name and address). The testator's occupation is sometimes added.
- If the testator is known by another name that should be referred to (see example above).
- If the testator owns assets in another name the grant of representation must refer to each possible alias otherwise it will not be possible to administer all of the estate.
- The date can be included in the commencement or at the end of the will.

2.2 Revocation

Example: Revocation clause

I hereby REVOKE all former wills and testamentary dispositions and declare this to be my last will

- A revocation clause can be included as part of the commencement or as a separate clause.
- It ensures that all previous wills/codicils (both are testamentary documents) are revoked so only one valid will exists at any one time.
- A will is valid without a revocation clause but one should be included as a matter of good drafting to avoid uncertainty.
- If a testator has more than one valid will the later will impliedly revokes the earlier will but only to the extent that it is inconsistent with or merely repeats the terms of the earlier will.
- There are other methods of revoking a will either in whole or in part. For example by way of codicil, in the event of a testator's marriage/divorce, or civil partnership or its dissolution, destruction of the will, or making effective manuscript amendments. However, the most common form of revocation is express revocation by way of a later will.

2.3 Burial & Funeral wishes

Example: Burial and funeral wishes clause

I WISH for any part or parts of my body where possible to be used for transplantation and for the treatment of others but subject to this I request that all burial and funeral arrangements conform with Bahá'í law and tradition

- Many testators want to direct what should happen to their body after their death and have specific funeral and burial instructions they would like followed. These clauses are usually inserted at the start of the will before the operative provisions.
- The instructions are not legally binding on the PRs but will normally be followed where possible.

2.4 Appointment of executors

- The role of a PR is to collect in the deceased's assets and administer the estate (s 25 Administration of Estates Act 1925 (AEA)); they must pay the deceased's debts, administration costs and expenses and distribute assets to the correct beneficiaries.

KEY TERM

Executor: A PR appointed by will is referred to as an executor and their power to act derives from the will.

Administrator: If a will does not appoint an executor who can act the Non Contentious Probate Rules 1987 (NCPR) determine who acts as PR. A PR appointed by the NCPR is an administrator.

- A testator is free to choose their executor. However, a minor or someone who lacks mental capacity cannot act. An executor who is bankrupt can act but may be unable to perform all PR functions and is therefore an unwise choice.
- A **minimum of 1 executor** is required, but it is often better to appoint at least 2 in case a sole executor does not survive the deceased or is unwilling/unable to act. A **maximum** of 4 can apply for the grant of representation. If more than 4 are named in the will then power is 'reserved' to those who do not apply initially, to apply later if any vacancy arises.

- It is common for a surviving spouse or close family member to be named. The role can be complex and it is often an onerous task, especially if the executor is grieving the death of a close relative. The testator should obtain consent from the executor in advance.
- Unless stated otherwise the appointment of a spouse/civil partner becomes ineffective if the testator later divorces/dissolves their civil partnership (s 18A / C WA).
- In most cases the scope of an executor's appointment is absolute and unrestricted. However, qualified appointments are possible. An executor's role may be qualified by **time** (eg to take effect only for a fixed period or if they survive the testator by a certain period), **location** of the assets (eg only UK assets) or **type** of assets (eg only business assets).
- Where a qualified appointment is made the drafter must ensure all of the estate will be administered and no assets passing under the will are left without an executor appointed to deal with them.
- Where the executor's appointment is qualified, the grant of representation issued in their name will be similarly limited.
- In most cases there will be no doubt about who is appointed but an appointment may be void if it is not clear that someone has been appointed to that role, or there is ambiguity about who is supposed to fulfil the role.

2.4.1 Appointment of executors and trustees

Example: Appointment of executors and trustees clause

I APPOINT [ ] and [ ] (hereinafter called 'my Trustees') jointly to be the executors and trustees of my will but if either of them shall be unable or unwilling to act I appoint [ ] to fill any vacancy thereby arising

---

- If a trust does, or could arise following the testator's death, eg an express trust is created or there are minor beneficiaries, at least 2 trustees should act (or a trust corporation).
- It is common, but not necessary, to appoint the same person(s) in capacity as **both executor and trustee**. A defined term of either 'Executors' or 'Trustees' can be used throughout the rest of the will. Trustees is more common.
- The above example appoints 2 executors to act jointly, in the role of both executor and trustee, and names a 3rd executor to act if either of the two appointed do not act.
- A family member will often be appointed along with a legal professional. A professional executor can provide experience, expertise and a neutral perspective that family members cannot offer.

2.4.2 Appointment of law firm partnership

Example: Appointment of law firm partnership clause

I appoint the partners (which term includes directors or members) at the time of my death in the firm of [ ] or the firm which at that date has succeeded to and carries on its practice including a firm which has been incorporated or formed an LLP ....to be the executors and trustees of this my will and express the wish that no more than two of them shall prove my will and act initially in its trusts but that [ ] if then a partner should be one of them

---

- A partnership does not have a separate legal identity distinct from its partners so cannot be appointed. Instead, all of the partners (construed as profit sharing) at the date of death are appointed ('a' or 'any one' partner is void for uncertainty).
- The number who should act can be limited by stating only 'one/two' should act. A testator can express a preference for a specific partner but should avoid a personal appointment (that person may no longer practice or work at the firm).
- The example above considers that the firm in the future may change its name, merge with another, convert to an LLP or incorporate.

2.4.3 Appointment of LLP / trust corporation

Example: Appointment of LLP clause

I APPOINT my spouse and [ ] LLP of [ ] jointly to be the executors and trustees of this my will (hereinafter called my Trustees)

- Many law firms have LLP status. An LLP has legal capacity to apply for a grant of representation and may be appointed as an executor.

Example: Appointment of trust corporation clause

I APPOINT [NAME OF TRUST CORPORATION] to be the only executor and trustee of this my will (hereinafter called my Trustee)

- A trust corporation is a specific type of corporation with authority to carry out trustee and PR roles. Law firms, banks and financial institutions may have established their own trust corporation and this will have separate legal personality from the limited company or LLP that owns or runs it. A trust corporation may be appointed as executor.
- An LLP or trust corporation may be appointed as sole executor and trustee.

2.4.4 Appointment of professional executors

- Only professional executors and trustees may charge for their time (s 29 Trustee Act 2000 ('TA 2000')). However, this statutory right to charge imposes some restrictions.
- Rather than relying on the scope of s 29 TA 2000, professional executors and trustees (whether partners in a law or accountancy firm, an LLP or a trust corporation) will want to include an express charging power. This is commonly added as part of the appointment clause.

Example: Express charging power clause

Any Professional Trustee is entitled to charge, and be paid, reasonable remuneration for services that the Professional Trustee or their firm provides.

- Receiving payment for services under s 29 TA 2000 or an express charging clause is not a breach of fiduciary duty, either by way of making a profit from a fiduciary position or a breach of the prohibition on self-dealing/ no conflict rules.

2.5 Appointment of Guardians

Appointment of guardian clause

I APPOINT [ ] and [ ] jointly to be the guardians of any of my children who have not attained the age of 18 at the death of the survivor of myself and my civil partner [ ]

- A testator with parental responsibility may appoint a legal guardian for their infant children by will (s 5 Children Act 1989). Appointment by one parent would not normally take effect until after the death of the surviving parent.
- Acting as guardian is a position of responsibly and the testator should obtain consent from the proposed guardian(s) that they are willing to act. A guardian is not required to accept their appointment.
- Consider whether any financial provision for the guardian is appropriate eg a legacy to be paid only if the guardian is appointed.
- Consider whether jointly appointed guardians will work together effectively.

2.6 Administrative Clauses and attestation

- As we have seen, executors and trustees are often appointed by the same clause in a will and are frequently the same people. However, their roles are different.
- An executor's primary duty is to administer the estate. Once they have distributed the remaining assets to the beneficiaries their task is complete. A trustee is responsible for the management of any trusts that continue following the estate administration and this role continues for as long as the trust is in existence.
- An understanding of the trustee role as well as the executor role is important when drafting a will because:
  - The will may include an express trust
  - Even if no express trust is created a trust may arise if the executors cannot distribute all of the estate eg a beneficiary is a minor or there are contingent interests which have not been satisfied. In which case the assets gifted under the will need to be held on trust until such time as they can be distributed.

In both situations the will drafter must consider the administrative powers required both by an executor to ensure effective estate administration and a trustee to ensure proper management of any ongoing trust.

2.6.1 Administrative Powers

- By virtue of their role, executors are responsible for assets within an estate and trustees are responsible for assets held in trust, but neither executors nor trustees are the **beneficial** owners of the assets they manage. Executors and trustees must therefore be given the power to carry out their role. These powers may derive from statute, common law and/or express powers conferred by the will.
- If a will contains no express administrative powers then by default only statutory and common law powers will apply. This is also the case when someone dies intestate (without having made a will).
- Express powers within a will override default powers to the extent there is any discrepancy. Express powers may restrict, re-state, or expand the default position and may also create new powers which would not otherwise exist.
- Professionally drafted wills usually contain express administrative provisions which should reflect the needs of the client. These clauses usually appear at the end of a will after the clauses that dispose of the testator's property.
- In practice, if the people appointed as executors are also appointed as trustees the capacity in which they act will vary depending on the situation. However, it is not always obvious whether a person is acting in their capacity as PR or as trustee.
- Where a trust is created by will, the will itself is the trust deed. However, for clarity, 'trust deed' usually refers to a document creating a lifetime trust and 'will' refers to the document that creates a trust following death.
- A will may contain a list of express clauses at the end or may include by reference a standard set of express clauses. The standard provisions produced by the Society of Trusts and Estates Practitioners (STEP) are nationally recognised and widely used in practice.
- STEP is a professional body promoting best practice for those advising on wills, trust and tax matters. The use of standard provisions avoids the need for an extensive list of clauses to be included in the will itself. The detail of the STEP provisions is outside of the scope of this workbook.

2.6.2 Date & Attestation

Example: Attestation clause

Date: [ ]

Signed by [ ] in our joint presence and then by us in [his OR her] presence

---

- An attestation clause describes the circumstances in which the will was signed.

- The attestation clause usually states that the will was executed in the presence of two or more witnesses (who attest the execution), and in doing so confirms the requirements for due execution in s 9 WA.
- The date may be included as part of the attestation clause (or earlier at the commencement) but should not appear in both places.
- The testator does not have to sign at the end of the will but it is common practice for the attestation clause to be the final clause in the main body of the will to avoid any question about their intention.

2.7 Summary

- To draft a will you should start with an appropriate precedent and insert, amend or remove clauses in accordance with the client instructions.
- Most precedents follow a similar structure: 1. introductory clauses, 2. appointment of executors and guardians, 3. dispositive clauses, 4. administrative provisions, 5. execution/attestation.
- Revocation, date and attestation clauses should be included to avoid confusion but a will is still valid without them.
- Any adult with mental capacity may act as executor. Their appointment may be absolute or qualified.
- To appoint a law firm partnership all of the partners must be appointed (then expressly limit the number). An LLP and trust corporation may be appointed directly.
- Most wills appoint executors and trustees in the same clause and appoint the same people in both capacities.
- The administrative clauses state the powers the executors and trustees have to carry out their role. Express powers take priority over statutory and common law defaults.

3 Dispositive clauses

- By these clauses a testator directs who is to inherit their assets, what each person should receive and on what terms.
- The words 'legacy' and 'devise' are traditionally used to describe gifts of property. 'Legacy' normally refers to a gift of chattels or personalty and 'devise' is normally used in relation to gifts of real property (land). This workbook will refer generically to 'gifts'.
- Items of property or cash may be given to named beneficiaries either directly and absolutely (without restriction) or subject to conditions / terms of a trust.
- Traditionally, the dispositive clauses appear in the following order with non-monetary gifts first, followed by gifts of cash, and finally the gift of 'everything else' referred to as the residue.
- This workbook considers each of the following in turn:
  - Specific (including gifts of chattels)
  - General
  - Pecuniary
  - Residuary

3.1 Specific gifts

Example: Specific gift clause

I GIVE to [ ] my painting of Epsom race course framed in red and gold absolutely

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- Specific gifts are of a **particular item** owned by the deceased at the date of death (distinguished from other property of a similar type owned by the deceased).
- A specific gift should be drafted precisely. The subject matter must be clear so the item can be identified, otherwise the clause may fail for uncertainty. Compare a gift of "my painting" (when the testator has more than one painting) with the example above. The former is likely to be void for uncertainty.

- If the testator does not own **at death** the item referred to in the will the gift adeems (fails to take effect) and the beneficiary receives nothing.
- A testator will commonly replace items such as cars, musical instruments etc. over time and when receiving instructions for a specific gift a solicitor should check the testator's intention in the event that the original item no longer exists.
- If the testator would like the beneficiary to receive 'something' even if it is not possible to give effect to the original gift an alternative substitute gift can be included. For example, an alternative item or cash equivalent to take effect only if the gift of the original item does not.

Example: Substitute specific gift clause

For example "I give to [   ] absolutely my Stradivarius violin or such other violin that I own at my death which I keep in my safe".

3.1.1 Collections

Example: Collections clause

I give to my grandchildren living at my death absolutely in equal shares all my household furniture to be divided among them as they shall agree within 6 months of my death but in default of which a division shall be made by my Executors in their absolute discretion which shall be final and binding on all my grandchildren

---

- Rather than making a gift of a single item a testator may instead wish to give a collection of items. Similarly to a specific gift of a single item any collection must be clearly identified to avoid uncertainty. A gift of 'my dressing up clothes' may be void for uncertainty if there is no way of distinguishing these clothes from any others.
- A gift of a collection may be to an individual for their benefit or to more than one individual to be divided as they see fit (see above). Where a division is required the will should specify how agreement should be reached, a time frame for deciding on a division (e.g. 6 months from death) and state how any failure to agree within such time should be resolved (e.g. in the absence of agreement the executors should decide).

3.1.2 Chattels

Example: Chattels clause

I give to [   ] absolutely all my personal chattels as defined by section 55(1)(x) of the Administration of Estates Act 1925

- A gift of a collection of chattels is a type of specific gift.
- Most testators will have personal possessions (chattels) which are included in their succession estate when they die. To the extent these are not to be given away as part of the general residue clause a specific clause is needed.
- The statutory definition of chattels (which applies on intestacy) is usually used to identify relevant assets and avoid the gift failing for uncertainty.

S 55(1)(x) AEA defines chattels as

> "all tangible movable property except for money or securities for money, assets used at the intestate's death solely or mainly for business purposes and assets held at the intestate's death solely as an investment".

Example: Extended chattels clause

I give to [   ] absolutely all my personal chattels as defined by section 55(1)(x) of the Administration of Estates Act 1925 **and also any motor car belonging to me even though used wholly or partly for business purposes**

- The statutory definition is usually wide enough to cover what the testator intends but may exclude items the testator would not expect.
- It **includes** vehicles, modes of transport and pets.
- It **excludes**:
  - Money or securities for money
  - Items used solely or mainly for business purposes
  - Items owned solely as an investment
- A gift of chattels as defined by s 55 AEA may therefore need to be amended to include or exclude certain items (see in bold above).
- A will signed before 1 October 2014 which refers to s.55(1)(x) AEA will be interpreted with reference to the previous definition (not covered by this workbook). The date of death is not relevant.

Example: Chattels clause to avoid conflict

I give to [   ] absolutely such of my personal chattels as defined by section 55(1)(x) AEA of the Administration of Estates Act 1925 **as are not hereby or any codicil hereto otherwise specifically disposed of**

- A specific gift, or a gift of a collection, usually disposes of items that fall within the general definition of a personal chattel.
- Where a will contains specific gifts **and** also a gift of chattels as defined by s 55 there would be a conflict if both clauses attempted to give away the same items.
- To avoid this, specific gifts of items/collections appear before the gift of chattels in a will, and the gift of chattels is drafted to cover only the items that have not already been given away (see words in bold above).

3.1.3 Specific gifts of land

It is important to first consider whether a clause dealing with the testator's real property is actually required.

- Property owned as joint tenants passes outside of the succession estate and is not distributed under the terms of the deceased's will (or intestacy). Instead, the property will pass automatically to the surviving co-owner under the law of survivorship. If this reflects the intention of the testator no provision within the will is required.
- Property owned solely by the testator, or jointly as tenants in common, is included within the succession estate and will pass in accordance with the deceased's will (or intestacy). If a testator wants this property to be given to a sole beneficiary of the residuary estate, no specific provision within the will is required.
- If the testator has no particular beneficiary in mind to receive the property and is happy for it to be sold as part of the administration (with sale proceeds being distributed according to the terms of the will) no specific provision within the will is required.

If a testator wants to give away their interest in a property to a particular beneficiary(ies) then the usual considerations regarding specific gifts should be addressed:

- The property must be identifiable. The full address and registered title number should be used.
- The clause should expressly state what will happen if that property is no longer owned by the testator when they die. Should a specific alternative property be given? Or should the gift be of the testator's "main residence on the date of my death".

But additional matters should also be considered, which include:

- The property must be capable of passing under the will so if owned as joint tenants the joint tenancy will need to be severed.
- A solicitor should check whether any third party interests affect the property and/or if the testator holds the property on trust for anyone else. If the property is owned jointly as tenants in common and the testator wants to leave their share to someone other than the surviving co-owner the testator needs advising on the rights of the co-owner.
- The testator should be given tax advice regarding the Residence Nil Rate Band.
- If the property is subject to a secured charge/mortgage the testator will need advice relating to the repayment of any outstanding loan and who should be liable for this.
- If the testator does not want to make an outright gift and instead plans to leave the property on trust e.g. conferring a right of occupation or an interest in possession, then practical considerations should be considered. Who will have a right to occupy? Should they pay rent? Can they veto a sale? Who pays the expenses associated with upkeep?
- If the property is being left to more than one person the terms of their joint ownership should be clear.

3.2 General legacies

Example: General legacy clause

I GIVE to [ ] a Hasselblad Lunar camera free of tax and costs of transfer absolutely

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- A general legacy is a gift of property which is not distinguished from property of a similar type – e.g. "a" rather than "my".
- A general legacy does not normally fail because the PRs would have to buy the specified property if it was not part of the estate at death. Check with the testator that this is in accordance with their wishes.
- Most pecuniary legacies (gifts of cash) are general in nature e.g. "I give £1,000 to [ ]".

3.2.1 Demonstrative Gifts

Example: Demonstrative gift clause

I GIVE to [ ] the sum of five hundred pounds (£500) to be paid from my Rochdale Building Society Account absolutely

---

- A demonstrative legacy is a type of general legacy (most often pecuniary in nature) which the will directs should be paid out of a specified fund. Such a gift will not fail if there are insufficient assets in the specified fund. Instead, if the specified fund has ceased to exist or is inadequate then the beneficiary is entitled to receive what is left in the fund and to have the balance of the legacy paid as a general legacy.
- It is unusual to see this type of legacy in practice. The gift is of the same value whether or not it comes from a specific account and the account itself would rarely have sentimental value.

3.3 Pecuniary Gifts

Example: Pecuniary gift clause

I GIVE to [ ] the sum of five hundred pounds (£500) free of tax and absolutely

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- A pecuniary legacy is a gift of money.
- It can be specific ('my £300 in the safe in the garage') or general (see above).
- The clause will often contain the amount of the gift in numbers and words in case there is an error when typing a numerical figure.

3.4 Residuary gifts

- A residuary legacy is a gift of all of the testator's property (capable of passing by the will i.e. the 'succession estate') which has **not already been disposed of under the will or any later codicil.**
- Usually it is the largest part of the deceased's estate and can be the most complex to draft as commonly there are substitutional gifts and age contingencies included and/or trusts created.
- If clauses disposing of the residue are not properly drafted there may be a partial intestacy.

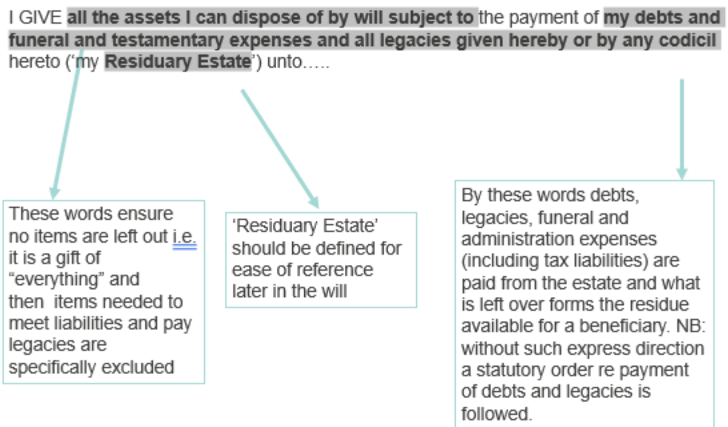

Figure 3.2: Analysis of residuary estate clause

Example: Residuary estate clause

I GIVE all the assets I can dispose of by will subject to the payment of my debts and funeral and testamentary expenses and all legacies given hereby or by any codicil hereto ('my Residuary Estate') unto.....

(a) My spouse absolutely but only if she survives me by twenty-eight clear days

(b) If clause (a) fails for any reason I GIVE my Residuary Estate to my trustees to hold on trust as set out in clause [ ]

- The residuary legacy may be given directly to beneficiaries (see (a) above) or a trust may be imposed (see (b) above).
- A trust should generally be imposed where:
  - a beneficiary is given a life interest in the residue
  - a discretionary trust of the residue is to be set up
  - the residue is given to more than one person
  - there are contingent or minor interests

  In each case the clause should be drafted incorporating the trust to cover a declaration of the trust and the terms of the trust itself.
- You will frequently see a substitution provision included to take effect if the primary gift fails. For example, clause (b) above is a substitution clause as it only comes into effect if clause (a) does not.

Example: 1 Possible partial intestacy

I GIVE my Residuary Estate to my nephews to be shared as follows:

(a) 1/3 to my nephew JACOB WHITE

(b) 1/3 to my nephew DARREN WHITE

(c) 1/3 to my nephew CHARLIE WHITE

- If Darren died before the testator, clause (b) would fail.

- In the absence of any express substitution this results in a partial intestacy (of Darren's 1/3).

Example: 2 No partial intestacy

I GIVE my Residuary Estate to such of my three nephews JACOB WHITE DARREN WHITE and CHARLIE WHITE as survive me and if more than one in equal shares

- If Darren died before the testator only Jacob and Charlie survive the testator.
- The residue would therefore be shared equally between them both. There would be no intestacy.

- If an asset given by an earlier gift in the will fails, the subject matter of the gift will usually pass under the residue clause instead (i.e. as an item that has 'not already been given way'). The original beneficiary may be disappointed but it does not usually result in a complex administration.
- However, the failure of a residuary gift, or part of it, results in a partial intestacy. This creates additional and unnecessary administrative complications for the PRs and is likely to result in a distribution that is not what the testator intended.
- To reduce the risk of this, professionally drafted wills tend to:
  - avoid giving separate parts of residue (Example 1) and instead use clauses similar to Example 2;
  - create express substitution clauses in the event that original gift does not take effect; and/or
  - use an ultimate gift over clause (sometimes referred to as a disaster clause) where the testator specifies who their estate should pass to in the event of all other gifts failing. A gift to a charity is a common choice of ultimate beneficiary.

3.5 Summary

- Particular care should be taken when drafting specific gifts because if the item is no longer owned by the testator when they die, the beneficiary will receive nothing (unless a substitution clause has been included).
- The gift of residue will usually be more complex than other gifts as it should include a definition of the property, explain what items will be paid out of residue, and often trusts are created.
- The failure of a specific, general or pecuniary gift, in the absence of any express or implied substitution, means the subject of the gift would be distributed under a clause giving away the chattels (if relevant) or fall within the definition of 'residuary estate' and pass under the residue clause.
- The failure of the residue clause (or any part of it) will usually give rise to full or partial intestacy.

4 Construction

The role of the solicitor is to draft a will that complies with the client's needs and instructions. If the wording of a clause is not absolutely clear the courts will construe the meaning based on various rules of interpretation.

It is important that you understand the general rules included in this workbook to ensure your drafting does not fall foul of them and to appreciate why express words clarifying a testator's intention should be used.

The rules of interpretation are particularly important in relation to the clauses within the will which dispose of the testator's property.

This workbook will consider:

- Date from which the will speaks
- Relieving provisions

- Survivorship provisions

4.1 Date from which the will speaks

There are particular rules that apply to determine the date on which the subject matter or object of a gift should be ascertained where the wording in the will is not definitive.

The rules for the following will be considered:

- Property
- Collections
- People

4.1.1 Property

General rule: Unless a contrary intention is shown, the will speaks from the date of the testator's death in respect of identifying the subject matter of a gift by virtue of s 24 WA which states:

> "Every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will."

It is therefore important to know what wording within a will constitutes a contrary intention.

A contrary intention can be demonstrated by the use of words such as '**my**' (as you would see in a specific legacy), 'now', or 'at present' when describing a gift. These words make the date of **execution** of the will the relevant date. In both examples below the car the testator owned when they executed the will (not when they died) would be the subject matter of the gift. The second clause is preferable as it states this expressly.

Example: 1 Date of execution

I GIVE to [ ] my car absolutely

Example: 2 Date of execution

I GIVE to [ ] the car that I own at the date of my will

It is because the use of the 'my' is construed to be a contrary intention to the general rule in s 24 WA that specific gifts have a significant risk of failure.

The gift will adeem if the testator no longer owns that car when they die and the beneficiary will receive nothing unless there is an express substitutional gift.

The beneficiary will not therefore receive any car (i.e. a replacement asset) that the testator did own at their death, or a cash alternative, unless this was expressly provided for

4.1.2 Collections

If there is a gift of a collection which is capable of growing the will speaks from the date of death notwithstanding the use of 'my'.

For example, 'my stamp collection' or 'my chattels' would be gifts of collections and would be construed to mean those items included in the collection **at the date of death**.

A holding of shares would be treated in the same way e.g. a gift of 'my Tesco plc shares' will be taken to mean the number of shares owned at the date of death.

Instructions should be taken from the testator as to whether he intends the gift to be of the collection owned at the date of the will or to include any items acquired in the future. This should then be expressly provided for in the drafting.

4.1.3 People

To identify the person(s) who should inherit under a clause the will is deemed to speak from the date of **execution**, unless the wording in the will shows a contrary intention. The rule in s 24 WA does not apply.

Where a gift is given to a class of beneficiaries e.g. 'my grandchildren' a testator should state expressly when the beneficiaries will be determined e.g. does the testator mean grandchildren alive when the will was executed / when the testator dies / all grandchildren including those born after the testator dies? Without express wording the 'class closing' rules apply and the class closes when the first beneficiary in the class obtains a vested interest.

The execution of a later codicil republishes the will it amends and under the general rule people are identified with reference to the date of the codicil. A gift to 'my nurse' in a will would refer to the nurse at the date of a later codicil not the will.

4.2 Relieving provisions

Relieving provisions deal with such matters as who should bear the burden of taxes, charges (e.g. mortgages), expenses and costs. Such provisions should be expressly stated to avoid confusion but in the absence of express wording there are general rules which apply.

Rules for the following will be considered:

- Inheritance tax (IHT)
- Expenses & Costs of transfer
- Charges

4.2.1 Inheritance tax

In the absence of any express provision an individual gift in a will is made free of IHT and IHT would be payable out of the residue as a general testamentary expense.

For the avoidance of doubt it is standard practice for legacies to be drafted expressly as free from tax and for the residuary estate to bear the burden of such tax even if it is not strictly legally necessary.

If the general rule does not reflect the testator's wishes the testator can oust the general rule by stating a gift is to bear its own IHT.

4.2.2 Expenses/cost of transfer

In the absence of any express provision specific beneficiaries bear the burden of the:

- cost of delivery of the item of property to them
- expenses incurred since the date of death in preserving the item or ensuring its upkeep

The testator may prefer these costs to be paid out of the residuary estate and if so, the gift should be stated to be 'free of' expenses and / or costs of transfer.

4.2.3 Charges

Where property is subject to a secured debt / charge e.g. a mortgage over a house the personal representatives will need to consider whether repayment of the debt linked with the charge is a cost of the estate.

The general rule set out in s 35 AEA is that unless the will shows a contrary intention, the asset charged bears liability for payment.

The beneficiary will therefore inherit the property subject to the charge.

A testator can expressly relieve the property of the charge. It would then become a general debt of the estate to be paid out of residue.

Note that a general direction in the will to pay debts and expenses from the residue of the estate is insufficient to oust the effect of s 35 AEA.

The testator should consider the effect of any mortgage protection policy. Is it intended that the proceeds of the policy are to clear the mortgage and the beneficiary to receive the property free of the charge? Or is it intended that the policy proceeds should form part of the general estate and the beneficiary to receive the property subject to the mortgage debt?

As well as checking the intention of the testator the terms of any policy should also be checked carefully as the lump sum may not even fall within the succession estate e.g. the policy proceeds may be payable directly to the lender, or may pass to the surviving joint owner if the policy was in joint names.

4.3 Section 21 Administration of Justice Act 1982

Where the meaning of a will or clause within it is unclear or ambiguous it is possible for the courts to rule on how it should be constructed.

The court has the power to determine the effect of a will and the overriding principle regarding construction is that the intention of the testator should be given effect to.

The court's role is to determine the meaning of the words within the will and what the testator intended by these, not to look behind the will to identify any other 'real' intention.

Extrinsic evidence (i.e. evidence that is not from the will itself) may in some circumstances be permitted.

Under s 21 Administration of Justice Act 1982 extrinsic evidence may be submitted in the following circumstances:

(a) If the will or any part of it is meaningless;

(b) If the language used in any part of it is ambiguous on the face of it;

(c) If the will is ambiguous in light of the surrounding circumstances.

Extrinsic evidence is used to help with construction of the will. Evidence is not used to vary or contradict the language used by the testator in the will.

4.4 Survivorship Provisions

Generally, in order to take a gift under a will a beneficiary must merely survive the testator, even if only for a short period of time. If the beneficiary predeceases the testator the gift will lapse (subject to s 33 WA). There is no equivalent of the 28 day survivorship period for spouses/civil partners imposed under the intestacy rules.

Consider the following situations:

(a) Two deaths occur within a short period of time, e.g. T died 2 weeks ago leaving all of their assets to W and W died last week.

(b) Two deaths occur in circumstances where the exact order of death is uncertain, e.g. both T and W die in a road accident.

With (b) the commorientes rule applies. Under s 184 Law of Property Act 1925 there is a presumption that the eldest died first so if T is older than W, W is deemed to have survived T.

In both situations W's estate would consist of all property received from T and W's own property. The following problems can therefore arise:

- There will be two administrations (with attendant costs and delay) of the property which passes from T to W – once in T's estate and then in W's.
- The first to die, T, loses control over the ultimate destination of their property as all of the assets will pass under W's will/intestacy.
- There may be an increased IHT liability if the same assets are taxed in both estates.

If the order of death is unknown s 4 Inheritance Tax Act 1984 (IHTA) treats the deaths as simultaneous. For IHT purposes neither inherits from the other and the estates are taxed separately. Property which in fact passes from the first to die to the second to die is not taxed again in the second estate.

Note. Section 4 does not apply if the order of deaths is known but there may be relief from double taxation if Quick Succession Relief applies.

To avoid the problems and potential confusion regarding two deaths which occur together or in very close succession an express survivorship clause can be included in the will.

A survivorship clause in a will is one which states that in order to take a particular gift the beneficiary must survive the testator by a specified period of time. A beneficiary who survived for less than the specified period would not be able to take the gift and it would pass to whoever was next entitled to the property under the terms of the will.

Example: Survivorship clause

I give my Residuary Estate absolutely to my spouse if he survives me by more than 28 days

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The survivorship period normally used is 28 or 30 days, as longer periods can be administratively inconvenient.

Where one spouse has very little or no assets and the couple's combined estate is above the nil rate band, equalisation of assets is recommended if their wills contain a survivorship clause for non-tax reasons to try and minimise potential IHT costs.

4.5 Summary

- A will speaks from death in respect of the items given (s 24 WA) unless a contrary intention is shown. The word "my" demonstrates the requisite intention and that item is identified with reference to the property owned at the date of the will
- Unless otherwise expressly stated:
  - Items that comprise a collection are identified at the date of death
  - People are identified with reference to the date of execution
  - A gift in a will is made free of IHT
  - A specific gift is made subject to expenses and costs of transfer
- A gift of property subject to a charge bears the liability of that charge (s 35 AEA)
- There are no deemed survivorship requirements for gifts under a will. Express survivorship clauses are often used to avoid unnecessary cost and complication

5 Gifts to particular beneficiaries

5.1 Gifts to Issue

When a testator wants to include gifts for their issue (meaning children / grandchildren and further lineal descendants) there are particular considerations to take into account.

- Does the testator want to make a gift to an individual or make a class gift?
- Is the gift to be vested or contingent?
- What does the testator want to happen if a beneficiary pre-deceases?

A gift to children includes illegitimate (born to unmarried parents), legitimated (born to unmarried parents who later marry) and adopted children. However, a stepchild is not included unless the interpretation of the will is clear this was intended. There are particular rules for children conceived but not yet born at the relevant date, and children born as a result of fertility treatment, but these are beyond the scope of the workbook.

When drafting gifts to issue the beneficiaries can either be named individually or the gift can be drafted in favour of a group identified by reference to their relationship with the testator.

Compare the following:

(a) I give absolutely to my son X and my daughter Y the sum of £100

(b) I give absolutely to each of my children the sum of £100

Unless there is a particular reason to name individuals if additional children may be born after the will is executed, and the testator would want those children to benefit, it is usually appropriate to draft a gift to 'children' as a class.

5.1.1 Class gifts

Where a gift is given to a group of beneficiaries who meet a general description such as 'children' or 'grandchildren' these are referred to as class gifts.

Each member of that class is entitled to inherit. However, in the absence of express wording to clarify, it can sometimes be difficult to identify with certainty which individuals will be included within a class until there is no possibility of further people being born who meet the definition.

The courts have developed rules of construction known as the 'class closing rules' to provide certainty and enable distribution.

The general rule is that a class closes (i.e. the beneficiaries within the class are identified and no one born subsequently can qualify) when any one member of the class first becomes entitled in possession. For example:

Class gift clause

I give £300 absolutely to each of my grandchildren who reach the age of 21

When the first grandchild reaches 21 the class of 'grandchildren' would close (this may be after the testator's death). If the testator has grandchildren born subsequently these grandchildren would not be included.

If no contingency applies (or at least one of the class has already satisfied the contingency when the testator dies) the class closes on the date of death, provided there is at least one person who satisfies the definition e.g. one grandchild in whom the gift can vest.

The application of the rules can be complex and it is preferable to avoid them and to create certainty by expressly stating when the class closes.

In the example above the PRs would be able to identify exactly which beneficiaries should inherit with reference to the date the testator died.

If a testator did want to provide for grandchildren born after his death this should be clearly provided for in the will.

5.1.2 Vested interests

A gift vests if it is given outright and absolutely and there are no conditions which must be met. For example:

Example: Vested interest clause

I give £1,000 absolutely to each of my children alive at the date of my death

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If the testator's children were aged 15 and 19 when the testator died both would have a vested interest even though one of them is a minor (under 18). Vesting is **not** about age. If a minor with a vested interest dies before attaining the age of 18 the gift belongs to them and will pass into their own estate.

However, where a vested gift is made to a minor the gift would be held on trust until the child attains 18 because a minor cannot give a good receipt for capital.

It is sometimes possible for a child aged 16 or 17 to give good receipt but only if there is an express clause within the will permitting this.

5.1.3 Contingent interests

A contingent gift is made where a beneficiary will have to satisfy a condition before they inherit. When the condition is satisfied the interest vests. The most common contingencies are a requirement to survive the testator by a specified amount of time or the beneficiary attaining a certain age.

Example: Contingent interest clause

I give £1,000 to such of my grandchildren alive at my death who reach the age of 21

If a grandchild died after the testator but before the age of 21 they would not have satisfied the contingency, and unlike with the vested interest, their estate would not be able to claim the property and the gift would lapse. In effect, the gift would fail.

Vested or Contingent

Whether a gift should be made vested or contingent is relevant to any dispositive clause within a will.

However, contingent gifts are most commonly used:

- where gifts are made to the testator's issue.
- in relation to the residuary estate (although if a legacy is quite large the testator may also want to specify an age).

If a gift to children is to vest absolutely at an age later than 18 the testator should be advised of the associated tax implications.

5.1.4 Pre-decease testator

If a beneficiary dies before the testator a gift to them in the will fails (lapses).

Consider the following:

- I give to my niece the sum of £100 absolutely
- I give my Residuary Estate to my nephew absolutely

If either the testator's niece or nephew pre-decease the testator the gifts to them would lapse. The consequence of this depends on the type of clause. If a pecuniary legacy lapses (gift to the niece) then the money that would have been given ends up in the residuary estate. However, if a gift of the residuary estate lapses (gift to nephew) then a full or partial intestacy is created.

A testator should consider what they would like to happen in the event of a gift lapsing. It is common for a substitutional gift to be specified.

Example: Substitutional gift clause for a legacy

I give absolutely to my niece X the sum of £10,000 but if she has died before me to her daughter Y

As a lapse of the residue clause will give rise to intestacy most professionally drafted wills include substitutional gifts of the residuary estate.

Example: Substitutional gift clause for the residuary estate

I give my Residuary Estate to my wife but if she has died before me then I give my Residuary Estate to such of my children who survive me and if more than one in equal shares

Example: Substitution in favour of grandchildren clause

When considering gifts to children, the most common substitution is in favour of the testator's grandchildren i.e. the children of any child that has predeceased the testator. An example is shown below with substitution element in bold.

I give my Residuary Estate to such of my children who survive me and if more than one in equal shares provided that **if any child of mine shall have died during my lifetime leaving a child or children then any such child or children (meaning in either case a grandchild or grandchildren of mine) as shall attain the age of 21 years shall take by substitution and in equal shares if more than one the share of my residuary estate which their parent would have taken had he or she survived me and attained a vested interest**

The terms of the original and substitutional gifts will vary depending on the testator's wishes. In this clause an age contingency of 21 is attached to the substitutional gift.

Section 33 Wills Act 1837

In the case of gifts in a will to the testator's own issue, if there is no express substitution clause, s 33 WA (set out below) may apply to prevent the gift lapsing where:

> "33 (1)
>
> (a) a will contains a devise or bequest to a child or remoter descendant of the testator; and
>
> (b) the intended beneficiary dies before the testator, leaving issue; and
>
> (c) issue of the intended beneficiary are living at the testator's death,
>
> then, unless a contrary intention appears by the will, the devise or bequest shall take effect as a devise or bequest to the issue living at the testator's death."

S 33(2) WA includes a similar provision but in relation to class gifts to children/grandchildren.

Section 33 WA applies where:

- there is a will containing a gift to the testator's issue (child or other lineal descendant)
- the intended beneficiary dies before the testator leaving descendants of their own who are living at the testator's death

The effect of s 33 WA is to enable the gift to be shared equally between the issue of the deceased beneficiary, provided no contrary intention is expressed in the will.

Example: Application of s 33 WA

For example, T's will contains a gift to T's child (A).

A pre-deceases T leaving children of their own (B and C) who are alive at T's death.

S 33 WA means B and C take the share A would have taken had A survived T (1/2 of A's share would pass to each of B and C).

It is good practice to include substitution provisions expressly for clarity even if s 33 WA would otherwise apply to achieve the same result.

Where s 33 WA applies and the original gift is contingent (e.g. to a beneficiary at 21) it may be unclear whether s 33 WA imposes a similar contingency on the substitution. It is therefore preferable to provide expressly what the terms of any substitutional gift should be.

It is important to appreciate that s 33 WA only applies to gifts to issue of the testator (whether to a named child or remoter descendant, or a class gift consisting of children or remoter descendants). However, it does **not** operate in relation to any other gifts. For example, a gift to a sibling who has predeceased will lapse and s 33 WA will not apply to enable nieces and nephews to inherit. Therefore, express wording is needed if this is the testator's intention.

Section 33 WA will apply unless excluded by the wording of the will or if the will otherwise indicates a contrary intention.

If a testator does not want s 33 WA to apply it is important that this is clearly stated. It can be difficult to know whether a will has expressed a contrary intention if there is no mention of s 33 WA. For example, if a class gift to "such of my children who survive me and if more than one in equal shares" is included in a will and one child has predeceased, should s 33 WA apply to that child's share? Or does the wording of the gift intend to override s 33 WA and ensure the estate would be shared between only those children who survive? The answer is not always clear and it is a matter of construction on an individual basis.

Ambiguity should be avoided by drafting to exclude s 33 WA and impose any required substitution expressly.

5.2 Charities & unincorporated associations

If the testator wishes to leave a gift to a club, institution, charitable organisation or other unincorporated association the drafter must have regard to the following:

- The organisation should exist and a full name and address (plus registered number of a charity) should be used to avoid doubt over the identity of the intended beneficiary.
- Consider whether the organisation has registered charity status (there are IHT implications).
- Express provision should be made for the organisation subsequently changing its name, amalgamating with another organisation or ceasing to exist.
- Provision should be made for who can give valid receipt (it is common to name the treasurer). In the absence of express provision all members or potential beneficiaries would need to give a receipt which is not practical.

Example: Charity clause

I GIVE to [ ] of [ ] (registered charity No.) ('the charity') absolutely £6,000 for its general purposes provided that:

(a) if at the date of my death the charity does not exist or is subject to a winding up order my Executors shall pay the legacy to such another charitable body having the same or similar objects

(b) the receipt of the treasurer or other appropriate officer for the time being of the charity (or of any substituted charity) shall be a good discharge to my Trustees

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- For gifts to charities, the testator should decide what they wish to happen if the charity ceases to exist or is subject to a winding up order. If the testator wants the gift to be given only to the named charity and/or not made if the charity is subject to a winding up order then ensure this is expressly stated. See example above.
- A charitable gift stated to be for **general charitable purposes** results in the application of the cy-pres doctrine - under s 62 Charities Act 2011 the gift can be given to a different charity with a similar purpose where the original gift cannot be given effect. See example above.

5.3 Summary

- When drafting gifts to the testator's issue consider whether a class gift should be made or gifts to named individuals. If a class gift is made express wording should be used to state when the class closes.
- Vested interests are absolute. Contingent interests arise where a beneficiary must satisfy a condition before their interest vests. Many testators will include an age contingency in any gift to a child / grandchild.
- If a beneficiary dies before a testator a gift to them will lapse.
- With regards gifts to the testator's issue, s 33 WA imposes an implied substitution in favour of the children of any issue who pre-decease. It is better to expressly exclude s 33 WA and expressly include substitution provisions which reflect the testator's wishes.
- When drafting gifts to charities and other unincorporated associations express provision should be made with regards who can give receipt for any gift.
- When drafting a charitable gift the effect of the cy-pres doctrine should be considered and the wording of the clause should make the testator's intentions clear.

6 Incorporating documents into a will

The provisions of a will should normally be contained in one properly executed document. If changes or additions are to be made to the will, this should be done by a codicil or by revocation of the original will, and the execution of a new will.

However, there are circumstances where an unexecuted document can be successfully incorporated into a will.

This workbook explores:

- Criteria for successfully incorporating unexecuted documents into a will
- Incorporating STEP provisions
- Letters of wishes

6.1 Incorporating unexecuted documents

An unexecuted document may be incorporated into a will by referring to it in the will.

To successfully incorporate an unexecuted document into a will, each of the following criteria must be satisfied:

(a) The document must exist when the will is executed (or at the time a later codicil is made – because the codicil re-publishes the original will)

(b) The will must refer to the document as being in existence at the time of execution

(c) The document must be clearly identified in the will

Example: Successful clause

A testator's will contains a clause which says:

> "I leave my collection of antique dolls to each of the people named in the list now to be found in my safe"

This clause would satisfy the criteria and, assuming it can be shown the listed existed at execution, the list would be successfully incorporated, and its terms would be given effect.

Example: Unsuccessful clause

A testator's will contains a clause which says:

> "I leave my collection of antique dolls to each of the people to be named in a list which I will write before my death"

This clause would not satisfy the criteria. Although the list is referred to in the will, it does not exist at the time of execution / has not been referred to as existing at that time. The list will not be incorporated.

If a document is validly incorporated into a will, it becomes part of the will even though the document itself does not comply with s 9 WA.

The document will be made public along with the will once it is admitted to probate following the testator's death. A client who believes it will be kept private is mistaken.

The incorporation of an unexecuted document may seem appealing to a client who wants to create a detailed schedule of personal possessions, perhaps with photographs, without this needing to form part of the will itself. However, this should be avoided wherever possible because of the danger of failing to satisfy the conditions, or loss of the document to be incorporated before death.

If an inventory or detailed list of goods is to be part of the provisions of the will it would be safer to include such a list in the will itself as a schedule.

6.2 Incorporating STEP provisions

STEP is a professional association which promotes best practice on matters such as will drafting and estate administration. STEP have produced a set of nationally recognised administrative powers for personal representatives and trustees. These are commonly incorporated into a will or trust deed as an alternative to drafting lengthy and technical administrative clauses in the body of the document itself.

The STEP provisions (an unexecuted document) can be incorporated into a will or trust deed by reference i.e. each provision does not need to be copied out in full in the will

The example below would successfully incorporate these provision into a will:

Example: Incorporation of STEP clause

The standard provisions and all of the special provisions of the Society of Trust and Estate Practitioners (2nd Edition) shall apply.

6.3 Letters of wishes

Where a trust is created under a will you may find an expression of wishes / letter of wishes has been drafted by the testator and stored with the will.

These 'letters' are common in practice and are drafted by the testator. They set out how the testator would like the trustees of the estate to manage their discretionary powers.

The letters are not legally binding and merely serve as guidance.

These letters do not form part of the will (or trust created under it) and there is no intention for these documents to be incorporated into the will.

6.4 Summary

- It is possible for unexecuted documents to be incorporated into a will by reference.
- The document must be clearly identified in the will, in existence when the will is executed and the will must refer to the document as being in existence at execution.
- Any document successfully incorporated into a will is admitted to probate along with the original will.
- Clients should be advised against incorporating additional documents into their will because of the practical issues that may arise if the conditions for incorporation are not satisfied or the document cannot be located following death.

4 Inheritance tax

1 Introduction to inheritance tax (IHT)?

IHT is a tax that is primarily paid on the estate of a deceased person. It applies to the worldwide assets of UK-domiciled taxpayers.

While most people know that IHT is paid when someone dies, you may not be aware that there are other events during a person's lifetime which can give rise to an IHT charge. The rates of tax differ depending on the nature of the IHT trigger event.

The scope of the IHTA is very broad, in order to prevent people avoiding IHT by reducing the value of their estate during their lifetime.

It is important to know what kinds of transfers could trigger IHT, the rates at which tax is payable on those transfers and what, if any, exemption or reliefs are available to reduce or eliminate any resulting tax.

1.1 Rates of tax

The rates of IHT are set annually by the budget for the tax year.

The tax year runs from 6 April one year to 5 April the following year. For the current tax year, the following rates of IHT apply:

Nil rate band	0%
Lifetime rate	20%
Death rate	40%

You will be required to apply tax rates in this topic. You will find it helpful to have a calculator to hand as you work through the topic.

1.2 IHT trigger events

There are three kinds of IHT trigger event that you need to be aware of when advising a client in relation to wills and estates:

(a) **Potentially exempt transfers (PET)** – Lifetime **transfers of value** which could become chargeable to IHT depending on whether the transferor survives for seven years after the transfer. Only failed PETs (i.e. those where the transferor does not survive for seven years) are chargeable.

(b) **Lifetime Chargeable Transfers (LCT)** – Lifetime **transfers of value** which are immediately chargeable to IHT at the lifetime rate. These are also reassessed if the transferor dies within seven years.

(c) **Death** – When a person dies there is a deemed transfer of all the assets that they own (s 4 IHTA). IHT is chargeable on this **transfer of value**

1.2.1 Transfers of value

IHT is payable on the value transferred by a 'chargeable transfer' (s 1 IHTA).

- A chargeable transfer is a 'transfer of value' made by an individual which is not an "**exempt transfer**" (s 2(1) IHTA).
- A "transfer of value" is a 'disposition' which results in an immediate decrease in the value of the individual's **estate** (s 3(1) IHTA).

Broadly, this means gifts but it can also include transactions at an undervalue (e.g. selling your house to a family member for less than it is worth – The difference in value counts as a gift). It applies to gifts of all forms of property (i.e. anything with a monetary value).

The 'value' of a transfer of value depends on the trigger event.

- For lifetime transfers, it is assessed by reference to the loss in value to the donor.
- For the death estate, the value is calculated by reference to the market value of items in the estate on the date of death (s 160 IHTA).

1.2.2 Nil rate bands

Individuals have a basic nil rate band of £325,000 (**NRB**). This means they can make £325,000 of chargeable transfers at a rate of 0% (i.e. no tax is due).

An individual's surviving spouse or civil partner (referred to as their 'spouse' for ease of reference) can inherit the unused portion of their basic NRB. This is known as the 'transferable nil rate band' (**TNRB**).

There is an additional nil rate band (currently £175,000) for individuals who die on or after 6 April 2017 if they leave their family home to a direct descendant. This is known as the 'residence nil rate band' (**RNRB**).

An individual's surviving spouse or civil partner can inherit the unused portion of their RNRB similarly to the basic NRB.

1.2.3 Potentially Exempt Transfer

A PET is a lifetime transfer of value to another individual. If the transferor does not survive for 7 years after making the transfer, it becomes chargeable alongside their death estate. The rationale behind PETs is to prevent individuals avoiding IHT by giving away property shortly before their death.

The tax treatment of a PET is as follows:

- The transfer is **not chargeable** at the point it is made. No IHT is payable yet.
- It becomes **fully exempt** if the transferor **survives seven years** from the date of the PET.
- If the transferor **dies within seven years** of making the PET, the PET 'fails' and becomes a chargeable transfer and thus subject to IHT.

1.2.4 Lifetime Chargeable Transfer

All lifetime transfers of value made by a person **into a trust** on or after 22 March 2006 will give rise to an LCT. The tax treatment is as follows:

- An LCT is a chargeable transfer when it is made. IHT is payable on the **chargeable value** of the LCT at the lifetime rate of **20%**.
- If the transferor survives 7 years following the LCT there is no further charge to tax.
- If the transferor dies within 7 years, the LCT will be reassessed to tax at the death rate of **40%**, with reference to the **NRB amount at the date of death**.

Practice Alert: There are different rules for trusts set up for disabled people provided that statutory requirements are met. These rules are outside the scope of this workbook.

1.2.5 Death

When a person dies there is a deemed transfer of all the assets that they own at the date of their death (s 4 IHTA).

It is this deemed transfer that gives rise to the IHT charge on death.

Property in the taxable estate is valued at the price it might reasonably be expected to fetch if sold on the open market immediately before the death (s 160 IHTA).

It is important to note that the taxable death estate is not the same as the succession estate so a separate calculation of the value of the estate for IHT purposes will be needed.

IHT is payable on a person's death estate at the death rate of 40% of the value of the estate above the available NRB.

In addition to the IHT for the death estate, any PETs or LCTs made in the 7 years before death must be re-assessed to IHT as well.

1.3 Comparing lifetime and death

Example: LCT with a chargeable value of £500,000

An LCT with a chargeable value of £500,000 would be taxed when it was made at the lifetime rate as follows:

£0 to £325,000 (nil rate band):	£325,000 x 0% = 0
£325,000 to £500,000 (lifetime rate):	£175,000 x 20% = **£35,000**

Example: Death estate with a chargeable value of £500,000

A death estate with a chargeable value of £500,000 would be taxed at the death rate as follows:

0 to £325,000 (nil rate band):	£325,000 x 0% = 0
£325,000 to £500,000 (death rate):	£175,000 x 40% = **£70,000**

1.4 Cumulation

Cumulation is used to prevent individuals reducing or avoiding an IHT liability by making a series of separate dispositions. Instead of viewing each chargeable transfer (i.e. failed PET, LCT, death) in isolation, HMRC consider other chargeable transfers made in the seven years prior to the transfer being taxed. The combined value of these transfer is called the cumulative total.

Cumulative total = total chargeable value of all chargeable transfers made in the previous 7 years.

The effect of the cumulative total is to reduce the NRB available for the transfer under consideration. It is therefore necessary to calculate the 'cumulative total' on the relevant date to determine the NRB amount for a particular transfer.

