



## Being an Executor in Scotland – Client Guide

*This is one of a series of Fact Sheets provided by J. & H. Mitchell W.S*

### What this guide is about

This guide provides an overview on the role and responsibilities of **executors** when dealing with the administration of a Scottish person's **estate**.

If a word or phrase is in **bold** when it is first used in this guide, then its meaning is given at the end.

This guide covers the role of executors when dealing with the **administration of the estates** of people who were **domiciled** in Scotland when they died. Different rules and procedures apply if the person was domiciled elsewhere in the UK or abroad when they died.

Topic covered are:

- Who are the executors
- Why are executors needed?
- What are executors' key duties?
- Investigating the value and extent of the deceased person's estate
- Obtaining valuations
- Investigating debts and liabilities
- Investigating gifts and lifetime transfers
- Applying for and obtaining Confirmation
- The IHT return
- Paying IHT
- Ingathering the estate
- Paying debts and the costs of administering the estate
- Making distributions to beneficiaries
- Preparing executry accounts
- Winding up the estate

## Who are the executors?

Executors are the people responsible for dealing with the administration of the estate of someone who has died.

When somebody dies, their estate must be dealt with (or administered). In Scotland this process is known as executry administration and it is the deceased person's executors who deal with this (often with the help of solicitors).

Executors are appointed in the deceased person's will or, if there is no will (or no valid appointment is made in the will), then an application to court is needed to have executors appointed.

Executors are a type of trustee. They hold a position of trust and, when carrying out their role, must act:

- In the interests of the beneficiaries at all times (and avoid situations where their own interests may conflict with those of the beneficiaries).
- Reasonably and exercise a certain standard of care (which is the same standard of care which a person of "ordinary prudence" would exercise when managing their own affairs).

Executors also have other duties, including the duty to carry out the executry administration in accordance with the law and the terms of the deceased person's will (or, if there is no will, and the deceased person died **intestate**, in accordance with the **rules of intestacy**). More information on executors' duties is provided in the sections below.

Being an executor therefore carries some degree of responsibility. If you are appointed as an executor and fail to carry out the functions and duties associated with your role, you may be held personally liable for any losses to the estate or beneficiaries (meaning you must pay for any loss from your own funds). For these reasons, it is important you are aware of your duties and seek appropriate professional advice and assistance where necessary (more information on this is provided in the section below headed "Do executors have to involve solicitors?").

## Why are executors needed?

When someone dies, their estate consists of assets, such as their home, personal belongings, finances and investments. There will also usually be debts and liabilities of the deceased person which must be settled.

Except in limited circumstances, ownership of a deceased person's assets and the right to deal with them does not automatically transfer to their family members or the beneficiaries under their will when the deceased person dies. Instead, the deceased person's executors must obtain Confirmation to the estate. Confirmation gives the executors legal authority to deal with and ingather the estate, pay the deceased person's debts and the costs of the executry administration, and to transfer legal ownership of the deceased person's assets to the beneficiaries named in the will or those entitled to the estate under the rules of intestacy. Until Confirmation to the estate is granted (and the executors are "confirmed"), no one may legally deal with the estate in this way.

## What are executors' key duties?

As an executor, your key duties are to:

- Investigate the value and extent of the deceased person's estate.
- Report the estate to **HM Revenue & Customs (HMRC)** and pay IHT, where necessary.
- Apply for and obtain Confirmation to the estate.
- Ingather the estate after Confirmation has been granted, which can involve:
  - encashing or uplifting assets (for example, closing bank accounts and uplifting the cash);
  - realising or selling assets (for example, selling the deceased person's home or investments); and
  - transferring assets into the names of the beneficiaries (for example, where the deceased person has left an asset as a **specific legacy** to someone).
- Pay the deceased's debts and the costs of administration of the estate.
- Distribute what is left of the estate (known as the **residue**) to the correct beneficiaries.

In addition, you will have duties to:

- Exercise the requisite standard of care (which is the same standard of care which a person of "ordinary prudence" would exercise when managing their own affairs). This involves, for example:
  - securing and safeguarding the value of the estate and the assets in it; and
  - seeking advice and assistance where necessary.
- Provide certain information to beneficiaries.
- Account to the beneficiaries (which generally means preparing executry accounts).
- Consult with the other executors on executry decisions.

More information on these duties and functions is provided in the sections which follow.

Many of the tasks associated with these duties will be carried out on your and the other executors' behalf by the solicitors you appoint to help with the estate administration.

