Simpler Law.

Probate Overview.

A guide to the features and processes of probate

Simpler Law.
Who Are We?

Simpler Law is part of a group of companies that specialise in end of life planning and private client services. Through acquisition and growth, it now has over 200,000 satisfied clients and has a 5-star Trustpilot rating.

Simpler Law is a nationwide company with clients throughout England, Wales, Scotland, and Northern Ireland. Whilst the head office is based in Lincoln, it has offices in Leicester, Cardiff, Birmingham, and the Northeast.

Our approach is mainly through a specialist phone-based team, but we also have a nationwide network of Advisors, to enable us to visit you in virtually every location across the UK, if required.

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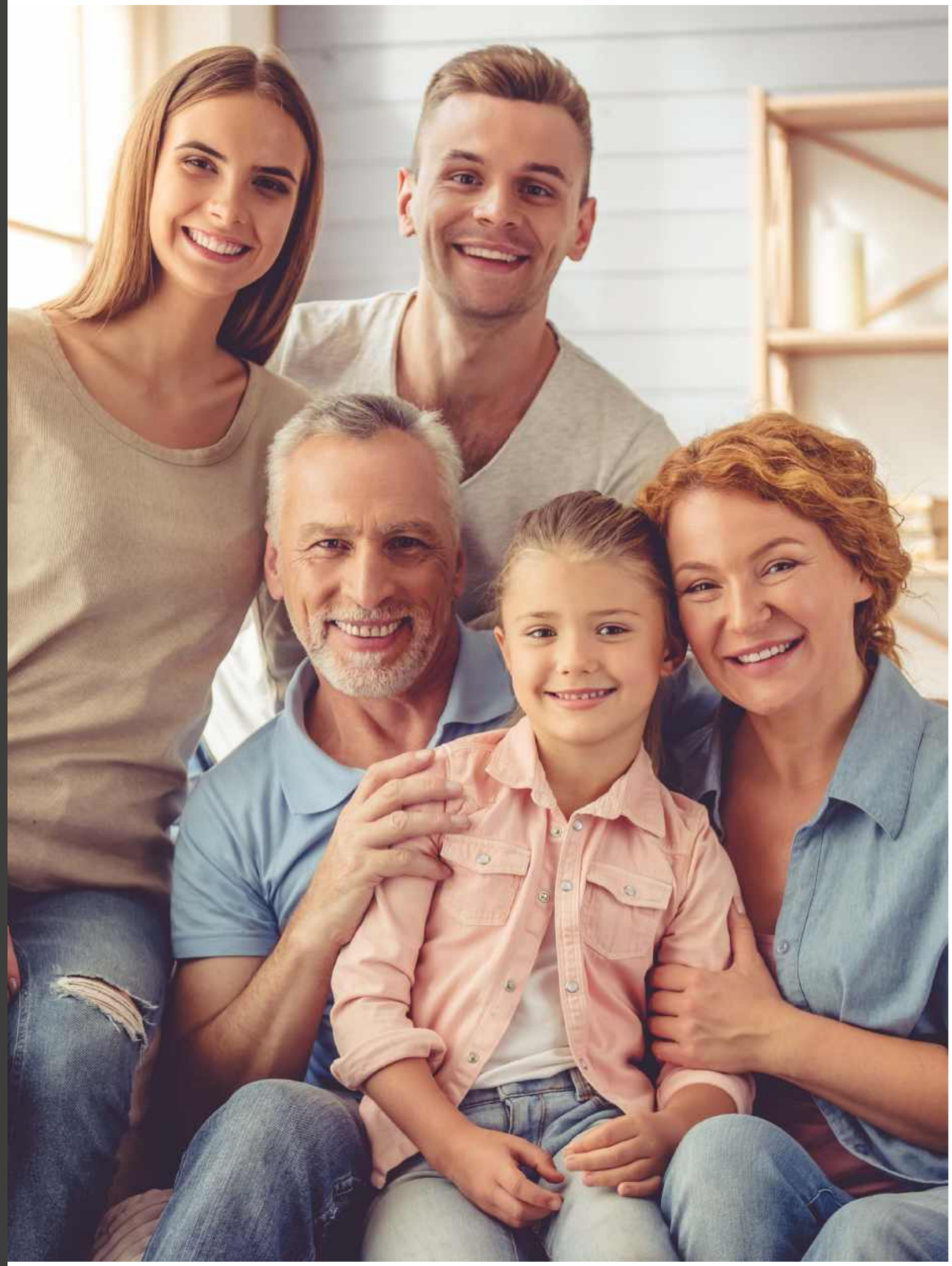


Probate Overview.
What is Probate?