Available NRB = Full NRB less cumulative total

Example: Cumulation

A man died last month having made two lifetime gifts within the last seven years

Last year he gifted cash with a chargeable value of £50,000 (a PET)

Two years ago he gifted shares with a chargeable value of £100,000 (a PET)

His cumulative total on death is £150,000

His NRB is reduced accordingly (£325,000 - £150,000)

The NRB available on death is £175,000

Please note that this is a simplified example which doesn't consider the availability of exemptions or reliefs.

1.5 Exemptions and reliefs

There are a number of different exemptions and reliefs which can be used to reduce or eliminate IHT. Exemptions and reliefs work in slightly different ways:

- Gifts to certain individuals or other entities are exempt from IHT. This means that they can be made completely free from IHT and do not use up the NRB.
- Gifts of particular assets benefit from reliefs. This means that, where the conditions of the relief are met, the amount of IHT payable is reduced (sometimes by 100%).

Some exemptions and reliefs only apply to PETs and LCTs. Others apply only to the death estate. Some apply to both.

1.6 Calculating IHT

To calculate the amount of IHT which must be paid in relation to a particular transfer you will be expected to apply the relevant formula.

There is a formula to follow in relation to the following lifetime transfers:

- Failed PET
- LCT (when made)
- LCT (when reassessed following transferor's death)

A different formula applies for the taxation of the death estate.

The formulas are set out below for completeness and are repeated later in the workbook when required for a calculation.

1.6.1 Calculating IHT on lifetime transfers

To calculate the IHT due on a failed PET or LCT the following formula should be used:

Step A	Calculate cumulative total
Step B	Identify value transferred
Step C	Apply exemptions and reliefs
Step D	Apply NRB and calculate tax
Step E	Apply taper relief
Step F	Give credit for tax paid in lifetime

Note that Steps E and F only apply when the IHT is being calculated **after death**.

Figure 4.1: Calculating IHT on lifetime transfers

1.6.2 Calculating IHT on the death estate

To calculate the IHT due when someone dies it is necessary to follow this 7 step process:

Step 1	**Calculate cumulative total**
Step 2	**Identify assets included in the taxable estate**
Step 3	**Value the taxable estate**
Step 4	**Deduct debts/expenses**
Step 5	**Apply exemptions & reliefs**
Step 6	**Apply RNRB**
Step 7	**Apply basic NRB and calculate tax**

Figure 4.2: Calculating IHT on the death estate

1.7 Key terminology used in topic

You may find it helpful to familiarise yourself with the following terminology:

- '**HMRC**' is short for 'His Majesty's Revenue & Customs', the UK tax authority.
- '**Failed PET**' refers to a situation where an individual does not survive for seven years after making a PET.
- References to a '**spouse**' or '**marriage**' should be taken to include '**civil partner**' or '**civil partnership**' (unless the context requires otherwise).
- '**Taxable estate**' and '**death estate**' may be used interchangeably.
- '**Transferor**' / '**transferee**' may be used interchangeably with '**donor**' / '**donee**'.

1.8 Summary

- IHT is a tax that is primarily paid on the estate of a deceased person at a rate of 40% but there are also lifetime trigger events.
- A PET is a lifetime gift to another individual. It is exempt unless the transferor dies within 7 years, in which case it is charged at the death rate of 40%.
- An LCT is a lifetime gift into a trust. It is an immediately chargeable transfer. An LCT is taxed at the lifetime rate of 20% but reassessed and charged at the death rate if the transferor dies within 7 years.
- There is a nil rate band of £325,000. Individuals also have an additional nil rate band if they dispose of their family home to direct descendants. The unused portions of both nil rate bands are transferable to the deceased's surviving spouse.
- When calculating IHT it is necessary to take into account the cumulative total of chargeable transfers made in the last 7seven years to determine the value of the NRB.
- Exemptions and reliefs may be available to reduce an IHT liability.

2 Nil rate bands

As mentioned above, all individuals have a NRB for IHT purposes. The basic NRB is £325,000. This means that the first £325,000 of a transfer subject to IHT is taxed at 0%.

An individual's surviving spouse or civil partner can inherit the unused portion of their basic NRB. This is known as the TNRB.

There is an additional nil rate band (currently £175,000) for individuals who leave their family home to direct descendants. This is known as RNRB. The RNRB can also be transferred to an individual's surviving spouse or civil partner.

2.1 Transfer of basic nil rate band

Before 9 October 2007 the basic NRB would be wasted when a deceased passed their estate entirely to their surviving spouse (because spouse exemption applied there was no use for the NRB).

Individuals would often try to make the most of both NRBs by leaving a portion of their estate to other family members or setting up trusts known as 'nil rate band trusts'. These are discretionary trusts which cover the amount of the NRB and include the surviving spouse as a potential beneficiary. This allows the survivor to benefit without the trust property forming part of their estate for IHT purposes.

Where one spouse held the bulk of the couple's assets, they would often be advised to try and equalise their estates, to ensure both had enough assets to make the most of their own NRB.

Such tax planning tends only to be useful for wealthier individuals. In any case, it has become less common since the introduction of the TNRB in the Finance Act 2008.

The TNRB allows a surviving spouse to take advantage of the unused portion of the deceased's basic NRB.

2.1.1 How the TNRB works

If a married individual dies and some or all of their NRB remains unused, the PRs of the surviving spouse can claim an increase in the survivor's NRB equal to the unused **percentage** of the first spouse's NRB - the TNRB.

The amount of the TNRB is equal to a % of the NRB sum on the date the survivor dies. It is not simply the unused amount carried forwards. This operates in favour of the taxpayer because the estate of the surviving spouse will benefit from any increase in the NRB threshold which occurs after the first death. For example, if the NRB was £312,000 when the first spouse died but had increased to £325,000 by the time the second spouse died, the amount of the TNRB would be calculated with reference to £325,000 not the lower figure of £312,000. Therefore, if the first spouse to die had used 50% of their NRB, when the second spouse died the transferable amount is £162,500.

Note. if the NRB amount has not changed between the date of the first and second death, the unused amount and unused % will be the same.

Outliving multiple spouses

The TNRB is only available after the surviving spouse **dies**. Therefore, it cannot be claimed in respect of a chargeable lifetime transfer when it is made by the survivor.

The date of the first spouse's death doesn't matter i.e. it can pre-date the introduction of the TNRB. The TNRB can apply provided the survivor's death occurred after the introduction of the TNRB.

Individuals who have survived more than one spouse can claim the TNRB in respect of all of them, subject to a cap of 100% of a full nil rate band being transferred.

Individuals who would be entitled to claim a TNRB with regards a previous marriage/civil partnership can also pass this on to any subsequent spouse they have (again capped at 100% of a full NRB).

Example: Outliving multiple spouses 1

- A and B were married. B later died. Following B's death, 20% of his NRB was used (leaving 80% unused).
- A then married C. C later died. Following C's death, 50% of his NRB was used (leaving 50% unused).
- A has just died.

A's PRs can claim a TNRB from both B and C (80% from B and 50% from C).

However, the total is capped at 100% (one full NRB of £325,000).

A's PRs can claim A's own NRB plus 100% TNRB (from B/C), thus increasing A's NRB from £325,000 to **£650,000**.

Example: Outliving multiple spouses 2

- D and E were married. E later died. Following E's death, 90% of her NRB was used (leaving 10% unused).
- D then married F. F died later. Following F's death, 70% of her NRB was used (leaving 30% unused).
- D has just died.

D's PRs can claim a TNRB from both E and F (10% from E and 30% from F).

D's PRs can claim D's own NRB plus 40% TNRB (from E and F), thus increasing A's NRB from £325,000 to **£455,000**

(£325,000 + £130,000 (40% of £325k))

Example: Passing TNRB to new spouse

(a) A died 15 years ago, survived by wife, B. A left all assets to B, meaning A's NRB was unused.

(b) B married C five years ago.

(c) B died two years ago, leaving her entire estate to the children from her first marriage. 50% of her NRB remained unused. B's PRs didn't need to claim TNRB from A because B didn't use her whole NRB.

(d) C died recently, leaving his estate (worth £700,000) to his siblings. He has a full NRB available.

C's NRB doesn't cover the full value of his estate. His PRs will therefore want to claim the TNRB from B's estate.

B's total available NRB included B's own NRB (of which 50% remained unused) and A's full NRB, to which B's estate was entitled but did not claim (worth £325,000).

The claim by C's PRs for a TNRB will be capped at one full NRB. C's PRs can increase C's NRB to £650,000, but no more, even though B's total 'available but unused' NRB would be worth more than £325,000.

2.1.2 TNRB: Making a claim

No claim needs to be made when the first spouse dies.

The PRs of the surviving spouse must make a claim for the TNRB in the IHT return within two years of the end of the month of death (or within three months of the PRs first acting, if this is later). If they fail to do so, anyone else who is liable to pay the IHT on the surviving spouse's death, can make the claim after the deadline for the PRs to make the claim.

HMRC has discretion to extend the deadline.

If an individual survives more than one spouse, a separate claim must be made for each TNRB. It is advisable to do this even though the cap means that only one TNRB might actually be needed (in case there is an error discovered in the IHT returns of any of the deceased spouses).

The PRs of a surviving spouse can also make a claim for any TNRB the deceased spouse was entitled to on the death of a previous spouse (if their own PRs had not made such a claim already).

2.2 Residence nil rate band

The RNRB was introduced by the Finance (No 2) Act 2015. It provides an additional nil rate band where the following conditions are satisfied:

(a) The deceased died on or after 6 April 2017

(b) Their death estate included a '**qualifying residential interest**' ('QRI')

(c) The QRI was '**closely inherited**' by a '**direct descendent**'

If part of the QRI is closely inherited but the other part is not, only the chargeable value of the share which is closely inherited is taken into account when calculating the value of the RNRB.

2.2.1 RNRB: Amount

The amount of a full RNRB is **£175,000**.

If the deceased's share or interest in the property (after the deduction of any mortgage on the property) is worth less than £175,000, the RNRB amount is capped at the value of the deceased's interest in the property.

Where the RNRB is claimed it is applied to the death estate as a whole rather than set-off against the gift of the property separately.

There is a tapered withdrawal of the RNRB for estates with a net value (here this means the value of the assets which comprise the taxable estate, after debts have been deducted, but before exemptions and reliefs are applied) of more than £2 million.

The reduction in the RNRB is £1 for every £2 above the £2 million threshold.

There is no RNRB available at all for net estates worth £2,350,000 or more (or £2,700,000 where a full transferred RNRB applies).

RNRB: Qualifying residential interest

A QRI is a **residential property interest** which is part of the deceased's estate immediately before death.

Where the deceased had more than one residential property interest in their estate at death, the PRs must nominate one of them as their QRI.

A **residential property interest** is an interest in a dwelling-house which the deceased occupied as their residence at some point during their period of ownership.

It includes property in which the deceased did not live (because they were living in other job-related accommodation) but intended to do so in due course.

It does **not** include rental investment properties in which the deceased never lived.

A **dwelling-house** can include the garden/grounds (if the land is not subject to a woodlands relief election).

RNRB: Meaning of 'closely inherited'

A QRI must be '**closely inherited**'.

A beneficiary closely inherits from the deceased if they receive the QRI by:

- gift under the **will** - either as a specific legacy of the deceased's home, or by taking a whole or part share of the residue which includes such property
- operation of the law of **intestacy**
- operation of the rules of **survivorship**

There are other circumstances in which a person will 'closely inherit' from a deceased e.g. where there are gifts into certain types of trust, or where the deceased has received a gift with reservation of benefit (GROB), but these rules are beyond the scope of the workbook.

Unless a specific exception applies, a beneficiary with a **contingent interest** following death does not 'closely inherit' for these purposes as they are not receiving an absolute interest e.g. it would not apply to a gift to a grandchild who was aged 15 if the gift was contingent on them reaching 25.

RNRB: Meaning of 'direct descendants'

A QRI must be 'closely inherited' by one or more **direct descendants**. The following are included as direct descendants of a deceased person (s 8K IHTA)

(a) The deceased's children, grandchildren, great-grandchildren and other lineal descendants,

(b) Spouse or civil partner of anyone included in a) above,

(c) Widow, widower or surviving civil partner of anyone included in a) above who has pre-deceased the deceased, provided the survivor does not re-marry or enter a new civil partnership before the deceased dies.

When considering a) above: adopted children, step-children (if their parent was married to the deceased), foster children and children for whom the deceased was a guardian or special guardian are included.

The deceased's siblings, parents, nieces, nephews are not direct descendants.

Example: RNRB

A man died this year, leaving his entire estate (worth £500,000) to his children. He has a full basic NRB available. The estate includes the family home (worth £250,000).

Without the RNRB, the estate would not all be covered by the NRB.

The family home is a QRI and the man's children are direct descendants. The conditions for using the RNRB are therefore met. As the family home is worth more than the RNRB, the full amount of the RNRB is available.

The man therefore can use both his NRB of £325,000 and RNRB of £175,000. Together they cover the value of the man's estate. There is therefore no IHT to pay on the man's estate.

2.2.2 Transferring unused RNRB

As with the basic NRB, it is also possible to transfer any unused RNRB to a surviving spouse. The transfer of the RNRB is relevant when the **survivor** of a married couple dies and their pre-deceased spouse did not use their own RNRB. This may arise where the first of the couple to die:

- did not own a QRI e.g. they did not own a residential property; or
- they did not qualify for the RNRB because they left a QRI to someone who was not a lineal descendant e.g. they left their entire estate to the surviving spouse.

Note that providing the **survivor** dies after April 2017 their estate may benefit from a transferred RNRB even if their pre-deceasing spouse died before this date.

A transferred RNRB can only be used if the **surviving** spouse leaves a QRI to a direct descendant (i.e. conditions for the RNRB must be met on the second death).

The home that the surviving spouse leaves to their direct descendants does not have to be the same house that they lived in with their deceased spouse(s) (the deceased spouse does not need to have owned any QRI).

Transferring the RNRB works in the same way as transferring the basic NRB, allowing the surviving spouse to increase the value of their RNRB by up to 100% (based on the percentage remaining of the deceased spouse's RNRB). Where a full transfer occurs, an estate may qualify for a RNRB of £350,000 (£175,000 + £175,000).

The tapered withdrawal of the RNRB for net estates worth more than £2 million applies with reference to the total RNRB. Where the survivor's estate could claim £350,000 RNRB this amount is reduced by £1 for every £2 in excess of £2m, and no RNRB can be claimed for net estates worth £2,700,000 or more.

Example: Transferring RNRB

A died five years ago, leaving her entire estate to civil partner, B.

B died this year, leaving her estate to daughter, C. The estate includes the family home (worth £350,000).

B's PRs can make a claim for the unused RNRB from A's estate.

The total RNRB available for B's death estate is £350,000 (B's own RNRB of £175,000 plus an additional 100% uplift in respect of A's RNRB).

Where the RNRB is claimed it is applied to the death estate as a whole rather than set-off against the gift of the QRI separately.

2.2.3 RNRB: Downsizing

You should be aware of rules which allow an estate to qualify for a full RNRB even if the deceased did not own a QRI when they died (or the value of their QRI is less than the RNRB). These rules are referred to as the "downsizing" rules and the additional amount of the RNRB referred to as the **downsizing addition**.

Broadly, to qualify:

- the deceased must have given away their QRI or downsized to a less valuable QRI on or after July 2015 (i.e. have lost the benefit of the full RNRB)
- the former home would have been a QRI if it had been retained
- a direct descendant inherits the replacement QRI and/or other assets

The **amount** of the addition is calculated with reference to the amount of the RNRB which would otherwise be lost because the former QRI is no longer owned (or a less valuable QRI has taken its place).

A claim for the downsizing addition is made by the PRs within 2 years of the end of the month of death, not when the sale/gift of the former home takes place. However, details of the lifetime sale/gift will be needed by the PRs to bring the claim.

The downsizing addition is only relevant if there is **no QRI** in the estate when the deceased died (but there was historically), or the value of the new QRI following a downsizing move is **less than the current maximum RNRB.**

The downsizing rules are not relevant if:

- there is **no loss** of the RNRB because the value of any new QRI in the estate is the same/more than the maximum available RNRB, or,
- the **RNRB is not available**, because the new QRI or assets are not left to a direct descendant

Application of the rules is complex and beyond the scope of this workbook but will never produce a total RNRB greater than the maximum otherwise normally available.

Example: Maximum combined NRB

It is possible for a person's estate to qualify for a total NRB amount of £1million.

Consider the following:

- A and B are married. A dies leaving all of their estate to B. A made no lifetime gifts.
- On A's death no NRB is used because the whole of A's estate passes to their spouse and is spouse exempt.
- B then dies leaving the whole of their estate to their children. B made no lifetime gifts.
- B's estate is worth £1million and includes a family home worth £500,000.

When B dies, B's PRs can claim:

- B basic NRB of £325,000
- B's RNRB of £175,000 (the house passes to a direct descendent)
- A's unused basic NRB of £325,000 (TNRB)
- A's unused RNRB of £175,000 (transferred RNRB)

This gives a total combined NRB of £1 million (£325,000 + £325,000 + £175,000 + £175,000).

No IHT is payable on B's death.

2.3 Summary

- Each individual is entitled to a basic NRB of £325,000. Chargeable transfers up to the value of the NRB are taxed at 0%.
- The NRB available is reduced by a person's cumulative total. The cumulative total = total value of the chargeable transfers made in the previous 7 years.

- The PRs of a surviving spouse/civil partner can claim the unused % of the NRB of the pre-deceased spouse/civil partner (the TNRB). The TNRB is capped at 100% of the basic NRB at the date of the survivor's death.
- On death, an additional nil rate band of £175,000 can be claimed if the deceased left a 'QRI' to a direct descendant, referred to as the RNRB. There is a tapered reduction in the RNRB for estates worth more than £2 million.
- The PRs of a surviving spouse/civil partner can claim the unused % of the RNRB of the former spouse/civil partner (the transferred RNRB). The transferred RNRB is capped at 100% of the amount of the RNRB at the date of the survivor's death.
- Estates without a QRI (or a QRI worth less than the maximum RNRB) might benefit from the downsizing rules.

3 IHT (Lifetime)

We will consider the full process of calculating the IHT due on lifetime transfers.

There are two separate calculations that may be required:

(a) The tax due on an immediately chargeable lifetime transfer (**LCTs only**).

(b) The tax due as a result of the transferor dying within seven years of making a lifetime transfer **(LCTs and failed PETs**).

3.1 Calculating IHT on lifetime transfers

To calculate the IHT due on a failed PET or LCT the following formula should be used:

Step A	Calculate cumulative total
Step B	Identify value transferred
Step C	Apply exemptions and reliefs
Step D	Apply NRB and calculate tax
Step E	Apply taper relief
Step F	Give credit for tax paid in lifetime

Note that Steps E and F only apply when the IHT is being calculated after death.

Figure 4.3: Calculating IHT on lifetime transfers

3.1.1 STEP A: Calculate cumulative total

The cumulative total is relevant to lifetime transfers as it tells us how much of the NRB is available for a particular transfer. The cumulative total is calculated by adding up the value of all chargeable transfers made in the **7 years prior to the transfer**.

Although cumulation only takes into account chargeable transfers made in a 7 year period, where an LCT or PET is reassessed, this can mean looking back as far as 14 years before the transferor's death.

For example, if a PET was made during the 7 years before the transferor's death, it will become chargeable when the testator dies. It is then necessary to calculate the cumulative total for the failed PET based on the 7 years prior to the PET (i.e. the 7 year period starting 14 years before the death, during which time the deceased may have made an LCT).

Example: Cumulation

A person makes the following three transfers:

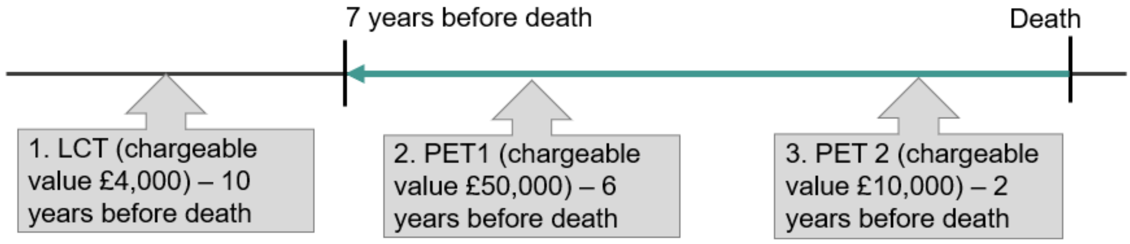

Figure 4.4: Transfers made before death

Both PETs have failed because they were made in the seven years before death and have become chargeable.

The LCT is also a chargeable transfer, but it is not reassessed following death because it was made more than 7 years previously, but is still relevant to the cumulative total for PET 1.

- The cumulative total applicable when calculating the IHT due on PET 1 is £4,000 (the LCT was made 4 years before PET 1).
- The cumulative total applicable when calculating the IHT due on PET 2 is £50,000. PET 1 failed, has become chargeable, and occurred 4 years before PET 2. The LCT is not considered as it was made more than 7 years before PET 2.
- The cumulative total on the date of death is £60,000 (value of both failed PETs).

3.1.2 STEP B: Identify value transferred

A 'transfer of value' is a 'disposition' which results in an immediate decrease in the value of the individual's **estate** (s 3(1) IHTA).

Broadly, this means gifts but it can also include transactions at an undervalue (e.g. selling your house to a family member for less than it is worth – the difference in value counts as a gift). It applies to gifts of all forms of property (i.e. anything with a monetary value).

For **lifetime transfers**, the value of a transfer is assessed by reference to the loss in value to the donor at the date of the transfer. Where cash sums are given this will be the same as the gain to the donee. For gifts of other assets, this will often, but not always, be the same as the value received by the donee.

3.1.3 STEP C: Apply exemptions and reliefs

It is then necessary to apply any available exemptions or reliefs to reach the chargeable value of the transfer.

For the purposes of this workbook, the exemptions and reliefs that you may be required to apply when calculating IHT on lifetime transfers are:

- Spouse exemption
- Charity exemption
- Family maintenance exemption
- Annual exemption
- Small gifts allowance
- Normal expenditure from income
- Marriage exemption
- Business property relief (BPR)
- Agricultural property relief (APR)
- Taper relief (applies at Step E)

The detail of these reliefs is explored later in the workbook.

It is after applying relevant exemptions and reliefs that you reach a figure for the **chargeable value** of the transfer.

The detail of various exemptions and reliefs is considered later in the workbook but, for now, you should note that the annual exemption ('AE') would always be considered when taxing lifetime transfers.

The amount of the AE is £3,000 per tax year (i.e. transfers of up to £3,000 per tax year are not chargeable). Once the AE for the current year has been used up, any part of the previous years' AE which was not used can also be claimed.

There are more exemptions and reliefs available for lifetime transfers than for the death estate. Where more than one relief applies, use the annual exemption last.

Example: Exemptions and relief

A man made a wedding gift of £12,000 to his daughter the year before he died. He made no other gifts.

When considering this failed PET, you would apply lifetime reliefs in the following order:

- Marriage exemption: £5,000 [you will learn about this later in the workbook]
- AE for year of gift: £3,000
- AE for previous year: £3,000

The total value of the exemption is £11,000.

Deduct total value of exemptions from value of gift to reach chargeable value: £12,000 - £11,000 = **£1,000.**

3.1.4 STEP D: Apply NRB and calculate tax

Once you have established the chargeable value of the transfer, the basic NRB can be applied against the remaining taxable value.

(a) Establish the value of the NRB.

(b) Reduce the total NRB by the value of the cumulative total (from Step A).

(c) Apply a rate of 0% to the value of the remaining taxable estate up to the total NRB amount.

(d) Apply the relevant rate to the rest to establish the IHT due.

Key points to note:

- The RNRB never applies to lifetime transfers.
- The NRB amount applicable to an LCT when it is first made is the NRB at the **date of the transfer**.
- The NRB that applies to a failed PET or re-assessed LCT is the NRB amount at the **date of death**.

The NRB has been fixed at £325,000 since April 2009 – use this figure unless a question tells you otherwise.

After deducting the NRB, it is necessary to apply IHT to the remaining amount at the appropriate rate. This rate will differ depending on whether you are dealing with the tax due immediately on an LCT, or are re-assessing a lifetime transfer (LCT or PET) because the transferor has died within seven years.

LCTs: When calculating the tax due immediately on an LCT, the tax is payable at the lifetime rate of 20%. Step D is the final step in the calculation.

Failed PETs and re-assessed LCTs: Tax is payable at the death rate of 40%. If the transferor dies 3-7 years after making the transfer, it is also necessary to apply taper relief at the relevant rate to reduce the IHT payable. Steps E and F would then be considered.

Example: Lifetime rate

A man settles £400,000 on trust for his grandchildren (an LCT).

He made one PET (£50,000) three years before the LCT.

Calculate the IHT due on the LCT.

Step A: Calculate cumulative total	£0 (as the earlier PET has not yet failed)
Step B: Identify value transferred	£400,000
Step C: Apply exemptions and reliefs	AE for year of LCT: £3,000 AE for previous year: £3,000 Chargeable value: £400,000 - £6,000 = **£394,000**
Step D: Apply basic NRB and calculate tax	Nil rate: £0 - £325,000 @ 0% Lifetime rate: £325,000 – £394,000 = £69,000 **£69,000 @ 20% = £13,800**

3.1.5 Steps E and F: Reassessed transfers

PETs or LCTs made in the 7 years before death must be reassessed to IHT. This is separate to the calculation of IHT on the death estate. Although death is the trigger for the lifetime transfer being reassessed, **these transfers do not form part of the death estate**. The tax payable on a failed PET or reassessed LCT must be calculated separately.

If a PET or LCT is being reassessed it is necessary to consider Step E of the calculation (which involves applying taper relief to transfers made 3-7 years before the death)

If tax was paid on an LCT during the transferor's lifetime and it is later reassessed at the death rate, it may also be necessary to consider Step F (which involves giving credit for tax paid in the transferor's lifetime).

Step E: Taper relief

The rates of taper relief are set out below. You will see these rates expressed either as a % reduction in the amount of IHT due, or confirmation of the % that remains payable. Both produce the same outcome.

Date to transfer	Reduction **in amount of IHT due**	**Amount of IHT due which is** payable
0 - 3 years before death	No taper applies	100%
3 to 4 years before death	20%	80%
4 to 5 years before death	40%	60%
5 to 6 years before death	60%	40%
6 to 7 years before death	80%	20%

Step F: Giving credit for tax paid in lifetime

Where an LCT is being reassessed at the death rate, it is also necessary to factor in any tax that was paid at the lifetime rate.

This is done by deducting the IHT paid previously from that due as a result of the death (after taper relief has been applied). Only the balance needs to be paid to HMRC.

If the balance is reduced to nil as a result of crediting the previous payment, there will be no further tax to pay.

It is not possible to obtain a refund for the lifetime payment if the balance is negative.

Example: Reassessing LCT

A man settles £400,000 on trust for his grandchildren (an LCT). Tax of £13,800 was paid on the LCT during the man's lifetime. He made one PET (chargeable value £50,000) three years before the LCT. He dies three years and two months after the LCT. He has made no other transfers.

Calculate the IHT due on the LCT after the man's death.

Step A: Calculate cumulative total	£50,000 (because the PET has failed & is now a chargeable transfer made during the 7 years before the LCT)
Step B: Identify value transferred	£400,000
Step C: Apply exemptions and reliefs	AE (£3,000) x 2 = £6,000 Chargeable value: £400,000 - £6,000 = **£394,000**
Step D: Apply basic NRB and calculate tax	Nil rate: (£325,000 - £50,000) = £275,000 @ 0% Death rate: Balance of £119,000 (£275,000–£394,000) @ 40% = **£47,600**
Step E: Apply taper relief	LCT 3-4 years ago. 80% of £47,600 = **£38,080**
Step F: Give credit for tax paid in lifetime	£38,080 - £13,800 = **£24,280**

3.2 Practice Alert: Grossing Up

If IHT is payable when a lifetime transfer is made (an LCT) and the transferor pays the tax (in addition to the gift itself), the reduction in the value of his estate includes the amount of IHT paid as well as the gift itself.

Therefore, the amount of the gift must be 'grossed up' to find the total 'value transferred' for IHT purposes before the tax due is calculated.

Grossing up is outside of the scope of the workbook but it is something to be aware of if you encounter IHT (or indeed other taxes) in practice.

3.3 Summary

- LCTs are lifetime transfers into a trust. PETs are lifetime transfers to an individual.
- LCTs are immediately chargeable to IHT at a rate of 20%. Use the following process to calculate the tax due:
  - Calculate the cumulative total
  - Identify the value transferred
  - Apply exemptions and reliefs
  - Apply basic NRB and calculate tax at the appropriate rate
- If the transferor dies within 7 years, the LCT must be reassessed, using the same 4 steps (but applying a tax rate of 40% at Step D). Then apply taper relief (Step E) at the appropriate rate and finally give credit for any IHT paid during the transferor's lifetime (Step F). (Credit is given for any tax paid in their lifetime but no refund is given if the tax due on death is less than that already paid at the lifetime rate).
- PETs are not chargeable unless the transferor dies within 7 years, in which case they are reassessed at the death rate of 40%. Follow Steps A to E to calculate the tax due.

4 Calculating IHT on the death estate

We will consider the full process of calculating the IHT due when someone has died.

It can be quite a complicated calculation, depending on the size and nature of the estate, as well as how the deceased dealt with their assets during their lifetime.

4.1 The seven steps

You should follow the seven step process below to help you break down the calculation and effectively work out the IHT due.

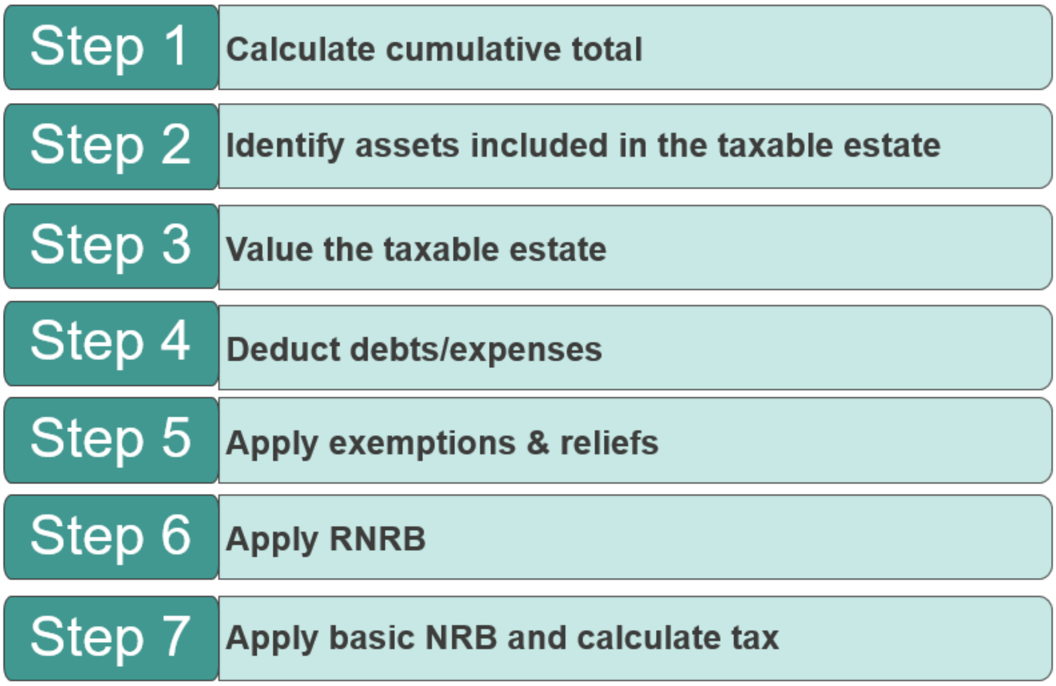

Figure 4.5: Calculating IHT on the death estate

4.1.1 Step 1: Calculate the cumulative total

The cumulative total is relevant to the death estate as it tells us how much of the NRB is available. The cumulative total is calculated by adding up the value of all chargeable transfers made in the 7 years prior to the death.

Consider the example below. (Note this is a simplified example which doesn't take into account the availability of any exemptions or reliefs.)

Ahmed died last week. He made the following chargeable transfers in the last 7 years:

- A PET, three years ago (chargeable value £20,000). This has now failed.
- An LCT, two years ago, (chargeable value £5,000).

Ahmed's cumulative total is £25,000. His NRB is therefore reduced from £325,000 to £300,000.

4.1.2 Step 2: Identify the taxable death estate

It is crucial to appreciate that the rules determining the property included in a person's estate for tax purposes are different to those which govern the property included in a person's succession estate. Therefore, the value of a person's taxable death estate will frequently be different to the value of their succession estate.

The general rule is that all property to which the deceased was beneficially entitled at the date of death is included in the estate for IHT purposes. This would include property situated both in the UK and abroad (where the taxpayer is UK-domiciled).

However, certain items of property may appear to belong to the deceased but are excluded for IHT purposes and conversely other types of property which do not belong to the deceased before death are included in the taxable estate.

Everything that is not specifically excluded will be included in the taxable estate.

Assets included at Step 2

The following assets are **included** in the taxable estate even though, in some cases, it may not be immediately obvious why (e.g. because the deceased did not actually own the asset when they died):

- All jointly owned property
- Property subject to a reservation
- Donationes mortis causa (DMC)
- Statutory nominations
- Some interests in possession

Jointly owned property

Where the deceased owned property as a tenant in common, this share passes into the deceased's estate for both tax purposes and distribution purposes.

Where the deceased owned property as joint tenants with another/others the distribution of the property and the tax position are considered separately.

Although the survivorship rule applies for distribution purposes, for IHT purposes there is a deemed severance of the joint tenancy immediately before death. This means that the deceased's 'share' of the property will be included in their taxable estate.

Example: jointly owned property

A testator's estate consists of:

- House in sole name: £300,000
- Chattels (joint tenants): £8,000
- Cottage (tenants in common in equal shares): £200,000

The **succession estate** is worth: £300,000 (house) + £100,000 (1/2 cottage) = £400,000. The chattels pass by survivorship.

The **taxable estate** is worth: £300,000 (house) + £4,000 (half chattels) + £100,000 (1/2 cottage) = £404,000.

Property subject to a reservation

If a person gives an asset away during their lifetime but reserves a benefit in that asset, the value of the asset at date of death will be included in the donor's IHT estate when they die at the date of death value (s 102 Finance Act 1986).

The most common example is where a parent transfers legal ownership of a property e.g. a holiday cottage to their children on the condition that the donor can continue to use it whenever they wish and free of charge. The parent in this case has reserved a benefit in an asset they previously owned and on the parent's death the value of the holiday cottage at that date will be included in their estate for IHT purposes.

Individuals can avoid the GROB rules by ensuring that they either do not derive any benefit from the assets they have given away, or, by paying a market value rent for the time they do derive benefit e.g. paying rent each time the donor uses the holiday cottage.

Donationes mortis causa

A DMC is a lifetime gift which is made conditional on death. At the date of death the donor no longer owns the asset as it has been given away while they are alive.

However, the conditional nature of the gift (and the donor's ability to revoke it up until death) means that for IHT purposes the subject matter of the DMC is still part of the deceased's estate and IHT will be payable on its value as at the date of death.

Statutory nominations

A person can make a written nomination of monies in any of the following accounts:

- Friendly Society
- Industrial Society

- Provident Society

The amount in each account must not exceed £5,000.

On the death of the deceased, the monies in the relevant account(s) pass to the nominee, do not enter the distribution estate and may be distributed without a grant. However, such monies **do** form part of the IHT estate.

Interests in possession trusts created before March 2006

Before 22 March 2006, the capital value of all interest in possession trusts was treated as being owned by the person with the interest in possession (i.e. the life tenant) for IHT purposes (s 49(1) IHTA). It was therefore included in the life tenant's taxable estate when the life tenant died.

This is still the case for existing interest in possession trusts provided they were created before 22 March 2006.

Example: Interests in possession trusts created before March 2006

Amir died last week. At his death, Amir's estate was worth £200,000. He was also the life tenant of a trust created in 2004. The capital value of the trust fund at Amir's death is £150,000.

The taxable value of Amir's estate is £350,000 as it includes the value of the trust fund.

Interests in possession trusts created after 22 March 2006

After March 2006, if a life interest trust is created following someone's death e.g. by will, the life interest is referred to as an 'immediate post death interest' (s 49A IHTA). When a life tenant with an immediate post death interest dies, the capital value of the trust is included in their taxable death estate.

If a new **inter vivos** life interest trust is created i.e. during the lifetime of the settlor, on or after 22 March 2006, the life tenant's interest is **not** included in their taxable estate

Where the initial trust was created before that date, the rules on the previous page continue to apply, although there are special rules for 'transitional serial interests' (trusts with successive life interests, e.g. to A for life, then to B for life, then to C absolutely) where the successive life interests arise on or after 22 March 2006.

Example: Interests in possession trusts created after 22 March 2006

A woman died last week owning assets worth £200,000. She was also the life tenant of a trust created following her father's death in 2012. The capital value of the trust at creation was £30,000, but had increased to £50,000 when the woman died.

The taxable value of the woman's estate is £250,000 because it includes the value of the trust fund when she died. The life interest trust was created following the death of the woman's father so she had an immediate post death interest.

Assets excluded at Step 2

The following are specifically **excluded** from the taxable estate:

- 'Excluded property'
- Insurance policies written in trust for a third party
- Discretionary pension scheme payments

Excluded property

The most common example of excluded property is a remainder interest (sometimes called a reversionary interest) in a life interest trust.

If the remainderman of a life interest trust dies before the life tenant, the trust fund that would have passed to them on the life tenant's death is not included in the remainderman's taxable estate.

In contrast, where a life tenant dies, the value of the trust fund may be included in their taxable estate.

Insurance policy written on trust

If the deceased had an insurance policy on their own life where the sum payable on death was written in trust for another the proceeds of the policy are not included in the deceased's estate for IHT purposes.

If the policy proceeds were payable to the deceased's estate then the amount would be included in the taxable estate.

Discretionary pension schemes

If the deceased was a member of an employer's pension scheme any discretionary lump sum payment made by the pension fund trustees is not included in the taxable estate. As the payments are made entirely at the trustees' discretion the deceased is not deemed to have any entitlement to the money, and the amount paid out (whether to a third party or to the deceased's PRs) does not form part of the deceased's estate for IHT purposes.

Many pension schemes allow contributors to indicate during their lifetime who should receive the money (often in an 'Expression of Wish' form) if the trustees exercise their discretion to make a payment after their death. The contributor's expression of wish is not binding on the trustees as the nature of the payment is discretionary and they are not legally obliged to pay the person(s) indicated by the contributor, although in practice they almost always do.

Pension lump sums payable **by right** to the estate of the deceased are included in the taxable estate.

4.1.3 Step 3: Value the taxable estate

The general rule is that the assets in the estate are valued at **market value at the date of death**. However, some special rules apply in certain circumstances:

Related property: If assets owed by spouses are worth more when valued together (e.g. because they form a set), each party's share is valued at their proportionate share of the combined total.

Joint property: Where land is co-owned (whether as joint tenants or tenants in common) the value of the deceased's share is reduced (by 10-15%) to reflect the difficulty of selling a share of the property rather than the whole. The deduction is not applied where the co-owners are married, as the related property rules apply and take priority. The valuation of other jointly owned property e.g. chattels does not commonly attract this discount.

Note. Although HMRC has discretion as to the amount of the deduction, for the purposes of this workbook we apply a deduction of 10%.

Example: Related Property

A set of two vases is worth £100,000 but each vase alone is only worth £20,000.

If the vases are owned one each by a husband and wife, for IHT purposes each party's share will be valued at half the value of the combined pair i.e. £50,000, and not at the stand-alone value of the one vase each party in fact owns (£20,000).

Example: Jointly owned property

Two siblings own a house together in equal shares.

The whole house is worth £300,000. Each half share is therefore worth £150,000.

When the first sibling dies, their taxable estate will include the value of the jointly owned asset as £135,000 (90% of £150,000).

Note. The same analysis would apply whether they were joint tenants or tenants in common in equal shares.

4.1.4 Step 4: Deduct any debts

Now that you have calculated the value of the deceased's assets, you must then deduct the following debts from the value of the estate:

(a) The deceased's debts /liabilities due at the date of death: This is money the deceased owed e.g. outstanding balance on a credit card or loan at the time of death.

(b) Post-death debts/expenses: The only post death debt/expenses that can be deducted for tax purposes are reasonable funeral expenses and the cost of a tombstone.

Other post-death expenses are payable from estate assets but cannot be deducted from the value of the IHT estate to reduce the overall tax due.

4.1.5 Step 5: Deduct available exemptions/reliefs

It is then necessary to deduct any available exemptions or reliefs to reach the value of the estate chargeable to tax.

For the purposes of this workbook the only exemptions and reliefs relevant to the death estate that you may be required to apply when calculating IHT on the death estate are:

- Spouse exemption
- Charity exemption
- Business property relief
- Agricultural property relief

4.1.6 Step 6: Apply the RNRB

Once you have a figure for the taxable death estate, you can then calculate the tax due on that estate. There are several stages to this tax calculation.

At Step 6 you should:

(a) Establish the value of the RNRB available. This includes the transferred RNRB if applicable.

(b) Apply a rate of 0% to the value of the taxable estate up to the total RNRB amount.

If any value remains, consider Step 7.

4.1.7 Step 7: Apply basic NRB and calculate the tax

Once you have considered the RNRB, the basic NRB and transferred NRB can be applied against the remaining taxable value.

(a) Establish the value of the NRB and any transferred NRB.

(b) Reduce the total NRB by the value of the cumulative total (from Step 1).

(c) Apply a rate of 0% to the value of the remaining taxable estate up to the total NRB amount.

(d) Apply the death rate of 40% to the rest to establish the IHT due.

Step 7 is the final stage in the calculation.

4.2 Summary

The following steps must be taken in order to calculate IHT on the death estate:

- Calculate the cumulative total – This is the total chargeable value of all the chargeable transfers made in the previous 7 years.
- Identify the assets included in the taxable estate – Remember that this will not necessarily be the same as the assets included in the succession estate.
- Value the taxable estate – Assets are generally given their market value although there are exceptions for related property and joint property.
- Deduct any debts – This includes lifetime debts and funeral expenses.
- Deduct available exemptions and reliefs – Consider the availability of spouse exemption, charity exemption, BPR and APR.
- Apply 0% rate up to the value of the residence NRB and any transferred amount.
- Apply 0% rate up to the value of the basic NRB and any transferred amount (after having taken away the cumulative total), then apply 40% rate to the remainder.

5 Liability & burden

You know there is a charge to IHT in respect of the following transfers:

- **LCT**: when made and later if **re-assessed** following the death of the transferor within 7 years of making the transfer
- **PET**: not when made, but later following the death of the transferor within 7 years of making the transfer (failed PET)
- **Death**: death triggers a deemed transfer of the death estate on the date of death.

We will consider who is liable for paying the IHT due (**liability**) and which assets are used to fund the tax charge (**burden/incidence**).

5.1 LCT - during lifetime

The general rule is that the person in whom the assets vest (**donee**) is usually liable to pay IHT.

For an LCT that will be the **trustees** of the trust which receives the assets.

Payment is made using the settled assets i.e. the trust fund.The general rule is that the person in whom the assets vest (donee) is usually liable to pay IHT.For an LCT that will be the trustees of the trust which receives the assets.Payment is made using the settled assets i.e. the trust fund.

Example: Trustees' liability to pay the IHT

A man (T) sets up a trust during his lifetime (an LCT) and IHT is payable as a result.

T transfers the sum of £200,000 and shares worth (£300,000) to the trustees (X and Y) of the trust.

The trust is for the benefit of A, B and C.

X and Y are jointly liable to pay the IHT due and will use some of the cash settled to meet this liability.

The trust fund left to benefit A, B and C is now smaller.

If the trustees **do not pay** the tax the **donor** becomes liable. Alternatively, the donor may **elect** to pay the tax.

If a donor pays IHT using their own funds their loss is effectively "assets settled + IHT liability". The amount of this figure is calculated by notionally increasing (**grossing-up**) the original value of the transfer. The IHT payable is then calculated with reference to the grossed-up value not the value settled.

More tax is paid to HMRC where grossing-up is required.

Example: Grossing-up

A man transfers £400,000 into a trust during his lifetime and elects to pay the IHT himself.

The LCT is subject to 'grossing-up'.

The value of the transfer is "£400,000 + tax paid by T" i.e. the cash entering the trust is the net amount after tax is paid.

IHT is calculated by first working out what transfer value would leave a post-tax sum of £400,000. The IHT liability is calculated with reference to this figure.

You will **not** be asked to carry out grossing-up calculations in this workbook.

5.2 Lifetime transfers taxed following death

The following rules apply to failed PETs and LCTs that become chargeable to IHT following the donor's death.

The general rule is that the lifetime recipient (**donee**) is liable to pay the IHT due.

Example: Liability following death

A man made the following gifts during his lifetime in the 7 years before he died: gift of cash to his son and gift into a trust.

- **Cash gift**: This is a failed PET. The man's son is primarily liable to pay any IHT due in respect of this gift even though the gift may have been made up to 7 years ago.
- **Gift to trust**: This is an LCT that will be re-assessed to IHT following death. The trustees are primarily liable to pay any further IHT due using assets in the trust fund at this time.

Assets in the man's death estate are not used to meet these IHT liabilities.

If the recipient of the lifetime transfer **does not pay** the IHT due within the deadline for payment (12 months from the end of the month of death) the deceased's **PRs** will become liable.

The PRs should therefore be aware of this possibility and retain sufficient funds to pay the tax bill should the need arise. Where estate funds are used the ultimate burden of the tax has effectively fallen on the residuary beneficiaries.

The question of whether the PRs can/should then seek to recover the cost from the lifetime donee is beyond the scope of the workbook.

Example: PR liability

A woman dies 5 years after making a gift of property to her sister. The woman leaves a will appointing her son as executor and leaving the whole of her estate to her grandson. IHT is payable in respect of both the failed PET and the death estate.

If the woman's sister does not pay the IHT due as a result of the gift of property to her, the woman's son (as executor) becomes liable and must use assets within the woman's death estate to meet the cost of both the lifetime and death IHT charge.

The woman's grandson effectively suffers the burden of the lifetime and death IHT as he inherits a smaller amount than would otherwise be the case.

5.3 Taxable Death Estate

A person's **taxable** estate may contain assets that are excluded from their **succession** estate.

The succession estate assets pass to PRs to be administered under the will/intestacy rules (can be called the "**free estate**").

Assets outside of the succession estate do not fall to the PRs and pass in accordance with their own rules (rather than being subject to the terms of the will or the intestacy rules).

The following are examples of taxable assets which pass outside of the succession estate:

- Joint tenant property
- GROB

Whether or not an asset is part of the free estate has **no effect** on the overall IHT payable. However, it does affect the rules regarding who is liable to pay that tax and where the burden of payment falls.

In practice you would calculate the total IHT due and then apportion that amount between the free estate and the other taxable items.

Example: Apportioning liability

A man owns a house as joint tenants (his share is worth £300,000) and bank accounts in his sole name (worth £100,000). The value of his estate subject to tax is £400,000. Assuming there is no NRB available, all of the estate will be taxed at 40% and £160,000 is due.

When paying the IHT a distinction is made between the house (which passes outside of the free estate by survivorship) and the bank accounts which pass to the PRs, and the total tax due is apportioned between the free estate and joint property.

This workbook considers the rules relating to the free estate first and then goes on to consider the rules regarding the other items.

5.3.1 Death - free estate

IHT on the free estate is a general testamentary and administration expense - s 211(1) IHTA

The deceased's **PRs** are liable to pay this tax.

IHT is paid from **residue** unless a **contrary intention** appears in the will – s 211(2) IHTA

Example: PR liability

A woman dies leaving a will that makes no provision regarding the payment of IHT. The woman's assets comprise various banks accounts and a house, all of which are in her sole name. IHT is payable in respect of her estate.

The house and bank accounts form part of her succession estate and pass to the PRs for distribution under the will.

PRs are liable to pay the IHT and will likely use cash from bank accounts to do this.

The general rule (IHT is payable from residue unless a contrary intention is shown) is the preferred option for most testators.

As such, it is a general rule of construction that gifts in a will (other than residue) are deemed to be given "free of tax" whether or not these words are expressly stated.

Example: IHT payable from the residue

I give £100 to my neighbour Charlie

I give £100 free of tax to my neighbour Charlie

Assuming the will does not vary the general rule, the tax is payable from residue and Charlie receives £100 in both cases.

Contrary intention

A variation to the general rule could mean:

- gifts within a will are paid subject to a deduction of the IHT attributable to them (which relieves the burden for residuary beneficiaries)
- alternatively, a testator could direct that the residue bears the burden of IHT due in respect of assets outside of the free estate (which increases the burden for residuary beneficiaries).

Example: Contrary intention

Consider the following:

I give £100 to my neighbour Charlie subject to the payment of inheritance tax

Charlie receives less than £100.

If all the estate assets were taxed at 40% Charlie would receive £60.

Charlie would be worse off but the residuary beneficiaries would be better off and the burden of IHT has been shared.

There is no prescribed wording. The testator's intention to exonerate or burden parts of their estate is determined as a matter of construction of the terms of the particular will under consideration.

It is not possible to reach a definitive conclusion based purely on the meaning attributed to particular words in other wills.

In practice it is common to draft all gifts expressly "subject to" or "free of" IHT so there is no doubt about the testator's intention.

A testator may vary the incidence of IHT as between **lifetime transfers and the death estate** e.g. direct that IHT due in respect lifetime gifts should be met from residue and so relieve the lifetime donee of this burden.

However, clear words to this effect must be used because a reference to “tax” is normally construed as meaning the tax payable only on dispositions made by the will, and, a general direction that “all taxes” should be paid from residue has been found to mean only tax payable on property passing under the will.

Variations to the rule do not (and cannot) **remove or reduce** the overall liability - it is the burden/incidence of IHT that is affected.

Activity 1: Contrary intention

Imagine a will contained only the following gifts. Can you spot the issue?

1. I give £100 free of tax to my neighbour Charlie
2. I give £200 free of tax to my son
3. I give the residue of my estate free of tax to my daughter

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Allocation of exemptions

Be aware that if **part** of an estate qualifies for an exemption or relief e.g. a share of residue passes to a spouse, this creates a layer of complication when determining where the burden of IHT falls.

Allocating the IHT between different parts of the free estate where exemptions also apply presents a particular challenge in the practice of will drafting and care must be taken.

There are specific rules that apply but the law relating to this aspect of IHT is not considered in detail here.

5.3.2 Death – items not passing by will/intestacy

Having considered the free estate we will now review rules that relate to the following taxable assets that fall outside of the succession estate / free-estate.

The general rule is that these items bear the burden of the IHT attributable to them and the liability for payment falls on the beneficiary of the item (or where a trust is concerned, the trustees).

- Joint tenant property → surviving co-owner
- Statutory nominations → nominated beneficiary
- Donationes mortis causa → lifetime donee
- Trust assets → trustees
- GROB → lifetime donee

Figure 4.6: Assets that fall outside of the succession estate and their IHT liability

Activity 2: Items not passing by will/intestacy

Consider the estate below. **Who will be liable to pay IHT? What proportion of the IHT due will each party pay?**

A woman dies leaving a taxable estate which includes only the following items:

- bank account in her sole name (worth £150,000)
- property owned as joint tenants with her sister (the woman’s share is worth £300,000)

The woman made a GROB to her son before she died. The asset is currently worth (£150,000).

5.4 Summary

- The donee of an LCT is liable for the IHT payable when the LCT is made.
- However, if the donor elects to pay IHT when making an LCT, the value of the transfer is "grossed-up" before the amount of IHT due is calculated.
- Liability for IHT in respect of failed PETs and re-assessed LCTs lies with the donee. If they do not pay, the PRs of the deceased are then liable
- PRs are liable to pay IHT in respect of the free-estate. IHT is a general testamentary expense payable from residue unless otherwise directed by the will (s.211 IHTA).
- The liability and burden of IHT in respect of items that do not pass to the PRs rests with the recipient of the gift or trustees of a trust.
- The amount of IHT payable in respect of the death estate is calculated first before the amount is apportioned between different parts of the estate.

6 IHT (lifetime transfers and the death estate)

When a person dies, there may be separate IHT calculations that are required:

(a) The tax due as a result of the transferor dying within seven years of making a lifetime transfer (**LCTs and failed PETs**).

