LEGACY Link

INCLUDE A CHARITY 2020 | 13.11.2020

CONFIDENTIAL

Estate Administration Webinar Guidance Notes

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Introduction

Estate or Legacy Administration is the final part of the Gifts in Wills giving journey. After a donor has died, there can be a period of months if not years in some circumstances before the gift is realised to the charity. During this time, there is a lot that a charity can do to influence the outcome and value of a Gift in a Will.

This is an area that can often be misunderstood or overlooked in many organisations – it may be seen as a simple 'thanking and banking' exercise and little time or investment is put in this area. However, we know that good estate administration can be as an important part of the Gifts in Wills journey as fundraising and marketing itself:

- Good Gifts in Wills estate administration protects the charity and its Trustees from unnecessary risk
- It can ensure that a Gift in a Will is received as the donor would have wanted it
- It can speed up the time that income is received
- It can build strong relationships with next of kin and solicitors, to positively influence future giving
- It can give the organisation vital information about future income for forecasting purposes
- It can increase the value of bequest giving to the charity

The biggest case for a proactive approach to estate administration is that we believe this adds around 10% in the value of bequest giving. Based on the estimated size of the Australian bequest giving market, this could provide an extra $75 million in additional Gifts in Wills income each year, if the sector adopted a consistent, proactive approach to estate administration.

This toolkit is designed as a supplement to a three-part webinar series developed for Include a Charity members, from the team of Gifts in Wills estate administration experts, Legacy Link.

We hope this becomes a helpful reference point for you in your ongoing communications with executors and family members, and we encourage you to make good practice in estate administration a core pillar of your Gifts in Wills strategy.

Ashley Rowthorn - CEO, Legacy Futures

Legacy Link

Legacy Link have been supporting charities with practical Gifts in Wills estate administration support for the last 20 years. Our specialist team of Gifts in Wills consultants work with more than 70 organisations of all shapes and sizes to ensure their Gifts in Wills income is received and that it has the greatest impact for the charity.

Legacy Futures

Legacy Futures is a new group of companies, formed in April 2020, bringing together estate administration specialists Legacy Link together with market insight specialists Legacy Foresight and communications experts Legacy Voice.

Together they are helping organisations across the world to maximise on the Gifts in Wills opportunity by growing their legacy income and securing their futures.

Our team

Ashley Rowthorn

Ashley is CEO of the Legacy Group of companies which includes Legacy Link, Legacy Voice and Legacy Foresight.

He is a Gifts in Wills fundraising specialist with over a decade of experience of developing strategies for charities in the UK, across Europe and Australia. Ashley is a member of the Remember a Charity Campaign Council and author of a chapter in the DSC published Legacy and In Memory Fundraising book.

Julie Bentley

Julie started her legal career in 1981 in Australia, completing her law degree and being admitted to practice as a Solicitor in Victoria in 2001, and subsequently in England and Wales in 2004.

Julie previously owned and operated a successful general legal practice in Victoria for several years. Following relocation back to the UK in 2011, Julie practised in-house as Head of Legal at two large national Charities, providing general commercial legal advice.

Having gained an extensive and well-rounded professional experience during the past 39 years, Julie now practises law on a consultancy basis, and provides Gifts in Wills estate administration services through Legacy Link.

Paul Browne

Paul Browne an experienced Gifts in Wills manager supporting a number of charities with hands on estate administration support.

Paul enjoys the challenges of delivering legacy administration, best practice and educational seminars to charitable legacy teams across the UK and also working as a Director of the Institute of Legacy Management.

Estate Administration 101

The role of the legacy administration officer

The Legacy Administration Officer has many functions, but primarily, acts as the representative of the Charity Trustees and as an ambassador for the Charity, with the aim of maximising financial benefit for the Charity.

The Legacy Administration Officer has responsibility for the pro-active management and administration of financial gifts, which involves responding to all communications received from internal and external sources in a timely manner, particularly Lay Executors and Solicitors appointed to obtain the Grant of Probate and administer the Estate.

It is fundamental that, at the first opportunity, Legacy Administration Officers express sincere condolences and gratitude to the family of the Deceased on behalf of the Charity, with genuine respect and sensitivity, and always taking into consideration the timing of communications so as to avoid causing unnecessary distress to family members.

It goes without saying that the legacy administration process involves dealing with sensitive personal information necessitating a high level of confidentiality.

Whilst there are usually no fixed time periods within which the legacy administration process is to be completed, particularly where complex Estates are involved, it is part of the Legacy Administration Officer's role to ensure that files are regularly reviewed to progress the receipt of the Charity's entitlement. As a general rule, and always on a case-by-case basis, files should be reviewed every three to six months.

Maintaining up-to-date records will ensure that the reporting of gift income is as accurate as possible, which in turn enables the Charity to forecast future gift income with a reasonable level of certainty.

The recording of restricted gifts is a vital function of the Charity's legacy administration process, as gifts for which a donor has directed be used for a specific purpose and accepted by the Charity **must** be separated from gifts for general application.

Where several charitable beneficiaries will share in an Estate, engaging with the wider Charity sector and building professional relationships with co-beneficiaries will often provide much needed support by way of 'strength in numbers'.

Finally, it is the Legacy Administration Officer's responsibility to not only ensure that the Charity receives its full entitlement in accordance with the Will, but to protect the Charity's valuable reputation in its dealings with both professionals and the general public.

The relationship between charity and solicitors/lay executors

An Executor appointed by the Will and pursuant to a Grant of Probate issued by the Court is empowered as the **legal personal representative** of the deceased following death. It is essential that Legacy Administration Officers maintain a pro-active, courteous and professional relationship at all times with both professional (i.e. Solicitors or Will Trustees) and Lay Executors in all communications.

Whilst it is polite to respond promptly to any request for information, it is imperative that sensitive dates be considered, for example, the anniversary of the date of death, or the Deceased's birthday, when sending any communications.

Expressing sincere empathy is fundamental in legacy administration communications, along with genuine gratitude for the financial gift. This is paramount when dealing directly with family members as Lay Executors. Whilst template letters are a time-saving tool, adapting these when communicating directly with a family member will convey a more personal and sensitive approach.

A Legacy Administration Officer needs to strike a fine balance between being persistent, but patient, when requesting information.

There may be times when Lay Executors will ask for your assistance in the administration process, and it is reasonable to provide general information only, and always be aware, that you are unable to offer any legal or financial advice.

The Will / Codicil itself and validity

What actually is a 'Will' ?

A 'Will' is a legal document that expresses how an adult individual wishes their assets to be distributed after their death, and which person or persons (the Legal Personal Representative/s (Executor/s) will be appointed to administer the distribution of those assets once a Grant of Probate is obtained.

What is a Codicil ?

A 'Codicil' is a legal document that changes one or more provisions in an existing Will, without affecting the remaining terms. For example, the name of the Executor may change, an additional financial gift may be included or a beneficiary removed.

When is a Will / Codicil legally valid ?

- The Testator (male) / Testatrix (female) must be at least 18 years of age;
- The Testator / Testatrix must possess 'testamentary capacity' at the time of providing their instructions for their Will / Codicil (*but note, not necessarily at the time of signing their Will)*. The definition of 'capacity' means being 'of sound mind', i.e. the ability to comprehend and understand information in order to make voluntary decisions and clearly communicate those decisions;
- the Will / Codicil must be in writing;
- the Will / Codicil must be signed ('executed') i.e. by the Testator/Testatrix personally, or at his/her direction; and
- the signature of the Testator/Testatrix must be correctly witnessed, i.e. in the physical presence of two independent adult witnesses in the same location, and preferably using the same pen.

An Executor or beneficiary named in the Will cannot act as a witness.

