



What are your responsibilities as an executor?

You have agreed to be the executor for a friend or family member. Now the time has come to discharge your duties – but where do you start and what are you required to do?

What is an executor?

An executor is the person who has been named in a Will to administer the estate of a deceased person. In broad terms, the executor takes charge of the estate of the deceased. The role includes collecting all assets, paying all outstanding debts, charges and taxes and distributing the net assets to the beneficiaries, in accordance with the will.

Who can be an executor?

There can be one or more executors, but there should not be more than four. Executors must be over 18 years of age and can be family members or friends. Beneficiaries of the will can act as executors. It is common for a lawyer, or partners of the legal firm who

prepared the will to be named executor; often with a family member or friend.

What are the first jobs of an executor?

The first job of an executor is to locate the will. The will may have information on the funeral wishes of the deceased. Funeral arrangements are usually handled by the family, in consultation with the executor.

What happens after the funeral?

After the funeral the executor compiles a general list of all the assets that the deceased owned or was entitled to.

Our firm assists executors in tracking down details of the assets and establishing their values as at the date of the deceased's death. This is done by contacting financial institutions, companies and searching records, such as the Lands Titles Office and Unclaimed Money Registers. Assets such as property, cars, cash reserves, bank accounts, shares and investments, insurance policies, superannuation, jewellery and household items are often involved. If there is more than

one beneficiary, valuations of the assets may also need to be arranged. We assist executors to ascertain if there are any debts, taxes or other charges that are payable by the estate.

Grant of Probate

Executors are responsible for applying to the Supreme Court for a Grant of Probate. With our assistance, certain documents are prepared and submitted to the Court. Once obtained, the Grant of Probate allows the executor to administer the estate in accordance with the terms of the will.

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Adverse Possession – How to safeguard your property investment.

What is Adverse Possession?

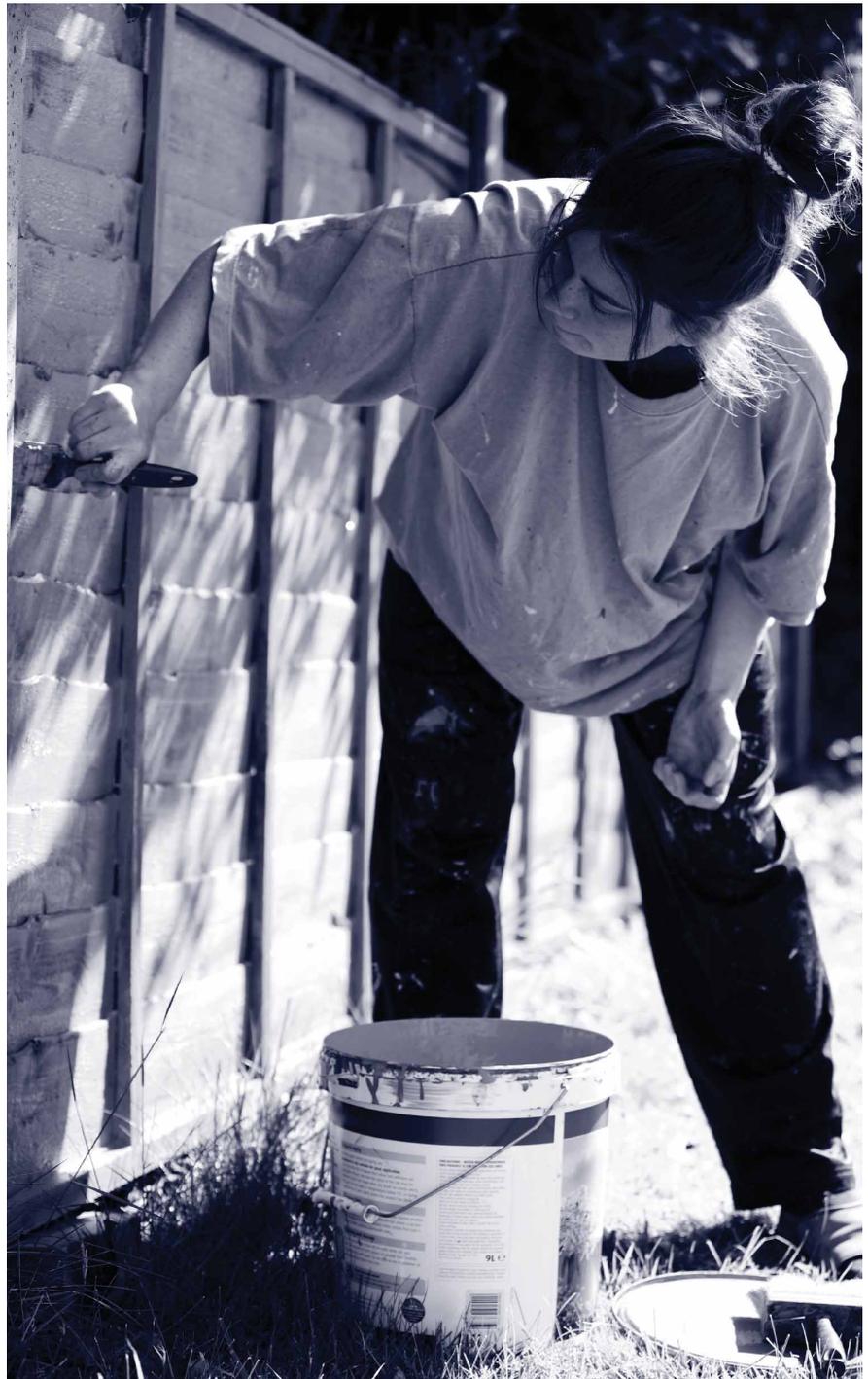
Adverse possession allows an occupier of a piece of land to obtain ownership as against the legal owner. In order to do so, the occupier must be able to prove continuous and exclusive possession of the land for at least 15 years, supported by an intention to permanently deprive the legal owner.

