

# ESTATE MATTERS

## ADVICE/INSTRUCTION BOOKLET



REABURN SOLICITORS

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#### **INTRODUCTION**

This Booklet aims to assist Executors (also known as Trustees) in both understanding and carrying out their roles.

The Executors role is, in simple terms, to administer the Will on its terms for the benefit of the Beneficiaries. Executors are ultimately accountable to the Beneficiaries for their conduct in the Estate administration.

It is often the case that people pass away as a result of misfortune and they are unfortunately not given the opportunity to “put their affairs in order”. That often leads to the Executors being unaware as to the status of the Deceased’s assets and liabilities. It is most important that we are provided with all financial documents/information to enable us to properly carry out the Estate administration and every effort should be made to locate this information and provide it to us. In acting in the Estate administration, we are obliged to contact all relevant financial institutions and creditors to establish the current status of any assets/liabilities of the Estate. From our experience, all financial institutions and creditors prefer to deal with solicitors acting in the Estate administration rather than the Executors personally.

The first and most important document which we require is the original Will of the Deceased. In many cases we hold the Will in our securities section. If we do not do so, we will require that document. We also require the original Death Certificate as recorded with the Registrar of Births, Deaths and Marriages. The documentation for the Death Certificate is generally prepared by a funeral director and submitted to the Registrar who then issues the original Death Certificate to the person nominated by the funeral director. As soon as that document is to hand please arrange to deliver it to us. That is the formal proof of death.

Throughout our conduct of the matter, every effort will be made to keep the Executors informed as to the progress of the Estate administration. This will be achieved by providing copies of most correspondence sent and received and arranging for regular meetings to advise on the progress of the file.

We stress that if you are unclear as to what steps need to be taken or in relation to the matter generally, you should feel free to telephone so that we can assist.

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## 3 WHO TO NOTIFY

There are a large number of people and organisations who should be informed of the death. Set out below is a checklist of these organisations, some of which the Executor can attend to. At our first meeting we will clarify who will arrange for the notification.

People/Organisations	Done/ Not Reqd	Solr	Exec
Accountant			
Aged Care Facility/Nursing Home			
Australian Electoral Commission ( <a href="http://www.aec.gov.au">www.aec.gov.au</a> or 132326)			
Australian Taxation Office			
Banks and other financial institutions			
Beneficiary liaison (including Acknowledgment & Indemnity)			
Bereavement Register ( <a href="http://www.tabr.com.au">www.tabr.com.au</a> or 1300 887 914)			
Boats/Marine equipment			
Body Corporate			
Child Support Agency			
Clubs and organisations			
Club memberships (RACQ, gym, football/sporting)			
Companies – Directorship/Secretary/Shareholding/Loan accounts			
Direct Debits			
Electricity Supplier (Energex/Origin)			
Employer/Employees			
E-Toll ( <a href="http://www.tollpay.com.au">www.tollpay.com.au</a> or 1300 555 833) OR <a href="http://www.linkt.com.au">www.linkt.com.au</a> or 133331 (Brisbane only)			
Executor of Will			
Family Provision Claims			
Financial Planner			
Gas Supplier			
Hire purchase companies			
Home care nursing services (Blue Care, Meals on Wheels)			
Home deliveries (newspapers, milk)			
Household help (cleaners, gardeners, pool maintenance)			
Insurers (life, home, contents, car)			
Intellectual property/passwords/patents/copyrights			
Internet/Cable TV provider			
Landlord			
Local Authorities (Council/Allconnex)			
Medicare and/or private health funds			
Motor vehicle registry/drivers licence			
Overseas assets/pensions			
Pets			
Post Office (redirect mail)			
Powers of Attorney Act – section 107 claims			
Property Transfers			
Personal Properties Securities Register ( <b>highly recommended</b> )			
Public services (library)			
Public and private companies			
Rewards cards/Fly Buys (131116)/Frequent Flyer accounts			
Social Security, Centrelink and/or Veterans Affairs			
Social media/Facebook/Twitter			
Superannuation funds			
TAB/betting accounts			
Telephone companies (home, mobile)			
Tenants			
Union			

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#### DOCUMENTS WE REQUIRE

We have previously mentioned the importance of providing us with financial information and most importantly the original Will. From our experience most people keep their financial information together and it would be helpful if you could search for a filing cabinet, manilla folder or documents case containing any financial records.

Set out below is a checklist of the documents which we may require during the Estate administration. If required, we will contact you to request the documents. We stress that it may not be necessary for us to have all of the documents to complete the Estate administration, however it would certainly assist. We will discuss that matter in more detail with you as the administration process unfolds.

