Practical Problems in the Administration of Estates.

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Friday 16th May 2003

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Scope for post death planning

From the date of death onwards we are operating within the confines of the will or the position on intestacy. The quality of the will depends very much on the experience of the person who has drafted it. The will may be adequate in its construction, but its relevance to the circumstances as of the date of death is just as important. The provisions of a will cannot be altered or stretched to meet the circumstances that prevail at death no matter how reasonable the application may appear and in the absence of any specific legislation governing the variation of wills in this jurisdiction we can struggle as advisors to a Personal Representative to make the will fit.

There are a limited number of areas that can be examined for their effectiveness for post death planning. In this paper I will consider the area of disclaimers, deeds of family arrangement and appropriation. I will also look at the need to protect the Personal Representative in an administration and finally consider some common problems in finalising an administration.

Disclaimers

We are familiar with the concept that no beneficiary can be compelled to accept an inheritance. There is therefore an opportunity to disclaim, which can in limited circumstances, result in the desired effect. To qualify as a disclaimer, the refusal of the inheritance must take place before the beneficiary accepts any benefit from it and so it is a question that should be considered early on.

It is not possible to disclaim in favour of a particular person, i.e. the disclaimer cannot contain any element of direction to a third party. In that case it would be a gift and there would be an assurance with stamp duty and gift tax implications. In effect it would take on the nature of a Deed of Family Arrangement, which I will deal with below. Although a beneficiary is free to disclaim one or more benefits he may not disclaim part of a benefit (i.e. a beneficiary may disclaim a specific bequest while taking the benefit of a share in the residue, but he cannot disclaim part only of the specific bequest or part only of the residue or the share in intestacy). However, if the will provides that the beneficiary is free to disclaim part only of a single inheritance, then he can do so. However, in the absence of such a direction in the Will, and quite frankly I have not across very many, a partial disclaimer as set out above cannot be effected.

What is the effect of a Disclaimer?

Where an inheritance under a will or Intestacy is disclaimed, the property will automatically pass to the person next entitled under the Will or under the Rules of Intestacy.

Prior to the provisions of section 6 of the Family Law (Miscellaneous Provisions) Act 1997, there was uncertainty as to the distribution of a disclaimed estate or part of a disclaimed estate on intestacy. The problem essentially can be summed up by saying there were and still are two schools of thought in relation to such disclaimers.

1) They are effective to pass an interest in the property to the persons who are next entitled (or if the persons that are disclaiming are in the same "class" of next of kin to the remainder of that class).
2) A disclaimer of an intestate share is not so effective because section 67(2) of the Succession Act states that certain portions of the intestate's property shall vest in the spouse and issue.

Those who follow this second school of thought hold that some of the sections of the Succession Act which provide for who is entitled to an intestate's estate, use mandatory language and accordingly there is no possibility of effectively disclaiming an intestate's share. It is still quite a common idea among a substantial number of practitioners that an intestate's property vests automatically in the person specified in the Succession Act, and thus it is impossible for a beneficiary to decline to accept it. It could be argued that on a disclaimer by such a person, the interest does not revert back to the estate, since never having been accepted in the first place, it cannot be re vested.

Section 73 of the Succession Act provides:

> 73- *"In default of any person taking the estate of an intestate, whether under this part or otherwise, the State shall take the estate as ultimate intestate successor."*

The second school of thought therefore holds that it is impossible to disclaim a share on intestacy since the effect is to bring about forfeiture to the State. In England in the decision of *Re Scottish Widows .v. Friends of the Clergy Corporation (1975) to AER1033* it was decided that where a member of a class entitled on intestacy disclaimed an interest it passed to the remaining members of the class and if the class was exhausted on disclaimer to members of the next class. This prevented property escheating to the crown *bona vacantia* (see Mellows the Law of Succession (fifth edition) paragraph 12.53).

To clarify this situation the following section of the Family Law (Miscellaneous) Provisions Act 1997 was passed:-

Section 6 of this Act inserts a new section 72A into the Succession Act, 1965, which deals with the distribution of a disclaimed estate, and clarifies the issue whether or not a Deed of Disclaimer in an intestate estate is effective to pass title. It reads as follows:

> 72(a)*"Where the Estate, or part of the Estate, as to which a person dies intestate is disclaimed after the passing of the Family Law (Miscellaneous) Provisions Act 1997 (otherwise than under section 73 of this Act) the estate or part as the case may be shall be distributed in accordance with this part.*
>
> *a) As if the person disclaiming had died immediately before the death of the intestate, and*
> b) *If that person is not the spouse or direct ancestor of the intestate, as if that person had died without leaving issue."*

In short, it provides that where a person disclaims on intestacy after the 5th of March 1997, that person shall be regarded as having predeceased the intestate when distributing his estate. It further provides that if the person disclaiming is not the spouse or lineal ancestor of the intestate he will also be regarded as having died without issue. However, this only applies to disclaimers after 7th May 1997 and therefore for all deaths prior to this date the previous discussion is still relevant. There is no controversy in relation to disclaimers in a testate estate, because the disclaimer of a prior interest under a Will will simply accelerate subsequent interests (subject to any contrary intention appearing in the Will).

The effect of disclaimers on the right to extract a Grant

It should be pointed out to any client intending to disclaim that in addition to losing any entitlement to a share in the estate, the person disclaiming will also lose any right that they have to extract a Grant of Representation to the estate of the deceased, in accordance with Rule 79(5) of the Superior Court Rules, unless a grant has been extracted before the disclaimer is signed.

In the event of a disclaimer being signed after the person disclaiming has applied for a Grant, but before the Grant has issued, the application should be withdrawn as the applicant would no longer be one of the persons "having a beneficial interest" as provided for in rule 79(5). Please note that if an applicant's right to a Grant arises from a disclaimer having been signed by a person who had a prior right, then the original of such a disclaimer must be lodged with the Oath of Administrator in the Probate Office.

The following are some examples which illustrate how the effect of a disclaimer is not always what your client anticipates.

Example 1: Spouse Disclaiming

If a spouse e.g. a wife disclaims her two thirds share on intestacy in her husband's estate, his issue (who in the normal course would also be her issue) would inherit his entire estate. The section does not deem a spouse disclaiming to have died without issue, as that would exclude the issue from inheriting the one-third share of their parent's estate, they would otherwise be entitled to inherit. Whilst a specific wording could have been inserted into the section to exclude a disclaiming spouse from passing the two third share to the issue, the legislature, on the wording of the section obviously wished to permit disclaimers of spouses to operate in such a way.

Helen (spouse)	**Tom** (deceased)
Disclaims her 2/3 share in her husband's estate therefore deemed to predecease him	dies intestate a married man with children
Rachel (surviving daughter)	**Pat** (surviving son)

Distribution:
Daughter Rachel will inherit a one half share of her father's estate.
Son Pat will inherit a one half share of his father's estate.

In this example, Helen should sign a disclaimer, which would be exhibited in the Oath of Administrator/Administratrix and lodged in the Probate Office. The Probate Officer will then proceed on the basis that the spouse pre-deceased her husband. It is not necessary to refer to a disclaimer in an Oath if the person disclaiming had an equal right to apply for a Grant with the applicant, for example being one of a number of children. If an original disclaimer is required for some purpose, it is desirable to have the disclaimer executed in duplicate.

