the grant is required as proof of that title. The grant is also conclusive as to the terms of the deceased's will.

(b) Letters of administration with the will annexed—this is a grant of representation made to a person (the administrator) where a will is proved by any person other than an executor. An administrator only acquires title to the deceased's estate by means of such a grant. Such a grant is also conclusive as to the terms of the deceased's will.

(c) Letters of administration—this is a grant of representation made to a person (the administrator) where the deceased died wholly intestate. Again, it is this grant which confers title on the administrator.

B. DEFINITIONS

1-03 This section of this chapter explains the principal terms used in this work and considers what persons may be excluded from the functions of an executor or administrator. Technical Latin terms have been anglicised where possible alternatives exist.

Executor

1-04 An executor[2] is a person appointed by a testator to execute the will.[3] "To appoint an executor", says Swinburne,[4] is:

> "to place one in the stead of the testator, who may enter to the testator's goods and chattels, and who hath action against the testator's debtors, and who may dispose of the same goods and chattels, towards the payment of the testator's debts, and performance of his will".

Unless separate executors are appointed over particular assets, an executorship is indivisible.[5] From the earliest time it has been a rule that any person may be an executor, saving such as are expressly forbidden.[6] Probate will not be granted to more than four persons in respect of the same part of the estate of a deceased person.[7]

A properly executed document that contains a bare nomination of an executor, without giving any legacy, or appointing anything to be done by him, is nevertheless a will, and as a will it is to be proved.[8] Further, since 1932, the High Court has

[2] As to executorship and trusteeship, see para.76-02, below. An executor is strictly executor of a person. Although appointed in the will he is not strictly executor of the will.

[3] 2 *Black. Comm.* 503; *Farrington v Knightly* (1719) 1 P. Wms. 544, 549; Toller 6th edn, 30. As to executor *de son tort*, see Ch.5, below. As to executor by the tenor, see para.6-11, below, and as to substituted executor, see para.6-16, below. As to transmission of the office, see para.6-63 onwards, below. As to joint representation, see para.35-25, below. As to universal heir, see para.6-26, below. As to the Official Solicitor, see para.4-09, below. In Scotland an executor named in a will is called an executor nominate.

[4] *Swinb.*, Pt 4, s.2, pl.2; *Brownrigg v Pike* (1882) 7 P.D. 61–64.

[5] *Re Wells* [1968] 1 W.L.R. 44. See *Fountain Forestry v Edwards* [1975] Ch.1 at 11, 12.

[6] *Swinb.*, Pt 5, s.1, pl.1; and see 2 *Black. Comm.* 503. The right to take on distribution is similar, see para.68-01, below.

[7] Senior Courts Act 1981 s.114(1).

[8] Godolph., Pt 2, c. 5, s.1; *Brownrigg v Pike* (1882) 7 P.D. 61–64; *Re Lancaster* (1859) 1 Sw. & Tr. 464. *Re Wayland* [1951] 2 All E.R. 1041.

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had jurisdiction to make a grant of probate or administration in respect of a deceased person who left no estate.[9]

The court's power to appoint new trustees does not of itself enable it to appoint an executor (or administrator).[10] However, there is power for the court to appoint a person (a "substituted personal representative") to act in place of an existing representative.[11] This includes the power to remove or replace a person who has been named an executor but has not yet obtained a grant of probate.[12] Where the substituted personal representative is appointed to act with an executor or executors, then the appointment constitutes him an executor (except for the purpose of including him in any chain of representation); in other circumstances, the appointment constitutes the appointee an administrator.[13] The court also has power to appoint one or more additional representatives to act during the minority of a beneficiary or the subsistence of a life interest under a will (or intestacy). Again, the appointment of an additional representative to act with an executor does not operate to include the appointee in any chain of representation.[14]

Settled land—special executors and personal representative

1-05 Where settled land is vested in a testator previously to his death and remains settled land thereafter, the testator may appoint, and in default of such express appointment is deemed to have appointed, the persons, if any, who are at his death the trustees of the settlement to be his special executors in regard to settled land.[15] In such a case, a grant may be made to such trustees specially limited to the settled land.[16] A special or additional representative in respect of settled land may also be appointed by the court where settled land has become vested in a personal representative who is not a trustee of the settlement.[17] Special executors may also be appointed by a sole surviving trustee in respect of trust estate.[18]

Coadjutor or overseer

1-06 Although the practice has fallen into disuse, it is possible to appoint a coadjutor (or overseer). The office of coadjutor or overseer has ancient authority although, as

[9] Senior Courts Act 1981 s.25, preserving the effect of Administration of Justice Act 1932 s.2, now repealed. See also *Re Wayland* [1951] 2 All E.R. 1041 at 1044. The application before the court in *Aldrich v Attorney General* [1968] P. 281 was for a legitimacy declaration and any criticism of *Wayland* must be treated as obiter if not wrong.

[10] See Trustee Act 1925 s.41. As to appointment of a judicial trustee in place of an executor, see para.1-18, below.

[11] Administration of Justice Act 1985 s.50(1) and see para.57-20, below.

[12] *Goodman v Goodman* [2013] EWHC 758 (Ch); [2014] Ch. 186.

[13] Administration of Justice Act 1985 s.50(2). For the significance of the chain of representation, see para.6-64, below.

[14] Senior Courts Act 1981 s.114(4) and (5) replacing Judicature Act 1925 s.160(2). See also paras 6-31 and 13-16, below.

[15] For definitions, see Administration of Estates Act 1925 s.55(1)(xxiv) and Settled Land Act 1925 ss.30 to 34 and s.117(1)(xxiv), as amended by the Trusts of Land and Appointment of Trustees Act 1996. See also *Re Gibbings* [1928] p.28. *Re Bridgett and Hayes* [1928] Ch. 163. See para.6-27 onwards, para.20-19 onwards, and para.40-05 onwards, below.

[16] Administration of Estates Act 1925 s.22(1). As to whether this is a grant of probate or of administration, see para.20-26, below.

[17] Administration of Estates Act 1925 s.23(2). *Re Clifton* [1931] P. 222.

[18] See para.6-27, below.

set out below, it does not constitute its holder an executor.[19] A coadjutor has no power to administer or intermeddle but can merely counsel, persuade and advise. If this fails to remedy negligence or miscarrying in the executors, the coadjutor is entitled if necessary to refer complaints to the court[20] and his charges in so doing ought to be allowed out of the testator's estate.[21]

Administrator

1-07 An administrator is the person to whom administration is granted,[22] i.e. the person to whom the court makes a grant to administer the estate of the deceased.[23] For the purposes of the Administration of Estates Act 1925, the word "administration" means (with reference to the real and personal estate of a deceased person) letters of administration whether general[24] or limited[25] or with the will annexed[26] or otherwise.[27] There is no bar to the appointment of any person as an administrator, but the matter is at the court's discretion.[28]

As mentioned above, there is power for the court to appoint a person to act in place of an existing representative (including an administrator). The appointment constitutes the appointee an administrator.[29]

"Personal representative"

1-08 This term originally referred to the executor or administrator in whom the deceased's personal property vested as distinct from the heir[30] (or "real" representative) in whom the deceased's real property vested. Since the personal representative is now the representative of the deceased for both realty and personalty, the adjective "personal" has become superfluous if not misleading. However, the term "personal representative" has become a collective term covering the offices of executor and administrator where the same principles of law apply to both,[31] and is used by Parliament in that sense. As regards liability for death duties,[32] the term "personal representative" includes any person who intermeddles with the property of a deceased person.[33] As has been seen, the court may appoint a "personal representative" as an additional personal representative where there is only one

[19] See para.6-26, below.
[20] See Wentworth, *Executors* (1728), p.9, and para.6-26, below.
[21] *Wentworth's Office of Executor*, 14th edn, p.21.
[22] A grant may be a grant of probate (to an executor) or a grant of letters of administration (to an administrator).
[23] Administration of Estates Act 1925 s.55(1)(ii).
[24] For grants to administrators see Chs 13 to 15, below.
[25] See Ch.19, below.
[26] See Ch.14, below.
[27] Administration of Estates Act 1925 s.55(1)(i).
[28] See paras 13-04, 15-04 and 21-03 onwards, below.
[29] Administration of Justice Act 1985 s.50 and see paras 2-04 and 57-20, below.
[30] See paras 6-26, 35-06 and 67-02, below.
[31] See *Re Brooks* [1928] Ch. 214, 218.
[32] This expression includes inheritance tax chargeable on the death of any person, Inheritance Tax Act 1984 Sch.6 para.1.
[33] Administration of Estates Act 1925 s.55(i)(xi). As to the executor *de son tort*, see Ch.5, below.

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personal representative, during the minority of a beneficiary or the subsistence of a life interest.[34]

The term "legal personal representatives" was held for the purposes of s.5(2) of the Copyright Act 1911 to include the foreign executors of a foreign testator having personal property in England.[35] The question when a personal representative becomes a trustee is discussed in relation to assents.[36]

For the sake of brevity the adjective "personal" is frequently omitted in this work and the word "representative" is to be interpreted as having the same connotation as "personal representative."

Substitute personal representative—substituted executor

1-09 A "substitute personal representative" is a personal representative appointed by the court in place of an existing personal representative or representatives under the power conferred by s.50 of the Administration of Justice Act 1985.[37] This is to be distinguished from a "substituted executor" who is a person nominated by a will as executor in the event that another named person does not take up that office.[38]

C. STRUCTURE OF THE BOOK

Part 1: Action before or without a grant

1-10 Part 1 (Chs 1-5) of this work considers various matters arising before the making of a grant or actions taken by persons without a grant. Chapter 2 lays out the sources of the court's jurisdiction, within their historical context. Chapter 3 introduces the principles of private international law that affect the administration of estates. Chapter 4 sets out the capacity of particular individuals or bodies to act as representatives.

Chapter 5 will consider when and why a grant is required, and looks at what a personal representative can do before obtaining a grant, the consequences of a person acting without a grant of representation, and the concept of an executor *de son tort*. It also notes further differences between the titles of an executor and of an administrator.

Part 2: Executors and the admission of wills to probate

1-11 Part 2 (Chs 6-12) of this book deals with various issues concerning executors and the admission of wills to probate.

Chapter 6 considers the appointment of executors and how the office of executor is transmitted. Chapter 6 also deals with the need for probate of a will, the acceptance or renunciation of the office of executor and also with the retraction of a renunciation.

Chapter 7 deals with what is meant by a "will" for these purposes and with the

[34] Senior Courts Act 1981 s.114(4). See para.2-04, below.
[35] See *Redwood Music Ltd v B. Feldman Ltd* [1979] R.P.C. 1. The point was not taken on appeal [1979] R.P.C. 385 CA or [1981] R.P.C. 337 HL.
[36] See Ch.76, below. An answer attributed to Augustine Birrell (an early 20th century lawyer, politician and author) is: "In the middle of the night".
[37] See para.57-20, below.
[38] See para.6-16, below.

type of wills that can be admitted to probate. Chapter 8 describes the various forms of probate that can be granted and Chapters 9–12 deal with various issues that arise in determining whether a will can be admitted to probate. In particular, Ch.9 covers the formal validity of wills, and Ch.10 their substantial validity, including testamentary capacity, knowledge and approval, undue influence, fraud and forgery.

Part 3: Administrators

1-12 Part 3 (Chs 13-15) is concerned with administrators. Chapter 13 considers the nature and acceptance of the office of administration whilst Chs 14 and 15 deal with the issues that arise where the deceased left a will but no willing executor and where he died wholly intestate.

Part 4: Non-contentious practice

1-13 Part 4 (Chs 16-28) is concerned with non-contentious practice and with the working of the Non-contentious Probate Rules 1987. At the time of writing, new Probate Rules have been drafted and, after a considerable delay, are awaiting enactment.[39] The draft Probate Rules change some of the terminology but make relatively few substantive alterations. This book will identify these changes, and otherwise refer to the equivalent rule to that in the N-CPR in the new Probate Rules. Readers are, therefore, advised to check on the status of the new Probate Rules.

It considers grants in common form,[40] grants where the deceased was domiciled abroad,[41] limited grants,[42] special grants[43] and cases when the court can pass over a nominated executor or the person otherwise entitled to a grant of administration.[44] It deals with practice within the probate registries[45] and, in particular, with the practice in relation to caveats and citations.[46] It considers, finally, the making of applications and the award of costs in non-contentious cases.[47]

Part 5: Contentious practice

1-14 Part 5 (Chs 29–33) deals with the practice and procedure governing contentious probate claims.

Part 6: Devolution and liability

1-15 Part 6 (Chs 34–41) deals with matters of devolution and liability.

Chapter 35 considers the effect of the making of a grant and the extent to which

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39 See para.16-03, below.
40 i.e. where there is no contention as to the right to a grant—see Ch.16, below.
41 See Ch.17, below.
42 There are a variety of limitations—see Ch.19, below. They include a limitation to reflect the fact that the will is lost, damaged or unavailable or that the grant is to an attorney, or is the use of a minor, or that the person entitled has a mental disability or is in prison, or that the grant relates to specific property or for a specific period or for a specific purpose.
43 i.e. grants *de bonis non*, cessate (or second) grants, grants of double probate and settled land grants. See Ch.20, below.
44 See Ch.21, below.
45 i.e. amendment, notation, revocation, recognition of foreign grants, searches and the obtaining of copies—see Chs 22–24, below.
46 See Chs 25 and 26, below respectively.
47 See Chs 27 and 28, below.

it is conclusive. It also considers the effect of the revocation of a grant or the rectification of the will. Chapters 36 and 37 deal with how property in which the deceased had an interest vests either in the representative or in some third party. Chapter 37 contains a short summary of social security claims, which are often necessary to resolve on someone's death, and may have relevance for family provision claims. Chapters 38 to 40 deal in detail with when various forms of property devolve on the representative so as to be available in the course of administration. The important issue of the incidence of liabilities to which the representative is subject is dealt with in Ch.41.

Part 7: Administration of assets

1-16 Part 7 (Chs 42–52) is the largest section of the book, and is concerned with matters of administration. It considers first the general duties on the representative, including dealing with the body and burial of the deceased,[48] the completion of an inheritance tax account and the payment of the tax due.[49] It then looks at the collection of assets available to the representative,[50] including digital assets,[51] and the payment of debts depending on whether the estate is solvent or insolvent, noting the priority of creditors over beneficiaries[52] and the particular rules applying when debts are owed by beneficiaries or representatives.[53] The section concludes by looking at the powers of the representatives, their entitlement to remuneration, and their potential liability for their own acts.[54]

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Part 8: Family provision

1-17 Part 8 (Chapters 53–56) deals with a specific area of administration, namely applications for provision out of the estate under the Inheritance (Provision for Family and Dependants) Act 1975.

Part 9: Administration and other actions

1-18 Part 9 (Chapters 57–63) deals with actions and proceedings in administration. It considers in detail the types of contentious proceedings which can be brought in relation to an estate; the role of a representative as a claimant or defendant in those proceedings and the relevant court procedures. It also deals with issues of limitation and the incidence of costs in relation to such proceedings.

Part 10: Distribution of assets

1-19 The final part of the work, Part 10 (Chs 64–78), considers the distribution of the assets of an estate by the representative. It deals with the so-called "executor's year"[55] and with various problems that can arise with regard to distribution includ-

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48 See paras 42-02–42-14, below.
49 See para.42-16 onwards and Ch.45.
50 See Ch.43, below.
51 See Ch.44.
52 See Chs 46 and 47, below.
53 See Ch.48.
54 See Chs 50 to 52, below.
55 See Ch.64, below.

ing, in particular, ademption and satisfaction,[56] incapacity,[57] the payment of legacies,[58] abatement,[59] the treatment of income, interest and annuities,[60] assents[61] and distribution on intestacy.[62] It also considers the issues of equitable apportionment.[63] Finally, it sets out the remedies available to creditors, beneficiaries and personal representatives against wrongful recipients of the estate's assets, such as refunding, following, tracing and subrogation.[64]

56 See Ch.66, below.
57 See Ch.68, below.
58 See Chs 70 and 72, below.
59 See Ch.71, below.
60 See Ch.74, below.
61 See Ch.76, below.
62 See Ch.77, below.
63 See Ch.75, below.
64 See Ch.78, below.

CHAPTER 2

HISTORY AND JURISDICTION

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A. HISTORY OF PROBATE JURISDICTION

Introduction

2-01 The law relating to executors and administrators is of some complexity. In understanding that law and the nature of the formidable duties owed by an executor or administrator, it is useful to understand something of the history of probate jurisdiction. In this regard, cases such as *Dyke v Walford*[1] and *Hewson v Shelley*,[2] are of interest. So too are early texts, before Sir Edward Vaughan Williams wrote the first edition of this work in 1832, in particular *Wentworth*[3] and *Toller*.[4] Also of use are the principal works on wills such as *Theobald on Wills*,[5] *Swinburne*,[6] *Jarman*[7] and *Hawkins on the Construction of Wills*.

1 *Dyke v Walford* (1846) 5 Moo. P.C. 434.
2 *Hewson v Shelley* [1914] 2 Ch. 13.
3 First published in 1641. Wentworth is thought to be a pseudonym for Dodderidge J. The 1774 edn was said to be "not much indebted to its several editors".
4 (1800). Samuel Toller was the first such writer to include reference to administrators.
5 Starting in 1876. The current edition being the 18th edition (2016).
6 A judge of the prerogative court of York. See (1993) 3 Ecc. L.J. 5.
7 Starting in 1841. The 8th and last edition being 1951.

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Jurisdiction in relation to matters of probate and administration of estates is currently exercised by the High Court and, in limited circumstances, by the County Court. In the past, however, jurisdiction in relation to such matters was divided between different courts depending on the nature of the property in question. The ecclesiastical courts and later the Court of Probate exercised jurisdiction in relation to the personal estate of the deceased, while the common law courts had jurisdiction in respect of his real property.

The position before 1857

2-02 Until 1857, jurisdiction in relation to the real estate of a deceased person was exercised by the common law courts,[8] while jurisdiction in relation to the personal estate was exercised by the ecclesiastical courts.[9] On this basis, until 1857, the testament of a deceased person in relation to personal estate would, in general, be proved in the Court of the Ordinary of the place where the testator had lived.[10] If, however, the deceased had effects to such an amount as to be considered notable goods (*bona notabilia*) within some other diocese or peculiar,[11] then the will had to be proved before the Metropolitan (i.e. Archbishop) of the relevant province by way of special prerogative.[12] In such a case, the validity of a will would be tried in the relevant Prerogative Court of either Canterbury or York.[13]

Whatever may have been the case in earlier times,[14] by 1857, the Ecclesiastical Court was, apart from certain Courts Baron, the only court in which the validity of wills of personalty, or of any testamentary paper relating to personalty, could be established or disputed.[15] Originally the ecclesiastical courts had no jurisdiction over wills of realty and no grant of probate was made.[16] Later, however, probate was granted of wills which disposed of both real and personal property.

8 See *Hewson v Shelley* [1914] 2 Ch. 13. The clergy never had a beneficial interest, *Dyke v Walford* (1846) 5 Moo. P.C. 434.

9 Constitutions of Clarendon (1164). See also *Re St Mary Faversham* [1986] Fam.143 at 154; "The Fall and Rise of Doctors Commons" (1996) 4 Ecc. L.J. 462; and *Hewson v Shelley* [1914] 2 Ch. 13. This jurisdiction stemmed from the church's encouragement of will-making (see, e.g. the Book of Common Prayer rubric for the Visitation of the Sick and *Hewson* at 38) and from the spiritual dangers of intestacy against which the ecclesiastical courts sought to guard on behalf of the intestate.

10 The "Ordinary" being the person exercising jurisdiction in the relevant ecclesiastical court. This was generally the bishop of the relevant diocese.

11 "Peculiars" are certain districts exempt from the jurisdiction of the Ordinary of the diocese, and are so called because they have a *peculiar* and special Ordinary of their own.

12 4 Inst. 335.

13 The Prerogative Court of Canterbury extends in general over all the southern dioceses (and formerly those in Wales), and is generally known as the Court of Arches. In York, the Prerogative Court is known as the Chancery Court of York. Both courts retain ecclesiastical jurisdiction, but no probate jurisdiction. Decisions of those courts in probate matters before 1857 are of similar authority to decisions of the later Probate Court and Probate Division of the High Court.

