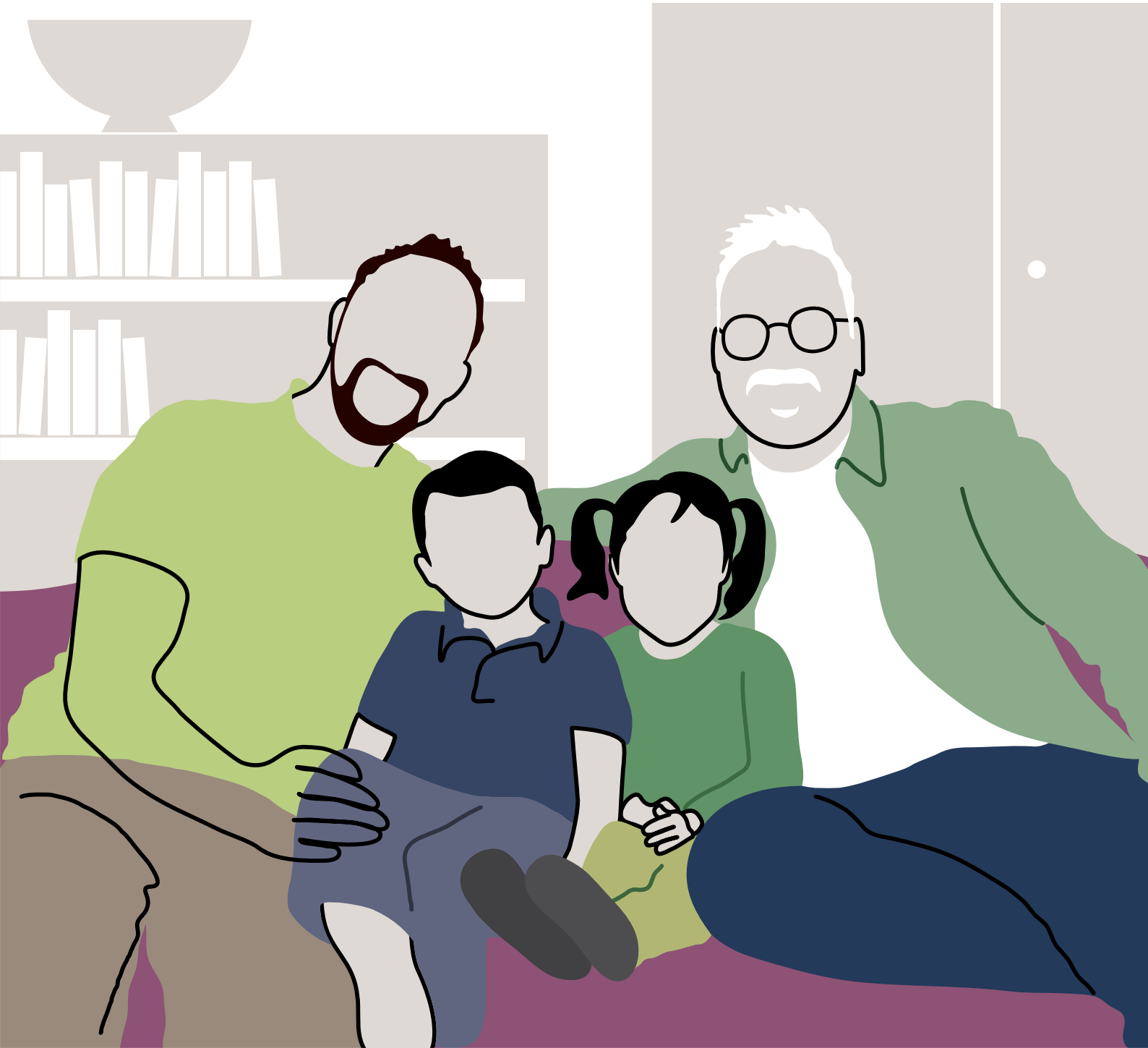
A guide for **beneficiaries**



20 FREQUENTLY ASKED QUESTIONS ABOUT BEING A BENEFICIARY

This booklet provides a guide, in question and answer format, for beneficiaries about what it means to be a beneficiary, what is required of them and what is involved in managing and finalising an estate in Victoria.

The information is general in nature and not specific legal advice. For more information beneficiaries should contact their legal practitioner.

CONTENTS

1 WHO IS A BENEFICIARY?

A beneficiary is any person or entity such as a charity that receives a gift or benefit from a person's estate.

