Wills and Estates

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Introduction

A will is a document that sets out the wishes of the testator regarding the distribution of their estate upon their death. Since a will must meet certain formal requirements and the law of wills has many pitfalls, it is highly advisable to consult a solicitor, the Office of the Public Trustee or a private trustee company about drafting a will. If the formal requirements are not complied with, costly legal proceedings, including applications to court, may result.

The law in Queensland relating to wills and intestacy is substantially contained in the *Succession Act 1981* (Qld) (Succession Act).

Definition of Important Words and Phrases

This area of law is more easily understood if the meanings of commonly used words and phrases are clear:

beneficiary—a person or organisation entitled to receive a benefit or gift from a deceased person's estate

codicil—a document executed by a person who had previously made a will to change, delete or revoke provisions contained in the will. A codicil must conform with the formalities of a valid will

dying intestate—when a person dies without leaving a will. Their estate is distributed to their spouse and/or amongst their next of kin as set out in the Succession Act. Such a person is said to have died intestate because they died without a valid will

dying testate—when a person dies leaving a valid will. That person's property is distributed according to the wishes expressed in the will. Such a person is said to have died testate because they died with a valid will

estate—the property owned by a person at the time of death

letters of administration—the document by which the court appoints a person to act as administrator of a deceased estate when there is no will of the deceased or no executor willing and able to apply for a grant

partially intestate—when a person dies leaving a valid will, but the will fails to dispose of all of the estate, a person is said to have died intestate. For example, if a person leaves their home to their partner and the proceeds of their bank account to their two children in equal shares, but one of those children dies before the testator (without leaving children), a partial intestacy would arise in relation to one half of the bank account, unless the will explained what was to happen if one of the beneficiaries died before the testator

personal representative—a person who is responsible for the administration of a deceased estate, including the responsibility for the collection and distribution of the deceased's assets. A personal representative appointed by a will is known as an executor. If the will does not appoint a personal representative, or if no will is written, or if the personal representative is someone other than the executor named in the will, the personal representative is called an administrator

probate—the document by which the court recognises the authority of an executor to act under a will. A grant of probate amounts to an official recognition by the court of the right of personal representatives to administer the estate of a deceased

spouse—a husband or wife, a person in a civil partnership or a de facto partner (including same-sex partners) as defined in s 32DA of the *Acts Interpretation Act 1954* (Qld) and s 5AA of the Succession Act

testator—a man or a woman who makes a will. The term testatrix can be used to describe a woman who makes a will

The Need for a Will

If a person wants their estate to be distributed in a particular way upon their death, a will is essential.

If a will is not made, the estate will be distributed according to the intestacy rules contained in the Succession Act. The rules ensure a distribution of property, in certain proportions, to the relatives of the deceased person. Friends or charities do not receive property under the intestacy rules.

Who may make a will?

Anyone over the age of 18 may make a valid will, as long as they are of sound mind, memory and understanding. A person under 18 years of age can make a will in contemplation of marriage. In addition, a married person under the age of 18 may make a valid will (s 9 Succession Act).

A will must be made of the testator's free choice and without pressure being exerted by anybody.

Old people

When very old persons wish to make or alter a will, the question of their mental capacity to do so may arise. Legal advisers taking and carrying out instructions from a very old person must be satisfied that the testator comprehends the nature of their actions and its effects.

Court-authorised wills

The Supreme Court can authorise a minor (i.e. a person under the age of 18 years) to make, revoke or alter a will (ss 19-20 Succession Act). The court must be satisfied that the minor understands the nature and effect of the proposed will and the extent of their property, that the proposed will reflects the minor's intention and that it is reasonable in all the circumstances.

The court can also make, revoke or alter a will for a person who does not have the mental capacity to make a will (s 21 Succession Act). The court must give leave before hearing the application (ss 22-23 Succession Act) and must then be satisfied that the proposal is or may be one that would be made by the person if they were to have capacity (s 24 Succession Act).

In either situation, if the court approves, then upon execution of the proposed will, it has the same legal status as any other will.

Making a Will

The Succession Act provides that a will should comply with the following formalities:

- The will should be in writing. 'Writing' is defined to mean any mode of representing or reproducing words in a visible form. Ideally, a will should be typed, but a handwritten will is valid so long as it is clearly printed. The same writing instrument (e.g. a typewriter or pen) should be used for the whole document in order to avoid confusion about what was intended by the will. The will can be in any language, although to avoid problems of translation and interpretation, it is desirable that it be written in English.
- It should be signed by the person making it. A signature includes a mark in the case of a blind or an illiterate person. It also includes, in exceptional circumstances, the signature of some other person at the direction of and in the presence of the person making the will (the testator). While not strictly necessary, it is advisable that the signature appears at the end of the will, and if the will is longer than one page, the testator and the witnesses should also sign their name or write their initials at the foot of all other pages of the will.
- The will should be dated when it is signed. When no date appears, it may be necessary for the witnesses (after the death) to swear an affidavit about the date on which it was signed. A will takes effect from the date of the testator's death, not from the date of signing. However, the date the will is signed is important to ensure that it is the deceased's last will.
- The signature of the testator should be witnessed by two witnesses. The witnesses must sign after the testator has signed. One of the witnesses may also be the person who signed for the testator, or who helped the testator sign. Both witnesses must be present together at the time of signing by the testator. To avoid confusion, it is advisable for witnesses' signatures to appear immediately below that of the testator. Witnessing the will is known as attestation.

If these formalities are not complied with, the will may not be valid (s 10 Succession Act). If there is no valid will, the deceased's estate will be dealt with as an intestate estate. However, a court may declare any document or a part of a document (even a document that is not in traditional written form) to be a valid will, an alteration of a will or a revocation of a will, if it is satisfied that the testator intended the document to form the person's will (s 18 Succession Act).

Custody of a will

A will is a very important document and should be kept in a safe place. Solicitors, the Public Trustee and private trustee companies will usually hold a will for a person and not charge for this service. The executor or a close friend or relative should be told the whereabouts of the will so that it can be easily located when the testator dies.

International wills

The Succession Act (pt 2 div 6A) provides for international wills. An international will is a will made in accordance with the requirements of the *Washington Convention 1973* (s 33YA Succession Act).

An Australian legal practitioner is authorised to act in connection with an international will under the law of a Convention country. Irrespective of where the will is made, the location of the assets and the nationality, domicile or residence of the testator, an international will is valid as regards form, if it is made in the form that complies with the relevant provisions of the Convention.

An Australian legal practitioner, as an authorised person, has a number of duties to undertake in the preparation and execution of the will, and in annexing a certificate, completed in the prescribed form, to the will itself.

Informal wills

A document that expresses the testamentary intentions of the author, but does not comply with the formal requirements required by s 10 of the Succession Act for a valid will, is commonly known as an informal will.

