

Legal Advice to the Executor of a Deceased Estate

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"Protecting and Planning Your Future"

Table of Contents

	Page
1. Appointment as Executor of a Deceased Estate	1
2. Statutory and Common Law Duties of an Executor	1
3. Important Statutory Provisions.....	3
4. Obtaining A Grant Of Probate.....	4
5. Notice To Creditors	5
6. Resigning As Executor	5
7. Notice To Government Departments.....	8
8. Locating And Collecting Assets.....	6
9. Paying Liabilities.....	6
10. Claims Against The Estate.....	7
11. Maintaining Dependents.....	7
12. Distribution To Beneficiaries	10
13. Executor's commission	8

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Disclaimer

The advice contained in this document is general legal advice only. It is not specifically tailored to your circumstances. We urge you to take advice specific to your circumstances prior to relying on any advice contained in this document.

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Executive Summary

Cooke & Hutchinson Lawyers provides advice in relation to the administration of estates on a daily basis. To allow executors to take advantage of our experience we have produced this advice to provide assistance to executors by helping them to understand their role in the estate administration process.

Instructions

1. Appointment as Executor of a Deceased Estate

You have been handed this document on the basis that you require general advice in relation to your role as an executor of a deceased estate. Your role carries significant legal responsibilities. We can offer specific advice about your individual circumstances if instructed to do so.

Advice

2. Statutory and Common Law Duties of an Executor

2.1 STATUTORY DUTIES

Pursuant to section 52 of the *Succession Act 1981* (Qld) the duties of an executor of a deceased estate are to:

- (a) collect and get in the real and personal estate of the deceased and administer it according to law; and
- (b) when required to do so by the court, exhibit on oath in the court a full inventory of the estate and when so required render an account of the administration of the estate to the court; and
- (c) when required to do so by the court, deliver up the Grant of Probate or Letters of Administration to the court; and
- (d) distribute the estate of the deceased, subject to the administration of the estate, as soon as may be; and
- (e) pay interest upon any general legacy:
 - (i) from the first anniversary of the death of the testator until payment of the legacy; or
 - (ii) in the case of a legacy that is, pursuant to a provision of the Will, payable at a future date from that date until payment of the legacy;

Interest is paid at the rate of 8% per annum or at such other rate as the court may either generally or in a specific case determine, unless any contrary intention respecting the payment of interest appears in the Will.

If the executor neglects to perform his or her duties the court may, upon the application of any person aggrieved by such neglect, make such order as it thinks fit including an order for damages and an order requiring the executor to pay interest on such sums of money as have been in the personal representative's hands and the costs of the application to the court.

2.2 COMMON LAW DUTIES

In addition to the statutory duties outlined above the executor of an estate also has a number of duties at common law¹. These are said to be "*fiduciary duties*" or duties of the utmost good faith. Fiduciary duties are the highest duties at law and require the executor to act in the best interests of the estate above all others including himself or herself at all times. In summary, the executor must not, without the express written consent of the beneficiaries:

- (a) Place himself/herself in a situation where there is, or may be, or be seen to be in a real conflict between the executor's duties to the estate and the executor's own personal interests.
- (b) Make a profit out of their position as executor. It should be noted that the *Succession Act 1981* (Qld) varies the common law position on this point in relation to executor's commission, see paragraph 13.

If the executor breaches their role as a fiduciary severe penalties will ensue. Fiduciary duties must not be breached under any circumstance.

2.3 PRACTICAL THINGS TO ATTEND TO

Practically the duties that have been set out in paragraph 2.1 and 2.2, above (albeit briefly) mean that the executor of the estate must step into the shoes of the deceased person and attend to matters such as:

- (a) Attending to funeral arrangements;
- (b) Locating and examining the Will;
- (c) Locating and advising beneficiaries of their entitlements pursuant to the Will;
- (d) Verifying, valuing and collecting assets of the deceased person;
- (e) Paying debts and tax liabilities of the deceased person from funds in their estate;
- (f) Investing surplus funds for the benefit of beneficiaries;
- (g) Proving the Will – obtaining a Grant of Probate from the Supreme Court of Queensland;
- (h) Seeking instructions from beneficiaries;
- (i) Dealing with disputes relating to the provisions of the Will;
- (j) Handling other specific bequests;
- (k) Obtaining income and land tax clearances;
- (l) Transferring real property;
- (m) Preparing final income tax returns for the deceased and the estate; and
- (n) Making a final distribution of assets in the estate to beneficiaries.

