LEGAL PROFESSION BOARD OF TASMANIA

Deceased Estates

What does it mean to administer an estate?

This fact sheet provides information to members of the public about the role of lawyers, costs and possible delays in dealing with deceased estates.

Introduction

When a person dies, all of the assets are called that person's *estate*. In most cases the deceased person has left instructions, called a 'will', which details what they want to happen to their estate after their death. The people who will inherit the deceased person's estate are called the *beneficiaries.*

Wills generally name one or more people as the *executors,* whose job is to administer the estate. Administering an estate involves, among other things:

- Looking after the assets of the estate, e.g. making sure the home or car of the person who died is maintained, or managing the deceased's bank accounts until they are closed (with the funds to be distributed between the beneficiaries) or the accounts are transferred to a beneficiary;
- Paying the estates debts e.g. using the money in the estate to pay the deceased person's last phone bill, funeral expenses, taxes and/or mortgage payments;
- Distributing the assets of the estate in accordance with the will, e.g. organising to transfer ownership of the person's house to the appropriate beneficiary.

It is also the executor's job in most estate matters to obtain a *grant of probate* from the Supreme Court. Probate is a court order saying that the will is valid and that the executor has the right to administer the estate.

Sometimes the executor of a will is also a beneficiary under the will. Beneficiaries who are not executors have no power to make decisions about the estate.

How long does it take to finalise an estate?

The time it takes to administer or 'finalise' an estate will depend on a number of factors:

- the complexity of the deceased's assets, e.g. do they have shares in various shareholdings or do they have assets interstate or overseas;
- whether there is one or more executors;
- whether one or more executors reside in a different state or country;
- the processing and lodgment of tax returns and how early that is able to be lodged with the Australian Taxation Office (ATO).

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It is expected that a fairly straight forward estate with minimal assets, i.e. one residential home and bank accounts with one banking institution, would commonly take a year to finalise. Further assets, multiple debts to be paid, awaiting instructions (*responses or approval*) from multiple executors or disagreements among executors can all extend the time it takes to finalise an estate.

What does a lawyer do in administering an estate?

Often an executor will need a lawyer's help to administer the estate. For example, a lawyer might:

- prepare and help to complete the forms needed to apply for probate;
- help identify and collect the deceased's assets;
- advise the executor(s) about the deceased person's tax liability;
- advise about the legal order in which debts must be paid and the remaining assets distributed.

When dealing with estates, the lawyer's client is the executor(s). The lawyer's professional duty is to help the executor(s) to carry out his/her/their duties to the estate in accordance with the law and the will. The *Legal Profession (Solicitors' Conduct) Rules 2020* requires all lawyers to follow a client's lawful, proper and competent instructions.[1]

It is not uncommon for a will to appoint a lawyer as the executor or one of the executors. The lawyer in such cases has the same duties as any other executor.

It is important to know that if a law firm holds the deceased's will, you **do not** have to instruct that firm to be the ones to administer the deceased's estate. Nor do you have to instruct the firm in which a lawyer-executor is employed. It is open to you, as an executor, to take the will and engage a different law firm to administer the estate.

What costs is a lawyer entitled to be paid?

Executors are entitled to reimburse themselves for expenses they incur as part of administering an estate. This also applies to lawyer executors as well. If a lawyer-executor is charging the estate for professional fees*****, it is recommended that an itemised bill be prepared and provided to any co-executors for evaluation.

If the will does not include a *charging clause,* which provides for payment to the executor, or the lawyer-executor proposes to be paid in a manner that is different to a clause provided for in the will, it is necessary to provide the beneficiaries of the estate with sufficient particularity of the proposed fees to ensure their consent is properly informed. [Refer to the Board's ***Itemised Bills and Beneficiaries Guidance Note***].

Be aware that if the beneficiaries do not agree to paying the executor for costs reasonably incurred during their duty administering the estate, the executor can apply to the Supreme Court to recover their costs and to be paid a fee.

When should I be told how much it will cost to administer the estate?

If you are an executor, the lawyer must tell the executor(s) about the expected fees leading up to and including the grant of probate, and any legal work done in the administration of the estate after the grant of probate. This disclosure should occur at the time the lawyer first receives instructions in relation to the estate or as soon as practicable after the initial instructions were received.

In circumstances where a lawyer is the executor, while it is not a legal obligation, it is prudent to provide written costs disclosure to the major beneficiaries for legal work associated with the administration of estates.

[1] Rule 12 (Note: These Rules commenced on 1 October 2020)

***professional fees:** fees charged by the lawyer in his/her capacity as an executor at the lawyers usual hourly rate. These charges are likely to be more than the fees of an ordinary executor.

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As a beneficiary you can request the lawyer provide you with written costs disclosure but know that they are not obligated to provide it to you.

I am a beneficiary, why won't the lawyer answer my questions?

Lawyers act on their clients' instructions. The lawyer acting on behalf of the executor(s) must follow the executor(s) lawful, proper and competent instructions and has no particular duty to respond to the beneficiaries because the lawyer's client is the executor – not the beneficiaries. However, a lawyer who is also the executor, or one of the executors, owes a duty of care to the beneficiaries both as a lawyer and as an executor.

Beneficiaries who are unhappy with the way the estate is being administered sometimes turn to the executor's lawyer, who is generally unable to assist them. They should instead discuss their concerns with the executor of the estate. It is appropriate for beneficiaries to raise their concerns with the lawyer only if the lawyer *is* the executor. It is only the Supreme Court that has the power to remove executors.

What if the deceased did not have a will?

If the deceased has not left a will, one of the people entitled to a share in the estate applies for *Letters of Administration* with the Supreme Court. The estate is then administered under the law relating to *intestacy* (i.e. dying without a will). When this happens, a lawyer's role may be to explain the legal order for distributing the estate and the proportions of the estate that beneficiaries are entitled to. A lawyer can also draw up a report and statement about the value of the assets of the estate and the distribution to each of the beneficiaries.

The information contained in this fact sheet does not constitute legal advice.

The information contained in this fact sheet has been adapted with permission from the NSW Office of the Legal Services Commissioner, 'Deceased Estates' Fact Sheet 12.

Further information

If you have any questions or require further information, please contact the Legal Profession Board of Tasmania.

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