

# ESTATE ADMINISTRATION GUIDEBOOK

FOR AUSTRALIAN CHARITIES

Second Edition  
2024



**Bequest Assist**



**INCLUDE  
A CHARITY**  
Make your mark

# A NOTE

FROM THE DIRECTOR  
OF BEQUEST ASSIST

Bequest Assist was founded in 2019 with the aim of improving bequest administration for Australian charities. Our founder Maureen dreamed that if we could improve estate administration by just 1% for the Gifts in Wills sector, that would mean an extra \$10-\$20 million dollars for charities to put towards their essential causes.

Since then, we've grown to manage estate administration for over 20 Australian and New Zealand charities, hosted countless webinars and released the first edition of the Guidebook you're now reading. We've administered thousands of estates and trusts and secured over \$3 million for charities that they otherwise would have missed out on, or not received for years to come.

We've seen a lot more case studies and heard feedback from charities on what they struggle with the most since the first Guidebook. Together with updates to probate processes in some states and territories, this new edition includes much more information about assets like shares, real estate and superannuation, includes more content about how to be a proactive estate administrator and provides updated and expanded examples. Thanks to the generosity of Include A Charity, a campaign of Fundraising Institute Australia, we can now offer this new and improved Estate Administration Guidebook for the benefit of anyone who works to administer charitable bequests.

I'd like to thank a few people who helped bring this Guidebook to life. Without Chris Coates, Kelly Irish, Nancy Collins and Helen Beeby, this would not have been possible and I am so grateful to each of you.

As we look ahead to big changes for the organisation in the year ahead, Maureen remarked how proud she is of the changes she's seen in the Gifts in Wills sector in the last few years. Bequest Assist's webinars and training sessions give us an opportunity to see the enthusiasm and dedication that charity workers from all over the sector have for honest and efficient estate administration. It is an honour to work alongside all of you and I hope this Guidebook becomes an invaluable resource in your journey to steward generous gifts from bequestors to your charity.



– MORGAN KOEGEL, DIRECTOR OF BEQUEST ASSIST  
For more information, visit: [www.bequestassist.com.au](http://www.bequestassist.com.au)

# A NOTE

FROM THE CAMPAIGN DIRECTOR  
FOR INCLUDE A CHARITY

Include a Charity is delighted to partner with Bequest Assist on this second edition of the Estate Administration Guidebook for Australian Charities.

The landscape in bequests is continually changing, and we must keep pace with developments to support our members, all charitable organisations, professional bodies and, most importantly, the donors and public we serve.

This Guidebook provides a repeated go-to for answers to many queries and problems faced by estate administrators and Gifts in Wills teams. The result of this collaboration will save you time and maximise your realised estates for years to come. In our increasingly busy lives, this is worth celebrating. Keep it handy...



– HELEN BEEBY, CAMPAIGN DIRECTOR, INCLUDE A CHARITY  
For more information, visit: [www.includeacharity.com.au](http://www.includeacharity.com.au)

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Each estate is different and has its own unique characteristics and challenges. Bequest Assist is not providing legal or accounting advice in this Guidebook. Legislation referred to in this Guidebook may change after publication. The information contained in this Guidebook is of a general nature only and is based on Bequest Assist's general understanding of, and experience in, estate management, estate administration and charity practices.

If you have specific questions about estate management, estate administration or charity practices, you should obtain suitable professional advice.

Bequest Assist expressly disclaims any and all liability and responsibility for any direct or indirect loss or damage which may be suffered by any person relying on this Guidebook.

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## GOALS OF THIS GUIDEBOOK

THE PURPOSE OF THIS GUIDEBOOK IS TO ASSIST YOUR CHARITY THROUGH THE ADMINISTRATION PROCESS FROM THE INITIAL NOTIFICATION TO THE FINAL PAYMENT OF A BEQUEST.



This Guidebook focuses on ‘best practice’ for estate administration so that charities can receive the maximum payment in the shortest period of time, as your generous bequestors would have wanted.

In our experience and related research, closely managed estates yield **5-10%** more money for charity beneficiaries than those where a charity simply says thank you and does not perform due diligence.

While many charities do amazing work helping generous individuals plan bequests, the task of estate management is sometimes overlooked or undervalued in charities. Furthermore, estate administration can quickly become an overwhelming task when faced with unfamiliar jargon, perplexing wills or substantial payment delays. Understanding the process and what your charity must do will help your organisation secure bequest payments quickly, efficiently and in line with bequestor expectations.

This updated Guidebook provides a step-by-step process to help you understand what needs to be done, when and why. Our Glossary of Terms section will help you navigate the language of estates and bequests. Whatever stage you are at in the estate administration process, you will find suggestions and helpful information to achieve a resolution.

At all times, remember that when you are performing the administrative role to receive a bequest you are navigating a delicate space.

While this Guidebook empowers you to exercise the rights of your charity as a beneficiary to receive your charity’s complete entitlement, it is essential to express appropriate gratitude and sensitivity to all associated with the estate – most especially the deceased. A great estate administrator will be kind, gracious and confident of their charity’s rights. It is with this goal that this Guidebook has been created. In recognition of all the generous bequestors who have funded charitable work, we strive to help charity estate administrators perform at the highest level.

Our information has been developed to assist you with estate administration. However, it is not legal advice and is not intended to be a substitute for legal advice. Each estate will have its own complexities. Please consult your charity’s solicitor whenever you are uncertain of how to proceed with an estate. If you don’t have a “go to” solicitor, consider advice in Chapter 2.

# QUICK START GUIDE

## 20 STEPS OF ESTATE ADMINISTRATION

- 1. NOTIFICATION**  
Receive notification from executor or solicitor.
- 2. WHO WAS THE DECEASED**  
Check your charity records: was this person known to your charity?
- 3. READ THE WILL**  
Read the Will and note required information.
- 4. CONFIRM CHARITY NAME AND RESTRICTIONS ON THE BEQUEST**  
Check that the name of your charity is correct and if there are restrictions on the use of the gift.
- 5. CALCULATE YOUR ENTITLEMENT**  
Calculate your entitlement from information in the Will, and if a residuary gift, the Will and asset list.
- 6. DETERMINE WHEN THE GIFT IS EXPECTED AND FORECAST**  
Determine the date the bequest distribution is expected.
- 7. RECORD ALL BEQUEST DETAILS**  
Record all details in your estate administration tool.
- 8. ACKNOWLEDGE THE NOTIFICATION**  
Respond to the notification, include your Bequest Practices Document and ask for required documents (Will, asset list, final statement).
- 9. ASK FOR HELP ON LARGE OR COMPLEX ESTATES**  
Seek help from professionals or others when needed.
- 10. CHECK WITH SOLICITOR AT END OF CLAIMS PERIOD**  
Request an update from the solicitor as the claims period closes.
- 11. ASK FOR AN INTERIM DISTRIBUTION**  
Request an interim payment if the amount expected is over \$100,000.
- 12. REVISE THE FORECAST AS NEEDED**  
Update the forecast (amount and timing) of the bequest as needed.
- 13. REVIEW REQUEST FOR EXECUTOR'S COMMISSION**  
Review commission request if presented. Negotiate or approve.
- 14. COMMUNICATE WITH CHARITY CO-BENEFICIARIES**  
Communicate with charity co-beneficiaries when needed.
- 15. CHECK PROGRESS WITH SOLICITOR**  
Check in with the solicitor on progress as needed.
- 16. RECEIVE DISTRIBUTION AND ISSUE RECEIPT**  
Receive payment, issue receipt. If this is final payment skip to 18.
- 17. IF PARTIAL DISTRIBUTION, RECALCULATE AND REFORECAST**  
If a partial payment, recalculate amount outstanding and reforecast.
- 18. RECEIVE FINAL DISTRIBUTION AND ISSUE RECEIPT**  
Receive final payment and issue a receipt.
- 19. REVIEW FINAL STATEMENT**  
If you are a residuary beneficiary, examine the final statement.
- 20. CLOSE THE ESTATE**  
Close the estate, send thanks and honour the life of the bequestor.

## WHY SHOULD CHARITIES FOLLOW THESE STEPS?

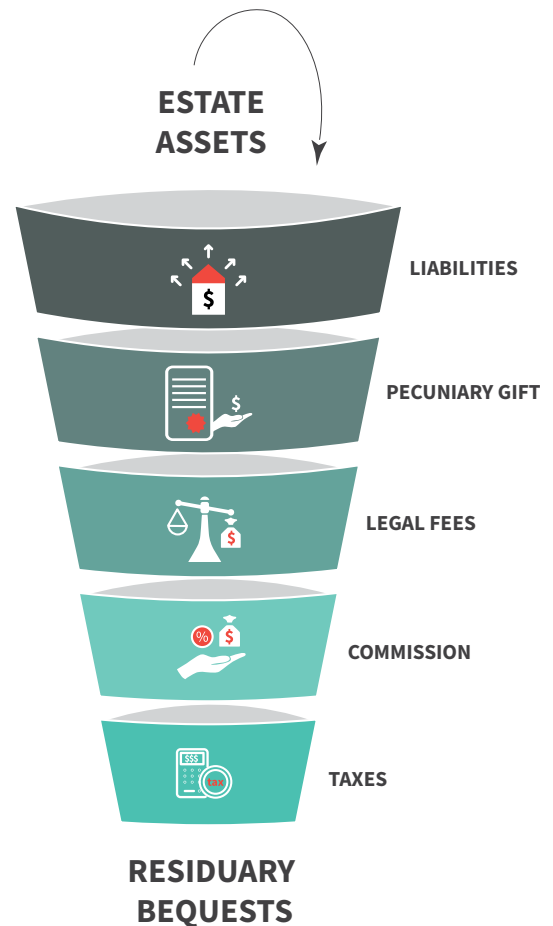
The steps outlined in this Guidebook represent a “proactive” estate administration style. Moving from a reactive style of management to a proactive one can mean an extra 5-10% of Gifts in Wills income and ensures that your charity is meeting its legal obligations as a beneficiary.

How you conduct estate administration within a charity can impact how the solicitor or executor managing the estate handles things. As a beneficiary, a charity is reliant on the work of those executors and solicitors to receive the gift the bequestor intended for them. In our experience, executors, solicitors and trustees do incredible work to ensure the final wishes of the bequestor are honoured – doing everything from organising funerals to selling properties and distributing personal effects. It is very time-intensive and emotionally draining work that should be honoured.

However, amongst all of that estate work, sometimes the peculiarities of administering a bequest for charities can get lost. Charities require documentation for auditing purposes that individual recipients of a bequest might not request and have specific taxation rules that are different from individuals. Given that only between 7-12% of wills probated in Australia leave a gift to a charity, it is entirely normal for a solicitor or accountant to have never worked on an estate with these types of gifts and to be unfamiliar with some of the details.

On average, a bequest in a will is worth \$135,000 to a charitable beneficiary in Australia. If the gift is a residuary bequest (where the charity is receiving a percentage of the estate instead of a set amount) that average gift size rises to \$265,000. Those larger residuary gifts are more complex for a charity, with more opportunities for funds to be saved by a savvy estate administrator.

To understand this, consider the diagram on this page. Before a residuary beneficiary can receive a percentage of the total estate, a number of things need to happen. The solicitor must identify and pay any liabilities of the deceased (such as debts or mortgages) and distribute pecuniary and specific gifts (for example, a set amount of money or property). They must pay any fees incurred through the estate administration process (such as legal or house cleaning fees) and handle any taxes due. In some instances, a commission for the executor will be specified in the will or they will seek to be paid one from the residuary beneficiaries or the court. Each of these obligations is a cost to the estate which means the amount of funds left at the bottom of the funnel to distribute to residuary beneficiaries grows smaller and smaller.



To be clear, all of these costs are legitimate forms of estate expenses, but errors can be made and unnecessary or disproportionately taxes and high costs paid when no-one is watching. This means less funds for charitable residuary beneficiaries to continue their important work.

Understanding all of these potential avenues for loss is essential for ensuring your charity doesn't miss out on income that the bequestor intended for you to have. It can sometimes shock people when we explain that there are no probate police. While there are laws in place for how an estate must be administered, most of the time there is no-one from probate courts actively checking to ensure this happens – it is up to beneficiaries (including charities) to perform their own due diligence.

Following the steps outlined in this Guidebook will make you a proactive estate administrator and increase the Gifts in Wills funds your charity receives.



## FULFILLING A BEQUEST

For those working for a charity in a Gifts in Wills team, the role can be hugely rewarding. The generosity of people who believe in the mission of your charity is affirming and inspiring. The commitment of a bequestor who chooses to make a final contribution in recognition of the work your charity does to make the world a better place brings enormous satisfaction.

At Bequest Assist, we feel strongly that when someone leaves a gift to charity in their will, it is the responsibility of the charity to ensure that final wish is honoured. Generous bequestors did not intend for their bequest to be eaten up by incorrectly handled taxes, unreasonable fees or solicitor error.

We owe it to those individuals to ensure that their gift is maximised.



# KEY ROLES

WHO IS INVOLVED IN  
A DECEASED ESTATE?

## The Generous Bequestor



### Executor

4 TYPES OF EXECUTORS



**1. EXECUTOR ACTING ALONE**  
(LAY EXECUTOR)

**2. EXECUTOR ACTING WITH A SOLICITOR**  
(HIRED BY EXECUTOR)



**3. PROFESSIONAL EXECUTOR/SOLICITOR**  
(SAME PERSON OR SAME FIRM)

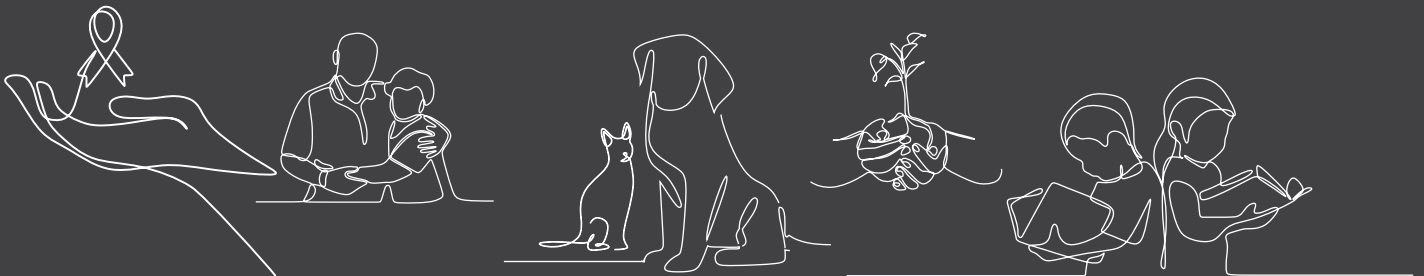


**4. PUBLIC TRUSTEE / PRIVATE TRUSTEE**



### Beneficiaries

FAMILY MEMBERS, FRIENDS AND CHARITIES





**THE DUTIES OF AN EXECUTOR/ADMINISTRATOR**



**WHO ARE THE BENEFICIARIES?**

The will identifies the beneficiaries and whether they are to receive a pecuniary gift or a residuary gift. A beneficiary can be an individual, such as a family member of the deceased, or an organisation such as a charity. 75% of estates that leave a bequest to a charity will include multiple charities, which you may note when reading the will.

**WHO IS THE EXECUTOR?**

The executor is appointed by the deceased in the will. The executor can be a family member, a friend, a trusted advisor, a trustee company, or a solicitor. Sometimes the deceased will have named a lay person and a solicitor or accountant as co-executors. It is important to remember that a lay executor (family member or friend) may be grieving the loss of the deceased and could have agreed to the task without completely understanding what would be required of them. Occasionally, they may not have been aware that they were named executor in the will until after the deceased’s death.

For many estates left wholly to charities, the deceased had little or no family and has entrusted a solicitor with the role of executor. No matter who the executor is, your entitlements as a beneficiary remain the same, but understanding a little about the executor’s relationship with the deceased will inform your approach and understanding of the executor.

Note: The term ‘Legal Personal Representative’ (or ‘LPR’) is sometimes used interchangeably with the title of executor (or ‘executrix’ in the case of a female executor). It is most commonly seen in reference to superannuation and tax. The ‘legal personal representative’ is the executor.

**WHAT DOES AN EXECUTOR DO?**

The executor is responsible for administering the final wishes of a deceased person in accordance with their last will.

The duties of the executor may include the following:

- Locating and examining the will
- Hiring a solicitor
- Obtaining a grant of probate from the Supreme Court in the state/territory the deceased lived in
- Locating and notifying beneficiaries
- Verifying and protecting assets
- Confirming insurance on assets
- Collecting valuables and income
- Determining debts and liabilities
- Clearing out and preparing property for sale
- Preparing tax returns and obtaining tax clearances
- Preparing financial statements
- Distributing the estate to beneficiaries

Effectively, the executor is the manager or director of the will - coordinating all of the actions that the deceased has outlined.

## WHY WOULD THE EXECUTOR HIRE A SOLICITOR OR TRUSTEE COMPANY?

Straightforward estates are relatively easy for the executor to administer, providing the executor has the time and knowledge to perform the tasks required. However, many executors are uncertain what work must be performed and may be time-poor or ill-suited to the tasks. Complex estates may have a large amount of assets, overseas accounts, claims on the estate, family conflict, business interests, trusts or self-managed superannuation. The executor will likely seek professional assistance, particularly in the case of complex estates. In approximately 90% of estates left to charities, you will be dealing with the executor’s solicitor or a trustee company. See Chapter 6, Step 13 for more information on commissions and legal fees.

PRIVATE TRUSTEE COMPANIES IN AUSTRALIA		
	AUSTRALIAN EXECUTOR TRUSTEES	1800 882 218
	PERPETUAL	1800 022 033
	EQUITY TRUSTEES	1300 133 472
PUBLIC TRUSTEE COMPANIES IN AUSTRALIA		
	PUBLIC TRUSTEE AND GUARDIAN ACT	02 6207 9800
	NSW TRUSTEE & GUARDIAN	1300 723 267
	THE PUBLIC TRUSTEE NT	1300 517 223
	THE PUBLIC TRUSTEE QLD	1300 360 044
	PUBLIC TRUSTEE SA	1800 673 119
	PUBLIC TRUSTEE TAS	1800 068 784
	STATE TRUSTEES VIC	1300 138 672
	PUBLIC TRUSTEE WA	1300 746 116

## WHAT IS THE CHARITY’S ROLE IN THE BEQUEST PROCESS?

While some charities see their role in receiving a bequest as one of waiting for money to arrive, this is contrary to good governance, best practices and honouring the wishes of your bequestor. As a proactive bequest recipient it is your duty to determine that the estate assets have been collected and the executor has distributed your charity’s entitlement in the estate completely. This is referred to as charity estate administration and should be a clearly defined role (or part of a role) in your charity, with a delegated authority to make financial decisions up to a dollar limit.

Depending on the executor and/or the type of bequest, your role in each estate will vary. Occasionally a lay executor will look to the charity estate administrator for advice on administering the estate. Caution must be exercised, as legal and accounting advice should not be given. In the majority of bequests, charities do not need legal advice and with a defined process the estate administrator can feel confident the estate has been properly distributed. There will be estates, however, when the estate administration task requires the assistance of a professional. Knowing how to identify these types of estates is important.

There are many experienced and qualified solicitors who handle estate administration, providing timely notifications, appropriate documents, helpful progress updates and charging fair legal fees. They make the work of estate administration predictable and straightforward. Unfortunately, there are also solicitors who are either inexperienced, uninformed, or opportunistic with their handling of estate administration. Additionally, solicitors with attitudes that prevent them from treating charity beneficiaries with the care they would take with other estate beneficiaries are a potential threat to your charity receiving its full entitlements. In these situations the work of the charity estate administrator is critical. In these estates you may be required to make repeated requests for documents, chase progress updates, caution against inappropriate sale of assets, review and question executor commission requests and legal fees to receive all of the gift that the bequestor intended.

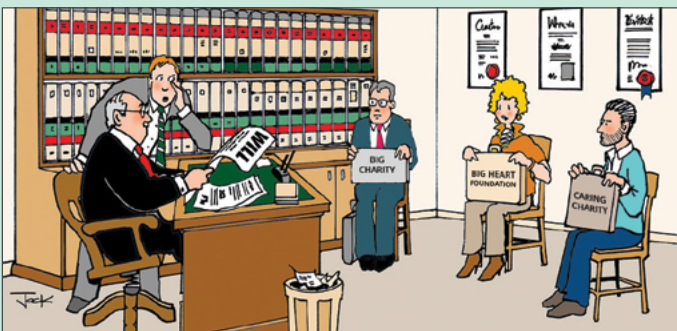
Throughout this document, the terms: **EXECUTOR, SOLICITOR, EXECUTOR’S SOLICITOR, EXECUTOR/SOLICITOR** refer to the person conducting the estate administration and may also refer to an employee of a Trust company.

**SOME EXAMPLES OBSERVED BY BEQUEST ASSIST INCLUDE:**

- Executors/solicitors failing to notify the charity they are a beneficiary, and never paying their gift
- Executors/solicitors being slow or unwilling to provide documentation such as an asset list or the final statement, preventing the charity from performing due diligence
- Executors/solicitors being confused about the process and taking excessive time to administer the estate
- Solicitors being nominated as executor by the deceased who have been disqualified from handling wills because of former misconduct
- Solicitors charging excessive fees for their service – sometimes extending into hundreds of thousands of dollars
- Executors/solicitors selling assets against the best interest of the charities, resulting in unnecessary taxation
- Executors/solicitors wrongfully removing funds or assets from the estate for themselves
- Executors/solicitors incorrectly allocating bequests from the estate so that the wrong charity receives the funds

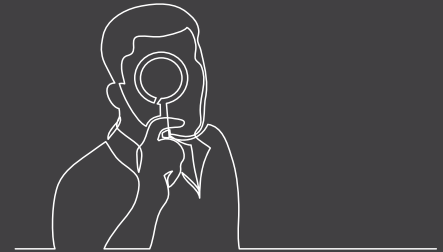
Bequest Assist emphasises that in most cases, the solicitors you encounter will be experienced, competent and honest. We highlight these examples merely as a demonstration of why we advise you to approach all bequests with a clear process and an eye for detail. The examples and case studies throughout this Guidebook have been deidentified but are all real events that Bequest Assist has observed.

In some of the above cases, the solicitor has committed an offence for which they may be reported. We will discuss what to do if a solicitor appears to be acting inappropriately in Chapter 6, Step 19.



*Seems like these charity bequest managers are getting the hang of this... better rethink that commission request.*

**CASE STUDY: 01**



**M**ary, the estate administrator for *Spider Sanctuary of Tasmania*, requested the will and asset list from a solicitor (who is also the executor), as is standard practice. Her charity received a complaint from the solicitor that Mary was questioning his integrity by requesting these documents. The fundraising manager of the charity responded to the solicitor by defending Mary and re-requesting the documents that the charity is legally entitled to. The same battle takes place over the final statement. When Mary eventually received a copy, it became apparent that the solicitor/executor took a commission without gaining the consent of the residuary beneficiaries, a potentially disbarable offence for a solicitor. She worked together with the charitable co-beneficiaries and they communicated that the funds need to be returned. The solicitor, seeing the charities understood their rights and the seriousness of the conduct, returned the funds and did not seek a commission.

This real-life example resulted in an extra \$52,000 being returned to the charitable residuary beneficiaries.

### DOES A CHARITY NEED ITS OWN SOLICITOR?

As previously explained, the executor, if not a solicitor, will often hire a solicitor to help administer the estate. It is important to emphasise that the solicitor is acting for the executor, who owes a fiduciary duty to the beneficiaries in the will. While the executor is to administer the estate according to the will, there may be times when the executor is also a beneficiary or has a conflict of interest with the beneficiaries. A charity may find that they need legal assistance in some estate work.

Best practice shows that having a solicitor you may consult from time to time on simple matters requiring legal advice is helpful. Often when major legal issues arise you don't have time to shop around to consider which solicitor will work best with your charity and consider the costs. Having a "go-to" solicitor with experience in estates may be worthwhile.

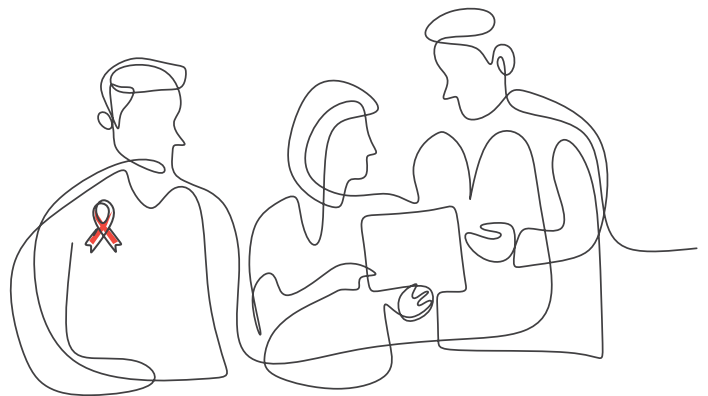
You may consult with other charities to seek advice on names of qualified, helpful solicitors. Or, with the help of others in your charity (CEO, CFO, Board members, etc), you may identify a legal firm that has worked with your charity. Check to see if that firm has a lawyer with expertise in wills, estate administration and disputes.

