

PROBATE GUIDE
Nachlass-Führer

There are some differences between Germany and Great Britain/United States. We will support you in Great Britain and United States and manage for you in Germany (full service). This guide has been prepared for the benefit of those of our clients who find themselves with responsibility for winding up an estate.

It summarises the more usual aspects of administering an estate, and is intended to help you know what to expect or do and what work is involved at different stages in winding up the estate. Not all of it may be relevant to the particular estate with which you are concerned. Please do not hesitate to contact us for further information.

A WINDLING UP AN ESTATE

The main stages of the administration of an estate are as follows:

1. Collect all the deceased's papers

This is the first thing which needs to be done. Count up the number of institutions where the deceased had assets or money.

2. Find out if there is a Will

If there is, find its original and check it for any funeral directions.

3. Register the death

This has to be done with the Registrar of Deaths in the area in which the death took place and should be dealt with as soon as possible, as funeral arrangements cannot be finalised until this is done, only in Great Britain, not in Germany. You need to buy from the Registrar one death certificate for each institution you counted up at Stage 1 when you collected all the deceased's papers. You can be reimbursed from the estate for this expense at a later date in Germany about 15 Euros.

4. Who winds up the estate?

If there is a Will, its executors should administer the estate (in Great Britain/United States), and we act on their instructions. If there is no Will, we will advise on the persons (called 'administrators') who should wind up the estate and who will inherit. In this Guide, 'executor' is used in all cases unless the distinction is important. The administrator is only fact in Great Britain and United States.

5. Probate checklist

In order to administer the estate property, we need to have:

- The death certificates
- Full details and supporting evidence of assets and liabilities, e.g. pension book, passbooks, bank statements, share certificates, any relevant references and addresses
- Full details (including addresses and references) of the deceased's professional advisers, and of the heirs.

6. Verifying

Once we have all the appropriate papers and necessary information, we:

- notify the appropriate authorities of the death, e.g. bank, building societies, and
- verify the extent and value of the assets and liabilities, obtaining valuations where necessary

7. Frozen Assets

It may take no time in one case, several months in another, to collect the information we need. It depends on the types of assets and liabilities involved. During this time all assets are frozen (except, Erbschein und Vollmacht über Todesfall), with the exception of joint accounts, which can be immediately to the surviving co-owner on production of a certified copy of the death certificate.

8. Probate

Once we have the necessary information, we prepare the 'probate papers' for the executors (in Great Britain/United States) to sign and swear, and, once signed and sworn, we then apply to the court for the grant of probate (in the case of a Will) or of letters of administration (if no Will). 'Probate' is used in this Guide to cover all cases, unless the distinction is important. Probate is typically obtained within two to three months of the date of the death, or earlier for estates of lesser value. In Germany we will prepare the Erbschein.

9. Financing Inheritance Tax and Probate Court fees

When preparing the probate papers, we consider how to finance any Inheritance Tax liability payable (a) when applying for probate and (b) later, and any Probate Court fees payable when apply for the grant.

10. Planning for the payment of debts, legacies and interim distributions

Before applying for probate, we also plan ahead for paying any debts and legacies and, if appropriate, making an interim distribution on the 'residuary beneficiaries', and make the necessary proposals to the executors to carry out those tasks, so that these steps can be taken once probate is received.

11. Trustee Act notices to claimants

If executors mistakenly pay money to the wrong people (e.g. because they did not know of a debt or a legacy under a later Will or Codicil), they must usually pay the right people out of their own pockets and then try to recover the money from the persons who had been wrongly paid. The law allows executors to advertise for claimants and, provided certain conditions are met, then to distribute the estate. This only protects the executors in that capacity, however, and so if anyone has a valid claim against the estate he can still pursue this against the beneficiaries direct. Sometimes executors may feel it is not appropriate to advertise for claimants, as this may invite burglary of an unoccupied property but, in others, that it is most important. Generally, executors can advertise immediately after the death, but administrators should only do so after obtaining letters of administration.

12. Registering probate

Once probate has been received, official copies are then sent to relevant organisations, together with signed forms prepared at step 10 above, carrying out the executors' instructions to close accounts and sell/transfer assets, etc.

13. Inheritance Tax (in Germany Erbschaftsteuer)

An estate liable to inheritance tax will normally take several months longer, and sometimes years longer, to wind up than a non-taxable one.