Each Australian State / Territory has its own legislation governing the valid execution of Wills:

Victoria	**Wills Act 1997 (s.7)**
South Australia	**Wills Act 1936 (s.8)**
Queensland	**Succession Act 1981 (s.10)**
New South Wales	**Succession Act 2006 (s.6)**
Tasmania	**Wills Act 2008 (s.8)**
Western Australia	**Wills Act 1970 (s.8)**
Australian Capital Territory	**Wills Act 1968 (ss.9, 10)**
Northern Territory	**Wills Act 2000 (s.8)**

The impact of Coronavirus

As a result of COVID-19, remote witnessing of Wills may now be carried out in the United Kingdom, however in Australia, only Victoria, New South Wales and Queensland have enacted legislation to allow remote witnessing of Wills:

Victoria:

- ***COVID-19 Omnibus (Emergency Measures) Act 2020 (Vic.) and COVID-19 Omnibus (Emergency Measures) (Electronic Signing and Witnessing) Regulations 2020 (Vic.).***

This legislation creates temporary measures to allow for some documents (Wills, Codicils and other testamentary documents) to be witnessed remotely. (*nb. These Regulations will only remain in effect until 25 October 2020*[1]).

New South Wales:

- ***Electronic Transactions Amendment (COVID-19 Witnessing of Documents) Regulation 2020.*** This Regulation is due to expire on 23 October 2020[2].

Queensland

- ***Justice Legislation (COVID-19 Emergency Response – Documents and Oaths) Regulation 2020 under the COVID-19 Emergency Response Act 2020.***
  These Regulations will apply to testamentary documents signed between 15 May 2020 and 31 December 2020.
  The Queensland Supreme Court Practice Direction Number 10 of 2020 also created the power to dispense with the rule under the *Succession Act 1981 (QLD)* that a witness to a valid Will must be physically in the presence of a Testator when they sign their Will.

What happens if you lack capacity and want to make a Will ?

Statutory Wills

If an individual lacks the legal testamentary capacity to provide instructions to make a Will, an application may be made to the appropriate State/Territory Supreme Court for a Statutory Will (also known as Court-authorised Will) to be made. A Statutory Will is one that is made by the Court on behalf of a person who lacks legal capacity to make their own Will. (nb. in Tasmania, a Statutory Will may also be made by the Guardianship and Administration Board in some circumstances).

Statutory Wills are a relatively new development in Australia, with the relevant laws having only been introduced in 1996.

Informal Wills

There have been some recent interesting Australia case law concerning 'informal' Wills, i.e. Wills which would not usually meet the legal requirements however were deemed valid:

- *Re Nichol; Nichol v Nichol [2017]* QSC 220 (involved an unsent text message);
- *Estate of Leslie Wayne Quinn, Re Quinn [2019]* QSC 99 (involved a video recording);
- *Alan Yazbek v Ghosn Yazbek & Anor [2012]* NSWSC 594 (involved a 'word' computer document).

Choosing an Executor

The appointment of an Executor is an important personal decision as this person will be responsible for identifying and gathering together all personal assets and liabilities and ensuring that the Estate is administered in accordance with the wishes of the Testator / Testatrix. It is usually a spouse/partner, family member or trusted friend.

The Will may appoint one Executor, with a substitute Executor named in the event the named Executor is either unable (having predeceased, or in ill-health) or is unwilling to accept the role of Executor. It is

[1] Subject to any extension of operation.
[2] Subject to any extension of operation.

also common to appoint more than one Executor to act jointly, however, any more than four in number may result in unnecessary disagreement and therefore become unworkable.

In some instances, a professional Executor may be appointed, for example, a Solicitor/Accountant or a professional Trustee such as State Trustees.

Executor's Commission - is an Executor entitled to be paid ?

An Executor is entitled to be reimbursed reasonable expenses incurred during the administration of the Estate, for example: travel and mileage expenses, any additional funeral or wake expenses paid personally, arranging delivery of specific gifts to beneficiaries, postage etc.

Generally, unless an Executor is a professional executor, or there is a specific **charging clause** in the Will which clearly makes provision for a commission to be payable to the Executor, an Executor is not entitled to charge professional fees for his/her time or services.

Where there is a charging clause, or the Executor has incurred unusual expenses or it is reasonable in the circumstances to provide his/her professional assistance, and the Executor is unable to reach an agreement with the Beneficiaries as to what reimbursements can be claimed, the Executor may apply to the respective State Supreme Court for an Order in accordance with the following legislation:

Victoria and Western Australia	**Executor's Commission will be capped at 5%**
New South Wales and Northern Territory	**This will be subject to the Court's discretion, however, generally:** **Between 0.25% - 1.25% of the value of the assets;** **Between 0.5% - 2.5% of the income on capital realisations; and** **Between 1% to 5% on income collections.**
Queensland, South Australia, Western Australia Australian Capital Territory and Tasmania	**All subject to the Court's discretion.**

What revokes a Will ?

Generally, a Will is revoked when:

- a new Will states that all former Wills are revoked;
- a marriage has the effect of revoking a Will - if a new Will is not made after marriage, then the Testator/Testatrix will be deemed to have died 'intestate' and the 'rules of intestacy' will apply. *(There are exceptions to this rule however, for example, a Will which is made in contemplation of marriage).*

It is important to note that a divorce will not revoke an existing Will.

'Intestacy' or 'partial intestacy' – where an individual dies without leaving a Will, or part/all of a Will is deemed invalid

Each Australian State/Territory has its own statutory rules governing distribution of an estate upon intestacy:

Victoria	**Administration and Probate Act 1958, Part 1A**
New South Wales	**Succession Act 2006, Chapter 4**
Queensland	**Succession Act 1981, Part 3 and Schedule 2**
South Australia	**Administration and Probate Act 1919, Part 3A**
Western Australia	**Administration Act 1903, Part 2**
Tasmania	**Intestacy Act 2010**
Northern Territory	**Administration and Probate Act 1969, Part 3, Divisions 4, 4A & 5**
Australian Capital Territory	**Administration and Probate Act 1929, Part 3A**

By way of example, in Victoria, if a person dies 'intestate' his/her assets are distributed in order of priority as follows:

- Payment of all funeral, testamentary, administration expenses, debts and other liabilities;
- Any pecuniary gifts (these will still be paid if there is only a *partial* intestacy, i.e. only part of the Will is deemed invalid);
- Where the deceased leaves a partner, but no child – the partner takes the whole of the deceased's Estate;
- Where the deceased leaves a partner and a child/children of the deceased and that partner, the partner takes the whole of the deceased's Estate;
- Where the deceased leaves a partner and a child/children who is/are not the child/children of the partner, then the partner takes:
  - the personal chattels, plus
  - the first $451,909 (the **'Statutory Legacy'**), plus interest on the Statutory Legacy from date of death to the date of payment *(nb. the partner will take all of the Estate if the Estate is worth less than the Statutory Legacy)*, plus
  - one half of the balance of the Estate; and
  - the child/children of the deceased are entitled to the other half of the balance of the Estate in equal shares.
- where there is no partner, but a child/children, then that child/children will share equally (or grandchildren equally if the child/children have predeceased, and great grandchildren (if any) equally);
- If the deceased leaves more than one partner, then the partners, in the absence of a distribution order or agreement will take the partner's share equally among them.
- Where there is no surviving partner, child/children or grandchildren etc, then the deceased's next-of-kin (and equally, if more than one) will share the Estate in the following order:
  - parent/s;
  - sibling/s;
  - children of deceased sibling/s;
  - grandparent/s;
  - aunts/uncles;
  - children of deceased aunts/uncles.
- Where there are no surviving next-of-kin, the Estate will go to the Crown.

The 'Statutory Legacy' of $451,909 is specified in *s. 70M, Part 1A of the Administration and Probate Act (Victoria) 1958)* and is adjusted annually to CPI.

Gifts in Wills – what type of gifts can you leave in Wills?

Gifts in Wills can comprise almost anything, however, the four most common types of gifts (or 'bequests') are:

- **Pecuniary gift** – a cash gift in a specific amount, for example $10,000;
- **Specific gift** – the gift of a particular item, i.e. a piece of jewellery or a property;
- **Residuary gift** – a gift of all, or a share of the Estate which remains after payment of all other gifts, debts, tax, administration and legal expenses;

- **Life interest gift** – an entitlement to receive income from all or part of an Estate until death. Another common life interest gift is a 'right to reside' which allows the recipient beneficiary (usually a spouse/partner) to reside in the deceased's property for the duration of their lifetime, or until some other event occurs, for example, re-marriage or the beneficiary chooses to vacate the property.

