

AF1/J02

Part 9: Wills and Intestacy

The milestones for this part are to understand;

- The probate process.
- The essentials of a valid will.
- How a will can be challenged
- The rules of intestacy.
- How a deceased's estate is taxed
- The principles of Deeds of Variation and disclaimers.

The Probate Process

Probate in England and Wales is the legal and financial processes involved in dealing with the property, money and possessions of a person who has died.

- If there is a will the named executor applies for a **Grant of Probate** from a solicitor or the local Probate Registry Office.
- If there is no will the person applying would be called an administrator and would apply for a **Grant of Letters of Administration** rather than a grant of probate. Executors and administrators can both be called the deceased's **personal representatives**.

The process can be split into five phases

1. Identifying and valuing all the deceased's assets and all their liabilities in order to determine the value of their estate.
2. Submitting the correct IHT return even if there is no liability to HMRC, and paying IHT if there is a liability. Once this is done an application is made to the Probate Registry for the Grant of Probate. This is a legal document confirming the authority to administer the estate. It enables the executors to close the deceased's bank accounts and to sell or transfer assets.
3. Once this has been issued the executor can deal with the deceased's assets, settle any liabilities, pay any expenses, including funeral costs.
4. Prepare estate accounts showing all payments in and out of the estate and showing the balance left for distribution to the beneficiaries.
5. The assets are then transferred to the beneficiaries in the will

Getting a Grant of Probate isn't always required in dealing with an estate.

- If all property is in joint names, the survivor automatically inherits this. If the couple were married (or in a CP) there would be no IHT but the executors would still have to submit a list of all assets to HMRC.
- If the deceased's estate is less than £5,000.

In addition banks and building societies have their own limits for closing an account without Requiring a Grant of Probate. Barclays and Nationwide have a limit of £30,000 whereas with Lloyds Banking Group it is £25,000

If the estate includes land or property a grant of probate is always required unless it was owned on a joint tenancy basis.

Practical issues facing the executors

The deceased's property is everything they owned at date of death. For jointly held property the deceased is deemed to own 50% unless otherwise stated. Land, property and household contents should be professionally valued. A valuation should also be made of any high value items such as jewellery or antiques. The value of shares and Gilts is the market price at close of trade on the date of death.

Any outstanding loans should be added to the estate. The personal representatives will also claim the sum assured on any life policy in the deceased's own name if this wasn't in trust. This will form part of the deceased's estate.

The executors must pay off any debts the deceased had and these will include utility bills and credit card debts. The personal representatives must also finalise the deceased's liability with HMRC for income and capital gains tax. If the deceased was on PAYE and died part way through the tax year there may be a refund since the PA is not reduced and tax would have been deducted on the assumption that the deceased would have received a whole year's salary.

The executors may find it easier to use a solicitor to carry out the process but they are still responsible for the overall process.

Wills

Ideally the writer of the will should have told the executor(s) that they wish them to carry out this role and told them where the will is kept. As part of the probate process the Will will be validated by the probate office.

For a will to be valid it must be:

- In writing
- Signed and dated by the testator (that is the person making the will)
- Witnessed by two persons who do not benefit from the will. That includes the witnesses' spouses

Couples usually make **mirror wills** that is they are identical.

David and Ruth write mirror wills leaving all their property to each other using a wording like, "all my property to my husband and then to our children"

If David dies first Ruth can write a new will. This could be a problem if they have children from previous marriages. David may want his children to benefit but Ruth's new will could pass the property on to her children.

An alternative is for the couple to write **mutual wills**. These establish a constructive trust on first death so the survivor cannot change the beneficiaries.

Another option especially with second marriages is to create an IPDI trust in the will.

Jack is a widower and marries Emma. Both have children from their previous marriages.

Jack wants to provide for Emma after his death but if he passes capital to her in his will it will become her absolute property. This means that she could pass it on to her children on her death.

To get round this Jack set up an IPDI trust in his will. The trust property is a mixture of different investments. As the life tenant Emma has a right to the income but not the capital.

On her death the trust property reverts to Jack's children as the remaindermen

A will can include a survivorship clause that states the beneficiary must survive 28 days after the death of the testator using a wording such as, "all my estate to my wife Mary providing she survives 28 days and if she does not all my estate to my children".

