verdict will not include any finding of criminal liability on the part of a named person (Coroners and Justice Act 2009, s 10). Similarly, the verdict of an inquest will not determine any question of civil liability.

3.22 While it falls outside the remit of this work, it should be noted that some inquests may be subject to significant adjournments. Schedule 1 to the Coroners and Justice Act 2009 sets out when a senior coroner can or must suspend and resume investigations and adjourn inquests. For example, these can include when an inquest is held in which the death was caused by an accident or disease and the representative of the enforcing authority is unable to be present, or where the Director of Public Prosecutions requests the coroner to adjourn an inquest on the ground that a person may be charged with an offence committed in circumstances connected with the death. In the latter case, in the event that a criminal trial takes place and someone is convicted, it is unlikely that the senior coroner will resume the inquest, unless the criminal proceedings did not bring out the evidence of the circumstances of the death. Instead, the coroner will send to the Registrar of Births and Deaths a certificate stating the result of the criminal proceedings in order for the death to be registered (Coroners (Investigations) Regulations 2013, reg 8).

FURTHER INFORMATION

3.23 Further information on the role of coroners and the coronial process inquest procedure will be published shortly on the Ministry of Justice website and the Coroners' Society of England and Wales website (see www.dca.gov.uk/corbur/coronfr.htm and www.coroner.org.uk/).

CHAPTER 4

DISPUTES – BURIAL AND ASHES

4.1 The reality of the law governing the disposal of human remains is often at odds with the expectations of families and relatives who have lost loved ones. The law is based on stark rules which can be difficult for those grieving to accept.

NO PROPERTY IN A CORPSE

4.2 Fundamental to the law governing ashes and burials is the premise that there is no property in a corpse (*Williams v Williams* (1882) 20 Ch D 659). A corpse is incapable of being the subject of property transactions or offences; for example, it cannot be bought or sold, stolen or criminally damaged, or seized by the deceased's creditors as security for his debts (*R v Fox* (1841) 2 QB 246).

METHOD OF DISPOSAL

4.3 The normal methods of disposal are burial or cremation. Cremation, which has always been permitted provided it does not amount to a public nuisance (*R v Price* (1884) 12 QBD 247), has a statutory footing under the Cremation Acts 1902 and 1952. Cremation other than in a crematorium in accordance with the legislation is unlawful. In *R (on the application of Ghai) v Newcastle City Council* [2011] QB 591 the Court of Appeal held that cremation on an open air funeral pyre within a walled enclosure was capable of being construed as being within 'a building' and therefore within the legislation.

THE DECEASED'S WISHES

4.4 As a corpse does not constitute property, it does not form part of a person's estate and cannot pass under a person's will or under the intestacy rules (*Williams v Williams* (1882) 20 Ch D 659). As a consequence, under common law, until recently, any direction in a will or codicil as to the disposal of a person's body was held to be unenforceable.

4.5 The position may have changed since the enactment of the Human Rights Act 1998. In *Borrows v HM Coroner for Preston* [2008] EWHC 1387 (QB), Cranston J found that it was clear from the jurisprudence of the European Court of Human Rights that the views of a deceased person as to funeral

arrangements and the disposal of his or her body must be taken into account in accordance with Art 8 – the right to private and family life.

4.6 However, Peter Smith J in *Ibuna v Arroyo* [2012] EWHC 428 (Ch), has disagreed with this analysis, finding that the Human Rights Act 1998 cannot be applied post death in relation to a body and preferring the position as set out by Hale J as she then was in *Buchanan v Milton* [1999] FLR 844, that in disposing of the body the executor is entitled to have regard to the expressions made by the deceased but is not bound by them. See further **4.18–4.20**.

DUTY OF DISPOSAL

4.7 Conflict may arise over who has the right to possession of the body to determine the mode and place of disposal. In the interests of public health, the law has imposed duties on certain people to dispose of the body and the right to possession will largely depend on who has the duty of disposal.

HIERARCHY OF THOSE WITH A DUTY TO DISPOSE OF THE BODY

4.8 (1) The primary duty to dispose of the deceased's body falls on the deceased's personal representatives. For this purpose the executors of the will, or administrators of the estate when the deceased dies intestate, have a right to possession of the corpse and may determine the mode and place of burial even where other family members object.