(b) The tax due as a result of the deemed transfer of the death estate.

We will explore how the timing of lifetime transfers affects the IHT due following death in the context of worked examples.

6.1 Total IHT payable

The following simplified examples show how the timing of PETs and LCTs affect the total IHT payable when an individual dies, both in respect of the transfers and how these affect the cumulative total on death, thus impacting the IHT payable on the death estate.

For the purpose of these examples, we do not consider the availability of any exemptions or reliefs (other than taper relief).

Please make a note of the following key facts which apply to each of the five examples:

- **An unmarried woman dies leaving a taxable death estate worth £500,000. The estate does not include any residential property.**
- **She made two lifetime transfers:**
  - **a PET with a chargeable value of £200,000**
  - **an LCT with a chargeable value of £350,000**
- **£5,000 IHT was paid at the time the LCT was made.**

The timing of these lifetime transfers will vary in each example.

Example: Lifetime gifts made more than 7 years before death

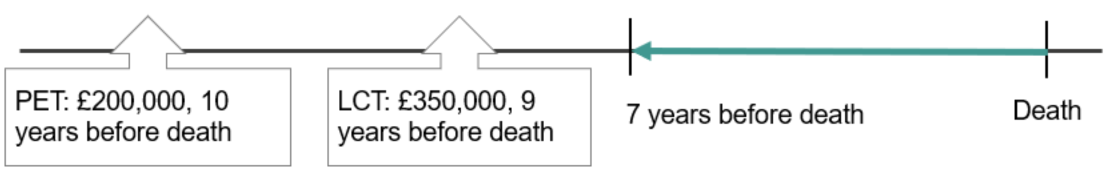

Figure 4.7: Transfers made before death

- Both lifetime gifts were made more than 7 years before death so no further IHT is due.
- The cumulative total on death is 0 and the death estate has a full NRB available.
- The death estate is taxed at 40% on the value above the NRB.
- £0 - £325,000@ 0%, £500,000 - £325,000 = £175,000 x 40% = **£70,000 IHT due**.

Example: LCT made 1 year before death

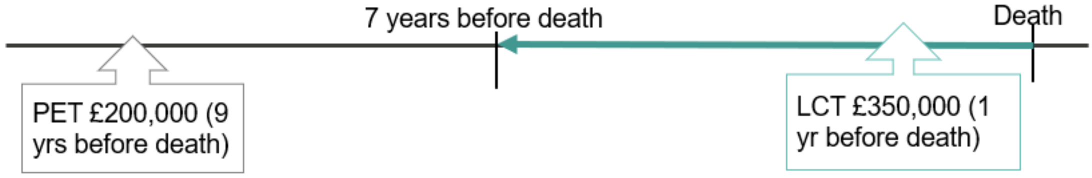

Figure 4.8: Transfers before death

- The PET is exempt - it was made more than 7 years before her death.
- The LCT was made less than 7 years before death and is therefore reassessed for IHT.
- The value of the LCT above the NRB (i.e. £25,000) is taxed at 40% = £10,000.
- No taper relief applies. She did not survive more than 3 years after the LCT was made. After crediting the £5,000 tax paid in her lifetime, **£5,000** remains payable re the LCT.
- The cumulative total on death is more than £325,000 so no NRB is available. The entire death estate (£500,000) is taxed at 40% = **£200,000** to pay re the death estate.

Example: PET made 1 year before death

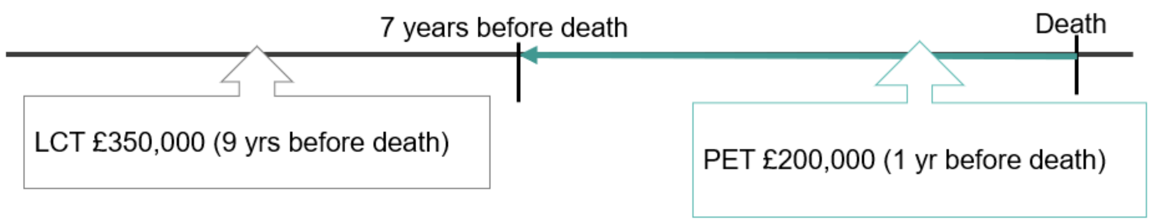

Figure 4.9: Transfers before death

- The LCT is not reassessed on death - it was made more than 7 years before death. It was also made more than 7 years before the PET so does not affect the PET.
- The PET has failed and is chargeable to IHT. The chargeable value is below the NRB so is taxed at 0% (ie no IHT is due in respect of the failed PET).
- The NRB for the death estate is reduced by the chargeable value of the PET made in the 7 years before death. The cumulative total of £200,000 reduces the NRB from £325,000 to £125,000.
- The death estate is taxed at 40% above the remaining NRB. £0 - £125,000@0%, and £375,000 (£500,000 - £125,000) @ 40% = **£150,000** due re the death estate.

Example: PET and LCT made within 7 years before death - no taper relief

Figure 4.10: Transfers made before death

- The PET has failed and is chargeable to IHT at 40%. The chargeable value is below the NRB so is taxed at 0%

- The LCT is reassessed for IHT at the death rate of 40%. The cumulative total on the date of the LCT is £200,000. After applying the available remaining NRB of £125,000, the balance of £225,000 is taxed at the death rate of 40% = £90,000. Taper does not apply as she did not survive more than 3 years after making the LCT. Credit is given for the £5,000 tax paid in her lifetime, leaving **£85,000** to pay in respect of the LCT.
- The cumulative total on death is more than £325,000 so no NRB is available. The entire death estate (£500,000) is taxed at 40% = **£200,000** to pay re the death estate.

Example: PET and LCT made within 7 years before death - taper relief

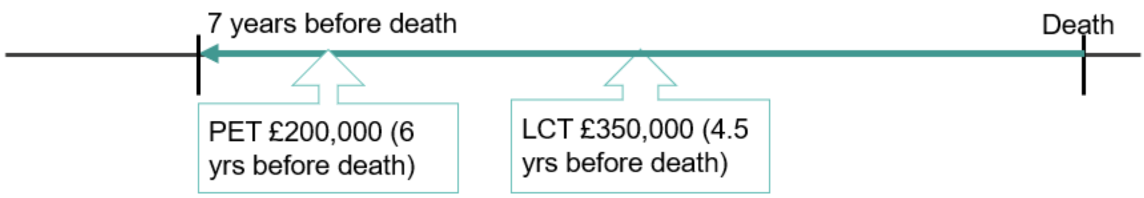

Figure 4.11: Transfers made before death

- The PET has failed and is chargeable to IHT at 40%. The chargeable value is below the NRB so is taxed at 0%.
- The LCT is reassessed for IHT at the death rate of 40%. The cumulative total on the date of the LCT is £200,000. After applying the available remaining NRB of £125,000, the balance of £225,000 is taxed at the death rate of 40% = £90,000. As the LCT was made 4-5 yrs before death taper relief reduces the tax payable by 40%. £90,000 x 60% = £54,000. Credit is given for the £5,000 tax paid in her lifetime, leaving **£49,000** to pay re the LCT.
- The cumulative total on death is more than £325,000 so no NRB is available. The entire death estate (£500,000) is taxed at 40% = **£200,000** to pay re the death estate.

6.2 Comparing examples

All of the examples above involved the same three transfers of value (a PET worth £200,000 and LCT worth £350,000 and a death estate worth £500,000). We can see below that the timing and order of the lifetime transfers can make a significant difference to the total overall tax payable. There is also an impact on who bears the tax liability. Liability for the tax payable on lifetime transfers rests with the transferee, while liability for the tax payable on the death estate rests with the PRs.

Example	How many years before death was LCT?	How many years before death was PET?	Total tax payable on lifetime transfers	Tax payable on death estate	Total tax payable
1	9 years	10 years	None	£70,000	£70,000
2	1 year	9 years	$5,000	£200,000	£205,000
3	9 years	1 year	None	£150,000	£150,000
4	1 year	2 years	£85,000	£200,000	£285,000
5	4.5 years	6 years	£49,000	£200,000	£249,000

6.3 Summary

- LCTs are lifetime transfers into a trust. LCTs are immediately chargeable to IHT at a rate of 20%. If the transferor then dies within 7 years of making the transfer the LCT will be re-assessed at the rate of 40%.
- PETs are lifetime transfers to an individual. PETs are not chargeable when made but become chargeable if the transferor dies within 7 years after making the transfer.
- Taper relief reduces the amount of tax payable following death in respect of a lifetime transfer that is chargeable (re-assessed LCT and failed PET) if the transferor survives 3 -7 years.
- The order and timing of lifetime transfers affects the IHT due in respect of the lifetime transfers and in respect of the death estate.
- The death estate taxation is affected by the lifetime transfers as they contribute towards the cumulative total on the date of death.

7 Introduction to exemptions and reliefs

You are already aware that a charge to IHT may arise in the event of lifetime transfers and/or death.

- A PET is a gift to a **person**. An LCT is a gift into a **trust**.
- PETs are not chargeable unless they fail (donor dies within 7 years).
- LCTs are chargeable when made and are re-taxed again if the donor dies within 7 years.
- When a person dies there is a deemed transfer of their death estate.
- The charge to IHT is based on the value of assets in the deceased's estate on the date of death.

When calculating the liability to IHT following a chargeable event (failed PET, LCT or death) IHT exemptions and reliefs can be used to reduce or eliminate the charge.

Exemptions and reliefs work in slightly different ways (and are distinct from the NRB which is a 0% rate of tax and neither an exemption nor relief):

- Certain gifts to individuals or other entities are exempt from IHT. They can be made completely free from IHT and have no effect on the NRB.
- Gifts of particular assets benefit from relief. This means that, where the conditions of the relief are met, the amount of IHT payable is reduced (sometimes by 100%).

7.1 Common exemptions and reliefs

The exemptions and reliefs below are those you will focus on in this workbook.

You will see reference to additional exemptions, and should be aware of them, but you are not required to apply them.

The statutory requirements governing IHT exemptions and reliefs are set out in the IHTA.

The relevant sections are noted below.

- Spouse exemption (s 18)
- Charity exemption (s 23)
- Family maintenance exemption (s 11)
- AE (s 19)
- Small gifts allowance (s 20)
- Normal expenditure from income (s 21)
- Marriage exemption (s 22)
- BPR (s 104)
- APR (s 116)
- Taper Relief (s 7)

7.1.1 When exemptions/reliefs apply

Some exemptions and reliefs can **only** be applied to transfers made during the donor's **lifetime** – this means the exemption or relief could be used in respect of:

- failed PET (donor died within 7 years of making a gift)
- LCT (taxed when made)
- LCT (if re-taxed following the donor's death within 7 years)

but not when calculating the IHT due in respect of the death estate.

Other exemptions and reliefs apply **only** to the **death** estate and cannot be applied to a failed PET or LCT.

Further exemptions and reliefs apply to **both** lifetime transfers and the death estate and should be applied in respect of all chargeable transfers.

As a practitioner it is important for you to know which exemptions and reliefs exist, when each will apply, and any criteria that must be satisfied before they can be used.

Tax advice is commonly required when clients e.g.Tax advice is commonly required when clients e.g.

- wish to carry out personal tax planning
- are liable to pay tax and the amount due must be calculated
- want to make a will or set up a trust.

Failing to advise on the effective use of exemptions and reliefs may mean a solicitor is negligent.

A table summarising the IHT exemptions and reliefs is set out below.

This table:

- lists all the IHT exemptions and reliefs, and
- confirms when each can be used (i.e. lifetime, death or both).

This table will be useful for you to refer to as you go through this workbook.

Available for lifetime transfers only	Available on death only
Annual exemption	Woodlands relief
Family maintenance exemption	Quick succession relief
Small gifts exemption	
Marriage exemptionMarriage exemption	
Normal expenditure out of income exemption	
Taper relief	

Available for both lifetime transfers and death estate	
Spouse exemption	Political party exemption
Charity exemption	Exemptions for gifts for national purposes or to heritage maintenance funds
Business property relief	Exemption for gifts to Employee Benefit Trusts
Agricultural property relief	Exemption for gifts to housing associations

7.2 Summary

- There are different exemptions and reliefs which can be used to reduce or eliminate a charge to IHT.
- Some apply to lifetime gifts only and others only to the death estate, and some apply to both.
- Exemptions and reliefs are distinct from the nil rate band which is a 0% rate of tax.
- IHT exemptions and reliefs are contained in the IHTA.

- Practitioners needs a good understanding of exemptions and reliefs to properly advise their clients.

8 Exemptions and reliefs: Lifetime only

The exemptions and reliefs listed below are those that apply to chargeable lifetime transfers (failed PETs and LCTs) only and cannot be applied to the death estate.

Available for lifetime transfers only
Annual exemption
Family maintenance exemption
Small gifts exemption
Marriage exemption
Normal expenditure out of income exemption
Taper relief

8.1 Annual Exemption (s 19 IHTA)

The AE allows individuals to make gifts of up to **£3,000** each tax year free from IHT.

The AE is applied chronologically to transfers (PETs or LCTs) when they are made. If more than one transfer is made on one day, the annual exemption is applied pro rata, irrespective of the order in which the gifts were made.

The AE should be used after any other available exemption or relief is applied to ensure the AE is available for later transfers.

Once the AE for the current tax year is used first and in full a transferor may look back to the previous tax year (but no further) and use any part of the AE from the previous tax year that was not used at the time.

Therefore, a maximum of 2 x AE (**£6,000)** may be available to use against a transfer (assuming no other transfers have been made in that tax year or the previous tax year).

A tax year runs from 6 April one calendar year to 5 April the following calendar year.

Example: Annual Exemption 1

Shayla made a gift of £1,000 to her sister in January (Gift 1) and a gift of £4,500 to her brother (Gift 2) a few months later in May. These are the only gifts made by Shayla.

Her AE could be used as follows:

January: Gift 1 falls towards the end of a tax year in which no other gifts have been made. The AE of £3,000 for the tax year of Gift 1 is available. Shayla only needs to use £1,000 to cover the full value of Gift 1. £2,000 of this AE remains unused.

May: Gift 2 takes place in the following tax year. We know no other gifts have been made. The AE of £3,000 for the tax year of Gift 2 is available. In addition, a further AE of £1,500 from the previous tax year can be used to cover the full value of Gift 2.

The amount of AE from the tax year of Gift 1 which still remains unused (£500) is effectively wasted – it cannot be carried forwards to any future tax years. NB: the current AE must be used first before any carried forward AE can be applied.

Example: Annual Exemption 2

Shayla made a gift of £10,000 to her sister this tax year. Shayla has made no other gifts.

Her AE could be used as follows:

As Shayla has made no other gifts:

- The AE of £3,000 for the current tax year is available, and
- The AE of £3,000 from the previous tax year can also be used.

Once the total AE (£6,000) has been applied to her gift the amount of £4,000 remains.

Shayla has therefore made a PET to the value of £4,000 - she must survive 7 years to avoid any IHT consequences of making this gift.

8.2 Family maintenance (s 11 IHTA)

Maintenance payments are not treated as transfers for IHT purposes if made to:

- A spouse (or former spouse if part of a divorce settlement)
- The minor child of either party to a marriage for maintenance, education or training, or if over 18 and otherwise in full time education or training
- A dependent relative to make reasonable provision for their care. 'Care' is not defined but HMRC suggest that payments to cover the provision of services, whether privately or in an institution, would be covered (but not payments which go beyond maintenance).

Practice Alert

Although the spouse exemption would normally apply for transfers between spouses, the maintenance exemption can be used in cases where the spouse exemption would not apply (e.g. if the recipient is domiciled outside the UK).

8.3 Small gifts allowance (s 20 IHTA)

Small gifts (of up to £250 per recipient) can also be made free from tax.

A transferor can make multiple gifts of up to £250 to as many different people as they like.

It differs from AE in that AE is an upper limit to the total value of all transfers in a tax year, whereas the small gifts exemption applies separately to each recipient with no limit to the number of different recipients.

The small gifts allowance is not available if combined with any other exemption, including the AE.

If an individual wishes to make gifts of more than £250 to any one person they should rely on the AE instead.

If a donor wants to give away e.g. £3,250 they cannot give this amount to one person and claim the AE and the small gifts allowance to cover the full value. However, if they gave £3,000 to one person and £250 to another person both reliefs could be claimed.

This exemption is most useful where a client has a number of different people to whom they wish to make gifts. For example, they may have a large family and want to benefit different children or grandchildren.

Clients could set up different accounts and make yearly transfers of £250. The exemption is often used for Christmas or birthday presents.

If gifts to any one person in the same tax year exceed £250 the exemption does not apply at all for that donee.

Example: Small gifts allowance

- A gives £250 to B - small gifts exemption applies.
- A gives £100 to B and later in the same tax year gives a further £150 to B – small gifts exemption applies.
- A gives £250 to 20 different people in a single tax year (total £5,000) – small gifts exemption applies to each gift.
- A gives £251 to B - small gifts exemption does **not** apply as the total value given to B exceeds £250.

8.4 Marriage Exemption (s 22 IHTA)

A gift given in consideration of a marriage to a party of that marriage is exempt up to:

- **£5,000** if made by a parent of one of the parties
- **£2,500** if made by one party of the marriage to the other
- **£2,500** if made by their remoter ancestor e.g. grandparent or great-grandparent; and
- **£1,000** in any other case.

Note. marriage exemption and the annual exemption can both be claimed in respect of the same gift.

The gift must be made in relation to a specific marriage – contemporaneously, or, before and conditional upon it, or, after if satisfying a previous legal obligation.

The relief applies to one or both parties to the marriage or civil partnership e.g. a father can give £5,000 to his own son and £1,000 to the bride and claim an exemption of £6,000.

The relief applies **per donor**.

8.5 Normal expenditure out of income (s 21 IHTA)

A transfer of value is exempt if made:

- from the donor's income (not capital)
- as part of a normal/regular pattern of giving, and
- does not affect the donor's standard of living.

There is no upper limit to this exemption.

Lightman J in Bennett v IRC said "as regards quantum, it is sufficient that a formula, or standard has been used, so that the amount can be identified".

It is a question of fact whether the requirements are satisfied.

HMRC are more likely to accept the relief applies if transfers are made under a legal obligation, or there is clear history of a settled pattern of giving e.g. monthly payments.

For example, a donor could mandate specific income e.g. dividends from certain shares, to be paid to the donee. Or, a donor could give away income generally each year e.g. 10% of total income.

8.6 Taper Relief

Taper relief is not an exemption. Instead, it reduces the amount of IHT that would otherwise be payable. To apply both of the following conditions must be met:

- **A lifetime transfer was made 3 – 7 years prior to the transferor's death** (i.e. a PET has failed / LCT will be re-assessed)
- **IHT is payable in respect of the lifetime transfer** (i.e. separately and in addition to IHT due in respect of the death estate)

This means:

- transferor must have died (taper does not apply to the charge when an LCT is made).
- the value of the lifetime transfer must have been large enough to trigger IHT (you cannot taper a tax liability of zero). In basic terms, IHT will only be due on a lifetime transfer where the amount transferred was greater than the available NRB.

Where taper relief applies it does not reduce the value of a lifetime transfer, nor does it alter the rate of IHT.

Instead, it takes effect as a proportionate reduction of the final tax bill.

The amount of the reduction depends on the number of years between the date of transfer and death.

The rates by which the IHT charge is reduced are set out below.

For taper relief to make sense it is important to appreciate that:

- when someone dies their death can trigger an IHT charge in respect of the death estate and a separate IHT charge in respect of lifetime gifts.
- It is always necessary to calculate the tax due on lifetime transfers separately from tax due on the death estate.

Although taper relief is only applied after someone has died, the relief has no effect on the IHT payable in respect of their death estate.

You will see these rates expressed either as a % reduction in the amount of IHT due, or confirmation of the % that remains payable. Both produce the same outcome.

Date of transfer	Reduction in amount of IHT due	Amount of IHT due which is payable
0 - 3 years before death	No taper applies	100%
3 to 4 years before death	20%	80%
4 to 5 years before death	40%	60%
5 to 6 years before death	60%	40%
6 to 7 years before death	80%	20%

Example: Taper Relief 1

A made a PET 4.5 years before they died. The value of the PET is less than the NRB. The PET has failed because A did not survive 7 years from making it.

Taper does not apply – no IHT is due in respect of the failed PET.

Example: Taper Relief 2

B made an LCT 9 years before they died. IHT was payable on the LCT when made. IHT is due in respect of B's death estate.

Taper does not apply – the LCT was made more than 7 years before death.

Example: Taper Relief 3

C made an LCT 5.5 years before they died. IHT was payable when the LCT was made. Further IHT is due because the LCT will be reassessed following C's death.

Taper relief can be applied to the IHT payable following a re-assessment of the LCT. C survived 5.5 years after making the LCT so a 60% reduction in the tax bill can be claimed.

Example: Taper Relief 4

D made a PET 3.5 years before they died. No IHT was due at the time (PETs are not chargeable when made). However, the PET has failed because D did not survive 7 years from making it. IHT is now payable in respect of the failed PET.

Taper relief can be applied to the IHT due regarding the failed PET. D survived 3.5 years after making the PET so 80% of the tax bill remains payable.

8.7 Benefit of lifetime exemptions and reliefs

Do you understand *why* lifetime exemptions and reliefs benefit a taxpayer? While the advantage of taper relief is clear (it reduces a tax bill) it may not be immediately obvious what benefit is afforded by the other provisions mentioned in this element.

If a transfer of value is made during a person's lifetime this will be either a PET (which might fail) or an LCT. There are IHT consequences for both; a failed PET and LCT can give rise to an IHT charge in their own right, so provisions which reduce the value of the transfer subject to tax will result in a smaller tax bill.

However, even if the value of a PET or LCT is not high enough to trigger a charge, if death occurs within the 7 years that follow, the chargeable value of these transfers "uses up" the NRB available for the death estate. As a result, a greater proportion of the death estate will be taxed at 40%. Therefore, any provision which reduces the chargeable value of a PET or LCT made in the 7 years before death, in whole or part, leaves the taxpayer with a larger NRB on death than would otherwise have been the case.

8.8 Summary

- Different exemptions and reliefs can be used to reduce or eliminate the charge to IHT.
- The AE is £3,000 per tax year. A previous year's AE can also be claimed if needed (to the extent this was not previously used).
- Family maintenance exemption can be particularly useful with regards provision for minor children (or adult children in full time education) and dependent relatives.
- Small gifts allowance applies gifts up to £250 per tax year (but not at all to any gift above this amount). Small gifts can be made to an unlimited number of individuals.
- Gifts made in contemplation of marriage qualify for an exemption. The amount available depends on the relationship between the donor and donee.
- Normal expenditure from income is useful where a person does not need or use all of their income.
- Taper relief reduces the amount of IHT due in respect of a lifetime gift which becomes taxable following the donor's death.

9 Exemptions: Lifetime and death

The exemptions and reliefs below apply to both lifetime transfers (failed PETs and LCTs) and the death estate, and therefore should be considered for all chargeable transfers.

Available for both lifetime transfers and death estate	
Spouse exemption	Political party exemption
Charity exemption	Exemptions for gifts for national purposes or to heritage maintenance funds
Business property relief	Exemption for gifts to Employee Benefit Trusts
Agricultural property relief	Exemption for gifts to housing associations

We will focus on the most common **exemptions** you will come across in practice - **spouse** and **charity** exemption.

[Note that any reference to 'spouse' also includes civil partner, and to 'marriage' also includes civil partnership.]

You should be aware of the other exemptions listed in the table above but a detailed knowledge of these is outside the scope of this workbook.

BPR and APR will be considered in detail later.

9.1 Spouse exemption (s 18 IHTA)

Gifts between spouses during life and following death are completely exempt.

Provided both parties are domiciled within the UK (which will always be the case in this module) there is no upper limit to the value of the exemption.

It does not matter why the spouse inherits. The relief applies to the value of assets received under a will, intestacy, survivorship or any combination etc.

Unmarried couples cannot claim spouse exemption, irrespective of how long they have been in a relationship or living together and there is no concept of a "common law" spouse.

A gift may be conditional provided the condition is satisfied within 12 months of death. A common example of a conditional gift is a 28 day survivorship clause.

Example: Spouse exemption

A man gives his spouse £1M during his lifetime and on his death leaves his spouse a collection of paintings worth £3M. The spouse also inherits the man's house by survivorship.

The lifetime transfer of cash, and the death transfer of assets (both paintings and property) are entirely exempt from IHT.

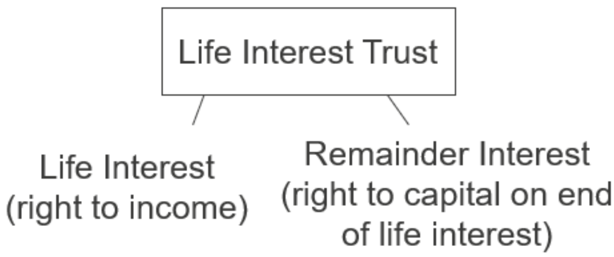

Figure 4.12: Life Interest Trust

On a person's death, spouse exemption will apply to the value of assets transferred to a life interest trust if the surviving spouse receives a life interest i.e. named as the **life tenant**.

However, spouse exemption does not apply if they receive a remainder interest i.e. named as the **remainder** beneficiary.

Example: Spouse exemption - husband is a life tenant

A woman dies and leaves her whole estate worth £2M

> "on trust to my husband for his life, remainder to my children".

The woman's estate will qualify for spouse exemption as her surviving spouse has received a life interest following her death. The amount of the exemption is £2M.

Example: No spouse exemption - civil partner has a remainder interest

A woman dies and leaves her whole estate worth £2M

> "on trust to my son for his life, remainder to my civil partner".

Spouse exemption does not apply-her civil partner did not receive a life interest. The woman's estate will be subject to IHT.

9.2 Charity exemption (s 23 IHTA)

All transfers to registered charities during life and following death are exempt irrespective of the amount given provided the gift is used exclusively for the purposes of the charity.

The gift can be conditional provided the condition is satisfied within 12 months.

The gift must be immediate and not in remainder for the exemption to apply. The gift must normally be absolute.

Example: Charitable legacy in a will

The following is an example of a charitable gift found in a will that would attract the charity exemption:

I GIVE to RSPCA of Wilberforce Way, , Horsham RH13 9RS RCN: 219099 ("the Charity") the sum of one hundred thousand pounds (£100,000) absolutely for its general purposes.

It is important to check the recipient's charitable status for **IHT purposes**.

To qualify for an IHT exemption a gift must be made to a charity that is subject to the "jurisdiction of a UK court or that of another EU member state" (Finance Act 2006).

A search of the UK national register of charities will reveal whether a charity is registered in the UK – generally registered charities are likely to qualify for IHT charity exemption.

If a charity is located abroad within the EU further enquiries would need to be made.

From a **trust law** perspective an organisation's charitable status may be questioned if it is not clear whether a gift is made for charitable rather than e.g. private purposes.

These considerations are important as they can determine the effectiveness of a gift.

However, even if a gift is confirmed as being made for charitable purposes, the IHT exemption will not apply unless the charitable body meets the other statutory requirements.

9.2.1 Practice alert: Leaving estate to charity

You should be aware of the following if a charitable gift is made under a will:

In addition to charity exemption, which will apply to the charitable gift itself, a reduced rate of IHT (36% instead of 40%) may be available in respect of the chargeable assets in the estate.

The reduced rate applies where a deceased leaves at least **10%** of their net estate to charity. When drafting a will that includes a charitable gift, it is worth checking how close it comes to 10% of the net estate. It can be beneficial for the client to increase the amount of the proposed gift in order to ensure that the 36% rate applies.

Rules regarding the reduced rate are complex and fall outside the scope of this workbook.

In this workbook you will only be required to apply the death rate of 40%.

9.3 Other exemptions

You should be aware of the other exemptions shown below which also apply to lifetime transfers and the death estate:

- Political party exemption
- Exemptions for gifts for national purposes or to heritage maintenance funds
- Exemption for gifts to Employee Benefit Trusts (EBTs)
- Exemption for gifts to housing associations

9.3.1 Gifts to political parties (s 24 IHTA)

Gifts to established political parties are exempt from IHT. In order to qualify for the exemption, one of the following conditions must apply (as at the last general election):

- The party had at least two MPs elected
- The party had at least one MP elected and at least 150,000 votes given to candidates representing that party.

9.3.2 Gifts of land to housing associations (s 24A IHTA)

A gift of land is exempt from IHT if it is made to a housing association or to a registered social landlord.

9.3.3 Gifts for national purposes (s 25 IHTA)

Gifts are exempt from IHT where they are made for designated 'national purposes'.

There is a list of bodies institutions in Schedule 3 which are covered by the exemption.

The list includes museums and galleries which exist for specified purposes that are for the public benefit (such as the National Gallery and British Museum).

9.3.4 Gifts to heritage maintenance funds (s 27 IHTA)

A similar exemption applies to gifts to funds which are designated as 'heritage maintenance funds'.

These are trusts which maintain historic buildings or land of scenic, scientific and historic interest.

Gifts to the fund do not incur IHT, nor is the fund itself required to pay IHT (as long as it continues to meet the requisite approval criteria).

9.3.5 Gifts to Employee Benefit Trusts (s 28 IHTA)

There is another exemption for transfers of shares made into EBTs providing they satisfy strict conditions set out in s28 IHTA.

The law relating to the taxation of EBTs is complicated and is not assessed in this workbook.

However, it is important to be aware of them as you may come across them when advising on corporate transactions or litigation matters, as well as if you work in a specialist tax or employment department.

Practice Alert

EBTs are a tax-efficient way of remunerating employees. Historically they were also used for quite aggressive tax avoidance. This led to a significant amount of litigation by HMRC and the introduction of quite complicated anti-avoidance rules attempting to restrict their use.

Attempts to avoid employment taxes using EBTs can give rise to unintended IHT charges so it is essential that specialist tax advice is sought whenever you encounter an EBT in practice.

9.4 Summary

- There are a number of different exemptions and reliefs which can be used to reduce or eliminate the charge to IHT.
- Spouse exemption enables spouses to make lifetime and testamentary gifts to each other completely free from IHT.
- Spouse exemption for couples who are married applies equally to civil partners within a civil partnership.
- Charity exemption means a person can make lifetime and testamentary gifts to a registered charity completely free from IHT.
- There is no financial limit to the amount of spouse or charity exemption that can be claimed.
- Other exemptions and reliefs apply to lifetime and death transfers which are not assessed in this workbook, but which have been covered for completeness.

10 Reliefs: Lifetime and death

We will now consider BPR and APR which apply in respect of **both** lifetime transfers and the death estate.

10.1 Business Property Relief (ss 103-114 IHTA)

BPR reduces the IHT payable on qualifying business property. Although a taxpayer can benefit from BPR at 100%, it is considered a relief rather than an exemption.

The effect of BPR is to reduce the value of a taxable transfer by the amount attributed to the business property.

A person must have owned qualifying business assets for the qualifying period of time.

10.1.1 Qualifying business assets

Business Assets include:

- **Unquoted shares:** includes all private company shares (i.e. in a "ltd" company) irrespective of the size or value of shareholding
- **Quoted shares:** shares listed on a recognised stock exchange (i.e. in a UK "PLC") but these are only business assets if the taxpayer controls the company (50%+)
- **Business or interest in a business:** taxpayer is a sole trader or has a partnership interest
- **Assets owned by taxpayer but used for business:** Assets owned by taxpayer but used for business: Land/buildings/machinery owned by a taxpayer but used for business purposes by a company the taxpayer controlled or a partnership in which they were a partner

10.1.2 Rates of Relief

Where assets qualify the following rates of relief apply:

Unquoted shares	100%
Quoted shares *[In the workbook, assume a shareholder with quoted / PLC shares does not have a controlling interest unless told otherwise ie. it is unlikely you will apply this 50% rate].*	50%
Business or interest in a business	100%
Assets owned by taxpayer but used for business purposes	50%

10.1.3 Investment Assets

A business (or interest in a business), or shares in a company, are **not business property** if the business concerned consists wholly or mainly of:

- **dealing** in securities, stocks or shares, land or buildings
- making or holding **investment** (rental property is considered an investment asset)

These exclusions causes problems for:

- property management companies
- furnished holiday lets and also, historically, for caravan sites

There is much case law in this area and it is important to appreciate that in practice it will not always be clear whether assets are held for 'investment purposes' or not.

10.1.4 BPR - qualifying period of ownership

To qualify the transferor must have owned the business assets continuously for at least **2 years** immediately prior to the relevant transfer.

The type of business does not need to be the same throughout the 2 year period but there must have been a business for all of that time.

The following are exceptions to the two-year rule:

- If qualifying assets are sold and replaced with new qualifying assets within a certain period of time, the taxpayer's period of ownership is usually treated as continuous.
- If a person inherits business assets following someone's death, they are deemed to acquire the assets on the date of death (even though the assets will have been transferred to them after this date).
- If a person inherits business assets following the death of their spouse, they are deemed to have owned the property from the time it was originally acquired by their deceased spouse irrespective of how long they had been married (the survivor 'inherits' the period of ownership).

Example: BPR 1

A acquires qualifying business assets and owns these for 5 years.

A sells the business assets and uses the sale proceeds to invest in quoted shares. A's quoted shareholding does not give them control of the quoted company.

A dies 2 months later.

No BPR applies in respect of A's death.

A does not own qualifying business assets when they die.

Example: BPR 2

B acquires qualifying business assets.

One year later, B sells those assets and uses the sale proceeds to buy replacement qualifying business assets.

B later dies and their estate includes the replacement business assets.

On B's death, the period of time that B owned the original business assets can be taken into consideration when deciding if the replacement assets qualify for BPR.

Example: BPR 3

C dies and leaves their partnership interest to their child, D.

The partnership interest qualifies for BPR and C's estate claims 100% BPR.

Six months after C's death the assets are transferred to D.

D makes a chargeable transfer of the business property 19 months later.

D can claim BPR. D is treated as having acquired the assets on the date of C's death (i.e. 25 months ago) and the ownership requirement is met.

Example: BPR 4

E dies leaving all of their estate to their spouse, F. E acquired business assets 18 months before they died.

E's estate would not qualify for BPR because E did not own the business assets for 2 years before death. However, E's estate is not taxable in any event because it passes to a surviving spouse.

F dies 1 year later, leaving their estate to their children.

F's estate is entitled to BPR in respect of the business assets even though F had only owned these assets for 1 year. F is deemed to have owned the assets from when E had acquired them i.e. 30 months ago (18 months + 12 months)

10.1.5 BPR and lifetime transfers

Where a taxpayer makes a PET or LCT of qualifying business assets and this transfer is assessed to IHT following the death of the transferor within 7 years, BPR is only available for the lifetime transfer if the qualifying property transferred (or replacement qualifying property):

- is owned by the **transferee**; and
- qualifies for BPR when the **transferor** dies (or on the death of the transferee if earlier).
- There is no minimum ownership requirement of 2 years for the transferee.

Example: BPR and lifetime transfers

A makes a PET of shares in a ltd trading company worth £400,000 to B. A had owned the assets for 3 years prior to making the gift. A dies 5 years later. The PET has failed and is now assessed to IHT.

- When deciding whether **A's** estate can claim BPR in respect of the failed PET, BPR will only be available if **B** still owns the business assets transferred.
- If B had sold half of the shares for £50,000 before A died, BPR could still be claimed in respect of A's PET, but only with reference to the proportion retained by B – i.e. on £200,000.

10.2 Agricultural Property Relief (ss 115 -124 IHTA)

APR reduces the IHT payable on the agricultural value of qualifying assets. The 'agricultural value' may not be the same as the market value. The definition of 'agricultural value' is outside the scope of this workbook.

The effect of APR is to reduce the value of a taxable transfer by the amount attributed to the agricultural property. Although a taxpayer can benefit from APR at 100%, it is considered a relief rather than an exemption.

A person must have owned qualifying assets for the qualifying period.

10.2.1 Qualifying agricultural property

Agricultural property includes:

- **Agricultural land and buildings:** used for purposes connected with agricultural activity
- **Farmhouses and cottages**: may qualify if they are of a 'character appropriate' to the associated agricultural land and have been occupied for the purposes of agriculture e.g. farmhouse occupied by a farm worker or their surviving spouse and not someone who occupies for purely domestic reasons.

The definition of agricultural property has been the subject of much case law. In practice, it is not always easy to determine whether a building is of a "character appropriate" to the land occupied with it (e.g. if the size or value of a farmhouse is disproportionately large compared to the land itself, then the farmhouse may not be agricultural property).

10.2.2 Qualifying periods of ownership

Qualifying property must have been:

- **occupied** for agricultural purposes by the transferor throughout the **two** years immediately before the transfer, or,
- **owned** by the transferor and occupied by them or another for agricultural purposes throughout **seven** years immediately before the transfer.

Note the following exceptions which also apply to BPR:

- If qualifying assets are sold and replaced with new qualifying assets within a certain period of time, the taxpayer's period of ownership is usually treated as continuous.
- If a person inherits qualifying assets following someone's death, they are deemed to acquire the assets on the date of death (even though the assets will have been transferred to them after this date).
- If a person inherits qualifying assets following the death of their spouse, they are deemed to have owned the property from when it was originally acquired by the deceased spouse irrespective of how long they were married (the survivor 'inherits' the period of ownership).

10.2.3 Rates of relief

100% relief is available if the transferor was the owner occupier (or would be entitled to vacant possession within 12 months), or, the property was let on a tenancy beginning on or after 1st September 1995. This is usually the case.

50% relief applies less frequently, and usually in respect of tenancies created before September 1995 where no specific concession applies.

If a person purchases a farm and occupies it for farming purposes the property will qualify for APR after two years of owner occupation.

If a person purchases a farm and lets it out (after 1995), and the tenant occupies the land for farming purposes, the property will qualify for APR after seven years of occupation.

In both cases the rate of relief will be 100%.

Example: APR

A man dies leaving his estate to his children.

His estate includes agricultural land with an agricultural value of £2 million and a market value of £2.3 million.

The man has owned and occupied the land for agricultural purposes for sixty years.

The remaining assets in his estate are valued at £500,000.

The value of the man's estate is £2.8 million (£2.3 million + £500,000).

APR of £2 million (the agricultural value of the land) can be claimed.

The estate qualifies for relief at 100% (so no IHT is payable on this amount).

The remaining estate will be taxed at 40% above the available NRB.

10.2.4 APR and lifetime transfers

Where a taxpayer makes a PET or LCT of qualifying agricultural property and this transfer is assessed to IHT following the death of the transferor within 7 years, APR is only available for the lifetime transfer if the qualifying property transferred (or replacement qualifying property):

- is owned by the transferee; and
- qualifies for APR when the transferor dies (or on the death of the transferee if earlier).
- There is no minimum ownership requirement of 2 years for the transferee.

Example: APR and lifetime transfers

A makes a PET of a farming partnership interest worth £400,000 to B. A had owned the partnership interest for 3 years prior to making the gift. A dies 5 years later. The PET has failed and is now assessed to IHT. When deciding whether **A's** estate can claim APR in respect of the failed PET:

- APR will only be available if **B** still owns the partnership interest transferred (or replacement qualifying agricultural assets).
- If B sell half of the partnership for £50,000 before A died, APR could still be claimed re the PET, but only with reference to the proportion retained by B – i.e. £200,000.

10.2.5 Interaction of APR and BPR

APR is given in priority to BPR in scenarios where both reliefs would apply.

It is not possible to claim BPR on a business asset if that asset also qualifies for APR.

Both reliefs may apply in the context of commercial farming enterprises. Some assets may qualify for both relief and others for only one.

- Agricultural buildings may qualify for both – so APR applies in priority
- Livestock is not included in the definition of agricultural property but its value may qualify for BPR
- Farmhouses/cottages are unlikely to qualify for BPR, but may qualify for APR

10.3 Summary

- BPR and APR reduce the value of a transfer to the extent the assets transferred qualify for the relief.

- 100% BPR applies in respect of all private company shares, partnership interests and to a sole trader business.
- 50% BPR applies to quoted shareholdings (provide the taxpayer had control of the company) and also to assets owned by a taxpayer but used for business purposes.
- For APR to apply the property must have been occupied for agricultural purposes for at least 2 years (if owner occupied) or 7 years (if someone else occupied).
- APR of 100% of the agricultural value of the property can be claimed in most cases (but if the property was subject to a tenancy that started before September 1995, 50% relief would usually apply).
- Where APR and BPR both apply, APR takes priority.

11 Exemptions and reliefs – Death estate only

The reliefs listed below are those that apply only to the death estate and are not available in respect of either failed PETs or LCTs.

You should be aware of the reliefs covered below, but the detailed application of the rules is outside the scope of this workbook.

Available on death only
Woodlands relief
Quick succession relief

11.1 Woodlands relief (s 125 IHTA)

Gifts of woodland following death may qualify for woodlands relief.

If the deceased had purchased the woodland, they must have owned it for at least 5 years before dying for the relief to apply.

If the deceased had themselves inherited the woodland following someone else's death, there is no qualifying period of ownership.

Woodlands relief is a **deferral** of the IHT that would otherwise be payable on the value of the woodland.

To use the deferral those administering the estate should make an election to exclude the value of the woodland from the death estate.

The value of the woodland is the value of the trees (i.e. timber) and not the land itself.

Tax is deferred until the timber, not the land, is subsequently sold or given away.

As woodlands relief only applies to the value of the timber (not the land) and is a deferral rather than reduction of liability it may be preferable to consider alternative reliefs that might apply instead.

The nature of woodland means that it could qualify as:

- Business property – so BPR might apply.
- Agricultural property – so APR might apply.

BPR should be considered where woodland is used for commercial purposes e.g. commercial fishing or timber harvesting.

APR can be considered if the land is classified as agricultural land or ancillary to this.

BPR and APR are more generous reliefs and if they apply would usually be claimed instead of woodland relief.

11.2 Quick succession relief (s 141 IHTA)

Quick succession relief (QSR) is intended to help the tax-payer where the same assets would otherwise be subject to more than one IHT charge in quick succession.

QSR applies where a person dies and:

- their death estate includes assets received by way of gift or inheritance,
- in the 5 years before their death, and
- those assets were subject to an IHT charge when transferred to the deceased.

Example: Quick Succession Relief 1

A woman dies and leaves all of her estate to her brother. IHT was payable on the woman's death.

The brother dies 3 years later and leaves all of his estate (which includes the items previously inherited from his sister) to his children. IHT is payable on the brother's estate.

QSR reduces the IHT payable on the brother's estate to the extent it is attributable to assets which had been previously been charged to IHT in the woman's estate.

For QSR to be relevant IHT must have been payable – both on the original transfer and following the subsequent death.

Application of the relief can be complex to work out but in principle the tax paid previously is credited against the later IHT charge.

If death occurs within one year of the previous IHT charge, the relief is calculated with reference to 100% of the amount of IHT paid previously.

This reduces each year, and only 20% of the amount of IHT paid previously is considered where death occurs 4-5 years after the original charge.

Example: Quick Succession Relief 2

A dies leaving all their assets to B.

B dies 2 years later. No IHT was payable on A's death as value of A's estate was less than the nil rate band. IHT is payable on B's estate.

QSR does not apply. The assets that B inherited from A's estate were not previously subject to an IHT charge.

11.3 Summary

- There are a number of different exemptions and reliefs which can be used to reduce or eliminate IHT. Some of these apply only to the taxation of the death estate.
- Woodlands relief is a deferral of tax on the value of the woodland until it is sold.
- QSR is reduction in the IHT charge following death where assets in the deceased's estate had been transferred to the deceased in the 5 years before their death and those assets were subject to IHT at the time of the transfer.

12 Calculating inheritance tax on the death estate (worked example)

We will now work through the IHT calculation for the following estate:

Estate of Rachel Fern (deceased)

(a) One PET two years before death of £50,000 to son

(b) House valued at £500,000 (total) owned as joint tenants with husband

(c) Holiday cottage valued at £400,000 (total) owned as an investment property as tenants in common in equal shares with her brother

(d) Bank account in sole name containing £300,000

(e) Discretionary pension lump sum written on trust for son £150,000

(f) Outstanding credit card debt of £2,000

(g) Funeral costs of £3,500

(h) The valid will leaves the cottage to her brother. Everything else is left to her son, except for £20,000 left to charity

12.1 Step 1 (Cumulative total)

£	
44,000	Rachel made a PET (worth £50,000) two years ago. • Apply annual exemption for year of gift - £3,000 • Apply previous year's annual exemption (unused) - £3,000 Chargeable value of gift: • £50,000 - £6,000 = £44,000

12.2 Step 2 & 3 (identify and value estate)

Assets outside of taxable estate	£	
Pension written on trust for son	150,000	This is a discretionary payment, so not part of the estate.

Assets within taxable estate	£	
House	250,000	House worth £500,000. Rachel owned as joint tenants with husband. House passes via survivorship to husband.
Holiday cottage (investment property)	180,000	Cottage worth £400,000. Owned as tenants in common in equal shares (with brother). Share worth £200,000. Deduction of 10% (£20,000) applies to reduce share to £180,000.
Bank account	300,000	
Gross taxable estate	730,000	Include all taxable assets even if they qualify for a relief and would be deducted later.

12.3 Step 4: Deduct debts/liabilities

	£	
Funeral costs	(3,500)	These are the only post-death expenses that are deductible for IHT purposes

	£	
Credit card	(2,000)	
Nex taxable estate	724,500	Gross figure from Step 3 less the total debts/expenses: £730,000 - £5,500 = £724,500

12.4 Step 5: Apply exemptions and reliefs

	£	
Charity Exemption (items passing to charities qualify for 100% relief)	(20,000)	The legacy left to charity under Rachel's will qualifies for relief.
Spouse Exemption (items passing to spouse qualify for 100% relief)	(250,000)	Rachel's share of the house passes to her husband free from tax.
Value of estate chargeable to tax	454,500	Net taxable estate from Step 4 less exemptions: £724,500 - £270,000 =£454,500

12.5 Step 6: Identify and apply residence nil rate band

	£	
Identify the amount of RNRB	0	Rachel owns a qualifying residential interest (half share of the house) but this is not passing to a lineal descendent. Instead it passes to her husband. The cottage is not a QRI as it is owned as an investment. It also does not pass to a lineal descendant. *As Rachel's estate does not qualify for a RNRB you would not consider whether any transferred RNRB applies*
Remainder of estate chargeable to tax	454,500	

12.6 Step 7: Identify and apply basic NRB & calculate IHT

	£	
Identify the amount of the basic NRB	281,000	• Full basic NRB = £325,000. • Rachel does not have a spouse who died before

	£	
		her – no TNRB • Deduct cumulative total (Step 1) to find amount of the basic NRB that can be used: £325,000 - £44,000 = £281,000
Apply 0% rate	0	No IHT is due on the value of the estate covered by the 0% rate. £0 - £281,000 @ 0%.
Apply 40% rate and calculate the IHT due	**69,400**	The remainder of the estate still chargeable to tax (after Step 6) is more than the available nil rate band. IHT is charged at 40% on the amount above the NRB: • £281,000 to £454,500 @40% (i.e. £173,500 x 0.4)

Activity answers

Activity 1: Contrary intention

An attempt to shift the burden of IHT onto a part of the estate which is not sufficiently valuable to meet the liability will be ineffective. If this will were given effect as drafted there would be no part of the estate that could be used to pay IHT – this is not possible!

Activity 2: Items not passing by will/intestacy

The woman's:

- **PRs** are liable for ¼ of the IHT. The free-estate includes only the bank account so they will use cash from this to meet the liability.
- **Sister** is liable for ½ the IHT. She will have to sell the house or use her own cash funds.
- **Son** is liable for ¼ of the IHT. He could sell the item gifted or otherwise use his own cash funds.

The proportion owed by each is calculated with reference to the value of the asset relative to the value of the whole estate.

Calculating the exact amount payable by each party can be complicated, especially where not all of the assets within an estate are subject to IHT. You should understand the key principles but will **not** be asked to carry out apportionment calculations in this workbook.

5 Tax planning and Anti-Avoidance

1 Introduction

You should be aware of the distinction between the following:

- **Tax avoidance**: the efficient and lawful arrangement of a client's affairs in a manner which minimises their liability to tax.
- **Aggressive tax avoidance**: a form of tax avoidance which often involves the taxpayer entering into complex or artificial arrangements which have the overall effect of reducing their tax liability. These schemes comply with legislation but often do not reflect the intention behind the law. This kind of tax planning may involve exploiting loopholes or inadvertent gaps in drafting. Once HMRC become aware of a particular arrangement, 'anti-avoidance' legislation is often introduced to prevent further exploitation.
- **Tax evasion**: where a taxpayer withholds information about assets or income, or otherwise takes steps to avoid paying the tax they are liable for. This is unlawful.

This workbook is predominantly concerned with the first of these although it does briefly cover anti-avoidance rules. Tax evasion is outside the scope of this workbook.

The simple objective of IHT planning is to reduce the overall IHT liability on a person's estate. The goals of the client are often threefold:

- to minimise IHT (usually by reducing the size of their taxable estate in advance of death by making gifts or acquiring exempt assets)
- to retain sufficient assets to maintain financial security during their own lifetime
- to provide adequately for their family after their death

These goals often conflict. It is important to ascertain the priorities of the client and consider whether it is practical or possible for them to undertake certain tax planning measures and still maintain their own or their family's financial security.

Tax planning may be achieved by a person making transfers of property during their lifetime or by dispositions in their will.

To comply with professional conduct obligations a solicitor must be competent to advise clients properly.

Advising on tax is generally considered to be one of the more technical areas of practice and when providing this advice clients must be advised fully on the implications of taking certain steps. It is crucial to remember that:

- actions taken to reduce IHT may result in a charge to capital gains tax (CGT) and / or result in a reduction in the client's future income.
- once gifts have been made to individuals, or into a trust, it is not usually possible to get the assets or cash back, unless the beneficiary consents. Any steps taken to reverse previous actions may themselves have further tax consequences.
- anti-avoidance legislation may prevent the effectiveness of certain actions.

Consider the relatively common scenario that follows:

Ten years before he died, X transferred a property to his niece (N). X thought this would save IHT when he died as his death estate would no longer include the property given away. After giving it away, X continued to live in the property rent free until his death

- The gift was a PET and not charged to IHT at that time. However, the transfer of ownership was a disposal for CGT purposes. X may have had to pay CGT.
- X survived more than 7 years after making the gift and it should therefore have been exempt from IHT. However, because X lived rent free in the property until he died, he made a gift with reservation of benefit (GROB) i.e. gave away an asset but continued to benefit from it. **No IHT saving is achieved**. The property is treated as never having left X's estate and its value at the date he died is included in his death estate. The GROB rules are an example of the effect of anti-avoidance legislation.
- Under general law, gains accrued in assets owned by X at the date of his death (i.e. increases in value during his period of ownership) are disregarded when X dies. As X is not the legal owner of the property when he dies this CGT benefit is lost. The increase in value of the property in the 10 years since X gave it away would be chargeable to CGT in N's hands.

X was not properly advised.

2 Lifetime IHT planning

We will consider steps that can be taken during a person's lifetime. These steps will be considered in the context of the following general categories:

- Exemptions and reliefs
- Assets not subject to IHT
- Transfers of value

2.1 Exemptions and reliefs

It is worth recapping why lifetime exemptions and reliefs benefit a taxpayer.

If a transfer of value is made during a person's lifetime this will be either a PET (which might fail) or an LCT. There are IHT consequences for both:

- A failed PET or LCT can give rise to an IHT charge in its own right. Provisions which exempt or reduce the chargeable value of the transfer result in a smaller tax bill.
- Even if the value of a PET/LCT is not high enough to trigger its own IHT charge, where the donor dies within 7 years following the transfer, the chargeable value of the transfer will 'use up' the NRB available for the death estate. As a result, a greater proportion of the death estate will be taxed at 40%. Steps which reduce the chargeable value of lifetime transfers leave a larger NRB and so help reduce the IHT liability on the death estate.

We will now consider statutory provisions which have the effect of reducing the chargeable value of a PET or LCT, in whole or part.

The statutory exemptions and reliefs listed below are available for a person during their lifetime. We will consider each in turn and look at how these can be used effectively.