¹ Common law is the law set by decisions made in various cases. Those decisions encapsulate a body of law known as the common law.

3. Important Statutory Provisions

3.1 THE *SUCCESSION ACT 1981* (QLD)

The sections of the *Succession Act 1981* (Qld) that are of particular relevance or importance to executors include:

Section	Overview of Content
33Z	Specifies persons who are entitled to receive a copy of the deceased person's Will.
45	Vests the property of the deceased person in the Executor of the estate
46	Allows the Executor to resign and covers situations in which the executor has died or will not act/cannot act.
48	States that there may be no more than four executors at any one time.
49	Sets out the statutory powers of the Executor.
49A	Allows the Executor to make distributions from the estate for maintenance of dependants.
52	Sets out the duties of the Executor.
52A	Sets out liability for waste by the Executor.
54	Protects a person who acts informally as executor of the estate.
57	Sets out priority of creditors of an insolvent estate.
59	Sets out the order in which assets of the estate must be liquidated to pay debts of the estate.
60	Sets out the manner in which pecuniary legacies must be paid.
Part 5A	Deals with the provision of guardians for orphaned children.
65	Where two or more persons have died at the same or a similar time and there is no way of determining which person passed away first the younger person is presumed to have survived the older person by one day.
66	Allows certain legal proceeding on foot at the date of the deceased's death to continue in certain circumstances.
68	Allows an executor to claim for an award of commission.

3.2 OTHER LEGISLATION

Other relevant legislation includes²:

- (a) *Trusts Act 1973* (Qld)
- (b) *Uniform Civil Procedure Rules 1999* (Qld)
- (c) *Property Law Act 1974* (Qld)
- (d) *Land Title Act 1994* (Qld)
- (e) *Superannuation Industry (Supervision) Act 1993* (Cth)

² Other Legislation may not apply depending on estate assets and liabilities

4. Obtaining A Grant Of Probate

4.1 WHAT IS PROBATE?

Probate is proof that the Will being relied on by the executor/s of the estate is the last Will of the deceased person. Formal recognition is given by the Supreme Court of Queensland which allows the executor/s to administer the estate and comply with their duties as executor/s.

4.2 WHAT IS INVOLVED IN MAKING AN APPLICATION FOR PROBATE?

An application for a Grant of Probate involves the filing of certain documents in the Supreme Court Registry such as:

- (a) An Application for the Grant³;
- (b) Supporting Affidavit material⁴ from the executor or executors which should identify at a minimum:
 - (i) that the Will identified in the affidavit is the last Will of the deceased;
 - (ii) the date of death or, if the date of death is not known, the circumstances of death and the place of death of the deceased;
 - (iii) identify the applicant as being the executor named or identified in the Will;
 - (iv) if a certificate of the deceased's death is issued under the *Births, Deaths and Marriages Registration Act 2003* or a corresponding law of another jurisdiction have, as an exhibit, a certified copy of the certificate.
- (c) In addition, whichever of the following documents is relevant must be an exhibit to the supporting affidavit:
 - (v) the original Will;
 - (vi) any codicil;
 - (vii) any other document that may be a Will or codicil;
 - (viii) anything mentioned in the affidavit as an exhibit must be filed with the affidavit.
- (d) Further, proof that the advertising requirements contained in the *Uniform Civil Procedure Rules 1999 (Qld)*⁵ should be set out either in the affidavit in support of the application or in its own application. A copy of the notice must be exhibited to the affidavit.