Probate is a generic term used to cover the legal process under which the authority to deal with the assets of the deceased is granted to the personal representatives of the estate. People tend to refer to 'obtaining probate' whether there is a valid Will in place or if the deceased has died intestate.

In fact there are a number of different 'Letters of Representation' that may be obtained depending on whether the deceased left a Will or not. The most common being as follows:

Grant of Probate

Used where a valid Will is in place and the named executors apply to take out the grant.

Letters of Administration (with Will annexed)

Used where there is a valid Will but the executors named are unable or unwilling to apply for the grant, or a gift under the Will has failed and falls under the intestacy provisions.

Letters of Administration

Used where there is no valid Will and the deceased has died intestate.

The process is sometimes also known as 'proving' the Will as the Probate Court will check the Will to see if it is attested correctly and appears to comply with the legislation contained within the Wills Act 1837 in respect of its validity.

Probate Overview.
Grant of Probate

Why is it needed?

The Will is a legal declaration of the wishes of the testator. The Will gives authority to the executor to act and the Grant of Probate confirms that authority.

The appointed executor has the authority to act immediately on the death of the testator as they are named within the Will (subject to it being proven that the Will in question is valid and has not been revoked by a later Will).

An administrator (a personal representative not named in a Will) has very limited power to act without a Grant and the power is not retrospective. This means that the administrator has no legal authority to act until the Court issues the Letters of Administration.

The Grant therefore confirms the authority of an executor and confers authority on an administrator. Many organisations will require sight of some form of Grant before they will release funds.

When is it needed?

If estate assets are below £5,000 a Grant should not be needed, though there are a few exceptions to this rule and each institution will have its own internal policies in relation to releasing assets without a Grant being needed.

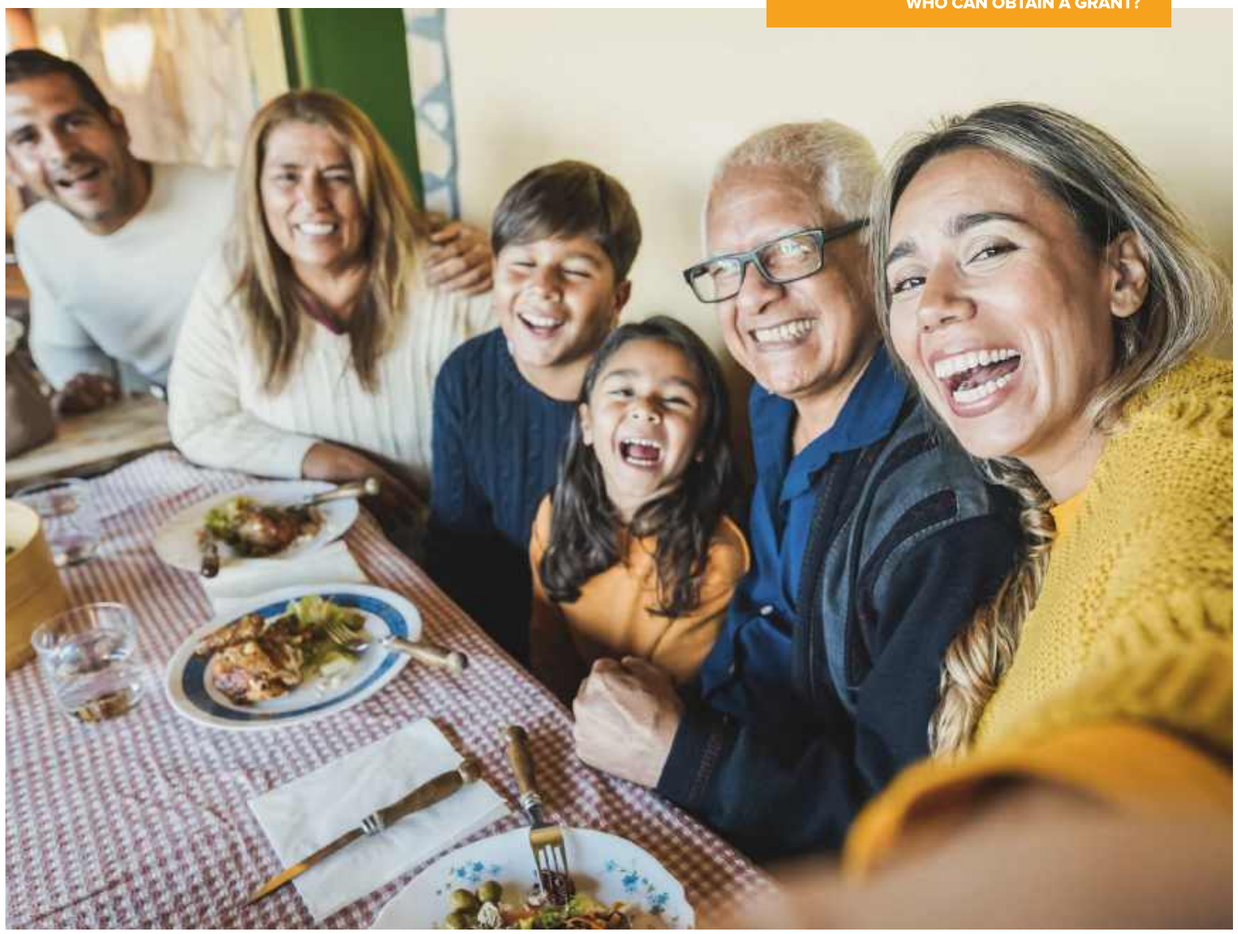
1. Whenever land is held (solely or tenants in common) a Grant will usually be required to deal with the land. This includes a sale of the property or a transfer of the property to a named beneficiary. Where property passes by survivorship (joint tenants) a Grant would not be required.

