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EXECUTOR'S GUIDE

How to obtain grant of probate and administer an estate

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ebook ISBN 9781907765506

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Notes:

- Since 2005, it has been possible for same-sex partners to register their relationships, so becoming 'registered civil partners'. For many purposes, and for most of the rules related to Wills and intestacy, registered civil partners are treated in the same way as spouses. Throughout this guide, for 'spouse' read 'spouse or civil partner'.
- The law is stated as at 1 January 2011; figures quoted are for the tax year 2010/2011.
- For convenience (and for no other reason) 'him', 'he' and 'his' have been used throughout and should be read to include 'her', 'she' and 'her'.
- Third party website links in this guide are correct at the time of publication, but Lawpack Publishing is not responsible for their currency or content.

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Contents

This is an excerpt from Lawpack's *Executor's Guide*.

To find out more about obtaining grant of probate and administering an estate, **click here**.

What is an executor?

When someone is named the executor of a Will, he is being asked to take responsibility for administering the estate of the person who made the Will, called the testator, upon the testator's death.

Acting as an executor should not be undertaken lightly. Immediately following the death, the executors are expected to begin their administrative duties; long after other mourners' lives have returned to normal, the executors will still be administering the estate. This entails corresponding with other parties, keeping meticulous records, filling out forms and being answerable to creditors, beneficiaries and the intentions of the deceased, as recorded in the Will.

Don't be put off by the term 'estate'. This simply refers to all the property a person leaves behind, whether its value be hundreds or millions of pounds. One person's assets may include homes, yachts and a Swiss bank account, while another leaves a wedding ring, some changes of clothes and a shoe box full of costume jewellery. Both have left estates to be accounted for and distributed.

Executors' duties can be summed up as: taking an inventory of the deceased's possessions and debts, collecting the assets, paying the bills and distributing the legacies (whether specific items, cash sums or residue) following the testator's wishes as closely as possible.

Grant of probate or confirmation

Executors have the power to deal with the deceased's assets from the date of death, but not until they receive what is called in England, Wales and Northern Ireland a 'grant of probate', or in Scotland 'confirmation', can they prove their authority to those institutions and authorities that hold assets in the deceased's name. In England, Wales and Northern Ireland, grants of probate are issued by the High Court through Probate Registries. In Scotland, confirmation is issued by the Commissary Department of the Sheriff Court in the area where the deceased had been domiciled at death.

More than one executor

If the Will appoints only one executor, or if only one person is able and willing to act, a grant of probate or confirmation can be issued to one person. In England, Wales and Northern Ireland, if the Will appoints more than four executors, only four of them will be allowed to apply for the grant of probate. The others may renounce their right to apply for probate; or they may decide not to apply for the time being but to reserve their right to apply in the future so that if, for example, one of the acting executors dies before the estate has been fully administered, the executor with power reserved may take his place.

In England, Wales and Northern Ireland, if only one executor is taking out the grant of probate, it may be prudent for the other executor(s) to sign what's called a 'power reserved' letter, even if it's not anticipated that he will want to apply at any stage. By reserving the right to apply in this way, a non-acting executor can step in if the acting executor becomes incapacitated before the administration of the estate is complete. The Probate Registry provides a form necessary to renounce or reserve the right to apply for probate.

In Scotland, there is no limit on the number of executors who may be appointed under a Will, but for practical reasons, it is probably not desirable to have more than four. Confirmation is always issued in favour of all surviving executors who have been nominated and who haven't predeceased the deceased or declined office. There is no Scottish equivalent to the English and Welsh power reserved option and any executor named in the Will but not wishing to have confirmation issued in his favour, must sign a 'declinature' to be submitted to the Sheriff Court with the application for confirmation.

No matter how many executors are named, for practical purposes it's usually easier if one of the executors undertakes the administrative tasks on behalf of them all (he is referred to in this guide as the 'first applicant'). The executors should meet to discuss the practical side of carrying out their duties. Whatever is agreed should be put in writing and signed by them all. In fact, all official paperwork may need to be signed by all executors, even if they agree that one of them is the first applicant (the exception being that in Scotland the application for confirmation [Form C1] needs to be signed by only one executor).

