A Guide for Beneficiaries of a Deceased Estate
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Who is a Beneficiary?
A beneficiary is a person who receives a gift or benefit from an estate.

What is an “Estate”?
The term “estate” usually refers to all the affairs of a person that remain outstanding at their death. It includes assets and liabilities.

Who is an Executor?
An executor is a person appointed by a Will to manage an estate.

What is the role of the Executor?
An executor must carry out the wishes of the deceased and administer the estate according to the Will.

Being an executor is a position of great trust. An executor has a legal as well as a moral obligation to fulfil the role with high standards of care and honesty.

The executor is answerable to the wishes of the deceased as expressed in the Will.

An executor is responsible for the assets and liabilities of the estate. An executor is a trustee and must conform with the special legal standards imposed on trustees.

An executor must:
- Follow the terms of the Will.
- Look after the assets carefully.
- Keep all necessary records and accounts and keep the beneficiaries fully informed.
- Consult with any other executor about any decisions which need to be made.
- Get proper expert advice if there is any doubt as to what is the best course of action.
- Not make a profit from the position of executor.
- Avoid situations of conflict of interest (for example an executor may not buy anything from the estate unless the beneficiaries are all adults and they all consent).
Do all the Beneficiaries need to agree?
Executors are accountable to the beneficiaries but it is the executors who are in charge of the estate, not the beneficiaries.

Executors must work according to the direction in the Will, not the direction of the beneficiaries.

The executor is answerable to the Court. Beneficiaries can have the Court order an executor to deal with the estate promptly and diligently and correct any wrongful distributions by an executor.

Generally, executors are not required to get consents from the beneficiaries.

If the executors wish to act contrary to the directions in the Will, they will need consent from the beneficiaries. Only adults can give such consent.

To avoid surprises confusion or misunderstandings, executors may choose to get feedback or consents from beneficiaries even where they are not required to do so.

For instance the executors must act prudently to get a fair market price on the sale of estate assets. They are not usually required to get consent from the beneficiaries to a sale price but may choose to do so out of respect for the beneficiaries, or to avoid an accusation the executors failed to act prudently to get a fair market price.

Must an Executor take on the responsibility?
An executor may refuse to take on the responsibility of acting in the estate.

This is an absolute right before the executor starts to take action under the Will. However, after the executor has taken action, the executor may need Court approval to be released from the responsibility of being the executor.

Who pays the Executor?
The executor is entitled to have expenses they incur in the conduct of the estate paid from the assets of the estate, but is not entitled to charge a fee or commission unless the Court, the beneficiaries or the Will so approves.

Typically executors are trusted friends or family members who perform their work without a claim for a fee or commission, out of respect for the deceased.

Who arranges the funeral?
The executor is responsible for making the funeral arrangements.
Executors may take guidance from any directions by the deceased or any consensus within the family, but such wishes are not legally binding. The executor has the legal right and duty to make these decisions.

Most funerals are organised through a funeral director who can advise on all the practical arrangements for the funeral and burial or cremation.

**Should there be a reading of the Will?**

It is not necessary or typical to have a formal reading of the Will.

Do you really need everybody to be advised about what is in the Will at the same time? Does there need to be a meeting for that purpose?

More usually, copies of the Will are sent to those people who have a genuine interest.

**What should the Beneficiaries be told?**

Careful communication is important to avoid misunderstandings.

The level of information that executors are required by law to provide to beneficiaries depends on what they receive under the Will.

Beneficiaries who are only entitled to specific gifts or money under the Will, generally will not be entitled to receive full details of the estate.

Beneficiaries who receive a share of the balance of the estate (known as residuary beneficiaries), are entitled to a full accounting of the estate funds, including details of all funds received and expended in the estate.

A beneficiary can bring court proceedings against an executor who fails to provide adequate information. Any proceedings would cause delays and incur additional expenses.

**What is Probate?**

The Supreme Court registers Wills and supervises the conduct of estates to regulate the proper transfer of wealth on death.

If satisfied, the Court Registry certifies the Will as in order and the authority of the executor to act in accordance to the Will. This is called Proving the Will and the form of the certificate is called “Probate”.

To obtain Probate, executors lodge with the Court Registry a statement of the
assets and liabilities of the estate, confirmation of the particulars of the Will and an undertaking to deal with the estate honestly and fairly. The forms required by the Court are usually prepared by the solicitors for the estate.

Probate is usually handled administratively and does not usually require a formal hearing or an appearance before a judge.

**Is Probate always necessary?**

People and businesses dealing with executors and estates may insist on the certainty of Probate before they rely on the Will or the power of the executor.

The nature of the assets and their value will determine whether Probate will be required. It may be possible to deal with all of the assets and liabilities without any one requesting Probate.