Example 2: Direct Lineal Ancestor Disclaiming

When a direct lineal ancestor disclaims, they are like spouses, whilst deemed under section 72A to have predeceased the intestate in the distribution of his estate, are not presumed to have predeceased **without issue**.

For example, a man dies intestate a bachelor without mother, leaving him surviving his father. If his father disclaims his share after 5th March 1997, his father is deemed under the section to

have predeceased the intestate. The effect of this is that the intestate's estate will pass to the father's other children, i.e. the brothers and sisters of the intestate. Section 72A does not deem the disclaiming father to have died without issue.

Matthew
(father of intestate. Disclaims his right to inherit his son's estate and is therefore deemed to have predeceased him.)

Jane (sister of deceased) **Jack** (the intestate who dies a bachelor without mother) **Mary** (sister)

Distribution:
Sister Jane will inherit a half share of the entire estate.
Sister Mary will inherit a half share of the entire estate.

Example 3: General Operation of section 72A

Where a disclaimer can be misapplied is where practitioners forget that if the person disclaiming is not the spouse or lineal ancestor of the intestate, he will also be regarded as having died without issue.

If a person other than a spouse or direct lineal ancestor of the intestate, (e.g. issue of the intestate or brothers and sisters/nieces and nephews) disclaim after 5th March 1997, that person is presumed to have predeceased the intestate and died **without issue**. A child therefore who disclaims, cannot pass the disclaimed share to his issue as he is likely to assume. The disclaimed share will pass to his brothers and sisters and to nephews and nieces, the children of a predeceased brother or sister who have actually predeceased the intestate.

Example. Widower Tom dies leaving him surviving two children Jack and Jill. Jack disclaims in 2003 and Jill survived the intestate and has since died. The other surviving issue are a grandchild Joseph, who is the issue of disclaiming child Jack. As Jack is deemed to have predeceased the intestate without leaving issue, Joseph is deemed in effect never to have existed. There are three further grandchildren, John, Phillip and Chris, issue of a predeceased child Mary.

Tom (intestate widower)
Jack (survives and disclaims), **Mary** (predeceased leaving children), **and Jill** (survives and has since died)

Joseph (Jack's son) **John/Phil/Chris** (Mary's children)
Is deemed never to have existed

Distribution:

Jill's personal representative will inherit half of Michael's estate on behalf of Jill.
John, Phil and Chris will inherit the remaining one half of Michael's estate in equal shares, i.e. 1/6 each.

Capital Acquisitions Tax and Disclaimers

Under the Capital Acquisitions Tax Consolidation Act 2003, Section 12, if the benefit under a Will or intestacy or an entitlement to settled property is disclaimed, or a claim under a purported Will or an alleged intestacy is waived, or a right under the Succession Act is renounced, disclaimed, elected against or lapses, then no liability to tax will arise and no disposition will be regarded as having been made for CAT purposes as a result. However, where a person receives money or monies worth for a disclaimer, renunciation, election or waiver of a claim, he is to be regarded as receiving a gift or inheritance of the amount paid to him as if he had received the gift or inheritance from the original disponer.

As a person disclaiming is probably doing so to benefit another person (quite often his own child see example three above), it is important to read section 72A carefully to make sure that it operates as you and the disclaiming party thinks it is going to and as we hope that it will.

In particular please note that if on the death of a surviving parent all the children disclaim, the estate will not pass to the grandchildren but rather to the deceased's brothers and sisters.

Note: A number of points should be considered in relation to the execution of a disclaimer:

1) A disclaimer gives rise to an effect, by operation of law and therefore unavoidable consequences flow from a disclaimer, the consequences of which cannot be dictated. It is important to keep this in mind in taking any instructions in this area.

2) Section 72A now dictates the result of disclaimers, which are made after the date of the Family Law (Miscellaneous Provisions) Act 1997, apparently regardless of the date of death.

3) In advising on any disclaimer, ensure that the following points are discussed and considered.
   a) The share of the estate to which he is entitled;
   b) The assets owned by the deceased, and an estimation of their value and the approximate value of the share being disclaimed;
   c) Any relevant tax liabilities which might arise if the disclaimer was not signed;
   d) The tax liabilities on the signing of the disclaimer, and;
   e) The effect of signing the disclaimer (and in particular to whom the disclaimed share will pass, pursuant to section 72A as amended).
   f) We must keep in mind that a disclaimer involves an election whether or not to take a benefit and therefore the choice can only be made in the possession of full information. The person taking the benefit as a result of the disclaimer may bear the onus of proving that the disclaimer was free and voluntary if challenged at a later date. One way of displacing any presumption of undue influence is that the person disclaiming it had full information and was fully advised.

It is, of course, as already stated, very important to ensure that the person disclaiming understands that he will lose any right that he may have to extract a Grant of Representation to the estate of the deceased where that right arises from the disclaimed benefit.

FAMILY ARRANGEMENTS

The phrase "Family Arrangements" is used to describe all types of property transactions between persons who are related to each other by blood or marriage, irrespective of the motive for the transaction.

In the context of Administration of Estates, this would arise where the beneficiaries in the Will, or indeed the parties entitled on intestacy, decide among themselves how the property is to be vested. Where such arrangements are being considered, it is necessary to be extremely careful, to be clear and to document precisely what is taking place. Before attempting to give advice or draft it is important as a minimum to ask yourself the following questions:

1. Is there a Conveyance of all or any part of the property by the personal representative to persons who are not beneficiaries?
2. Is there a Conveyance of all or any part of the property by the personal representative and is that an appropriation under the Will, or under section 55 of the Succession Act 1965?
3. Is there to be an assent of all or part of the property by the personal representative?
4. Is there a gift by a person/persons entitled to all or part of the property to persons who are not so entitled?
5. Is there a sale by a person/persons entitled to all or part of the property to persons who are not so entitled?
6. Depending on the answers to 1-5 above various taxes may be applicable. Practitioners need to be absolutely certain on all taxes of whatever type, which can arise taking into account what the beneficiaries wish to do. Above all we need to be certain who will fund the tax. The funding of the tax in itself can constitute an additional gift. A family, in reaching an agreement frequently forget the issue of tax and when it is explained to them, are horrified that their "altruistic" agreement will cost money. It is not unheard of for the deal to fall apart at this point.

An example of a situation in relation to the Administration of Estates where a family arrangement would arise is where a Testator devises the family home to his five daughters as tenants in common in equal shares. One of those children is very successful, married, living abroad and decides to voluntarily release her share to the other four devisees. Another child wishes to sell her share to the remaining three beneficiaries. What is actually happening in this instance is that one sister is selling her one fifth share to three siblings and one sister is giving her one fifth share to three siblings.

Such a Deed of Family Arrangement between the children who inherit the property under the Will of their parent equally would necessitate a Deed of Family Arrangement involving a sale by one beneficiary of her share and a Voluntary Disposition by another beneficiary of her share to the remaining three beneficiaries.

Under section 10 of the Succession Act 1965, the personal representative will need to join in to assign the legal estate vested in him or her to the other three beneficiaries.

Instead of joining the personal representative in the Deed the transaction could be effected by two separate Deeds:-

1. A Deed of Family Arrangement between the five beneficiaries.

2. An Assent by the personal representative either in writing or under Seal, in favour of the three beneficiaries who, by virtue of the combined operation of the Will of the testator and the Deed of Family Arrangement, became entitled to the entire beneficial interest in the premises.

By virtue of **the combined operation** of the Will of the Testator and the Deed of Family Arrangement, the beneficiaries become entitled to the entire beneficial interest in the premises.