Caution: If it looks as though the deceased's estate is insolvent, i.e. the debts of the deceased and other liabilities of the estate, including funeral expenses, will exceed the value of the assets in the estate, executors should think carefully before applying for the grant of probate or confirmation and should seek professional legal advice.

Other personal representatives

If an executor renounces the right to take out the grant of probate or in Scotland if a nominated executor declines to accept office, any substitute executor named in the Will steps in and proceeds to apply for the grant of probate or confirmation. If no executor is named in the Will or if the executor named

cannot or does not wish to act and no substitute is named, beneficiaries can apply to act as the deceased's personal representatives. A beneficiary acting as the testator's personal representative is, in England, Wales and Northern Ireland, known as the 'administrator' and the grant itself is called a 'grant of letters of administration with Will annexed'.

An administrator's duties are essentially the same as those of an executor. This guide refers to executors, but the rights and responsibilities of both are the same in most respects, whether the person doing the work is an executor or an administrator.

In England and Wales, beneficiaries may apply for a grant as the deceased's administrators in the following order of priority:

1. Any residuary beneficiary.

2. Any personal representative of a residuary beneficiary.

3. Any other 'legatee' (i.e. someone who receives a legacy).

4. Any personal representative of any other legatee.

5. Any creditor.

In Northern Ireland, entitlement to the grant in this situation follows the right to property; the order of priority is:

1. Any residuary legatee holding in trust for any other person.

2. Any residuary legatee for life.

3. Any ultimate residuary legatee.

In Scotland, an executor appointed by a Will is called an 'executor-nominate' and an executor appointed by the Court is called an 'executor-dative' (appropriate where there is no Will and the deceased died 'intestate' or where there is a Will but not

all assets have been disposed of, thus creating a 'partial intestacy'). Where there is a Will but no executor has been named, or there is no surviving executor who agrees to accept office, it is still possible to have an executor-nominate appointed if certain conditions can be met. The Sheriff Clerk at the relevant Sheriff Court will be able to advise. The order of priority to be appointed executor-nominate is:

1. Any trustees appointed under the Will to administer a trust created by the Will.
2. A 'general disponee', 'universal legatory', or 'residuary legatee' – terms all meaning the person or persons entitled to the residue of the estate.

If the conditions to obtain a nominate appointment cannot be met, it will be necessary to submit a petition to the Court for the appointment of an executor-dative. The order of priority to be appointed executor-dative follows the order of entitlement to succession to the intestate estate, (see flowchart on page 74).

In England, Wales and Northern Ireland, a minor (someone under the age of 18) cannot act as an executor. If a minor is the only executor appointed in a Will, his parents or guardian are entitled to take out a grant of letters of administration with Will annexed on his behalf. The minor has the right to apply for the grant of probate on reaching his 18th birthday, if the administration of the estate has not been completed.

In Scotland, a person reaching the age of 16 has legal capacity and in principle may act as executor; however, there can be practical difficulties and it is not recommended that a person below the age of 18 be appointed executor. Where a child below the age of 16 has been named as executor and has parents or a guardian, the parents/guardian may seek

appointment and be confirmed as executor on behalf of the child, or may decline office on the child's behalf.

If the deceased left no Will and died intestate, the estate is distributed according to the rules of intestacy. In England, Wales and Northern Ireland, the personal representatives are again known as administrators and the grant is called a 'grant of letters of administration'. In Scotland, the personal representatives are, when appointed, known as executors-dative but the grant is still known as confirmation. In England, Wales and Northern Ireland, when there is no Will administrators are appointed in the following order of priority (except that in Northern Ireland, no difference is made between relatives of the whole blood and half blood):

1. The deceased's spouse.
2. Any child of the deceased and any issue of a child who died before the deceased.
3. The parents of the deceased.
4. Brothers and sisters of the whole blood of the deceased and the issue of any who died before the deceased.
5. Brothers and sisters of the half blood of the deceased and the issue of any who died before the deceased.
6. Grandparents of the deceased.
7. Uncles and aunts of the whole blood and the issue of any who died before the deceased.
8. Uncles and aunts of the half blood and the issue of any who died before the deceased.

