Administering Deceased Estates...

Client Guide

McKays Solicitors Unique.Focus

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Choosing the right solicitor

Not all solicitors are the same. Choosing the right one to help you look after the administration of the estate of a loved one can be difficult and at times traumatic.

When choosing your solicitor, this is what we suggest you consider...

- **Ask your friends about the solicitor** – See if any of your friends or advisers, such as your accountant or financial planner, have dealt with the solicitor before.

- **Talk to the solicitor** – Make sure you are comfortable with that person; make sure you feel heard; make sure the solicitor has common sense and treats you with respect, honesty and compassion.

- **'Jack of All Trades, Master of Nothing'** – The relevant law and procedural red tape can be complex – you want someone who knows what they are talking about. Would you go to your GP for heart surgery? No, you would see a specialist trained heart surgeon. The same principle applies to solicitors. No one solicitor can be competent in all areas of the law. Do not choose a solicitor who does many types of legal work. Choose your solicitor for the specific task that you want performed. Ask whether the solicitor has substantial experience and skill in the area of estate administration.

- **You want a solicitor who keeps up-to-date** – The law changes everyday. Ask your solicitor if they regularly attend legal education sessions and read up on the latest developments as and when they occur. Keeping up-to-date with new advances in the law can result in significant benefits to you.

- **You want a team** – A good cost effective result requires experience and skill and a specialised team approach. Why a team? Because a number of tasks usually need to be performed. Some tasks need greater skill and knowledge than others and the rates of charge of individual team members reflect their level of skill and experience. You do not want a specialist solicitor typing up your documents when a trained typist at a substantially lower rate of charge could probably do a faster and more accurate job. You want the job done accurately and quickly at the least cost. Ask whether your solicitor is a member of a team that works together in this way.

- **Send in the backup** – You want a solicitor who has backup from human, financial and technological resources available to support the conduct of your matter. The team approach also gives you multiple points of contact so that if the solicitor in charge of your matter is away, others in the team can help answer your queries.

- **Communication** – You want a solicitor who will communicate with you. Choose a solicitor who talks plainly and does not use legal jargon. Ask if your solicitor will promptly return your calls. Ask how often you will get progress reports. Check that the solicitor will communicate by your preferred method be it regular meetings, phone, fax, email or letters.

- **Avoid unwelcome surprises** – Ask your solicitor about the legal costs. Obtain an estimate. Check what factors impact on the eventual costs. Ask about how long it may take to complete the matter. Ask how often accounts are sent to you and when payments may be required.

How do we know these are factors that should be considered when choosing a solicitor? Because we ourselves look at these considerations when choosing our own staff so that we can offer you the best service possible.

We are real people and we understand that losing a loved one or friend can be very distressing and in your time of grief, the last thing you want to be thinking about is administrative and legal formalities.

That is why we are committed to easing the burden – we will use our best endeavours to look after the administration of the estate for you. We have a dedicated, honest and compassionate team specially established and trained to handle estate administration. We genuinely care about our clients.

We have a blend of youth and experience, male and female solicitors and support staff who are able to provide their skills and different perspectives to ensure that you get the best results.

Our solicitors attend succession seminars which deal primarily with the issues of Wills and Estates.

We subscribe to numerous electronic research tools to ensure that we are always up-to-date with the new developments in the law.

Our sophisticated computer systems and electronic resources coupled with our commitment to document development means that we can get things done quickly, with a minimum of fuss and at a lower cost to you.

Also, having offices in both Brisbane and Mackay, we have knowledge of rural issues along with urban concerns and have a great knowledge base from which we can draw.

We will be upfront about legal fees with you and provide you with updates as the matter progresses. We will not try to overcomplicate matters by using legal jargon – we will talk to you in plain English and ensure that you understand what is happening on the matter. We will always be upfront and honest with you because the solicitor/client relationship is very important to us and we want to foster mutual trust and understanding.

These are the reasons why clients keep coming back to us, recommend us to their friends and family, and a number of accountants, financial planners and brokers in Queensland and even Australia-wide recommend us to their clients as their number one choice for solicitors.

So if you want your questions answered or need help with administering an estate, just give us a call and we will ensure that you speak to one of our helpful team.

"In life, it is commonly said that death and taxes are inevitable. Most of us though, are not prepared for the death of a loved one or friend.

Death means not only sadness and grief, but brings with it essential administrative matters that must be attended to.

Many private executors and administrators are family or friends of the deceased and are often not well equipped to handle what can sometimes be quite complex administrative matters".

Executor v Administrator

A Will should always appoint one or more persons to act as "executor" of the estate.

But...

- What if there is no Will?
- What if the Will fails to appoint someone as an executor?
- What if the executor does not want to act?

In these circumstances, someone will need to be appointed as an "administrator" and there is a section in this guide giving some information about how an administrator is appointed. Once appointed, this person has the same basic responsibilities as an executor.

If you have been appointed as an executor in Queensland, or are looking to be appointed as an administrator, then this guide is designed to help you understand some of the steps that need to be taken by you.

A family member or friend has died and I have been appointed as executor in the Will – what do I have to do?

Your duty is to carry out the wishes of the person who has appointed you as executor even if you do not agree with them. We shall say more about these duties later in this booklet but for now there are some initial practical things you must do.

What is the first thing I should do?

The Will is what gives you the authority to act as executor. It is important that you check the original Will to ensure you have been properly appointed. The Will may also contain funeral instructions or may refer to matters that require urgent attention.

The solicitors who prepared the Will usually keep the original Will in their safe custody, but this does not mean that you have to use their services in the administration of the estate. As executor you can choose who your advisors are. If you take possession of the original Will rather than leaving it in safe custody, it is vital that it is not folded or marked in any way. Even the slightest mark can lead to additional costs and delay where the court will want an explanation as to how the Will was marked. The court's main concern is to ensure there were no attachments to the Will that have gone missing.

