

Executor's duties in a deceased estate

Wills & Estate Planning series

Sep 2017

When a person dies they usually leave behind a Will that specifies what is to happen to their assets upon their death and who are executors.

In this guide, we talk you through some of the important aspects of an executor's role and duties.



ANDERSONS
S O L I C I T O R S

andersons.com.au
Freecall 1800 653 655
100% South Australian

What is the role of an executor?

An Executor is the person (or people) whose role it is to secure and distribute assets of the deceased and ensure the terms of the Will are carried out lawfully.

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;
- ascertaining and taking control of the deceased's assets;
- 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);
- dealing with any directions in the Will;
- attending to the distribution of assets to beneficiaries and determining when this should occur;
- if the appropriate power is provided, to sell or convert assets of the estate to money in preparation of distribution;
- take possession and control of the body of the testator; and
- preparing and paying any taxation liability of the estate.

What are grants?

The Supreme Court of South Australia has the exclusive jurisdiction in South Australia 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.

Grants of Probate are required if there is a Will and an executor able to act.

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

Grants of Probate or Grants of Letters of Administration are the official recognition by the Court of the right of the executor or administrator to be the personal representative for the estate of the deceased person.

When necessary, a Grant will be limited in duration, in respect of specific property, or in respect to any special purpose.

All applications for Grants must be in accordance with the Rules of Court which govern who is entitled to a Grant and the manner in which the application must be made.

When is a grant required?

Whether a Grant is needed will depend on the nature and extent of the assets to be administered. Where there is a requirement for a personal representative to prove his or her title to an asset in the deceased's name, the production of the Grant is necessary. For example, a bank holding money belonging to the deceased will need to know to whom that money should be paid and the Grant is proof that the person named in the Grant (executor or administrator) is the person entitled to collect the money.

If the deceased owned a substantial number of shares in a company, that company will usually insist on seeing the Grant before it will register the personal representative as shareholder on behalf of the deceased.

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(s) are automatically 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 months from the date of a Grant.

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 months from the date of a Grant. 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 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. Other protections may also be available.

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.

Executor's commission is discretionary, but ordinarily calculated in accordance with what is known as the Barr Smith Scale.

This scale indicates a certain percentage of estate assets to be paid to executors by way of commission. The scale also states that where executors use agents, including solicitors and real estate agents, to assist with the disposal of assets, then as a rule of thumb, the amount paid by way of executor's commission is halved.

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 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.

At Andersons our experienced estate solicitors can assist you with all facets of estate administration and ensure compliance with your lawful obligation.