In England, Wales and Northern Ireland, the maximum number of administrators is four, whether there is a Will or the person

died intestate. A sole administrator may take out the grant only where none of the beneficiaries is under 18 or where no life interest arises. If either of these is the case, the grant must be issued to a minimum of two administrators. In Northern Ireland, there is no minimum number of administrators.

In England and Wales, a life interest most commonly arises where the deceased's estate is worth more than £250,000 and he died intestate leaving a spouse and a child or children. In that case, the spouse will take the first £250,000 as a legacy, all the personal chattels, and will have a life interest in half of the residue of the estate: the remaining half of the estate is held in trust for the child or children until they reach 18; they also benefit from the spouse's life interest on the spouse's death.

In Scotland, where there is no Will, or there is a partial intestacy, it is necessary for an executor-dative to be appointed. An executor-dative is appointed on application to the Sheriff Court in the area where the deceased had been domiciled at the date of his death. That application is by way of petition in prescribed form.

Historically, the order of priority to be appointed executor-dative is:

1. A general disponee, universal legatory or residuary legatee (only relevant where there is a Will naming beneficiaries but giving rise to a partial intestacy).
2. The 'next of kin'. This term means the surviving members of the class of relatives nearest in degree to the deceased, related through the father's line. This would exclude the deceased's spouse, mother and any maternal relations.
3. The deceased's creditors.
4. 'Special legatees', i.e. those entitled to a legacy of a specific item of estate rather than a residuary legatee (again, only relevant where there is a Will but a partial intestacy arises).

However, contemporary Sheriff Court practice is that the person or persons entitled to receive the deceased's estate under the rules of intestate succession (which post-date the creation of the above order of preference) will be deemed entitled to the office of executor-dative. The same legislation provides that the surviving spouse has the right – treated in practice as the exclusive right – to the office of executor-dative, where he is entitled to the whole of the intestate estate under the succession rules. In Scotland, in an intestate estate no 'liferent' (or life interest) arises – the Scottish rules of intestate succession are explained on page 73.

Should a solicitor be instructed?

Executors can instruct a solicitor, stockbroker or other adviser to perform specific duties even if they do not use a solicitor to make the probate or confirmation application. Whether an executor handles all the tasks involved in administering the estate or uses professional advisers is a matter of choice and convenience. Any fees properly incurred are paid out of the estate.

This Executor's Guide is designed to help the layperson sort out a simple, straightforward Will or intestacy. If the Will or the estate is complex, a solicitor should be consulted. If you are in any doubt, seek professional advice. Some signs that a solicitor should be involved include the following:

1. The estate is insolvent.
2. A beneficiary cannot be contacted.
3. Someone intends to challenge the Will.
4. There is some question of the Will's validity, or the Will cannot be found.

5. Someone stands to inherit a life interest in (or in Scotland a 'liferent' of) the estate.

6. Beneficiaries include children under the age of 18 (in Scotland, 16) and a trust is set up for them.

7. The deceased owned a business or was a partner in a business or owned agricultural property.

8. The deceased was a Name (i.e. an investor) in Lloyd's of London insurance market.

9. A trust is set up under the Will.

10. Any house or land in the estate has an unregistered title.

11. The Inheritance Tax calculations are particularly complex.

12. One or more beneficiaries wish to vary the terms of the Will in so far as it affects their entitlement.

13. There is no Will but a cohabitee neither married to, nor in a civil partnership with the deceased, may wish to make a claim on the intestate estate.

If you need specific assistance from a solicitor or would like to see how a solicitor can help to administer the estate, national law firm Irwin Mitchell Solicitors have significant experience and expertise in the provision of estate administration, probate and confirmation advice, including advice on estate disputes and conveyancing of estate properties. Irwin Mitchell can be contacted on 0845 604 1722 – please quote reference 'Lawpack Executors'.

In Northern Ireland, Tughans Solicitors can assist in estate administration, Will preparation, probate advice and the conveyancing of estate properties. Tughans can be contacted on 028 9055 3300 – please quote reference 'Lawpack Executors'.

When death occurs

When someone dies, a doctor should be called. He will issue a medical certificate stating the cause or causes of death, along with a notice setting out who is eligible to register the death with the local Registrar of Births and Deaths.