This reduces administration in cases where the testator and beneficiary die together or one dies shortly afterwards.

George and Mary were married and made wills leaving to each other. This included a 28 day survivorship clause.

They were involved in a car accident and George died instantly. Mary died 8 days later. Under the terms of the will Mary will not inherit. If the clause was not in the will there would be two estates to administer compared to just one with the survivorship clause.

The drawback is that it could limit the ability to use transferable Nil Rate Bands. In the previous case if George's estate had gone direct to his children the NRB would have been £325,000. Without the clause George's estate would have gone to Mary which would be exempt. Her estate would then go to her children and the executors could claim George's unused NRB.

Care needs to be taken in getting the wording right. A will that states "£5,000 to be paid to cancer research" sounds fine but there is no such organisation or charity. The executors would have problems paying that money and would need to consult with the beneficiaries.

A will can be revoked at any time and a will usually starts with a phrase, "I revoke all previous wills" A will can be amended by making a codicil but this can be quite tricky and it is usually better to make out a new will.

Effect of marriage and divorce on wills.

A will is automatically revoked on marriage.

Bill and Linda have lived together for many years and both made wills leaving everything to each other. They decide to marry and as soon as the marriage is concluded their wills become invalid and they would die intestate.

This can be avoided by writing a will "in anticipation of marriage"

Divorce does not revoke a will but once the divorce is finalised the previous spouse is deemed to have "died" on the day the decree absolute is granted so cannot inherit even if he or she is named in the will.

If the spouse had been appointed an executor, divorce will cancel that appointment.

Challenging a will

Under English law an individual can pass their property on to anyone as they wish. Their dependents have no automatic right to anything. However, a will can be challenged in court. The most common situation is where the children believe a parent was pressurised into leaving everything to a new spouse or partner. They may also claim that the parent wasn't of sound mind when the will was made.

It is possible for children of the deceased to take action using the provisions of **The Inheritance (Provision for Family and Dependents) Act 1975**.

They would apply to the courts on the grounds that the will did not make reasonable financial provision for them. To qualify they must have been:

- the children of the deceased
- living in the same household
- financially dependent of the deceased.

The application must be made within six months of the Grant of Probate being issued.

The principle that property can be left to anyone has been modified by a recent case (**Ilott v The Blue Cross and others 2017**) The deceased had left all her estate of £500,000 to charity excluding her daughter from whom she was estranged. The daughter challenged this and the Court found that the mother's actions were "unreasonable, capricious and harsh" because she had failed to make "reasonable provision" for her. The court ordered the executors to give the daughter £164,000 from the estate. This went to the Supreme Court and it partly upheld the decision that the mother did owe something to her daughter and couldn't totally exclude her.

Intestacy

If someone dies intestate, their property will be divided along intestacy rules. Intestacy rules only apply to solely owned property, including a share of the property owned as tenants in common. Property held in joint tenancy will automatically pass to the survivor

The two factors that will determine how the estate will be distributed are whether the deceased was married (or in a civil partnership) and whether he or she had children.

Unmarried partners have no rights under intestacy rules.

Married, with children

- Spouse gets deceased's personal possessions plus £322,000 absolutely. Note that the spouse must survive 28 days after their spouse's death to get this right.
- Remainder is split 50/50
- 50% goes to children absolutely if over 18. If under 18 it is held in trust until they become 18.
- 50% goes to spouse absolutely

Note that it is only the child/children of the deceased that can benefit. This definition includes illegitimate and adopted children but not step children. This could be significant in second marriages.

Henry and Helen are married. Helen had two children from her previous marriage but Henry has no children. If Henry dies Helen's children cannot benefit under the intestacy rules because they are his step children and his estate will be treated as married, no children.

If a child of the deceased had died previously, any of their children, that is the deceased's grandchildren will take the share of the deceased parent.

Emma had one child, Sarah who died before her mother. Sarah had a son, John, who was alive when Emma died. Under intestacy rules he will be entitled to receive whatever Sarah would have inherited.