4.3 WHEN IS PROBATE REQUIRED?

Probate is required in certain circumstances such as:

- (a) When it is required by a bank or financial institution to release moneys held by it to the estate (usually over \$50,000);
- (b) It is required by a share registry to dispose of or transfer shares;
- (c) It is required by a nursing home to release an accommodation bond;
- (d) It is required by the Registrar of Titles to transfer certain property;
- (e) There a claim or notice of claim against the terms of the Will;
- (f) There is a claim that the Deceased did not have capacity to make the Will;
- (g) There is a claim that the Deceased was unduly influenced to make the Will;
- (h) There is any suggestion that there might be a more current Will or the Will be upon which the executors are relying, was made many years prior to the deceased's death;
- (i) The estate is suing or is being sued;
- (j) There is concern that the document being relied upon does not comply with the relevant section of the *Succession Act 1981 (Qld)*; or

³ Rule 597 *Uniform Civil Procedure Rules 1999 (Qld)*

⁴ Rule 602 *ibid*

⁵ See Rules 598 & 599

(k) The executor of the estate requires an indemnity.

4.4 HOW LONG DOES IT TAKE TO OBTAIN PROBATE?

From the time that we receive instructions and documents to enable us to apply for the grant of Probate to the time that we receive the grant from the Supreme Court is, subject to Court delays, between six and eight weeks.

Step	Action
Step 1	Advertise in the Courier Mail and the Queensland Law Reporter.
Step 2	Advertising will appear in the Courier Mail and the Queensland Law Reporter one week after we send the advertising notice to those publications.
Step 3	Probate documents are prepared for your signature and filed in the Supreme Court of Queensland – these documents cannot be filed in the Supreme Court Registry until 14 days after the advertising requirement has been effected.
Step 4	Lodge the documents in the Supreme Court Registry.
Step 5	Receive Grant of Probate from the Supreme Court Registry – somewhere between two and three weeks after the documents have been filed, depending on the volume of applications at the Registry at that time.

5. Notice To Creditors

5.1 WHEN SHOULD I ADVERTISE A NOTICE TO CREDITORS?

We strongly suggest that you should advertise a notice to creditors pursuant to section 67 of the *Trusts Act* (Qld) for every estate. A notice of this type will, upon publication, serve as a final opportunity for creditors to lodge any claim on the estate. By serving such a notice you will have fulfilled your duty to notify potential estate creditors of the death of the deceased person and in the absence of any claim within six weeks after the notice is published, and after the estate has been distributed pursuant to the terms of the Will, creditors will forfeit their claim. If you do not publish a notice to creditors, any unknown claims against the estate will remain a liability of the estate, in perpetuity, despite any distribution made by you to the beneficiaries of the estate.

5.2 CREDITORS NOTICE AND PROBATE

As a matter of course we include a creditors notice as discussed above in the advertisement that is placed to comply with the advertising rules when applying for a Grant of Probate. There is no need to advertise twice.

6. Resigning As Executor

6.1 HOW CAN I RESIGN?

If you do not want to act as executor you can resign by executing a document known as a Renunciation of Probate. The notice should be served on the other executor or executors of the estate, including a substitute executor (if any) or where there is no other executor then upon the beneficiaries of the estate

6.2 WHAT HAPPENS TO THE ESTATE AFTER I RESIGN?

The remaining executor(s) can apply for a Grant of Probate or if there are no executors, one of the beneficiaries of the estate may apply for what is called "*Letters of Administration (with the Will)*". You are not generally liable for the actions of the subsequent executors or administrators of the estate after you have renounced executorship (resigned as executor).

7. Notice To Government Departments

7.1 WHO SHOULD I NOTIFY?

As a general rule you should notify the following government agencies of the death of the deceased person (if applicable) as soon as is practicable:

- (a) Centrelink;
- (b) Australian Taxation Office;
- (c) Department of Veteran's Affairs;
- (d) Provider of any overseas pension;
- (e) Queensland and Australian Electoral Commissions (as a precaution);
- (f) Medicare;
- (g) Notice might be required to be given to other Government Departments. Notice to other Government Departments will depend upon the individual circumstances of the Estate.

8. Locating And Collecting Assets

8.1 HOW DO I LOCATE ASSETS?

The first port of call when attempting to identify the deceased person's assets is at their home and their mail box. Generally important papers will be kept in one place and will give some clues as to what the estate consists of. The second manner in which assets might be tracked down is by obtaining a copy of the last tax return for the deceased person and by writing to the various institutions named in that return.

