

WILLIS  
— & —  
BOWRING  
SOLICITORS & ATTORNEYS

## SO WHAT HAPPENS WHEN I DIE?



It is an unfortunate fact of life that death will eventually affect everyone.

However, when a family member or loved one passes away, it can be a very difficult time for the people that are left behind.

This booklet has been prepared to provide initial advice to your family and Executor following your death and to provide them with some information that they may require.

**Disclaimer:**

This booklet provides general information only. Legal advice should be sought as to how this may apply in each individual case.

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## Death & Death Certificate

When a person dies, a doctor must be called to issue a Medical Certificate as to cause of death.

Once a Medical Certificate of Cause of Death has been issued, either a doctor or more usually the Funeral Director, will send it to the Registrar of Births Deaths & Marriages who will then issue a formal Death Certificate to the next of kin. The Death Certificate is accepted as proof of your death. Next of kin should provide personal details of the deceased to facilitate registration of death.

The Law required all deaths in NSW to be registered. Registration cannot take place without the Medical Practitioners Certificate.

In some situations, a doctor cannot issue the Certificate. A doctor cannot sign a Medical Cause of Death Certificate if the deceased has:

- Died a violent or unnatural death
- Died a sudden death and the cause is unknown
- Died under suspicious or unusual circumstances
- Died not having seen a medical practitioner within 3 months of death or when a medical practitioner attended after death but did not give a medical certificate at the time, as to cause of death
- Died while under or as a result, within 24 hours, of an anaesthetic being administered in the course of surgical, medical or dental treatment or an operation or procedure of a like nature
- Died in an admission centre, mental hospital, prison or detention centre or in any lock up or otherwise whilst in the lawful custody of any member of the Police Force

If any of the above apply, then the doctor or hospital must notify the Police and the matter is referred to the Coroner. If the Coroner considers that a post mortem is necessary, then an Order shall not issue authorising disposal of the body until after the post mortem has been completed. If a cremation is required, then it will be necessary to complete an Application for Permission for Cremation. The Coroner will issue information to the Registrar of Births Deaths & Marriages to enable the issue of the Death Certificate.

If the doctor issues a Medical Certificate, either the family or the doctor should contact a Funeral Director chosen by the family to remove the person to a funeral home, or prepare the body and return it home, if the family wishes, until the funeral.

Some families will want to dress the body themselves and have the deceased at home for viewing until the funeral. This is usually possible as long as a Funeral Director is involved and certain health regulations are met.



## **Organ Donation**

Less than 1% of deaths occur in such a way that organ donation is possible. Currently only an average of 50% of families consent to organ donation of a loved one across Australia. The organ donation rate could be dramatically improved if more people discussed their wishes with their family and registered their decision on the Australian Organ Donor Registry. This is the only National register for organ and/or tissue donation.

Most organs are donated by people who die while on a ventilator in an intensive care unit, generally as a result of a major accident, a brain haemorrhage or stroke. Today, very few people die in these circumstances and the number is falling because of welcomed improvements in road safety and advances in medical treatment. Tissue donation may occur when someone has died without being in hospital as tissues can be donated up to 24 hours after death. Many more people are suitable for tissue donation than organ donation.

The Australian Organ Donor Register will be accessed by a suitably qualified member of the medical staff and information provided to your family. Your consent (or objection) to donating organs and/or tissue for transplantation can be verified 24hrs a day, 7 days a week anywhere in Australia. It is important that you talk with your family before registering your decision.

You may contact the register on telephone 1800 777 203 and via their website [www.australiansdonate.org.au](http://www.australiansdonate.org.au) .



## **Donating the Body for Research**

This option is only available to people living in the Sydney metropolitan area. The person needs to make a formal agreement with a University for the future donation of their body. Universities can provide full details and a copy of the donation form. Bodies are only accepted if they are required at the time of death and if certain conditions are met.

People making these arrangements should inform their family, nursing home or hospital about the agreement.

Relatives usually hold a memorial service shortly after the death, and the University arranges a burial or cremation later (as agreed with the donor). Relatives can be advised of these arrangements if they wish.



## Euthanasia

Euthanasia is dealt with under Section 18(1) of the *Crimes Act*, which states that murder has been committed where:

- A person has acted – or not acted – with reckless indifference to human life or with intent to kill, and
  - Death has resulted

Under this law, active euthanasia is clearly murder. Active euthanasia covers the situation where death is deliberately caused by, for example, deliberately administering an overdose of drugs.

It is debatable whether passive euthanasia, regarded as ‘death from natural causes’, also constitutes murder. Passive euthanasia covers the situation where death occurs because treatment, that merely sustains life, is withheld or withdrawn. Example, removing a life support system from someone in a coma. Death from passive euthanasia is technically from natural causes. Even where death is due to natural causes, a doctor who withholds or withdraws medical support can be considered the legal cause of death. This is because Section 18(1) of the *Crimes Act* states that murder can be due to an omission – a failure to take action. A doctor may be charged with murder if their actions legally constitute an omission.