2 WHAT IS 'AN ESTATE'?

An estate is all of the property and liabilities of a person in existence after their death.

3 WHO IS AN EXECUTOR?

An executor is a person who has been appointed in a will to manage the will maker's estate.

4 WHAT IS THE ROLE OF AN EXECUTOR?

The role of the executor is to carry out the wishes of the will maker as specified in the will. This is a position of great trust and must be carried out with care and honesty.

The executor must:

- act in the best interests of the estate and all of the beneficiaries and cannot act in their own interests if they are not the same as the interests of the estate and the beneficiaries
- do what is specified in the will unless there is an alternate agreement made with the informed consent of all beneficiaries. This may not be possible (without consent of the Supreme Court) if some beneficiaries are infants or don't have legal capacity.
- protect all of the assets of the estate until they are distributed
- keep good records of everything they have done for the estate
- obtain advice from professionals such as lawyers, accountants and real estate agents where necessary.

The executor is entitled to seek compensation on behalf of the estate against any attorney appointed by the will maker under an enduring power of attorney. The attorney must have caused a loss by not behaving as required by the *Power of Attorney Act 2014* (Vic). Generally the executor only has six months from the date of the death of the will maker to apply to the Victorian Civil Administrative Tribunal (VCAT) for the compensation. Executors should promptly obtain expert legal advice before making such a claim.

An executor may be ordered by a court to act properly and promptly if the beneficiaries believe that the executor is not doing what they should.

5 DO ALL THE BENEFICIARIES NEED TO AGREE WITH DECISIONS OF THE EXECUTOR?

All of the beneficiaries do not have to agree with the decisions of the executor if the executor is carrying out the wishes of the will maker as set out in the will.

If there is a proposal that the assets be distributed other than as specified in the will, the alternate arrangements may create new and different taxation and duty consequences.

Before consenting to a change in the distribution, beneficiaries should obtain their own legal and financial advice. The lawyer acting for the estate is unable to give the beneficiaries independent legal advice because they are acting for the estate and there may be a conflict of interest in also advising the beneficiaries.

6 MUST AN EXECUTOR TAKE ON THE RESPONSIBILITY?

An executor can refuse to accept the position of executor, but this should preferably be done before probate is granted. If the executor seeks to step down from that position after probate is granted, they must obtain the consent of the Supreme Court.

Executors can delegate some of the actions and responsibilities to others, for example, funeral directors, lawyers, accountants and real estate agents. The executor will be ultimately responsible for the actions of those people.

An executor should refuse to accept the position of executor if their personal interests will be in conflict with the role of the executor, for example:

- if they behaved inappropriately as attorney when the will maker was alive and caused a loss that as executor they should seek to recover from themselves
- if they want to personally purchase major estate assets
- if they want to make a claim for a further share of the estate[1].

7 WHO PAYS THE EXECUTOR?

An executor is entitled to be reimbursed by the estate for any amounts they have paid on behalf of the estate, provided they were appropriate amounts.

The executor's role is often described as a trustee or fiduciary role. In most circumstances, where the executor is a person known to the will maker, they will not receive any financial benefit or payment for taking on the role. However, the executor may receive some payment for their work in the following circumstances.

- If the will maker sets out in the will that the executor is entitled to be paid for their efforts. Usually the will states the rate of payment in terms of a percentage of the total assets and/or income of the estate.
- Where a gift to the executor is included in the will in lieu of the right to apply to the court for remuneration.
- If all of the beneficiaries agree on an amount the executor should be paid from the estate. Beneficiaries should be given details of all the work undertaken by the executor and should obtain independent legal advice before agreeing to such a request.
- If the Supreme Court orders that the executor is entitled to be paid.

The payment to the executor is called a commission and in Victoria it cannot exceed five per cent of the total value of the estate assets. When a court considers whether an executor should be paid a commission it takes into account the work done by the executor as well as the responsibility and time involved, often referred to as 'the pains and troubles'. It is rare that a court would order commission of five per cent. The maximum rate of five per cent is generally reserved for very complicated and time-consuming estates.

Executors wishing to receive a commission should keep extensive records of all they have done in their executorial role to justify the commission.

