



6 things to know before applying for probate

Author: [Kerry-Ann Smith](#)

Email: kerryann@smithfamilylaw.com.au

Date: Sunday September 15, 2024

Applying for a [Grant of Probate](#) is a crucial step in administering a deceased person's estate. It ensures that the Will is proved (i.e. validated) by the Supreme Court of Victoria ('the Court') and the estate is distributed according to the deceased's wishes. This process can be daunting and complicated for an executor, and knowing where to begin can make a world of difference. Here are six key things to know before you begin the probate process.

A valid Will is required for a Grant of Probate

Before [applying for probate](#), it's essential to confirm that the deceased person left a valid Will. In Victoria, the elements that make a Will valid are set out in Section 7 of the *Wills Act 1997* (Vic). The Will must be:

- in writing and signed by the Will-maker;
- intended to be the Will-maker's Will;
- signed by the Will-maker in the presence of at least two witnesses who are present at the same time; and
- attested and signed by at least two of the witnesses in the presence of the Will-maker.

There are a number of other factors to be taken into account when assessing whether the deceased has left a valid Will. For instance, at the time of making the will, the Will-maker must have been over the age of 18 and have had testamentary capacity to make the Will. Testamentary Capacity requires the Will-maker to be of sound mind at the time of making the Will and have understood the legal consequences of making a will.

You can read more about this in our earlier blog, [“What is testamentary capacity and how is it assessed?”](#)

Without a valid Will, a person's estate will be distributed according to the [intestacy laws](#) set out in the *Administration and Probate Act 1958* (Vic), which dictate how assets are distributed when no valid Will exists.

Who should apply for probate?

Typically, the [executor named in the Will](#) is the appropriate person to apply for a Grant of Probate. If no executor is named or the named executor is unable or unwilling to act (and there is no named alternate executor), the Court will appoint an administrator to manage and administer the estate. In such a case, the appointed administrator will usually be the main beneficiary of the estate, or the Court may appoint an independent person or trustee company.

Understanding how co-executors work where there are multiple executors of a Will

In situations where the Will-maker nominated more than one executor (known as 'co-executors') to administer the estate, a combined application for probate can be made to administer the estate jointly. However, Victorian law limits the number of co-executors capable of applying for probate to four.

If a nominated co-executor in the Will does not wish to apply for probate, they may renounce their executorship by signing and filing a document with the Court as part of the application made by the executor who does wish to apply for probate.

In cases where there are multiple executors and one or more executors are unwilling to apply for a grant but also refuse to formally renounce their executorship, the remaining executors can apply for a Grant of Probate themselves, with the option known as 'leave reserved' for the other executor to apply for the grant at a later time.

It's important to understand who is appropriate, and who has the legal entitlement, to apply for probate to avoid any conflicts or [delays in the administration of the deceased estate](#).

Should I provide a copy of the Will to the beneficiaries?

Generally, it is prudent to provide a copy of the Will to the beneficiaries named in the Will prior to the Grant of Probate. This helps to manage expectations and ensures that all parties are aware of the deceased's wishes.

Certain family members or other persons who have not received provision (any inheritance) in the Will may also approach the executor requesting a copy of the Will. Section 50 of the *Wills Act* sets out those persons who are entitled to [inspect or receive a copy of the Will](#).

Whilst any person can obtain a copy of the Will from the Court after probate is granted (as the Will becomes a public document), it is often prudent to comply with such a request when it is received in instances where the person is legally entitled to see the Will.

Do I even need probate to distribute the assets of a deceased estate?

Not all estates require probate. Whether or not probate is necessary depends on the size and complexity of the estate, as well as the types of assets involved. It's important to [assess the estate to determine if probate is required](#) before making your application.

In most cases, institutions that hold assets of the deceased will require a certified copy of the Grant of Probate and the death certificate before releasing those assets to the executor for distribution in accordance with the Will. For instance, probate is required if the deceased owned real estate solely in their name, held significant shareholdings, or had a substantial amount in a bank account.

However, each institution may have different requirements regarding the release of assets and these requirements can also vary on a case-by-case basis. It is therefore important that an executor or the lawyer acting for the estate contacts each asset holder or institution directly to understand the specific requirements that need to be met.

Smith Family Law offers an obligation-free initial discussion where we can review your specific circumstances and determine whether a Grant of Probate is necessary.

[GET ADVICE FROM A PROBATE LAWYER: 03 8625 8957](#)

Possibility of Family Provision Claims – contesting the Will

During the probate process, there is a possibility that family members or dependents might make a [Family Provision Claim](#) against the estate if they believe they were inadequately provided for in the Will or left out altogether. These claims can complicate and prolong the administration of the estate and delay the distribution of the deceased's assets to the beneficiaries.

As an executor or an administrator, it is important to be aware of this possibility and seek legal advice if you anticipate any such claims being made.

How a probate lawyer can help

The deceased estates team at Smith Family Law has significant expertise and experience in applying for Grants of Probate and Letters of Administration. For help getting started, contact us to organise a free initial consultation with one of our experienced deceased estate lawyers.

Contacting Smith Family Law

[03 8625 8957](tel:0386258957)

info@smithfamilylaw.com.au

Learn about what to expect at your initial consultation in our earlier blog, ["What to expect from your first appointment with a probate lawyer"](#).

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.