

## Deceased Estate Information - When there is a Will

This document provides executors and beneficiaries with general information about a deceased estate and the administration process when a person dies leaving a Will. Our role is to assist and guide executors through the estate administration process. The information is of a general nature only and is not legal advice.

### General summary of executor's role

In summary, an executor has four main functions:

1. To ensure that the deceased is buried or cremated. Often members of a deceased's family arrange this, regardless of whether they are the executors.
  2. To determine the assets and liabilities of the deceased, and do the things necessary to take control of them.
  3. To pay the deceased's debts and the expenses of administering the estate.
  4. To distribute the deceased's estate in accordance with the Will and the law.
- ### Different ownership structures
- A person may own assets in several different ways. How an asset is owned will determine if it is administered under the Will or under a different legal process. The following is some general information about some different ownership structures, and consequences when the owner or controller dies:
1. Assets in sole name | A person's estate consists of the assets owned by the person in his or her sole name at death, or which are subsequently transferred to the estate as a matter of law.
  2. Assets owned jointly | Assets owned by two or more people jointly except as tenants in common do not form part of the estate of a deceased owner. The surviving owner is automatically entitled to the assets by right of survivorship. Jointly owned assets are not transferrable under a Will as long as at least one other owner survives.
  3. Assets owned as tenants in common | Ownership as tenants in common is different from joint ownership. This is where two or more people own an asset together, but they each own distinct shares in the asset. In this case the deceased's individual share does not pass automatically to the other owner/s, instead it forms part of his or her estate. Before a person dies they can direct that real estate is to be owned in this way. An interest in a business partnership is usually held this way.
  4. Superannuation | A superannuation fund is a form of trust and is covered by specific legislation. When a superannuation fund member dies, the trustee of the fund often has discretion in choosing how to distribute the balance of the member's account. However, in most cases the trustee is restricted to transferring the balance either to a spouse, children or the person's estate. A member can usually make a Binding Death Benefit Nomination before they die to force the trustee to distribute the balance to particular eligible recipients.
  5. Discretionary trusts | Discretionary trusts, often known as family trusts, are commonly used to hold assets and operate businesses. The trustee (who can be a company) holds the assets and income of the trust on behalf of various potential beneficiaries. The trustee generally has an absolute discretion about who will receive the benefit of the assets and income of the trust, with no obligation to pay or distribute anything to any particular beneficiary. How the trust is controlled is set out in the trust's governing deed. Control can often be passed on by a deceased controller in their Will.

6. Companies | A company is a legal entity which has all the legal powers of a natural person. It is owned by its shareholders and managed by its directors, but is separate from them. A person cannot give away the assets of a company by their Will. However, if the person owns shares in the company in their sole name, they can give away those shares. This applies to both shares in listed public companies and to shares in privately held companies.

### Duties and obligations of executors

Executors have various duties and obligations, including:

1. Locate and protect the deceased's last Will (Mellor Olsson will usually hold the original Will for the deceased if we drafted the Will);
2. Collect and "get in" the deceased's assets, and comply with any requirements to achieve this – for example, obtaining a grant of Probate if required;
3. Ensure no waste of assets – for example making sure the estate's assets are adequately insured, and that rent on a rental property continues to be paid;
4. identify and deal with any claims made against the estate from a creditor or a potential beneficiary;
5. Pay the deceased's debts at the date of death and the expenses of administering the estate, such as funeral costs;
6. Notify relevant organisations of the deceased's death;
7. Administer the estate promptly;
8. Keep a proper account of the administration so they can justify their actions; and
9. Distribute the estate assets or hold them on trust in accordance with the Will.

### Rights and powers of executors

Executors also have various rights and powers given to them by law and the Will, including:

1. The right of indemnity and reimbursement from the estate assets in paying the deceased's debts, and the debts and expenses incurred in administering the estate. However, an executor might have to pay debts and expenses they incur which exceed the estate's value, or which are not justifiable.
2. The right to seek a commission. This is a payment for the executor's work. However, it is uncommon and difficult for an executor to be paid a commission when administering a family member's estate as it requires an order from the Supreme Court, or the consent of all beneficiaries.
3. The power to sell assets as permitted by the Will and the law.
4. Usually the power to allocate specific assets to a beneficiary in payment of their share, as opposed to selling everything and distributing the sale proceeds.
5. The power to engage professionals such as lawyers and accountants to assist in administering the estate.
6. Some discretion in how to deal with assets that are to be held on an ongoing trust for beneficiaries such as minor children, with the level of discretion determined by the Will.

### Probate and Letters of Administration

Probate is a legal process which involves proving to the Supreme Court that a Will is valid, and that the executors have been validly appointed. This involves lodging the Will and other documents in the Probate Registry of the Court for examination. When lodged by a Solicitor, it generally does not require anyone to attend Court or give evidence in person. For personal applications, attendance at the probate registry is required.

