

Public Trustee

Deceased Estate Information

Acknowledgement of Country

The Public Trustee respectfully acknowledges the traditional custodians of the land as being the first peoples of this country. We embrace the vast Aboriginal cultural diversity throughout Western Australia and recognise their continuing connection to country, water and sky.

We pay our respects to Elders past, present and emerging.

The Public Trustee is committed to fostering respectful partnerships with our Aboriginal colleagues, clients and those in our care.

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Introduction

Everyone who dies leaves loose ends to be tied up. Even if they didn't own a home or have a bank account, they could have had a pension to be finalised or personal possessions to distribute. The assets and liabilities someone leaves at the end of their life is described as their "**Estate.**"

Whether you need someone to administer the estate depends on the assets involved. For example, if an elderly woman, on a pension, only had a bank account that was jointly held with her husband and the title to her house was also in joint names with her husband when she died - then she had no assets in her sole name. The joint assets will normally go to her husband. The husband will need to notify Centrelink and bank of the woman's death. At some point he will need to change the name on the title for the property to his own sole name but that can be done at a later time.

If the elderly woman had assets in her own name - such as her own bank account or shares in a company - then the woman has an Estate that needs to be administered. Depending on the amount in the bank or the value of the shares, the bank or company might want someone to produce a formal authority from the Supreme Court of Western Australia (the Court) before they will allow the bank account to be closed or the shares to be transferred or sold.

A common misconception is that the Public Trustee administers all deceased estates or all estates when someone dies without a Will. That is not the case. The Public Trustee Deceased Estates team deals with Estates where the Public Trustee has been named as an Executor in a Will or where another Executor wants us to take over and we accept the estate.

We can deal with Estates where there is no Will and the family asks us to administer the Estate, but we can decline to take on administration of the Estate. Sometimes we take on Estates where someone has died without a Will and there is no family around to ask that we take on the Estate. We also deal with making funeral arrangements for those people who have no friends or family willing or able to make those arrangements.

Another false idea is that the Public Trustee - as a Government agency - has access to all of a person's financial information. When it comes to finding out what is in an Estate the Public Trustee is pretty much like anyone else. The Public Trustee relies on family and friends, as well as going through a deceased person's paperwork and information on the person's Will file (if there is one), to find out where to start when making enquiries about what is in an Estate.

The following information covers general concepts of an Estate administration. It is not intended as legal advice. Every Estate is different. You may need to obtain legal advice when dealing with a deceased Estate.

Deaths and Funerals

When someone dies it is usual for family or friends to make the funeral arrangements. Often there are cultural or religious traditions to consider, as well as any written wishes of the person who has died.

A funeral can be paid from the bank account of the person who has died. The bank will usually accept the funeral invoice and use the money in the bank account to pay the funeral. If there is not enough money in the bank account, the family can apply to the [Department of Communities' Bereavement Assistance Program](#). The Department of Communities will check the income of the person applying before agreeing to fund a funeral and the family may be asked to contribute to the cost. The funeral will be basic and will be conducted by the Department's contracted funeral director.

Where there is no one willing or able to make the funeral arrangements, the Public Trustee can make the funeral arrangements with its contracted funeral director. Most often, hospital morgues or the Coroner's Court will refer an unclaimed body to the Public Trustee after attempts have been made to contact or find family to make the funeral arrangements. The Public Trustee will then write to the bank of the person who has died to see if there is enough money to cover the cost of a full funeral. If there is not enough money, the Public Trustee will arrange a simple funeral called an **indigent funeral** and pay the balance of the account.

The person will be buried unless there is written evidence showing the deceased person wanted to be cremated or there are cultural or religious reasons why they need to be cremated. The Public Trustee will also consider a cremation where the closest family members make a request in writing.

In most cases, it is not until a funeral happens and the funeral director completes the paperwork to register the death with the Registry of Births, Deaths, and Marriages that a death certificate will issue. Often the funeral cost covers the cost of one death certificate. It is important to have that certificate when dealing with a person's assets.

Creditors

When a person dies leaving debts, the creditors can make a claim on the assets in the person's Estate. If there is not enough money in the Estate, the creditors will normally have to write off the balance of the debt, as they normally cannot demand the debt be paid from anyone else's personal money.

There are legal rules about how creditors are treated but some key things to remember are:

1. The funeral account must be paid first. There are limits on how much of that account can come out of the estate.
2. If there is a loan that is secured by an asset - such as a mortgage over a house property - then the bank who is the creditor will have first claim on that asset. These are **secured creditors**.
3. If someone has to administer the Estate and incurs costs such as clearing a property for sale, then those costs come before general creditors.
4. Creditors are to be paid before family or those named as beneficiaries in a Will.

Wills

The best way for someone to let people know what they want to happen to their assets and possessions when they die is to make a **Will**. It is normally best for a Will to be professionally done. There are some requirements when you make a Will that are set out in the [Wills Act 1970](#). In general, the requirements for a Will are:

1. It is in writing.
2. It is signed by the **testator**, which is the person who is making the Will.
3. The testator's signature is witnessed by two witnesses, who normally would sign the Will.

