

When is probate not required in Victoria?

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In order for an individual to be legally authorised to administer the estate of a deceased person, they must obtain a Grant of Representation from the court. A Grant of Probate or a Grant of Letters of Administration are the two ways in which a person can obtain a Grant of Representation.

However, there are occasions when a Grant of Probate is not required or not appropriate, including some circumstances where the following applies:

- Small estates;
- Jointly held assets;
- Insurance policies and superannuation;
- Assets held in a trust; and
- Intestacy (where a person dies without a valid Will).

What is a Grant of Probate?

A Grant of Probate is issued when the deceased has left a valid Will, and the executor(s) named in the Will are appointed to administer the estate. The grant confirms the validity of the Will and the authority of the executor(s) to administer the estate as outlined in the Will.

The process also involves identifying and inventorying the deceased person's assets, paying off debts and taxes owed by the estate, and distributing the remaining assets to the beneficiaries named in the Will.

Typically, institutions holding assets belonging to the deceased (eg, banks and other financial institutions) will request a certified copy of the Grant of Probate before releasing those assets to the executor. This requirement is in place to ensure that the executor possesses the necessary legal authority to manage the deceased's assets and to verify the validity of their Will.

Probate is usually necessary if the deceased owned real estate solely in their name, held a substantial shareholding, or maintained a significant balance in a bank account. Additionally, probate may be required if the deceased has a refundable accommodation bond payable to their estate.

However, it's important to note that the specific requirements can vary among different asset holders, and it is important to make inquiries with those asset holders prior to obtaining a Grant of Probate. If you're at all uncertain about your obligations as an executor, you should seek legal advice.

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When is probate not required?

Although each case may differ depending on its circumstances, generally, a Grant of Probate will **not** be required in the following instances:

Small estates

In circumstances where asset holdings are relatively small, institutions that hold these assets may release funds without the need for probate. Whilst the threshold for what is considered a small asset holding can vary depending on the asset holder, in some instances, assets with a value of less than $50,000 will not require a grant of probate.

Jointly held assets

Where property or other assets are jointly held, the surviving joint owner will be entitled to those assets according to the Rules of Survivorship. This means that the deceased's interest in the asset will not form part of their estate when they die but will rather transfer automatically upon their death to the surviving joint owner. This is common, for example, where a married or de facto couple owned all property (the family home, bank accounts, investments) in joint names.

Insurance policies and superannuation

In the case of some assets, such as life insurance policies and superannuation accounts, the account holder is able to nominate beneficiaries to receive the death benefit payment directly. The proceeds of these policies and superfunds may be paid directly to nominated beneficiaries, as opposed to the estate, thereby not requiring probate.

It is important to note that in the case of superannuation, the trustee of the superannuation fund decides who to pay the deceased's superannuation death benefit.

If the deceased makes a non-binding nomination to a beneficiary, the trustee need only take the deceased's nomination and their wishes into consideration when determining who to make the payment to. The trustee may choose to make the payment of the death benefit to the estate for distribution in accordance with the Will.

However, if the deceased left a valid and non-lapsing binding nomination, the trustee has no discretion and **must** pay the death benefit in accordance with the nomination, that is, directly to the nominated beneficiary.

You can read more about this in our earlier blog, "Superannuation and your Will".

Assets held in a trust

If property is held in a trust, the assets may be transferred to the beneficiaries according to the terms of the trust deed without the requirement to obtain probate.

Intestacy

When a person dies without a valid Will or where the Will does not effectively dispose of all of the deceased person's assets, they will have died 'intestate'.

When an intestacy occurs, rather than obtaining a Grant of Probate, generally, the person with the largest interest in the deceased's estate will be entitled to apply for Letters of Administration. That administrator will then be able to manage and administer the estate.

Whilst the above exceptions provide an idea of when probate is **not** required, it is always important to contact the relevant financial or proprietary institutions to determine whether certain assets do not require a grant if you are unsure.

Keeping in mind that attempting to access or deal with estate assets without proper authorisation may cause complications in the future, it is recommended that you seek legal advice early in the process to determine the appropriate steps to take.

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Still not sure if you need a Grant of Probate

There can often be a large and diverse range of assets left in a deceased person's estate. Identifying which assets will require a Grant of Probate to be released and which will not, will often require legal advice from a qualified professional.

We recommend executors seek legal advice and assistance with obtaining a Grant of Probate if:

- they know that asset holders will require a grant to release the assets;
- there are doubts regarding the validity of the will (for example, did the Will-maker have capacity when making the Will?); or
- whenever they have concerns about potential claims from creditors or other individuals who may seek to contest the Will.

Some executors choose to undertake the process of probate on their own, however, this can come with risks. As an executor, you need to ensure you are fully aware of all your obligations. To learn more, you can read our earlier blog, "The risks of DIY Probate".

Get help from our Wills &Estates lawyers

Whilst applying for a Grant of Probate for small or simple estates without legal representation or advice may seem appealing, legal advice is recommended so that you can understand your duties, obligations and responsibilities, particularly where complexities and difficulties may arise.

Our deceased estates team have significant expertise and experience in probate applications, including complex estates. We can assist you if are just getting started in applying for probate or you are experiencing troubles with your application and require legal assistance to protect your interests and the interests of the beneficiaries.

Contacting Smith Family Law

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Further reading on probate

- The role of executor of a Will
- What happens when executors do not agree?
- How to remove an executor of a Will
- How long does probate take in Victoria?
- Tasks for the executor after probate is granted

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.