



REGULATORY ADVICE ON WHEN TO SEEK A LICENCE FOR PROBATE

BACKGROUND

Probate and estate administration are closely aligned activities. ICAEW members and firms carry out the latter as part of their practice. Probate is a reserved activity that requires authorisation or a licence from an approved regulator (AR) or licensing authority (LA). ICAEW was designated as an AR and LA in 2014.

ICAEW members and firms have also provided tax advice and compliance services in relation to inheritance tax and other death taxes, without necessarily considering these as either estate administration or probate services.

Delineation between these activities has not been closely tested. To a large extent, ICAEW members and firms have had to determine their own boundaries, seeking legal advice where appropriate, to ensure they remained within the law. Carrying out the reserved activity when not authorised is a criminal offence.

ICAEW has taken legal advice on the setting of boundaries and it is clear that there is no definition in law or the courts other than that currently offered by the Legal Services Act 2007 (the Act) which states that the reserved service of probate constitutes;

‘the preparation of any probate papers on which to found or oppose a grant of probate or a grant of letters of administration.’

ICAEW as a regulator has duties under the Act to operate oversight of its members and firms in ways which recognise both the consumer and public interest. It also has an obligation to act in accordance with regulatory principles, which include a requirement to act with transparency and consistency. Accordingly we cannot prescribe the law, but should indicate the regulatory boundaries beyond which we do not expect members and firms to be practising in this area without accreditation.

The regulatory advice below sets out a framework to enable ICAEW members and firms to decide whether they are currently operating within these expectations or whether they should be applying for probate accreditation.

If an ICAEW member firm is found to have been operating outside this regulatory framework then this will be treated as a disciplinary offence and members will be called to account.

This regulatory advice was published 1 April 2015 and took full effect from 1 August 2015. The interim period allowed firms to assess existing practice and make an application for licensing where appropriate or discontinue certain procedures.

Any services completed before 1 August 2015, or undertaken or contracted before 1 August 2015 and completed after that date, which might have fallen foul of this advice, will not be subject to disciplinary measures unless;

- they were clearly inappropriate under previous formal ICAEW guidance;
- showed a cavalier disregard of the reserved nature of probate activity; or
- did not serve the interest of clients or beneficiaries.

They would however remain open to the risk of external challenge and would be followed up in the event of an external complaint.

The advice was updated on 1 March 2016 and took effect on 1 June 2016 to clarify certain aspects of the probate process. These include;

- An explanation of the application of the policy where unlicensed firms act as executors (see next page – advice questions).
- A clearer explanation of the limitations on the unlicensed firm to charge for services when they perform the probate service itself (see question 8 – advice questions).
- The additional obligations for firms which are appointed joint executors (see question 7 - frequently asked questions).

The update clarifies where an unlicensed firm is appointed executor, it cannot perform the probate work if there is intent to provide the estate administration work (or other work in connection with the estate) for a fee, even if there is a charging clause in the will. In such circumstances the firm should outsource the probate element of the executorship to a licensed practitioner. Where no fees are proposed for any element of the executorship then the firm can perform the reserved probate work under the statutory exemption.

As in the case of the core advice note above, the interim period is to allow firms to make the necessary adjustments to their practice. The rules around the cut off of 1 June 2016 will be similar to those applied at 1 August 2015.

OVERARCHING PRINCIPLE

The overarching principle applied is that where a member or member firm engages in estate administration services (be it as executor or acting for the executor) and also undertakes probate related activities which are managed as a process and a fee is involved, then the practitioner should be licensed for the reserved service. 'Managed' is a term of degree, but where significant decisions are being made without recourse to the executor this will be interpreted as management. The assessment will be similar to that exercised by a firm providing non-audit services to an audit client - where management control must be retained by the client, under ethical standards.

ADVISORY QUESTIONS

The table on the following pages has been prepared to provide additional guidance as to when a practitioner should be licensed for the reserved service, and what services can be provided with or without a licence. It also gives guidance as to what cannot be done even if a licence is held. Further guidance is [available](#).