There are exceptions to these rules and care should be taken if you come across any form of document or note or even a recording in which a person indicates what they want to happen to their assets after they die. It is best to get legal advice on whether the document or recording could be considered as an informal Will.

It is also important at the time a person makes their Will that they understand what they are doing. This is called **testamentary capacity**.

Sometimes a person has a mental health condition – and there could be a question/concern about their testamentary capacity. It's best then that they ask their treating doctor to write a letter about their testamentary capacity and understanding and keep the letter with their Will. A Will can be ruled invalid if the Court decides the person did not have the testamentary capacity to make it.

In most cases a Will names a someone to be an **Executor**. Sometimes the Will names more than one person or a solicitor or an organisation such as the Public Trustee. The Executor is responsible for carrying out the testator's wishes. In Wills made by the Public Trustee it is often the Public Trustee who is the Executor.

A person does not have to act as Executor if they don't want to. Sometimes a Will states who can take over as Executor if the first person named doesn't want to or isn't able to. If there is no-one else named, then the beneficiaries named in the Will may be able to act. If an application needs to be made to the Court to obtain an authority to deal with the Estate, it is helpful if the named Executor provides written confirmation that they don't want to act as Executor. The Public Trustee recommends legal advice is obtained when dealing with this situation.

Where a person or organisation is left something in a Will, they are called a **beneficiary**. A testator may leave money or specific assets to a person or organisation, who might be called a **legatee**. A testator may leave everything else (the **residue**) to **residuary beneficiaries**.

One common mistake people make when they write their own Will is not to provide a residue clause. They think they have accounted for all their assets, but when they die there may be something they own that is not covered by the Will.

People should update their Will as their circumstances change. If you are dealing with an Estate where someone was married and/or divorced after making their Will, the Public Trustee recommends legal advice is obtained to confirm the Will is valid.

Nothing should ever be stapled or attached to a Will, which should be kept in a safe place and its location known by someone close to the testator.

Intestacy

When someone dies without a Will, or their Will is not valid they are said to die **intestate**. If there are assets in the Estate to be administered, then someone entitled to benefit from the Estate would be entitled to apply to the Supreme Court of Western Australia for Letters of Administration - usually the beneficiaries (**next of kin**). While a person can nominate anyone to be their next of kin for such things as hospital records, only legally recognised relatives are considered next of kin when it comes to an intestate Estate.

Western Australia has legislation that sets out who the beneficiaries are when there is no Will ([Administration Act 1903](#)). When the Act talks about next of kin, it is talking about family by birth, marriage, or legal adoption. It does not consider any cultural traditions regarding raising family members as your own. When the Public Trustee Estate's Team administer an intestate Estate, they **must** follow the legislation. Genealogical research is done to identify the next of kin through birth, death and marriage certificates and other types of evidence.

Beneficiaries identified as being entitled under the Act can choose to enter an agreement with others who are considered family but are not under the Act. Depending on the value of the Estate, a Deed can be created which gives some of the Estate to others. This could affect a person's pension or result in State tax, so the Public Trustee recommends seeking advice if considering this.

When there are a number of beneficiaries who can apply to administer the Estate, usually one or two in the family will take on the role and the others need to agree. If there is no agreement the Court can or will decide.

If there are children under the age of 18 who benefit, the Court might want sureties, so the minor child's inheritance is guaranteed if anything goes wrong. Another option is a **section 17A Deed** which is an agreement between the person seeking to administer the Estate and the Public Trustee so that the Public Trustee holds the minor child's money until they turn 18. It means there is no need for sureties, but the Public Trustee will charge for the role. More information about s17A Deeds can be obtained from the Public Trustee's **Trusts Business Manager** by emailing TM51@public.trustee.wa.gov.au

Until 7 August 2013 there was legislation in place ([Aboriginal Affairs Planning Authority Act 1972](#)) that meant only the Public Trustee could administer the Estate of some people of Aboriginal descent who died intestate. s33 sets out who was affected, and s35 required that their Estates be dealt with by the Public Trustee. This was offensive to many people, including Public Trustee staff. It was often the case that the Public Trustee was not notified of this Estate unless there was an organisation such as a superannuation company that wanted someone to provide an authority to administer the Estate before they would release the money.

When the legislation was amended it meant that if an Aboriginal person died without a Will on or after 7 August 2013, their beneficiaries could decide who they wanted to administer the Estate. The Public Trustee understood that for some families that might be difficult so it agreed to administer Aboriginal deceased estates valued at less than \$100K when it was expedient to do so or the family requested it. The Public Trustee can also consider requests to deal with larger estates.

Family Provision Act Claims

The [Family Provision Act 1972](#) (FPA) provides a way for certain family members, such as spouses, de facto partners and children, to make a claim on an Estate where they believe they have not been adequately provided for.

