

Estate Administration

What are the Risks if I don't get Probate?



Article by Wills & Estates Lawyer [Krystal Potrzeba](#)

March 2024

[Krystal Potrzeba](#) is a Senior Associate at O'SheaDyer Solicitors Townsville. She practices exclusively in estate planning and succession Law. She prepares standard and complex wills, advises on trusts, and works with executors and family members to administer estates when a loved one passes. She also advises regarding contesting a will.

Context

When someone dies in Queensland, and they have a will that has appointed an executor, the executor is obliged to carry out the terms of the will. It will be important for the executor to determine whether to obtain a grant of probate of the will, from the court.

I often see clients who have been appointed as the executor in a will. They are wanting to know what they need to do to fulfil the legal obligations of this role. And they also want to know if a grant of probate needs to be obtained by the court.

Recommendation

As lawyers who are concerned with protecting the position of executors, we always strongly recommend that executors take the same approach as banks (etc).

We recommend you apply for probate if the total value of all the estate assets combined is over \$25,000 - \$50,000. Otherwise, the personal risk to you without probate, is too significant.

In an earlier article, *Estate Administration: Do I need Probate of the Will?*, I address in some detail when and why it is important to obtain a grant of probate.

In this article, I will highlight the risk factors to consider when deciding to apply for probate.

Estate Administration

What are the Risks if I don't get Probate?



Article by Wills & Estates Lawyer [Krystal Potrzeba](#)

March 2024

Risk Factors to Consider if you don't obtain a Grant of Probate

If you are an executor about to administer an estate and you are thinking about not obtaining a grant of probate, it is important to **consider the risks** of not doing so. Below are just some of the risk factors that should be considered when deciding whether to obtain a grant of probate of the will.

Consider:

The name on the will or spelling of the deceased's name on the will differs from that on the bank accounts or title to the assets.

In this situation, we would recommend obtaining a grant of probate from the court.

Consider:

How old is the will and the likelihood that there could be another later/more recent will out there?

The older the will the riskier it is to administer the estate without a grant of probate. For example, if the will is any more than a few years old, there is a greater chance there is another later will as often it is recommended people review their will every 3-5 years.

In the case where the last known will is say 10-30 years old, it would be strongly recommended to obtain a grant of probate of the will.

Consider:

If you or someone else suspect the deceased was lacking the capacity to make a will.

If the deceased was becoming forgetful around the time they made the will, or suffered from dementia, Alzheimer's or any other disorder that may have affected their capacity around the time they made their will.

In this situation, we would recommend obtaining a grant of probate from the court.

Estate Administration

What are the Risks if I don't get Probate?



Article by Wills & Estates Lawyer [Krystal Potrzeba](#)

March 2024

Consider:

If you or anyone you know is suspicious the deceased who made the will was pressured or unduly influenced into making the will.

In this situation, we would recommend obtaining a grant of probate from the court.

Consider:

If the deceased had assets located overseas or in a state other than just Queensland.

The rules and requirements to obtain probate may differ and probate may be required in other states or overseas in certain situations.

In this situation, we would recommend obtaining a grant of probate from the court in Queensland.

Consider:

Retirement villages, aged care facilities and nursing homes will almost always require a Grant of Probate to release the deceased's exit entitlements including a Refundable Accommodation Deposit.

Consider:

If the deceased was involved in court proceedings prior to their death that can be continued by the executor or where there is litigation concerning the will or estate or the deceased's affairs that were commenced by the executor after the will maker's passing.

In this situation, we would recommend obtaining a grant of probate from the court.

Consider:

If you need to deal with the ATO to sort out the deceased's tax affairs the ATO will insist on a Grant of Probate to provide you with information about the deceased including the deceased's tax file number etc.

Estate Administration

What are the Risks if I don't get Probate?



Article by Wills & Estates Lawyer [Krystal Potrzeba](#)

March 2024

Consider:

If you wish to distribute estate funds to the beneficiaries yourself by setting up an estate bank account at a bank of your choice the bank may require a grant of probate in order to open an account and deposit funds. They will require this if the funds are substantial.

The other option is to use a solicitor's trust account as the estate bank account.

Consider:

If you are required to hold any of the estate funds on trust for minor beneficiaries until they reach 18 years or another nominated age, or as trustee of a testamentary discretionary trust and you are required to invest the estate funds as trustee for the beneficiary, then you will likely need a grant of probate of the will before the bank will allow you to open a testamentary trust account to invest the funds.

Sometimes you don't need Probate.

There are situations where an executor doesn't need to obtain a grant of probate.

Some assets of a deceased person do not form part of their estate (eg. Superannuation). If the only assets owned by the deceased person, do not form part of the estate, then probate is not required.

However, if the deceased person owned some assets that form part of the estate (eg. property and cash) and other assets that do not form part of the estate (eg. superannuation) - if the value of the assets that do form part of the estate is over \$25,000 - \$50,000 then the executor should obtain a grant of probate of the will.

Estate Administration

What are the Risks if I don't get Probate?



Article by Wills & Estates Lawyer [Krystal Potrzeba](#)

March 2024

Some examples of when a grant of probate is not needed:

Probate is not required if the only assets of the deceased are as follows:

- a) Where the deceased held property with another *as joint tenants*. However, it should be noted that not all property in joint names is owned as joint tenants.
- b) Where the deceased owned property through a company or trust.
- c) Where the deceased has life insurance and the beneficiary nominated on the life insurance policy is a person directly and not 'the estate'.
- d) Where there is a superannuation fund and the deceased left a binding death benefit nomination and left this benefit to a person directly and not the estate.

Summary

The rules and recommendations around probate can be complex. Probate is recommended to protect yourself fully as executor. If you are the executor of a will, speak to an estate lawyer to get some advice about what to do.

O'Shea Dyer Solicitors Townsville

Estate Matters

O'SheaDyer Solicitors offer a fixed fee first appointment of \$330 for all Estate enquiries

You get to discuss your specific situation with an experienced Estates Lawyer who will give advice tailored to your circumstances.

Phone (07) 4772 5155 to make an appointment.

We would love to help you.