2. Financial Institutions, Banks and Building Societies – there is no set limit in respect of the value of funds they will release without a Grant. Each have their own rules though the usual range is £5000 to £20,000. The executor or administrator will need to check individually with each institution for their requirements.

3. Stocks and shares – a Grant is usually required unless the holding is nominal and this will still be at the discretion of the company concerned.

4. Life Policies – the executor or administrator will need to check with the Policy provider as requirements vary and will depend on how the policy is held. A policy held in trust for example will pass directly to the fund trustees who will distribute the proceeds. These will not form part of the deceased's estate for distribution or inheritance tax purposes.

A Grant is not normally required for chattels, cash, joint property (survivorship) and certain trust assets.



Probate Overview.
Who can obtain a Grant?

The named executors in the Will are entitled to obtain the Grant or, if they do not wish to act, the residuary legatee(s). Any one of the named executors can act in their own right or they can apply jointly.

A named executor can renounce their position as executor and this then passes to the substitute executor. A named executor can also appoint a professional to act in their place.

If there is no Will, the intestacy rules set a strict order of who can apply to the Court (contained within the Non-Contentious Probate Rules 1987) – but in simple terms it follows this order; the Spouse, children (and grandchildren if the child has pre-deceased), parents, brothers and sisters of whole blood (and their children).

There can only be a maximum of four executors named on the Grant though, in theory, there may be more named within the Will itself. Minors cannot act in their own right although a Grant can be obtained on their behalf.

This can add complications however so a minor should not be named within a Will as an executor.

Probate Overview.
Process to follow before Grant application

Check there is a valid and correctly attested Will

This will involve reference to the Wills Act as previously mentioned and may involve obtaining a statement from the witnesses to the Will in the form of an Affidavit.

Ascertain beneficiaries and the nature and extent of their gift

They may need to be located and a genealogist may be required to establish and locate all the beneficiaries, particularly in the case of intestacy. If there are insufficient assets within the estate to pay all the gifts (after the payment of debts) then there are strict rules to follow in relation to how gifts might fail or reduce.

