

## YOUR DUTIES AS EXECUTOR

### The funeral

- You may be required to make the funeral arrangements. In most instances, close family or friends attend to funeral arrangements without reference to the executor, but in some instances, it may be necessary for you to make decisions in connection with the funeral.
- It is desirable that the will be located as soon as possible after death, as some people express wishes in relation to their own funeral arrangements.
- Disputes are rare in relation to funeral arrangements. If disputes do arise, the decision of the executor prevails.
- The bank will likely release a cheque from the deceased person's bank account payable to the funeral director. If you deliver the tax invoice for the funeral to this office, we will liaise with the deceased person's bank.
- If you have paid the funeral account yourself, you are entitled to be reimbursed from estate funds upon presentation of a receipt.
- In some cases, there are insufficient funds in the bank to cover the funeral director's tax invoice. Funeral directors are usually willing to allow payment of funeral expenses to be deferred until estate funds are available (usually when the deceased person's house is sold), although some charge interest on the outstanding balance.
- The cost of a memorial plaque or tombstone is not regarded as a funeral expense and cannot be met out of the estate of the deceased person, unless specific provision had been made by that person.

### A grant of probate

- Other than in very small estates, the executor must apply to the Supreme Court for a grant of probate.
- Wills and estates are under the supervision of the Supreme Court. It's necessary for the will, with supporting documents, to be submitted to the Supreme Court for approval. This is the process known as "*application for a grant of probate*".
- The grant of probate by the Supreme Court confirms the validity of the will and the appointment of the executor.

- The grant of probate entitles the executor to deal with the estate assets.
- The process of obtaining a grant of probate involves:
  - First, we will place an electronic advertisement in prescribed terms.
  - Second, we will prepare the application documents, including an affidavit of executor, which you will swear. By this affidavit, you will inform the court as to the death of the deceased, as to the deceased's will, and as to the assets and liabilities of the deceased.
  - Third, you will swear the probate application documents (these are required to be sworn on oath).
  - Fourth, we will lodge the application for grant of probate with the Supreme Court, together with the original will and the court's filing fee.
  - After lodgement, the court will usually grant probate within about 10 days, and will send the original probate document to us.
  - We will inform you once probate has been granted, and will send you a copy of the probate (which is an official document of the Supreme Court, bearing the court's seal).

## To locate and secure the estate of the deceased person

- The executor (usually with the assistance of the solicitor and sometimes the accountant to the estate) must identify, collect, and preserve the assets of the estate. Such assets commonly include:
  - Money in hand, at the house, or at the place of business.
  - Money in banks or other financial institutions. The executor should locate current bank passbooks, investment account books, cheque books, bank statements, certificates of interest bearing term deposit, etc.
  - Shareholdings. Issuer/holder statements, dividend statements, etc, will assist in identifying shareholdings.
  - Interests in partnerships. There will ordinarily be a partnership agreement. The deceased person's accountant would usually have a copy. Partnership accounts will be able to be obtained from the accountant to the partnership and these will be useful in establishing the value of the partnership interest.
  - Other investments such as managed funds, property trusts, etc. These will usually be evidenced by holder statements, periodic statements concerning earnings, etc.

- Any debts owed to the deceased. Monies lent by the deceased person are an asset of the estate. Such loans may be verbal or evidenced in writing (acknowledgment of debt documents, loan documents, mortgage documents, periodic interest payments, etc).
- Motor vehicles. The current certificate of registration of motor vehicles should be located.
- Real estate. Details of real estate holdings will usually be well known to the executor. Title searches against the name of the deceased can be performed. These may reveal unknown landholdings.
- Life insurance policies. The policy documents will ordinarily be at the deceased person's residence.
- Household contents. An inventory should be prepared.
- In the case of the death of a farmer, the financial statements for the farm will assist in establishing such things as plant and equipment, livestock holdings, and credits with rural organisations such as grain boards and cooperatives.
- Certain assets and financial resources do not form part of the estate. Common examples are:
  - Property owned as joint tenants. Most matrimonial homes are owned on this basis. The share of the deceased person will pass automatically to the surviving owner without reference to the will. The same principle applies to jointly owned bank accounts.
  - Superannuation. The deceased person's superannuation accounts will pass to the nominated beneficiaries, or as determined by the trustee, after consideration of the circumstances of the persons close to the deceased person, including their dependency upon the deceased person.
  - Some assets held within family trusts and family companies.

## The deceased person's debts and liabilities

- It is the responsibility of the executor (usually with the assistance of the solicitor and sometimes the accountant to the estate) to ascertain the deceased's debts. Such debts may include:
  - Funeral expenses and other expenses associated with the deceased person's death.
  - Outstanding medical accounts, pharmaceutical accounts, hospital accounts, and ambulance accounts.
  - Debts to the Australian Taxation Office.
  - Loans due under mortgages.
  - Credit card debts.
  - Monies owed to other persons.