8 WHO ARRANGES THE FUNERAL?

The executor is responsible for making the funeral arrangements if the will maker has not already made those arrangements. The executor should follow any directions left by the will maker as to the funeral arrangements but is not bound to do so. Things to consider include:

- whether the body is to be buried or cremated
- if the body is to be buried, where
- if the body is to be cremated, whether the ashes are to be scattered or retained
- the nature and format of the funeral service
- who they should notify about the service.

If the executor is not an immediate family member, the executor should consult with the family about the funeral arrangements.

[1]The family provision laws allow an executor to proceed with a personal claim by naming another executor or beneficiaries as defendants to their claim, but all conflicts should ideally be considered and advice taken.

The reasonable cost of the funeral is an expense of the estate, but the executor should be careful not to incur expenses beyond the available funds in the estate.

9 SHOULD THERE BE A READING OF THE WILL?

It is not usual to have a formal reading of the will. Usually the beneficiaries are notified of their interest by the executor or the firm of lawyers appointed by the executor.

In Victoria, various categories of people are entitled to request a copy of a will if it was made on or after 20 July 1998 including:

- any person named or referred to in the will, whether as beneficiary or not
- any person named or referred to in any earlier will as a beneficiary
- any spouse of the testator at the date of the testator's death
- any domestic partner of the testator
- any parent, guardian or children of the deceased person
- any person who would be entitled to a share of the estate if the deceased person had died intestate
- any parent or guardian of a minor referred to in the will or who would be entitled to a share of the estate of the testator if the testator had died intestate
- any creditor or other person who has a claim at law or in equity against the estate of the deceased person and who produces evidence of that claim.

A beneficiary has no legal right to see a will of a deceased person made before 20 July 1998. However, once probate is granted, a copy may be obtained from the Supreme Court.

It is usually appropriate and good practice for the executor or the firm of lawyers appointed by the executor to write to the beneficiaries and tell them they are beneficiaries under the will, soon after probate is obtained and even beforehand in some circumstances.

10 WHAT SHOULD THE BENEFICIARIES BE TOLD?

There is no legal obligation for beneficiaries to be told they are beneficiaries before the gifts in the will are given to the beneficiaries. A beneficiary is entitled to receive a copy of the will upon request as set out in point 9 Should there be a reading of the will?

Executors are usually encouraged by lawyers for the estate to be open, honest and in regular communication with beneficiaries.

The lawyers for the estate will usually discuss with the executor who should provide information on the progress of the estate to the beneficiaries. The lawyers for the estate can only provide information to the beneficiaries if given permission by the executor. There may be instances where the lawyers have to tell any beneficiary who asks about the progress of the estate that they should speak directly with the executor.

Executors should provide a residuary beneficiary with a statement summarising the financial aspects of the estate for approval prior to making final distributions.

Beneficiaries are entitled to a proper account of the administration, but Executors have no right to insist on a formal Release either prior to or upon Distribution.

11 WHAT IF THERE IS NO WILL?

If there is no will the next of kin of the deceased usually has to apply to the Supreme Court for a document called Letters of Administration. This document is the court's formal approval for someone to administer the estate of the deceased, effectively acting in the same role as an executor but called an administrator. Approval is usually granted in favour of a family member or another person who has the most substantial interest in the estate.

If there is no will the *Administration and Probate Act 1958* (Vic) sets out a scheme of distribution, favouring the closest next of kin, commencing with spouses, then children, then surviving parents and extending as far as first cousins. State Trustees Ltd often act as "Administrator of last resort" and have particular expertise (including genealogical experts) relating to the estates of persons without immediate family.

12 WHAT IS PROBATE AND IS IT NECESSARY?

Probate is a document given by a Supreme Court (usually the Supreme Court of Victoria where there is property in Victoria) that confirms the validity of the will and the appointment of the executor to look after the estate of the deceased will maker.

Before applying for probate, the executor (or their lawyer) must advertise that an application for probate is being made.

This advertisement is usually posted on the Supreme Court's website and must be placed at least 14 days before the probate application is lodged with the court.

An application for probate requires the preparation and filing of various documents with the court, including:

- a statement of assets and liabilities with appropriate valuations. This often takes some time to prepare as information needs to be obtained from institutions such as the banks, companies in which the will maker held shares and superannuation funds. It can take up to six weeks to receive a response from all of these institutions. Formal valuations of real estate or antique items may be necessary
- a certified copy of the death certificate
- the original will
- an affidavit from the executor setting out background information about the deceased, the will and financial position of the estate. An affidavit is signed in the presence of an authorised witness and has the same importance as evidence given under oath in court.

