**PROBATE PRACTITIONERS UPDATE**

**by**

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**Objectives**

After this session you will be:

* aware of recent developments affecting private client practitioners;
* able to adapt your office practice and procedures where necessary.

**I. VIRTUAL EXECUTION OF WILLS**

The Wills Act 1837 (Electronic Communications) (Amendment) (Coronavirus) Order 2020 (2020/952) was laid before parliament on 7 September 2020 and came into force on 28 September. It is very short.

It adds the following to section 9(b) of the Wills Act:

*“For the purposes of paragraphs (c) and (d) of subsection (1), in relation to wills made on or after 31 January 2020 and on or before 31 January 2022, ‘presence’ includes presence by means of videoconference or other visual transmission*.”

The only other provision is an exclusion providing that the Order does not affect any grant of ***probate*** or anything done pursuant to a grant of probate prior to the SI coming into force.

**Example**

Tom makes a conventionally witnessed will in 2015.

On 1 February 2020 he makes a will which is witnessed remotely and complies with the requirements of the later SI.

Tom dies on 1 April 2020. Everyone believes that the remotely witnessed will is invalid so the executor of the 2015 will obtains a grant of probate on 30 June 2020.

In July the government announces that wills witnessed remotely are valid.

The SI does not allow the remotely witnessed will to be proved because a grant of probate was obtained before 28 September 2020.

The reference to a grant of ‘*probate*’ is a little odd. The policy decision was apparently that a grant of administration on intestacy is to be overturned by a valid video witnessed will. But what about a grant of administration with will annexed?

Taken literally, only grants of *probate* are unaffected by a later remotely witnessed will. So, in the example above, if there was no executor appointed (or no executor able and willing to take the grant), a grant of letters of administration with will would have been obtained and apparently that grant would be overturned by the remotely witnessed will.

This seems illogical and the reference to grants of ‘*probate*’ may be an error.

The chances of you encountering an earlier will which has been proved, despite there being a valid remotely witnessed subsequent will, are not high so we probably do not need to dwell on how a grant of letters of administration with will are to be treated.

Anyone thinking of taking advantage of virtual witnessing should look at the “*Guidance on making wills using video-conferencing*” which the government published on 25 July 2020 and which makes the following points:

***Set-up***

* The type of video-conferencing or device used is not important.
* Witnessing pre-recorded videos is not permitted - the witnesses must see the will being signed in real-time.
* The witnesses and testator can all be at different locations, on a three-way link, or two can be physically together with one at a remote location.
* If possible, the procedure should be recorded.
* The attestation clause should be amended to state that one or both witnesses are witnessing remotely.

***The testator signs***

* Before signing, the will-maker should ensure that the witnesses can see them actually writing their signature on the will, not just their head and shoulders.
* The witnesses should confirm that they can see, hear (unless they have a hearing impairment), and acknowledge they understand their role in witnessing the signing of a legal document.
* The testator should hold the front page of the will document up to the camera to show the witnesses, and then turn to the page they will be signing and hold this up as well.
* The testator must physically sign the will (or acknowledge an earlier physical signature). Electronic signatures are not permitted. The testator will date the will with the date of signature.
* If the witnesses do not already know the testator, he/she should hold up photographic identification such as a passport or driving licence.

***Witnessing the will***

* The will must then be taken or posted to the witnesses.
* The witnesses must physically sign the will in the virtual presence of the testator, and, if possible, in the virtual or physical presence of each other.
* As with the testator, they should hold up the will to the testator and sign (or acknowledge an earlier signature) (again the testator should see them writing their names, not just see their heads and shoulders).
* The witnesses will sign with the date on which they are signing which may be different from the date on which the testator signed and the date on which the other witness signs. The execution process is not complete until everyone has signed.

When the change to the Wills Act was announced, the guidance said:

*“The advice remains that where people can make wills in the conventional way they should continue to do so.”*

The accompanying press release said

“*The use of video technology should remain a last resort, and people must continue to arrange physical witnessing of wills where it is safe to do so.*”

However, there is no means of enforcing this so people are free to choose this method if they wish to.

The procedure is cumbersome. If the will has to be posted to the witnesses, there is the risk that the testator will die before the witnesses sign. If this happens, obviously the will is invalid. Anyone who can arrange physical witnessing would be better off doing so.

Having said that, there will be occasions when the procedure will be useful. For example, where someone has tested positive and wants to proceed with execution.

Life will be much easier if the two witnesses can be physically together as that will reduce the occasions when the parties have to be in communication with each other and speed up the process.

**Possible attestation clause where both witnesses are witnessing remotely**

**Testator**

Signed by me in the joint virtual presence of these two witnesses, who are witnessing me doing this remotely via a video-conferencing link

[signature of testator or testatrix]

[Date]

**Witnesses**

Signed by me in the virtual presence of [testator/testatrix] and the [actual] [virtual] presence of [other witness] having watched [testator/testatrix] sign remotely via a video conferencing link on [date]

[signature of witness]

[Date]

The MoJ has provided a possible clause which it says can be used for guidance. I am not a fan. It mixes attestation with other issues which witnesses may not feel comfortable with, uses ‘legalese’ and does not state expressly that the witnesses signed after the testator.