Ascertain the extent of estate assets and liabilities

Note the following:

- The value of assets must be at date of death and include interest accrued but not yet paid.
- Valuers must be instructed to value in accordance with IHT guidelines (even if it is known IHT will not be payable).
- Allowable discounts must be applied to jointly held property.
- Include a calculation of income tax and capital gains tax to the date of death.
- HMRC will look closely at values where an estate is near the IHT nil rate band.
- Include gifts in last 7 years and assets subject to Gift with Reservation of Benefit rules.

Protect the estate assets

This will involve ensuring that any valuable assets, particularly a property, are insured throughout the administration period. An executor will be liable for the loss of any asset that is not adequately protected. Note that many insurance policies have rules about an empty property so check carefully with your provider to ensure this is covered.

Inheritance tax return to HMRC

This is required in most cases unless the estate is very small. There are two types of return that might be required. In the majority of cases a limited return will be acceptable (IHT 205). This applies where the estate value is less than £325,000 or where the bulk of the estate is spouse or charity exempt and the gross estate does not exceed £3 million.

In a larger estate, where IHT is due, a full return (IHT400) will be required along with any appropriate supplemental forms. A transferable nil rate band can also be claimed on second death where it has not previously been used up to £325,000 however HMRC will require evidence of the availability of the unused portion to transfer.

There are additional allowances and exemptions in relation to property passing to the descendants of the deceased (the residence nil rate band), charitable gifts and some business assets.

These are all claimed as part of the IHT return. Any IHT due must be paid prior to the application for the Grant which can lead to funding problems for executors as the testator's assets will be frozen. (IHT is payable within 1 year of death, interest is chargeable after 6 months).

Make a Probate grant application to the court

If applying for probate yourself without seeking specialist assistance there are two ways to apply for the Grant.

You can apply online at **www.apply-for-probate.service.gov.uk** however you must have the original Will and death certificate and the deceased must have lived in England or Wales. You must also have already completed the IHT return to report the estate's value. The Court fee of £300 is paid online. You will still need to send the original Will to the Court but ensure you keep a copy as they will retain the original Will. Do not remove staples or binding from the original.

You can apply by post by completing form PA1P or PA1A depending on whether there is a Will or not. You will need to pay the Court fee of £300 by sending a cheque or calling your district probate registry before sending the application. You will need to send the original Will and two copies along with the death certificate. Make sure you use a tracked postal service to send the original documents.

Publish statutory notices

A notice must be placed in the London Gazette announcing the death to allow anyone that was owed money by the deceased to come forward. A notice also needs to be placed in the press local to where the deceased lived. They give notice to creditors and other people who may have an 'interest' in the estate that any claim must be received by a specific date (at least two months from the date of the notice). The notices cost approximately £200 though this will vary between regions.

Once the notices have expired the executor may then distribute the estate in the knowledge that they will not be personally liable should claims or debts subsequently come to light. A claimant may still come forward after this time but, as long as they were not aware of the claim, the executor will not be personally liable for it.

PROCESS POST GRANT

Probate Overview.
Process Post Grant

Open an executor account to hold the estate funds

You will need to maintain accurate accounting records throughout the administration as this will help you prepare the estate accounts when the administration has been completed.

Collect in all assets

This includes money from bank accounts, proceeds from the sale of any assets or investments and any debts owed to deceased. Don't forget that the deceased may be due a refund from HMRC in respect of income tax paid during the tax year to the date of death.

Pay any debts and liabilities

There is a strict order in which debts must be paid from an estate so care is required. Attention must also be paid to any directions within the Will in relation to any debts. If an estate is insolvent (doesn't have enough assets to pay all the debts) then it is important to advise creditors as some may be willing to write off a debt that is owed. Others may insist on payment even if they receive less than the original debt owed. The method for calculating the reductions in payment must be followed as the executor could be personally liable for any mistakes they make.

Complete an income tax and CGT return for the administration period

Where a liability has arisen you must account to HMRC for all additional tax payable.

Adjust IHT payable where necessary

The amount payable may have changed from the original calculation if assets have increased or decreased in value from the original valuation given on the IHT form submitted. This is very common where an estate property has been sold for a different price to that first anticipated.

You can use form IHT35 to claim relief when you sell 'qualifying investments', that were part of the deceased's estate at a loss within 12 months of the date of death. After the final account has been agreed you must obtain a Certificate of Clearance or closing letter from HMRC.