## Forfeiture Rule

This Rule, based on public policy, prevents a person who is otherwise a beneficiary under a Will or a next of kin on intestacy from inheriting from the deceased if they unlawfully kill the deceased. This Rule also applies in any situation where an unlawful killing brings an enforceable legal right in the perpetrator, for example, to claim under an insurance policy. The Forfeiture Rule applies not only to killings that are murder but also to manslaughter and those cases where the killings amount to a lesser crime, such as, dangerous driving causing death. It does not matter whether the killing was motivated by the desire to inherit or was committed out of a desire to alleviate the suffering of the deceased without any motive to benefit.

The application for the Forfeiture Rule as an inflexible rule to all cases where a right to benefit arises from an unlawful killing, has resulted in the rule producing harsh results in some cases, particularly where it was thought the killing was not morally culpable, example, an accident. As a result the *Forfeiture Act*, 1995 (NSW) gives power to the Supreme Court to exercise a discretion to modify the Forfeiture Rule in any case where it might apply, except in the case of murder.



## **Disposal of your Body**

It is important that you have chosen an Executor who will respect and follow your decision concerning the disposal of your body following your death. Apart from a direction that you not be cremated, any directions in your Will are not binding. Furthermore, Wills are often not located until after the funeral or cremation. Accordingly, should you have any special wishes concerning the disposal of your body following your death, you should discuss this with your Executor and obtain their assurance that they will follow your wishes.

If there is a dispute over custody of the body or its disposal, then legal advice is required urgently.

People who wish to follow particular cultural and religious practices should choose a Funeral Director who can provide a funeral according to their specific needs, including, if necessary, shipment of the body overseas.

Funeral Directors can arrange to ship bodies to other countries. Each country has its own Consular and health regulations for receiving bodies, and these must be followed.

It is very expensive to both prepare the body and to transport it (by air freight) overseas. Cremating the body and sending the ashes is a cheaper option.

Embalming involves the removal of bodily fluids and their replacement with formalin. This preserves the body for a long time and reduces bacterial action. This is very important if the body is to be viewed or transported to another place for burial. Bodies leaving or coming into Australia and bodies being entombed into an above ground vault or mausoleum must be embalmed.

Health regulations apply to people who handle the bodies of those who have died from certain infectious diseases. Workers must wear protective clothing, and the body must be placed in a double body bag, which is heat sealed so that it cannot be opened. Embalming is not permitted in these circumstances. Only in very exceptional cases can the body be sent overseas. Ashes can be taken overseas, so cremation could be an acceptable option for people who wish to send their remains to another country.



## **Arranging and Paying for the Funeral**

About 90% of people in NSW die in a hospital or institution. A Medical Certificate of Cause of Death is issued and the deceased person is kept at the institution's morgue until their next of kin make arrangements for a funeral or contact a funeral director. If you die at a nursing home or an institution that has no morgue, then the next of kin arranges to take the body to either the family home until the time of the funeral or to a funeral home.

When someone dies at home, a doctor should be called to pronounce the person dead and to issue a Medical Certificate as to cause of death. Either the family or the doctor should contact a funeral director and arrange for the body to be taken to a funeral home or, if desired, to prepare the body to be kept at home until the time of the funeral.

As a general rule, whoever organises the funeral must pay the funeral director. However, they do have the right to receive priority of payment from your Estate but only for the *reasonable* costs incurred. If extravagant costs are incurred then the person who arranges the funeral will pay those extra costs themselves and not be entitled to recover them from the Estate unless the beneficiaries consent.

Most banks will release from your bank account sufficient funds to pay the funeral or cremation costs.

People wanting a headstone or monument erected should contact a Monumental Mason to have one made, and arrange the size, shape and details. Before making arrangements, it is important to contact the cemetery to see if there are any restrictions on the dimensions of the headstone.





## **What Does a Funeral Director Do?**

Funeral Directors are usually responsible for:

- Collecting the documents required for burial
- Removing the body
- Supplying the coffin or casket
- Preparing the body
- Purchasing the burial plot and arranging for it to be opened and closed
- Providing a hearse
- Arranging a service at a crematorium, grave site, church or whatever is required

A Funeral Director may also:

- Arrange a pre-burial service
- Provide a funeral parlour or chapel for viewing the deceased person
- Arrange cars for the mourners
- Order flowers and place advertisements

Funeral Directors will accommodate people who wish to do things differently; for example, dress the deceased themselves and have home viewings.