Who is responsible for the funeral arrangements?

It is your responsibility as executor to ensure proper funeral arrangements are made. Nonetheless, it is common for close family or friends to organise the funeral arrangements, sometimes without even referring to the executor.

Who pays for the funeral costs?

Funeral costs should be paid straight away. Whoever arranges the funeral often pays the costs and is then entitled to be reimbursed out of the estate in priority to all other claims. This is on the condition that the funeral arrangements are appropriate, bearing in mind the assets of the deceased.

If you approach a bank where the deceased had an account, then they often release monies from the account on presentation of the funeral account.

You should be aware however that "funeral costs" do not normally include any memorial services, the cost of a wake, the cost of a headstone or other plaque – it relates strictly to the actual disposal of a body. If you wish to provide for these things ask us about what you may need to do.

Should I notify the beneficiaries of their interest in the Will?

It is generally advisable to notify the beneficiaries and ordinarily a copy of the Will would be provided to any beneficiary requesting it.

Is there a "reading of the Will"?

There is rarely any formal reading of the Will despite what you may see in the movies.

If the Will is not clear, who interprets what it means?

A Will should be clear and unambiguous but sometimes the solicitors who drew the Will may use complex wording. Sometimes a clause is worded so that the deceased is not giving a direction but merely expressing a desire as to what he or she would like to see occur. If the Will is difficult to understand we recommend you consult us to help you with the interpretation.

If there is ambiguity then we can apply to the court for directions as to how to interpret the Will. The costs of making the application are usually paid out of the estate and we can help you with any application that may be required.

What else should I do?

Urgent attention often needs to be given to certain assets and responsibilities of the deceased although often family and friends will attend to the matters without reference to the executor. These can include:

- Immediate caring for any children;
- Ensuring the deceased's home and contents are secure and advising any insurance company if the home is unoccupied;
- If there is no insurance of assets and a prudent person would insure those assets, then you should consider taking out insurance – if you fail to do so, there is a risk that you may be held personally liable for any loss that may occur;
- Immediate caring for any pets; and
- Arranging for funds in the short term to support any dependants who are beneficiaries. This can include making arrangements with the bankers for the deceased, Centrelink, former employers or trustees of any superannuation fund of which the deceased was a member.

What other matters might I need to immediately consider doing?

If the deceased operated a business it may be vital to act so as to preserve some business assets. What needs to be done will depend entirely on the circumstances. The deceased's accountants and key employees would normally assist in making the necessary decisions.

When does my authority as executor begin?

Usually any person appointed as an executor in a Will may immediately start to act as the executor

upon the death of the deceased.

What if there was an attorney appointed?

If the deceased appointed anyone as his or her attorney then that authority to act as attorney ceases immediately upon death. This applies even if the power of attorney was an enduring power of attorney. It is therefore important that any attorney be notified of the death of the deceased as soon as possible.

What does a coroner do?

A coroner's job is to investigate and establish a cause of death. A coroner is usually appointed where the cause of death is unknown or the deceased died as a result of violence or an accident.

What obligations do I have?

Basically, you need to:

- Get possession or control of the assets owned by the deceased;
- Pay the funeral and other expenses associated with looking after the estate;
- Pay the debts of the deceased; and
- Distribute what is left over to those entitled under the Will.

This is called administration of the estate. During the administration you control and are responsible for all of the assets of the estate.

What is the "estate"?

This is the term commonly used to refer to the assets and debts of the deceased.

What if I don't want to act as executor?

Any person appointed as an executor may renounce the executorship. If an executor intends to renounce it is preferable that he or she do so immediately. It is usually not desirable for him or her to take any part in the administration of the estate before they renounce.

What if I am the only executor and I renounce?

The *Succession Act* sets out an order of entitlement for those persons who may be prepared to be responsible for administering the estate. It may be necessary for them to apply to the court to be appointed. As mentioned above that person will become the administrator of the estate and essentially have the same powers and responsibilities as an executor. We can assist you with the application to the court if it is necessary.

When should I start dealing with administration of the estate?

Generally you will be able to do very little in relation to the administration of the estate until such time as the certificate of registration of death has been obtained. All the banks, building societies, life insurance companies and others will require a copy of the death certificate before they will release the assets held by them.

In many circumstances they will also require "Probate" of the Will. If there is no Will then they will often require "Letters of Administration".

Where do I get the certificate of registration of death from?

The doctor's medical certificate certifying the cause of death is not the certificate of registration of death. The funeral director usually receives the death certificate within two to four weeks from the date of the funeral.

A funeral director often requires their account to be paid before they hand the document to you. If you do not receive a certificate we can assist you to obtain one from the Registrar Generals Office.

> "If there is no Will then a complex set of rules apply to determine who is entitled to the estate... generally the rules apply to ensure the benefit of the estate passes to spouses and close family members."

What are Probate and Letters of Administration?

"Probate" and "Letters of Administration" are legal jargon for what are essentially documents issued by the court. The documents are used as proof that the court has recognised you as the person who has the authority to deal with the estate. You have to apply to the court to be issued these documents.

Where there is a Will that appoints someone willing to act as executor then we may need to make an application for Probate of the Will.

Where there is no Will or the Will fails to appoint someone willing to act as executor then we may need to make an application for Letters of Administration.

Who may apply for Probate or Letters of Administration?

Except in very limited circumstances, only persons named in the Will as executors may apply for Probate.

Where there is no Will or the Will fails to appoint someone willing to act as executor then, as a general rule, only persons who are entitled to a share of the estate may apply for Letters of Administration. We can help identify who has the greater right to apply out of the various persons who may be entitled to some benefit out of the estate and who are willing to administer the estate.

