

## Probate & Estate Administration

### Winding up an estate

#### What is Probate?

A Grant of Probate is a document issued by the Supreme Court that confirms the validity of the Will and the appointment of the executor. The application for a Grant of Probate differs for each state and territory.

The Grant of Probate provides the executor with the approval needed to act as trustee of the deceased estate and to carry out their required duties in accordance with the Will. Estate assets usually cannot be distributed without a Grant of Probate.

#### How long does it take to get a Grant of Probate?

This usually takes around two weeks once the completed and signed application has been submitted to the Supreme Court.

Getting to that point however, can take time, depending on what is involved in gathering together the information required.

For example, all relevant authorities, institutions, companies and individuals connected to the deceased's assets and liabilities need to be contacted to enable a complete inventory to be compiled as part of the application.

#### What is required to apply for a Grant of Probate?

Before applying for probate, an appropriately worded advertisement must be placed on the Supreme Court's website, in the state or territory where the Willmaker resided. 14 days after placement of the advertisement, the application can be submitted to the court.

An application for probate requires the preparation and filing of a number of documents with the Court. These include:

- A statement of assets and liabilities with formal valuations where relevant;
- A certified copy of the death certificate;
- The original Will (Note: It is very important that a certified copy of the Will be kept in safe custody in case the original is lost);
- An affidavit from the executor containing background information on the deceased, the Will and the finances of the estate; and
- An affidavit including a copy of the advertisement placed on the Supreme Court's website as well as information about searches conducted to identify and confirm the existence of any prior grants of probate or administration in relation to the deceased's estate.

#### What are the legal duties of the executor?

The executor's role is to carry out the wishes of the Willmaker as specified in the Will. The executor becomes the trustee of the deceased estate and is governed by the Trustee Act and legal precedents as defined in Trust Law.

There is a high level of care imposed upon any trustee, such as an executor, including a fiduciary duty to the beneficiaries of the trust, in this case, as

named in the Will.

For example, while the executor can be rewarded for their efforts in administering the estate, they cannot profit from their position. Further, if they were to sell an asset they may need to ensure an appropriate valuation is obtained, along with the consent of all adult beneficiaries of the Will.

If the executor is giving a particular item to a beneficiary, a professional valuation may be needed. However, if the value is agreed upon by the executor and the beneficiaries, this will not be needed. Proper records should be kept in these cases.

Executors have an obligation to ensure the value of the estate assets is maintained. If, for example, assets are sold and the proceeds are not distributed immediately, the funds should be invested. Further, if real estate is to be held for a period of time, the executor should consider whether it should be rented.

The executor must keep complete and accurate records of how the estate has been managed, including how the assets are distributed, and should provide a summary of all financial transactions for the estate to the beneficiaries.

If conflicts arise between beneficiaries, the executor must remain impartial and should try to mediate a resolution.

#### Estate Administration

Once probate has been granted, estate administration can commence. In the first instance, this involves organising for the executor to be noted as having an interest in the assets. For example, if there are properties, the executor needs to be registered on the titles. If there are shares, this involves a request being submitted to the relevant share registries to note the executor's interest in the



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shares.

The next phase then depends on the type of estate assets and whether they are to be transferred to the beneficiaries, or sold and the cash distributed (see capital gains tax issues discussed later).

If properties are to be sold and the proceeds distributed, title searches are conducted, appropriate certificates obtained and a Contract of Sale drawn up. Once sold, the transfer and settlement takes place. If the property is to be transferred to a beneficiary, it is a simpler process with the property title transferred.

Similarly, if there are shares in the estate. Once the executor's interest is noted on the share registry, the next phase involves either transfer of ownership of the shares to the beneficiaries or sale of the shares. If sold, the executor receives the cash and can distribute it to the beneficiaries.

A sale of a business will usually involve development of an 'expressions of interest' document, followed by approaches and discussions with potential buyers. A Contract of Sale will need to be drafted and eventually, completion of the transfer and settlement process.

If there are superannuation death benefits to be distributed they need to be managed carefully in order to ensure tax benefits are maintained. The payments to beneficiaries must take into account the consequences of tax legislation to ensure the beneficiaries receive the maximum allowable.

Other tax issues also need to be addressed. Any income earned by the deceased up to the date of death will be assessed under the deceased's tax file number. After death, any income earned by the estate will be assessed separately. A new tax file number must be obtained for the deceased estate and tax returns submitted annually and when the estate is wound up.

Capital gains tax is a complication that must also be addressed. Regardless of

whether an estate asset is sold or transferred, any capital gains tax potentially applicable must be considered. For example, estate assets may have capital gains tax liabilities attached but won't be triggered if the asset is transferred to a beneficiary. It will however, affect the value of that asset received by the beneficiary.

Alternatively, if an asset is sold and the proceeds distributed to beneficiaries, any capital gains tax owing is triggered and payable as part of the deceased estate's next tax return.

Once the estate is in order, the creditors can be paid and the remaining assets distributed to the beneficiaries in accordance with the Will. Finalising the estate involves appropriate accounting for all assets, liabilities and associated expenses, notifying the Tax Office, completing a Statement of Trust and organising for beneficiaries to sign the Deeds of Release. The estate is then officially wound up.

## Can a lawyer be engaged to manage this process?

Whilst it is possible for an Executor to apply for probate, because of the legal complexities involved, lawyers are usually employed to undertake the process.

The Executor is responsible for appointing the lawyer and will need to assist them with gathering the relevant documents to be sent to the Court.

The cost of any associated administration expenses is borne by the deceased estate and the executor can use the estate assets to pay for these. This may include asset valuation fees, court filing fees and other legal costs.

## What if someone dies without a Will?

If someone has died intestate, in other words, without a Will, an 'administrator' needs to be appointed to manage the estate.

Usually the next of kin will apply to the court to appoint an administrator. If there is no-one suitable, the court can appoint a third party to act as administrator. Once again, the lawyer can assist with this application to the court if necessary.

This is known as granting of Letters of Administration and once granted, the estate assets must be distributed according to the formula prescribed in State legislation.

So, whereas a grant of probate is validation of the executor's appointment and the validity of the Will, Letters of Administration are issued by the Court to certify that the administrator has the authority to manage the estate where there is no valid Will in existence.

Once this is obtained the same process as previously described applies to the transfer of assets or sale proceeds.

## Is probate always required?

No, not always. There may be circumstances where probate is not required. This will depend however, on the value of the assets, and the individual organisations (e.g., the banks or share registries) involved. They tend to have different threshold rules applicable. However, where property is held, probate will be required. We can advise the executor at the time as to whether they need to apply for probate.

## Do you need help?

For more information please contact Irongroup Lawyers on 03 8621 9000 and we will work with you to protect your position in managing what needs to be done, from applying for a Grant of Probate through to the completion of the estate administration.