Leeburn v Derndorfer [2004] WTLR 867 confirmed that this right extends to the deceased's ashes, so as to enable the executors to dispose of the deceased's remains properly after cremation (see also *Robertson v Pinegrove Memorial Park Ltd* (1986) ACLD 496).

The courts have proved reluctant to interfere with executors' decisions as to burial unless they are capricious, unreasonable or made dishonestly. In *Re Grandison* (1989) *The Times*, July 10, strong grounds were required to interfere with the exercise of executors' discretion.

The testamentary appointment of executors is binding and testators should give careful consideration to this appointment in the context of their burial instructions.

(2) Where personal representatives have not been appointed, the person with the highest right to take out a grant (as set out in the Non-Contentious Probate Rules 1987 (NCPR 1987),[1] r 22 and Administration of Estates Act 1925, s 46) can take possession of the corpse:

[1] At the time of writing the Non-Contentious Probate Rules 1987 (as amended) remain in force. However, the government has recently consulted on changes to the rules including a possible change of name to the Probate Rules 2013. No final form of the new rules has yet been published or date fixed for their coming into force.

> **'22.— Order of priority for grant in case of intestacy**
>
> (1) Where the deceased died on or after 1st January 1926, wholly intestate, the person or persons having a beneficial interest in the estate shall be entitled to a grant of administration in the following classes in order of priority, namely–
>
> (a) the surviving [spouse or civil partner];
> (b) the children of the deceased and the issue of any deceased child who died before the deceased;
> (c) the father and mother of the deceased;
> (d) brothers and sisters of the whole blood and the issue of any deceased brother or sister of the whole blood who died before the deceased;
> (e) brothers and sisters of the half blood and the issue of any deceased brother or sister of the half blood who died before the deceased;
> (f) grandparents;
> (g) uncles and aunts of the whole blood and the issue of any deceased uncle or aunt of the whole blood who died before the deceased;
> (h) uncles and aunts of the half blood and the issue of any deceased uncle or aunt of the half blood who died before the deceased.'

In *Holtham v Arnold* (1985) 2 BMLR 123 the deceased's separated wife, being entitled to letters of administration of her late husband's estate, was entitled to possession of her husband's corpse above his cohabitee. In the Australian case *Smith v Tamworth City Council and Others* [1997] NSWSC 197 (14 May 1997), the deceased's adoptive parents, rather than the biological parents, had the right to determine the burial.

POINTS TO NOTE AND EXCEPTIONS TO THE HIERARCHY

Parental responsibility

4.9 The parents of a child are responsible for the disposal of their child's body, provided they have sufficient means (*R v Vann* [1851] 2 Den 325, 169 ER 523, *Clarke v London General Omnibus Co Ltd* [1906] 2 KB 648, *Fessi v Whitmore* [1999] 1 FLR 767). In *Fessi v Whitmore*, married parents were held to be equally entitled to their deceased child's body.

4.10 The right and duty to dispose of a child's remains may be an element of parental responsibility (as defined in Children Act 1989, s 3(1)), in which case a parent without parental responsibility would not have the right or duty to dispose of their child's remains, but there is no direct authority on this point (David Hershman 'Parental disputes over a child's funeral' *Trusts and Estates Law Journal*, November 1999).

4.11 If a child in the care of the local authority dies whilst in care, the right or duty to bury the child reverts to the child's parents (*R v Gwynedd County Council ex parte B* [1992] 3 All ER 317). Only if the parents cannot be found, or are unwilling to take responsibility for the body, can the local authority exercise the right to arrange the child's burial.

Householders and those lawfully in possession of the body

4.12 A householder is responsible for the disposal of any body on his premises (*R v Stewart* (1840) 12 Ad & El 773) and is lawfully in possession of the body for these purposes. This includes a NHS Trust or hospital and is subject to the claims of others who have the better right to make arrangements for the disposal of the body.

4.13 Where there is a bona fide dispute as to the identity of the personal representatives which cannot be immediately settled, the person lawfully in possession of the body will normally have the power to make arrangements for disposal (*University Hospital Lewisham NHS Trust v Hamuth* [2006] EWHC 1609 (Ch)). This principle was applied in *Laing v John Poyser Solicitors* [2012] EWCA Civ 1240, in which an appeal against a refusal to halt the cremation of the deceased's body, on the basis that she was a member of the West Indian community and would not have wished to be cremated, was refused.

