

Wills and estates

This chapter has information on Wills and estates in the event of a loved one's passing. Some of this information may be distressing for you to read. Make sure you have the support you need. Information on where you can get help and support is listed in this chapter and at the back of this Handbook.

My loved one left behind a Will. What needs to be done?

When there is an executor named in the Will

The Will should name an executor. An executor is a person named in a Will who will carry out the wishes of the Will-maker after their death. Often lawyers or specialist trustee companies are named as executors. The duties of the executor after someone dies are to bury the body, call in all of the assets, pay out all debts and give out the estate according to the wishes of the Will-maker.

The executor (or their lawyer or authorised trustee company) needs to apply for a grant of probate. A grant of probate is a court order giving the executor permission to carry out what the Will says. Not every Will needs a grant of probate but it is usually required where there is real estate, or large sums of money or shares. For example, the Land Titles office will not allow land to be transferred if a grant of probate has not been received. Banks and other financial organisations have their own policies about when a grant of probate is required, depending on how much money or shares are held.

Smaller estates may be able to receive a grant of probate or letters of administration in some circumstances. **See** the upcoming section 'My loved one left a small estate. Can I get help to administer the estate?'

To apply for a grant of probate, official forms must be completed and given to the Probate Office in the Supreme Court. Information about how to complete probate forms can be found on the Supreme Court website at www.supremecourt.vic.gov.au (click on 'Practice and Procedures > Probate Office').

When there is no executor named in the Will

If the Will-maker did not appoint an executor, a decision has to be made about who should administer (manage) the estate. The person who decides to administer the estate is generally the adult who is to be the major beneficiary of the Will. A beneficiary is a person who gets something from a deceased person's estate.

Where no executor has been named in the Will, the person who takes on looking after the administration must apply to the Probate Office of the Supreme Court for 'letters of administration', not a grant of probate. Letters of administration is the recognition by the Supreme Court of a person's right to administer an estate where there is no Will or executor named in a Will.

Death certificates

A death certificate is needed to apply for a grant of probate or for administration. The death certificate can be given by the Registry of Births, Deaths and Marriages. The registry can do this when the Coroner has decided a person's identity and cause of death. A funeral director must then give the death notification to the Registry of Births, Deaths and Marriages for a death certificate to be issued.

Because of the large number of bushfire related deaths during the February 2009 Victorian bushfires and the forensic processes needed to identify the deceased, the issue of certificates took longer than usual. Where a death certificate was not issued, the Supreme Court's Registrar of Probate can give a grant of probate or administration if an interim death certificate is filed. Interim death certificates can be made by either the State Coroner or the Registrar of Births, Deaths and Marriages.

For more information about death certificates visit the Registry of Births, Deaths and Marriages website at www.bdm.vic.gov.au

What happens if the Will was destroyed during the bushfires?

If there is a copy of the Will available, the executor can apply for a grant to get a copy. To do this, the executor needs to file an affidavit, with the grant application. The affidavit must include:

- how the Will disappeared (for example, during the bushfires)
- the efforts the executor made to find the Will (such as calling banks, lawyers, putting advertisements in the newspaper)
- any evidence that the Will-maker did not 'revoke' (cancel or stop) the Will before the bushfires. This might include, for example, witnesses seeing or talking about the Will with the Will-maker, shortly before the bushfires.

Witnesses to the Will are usually needed to file affidavits too. If the witnesses cannot be located, then other evidence will be needed. Their evidence is needed to agree that the Will existed and was signed the correct way or to establish that a document is an informal Will.

If there is no copy of a Will, a grant of a 're-constructed' missing Will can be applied for. You will need the same information listed above for a Will's copy, as well as evidence of the content of the Will, for example from the lawyer who drafted the original Will. The Will's contents will need to be agreed upon by other witnesses too.

The State Trustees has set up a Bushfire Helpline to help people affected by the Bushfires. They can provide information about lost Wills, as well as help with re-drafting Wills lost in the fires. Call 9667 6073 and visit www.statetrustees.com.au

What can I do if I need a grant of probate urgently, for example, to carry on my loved one's business or a conveyancing matter?

Urgent probate matters can be heard by a Supreme Court judge. The court's Probate Office is helping bushfire related urgent applications to proceed sooner. For more information see the Supreme Court's Bushfire Information Kit at www.supremecourt.vic.gov.au (click on 'Practice and Procedures > Probate Office' and look at 'Related publications > Probate - Bushfire Related Inquiries') or call 9603 9286 or 9603 9284 for more information.

Is a Will valid if it hasn't been made following the official guidelines, for example, if it isn't signed?

The Supreme Court can decide whether a document that does not strictly meet the requirements for a valid Will can be submitted for probate, provided the court is satisfied that the Will-maker wanted that document to be their Will. The court can also make decisions about changes or additions to Wills and correct any obvious errors.

My loved one left behind a small estate. Can I get help to administer the estate?

The Supreme Court's Registrar of Probates may be able to help people who wish to get a grant (probate or administration) in small estate matters. Whether you get help depends upon your relationship to the deceased and the value of the estate.

The estate must not be worth more than:

- \$50,000 where the persons entitled to share in the estate are the children only or the partner only or the partner and children only or the sole surviving parent, or
- \$25,000 where persons outside the above categories are entitled to share in the estate.

If you are approved to receive help, you will need to give instructions to the court's Small Estates Officer. They will then prepare and file your application. If you live outside a 32 km radius from Melbourne, you can call the Registrar of your local Magistrates' Court for help.