**MoJ clause**

*“We, the undersigned testator and the undersigned witnesses, respectively, whose names are signed to the attached or foregoing instrument declare:*

* 1. *that the testator executed the instrument as the testator's will;*
	2. *that, [on x date], in the presence [by video conference] of both witnesses, the testator [signed the instrument]/[ acknowledged the signature already made on the instrument]/[ the instrument was signed by [X/another] in the physical presence of the testator as directed by the testator];*
	3. *that, to the best of our knowledge and belief, the testator executed the will as a free and voluntary act for the purposes expressed in it;*
	4. *that, to the best of the witnesses' knowledge and belief, the testator was of sound mind when the will was executed.”*

An amended attestation clause dealing solely with formalities is preferable although it is sensible to prepare a supporting document setting out:

* The reason the will was executed remotely.
* Evidence suggesting that
* T appeared to have testamentary capacity when giving instructions and when executing;
* T knew and approved the contents of the will;
* T was not subject to undue influence.

**III. PROBATE CHANGES**

**1. Mandating online professional applications**

On 10 August the Ministry of Justice issued a Consultation Paper aimed at specialist practitioners who submit probate applications in England and Wales setting out the Government’s proposals for mandating online professional applications for grants of probate or letters of administration.

Perceived advantages include efficiency, security, ability to access at any time, tracking, reduction in errors by virtue of built in checking, more flexible operating model, reduction in cost of maintaining large archives of documents and improvement in storage and management of records

The Consultation period was short, closing on 10 September 2020. On 29 September the Non-Contentious Probate (Amendment) Rules 2020 (2020/1059) were laid before parliament, coming into force on 2 November 2020.

The SI inserts a new Rule 4 into the Non-contentious Probate Rules 1987 making it obligatory for professionals to apply on-line unless the application is listed in a new Third Schedule to the 1987 Rules. Even in the case of applications listed in the schedule applications can be made on-line.

The exceptions are:

* A grant of administration including a grant of administration with will annexed.
* A second grant of probate in respect of the same estate.
* A grant where the person entitled has been convicted of murder or manslaughter of the deceased or has otherwise forfeited the right to apply.
* A grant in respect of a foreign will.
* A grant accompanied by an application to prove a copy of the will.
* A grant, where all those entitled are deceased, to any of their legal personal representatives.
* A grant accompanied by an application for rectification or fiat copy of the will.
* A grant under rule 25 (Joinder of administrator).
* A grant under rule 27 (Grants where two or more persons entitled in same degree).
* A grant under rule 30 (Grants where deceased died domiciled outside England and Wales), except a grant under rule 30(3)(b).
* A grant under rule 31 (Grants to attorneys).
* A grant under rule 36 (Grants to trust corporations and other corporate bodies).
* A grant under rule 39 (Resealing under Colonial Probates Acts 1892 and 1927).
* A grant under rule 52 (Grants of administration under discretionary powers of court, and grants *ad colligenda bona*).

Although the new rules came into force on 2 November 2020, there will be a grace period until 30 November 2020 when paper applications will still be accepted. This is to provide additional time for professional users to sign up for online accounts in readiness for the future submission of grants of probate applications via MyHMCTS. Paper applications which have no exemption will be returned unissued after this date and submission will have to be made online.

It is to be hoped that the new system does increase efficiency. On 11 November 2020 the Law Society Gazette carried the following report:

*The probate service is plagued with more delays and errors than it was two years ago, despite higher staff numbers and a bigger budget, a solicitor and MP has told the government.*

*Speaking at a Westminster Hall debate, Conservative John Stevenson MP said the quality of the probate service has ‘deteriorated’ since district registries were centralised and paper applications were replaced by a digital system.*

*Stevenson reported waiting up to 17 weeks for grants of probate and said solicitors can spend 50 minutes on the telephone waiting for a response to a probate enquiry. He added that ‘errors are creeping in in a way that would have been unimaginable previously’ and that the government had ignored advice from practitioners to delay the introduction of mandatory online applications.*

*The probate registry currently has 215 staff members, compared with 156 in 2018, and costs £7.5m to run, up from £5.7m two years ago.*

*Stevenson asked.*

*‘Could the minister please explain how a service which employs more people and costs more is now delivering a poorer service? Could the minister explain how introducing new technology which was meant to improve the service has resulted in probate being issued in seven weeks plus, compared with the previous system, which was around three weeks?’*

*According to an updated court recovery plan published yesterday, HM Courts & Tribunals Service expects to reduce the probate backlog that accumulated earlier in the pandemic this autumn.*

*HMCTS said.*

*‘Our digital reforms to the probate and divorce services have increased resilience and put us in a strong position to make quick progress by enabling both our operational staff and our users to work remotely,’*

*The increase in the death rate associated with the pandemic has resulted in an above average number of probate service receipts since the start of June 2020.*

*However, HMCTS claims waiting times for grants of probate have been maintained at pre-Covid levels during April to June 2020 and throughput in the four weeks to 20 September exceeded pre-Covid levels.”*

**Managing the new process**

Useful guidance on creating an online account is available at <https://www.gov.uk/guidance/hmcts-online-services-for-legal-professionals>.