### **Investigating the value and extent of the deceased person's estate**

Before they can ingather the estate, executors must first know what is in it. Therefore, a key part of an executor's role and duties is to investigate the value and extent of the estate. You and the other executors (or the solicitors) must make detailed enquiries to identify all of the deceased person's assets and liabilities. This is important for the following reasons:

- All assets must be identified to enable you and the other executors to produce the inventory of the deceased's estate, which is required to obtain the **grant of**

**Confirmation.** More information on this is provided in the section below headed "Applying for and obtaining Confirmation".

- The estate must be valued to determine if there is an IHT liability and this can only be done if all assets and liabilities are identified, and valuations obtained.
- By signing and submitting the application for Confirmation and, where it is required, the IHT return, you and the other executors are declaring that:
  - you have carried out full and complete investigations into the estate; and
  - you acknowledge that you may be liable to penalties or prosecution if you have not fully investigated the estate and reported all assets on which IHT may be payable.

You and the other executors can carry out the investigation into the deceased person's estate yourselves. However, in most cases this is carried out by the solicitors after executors have provided preliminary information to the solicitors about the estate at an initial meeting. The information obtained at the initial meeting is used to identify assets and liabilities in the estate. The solicitors will then contact the various asset holders and institutions (usually in writing) to obtain details of the assets and accounts held by them.

If you fail to include any asset which forms part of the estate in the inventory for Confirmation, you and the other executors may be held liable for the loss to the beneficiaries. Strictly speaking, if you genuinely and reasonably believe certain items have no value, they do not have to include these in the inventory, nor do you have to obtain formal valuations to confirm this belief (you may instead rely on the advice of the solicitors). However, as a rule of thumb, all of the deceased person's assets should be included in the inventory and, if there is any doubt about an item's value, you should obtain a valuation (more information on this is provided in the section below headed "Obtaining valuations").

The investigatory stage can take several weeks or even months to complete. Much of the work goes on behind the scenes so, even if it appears that progress is slow, there will usually be activity in the background. The solicitors should keep you and the other executors up to date with progress. It will usually be appropriate to keep beneficiaries up-to-date too.

### **Obtaining valuations**

Obtaining estimated valuations may be enough for some assets (such as house contents) and are often used if there is no IHT to pay or the asset is of low value. However, you may need to obtain formal valuations for some assets regardless of circumstances (such as houses and shares) and will usually have to if:

- The asset is likely to have significant value (that is, generally a value of £1,500 or more).
- It is unreasonable or impossible to provide a reliable estimate.
- There is (or there is likely to be) IHT payable.

Formal valuations may also be useful for beneficiaries so they know the value of their inheritance. This information is helpful for beneficiaries' capital gains tax purposes and allows them to make sure inherited assets are adequately insured.

It is the executors' responsibility to provide a reasonable valuation of the estate which is as accurate as possible. The solicitors will advise you on whether formal valuations are necessary or if estimates will suffice. You are entitled to rely on any advice you receive from the solicitors on these matters.

### **Investigating debts and liabilities**

Executors have a duty to settle the debts and liabilities of the deceased person (and must do so before making any other payments or distributions). Also, generally, debts incurred by the deceased person before they died, together with funeral expenses, may be deducted from the value of the estate when working out if (and how much) IHT is payable. Therefore, it is important to identify and value the deceased person's debts so you and the other executors can discharge your duty to settle these debts and pay the correct amount of IHT.

The deceased person's creditors have a period of six months from the date of death within which to make claims for debts due to them from the estate (this is sometimes referred to as the "six-month rule"). If executors make distributions (for example, to beneficiaries, but also to creditors) during the six-month period following the death and there are insufficient funds from which to settle claims made by creditors within this six-month period, the executors may be personally liable for the sum due.

Strictly speaking, this means that you should avoid making distributions or payments from the estate within the first six months following the death unless you are confident there is more than enough value in the estate to settle all debts. The solicitors can advise on this.

For information on how to investigate the deceased person's debts and liabilities, ask to see our guide on executry administration.

### **Investigating gifts and lifetime transfers**

In addition to investigating the deceased person's assets and debts, assets which they gave away within a certain time before their death are also taken into account when assessing the IHT liability of the estate. The most common type of transfers which are taken into account are outright gifts made by the deceased person in the seven years before their death (known as potentially exempt transfers or PETs). Therefore, the solicitors may ask you and the other executors, and the deceased person's family, about any gifts or transfers of assets which the deceased made in the years before their death.

### **Applying for and obtaining Confirmation**

Once all assets and liabilities have been investigated and identified, you and the other executors should have the information you need to apply for Confirmation. This involves completing and submitting an application for Confirmation and, where necessary, the relevant IHT return (the appropriate form of the IHT return depends on several factors, including the size of the estate and the assets in the estate; more details are provided in the section below headed "The IHT return").

