



Wills and Estates

Deceased Estates and Executors' Duties

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When a person dies, they usually leave assets such as property, money, bank accounts, superannuation accounts and shares or other investments. Most people die leaving a will that sets out what is to happen with their assets on their death. The will also appoints a person (the executor) whose role is to sort out the assets and liabilities and ensure that the terms of the will are carried out. This brochure outlines the responsibilities of an executor in the administration of a deceased estate.

WHAT MUST AN EXECUTOR DO FIRST?

An executor needs to obtain possession and control of the deceased person's assets in order to carry out the instructions in the will.

The organisations that hold the deceased's assets, such as banks, will require evidence that the executor is the person entitled to deal with the deceased's assets. Where the assets have significant value, banks and other asset holders will require a grant of probate of the will to enable any transfer, redemption or sale of the deceased's assets.

WHAT IS A GRANT OF PROBATE?

A grant of probate is a document that is issued by the Probate Office of the Supreme Court, which states that the executor has proven the will is valid. In order to obtain a grant of probate, the executor must prove to the Probate Office that the will is valid, that it is the last will of the deceased and that the executor is the person entitled to administer the estate.

APPLYING FOR A GRANT OF PROBATE

To obtain a grant of probate a number of steps must be carried out, including:

- ▶ Gathering the documents and information necessary to apply for the grant, including details of the

will and the deceased, the identity of the executor and a full description of the type and value of all the deceased's assets and liabilities at the date of death;

- ▶ Preparing the appropriate application, affidavit and other documents in accordance with the Supreme Court's rules; and
- ▶ Placing an advertisement of the executor's intention to apply for probate in an appropriate newspaper.

Once a grant has been obtained, the executor can deal with the assets. However, there are important considerations to be made before distributing the estate to beneficiaries.

DISTRIBUTION OF THE ESTATE

- ▶ Claims against the estate

The Administration and Probate Act allows any person for whom the deceased had a responsibility to make provision, and who is in need, to make a claim against the deceased's estate. The claim must be made during the period of six months after the date of grant of probate, although the Court can allow an extension of that time limit. An executor may choose to distribute the estate within the six month period if the executor is confident that no such claim will

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arise, but always in the knowledge that there is a risk involved. If a successful claim is made and the executor has distributed the estate assets prior to the expiry of the six month period, the executor can be personally liable to pay the claim.

▶ Rectification of wills

The Wills Act permits application to the Supreme Court for rectification of wills where a clerical error has been made or where the will does not give effect to the will maker's instructions. Any such application must be made within six months of the date of grant of probate. Again, a prudent executor will not distribute the estate until the six month period has expired without complete confidence in the accuracy of the will.

▶ Taxation

Executors must ensure that all taxation requirements are met prior to distribution. If an executor makes a distribution and then discovers the estate is liable for taxation (whether incurred prior to the deceased's date of death or after) the executor can be personally liable to pay that tax.

▶ Liabilities

Before an estate is distributed in full, an executor must be certain that all liabilities of the estate are paid. A notice to creditors can be published in a newspaper calling for creditors to notify the executor of their claims, if necessary.

EXECUTORS' EXPENSES AND COMMISSION

An executor is entitled to a refund of expenses incurred in carrying out duties and to a commission for time spent and responsibility undertaken in administering the will. If the amount of commission is not specified in the will, an executor needs to obtain the consent of the

residuary beneficiaries. If those beneficiaries do not or cannot consent because, for example, they are children, approval by the Court is required before a commission can be paid. A commission is rarely charged when the executor is a substantial beneficiary.

WHAT IS THE ROLE OF THE EXECUTOR?

There are certain duties that must be carried out by the executor, which include:

- ▶ Attending to funeral arrangements;
- ▶ Notifying any banks, insurers and other organisations of the death;
- ▶ Ascertaining and taking control of assets;
- ▶ Identifying beneficiaries and their entitlements;
- ▶ Obtaining the grant of probate;
- ▶ Attending to payment of all estate liabilities, settling any disputes and paying any income tax liability;
- ▶ Considering whether to delay distribution for the six month period after the grant;
- ▶ Distributing assets to beneficiaries, either by the transfer of the assets or by distributing money received from sale of the assets;
- ▶ Investing funds or managing assets of the estate on behalf of the beneficiaries before distribution; and
- ▶ Ensuring any property which is held in trust (for example, for life beneficiaries) is kept in good repair, insured and that rates and taxes are paid.
- ▶ Preparing a financial statement setting out the assets of the estate and their distribution.

WHAT RIGHTS DO BENEFICIARIES HAVE?

If a beneficiary is entitled to a share in the residuary estate (as opposed to specific assets), he or she is entitled to:

- ▶ A copy of the will;
- ▶ A copy of the statement of assets and liabilities;
- ▶ A copy of the annual accounts; and
- ▶ Inspect assets such as share certificates, bank books, land titles, art works and jewellery and to see any valuation of these.

A beneficiary must be prepared to pay the costs incurred by the estate in providing this information. If a beneficiary is entitled only to a specific gift of land, money or goods, he or she is not entitled to receive the above financial information but is entitled to receive a copy of the will. A gift of an income earning asset (such as a rental property or shares) carries with it any income earned from the date of death. Likewise, a beneficiary must bear all costs of maintaining the asset after the date of death.

WHAT IF THERE IS NO WILL?

When someone dies without a will or with an invalid will, they are said to have died intestate. The Administration and Probate Act sets out who, among the nearest next of kin, is then to receive the estate's assets. Normally the deceased's partner or the person with the greatest claim to the estate may apply for a grant of letters of administration to represent the estate.

A grant of letters of administration is a document issued by the Probate Office of the Supreme Court stating that the person referred to in the grant, called the administrator, is entitled to administer the estate. It gives the administrator the same powers as an executor to whom a grant of probate is made.

CONTACT US

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