Available for lifetime transfers only	Available for lifetime and death transfers
Annual exemption	Spouse exemption
Family maintenance exemption	Charity exemption
Small gifts exemption	Agricultural property relief
Marriage exemption	Business property relief
Normal expenditure out of income exemption	

2.1.1 Annual Exemption (s 19 IHTA)

Recap

- AE allows individuals to make gifts of up to £3,000 each tax year free from IHT.
- Any amount unused from the previous year can also be claimed to the extent it is needed.

The AE is useful because without it a person is making a PET, and if they die within 7 years the gift would use up part of the NRB.

Clients should be advised to

- use the AE each year to make gifts without IHT consequences, even if the client cannot give away a large amount in one go
- appreciate that consistent giving over a number of years can enable a significant amount of money to be given away
- the AE should be used **after** any other available exemption or relief is applied to ensure the AE is available for later transfers.

2.1.2 Family maintenance (s 11 IHTA)

Recap

- This relief applies to transfer of value for the purpose of education (of the donor's children) or maintaining dependent family members

This relief is often overlooked but, with increased education and nursing care costs, it can be very useful where applicable.

There is no upper limit to the amount that can be given away.

It is important to ask the client questions to identify whether the relief applies - many high net worth clients look after elderly relatives, so you should make it clear that gifts made in this regard will be free of IHT if reasonable in the circumstances.

However, if the donee is elderly and already has assets that exceed the NRB, it would be inappropriate (from an IHT perspective) to increase their estate further. Here, instead of claiming the relief, it may be preferable to put in place a loan arrangement, so sums received from the younger relative do not fall within the elderly relative's estate when they die.

2.1.3 Small gifts (s 20 IHTA)

Recap

- Small gifts (of up to £250 per recipient) can be made free from tax
- **Cannot** be used with AE

This exemption is useful where a client has a number of potential beneficiaries e.g. they have a large family and want to make gifts to a number of different children/grandchildren.

Clients can make yearly transfers of £250 to an unlimited number of different people. The exemption is often used for Christmas or birthday presents.

2.1.4 Marriage (s 22 IHTA)

Recap

- £5,000, £2,500 or £1,000 may be given tax free as a wedding gift
- The amount of the relief depends on the relationship with the donee
- **Can** be used with the AE

This exemption is not useful to all clients.

However, when finding out about a client's family it would be pertinent to ask about any planned marriages and, if appropriate, explain there is an opportunity to undertake tax planning / make exempt gifts that would not otherwise be possible.

2.1.5 Normal expenditure out of income (s 21 IHTA)

Recap

- Regular payments of spare income which do not affect the donor's standard of living are exempt.

- There is no upper limit to this exemption.

This exemption is most useful for clients who have a large income where a significant amount is unused each month.

It may not be appropriate for elderly clients, who are often 'asset rich cash poor' (have a relatively low income but have accrued or inherited potentially high value capital assets).

For HMRC to accept a claim for this relief proof of payments will be needed. Clients should be advised to keep a log of all of the payments they make, and this can be submitted along with the death estate information where required.

If a taxpayer pays the monthly premiums on a life policy written into trust for another person, these payments would ordinarily be treated as PETs (in favour of the beneficiary who will ultimately inherit the lump sum following death).

However, the normal expenditure from income exemption can be claimed so these payments are instead exempt / not treated as PETs.

2.1.6 Spouse exemption (s 18 IHTA)

Recap

- All transfers between spouses/civil partners are fully exempt
- Where the donor is UK domiciled there is no limit to the amount that can be claimed

It is usually beneficial for both parties to a marriage to have assets of their own so they can each carry out tax planning. Together a couple can make more exempt transfers than if one party were to hold all/most of the assets. An exempt transfer, from the richer spouse to the poorer, can be made to enable the poorer spouse to utilise exemptions.

Despite tax benefits, some clients will not wish to do this. There may be many reasons, but it is not uncommon for one person to be in control of financial affairs and not trust the other to preserve the family assets. Here, tax planning does not tie in with the client's other goals.

The availability of spouse exemption for IHT may also provide an opportunity for CGT planning.

For CGT purposes, assets can be transferred from one spouse to another as a "**no gain and no loss**" transfer (the donor is treated making a disposal for an amount which results in neither a gain nor a loss).

The CGT relating to gains accrued by the donor prior to the transfer are deferred until the donee spouse disposes of the asset later (s 58 Taxation of Chargeable Gains Act 1992).

Example: Spouse exemption giving rise to CGT planning

A and B are married. A uses up their CGT tax free allowance for the tax year. B has not used any of their tax free allowance. A now wants to sell an asset but the sale will result in A making a taxable gain. Instead of selling the asset, A gives the asset to B.

The gift is exempt from IHT because of spouse exemption and treated as a "no-gain no-loss" transfer by A (so no CGT is payable by A). B can then sell the asset and make use of their own CGT tax free allowance, which may otherwise be wasted, to minimise the CGT due on A's gain.

2.1.7 Charity exemption (s 23 IHTA)

Recap

- All transfers to charity are fully exempt
- There is no limit to the amount that can be claimed

Clients should be advised that they can make tax free gifts to charity. However, very large gifts are only likely to be a valid option for wealthy clients who can afford adequately to provide for their family and also make charitable gifts, or clients without family to support.

Note that if a person leaves 10% or more of their net estate to charity when they die the reduced rate of 36% IHT rather than 40% may apply to the taxable portion of their estate. A client should be advised of the circumstances in which this might apply and, in some cases, will wish to make large charitable gifts by will rather than during their lifetime in order to benefit from this IHT saving.

2.1.8 Business & Agricultural Property Relief (s 103-124 IHTA)

Recap

- Transfers of qualifying business/agricultural assets are exempt up to either 100% or 50% provided the transferor has owned the assets for the minimum qualifying period

BPR and APR are useful if the client already has property that qualifies. Advice should be given to ensure that nothing is done to compromise this. Care should be taken with regards farmhouses where surrounding land is only partly used for agriculture.

Clients could choose to invest in assets that qualify for BPR / APR e.g. if there is potential for investment in a farming partnership, or, clients could purchase Alternative Investment Market shares, which are 'unquoted' for the purposes of BPR. By 'investing' clients are not giving anything away but are turning non-exempt cash into exempt assets.

If giving assets away, it is more efficient to give items which qualify for BPR/APR to a non-exempt beneficiary or a trust than to their spouse, where spouse exemption applies in any event.

2.2 Assets not subject to IHT

Recap:

- Discretionary pension lump sum payments and life insurance policies written in trust are excluded from the taxable estate.

Clients can be advised to take out life insurance and/or pay into a pension and write the benefit of these in trust. Where clients already have insurance or a pension in place, solicitors should advise on the terms of any lump sum payments to identify whether death benefits have been nominated for a third party. If not, clients should take steps to do so.

If a life policy is written in trust *after* it has been set up there is a deemed PET of the redemption value of the policy at that date (usually a small amount).

If a client pays the premiums on a life policy nominated for another the client is treated as making a PET of the annual premiums (although normal expenditure from income relief can usually be claimed to mitigate this).

2.3 Transfers of value

Even if no reliefs or exemptions are available, it is worth a client considering making PETs or LCTs.

It should be obvious that if a client gives away a valuable asset or a large cash lump sum, the donor's estate after the transfer is smaller and less IHT may be due on their death as a result.

Tax planning can involve looking at whether money or assets can be given away via PETs or LCTs without triggering IHT as a result of the transfer.

You should always make sure the client has sufficient capital to make the gift as it will be impossible to recover the money once the gift is made without the beneficiary's consent.

PET recap:

- There is no charge at the time the PET is made so a client can give away significant sums of money and provided the donor survives 7 years the transfer will become fully exempt.

The obvious risk is that a client will not know for certain that they will survive 7 years from making such a transfer.

The client can mitigate against the risk of dying within 7 years by taking out fixed term life assurance specifically to cover the cost of any IHT on the PET.

This type of life insurance policy would pay out a lump sum (often equivalent to the IHT liability) if the donor died within the 7 years after the transfer.

The cost would depend upon the life expectancy of the client and may be very low if the client is young and healthy.

The insurance policy proceeds could be written in trust to ensure the lump sum paid out is not itself taxed.

If IHT is charged following death, it will be on the chargeable value of the PET at the time it was made, not the date of death value. Therefore, clients should consider giving away assets which are likely to increase in value over time.

A PET will usually be a disposal for CGT purposes and the normal rules will apply unless hold-over relief is available. As cash is exempt from CGT, this is ideal when making a PET.

If an individual wants to make a gift of shares, or other assets attracting CGT, then consider making two separate PETs in different tax years. This will allow the transferor to use two CGT annual exemptions.

A client should be made aware that if the transfer is to an unmarried minor child, then, for income tax purposes, the income arising (if more than £100) from the property given away is taxed as if it still belongs to the parent (s 629 Income Tax (Trading and Other Income) Act 2005). This is known as the parental settlement rule.

LCT recap:

- A gift into trust is immediately chargeable to IHT
- Whether any IHT is payable will depend on the available NRB
- If the donor dies within 7 years of making the LCT, it is reassessed at the death rate

The use of trusts for tax planning is beyond the scope of the workbook but in basic terms, provided an LCT for an amount equal to or less than the NRB is made there is no IHT payable at that time, and if the settlor survives 7 years then no IHT will be due at all.

A trust can be useful where a client can afford to make a substantial gift but wants to benefit a group of people (often family members) rather than one particular person.

If a client is wealthy enough, they can make LCTs of up to the NRB amount every 7 years (some people view this as the NRB being 're-set' every 7 years) and over time can move significant value into trust from their own personal taxable estate.

The tax treatment of a trust (independently from the individual settlor) is beyond the scope of this workbook.

2.4 Summary

- Tax planning involves advising a client on the efficient and lawful arrangement of their affairs with a view to reducing their liability to IHT. This may involve a combination of advising about available exemptions and reliefs, writing certain death benefits into trust, and the careful use of PETs and LCTs.
- The IHT consequences of dying in the 7 years following a chargeable transfer can be mitigated by the purchase of life insurance.
- The timing of a transfer, so that it falls within one tax year or another, may form part of tax planning.
- Steps that help reduce an IHT liability may have consequences for capital gains tax or income tax.

3 Tax planning in wills

The simple objective of IHT planning by will is to minimise the tax liability on a person's death to ensure the greatest provision for their surviving family. When drafting a will with this in mind, the following would usually be considered:

- Exempt beneficiaries and qualifying assets
- Allocation of exemptions
- NRB
- Trusts

3.1 Exempt Beneficiaries

You are aware that when a person dies there are two kinds of beneficiary who are exempt for IHT purposes:

- Spouse / civil partner of the deceased
- Charities

When drafting a will for a client they should be made aware of the exempt status of these beneficiaries as this may impact on the drafting of their will.

Note. All rules which apply to spouses and marriage apply equally to civil partners and civil partnerships.

3.1.1 Gifts to a spouse /civil partner

At the most basic level it is tax efficient for a client to leave assets to their spouse by will as all gifts to a spouse are exempt from IHT.

- The relief applies to specific gifts and to the gift of residue
- The amount of the relief is 100% of the value of the items inherited by the surviving spouse

It is clear that there is an advantage to leaving assets to a spouse and many clients may wish to leave assets to their spouse as a method of eliminating the charge to IHT.

However, spouse exemption only offers a tax saving if the client's estate would otherwise be taxable.

Example: Spouse exemption 1

A and B are married.

- A's estate is worth £200,000
- B's estate is worth £50,000

Both estates will be free from IHT as they fall within the NRB.

Neither A nor B need to claim spouse exemption to eliminate the charge to IHT.

However, although no IHT is saved, the couple are likely to benefit from inheriting from each other because neither has a particularly large estate.

Example: Spouse exemption 2

C and D are in a civil partnership.

- C's estate is worth £340,000
- D's estate is worth £1.5M.

C would not mind leaving their estate to D but D is wealthy already and does not need the inheritance.

C's sister (S) is not well off and C would prefer for S to inherit all/most of C's assets.

If C left everything to S there would be a small IHT liability.

Instead, C could give the first £325,000 of their estate to S and the balance to D.

Civil partner exemption would apply to the part of C's estate passing to D and no IHT would be payable following C's death.

Here, the exemption helps to eliminate the IHT charge and in doing so also simplifies the process of administering C's estate.

If you take instructions from a couple who are not married (or in a civil partnership) it may be appropriate to discuss the benefits of spouse exemption. "Getting married" may be the best tax planning advice they can be given!

Conversely, it is important for a client to understand that the benefit of spouse exemption on death is lost if the client is no longer married at that date.

Finally, if either one of the married couple are domiciled outside of the UK, the application of spouse exemption is more limited and your clients will need specific advice on this point.

3.1.2 Gifts to charity

It is tax efficient for a client to leave assets to a qualifying charity by will as these gifts are exempt from IHT, however, not all clients want to make charitable gifts.

We will consider the use of charity exemption where a client does want to make a gift to a charity in their will.

- The relief applies to specific gifts and to the gift of residue
- The amount of the relief is 100% of the value of the items inherited by the charity

Charity exemption only offers a tax saving if IHT would otherwise be payable following the distribution of a client's assets on their death.

There are various ways a client can benefit a charity by their will e.g. setting up a trust where a charity is included among the beneficiaries. We will look at specific gifts here.

- Not all organisations that identify as a 'charity' will qualify for relief. When advising a client you must establish whether the organisation meets the qualifying criteria. Most charities registered by the Charity Commission will meet the criteria for IHT charity exemption.
- Unregistered charities and those located abroad may qualify but their status requires particular consideration before this can be determined.

As a general point, when drafting a legacy to a charity you will need to ensure the gift is effective. If the legacy fails due to poor drafting, no IHT relief can be claimed.

A gift to a charity by will is fully exempt from IHT. In addition, the chargeable part of the estate may qualify for a reduced rate of IHT. In simple terms:

- If a testator leaves **10% or more** of their net estate to charity
- the chargeable part of the estate is taxed at **36%** (rather than 40%).

The value of the 'net estate' for these purposes includes the succession estate assets and additional items, including assets passing by survivorship.

A detailed consideration of the rules is beyond the scope of this workbook but you should be aware that if a client suggests making a charitable gift large enough to be relevant, you will need to advise on the application of the rules relating to the reduced rate of IHT.

Consider the following:

- A testator makes a gift of **8%** of their estate to charity with the remainder passing to their son. The remainder of the estate (above the NRB) is taxed at 40%.
- A testator makes a gift of **10%** of their estate to charity with the remainder passing to their son. The remainder of their estate (above the NRB) is taxed at 36%.

In some situations, the testator can increase the amount of a charitable gift **without reducing** the amount the non-exempt beneficiary receives after tax is paid. The increase in the legacy amount is offset by the tax saving made by the lower tax rate. This is tax efficient as the cost of increasing the legacy is born by HMRC not estate beneficiaries, and the charity is better off as a result of the larger gift.

3.2 Qualifying assets

Recap: There are two main types of **asset** that may qualify for IHT relief:

Business Property

- qualifying assets must have been owned by the deceased for a minimum of 2 years prior to death
- if BPR the relief is either 100% or 50% of the value of the assets

Agricultural Property

- qualifying assets must have been owned by the deceased for the minimum period of time prior to death (usually 2 years)
- if APR applies the relief is either 100% or 50% of the agricultural value of the assets

A client must own qualifying assets at the date of their death (not the date of their will) for the relief to apply. A client with assets which qualify (or may qualify) for relief must be advised of the qualifying criteria so they do not make changes before death which render the relief inapplicable.

The main risk is that the client sells the assets before death and does not acquire qualifying assets with the sale proceeds.

Assuming the deceased's estate will include qualifying assets when they die, their will should be drafted to ensure the estate is distributed in a tax efficient way.

Note that:

- APR and BPR will only provide a tax saving if IHT would otherwise be payable.
- No specific tax planning is required regarding the structure of the will provided there are no exempt beneficiaries.

See the following basic examples:

Example: APR

The value of A's taxable estate is £300,000 (including land with an agricultural value of £20,000).

APR has no effect as the whole estate is within the NRB.

Example: BPR

The value of B's taxable estate is £500,000 (including business assets worth £200,000).

If no BPR applies **£70,000** of IHT is payable:

- £500,000 less £325,000 (NRB) leaves balance of £175,000 @ 40% = £70,000.

If BPR applies at a rate of 100% **no IHT** is due:

- £500,000 less value of qualifying assets (£200,000) leaves balance of £300,000, which is within the NRB so taxed @ 0%.

3.2.1 Qualifying assets and exempt beneficiaries

Most tax planning regarding the gift of qualifying assets by will occurs where clients with these assets want to leave part of their estate to exempt beneficiaries (i.e. a spouse and/or charity).

The way in which the 'beneficiary relief' interacts with the 'asset relief' can be complicated. The primary concern is usually to make full use of both.

The rules vary depending on whether the will contains:

- A **specific gift** of qualifying assets to an exempt beneficiary, or
- A gift of **residue** (which includes qualifying assets) to an exempt beneficiary.

Specific gifts

APR and BPR will be wasted if a specific gift of qualifying assets is made to an exempt beneficiary. For example:

> "I give my shares in X ltd to my spouse"

By s 39A IHTA the relief attaches to the assets and is not applied generally to the estate as a whole. As a result, both spouse exemption and BPR apply in relation to the same gift. BPR is wasted and an opportunity for the testator to have made more tax-free gifts to non-exempt beneficiaries is lost.

There is no guarantee the assets which qualified on the testator's death will still qualify on the death of the survivor, so using the relief when the testator dies is often preferred.

From a tax planning perspective a client should therefore be advised against making specific gifts of qualifying assets to exempt beneficiaries.

However, despite the potential tax inefficiency, there are practical reasons why a testator may want their spouse to inherit these assets. For example:

- there is no appropriate chargeable beneficiary to whom the assets can be given
- the testator's spouse requires the assets for their own benefit or to continue running a business.

A possible solution is for the testator to make a specific gift of the qualifying assets to a discretionary trust (a non-exempt beneficiary) and claim BPR or APR. The testator can then leave other assets to their spouse.

Provided the testator's spouse is named as one of the discretionary trust beneficiaries they will be able to benefit from these assets despite not inheriting them directly. The value of the trust assets (whether they continue to qualify for relief or not) will remain outside the taxable estate of the survivor who, as a discretionary trust beneficiary, is not treated as the owner of trust assets.

Gifts of residue

If qualifying assets are not specifically given away, and therefore fall into the residuary estate, APR/BPR do not attach to the assets (s 39A IHTA).

Instead, the benefit of the relief is **apportioned** generally between taxable and non-taxable beneficiaries.

Apportionment produces different results depending on whether an exempt beneficiary inherits by way of:

- specific gift
- a gift of residue
- both of the above

A detailed discussion of the apportionment rules is outside of the scope of this workbook but note that APR/BRP are wasted where apportionment allocates some/all of the relief to an exempt beneficiary.

For example:

- All or part of the residuary estate (containing qualifying assets) passes to an exempt beneficiary, commonly the testator's spouse.
- The residue contains qualifying assets and there is a specific gift of non-qualifying assets (e.g. a cash legacy) to an exempt beneficiary (e.g. charity).

3.3 Summary

- All gifts to a spouse or charity are exempt from IHT and are a tax efficient method of giving away assets by will.
- If a testator gives away 10% or more of their estate to charity, the chargeable part of the estate qualifies for a reduced rate of IHT at 36%.
- Owning assets which qualify for APR or BPR provide an opportunity for a testator to make tax-free gifts to otherwise taxable beneficiaries.
- By s 39A IHTA BPR/APR attaches to the qualifying assets where they are given away specifically, but, where the assets form part of residue, the reliefs are apportioned generally between exempt / non-exempt beneficiaries as a whole.
- APR/BPR are wasted to the extent the relief applies to a gift to an exempt beneficiary. This may occur where a specific gift of qualifying assets is made to an exempt beneficiary, or, as a result of apportioning the relief generally where the qualifying assets form part of the testator's residuary estate.

3.4 Allocation of exemptions

We will consider the situation where IHT is payable in respect of the testator's estate but some of the estate assets are passing to an exempt beneficiary.

Statutory rules apply to ensure an exempt beneficiary is not taxed on their gift and the effect of these rules can vary depending on how the will has been drafted.

Note that there is no particular issue for estates where:

- No IHT is payable (because the estate value is below the NRB / is below the NRB after all exemptions and reliefs have been applied)
- IHT is payable and **all** of the gifts in the will are made to chargeable beneficiaries (IHT is usually paid from residue unless testator states otherwise)

You are aware that when a person dies there are two kinds of beneficiary who are exempt for IHT purposes:

- Spouse / civil partner of the deceased
- Charities

The basic principle on which the material below is based is that all gifts to exempt beneficiaries are made free of IHT.

This means the beneficiary should receive their inheritance without the cost of any IHT being directly applied to their gift i.e. the benefit of the IHT exemption is allocated only to their gift.

Statutory rules determine the allocation of exemptions and may influence a testator's instructions regarding their will. Note also that express wording within the will can affect the way in which the IHT is calculated.

The following content does not involve a direct form of tax planning. However, an awareness of this topic is required when advising a client who wants to take advantage of IHT exemptions under their will.

We are going to consider how the benefit of an IHT exemption is allocated in a scenario where a testator makes a will that contains the following:

- Specific gift to exempt beneficiary and:
  - whole of residue to chargeable beneficiary, or
  - part of residue to chargeable beneficiary and part to exempt beneficiary
- Specific gift to chargeable beneficiary (drafted as "subject to tax") and:
  - whole of residue to exempt beneficiary
  - part of residue to chargeable beneficiary and part to exempt beneficiary
- Specific gift to chargeable beneficiary (drafted as "free of tax") and whole of residue to exempt beneficiary

Note. *"specific gift" in this part of the workbook refers to a gift which is not a share of residue.*

3.4.1 Specific gifts to exempt beneficiaries

Example: Specific gift to exempt beneficiary with residue to chargeable beneficiary

A testator leaves the following in their will:

- £100,000 to spouse
- Residue to child

Only the residue is subject to IHT and the amount of IHT due is paid from residuary funds.

- Spouse gets £100,000
- Child gets the remaining sum after tax

Example: Specific gift to exempt beneficiary with residue to chargeable and exempt beneficiaries

A testator leaves the following in their will:

- £100,000 to spouse
- Residue equally between [charity] and children

Only part of the residue is subject to IHT (the charitable gift is disregarded). IHT is calculated on the children's share and paid from this amount.

- Spouse gets £100,000
- Charity gets ½ residue
- Children get other half of residue after IHT has been deducted

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3.4.2 Specific gifts (subject to tax)

Example: Specific gift to chargeable beneficiary (subject to tax) and residue to exempt beneficiary

A testator leaves the following in their will:

- £400,000 to child subject to tax
- Residue to spouse

The only part of the estate subject to IHT is the specific gift. The IHT due is paid from the legacy amount.

- Child inherits £400,000 less the tax due
- Spouse inherits the residue without any deduction for IHT

Example: Specific gift to chargeable beneficiary (subject to tax) and chargeable and exempt beneficiaries

A testator leaves the following in their will:

- £100,000 to daughter subject to tax
- Residue equally between spouse and son
- Spouse's share of residue is exempt
- IHT due is apportioned between the legacy and son's half of residue
- Daughter gets legacy with IHT deducted (ie less than £100k)
- Son gets share of residue with tax deducted (ie less than spouse)

3.4.3 Specific gifts (subject to tax)

Example: Specific gift to chargeable beneficiary (free of tax) with residue to exempt beneficiary

A testator leaves the following in their will:

- £350,000 to son free of tax
- Residue to spouse

Drafting the legacy "tax free" means the son gets £350,000 (instead of a smaller sum after IHT is deducted).

The real value of the gift to the son is '£350,000 + IHT attributable to the legacy'. To calculate the true value of the gift and therefore the amount of IHT due "grossing-up" must occur. (This is outside the scope of this workbook).

£350,000 is paid to the son and the IHT is paid from other funds.

The balance (i.e. residue) passes to spouse. The spouse receives less overall because IHT was due and residue was the only part of the estate from which it could be taken.

It is not possible for the will to result in a smaller tax liability by drafting all gifts as "tax free". In this scenario, more IHT will be payable than if the testator had not made a tax-free gift to the son, as grossing–up would not have applied and the proportion of the estate subject to tax would have been smaller.

3.4.4 Practice Alert: Double grossing-up

Some wills may contain:

- specific gifts free of tax to chargeable beneficiaries and a gift of *part* of the residue to an exempt beneficiary, or
- specific gifts to chargeable beneficiaries where some but not all are "free of tax".

In these scenarios **double grossing-up** is required.

These calculations are particularly complex and drafting a will where these would be required should be avoided where possible.

3.4.5 Summary

- All gifts to a spouse or charity are exempt from IHT and are a tax efficient method of giving away assets by will.
- There are statutory rules that determine how the benefit of the exemption applies where an estate is divided between exempt and non-exempt beneficiaries and IHT is payable.
- The overall effect of the rules is to ensure that exempt beneficiaries do not suffer the burden of the IHT payable in respect of the assets passing to the non-exempt beneficiaries.
- Where IHT is payable as a result of specific gifts to non-taxable beneficiaries which are made "free of tax" and the residue passes to an exempt beneficiary, the amount of the specific legacy needs to be grossed-up before the IHT due can be calculated.

3.5 Tax planning in wills: NRB gifts

Maximising the amount of the NRB and the residence NRB (plus any transferred amounts) is an important consideration for all clients with taxable estates and will be relevant when taking instructions for a will.

We will look at:

(a) The extent to which a client 'uses' their NRB

(b) Making a gift by will of the NRB amount

We will distinguish between considerations for married and unmarried couples.

3.5.1 Extent to which a client 'uses' their NRB

'Using' the NRB on death refers to making transfers to non-exempt beneficiaries (which are taxed at 0% on the value which falls within the NRB).

- The NRB is not used **at all** if a client leaves the whole of their estate to an exempt beneficiary. The exemption reduces the taxable value of the estate to zero.
- The NRB will be used **in part** if either i) the total value of the estate is less than the NRB, or ii) the total value of gifts to non-exempt beneficiaries is less than the NRB amount.
- The NRB is used **in full** if the total value of gifts to non-exempt beneficiaries is greater than the NRB.

IHT is only payable on an estate where the NRB is used in full.

If a client does not wish to make any gifts to an exempt beneficiary the NRB will be applied against their taxable estate in the usual way. The client has no choice about whether to use it or not.

A married testator who wants to leave assets to their surviving spouse may choose the extent to which their NRB is used.

The testator could:

- leave their whole estate to their spouse, so spouse exemption applies and none of the NRB is used, or,
- make gifts to non-exempt beneficiaries and give the remainder to their spouse, so the NRB will be used in whole or part (depending on the value of the gifts to non-exempt beneficiaries).

If a couple (married or not) have children, it is common for the couple to want to leave assets to each other following the death of one of them, and on the death of the survivor, leave the estate to their children.

A client will often be interested in reducing the IHT burden for their family as a whole rather than just themselves as an individual.

Tax planning often requires the will drafter to consider the IHT implications following the death of the couple and their combined estate. The client objective is often long term and is to maximise the amount that can pass down a generation to children or grandchildren.

NRB: Married couples

Prior to 2007 it was **not** possible for one spouse to pass on their NRB to the survivor.

To the extent a testator's NRB was not used on their death it was wasted.

A will that left everything to a spouse did not utilise any of the NRB because the whole estate qualified for 100% spouse exemption.

The assets of the first to die would pass to the survivor and be taxed on the survivor's death after the deduction of only the survivor's NRB.

Example: Prior to NRB transfer

A and B are married. Both have estates worth £500,000.

Will of A (first to die)

- Everything to spouse (B)

A's estate is not taxed as it qualifies for spouse exemption.

None of A's NRB is used.

When B dies their estate includes their own assets plus those inherited from A (the estates are 'bunched' together).

Will of B (survivor)

- Everything to children

B's estate (worth £1m) is taxable as it is passing to non-exempt beneficiaries. Only B's NRB can be claimed.

A's unused NRB is wasted.

Solution

To avoid the NRB being wasted A could have given a sum equal to the NRB:

- to a non-exempt beneficiary (e.g. their children)
- to a trust (a discretionary trust was commonly used and B would be one of the beneficiaries to ensure B could benefit from the portion of the estate not passing to them directly)

And then B would receive the balance above the NRB.

This was tax efficient because:

- IHT would not be payable following A's death (the gift of the NRB would be taxed at 0% and the balance passing to B would be spouse exempt).
- Although IHT would be payable following B's death, B's estate would be smaller than if they had inherited everything from A and thus less tax would be paid.
- Ultimately, the children would receive a larger inheritance as both NRBs were used and B's tax liability would be smaller.

Following the introduction of the transferrable NRB between married couples in 2007 it is no longer a primary concern to ensure that the **first** of a couple to die uses their NRB at that time.

This is because the survivor is entitled to their own NRB plus the unused proportion of their spouse's NRB.

It does not matter when the first spouse dies, provided the **survivor** dies after the introduction of the transferrable NRB, it will be available.

Consider the example that follows:

Example: After NRB transfer

A and B both have an estate worth £325,000.

A's Will (first to die)

- Everything to B (spouse)

A's estate is not taxed as it qualifies for spouse exemption.

A does not use any of their NRB.

B dies later and their estate includes their own assets plus those inherited from A.

B's Will (survivor)

- Everything to children

B's estate, worth £650,000, is taxable as it is passing to non-exempt beneficiaries.

B's estate is entitled to both A and B's NRB. The whole of B's estate is within the combined amount (£325,000 + £325,000).

No IHT is due. No NRB is wasted.

While it is no longer crucial to ensure the first of a married couple to die makes use of their NRB, because to the extent it is unused it can be claimed by the survivor, a client may want to use their NRB /not leave everything to the survivor. For example, if:

- the client intends to benefit someone other than a spouse.
- the client does not want their surviving spouse to control all the family assets (perhaps where the client has children from a previous marriage).
- there is an advantage to keeping the survivor's estate smaller. E.g. to reduce the value of assets within the remit of local authority assessment for care home costs, or, if the value of their combined estates will be more than £2M thus limiting the application of the residence NRB on the survivor's death.
- the value of some assets will likely increase more rapidly than any increase in the NRB over time.
- the survivor will not have enough assets to make full use of a transferred nil rate band.

Sometimes a client may decide to use (or not use) their NRB based on an expectation of how the NRB may change in the future.

No IHT is payable whether the client has Will 1 or Will 2.

Will 1

- £NRB to children
- Everything else to spouse

Will 2

- Everything to spouse

However, a possible advantage to Will 2 is that the **amount of the NRB is not fixed until the death of the survivor**.

If the NRB increases in value between the first and second death, and the value of the combined estates is sufficient to make use of any increase, it may be better for the first spouse not to use their NRB. See the example which follows:

Example: Fixing of NRB

T's Will 1

- £NRB to children
- Everything else to spouse (S)

T's Will 2

- Everything to spouse (S)

Assume the NRB at T's death is £325,000 but increases to £400,000 by the time S dies.

Will 1: T's estate is entitled to a NRB of £325,000 (applied against the gift to the children). S's estate is entitled to a NRB of £400,000. Total NRB for their combined estates is £725,000.

Will 2: T does not use their NRB. S's estate is entitled to a full NRB for both S and T (i.e. 100% of T's NRB is transferred to S). The amount of the NRB is fixed at S's death. The total NRB for their combined estates is £800,000.

A different factor to consider is where one party has an estate worth less than the NRB.

If the poorer spouse dies first, their NRB cannot be used in full, and to the extent it is unused it is wasted. This is not an issue if the richer spouse dies first leaving their estate to the survivor of the couple, however, the order of death will not be known in advance.

Here, tax planning may involve the richer of the two making transfers during their lifetime to equalise the value of the two estates and then each person making wills that benefit the other.

Provided both estates are worth more than the NRB the NRB will be used in full irrespective of who dies first.

NRB: Unmarried couples

Spouse exemption is not available for unmarried couples so the IHT considerations will be different.

If both parties have estates large enough to attract IHT, tax will be payable on the first and second deaths (unless other exemptions apply). These clients may be concerned with **'bunching'**.

Example: Bunching

Will of A (first to die)

- Everything to B

Will of B (survivor)

- Everything to children

A dies:

IHT is payable on the value of A's estate above the NRB. B inherits assets from A after they have been taxed.

B dies:

B's estate now includes their own assets plus those inherited from A (the estates have been bunched together). IHT is payable on the value of B's estate which is above the NRB.

The value of the assets inherited from A may be re-taxed as part of B's estate before passing to their children.

A couple who want to limit the amount the survivor inherits (to avoid B's estate becoming too large) could make gifts to children (or other family members) on the first death rather than leaving everything to each other.

However, if children are young and /or the couple want the survivor to be able to benefit from all of the estate of the first to die, alternatives can be considered. One option is for the first of a couple to die to leave an amount into a discretionary trust instead of to the survivor directly. If the survivor and their children/grandchildren are named as beneficiaries of the trust they can benefit from the assets (although will not have complete control over them). When the survivor dies their taxable estate does not include the assets held in the trust.

Although there are administrative costs to running a trust, and beneficiaries do not have unrestricted or certain access to the trust fund, these considerations are often agreeable to a client when the possible tax saving is considered. See the example which follows:

Example: Unmarried couple scenario 1

- A dies leaving an estate worth £500,000 to B.
- IHT payable: **£70,000***(£500,000 – NRB of £325,000. Balance of £175,000 @ 40%)*
- Assume B dies leaving an estate worth £830,000 (residue of £430,000 from A plus £400,000 of B's own assets) to their children.
- IHT payable: **£202,000***(£830,000 – NRB of £325,000. Balance of £505,000@ 40%)*

Total IHT paid: £272,000.

Example: Unmarried couple scenario 2

- A dies leaving an estate worth £500,000 to a discretionary trust. B and the children are the trust beneficiaries.
- The discretionary trust is not exempt so all of A's estate is taxable. IHT of £70,000 is payable as per Scenario 1.
- B dies leaving an estate worth £400,000 to their children.
- IHT payable on B's death is: **£30,000** (£400,000 - NRB of £325,000. Balance of £75,000 @ 40%).

Total IHT paid: £100,000.

Residence NRB

If your client owns residential property further consideration will be required if the client wishes to make use of the separate RNRB and the transferred RNRB.

You will recall that the criteria for claiming the RNRB are:

- qualifying residential interest
- is left absolutely
- to a direct descendant (children, grandchildren etc)

The NRB is reduced (tapered) for estates worth more than £2M.

If a client has an interest in residential property they should be advised on how to structure their will to ensure the RNRB can be claimed.

Factors to consider:

(a) *Is a specific gift of property being made to beneficiaries, or is the property part of the general residue of the estate?*

- Where the residence is part of the residue, and this is shared between direct descendants and non-direct descendants, it makes things more complicated.

(b) *Is the property passing outright to the direct decedents or not?*

- Where an age contingency is attached to the gift in the will, and the beneficiary is under this age when the testator dies, the RNRB may not apply.
- If property is left into certain types of trust, rather than by way of direct gift, the RNRB may not apply.

The tax saving obtained by making use of the RNRB should be considered alongside other client objectives.

3.5.2 Drafting gifts of the NRB

If a client decides to give away 'the NRB' to a non-exempt beneficiary it is important to identify exactly what is intended. For example, the gift of a fixed sum (as below) is not advised because:

> "I give the sum of £325,000 to my daughter"

(a) If the testator does not have a full NRB available when they die, part or all of the gift may end up being taxable when this was not intended.

(b) The amount of the NRB may change over time. If the NRB increases between the date of the will and the date of the testator's death this may result in a missed opportunity to make full use of the tax-free amount.

A formula clause is usually preferred:

> "I give an amount equal to the value of my nil rate band available on the date I die to my daughter"

However, where a formula clause is used, there should be certainty about what is meant by any reference to the NRB. These clauses may or may not include the amount of the:

- NRB transferred from a pre-deceased spouse
- RNRB and any transferred RNRB

A gift of the client's 'NRB' may be of a smaller amount than a gift of "the maximum amount that can be given without tax being payable".

A testator who wants to maximise the use of their NRB (often before paying the residue to their spouse) may prefer a clause which covers all of the possible NRB amounts, compared with a testator who wishes to cap the maximum amount that would be given to the beneficiary.

3.5.3 Summary

- A married testator should consider whether or not to make use of their NRB in the event they pre-decease their spouse.
- The first of a married couple to die may leave everything to the survivor and avoid using their NRB, which can be transferred to the survivor and claimed on their death instead. The amount of the transferred NRB is determined on the second death.
- There are practical reasons why a married client may not want to leave their whole estate to their surviving spouse.
- An unmarried couple may want to ensure that both NRBs are used in full, and prevent assets inherited from the first of them to die being taxed again as part of the estate of the second to die.
- If a client wishes to make use of the residence nil rate band, the will must be carefully drafted to ensure that the qualifying criteria can be met.
- When drafting a gift of the nil rate band, a formula clause should be used instead of specifying a fixed sum. The wording of a clause should make the value of the gift clear; will it include or exclude any transferred or residence NRB?

3.6 Trusts

A testator may make a gift into trust by their will.

A trust does not have separate legal personality. Therefore, a gift into trust takes effect as a transfer to the trustees. The trustees will be the legal owners of the assets (collectively referred to as the trust fund). The equitable and beneficial interests lie with the beneficiaries.

The testator may leave a specific gift of cash or assets or give the whole or part of the residue of their estate to a trust.

It is possible for a testator to add assets to a pre-existing trust. In this case the drafting is fairly simple, and the will simply needs to identify the trust to which the assets are being given. However, it is more common for a new trust to come into existence by operation of the terms of a testator's will.

A will that contains the following type of clause creates a **new** trust. The clauses in the will which follow should contain the detailed provisions.

> "I give the sum of £325,000 to my Trustees to hold on trust in accordance with the following terms..."

A will that contains the following type of clause is **adding** to an existing trust. The will does not need to contain further detailed clauses.

> "I give my Residuary Estate to the trustees of the ABC Family Settlement to hold in accordance with its terms"

It is more common than not for a testator to appoint the same people to act as both executor of their estate and as trustee of any trust created by their will.

For the purposes of this section, you should assume that a will has been professionally drafted and any gift into trust satisfies the legal requirements to be valid under trusts law.

A trust created on death by a testator's will is referred to as a 'will trust'. Where the testator creates a trust by will the:

- will is the trust deed
- testator is the settlor

- trust comes into existence on the date of the testator's death when the provisions of the will become operative (not on the date the will was executed).

Drafting a will that creates a trust can be complicated. Express wording in the will is required to:

- Set out the terms of the trust & the beneficial interests
- Appoint trustees
- Identify beneficiaries
- Identify which part of the estate the trust will apply to
- Set out the scope of the trustees' powers

A number of different kinds of trust may arise following a person's death e.g. where there is a contingent gift to a minor.

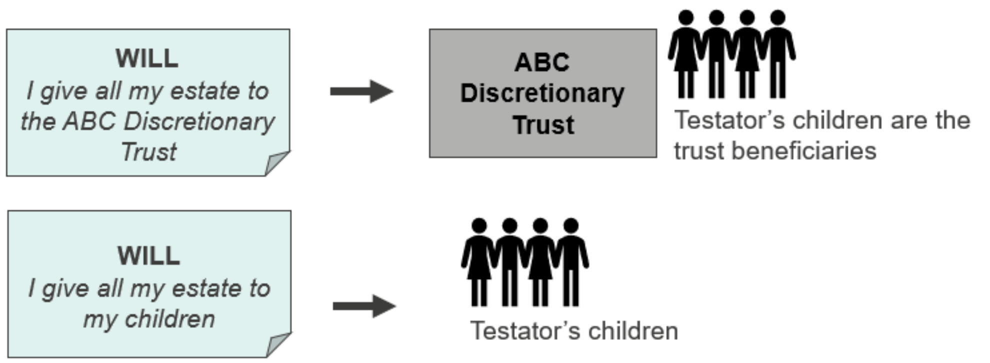
We will focus on trust structures commonly used for **tax planning** purposes, which includes:

- **DiscretionaryTrust**: A trust for the benefit of a group of beneficiaries, none of whom have any fixed right to trust assets. The trustees have absolute discretion over capital and income i.e. when, how much and to whom any distributions should be made
- **Life Interest Trust**: A trust for the benefit of a life tenant (entitled to income during their lifetime) and the remainderman (entitled to capital when the life interest ends, usually on the death of the life tenant). The trustees do not have complete discretion over distributions from the trust fund.
- Trusts for young people and bereaved minors (where s 71A/D IHTA applies) ie trusts that benefit the testator's children.
- Trusts for disabled people: Trusts that provide for those with physical or mental disabilities.

We will only consider the trusts shown in bold. The tax law relating to trusts for young and vulnerable people is beyond the scope of this workbook.

3.6.1 Discretionary will trusts

If a settlor creates a discretionary will trust there is no immediate tax saving for the **testator** (or their estate) compared to making an outright gift. No spouse exemption can apply (even if the spouse is one of the trust beneficiaries) and the IHT position for both of the examples below is (in principle) the same:



As there is no direct IHT saving on the death of the testator you might wonder why the use of a discretionary trust might be considered 'tax planning'.

In simple terms, if a testator makes a gift to a discretionary trust the beneficiaries can benefit from the trust assets without an accumulation of wealth into the hands of any one of them individually.

This is because no beneficiary is treated as owing the trust fund. When a beneficiary dies their taxable estate does not include the trust assets at that time.

Let's consider the previous example but from the perspective of the testator's children to see how this may save IHT over the longer term / for the beneficiaries:

Figure 5.1: Discretionary Will Trust

Figure 5.2: Outright gift to children

Drafting discretionary will trusts

Where a transfer is made by will to a discretionary trust it will usually be drafted as either of the following:

- Discretionary trust of **residue**: the whole or part of the residuary estate passes to a discretionary trust and the exact amount cannot be determined until the administration is complete.
- **Legacy** to a discretionary trust: a fixed sum or a sum 'equal to the nil rate band' passes to a discretionary trust. The amount is numerically certain / can be calculated.

The RNRB does **not** apply if the deceased's residential interest passes to a discretionary trust, even if the testator's children are among the beneficiaries. This is because the children are not inheriting 'directly'. Careful consideration is required if a client wishes to make use of the RNRB and transfer assets to a discretionary trust.

Non-tax reasons for discretionary will trusts

It is useful to be aware of the succession / non-tax reasons a settlor may wish to set up a discretionary trust instead of leaving gifts directly to individuals.

- **Flexibility**: The testator is not required to know in advance exactly how their estate should be distributed after their death and the changing needs of beneficiaries can be accommodated by the trustees having regard to the circumstances at the relevant time. A '**letter of wishes**' is commonly drafted by a testator and given to the trustees describing how the testator would like the trustees to exercise their discretion. These letters are not legally binding on the trustees but are a useful reference point.
- **Protection**: The assets in a discretionary trust are not controlled or owned by any single beneficiary and are therefore usually protected from claims by i) a beneficiary's creditors should they be declared bankrupt, or ii) a beneficiary's spouse as part of divorce proceedings.

Practice Point - Trust taxation

We have seen that that is no IHT charge in relation to the discretionary trust assets for the estate of any individual beneficiary.

However, you should be aware that instead of taxing an individual beneficiary, HMRC apply IHT charges to the trust itself. These charges (paid by the trustees from the trust fund) are usually significantly smaller than the IHT that would be payable if a beneficiary owned the trust fund outright on their death.

The tax charges applied to discretionary trusts are commonly referred to as the 'relevant property regime'.

Trust taxation and the relevant property regime are outside the scope of this workbook.

2 Year discretionary will trusts

These discretionary will trusts are drafted with the intention they only last for the period of **two years** following a testator's death. The limit of two years is with reference to s 144 IHTA by virtue of which distributions of capital from a discretionary trust made by the trustees within two years of the testator's death are deemed to have taken place under the deceased's will for IHT purposes and not by the trustees.

Note. (there is no equivalent provision for CGT purposes).

A two-year discretionary will trust allows the testator a great deal of flexibility; they do not have to decide how their estate should be distributed when their will is drafted, instead the trustees decide who (among the trust beneficiaries) should inherit and what they should receive *after* the deceased has died.

It should be obvious that these trusts would only be used where the testator trusts that the trustees will make appropriate decisions. Often a testator will appoint their surviving spouse as one of the trustees.

Example: 2 year discretionary will trust

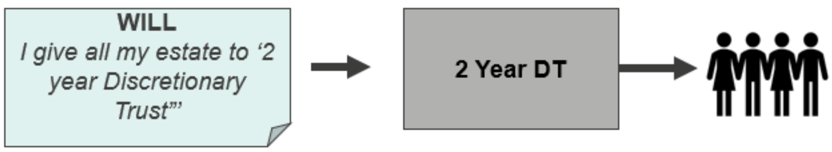


Figure 5.3: 2 Year discretionary will trust

Consider the following scenario:

- A testator leaves their entire estate worth £400,000 to a discretionary trust.
- The testator's spouse, children and a charity are among the beneficiaries.
- No exemptions apply. The NRB is worth £325,000. No RNRB can be claimed as the children do not inherit an interest in the property.
- When the testator dies IHT will be payable as the value of the estate is greater than the NRB.

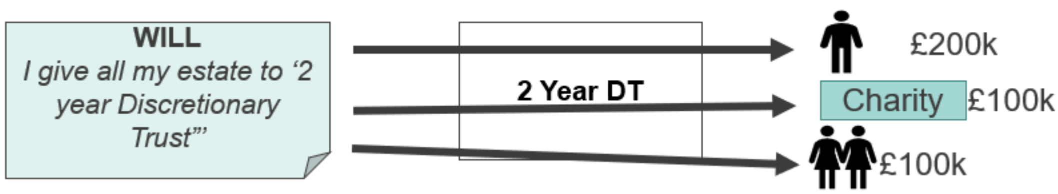


Figure 5.4: Distribution from the 2 year discretionary will trust

One year after the testator's death the trustees pay ½ of the trust fund to the testator's spouse, ¼ to charity and ¼ to the testator's children. These payments are treated under s 144 IHTA for IHT purposes as having been made by the testator's will not the trustees:

- therefore spouse and charity exemption can be claimed
- after they have been applied the value of the estate is less than the NRB (which could also now include the RNRB if a residential property had been distributed to the children)
- a refund of all of the IHT paid following death can be claimed.

The trust has not retained any assets and comes to an end.

3.6.2 Life interest will trusts

If a testator creates a life interest trust by will, spouse exemption can be claimed on the amount passing to the trust provided the testator's spouse is the **life tenant**. There is no spouse relief if the testator's spouse is a remainder beneficiary.

This means:

- there is tax advantage to the **testator** (or their estate) compared to the testator making a gift to a non-exempt beneficiary.

• the IHT position would be the same whether a testator left their entire estate to their spouse absolutely, or left their entire estate on a life interest trust and named their spouse as the life tenant.

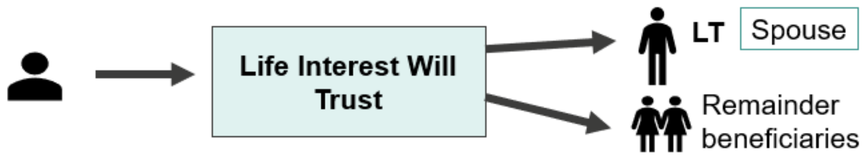


Figure 5.5: Life Interest will trust

Example: Life Interest Will Trust - spouse exemption

Testator A leaves their entire estate on the terms of a life interest trust, naming their spouse as the life tenant and their children as the remainder beneficiaries.

No IHT is payable because spouse exemption will apply to the assets passing into the trust.

Example: Life Interest Will Trust - no spouse exemption

Testator B leaves their entire estate on the terms of a life interest trust, naming their sister as the life tenant and their spouse as the remainder beneficiary.

IHT will be payable unless the value of the estate is below the nil rate band. No spouse exemption applies.

Example: No Life Interest Will Trust - spouse exemption

Testator C leaves their entire estate to their spouse absolutely.

No IHT is payable because spouse exemption will apply to the assets passing directly to their spouse.

The estates of Testator A and Testator C are taxed in the same way. A testator who is married or in a civil partnership has the opportunity to benefit from the practical advantages of a trust while maintaining the benefit of the IHT exemptions.

We will consider the practical reasons why Testator A may have wanted to create a life interest trust.

Life interest will trusts: Practical advantages

The key practical advantage of a life interest trust compared to an outright gift is that the testator can control the ultimate destination of their estate. The testator can specify who benefits as the life tenant whilst preserving the capital of their estate for other beneficiaries.

This structure is particularly useful if the settlor has remarried and has children from a previous marriage, or thinks their spouse may marry again in the future. The concern is that a surviving spouse may ultimately leave assets they inherited under the testator's will to someone the testator did not know e.g. their second spouse or children from another marriage.

A testator who sets up a life interest will trust, naming their spouse as life tenant and their own children as remaindermen, will obtain the same tax advantage of spouse exemption as if their estate passed directly to their spouse, but will also the ability to preserve their assets for other family members after their spouse dies.

Practical considerations

The following practical matters should also be considered:

- A life tenant is only entitled to trust income (not capital) and the amount of income generated may not be sufficient. The testator should consider the needs of the life tenant, the amount of income likely to be generated by the trust and other resources of the life tenant. The ideal is to achieve the following:

Life tenant's needs = life tenant's resources + trust income

- If the life tenant's needs are likely to exceed their resources plus trust income other options should be considered, for example:
  - Make the trust fund larger (if possible) so more income is generated, and/or
  - Ensure trustees have express powers to advance capital and/or to make loans to the life tenant if this is needed.

3.6.3 Summary

- A testator may create or add to an existing trust by operation of express clauses in their will.
- A discretionary trust offers the advantage of flexibility regarding the future needs of the beneficiaries and a longer-term tax advantage to the beneficiaries compared with a direct inheritance. However, no spouse exemption can apply on a gift to the trust and the RNRB cannot be claimed if the residential interest passes to a discretionary trust.
- Section 144 IHTA will apply to distributions made from a discretionary will trust in the 2 years following a testator's death and these distributions are treated for IHT purposes as having been made under the testator's will, not by the trustees.
- A life interest trust creates fixed interests in the trust fund (the life tenant and remainder beneficiaries have defined rights) and spouse exemption can be claimed if the spouse is the life tenant. The testator can retain control over the destination of their estate. However, if a life tenant is likely to require access to the trust capital express powers permitting trustees to pay or loan capital to the life tenant must be express drafted.

4 Anti-Avoidance

It is likely that you will be aware of the issue of tax avoidance because of high profile cases that have been in the news in recent years. HMRC considers tax avoidance to involve

> "bending the rules of the tax system to gain a tax advantage that Parliament never intended".

Often this involves taxpayers entering into convoluted, artificial arrangements to hide their true nature and affect the consequential tax treatment.

Since the 1980s, these sort of arrangements have been challenged by HMRC taking a purposive interpretation to the relevant legislation. This is similar to the mischief rule of statutory interpretation and involves the courts looking at the purpose behind the legislation, and applying the tax rules based on the underlying substance of the transaction rather than its form. This is known as the Ramsay Principle.

Although the Ramsay Principle is still a valid method of statutory construction, it has been supplemented by a series of legislative reforms which are aimed at preventing aggressive tax avoidance. These include both targeted and general anti-avoidance rules. This element introduces you to the most common anti-avoidance rules you need to be aware of when advising on wills and estates.

We will consider the following anti-avoidance rules:

(a) Restriction on deduction of loans for IHT purposes

(b) GROB rules

(c) Pre-owned assets charge (POAC)

(d) General anti-abuse rule (GAAR)

(e) Disclosure of Tax Avoidance Schemes (DOTAs)

Although our focus is avoidance of IHT, you will note that not all of the rules covered relate directly to IHT liability. It is important to be aware that attempts to avoid one tax can give rise to a liability for a different tax. For example, the POAC is an income tax charge which penalises IHT avoidance. It is therefore essential in practice that you have a broad understanding of tax law (and seek specialist tax advice if you are uncertain of the potential tax implications of a course of action).

4.1 Restriction on deduction of loads

When calculating the chargeable value of a deceased's estate for IHT purposes, it is necessary to deduct the deceased's debts. It is also possible to deduct financing costs when ascertaining the taxable value of a lifetime transfer. However, there are anti-avoidance rules which restrict deductions in the following circumstances:

(a) Loans made to acquire, maintain or enhance assets that qualify for BPR. (This also applies to agricultural and woodlands relief.)

(b) Loans which are not repaid from the estate.

(c) Loans made to acquire, maintain or enhance excluded property (i.e. property which is not subject to IHT).

