Office of the NSW
Legal Services
Commissioner

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Fact Sheet 12 - Deceased Estates

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When a person dies, all of the assets are called that person's *estate*. In most cases the deceased person has left instructions, called a *will*, which provides for what they want to happen to their estate after their death. The people who will inherit the deceased person's estate are called the *beneficiaries*. The estate that a beneficiary receives is called a *bequest*, a *legacy*, an *inheritance*, a *gift*, a *devise*, etc.

Wills generally name someone as the *executor*, whose job is to *administer the estate*. Administering an estate involves, among other things:

- looking after the assets of the estate, e.g. making sure the home or car of the person who died is maintained, or managing the deceased's bank accounts until they are *realised* (i.e. turned into money) or transferred to the beneficiaries
- paying the estate's debts, e.g. using the money in the estate to pay the deceased person's last phone bill, funeral expenses, taxes and mortgage payments
- distributing the assets of the estate in accordance with the will, e.g. organising to transfer ownership of the person's house to the appropriate beneficiary.

It is also the executor's job in most estate matters to obtain a grant of *probate* from the court. Probate is a court order saying that the will is valid and that the executor has the right to administer the estate. The whole process of administering an estate commonly takes at least a year.

Sometimes wills provide for certain people to receive a continuing benefit from the estate. For example, the deceased might have wanted one beneficiary to receive regular payments over a long period, or might have wanted money kept for a beneficiary until a certain age. In such cases, the will appoints a *trustee*. The trustee's job is to manage money, investments or assets for the benefit of a beneficiary, in accordance with the wishes expressed in the will.

Usually one person is appointed as both executor and trustee, but the functions of each are different. A trustee's duties do not normally commence until the executor's duties (e.g. identification and/or realisation of assets and payment of debts, funeral and testatory expenses) have been completed.

Sometimes the executor of a will is also a beneficiary under the will. Beneficiaries who are not executors have no power to make decisions about the estate.

What is a lawyer's role in relation to an estate?

Often an executor will need a lawyer's help to administer the estate. For example, a lawyer might:

- prepare and help to complete the forms needed to apply for probate
- help identify and collect the deceased's assets
- advise the executor about the deceased person's tax liability
- advise about the legal order in which debts must be paid and the remaining assets distributed

If the deceased has not left a will, one of the people entitled to a share in the estate applies for Letters of Administration. The estate is then administered under the law relating to *intestacy* (i.e. dying *intestate*, dying without a will). When this happens, a lawyer can explain the legal order for distributing the estate and the proportions of the estate that beneficiaries are entitled to. A lawyer can also draw up a report and statement about the realisation of the assets of the estate and the distribution to the beneficiaries.

When dealing with estates, the lawyer's client is the executor. The lawyer's professional duty is to help the executor to carry out his or her duties to the estate in accordance with the law and the will.

Some wills appoint a lawyer as the executor. The lawyer in such cases has the same duties as any other executor. Executors are entitled to reimburse themselves for expenses they incur as part of administering an estate. This applies to lawyer executors as well as other executors. If the will does not include a *charging clause* which provides for payment to the executor, and if the beneficiaries do not agree to paying the executor, the executor can apply to the Supreme Court to recover their costs and to be paid a fee. Major beneficiaries are entitled to full details of how the estate is distributed.

Another role that a lawyer may have is that of custodian of a will, where a lawyer has been instructed by a client to hold their will in safe custody. Upon receiving notification of the client's death, the lawyer may be required to ascertain who the executor is and communicate with that person regarding their role as the executor named in the deceased's will.

What costs is a lawyer entitled to be paid?

The costs for legal work done up to and including the grant of probate are regulated according to a scale of fees. When first receiving instructions from an executor, the lawyer must tell the executor

about these fees. The lawyer must also tell the executor about fees that the lawyer will charge for legal work done in the administration of the estate after the grant of probate. [Further information can be found on the OLSC Fact Sheet Costs Disclosure]

If the lawyer is the executor, while it is not a legal obligation, it is prudent to provide written costs disclosure to the major beneficiaries for legal work associated with the administration of estates.

What duties does the lawyer owe to the beneficiaries?

Lawyers act on their clients' instructions. The lawyer acting on behalf of the executor has no particular duty to the beneficiaries because the lawyer's client is the executor — not the beneficiaries. The lawyer acts on instructions from their client regarding, for example, the extent of engagement in communications with beneficiaries and other parties. However, a lawyer who is also the executor, or one of the executors, owes a duty of care to the beneficiaries both as a lawyer and as an executor.

Beneficiaries who are unhappy with the way the estate is being administered sometimes turn to the executor's lawyer, who is generally unable to assist them. They should instead discuss their concerns with the executor of the estate. It is appropriate for beneficiaries to raise their concerns with the lawyer only if the lawyer *is* the executor. It is only the Supreme Court that has the power to remove executors.