A Deed on the lines of the Family Arrangement mentioned above would be kept off the title and any purchaser dealing with the persons named in the Assent referred to would be entitled to rely on the protection given by section 53 sub-paragraph 3 of the Succession Act 1965 and should regard the Assent as conclusive evidence that the person in whose favour it was given was the person entitled to have the premises vested in him or her. It states as follows:

"*An Assent or Conveyance of unregistered land by a personal representative shall, in favour of a purchaser, be conclusive evidence that the person in whose favour the Assent or Conveyance is given or made is the person who was entitled to have the estate or interest vested in him, but shall not otherwise prejudicially affect the claim of any person originally entitled to that estate or interest or to any mortgage or encumbrance thereon."*

WHAT ARE THE TAX IMPLICATIONS OF FAMILY ARRANGEMENTS?

1. Stamp Duty:

The Deed above would attract ad valorem stamp duty on the following elements in it:

(i) On the value of the one individual fifth share conveyed by way of gift;

(ii) Assuming that the consideration for the one undivided fifth share conveyed by the second beneficiary represents the full value of that share, stamp duty is payable on that consideration or alternatively on the full value of that share, if greater.

In each case stamp duty will be payable at half the normal rate if the Consanguinity Certificate contained in clause 5(b) is applicable. Paragraph 15 of Schedule 1 of the Stamp Duty Consolidation Act (SDCA) 1999. The Deed will have to be adjudicated and thus the requirements in relation to full disclosure to the Revenue Commissioners should be noted. See sections 8 and 15 of SDCA 1999.

Section 8 imposes a duty to set out all the facts and circumstances affecting the liability of any instrument to duty, either in the instrument or in a statement attached to the instrument. Penalties are incurred by anybody who fraudulently or negligently executes any instrument not containing all such facts and circumstances and it provides that anybody employed in or concerned in the preparation of any such instrument who fraudulently or negligently prepares it shall also incur the same penalties. Thus a Professional Advisor will be deemed to be negligent if he fails to take reasonable care. We must further note that section 15 of the SDCA 1999 sets out a surcharge that will be imposed where a "submitted value" is less than the value of the property.

Prior to the Finance Act 1991 (which first introduced the duty), some Practitioners used to take the view that you had no obligation to stamp such Deeds of Family Arrangement where a form of Assent in favour of the nominated party/parties was lodged in the Land Registry, on the basis that the personal representative could be confident that the Settlement would never need to be relied upon or if relied upon that it could be stamped at a late penalty.

In my view this view was always questionable. The reason that this view point was taken in Land Registry cases is because where a Deed of Family Arrangement is completed, the Land Registry do not actually register the Deed of Family Arrangement but are only concerned with the form of Assent duly executed by the person named in the Grant of Representation. In other words the Land Registry does not look behind the Deed of Assent and accept the Deed of Assent on face value. They will register the new owner in accordance with the terms of the Assent. See section 54 of the Succession Act 1965.

The fact that the Deed does not have to be sent to the Land Registry served to persuade some Practitioners that it was not necessary to stamp it. I have found in practice that this is the continuing view of a certain number of Solicitors.

This practice is clearly out of the question now in the light of the provisions of Part V of the Finance Act, 1991 and in particular the consequence of the duty of disclosure now imposed on Professional Advisors.

2. Capital Gains Tax

A second tax which ought to be borne in mind when advising on a Deed of Family Arrangement is Capital Gains Tax. The CGT legislation is significantly more liberal than the Capital Acquisitions Tax legislation in this area. The question that will be most frequently asked of you is whether the disposition by the various parties gives rise to a CGT liability.

See section 573(6) of the Taxes Consolidation Act, 1997, which states that there is no Capital Gains Tax liability where a Deed of Family Arrangement is made within 2 years from the date of death or such longer period as the Revenue may agree in writing. There is a concession in such a case so that the dispositions made by the parties to the Deed are deemed to be the deceased's dispositions. See the U.K. case of *Marshall v Kerr* 1991 STC686.

An example of this would be as follows:

Helen Maguire dies on 1st January 2003 leaving her company and her investments and other assets to her two children, Patrick and Danielle, equally. By Deed of Family Arrangement dated 6th June 2003 it is agreed with Helen Maguire's personal representatives that Patrick will take the company and Danielle will take the shares and the other assets. This will not be regarded as a disposal for CGT purposes.

A difficulty often arises because the family comes to the professional advisor many years after the date of death to seek to vary the terms of the Will. In that event CGT is a very real concern. Note that the Revenue may extend the period under Section 573(6) but it is a concession of the Revenue and must be applied for and obtained.

3. Capital Acquisitions Tax

The Capital Acquisitions Tax implications should also be considered. Where the consideration in such a document or Deed is that of natural love and affection, be particularly careful about the value at which the property is transferred for the purposes of the family arrangement. Remember that you will have filed a value in the Schedule of Assets as at the date of death.

In a Deed of Family Arrangement two possible charges to Capital Acquisitions Tax arise:

1. Inheritance tax - payable on the inheritance from the deceased to the beneficiary.
2. Gift tax - payable if full consideration has not been paid to the beneficiary by the family member receiving the property.

Certificates of Discharge in respect of both dispositions will be required. It is our job as Solicitors to ensure that the personal representative is fully protected. We must keep in mind that while the Donee is primarily liable for the tax, the personal representative and the disponer are secondarily liable for payment of this tax.

Section 8 of the Capital Acquisitions Tax Act would not apply to a family arrangement as the initial disposition was not a gift but could arise later (see below).

The Disponer in our example above, one of the children is secondarily liable for payment of Capital Acquisitions Tax by the Donees. On a future disposition by the Donees, they will have to produce Certificates of Discharge from CAT both in respect of the gift and the voluntary disposition and further they will also have to prove that the Disponer survived the execution of the Deed by more than 2 years (see section 8 of the CATCA 2003).

"Where a Donee takes a gift under a disposition made by a Disponer (in this Section referred to as the original Disponer) and, within the period commencing three years before and ending three years after the date of that gift, the Donee makes a disposition under which a second Donee takes a gift and whether or not the second Donee makes a disposition within the same period under which a third Donee takes a gift, and so on, each Donee is deemed to take a gift from the original Disponer (and not from the immediate Disponer under whose disposition the gift was taken) and a gift so deemed to be taken is deemed to be an inheritance (and not a gift) taken by the Donee, as successor, from the original Disponer if:

a) the original Disponer dies within two years after the date of the disposition made by that original Disponer and;

b) the date of the disposition was on after 1st April 1975."

In other words, if a sale takes place within two years from the date of the Deed, the Purchaser will require an Indemnity in the form of an Insurance Bond against the eventuality of Inheritance Tax becoming payable by reason of the death of the Disponer within a two year period.

You need to advise your client of the Tax implications of the proposed Voluntary Disposition from the perspective of the Disponer and that of the Donee. While the Donee of the gift is the person primarily accountable for gift tax payable in connection with the gift of the Disponer, as already mentioned, the Donor is secondarily accountable for payment of such gift tax.

Thus it is in the interest of the Disponer to ensure that any gift tax payable is discharged by the Donee and it is your responsibility to so inform the Disponer. Should the property be sold or mortgaged within 12 years from the date of the gift or the date of the inheritance the Purchaser or Mortgagee will insist on an absolute Certificate of Discharge from Capital Acquisitions Tax.

