

## Appointing an executor and trustee

*Rigby Cooke Lawyers provides a comprehensive executor and trustee service to professionals, executives, business owners, investors, individuals, families and retirees.*

### What is an executor?

An executor is the person you appoint in your Will to collect your assets and administer your estate upon your death.

### Role of your executor

- > Make funeral arrangements
- > Identify and collect all of your personally owned assets
- > Protect assets (eg insure properties)
- > Apply for a grant of probate and attend to legal formalities with a solicitor
- > Notify your bank, amenity providers and creditors of your death
- > Notify your beneficiaries of your death
- > Manage assets, including investments and businesses
- > Arrange for the preparation of income tax returns and where necessary, the reconstruction of capital gains tax records
- > Deal with any claims against your estate
- > Discharge all of your debts including income tax
- > Distribute the balance of your estate to your beneficiaries in accordance with the terms of your Will
- > Where trusts are established under the Will, continue the management and administration of those trusts (unless a separate trustee is appointed)

### Wills & Estates areas of expertise

- > Business transfer and succession
- > Charitable foundations
- > Estate administration
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## Who should you appoint as your executor?

There are three groups who may be appointed as your executor:

- > Family and friends
- > Professionals such as lawyers and accountants
- > Trustee companies

When deciding who you should appoint as your executor, consider the following questions:

- > Will they charge my estate a fee or commission to act as my executor?
- > Do they have the time to administer my estate?
- > Do they have the business acumen to discharge the duties of an executor?
- > Are they likely to outlive you?
- > Are they an Australian resident who lives in the same jurisdiction (state) as the bulk of your asset holdings?

If you choose to appoint only one person as your executor then you should consider appointing a substitute executor for situations where the initial executor is unable to act due to death or illness.

You cannot appoint more than four executors. Where two or more people are appointed executors, their decisions and actions are carried out either jointly or severally. However, where one of the executors acts alone, their actions will be carried out on behalf of all of the executors. It is important to note that many organisations will require the executors to act jointly.

## What is a trustee?

A trustee is the person you appoint in your Will to manage and administer any trusts created in accordance with the terms of your Will. In most cases your trustee will be the same person you appoint as the executor of your Will.

## Role of your trustee

Once the executors have collected the assets and paid the debts of the estate, the executors role shifts to the role of trustee.

The trustee holds the assets in trust until they are to be distributed to the beneficiaries or transferred to any trusts created under the Will.

These trusts may exist because of the operation of law (where minor beneficiaries have not attained 18 or the age specified in the Will) or by choice if you have incorporated a testamentary trust in your Will. Your trustee is responsible for managing these assets in accordance with the terms of the Will and the best interests of the trust's beneficiaries.

## Duties of a trustee

- > **Follow the terms of the trust.** These can be found in the Will or trust deed (the governing document).
- > **Ensure there is an investment strategy in place for the assets of the trust.** This strategy must take into account the needs of the beneficiaries; both income and capital beneficiaries.
- > **Compile and manage the investments of the trust.**
- > **Distribute the income and capital of the trust in accordance with the terms of the governing document.** In making distributions the trustee will also have to review income and capital requests from beneficiaries and guardians (where the beneficiary is a minor or has a disability).



Where the trustee has the discretion to pay income and capital, they must weigh up the request with reference to the terms of the Will or deed, the intentions of the testator and the needs and circumstances of the beneficiaries.

## Who should you appoint as your trustee?

When deciding who you should appoint as trustee, consider the issues identified when appointing an executor (listed previously) as well as the following:

- > Do they have the capability to understand and follow the terms of the trust?
- > Do they understand the needs of the beneficiaries?
- > Will they have access to an accounting system which can accurately keep track of the income and capital of the trust separately?
- > Do they understand the law governing the management of trusts?
- > Will they ensure an investment strategy is developed, implemented and maintained?