Distribute legacies in accordance with the terms of the Will

You will need to arrange for the physical or legal transfer of ownership of assets passing to beneficiaries which may include the conveyance of a property.

Don't forget to obtain valid receipts from the beneficiaries as evidence that the assets have been received by them. If the gift was given subject to IHT or the costs of distribution, then don't forget to take this into account. The wording of the Will dictates this.

Distribute the residuary estate

Again, this includes the legal or physical transfer of assets to the beneficiaries. If there are a number of recipients, larger items may need to be sold to allow the estate to be divided.

For smaller items you may need to consider the executors power of appropriation (transferring an item to a beneficiary in satisfaction of their inheritance) or, if a beneficiary does not want to receive their share, you may have to consider a Deed of Variation or Disclaimer to change the distribution of the estate.

As part of the distribution, you may need to transfer assets to the trustees of any trusts contained within the Will. We always advise you seek our expert assistance if this is the case.

Complete and distribute R185's to beneficiaries

Any transfer of an asset or income to a beneficiary during the administration period will trigger the need for a R185 (a return of the income tax paid by the estate to provide to a beneficiary to enable them to complete their own tax return).

Preparation of estate accounts

The estate accounts should include a full breakdown of capital assets and liabilities of the estate. They should also account for all income and expenditure during the administration period.

Details of distributions made to beneficiaries should be clearly shown so that the ultimate destination of all assets is clear. The executor should ensure they get approval of the accounts by the residuary beneficiaries in order to release them from any further personal liability.

Probate Overview.
How long does it take?

The court application for the grant of probate, once submitted, takes 16-20 weeks depending on how busy the court is and which office you use. Getting to that point can take months but usually 1-2 months to collect in the relevant asset information.

Following receipt of the grant there is the 2-month statutory notice period referred to previously. Also, consideration should be made for any potential claims under the Family Provisions Act (IPFDA).

These have to be submitted within 6 months of the date of the grant and, if you are notified of a claim, you will not be able to distribute any of the estate until the claim has been decided. You will then need to distribute the estate in accordance with any order of the Court.

As an average the whole process can take 12-18 months although some cases can take much longer especially those of high value with multiple assets, those with assets in foreign jurisdictions, cases of intestacy where there is uncertainty as to the identity or location of beneficiaries and those with contentious matters such as claims of invalidity of the Will or claims against the estate.

Probate Overview.
How much does it cost?

Even if a professional executor is not used costs will be incurred in connection with the administration of the estate, court fees and statutory notices along with out-of-pocket expenses. Accountant's fees may also be incurred if one is used to prepare the estate accounts. These can generally be paid by the estate as long as valid receipts are obtained and the cost is a legitimate administration expense.

A hidden cost is also the time and effort that will be required to gain a Grant of Probate and no payment can be claimed from the estate by a lay executor.

Professionals tend to charge a percentage of the value of the gross estate + VAT + disbursements, an hourly rate or a combination of the two. These are usually chargeable directly to the estate only once a grant has been obtained unless the professional you use has been instructed in obtaining the Grant only rather than administering the full estate.

Further fees may be incurred for contentious matters, foreign assets, business assets or any part of the administration which requires a third-party service such as a valuation.

General considerations.
Executors and beneficiaries

Executors

Ensure the executors named are capable of acting and willing to take on the role. They can refuse to act or appoint an Attorney to assist but this can make the administration more difficult. Alternatively, they can instruct a professional executor.

Executors have personal liability for loss to the estate from a breach of duty e.g: failing to protect the value of assets, failing to pay the people entitled or paying the wrong person. A breach of duty can also arise from the failure to do something. Ignorance of the process is not an excuse. HMRC have a new penalty regime and penalties are now due for careless mistakes.

An executor is legally responsible for administering the testator's estate in accordance with the terms of the Will. An executor can be held personally liable for a loss to the estate resulting from the actions they take; as well as any actions they do not take.

Choosing a close friend or family member as an executor risks placing an unnecessary burden on them as the process can involve a great deal of time, effort, stress and even financial costs; all of which can be daunting.

Appointing a close family member will mean they will have to undertake potentially complex administration tasks, including court paperwork and returns to HM Revenue and Customs, at a time when they also have to deal with the emotions of losing a loved one.