Advisory question	Accountancy practice without a probate licence / authorisation	Accountancy practice with a probate licence / authorisation	Unlicensed member who is executor and charging for their work
1 Can I handle the whole probate process?	No	Yes with two exceptions: <ul style="list-style-type: none"> • The licence does not cover contentious probate which needs to be referred to a practitioner suitably licensed for contentious work such as a solicitor. (SWAT training makes clear when non-contentious probate becomes contentious). • The swearing of the oath which can be sworn by but not sworn to – (see 8 and 9 below). 	Yes apart from extracting the grant of probate which must be done by a licensed practitioner e.g. a solicitor or authorised member.
2 Can I be pro-active in the process?	No. All activities need to be managed by executor(s).	Yes	Yes
3 Can I complete the PA1?	One can help fill in the detail but not submit. Client (executor) must be in complete control of the document. (There is no signature required so that is not an issue).	Guidance obtained from Probate office (https://www.gov.uk/government/organisations/hm-revenue-customs/contact/probate-and-inheritance-tax-enquiries) indicates that licensed Chartered Accountants are not required to complete the PA1 form.	No. And if out-sourced to a licensed firm or legal practice it would not in any case be required.
4 Can I complete the IHT 400 or the IHT 205?	One can fill it in and calculate the numbers. However in the majority of cases one cannot sign and submit unless under express authority from the executor who would have had to have sight of the document before submission.	With a licence the IHT400 and IHT205 can be completed and submitted to HMRC without executor intervention.	One can complete and sign the IHT 400 and IHT 205; however a licensed practitioner must submit all documents to the probate registry to extract the grant of probate.
5 Can I negotiate with HMRC regarding subjective areas on the IHT 400 or IHT 205?	Yes within careful limitations. You can advise clients on this matter (as an accountant, not as a legal adviser) but any negotiations must be carried out under the full control of the client or their legal adviser.	Yes without limitation.	Yes although members should be clear that they are not providing legal advice to any co-executors unless the member is also legally qualified.

However you can still represent the client at a tax tribunal in connection with the estate.

<p>6 Can I advise the client on the appropriate treatment of assets and liabilities in the IHT400?</p>	<p>Yes, but again with careful limitations. Where there are alternatives the choice must be made by the client, who will be responsible for the submission. The client must make the decision from your options. The filling in can only be compliance/clerical activity. (The approach is very similar to that required of non-audit services rendered to audit clients under Ethical Standards 290.164 to 166.).</p>	<p>Yes without limitation.</p>	<p>As Executor you will need to decide on what treatment is appropriate.</p>
<p>7 Can I assemble the documentation for the submission for probate (IHT400, PA1, Will (if one), death certificate and probate fee)?</p>	<p>No this has to be done by the client or their solicitor. However advice can be offered on how to approach this.</p>	<p>Yes</p>	<p>No a licensed person must do this e.g. a solicitor or authorised member.</p>
<p>8 Can I do the reserved probate activities if I don't charge a fee?</p>	<p>Yes if you don't charge fees for estate admin work at all. Should a practising accountant decide to charge for the accountancy work entailed in the collection of material for purposes of obtaining probate, extracting the grant of probate must be done by a solicitor or another licensed practitioner.</p>	<p>Yes</p>	<p>Yes if you don't charge fees for estate admin work at all. Should a practising accountant decide to charge for the accountancy work entailed in the collection of material for purposes of obtaining probate, extracting the grant of probate must be done by a solicitor or another licensed practitioner.</p>
<p>9 Can I draft the oath?</p>	<p>No</p>	<p>Yes</p>	<p>No</p>
<p>10 Do my clients have a right to privilege?</p>	<p>No</p>	<p>Yes, and this extends to estate administration and any other ancillary work associated with the evaluation of and distribution of the estate.</p>	<p>No</p>

11 Do I have to contribute to the compensation fund?	No	Yes. This needs to be confirmed in the letter of engagement.	No
12 Do I have to pay more for my PII or change my insurer?	No	You should confirm with your broker that cover under your current policy will extend to probate. You may need to increase cover to £500k per claim in relation to claims arising from probate and estate administration work if it is not already at that level for other activities. But otherwise the probate activity is considered to be an extended accountancy activity and should not affect premiums or availability of cover. But insurers have the right to refuse.	You should confirm with your broker that your current policy covers you acting as a paid executor.
13 If there is no client do I need to issue a letter of engagement?	The client will be the executors of the deceased individual and the engagement letter must be issued to them.	Client will be the executors of the deceased individual and the engagement letter must be issued to them.	It is considered best practice under other licensing authorities to advise key beneficiaries of the terms of engagement and the basis of fee charges, even if there is no direct client. This is despite beneficiaries not being a client or having a vires to challenge charges. This is also ICAEW policy.
14 Do I need a licence to prepare a lasting power of attorney?	No. This is excluded from reservation under Schedule 2 paragraph 5(3) (c) of the Legal Services Act.	No	No. This is excluded from reservation under Schedule 2 paragraph 5(3)(c) of the Legal Services Act.
15 What happens if I do something that strays into the reserved area when I am not licensed?	You will be committing a crime under the Administration of Justice Act 1985 and also subjecting yourself to disciplinary action by ICAEW. The action may also take you outside the PII cover provided by your insurer.	Not applicable as the reserved area is licensed.	You will be committing a crime under the Administration of Justice Act 1985 and also subjecting yourself to disciplinary action by ICAEW. The action may also take you outside the PII cover provided by your insurer.