Other types of gifts in Wills

Restricted gifts

When the gift in a Will is specified as being for a particular purpose, this is known as a 'restricted' gift, (usually an amount of money or an item). If a restricted gift is accepted by the Charity, the Charity is under a **legal obligation** to use that gift strictly in accordance with the Testator's directions. For example, the Will clause states:

'I give the sum of Ten Thousand Dollars ($10,000) to the Salvation Army to support its work with the homeless in Sydney'.

Conditional gifts

When a gift only becomes payable upon the occurrence of a specified event, this is known as a 'conditional' gift, for example:

'I give the sum of Ten Thousand Dollars ($10,000) to my nephew, Peter James Taylor, if he shall survive me and attain the age of twenty one (21) years'.

The Estate

What assets are included in the Estate

Generally, an Estate will generally comprise all assets which the Deceased owned in their own name (or as 'tenants-in-common' with other individuals) as at the date of their death.

These assets usually comprise:

- all personal belongings (household items, clothing, ornaments);
- jewellery;
- motor vehicles;
- bank accounts;
- property (house/land);
- investments/shareholdings portfolio;
- art collections;
- a share or other rights/entitlements in businesses/companies;
- superannuation fund proceeds and life insurance policy proceeds (in the absence of any nominated beneficiary such as a spouse/partner or children, or where or a non-binding nomination is upheld by the Fund Trustees);
- assets which are owned 'tenants-in-common' in equal or unequal shares with other individuals.

What assets fall outside the Estate?

- superannuation funds and life insurance policy proceeds where there is a binding nomination I favour of specified beneficiaries such as a spouse/partner or children;

- assets owned jointly (i.e. not as tenants-in-common) where the surviving owner is entitled to the whole asset.

The Grant of Probate / Letters of Administration application process

Following the death of an individual, where there is a legally valid Will, the named Executor/s is responsible for obtaining a Grant of Probate to 'prove' the Deceased's Will and obtain legal authority to deal with their assets and liabilities in accordance with the terms of the Will.

Where there is a valid Will, but the only named Executor has either died before the Deceased or is unable/unwilling to act as Executor, then an application for a **Grant of Letters of Administration with the Will Annexed** must be obtained to enable an alternative legal personal representative to be granted authority to deal with the Deceased's assets and liabilities.

Where the Deceased died without leaving a legally valid Will at all, then an application for a **Grant of Letters of Administration** must be obtained to enable the Court to appoint an alternative legal personal representative to deal with the Deceased's assets and liabilities in accordance with the laws of intestacy.

Following death, an Executor/s named in the Will has responsibility for a variety of duties such as assisting with arranging the funeral, obtaining the Death Certificate and identifying all assets and liabilities of the Deceased.

The Executor/s will then either instruct Solicitors to prepare and submit the application for a Grant of Probate / Letters of Administration and administer the Estate on his/her/their behalf ***OR*** prepare and submit the application and administer the Estate in accordance with the terms of the Will personally.

To enable an application to be submitted to the Supreme Court, the Solicitor/Executor will need to:

- contact all interested parties, eg. banks, lending institutions; professional advisers; property insurers, personal life insurance companies, pension/superannuation funds; investment fund managers; beneficiaries etc., to formally notify the death;
- identify the beneficiaries named in the Will, and their respective entitlements;
- obtain asset/debt valuations as at the date of death which will form the Inventory of Assets;
- arrange for the requisite Statutory Notice to be posted on the appropriate Supreme Court website – *please refer to section 14.9 of IAC Legal Engagement Toolkit for State by State legislative authority*.
- following expiry of the two week Statutory Notice period, submit the formal application for Grant of Probate/Letters of Administration together with the original Will and supporting documentation to the State/Territory Supreme Court Probate Registry.

If the Application is accepted by the Court, an official Grant will be issued.

The Executor/s will then be responsible for:

- Arranging to gather in all financial assets of the Estate;
- Resolve any disputes concerning the Estate;
- Arrange for the sale or redemption of any assets not specifically gifted in the Will;

- Attend to the discharge of all personal debts, liabilities, outstanding income tax, deduction of all administration and legal costs of the administration;
- Invest funds or manage assets on behalf of minor or conditional beneficiaries, including insuring and maintaining properties in good repair;
- Upon expiry of the statutory claim period *(nb. each Australian State/Territory nominates a specified claim period – please refer to section 14.11 of IAC Legal Engagement Toolkit for State by State legislative authority)*, distribute the Estate assets to all beneficiaries, either by a transfer of ownership (specific gift) or by cash entitlement;
- Obtain a receipt and release from each beneficiary.

When should the Executor submit an application for Probate?

For statutory time limits, please refer to section 14.8 of IAC Legal Engagement Toolkit for State by State legislative authority.

'Small' Estates

What constitutes a 'small' Estate is determined by a gross value threshold for each State/Territory, however in some circumstances a formal Grant may still be required by individual banks, superannuation funds or insurance companies etc., regardless of Estate value.

The Victorian Supreme Court Probate Office provides a 'Small Estates Service' to assist Executors apply for a Grant where an Estate is valued at $50,000 or less.

The beneficiary's right to information

A beneficiary named in a Will / Codicil is entitled to be provided with certain information by the Executor, particularly a copy of the Will which will enable the beneficiary to be aware of the size and nature of their gift, and importantly, to identify whether the gift is conditional or imposes any restrictions upon the use of the gift – *please refer to section 14.2 IAC Engagement Toolkit for State by State legislative authority.*

In general legacy administration practice:

- a **pecuniary/specific gift** beneficiary is entitled to a copy of the Will, or alternatively, the relevant Will clause;
- a **residuary** beneficiary is entitled to a copy of the Will, the Inventory of Assets and the Estate Distribution Statement, and may also request copies of any other relevant information such as property, investment portfolio and jewellery/artwork valuations.

Obtaining copies of documents not provided by the solicitor/executor

Most Australian States and Territories (with the exception of South Australia and Western Australia) have legislation which provides that any person who has possession or control of a Will must allow a person named in the Will (and any earlier Will) to either inspect the original Will, or be provided with a certified copy.

A beneficiary may politely refer the Solicitor/Executor to this legislation when requesting copy documentation not provided following a previous request.

If copies are still not forthcoming, then once a formal Grant has been issued, upon payment of the appropriate fee, a beneficiary may submit an online application to the relevant State/Territory Supreme Court Probate Registry for a copy of the Will, Grant and Inventory of Assets, all of which are public record.

Breach of Executor/legal personal representative duties

Accepting the role of Executor or Legal Personal Representative comes with both a legal responsibility and personal liability to act diligently in the administration of the Estate.

An Executor/Legal Personal Representative can be found to have personally committed a breach of trust owed to the beneficiaries in the following circumstances:

- An unreasonable delay in obtaining a Grant of Probate or administering the Estate;
- Failure to protect the Estate assets, for example, allowing a property to deteriorate in condition or buildings/contents insurance to lapse;
- Dealing with assets in contradiction to the terms of the Will (known as ‘maladministration’);
- Making a serious error in administration (calculating distributions incorrectly);
- Misappropriating assets for personal gain, or acting with a conflict of interest (such as purchasing Estate property at a reduced value);
- Acting prejudicially against beneficiaries;
- Failing to produce the Distribution Statement;
- Distributing the Estate prematurelywithout retaining sufficient funds to cover liabilities or disregarding notice of potential claims against the Estate.

What can be done?

If an Executor delays in obtaining a Grant of Probate for the Estate or, having obtained the Grant, delays in carrying out the administration of the Estate, it is possible for an interested party, i.e. a beneficiary, to make application to the respective State/Territory Supreme Court to obtain one or more certain Orders, for example:

- requiring Executors to furnish accounts of their administration of the Estate;
- directing Executors to do or abstain from doing any act relating to the Estate;
- approving transactions such as the sale of an asset, or a compromise between beneficiaries;
- determining any question arising in the administration of the Estate; or
- as a last resort, requiring the Executor to deliver the Grant of Probate back to the Court and the removal of the Executor to enable the administration of the Estate to be carried out by an independent person such as the Public Trustee (known as an ‘administration order’).

The principles for good estate administration

Notification of gifts in wills ('bequests')

Notification of a gift in a Will (often referred to as a 'bequest') can be received in several different ways, for example:

- Solicitor's letter;
- Communication from the Executor (legal personal representative), sometimes including a cheque;
- Notification from a family member;
- Direct payment into your Charity's bank account via your 'donate' web page, usually with a confirmation email/letter.