Probate is necessary to give the executor the right to deal with certain assets such as real estate and money in bank accounts.

Real estate cannot be transferred unless probate is obtained except to a surviving joint proprietor.
Most banks will not allow the will maker's nominated representative in the will to deal with accounts which have a balance above a certain amount unless probate has been granted although banks will usually allow access to funds for the payment of the funeral account.

It can sometimes take a considerable amount of time to receive confirmation from banks and share registries about date of death balances and share values. This can delay the application for probate.
There are some estates that are small and do not contain real estate, as the real estate is transferred to a surviving joint proprietor, and in these cases, probate may not be required required for transfer purposes, but it may still be important for other reasons, such as to confirm an inheritance by allowing claim periods to run and exhaust.

13 HOW LONG DO ESTATES TAKE TO FINALISE?

The time it takes to finalise an estate depends on what must be done and how long it takes for each step to be completed. Often third parties such as banks and companies in which the estate has shares are required to supply information and this can take some time to receive. See point 12 What is probate and is it necessary?

It is prudent for all of the estate's liabilities to be paid before the estate is finalised. See point 18 Is there tax to be paid?

The law in Victoria says that executors do not have to distribute the estate within 12 months of the death of the will maker. After 12 months, some beneficiaries may be entitled to receive interest on the value of their gifts if certain circumstances apply. It is prudent for estates not to be distributed fully within six months from the time of probate. For further information see point 14 Can dependents claim more?

Some wills may require gifts to be held on trust until a certain event occurs such as until a minor beneficiary reaches a certain age. In many instances the executor will become the trustee of that money and will have to look after it until the specified event.

In other cases, a gift may be left in a trust for a person's benefit, rather than being left to them in their own right. Protective trusts and special disability trusts are examples of such ongoing trusts.

Where property is the subject of ongoing trust obligations, the executor should discuss these obligations with their lawyer.

Some gifts may be left as life interests only, so the beneficiary is entitled to use the assets but is not free to dispose of them, for example:

- the beneficiary who is given a life interest in a house may live in the property but cannot sell the property except in certain limited circumstances
- the beneficiary who is given a life interest in shares may have the income from a share portfolio but cannot sell the shares and take the sale proceeds.

When that beneficiary dies, the asset that was the subject of the life interest then passes to the beneficiary who was left the remainder interest in the will.

14 CAN DEPENDENTS CLAIM MORE?

Yes, in some circumstances an eligible person (see below) may make a claim to a court for a distribution of assets other than as set out in the will. These claims can be complex and the executor should obtain legal advice.

Eligible person

In Victoria, the applicant must fall within the definition of an eligible person as set out in the *Administration and Probate Act 1958* (Vic). An eligible person is a:

- spouse or domestic partner
- child, adopted child, step child or someone who thought they were a child
- former spouse or domestic partner who would have entitled to bring a family law claim but had not or was part way through proceedings
- registered caring partner
- grandchild
- spouse or domestic partner of a deceased child, adopted child, step child or someone who thought they were a child, if they died within one year of the deceased
- a person who is a member of the deceased's household or had been and was likely to be again in the near future.

What factors

The applicant must show that the will maker had an obligation or duty to make adequate provision for them and that this was not done. There are many factors that the court will take into account when considering these types of applications.

In general, the courts will look carefully at situations where spouses, children or other dependants of the will maker have been left out of the will or been unfairly treated. All claimants need to demonstrate relative financial need and particular consideration will be given to the financial circumstances of adult children when they make a claim. In relation to an eligible person other than the spouse or children, the courts will look at whether there was a dependent relationship with the will maker and what contribution they made to the building up of the estate or the welfare of the will maker. The courts will consider any written reasons given by the will maker as to why the eligible person was left out or left less than others.

It is a complicated area of law and each matter is judged on its own facts. You should discuss the matter with a lawyer if you want to bring a claim on this basis.

Time frame

Anyone wishing to make an application is entitled to do so within six months of the date that probate was granted. If they try to make an application after that time, special permission from the court is required.

It is prudent for the executor to hold on to the estate assets for six months from the date probate is granted. If the executor distributes the estate within six months of the date probate was granted and a claim is made for further provision from the estate within the six-month period, the executor may be personally liable for any amounts the court requires the estate to pay. The exception to this rule is that the executor may make a distribution to the spouse, partner or children of the will maker of all or part of their entitlement under the will for the purpose of providing for their 'maintenance, support or education' without any personal liability in the event of a claim by others for provision from the estate.