Some law firms will do select legal work pro bono for their charity clients. If you establish a relationship, you may have a trusted ally when you encounter a legal issue that requires outside assistance.

### ACCREDITED SPECIALISTS AND DOYLE'S GUIDE

Some solicitors will be certified as Accredited Specialists in Wills and Estates or Succession Law. Law societies in some states define criteria and seek to formally recognise a level of competency and knowledge in the area. However, there are competent solicitors who do not hold accreditation. You may refer to Doyle's Guide annual rankings which lists leading lawyers in Wills and Estates across all Australian legal markets.

Another great place to find a solicitor who can be of assistance is to speak with charities that receive a large number of bequests.



### CASE STUDY: 02



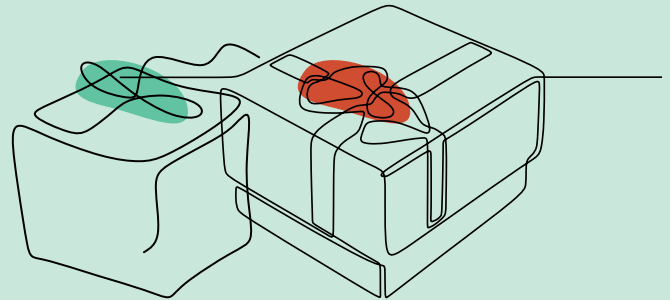
**S**ave the Australian Elephants does not have a relationship with a solicitor and finds it difficult to navigate complex estate issues. Esther, the estate administrator, consults with bequest colleagues in other charities and forwards three names of recommended solicitors to the fundraising manager. After careful consideration the charity establishes a relationship with one of the solicitors who takes instruction when required and agrees to answer Esther's occasional "simple" questions by phone, 'pro bono', as part of their ongoing support of the charity. When the charity requires external legal advice they instruct their preferred solicitor.

## 03 TYPES OF GIFTS

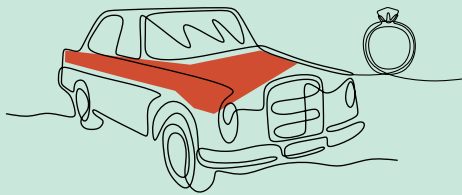
There are different types of gifts that may be granted by the deceased's will. The term "bequest" is often used to describe any type of gift in the will. The term "bequestor" is used for the person making the gift. Also, the term "legacy" is commonly a reference to a gift of money.

The "estate" refers to everything the deceased owned in their personal name at the time of their death, including money, superannuation, properties and assets such as cars and household items. The net value of the estate is all of those assets minus the deceased's liabilities, such as outstanding bills and debts. When a person dies, they leave only one estate but from that estate might leave multiple bequests (being gifts from their will).

This section provides an overview of the most common types of gifts in a Will.



### SPECIFIC GIFT



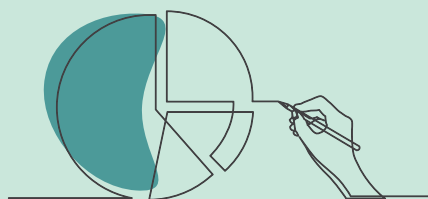
A **specific gift** is an identified piece of property given to a beneficiary, such as real estate, shares, a painting or an item of jewellery. If the specific item no longer exists (because, for example, the deceased sold or lost the item prior to death) the gift is "adeemed" and, in many cases, the gift fails.

### PECUNIARY GIFT



A **pecuniary gift** is a fixed sum of money specified in the will and may also be referred to as a "legacy". The pecuniary gift is paid out of the estate before the residuary gifts are paid.

### RESIDUARY GIFT



A **residuary gift** is a gift of the whole or a portion of the residuary estate. The residuary estate is the remainder of the estate after debts have been paid and pecuniary and specific gifts have been allocated.

## Last Will and Testament

I, Robyn Crane, of 10 Cassowary Lane, Kookaburra Nest, Queensland, hereby revoke all former Wills and Testamentary dispositions made by me and declare this to be my last Will.

I bequeath my gilded bird cage collection to my niece, Wren Finch.

SPECIFIC

I bequeath TEN THOUSAND DOLLARS, \$10,000, to the Charity for Flightless Birds to use for any purposes which they deem useful to their cause.

PECUNIARY

I bequeath the remainder of my estate, after all expenses are paid, to be divided equally into three parts to:

RESIDUARY

The Bird Watchers Club of Far North Queensland

The Queensland Home for Wayward Birds

The Australian College of Ornithology

IN WITNESS whereof I have hereunto set my hand to my Will this 12th day of May 2008.

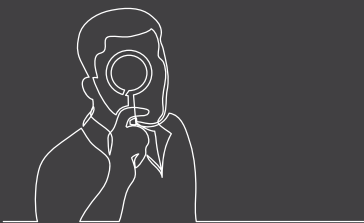
Signed by the said Robyn Crane as her last Will and Testament in sight and presence of us both being present at the same time who at her request in the sight and presence of each other have here unto subscribes our names as witnesses:

*Robyn Crane*

It is worth noting that not all gifts have monetary value, for example it is quite common for a deceased to leave items with sentimental value to family and friends.

Occasionally the charity will receive the entire estate and a friend or family member will request an item from the estate that holds sentimental value to them. It is always advisable to be generous and kind in these circumstances.

### CASE STUDY: 03



James passed away and left his entire estate to three charities. The solicitor managing the estate approaches the charities and shares that cousins of the deceased have asked if they can take two paintings from James' house that have sentimental value to them. The charities work to determine that the paintings do not have significant material value and approve the request as quickly as possible, leaving the cousins feeling grateful while ensuring that the estate funds are still used for the purpose that James intended.

## WHAT ARE SOME OTHER TYPES OF GIFTS THAT CHARITIES MAY ENCOUNTER?

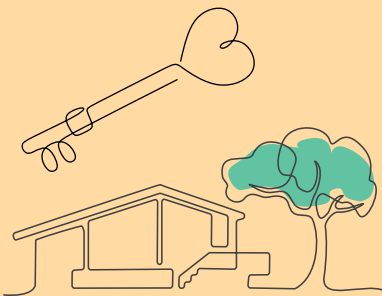
### TESTAMENTARY TRUSTS



Another form a gift in a will may take is for some or all of the estate to become a trust. A trust is simply an arrangement, recognised by law, by which assets are held by one person (called the ‘trustee’) for the benefit of another person or persons (called ‘beneficiaries’) for a specific purpose. A testamentary trust is a trust created by the terms of a will.

The testamentary trust starts once the executor distributes the gift to the trust. The assets held on trust are controlled by a trustee and the trustee makes distributions from the trust to the beneficiaries according to the terms of the trust.

### LIFE ESTATE OR A RIGHT TO OCCUPY



Some bequestors leave an asset, usually money or land, in their will to a charity or charities but allow for a different person to first use that money or land for a particular period of time.

If the person can use the asset for their lifetime, the person has a life interest. The person is called a “life tenant” and the charity is called the “remainder beneficiary”. What the life tenant can do with the property or funds and for how long depends on the wording of the will. Upon the life tenant’s death, the charity will receive the gift in the will. The rights and interests of a life tenant and remainder beneficiary is a complex area of law and you may need help understanding your entitlement.

The will may give a person a “right to occupy” or “right to reside” instead of a life interest. The period of the right to reside is set by the testator; it may be a specific period of time or until a specific event, for example entering a relationship or no longer living in the property. When the beneficiary’s interest in the gift ends, the charity will be distributed the gift.

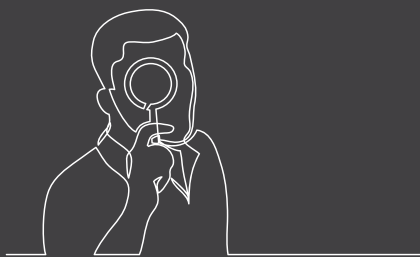
Because life interests can exist for many years before a charity can receive their entitlement, they are more difficult than other estates to stay on top of. You may need to seek legal advice about how to protect your charity’s interest, such as lodging a caveat to have the charity’s interest registered on the title to a property. This can prevent the sale of the property without your knowledge. It can be a small investment to protect a long-term interest. This would be especially important when the asset is not managed by a professional trustee.

## WHY SHOULD YOU IDENTIFY YOUR GIFT TYPE?

Understanding what type of gift your charity has been given will allow you to forecast when your gift should be paid and how much you will receive. To perform due diligence on whether your charity has received its full entitlement, you must know what sort of gift you have been granted.

For example, a residuary gift will almost always mean that the charity receives an uneven dollar amount – such as \$145,672.34 – because the entire residue of the estate must be paid out to finalise the estate. Sometimes we see charities receive an even dollar amount – such as \$145,600 – and believe this is their full gift, when actually there is another payment still to be made. Other times, the solicitor claims that the full residue has been paid but a careful analysis of the final statement is needed to understand how the amount is so even.

Bequests such as life estates that may be open for years require your charity to keep a detailed record of its entitlements. Bequest Assist has seen more than one example of a charity losing track of its interest in a life estate. In one case, investigation revealed that the property had been sold without the charity’s knowledge and the seller and proceeds were unable to be found. This meant that the charity entirely missed out on a substantial gift because there was no-one inside the charity regularly checking in on their gift.



## CASE STUDY: 04

**E**lizabeth leaves her entire estate to the *Jumpers for Joeys Foundation*, however, she provides a life interest in her home to her brother John. This means John is the life tenant and he may live in the property for the rest of his life. Once John has passed, the house becomes the full property of the *Jumpers for Joeys Foundation*.

Stephen comes into a Gifts in Wills role at the Foundation and discovers that no-one has checked in on the life interest in years. He emails the executor whose details were on file from a decade earlier, only to find that those contact details are no longer current. He does a probate search and discovers that the life tenant John has recently died. Realising that there is a risk that the executor of John’s estate might not be aware of the life interest arrangement, Stephen quickly seeks legal assistance to ensure the Foundation receives their gift.



## PARTICULAR ASSETS TO BE AWARE OF

### SUPERANNUATION

When we first released this Guidebook, superannuation was barely mentioned because it was an asset we rarely saw in deceased estates. Now it is a major asset in estates with a gift left to charity about 10% of the time and this is only set to increase. It became mandatory to contribute to superannuation in 1992, so as time passes, more people will pass away who worked beyond that point.

Superannuation is not like other assets in that it does not automatically flow into the estate to be divided as per the Will. The bequestor may have made a “binding death nomination” in favour of a particular person before they died. If that person is eligible, the funds will likely be given directly to them rather than the estate. If the nomination was not completed or is invalid, the Trustee of the superannuation company will make a decision as to where the super goes. Charities are not eligible to be nominated (yet) but the individual’s Legal Personal Representative is, which would mean the super flows into the estate.

Because of this complexity, we sometimes see superannuation included or excluded from an asset list by solicitors with different interpretations. This can create complexity for forecasting – we have seen instances where superannuation was included in the asset list, but ultimately was given by the Trustee to family members rather than to the executor to distribute as per the Will. On the other hand, we have seen superannuation excluded from the asset list but ultimately paid out as per the Will, resulting in a windfall for the charitable beneficiaries.

In addition, currently even though charities are tax exempt as beneficiaries, taxes on superannuation cannot be avoided as CGT can on shares. This is an issue that *Philanthropy Australia* and *Include A Charity* are advocating for policy change on.

Because of these complexities, we take a special approach to superannuation at Bequest Assist. Firstly, we make enquiries if any superannuation identified in the asset list is indeed flowing into the estate. This ensures we do not overestimate what the charity will receive only for the superannuation to be distributed elsewhere. If the executor or solicitor confirms that the superannuation will flow into the estate, we calculate that roughly 17% of its value to the charity will be lost to inevitable taxes, again so as not to overestimate the amount to be received.

We have also seen some issues arising where a person was nominated to receive the superannuation before the bequestor’s death, but is either ineligible or the nomination was incorrectly completed (eg expired or incomplete). In a few instances that we’ve observed, that individual has approached the charity and asked for their agreement for the superannuation to be paid to them nonetheless. This is a tricky position for a charity with potential reputational risk and we recommend seeking advice dependent on the circumstances.

## BEQUEST ASSIST WEBINARS

COME ALONG TO OUR REGULAR  
FREE WEBINARS ON A RANGE  
OF ESTATE ADMINISTRATION  
TOPICS.



Bequest Assist hosts webinars co-presented with professionals to address topics of concern to estate administrators.

To see upcoming topics and to register, visit:  
<https://bequestassist.com.au/webinars>

## PARTICULAR ASSETS TO BE AWARE OF

### REAL ESTATE

The majority of estates which leave a bequest to charities include at least one piece of real estate which carries a variety of additional considerations for charitable beneficiaries.

Often, real estate is one of the highest value assets in an estate and the value can be variable. This means if the property is sold for much more or less than the asset list, the forecast of what the charity beneficiary is set to receive will change. It is advisable to check what the property sells for and recalculate accordingly.

Like with shares, CGT can be an issue with real estate. For the bequestor's primary residence, there is an exemption on CGT for two years after the date of death. Occasionally the administration of an estate will take longer than this and the executor must seek an extension from the ATO to avoid that unnecessary CGT. Estate administrators should ensure that real estate is sold within that exemption window or encourage the executor to seek an extension. If the primary residence was very large or also included a business component (for example a farm or regional property), the CGT exemption may not apply to those parts of the property and specialist advice should be sought.

In addition, if the deceased owned more than one property, the sale of the non-primary residence causes a CGT event. Our analysis found that around 3.5% of estates with a bequest left to charities includes at least two pieces of real estate, and often there will be multiple secondary properties all with the potential for unnecessary CGT. In instances where there are multiple properties, deceased estate taxation advice should be sought to avoid unnecessary tax loss to the estate.

Finally, real estate can be an asset where funds can be lost or gained through careful management. For example:

- Sometimes executors feel compelled to do renovation works on a property before sale with the cost of these works coming out of the estate. Some repairs can be a worthwhile investment, while at other times we have observed renovation works causing delays and not ultimately resulting in a better sale price.
- Real estate agents are sometimes willing to reduce or waive their commissions when working for charities. If an estate administrator is given the opportunity to input in the sale process, they might be able to win the estates extra funds this way.
- We have seen rare but costly examples of real estate being mismanaged by a solicitor or executor. One example was an executor hiring friends at above-market rate to do work on the house. Another example was an executor selling the house at below-market rate to a family member rather than taking the house to auction. Performing due diligence on the sale process and asking questions when you have concerns is worthwhile. Where needed, you can perform a title search to understand more about the sale of the property.

## CASE STUDY: 05

**T**he residuary of an estate has been left to the *Australian Jazz Society*, but the solicitor only gets in touch once the estate has been entirely administered and it's time to pay the gifts. The charity's estate administrator Cassandra requests a copy of the estate documents and sees that the deceased owned both a primary residence and a beach house. She makes further enquiries and discovers that the solicitor is not familiar with 'present entitlement' and says that CGT has been paid. Cassandra explains to the solicitor that the charity's tax exempt status means these taxes shouldn't have been paid, but there might still be an opportunity to correct the error. She puts the estate solicitor in touch with a deceased estate taxation specialist who explains that a tax objection is possible in the circumstances. The tax objection costs around \$5000 and returns \$150,000 to the estate to be distributed to the residuary beneficiaries.

### PARTICULAR ASSETS TO BE AWARE OF

#### SHARES

About 45% of the time, an estate that leaves a bequest to charity will include shares. The value of the shares at the time of the bequestor's death will be included on the asset list, but share prices may fluctuate over time.

Shares are one of the assets that needs to be monitored particularly closely because they have the potential to cause the estate to pay Capital Gains Tax (CGT), resulting in a diminished residuary estate.

CGT is a form of income tax when an asset is sold that has increased in value since it was purchased. When an estate includes particular assets and those are sold, under normal circumstances a CGT event would occur and the estate would pay the taxes due. However, because most charitable beneficiaries are tax exempt, they do not pay CGT and it can be avoided on assets that are passing to them as beneficiaries from a will. This will be covered in further detail in Chapter 8. Shares are the most common estate asset where CGT might be an issue. Estate administrators within charities don't need to be experts in CGT, but do need to have a robust understanding of what assets can cause a CGT event and what options there are for charities to avoid them.

While it feels like solicitors administering deceased estates should be aware of these issues and suggest solutions to charitable beneficiaries, at Bequest Assist we find this is rarely the case. Remember that only between 7-12% of wills probated in Australia have a gift to charity and deceased estate taxation can be complex, meaning that solicitors may have limited exposure to the particularities of charitable tax exemptions and CGT. In fact, many accountants that Bequest Assist has interacted with are unfamiliar with these particulars. The assistance of a deceased estate taxation specialist is required to ensure the best outcome for the charitable beneficiaries.

If CGT is unnecessarily paid on the estate, it can mean a loss of thousands and even hundreds of thousands for the charitable beneficiary. It is essential that estate administrators understand this potential loss and take proactive action, such as that recommended in Chapter 8.



### CASE STUDY: 06

**E**state administrator Juan is notified of a new bequest coming to his charity by the solicitor. When he requests a copy of the asset list, the solicitor is resistant and Juan considers backing off, but resolves that he must know what assets are in the estate. When the asset list arrives, he sees that there are an estimated \$900,000 in shares in the estate. He quickly gets in touch with the solicitor and asks if they will seek advice from a deceased estate taxation specialist and provides some names. The solicitor says they have their own accountant but will seek the advice.

Ultimately the solicitor returns to Juan and explains that their own accountant was unfamiliar with the concept of 'present entitlement' which can avoid unnecessary CGT. Through the deceased estate taxation specialist's advice, the charities are made presently entitled and \$180,000 in unnecessary CGT is avoided. The solicitor expresses their gratitude at Juan drawing attention to the potential issue.

The event reminds Juan of why he prioritises getting an asset list to understand the different assets in the estate, and the benefits of proactively communicating about CGT.

#### REFUNDABLE ACCOMMODATION BONDS

This is a payment made to a retirement community or similar where the amount of money returned to the estate depends on how long the individual lived in the community and what charges applied. Note that while the bequestor lived in the community, this asset is not the same as real estate and generally does not take as long for the executor to call-in to the estate.

#### OTHER ASSETS THAT CAN CARRY CAPITAL GAINS TAX

Other than shares and real estates, there are other less common assets that can have tax consequences for the estate. These include boats, art collections and businesses. When an estate contains assets such as these, it's advisable for the executor to get specialist deceased estate taxation advice.

## WHAT IS A GRANT OF PROBATE?

A Grant of Probate is given by the Supreme Court in each state and territory. The Grant of Probate is the document which confirms that the Will is valid. Banks, government bodies and other entities accept the grant as evidence that the person named in it is the proper executor of the estate, having the power to do all the things the deceased could do with the deceased's assets.

Occasionally, you may be dealing with an administrator pursuant to "Letters of Administration with the Will Annexed". That arises where the deceased's Will does not name an executor, the executor has pre-deceased the Will-maker, or is unable to carry out their duties.

The Probate Registry is the department in the Supreme Court that processes applications for grants of probate and letters of administration. The Probate Registrar has the power to grant probate, which is the court's official recognition of the validity of the Will and the executor responsible for the estate.

Applying for a Grant of Probate is not always necessary – such as when the deceased's assets were all jointly held with a spouse or when their assets are below a certain threshold. Each financial institution has its own policy as to what amount they will release to an estate without a Grant of Probate. If the estate includes real estate (other than jointly owned property); superannuation; a life insurance policy; or refunds from retirement villages or aged care facilities, a Grant of Probate will most likely be required. Most estates with bequests to charities will obtain a Grant of Probate.

When the deceased owned property as a "joint tenant" with another person, the surviving joint tenant owns the whole of the property and the property does not become part of the estate. Where the deceased owned property as "tenants in common" with another person, upon the death of one of the owners, that owner's share of the property forms part of the estate. Superannuation and life insurance may not be part of the deceased estate if the policies were arranged to go directly to a beneficiary rather than the estate.

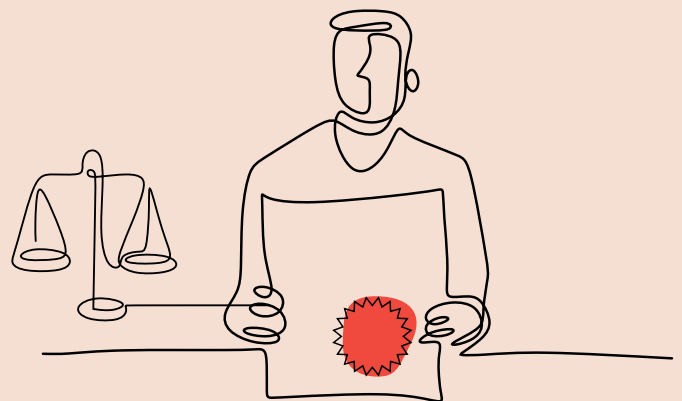
## WHAT GETS FILED WITH THE COURT AND WHEN?

To obtain a Grant of Probate, the executor must file an application with the Supreme Court of the relevant state or territory. The application is in the form of a sworn affidavit, which is a written statement confirmed by oath or affirmation.

The application will include the Will, the death certificate and a statement of property and asset values (in some states including debts and liabilities), except in Queensland where the asset list is not required. In Victoria, the statement is referred to as the Inventory of Assets and Liabilities while in other states the statement is referred to as a Statement of Assets and Liabilities. In New South Wales assets are filed with the Will, while Liabilities are treated separately and not always disclosed to the beneficiaries. The values listed in the statement are generally as at the date of death.

See Chapter 5: Notice of Probate Application for information about where to find the application or the Grant of Probate.

The table on the following page is the stated time frame during which an executor should apply for a Grant of Probate/ Letters of Administration in each state and territory, but note we regularly see executors take longer and the court accepting their late application.



STATE/TERR	HOW SOON EXECUTOR MUST APPLY FOR PROBATE	CITED LEGISLATION
ACT	If the person named as executor in a Will fails to prove the Will or renounce probate within six months after the date of death, the Supreme Court may appoint an administrator.	Section 25 of the Administration and Probate Act 1929 (ACT)
NSW	If an application for the grant of probate or administration-- (a) is filed later than six months after the death of the deceased, and (b) is the first application for such a grant, the affidavit in support must include a statement explaining the delay.	Rule 78.16 of the Supreme Court Rules 1970 (NSW)
NT	When a proceeding for a Grant is not commenced until six months or more after the death of the deceased, the applicant is required to file an affidavit of delay.	Regulation 88 of the Administration and Probate Act 1969 (NT)
QLD	No legislated time limit	
SA	No legislated time limit	
TAS	No legislated time limit	
VIC	From six weeks from the date of death a person with an interest in a Will or estate can apply to the Court to summon a person named as executor in a will to either renounce or apply for probate.	Section 15, of Administration and Probate Act 1958 (VIC)
WA	No legislated time limit	

Disclaimer: The above table is an overview of the relevant information at the date of publishing. We recommend an online search of the relevant legislation to view more details and exceptions to the rule. Please seek legal assistance if necessary.

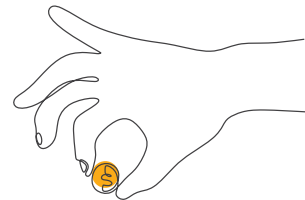
## PROBATE FILING FEES VS LEGAL FEES

There are fees charged to apply for and obtain a Grant of Probate. Those fees are paid out of the estate.

The Court's fee for issuing a Grant of Probate is different in each state and territory and is often dependent on the size of the estate. These fees are published on the websites of the Supreme Courts.

Additionally, legal fees for engaging a solicitor to prepare and file the probate application are billed either by the hour, a quoted flat fee agreed between the solicitor and the executor or, as in NSW, a scale fixed by government regulations dependent on the value of the estate.

It is important to note that the legal fees charged by a solicitor to the executor in relation to the administration of the estate are in addition to the probate application fees. These will be determined by the complexity of the estate and the work performed. These fees are also paid from the estate. Legal fees are usually not disclosed until the final statement is issued. See Chapter 6, Step 19 for more information.



## CONFIRMED BEQUESTOR/ NO NOTIFICATION

Sometimes, your charity will be unable to communicate with a confirmed bequestor and you will not have been notified of their status or estate. Before we begin our 20 step process of estate administration, we must consider this occasional circumstance.

### KEEPING RECORDS ON CONFIRMED BEQUESTORS

Predominantly, this guide is focused on how to handle estates after a death has occurred and does not offer advice on bequest acquisition, stewardship and management. However, it is important to note that keeping detailed records on confirmed bequestors is critical. Once they pass this may be the only information besides the Will to help understand how they intended their estate to be distributed. Your charity's record keeping can be enormously helpful in efficient and accurate administration of estates. This means recording notes in a CRM that identifies confirmed bequestors and any details they have shared.

