

A guide for executors

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why?

what?

what?

18 frequently asked questions about being an executor.

This booklet provides a guide, in question and answer format, for executors about their role, their obligations and what is involved in managing and finalising an estate in Victoria.

For more information executors should contact their legal practitioner

1 Who 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 she or he has died.

2 What is 'an estate'?

An estate is all of the property and liabilities of a person in existence after her or his 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 (not as tenants in common). 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)
- Undistributed assets of a family trust.

3 Who 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.

4 What is the 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 and cannot act in his or her own interests if they are not the same as those of the estate and the beneficiaries. The executor's role is often referred to as a trustee or fiduciary role. If, for example, the executor wanted to buy something from the estate, he or she would need to ensure that there was an appropriate valuation of the item and also obtain consent from all of the adult 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.

Where there is more than one executor they 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. This is especially so as the family and friends of the will maker are coming to terms with their loss and will need caring and clear communication about what is happening.

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

5 Must an executor take on the responsibility?

An executor can refuse to accept the position of executor, but this should preferably be done before probate is granted. If the executor seeks to step down from that position after Probate is granted, they must obtain the consent of the Supreme Court.

Executors can delegate some of the actions and responsibilities to others, for example, funeral directors, lawyers, accountants and real estate agents. The executor will be ultimately responsible for the actions of those people.

6 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.

The reasonable cost of the funeral is an expense of the estate, but the executor should be careful not to incur expenses beyond the available funds in the estate.

7 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.

8 Should there be a reading of the Will?

It is not usual to have a formal reading of the Will. Usually the beneficiaries are notified of their interest by the executor or the firm of solicitors appointed by the executor.

In Victoria, various categories of people are entitled to request a copy of a Will if it was made on or after 20 July 1998:

- a) any person named or referred to in the Will, whether as beneficiary or not;
- b) any person named or referred to in any earlier Will as a beneficiary;
- c) any spouse of the will maker at the date of the will maker's death;
- d) any domestic partner of the will maker;
- e) any parent, guardian or children of the will maker;
- f) any person who would be entitled to a share of the estate if the will maker had died without leaving a will;
- g) any parent or guardian of a minor referred to in the Will or 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
- h) any creditor or other person who has a claim at law or in equity against the estate of the will maker and who produces evidence of that claim.

A beneficiary has no legal right to see a Will of a deceased person made before 20 July 1998. However, once probate is granted, a copy may be obtained from the Supreme Court.

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.

9 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. A beneficiary is entitled to receive a copy of the Will upon request as set out in the section "Should there be a reading of the Will?"

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. Failing to be open and honest in dealing with beneficiaries can lead to distrust and conflict later.

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.

10 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). Using a video recorder or camera may be a good method of recording what household items exist;
- 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. Consider whether the insurer needs to be notified because of any change i.e. the house is vacant or the vehicle is housed elsewhere;
- 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;
- consider obtaining valuations of personal chattels (where appropriate).

Consideration should 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. If money is collected from the sale of assets and is not to be distributed straight away, it needs to be invested. If real property is to be held for some time, consideration should be given to whether it should be rented.

In some instances, professional valuations will be needed if beneficiaries are given items. Alternatively, the value may be agreed upon by the executors and beneficiaries.

The executor should also ensure that all liabilities of the estate are accounted for. This may include the usual household accounts such as telephone accounts and credit card bills but will also include other liabilities, such as income tax.

11 What is probate and why do I need to apply for it?

Probate is a document given by a Supreme Court (usually it would be the Supreme Court of Victoria where there is property in Victoria) 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 is increased annually on 1 July.

Before applying for probate, the executor (or his/her solicitor) 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 must be placed 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. This often takes some time to prepare as information needs to be obtained from the banks, companies in which the will maker held shares, superannuation funds (etc.). It can take up to six weeks to receive a response from all of these institutions. Formal valuations of real estate or antique items may be necessary;
- 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. An affidavit is signed in the presence of an authorised witness and has the same importance as evidence given under oath in court; 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).

There are some estates that are small and do not contain real estate (for example, because it is transferred to a surviving joint proprietor) and in these cases, probate may not be required.

12 What if there is no Will?

If there is no Will the next of kin of the deceased usually has to apply to the Supreme Court for a document called “Letters of Administration”. This document is the court’s formal approval for someone to administer the estate of the deceased, effectively acting in the same role as an executor, but called an administrator. Approval is usually granted in favour of a family member or another person who has a substantial interest in the estate.

13 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 no inheritance taxes or death duties in Victoria.

If property is given to beneficiaries in accordance with the Will, for most transfers there will be no capital gains tax or stamp duty payable by the estate or beneficiaries at the time. However, capital gains tax may be payable by the beneficiaries when they dispose of the property at a later date.