Local authority

4.14 If no other appropriate arrangements have been made for the disposal of a body in its area, the local authority bears the burden of disposal (Public Health (Control of Diseases) Act 1984, s 46).

Coroner's inquiry

4.15 An exception to the above order will arise when a coroner is under a duty to inquire into the death of a particular person, in which case he has a right to possession of the body for the purpose of those inquiries. This right overrides all others (see Chapter 3).

Donation of body parts

4.16 The Human Tissue Act 2004 confers a statutory right to donate body parts for research or transplant purposes, and the Human Fertilisation and Embryology Act 1990 permits a man to consent to the posthumous use of his sperm.

SENIOR COURTS ACT 1981, S 116

4.17 Section 116 of the Senior Courts Act 1981 (SCA 1981) can be used to override the hierarchy:

> **'116.— Power of court to pass over prior claims to grant.**
>
> (1) If by reason of any special circumstances it appears to the High Court to be necessary or expedient to appoint as administrator some person other than the person who, but for this section, would in accordance with probate rules have been entitled to the grant, the court may in its discretion appoint as administrator such person as it thinks expedient.
>
> (2) Any grant of administration under this section may be limited in any way the court thinks fit.'

4.18 In *Buchanan v Milton* [1999] FLR 844, the natural mother of the deceased, an Australian aborigine who had given up her son for adoption at 4 days old (alleged at one stage to have been one of the 'stolen generation' improperly removed from Aboriginal parents in the 1970s), requested that the deceased's body be transported to Australia for burial in accordance with Aboriginal custom. The respondents were the persons entitled to a grant in the deceased's estate. Hale J found that there were special circumstances bringing into play s 116 but did not find it necessary or expedient to prefer the natural mother over the respondents.

4.19 In *Borrows v HM Coroner for Preston* [2008] EWHC 1387 QB, the hierarchy was varied on the basis of s 116. The judge set out guidance for coroners as follows:

> 'Where there is no executor or administrator, [coroners] will simply apply the order of priority set out in Rule 22 of the Non Contentious Probate Rules ... However if someone lower in that order of priority, or not there at all, advances a claim, they will need to consider it ... where compromise is not possible, coroners need to make a decision. They do this by asking themselves two questions, first are there special circumstances which weigh in favour of varying the order of priority set out in Rule 22. Consistently with the jurisprudence of the European Court of Human Rights, special circumstances include the wishes of the deceased person, if there is clear evidence of those wishes ... a second question they need to ask is whether it is necessary or expedient to do so.' (See also **4.4**.)

4.20 In *Ibuna v Arroyo* [2012] EWHC 428 (Ch), Peter Smith J did not agree that the Human Rights Act 1998 had any impact on the law ('I confess that I have some difficulty in a post mortem application of human rights in relation to a body as if it has some independent right to be heard') but found that the established law was correctly summarised by Hale J, as she then was, in *Buchanan v Milton,* namely, that in disposing of the body the executor is entitled to have regard to the expression made by the deceased but is not bound by it. Finding that the deceased's daughter had the prima facie right to take out a grant he used his powers under s 116 to make a joint grant to the deceased's cohabitant in view of the deceased's expressed wish that the cohabitant should direct the disposal of his remains. It was possible to make this order as both the daughter and the cohabitant were in agreement that they would bury the deceased in accordance with his wishes.

CHAPTER 12

VALIDITY DISPUTES

12.1 The will making process is an area ripe for dispute – the key witness, the deceased testator, being no longer available.

VALIDITY: ESSENTIAL ELEMENTS

Due execution

Basic principles

12.2 The formal requirements for executing a will are set out at Wills Act 1837, s 9 as amended by the Administration of Justice Act 1982 (AJA 1982).

> 'No will shall be valid unless –
>
> (a) it is in writing, and signed by the testator, or by some other person in his presence and by his direction; and
> (b) it appears that the testator intended by his signature to give effect to the will; and
> (c) the signature is made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and
> (d) each witness either –
> (i) attests and signs the will; or
> (ii) acknowledges his signature, in the presence of the testator (but not necessarily in the presence of any other witness),
>
> but no form of attestation shall be necessary.'