HMCTS published a letter on 9 October offering guidance to practitioners on the process. It says:

*“If your organisation is already registered (for example this may be the case if you have a team in your law firm that submits divorce applications online), you will need to contact your firm’s MyHMCTS account administrator to request access.*

*It’s important that your organisation does not attempt to register more than once. If your firm has not yet registered, we will contact you before 2 November with further information and assistance about signing up.”*

In relation to ‘*Help and support’* it says:

*“The HMCTS online services for legal professionals provides additional guidance on how to use the online probate service.*

*If you have any queries about MyHMCTS registration, please contact the support team MyHMCTSsupport@justice.gov.uk.*

*If you require further help or support, please email contactprobate@justice.gov.uk or telephone 0300 303 0648.”*

The STEP UK News Digest 29 October 2020 reported that

 *“HMCTS has requested that if practitioners email for assistance, they include the word ‘probate’ in the subject of the email, to ensure the request is actioned efficiently.”*

The Law Society Gazette 2 November 2020 said that it understood that

*“the digital platform used by HM Courts & Tribunals Service is not compatible with older web browsers such as Internet Explorer commonly used by small and medium sized firms. This has meant some solicitors have struggled to submit digital applications.”*

Apparently, it is necessary to use Firefox or Chrome.

**2. Probate FAQs**

HMCTS issued *Probate Frequently Asked Questions* on June 10 and has said that it will be updated on a rolling basis.

Much of what is said about paper applications is no longer relevant to practitioners who are now required to use the on-line process for grants of probate.

* **Online applications**

If you apply online, you have to send supporting documents.

A8 of the FAQs says:

*“You will be given a list of all the supporting documents you need to provide and where you need to send them once you have submitted your application. You will not have to produce a cover letter to go with these documents – the system will generate one for you. You do not need to send two copies of the will with online applications, although we would advise having copies for your own files.”*

**In relation to signatures the FAQs say:**

Q1. Can I sign the legal statement on behalf of my client, or do they
 need to be sent a copy of the legal statement to sign?

A1. You must send it to your client to sign.

Q2. Can the client sign the legal statement electronically, in addition
 to a wet signature?

A2. Yes, they can sign electronically.

* **Paper Applications**

There are currently 4 forms: PA1P for applications where there is a will and PA1A where there is no will. Each is available in a citizen and professional version. Earlier in the year we were promised a combined version of each but there is no sign as yet.

 If circumstances are unusual, the instruction is to complete box 2.15 or 2.16 on the PA1A. or PA1P

The PA4SOT now says *“Please send your form and required documents to: HMCTS Probate, PO Box 12625, Harlow, CM20 9QE”*

**In relation to signatures the FAQs say that the forms:**

“*must be signed by all persons making this application, or by their legal representative acting for them.*”

The FAQs say that It can be signed with a wet or electronic signature.

If there are two or more applicants:

 “*you (the professional) can sign on behalf of all these applicants, but they may also opt to sign themselves. If signing for multiple applicants, you must sign in the applicant boxes for however many additional individuals you are acting for. Each signature can be either electronic or wet*.”

**3. Statements of Truth instead of Affidavits**

 On 17 April 2020 the President of the Family Division issued Guidance *as to the replacement of affidavits with statements of truth in non-contentious probate processes* which said that to *“enable non-contentious probate business to continue during the current social conditions imposed for the coronavirus pandemic”* he would authorise District Probate Registrars to allow statements of truth to be used as an alternative to affidavitsfor applications and processes within the Non-Contentious Probate Rules 1987and that:

*Consideration will be given to making this rule change permanent by Statutory Instrument at a future date*.”

On 23 July 2020 the period w*as* extended to expire on 30 October 2020*.*

The 2020 Amendment Rules make the change permanent. A new 2A is inserted into the 1987 Rules which says that witness statements must be verified by a statement of truth and that in the following Rules ’or witness statement’ should be added to ‘affidavit’. The effect is that witness statements can be used as an alternative to an affidavit.

* rule 10(1)(b) (Exhibition of wills)
* rule 12(1) (2)(Evidence as to due execution of will),
* rule 25(2) (Joinder of administrator),
* (rule 26(1) (Additional personal representatives),
* rule 32(2) (Grants on behalf of minors),
* rule 44(6), (10), (12) (Caveats),
* rule 46(4) (Citations)
* rule 47(4), (6) (Citation to accept or refuse to take a grant),
* rule 48(2)(a) (Citation to propound a will),
* rule 50(2) (Application for order to attend for examination or for subpoena to bring in a will),
* rule 51 (Grants to part of an estate under section 113 of the Act),
* rule 52 (Grants of administration under discretionary powers of court, and grants *ad colligenda bona*),
* rule 55(2), (3) (Application for rectification of a will).

**III. HMRC CHANGES**

**1. Accelerated payment of CGT**

HMRC guidance is quite thin. However, the Institute of Chartered Accountants England and Wales ( ICAEW) published a very helpful guide ‘*TAXguide 15/20 Capital gains tax 30-day reporting*’ last updated 15 October 2020. he Association of Tax Technicians published ‘*UK Property Reporting Service - a user's guide*’ updated 28 September 2020 which is equally helpful.