Registering the death

In England and Wales, if the death has occurred inside a house or public building, the following people may act as informant, in the following order:

1. A relative of the deceased who was present at the death.
2. A relative of the deceased who was present during the final stages of the illness.
3. A relative of the deceased who lives in the district where the death occurred.
4. Anyone who was present at the death.
5. Someone in authority in the building where the death occurred who was aware of the circumstances of the death; for example, the owner of a nursing home or the warden of sheltered accommodation.
6. Any resident of the building where the death occurred, if he was aware of the circumstances of the death.

7. The person who accepts responsibility for arranging the funeral.

If the death occurred outside a house or public building, the following people are eligible to register the death in the following order:

1. A relative of the deceased able to provide the Registrar with the necessary details.
2. Anyone who was present at the death.
3. The person who found the body.
4. The person in charge of the body (the police if the body is unidentified).
5. The person who accepts responsibility for arranging the funeral.

In Northern Ireland, the death can be registered by:

1. Any relative of the deceased who has knowledge of the details required to be registered (this includes a relative by marriage).
2. A person present at the death.
3. A person taking care of the funeral arrangements.
4. The executor or administrator of the deceased's estate.
5. The governor, matron or chief officer of a public building where the death occurred.
6. A person living in and responsible for a house, lodgings or apartments where the death occurred.
7. A person finding, or taking charge of, the body.

In Scotland, the death must be registered by:

1. Any relative of the deceased.
2. Any person present at the death.
3. The executor or other legal representative of the deceased.
4. The occupier at the time of death of the premises where the death occurred.
5. Any other person having knowledge of the particulars to be registered, if there is no person as above.

In England, Wales and Northern Ireland, within five days of the death (or in Scotland within eight days), the informant must take the medical certificate to the Registrar of Deaths, or must send written notice. In England and Wales, the deceased's medical card should be given to the Registrar as well. The Registrar will ask for other details about the deceased:

1. The date and place of death (birth certificate should be produced if available).
2. The full name of the deceased, including any maiden name.
3. The date and place of birth of the deceased.
4. The occupation of the deceased.
5. The name, date of birth and occupation of the deceased's spouse (and in Scotland, former spouses), whether or not still living.
6. The deceased's usual address.
7. Whether the deceased received any state pension or allowance.

8. The date of birth of any surviving spouse.

9. In Scotland, the full names and occupations of the parents of the deceased should also be provided (if known).

10. In Northern Ireland, the name and address of the deceased's GP.

The death certificate

Once the death has been registered, the informant will be given a death certificate, which is a copy of the register entry. (In Scotland, he will also be given a certificate for the funeral director dealing with the funeral, a free abbreviated death certificate, and a Social Security notification of death form to assist in obtaining or adjusting benefits.) There is a small charge for each copy of the full death certificate, and it's sensible to get three or four copies. The executors may need to send copies to the deceased's bank, to the registrars of companies in which he held shares, to insurance companies holding policies written in trust and, in England and Wales, to the Probate Registry. Although you can have the certificate returned to you once it has been inspected, it may be more convenient to circulate several copies at once.

Note: A while after the death, the cost of a copy of the death certificate may increase. The period varies depending on the register office, so it's worth checking if it's probable further copies will be needed.

The Will

If the executors are prepared for their duties, they may have been in possession of a copy of the Will even before the death and know the location of the original. They may know of the deceased's instructions concerning organ donation, disposal of

the body, and funeral wishes. All of this information is needed in the first hours following death.

Arranging the funeral is not specifically the duty of executors and should be handled by whoever is most aware of the deceased's wishes. But anyone who manages the funeral is entitled to have the account settled out of money from the estate.

If there is no opportunity for preparation before the death, the Will must be located to determine who has been named its executor(s). If no Will is found at the deceased's home, it may have been sent to his bank or solicitor for safekeeping or to Lawpack's Will Storage Service. In England and Wales, it may have been deposited at the Principal Registry (formerly Somerset House), in which case a deposit certificate will have been issued on receipt of the Will; the Will can be reclaimed by sending the certificate to:

Record Keeper's Department
Principal Registry of the Family Division
First Avenue House
42–49 High Holborn
London WC1V 6NP
Tel: 020 7947 7022

If a Will is found, ascertain that it is the deceased's last Will by making enquiries at, for example, the deceased's bank and solicitor. It must bear the signature of the deceased (in Scotland, it must be signed on every page) and of an appropriate witness or witnesses.