Signature

12.3 The signature of the testator can be merely a mark (for example a thumb print as in *Borman v Lel, In the Estate of Parsons* [2002] WTLR 237).

12.4 A will or codicil no longer needs be signed 'at the foot or end thereof' (after the AJA 1982, s 17) and a testator's writing of his name as part of the attestation clause has been held to be a signature intended to give effect to a will (*Weatherhill v Pearce* [1995] 1 WLR 592).

12.5 The will can be signed by someone other than the testator at the testator's direction in accordance with s 9(a) of the Wills Act 1837. In *Barrett v Bem and Others* [2012] EWCA Civ 52, the Court of Appeal held that there must be a 'positive and discernible communication (which may be verbal or non-verbal) by the testator that he wishes the will to be signed on his behalf by the third party' ie 'more than passive acquiescence' overruling the first instance judge who found that the act of attempting to sign personally, failing to do so, and allowing someone else to sign, was sufficient to amount to a direction. The evidence fell short of establishing a positive communication by the testator expressing a direction, and therefore the court ordered probate of the earlier will.

12.6 The Court of Appeal did not need to address the second ground of appeal that, since the signature was appended by the sole beneficiary under the will, it ought to be declared invalid on the grounds of public policy by analogy with s 15 of the Wills Act 1837 which renders a gift void if an attesting witness is a beneficiary. However, the court noted that it was 'plainly undesirable that beneficiaries should be permitted to execute a will in their own favour' and recommended that Parliament consider changing the law to ensure this could not happen in the future.

12.7 As set out above, s 9(b) requires that the testator intended by his signature to give effect to the will.

12.8 In *Marley v Rawlings* [2012] EWCA Civ 61, the Supreme Court overturned the Court of Appeal's decision that a will intended to be signed by Mrs Rawlings but in fact was signed by Mr Rawlings did not satisfy s 9 and therefore could not be rectified under s 20 of the Administration of Justice Act 1982. The Supreme Court found that Mr Rawlings had indeed signed the will and by signing intended to give effect to it so that it could be rectified to reflect his testamentary intentions (see also Chapter 10).

Witnesses and attestation

12.9 Two or more witnesses must be present at the same time when the testator signs his will, or alternatively, the testator must acknowledge the signature in their joint presence. Wills that fail to meet this requirement will be overturned.

12.10 The witnesses must then attest or acknowledge the will in the presence of the testator but not necessarily in each other's presence.

12.11 'Acknowledge', introduced by the AJA 1982, is liberally interpreted. In *Couser v Couser* [1996] 1 WLR 1301, one of the witnesses to the will was deemed to have acknowledged that she had witnessed the will by her protests as to its validity at the time of execution.

12.12 A formal attestation clause is not required by law but will assist in proving the will if there is any dispute at a later stage. In *Re Denning, Harnett v Elliott* [1958] 2 All ER 1, two names, in different handwriting from each other and from the testator's signature, on the reverse side of a will, were found to be there for the purpose of attesting the will despite there being no stated purpose within the will. The court in that case was prepared to impute that the names must have been there for the purpose of attestation.

Presumption of due execution

12.13 Where 'on its face' a will is properly attested and executed there is a presumption of due execution. Where there is no attestation clause there will be no such presumption and the burden will be on the proponent to establish attestation.

12.14 The presumption is rebuttable only by the strongest evidence. In the absence of the strongest evidence, the intention of the witness to attest is inferred from the presence of the testator's signature on the will, the attestation clause and the signature of the witness. The court's stance on this issue was reinforced in *Sherrington v Sherrington* [2005] WTLR 587 and *Channon v Perkins (a firm)* [2006] WTLR 425.

12.15 In *Sherrington v Sherrington* the first instance judge found that the witnesses signing the will had not intended to attest the will (neither knowing that the document they were signing was a will, nor understanding why they were signing the will). The Court of Appeal overturned the first instance decision on the basis that the witness evidence was 'open to serious doubt'.

12.16 In *Channon v Perkins* both witnesses were sure that they had not signed a document in the testator's presence. The first instance judge held that the requirements of the Wills Act 1837, s 9 had not been satisfied. The Court of Appeal overturned the judge's decision and characterised the evidence of the witnesses as a mere failure to recollect.