Under s 18 of the Succession Act, the court may dispense with the execution requirements for a will, its alteration or revocation and declare an informal will to be valid. The broad definition of the term 'document' assists in such an application, because it includes any paper or other material on which there is writing, any disc, tape or other material from which sounds, images, writings or messages are capable of being produced or reproduced (sch 1 *Acts Interpretation Act 1954* (Qld)).

A number of 'electronic' informal wills have been found to be valid. Examples include documents found on the computer of the deceased, a series of messages on a deceased's iPhone and DVD recordings.

For a successful proving of informal wills, the court must be satisfied that the deceased intended that the actual document before the court was to be their will. In one case, a 'computer will' was found not to be valid because the court determined that the deceased had not intended that particular electronic document to be her will (see *Mahlo v Hehir* [2011] QSC 243).

'Video wills' and other electronic forms have considerable risk associated with them. Their informality may not meet statutory requirements and the prospects of such wills being uncertain or ambiguous is significant. The expense of bringing such applications to the court will certainly reduce the assets of the estate.

Important Clauses

A will should contain:

- a clause appointing an executor or executors to carry out the terms of the will. Any person who is 18 years of age or older may be an executor, as long as they do not lack mental capacity. The Public Trustee or a trustee company may also act as executors. Most of the major financial institutions in Australia offer this service. A testator should consider appointing more than one executor, particularly when one or more of the proposed executors are the same age or older than the testator. Appointing more than one executor is also a safeguard to ensure that the executor actually carries out the testator's wishes, because executors must act jointly and unanimously. However, s 48 of the Succession Act provides that a grant of probate or letters of administration shall not be made to more than four people

- clauses containing gifts of property. Before drawing a will clause disposing of real property, say a gift of a house or land, it is important to know how the particular property is owned. A title search will determine how two or more owners hold the property. They may hold the property as 'joint tenants' or as 'tenants in common', equally or in other specified shares. It is essential that the testator is fully aware of how the property is owned so that their intentions can be made clear in the will. If the ownership is by joint tenants, the testator cannot dispose of the property by will unless he becomes the surviving joint tenant before their death. However, a testator can dispose of their share of a tenancy in common. And sometimes, the title search may disclose that the testator is a 'life tenant' and so cannot dispose of any interest in the property at all
- a residue clause so that the will deals with all of the testator's property. If a residue clause is not included and the testator fails to mention a specific item of property, the result will be a partial intestacy, which will mean that any property not specifically disposed of will pass according to the rules of intestacy
- an attestation clause, which should be placed at the end of the will, beside or below the space allowed for the signatures of the testator and the witnesses. The following is a standard attestation clause:

  > *The testator signed this will in the presence of both of us, being present at the same time, and we signed it in the presence of the testator and each other.*

- If this clause or a clause having the same effect is not used, an affidavit will be required from one or both of the two witnesses confirming that they both witnessed the signing of the will. This affidavit must be tendered when an application for probate is made. If a proper attestation clause is not used and both witnesses die before the testator or cannot be found after proper enquiry, it may be difficult to obtain a grant of probate. However, the will may be upheld as an informal will if the requirements of s 18 of the Succession Act are met.

A will may contain:

- a clause containing burial instructions. Generally, it is the executor's duty to attend to funeral arrangements and the burial or cremation of the deceased's body. Any wishes expressed by the testator in the will are not necessarily binding on the executor, except if it contains a direction that they are to be cremated, as an executor is required to carry out that direction (s 7 *Cremations Act 2003* (Qld)). Burial instructions in a will are of little use if the will cannot be readily located after the testator's death. It is important that any specific wishes regarding burial instructions (including a preference for cremation, or burial with someone or somewhere in particular) be made known to relatives, friends or people likely to be responsible for such arrangements before the testator's death
- a clause donating organs for transplant purposes. Testators can include their name on the Australian Organ Donor Register. It is not enough to merely state an intention to donate organs or body parts in a will, as usually a will is read too late after the testator's death for the organs to be used. It is strongly recommended that next of kin be notified of any arrangements that have been

made, so that the appropriate action can be taken after death without undue delay. The consent of the next of kin is essential under ss 22 and 23 of the *Transplantation and Anatomy Act 1979* (Qld)

- a clause donating a body or body parts for research (for more information contact the School of Biomedical Sciences at the University of Queensland)
- a clause appointing a guardian for minor children. A guardian can be appointed to act in the event of the death of one or both parents. However, a guardian whose appointment takes effect on the death of only one parent will be required to make decisions together with the surviving parent regarding the long-term care and welfare of the child. Any dispute may have to be resolved by the court.

Gifts to interested witnesses

If a beneficiary witnesses the will, the gift to that beneficiary may be invalid, unless:

- there are two other witnesses who are not beneficiaries under the will
- all of the interested beneficiaries consent in writing to the interested witness taking the gift
- the court is satisfied the testator knew and approved of the disposition, and it was made freely and voluntarily (s 11 Succession Act).

Beneficiaries do not have to be named personally in the will to be disentitled if they sign it. It is sufficient if there is a general reference, such as 'my children'. For example, if a will says 'I give everything to my children', and one of the witnesses is the testator's son, then any gift to that son from the will may be invalid.

Similarly, an interpreter or translator whose services have been used in preparing the will may not be able to take the benefit of any gift left under the will.

To avoid unnecessary legal costs, it is best to ensure that two completely independent people witness a will.

Use of legal jargon

A will does not have to contain any particular legal jargon. The important thing is that the testator's wishes are clearly expressed.

Essentially, a will must state that it is the will of the testator and that, upon death, the estate is to be distributed in accordance with the testator's directions contained in the will.

The Need for a Solicitor to Draw up a Will

When a will is drawn up, great care must be taken that all formal requirements have been observed in the will and that it is unambiguous. Any challenge to the validity or interpretation of a will involves court action that may be expensive, delay distribution of the estate and cause hardship to the beneficiaries in the meantime. Nevertheless, employing someone with legal knowledge to draw up a will is only a safeguard, not a requirement.

However, if a testator is not going to make a direct gift of all or part of their estate (e.g. by giving the property outright to a person on their death), but wishes to create certain trusts to continue until the happening of a certain event, professional advice is almost essential.

Solicitors are also able to provide advice about how superannuation will be distributed and will give consideration to taxation implications of a person's succession plan.

A solicitor's responsibilities

A solicitor is bound by the statutes, statutory conduct rules and ethical considerations to act professionally in the interests of the client. In receiving instructions for a will, a solicitor must be aware of potential conflicts of interest, such as receiving instructions from domestic partners who have had prior relationships or for whom the solicitor has acted in the past.

