

Risks of DIY probate

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In today's fast paced world with significant access to online resources like Google and YouTube, it's not uncommon for people to think they can do just about anything themselves. But the old adage "you get what you pay for" (or don't pay for at all) rings true. In this blog, we explore the risks and dangers of DIY probate after the death of a loved one.

The benefit of being a long-term practitioner is that you build up plenty of "war stories" over the years!

As with many things now, information is available to assist in some legal work but unless you understand some of the issues that need to be addressed or may arise, saving some legal costs in the short term may cost a lot more in the long term.

What is probate?

Essentially, a Grant of Probate is the authority for the person appointed as Executor of the Will of the deceased, to deal with the assets of the deceased. The grant is given by the Supreme Court after making a formal application. Until the authority to distribute the estate is granted, the assets of the deceased may not be able to be dealt with.

When is a Grant of Probate required?

The nature of the assets that were held by the deceased will determine whether or not you need to apply for a Grant of Probate. As a general rule, if the deceased owned any of the following, then commonly a Grant of Probate will be needed:

- Real estate;

- A retirement village unit/house;
- A room in a nursing home;
- company shares; or
- bank account(s).

So applying for probate should be easy, right?

In lawyer speak, yes and no.

Yes, applying for probate can be fairly straightforward depending upon what is provided for in the Will and what the assets are.

No, it can be more difficult if there are issues with the interpretation of the Will or if there are assets needing specific attention and treatment. It is also a process that many people are not familiar with, which can make it difficult to navigate the Court's requirements. And it is certainly not easy where there are differences of opinion among the beneficiaries as to what the Will provides or means.

Real examples of complicated probate where DIY will not be practical

Handwritten changes made to the Will

This is a matter where the deceased had, prior to his death, taken a copy of his formally drafted Will and written changes to it and signed it.

In this case, was it the formal (original) Will that applied when applying for probate or was it the Will varied by the handwriting?

The added issue was that some of the handwriting was ambiguous and difficult to interpret. It was not then a simple application and a great deal of effort was required to appease all the parties involved, including the Supreme Court, without going to a full Court hearing. Not only is this frustrating and time-consuming, it is costly.

Beneficiaries not clearly identified in the Will

In this case, the Will referred to gifts to "my spouse" and “my children” without recording any names.

It is now a requirement that proper identification of who constitutes "my spouse" or “my children” is made. And that can get even harder when some birth certificates do not identify who is the father!

Beneficiaries referenced by old names (eg, post marriage or divorce)

Then there was the old Will which named certain persons to benefit but the names of those persons had been changed in the intervening period.

It became an exercise in finding the evidence necessary to ensure that the proper person received their inheritance.

Challenges for the Executors

We regularly assist with managing estates where the Executors have limited time to dedicate to the requirements of the Estate. In a recent matter, we were involved in, two brothers were the Executors and the whole of the estate was divided equally between them. Neither brother had time to dedicate to the estate when also managing their home and work lives, and arguments arose as to who was doing more on behalf of the estate.

In guiding the brothers through the process, we assisted in removing the stress and hassle associated with managing a deceased estate, which also helped to reduce the arguments between them.

Another regular challenge for Executors is communicating with the beneficiaries. We have had many instances of beneficiaries demanding action by the Executors beyond their responsibilities or in contradiction to the Will or the law. Our role then becomes one of protecting the Executors from overzealous demands and from acting contrary to their Executorial duties.

A recent case saw a beneficiary inferring that the Executor was criminal in the way the estate was being administered when, in fact, the Executor had acted appropriately. The accusations were hollow but without our involvement, the personal stress on the individual would have been significant.

Complexities in the Will

In many matters, a Will prepared by lawyers includes additional complexities, such as Testamentary Trusts.

It can be difficult to interpret these Wills unless you are familiar with them. It is not only understanding the benefits of using Testamentary Trusts but also understanding the tax issues that need to be considered as part of the processes in establishing and managing the Trusts. This area is quite specialised and requires knowledge of relevant tax laws and also accounting issues, for which we work closely with the accountants.

Complexities in the assets

Problems can arise in understanding the extent to which the Will deals with assets or financial resources which may be subject to different laws. For instance, there is often a crossover between the Will and the entitlements of the deceased to superannuation benefits, as those benefits may be the subject of a Binding Death Benefit Nomination.

The Executor needs to be aware of whether certain superannuation documents (the trust deed, any Binding Death Benefit Nomination and the superannuation legislation) override what might be provided for in the Will.

There can also be complexity as to the intersection between the Will and a family trust in which the deceased held a role or an interest. Knowledge of the laws relating to trusts and the interpretation of trust deeds is important to identify what rights are available to the Executor or others to be able to deal with the trust and the assets held in the trust.

Can the Executor be personally liable?

Yes.

The Executor must swear that they will administer the estate according to law. On top of that, the Executor has a fiduciary duty to act in the interests of the estate and the beneficiaries, not themselves.

The incidence of claims by beneficiaries is rising, so a clear understanding and adherence to the law and avoiding a personal conflict of interest is imperative. Being aware of these issues is critical and Executors need advice from an experienced legal practitioner to avoid being personally liable.

One area of significant exposure is dealing with tax relating to a deceased estate. The Executor certainly needs to ensure that tax consequences are identified and dealt with during the administration of the estate and any tax is paid before the estate funds are distributed to the beneficiaries. We work closely with accountants and tax advisers to ensure this is done so that the Executor is protected.

Another area, which even lawyers have fallen foul of, is ensuring that the estate assets are correctly distributed in accordance with the Will. An example of this is when a beneficiary has borrowed money from the deceased and that borrowing is to be taken into account when distributing the estate. There have been cases where the borrower has benefitted by retaining the loan *and* still getting a share of the estate without allowing for the benefit of that loan.

Dealing with authorities when administering a deceased estate

There is certainly a growing trend for authorities to want to communicate with a lawyer when dealing with issues related to a deceased person’s property.

- Some share registries insist on only dealing with a lawyer acting for the Executors.
- Dealing with the title to real estate must now be done through PEXA (e-conveyancing) which requires that there be a lawyer involved.
- Other government authorities will often be cautious in dealing with unrepresented individuals.

The main issue driving this is identity fraud. There is a belief that lawyers assist in avoiding that fraud because of their professional responsibility to identify who they are representing.

The sounding board

Apart from the issue of personal liability, Executors are often thrust in to resolving arguments among family members as to how the estate may be administered.

A common area of contention is how to divide up the deceased's bits and pieces (personal possessions of the deceased), many of which have high sentimental but low commercial value. We often assist in being the intermediary between the individual beneficiaries and the Executor and we are able to guide the Executor through the issues.

Get help from a Wills and Estates lawyer

We can assist in identifying issues to be addressed before the application for probate is made, saving time and costs.

And we can guide Executors as to their responsibilities and obligations, being mindful of complying with the law, including tax laws, and minimising the chance of claims being made by beneficiaries.

Contacting E&A Lawyers

For more information or to arrange a consultation with a lawyer, you can call or email us.

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