These records not only allow you to continue your stewardship of that supporter when they are contactable, but may provide forecasting insight and can help judge if something feels "off" about a bequest, when you are notified.



Original article published by The Sydney Morning Herald on 8 July 2020.  
Authors: Angus Thompson and Georgina Mitchell

### SOME EXAMPLES OBSERVED BY BEQUEST ASSIST INCLUDE:

- No notification from the executor (son of the deceased) that the charity was included in the will one year after the deceased had passed away. Once discovered, the executor attempted to pay \$10,000 rather than the bequest specified in the will of \$100,000. The charity was only aware because they purchased a copy of the will due to their suspicions. A judge ordered the executor to pay the \$100,000 plus interest and court costs to the charity.
- A solicitor administering an estate found an old PO Box of the charity through a Google search and posted a cheque to the charity there without getting in touch through another method. The missing cheque wasn't discovered until much later when the charity wondered why they never received a bequest from an individual who had promised one during their life and made enquiries with the solicitor.
- The deceased died with multiple wills written at different times with different beneficiaries. The notes the charity had on their CRM about their discussions with the bequestor about his intentions became evidence in court.
- A solicitor failed to notify charities altogether, instead using the money to purchase a luxury home. He was eventually convicted and sent to prison when the fraud was discovered.

In each of these examples, the charity having records of conversations and information supplied from the confirmed bequestor could have helped prevent loss or delay in notification and identify potential errors in the administration.

## WHEN MUST AN EXECUTOR NOTIFY BENEFICIARIES?

There are no legal requirements stating that an executor must notify a beneficiary of a pending bequest before the final administration of an estate. Charities will often learn of their bequest when a cheque is received at the end of the estate administration. Given the executor has a fiduciary duty to act in the best interest of the estate and its beneficiaries, one might expect that the executor will notify all beneficiaries that an estate is in the process of being administered. While most charities would benefit from advance notification for budgeting purposes, many executors will wait until they are ready to distribute money to notify a charity of a bequest.

Every charity will have their own procedure to identify and adjust their database when a supporter has died in order to stop further communication from being sent to the deceased. Of course, when a known bequestor stops communicating it may mean that they have gone into aged care or are simply uninterested in communication at that time. A charity may check to see if a confirmed bequestor is deceased by doing one or more of the following:

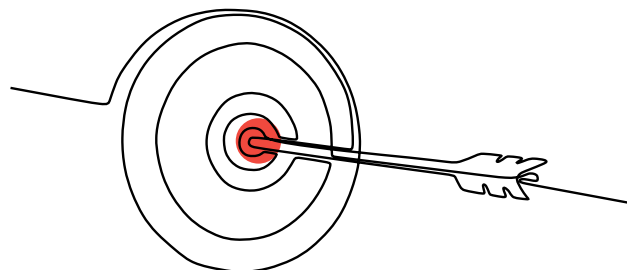
- Conduct an online search using your preferred search engine to see if an obituary is listed.
- Search probate notices in the state/territory where the deceased lived. See Table on following page.
- Search local newspapers for tributes and notices. All Newscorp papers are catalogued on <https://www.mytributes.com.au>. You will find this easiest if you know date and location which is often published on The Ryerson Index.
- Search the Ryerson Index — <http://ryersonindex.org/search.php>

The Ryerson Index is a free online index of death notices sourced from 390 Australian newspapers, publisher websites and funeral director's websites. The index also includes information from some probate notices.

The index was created by the Sydney Dead Persons society in 1998 and is maintained by volunteers across Australia.

Site updates generally occur weekly. While not a primary source, it is a great aid to direct you to the original death notice.





## HOW DO YOU LOCATE A NOTICE OF PROBATE APPLICATION?

If you believe that a bequestor has died and left a gift to your charity you may check the probate notices online to see if an intention to apply for probate has been advertised or an application for probate lodged and granted. The probate advertisement will show details of the executor and the acting solicitor. You may then contact the executor or the solicitor to ask whether the charity is a beneficiary in the bequestor’s Will.

The way to search probate differs in each state and territory and changes from time to time. Make sure to familiarise yourself with the specifics in the states and territories in which you frequently receive bequests – such as how some states split where you can find notices of intention to apply for probate and grants of probate.

STATE/ TERR	WHERE TO FIND A NOTICE OF A PROBATE APPLICATION AND/OR A GRANT OF PROBATE
ACT	For probate search, see: <a href="https://www.courts.act.gov.au/supreme/law-and-practice/wills-and-probate/probate-notices/search-probate-notices">https://www.courts.act.gov.au/supreme/law-and-practice/wills-and-probate/probate-notices/search-probate-notices</a> <b>Note that the grant of probate is often not published, but the advertisement for probate always is.</b>
NSW	For probate search, see: <a href="https://onlineregistry.lawlink.nsw.gov.au/content/search-probate-notices">https://onlineregistry.lawlink.nsw.gov.au/content/search-probate-notices</a> <b>Note: Only available for documents from 1 March 2022. Includes: Notices of intention to apply for a grant of probate, letters of administration, Reseal of a foreign grant.</b>
NT	For probate search, see: <a href="https://supremecourt.nt.gov.au/about/registry/wills-and-probate#Notices%20filed%20in%20probate%20proceedings">https://supremecourt.nt.gov.au/about/registry/wills-and-probate#Notices%20filed%20in%20probate%20proceedings</a>
QLD	For probate notice database, see: <a href="https://www.queenslandreports.com.au/qlr/probate-notice-database/">https://www.queenslandreports.com.au/qlr/probate-notice-database/</a> For probate grant information see: <a href="http://apps.courts.qld.gov.au/esearching/">http://apps.courts.qld.gov.au/esearching/</a> <b>Note: In ‘party details’ enter last name / given name. In ‘party role’ select ‘Deceased’.</b>
SA	To register for free access see: <a href="https://courtsa.courts.sa.gov.au/">https://courtsa.courts.sa.gov.au/</a> <b>Note: Must register before searching. Copy of will provided for free via email</b>
TAS	For intention to apply, see: <a href="https://www.supremecourt.tas.gov.au/probate/notices-intention-apply/">https://www.supremecourt.tas.gov.au/probate/notices-intention-apply/</a> <b>Note: Phone the registry on 1300 664 608 to enquire if/when probate grant was made</b>
VIC	For probate notice database, see: <a href="https://online.justice.vic.gov.au/poas/searchadvert.doj">https://online.justice.vic.gov.au/poas/searchadvert.doj</a> For probate grant information, see: <a href="http://www.scvprobate.com.au/probate/Search/ApplicationIndex.aspx">http://www.scvprobate.com.au/probate/Search/ApplicationIndex.aspx</a>
WA	See WA Gazettes, see: <a href="https://www.legislation.wa.gov.au/legislation/statutes.nsf/gazettes.html">https://www.legislation.wa.gov.au/legislation/statutes.nsf/gazettes.html</a> For probate search once date of death is confirmed see, <a href="https://ecourts.justice.wa.gov.au/eCourtsPortal/Probate.Portal/MatterSearch">https://ecourts.justice.wa.gov.au/eCourtsPortal/Probate.Portal/MatterSearch</a> <b>Note: The first link is to searchable gazettes where you need only the name of the deceased. Where you have an idea of the date of death, you can search a 30 day range using the second link.</b>

Disclaimer: The above table is an overview of the relevant information at the date of publishing. We recommend an online search to view more details. Please seek legal assistance if necessary.



## THE POWER OF INFORMATION SHARING

When Bequest Assist enters a new estate for one of our charitable clients, we send an automatic email to charity co-beneficiaries like the one below. This should alert you to look for or enquire about your notification.

**To:** Annika Lorsen<annikal@savetheaustralianelephants.com>  
**Subject:** The new Deceased Estate, The Estate of Jane Ann Doe has been recorded

**Dear Save the Elephants Australia,**

A new Deceased Estate, The Estate of Jane Ann Doe (late of NSW) has been recorded in the Bequest Assist Estate Management System. You are receiving this email because Bequest Assist believes Save the Elephants Australia has been listed as a beneficiary.

Bequest Assist releases alerts for charities identified as beneficiaries in a Will as a free service for the not-for-profit sector. In case your organisation has not received notification of this Estate, you can find the solicitor or trustee details listed on probate. The links to access each Australian state and territory’s probate ads are available here: <https://bequestassist.com.au/online-probate-information>.

If you would like to learn more about Bequest Assist or change how your organisation receives this notification, please contact us at [info@bequestassist.com.au](mailto:info@bequestassist.com.au).

You can also visit <http://www.bequestassist.com.au/> to learn more about Bequest Assist estate management outsourcing services and register for our free monthly educational webinars on estate management.



## WHAT IF YOU DON'T RECEIVE AN EXPECTED NOTIFICATION?

If your charity does not receive a notification within a reasonable amount of time after probate is granted by the court and you believe the deceased was a bequestor, you may elect to contact the solicitor named in the public notice to enquire whether the charity is a beneficiary in the will. If the charity is a beneficiary of a residuary gift, it is an opportune time to let the executor know of the charity's tax status. There may be tax benefits for the estate and the charity. It is also important to forecast bequest income as early as possible.

Note: Care must be taken with proactive contacts. You should allow adequate time (approx. three months) from the date of death prior to making contact with the solicitor and even more time before contacting an executor, who may still be personally grieving.

## ESTATES ARE UNIQUE, BUT YOU CAN FOLLOW A PROCESS

If every estate followed the example in Case Study 05, the task of your charity's bequest manager would be simple. Unfortunately, there are many reasons for delays such as challenges to the validity of the will, difficulties identifying the assets and liabilities of the deceased which delays obtaining probate, slow solicitors and accountants, contested estates, difficulty locating all beneficiaries, or frozen assets. In our experience, almost all pecuniary gifts are distributed within 1 year of death and overall most estates are fully distributed within 24 months of the date of death. Estates that take longer than 24 months to close are usually larger estates with the issues noted above. Time frames for estates are discussed in Chapter 6, Step 6.

Each estate is unique and will move through administration based on when you are notified, the type of gift your charity is receiving, the type of estate assets and the solicitor/executor/trust company in charge. You may find it helpful to anticipate movement through a sequence of stages including: pre-notification, notification, claims period, receiving payments and closing the estate. The next chapter will walk you through the 20 steps in detail, and offer suggestions on how you can ensure timely and effective action.



## CASE STUDY 07: IDEAL ESTATE ADMINISTRATION

**T**he brother of Madeleine Gifter calls to notify you that his sister (a regular donor to your charity) has passed away. As the named executor, the brother is asking that you stop the direct debit on his sister's credit card and to please not send any further correspondence. He is also notifying you that his sister left your charity a bequest.

Two months later you receive notification from a solicitor (hired by the executor brother) that probate has been granted on the estate of Madeleine Gifter and a copy of her Will and a Statement of Assets and Liabilities is enclosed. The Will does not include any pecuniary gifts and states that your charity is to receive 25% of the residuary estate. This gift is unrestricted and can be used for general purposes. The total value of the estate is \$1,210,428, which calculates to approximately \$302,607 for your charity. As no distribution will be made until the 'claims period' has expired you can expect to receive the funds after the claims period, and around 12 months from the date of death.

As the administration proceeds, the solicitor informs you that there have been no claims filed on the estate and they are able to pay an interim payment of 90% of your charity's total gift. The remaining 10% is to be held until after the estate tax returns have been filed and any taxes paid. When the final 10% is paid, a Final Statement is provided which details the assets collected, liabilities paid and estate distributed. This is as you expected, and the solicitor's charges are under 2% of the estate. The solicitor's charges were offset by interest earned during administration thus resulting in a gift of \$302,754.32, near to what you forecasted earlier in the process. The estate is closed within 18 months of the date of death.

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# THE 20 STEPS

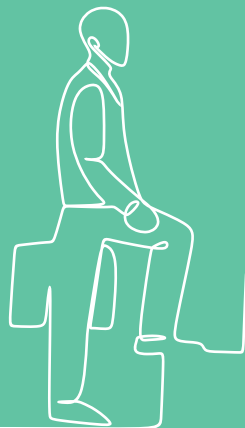
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## OF ESTATE ADMINISTRATION

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THE 20 STEPS ARE BASED ON CHARITY  
ESTATE ADMINISTRATION BEST PRACTICE.

THIS SECTION WILL BREAK DOWN EACH OF THE STEPS,  
DISCUSS YOUR ACTIONS IN DETAIL AND OFFER  
ADVICE ON HOW YOU CAN ENSURE TIMELY  
AND EFFECTIVE PROGRESS IN EACH STEP.



## STEP 1 NOTIFICATION

You will receive a letter, email or phone call from the executor or solicitor informing your charity that they have been named as a beneficiary in a will. Occasionally the notification and the distribution may be concurrent. Nonetheless, follow the 20 Steps to ensure you've received your full entitlement.

Focus on the information received in the notification letter or phone call that informed your charity of the bequest. Determine what additional information you will need to properly forecast the gift. Required information includes the will, the asset list (if you are a residuary beneficiary), date of death and date of probate.

Most charities are notified that they are a beneficiary of an estate when they receive a letter or email from the solicitor or executor. The notification sent to a charity may contain a copy of the Grant of Probate with a copy of the will attached and an asset list. Occasionally, the death certificate is also provided, but not legally required. If the date of the probate application or date of death is not included, you may find this by searching for the Grant of Probate in your state or territory's public notices (See Table on page 20). This will help to determine when your charity can expect to receive a distribution. See Step 6.

If you have not been provided with the documents and information you require, Step 8 will guide you on how to ask for these critical pieces of information.

## STEP 2 WHO IS THE DECEASED?

**Check your records to determine if the deceased was known to your organisation.**

If the deceased is in your CRM (or other records) you will want to take immediate steps to stop mail and credit card debits. If this person was known, it will be helpful to understand what type of relationship they had with your charity. Were they a confirmed bequestor, a regular giver, a volunteer, a patient or a service user? In addition to what your CRM reveals, performing an online search may point you to the obituary and help you to understand more about the generous bequestor.

Bequest Assist's data analysis has revealed that around 60% of bequestors were known to the charity in some way before they passed away, with around 30% having been confirmed bequestors. Collecting data on the individual's relationship to your charity may help to paint a picture of future bequestors to improve your Gifts in Wills acquisition and retention work.

## STEP 3 READ THE WILL

Reading the Will helps you to pick up much of the information you will need to manage and forecast this bequest.

For notes on how to ask for or acquire the Will if it hasn't been provided by the executor or solicitor, see Step 8.

Most importantly, you will need to confirm whether the type of gift is pecuniary or residuary (see Chapter 3) but there are several other points to note as mentioned below.

Reviewing the Will can be a time-consuming task. Using a template to gather information in one read may work best. We have provided you with a checklist of questions below to help identify the key information you may require to complete Steps 2-5.

1. What is the name of deceased and is this consistent with the notification?
2. Is your charity named correctly? See Step 4.
3. Is the gift a pecuniary or residuary gift?
4. If the gift is pecuniary, what dollar amount will your charity receive?
5. If the gift is a residuary gift:
  - what percent of the residuary estate will your charity receive?
  - remember to calculate the total value of all non-residuary gifts in the Will and subtract that amount from the net estate to determine the residuary estate, see Step 6.
6. Are there family members named in the Will but not provided for? This may indicate that a claim will be made, however, claims may be made regardless of inclusion or exclusion.
7. Is there real estate to be sold? Selling real estate can take time.
8. Are there international assets? Selling international assets can take time.
9. Does the estate include shares? This may delay the process and cause a Capital Gains Tax event which can be avoided if correctly handled.
10. Does the Will address the executor's commission or have a charging clause stating how fees may be charged?
11. Is the executor named as a beneficiary? Is the gift to the executor noted in the Will to be for performing the role of executor?
12. Does the bequest have any specific conditions on how the charity is to use the gift? If so, can the charity meet these requirements? See Step 4.
13. What is the date the Will was signed?
14. Are any other charities named as beneficiaries?
15. Who is the executor? Record their contact details.
16. Is the address of the deceased in the Will different from the address at death or in your charity's database?

**STEP 3 (continued)**  
**READ THE WILL**

**WHO IS LEGALLY ENTITLED TO A COPY OF THE WILL?**

Each state and territory has legislation regarding who is entitled to see a will. All beneficiaries are entitled to a copy of the will or the relevant clause in the will stating your charity’s gift.

The following table indicates the legislation of each state and territory, as it may pertain to your charity.

Most solicitors are aware that a charity beneficiary will seek a copy of the will and are happy to comply, however, you will sometimes meet with resistance. Knowing your rights will arm you with the necessary confidence when facing such resistance. This will be covered in further detail in Step 8.



*The solicitor for the Jones estate is on the line... she wants to know if we are “proactive” or “reactive” and if she should bother sending us any estate documentation.*

STATE/ TERR	WHO IS LEGALLY ENTITLED TO THE WILL?	LEGISLATION
ACT	A beneficiary named in the will or an earlier will.	Section 126 of the Administration and Probate Act 1929 (ACT)
NSW	Any person named or referred to in the will, whether as beneficiary or not, plus any beneficiary of an earlier will.	Section 54 of the Succession Act 2006 (NSW).
NT	Any person named or referred to in the will, whether as beneficiary or not, plus any beneficiary of an earlier will.	Section 54 of the Wills Act 2000 (NT).
QLD	Any person named or referred to in the will, whether as beneficiary or not, plus any beneficiary of an earlier will.	Section 33Z of the Succession Act 1981 (QLD).
SA	Does not state who is entitled to view the will but says the will may be obtained from the registrar on payment of fees. Note: Once probate is granted, any person may view a copy of the will online, free of charge.	Section 30 of the Administration and Probate Act 1919 (SA).
TAS	Any person named or referred to in the will, whether as beneficiary or not, plus any beneficiary of an earlier will.	Section 63 of the Wills Act 2008 (TAS).
VIC	Any person named or referred to in the will, whether as beneficiary or not, plus any beneficiary of an earlier will.	Section 50 of the Wills Act 1997 (VIC).
WA	Does not state who is entitled to view the will but says the court may allow access to the will through the Principal Registrar.	Section 45 of the Wills Act 1970 (WA).

Disclaimer: The above table is an overview of the relevant information at the date of publishing. We recommend an online search of the relevant legislation to view more details and exceptions to the rule. Please seek legal assistance if necessary.

STEP 4

CONFIRM CHARITY NAME & RESTRICTIONS ON THE GIFT

Confirming that your charity is named correctly and can meet any restrictions on the gift at the start of estate administration will reduce issues later and give you time to clarify with the executor.

IS YOUR CHARITY NAMED CORRECTLY?  
NAME CHANGES/AMALGAMATIONS

Sometimes you will find that your charity’s name is not exactly as stated in the Will. Perhaps the name of your charity has changed over time or your charity amalgamated with a second charity. An executor must be satisfied that your charity is the one named in the Will before they can distribute to your charity.

You may prepare a template letter that states the names of your charity over time and the date(s) the new name(s) was adopted. Any information relevant to why there is a discrepancy with the name in the Will and the current name of the charity should be included. Certain executors or executor’s solicitors are very strict in matching the identity named in the Will with your current name. If this has been or could be an issue due to name changes or amalgamations, seek legal advice, and have relevant documentation on hand, ready to supply.

ARE THERE CONDITIONS ON THE BEQUEST?  
(RESTRICTED VS UNRESTRICTED)

A bequest may stipulate a condition for how the funds should be used. Such a gift is known as a restricted bequest. However, there are no legal requirements that your charity must accept a bequest. Your charity may want to consider whether the bequest conditions are in accordance with your organisation’s mission, rules or constitution. If these conditions are contrary to your organisation’s goals, present a burdensome administrative process, or are a long-term financial burden, your charity may choose to decline the bequest.

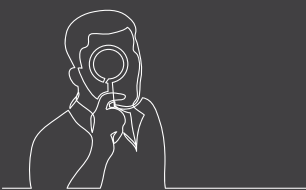
If your charity accepts a restricted bequest, it must comply with conditions of the gift set out in the Will. Should this not be possible you must consult with the executor to see if an agreement can be reached. It is advisable that you do so early in the administration of the estate. Not complying with conditions could leave your charity open to legal action.

CASE STUDY: 08

**B**eautiful Gardens Queensland was a longstanding horticultural society until 2013 when all of the state chapters made the decision to amalgamate into a single national organisation: *Beautiful Gardens Australia*. In 2021, they receive contact from a solicitor looking for the Queensland chapter to begin distribution of a bequest naming *Beautiful Gardens Queensland*. The bequest administrator advises the solicitor about the amalgamation and provides pre-prepared documents evidencing this change. The solicitor is satisfied that the bequest can rightfully be directed to *Beautiful Gardens Australia* for use in Queensland and the bequest is distributed.

CASE STUDY: 09

**A**n international aid charity receives a bequest for “funding water purification systems in Namibia” however they have no water projects in that country. While the bequest is generous, it will not be economically feasible for the charity to start a project and veer from their operational plan. In consultation with the executor they agree to use the money to fund “food security” as part of their existing and ongoing relief efforts in Namibia. The executor is satisfied that the wishes of the deceased are being carried out as well as helping vulnerable people in this country.



## STEP 5 CALCULATE YOUR ENTITLEMENT

While every bequest, regardless of size is appreciated it may be crucial to your charity’s finance team that you estimate the expected value of your gift.

### HOW DO YOU ESTIMATE YOUR CHARITY’S ENTITLEMENT?

Equipped with a copy of the will, you are able to determine the value of a pecuniary gift for your charity. Those receiving a residuary gift will require the will and the asset list to determine the value of their gift. The way to remember this is simple – a pecuniary gift will state a specific dollar amount. A residuary gift will tell you a part or percentage – for example 20% - but without an asset list you will be asking “20% of what?”

If you did not receive a copy of the asset list or other documents you need, Step 8 will guide you on requesting this information. Knowing the expected amount will help you identify when the gift has been completely distributed.

Your charity’s residuary gift is calculated from the total value of the estate minus liabilities at death, executor’s commission, administration costs, specific and pecuniary gifts. The following list of questions will aid your calculations when determining an estimate of what your charity will receive.

1. Confirm sufficient assets to cover liabilities and all pecuniary gifts.
2. Total the amount of all pecuniary gifts named in the will to use in your calculation.
3. Are there specific gifts like real estate or shares being specifically gifted in the will? Any assets that are being gifted by the will must be subtracted from the total asset value of the estate (if they appear there) to arrive at a correct figure.
4. Are there public company shares held in the estate? If so, you may want to create a spreadsheet to track share value fluctuations. Record company, quantity, date of death share price and current share price for future calculation.
5. Is there property to be sold? If so, you may use [www.realestate.com.au](http://www.realestate.com.au) or [www.onthefhouse.com.au](http://www.onthefhouse.com.au) to check the estimated value of real estate and compare this to the asset amount. An online search of the property address will provide you with several estimated amounts. Note that they are just a guide.
6. Unless the amounts are known, use an estimate of 5% of total estate value to cover potential but currently unknown executor’s commission, legal fees, and estate expenses like taxes.
7. Once you know the amount of the estate residue, calculate your gifted percentage.

Note: Some assets, such as superannuation, life insurance and jointly held property may not be part of the estate. If you have questions pertaining to these assets, a written enquiry to the executor or solicitor is best.

FOLLOW THESE STEPS TO ESTIMATE YOUR ENTITLEMENT			
	Total Value of the Estate		\$ 897,655.00
	Subtract	Liabilities	\$ 12,423.00
		<b>Net Estate</b>	<b>\$ 885,232.00</b>
	Subtract	Total pecuniary gifts	\$ 150,000.00 (This total comes from Will)
	Subtract	Gift of car	\$ 10,000.00 (Value of car in asset list)
Estimate these unknown expenses at 5% of estate	Subtract	Executors commission	\$ TBD
	Subtract	Legal fees	\$ TBD
	Subtract	Estate expenses	\$ TBD
		<b>Residual Value of Estate</b>	<b>\$ 680,349.25</b>
	Your Gift 25%		\$ 170,087.31

**STEP 5 (continued)**  
**CALCULATE YOUR ENTITLEMENT**

**WHAT IF THERE ARE INSUFFICIENT FUNDS IN THE ESTATE TO COVER ALL GIFTS?**

There will be instances when the estate has insufficient assets to pay liabilities and all of the gifts included in the Will. The executor is responsible for paying funeral expenses, legal expenses, taxes and any other debts before distributing the estate. Specific gifts are first awarded followed by pecuniary gifts and finally residuary gifts. If there are insufficient funds to pay all pecuniary gifts, the assets will be distributed on a pro-rata basis to the pecuniary beneficiaries. If there is nothing left in the residuary of the estate, residuary gifts are not paid.

**WHO IS ENTITLED TO AN ASSET LIST AND A FINAL STATEMENT?**

Beneficiaries are entitled to information (including documents) from the executor, sufficient to satisfy themselves that the estate is being properly administered.

If your charity is to receive a pecuniary gift (a specified amount) your charity requires only a copy of the Will to confirm the amount it is receiving is the correct amount.