12.17 These cases show that challenges on technical grounds based on due execution have not found favour with the Court of Appeal without strong positive evidence in support. Other cases where the challenge has failed are *Borman v Lel, In the Estate of Parsons* [2002] WTLR 237, *Sohal v Sohal* [2002] EWCA Civ 1297 and *In the matter of the estate of Yvonne Cynthia Sholto-Small* (unreported) 2002. The message of the Court of Appeal appears to be that witnesses need positive recollections if it is to be accepted that something went wrong with the execution. In *Singh v Ahluwalia* [2012] WTLR 1 the first instance court judge found that the presumption was rebutted. He was 'about as sure as [he] could be' that the witness's recollection that the other witness was not present at the signing was accurate. The specific detail that the other witness was a traditional Sikh who would have been wearing a turban and whose presence would likely have been recalled by the first witness had he been there, assisted the judge in reaching his conclusion.

12.18 In the case of *Murrin v Matthews* [2006] EWHC 3419, Guy Newey QC found the presumption was rebutted. The case involved a will in which everything was left to one beneficiary. Although signed by two witnesses, there was no address given for them, nor could they be found. Guy Newey QC considered that the beneficiary of the contested will was 'overwhelmingly likely' to have been involved in the preparation of the will. No evidence was produced by the attesting witnesses as to its execution and therefore the will was found to be invalid.

Revocation

12.19 Only marriage or civil partnership automatically revoke a will (Wills Act 1837, ss 18, 18B).

12.20 Wills Act 1837, s 19 states that no will is to be revoked by presumption from altered circumstances.

12.21 Other than as a result of marriage or civil partnership, a will may only be revoked in accordance with Wills Act 1837, s 20, namely:

(1) by another will or codicil;
(2) by some writing declaring an intention to revoke and executed in the same manner as a will; or
(3) by burning, tearing, or otherwise destroying by the testator, or by someone in his presence and by his direction, with the intention of revoking.

12.22 Where there is no express revocation clause, a subsequent testamentary document may nevertheless revoke an earlier will by implication. This is a matter of construction. There is a presumption against implied revocation so a later will revokes an earlier will only if there is inconsistency between them (*Lemage v Goodban* (1865) LR 1 P & D 57).

12.23 In *Perdoni v Curati* [2011] EWHC 3442 (Ch), the first instance judge found that there was no inconsistency between an Italian will and an earlier English will because the Italian will was silent about what should happen if the sole heir under that will predeceased whereas the English will made express provision for it. Accordingly the presumption against implied revocation was not rebutted and the substitution provision in the English will was effective. The Court of Appeal in *Curati v Perdoni* [2012] EWCA Civ 1381 found 'nothing from which an intention to revoke the earlier will [could] be deduced' and agreed with the first instance judge's conclusion.

12.24 There is long-standing authority (*Lowthorpe-Lutwidge v Lowthorpe-Lutwidge* [1935] P 151) that the courts can reject an express clause of revocation if there is evidence that the deceased did not know and approve of it or did not in fact intend to revoke the earlier will. However the evidence must be convincing.

> '... it is a heavy burden upon a plaintiff who comes into this Court to say: "I agree that the testator was in every way fit to make a will, I agree that the will which he has made is perfectly clear and unambiguous in its terms, I agree that it contains a revocatory clause in simple words: nevertheless I say that he did not really intend to revoke the earlier bequests in earlier wills."'

12.25 In *Lamothe v Lamothe and Others* [2006] WTLR 1431, the court preferred evidence that a 1995 will executed in Dominica had been intended to revoke the earlier 1993 will.

12.26 In examining acts of destruction, the court must consider whether the act was accompanied by the requisite intention to revoke.

12.27 The testator must have had capacity at the point of revocation in accordance with the tests in *Banks v Goodfellow* (1869–70) LR 5 QB 549 (see *Re Sabitini* (1970) 114 SJ 35) (see **12.35**).

Burden of proof and presumptions

12.28 Where there is proof of due execution, the burden lies on the person challenging the will to prove revocation.

12.29 As referred to at **12.22** there is a presumption against implied revocation such that, in the absence of an express revocation clause, a later will revokes an earlier will only if there is inconsistency between them (*Lemage v Goodban* (1865) LR 1 P & D 57).