**1.1 FA 2019**

FA 2019, s14 and Sched 2 introduced accelerated reporting and payment dates for CGT on UK land disposed of by non-residents starting in tax year 2019/20.

The change applies to all disposals of UK residential land on or after 6 April 2020 ***where tax is due***. It applies to disposals made by PRs and trustees as well as to disposals by individuals.

The date of disposal is fixed by reference to the date of unconditional exchange of contracts. The return and payment must be submitted within 30 days of completion of the disposal.

**Example**

(1) PRs of Anna exchange contracts for the sale of her residence under an unconditional contract on 1 April 2020 making a chargeable gain of £3,000. Completion takes place on 15 May 2020. The gain accruing on the disposal is subject to the old rules and the PRs will deal with the CGT at the end of the administration period if the estate is a simple estate or in the self-assessment return for tax year 2019/20 if it is complex.

(2) If, however, the PRs exchange unconditional contracts on 6 April 2020, the PRs must make a return to HMRC within 30 days of completion on 15 May 2020 together with a payment on account within the same 30 days’ timescale.

No returns are required for disposals where no tax is due, for example because the gain is

* within the annual exemption,
* covered by existing losses or
* to a spouse or civil partner (no gain/no loss disposal)

The calculation of tax is made on the basis of events so far in the tax year with an approximation of the level of income expected during the year. The payment made is on account of the tax due at the end of the year. However, it is not necessary to submit a self-assessment tax if the tax paid was correct and there is no further need for a return.

**1.2 Procedure**

The report must be made online following the Gov.UK guidance on *Report and pay Capital Gains Tax on UK property*.

The online process is completely stand alone and does not use self-assessment returns or references. Existing agent authority is not recognised for the service.

The taxpayer needs to set up a CGT UK Property Account regardless of whether they are reporting the gain themselves or whether they are appointing an agent to report the gain. They do so from the green ‘Start’ button on the Gov UK *Report and pay Capital Gains Tax on UK* *propert*y page. If they already have government gateway credentials they sign in with those existing credentials. If they do not, they will have to create a user name and password.

Once the CGT UK Property Account has been set up is it possible for the taxpayer to authorise an agent to use the online procedure report the gain on their behalf (but not in the case of PRs – see below).

The ICAEW and ATT guides referred to above has a step-by-step guide to the process.

**1.3 Trustees and PRs**

**Trustees**: Trustees who sell or dispose of a UK residential property held in a UK resident trust must ensure that any CGT liability due is reported and paid within 30 days of the completion of the disposal - in the same way as for UK resident individuals.

Registered trusts use their UTR to access the online service.

HMRC has confirmed that a trust will need to register on the Trust Registration Service (TRS) in advance of reporting the property disposal so it can provide either a UTR or a Trust Registration Number as part of the CGT reporting process. The main issue is one of timing, as, under current rules, trustees of an unregistered trust incurring a liability to pay income tax/CGT for the first time in 2020/21 would have until 5 October 2021 to register. If the trustees are in the process of registering and are waiting for a UTR, they can use the Temporary Reference Number to access the new Capital Gains Tax Service.

From March 2022, as a result of the increased requirement for registration within 30 days of creation following implementation of the 5th Anti-Money Laundering Directive, this will be less of a problem as there will be far fewer unregistered trusts.

**PRs:** The August 2020 Trusts and Estates Newsletter included this reminder of accelerated payment dates for CGT on disposals by PRs of UK residential property.

*“If a personal representative has disposed of UK residential property which gives rise to a Capital Gains Tax liability they must report and pay the tax due within 30 days of the completion date.*

*This can be reported through the new Capital Gains Tax payment on property disposals service if this disposal occurs before they are ready to finalise the estate’s tax affairs.*

*Or, if following the disposal of UK residential property which gives rise to a Capital Gains Tax liability, the personal representative is also ready to finalise the estate’s tax affairs in their entirety and pay any tax due, they can report and pay through the existing processes as set out on GOV.UK but still within the Capital Gains Tax payment on property disposals 30 day window.*

**Procedure where PRs not ready to finalise estate’s tax affairs**

An online report will have to be made within 30 days of completion.

The Gov.UK guidance referred to above includes instructions on how ***unrepresented*** PRs can file a return under the heading ‘*If you’re a capacitor or personal representative’.* However, this process is not intended for use by agents who cannot currently use the online service on behalf of PRs.

A PR reporting on behalf of the estate would create a UK Property Account in their own name using their own credentials, but select the option to report on behalf of another person. Once logged into their account, they will be able to submit a CGT Return on behalf of the estate, by providing personal details for the deceased which could (but does not have to) include the deceased’s UTR.

Note that this service allows a PR to file a return but does not provide online access to view the return or make payment online. The ICAEW guide says that it understands that the return is, in fact, processed manually by HMRC, who then writes to the PR with instructions on how to pay and grants an extended payment deadline.

