

A guide to probate in Victoria

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What is probate?

Probate is the process of officially proving the validity of a Will in deceased estate matters. That is, establishing the validity of the Will as the last Will of the deceased.

The executor of a deceased's Will is the person who makes the probate application. The application is made to the Supreme Court of Victoria. As part of the application, the executor will need to provide the court with the Will and death certificate of the deceased, as well as a list of the assets and liabilities of the estate.

When do you need probate?

Whether or not you need to apply for probate will often depend on the nature of assets the deceased left and the requirements of any organisations or institutions that held the assets at the time of death (e.g. banks or superannuation funds).

In most cases, institutions that hold an asset of the deceased will require a certified copy of the grant of probate before they release those assets for distribution. This is to ensure that you have the legal authority to manage the deceased's assets and also to confirm that the Will of the deceased is valid.

For example, you will certainly need probate if the deceased had real estate in their sole name, a significant shareholding or a considerable amount in a bank account. It is also likely you will need probate if the deceased has a refundable accommodation bond that is payable to their estate.

However, the requirements for each asset holder differ between institutions.

If you're an executor or administrator of a deceased estate, you should contact each asset holder and find out directly from them what requirements you must fulfil before they can release the deceased's assets to you. This can differ on a case-by-case basis.

For example, sometimes banks and/or other institutions will not require a grant of probate in circumstances where the amount held in the name of the deceased is minimal or below a certain threshold.

We provide an obligation-free discussion where we can discuss your particular circumstances, and our lawyers can help you to understand whether or not a grant is required.

Call Smith Family Law for probate advice and assistance: 03 8625 8957

How to apply for probate

There are a few ways to obtain a grant of probate in Victoria.

You can elect to:

- instruct a lawyer to act on your behalf;
- authorise a trustee company to act as executor or administrator;
- make the application as a self-represented person (without a solicitor); or
- if eligible, instruct the Probate Office small estates optional service to prepare your application. For a fee, the Probate Office will prepare the paperwork to apply for a grant of probate on your behalf, provided that the estate is considered 'small'.

4 steps recommended when applying for a grant of probate

1. Determine whether a grant of probate is required (including whether you need to apply for a grant of probate or a different type of grant of representation).
2. Advertise your intention to apply for a grant of probate by publishing your advertisement on the probate online advertising system.
3. Complete your online application via 'RedCrest – Probate'. Through the online application, you will be guided through questions to generate the documents required for your application to be processed. These documents will need to be printed, signed and witnessed.
4. Upload your properly signed documents, together with the deceased's Will and a certified copy of the death certificate. The hard copy of the original Will also needs to be provided to the Supreme Court of Victoria.

If the Supreme Court of Victoria requires any further documents or information, you will receive an email that details the further steps required, known as "requisitions".

If the grant of probate is made, you will be able to view, download and print the grant of probate.

Depending on the circumstances of the Will and the estate, the processes of publishing the advertisement, preparing the necessary documents and navigating the Supreme Court online system can be quite complex.

We recommend you obtain legal advice in relation to the preparation of probate documents and making your probate application, as there are risks associated with DIY probate.

If you would like us to act for you in obtaining a grant of probate, our lawyers will prepare and lodge the necessary documents for you.

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Time limits to apply for probate

Where the executor of a Will has not applied for a grant of probate within six weeks of the death of the deceased, renounced their executorship, or otherwise brought the Will into court, Section 15 of the *Administration and Probate Act 1958* (Vic) ("the Act") gives the court the power to summon the executor to show cause as to why they have not or should not do so.

However, in practice, the strict time limit prescribed in the Act is not commonly enforced. Generally speaking, it is recommended that you apply for probate of a deceased estate promptly after the deceased's death.

Delays in applying for probate can potentially complicate the administration of the estate, especially if there are changes in the value of estate assets, and it can lead to practical issues in terms of settling debts and distributing assets.

Generally, an estate should be distributed within one year of the death of the deceased, known as the 'executor's year', although this can be subject to the complexity and nature of the estate. After one year, beneficiaries may be entitled to receive interest on the value of their gift in a Will.

How do I know that the Will is valid?

A "valid" Will is one that has been properly executed according to the legislative requirements set out in the Act.

In Victoria, for a Will to be properly executed and valid, it must be:

- in **writing** and signed by the Will-maker;
- **intended** to be the Will-maker's Will;
- **signed** by the Will-maker on **each page** in front of at least **two authorised witnesses** who are present at the same time; and
- **dated** at the time of signing.

These formal requirements are in place to ensure that the Will reflects the Will-maker's true wishes and is not the result of fraud, undue influence or impaired testamentary capacity. If a person does not make a Will freely and voluntarily, does not have testamentary capacity, or does not intend to make a Will, then the Will is invalid.

If you have any concerns about the validity of a Will, our lawyers can help you to determine the next steps should the validity of the Will be uncertain.

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Can any of the estate assets be accessed before probate?