If the Letters of Administration are then granted to that person, then he or she becomes the "administrator". This is essentially the same role as an executor.

If there is no Will who is entitled to the estate?

A complex set of rules apply to determine who is entitled to the estate and it is beyond the scope of this guide to explain all those rules fully. Generally the rules apply to ensure the benefit of the estate passes to spouses and close family members – which can include de facto spouses and step children in certain circumstances.

We can advise you on who is entitled to the estate but would need to know full details of the deceased's family and marriage or de facto partners.

Do I absolutely have to get Probate or Letters of Administration?

There is usually no obligation to apply for Probate unless required by a person or company holding assets of the estate which need to be dealt with such as bank accounts, life policies, shares in companies, etc. The decision as to whether to apply for a grant of Probate or not is normally made after you have considered the assets of the estate which must be dealt with.

In acting on your behalf we would normally seek to verify the existence of the assets of the estate and ask each relevant person or company whether or not they required a grant of Probate to be produced before allowing the asset concerned to be dealt with.

For example, a company in which shares are held may, or may not require a grant of Probate depending upon their own particular internal policies. Strictly speaking, any party holding assets of the deceased may insist on sighting a grant of Probate before allowing the asset to be dealt with. This right exists regardless of the value of the assets.

Where there is no Will then you are likely to have to apply for Letters of Administration although if the estate is very small, then you may in some cases be able to deal with the estate without having to apply to the court. Again it depends very much on which organisations you have to deal with and what their requirements are.

Even if I am not required by any party to obtain Probate, is it recommended?

Even if it is possible to deal with all the assets of the estate without obtaining a grant of Probate, it may still be wise to obtain the grant because of the protection it gives you.

> "You should certainly obtain Probate where there is disagreement between family members about how the estate should be administered, if someone is threatening to challenge the Will, if the Will is damaged in any way, if the Will may be incorrectly signed or if the deceased may not have been of sound mind when the Will was signed or may have been coerced into signing it."

An executor who in good faith and without any negligence who has obtained a grant of Probate, is not liable for any gift or asset distributed in good faith and without negligence in reliance upon the grant of Probate. This rule applies even if the grant of Probate is subsequently revoked by the court.

You may therefore decide to obtain Probate even if the assets of the estate can be dealt with without Probate. The factors to consider often involve the size of the estate and how confident you are that the estate administration is likely to be free from any difficulties.

You should certainly obtain Probate where there is a disagreement between family members about how the estate should be administered, if someone is threatening to challenge the Will, if the Will is damaged in any way (such as having staple or pin holes in it), if the Will may be incorrectly signed or if the deceased may not have been of sound mind when the Will was signed or may have been coerced into signing it.

In addition, a bank, building society or company who agree to waive the necessity to obtain Probate often require you, as the executor, to provide an indemnity to the bank, building society or company.

Accordingly, you will expose yourself to some personal liability in giving the indemnity. If a grant of Probate is produced you will normally not be required to provide a personal indemnity.

If Probate gives me this protection, why would I not get Probate?

Having to obtain Probate can slow down the administration of the estate and can lead to additional costs being incurred. Having said that, in some cases the costs of the work involved in seeking to avoid getting Probate can sometimes exceed the cost of actually obtaining the Probate. We can assist you to make the decision on whether to obtain Probate or not.

How do I apply for Probate or Letters of Administration?

Basically, we would prepare and place an advertisement notifying the public of your intention to apply for Probate or Letters of Administration in certain newspapers. We then serve copies of the notice of the application on the Public Trustee.

The application itself then needs to be filed in the court registry along with supporting affidavits which would be signed by you together with the certificate of death. Where we are applying for Probate of the Will, the original Will needs to be lodged as well.

The court registry then checks all documents closely and on occasions may issue a requisition. Requisitions are questions that the registrar may have about the application. For example, if the registrar notices some mark on the Will which is not fully explained they may ask that an affidavit be submitted by someone who can explain how the mark was made.

Requisitions can increase the costs of obtaining Probate and delay the process, so we make every attempt to anticipate what the Registrar may want and submit affidavits answering any question we anticipate the Registrar may ask.

After a Registrar of the court has had an opportunity to consider the application, ensure the Will appears to be in order and that there have been no claims or objections lodged in respect of the application, the Registrar will issue and seal the grant of Probate or Letters of Administration.

What is the effect of Probate or Letters of Administration being granted?

Probate in "common form" is intended to be proof that the Will is the last Will of the deceased upon which the executor, the beneficiaries and others may act and rely. It is proof that the executor has the authority to administer the estate.

Occasionally, it is necessary that a more stringent proof be obtained in which case a "solemn form grant" is made after there has been a judicial determination of the validity of the Will. This is normally required should someone lodge an objection against the granting of Probate in common form.

Letters of Administration are proof that the administrator has the authority to administer the estate.

Who pays for the cost of Probate and Letters of Administration?

The legal costs are paid out of the estate. You should endeavour to get at least some preliminary idea of what assets may be in the estate, because, if the estate does not have sufficient funds to even cover the costs of obtaining the grant of Probate or Letters of Administration, then it is unlikely that Probate or the Letters of Administration will be required, but if you nonetheless proceed to obtain them, you may be personally liable for the costs.

How do I now get the estate assets under my control?

This will depend very much upon the nature of the asset. Where there is a form of registration of the asset, such as a share in the share register of a company or ownership of land in the land registry, it is often necessary to have the share or land transmitted into your name as executor of the estate. These applications are generally regarded as "transmission applications" and the registration procedures vary according to the requirements of the company or body which controls the ownership register.