If your charity is left a residuary gift, you will need to examine, at least, the Will, the asset list and the final statement to be satisfied that your charity has received its full entitlement.

If information is being withheld from a beneficiary, a beneficiary can purchase some documents themselves or apply to the Court to compel the executor to provide information. See Step 8 for more information on requesting and receiving the documents you require.

**WHY DO YOU ESTIMATE YOUR ENTITLEMENT?**

Estimating your entitlement allows you to forecast and helps you to understand when your complete gift has been distributed. You will confirm this with a final statement. Bequest Assist often observes charities that are unaware that there are further distributions to be made from an estate.



**Bequest Assist**

ESTATE MANAGEMENT OUTSOURCING

**NO TIME TO READ WILLS?  
 NO TIME TO CREATE FORECASTS?  
 UNDERSTAFFED?**

**PARTNER WITH BEQUEST ASSIST**

- Maximise the gift-  
 Mimimise the distribution time
- Complete visibility of all our work on  
 bequest progress
- Accessible forecasts and  
 management reports
- Allows you to focus on bequest  
 acquisition and stewardship



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## STEP 6

### DETERMINE WHEN THE GIFT IS EXPECTED & FORECAST

Estimating the value of your gift (Step 5) is only half of the work required to make a forecast. You must also estimate the date that the complete or partial distribution will arrive.

#### FORECAST ESTIMATES

In our experience, as a rough guide, assuming that probate has been granted within 6 months of the date of death, the estate is uncontested and you have not received contrary advice from the executor or their solicitor:

- forecast pecuniary gifts within one year of the date of death
- forecast residuary gifts within 18 months from the date of death when there is no real estate, shares or international assets
  - add 3 months for estates with real estate
  - add 6 months for estates with shares
  - add 6 months for estates with superannuation
  - add 12 months for estates with international assets

If a pecuniary gift is not paid within 12 months from the date of death, interest is due on this type of gift. Good record keeping will help ensure you know if you are entitled to interest. Pecuniary gifts are nearly always paid in one distribution.

Estimating the timeframe to receive a residuary gift is more complicated. With residuary gifts you will often receive two or more distributions. In Step 11 we suggest asking for an interim distribution, where some of the funds may be provided to your charity as estate administration is ongoing. The larger and more complex the estate, the longer it will take for you to receive all the money from a residuary gift. In general, you may expect a first distribution from the estate within 12 months from the date of death and a further distribution at the additional time suggested above for complexities like real estate, shares and international assets to receive the entirety. The majority of residual gifts are completely paid within 2 years from the date of death.

In both pecuniary and residuary gifts the only way to accurately compare and predict the payment time is from the date of death. This is because notification of the estate and the date of probate vary from estate to estate. However, a late probate application will usually mean a late distribution from the estate.

#### WHY IS FORECASTING NECESSARY AND DIFFICULT?

Many charities depend on their bequest income to fund their work. The finance team often requires a weekly, monthly or quarterly forecast of the income expected from Gifts in Wills in those time periods. Their goal is ensuring that the charity has adequate income to run campaigns and deliver on the mission of the organisation. It is hard for some accountants who are unfamiliar with bequests to understand why forecasting is so difficult.

Actively managing your bequests and using software to assist will help to improve your forecast but there are many times when a solicitor gives a date for distribution and for whatever reason is unable to make the distribution at that time. Additionally, the surprise cheque that shows up at the same time as the notification makes planning for that gift difficult.

Of approximately 300 bequests analysed at Bequest Assist, 50% were paid at the same time as the notification or within 30 days of the notification. This is not because the executor was speedy but rather because they completed all of the administration before notifying the charities. In 2020, ten Australian charities were informed two weeks before they each received \$2.5 million as a first payment from a very generous bequest. This is just one example of an estate where the executor/solicitor chose not to inform charity beneficiaries in advance of their gift, a full 18 months past the date of death. Who can complain with such a generous surprise, but what projects might have been planned and funded if the charities had received advance notification of the gift?

Charities receiving more than 50 bequests per year may improve their forecasts by analysing the last several years of the charity's bequest income. Determine the percent of bequest dollars that arrive per year with no advance notification (bequests paid within 30 days of notification). Determine any seasonality and calculate an average monthly amount that may be added to bequest income already in your pipeline. Be cautious with exceptional gifts (over \$1 million) that will skew your budgeting.



**STEP 6 (continued)**  
**DETERMINE WHEN THE GIFT IS EXPECTED AND FORECAST**

**WHAT IS THE CLAIMS PERIOD AND WHY SHOULD I CONSIDER IT?**

Throughout Australia, legislation exists that allows certain persons to make a claim on an estate for a share (or greater share) of the estate. Those claims are called “family provision claims”, “testator’s family maintenance claims” or “TFM claims”.

Each jurisdiction provides a period in which to make a family provision claim (“claims period”). The claims period is in place to give eligible persons time to learn of the death and make an application to the Court for a share (or a larger share) from the estate. From a charity’s perspective, it may be viewed as a waiting period. Even in a simple estate, most executors will not distribute assets before the claims period expires because the executor may be personally liable if a claim is made within the claims period and the executor has distributed some or all of the estate. You will want to note the date when the claims period ends to assist with forecasting and future communication with the executor or solicitor. An application for family provision can be made out of time if there are still assets in the estate. Prompt distribution of the estate upon the expiry of the claims period, where possible, should be encouraged.

There are a few pieces of data that may help with your forecast. The date of death or the date probate is granted is used to calculate the date the claims period will end, based on the state where the Will is probated.

**WHAT SHOULD I FORECAST IF I AM NOTIFIED OF A CLAIM AGAINST THE ESTATE?**

If, at any time during the administration of the estate the executor notifies you of a family provision claim, or an individual contesting the Will, you will need to revise your forecast. This ensures consideration of potential loss of some, or all of your entitlement. More information on contested estates is presented in Chapter 7.

STATE/ TERR	CLAIMS PERIOD
ACT	Claim must be brought within 6 months of the date of the Grant of Probate
NSW	Claim must be brought within 12 months of the date of Death
NT	Claims must be brought within 12 months of the date of the Grant of Probate
QLD	A claimant has 6 months after the date of death to notify the executor of their intention to bring a claim and 9 months from date of death to file the family provision application with the court
SA	Claim must be brought within 6 months of the date of the Grant of Probate
TAS	Claim must be brought within 3 months of the date of the Grant of Probate
VIC	Claims must be brought within 6 months of the date of the Grant of Probate
WA	Claim must be brought within 6 months of the date of the Grant of Probate

Disclaimer: The above table is an overview of the relevant information at the date of publishing. We recommend an online search of the relevant legislation to view more details and exceptions to the rule. Please seek legal assistance if necessary.

**CASE STUDY 10:**



**T**om, the estate administrator at *The Tasmanian Tiger Rehab Centre*, receives a notification of a bequest and wants to accurately forecast when his charity will receive their residuary gift. He finds the date of death is 1 September 2022 and notes that probate was granted in NSW on 15 December 2022. The estate is straightforward and contains a home and three bank accounts but no shares or overseas assets. Tom estimates that the estate will be completely distributed and closed around June 2024.

## STEP 7 RECORD ALL BEQUEST DETAILS

Good record keeping and data gathering is paramount for effective estate management and efficient distribution.

Charities use a variety of tools to record their bequest information:

TOOL	PROS	CONS
CRM	Already in use for donors	Lacks functionality for the estate process
Excel Spreadsheet	No additional cost	Corruptible, limited function
Estate Management Software	Purpose built and improves efficiency	Fees and maybe some duplication from your existing CRM
Paper files	Seriously, it's 2024!	

There are several reasons that your charity should ensure that data and documents on bequestors, bequests and their estates, are recorded and stored.

Data and the associated estate files are required to:

- calculate the bequest and manage the forecasted receipt dates;
- communicate about the estate effectively;
- provide information to auditors to confirm that the charity is receiving bequest funds as anticipated;
- review the work of the estate manager; and
- analyse information about bequestors to help identify potential future bequestors.

## STEP 8 ACKNOWLEDGE THE NOTIFICATION

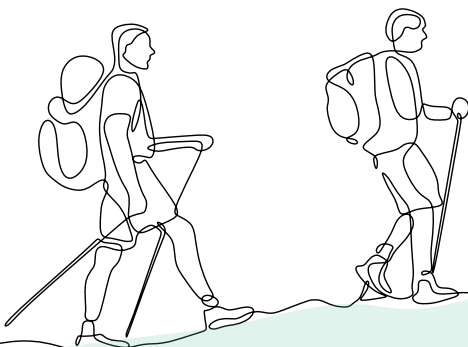
Responding to the notification of a bequest is a great opportunity to thank those involved and make your position as an active participant in the estate administration clear. This is also the time to inform the executor/solicitor of your charity's bequest practices and ask for any documents that have not been provided.

### HOW DO YOU RESPOND TO A NOTIFICATION?

When you receive a notification from the executor or the executor's solicitor we recommend that your charity have a prepared template letter that responds to the notification. If the notification does not include a copy of the will or an asset list then adjust your template response accordingly to include a formal request for copies of those documents.

It is also useful to send your charity's details and Bequest Practices Document regarding bequests, as it informs the solicitor of your charity's expectations regarding estate administration.

Be sure to include all charity information that the executor may require during the administration of the estate. On the following page, we have made a suggested list of information to include in your charity's Bequest Practices Document.



Estate Management can feel like an uphill climb.

**STEP 8 (continued)**  
**ACKNOWLEDGE**  
**THE NOTIFICATION**

**YOUR CHARITY’S BEQUEST PRACTICES DOCUMENT**

Information to include in your charity’s Bequest Practices Document or response to notification letter:

- The correct legal name of the charity (see section on Charity name changes or amalgamations where such changes have occurred)
- Registered Office address, plus postal address for cheques
- ABN or ACN
- Contact details of a specific person with job title, telephone number and email address for the solicitor to contact. Consider adding a second name if this is a part-time employee, so as not to miss any important calls that may delay the process
- Official taxation status (tax exempt; Deductible Gift Recipient (DGR) status)
- Bank details for electronic distribution
- List of documents that your charity requires copies of (the Will, asset list and final statement once estate administration is complete)
- Your charity’s willingness to take shares or real property *in specie*
- Desire to be made ‘presently entitled’ to franking credits
- Your charity’s practice about executor commission claims
- Your charity’s procedure for signing releases and indemnities
- Your charity’s desire to receive interim distributions (when possible)

**A prepared response to notification and a Bequest Practices Document will save time and money in the long term.**

**As always, seek legal advice when required.**



**CASE STUDY 11:**



**J**ohn handles bequest administration for the *Bicycle Paths Preservation League*. He receives a phone call from a solicitor notifying him that the charity will be receiving a residuary gift from Geoffrey Beene. John expresses gratitude and politely requests a copy of the will, asset list and a final statement when the estate is administered.

Solicitor: “What do you need that for? It will take me time to prepare and you’ll get the money soon enough.”

John: “I understand that and I’m very appreciative of your time. It’s just that by receiving those documents, I can meet our auditing requirements and best calculate what the charity will receive and when, which allows us to forecast.”

Solicitor: “What do you think I’m being dishonest or something? You want to check up on me?”

John: “Not at all! This is standard operating procedure for our charity – we try to follow through on gifts in wills and keep records that show our auditors that we are receiving the bequest as expected. You see, at *Bicycle Paths Preservation League*, bequests are important and we have to budget our projects really carefully. If we don’t know when funds are coming in and how much, we have to say no to projects that could help more people ride safely to and from work and school. Whenever we get bequests, we ask for these documents right away so we can start making plans for how to best deliver the wishes of the generous donor, like Geoffrey. He was a fabulous supporter with a sense of humour that will be missed.”

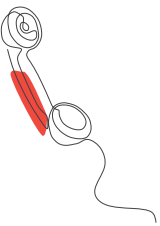
Solicitor: “Fair enough – that sounds reasonable. I’ll have my paralegal send it over.”

**STEP 8** (continued)

**ACKNOWLEDGE THE NOTIFICATION**

**RECOMMENDED APPROACHES WHEN COMMUNICATING**

**What to say when phoning the executor/ solicitor**



You may want to phone the executor’s solicitor to make the initial contact more personal and positive. In your conversation you may say things like:

*“Thank you for your help in realising the deceased’s wishes. (name of deceased) was a generous supporter of our cause and will be missed.”*

*“May I please have a copy of the Will? And, (if residuary beneficiary) a copy of the asset list. This helps with our auditing process to show we have received our proper entitlement.”*

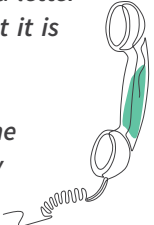
*“Are you able to give me an indication when you plan to make distributions, will you consider making an interim distribution?”*

*“Thank you for the notification, I will send a written response today, including our practices around bequests.”*

*“Thank you for notifying us early as it helps with budgeting and making the most of every dollar. Gifts in Wills are vital to help us continue with our life-saving work / our mission of... / providing care for...”*

*“I would like to include a sympathy / thank you letter for you to pass onto the family, if you feel that it is appropriate to do so.”*

*“May I please confirm the last address of (name of deceased) to correctly identify in our charity database.”*



**How to write to a solicitor or executor/ solicitor**

Below is our recommended approach to communication when making a request for sensitive documents such as the will, an asset list and the final statement.

Remember to be mindful of the different styles in communication with a lay executor as opposed to a solicitor.

**Communication #1:** Be friendly and clear on what documents are required. Note that it is per your charity’s standard operating procedure for auditing purposes. (Allow 14 days for response).

**Communication #2:** Note that this is second request and remind the executor/solicitor that a beneficiary has the right to obtain a copy of the will. If the bequest is pecuniary you may note that receiving the clause in the will relating to the gift with other sensitive information blacked out is sufficient.

**Communication #3:** If a third request is required, include a copy of your first two communications and ask the solicitor directly if they are opting to not provide the will. If so, request that the solicitor provide a written statement that they are refusing to provide a copy of a will for your records.

If you are working directly with a lay executor it may be unwise to make multiple requests and best to maintain a good relationship. Similarly, if a solicitor ignores these requests and you want to save time you may purchase a copy of the will from the Supreme Court’s probate office. See Table on following page.



## HOW TO OBTAIN, AND THE COST OF PURCHASING A WILL

STATE/ TERR	INTERNET ADDRESS OR PHONE TO ORDER	DETAILS	COST	TIME TO RECEIVE	WHAT YOU GET
ACT	Email a request for probate documents outlining the reasons why you require them to <a href="mailto:civil@courts.act.gov.au">civil@courts.act.gov.au</a> including the probate number for the Estate.	Phone number for support is: (02) 6205 0000	\$30.85	1 week.	Probate details, Will and asset list depending on your request.
NSW	Complete an "Application for an Exemplification of a grant" form. Email the form to the Supreme Court at: <a href="mailto:sc.probate@justice.nsw.gov.au">sc.probate@justice.nsw.gov.au</a>	Replies will be posted to your nominated address.	\$166.00	Generally 4 weeks.	Grant of Probate, Will and asset list.
NT	Submit request via email to The Probate Officer, Supreme Court of the Northern Territory: <a href="mailto:ProbateOfficer.NT@nt.gov.au">ProbateOfficer.NT@nt.gov.au</a>	Email or phone for support: Darwin: (08) 8999 6562 Alice Springs: (08) 8951 5727	\$31.00 plus photocopying, but can be given for free at the Registrar's discretion	2 weeks.	Probate details, Will and asset list.
QLD	To confirm Probate was granted, see: <a href="http://apps.courts.qld.gov.au/esearching/">http://apps.courts.qld.gov.au/esearching/</a> <ul style="list-style-type: none"> <li>• Scroll down to 'Party Details' and type in last and first name in 2 boxes.</li> <li>• In 'Party Role' select 'Deceased'. Note the file number in top bar and which location 'Originating In' for the application (you may click on file details to see what was filed to know which documents you will request).</li> <li>• Complete and enter file number on form found here: <a href="https://www.qld.gov.au/law/court/court-services/access-court-records-files-and-services/apply-to-search-and-copy-court-documents">https://www.qld.gov.au/law/court/court-services/access-court-records-files-and-services/apply-to-search-and-copy-court-documents</a></li> <li>• Enter that it is: Supreme Court/Oriinating City/Civil matter/ You are not a party to the proceeding/Want copies made / Description/ Will or list the file numbers.</li> </ul>	Submit forms online.	Fee dependent on the number of pages to be copied, but generally in our experience around \$25.	Generally 2 weeks.	Probate details and Will (no asset list is filed in Qld).
SA	Wills are available online for free in South Australia. Create an account on <a href="https://courtsa.courts.sa.gov.au/">https://courtsa.courts.sa.gov.au/</a> and search for the probate notice you are looking for. If you require an asset list, email: <a href="mailto:enquiry@courts.sa.gov.au">enquiry@courts.sa.gov.au</a> explaining why you require a copy and providing evidence that the executor has not been willing to provide it.	Create an online account. Email: <a href="mailto:enquiry@courts.sa.gov.au">enquiry@courts.sa.gov.au</a> .	\$0	Will is automatically sent to your email.	Documents are sent online. Probate, Will and asset list.
TAS	Fill out a Search Request Form from <a href="https://www.supremecourt.tas.gov.au/probate/search-probate-registry/">https://www.supremecourt.tas.gov.au/probate/search-probate-registry/</a> . Email to: <a href="mailto:Probate@supremecourt.tas.gov.au">Probate@supremecourt.tas.gov.au</a> .	Email or phone 1300 664 608 for support.	\$33.82	2 weeks.	Probate details and copy of Will and asset list.
VIC	Fill out the Searching Probate Records form here: <a href="https://www.supremecourt.vic.gov.au/wills-and-probate/searching-probate-records">https://www.supremecourt.vic.gov.au/wills-and-probate/searching-probate-records</a> . Submit this via RedCrest (you will have to create an account) here: <a href="https://www.redcrest.com.au/probate/login.aspx">https://www.redcrest.com.au/probate/login.aspx</a> If probate was granted prior to 2020, the process is different. See: <a href="https://prov.vic.gov.au/explore-collection/explore-topic/wills-and-probates">https://prov.vic.gov.au/explore-collection/explore-topic/wills-and-probates</a>	Submit application via RedCrest. For support: 03 8600 2000.	\$38.20	Generally within a few days.	Copy of Probate, Will, asset list and any other documentation filed with Probate.
WA	First, email: <a href="mailto:sccentraloffice@justice.wa.gov.au">sccentraloffice@justice.wa.gov.au</a> and explain why you require the documents. Sometimes they will be provided directly. Then, see: <a href="https://www.supremecourt.wa.gov.au/P/probate_fees.aspx">https://www.supremecourt.wa.gov.au/P/probate_fees.aspx</a> and select 'Search Enquiry'. Email: <a href="mailto:supremecourt.probate@justice.wa.gov.au">supremecourt.probate@justice.wa.gov.au</a>	Email request form or phone (08) 9421 5152 for support.	\$2.45 per page of photocopying, but an additional fee if you do not have a case number.	Depends.	Copy of Will and sometimes asset list if deemed appropriate.

Disclaimer: The above table is an overview of the relevant information at the date of publishing. We recommend an online search of the relevant legislation to view more details and exceptions to the rule. Please seek legal assistance if necessary.

## STEP 9 ASK FOR HELP ON COMPLEX ESTATES OR LARGE GIFTS

Some bequests you receive will come from very complex estates. Don't hesitate to seek help when required.

Bequest Assist has seen a few examples where charities did not seek professional assistance and missed out on receiving the maximum amount from a bequest. Charities are often hesitant to seek professional help because it will cost money. Accept that you will occasionally need to spend money to ensure the maximum value of a bequest is received, or that the gift is received in a timely manner.



Examples where a bequest may be “complicated” and in need of professional assistance include, but are not limited to:

- When a will is contested or unclear
- When there are substantial shares or properties included in the estate
- When there are overseas assets to be collected
- When the deceased owned a company
- Where a ‘life estate’ is granted and when this type of gift is being distributed

A savvy estate administrator will have a network of individuals to call on. There may be helpful coworkers in roles outside the bequest team (CFO, CEO, Board members). Hiring a solicitor (see page 12) or conferring with an accountant (see page 67), may be required.

Speaking with colleagues at other charities, especially charity co-beneficiaries in a complex estate is a cost effective approach. Sharing information, avoiding duplication of efforts and reducing contact with the executors/solicitor makes estate administration more efficient. See Step 14.

### SOME EXAMPLES OBSERVED BY BEQUEST ASSIST INCLUDE:

- Undecipherable handwritten codicil
- Complex tax issues with shares or business that need to be sold
- Overseas property slowing estate admin for years
- Life estates involving more than one generation
- Abscondment by life tenant

## STEP 10 CHECK WITH SOLICITOR AT END OF CLAIMS PERIOD

Seek an update from the solicitor as the claims period closes.

Approximately one month prior to the end of the claims period we recommend you communicate with the executor or solicitor about how the estate is progressing and request an estimated date of distribution.

At this stage the executor or their solicitor may know if there is a claim or complications which may delay administration of the estate. It is less likely that the executor or their solicitor will accurately advise when they will pay residuary gifts.

### WATCHING REAL ESTATE

Other than seeking updates from the executor or solicitor, another way you can check for estate progress is by watching what is happening with any properties in the estate. Based on Bequest Assist's analysis, around 65% of estates which leave a gift to charity include at least one property.

By using online real estate sites such as realestate.com.au, you can see when a property is listed for sale and then sold. Generally a property will be listed for sale for about a month and then settlement will take three months from the date of sale (with longer sale periods for regional properties). Knowing this can help you reasonably predict when the estate might have funds to make a distribution. It will also indicate if you need to reforecast based on the property selling for more or less than the estimate used in the asset list.

## STEP 11 ASK FOR INTERIM DISTRIBUTION

In some estates where assets have been collected and you are receiving a large residual gift, asking for an interim distribution is worthwhile.

You may want to request an interim distribution if your charity is a residuary beneficiary owed more than \$100,000. The executor may make an interim distribution while retaining some funds to pay tax liabilities and further expenses. However, this will most likely only occur when the executor is certain that a claim will not be made on the estate, they have settled liabilities and there is sufficient cash in the estate.

Understanding the 'time value of money' comes from the idea that rational individuals prefer to receive money today rather than the same amount of money in the future. Your charity may make better use of the bequest with money in your bank account sooner.

Furthermore, most solicitors hold funds from an estate in a trust account which does not earn interest. This means that your charity is getting even less benefit than if you had the funds in-hand where your finance team can put them to use, or hold them in an interest-bearing account that means more money later.



STEP 12

REVISE THE FORECAST AS NEEDED

Using information gleaned from communication with the solicitor, revise the forecast as needed. Your first forecast in Steps 5 and 6 may have been made with limited knowledge.

HOW AND WHY SHOULD I REFORECAST?

The initial forecast that you created for your charity was based on the information you gathered from the Will and asset list. The asset list is the executor’s best estimate of the value of the estate’s assets at the time of death of the bequestor, but it might not be completely accurate.

For example:

- Sometimes additional assets or liabilities are discovered later;
- It often does not include superannuation if the executor is unsure whether or not it will flow into the estate ;
- Property and share prices can be variable – and perhaps they didn’t yet have time to have the property evaluated;
- Different executors might be more optimistic or pessimistic in their calculations. For example, we often see household goods have a value in the asset list, but ultimately not be worth anything to the estate.

In addition, the timing of when you can expect a distribution might change as the estate is administered with an executor acting slower or faster than initially expected. You will want to reforecast so you are not expecting funds before they are likely to come in.

Other than seeking updates from the solicitor, the following circumstances may make you want to reforecast:

- You receive an interim payment that is higher or lower than you would have expected;
- You observe the property selling for a different price than expected;
- Superannuation is one of the assets in the estate – you must subtract mandatory taxes from what you expect;
- You receive a share transfer and the value is higher or lower than you expected.

It can be helpful to focus on the largest assets in the estate as they will have the biggest impact on what you ultimately receive.

IS INTEREST DUE WHEN ESTATES ARE PAID LATE?

Unsurprisingly, where the charity has closed its file within one year, the majority of the gifts are pecuniary gifts because pecuniary gifts are to be paid after the liabilities and before residuary gifts. All states allow that beneficiaries receiving pecuniary gifts, also referred to as legacies, not paid within one year of the date of death may claim legacy interest. The amount of interest depends on the state.

In Victoria the law states that “The interest is calculated according to the relevant rate of interest which is 2% above the cash rate last published by the Reserve Bank of Australia before 1 January in the calendar year in which interest begins to add”. In Queensland, section 52 of the Succession Act imposes a duty on the executor to pay interest at a rate of 8% per annum, or at such other rate as the court may determine.

However, in the study referred to below, 72% of pecuniary gifts were paid within one year of the date of death. Of the late gifts, only 6% included interest. You may notify the solicitor in your communication that you are aware of interest due on late pecuniary gifts and it is your practice to seek interest payment.

