

EXECUTORS' DUTIES IN A DECEASED ESTATE

When a person dies they usually leave behind a Will that specifies what is to happen to their assets upon their death. The Will should also outline and determine who the executors are. The executors are the persons whose role it is to secure and distribute assets of the deceased and ensure all liabilities are paid. They also ensure that the terms of the Will are carried out lawfully.

What is the role of an executor?

An executor has many important duties when acting on behalf of the estate of the deceased person. They include:

- notifying banks, credit unions, insurers, and other organisations such as Centrelink, Transport SA and the Australian Taxation Office;
- identifying who the beneficiaries of the estate are and determining what their entitlements are;
- obtaining the grant of Probate from the Supreme Court of South Australia or in another State;
- paying the liabilities of the deceased and any estate claims (from the value of assets held by the estate);
- take possession and control of the body of the deceased;
- preparing and paying any tax liability of the estate.

What is a grant of Probate?

The Supreme Court of South Australia is the Court which has the exclusive jurisdiction in this State to make orders in relation to the validity of a Will of a deceased person, the appointment of an executor, and the administration of a deceased estate.

There are two types of grants: Grants of Probate and Grants of Letters of Administration.

Grants of Letters of Administration are needed where there is no Will or the executor who has been appointed is not able to act for some reason.

A grant is the official recognition by the Court of the right of the personal representative named to administer the estate of a deceased person.

When is a grant required?

Whether or not a grant is needed will depend on the nature and extent of the assets of the estate. For example, a bank holding money belonging to the deceased will need to know to whom that money should be paid. The grant is proof that the person named (executor or administrator) is the person entitled to collect the money.

A grant will be required if the deceased owned a house in his or her own name or held an interest with another party as tenant in common. The Lands Titles Registration Office will not transfer land to another person without a grant. However, real estate owned by the deceased as a joint tenant with another person cannot and will not form the subject of a grant or part of the deceased estate as the surviving joint tenant is entitled to the property.

Claims against an estate for greater provision

Spouses (including domestic partners and those of the same sex), ex spouses, children, grandchildren and in certain circumstances parents, siblings and step-children may have a claim against the estate on the basis they have not been adequately provided for out of the estate and are in need.

A claim must be commenced in Court and served on the Executor within six (6) months from the date of the grant of Probate.

The likelihood of any claim or the success of any claim depends very much on the individual circumstances of any claimant and other persons with an interest in the estate. All claims for further provision from an estate are dealt with under the Inheritance (Family Provision) Act 1972.

Distribution of the estate

In many cases, executors should not distribute the estate for a period of six (6) months from the date of a grant of Probate. This period allows any claimants seeking greater provision from the estate to put forward their claim.

The executor must ensure all taxation and other liabilities of the estate have been met. If an executor makes a distribution and then discovers there is an outstanding liability, the executor could be personally made to pay that liability.

An executor must distribute the estate in strict accordance with the directions left in the Will. This may not be easy as the Will may be complex or lacking detail as to the precise nature of the distribution method. In each case an application to the Supreme Court may be required to provide the executors with direction.

An advertisement in the Public Notices section of newspapers circulating in the State or States in which the deceased lived and/or conducted business and/or had relatives may provide some protection.

Executor's expenses and commission

Executors are entitled to a reimbursement of out of pocket expenses they incur in carrying out their duties as an executor and a commission so as to reimburse them for their time and efforts. If there is no amount specified by a Will, then the consent of all beneficiaries affected will be required, or the commission will need to be approved by a Court.

When there is no Will

If a person dies without a Will, or with an invalid Will, they die intestate. The Administration and Probate Act 1919 specifies who will benefit from the assets of the deceased and who can be appointed an administrator (a similar role to that of an executor).

Spouses and children will ordinarily share in the intestate estate of a deceased person, but if any beneficiary is a minor, then the Public Trustee have a duty to maintain the financial interests of that minor child.

An application for a grant of Probate will still need to be made. Similar responsibilities to that of an executor (the payment of liabilities including tax, distribution of the estate, controlling and securing assets and generally representing the interests of the deceased) apply to administrators, with additional requirements being imposed because the deceased did not choose the administrator.

Our Recommendations

If you are called upon to act as an executor or believe you may be entitled to act as an administrator you should seek professional legal advice, especially if you are not sure you want to be an executor or are not sure what you need to do.

We are experienced estate solicitors and can assist you with all facets of estate administration and ensure compliance with your lawful obligations.



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