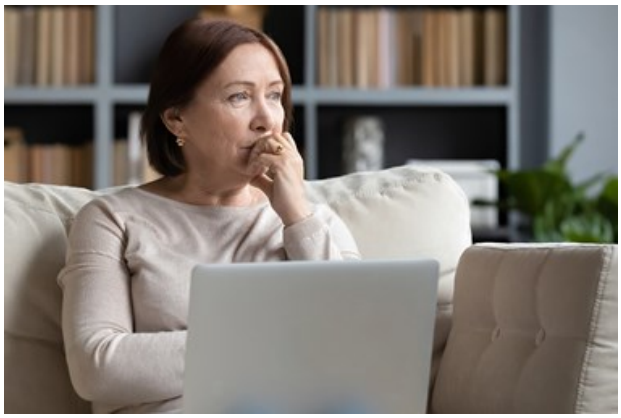


What happens if an executor or beneficiary of a Will can’t be found?

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When a person passes away and leaves a Will, the executor is responsible for applying for a Grant of Probate and distributing the estate. This process can be relatively straightforward if the executor and all the beneficiaries of the estate are readily available and cooperative. However, complications can arise if the executor or a beneficiary cannot be located. In such cases, legal advice is recommended to navigate the issues involved.

This blog looks at the complexities that can arise if an executor or beneficiary of an estate is missing and cannot be located.

What happens when one of the executors of a Will is missing?

A person making a Will may appoint two or more executors with the intention that the executors work jointly to manage and administer the estate after the Will-maker’s death.

When two or more executors are appointed jointly, and one of them cannot be located, the process can be relatively straightforward. The remaining executor or executors can apply to the Supreme Court of Victoria (‘the Court’) for a Grant of Probate , with leave reserved for the missing executor to apply for their own grant at any time. This allows the executor who is willing and able to take on the executorship to manage and administer the estate on their own. There is no requirement for the absent executor to formally renounce their executorship.

What happens when all named executors of a Will are missing?

If a Will-maker has appointed one or more executors and all of them are missing and cannot be located, another person will need to apply to the Court for a grant of Letters of Administration of the estate.

Once the grant of Letters of Administration is made, this person will be appointed as Administrator of the estate and will assume the same responsibilities as the executor(s) named in the Will.

Generally, the beneficiary who receives the majority of the estate is the appropriate person and has the greatest entitlement to apply for a grant of Letters of Administration.

A beneficiary seeking to become the estate Administrator in the absence of all appointed executors must file an application for "Letters of Administration with the Will Annexed." They must demonstrate to the Court that they have made reasonable efforts to locate the missing executors. Such efforts may include:

- advertising in local publications;
- contacting family members or friends of the missing executors;
- requesting information from the Registry of Births, Deaths, and Marriages; and
- contacting the missing persons' employers or affiliated organisations.

Once the beneficiary has shown that they have made reasonable attempts to locate the missing executor or executors, they can request the Court to "pass over" the absent executor or executors and appoint the beneficiary in their place. Although proving the absence of an executor can be a detailed process, it is essential to ensure that the Will-maker's wishes are honoured to the fullest extent possible.

What happens when a beneficiary of a Will is missing?

There are fairly clear processes when an executor cannot be located. However, if a beneficiary cannot be located, the process can become overwhelming for an executor navigating the estate administration.

The law does not permit administration of an estate to be delayed for years where there is uncertainty as to whether a beneficiary is alive where they have not been heard from for some time. For this reason, there is a presumption at law that a person who has not been heard from for a period of at least seven years is presumed to be dead. This is referred to as the 'presumption of death'.

When the beneficiary has not been heard from for some time, the executor can apply to the Court for a 'Benjamin Order'. A Benjamin Order authorises the executor to distribute the estate as though that beneficiary was deceased. The Order protects the executor from being sued if the beneficiary later turns out to be alive.

In order to apply for a Benjamin Order, the executor must go to significant lengths to prove the beneficiary is missing and is likely deceased.

Case example: application for a Benjamin Order successful after missing beneficiary

In the 2023 case of *Application of Jordan; Estate of Michael Galanis (aka Michael Galanakis) [2023] NSWSC 221*, the deceased died without a Will, and the Rules of Intestacy directed the

estate was to be distributed as follows:

- One half to the deceased's brother;
- One quarter to one of the deceased's nephews; and
- One quarter to another nephew of the deceased.

However, one of the two nephews of the deceased had been missing since 1985 and had not been seen or heard from since.

In deciding whether to exclude the missing nephew from his entitlement under the Will, the Supreme Court of New South Wales considered the following:

- How much time had passed since the death of the deceased;
- How much time had passed since the missing nephew was last heard from;
- Whether continuing attempts to locate the missing nephew would produce further information as to his whereabouts;
- Whether searches for the missing nephew had taken place following the death of the deceased, and how thorough these inquiries were; and
- How delayed the estate distribution would be if searches continued for the missing nephew.

The Supreme Court of New South Wales ordered that the missing nephew should be presumed to have died *before* the deceased, and thus his share of the estate was to be distributed to his brother (the remaining surviving nephew), as would be the case pursuant to the Rules of Intestacy. The executor was then able to distribute the estate in accordance with the Benjamin Order.

Get help from a probate lawyer

If one or more executors or beneficiaries of a Will cannot be located, there are significant steps that need to be taken before administering the deceased estate. In order to undertake the various tasks required effectively and within a reasonable time frame, it may be prudent to seek legal advice and assistance.

Contact a team member today for advice and assistance about the next steps in seeking probate.

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