It is important to always check whether the notification relates to **a gift in a Will** or actually is a **donation** or **'in memory'** gift which is recorded differently and will not be included in your Charity's legacy income.

The initial process

Although each gift in a Will is unique, once notified of the gift, the initial administration of that gift usually follows a similar process involving:

1. Creating a new legacy record – your Charity may use a dedicated Gifts in Wills administration application (such as 'FirstClass'), another similar database or perhaps a simple Excel Spreadsheet;

2. Sending a prompt response in writing (letter or email) with sincere condolences to the family and expressing genuine gratitude for the gift, recognising any personal connection by the Deceased with your Charity (i.e. if he/she was a long standing member/financial supporter), providing any information requested of the Charity. This first communication is also an opportunity for you to politely request a copy of any documentation not yet provided, such as:

   2.1 for **Pecuniary** gifts: a copy of the Will and Grant;

   2.2 for **Residuary** gifts: a copy of the Will, Grant, Inventory of Assets, any property market appraisal/s or investment portfolio valuations (where appropriate).

Template correspondence will assist in ensuring consistency in communications.

Nb. if the date of death is less than six (6) months prior to the notification, then please remember to exercise sensitivity in your communications, particularly with personal Executors or family members.

3. Upon receipt of a copy of the Will / Grant of Probate and any other information, **always** check the following:

   3.1 the full name of the Deceased matches on both Will and Grant of Probate;

   3.2 dates in the Will/Grant of Probate correspond with other information received;

   3.3 the Will has been witnessed by two independent witnesses not named in the Will;

   3.4 all other information corresponds; and

   3.5 look for any conditions or restrictions that your gift may be subject to.

4. Maintain a good diary system to follow up with the Solicitors / Executors for progress every 3 months or so.

Estimating your Charity's entitlement

Calculation an estimation of your Charity's entitlement is an important function of the legacy administration process:

- For **pecuniary** gifts: the amount specified in the Will is your legacy income estimate, and can be formally 'recognised' or 'accrued' from an accounting point of view once the Grant of Probate has issued and you are not aware of any potential claims or issues which may reduce or abate your entitlement.
- For **residuary** gifts: to calculate a reasonable estimation of your Charity's entitlement, you will need a copy of the Will, the Grant of Probate and the Inventory of assets and liabilities filed with the Application for Probate. After deduction of all pecuniary and specific gifts, together with any other known liabilities (eg. mortgage/personal loans) and a general allowance for estimated legal fees (at say, 5% of the gross Estate value), you will be able to estimate your likely proportionate share.

Property investigations and market appraisals

If your Charity is a residuary beneficiary, and the Estate includes a property to be sold, it is prudent to request copies of any market appraisals obtained, together

with details of any issues which may impact upon the potential sale value, i.e. development value, non-compliance with covenants or planning/building regulations etc. from the Estate Solicitors / Executors.

It is also helpful to conduct your own searches of the Estate property via property engines such as ***www.realestate.com.au*** which may provide an indicative value, together with useful comparative sales information. Keep a copy of these searches on your legacy file, as they may be of use to your Charity's auditors.

Reviewing progress on your legacy administration files

It is best practice to regularly review your legacy administration files for progress every three months or so.

Where the Estate is being administered by Solicitors or professional executors (State Trustees), where there has not been any communications for a period of three months, a brief, but polite, follow up email or letter requesting an update on the administration will suffice – as each Estate is unique, please bear in mind any circumstances of which you may be aware which could cause a slight delay in progress and adjust your review diary accordingly.

For Estates administered by a Lay Executor, it is advisable to allow a period of six months in between follow up communications in order to avoid causing any personal distress, or appear to be 'pestering' the family.

If no further communications are received following two or more 'chaser' communications, then you may consider contacting the Solicitors or Lay Executor by telephone to politely enquire as to progress with the administration..

It is **paramount** that reviews be conducted on a case-by-case basis, and always taking into consideration any specific issues which may affect the timing of communications from the Solicitor/Executor.

Finally, getting into the habit of including any important dates in your diary reviews, for example, expiry of the 6 month claim period from the date of the Grant, Executor's year, property sale settlement date etc.

What if the Deceased owned assets in more than one State / Territory?

A Grant of Probate/Administration is usually applied for in the Supreme Court of the State/Territory where the Deceased person resided at the date of death.

If the Deceased owned property or assets in more than one State/Territory, it will be necessary for the original Grant of Probate/Administration to be 're-sealed' in each State/Territory Supreme Court to empower the Executor/Administrator with authority to deal with those interstate assets.

Once re-sealed, the original Grant will have the same effect and operation in each relevant State/Territory.

Taxation matters and appropriation of assets

Thankfully, unlike the United Kingdom, there is no Estate inheritance tax or death duties payable in any Australian State or Territory.

However, if the Deceased was a taxpayer at the date of death, then the Executor will need to ensure that a final personal taxation return is lodged on behalf of the Deceased up to the date of death, and that all personal and any capital gains taxation is paid prior to final distribution of the Estate.

Taxation of an individual and his/her Estate is governed by Federal taxation provisions, the (*Income Tax Assessment Act 1997 (Cwth).*

A Deceased's Estate is considered a 'trust' for taxation purposes, and whilst any income accrued upon the assets after death (i.e. bank interest, property rental income) will also be distributed to the beneficiaries in accordance with the Will, any tax must first be paid by the Estate, which is usually assessed at individual marginal tax rates for a period of three tax years after the date of death. For complicated Estates, it is usual for Solicitors / Lay Executors to seek professional assistance with preparation of final taxation returns from an Accountant.

Appropriation of assets:

'Appropriation' of assets is the 'paper' transfer of an asset to a beneficiary, either in full or partial satisfaction of a pecuniary gift or a share of the residuary Estate.

If agreed by all beneficiaries, it may be possible for assets such as property or an investment portfolio to be 'appropriated' **to tax-exempt charitable beneficiaries prior to sale**, with the sale subsequently effected by the Executor/Administrator as 'bare trustee' which may reduce the taxation payable by the Estate upon the sale of that individual asset.

Checking estate accounts and distribution

In Australia, there is a general principle that a legal personal representative has a responsibility to realise Estate assets, pay debts/expenses and distribute the Estate within one year of the date of death (this is known as 'the Executor's year').

Some Australian States/Territories impose a statutory time limit:

- Victoria – 1 year from date of death *(s.49 Administration & Probate Act 1958)*;
- South Australia – 6 months from date of Grant *(s.56 Administration & Probate Act 1919)*;
- Western Australia – 1 year from Grant *(Rule 37 - Non-Contentious Probate Rules 1967)*;
- Tasmania – 1 year from date of death *(s.43 Administration and Probate Act 1935)*;
- New South Wales – 1 year from date of death (general principle);
- Queensland: - 1 year from date of death, otherwise 8% interest payable *(Succession Act 1981)*.

Upon being provided with the Distribution Statement towards the end of the administration process and prior to distribution, Charities should carefully review the contents to ensure that all assets and liabilities in the Inventory have been properly dealt with in accordance with the terms of the Will, in particular:

- **Arithmetic** – Solicitors and Lay Executors are not usually accountants, and therefore first and foremost, check that the basic calculations in the Distribution Statement add up correctly, including

the apportionment of the residuary Estate. Whilst errors are not uncommon, save for minor discrepancies, these should be politely identified to the Solicitors/Executors;

- **Asset and liability values** – carefully check that the individual assets and liabilities included in the Inventory correspond with those listed in the Distribution Statement, and there are no significant decreases in value (allowing for any reasonable or known gain/loss, fees etc);
- **Unusual or unexpected liabilities or expenses** – look for those which appear to be excessive (for example, large personal loans or high credit card debt for an elderly person), given your knowledge, if any, of the Deceased's lifestyle;
- **Legal fees** - check the legal fees charged against the Estate. Generally, for a straightforward medium-sized Estate, you would expect to see legal fees equating to approximately 2-5% of the gross Estate value, and possibly more where the Estate is particularly complicated with little information or assistance provided by the Executor/family during the administration process. Also, bear in mind that for a smaller Estate (say, less than $100,000) the fees may be proportionately higher given that a similar type of legal work involved in a larger Estate may still be required;
- **Capital Gains Tax ('CGT')** - Charities are exempt from CGT and if the sale of an asset would usually attract CGT (for example, an investment property), then the Executor would be obliged to mitigate a tax liability arising wherever possible by 'appropriating' the asset to charitable beneficiaries prior to sale. It is recommended that the inclusion of capital gains tax paid in the Estate accounts should be clarified with the Solicitors/Lay Executor;
- **Deductible Gift Recipient** – if your Charity is a registered Deductible Gift Recipient, you can request that this is taken into account prior to final distribution to ensure that your gift is received tax-free.
- **Executor's commission** – it is wise to check that any commission paid to an Executor is pursuant to a charging clause in the Will, or with prior agreement, and is in accordance with State/Territory criteria;
- **Non-professional Executor expenses** – whilst a non-professional Executor acts voluntarily and must not profit from their position, they may claim reimbursement for reasonable out-of-pocket expenses they have incurred personally during the administration period. Charges for time or loss of earnings should be politely rejected, however, in some circumstances, a pragmatic approach may be warranted;
- **The Will** – also check that the specific terms of the Will have been applied, including the correct payment of all pecuniary gifts (and any 'abated' gifts) and residuary entitlements apportioned correctly.