14 See Bac.Abr., Exors. E. 1; *Dyke v Walford* (1846) 5 Moo. P.C. 434; see also Holdsworth, *A History of English Law*, 34rd edn, Vol.1, p.625; Pollock and Maitland, *The History of English Law before the Time of Edward*, 2nd edn (1895), Vol.2, p.331 onwards.

15 Fonblanq. Treat. on Eq., Pt 2, Ch.1, s.1, n.(a); Bac. Abr., Exors. E. 1; *Gascoyne v Chandler* (1755) 2 Lee 241. See below, para.5-08, as to the general question as to what instruments require probate.

16 There have been contradictory attempts in the past to distinguish between the words "will" and "testament." Littleton suggested the former referred to personalty and the latter to realty, and Coke and others the reverse. See 12th edition of this work, p.4.

The position between 1857 and 1875—the Court of Probate

2-03 The position changed in 1857 with the Court of Probate Act 1857. This Act abolished all voluntary and contentious jurisdiction and authority of all ecclesiastical, peculiar, manorial, and other courts and persons in England, then having jurisdiction or authority to grant or revoke probate of wills or letters of administration of the effects of deceased persons.[17] Thereafter, those courts or persons had no jurisdiction or authority in relation to any testamentary matters, or to any matter connected with the grant or revocation of probate or administration.[18] Instead, all jurisdiction in relation to the grant and revocation of probate of wills and letters of administration in England and Wales was made exercisable in the new Court of Probate established by the 1857 Act.[19]

The position after 1875—the High Court of Justice

2-04 There was another important change in 1875 brought about by the Judicature Act 1873. Under the 1873 Act, certain existing courts (including the Court of Probate) were united and consolidated together as one Supreme Court of Judicature in England and Wales.[20] This Supreme Court was divided into the High Court of Justice and the Court of Appeal, and jurisdiction in relation to probate and administration matters was assigned to the Probate, Divorce and Admiralty Division of the High Court.

Later, by the Land Transfer Act 1897, the jurisdiction of the Probate, Divorce and Admiralty Division of the High Court was extended from personal property to cover real property as well. The 1897 Act also provided that probate or letters of administration could be granted in cases where there was real estate and no personal estate.[21]

Then, for deaths after 1925, the Supreme Court of Judicature (Consolidation) Act 1925,[22] provided that probate or administration could be granted in respect of the real estate of a deceased person, or any part thereof, either separately or together with probate or administration of that person's personal estate. It could also be granted in respect of a trust estate only where there was no personal estate, or in respect of a trust estate only. Further, the court was empowered to make a grant of letters of administration to real estate limited in any way it thought proper. The present position is that under the Senior Courts Act 1981[23] the High Court may (subject to an exception where the estate is known to be insolvent) grant probate

17 Court of Probate Act 1857 s.3.

18 The ecclesiastical courts still have power to decide all matters necessary to their existing jurisdiction. On this basis, they may be able to rule on matters such as the existence or otherwise of a trust, such that if not appealed it will be binding on the parties. See *Re St Mary Faversham* [1986] Fam. 143 at 154.

19 Court of Probate Act 1857 s.4.

20 Judicature Act 1873 s.3.

21 Land Transfer Act 1897 s.1(3).

22 Supreme Court of Judicature (Consolidation) Act 1925 s.155(1).

23 Formerly called the Supreme Court Act 1981, it was re-titled as a result of the Constitutional Reform Act 2005 s.59 and Sch.11 Pt 1 para.1(1). The 1981 Act replaced the Senior Courts of Judicature (Consolidation) Act 1925.

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or administration in respect of any part of the estate of a deceased person, limited in any way the court thinks fit.[24]

2-05 In 1970, the assignment of probate business within the High Court was altered so that non-contentious (or common form) business was assigned to the Probate Division (which was renamed the Family Division) while other (contentious) business was assigned to the Chancery Division. This remains the position under the Senior Courts Act 1981.[25]

County Court

2-06 Under the Court of Probate Acts 1857 and 1858, the county court had jurisdiction in all contentious probate matters limited only by the abode of the deceased and the size of the deceased's estate.[26] This remains the position.[27]

B. JURISDICTION OF THE COURTS

Jurisdiction of the High Court

2-07 The High Court is a superior court of record.[28] In probate matters, its jurisdiction is defined by s.25(1) of the Senior Courts Act 1981 as:

> "... all such jurisdiction in relation to probates and letters of administration as it had immediately before the commencement of this Act, and in particular all such contentious and non-contentious jurisdiction as it then had in relation to—
>
> (a) testamentary causes or matters;
> (b) the grant, amendment or revocation of probates and letters of administration; and
> (c) the real and personal estate of deceased persons".

This throws one back to the position immediately before the 1981 Act when, under s.20 of the Supreme Court of Judicature (Consolidation) Act 1925, the High Court had:

(a) all such jurisdiction and authority in relation to probates and letters of administration as was at the commencement of the Court of Probate Act 1857 vested in or exercisable by any court or person in England, together with full authority to hear and determine all questions relating to testamentary causes and matters;
(b) all such powers throughout England in relation to the personal estate in England of deceased persons as the Prerogative Court of Canterbury had immediately before the commencement of the Court of Probate Act 1857, in the Province of Canterbury or in the parts thereof within its jurisdiction in relation to those testamentary causes and matters, and those effects of deceased persons which were at that date within the jurisdiction of that court;
(c) such like jurisdiction and powers with respect to the real estate of deceased persons as were thereinbefore conferred with respect to the personal estate of deceased persons;
(d) all probate jurisdiction which, under or by virtue of any enactment which came into force after the commencement of the Act of 1873 and was not repealed, was immediately before the commencement of that Act vested in or capable of being exercised by the High Court constituted by the Act of 1873.

Under s.25(2) of the Senior Courts Act 1981, the High Court, in the exercise of its probate jurisdiction

> "shall perform all such like duties with respect to the estate of deceased persons as were immediately, before the commencement of the Court of Probate Act 1857, to be performed by ordinaries generally, or by the Prerogative Court of Canterbury in respect of probates, administrations and testamentary causes and matters which were at that date within their respective jurisdictions."

The jurisdiction of the High Court may be exercised through one of the district probate registries of the High Court in accordance with directions from the Lord Chancellor.[29]

Assignment of business—Family Division or Chancery Division

2-08 Since the Administration of Justice Act 1970, the probate jurisdiction of the High Court has been divided between the Family Division[30] to which non-contentious (or common form) probate business is assigned and the Chancery Division to which all other probate business is assigned.[31] Formerly, all probate business was assigned to the "Probate Division."[32]

2-09 The definition of non-contentious (or common form) probate business which is assigned to the Family Division is

> "the business of obtaining probate and administration where there is no contention as to the right thereto, including—
>
> (a) the passing of probates and administrations through the High Court in contentious cases where the contest has been terminated,
> (b) all business of a non-contentious nature in matters of testacy and intestacy not being proceedings in any action, and
> (c) the business of lodging caveats against the grant of probate or administration".[33]

The test, therefore, is a technical one, and the fact that a matter is contested does not necessarily mean that it must be treated as contentious business. If it falls within

24 Senior Courts Act 1981 s.113(1).
25 Senior Courts Act 1981 s.61 and Sch.1 paras 1(h), 3(b)(iv).
26 *Re Thomas* [1949] p.336. *Zealley v Veryard* (1866) L.R. 1 P. & D. 195.
27 See para.3-14, below.
28 Senior Courts Act 1981 s.19.
29 Senior Courts Act 1981 s.104 and see the District Probate Registries Order 1982 (SI 1982/379) (as amended by SI 1994/1103 and 1994/3079). See also para.16-05, below.
30 Under Administration of Justice Act 1970 s.1(1), the Probate, Divorce and Admiralty Division of the High Court was renamed the Family Division and the principal probate registry was renamed the Principal Registry of the Family Division.
31 Senior Courts Act 1981 s.61(1) and Sch.1 paras 1(h) and 3(b)(iv) (formerly Administration of Justice Act 1970 s.1(4)).
32 See para.2-04 and the Judicature Act 1925 s.56(3).
33 Senior Courts Act 1981 s.128.

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the above definition it is non-contentious business and is assigned to the Family Division.[34]

2-10 All other probate business (i.e. contentious or solemn form business) is assigned to the Chancery Division. This means that where there is a dispute about probate (i.e. whether a particular document should be admitted to probate) and also as to the interpretation of that document (assuming that it is admitted to probate), both matters can be heard and decided in sequence at one hearing by the same judge. In such cases, the court performs the function of a court of probate and also the function of a court of construction. In performing these functions, there may well be differing rules of evidence. For example, while extrinsic evidence as to a testator's intention is admissible when the court is acting as a court of probate in determining whether to admit a document to probate, it is not generally admissible when, having admitted that document to proof, the court seeks to construe it.[35]

While probate business is assigned to either the Family Division or the Chancery Division, technically, all jurisdiction vested in the High Court under the Senior Courts Act 1981 belongs to all Divisions alike,[36] so that any judge may exercise jurisdiction in any matter even if that matter is assigned to another Division. But though a judge in another Division would have jurisdiction to grant probate of a will, this would be so inconvenient that any judge would direct the parties to obtain probate in the Division to which such matters have been assigned.[37]

Practice of the High Court

2-11 Under the Senior Courts Act 1981, the Lord Chief Justice or a judicial office holder nominated by him with the agreement of the Lord Chancellor may make rules for regulating and prescribing the practice and procedure that applies to non-contentious probate business in the High Court.[38] Such rules, which have to be made by statutory instrument,[39] are currently contained in the Non-Contentious Probate Rules 1987.[40] At the time of writing, new Probate Rules have been drafted and, after a considerable delay, are awaiting enactment. The draft Probate Rules change some of the terminology but make relatively few substantive alterations. This book will identify these changes, and otherwise refer to the equivalent rule to that in the N-CPR in the new Probate Rules. Readers are, therefore, advised to check on the status of the new Probate Rules.

2-12 Since 15 October 2001, the procedure for contentious business in the Chancery Division has been governed by the Civil Procedure Rules 1998, in particular Part 57 and the Practice Direction thereto[41] which apply, inter alia, to "probate claims".[42]

[34] See, for example, *Re Clore (Deceased)* [1982] Fam. 113, per Ewbank J. at 116.

[35] See *Lamothe v Lamothe* [2006] EWHC 1387; [2006] W.T.L.R. 1431 and the cases reviewed there including, in particular, *Re Resch's Will Trusts* [1969] 1 A.C. 514.

[36] Senior Courts Act 1981 s.5(5).

[37] While a claimant may allocate his case to whichever Division of the High Court he thinks fit, this is always subject to the court's power to transfer the matter to another Division—ss.64 and 65 of the Senior Courts Act 1981.

[38] Senior Courts Act 1981 s.127(1) (as amended by the Constitutional Reform Act 2005 Sch.1(2) para.12(2)).

[39] Constitutional Reform Act 2005 Sch.1 para.4(1)(b).

[40] SI 1987/2024, as amended by the Non-Contentious Probate (Amendment) Rules of 1991, 1998, 1999, 2003, 2004 and 2009.

[41] Under s.1(2) and Sch.1 para.6 of the Civil Procedure Act 1997, the Civil Procedure Rules (CPR) may, instead of providing for any matter, refer to provision made or to be made about that matter by

For these purposes, a "probate claim" is defined[43] as a claim for:

"(i) the grant of probate of the will, or letters of administration of the estate, of a deceased person;
(ii) the revocation of such a grant; or
(iii) a decree pronouncing for or against the validity of an alleged will not being a claim which is non-contentious (or common form) probate business."

Where such an issue is resolved in favour of the validity of the will, the will is said to have been proved in "solemn form".

2-13 To the extent that no special provision is contained in the Senior Courts Act 1981 or in any rules, the jurisdiction of the High Court is exercised as nearly as may be in the same manner as that in which it might have been exercised by the court to which it formerly appertained.[44]

The county court—contentious probate jurisdiction

2-14 The county court has a limited jurisdiction in relation to probate matters. Where an application has been made for a grant or revocation of a grant[45] and it is shown to the satisfaction of the county court that the value of the deceased's net estate at the date of death does not exceed £30,000, then the county court will has jurisdiction in respect of any contentious matter arising in connection with the grant or revocation.[46] For these purposes, "net estate" means the estate of the deceased person, exclusive of any property he was possessed of or entitled to as a trustee and not beneficially but after making allowance for funeral expenses and for debts and liabilities.[47]

Since the jurisdiction of the county court is concurrent with that of the High Court and is not exclusive, it is not obligatory to apply through the county court for probate or administration even where the net estate does not exceed the county court limit. However, in such a case (as well as in other suitable cases), the High Court may well order a transfer of the proceedings to the appropriate county court, even though the value of the estate well exceeds £30,000.[48]

practice directions.

[42] CPR r.57.1(1)(a). CPR Pt 57 also applies to claims for the rectification of wills, claims to substitute or remove a personal representative and claims under the Inheritance (Provision for Family and Dependants) Act 1975 and Presumption of Death Act 2013—see CPR r.57.1(1)(b)–(d).

[43] By CPR r.57.1(2)(a).

[44] Senior Courts Act 1981 s.25.

[45] Such applications are made through the Principal Registry or a district probate registry under Senior Courts Act 1981 s.105.

[46] High Court and County Courts Jurisdiction Order 1991 art.2(7B), as amended by the High Court and County Courts Jurisdiction (Amendment) Order 2014, with effect from 22 April 2014. Section 32(1) of the County Courts Act 1984 was to similar effect before its repeal by the Crime and Courts Act 2013 Sch.9(1) para.10(3).

[47] High Court and County Courts Jurisdiction Order 1991 art.2(7C), formerly County Courts Act 1984 s.32(2).

[48] County Courts Act 1984 s.40 and Chancery Guide 2016 para.14.18. Many cases are transferred to the County Court at Central London, which operates a specialist list for chancery business.

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C. Probate Business: the Functions of the Court in Making a Grant

The grant

2-15 As discussed later, where an executor is appointed by a will, he derives title from that will. However, as a general rule, he cannot assert or rely on his rights in relation to the estate in any court without showing that he has previously established his executorship.[49] The usual proof of his executorship is the production of the grant of probate which will contain a copy of the will by which he is appointed and which bears the seal of the court. This is usually called the probate. Nothing but the probate or other proof tantamount thereto of the admission of the will constitutes legal evidence of his appointment and of the terms of the will.[50] However, evidence of the existence of the will and of its terms may be accepted in the absence of a grant if they are not in issue.[51]

In a case of a grant of letters of administration, the authority and title of the administrator derives entirely from the grant made by the court.[52] The administrator must, therefore, be able to produce the grant (or proof tantamount to the grant). Where the grant was of letters of administration with the will annexed, the grant also constitutes legal evidence of terms of that will.

The rule that a grant is required to prove the existence and terms of a will applies to the will of a deceased Sovereign of the realm even though the court has no jurisdiction to make a grant in relation to such a will.[53] Hence, the court is unable to enforce payment of legacies under such a will. If there is any claim under a Sovereign's will, the proper course is to proceed by petition of right.[54]

Extent of grant

2-16 Under s.113(1) of the Senior Courts Act 1981, the High Court has power to grant probate or administration in respect of any part of a deceased's estate, and such a grant may be limited in any way that the court thinks fit.[55]

As a general rule, the High Court will only exercise its jurisdiction to make a grant of probate or letters of administration if property forming part of a person's estate is situate in England or Wales. However, the court does have jurisdiction to issue a grant where the deceased left no estate.[56]

Court acting as a court of probate and as a court of construction

2-17 In exercising its jurisdiction to make grants of probate or letters of administration, the main functions of the court (whether as the Chancery Division or the Family Division) are to ascertain and determine what testamentary paper or papers are

[49] As to what acts an executor may do before probate, see Ch.5, below.

[50] See, for example, *Re Crowhurst Park* [1974] 1 W.L.R. 583 at 594 (where the grant was held to be necessary to prove the title of a person tracing title to personal property through an executor). See also *Re Parker's Trusts* [1894] 1 Ch. 707 at 720–721.

[51] See *Whitmore v Lambert* [1955] 1 W.L.R. 495 and *Power v Stanton* [2010] 3 E.G.L.R. 71.

[52] See para.5-13, below.

[53] See para.5-25, below.

[54] *Ryves v Duke of Wellington* (1846) 9 Beav. 579; Crown Proceedings Act 1947 s.40(1).

[55] For limited grants, see Ch.19, below.

[56] Senior Courts Act 1981 s.25, preserving the effect of the repealed Administration of Justice Act 1932 s.2(1). *Re Wayland* [1951] 2 All E.R. 1041, but see *Aldrich v Attorney General* [1968] P. 281, 295.

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to be regarded as the deceased's last will, and who is entitled to be constituted as his or her representative.[57] Save in so far as is necessary in order to fulfil those functions, the court is not required to construe the relevant documents.[58] This was also the position as regards the former Court of Probate which was expressly prohibited from maintaining any suit for construction of a will.[59] It was also the position for the former Probate Division of the High Court.[60]

By contrast, with the development of the system of equity, the courts of equity assumed a jurisdiction over representatives (i.e. executors and administrators) to ensure the proper performance of their duties in relation to the administration of the estate (whether that estate was testate or intestate). This jurisdiction was exercised in favour of persons interested in the distribution of the estate, including dependants entitled to claim provision or maintenance. While, for these purposes, the probate seal was conclusive evidence of the validity of a will,[61] and the right of the representative to administer the estate, the courts of equity had to construe the will and any relevant legislation in order to enforce a proper performance of the duties of that representative. For this reason, the courts of equity were sometimes called Courts of Construction.[62]

[57] See, for example, *Lamothe v Lamothe* [2006] EWHC 1387 and para.3-10, below.

[58] *Re Berger (Deceased)* [1990] Ch. 118.

[59] Court of Probate Act 1857 s.23 and see *Warren v Kelson* (1859) 1 Sw. & Tr. 290. By contrast, before 1857, the ecclesiastical courts were courts of construction as well as courts of probate because suits for legacies could be brought in those courts (although, in practice, they actually retained jurisdiction only over grants—see Holdsworth, *A History of English Law*, 34th edn, Vol.1, p.629) and the Court of Chancery did not (until Lord Nottingham extended the system of equity) administer relief to legatees under wills (see *Deeks v Strutt* (1794) 5 T.R. 690 at 692). See also *Re Diplock* [1948] Ch. 465, 484–487. Hence, the hybrid nature of legacies which were often treated as analogous to debts rather than as interests in the residue of an estate.

[60] See *Re Heys (Deceased)* [1914] P. 192 at 200; *Re Hawksley's Setlement* [1934] Ch. 384; and see *Re Lupton* [1905] P. 321, *Re Fawcett* [1941] P. 85 and *Re Last* [1958] P. 137.

[61] See para.34-02, below, and *Guthrie v Morel* [2015] EWHC 3172 (Ch); [2016] W.T.L.R. 273 at [21].

[62] For more detail as to the history of this distinction, see the previous editions of this work.

The district registries and sub-registries

16-05 The district probate registries are empowered to make grants in common form.[7] There is no limit to the value of the estate in respect of which such a grant can be made nor are there any territorial restrictions on where an application should be made. In general, district probate registrars have the same powers as regards grants as the district judges of the principal registry.[8] However, a registrar in a district probate registry cannot make a grant in any case where there is contention until that contention is disposed of nor can a grant be made in any case in which it appears to the registrar that a grant ought not to be made without the direction of the court.[9] Thus a grant of administration pending determination of a probate action must be obtained from the Principal Registry.[10]

District probate registries have been established at a number of places in England and Wales.[11] Some of these district registries have sub-registries. Sub-registries have no power to issue grants and the necessary papers are forwarded after preliminary examination to the parent district registry for the grant to be issued. There are also a number of interview venues controlled by the district registries or sub-registries.

As in the case of the principal registry, an application for a grant from a district probate registry or sub-registry may be made in person or through a solicitor or probate practitioner.[12]

Second or subsequent grants

16-06 Where a second or subsequent grant is required,[13] the application need not be made in the registry in which the first grant was made. It can be made to any registry or sub-registry.[14]

The county court

16-07 When a probate action is heard in a county court the testamentary papers are, on its conclusion, sent to the probate registry from which they came and the grant is made there.