The Estate does not have to have registered via the Trust Registration Service as a complex estate (see below) to be able to use the new Capital Gains Tax payment on property disposals procedure.

When the estate makes payment of the balance of CGT and Income tax due, the PRs will need to quote any reference numbers relating to the earlier CGT payment to enable HMRC to link both payments together.

Where an agent is acting for an estate, they should request a paper return, called PPD CGT. This is quite different from the ordinary self-assessment form so, to avoid confusion, it is important to refer to it by name.

The ICAEW Guide says:

*“Given the very short time in which returns must be filed, it is advisable to request the paper returns as early as possible in the process, ideally in advance of the sale. We understand that HMRC may ‘stop the clock’ (ie, pause the 30-day count from the completion date to the submission and payment deadline) during the period between receipt of a completed paper return and the issue of the payment demand so that the taxpayer is not penalised for any delay in HMRC processing the return but the exact details of how this works are unclear.”*

**Procedure where PRs are ready to finalise tax affairs within 30 days**

This may be done without a separate report as part of the normal final payment procedure.

* If the estate meets the ‘*complex estate*’ criteria, completing a self-assessment return for the final year of the administration period;
* If it does not meet the complex estate criteria, using the ‘*informal arrangements’*.

 **Note: When is an estate complex?**

Complex estates are those where:

* the probate value of the estate is more than £2.5 million
* income Tax and, or CGT for the whole of the administration period exceeds £10,000
* the proceeds of assets sold by the personal representative in any one tax year exceeds £500,000 for date of deaths after 5 April 2016 (£250,000 for earlier deaths).

**1.4 Penalties**

 Due to coronavirus (Covid-19) HMRC did not issue late penalties to any transactions completed between 6 April and 30 June 2020, provided the gain was reported and any tax due paid by 31 July 2020.

Transactions completed from 1 July 2020 will receive a late filing penalty if they are not reported within 30 calendar days. Interest will be charged if the tax remains unpaid after 30 days for all transactions from 6 April 2020.

**1.5 Losses**

Returns are only required when there is a chargeable gain. However in a webinar (*Disposal of UK properties – important changes to reporting and paying CGT* <https://attendee.gotowebinar.com/recording/7889812172052289799>), HMRC said that if a disposal results in a loss, the taxpayer can submit a voluntary report in order to recover tax paid on an earlier disposal.

**Comment:** Yet another complication for taxpayers and their advisers.

**2.1 *Trusts and Estates Newsletter* June 2020 announced the following:**

* **Wet signatures on accounts and returns**

*We recognise that it’s difficult for personal representatives or trustees to physically sign forms IHT400, IHT100 and IHT205 with current social-distancing measures in place.*

*To help customers, we’ve agreed a new temporary process. Until further notice we’ll accept accounts and returns without wet signatures from professional agents if:*

* *the names and personal details of the personal representatives or trustees are shown on the declaration page*
* *the account has been seen by all the personal representatives or trustees and they all agree to be bound by the declaration.*

*The agent must include one of the following statements:*

***Form*** ***Statement***

*IHT100 As the agent acting on their behalf, I confirm that all the people whose names appear on the declaration page of this IHT100 have seen the IHT100 and agreed to be bound by the declaration on page 8 of the IHT100.*

*IHT205 As the agent acting on their behalf, I confirm that all the people whose names appear on the declaration page of this IHT205 have seen the IHT205 Return and agreed to be bound by the declaration on page 8 of the IHT205.*

*IHT400 As the agent acting on their behalf, I confirm that all the people whose names appear on the declaration page of this IHT400 have seen the IHT400 and agreed to be bound by the declaration on page 14 of the IHT400.*

* **Change of process for form IHT421**

*HMRC has changed the process for dealing with forms IHT421 – ‘Probate Summary’ for grants in England and Wales. We’re now emailing these forms directly to HM Courts and Tribunals Service (HMCTS) in all cases, rather than returning the forms to you. When we’ve done this, we’ll either write to you or include a note on the calculations to tell you what we’ve done.*

*This new process means that customers will get their grant more quickly. To make the probate process as quick and smooth as possible we advise customers to send their application for a grant to HMCTS, 15 working days after they have sent their form IHT400 to HMRC. The form IHT421 has been amended to reflect this process change.*

* **Paying by cheque for Inheritance Tax**

*From 6 April 2020 we stopped accepting cheques as a method of payment for Inheritance Tax. Other methods to pay are listed on the Inheritance Tax payments page.*

* **Inheritance Tax valuations**

*We are aware that some customers have questions about valuing some types of property for Inheritance Tax, with the current coronavirus measures in place. There’s guidance on how to value property in the form IHT400 notes. This guidance covers estimated values and tells you that if you’re having difficulty, you may include the best provisional estimate you can. You’ll need to list the boxes that contain provisional estimates in box 121 of form IHT400 and the correct figure as soon as you know it.*

**2.2 *Trust and Estates Newsletter* August 2020 change to clearance procedure**

*To prevent delays we are making changes to the current process for handling forms IHT30 –‘Application for a clearance certificate’. Instead of returning a stamped and signed copy of the form IHT30 we will send customers a letter to certify that the Commissioners of HM Revenue and Customs discharge the applicants who have signed the form.*

*In place of our usual stamp, HMRC will use a unique authorisation code. The letter will have exactly the same effect as the stamped and signed IHT30.*

**IV. REDUCING RISKS**

**1. The duties of PRs**

PRs must collect in the assets of the deceased, identify and pay liabilities and distribute the balance to those entitled.