We are able to attend to various searches for a nominal fee to help track down real estate and we have many years experience tracking down assets that belong to estates.

8.2 HOW DO I COLLECT ASSETS?

As executor of the estate, you are entitled to sign for and collect assets of the estate. The assets collected must be banked into an estate trust account. If you do not have or do not wish to establish a trust account then you may choose to utilise our trust account. The advantage of using our trust account is that a statement can be produced and emailed or faxed to you or to a beneficiary (at your direction), almost instantaneously and you do not need to comply with the requirement of the banks and the *Trust Accounts Act 1973* (Qld) to establish the account.

You will be required to write, or to instruct us to write, to various institutions and companies that hold assets of the deceased person. We can assist you in completing the various claim requirements and as mentioned above, bank the proceeds into our trust account on behalf of the estate.

Real property will need to be liquidated or transferred. To liquidate real property, the property must first be transferred to you as executor of the estate so that it may be sold. We are able to assist with this transfer, the appointment of a real estate agent to sell the property, valuations, drafting contracts and subsequent conveyancing relevant to the sale.

9. Paying Liabilities

9.1 WHAT LIABILITIES NEED TO BE PAID AND WHEN?

Generally, where the estate is solvent (its assets exceed its liabilities) all liabilities must be paid. This can mean that certain distributions provided for set out in the Will might be less than was intended by the deceased or might not take effect at all.

The funeral director's fees will always take priority. For that reason you may present the invoice from the funeral director to the deceased's bank and the bank will pay all, or where there are insufficient funds, to the value of the deceased's bank balance to the funeral director. You do

not need Probate of the Will to be able to pay the funeral director.

Most other creditors understand that the collection and distribution of an estate takes some time and are willing to wait for payment of their debt provided that the debt has been acknowledged by you as the executor of the estate.

It is the executor's responsibility to make sure that all debts are paid including any tax liability for the deceased or for any tax liabilities arising after death, such as Income Tax, and Capital Gains Tax.

10. Claims Against The Estate

10.1 ON WHAT BASIS CAN A CLAIM BE MADE?

There are effectively three basis upon which a person can make a claim against an estate:

- (a) that they have been left inadequate provision or left out of the Will completely⁶;
- (b) that the deceased person lacked the requisite capacity to make the Will; or
- (c) that the deceased person was unduly influenced when making the Will.

This advice will focus on claim (a) only because is it the most common.

10.2 WHO CAN MAKE A CLAIM?

A person who is defined by the *Succession Act 1981* (Qld) as a Spouse, Child or Dependant⁷ of the deceased person may make a claim against the estate of a deceased person on the basis that adequate provision was not made for their proper maintenance and support.

10.3 WHEN MUST THE CLAIM BE MADE BY?

The executor or executor's solicitor should be given notice of a claim within six months of the deceased person's death. A claim for adequate provision pursuant to the *Succession Act 1981* (Qld) must be made within nine months of the deceased person's death unless exceptional circumstances apply.

Any assets distributed after the expiration of six months of the date of death, without notice of a claim, cannot be considered as part of the claim. Any asset distributed after nine months of the date of death without notice that a claim has been commenced or, service of a claim, despite notice of an intention to make a claim, will not be considered to be part of the deceased estate for the purposes of the claim.

If you receive a notice of a claim you should seek advice immediately. We are able to provide that advice.

11. Maintaining Dependants

There is a general duty to maintain the deceased person's dependants, especially minors, even if the executor has received notice of a claim against the estate. The maintenance that is paid to maintain the deceased's dependants must be reasonable in the circumstances and is allowed pursuant to section 49A of the *Succession Act 1981* (Qld).

⁶ Section 41, *Succession Act 1981* (Qld)

⁷ See Sections 40 & 40A

12. Distribution To Beneficiaries

12.1 WHEN SHOULD/CAN I MAKE A DISTRIBUTION?

You can make a distribution at any time you so decide after liabilities have been paid or on the basis that sufficient monies are held in trust to cover future liabilities and subject to our comments in relation to claims in item 10 above. Generally where there is a large sum held in the estate trust account most executors will make what is called an interim distribution to the beneficiaries prior to making a final distribution at the completion of the matter.