Following your review of the Distribution Statement, it is important to raise any queries with the Solicitor/Executor as soon as possible prior to final distribution to allow sufficient time for any amendments to be made.

Acceptable legacy administration expenses and legal fees

Generally, unless otherwise specified in the Will itself, the following expenses are deductible from the Estate before final distribution:

- funeral expenses;
- reasonable wake expenses;
- memorial/headstone costs;
- Probate application fees;

- asset sale expenses, including Agent's sales commission and conveyancing fees;
- property or asset valuation fees (if appropriate);
- investment share portfolio transfer/redemption fees;
- Accountant's fees in dealing with taxation returns;
- Executor's other reasonable expenses incurred;
- legal fees incurred during the administration period; and
- Executor's commission (if entitled).

A residuary beneficiary is entitled to respectfully challenge any expenses which are not allowable, appear unusual or are unreasonably high.

Receipts, releases and indemnities

Upon final distribution of an Estate, Solicitors/Executors may ask beneficiaries to sign a **Receipt**.

It is imperative that the legacy administration officer carefully reads the document you are being asked to sign upon receiving your Charity's gift.

A simple form of Receipt will request an acknowledgement that your gift entitlement has been safely received - a simple communication of acknowledgement of safe receipt is sufficient.

In some circumstances however, the form of Receipt which goes further to include a formal **Release** and/or an **Indemnity** is requested by the Solicitor/Executor – unless otherwise agreed during the administration period, there is **no legal obligation** upon a beneficiary to agree to provide a Release/Indemnity as an Executor is **not entitled** to withhold distributions on this basis –

A Release not only acknowledges safe receipt of your gift by your Charity, but seeks to forever release the Solicitors/Executor from any future liability or further claim on the Estate once final distribution has occurred ***– it is recommended that this particular wording is deleted and initialled before returning the document.***

An **Indemnity** goes considerably even further than a Release, and entitles the Executor to recover gifts incorrectly paid to the Charity, together with any amounts awarded or costs incurred by the Executor in the event of a future claim against the Estate. Generally, Charities should **always decline** to provide Indemnities in the first instance.

If there are several charitable beneficiaries some of whom may have already agreed to provide an Indemnity, it is important to remember that your Charity is not legally obligated to also provide an Indemnity – a simple refusal will not preclude your Charity from receiving its entitlement.

In rare circumstances, it may be reasonable and appropriate for your Charity to provide an Indemnity, for example, where it has not been possible to locate a missing beneficiary, and in the absence of any insurance to protect the Executor from personal liability if that beneficiary makes a future claim for his/her entitlement. However, ***Indemnities should only be provided in exceptional circumstances, and if so, the terms of the Indemnity are limited as follows:***

- In time - for a short, fixed period of time only, for example one year if possible;
- In value - for an amount not exceeding the value of the Charity's share of the Estate;

- If more than one residuary beneficiary, then in the same **proportion** of as the Charity's entitlement in the Will, eg. 25%; and
- **Never** on a **joint and several** basis, i.e. where your Charity agrees to acceptother beneficiaries' liability if they fail to honour their obligations under the Indemnity.

The Trustees of your Charity have a legal duty to carefully consider any request for an Indemnity – therefore, ensuring that you have received all relevant information concerning the assets, liabilities and distribution of the Estate will enable your Trustees to make a fully informed decision if this situation arises.

It is our recommendation that Indemnities are not signed unless they are strictly limited as set out above. It is paramount that you carefully read the terms of any document requiring your Charity's signature before signing, and always refer the document to your Manager if unsure as to its meaning.

Co-beneficiaries – the benefits of a 'lead Charity'

By working together, Charities as co-beneficiaries can reduce the burden for Solicitors/Executors of communicating and duplicating information for numerous Charities, therefore minimising time, legal fees and postage in the administration of an Estate.

Charities can work collaboratively by agreeing to appoint a 'lead Charity' who will liaise with the Solicitors/Executors directly, sharing useful updates and information throughout the administration period with their charitable co-beneficiaries.

An additional benefit is that a lead Charity is able to collect the views of its charitable co-beneficiaries and present a united decision to Executors, by way of a 'strength in numbers' approach.

What if an Estate is insolvent?

Generally, it is the duty of the Executor/Administrator to pay all personal debts, tax and other liabilities, specific gifts, pecuniary gifts and then finally, after deduction of all estate administration costs, the residuary gifts.

The Will may include a direction to the Executor as to the discharge of a particular liability for which the Executor is bound to follow, eg a personal loan is to be repaid from the proceeds of sale of a specific asset before distribution of the net proceeds to a beneficiary.

If an Estate is **partially insolvent** after discharge of all liabilities, it may be necessary for gifts to be proportionately reduced (this is known as **'abatement'**).

'Abatement' of a gift occurs when there are insufficient funds in an Estate to pay all or some of the gifts.

What if an Estate is has insufficient funds to repay any debts at all?

If an Estate is completely **insolvent,** or becomes insolvent as a result of payment of the liabilities and expenses incurred by the Executor, and it is not possible for any gifts to be paid, then the Estate will be administered pursuant to either Part XI of the *Bankruptcy Act 1966 (Cwth)* or other appropriate

State/Territory legislation. The latter may be the easiest approach which involves notifying creditors that no assets are available to pay the Deceased's debts and requesting a write off.

For example, in South Australia: the *Administration and Probate Act 1919* requires the Executor (or a creditor) to file a declaration with the Registrar of Probates, and upon approval by the Court, the Estate will be administered in the same manner as the Estate of a person who has been declared bankrupt and any beneficiaries treated as creditors of the Estate. The Executor will then distribute the assets to pay part or all of the debts in accordance with the same rules as the *Bankruptcy Act 1966 (Cwth).*

For more complex Estates, these can be administered pursuant to the *Bankruptcy Act 1966 (Cwth)*, which includes provisions enabling the recovery of property or dubious lifetime transactions - eg. undervalued disposals/transfers/preferential payments - an independent expert is appointed to deal with the Deceased's Estate and relieve the Executors from dealing with pressure from creditors or family members.

If the Deceased satisfies the residency requirements of the *Bankruptcy Act 1966 (Cwth)* (i.e. personally present/ordinarily resident in Australia at the time of their death), then the Executor (or a creditor) may apply to the Federal Court to appoint a Bankruptcy Trustee. After the Estate administration is concluded, any outstanding debts unpaid will 'die' with the individual.

How can an Executor be protected from liability?

An Executor is able to protect himself/herself by:

- Placing Statutory Notices prior to submission of the Application for Grant of Probate to ensure the Executor is not liable for any unknown outstanding debts of the Deceased;
- Seeking to obtain signed Releases (or even Indemnities) from beneficiaries.

What happens if there are missing beneficiaries?

When an Executor is unable to locate one or more beneficiaries named in the Will, an Executor may apply to the appropriate State/Territory Supreme Court for a **'Benjamin Order'** *(Re: Benjamin; Neville v Benjamin [1902] 1 CH 723).*

This is an Order by the Court to determine who should benefit from the distribution of assets upon death when it is uncertain whether a beneficiary is alive or is unable to be traced, and relieve the Executor from further liability if missing beneficiaries are subsequently discovered.

