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What steps have to be taken?

When somebody dies, the paperwork involved in proving the will and in sorting out the deceased's property can be daunting for the family.

Deceased estate administration

When someone dies the following steps have to be taken:

- The will should be read to make sure that you understand what it means.
- The people named in the will as trustees or executors apply to the High Court for a probate order confirming the will and giving them authority to deal with estate assets.
- If there is no will then someone has to apply to the High Court for a grant of letters of administration giving them authority to deal with estate assets.
- The executors (if there is a will) or the administrators (if there is no will) then, using the probate document or the letters of administration document, have to transfer the assets in accordance with the will.

Sometimes probate or letters of administration are not required – usually if the estate is small. However, the period for which the trustees could be personally liable for estate assets is much longer than if the applicable orders are obtained, so the trustees may choose to get the order anyway.

What is the difference between executors and trustees?

Wills usually appoint one or more people as "executors and trustees". This involves two responsibilities. First, as executors those people must locate the will, arrange the funeral and ensure the instructions in the will for the distribution of the estate are carried out. If the will requires any estate assets to be held in trust, then the second responsibility is as trustees. This situation could arise where a person has died leaving assets to young children or leaving a life interest to someone. The assets must be looked after until the children reach 20 years of age (in some cases for longer), and in the case of life interests, sometimes for many years.

Trustees' duties

The trustees of an estate must be aware of their duties. These duties will arise from the will (if there is one) and from the Trustee Act 1956, the Family Protection Act 1955 and the Administration Act 1969. Other laws also apply. In brief, trustees' duties include:

- A trustee must be familiar with the will (if there is one), the estate's assets and the estate's business.
- A trustee must comply with the terms of the will and the law.
- A trustee must make sure the estate's assets are held in the name of the trustees.
- Generally the trustees must provide information about the estate to any beneficiary if asked to do so.
- The trustees must keep accurate records and proper accounts for the estate.
- Participation – if there is more than one trustee their decisions must be unanimous.

Trustees should also be aware that if they allow estate assets (including personal items and household chattels) to be distributed within six months of the date of probate or letters of administration, trustees can be held personally liable for those assets, if a successful claim against the estate is made later. We recommend waiting for the six-month period to pass before any distribution is made. The period of personal liability is longer if probate or letters of administration are not obtained.

Please note that it is the executors and trustees who are primarily our clients for the purpose of administration of the estate, and we therefore act on their instructions.

What if a will is challenged or is inappropriate?

Sometimes a will is challenged. When this happens, the person challenging the will cannot take legal advice from anyone in the firm acting for the trustees. We continue to act for the executors and trustees who must remain neutral. Where this occurs, the beneficiaries must take their own legal advice independently of this firm.

Sometimes, the terms of a will may not be appropriate because of changes in circumstances after it was made or because of something the will-maker may have overlooked. The beneficiaries may just believe that the terms of the will are not appropriate. In these situations the beneficiaries can agree to alter the terms of the will. Their agreement is recorded in writing. Anyone who is a possible beneficiary under the will must sign the agreement after taking independent legal advice.

When a will is challenged or when it is being changed by agreement, any beneficiaries who are under 20 are represented by their legal guardian, and in some cases the approval of the court may need to be obtained on their behalf.

What about mediation?

If all parties agree, a mediator may be able to act if there is a dispute about a will. Mediation is less expensive and quicker than court action. A successful mediation will result in agreement which is recorded in writing. Again, in some instances the approval of the court may be required on behalf of beneficiaries who are under 20.

Who is entitled to make a claim against an estate?

The Family Protection Act 1955 provides that a deceased person's spouse, partner, and/or children are entitled to make a claim if they believe they have not been provided for adequately. If any of the deceased's children have died leaving children of their own then those grandchildren are also entitled to make a claim.

The Property (Relationships) Act 1976 provides that a deceased person's spouse or partner may choose to elect to make an application under that Act for a division of the relationship property if they believe they have not been adequately provided for in the will. The law allows for the deceased person's spouse or partner to either take whatever has been provided for them by the will OR take whatever they would be entitled to under the Act. It is important to note that the choice MUST be made within six months from the date that probate is granted.

In addition to the above, some persons can make claims under various other statutes and laws.

An executor or trustee must make reasonable inquiries to make sure all potential claimants are known. Those inquiries may involve making a search of records at Births, Deaths and Marriages to check the deceased's marital status and/or to check for children of the deceased.

Creditors

Where appropriate, trustees should make sure the deceased has no outstanding debts by advertising for creditors (as provided for in the Trustee Act 1956) in an appropriate newspaper before the estate is distributed.

Timing of payment to beneficiaries

Claims can be made against an estate up to one year (and in some cases even longer) after the date of grant of probate or letters of administration. If trustees distribute assets in the six-month period after that date of the grant, they may be personally liable for those assets if a successful claim is made. We would normally recommend waiting for the six-month period to expire (and where a claim is a real possibility we will suggest waiting twelve months), before the estate is distributed.

Early distributions are possible but in those cases, we must advise the trustees to do so only on the basis that the beneficiaries indemnify the trustees against liability for any later claims. The beneficiaries will need to take their own legal advice about the indemnities.

Fees

The basis on which our fees are charged is set out in our terms of engagement which outlines the principal aspects of our client service, a copy of which the trustees will receive or have already received. A copy of these terms of engagement is available to the beneficiaries on request. If you require further information as to our costs, please let us know.

Helpful information for your lawyer

It is helpful to give the following information to your lawyer to assist with administering the estate:

1. Work and Income New Zealand benefit number or recent correspondence from the department
2. Any bank passbooks, cheque books, and credit cards held in the **sole name** of the deceased
3. Insurance policies on house, contents and vehicles or insurance company details
4. Bonus Bond certificates
5. Original life insurance policy document(s)
6. Birth certificate
7. Marriage certificate or civil union certificate
8. Death certificate
9. Driver's licence
10. Passport
11. KiwiSaver account details
12. Funeral account
13. Any household accounts to be changed such as electricity, telephone, SKY TV etc

Note to beneficiaries of an estate

If you are in a relationship, then the Property (Relationships) Act 1976 may apply to you.

You may wish to keep the funds or property you are inheriting from the estate separate from your relationship property.

Generally, and except for property which falls into categories like the home, furniture, or family car,

- property owned before the relationship began,
- **inherited property**, and,
- gifts

are **not shared** – but there are exceptions to this. If you really wish to be sure your relationship partner has no claim on this property, you need an agreement, or you need to make sure that the property never becomes available for the purposes of the relationship. This is a complex area of the law. If you are inheriting property or looking at becoming the owner of something that is either important or expensive – **see your lawyer first**.

Because of the above, your inheritance money should be deposited into an account held in your **sole name**.

If you decide to deposit funds into a jointly held account, or any other account that is not in your name we will require a signed written instruction from you.

Please do not hesitate to contact your Lawlink lawyer if you have any questions.

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