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[7] Such grants being made in the name of the High Court—see Senior Courts Act 1981 s.106.
[8] N-CPR 1987 r.2. Draft Probate Rules r.2 is to the same effect.
[9] N-CPR 1987 r.7(1). Draft Probate Rules r.50(1) is to the same effect, although "contentions" are instead referred to as "disputes".
[10] *Registrar's Direction* 1935.
[11] The district registries and their attendant sub-registries are currently: (i) Birmingham, sub-registry, Stoke-on-Trent; (ii) Brighton, sub-registry Maidstone; (iii) Bristol, sub-registries Bodmin and Exeter; (iv) Ipswich, sub-registries Norwich and Peterborough; (v) Leeds, sub-registries Lincoln and Sheffield; (vi) Liverpool, sub-registries Chester and Lancaster; (vii) Cardiff, sub-registries Bangor, Carmarthen; (viii) Manchester, sub-registry Nottingham; (ix) Newcastle, sub-registries Carlisle, Middlesbrough and York; (x) Oxford, sub-registries Leicester and Gloucester; (xi) Winchester (no sub-registry). The registry at Cardiff is known as the Probate Registry of Wales. See s.104 Senior Courts Act 1981 and the District Probate Registries Order 1982 (SI 1982/379) (as amended by SI 1994/1103 and 1994/3079). The location of these district registries can be varied by Order.
[12] See para.16-04, above.
[13] For example, in the case of a settled land grant after a "save and except" grant and vice versa (see *Registrar's Direction*, 27 June 1932) or where there is a further grant following one which has been revoked or become cessate.
[14] Administration of Justice Act 1969 s.28 (now repealed by the Statute Law (Repeals) Act 1978) repealed Supreme Court of Judicature (Consolidation) Act 1925 s.153, which imposed restrictions.

C. Modes of Application for Grants

Applications at the principal registry

Applications made through solicitor or probate practitioner[15]

16-08 Where an application for a first grant is made through a solicitor or probate practitioner, that solicitor or probate practitioner will leave at the Probate Department the necessary papers to lead the grant. These papers comprise:

- Any will or codicils (with two A4 photocopies).
- The oath.
- Where applicable, form IHT 205 (Return of estate information). This form is used in cases where the gross value of the estate is less than: (a) the exempted estate limit; or (b) two times the excepted estate limit and a claim is being made to transfer an unused nil rate band—in which case, form IHT 217 (Claim to transfer unused nil rate band for excepted estates) must also be attached)[16]; (c) £1,000,000 but there is no inheritance tax payable due to the spouse, civil partner or charity exemption applying.
- Where applicable, form IHT421 (Probate summary) with HM Revenue & Customs' section of the form having been completed by HM Revenue & Customs.[17]
- Such other papers as the nature of the case may require.

The fee is paid and a fee sheet is impressed. The solicitor or probate practitioner through whom the application is made must give the address of his place of business within the jurisdiction.[18]

Where precedents are not readily available or where there is a particular difficulty, drafts of papers may be submitted to the probate department for settling. Affidavits of fact, where these are requisite, will not be settled by the department but may be "approved".

Applications for grants may also be made by post at the principal registry, by sending the necessary papers addressed to: The Probate Manager, The Probate Department, Principal Registry of the Family Division, First Avenue House, 42–49 High Holborn, London, WC1V 6NP (DX 941 London/Chancery).[19]

The staff at the registry will answer simple queries by telephone, letter or email, as far as this is practicable.

Personal applications

16-09 Personal applications to the principal registry are made to the Probate Department of the Principal Registry at First Avenue House, 42–49 High Holborn,

[15] Applications for grants may be made through a solicitor or probate practitioners either at the principal registry or at any district registry or sub-registry—see N-CPR 1987 r.4 (as amended). See also, para.16-04, above. Draft Probate Rules rr.2 and 20 are to similar effect. References to solicitors have been removed since they are included in the new definition of "probate practitioner".
[16] The IHT threshold (nil rate band) up to 5 April 2021 is £325,000.
[17] Form IHT421 is used where form IHT 205 is inappropriate.
[18] N-CPR 1987 r.4(2). Draft Probate Rules r.21 is to the same effect.
[19] *Practice Note* [1975] 1 W.L.R. 662.

London, WC1V 6NP.[20] Assistance and details in relation to the process can be obtained online from *https://www.gov.uk/wills-probate-inheritance/applying-for-a-grant-of-representation*.[21] The application form to be filled out in such cases (PA1), the guidance notes (PA1A), information booklet (PA2), list of probate fees (PA3) and directory of probate registries and interview venues (PA4) are all obtainable on request from any registry or sub-registry or can be accessed and downloaded from *http://hmctsformfinder.justice.gov.uk/HMCTS/GetForm.do?court_forms_id=735* [Accessed 19 February 2018].

Where an application is made personally, it cannot be made through an agent (whether paid or unpaid) nor can the applicant be attended by a person acting or appearing to act as an adviser.[22] The only exception to this is where the application is made under the Colonial Probates Acts 1892 and 1927 for the re-sealing of a grant made by a court in a country to which those Acts apply.[23]

The following documents should be lodged, together with the appropriate fee, either personally or by post in the registry at which the applicant wishes to attend:

- Form PA1—which form provides full particulars of any testamentary documents, the deceased's relatives, details of the applicant and of the deceased and details of the estate.
- A death certificate or other evidence of death.[24]
- Where applicable—form IHT 205 (Return of estate information). This form is used in cases where the gross value of the estate is less than: (a) the exempted estate limit; or (b) two times the excepted estate limit and a claim is being made to transfer an unused nil rate band—in which case, form IHT 217 must also be attached;[25] (c) £1,000,000 but there is no inheritance tax payable due to the spouse, civil partner or charity exemption applying.[26]
- The original testamentary documents (with two A4 photocopies)
- Any other information necessary to enable the papers leading to the grant to be prepared.

If an appointment at a probate office is required, the applicant should request this on lodging the papers.

The papers leading to the grant are then prepared in the registry.[27] The applicant is then given a date to attend to swear the oath at an appropriate registry, sub-registry or interview venue or (if the applicant makes the necessary arrangements) he may attend at the office of a commissioner for oaths to swear the oath. On such attendance, the applicant has to verify his identity, and (unless a district judge orders

[20] Personal applications are governed by the N-CPR 1987 r.5. The procedure is set out in rr.22 and 24(3) of the Draft Probate Rules.
[21] [Accessed 19 February 2018].
[22] N-CPR 1987 r.5(2). Draft Probate Rules r.22(1) is to the same effect.
[23] N-CPR 1987 r.39. See para.23-04 onwards, below. Draft Probate Rules r.45 is to the same effect.
[24] N-CPR 1987 r.5(5).
[25] The IHT threshold (nil rate band) up to 5 April 2021 is £325,000.
[26] Where form IHT205 is inappropriate, the applicant must complete form IHT400 and form IHT421 and lodge them with H.M. Revenue & Customs (HMRC). If HMRC return the form 421 with its part of the form completed, the applicant may also lodge this with the Registry. Usually, however, HMRC will send this document direct to the appropriate registry.
[27] N-CPR 1987 r.5(6).

otherwise) swear the oath and confirm to the interviewing officer that the information that he has provided is accurate.[28]

A district judge has a discretion to direct that a personal application be not received or be not proceeded with.[29] Applications will not be accepted where a probate action or summons is necessary or where there is already an outstanding application made by a solicitor on behalf of the applicant.[30]

Although the registries' officers play a significant role in the preparation of the paperwork for personal applications, they are not able to give legal advice and are only responsible for embodying the applicant's instructions in the proper form.[31]

There is no longer any requirement for personal applicants to obtain an administration guarantee or bond or give a surety.

Changes to procedure in the Draft Probate Rules

16-10 The Draft Probate Rules will modify the procedure for both personal applications and applications through a probate practitioner. An application by a probate practitioner must[32]:

- specify the form of grant being applied for;
- be supported by a witness statement by the person seeking the grant setting out all the facts necessary to be established if such a grant is to be made;
- be accompanied by such other papers as may be required by any relevant Practice Direction; and
- give the address of the probate practitioner's place of business within England and Wales.[33]

An application by a personal applicant shall be made as follows[34]:

- the applicant shall complete and deliver to the registry a questionnaire in the form set out in the relevant Practice Direction;
- the applicant shall verify the truth of the answers in the manner required by the form; and
- the applicant shall deliver to the registry such other papers as may be required by any relevant Practice Direction.

A personal applicant is no longer required to attend a registry or interview venue to swear an oath before an authorised officer but may be required to attend pursuant to Draft Probate Rules r.25, which also applies to probate practitioners, where appropriate. The requirement to produce a certificate of death pursuant to N-CPR r.5(5) has also been removed.

In both cases:

- the above "relevant Practice Directions" may be made pursuant to Draft Probate Rules r.6, which allows the rules to be supplemented by Practice Directions made in accordance with the Constitutional Reform Act 2005 Pt 1 Sch.2;

[28] N-CPR 1987 r.5(7).
[29] N-CPR 1987 r.5(3). Draft Probate Rules r.22(2)(c) is to the same effect.
[30] N-CPR 1987 r.5(3). Draft Probate Rules r.22(2)(b) is to the same effect.
[31] N-CPR 1987 r.5(8). Draft Probate Rules r.22(4) is to the same effect.
[32] Draft Probate Rules r.24(4).
[33] Draft Probate Rules r.20.
[34] Draft Probate Rules r.24(3).

- an application for a grant may be made to any registry[35];
- applications may be delivered to the registry in any of the ways set out in any relevant Practice Direction[36];
- any applicant shall if requested by the registry provide any further information or any copy or original document requested or specified by the registry; and attend for interview at the registry.[37]

The witness statement replaces the oath and must[38]:

- be verified by a statement of truth;
- unless otherwise directed by the court, state:
  - (a) the full name of the deceased (subject to r.28);
  - (b) the date of birth of the deceased as stated on the death certificate or as applicable to the circumstances;
  - (c) the date of death of the deceased as stated on the death certificate;
  - (d) the address of the principal residence of the deceased; and
  - (e) the state or territory where the deceased died domiciled;
- and state:
  - (a) the basis on which the applicant claims to be entitled to a grant;
  - (b) in what manner any person having a prior right to a grant has been cleared off;
  - (c) where the application is for a grant of administration, whether any minority or life interest arises under the will or intestacy; and
  - (d) the gross and net value of the estate of the deceased.

Procedure after an application has been lodged

16-11 When an application, whether by a solicitor, probate practitioner or in person, has been lodged, a further photocopy of any will (or codicil) is made for record purposes, and the records are searched to see whether any other grant has been made in respect of the same estate or any caveat has been entered. For these purposes, there is a computerised central index of caveats and of grant applications to which all registries are linked.[39] The papers are examined and a grant prepared to which a photocopy of any will or codicil is attached. No grant may be made until computer clearance shows there is no impediment to the grant's issue. The grant is signed by a District Judge, or a Probate Officer, authorised in that respect by the President of the Family Division, and sealed with the seal of the Family Division. A copy of the grant is filed for record purposes and available for inspection by the public.

[35] Draft Probate Rules r.24(1).
[36] Draft Probate Rules r.24(2).
[37] Draft Probate Rules r.25.
[38] Draft Probate Rules r.27.
[39] N-CPR 1987 rr.44(4) and 57. Provision for an index of caveats is contained in Draft Probate Rules r.55(2), renamed a "record of objections". Similarly, a record of grant applications is provided for by r.63(1) and the records are to be searched pursuant to r.63(2). Under Senior Courts Act 1981 s.111, records must be kept of all grants by the Principal Registry and any district probate registry (including those which have been closed). Such records were in book form until 31 December 1979, on microfilm from then until 31 December 1994 and on computer thereafter. The records which are now required to be kept are as set out in the *President's Direction* of 3 November 1998. They include details of the deceased's name, last address, date of death and domicile, the names of his representatives, the type of grant made, the value of the estate, the name of the extracting solicitor (if any) and the date of the grant.

Grants are sent by post unless the application has been made by a law agent on behalf of a solicitor. A grant is regarded as issuing at 10.00 on the day for which it has been dated.

Applications at a district registry or sub-registry

16-12 Where the application is made by a solicitor or probate practitioner he may attend at the district registry or send the appropriate papers by post. Personal application may also be made in much the same way as at the principal registry.[40]

The procedure after papers have been lodged is similar to that at the principal registry. No grant can be made at a district registry until computer clearance shows there is no impediment to the grant's issue.[41] The grant is issued and a copy thereof and of any will is sent to the records repository which can be inspected at any district registry.[42] The practice as regards the papers to be lodged is similar to that at the principal registry. Papers delivered to a sub-registry are sent on to the district registry for the issue of the grant.

Appeals

16-13 An appeal against a decision of a district judge or registrar in any non-contentious matter, including refusal to make a grant, is by summons to a High Court judge. If any other person had appeared or been represented before the district judge or registrar, then the summons must be issued seven days of the decision being appealed and served on that other person.[43] Draft Probate Rules r.73 will set out an altered procedure in which summonses will be replaced by application notices[44]:

- an appeal against a decision or requirement of a registrar or district judge shall be made to a High Court judge[45] and shall be made by filing a notice of appeal at the Principal Registry;
- the notice of appeal shall be filed within 21 days after the decision or requirement against which the appeal is brought, unless the court specifies a different time, and the appellant shall at the same time serve a copy of the notice of appeal on every other party to the proceedings;
- any reference in CPR pt.52 to a district judge shall be taken to include a district judge of the Principal Registry;
- CPR r.52.3 (Permission to appeal) does not apply to an appeal under Draft Probate Rules r.73;
- Draft Probate Rules r.73 does not apply to an appeal against a decision in proceedings for the assessment of costs (in proceedings for the assessment of costs, an appeal from the decision of a costs judge or district judge lies to a judge of the High Court under CPR pt.52 and an appeal from the deci-

[40] N-CPR 1987 rr.4(1) and 5(1). For the procedure under the Draft Probate Rules, see para.16-09.
[41] See the N-CPR 1987 r.57. Draft Probate Rules r.63 is to the same effect.
[42] See fn.41, above.
[43] N-CPR 1987 r.65. This rule does not apply to appeal against a decision in proceedings for the assessment of costs.
[44] Consistently with similar changes throughout the Draft Probate Rules.
[45] This includes a person acting as a High Court judge in accordance with s.9(1) or 9(4) of the Senior Courts Act 1981.

sion of an authorised court officer lies to a costs judge or a district judge under CPR rr.47.21 to 47.24).

D. GENERAL PRACTICE AS TO GRANTS

16-14 Having considered the particular practice in obtaining grants at the principal registry and at district registries the general practice as to grants is now considered.

Papers to be lodged on application for a grant

16-15 The papers to be lodged on an application for a grant have already been considered and depend on whether or not the application is being made through a solicitor or probate practitioner or in person and on whether or not any inheritance tax is payable.[46]

Where, after papers have been lodged by a solicitor, the conduct of the matter is transferred to another solicitor, there must be lodged a letter of consent by the solicitor who lodged the papers and an authority for the new solicitor to act. It is likely that the same practice will apply in the case of a probate practitioner.

A district judge or registrar will not allow a grant to issue until all inquiries which he may see fit to make have been answered to his satisfaction.[47] In some types of case, affidavits are always required; in others the circumstances of the case may make affidavits necessary. Other documents are necessary in cases of a particular type or may be required in special circumstances to support the averments in the oath. These requirements are dealt with in various places in this work.

Where two applications are lodged in the same estate, and one applicant opposes the application of the other, each being equally entitled, a summons to a registrar is necessary.[48]

Fees payable on issue of an original grant

16-16 No fee is payable in respect of an application for a grant where the asset value of the estate does not exceed £5,000. Where the net estate exceeds £5,000, a flat fee of £155 is payable, irrespective of the value above £5,000.[49] If the application for a grant is a personal application, an additional fee of £60 is also payable.[50]

Fees on grants are paid by cash or cheque. At the principal registry payment is shown by a machine imprint on a fee sheet.

The fee can be reduced or remitted if certain specified conditions are shown[51] or

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[46] See paras 16-08 and 16-09 above. See para.16-10 above for the procedural changes contained in the Draft Probate Rules.

[47] N-CPR 1987 r.6(1). Draft Probate Rules r.49 is in similar terms.

[48] N-CPR 1987 r.27(6). Draft Probate Rules r.13(7) is to the same effect. Summonses will be replaced by applications.

[49] See the see Non-Contentious Probate Fees Order 2004 (SI 2004/3120) (as variously amended), fee 1. In March 2017, it was announced that fees would be increased in May 2017, in line with the Government's "Consultation on proposals to reform fees for grants of probate", published in February 2016, providing for a graduated scale of fees from £300 to £20,0000, depending on the assessed value of the estate. This proposal was abandoned in April 2017.

[50] See the see Non-Contentious Probate Fees Order 2004 (SI 2004/3120) (as variously amended), fee 2.

[51] For example, that the applicant is in receipt of a qualifying benefit or meets certain criteria regarding number of children and income. See Non-Contentious Probate Fees Order 2004 (SI 2004/

where, owing to the exceptional circumstances of a particular case, payment of the fee would involve undue financial hardship.[52] A person who has already paid the fee can apply for a refund on similar grounds. However, such application must be made within six months of the payment or, if good reason is shown, within some longer period.[53]

In determining whether the value of the estate is such that a fee is payable, death gratuities payable to the representatives of the judiciary and of civil servants are excluded.[54]

Fees where a member of the armed forces died on service

16-17 A reduced fee of £10 is payable where the application is for a grant in respect of a member of any of the armed services or certain associated persons dying after 20 March 2003 whose death is certified by the Defence Council of by the Secretary of State to have been caused by a wound inflicted, accident occurring or disease contracted while he was on active service or other service of a warlike nature.[55]

Notice to the Crown of application for a grant

16-18 In any case in which it appears that the Crown is or might be beneficially interested in the estate, notice of the intended application for a grant must be given to the Treasury Solicitor, and the district judge or registrar may direct that no grant shall issue within 28 days after such notice has been given.[56]

Stamp duty

16-19 Where, on an application for a grant, an original instrument has been produced, it is the practice of the registries to ensure that such instrument has been properly executed and stamped in accordance with the Stamp Act 1891. If there is any doubt as to whether an unstamped instrument should have been stamped, the applicant will be required to submit the matter for adjudication by HM Revenue & Customs. Where adjudication is likely to delay the issue of a grant, the procedure can be expedited if the application for a grant had been made by a solicitor for in such cases the registries will make a grant provided that solicitor undertakes to HM Revenue & Customs that he will resubmit the instrument for adjudication after the grant has issued and will pay any stamp duty to which the instrument is adjudged liable.[57] Where there is an exemption from stamp duty, the appropriate certificate in the prescribed form must appear on the document being presented.

3120) art.4 and Sch.1A paras 2–6.

[52] Non-Contentious Probate Fees Order 2004 (SI 2004/3120) art.4 and Sch.1A para.8.

[53] Non-Contentious Fees Order 2004 art.5 and Sch.1A, para.9.

[54] Non-Contentious Probate Fees Order 2004 (SI 2004/3120) art.3.

[55] Non-Contentious Fees Order 2004, fee 3.2. The estates of such people are also exempt from Inheritance Tax by reason of s.154 Inheritance Tax Act 1984 (formerly Finance Act 1975 Sch.7 para.1(1)). An earlier (1991) Fees Order did not provide for a reduction in the fees payable in respect of such people. However, the Non-Contentious Fees Order 2004 art.7. now provides that, where a fee has been paid in respect of a death before 20 March 2003, a refund can be claimed for the difference between the amount paid and fee 3.2 (£10).

[56] N-CPR 1987 r.38. Draft Probate Rules r.26 is to the same effect.

[57] *Practice Direction* [1978] 1 W.L.R. 430.

How soon a grant may issue

16-20 The 1987 Rules provide that, except with the leave of a district judge or registrar, no grant of probate or letters of administration with the will annexed may issue within seven days of the death of the deceased and no grant of letters of administration within 14 days of the death.[58] If a person needs a grant before those time periods have expired, an application for leave must be made. The precise form of such application and the nature of the supporting evidence will depend on the court. However, initially at least, it is made without notice with evidence, usually by way of affidavit, setting out the special reasons why an earlier grant is required. The court may, before deciding to give leave, require some other person to be notified of the application or joined as a party to it.