Rectification of Wills

Legislation in all Australian States/Territories empower each Supreme Court with a discretionary power to rectify a Will so that it carries out the true intentions of the Deceased, for example, in order to correct a simple clerical error in drafting the Will, where a specific clause is ambiguous in its meaning, a particular item has been mis-described, or because the Will fails to properly give effect to the Deceased's instructions.

Victoria	**Wills Act 1997 (s.37)**

South Australia	**Wills Act 1936 (s.25AA)**
Queensland	**Succession Act 1981 (s.33)**
New South Wales	**Succession Act 2006 (s.27)**
Tasmania	**Wills Act 2008 (s.42)**
Western Australia	**Wills Act 1970 (s.50)**
Australian Capital Territory	**Wills Act 1968 (s 12A)**
Northern Territory	**Wills Act 2000 (s.27)**

Time limits do apply for such applications and the period can vary from 3 to 12 months depending upon the State or Territory involved. The time period may commence from either the date of death, or from the date Probate was granted. In extenuating circumstances, a Court will have discretion to allow an application to be filed out of time.

For the application to succeed, scompelling supportive evidence is required showing clear proof of the Deceased's actual intention.

If the Will rectification will have an adverse effect upon your Charity's entitlement, it is always prudent to obtain independent legal advice before consenting to any Application.

Deeds of Family Arrangement

It may also be possible for one or more beneficiaries of a Will to mutually agree to enter into a **'Deed of Family Arrangement'** in order to vary the distribution under the Will, and in some instances, in order to avoid a formal claim being made against the Estate.

A Deed of Family Arrangement:

- Does not require formal legal proceedings to have been previously issued by a party to the proposed Deed; and
- Must be signed by **all** interested parties, including the Executor/s;

If the requirements of the *Income Tax Assessment Act 1997 (Cwth)* are met, then there should be no adverse capital gains tax consequences by entering into the Deed of Family Arrangement, although there may be specific State/Territory stamp duty implications concerning any property involved.

Although the Executor is not obligated to do so, for greater certainty, a Deed of Family Arrangement may be submitted to the appropriate State/Territory Supreme Court for approval.

It is our recommendation that your Charity seek specialist legal advice before agreeing to enter into a Deed of Family Arrangement.

Governance and other legal considerations

Restricted gifts – legal obligations

What is a restricted gift?

It is not uncommon for donors to leave a gift to your Charity which includes a specific direction as to how the gift or specific item is to be used. This is known as a 'restricted gift'. For example:

'I give devise and bequeath the sum of $10,000 to the RSPCA and I direct that the funds be used for their facility at Geelong, Victoria'.

It is important to check the actual wording in the Will to determine whether the gift is restricted or not – if not, then the gift may be used for general purposes.

Acceptance of a restricted gift creates a **legally binding obligation** upon the Charity, which must be recorded separately in the Charity account and kept separate from general purpose funds.

Restricted funds are usually created by a bequest in a Will/Codicil (known as the 'governing document'), or they may be created by way of a fundraising appeal for a specified project.

What if the Will refers to a 'wish' only?

Sometimes, a Will clause may read as follows::

'I give devise and bequeath the sum of $10,000 to the RSPCA and I wish, but without creating any legal obligation, that the funds be used for their facility at Geelong, Victoria'.

Reference in a Will or Codicil to a **'wish'** is **not legally binding** on the beneficiary, however may create a moral obligation upon your Charity to comply from a reputational point of view.

Charities are also under a legal and financial duty to apply restricted funds in accordance with the specified restriction within a reasonable period of time (i.e. a Charity cannot simply retain funds for a 'rainy day').

Expenditure of restricted funds for a purpose other than specified and formally accepted, is a serious breach of trust by the Charity trustees and may result in legal action, not to mention the risk of considerable reputational damage.

Upon initial notification of a restricted gift, it is imperative that the Charity carefully consider whether it is able to accept and comply with the terms of the gift itself. There are several reasons why a Charity may not be able to implement the donor's intended purpose, such as:

- the activity or project for which the funds were to support no longer exists, for example, the RSPCA's facility at Geelong had closed;
- the intended use of the funds is not for public benefit or a charitable use in itself, for example, the donor intended the funds to be used to pay for Charity staff parties;
- it may be discriminatory, unethical or prejudicial insofar as equality, race or religion are concerned, for example, the donor specified the funds could only be used to support male clergy;
- it is too not financially viable for the Charity to implement the terms of the gift strictly, for example, a gift of $1,000 is to be used to advertise the Charity's services on prime-time television;
- the specifiedpurpose of the gift itself is illegal, for example, the funds are to be used for a criminal activity such as supporting terrorism;
- accepting the gift may adversely damage the Charity's reputation.

In some of the above circumstances, it is obvious that a Charity must **decline the gift**, however, where a particular project no longer exists, then it may be prudent for the Charity to seek legal advice as to whether there is an opportunity to obtain the agreement of the Executor and beneficiaries to vary the terms of the restriction.

For those historical restricted gifts already accepted, there may bemechanisms similar to the *Charities Act 2011 (UK)* available by which restricted funds can be 'unlocked', i.e. in Australia, a charitable beneficiary may seek the agreement of the Executor to an amendment of the restriction specified in the Will before the Application for Probate is submitted.

Types of restricted gifts

Gifts which are restricted in their use are commonly divided into two maintypes:

1. **Restricted gifts** – where the Will clause simply specifies a particular purpose for which the gift must be used, using the example above:

   'I give devise and bequeath the sum of $10,000 to the RSPCA and I direct that the funds be used for their facility at Geelong, Victoria'.

   Restricted gifts may be fully expended for the specified purpose, without any obligation to invest the original gift amount (known as the 'capital');

2. **Endowment Funds (either Permanent or Expendable)** – an endowment fund is created where the Will clause directs that the gift must be invested, with **only the income** available for a particular purpose, for example:

   Permanent Endowment Funds:

   'I give devise and bequeath to the RSPCA the sum of $10,000 to be invested, with the income only to be applied for the benefit of their facility at Geelong, Victoria'.

   If this type of financial gift is accepted, the Charity is legally obliged to comply with the terms of the gift, namely that the 'capital' gift of $10,000 must be invested with the Charity only being able to spend any interest (income) accrued on the original $10,000 for the specified purpose;

   Expendable Endowment Funds:

   'I give devise and bequeath to the RSPCA the sum of $10,000 to be invested, for which both the capital and income is to be applied for the benefit of their facility at Geelong, Victoria'.

   If this type of financial gift is accepted, again the Charity is legally obliged to comply with the terms of the gift, namely that the 'capital' gift of $10,000 must be invested, however the Charity is not only entitled to spend any interest (income) accrued on the original $10,000 gift, but if required, is also entitled to spend some or all of the original invested capital amount for the specified purpose.

   Historically, in the UK, endowment funds were more commonly gifted to Parish Churches, particularly for the ongoing maintenance of their historical buildings.

Charity trustee obligations

The **Australian Charities and Not-for-Profits Commission (the 'ACNC')** is the national (federal) Charities regulator. The ACNC is not a **fundraising** regulator as each Australian State/Territory has its own fundraising regulations and associated legislation.

It is imperative that Charities and their Trustees act in accordance with the provisions of the *Australian Charities and Not-for-profits Commission Act 2013* (the 'ACNC Act'), and the *Australian Charities and Not-for-profits Commission Regulations 2013* (the 'ACNC Regulations').

The ACNC Regulations incorporate the five 'Governance Standards'.

Charities must take all reasonable steps to ensure their Trustees know and understand their legal duties, and carry out these duties in accordance with the Governance Standards. **Governance 5** specifies the key obligations:

- to act in good faith, with reasonable care, skill, diligence and integrity at all times;
- to act in the best interests of the Charity to further its charitable purposes;
- not to improperly use information or position for personal gain;
- to manage financial resources and systems responsibly;
- to disclose and manage conflicts of interest;

- to ensure the Charity does not operate whilst' insolvent' (i.e. when the Charity is unable to pay its debts as and when due).