In most cases, the solicitors will prepare this paperwork on your behalf. In complex cases, you may have a duty to seek help and advice on the completion of the paperwork to comply with your duty of care. It is important the information in the forms is true and

complete as any false information or omissions may result in personal liability for you and the other executors. Therefore, you should always seek professional advice if you need it.

The application for Confirmation is a standard form (called a form C1). There are two versions of the form C1 and the correct version to use depends on when the deceased died.

The C1 includes details of the deceased person and the executors, and an inventory of the deceased person's assets. The inventory lists all the assets in the deceased's estate, together with the value of those assets at the deceased's date of death. Assets must be described in certain ways so the asset may be readily identified.

The form C1 also includes a summary of any debts and other liabilities which are deductible for IHT purposes, as well as certain other estate values which are necessary for IHT purposes.

### **The IHT return**

Executors have a duty to pay any IHT which is due in respect of the estate and, in some cases, must report the estate for IHT purposes even where there is no IHT liability. Therefore, an IHT return for the estate must sometimes be completed in addition to the application for Confirmation (form C1).

An IHT return is not required if the estate is an **excepted estate** and the death occurred on or after 1 January 2022 (provided the deceased was domiciled in Scotland when they died). Otherwise, if the estate is not an excepted estate, or it is an excepted estate but the death occurred on or before 31 December 2021, an IHT return will be required.

The IHT return for the estate is usually prepared at the same time as the form C1. This is because the information in the application for Confirmation is needed to complete the IHT return.

The form the IHT return takes depends on several factors, including the size of the estate and the assets in it. Generally:

- A form C5 is used where there is no IHT to pay because the estate is an excepted estate and the death occurred on or before 31 December 2021.
- A form IHT400 with accompanying schedules is used if the estate is larger, more complex, and/or there is IHT to pay.

The form C5 is a short and relatively straightforward form. It must be signed by one executor on behalf of all of them and is sent directly to the court, together with the application for Confirmation (form C1), the will and any other relevant documents.

### **Paying IHT**

In many cases where IHT is due, only some of it is payable within the first six months following the date of death. IHT which is attributable to certain assets (primarily non-liquid assets such as houses, land or business assets) may be paid in yearly instalments over ten years (or until the asset is sold, if earlier).

Where IHT may be paid in instalments, the first instalment is due within the first six months after the date of death. Interest runs on the remaining instalments. This means

that, if possible, it is a good idea to pay the remaining instalments of IHT as soon as possible after Confirmation has been granted to avoid large interest charges.

IHT which is attributable to other assets must be paid within the first six months following the death or interest will start accruing. The solicitors will advise on how much IHT is due by the end of the first six months and how much may be paid in instalments.

Executors cannot generally access cash in the estate until Confirmation has been granted, and Confirmation will not be granted until IHT has been paid. Therefore, executors cannot generally access estate funds to pay IHT in the first instance. Instead, there are other options, including obtaining a bank or private loan, or using the proceeds of a life insurance policy, where applicable. The solicitors will provide information on what options you and the other executors have for accessing cash to pay IHT.

### **Ingathering the estate**

Once Confirmation to the estate has been granted, you and the other executors may start to gather in and administer the assets in the estate. This will involve:

- Withdrawing funds held in bank accounts and instructing the closure of accounts where appropriate.
- Calling in any debts due to the deceased (and, in extreme cases, raising court action to recover those debts if necessary).
- Realising (or selling) assets and receiving the proceeds of sale.

As an executor, you have a duty to preserve and safeguard the value of the estate for the beneficiaries. Therefore, when selling assets, you should try to achieve the best sale possible. This will often involve achieving the best price possible, but other factors may be relevant and take precedence.

Sometimes, time can be of the essence when selling certain types of assets (particularly where the market for the assets is volatile). In these cases, do not unreasonably delay in instructing sales after Confirmation has been granted or you and the other executors may be liable for any loss suffered due to that delay.

In some cases, you may need to seek specialist advice to achieve the best sale when selling assets (for example, if you are selling certain property, such as landed estates or farms, or private shares, antiques or works of art).

Assets which have been left to a specific person in the deceased person's will (this type of legacy is called a specific legacy or bequest) should not be sold but should be transferred to that person unless there is not enough cash to settle the deceased's debts. If this is the case, assets which are the subject of specific bequests may have to be sold. The solicitors can provide advice on this if it becomes necessary.

The timescales involved in this stage of the executry administration process vary considerably depending on the assets being ingathered and realised.

