Sharrock Pitman Legal

A LEGAL GUIDE TO

Probate & Estates

It's always very tough dealing with the loss of a loved one. Our Probate & Estates guide is here to assist you through the legal questions that may arise during this most difficult of times.

For legal help call **(03) 9560 2922**

www.sharrockpitman.com.au

About this document

This guide has been prepared for the purpose of providing general information surrounding probate and estate administration in Victoria.

Please note that this document does not constitute legal advice.

If you have any particular queries or concerns, please contact our probate and estates team for assistance on (03) 9560 2922.

Disclaimer:

This information is not provided as legal advice and it should not be relied upon as such by any person. It is information of a general nature only. Sharrock Pitman Legal will therefore not be liable to any person who might suffer any financial loss by their reliance upon the information in this publication.

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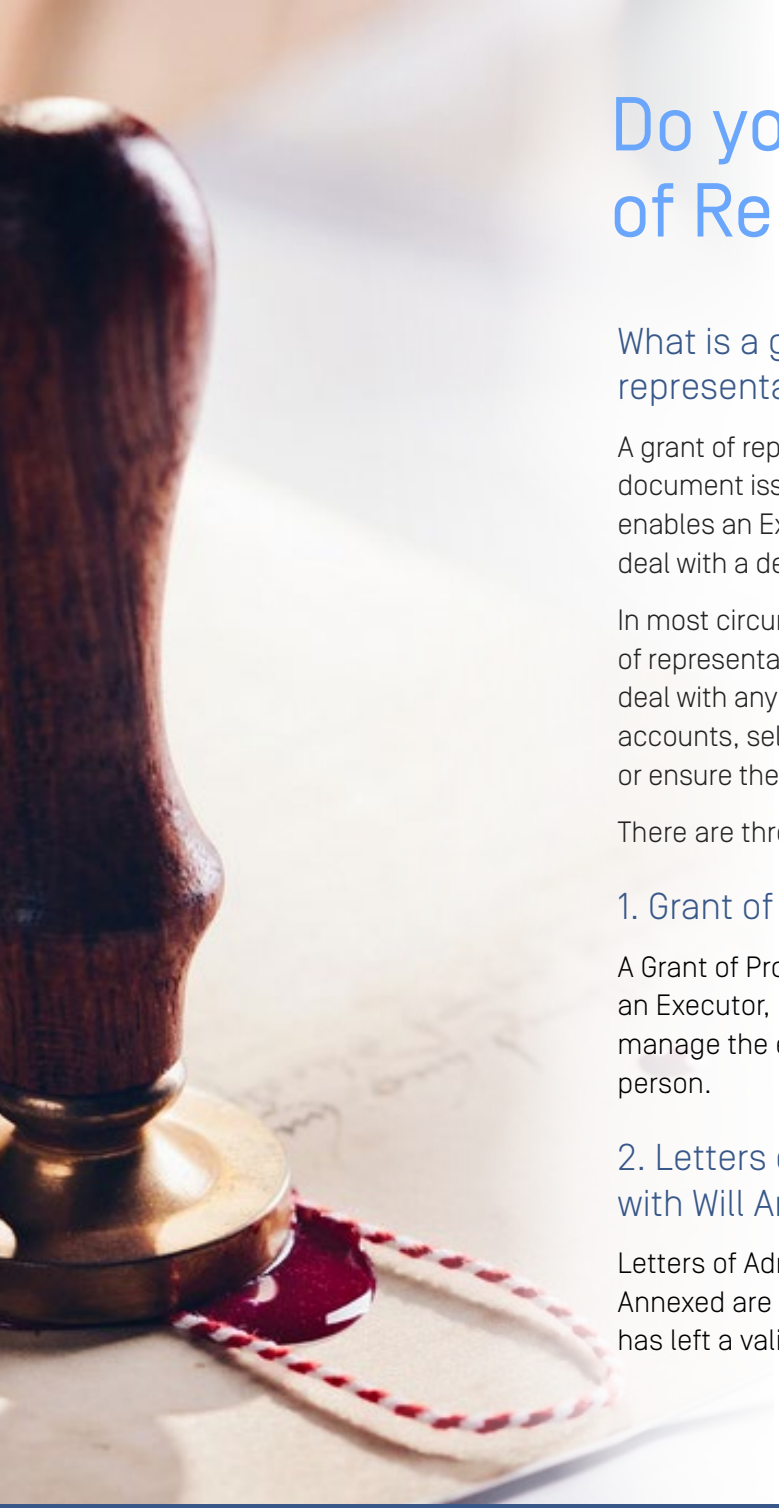


Do you need a Grant of Representation?