The solicitor must also be alert to any suspicious circumstances or possible mental incapacity of a testator who is required to have knowledge of, and to give approval to, the terms of the will at the time of its execution. The solicitor's awareness of such matters is a protection for the testator, the estate, the beneficiaries and also for the solicitor (see the case *Calvert v Badenach* [2015] TASFC 8 for an illustration of the importance of a solicitor being proactive).

Model Will

The model set out below covers only a family situation when a spouse wishes to leave everything to the other spouse or, if the other spouse dies first, to the children.

Wills can incorporate many other clauses. They may establish certain trusts, make specific monetary or other gifts to persons or organisations and leave particular assets to certain people.

The will set out below passes the whole of the estate to the testator's spouse, provided that spouse survives the testator. If the spouse dies before the testator, the will below passes the whole of the estate to the child or children equally.

> THIS IS THE LAST WILL AND TESTAMENT OF ME
>
> (*full name of testator*)
>
> of (*full address of the testator*) in the State of Queensland
>
> (*occupation*)
>
> 1. I REVOKE all former wills and declare this to be my last Will.
>
> 2. I APPOINT my husband/wife (*full name of husband/wife*) to be the Executor and Trustee of this my will provided that if my husband/wife predeceases me, renounces or otherwise not act or continues to act or shall die before my estate is completely administered then I APPOINT (*full name(s) and address(es) of alternative Executor(s)*)(herein after called 'my Trustees') to be the Executor(s) and Trustee(s) of this my will.
>
> 3. I GIVE, DEVISE AND BEQUEATH the whole of my estate both real and personal UNTO my husband/wife (*full name of spouse*) absolutely PROVIDED THAT should

my husband/wife predecease me, then UNTO my Trustee/s UPON TRUST for such child or children of mine as shall be living at the date of my death, and if more than one, in equal shares.

4. Should my said husband/wife predecease me I APPOINT (*full names and addresses of guardians*) to be the guardian(s) of my infant child or children.

IN WITNESS WHEREOF I have to this my last Will and Testament set my hand this (*day*) day of (*month*) 20 (*year*)

SIGNED BY THE SAID (*full name*)

(*signature of testator*)

IN OUR JOINT PRESENCE AND ATTESTED BY US IN THE PRESENCE OF HIM/HER AND EACH OTHER

Witness Witness

Occupation Occupation

Address Address

Changes to a Will

Between the time of making a will and death, circumstances may change. The testator may sell or buy property, give it away or lose it. The beneficiaries named by the will may have died or new beneficiaries may come into consideration. Whether circumstances change or not, the will remains in force from the date of signing until the testator marries, divorces or formally changes all or part of the will.

Marriage and divorce

Marriage may automatically revoke a will unless the will was made in contemplation of the marriage taking place. However, the following provisions in a will pre-dating a marriage will not be revoked:

- gifts to the person to whom the testator is married at the time of death
- an appointment as executor, trustee or guardian of the person to whom the deceased is married at the time of death (s 14 Succession Act).

Unless a will specifically states otherwise, divorce will automatically revoke any provision in the will in favour of the former spouse, except for an appointment of that former spouse as trustee of property left by the testator on trust for beneficiaries that include that former spouse's children. Any provision in a will that appoints a spouse as executor, trustee of certain trusts or guardian is also revoked when that spouse is divorced (s 15 Succession Act).

Civil and de facto relationships

The entering of a civil relationship has the same effect as marriage (s 14A Succession Act) and the ending of a civil relationship has the same effect as divorce (s 15A Succession Act). The ending of a de facto relationship also has the same effect as divorce (s 15B Succession Act).

As such, all references to marriage and divorce apply equally to the entering and ending of a civil or de facto relationship.

Alterations

Once a will has been made, it cannot be validly altered by:

- obliteration (rubbing out)
- interlineation (writing between the lines)
- deletion (crossing out)
- addition (writing new clauses)
- writing in anything at all affecting the will

unless these alterations are properly executed by the testator in the presence of two witnesses (s 16 Succession Act). If such an alteration is made without being properly executed, it may be of no effect, unless it can be proved as an informal will under s 18 of the Succession Act.

However, testators may correct the text of their wills before they are signed. If any typing or handwriting mistakes occur when the will is being prepared, these should be corrected before the will is signed. If this is done, the testator and both witnesses should initial any alteration as close as possible to the alteration itself. This is usually done in the margin. If this is not done, the court will assume, in the absence of evidence to the contrary, that the alteration was made after the signing of the will, and the alteration may not be effective. However, such alterations may be effective, even if they are not initialled, if a witness to the will can confirm that the alterations were properly executed by the testator and the witnesses. Alternatively, the alterations may take effect as an informal will under s 18 of the Succession Act.

When several mistakes are made in the preparation of the will, it is preferable for the will to be completely rewritten or retyped before it is signed.

Updating the will

A will can be updated by:

- revoking the existing will and making a new one
- making a codicil. The codicil may delete, add to or in some other way relate to the provisions of the will. It must conform to all the formalities of a valid will (outlined above) and must refer to the original will.

It is preferable to make a new will incorporating the change and revoking the former will, rather than make a codicil.

Revoking the will

When a will ceases to have legal effect, it is said to have been revoked. A will is revoked if the testator:

- marries after making the will (subject to the comments made above under the heading Marriage and Divorce)
- makes specific provision in a later will to revoke all former wills
- makes a later will that is inconsistent with a former will. When this occurs, and when the testator has not expressly revoked the former will, the former will or wills will be revoked only to the extent of the inconsistency. A codicil is usually prepared where part only of a will is to be revoked and new provisions inserted into the will
- destroys the will with the intention of revoking it, such as by burning or tearing the will. The will may be destroyed by the testator or by some person in the testator's presence and at the testator's request
- obtains a divorce after making the will. Divorce will not cause a will to be revoked entirely (see Marriage and Divorce above) (s 13 Succession Act).

Probate and Letters of Administration

Grant of probate

Probate means official recognition by a court that the executors have the right to administer the deceased's estate according to the terms of the will, and that the executors have title to the assets of the deceased, which passed to them as executors. For a grant of probate to be made, there must be a will of the deceased in existence. When a person dies leaving a will, and there is no dispute that the will is the last will of the deceased, probate will be granted when certain documents are filed in the registry of the Supreme Court. If some dispute arises about the will, a court may be asked to decide whether or not to grant probate of the will.

Obtaining a grant of probate can be complex. It is advisable for the executor to obtain the services of a lawyer to help them with the process. Normally, the costs of obtaining a grant of probate are paid from the assets of the deceased estate.

Letters of administration

If a deceased died intestate, if a will does not appoint an executor, or if no executor is willing or able to act, the court may, at the request of an applicant, appoint an administrator. The order appointing such a person is known as letters of administration. The administrator oversees the distribution of the estate.