(d) Loans which fund a qualifying foreign currency account.

The first two are considered in more detail below. The others are outside the scope of this workbook but you may need to be aware of them in practice.

4.1.1 Loans made for assets attracting BPR

If a loan was made to acquire, maintain or enhance assets that qualify for BPR (or agricultural / woodlands relief) the costs of the loan must first be set against the value of the qualifying assets. This reduces the value of assets which attract relief. If the loan exceeds the value of the relievable assets the remainder can be deducted from the value of the chargeable estate.

The effect of this restriction is shown by the examples below. Both examples consider an estate of the same size, comprising the same assets and liabilities. The only difference is the purpose for which the loan was taken out. In the first example, the loan was used to acquire shares which qualify for BPR. The costs of the loan must therefore be set against those shares, reducing the relief available. In the second, the loan was used for home improvements. The costs of the loan are not restricted to a particular asset, meaning BPR is available for the entire value of the shares, reducing the value of the taxable estate.

Example: Loan used to acquire shares which qualify for BPR

A man dies. His £700,000 estate includes:

(a) A house worth £400,000

(b) Shares worth £100,000 which qualify for BPR (at 100% relief)

(c) Cash of £200,000

The man's funeral expenses are £5,000. He has an outstanding debt of £25,000 from a loan used to buy the shares.

Deduct debts / expenses: £25,000 loan used to reduce value of the shares to £75,000. £5,000 funeral expenses deducted. Estate = **£670,000**

Apply reliefs: Deduct £75,000 (BPR)

Taxable estate: **£595,000**

Example: Loan used for home improvements

A man dies. His £700,000 estate includes:

(a) A house worth £400,000

(b) Shares worth £100,000 which qualify for BPR (at 100% relief)

(c) Cash of £200,000

The man's funeral expenses are £5,000. He has an outstanding debt of £25,000 from a loan used for home improvements.

Deduct debts / expenses: Total debts £30,000. Estate = £670,000

Apply reliefs: Deduct £100,000 (BPR)

Taxable estate: £570,000

4.1.2 Unpaid loans

Loans are only deducted from the value of the estate at death if they are repaid from the estate. Most loans will be commercial, arm's length arrangements which HMRC expects will be repaid and does not investigate. Debts owed to the deceased's family, related trusts or companies, and those made as part of tax avoidance arrangements should only be deducted if they are actually repaid. HMRC will look at these more closely.

Example: Unpaid loan

A woman lends her brother £200,000 to help him buy a house. The brother dies a year later, leaving his entire estate to his son. The estate consists of the house (£600,000) and cash in a bank account (£50,000). The man's funeral expenses are £5,000. He has not paid any of the £200,000 back to his sister. He has no other debts.

The woman tells her brother's executors that she does not want to enforce the debt. It therefore cannot be deducted from the value of the man's estate. The man's taxable estate is worth £645,000. If the loan had been repayable, it could have been deducted from the value of the estate, reducing the taxable value to £445,000.

4.2 Gifts with reservation of benefit

The GROB rules were first introduced in the Finance Act 1986 (FA 1986).

The purpose of the rules is to prevent individuals attempting to manipulate the IHT regime by giving away property during their lifetime but retaining a personal benefit in that property.

The rules work by treating such property as remaining part of the donor's estate, ensuring that it is taxed upon their death (unlike genuine gifts which will only be taxed – as failed PETs - if the donor dies within 7 years of making the gift).

4.2.1 When do the GROB rules apply?

The GROB rules are set out in s 102 FA 1986. A lifetime gift will be treated as a GROB in one of two situations:

(a) the donee does not assume "**bona fide possession**" of the property at or before the start of the "**relevant period**".

(b) At any time during the "**relevant period**" the property "**is not enjoyed to the entire exclusion, or virtually to the entire exclusion, of the donor and of any benefit to him by contract or otherwise**".

The **relevant period** is the seven year period before the donor's death (or a shorter period if the gift is less than seven years before death). Note that it is not simply the seven years after the gift is made. A gift can be caught by the GROB rules many years after it is made if the donor reacquires an interest in the property. (This prevents donors avoiding the GROB rules by temporarily giving up an interest in the property.)

GROB: Bona fide possession

For a donee to be treated as having **bona fide possession** of the gifted property for the purposes of the GROB rules they must:

(a) Obtain a vested, beneficial interest in the property.

(b) Have actual enjoyment of the property.

(c) Assume possession and enjoyment at the start of the relevant period.

Actual enjoyment of property may consist of physical enjoyment (e.g. occupation of land) or receipt of the income produced by the property. For example, if a donor transfers legal title to their home but the donee allows them to live in it rent-free, while the donee lives elsewhere, the donee has not obtained bona fide possession. Although they have a vested, beneficial interest, they do not have actual enjoyment of the property. In contrast, if the donor pays the donee market rent to remain in the home, the donee will have actual enjoyment of the property.

GROB: Exclusion of the donor

The donor must be entirely or virtually excluded from benefitting from the property. There is no statutory definition of “virtually” but HMRC consider it to mean “to all intents” or “as good as”.

HMRC gives examples of situations where they deem the benefit to be de minimis. These include, for example, the donor giving away their home but returning for social visits and occasional overnight stays. In contrast, if the donor were to remain living in the house rent-free, this would be an example of a GROB.

Settlor Interested Trusts

Where the gift is into a trust, a GROB will arise if the settlor (i.e. the donor) is a potential beneficiary, whether or not they actually obtain a benefit. An obvious example is where the settlor is included as one of the objects of a discretionary trust.

Practice Alert: There are also income tax and CGT consequences of naming the settlor (or their spouse or unmarried minor children) as the beneficiaries of a discretionary trust. These are outside the scope of this workbook.

4.2.2 GROB: Effect of reserving benefit

The effect of a reserving a benefit depends on for how long the benefit is reserved:

(a) If the GROB subsists at the date of the donor’s death, the property is treated as if it were part of the donor’s estate for inheritance tax purposes. It is valued at the date of the donor’s death.

(b) If the donor no longer retains the benefit at the date of their death, they are treated as having made a PET on the date the reservation ceased. This deemed PET is charged in the same way as any other PET on the donor’s death but because it does not involve an actual transfer of value it will not benefit from the AE.

Because the original gift may also be chargeable as a failed PET (if it was made within the 7 years prior to death) the GROB could end up being charged to tax twice. Relief is available to prevent a double-tax charge in these circumstances. This is outside the scope of this workbook.

4.2.3 GROB: CGT consequences

Where a donor makes a GROB the property becomes the donee’s property for the purposes of CGT.

This means that CGT may be payable by the donor on the increase in value of the property since they acquired it. If the donee later sells the property, CGT will be calculated based on the increase in the value of the property between the date of the gift and the date of transfer (even though, because it is a GROB, the donee may not have actually obtained any real benefit from the property until the GROB ceased or the donor died).

In contrast, if the gift is made upon the donor’s death, there is no CGT liability in relation to gains accrued during the deceased’s lifetime for the donor’s estate, and the donee is treated as acquiring the property for its market value at the date of death. This is known as the **free CGT uplift** and can be a significant justification for leaving it until death to make a gift of valuable property.

Example: GROB subsists at death

A man transfers legal title to his house (worth £650,000 at the date of the gift) to his daughter. He continues to live in the house until his death. The daughter lives elsewhere. At the date of the death, the house is valued at £750,000.

The man has made a GROB as his daughter does not have bona fide possession and he continues to enjoy actual occupation. The house is included in the taxable value of his estate for IHT purposes at the date of death value of £750,000.

No CGT was payable on the gift of the house when it was made as it is the man's main residence. The daughter's acquisition cost for CGT purposes is £650,000. The house is not her main residence so she will be subject to CGT on the gain when she disposes of it. By the date of the man's death, the daughter has accrued a gain of £100,000 despite having had no benefit from the property. If the gift had been made on the man's death she would have benefitted from the CGT uplift i.e. inherited the property at the value of £750,000 and then could have sold the house at market value free from CGT.

Example: GROB ceases before death

A man transfers legal title to his house (worth £650,000 at the date of the gift) to his daughter. He continues to live in the house until five years before his death, when he moves into a care home. At this date, the house is worth £700,000. His daughter rents out the house and receives the rental income. The house is worth £750,000 at the man's death.

As in the previous example, the man has made a GROB. This ceases when he moves out and his daughter receives the income. The man is treated as making a failed PET (£700,000). No AE is available.

Again, the daughter acquires the house at the date of the GROB so her acquisition cost is £650,000 and she loses the benefit of the CGT uplift. Unlike the previous example, she has had the benefit of the rental income in the period since the GROB ceased (but will be subject to income tax on that income).

4.3 Pre-owned assets charge (POAC)

The POAC was introduced in the Finance Act 2004 (FA 2004). It is an annual **income** tax charge imposed upon individuals who give away certain types of property during their lifetime but subsequently obtain a benefit from that property. (You may also see it referred to as the pre-owned assets tax but note that it is not strictly accurate as it is not a tax in its own right.)

The POAC was introduced to prevent individuals exploiting loopholes in the GROB rules that allowed them to remove the value of their homes from their estates for IHT purposes, while continuing to live in them rent-free.

The POAC does not apply to property which remains within the individual's estate for IHT purposes. This means that property cannot be taxed under both the GROB rules and as a POAC. It is, however, possible to make an election for property to be taxed as a GROB instead of a POAC.

Whether an individual chooses to do this will depend on their personal circumstances and a comparison of their respective income tax and IHT positions.

4.3.1 POAC: When does the POAC apply?

The POAC is set out in s 84 and Sch 15 FA 2004. It applies to 3 different types of property:

(a) Land

(b) Chattels

(c) Intangible property held in a **settlor-interested trust**. (For these purposes '**intangible property**' means any property other than land or chattels. Examples include cash, credits in a bank account and shares.)

The rules for each type of property are different and will be considered in turn. We will also consider the circumstances in which a transaction will be excluded from the POAC. (Note that there are other exemptions and reliefs from the POAC which are outside the scope of this workbook but which, generally, are intended to prevent an individual being subject to both IHT and the POAC. There is also a de minimis exemption and a territorial exemption (which prevents the POAC being charged on individuals who are resident or domiciled outside the UK).)

POAC: Land

Two conditions must be satisfied for land to be subject to the POAC:

(a) An individual **occupies** land (either individually or with others). This condition is not always easy to assess as there is no statutory definition of occupation but HMRC's guidance indicates that it should be construed widely, with each case determined on its own particular facts.

(b) Either the '**disposal condition**' or '**contribution condition**' is met. You do not need to know how to apply these in detail but, broadly, they apply to situations where the individual has either disposed of the occupied land or has contributed (directly or indirectly) towards the acquisition of that land without obtaining a beneficial interest in it.

If the POAC applies, the benefit that the individual receives through their occupation is treated as income. Broadly, this means the individual will pay income tax on the equivalent of the market rent they would have had to pay in order to occupy the land.

POAC: Chattels

The rules for chattels are similar to those that apply to land except that the occupation condition instead requires that the individual is in possession of or has the use of the property.

Again, there is no statutory definition of either 'possession' or 'use' meaning it is a matter of fact for HMRC to assess. There is limited guidance on the meaning of either term, although HMRC does consider that the same de minimis thresholds apply here as they would in an assessment for the purposes of the GROB rules.

If the POAC applies to a chattel, income tax will be calculated by taking the market value of that chattel and multiplying it by an official rate of interest.

Example: POAC: Land

A woman lives in her solely-owned house with her adult daughter. On her daughter's 40th birthday the woman transfers legal ownership of the house to the daughter. They continue to live in the house together.

The occupation and disposal conditions have both been satisfied. The woman must pay the POAC based on the market rent she would otherwise need to pay. As this is also a GROB she could instead elect into that regime.

Example: POAC: Chattels

A man makes a gift of shares to his sister. The sister immediately sells the shares and uses the proceeds to buy a car. The man uses the car to drive to work every day and parks it outside his house.

The possession condition is satisfied as the man has the use of the car. The contribution condition is satisfied because the car was acquired indirectly using the gifted shares. He must pay the POAC (calculated by reference to the official rate of interest on the car's market value). This is not a GROB so there is no possibility of electing into that regime.

POAC: Settlor-interested trusts

As with land and chattels, two conditions apply:

(a) The trust must be **settlor-interested**, meaning there are circumstances in which the trust property is, will or may become payable to or for the benefit of the settlor. Examples include discretionary trusts of which the settlor is an object and trusts in which the settlor has a remainder interest.

(b) The trust property must include intangible property which was settled into the trust by the individual on its creation or subsequently added by them to the settlement. (It includes the invested proceeds of the original settled property – it doesn't need to remain in exactly the same form.) The settlement or addition must have taken place after 17 March 1986.

If the POAC applies, it is calculated by reference to the official interest rate that would be payable on the settled property (with credit for any income tax or CGT paid under other anti-avoidance rules.)

4.3.2 POAC: Excluded transactions

The POAC does not apply to 'excluded transactions'. These only apply to land and chattels and are broadly equivalent to other IHT exemptions. They include:

- Transfers to the individual's spouse or civil partner are exempt from POAC.
- Dispositions for the purposes of family maintenance: If a gift qualifies for family maintenance allowance it is not subject to POAC (whether it would be caught by the disposal or the contribution condition).
- Annual and small gift exemptions: If a gift qualifies for annual or small gift exemption, it is not subject to POAC (whether it would be caught by the disposal or the contribution condition).
- Arm's length sales: Disposals at arm's length to unconnected persons do not meet the disposal condition.
- Occupation seven years after cash gift: If the contribution condition is met more than seven years before the occupation/possession condition, the POAC does not apply.

4.4 General anti-abuse rule

The GAAR was enacted in Finance Act 2013 as an attempt to counteract a wide range of aggressive tax avoidance. It applies to a range of taxes, not just IHT.

HMRC guidance on the GAAR indicates that it is intended to catch arrangements which are contrary to the spirit or policy of tax law, seek to exploit perceived loopholes in the law or involve artificial arrangements aimed at avoiding tax.

Where arrangements are caught by the GAAR, it is necessary for the taxpayer (to whom the tax advantage arises) to counteract the abusive effect of the arrangements by making "just and reasonable" adjustments. As a further deterrent, a penalty (of 60% of the counteracted amount) is also payable.

HMRC decisions as to the application of the GAAR may be referred to an independent GAAR Advisory Panel for determination.

4.4.1 When does the GAAR apply?

The following conditions must be satisfied for the GAAR to apply:

(a) There is an arrangement which gives rise to a tax **advantage**: This can include a reduction, deferral or complete avoidance of tax. HMRC will usually compare the result with the tax consequences of the hypothetical transaction the taxpayer would have most likely entered into in the absence of the arrangements.

(b) The tax advantage relates to a **tax to which the GAAR applies**: This includes IHT.

(c) The arrangement satisfies the **'main purpose' test**: This applies where it is reasonable in all the circumstances to conclude that obtaining a tax advantage is the main or one of the main purposes of the arrangement.

(d) The arrangement is **abusive**: The test requires HMRC to show that entering into the arrangement "cannot reasonably be regarded as a reasonable course of action in relation to the relevant tax provisions, having regard to all the circumstances". This is known as the '**double reasonableness test**'.

4.5 Disclosure of Tax Avoidance Scheme

The DOTAS was introduced in the FA 2004. It is a reporting regime which is intended to make HMRC aware of potentially unacceptable tax avoidance arrangements at an early stage. It applies to a range of taxes, including IHT.

- DOTAS places duties primarily on 'promoters' of arrangements to inform HMRC about notifiable arrangements or proposals. Crucially, this can include legal advisers.

- Once informed, HMRC may allocate a scheme reference number to notifiable arrangements or proposals. Promoters (and their clients) are then required to provide this number to parties to the arrangements.
- Promoters must provide information to HMRC about any clients to whom they provide services connected to the notifiable arrangements.
- Parties to notifiable arrangements must also provide information to HMRC.
- HMRC has investigation and enforcement powers under DOTAS.
- Penalties apply for failure to comply (but non-compliance is not a criminal offence).

4.5.1 DOTAS: Notifiable arrangements

Under s 306(1) FA 2004 arrangements in respect of IHT are notifiable if any of the following conditions apply:

(a) The arrangements fall within any description prescribed by HM Treasury by regulations. (These are commonly referred to as '**hallmarks**').

(b) The arrangements (might be expected to) enable any person to obtain an advantage for a tax to which a relevant hallmark applies.

(c) The arrangements are such that the main benefit, or one of the main benefits, that might be expected to arise from them is the obtaining of the identified advantage.

The **hallmarks** differ depending on the tax concerned. There are three applicable to IHT. In this workbook we focus on the specific IHT hallmark, but note that there are two more general hallmarks that apply to IHT in practice.

DOTAS: The IHT hallmark

Two conditions must be satisfied for the IHT hallmark to apply:

(a) The main purpose or one of the main purposes of the arrangements is to enable a person to obtain one or more specific advantages in respect of IHT. The specific advantages are:
  - The avoidance or reduction of specified IHT charges relating to trusts and gifts to close companies. (These are outside the scope of this workbook.)
  - The avoidance or reduction of charges arising under the GROB rules (unless the arrangement instead gives rise to POAC).
  - A reduction in the value of an individual's estate which does not give rise to a chargeable transfer or PET.

(b) The arrangements involve one or more contrived or abnormal steps without which there would be no tax advantage.

HMRC guidance indicates that ordinary IHT planning will not be notifiable under DOTAS. The following are therefore not notifiable:

- Ordinary outright gifts, even where they are exempt.
- Executing a will, deed of variation or disclaimer which gives rise to an IHT exemption.
- Acquisition of property which qualifies for a statutory relief or a transfer which is specifically provided for in the IHT legislation.

The guidance indicates that the following are (or may be) notifiable:

- Creation of a reversionary lease to the lessor's children which starts so far in the future that the lessor would not still be expected to be alive.
- Creation of an employee benefit trust to benefit the settlor's children after the settlor's death.
- Settlement of shares qualifying for BPR with an arrangement to sell them back to the settlor – This **may** be notifiable, depending on the specific circumstances.

4.6 Summary

Aggressive tax avoidance is countered by HMRC taking a purposive approach to tax legislation as well as enacting and utilising a range of targeted and general anti-avoidance rules. The following are the key IHT anti-avoidance rules you need to know:

- Restriction on deduction of loans for IHT purposes – These rules prevent individuals manipulating the rules on deducting debts to artificially reduce their IHT liability.

- GROB rules –These rules prevent individuals manipulating the PET rules by giving away property but retaining an interest in it.
- POAC – This is an income tax charge which complements the GROB rules by preventing individuals using assets which they have given away (or contributed towards).
- GAAR – This is an extremely wide measure that penalises aggressive tax avoidance.
- DOTAs – This is a reporting regime that helps HMRC identify and monitor potential tax avoidance at an early stage.

6 Administration

1 Introduction to Administration

When a person dies the legal process for managing the distribution of their estate, paying debts, taxes, estate expenses and the beneficiaries is referred to as **administration**.

The people permitted by law to administer a deceased's estate are the **PRs**.

A PR appointed by **will** is an **executor** and a PR appointed by **statute** is an **administrator** (you may come across the female forms executrix / administratrix).

The court order confirming the authority of the PRs to act (in particular, their right to collect in the deceased's assets and distribute the estate) is the **grant of representation (**the 'grant').

The grant is an order of the High Court. It is necessary because it **establishes** the:

- **authority** of the PRs to act (in particular, their right to collect assets and distribute the estate); and
- **validity** of the deceased's will, or, that the deceased died intestate.

The PRs will **not** usually be able to collect or realise assets in the estate without producing the appropriate grant.

The power conferred by the grant is limited to the assets passing under the will or intestacy i.e. the **succession** estate. While the PRs may advise on practical steps to follow regarding assets passing outside the succession estate (e.g. joint tenant property) the PRs have no legal authority to deal with these assets.

An **executor** (a PR appointed by will) derives authority from the **will** and they may act from the date of **death**. The grant **confirms** this authority.

An **administrator** (a PR appointed by operation of statute) derives authority from the **grant**. They have **no** authority to act until the grant is issued.

Even though executors have a legal right to administer an estate without a grant it would not usually be practical to attempt this as most asset holders require sight of the grant before paying over funds to the executors.

Obtaining the grant is therefore a priority for all PRs and this should be done as quickly as it is practical to do so.

The topics in this chapter are grouped into one of the four main subject areas as shown below.

(a) The role of a PR, their duties, powers and liabilities.

(b) Grants of representation

(c) Applying for a grant

(d) Post-grant practice

(a) **The role of a PR, their duties, powers and liabilities.**

The topics we will consider are the:

- role of a PR
- legal and fiduciary duties of a PR

- powers a PR has to carry out the administration and the source of those powers
- personal liability of a PR
- protection a PR maybe afforded

(b) **Grants of Representation**

The topics we will consider are the:

- nature of a grant and why one is required
- three main different types of grant and when each would be used
- assets which may be distributed without a grant

Where a grant is required administration can be divided into two stages:

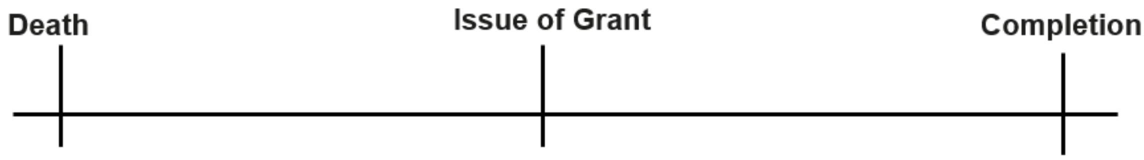


Figure 6.1: Administration timeline

(c) **Applying for a grant:**

The topics we will consider are:

- The initial steps taken following death
- Who will be appointed as PR
- The options for those who do not wish to act as PR
- The Non-Contentious Probate Rules 1987 ('NCPR')
- Reporting to HMRC and paying inheritance tax ('IHT')
- Completing the application

(d) **Post grant practice:**

The topics we will consider are:

- The collection of the deceased's assets
- The payment of the deceased's debts
- Estate tax liabilities
- Beneficiary tax liabilities
- Making distributions
- Preparation of Estate Accounts

The content which explains pre and post grant practice will guide you through the administration process in a logical order.

However, you should be aware that in practice many of these steps will be carried out in parallel to ensure that the administration proceeds quickly.

Where the specific order is important, or obtaining the grant is a pre-requisite, this will be made clear.

1.1 Summary

- Estate administration is the process of collecting in the deceased's assets, paying debts and liabilities and distributing the remaining assets in accordance with the deceased's will or the intestacy rules.
- Many of the steps in an administration can be carried out simultaneously, although in this workbook we look at each particular step in turn.
- The PRs carry out the administration process. A PR appointed by will is an executor and a PR appointed by statute is an administrator.
- The grant of representation, commonly referred to as the grant, is a court order conferring authority on the PRs to carry out the administration.

- The grant establishes the PRs right to deal with the succession estate assets.

2 The role of a PR, their duties, powers and liabilities

2.1 What is the role of a PR?

Section 25 Administration of Estates Act 1925 (AEA): a PR must 'collect and get in the real and personal estate of the deceased and administer it according to law'.

The role of the PR is to administer the estate of a deceased. They have a statutory duty to collect in the deceased's assets, ensure the deceased's debts are paid and outstanding tax liabilities are met, and then to distribute assets to the beneficiaries who are entitled (either under a will or intestacy).

A PR may (but will not always be) a beneficiary of the estate.

The role of a PR is **fiduciary** in nature. All **duties** of a PR must be performed in accordance with their duty of care. What amounts to 'due diligence' will depend upon the circumstances and complexity of the estate.

To act as a PR a person must be appointed either by the deceased's will or by operation of statutory rules – the NCPR.

A PR appointed by will is referred to as an executor. An **executor's** authority to act derives from the **will** itself and the grant acts as confirmation.

Where there is a will, but no executor appointed who is willing or able to act, or where the deceased died intestate, a PR will be appointed under the NCPR and is referred to as an **administrator**. An administrator's authority to act derives from the **grant**.

Legal title to the estate lies with the PRs by virtue of their appointment. However, PRs may decide to formally transfer the deceased's assets into their own name before distributing them to beneficiaries.

The grant is confirmation of their authority to deal with the deceased's assets.

While some assets may be administered without a grant, some institutions may be unwilling to release funds from the deceased's account into the hands of the PRs without seeing the grant.

The land registry will require a grant before transferring legal title to land into the name of the PRs.

2.1.1 Are PRs also trustees of the estate?

A PR is not automatically the 'trustee' of the estate being administered, although the role of PR and role of trustee are similar, and both are fiduciary in nature. When the estate administration is complete the role of the PR ends (although their duties may continue).

If any continuing trusts are created, the property which makes up the trust fund should be transferred to the trustees as part of the administration process. The PRs should record the date on which estate assets are transferred from the PRs to the trustees, even if the executors and trustees are the same people.

However, a PR will be a trustee of some/all of the estate property where:

- the will expressly appoints the executors to act as trustees of any trust arising.
- there is an intestacy; the PRs hold the estate generally "on trust with a power to sell" (s 33 AEA).
- a statutory trust arises under an intestacy; the PRs will be the trustees of that trust on behalf of the minor beneficiary (s.46 AEA).

Irrespective of whether a PR is formally acting in the role of trustee, many of the statutory powers and duties of a trustee that you will study, including the statutory duty of care, apply equally to PRs.

> S 68 Trustee Act 1925 (TA 1925): "the expressions "trust" and "trustee" extend to ..... the duties incident to the office of a personal representative, and "trustee" where the context admits, includes a personal representative".

S 35(1) Trustee Act 2000 (TA 2000): "this Act applies in relation to a personal representative administering an estate according to the law as it applies to a trustee carrying out a trust for beneficiaries."

In this context, the 'will' would be a trust instrument and those entitled under the will or intestacy would be the beneficiaries.

2.1.2 The role of a solicitor

There are three ways in which a solicitor would usually become involved in the administration of an estate:

(a) The solicitor has been **instructed** by the PRs for advice on the administration.

(b) The solicitor has been **appointed as executor** under the deceased's will.

(c) The solicitor has been instructed to act on behalf of a party to a **contentious probate** matter.

The solicitor's duties and level of involvement in the administration depend on the capacity in which they are acting.

Instructed by the PRs

A solicitor may be **instructed by lay PRs** if the PRs are unable to carry out the administration due to e.g. time constraints or a lack of technical knowledge or confidence to administer the estate without professional help. Ideally, a solicitor would be involved from the start but it is not unusual to be instructed part way through the administration where PRs have met with unexpected difficulties and sought assistance at this point. In this case the solicitor should check the earlier steps have been completed correctly.

If a firm is instructed by PRs the firm's **client is the PR** not the beneficiaries. The solicitor must act on the PR's instructions, not those of the beneficiaries. The solicitor should check the identity of the PRs when a file is opened in the usual manner for any new client. The cost of providing legal advice is an administration expense and the legal fees may be paid using the estate assets rather than the PR's personal funds.

Where the solicitor is advising PRs most formal documentation required for the administration will be signed by the clients even if it is prepared/drafted by the solicitor.

Appointed as executor

A solicitor can be appointed as an executor by a will.

If a solicitor acts as executor they will be a **professional** PR and their duties are owed to the estate creditors and beneficiaries.

The testator may have appointed a firm (either an LLP or the firm's trust corporation) or one or more of a firm's partners. Solicitors may act alone or in conjunction with another executor (often a family member). The solicitor will charge the estate for their services.

A testator planning to appoint a professional executor should be given sufficient information to make an informed decision about the appointment and related costs (though if lay executors are named they may choose to instruct solicitors to assist and the costs are payable from the estate). Where the estate is complex or there are family disputes then appointing a professional executor may be in the client's best interests.

Contentious matters

A solicitor may find themselves involved in matters of contentious probate work.

For example:

- the terms of the will are disputed or the validity of the will is challenged
- a disappointed beneficiary wants to make a claim under the Inheritance (Provision for Family and Dependants) Act 1975

A solicitor may be acting for the estate PRs or beneficiaries to either bring or defend a claim and the solicitor owes a duty to their client in the usual way.

While the solicitor will not be involved in carrying out the administration they will require knowledge of the administration process and the obligations of the PRs to advise their client.

2.1.3 Summary

- The role of a PR is to administer the estate of a deceased.
- The administration process requires the PRs to collect in the deceased's assets, pay the deceased's debts and the estate expenses and then distribute the estate funds to the correct beneficiaries (who are entitled under the will or intestacy).
- The role of PR is fiduciary in nature.
- A PR may also act in the capacity of a trustee of any trust arising following the deceased's death.
- Many of the statutory duties and powers that apply to trustees under the TA 1925 and TA 2000 apply equally to PRs.
- A testator may appoint a solicitor or firm to act as executor under their will.
- Where lay executors are appointed under a will, or administrators are appointed under an intestacy, the PRs may instruct solicitors to assist them.
- Solicitors may be instructed to assist with contentious probate matters.

2.2 Duties of a personal representative

To understand the administrative process is it important to understand the obligations that PRs are subject to and the powers available to them.

- The duties of a PR include key **statutory** and **common law** obligations to carry out the administration of the estate.
- PRs also have a duty to act within the scope of their **powers** when carrying out the administration- it is therefore important to understand what a PR's powers are. The extent of these powers is considered in detail later.
- The role of PR is **fiduciary** in nature and PRs are also subject to fiduciary duties.

A PR is personally liable for loss caused by a breach of duty.

The duties of a PR before the issue of a grant:

- Common law duty to **dispose of the deceased's body***(Williams v Williams)*

This is usually arranged by surviving family members and will often take place before a solicitor becomes involved.

- Statutory duty to provide information about the estate to **HMRC** and pay IHT due (Ss 216 and 226 Inheritance Tax Act 1984 ('IHTA'))

A grant will not be issued unless information required to be reported to HMRC has been delivered and any IHT due has been paid. The practical issue of how funds can be raised to pay IHT before the grant is issued is considered later in this workbook.

2.2.1 Duty to inform HMRC and pay IHT

The PRs must notify HMRC about the assets and liabilities of the estate (s 216 IHTA).

They do so by completing form IHT 400. An IHT 400 will be completed for any estate that is not excepted. You will consider the difference between excepted and non-excepted estate in another part of this workbook.

The PRs must also pay any IHT due in relation to the estate assets within their control i.e. the succession estate (s226 IHTA). The PRs may use estate funds and are not required to use personal assets to meet this liability.

These duties must be complied with **before** the grant is obtained.

2.2.2 Duties of a PR under the grant

- Collect and get in the real and personal estate of the deceased and administer it according to law
- Provide an inventory and account of the estate assets

(Section 25 AEA)

These duties are owed to the estate beneficiaries and creditors (those to whom the deceased owed money) (Tankard v Midland Bank 1942)

Duty to "collect in …."

To comply with this duty PRs must:

- Identify and locate the deceased's assets (including sums owed to the deceased)
- Identify the deceased's liabilities and creditors
- Obtain control, possession or legal ownership of the assets

The PRs will already have identified and valued the assets and liabilities as part of reporting to HMRC prior to obtaining the grant. The method of obtaining control over the assets will depend on the nature of the asset.

Duty to "…. administer estate"

Once assets have been collected in, the PRs must 'administer' the estate in full by:

- keeping the assets secure
- paying the deceased's debts and liabilities (in accordance with statutory order)
- meeting administration expenses
- paying legacies
- and distributing the residue to those legally entitled.

The duty relates only to assets which **devolve** on the PRs i.e. the succession estate. Assets which pass outside of the succession estate do not vest in the PRs e.g. joint tenant property.

Duty to provide "inventory and account"

The PRs must keep a list of assets and values (inventory) and a record of the steps they have taken in the administration (account). This information is usually recorded in the '**Estate Accounts**'.

A beneficiary or creditor may ask to see the estate accounts. If the PRs refuse, or have not maintained adequate records, an application to court (in accordance with the NCPR) for an order to produce an inventory and account may be made.

While it is usually the beneficiaries who have an interest in seeing the estate accounts, a creditor with a claim against the estate may want to find out more information.

2.2.3 Duty of due diligence

PRs are free to make their own decisions about how best to carry out their duties but must always act within the scope of their powers conferred by the will/codicil and/or statute. Whatever the scope of the PRs powers, PRs must always act within them and an ultra vires act will be a breach of duty.

However, PRs do have a general duty to carry out the administration with **due diligence** and within a **reasonable time**. What amounts to due diligence will depend on the facts of the case but if the court decides a breach of duty has occurred it can make a declaration as to the breach and direct an inquiry as to damages.

PRs should complete the administration within 12 months of the date of death (s 44 AEA) known as the '**executor's year**' (but applies also to administrators). If the administration takes longer than 12 months this does not necessarily mean a breach has occurred, but from this time PRs are required to justify any delay.

Although a PR has an obligation to complete the administration within a reasonable time and their role ends once the administration is finalised, the appointment is for life. This means:

- If additional assets are discovered after the administration is complete the PRs have a duty to administer these assets.
- There is an ongoing risk of personal liability if creditors or beneficiaries, who were not known of at the time, come to light after the estate is fully administered and demand their entitlement.

2.2.4 Statutory duty of care

In addition to the general duty of due diligence, by virtue of s 35 TA 2000 PRs are subject to the same **statutory** duty of care (s 1 TA 2000) as trustees when the PRs exercise the powers under the TA 2000 to which the duty applies.

The s1 duty of care imposes a higher standard for professional PRs such as solicitors than lay trustees.

A higher standard is also imposed upon those possessing special knowledge or experience, as well as those who hold themselves out as having such special knowledge or experience.

The statutory duty of care will apply when PRs exercise their power to invest, delegate, insure and purchase land.

2.2.5 Fiduciary Duties

As noted earlier, a PR must comply with their duties relating to the administration process and fulfil these using the powers conferred on them by statute and/or will/codicil.

In addition, the role of a PR is fiduciary in nature so PRs are also subject to the wider fiduciary duties. PRs must not, unless authorised by the court or fully informed beneficiaries:

- Place themselves in a **position of conflict** e.g. a PR may not purchase an asset from the estate even if this is for a fair value.
- **Profit** from their position. Payment for services will not constitute a breach of the 'no profit' rule if a PR acts in a **professional** capacity or the payments are authorised under the will.

2.2.6 Summary

- PRs are subject to various statutory and common law duties, including a duty to report to HMRC and pay IHT, collect in and administer the deceased's estate and provide an inventory and account of the administration.
- PRs have a duty to administer the estate according to law and act with due diligence.
- PRs should complete the administration of an estate within the "executor's year" (12 months from the date of death)
- PRs derive their powers to carry out their duties from statute and from a testator's will / codicil and must act within those powers.
- The role of a PR is fiduciary in nature and a PR must comply with the 'no conflict' and 'no profit' duties.

2.3 Powers of personal representatives

To understand the administrative process is it important to understand the obligations that PRs are subject to and the powers available to them.

- The duties of a PR include key statutory and common law obligations to carry out the administration of the estate.
- PRs must carry out their duties in accordance with the powers conferred on them - it is therefore important to understand the scope of their powers.
- The role of PR is fiduciary in nature and PRs are also subject to fiduciary duties.

To carry out their administrative duties PRs require the power to deal with the estate assets e.g. to sell assets.

The PRs must always act within the scope of their powers and an ultra vires act will give rise to a breach of duty. Therefore, at the start of the administration the PRs must consider the powers available to them.

PR powers primarily derive from two sources:

- Statute
- Will/codicil

Statute:

- If the deceased died intestate **only** statutory powers will apply.
- If the deceased left a will, statutory powers apply to the **extent these do not conflict** with express provisions i.e. statutory powers apply in default of any alternative contained in the will.

Will/codicil:

- If the deceased left a will, it may (but does not have to) contain express administrative provisions dealing with PR powers.
- Express clauses may confer **additional** powers that go beyond statutory provisions or may **exclude / modify** statutory powers.

- Express provisions in a will **take priority** over statutory powers.

2.3.1 Statutory powers

The AEA confers powers specifically on PRs.

The TA 1925 and TA 2000 and Trusts of Land Appointment of Trustees Act 1996 include powers for 'trustees' and these powers also apply to PRs.

We will explore the statutory powers of PRs to:

- Sell, charge or lease
- Appropriate
- Insure
- Invest
- Charge for PR services
- Delegate powers
- Appoint trustees

Power to sell, charge or lease

ss 33 & 39 AEA

The PRs have wide powers to sell estate assets.

The PRs may need to do this soon after the grant is issued so they can repay the deceased's debts and any loan taken out to meet the inheritance tax liability.

The choice of asset to sell is considered elsewhere in the workbook.

Power to appropriate

s 41 AEA

PRs have the power to appropriate an asset in satisfaction of a beneficiary's entitlement and PRs can decide which assets are used to meet this.

The power is subject to the following rules:

- A specific beneficiary must not be prejudiced.
- Consent of the recipient beneficiary is required.
- The value of the asset must be considered at the date of transfer/appropriation rather than the date of death.

If the value of an asset **exceeds** the beneficiary's entitlement, the PRs may not appropriate.

If the value of the asset is **less** than the entitlement, the PRs may appropriate and then make a balancing cash transfer.

It is common for a will to include an express clause removing the need to obtain the consents required by the section.

Example: Power to Appropriate

- A testator (T) left a will which gave £25,000 to his friend (F) and the rest of his estate to his sister (S).
- F wants the PRs to give her T's antique desk instead of giving her £25,000 in cash. The desk was worth £20,000 at T's death but is now worth £18,000.

The PRs can do this:

- because the desk was not specifically given to someone else by the will,
- provided F consents (not an issue as F requested the appropriation); and
- provided F receives a further £7,000 so the total value received is equal to the amount of the gift.

Power to insure

s 19 TA 1925

PRs have the power to take out insurance to insure estate assets comprehensively and for full value.

PRs are authorised to pay the insurance premiums out of either estate income or capital.

Power to invest

ss 3 - 8 TA 2000

If PRs retain assets for a period of time they have a **duty to preserve the estate** and actively invest.

The **general power of investment** in s 3 TA 2000 applies to PRs just as it does to trustees. PRs are also permitted to acquire freehold or leasehold **land** in the UK in accordance with s8 TA 2000.

PRs must carry out **regular reviews** of investments (commonly annually).

When exercising the general power of investment or reviewing their investments the PRs must have regard to the **standard investment criteria** in s4 TA 2000.

The s 5 TA 2000 duty to obtain **advice** also applies unless the PRs reasonably conclude that in the circumstances it is unnecessary or inappropriate.

Power to charge for services

s 29 TA 2000

Professional PRs e.g. solicitors may claim **reasonable** remuneration for their services (i.e. time spent carrying out the administration) provided:

- they are **not acting alone**, and
- that co-PRs give their **written consent**.

A lay PR or, a professional PR who is acting alone, needs to be given express power in the will to charge for their services.

Section 28 TA 2000 makes it clear that payment as remuneration for services is not to be treated as a gift under s 15 Wills Act 1837.

Reimbursement of PR expenses

s 31 TA 2000

All PRs (whether or not they are acting in a professional capacity) may reimburse themselves for **expenses** properly incurred when acting on behalf of an estate. For example, travel costs incurred in the course of carrying out estate administration.

This is not a power to charge the estate for time spent on the administration process, even if, for example, the PR has had to turn down work to carry out this role.

Power to delegate

s 11 TA 2000

PRs are permitted to employ agents and delegate their powers, except for the following:

- how and whether assets should be **distributed**
- whether fees or costs are payable from **income or capital**
- the **appointment of trustees** /nominees/custodians

PRs may not appoint a beneficiary as their agent but may appoint one of the PRs if they are sufficiently qualified.

If delegation is required, the PRs must:

- do so in **writing** to the agent and
- provide them with a **written policy statement** which the agent must agree to comply with (s 15 TA 2000).

The use of an agent and the terms of the policy document need to be kept under **review** (s 22 TA 2000).

It is common to delegate investment powers and law firms often have links with financial advisers to whom they refer work.

Power to appoint trustees (gifts to minors)

s 42 AEA

Where a legacy is given absolutely to a minor there is no general power to pay the legacy to the beneficiary until they reach 18 because a **minor cannot give valid receipt.**

The PRs therefore need to hold the relevant assets on trust for the minor, investing these assets in accordance with the statutory powers and utilising their statutory powers of maintenance and advancement where appropriate, until the minor attains 18. These powers are held in their capacity as trustee.

However, under s 42 AEA PRs could instead appoint trustees (usually the minor's parent/guardian) of the legacy and give the legacy to the trustees rather than retaining it.

Power to accept receipt from parent

It is thought that under s 3 Children Act 1989 a minor's **parent or guardian** has the power to give a good receipt to the PRs on behalf of a minor. However, this power is commonly included expressly for clarity.

If the testator does not want the parent or guardian to receive the legacy on behalf of the minor, the will can be drafted expressly to give the legacy to trustees to hold until the child reaches majority.

Note that an express clause within a will which permits PRs to accept receipt from a minor beneficiary aged **16** or older is effective.

Power to run a business

If a testator was a **shareholder,** the 'company' as an entity will survive the testator's death. The company articles and / or shareholders agreement will often contain provisions that apply on the death of a key shareholder.

If the testator was a **partner** in a business partnership, the partnership agreement should contain terms which enable the partnership to continue after the death of a partner.

If a testator ran a business as a sole trader business, there is a limited **common law** power to enable PRs to sell the business as a **going concern within a year of death**.

PRs may only access assets in the business at the date of death (not other estate funds) and are personally liable to business creditors (but may indemnify themselves from the estate for liabilities incurred when running the business for realisation only).

As the default power is limited it is common to include an express power so PRs can run/manage a sole trader business in accordance with the testator's wishes.

2.3.2 Express Powers (in Will or Codicil)

In practice most firms draft express PR powers using a will precedent that already contains a set of express provisions (some of which restate the existing statutory position and others which amend it).

Further amendments are then made on a case by case basis.

Many firms refer to or incorporate the Society of Trusts and Estate Practitioners (STEP) **provisions** into the wills they prepare.

These are a set of express powers drafted by STEP and are recognised by the Law Society.

The STEP provisions contain the powers considered most useful for the greatest number of estates. You will come across these provisions in practice but the content of the provisions is beyond the scope of this workbook.

Can a joint PR act alone?

If more than one PR is appointed then, similarly to trustees, they are required to make decisions together and should exercise discretionary powers **unanimously** (unless the PRs are joint executors appointed by will and the will states otherwise).

However, when exercising a lawful power to **sell or transfer** an estate asset during the administration, a jointly appointed PR will usually have the authority to act alone. For example: a PR acting alone has authority to pass title to the deceased's personal possessions to a third party and so bind the other PRs.

Note that, as an exception, a sole PR may not deal with stocks and shares which are registered in the joint names of the PRs.

2.3.3 Summary

- PRs derive their powers to carry out their duties from statute and from a testator's will / codicil.
- PRs must act within the scope of their powers to avoid acting in breach of duty.
- Statutory PR powers apply by default but where express provisions within a will conflict, the express powers take priority.
- Many of the PR powers are identical to those that apply to trustees of a trust.

2.4 PR liability & protection

To understand why a PR will be concerned about their own personal liability you must appreciate the obligations that PRs are subject to:

- PRs have **statutory** and **common law duties** to carry out the administration of the estate.
- PRs may only exercise the **powers** conferred on them by statute and/or will.
- The role of PR is **fiduciary** in nature and PRs are subject to fiduciary duties.

A PR is **personally liable** for losses that result from a breach of duty which they commit. A PR may also be liable for breaches committed by other PRs if they did not make a reasonable effort to monitor the co-PRs' conduct.

2.4.1 PR Liabilities

PRs owe duties to the estate beneficiaries and creditors.

A claim of action against a PR for breach of their PR duties is called a devastavit (wasting of assets) and may be brought where there is loss to the estate because of PR wrongdoing. The claimant will seek a court order that the PR makes good the loss using their personal assets.

Even if there is no loss, if a breach of fiduciary duty has occurred, the claimant may seek an account of unauthorised profit and/or for a transaction to be set aside.

A claim against a PR may be based on:

- Maladministration
- Misuse of assets
- Negligence
- Breach of fiduciary duty

Maladministration

This could include:

- Incorrectly administering the estate by making distributions to the wrong beneficiaries
- Using the residuary estate to meet liabilities which should have been paid from other parts of the estate
- Paying legacies before debts without retaining sufficient funds for creditors

Misuse of assets

This could include:

- Making personal use of the estate assets

Negligence

This could include:

- Unreasonable delay in carrying out the administration
- Failing to invest or making poor investment decisions in breach of the duty of care

Breach of fiduciary duty

This could include:

- Breach of the no conflict rule
- Breach of the no profit rule
- Self-dealing

Removal as PR

In addition to any personal liability, a PR who fails to carry out their duties properly may be effectively removed from the role by:

- A court order under s 50 Administration of Justice Act 1950 appointing a replacement PR
- An administration action, where the court would take over the administration itself

2.4.2 Protection for PRs

If PRs also act in a trustee capacity, they will be subject to **trustee duties** and be personally liable for loss suffered as a result of a breach of trust.

There are a number of ways of obtaining protection from personal liability, many of which are equally applicable to PRs and trustees, but in this workbook we focus on the action that PRs can take for breach of their duties in that capacity.

We will consider the following methods of protecting PRs:

- Seeking court directions
- Section 48 Administration of Justice Act 1985 (AJA 1985) application
- Section 27 TA 1925 notice
- Benjamin Order
- Presumption of Death Act
- Insurance
- Payments into court
- Indemnity from beneficiary
- Section 61 TA 1925

Court directions

If PRs foresee difficulties in the administration (e.g. the construction of the will is ambiguous) and are concerned this may lead to them incurring personal liability (e.g. by making distributions to the wrong beneficiaries) they may seek court guidance.

Administration proceedings could take the form of:

- an administration action application to have the estate administered by the court.
- specific relief, an application for guidance on a particular matter.

Section 48 Administration of Justice Act 1985

Although seeking court directions is the most prudent course of action, it is also very expensive and time consuming.

In cases where there is a question over the construction of the will, the PRs may instead make an application under s 48 AJA 1985 to distribute in accordance with a written legal opinion (providing the opinion is given by a person who meets the criteria in s 48 AJA 1985 and there is no dispute making it inappropriate for the court to grant permission to rely on the opinion).

Section 27 Trustee Act 1925

PRs who distribute the estate remain personally liable to unpaid beneficiaries and creditors, even if the PRs were unaware of their claim at the time of the administration.

To prevent liability to unidentified beneficiaries and creditors, the trustees may publish a notice of their intention to distribute to known beneficiaries **two months** after the date of the advertisement.

The notice must be placed in:

(a) The London Gazette,

(b) A newspaper circulating in the area in which any land held on trust is situated, and

(c) Any other newspaper which is appropriate e.g. if the deceased owned a business, the relevant trade paper may be appropriate.

Section 27 TA 1925 only protects against claims by **unknown beneficiaries and creditors**.

It does not protect the PRs if they distribute assets ignoring the claim of a **known but missing beneficiary or creditor**.

It also does not protect other beneficiaries who receive more than their entitlement to the estate. A disappointed creditor/beneficiary may still claim against the beneficiaries.

This means **PRs who are also beneficiaries** may still be liable to other beneficiaries. Section 27 TA 1925 **protects PRs from claims against them in their capacity as PR** but not in their capacity as beneficiary.

Benjamin Order

In the case of **known but missing beneficiaries**, the PRs will not be able to rely on s 27 TA 1925 and may instead seek a Benjamin Order permitting them to distribute the estate on the basis that the missing beneficiaries have died.

Although this is the common situation in which a Benjamin Order is used, it might also be used to permit the trustees to distribute the estate on the basis of a different assumption, such as the assumption that the missing beneficiary had no children.

The order relieves the PRs from personal liability if they administer an estate in accordance with the court order and the assumption turns out to be incorrect. As with s 27 TA 1925, a disappointed beneficiary or creditor can still make a claim against other beneficiaries to whom the property had been distributed.

Before an order is awarded the PRs must make full enquiries to attempt to establish the true position (Re Benjamin 1902) and demonstrate there is no reasonable prospect of knowing the true position without disproportionate expense.

Presumption of Death Act 2013

The PRs may make an application under this act for a court order declaring that a person thought to have died, or not known to have been alive, for **seven years or more** has **died**.

The order will confirm the presumed date of death and relates generally to the deceased's property and affairs.

If the criteria for application can be met it may be quicker and easier to use this process rather than requesting a Benjamin Order.

Insurance

The PRs could purchase insurance to cover the risk that the beneficiary or creditor returns after the administration is complete and makes a claim against the PRs for the share they should have received.

However, it may not be possible to obtain insurance if the risk is too high. Insurance premiums may also be very expensive (although are likely to be less expensive than seeking a Benjamin Order).

Payment to court

PRs could pay the legacy amount into court and distribute the balance of the estate. Although the person who would otherwise benefit from the share paid into court may not favour this option.

While the purchase of insurance would be a preferable option re a missing beneficiary, a payment into court may be suitable where a beneficiary can be located but is refusing to accept their inheritance.

Indemnity

The PRs could seek an indemnity from the beneficiaries they can trace.

The beneficiaries promise to reimburse the PRs for any loss the PRs suffer as a result of being sued by a disappointed beneficiary or creditor.

An indemnity from the existing beneficiaries is only as good as the person giving it. Also, it may prove difficult in the future to trace those providing the indemnity. As such this may not be a preferred option for the PRs.

Exoneration by the court

Under s 61 TA 1925 a PR may apply to the court for an order exonerating them, in whole or part, from personal liability for breach.

An order will not be made unless the court considers that the PR:

- acted honestly and reasonably,
- ought fairly to be excused for:
  - the breach of trust and
  - omitting to obtain directions of the court in the matter

Section 61 TA 1925 refers to trustees, which includes a PR for these purposes.

Exemption clauses in a will

The testator's will may contain clauses which exclude or restrict liability for a PR's wrongdoing.These clauses may cover a range of scenarios from innocent mistake to gross negligence and may offer different levels of protection to lay and professional PRs.

See the example below for a clause which exempts lay executors from liability (but still allows claims against professional executors) and also excludes the statutory duty of care for all executors:

Example: An exemption clause

"None of my Executors (other than a professional executor) shall be liable for any act or omission save for an act or omission involving willful fraud or dishonesty and I further declare the duty of care contained in section 1 of the Trustee Act 2000 shall not apply to any of my Executors."

2.4.3 Summary

- PRs are personally liable for a failure to carry out their duties properly. Beneficiaries and creditors can bring a claim for devastavit against a PR.
- Where PRs are unsure of their obligations, they may seek court directions or make a s 48 AJA 1985 application to rely on a written legal opinion.
- To avoid liability to an unknown beneficiary/creditor who comes forwards after the estate has been distributed the PRs should follow the notice procedure in s 27 TA 1925.
- Where there is a known but missing beneficiary/creditor the PRs have a number of options available to minimise the risk of personal liability e.g. obtaining a Benjamin Order or taking out insurance.
- A PR may be protected generally by exemption clauses within a will.

3 Grants of Representation

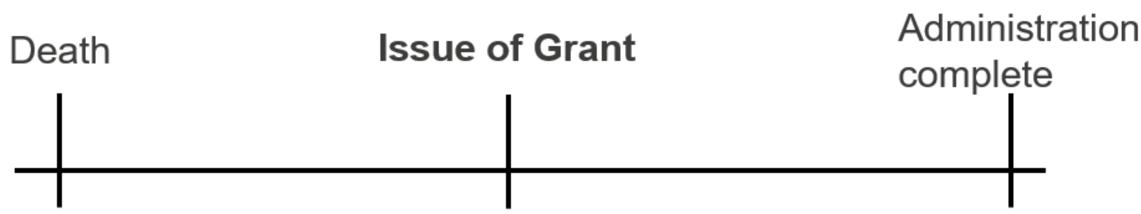


Figure 6.2: Administration timeline

The grant is a court order confirming the authority of those named in it to administer the estate. 'Grant' is a generic term for any grant of representation. This workbook considers the following three main kinds of grant:

- Grant of probate
- Grant of letters of administration (with will)
- Grant of letters of administration

High Court of Justice England and Wales
Oxford District Probate Registry
Combined Court Building
St Aldates
OX1 1LY
Oxford
0300 303 0648

Grant of Probate

Case Reference: 1547059435121136
Date of Issue: 10th JanuaryXX

Jane Doe made an application to this Court for a grant of probate and declared the following information.