In our experience, trustees pay interest automatically on late pecuniary gifts, but most solicitors must be asked and can sometimes be resistant. The reason for the resistance is that it forces them to explain to residuary beneficiaries why their gift was diminished (eg by slow estate administration) or they feel the delay was unavoidable. For smaller pecuniary gifts, it might not be worth pushing the point, but for larger and very delayed gifts the amount can be significant.

CASE STUDY 12:

A

bdul works for *The Clean Water Charity* and is notified that they are to be the recipient of a \$100,000 pecuniary gift. When checking probate, Abdul notices that the deceased passed away a full three years earlier, but this is the first they are hearing of the Estate. Knowing that the gift is overdue and interest is due, Abdul asks gently if the solicitor is intending to include interest with the payment (rather than demanding). The solicitor agrees and when the payment arrives it is for just over \$116,000 as it includes interest for the delay. Through Abdul’s savvy management, *The Clean Water Charity* has an additional \$16,000 to put to good use.





## STEP 12 (continued)

### REVISE THE FORECAST AS NEEDED

#### WHY DOES ESTATE ADMINISTRATION GET DELAYED?

As discussed earlier in Step 6, there are several reasons why the administration of an estate takes longer than anticipated and distribution of the estate to beneficiaries is delayed.

These can include:

- Frozen funds – the executor may be unable to convert certain funds to cash for distribution because a managed investment scheme has suspended the investors' right to redeem their investments.
- Overseas assets – there may be delays in realising assets held in another country. Gaining access to funds and satisfying legal requirements to move and convert the money can be a difficult process. Selling real estate in a foreign country will usually require the assistance of a solicitor in that country.
- Difficulty in selling assets - real estate sales often take time if a buyer is not available or the asking price is high.
- Beneficiaries who are uncommunicative or unable to be located – a search may need to be undertaken to find a missing beneficiary or make contact with those outside Australia.
- Business ownership – winding up companies and redeeming all assets can be time intensive.
- Tax returns – the most common reason solicitors give for not paying all or part of a bequest is that they are waiting for tax returns to be completed.
- Contested estates.

#### HOW CONSERVATIVE SHOULD YOUR FORECASTS BE?

It may be helpful to have a conversation with your finance department of how conservative they'd like your forecasts to be. Because Gifts in Wills can be such a huge source of funding for a charity, it can be very stressful when a large gift is not paid before the end of the financial or calendar year as expected.

We have noticed that sometimes executors or solicitors can be overly optimistic with when they expect to make payment – such as sending an email that they expect to distribute in January but the funds not actually being realised until May. Sometimes solicitors may not be aware of how long it will take for taxes to be finalised or other circumstances – so it is best not to assume their prediction is exactly right.



#### WHAT IS THE EXECUTOR'S YEAR?

There are numerous references to the 'executor's year' in texts about wills and estates. This refers to the suggested timeframe for the administration of an estate – being one year from the date of death to the final payment. However, in a recent study of 365 estates (mainly Victorian) less than 50% provided final payments within one year of death.



# AND, BREATHE.

FOLLOWING THE TWENTY STEPS  
WILL GET YOU THERE.

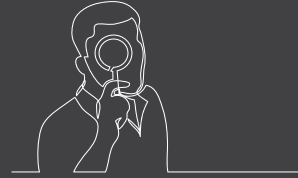


**STEP 13****REVIEW REQUEST FOR EXECUTOR'S COMMISSION**

As the estate administration progresses, the executor may make a request for commission and ask all residuary beneficiaries to approve.

Executors play an important role in administering estates. Historically the role of executor was a role that a person did without any compensation. Even today, an executor does not have an automatic right to a commission for their 'pains and troubles' in administering the estate. However, society is more complex than ever and the demands on a person's time while administering an estate can be significant. The days when beneficiaries could expect an executor to administer an estate, even a simple estate, for free, have nearly passed. You should anticipate that executor's commission will be sought by an executor and, if the estate has been properly administered, the question will be about the amount of commission that will reasonably compensate the executor for their 'pains and troubles', not whether any amount of commission should be paid at all.

Executor's commission is paid out of the residuary estate. An executor who seeks commission should provide the residuary beneficiaries of the estate with an up-to-date administration account, a detailed account of the specific work attended to by the executor and the time involved. If you believe the amount is excessive, it is very important to consult with other charity co-beneficiaries and seek their opinions. A united front of charity beneficiaries working to negotiate a fair commission will be most successful. If the residuary beneficiaries do not agree with the executor on an amount of commission, the executor can apply to the Court for an award of commission.

**CASE STUDY: 13**

Jane makes a Will appointing John, her friend, as her executor. When Jane dies, her estate is worth approximately \$600,000, which includes her residence and a substantial sum held in fixed term deposits. Jane had no partner or children, so she left her estate to four charities and her nephew and nieces. John was not a beneficiary. Upon completing the administration of the estate John asks the beneficiaries of Jane's estate to agree to a payment of \$10,000 for his 'pains and troubles' in administering the estate. All beneficiaries do not consent to John's proposal, so he applies to Court for an award of commission. John files the estate account and sets out in an affidavit all of his 'pains and troubles' in administering the estate. The Court awards John an amount of commission of \$8000 plus an additional \$3000 in costs, stating that the administration of the estate was relatively straightforward. The estate pays the commission and John's costs of his application to the court. This means ultimately the charities have lost a greater amount of funds (and time) than if they had agreed to the initial request for \$10,000.

**UNDER WHAT CIRCUMSTANCES CAN AN EXECUTOR RECEIVE A COMMISSION?**

An executor may receive a commission if one of the following is true:

1. A right to commission is given in the will. Note that, in some states, the written and informed consent of the deceased to include a commission or charging clause must have been given by the deceased before signing the will.
2. All residuary beneficiaries of the estate consent to the payment of commission.
3. The executor applies to the court and obtains an order to be paid a commission for their 'pains and troubles' in administering the estate.
4. The executor is a trustee company, legislation sets out the commission and fees that the trustee company may charge.

**STEP 13 (continued)**

**REVIEW REQUEST FOR EXECUTOR’S COMMISSION**

The amount of commission (usually listed as a percentage of the estate) will vary according to the unique requirements of each estate. There is some legislation surrounding what percentage should be granted (see the table below). However, one must ultimately rely on case law as a guide for the amount of commission that is reasonable for similar estates. While solicitors often refer to the fact that an executor may be entitled to commission up to 5%, in practice, the awards are usually at the lower end, in the range of 1.5-3%.

Legislation in all states allows the executor to apply to the court. Additional notes from legislation for each state are included in the table below.

STATE/ TERR	LEGISLATION ON PAYMENT OF COMMISSION	RELEVANT LEGISLATION
All States & Territories	An executor, administrator or trustee may apply to the court to be paid commission for their ‘pains and troubles’ [in discharging their obligations] as is ‘just and reasonable’.	
ACT	The Supreme Court may allow out of the assets of a deceased person to the person’s executor, administrator or trustee, the commission or percentage for his or her services that is just.	Section 70, Administration and Probate Act 1929 (ACT)
NSW	As in all states except; No commission shall be paid to an executor, administrator or trustee who neglects or omits without good reason to pass the accounts relating to the estate pursuant to legislation or order of the court Actual rate will be discretionary and depend upon the circumstances of the case. Recommended rates: Between 0.25% to 1.25% of the value of assets transferred <i>in specie</i> Between 0.5% to 2.5% on income on capital realisations Between 1 to 5% on income collections.	Sections 86, Probate and Administration Act 1898 (NSW)
NT	Same as NSW	Section 102, Administration and Probate Act 1969 (NT)
QLD	Court may authorise payment of remuneration or commission to an executor for their ‘services’. The amount will be as much as the court thinks is fit and may be subject to conditions on filing estate accounts and plan of distribution.	Section 68, Succession Act 1981 (QLD)
SA	The court may allow to any executor, administrator or trustee, such commission or other remuneration out of the estate or trust property, and either periodically or otherwise, as is just and reasonable. No allowance shall be made to any administrator who neglects to deliver the statement and account required by section 56.	Section 102, Administration and Probate Act 1969 (NT)
TAS	Same as Victoria provisions except no provision for court to reduce excessive commission.	Section 64, Administration and Probate Act 1935 (TAS.)
VIC	Same as All states provisions except: The maximum amount of commission is 5% of gross estate; The court may order that an amount of commission paid to an executor be reduced or repaid to the Estate if already drawn on the application of any interested beneficiary, creditor, or of the court’s own motion.	Sections 65 and 65A-65E, Administration and Probate Act 1958 (VIC)
WA	Same as Victoria provisions except: No provision for court to reduce excessive commission Commissions are awarded for executor’s ‘services’ rather than ‘pains and troubles’.	Section 102, Administration and Probate Act 1969 (NT)

Disclaimer: The above table is an overview of the relevant information at the date of publishing. We recommend an online search of the relevant legislation to view more details and exceptions to the rule. Please seek legal assistance if necessary.

**STEP 13** (continued)  
**REVIEW REQUEST FOR EXECUTOR'S COMMISSION**

**WHAT FACTORS SHOULD BE CONSIDERED IN AN ASSESSMENT OF THE 'PAINS AND TROUBLES' OF AN EXECUTOR?**

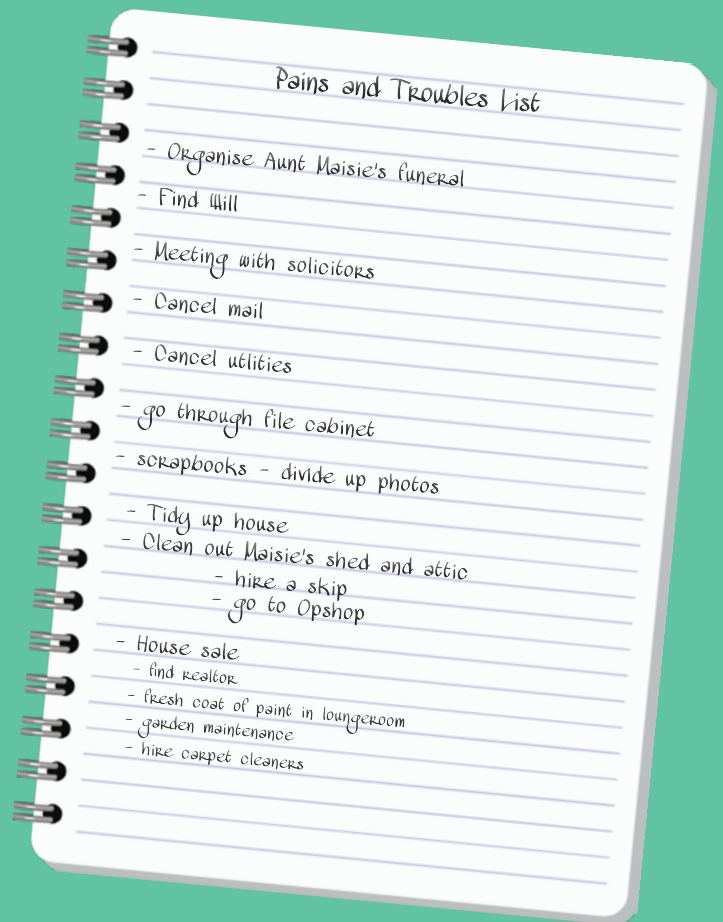
- Whether a lawyer or other professionals were engaged to assist the executor and the extent of that assistance.
- The size and value of the estate being administered.
- The type of assets in the estate (for example, bank accounts require little 'pain and trouble' to deal with, whereas foreign assets can take up a lot of time).
- The time overall required to administer the estate.
- The work and judgment involved in the realisation of assets and earning income.
- The extent of administrative activities.
- The level of complexity and responsibility generally.
- Whether the amount of work done is reflected in better financial outcomes.
- Length of time the estate takes to be administered and whether this has caused any loss to the value of the estate.
- Whether there has been any litigation against the estate.
- Whether there is any conflict in relation to aspects of the estate's administration.

If there is more than one executor, the amount of commission is not doubled. Rather the executors divide the amount of commission between them.

**COMMISSION IS NOT ALWAYS AWARDED AND MAY BE REFUSED OR REDUCED IF:**

- The delay in the administration of the estate was excessive.
- The executor was a beneficiary and the will specified the gift is in lieu of commission.
- There is any fraud, dishonesty or misconduct by the executor.
- The court finds that the executor has been careless or wasteful in their administration of the estate.

'Pains and troubles' in the administration of an estate refers to the time and effort it has taken to perform the work required. The 'pains' are described as the responsibility, anxiety and worry of the executor. The 'troubles' are the actual work carried out by the executor.



**STEP 13 (continued)**  
**REVIEW REQUEST FOR EXECUTOR’S COMMISSION**

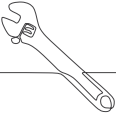
**WHAT SHOULD YOU DO WHEN THE REQUEST FOR EXECUTOR’S COMMISSION SEEMS EXCESSIVE?**

While Case Study 13 on page 43 demonstrates that the escalation of a commission dispute to the Court might disadvantage beneficiaries, that does not mean that you should allow unfairly high commission requests to stand. As previously mentioned, the standard is generally between 1.5-3% and you should review commission requests especially those at the higher end. It was the intention of the bequestor that your charity should receive the funds they allocated to you, and it’s your duty to uphold those wishes.

If a commission request seems too high, there are several steps you can take:

- Review the estate and consider the list of factors from the previous page.
- Ask the executor for a list of their ‘pains and troubles’.
- Consult with any other charity beneficiaries in the Will and agree on a position. This is particularly important when the other charity(ies) receives few bequests – they may be inclined to agree quickly, not realising that the commission is too high.
- Get legal advice from your in-house or regularly consulted solicitor.
- Write to the executor or their solicitor and suggest a lower percentage. You can point out that the average commission is about 1.5-3%.

Negotiation and communication are key.



A USEFUL TOOL

CHECK OUT THE ESTATE ADMINISTRATION FEE ESTIMATOR PROVIDED BY THE PUBLIC TRUSTEE OF QUEENSLAND. IT IS A GREAT WAY TO SEE AN ESTIMATE AT THE TOP END OF THE COMMISSION RANGE.

<https://www.pt.qld.gov.au/deceased-estates/estate-administration-fee-estimator/>

**SOME EXAMPLES OBSERVED BY BEQUEST ASSIST INCLUDE:**

Bequest Assist has seen several instances where executors performed countless hours of work and requested no compensation. There have also been cases when an executor was not provided for in the Will, yet, charities received large gifts. These executors may have felt slighted and requested a larger commission than justified.

Charities are wise to consult with charity co-beneficiaries and arrive at a fair payment. If the executor takes their commission claim to court it is likely commission will be granted and the court fees will come out of the estate, further reducing the residual amount.

**WHAT COMMISSION DO TRUST COMPANIES CHARGE?**

Many Australians choose the services of a public/state trustee in their state or territory when they have no family to act as executor. Public/state trustees often write Wills, store Wills and offer estate administration services. Advantages of public/state trustees are the experience and impartiality that they bring to the task. A public/state trustee’s estate administration fees are usually higher than those encountered in estates where private solicitors act as executors. While their fees are published, it is still wise to check the final statement to be certain the fees have been correctly applied. Legal fees, when required, will be additional.

Private trustee companies offer wealth management services and may act as trustee prior to death if their client is unable to manage their own investments. Private trustees are also able to advise individuals on appropriate structures to meet their philanthropic goals. Many Testamentary Trusts are managed by the 3 private trustee companies (page 9).

The following table shows some examples of the charges that the public trustees will apply to the estate. As a general rule, estimate 5% of the estate value for public trustee commission or administration fees. Please note: The following Table is an outline, more details relating to specific estate fees may be found on each public trustee’s website and also in the private trustee disclosures.

**PUBLIC TRUST COMPANIES - COMMISSION TABLE**

S/T	PUBLIC / STATE TRUSTEES	HOW FEES ARE CALCULATED	ESTIMATED FEE
ACT	Public Trustee & Guardian (An ACT territory authority)	The maximum fee is set by the Attorney-General. While this depends on a variety of factors, it usually corresponds to the proportionate gross value of capital assets. This does not include jointly held assets such as a marital home and superannuation with a named beneficiary.	<ul style="list-style-type: none"> <li>• Minimum administration fee of \$3138 + commission on assets (4.4% on 1st \$300,000, 3.3% on 2nd \$300,000, 2.2% on the 3rd \$300,000, 1.1% on assets above \$900,000)</li> <li>• Commission on income received of 6.6%</li> <li>• \$318/hr legal work fee</li> </ul>
NSW	NSW Trustee and Guardian (State government agency)	Fee is based on solely owned assets. A one-off executor fee is payable based on the value of assets. Additional fees for legal work as required.	<ul style="list-style-type: none"> <li>• Minimum fee of \$220</li> <li>• Depending on estimated value of estate, a one-off executor fee estimated from \$2.2k to \$30.8k</li> <li>• 4.4% on 1st \$100,000, 3.85% on 2nd \$100,000, 2.75% on 3rd \$100,000, 1.65% on amounts over \$300,000</li> <li>• Estate management per year = .77% on values of assets held</li> <li>• \$132 per year account keeping</li> <li>• Investments with NSW T and G = 0.165% per year of value of Primary Portfolio, 0.385% of Growth Portfolio</li> <li>• Lodgement of tax return = \$297 for first hour, \$253 additional hourly rate</li> <li>• Tax investigation without lodgement = \$148.50 for first hour, \$253 additional hourly rate</li> <li>• In-house legal work ranges from \$165-\$561 per hour</li> <li>• Additional fees for property inspection/securing/inventory and conveyancing</li> </ul>
NT	NT Public Trustee	See estimated fee details.	<ul style="list-style-type: none"> <li>• 4.4% on 1st \$200,000, 3.3% on 2nd 200,000, 2.2% on 3rd 200,000, 1.1% over than \$600,000.</li> <li>• Minimum charge: \$694.10</li> <li>• Trust management fee (6.6% of income and 1.1 or 2.2% for capital with defined or undefined (respectively) maturity date)</li> <li>• \$209 for inspecting/reporting/collecting personal property from estate, \$9.90 per month per cubic metre for storage, 3.3% rent collected by Public Trustee, locating next of kin/beneficiaries \$694.1 or 5.5%, whichever greater</li> </ul>
QLD	Public Trustee of Queensland (Statutory authority reporting to the Queensland Parliament through the State Attorney General)	Fees are determined by many factors such as the type of legal authority needed to administer the estate, and the number and type of: a.) assets in the estate; b.) liabilities; c.) beneficiaries and whether they live overseas. If administration of an estate takes longer than expected, the fees will not increase because of this.	<ul style="list-style-type: none"> <li>• Minimum fee \$1751.3</li> <li>• 1.61% per annum for Public Trustee investment funds</li> <li>• Has estate administration fee estimator on website + see also breakdown on basis of "effort level" - Schedules to Public Trustee (Fees and Charges Notice) (No.1) of 2021)</li> </ul>
SA	Public Trustee (Government business enterprise, an agency of the South Australian Attorney General's Department)	Charges set by the Public Trustees Act. (1995). There may be additional charges for the services of third-party providers and a commission charge on gross capital value of the estate. There is no commission on bank accounts, home etc. that is jointly owned.	<ul style="list-style-type: none"> <li>• Commission = 4.4% on 1st \$200,000, 3.3% on 2nd \$200,000, 2.2% on 3rd \$200,000, 1.1% above \$600,000)</li> <li>• Commission of 5.5% on all income received by estate/trust</li> <li>• Tax fees of \$261 per hour, generally</li> <li>• Admin/audit fees of \$192 annually</li> <li>• Additional fees of \$300 per affidavit, \$284 per deed, \$195 per hour at property, \$198 per hour to search for next of kin</li> </ul>
TAS	Public Trustee (Government business enterprise, owned by the Tasmanian government)	No commission on joint assets. Various other fees and charges inc. fees for taxation, conveyancing and other matters as needed.	<ul style="list-style-type: none"> <li>• 2.2% on solely owned assets transferred directly to surviving spouse/partner</li> <li>• Commission = 6.6% on all income + 4.5% on first \$200,000, 3.5% on 2nd \$200,000, 2.5% on 3rd \$200,000 and 1.5% above \$600,000)</li> <li>• 1.1% for investment management</li> <li>• Account keeping fee of \$13.5 per month</li> <li>• Legal fee determined by Public Trustee (but not exceeding max hourly attendance rate)</li> </ul>
VIC	State Trustees (State government business with full commercial status and receives government funding to support vulnerable Victorians)	Fees are based on the overall asset values and / or a service fee for work undertaken based on complexity	<ul style="list-style-type: none"> <li>• Commission applied to estate, lesser of: aggregate of asset-based and estate service components</li> <li>• 1.65% on principal place of residence, 3.85% on all other assets, and 5.5% of gross value of estate, 6.6% on gross income received by estate where informal deceased estate administration</li> <li>• Where formal court authorisation not required/no capital commission taken = \$216 per hour</li> <li>• Legal fees range from \$228-563 per hour</li> <li>• Additional conveyancing/taxation/trust fees</li> </ul>
WA	Public Trustee (Statutory body that operates under the Parliament of WA)	Fees and charges are calculated by determining the number and types of tasks that need to be completed. These are calculated in standard units of effort.	<ul style="list-style-type: none"> <li>• Fees calculated by using standard schedule to determine number/type of tasks required to administer (depending on units of effort range from \$2916-\$42,601 + asset management depending on service level ranging from \$0-7825 + potentially more)</li> <li>• Legal services = \$324-543 per hour</li> </ul>

Disclaimer: The above table is an overview of the relevant information at the date of publishing. We recommend an online search for further information. Please seek legal assistance if necessary.

## STEP 14 COMMUNICATE WITH CHARITY CO-BENEFICIARIES

Communicating with charity co-beneficiaries is a great way to make better decisions that maximise your bequest and create a united front that will assist and influence executors.

If there are issues affecting all beneficiaries like the executor's commission, hiring a solicitor and sharing costs for legal issues, contested estates, questioning property valuations or excessive legal fees, communicate with the charity co-beneficiaries.

Estates that include a gift to one charity have multiple charity beneficiaries 75% of the time, so reach out to these colleagues. Bequest Assist has noted that charities have competing interests in the way the estate is administered in only a small percentage of cases. Sharing knowledge, combining resources, and forming a consensus on a response to a solicitor is beneficial to all of the beneficiaries.

Charities are stronger if they deal with estate issues together. In particular with getting legal assistance, sometimes there will be a need for a charity to have their own representative, but most of the time charities' interests are aligned and the assistance can be shared. Legal costs can eat into income from an estate very quickly and often charities will need to pay some legal fees before they even receive funds from the estate. It can be a significant cost and time savings for the charities to come together and work with one law firm where an estate is legally complex.

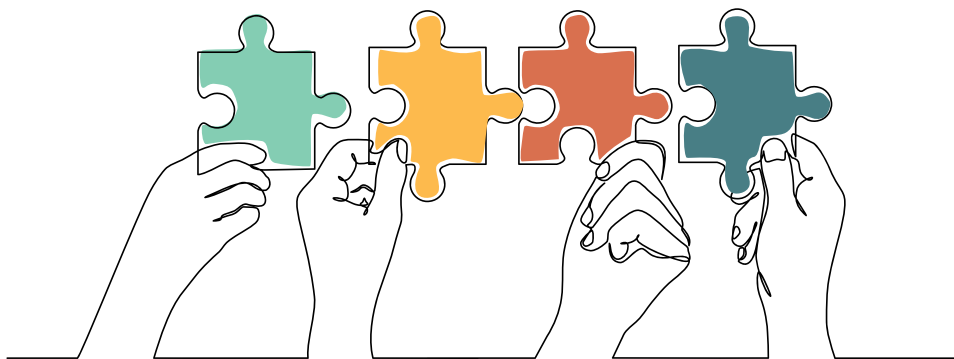
## STEP 15 CHECK ON PROGRESS

If required, you may need to consult the solicitor on progress in the estate.

It may not be necessary, but if updates are not forthcoming 12-18 months after the date of death, it may be time to check in with the solicitor. At this point you may learn more about the sale price or settlement date of real estate, delays in retrieving assets or other issues. If you gain more accurate information on assets or payment timing, you will want to revise your forecast.

As interest is due on pecuniary gifts not paid within 12 months of the date of death, Bequest Assist has adopted a policy of sending a letter at the 12 month point, politely reminding solicitors of this fact. Remember, the tone of communication is critical to maintaining a good relationship, while still asserting your rights to be paid the complete entitlement as soon as possible.

While the executor has a fiduciary duty to beneficiaries to administer the estate as quickly as possible, there is no set time frame for receiving a residuary bequest. Each estate is unique and you will need to consider the estimated date for payment with the particulars in mind. See Step 6 for general time frames.





## STEP 16 RECEIVE DISTRIBUTION AND ISSUE RECEIPT

When you receive your charity’s distribution, it is time to issue a receipt.

### IS IT NECESSARY TO ISSUE RECEIPTS FOR BEQUEST DISTRIBUTIONS?

Most executors request that a receipt be issued upon payment of all or part of the bequest. Additionally, it is common language in wills to state, “I direct that the receipt of the treasurer or other proper officer of the aforesaid organisation shall be sufficient discharge for my executor.” A standard charity tax receipt is usually sufficient.