Increasing digitalization makes it harder to find assets and liabilities.

**2. Assets**

If the deceased submitted tax returns, this is a good place to start. It should reveal interest-bearing accounts and shares.

However, many potentially valuable assets will not show up on the tax return, for example gambling accounts, non-interest accounts, PayPal etc.

HMRC are very quick to impose penalties on PRs where accounts understate IHT due to lack of reasonable care.

Using search providers saves time, may find assets AND demonstrates reasonable care.

**3. Liabilities**

PRs normally rely on advertisements to protect them from liability in relation to unknown claimants. It is as follows:

 Section 27

1. *With a view to the conveyance to or distribution among the persons entitled to any real or personal property, the trustees of a settlement, trustees of land, trustees for sale of personal property] or personal representatives, may give notice by advertisement in the Gazette, and in a newspaper circulating in the district in which the land is situated and such other like notices, including notices elsewhere than in England and Wales, as would, in any special case, have been directed by a court of competent jurisdiction in an action for administration, of their intention to make such conveyance or distribution as aforesaid, and requiring any person interested to send to the trustees or personal representatives within the time, not being less than two months, fixed in the notice or, where more than one notice is given, in the last of the notices, particulars of his claim in respect of the property or any part thereof to which the notice relates.*
2. *At the expiration of the time fixed by the notice the trustees or personal representatives may convey or distribute the property or any part thereof to which the notice relates, to or among the persons entitled thereto, having regard only to the claims, whether formal or not, of which the trustees or personal representatives then had notice and shall not, as respects the property so conveyed or distributed, be liable to any person of whose claim the trustees or personal representatives have not had notice at the time of conveyance or distribution; but nothing in this section:*
3. *prejudices the right of any person to follow the property, or any property representing the same, into the hands of any person, other than a purchaser, who may have received it; or*
4. *frees the trustees or personal representatives from any obligation to make searches or obtain official certificates of search similar to those which an intending purchaser would be advised to make or obtain.*

Section 27 only protects against unknown claims so, for example, is of no assistance where the existence of a beneficiary or creditor is known but they cannot be traced. Nor is it any help where a liability is contingent or of questionable liability.

It has three other problems.

1. Sub-section 2b makes it clear that PRs are required to make searches similar to those an intending purchaser would be advised to make or obtain. What exactly this means when considering assets other than land is unclear. But the increased availability of on-line searches may mean that they become regarded as standard.

1. Dicta in ***Re Yorke*** [1997] 4 All ER 907and ***In the Estate of Michael John de Clare Studdert deceased*** [2020] EWHC 1869 (Ch) suggest that s27 does not protect PRs, if:

 (a) there are grounds for suspecting liabilities exist, and

 (b) it is unlikely that a claimant would see the advertisements;

Both of these cases were very different from the standard administration: ***Re Yorke*** was a deceased Lloyds name with huge contingent liabilities and ***Studdert*** was a case of possible historic sexual abuse overseas. In both cases there were grounds for the PRs to believe that liabilities might exist although they had no knowledge of particular individuals.

In ***Re Yorke*** Lindsay J said at p918:

*“It is possible to find dicta which suggest even with respect to contingent creditors, that, should they not come in and claim in response to advertisement, then their only remedy would thereafter be against the legatees and that their remedy against the executors personally would have gone: Waller v Barrett (1857) 24 Beav 413, 53 ER 417. Such a view not only conflicts, in my judgment, with the earlier broad approach in such cases as Knatchbull v Fearnhead and Hawkins v Day (where the executors' ignorance of the claims was no defence) but with basic notions of justice and common sense. Especially is that so in the context of claims against a Lloyd's name where a policyholder (who could be anywhere in the world) could not reasonably be expected to know, at the time of any advertisement, even if it came to his notice or could be expected to have done so, that he had or might have a claim against some particular deceased.”*

In ***Studdert*** Chief Master Marsh also accepted at [10] that there are be cases where s27 will not protect PRSs:

*“The protection afforded by section 27 of the Trustee Act 1925 is a secondary consideration. In this case it became clear that although the claimants had placed the statutory form of advertisement in the media, there were two additional points to be considered.*

*First, the prospect of the advertisement being seen, let alone acted on, by victims of historic abuse, were extremely slight.*

*Secondly, the protection afforded by section 27 is, or at least may be, limited. It provides in subsection (2) that the personal representatives “… shall not … be liable to any person of whose claim the … personal representatives have not had notice …” provided they have advertised in the form required by the Act. It is unclear whether they would be treated as having notice of a class of claims which they believe may exist in relation to which the identity of the possible claimants is unknown. Indeed, there remains the possibility that the estate is insolvent.”*

1. A much more general problem with s27, however, is that while it protects the PRs, any unpaid claimants can follow estate assets into the hands of beneficiaries. It is human nature to be very much more aggrieved by the loss of something as opposed to being told in advance that there are liabilities that have to be paid. In the interests of harmony it is better to search for liabilities before they crawl out of the woodwork.