In Victoria, you can apply to the Land Titles office for a vesting order to obtain legal ownership of the occupied land. The application requires you to produce supporting evidence. This includes a full survey by a licensed surveyor and evidence of exclusive possession verified by statutory declarations from disinterested witnesses (such as neighbours). Adverse possession claims cannot be made against Crown land or council-owned land.

A case study

Wendy purchased her inner-city property in 2000 and then completed a renovation in 2002. Unfortunately, Wendy neglected to have a licensed surveyor conduct a survey of her property boundaries either at the time of purchase or renovation. Wendy lived happily in her home for the next 10 years. Trouble arose in 2012, when a neighbour conducted a property survey, prior to building two townhouses on his land. The survey showed that Wendy's house encroached on his title. The neighbour is now demanding that Wendy move her house or pay him compensation.

Due to her oversight, Wendy now has a significant legal problem. Unfortunately she cannot succeed with an adverse



possession claim as she has not occupied the land encroached upon for the required 15 year period. It is likely that resolution of this issue will be both complex and costly – as well as creating tension between her and her neighbour.

What can be learnt from Wendy?

- Check title boundaries when purchasing or renovating.

- Check title boundaries when replacing fences.
- Get a survey done to confirm title boundaries.
- If any discrepancies arise - contact TDE immediately.

For further information on this topic, please contact Louise Tolson at ltolson@tde.com.au

Divorce FAQ (Frequently asked questions)

Navigating a divorce can be an emotional and confusing time. For many people, a divorce is the first time they have any experience of the legal system. At TDE we encourage our clients to ask questions. It is not uncommon for the following questions to be asked by our family law clients. At all times, we endeavour to answer questions in a practical and "plain-speak" style.

Q *Can I get a divorce in Australia if I got married overseas?*

Answer If you are an Australian citizen or you usually live in Australia but were married overseas, you can apply for a divorce in Australia. If the Marriage Certificate is not written in English, you have to provide a certified translation of it. You may also need to file an affidavit from a lawyer or Notary practising in the country where you were married, stating that the marriage was carried out in accordance with the law of that country.