John Doe of 12 Walton Avenue Sutton Surrey SM3 9QZ

Died on **1st January**XX domiciled in **England and Wales**

The Last Will and Testament of **John Doe** (An official copy of which is available from the Court) 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 Walton Avenue Sutton Surrey SM3 9QZ**
and **FRED DOE** of **12 Walton Avenue Sutton Surrey SM3 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 £3,321

DISTRICT REGISTRAR

Extracted personally

If you wish to validate the information contained within this document please call 0300 303 0648

Figure 6.3: Sample grant of probate

This is a sample grant of probate issued by HMCTs.

You will note that the grant confirms the:

- Identity and date of death of the deceased
- Deceased left a valid will
- Identity of the executors appointed
- Value of the estate to which the grant applies (the succession estate)

An official signature, stamp and holographic seal are added.

3.1 Requirement for a grant

When a person dies it is necessary for someone to administer their estate. The person with the legal right to carry out the administration is the PR.

To comply with their duty to collect in and administer the deceased's estate, the PR will usually need to provide evidence of their appointment.

The grant provides proof of the PRs authority to act and is therefore required.

Some assets can be dealt with without a grant but unless the estate contains only these assets a grant is needed.

The authority of the grant only extends to the assets which actually vest in the PRs - i.e. **succession estate**.

Legally, the succession estate vests in the hands of an executor from death, but does not vest in the hands of an administrator until their appointment is confirmed by the grant.

3.2 Main types of grant

The type of grant required for an estate depends on the circumstances; primarily whether the deceased left a valid will or not, and, whether any executors appointed under the will are going to act as PR.

The three main types of grant you will come across are:

- Grant of probate
- Grant of letters of administration (with will)
- Grant of letters of administration

3.2.1 Grant of probate

The grant of probate is required for estates where:

- The deceased left a **valid will**
- The will **appoints executors**
- At least one of the executors appointed is **going to act**

The grant of probate is issued in the name(s) of those executors who apply.

A grant of probate is required even if the will does not dispose of any/all of the deceased's property.

For example, the whole or part of the estate is left to a pre-deceased family member by will and no substitution provisions apply.

If the appointment of an executor under the will is limited e.g. to specific assets, jurisdiction or by time, then this will be reflected in the authority conferred by the grant.

Only those named may take out the grant and they cannot simply give that right to someone else. However, a named executor may formally appoint someone to act on their behalf under a **power of attorney**.

3.2.2 Grant of letters of sdministration (with will)

A grant of letters of administration (with will) is the appropriate grant where:

- the deceased left a valid will
- but the will appoints no executors who are willing/able to act.

This is the correct grant even if the will fails to dispose of all the estate.

Administrators are appointed under the NCPR. **Rule 20** applies and lists, in order of priority, those entitled to apply for the grant.

3.2.3 Grant of letters of administration

A grant of letters of administration is the appropriate grant where:

- the deceased died without having made a valid will (i.e. died intestate).

This may be because they did not make a will at all, had revoked a will they did make, or the will they made is invalid.

Administrators are appointed under **NCPR 22** which lists, in order of priority, those entitled to apply for the grant.

3.3 Assets without a grant

The PRs will usually need a grant of representation to confirm their authority to collect in, realise and distribute the deceased's assets.

However, no grant is required to deal with assets that fall outside of the succession estate, and there are exceptions for assets that do fall within the succession estate.

Where the following assets are included in the succession estate, no grant is required for the PRs to deal with them:

- Assets which can be distributed under the Administration of Estates (Small Payments) Act 1965
- Personal household possessions

- Cash

3.3.1 Administration of Estates (Small Payments) Act 1965

Orders made under this Act permit payments to be made to persons who appear to be beneficially entitled to the assets without formal proof of title.

There is a restricted category of assets to which the Act applies set out below:

- National Savings (inc. Bank accounts, Savings Certificates and Premium Bonds)
- Friendly Society and Industrial and Provident Society deposit accounts.
- Arrears of salary and wages
- Pensions where the deceased was a member of the police, fire authority, air force or army.
- Building society accounts

There is an upper financial limit of £5,000 per asset. If a holding exceeds this financial limit no payment can be made under the Act and a grant will be necessary to establish title to the whole sum, not just that in excess of the £5,000 limit.

The provisions only make payments permissible; they do not compel those holding the assets to do so.

In practice, these statutory provisions are rarely required because most banks and financial institutions adopt their own policy and will release sums (commonly up to £15,000 but sometimes larger amounts) without sight of the grant.

Each institution will have its own evidential requirements before closing an account. Most will require sight of the death certificate and will (or confirmation of entitlement under intestacy) as evidence that the recipient is entitled to the money. The PRs may also be expected to sign an undertaking confirming their right to administer and give an indemnity to the bank in the event the payment is made to the wrong person.

Example: Administration of Estates (Small Payments) Act 1965

An estate incudes:

- A building Society account worth £60,000
- Premium Bonds worth £2,000
- A high street bank current account worth £10,000

Building Society Account: A grant is required because the value is greater than the statutory limit under the Act.

Premium Bonds: The Act would apply and these could be administered without a grant.

Current Account: although technically not subject to the Small Payments Act, the bank, following its own polices, may agree to close the account without sight of the grant.

3.3.2 Personal possessions and cash

Title to personal household possessions passes by delivery and proof of ownership is not required when they are sold (with the exception of cars where registration documents are needed).

Therefore, PRs are normally able to dispose of chattels without having to produce formal proof of their authority.

This applies where items were owned solely by the deceased. If there was a joint owner they would need to consent before the PRs could effect a sale.

Before any items are sold PRs should check whether any particular items were gifted specifically by the deceased's will.

A PR does not need a grant to take possession of cash found at the deceased's home.

3.3.3 Property that does not devolve on PRs

Assets which pass **outside of the succession estate** (in other words, cannot pass by a will or intestacy) do not devolve on the PRs and do not require a grant to be released.

For these assets the PRs will need to produce:

- Death certificate
- Any other documentation the asset holder requires

Here is a reminder of the items passing outside of the succession estate and the process for dealing with these following death:

Property owned as joint tenants (commonly land and bank accounts)

On the death of one owner the property passes automatically to the survivor under the rules of survivorship.

The land registry / bank will transfer the title into the name of the surviving owner.

Life policies written in trust, discretionary pension lump sums nominated for a third party, and other nominated assets

On production of the death certificate these funds would be payable to the named beneficiary.

Donationes mortis causa

The deceased would have transferred ownership or control of the asset to the beneficiary during their lifetime.

Assets held in a trust in which the deceased had an interest

The trustees should be notified of the death. The trust deed will determine what happens to the trust fund (if anything) following the death of a beneficiary.

3.3.4 Practical considerations

There are advantages to having some assets within an estate that can be administered without a grant:

- releases money which can be made available to beneficiaries without waiting for the grant or administration to be completed
- provides a source of funds to meet expenses, including IHT
- if the estate is small or comprises only assets which do not require a grant, it can be a cost-effective way to carry out the administration

Note that unless an estate comprises only assets where a grant is not required the PRs will need to obtain a grant.

Once a grant is required, it is usually simpler to administer the whole estate with reference to the grant, rather than try and administer some assets without it, even if in principle that might be possible.

3.4 Summary

- A grant is required to confirm the authority of the PRs to administer a deceased person's succession estate assets.
- An executor's authority to act derives from will and is confirmed by the grant.
- An administrator's authority to act derives from their appointment under the grant.
- A grant of probate is the correct grant where the deceased left a valid will that appoints executors, at least one of whom is going to act.
- The executors in the will who make the application are named on the grant.
- A grant of letters of administration with will is the correct grant where the deceased left a valid will but no executors are acting.
- Administrators are appointed under Rule 20 NCPR.
- A grant of letters of administration is the correct grant where the deceased died intestate. Administrators are appointed under Rule 22 NCPR.
- A grant is usually required to enable PRs to administer the estate assets. However, some assets can be dealt with without a grant.
- Some accounts worth up to £5,000 can be released without a grant (but do not have to be) under the Administration of Estates (Small Payments) Act 1965. More generally, many other

banks and financial institutions will release sums up to £15,000 (sometimes more) without sight of a grant and in accordance with their own policies.

- Household possessions and cash in the home can be dealt with without proof of title so a grant is not required.
- Assets passing outside of the succession estate do not require a grant because these items do not devolve on the PRs.

4 Applying for the Grant of Representation

4.1 Pre-Grant Steps

PRs will not necessarily be involved in all of these and some would usually be carried out by relatives.

Solicitors are more likely to advise on the technical, legal rules relating to the administration rather than the early practical steps.

There is no strict chronological order to the pre-grant steps and many of them will take place simultaneously.

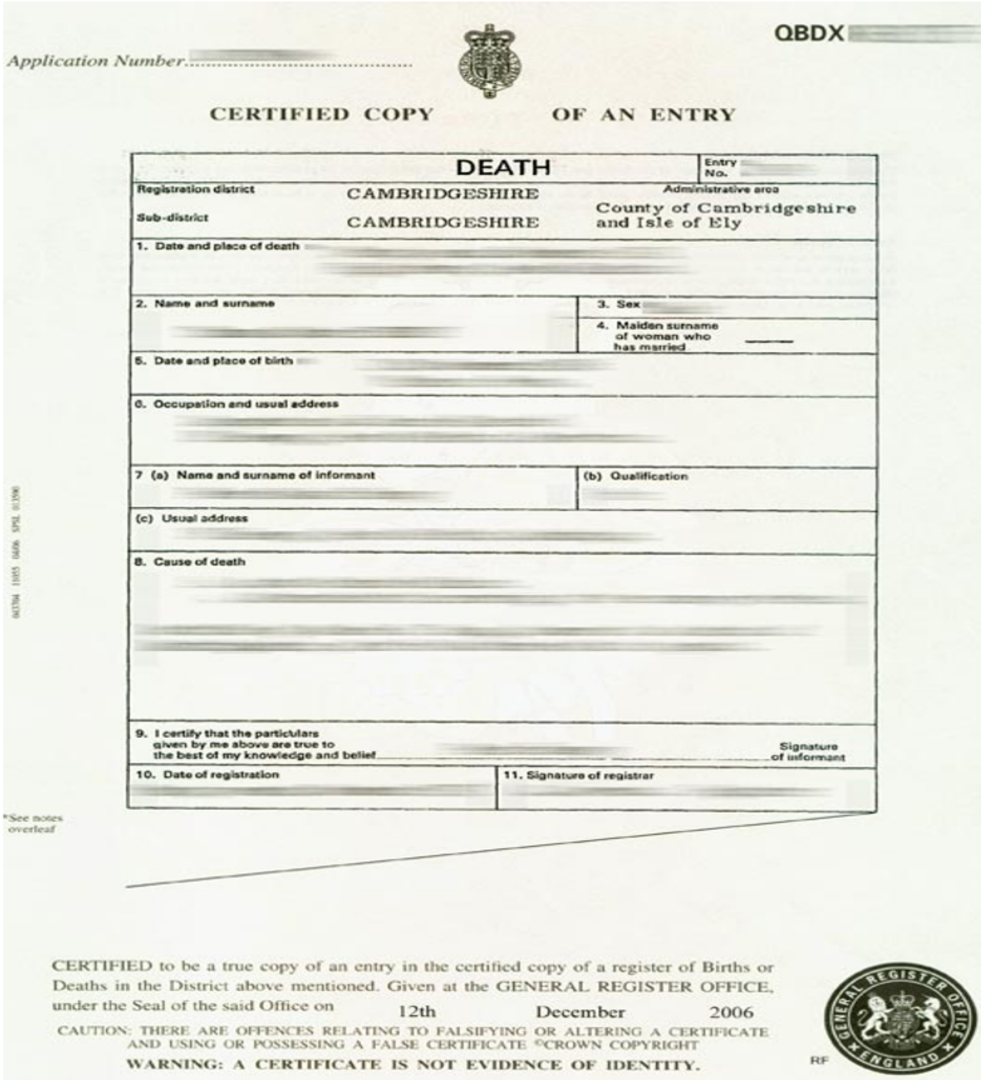
4.1.1 Death Certificate / Funeral

PRs may register a death (and have an underlying duty to deal with the body) but this is more likely to be done by the family who then provide the PRs with the death certificate. The death must be registered before a funeral can take place.

PRs need official copies of the death certificate to send to institutions where the deceased held assets e.g. banks / building societies/ insurance companies.

Government organisations such as HMRC / DVLA / DWP can be notified of the death via a centralised service when registering the death – if the service is not used PRs should notify each institution individually.

It is useful for a solicitor to keep a copy death certificate on file as it confirms the deceased's name, date of death, birth, and other key information.



QBDX

Application Number...

CERTIFIED COPY OF AN ENTRY

DEATH		Entry No.
Registration district: CAMBRIDGESHIRE	Administrative area: County of Cambridgeshire and Isle of Ely	
Sub-district: CAMBRIDGESHIRE		
1. Date and place of death		
2. Name and surname	3. Sex	
	4. Maiden surname of woman who has married	
5. Date and place of birth		
6. Occupation and usual address		
7 (a) Name and surname of informant	(b) Qualification	
(c) Usual address		
8. Cause of death		
9. I certify that the particulars given by me above are true to the best of my knowledge and belief	Signature of informant	
10. Date of registration	11. Signature of registrar	

*See notes overleaf

CERTIFIED to be a true copy of an entry in the certified copy of a register of Births or Deaths in the District above mentioned. Given at the GENERAL REGISTER OFFICE, under the Seal of the said Office on 12th December 2006

CAUTION: THERE ARE OFFENCES RELATING TO FALSIFYING OR ALTERING A CERTIFICATE AND USING OR POSSESSING A FALSE CERTIFICATE ©CROWN COPYRIGHT

WARNING: A CERTIFICATE IS NOT EVIDENCE OF IDENTITY.

GENERAL REGISTER OFFICE ENGLAND

RF

Figure 6.4: Example death certificate

Family members usually arrange the funeral but PRs (or instructed solicitors) may do this if necessary.

There is a moral, rather than legal, obligation to follow funeral wishes set out in a will. The will should be checked for specific instructions e.g. did the deceased request burial or cremation, should a particular religious ceremony be followed, or may the body be used for medical purposes?

The cost of a funeral is a post-death administration expense payable from the estate funds (s 34(3) AEA) and may be taken into account when calculating IHT.

The deceased may have taken out insurance to pay for their funeral or purchased a pre-paid funeral plan during their lifetime (where funeral arrangements are made and paid for before death).

4.1.2 Secure the estate assets

The PRs have a duty to preserve the value of the estate and may be personally liable to account for loss or damage to the estate assets.

The PRs should take steps to ensure valuable items and documents are kept safe.

If a property is left vacant it should be secured and the insurers notified. If a vehicle will be left unattended and off road, the insurers and the DVLA should be notified.

The PRs should consider the security of any digital assets and the possible closure of social media accounts.

4.1.3 Locate Will / Codicil

At the start of the administration process the PRs should obtain the **original will** and any codicils. A copy will not suffice for the purposes of obtaining a grant unless special permission has been obtained from the Probate Registry.

The PRs should satisfy themselves that the will is **valid**, e.g. it was correctly executed and witnessed.

A check for obvious failings with the drafting process such as common drafting errors or missing clauses should be carried out. If any documents have been incorporated into the will these should be obtained too.

Any codicil to the will should be reviewed in the same manner as the will.

The solicitor should ensure that the codicil is drafted in a way that makes logical sense when read together with the will.

Essentially, the PRs should be aware as early as possible of any potential problems so that steps can be taken immediately to rectify the situation.

If it appears the deceased died **intestate** (without having made a will) the PRs should make enquiries to confirm this before proceeding with the administration.

If there is evidence a will was made, but it cannot be located, the PRs will need to find out what happened. Was it revoked or is it merely lost? If a valid will has been lost appropriate steps must be taken to re-construct it.

There are commercial organisations which charge a fee for operating a search service against a national wills register. It is entirely optional to register a will on the national register.

While only the executors appointed in a will are legally entitled to see it before a grant is obtained, once the grant is issued the will is a public document

4.1.4 Basis of distribution

The will plus any codicils should be read in full and the beneficiaries identified. If there is no will, the **intestacy** rules determine who benefits. Those entitled should be informed.

The PRs should provide the beneficiaries with a realistic timescale for distribution of the estate.

The administration process often takes longer (months rather than weeks) than some beneficiaries expect and it is best to manage expectations from the start.

4.1.5 Schedule of assets & liabilities

The PRs must compile an accurate list of the deceased's **assets** and **liabilities** to:

- Identify and value estate assets
- Identify the deceased's creditors (to whom the PRs owe a duty as well as the beneficiaries)
- Work out what steps are required to manage the distribution of the assets
- Calculate the IHT due (with reference to the date of death values)
- Establish whether the estate is solvent
- Estimate what each beneficiary is entitled to

It is not possible to obtain the grant or calculate the IHT without this information.

Creating a complete list is not always straight forward or 100% accurate. A PR relies on family members to provide information about the deceased's assets and organisations to contact where the deceased may have had dealings.

It is not uncommon to start the administration with a theoretically complete list only to discover new assets later on that no one knew about.

If there are no family members a PR may need to search the deceased's home for evidence of what they owned e.g. for bank statements or insurance policy documents.

Once a schedule of assets and liabilities has been prepared the PRs should contact any appropriate organisation to:

- notify them of the death and provide a copy death certificate (if this has not already been done)
- request confirmation of the value of the asst at the date of death
- request instructions for how to close an account / transfer ownership of the items to the PRs

To establish the value of the following commonly held assets:

- **Bank accounts**: PRs should request from the bank a summary of the account balance on the date of death **plus** any accrued interest.
- **Joint accounts**: PRs must establish what proportion of the account was owned by the deceased. 50/50 is often presumed but enquiries should be made to ensure an alternative arrangement had not been made. For example, a parent and child may hold a joint account to allow the child to easily manage their parent's finances - but the £ in the account may belong entirely to the parent.
- **Low value chattels**: It is usually acceptable to estimate their value. The probate value (what they would fetch if sold) will normally be lower than their value for insurance purposes (replacement cost).
- Single items worth **more than £500** (or **unusual** items): a formal probate valuation should be obtained. Many commercial organisations specialise in this and the costs are payable from estate funds.
- **Quoted shares**: If the deceased owned quoted shares there are special rules for establishing the date of death value linked to the stock exchange prices on that date.
- **Private co shares / partnership interests / sole trader business**: the valuation process is more complex and a specialist valuer would usually be instructed.
- If the deceased held shares or other financial investments through a financial services company the broker will provide a list of shareholdings /investments and the date of death values.
- **Land**: PRs will usually instruct estate agents to prepare a valuation. Commonly more than one estate agent is instructed and the average value is used. This helps avoid queries from HMRC later regarding the values for tax purposes.
- Where land is owned jointly the value of the deceased's share should be established. A PR may need to view the land registry official copies to establish the basis on which joint property was owned (joint tenants or tenants in common) and the identity of the co-owner(s).

The PRs also need to collect details of the **debts** / liabilities owed by the deceased at death. These continue against the estate after death and the PRs must meet these liabilities.

Often there will be evidence in the form of credit card statements and loan documents. When utility and phone companies are notified of the death they will provide a summary of amounts due to be paid (or refunded) at the date of death.

There are also steps PRs should take to locate possible creditors who exist but are not known to the family or PRs. This notice procedure is considered elsewhere in the workbook.

Debts owed by the deceased should be repaid by the PRs. Usually the amount of the deceased's debts at the date of their death are taken into account when calculating IHT (i.e. the value of the debt reduces the value of the estate for IHT purposes).

However, this will not be possible in the situations below and PRs should make enquires to satisfy themselves of the nature of a debt as well as the amount in case one of following applies:

- the deceased had borrowed money to finance the purchase of an IHT excluded asset.
- a debt owed by the deceased is never actually repaid from the estate funds.

4.1.6 Lifetime transfers

The value of lifetime transfers made by the deceased in the 7 years before their death will have an impact on the IHT due following their death, and if large transfers have been made, there may be a tax charge in addition to the tax due in respect of the death estate assets.

It is therefore important for the PRs to ask questions of the family to establish:

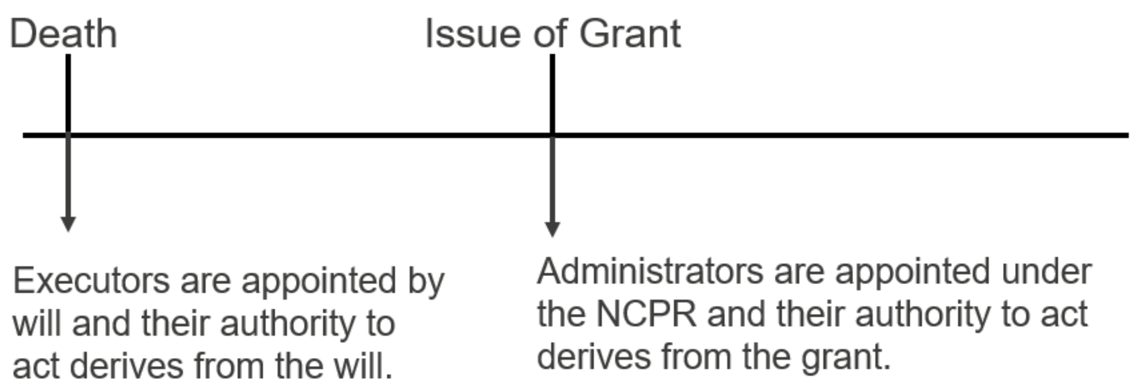
- The nature of any transfer
- Date it was made
- Amount or value
- Identity of the donee

4.1.7 Summary

- Family members will usually register the death and arrange the funeral.
- The PRs must locate the original will (and any codicils) to identify the beneficiaries. If there is no will the intestacy rules will form the basis of the estate distribution.
- It is important that the PRs identify any potential problems with the will or codicil before making the application for a grant.
- The PRs must compile a complete list of the deceased's assets and liabilities as at the date of **death** and their lifetime transfers. Each institution the deceased had dealings with should be notified of the death.
- When valuing estate assets the PRs should be aware of any particular rules that apply and should record the value of the deceased's share of any jointly owned assets.

4.2 Entitlement to the Grant (Executors)

An executor is a PR appointed by will. An administrator is a PR appointed under the NCPR.



4.2.1 Entitlement to the grant of probate

The entitlement to act as executor derives from the appointment under the will.

All executors appointed by will are entitled to take out the grant of probate (subject to restrictions on number discussed later).

Only those named may take out the grant and they cannot give that right to someone else (although an executor may appoint someone to act on their behalf under a power of attorney).

If the appointment of an executor under the will is limited e.g. to specific assets, jurisdiction or by time, then this will be reflected in the authority conferred by the grant.

4.2.2 Capacity to act

An executor named in a will is **unable** to act as PR if they:

- **pre-deceased** the testator (or survived but died before taking out the grant). The will may expressly appoint a substitute executor to act in their place.
- are a **minor**. Although a minor cannot act as PR, their appointment by will is valid. Power can be reserved to the minor who, on reaching the age of 18, can make an application later if the administration remains incomplete.
- lack **capacity**.
- are the testator's **former spouse/civil partner** and the divorce/dissolution took place after the will was made. By s 18A/C Wills Act 1837 (WA) the former spouse/civil partner is treated as having pre-deceased the testator and therefore cannot be appointed (unless the will expressly overrides the effect of s 18A/C WA).

4.2.3 Number of Executors

Only one executor is required even if there are minor or life interests that arise. However, for practical reasons it is common for at least two to be appointed.

If more than one executor is appointed, but not all of them will apply for the grant of probate, e.g. if one of them has pre-deceased, the remaining executor(s) may continue with the application. However, they will need to explain to the probate registry why not all of those named are applying e.g. by providing a copy of the death certificate.

The testator may appoint as many executors as they like in the will but a maximum of **four** people can be named on the grant. If more than four are appointed in the will they must decide who is to take out the grant.

Power can be reserved to any remaining executors, which means they would be able to apply at a later date if a vacancy arose and the administration remained incomplete. In this case, they would apply for a **grant of double probate**.

For both scenarios below assume the named executors survive the testator and are willing and able to act.

Scenario 1

> "I appoint my siblings Anna, Bella, Chris, David and Ellie jointly to be the executors of my will."

The grant can only be issued to four of the five executors named. They can decide which of them this will be. The 5th person could have power reserved to them and if a vacancy arises later they can apply for a grant of double probate to act alongside the others.

Scenario 2

> "I appoint my siblings Anna, Bella, Chris and David jointly to be the executors of my will but if any of them shall die before me or fail to be appointed for any reason I appoint my sister Ellie to fill any vacancy."

The grant can be issued to the four executors appointed by the will. Ellie will not be involved. She cannot have power reserved to her as she was not appointed in the first place. However, if any of those originally appointed had died before the testator or were otherwise not appointed, she could have applied as a substitute.

4.2.4 Death of a proving PR

What happens if a grant has been taken out and one of the PRs appointed dies before the administration is complete?

At least one PR remains:

If more than one PR was appointed, following the death of one of them, the remaining PRs may continue with the administration. If, following the death, the number of PRs falls below the minimum needed an additional PR can be appointed.

If no PR remains:

Following the death of the sole/last surviving PR, what happens depends on the estate being administered. Either:

- **Chain of representation** applies, or
- Grant of **letters of administration de bonis non** is issued

The **chain of representation** will apply if the last surviving **executor** (E1) dies having appointed an executor of their own estate and this person takes out the grant of probate for E1's estate (E2).

Section 7 AEA 1925 provides that E2 automatically becomes executor of the original testator's estate as well as being executor for E1's estate.

No additional grant is required.

Section 7 AEA does not operate where administrators are acting.

If the chain of representation cannot operate a second grant will be issued - a **grant of letters of administration de bonis non**.

Three requirements must be satisfied:

- the administration is incomplete;
- there are no remaining personal representatives; and
- there has been a previous grant of representation.

Activity 1: Chain of representation

A testator (T) dies leaving a will in which he appoints his civil partner (CP) as his sole executor. CP takes out a grant of probate for T's estate but subsequently dies before completing the administration. CP made a will appointing his daughter (D) as his sole executrix.

Who will administer T's estate?

4.2.5 Summary

- An executor derives their authority to act from the will.
- Any adult with capacity may be appointed and act as executor.
- A minimum of one executor is required and a maximum of four can be named on the grand of probate.
- If an executor named in the will cannot act, the remaining executors (providing there is at least one) may still apply.
- If a PR dies after having taken out a grant the remaining PRs may continue with the administration. If a sole surviving executor dies before the administration is compete, either s 7 AEA or a grant de bonis non apply.

4.3 Entitlement to the Grant (Administrators)

4.3.1 Grant of Letters of Administration (with will)

Letters of Administration (with will) is the appropriate grant where the deceased left a valid will but there are no executors who are willing/able to act. This is the correct grant even if the will fails to dispose of all the estate (i.e. full or partial intestacy).

- **Administrators** are appointed under this grant.
- Their entitlement to apply derives from **Rule 20 NCPR**, not the will.
- Rule 20 lists, in **order of priority**, those entitled to make an application for the grant.

The order in Rule 20 broadly follows the entitlement to the estate assets.

(a) executor;

(b) trustee of the residuary estate;

(c) any residuary beneficiary (whether taking absolutely or for life), or, where there is a partial intestacy, a beneficiary of the estate under intestacy;

(d) the PRs of anyone in (c) other than a trustee or life tenant of the residue;

(e) any other beneficiary or a creditor;

(f) PRs of anyone in (e).

Entitlement to the grant correlates with the distribution of the estate under the will, not the applicant's familial relationship with the deceased.

A person in one category cannot apply if anyone in a higher category is able and willing to act as administrator.

A trustee of the residue (b) cannot apply if there is an **executor (a)** willing and able to act.

A **residuary beneficiary (c)** cannot apply if there is either an **executor (a)** or **trustee of the residue (b)** willing and able to act.

Those within the same category have an equal right to apply (though a beneficiary with a vested interest is preferred over one with a contingent interest).

If there are three residuary beneficiaries (c) *[and no executor (a) or trustee of the residuary estate (b)]* all three beneficiaries have an equal right to apply.

The applicant(s) must explain why anyone with a better right to apply is not doing so (known as **"clearing off"**). Applicants do not need to explain why a person in the same category i.e. with an equal entitlement is not making the application.

If one of two **residuary beneficiaries (c)** applies for the grant, the applicant must "clear off" **(b)** by e.g. confirming no trustee of residue is appointed, and **(a)** by e.g. confirming the sole appointed executor has pre-deceased. But the applicant is not required to "clear off" anyone in **(c)**, i.e. explain why the other residuary beneficiary is not applying.

Example: NCPR 20 1

The deceased left a valid will that appoints their spouse as executor.

The residue of the estate is left on trust for their adult children. The deceased's brothers are appointed as the trustees.

The deceased's spouse has pre-deceased.

Who will apply for the grant? Under what authority?

Check: Does NCPR 20 apply?

Yes, the deceased left a valid will but because their spouse pre-deceased the will does not appoint an executor who can act.

Who will apply?

Either or both of the brothers could apply as residuary estate trustees under NCPR 20(1) (b) (not in their capacity as the deceased's siblings).

The brothers would have an equal right to apply and will need to "clear off" the deceased's spouse in her capacity as executor.

Example: NCPR 20 2

The deceased left a will that does not appoint any executors.

The will gives £10,000 to the deceased's friend.

The residuary estate is given absolutely to the deceased's adult niece and nephew.

Who will apply for the grant? Under what authority?

Check: Does NCPR 20 apply?

Yes, the deceased left a valid will but the will does not appoint any executors.

Who will apply?

Either or both of the niece or nephew would have an equal right to apply as residuary beneficiaries under NCPR 20 (1) (c).

They would need to clear-off the executors (a) and trustees of the residue (b), by showing that there was no-one appointed.

4.3.2 Grant of Letters of Administration

Letters of Administration is the appropriate grant where the deceased died without a valid will (i.e. died **intestate**). This may be because they did not make a will, had revoked a will they did make, or the will they made is invalid.

- **Administrators** are appointed under this grant.
- Their entitlement to apply derives from **Rule 22 NCPR**.
- Rule 22 lists, in **order of priority**, those entitled to make an application for the grant.

The order in Rule 22 broadly follows the entitlement to the estate under intestacy.

(a) surviving spouse or civil partner

(b) children of the deceased

(c) father and mother of the deceased

(d) whole blood siblings (share both parents)
(e) half-blood siblings (share one parent)
(f) grandparents
(g) uncles / aunts of whole blood
(h) uncles / aunts of half blood

Issue of b, d, e, g, and h are included where their parent has pre-deceased.

If there is no-one who can apply from (a) – (h):

- The Crown (claiming bona vacantia) may apply (22(2))
- If the Crown does not apply, a creditor, or person who does not receive benefit (but would have done if the estate was larger) may apply (22(3))

Similarly to Rule 20: a person in one category cannot apply in priority to someone in a higher category, those within the same category have an equal right to apply, and applicants must "clear-off" anyone with a better (but not equivalent) right to apply.

Under Rule 22(4), the **PR** of any **applicant who survived the deceased but died before taking a grant** may apply on their behalf, although an application by a living person within the same category is preferred.

Applicants must demonstrate the nature of their **familial relationship** with the deceased (to evidence which category they fall within). In addition, they must also have a **beneficial entitlement** under the estate.

Commonly, the applicant next in order to apply will have an entitlement to the estate, but this will not always be the case. Consider the example below.

Example: Beneficial entitlement

A man dies intestate leaving an estate worth £200,000. The man is survived by his spouse and two adult children.

- The spouse has the best right to apply (a) but cannot do so until at least 28 days after the man's death. This is because under the intestacy rules she is not beneficially entitled to the estate unless she survives the man by 28 days (s 46(2A) AEA).

And, if the spouse chooses not apply....

- The **adult children** are the next category entitled **(b)**. However, the value of the man's estate is less than the statutory legacy so the whole estate passes to the spouse. The children therefore have no beneficial entitlement.
- Where no-one in a) –h) with a beneficial entitlement to the estate will apply, a person with no immediate entitlement may do so, **provided they would have benefited if the estate were larger** (22(3)). As the children would have taken a share of the estate with the spouse if the man's estate was more valuable, they are able to apply.

Example: NCPR 22

A deceased died intestate.

The deceased was survived by their mother and brother. The deceased's father had died previously.

The deceased had never married or entered a civil partnership, had no issue.

Who will apply for the grant? Under what authority?

Check: Does NCPR 22 apply?

Yes, the deceased died intestate.

Who will apply?

The deceased's mother is entitled to the whole estate.

She has the best right to apply under **(c)** and will clear-off **(b)** (explaining there are no issue), and clear-off **(a)** (explaining the deceased never married). She does **not** need to clear-off the father's right to apply because he falls within the same category.

Note. The deceased's brother has no right to apply because he falls in a lower category of applicant **(d)**. **However, even if the mother decided not to act the brother would still be unable to apply**.

He would be next in order under Rule 22 but he has **no beneficial interest in the estate**. No matter how large the estate is, it all passes to the mother.

The brother would only be able to apply if he were a creditor of the estate under Rule 22(3).

4.3.3 Capacity to act

Someone who lacks **mental capacity** may not apply for a grant.

Ideally, there would be someone else with an equal or greater entitlement to apply.

However, if there is not, Rule 35 will determine who can act. The detail of Rule 35 is outside the scope of the workbook.

A **minor** may not act as administrator, although it is possible for someone to apply for a grant on their behalf. However, an application by an adult with equal entitlement to apply is given priority over an application made on behalf of a minor (Rule 32).

An application on behalf of a minor may be appropriate where:

- No adult with equal or greater entitlement will act
- The minor is the only person within the category having the greatest entitlement, or, all those within the category are minors.

4.3.4 Number of Administrators

In respect of both letters of administration (with will) and letters of administration:

- Only **one** administrator is required, unless there are minor or a life interest in the estate, in which case **two** will be required (s 114 Senior Courts Act 1981). i.e. two are needed if any part of the estate is passing to a minor beneficiary or is to be held on a life interest trust.
- If two administrators are required but there is only one able/willing person in the category with best entitlement to apply, that person may apply for the grant with somebody from the next category of entitlement (Rule 25(1) NCPR).
- A maximum of **four** applicants may apply.

4.3.5 Summary

- Administrators are appointed under a Grant of Letters of Administration (with will) in accordance with **NCPR 20** for estates where there is a valid will but no acting executor. The entitlement to apply depends on the provisions in the will.
- Administrators are appointed under a Grant of Letters of Administration in accordance with **NCPR 22** for estates where the deceased died intestate. The entitlement to apply depends on the familial relationship with the deceased and having a beneficial entitlement to the estate.
- The minimum number of administrators required is one, unless there is a life or minor interest, in which case two are needed. The maximum number possible is four.
- A minor or someone without mental capacity does not have the capacity to be appointed as PR.

4.4 PRs unable or unwilling to act

4.4.1 Executor unable to act

If the deceased left a valid will which appoints executors who are willing and able to act those executors will apply for a grant of probate.

However, an executor appointed under the will is unable to act if they:

- **Pre-deceased** the testator, or survived the testator but died before taking out the grant.
- are a **minor**

- lack **capacity**
- are the testator's **former spouse/civil partner** and the divorce/dissolution took place after the will was made (s 18A/C WA) unless the will expressly states otherwise.
- If an executor is unable to act, the remaining executor(s) can apply for the grant of probate but need to explain to the probate registry why all of those appointed by the will are not applying.
- If an executor is a **minor**, probate can be issued to the other executors with **power reserved** to the minor, who is entitled to make an application upon reaching 18 (Rule 33 NCPR). Power may also be reserved to an executor who lacks **capacity**.
- In some circumstances an application can be made by a competent adult on behalf of a minor/someone who lacks capacity but these circumstances are outside of the scope of this workbook.

4.4.2 Executor unwilling to act

It may be that an executor named in the will is able to apply but **does not wish to**.

This could be because they are unwell or believe the role is too complex. It may also be impractical for them to act due to time constraints of work or family.

Others may be unwilling to assume the responsibility if a dispute or family disagreement is likely to arise or there are insufficient funds to meet expenses and liabilities.

The PRs may decide to instruct a solicitor to assist them with the administration, but if an executor is not willing to act, they have a number of formal options:

- Renunciation
- Reserving power
- Appointing an attorney

Renunciation

- An executor may formally renounce (give up) their right to apply for probate and the administration continues as though they had not been appointed.
- The executor must sign a **form of renunciation**.
- Those who are applying for the grant must submit the form of renunciation to the probate registry as evidence of why an executor appointed by the will is not making the application.
- The renunciation will be noted on the grant when it is issued.
- Renunciation is final and the executor cannot later change their mind without court approval.

An executor cannot renounce if they have intermeddled with the estate and the court will not accept an attempt to renounce.

KEY TERM

Intermeddling: A person intermeddles when they take steps indicating they have 'accepted their appointment' and are fulfilling the duty to administer the estate (even if they do not in fact wish to act as executor).

Examples include:

- "Obtaining, receiving or holding" the deceased's assets, or forgiving any debt or liability due to the estate (s 28 AEA)
- Paying debts, selling assets, disposing of personal property (under common law)

Acts of **common humanity** such as arranging a funeral or taking steps to secure the estate assets do **not** amount to intermeddling.

Activity 2: Renunciation

A testator died a month ago. The family are very upset and need some advice. The testator left a valid will appointing A, B and C as executors.

A has taken no action so far and is very upset. A is not certain they want to help with the administration.

B and C have taken charge and arranged the funeral, notified relevant banks of the death and sold some of the household contents.

Who is able to renounce? What grant is needed?

Reserving power

- If an executor does not want to act initially, and will not apply for the original grant, but wants to retain the option to apply for probate later, they may **reserve the power** to do so.
- To reserve power there must be at **least one other executor who does take out the grant of probate**. The power 'reserved' is to apply for the same grant as originally issued i.e. there must be an original grant of probate.
- An executor who has intermeddled can still reserve power.
- To act later, the executor who reserved power can apply for **grant of double probate** to run concurrently with the original grant.
- Applying for a grant of double probate is only appropriate if the administration is not yet complete.
- There is no form of reservation.
- However, where power is reserved to an executor, the executor(s) who are **applying** for probate must give notice of their intention to apply to the **executor to whom power is reserved**. The reservation of power is noted on the grant (Rule 27 NCPR)

Example: Reserving Power

A will appoints A, B and C as executors. A does not want to act but may want to apply later. A decides to reserve power.

B and C will apply for the grant of probate alone. They will give A written notice of their intention to make the application. The grant of probate, when issued, will refer to the fact that power is reserved to A and they were notified.

Appointing an attorney

An executor, who does not want to be directly involved in the administration, may appoint another person as attorney to act on their behalf. The power may be given by the executor (donor) to the attorney (donee):

- **After the executor has obtained a grant**: s 25 TA 1925 confirms that a PR may delegate their functions to an attorney for a maximum of 12 months. This can be renewed if needed. Notice should be given to the other executors. Once appointed the attorney can carry out administrative steps on behalf of the donor.
- **Before a grant has been obtained**: here the executor is delegating the power to apply for a grant. As the attorney is not named in the will they cannot apply for a grant of probate. Instead, if other executors are applying, the executors would apply for a grant of probate and the attorney would make a parallel application for letters of administration (with will).

The power of attorney must be provided to the probate registry as part of the application.

4.4.3 All executors unable or unwilling to act

If there is no executor who is able or willing to act then a grant of probate cannot be issued.

Instead, a grant of letters of administration (with will) would be appropriate and an administrator would be appointed under **NCPR 20**.

Example: No executors able/willing to act

A will appoints X and Y executors. The whole estate passes to Z absolutely.

X died many years before the testator. Y wants to renounce.

No grant of probate will be issued. Instead, Z will apply as administrator under NCPR 20 for a grant of letters of administration with will.

4.4.4 Administrator unable to act

If the deceased left a valid will which does not appoint willing or able executors, or the deceased died intestate, administrators will be appointed under either NCPR 20 or 22.

However, a person cannot act as administrator if they:

- **Pre-deceased** the testator or survived the testator but died before taking out the grant (although in some cases their PR may act)
- are a **minor** (unless an application is made on their behalf)
- lack **capacity**
- do not have a **beneficial entitlement to the estate (for appointments under NCPR 22)**

4.4.5 Administrator unwilling to act

It may be that someone with a right to apply is able to act but does not wish to.

As with executors who do not wish to act, it could be because they are unwell or believe the administrator role is too complex or onerous a task even if professional help is obtained. If someone with the best right to apply under NCPR 20 or 22 does not wish to act they may:

- Renounce
- Appoint an attorney

Unlike an executor, an administrator **cannot reserve power**.

Renunciation

- A potential applicant may formally give up their right to apply for the grant and the next person best entitled to apply may do so. Renunciation is final and because there is no right to reserve power a person must think carefully before renouncing.
- A **form of renunciation** must be signed and **submitted to the probate registry** with the application for the grant. The renunciation will be noted on the grant.
- A potential administrator may renounce at any time before the grant is issued. They are **not** prevented from renouncing **even if they have intermeddled with the estate**.
- An executor who renounces their right to apply for a grant of probate, does not automatically renounce their right to apply as administrator under NCPR 20/22 so they may may need to renounce both rights.

Appointing an attorney

Someone who does not want to be directly involved in the administration may appoint another person as attorney to act on their behalf. The power may be given by the administrator (donor) to the attorney (donee):

- **After the administrator has been appointed** under the grant: s 25 TA 1925 confirms that a PR may delegate their functions to an attorney for a maximum of 12 months. This can be renewed if needed. Notice should be given to the other administrators. Once appointed the attorney can carry out administrative steps on behalf of the donor.
- **Before a grant has been obtained**: in this case the applicant is delegating the power to apply for a grant, which is permitted under **Rule 33** NCPR. The power of attorney must be provided to the probate registry as part of the application.

4.4.6 Citations

If a PR is entitled to act but decides not to, they should take formal steps to give up their right to apply so others can proceed with the administration. They should not "do nothing".

But, what happens if those entitled to apply refuse to act but also refuse to renounce their right to apply? Or, what if an executor intermeddles in the estate (and is thus unable to renounce) but refuses to apply for the grant?

In these situations, it is possible to obtain a **court direction** (using the citation process) to:

- Require a person to take out a grant
- Remove their right to apply
- Authorise another person to take on the administration

The citation process is outside the scope of this workbook.

4.4.7 Summary

- An unwilling **executor** may renounce probate (unless they have intermeddled), have power reserved (provided another executor takes out the grant) or may appoint an attorney.
- An executor who has power reserved may apply later to administer the estate under a grant of double probate.
- An unwilling **administrator** may renounce their right to apply for a grant (even if they have intermeddled) or appoint an attorney. They cannot have power reserved.
- A minor or someone who lacks capacity cannot be appointed as a PR.
- Citations may be used to force an unwilling PR to act, remove their right to act, or authorise another to act in their place.

4.5 Reporting to HMRC & payment of IHT

The PRs of an estate have a duty under s 216 IHTA to:

- Deliver an account to HMRC regarding the deceased's estate
- Pay any IHT due

PRs should deliver an account to HMRC specifying:

- all of the **property** comprising the deceased's taxable estate immediately before death and the **value** of each item at the date of death (in essence a list of assets and liabilities)
- the **exemptions** and reliefs that apply.

The account provides the basis upon which the amount of IHT due (or not) is calculated and the form is provided to HMRC along with payment for any IHT due.

We will consider in basic terms how HMRC assess the IHT position using the information provided.

IHT is calculated by adding the value of the deceased's taxable assets, then reducing this figure by deducting the deceased's debts and applying exemptions /reliefs.

No IHT is due on assets passing to a spouse or charity. If BPR or APR applies, no IHT is due on these assets.

Once deductions are made the tax rates are applied:

- **0**% on the nil rate band ('**NRB**') (value up to £325,000 – though figure may vary)
- **40**% on any value above the NRB.

If the deceased's (D) spouse/civil partner (Y) pre-deceased them, D's estate may be entitled to claim the **unused** part of Y's NRB – the transferrable NRB ('TNRB')

Example: Spouse exemption

A man dies leaving his estate to his wife - no IHT is due (irrespective of the value) as the whole estate is **spouse exempt**.

Example: Charity exemption

A woman dies leaving her estate to charity - no IHT is due (irrespective of the value) as the whole estate is **charity exempt**.

Example: BPR

A woman dies leaving her estate to her son. The estate comprises £30,000 and a business worth £500,000 (which qualifies for BPR). The estate is valued at £530,000 but **after the deduction** of BPR the value that remains is £30,000. This amount falls within the 0% band so no IHT is due.

4.5.1 IHT & Account - Deadline

The deadline for **submitting the account** is:

- **12 months** from the **end of the month** in which the death occurred. If the deceased died on 15 March the IHT account would need to be submitted by 31 March the following year.

The deadline for **paying IHT** due is:

- **6 months** from the **end of the month** in which death occurred, after which interest becomes payable on the unpaid tax. If the deceased died on 15 March the IHT should be paid by 30 September.

In practice the PRs will submit the account and pay the IHT due as soon as possible because the:

- **grant will not be issued** until information about the estate has been provided to HMRC and any IHT has been paid; the PRs need the grant to carry out the administration
- payment of interest on unpaid IHT should be avoided

For example, if the deceased died on 18 January the due date for submitting the IHT account is 31 January the following year. However, as interest would be charged on any IHT that has not been paid by 31 July the PRs should pay the IHT and submit the account by the earlier date.

4.5.2 IHT & Account – Instalment Option

Under ss 227-228 IHTA the IHT due in respect of certain assets may be paid by **10 equal annual instalments**.

The first instalment is due by the usual deadline (i.e. six months after the end of the month in which the deceased died). The remaining instalments are due on each subsequent anniversary date, with interest charged on any IHT that remains outstanding after the initial deadline date.

To avoid interest costs instalment option is usually only used where required (and only for as long as it is needed). This is most commonly where there are insufficient liquid assets available to pay IHT and the PRs wish to e.g. avoid a sale of the family home simply to raise funds to pay tax.

Instalment option is only available in respect of the IHT attributable to the following assets:

- Land and buildings
- Company shares/securities giving the deceased control
- Some unquoted company shares/securities that did not give control but where payment cannot be made without undue hardship
- Farms or interest in a farming business
- Business or interest in a business
- Timber

Instalment option exists to prevent undue hardship on the tax payer.

If any property to which instalment option applies is subsequently sold, the instalment option ceases in relation to that property. The outstanding IHT on that property is due immediately and the sale proceeds are available to meet this liability.

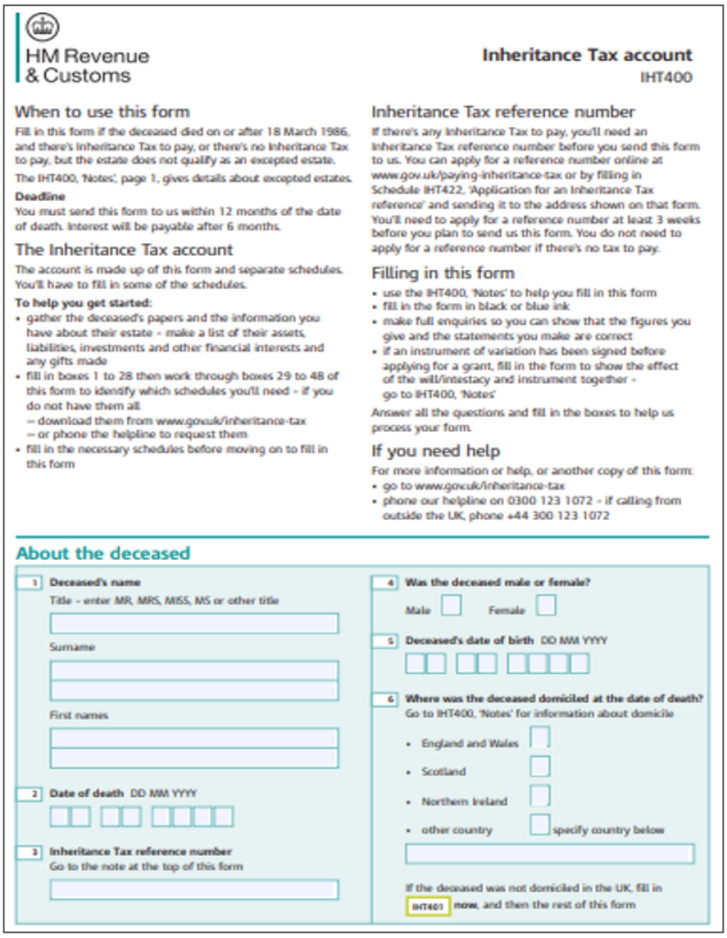
This workbook does not require you to calculate how much IHT may be paid by instalments i.e. apportion the overall tax to the value of the assets on which instalment option may be claimed.

4.5.3 IHT Account – IHT 400

Unless the estate is excepted, the PRs report to HMRC about the estate assets and liabilities by completing form IHT 400 (IHT account).

Completing the IHT 400 can be time consuming and complicated if a large number of the supplemental schedules also need to be completed.

If the estate is excepted, the PRs are not required to complete an IHT400. Instead, they provide information about the value of the estate as part of the application for the grant. Key information is then sent by the Probate Registry to HMRC.



HM Revenue & Customs

Inheritance Tax account

IHT400

When to use this form

Fill in this form if the deceased died on or after 18 March 1986, and there's Inheritance Tax to pay, or there's no Inheritance Tax to pay, but the estate does not qualify as an excepted estate.

The IHT400, 'Notes', page 1, gives details about excepted estates.

Deadline

You must send this form to us within 12 months of the date of death. Interest will be payable after 6 months.

The Inheritance Tax account

The account is made up of this form and separate schedules. You'll have to fill in some of the schedules.

To help you get started:

- gather the deceased's papers and the information you have about their estate – make a list of their assets, liabilities, investments and other financial interests and any gifts made
- fill in boxes 1 to 28 then work through boxes 29 to 48 of this form to identify which schedules you'll need – if you do not have them all
  – download them from www.gov.uk/inheritance-tax
  – or phone the helpline to request them
- fill in the necessary schedules before moving on to fill in this form

Inheritance Tax reference number

If there's any Inheritance Tax to pay, you'll need an Inheritance Tax reference number before you send this form to us. You can apply for a reference number online at www.gov.uk/paying-inheritance-tax or by filling in Schedule IHT422, 'Application for an Inheritance Tax reference' and sending it to the address shown on that form. You'll need to apply for a reference number at least 3 weeks before you plan to send us this form. You do not need to apply for a reference number if there's no tax to pay.

Filling in this form

- use the IHT400, 'Notes' to help you fill in this form
- fill in the form in black or blue ink
- make full enquiries so you can show that the figures you give and the statements you make are correct
- if an instrument of variation has been signed before applying for a grant, fill in the form to show the effect of the will/intestacy and instrument together – go to IHT400, 'Notes'

Answer all the questions and fill in the boxes to help us process your form.

If you need help

For more information or help, or another copy of this form:

- go to www.gov.uk/inheritance-tax
- phone our helpline on 0300 123 1072 – if calling from outside the UK, phone +44 300 123 1072

About the deceased

1 **Deceased's name**

Title – enter MR, MRS, MISS, MS or other title

Surname

First names

2 **Date of death** DD MM YYYY

3 **Inheritance Tax reference number**

Go to the note at the top of this form

4 **Was the deceased male or female?**

Male Female

5 **Deceased's date of birth** DD MM YYYY

6 **Where was the deceased domiciled at the date of death?**

Go to IHT400, 'Notes' for information about domicile

- England and Wales
- Scotland
- Northern Ireland
- other country specify country below

If the deceased was not domiciled in the UK, fill in IHT401 **now**, and then the rest of this form

Figure 6.5: IHT 400

The IHT400 must be used unless an estate is excepted so it is therefore important to establish whether a particular estate is excepted or not.

For those domiciled in the UK there are two categories of excepted estate:

- **Low value** excepted estate
- **Exempt** excepted estate

If neither of these apply and if certain other conditions are not satisfied, the estate is not excepted.

For the purposes of this workbook, you are not required to know the law governing the estate of a non-domiciled individual.

Low Value Excepted Estate

A **low value** excepted estate is one where there is:

- no IHT payable, and the reason for this is because
- the gross value of the estate is below the NRB .

The gross value is the total taxable estate figure plus the value of certain 'specified transfers' plus the value of 'specified exempt transfer'.

Specified transfers include chargeable transfers made in the 7 years before death comprising cash, chattels, shares or land.