Real estate or significant amounts of money are likely to require Probate.

**How are Estates Administered?**

During the first few months from the date of death, the executor will identify and protect the assets of the estate, take control of the affairs of the deceased and prepare to apply for Probate of the Will.

Once Probate has been granted or it is determined that Probate is not necessary, the executor will commence the process of collecting assets and paying liabilities.

If necessary a tax return will need to be prepared and lodged.

Once the debts of the estate are cleared and the gifts under the Will are made, and the estate is distributed to the residuary beneficiaries.

**How long do Estates take?**

A typical estate is likely to take between 6 months and one year from the date of death until when distributions begin but it is hard to generalise.

Estates are notoriously prone to unexpected delays.

Beneficiaries often feel they wait too long!

After a year from the date of death, executors need to be able to justify the outstanding delay. That explanation might be; difficulties or complexities in getting information, getting control of assets or arranging sales.
What if the Will has an extended provision?

A Will may provide for funds or assets to be held subject to specific conditions, sometimes for extended periods, for instance to hold inheritances for children until they reach a certain age or to provide ongoing income.

Where funds or assets are to be held subject to specific conditions, a “Trust” is created. A person will be appointed to hold the funds or assets according to the rules of the trust. This person is called the “Trustee”. Often the executor is also the trustee but there may be a separate person appointed.

Gifts are typically only distributed to children once they attain a minimum age specified in the Will or become adults. The trustee may be able to advance funds for a child’s maintenance, or towards their schooling or education expenses.

Can Dependents claim more?

In death as in life the law imposes an obligation to support our dependents. Dependents may apply to the Court to have estate provisions amended to make adequate provision for them.

Dependents may claim extra provision beyond what they are gifted under the Will or the rules for estate division applicable where there is not a Will.

The dependents who are able to claim are:

- the spouse of the deceased whether formally married or by virtue of the Relationships Act;
- the children of the deceased;
- the parents of the deceased if the deceased dies without leaving a widow or children;
- a divorced spouse of the deceased, if at the date of the death of the deceased they are receiving or entitled to receive maintenance from the deceased.

Ask Tierney Law for a Client Guide Booklet on this topic if you need more details.

Any such claim must be made within 3 months of the date that the Court grants Probate or Letters of Administration. If an executor or administrator distributes part of the estate to the residuary beneficiaries before this date, the executor or administrator may be personally liable if a claim for an increased share of the estate is successful. Accordingly, some executors wait until this period has expired before finalising distributions.

Can Beneficiaries reject a gift?

A beneficiary who does not want to receive a gift under a Will can reject or
renounce the gift. Usually, the executor would prepare a short agreement to confirm the gift is not being taken.

A beneficiary should get legal advice before they reject an entitlement to an inheritance. A beneficiary should check the consequences for any Centrelink benefit in case Centrelink gifting rules apply.

**What happens to household goods and personal items?**

Unless the executor is the only person who benefits from the estate, the executor should make an inventory of items in the estate and the condition of the items at the time the executor takes over control of the estate so there are clear records in case of query or dispute.

Typically executors offer those taking a share of the balance of the estate the opportunity to take items of household goods in part satisfaction of their interest in the estate, with the value of items selected being deducted from the benefit otherwise passing to that person. The executors will need to value the items taken.

Hopefully there will be ready consensus on such issues.

The executor will need to exercise discretion if professional valuation advice or written consent to valuations is required.

Where more than one person seeks a particular item, the parties can agree that beneficiaries take turns to pick from those items more than one seeks, the order of selection being determined by lottery.

**What if the liabilities exceed the assets?**

If the deceased had more debts than assets the estate would be bankrupt, the same way as a living debtor would be. Provided the executor deals with the estate properly, the executors and beneficiaries will not be responsible for the shortfall.

**Is there Tax to be paid?**

There are no death duties payable in Tasmania.

There are some relatively minor fees charged by government departments in dealing with estates. If Probate is required, a fee is payable to the Court. The fee varies from $150 to $750 depending on the gross value of the estate in Tasmania.

If property subject to capital gains tax is disposed of by the estate, other than by being transferred to a beneficiary, the estate will need to pay any capital gains tax that arises from the disposal.
If property is transferred to a beneficiary as a gift under the Will, payment of any capital gains tax is postponed until the beneficiary in turn disposes of the asset.

The executor will need to ensure the estate pays any capital gains tax payable on property disposed of by the estate other than to a beneficiary who is not a tax-exempt charity, a non-resident or a superannuation fund.

Assets purchased by the deceased before 20 September 1985 are only subject to capital gains tax in the hands of the beneficiaries from the date of death onwards, the capital gain is based on the date of death value.

