



**Bellwether Financial Group**

**Executor Will Kit**

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## **Who is an executor?**

The executor is a person that the will-maker has nominated to oversee the administration of the will-maker's estate following their death. The executor carries out the instructions set out in the Will and is the legal personal representative of a deceased person.

## **What are the duties of an executor?**

- Obtain the last Will of the deceased and organise the funeral or cremation.
- Notify the deceased's beneficiaries and business associates of the death.
- Look after the estate (make sure that all the deceased's assets are secure and arrange insurance protection where required).
- Arrange for the deceased's property and business investments that need managing to be managed.
- Value the estate as at the date of death.
- Obtain authority (apply for probate) to administer the estate.
- Assume control of all the assets of the estate.
- Complete any necessary income tax returns.
- Get tax advice.
- Pay in this order: 1. funeral expenses; 2. any tax debt; and then 3. creditors, legal fees, and any fees for administering the estate and obtaining probate, out of pocket expenses, etc.
- Prepare a final statement and transfer cash and assets to the beneficiaries (as per the Will), keeping appropriate records.
- Establish a trust if a beneficiary is under 18 years of age or mentally incapable or there are specific instructions to this effect in the Will. Note that many trusts will need ongoing administration over several years.

## **What if more than one executor is appointed?**

All the executors named in the Will can apply for probate. If only one executor wishes to apply for probate, the other executor(s) may renounce their duties or reserve their right to apply for probate later.

### **If I have been appointed as the executor, must I make an application for probate?**

You are under no legal obligation to do so. If you do not want to act as an executor, you need to renounce your appointment as executor. If you do not want to act as executor and a substitute executor is named in the Will, the substitute executor can take on all the duties. If the Will does not name another executor, get legal advice.

### **Should there be a reading of the Will?**

There is no requirement for this. The executor can arrange a meeting with family members of the deceased and beneficiaries named in the Will and explain the provisions there. Alternatively, it may be more practical to send a copy to anyone with a legitimate interest. It is not a legal requirement that a beneficiary be provided with a copy of the Will.

### **Can I be held personally responsible for what I do as an executor?**

You are responsible for any loss which the estate incurs from your unauthorised or negligent acts.

### **Can an executor distribute the assets of the deceased contrary to the instructions in the Will?**

No, the executor must follow the terms of the Will. To change the way the assets are to be distributed, court action may be required. If all the beneficiaries agree, the terms of the Will can be altered by means of a Deed of Family Arrangement.

### **Must the executor get legal advice, and if so, who pays for the advice?**

It is advisable to get legal advice. The cost of legal assistance is a debt of the estate and should come out of the estate once probate has been granted.

## **What is an Application for Probate?**

This is an application made by the executor to the Supreme Court of Western Australia. The executor must satisfy the Supreme Court of the following:

- That the Will is the last Will of the deceased, and there is no later Will;
- That when signing the Will, the deceased was at least 18 years of age, was of sound mind and not subject to undue influence; and
- That the Will was signed in the manner required by law.

The application is made by way of an affidavit and the original Will is lodged with the Supreme Court. If the application is successful, the Supreme Court gives the executor a document called a Grant of Probate which entitles the executor to proceed with carrying out the terms of the Will.

## **When can I apply for probate?**

You must wait at least 14 days after the death of the will-maker before applying for probate.

## **Is there a set time for an executor to finish their duties?**

The general rule is the executor must act within a reasonable time. What is reasonable will depend on each estate. A simple estate can be wound up quickly while a complex estate may take some time to finalise.

## **Are there any circumstances when probate is not required?**

If all assets are held in joint names a probate application is not required. If the deceased has made a nomination for their superannuation funds, and that is the only asset of the deceased, probate may not be required. If only a small amount of funds remains in the bank account of the deceased, you may not need a grant of probate. Talk to the bank.

## **What if the executor is delaying applying for probate?**

If discussions with the executor does not result in them applying for a grant, the beneficiaries may have to commence action in the Supreme Court to either force the executor to act or have the executor removed.

### **Can executors get paid?**

Sometimes in the Will the will-maker may set out how much an executor is to be paid. Otherwise, the executor is not entitled to a commission. If all the beneficiaries agree for the executor to be paid, payment can be made to the executor. An application can be made to the Supreme Court to get direction from the Supreme Court. The executor may recover from the estate any reasonable out of pocket expenses incurred whilst administering the estate.

### **Can the assets be dealt with as soon as probate is obtained?**

The executor can deal with the assets as soon as the Grant of Probate is received. In many cases, however, an executor cannot safely distribute the assets until six (6) months have elapsed from the granting of probate. This is because, in some cases, members of the family may challenge the Will by applying to the Supreme Court of Western Australia. Furthermore, there are certain things the executor must do before distributing the assets of the deceased.

***Refer to our fact sheet on Administering the estate of the deceased after a grant of Probate.***