Under the intestacy rules, where a person dies intestate survived by a spouse, that spouse does not acquire a beneficial interest in the deceased spouse's estate unless he or she survives by 28 days.[59] Strictly, therefore, a grant of letters of administration cannot issue to the surviving spouse before the expiry of 28 days from the date of death. Despite this, it is the practice of the court to allow letters of administration to issue to the surviving spouse after the 14-day period provided for in the N-CPR 1987 has expired and to treat the estate as vested but as being subject to divesting if that spouse does not survive the requisite 28 days. If the surviving spouse dies before the 28-day period expires, administration is granted to those next entitled in the usual way.

Although the earliest times for the issue of grants are laid down, no latest time is specified and no limitation period applies.

A person who administers any part of an estate or effects of any deceased person without obtaining a grant within six months of the death (or within two months of the resolution of any dispute as to the right to a grant) is liable to a fine of £100.[60]

Issue of grants

16-21 As already stated, grants are sent by post or through the document exchange unless arrangements are made for their collection.

Expediting issue of a grant

16-22 After an application is made, the actual process of issuing a grant may be expedited where circumstances justify it; but it must be shown that hardship would result if expedition were not granted.[61] An affidavit is not required but the registrar must be apprised of the grounds for expedition. Grants may also be expedited where

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[58] N-CPR 1987 r.6(2). For the origins of this rule, see *Hewson v Shelley* [1914] 2 Ch. 13 at 45. Under Draft Probate Rules r.49 no grant may be made in all cases (whether a grant of probate, letters of administration with the will annexed or grant of letters of administration) within 14 days without the permission of the court.

[59] Administration of Estates Act 1925 s.46(2A) as added by s.1, Law Reform (Succession) Act 1995.

[60] By the Stamp Act 1815 s.37, as amended by the Finance Act 1975 s.52(2) and Sch.13. For deaths before this date, see the Stamp Act 1815 s.37 (before amendment) and the Customs and Inland Revenue Act 1881 s.40. As to the object of s.37 of the Stamp Act 1815, see *Bodger v Arch* (1854) 10 Exch. 333 at 337.

[61] Secretary's Circular, 13 November 1951.

it is necessary to administer any part of the estate urgently, for example the sale of real estate.

Errors in grants

16-23 Where a grant, after passing the seal, is found to be defective through an official error, if it has not been registered, it should be returned to the registry within 28 days for correction by rewriting. In all other cases the correction is made by order of a district judge or registrar.[62]

Where the error arose as a result of a defect in the oath the grant may be rewritten or amended on application to the district judge or registrar. The mode of application by affidavit or some lesser form is a matter for the court's discretion.

Death of the grantee before the official issue of the grant

16-24 A grant sealed after the death of a sole grantee is a nullity.[63] Where the grantee dies on the actual date of the grant, the district judge or registrar may require an affidavit in order that he may decide whether to exercise his discretion to revoke the grant.[64] If the registry is notified of the death on the day the grant issues, the document is unofficially destroyed and the records of it are expunged. Otherwise revocation of the grant is necessary.[65]

Copy grants

16-25 An executor or administrator may obtain copies of the grant sealed with the seal of the registry on payment of the appropriate fee.[66] Such copies are useful in expediting the registration of the grant. Application for copy grants may be made with the application for the grant or at any time thereafter. Sealed copies are accepted as evidence of the grant in all parts of the United Kingdom without further proof.[67] If the grant is required for use abroad a certified copy may be endorsed with the "apostille" or appropriate annotation on application to the Foreign and Commonwealth Office and on payment of their fee.

E. THE OATH

16-26 As mentioned above every application for a grant must be accompanied by an oath. This oath must be sworn or affirmed by every executor or administrator.[68]

As set out below, there are a number of matters that the oath must cover. These

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[62] *Registrar's Direction*, 14 November 1940. For the amendment and revocation of grants for other errors, see Ch.22, below.

[63] If there are two or more applicants, a grant may be made to the survivors, if otherwise appropriate

[64] i.e. under the N-CPR 1987 r.41, *Registrar's Direction*, 19 June 1975. And see *Re Seaford* [1968] P. 53. For revocation of grants generally, see para.22-15 onwards, below. Draft Probate Rules r.62 is to the same effect.

[65] *Registrar's Direction*, 18 June 1951. These propositions appear to depend on the supposed principle that a judicial act relates back to the earliest moment of the day in question. This has been seriously questioned by the Court of Appeal; see *Re Palmer* [1994] Ch. 316 at 348.

[66] The fees charged by the registries are all set out in form PA3 which is available from registries or online at *http://hmctsformfinder.justice.gov.uk/HMCTS/GetForm.do?court_forms_id=735* [Accessed 19 February 2018].

[67] Senior Courts Act 1981 s.132.

[68] The Draft Probate Rules, r. 24(4)(b), makes provision for the information to be given by witness

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are matters required in part by the N-CPR 1987 and in part by the practice of the registry.[69] However, it should be borne in mind that it may not always be appropriate to follow rigid forms of words from standard forms and precedents. In particular, if there are uncertainties, these should be explained.[70] Where precedents are not readily available or where there is a particular difficulty, the oath may be submitted in draft for settling by the registry. See para.16-10, above for changes to the procedure under the Draft Probate Rules, including the requirement for a witness statement in place of an oath and the matters that must be contained therein.

The name, address and description of the deponent

16-27 The true full name of the deponent must be given.[71] Where the name of an executor applicant has been wrongly given or misspelt in the will, the oath corrects this by reciting e.g. "William Bailey (in the Will and usually known as Bill Bailey)." Where the misspelling is minor, e.g. "Brown" for "Browne," or where a second forename has been omitted, no further evidence of identity is usually required, but where a wrong surname or first forename is given or where the description might apply to some other person, e.g. "Mr. Green" a statement in the oath or a separate affidavit may be required.[72] The grant will issue in the correct name.

Where the will merely appoints "my husband" or "my wife" as executor, the oath must state that the deponent was the lawful husband or wife of the testator/testatrix at the date of the will. If the executor has changed his name from that given in the will, he should show that that name was formerly his. Any deed poll which changed the name should be referred to and produced; otherwise he should set out when the change of use took place, that he has abandoned the name given in the will and now uses his current name. An executrix who has married or married again gives her present description and her former name and description, e.g. "Jane White, wife of John White, formerly Jane Grey, spinster."

The address given (including postcode) must be the true place of residence and, except in special circumstances, a business or accommodation address or a club is not accepted unless the oath or a certificate from a solicitor or probate practitioner establishes that the deponent has no permanent or better address.[73] A professional person e.g. a solicitor, probate practitioner or accountant who is an executor may, however, give his professional address.[74] The address of an executor given in the will is not mentioned in the oath except to establish identity, e.g. "Mr. Black of The Orchard, Littley".

The deponent, if male, must give his occupation; if female, her occupation or, if

statement.

69 N-CPR 1987 r.8. See also *Practice Direction, (Fam D) (Probate: Oath)* [1988] 1 W.L.R. 610; *Practice Direction (Fam.Div.: Probate: Deceased's Names)* [1999] 1 W.L.R. 259. The Draft Probate Rules r.27 has a comprehensive list of matters to be dealt with.

70 *Ghafoor v Cliff* [2006] 1 W.L.R. 3020 at 3039C–3039D.

71 For the practice where the named executor has adopted a different gender, see below.

72 See the N-CPR 1987 r.6(1). Draft Probate Rules r.49 is to the same effect.

73 *Registrar's Direction*, 22 July 1941.

74 Rules of the Supreme Court Ord.41 r.1(4) (as in force at 26 April 1999) which still apply to non-contentious probate matters—see N-CPR 1987 r.3 (as amended by the Non-Contentious Probate (Amendment) Rules 1999 (SI 1999/1015)). This is not reproduced in Draft Probate Rules r.3, which provides only for the CPR 1998 (as amended from time to time) to apply to probate matters. In any event, both 32PD para.18.1(2) to the CPR and Draft Probate Rules r.20 are to similar effect as regards witness statements in support of a grant.

none, her marital status.[75] A retired man gives his former occupation and adds "retired". The expression "of no occupation" is permitted[76] and so is "Knight", "Peer of the Realm",[77] etc. but not such expressions as "of independent means", "gentleman or esquire". The wife of a baronet is strictly described as "Dame", but "Lady", the correct title of the wife of a knight, is accepted except where she has a higher title in her own right[78] or by courtesy.

Details of the deponent may be kept confidential by the registry in cases where the person named or identified as executor is named or identified by reference to their sex (e.g. "my son") but is proposing to undergo, or is undergoing or has undergone the process of changing that sex. Dependents identifying themselves as transsexual and wishing to be known in the opposite sex should seek guidance from the relevant registry in order to ascertain what policies and guidance are in place to deal with this situation.[79]

The name, address, age and description of the deceased

16-28 The oath gives the true name of the deceased and also recounts how the name appears in the death certificate in a death registered in a UK Register of Deaths (as these names may differ)[80] and, where he used an alias, he should be described as "AB otherwise YZ". The grant is made in the true name of the deceased, but an alias may be added for special reason, e.g. because some part of the estate was held in another name or the will had been executed in the alias name.[81] The oath explains the position as to an alias.[82] If a different name appears on the death certificate, the oath must show that no assets are held in that name (assuming that such is the case). Change of name is explained mutatis mutandis, as in the case of a change of name by an applicant.[83]

Where the heading in the will gives the true name of the testator but the signature gives merely one forename or one of his initials, no alias is necessary in ordinary circumstances. But if the names or initials differ, except in minor respects, from the name in the heading, an alias is necessary.[84] The oath must state specifically which is the true name,[85] but alternatively, an affidavit of alias may be sworn.

In the past where the deceased was described in the will as "the elder" but had not so signed the will, such description was not inserted in the grant, but the reverse was the case where he was described as "the younger". However, this practice has fallen from use and it seems that the only occasion when the terms "elder" and "younger" would appear on a grant would be where both persons were extracting the grant in order to differentiate between the two.

75 Secretary's Circular, 12 May 1967.

76 *Registrar's Direction*, 26 May 1936.

77 *Registrar's Direction*, 8 December 1936.

78 Secretary's Circular, 2 March 1955.

79 This follows from the provisions of the Equality Act 2010 and the Gender Recognition Act 2004 s.22 which give legal protection to persons who are proposing to undergo, or are undergoing or have undergone the process of changing their sex.

80 *District Judge's Direction*, 12 January 1999.

81 N-CPR 1987 r.9. Draft Probate Rules r.28 is to the same effect.

82 N-CPR 1987 r.9. Draft Probate Rules r.28 is to the same effect as regards the witness statement in support of a grant.

83 See para.16-26, above.

84 *Registrar's Direction*, 27 March 1931.

85 *Registrar's Direction*, 27 March 1931.

The same rules as to the address of the deceased apply as in the case of a deponent. Where the deceased's last address was other than that given in his last testamentary instrument, the oath shows that he was formerly of that address or that the address was a temporary one. Where the address of the deceased is uncertain, the best address that is known should be given and, unless a district judge or registrar otherwise directs, it should be sworn that no better address can be given; and the domicile of the deceased must be sworn to.[86] An address such as a Caravan Park or Public House will require clarification to show it was an only and permanent address. Unless it is specifically requested only the last address of the deceased will appear in the grant. If good reason can be shown a former address may be included, or a second address, if this is relevant.

If it is sought to have set out in the grant more than the last address of the deceased and that set out in his last testamentary instrument, a written request for the addition of any other address must be lodged; but not more than four addresses will be allowed in the grant.[87] The age of the deceased must be given. The deceased's date of birth as it appears in the death certificate for deaths registered in the UK Register of Deaths must be given.[88]

The rules applying to the description of the deponent[89] apply to the description of a testator.

The dates of birth and death of the deceased

16-29 The date of death as it appears in the death certificate for deaths registered in the UK Register of Deaths[90] must be given in the oath. If the fact of death is known but the exact date is not, the oath follows the details given in the death certificate by reciting when the deceased was last seen alive or last known to be alive and when his body was found, or that he died on or about a certain date.[91] Where leave has been obtained to swear the death, the oath states that the deceased died on or since the date when he was last known to be alive and gives particulars of the order made. If the certificate is incorrect, the correct date of death must be shown. By contrast, although oaths must now also recite the date of birth of the deceased, this must be shown as it is shown on the certificate of death, even if that entry is incorrect.

The date of death given in a grant is not prima facie evidence of death.[92]

Evidence of death

16-30 In the case of the armed forces of the Crown, the certificate of the Ministry of Defence, giving a specific date of death is sufficient proof and this should be filed with the oath but may be redelivered if a note of it is made on the oath.[93] Where a definite date cannot be given or the deceased is "missing believed killed", the certificate must still be lodged for consideration whether a grant can issue or whether application must be made to swear death.

[86] *Registrar's Direction*, 1 August 1925.
[87] *Registrar's Direction*, 23 January 1939.
[88] *District Judge's Direction*, 12 January 1999.
[89] See above.
[90] *District Judge's Direction*, 12 January 1999. This is replicated in Draft Probate Rules r.27(2)(c).
[91] *Re Long-Sutton* [1912] P. 97.
[92] *Moons v De Bernales* (1826) 1 Rus. 301.
[93] *Registrar's Direction*, 15 July 1943.

Death certificates issued by the Registrar General of Shipping and Seamen[94] are accepted as proof of death in the case of known death, and also in the case of presumed deaths, provided they are properly endorsed.[95] A certified copy of entry in the Marine Register under the Offshore Installations (Logbooks and Registration of Death) Regulations 1972 is also accepted. Certified copies of records which the Secretary of State for Trade and Industry required to be kept of deaths on UK registered aircraft are accepted as proof of death.[96] Certificates of death or presumed death are issued by the Ministry of Defence and the former India Office, Colonial Office and the Commonwealth Relations Office and are accepted. The Senior District Judge has a discretion to accept other certificates of death or presumption of death as sufficient proof.[97]

The place of death

16-31 Since the place of death is no longer included in the grant, it is not necessary to state it in the oath.

The domicile of the deceased

16-32 The oath must state the domicile of the deceased, unless the district judge or registrar otherwise directs.[98] This requirement results from the passing of the Administration of Estates Act 1971 under which a grant issued in England or Wales in respect of the estate of a person who died domiciled in England or Wales will be recognised to administer estate in Scotland and Northern Ireland provided the grant contains a note of the domicile. Similarly a grant issued in Northern Ireland or a confirmation issued in Scotland in respect of persons domiciled there containing a note of the domicile are effective to administer estate in England and Wales.[99]

Where the deceased died domiciled in a country with no uniform system of law, the oath should specify in which state, province or other judicial division of that country the deceased died domiciled.[100] Draft Probate Rules r.27(2)(e) requires the witness statement in support of a grant to state the state or territory where the deceased died domiciled in all cases.

Settled land: life or minority interest

16-33 The oath must state to the best of the knowledge, information and belief of the deponent whether there was land vested in the deceased which was settled before his death (and not by his will) and which remained settled land notwithstanding his death. On application for a grant of administration with or without will the oath shall state whether any life or minority interest arises.[101] This requirement has been omitted in the Draft Probate Rules.

[94] Under the Merchant Shipping Act 1995 s.108.
[95] *Registrar's Direction*, 1 February 1973.
[96] Under Civil Aviation Act 1982 s.83.
[97] *President's Direction*, 19 March 1943. For the Presumption of Death Act 2013, see para.21-30.
[98] N-CPR 1987 r.8(2).
[99] Administration of Estates Act 1971 ss.2, 3.
[100] *Registrar's Direction (Notation of Domicile)*, 24 January 1961.
[101] N-CPR 1987 r.8(3).

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Orders made in probate actions

16-34 If, following a probate claim, a will has been pronounced for; an office copy of the order should be lodged with the papers. The wording of any order admitting the will to probate must be followed in referring to it in the oath.

Where the omission of part of the will from probate has been ordered,[102] a copy of the will omitting that part is lodged together with the order.[103] The fiat (i.e. the registrar's or probate officer's signature of approval) is then written officially in the margin of the copy.

Orders made to rectify a will

16-35 If, following an application to rectify a will on the ground that the will as executed failed to carry out the testator's intentions through clerical error or a failure to understand his instructions,[104] the district judge or registrar orders rectification, an engrossment of the will in its rectified form should be lodged for the registrar's fiat. It is usual for a copy of the will as rectified to be exhibited to the affidavit making the application. The exhibit may be used as the engrossment. Wills may be rectified after the issue of the grant. Notice must be given to the persons prejudiced by the intended rectification and Registrars cannot rectify where there is contention.

Relationship

16-36 Where there is a will for which a grant of probate is sought, it is not necessary to set out the relationship between the executor and the deceased but the court finds it useful and, except where there would otherwise be ambiguity or doubt the presence of the relationship can (in some instances) avoid further evidence being called for. Thus, where an executor is referred to in the will merely as "my husband" or "my son" the oath should state that the deponent was the lawful husband or only son at the date of the will.

Where the application is for administration on intestacy, the relationship of the applicant to the deceased is set out, as it is in those cases in which it is relevant to give title to apply for grant.

Description of executors

16-37 The deponent shows that he is the sole executor or one of the executors, the surviving executor or one of the surviving executors. A woman describes herself as executrix. Where power is reserved to an executor or he renounces, the executor applying describes himself as one of the executors of the deceased. Any limitation in the appointment must be mentioned, e.g. that the appointment is for life. An executor for the English estate of the deceased describes himself as "executor limited to estate in England". Where an executor has been appointed on his coming of age the oath states that he has "attained the age of 18 years". The description should say whether a person is an executor substituted, but where the application is made by an executor for whom another is substituted in the event of his death, he is described as the executor named in the will.[105] This expression is also used where the codicil cancels the appointment of an executor named in the will. Where the substitution is to take place in certain eventualities, the description is "the executor named in the will as therein mentioned".[106]

Where an individual and a non-trust corporation are named executors in a will, the former recites in the oath that the latter is a non-trust corporation.

Where partners in a firm of solicitors are appointed executors without naming them individually, and not all wish to apply, it is sufficient for the Oath to recite that the applicant is or was a profit sharing partner at the relevant date.[107] The Oath need not now recite that notice of the application has been given to all the other non-applying partners to whom power is to be reserved.[108] There is no need to recite their names.[109] Unless a contrary intention appears in the will, the appointment is of profit sharing partners or, in the case of a limited liability partnership, profit sharing members.[110]

Clearing off persons with a prior right to a grant

16-38 Executors and administrators who are not primarily entitled to a grant must show in the oath in what way those with prior rights have been cleared off.[111] On an application for probate, an executor substituted shows that the event in case of which he was substituted has occurred. Where a will names two persons as executors but names another as a substitute if one of them is unwilling to act, it has been said that power cannot be reserved to the unwilling executor and that he must either take a grant or renounce and so allow the substitute to take a grant.[112] In practice, however, it seems that power is reserved to the unwilling executor "as therein mentioned". The second executor is identified if and when a subsequent application is made.

The amount of the estate

16-39 The oath states the gross value of the estate as shown in form IHT421, unless the value is below that for which an IHT Account is required, in which case this fact is stated.[113] Where HM Revenue and Customs alters the amount of the estate shown in form IHT421, it is not normally necessary to amend the figure given in the oath. Draft Probate Rules r.27(3)(d) requires the witness statement in support of a grant to state the gross and net value of the estate of the deceased.

Where the sole asset of the estate is a claim under the Law Reform (Miscellaneous Provisions) Act 1934, a figure of "nil" as the value of the estate is only permit-

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[102] For the circumstances in which part of a will may be omitted, see para.18-22, below.
[103] *Practice Direction* [1968] 1 W.L.R. 987.
[104] Administration of Justice Act 1982 s.20. For the practice on such applications, see N-CPR 1987 r.55 and para.10-55, above. An application cannot be made to a district judge or registrar if a probate action has been commenced—see r.55(1). The procedure is set out in Draft Probate Rules r.78; r.78(1) is to the same effect.

[105] *Registrar's Direction* 20 June 1910.
[106] *Practice Direction*, 12 June 1990.
[107] *Practice Direction*, 12 June 1990, so as to comply with N-CPR 1987 r.27(1). Draft Probate Rules r.13(1) is to the same effect.
[108] N-CPR 1987 r.27(1A), as amended from 4 September 1998. Draft Probate Rules r.13(2) is to the same effect.
[109] *Registrar's Direction*, 12 June 1990.
[110] *Re Rogers (Deceased)* [2006] EWHC 753 (Ch); [2006] 1 W.L.R. 1577.
[111] N-CPR 1987 r.8(4). Draft Probate Rules r.27(3)(b) is to the same effect as regards the witness statement in support of a grant.
[112] Senior Registrar's Instruction, November 1962.
[113] See *Practice Direction* [1981] 1 W.L.R. 1185.

ted if the solicitor applying shows that he cannot give a better estimate. It is usual, however, for an estimate of the ultimate value of the estate to be given.

