

# Estate Administration

## Do I need Probate of the Will?



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

March 2024

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### 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 want 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.

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### Do I need to Obtain Probate?

Probate of a will is essentially the recognition of the court that the will is the last valid will of the deceased.

Probate is appropriately obtained from the court before the executor starts to administer the estate.

The executor is then authorised to administer the estate. Until such time as probate of the will is granted by the court, the executor has no powers to bind the estate of the deceased and therefore any action taken is at their risk personally and the risk of persons dealing with them.

However, once the executor is appointed by the court *under a grant of probate* they may give good receipts, transfer assets, and generally deal with the assets and liabilities of the estate as if their own.

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### What if I don't get Probate?

If you, as an executor of the will, begin to administer the estate without probate of the will, and in the future, a different will is found to be the last valid will (which could possibly be an earlier will than the one you are relying on) then you could be personally liable to the estate for funds and property you have distributed as executor.

For example, you could be required to transfer or pay back the estate funds and assets if they still exist and/or are able to be recovered, and if they are not, then you will have to pay the value of them back from your own personal funds or property. Or if you do not have enough of your own personal funds or assets to pay them back into the estate, then you could be sued and be personally made bankrupt.

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### Is there a Legal Requirement to Obtain Probate of a Will?

Although there is no legal requirement to obtain a grant of probate in Queensland, and (therefore) most assets can be sold or transferred without a grant of probate, most banks and financial institutions and other types of asset holders will insist on a grant of probate if the value of the asset they hold is more than \$25,000 - \$50,000.\*

In circumstances where there is say \$50,000 in the deceased's bank account, the bank will likely require a grant of probate before they will release the funds or information to the executor of the will.

It is ideal to make an enquiry of the financial institutions or asset holders concerned, to find out if they will require a Grant of Probate before the executor can deal with the funds or assets.

\*Different banks have different limits

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### What if there is less than \$25,000 in the Deceased Account?

If the amount is less than \$25,000- \$50,000\* the banks and other asset holders will normally release the account or asset to the executor on receipt of a copy of the will, a death certificate and indemnities signed by the executor.

\*Different banks have different limits

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### What is an Indemnity 'Signed by the Executor'?

If you as an executor are asked to sign an indemnity, this is a form you sign which confirms you agree to be personally liable and will compensate the bank or asset holder in the event they provide you with estate assets or funds without sighting a grant of probate, and another will is later found to be the last valid will.

In circumstances where a later will is found to be the last valid will, and the bank or asset holder is sued by the beneficiary of the valid last will, the bank can then sue you for compensation.

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### How do I Decide whether to obtain Probate or not?

When deciding whether to obtain probate, the value of the combined assets of the estate should be carefully considered, and not just on an asset-by-asset approach.

The higher the value of the total estate, the higher the risk to the executor if probate is not obtained.

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### What do Lawyers recommend regarding Probate?

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

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.

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### How much does Probate Cost?

Lawyers or law firms charge differently when it comes to their time and professional fees.

Our professional fees start at \$2750. If the matter is complex and takes more time than usual, professional fees will be higher. We estimate costs in advance so you can decide whether to retain us or not. There are a number of court documents that need to be prepared to make the application to the court.

There is also a compulsory court filing fee that is around \$800 and a fee for advertising the application in the Qld Law Reporter which is around \$200.

All up, it usually costs just under \$4000.

Most executors choose to obtain probate. It is the prudent thing to do, and it appropriately protects them from any personal liability. The cost of preparing probate is a cost of the estate. If there are several beneficiaries, (and usually the executor is one of them) this cost is effectively shared between all beneficiaries making it a very reasonable fee.

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## 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.**