By instructing a professional to act as executor (either in the Will or by the named executor after the date of death) means the professional can take on the responsibility of the administration as soon as they are contacted.

Beneficiaries

Ensure all the beneficiaries are traceable. The testator may have made provision for a long-lost family member in the Will. This will subject the estate to costs and delays in either tracing the beneficiary, obtaining indemnity insurance, or alternatively obtaining a court order to allow the estate to be paid out on the basis that the missing beneficiary is dead.

Transferable Nil rate bands

On second death, where they have not been used by the first spouse to die, the nil rate band and residence nil rate band can be applied to the estate of the last spouse to die. If 100% of the allowances are available to claim the process involves the completion of a form in addition to the standard IHT return.

However, if the first spouse has left any non-exempt gifts in their Will, no matter how small, the full nil rate band is not available to transfer and a full IHT return will be necessary. Whilst this has no impact on the client themselves during their lifetime, it may mean that additional expenses will be incurred in obtaining probate.

E.g. The Will of first spouse leaves a specific gift of a watch (value £100) and everything else to spouse. On second death, the full IHT return will be required which may incur probate costs way above the value of the watch. An alternative would be to leave all to the spouse with a non-binding letter of wishes in relation to any small gifts.

Gifts to minor children / contingent gifts

Where the Will leaves a specific gift or residue, and the sum cannot be paid over immediately the funds will have to be held in trust.

Where small gifts are made the testator should be made aware that the cost of managing this trust may outweigh the benefit of the trust.

E.g. 1% of residuary estate is left between grandchildren subject to them attaining age 21. The value of 1% of the estate was circa £400 and the three Grandchildren ranged from 6 months to age 8 years meaning the monies would have to held for up to 21 years. If a professional trustee was appointed the charges involved in administering this fund would negate any value of the gift. However, if a lay trustee was appointed would they manage the funds correctly?

Consider gifting small sums absolutely.

General considerations.
Specific gifts and residue

Where the Will contains specific gifts and residue, ensure it is clearly stated where any burden for liabilities may lie, i.e. Mortgages and the IHT burden. This can have a huge impact on the residuary estate.

For example, an estate with a value of £500,000 consists of a house with a value of £400,000 (with a mortgage of £150,000) and Bank accounts and investments of £250,000 with a specific gift of the house to Beneficiary 1 and the residue to Beneficiary 2.

Assuming no residence nil rate band is available:

If the house is gifted free of IHT and Mortgage

- Beneficiary 1 will receive £400,000 worth of assets.
- Beneficiary 2 will receive £250,000 less £70,000 IHT and £150,000 Mortgage leaving only £30,000.

If the house is gifted subject to mortgage, the IHT will still be taken from residue

- Beneficiary 1 will receive £400,000 asset but will have to take responsibility for the mortgage or repay it.
- Beneficiary 2 will receive £250,000 less £70,000 = £180,000

If the house is gifted subject to mortgage and IHT

- Beneficiary 1 will receive the £400,000 asset as above but will also have to find their share of the IHT bill that relates to the value of the property ie £35,000. As they are getting no liquid assets this means they may have to sell the house to repay the debt, perhaps not what the testator intended.
- Beneficiary 2 will receive £250,000 less the share of IHT payable on the residue.