Where a person died domiciled in England and Wales, the property covered is the estate in the United Kingdom.[114] Where a person died domiciled outside England and Wales, the property covered is the estate in England and Wales. All property which is covered by the grant must be included in the total of the estate, even where it is exempt from inheritance tax as must reversionary interests.

Property not included

16-40 The mere fact that property was aggregated with the estate for the purposes of taxation did not make it part of the estate. Thus, gifts inter vivos, property held on joint tenancy and property passing under a settlement were not included in the amount given in the oath. Where the deceased had a general power of appointment, the property comprised in it was only included if the power was exercised by will or if it belonged to the deceased's estate in default of appointment.[115] Aggregation does not arise under the legislation affecting inheritance tax.[116]

Payments under the Fatal Accidents Act 1976, or the Fatal Accidents Acts 1846-1959 are not included, nor are payments in respect of industrial injury benefit payable under Social Security legislation.

16-41 The proper description of the surviving spouse, civil partner, issue and other relatives has been laid down[117] and must be followed in the oath.[118] The applicant must show in what way he is entitled to a grant.[119]

Minority or life interest on intestacy

16-42 The deponent must state whether there is or is not a minority or life interest and whether there was land vested in the deceased which was settled previously to his death and remains settled land notwithstanding his death.[120] The Draft Probate Rules continue the requirement for a statement regarding minority or life interests but omit the provisions regarding settled land.[121]

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[114] i.e. England, Wales, Scotland and Northern Ireland. This follows from the Administration of Estates Act 1971 ss.2, 3.

[115] *O'Grady v Wilmot* [1916] 2 A.C. 231.

[116] See generally Ch.45, below.

[117] *President's Direction (Non-Contentious Probate)* 1925 and *Registrar's Direction*, July 16, 1951, as amended by *Practice Direction (Probate D) (Succession Rights: Illegitimate Children)* [1969] 1 W.L.R. 1863 and *Practice Direction (Fam D) (Probate: Oath)* [1988] 1 W.L.R. 610. Those entitled are as set out in Administration of Estates Act 1925 s.46 (as amended). A spouse is described as the "lawful spouse". In cases where an accretion is possible the surviving spouse is described as "the only person [now] entitled to the estate" (if so). Other persons are described as the "lawful civil partner". "son", "daughter", "grandchild" or "parent" and as the "only person [one of the persons] entitled to share in the estate". An adopted child is referred to as "the lawful adopted son/daughter". Where a person's claim to a grant depends on the death of a parent in the lifetime of the deceased, this should be shown. Brothers, etc., should be described as "a brother of the whole, or 'half', blood of the deceased". Cousins entitled are referred to as "cousins german" or "cousins of the whole blood of the deceased".

[118] The form of oath used by the Solicitor in the affairs of the Duchy of Cornwall is slightly different.

[119] This is expressly required by Draft Probate Rules r.27(3)(a).

[120] N-CPR 1987 r.8(3).

[121] Draft Probate Rules r.27(3)(c).

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Court orders

16-43 Where any decree or order of a judge or registrar has been obtained enabling the application for a grant, e.g. under the discretionary powers of the court or giving leave to swear death, particulars of the decree or order must be included in the oath and must be lodged with the papers, as must the supporting papers in ex parte applications.

Notice to the Treasury Solicitor

16-44 Where it appears that the Crown is or may be beneficially interested in the estate, notice must be given by the applicant to the Treasury Solicitor. The registrar may direct that no grant shall issue within 28 days after such notice has been given.[122]

Wills of persons on military service and seamen

16-45 Where the deceased died domiciled in England and Wales and it appears the will of the deceased is one for which privilege can be claimed it is admitted to proof on the registrar being satisfied that the will was signed by the testator or, if unsigned, that it is in the testator's handwriting.[123]

F. GUARANTEES

Discretion to require a guarantee

16-46 There is no longer a general requirement[124] that security be given as a condition of making a grant of letters of administration.[125] Instead, as set out below, the matter is generally one for the court's discretion.

Under s.120 of the Senior Courts Act 1981 the court may require one or more sureties to provide guarantees as a condition of making a grant of letters of administration.[126] The court's power under s.120 is, however, "subject to and in accordance with probate rules". The current N-CPR 1987, unlike their 1954 predecessors, do not make specific provision for requiring such guarantees. Nor is specific provision made in the Draft Probate Rules. Despite this, it is thought that the court still has a discretion to require a guarantee[127] although this discretion is now only likely to be exercised in exceptional circumstances.[128] Formerly, under the old

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[122] N-CPR 1987 r.38. Draft Probate Rules r.26 is to the same effect.

[123] N-CPR 1987 r.18 and Wills Act 1837 s.11. Draft Probate Rules r.38 is to the same effect.

[124] See the 15th edition of this work.

[125] The former general requirement was abolished with effect from 1 January 1972 by the Administration of Estates Act 1971 ss.8, 14(2), passed following the recommendation of the Law Commission in its Report on *Administration Bonds, Personal Representatives' Rights of Retainer and Preference, and Related Matters* (1970) Cmnd.4497.

[126] Senior Courts Act 1981 s.120 does not apply where administration is granted to the Treasury Solicitor, the Official Solicitor, the Public Trustee, the Solicitor for the affairs of the Duchies of Lancaster or Cornwall or for Northern Ireland, or the consular officer of a foreign state to which s.1 Consular Conventions Act 1949 applies—see Senior Courts Act 1981 s.120(5).

[127] For example, N-CPR 1987 r.40 makes provision for applications for leave to sue a surety under such a guarantee. Draft Probate Rules r.77 is to the same effect.

[128] Stamp duty is not chargeable in respect of any such guarantee—s.120(3) Senior Courts Act 1981.

probate rules,[129] a guarantee was not required unless it was proposed to grant administration to a creditor,[130] a person who might have an interest if there were an accretion,[131] a person who would be entitled if the person beneficially entitled died intestate (spes successionis),[132] an attorney of a person entitled,[133] a person taking for the use and benefit of an infant,[134] or an incapable person[135] or to a person resident outside the United Kingdom.[136] Even in these cases a guarantee was not normally required for a trust corporation, a practising solicitor, a Crown Servant acting in his official capacity or the nominee of a public department or local authority.[137]

A similar discretion exists where the court is asked to seal in the United Kingdom letters of administration which have been granted in a country to which the Colonial Probates Act 1892 applies.[138]

Enforcing a guarantee

16-47 Where a guarantee is given, it enures for the benefit of every person interested in the administration of the estate and is enforceable as if it had been given to that person by contract under seal. However, no action can be brought on such guarantee without the leave of the court.[139] The application for leave is (unless the district judge or registrar orders otherwise under r.61) made by summons to a district judge or registrar and notice is served on the administrator, the surety and any co-surety.[140]

G. THE INHERITANCE TAX ACCOUNT

Necessity for the Account

16-48 Unless the estate is an excepted estate,[141] the representative of a deceased person must deliver to the Commissioners for H.M. Revenue & Customs (HMRC), an Ac-

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[129] When the discretion was exercised in the light of r.38(1) of the Non-Contentious Probate Rules 1954 (N-CPR 1954).

[130] Such a grant is now made under N-CPR 1987 r.22(3). Draft Probate Rules r.11(3) is to the same effect.

[131] See N-CPR 1954 r.19(v). The provision for accretions is now contained in N-CPR 1987 r.22(3). Draft Probate Rules r.11(3) is to the same effect. "Accretion to the estate" is renamed "increase in the value of the estate".

[132] See N-CPR 1954 r.27.

[133] See now, N-CPR 1987 r.31. Draft Probate Rules r.39 is to the same effect.

[134] See now, N-CPR 1987 r.32. Draft Probate Rules r.41 is to the same effect.

[135] See now, N-CPR 1987 r.35. Draft Probate Rules r.43 is to the same effect. The requirement to give notice to the Court of Protection has been omitted.

[136] See N-CPR 1954 r.38(1).

[137] See N-CPR 1954 r.38(2).

[138] Administration of Estates Act 1971 s.11. Again, stamp duty is not chargeable in respect of such security—s.11(6).

[139] Senior Courts Act 1981 s.120(2) and (3) or, as the case may be, s.11(4) and (5) Administration of Estates Act 1971. Draft Probate Rules r.77 is to the same effect. The application is made by application notice rather than by summons.

[140] N-CPR 1987 r.40. Draft Probate Rules r.77 is in similar terms.

[141] For the meaning of "excepted estate" see para.16-53, below and Inheritance Tax (Delivery of Accounts) (Excepted Estates) Regulations 2004 (SI 2004/2543) reg.4 (made under Inheritance Tax Act 1984) s.256.

count known as an Inheritance Tax Account (form IHT400).[142] This form is submitted to HMRC along with a Probate Summary (form IHT421).[143]

The delivery of this Account is an essential step for, where such an Account is required, the representative will not be able to obtain a grant of probate or of letters of administration (nor can any foreign grant be resealed) unless and until the Registry has been provided with the form IHT421 on which HMRC has filled out its section to confirm that all Inheritance Tax payable on the delivery of the Account has been paid or, as the case may be, that no such tax is payable.[144]

Where the estate is an excepted estate, there is no requirement to deliver an Account.[145] In such cases instead of lodging form IHT400, the representative provides certain specified information to HMRC using form IHT205[146] (and, if necessary, form IHT217).[147]

If the application is for a grant that is subsequent to an earlier grant—i.e. a grant *de bonis non*, or of double probate, or a fresh grant following a *cessate* grant—then there is no requirement to file a further account. Instead, the representative must file a Cap Form A5C which is sent to HMRC after the issue of that subsequent grant.

The law relating to Inheritance Tax Accounts and Inheritance Tax generally will only be dealt with in outline in this book.[148] For a fuller treatment, reference should be made to the specialised books[149] or to HMRC's Inheritance Tax Manual which is available on the HMRC website[150] which contains useful guidance as to the relevant procedure and links to the various forms. A testator cannot prevent the swearing of an Inheritance Tax Account by a direction in his will.[151]

[142] Inheritance Tax Act 1984 s.216(1). A service for completing inheritance tax estate information online is in a beta (experimental) version and can be used on request: *https://www.gov.uk/government/publications/inheritance-tax-return-of-estate-information-iht205-2011/apply-to-use-the-online-service* [Last accessed 19 February 2018].

[143] Provision has been made for the electronic filing of returns, although this is not mandatory: see Inheritance Tax (Electronic Communications) Regulations 2015 (SI 2015/1378).

[144] Senior Courts Act 1981 s.109. For more on the payment of the Inheritance Tax shown due on the Account, see para.42-16 onwards below.

[145] Inheritance Tax (Delivery of Accounts) (Excepted Estates) Regulations 2004 (SI 2004/2543) reg.3(1). For the meaning of an excepted estate, see para.16-54, below.

[146] Inheritance Tax (Delivery of Accounts) (Excepted Estates) Regulations 2004 (SI 2004/2543) reg.6(1). The relevant information includes the deceased's name, date of death, marital/civil partnership status, occupation, details of relatives, NI number and tax details, domicile and address (if not UK), details and value of property, of transfers, of liabilities, of transfers to spouse or to civil partner and/or charity. Such information is treated as being produced to the HMRC when it is produced to a probate registry. The registry must then forward the information to the HMRC within one week of the grant of probate or letters of administration—see reg.7. Form IHT207 should be used where the person who has died had their permanent home abroad and their assets in the United Kingdom consisted of cash, or quoted stocks and shares only, the gross value of which was less than £150,000.

[147] Form IHT217 is used to claim a transfer of an unused nil rate band for an excepted estate.

[148] Inheritance Tax generally is considered in Ch.45, below.

[149] See, for example, *McCutcheon on Inheritance Tax*, 7th edn (2017) and *Barlow, King & King's Wills, Administration and Taxation, a Practical Guide*, 11th edn (2014).

[150] See *http://www.hmrc.gov.uk/manuals/ihtmanual/IHTM10000.htm* [Accessed 19 February 2018].

[151] *Re Beech, The Times*, 9 August 1904.

B. INFORMATION AND PROPERTY

44-02 A deceased's personal estate devolves on his personal representative.[2] This does not apply to any interests that cease on death, such as a joint beneficial interest that accrues in favour of the surviving joint tenant or tenants and not on the representative,[3] or a contract that terminates on death,[4] nor does it apply to any rights arising out of a cause of action that does not survive the deceased's death, although the personal representative is entitled to sue in respect of rights that accrued before death.[5] The deceased's personal estate includes money and choses in action, which are also known as "things in action", and the expression is used to describe all personal rights of property that can only be claimed or enforced by action, and not by taking physical possession.[6] Examples of choses in action are: debts, contract rights, causes of action, company shares, intellectual property rights and equitable rights. For the purposes of the Wills Act 1837, personal estate "extends to leasehold estates and other chattels real, and also to monies, shares of government and other funds, securities for money (not being real estates), debts, choses in action, rights, credits, goods, and all other property whatsoever which by law devolves upon the executor or administrator, and to any share or interest therein".[7]

In the case of information, including information that is stored or manipulated by the deceased in a computing device owned, controlled or used by him or using cloud services for which he had a contractual arrangement during his lifetime,[8] the information itself is not personal property and does not pass to the personal representative. Rights and interests associated with it, such as intellectual property rights, or the contractual rights associated with the cloud services, may pass. Information, in the sense of a fact or idea, is itself not capable of being owned and, without more, there are difficulties in characterising any enforceable rights in it. In *Fairstar Heavy Transport v Adkins*, in which the property rights in emails were discussed, Mummery L.J. said[9]:

> "Everybody knows that 'property' differentiates between things that are mine and things that are not mine. The law lays down criteria for determining the boundary between, on the one hand, those rights that are only enforceable against particular persons and, on the other hand, those rights attaching to things that are capable of being vindicated against

[2] See para.35-28 onwards, above; if there is an intestacy, the estate vests in the Public Trustee until the appointment of an administrator: para.35-03, above.
[3] See para.35-30, above.
[5] *Stubbs v The Holywell Railway Company* (1867) LR 2 Ex 311.
[6] See per Channell J. in *Torkington v Magee* [1902] K.B. 427, at 430 (reversed on another ground: [1903] 1 K.B. 644); *Your Response Ltd v Datastream Business Media Ltd* [2014] EWCA Civ 281; [2014] 3 W.L.R. 887; [2014] 2 All E.R. (Comm) 899; [2014] C.P. Rep. 31; *Colonial Bank v Whinney* (1886) 11 App Cas 426.
[7] Wills Act 1837, s.1.
[8] For cloud services, see para.44-09, below.
[9] [2013] EWCA Civ 886; [2013] 2 CLC 272 at [47]. See also *Your Response Limited v Datateam Business Media Ltd* [2014] EWCA Civ 281; [2015] Q.B. 41 (no entitlement to exercise a common law lien over an electronic database); *Boardman v Phipps* [1967] 2 A.C. 46; *Oxford v Moss* [1979] 68 Cr. App. R. 183; *Douglas v Hello! Ltd* [2007] UKHL 21; [2008] 1 A.C. 1; *Victoria Park Racing & Recreation Grounds Co. Ltd v Taylor* (1937) 58 C.L.R. 479; *RCA Mfg. Co. v Whiteman* 114 F.2d 86 (2d Cir. 1940); cf *News Service v Associated Press*, 248 U.S. 215, 39 S.Ct. 68, 63 L.Ed. 211, 2 A.L.R. 293; *Dixon v R* [2014] N.Z.C.A. 329. See also per Sir Iain Glidewell in *St Albans City and District Council v International Computers Ltd* [1997] F.S.R. 251; *Software Incubator Ltd v Computer Associates Ltd* [2016] EWHC 1587 (QB); [2017] Bus. L.R. 245.

> the whole world. The claim to property in intangible information presents obvious definitional difficulties, having regard to the criteria of certainty, exclusivity, control and assignability that normally characterise property rights and distinguish them from personal rights."

Pure information, including digital information, is therefore not recognised as property in English law. The medium on which information is written, such as paper, a strip of film, a magnetic disk or the millions of silicon chips that are used to construct a computing device, is a chattel capable of ownership, which carries with it the ink on the paper, the silver halide emulsion on the film strip and the silicon in the computer chips. The rights associated with that information, such as copyright and contractual rights, however, are capable of ownership distinct from the ownership of the medium.[10]

Digital assets

44-03 In books, articles and some will precedents that are currently in circulation, writers use the expression "digital assets",[11] without distinguishing between proprietary rights and interests and non-proprietary items. In this chapter that expression is largely avoided because it is not sufficiently precise for the purposes of estate administration. The expression "digital property rights" is used to describe property rights associated with digital information and "digital records" is used to describe digital information stored in electronic or magnetic form in a computing device.[12] "Digital assets" may be used for general convenience, but only where there is no definitional need to distinguish between these concepts.

Digital records

44-04 The contents of a printed book, a phonographic disc and a cinematic film are examples of information (known as analog information) that is part of the containing medium. The book, record and film are all chattels that devolve on the personal

[10] See para.5-68 of Davies, Caddick and Harbottle, *Copinger and Skone James on Copyright*, 17th edn.
[11] See, for instance, Dew and Shannon, *Parker's Will Precedents*, 8th edn, Chapter 15; *Butterworths Wills Probate and Administration Service*, para.[4.7]; *Butterworths Practical Will Precedents*, para.F5-1359 ("... so far as such asset or right may be lawfully transmissible or transferable ..."); McCallig, "Facebook after death: an evolving policy in a social network" (2014) 22(2) Int J Law Info Tech 107; Davies, "We are living in a virtual world", *Solicitors Journal* (2014) SJ 158/22; Currie, "Can a 'digital buddy' bring solace to our loved ones?", *Solicitors Journal* (2015) SJ 159/02; Ali, "£17bn of digital assets could be left in cyber space", *Solicitors Journal* (2014) SJ 159/09; Murray, "Digital life after death", *Solicitors Journal* (2014) SJ 158/36; Walsh and Teitell, "Protecting Clients' Digital Assets", *Trusts & Estates*, January 2014, p.32.
[12] The Revised Uniform Fiduciary Access to Digital Assets Act (2015), which is known as "RUFADAA", is draft legislation prepared by the National Conference of Commissioners on Uniform State Laws in the United States and recommended for adoption by individual states for uniformity of state law. RUFADAA is designed to deal with the problem of fiduciaries obtaining access to information relating to cloud services. It defines a "digital asset" as "... an electronic record in which an individual has a right or interest. The term does not include an underlying asset or liability unless the asset or liability is itself an electronic record" (s.2(10) of RUFADAA). A similar enactment has been prepared by the Uniform Law Conference of Canada (in 2016), in which "digital asset" is defined as "a record that is created, recorded, transmitted or stored in digital or other intangible form by electronic, magnetic or optical means or by any other similar means"—cf. the description of a digital record in para.44-04, below. No specific equivalent legislation has been enacted or is contemplated in England and Wales.

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representative as personal property,[13] but the information—represented by the words printed on the paper, the music etched onto the plastic disc and the images printed on the film—can be separated from the media and stored in a different way: processes can be applied to synthesise the information so that it is represented by numbers (generally in binary format), which can be stored electronically or magnetically as records, sometimes known as "files", and the numbers can be reconverted back into analog form for the enjoyment or utility of the user. Digital information need not have originated in analog form; a substantial proportion of all documents, images and videos are now created directly in digital form by computer programs and applications.[14]

The information represented by these numbers is in this chapter referred to as digital information and the stored information as digital records.

Digital property rights and interests

44-05 The ownership of the physical material in which the information, whether digital or analog, is stored or held, must be distinguished from any rights and interests that are associated with the information. These rights might be intellectual property rights, subsisting in literary, musical, artistic and dramatic works. The use of digital information might be controlled by a contract made by internet communications using a web browser.[15] The information might exist within the bitcoin protocol as a digital cryptographic token.[16]

Such rights and interests are referred to in this chapter as "digital property rights" and "digital property interests".