Delegated authority

Administration of gifts in Wills is a particularly sensitive activity, and therefore, with increasing regulation of the charitable sector, Charities should consider legacy administration a priority in terms of management and delegation of their authority.

Trustees have the ultimate overall responsibility for the conduct of the Charity and its staff, and may find themselves personally liable for any perceived or inappropriate operations of the Charity, whether they are aware or not.

What is delegated authority and why is it important?

To assist with the day-to-day operation and functionality of the Charity, it is helpful that a clear **Scheme of Delegation** is authorised by the Charity's Trustees and implemented by Charity staff.

Charity Trustees may elect to delegate particular functions to others, including sub-committees, management teams, specific staff, agents or investments managers for various reasons:

- To utilise the available skills of qualified staff or a select Committee to make decisions in relation to specific issues on behalf of the Trustees;
- To free up time for the Trustees to focus on more strategic decision-making and oversight of the Charity as a whole.

The power for Trustees to delegate these functions is usually embodied in its 'governing document', i.e.

- the Memorandum and Articles of Association (if the Charity is an incorporated charitable company);
- the Constitution (if the Charity is unincorporated);
- a Trust document (if the Charity was established by way of a Deed of Trust);
- sub-ordinate documents such as standing orders, Schemes of Delegation, terms of reference, internal policies or resolutions of the Trustees which detail the scope of delegated authority.

There is a key distinction between the **delegation of decision-making powers**, and the **delegation of the power to implement decisions made** - there is no restriction upon Trustees delegating their power to implement their decisions.

There may also be limitations within the Charity's own governing document as to which decisions can be delegated, or how they can be delegated, for example: where a **unanimous decision** of the Trustees is required.

Fundamental matters which are **specifically reserved to Trustees** cannot be delegated by Trustees, for example:

- Amending the Charity's governing document;
- Making decisions concerning the remuneration of Trustees, or other benefits; and
- Determining the strategic aims and objectives of the Charity.

Each Australian State/Territory operates its own statutory legislation which incorporates powers for Trustees to delegate certain functions:

Victoria	**Trustee Act 1958** **Trustee Companies Act 1984**
South Australia	**Trustee Act 1936** **Trustee Companies Act 1988**
Queensland	**Trusts Act 1973** **Trustee Companies Act 1968** **Trustee Companies Regulation 1996**
New South Wales	**Trustee Act 1898 No 4** **Trustee Act 1925 No 14** **Trustee Companies Act 1964 No 6**
Tasmania	**Public Trustee Act 1930** **Public Trustee Regulations 1999** **Public Trusts Act 1882**
Western Australia	**Public Trustee Act 1941** **Trustee Companies Act 1987** **Trustees Act 1962**
Australian Capital Territory	**Trustee Act 1925**
Northern Territory	**Trustee Act 2007**

The terms of any delegated authority should be recorded in writing, either in formal Trustee Minutes of Meeting, in a Scheme of Delegation or similar document, and ideally should include:

- details of the power delegated, and any limits upon such delegation;
- to whom the power is delegated, i.e. a named individual or specific role (Head of Finance) or a staff committee; and
- the procedure for reporting back to the Trustees on implementation of the delegated powers.

How will a Scheme of Delegation assist the administration of gifts in Wills?

On practical terms, much of the day-to-day work of a legacy administration officer, i.e. reviewing Wills, approving Distribution Statements, raising queries, issuing receipts for funds, is usually carried out pursuant to authority delegated by the Trustees.

Legacy administration officers should not make any decision on behalf of Trustees **unless they are specifically authorised to do so** and within defined limits, otherwise they may be held personally liable for actions or claims arising at a later date, despite originally carried out in all good faith.

Some Charities enable legacy administration officers a certain level of authority to make decisions such as approving the sale of Estate assets.

Activities involved in legacy administration which would usually be referred to in a Charity's Scheme of Delegation may include:

- decisions concerning the sale of Estate property, for example, what is the financial limit for a legacy administration officer/team manager to be able to approve, on behalf of the Charity, offers received for Estate property which are below the value specified in the Inventory;
- when and whom a legacy administration officer must inform Trustees of any contentious, or potentially contention legacy matters;
- when a legacy administration officer is permitted to instruct external professionals for advice, for example, the allowable budget available for external professional advisors eg. solicitors, counsel (barristers), accountants, investment managers;
- who will have authority to approve and sign receipts, releases/discharges on behalf of the Charity;
- negotiating the terms of Indemnities – as only Trustees can approve and sign the terms of an Indemnity, it is imperative that clear parameters must be outlined concerning authority to initially negotiate the terms of a proposed Indemnity;
- in limited circumstances where there are no other individuals/beneficiaries able or willing to act as Executor, the Charity accepting the role of Executor and making application for Grants of Probate/Letters of Administration, subject to:
  - the Charity's governing document permitting a staff representative of the Charity to act as Executor;
  - the Charity's Scheme of Delegation providing full authority to approve a decision for the staff representative to act as Executor and obtain a Grant of Probate/Letters of Administration; and
  - The staff representative being fully informed as to the ongoing personal nature of accepting the role and potential personal liability.
- Accepting/declining restricted gifts, for example, internal levels of approval for determining whether or not the terms of a restricted gift can be fulfilled before the gift is formally accepted.

It is considered best practice for a Scheme of Delegation to be reviewed **regularly** to ensure it remains fit for purpose and continues to align with both Charity governance policies, its aims and objectives, as well as the statutory Governance Standards.

Trustee are also obligated to carefully and continuously monitor the implementation and outcomes of their delegated authority.

Ex gratia payments

An **'ex gratia payment'** is a payment for which:

- the Trustees are not under any **legal** obligation to make;
- the Trustees feel they are under a **moral** obligation to make; and
- the Trustees cannot justify the payment as being in the interests of the Charity.

The majority of requests for ex gratia payments relate to a Deceased's Estate and usually involve a monetary amount, however, in some instances, they may involve specific items of sentimental value such as jewellery or personal belongings.

Ex gratia payments are commonly requested by family members, carers or close friends of the Deceased on the basis that the Deceased may have promised them a gift from their Estate which for whatever reason was not included in the Will.

It is important to be aware that an individual is entitled to leave their Estate as they choose, and mere disappointment in itself does not create a moral obligation upon the Charity to agree to make an ex gratia payment.

It is important to note that a payment to settle a legal obligation, for example, a payment to settle a potential claim against the Estate, does not constitute an ex gratia payment.

Some other payments which are commonly confused with ex gratia payments, but do not actually constitute an 'ex gratia' payment include:

- a payment that can be made under an existing authority, either express or implied, i.e. an agreement entered into by the Deceased with another individual prior to his/her death;
- a payment made as a compromise to avoid a claim being pursued against the Estate;
- a payment that can be justified as furthering the Charity's own objectives.

Only Trustees can approve an ex gratia payment request, unless authority up to a relatively small particular limit (i.e. $250) has been granted to legacy administration staff. For all requests over and above any set limit, the legacy administration officer must first obtain appropriate authority before approving.

Although not specifically stated in the Charities Act 2011 (UK), Trustees are generally not obligated to obtain Charity Commission approval for ex gratia payments in an amount less than £1,000, however Trustees must be able to demonstrate all relevant considerations have been made.

Process:

It is imperative that Executor and family expectations concerning ex gratia payments are managed in a sincere and sensitive manner.

Following any request for an ex gratia payment, legacy administration officers should notify Solicitors/Lay Executors in writing as soon as possible that whilst the request will be given due consideration, there is no legal obligation to agree an ex gratia payment, and that the Charity may not be able to honour the request.

It is the legacy administration officer's role to gather as much relevant information concerning the circumstances of the request as possible to enable the Charity to make an informed decision whether or not to approve an ex gratia payment for example:

- what were the true intentions of the Deceased, and whether there is any compelling evidence in support;
- whether there is any moral obligation owed by the Charity to the individual requesting the ex gratia payment, i.e. are there reasonable grounds to believe it would be morally wrong to refuse the request;
- the extent to which the Charity's own beneficiaries would be disadvantaged if the ex gratia payment was made;
- does the individual seeking the ex gratia payment have any other legal remedy, i.e. eligibility and reasonable grounds for a claim against the Estate;
- what is the potential for reputational risk for the Charity in either making or refusing the request (nb any decision made by the Charity must **not** be made solely on the basis of reputational risk).