Frequently asked questions

1. If the practitioner providing a probate service for no fee has a bequest under the will are they acting for reward?

The practitioner would need to show that the bequest under the will was made to them by reason of personal relationship and not as a deferred fee payment arrangement with the deceased. Unless the bequest is conditional on the member providing probate services, the default position would be that the bequest is not a reward for services.

2. If the practitioner has retired before the client dies and the will has a charging clause, does the member need a practising certificate?

Estate administration is an accountancy service and therefore the practitioner would be required to hold a practising certificate and PII.

3. What is the wording for the oath?

The SWAT course materials provide template wording.

4. When does executorship commence, on death or on grant of probate?

Executorship commences on death and the appointment is for life unless the executor renounces his role before he has intermeddled in the estate.

5. At what point does probate become contested if a beneficiary argues against the executors?

Probate becomes contentious when the validity of the will is challenged in some way, for example where a claim is made that the will has failed to make reasonable financial provision for someone under the Inheritance (Provision for Family and Dependents) Act 1975. Once the probate becomes contentious, the matter must be passed to a suitably licensed person such as a solicitor.

There is no time limit for claims to be made against the estate, so the validity of the will can be challenged at any time, and the probate would then become contentious.

6. Are there any additional obligations for an accountancy practice where they are appointed as a joint-executor?

Yes. A letter of engagement should be shared with the co-executor(s) and their agreement secured for any fees the accountancy firm might levy on the estate in accordance with the will.

What are probate and executor activities?

DEFINITION IN LAW

- Schedule 2 paragraph 6 of the Legal Services Act 2007 defines probate activities as preparing any probate papers for the purposes of the law of England and Wales.
- Probate papers are papers on which to found or oppose a grant of probate (or grant of letters of administration).

PREPARING PROBATE PAPERS INVOLVES THE FOLLOWING:

- PA1 form for personal applicants
- Inheritance Tax forms
- Paying the Inheritance Tax due
- The oaths

OBTAINING THE GRANT OF PROBATE INVOLVES THE FOLLOWING:

- Swearing the oath
- Submitting the relevant papers to the probate office
- Obtaining copies of the grant

DUTIES OF AN EXECUTOR:

- Determine the assets and liabilities of the estate
- Protect those assets
- Obtain the grant of probate / grant of representation where needed*
- Collect in assets, recover debts due, administer the estate in accordance with the law
- Settle any tax liabilities and deliver tax returns as required
- Distribute the estate in accordance with the will or intestacy rules
- Manage the estate correctly
- NB appointment as executor is for life and is not discharged once the estate administration is finalised. If income becomes due to the estate or if claims are made against it is the executor's responsibility to deal with them.

*Obtaining the grant of probate / grant of representation is the reserved activity within the executor's duties.

What can an unlicensed executor do when preparing probate papers?

Part of process

PA1 form for personal applicants	This is only needed for a personal application, so where there is no solicitor or other licensed practitioner involved. If a non-licensed member is the executor the PA1 form is needed and should be completed by the member in his role as executor.
Inheritance Tax forms	Where the member is the executor it is his responsibility to prepare the IHT forms. He can submit the IHT400 to HMRC; however he can't submit the IHT 205/207 to the probate registry because this is part of obtaining the grant of probate. An authorised person such as a solicitor must submit the IHT 205/207.
Paying the Inheritance Tax due	A non-authorised member can pay the IHT in his role as executor
The oaths	<p>For a personal application the oath is prepared by the probate registry and sworn by the executor. A non-authorised member can't prepare the oath.</p> <p>An authorised member can prepare the oath; if he is executor he will swear it too.</p>
Submit these documents to the probate registry	A solicitor or authorised member must do this part of the process.

ENGAGEMENT LETTERS

Guidance for letters of engagement has been issued for firms who provide legal services including probate. This can be found [here](#)

Guidance issued February 2016.