It is possible in some instances to transfer property directly from the name of the deceased to the beneficiary. Whether or not this procedure is adopted depends very much on the circumstances at the time. You should be wary of making a decision about this without considering what the taxation implications may be.

What about property that was owned by the deceased with another person as joint tenants?

Generally, upon the death of one joint tenant, the surviving owner is entitled to be registered as the sole owner of the property and becomes beneficially entitled to the whole of the property. There are exceptions to this rule such as where the property is part of the assets of a partnership in which the deceased was a partner.

Where there is an ownership register for the property (such as the Queensland Land Registry), then it is usually necessary to record the death in the register. The procedure to be adopted depends very much upon the particular requirements of the registrar who maintains the ownership register.

Where property is held by the deceased with another person as tenants in common, the deceased's share in the property needs to be "transmitted". It is not just a case of registering the death on the ownership register.

We can assist you in determining how the property needs to be dealt with and the correct procedures to follow.

> "Generally upon the death of one joint tenant the surviving owner is entitled to be registered as the sole owner of the property and becomes beneficially entitled to the whole of the property. There are exceptions to this rule such as where the property is part of the assets of a partnership in which the deceased was a partner".

The Will grants someone a "life estate" – how do I deal with that?

Sometimes the deceased wanted to give someone the benefit of a property during their life and on their death pass the property to someone else. A classic example is where a person wants to give their spouse a life interest in the family home and to then pass the ownership of the home to the children on the death of the spouse.

There are a number of ways this intention can be achieved. Because of the complexities involved, we recommend you consult us about the registration process for life interests.

What if the deceased had a trust?

Trust assets usually do not form part of the estate of a deceased even if the deceased was the trustee, although the estate may have an interest in the trust (such as units in a unit trust owned by the deceased).

If the deceased was a beneficiary of a discretionary trust (commonly called a family trust), then monies may be owed by the trustee to the deceased and that loan will form part of the estate assets. Loan accounts are usually well documented in the accounts for the trust and the accountant for the trust can help with this.

Even though the trust fund is not part of the estate it is often necessary to review the trust deed. A trust deed commonly appoints someone with the power to remove and appoint new trustees and if the power was held by the deceased, that power often passes to the executor of the deceased. In that case you may need to consider the exercise of the power and it may even be appropriate to appoint yourself as trustee. The role of trustee, including the extent of your powers, is not then governed by the Will, but is governed by the terms of the trust deed.

There are some very complex issues that need to be reviewed including taxation considerations – particularly if the trust has made a family trust

election under the taxation laws. We strongly recommend you talk to us about what you should do if there is a trust to be considered.

What if the deceased had a company?

Again, company assets usually do not form part of the estate of a deceased even if the deceased was the director or shareholder – although if the deceased owned a share in the company, then the share will form part of the estate assets.

Shareholders have the power to appoint the directors of the company and it is the directors who have the job of managing the affairs of the company. You may therefore need to consider whether it is appropriate to exercise the vote attached to any shares held in the estate to appoint yourself or someone else to be director of the company – particularly where the deceased was the sole director.

There are again some complex issues that need to be considered, including being careful about being appointed director of an insolvent company and we recommend you talk to us about what you should do if there is a company to be considered. With companies you should be careful as there are certain notices that may need to be given to the Australian Securities and Investment Commission within set time frames, as penalties may be issued if the notices are not given in time.

What if others are involved in the trusts companies or even a partnership?

You should confer with the others before making any decision as to what should be done. If the deceased was involved in a business then the deceased may have entered into a business succession plan.

A business succession plan is commonly a form of agreement between those interested in the business that leads to a sale by the deceased of his or her interest in the business to the survivors. It is not uncommon for an insurance policy to exist which provides the funding necessary to pay the purchase price.

It is essential that you obtain a copy of the agreement as soon as possible because you may need to take positive steps to ensure the sale occurs by giving notice to the others involved in the business within strict time frames. If you miss the time frame and give the notices late, then the estate may suffer a serious loss.

What about superannuation?

Each superannuation fund is different but the usual situation is that, on the death of a member of a superannuation fund, the trustee pays a "death benefit". The deceased may have advised the trustee of the fund who was to receive the death benefit either by way of a preferential nomination (which is normally not binding on the trustee), or a binding death nomination (which is binding on the trustee as long as it is in the correct form and has not lapsed).

The trustee often has discretion to pay the death benefit to the person who the trustee feels is most appropriate including the estate. In fact it is not uncommon for the death benefit to be paid to the estate, in which case it forms part of the estate funds to be dealt with in accordance with the Will.

In exercising that discretion, the trustee should take into account a number of matters including any nomination made, the tax implications of any payment, the marital status of the deceased at the time of death, the extent to which any person was financially dependent on the deceased, the various ages of those who may receive the payment etc.

If the trustee decides to make the payment direct to any one or more persons, then the payment does not form part of the estate. Nonetheless, it may be appropriate in some cases for you as executor to challenge a decision of the trustee. We recommend you consult us about this if it becomes an issue.

"A business succession plan is commonly a form of agreement between those interested in the business that leads to a sale by the deceased of his or her interest in the business to the survivors."

How do I deal with money received on behalf of the estate?

It is usually necessary to open a bank account in your name as executor of the Will. Where we act for an executor, then it is not uncommon for all monies received from the estate to be deposited into our trust account on behalf of the estate. This has the advantage of ensuring that clear records are maintained of all monies received and disbursed in the administration of the estate. We can also invest funds which may accumulate through the trust account if they are to be held for any length of time before being distributed.

You should keep in mind that you have an obligation to make the estate productive for the benefit of the beneficiaries and we may recommend that the estate funds earn interest if they are not immediately required for payment of estate debts or administration purposes.

How do I find out what debts were owed by the deceased?