When the Voluntary Disposition has been completed, the Deed stamped and adjudicated, you should ensure that the Donee applies for a Certificate of Discharge from Gift Tax. If the Disponer dies within 2 years from the taking of the gift i.e. the date of the Conveyance, the Donee is deemed to take "on her death." See section 3(1) of the CATCA 2003 as follows.

> *"In this Act, "on a death" in relation to a person becoming beneficially entitled in possession, means-*
>
> *(a) on the death of a person or at a time ascertainable only by reference to the death of a person;*

(b) under a disposition where the date of the disposition is the date of the death of the Disponer;

(c) under a disposition where the date of the disposition is on or after the 1st day of April, 1975, and within two years prior to the death of the Disponer; or

(d) on the happening, after the cesser of an intervening life interest, of any such event as is referred to in subsection (2).

(2) The events referred to in subsection (1) (d) are any of the following-

(a) the determination or failure of any charge, estate, interest or trust;

(b) the exercise of a special power of appointment;

(c) in the case where a benefit was given under a disposition in such terms that the amount or value of the benefit could only be ascertained from time to time by the actual payment or application of property for the purpose of giving effect to the benefit, the making of any payment or the application of the property; or

(d) any other event which, under a disposition, affects the right to property, or to the enjoyment of that property."

This means that a person is also deemed to take "on a death" where a Disponer dies within two years of making the gift. Therefore, because the Disponer died within two years of the date of the gift, the gift becomes an inheritance, that is to say the Gift Tax rate (which was 75% of the cumulative total until 1st December 1999) will not apply but rather the full Inheritance Tax rate on the gift which at that time (prior to 1st December 1999) was 20% on the first £10,000, 30% on the next £30,000 and 40% on the balance. There was, however, a small gift allowance, which in 1998 was £500. It did not increase to £1000 until 1st January 1999. The current small gift allowance is €1270.00.

Appropriation of Assets under Section 55 of The Succession Act 1965

Section 55 of The Succession Act 1965 confers on a personal representative a power, on serving the requisite notices, to appropriate certain assets for the benefit of a beneficiary. The relevant portion of section 55, for the purposes of this paper, is set out below. Note the following extract is not a full version of all the subsections of section 55.

Section 55 –

"(1) The personal representatives may, subject to the provisions of this Section, appropriate any part of the estate of a deceased person in its actual condition or state of investment at the time of appropriation in or towards satisfaction of any share in the estate, whether settled or not, according to the respective rights of the persons interested in the estate.

(2) Except in a case to which section 56 applies, an appropriation shall not be made under this Section so as to affect, prejudicially, any specific devise or bequest.

(3) Except in a case to which section 56 applies, an appropriation shall not be made

under this Section unless notice of the intended appropriation has been served on all parties entitled to a share in the estate (other than persons who may come into existence after the time of the appropriation or who cannot, after reasonable enquiry, be found or ascertained at that time) any one of which parties may within six weeks from the service of such notice on him apply to the Court to prohibit the appropriation.

(4) An appropriation of property, whether or not being an investment authorised by law or by will, if any, of the deceased shall not (save as in this Section mentioned) be made under this Section except with the following consents:-

(a) When made for the benefit of a person absolutely and beneficially Entitled in possession, the consent of that person:

(b) When made in respect of any settled share, the consent of either the trustee thereof, if any (not being also the personal representative) or the person who may for the time being, be entitled to the income.

(10) For the purposes of such appropriation, the personal representatives may ascertain and fix the values of the respective parts of the estate and the liabilities of the deceased person as they may think fit, and may for that purpose employ a duly qualified Valuer in any case where such employment may be necessary; and may make any conveyance which may be requisite for giving effect to the appropriation.

(11) Unless the Court on application made to it under sub-section (3) otherwise directs, an appropriation made pursuant to the section shall bind all persons interested in the property of the deceased whose consent is not hereby made requisite.

(13) This section does not prejudice any other power of appropriation conferred by law or by the will, if any, of the deceased, and takes effect with any extended powers conferred by the will, if any, of the deceased, and where, an appropriation is made under this Section, in respect of a settled share, the property appropriated shall remain subject to all trusts for sale and powers of leasing, disposition and management or varying investments which would have been applicable thereto or to the share in respect of which the appropriation is made, if no such appropriation had been made.

(16) This section applies whether the deceased died intestate or not and whether before or after the commencement of this Act, and extends to the property over which a testator exercises a general power of appointment, and authorises the setting apart of a fund to answer an annuity by means of the income of that fund or otherwise."

(Note, section 56 which is referred to in section 55 relates to an appropriation by a spouse of a dwelling, which forms part of the estate of a deceased spouse, and which the surviving spouse was ordinarily resident at the date of death of the deceased spouse).

Surprisingly this section has given rise to very little litigation. Prior to a recent case, the only reported case on the question of appropriation is the decision of the Supreme Court in *H v O* [1978] I.R. 194. In this case, the Supreme Court set down principles which would be adopted

by a Court on an application to prohibit an appropriation under sub-section (3). Henchy J. at page 206 of the report in *H v O* [1978] I.R. 194 stated as follows:-

"It must be assumed, having regard to the tenor, the scope and the purpose of the section, that the Court should prohibit an intended appropriation only:-

> *(a) When the conditions in the section have not been complied with; or*
>
> *(b) When, notwithstanding such compliance it would not be just or equitable to allow the appropriation to take place, having regard to the rights of all persons who are or will become entitled to an interest in the estate; or*
>
> *(c) When, apart from the section, the appropriation would not be legally permissible".*

The section was further considered by Finnegan J. in the High Court in the case of *Messitt v Henry* [Unreported decision of the High Court, Finnegan J., 19th of July, 2001]. In that particular case, a Deceased died intestate. He was a bachelor and survived by one surviving sibling, the personal representative, and a number of nephews and nieces the issue of a predeceased sibling. The estate principally comprised a cottage and lands at Enniskerry, County Dublin. The personal representative, who had been born in the cottage concerned, wished to appropriate the cottage and some surrounding land in satisfaction of her half share of the estate of the deceased. She took advice from a reputable auctioneer and was advised as to a suitable sub-division of the lands, which would, in the opinion of her valuer, not prejudice the entitlement of the children of the predeceased sibling. Correspondence ensued between the Solicitor having carriage of the administration of the estate of the deceased and the issue of the predeceased sibling and their Solicitor. In any event, a notice of appropriation was served which was objected to and an application was brought before the Court arising out of the objection.

The Court accepted the *bona fides* of the personal representative seeking to appropriate the cottage and surrounding lands and took into account her sentimental attachment to the cottage and lands when assessing that *bona fides*. The Court heard evidence of valuers adduced on behalf of the personal representative and on behalf of the other beneficiaries. The Court preferred the evidence of the valuer who gave evidence on behalf of the beneficiaries. He held that in the sub-division proposed by the personal representative there was a disparity and that on that sub-division the personal representative would be acquiring fifty five per cent of the estate whereas the other beneficiaries would have their benefit reduced to forty five per cent of the estate. In such circumstances he prohibited the appropriation. The Court applied the principles laid down by the Supreme Court in *H v O* [1978] I.R. 194 and held that the personal representative in exercising the right of appropriation nevertheless acts as a statutory trustee and it was imperative that the appropriation would not prejudice the interest of the other beneficiaries.

