

GUIDE FOR EXECUTORS



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ABOUT THIS GUIDE

This guide provides general information only to assist you in gaining a basic understanding of areas that are applicable to most Wills & Estates matters. This guide is not intended to give any specific legal advice. Every Wills & Estates matter is unique and determined on its own specific facts and circumstances. You should obtain specific advice about your own circumstances. South Geldard will not accept any liability or responsibility for loss occurring (including negligence) as a result of any person or entity acting or refraining from acting in reliance on any material contained in this publication.

ABOUT SOUTH GELDARD

South Geldard is a full service law firm based in Rockhampton that has been servicing Queenslanders for over 55 years. The Family Law Team at South Geldard Lawyers, developed under the stewardship of one of the Firm's Principals, Vicki Jackson, has the experience to provide easy to understand legal and practical advice tailored to your particular circumstances.

In what can be a very personal and often emotional time, our sensitive and discrete team is able to provide honest and comprehensive advice. Our experience extends to complex litigations where clients receive the benefit of our firm's full service approach and commercial background. We promote a conciliatory approach to resolving disputes by encouraging negotiation processes to assist in achieving early and cost effective resolutions that are best for clients and their family.

The South Geldard Family Law Team is lead by partners who are Accredited Family Law Specialists with the Queensland Law Society, who are recognised as having demonstrated ability and experience in a complex area of law, having proven their expertise in Family Law by successfully undertaking an advanced study program and examinations.

WHAT IS AN EXECUTOR?

An executor is a person who has been appointed in a Will to manage the will maker's estate and carry out the will maker's wishes set out in the Will after he or she has died.

WHAT IS 'AN ESTATE'?

An estate is all of the property and liabilities of a person in existence after his or her death.

There are some assets that do not form part of the will maker's estate after his or her death. The most common examples are:

- ✓ Property owned jointly with another person. In this instance, the will maker's share of the property passes to the other owner automatically on the will maker's death;
- ✓ Superannuation and life insurance proceeds that are paid directly from the fund to a superannuation/life insurance beneficiary (and not to the estate); and
- ✓ Undistributed assets of a family trust.

WHAT IS A BENEFICIARY?

A beneficiary is any person or entity (e.g. a charity) that receives a gift or benefit from a person's estate.

ROLE OF AN EXECUTOR

The role of the executor is to carry out the wishes of the will maker as specified in the Will.

This is a position of great trust and must be carried out with care and honesty.

The executor must act in the best interests of the estate and all of the beneficiaries.

The executor is responsible for managing and protecting all of the assets of the estate until they are distributed to the beneficiaries.

He or she is also responsible for ensuring that all of the liabilities of the estate are paid where appropriate.

A will may appoint more than one executor. In this case, the executors should consult with each other and agree on a course of action.

Executors should keep full and accurate records of how the estate has been managed and distributed and should provide a summary of the financial transactions for the estate to the beneficiaries.

If a conflict arises, an executor cannot take sides with one or more beneficiaries.

The executor should try to mediate a resolution to the conflict.

Communicating regularly with the beneficiaries about what is happening with the estate is a good way of minimising misunderstandings and conflict.

It is possible for assets to be distributed other than as set out in the Will.

In this instance, the executor must inform all beneficiaries and obtain consent from all adult beneficiaries to the change, preferably in writing (and preferably after each beneficiary has had the opportunity to seek independent legal advice).

WHO ARRANGES THE FUNERAL?

The executor is responsible for making the funeral arrangements if the will maker has not already made those arrangements.

The executor should follow any directions left by the will maker as to the funeral arrangements but is not bound to do so. Things to consider include:

- ✓ whether the body is to be buried or cremated;
- ✓ if the body is to be buried, where;
- ✓ if the body is to be cremated, whether the ashes are to be scattered or retained;
- ✓ the nature and format of the funeral service; and
- ✓ who they should notify about the service.

If the executor is not an immediate family member, then the executor should consult with the family about the funeral arrangements.

Funeral costs are an expense of the estate.

WHAT HAPPENS TO THE BODILY REMAINS?

The executor may be asked whether organs can be donated. This usually occurs where the will maker has registered with the organ donation register or there is a request by the hospital or the next of kin. The decision is usually left to the next of kin.

SHOULD THERE BE A READING OF THE WILL?

Not normally. Usually the beneficiaries are notified of their interest by the executor or the firm of lawyers appointed by the executor.

In Queensland, various categories of people are entitled to inspect the original or request a copy of a Will under section 33Z of the Succession Act. These people include:

- ✓ any person mentioned in a Will - as a beneficiary or not;
- ✓ any person mentioned in any previous Will - as a beneficiary or not;
- ✓ any spouse, parent or issue (children / grandchildren) of the testator;
- ✓ any person who would be entitled to a share of the estate if the will maker had died without leaving a will;
- ✓ any parent or guardian of a minor referred to in the Will who would be entitled to a share of the estate of the will maker if the will maker had died without leaving a will; and
- ✓ any creditor or other person who has a claim at law or in equity against the estate (providing they who produce evidence of that claim).

It is usually appropriate and good practice for the executor, or the firm of lawyers appointed by the executor, to write to the beneficiaries and tell them they are beneficiaries under the Will as soon as possible.