Again, the process of obtaining a grant of letters of administration can be complex, and any person seeking to be appointed should obtain legal assistance.

Statutory order on intestacy

When a person dies intestate or partially intestate, the estate (or the undisposed portion of the estate) is distributed between the deceased's spouse or de facto spouse and children and then among the deceased's next of kin in the order prescribed by the intestacy provisions under pt 3 of the Succession Act. Next of kin receive property from an estate in accordance with the degree of their relationship to the deceased.

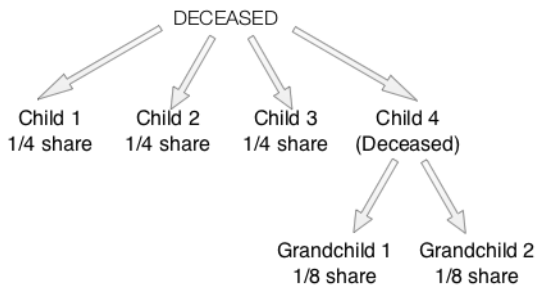
The people regarded as next of kin in this context are parents, brothers, sisters, grandparents, uncles, aunts, nephews, nieces and first cousins (ss 35(1), 35(1A) Succession Act). To receive the benefit, however, a person must survive the intestate for a period of 30 days (s 35(2) Succession Act).

The term 'issue' in this context means children and grandchildren, and includes children born to unmarried parents. It does not include stepchildren.

Grandchildren are entitled to share in an estate only if their parent, a child of the deceased, dies before the intestate. Schedule 2 of the Succession Act contains a Table which sets out in detail the distribution of the estate, or undisposed part of the estate, on intestacy or partial intestacy.

When determining the respective entitlements (or shares) of brothers and sisters, nephews and nieces, uncles and aunts and first cousins, the same rules apply as apply in the case of distribution to children and grandchildren of the deceased (see diagram below).

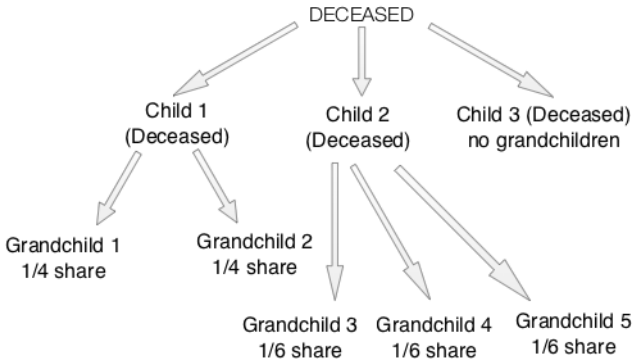
Where there is a distribution of the whole or part of the estate to children or grandchildren, the whole of the estate is divided equally among the issue if they are all of the same generation. However, if the intestate is survived, for example, by three children and two grandchildren, who are the children of a child who has died, each of the children will receive a quarter of the part of the estate set aside for issue, while the grandchildren will each take one eighth of that part of the estate (being an equal share (one half) of the one quarter share their parent would have received if they survived).



This diagram is showing the distribution of the estate of a person who died intestate with three of four children surviving and two grandchildren of the deceased child. A quarter share goes to each surviving child while the final quarter share is distributed equally between the children of the deceased child.

If the deceased's only surviving issue were all grandchildren, then the estate is divided into as many entitlements as the deceased had children who left issue. The issue of each child then takes equally their parent's share by representation.

The diagram below is showing the distribution of an intestate person's estate where all three children of the deceased are also deceased but one has two children, the other has three and the third has none. The estate is divided in two, and the two children of the first deceased child get a quarter share (half divided by two) while the three children of the second deceased child get a sixth share each (half divided by three).



No will, no next of kin

Where a person dies leaving no will and no next of kin, property of the deceased passes to the Crown (government) as bona vacantia (un-owned property).

When probate or letters of administration are required

A grant of probate or letters of administration amounts to an official recognition by the Supreme Court of the right of personal representatives to administer the estate of a deceased, and it confers (or affirms) title upon them to those assets of the deceased that pass to them as the deceased's personal representatives. It is not always necessary to obtain probate or letters of administration to enable the estate of a deceased person to be administered. Each financial institution has its own policy as to what amount they will release to an estate without requiring a grant of probate. As each institution has different requirements, it is important to find out the requirements to release funds before deciding if it is necessary to obtain a grant of probate or letters of administration. However, in any case when it is necessary for the personal representatives to provide proof of their title to property of a deceased person, or of their right to commence litigation on behalf of the estate of a deceased person, it is necessary for them to obtain a grant of probate or letters of administration. A grant of probate or letters of administration can also be advisable for a personal representative to obtain as it confers a certain level of protection on a personal representative acting under it (particularly in the event a later will is subsequently discovered).

Transfer of real estate

When real estate (e.g. a house, land or a home unit) is given by a will, an application must be made to the registrar of titles to register the beneficiaries as owners. The registrar of titles may act on the

application without requiring the production of a grant of probate (s 112 *Land Title Act 1994* (Qld) (Land Title Act)).

Where a person dies intestate, real property can be transferred without a grant of letters of administration, provided the gross value of the assets of the deceased in Queensland are no greater than $300 000 (s 111 Land Title Act).

When two or more people own property as joint tenants, the property passes immediately to the survivor or survivors on the death of one of them. No grant of probate is necessary to enable the ownership to pass, and the registrar of titles requires a request to record death to be lodged so that the survivor can be recorded as the owner.

Transfer of money

When no complications arise during the distribution of an estate, banks, companies and life assurance societies are often prepared to transfer balances of accounts (up to certain limits) and shares, and to pay out life policies to personal representatives without a grant of probate or letters of administration.

Procedure for Obtaining a Grant

Probate

The obtaining of a grant of probate involves certain formalities. The court needs to be satisfied that the will is the last will made by the deceased, and the person applying for a grant is the appropriate person to be recognised as personal representative of the estate. As part of the application, proof of the death of the deceased is required, and notice must be given of the intention of the executor to apply for probate.

The *Uniform Civil Procedure Rules 1999* (Qld) (UCP Rules) require that notice of the intention to apply for a grant of probate be advertised and served on the Public Trustee, and that certain documents be prepared, sworn and filed in the Supreme Court Registry with the original will and death certificate (rr 598–599 UCP Rules). The Deputy Registrar of Probates examines these documents and, if they are satisfied that all formalities have been observed and that the documents are complete and in order, a grant of probate will be made (r 601 UCP Rules).

Letters of administration

The grant that the court makes to the administrator of an intestate estate is a grant of letters of administration on intestacy. The grant made by the court, where there is a will but no executor willing or able to apply for a grant, is a grant of letters of administration *cum testamento annexo* (with the will annexed).