If someone seeks to make a claim under the FPA, the beneficiaries may be able to come to an agreement with them and sign a Deed to redistribute the assets of the Estate. If the beneficiaries don't come to an agreement, the matter can end up in the Court. The Court usually sends the matter to mediation but, if no agreement is reached, the Court can decide who gets what. Special provisions apply if a person is under 18 or has a mental disability.

The Public Trustee recommends legal advice is obtained if you are considering making a claim or you are a beneficiary affected by someone making a claim.

Applying for an authority to Administer the Estate

Whether someone needs to administer the Estate depends on the value of the assets/liabilities and the requirements of the various institutions.

Many banks, share companies and other organisations have guidelines on what they require if the value of the asset is small. The first step anyone should take when looking at the Estate is to notify these companies of the death and ask what their requirements are. Due to privacy laws, it is preferable to send a copy of the person's death certificate and the Will - if there is one - when making these enquiries, otherwise the company may not speak to/deal with you.

If a bank, share company or other organisation requires a formal authority, then you will need to apply for that authority. The Supreme Court of Western Australia will only grant an authority when there are assets in Western Australia. So if someone has assets in Western Australia AND other States or countries, then you may need to get an authority from Courts in those places to deal with those assets. These situations can be complex, so the Public Trustee recommends obtaining legal advice.

In most cases where there is a Will, an Executor can apply for a **Grant of Probate** and that application can be made online [and guides you through the application process](#), but you will still need to print the application and send it with the original Will (if there is one) and the original death certificate.

In **Appendix 1** there is an example of what a Grant of Probate from the Court looks like. The document is yellow parchment with a red wax seal and a photocopy of the Will. The Court keeps the original Will.

When someone dies without a Will an application can be made to the Court for **Letters of Administration**. This looks similar to a Grant with the yellow parchment and red seal but there is no Will attached.

To deal with the banks, share companies, superannuation funds, and other organisations you will most likely need to provide a copy of the Grant of Probate or Letters of Administration which has been certified as a true and original copy by someone on the approved list. You can check with the organisation involved on who they accept to certify documents.

Superannuation

Often when a person dies, a superannuation death benefit is payable. Even if the person has not worked long, it could be substantial, because it could include some insurance cover.

Superannuation is a complex area. Not all superannuation funds are the same. Sometimes, death benefits are paid to the person's Estate. Sometimes, they are paid directly to people such as a spouse or children, but there are restrictions on which people can get them. You may be able to make a **binding nomination** or a **non-binding nomination**. If you have a superannuation fund, it is a good idea to speak to the fund to see what decisions you can make now.

Taxation

While a person is alive, they pay tax on their income if it is above the taxable threshold. This does not stop when they die. If the deceased needed to lodge tax returns when they were alive, then the Australian Tax Office (ATO) should be notified of their death, and all their tax requirements brought up to date.

Until a person's assets are distributed, they belong to the Estate and if those assets generate income, for example shares or a term deposit, then whoever administers the Estate will need to consider tax and whether the income requires that a tax return is lodged. When there is the need to lodge a tax return for an Estate, the administrator will need to apply for a **Trust Tax File Number** and lodge **Trust Tax Returns**. There can also be capital gains tax payable if an Estate asset is sold. Even superannuation payouts can be taxed depending on certain circumstances, so the Public Trustee recommends seeking the advice of a tax agent or accountant regarding any tax issues for the Estate.

Where to go for advice

A deceased Estate can be simple or complex depending on what the assets are and what the personal relationships of the beneficiaries are.

While the Public Trustee cannot give legal advice, information about the Public Trustee's services is available from the Customer Service Team on ptocustomerservices@justice.wa.gov.au or 1300 746 116.

There are many solicitors and services who can assist with administering an Estate. One source of information about those lawyers is the Law Society of WA whose website is www.lawsocietywa.asn.au.

The [Citizens Advice Bureau](#) can also provide some assistance when applying for an authority.

Legal Aid WA does not give legal advice or assistance about drafting Wills, Grants of Probate or Letters of Administration.

Appendix 1 Sample Grant of Probate

**In the Supreme Court
of Western Australia**


Probate Division

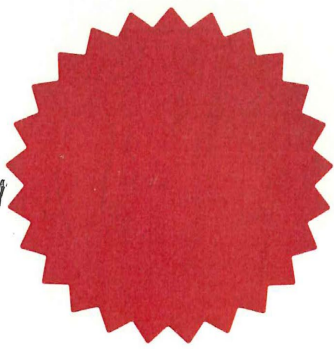
PRO/ _____

The Estate of _____
late of _____
Western Australia deceased

PROBATE
Dated 20/05/2022

PROBATE of the last Will and Testament dated 29/03/1993 (copy annexed) of
late of _____, Western Australia
who died on 28/12/2021 is hereby granted to THE PUBLIC TRUSTEE of 553 Hay
Street, Perth, Western Australia, the executor appointed under the will.


REGISTRAR



Grant issued to THE PUBLIC TRUSTEE, 553 Hay Street, Perth, WA, 6000

V 231001