WHAT SHOULD THE BENEFICIARIES BE TOLD?

There is no legal obligation for beneficiaries to be told that they are beneficiaries before the gifts in the Will are given to them.

This can often be a very emotional and confusing time for beneficiaries and open, honest and regular communication with beneficiaries is often the best way to minimise any difficulties that may arise.

An executor may instruct their lawyers to notify the beneficiaries of their entitlement and where necessary, communicate with beneficiaries as to the progress of the administration of the estate.

Alternatively, they may choose to do so themselves.

WHAT SHOULD BE DONE WITH THE ASSETS AND LIABILITIES OF THE ESTATE?

As executor, you are responsible for the safekeeping of the assets of the estate.

You should:

- ✓ make an itemised list of all of the assets as soon as possible, including a description of their condition and where they are stored (if necessary).
- ✓ digital assets should also be considered, such as photographs and documents stored digitally;
- ✓ ensure that property such as houses, buildings, boats and cars have current and adequate insurance.
- ✓ ensure that items of dollar or sentimental value such as jewellery, photographs, paintings etc. are adequately secured;
- ✓ consider whether the locks to houses and buildings need to be changed; and
- ✓ consider obtaining valuations of personal chattels (where appropriate).

Consideration should then be given to what to do with all household items.

Some items may be given to the beneficiaries in part satisfaction of their interest in the estate, some may be sold to second-hand dealers or given to charities or otherwise disposed of.

Care must be taken in making these choices.

Many executors consult with the family of the deceased before making these decisions.

Executors have an obligation to ensure that assets are not wasted and do not diminish in value.

The executor should also ensure that all liabilities of the estate i.e. telephone accounts, credit card bills and even a final personal income tax return, are finalised.

WHAT IS PROBATE AND WHY DO I NEED TO APPLY FOR IT?

Probate is a document given by a Supreme Court that confirms the validity of the Will and the appointment of the executor to look after the estate of the deceased will maker.

There is an application fee to file for probate which can be paid from the estate.

Before applying for probate, the executor (or his/her lawyers) must advertise the fact that an application for probate is to be made.

This advertisement is usually posted on the Supreme Court's website and published in the Queensland Law Report at least 14 days before the probate application is lodged with the court.

An application for probate requires the preparation and filing of various documents

with the Court, including:

- ✓ a statement of assets and liabilities with appropriate valuations.
- ✓ a certified copy of the death certificate;
- ✓ the original Will;
- ✓ an affidavit from the executor setting out background information about the deceased, the Will and financial position of the estate; and
- ✓ an affidavit including a copy of the advertisement required and a statement about what searches have been made to ascertain the existence of any prior grants of probate or administration in relation to the will maker's estate.

Probate is necessary to give the executor the right to deal with certain assets such as real estate and money in bank accounts.

Real estate cannot be transferred unless probate is obtained (except to a surviving joint proprietor).

Most banks will not allow the executor to deal with money in the will maker's bank account(s) where the balance is above a certain amount unless probate has been granted (although banks will usually allow access to funds for the payment of the funeral account).

IS THERE TAX TO BE PAID?

The executor is responsible for lodging any outstanding income tax returns on behalf of the will maker where necessary.

The last tax return should also contain a statement of assets and liabilities of the will maker at the date of his or her death.

The estate is also subject to income tax if it earns income, such as rent on real estate or interest on investments, and a tax return may need to be lodged on behalf of the estate.

The estate should not be fully distributed until all income tax liabilities are known and accounted for.

There are currently no inheritance taxes or death duties in Queensland although tax may be payable on the payment of superannuation death benefits to non-dependents (for example independent adult children of the deceased).

HOW LONG DO ESTATES TAKE TO FINALIZE?

The time it takes to finalise an estate depends on what must be done and how long it takes for each step to be completed.

Often third parties such as banks and companies in which the estate has shares are required to supply information and this can take some time to receive.

It is prudent for estates not to be distributed fully within six months from the time of probate.

WHAT IF THE ESTATE LIABILITIES EXCEED THE ESTATE ASSETS?

If there are more liabilities in the estate than assets, then the estate is insolvent.

In this situation, the estate should be declared bankrupt and the remaining assets used by the trustee in bankruptcy to pay out the liabilities.

The executor and beneficiaries would not be liable for the shortfall provided that they had not already taken any assets from the estate.

WHO PAYS THE EXECUTOR?

An executor is entitled to be reimbursed by the estate for any amounts he or she has paid on behalf of the estate, provided they were appropriate amounts.

In most circumstances, where the executor is a person known to the will maker, he or she will not receive any financial benefit or payment for taking on the role.

CAN ANYONE CLAIM MORE?

Yes, beneficiaries under the Will may make a claim for a larger share of the assets and others not mentioned in the Will can make a claim for a share of the assets.

The court may order that there be a distribution of assets other than as set out in the Will if the court is satisfied that the will maker has responsibility to provide for the maintenance and support of the person claiming further provision from the estate and the will maker has failed to meet this responsibility.

Anyone wishing to challenge a will must notify the estate within 6 months of death of the deceased and file an application with 9 months of death.

It is prudent for the executor to hold on to some or all of the estate assets for six months from the date probate is granted.

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