## To distribute the residue of the estate after payment of debts and expenses of administration to the beneficiaries

- The beneficiaries are the persons entitled to the net estate. Beneficiaries should receive their entitlements at the earliest possible time. Beneficiaries are entitled to a copy of the will. It is usually appropriate, and good practice, for the executor or the solicitor for the estate to write to the beneficiaries to inform them that they are beneficiaries. This should be attended to at the earliest time.
- The executor must not delay in the performance of his or her duties. Generally, the executor should be in a position to complete the estate not long after 12 months from the date of death. In New South Wales, family members and other persons in close relationships with the deceased may bring family provision claims, and they have 12 months in which to do so. In Victoria, similar claims can be made, but the time limit is 6 months from the grant of probate by the Supreme Court.
- The final phase of the estate – distribution to the beneficiaries – can be quite complex and may involve the completion of a number of legal documents, including land transfers, share transfers, preparation of tax returns, etc.
- The final duty of the executor is to provide a full and final accounting to the beneficiaries (final estate accounts). This is attended to by the solicitor to the estate, often in conjunction with accountants retained to attend to estate tax returns.

## Tax

- There are no gift taxes, death duties, probate duties and taxes, and inheritances duties and taxes in Australia. All these taxes and duties have been abolished.
- The estate may be liable for tax for a number of reasons, including:
  - unpaid tax owed by the deceased.
  - outstanding tax returns of the deceased resulting in assessments.
  - the receipt by the estate of income such as rent, interest, dividends.
  - capital gains tax due to assets sold by the executors resulting in capital gains (there will be no capital gains tax on the sale of the deceased's main residence if it is sold within 2 years of date of death).
- If the beneficiaries receive property, in most cases, there will be no capital gains tax or stamp duty payable by the estate or beneficiaries. However, the beneficiaries may be liable for capital gains tax if they dispose of the inherited property at a later date for profit.

## Other duties

- You should not mingle your own affairs with the affairs of the estate.
- You are required keep accounts and receipts in relation to monies coming into and out of the estate. The solicitor will often have custody of the tax invoices, receipts, etc.
- It is your duty to insure property appropriately and to make sure insurances are up to date. There may be instances where it is impossible to insure. If a building is vacant, many insurers will refuse to offer insurance.

## What if there is no will?

- If the deceased leaves assets, but no will, a person close to the deceased (spouse or relative) will apply to the Supreme Court for a grant of letters of administration. The court's grant of letters of administration enables the administrator to administer the estate, in the same way that an executor does.

## Charges, expenses, and legal costs

- The Supreme Court charges a filing fee for probate applications. The fee depends on the value of the estate. Probate filing fees change from time to time, and are accessible on the internet. There is a fee to advertise (as is required) the application for grant of probate. Depending on the estate, there may be other expenses such as title search fees, registration fees on land transfers, transfer fees on vehicle transfers of ownership, broker's commission on sale of shares, etc.
- The government sets the fees to be charged by solicitors in connection with probate applications. The fee allowed to be charged depends on the value of the estate. For New South Wales probate applications, refer to the Schedule 3 of the [Legal Profession Uniform Law Application Regulation 2015](#). For Victoria, refer to the Appendix of the [Supreme Court \(Administration and Probate\) Rules 2014](#). We will inform you of the permitted fee (GST additional) when we know the gross value of the estate.
- Separate to the application for grant of probate, fees are charged by solicitors for the administration of the estate (calling in of assets, dealing with assets, disposing of assets, paying debts, addressing other liabilities, addressing tax, distribution to beneficiaries, report/final accounting to beneficiaries, etc). The fees on administration are determined by our hourly rate, which changes from time to time.
- We are required to disclose in relation to fees. We will provide you with costs disclosure documents. We invite you to contact us with any queries you may have in relation to legal costs, charges, and expenses. We are happy to answer any questions you might have.
- In most estates, funds do not become available until proceeds of bank accounts are released by banks, real estate is sold, aged care accommodation bonds are released, etc. Solicitors assist the executor in this regard by waiting for payment until funds become available.

## Is the executor entitled to payment?

- The Supreme Court may authorise the payment of commission to the executor for his or her services.
- Executors wishing to receive a commission should keep extensive records of all of their work in connection with the estate in order to substantiate the claim.
- If the executor and all beneficiaries agree to the payment of executor's commission, then application to the court is not necessary. If there is disagreement in relation to executor's commission, it is necessary to apply to the court.
- In most cases, the court will allow commission. When the court considers an application of an executor for payment of commission, it takes into account the work done, the time involved, and the level of responsibility. The maximum rate of 5% is almost never awarded and is reserved for the most complicated and time-consuming estates. In our experience, commission is usually allowed in the vicinity of 2% to 2.5%. If there has been delay, breach of trust, dishonesty, or negligence, the court may refuse to allow commission.

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### Lavington

2/346 Griffith Road (PO Box 594), Lavington, NSW 2641  
DX 5835, Albury, NSW

### Wodonga

18 Jarrah Street, Wodonga, VIC 3690

### Melbourne

74/299 Queen Street, Melbourne, VIC 3000

### GIBNEY & GUNSON

Lawyers

Victoria & New South Wales

P: (02) 6049 6666 F: (02) 6040 1840

[www.gibneygunson.com.au](http://www.gibneygunson.com.au)

[mail@gibneygunson.com.au](mailto:mail@gibneygunson.com.au)