If assets are sold by the estate, then capital gains tax may be charged to the estate. There will be no capital gains tax on the sale of the will maker’s main residence if it is sold and the sale settles within 2 years of the date of his or her death.

14 How long do estates take to finalise?

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. See *What is probate and why do I need to apply for it?* (Point 11).

It is prudent for all of the estate's liabilities to be paid before the estate is finalised. See *Is there tax to be paid?* (Point 13).

The law in Victoria says that executors do not have to distribute the estate within 12 months of the death of the will maker. After 12 months, beneficiaries may be entitled to receive interest on the value of their gifts of up to 8% in certain circumstances. It is prudent for estates not to be distributed fully within six months from the time of probate - for further information, see the discussion under the heading *Can anyone claim more?* (Point 17).

Some Wills may require gifts to be held on 'trust' until a certain event occurs (ie until a minor beneficiary reaches a certain age). In many instances the executor will become the 'trustee' of that money and have to look after it until the specified event occurs.

In other cases, a Will gift may be left in a trust for a person's benefit, rather than being left to them in their own right. Protective Trusts and Special Disability Trusts are examples of such ongoing trusts.

Where property is the subject of ongoing trust obligations, the executor should discuss these obligations with their lawyer.

Some gifts may be left as life interests only, so that the beneficiary is entitled to use the assets but is not free to dispose of them. For example:

- the beneficiary who is given a life interest in a house may live in the property but cannot sell the property except in certain limited circumstances; and
- the beneficiary who is given a life interest in shares may have the income from a share portfolio but cannot sell the shares and take the sale proceeds.

When that beneficiary dies, the asset that was the subject of the life interest (i.e. the house or shares etc) then passes to the beneficiary who was left the 'remainder' interest in the Will.

15 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.

16 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. The executor's role is often described as a trustee or fiduciary role. 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. However, the executor may receive some payment for their work in the following circumstances:

- if the will maker sets out in the Will that the executor is entitled to be paid for his or her efforts. Usually the Will states the rate of payment in terms of a percentage of the total assets and/or income of the estate;
- where a gift to the executor is included in the Will in lieu of the right to apply to the court for remuneration;
- if all of the beneficiaries agree on an amount the executor should be paid from the estate. Beneficiaries should be encouraged to obtain independent legal advice before agreeing to such a request; and
- if the Supreme Court orders that the executor is entitled to be paid.

The payment to the executor is called a 'commission' and in Victoria, it cannot exceed 5% of the total value of the estate assets. When a court considers whether an executor should be paid a commission it takes into account the work done by the executor as well as the responsibility and time involved, often referred to as 'the pains and troubles'. It is rare that a court would order commission of 5%. The maximum rate of 5% is generally reserved for very complicated and time-consuming estates. Generally speaking, the rate of commission awarded would not exceed 3% of the total assets.

Executors wishing to receive a commission should keep extensive records of all they have done in their executorial role to justify the commission.

17 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.

In Victoria, the applicant need not be a relative of the will maker. However, the applicant must show that the will maker had an obligation or duty to make adequate provision for them and that this was not done. There are many factors that the court will take into account when considering these types of applications. In general, the courts will look carefully at situations where children or spouses of the will maker have been left out of the Will or been unfairly treated. Consideration will be given to the financial circumstances of the people claiming as well as the relationship they had with the will maker.

In relation to more distant relatives or non-relatives, the courts will look at whether there was any special relationship with the will maker and what contribution they made to the building up of the estate or the welfare of the will maker. It is a complicated area of law and each matter is judged on its own facts. You should discuss these factors with your lawyer if you have any concerns or suspect that a claim may be brought on this basis.

Anyone wishing to make an application is entitled to do so within six months of the date that probate was granted. If they try to make an application after that time, special permission from the court is required.

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. If the executor distributes the estate within six months of the date probate was granted and a claim is made for further provision from the estate within the six month period, then the executor may be personally liable for any amounts the court requires the estate to pay. The exception to this rule is that the executor may make a distribution to the spouse or partner or children of the will maker of all or part of their entitlement under the Will for the purpose of providing for their 'maintenance, support or education' without any personal liability in the event of a claim by others for provision from the estate.

An executor should not make any distribution of an estate if he or she has received written notification that someone intends to make an application to a court for further provision from the estate. The executor needs to wait three months from receiving that notice before a distribution can be made, and the distribution can only be made if the executor has received no further notice that the application has actually been made. It would be prudent for an executor who has received notice of a claim to conduct litigation searches in the Supreme Court and County Court before deciding to distribute the estate assets.



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