Again, the basic two requirements for each application are:

- proof of the death of the deceased
- proof of the entitlement of the applicant to apply in priority to other persons interested in the estate of the deceased.

Notice of the intention of the applicant to apply for a grant must also be given.

The UCP Rules require the advertisement and service on the Public Trustee of the Form 103, Notice of the Intention to Apply, and the preparation and filing of certain documents in the registry. Subject to all formalities having been observed and the examination of documents proving satisfactory, a grant of letters of administration (on intestacy or *cum testamento annexo* as appropriate) will be made.

General practices

The registry of the Supreme Court follows a number of practices when examining documents in support of applications for grants of probate and letters of administration. The Supreme Court website provides guidance to persons seeking to make an application for a grant. The complexity of the law in this area and the expense that could be incurred if the advertising of the notice of intention is incorrect and needs to be re-advertised suggest that it is unwise for a person to apply for probate or letters of administration without professional assistance.

Death duty

In Queensland, death duty is not payable on the estates of persons dying after 1 January 1977. Federal estate duty was abolished for persons dying after 30 June 1979.

Small estates

The need to obtain probate or letters of administration of the estate of a deceased person in Queensland is determined to a degree by the nature of the assets in the estate and the manner in which ownership was held by the deceased. The value of the assets will not necessarily determine the need to obtain probate or letters of administration.

The Public Trustee is empowered in certain circumstances to obtain from the court an order to administer the estate, instead of obtaining a grant of probate or letters of administration of an estate (s 29 *Public Trustee Act 1978* (Qld)) or, in the case of small estates (under $150 000), it may file an election to administer (s 30 Succession Act). These procedures are fairly informal, and the object of them is to provide a means of reducing the costs of administering estates.

Special powers of the Public Trustee

When a person dies while residing in Queensland or leaving property in Queensland, and a grant of administration has not been made to anyone else, the Public Trustee may apply for and be granted an order to administer the estate of that person when:

- the deceased dies intestate
- the deceased dies testate and the Public Trustee was appointed executor of the will
- the executor appointed does not within three months of the date of death, or cannot for a variety of reasons, take steps to administer the estate of the deceased.

Furthermore, when a person dies while residing in Queensland or dies leaving property in Queensland, and the gross value of the property which would pass to the deceased's personal representative is estimated by the Public Trustee not to exceed $150 000, and there is no grant of administration in force in Queensland, the Public Trustee may in all cases in which it is entitled to

obtain an order to administer, file instead an election to administer the estate of the deceased. The filing of an election to administer has the same effect as an order to administer.

When an order to administer is made by the court, the Public Trustee has the same powers over the property as it would have had if probate or letters of administration had been granted to it.

Informal procedures

A deceased estate can be administered informally (i.e. without obtaining a grant of representation). However, this may depend on the requirements of the institutions with which the deceased held assets.

Banks and building societies

As mentioned earlier, every bank and building society has its own guidelines about its requirements for releasing funds without requiring a grant of probate. Enquiries need to be made to determine whether the institution will release funds without a grant and what other conditions may need to be satisfied to enable the release of funds accordingly.

Joint accounts

On the death of one of the joint owners, the account can be noted without any formality and the account reverts to the surviving account owner or owners. Production of the death certificate is usually sufficient to have the change made to the account.

Life insurance

Some policies of assurance mature on death, under which the proceeds are payable to their personal representatives. These are commonly known as whole of life policies.

A life assurance society is empowered by an Act of parliament to pay the proceeds of such a policy or policies, so long as the amount of insurance or the aggregate amounts of insurance (in the case of more than one policy with the society) does not exceed a prescribed amount. The insurance must be paid to the widow or widower, to certain next of kin, to the legatee or to the personal representative of the deceased. It may be paid without production of probate or letters of administration. Bonus additions are disregarded when ascertaining the amount payable.

Jointly owned property

The interest of a deceased person in real estate or other property held by joint tenancy passes automatically to the surviving joint tenant or tenants without the need for a grant of probate or letters of administration.

Motor vehicles

Transfer of the registration of a motor vehicle following the death of the owner may be done without production of a grant of probate or letters of administration to the Department of Transport and Main Roads.

Furniture, jewellery and personal belongings

Ownership of furniture, jewellery and personal belongings can be handed over to those entitled following the death of the owner without the need for a grant of probate or letters of administration.

Obtaining a Death Certificate

To enable payment to be made by banks, life assurance societies and building societies, death has to be proved. This is done by production of a death certificate.

Death certificates may be obtained for a fee from the Registry of Births, Deaths and Marriages. Outside Brisbane, application should be made to the District Registrar of Births, Deaths and Marriages nearest to the deceased's place of death.

Death of joint tenant

While the ownership of jointly held property passes to the survivor or survivors on the death of a joint tenant, it is necessary in respect of land to establish the joint tenant's death for the Registrar of Titles, so that the register and any title deed can be noted accordingly. For this purpose, all that is required to be lodged in the Titles Office is the death certificate, the certificate of title to the property (if one is issued) and a request to record death by the surviving joint tenant(s).

Inheritance Problems

Adopted children

In Queensland, the adopted children of a person are treated as if they are natural-born children of that person for the purposes of the will or the intestacy provisions. Adopted children may also be eligible to make a Family Provision application against the deceased's estate (s 40 Succession Act).

'Adopted child' in this context is not restricted to children adopted in Queensland, but extends to children adopted under the laws of another state or territory of the Commonwealth or a foreign country, provided the adoption was legal according to the laws of that country (s 5 Succession Act).

Children born or adopted outside of marriage

The rights of such children are provided for in the *Status of Children Act 1978* (Qld). This Act affects such children in two ways:

- when there is a will—the word 'children' in a will means all children of the deceased, including those born outside marriage. The deceased may specifically exclude particular children under the will, but this must be done by the use of clear words
- when there is no will—any child, irrespective of whether their parents were married, is entitled to share on an intestacy following the death of one of the parents. Any child is an entitled applicant who has standing under the Succession Act to make a Family Provision application on the death of a parent or other provider.

Stepchildren and half brothers and sisters

A stepchild is not legally the child of a deceased person. Therefore, a stepchild does not, unless the contrary intention appears in a will, receive any interest in the deceased's estate that is left to a child. Similarly, stepchildren cannot claim against an estate on an intestacy. However, stepchildren are clearly included as eligible applicants who may make a Family Provision application under the Succession Act (see Family provision applications), provided they satisfy the criteria in s 40A of the

Succession Act. Reference merely to a brother or sister in a will generally includes a gift to a half brother or sister. Again, the answer depends on the construction of the will.

Brothers-in-law and sisters-in-law are not generally taken to be included in the expressions brothers or sisters.