Assets purchased after 20 September 1985 are fully subject to capital gains tax in the hands of beneficiaries based on the cost base of the deceased.

It may be necessary to obtain a date of death valuation of those assets that could be subject to capital gains tax.

The main residence of the deceased person does not attract capital gains tax if sold within 2 years of the date of death.

The executor needs to complete any outstanding tax matters on behalf of the deceased person. It may be necessary to lodge a final income tax return for the deceased reflecting all income and deductible expenses up to the date of their death. The return should also include a statement of assets and liabilities of the deceased as at the date of death.

There may be income that relates not to the deceased but to the estate. Sometimes, but rarely, the estate itself needs to lodge a return. The executor must make sure all tax liabilities are identified and that provision is made for them prior to distributing the estate.

**Planning for your inheritance**

Be prudent. Do not rush in to any decision regarding your inheritance. Consider your longer term plans for your inheritance and perhaps consult an accountant or financial planner.

Be prepared. Begin to work out your plans and take advice as soon as you know roughly what you can expect and approximately when you can expect to receive it.

Be flexible. Avoid committing to a deadline in expectation of receipt of your inheritance, remember, estates are notoriously prone to unexpected delays.
**Tax benefits from placing estate proceeds in Trust**

Holding funds from an estate in trust for children may allow the children to earn investment income without paying the top rate of tax that otherwise would usually apply.

The Will may so provide or such an arrangement can be established by a deed after death known as “an Estate Proceeds Trust”.

The income distributed from the proceeds of Wills may be used to pay for the children’s education, living and other expenses.

Any income received by a minor will be taxed at the normal adult rate, rather than the penal rate that normally applies to the investment income of children. Assuming the children are not earning other income, they will not pay any tax until they exceed the adult tax free threshold and any additional income will be taxed at the ordinary marginal rates.

This tax benefit applies to the income of children from trusts established in a Will. It also applies to an Estate Proceeds Trust but the following restrictions apply.

- Minor beneficiaries (persons under 18 years of age on establishment of the trust) must be the ultimate capital beneficiaries of the trust, meaning the assets of the trust must ultimately vest in them;
- the transfer of estate assets to the trust must occur within 3 calendar years of the date of death of the deceased; and
- the assets transferred must not exceed the entitlements that the minor beneficiaries would have received if the deceased had not left a valid Will.

The concessional rates of tax will not be available to the grandchildren of the deceased.

Assets in excess of what the children may have received on an intestacy can be contributed to the Estate Proceeds Trust, but only the income generated by that portion of the capital which the children would have received on an intestacy will be entitled to the concessional rates of taxation.

Trusts allow parents to provide for their children in a structured way by providing a facility for the trustee to split income according to the financial circumstances and needs of the deceased’s children.

Speak to Tierney Law if you would like to investigate such a trust.

**Conflict resolution**

The executor has an obligation to administer the estate and to treat all
beneficiaries fairly.

Conflicts sometimes arise because there is often a misunderstanding about the legal obligations of the various parties.

The executors must not take sides in cases of disagreement between beneficiaries, but instead try where possible to mediate a solution.

Disagreement might end up in Court.

If all affected beneficiaries agree, then the executors will usually work with the consensus, subject to receiving suitable indemnities from all affected beneficiaries.

**Challenging times**

A death can place great strains on the relationship of those who are left behind.

Besides the legal and financial responsibilities, all those involved in an estate need to take care to avoid misunderstandings and disagreements.

It is important all communications are open, frank and precise.

Dealing with an estate often puts people into new types of relationships. Dealing with different issues may require different communications. Sometimes the absence of support from the deceased makes things more difficult. Old tensions can sometimes be revived. Sometimes old relationships are unable to stand the strain of dealing with the new issues raised by the estate.

Caring, careful and tactful communication can make a big difference.

**Some Relevant Support Services**

- Lifeline; Counselling Service ph 131114
- Hospice Care Service; support for terminally ill and their family ph 62343808
- Palliative Care Service; support for terminally ill and their family ph 62242515
- Sudden Infant Death Support ph 6259725
- Cancer Support Centre ph 62332088
- Loss and Grief Support ph 62354245
- Compassionate Friends; Support group on loss of a child ph 62614250

This booklet is not a complete statement of the law. It does not deal comprehensively with your particular situation. This booklet is to provide general information to supplement our specific advice to you. Do not act in reliance on this booklet without our specific advice. We are responsible only if you give us specific instructions and for the specific advice we give. This booklet was originally prepared in 1995 and has been updated as at the 30th August 2012. It does not reflect changes to the law after that date. You need to take specific advice on the possibility or effect of any such changes.