**V. LIMITATIONS OF POST-DEATH VARIATIONS**

**1.** **Reading back is only for purposes of IHT and CGT**

Where the statutory provisions apply the reading back is effective only for the purposes of IHT and/or CGT and for no other purpose. It is important not to overlook this.

**Example**

Sally inherits an investment property from her brother, Ben, and wants to vary the disposition of Ben’s estate to leave the property to her adult daughter, Diana.

Sally executes a deed of variation which declares that Ben is to be treated as leaving the property to Diana for IHT purposes (under IHTA 1984, s142) and for CGT purposes (under TCGA 1992, s62(6)).

For all other purposes Sally will be regarded as having given away the investment property. So:

* She will remain liable for income tax on any income accruing in the period from death till the date of the variation.
* If an issue arises about care home fees at a later date, a local authority could legitimately raise the question of deliberate deprivation of assets in relation to the variation.

The ‘*Care and Support Statutory Guidance 2014’* Annex E para 11(a) says that there is deliberate deprivation where avoiding care charges was ‘*a significant motivation in the timing of the disposal of the asset’*. Where there is deliberate deprivation of assets, a local authority is entitled to regard the asset given away as part of a person’s notional capital.

* A similar issue arises in relation to means tested benefits. See below

 **2. *Barrs Residential & Leisure Limited v Pleass Thomson* [2020] UKUT 114 (LC).**

This case concerned a mobile home. The benefit of a pitch agreement for a mobile home can only be transmitted on death to a close family member residing with the deceased or in default of any such person so residing, the person entitled to the mobile home by virtue of the deceased’s will or under the law relating to intestacy[[1]](#footnote-1)

In this case the deceased’s will was varied to give his son the mobile home. It was accepted that although the variation passed the mobile home itself to the son, that did not mean that he was a beneficiary under the terms of the deceased’s will for the purposes of the legislation. A variation is only treated as the deceased’s disposition for the purposes of IHT and CGT. Hence, the son acquired no right to the pitch agreement, the benefit of which remained with the executor.

**3. *FSS v LMS (by her litigation friend, the OSS)* [2020] EWCOP 52**

P was in receipt of means-tested benefits. Her mother (who was P’s attorney) applied for an order under the Mental Capacity Act 2005 permitting the settlement of £170,000 left to P by her grandfather into a disabled person’s trust.

If P received her inheritance outright, her capital would preclude her from receiving those means-tested benefits. A disabled person’s trust is discretionary in form (although treated for IHT purposes as creating a qualifying interest in possession). Because it is discretionary in form, it does not prejudice means tested benefits.

Her mother contended that the variation would allow P to continue to receive means-tested benefits; the Official Solicitor disagreed on the basis that placing the inheritance into the proposed disabled person's trust would amount to a deliberate deprivation of capital such that P would still not be entitled to means-tested benefits.

The benefits P received all provided that claimants were to be treated as notionally entitled to income and capital of which they had deprived themselves for the *for the purpose of* obtaining the benefit.

The principles applicable to determining whether a disposal of capital is a deliberate act for the purposes of means-tested benefits were considered by Mr Howell QC then a Social Security Commissioner in *R(H)1/06* at paragraphs 20 to 23:

“ *the correct test to be applied in determining whether the claimant is shown to have deprived himself of capital for the purpose of securing entitlement to housing benefit is the well-established one applied on similar wording in the main social security legislation, namely whether the securing of such entitlement is shown to have been* *a ‘****significant operative purpose’*** *of the claimant's relevant actions in disposing of his capital*.”

Whether the securing of entitlement to benefit is, in this sense, among the purposes leading any particular claimant to act as he did is a question that must be determined by the tribunal of fact.

The Court of Protection accepted that the issue was whether or not obtaining the benefits was a ‘significant operative purpose’. It accepted that P’s grandfather had intended her to benefit and would have left the legacy differently had he known of the effect on her benefits.

Although the Court of Protection has no jurisdiction to determine whether P’s means-tested benefits would be affected, it can record its own intention in authorising the deed on behalf of P.

Beckley DJ said that the continuing eligibility of P to means-tested benefits and funding was not the ‘*significant operative purpose’* of the proposed deed. The court’s motive in authorising the deed on P’s behalf was to better effect the intention of her grandfather.

**Comment:**

Although good news for P and her mother, the case does illustrate the fact that claimants in receipt of means-tested benefits are at risk of falling foul of the deliberate deprivation rules if they vary legacies left to them.

**VI. RECENT DECISIONS UNDER I(PFD)A 1975**

Recent decisions on the Inheritance (Provision for Family and Dependants) Act 1975 suggest that a surviving spouse who receives no capital and is unhappy with that position has a good chance of succeeding in a claim. In 1975 Act claims brought by spouses and civil partners, the court is required to consider what the claimant would have received had the marriage or civil partnership ended in divorce or dissolution.

Since the House of Lords decision in ***White v White*** [2001] AC 596 both parties would expect to receive a share of capital.