Destroyed will

12.30 Where a will is found destroyed after the testator's death, it is presumed that the testator destroyed it with the intention of revoking it, and the onus is on those seeking to propound the will to prove on the balance of probabilities that there was no intention to revoke.

Missing will

12.31 Similarly, where an original will was known to have existed and was last seen in the hands of the testator, but is missing on death, there is a rebuttable presumption that the will was destroyed by the testator with the intention of revoking it. The onus is on the propounder to show that there was no intention to revoke.

12.32 *Rowe v Clarke* [2006] WTLR 347, reiterates that 'the strength of the presumption depends on the level or degree of security with which the testator had custody of the will during his lifetime'. In that case, the judge found that the will, known to be in the hands of the testator during his lifetime but missing after his death, was not carefully looked after and that the testator was disorganised. The presumption of revocation was weak and was rebutted. However, in *Wren v Wren* [2007] WTLR 531 the presumption was held to have

CHAPTER 19

TAX EVASION, FOREIGN TAXES AND CRIMINAL MATTERS

DISCLOSURE TO DOMESTIC AUTHORITIES OF INFORMATION RELATING TO TAX AND BENEFITS

19.1 From time to time, Her Majesty's Revenue and Customs (HMRC) may require personal representatives to supply information about the tax affairs of the deceased, or the beneficiaries of the deceased's estate. Similarly, personal representatives may be requested by the Department of Work and Pensions (DWP) to supply information about the deceased as part of an investigation into the overpayment of benefits, whether innocent or fraudulent. Although a detailed treatment of the tax and benefits system is beyond the scope of this work, personal representatives should be aware of the powers that might be used by these entities to obtain information from them.

19.2 Prior to 31 March 2009, HMRC could require taxpayers and third parties to produce relevant documents and accounts pursuant to ss 19A and 20 of the Taxes Management Act 1970 (coverage of these provisions can be found in earlier editions of this work). Since 31 March 2009, HMRC's powers to compel disclosure of documents are contained in Sch 36 to the Finance Act 2008 (FA 2008). Given the various restrictions on their use (see **19.6**), HMRC is unlikely to resort to these provisions in the first instance. Instead, it will simply write to the personal representatives of the estate that is under investigation. However, it will utilise these powers where there is no reasonable response to its initial inquiries.

19.3 Of most relevance is FA 2008, Sch 36, para 2. Under this provision, HMRC can serve a written notice on a personal representative (or any other third party) naming a specific taxpayer. The notice can require the personal representative to 'provide information' or to 'produce a document' if the document or information is reasonably required for the purpose of checking the 'tax position' of the specified tax payer. 'Tax position' is broadly defined as including 'past, present and future liability to pay any tax', covering almost every conceivable UK tax liability and importantly a 'relevant foreign tax' (FA 2008, Sch 36, paras 63 and 64). This allows HMRC to supply information to foreign revenue agencies.

19.4 The notice will specify a reasonable time for compliance (FA 2008, Sch 36, para 7). Generally this will be between 30 and 90 days, depending on

the nature of the request. Where personal representatives are dealing with disorganised or complex estates this may be insufficient time. Best practice in such cases is likely to be to contact HMRC as soon as practicable asking for an extension of time, and setting out the reasons.

19.5 The notice may require the production of specific documents, if they are in the personal representative's possession. Otherwise, where 'information' is requested, the notice will specify the form in which that information should be supplied, which could involve the personal representative producing tables, schedules or summaries of the deceased's assets, and income. There are a variety of criminal sanctions for non-compliance with a written notice served on a third party (FA 2008, Sch 36, paras 53–55). The severity of any sanction will depend on the gravity of the non-compliance. Prison sentences are likely to be reserved for cases where the personal representative is complicit in destroying documents requested by HMRC.

19.6 Notwithstanding their apparently broad nature, there are a number of restrictions on HMRC's ability to use these powers that can to some degree protect those administering estates. First, HMRC may only serve a notice requiring a third party to produce information or documents where the relevant taxpayer agrees or the First-tier Tax Tribunal (the Tribunal) approves the notice (FA 2008, Sch 36, para 3). In practice, this will mean that HMRC will be unable to serve a notice on personal representatives without the Tribunal's consent. The Tribunal may not approve a notice unless: (1) HMRC has notified the individual on whom the notice will be served that it requires the documents and information; and (2) put any representations made by that person before the Tribunal. However, in circumstances where the 'assessment or collection of tax' might be prejudiced, HMRC can apply without notice for permission and does not need to satisfy the requirements described above (FA 2008, Sch 36, para 3(2A) and (4)). On any application by HMRC, the Tribunal must be satisfied that HMRC is justified in seeking the notice.

