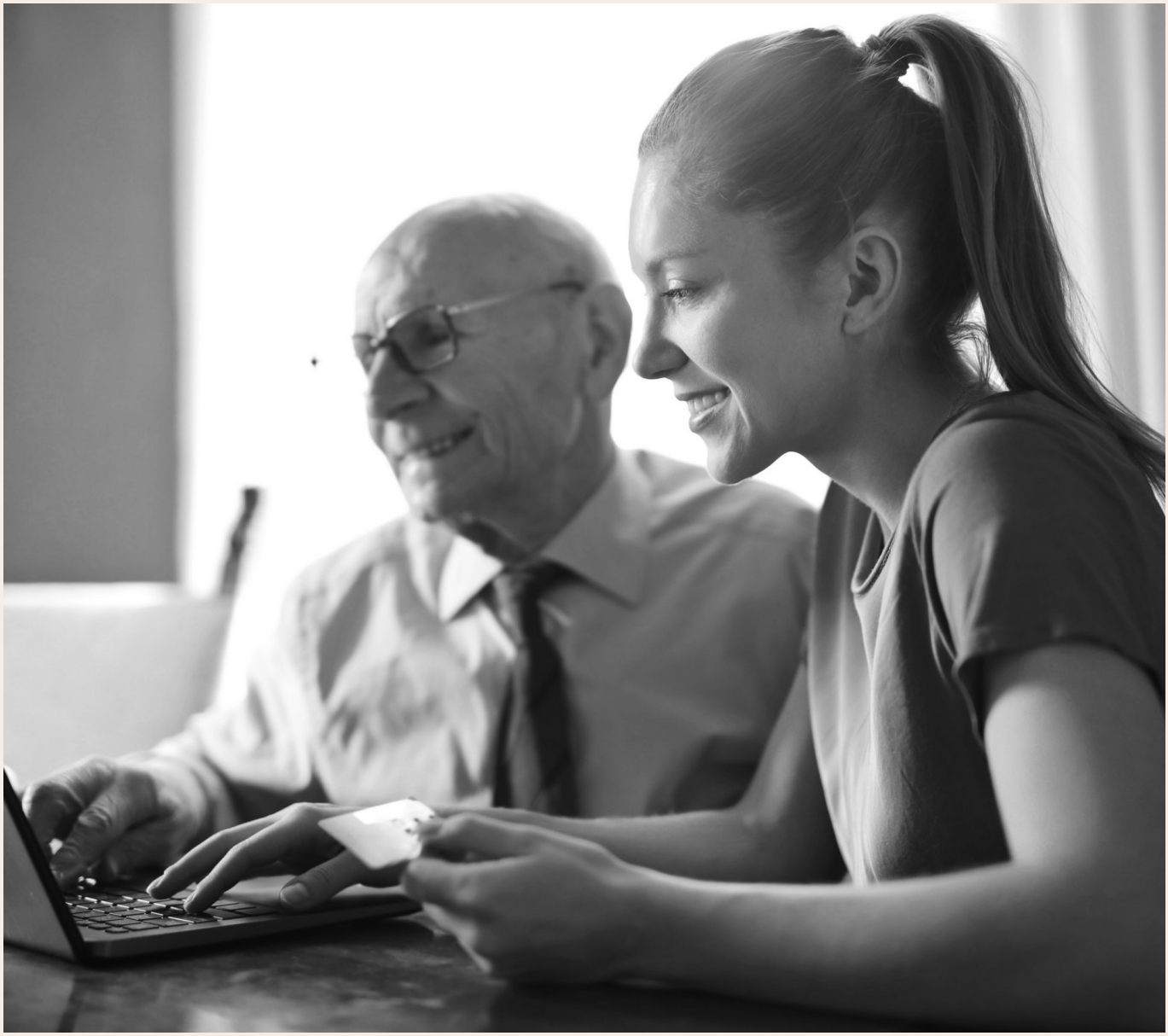


What happens if an executor or beneficiary of a Will can’t be found?

When a Will is written, chances are that the persons named in the Will won’t stay in the same place. People move for a variety of reasons, sometimes interstate or overseas. Unfortunately, addresses and details aren’t always updated, and contact can be lost. This can present a significant problem when it comes time to administer a deceased person’s estate.

In South Australia, it is expected that interested parties will go to significant lengths in an attempt to

track down the relevant persons. The process for locating an executor or a beneficiary can vary slightly, and each has a different scenario when someone simply cannot be located.

A Missing Executor

An executor is a person appointed by a person in their will to carry out the wishes contained in the document, including distributing the estate to beneficiaries. The role of executor is very important to an estate, so it is a good idea to select an executor that you anticipate will be around to carry out the job, as well as appointing a substitute executor in the event your primary executor is no longer willing or able to act.

A common thread between locating an executor and a beneficiary is the fact an interested party must prove they have taken reasonable steps to track down the missing person. This can include but is not limited to:

- Contacting family members or friends of the missing person (including genealogy searches);
- Advertising in publications such as the local newspaper;
- Applying to government agencies for information and tracing, such as Births, Deaths and Marriages; or
- Contacting organisations, the missing person may be a member of, such as sporting clubs, charities or the like.

Where steps such as the above have been undertaken without success, an interested party (such as a beneficiary) may apply to the Supreme Court to have the executor "passed over". In effect, this means the role of executor can be passed to the next appropriate party as set out in the *Probate Rules 2015 (SA)*. This is usually a beneficiary, who then becomes the **administrator** of the estate.

Acting as an administrator has the same obligations as an executor, but does not impact on a beneficiaries' entitlement to their share of the estate.

A Missing Beneficiary

Similar to a missing executor, steps to track down a missing beneficiary must be proven to the Court before any further action can be taken. If the executor is known, then it will be their job to undertake steps in line with the above.

In circumstances where a search has been undertaken, and the missing beneficiary or any "issue" (i.e. children) of the missing beneficiary cannot be located, the executor may apply to the Supreme Court for a "Benjamin" order.

The Court can, where satisfied that a beneficiary cannot be located, make an order allowing for the executor to distribute the estate to the known beneficiaries. This also removes the executor's personal liability for distribution should the missing beneficiary ever come forward.

An important consideration in making a Benjamin order is the potential cost to the estate for further searches to be carried out. The court is conscious of "wasting" the estate on those searches, which in turn impacts the amount the beneficiaries will eventually receive.

A Benjamin order does not always stop a beneficiary from claiming their entitlement after distribution.

A beneficiary may come forward at a later date and "reclaim" their interest that has been paid to any other beneficiaries. However, practical considerations, such as the passage of time, are taken into account when considering whether a beneficiary can reclaim their interest.

In what is already a difficult time, being unable to contact an executor or beneficiary can create further complications. While steps can be taken to avoid this scenario, such as appointing a substitute executor, unexpected situations can arise.

For assistance with administering an estate, however complicated, contact our specialised Estates team.

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The information in this article is general in nature and was accurate at the time of publication. Laws and circumstances can change. For advice specific to your situation, please seek professional legal advice.