C. ADMINISTRATION OF DIGITAL INFORMATION

44-06 The personal representative's engagement with digital information associated with the deceased can be viewed as a process. The following steps are relevant where the deceased owned or controlled a computing device.

Securing devices

The personal representative must as soon as possible secure from interference or trespass any computing devices controlled or owned by the deceased.[17] An executor should take control of the devices without delay; a proposed administrator should do the same, even though he will not have any authority over the devices

[13] See para.35-29, above.

[14] For instance, few cameras still use rolls of film that need to be processed before the images can be seen; most now use an image sensor to collect light signals that are processed by computer software running in the device.

[15] See Mason, *Electronic Signatures in Law*, 4th edn, for a discussion about electronic and digital contracts; see also Electronic Communications Act 2000 and Regulation (EU) No 910/2014 on electronic identification and trust services for electronic transactions in the internal market (known as the e-IDAS Regulation); and the Law Society, *Execution of a document using an electronic signature*, 21 July 2016: *http://www.lawsociety.org.uk/support-services/advice/practice-notes/execution-of-a-document-using-an-electronic-signature/* [Accessed 19 February 2018].

[16] Bitcoin and other cryptographic digital tokens are discussed in para.44-12, below.

[17] If a device was controlled but not owned by the deceased, it will not vest automatically in the personal representative, who should involve its owner in preventing interference with the deceased's property.

until after taking a grant.[18] This includes ensuring that the device has suitably strong password protection. Information created, used or manipulated by the deceased is stored not only inside one of the computing device or in attached local storage devices, but is also likely to be stored off-premises using cloud services.[19] If some person other than the personal representative accesses a device, he may be able to gain unauthorised access to the deceased's banking and other cloud accounts, bitcoin and other valuable property; if he should misappropriate any of that property and it cannot be restored, the personal representative could be liable for failure to preserve the deceased's property.[20]

Accessing devices

44-07 The personal representative will need to gain access to the devices that have automatically vested in him.[21] If any of them are protected by passwords and the deceased left no communication of those passwords, the representative will need to instruct a digital forensic expert for the purpose of gaining access if he is unable to do so himself. If a properly qualified and properly instructed expert is unable to gain access or advise on further steps that might be taken to do so, the representative need do nothing further. The obligations of the representative relate only to property that comes into his hands or, but for his wilful default, would have come into his hands.[22] He is exonerated and never required to make good any loss if he has done all he can to get the property in his hands but his efforts have not proved successful.[23]

Digital records

44-08 Once the representative has access to a device, he will need to catalogue the digital records (usually referred to as "files") stored on it. In some devices, the operating system enables the user to list all digital records. The content of those records will assist the representative in identifying digital property rights or interests that may have been vested in him and require administration and distribution.[24]

Cloud services

44-09 After identifying the digital records stored on a device, the representative must discover and catalogue all cloud services to which the deceased had been connected while using the device.[25] If, as is advisable, the deceased left for the

[18] See para.5-13, above. As he will be intermeddling in the affairs of the deceased, the proposed administrator should, in case he should not obtain a grant, record all actions taken with the devices, if possible supported by video evidence, to show that he has not wrongfully interfered with them. He should not access the devices other than to protect it, for instance by adding password protection, until he has obtained the grant.

[19] For cloud services, see para.44-09, below.

[20] See para.52-04, below.

[21] He may also need to gain access to those that were in the possession or under the control of the deceased at his death but do not vest in the representative, but he will need to involve the owners.

[22] In this context "wilful default" results from the personal representative having "been guilty of a want of ordinary prudence", see per Millett L.J. in *Armitage v Nurse* [1998] Ch. 241, at 252.

[23] See per Sir John Romilly MR in *Clack v Holland* (1854) 19 Beav 262, at 271–272.

[24] Digital property rights and interests are discussed in para.44-05.

[25] Such services would in almost all cases involve the deceased entering into a contractual arrange-

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representative a list of those services with his username, this task will be a simple one. If no such list has been left by the deceased, the services that he used may be apparent from an examination of the email correspondence in the mail client on the device.[26] Generally, these will open without a need to enter a password. Although the terms and conditions applicable to the email service might prohibit use by anyone other than the deceased,[27] if accessing the email communications is the only method available to the representative for the identification of the cloud services used by the deceased, that is considered to be justifiable, provided that access is limited to that activity and a detailed record (preferably made by making a video recording of the actions taken) is kept. If the representative does not have sufficient expertise to carry out this discovery process, he should instruct a digital forensic expert for that purpose and the expert should likewise keep a detailed record of his actions.

Devolution

44-10 Once the cloud services used by the deceased have been identified, the representative should identify what interests, rights and obligations are associated with that information and have devolved on him by operation of law. This will include rights and causes of action relating to intellectual property, rights and causes of action relating to contracts and the entitlement to transfer bitcoin and other cryptographically enabled digital tokens.[28]

Terms and conditions

44-11 As regards any contracts in existence between the deceased and any cloud service provider (to the extent that the contract survived the death of the deceased), the personal representative must examine any terms of service agreements that were in existence between the deceased and the providers of the various cloud services used by the deceased. These provisions will give rise to obligations that must be considered and appropriately discharged and to rights that can benefit the estate. In addition, they may well affect the digital property rights otherwise vested in the deceased; for instance, if the deceased had a Facebook account, he will have granted to that company a "non-exclusive, transferable, sub-licensable, royalty-free, worldwide license to use any IP content" (the copyright arising out of any image files, video files and text files) posted to the Facebook cloud.[29]

ment with the cloud service provider and the contract would have been electronic: see generally Mason, *Electronic Signatures in Law*, 4th edn, 2016; Electronic Communications Act 2000; the e-IDAS Regulation (EU) No 910/2014 and the practice note of the Law Society: "*Execution of a document using an electronic signature*", 21 July 2016 (*http://www.lawsociety.org.uk/support-services/advice/practice-notes/execution-of-a-document-using-an-electronic-signature/* [Accessed 19 February 2018]).

[26] A mail client is usually in the form of an email programme or application (or "app") running on the device; examples are Outlook (Windows), or Mail (Mac OS or iOS).

[27] The use of the deceased's cloud services by the representative is discussed in para.44-09.

[28] See para.44-12, below.

[29] See provision 2, paragraph 1 of the Facebook Statement of Rights and Responsibilities.

Digital property interests

44-12 The existence of digital property interests, such as bitcoin and other cryptographic currency tokens (referred to in this chapter as "DCTs"),[30] cannot be discovered simply by examining email correspondence.[31] Email correspondence could show that the deceased used a bitcoin exchange to store his DCTs,[32] but it is also necessary to search for DCT wallets, which can exist as computer programs or applications designed to store the digital records needed to transfer and receive the tokens over the relevant protocol.[33] The connection of a DCT wallet to the internet brings a risk of unauthorised access through hacking and hardware wallets have been created, existing as hardware devices designed to hold the DCT digital records free from any connection to the internet. Additionally, it is possible to print onto paper the digital records relevant to the DCT; the paper can (and should) then be safely stored, to be read by a software wallet when required for a transfer of DCT. If the representative does not have sufficient knowledge to find the existence of any DCT, the services of a digital forensic expert should be obtained.[34]

Accessing cloud services

44-13 When accessing cloud services formerly operated by the deceased, caution needs to be exercised to avoid the commission of a criminal offence under the Computer Misuse Act 1990.[35] By s.1 of the 1990 Act, a person is guilty of an offence if:

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[30] Cryptographic currencies exist as digital records and are in this chapter referred to as digital cryptographic tokens. Examples of other DCT's are EUAs, which are allowances credited under the EU Emissions Trading Scheme—see *Armstrong DLW GmbH v Winnington Networks Ltd* [2012] EWHC 10 (Ch); [2013] Ch. 156—and gaming tokens acquired by players for use within electronic games.

[31] For further information about bitcoin and other cryptocurrencies ("altcoins"), see Figna and Casey, *Cryptocurrency: The Future of Money*; Barski and Wilmer, *Bitcoin for the Befuddled*; and Antonopoulos, *Mastering Bitcoin*. Examples of popular altcoins are Ether (the token used with the Ethereum protocol), Litecoin, Ripple, Monero, Dash and Zcash; a list of cryptocurrency market capitalisations can be found at *https://coinmarketcap.com*; there are several popular podcasts in which various aspects of bitcoin are discussed, including "Unchained", which can be found at *https://www.forbes.com/podcasts/unchained* [Accessed 19 February 2018]

[32] The traditional use of a bitcoin exchange has been the exchange of "fiat" currencies, such as Sterling, Dollars and Euros, for DCTs. They can also be viewed (but are not) as banks for bitcoin and altcoins; generally (subject to the terms and conditions) the user has a cloud account with the exchange, which owes the user an amount of bitcoin or altcoins, to be transferred as directed; see the decision of the CJEU in *Skatteverket v David Hedqvist* (22 October 2015) Case C-264/14 (see *http://curia.europa.eu/juris/document/document.jsf?docid=170305&doclang=EN* [Accessed 19 February 2018]; for a Case Note, see *Tax Journal*, Issue 1283, 4), on whether services for the exchange of fiat currency for bitcoin and vice versa were subject to value added tax. Examples of bitcoin exchanges are listed in the Wikipedia article at *https://en.wikipedia.org/wiki/List_of_bitcoin_companies* [Accessed 19 February 2018].

[33] The digital record that is needed to transfer a DCT is known as the "private key"; if it is lost it is not recoverable and the DCT becomes worthless, unless a functional backup of it is kept. A list of wallets used by the various DCTs can be found on the Wikipedia page at *https://en.wikipedia.org/wiki/Comparison_of_bitcoin_wallets* [Accessed 19 February 2018]. There are no terms and conditions applicable to holding a DCT in a local wallet; a DCT so held can be used as money within the DCT system (*Skatteverket v David Hedqvist* (22 October 2015) Case C-264/14).

[34] This assumes that there is some reasonable cause to believe that the deceased did own DCTs at his death. If the representative wishes to transfer a DCT he should likewise seek expert advice unless he is familiar with the process. As some transactions using transfers of DCTs are known to involve criminal conduct, there may be money laundering issues with DCTs.

[35] "The 1990 Act".

"(a) he causes a computer to perform any function with intent to secure access to any program or data held in any computer;
(b) the access he intends to secure … is unauthorised; and
(c) he knows at the time when he causes the computer to perform the function that that is the case."

His intent need not be directed at any particular program or data, a program or data of any particular kind or a program or data held in any particular computer,[36] including a computer used by a cloud service provider but (unless the charge is of conspiracy to commit the offence) at the relevant time, either the person, or the computer holding the program or data he was accessing, must have been in England and Wales.[37]

Access by a person to the program or data is unauthorised if (a) he is not himself entitled to control access of the kind in question to the program or data; and (b) he does not have consent to access by him of the kind in question to the program or data from any person who is so entitled.[38] Of concern to the personal representative will be his entitlement or authority to access a program or data held in a computer owned, or controlled for that purpose, by a cloud service provider who had been supplying services to the deceased before his death.

- Apart from the terms and conditions of the service agreement between them, as between the deceased and the provider, the latter was entitled to control access to the programs or data on its computer.
- The deceased had access to that computer under the authority granted to him by the provider, in accordance with the terms of the service agreement.
- Unless by those terms, or by some other authority granted to the deceased, the service provider delegated to the deceased some entitlement to grant consent to others, none of them would have any authority to do so.

Accordingly, unless such delegation existed or authority is granted by the terms of service, the personal representative will have no authority to access the program or data held in the service provider's computer and if he does so, he might be committing an offence.[39]

Costs

44-14 Once the digital property rights and interests have been identified and secured, their administration and appropriate distribution can be undertaken. This is the responsibility of the personal representative. He is not, however, responsible to the beneficiaries to control the digital records (which are not property and do not vest

[36] Section 2 of the 1990 Act.
[37] Sections 4 and 5 of the 1990 Act.
[38] Section 17(5) of the 1990 Act; certain actions pursuant to an enactment relating to powers of inspection, search of seizure and by persons charged with the duty of investigating offences are excluded: s.10 of the 1990 Act.
[39] Commonly, terms and conditions of service prohibit the use of any passwords by others: Facebook: "You will not share your password … let anyone else access your account (provision 4, paragraph 8); iTunes Store: "Don't reveal your Account information to anyone else." (under "YOUR ACCOUNT"); Blizzard Entertainment's World of Warcraft permits use by an adult user and one minor child for whom he is a parent or guardian and whom he authorises to use the account. For a contrary analysis, see Ramage, E-material & testamentary directions (2017) 167 NLJ 7733, p15: "… unless consent had been given by the deceased expressly during his lifetime or by will or codicil or can be implied, eg by testamentary directions".

in him as representative) that are stored otherwise than on a computing device that is part of the deceased's estate or in respect of which there is no contractual arrangement under a cloud service agreement. A question therefore arises as to whether the representative is entitled to recover the cost and expense (and remuneration) for administering such information, which has no property rights or interests associated with it. If the will contains specific directions for the representative, or some other person nominated by the deceased to be his digital manager, to deal with these digital records, the expense to the representative or digital manager of dealing with those matters can to that extent come out of the estate. Otherwise, and in the case of an intestacy, there must be some doubt as to whether the expenses will have been properly incurred by the representative or digital manager in the conduct of his office within s.31(1) of the Trustee Act 2000.[40]

Recommendations

44-15 Some practical steps for representatives to take in the administration of digital assets:

(a) An obligation of confidentiality in relation to digital records stored on the deceased's devices or with cloud service providers might have been owed by the deceased to others (such as his employer or clients) during his lifetime. The representative should ensure that this is respected, so far as required.
(b) The existence of computer access to cloud services with a username and password does not alter any requirement that the representative should notify a bank or other institution of the death of the deceased; very often no one other than the deceased has authority to utilise that access.[41] The relevant terms and conditions for the use of such access should always be considered.
(c) If the deceased used cloud services to store digital records (including documents, images and videos), before terminating the services, the representative or digital manager should download all stored records onto a device, such as a computer or portable hard drive, to ensure that the content stored with those services are available for appropriate processing?
(d) The representative should consider the extent to which any digital records should be deleted or transferred from the storage of a computing device that is comprised in the estate, before the device is distributed.

D. Data Protection

44-16 The administration of digital information stored on devices and with cloud service providers might involve the processing of personal data, within the meaning of the Data Protection legislation,[42] and the representative should consider the extent of his duties under the 1998 Act. The personal representative might process

[40] It may be that the court will be able to grant power to the representative to administer the information under the Trustee Act 1925 s.57.
[41] See para.44-13.
[42] See the Data Protection Act 1998 ("the 1998 Act") and the Privacy and Electronic Communications (EC Directive) Regulations 2003 (SI 2003/2426)—see generally Jay, *Data Protection Law and Practice*, 4th edn. The General Data Protection Regulation will take effect in the EU on 25 May 2018; it will seek to extend the reach of EU data protection—see Jay, *Guide to the General Data*

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personal data about individuals in the course of administering the estate; for instance, the representative may keep records of the names and addresses of individuals who have been contacted about the assets and liabilities making up the estate and about the identification of beneficiaries mentioned in the will or entitled on an intestacy. He might also process names and addresses of beneficiaries so that the proper documentation can be prepared and executed. Some of this could be exempt from the data protection principles[43] and the provisions of Parts II and II of the 1998 Act, under the domestic purposes exemption.[44]

Data processing

44-17 During his lifetime, the deceased may have been involved in the processing of personal information for various purposes. In the course of the administration of the deceased's estate a personal representative might carry out certain types of data processing.

(a) The deceased may have had a collection of names and addresses of friends, acquaintances and business contacts in an electronic address book on his computer or mobile phone. This would be within the domestic purposes exemption and the representative's processing of that data for the purposes of administering the estate might likewise be exempt.

(b) He may have published a website that collected names and addresses of individuals who registered as account holders to take advantage of information available to registered users of the site. This would not have been exempt and the representative's processing of that data for the purposes of administering the estate would not be exempt.[45]

(c) He may have run a business (whether online or not) that involved, either directly or indirectly, the digital processing of personal data, such as the names and addresses and the buying history of customers or the names and addresses and historic appraisals of employees. He may have carried out marketing operations using email addresses held electronically.[46] These would not have been exempt and the representative's processing of that data for the purposes of administering the estate would not be exempt.

(d) If he had installed a CCTV system to identify individuals accessing his premises, those images may have been personal data and may not have been exempt.[47]

(e) If the deceased had been a doctor, the records relating to his patients would be sensitive personal data.[48] He would have been authorised to process that information if it was necessary for medical purposes,[49] but the representative would not be entitled to do so.

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Protection Regulation.

43 Schedule 1 to the 1998 Act.

44 Section 36 of the 1998 Act.

45 *Criminal Proceedings against Lindqvist* EUCJ Case C-101/01; [2004] Q.B. 1014; [2004] All E.R. (EC) 561.

46 This activity would in addition have been restricted by the provisions of the Privacy and Electronic Communications (EC Directive) Regulations 2003, as amended, implementing the EU Privacy and Electronic Communications Directive 2002/08/EC.

47 See *František Ryneš* EUCJ, Case C-212/13.

48 See reg.5 Data Protection (Notification and Notification Fees) Regulations 2000 for notifications by partnerships.

49 Paragraph 8, Sch.3 to the 1998 Act.

(f) If the deceased had been the owner of the copyright or a patent in relation to an application, or program that was sold for installation on personal computers, mobile phones or tablet devices, that application might collect personal data in the course of its operation and sent that data to a server that was controlled by the deceased. For instance, the application might send photographs that contain metadata such as the location where the image was taken and the names of the individuals in the photographs. Processing of such data by the deceased would not have been exempt and the representative's processing of that data for the purposes of administering the estate would not be exempt.

(g) If the deceased had been operating a news blog, that might have been exempt under the journalism exemption conferred by s.32 of the 1998 Act.[50] Continuation of that blog by the representative might also be exempt.

Estate accounting

44-18 The personal representative catalogues the deceased's estate and, for that purpose, might list the assets and liabilities and documents that are associated with them. Some of the documents will identify the deceased. Some of the information might lead to the identification of the deceased and other individuals who are living, such as joint bank account statements, joint property title deeds and partnership documents and any wills executed by the deceased. Yet other information could lead to the identification of individuals; for instance the deceased may have owed money to an individual or he may have been owed money by an individual. These data are unlikely to be exempt under the domestic purposes exemption.

50 See *BBC v Sugar (No 2)* [2012] UKSC 4; [2012] 1 W.L.R. 439.

The deceased's estate

45-05 For Inheritance Tax purposes, a person's estate is, subject to certain exclusions considered below, the aggregate of all the property to which he was beneficially entitled immediately before his death.[14] Hence, the deceased's estate will include:

(a) the deceased's free estate;
(b) property passing by survivorship (i.e. the interest of the deceased as a joint tenant);
(c) settled property in which the deceased had a qualifying interest in possession[15];
(d) property (other than settled property) over which the deceased had a general power of appointment[16];
(e) property subject to a reservation of benefit[17]; and
(f) property subject to a donatio mortis causa.

Excluded property

45-06 The estate of a person immediately before his death does not include excluded property.[18] Excluded property includes:

(a) property situated outside the United Kingdom if the person beneficially entitled to it is an individual domiciled outside the United Kingdom[19];

[14] Inheritance Tax Act 1984 s.(1). Property includes rights and interests of any description, but does not include a settlement power: s.272. A settlement power means any power over, or exercisable (whether directly or indirectly) in relation to, settled property or a settlement, in relation to transfers of value after 16 April 2002: s.47A. The effect is to reverse *Melville v IRC* [2001] S.T.C. 1271 where a settlor transferred property to a settlement, reserving a general power to have the trust fund transferred back to him after 90 days. This power was held to be property having a significant value, with the result that the transfer of value by the settlor was minimal. There was nonetheless a chargeable transfer, with the result that the capital gain on the transfer to the trust could be held over pursuant to Taxation of Chargeable Gains Act 1992 s.260(2)(a).

[15] Inheritance Tax Act 1984 s.49(1). However, the estate will not include an interest in possession under a bereaved minor's trust within IHTA 1984 s.71A, or an 18-25 trust within IHTA 1984 s.71D: IHTA 1984 s.5(1)(a). Nor will it include an interest in possession, to which a person becomes entitled on or after 22 March 2006, other than an immediate post-death interest, disabled person's interest or transitional serial interest, unless the interest has been purchased by a UK-domiciliary on or after 9 December 2010 (Inheritance Tax Act 1984 s.5(1A) and (1B)).