I cannot wait for the Will's estate to be finalised and need funds urgently. What can I do?

Banks and other organisations are obliged to release enough funds from a deceased's estate to pay the funeral costs. A bank, for instance, will either pay the funeral home directly once it gets the original invoice or will use the deceased's funds to pay back the person who paid the funeral invoice.

Banks and other organisations may release part or all of the funds they hold straight away if they believe a beneficiary of the estate, such as a spouse or child, will suffer significant hardship. A release of funds urgently to a beneficiary is not an automatic right and is up to the bank or organisation which holds the assets for the deceased to release the funds.

What if I disagree with the Will? What can I do?

Reasons for challenging a Will

A Will can be challenged if:

- the Will-maker did not have the testamentary capacity to make a Will at the time it was signed. Testamentary capacity is the mental ability (capacity) to make a valid Will

- The Will-maker did not make the Will freely or their decisions were influenced by others
- a person the Will-maker had a 'responsibility' to provide for believes that they have not been left a fair share of the Will's assets.

When the Will has not left enough assets to support the children or other dependants

Any person who can show that the Will-maker had a 'responsibility' to provide for them, for example, spouse, children or domestic partners, can challenge a Will if they are unhappy with their inheritance. This is done by starting a Supreme Court process called 'testator's family maintenance'.

The court takes into account the person making the claim's circumstances, the size of the estate and their relationship with the Will-maker. The court will look at:

- whether the person who died had a responsibility to provide for the person/s making the claim
- whether adequate provision was made for the person/s (and if not, what provision should be made)
- the physical, mental or intellectual disability of the applicant and any other beneficiary.

Applications for claims must be made within six months of the grant of probate or letters of administration being made. If you want to challenge a Will, get legal advice. **See** 'Where to get help'.

My loved one did not leave behind a Will. What should I do?

If your loved one did not leave a Will (called 'dying intestate') the law decides who gets the assets. Assets will usually pass first to the deceased person's surviving spouse/partner and children, and then next-of-kin (other close relatives). These rules apply to everyone and do not take into account an individual's wishes or situation.

The estate does not pass to the government unless the deceased person leaves behind no relatives at all.

Where there is no valid Will an application must be made to the Supreme Court for 'letters of administration' rather than probate.

I lost two loved ones in the bushfires. How does that affect the distribution of the Will's estate?

Where two or more people die in the same situation it may be hard to determine who passed away first. This can affect the distribution of their Will's estates. For example, the estates may contain property owned together by both deceased persons (for example, a husband and wife), property may be owned separately, or children and parents may die together. In all these cases, grants may be required to finalise the administration of the estates.

A 'Notice to Practitioners' about deaths that happen together is available from the Supreme Court. You can get a copy from the registry counter.

This area of law is very complicated. It is very important that you get legal advice. **See** 'Where to get help' for legal services that can help you.

Financial and other help

Superannuation

A deceased person's superannuation does not always form part of their estate. Superannuation can usually be applied for without the need for a grant of probate or letters of administration. You should write to the deceased person's superannuation fund and ask about their rules for who can claim and how to do this.

Life insurance

Most people are covered for some life insurance cover in their superannuation policy. Policies often cover a person even when they have left employment. Claims may be made on the different superannuation funds if a deceased person was a member of more than one fund. A superannuation fund may also include cover for permanent disability, temporary and total disablement and salary continuance. Contact your loved one's superannuation fund, insurer or the Insurance Council of Australia on 1300 728 228, for more information.

See the 'Insurance' chapter for more information on insurance in general.

Consumer protection

If you took out a loan with another person and they died in the bushfires, you may be entitled to loss of life cover. Check with the credit company that lent you the money or call Consumer Action Law Centre on 1300 881 020 or 9629 6300. **See** the 'Debt' chapter for more information on debt in general.

Legal advice

There can be complications, delays and extra expenses if grants applications are not done correctly. It is important that you get legal advice and help with the administration of a deceased estate. Your local community legal centre can give you information and advice. Call the Bushfire Legal Helpline or the Federation of Community Legal Centres for referral to a community legal centre near you. The Law Institute of Victoria can also give you the contact details of private lawyers who specialise in Wills and estates. **See** 'Where to get help'.

Grants of probate or letters of administration

For more information on bushfire related probate matters, read the Bushfire Information Kit on the Supreme Court's website at www.supremecourt.vic.gov.au (click on 'Practice and Procedures > Probate Office' and look at 'Related publications > Probate - Bushfire Related Inquiries'). You can also call the Supreme Court's probate bushfire officers on 9603 9286 or 9603 9284 for more information.

Trustee, executor and personal financial administration

The State Trustees can help with:

- finalising loved one's affairs, deceased estate administration and help with funeral arrangements
- re-drafting Wills and Enduring Powers of Attorney lost in the bushfires
- providing a temporary Enduring Power of Attorney service to help manage people's financial affairs while they get back on their feet
- initial financial planning assistance.

They can also provide information about locating next of kin or beneficiaries or simply working out what to do next. Call the State Trustees Bushfire Help Line on 9667 6073 and visit www.statetrustees.com.au for general information.

Other useful Handbook chapters

See 'Debt', 'Insurance', 'Family law' and 'Relief'.

DISCLAIMER

The information contained in this chapter of the Bushfire Legal Help Handbook is intended to provide general information on legal topics, current at the time of first publication. The contents do not constitute legal advice, are not intended as a substitute for legal advice and should not be relied on as such. You should get legal advice in relation to your individual circumstances and any particular matters you may have.

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