You can often locate evidence of various debts from the papers and computer records kept by the deceased. To give you some comfort that you have properly dealt with all debts, the *Trusts Act* allows you to place a notice in the paper calling for any person who has a claim against the estate to notify the executor of that claim. The effect of the notice is to protect an executor from claims by any creditor, beneficiary or other person that the assets in the estate were distributed to the beneficiaries without payment of the claim.

The claims should be lodged within six weeks of the notice. If a claim is not lodged within that time and the executor is not otherwise aware of the claim, the executor may usually distribute the estate assets in good faith without regard to claim. We can assist you with the wording and placement of the advertisement.

When do I pay the debts of the deceased?

The answer to this question depends a lot on the terms of the debt and the attitude of the creditor. You certainly should not distribute any part of the estate to any beneficiary without first ascertaining what all the debts are and ensuring there are sufficient assets to pay them all.

These debts include tax that may be owed by the deceased. Tax may also become owed by the estate because of income derived from assets in the estate after the death of the deceased.

What if the estate is insolvent?

Provided you do your job as executor correctly then, as executor, you do not become personally responsible for paying any shortfall in monies owed by the deceased but you can become personally responsible for payment to any solicitor, accountant or other advisor engaged by you to administer the estate.

Funeral and estate administration costs take priority so that, if there are limited assets available, the general rule is that they must first be applied to paying the funeral and estate administration costs. Creditors of the deceased only get paid after that.

If you are concerned about the extent of the estate assets we recommend you raise this with us as

soon as you can so we can help limit the costs you incur and minimise the risk of you becoming personally exposed to a liability. It may be the case that the estate may need to be declared bankrupt.

What records do I need to keep?

Whether our trust account is used or you establish a private account, it is essential that detailed financial records be maintained. Any beneficiary under the Will is entitled to call for an account of the estate's administration at any time and you would need these details available in order to comply with that request.

How do I know if I should sell the assets or distribute them in their current form?

Usually you should not decide whether to sell an asset or not until you have ascertained exactly what all the assets are, what all the liabilities are, what potential capital gains tax or other tax is payable if the asset is sold, the terms of the Will and the wishes of the beneficiaries. Generally no assets which have been specifically left to a beneficiary should be sold unless the assets must be applied in the payment of debts.

It is essential that you get taxation advice as there are various rules that apply. One example of such a rule is that the sale of the deceased's principal place of residence within two years of the date of death, will not ordinarily result in a liability for capital gains tax, either by yourself as executor or a beneficiary entitled to the house, but if a sale takes place after that two-year period then capital gains tax may be payable.

It may also be inappropriate for you to sell assets to which a beneficiary is specifically entitled, even if the beneficiary wishes them to be sold and to receive the proceeds of sale instead of the property. This is because it might trigger a tax liability for the estate.

Where the deceased had an obligation to lodge income tax returns, it will be necessary for you, as the executor, to lodge an income tax return on behalf of the deceased up to the date of death. Thereafter, you are also required to lodge annual returns until the estate is fully administered. Accordingly, arrangements will need to be made with an accountant for the preparation of at least the return up to the date of death as soon as possible.

If the deceased had not been earning income and he or she was not obliged to lodge an income tax return, it is still preferable that the Commissioner of Taxation be notified of the deceased's death and to take steps to effectively obtain a clearance from the Commissioner of Taxation from any income tax liability of the deceased up to the date of death.

We recommend that you get a statement in writing from the tax office or from the accountants that no tax is payable by the deceased or the estate prior to the final distribution. Without this you may be exposed to personal liability for any unpaid tax. You should never distribute the estate to the beneficiaries until you get this statement (or be satisfied that the funds retained by you are sufficient to cover the expected tax liabilities).

Do I have to concern myself with capital gains tax?

Questions relating to capital gains tax are invariably complex and should be directed to the accountant. It is prudent to consider the capital gains tax effect on any sale. Purely by way of general guidance, if you, as the executor, dispose of an asset which was acquired by the deceased after 20 September, 1985 it is possible that capital gains tax would be payable on that disposal. The extent of tax payable can be determined by the accountant.

What if specific assets are left to a beneficiary?

If assets are transferred to any beneficiary in their current form pursuant to the Will (as opposed to being sold with the proceeds payable to the beneficiary), the transfer is not usually regarded

as a disposal and does not attract an immediate capital gains tax liability. Usually the beneficiary who inherited the asset is deemed to have either acquired the asset for market value (for assets acquired by the deceased before 20 September, 1985) or at the deceased's own cost base for assets acquired by the deceased on or after 20 September, 1985.

There are exceptions to this rule such as where an asset acquired by the deceased on or after 20 September, 1985 passes to a tax exempt person as a beneficiary. In that case the asset can be deemed to have been disposed of by the deceased at the market value immediately before his death and this may result in a taxable capital gain at the hands of the deceased.

Accordingly, it is essential that you seek advice from the accountant for the estate in relation to these matters.

Do I need to value the assets?

Evidence of the value of assets may be desirable where it is necessary to dispose of some assets for the payment of debts. In this case the valuation may provide some guidance as to which assets should be sold so as to minimise potential capital gains tax liability. The nature of the valuation depends on the circumstances which call for the valuation to be made, although generally a formal valuation by a registered valuer is not necessary.

If there is a delay in distributing to the beneficiaries, should I invest monies in the meantime?

If there is any delay then you should consider investing surplus funds. You have a general duty to make the estate funds productive for the benefit of the beneficiaries and how you invest depends upon the terms of the Will and the powers given to you in either the Will or under the *Trusts Act*.

If no authority is contained in the Will, then the *Trusts Act* gives broad authority to invest and you should refer to those powers when you make an investment decision.

