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## APPLYING FOR PROBATE

### What is Probate?

In Australia our system of law is still largely based on the English system. Over many centuries in England the Church and the Government developed the law in various areas, including in the area of ownership of property. At one stage you had no right to choose how you left your property. It would automatically pass to your eldest son. There was also a time when a married woman was not able to own property herself, it automatically belonged to her husband. Fortunately, the law has evolved considerably since those days.

When an adult dies in Australia, there is initially no person who has the legal right to deal with the property which belongs to the person who has died (the deceased). However, the Supreme Court in each state has the power to make an order appointing a person (or more than one person) to deal with the property belonging to the deceased. This order is called either a **Grant of Probate**, or a **Grant of Letters of Administration**.

Where the deceased leaves a valid Will, appointing an Executor, it is the obligation of the Executor to either apply to the Supreme Court to be given the power to deal with this estate or to renounce (or reject) the appointment as Executor.

Once the Executor has complied with the Court's requirements, the Court makes an order granting Probate, which then empowers the Executor to transfer or sell the property of the deceased to pay the debts of the deceased, to meet any claims against the deceased, and to generally carry out the wishes of the deceased as set out in their Will.

### What Happens If There Is No Will?

If an adult Australian dies without leaving a current and valid Will or if the Executor named in the Will has died or is unable or unwilling to act as Executor, then it is necessary to apply to the Supreme Court for a **Grant of Letters of Administration** instead of a Grant of Probate.

This involves more work than an application for a Grant of Probate because it is necessary to locate and seek the consent of all next of kin and all beneficiaries to the appointment of a particular person (or more than one person) as Administrator of the Estate. If the next of kin or the beneficiaries fail to agree on who is to be appointed, the Court then makes the decision. The costs of this legal work will normally be met out of the Estate of the deceased person.

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## **How Do I Apply For Probate?**

The first requirement is to locate the signed original of the last Will of the deceased. This is sometimes much more difficult than you would anticipate. We often have situations where the family believe that the deceased may have made a later Will than the one which has been located. It is then necessary to write to any solicitors whom the deceased may have seen, and even to advertise to locate the last Will. Sometimes it *disappears!*

The next requirement is to identify all of the assets (or property) and liabilities (including debts) of the deceased. This can be extremely difficult where there are no comprehensive records and where property may be interstate or overseas.

It is also possible for liabilities that were not anticipated to arise. For example, if the deceased is in a business and a claim is made against the business, which then results in court proceedings, and those court proceedings take years to finalise, it may not be possible to finally work out what the liabilities of the deceased are, until after the court proceedings have been completed.

In addition, there are often difficulties in determining the tax liability of the deceased. For example, if the deceased purchased property to which improvements were made over several years, it may be almost impossible to calculate the Capital Gains Tax liability if no comprehensive and detailed records exist to support those improvements. To apply for Probate it is necessary to prepare a statement listing all of the assets and all of the liabilities as at the date of death. This involves writing to any banks with which the deceased had accounts and obtaining from the banks an actual balance of each account, including interest, as at that date. The Executor may do this personally or may have a solicitor or accountant do this on their behalf.

Once this information has been collected, and the statement of assets and liabilities has been prepared, a number of documents are prepared, (usually by a solicitor), so that they can be lodged at the Supreme Court and the Grant of Probate can be obtained. If the Supreme Court is not satisfied with the information contained in the documents which have been lodged, then it will “raise requisitions” (ask for more information) which may include proof that the deceased was mentally capable at the time he or she signed their last Will.

Where the deceased has left adequate records of their assets and liabilities, and the original of their last Will, it is a relatively simple exercise to obtain a Grant of Probate. It is usually where the Will is not valid, or the Executor has died, or all assets and liabilities cannot be easily identified, that this becomes an expensive and time consuming exercise.

### **Butlers**

At Butlers we pride ourselves on being “The Personal Law Firm”. Our commitment at Butlers is to make the law more accessible, affordable, understandable and human. We aim to reduce your concerns by speaking and writing in plain English, cutting through legal jargon and keeping you informed at all times. Through it all, we work closely with your family’s accountant, bank manager, financial adviser, and other professionals as required. We therefore encourage you to contact us if we may be of any assistance.