Q *What do I have to prove to get a divorce?*

Answer In Australia, we have a system of "no fault" divorce. Adultery, desertion and cruelty are no longer grounds for divorce. If you have been married for more than two years, you must be separated for 12 months in order to obtain a divorce in Australia.

Separations are often messy. If you separate and then reconcile, but again separate within three months, you can count the first period of separation, in addition to the later period of separation. You must show a total period of 12 months separation to the Courts. For example, if you separate in January, 2013 but reconcile in April, only to separate again in May, you could obtain a divorce 10 months after the second separation, namely March 2014. This is because the

two periods of separation added together make a total of 12 months separation.

If you have been married for less than two years, you need to attend a family counsellor and file a certificate from the counsellor saying that you have considered reconciliation before the court will grant you a divorce.

Q *How can I get a divorce if my husband won't leave the house?*

Answer You can obtain a divorce if you are "separated under the one roof". Having separate bedrooms is not enough to show that you are "separated under one roof". You must prove to the court that you have been separated for 12 months, even though you are both still living in the same house. This includes showing that you have not been sleeping with your husband, you have not performed domestic services for him such as shopping, cooking, cleaning, washing and entertaining his friends.

To satisfy the court that you have been separated, you should file an affidavit saying that you have not performed any domestic services for him for 12 months. In addition, you should file an affidavit from family or friends confirming that you and your husband have not presented yourselves as a "couple" and that you have led separate lives for 12 months.

Q *Do I have to get a divorce before I can have a property settlement?*

Answer You do not need to be divorced to have a property settlement. Some people, who are permanently separated, never apply for a divorce on religious grounds. This does not prevent them from dividing up matrimonial property, either by agreement or by making an application for property division to the Family Court or Federal Magistrates Court.

If you have not already divided your matrimonial property, it is important to file an application for property settlement within 12 months of the divorce taking effect. If you do not make an application within 12 months of being divorced the

situation becomes more complex. You cannot make an application without first obtaining leave from the court for an extension of time to file your application for property settlement. To obtain an extension of time, you have to file an affidavit explaining why you had not applied for property settlement within 12 months of your divorce becoming effective.

Q *How much would it cost me to get a divorce?*

Answer The Federal Government has imposed a fee of \$800.00 which you have to pay to file an application for a divorce in the Federal Magistrates Court. However, if you are on a pension or you are suffering financial hardship, you can make an application for the fee to be reduced to \$265.00.

How can TDE help you?

Our Family Law practitioners, Randall Bradshaw and Eilish Cooke understand that relationship breakdown is a stressful life event, especially if children are involved. Their aim is to ensure that our clients understand what is occurring and are supported each step of the way through the process.

Both Randall and Eilish can assist you in relation to all the questions answered above. They work with clients to resolve matters as promptly and cost effectively as possible, often through mediation negotiation. Mediation minimises the emotional and financial stress – allowing you to re-establish your life as quickly as possible. If mediation proves to be unworkable, they are skilled at representing clients through the Courts. At all times, they guide you through the process with compassion, understanding, expertise and support.

For further information on this topic, please contact Randall Bradshaw at rbradshaw@tde.com.au or Eilish Cooke on ecooke@tde.com.au



Lost or destroyed certificates of title – what should you do?

The certificate of title to your property is a very important document. Certificates of title prove ownership of property. In most cases they are issued to one of the registered proprietors (i.e. owners), mortgagee (i.e. bank or other lender) or a lawyer or conveyancer on behalf of these groups.

Where should you begin your search?

Conducting a thorough search is the first and most important action when you think you have lost your title. It may sound obvious, but it is important that you check through your own personal papers, files and safe; contact your lawyer to see whether it has been placed for safekeeping in their strongroom and ask at your bank to ensure that they have not forgotten to forward it to you when you paid off your mortgage. In the event that the property is owned by more than one proprietor, a check through each proprietor's documentation is necessary.