An estate is generally treated as if it is a separate individual tax payer and so it will need to account for tax on any income received. You will need to apply for a tax file number for the estate if the estate is to earn any income.

Where should I invest?

A financial planner can often assist you with the choice of investment and an accountant can assist in the administration of the accounts and the tax returns for the deceased and the estate and to provide general taxation advice in the administration of the estate.

The cost of professionals used for the administration of the estate is a legitimate expense of the estate although you do need to at all times have regard to the terms of the Will and the extent of powers granted to you.

When should I make distribution to the beneficiaries?

Before you can realistically contemplate any distribution you need to ensure that all debts, funeral and testamentary expenses and liabilities of the estate have been paid or are adequately provided for.

In addition, you need to check the identity of the beneficiary named or referred to in the Will and the benefit to which that beneficiary is entitled. If the beneficiary is not personally known to you, then it is prudent to obtain a statutory declaration from the beneficiary as to their identity.

You should also ensure the beneficiary has met any conditions attached to the gift and ensure that there are no outstanding family provision applications. In addition, you should ensure the beneficiary is able to give you a good discharge in respect of the assets distributed to them.

For example, if the beneficiary is an infant then the *Trusts Act* may help by enabling you to deliver any chattels to which an infant beneficiary is entitled to that beneficiary's guardian. Generally a receipt obtained from the guardian will serve as a complete discharge to you in respect of those chattels.

You should also ensure that the beneficiary is not an undischarged bankrupt, otherwise the entitlement to the benefit may have passed to the trustee of the bankrupt. These are just a few examples that should be addressed before any distribution is made.

> "Before you can realistically contemplate any distribution you need to ensure that all debts, funeral and testamentary expenses and liabilities of the estate have been paid or are adequately provided for".

What if a beneficiary is under age or lacks capacity?

Sometimes you are not able to distribute assets until some future time when a beneficiary has reached a specified age – commonly 18 years of age. Sometimes the beneficiary lacks the capacity to manage their own affairs.

In this case you need to again pay close attention to the terms of the Will but you are likely to need the services of a financial planner to help with the investment strategy. Using a financial planner minimises the risk that a beneficiary in later years makes a claim against you that your investment strategy was foolish and has cost that beneficiary money.

Again it is vital that both you and the financial planner pay close attention to the terms of the Will to ensure you have the power to make any proposed investment. If you were to make an investment that was outside the scope of your authority, then you could find yourself personally liable for any loss.

What if the terms of the Will makes reference to a trust being created?

The deceased may have decided to incorporate a testamentary trust in the Will. This can provide great benefits to the beneficiaries.

Often the Will is drawn so as to give the beneficiaries some discretion as to whether to inherit personally or as a trustee of a trustee for the benefit of themselves and their family group. In that case, each beneficiary should get their own financial and taxation advice before making a decision in that regard.

Communication about these issues between you and the beneficiaries is crucial and we can help with this to ensure the options are correctly explained and decisions properly implemented.

What do I have to show the beneficiaries?

The cardinal rule is that you must act in the best interests of the beneficiaries. Unless there is a good reason not to do so, we generally recommend that you keep the beneficiaries fully informed. After the administration of the estate is complete, you should give a statement to the beneficiaries setting out what came into the estate and what went out. An accountant may be able to help with this.

What is a family provision application?

The *Succession Act* entitles certain persons who are dissatisfied with what they have been left in the Will to make application to the Supreme Court for adequate provision to be made from the estate for

their proper maintenance and support.

Not just anyone can challenge the Will. They have to fall within a defined group of people. Depending on the circumstances these can include spouses and de facto spouses, former spouses who receive spousal maintenance, children and step children, grandchildren, parents and anyone else who the deceased was maintaining.

Anyone wanting to challenge the Will has to make application to the court and if they do this then you will most likely be joined into the court action as executor of the estate. If anyone tells you that they may challenge the Will, then generally you can still go about the business of administering the estate but you should not distribute anything to a beneficiary without resolving the claim one way or the other (even if that might be by allowing the period within which they must file their claim in the court, to expire). The rules are very complex and it is important to get legal advice if there is a hint of a claim.

Am I entitled to any payment for acting as executor?

You do have the right to apply for commission for the "pain and trouble" incurred in acting as the executor. You are also entitled to be reimbursed any expenses you incur.

In considering whether to grant commission, the court will consider the work done in arranging the funeral, protecting the deceased's assets, ascertaining the deceased assets and liabilities, the attendances on legal, accounting and other professional advisors, any meetings with co-executors required concerning the estate administration, any work or effort of a special or unusual nature or involving special skill and judgment and the like.

Accordingly, if you are considering claiming commission you are encouraged to keep a detailed diary note of all these matters. This diary note should be kept even if you are unsure at this stage whether or not you wish to claim commission at some future time.

What should I do now?

If you meet with us we can sit down and work out what activities you feel comfortable undertaking yourself and those that you need us to undertake on your behalf. We can do everything that is required, just give you guidance on what needs to be done and leave it all to you to do or anything in between. The choice is yours.

We recommend you use the checklist at the back of this guide to gather as much information and documents as you can and make an appointment to see us. If there is more than one person acting as executor, it is preferable that all parties attend the interview.

> "Anyone wanting to challenge the Will has to make application to the court and if they do this then you will most likely be joined into the court action as executor of the estate."

What should I bring to the interview?

One of the initial steps to be taken is to prepare an inventory of the estate and it is preferable that you bring all documents relating to the deceased's affairs which you can conveniently gain immediate possession of. These include bank and building society statements, share and debenture certificates, life and insurance policy documents, certificates of title to land, unpaid accounts, the funeral account and the like.

What does it cost for you to act on my behalf?

We do not charge a percentage of the value of the estate, but charge according to the work that we actually do. The costs involved cannot be estimated until such time as we have a statement of all assets and liabilities and agreed with you on the scope of work we are to undertake.

