The risks of DIY probate

Author: Kerry-Ann Smith
Email: kerryann@smithfamilylaw.com.au
Date: **Monday July 24, 2023**

In the event of the death of a loved one, it is possible to apply for a Grant of Probate or Letters of Administration in order to deal with the assets of the deceased estate without the help of a lawyer. This is referred to as 'DIY Probate' and, despite being an attractive cost-saving option, may pose significant risks which are worth considering.

This blog explores the risks associated with DIY probate and the ways in which you can minimise these risks when applying for a Grant.

What is a Grant of Probate?

A Grant of Probate is a document issued by the Supreme Court of Victoria ('the Court') which enables the executor to deal with the deceased's assets and also allows the executor to lawfully administer the deceased's estate in accordance with their Will.

A grant of Letters of Administration is similar to a Grant of Probate, however, it is a document issued by the Court in circumstances where the deceased left no Will, which enables an Administrator (in most cases, the next of kin or person with the greatest entitlement in the estate) to deal with the deceased's assets and distribute them to the beneficiaries in accordance with the formula prescribed in the *Administration and Probate Act 1958* (Vic) ('the Act').

In order to obtain a Grant, the executor (or, in the case of Letters of Administration, the person with the greatest entitlement in the estate) must make an application to the Court. As part of this application, the executor must provide the Court with:

- the last Will of the deceased;

- The deceased's death certificate;
- a list of the deceased's assets and liabilities; and
- any other document that the Court may request.

Who can apply for a Grant of Probate or Letters of Administration?

In general, only an executor (or the alternative or substitute executor named in the Will in the event that the first named executor dies before the deceased or is unable or unwilling to obtain the Grant) is permitted to apply for a Grant of Probate. An executor is the person or people named in the deceased's Will who is or are responsible for collecting the assets and administering the deceased's estate after their death. You can learn more about their role in our earlier blog, "The role of executor of a Will".

In the case of there being no Will, the person with the greatest entitlement in the estate is the most appropriate person to apply for a Grant of Letters of Administration of the estate.

An executor or administrator can apply for a Grant of Probate or Letters of Administration on their own, or they may engage a lawyer to do so on their behalf.

Call us for a free initial consult: 03 8625 8957

Can you be held personally liable for making a mistake as an executor?

If you are the executor or administrator of an estate, it is possible for you to be held personally liable for errors and oversights that you may make when applying for a Grant and administering the deceased estate. The potential for such errors will often increase with a DIY Probate.

This means that you may be sued by the beneficiaries of the Will or the estate of the deceased if, for example, you do any of the following:

Not properly account for all of the assets and liabilities of the deceased estate

An executor or administrator is responsible for identifying, managing, preserving and collecting the assets of the estate prior to distributing those assets to the beneficiaries.

If you fail to investigate, locate and declare all assets and the beneficiaries do not receive all of what they are entitled to, you may be held personally liable.

The executor or administrator is also responsible for ensuring the liabilities of the estate are identified and paid prior to distributing the estate to the beneficiaries. This can be particularly important if there are liabilities of the estate which you do not declare and which remain unpaid

when you distribute the estate. As a result, this liability may pass on to you personally.

Failure to act in a timely manner

If you delay too long in administering the estate of the deceased, you may be held personally liable and could potentially be removed as executor.

Acting too quickly when administering the deceased estate

It is critical that all aspects of the estate administration process are dealt with and that nothing is left undone prior to distributing the estate to the beneficiaries. Distributing an estate too early (perhaps as a result of pressure from the beneficiaries who wish to receive their inheritance as soon as possible) can cause complications and leave an executor open to claims from beneficiaries.

For example, an estate should not be distributed until six months from the date of the Grant (that is, the date the court issued the Grant of Representation) has passed. This is because an executor or administrator should wait to see whether any family provision claims or challenges to the Will are made by eligible persons against the estate during that time.

Avoiding conflict of interest

An executor has a fiduciary duty to act in the best interests of the beneficiaries. They cannot put their own interests above that of the beneficiaries. It is, therefore, important to avoid any conflict of interest when administering a Will or the estate, particularly in circumstances where the executor is also a beneficiary of the Will.

Dealing with tax liabilities of the deceased estate

The executor or administrator needs to ensure that the tax liabilities of the deceased and of the estate are dealt with and that any necessary tax is paid prior to the distribution of the estate to the beneficiaries.

Administering the estate in accordance with the law

It is important that an executor (or an administrator if there is no Will) distributes the estate correctly in accordance with the terms of the Will or in accordance with the formula set out in the Act if there is no Will. It is, therefore, critical to obtain proper advice from a lawyer experienced in understanding and interpreting the legal jargon and complexities that can often be contained in Wills.

Deciding on a DIY Probate can expose you to many unknowns about the legal processes associated with administering a deceased estate.

Where the deceased left no Will, it is also important to obtain advice from an experienced lawyer to properly identify the beneficiaries of the estate, as the formula prescribed by the Act, known as the Rules of Intestacy, can, in some cases, be complex and difficult to understand. If an estate is distributed to a person or persons who are not actual beneficiaries in accordance with the law, or if certain beneficiaries have missed out, the administrator can be held liable.

It is crucial that an executor or administrator of a deceased estate is aware of the above issues and the steps to take to avoid being held personally liable. It is advisable that you consult an experienced deceased estates lawyer in relation to these issues and your obligations as executor or administrator and seek the assistance of a lawyer in obtaining the Grant and administering the estate.

Call us for a free initial consult: 03 8625 8957

Other risks and difficulties of DIY Probate

There are also other risks and difficulties of DIY Probate, including the following:

Your application may be rejected

If you make a mistake or fail to provide all required information and documents in your application, the Court can reject the entire application and make you apply again after rectifying the mistake(s). This can cause delays in administering the estate and increase costs.

The deceased may have an invalid Will

In some circumstances, the deceased may have an invalid Will. In this circumstance, you will not be able to be granted Probate but instead may need to apply for a Grant of Letters of Administration.

Knowing what constitutes an invalid Will is not always straightforward, and you may require legal advice to determine which option is correct.

There may be other unusual circumstances associated with the estate

Without the advice of a lawyer, you may be unable to identify whether your application is unusual. Some examples of unusual situations where it is critical to obtain the advice of a lawyer include the following:

1. The deceased may not have had testamentary capacity to make the Will, such as where they were of advanced age or suffering dementia at the time the Will was made;

2. The deceased made an informal Will, such as where there are handwritten amendments to the Will, or the Will was not properly executed (for example, the Will was not witnessed);
3. The deceased made multiple Wills in close proximity;
4. Where the assets of the estate are complex or the deceased left assets overseas; and
5. Where the executor has predeceased the deceased or is unable, for whatever reason, to prove the Will, and there is no alternate or substitute executor named in the Will.

Get help from a deceased estates lawyer

Smith Family Law will be able to assist you in navigating the complexities involved in applying for a Grant of Probate or Letters of Administration in a cost-effective and time-sensitive manner and advise you of your responsibilities and obligations as an executor or administrator in order to avoid being held personally liable.

Contacting Smith Family Law

03 8625 8957

info@smithfamilylaw.com.au

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.