The proceeds of any sales will be made over to the solicitors in the first instance, who will hold cash in accordance with the rules set out by the Law Society of Scotland on

holding client funds (for more information on these, see the Law Society of Scotland's website listed in the section headed "Further help" at the end of this guide).

### **Paying debts and the costs of administering the estate**

One of an executor's key duties is to pay the deceased's debts. Debts and liabilities must be paid first, before any distributions are made to beneficiaries.

The types of debts and liabilities you may need to pay include any:

- Outstanding debts incurred by the deceased person before they died.
- Outstanding balance due in respect of the funeral.
- Income or capital gains tax due by the deceased person for the tax year in which they died (and, sometimes, the previous tax year).
- Outstanding balance on any IHT loan.
- Outstanding IHT payable in instalments, if the asset to which the IHT relates has been sold.
- Expenses incurred in respect of the executory administration (including legal fees).
- Any Legal rights claims.

### **Making distributions to beneficiaries**

Once all known debts are paid, and provision has been made for upcoming expenses and costs (for example, the solicitors' final fee), distributions to beneficiaries should then be made in a specific order:

- First, any bequests of a specific asset (or collection of assets) specified in the will (called specific legacies or bequests) must be paid or made over. Examples of specific legacies include items of jewellery, collections, or artwork.
- Then, any cash legacies should be paid.

This will leave the residue. The residue of an estate is what is left after debts and liabilities have been paid, and all legacies have been satisfied. Sometimes, after payment of debts and legacies, there is nothing left to form the residue, but this is relatively rare.

Residuary beneficiaries are beneficiaries who are entitled to the residue. These beneficiaries cannot receive their whole share of residue until the very end of the executory administration, only after all debts and liabilities have been identified and paid (or cash has been earmarked to pay them) and after all other legacies have been satisfied. However, in some cases, interim payments of part of their entitlement may be made to residuary beneficiaries before the end of the administration. However, interim payments of residue should only be made if you and the other executors (and the solicitors) are confident that:

- There is plenty of cash available in the estate to make these payments.
- All debts and liabilities have been identified and provision has been made for them (that is, estate funds have been earmarked to settle them).

Unless these two conditions are (comfortably) met, you should not make any payments to residuary beneficiaries until the end of the executry administration. If you make distributions to residuary beneficiaries before the end of the estate administration and it turns out there is not enough cash left in the estate to settle all debts and liabilities, you and the other executors may be personally liable for these outstanding costs.

### **Preparing executry accounts**

Executors have a duty to account to the beneficiaries. This means you and the other executors must account and provide vouching for all:

- Assets and funds received into the estate during the period of the executry administration (including any income received and capital gains or losses realised) and
- Payments or transfers made on behalf of the estate from estate assets during the period of the executry administration (including the satisfaction of all legacies and bequests, and payments of all debts, liabilities and expenses).

This is done through the preparation of executry accounts. All invoices and receipts for costs you and the other executors incur and payments you make (including any receipts signed by beneficiaries to confirm they have received their bequests) should be retained and used to prepare the executry accounts.

The accounts are usually prepared towards the end of the executry administration and will include provision for the solicitors' fees and any other outstanding costs. They will also show the value of the residue and the final amount being made over to residuary beneficiaries (including any interest which has been earned and is due in relation to the residue).

In some cases, interim executry accounts may be prepared. However, this is rarely necessary except in cases where the executry administration runs for a long time over several years.

The executry accounts are usually prepared by the solicitors but must be reviewed and approved by all executors before you all sign the final version.

### **Do beneficiaries have a right to see the executry accounts?**

Residuary beneficiaries have a right to see and receive a copy of the executry accounts at the expense of the estate. However, other beneficiaries may only demand to see the accounts. You can agree with the other executors to provide copies to these beneficiaries, but the beneficiary should pay for any costs associated with this.

### **Winding up the estate**

Before finally completing the executry administration and winding up the estate, there are some final matters which, if applicable, you and the other executors must deal with (unless they have been dealt with earlier in the estate administration). The solicitors will advise if any of these apply, but they may include:

- In cases where there is IHT to pay, dealing with any queries or observations raised by HMRC in respect of the IHT return and obtaining a clearance certificate (this is a

- document from HMRC formally confirming that all IHT which is due has been paid).
- Completing the estate tax return and ensuring any income or capital gains tax liabilities arising from the estate administration are paid from estate funds.
  - Dealing with any variations beneficiaries wish to make in respect of their entitlement.
  - Taking advice on what to do with any trusts set up in the deceased's will.