[16] Inheritance Tax Act 1984 s.5(2). If one of the parties to a joint bank account can withdraw the whole of the entire funds in the account, that party may be treated as having a general power over all the money in the account: see *Sillars v IRC* [2004] W.T.L.R. 591; *Taylor v IRC* 2008 S.T.C. (S.C.D.) 1159; *O'Neill v IRC* 1998 S.T.C. (S.C.D.) 110; *Matthews v HMRC* [2013] W.T.L.R. 99. However, HMRC will not apply this approach if both parties have contributed to the account and can withdraw the whole of the monies in the account: see IHTM 15042; *Melville v IRC* 2000 S.T.C. 628.

[17] Finance Act 1986 s.102(3). As to whether property has been given subject to a reservation, see Finance Act 1986 ss.102, 102A, 102B, 102C and Sch.20.

[18] Inheritance Tax Act 1984 s.5(1)(b). Note that some other forms of property, whilst not "excluded property" as defined, are left out of account when valuing the estate deemed to have been transferred on death, see para.45-09, below.

[19] Inheritance Tax Act 1984 s.6(1). The Finance Bill 2017, as initially published, contained provisions designed to withdraw excluded property status from shares in "close companies" (within the meaning of the Income and Corporation and Taxes Act 1988 if the company were resident in the UK) insofar as the value of those shares is derived from UK residential property. However, this measure was not included in the Bill following the announcement of the 2017 General Election. However, it is included in the Finance (No.2) Bill 2017 published on 8 September 2017.

(b) property situated outside the United Kingdom and comprised in a settlement if the settlor was not domiciled in the United Kingdom when the settlement was made[20];
(c) a holding in an authorised unit trust and a share in an open-ended investment company if the person beneficially entitled to it is an individual domiciled outside the United Kingdom[21];
(d) a decoration or other award for valour or gallant conduct which has never been the subject of a disposition for money or money's worth[22];
(e) certain securities issued by the Treasury, subject to conditions as to the foreign domicile and residence of the beneficial owner[23];
(f) reversionary interests under trusts (subject to exceptions)[24];
(g) certain savings in the beneficial ownership of a person domiciled and resident in the Channel Islands or the Isle of Man[25];
(h) certain property of members of visiting forces[26]; and
(i) a foreign-owned work of art which is situated in the United Kingdom for one or more of the purposes of public display, cleaning and restoration (and for no other purpose).[27]

Subject to certain exceptions, a person not domiciled in the UK at any time ("the relevant time") is treated for inheritance tax purposes as domiciled in the UK (and not elsewhere) at the relevant time if (a) he was domiciled in the UK within the 3 years immediately preceding the relevant time, or (b) he was resident in the UK in not less than 17 of the 20 years of assessment ending with the year of assessment in which the relevant time falls.[28] The Finance Bill 2017, as initially published, contained draft legislation to the effect that a person resident in the UK in not less than 15 out of 20 years would be deemed domiciled in the UK for all tax (not just inheritance tax) purposes. This provision was removed from the Finance Bill 2017 before enactment, but is included in the Finance (No 2) Bill 2017 with effect from 6 April 2017. In addition, a new provision is introduced with effect from 6 April 2017 to the effect that a formerly domiciled individual will acquire a deemed UK domicile for IHT purposes from the start of their second tax year of continuous UK residence.

Where under the terms of a will or otherwise property is held for any person on condition that he survives another for a specified period of not more than six

[20] Inheritance Tax Act 1984 s.48(3)(a). But see s.82 in the case of property to which ss.80 or 81 apply.

[21] Inheritance Tax Act 1984 s.6(1A). See s.48(3A) where the holding is comprised in a settlement.

[22] Inheritance Tax Act 1984 s.6(1B)–(1C). This exemption is extended, for transfers of value made on or after 3 December 2014, to an Order, decoration or award, including those made by a country or territory outside the UK, which has never been the subject of a disposition for money or money's worth: Inheritance Tax Act 1984 s.6(1B) and (1BA).

[23] Inheritance Tax Act 1984 ss.6(2), 48(4).

[24] See Inheritance Tax Act 1984 s.48. A "reversionary interest" means a future interest under a settlement, whether it is vested or contingent (including an interest expectant on the termination of an interest in possession which, by virtue of IHTA 1984 s.50, is treated as subsisting in part of any property): s.47.

[25] Inheritance Tax Act 1984 s.6(3).

[26] Inheritance Tax Act 1984 ss.6(4), 155.

[27] Inheritance Tax Act 1984 s.5(1)(b).

[28] Inheritance Tax Act 1984, s. 267.

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months, that property will not form part of that person's estate if he does not survive for that period.[29]

The value of a person's estate

45-07 There is a deemed transfer of value on death equal to the value of the deceased's estate immediately before death. The general rule is that the value at any time of any property is the price which the property might reasonably be expected to fetch if sold in the open market at that time.[30] However, as set out below, in valuing the deceased's estate, a number of considerations must be borne in mind.

First, any change in the value of the estate which has occurred by reason of the death is to be taken into account, provided that it is an addition to the property comprised in the estate, or an increase or decrease in the value of any property so comprised.[31] Accordingly a life insurance policy payable on death will be taken into account at its full value without any discount for the possibility that, immediately before death, the proceeds might be payable on an unknown future date.

Secondly, in determining the value of a person's estate at any time his liabilities at that time shall be taken into account.[32] In this regard:

(a) A liability is only to be taken into account if and to the extent that it is imposed by law, or was incurred for a consideration in money or money's worth.[33]

(b) Any undischarged liability to IHT of the deceased on previous lifetime gifts will be deductible if the liability is discharged by the estate.[34]

(c) If the deceased's personal liabilities exceed the value of his free estate, those excess liabilities cannot be deducted from the value of settled property in which the deceased had an interest in possession.[35]

(d) Certain debts incurred out of property derived from the deceased are not deductible.[36]

(e) A liability in respect of which there is a right to reimbursement is taken into account only to the extent, if any, that reimbursement cannot reasonably be expected to be obtained.[37]

(f) Where a liability falls to be discharged after the time at which it is to be taken into account, it is valued as at the time at which it is to be taken into account.[38]

(g) Unsecured foreign liabilities so far as possible are to be taken to reduce the value of property outside the United Kingdom.[39]

(h) Administration expenses are not deductible, not being liabilities of the deceased.[40]

(i) The value of an estate may also be diminished by adverse claims, such as claims by way of constructive trust or estoppel.[41]

(j) Conversely, a deceased person's estate will include the right to recover property, such as gifts which an attorney of the deceased had no power to make.[42]

(k) A contractual exclusion or restriction on the right to dispose of property, such as an option, will only affect the value of the property to the extent that consideration in money or money's worth was given for it.[43]

45-08 The Finance Act 2013 amended the Inheritance Tax Act 1984 to restrict the deduction of the following liabilities for Inheritance Tax purposes in relation to transfers of value made, or treated as made, on or after 17 July 2013:

(a) a liability attributable to financing directly or indirectly the acquisition of any excluded property, or the maintenance, or an enhancement of, the value of any such property, or property which has become excluded property, unless specified exceptions apply[44];

(b) a liability incurred on or after 6 April 2013 attributable to financing directly or indirectly the acquisition of property attracting business property, agricultural property, or woodlands, relief, or an enhancement of the value of such property[45]; and

(c) any liability, affecting the deceased's estate on death, unless the liability is discharged on or after death, out of the estate or from excluded property owned by the deceased immediately before the death, in money or money's worth.[46]

In the case of a liability incurred (directly or indirectly) to finance a qualifying foreign currency account[47] the liability is only deductible to the extent that it

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29 Inheritance Tax Act 1984 s.92.

30 Inheritance Tax Act 1984 s.160. The severable joint interest that the deceased had, immediately before her death, in a terminal illness benefit under a life insurance policy that she had taken out with her husband had no value immediately before her death because it would cease to exist if (as happened) death occurred without a claim to that benefit being made: *Lim v Walia* [2014] EWCA Civ 1076.

31 Inheritance Tax Act 1984 s.171.

32 Inheritance Tax Act 1984 s.5(3). A liability which is an incumbrance on any property is, so far as possible, taken to reduce the value of that property: s.162(4). Liabilities should not be secured against property attracting relief, such as agricultural property.

33 Inheritance Tax Act 1984 s.5(5). If the debt was incurred in an amount which exceeds the consideration given for the debt, it will not be deductible as to the excess. A gaming debt is not deductible, not being enforceable at law.

34 Inheritance Tax Act 1984 s.174(2).

35 *Green v IRC* [2005] 1 W.L.R. 1772.

36 Finance Act 1986 s.103. See *Phizackerley (PRs of Phizackerley, decd) v IRC* 2007 S.T.C. (SCD) 328 as to the impact of s.103 on nil rate band debt schemes.

37 Inheritance Tax Act 1984 s.162(1). The personal representatives of a surety will not be able to claim a deduction if and to the extent that reimbursement can be claimed from the principal debtor.

38 Inheritance Tax Act 1984 s.162(2). There may, therefore, be a discount in respect of a future liability.

39 Inheritance Tax Act 1984 s.162(4).

40 However, funeral expenses are deductible, as are expenses incurred in connection with administering or realising property outside the UK up to 5% of the value of such property: Inheritance Tax Act 1984 ss.171 and 173. Funeral expenses will include the cost of a gravestone: SP 7/87. The costs of settling a probate action in respect of the deceased's will are not deductible as the deceased would have been under no liability to make such a payment before his death (*Silber v HMRC* [2013] W.T.L.R. 113).

41 See C. Davies, [2006] No. 4, B.T.R. 458–481; P. Reed, "Private Client Business" P.C.B. (2010) No.1, 49–57; Chris Whitehouse, "Private Client Business" [2010] No. 2 P.C.B. 91–94.

42 *McDowell v IRC* 2004 S.T.C. (SCD) 22.

43 Inheritance Tax Act 1984 s.163.

44 Inheritance Tax Act 1984 s.162A.

45 Inheritance Tax Act 1984 s.162B. The liability is taken, so far as possible, to reduce the value of the relievable property before relief applies, so that only the excess value can be set against other assets.

46 Inheritance Tax Act 1984 s.175A. If the liability is not so discharged, it may still be deductible if there is a real commercial reason for it not being discharged, and securing a tax advantage is not the main purpose, or one of the main purposes, of leaving the liability undischarged.

47 Left out of account under Inheritance Tax Act 1984 s.157.

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exceeds the balance of the bank account, subject to the proviso that the excess does not arise for a tax advantage purpose or to increase the value of the liability.[48]

In relation to transfers on or after 17 July 2013, there is a prescribed order of priority for the purposes of determining the extent to which a liability is attributable to financing excluded property, relievable property or foreign currency bank accounts.[49]

45-09 Thirdly, the value of certain forms of property (not being excluded property as such) is left out of account in valuing the estate. These forms of property include:

(a) land in the United Kingdom on which trees or underwood are growing which is not agricultural property[50];
(b) rights to a pension or annuity under certain pension schemes[51];
(c) cash options payable under certain pension schemes[52];
(d) certain pensions payable by the UK Government in respect of overseas service[53];
(e) foreign currency accounts of persons not domiciled, resident or ordinarily resident in the United Kingdom, and
(f) compensation paid to the victims of National Socialist persecution and of Japanese internment or imprisonment during the Second World War.[54]

Further, an allowance is also made for income tax on offshore income gains.[55]

Fourthly, the general valuation rule is qualified by certain provisions as regards "related property"— which includes property comprised in the estate of a spouse or civil partner and property which had in the preceding five years been the subject of an exempt transfer of value by the deceased or his spouse or civil partner to a charity.[56] Under these provisions, the value of the deceased's property will be an appropriate proportion of the value of the aggregate of that property and any related property.[57] The proportion of the aggregate value may be greater than the actual value.[58]

45-10 Fifthly, where a person is entitled to an interest in possession in settled property which on his death, but during the settlor's life, reverts to the settlor, either absolutely or on interest in possession trusts (or to his UK domiciled spouse or civil partner if the settlor is still alive or has died less than two years earlier) the value of the settled property is left out of account in determining the value of the

48 Inheritance Tax Act 1984, s.162AA.
49 Inheritance Tax Act 1984, s.162C.
50 Inheritance Tax Act 1984 s.125.
51 Inheritance Tax Act 1984 s.151.
52 Inheritance Tax Act 1984 s.152.
53 Inheritance Tax Act 1984 s.153.
54 ESC F20.
55 Inheritance Tax Act 1984 s.174.
56 Inheritance Tax Act 1984 s.161(2).
57 Inheritance Tax Act 1984 s.161. The value of the aggregate is the price which both items of property would fetch if both had been offered on the open market together and at the same time, not (if less) the total price which would be realised for each item, if sold separately: *Price v HMRCC* [2011] W.T.L.R. 161.
58 On this basis, where the deceased and his wife each had minority shareholdings in a company but those shareholdings when aggregated would be a majority shareholding, the value of the deceased's share would be valued as a proportion of the value of the aggregated majority shareholding— which is likely to be higher.

deceased's estate immediately before his death.[59] However, if the deceased became entitled to the interest in possession on or after 22 March 2006, the value of the settled property will only be left out of account on the death of the deceased, if the interest in possession was a disabled person's interest or a transitional serial interest.[60]

Sixthly, the interest of a residuary beneficiary in an estate, which has not been fully administered, will be valued as if the administration had been completed immediately after the deceased's death.[61]

Exempt transfers and other reliefs

45-11 The deemed transfer on death is not chargeable to inheritance tax to the extent that it is an exempt transfer. There are a number of exemptions that apply on death. These include:

(a) exemptions in respect of transfers between spouses or civil partners[62];
(b) transfers to charities[63];
(c) gifts to political parties[64];
(d) gifts for national purposes[65];
(e) gifts for public benefit[66];
(f) gifts to certain housing associations[67]; and
(g) gifts to maintenance funds for historic buildings.[68]

Further, there is no deemed transfer in respect of the estate of a person who dies on active service.[69]

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59 Inheritance Tax Act 1984 s.54(1), (2). The exemption does not apply where the settlor or his spouse or civil partner has acquired a reversionary interest in the property for a consideration in money or money's worth: s.54(3) applying s.53(5).
60 Inheritance Tax Act 1984 s.54(2A).
61 This follows from Inheritance Tax Act 1984 s.91; *Daffodil (administrator of Daffodil) v IRC* 2002 S.T.C. (SCD) 224.
62 Inheritance Tax Act 1984 s.18. From 13 March 2014 a reference in legislation to a person who is married includes a reference to a person who is married to a person of the same sex: Marriage (Same Sex Couples) Act 2013 s.11; Sch.3, para.1. The exemption will apply where the surviving spouse acquires an interest in possession in the deceased spouse's free estate, if the surviving spouse's interest is an immediate post-death interest (s.49A) or a disabled person's interest (s.89B): Inheritance Tax Act 1984 s.49(1A)(a) and (b). The exemption will also apply where the deceased spouse had an interest in possession under an existing settlement prior to 22 March 2006, if the surviving spouse becomes entitled to an interest in possession which is a transitional serial interest pursuant to ss.49C or 49D: s.49(1A)(c). There will be an abatement of the exemption where a claim against the estate is settled out of the exempt beneficiary's own resources: s.29A.
63 Inheritance Tax Act 1984 s.23. Finance Act 2010 Sch. 6 Pt 1, has introduced a new definition of "charity" for certain purposes, including inheritance tax, with effect from 1 April 2012. A "charity" means a body of persons or trust that is established for charitable purposes only. This definition will be satisfied if the charity is a body of persons or trust established in the UK, another EU Member State or a territory specified in HMRC regulations, if it is established for charitable purposes within the meaning of s.2 of the Charities Act 2011. In addition, the charity must meet the "jurisdiction condition", the "registration condition", and "the management condition" described in Sch.6 para.1. It is no longer a requirement that the charity be established within the UK.
64 Inheritance Tax Act 1984 s.24.
65 Inheritance Tax Act 1984 s.25, Sch. 3.
66 Inheritance Tax Act 1984 ss.25–26.
67 Inheritance Tax Act 1984 s.24A.
68 Inheritance Tax Act 1984 s.27.
69 Inheritance Tax Act 1984 s.154.

With regard to the spouse exemption, if, immediately before the transfer, the transferor but not the transferor's spouse is domiciled in the UK, the value in respect of which the transfer is exempt may not exceed £55,000 less any amount previously taken into account for the purposes of the exemption.[70] On or after 6 April 2013 the exemption is increased from £55,000 to the amount of the prevailing nil rate band less any amounts previously taken into account for the purposes of the spouse exemption. A written election may now be made in writing to HMRC by a non-domiciled person or by his or her personal representatives (within two years of death or such longer period as HMRC may allow) whose spouse or civil partner is or was domiciled in the UK on a specified date, for that person to be treated as domiciled in the UK for IHT purposes, provided that certain conditions are satisfied[71]

There are also extensive and important reliefs dependent upon the nature of the property being transferred. These include business property relief,[72] agricultural property relief,[73] and woodlands relief.[74] Heritage property may also be exempt subject to certain conditions being satisfied (conditional exemption).[75]

45-12 Revaluation reliefs may apply whereby the actual, lower sale value of certain property, realized within a fixed period after death, is substituted for the market value on death: such as where quoted securities are sold, cancelled or suspended at a loss within twelve months after death, or where land is sold at a loss within four years of death.[76] In addition, related property sold within three years may in certain circumstances be revalued as if the related property provisions did not apply.[77]

Finally, there are regulations which prevent a double charge to tax, where one of the chargeable events is death.[78] Where, for instance, the deceased made a gift of property which is or subsequently becomes a chargeable transfer, and the property is (by virtue of the provisions relating to gifts with reservation) subject to a further chargeable transfer on the transferor's death, only the transfer that gives rise to the greater amount of tax is charged.

Alterations of dispositions on death

45-13 There are a number of provisions relating to post-death transactions which, for inheritance tax purposes, are deemed to have retrospective effect as if they had been effected by the deceased on death or, in the case of a disclaimer, as if the disclaimed benefit had not been conferred. For a detailed treatment of these provisions, readers are referred to specialist texts such as *McCutcheon on Inheritance Tax*, 7th edn (2016). In summary, the relevant transactions include:

[70] Inheritance Tax Act 1984 s.18(2).
[71] Inheritance Tax Act 1984 s.267ZA and 267ZB.
[72] Inheritance Tax Act 1984 ss.103–114.
[73] Inheritance Tax Act 1984 ss.115–124C.
[74] Inheritance Tax Act 1984 s.125.
[75] Inheritance Tax Act 1984 ss.30–35A.
[76] Inheritance Tax Act 1984 ss.178–189 (securities); ss.190–198 (land and buildings). The claim must be brought within 4 years of the end of the 12 month, or 3 year, period: Finance Act 2009 Sch.51 paras 9 and 10. HMRC have with effect from 23 January 2013 revised *Inheritance Tax Manual* IHTM 33026, relating to IHTA 1984 s.191 (sale of land within four years of death) to make clear that a claim to substitute a higher sale price where the estate is taxable must be rejected as being invalid.
[77] Inheritance Tax Act 1984 s.176.
[78] Finance Act 1986 s.104; SIs 1987/1130, 2005/724 reg.6.

(a) variations of dispositions made on death made by a written instrument in writing within two years of death[79];
(b) disclaimers of the benefit conferred by any dispositions made on death[80];
(c) disclaimers of an interest in settled property[81];
(d) distributions out of discretionary will trusts within two years of death[82];
(e) transfers pursuant to precatory trusts within two years of death[83];
(f) dispositions of property pursuant to an order under The Inheritance (Provision for Family and Dependants) Act 1975.[84]

Effect of death on lifetime transfers

45-14 Inheritance Tax is charged on death, not only on the value of the deemed transfer on death, but also in respect of certain other transfers made by the deceased in the seven years prior to death. As set out below, where a person dies within seven years of making an immediately chargeable transfer, an additional charge to inheritance tax arises. Similarly, inheritance tax will be payable in respect of potentially exempt transfers (PETs) made within that period.