Whether an estate is taxable, and if so the amount payable, can depend on a number of factors including whether the deceased:

- had an interest under a trust or settlement at any time during the seven years prior to the death
- had made lifetime gifts,
- and the executors must fully investigate these points.

There are numerous inheritance tax exemptions and reliefs. In general, taxable lifetime gifts would be those made not more than seven years (in Germany 10 years) before death, certain small gifts made each tax year being disregarded.

The delays in winding up a taxable estate may be due to the time taken to:

- obtain final clearance from the Capital Taxes Office;
- negotiate asset values with the Capital Taxes Office, because some asset values cannot be determined at the date of death;
- agree the income tax/capital gains tax position at the date of death. The inheritance tax position (which is dealt with by a completely different part of the Inland Revenue)

14. Completion of the administration

During the administration of an estate the file is regularly reviewed and progress reported to the executors (Testamentsvollstrecker). Estate accounts are prepared and copies sent to the executors for approval. Inheritance Tax clearance must first be obtained before winding up a taxable estate. Once the executors have approved the final estate accounts, it can then be wound up and what remains distributed to the residuary beneficiaries or trustees of any continuing trust arising on the death.

15. Income tax and capital gains tax of the deceased

We will be happy to deal with finalising the deceased's tax affairs to the date of death, unless this is dealt with by the professional advisers who acted for the deceased prior to his death. Income tax and capital gains tax returns of the personal representatives are prepared to the closure of administration.

16. Court work

If a Will is disputed, or claims made against an estate, our litigation department will normally represent you at the court (Nachlassgericht).

17. Tax position of the residuary beneficiaries

(a) Information we need from the beneficiaries

As you may appreciate, the executors are obliged to account to the appropriate Inspector of Taxes for income received and capital gains made during the period of administration. They also need to provide certain information to that Inspector for each residuary beneficiary who receives income from the estate, including his full name and address, tax district, reference, and national insurance number. Additionally, for reasons explained below, we will need to know whether a beneficiary is a basic rate income tax payer, close to being a higher rate tax payer, or already a higher rate tax payer.

(b) Distributing income during the administration period

The income which is received from an estate counts towards that person's total income for the purpose of calculating whether he pays income tax and if so, whether at the basic rate or the higher rate. Under the present income tax regime as it affects executors and beneficiaries, it is important (so far as practicable) for the executors to distribute income to the appropriate beneficiaries within the tax year in which it arises. Failure to do this by accumulating income may cause "bunching" of a beneficiary's income in a given tax year, provoking an avoidable higher rate tax liability. The risk of this occurring will depend on whether, in a given tax year, a beneficiary's existing income and the amount of income from the estate to which he is entitled places him close to the higher rate income tax threshold.

(c) Advice to beneficiaries receiving income during the administration period

A beneficiary should, whenever receiving a distribution of income (whether as part of a distribution comprising capital as well) receive an income tax deduction certificate from R185E. He should immediately send it to his tax adviser, if any. Failing this, if he completes annual tax returns or claims, he may either send the form to his Inspector of Taxes immediately, or when next submitting a tax return or claim, declaring the net income received in the appropriate section of that return or claim form.

B SOME LEGAL TERMS EXPLAINED

Administration period

The period between the date of death and the date of the final estate accounts.

Administrator

A person responsible for winding up the estate of a person who has died leaving no will or the executors of whose will are unable or unwilling to act.

Appropriation

The transfer of an asset instead of its sale proceeds on account of a legacy or share of residue.

Codicil

A legal document by which a person amends his will.

Contingent gift

A gift conditional on the happening of a particular event, e.g. a beneficiary reaching 21.

Estate accounts

Accounts recording the financial transactions during the administration period.

Executor (in Germany Testamentsvollstrecker)

A person appointed by a will or codicil to wind up the estate.

Grant of representation

The court order authorising a person to deal with the assets of the deceased. If a will is proved by executors, it is more precisely called a grant of probate; otherwise, a grant of letters of administration (with or without a will annexed).

Intestacy

Where a person dies without making a will fully disposing of all his assets. The administration of "intestate" estates is largely governed by the Administration of Estates Act 1925.

Legacy/bequest/devise

A gift of chattels/money/other assets by will.

Personal representative

An executor or administrator.

Power reserved

Where a named executor declines to act as such, but reserves the right to do so at a later date.

Renouncing probate

Where a named executor signs a legal document which cancels his appointment from the start.

Residuary beneficiary

A person entitled to share in the residuary estate.

Residuary estate

What remains of the estate after payment of all debts, legacies and all taxes and expenses.