If the executor’s solicitor sends a “receipt” for you to sign, read the wording of the receipt carefully. Be wary of a request to sign a receipt that has the wording of a release and/or indemnity within it. See Step 18 before signing anything.

### WHY DO I NEED TO CONFIRM BANK DETAILS? HOW IS CYBERCRIME INVOLVED?

While you may have notified the solicitor of your charity’s bank account details in your response to the notification, expect a telephone call to confirm your charity’s bank details prior to a distribution of payment. The risk of email cybercrime makes everyone susceptible to receiving bogus email instructions from apparently legitimate email accounts which have been infiltrated and monitored by cybercriminals.

If your charity’s estate administrator works part-time, you will need a back-up contact for when they are not working. Alternatively be prepared that the time to verbally confirm bank details may delay the distribution of funds.

If this is the final distribution or complete payment of the bequest, you can skip to Step 18.

## STEP 17 IF PARTIAL DISTRIBUTION, RECALCULATE AND REFORECAST

Once your distribution has been received, it is important to return to original calculations and determine if the complete estate has been distributed and your total entitlement has been paid.

If your total entitlement has not been received, calculate how much you are due to receive and when. If this is the final distribution, refer to Step 18.

It is very standard for a residuary gift to be paid out in several payments, with the final payment being a small amount after taxes are settled. There are several ways you can determine if a payment is final:

- Ask the solicitor when they call to confirm bank details.
- Watch for the amount to be down to dollars and cents. \$17,000 is unlikely to be a final payment but \$17,465.34 is more likely to be a final payment (because the whole residue must be paid out).
- Check the final statement and make sure no funds have been held back for tax or other purposes. If they have, you should expect another payment once that is settled.
- Check if you have received as much or more than the amount you initially forecast. If you have not, check if there are reasons the estate may have underperformed, or expect more funds.

### SOME EXAMPLES OBSERVED BY BEQUEST ASSIST INCLUDE:

- Charities unaware of their entitlement
- Charities closing an estate without receiving a final distribution or final statement
- Charities failing to follow up on estates that have not paid a full entitlement

## STEP 18

### RECEIVE FINAL DISTRIBUTION

Executors' solicitors will often advise charities that the estate administration has concluded and they are prepared to make the final payment. You should receive and review the final statement at this time if you are a residuary beneficiary. You may also receive a request to sign a release and/or an indemnity.

#### SHOULD I SIGN A RELEASE OR INDEMNITY?

At the end of the administration of an estate many executors (directly or via their solicitor) ask beneficiaries to sign a release and sometimes an indemnity. If an executor has, with the agreement of the beneficiaries, taken steps that are not in accordance with the terms of the will (such as paying a family provision claimant an amount of money with the agreement of all beneficiaries) the executor is entitled to a release in relation to those steps. If the executor has administered the estate according to the will, the executor may still seek a release, but cannot legally demand a release as a condition of distributing your charity's entitlements under the will.

#### RELEASES AND INDEMNITIES HAVE SERIOUS LEGAL CONSEQUENCES.

If the executor asks your charity to sign a release and/or an indemnity you should seek legal advice before signing. You may also look to have a letter drafted by a lawyer that you may use to routinely respond to requests for releases and indemnities.

**A release** forfeits the charity's right to complain about conduct of the executor in the administration of the estate, even if only discovered after the date of the release.

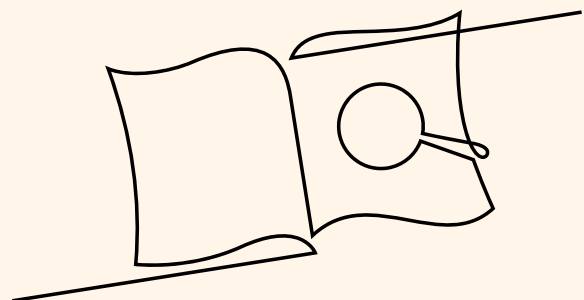
**An indemnity** given by a charity to an executor means that the charity agrees that, if called upon by the executor, the charity will pay money to the executor. The reasons the executor may call on the indemnity, include that a new debt of the estate has been found and must be paid, or the executor has miscalculated a distribution. Be very wary of a general indemnity that has no time limit, or limit on the amount.

There are times when a release or indemnity is appropriate, however the terms should be limited and you should receive legal assistance before your charity signs these documents.

#### HOW WILL I SPOT A RELEASE OR INDEMNITY

Sometimes releases and indemnities can be disguised as a "receipt" or "agreement to final payment" and only become apparent when you start reading the wording of the document. In general, there is nothing for you to sign at the end of the estate administration process – a receipt from the charity is sufficient for the executor to evidence the funds have been received. Where you are asked to sign a document, check to see if the wording is something you need advice on.

In our experience at Bequest Assist, most of the time when we respond to a solicitor and say that it is the charity's policy based on legal advice not to sign releases/indemnities and a receipt should be sufficient, they back down. There are times where a solicitor has threatened to withhold a payment until the document is signed which is unlawful. In instances where the solicitor is very firm, we recommend getting legal advice either internally or externally.



## STEP 19

## REVIEW FINAL STATEMENT

While it is a relief each time an estate comes to a close and you know you have helped your bequestor complete their final donation, residuary beneficiaries must not skip the step on reviewing the final statement. This is your only method of ensuring that the correct amount was distributed to your charity.

## WHAT IS FILING AND PASSING OF ACCOUNTS?

All states require that an executor keep proper records of the administration of the estate, including receipts, invoices, expenses and assets that have been transferred to beneficiaries.

An executor can be required by the Court or by a beneficiary to “pass accounts”. Rules differ between states and territories regarding the filing and passing of estate accounts, but in practice we have rarely seen this done. Nonetheless, it is helpful to be aware of in case an executor or solicitor is resistant to sharing a final statement.

The Table below details what the Supreme Court in each state and territory requires of the executor in relation to estate accounts.

STATE/ TERR	LEGISLATION ON PROVIDING ACCOUNTS TO SUPREME COURT	RELEVANT LEGISLATION
ACT	There is no time limit on filing estate accounts and plan of distribution in the ACT. However, the Court or the Registrar may at any time require an executor or administrator to file and pass accounts relating to the administration of the estate.	Rule 58, Administration and Probate Act 1929 (ACT)
NSW	Estate accounts and plan of distribution required within 12 months of Probate Grant. Application is made to the Court by filing a notice of motion (UCPR form 20).	Part 78, Division 11, Rule 71 of the Supreme Court Rules 1970 (NSW)
NT	There is no time limit on filing estate accounts and plan of distribution in the Northern Territory. However, the Court or the Registrar may at any time require an executor or administrator to file and pass accounts relating to the administration of the estate.	Part 3, Division 6, Rule 89, Administration and Probate Act 1969 (NT)
QLD	There is no time limit on filing estate accounts and plan of distribution in Queensland. However, a beneficiary in an estate may apply to the court for an order that a trustee of the estate file an estate account and that the estate account be assessed and passed.	Rule 645, Uniform Civil Procedure Rules 1999 (QLD)
SA	Administrators, must within six months from the date of the administration, provide the Public Trustee a statement and account of the estate and their administration of it.	Part 3, Division 3, s. 56 of the Administration and Probate Act 1919 (SA)
TAS	After the day specified in the advertisement for claims to be submitted, the executor must file with the Registrar an account in writing and pass accounts relating to the administration of the estate.	Section 56, Administration and Probate Act 1935
VIC	There is no time limit on filing estate accounts and plan of distribution in Victoria. However, the Court or the Registrar may at any time require an executor or administrator to file a true and just account in Form 3-6AA of the administration of the estate, verified by affidavit. The account must contain full particulars of receipts, disbursements, all assets and liabilities and particulars of distribution of all assets.	Regulation 6.0, Supreme Court (Administration and probate) Rules 2014 (VIC)
WA	Estate accounts and plan of distribution required within 12 months of Probate Grant.	Non-Contentious probate Rules 1967 (WA) Reg 37

Disclaimer: The above table is an overview of the relevant information at the date of publishing. We recommend an online search of the relevant legislation to view more details and exceptions to the rule. Please seek legal assistance if necessary.

## **STEP 19** (continued) **REVIEW FINAL STATEMENT**

### **WHY ASK FOR A FINAL STATEMENT?**

As part of the executor's record keeping obligations, the executor must keep an account of the administration of the estate listing all of the receipts and debits of the estate and distribution of the estate. An estate account is necessary for the executor to determine the correct amounts to distribute to the residuary beneficiaries.

If your charity has been left a residuary gift, your charity is entitled to, and should ask for, a copy of the administration account with records up to the end of the administration of the estate. This is often referred to as a final statement. The final statement should allow you to confirm that your charity's residuary gift has been accurately and completely paid. The final statement will also help you understand the impact of administration costs, legal fees, commissions, taxes and accounting fees on the final value of the residuary estate. Some solicitors supply a Trust Account Statement which shows all transactions for an estate. These statements can be confusing and hard to follow.

A solicitor should know what you're asking for, but if an executor seems uncertain, you can explain that this is simply a document that shows the funds that came into the estate and the funds that went out to pay gifts and debts. They might know it by a different name, or be unaware that they can be asked to provide it.

Without a final statement, you have no way to see how the estate administration was handled. The asset list provided you with an estimate of the value of assets in the estate at the time of death of the bequestor, but the final statement includes what assets were collected and what fees, gifts and taxes were paid. Only with this information can you check that your charity received its full entitlement.

### **WHAT ARE THE KEY THINGS TO NOTE WHEN CHECKING THE FINAL STATEMENT?**

- Note the dates of administration (period of time covered by the statement). This should cover the period from date of death to present.
- Note the total value of all assets collected for the estate. The total value of the estate should be equal to or greater than that indicated in the asset list. If it is less, you should understand why all the assets were not realised at the value listed on the asset list. This may be due to the real estate selling for less than appraised, or fluctuations in stock prices.
- Note the amounts paid out of the estate. These include both the deceased's debts that were not known at the time the asset list was filed and additional fees and costs to administer the estate. Those fees and costs are likely to include funeral expenses, legal fees, probate filing fees, taxes, accounting fees, and if there was real estate, utilities, rates, insurance and the costs of clearing, cleaning and preparing a house for sale.
- Scrutinise the miscellaneous charges on the estate. If there are credit card fees these should not continue after the date of death and insurance premiums should not be paid once assets are sold. Consider whether the charges are reasonable.
- Total the legal fees and calculate as a percentage of the estate value. If the solicitor is also acting as the executor, they should not charge both an executor's commission and legal fees for the same work (this is referred to as "double dipping").

**ALWAYS CHECK THE NUMBERS!**

## STEP 19 (continued) REVIEW FINAL STATEMENT

### WHAT TO DO IF YOU DO NOT RECEIVE A FINAL STATEMENT?

As previously mentioned, only residuary beneficiaries are entitled to a final statement. In many instances you will need to request the final statement. An executor that will not present a residuary beneficiary with a final statement may be compelled by the Court to file and pass accounts. However, as noted in sections about uncooperative executors/solicitors, the easiest method of getting what you need is to be persistent with requests for information. You may need to make multiple requests via email and phone telling the solicitor, their manager or their assistant why you need this document. Asking your charity's solicitor to write a letter of request on your behalf may get action as solicitors tend to respond to letters from other solicitors.

If these requests do not get results and you wish to proceed, there will be a court filing fee and you may require legal assistance – as shown in the examples on the right. The exception is Victoria which has a prothonotary who can make a formal request on the court's behalf for accounts to be filed. In our experience the executor/solicitor is not notified who has made the request to the prothonotary, but may be able to work it out if you're the only charity asking them for it!

- NSW**
- File a Notice of Motion to file accounts.
  - You may need legal assistance to fill out the form and pay the filing fee.
- QLD**
- Make a request for an estate account following regulation 646.
  - After 30 days make application to the court under rule 645 of the Uniform Civil Procedure Rules 1999 and pay the filing fee.
- For more information see: [http://classic.austlii.edu.au/au/legis/qld/consol\\_reg/ucpr1999305/s646.htm](http://classic.austlii.edu.au/au/legis/qld/consol_reg/ucpr1999305/s646.htm)
- VIC**
- Email the prothonotary at [probate@supcourt.vic.gov.au](mailto:probate@supcourt.vic.gov.au) citing the estate name, the application number (S PRB 20yy XXXXX), the date probate was granted and that multiple requests for administration accounts have been ignored.



### CASE STUDY: 14

**E**state administrator Jian is reviewing a final statement on behalf of her charity. The charity has received funds above what Jian initially predicted and she identifies that this is likely due to the property being sold for a higher price than was estimated on the asset list. To be thorough, she jots down a checklist of the assets listed in the asset list and looks at the final statement to make sure they were called in. She discovers that the asset list identified four bank accounts, but the final statement only lists three being called in – it is missing one bank account that was estimated to be worth \$50,000. Jian contacts the solicitor to enquire and the solicitor writes back that she made an error and missed one bank account. The funds are called in and distributed to the charitable beneficiaries a month later. This serves as a powerful reminder to Jian that mistakes can be made (but they are costly to the charity) and that even if the estate seemed to pay enough money, she needs to check final statements for what happened to the assets as well.

## STEP 19 (continued)

### REVIEW FINAL STATEMENT

#### HOW ARE LEGAL FEES CHARGED FOR ESTATE ADMINISTRATION?

The fees charged by the estate solicitor are paid out of the estate and should be reviewed by residuary beneficiaries. The solicitor's fees for work in the administration of the estate are difficult to predict and are usually charged on a time basis. The amount of time a solicitor may spend assisting the executor to administer the estate will depend on things like:

- The amount of work the executor is prepared to do themselves;
- The number of letters that need to be written to banks and share registries and other entities to determine the assets and liabilities of the estate;
- The number of properties owned by the deceased and whether they are to be sold or transferred *in specie* to a beneficiary;
- How many beneficiaries are included in the will;
- If any beneficiaries or assets are overseas;
- The complexity of the estate assets; and
- Whether there are claims made on the estate.

In all cases, any out-of-pocket expenses, court fees or costs of public notice advertisements are charged as disbursements, in addition to the professional charges. Most lawyers charge their fees on a time basis. The hourly rate increases with the seniority of the solicitor. Time is usually billed in 6-minute units. A 30-minute task will be billed as five units. Solicitors will round up, so something that takes 8 minutes will be charged as two units. Less complex work should be performed by more junior lawyers who charge less per hour.

#### DO LEGAL FEES NEED TO BE REVIEWED AND CHECKED?

A way to check the appropriateness of legal costs is to compare with similar estates. The legal fees are calculated by reviewing the final statement and determining the total amount charged for legal work. Total the legal fees and calculate as a percentage of the total value of the estate for a percent of legal fees. Performing this exercise on a large number of estates has led Bequest Assist to conclude that legal fees are usually below 2% of the total estate value. If the estate solicitor has charged more than 2% in legal fees you should understand why. The size of the estate is always a major factor. Based on our research, we have found:

- Estates valued under \$300,000 average 5% in legal fees
- Estates valued from \$300,000 to \$1million average 2% in legal fees
- Estates over \$1million average less than 1% in legal fees

There are many issues that complicate and slow down administration, thus making it more costly to complete the estate work. See Step 12 for reasons that cause delays.

It is worth noting that of all charges on the estate that reduce the amount that residuary beneficiaries receive, Bequest Assist has had the least success at challenging high legal fees. We are regularly able to avoid unnecessary taxation or negotiate lower executor's commissions, but high legal fees can be more difficult. We suggest considering if the legal fees you are observing are truly out-of-step with what you think is appropriate before spending significant time on the matter.

#### HOW DO BENEFICIARIES AVOID INCREASING ESTATE LEGAL FEES?

Limiting unnecessary contact with the solicitor will save fees on the estate. It is often useful to imagine that each email and/or phone call by a beneficiary to the solicitor will cost the estate for the solicitor's time. (As an example, if the solicitor charges \$500 per hour and takes 2 units or 12 minutes to answer your call or email, the estate will be billed \$100).

Of course, one must stay informed on the progress of the estate, but limiting unnecessary contact is advisable. Additionally, planning contact dates for when a solicitor may have progress information to specific times i.e. one month prior to expiration of the claims period, 11 months after the date of death and other dates as advised by the solicitor may help to avoid unnecessary charges.

If you must phone the solicitor to check on progress, you may want to plan your questions in advance so you limit time on the call. The lawyer cannot disregard emails sent or copied to them, so be certain that the email is required. Always remember: if you pose questions to the solicitor, they will charge the estate for the time needed to prepare and communicate an answer.

## **STEP 19** (continued) **REVIEW FINAL STATEMENT**

### **WHAT CAN BE DONE IF THE LEGAL FEES ARE EXCESSIVE?**

If you are unhappy with the solicitor's fees it is within your right as a beneficiary to challenge the legal costs. However, the first step you want to take is to understand the fees being charged. We recommend first talking to the solicitor about the bill. Once the solicitor understands why you are concerned, they may be able to explain the reason for specific costs to you or they may agree to review the bill.

The executor is under a duty to scrutinise all costs charged to an estate to make sure they are properly incurred. For that reason, the solicitor's bills should be in the form of an itemised bill that lists each item of work that has been done and the amount charged for each item (the executor cannot properly scrutinise a bill that simply has an amount owing without any explanation). An itemised bill might help you work out why the estate administration includes a higher percent of legal costs. If the executor has not obtained an itemised bill, you may ask the executor to request an itemised bill.

The Legal Profession Board of Tasmania has considered whether beneficiaries of the estate are eligible to request an itemised bill. They contend that the executor, rather than the beneficiary, is the client of the solicitor so there is a question of whether the beneficiary has this right. The board concluded that it is advisable for the solicitor to provide the beneficiary with the itemised bill.

After your charity has received and reviewed the itemised bill, if you are still not satisfied with the costs you should seek legal advice about how to challenge those fees. Rules differ in each state and the process is different where the executor is a solicitor versus where the solicitor acts for the executor. Hypothetically a Legal Services Board can receive a complaint in relation to a cost dispute, but in our experience they are focused on assisting clients of solicitors rather than beneficiaries. In some states, a cost assessment may be requested where an independent person considers the legal fees and any objections.

### **WHAT ABOUT OTHER FEES AND CHARGES?**

Other fees and charges that the estate may have paid throughout administration include funeral costs, house cleaning and sale costs and reimbursements to the executor for any out-of-pocket expenses (which are different than a commission). It can be helpful to develop a checklist of the costs you expect to see in a final statement and what amounts you normally see attached to those. For example, at Bequest Assist we expect to see executor's reimbursements, but if the amount is higher than \$10,000 without any further information, we generally enquire as to what those costs were for completeness.

There have been instances where a cost has been disproportionately high and requires further explanation. It is always best to approach the executor or solicitor with questions rather than accusations.



**STEP 19 (continued)**  
**REVIEW FINAL STATEMENT**

**WHAT IF I AM UNHAPPY WITH THE ACTIONS OF THE EXECUTOR?**

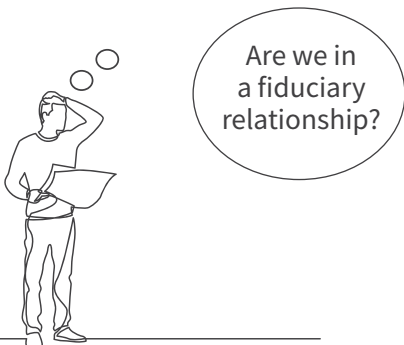
The executor has the duty to protect, preserve and administer the estate diligently. Common complaints about executors include:

- delay in administering the estate
- failure to administer the estate according to the Will
- failure to keep proper accounts
- failure to communicate with beneficiaries

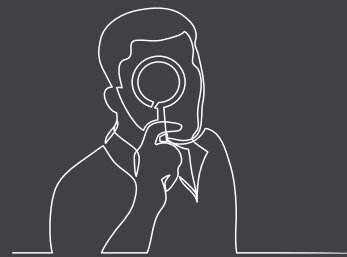
The executor owes a fiduciary duty to the beneficiaries of the estate, in other words, the executor must act in the best interests of the beneficiaries. Where an executor has breached their duties action may be taken against the executor personally, not the estate. The main categories of breach of executor’s duties include:

- **Misappropriation:** where the executor uses estate assets to pay their own liabilities or fraudulently disposes of them for profit;
- **Maladministration:** where the executor fails to follow the direction of the Will, or causes undue delay;
- **Conflict of interest:** where the executor puts their own interest or those of one beneficiary over another.

Australian legislation in each state gives the Court the power to order removal of the executor however, this is not an easy process. The Court is unlikely to remove the executor unless it finds that significant harm will be done to the beneficiaries’ interests. Your charity will want to try working with the executor whenever possible and if necessary, obtain legal advice on how to proceed. See the following page if the executor is a solicitor.



**CASE STUDY: 15**



**C**ompanion Cats Charity has waited 8 years for an executor who is also a solicitor to furnish a final statement and make the last distribution from an estate. The solicitor does not respond to calls, emails or certified letters from the charity. A letter from the charity’s solicitor goes unanswered. Action is finally elicited when the charity’s solicitor threatens to make a report to the Legal Services Board. After 8 years the charity is happy to finally receive their full entitlement and be able to close the file on this bequest.



**STEP 19** (continued)  
**REVIEW FINAL STATEMENT**

**HOW DO I MAKE A COMPLAINT ABOUT A SOLICITOR?**

- Complaining about an executor who is a solicitor, is also a difficult process. As previously noted, the charity is the beneficiary of the estate and is not the “client” of the solicitor. There are organisations in each state as outlined below that handle complaints about solicitors. Some will require you to be a client of the solicitor in order to make a complaint.
- Your first course of action should be to raise your concerns with the solicitor. Record your concerns and communication in writing for future reference. Threatening to report a solicitor to the state based organisation may or may not be effective. The best avenue for resolution of problems with a solicitor/executor who is unresponsive or mismanaging an estate is to turn to your charity’s solicitor.

STATE/ TERR	WHERE TO COMPLAIN ABOUT LEGAL ISSUES	WHAT TYPE OF COMPLAINTS
ACT	ACT Law Society <a href="http://actlawsociety.asn.au">actlawsociety.asn.au</a> 02 6274 0300	All complaints of professional misconduct or unsatisfactory conduct.
NSW	Office of the Legal Services Commissioner <a href="https://www.olsc.nsw.gov.au/">https://www.olsc.nsw.gov.au/</a> 1 800 242 958	Costs disputes should be within 2 months of issue of bill other complaints within 3 years. Complaints may be about: Poor communication, lawyers, bills, handling of documents, poor service including delay, mistakes, misleading conduct, acting with a conflict of interest, not following instructions, discourtesy.
NT	Law Society Northern Territory and the Legal Practitioners’ Disciplinary Committee <a href="https://lawsocietynt.asn.au/">https://lawsocietynt.asn.au/</a> (08) 8981 5104	Initially reviewed by the Law Society but you can refer complaint to the Disciplinary Committee.
QLD	Legal Services Commission <a href="https://www.lsc.qld.gov.au/">https://www.lsc.qld.gov.au/</a> 1300 655 754	Law Society can investigate trust account matters all other complaints go to Legal Services Commission.
SA	Legal Profession Conduct Commission <a href="http://lpcc.sa.gov.au/complain">lpcc.sa.gov.au/complain</a> 1800 337 570	Complaint about Practice of the Lawyer or fees charged.
TAS	Office of the Legal Services Commissioner <a href="https://www.lpbt.com.au/">https://www.lpbt.com.au/</a> 03 6226 3000	Any complaint, contact the board for guidance.
VIC	Legal Services Board Commissioner <a href="https://lsbc.vic.gov.au/consumers/complaints">https://lsbc.vic.gov.au/consumers/complaints</a> . Tel:03 9679 8001	Complaints regarding costs have a 30 or 60 day time limit. Complaints about behaviour or quality of service have a 3 year time limit.
WA	Legal Practice Board of WA, and the Legal Profession Complaints Committee. <a href="http://lpbwa.org.au/complaints">lpbwa.org.au/complaints</a> (08) 6211 3600	All complaints regarding Lawyers in WA. It has a rapid resolution team.

Disclaimer: The above table is an overview of the relevant information at the date of publishing. We recommend an online search of the relevant legislation to view more details and exceptions to the rule. Please seek legal assistance if necessary.

STEP 20

CLOSE THE ESTATE

At the end of the process you should have a procedure to confirm that all documents are in order. Finally, send a letter of thanks and find a way to celebrate the life of the bequestor.

HOW DO YOU CLOSE AN ESTATE?

Whatever your record-keeping method, you will want to focus your time and energy on open estates: those that are in the process of being administered. Moving the information for closed estates out of your daily view but keeping the data and records allows you to analyse your income or bequestors, have records available for audit or ready to re-open if an unexpected late distribution comes from a refund to the estate.

WHY SEND A LETTER OF THANKS?