Accessing estate assets before probate is granted can be challenging, depending on the type of asset in question. Typically, financial institutions and other entities may require the legal authority provided by a grant of probate before releasing or transferring assets to the executor.

However, there are some exceptions that may be considered, although each case can differ.

Jointly held assets

If certain assets are jointly held, the surviving joint owner may gain access to those assets without waiting for probate, and the transfer of such assets to the remaining joint owner will not require a grant of probate.

Insurance policies and superannuation

Proceeds from life insurance policies and superannuation may be paid directly to nominated beneficiaries without waiting for or requiring probate.

Small estates

In some cases, if the asset holding (such as minimal funds in a bank account) is relatively small, financial institutions may release funds without probate. The threshold for what is considered a small asset holding can vary, so it's advisable to check with the specific institution.

It's important to contact the relevant financial institutions and it may be prudent to obtain advice from a lawyer to discuss the specific circumstances of the estate. Seeking legal advice early in the process can help navigate these complexities and determine the appropriate steps to take.

Keep in mind that attempting to access estate assets without proper authorisation may cause complications in the future.

Will I be paid as the executor?

In accordance with the *Administration and Probate Act 1958*, an executor, administrator or trustee of an estate may apply to the Supreme Court of Victoria to be paid commission for their “pains and trouble” in discharging their obligations as a legal representative of the estate. The commission sought must be “just and reasonable”.

However, executors and administrators of a deceased estate must be aware that they do not have an automatic right to receive commission.

For more information, visit our earlier blog, “Does the Executor of a Will get paid?”

Do I have to keep beneficiaries informed during the probate process?

An executor has a legal obligation to keep the beneficiaries informed during the probate process.

During the probate process, an executor is expected to perform the following tasks.

1. **Provide notice**

•Notify beneficiaries that they have been nominated executor of the Will.

•Inform beneficiaries of the probate application and keep them updated on the progress of the probate process.

1. **Inventory and valuation**

•Compile an inventory of the deceased person's assets and liabilities.

•Keep beneficiaries informed about the valuation of assets.

1. **Debts and expenses**

Inform beneficiaries about the settlement of the deceased person's debts and funeral expenses.

1. **Distribution of assets**

•Communicate the intended distribution plan for the estate assets.

•Keep beneficiaries informed about the timeline for distribution.

1. **Accounting and reporting**

•Provide an accurate and detailed account of the estate's financial transactions.

•Ensure beneficiaries receive periodic reports on the administration of the estate.

Executors should document their actions and decisions in relation to probate carefully, as this documentation can be valuable in case any disputes arise. If in doubt, seeking legal advice is recommended to ensure compliance with legal obligations.

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How long does probate take?

It may take several weeks for the application to be granted from the date you apply, assuming there are no issues with your application (noting that you can only apply after your advertisement has been advertised for 14 days).

Are there costs associated with applying for probate?

The costs associated with applying for probate may include the following:

1. **Advertisement fee:** There is a fee payable to the Supreme Court of Victoria when publishing your intention to apply for a grant of probate. The amount of this fee is subject to change, so it's important to check the current fee schedule on the Supreme Court's website.
2. **Filing fee:** There is a fee payable to the Supreme Court of Victoria when lodging the probate application. The amount of this fee varies depending on the size of the estate and is subject to change, so it's important to check the current fee schedule on the Supreme Court's website.
3. **Legal fees:** If you choose to seek legal assistance in preparing and filing the probate application, you may incur legal fees. Legal professionals can provide guidance on the process, ensure all necessary documents are prepared correctly, and represent your interests before the court.
4. **Copy/certification fees:** You may need to obtain certified copies of the grant of probate, and there may be fees associated with obtaining these copies. If you engage a lawyer to apply for probate on your behalf, these fees will usually be included in their service.

It's important to note that these costs can vary depending on the complexity of the estate and the specific circumstances of the probate application. Executors should consider consulting with a lawyer to ensure a smooth probate process and to obtain accurate information about the associated costs in their particular case.

Legal fees and disbursements (such as court filing fees and any transfer of land fees) are a liability of the estate and, therefore, payable by the estate and not by the executor personally.

Any legal fees or disbursements that are paid by an executor from their own funds prior to the grant of probate being made (and therefore prior to the executor being able to access and collect the estate assets) can be reimbursed to them upon the grant being made. This means that the executor can reimburse themselves as soon as the assets become available and are collected from the organisations and institutions, and prior to the distribution of the estate.

Get help from a deceased estates lawyer

Although it is possible to go through the process of applying for a grant of probate on your own, as you can see, there can be a lot of hurdles to overcome. In a small and simple estate, DIY probate may be suitable, however, if there are any complications or complexities with the estate, legal advice and assistance is highly recommended.

The deceased estates team at Smith Family Law has significant expertise and experience in probate applications, including complex estates. Whether you're just starting out on the process of applying for probate or you're halfway through and find you need assistance, please get in touch.

Contacting Smith Family Law

03 8625 8957

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This blog is of a general nature and should not be relied upon as legal advice. If you require further information, advice or assistance for your specific circumstances, please contact us.