12.2 FINAL DISTRIBUTION

The final distribution to beneficiaries should include details of the estate administration expenses, liabilities paid by the estate for the deceased and give the beneficiaries details of the income and expenses of the estate followed by the final Nett position. At distribution a copy of the Will should be provided to the beneficiaries if this has not already been attended to.

13. Executor's Commission

An executor's entitlement to claim a reasonable commission is authorised by section 68 of the *Succession Act 1981* (Qld) which states:

"The Court may authorise the payment of such remuneration or commission to the personal representative for his or her services as personal representative⁸ as it thinks fit, and may attach such conditions to the payment thereof as it thinks fit."

Further, section 101 of the *Trusts Act 1973* (Qld) also allows the Court authorised payment of the remuneration for services as a trustee.

Strictly speaking, an executor may only claim commission from the estate if the payment is authorised by the Court. It is worth noting however that, where all of the residuary beneficiaries are over the age of 18 years and are able to consent, then, payment may be authorised by unanimous approval of all residuary beneficiaries that are affected by the payment of commission.

In the circumstances where an executor is left a legacy pursuant to a Will, that legacy or gift does not preclude a claim for executor's commission.⁹ If the legacy is worded so as to leave no doubt that the legacy is provided in lieu of an appropriate executor's commission then the executor is generally not entitled to claim the executor's commission.

To determine an appropriate level of executor's commission the circumstances of the particular case must be carefully considered. It is unfortunate that there is no statutory scale provided to calculate the amount of commission payable to individual executors. At present section 41 (1) of the *Trustee Companies Act 1968* (Qld) sets a maximum statutory scale for trustee companies being 5% on the gross capital value of the estate and 6% on the income derived from that estate.

It is worth bearing in mind that the executor's commission is awarded having regard to the *"pains and trouble"* incurred by the executor or executors in the administration of the estate. It is said that the phrase *"pains"* refers to the responsibility and anxiety of the executor during the administration of the estate and that *"trouble"* refers to the work that is actually attended to by the executor.¹⁰ The matters that are taken into account by the Court when awarding an amount of commission includes but is not limited to:

- (a) The magnitude of the trust;

⁸ Note that Personal Representative means the same as the word Executor

⁹ Re: Lack [1983] 2 Qd R 613

¹⁰ Re: Colin McLean [1911] 31 NZLR 139

- (b) The care and responsibilities arising from the magnitude of the trust;
- (c) The time occupied and performing the duties;
- (d) The skill and responsibility displayed by the trustee or trustees; and
- (e) The success to which the executor attends to the administration of the estate.

A generally accepted rule of thumb is that commission on capital should be calculated at 2.5% and commission on income calculated at 5%. This rule of thumb is not definitive and each case must be considered on its merits.

Where there is more than one executor acting in relation to the administration of the estate only one commission is paid. It is a matter for the executors to decide how the commission should be apportioned.

Recommendations

This advice is given as a general aide and whilst it is not to be considered comprehensive legal advice it is designed to illustrate the main duties that you owe the estate of the deceased person. In our view there is no such thing as a "simple estate". Each estate, no matter the size, has its own peculiarities that warrant your undivided attention.

It should come as no surprise that we consider legal advice to be a very necessary part of the administration of a deceased estate.

We are able to provide either:

1. a fixed price to assist you with your duties as executor or;
2. should you prefer, to be engaged on the basis of an hourly rate or;
3. on the basis of the Scale, for the provision of legal services set by the Supreme Court of Queensland.

If you require our assistance, we are more than willing to assist.

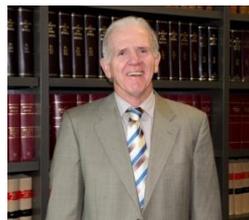
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The information contained in this report is merely a guide and is not meant to be a detailed explanation of the law relating to this subject. We recommend that you see us about any particular legal problem.