In the correspondence which passed between the respective Solicitors, there was considerable detail relating to the liabilities of the estate and the notice of appropriation made no reference to the apportionment of the liabilities. The Court held that it could only have regard to the notice that issued pursuant to section 55 and not to the correspondence and as the notice was

silent as to liabilities it might suggest that there was not to be an equal apportionment of the liabilities and to this extent, it would further prejudice the other beneficiaries.

The Court in *Messitt v Henry* appears to have approached the case as a mathematical exercise, which might not be the intention of the section. The Court, for example, refused to take into account that on the appropriation the sister of the deceased would be entitled to claim agricultural relief which would have resulted in a saving of Capital Acquisitions Tax for her in excess of IR£90,000.00.

It is imperative, therefore, in appropriation cases that it be impressed upon any valuer the importance of being very accurate in respect of the valuations and, if necessary, to err on the side of caution by according perhaps, a greater benefit to persons who might claim to be prejudiced by the appropriation. It is fair to say that in cases of this sort there may well be a family history whereby persons will object to appropriation so that a particular person does not obtain a particular piece of property and it would be very important therefore that the valuer give very clear and precise advice. No service will be done to your clients if the value is either inflated or deflated. The valuation should be as accurate as possible accepting of course that valuation is not an exact science.

It appears also that care should be taken in relation to the drafting of the notice of appropriation to include all matters relevant to the appropriation, such as the apportionment of liabilities where that arises.

Note that under the Capital Acquisitions Tax Act 2003, Section 89(6), an arrangement made during the administration of a trust or estate, whereby agricultural property is appropriated, such appropriation will be treated as if it had been a direct bequest from the Testator. An example of this would be as follows:

Tom Dunne, a bachelor, died on the second of January 2003 leaving a significant estate including investments and a small farm. Under his Will he leaves as to nephews and three nieces EUR1 million each and the residue of his estate to his only surviving sister. By agreement between the Personal representative and all of the Beneficiaries, Jack, one of the nephews, is allowed to take the farm in part satisfaction of the pecuniary legacy due to him. Jack will be deemed to have been bequeathed the farm, directly by Michael.

Protecting the Personal Representative in an administration.

1. General

I like to keep a Personal Representative in sight and in control. An overenthusiastic Personal Representative (armed with an executors account chequebook), who thinks they are going to please all of the beneficiaries all of the time, can be lethal. A disillusioned Personal Representative who wants to get out when the going gets rough can be equally difficult especially if he or she failed to understand the consequences of the acceptance of the role in the first instance

The role of a Personal Representative is daunting and if a Personal Representative considers the responsibility and the liability to the estate, the beneficiaries and the Revenue, it is a wonder that any Personal Representative accepts the role in the first

place. Very often, the implications of the role are not properly pointed out to such an individual, and he or she quite rightly depends on the acting solicitor to protect them in executing that function. The following are some instances where the role has become very difficult for the appointed individual.

One of the most common reasons for a Personal Representative getting into trouble is in forgetting what the Personal Representative was originally appointed to do, and empowered to do under the will or the Succession Act 1965. The role is to protect and administer the estate, and to ultimately vest the estate in the persons entitled under the will or on intestacy. In the absence of any legislation governing the variation of wills in this jurisdiction, it is not the function of the Personal Representative to vary or alter the circumstances on death or go further than he is obliged to do.

I have seen many instances of straightforward administrations brought to a standstill or indeed standoff, by disputes between the Personal Representative and the beneficiaries over family arrangements. In many cases where a Personal Representative is under pressure to go along with the "better plan" the central function of the Personal Representative is overlooked. The Personal Representative is then bound up in the personal affairs of the beneficiaries which at the very least can result in a conflict of interest

One has to ask in relation to Deeds of Family Arrangements in particular, would the Personal Representative have been better off vesting (and in the process obtaining receipts and indemnities) and letting the beneficiaries get on with whatever they wished to do from that point onwards? I consider that there is a real need for us as practitioners to advise the Personal Representative as to how the role should be discharged not to encourage variations of the will thus exposing the Personal Representative to considerable additional and sometimes unnecessary liability.

The tendency in family situations is for the Personal Representative to assist. I am of the view that in assisting without due care, an unnecessary layer is added to the role of the Personal Representative.

In protecting the Personal Representative we need to assess the capacity of the Personal Representative to administer the estate. In practice the responsibilities of the Personal Representative are not reduced by the lack of personal knowledge of the Personal Representative of the affairs of the deceased. The Personal Representative has a strict duty to identify and value all assets in the estate. Is he in a position to do this, especially where there is immediate contention? Quite often the Personal Representative is in notional control of the assets but in practice is just keeping his fingers crossed that all will be well until the estate is finalised. The issue of full disclosure to the Revenue is particularly worrying especially if for example the deceased was involved in a business, and the Personal Representative has no way of knowing if full disclosure of all income has been made. There is a very real need for the duties and responsibilities of a Personal Representative to be set out in writing to the Personal Representative at the outset and to impress on the Personal Representative the need to actively make enquiries concerning the assets and liabilities. This is not a passive role.

Having considered how to protect the Personal Representative from the beneficiaries and indeed from himself, the next point is to consider the Revenue clearances that will be needed.

2 Revenue Clearances/Social Welfare Clearances

It is of paramount importance that we are in a position to close an administration file which is in effect a tax file. To do this effectively we need to examine the types of clearances necessary and the protection we should be seeking for our client, the personal representative.

The first step is to examine the burden of accountability that the Revenue places on the personal representative, the beneficiary and on others (including ourselves).

(a) Capital Acquisitions Tax

Accountable Persons for Capital Acquisitions Tax

Section 45 of the CATCA 2003 states that the person primarily accountable for the payment of the tax is the donee or successor. This may seem obvious but the section goes on to fix the following parties with responsibility.

"In the case of an inheritance, every trustee, guardian, committee, personal representative, agent or other person in whose care any of the property comprised in the inheritance or the income therefrom is placed at the date of the inheritance or at any time thereafter and every person in whom the property is vested after that date other than a bona fide purchaser or mortgagee for full consideration in money or money's worth, or a person deriving title from or under such Purchaser or Mortgagee."

This section would give any person cause for concern and needs to be kept to the forefront of our minds in administering an estate or a trust. The beneficiary may seek to exert undue pressure on the trustee or the personal representative to distribute quickly and it can be difficult in certain circumstances for a personal representative to insist on retaining the benefit until clearance is obtained, especially where there is a delay in the administration or where the beneficiary and or the personal representative perceives there to be a delay. This pressure is in turn passed on to us as the solicitor acting. There is always a need to act expeditiously in an estate if only to fend off the pressure to distribute before we are ready to do so. This section fixes not only the personal representative but also any person in whose care the property is placed (that is us!), with potential liability.

Having thrown the book at us, the Revenue then seeks to soften the blow slightly in subsection 3.

"No person referred to in subsection (2)(a)(ii) or (b)(ii) is (unless he is a person who is also primarily accountable under subsection (1)) be liable for tax chargeable on any gift or inheritance to an amount in excess of – (a) the market value of so much of the property of which the gift or inheritance consists; and (b) so much of the income from such property which has been received by him or which, but for his own neglect or default, would have been received by him or to which he is beneficially entitled in possession."

This confirms that the liability will not extend beyond the value of the property in the gift or the inheritance. Note that the section refers to property, which he would have received, but for his own neglect or default, or to which he is beneficially entitled in possession. This places a clear onus of a personal representative to collect in and pursue all assets in the estate. It would also in my view impinge on the right of a Personal representative to compromise any debt in the estate.