Following due consideration, if the information obtained does not sufficiently justify the requested ex gratia payment, then the Trustees are obliged to reject the request.

Please remember that expressing both sensitivity and empathy in dealings with family members and Executors at all times concerning any request for an ex gratia payment is paramount in order to protect your Charity's reputation and preserve public respect.

Claims against the Estate

Each Australian State/Territory's succession legislation provides that where the Deceased is deemed to have not made adequate provision for the proper maintenance and support of certain dependants, then the Court may (at its discretion) make an order for further provision out of the Estate.

Applications are time limited – *please refer to Section 14.11 of the Legal Engagement Toolkit for individual State/Territory legislation.*

The various 'testator's family maintenance claim' ('TFM') legislation also applies to **intestate** Estates i.e. where an individual has died without leaving a valid Will.

The amount of any Order issued by the Court will depend upon the circumstances of each individual case.

To be eligible to bring a claim against the Estate, the Applicant must fall within one of the statutory prescribed categories:

Queensland	**Part 4 of the Succession Act 1981**
New South Wales	**Chapter 3 of the Succession Act 2006**
Victoria	**Part 4 of the Administration and Probate Act 1958**
South Australia	**Inheritance (Family Provision) Act 1972**
Australian Capital Territory	**Family Provision Act 1969**
Northern Territory	**Family Provision Act 1970**
Western Australia	**Family Provision Act 1972**
Tasmania	**Testator's Family Maintenance Act 1912**

For example, in Victoria, following the reform of family maintenance provisions which came into effect in January 2015, pursuant to *Part IV of the Administration and Probate Act 1958*, if the Deceased died on or after 1 January 2015, then only the following individuals are eligible to make a claim:

- a spouse or domestic partner of the Deceased at the time of death;
- a child of the Deceased (including an adopted or step-child or someone who believed the Deceased to be their parent and was treated as such) and who was under the age of 18 years at the time of death, a full-time student under the age of 25 or suffering from a disability;

- adult children of the Deceased not referred to above. Please note, however, that for claimants in this category, there is an additional consideration, namely the degree to which these children are not capable of providing adequately for their own maintenance and support;
- A former spouse or domestic partner who was eligible to make a claim under the Family Law Act 1975, but either had not yet done so, or existing proceedings were not finalised at the time of death preventing the claim proceeding.

Other eligible persons include the following, but only if they were **wholly or partially dependent** upon the Deceased for their proper maintenance and support:

- a registered caring partner;
- a grandchild;
- the spouse or domestic partner of a child of the Deceased (including an adopted or step-child or someone who believed the Deceased to be their parent and was treated as such, i.e. son or daughter-in-law) where that child has died within one year of the Deceased's death;
- a person who is (or had been, and was again likely to be in the near future) a member of the Deceased's household.

Instructing external legal advice

When does it become prudent to seek independent legal advice concerning specific legacy administration issues?

The Charity's delegated authority may specify:

- what type of contentious and non-contentious issues could arise for which independent legal advice should be obtained;
- interpretation of an ambiguous or complex Will clause;
- when your Charity is requested to take on the role as Executor/Administrator of an Estate;
- problematic requests for ex gratia payments;
- proposed Deeds of Family Arrangement;
- complex property issues;
- undue delays in Estate administration by the Executor;
- claims raised against the Estate; or
- suspected legacy fraud.

Who should be instructed?

It is common practice for a Charity to instruct a preferred firm of Solicitors used regularly, or chosen from a panel of Solicitors.

If the issue is particularly complex or contentious, specialist legal opinion may be required from Counsel (barristers) and will usually be obtained by your Solicitors on your behalf (at the expense of the Charity).

If your Charity is one of several charitable beneficiaries, it is both cost-effective and time-efficient for the Charities to work collaboratively and collectively instruct a preferred firm of Solicitors, with one of the Charities acting as 'lead charity' for communication purposes.

Best practice procedure:

- As soon as you become aware of a potential issue requiring external professional advice, it is prudent to first seek an indication as to whether your preferred firm of Solicitors will be able to accept your instructions;
- If accepted, confirm your instructions to professional advisers in writing;
- Always obtain fee estimates for both your preferred and other Solicitors (and Counsel if necessary);
- Ensure you have obtained Manager or Trustee approval before accepting fee estimates and formally engaging preferred Solicitors;
- Notify the Estate Solicitors/Executors of your intention to obtain independent legal advice.

Once appointed, your Solicitors will provide you with their recommendations as to your Charity's legal position, recommend available options and engage with the Estate Solicitors/Executors and third parties on behalf of your Charity.

In the unlikely event that further specialist expert advice or reports are necessary i.e. handwriting experts, medical experts etc. to support your Charity's position and assist in bringing the claim to a speedy resolution, your Solicitors will assistyou in this regard.

Legacy fraud

What is legacy fraud?

Legacy fraud occurs where there has been a misappropriation of either money, property or specific item gifted in a Will.

The **Smee & Ford Notification Service** in the UK is vital to UK Charities, as the service minimises the incidence of legacy fraud by providing subscribing members with notification of all Wills in the UK in which the member Charity is mentioned as a potential beneficiary.

Who would commit legacy fraud?

The perpetrator of legacy fraud may be either:

- an Executor (lay or professional);
- the Deceased's family members, friends or carers;
- a Charity staff member or volunteer.

External legacy fraud can arise as the result of:

- the Executor's failure to notify a beneficiary of a gift in a Will;
- the underpayment of an entitlement to a beneficiary;
- falsification of an Inventory of assets and liabilities, or Distribution Statement;
- the Estate Solicitors or Executors charging excessive fees or claiming unreasonable expenses;
- the sale of an asset at less than market value to a 'related person', i.e. a friend or family member;
- bogus invoices paid against the Estate;
- unauthorised access to, and use of the Deceased's assets, eg. cash, bank accounts;
- deliberate concealment of the existence of a Will;
- forgery of a Will or Codicil;
- deliberate concealment of Estate assets.

Internal legacy fraud can arise as a result of:

- diversion or misappropriation of gift in Wills income by a staff member for their own personal gain;
- unauthorised access to the Charity's bank account and transactional details;
- the financial misreporting of gift in Wills income.

It is paramount that all Charities implement robust safeguards to minimise the risk of both external and internal fraudulent activity. This may be achieved by:

- carefully checking Distribution Statements for asset values and accurate calculation of Estate distribution;
- Politely and respectfully requesting further information from Solicitors/Executors to verify asset values and Estate expenses;
- creating clear audit trails for electronic and paper legacy records;
- implementing and maintaining appropriate levels of authority for access to the Charity's bank account and transactions;
- monitoring your Charity's gift in Wills income and any unexplained variances in anticipated gift income;
- when closing gifts in Will files, reviewing the files against a closure checklist to ensure all gift income has been properly accounted for; and
- regularly reviewing your Charity's internal fraud detection procedures.

The following activity may be a warning sign that legacy fraud has occurred:

- No formal notification of an anticipated/expected gift, eg the Deceased had already provided a copy of their Will, or written advice stating their intention to leave a gift to the Charity;
- Assets and/or liabilities appear inconsistent with the lifestyle of the deceased, eg. the Deceased was an elderly pensioner not likely to own fast cars or expensive yachts;
- Unusual transactions appear in Estate Accounts, eg. the Deceased was known to be financially comfortable but had incurred vast credit card debt or personal loans;
- Unusual clauses have been included in the Will/Codicil, eg. where the Deceased had family, but the Will included generous gifts in favour of personal carers, distant friends etc.

What should I do if I suspect something is not as it appears?

If a legacy administration officer suspects that legacy fraud may have occurred, then they should act promptly and discreetly.

Given the extremely sensitive nature of legacy administration, it is imperative that all actions are taken with the utmost care, sensitivity and confidentiality. Suggested actions may include:

- Reporting the matter immediately to senior staff;
- Making a polite request for further information from the Estate Solicitors/Executors – this may assist in identifying or discounting any suspected fraud;
- Requesting independent valuations of specific assets or liabilities be obtained;
- Obtaining specialist advice for complex matters before any other action is implemented;
- where appropriate, contact the ACNC or your State Fundraising Regulator for guidance.

LEGACY Link

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