Immediately chargeable transfers, include transfers made before 22 March 2006 to a discretionary settlement (not being an accumulation and maintenance trust, a disabled person's trust or a protective trust) and transfers on or after 22 March 2006 to any settlement other than into a disabled trust.[85] On making such a transfer, inheritance tax would be immediately chargeable at half the death rate—currently half of 40% on the value transferred[86] in excess of the nil rate band, taking into account the value of any chargeable transfers made within seven years prior to the transfer.[87] In the event of the transferor dying within seven years of such a transfer, additional tax is chargeable, as the inheritance tax payable on the transfer is recalculated at the rate in force on the date of death[88] (currently 40% in excess of the nil rate band), credit being given for any tax previously paid. Taper relief ap-

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[79] Inheritance Tax Act 1984 s.142. See *McCutcheon on Inheritance Tax*, 7th edn (2016), paras 8-118 to 8-177. See paras 8-170 to 8-171 for variations by personal representatives. Similar, but more restricted, relief applies for CGT purposes to variations and disclaimers pursuant to the Taxation of Chargeable Gains Act 1992 ss.62(6)–(10); *Marshall v Kerr* [1994] 3 All E.R. 106. There is no relief for income tax purposes.
[80] Inheritance Tax Act 1984 s.142(1). See *McCutcheon on Inheritance Tax*, 7th edn (2016), paras 8-178 to 8-191.
[81] Inheritance Tax Act 1984 s.93. See *McCutcheon on Inheritance Tax*, 7th edn (2016), paras 8-189 to 8-190.
[82] Inheritance Tax Act 1984 s.144. See *McCutcheon on Inheritance Tax*, 7th edn (2016), paras 8-192 to 8-208.
[83] Inheritance Tax Act 1984 s.143. See *McCutcheon on Inheritance Tax*, 7th edn (2016), paras 8-209 to 8-210.
[84] Inheritance Tax Act 1984 s.146. See *McCutcheon on Inheritance Tax*, 7th edn (2016) paras 8-211 to 8-218. Under s.19(1) of the Inheritance (Provision for Family and Dependants) Act 1975 an order under s.2 of the Act has effect "for all purposes", which would include all tax purposes, including CGT and income tax.
[85] See *Simon's Taxes*, para.I3.319 for a full list of immediately chargeable transfers.
[86] Grossed up to take account of the fact that the transferor is making a transfer of value of the tax for which he is liable unless the transferee agrees to pay the tax: see Inheritance Tax Act 1984 s.5(4).
[87] Including potentially exempt transfers made within seven years of death. Where more than one lifetime chargeable transfer is made on the same day by the same person, the transfers are treated as made in the order which results in the lowest value chargeable: see Inheritance Tax Act 1984 s.266. This may be relevant where the transferor bears the tax on some, but not all of, the transfers, and the aggregate value exceeds the nil rate band.
[88] If lower than at the date of transfer: Inheritance Tax Act 1984 Sch.2 para.2.

plies to reduce the death rate to a minimum of 20% in respect of transfers made between three and seven years before death.[89] In practice, a liability will only arise if the lifetime transfer of value exceeds the nil rate band at the date of death.

No tax is paid in respect of a potentially exempt transfer when it is made, as the transfer is assumed to be exempt. However, the transfer will become chargeable if the transferor dies within seven years of the transfer. Tax is then charged at the full death rate prevailing at the date of death[90] (taking into account chargeable transfers made within seven years prior to the transfer).[91] Taper relief will apply, so as to reduce the rate of tax, if the transferor dies between three and seven years after the transfer.[92]

45-15 The transferee is primarily liable for the tax in respect of a potentially exempt transfer, and for the additional tax in respect of an immediately chargeable transfer. However, the deceased's personal representatives may also be liable, if the tax remains unpaid twelve months after the end of the month in which the death of the transferor occurs, or if and to the extent that the liability of the transferee is limited.[93] Even if the personal representatives discharge this liability, the amount of the liability is not deductible for the purposes of calculating the charge to tax on the transferor's estate on death.

If the value of the transferred property has increased by the date of death, the increase is ignored. The tax or additional tax is calculated on the value of the property transferred when it was transferred. However, revaluation relief may be available where the value has fallen between the date of the transfer and the date of death or, in certain circumstances, by the date of an earlier sale of the transferred property.[94] A claim may be made to reduce the value on which tax is charged on the death by the amount by which the transferred property has diminished in value (but subject to various rules and qualifications).[95] Such a claim must be made by a person liable to pay the tax (which could include the transferor's personal representatives) and must be made within four years of death.[96]

Double charge relief applies where the deceased was immediately before his death beneficially entitled to property which directly or indirectly represents property which the deceased had transferred within seven years prior to death by way of a potentially exempt transfer, or pursuant to a transfer which was chargeable when it was made, having re-acquired such property from the transferee otherwise than for full consideration.[97] Either the lifetime or the death transfer, but

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[89] Inheritance Tax Act 1984 s.7(4) and (5). The tax paid on the lifetime transfer cannot be repaid. Taper relief is of no benefit in respect of transfers within the nil rate band since the rate cannot be reduced below nil.

[90] If lower than the rate at the date of the transfer: Inheritance Tax Act 1984 Sch.2 para.1A. By reason of increases in the nil rate band, rates have reduced, with the result that the rate at death normally applies.

[91] Chargeable transfers made more than seven years before death will be aggregated, but not PETs made more than seven years before death.

[92] There is a 20% reduction in respect of the full rate of 40% for each year between 3 and 7 years. After 6 years the rate is, therefore, 8%.

[93] Inheritance Tax Act 1984 ss.199(1)(a), (2), 204(8).

[94] Inheritance Tax Act 1984 s.131.

[95] See Inheritance Tax Act 1984 ss.132–140. Relief is not available in respect of tangible property which is a wasting asset. The relief does not operate to reduce the transferor's cumulative total.

[96] Inheritance Tax Act 1984 s.131(2ZA).

[97] Inheritance Tax (Double Charges Relief) Regulations 1987 regs 4, 7.

not both, are charged, depending upon which transfer gives rise to the higher amount of tax payable.

Rate of charge on death

45-16 On death tax is charged at a percentage rate of the value of the deemed chargeable transfer on death, having regard to any exemptions and reliefs. The value transferred on death will include the value of property subject to a reservation, and settled property in which the deceased had a qualifying interest in possession.

The rate of tax is assessed by reference to the table of rates in Sch.1 to the Inheritance Tax Act 1984. Since 1988, tax has been charged at 40% of the value over and above the upper limit of the nil rate band. In practice, there are, therefore, two bands: a nil rate band, and a 40% rate band. The nil rate band since 6 April 2009 has been £325,000. Up to and including 2020–21 the nil rate band will remain frozen at £325,000. From 2020-21 the nil rate band will increase in line with the Consumer Prices Index.

The nil rate band may not be available, or fully available, in respect of the value of the chargeable transfer on death. This is because the value of any chargeable transfers, including the value of any potentially exempt transfers, made in the period of seven years before death, form part of the deceased's cumulative total and the value of such transfers must be aggregated with the value of the chargeable transfer on death.[98] The chargeable transfer on death is taxed at the rate appropriate to the top slice of the total of the value of that transfer and that of the chargeable transfers made within the previous seven years. If, therefore, the value of the previous chargeable transfers, forming part of the deceased's cumulative total, exhausts the nil rate band, the chargeable transfer on death will be taxed in full at 40%.

Where the value transferred depends on the values of more than one property, the tax has to be attributed to the respective values in the proportions which they bear to their aggregate.[99] If, therefore, the deceased had a qualifying interest in possession in settled property, and also free estate, the tax on death, and therefore the nil band rate, will be apportioned between the value of the settled property (for which the trustees will be primarily liable) and the free estate (for which the personal representatives will be primarily liable).

Transferable nil rate band

45-17 From 9 October 2007, on the death of a surviving spouse or civil partner, a claim may be made for the transfer of the unused percentage of the nil rate band of a pre-deceasing spouse or civil partner ("the transferable nil rate band").[100] It does not matter when the pre-deceasing spouse died. However, for civil partners the first

[98] Inheritance Tax Act 1984 s.7(1).

[99] Inheritance Tax Act 1984 s.265.

[100] Inheritance Tax Act 1984 ss.8A–8C. A legacy giving "such sum as is at the date of my death the amount of my unused nil rate band for Inheritance Tax" included the transferable nil rate band of the testatrix's husband which had been claimed by her personal representatives, since the statutory consequence of claiming the nil rate band is to increase the nil rate band retrospectively to death: *The Woodland Trust v Loring* [2014] EWCA Civ 1314. In *RSPCA v Sharp* [2011] 1 W.L.R. 980 a gift of the maximum amount the testator could give without inheritance tax being payable was construed as a gift of only the unused nil rate band after deducting the value of a property given under other provisions in the will, rather than of the entire nil rate band. In *Brooke v Purton* [2014] EWHC 547 a nil rate band legacy which had been drafted in such a way as to exclude property attracting

death must have occurred on or after 5 December 2005. The marriage or civil partnership must have come to an end on the death of the other spouse or civil partner, with the result that the transferable nil rate band is not available to divorced couples.

When the surviving spouse or civil partner dies, the nil rate band available on that death will, in effect, be increased by the proportion of the nil rate band that was not used on the earlier death of the pre-deceasing spouse or civil partner (subject to a maximum 100% increase).[101] The survivor may, therefore, be entitled to a double nil rate band if the nil rate band on the earlier death was wholly unused. The nil rate band of the pre-deceasing spouse or civil partner may have been unused where, for instance, the whole of the estate passed by way of an exempt transfer to the survivor, or the estate had a nil value, or the whole estate was excluded property.[102]

The transferable nil rate band is available to reduce the charge to death on the death of the survivor.[103] It can, therefore, be set against the value of the survivor's free estate, any reservation of benefit property included in his estate, settled property in which the survivor enjoyed a qualifying interest in possession at death, and failed potentially exempt transfers and chargeable lifetime transfers made within seven years prior to death.

45-18 A claim must be made to take advantage of the transferable nil rate band. Normally, the claim will be made by the surviving spouse or civil partner's personal representatives. However, they may have no incentive to do so if the deceased had made a chargeable transfer or failed potentially exempt transfer, against which the transferable nil rate band may be set. The donee will be primarily liable for the tax on such a transfer.

A claim by the personal representatives must be made within the "permitted period" of two years from the end of the month in which the survivor dies or (if it ends later) the period of three months beginning with the date on which the personal representatives first act as such, or such longer period as an officer of Revenue and Customs may in the particular case allow.[104] Such a claim may be withdrawn no later than one month after the end of the period concerned.[105]

The claim must be made on claim form 402 (part of the IHT400) unless the estate is an excepted estate and the whole of the nil rate band is available to transfer, in which case forms 205 and 217 should be used. The form requires the production of certain documents relating to the estate of the pre-deceasing spouse or civil partner including a copy of the grant; a copy of any will; a copy of any deed of variation; and death and marriage certificates. If there are no records, the personal representatives should try to find out the information about the spouse or civil partner's estate from others who might know, for example, the solicitor who acted for the estate, the executors or administrators, other family members, and close friends. H.M. Revenue & Customs (HMRC) accepts that where the first spouse or

business property relief was construed, with the aid of extrinsic evidence pursuant to s.21 of the Administration of Justice Act 1982, as if it included business assets. All these cases proceed on the basis that the nil rate band legacy extends to the maximum amount (no more, and no less) that can be given without any Inheritance Tax liability. For comments on *RSPCA v Sharp*, see (2011) *Private Client Business* 95; (2011) 9 *Trust Quarterly Review* Issue 3 (Sept) 13; Issue 4 (Dec) 9.

[101] Thus preventing a greater increase if there were two pre-deceasing spouses/civil partners.

[102] As would be the case if the deceased was domiciled abroad on death, and the estate was situated abroad.

[103] Inheritance Tax Act 1984 s.8A(3).

[104] Inheritance Tax Act 1984 s.8B(1).

[105] Inheritance Tax Act 1984 s.8B(4).

civil partner died some time ago, this information may not all be obtainable. Personal representatives should in those circumstances make a claim based on the information they have available. In the case of first deaths on or after 9 October 2007, HMRC will certainly expect taxpayers to preserve all relevant documents.

Residential nil rate band

Introduction

45-19 An additional nil rate band, over and above the standard and the transferable nil rate bands, applies to transfers on death (but not during lifetime[106]) where an interest in the deceased's residence is inherited by "lineal descendants" and their spouses and former spouses on a person's death on or after 6 April 2017.[107] The basic residential nil rate band ("the residential enhancement") is a maximum of £100,000 in 2017/18, increasing by increments of £25,000 per annum to a maximum of £175,000 in 2020/21, thereafter increasing in line with the Consumer Prices Index.

The estate of a person dying on or after 6 April 2017 (P) may also be entitled to a "brought-forward allowance", modelled on the transferable nil rate band, if and to the extent that the residential enhancement of a deceased former spouse or civil partner was not used on the related person's death. This allowance will be a percentage (up to 100%) of the residential enhancement on the second death.[108] Potentially, the maximum residential nil rate band available to a surviving spouse or civil partner will be £350,000 in 2020–21, and the maximum aggregate nil rate band £1m.[109]

The residential nil rate band is, however, subject to a number of limitations and contingencies. Relief depends upon a qualifying residential interest being "closely inherited".[110] The residential nil rate band is nil if the deceased's estate immediately before death does not include such an interest, or does do so but no part of that interest is closely inherited.[111] This limitation is mitigated to an extent by downsizing relief, which may be available so as to preserve entitlement to the residential nil rate band where a person has disposed of his residence after 7 July 2015, and replaced it with a less valuable dwelling, or not replaced it at all.[112] However, downsizing relief will be of no avail to a person who has never owned a residence, or who disposed of one before 7 July 2015. The amount of the residential nil rate band will also be tapered, or even extinguished, if the deceased's estate is worth more than £2m on death.[113] The brought-forward allowance is, of course, of no benefit to a single person, or to couples who are not married or in a civil partnership.

[106] Not, therefore, on failed PETs or chargeable transfers within 7 years of death.

[107] Inheritance Tax Act 1984, s.8D–M. Downsizing relief may apply where the deceased formerly owned an interest in a residence, but the estate on death does not include such an interest, or only includes a lower value interest.

[108] See para.45-24.

[109] £325,000 (standard nil rate band); £325,000 (transferable nil rate band); £175,000 (residential enhancement); £175,000 (brought-forward allowance).

[110] See para.45-23.

[111] IHTA 1984 s.8F(1), (2). In addition, where the value of the QRI which is closely inherited is less than the maximum residential nil rate band, the nil rate band is limited to that lesser value. The residential nil rate band cannot in any event exceed the value of the chargeable estate.

[112] See paras 45-28 to 45-32.

[113] See para.45-26.

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The residential nil rate band applies in priority to the standard nil rate band, and the transferable nil rate band.[114] It applies so as to increase the nil rate band for the benefit of the estate generally, rather than being for the benefit of devisees of a qualifying residential interest.

Qualifying residential interest

45-20 The residential enhancement will be available where:-

(a) a person dies on or after 6 April 2017[115]; and
(b) that person's estate immediately before death included a "qualifying residential interest" ("QRI")[116];
(c) which is "closely inherited".[117]

A residential property interest, in relation to a person, means:

(a) an interest in a dwelling-house[118];
(b) which has been a person's residence[119];
(c) at a time when the person's estate included that, or any other, interest in the dwelling-house.[120]

The general rule is that the deceased person's estate immediately before death must include a QRI.[121] However, it is not a requirement that the deceased resided in the dwelling-house immediately before death. It is sufficient if the deceased owned an interest in the dwelling-house immediately before death, and it was his residence at a time when his estate included that, or any other interest, in the dwelling-house. It is sufficient, for instance, if the deceased was in a nursing home at death, having rented out his former residence prior to death, so long as he owns some interest in his former residence on death. Relief is limited to a person's interests in only one residential property. However, the residence need not have been the deceased's main residence, e.g. for the purposes of CGT principal private residence relief. There can only be one QRI, and if there is more than one such interest, the personal representatives must nominate the dwelling-house in which the QRI subsists.[122] Personal representatives would be advised to nominate the dwelling-house in which the most valuable interest subsists.

[114] Inheritance Tax Act 1984 s.8D(3).
[115] IHTA 1984 s.8D(1)).
[116] IHTA 1984 s.8E(1)(a)).
[117] IHTA 1984 s.8E(1)(b).
[118] A dwelling house includes any land occupied or enjoyed with it as its garden or grounds (there being no restriction as to size) but does not include, any trees or underwood in relation to which an election is made for woodlands relief pursuant to IHTA 1984 s.125: Inheritance Tax Act 1984 s.8H(5).
[119] "Residence" is not defined, but, as a matter of general law, denotes some degree of continuity (*Goodwin v Curtis* [1998] STC 475) albeit this factor should not be overstated (see *Dutton-Forshaw v RCC* [2015] UKFTT 478 (TC) where the period of residence was only seven weeks, but the taxpayer had no other residence during the relevant period, and intended to live at the property on a permanent or continuous basis).
[120] Inheritance Tax Act 1984 s.8H(2).
[121] Inheritance Tax Act 1984 s.8E(1); s.8F(1)(a), (2). However, the requirement of ownership before death is mitigated by downsizing relief which can apply where the deceased did not have at the date of death, but did at some time prior to death have, a qualifying residence.
[122] Inheritance Tax Act 1984 s.8H(4). Where a person's estate immediately before death includes

Inherited

45-21 The residential nil rate band will only be available if a QRI is "closely inherited". It is, therefore, a requirement that a person ("B") should "inherit" from a person who has died ("D"). B inherits for these purposes if[123]:

(a) there is a disposition to B;
(b) of property which forms part of D's estate immediately before D's death;
(c) whether effected by will or intestacy or otherwise, e.g. survivorship.

If, therefore, B becomes absolutely entitled to a QRI, under D's will or intestacy, or by survivorship, the QRI is inherited. Where property forms part of a deceased's estate immediately before death as a result of the gift with a reservation provisions, the donee is treated as inheriting the property.[124] The general rule is that property is not inherited, where it becomes comprised in a settlement on D's death.[125] However, there are exceptions to this rule. Where property becomes comprised in a settlement on D's death, B inherits the property if[126]:

(a) B becomes beneficially entitled on D's death to an interest in possession, being an immediate post-death interest ("IPDI") or disabled person's interest ("DPI"); or
(b) the property becomes on D's death settled property:
    (i) to which s. 71A or 71D applies (bereaved minor's trust, or 18–25, trust for children of D); or
    (ii) held on trusts for the benefit of B (a bare trust).

45-22 In all these cases B is, or is deemed for inheritance tax purposes to be, entitled to the trust property either on the death of D, or on attaining a specified age. The legislation focuses on the position at death. Therefore, B will be treated as having "inherited" if B becomes entitled to an IPDI on D's death, even if that IPDI is soon thereafter terminated. By the same token, if B becomes absolutely entitled to D's residence on D's death, B need not reside in D's residence, and can sell or give the residence to a third party. To fulfil the additional requirement of being "closely inherited",[127] B must be a lineal descendant of D, or a current or former spouse or civil partner.[128]

Conversely, property may be inherited by B from D where D did not have an absolute interest in a QRI on death. Where, immediately before D's death, the property was settled property in which D was beneficially entitled to an interest in

residential property interests in just one dwelling-house, that person's interests in that dwelling-house are a QRI in relation to that person (Inheritance Tax Act 1984 s.8H(3)).
[123] Inheritance Tax Act 1984 s.8J(2).
[124] Inheritance Tax Act 1984 s. 8J(6). If, therefore, the donee is a lineal descendant, the residence will be closely inherited, and the residential nil rate band may apply by reason of the deceased's former ownership of the residence in which the deceased has reserved a benefit.
[125] Inheritance Tax Act 1984 s. 8J(3)(a).
[126] Inheritance Tax Act 1984 s. 8J(4).
[127] See para.45-23.
[128] A devise of a QRI to a discretionary trust, or to a trust for grandchildren contingent on attaining a specified age, or to a sibling or collateral relative absolutely or on IPDI trusts, will not qualify. However, in the case of a discretionary trust, advantage can be taken of IHTA 1984 s.144 to appoint to a lineal descendant within 2 years of death. The appointment will be retrospective for IHT purposes. A beneficiary, who is not a lineal descendant, may also re-direct the whole or part of their entitlement to a lineal descendant by means of a Deed of Variation within 2 years of death pursuant to IHTA 1984 s.142.

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