Personal representatives and trustees clearly need to protect themselves from any such liability by seeking to obtain full clearances prior to distribution. The liability of a personal representative is for life and nowhere is this more clearly seen than in subsection (6) which states:

"The tax shall be recoverable from any one or more of –(a) the accountable persons, and (b) the Personal representatives of any accountable persons who are dead, on whom the Commissioners have served notice in writing of the assessment of tax in exercise of the power conferred on them by section 39."

In general the Revenue would not call on the personal representative to pay tax in connection with the death of the deceased unless the beneficiaries who have primary accountability default in payment. Accordingly, in the case of a foreign beneficiary it would be advisable for the Personal representative to withhold cash sufficient to pay the Inheritance Tax liability of the beneficiary in case he defaulted in paying the Tax.

In the case of those who are not primarily accountable, they are liable for tax only to the extent of the property which they have received and which is comprised in the gift or inheritance and once tax was paid they will be entitled to reimbursement from the person primarily accountable.

In addition to the right of the Revenue (a right in personam) to follow the person accountable for Tax, section 47 of the Capital Acquisitions Tax Act gives the Revenue a right in Rem against the property of which the benefit consists at the valuation date.

Clearance for Capital Acquisitions Tax pre death

Although it does not arise very often, a deceased person may have received a benefit under a Will or on intestacy, which was taxable, or the deceased may have an interest in expectancy in property. Either way the benefit will be one that will be included in the value of the estate. In this instance it will be the deceased who will have the primary liability for the payment of any Capital Acquisitions Tax and this liability on death passes to the personal representative.

Clearance for Capital Acquisitions Tax post death

(i) Clearance for the beneficiary

It is the aim of any Solicitor acting in administration to get full and final Certificates of Discharge from Capital Acquisitions Tax for each and every benefit in the estate. My view is that there is no benefit too small that does not require a form. The main points to watch is if the Certificates issue with any conditions attached and if so those conditions need to be brought to the attention of both the personal representative and the beneficiary. I am of the

view that the Personal Representative and the beneficiary should be advised in writing of any such restriction.

(ii) Clearance for the Personal Representative

The Revenue has now introduced a form CA44, which is a certificate of discharge from Capital Acquisitions Tax. It is a clearance for the personal representative, rather than the beneficiary. The form is similar in appearance to the form CA11, and calls as usual for all details concerning the deceased and the date of the gift/inheritance and the valuation date. The details of the taxable value, and also the tax paid are provided for. The qualification is that different forms should be completed in respect of property taken under different dispositions, or in respect of property taken under the same disposition but by different beneficiaries. The clearance given is under section 48(5) of the Capital Acquisitions Tax Act, and it provides that X in his capacity as (either a trustee or a personal representative) is discharged from any further claim for gift/inheritance tax on the property described in the gift/inheritance mentioned in the form. This form will be very useful in practice as it can be used for personal representatives and for trustees. I would recommend its use, especially in protracted or complex benefits.

B. Income Tax

Income Tax is one area that requires immediate attention as soon as possible after the date of death. One of the most common delays in the winding up of an estate occurs in obtaining a clearance certificate in respect of Income Tax. This is an additional service that can be provided by a Solicitor to a personal representative and it can be billed for on a separate basis. If attended to early on in the administration, it can be dealt with concurrently with the general administration and winding up. If left until the last minute, it usually prolongs the finalisation of the estate and may even cause serious delay in completing the administration.

It may be that a bank, accountant or tax adviser handled the deceased's tax affairs. It is advisable to obtain the personal representative's consent to the retention of such adviser, who will no doubt charge professional fees in finalising matters. Once the position as of the date of death is clarified, any Income Tax liability will be represented as a debt in the estate and any certified refund will be included as an asset. The personal representative's main objective is to obtain a tax clearance certificate prior to distribution.

The main advantage in dealing with the Income Tax yourself, (apart from being able to charge for doing so), is that you can retain control over this area of the administration. If so, it is entirely up to you how quickly matters can be resolved with the Inspector of Taxes.

The self-assessment has now made matters more user friendly. However, you should not, without adequate consideration of your own abilities and knowledge in this area, become involved in a long and protracted Income Tax problem that could otherwise, with assistance, be sorted out relatively quickly. In the vast majority of cases I would recommend that the personal representative retain an accountant to deal with this area, if he does not have the necessary skills to approach the issue with confidence.

If tax is immediately payable on death, consider from what source funds might be available to discharge the tax in order to avoid interest and penalties.

In dealing with Income Tax, a number of issues need to be considered:

1) Pre-death liability;
2) Post-death liability;
3) Liability of personal representative

Pre death;

The personal representative must file a return under the self-assessment rules detailing all the income and the taxable gains of the deceased. The personal representative must also complete returns and pay any taxes where the deceased is in default. This is an area that gives many personal representative sleepless nights. They are bound to make enquiries and if they do not do so and do not obtain full clearances they are liable to the extent of the assets in the estate. If a problem arises many years from the date of death such as the discovery of a previously undisclosed bank account, notwithstanding that the personal representative may consider themselves off the hook, their liability does not cease and they are bound to deal with the matter and to obtain clearance.

A personal representative must ascertain the deceased's liability to date of death and discharge all liabilities including interest to date of death. This involves not only the preparation and submission of a return from 1st of January last to date of death, but also the submission of returns for previous years (if necessary). The deceased's Inspector of Taxes will also require a copy of the Inland Revenue affidavit and a copy of the Will. (He will also require a copy of the Grant when it issues).

Other matters that should be investigated as soon as possible by the personal representative are:

1) Any possible available reliefs
2) Refunds of overpayment of tax
3) Any available losses that should be claimed in the final years before death
4) Any claims for medical expenses.

In an ideal world, the only period that would require finalisation would be the period from 1st of January last to the date of death. In many instances, however, the deceased may not have been making a return (or a full return) of all assets for a number of years prior to death.

Post-Death Administration Period

It should be noted that personal allowances or other reliefs, which are available to an individual, do not apply to a personal representative. Any income arising after death is regarded as income of the personal representative (although it is not aggregated with the personal representative's personal income). If a personal representative is resident in Ireland, worldwide income of the deceased is liable to Income Tax in Ireland.

The administration period is, in effect, the period between the date of death and the date on which the residue is ascertained. It may consist of a number of years or part only of such

years, depending on the length of time taken to wind up the estate. The date of ascertainment is usually the date on which the liabilities, costs and expenses have been paid and the legacies and taxes discharged.

(i) Resident Beneficiaries

If all the residual legatees/persons entitled on intestacy are resident within the jurisdiction, the Inspector of Taxes will normally agree to treat these people as succeeding to the income from the date of death. This saves you a lot of work in that the income is not therefore assessed in the hands of the personal representative. If the Inspector of Taxes treats the beneficiaries as so succeeding, the income need not be included in an assessment for inheritance tax where the valuation date is later than the date of death.

You must obtain, of course, a letter from the Inspector of Taxes confirming that he will treat the income as income of the beneficiaries.

If there is an income producing asset in the hands of the personal representative and it would be more beneficial for such to be taxed in the hands of the beneficiary, the personal representative should consider vesting such property in the hands of the beneficiary, **provided always** that there are sufficient assets to meet all liabilities.