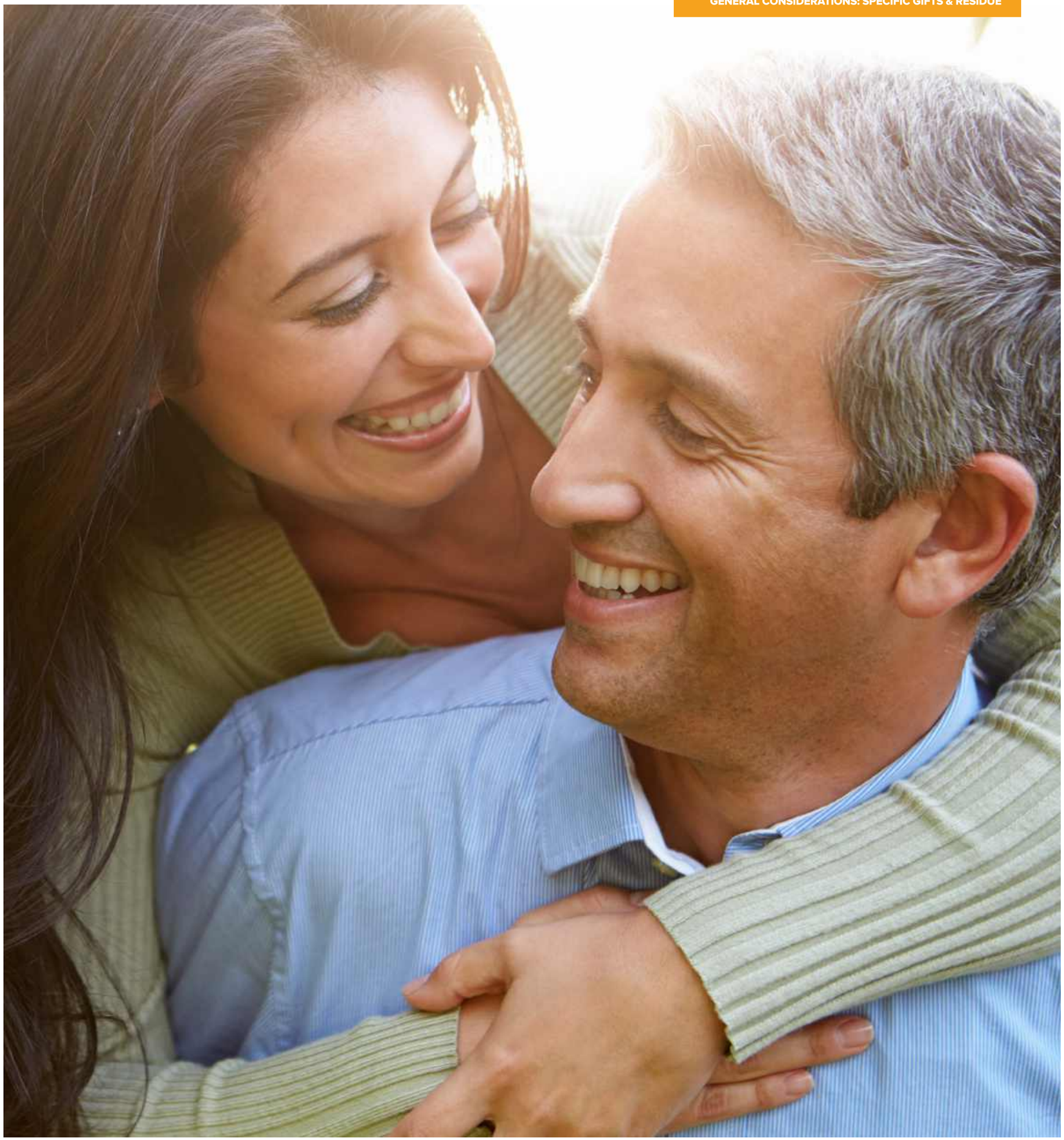
If a testator is aware of family issues the best advice is to appoint a professional executor. An impartial adviser can take control of the situation and stop any contentious matters developing, or deal with them if they do. A professional executor can act as an intermediary and try to resolve matters before they escalate.

Unfortunately, the closest of families can, and do, fall out after the death of a family member. Most commonly children after the death of a parent. Where a testator is sure the family will act as executor a professional substitute is also advisable.

If the Testator excludes any family member or dependant, then there may be a claim under the Inheritance (Provisions for Family and Dependants Act) if they feel the testator has not made reasonable provision for them. The time limit for such claims is 6 months from the date of the Grant. This will apply even if there are specific exclusions within the Will (the court will take these reasons into account along with all other considerations).

Also, an excluded beneficiary may incorrectly lodge a caveat which will block the issue of a Grant of Probate. They may assume this is the best course of action to take but actually the issuing of the Grant is required in order for them to bring a claim. A caveat lasts for 6 months but can be renewed without limit. Once a caveat is lodged it can potentially take months to get the caveat removed and it is likely that legal costs will start to escalate.

The claimant will initially have to pay their own legal costs, but should this matter progress further, costs may become an issue for negotiation or by order of the court. Obviously, any action will delay the administration of the estate quite considerably.



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