What is a grant of representation?

A grant of representation is the legal document issued by the Court which enables an Executor or Administrator to deal with a deceased person's assets.

In most circumstances, without a grant of representation, you will not be able to deal with any of the deceased person's accounts, sell or transfer their property, or ensure their debts are paid.

There are three main types of grants:

1. Grant of Probate

A Grant of Probate formally authorises an Executor, named in a Will, to manage the estate of a deceased person.

2. Letters of Administration with Will Annexed

Letters of Administration with the Will Annexed are issued when a deceased has left a valid Will, but a person other than the Executor is applying because the Executor cannot, or will not, apply for a grant of representation.

3. Letters of Administration

If there is no Will, then Letters of Administration are the proper grant of representation to enable you to deal with the deceased's estate. This grant of representation is usually obtained by the person who is the closest next-of-kin to the deceased.

Do I Need a Grant of Representation?

A grant of representation will be necessary where the deceased owned real estate in their sole name or as a tenant in common. A grant of representation will also be necessary where an institution in which the deceased owned assets requires a grant, prior to releasing assets.

Each institution has their own requirements as to whether a grant of representation is required. Often, the value of the assets held will determine whether a grant is required.

Where the deceased's assets are jointly owned, a grant of representation may not be required. In these circumstances, it will often simply be a matter of attending the particular bank of the account holder, with the death certificate, to transfer the accounts to the surviving joint holder.

This also includes real estate owned as a joint proprietor. In these circumstances, an application will need to be made to Land Use Victoria by the surviving proprietor to have the name of the deceased removed from the Certificate of Title.

How long does Probate take?

There is unfortunately no set answer to this question.

There are, however, various factors that will influence how long it will take to obtain a Grant of Probate and to administer an estate in Victoria.

Timeframes for Probate in Victoria

In order to obtain a Grant of Probate, the Court needs to be given information about the deceased person, the assets and liabilities of the estate, the witnesses to the Will, the Executors, and the Will itself. An advertisement of your intention to apply for Probate must also be placed on the Supreme Court website for at least 14 days prior to any application.

Often, making enquires to obtain all the necessary information can take a number of weeks. Also, you will need the Death Certificate for the application for Grant of Probate and possibly also for making proper enquires regarding the assets and liabilities.

Waiting for the Death Certificate to issue can therefore add a few more weeks to the process. Overall, if you have your application for Grant of Probate lodged within 1 to 2 months from the date of death, you are making timely progress.

The Court itself does not take long to process the application (maybe another 1 to 2 weeks) and this is done 'on the papers'. This means you do not have to go to a court hearing. There is also a general discretion for the Court to issue a 'Requisition' asking that you provide more information before they process the application and this can delay matters.

So, here we are a few months after death and you finally have a Grant of Probate. It is important to remember that this is the start of estate administration and not the end.

For a very simple estate, you might only need a further month or so to cash the assets and pay them to the correct Beneficiaries. However, it can often be more complex than that.

Factors that determine the timeframe to administer the estate include:

- Some assets will take time to cash or transfer. For example, if selling a property, final settlement might be 60/90/120 days from the day of sale.
- There is a 6 month period for challenges to be brought against the estate and Executors must wait until this period expires before distributing the estate, if there is any risk that a disgruntled family member might come forward.
- There might need to be final tax returns lodged for the deceased or for the estate. Failing to wait for the ATO to process these could leave the Executor personally liable for a tax bill.
- You might need to advertise for creditors to come forward and wait for a period of months while this advertising timeframe expires. This protects the Executor if they are unsure about all of the deceased's financial dealings and creditors.
- It might not always be a good time to immediately cash estate assets. For example, if shares just took a nose-dive, do you still sell regardless of available price?

There is a general rule that Executors have an 'executor's year' to complete estate administration. This means that you should be aiming to have the estate finalised and distributed by no later than 12 months from the date of death.

Taxes and Deceased Estates

Nothing is certain in life except death and taxes! There are important issues for an Executor to consider when dealing with deceased estates and their taxes.

Upon obtaining **Probate or Letters of Administration**, a deceased's Legal Personal Representative (i.e. Executor or Administrator) is responsible for finalising the affairs of the deceased and their estate. One crucial element is that of attending to any tax payable by the deceased or by their estate.