(ii) Non-resident Beneficiaries

Where the residuary legatee is residing outside the jurisdiction, the Inspector will normally require returns for the administration period. The distribution date will usually be the date on which all the assets are available for distribution, and not just the bulk of the assets.

The Inspector of Taxes will not regard the estate as finalised until all the Executors/Administrators accounts have been closed off and securities transferred.

Under section 52 of the Taxes Consolidation Act 1997, the personal representative is liable to income tax in respect of each category of income under the relevant schedule of case in the Income Tax Acts as persons receiving or entitled to that income.

D. Social Welfare Clearance

Immediately the Schedule of Assets has been certified it should be sent without delay to the department of Social Welfare and you should be seeking clearance on behalf of the personal representatives. As the Department of Social Welfare have a three month period to make any claim, you need to get this three month period running as soon as possible. This notice must be given in accordance with section 280 of the Social Welfare (Consolidation) Act 1993. I understand that there are still a substantial number of cases where the acting solicitor is failing to obtain the clearance. In certain areas of the country I understand that almost every estate is throwing up a liability. It is vital to obtain this clearance and the Personal Representative will be depending on us to advise on the necessity for same.

3. Protecting the Personal Representative in the context of an appropriation under section 56(6)

Under section 56, where the estate of a deceased person includes a dwelling in which, at the

time of the deceased's death, the surviving spouse is ordinarily resident, the surviving spouse may, subject to subsection 5, require the personal representative in writing to appropriate the dwelling under section 55 in or towards satisfaction of his or her share. (Note the share could be a share on intestacy or share under a Will).

The same power applies in relation to the appropriation of any household chattels. This provision was mainly brought in to allow a surviving spouse to keep the family home if the family home had not been left to the surviving spouse but note that it is a condition that the surviving spouse must be resident in the house as at the date of death of the Testator.

Note also that under subsection 3, that if the share of the surviving spouse is insufficient to enable an appropriation to be made under subsections 1 or subsections 2 as the case may be the right conferred by the relevant section may also be exercised in relation to the share of any infant for whom the surviving spouse is a trustee under section 57 or otherwise.

It is a duty of the personal representative to notify the surviving spouse in writing of the rights conferred by this section under subsection 4. In practice the notice to surviving spouses is normally sent out with the notification of the right to elect under section 111.

There are certain restrictions contained in subsection 5.

Under subsection 5 a right conferred by the section is not exercisable after six months from the receipt of the surviving spouse of such notification or one year from the first taking out of representation of the deceased's estate whichever is the later. This ties in with similar time limits for the exercise of the right to elect to take a legal right share. Subsection 5(6) further goes on to say that in relation to a dwelling in any of the cases mentioned in subsection 6, unless the Court, on application made by the personal representatives or the surviving spouse, is satisfied that the exercise of that right is unlikely to diminish the value of the assets of the deceased, other than the dwelling, or to make it more difficult to dispose of them in due course of administration, and authorises its exercise.

The Act recognises that there will be certain instances where the spouse's right to appropriate will have a direct effect on the overall value of the assets. Under subsection 6 the various categories of dwellings are set out and are, in short, as follows:

56(6):-

(a) "*Where the dwelling forms part of a building and an estate or interest in the whole building forms part of the estate, or*

(b) *Where the dwelling is held with agricultural land an estate or interest in which forms part of the estate,*

(c) *Where the whole or a part of the dwelling was at the time of the death used as a hotel, guesthouse or boarding house,*

(d) *Where a part of the dwelling was, at the time of the death, used for purposes other than domestic purposes."*

It is important to note that the personal representative has no automatic power to appropriate in any of the above circumstances without first making an application to Court. There may be

cases where it will appear to be a sound judgement decision and everyone is in favour of the intended appropriation. In such a case can you ignore the provisions of subsection 6 and go ahead anyway? In my view the answer is no. An order of the court on consent can be applied for. Keep in mind that your client is in every administration, the personal representative. Your duty is to stand between the personal representative and all possible claims.

The Court, under section 56(10) (d) shall not make an order under this subsection in relation to a dwelling in any of the cases mentioned in subsection 6, unless it is satisfied that the order would be unlikely to diminish the value of the assets of the deceased, other than the dwelling, or to make it more difficult to dispose of them in the due course of administration. The section states that the court must be satisfied, not the personal representative, the spouse or the majority of the beneficiaries.

In the case of *H -v- H*, 1978 IR, Parke J., considered an appeal from the High Court. With reference to section 56, Parke J. agreed with Kenny J.'s opinion in the High Court on the onus of proof. Kenny J. had held that the onus lies upon the Applicant under the subsection to satisfy the Court that the exercise of the right of appropriation is unlikely to diminish the value of the assets of the deceased other than the dwelling or to make it more difficult to dispose of them in due course of administration.

In accordance with subsection 8(a)

> 56(8) (a) *"So long as a right conferred by this section continues to be exercisable the Personal representatives shall not, without the written consent of the surviving spouse or the leave of the Court given on the refusal of an application under paragraph (b) of subsection 5, sell or otherwise dispose of the dwelling or household chattels except in the course of administration owing to want of other assets".*

This is a very real restriction on an executor's power of sale under section 50. It is important to note also that under subsection 9 the rights conferred by this section on the surviving spouse include a right to require appropriation partly in satisfaction of a share in the deceased's estate and partly in return for a payment of money by the surviving spouse on the spouse's own behalf and also on behalf of any infant for whom the spouse is a trustee under Section 57 or otherwise. There is also a hardship provision in subsection 10(b).

In short section 56 is the only case in which a beneficiary being a surviving spouse **can insist** that an appropriation be made. A share is defined in section 3 as including any share or interest whether arising under a Will or intestacy or as a legal right including a right to the whole estate. Once a surviving spouse has applied for appropriation of the dwelling equity immediately arises in the spouse's favour, which can be enforced by his or her Personal representative, if the surviving spouse dies before the administration has been completed. See the case of *(Re Hamilton) Hamilton -v- Armstrong*, 1984 ILRM 306. A common mistake is to regard the right of the spouse to appropriate under section 56 as being restricted to the legal right share. It is much wider and extends to any interest.

Common problems in finalising administration cases.

In this part of the paper, I have decided to concentrate on a number of issues which I have found in practice, caused practitioners to falter. There are so many issues which could be raised under this heading. I will to concentrate on just a few.

The main issues include the following:

1. I consider that problems arise where a Solicitor approaches an administration in a piece meal fashion in that each aspect of the estate is dealt with successively rather than concurrently. This causes inordinate delay. In my view an administration is a particular type of file that needs to be tackled as a whole from the outset. Problem management can only be carried out effectively if problems are clearly identified at the outset. I have come across many situations where basic problems with the Will have not been noticed until such time as the Will was either submitted to the Revenue or to the Probate Office or indeed sometimes when the Solicitor goes to distribute the estate and re-reads the Will for the purposes of distribution. Organisation is the key and precise and accurate filing is an absolute must. A large amount of information passes through our hands in a relatively short space of time and it is the management of this information that is absolutely key.

2. The next problem which I have found in finalising administration cases is the simple problem of not tackling the income tax affairs of the deceased early enough. If this is left until the end or indeed until after the post-Grant situation it can add months onto the administration.

3. The next issue that I have come across is the issue of separated spouses and the Probate Office. When parties enter into a Separation Agreement, the couple's marriage is not dissolved and their legal status as each other's spouse is maintained. This fact alone together with the fact that the Separation Agreement may be revisited at any point precludes the Probate Office from regarding separation as final and conclusive. Consequently, when one of the parties dies intestate, the question of succession rights has to be revisited.