19.7 Secondly, if served with a notice requiring the production of documents or the divulging of information, personal representatives have the right to appeal on the grounds that it is unduly onerous to comply with (FA 2008, Sch 36, para 31). This may arise in cases where the estate is small, the relevant documents fragmented and disorganised and the potential liability to HMRC relatively minor. An appeal must be made in writing to HMRC within 30 days from the date on which the notice was given (FA 2008, Sch 36, para 32). The Tribunal will hear the appeal and may confirm, vary or set aside the notice.

19.8 Thirdly, HMRC's powers are also subject to a longstop following the death of a taxpayer. HMRC may not serve a notice for the purpose of checking the tax position of a deceased person more than 4 years after that person's death (FA 2008, Sch 36, para 22). This will afford personal representatives some degree of protection from tax investigations into estates where significant time has elapsed since the taxpayer's death.

19.9 Finally, HMRC may not serve a notice requiring a third party to produce documents or information protected by legal professional privilege (FA 2008, Sch 36, para 23; the leading authority on the previous regime still provides useful guidance on this issue: *R v Special Commissioner of Income Tax, ex p Morgan Grenfell* [2003] 1 AC 563).

19.10 Closely allied to tax matters, personal representatives may be the subject of requests for information from the DWP where it suspects the deceased mistakenly or fraudulently overclaimed various benefits. Personal representatives are often initially asked to complete a standard form dealing with the assets and liabilities of the estate. If the information provided gives rise to queries, the DWP will respond seeking further information. The DWP can take advantage of specific powers in relation to personal representatives to obtain information where there has been non-compliance with a request.

19.11 The Social Security Administration Act 1992 (SSAA 1992) gives officers acting on behalf of the DWP specific powers in relation to the estates of deceased welfare recipients. The personal representatives of a person who was in receipt of certain benefits (including income support, job seeker's allowance and state pension credit) at any time before his death must provide such information as the DWP may require relating to the assets and liabilities of that person's estate (SSAA 1992, s 126(1)). If the personal representatives fail to supply the information within 28 days of being required to do so, the Secretary of State may make an application for a court order requiring the personal representatives to comply with the request. In such circumstances the court may order that all costs of and incidental to such an application are borne personally by the personal representatives (SSAA 1992, s 126(2)). The Welfare Reform Act 2012 provides that these powers will apply to the new 'universal credit', when it comes into effect. Accordingly, it is likely to be unwise for personal representatives to refuse to comply with a request for information without good reason.

19.12 The DWP can recover overpaid benefits from the estates of deceased claimants, however, there is no power to recover overpaid benefit at common law (*Child Poverty Action Group v Secretary of State for Work and* Pensions [2010] UKSC 54). The DWP's current power arises under SSAA 1992, s 71. This provides that where there has been overpayment of a benefit as a result of a misrepresentation or a failure to disclose a material fact (whether fraudulently or innocently), the DWP can recover the amount of the overpayment. Although various statutory provisions permit the DWP to recover this sum via deductions of benefit and other income during the claimant's lifetime, it is clear that the sum to be repaid also constitutes a debt, which remains payable by the deceased claimant's estate (*Secretary of State for Work and Pensions v Mcgrath* [2012] EWHC 1042 at [12]).

ENFORCEMENT OF FOREIGN REVENUE CLAIMS

19.13 It is a long-established common law principle that the court will not enforce the revenue laws of a foreign state (*Government of India v Taylor* [1955] AC 491, and see *QRS 1 ApS v Frandsen* [1999] STC 616). Accordingly, absent specific provision by statute or treaty (see **19.14**), the general rule is that foreign revenue authorities will not be able to maintain a claim for the payment of foreign taxes, or for the enforcement of a foreign judgment ordering the payment of foreign taxes, against the personal representatives of an estate. However, in the modern era this general common law rule is subject to increasingly important exceptions.