Married no children

- Spouse gets all property. Again the 28 day rule will apply

No spouse but children

- Everything to the children.

No spouse, no children

The first in line to inherit would be the deceased's parents. If neither parent is alive it is shared between any brothers and sisters. If these had died, then their share would pass to their children and they are deemed to "stand in the shoes of their parents."

Simon died a widower who had never had children. Both his parents had died but he had two siblings, Alan and Carol, both of whom were dead. Alan had three children and Carol had one.

Simon's estate is split 50/50 (between his two siblings). Alan's children each receive 1/3 of his 50% share. Carol's child receives all of his share

Taxation of the estate

It may take quite some time for an estate to be wound up and during this time tax may become due. For example, there may be a large amount of cash on deposit or the executors may sell assets that creates a CGT liability.

Income Tax

If the estate property produces income after the date of death, the estate has no personal allowance, PSA or Dividend Allowance. Tax is only applied at basic rate, that is 20% on savings income and 8.75% on dividend income. Following the changes that came in from April 2016 interest and dividends are paid gross so the executors or administrators will have to pay tax.

If death occurred on or after April 6 2018 the executors can apply for any ISA the deceased owned to be designated as a **Continuing ISA**. This means it retains its tax benefits and the estate will not be liable to income or CGT tax.

This status will last until the sooner of:

- The administration of the estate is complete
- The ISA is closed
- Three years after death of the investor

Capital Gains Tax

There is no liability for the individual on death.

The personal representatives are deemed to acquire assets at market value at date of death. If they are sold they are liable for CGT at a rate of 20% or 28% for residential property. They can use the individual's personal exemption for the tax year of death and the following two tax years. The personal representatives can also claim for any capital losses that arose in the tax year of death to be carried back and set against capital gains in the three preceding years.

Deeds of variation

This effectively allows a will to be rewritten after death (it can also apply to cases alter provisions made under intestacy.)

To be valid:

- All affected beneficiaries must be over 18 and sane
- All affected beneficiaries must agree to the change
- It must be executed within two years of death
- It must contain a statement that the variation is to have effect for IHT as if the deceased had made it
- Should the deed increase the IHT liability it must also be signed by the deceased's personal representatives.
- No money or consideration paid for making the deed.

A DOV can be made even if the beneficiary has received the property as long as it is executed within two years of death.

Janet & John are the sole beneficiaries of their late father's estate. Janet has no children but John has two and wishes to pass half his legacy to them. He can complete a DOV without his sister's agreement as she is unaffected by this arrangement.

The benefit of this arrangement is that the gift to his children is effectively made from his late father's estate. If he had accepted the full legacy and gifted half to his children he would have made a PET.

Fatima receives a legacy of £300,000 from her late father. She is independently wealthy and would prefer to put this money into a trust for her children.

If she makes a gift her NRB would be reduced by £300,000 for the next seven years. If she does a DOV the money will be considered to have come from her father's estate and she will still have her full NRB of £325,000.

Disclaimers

If you receive property under a will, intestacy or trust, you can disclaim it provided you haven't yet received it.

To be effective for IHT purposes:

- It must be disclaimed within two years of the death
- There must be no money or consideration paid for making the disclaimer
- The instrument of disclaimer must contain a statement that it is to have effect for IHT as if the disclaimed benefit had never been conferred

Unlike a DOV the person making the disclaimer has no right to direct the proceeds, they must be paid to the next in line

That concludes this part so you should now understand:

- The probate process.
- The essentials of a valid will.
- How a will can be challenged
- The rules of intestacy.
- How a deceased's estate is taxed
- The principles of Deeds of Variation and disclaimers.

Individuals can leave their estate to whoever they wish. A will can be challenged, usually by a person who believes they should have received a legacy. The main grounds for a successful challenge are that the testator was not of sound mind when the will was made or that they were influenced or pressurised by a beneficiary.

Further Reading

<https://www.ageuk.org.uk/information-advice/money-legal/legal-issues/making-a-will/#>

<https://www.citizensadvice.org.uk/family/death-and-wills/who-can-inherit-if-there-is-no-will-the-rules-of-intestacy/>

<https://www.gov.uk/alter-a-will-after-a-death>