Beneficiaries who lack capacity

The mere fact that a person entitled to benefit under a will or under the intestacy provisions lacks capacity, owing to either infancy or mental incapacity, is no bar to their taking a benefit. However, it can affect the actions of the person administering the estate.

For example, in the case of infancy, unless there is a contrary intention expressed in the will, the personal representative may pay the income of any property to which the infant is entitled to the infant's parent or guardian, or otherwise apply that income for or towards the infant's maintenance, education, advancement or benefit until the infant is entitled to receive the gift upon attaining majority or the age specified in the will.

To overcome unintended consequences of leaving a benefit to a person who lacks capacity, the testator could consider establishing a trust within their will (a testamentary trust) for the benefit of the person who lacks capacity.

Divorced people

When there is a will, a person divorced from the deceased is only entitled to benefit under the deceased's will if the deceased showed a clear intention in the will to benefit the ex-spouse, notwithstanding the divorce. When there is no will, the former spouse of the deceased would not benefit from the intestacy of the deceased.

However, whether the deceased died testate or intestate, the deceased's ex-spouse may make a Family Provision application in some circumstances. For more information on time limits and who may apply see Family provision application.

The Roles Within Administration of Estates

Two distinct phases occur when finalising a deceased person's estate. Firstly, the necessary papers must be prepared for the grant of probate or letters of administration if such an application is warranted. Secondly, once this has been completed, the property of the deceased must be collected and distributed in accordance with the terms of the will or the statutory order.

Executors

Several problems may arise with regard to executors, and it is usually safest to appoint more than one executor, except in the simplest of cases.

No executor appointed

When no executor is appointed under the will of the deceased, the court will generally grant the administration of the estate to the beneficiaries under the will. There is an order of priority of

entitlement to apply provided for in r 603 of the UCP Rules. The person appointed is called an administrator. The administrator will then carry out the terms of the will.

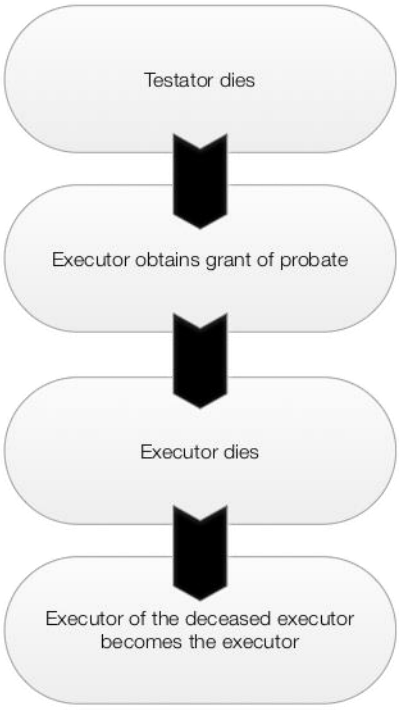
The executor does not wish to act

If a person appointed in a will as an executor does not wish to act, or is not able to act, they do not have to accept that responsibility and can formally renounce the appointment. If a person renounces such appointment (refuses to act), any other executor named under the will can perform all executorial duties. If there is no other executor named, the procedure applicable when no executor has been appointed is adopted.

People who are named as executors who do not wish to act as executor should not do any of the acts normally performed by an executor. For example, they should not pay the deceased's debts unless they act in a situation of emergency. A person who acts in relation to an estate without intending to take up executorship is said to intermeddle in the estate. Section 54 of the Succession Act allows an intermeddler to renounce executorship prior to probate of the will being obtained.

The executor is dead

This frequently happens when the will of the testator was made many years before death. If the executor has obtained probate before they die, their executor (or the executor of the last surviving deceased executor) becomes the executor for the deceased (s 47 Succession Act) (see diagram below). The issues raised by the death of an executor can be quite complex and legal advice should be sought.



This diagram describes the process when the executor of an estate dies after obtaining a grant of probate. 'Testator Dies' so 'Executor obtains grant of probate' but then 'Executor dies' so the 'Executor of the deceased executor becomes the executor'.

When probate has not been obtained, the position is the same as if there is no executor appointed. To help avoid this unsatisfactory situation, it is best to appoint more than one executor.

The executor is under 18 years of age

When the sole executor is under 18 years, the practice of the court is to appoint the minor's guardian (or another person the guardian agrees should be appointed) as administrator. When the minor reaches the age of 18 years, they then take over executorship of the estate.

Duties of personal representatives

The basic duties are to collect the assets of the deceased, attend to the payment of any debts and distribute the estate to the beneficiaries in accordance with the will. The personal representative also has a duty to protect the estate assets and maximise the value of the estate for the benefit of the beneficiaries. The personal representative is accountable to the beneficiaries for their actions in the administration of the estate. The personal representative is required to provide a detailed accounting of the estate's assets and liabilities upon request by an interested beneficiary. If the personal representative fails to provide adequate information or has not acted diligently, the beneficiary may complain to the Supreme Court (s 52 Succession Act). This is the only right a beneficiary has before distribution. A beneficiary does not own the property until the personal representative distributes the estate of the deceased.

The manner in which the personal representative deals with the assets of the estate depends on the terms of the deceased's will and the nature of the estate. If specific items are left to beneficiaries, these assets should be given to the appropriate beneficiaries. However, in situations where the estate has insufficient funds available for the payment of debts, items that are the subject of a specific gift to beneficiaries may have to be sold to obtain money for the payment of such debts (s 59 Succession Act).

Payment of executors

The deceased may specifically indicate in the will that executors should be paid for administering the estate. Even if this is not stated in the will, the court may authorise the payment of remuneration or commission to personal representatives for their services (s 68 Succession Act).

Trustees

Often, a person is appointed an executor and a trustee. There is a difference in function between the two. The executor's function ends once the estate is distributed to the beneficiaries.

Trustees have continuing duties set out by the terms of the will, such as the support and maintenance of young children or the administration of a sum of money for someone's benefit as a trustee. Trustees have a high duty to act honestly and in good faith when carrying out duties of trust given to them under a will. The rights and duties of trustees are mainly set out in the *Trusts Act 1973* (Qld).

Administrators

Subject to any conditions stipulated in the grant of letters of administration, every person to whom administration of the estate is granted has the same rights and liabilities and is accountable in the same way as an executor of the deceased (s 50 Succession Act).

The Cost of Administering an Estate

Executor's commission

People acting as a personal representative of a deceased person are entitled to a just and reasonable commission for work in administering the assets of the deceased's estate. Payment is made out of the assets of the estate as an administration expense. However, unless the will specifically provides for the payment of the executor, such payment must be approved by the court or agreed to by all affected beneficiaries.

The Public Trustee and the trustee companies acting as executors or administrators of deceased estates charge commission for their administration at their published rates.

