

Background

To assist you in this process, we are providing this general guide on some of the duties and responsibilities on executors of a Will or administrators of an estate. By its nature, it is not able to cover all the various issues that might be relevant and the exact processes. In this regard, we will be happy to assist.

Who takes responsibility for the affairs of a person who has died?

- If a person dies having made a Will, then usually it will also appoint someone to act as executor. There may be more than one person appointed, in which case they ought to agree to whatever actions are necessary. However, if appointed as an executor, there is no obligation to accept the role.
- If a person dies without having made a Will, then generally the nearest next-of-kin will be entitled to make the appropriate arrangements and administer the estate. This may be a spouse, a domestic partner, oldest child or other relatives, depending on who happens to be the closest next-of-kin to the deceased.
- If there is a Will then it may be necessary to obtain what is called a Grant of Probate of that Will - that is, make a formal application to the Probate Office (which is part of the Supreme Court) in order to have the Will acknowledged and registered at the Court as the deceased's last valid Will and confirm that the executor/s is/are entitled to deal with his/her affairs.
- If a person dies without a valid Will, then the application to the Probate Office is for a Grant of Letters of Administration to the nearest next-of-kin (usually two people as a matter of prudence) who swear to the Court that they will properly administer and distribute the estate according to those entitled under the Intestacy Rules.
- It is not necessary to obtain a Grant of Probate or Letters of Administration to make the funeral arrangements and most other things necessary to safeguard the estate. Also, where a bank account is under (usually about) \$50,000, the Bank will waive the need for Probate or Letters of Administration subject to various indemnities being signed by the executor/administrator. If the deceased owned real estate jointly with another, then Probate or Letters of Administration will not be required to transfer the deceased's interest to the survivors, but it will be where the deceased owned it solely.

Initial responsibilities after someone has died

If acting as an executor or administrator of a deceased person, the following ought to be dealt with:

- Attend to appropriate funeral arrangements;
- Ensure that the deceased has sufficient funds available to meet the anticipated funeral costs - often it can be claimed directly from the deceased's bank account;
- Advise Centrelink, Veterans Affairs and/or any superannuation fund;
- Protect the assets of the deceased by:
 - changing locks on the house if appropriate;
 - arranging postal re-directions;
 - advising the deceased's insurer that the property is now vacant;

- arranging insurance if none can be found;
 - collecting and safeguarding jewellery and other easily removable valuables;
 - ensuring the letterbox is regularly cleared of mail and junk mail;
 - cancelling any newspaper subscriptions; and
 - any other appropriate actions given the particular circumstances.
- Keep records of all reasonable expenses incurred as they will be able to be claimed back when funds in the estate become available; and
 - Collect details of the various assets and liabilities of the deceased.

Who are the beneficiaries?

- Where a person has died leaving a Will, the beneficiaries are those who have been named in it to receive either a specific gift of money, an asset or perhaps a proportion of the deceased's estate. Beneficiaries can include charities, companies, trusts and other legal entities.
- On the other hand, if a person has died without leaving a Will, then the beneficiaries will be, in simple terms, people who are the nearest next-of-kin (including spouses and/or domestic partners, children or other relatives) in accordance with a statutory formula known as the Intestacy Rules. In this instance we would have to take you through who the beneficiaries might be after obtaining details of all relevant individuals. A brief overview of the intestacy rules, applicable to those who had passed away after 1 November 2017, is below:

Circumstance	Outcome
Deceased leaves no child or other issue but a partner	Partner entitled to the whole of residuary estate (but does not apply if more than one partner).
Deceased leaves a partner and a child or other issue who is also a child or other issue of that partner	Partner entitled to the whole of residuary estate (but does not apply if there is more than one partner or if there is a child or other issue who is not also a child or other issue of that surviving partner).
Deceased leaves a partner and a child or other issue who is not the child or other issue of that partner	If the residuary estate does not exceed the partner's statutory legacy (currently \$451,909), the partner is entitled to the whole of the estate, including personal chattels; or If the residuary estate exceeds the partner's statutory legacy (currently \$451,909) the partner is entitled to personal chattels, statutory legacy and interest, and one half of the balance of the residuary estate with the children of the deceased entitled to the other half of the balance of the residuary estate.
Deceased leaves no child or issue but multiple partners	The partners are entitled to whole of the residuary estate: <ul style="list-style-type: none"> ● If there is a distribution agreement, in accordance with that agreement; or ● If there is a distribution order, in accordance with that order; or ● In equal shares.
Deceased leaves more than one partner and a child or other issue who are also a child or other issue of one or more of those partners	The partners are entitled to whole of the residuary estate: <ul style="list-style-type: none"> ● If there is a distribution agreement, in accordance with that agreement; or ● If there is a distribution order, in accordance with that order; or ● In equal shares.
Deceased leaves more than one partner and child or issue not the child or issue of one or more of those partners	<ul style="list-style-type: none"> ● The partners are entitled to share the personal chattels further to a distribution agreement, distribution order or equally; ● If the residuary estate is not worth more than the statutory legacy (currently \$451,909), then the partners share the amount of the statutory legacy further to a distribution agreement or distribution order or equally, and share one half of the balance of the residuary estate further to a distribution agreement or distribution order or equally, with any children of the deceased entitled to share the other half of the residuary estate.
Deceased leaves no partner but leaves a child or children	<ul style="list-style-type: none"> ● The child or children are entitled to the residuary estate in equal shares (if none of the deceased's children have predeceased the deceased);

	<ul style="list-style-type: none"> • If one or more of the deceased's children predeceased the deceased who leave children who survive the deceased – <ul style="list-style-type: none"> ○ The share of the deceased child is to be divided between that deceased child's children; ○ If any of those grandchildren of the deceased predeceased the deceased leaving their own children who survived the deceased, the deceased's grandchild's share is to be divided between the deceased's grandchild's children.
Deceased leaves no partner, no children or other issue	The deceased's parents equally, or if only one parent, the whole of the residuary estate.
Deceased leaves no partner, no children or other issue	The deceased's siblings equally or if a sibling predeceases the deceased leaving a child who survives the deceased, then that child is entitled to the sibling's share.
Deceased leaves no partner, no children or other issue, no parents, no siblings	The deceased's grandparents equally, or if only one grandparent, the whole residuary estate.
Deceased leaves no partner, no children or other issue, no parents, no siblings, no grandparents	The deceased's aunts and uncles equally, or if only one aunt or uncle, the whole of the residuary estate and if an aunt or uncle predeceases the deceased leaving a child who survives the deceased, the child is entitled to the aunt or uncle's share.
Deceased leaves no one entitled above	The residuary estate is taken to be property with no owner and passes to the Crown.

- Beneficiaries under a Will are entitled to ask for and be given a copy of the deceased's Will, so too are people who are not mentioned, but have been mentioned in a previous Will or who are next-of-kin who would inherit in the event there was no valid Will.
- There are occasions when the beneficiaries wish to vary the amount or assets to be received by them and generally, if all relevant beneficiaries agree and there is the power to do so, this can be done. Care needs to be taken to avoid potential capital gains tax and stamp duty consequences.

What is Probate/Letters of Administration?

- Probate is the process required to be followed where a Testator dies leaving a valid Will and has an interest in real estate or assets that exceed the value of \$50,000 (approximately). A Grant of Probate represents the official proving of the Will and once obtained, entitles the appointed Executor to formally administer the assets of the Testator in accordance with the terms of their Will.
- Letters of Administration is applicable when the deceased leaves no valid Will and has an interest in real estate or assets that exceed the value of \$50,000 (approximately). It is for an interested party (usually the next-of-kin) to apply to be the appointed Administrator and ultimately entitles that person to administer the deceased's assets in accordance with the intestacy rules.

Estate administration

One of the foremost obligations on anyone administering the estate of someone who has died is to ascertain, as far as is possible, all their assets and liabilities and then seek to get in and take control of the assets with a view to paying any debts owed by the deceased and then distribute and accounting to the relevant beneficiaries for what remains.