Please call us on 1300 625 297 if you have any questions.

Administering Deceased Estates Questionnaire

The information and items listed in the checklist below will allow us to advise you on the administration of the estate. It is not an exhaustive list of the matters which must be considered. If you are unable to locate any information or documents which have been asked for, please do not worry as we may be able to locate or obtain these for you. Please note that this guide has been prepared for general use to minimise delays and costs and much of the information requested may not end up being vital for the proper administration of the estate.

Executors or Administrators

If there is more than one Executor or Administrator, then please include the details of everyone. Please use the notes section at the end of the questionnaire if there is insufficient room.

Executor or Administrator
Full name:
Residential Address (needed for affidavits):
Occupation:
Address for correspondence, if not the above:
If there is more than one person, please indicate below if you want correspondence to go to all or just one address:
Home telephone:
Business telephone:
Mobile:
Email address:

Deceased
Full name and address:

Was the deceased commonly known by any other name?

Occupation at date of death:

Date of death:

Place of death:

Cause of death. *(The reason for requesting this information is that the death may give rise to a common law claim by the estate if the death was caused by the negligence of another, or an issue of testamentary capacity may arise or where the death is accidental; or there may sometimes be some extra insurance cover which is overlooked)*:

Marital status. Include full names and addresses, including reference to any de facto spouse if relevant. *The reason for requesting this information is that if a spouse is appointed an executor, then a subsequent divorce revokes that appointment and in some cases a de facto spouse may have a claim against the estate if inadequate provision has been made for them in the Will):*

Date of marriage, or commencement of de facto relationship. *(The reason for requesting this information is that a marriage usually revokes some aspects of a Will and whether a person is a de facto spouse may depend upon the length of cohabitation):*

Date and place of inquest if any. *(The reason for requesting this information is that where an inquest is being held into the death of the deceased, we need to consider if the estate needs to be represented at the inquest. It may be that attendance at the inquest could give an indication as to any common law claim not only by the estate but also by dependants of the deceased):*

Children of the deceased, including details of their names, addresses and ages:

Have any of the children died before the deceased? If so, did they leave any children who survived them? Please provide names and addresses. Depending on the wording of the Will, these children may be entitled to inherit anything that their parent may have received under the Will:

Details of any other persons who may have been dependant upon the deceased in any way:

Name and contact details of the accountant for the deceased (if any):

Name and contact details of the financial planner for the deceased (if any):

Name and contact details of the insurance broker for the deceased (if any):

We recommend you bring the following with you to the meeting if it is readily available. Some of this information can take time to gather so please do not worry if it is all not readily available. Simply pull together what is available and make the appointment to see us. Much of this information can be identified or collected during the course of administration of the estate. If you are unable to locate any information or documents, we will normally be able to locate these for you or obtain replacements if required.

Estate Documents

- ☐ Original Will (or at least a copy if you have one).
- ☐ Certificate of registration of death (if you have received it).

- ☐ Copy of the account for the funeral and receipt if it has been paid.
- ☐ A copy of any medical or hospital accounts that need to be paid or someone reimbursed for including receipts if relevant.

Personal records of the deceased

- ☐ A copy of any executors dossier (a booklet filled in by the deceased setting out details for a lot of the information requested in this checklist).
- ☐ Capital gains tax records, if available.

Cash and bank accounts

- ☐ Cash held by the deceased.
- ☐ Details of bank accounts including account numbers – preferably the latest bank statements.
- ☐ Cheque books.
- ☐ Details of any credit cards – please bring the cards along with you as they need to be surrendered to the financier who issued them.

Did the deceased own their home?

- ☐ Details of any home – preferably include the street address, the real property description (to be found on a copy of the rates notice) and a description of improvements on the land (eg house, shed, pool etc).
- ☐ Location of certificate of title (if one has been issued). If the land is mortgaged there is unlikely to be a certificate issued and if there was then it would be held by the mortgagee (the bank).
- ☐ Whether the property was used as the deceased's sole or principal place of residence during the entire period that it was owned. If not then please advise the date of acquisition and purchase price if known. The reason for needing this information is that it helps determine if any capital gains tax may be payable.
- ☐ Details of the contents of any house other than the normal household goods and personal effects.
- ☐ Details of any insurance policy in respect of the home (including contents) – preferably bring with you the insurance policy document.

Did the deceased own any motor vehicles?

- ☐ Details of motor vehicles – preferably including the make, type, registration number, engine and chassis number.
- ☐ The location of the motor vehicle.
- ☐ Details of any insurance policy in respect of the motor vehicle – preferably bring with you the insurance policy document.

Did the deceased have personal items of some value that may need to be properly secured and insured?

- ☐ Details of these items – such as jewellery – including their location.

Did the deceased have any life insurance?

- ☐ Details of any life insurance policies – preferably bring with you the original policy document and latest premium notice.

Did the deceased have a company or trust for investment purposes?

- ☐ If a company is involved – details of the company name and a copy of any constitution or shareholders agreement that may exist.
- ☐ If a trust is involved – details of the trust including a copy of the trust deed and, if it is a unit trust, any unit holder's agreement that may exist.
- ☐ The firm of accountants or solicitors maintaining the records of the company or trust.
- ☐ Whether the deceased was a director, secretary or other office holder of the company.
- ☐ A copy of the latest set of financial accounts.
- ☐ Details of listed shares, managed funds and other investments – preferably bring with you the latest statements and the date of acquisition if that is known.
- ☐ For each of the above – provide the initial purchase price and date of acquisition (if readily available). (The reason for needing this information is that the date of acquisition will determine if any capital gains tax is payable and the purchase price will be used to determine the amount that may be payable).
- ☐ The sponsorship agreement or other evidence identifying the CHESS (Clearing House Electronic Subregister System), sponsor and details of the holdings on CHESS.