In many cases the executor appointed under your Will will continue on as trustee, however this may not always be appropriate. To determine the best solution for your circumstances, please consult with our lawyers.

## Should you choose a personal or professional executor/trustee?

When deciding whether you appoint a professional or personal friend or family member as your executor/trustee, consider the following questions:

- > Is there likelihood that someone will contest your Will?
- > Do you have beneficiaries in conflict?
- > Are your estate and non-estate assets complex; that is does your estate include trust structures, businesses or private companies?
- > Are you in a second marriage with children from a first marriage? Weighing up each party's needs and interests can be difficult especially if you intend for your spouse to benefit from your estate during their lifetime, but the assets themselves distributed to your children upon your spouse's death.
- > How do you own your assets? If you do not own many assets in your personal name then the role for your executor may be minimal, however this is best discussed with one of our experienced lawyers.
- > Do you wish to pay for the services of a professional trustee?

The more complex your personal and financial circumstances are, the more appropriate it may be for you to consider the appointment of a solicitor or a trustee company as your professional trustee.

## What is a Grant of Probate?

A Grant of Probate is a legal document which confirms the validity of a Will and the appointment of the executor. Probate thereby gives the executor of the estate authority to deal with the deceased's assets in accordance with the Will.

## Why is it important?

Probate is often a crucial step before the estate can be administered and distributed to the beneficiaries.

- > **Finalisation of affairs:** the Grant of Probate provides the authority for the executor to collect and distribute the estate of the deceased. The Grant of Probate allows the executor to deal with banks, financial institutions and registries. These institutions rely on the Grant of Probate to release monies or transfer ownership to the intended beneficiaries.
- > **Protection of executor:** the executor will generally be protected against claims made by creditors or beneficiaries (including those challenging the Will).

## Who may apply?

The executor named in the Will, whether initial or substitute, may apply for probate (where they are over 18 years of age).

- > **Application where there is no valid Will:** where there is no validly executed Will, letters of administration may be sought by the person entitled (on intestacy) to the greatest interest in the estate. The application process is largely the same as for a Grant of Probate except there is no Will to be provided.
- > **Application where the executor is unable to apply:** if the executors named have died or cannot act then a beneficiary with the greatest interest can apply for letters of administration with the Will annexed.

## When is a Grant of Probate required?

Whether probate is required will depend on the nature and extent of the assets of the deceased. Some asset holders will not permit release or transfer of assets without such authority. Accordingly, a grant will ensure the executor has legal authority to:

- > collect or gather all of the deceased's assets
- > pay off any debts
- > distribute the assets to the persons entitled

There may be limited circumstances where probate may not be necessary. These include where the estate consists of:

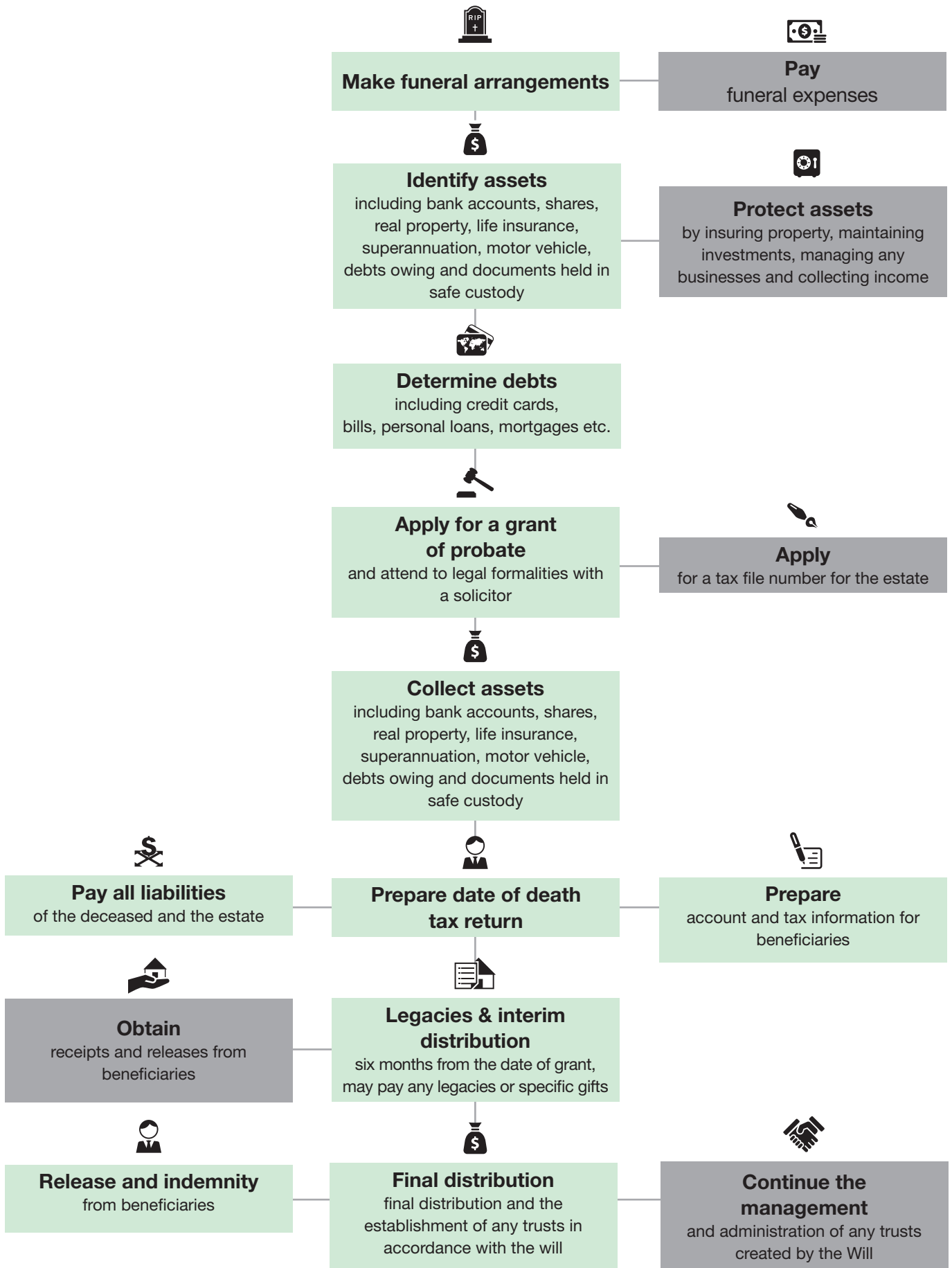
- > only jointly held assets such as property held as joint tenants or bank accounts in joint names
- > where the gross value of solely owned assets does not exceed \$107,160

## Consequences of a Grant of Probate

After probate is granted, the assets of the deceased will vest in the executor. The assets will be under the authority of the executor to distribute in accordance with the terms of the Will of the deceased.



# Role of the executor during estate administration



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## About Rigby Cooke Lawyers

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With origins that can be traced back to the 1840s, we have earned our reputation of achieving success for – and with – our clients, by remaining adaptive to change. We do this by understanding each of our clients' businesses and industry, and by staying at the forefront of changes in technology and legislation.

This is because, above all else, we remain true to our mission, *Our people: Your success.*

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- > Customs & Trade
- > Insolvency & Reconstruction
- > Intellectual Property
- > Litigation & Dispute Resolution
- > Mergers & Acquisitions
- > Migration
- > Notary Public
- > Planning & Environment
- > Property
- > Tax & Wealth
- > Wills & Estates
- > Workplace Relations

## Further information

We provide a comprehensive Wills & Estates service to professionals, executives, business owners, investors, mums and dads and retirees. Contact our Wills and Estates team on **+61 3 9321 7857** or **willsandestates@rigbycooke.com.au**

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