

## Inheritance – The Problem

What happens when the owner of a house, building or land dies with or without leaving a will in respect of this property and not all of the heirs can be identified or found or, perhaps, where even the ownership of the property itself is uncertain?

In the past, this may have led to an estate taking years to be administered while extensive searches were carried out, both here and overseas, or even to a property becoming derelict because of the time this took or because there were no funds to pay for such searches and in some extreme cases to the Crown taking possession where no heirs could be found.

A solution is available now the Law Reform (Inheritance and Miscellaneous Provisions) (Guernsey) Law, 2006 (“the Law”) has come into operation.

The Law enables H M Procureur, an heir to the property or the guardian of an heir to apply to the Royal Court for the making of an Administration Order. In granting such an order, the Court may appoint an administrator being any one or more of H M Procureur, the applicant (if ordinarily resident in Guernsey), an advocate of the Royal Court, the Public Trustee or, with the approval of H M Procureur, any other person who is ordinarily resident in Guernsey, but only a natural person (i.e., a human being and not a company) can be appointed.

On the making of an Administration Order the property becomes vested in the administrator as trustee for the benefit of the heirs, whether or not at that time the

heirs or all of them have been identified. As is to be expected, the burden placed on the administrator is onerous and the remainder of this article outlines what is expected of them.

The administrator must look after the property with a view to selling it, then look after the proceeds of sale and distribute them appropriately.

An administrator must observe “the utmost good faith”, act only in the interests of the heirs, act “en bon père de famille” i.e., prudently, keep accurate accounts and records of his dealings with the property and at the written request of the heirs or at the Court’s discretion provide accurate information about the state of the property and his administration of it including the production of accounts.

He is also required so far as is reasonable to preserve and where appropriate enhance the value of the property pending its sale. After the sale he is required to show the same diligence with respect to the proceeds of sale.

While carrying out his duties in relation to the property, the administrator will have the same legal interest in the property and all of the powers which its late owner had before his death, including - the ability to let the

property and to incur liabilities in doing so; may sue and be sued, may take professional advice in relation to his management and sale of the property and the management of the proceeds of sale, (but may not delegate his functions other than in accordance with the provisions of the Law or subject to any order of the Court); and, may apply to the Court for directions in relation to the management of the property or of its proceeds of sale.

He can postpone the sale of the property but may not unreasonably delay any sale, nor may he borrow against the security of the property or cause any charge to be attached to it without the consent of the Court.

He is to take all reasonably practicable steps to identify the heirs to the property and their respective interests .

The property may be sold privately or by public auction. The proceeds of sale and any accrued income, less the administrator’s reasonable fees and expenses, must be held by him in an account which is separate from his own property and separately identifiable from any other property, for a minimum of six years from the date of the sale.

At the end of that period he shall apply as soon as he can to the Court for permission

to distribute the net proceeds of sale to the identifiable heirs. If he has not been able to identify all of the heirs, or has not been able to identify any heir or heirs, he shall apply to the Court for directions.

The Court has the power, on the application of the administrator, to order a distribution before the period of six years has elapsed from the sale of the property. In such a case, any heir who has not received a share of the distribution will (a) still have the right to claim against those heirs who have and, (b) until the period of six years has elapsed from the date of the sale, have a lien on the proceeds of sale. The administrator, however, shall be discharged from any personal liability in respect of the distribution.

When the administrator applies to the Court to make a distribution, he must provide a sworn statement or affidavit which sets out the actions he has undertaken to identify the heirs; whether he is satisfied that all the heirs have been identified; and, lastly, provide details of the heirs to whom he proposes to distribute the proceeds of sale. In addition, he must apply to the Court for whatever directions he considers suitable.

An administrator can be liable for breach of trust, in which case he will be accountable for any resultant loss or depreciation in value of the property or value of the proceeds of sale. Where co-administrators have been appointed, in certain circumstances, one may be liable for a breach of trust of the other.

Unless the Court orders otherwise, an administrator is not obliged to disclose any documents which reveal the reasons for his decisions, his deliberations as to how he should exercise his functions, or any material on which such decisions were or might have been based.

An administrator may appoint a person as his attorney to sign any document or attend Court to consent to the sale of a property, provided that the administrator has first approved the terms of the document or sale.

The Court has the power to relieve an administrator in whole or in part for liability for a breach of trust if it is satisfied that the administrator has acted honestly and reasonably and ought fairly to be excused.

On the other hand, if an administrator does not comply with an order of the Court requiring him to undertake an action, the Court may nominate another person to do so and this may be at the personal expense of the administrator.

When an administrator is dealing with a third party if he:

- (a) informs that person that he is acting as a trustee, then a claim by the third party in respect of that matter shall be limited to the value of the property at that time or of the proceeds of sale from time to time as the case may be;
- (b) fails to inform the third party that he is acting as trustee and the third party is otherwise unaware of that fact, then the administrator incurs personal liability in respect of the transaction or matter and he has a right of indemnity against the property or the proceeds of sale in respect of his personal liability, unless he acted in breach of trust.

When in doubt, an administrator may always apply to the Court for directions.

An application may be made to the Court by HM Procureur, the administrator, an heir, or, with the Court's permission, any other person to make an order:

- (a) for the carrying out of any act in the administration of the property;
- (b) in respect of the administration in relation to the carrying out of any of the administrator's functions, his appointment, remuneration or conduct, his removal from office, the maintenance and submission of accounts and the making of payments;
- (c) relating to the heirs or any person connected to or concerned with the administration; and

- (d) relating to any real or personal property subject to the administration including its vesting, preservation, application or recovery.

If the Court removes an administrator, it may impose conditions and may require an administration bond to be given.

An Administration Order will remain in force until the proceeds of sale of the property have been distributed in accordance with the law or otherwise as the Court may direct.

An administrator may apply to the Court to be discharged in which case the Court may require an account for the administration of the property, or of its proceeds of sale, or of both, before discharging him.

Any person who could have applied for the making of an administration order may apply to the Court for removal of the administrator, if he becomes incapable of acting, refuses, neglects or is unfit to act.

When an administrator dies, is discharged from his functions or is removed by the Court and no one else is authorised to act as administrator, the court shall appoint a person from those who could have applied originally to carry out the functions of the administrator in place of the former administrator. Where more than one administrator was appointed, the Court may appoint one or more persons to act with the continuing administrator(s).

On appointment by the Court, the administrator is obliged to take an oath or give an affirmation to carry out his duties properly.

The administrator is entitled to be paid for all reasonable expenses properly incurred and for all reasonable fees, as the Court may approve. These fees and expenses are deemed to constitute a charge against the proceeds of sale in priority to all other claims.

## **Babbé**

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