

Checklists for Sale by Executor, Deputy and Attorney

The following checklists may help to guide your thinking and process in probate sales where you are required to act for executors, deputies and attorneys:

1. Sales by Executors page 1
2. Sales by Attorneys page 3
3. Sales by Deputies page 6

1. Sales by Executors

If an owner or registered or unregistered property has died, is probate needed?

- Sole owner: Yes, to grant legal title to the executors/administrators to sell.
- Joint owner as joint tenants: No, as legal and beneficial ownership passes automatically by survivorship to the surviving owner(s).
- Joint owner as tenants in common: This depends on the nature of the trust created by the late owner's Will or by the Administration of Estates Act 1925. Best practice is to obtain a grant on first death as it confirms this is the last Will and sets out the details of the trust

Who is our client? Executor/administrator

Obtain a copy of the death certificate, grant of probate if available already, and where there is one, the Will of the late owner to establish who is named as executor to administer the estate and to whom beneficial ownership passes.

Always ensure you have a death certificate and grant. Never one or the other.

Fraud – check for ID the deceased if possible - If your firm has acted for the late owner, see what ID we have on record for the deceased. Copy it to your file. Check online notice of death. E-verification for the late owner at the property address/the address for service in the title register. Ensure there is no property fraud and the person has died.

If there is no Will, or the executor(s) named in it have died or are unable to act, the Administration of Estates Act 1925 applies and there is an order of who may apply for a Grant of Administration to administer the late owner's estate. This has to be established if the Grant of Administration is not yet issued.

ID is then required for those who are established as clients, executor(s) or administrator(s).

Sale details

Who is the executor/administrator selling to?

Private sale – ensure market value obtained and recommend tax advice is sought.

Private sale – below market value – check all executors/administrators and beneficiaries agree, especially important where there are charity beneficiaries. Recommend tax advice is sought.

Completion funds

If your firm is acting in administering the estate of the late owner, transfer sale proceeds to the estate administration client account: liaise with your probate department.

If your firm is not acting, the sale proceeds must go to the executors'/administrator's estate account. This must be a specific bank account but **note the following 4 points to keep in mind:**

- a) **Sometimes** the bank will convert the deceased's account to an executor's account automatically on production of a death certificate and it can be used to administer estate funds;
- b) If the bank does not convert the deceased's account, there can be **delays in opening an executor's account**. We cannot act as a bank and hold funds indefinitely – check at the outset the status of an executor account and if one needs to be opened but will not be by the time completion takes place, **obtain COLP/COFA consent to us holding funds for a short period after completion. Make sure you follow conduct and accounts rules as to explaining to the clients regarding interest from client accounts and set a reasonable timescale as approved by your COLP/COFA**
- c) **Avoid** paying proceeds to an executor's/executors' personal bank account(s).
 - a. There have been numerous reported cases of executors not distributing funds, family fall outs and making off with estate funds.
 - b. **You must be aware** that the executor may die, be divorcing, and estate funds could be frozen whilst estate administration/divorces proceed or it could be difficult to distinguish estate funds from their personal funds .
 - c. **Also note** if estate funds intermingle with personal funds there is a breach of fiduciary duties by the executor and the beneficiaries have a claim against them/ possibly your firm.
 - d. **There may** be limited circumstances where the executor is also sole beneficiary and you have seen the Will, and know this, or 2 executors/both beneficiaries, or there is a limited number of beneficiaries who all consent in writing and you have their ID.
 - e. **This is very much a risk-based approach as to payment of net proceeds**. Consider any knowledge of disputes/estranged family members who are beneficiaries.
- d) **Appropriation:**
 - a. **This involves** assigning the beneficial interest in the property to the beneficiaries, and is used when the property is being sold at a gain against probate valuation.
 - b. **It must happen before exchange of contracts**.
 - c. **As the beneficiaries have the beneficial interest** at the point of completion, you can pay proceeds to each directly. You must have ID and signed instructions from each to do so.

Obtain payment instructions in writing/hard copy or by secure email.

Ensure you do a bank checker – your Accounts team should be able to do this.