The following are various issues that may be relevant:

- **Family Trust/Companies**
Where a deceased person had some form of interest in a Family Trust or a Family Company, then we will need to obtain much more detail from you and probably liaise with the deceased's accountant.
- **Joint assets**
It is important to bear in mind that if the deceased owned assets jointly with another, then as a general rule, the other surviving owner will be entitled to take full ownership of the deceased co-owner's interest. Most

commonly, this will occur when a couple hold their home, bank accounts, share etc. as joint owners. Generally, on proof of death and some other forms, these assets can be readily transferred to the survivor.

- **Superannuation proceeds**

A deceased person's superannuation entitlements may pass in accordance with a Nomination made by the deceased, or pursuant to a determination by the Trustee of the Superannuation Fund. Generally, if it is to pass directly from the superannuation fund to a dependent of the deceased, then those proceeds will not form part of the deceased's estate. If they are said to pass to the "legal personal representative", then they will form part of the estate to pass to the beneficiaries duly entitled under the Will, or if there is no Will, in accordance with the Intestacy Rules.

- **Taxation**

When administering an estate, it is also important to finalise the deceased person's normal income tax returns (if required) and be aware that income earned after the date of death may also be subject to means and/or capital gains tax. We, in conjunction with the deceased's accountants, would need to advise you specifically in this regard.

- **Reimbursement of Expenses**

The reasonable expenses incurred by the executor/administrator are all a first charge on the assets of the estate - these include funeral, a wake, burial, monuments, lock-smiths, legal advisor, accountants, garden maintenance, repairs, rates, electricity bills and so on.

- **Executor's Commission**

Apart from reimbursement for expenses incurred, an executor/administrator may ask the relevant beneficiaries to agree to a fee or commission being paid to them for their 'pains, troubles and responsibilities' incurred in undertaking the role. Sometimes the deceased may have nominated a sum of money or percentage of the estate in his/her Will.

If there is no such clause in the Will authorising the payment then if all of the relevant beneficiaries do not agree to a request for a fee or percentage, then an application may be made to the Supreme Court (and if reasonable, potentially at the cost of the estate) the Court can award a maximum of 5% of the estate value. If you are considering such a claim, then you should keep detailed accounts and records of the administration of the estate and all your actions relating to the same. It will become significantly easier to prove work done throughout administration of the estate than to attempt to recall at a later date.

- **Claims on the Estate**

In order to protect the executor from personal liability, it may be appropriate to give a formal notice in a newspaper and the Government Gazette calling on claimants to submit their claims within 60 days of publication.

However claims may be brought by certain classes of people who would claim that the deceased had a moral duty to make provisions for them and the Will of the deceased (or the effect of the Intestacy Rules, if there is no Will) does not make adequate provision for the claimant. Generally, these types of claims must be brought within six months of the Grant of Probate or Letters of Administration.

In many cases, the executors/administrators would be wise to delay distribution until that period has expired. If they distribute earlier, then the executor/administrator could be personally liable for the claims (and fighting it) in the event money cannot be recovered from the beneficiaries.

- **Distribution of the Estate**

The executor/administrator is not required to distribute the net assets of the estate as soon as they are received by him/her, but must make reasonable efforts in all the circumstances to wind up the estate promptly. However, the executor/administrator is entitled to (and in many cases well advised to) delay the

distribution of the estate until the six month claim period referred to above under Claims on estates, has elapsed.

Generally, the administration will normally take somewhere between 6 and 12 months from the date of death. Often it is necessary to make interim distributions of available funds when safe to do so and hold back funds to cover income and capital gains tax until after the finish of the relevant financial year and then account to the beneficiaries for the balance once finalised.

The beneficiaries who share in the residue of the deceased's estate are entitled to receive an account showing all moneys received by or on behalf of the executor, and bills paid - copies of relevant invoices must be provided if requested, thus full records should be retained by or on behalf of the executor for up to 6 years.

Have any questions?

We are more than happy to assist regarding any of the above matters.

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