19.14 First, the common law rule is subject to various international regimes providing for the direct collection of taxes in foreign states. From a European perspective, the most important such regime is undoubtedly the EU Mutual Assistance in Recovery Directive 2010 (Council Directive 2010/24/EU) (often referred to as 'MARD'), which is implemented in the UK by s 87 and Sch 25 to the Finance Act 2011. As well as providing for the exchange of tax information (which is dealt with at **19.20**), MARD permits the revenue authority of a member state to make a request for the enforcement of a tax claim by the competent revenue authority of another state (in the case of the UK, this will generally be the Commissioners for HMRC). Thus, where an estate is subject to tax in one EU member state, that claim is in effect enforceable in all other member states.

19.15 In addition to MARD, the other major international regime providing for the enforcement of foreign revenue claims is the Council of Europe/OECD's Multilateral Convention on Mutual Administrative Assistance in Tax Matters (referred to as the Mutual Assistance Convention or 'MAC'). The UK is a signatory to MAC, and the convention has also been extended (at their request) to certain offshore financial centres connected with the UK, including the Isle of Man and the Cayman Islands. MAC provides that, at the request of a state, the state receiving the request shall (subject to certain conditions) take the necessary steps to recover tax claims for the requesting state as if they were its own. However, Art 11(3) of MAC stipulates that: 'The obligation to provide assistance in the recovery of tax claims concerning a deceased person or his estate, is limited to the value of the estate or of the property acquired by each beneficiary of the estate, according to whether the claim is to be recovered from the estate or from the beneficiaries thereof', which provides a measure of personal protection to personal representatives facing a claim relating to the deceased's foreign tax liabilities.

19.16 The second important exception to the common law rule is where a foreign revenue authority is alleging that a financial crime has been committed. It has always been an exception to the non-enforcement principle if criminal conduct is an issue, and in any event there is an increasingly sophisticated (and complex) range of international regimes for cooperation in criminal matters

that may override the general common law principle. The various international regimes for tackling financial crime are dealt with below (see **19.27–19.31**).

19.17 Where a foreign revenue claim or judgment is indirectly enforceable in their home jurisdiction (by the home revenue authority through an international regime such as MARD or MAC), the personal representatives will have to deal with that claim in the same way as any other action enforceable against the estate. But where the foreign claim is not enforceable in this way, the position is more complex. This is because, as a matter of general principle, 'it is the executor's duty to protect the estate against demands which by law cannot be enforced against it' (*Midgley v Midgley* [1893] 3 Ch 282, 299, per Lindley LJ). Thus, personal representatives who discharge a foreign tax liability that would not have been enforceable against them in their home jurisdiction may be committing a breach of duty. On the other hand, the personal representatives may have a very good reason for discharging a foreign tax liability: for instance, they may wish to pay foreign tax where not to do so would expose estate beneficiaries, or even the personal representatives themselves, to personal claims or other enforcement measures in that jurisdiction (see *Re Lord Cable* [1977] WLR 7; *Re Marc Bolan Charitable Trust* [1981) JJ 117; and see *Re B* [2013] WTLR 763). Indeed, where estate assets are located in the foreign jurisdiction levying the tax, it may be pointless to resist enforcement.

19.18 Given their general duty to protect estate assets, personal representatives have historically been advised to be wary of discharging taxes levied by a foreign revenue authority which could not otherwise be enforced against them: according to a Jersey authority (*Re Tucker* (1987–88) JLR 473), trustees (and by extension personal representatives) should seek directions before doing so. If the personal representatives do not propose to do so a beneficiary might wish to seek such a direction, but it should be noted that in *Re Lord Cable*, the court refused to restrain trustees of an Indian trust from remitting to India the proceeds of sale of certain UK assets, where the trustees' failure to do so would have been a breach of Indian exchange control laws. Thus it appears that, while the court will not actively assist in enforcing foreign revenue laws, equally it will not actively prevent the personal representatives from complying with their obligations under those laws.

DISCLOSURE AND OTHER ASSISTANCE TO FOREIGN REVENUE AUTHORITIES

19.19 Even in circumstances where the court will not enforce a foreign revenue claim directly, a foreign tax authority may be able to obtain assistance in support of such a claim at common law (*Re State of Norway* [1990] 1 AC 723). Common law assistance might extend to an order that the personal representatives disclose documents or information or provide evidence in support of the foreign proceedings.