Conducting an issue search

Assuming that the title still cannot be found, the next step is to conduct an issue search through Land Victoria. This action will identify the party to whom the title was last issued by Land Registry. In many cases this provides the vital information required to locate the document.

Applying for a replacement certificate

Assuming that the title is still lost, you will need to apply for a replacement certificate. This requires the completion of an Application for a New Certificate of Title in Place of One Lost or Destroyed - Form 10, from Land Victoria. To complete the form successfully, you must show evidence that all reasonable searches have been made. Statutory declarations from all registered proprietors of the land and several witnesses to explain what has happened to the misplaced certificate are often part of the process. In some cases, it may be necessary to place advertisements in a newspaper, as advised by Land Victoria.

Each application involves the payment of a registration fee, in addition to an

indemnity contribution to Land Victoria. The level of the indemnity contribution varies and is determined on the value of the land and the circumstances surrounding the loss of the certificate of title. The maximum contribution is \$600 for land that has a value of over \$500,000.

How can TDE help you?

The replacement of lost titles can be complex and require the assistance of a solicitor. We can help you with working out your search strategy, conducting an issue search, lodging an application for a replacement certificate, contacting banks and witnesses and the preparation of statutory declarations. When the title is replaced, we can then hold it in our strongroom for safekeeping. Holding legal documents in safe custody is a valuable service that we provide to our clients free of charge.

For further information on this topic, please contact Paul Webster at pwebster@tde.com.au

Maximising the security of your commercial tenancy agreement.

Business cycles bring a range of legal issues. During times of economic challenge, the security of commercial tenancy agreements more commonly requires legal intervention.

In times of economic uncertainty how can landlords maximise the security of their commercial tenancy agreements? The answer to this question lies somewhere in the maxim: "prevention is better than cure."

It is impossible to safeguard completely against tenancy default. However, there are several things that can be done at the outset of the transaction to protect

the position of the landlord against the unfortunate event of default.

These are summarised below:

- If the lease is taken out in a company name, obtain personal guarantees from the directors of the company.
- Before entering into the lease, the landlord should instruct an agent to obtain a comprehensive list of assets and liabilities of the tenant and any guarantors.
- The agent should obtain documentary evidence of the ownership of assets or proof of the level of any debts. This can be substantiated via current title certificates of any properties owned, share certificates and bank statements etc.
- Do not place too much reliance on assets such as superannuation, motor vehicles or household contents. In the unfortunate incidence of default, they are often difficult, if not impossible, to execute against.

- Have prepared and signed professionally drawn lease agreements. These can then be enforced, if required, in the event of tenancy default.

The quality of your tenant is an important component in maximising the security of your commercial tenancy agreement. Spend the time at the outset to ensure that you have properly vetted your lessee. This will pay dividends in reducing the likelihood of default, or in assisting with the recovery of your losses should the worst case scenario occur. In all cases we advise you to contact us before installing a new tenant into your commercial property. Our early advice can assist in maximising your investment and minimising the risk of this transaction.

For further information on this topic, please contact Paul Webster at pwebster@tde.com.au

Practitioner Profile



Eilish Cooke
Solicitor, Family law

Eilish Cooke is well known to many of our clients who utilise our family law services. Working alongside Randall Bradshaw, Eilish conducts a broad range of work including issues relating to marriage, de facto and same sex relationships, parenting and children's issues, property

settlements, binding financial agreements, divorce, intervention orders, spousal maintenance and child support.

Why have you chosen to practise in the area of family law?

One of the main reasons that I have chosen to practise in family law is due to the variety of work this field entails. In particular, I enjoy drafting documentation and appearing in Court on a regular basis. Having spent 7 years at the Bar, I enjoy and have a deep appreciation for the role of advocacy. I also enjoy the client interaction and forming close professional relationships with clients at a time of great need in their lives.

What have been the highlights of your career?