## **Burial on a Private Property**

New South Wales Health Document No. GL2006 008 issued on 7 June 2006 contains guidelines to assist local authorities in approving burial locations on private land. The document lists 13 conditions that must be considered by authorities including:

- The land area must be more than 5 hectares, and fenced, to delineate the boundaries and secure the location.
- The local authority must give its consent
- The burial must not be likely to contaminate drinking water or a domestic water supply, and there must be minimal soil coverage of 900mm
- The owner must provide access to the site

Records of the burial are kept by the local authority.



## **Payment of My Debts**

Your debts will now be payable by your Estate. The solicitor for the Estate should be notified of any debts to enable arrangements to be made to hold all debts until funds become available in the Estate, usually following a Grant of Probate. Should your next of kin pay your debts they will be entitled to be reimbursed from the Estate.

The *Probate & Administration Act, 1898* prescribes an order of priority for payment of your debts depending on whether your Estate is solvent or insolvent. Your funeral and testamentary expenses shall have priority. Testamentary expenses will include the costs and expenses of obtaining Probate, administering your Estate, funeral expenses, the costs of getting in assets of the Estate, commission payable to your Executor for administering the Estate and the costs of obtaining legal advice in relation to the administration of the Estate.

If there are insufficient assets to pay your debts, your Estate will be known as an insolvent estate. Legal advice will be required to ensure that debts are paid from any assets in the Estate according to their legal priority.



## **Power of Attorney & Authority to Operate Bank Accounts**

Upon your death, any Power of Attorney or authority to operate your bank account ceases to have effect. Your Attorney or bank signatory must not continue to operate your accounts or carry out business on your behalf following your death. It is now the Executors role to attend to your affairs following your death.

### **Executor's role**

In general terms, an Executor's duty is to take care of the deceased's assets and property, see that debts and taxes are paid and finally, to distribute the assets to the beneficiaries of the Will.

The Executor will have to begin by finding out and making a list of everything the deceased owned or was entitled to. The list could include a home, car, money in bank or building society accounts, furniture, household appliances, jewellery, shares and other investments, insurance policies, superannuation and holiday pay from work. In addition, if the Estate is to be divided between a number of beneficiaries, the assets may have to be valued.

Next, the Executor will have to apply to the Probate Registry of the Supreme Court for a Grant of Probate. Probate is a certificate issued by the Court saying that the Will is valid and that the Executor has the right to administer the Estate. When applying for Probate, you will need to complete a number of legal documents. The Executor will also have to produce documentary evidence and death, property, attestation of the Will and details of assets and liabilities of the deceased, among other things. It is usual to engage a solicitor to assist in this process.

### **Joint Assets**

Joint assets pass by operation of Law to the surviving joint tenant and do not form part of the Estate.

### **Superannuation**

The Trustee of the superannuation fund determines who will receive any superannuation unless you have executed a valid binding Death Benefit Nomination. Superannuation usually does not form part of the Estate unless the Trustee of the Superannuation Fund to which you are a member decides to pay it to the Estate or a valid Binding Death Benefit Nomination directs these assets to the Estate.



## **What Does the Executor Do *After* Probate has been Granted?**

Once Probate has been granted, the Executor must collect the deceased's assets and take steps to pay any debts or taxes – including income tax – the deceased owed.

Funeral expenses are to be paid first and there is a particular order in which any other debts must be paid. Legal advice is required to ensure that the proper assets/beneficiaries bear the burden of these liabilities. After funeral expenses are paid, the Executor is entitled to claim any expenses relating to the administration of the estate before other debts are paid.

Once debts have been paid, assets are either distributed accordingly to the terms in the will or they are sold so that money can be divided among the beneficiaries. The Executor might have to contact financial organisations and companies in which the deceased had money invested in order to realise those assets, and become involved in selling various pieces of the deceased's belongings such as jewellery, a boat or car.

A bank account will have to be opened, in the name of the estate, into which all funds owed to the estate must be deposited and from which debts must be paid.

### **Distributing the Assets**

When all assets have been identified and, if necessary, sold to raise cash, and all debts have been paid, the remainder of the estate can be distributed to the beneficiaries.

The Executor must prepare a report and statement for the beneficiaries – given to them when they receive their share of the estate – showing what the assets were, how much money they raised and what expenses and debts were paid from the proceeds.

Finally, the estate is wound up. This involves drawing up accounts – showing money paid into the estate and money paid out – which are sometimes required to be lodged with the Probate Registry.



## Who Can Read my Will?

First of all, it is vital that your last Will is located. You must ensure that your Executor knows where it is as he/she is entitled to possession of it after you die (so that he/she can administer your Estate).