Did the deceased own any other land such as an investment property or beach house?

- ☐ Details of the land – preferably include the street address, the real property description and a description of improvements on the land (eg house, shed, pool etc).
- ☐ Location of certificate of title (if one has been issued). If the land is mortgaged there is unlikely to be a certificate issued and if there was then it would be held by the mortgagee.
- ☐ Whether the property is rented and a copy of the lease document (if any) – otherwise the name of the tenant and details of the rent payable.
- ☐ To which account or managing agent is the rent being paid and if to an agent, the agent's name and address.
- ☐ Details of any insurance policies covering improvements and the contents – preferably bring with you the insurance policy document.

Did the deceased carry on any business (including a rural business) in his or her own right, or in partnership or using a company or trust?

- ☐ Details of the business. With some general description of the name and nature of the business and the business assets such as plant & equipment, stock-in-trade, work-in-progress, vehicles, lease of premises, cattle, crops, earmarks, brands, water rights etc. The sort of details we will need will depend on the nature of the business, whether others are involved, and what is to be done with the interest of the deceased in the business. At this stage we only need to get a general description from you so that we can guide you on what may need to be done.

- ☐ Latest set of financial accounts for the business.
- ☐ If a franchised business then a copy of any franchise agreement (if available).
- ☐ Details of any business insurance policies – preferably bring with you the original policy document and the latest premium notice.
- ☐ Details of any business loan or overdraft including the name of the financier.
- ☐ Details as to what immediate steps may need to be taken to manage the business.

Contact details as to any person who may manage the business until such time as you can make a decision on its future.

- ☐ The name and address of the accountant for the business.
- ☐ If in a partnership then details of the partnership – including the name of the partnership, the nature of the business that was conducted, the names and contact details of the other partners – preferably bring along a copy of the partnership agreement and the latest financial statements for the partnership.
- ☐ Details of any business succession plan – preferably bring along a copy of any agreement (maybe called a buy/sell agreement) – again these documents can usually be obtained from the partnership accountants if they are not readily available.
- ☐ If a company is involved – details of the company name and a copy of any constitution or shareholder's agreement that may exist.
- ☐ If a trust is involved – details of the trust including a copy of the trust deed and, if it is a unit trust, any unit holders agreement that may exist.

Was the deceased working?

- ☐ The employer's name and address.

Was the deceased receiving a benefit from Centrelink?

- ☐ Details of the benefit received – include a copy of the latest statement if available.

Did the deceased have one or more superannuation funds?

- ☐ Details of the deceased's superannuation fund – preferably bring with you the latest statement from the trustee of the fund.
- ☐ If the deceased had a self managed superannuation fund – please bring along a copy of the trust deed for the fund and a copy of any trustee statement.
- ☐ A copy of any preferential nomination or binding death nomination form that is amongst the deceased's records. If this is not readily available then we can usually obtain the information from the deceased's accountant.
- ☐ If the deceased had a self managed superannuation fund and was the sole trustee (or the sole director of a company that is trustee) then please bring along the records kept for the fund and all investments for the fund. If this is not readily available then we can usually obtain these from the deceased's accountant.

- ☐ If the deceased had a self managed superannuation fund and was not the sole trustee (or the sole director of a company that is trustee) but was one of a number of trustees or one of a number of directors then please provide details of the surviving trustee or director.

Did the deceased have an interest as a beneficiary in an estate?

- ☐ Details of the interest in a deceased person's estate – including the name of the deceased, the personal representatives for the estate (executor or administrator) and the name of the solicitors assisting in the administration of the estate.
- ☐ The nature of the interest of the deceased in the estate.
- ☐ Any distribution statements or correspondence received by the deceased from the personal representative or the solicitors engaged in administering the estate.

Was the deceased owed any money?

- ☐ Details of debts owed to the deceased – preferably including any loan agreements, mortgages or other securities.

Did the deceased have a mobile phone?

- ☐ Details of the plan or account (including a copy of the plan terms and conditions or the latest account) – or if these are not readily available then the phone number and the name of the provider.
- ☐ Location of the phone.

Creditors of the estate

- ☐ Please bring along unpaid miscellaneous domestic accounts – such as gas, power, phone, rates etc.
- ☐ Details of any outstanding tax payable – including a copy of the latest tax return that has been lodged if available.
- ☐ Details of any guarantee and indemnity given by the deceased to anyone – if relevant please bring along a copy of the guarantee and indemnity.

Did the deceased owe any monies not otherwise described above?

- ☐ Details of the financier, the purpose of the loan, the approximate amount owing, the regular repayments to be made – please bring along a copy of any statements, loan agreements or securities (such as mortgages) related to the loan/s if they are readily available.

Was the deceased involved in any court action?

- ☐ Please provide details including the name of the solicitors acting for the deceased.

Was the deceased paying maintenance for any former spouse or for any children?

- ☐ Please provide details including a copy of any court order if available.
- ☐ The deed of guarantee and related documents, relevant court order etc.

Other matters

- ☐ Details of any funeral benefit payable under a funeral benefit scheme or by a trade union (if known).
- ☐ If the deceased had private medical insurance – the details of the insurance including the membership number.
- ☐ If the deceased had a T.A.B. betting account – the details of the account.

- ☐ Was the deceased a member of any club or organisation, who should be notified?
- ☐ Have you organised a redirection of the mail at the post office?
- ☐ Please also advise details of any other assets or liabilities.

Make an appointment now!

Please call to make an appointment today on 1300 625 297.

Appointment Date:

Appointment Time:

Name of Solicitor:

McKays Solicitors Unique.Focus