

The 20 Probate Pitfalls

How can we help you?

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Your guide to probate

Anyone wishing to act as an executor should be aware of the duties and responsibilities involved before the process begins. There are a number of potential pitfalls to be aware of, including the following:

1. Arranging the funeral

An executor generally has the responsibility of arranging the funeral. You may need to involve different sides of the family which can lead to disputes. You may also need to pay for part, or all, of the funeral in advance from your own pocket.

2. Debts of the deceased

If debts turn up once the estate has been settled then you may end up settling these out of your own pocket.

3. Claims against the estate

If the estate is finalised too soon and someone makes a claim for provision under the Inheritance (Provision for Family and Dependents) Act 1975, then you may have to settle that claim from your own pocket.

4. Inheritance Tax and calculations

You may have to pay Inheritance Tax before you can obtain probate, consider how you are going to find this money. Interest may be payable on the Inheritance Tax if it is not settled within the correct timeframe.

When the estate is divided between exempt beneficiaries (such as charities or a spouse) and taxable beneficiaries, there are complex calculations to undertake.

5. Inheritance Tax on gifts

Some gifts made by the deceased during their lifetime are added to the value of the estate and Inheritance Tax is payable on the value of the estate, plus these lifetime gifts. Unless the deceased kept careful records these lifetime gifts could easily be missed. If you do not know of any gifts at the time of making the Inheritance Tax return but these are discovered later, you may have to pay heavy penalties and additional Inheritance Tax personally.

6. Missing beneficiaries

In the case that beneficiaries cannot be found easily, there must be a plan to find them.

7. Under age beneficiaries

What are your plans for their legacy or share of the residue?

8. Investing money for beneficiaries under 18

There are certain precautions to keep in mind, so you have to act carefully when you choose to invest. Beneficiaries have sued executors who have failed to invest the inheritance properly.

9. Deceased beneficiaries

What will you do with their legacy? If they were given a share in the residue, there are complex rules to decide what happens to their share.

10. Bankrupt beneficiary

You could face claims from creditors if you accidentally pay money to a bankrupt beneficiary. You may have to again pay the inheritance out of your own pocket.

11. No Will?

If the deceased left no Will, you will need to decide who is legally entitled to the estate. If the estate is not distributed correctly you may have to pay the rightful beneficiaries what they are due from your own pocket.

12. Validity of the Will

It is essential to seek legal advice if you believe there may be any challenges to the validity of the Will.

13. Homemade Will

There may be difficult legal questions in interpreting the wording of homemade Wills and proper advice should be obtained.

14. Trusts in the Will

If there is any trust in the Will it will be complicated to deal with the legal requirements and professional advice should be sought.

15. Assets abroad

How will you deal with assets abroad? The law in other countries is quite different from English law. You have a duty to collect all money due to the estate and this may prove to be difficult.

16. The house

You must work out the type of ownership of the property and deal with it accordingly. You cannot overlook this as it will cause problems when the property is next sold.

Part of the house may also be owned by a trust, which may not be immediately apparent without legal advice being sought. If the property is sold and the trustees are not consulted then you may be personally liable and have to 'make good' the loss to the trust from your own funds.

17. Sales of houses or shares at a loss

It is your duty to claim back overpaid Inheritance Tax if you sell at a loss within a certain time.

18. Capital Gains Tax (CGT) duties

If you sell assets of the estate at a profit you must ensure that the correct legal procedure is carried out to reduce the CGT liability for the beneficiaries where possible. In certain circumstances there are steps that can be taken to reduce any CGT that may otherwise be payable. If these steps are not taken, the beneficiaries may make a personal claim against you to recover the tax which would otherwise not have been paid.

19. Transferable Nil Rate Band and Residence Nil Rate Band (RNRB)

If the deceased has been previously married it is your duty to claim a reduction in Inheritance Tax where applicable. The new provisions for claiming the RNRB are extremely complicated and even some professional advisors have decided not to provide this advice for risk of getting it wrong.

20. A new Inheritance Tax problem

In a recent case the executors of a woman's estate have been ruled to be liable for Inheritance Tax on the value of her pension fund which she failed to withdraw while terminally ill. This could cause a problem even when you think you are dealing with a simple estate with no Inheritance Tax.

These are just a few examples of the problems to be considered when you act as an executor of a Will.

In addition to the above you should remember that you are liable for any action you take (or fail to take) on behalf of the estate.

Our solicitors are insured and so the beneficiaries are protected.

Personally, you do not have insurance to cover you for any mistakes that may occur throughout the process, which is why legal advice should be sought when acting as an executor.

The estate's beneficiaries, who may be your relatives, may sue if any of the following situations arise:

- You do not secure the property and loss is suffered
- You fail to insure the property and it is damaged by fire
- You diminish the estate through unwise investments
- You fail to pay taxes on the estate, in which case you may be personally responsible for interest and penalties
- You sell an asset of the estate without authority to do so
- You delay settlement of the estate unnecessarily or are slow in executing important transactions
- You do anything which may involve a conflict of interest
- You delegate decisions to others who have no legal authority in the estate
- You approve another executors breach of duty

Remember, it is your duty to deal with the administration of the estate carefully and properly.



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Private Clients

A personal approach to legal advice

Trust is the most important aspect when it comes to legal matters.

We believe it is essential that we take time not only to review your legal issue, but also get to know you. From business to personal affairs, a complete understanding of your circumstances and objectives is the starting point.

Once we can see the bigger picture, we can focus on the detail.

Talk to us about:

- › Arbitration
- › Buying and selling your home
- › Care Is Our Concern
- › Children
- › Cohabitation
- › Consumer law
- › Contested Will and estate claims
- › Debt recovery
- › Divorce and financial advice
- › Domestic violence
- › Inheritance tax advice
- › Landlord and tenant
- › Lasting Powers of Attorney
- › Litigation
- › Living Wills
- › Personal injury
- › Prenuptial agreement
- › Tax and succession
- › Trusts
- › Wills and probate



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For more detailed advice on probate pitfalls and how it can affect you and your personal circumstances, please contact your nearest HK Law office.

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