Letting an executor or solicitor know that you appreciate their work is an easy way to leave a good impression of your charity. You may include how the bequest will be put to use in your charity to help the solicitor understand the importance of the gift. Remember to review any details about the bequest – did the will mention it was left in memory of someone? Was the gift restricted or expressed as a wish for it to be used in a particular way?

THANK YOU.

THANK YOU.

THANK YOU.

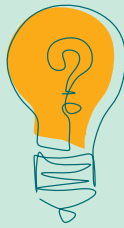


HOW DO YOU HONOUR THE BEQUESTOR?

One of the highlights of working in bequests is the contact with generous individuals that have chosen to make a gift in their will to a charity. These individuals are often passionate about the charity and the impact that some or all of their estate may have. It can leave one with a heavy heart, as the bequestors you have come to know pass away.

Ensuring that the bequestor’s wishes for their final gift are realised to the maximum extent possible is the best way to honour these charitable individuals. Taking the time to understand the will, analyse account statements and speak up when appropriate is the best way for the charity estate administrator to say the last thank you to the bequestor.

Celebrate any details of this person’s life within your organisation, display their photo and talk to your colleagues about the amazing gift they have given. Feeling pride in the fact that a bequestor chose your charity and sharing their life story helps staff from all areas (fundraising, volunteering, administration, finance, marketing, etc.) to understand the importance of bequests and speak confidently about this method of giving.



# GUIDEBOOK EXERCISE:

## ARE YOU PROACTIVE OR REACTIVE IN ESTATE MANAGEMENT?

This self-reflective exercise is designed to ascertain whether you are proactive (working the 20 steps as described in Chapter 6) or reactive, as an estate administrator. A score of 12 - 15 indicates you are proactive and working to maximise your bequest income. A score of 8 - 11 is a sign you take some steps but need more emphasis on estate management to make the most of your bequests. A score of 0-7 indicates that you are not managing incoming bequests at an optimal level and your charity could benefit by prioritising estate management, training an individual or outsourcing these tasks.

- 1.**  
Do you express gratitude to all involved with the bequest?

YES  NO
- 2.**  
Do you let the executor know your charity's tax status and policies and Bequest Practices?

YES  NO
- 3.**  
Do you always ask for a copy of the Will?

YES  NO
- 4.**  
When receiving a residuary gift do you obtain a statement of assets?

YES  NO
- 5.**  
When receiving a residuary gift do you calculate the amount your charity should receive?

YES  NO
- 6.**  
Do you check with the executor or executor's solicitor on the progress of the estate?

YES  NO
- 7.**  
If your charity receives an interim payment, do you recalculate the amount expected?

YES  NO
- 8.**  
Do you compare the internet real estate value with the asset list value and sale price?

YES  NO
- 9.**  
Do you return signed documents or required information within one week?

YES  NO
- 10.**  
Do you understand CGT and speak to solicitors proactively about avoiding it?

YES  NO
- 11.**  
Do you know the people in other charities who do a similar role to you and are you comfortable contacting them to discuss bequests that your charities share?

YES  NO
- 12.**  
When receiving a residuary gift do you ask for and analyse the final statement?

YES  NO
- 13.**  
If your charity's bequest is not paid in the expected time frame do you contact the executor or executor's solicitor?

YES  NO
- 14.**  
Do you have a way to honour the bequestor in your organisation?

YES  NO
- 15.**  
Do you have a method of keeping long-term estates (such as life interests) open for the entire life of the estate?

YES  NO

## PROACTIVE VS REACTIVE ESTATE ADMINISTRATION

### MOVING FROM REACTIVE TO PROACTIVE ESTATE ADMINISTRATION

Bequest Assist performs estate administration for more than 20 Australian charities who have outsourced this responsibility to us. Through this work, we are regularly able to see the material difference that proactive management makes to a charity's Gifts in Wills bottom line. We recommend that every charity implement policies to ensure estates are proactively managed.

In our experience, the difference between reactive and proactive management could mean an extra 5-10% of Gifts in Wills income for your charity. That may not be the case every year and you may not even be aware that a step you have taken has caused a course of incorrect management to be corrected, but we have seen charities recover hundreds of thousands of dollars from a single proactive step.

So, other than a lack of awareness of the issues, what is stopping charities from moving to proactive estate management? We think it comes down to one or more of three things being missing: **time, tool** and **knowledge**.

Gifts in Wills professionals need **time** to manage estates – which they often don't have with pressing work to be done

with living bequestors and the charity's emphasis on growing the future pipeline.

A **tool** that allows for estate administrators to see what bequests are open, track administration progress and calculate what they are entitled to is essential but often lacking. We know many charities who are struggling to manage bequests either in an Excel spreadsheet or using a CRM that is designed for living donors.

And finally, **knowledge** of deceased estates is essential. This includes what documents beneficiaries are entitled to, what assets are impacted by Capital Gains Tax and how to check for probate in each state.

Most Gifts in Wills professionals are incredibly talented and experienced fundraisers, but might not be experienced in the particulars of deceased estate taxation – fair enough! We meet many solicitors and accountants who are unfamiliar with the topic.

Charities hoping to move from reactive to proactive management should invest in providing these three things to their Gifts in Wills team, or seeking external support so that their team can stay focused on acquisition and retention of new bequestors.



**PROACTIVE MANAGEMENT**

- Proactively make contact
- Ask for estate documents
- Calculate your entitlement
- Communicate about taxes
- Check that estate has been properly administered

**REACTIVE MANAGEMENT**

- Wait for contact
- Thank and bank



## PROACTIVE VS REACTIVE ESTATE ADMINISTRATION

### WHAT DOES IT TAKE TO PUT THIS INTO PRACTICE?

At Bequest Assist it takes approximately six months of training for individuals with a legal background to have the level and diversity of knowledge to handle complex estate administration (like some of the situations described in this Guidebook). This “high” level of knowledge might take longer to acquire when an individual is also working across other responsibilities, such as communication with living supporters.

Note that the person who administers estates does not need to be the same person speaking to living donors about Gifts in Wills. In fact, the skills needed for each of these types of tasks are very different and may require that the charity find a unicorn of an applicant! There is significant time lost when someone who is focused on communicating with living donors has to switch to focusing on careful estate administration.

In addition to the resourcing needs described, charities should have other teams and their board pre-trained to understand major estate administration issues (such as where there is reputational risk or large amounts of money at stake). The finance team should have a strong understanding of share transfers, franking credits, CGT and present entitlement and the in-house counsel or law firm the charity works with should be experienced in deceased estates (noting that the law is different in every state and territory).

Another thing that proactive management of estates requires is consistency. As an estate manager, you do not have complete control and your performance is only as good as what the person in the role before you did. If you come in without good records of life estates and with inconsistent storage of probate documents, it will be very hard to get across the work entirely. One of the main reasons a charity hires us to start managing their estate work at Bequest Assist is because a key team member has left, and no-one else at the charity has the knowledge or time to jump

in. Your charity must have a plan for when this happens. If your charity takes all of these steps, your Gifts in Wills income will be 5-10% higher than it otherwise would have been in that year – through reduced fees, avoided CGT, lowered executor’s commissions and avoidance of solicitor error. Remember Gifts in Wills income is extremely variable depending on the size of gifts, so a trend might not be immediately visible, but we recommend tracking your “wins” on estate matters to fully understand the impact.

### *To put that in perspective-*

**Increasing your annual Gifts in Wills income by 5-10% could mean:**

For a charity with an annual Gifts in Wills income of \$500,000 = an extra \$25,000-\$50,000

For a charity with an annual Gifts in Wills income of \$1 million = an extra \$50,000-\$100,000

For a charity with an annual Gifts in Wills income of \$5 million = an extra \$250,000-\$500,000

For a charity with an annual Gifts in Wills income of \$15 million = an extra \$750,000-\$1.5 million

## ON WHAT GROUNDS CAN A WILL BE CHALLENGED OR CONTESTED?

Based on our analysis, 4-5% of estates are contested with a further 5-6% being impacted by other legal issues. This is a complicated part of estate management.

### THERE ARE TWO MAIN TYPES OF CHALLENGES TO A WILL.

First, there can be a challenge to the validity of the Will itself. That type of challenge usually occurs at the stage when the executor applies for probate.

#### The reasons the Will may not be valid include:

1. The testator (Will-maker) did not have the required mental capacity to make the Will when signed;
2. The Will was not executed properly and/or;
3. The testator was improperly influenced by others.

If the executor has obtained a grant of probate, you can be fairly confident that the validity of the Will is unlikely to be challenged in the future.

The second, more common type of contest, is when a person is left out of a Will or was not adequately provided for in a Will and applies to the Court seeking provision from the estate. Those claims are commonly referred to as “family provision claims”, “testator’s family maintenance claims” or “TFM claims”.

In both instances the executor will engage a solicitor to represent the interests of the estate.

If a contest occurs, the executor is obliged to defend the deceased’s wishes expressed in the Will.

Once the executor receives notice of a potential family provision claim, distribution of the estate will not continue until the court makes a determination or a settlement is reached between the executor, the claimant and the beneficiaries whose interests would be affected by a settlement.



## WHO IS ELIGIBLE TO CONTEST A WILL AND WHEN?

Who is eligible to make a family provision claim and when varies between each state and territory. Some family provision claims are settled at mediation prior to the commencement of court proceedings to save the estate money and are based on evidence that:

1. The claimant was being maintained or supported by the deceased prior to death.
2. The claimant has financial needs such that continued support is warranted.
3. It is proper that some provision be made for the claimant.

Family provision is a complicated area of law with different classes of 'eligible persons' in each state and territory.

The table below details who can contest a Will and when. Please note, this is a guide only and you should seek legal advice (possibly in conjunction with charity co-beneficiaries) if a family provision claim arises.

S/T	CLAIMS PERIOD	ELIGIBLE PERSONS (WHO MAY CONTEST)	CITED LEGISLATION
ACT	6 months after Grant of Probate	<ul style="list-style-type: none"> <li>• A partner of the deceased;</li> <li>• A person (other than a partner) who was in a domestic relationship for 2 or more years continuously at any time;</li> <li>• A child, step-child, grandchild or parent of the deceased.</li> </ul>	Claims period: Family Provision Act 1969, section 9 Eligible persons: Family Provision Act 1969, section 7
NSW	12 months after date of death for family provision application	<ul style="list-style-type: none"> <li>• A spouse of the deceased;</li> <li>• A former spouse of the deceased;</li> <li>• A person in a defacto relationship with the deceased at the time of death;</li> <li>• A person who was at any time wholly or partly dependent on the deceased;</li> <li>• A grandchild of the deceased or a member of the same household;</li> <li>• Any person living in a close relationship with the deceased;</li> <li>• The children of the deceased.</li> </ul>	Claims period: Succession Act 2006 No 80, section 58 Eligible persons: Succession Act 2006 No 80, section 57
NT	12 months after Grant of Probate	<ul style="list-style-type: none"> <li>• A spouse or de facto partner of the deceased person;</li> <li>• A former spouse or de facto partner of the deceased;</li> <li>• A child, step-child, grandchild or parent of the deceased.</li> </ul>	Claims period: Family Provision Act 1970, section 9 Eligible persons: Family Provision Act 1970, section 7
QLD	6 months after date of death but 9 months from date of death for family provision application	<ul style="list-style-type: none"> <li>• A spouse or de facto partner of the deceased person (including a divorced spouse who has not since been re-married at the time of death)</li> <li>• The deceased's child including stepchild, adopted child or any child born outside of marriage;</li> <li>• A dependent person under the age of 18;</li> <li>• A parent of a surviving child under the age of 18;</li> <li>• A parent of the deceased.</li> </ul>	Claims period: Succession Act 1981, section 41(8) Eligible persons: Succession Act 1981, section 5AA & section 40
SA	6 months after Grant of Probate	<ul style="list-style-type: none"> <li>• The spouse of the deceased;</li> <li>• A person who has been divorced from the deceased (including a domestic partner);</li> <li>• A child or grandchild of the deceased;</li> <li>• A child of the spouse/domestic partner who was maintained wholly or partly by the deceased at the time of death;</li> <li>• A parent or sibling of the deceased who cared for or contributed to the maintenance of the deceased during their lifetime.</li> </ul>	Claims period: Inheritance and Family Provision Act 1972, section 8 Eligible persons: Inheritance and Family Provision Act 1972, section 6
TAS	3 months after Grant of Probate	<ul style="list-style-type: none"> <li>• The spouse of the deceased;</li> <li>• The children of the deceased;</li> <li>• The parents of the deceased, if the deceased had no spouse or children;</li> <li>• A person who was married to the deceased and received or was entitled to receive maintenance;</li> <li>• A person in a significant relationship with the deceased, within the meaning of the Relationships Act 2003 (TAS) who was entitled to receive maintenance.</li> </ul>	Claims period: Testator's Family Maintenance Act 1912, section 11 Eligible persons: Testator's Family Maintenance Act 1912, section 3A
VIC	6 months after Grant of Probate	<ul style="list-style-type: none"> <li>• A spouse or domestic partner (or former partner eligible to apply to court for a property settlement);</li> <li>• A child or stepchild, or someone treated as a child by the Will-maker and the child believes the Will-maker was their parent'</li> <li>• A registered caring partner, the spouse or domestic partner of a child of the deceased, where child dies within one year, a grandchild, a member of the household or former member who would have moved back in the near future, had the death not occurred - each must also have been wholly or partially dependent on the deceased at the time of death.</li> </ul>	Claims period: Administration and Probate Act 1958, section 99 Eligible persons: Administration and Probate Act 1958, section 90A
WA	6 months after Grant of Probate	<ul style="list-style-type: none"> <li>• A spouse or de facto partner of the deceased;</li> <li>• A former spouse or de facto partner of the deceased if they were receiving maintenance;</li> <li>• A child of the deceased;</li> <li>• A stepchild or grandchild of the deceased in limited circumstances;</li> <li>• A parent of the deceased person.</li> </ul>	Claims period: Family Provision Act 1972, section 7(2) Eligible persons: Family Provision Act 1972, section 7(2)###

Disclaimer: The above table is an overview of the relevant information at the date of publishing. We recommend an online search of the relevant legislation to view more details and exceptions to the rule. Please seek legal assistance if necessary.

## HOW DOES THE COURT DECIDE IF THE WILL SHOULD BE ALTERED IN FAVOUR OF THE CLAIMANT?

Whether the Court makes a family provision order is at the Court's discretion. It must consider whether the deceased had a moral obligation to provide for the claimant and, if so, whether the provision in the will for the claimant is adequate or not. In coming to a decision, the Court will consider numerous factors including:

- The value of the deceased's estate;
- The claimant's financial circumstances;
- The relationship between the deceased and the claimant;
- Whether any other person has a moral obligation to financially support the claimant;
- The claimant's health and age;
- The strength of competing claims on the estate;
- Contributions made by the claimant to the building of the deceased's estate;
- The claimant's conduct which may reduce the moral obligation of the deceased to provide for the claimant; and
- Any other matters which the court considers relevant.

## CAN A CHARITY CONTEST THE WILL?

As indicated in the Table on the previous page, a charity or not-for-profit organisation is not a category of person eligible to contest a will. A supporter may have expressed a plan to leave your charity a bequest at one time but may have changed their mind (which they are, of course, free to do). If a bequest to your charity is not stipulated in the current will there are no legal grounds for a charity to instigate a contest. If the will is contested by an eligible person, a charity does have the right to defend its bequest.



## WHAT IS THE FINANCIAL COST OF CONTESTING A WILL?

Legal costs are often paid out of the residuary estate, so the beneficiaries entitled to the residuary usually bear the brunt of the legal costs. Each case is different, but if a contest gets to mediation, the costs on each side can be between \$30,000 to \$80,000 leading up to and including mediation. If your charity decides to attend mediation and bring its own solicitor to represent its interests, this additional cost is unlikely to be reimbursed by the estate. When multiple charities are named in the will, it can be financially advantageous to join forces in approaching a contest.

## WHAT IS THE DIFFERENCE BETWEEN MEDIATION AND A TRIAL?

Mediation is a confidential forum where the parties present their positions and work together with their solicitors and a mediator to try to come to a compromise acceptable to everyone. Unlike a trial, where a judge makes the determination, the terms of a settlement at mediation are in the hands of the parties. In the opinion of Melbourne solicitor, Nancy Collins, "the best mediation outcome is where all parties are slightly unhappy with the settlement".

Some states require the parties to attend mediation before the parties proceed to trial. Other than the outcome of the mediation was unsuccessful, the Court will not be given any further details of the mediation.

Unlike a mediation, where the outcome arrives from the negotiation and agreement of the parties, a trial has an essentially binary outcome – either the claimant wins or they lose. Trials are costly and time consuming. The time between an unsuccessful mediation and a trial can be a year or more. More months after trial are spent waiting for the Court to hand down a written judgment. Given the time, costs and risks of a trial, the vast majority of contested estates are settled at mediation.



## SHOULD YOUR CHARITY BACK DOWN WHEN A CONTEST OCCURS?

Some charities have a policy not to be involved in defending their share in contested estates. This may be due to concerns about the reputation of the charity, the potential to drain the estate with excess legal fees or the lack of resources to commit to the extra work involved. However, a blanket policy for your charity not to be involved is outdated. Contests are more frequent today than they were a decade ago due to increased life expectancy, larger estates due to real estate and share prices, increased fluidity of family formations and greater access to ‘no win, no fee’ solicitors. Equating the dollar amount that your charity is asked to give up to the services your charity could potentially provide will help clarify the importance of defending your charity’s bequest in your mind and the minds of the executor and claimant.

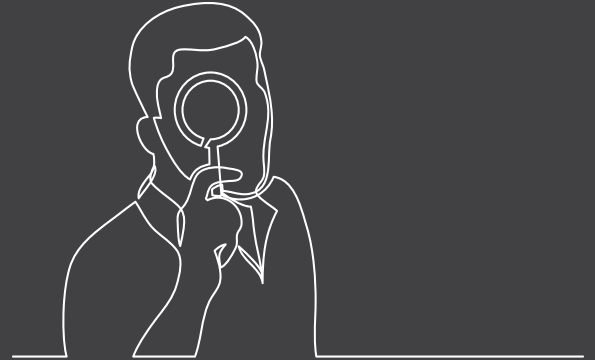


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## CASE STUDY: 16

**T**en charities are named as equal residuary beneficiaries of a one million dollar estate. The bequestor’s will explicitly states that she does not intend to leave any money to her stepsons, with whom she hasn’t spoken in years. One stepson files a Family Provision Claim that the deceased had an obligation to provide for him.

Two charities decide that they do not wish to engage in the contest. The other eight charities believe the executor and the executor’s solicitor are not vigorously defending the claim and hire one solicitor to represent their interest. They work together to form a consensus on how to proceed. Legal advice, based on the circumstances, is that the stepson is likely to receive some of the estate even though the will explicitly stated this was not the deceased’s intention.

Mediation with the stepson ends with the estate paying all legal bills and awarding half of the remaining assets to the stepson and the other half divided among all ten charities. The charities are satisfied that working together through one solicitor and settling at mediation has preserved as much of their bequest as possible.

## WHAT SHOULD YOUR CHARITY DO WHEN A CONTEST OCCURS?

Ensure that you are thoroughly aware of the context of the contest by staying informed with the estate's solicitor and executor. The process may be time consuming and stressful. A charity's estate administrator must always balance honouring the deceased's wishes, remaining respectful of those who feel left out and achieving the best outcome possible for your charity.

It is important to be actively involved in the process of defending a claim by being as informed and responsive as possible to the executor. It may also require seeking advice from your charity's solicitor especially if you do not believe the executor or the executor's solicitor is unbiased and committed to defending the will. It is important to be well versed in the unique facts of each contest.

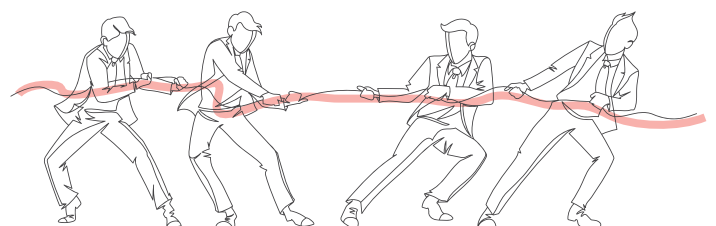
We suggest the following actions to ensure you are doing everything within your power to be involved in the process:

- Obtain a copy of the will and statement of assets;
- Understand your charity's entitlement;
- Understand your charity's rights as a beneficiary;
- Request and read the court documents, particularly the affidavits or position statements filed in support, and in defence of the claim;
- Enquire if the executor sought advice of a barrister, and if so, the barrister's opinion on the claimant's prospects of success;
- Request an up-to-date estate administration account and estimate of the legal expenses from all sides;
- Attend mediation and have the necessary delegated authority to sign a settlement deed on behalf of your charity;
- Understand the claimant's prospects for success and the size of a potential order for further provision to the claimant;
- Agree on a settlement range within your charity before attending mediation;
- Communicate with other affected charities/beneficiaries and strategise a united front;
- Respond to all communications from the solicitor promptly.

A charity must always consider the potential press exposure when it gets involved in contests, so keeping your media team in the loop about any action the charity is taking is strongly advised. This allows them to develop a media plan in advance that stresses the important benefits of this gift to your charity and the strong relationship the bequestor had with your charity. In our view, the best way to honour the bequestor and their trust in your charity is to ensure as much as possible that their wishes are being fulfilled.

Communication and knowing your charity's entitlements is more than half the battle. If your charity does not have time to commit to estate management, consider partnering with Bequest Assist to outsourcing estate management.

In a 2015 study of public trustee files by Tilse (et al.), *Having the Last Word? Will Making and Contestation in Australia*, 75% of contested estates resulted in the court distributing assets differently from the will. Not surprisingly spouses were the most successful followed by children, then extended family. As previously stated, most litigious matters are settled out of court at mediation where compromises have been made by all parties. It is important to remember that sometimes the claims being made are fair positions that the will-maker had not considered when writing the will. In cases likely to be successful at trial, a win for the charity may be simply retaining some of the bequest and settling at mediation so that fewer costs are incurred.





## DO DECEASED ESTATES PAY TAXES?

The executor is responsible for filing the deceased's personal tax return up to the date of death and for filing estate tax returns. Any tax liability and accounting fees for the completion of all tax advice and preparing tax returns will be paid out of the estate.

If the estate earns income above the tax-free threshold, (\$18,200 in 2024) there will be tax returns prepared and filed for each year that the estate is being administered. Tax rates on the estate's income vary according to the time that has passed since the bequestor's death. For the first three years following the date of death, the estate will be taxed at the same rate as an individual including the tax-free threshold. After three years the tax-free threshold for the estate is lower, resulting in higher taxes. Once the executor has obtained a final assessment from the Australian Tax Office, they will make the final distribution to the beneficiaries.

## DO CHARITIES PAY TAXES?

Charities that are endorsed as tax exempt by the Australian Tax Office do not pay income tax. A charity with DGR status is an entity or fund that can receive tax deductible gifts. While some of the criteria for qualification are the same, these are two separate matters. Ask your finance manager if you are uncertain of your charity's status.

Taxation of deceased estates is a specialised area. It is important that the executor or their solicitor retains an accountant that is experienced in this area if taxes are to be reduced or avoided, thus maximising the residuary estate for tax exempt beneficiaries.

## WHO CAN HELP WITH TAX ISSUES?

It is imperative that the executor or their solicitor uses an experienced tax professional who understands taxation matters for trusts and estates as these laws are complex and constantly updated. It may be prudent to encourage the estate executor/solicitor to hire a specialty tax professional if you are a residuary beneficiary in a large, complex estate to guard against costly errors that reduce your charity's entitlement.

This is especially true when there are shares, company ownership or multiple properties included in the deceased's estate. Taxation on deceased estates can be complicated for even an experienced accountant. If the executor/solicitor is open to the suggestion, providing the names of tax professionals who may help with estate taxes is a good way to encourage better results when you are a residuary beneficiary.

Please see below for names of individuals known to specialise in the area of taxation on deceased estates. Please note Bequest Assist does not recommend or endorse the individuals but provides details as this information is hard to obtain.

**Jamie Towers**, Tax Partner Mazars

Ph: (07) 3218 3900 | e: [Jamie.Towers@mazars.com.au](mailto:Jamie.Towers@mazars.com.au)

Note: Jamie is willing to advise charities and solicitors and is the author of *Mazar's Guide to Tax Effective Giving*. This guide is available for download <https://www.mazars.com.au/Contents-library/Forms/Download-our-philanthropists-guide-to-tax-effective-giving>

**Melanie Costin**, Director of T & E Accounting

Ph: 1300 082 633 | e: [mcostin@trustandestate.com.au](mailto:mcostin@trustandestate.com.au)

Note: Melanie specialises in deceased estate taxation and primarily advises solicitors not charities.

**Ian Raspin**, Managing director at BNR Partners

Ph: 03 9781 6800 | e: [iraspin@bnrpartners.com.au](mailto:iraspin@bnrpartners.com.au)

Note: Ian is an estate taxation specialist and has also written books on the topic including *Taxation of Deceased Estates for Estate Practitioners*. Ian primarily advises solicitors not charities.