After these matters have been addressed, the executry may be wound up and final payments made to the residuary beneficiaries in settlement of their entitlement.

The solicitors will retain key documents relating to the executry in case there are any disputes or claims made in the future by beneficiaries, and because they may be needed in the future when administering the estate of any surviving spouse or civil partner of the deceased person.

### **Words used in this guide**

**Administration of the estate:** Describes the tasks carried out by the executors of a person who has died. They involve gathering information on and assembling all the person's assets, paying the person's debts and any tax due, and handing over whatever remains to the people who are entitled to it under the will or the rules of intestacy. Administering an estate is also known as executry administration.

**Beneficiaries:** In the context of executry administration, the people who are entitled to receive money or other assets from the estate of the deceased person, either under the terms of the deceased person's will or under the rules of intestacy.

**Commissary:** The department in Scottish courts that deals with executry matters.

**Confirmation:** The legal process through which the appointment of executors is confirmed by a relevant court. Confirmation gives the executors authority to deal with the estate, including receiving payments due to the estate and making distributions of assets and payments due by the estate in accordance with the deceased person's will or under the rules of intestacy. Confirmation may not be required in some low-value estates or where all assets pass automatically to a surviving joint owner.

**Domicile:** Broadly, a person's domicile is the place where they have their permanent home or closest connection. It is not the same as residence, which is where a person currently lives.

**Estate:** Everything that belonged to a person who has died and all the person's debts.

**Excepted estate:** Generally, an estate where there is no IHT payable and a full IHT account is not required because it is a "low-value estate" (that is, one which is worth less than the IHT nil rate allowance threshold, currently £325,000), an "exempt estate" (that is, its gross value is less than £3 million (or £1 million if the death occurred on or before 31 December 2021) and the whole estate (or everything over the nil rate allowance) is being inherited by a spouse, civil partner or charity), or the deceased was not domiciled in the UK (that is, they lived abroad permanently) and their estate is worth less than £150,000. There are certain rules and exceptions to an estate being an excepted estate if

the deceased made certain transfers or gifts during their lifetime or if they had the right to benefit from certain trusts.

**Executors:** The people who are responsible for dealing with and administering the estate of the person who has died, and who have the legal authority to deal with the person's estate once Confirmation has been granted. They are often, but not always, members of the person's family. If there is a will, the executors are named in the will and called executors-nominate. If there is no will, executors are appointed by the court and are called executors-dative. A solicitor whose practice includes wills and executry administration can advise on who is entitled to be appointed as an executor-dative.

**Executry administration:** Another way of referring to the task of administering the estate of someone who has died (for more details, see the definition for "Administration of the estate" above).

**Grant of Confirmation:** A document issued by the **commissary** department of the sheriff court to the executors of a deceased person confirming that they have authority to deal with the deceased person's estate.

**HM Revenue & Customs (HMRC):** The UK government department responsible for the administration of UK taxes (including IHT), other than local authority taxes such as council tax. (Scotland's devolved taxes are administered by Revenue Scotland, with the exception of Scottish income tax, which is administered by HMRC.)

**Inheritance tax (IHT):** A tax on the transfer of assets from a person's estate. It is primarily charged on death where the value of a person's estate is over and above a certain value (although it can arise on some transfers made during a person's lifetime too). The rate of IHT on death is 40%.

**Intestate:** When someone dies without leaving a valid will, they are said to have died intestate.

**Legal rights:** claims which a deceased person's surviving spouse or civil partner and the deceased person's children (or, in certain circumstances, the deceased's remoter descendants) have to a share in the deceased's person's estate, which apply whether or not there is a will.

**Residue (of an estate):** the part of a deceased person's estate which remains after payment of debts, funeral expenses and taxes (including IHT), administration costs and other types of legacies.

**Rules of intestacy:** the rules that govern the administration and distribution of a person's estate where they have died without making a will (that is, they have died intestate).

**Small estate:** An estate worth less than a certain amount (which is set by law), before deduction of any of the deceased person's debts. The small estates limit is currently £36,000. If the estate is a small estate, a simplified procedure for applying for Confirmation may be followed and the sheriff court can assist with this for no charge. This often means the help of solicitors is not required.

**Specific legacy:** a legacy of a particular, defined asset (or assets) in a person's estate left to a beneficiary in the person's will.

*The information in this Factsheet is intended as a guide only and is not legal advice. Specific advice should be requested on individual situations. Any legislation cited reflects that in force at the date of publication. No action should be taken without consulting the detailed legislation or seeking professional advice. J & H Mitchell WS accept no responsibility for loss occasioned by any person acting or refraining from action as a result of the material contained in this Factsheet.*