- Will (we may already have the original copy however if not we will require the original)
- Death Certificate (mandatory)
- Birth and Marriage Certificates
- Property deeds and mortgage papers
- Home loan details (latest statement of loan account containing details about finance for the Deceased's property)
- Lease (setting out legal entitlements on a rented property)
- Taxation records including a copy of the last tax return lodged with the ATO (if possible)
- Insurance policies (e.g. home, contents, car)
- Life insurance and superannuation policies
- Savings/investment account details (showing where savings are located)
- Any documents about pre-paid funeral arrangements or burial plots
- Shareholding details including share certificates and correspondence
- Motor vehicle registration

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### **DEBTS/TAXES**

#### **Debts**

The funeral costs are the first expense to be paid by the Estate. Banks and financial institutions usually allow a "one off" payment to be drawn in payment of funeral expenses once a funeral account is produced. If you have not already done so, please provide us with the invoice together with banking details and we can ask the bank to make the payment.

Sometimes certain health care providers and life insurance companies have provision for a contribution towards funeral expenses. We cannot make a determination on that issue until we sight the appropriate documents regarding that matter.

It is important to remember that it is the Estate which has the obligation to pay the debts of the Deceased, not the Executors. Executors are not personally liable for the debts of the Estate. This is the reason we require the financial documents.

As you will no doubt appreciate it can create great difficulty where an Executor makes a distribution of Estate funds to a beneficiary or Beneficiaries and subsequently finds that there is a debt owed by the Deceased. It can cause great embarrassment and hardship to then expect a beneficiary to return some of the funds already paid to enable the Estate debts to be met.

#### **Taxes**

It is mandatory for all taxation issues to be resolved, including, where necessary, the lodgement of a final Estate tax return. As part of that process, the issue of capital gains tax becomes relevant. Beneficiaries are deemed to have acquired any assets from the Estate at the date of the Deceased's death and at the value or "cost base" which is calculated having reference to the date when the Deceased acquired the assets. We will discuss that issue with you separately.

We stress that our role is limited to acting in relation to legal matters, not taxation matters. It is most important that the Trustees take Accountant advice and have taxation returns for the Estate prepared by a qualified Accountant. We do not give specific advice in relation to Capital Gains Tax.

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#### WHAT IS PROBATE

Probate is a process whereby the original Will is “proven” in the Supreme Court at Brisbane. The effect of the Grant of Probate is that the Court gives its sanction to the terms of the Will.

The process itself imposes the following obligations:

1. Advertising calling on any potential creditors of the Estate to come forward;
2. The preparation and execution of formal Court documents setting out details of the advertising undertaken including Affidavits by the solicitor handling the file and the Executors. Further, it is necessary to provide the original Death Certificate and Will to the Court;
3. A formal application to the Court.

The out of pocket expense associated with undertaking the advertising process, payment of filing fees and the engaging of Brisbane agents to file the documents in the range of \$800.00 to \$1,000.00. This does not take into account our professional costs associated with the process.

By its nature, the Probate application is expensive. We will generally try to avoid the application where possible, however, we have found from past experience that where there are either funds in the bank or investments having a value in excess of \$50,000.00, most banks and financial institutions require Probate to be obtained. If the financial institution elects not to impose the obligation to obtain Probate, the Executors may be obliged to provide an indemnity to the financial institution. The reason for the indemnity is that the financial institution may wish to rely on that document in the event that a disgruntled creditor or a potential claimant on the Estate attacks the financial institution for releasing funds. Many public companies also require a Grant of Probate before releasing shareholder funds.

If the Deceased had paid an Accommodation Bond to a nursing home or care facility, the operator may require Probate to be obtained.

Where there is no Will, or where the Executor in the Will has either passed away or is not prepared to act in that capacity, it may be necessary to make an application for Letters of Administration. The process is similar to the Probate Application. Once Letters of Administration are granted, the persons charged with administering the Estate are known as Administrators not Executors. Their duties remain the same as the Executor under a Will, however, the *Succession Act* sets out a fixed formula in relation to the distribution to Beneficiaries.



