



## OBTAINING PROBATE IN VICTORIA - A SUMMARY

### What is Probate?

Prior to property being distributed under the terms of the Will, the Will needs to be 'proven' as being the last valid Will of the deceased, by being submitted to the Probate division of the Supreme Court. This process protects the executor, beneficiaries and claimants.

This is the formal process whereby those named in a Will as Executors and Trustees apply for the position of and are legally accepted as the rightful person/s to "stand in the shoes" of the Will maker after death.

That is, the person/s are formally appointed to manage the affairs and Estate of the deceased, in accordance with the provisions of their Will.

The Supreme Court in its probate jurisdiction has the power to make orders in relation to the validity of the Will, the appointment of an Executor and the administration of a deceased Estate.

Where an Executor is applying for a Grant of Probate there are a number of formal procedures to be followed. Normally the larger the estate the more complex the Executor's task is and the more advice is required. This process starts with advertising the intention to apply for a grant of probate through to filing documents in court. Probate may not be required for very small estates or where property is held jointly.

### What is an Estate?

The term "estate" includes any thing of value to which a deceased person was, or might have been, entitled to claim during his or her lifetime, which will pass to the executor. Property that is held as joint tenants, which pass by survivorship, and some life insurance and superannuation assets that have prescribed beneficiaries, is not included in the estate.

The property of the estate may be bequeathed through a Will, or transferred through the laws of intestacy if there is no Will. A Will is the most commonly used legal instrument for the distribution of the tangible assets of a deceased person.

### What is an Executor?

An Executor is a person chosen by the Will maker to carry out that person's wishes and manage their estate. An executor may be a friend, a relative, or a professional.

An Executor is responsible for the administration and distribution of assets to beneficiaries according to the Will. There is significant obligation, and often

complexities and time involved in administering an Estate.

Executor duties can be demanding and complex and generally require an understanding of law.

### Executor duties can include:-

- ✓ Attending to funeral arrangements;
- ✓ Identifying assets of the Estate;
- ✓ Applying for and obtaining the Grant of Probate/Administration (see below);
- ✓ Collecting any monies due;
- ✓ Paying debts, duties and expenses;
- ✓ Preparing tax returns;
- ✓ Protecting business interests;
- ✓ Transferring the assets to the beneficiaries according to the Will or relevant law.

Furthermore, upon completion of the executorial duties, the Executor may continue in the role of trustee, for instance, where assets are held for children or where a life estate of a disabled person is involved.

### Disputes

Where undisputed a Grant of Probate in is generally issued. When disputed, a court case may follow.

Where an Executor is faced with a contentious matter such as a challenge to the Will it is essential to obtain legal advice as soon as possible.

### Small Estates

Although not mandatory for small estates, a Grant of Probate is far more common when dealing with banks, share registries, titles office and building societies. This avoids dealing with their internal procedures to ensure they are fully protected against liability when dealing with Estate matters.

### Intestacy

If there is a Will but no executor then you need to seek expert legal advice.

If there is no Will and no executor the same applies. Where there is no Will the deceased is said to die 'intestate' and application must be made to Court for Grant of Letters of Administration authorizing the administrator to proceed to administer the deceased's estate according to statute.

As in all these processes when a person applies for Letters of Administration certain documents are required before the matter can proceed.

Intestacy results in assets being distributed to any one of nine different classes of beneficiaries according to prescribed statutory order. Where there is a person/s qualifying in a particular class the whole estate passes to that class and no one else.

Where an Executor or Administrator has been appointed the administration of the Estate must occur within a reasonable time. Generally, it should not be more than one year. The Grant normally takes between two to four months. Of course matters can be more complicated where a will is contested or disputed - the former because of its validity and the latter because of a lack of adequate provision. In these cases one can expect that the distribution of an Estate can be substantially delayed.

There are very few cases where a lay Executor or Administrator possesses the necessary knowledge and experience allowing them to successfully deal with the administration of an estate so don't take the risk, call MCP Commercial Lawyers without delay.

**DISCLAIMER: This information is provided as a broad overview and should not be relied upon as a substitute for legal advice. If you require further advice in relation to the above or Property, Franchising, Leasing, Trademarks or Commercial or Corporate Law, please contact Mike Poynter or Shane Frost @ MCP Commercial Lawyers on ☎ (03) 9620 2001**