   A policy was devised in the Probate Office which does not contravene the legislation and which facilitates the next of kin in the extraction of a grant of representation. Subject to the circumstances of each case, this policy involves the execution of either a Renunciation or a Disclaimer by the surviving spouse. I understand that the policy works as follows.

   When a spouse dies Intestate leaving a surviving spouse and children, the surviving spouse and children have an interest in the estate and consequently are the only persons entitled to extract a grant of administration in the estate. The surviving spouse has a prior entitlement, however, and in the event of one of the children wishing to apply, the surviving spouse must renounce their entitlement to extract a grant. For the reasons advanced above, this position also prevails when the spouses are separated. Therefore, if Administration papers are presented to the Probate Office and it is evident that the parties are separated and one or more of the children are applying for Administration, a Renunciation will be sought from the surviving spouse (notwithstanding that the parties may have renounced their succession rights under the agreement) and this Renunciation must be exhibited in the Oath for Administrator.

   This policy of the Probate Office, although understandable, took many of us by surprise. In the context of an administration, we do not envisage having to revisit the terms of a separation agreement especially in cases where the terms of the agreement were fraught and difficult to negotiate. It is entirely possible that an application by a

child of a second union will involve researching the whereabouts and existence of a first separated wife to progress the administration. This is going to be very difficult to explain to clients. It should be pointed out that this difficulty would not arise where the parties were divorced in Ireland.

In situations where the surviving spouse has renounced his or her rights and then wishes to go ahead and apply for a grant, in these circumstances a court application was necessary for liberty to appoint a Personal representative under section 27(4) of the Succession Act 1965. There is one situation where the surviving separated spouse, notwithstanding a Renunciation, need not return to Court. Such a situation occurs when a spouse dies leaving minor children and the surviving spouse wishes to apply for a Grant of Administration, not in her own right but in her capacity as Guardian of the infant children. There is one impediment however, and this is set out in Order 79 Rule 38 of the Rules of the Superior Courts:

"No person who renounces probate of a will or letters of administration of the estate of a Deceased person, in one character, shall be allowed to obtain representation to the same Deceased in another character, unless the Court shall otherwise order."

I understand that this problem can be remedied by the execution of a Disclaimer by the surviving spouse. The Disclaimer operates in such a way as to create a presumption for the purpose of distribution of the estate that the person disclaiming had died immediately before the death of the spouse in question. When the Disclaimer is executed, the surviving spouse's interest is dissolved and in this instance the only persons with an interest in the estate are the infant children. The surviving spouse, on an application to the Probate Officer on foot of a Petition, may be given liberty as guardian of the children to apply for the Grant of Administration by and on their behalf and limited during their minority. We regard disclaimers as devices to deal with the right of an individual not to have to accept a benefit. A disclaimer in this instance can be used in an unusual manner and it is an indication of the Probate Office seeking to apply an Irish solution to an Irish problem.

If a separated spouse dies without issue, leaving him surviving his surviving spouse and other next of kin (i.e. his parents or brothers or sisters), a Disclaimer will have to be executed to allow his nearest next of kin to apply for the Grant. This is very difficult to explain to a client. You can imagine the meeting between the next of kin of a deceased separated person in his forties and their solicitor. As the deceased died intestate and without issue, and as the surviving spouse clearly renounced her succession rights in a closely fought and negotiated settlement, you would imagine that the next of kin could bypass any communication with the surviving spouse for the purposes of the administration. It appears not and this is going to lead to all sorts of practical problems for solicitors especially if we do not realise the problem at the initial stages. It is embarrassing for such an awkward issue to be raised at the time of assessment of the papers by the Probate Officer.

5. The next issue that causes delays is where the deceased has obtained a divorce and this divorce is one that may not be recognized in this jurisdiction. The point that I would like to emphasize at this stage is the question mark over certain foreign divorces and the effect of such a divorce on basic succession rights

Under the Domicile and Recognition of Foreign Divorces Act 1986 provision is made for the recognition by the Irish Courts of foreign divorces within this jurisdiction. Certain criteria must be met to satisfy the Court that the divorce in question should be recognised. The EU, through the Brussels Convention, has made additional provision that divorces obtained within the EU should be directly applicable within Ireland but, again subject to certain criteria being satisfied by the parties concerned. The approach is often to accept the status of the foreign divorce at face value given the direct applicability provisions of the Brussels Convention, but this can be misleading. I understand that this is a very real problem faced by the Probate Office.

The only circumstances prior to 1997 in which the parties to a failed marriage who were residing in Ireland could obtain a divorce, was to seek a foreign divorce. A foreign divorce would only be recognised as valid in Ireland under the Domicile and Recognition of Foreign Divorces Act 1986 if one or both of the spouses were resident in the State where the divorce was obtained at the date when the divorce proceedings were initiated or if the divorce was obtained in a third country and recognised as valid in the couple's country of domicile.

The problem is that many countries would grant a decree of divorce based on residence or even a very short stay in the country in question, but such divorces are not recognised as valid in Ireland. This results in the parties to the original marriage still being recognised as husband and wife. There is a procedure under section 29 of the Family Law Act 1995 whereby a declaration may be sought from the Court as to the validity of a foreign divorce. If you are dealing with the administration of the estate, and no such application was made, the problem is postponed until death and now has to be faced. I have heard of instances where practitioners have had to explain to a surviving spouse that they are not the spouse for the purposes of the Succession Act 1965. If the deceased remarried, the second spouse will not automatically be entitled to the legal right share or the right to elect, or to any share on intestacy. This will of necessity require the involvement of the first spouse, if he or she is still alive, and the implications are obvious.

The argument is often made to the Probate Office that, when a foreign divorce is presented to them that they should without question accept and recognise same without question given the direct applicability provisions of the Brussels Convention. Only a Judge has jurisdiction to make a determination regarding foreign divorces, whether in the EU or not. The Probate Officer does not enjoy the breadth of powers, which would enable her to conduct a line of inquiry to make a determination regarding recognition of a foreign divorce.

This situation can therefore result in Court proceedings for the parties concerned. To avoid such an approach and the costs involved in same, Annette explained the policy of the Probate Office of inviting the divorced surviving spouse to execute a Renunciation, which has evolved where there are issue applying for the Grant of Administration. If there are no issue a Disclaimer is sought to allow the nearest next of kin of the Deceased to apply in the circumstances. It is acknowledged that this is not a satisfactory state of affairs and, in my view, it is a use of a disclaimer for a purpose for which it was not originally envisaged.

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6 The final issue which is particularly close to my heart is the preparation of administration accounts. For one reason or another many practitioners are quite skilled in the administration of estates but when it comes to the actual preparation of administration accounts, through uncertainty or otherwise, they falter. It may be that the financial information during the administration itself has not been managed properly and that proper records have not been kept. I have seen cases where administrations have been needlessly delayed. In my view the preparation of accounts is an aspect that should be commenced at the very start of the administration, the Schedule of Assets being the first set of accounts that is prepared. Perhaps this is a training issue but it certainly is a problem in practice.

In summary

To avoid problems in an administration we need to be very careful in advising on the variation of the will or the Rules of Intestacy either by disclaimers, Deeds of Family Arrangement or Appropriation. Further identify and manage all the various strands of an administration simultaneously.