On 1 March 2008, Section 54 was introduced in the *Succession Act, 2006*. This section regulates who is entitled to inspect the Will of a person who dies after 1 March 2008. Section 54 States:

*“(1) In this Section:*

*Will includes a revoked will, a document purporting to be a will, a part of a will and a copy of a will.*

*(2) A person who has possession or control of a will of a deceased person must allow any one or more of the following persons to inspect or be given copies of the will (at their own expense):*

- (a) any person named or referred to in the will, whether as a beneficiary or not,*
- (b) any person named or referred to in an earlier will as a beneficiary of the deceased person,*
- (c) the surviving spouse, de facto partner (whether of the same or the opposite sex) or issue of the deceased person,*
- (d) a parent or guardian of the deceased person,*
- (e) any person who would be entitled to a share of the estate of the deceased person if the deceased person had died intestate,*
- (f) any parent or guardian of a minor referred to in the will or who would be entitled to a share of the estate of the testator if the testator had died intestate,*
- (g) any person (including a creditor) who has or may have a claim at law or in equity against the estate of the deceased person,*
- (h) any person committed with the management of the deceased person’s estate under the Protected Estates Act 1983 immediately before the death of the deceased person,*
- (i) any attorney under an enduring power of attorney made by the deceased person,*
- (j) any person belonging to a class of persons prescribed by the regulations.*

*(3) A person who has possession or control of a will of a deceased person must produce it in a court if the court requires the person to do so.”*

Once Probate or Letters of Administration has been granted a copy can be obtained by anyone from the Supreme Court of NSW upon payment of the prescribed fee.



## ***Stealing, Destroying or Concealing a Will***

Pursuant to the *Crimes Act 1900* (NSW) it is a criminal offence to steal, destroy or conceal a Will.

Section 135 *Crimes Act, 1900* (NSW) states:

“Whosoever steals, or, for any fraudulent purpose destroys, cancels, obliterates, or conceals, the whole or any part of any Will, Codicil, or other testamentary instrument, either during the life of the testator, or after the testator’s death, or whether the same relates to real, or personal estate, or to both, shall be liable to imprisonment for 7 years.”

Legal advice should be immediately sought by your Executors if they are of the belief that your last Will has been stolen, destroyed or concealed by anyone. This also highlights the importance of choosing a trustworthy Executor and making people aware that, you have made a new Will and, of its whereabouts.





## **People and Organisations the Executor may need to contact following the deceased's death**

There are many people and/or organisations that the Executor may need to contact to advise of the deceased's death. The following table has been provided to assist your Executor.

<b>Person or organisation to be contacted</b>	<b>Contact person, phone number and address (if needed)</b>	<b>Details of person who died (for example, account number, Medicare number)</b>	<b>Notified of death (Yes/No)</b>
Doctor			
Preferred funeral director			
Family and friends			
Executor of Will			
Minister of religion			
Funeral bond            Yes/No			
Prepaid funeral        Yes/No			
Funeral insurance    Yes/No			
Centrelink			
Department of Veterans' Affairs			
Foreign pension authority			
Employers			
Superannuation fund			
Clubs (for example, the RSL)			
Banks, credit unions, and so on			
Public Trustee			
Credit card/hire purchase			
Insurance companies			
Hospital Social worker Hearing centre Health professionals (physiotherapist, dentist, podiatrist, optometrist and so on)			
Health benefits fund			
Medicare			
Landlord			

Local electricity authority			
Gas supply company			
Local council (rates/Meals on Wheels)			
Telephone company			
Vehicle registration and licencing authorities			
Electoral Office			
Accountant			
Australian Taxation Office			
Professional bodies (for example, solicitor, accountant)			
Public services (library)			
Post Office			



## **How Can a Solicitor Help Me?**

A solicitor can:-

1. Inform you in detail about the rights and responsibilities of an Executor.
2. Help you obtain and complete the legal documents needed to apply for probate.
3. Assist you to identify and collect the deceased's assets.
4. Advise you about the legal order in which debts must be paid and the remaining assets distributed.
5. Explain the legal order of distribution of the estate in a case where there is no will.
6. Help you draw up the report of statement on the assets for the beneficiaries.
7. Deal with any claims on the estate.



## **The Willis & Bowring Difference**



At Willis & Bowring, **Peter Baltins** is accredited by the Law Society of NSW as a specialist in Wills and Estates Law. He can assist your Executor with administering your Estate and dealing with any disputes or claims on the Estate that may arise. Your Executor should contact Mr Baltins as soon as possible to be informed of his or her rights and responsibilities.

Like most lawyers, Peter charges the schedule fee for obtaining a Grant of Probate. Accordingly, it will cost your Estate no more to have the benefit of an Accredited Specialist to obtain a Grant from the Supreme Court to administer the Estate.

Peter can be contacted as follows:

Telephone: 02-0525 8100  
Facsimile: 02-9526 1182  
Email: [pbaltins@willisbowring.com.au](mailto:pbaltins@willisbowring.com.au)