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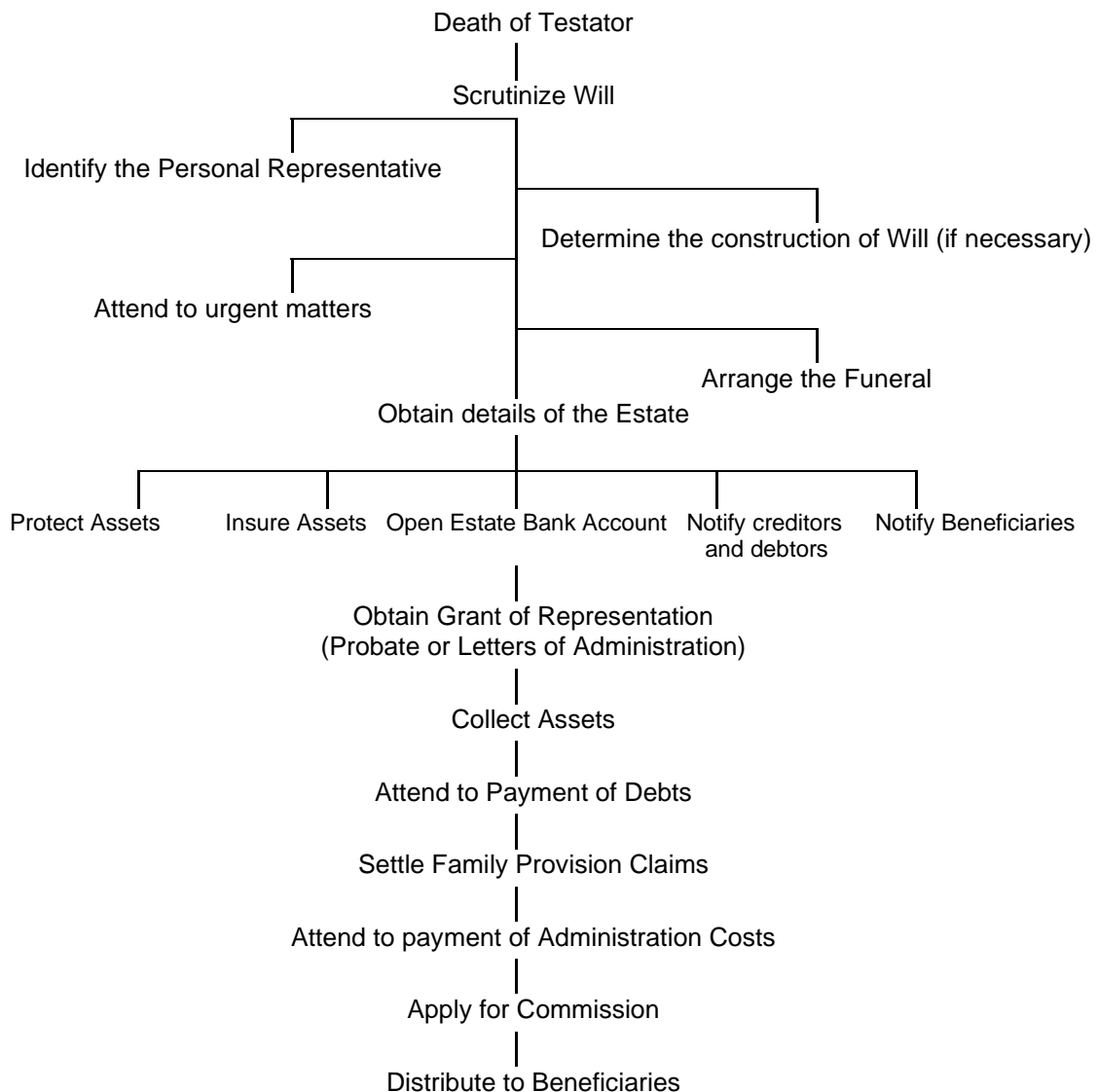
## EXECUTORS DUTIES/FLOWCHART

Set out below is a synopsis of the Executors role which may assist in the conduct of the Estate.

Traditionally the Executors duties are summarised as follows:

1. Reduce the Estate of the Deceased into possession. In simple terms this means to gather all appropriate documentation and convert to cash or have the assets transferred into their names to hold pursuant to the Will for the benefit of the Beneficiaries or alternatively transferred direct to the Beneficiaries;
2. Pay the debts of the Deceased; and
3. Distribute the rest (known as residue) of the Estate after payment of debts and expenses (including the Estate administration) to the Beneficiaries.

Set out below is a flowchart of the obligations.



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### **FAMILY PROVISION CLAIMS**

It is possible for certain class of persons, including a Spouse, De facto or Child, to make application to the Court seeking “further and better provision” than is provided in the Will. This is called a Family Provision Claim. The Application must be made to the Court within 9 months of the date of death. As a general rule, if the Application is successful the costs of the Application are met by the Estate. These can be very expensive. It is important that you discuss any potential Applications with us.

### **EXECUTORS COMMISSION**

Section 68 of the *Succession Act* provides that the Court can authorise the payment of remuneration or commission to an Executor for “his or her services as personal representative as it thinks fit”. This is known as Executors Commission. It is awarded by the Court after taking into account issues such as the size of the Estate and the “pains and troubles” incurred in the administration. “Pains” applies to the responsibility/anxiety/worry undertaken and undergone and “troubles” covers the actual work done.

Whilst the award of commission is discretionary, it is rare that a Court would not award commission. Equally, applications for commission are rarely made. From our experience the award of commission is usually made by agreement between the Executors and the Beneficiaries. It is, however, important to document that agreement. Payment pursuant to agreement is preferable because it then avoids the costs and potential trauma associated with making an application to the Court.

Whilst the amount of the commission is not a fixed percentage, from our experience it is not unreasonable for the commission to be in the range of 3% of the value of the Estate. Each case is different and we will discuss this matter with you during the administration process.