See, for example, ***Berger v Berger*** [2013] EWCA Civ 1305, an application by a widow with only a life interest seeking leave to apply out of time. Although her application was refused because the delay was inexcusable, the Court of Appeal considered that she had a strong case. In this they differed from the trial judge who had said that “*bearing in mind her age and health” and, in particular her age, it was not unreasonable to adopt the solution of a life interest*”. Black LJ said that this was a wrong approach. A court determining a substantive application is required by s3 of the Act to have regard to the provision which wife might have received if the parties had been divorced on the date of death. In ***White v White*** [2001] 1 AC 596 The House of Lords said that in ancillary relief proceedings equality should only be departed from if, and to the extent that, there was good reason for doing so. A claimant's financial needs or reasonable requirements should not be regarded as determinative in arriving at the amount of an award. It was at least arguable that the starting point for an ancillary relief order in *Berger*, given the very long period during which the appellant and the deceased had been together, would have been a 50:50 division of their assets.

***Cowan v Foreman*** [2019] EWCA Civ 1336. This was also an application to apply out of time (this time successful). The Court of Appeal considered that the trial judge (who had refused leave) had failed to have proper regard to all the circumstances of the case, including the size of the estate, the length of the relationship, the fact that Mrs Cowan received only chattels of nominal value outright, she had no autonomy, no security and no direct interest in her home of 20 years which was owned through the discretionary trust.

Note the decision in ***Hendry v Hendry and Others*** [2019] EWHC 1976 (Ch) where the existence of a pre-nuptial agreement was taken into account.

The estate was modest, the principal asset being the deceased’s residence worth approximately £220,000.

Rosita (the claimant) met the deceased in the Philippines in 2001. She moved from the Philippines to the United Kingdom in 2003. The deceased and Rosita married in 2003: the deceased was 57 and Rosita was 37. They had entered into a pre-nuptial agreement on 8 October 2003 which provided that in the event of the marriage failing Rosita would receive a lump sum of £10,000 and a one-way flight to the Philippines.

The existence of the pre-nuptial agreement was significant.

*“Whilst the court retains jurisdiction to make a financial provision order on divorce the fact that the parties entered into a prior agreement which would determine the appropriate financial provision order should the marriage come to an end is something that must be given weight by the court.”*

The evidence suggested that the parties entered into the agreement having been given separate independent legal advice, having all the relevant financial information and intending that the agreement would govern the financial consequences of the marriage ending and appreciating that they would be held to the agreement.

**VII. GDPR & PERSONAL REPRESENTATIVES**

STEP Guidance on the General Data Protection Regulation (EU) 2016 was published on 24 January 2020 by the Data Protection Working Group dealing with the processing of personal data relating to beneficiaries of trusts and estates.

It sets out STEP’s views on what it considers to be reasonable positions for members to take in the absence of any further clarifications from either the Courts or Information Commission Office (ICO).

STEP prepared the guidance following discussion with the ICO.

 **The personal or household activity exemption**

Anyone who processes personal data is a data controller and subject to the GDPR. Processing is very widely defined and includes recording and storing data. PRs and trustees will be data controllers unless an exception applies.

There is an exception where data is processed during the course of a ‘*purely personal or household activity*’.

STEP considers that a trustee or personal representative is within the scope of the ‘*purely personal or household activity’* exemption (and therefore not subject to the GDPR) if they are:

1. acting in their personal capacity as opposed to a professional capacity; and
2. unpaid (for these purposes, expenses do not qualify as payment).

STEP considers that regarding lay people as data controllers would lead to “*innumerable accidental breaches of data protection laws and a reduction in the willingness of individuals to accept these roles”.* It notes that this approach would be in line with the view of the Court of Appeal that the courts should *“be cautious about criminalising what, for many people, are their ordinary activities*”.

The ICO has offered qualified support to the suggested approach.

During the course of 2019, STEP submitted the following question to the ICO:

*“Please confirm that data processing carried on by individuals acting as fiduciaries in a non-professional capacity and without payment should fall within the scope of the personal or household activities exemption in [Article 2(2)(c)].”*

In April 2020, the ICO responded to say:

 *“Based upon the information provided in the*

*examples, it is likely that the individuals would fall within the exemption at [Art 2(2)(c)],*

*however, each situation should be considered in light of the individual circumstances.”*

The “*examples*” referred to were a number of examples of fiduciary arrangements considered during the course of discussions between STEP and the ICO, including:

* individuals jointly owning residential property;
* trustees holding assets in various circumstances, such as for minors under the terms
* of a will or intestacy, or for disabled beneficiaries;
* PRs administering an estate; and
* an individual acting as an attorney for a family member under a lasting power of attorney.

Whilst the ICO’s response does not go into any specifics, it does appear to confirm the

principle that an individual acting in a fiduciary capacity can nevertheless fall within the

scope of the Article 2(2)(c) exemption provided that they are not acting in a professional capacity and are not paid for their services.

Note, however, that firms acting for PRs will have their own obligations.

1. Under the Mobile Homes Act 2013, s3. [↑](#footnote-ref-1)