Specified exempt transfers include exempt gifts to spouses/civil partners and charities.

When determining if the gross value of the estate is below the NRB, you need to refer to the current NRB amount + any TNRB from their spouse.

NB: the residence NRB ('RNRB') is not considered and if claimed, the estate cannot be excepted.

Example: Low value excepted estate 1

A woman dies and leaves her estate to her friend. She had never married, made no lifetime gifts and had no debts.

The woman's estate includes her home (£300,000), bank account (£2,000) and car (£1,500).

The total (gross) value is **£303,500**.

This is below the NRB of £325,000 so the whole of the estate is taxed at 0% and no IHT is payable.

Example: Low value excepted estate 2

A woman dies leaving her estate to her daughter. She made no lifetime gifts and had no debts. The woman's civil partner (CP) died before her and did not use any of her own NRB.

The woman's estate includes her home (£600,000), bank account (£2,000) and car (£1,500). The total (gross) value is **£603,500**.

CP did not use her own NRB so it can be transferred in full to the woman's estate - which qualifies for the woman's own NRB and a TNRB.

The value of the woman's estate is **below £650,000** (2xNRB) so the whole of the estate is taxed at 0% and no IHT is payable.

Exempt Excepted Estate

An exempt excepted estate is one where:

- the **gross value** of the estate is no more than £3 million, but
- **no IHT is payable**, and the reason for this is because
- after debts are deducted and spouse and/or charity exemption are applied the net value of the estate is below the **NRB**. (N.B. Debts alone cannot bring the estate into exempt excepted status).

The meaning of **gross value** and **NRB** are the same as for the low value excepted estate.

Only spouse/civil partner or charity exemption can be considered for these purposes – no other reliefs can be taken into account.

Example: Exempt excepted estate 1

A man dies leaving his estate worth £3.5M to his spouse. No IHT is payable because the whole estate passes to his spouse and is exempt. **However, this is not an exempt excepted estate** because the value of the estate is more than £3 million.

Example: Exempt excepted estate 2

A man dies leaving his estate worth £400,000 to his son. After BPR is applied the value of the estate is £50,000. No IHT is due as all of the estate falls within the NRB.

However, this is not an exempt excepted estate because although the estate is worth less than £3M and no IHT is due, this is only because of BPR - and BPR cannot be considered for these purposes.

Example: Exempt excepted estate 3

A woman dies leaving her estate worth £600,000 to a charity. No IHT is payable because the whole estate passes to a charity and is exempt.

This **will** be an exempt excepted estate.

Example: Exempt excepted estate 4

A woman dies leaving her estate worth £400,000 equally between her spouse and children. The value of the spouse exemption is £200,000 and once this is taken into account the remaining £200,000 falls within the NRB and is taxed at 0%. No IHT is payable.

This **will** be an exempt excepted estate.

Activity 3: Excepted/not excepted estates

Which of the following estates are excepted?

[A] A man dies with an estate valued at £700,000. He had no debts and had never married or entered a civil partnership. He gives £60,000 to a charity, which leaves a net estate £640,000.

[B] A widower dies. His wife died 3 years before him and did not use any of her own NRB. The man's estate is valued as per [A] above.

[C] A widower dies with an estate valued at £360,000. His wife died 3 years before him and used half of her NRB.

Excepted Estates – additional factors

Once the PRs have established that an estate may be either a low value or exempt excepted estate they must also check that no additional factors prevent the estate from being excepted. **If any of the following apply, the estate cannot be excepted**:

- The deceased made a GROB that subsists at death (or the reservation ended in the 7 years prior to death and the transfer was not exempt)
- The estate includes either more than one trust interest, or, a single trust interest worth more than £250,000 (and is not passing to spouse)
- Foreign assets are worth more than £100,000
- The value of specified transfers exceeds £250,000
- A claim for the **RNRB** is being made (the claim for RNRB - IHT 435/6 - would accompany the IHT 400).

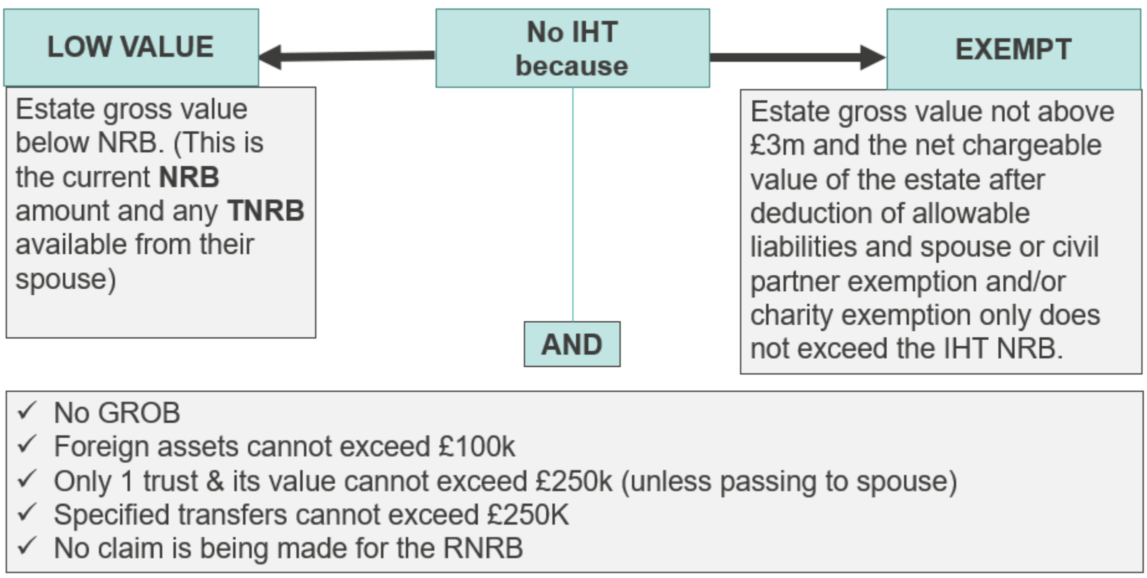


Figure 6.6: Excepted estate summary

4.5.4 IHT Account

The factors which determine whether an estate is excepted or not are considered for the purposes of deciding whether to complete form IHT400. They do not affect the distribution of the estate or the calculation of IHT due.

An advantage of dealing with an excepted estate is that it is simpler and quicker than the IHT 400. If the estate is excepted, then there is no form to complete and send to HMRC.

The IHT 400 is a long form and is supplemented by additional forms called schedules (IHT401 - IHT 420) which contain detailed information about each of the assets. Which schedules should be completed will depend on the assets held by the deceased.

An **IHT 421 (the probate summary)** should also be completed. It contains details about the deceased and a summary of the gross/ net succession estate (assets passing under the grant rather than the IHT estate).

Remember that it is the **date of death** values which are relevant for IHT purposes and when completing the IHT 400. Changes in the value of the assets post death are not recorded for these purposes (unless the PRs make a claim for loss relief).

Loss relief entitles the PRs to claim a partial refund of IHT where losses occur on the sale of certain assets within prescribed time frames – the detail of this relief is beyond the scope of this workbook.

4.5.5 Corrective Accounts

Although post death changes to the estate are not usually notified to HMRC, if the PRs discover later on that the **date of death** information provided in the IHT400 was inaccurate, and too much or too little IHT has been paid, this must be corrected. Revised information is set out in corrective account **Form C4**.

The C4 is used to inform HMRC about:

- **additional assets**/ liabilities discovered after the IHT 400 was submitted
- **corrections** to the **value** of assets/liabilities originally included in the IHT400
- **changes** to **exemptions/reliefs** applied – e.g. an increase or decrease in value or where these were not claimed or not due
- a **variation of the original beneficiary entitlements** which affect the IHT liability e.g. changes in the value of what an exempt beneficiary receives

If the PRs complete a C4 they will also make an adjustment to the calculation of IHT as the liability has either increased or decreased.

- If new assets are discovered, the original value of an asset was too low (or a liability too high), or reliefs were mistakenly claimed - the total value of the taxable estate will **increase**. The PRs should pay the additional IHT due when sending HMRC the C4.
- If new liabilities are discovered, the original value of an asset was too high (or liability too low), or reliefs due were not claimed - the total value of the taxable estate will **decrease**. The PRs will claim a refund of IHT already paid.

4.5.6 Raising funds to pay IHT

PRs cannot obtain a grant without payment of IHT but in most cases cannot access the deceased's assets without a grant – so with what money do they pay the tax due?

The options available are:

- Direct Payment Scheme
- Borrowing

Direct Payment Scheme

Banks or building societies may not be able to release funds to the PRs prior to the issue of the grant but they can be asked to make a direct payment from the deceased's account(s) to HMRC by telegraphic transfer under the Direct Payment Scheme.

PRs must complete schedule IHT 423.

Borrowing

- From a **beneficiary** (often interest free). The main beneficiary of the estate will often fund the payment of IHT using funds outside of the succession estate/ for which the grant is not required e.g. money held in a joint bank account which passed by survivorship, or the proceeds of a life policy written in trust.
- From a **bank**, where commercial rates of interest will apply.

4.5.7 Summary

- The value of the deceased's assets and liabilities at the date of death are set out in form IHT 400.
- No IHT form is required for an excepted estate (low value or exempt).
- IHT 400 is required for any estate which is not excepted.
- If IHT is payable on an estate, it will never be excepted.
- If no IHT is payable, the estate may be excepted if the required criteria are met.
- The deadline for submitting the IHT 400 is 12 months from the end of the month of death.
- The deadline for paying IHT (or the first instalment where instalment option is used) is 6 months from the end of the month of death.
- To raise funds to pay the IHT due prior to the issue of the grant the PRs may use the direct payment scheme or arrange to borrow money.

4.6 Making the application for the grant of representation

The Probate Registry will not issue a grant unless the applicants can demonstrate they are entitled to it.

Applicants must therefore provide sufficient information about the deceased's estate to satisfy the Probate Registry that the correct grant has been requested and that those applying have the best entitlement to it. This information is provided by either:

- Completing and then posting a paper application form to Probate Registry
- Submitting an online application via HMCTs service and answering the relevant questions

The applicants are also required to submit supporting documentation. This is considered in more detail elsewhere in this workbook.

The format required depends on the person making the application and the type of estate/grant required.

4.6.1 Professional Applications

A professional application is one made by a solicitor or probate practitioner. This may be because the solicitor or firm is appointed as PR, or where they are instructed by the PRs and submit the application on their behalf.

Applications made by professionals fall into one of three categories:

- Mandatory **online** application
- **Online** application possible but not mandatory
- Mandatory **paper** application

Mandatory online applications

This includes most grants of probate.

Online application possible but not mandatory

This includes some simple applications under NCPR 20 and 22 e.g. sole applicant and no minority or life interests.

Mandatory paper application

This includes non-standard grants, and more complicated applications under NCPR 20 and 22.

The full list is shown in Schedule 3 NCPR and includes those noted below:

- Second grant e.g.to an executor who previously reserved power
- Grants to a PR where the chain of representation applies
- Grants where original will is missing or there are issues with the will

- Grants to attorneys
- Grant under NCPR 20 if life interest arises

4.6.2 The Application

A solicitor must decide whether to make an online or paper application.

If a **paper** application will be made, the solicitor must complete either form **PA1A** or **PA1P** and post it to the Probate Registry.

The **PA1A** is used where the deceased did not leave a will (NCPR 22 applies).

The **PA1P** is used where the deceased left a valid will (executors act under the will or administrators are appointed by NCPR 20).

If an **online** application will be made, the solicitor will submit this via HMCTs service and answer the relevant online questions.

4.6.3 PA Forms

It is important to identify the correct grant required and to complete the appropriate application form (where a paper application is made).

When complete, the paper forms are sent to the probate registry.

The flow chart below summarises when each form should be used and the type of grant that can be issued following an application using that form.

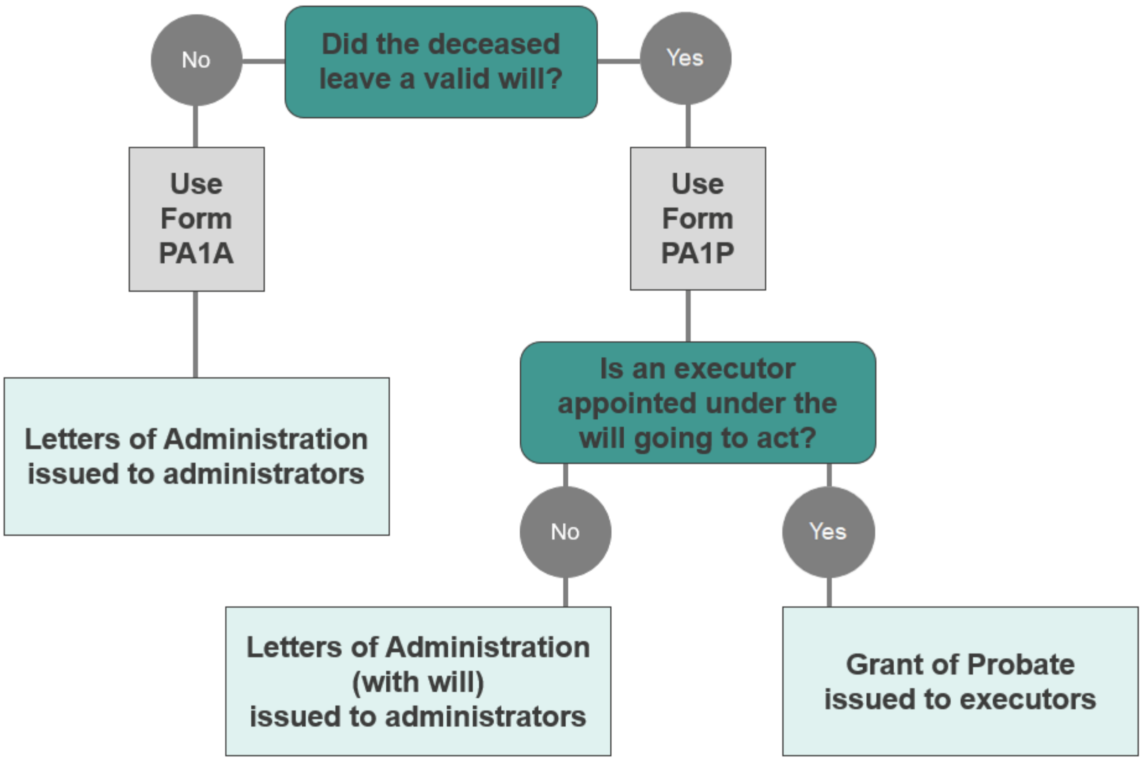


Figure 6.7: Flow chart for paper applications

Activity 4: PA1A

Where the deceased left a valid will appointing executors but there is a partial intestacy due to careless drafting the PA1A will be used.

True or false?

Activity 5: Invalid will

A deceased testator appointed their civil partner as executor.

The will has subsequently been declared invalid as there was only one witness

The testator had not made any other will.

What grant will be required for the estate and which PA form will be used?

4.6.4 Application Process

All applications, irrespective of the type of grant or whether the application is made online or by PA1A/P, require applicants to:

- confirm the **identify** of the deceased and the applicants
- justify the **type of grant** requested and their **entitlement** to act as PR
- provide information about the value of the estate and **IHT** status of the estate
- complete the **legal statement** on the probate form confirming the information provided is correct and that they will administer the estate properly

Identity of deceased & applicants

The **full name** of the **deceased** (as per death certificate) should be included along with the **date of birth** and **death**.

If the deceased owned assets in a common name this should be stated. For example, "*Margaret Alice Smith also known as Meg Smythe or M A Smith*".

This ensures the grant will be issued in both names so the PRs will be able to deal with assets held in either.

Each **applicant's** full name, address and contact details are included.

Information for up to four applicants can be provided (the maximum who can be named on the grant).

The deceased's address is their last usual residential address (which can be a residential nursing home).

The testator's domicile, marital status, and value of foreign property are also confirmed.

Confirmation of the grant required

An express statement confirming the type of grant requested must be included.

Recap

- Grant of probate is required where executor(s) appointed by will are applying
- Grant of letters of administration (with will) is required where no executors appointed by will are applying and so NCPR 20 applies.
- Grant of letters of administration is required where the deceased did not leave a valid will (i.e. died intestate) and so NCPR 22 applies

Executor's entitlement to grant

Executors are entitled to act by virtue of an appointment under the will. The deceased's will and any codicils to it are therefore evidence of this.

Original testamentary documents must be submitted so they can be confirmed as valid. This is known as "proving" the will. The original documents are not returned.

Information about the physical condition of the will is given and confirmation that all of its pages are submitted.

If an executor's true name differs to that in the will, this should be explained – e.g. "Francis Donnelly in the will called Frank Donnelly."

If anyone named is not applying e.g. because they pre-deceased, renounced or reserved power, evidence is needed.

For example, the death certificate, form of renunciation, or confirmation that notice was given to those to whom power is reserved.

Administrator's entitlement to grant

Applicants under NCPR 20 should:

- state which category of applicant they fall within (with reference to the will)
- clear-off anyone with a better right to apply (but not those with equal right) e.g. explaining why executors appointed by will are not acting
- state whether any beneficiary is a minor or if any life interest arises (in either case, at least two administrators are then required)

Applicants under **NCPR 22** should:

- state their familial relationship to the deceased / identify which category of applicant applies, and confirm they are entitled to the whole or part of the estate
- clear-off anyone with a better right to apply (but not those with equal right) e.g. explaining who surviving family members are
- state whether any beneficiary is a minor (if so, at least two administrators are required)

Estate value and IHT status

Succession Estate

The value of the gross and net estate passing under the grant (the succession estate) is provided. The grant can only confer power on the PRs to deal with assets that fall within the succession estate and the value of these assets is noted on the grant.

IHT status

- If an **IHT 400** was completed, the applicants must confirm this has been sent to HMRC and the IHT due was paid. HMRC will provide confirmation to the Probate Registry using form **IHT 421**. The Probate Registry will not issue a grant before receiving the IHT 421 from HMRC, which is why IHT must be paid prior to the grant application.
- If the estate is an excepted estate, then applicants do not need to complete a form for HMRC but will need to include the gross and net values of the taxable estate in their probate application.

Settled Land

Settled land refers to a specific interest in land under a trust governed by the Settled Land Act 1925.

Interests in settled land are different to, and should not be confused with, a normal trust of land.

It is no longer possible to create a trust that includes settled land but those interests which existed on 1 January 1997 remain and are governed by their own rules.

When applying for the grant an applicant must state whether the deceased had an interest in settled land. If they did, a separate grant is required to deal with the legal estate.

It is unusual for an estate to include settled land.

Legal Statement

The undersigned confirms:

- That the last will and any codicils referred to in this application is the last will and testament of the person who has died
- to collect the whole estate
- to keep full details (an inventory) of the estate
- to keep a full account of how the estate has been distributed

If the Probate Registry (court) asks the undersigned they will:

- Provide the full details of the estate and how it has been distributed
- Return the grant of representation to the court

and understand that:

- The application will be rejected if the information is not provided (if asked)
- Proceedings for contempt of court may be brought against the undersigned if it is found that the evidence provided is deliberately untruthful or dishonest, as well as revocation of the grant

The undersigned confirm to administer the estate of the person who has died in accordance to law, and that the application is truthful.

This **statement of truth** must be signed by all persons making this application, or by their legal representative acting for them.

Figure 6.8: Legal statement

By signing this statement, the applicants confirm they will comply with their duties under s 25 AEA and that the contents of the form are true.

4.6.5 Completing the application

When the applicants are ready to proceed with their application, they should consider what supplemental documentation should be provided in support of their application.

The documentation required for an estate depends on the circumstance and is considered elsewhere in this workbook.

4.6.6 Oaths

Historically, the application for a grant was made by way of an oath:

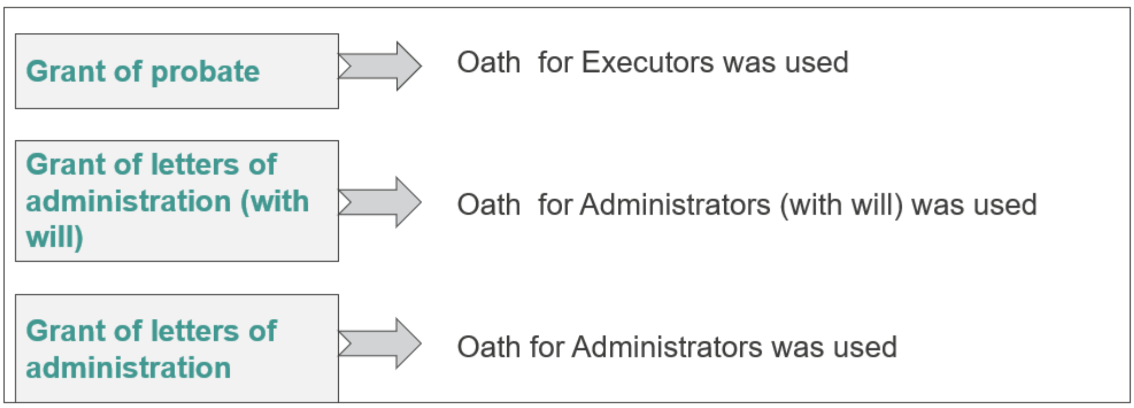


Figure 6.9: Oaths

Oaths are no longer used but you may still see reference to these in practice and in practitioner texts

4.6.7 Summary

- The application for a grant may be made online or by completing PA1A or PA1P.
- If a PA form is going to be used, PA1P is completed if the deceased left a valid will and PA1A is completed if the deceased died intestate.
- If an online application is made, the applicant simply needs to answer the questions asked correctly, and this enables the probate registry to distinguish the different kinds of estate.

- Applicants must provide sufficient information to the probate registry to allow them to verify those applying to be appointed as PR are entitled to the grant requested.
- Applicants must sign a legal statement by which they promise to comply with their legal obligations to administer the estate.

4.7 Completing the application

You are already aware of the requirement to submit a formal application to the probate registry to apply for a grant.

However, to complete the application additional items should also be provided and the items needed will depend on the estate. We will consider in turn:

- Probate Registry Fees / Death Certificate
- Testamentary documents
- Form of renunciation
- IHT forms
- Power of attorney
- Affidavits

4.7.1 Probate Registry Fees & Death Certificate

Applicants must pay the probate **registry fee**. The amount depends on whether or not a professional is applying and the value of the estate. There is no fee for estates worth less than £5,000.

There is no “original” grant. The Probate Registry will provide the number of **sealed copies** as requested by the PRs when making the application.

The number required depends on the estate assets e.g. one per asset holder and a couple of spare copies. There is a small fee for each sealed copy requested.

Sealed copies are used when contacting assets holders. For example, if the deceased had an account with three different banks, the PRs would provide each bank with a sealed copy as evidence of their entitlement.

The PRs state how many sealed copies they want when completing the application.

A certified copy (not photocopy) of the **death certificate** should be provided on personal applications. It is not required for legal professional application.

4.7.2 Testamentary Documents / Renunciation

If the deceased left a valid will the **original** will must be submitted with the application.

The validity of the testamentary documents is confirmed by the Probate Registry. By issuing the grant the probate registry **“proves”** the will/codicil.

The same applies to any **codicils** to the original will, including those which amended the will but have subsequently been revoked. This is because revoking a codicil does not automatically reinstate the terms of the will it had amended.

If an executor appointed by the will does not wish to act they may renounce their right to take out the grant of probate.

Renunciation is only possible if the executor has not intermeddled.

To renounce, the executor must complete a **form of renunciation** and this must be included in the application.

The renunciation is final and from this point the administration is completed as if they had not been appointed (s 5 AEA).

4.7.3 Inheritance Tax Forms

Excepted Estates

- If the estate is excepted there will be no IHT payable and the PRs are not required to submit an IHT form as part of the grant application.

Non-excepted estates

- If the estate is not excepted an IHT400 will have been completed.
- The IHT 400 and any tax due are sent to HMRC (not the Probate Registry)
- HMRC then provide confirmation (by **IHT 421**) to the Probate Registry
- The Probate Registry will not issue the grant before receiving the IHT 421.

4.7.4 Power of Attorney / Affidavits

Where an executor (or beneficiary) appoints an attorney to make an application on their behalf, the attorney's details must be provided in the application form along with an express declaration of why the named executor is not applying.

The **power of attorney** (commonly Form PA11) is completed by the donor and also submitted with the application for the grant.

Affidavit evidence may be required if there is a valid will but there is something about the document which renders its validity uncertain.

The requirement for affidavit evidence is considered further in detail elsewhere in this workbook.

4.7.5 Summary

You should be aware of the items that comprise the application for a grant:

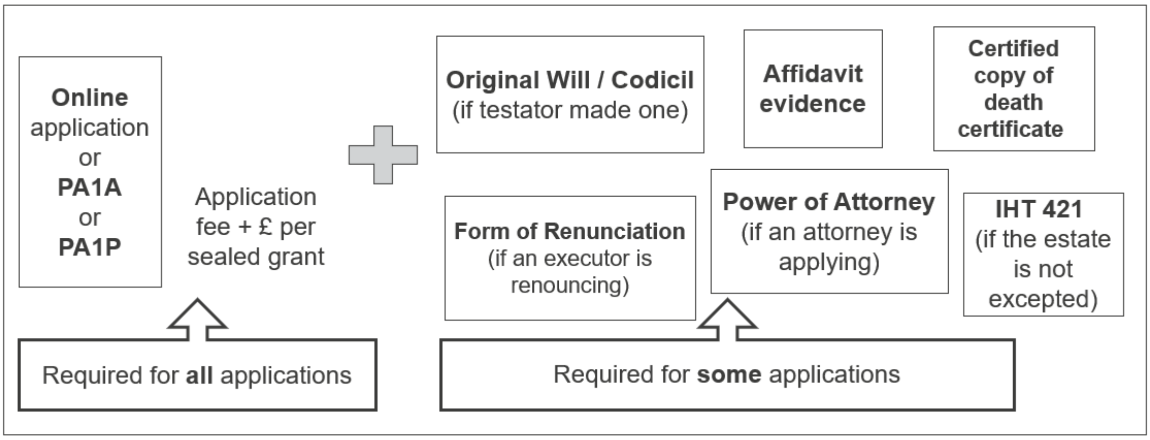


Figure 6.10: Items that comprise the application of a grant

4.8 Affidavits

An affidavit is a **formal written statement of fact** which a person signs under oath.

The person making the affidavit (deponent) 'swears' or 'affirms' (i.e. makes a formal promise) that the contents of the document are true.

If the requirements for making an affidavit are met the facts contained within it can be admitted as evidence in support of legal proceedings. The legal requirements for making an affidavit include the requirement that the authenticating statement (known as 'jurat') is:

- signed by all parties and dated
- completed and signed by the person witnessing (this must be an independent solicitor or commissioner for oaths) and their name, address and qualification must be stated
- must follow immediately on from the text and not on a separate page

Example: Jurat which would appear at the end of affidavit

[Sworn OR Affirmed] by the above named deponent

[SIGNATURE OF DEPONENT]

at: [ADDRESS OF SOLICITOR OR COMMISSIONER FOR OATHS]

this [DATE] day of [MONTH] [YEAR]

before me: [SIGNATURE] [Solicitor OR Commissioner for oaths]

4.8.1 When are affidavits required?

Ideally, affidavit evidence would not be required. However, it may be needed where there is a valid will but there is something about the document which renders its validity or interpretation uncertain. The original will is submitted with the affidavit and the affidavit provides confirmation to the Probate Registry of the circumstances surrounding the drafting or execution of the will.

Where applicable, an affidavit will often relate to one of the following:

- Compliance with s 9 WA
- Knowledge & Approval
- Date
- Physical condition of the will

Requirements of s 9 Wills Act 1837

An affidavit of due execution would be used where the PR believes the will to be valid but it is not clear that the execution requirements set out in s 9 WA have been complied with.

For example:

- Signatures are oddly placed
- There is no attestation clause (but e.g. three signature appear at the end)

Example: No attestation clause but three signatures


Signed by:
Mrs A Miss C
MR B

The original will is submitted with the affidavit.

The affidavit will usually be made by one of the witnesses and will confirm that the will (in the form attached to the affidavit) was executed in accordance with the formalities required.

If the Probate Registry accepts the evidence the application for the grant can proceed.

Knowledge & approval

Where a will has been properly executed and contains a standard attestation clause this raises a presumption of knowledge and approval.

However, if there is reason to doubt this e.g. the testator was blind or could not read the contents of the will, or the appearance of the signature suggests extreme frailty, an affidavit of **due execution** may be required.

If the Probate Registry accepts the evidence the application for the grant can proceed.

The affidavit would usually be made by one of the witnesses and confirms the circumstances in which the will was executed e.g. that it was read out loud to the testator and testator appeared to understand the contents of the will.

The need for an affidavit can be avoided if the original attestation clause is drafted to reflect the special circumstances under which the will was signed i.e. was read out loud to the testator.

Date

The Probate Registry will need to be clear of the date on which the will was signed in order to be certain that the will submitted is the last will the testator made.

There may be doubt as to the date where the date is:

- missing
- incomplete
- more than one date is included

An affidavit of **due execution** made by one of the witnesses to confirm the correct date can be submitted with the original will.

It is not uncommon for a client to return their will signed but not dated.

This is particularly true where the clause containing the date of the will is drafted as part of the commencement clause and not at the end of the will with the attestation.

Solicitors should always check a will has been properly signed and dated before it is put into storage to avoid any issues later.

Physical condition of the will

The physical condition of the will submitted to probate may give rise to problems with its interpretation and affect whether or not its contents can be given effect to.

You will already be aware that there are problems if alterations have been made to the text in the will as it is not always possible to determine when these were made; before execution (and valid) or after execution (and invalid).

Consider the following:

I ~~give the sum of £100 to my friend Kelly~~

Figure 6.11: Manuscript amendment

Assuming there is a clear intention to revoke the gift to Kelly, this alteration would be effective if it was made before the will was executed. An **affidavit as to alterations** could be submitted by one of the witnesses to establish the timing of the alteration.

In the absence of affidavit evidence, PRs will have to rely on the presumptions regarding timing and interpretation in s 21 WA and the common law when deciding how to distribute the testator's assets.

There are other physical signs that suggest a will may be incomplete or have been tampered with:

- Pin holes (indicating staples have been removed)
- Paperclip indentations (indicating another document was attached to the will)
- Non-consecutive page/clause numbering or other sign there may be missing pages
- Signs that an attempt had been made to revoke the will e.g. burning or tearing

In these situations an affidavit of **plight and condition** or **attempted revocation** may be required.

The affidavit should be signed by someone who is able to confirm the condition of the will when it was executed, and its condition later when it was found following the death of the testator.

If there is evidence to suggest that another testamentary document was supposed to be attached to the will, it is possible that an **affidavit of search** may be required.

The personal representative would confirm what enquiries were made and searches carried out to locate the missing document.

4.8.2 Original will is missing

If a will or codicil existed but the original document cannot be located this must be addressed before making the grant application. The will or codicil may be missing or could have been accidentally destroyed.

NCPR 54 permits a copy of the will or codicil to be admitted to probate if there is a court order approving this. An affidavit, including the following, should be used when applying for a court order:

- evidence that the will/codicil existed after the deceased's death (or facts which rebut the presumption that the missing will was revoked during the testator's lifetime),
- confirmation the will/codicil was correctly executed, and
- that the copy document submitted accurately records the testamentary wishes of the deceased.

4.8.3 Practical considerations

Affidavits are only an option where a suitable deponent can be located and is able and willing to provide the evidence required.

If a will or codicil is properly drafted, and care is taken over its execution and storage, there is unlikely to be any need for affidavit evidence.

Issues most commonly arise in respect of 'home-made' wills or where the execution of the will was not supervised by a solicitor. Proper instructions should be given to a client who will execute their will at home. A testator should be instructed not to make alterations to the will and to take care over the condition of the document, avoiding anything that leaves an unintended physical mark.

You are not required to know about the use of affidavits in detail but you should be able to recognise on a set of facts when an affidavit might be needed for the probate application and which type of affidavit would be most appropriate.

4.8.4 Summary

- An affidavit can sometimes be required when an application is made for the grant of representation.
- Affidavits can be needed where there is evidence to suggest a problem with the validity or enforcement of a will or codicil.
- An affidavit:
  - **of due execution** can be used to confirm compliance with s 9 WA, that knowledge and approval were present, and the date on which the will was signed.
  - as to **alterations** can be used to confirm the timing of alterations made to a will.
  - **of plight and condition** can be used to confirm the physical condition of the will at execution and after death.
  - **of search** can be used to confirm steps taken to locate missing documents.

5 Post-Grant Practice

After obtaining the grant the PRs have evidence of their authority to collect in and administer the estate and can continue with this part of the administration.

The PRs should consider their powers and duties, and what protections may be necessary with regards beneficiaries and estate creditors.

5.1 Collecting in assets

The method of collection will vary depending upon the asset involved and the procedures that the institutions have in place.

- Most bank and building societies require withdrawal forms to be completed to collect the balance of bank accounts.
- Personal possessions (for example, jewellery) once collected should be stored and safeguarded.
- The sale or transfer of investments can usually be arranged by a financial advisor.
- Land registered at the land registry can be transferred into the name of the PRs if not being directly transferred to a beneficiary.

Money collected in should be paid into:

- a PR's bank account (opened specifically to hold estate money and to prevent this being mixed with their personal funds), or
- a law firm client account.

Solicitors' Accounts rules apply to money held in the firm's client account and the firm must provide credit interest of a "fair and reasonable" sum.

5.2 Payment of debts

As soon as assets can be collected PRs should begin to pay the deceased's outstanding debts and funeral expenses.

PRs have a duty to pay debts with 'due diligence' – this is not defined but creditors should normally be paid before the end of the 'executor's year'.

If a PR fails to pay debts, even though they have assets available, they will be liable to the creditor and to any beneficiary for consequent loss (eg costs of proceedings incurred by the creditor to recover the debt).

An express clause in the will may limit a PR's liability to the beneficiaries but it cannot relieve them of liability to creditors.

However, if PRs comply with the s 27 TA 1925 notice procedure, they may obtain protection against personal liability to **unknown** creditors.

5.3 Payment of expenses

In addition to the deceased's debts the PRs should ensure that any pre-grant loan the PRs took out to pay IHT is repaid as soon as possible to minimise the expense of interest payments.

This is particularly important if the PRs have given a 'first proceeds' undertaking to a bank in connection with the loan – where PRs promise to use the first moneys raised during the administration to repay the loan. Failure to comply will be a breach of this undertaking.

PRs should also pay general administration expenses as and when they arise during the administration.

For example:

- Cost of valuing the estate assets
- Probate fees
- S 27 TA 1925 notice costs
- Professional legal fees for services provided to the estate

5.3.1 Burden of debts/expenses

All the deceased's property constitutes assets which can be made available for the payment of the deceased's debts and liabilities and any clause to the contrary in a will is void (s 32 AEA).

However, there are rules which determine the order in which estate assets are used for these purposes. The rules differ depending on whether the:

- Estate is solvent or insolvent
- Debts are secured or unsecured

Solvent / Insolvent Estates

An estate is **solvent** if the assets are sufficient to pay all the funeral, testamentary and administration expenses, debts and liabilities, and will be **insolvent** if the assets are insufficient to do so.

It is immaterial whether legacies can be paid in full or not.

For insolvent estates debts must be paid in the statutory order in the **Administration of Insolvent Estates of Deceased Persons Order 1986**. You do not need to know the detail of this statute for this workbook.

Secured Debts

There are specific rules for secured debts.

A debt is secured if it has been charged on part of the deceased's property during their lifetime, for example, a mortgage on the deceased's house. Charged property will bear primary liability for payment of the debt secured against it unless a contrary intention is shown in the will (**Section 35 AEA**).

If the amount of the outstanding loan is less than the value of the asset secured (usually the case) no other estate assets can be used to repay the secured debt.

To the extent the outstanding loan is greater than the value of the asset, the creditor will usually rank as an unsecured creditor.

Example: Secured debts

A owns a house, Chez Nous (£250,000) which was charged with a mortgage during A's lifetime (£30,000 is outstanding). By his will, A gives Chez Nous to B. The will is silent on the liability to repay debts.

The effect of s 35 AEA is that B inherits Chez Nous subject to the mortgage and is not entitled to have the mortgage debt discharged from other assets in the estate.

B therefore may need to sell Chez Nous to repay this debt.

Unsecured debts /expenses

For solvent estates the order in which unsecured debts are met is not a primary concern for a **creditor** as they will be paid in any event. However, the choice of assets used to pay these amounts will affect the **beneficiaries** because if "their part" of the estate is used, that beneficiary will receive less.

There is a statutory order (**Sch 1 Part II AEA**) regarding the application of assets towards the payment of **unsecured** debts and administrative expenses i.e. which assets are used.

The assets used to repay unsecured debts e.g. credit card debt/utility bills and expenses are taken in the statutory order unless expressly varied by the terms of the will.

An explanation of the statutory order follows. Note that assets in each category are exhausted in full before moving to the next as required.

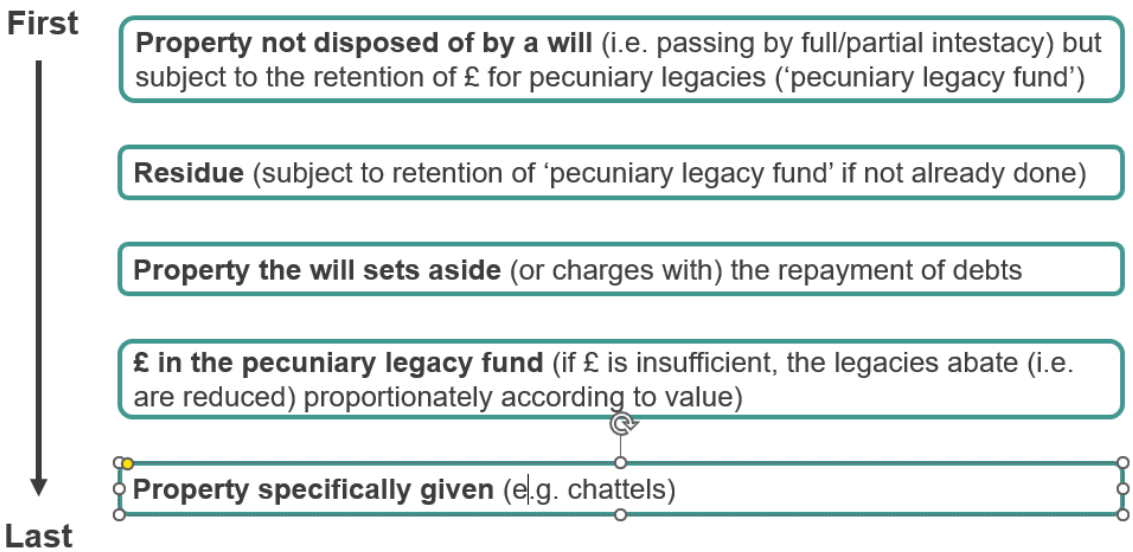


Figure 6.12: Statutory order

Example: Unsecured debts 1

A testator (T) leaves their estate by will as follows:

- House to A valued at £210,000 (subject to mortgage of £60,000)
- £10,000 to each of B and C
- Residue to D

T's assets, excluding the house, are worth £55,000. The unsecured debts are £6,000. The will is silent as to which part of the estate should bear the burden of the debts.

A receives the house subject to the secured debt (mortgage) (s 35 AEA)

Unsecured debts (£6,000) will be paid in accordance with the statutory order.

- The first relevant category is the residue (subject to the retention of a legacy fund of £20,000 for B and C). Gross estate £55,000 - £20,000 = £35,000 residue.
- Debts are repaid in full from this residue.
- B and C are paid in full from the legacy fund.
- D receives the remaining residue £29,000 (£35,000 - £6,000 for debts)

Example: Unsecured debts 2

A testator (T) leaves their estate by will as follows:

- £10,000 to each of B and C
- Residue to D

T's assets are worth £55,000. The unsecured debts are £40,000. The will is silent as to which part of the estate should bear the burden of the debts.

Unsecured debts (£40,000) will be paid in accordance with the statutory order.

- The first relevant category is the residue (subject to the retention of a legacy fund of £20,000 for B and C).
- Gross estate £55,000 - £20,000 = £35,000 residue. The whole of the residue is used to repay the debts . D inherits nothing.
- Debts of £5,000 remain outstanding. These are paid from the next category (the legacy fund). £20,000 - £5,000 leaves only £15,000 for B and C.
- The original legacies for B and C are equal. These **abate proportionally** (i.e. the burden of the debt is shared between them in proportion to the value of their gifts) so both receive £7,500.

Example: Unsecured debts 3

A testator (T) leaves their estate by will as follows:

- £15,000 to B
- £5,000 to C
- Residue to D

T's assets are worth £55,000. The unsecured debts are £40,000. The will is silent as to which part of the estate should bear the burden of the debts.

Unsecured debts (£40,000) will be paid in accordance with the statutory order.

- The first relevant category is the residue (subject to the retention of a legacy fund of £20,000 for B and C).
- Gross estate £55,000 - £20,000 = £35,000 residue. The whole of the residue is used to repay the debts . D inherits nothing.
- Debts of £5,000 remain outstanding. These are paid from the next category (the legacy fund). £20,000 - £5,000 leaves only £15,000 for B and C.
- The original gifts are of **unequal** amounts. These **abate proportionately**. B's legacy is reduced by ¾ of the debt and C's by ¼ of the debt. B gets £15k - £3,750= £11,250. C gets £5k - £1,250 = £3,750.

Contrary Intention

Unsecured Debts

Express wording in a will can override the statutory order in Sch 1 Part II AEA where a contrary intention is shown.

Many wills include a general direction for the residue to bear the burden of debts.

This type of clause would usually be sufficient.

Example: Clause directing the residue to bear the burden of debts

"I give my residuary estate to my executors on trust for sale and out of the proceeds of sale to pay my debts ....."

Secured Debts

Express wording in a will can override the general rule in s 35 AEA that secured assets are subject to the related debt.

However, a contrary intention is not shown by a general direction for debts to be paid out of residue (such as the example clause above).

Instead, a clear /specific intention for the beneficiary of the secured asset to receive the item free of debt must be shown.

5.3.2 Marshalling

If PRs do take assets 'out of order' to pay creditors, the beneficiaries whose assets have been 'wrongly taken' can use the doctrine of marshalling.

The creditors are not bound by the rules and are under no obligation to return the money paid to them.

The general principle of marshalling allows a beneficiary who is disappointed that his inheritance has been reduced (because assets to which he was entitled have been wrongly used to pay a creditor) to compensate himself by going against the property which ought to have been used to pay the debts.

This means the disappointed beneficiary could claim against the assets inherited by another beneficiary if those assets should have been used to repay the debts.

5.3.3 Choices of assets for sale

Having identified the appropriate part of the estate to use to meet the debts / expenses (most often the residue) the PRs should use the available cash to make these payments. However, if there is insufficient cash the PRs may need to **sell non-cash assets**.

PRs have a general power of sale over the whole of the estate but when deciding **which** assets to sell they must comply with the rules discussed previously regarding the appropriate part of the estate and the statutory order in which property should be taken.

Where they have a choice about which assets to sell the following should be considered:

- Capital gains tax ('CGT') implications of sale
- How easily or quickly a sale can be carried out
- Wishes of beneficiaries

CGT considerations

PRs acquire estate assets at their market value on the date of death (**probate** value).

To avoid CGT (or using the tax-free allowance unnecessarily) PRs should consider selling assets which have **not risen** in value.

Assets **falling** rapidly in value should usually be sold in any event to preserve the value of the estate.

If PRs sell an asset which has increased in value after death the 'profit' they make may be subject to CGT if the gain is greater than any tax-free allowance.

Assets that have risen in value may be **transferred** directly to a beneficiary without triggering a CGT charge.

This is because the transfer from a PR to a beneficiary is not treated as a "disposal" for CGT purposes and the beneficiary inherits the asset at its probate value.

Example: CGT considerations

PRs need to raise cash by selling an item from residue and may choose:

- Car (probate value £4,000, current value £4,000)
- Painting (probate value £10,000, current value £25,000)

The PRs should sell the car to raise cash and retain the painting to be transferred to a residuary beneficiary.

Ease of sale and wishes of beneficiaries

Some assets in the estate will be quicker and easier to sell than others.

Quoted shares and other financial investment products can usually be sold (subject to any penalty charges that might apply) fairly quickly and easily.

Unquoted shares, business interests and land will usually take longer to sell.

Cars and household possessions can usually be sold fairly easily but may not produce the amount needed.

PRs are not bound to comply with the wishes of a beneficiary but should take these into account when reaching a decision. The PRs have the power to appropriate assets in satisfaction of:

- a general legacy
- an entitlement to the residuary estate

So in simple terms, if a beneficiary wants to receive a particular item as part of their inheritance (and there is no legal objection) the PRs ought to respect these wishes and avoid selling the item where possible.

5.3.4 Summary

- PRs should collect in the assets using the method prescribed by the asset holder.
- Estate cash should be held in a PR bank account and/or a law firm client account.
- The PRs owe a duty to estate creditors to pay the deceased's debts.
- An estate is solvent where its value is sufficient to meet debts, liabilities and administration expenses (even if legacies cannot be paid in full).
- Subject to a contrary intention in the will:
  - an asset subject to a charge bears the burden of the debt secured to it
  - the order of application of assets to meet unsecured debts/expenses is prescribed by statute. If the PRs do not apply the order correctly the doctrine of marshalling can assist a disappointed beneficiary.

5.4 Income Tax and Capital Gains Tax during administration

PRs have a responsibility to:

- Finalise the **deceased's** income tax and CGT position for the tax year of death. The deceased is likely to have died part way through a tax year so will either owe outstanding tax to HMRC or the estate will be due a refund.
- Pay income tax and CGT that becomes due during the **administration** period. PRs must pay CGT on taxable gains made following a disposal of estate assets and pay income tax on any income received during the administration period.

5.4.1 Deceased's Income & Gains

PRs are liable to pay any income tax and CGT that the deceased **owed** at the date of their death (or alternatively, the PR must claim any tax refunds the deceased was entitled to).

The PRs should record information and notify HMRC by submitting a tax return on behalf of the deceased for the period **6 April to date of death**.

These tax liabilities are an estate expense and payable from the estate assets. The liabilities are deductible when valuing the taxable estate as a whole for IHT purposes. Conversely, refunds due are an asset of the estate and should be included when valuing the IHT estate.

The PRs must differentiate between the **deceased's** income and gains and the **estate's** income and gains because different rates and reliefs apply.

Deceased's Income

When working out the deceased's income tax liability the PRs will need to access the deceased's financial records. When calculating the income tax due PRs should utilise the **deceased's** tax-free allowances and pay tax at the rates applicable to the deceased.

The PRs will need to account for:

- untaxed income due and paid **before** death
- some income paid **after** death which relates to a period before death. For example:
  - Rent due on properties the deceased let, but which had not been paid,
  - Final dividends declared before death but not paid.

No date apportionment is needed for bank interest (CIR v Hendersons Executors). Bank interest paid before death is taxed as the deceased's. Bank interest paid after death is taxed as the PRs' (even if part of it relates to a period prior to death).

Deceased's Gains

To work out whether the deceased had any outstanding CGT liability on the date they died the PRs will need to consider the disposals made by the deceased before they died.

These matters relate to assets that the deceased no longer owned on the date they died.

When calculating the CGT due PRs should utilise the deceased's tax-free allowances and pay tax at the rates applicable to the deceased. Death is not a disposal for CGT purposes and does not give rise to a CGT liability.

On death, the base cost of assets in the estate is 'up-lifted' to the date of death value. This has the effect of wiping out the gains that have accrued during the deceased's lifetime (sometimes referred to as a "**tax free uplift**").

5.4.2 Estate income

PRs may be liable to pay income tax if the estate assets generate income in the hands of the PRs i.e. income arises between the date of death and the date the assets are distributed.

The estate may receive interest (in respect of bank accounts), dividends (in respect of shares) and rent (in respect of let properties). This income is taxed as estate income in the hands of the PRs.

PRs pay income tax at the **basic rate** (the % will depend on the type of income). The starting and higher rates do not apply to PRs in the same way they do for individuals.

PRs are **not** entitled to claim an income tax personal allowance.

Income generated by the assets **after** they have been distributed to beneficiaries is taxed as the **beneficiary's** income.

Income tax will have been collected at source where this income is paid net (e.g. dividends) or paid by PRs for income paid gross (e.g. rent from estate properties).

If the **only source** of income is savings interest of less than £500 and, therefore, the tax due would be less than £100, HMRC do not require any reporting of estate income.

PRs give a **Form R185** to beneficiaries when the estate income is distributed. R185 records the income tax paid by PRs in respect of the income a beneficiary receives.

- Beneficiaries who don't pay income tax can use R185 to claim a tax refund.
- Beneficiaries who are higher/additional rate taxpayers will need to make a 'top-up' payment to HMRC and use R185 when completing their own tax return.

5.4.3 Estate gains

PRs are potentially liable to **CGT** if they make a disposal / sale of estate assets during the administration period.

If assets have **increased** in value since the date of death there will be a gain when they are sold. If the amount of the gain is greater than the tax-free allowance PRs will pay CGT. PRs **can** claim the same **tax-free allowance** as an individual (unlike IT).

If assets have **fallen** in value since the date of death there will be a **loss**. The amount of the loss can be off-set against other gains made during the administration. E.g. if the PRs make a gain of

£26,000 on the sale of one asset and a loss of £2,000 on the sale of another the overall net gain is £24,000. Losses are useful only where there are taxable gains against which they can be applied.

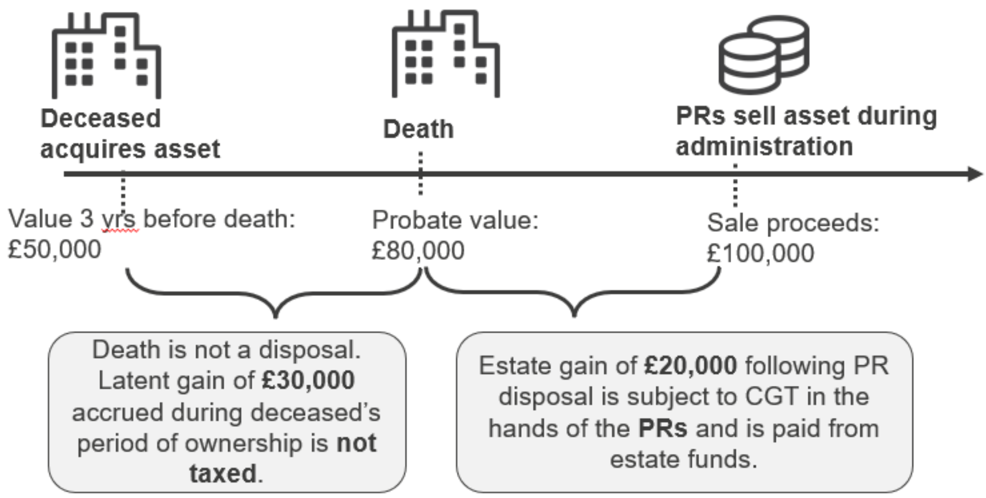
It is important to appreciate that only **post-death gains** are chargeable.

Gains made by the deceased during their lifetime in relation to assets which they still own at the date of death i.e. increases in value from the date they acquired an asset and the date of death, are **not** taxed.

As mentioned previously, the value of estate assets for CGT purposes is re-set (re-based) to their date of death value for future CGT purposes.

Chattel exemption: You should be aware that in most cases, PRs can sell chattels without having to worry about CGT because a gain made on the disposal of a tangible moveable asset is exempt from CGT if the disposal is for a consideration of £6,000 or less (s 262 Taxation of Chargeable Gains Act 1992).

