



## Legal Issues. Estates and Probate

### Where there is a will

When a person dies leaving a will, certain procedures have to be undertaken before that person's wishes can be carried out.

A **Grant of Probate** (probate is an order of the court, in South Australia it is an order from the Supreme Court, that an executor named in the deceased person's will is entitled to administer the estate - it gives the executor/s permission to deal with the deceased's assets) will be required where the deceased held real estate in their sole name or as tenants in common, has a refundable accommodation bond from a nursing home or retirement village due to them or had a large amount of money or shares. Some estates can be handled without obtaining a grant of probate.

If the deceased left a will but the appointment of an Executor is defective in some way (maybe no executor was appointed or no executor is able or willing to handle the estate) then an application must be made for a grant of **Letters of Administration with the will annexed**.

A grant of probate or letters of administration with the will annexed gives protection to beneficiaries, who can then be assured of being the only people who will receive the property of the deceased (unless a claim is made under *the Inheritance (Family Provision) Act*). If another person disputes their claim by the production of another will, the only way that person can receive any of the estate is to apply to the court to revoke or change the grant of probate.

### Partial intestacy and lapsed gifts

Where a will distributes only part of a deceased's estate (which means that the person died partially intestate), the part of the estate that has not been disposed of by the will is divided according to the order set out in the *Administration and Probate Act 1919*.

### What if it is not known if there is a will?

For a grant of probate, there must be a will. If it is not known whether or not the deceased left a will or where the original will is located, if the will is not with the deceased's personal papers, checks should be made with the deceased's

bank, insurance company, accountant, financial advisor and lawyer. A deceased may have left a will with the Public Trustee or a private trustee company. If no will can be found, the person is treated as having died without a will (intestate).

### If there is no will

It is not possible to obtain probate if the deceased died intestate - that is without a will. In that situation, it is necessary to apply to the court for a grant of **Letters of Administration** which appoints an Administrator to carry out the administration of the estate.

When there is no will to follow, the estate is distributed according to the rules set out in the *Administration and Probate Act 1919*.

No notice can be taken of any wishes of the deceased that are not expressed in a will.

### Obtaining a grant of probate

Obtaining the grant involves the preparation and lodging of several documents at the **Probate Registry** of the Supreme Court of South Australia at **1 Gouger Street, Adelaide, tel. 8204 0505**.

The documents to be lodged are an executor's oath, the original will, a draft grant of probate, an affidavit of assets and liabilities (which must have a schedule of assets and liabilities annexed or attached to it) and a certified copy of the death certificate. When preparing the schedule of assets and liabilities, it is necessary to disclose all of the deceased estate's assets and liabilities. Failure to do so is an offence under the Act.

If there are any staple holes, if the will has been incorrectly witnessed, or if the witnesses used different pens, the Registrar will require an additional affidavit.

### How long does probate take?

Normally the grant is made within 2 to 5 weeks of the application if all the papers are in order. If there is any doubt or difficulty about a will, the Registrar may require that further affidavits are filed.

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### Contesting an Estate

A person has six months from the date of the grant to issue proceedings to contest an estate.

### Payment of debts

Before the assets of the deceased estate can be distributed to beneficiaries, the funeral expenses may have to be paid. The person who orders the funeral is responsible for paying the account but is entitled to be repaid for the reasonable cost of the funeral before other creditors are paid.

Creditors of an estate must wait until the assets of the estate are available to the executor and reasonable funeral and testamentary expenses are paid before they receive payment.

If the deceased had more debts than assets, it is necessary to deal with the estate in a different way from a normal administration. The executor, administrator or creditor of the deceased may file with the Registrar of Probate a declaration that he/she believes the estate to be insolvent.

### Release of assets

When an estate is very small, there may be no need to obtain a grant of probate or letters of administration. If a bank account is in the deceased's name only, banks will usually release enough to cover funeral expenses, or for a surviving spouse or children if the amount does not exceed a certain limit. All the money in a joint account automatically goes to the survivor when one of the account holders dies.

### Real property

Where the deceased owned a house or land or an interest in a house or land (such as a mortgage or lease) in his or her name only, it is necessary to obtain a grant of probate or letters of administration. No grant of probate is required to deal with a house or land owned as a joint tenant. A surviving joint tenant automatically gets the whole property when one joint tenant dies. The deceased person's interest does not form part of the deceased estate.

### Motor vehicles

The only requirement for the transfer of a motor vehicle to a beneficiary is the changing of the name of the owner for registration purposes. A grant of probate or letters of administration is not needed for this. An application for transfer of ownership form must be lodged with the Registration and Licensing section of Transport SA. In order to obtain a reduction of stamp duty, the beneficiary must sign the declaration on the back of the form which states

that the vehicle is transferred in the terms of the will of the deceased owner and a reduction of stamp duty is claimed.

### Personal goods and belongings

Generally there is no special procedure required for the transfer of these items.

### Hardship

No beneficiary has a right to any of the deceased's property until the executor distributes the estate. This can cause hardship if the main beneficiary is a spouse who has no other source of income. Such hardship may be avoided by spouses keeping a joint bank account. On the death of either, the whole of the account passes to the survivor. A widow may be eligible for the Widow Allowance or other social security entitlement and a widow or widower may be able to obtain a loan using the estate as security. In some cases an executor, such as the Public Trustee, will make a partial distribution, or an advance, to a widow or widower.

### Taxes

There is no longer any kind of death duty in Australia. If a person died before 1980 and the estate has been left unadministered, death duties may be payable. Death duties may be payable in another country if assets are owned in that country.

### Key points:

- *Do not take apart an original will to copy it*
- *Do attach anything to an original will with a paperclip or any other clip*

Catalyst Foundation (formerly Seniors Information Service) at 149 Currie Street, Adelaide has a solicitor able to provide free advice on general legal matters. Charges apply for preparing legal documentation. Telephone 8168 8776 to make an appointment.

**The information contained here is general in nature and is not intended as legal advice.**