



## **Ideas for information to leave executors and trustees**

An important aspect of estate-planning is equipping your executors with the information and documents they will need to administer your estate with minimum cost, delay and inconvenience. It is up to you to decide what information you are comfortable providing to your executors during your lifetime, and in what manner you provide it (eg. by giving it directly, leaving letters in sealed envelopes, splitting information between people, or leaving all information with a trusted person such as your solicitor, accountant or financial advisor, with instructions to your executors about its location).

Some possibilities you might consider are set out below. Please contact us if you would like legal advice in relation to any of these options.

**Contact details**- for beneficiaries, next of kin, friends and acquaintances to be advised, guardians of minor children, persons who hold power of attorney for you, your accountant, your financial planner or financial advisor, your solicitor, your personal banker or broker, your landlord or investment property manager, and your employers or business partners.

**Account details** (or as much identifying information as you are comfortable recording for security reasons- eg. just the name of the bank or location of the bank branch)- for bank accounts, managed funds, superannuation funds, and utility or subscription accounts.

**Original documents** (or their locations)- including certificates of title for properties, motor vehicle registration papers, insurance policies, birth and marriage certificates, Court orders (such as family law orders), trust deeds, death certificates for any dependents of yours, and rights of burial you have pre-purchased.

**Details**- of any undocumented loans you have made or received, and on what terms (eg. so that your executors have evidence of any amounts owed to your estate), email and social media accounts (noting that the information you record, depending on the manner in which you record it, could pose a security risk for you during your lifetime, or for your estate after your death), and pre-paid funeral plans.

**Memoranda**- containing guidance to your executors and the guardians of any minor children about the investment and distribution of your assets, the manner in which you would want your children to be brought up or your pets cared for, and any messages you want conveyed after your death.

**It is vital that guiding memoranda state that they are, ‘An expression of my non-binding wishes only, intended to provide guidance to my executors and others, and not a Will or other testamentary document revoking my existing Will’.**



### **Information for executors and trustees**

As an executor or trustee, you should seriously consider seeking qualified legal, taxation and financial advice ahead of administering the estate. As at the date of this memorandum, the reasonable cost of your seeking such advice is, in most instances, payable by the estate. The information contained here is general only, and is not a substitute for legal advice. It is also possible that the legal processes and rules relating to estates have changed since the date of this memorandum. Please also note that legal procedures differ between Australian States and Territories, and may be entirely different in overseas jurisdictions.

Nevertheless, the information below may assist you in making your own enquiries.

1. First steps- There is generally little you can do without the original Will and a death certificate. You should locate these documents. Often, a close family member or funeral director will organise for a death certificate to be produced. Common locations of original Wills include solicitors' offices, bank safe custody vaults, and folders of personal papers kept at home.
2. Funeral costs- A funeral can usually be held while you are obtaining the documents above. Keep receipts for funeral costs. In most instances, these can be repaid from the estate. If no money is available to pay for a funeral, but the deceased had bank accounts, some banks will agree to release funds to pay a funeral director's invoice on production of that invoice in branch. Bank accounts will otherwise be frozen as soon as the bank is aware of the death. As part of this freezing, no penalties should be applied to outstanding loans during the reasonable period of administration.
3. Ascertaining assets and liabilities- In order to seek probate or distribute the estate, you will need to know the extent of its assets and liabilities. Generally speaking, liabilities must be paid before assets can be distributed. You may wish to write to each of the banks the deceased banked with, the Australian Taxation Office, the deceased's superannuation fund, anyone who used a power of attorney to act for the deceased, and any utility providers to ascertain details of assets and liabilities. You may also wish to contact the deceased's accountant. Notifying utilities and other service providers may also enable you to cancel subscriptions and prevent overdue notices from being generated.
4. Court orders- In most instances, you will need to apply to the Supreme Court for a grant of probate to administer the estate. Even if you are not required to do this (eg. if an estate based in New South Wales has nominal assets), you may still wish to do so in order to provide yourself with protection as executor. A grant of probate is

essentially an order of the Court confirming the authenticity of the Will, as well as the fact that there is no known later Will revoking it, and so confirming your authority.

5. The probate process- As at the date of this memorandum, the Court forms required to be completed and filed are downloadable from the website of each State's or Territory's Supreme Court. Where the estate contains assets in more than one jurisdiction, it is wise to seek legal advice about which Court has jurisdiction to grant probate ahead of making an application.

Briefly, in the Australian Capital Territory (ACT), the forms you may need to file include your Affidavit as executor applying for probate, a draft Grant of probate for the Court to seal, an Originating Application for probate and an Affidavit of search to be completed at the Court registry (confirming that no earlier application for probate has been lodged). Your Affidavit annexes a prescribed inventory of the assets and liabilities of the estate, a certified copy of the death certificate, and a copy of the newspaper notice advertising your intention to apply for probate (see below). The original Will, which you will sign in accordance with your Affidavit, is also filed. Depending on the size of the estate, a filing fee may be required. The estate is ordinarily liable to pay this fee, or reimburse you for it.

6. Newspaper notice- Before you can apply for probate, you are also required to publish a prescribed notice of your intention to apply for probate in an approved newspaper (in the ACT, this could be the Canberra Times). The wording of the notice is also downloadable from the Supreme Court website in the ACT. In other jurisdictions, such as New South Wales, you may instead be able to file the notice online. You must disclose any responses you receive to the notice (eg. notification of a later Will) in your Affidavit.
7. Distributing the estate- In some States, but not in the ACT, there is a minimum period of time you must wait before distributing the estate. In the ACT, you may do this once probate is granted and the estate's assets and liabilities are ascertained. The procedure for transfer of the assets depends on what needs to be transferred. The Will may also give you authority to liquidate some assets prior to distribution. Generally speaking, you may wish to consult a solicitor and an accountant prior to distribution, in case the transfer of any assets may be contested, is required to be done in a prescribed manner, or may result in the payment of stamp duty, capital gains tax, income tax on superannuation death benefits, or other liabilities.
8. Due diligence- As an executor, you are required to take proper care of the assets of the estate. In some cases, this may involve maintaining insurance in respect of them- you may wish to advise beneficiaries to do the same in due course. You are also required to keep records of your dealings with the estate's assets (this could include confirmation from beneficiaries on receipt of assets). It is generally sensible to keep such records for at least seven years. There is often no process for 'finishing' an estate- your duties may simply be discharged when all debts are paid, all assets are distributed, and all records are filed safely in a secure location within your control.

Date of this memorandum: 12 July 2016