Example: CGT

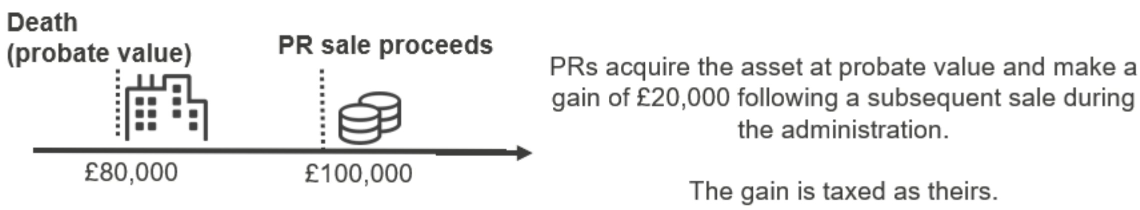


When carrying out the administration of non-cash assets the PRs will either:

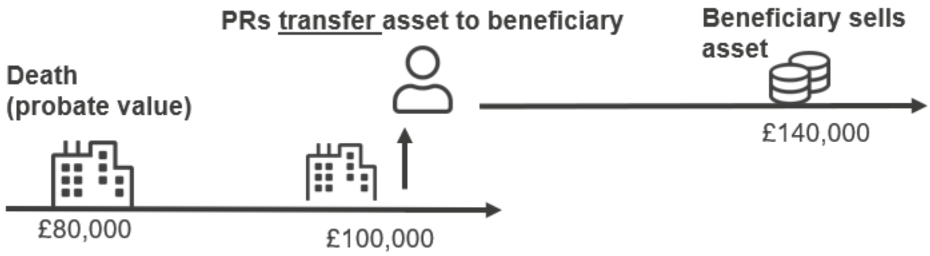
- **Sell** an asset to raise cash and then distribute this to the entitled beneficiary/creditor. PRs have a power of sale in relation to all estate assets.
- **Transfer** an asset directly to a beneficiary. PRs have a power of appropriation in relation to the estate assets i.e. they can transfer assets in satisfaction of a beneficiary's entitlement.

Subject to any specific obligation PRs are free to decide whether to sell or transfer items in the estate. The **CGT** implications of each should be considered by the PRs before they make a decision. Consider the examples which follow:

Example: (Sale)



Example: (Transfer)



- PRs acquire the asset at probate value. The subsequent transfer to a beneficiary is **not** a disposal so no chargeable gain occurs.
- For CGT purposes the beneficiary acquires the asset at probate value (£80,000), not the value at the date of transfer (£100,000).
- When the beneficiary sells the asset they are treated as making a gain of **£60,000** (not £40,000). The beneficiary can use their tax free allowance.

5.4.4 Tax efficiency

If an asset is going to be sold the PRs should consider whether it is more tax efficient for PRs to a) sell it as part of the administration; or b) transfer it to the beneficiary so the beneficiary can sell it.

- If the **beneficiary** has used their tax-free allowance, or would otherwise pay tax at a higher rate, it may be better for the PRs to sell the assets and use the estate tax-free allowance and then distribute cash to the beneficiaries.
- Conversely, if the PRs have used their tax-free allowance but the beneficiary has not, it may be better for the PRs to transfer the asset to the beneficiary and for the beneficiary to sell it and make the gain so the beneficiary can make use of their tax-free allowance.
- The PRs cannot claim **main residence relief**. Where applicable, a property can be transferred to a beneficiary and the beneficiary can sell it later once they satisfy the criteria for main residence relief.
- If the sale of an asset will generate a **loss**, PRs should consider whether the estate or the beneficiary has gains against which to set off the loss.

5.4.5 Summary

- PRs are required to finalise the deceased's liability to income tax and CGT.
- PRs will pay income tax in respect of income generated during the administration and CGT in relation to gains made on the disposal of estate assets during the administration.
- Death does not constitute a CGT disposal.
- Transferring assets to a beneficiary does not constitute a CGT disposal.
- Post death gains are taxed in the hands of PRs if assets are disposed of by PRs during the administration, and taxed in the hands of a beneficiary if they dispose of the asset after it has been transferred to them.

5.5 Distributions to beneficiaries

5.5.1 Distributions to beneficiaries

Once the PRs have collected in assets and paid debts, funeral, testamentary and administration expenses (or have a sum set aside for their payment) they have a **duty** to distribute the remaining estate assets to beneficiaries in accordance with their legal entitlement under the will and /or intestacy rules.

The PRs will make payments of legacies **other than** the residuary legacy first. It is not possible to identify the exact value of residuary gifts until the administration is complete.

Full distribution of the residue is the final step in the administration.

The delay in distributing the residuary estate can give rise to financial difficulty for the beneficiary. Therefore, provided PRs are confident that sufficient assets will remain within their control to meet any outstanding payments later, they may make early payment of part of a residuary beneficiary's share before the end of the administration – referred to as **interim distributions**. The beneficiary receives a balancing payment at the end.

To ensure the PRs fulfil their duty to accurately distribute the estate they must carefully consider:

- Identity of the beneficiaries

Review the will to identify those entitled to legacies & apply rules of construction. (Consider the effect of class gifts, substitution clauses, s15 / 18 / 33 WA).

Apply intestacy rules if full or partial intestacy occurs.

- Nature of the interest

Establish if a beneficiary has a vested or contingent interest, or, an interest under an express trust in the will.

Assess what 'share' each beneficiary is entitled to.

- Property to which they are entitled

Establish which items fall within a general gift of chattels or collection of items.

Apply the effect of s 21 / 24 Wills Act.

Provided an asset is not required for the payment of debts, or a legacy has not failed, the PRs can make a transfer to the beneficiary entitled. In doing so they should consider the following practical matters:

- **Method** of transfer
  - **Chattels**: delivery to the beneficiary
  - **£** legacies: cheque or bank transfer
  - **Shares**: stock transfer form
  - **Land**: Assent for a legal estate in land (land registry form AS1)
- **Relieving** provisions

Unless the will specifically provides otherwise, the beneficiary must bear the cost of the transfer of the asset (but inherits the item free of IHT).

5.5.2 Timing considerations

While PRs have a duty not to delay the administration and should complete this within a year of death, before making significant distributions, the PRs need to consider:

- **Claims against the estate**

If a claim under the IPFDA 1975 may be brought, the PRs may wish to delay distributions until ten months of the grant being issued (there is a six month deadline for issuing a claim and a further four months to serve notice of this).

- **S 27 TA notice**

PRs should not make distributions until after the two month deadline for being notified of claims by unknown beneficiaries and creditors.

5.5.3 Order of payment of legacies

In general law, unless the will states otherwise, legacies are paid in the following order:

- specific
- general
- residuary

If it is not possible to pay all of the legacies they abate (reduce) in reverse order. So:

- If funds are insufficient to pay all other legacies the residuary beneficiary takes no benefit.
- If funds are insufficient to pay all specific legacies, the general beneficiaries take no benefit.

- If there are sufficient funds to meet all specific gifts but not all general legacies, the general beneficiaries take a reduced inheritance. (Demonstrative legacies abate with general legacies once the specific fund set aside has been exhausted.)
- specific gifts take priority.

Within each category, if not all of the legacies can be paid, they abate proportionately.

Specific and general legacies

Assuming all legacies can be paid the PRs need to consider which items they will transfer to a beneficiary.

The nature of a specific legacy (e.g. "my gold ring") is that the PRs will know the exact item within the estate to transfer.

The nature of a pecuniary or other general legacy is that there is often no direction as to which particular assets in the estate should be used to meet them. For example:

- "I give £1,000"
- "I give 100 ordinary shares in ICI plc" (rather than "my" shares)

If the will contains a direction as to the order in which assets should be used to pay legacies the PRs must comply with it. In the absence of any such direction, assets will be taken so that general legacies are paid from residue.

Ascertain and distribute residue

When all of the debts, testamentary expenses and other legacies have been paid the PRs can **ascertain the value** of the residue.

To calculate the value of the residue it is necessary to have final **accurate** figures for tax liabilities (including IHT) and other expenses such as interest payable on loans and professional legal fees.

If a law firm has been involved then money in the client account can be used to pay the final invoice for fees and the balancing figure would be distributed in accordance with the residuary entitlement.

Example: Ascertaining the residue

The value of an estate which devolves on the PRs is £400,000. The total amount of debts, expenses and liabilities is £50,000. The deceased made a will which contains pecuniary legacies of £30,000 and leaves the residue to the deceased's spouse.

The value of the residue is £320,000 (£400,000 less £50,000 less £30,000).

5.5.4 Appropriation

When paying **general and residuary** legacies the PRs are free to choose which assets to appropriate to the beneficiaries in settlement of their entitlement (s 41 AEA).

- The power of appropriation does not allow appropriation where the value of the asset at the date of appropriation exceeds the entitlement of the beneficiary concerned.
- If the value of the asset at the date of appropriation is less than the beneficiary's entitlement the PRs will need to make a further balancing transfer.

Example: Appropriation 1

By will a beneficiary is left "£500".

The beneficiary has asked the PRs if they can be given the deceased's flute (probate value of £100) instead of a cash sum of £500. The PRs have the power to do this. If the value of the flute at the date of transfer is £70 the PRs should also make a cash transfer of £430 – so the total value received by the beneficiary is £500.

Example: Appropriation 2

An estate contains:

- house £200,000
- chattels £3,000
- cash in bank £250,000

The will leaves:

- chattels to A
- £5,000 legacy to B
- residue equally between C and D

The total of all debts/ expenses is £10,000.

The total estate is worth £453,000 and there are sufficient funds to pay all debts and legacies.

The PRs will pay the debts/expenses and the cash legacy to B using cash in the bank (£250,000 - £10,000 - £5,000 = £235,000) and transfer the chattels to A.

This leaves a residue of £435,000 (comprising house worth £200,000 and remaining cash of £235,000). The residue will be divided between C and D equally so each is entitled to £217,500. Assuming C would like the house, the PRs can appropriate the house + £17,500 to C, and a cash sum of £217,500 to D.

5.5.5 Obtaining receipt

PRs should obtain confirmation of receipt from the beneficiary when making a distribution.

An issue arises if **minor beneficiaries** have a vested interest because they cannot give good receipt. Where this applies the PRs have the following options:

- An express clause in the will which gives PRs the power to accept receipt from a minor aged 16 or 17 (but no younger) is enforceable
- By virtue of s 3 Children Act 1989 (where a parent/guardian provides receipt)
- PRs to hold the gifted property themselves until the child is 18
- Appoint trustees to hold the property for the minor (s 42 AEA) and make payment to the trustees
- Pay the legacy into court (s 63 TA 1925)

5.5.6 Summary

- PRs must work out who should inherit the deceased's assets and what they are entitled to receive by reference to the deceased's will and/or intestacy rules.
- PRs must establish whether there are sufficient funds to pay all the debts/expenses as well as the legacies. If funds are insufficient to meet all the legacies, the residue followed by the general legacies abate in priority to the specific legacies.
- PRs have the power to decide which assets to appropriate in full or part satisfaction of an entitlement to a general or residuary legacy.
- PRs should obtain receipt from the beneficiaries when making distributions.

5.6 Estate accounts

PRs have a duty under s 25 AEA to produce an account of the estate administration if required by the court. PRs (or their legal advisors) will prepare estate accounts as part of the administration.

The estate accounts should be signed/approved by all PRs and by residuary beneficiaries. By approving the accounts, the residuary beneficiaries indicate their agreement with how the estate has been administered and this usually releases the PRs from further liability to account. The date the accounts are signed is often considered to symbolise the 'end' of the administration.

Estate Accounts should be clear and comprehensible to the beneficiaries and serve as a record of the estate assets and how these have been administered. There is no prescribed format for the estate accounts, but they often comprise a summary followed by three main sections:

- Capital Account
- Income Account

- Distribution Account

5.6.1 Capital Account

- Sets out the estate assets and liabilities at death.
- Records what has happened to each item during the administration, for example, whether assets have been sold or transferred to a beneficiary.
- Liabilities such as pecuniary/specific legacies and IHT are included, as are any solicitor's fees for carrying out the administration.
- The capital account will then show a balance which is available for distribution to the residuary beneficiaries.

5.6.2 Income Account

- Sets out the income received in relation to the estate assets during the administration and summarises how this was spent.
- Income expenses are then deducted as liabilities.
- The income account will then show a balance which is available for distribution to the residuary beneficiaries.
- If the PRs receive rent from the tenant of an estate property the income would be shown in the income account and any income tax payable on the income would be shown as an income liability.

5.6.3 Distribution Account

The distribution account sets out the **residuary beneficiaries**' entitlement.

It includes distributions made during the course of the administration of the estate ('interim distributions') and the final balance due to be distributed.

Example: Distribution Account

A is entitled to a ½ share of the residue worth £100,000.

During the administration A received interim payments totalling £40,000 so a balance of £60,000 is due to him. Each interim payment and the final balance will be shown on the distribution account.

5.6.4 Summary

- PRs should prepare estate accounts.
- Signing the estate accounts indicates the end of the administration.

Activity answers

Activity 1: Chain of representation

T's sole executor (CP) has died, appointing their own executor (D). If D takes out the grant of probate for CP's estate the chain of representation is complete and D can complete the administration of T's estate.

No additional grant is required. The grant of probate issued to D for CP's estate is sufficient together with the grant of probate issued to CP in T's estate.

Activity 2: Renunciation

- A can renounce because they have not intermeddled.
- B and C cannot renounce because it appears they have both intermeddled. Arranging the funeral is an act of common humanity and on its own would not amount to intermeddling. Arguably, notifying a bank of a death may not, of itself, be intermeddling. However, selling household possessions would be.
- B and C can apply for the grant of probate without A.

Activity 3: Excepted/not excepted estates

[A] A man dies with an estate valued at £700,000. He had no debts and had never married or entered a civil partnership. He gives £60,000 to a charity, which leaves a net estate £640,000. Although the estate is worth less than £3m and charity exemption applies, the value after charity relief has been considered is still above the NRB. IHT is payable and the estate is not excepted.

[B] A widower dies. His wife died before him and did not use any of her own NRB. The man's estate is valued as per [A] above.

The man's PRs will claim his NRB and the TNRB from his spouse. After the gift to the charity, the remaining estate (£640,000) is below £650,000 (2x NRB) and no tax is due. This is an exempt excepted estate.

[C] A widower dies with an estate valued at £360,000. His wife died before him and used half of her NRB. The man's PRs will claim his NRB and the unused TNRB from his spouse. No tax is due because the total NRB is greater than £360,000 (£325,000 + £162,500). This is a low value excepted estate.

Activity 4: PA1A

False: Where the deceased left a valid will the correct application form to use is the PA1P.

Activity 5: Invalid will

Grant of letters of administration because the deceased died intestate and therefore form PA1A should be completed.

7 Inheritance (Provision for Family and Dependants) Act 1975 and Post Death Changes

1 Inheritance (Provision for Family and Dependants) Act 1975

Unlike many continental jurisdictions, English law allows a testator to dispose of their property however they wish.

Close relatives have no legal right to inherit any fixed proportion of the estate, but may make an application to the court under the Inheritance (Provision for Family and Dependants) Act 1975 ('IPFDA 1975') to vary the content of a will or an intestacy after the deceased has died.

The court has the power to make provision for an applicant if it feels that reasonable financial provision has not been made out of the deceased's estate.

It is essential to be aware of the implications of the IPFDA 1975 when:

- taking instructions from a client for a will;
- acting in the administration of an estate;
- advising a potential applicant looking to make a claim; and
- acting in ancillary relief proceedings.

1.1 Eligibility to make an application

In order to make an application under the IPFDA 1975, an applicant must:

(a) Be within the jurisdiction of the IPFDA 1975.

(b) Demonstrate that they fall within a recognised category of eligible applicants.

(c) Make their claim within the prescribed time limit.

1.1.1 Jurisdiction (s 1(1))

The IPFDA 1975 only applies where the deceased died domiciled in England and Wales. It is therefore important to establish where the deceased was domiciled at the date of death.

Domicile is different from nationality or residence. However, most individuals born and residing in the UK are likely also to be domiciled either in England and Wales (and, therefore, subject to its legal system which governs succession to property) or Scotland (which has its own succession rules). It is only possible to have one domicile at a time but a person's domicile can change during their lifetime.

The different types of domicile are:

- Domicile of origin: This is determined at birth and is based on the father's domicile if the parents were married or mother's if they were not.
- Domicile of dependency: If the relevant parent changes domicile, the domicile of children under 16 changes too.
- Domicile of choice: An individual can choose to sever all ties with their domicile of origin (e.g. by emigrating with the intention of never returning to the UK). The intention to change domicile must be permanent.

1.1.2 Categories of applicant (s 1(1)(a)-(e))

In order to make an application under the IPFDA 1975, an applicant must show that they come within a recognised category. The categories are set out in section 1(1)(a)-(e) and are summarised below:

- A spouse / civil partner of the deceased.
- A former spouse / civil partner who has not remarried or formed a subsequent civil partnership.
- A person (other than a spouse/civil partner) who cohabited with the deceased as if they were spouses / civil partners for two years prior to their death.
- A child of the deceased. (N.B. Adopted children are recognised as the children of the adopters for all legal purposes. Adoption severs legal ties with the birth family.)
- Any person who was treated by the deceased as a child of their family. (This might include a step-child for example).
- Any other person who was maintained (wholly or partly) by the deceased immediately before their death.

Note that for the purposes of the final category 'maintenance' refers to financial maintenance of the applicant. It is not sufficient that the deceased was providing the applicant with emotional or other forms of support.

> Section 1(3 IPFDA 1975): An applicant who falls within this category is treated as being maintained by the deceased "only if the deceased was making a substantial contribution in money or money's worth towards the reasonable needs of that person, other than a contribution made for full valuable consideration pursuant to an arrangement of a commercial nature."

1.1.3 Time limits (s 4)

An application under the IPFDA 1975 cannot be made more than six months after the date the grant was made (although an application can be made before the grant is issued).

You can search the government probate records online to find out the date of grant.

If the person died within the last six months a grant may not have been issued yet. Consequently, the online search service should be checked regularly.

Alternatively, an application can be made for a standing search by lodging the application form and fee at the Probate Registry.

The Probate Registry will search the index of grants to see whether a grant has been issued within 12 months before the application and, if not, for the following six months.

The application can be renewed at the end of the six month period on payment of a further fee.

Extension of time limits

The Court has discretion to extend the time limit for making a claim (see *Re Salmon (Deceased) [1980] 3 All ER 532 and Re Dennis [1981] 2 All ER 140).*

Following *Re Salmon*, the onus is on the applicant to show special reasons for having exceeded the time limit. The Court should take into account:

- the circumstances surrounding the delay,
- whether negotiations were commenced within the time limit,
- if the estate had already been distributed before notification of the claim, and
- whether a refusal to allow the applicant to bring proceedings would leave them without recourse against anyone else.

Re Dennis added that the applicant must demonstrate that they have an arguable case fit to go to trial.

1.2 Choice of Court

An application can be lodged in the High Court or County Court. When lodging an application in the High Court, consider whether to use the Family or Chancery Division.

Where using the High Court, it would be more appropriate to use the Family Division when an application is made by a spouse, civil partner or cohabitee and there are no complex issues of interpretation. In other cases it is generally more appropriate to use the Chancery Division.

1.3 Property to which the IPFDA 1975 applies

Any order under the IPFDA 1975 is made out of the 'net estate' of the deceased. This is defined in s 25 IPFDA 1975. It includes the following property:

- The normal succession estate.
- Any property in respect of which the deceased held a general power of appointment which has not been exercised.
- Any property which the deceased nominated by statutory nomination or gave by donatio mortis causa (minus any IHT paid by the donee)(ss 8(1) and (2) IPFDA 1975).
- The deceased's severable share of a joint tenancy. This is only part of the net estate if so ordered by the court under s 9 IPFDA 1975.
- Any other property disposed of during the deceased's life but which is made available by the court's anti-avoidance powers under ss 10 and 11 IPFDA 1975.

1.4 Grounds for IPFDA 1975 claim (s 1)

The grounds for making a claim under the IPFDA 1975 are:

- that the deceased's will did not make reasonable financial provision for the applicant; and/or
- that the distribution of the deceased's estate under the intestacy rules fails to make reasonable financial provision for the applicant.

Recent case law has demonstrated the difficulty in determining what 'reasonable' provision is. (See *Ilott v The Blue Cross and others [2017] UKSC 17.*)

The courts will consider the competing interests of the applicant and intended beneficiary, as well as the original wishes of the testator.

It is difficult for an applicant to predict what award they may be given under s 2 of the IPFDA 1975, should their claim be successful.

1.4.1 Orders of the court under s 2(1) IPFDA 1975

Section 2(1) of the IPFDA 1975 gives the court power to make the following orders:

- Periodical payments.
- Lump sum.
- Transfer of property.
- Settlement of property.
- Acquisition of property for transfer.
- Variation of marriage settlements.
- Variation of civil partnership settlements.
- Variation of the trusts on which the deceased's estate is held (whether those trusts arise by will or intestacy).

Any order is deemed to be effective from the deceased's death.

Orders are therefore 'read back' for tax purposes and treated as if the deceased had made the dispositions at death.

1.5 Summary

- If a person feels that a deceased has not made reasonable provision for them out of their estate, they may make a claim against that estate under the IPFDA 1975.
- The applicant must demonstrate that they fall within a recognised category of potential applicants, which includes spouses/civil partners and children of the deceased and other persons who were maintained by the deceased.
- The IPFDA 1975 only applies to the estates of persons domiciled in England and Wales at the time of their death.

- Claims must be made within made within six months of the grant.
- The applicant may make their claim in either the High Court (Family or Chancery Division) or County Court.
- The grounds for a claim are that the deceased did not make 'reasonable financial provision' for the applicant either by their will or under the intestacy rules.
- If a claim is successful, the court has wide powers to make appropriate orders such as lump sum and periodical payments out of 'net estate' of the deceased.

2 Assessing claims under the IPFDA 1975

2.1 Two-stage test for IPFDA 1975 claims

An IPFDA 1975 assessment requires the court to consider the following questions:

(a) Did the deceased fail to make reasonable financial provision for the applicant?

(b) If so, what award should the court make?

Both questions require an objective assessment of the facts of the case with reference to guidelines set out in section 3 of the IPFDA 1975.

2.2 Step 1: Reasonable financial provision

The first step of the process is to consider whether the deceased has made "reasonable financial provision" for the applicant. This is an objective assessment, based on statutory criteria. The court does not consider whether the deceased was morally wrong to dispose of their estate in the way that they did.

It is crucial to know what category the claimant falls into:

- Section 1(2) IPFDA 1975sets out two standards of reasonable financial provision, one of which applies to spouses/civil partners and the other applies to all other applicants.
- Section 3 IPFDA 1975 sets out factors that must be considered when assessing claims. Different factors apply depending on the category of claimant.

2.2.1 Standards of financial provision

Surviving spouse standard -

> 'Such financial provision as it would be reasonable in all the circumstances for a husband or wife or civil partner to receive whether or not that provision is required for his or her maintenance.'

Maintenance standard -

> 'Such financial provision as it would be reasonable in all the circumstances of the case for the applicant to receive for his/her maintenance.'

2.2.2 Extension of surviving spouse standard (s 14)

The court has discretion to apply the surviving spouse standard where the three following conditions are satisfied:

(a) An applicant is a former spouse or civil partner of the deceased who has not remarried / entered a civil partnership, or a spouse who is judicially separated from the deceased;

(b) Divorce, dissolution, nullity or judicial separation occurred within 12 months of the death; and

(c) No order for financial provision has been made or refused in the ancillary proceedings.

2.2.3 Useful terminology in relation to s 14

- Divorce ends a marriage. The parties are free to re-marry or enter a civil partnership.
- Civil partnership is ended by 'dissolution'. This is equivalent to a divorce.
- In limited circumstances, a marriage can alternatively be 'annulled'. This is a judicial declaration that the marriage never took place (it is a 'nullity').

- An alternative is seeking a decree of judicial separation. This formalises the end of the relationship but does not legally end the marriage. Some parties may seek this where e.g. for religious reasons, divorce is unacceptable.
- Ancillary relief is the name commonly given to the range of financial orders that a court may make upon divorce, dissolution, annulment or judicial separation.

2.2.4 Difference between the two standards

The key difference between the two standards is that the surviving spouse standard simply requires the court to consider what would be reasonable for the applicant to receive, without any requirement to consider what is needed for their maintenance. This is clearly a higher standard than the maintenance standard.

Although the conceptual distinction is clear, it is a difficult exercise in practice which will turn heavily on the facts of the case. It has unsurprisingly given rise to a lot of case law, especially as there is no statutory definition of 'maintenance'.

Broadly, the courts consider the maintenance standard to require an assessment of what it would be reasonable for an applicant to live on (without either living in luxury or poverty). This is not the same thing as the actual standard of living that the claimant has enjoyed during the deceased's lifetime (although this will be a relevant consideration).

2.2.5 Section 3 guidelines

- The court must consider guidelines set out in section 3 IPFDA 1975.
- The court must apply the common guidelines to all categories of applicants.
- Additionally, the IPFDA 1975 then sets out particular factors relevant only to each individual category of applicant.
- All the factors set out in section 3 IPFDA 1975 must be given equal weight.

Exercise: Read alongside

The guidelines are summarised in this part of the workbook. This is no substitute for reading the detailed legislation. You may find it helpful to have a copy of the legislation in front of you before moving on.

2.2.6 Common guidelines (All applicants)

Under section 3(1) IPFDA 1975 the court is required to have regard to:

(a) The applicant's financial resources and financial needs;

(b) The financial resources and financial needs of any other applicants;

(c) The financial resources and financial needs of any beneficiary of the estate;

(d) Any obligations and responsibilities which the deceased had towards any applicants or beneficiaries;

(e) The size and nature of the net estate of the deceased;

(f) Any physical or mental disability of any applicant or beneficiary;

(g) Any other matter the court considers relevant in the circumstances (including the conduct of the applicant or any other person).

When considering a person's financial resources and needs, the court must take into account any resources and needs they are likely to have in the foreseeable future.

2.2.7 Specific guidelines: Spouse / civil partner

Under s 3(2) IPFDA 1975 the court also considers the following in relation to spouses / civil partners:

(a) The applicant's age and the duration of the marriage / civil partnership.

(b) The contribution made by the applicant to the welfare of the family of the deceased, including any contribution made by looking after the home or caring for the family.

(c) The provision which the applicant might reasonably have expected to receive in divorce / dissolution proceedings if the couple had ended their relationship at the date of death. (This does not apply if they are judicially separated.) This is guidance only and does not set a limit on the award that can be made.

The court considers the first two criteria for former spouses / civil partners too. The third also applies if the court exercises its discretion to apply the surviving spouse / civil partner standard under s 14 IPFDA 1975.

2.2.8 Specific guidelines: Cohabitees

Under s 3(2A) IPFDA 1975 the court considers equivalents of the first two criteria for cohabitees i.e.

(a) The age of the applicant and the length of the period of cohabitation.

(b) The contribution made by the applicant to the welfare of the family of the deceased, including any contribution made by looking after the home or caring for the family.

The third criterion does not apply to cohabitees.

2.2.9 Specific guidelines: Child of the deceased

Under s 3(3) IPFDA 1975 where the applicant is a child of the deceased, the court must also consider the manner in which the applicant was (or might expect to be) educated or trained.

This section also applies if the applicant was not a child of the deceased, but was treated as such, but the court must **also** consider:

(a) Whether and on what basis the deceased maintained the applicant, for what time they did so and the extent of their contribution.

(b) Whether and, if so, to what extent the deceased had assumed responsibility for the applicant's maintenance.

(c) Whether in maintaining or assuming responsibility for maintaining the applicant the deceased did so knowing that the applicant was not their child.

(d) The liability of any other person to maintain the applicant.

2.2.10 Specific guidelines: Other applicants

Under section 3(4) IPFDA 1975 if an applicant does not fall within one of the previous categories, but was maintained (wholly or partly) by the deceased, the court must take into account:

(a) The length of time for which and the basis on which the deceased maintained the applicant, and the extent of the contribution made by way of maintenance.

(b) Whether and, if so, to what extent the deceased assumed responsibility for the maintenance of the applicant.

> Section 1(3) IPFDA 1975: An applicant who falls within this category is treated as being maintained by the deceased "only if the deceased was making a substantial contribution in money or money's worth towards the reasonable needs of that person, other than a contribution made for full valuable consideration pursuant to an arrangement of a commercial nature."

2.3 Step 2: What award should the court make?

Once it has been determined that the deceased failed to make reasonable financial provision for the applicant, it is necessary to consider what award should be made to the applicant. There are two components to this assessment:

(a) Quantum: How much should the applicant receive?

(b) Form of award: What form should the award take?

Again, the considerations depend on the category into which the applicant falls and all relevant section 3 IPFDA 1975 factors must be given equal weight. As the process is objective, the assessment will be based largely on financial evidence.

2.3.1 Assessing value and nature of award

In order to assess the value of a claim, it is necessary to obtain a list of the applicant's assets and liabilities (including any future assets or liabilities).

This should be used to assess the relevant section 3 IPFDA 1975 factors and determine whether the applicant has a particular need (such as insufficient income or a need for housing).

This will help to determine not only the amount that should be awarded but also the nature of the award.

REMINDER:

Section 2(1) of the IPFDA 1975 gives the court power to make the following orders:

- Periodical payments.
- Lump sum.
- Transfer of property.
- Settlement of property.
- Acquisition of property for transfer.
- Variation of marriage settlements.
- Variation of civil partnership settlements.
- Variation of the trusts on which the deceased's estate is held.

2.3.2 Comparisons with divorce

Where the applicant is a spouse/civil partner of the deceased, the court is required to consider the relief that might be available on divorce.

It does not mean that the applicant will definitely receive the same award as they would have in these circumstances. In particular, it is not correct to assume that the applicant will receive a 50% interest of the estate on a "clean break" basis.

The "deemed divorce" factor is only one consideration. There are many reasons why it may not be possible or fair to award the applicant what they would have received on divorce.

Because there is no presumption of a clean break, there is also the question of whether it is appropriate to award the applicant an outright interest in the estate, or whether it may instead be appropriate to grant them a life interest.

2.3.3 Interests under a trust

An applicant may be the object of a trust under the will or intestacy but argue that it is not reasonable financial provision.

This requires an assessment of all relevant factors. An interest under a discretionary trust may not constitute reasonable financial provision, as it does not guarantee the applicant anything.

A life interest may amount to reasonable financial provision, depending on the level of income that the property is producing (compared with the applicant's needs).

Not only may a life interest be reasonable financial provision in the first place, but the court also has the power to award a life interest under IPFDA 1975 Act. There are many cases in which this may be more appropriate than awarding the applicant a capital interest. For example:

- The applicant may simply want to continue to live in the family home, which was owned by the deceased.
- The deceased may have children from another relationship, to whom the applicant would be unlikely to leave the property upon their own death.

2.4 Summary

- Claims under the IPFDA 1975 can only be made on the ground that the deceased failed to make 'reasonable financial provision' for the applicant.
- What is 'reasonable financial provision' depends on the relationship between the deceased and the applicant. Different standards apply to spouses/civil partners and all other applicants.

- Once the court has concluded that the deceased did not make 'reasonable financial provision' for the applicant, it is necessary to assess the quantum and form of award to be made to the applicant.
- The court must apply statutory guidelines when assessing whether the deceased made 'reasonable financial provision' and considering what award to make.
- There are common guidelines that apply to all categories of applicant, as well as more specific guidelines that vary depending on the type of applicant.
- It is an objective process and all factors have equal weight.

3 Post Death Changes

When a person dies their estate is distributed by law according to the provisions of their will or the intestacy rules.

The distribution of an estate under a will or intestacy may be considered unsatisfactory by the beneficiaries if:

- inadequate provision has been made for a particular person
- too great / unwanted provision has been made for a beneficiary
- the distribution results in an undesirable tax situation

If an original beneficiary does not wish to keep their inheritance, or otherwise wants to re-distribute the estate, they are free to give this away as they see fit.

However, such a gift will take place after the administration of the deceased's estate and will be treated for tax purposes as a transfer made by that beneficiary.

If a beneficiary chooses to give away their inheritance there may be adverse IHT and CGT consequences for the donor:

IHT:

- The original beneficiary would be making a PET
- This would be a chargeable transfer if they died within 7 years of the gift

CGT:

- A gift of a non-cash asset would be a CGT disposal by the original beneficiary
- Any increase in value of the asset since the date of the deceased's death would be subject to CGT if the increase (i.e. gain) is greater than the beneficiary's tax-free allowance.

It is possible for changes to be made to the original estate distribution after a person has died which can mitigate these tax consequences.

3.1 Variations

KEY TERM

Variation: A variation is a direction from an original beneficiary, to the deceased's PRs, to transfer property that the beneficiary is entitled to under the terms of a will or the intestacy rules to another person instead.

- A variation is possible **after** an inheritance has been accepted
- A variation may be made in respect of the whole or part of an inheritance
- The original beneficiary is free to determine who receives the varied inheritance

3.1.1 Variations: IHT consequences

If the conditions of s142 IHTA (as explained later) are satisfied, the gift from the original beneficiary is read-back to the date of the deceased's death and treated for IHT purposes as having been made by the deceased to the new beneficiary (instead of being made by the original beneficiary to the new beneficiary).

The consequences are:

- the original beneficiary does not make a PET. A PET is a lifetime transfer of value to another individual. If the transferor does not survive for seven years after making the PET, it becomes chargeable alongside their death estate. However, with a variation the original beneficiary does not need to be concerned about surviving 7 years from the date of the gift.

- IHT due on the deceased's death estate is re-calculated on the basis the deceased left the property to the new beneficiary.

Variations: Conditions

A variation must comply with the following conditions for the IHT 'writing–back' effect to be achieved:

Legislation: s 142 (1) IHTA

- made by the original beneficiary in writing (a deed is not required but frequently used)
- within the two years following the deceased's death
- contains an express statement by the beneficiary confirming s 142 IHTA should apply
- not be made for consideration in money or money's worth

Variations: Estate PRs

A beneficiary can vary their entitlement to the estate assets without approval from the PR's of the deceased's estate.

However, if the variation results in additional IHT being due in respect of the deceased's estate, the PRs should:

- Sign the variation
- Provide HMRC with a copy of the written variation and pay the amount due.

The PRs can only refuse to sign the variation/approve the "writing back" under s 142 if the assets held by them are insufficient to discharge the additional tax payable.

The amount of IHT payable in respect of the deceased's estate may not be affected by a variation. However, if the amount an exempt beneficiary receives either increases or decreases, this may result in an increase or decrease in the IHT payable. The following examples demonstrate how the estate IHT can be affected by a variation.

Example: Change to estate IHT 1

A leaves their estate to their spouse, B. A has no NRB available but the estate is spouse exempt so no IHT is due. B varies their entitlement to give F one of A's paintings.

A's estate is now taxed as though their will:

- Gave a painting to F
- Left the residue of the estate to B

IHT will now be payable in respect of A's estate because the painting is passing to a non-exempt beneficiary (F) and there is no NRB to use.

Example: Change to estate IHT 2

A leaves their taxable estate to their child, D. IHT is payable.

D varies their entitlement to make a charitable gift of £50,000.

A's estate is now taxed as though their will:

- Gave £50,000 to charity
- Left the residue of the estate to D

A's estate now qualifies for charity exemption, which was not the case originally.

Less IHT will be due and A's PRs can claim a refund.

Example: No change to estate IHT 1

A leaves their estate to their spouse, B.

A's estate qualifies for spouse exemption and no IHT is due. A has a full NRB available but does not use any of this.

B varies their entitlement to give B's child (C) the sum of £150,000.

A's estate is now taxed as though their will:

- Gave a cash legacy of £150,000 to C
- Left the residue of the estate to B.

Following the variation A's estate is taxed as follows:

- the gift to C is within A's NRB so taxed at 0%
- the balance of A's estate is spouse exempt.

No IHT is payable and the variation does not affect the IHT due in respect of A's estate.

However, A has now used part of their NRB, which affects the amount that can be transferred to B as the surviving spouse.

3.1.2 Overview of Capital Gains Tax

CGT is also relevant to variations. To appreciate why you need an understanding of the basic principles of the charge:

- CGT is charged on the disposal of a non-cash asset. Selling and giving an asset away are both types of disposal.
- A gain made by the person who disposes of the asset is potentially subject to CGT.
- The gain is the increase in value of the asset since the date of acquisition to the date of disposal. In basic terms the acquisition value is the price paid when the asset was purchased (or the market value at the time if it was received as a gift) and the disposal value is the sale price if the asset is sold (or the market value if it is given away).
- If someone gives an asset away no actual profit is made because the transferor does not receive payment. However, for CGT purposes, they are deemed to make a gain with reference to the market value at the time of the gift.
- Taxpayers have an annual tax-free allowance. Exemptions and reliefs may also apply. Only gains above this are charged to tax.

Example: CGT 1

- Disposal value - Acquisition value = Gain
- Gain – tax free allowance (TFA) = amount charged to CGT

A few years ago, A purchased shares for £10,000. A has just sold the shares for £30,000.

- A's gain is £20,000 (£30,000 - £10,000)
- A has a TFA of £5,000. After this is applied, the amount of A's gain which is charged to tax is £15,000.

Example: CGT 2

A few years ago, B was given shares worth £2,000. B has just given these shares to C, which are now worth £30,000.

- B's deemed gain is £28,000 (£30,000 - £2,000).
- B has an available TFA of £10,000. After this is applied, the amount of B's gain which is charged to tax is £18,000.

Variations: CGT consequences

Under normal rules a gift by the original beneficiary to another person would be a disposal by the beneficiary.

If the assets had increased in value since the date the deceased died a CGT liability can arise if the increase is more than the beneficiary's TFA.

If an estate beneficiary wants to give away their inheritance but avoid a CGT charge the provisions of s 62 Taxation of Chargeable Gains Act 1992 permit a writing-back effect similar to that available for IHT under s 142 IHTA.

The conditions for s 62 Taxation of Chargeable Gains Act 1992 to apply are the same as for s 142 IHTA.

The effect of complying with the conditions is that the gift is 'written-back' to the deceased's date of death and treated as having been made by the deceased.

The writing back effect means the new beneficiary is treated as inheriting the assets from the deceased, and the original beneficiary has not made a disposal. The new beneficiary is deemed to acquire the assets at their date of death value (not the value at the date of the variation).

Any increase in the value of the assets since the date of death will be taxed in the hands of the new beneficiary when/if they later dispose of it.

Note that contrary to IHT there is no issue of additional CGT as a result of a variation because no CGT is payable in respect of the deceased's death estate in the first place.

Gifts of cash are **exempt** from CGT so the CGT consequences only need to be considered where non-cash assets are the subject of the variation.

3.1.3 Variations: choice to write-back

The original beneficiary can choose whether or not to use the writing back provisions for either or both of IHT and CGT.

If no writing-back is required for either IHT or CGT, no formal variation is needed and the beneficiary can simply make a gift to the intended beneficiary.

The choice about whether to enter a formal variation in order to make use of s 142 IHTA and/or s 62 Taxation of Chargeable Gains Act 1992 will depend on the circumstances.

Activity 1: Choice to write-back?

Consider the following :

A inherits a shareholding from the estate of his late father (F) which he wishes to vary in favour of his long-term girlfriend (G).

At the date of F's death, the shares were worth £105,000.

At the date of the proposed variation the shares are worth £112,000.

Should A elect to make use of s 142 IHTA and s 62 Taxation of Chargeable Gains Act 1992?

3.1.4 Variations: Restrictions

Capacity to vary

If the original beneficiary is a minor or lacks mental capacity, they cannot make a variation without the consent of the court under the Variation of Trusts Act 1958.

Such applications are expensive and time consuming.

Number of variations possible

There is no limit to the number of times a will can be varied, but each asset can only be varied once.

HMRC stated

> 'an instrument will not fall within s 142 if it further redirects any item or any part of an item that has already been redirected under an earlier instrument'.

Therefore, a second variation in relation to the same property will not be effective for tax purposes.

Property subject to a variation

Property passing by will, intestacy and interests in joint property can all be the subject of a variation. However, the following **cannot** be varied:

- Property in respect of which the deceased was a life tenant immediately before death. The trust deed will determine where those assets go.
- If the deceased had made a gift with reservation of benefit, this property cannot be varied post death as the deceased was not the legal owner of these assets and, although they are subject to IHT, they do not form part of the distribution estate.

If the original beneficiary makes a variation of property but continues to enjoy the property – *has the original beneficiary made a gift with reservation of benefit?*

No! Because the effect of the writing back provisions is to treat the arrangement as a disposition by the deceased, the original beneficiary is not the donor of the property and therefore there can be no reservation of benefit by them.

3.2 Disclaimers

KEY TERM

Disclaimer: A disclaimer is similar to a variation but operates as a refusal to accept property to which a beneficiary is entitled either under the intestacy rules or under the terms of a will.

There are limitations to disclaimers:

- A beneficiary can only disclaim **before** acceptance
- A beneficiary can only disclaim the whole gift
- A disclaimer of a beneficiary's rights under a will does not disclaim their rights under any intestacy which may arise as a consequence of disclaiming their testamentary inheritance
- The inheritance passes as if the gift to the original beneficiary had failed. The ultimate destination is determined by provisions in the will or the intestacy rules. The original beneficiary cannot control who receives the assets they disclaim.

3.2.1 Disclaimers: IHT & CGT

Where a beneficiary does disclaim their inheritance, the provisions of s 142 IHTA and s 62 Taxation of Chargeable Gains Act 1992 apply in the same way as they do to variations.

The original beneficiary is not treated as having made a transfer to the new beneficiary. Instead, the deceased's estate is taxed as though the person who is ultimately entitled had actually been entitled on death.

The conditions for the writing back effect are the same as those for a variation.

Variations are not subject to the same practical limitations as disclaimers so are usually preferred.

3.3 Precatory Trusts

KEY TERM

Precatory Trusts: A precatory trust arises where a gift is made to a beneficiary by will with a wish expressed as to how the beneficiary should pass on those assets to others.

For example:

> "I give my gold rings stored in the safe in my bedroom to my daughter with the hope that she distributes these according to the letter of wishes I have left with this will"

In this context the word trust is misleading. No formal trust is created (due to an absence of intention) and the testator's wishes are not binding on the beneficiary. In the example above the daughter could simply keep all of the rings.

Precatory trusts allow flexibility with regards gifts of chattels as the testator may change their mind and update the letter of wishes without amending their will. Though note that it is important for the subject matter of the gift to be certain.

3.3.1 Precatory Trusts: IHT

A precatory trust does not vary the distribution of an estate directly, but there is a similar legal effect for IHT purpose if the beneficiary acts upon the testator's wishes.

By virtue of s 143 IHTA, if the original beneficiary makes the distributions intended by the testator within 2 years of the testator's death, these are treated for IHT purposes as gifts made by the testator's will and not the original beneficiary.

The effect of s 143 IHTA on distributions under a precatory trust is that the original beneficiary is not treated as having made a PET of these items, which would otherwise be the case.

However, unlike variations and disclaimers, **no written election** is necessary for this to apply and the writing back effect for IHT happens automatically.

3.3.2 Precatory Trusts: CGT

There are no equivalent CGT rules and s 62 Taxation of Chargeable Gains Act 1992 does not apply.

Therefore, a re-distribution in accordance with testator's wishes would be treated as a disposal by the original beneficiary.

However, because:

- there is likely to only be a short time between the death of the testator and the distribution by the beneficiary, and
- most chattels are unlikely to increase significantly in value in any event this is not usually an issue.

3.4 Summary

- A beneficiary may vary their inheritance by giving all or part of it away to another person that they choose.
- A beneficiary may disclaim (i.e. refuse to receive) the whole (but not part) of their inheritance prior to accepting it. The property disclaimed is re-distributed according to the terms of the will/intestacy rules as if the original gift had failed.
- If a variation or disclaimer is made in the 2 years following death the beneficiary may elect in writing to have the gift 'read-back' to the testator's estate for IHT and/or CGT purposes such gifts are treated as made by the deceased, not the original beneficiary.
- A precatory trust arises where a gift is made with an express wish that the beneficiary distributes their inheritance in accordance with the testator's wishes. There is no legal obligation for the beneficiary to comply with these wishes.
- If a beneficiary does comply with the testator's wishes under a precatory trust, the distributions are automatically treated for IHT purposes as made by the deceased. There is no equivalent writing-back effect for CGT.

Activity answers

Activity 1: Choice to write-back?

IHT (s 142 IHTA)

- It makes sense for A to make an election under s 142 IHTA so that the gift of the shares is treated for IHT purposes as being a gift from F to G following F's death.
- A will not be treated as making a PET to G, which could otherwise impact on his own IHT affairs.
- It makes no overall difference to the IHT due on F's death estate and only A needs to sign the variation.

CGT (s 62 Taxation of Chargeable Gains Act 1992)

- If A **elects** to use s 62, G will be treated as receiving the shares by F following F's death.
- G will receive the shares with an acquisition value equal to the date of death value - £105,000.
- If A does **not elect** to use s 62 the gift is a disposal by A to G of the shares at the current market value of £112,000. A will make a gain of £7,000.
- If A's gain is within his TFA and A does not otherwise need to use this it is preferable not to use the writing back effect under s 62 Taxation of Chargeable Gains Act 1992.
- A has no CGT liability to avoid so there is no tax saving to be made and there is an added benefit for G who receives the shares with the higher acquisition cost. This potentially reduces the gain G stands to make on a later disposal.

8 Ethical and professional conduct issues

1 Introduction

When taking instructions for a will a solicitor must comply with relevant regulations and duties.

2 SRA Code of Conduct for Solicitors ('CCS')

The CCS form part of the SRA Standards & Regulations and sets out the professional standards the SRA expect of solicitors authorised to provide legal services.

The standards are a framework which applies to all those working within a law firm. Each individual must exercise personal judgment regarding how to meet the standards, taking into account their particular situation, the nature of their client, and their area of practice.

While the CCS is drafted in general terms the SRA have produced guidance notes to assist with the interpretation and implementation of the standards and there are certain parts of the CCS which are particularly relevant when drafting wills.

2.1 Third Party Instructions

CCS 3.1: You only act for clients on instructions from the client, or from someone properly authorised to provide instructions on their behalf. If you have reason to suspect that the instructions do not represent your client's wishes, you do not act unless you have satisfied yourself that they do.

A solicitor must take instructions for a will from their client only, and should not take instructions from anyone else (unless a third party is authorised by the client to provide instructions). A solicitor should be aware of the risk of (and avoid) someone giving instructions on behalf of another when meeting a couple or members of the same family together.

A solicitor should be alert to the risk of undue influence. A will made under undue influence or as a result of fraud will not be valid.

2.2 Providing a competent service

CCS 3.2: You ensure that the service you provide to clients is competent and delivered in a timely manner.

CCS 3.3: You maintain your competence to carry out your role and keep your professional knowledge and skills up to date.

When preparing a will for a client you must be competent to advise on all aspects of the retainer, including any tax and trust implications. A will must be drafted promptly and a time delay gives rise to the risk that the testator dies intestate or with an earlier valid will that does not reflect their current wishes. These aspects of the CCS are pervasive and apply to all clients.

In addition to the CCS (breach of which may give rise to SRA sanctions) there are overlapping common law obligations which require a solicitor to exercise a duty of care and skill (breach of which may give rise to a claim for negligence against a solicitor personally).

2.3 Client's circumstances

CCS 3.4: You consider and take account of your client's attributes, needs and circumstances.

It is with reference to this rule that a legal practitioner should be alert to any indication that their client may lack testamentary capacity. A common legal challenge for anyone seeking to disregard the effect of a will is to claim that the testator lacked capacity when it was made, which if true, renders the will invalid.

A solicitor has a duty to ensure their client does have capacity and also to retain evidence to support this should the will be challenged at a later date.

When taking instructions for a will a solicitor must satisfy themselves the client has testamentary capacity.

If testamentary capacity is in doubt the testator's consent should be obtained to approach their medical practitioner for confirmation of capacity and to make a record of the findings (known as the 'golden rule'). The purpose of the assessment and the test for testamentary capacity should be explained to the medical practitioner so they are able to make a decision.

- If testamentary capacity is confirmed: a will can be made but it is advisable to ask the doctor to act as a witness and to record their findings.
- If testamentary capacity cannot be confirmed: a will should not be prepared. The only will which can be made is a statutory will following an application to the Court of Protection under s 16 Mental Capacity Act 2005.

Whether or not there are concerns, a detailed file note of the client's instructions and an express statement regarding the solicitor's assessment of the client's testamentary capacity should be kept. An attendance note confirming there were no concerns may be useful evidence later on should the will be challenged. In *Hawes v Burgess 2013* it was held that where an experienced solicitor had made a contemporaneous attendance note recording his view that a testator had capacity it would require strong evidence for the court to find otherwise.

2.4 Gifts to solicitors in a will

CCS 6.1: You do not act if there is an own interest conflict or a significant risk of such a conflict.

A client may wish to leave property to you or a member of your firm in their will. There is no mandatory rule which prohibits this, but there is a risk of a conflict of interest and it is recommended that you should refuse to act for a client where the client is proposing to make a gift of a **significant value** to you or a member of your family, or a member of your firm or their family, unless the client takes independent legal advice.

A gift may be significant in itself, or when considering the size of the testator's estate.

NB: There is no presumption of a testator's knowledge and approval where the person who prepared the will is a beneficiary. Those attempting to prove the will would have to prove that the testator did know and approve of the contents.

3 Common Law duties

You should be aware of:

- a general common law duty to prepare a will for a client with due skill and care, and within a reasonable time (*White v Jones*).
- the obligation to draft a will which gives effect to the testator's instructions. Mistakes often only come to light after the testator's death, when it is often too late to rectify the errors. If the testator fails to execute a valid will which achieves their intended aims because of the legal practitioner's breach, the practitioner may be liable to the testator's intended beneficiary.
- the requirement to advise a client on *how* to execute their will. In *Ross v Caunters* the defendants were liable for not advising on the effect of s 15 WA in relation to a witness who was a spouse of a beneficiary. In *Esterhuizen v Allied Dunbar Assurance* it was considered that a solicitor would likely be negligent by simply leaving a will with the testator to be executed and witnessed and to do no more.

4 Good practice: Taking instructions

To obtain full and clear instructions to draft a will, a personal interview with the client will usually be necessary. A solicitor should obtain written confirmation from the client that they want the law firm to act and the terms of the instructions.

Many firms use checklists or questionnaires to ensure key information is obtained from the client. However, a solicitor should beware of simply completing a checklist and not fully interviewing the client or listening to their instructions when ascertaining the client's personal circumstances and goals.

Once relevant information has been recorded, the client should be advised of the alternative ways of disposing of their estate. It may also be relevant to give advice about lifetime gifts including tax planning matters.

5 Taking instructions: IPFDA 1975

One very important issue to consider when taking instructions is the risk that a claim may be made against the client's estate under IPFDA 1975. The following steps should be taken to minimise the risks and ensure that full advice is given:

- Ensure that you take full details of all members of the family and any dependants to enable you to provide full advice.
- If there is a former spouse or civil partner, check the ancillary relief order to see whether IPFDA 1975 claims have been barred under s 15 (which is normal where there is a clean break order).
- If the deceased is maintaining someone other than immediate family members then consideration should be given as to whether that maintenance could be terminated. If so, ensure there is a written record to evidence the termination.
- If there is the possibility of a claim from someone with special needs then the client needs to be aware that social services could pursue a claim on behalf of that person.
- If there is a potential applicant that the client does not wish to include in the will despite your advice, then get the client to provide a written statement explaining why no provision has been made. The statement should be kept with the original will and copies kept on the client file and with the executors (if the client agrees).
- Irrespective of the practical steps taken by a testator, clients should be advised that it is not possible to prevent a future claim being made against their estate under the IPFDA 1975 Act or guarantee that any such claim will fail.

Key case: Ilott v The Blue Cross and others [2017] UKSC 17

In *Ilott v The Blue Cross and others* [2017] UKSC 17 the testator left the whole of her estate to charity and nothing to her only child (from whom she was estranged). The testator in this case had left a note with her will explaining why she was dis-inheriting her adult daughter and making it clear she did not wish her to receive anything.

Despite this, a claim made by the testator's daughter following her mother's death was successful.

6 Good practice: review of wills

Once a testator has made their will, it is important to ensure that it is reviewed at regular intervals either generally (to take account of tax changes/changes in testator's general financial situation) or specifically if certain events occur. These could include such events as:

- Marriage or civil partnership;
- Divorce or dissolution of civil partnership;
- Birth of children;
- Death of close relatives/beneficiaries;
- Substantial change to the value of assets;

- Recent inheritance of their own; and
- Moving or acquiring assets abroad.

7 Summary

Professional conduct matters pervade all aspects of your work irrespective of the department you work in. However, when providing will drafting services, particular attention should be given to:

- CCS 3.1-3.4
- CCS 6.1
- IPFDA 1975
- Common law duties and obligations
- Your firm's best practice