Legal costs

The fees charged by solicitors for work on the administration of a deceased estate are based on the work they do, which can be charged at rates fixed by the scales of costs for the courts or by written agreement with the executor. In all cases, court fees, costs of public notice advertisements and other out-of-pocket expenses are payable in addition to the professional charges made by the solicitor.

Obligations Outstanding at the Time of Death

Contracts

As a general rule, the personal representative must perform all contracts entered into by the deceased that were enforceable against them. This rule does not apply if it was expressly agreed that the contract should terminate on the death of the deceased, or if a contract terminates on the death of the deceased, expressly or by implication. A contract will terminate on death if the obligation on the deceased was personal (e.g. if the deceased was to perform a service such as writing a book, conducting a concert or building a house).

Similarly, the personal representative may enforce any contract that the deceased was entitled to enforce.

Payment of debts

The personal representative is liable for all debts owing by the deceased. Such debts and other liabilities of the deceased at death are paid out of the estate. The personal representative is not personally liable for these debts (unless the personal representative failed to give a statutory notice to potential claimants).

The personal representative is personally liable for any debts incurred in the course of administering the estate, but is entitled to an indemnity (repayment) from the deceased's estate if the debts were properly incurred.

Statutory notice to claimants

To guard against the discovery of a debt after the estate has been administered, personal representatives may give a statutory notice to claimants. This notice advertises the fact that, if any creditors do not notify the personal representatives of their claim within six weeks of the notice, the

personal representatives may distribute the estate's assets only in accordance with the debts of which they have been notified at that time.

The notice should be advertised in a newspaper as described in s 67 of the *Trusts Act 1973* (Qld). If the deceased's last known address is more than 150 kilometres from Brisbane, it should be advertised in a local newspaper circulated and sold at least once each week in the area of the deceased's last known address; otherwise it should be advertised in a newspaper circulating throughout the state.

Other notices as would be directed by the court to be given in an administration action should also be advertised.

If the personal representatives distribute the estate's assets without giving the notice, they are personally liable to pay any debt of which they subsequently become aware.

Time for distribution of assets

No beneficiary, whether under a will or on an intestacy, has a right to the estate until it has been distributed by the executor. This can cause serious financial problems if the major beneficiary's sole source of income was the deceased. If this happens, a spouse can:

- immediately apply for a pension (see the chapter on Social Security Payments)
- seek a loan, using their interest in the estate as security
- receive immediate payment out of the estate for the maintenance of the deceased's spouse and children, and such payment will be offset against their share in the estate (s 49A Succession Act).

This situation can be avoided if the beneficiary and the deceased maintained a joint bank account, because on the death of either of the joint account holders, the account passes to the survivor.

Time limit for distribution

Personal representatives do not have a time limit within which to distribute the estate; although, the administration of the estate should be undertaken in a timely manner. Generally, the estate should be dealt with (unless there is litigation or other issues which prevent the proper administration) within 12 months of the deceased's death. Much will depend on the size of the estate, the number of possible creditors and the possibility of any Family Provision application.

If the personal representative neglects to distribute the estate of the deceased or is dilatory in carrying out their functions as personal representative, the court may, upon the application of any person aggrieved by such neglect, make orders to speed up the administration of the estate, including an order requiring the personal representative to pay interest on money in their possession.

Payment of interest by executors

To encourage the speedy administration of estates, the law imposes a duty on personal representatives (in the absence of a contrary provision in the will) to pay interest at a rate of 8% per annum, or at such other rate as the court may determine, on general legacies that have not been paid after the first anniversary of the deceased's death (s 52 Succession Act).

A general legacy is a gift of personal property in general terms to be provided out of a testator's estate (e.g. a sum of money), as distinct from a specific legacy that earmarks specific property as the subject

of the gift (e.g. 'my oil painting of ships at sea to Sally'). Interest is not paid on specific legacies. This interest is paid out of the estate funds.

Insolvent estates

Personal representatives of a deceased must pay the debts of the deceased that were owing at the time of death. They must also pay any debts that they incur in the course of administration. If the assets of the estate are insufficient to discharge these obligations, the estate is said to be insolvent.

An insolvent estate can be administered by a trustee in bankruptcy in accordance with the *Bankruptcy Act 1966* (Cth), or it can be administered informally by the personal representative.

It sometimes happens that a personal representative commences the administration of an insolvent estate without realising that insufficient assets exist to pay the deceased's debts and the administration expenses. Complex rules that govern the order in which creditors and others must be paid regulate the administration of such an estate (pt 5, div 2 Succession Act).

In this case, personal representatives should seek legal assistance in carrying out the administration.

Two points should be noted:

- Payment of funeral expenses has first priority.
- As a general rule, money payable under a policy of insurance on the life of a deceased is protected from the claims of creditors and is therefore available for distribution to the beneficiaries under the will or on intestacy.

Maintenance orders

An order for the maintenance of a party to a marriage or a child of a marriage ceases to have effect upon the death of the party or child who stands to benefit under the maintenance order. Similarly, an order with respect to the maintenance of a party to a marriage or a child of a marriage ceases to have effect upon the death of the person liable to make payments under the order unless the order was made:

- before the 1983 amendments to the *Family Law Act 1975* (Cth) (Family Law Act) and is expressed to continue in force throughout the life of the beneficiary
- for a period that has not expired at the time of the death of the person liable to make the payments (ss 82(2)–82(3) Family Law Act).

In either case, the order is binding upon the personal representative of the deceased.

Contesting a Will

The will of a deceased sometimes involves a contest in the Supreme or District courts between persons interested in or affected by its existence, the will's meaning or its effect.

Contesting grant of probate

A person may contend that a will is not the last will of the testator because:

- it was revoked by the testator

- the testator lacked mental capacity to make a will
- parts of the will were alterations or additions made after the will was signed by the testator.

In all of these cases, the validity of the will must be determined. The court decides the issue by granting or refusing to grant probate of the will, or by revoking an existing grant.

Contesting on point of construction

In some cases, the meaning of expressions used in the will may be unclear. For example, a testator may have made a gift in the will to 'my nephew George', when more than one nephew answers to that name, or the testator may have given 'my house at Ipswich' to a legatee and then sold the house after making the will and purchased a home unit at Ipswich.

The executor or a person interested in the estate of a deceased person may apply to the court for a decision on the construction of the will. The court will then resolve doubt about the meaning of the will by determining the meaning of the words used by the testator. Such an application must be made within six months of the date of death of the testator.

Family provision applications

Generally, testators may leave their possessions and money to any people or causes they choose. However, if the deceased's close family or dependants will suffer hardship as a result of the deceased's decision to give money or property to others, a family member may bring a court action for provision from the estate of the deceased.