In England, Wales and Northern Ireland, probate may be granted on a copy, but you should notify the Probate Registry as soon as possible that the original cannot be found. The Registry will tell you what evidence is needed as proof that the original Will had not been revoked by being destroyed before death.

In Scotland, if only a copy of the signed Will can be found, it may possible for the executors to treat the estate as 'testate' and proceed to wind up the estate in accordance with the copy Will but it will be necessary in the first instance to raise an action in the Court of Session in Edinburgh to 'prove the tenor' of the original signed Will using the copy. If this fails, the estate must be treated as intestate and wound up accordingly.

The necessity of a formal reading of the Will before hopeful beneficiaries, or a solicitor, is a myth. There is no legal requirement for any reading but it is courteous to write to beneficiaries to inform them of their entitlement under the Will.

There may be some doubt as to who the beneficiaries are under the Will. Many Wills describe certain beneficiaries in terms of groups of people, for example 'my children,' rather than naming them. The expression 'my children' includes, by law, children conceived at the time of the deceased's death and subsequently born alive, adopted children and, in England, Wales and Northern Ireland, legitimated children (children born to unmarried parents who later marry). In Scotland and Northern Ireland, illegitimate children (i.e. children born outside marriage) are also included in the expression 'my children'.

In England and Wales, if the Will was executed after 3 April 1988, children whose parents were married to each other at the time of their birth are treated in the same way as those whose parents were not, even if the executors have no knowledge of the children's existence. If the Will was executed before then, the executors will not be liable to a testator's child born outside marriage if they didn't know of his existence. These rules apply unless it is clear from the Will that the deceased intended otherwise.

In Scotland, if the Will was executed on or after 25 November 1968, in determining who should be the beneficiaries of an estate, no distinction is to be drawn between legitimate and

illegitimate relationships. This applies to all relationships including the construction of such terms as grandchildren, brother, cousin, etc. These rules apply unless it is clear from the Will that the deceased intended otherwise.

For Wills executed in Scotland prior to that date, the common law continues to apply and expressions such as 'children' or 'issue' are presumed to refer to legitimate relationships only, unless the Will indicates otherwise. Providing the executor is acting in good faith having made all reasonable enquiries, statute gives the executor some protection, allowing him to distribute the estate without instigating an exhaustive search for potential illegitimate claimants or any person adopted by the deceased who would also have a claim on the estate.

Generally, if a beneficiary named in a Will has died before the testator, the gift to him will simply not take effect. However, if that beneficiary is a child, grandchild or great-grandchild or remoter issue of the testator (or in Scotland, a nephew or niece of the testator, but the extension of the principle is limited to those specific relatives only), and he has left children of his own, the children step into or may step into their parent's shoes and their entitlement under the Will, shared equally between them.

In England, Wales and Northern Ireland (but not in Scotland), if the deceased married after making the Will and the Will was not expressed to be in expectation of the marriage, the Will is automatically revoked. Divorce, however, does not revoke a Will, but in England, Wales and Northern Ireland (but not in Scotland), the former spouse is treated as if he died on the date of the divorce so that he cannot take a gift under the Will or act as an executor.

It is important to note that in Scotland so called 'legal rights' of the spouse and issue of the deceased can affect the division of an estate, regardless of the terms of a valid Will – see page 78 for

an explanation of legal rights. Executors must deal with this issue as part of the administration of a testate estate.

If the executors are uncertain as to the interpretation of other parts of the Will, they should seek the advice of a solicitor to avoid the risk of distributing the money wrongly.

Once probate or confirmation is granted the Will becomes a public document, but until then the beneficiaries may know nothing of their legacies, unless the deceased told them before he died. However, the executors will usually tell the beneficiaries that they have been left a legacy, although it's impossible to be specific about the amount if it's a legacy of residue or part of residue. But no legacy can be guaranteed at this stage as the Will may be found invalid, may be challenged, or the assets of the estate may not be sufficient to pay all the legacies.