## THE SHARE TRANSFER PROCESS

### HOW CAN SHARES BE SOLD OR TRANSFERRED IN A TAX EFFICIENT MANNER?

If the executor sells assets in the estate there may be Capital Gains Tax due. This tax will reduce the residuary of the estate. There are two ways that shares may be sold or transferred while maintaining the tax exempt status of the charity and maximising the value of the estate.

1. The executor transfers shares from the estate *in specie* to the charity. The charity may then hold or sell the shares without a Capital Gains Tax event.
2. Follow the “pay or notify” rule. The executor records a resolution to make the charity presently entitled prior to 30 June (end of the tax year). Additionally, the executor must pay proceeds of the sale of the shares OR notify the charity beneficiary that they are entitled to this income prior to 30 August (within 2 months of the end of the tax year). See the ATO website for more information. See : <https://www.ato.gov.au/businesses-and-organisations/trusts/in-detail/distributions/distributions-to-tax-exempt-beneficiaries-anti-avoidance-rules/pay-or-notify-rule>

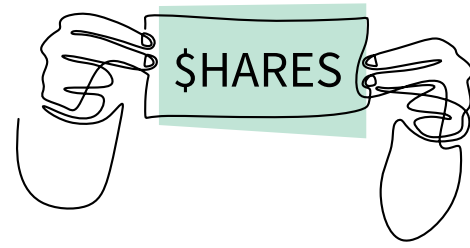
### WHAT IF SHARES WERE SOLD AND TAXES PAID?

If the executor sold the shares and paid the tax you may still be able to reclaim the tax from the ATO for the estate. There is a time limit, the executor must agree to this step and certain conditions will apply so engage a knowledgeable accountant to file an objection with the ATO. An independent accountant filing an objection is better than the original tax preparer amending the return.

### WHAT ARE FRANKING CREDITS AND WHEN IS A CHARITY ENTITLED TO THEM?

Some Australian share companies will have franking credits attached to the dividends they pay. This is tax paid by the company that is allocated to shareholders. If the deceased owned shares that paid franked dividends and the charity was made presently entitled to the income of the estate by 30 June in that tax year the charity may claim the franking credit. An application to the ATO will be required to refund these franking credits to the charity.





## THE SHARE TRANSFER PROCESS

Many charities prefer avoiding unnecessary CGT through 'present entitlement' rather than an *in specie* transfer of shares as it avoids the transfer costs and hassle of that process. In some cases though, 'present entitlement' will not be available, either because of the preferences of other beneficiaries or the understanding of this issue of the executor.

In those instances, if there is the potential of substantial CGT being lost, the charity should be prepared to take a share transfer, even if only on a case-by-case basis. With the help of a broker, shares can be sold very quickly and the funds returned to the charity without losing funds to unnecessary tax.

Before agreeing to a share transfer, there are a few things the charity should take into consideration:

- What company are the shares in? Are they ASX listed?
- Does the charity have an ethical policy about what shares they will and will not accept?
- What are the shares worth? Is it a high enough amount to justify the trouble of a share transfer?
- Does the charity have a share broker or wealth manager that they can work with to receive and sell these shares?

Once it has been decided that the charity will accept the share transfer, they communicate this with the executor or solicitor. It is then the executor/solicitor's responsibility to start the share transfer process and provide the necessary forms to the charity. When received, it is important that the charity checks:

- All details are correct – even down to the exact spelling of the charity name and address.
- That the shares are as expected (company and quantity)
- Who has the delegated authority to sign for the charity? Most of the time the signature must be on the original forms and a board member or executive team member might be required to sign.

The original signed form with certified ID and the correct delegated authority signature must be sent back to the executor. Sometimes there is a time limit on how quickly this must happen (eg 3 months).

There is then sometimes a wait for the share transfer to occur as the solicitor/executor gathers forms from each of the beneficiaries. It is important that the charity has a method of keeping track during this process. You may want to track:

- Where the process is up to – eg the date you sent the forms back to the solicitor.
- What specific shares and quantities you are expecting.
- Have you received a holding statement?
- When shares are received – their number and value.
- If the shares are to be sold right away, the date they are sold and the value in cash returned to the charity.

Share brokers can provide great support to charities through this murky process. It may be worthwhile reaching out to a charity with a similar size bequest program to get recommendations on how they handle share transfers.

## HOW TO REDUCE ESTATE COSTS AND/OR MAXIMISE A GIFT

There are a number of ways a charity can maximise the amount they receive in residuary funds from an estate. The simplest way is to respond promptly to any requests from the estate solicitor. Providing bank account details, required signatures and completing forms in a timely manner will speed up administration and save everyone money. Additional fees result when solicitors must chase beneficiaries for required information.

### Additional ways to maximise residuary bequests include:

- Get to know estate administrators at charities where you are often co-beneficiaries. Avoiding duplication of efforts saves you time and limiting enquiries being sent to the executor's solicitor will reduce legal costs.
- If real estate is to be sold, you may find a real estate agent keen to help your charity's cause that may reduce or donate their commission to your charity. Advising the executor/solicitor of this may increase the amount achieved from property sales.
- If cleaning out the deceased's home prior to sale is a task for the executor, perhaps charity volunteers can assist to save costs to the estate.
- Selling the contents of a home through charity opportunity shops when they have been bequeathed the contents of the home may bring in small income but also save on disposal fees.
- Gifts of art, jewellery or specific items may need to be appraised and sold. Is there a supporter in your charity with experience in a particular area? Asking supporters for their advice is a great way to build relationships.
- Having your charity made 'presently entitled' or receiving shares *in specie* to reduce Capital Gains Tax on the estate, and investing time into seeking refunds on franking credits, may also increase your entitlement.
- If the pecuniary gift is not paid within one year of the date of death, interest is payable. Requesting the interest on late payments will increase the amount collected.
- Avoiding court to save on legal fees is another method of reducing costs on the estate. Negotiating commissions without involving the court, pre-mediation settlements, collaborating with other named charities and resolving other issues in the estate may be less expensive and provide a better outcome for your charity than pursuing all legal avenues. Finding a solicitor to act pro bono for your charity on certain issues will reduce the amount your charity spends in legal fees. There may be a solicitor amongst your supporters who will agree to send a letter on behalf of your charity, to elicit a response from an uncooperative solicitor.
- If you have engaged a solicitor to represent multiple charities, selecting a person to be the conduit for communications between the charities and the solicitor may save legal costs. A solicitor representing 10 charities will spend considerable time communicating with each charity and answering questions unless a person takes the lead role
- Understand that sometimes you have to spend money to obtain your charity's rightful entitlement. Don't be afraid to seek outside help when you encounter a difficult estate.
- If your charity is struggling to handle bequest administration to the standard outlined in this Guidebook, talk to us! Bequest Assist handles the whole bequest administration process so charities can focus on the acquisition and stewardship of bequests, ensuring economical, efficient and professional estate administration.

## HOW CAN COMMUNICATION WITH SOLICITORS AND EXECUTORS BE MOST EFFICIENT?

Below is a list of our top tips for efficient communication which will help you receive your charity's bequest and create a favourable impression of your charity.

### 1. Respond quickly

Respond to requests for information in a timely and efficient manner. Delays caused by one beneficiary may delay distributions to all charities and result in additional charges.

### 2. Make contact at appropriate points and stay in touch

Using information provided in this Guidebook, check in with the solicitor or executor for the estate as often as necessary but at the right times. Make notes in your work calendar or use an estate management software system as a reminder tool for follow up dates.

### 3. Prepare questions

Prior to phoning an executor or solicitor for information, review your documents and make a list of questions you need answered.

### 4. Phone vs email

Carefully consider your communication options. Sometimes a phone call allows for clarification of specific points and avoids back and forth emails to reach a conclusion. Remember to take notes of your verbal conversations.

### 5. Be professional and respectful

Expressing yourself professionally whilst conveying your gratitude may get better results.

Solicitors and their support staff often have large caseloads and may not fully appreciate the importance of a timely distribution to the charity. Always be mindful of this and approach communication with a sense of understanding.

## WHAT TEMPLATES DO I NEED FOR CHARITY ESTATE ADMINISTRATION?

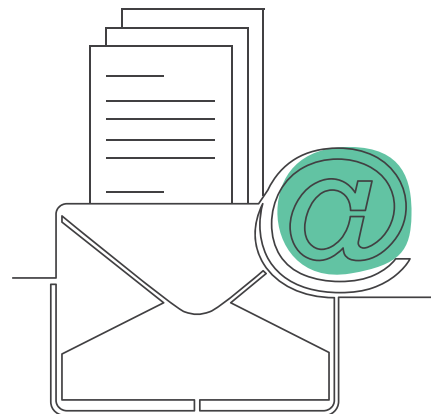
While the estate administration can stretch out for years, there is a lot of information that is required quickly at different stages. Having professional templates on hand will be a crucial time and money saver for your charity. Have the core text ready so that you simply have to adapt the language to tailor it to the specific estate.

When communicating with lay executors we recommend you personalise your templates whenever possible.

## TEMPLATES YOUR CHARITY SHOULD HAVE ON HAND:

1. "Acknowledgment of Notification" (including a version that requests any missing documentation). See Step 8.
2. "Second" and "Third" requests for documents. See Step 8.
3. Progress Update Request.
4. Bequest Practice Document, see Step 8.
5. "Thank you" to family and/or executor.

Tip: Be sure to name these template files for easy storage and access. Creating a consistent nomenclature and storage area for estate documents (the will, notification letter, asset list, final statement, etc.) will allow easier access to these documents.



# GLOSSARY

## OF TERMS

THIS GLOSSARY OF TERMS IS INTENDED TO HELP STAFF AND VOLUNTEERS OF NOT-FOR-PROFIT AND CHARITABLE ORGANISATIONS UNDERSTAND THE TERMS AND CONCEPTS USED WITHIN THE PROCESS OF MANAGING WILLS AND ESTATES. IT SHOULD BE USED ONLY AS A GUIDE IN CONJUNCTION WITH THE USE OF PROFESSIONAL ADVICE.

**ADEMPMENT OF A GIFT:** A gift in the will is not received because it no longer exists.

**ADMINISTRATION OF AN ESTATE:** The work of the executor or administrator in completing the conditions of a will. This includes resolving any claims on the estate, calling in the assets, paying any liabilities and distributing the estate.

**ADMINISTRATOR:** Appointed by a court to manage/administer the estate of a person where: a valid will does not exist; no executor has been appointed or named; and/or the executor has pre-deceased the testator or is unable to undertake their duties.

**ALTERATION TO A WILL:** Changes to a will which are not permitted unless properly executed (also see Codicil).

**ANCILLARY FUND:** Special funds established under a will or trust that provide a link between donors (the giver) and an organisation that can receive tax deductible donations. Such organisations are termed Deductible Gift Recipients (DGR). Sometimes called Donor Advised Fund, Community Foundations.

**ATTESTATION OR ATTESTATION CLAUSE:** The term for a signature clause in formal documents, in this case the will.

**BENEFICIARY:** A person or organisation benefiting under a will by receiving some of the deceased estate.

**BEQUEST:** A gift of a sum of money or an asset to a person or organisation contained in a will. The terms bequest (not money) and legacy (money) are used interchangeably and terms such as gift may also be used.

**CAVEAT:** A document that any person with a legal interest in a property can lodge at the official property registration system in the appropriate state. This creates a note on the title showing that a third-party claims rights over the property and prevents the property owner from selling the property until the caveat is removed.

**CHATELS:** Any item of personal property that can be moved from place to place – including furniture, belongings or a car.

**CHILD:** In estate law this includes a stepchild or an adopted child.

**CLAIMANT:** A person who makes a claim. In contested estates a person who makes a Family Provision Claim.

**CODICIL:** A document that acts as a supplement or amendment to an existing will.

**COLLABORATIVE LAW:** An alternative dispute resolution not involving a third-party mediator. The parties settle between themselves through their lawyers and agree they will not litigate in relation to the dispute nor will the lawyers take the case to litigation.

**COMMISSION:** A payment made by/from the estate to an executor or administrator as a reimbursement for their 'pains and troubles' in undertaking their tasks. This should be a 'just and reasonable' amount. Some states have suggested a percentage maximum for this or a range.

**CONTINGENT BEQUEST:** A gift that is dependent on a particular event occurring.

**DEDUCTIBLE GIFT RECIPIENT (DGR):** An organisation that is able to receive income tax deductible gifts and is endorsed by the Australian Tax Office (ATO).

**DEVISE:** A gift of property in a will.

**DISENTITLING CONDUCT:** Conduct, generally abusive or violent, which disentitles an applicant from family provision.

**DISTRIBUTION STATEMENT:** A financial statement that shows the assets, liabilities paid and distributions of the residue. All residuary beneficiaries should receive a copy of this document from the person charged with handling the estate. This may be the executor, administrator or trustee of the estate.

**ELIGIBLE PERSON:** An individual who is allowed to challenge the provisions of a will. In Australia this can differ in the states and territory jurisdictions.

**ENDOWMENT:** An amount of money (usually invested in perpetuity) established to provide income for one or more beneficiaries.

**ESTATE:** The total of the assets, liabilities and obligations which the deceased owned or had an interest in at the time of death.

**ESTATES IN FEE SIMPLE:** A legal term which refers to real estate.

**EXECUTION:** The formal process of will making by attestation - signature and witnessing.

**EXECUTOR/EXECUTRIX:** A person appointed by the will maker to be their representative when they are deceased and to administer the estate. This could be more than one person or an organisation.

**EXEMPLIFICATION:** This is an example, in the case of wills it means an official copy from the court of the Grant of Probate or letters of Administration.

**FAMILY PROVISION APPLICATION/CLAIM:** An application to a Supreme Court for provision or further provision from an estate. The claim is made by an eligible person seeking "proper and sufficient" provision. In Victoria it is referred to as Testators Family Maintenance.

**FIDUCIARY DUTY:** An obligation to act honestly for the benefit of another person (or charity beneficiary). The executor owes a fiduciary duty to the beneficiaries of the estate.

**GENERAL LEGACY:** An amount of money or other asset that is payable about of the collective assets of the estate.

**GRANT OR GRANT OF REPRESENTATION:** The Grant of Probate or Letters of Administration approved by the supreme court.

**HOLOGRAPHIC WILL:** A will written in the will-maker's own handwriting.



## GLOSSARY OF TERMS

**IN SPECIE ('IN ITS OWN FORM'):** This term is used where the assets of an estate are transferred directly to the beneficiary. This could be where an estate transfers shares to the beneficiary rather than selling the shares and distributing the resulting funds to the beneficiaries.

**INTER VIVOS ('WHILE ALIVE'):** Is generally used to indicate gifts made by the deceased while still alive.

**INTERLINEATION:** An alteration to a will which is written between the lines of the existing will (see Codicil).

**INTESTATE:** Dying without leaving a will. This may also be used when the deceased leaves a will covering only part of the estate or an invalid will. The property of the estate in this case may pass by the laws of succession rather than by the directions of the deceased depending on the jurisdictional law.

**INFORMAL TRANSMISSION:** The transition of the estate assets (including real estate) without the need of a Grant of Probate.

**INFORMAL WILL:** This may apply to a document purporting to be a person's last will, that does not comply with all the formal requirements. It may still be enforceable subject to a Grant of a supreme court.

**INVENTORY OF ASSETS AND LIABILITIES / STATEMENT OF ASSETS AND LIABILITIES:** A document which contains what the court needs to know about the assets and liabilities of the estate. This is submitted when application for a Grant of Probate is made, although it may not be complete at this time.

**JOINT WILL:** A single will of more than two persons, usually between spouses.

**LEGACY:** A gift of money to a person or an organisation (may be in the form of private property).

**LEGAL PERSONAL REPRESENTATIVE:** Also, just called personal representative or LPR, and refers to an executor, administrator or trustee of an estate.

**LETTER OF ADMINISTRATION:** A document giving an administrator the right to deal with a will. Also known as a Grant of Letter of Administration ordered by a supreme court. It can occur when a person either dies without a will, has a will but where no executor is named, or the executor has pre-deceased the will-maker or is unable to carry out their duties.

**LIFE INTEREST / LIFE ESTATE:** A lifetime gift, for example giving someone the right to live in a property until their death. At this time the asset or capital is distributed according to the will.

**LIFE TENANT:** A person with a life interest in a life estate.

**MEDIATION:** The process of settlement where parties are in dispute over the provisions of an estate. This is facilitated by an independent third-party. This may be ordered by the court before the matter will be listed for hearing.

**MORAL DUTY:** The moral claims established by the court for a will-maker's spouse, children or dependents to provision from the estate.

**MUTUAL WILLS:** Usually between spouses where the assets are left to each person in the same way.

**NOTIONAL ESTATE:** These are assets the deceased had an interest in when alive which are returned to the estate after death. Examples are superannuation or joint bank accounts which may be called into the estate to make a family provision order (currently only legislated in NSW).

**PARTIAL INTESTACY:** The term used to describe estates where a valid will exists but it fails to dispose of all of the assets.

**PECUNIARY LEGACY:** A gift in a will that is a fixed sum of money.

**PRESCRIBED PRIVATE FUND:** A tax effective fund for holding money, property or other assets for charitable giving.

**PROBATE OR GRANT OF PROBATE:** A Grant of Probate is an order granted by a Supreme Court that permits the executor to collect and distribute the assets of a deceased person in accordance with the will.

**PROTHONOTARY:** The title of the chief clerk of the Supreme Court of Victoria. Prothonotaries are responsible for the Court's administrative functions. They can also review costs and fees charged to parties, conduct mediations and bring charges for contempt of court if someone breaks the Court's rules or shows disrespect towards it.

**REMAINDERMAN:** The person or organisation that inherits the property upon termination of the life estate.

**RESEAL:** Where other jurisdictions add their seal to a Grant which extends the jurisdictions in which the Grant is enforced.

**RESIDUARY BEQUEST:** Remainder of the estate left as a legacy after specific legacies (pecuniary legacies) and all debts have been cleared.

**RESIDUE OF ESTATE:** Residue of an estate in possessions, property and money after all debts, testamentary expenses paid, specific gifts distributed and any claims have been settled in accordance with the will.

**REVERSIONARY LEGACY:** The assets and money remaining after a life interest has been completed.

**REVOCAION OF A WILL:** Where a will is cancelled, generally through the making of a new will.

**RIGHT TO OCCUPY / RIGHT TO RESIDE:** The right to live in a property as specified in the will.

**SEAL:** The formal stamp of the Supreme Court in relation to a Grant.

**SPECIFIC BEQUEST:** The gift of a specific identifiable item such as jewellery or furniture.

**SUBSTANTIAL COMPLIANCE:** Where a will does not meet all the normal formalities but the court admits it because the testamentary intention is considered to be clear.

**SUCCESSION LAW:** The law relating to wills and estates.

**SUPREME COURT:** The court in each of the states and territories for will proceedings. Sometimes, as in Victoria, the county court may be able to hear family provision claims.

**TESTAMENT, TESTAMENTARY:** Relating to a will.

**TESTAMENTARY CAPACITY:** The ability of a person to make a valid will, that in doing so one is in sound mind, understanding and memory.

**TESTATION:** The clear statements of intent in a will.

**TESTATOR OR TESTATRIX:** Traditionally, a testator refers to a man who makes a will, while a testatrix refers to a woman who makes a will. Today, the term testator is generally used regardless of gender identification. However, the courts may still use both terms.

**TESTATORS FAMILY MAINTENANCE:** Another term for family provision.

**TRUST ACCOUNT:** A bank account in which money is held on behalf of another person, not for the use of the account holder. This is the account used by the lawyer for money held on behalf of the estate.

**TRUSTEE:** One who holds assets on behalf of another, the beneficiary, to whom they owe a duty to administer the will with the intent expressed by the testator.

**UNDUE INFLUENCE:** Coercion placed on a will-maker which invalidates the will.

**WILL:** A legal document expressing the intentions of the will-maker to distribute their assets after death. This document will also name the executor to administer the estate.

**WILL-MAKER:** A plain English version of testator.

**WITNESS:** A person who attests to the signing of the will by the testator.

# RESOURCES

**Law Society NSW:**

<https://www.lawsociety.com.au/resources/resources/my-practice-area/elder-law/Wills-Estates-FAQ>

**Law Access NSW:** <https://www.lawaccess.nsw.gov.au>

**Law Society SA:** [https://www.lawsocietysa.asn.au/PDF/Prof\\_Legal\\_Practitioners.pdf](https://www.lawsocietysa.asn.au/PDF/Prof_Legal_Practitioners.pdf)

**Legal Practitioners Liability Commission- A Guide for Beneficiaries (VIC):**

<https://lplc.com.au/practice-risk-guides/guide-beneficiaries/>

**Legal Practitioners Liability Commission - Beware the risk your client's email system may have been compromised (20 Feb 2020):** <https://lplc.com.au/resources/lplc-article/beware-risk-client-email-compromised>

**Legal Practitioners' Liability Committee- A Guide for Executors (24 Jan 2018):**

<https://lplc.com.au/resources/client-resources/guide-executors>

**Legal Services Commission of South Australia - Problems with executors:**

<https://lawhandbook.sa.gov.au/ch36s02s04s02.php>

**Tasmanian Legal Handbook:**

<https://www.hobartlegal.org.au/handbook/Wills-Estates-and-funerals-and-guardianship/Wills-Estates-and-funerals/executors-and-trustees/>

**Tilse, C., Wilson, J., White, B., Rosenman, L. & Feeney, R. (2015) Having the Last Word? Will Making and Contestation in Australia. The University of Queensland.**

<https://eprints.qut.edu.au/215396/>

**Australasian Legal Information Institute**

<http://www.austlii.edu.au/>

**VIC Legal Services Board + Commissioner - Fiduciary duties of executors, and claiming executor's commission:**

<https://lsbc.vic.gov.au/news-updates/news/fiduciary-duties-executors-and-claiming-executors-commission>



## BEQUEST ASSIST WEBINARS - ARE YOU ATTENDING?

Bequest Assist hosts webinars co-presented with professionals to address topics of concern to estate administrators. If you would like to receive invitations to our webinars, please register at:

[WWW.BEQUESTASSIST.COM.AU](http://WWW.BEQUESTASSIST.COM.AU)



## Bequest Assist

Bequest Assist was founded in 2019 by Maureen Koegel with the aim of improving bequest administration for Australian charities. The goal was simple: to make the charity estate administration process more efficient and improve outcomes for charities. In that time, we've secured over \$3 million for charities that they otherwise would have missed out on, or not received for years to come.

We offer estate administration outsourcing to charities around Australia and New Zealand, regular training for Gifts in Wills team members and free monthly webinars.

If you would like to learn more about Bequest Assist's services, visit:

[www.bequestassist.com.au](http://www.bequestassist.com.au) or

email: [info@bequestassist.com.au](mailto:info@bequestassist.com.au)



Include a Charity is a campaign of Fundraising Institute Australia - broadly seeking to inspire and encourage people to leave charitable gifts in Wills.

The Include a Charity team strives to build awareness, community, knowledge and engagement for its members and Australian society through active campaigning, training, research and networking. Members hail from more than 100 not-for-profits - in the fields of health, education, international development, community services, animal welfare, the environment, the arts and more. We provide support, education and encouragement to gift-givers and, solicitors and financial planners.

Charities benefit through contemporary training, upskilling, collaboration, social networking and the pooling of ideas and resources.

This interaction between key stakeholders enables us:

- to increase public awareness of gifts in Wills as a philanthropic act and to make it as commonly recognised and enacted as all other fundraising channels.
- to develop the knowledge, experience and skills of the gifts in Wills fundraising sector in Australia to ensure best practice and promotion of member bequest programs.
- to advocate for operational and legislative change with government to smooth channels for growth in bequest fundraising in Australia.
- to encourage estate planning professionals and solicitors to reference gifts in Wills during the will-writing phase or in public forums to grow and support campaign objectives.
- to undertake world-first research projects in the charitable gifts in Wills fundraising space.

Include a Charity promotes gifts in Wills fundraising across the NFP sector and to the general public to transform the landscape around leaving charitable bequests to vital causes: To make leaving gifts in Wills to charity the norm for every walk of life.

*Thank you*

## KING & COLLINS

BEQUEST ASSIST WOULD LIKE TO EXTEND A VERY SPECIAL THANKS TO NANCY COLLINS OF KING & COLLINS FOR PROVIDING ONGOING SUPPORT AND FEEDBACK ON THIS GUIDEBOOK.

King & Collins is very pleased to provide support and encouragement to Bequest Assist. The management of gifts in wills is a critical category of financial support to charities. We have every confidence that this reference guide for managing gifts in Wills will be gratefully received by bequest managers throughout the philanthropy sector. We commend Maureen Koegel for her vision and commitment to improving the financial outcomes for charities and for generously sharing her knowledge, expertise and experience in this Guidebook.



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A CHARITY**

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