The Succession Act allows courts to award family members or dependants a portion of the deceased's estate, even though the deceased made no provision or an inadequate provision for them in the will (ss 40–44 Succession Act).

Family provision applications may be brought even if the deceased died intestate, but such applications are rare.

When must family provision applications be brought?

Intending applicants must give the personal representative written notice of their intended application within six months of the death of the deceased (s 44(3)(a) Succession Act). Applicants must then commence the legal action within nine months of the death of the deceased (s 44(3)(b) Succession Act). No application can be commenced more than nine months after the death of the deceased unless the court grants an extension (s 41(8) Succession Act). This power is discretionary and the outcome of an application must depend on the particular facts of the individual case. The normal ground for granting an extension of time within which to apply is that applicants did not know of, or appreciate, the extent of their rights to apply for maintenance. Another important consideration is whether the estate has already been distributed to the beneficiaries.

Who may apply?

The following persons may apply for (but not necessarily be granted) provision from the estate:

- the deceased's spouse—this includes a husband or wife who has been divorced from the deceased and who has not remarried before the death of the deceased, if they were receiving or were

entitled to receive maintenance from the deceased at the time of death. 'Spouse' includes married and de facto couples. The definition of 'de facto partner' includes a same-sex partner. To fall within the definition, couples must have been living together on a genuine domestic basis for the two years up to the date of death (s 32DA Acts Interpretation Act 1954 (Qld), s 5AA Succession Act)

- the deceased's child—this includes any child of the deceased, including a stepchild, adopted child or a child born outside of marriage (s 40 Succession Act)
- the deceased's dependant—this includes any person who was being wholly or substantially maintained or supported (other than for a wage or some other payment) by the deceased at the time of the deceased's death and who is:
- a parent of the deceased
- the other parent of a surviving child under the age of 18 years of the deceased
- a person under the age of 18 years (s 40 Succession Act).

When will family provisions be ordered?

Not all applicants who feel that the deceased has not adequately provided for them may receive an order for provision from the court. The question is whether the applicant has financial need in all of the circumstances, so that it can be said that the deceased failed to make adequate provision for their proper maintenance and support (s 41(1) Succession Act).

An application cannot be made on the ground that the will was unfair or unjust in its distribution when, in fact, adequate provision for the applicant has been made in the will.

Principles applied by the court

In considering whether adequate provision has been made for the applicant's proper maintenance and support, a variety of considerations are relevant. They include:

- the net value of the estate (i.e. its size after debts, funeral, testamentary and other expenses have been deducted)
- the financial position of the applicant
- the age, sex and health of the applicant
- independent means of the applicant because of any gift, transfer or other provision made by the deceased during their life, or from any other source
- the closeness of the relationship between the applicant and the deceased
- contribution of the applicant to the building-up of the deceased's estate
- the character and the conduct of the applicant. The court has power to refuse the application if, in its opinion, the applicant's character and conduct disentitles them to a share or an increased share of the estate.

Funeral Funds and other Benefits

There are numerous pitfalls in negotiating benefits from many of the available funeral funds and plans. The only recourse for persons upset about sharp practices (unethical practices) is contractual and consumer remedies (see the chapter on *Consumers and Contracts*).

Cash benefit schemes

Under a cash benefit scheme, a sum of money is provided for the funeral upon the death of the beneficiary. Such a scheme may be a benefit of membership of a particular organisation, such as a trade union.

Some cash benefit schemes are organised upon a contributory basis (i.e. the member has to make regular contributions to the scheme). There are several dangers with contribution schemes:

- non-payment of subscriptions—some schemes will not pay benefits if the member has failed to keep payments to the fund up to date. As a result, years of contributions may be lost and no benefit received from the fund
- an inability to cash in—there may not be provision for the member to cash in contributions to the fund. In such cases, the only way to receive any benefit from the fund is to die and have the money paid for the funeral
- the imposition of conditions affecting the disposal of the body—restrictions may be placed upon the payment of the cash benefit if, for example, the recipient of the benefit must be cremated
- limited entitlement—the benefit that is offered by such a scheme is limited to a set sum. The sum is usually nowhere near enough to pay for a basic funeral.

Non-cash benefit schemes

Under a non-cash benefit scheme, the burial or cremation is performed free for the member of the scheme.

Usually, such schemes are organised and operated by the funeral industry itself. They can be operated upon the basis of a contribution or a once-only payment.

This type of scheme also has pitfalls. They can include:

- the failure of the funeral company to provide the type of service contracted for by the deceased. Usually, people pay for a certain type of funeral or cremation. When the cost of such a service has risen by the time of death, the funeral company may not provide it. Many companies base their refusal to perform such a service on conditions included in the fine print of the agreement. Such conditions may include:
    - a rise and fall clause—this clause may be included to ensure that the person who desires a certain type of funeral at the time of joining the scheme will have to pay an additional sum, over and above the contributions already made, to receive a funeral of the standard and type originally desired

    - a set cost clause—when the cost of the funeral originally desired has risen by the time of death, it will not be provided. Instead, a funeral that costs the price originally agreed upon will be substituted

- non-transferability of rights under the scheme
- unexpected charges by the undertaker if the member dies outside the geographical area in which the undertaker operates
- the absence of entitlement to cash in the benefit.

Tax and Superannuation in Deceased Estates

Income tax

The executor or administrator of an estate is usually required to lodge an income tax return on behalf of the deceased for the period from the beginning of the financial year until the deceased's death and then on behalf of the estate from the date of death to the end of the financial year. Returns may then have to be lodged every year until the finalisation of the estate.

Capital gains tax

Capital gains tax may be payable if:

- the personal representative sells a taxable asset of the deceased in the course of administering the estate
- a beneficiary sells a taxable asset derived by the beneficiary from the estate
- a taxable asset (other than money) is left to a charity, a complying superannuation fund or a foreign resident.

While certain personal use assets are exempt from capital gains tax, most assets of any significant value (e.g. antique furniture, jewellery or rare books) are not. A person's sole or main residence continues to be exempt from capital gains tax, provided it is sold within 24 months of the date of the deceased's death. It would be prudent to obtain professional advice before disposing of assets on which capital gains tax may be payable.

Superannuation

Superannuation is held by a trust and is not, strictly speaking, an estate asset. Upon the death of a person, the trustee of the superannuation fund has the discretion to pay the superannuation to a person's personal representative or dependant (e.g. a spouse, child, interdependent or financial dependant) who are defined under s 10(1) of the *Superannuation Industry (Supervision) Act 1993* (Cth).

If superannuation is paid by the trustee to the personal representative then it becomes an asset of the estate and is dealt with by the person's will.

If a person makes a valid binding death benefit nomination or revisionary pension, then the trustee will not have discretion and will be compelled to pay the superannuation in accordance with it.

Legal Notices

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