From a tax standpoint, a Legal Personal Representative is responsible for:

1. Notifying the **Australian Tax Office** ("ATO") of the death of the Deceased
2. Preparing and lodging any outstanding tax returns the deceased failed to submit and paying all outstanding tax obligations
3. Preparing and lodging a **Date of Death Income Tax Return** (if required)
4. If a tax return is required for the estate, preparing and lodging **Estate Income Tax Returns**, and
5. If the deceased was registered for an Australian Business Number ("ABN") or Goods and Services Tax ("GST"), preparing and lodging a final Business Activity Statement.

When is a Tax Return Required?

A deceased person and their estate have essentially the same requirements to lodge a tax return as any other taxpayer. The most effective way to assess whether a tax return is required is to ask yourself: 'If this were my own financial circumstances, would I need to lodge a tax return?'

When assessing whether a Date of Death Income Tax Return or an Estate Income Tax Return are required, consider the following three questions:

1. Did the deceased or the estate pay tax or have tax withheld?
2. Is the taxable income over the minimum income threshold?
3. Was the taxpayer conducting a business?

If you answer 'yes' to any of the above questions, then it is highly likely an income tax return will be required.

Date of Death Tax Return

Where the deceased was lodging tax returns up until their passing, a Date of Death Income Tax Return will likely be required for the part of the financial year from July 1 to the date of death of the deceased.

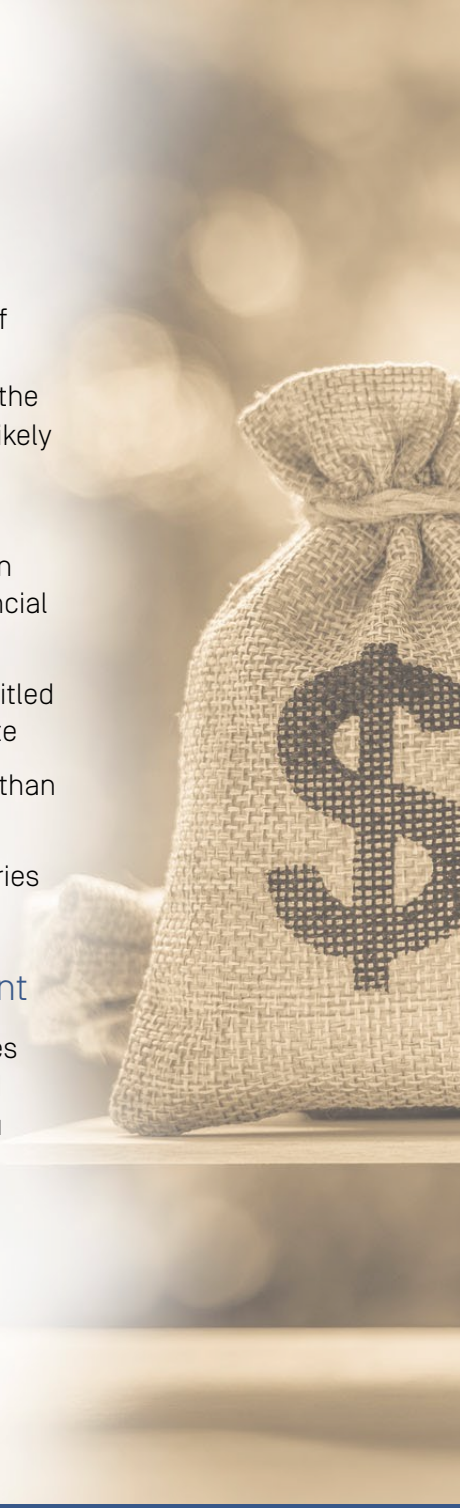
Estate Income Tax Return

An Estate Income Tax Return aligns itself with the administration period of the estate, that is, any income earned after the passing of the deceased. However, it is likely an Estate Income Tax Return will not be required where:

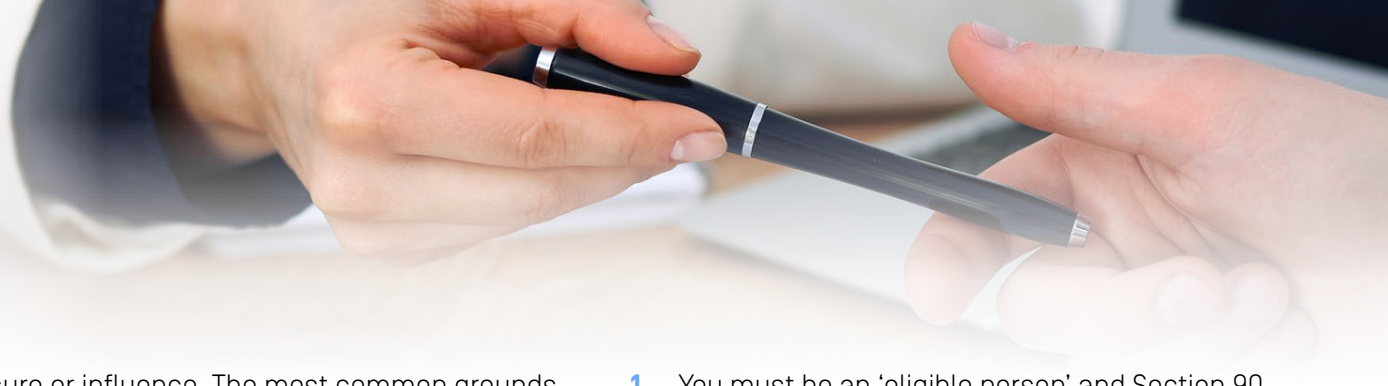
1. The deceased passed away less than 3 months before the end of the financial year
2. There is no Beneficiary presently entitled to a share of the income of the estate
3. The net income of the estate is less than $18,200, and
4. There are no non-resident Beneficiaries of the estate.

Final Business Activity Statement

If the Executor or Administrator continues to conduct a business which was owned and operated by the deceased, then you will need to apply for a new ABN and, if applicable, GST registration on behalf of the estate.



Can I challenge a Will?



The power to make a Will and chose how to distribute your estate comes with responsibility.

The law can intervene if a Will Maker (called a 'Testator') fails to properly consider who should receive their estate or if the Will results from illness, fraud or improper pressure.

If you have been omitted from a Will in Victoria, then there are two key claims that you may be able to bring. The basis for these claims are (in general terms):-

- That the Testator did not understand or agree to the terms of the Will when they executed it. This type of claim seeks to invalidate the Will; or
- That the Testator has not made proper provision for a person for whom they had an obligation to provide. This type of claim is based on Part IV of the *Administration and Probate Act 1958 (Vic)* ("the Act") and is often called a 'family provision' or 'Part IV' claim.

Invalidating a Will

In order for a Will to be valid, the Testator must have had the capacity to understand what they were signing and chose to sign free from any overt pressure or influence. The most common grounds used to argue that a Will is invalid are therefore:-

- That the Testator was too unwell (often with dementia or similar degenerative illness) to have the capacity to reasonably assess who should receive their estate; and
- That the Testator was coerced by someone into making their Will. This goes beyond a person asking or suggesting that a Will should be made to favour them and involves actually pressuring the Testator to sign against their better judgement.

If you believe a Will is invalid, you should take urgent steps to prevent a Grant of Probate from being issued and this is done by lodging a Probate Caveat in the Supreme Court. Alternatively, you can seek to have a Grant of Probate revoked if it has already issued, but this should occur as soon as possible after the Grant has been made.

Family Provision or Part IV claims

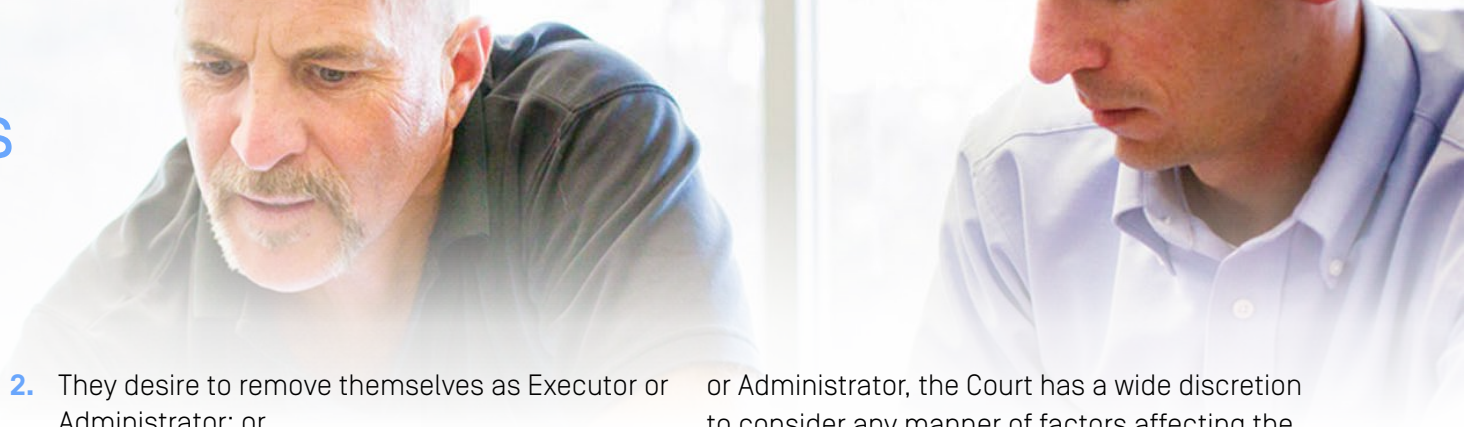
These claims are based on the concept that a Testator has a moral obligation to properly consider who should share in their estate. It does not rely on the Will being invalid. The steps in considering any family provision claim are:

1. You must be an 'eligible person' and Section 90 of the Act sets out the full list of eligible people. This includes spouses, domestic partners, children, step-children and other persons who were dependant on the Testator for support.
2. The Testator must have had a moral duty to make provision for you. A range of factors are considered here, such as your relationship with the Testator, whether you contributed to their financial or personal welfare, and whether you were dependant on them. It will also be considered whether there was any conduct by you that justified omission from the Will.
3. You must show that the provision made in the Will (if any) is not adequate for your maintenance and support. This requires an examination of your finances and usually those of other beneficiaries.

If the Court is satisfied that you ought to have further provision made for you, then a Judge will determine the appropriate amount.

There is a strict time limit of 6 months from the date of the Grant of Probate to commence a family provision claim.

Issues with Executors



Issues with Executors may arise if there are any disagreements in their ability to carry out their duties in the administration of an estate. The role of an Executor (or Administrator) is often open for dispute, whether between co-Executors or between Executors and Beneficiaries.

Executor's duties

Executors are appointed to administer, preserve and protect the estate of a deceased person on behalf of the Beneficiaries. The same applies to Administrators of an estate. These are positions of trust and confidence. Under some circumstances, there may be issues with Executors and Administrators in how they exercise their discretion in carrying out their duties. There are various steps that can be taken to dispute an Executor's role, which can result in the removal of the Executor.

Removing an Executor

The *Administration and Probate Act 1958 (Vic)* provides that a Court may order the termination of an Executor or Administrator where:

1. They remain out of Victoria for more than two years;
2. They desire to remove themselves as Executor or Administrator; or
3. They refuse, or are otherwise unfit or incapable to be the Executor or Administrator of the estate.

An Executor or Administrator may be deemed unfit in the following situations (among others):

- Maladministration (i.e. undue delay, making of unauthorised investments, or failure to observe provisions or directions in a Will);
- Misappropriation (i.e. dishonestly using estate assets or funds for their own private use); or
- Conflict of interest (i.e. making a profit in their administration).

Unworkable relationships between co-Executors is another common example for the removal of Executors.

It is important to note that a Court will not lightly set aside the Willmaker's wishes that a particular person administer their estate. Removal is only likely to occur if the Court finds that significant harm would be done to the interests of the Beneficiaries, should the Executor or Administrator not be removed.

In considering whether to remove an Executor or Administrator, the Court has a wide discretion to consider any manner of factors affecting the Beneficiaries and the estate at large.

How can I prevent issues with Executors of my Estate?

It is impossible to foreshadow whether there will be any issues with your Executors and the administration of your estate. However, there are some simple ways in which you can attempt to reduce the likelihood of a dispute after your death:

1. Appoint multiple Executors – by appointing multiple Executors, they are able to keep a check and balance on their co-Executor's actions, thus reducing the potential risk of misappropriation;
2. Appoint people you trust – sometimes the most obvious candidate to act as your Executor may not be the most appropriate. It is essential to appoint someone you trust and believe can competently handle your estate; and
3. Appoint a professional Executor – by appointing a professional Executor (i.e. a law firm or professional Trustee), this can have the effect of removing any personal bias or pre-existing animosity between Executors and/or Beneficiaries.

About Sharrock Pitman Legal

Sharrock Pitman Legal is a boutique law practice based in the eastern suburbs of Melbourne, having served businesses, not-for-profit organisations and the wider community for over 50 years.

Winner of the Law Institute of Victoria's 2018 Boutique Law Firm of the Year, and with expertise in various areas of law including wills and estate administration, complex estate planning and elder law, we can walk you through any queries or concerns you have regarding probate and estates.

Contact our probate and estates team today or check out **www.sharrockpitman.com.au/legal-solutions/probate-estates** for more details.

Sharrock Pitman Legal *On your side*

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