Notice of a claim

An executor should not make any distribution of an estate if they have received written notification that someone intends to make an application to a court for further provision from the estate. The executor needs to wait three months from receiving that notice before a distribution can be made and the distribution can only be made if the executor has received no further notice that the application has actually been made. It would be prudent for an executor who has received notice of a claim to conduct litigation searches in the Supreme Court and County Court before deciding to distribute the estate assets.

15 CAN BENEFICIARIES REJECT A GIFT?

Beneficiaries can refuse to accept a gift from a will. The executor will usually require the beneficiary to give written confirmation that they refuse to accept the gift.

Before rejecting a gift, beneficiaries should obtain legal advice as there may be taxation, duty and other implications that they should take into account when making the decision.

16 WHAT HAPPENS TO HOUSEHOLD GOODS AND PERSONAL ITEMS?

The executor should make an itemised list of all of the assets as soon as possible, including a description of their condition and if necessary, where they are stored. The executor may also use a video recorder or camera to record what household items exist.

It is common practice for executors to offer the beneficiaries who are to receive a share of the estate (other than specified items) an opportunity to choose household items in part satisfaction of their share of the estate. These items would need to be valued, either by agreement of the beneficiaries or professionally, and then offset against the beneficiaries' shares of the estate.

In practice, household goods and personal effects are now rarely of significant value (although Executors should search for "hidden gems"), so formal valuation will not always be prudent. It should be understood that disputes over personal effects usually cannot be resolved adversarily, without burdensome and uneconomic legal fees being incurred.

17 WHAT IF THE ESTATE LIABILITIES EXCEED THE ESTATE ASSETS?

If there are more liabilities in the estate than assets, the estate is insolvent. In this situation, the estate should be declared bankrupt and the remaining assets used by the trustee in bankruptcy to pay out the liabilities. The executor and beneficiaries would not be liable for the shortfall provided that they had not already taken any assets from the estate.

18 IS THERE TAX TO BE PAID?

The executor is responsible for lodging any outstanding income tax returns on behalf of the will maker where necessary. The estate is also subject to income tax if it earns income, such as rent on real estate or interest on investments, and a tax return may need to be lodged on behalf of the estate. The sale of assets may result in capital gains tax and the estate should not be fully distributed until all income tax liabilities are known and accounted for. There are no inheritance taxes or death duties in Victoria.

If property is given to beneficiaries in accordance with the will there may be a roll over of capital gains tax (subject to taxation rules), and capital gains tax may be payable by the beneficiaries when they dispose of the property at a later date. If the beneficiaries agree to the distribution of real property other than as stated in the will, there may be stamp duty payable on the transfer of the property and other taxation liabilities triggered. In short, professional taxation advise should be obtained and taken into account before the sale of assets, distribution of assets and finalisation of the estate. Expert tax advice should be taken when the beneficiaries include any tax-exempt charity, a non-resident or a complying superannuation fund.

19 PLANNING FOR YOUR INHERITANCE

Beneficiaries should take some time to plan what they will do with their inheritance. Once the approximate amount of the inheritance is known, it would be prudent to obtain accounting and/or financial advice.

20 WHAT HAPPENS TO CHILDREN'S INHERITANCE HELD IN TRUST?

Children cannot have formal and unsupervised access to their inheritance until they reach 18 years of age, and some will makers extend the age for inheritance to later ages.. The assets, usually money, are held in trust for the child beneficiary until that time, usually by the executors or administrator.

They are usually invested and earn income during that time. The will may provide that while in trust the capital or income may be used for the 'maintenance, education, benefit or advancement' of the beneficiary (or similar wording). This allows the funds in trust to be applied for things like school fees and other educational requirements.

The trustees of the trust are obliged to look to the welfare of each beneficiary, but practically will usually require a written request for specific items and an accounting of how the money was spent, either from a child's guardian, or from any capable beneficiary above the age of 18.

Support services

Life Line Telephone	counselling for anyone needing emotional support 131114
Australian Centre for Grief and Bereavement	grief.org.au
WIRE Women's Information and Referral Exchange	wire.org.au 1300 134 130
Men's sheds	mensshed.org
Mensline Australia	mensline.org.au
Community health services/centres	health.vic.gov.au/community-health/community-health-services
Veterans and Veterans Families Counselling Service	openarms.gov.au
Aged Care Information	myagedcare.gov.au