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Probate, or any other grant – Why Bother?

Following the death of an individual with assets in England & Wales, a grant (whether of probate or letters of administration) is generally required in order to establish legal title to those assets.

The exceptions are:

- Where the deceased died domiciled in Scotland or Northern Ireland, confirmation or a Northern Ireland grant, respectively, have the same legal standing as regards assets within England & Wales as a grant issued within England & Wales (s.1 Administration of Estates Act 1971);
- The Administration of Estates (Small Payments) Act 1965 (the 1965 Act) applies, mainly in respect of monies held with a building society or friendly societies where the amount held does not exceed £5,000; and
- Where there is a valid nomination in relation to: moneys held by a friendly society, industrial provident society or trade union (and the amount does not exceed £5,000); or in relation to National Savings Certificates or a National Savings Investment Account (where it appears the amount that may be released is unlimited).

The Administration of Estates (Small Payments) Act 1965

Unfortunately, the terms of the 1965 Act are often wildly misrepresented and conflated with the relaxed attitude of various financial institutions, causing the Public and many professionals to believe that it enables beneficiaries to demand the release of assets of, perhaps, significant value without the need to obtain a grant of any kind. The reality is that in the vast majority of cases the legal requirement is that a grant is required before the asset holder can be required to release the assets owned by the deceased. Having said that, various institutions will agree to release assets without a grant, usually subject to the person to whom they are released providing evidence of their entitlement under the will or intestacy and indemnifying the asset holder against any claims from third parties that might arise from the release of the assets without a grant.

At this point it might be worth noting that a number of jurisdictions do not permit such a relaxed attitude: for example, under Article 19 of the Probate (Jersey) Law 1998 a grant is required other than where the deceased is domiciled outside of Jersey and their moveable estate in Jersey does not exceed £10,000. At present there is no suggestion that any such regulation be imposed within the UK.

Delays with Grants, and alternative approaches?

HM Courts and Tribunal Service has recently advised that it can now take at least 16 weeks for a grant to be issued where there is a paper application. It is difficult to see this other than as an

incentive for anyone dealing with the estate of a deceased person to investigate other means of accessing "their" deceased's assets. There is a growing industry looking to facilitate arrangements to effect this, most of which rely upon the person claiming a right to the deceased's assets giving indemnities under which they are liable for any claim on the funds/assets released to them. Gathering in the assets, though, may only be half of the job as whoever instructs the facilitator may well be liable for satisfying the debts of the deceased (out of the funds/assets they receive) and to settle any outstanding tax issues.

Downsides of no Grant

Whilst recognising the desire to have early access to the deceased's monies and other assets and avoid the cost of probate (which might not be much different to the fees of any facilitator), the downside of administering an estate informally - i.e. without a grant - is rarely flagged.

Immediate thoughts are:

- Inheritance claims – until a grant is issued time does not start running against anyone with a potential claim under the Inheritance (Provision for Family and Dependents) Act 1975;
- Those dealing with the estate may not be advised to advertise for creditors, etc, and thereby secure the protection of s.27 Trustee Act 1925 against personal liability for any debts of the deceased;
- Without the will being submitted for probate, how will the original document be kept safe? If it is mislaid, that will likely have unforeseen consequences;
- Someone else might apply for a grant, as a result of which the institution that released funds/assets will want what it released to be restored to it so that it can comply with its legal obligation to account to the grant holder for such funds/assets;
- Any such grant could be issued to an earlier will, thus giving rise to a potentially expensive probate dispute;
- Various government agencies, such as the DWP, regularly check details of grants issued. If no grant is obtained knowledge of, say, a benefits overpayment might not be identified for some while and a demand for payment could be a very unwelcome surprise;
- Completing a grant application focusses the mind on what an estate is actually comprised of and, in some cases, that is the point when it becomes clear that an estate is liable to pay inheritance tax;
- Transferable nil rate band, the existence of a grant for the deceased's spouse's/civil partner's estate should simplify the application where TNRB, and perhaps the transferable residence nil rate band, is claimed by the survivor's estate.

Probate also fulfils a useful social function. May people trying to trace their roots look to find copies of their ancestors' wills or, if they have died intestate, details of the family who acted in their estate. With the upswing of interest in "where we come from", should we deny our successors the possibility of going back even one or two generations?

Loss of Dormant Assets?

It should also be borne in mind that every year many millions of pounds (in some years hundreds of millions) are transferred to "good causes" under the Dormant Assets regime as the beneficial owners cannot be traced. Before transferring assets into the scheme, the asset holders are required to try and trace the beneficial owners. Even if they can trace beneficial ownership into the estate of a deceased person, if there is no grant how does anyone prove their right to receive the asset? If they have to obtain a grant many years after the death, how easy will it be to provide details of the assets and liabilities at the date of death in order to complete the papers required to support the grant application. I suspect that much of the value transferred to "good causes" under the scheme should belong to the beneficiaries of estates where details of who dealt with the estate are unobtainable. Perhaps an avoidable cost of avoiding the cost of probate!

Summary

Those cases where it is imperative to obtain a "quick" grant are most likely to be where the deceased had agreed a sale of property and the sale cannot complete until the grant is issued.

In other cases, why the rush?

Despite the serious issues there are with the HM Courts and Tribunal Service issuing grants of probate and letters of administration, it is important that the protections such a grant provides to whoever is administering an estate (some of which are identified above) are not overlooked, especially just to "save a few bob". In most cases the driver behind going down the indemnity route may be impatience, having been told that it will take months just to get a grant, rather than a considered discussion on the pros and cons of adopting that process.

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