I have enjoyed a varied career, but with a particular interest in the area of law as it affects families. Over the years I have sat on government boards making decisions on refugees, workers compensation and

guardianship and administration matters. I have also spent 7 years at the Bar, working primarily in Family law. My professional life has now come full circle with my role as a Solicitor in the Family Law department of TDE.

What makes a good family lawyer?

Without a doubt a good family lawyer must be able to quickly gain the confidence and trust of their clients. We are dealing with people at a time of great stress in their lives. We must be empathetic, practical and be able to guide our clients through one of the most difficult challenges they will face.

What are your interests outside of work?

Outside of work you can generally find me with a book in hand! I have a passion for classical history. I really enjoy overseas travel with an emphasis on visiting classical sites from the ancient world.

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Payment of any expenses

Once probate is granted, TDE assists with the sale or transfer of investments and property, as well as accessing any proceeds from bank accounts. We assist executors to pay all outstanding expenses including funeral costs, taxes and other debts.

Taxation issues and distribution of the assets

In many cases, it is important that a final taxation return is completed and lodged. Awareness of the implications of Capital Gains Tax is imperative. Our practitioner, John Toohey, is a registered Taxation Agent and conducts work of this nature on behalf of our clients. Once the final tax liability has been established, we prepare detailed financial statements setting out all the assets collected by the estate and expenses paid. Before any distributions to beneficiaries occur, TDE prepares a distribution statement for the approval of the executor.

What if I don't want to be the executor?

As you can see, the role of the executor is demanding and time consuming. At TDE we take great care in assisting you through this process in the most timely and professional manner, to make it as smooth and easy for you as possible. However, if you decide that you cannot undertake the role of an executor you can renounce your executorship. We can assist you with the preparation of the necessary documents should you wish to go down this path.

For further information on this topic, please contact Ines Kallweit at ikallweit@tde.com.au

How can TDE help?

Our firm assists executors undertake their responsibilities, guiding you through this process. We can help you with:

- attending to funeral arrangements;
- notifying any banks, insurance and other companies and other relevant organisations of the death;
- ascertaining and taking control of all assets;
- identifying the beneficiaries and their entitlements;
- obtaining the grant of probate or letters of administration;
- resolving all estate liabilities and disputes which will include settling final income tax liability and may also include waiting for the six-month period after the grant during which time family claims against the estate can be started;
- distributing assets to beneficiaries: either by transfer or by sale of assets and distributing moneys realised;
- prudently investing funds or managing the assets of the estate on behalf of beneficiaries;
- keeping property held in trust (e.g. for the life of beneficiaries) in good repair, insured and covered for rates and taxes;
- acting impartially and in the best interests of all beneficiaries.
- compiling and maintaining estate accounts and, where required, records for capital gains tax purposes.



Notary Services provided by TDE

Did you know that TDE offers notarial services?

In certain circumstances, you may need to sign a legal document from a country other than Australia or send a legal document overseas. Some of those documents must be witnessed by a notary. Notaries are recognised worldwide as qualified witnesses of documents of all kinds. Documents dealing with land overseas, overseas estates, or to do with migration or the certification of copies of documents for overseas, often require the services of a notary. Whoever sends you or asks for the document for overseas will usually tell you if it needs a notary.

Our practitioner, John Henry, is one of a small number of practising notaries and assists clients requiring these services. Please contact our office to make an appointment with John, should you require this type of assistance.

Tolhurst Druce & Emmerson incorporates the firms of Gavan Duffy & King, Doyle & Kerr, Puglisi, Heffey & Pavlidi, Louis S Lazarus, Gilbert Bell and D Condon & Co. If you wish to change your contact details or no longer wish to receive this publication, please contact our office on (03) 9670 0700.

The information in this newsletter is not intended to be a complete statement of the law relating to the issues raised. Accordingly, no person should rely on this information without obtaining specific advice from lawyers. Liability limited by a scheme approved under Professional Standards Legislation.

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