Probate is required whenever an organisation holding or controlling a deceased person's assets requires it. It gives legal protection to these organisations so they can confidently release the assets to the executors. Probate is always required where a deceased person owned an interest in land in their sole name. It is often required by banks and other financial organisations.

Probate can be a time consuming, complex and expensive legal process. It can be especially difficult where there are defects in the Will or questions about the deceased's mental capacity at the time of signing it. It is common for the Court to require further information or evidence before it will grant Probate of a Will. This can lead to delays in administering the estate.

Letters of Administration is a similar legal process to Probate. It applies where there is either no Will or there is a Will but no executor is validly appointed. Letters of Administration offers similar protection to people dealing with a deceased estate. However, there are many differences between Probate and Letters of Administration. They are beyond the scope of this document.

Probate is not a tax or duty payable on the value of a deceased person's estate. Probate duty and death duty were abolished decades ago. However, there is still a Court filing fee associated with applying for Probate and Letters of Administration, based on the gross value of the estate involved.

### Some practical things executors can do

Executors usually engage lawyers to assist with the administration of an estate due to the complexity of the process. However, there are various tasks that executors can do themselves. They might include the following:

1. Engaging a funeral director, organising the funeral and the burial or cremation of the deceased;
2. Gathering paperwork relating to assets and liabilities;
3. Locating any items or documents held in safe custody for the deceased;

4. Securing the deceased's property and assets;
5. Making sure the deceased's insurable assets remain adequately insured - this is extremely important as the executors may be held liable by the beneficiaries if uninsured assets are damaged, lost or stolen;
6. Redirecting the deceased's mail to the executors - we recommend it for at least a year;
7. Notifying organisations such as telephone providers, internet providers, electricity, gas suppliers, Department of Veterans Affairs, Centrelink, Medicare, private health insurers, RAA, SA Ambulance Service and the Australian Electoral Commission that the deceased has died;
8. Notifying the beneficiaries of the inheritance they stand to receive when it can be determined - often executors instruct their lawyers to do this on their behalf; and
9. Depositing any money received on behalf of the estate into the lawyers' trust account - sometimes executors hold money in an estate account they manage themselves.

### Taxation Matters

The deceased's income tax obligations need to be finalised as part of the estate administration. The executor must make sure that any tax returns are filed for previous years, for the period of time between the previous 30 June and the date of death and (depending on the amount of income generated before the estate is finalised) for the period of administration. There may also be tax obligations to deal with in relation to companies, trusts and superannuation funds.

## Glossary - Some terms commonly used in deceased estates

**Administrator** is a person appointed by the Supreme Court to administer an estate and distribute the assets, where there is no executor appointed by a Will.

**Beneficiary** is a person who is or may be entitled to receive some benefit from an estate or trust.

**Bequest** and **bequeath** are old fashioned terms referring to a gift of personal property.

**Binding Death Benefit Nomination** is a nomination made to a superannuation fund which binds its trustee to pay a deceased member's benefits to certain dependant(s).

**Creditor** is a person to whom another person owes a debt (for example, a bank which lends money to a borrower is a creditor).

**Debtor** is a person who owes a debt to another person (for example, a person who owes money to a deceased person).

**Devise** is an old fashioned term referring to a gift of real property.

**Estate** means the combined assets and liabilities that a deceased person held in his or her sole name (rather than jointly, as a trustee or through a separate entity).

**Executor** is a person appointed in the Will of a deceased person to administer the estate and distribute the remaining assets.

**Intestate** means a person who has died without an effective Will disposing of his or her estate, and **intestacy** means the situation where a person has died intestate.

**Gross value** means the value of something before any deductions are made.

**Leave reserved** is a process by which an executor leaves it to another executor to obtain a grant of Probate on their behalf.

**Legacy** is an old fashioned term meaning a gift of money.

**Legal personal representative** means a deceased person's executor(s) or, if there is no executor, the person's administrator.

**Letters of Administration** means a Court order similar to Probate which appoints the administrator of an estate (where there is no Will, or the Will doesn't appoint an executor).

**Net value** means the value of something after any deductions (such as debts) are made.

**Personal property** is anything other than real property (for example, shares, a motor vehicle or money in a bank account).

**Probate** is an order of the Supreme Court that a deceased person's Will is the person's last Will, and that the executor is validly appointed.

**Real property** is an interest in land, or things affixed to land (such as buildings).

**Residue** means the assets of an estate remaining after all debts, expenses, taxes and specific gifts are made.

**Testator** is a person who makes a Will.

**Trust** is an arrangement where a person (the trustee) holds assets and income on behalf of other persons (the beneficiary or beneficiaries), rather than for the trustee's own benefit.

**Will** is a document which contains a person's directions about the disposal of the person's estate after he or she dies, the appointment of executors, and certain other matters.

Please contact us if you need specific advice or assistance in relation to a deceased estate, or in preparing estate planning documents such as Wills. Mellor Olsson practises in all aspects of succession law.

To find out more about our services and experience visit [www.molawyers.com.au](http://www.molawyers.com.au)