2. Sales by Attorneys

Establish why the legal owner(s) is/are not able to act: incapacity/posting overseas with work

What authority is in place for someone to act on the legal owner's behalf? In order to sign contracts, transfer deeds and other documentation, there must be either:

- a) A registered Lasting Power of Attorney ("LPA"), stamped by the Office of the Public Guardian. An LPA is not valid unless it has been registered and stamped by the Office of the Public Guardian.
- b) An Enduring Power of Attorney ("EPA"):
 - a. This can be used, even if not registered with the Office of the Public Guardian, if the legal owner ("donor") who gave authority still has mental capacity but does not wish to act for some reason, e.g. they are finding it overwhelming or they are posted overseas.
 - b. If the legal owner lacks mental capacity, an EPA can only be used if it has been registered with the Office of the Public Guardian and is stamped. Without registration, it cannot be used in the sale. There are limited circumstances where it can be used whilst the EPA is being registered
- c) A general or property specific power of attorney: This is granted under the Powers of Attorney Act and can only be used where the legal owner has capacity and decides to let someone else deal with the sale, for example if there is a partnership property being sold or the legal owner is based overseas (but NB carry out detailed due diligence if they are).

LPA – additional checks

Check the LPA has not been revoked and is valid – OPG100 – free search:

<https://www.gov.uk/government/publications/search-public-guardian-registers>

Check for restrictions on what the attorneys may use it for: can they use it to sell property, or did the legal owner say a court order would be needed for them to do so, or certain conditions would apply, for example the family would have to be consulted and make a decision on the sale of a property.

Check when the LPA can be used which can be after registration or only on mental incapacity

Check how many attorneys are appointed and if they can act jointly and severally, or must act jointly, so all attorneys have to sign papers, or only one can. Some LPAs states that for property sales, the attorneys must act jointly but for other matters such as dealing with bank accounts, they may act jointly and severally, so any one of them can pay bills etc.

If legal owner lacks capacity the attorneys have a duty to consider the legal owners wishes, if made known to them.

EPA – additional checks

Check the EPA has not been revoked and is valid – OPG100 – free search:

<https://www.gov.uk/government/publications/search-public-guardian-registers>

Has it been revoked? EPAs stopped being created from 1 October 2007 and there are a great many people who have revoked them to create LPAs.

Check how many attorneys are appointed and if they can act jointly and severally, or must act jointly, so all attorneys have to sign papers, or only one can.

Check all parties signed before 1 October 2007

If legal owner lacks capacity the attorneys have a duty to consider the legal owners wishes, if made known to them.

General or property specific power of attorney – additional checks

How old is it? There is a presumption that these types of power of attorney remain valid for 12 months only, and you must ensure there is a valid power of attorney in place at the time completion takes place, otherwise Land Registry may refuse to register the transfer or document being sent to them for registration.

What is the exact wording? Does it allow the attorney to sign “all papers necessary to effect the sale of [PROPERTY], or allow them to deal with bills for it only?

Has it been revoked? Ask the question, especially if it is over 10 months old.

Does the donor have capacity? Ask the question and speak to the legal owner who made the power of attorney.

ID – who is client

The legal owner(s) is/are the clients.

- Need ID for the donor and ID for the attorneys to confirm they are who they say they are
- It is difficult sometimes, especially where the legal owner lacks capacity and is perhaps in a care home, to arrange this, but an attempt must be made to obtain ID and then run electronic verification (ThirdFort/Smartsearch) which might include
 - Obtain a DWP letter with National insurance number;
 - Obtain a letter from the care home confirming they are resident and how long they have been there.
 - Consider if we need to speak or attempt to speak to the donor, obtain a capacity assessment letter from their GP to see what the position is.
 - Again it is a risk based approach
- Without ID for the legal owner you do not know if the legal owner is aware of the sale and agrees to it, which you must try to establish, and you cannot give undertakings in replies to TA13 to say you act for the true legal owner.
- If the donor **has capacity**, write to them at the address you have for them which may be the one in the power of attorney/address for service on the register confirming your instructions, sale price and any transaction details. Ask for them to sign a duplicate letter and return as their written authority to take instructions from their Lasting/Enduring/general attorneys.
- If the donor **lacks capacity – EPA or LPA must be registered otherwise invalid**. General powers of attorney cannot be used.
- If you are told that the donor lacks capacity independently verify this by speaking to the care home or obtaining a capacity assessment letter from a qualified person (**geriatrician**) confirming they lack capacity
 - Check with the care home that they have moved there permanently.
- **Where the donor lacks capacity** – make a note as to why the transaction is in the **donor’s best interests** – e.g. sale proceeds will fund care home fees.

Sale details

Who are the attorneys selling to?

Private sale – ensure market value obtained (as the attorneys must act in the best interests of the legal owner and achieve the best price possible, Obtain a RICS valuation not just three estate

agents) and recommend tax advice is sought. Court of Protection order needed to protect all parties too (especially if parties fall out later on).

Private sale to a family member at open market or under open market value – will need Court of Protection approval.

Private or third party sale below market value – will need Court of Protection approval to ensure the sale is not depriving the legal owner of funds, for example for care home fees: the local authority (where there are insufficient monies to pay outstanding care home fees, or future fees) and Office of the Public Guardian may question transactions that did not have court approval.

Completion funds

Monies must be paid to the legal owner's bank account, NOT the attorney's.

Obtain payment instructions in writing/hard copy or by secure email.

Ensure you do a bank checker – your Accounts team should be able to do this.

3. Sales by Deputies

A Deputy is appointed by the Court of Protection to act on someone's behalf where they lack mental capacity and either did not make any power of attorney, or they did but their attorneys are unable to act or the POA did not cover the sale of their property

The Court of Protection will also have to make specific orders relating to certain types of sales:

- a) Where there is a sale to a family member, or any sale at an undervalue by an attorney or deputy;
- b) Where there is a tenancy in common Form A restriction on title, the first owner has died and the surviving owner has lost capacity, an order will usually be needed to appoint a second trustee.

Court of Protection Order to Appoint a Deputy – additional checks

Check the order has not been revoked and is valid – OPG100 – free search:

<https://www.gov.uk/government/publications/search-public-guardian-registers>

Check for restrictions on what the deputies may do under the terms of the Order: is it all-encompassing to cover all property and financial affairs, can they use it to sell property, or did the court say a further order would be needed for them to do so, or certain conditions would apply, for example the family would have to be consulted and make a decision on the sale of a property.

Check if the deputies – if more than one are appointed jointly or jointly and severally

.

Deputy has a duty to take into account the legal owners wishes, if made known to them.

ID – who is client

The legal owner and deputy instructing us and acting on behalf of the legal owner are both clients.

- Need ID for all
- It is difficult sometimes, especially where the legal owner lacks capacity and is perhaps in a care home, to arrange this, but an attempt must be made to obtain ID and then run electronic verification (ThirdFort/Smartsearch).
- Without ID for the legal owner you do not know if you are acting for them so you must try to establish this in order to give the undertakings in replies to TA13 to say you act for the true legal owner.

Sale details

Who are the deputies selling to?

Private sale – ensure market value obtained (as the deputies must act in the best interests of the legal owner and achieve the best price possible, Need a RICS valuation) and recommend tax advice is sought and obtain specific order.

Private sale to a family member at open market or under open market value – will need Court of Protection approval.

Private or third-party sale below market value – will need Court of Protection approval to ensure the sale is not depriving the legal owner of funds, for example for care home fees: the local authority

(where there are insufficient monies to pay outstanding care home fees, or future fees) and Office of the Public Guardian may question transactions that did not have court approval.

Completion funds

Monies must be paid to the deputy account – which will state it is in the name of the deputy, acting as deputy for the person who lacks capacity. This will ensure that the OPG are aware of the sale.

Obtain payment instructions in writing/hard copy or by secure email.

Ensure you do a bank checker – your Accounts team should be able to do this.

Disclaimer

This document is shared with webinar participants for discussion and general information only and is not intended as legal advice. Neither the authors, nor the Law Society, make any representations, warranties or guarantees that the content is accurate, complete, up to date or suitable for a specific situation and do not accept any liability for reliance on any of the information stated. You should undertake your own research before taking any action on the basis of this checklist.