

DEATH AND DEBTS

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Ian Macdonald

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When a person dies, their assets, other than things they owned jointly with someone else, and all of their debts comprise their estate. This is called a deceased estate. Property – goods, money or real estate – which they owned jointly with another person do not form part of their estate, but pass to the other joint owner by survivorship. If a person owned property as tenants in common with somebody else, the share of the person who died does become part of their estate.

The debts which a person has at the time of their death also form part of their estate. If a court action is under way against a person at the time of their death, the action can continue against their estate. This means their executors or administrators become the defendants in place of the person who died (1). The executors or administrators of the estate are not personally liable for debts of the deceased. Debts are paid from the assets of the estate.

If the value of the debts of the deceased are less than the value of the assets, the debts are paid. If the value of the debts is greater than the value of the assets, the estate is insolvent.

Insolvent Deceased Estates

If an estate is insolvent, that is the liabilities are greater than the assets, then it can be dealt with in one of three ways. It is useful to note that an estate of a person who appeared immediately before their death to be reasonably well off can be insolvent, if all of the valuable property they owned was owned jointly with another person and passes to that other person by survivorship and the only things left in the estate are the individual debts of the deceased.

The first way in which an insolvent estate can be dealt with is in accordance with section 10 A of the Administration Act. An estate is insolvent if there are insufficient assets for the payment in full of the debts and liabilities of the estate. The Act provides that an insolvent estate shall be dealt with in the way set out in the fifth schedule to the Act. The fifth schedule provides that funeral, testamentary, and administration expenses have priority. A demand in the nature of unliquidated damages arising otherwise than by contract, promise or by breach of trust is provable in the administration of the estate, and subject to those principles the same rules shall prevail as would apply in regard to a bankrupt deceased estate.

If an estate is insolvent, the executor of the deceased's will, or a friend or family member of a person who has died without leaving a will, may decide they wish to use section 10 A of the Administration Act to wind up the estate. They may wish to do this to achieve a tidy outcome, and ensure that funeral, testamentary and administration expenses are paid as a priority. It may also be that there is a valuable item of property which they wish to get in, such as a West Scheme or GESB Superannuation, and they wish to have the authority of a grant of Probate of Letters of Administration to get the item of property, and deal with it by passing it to beneficiaries.

The second way in which an insolvent deceased estate can be dealt with is under Part X1 of the Bankruptcy Act. This provides the assets and liabilities of a deceased person are dealt with in much the same way as the assets and liabilities of a living person who becomes bankrupt. It allows creditors with a debt more than the "statutory minimum" to petition for the administration of the estate in accordance with Part X1. It is also possible for an executor or administrator to use these provisions. The statutory minimum is currently \$10,000 (Bankruptcy Regulations 2021 regulation 10A)

The third way in which an insolvent deceased estate can be dealt with is by friends and family doing nothing. No one is obliged to obtain Probate of a will or Letters of Administration unless they wish to. If the deceased has no assets of any particular value, and family members or friends of the deceased leave the property of the deceased where

it is and advise the creditors of the situation, then creditors would normally ask for documentation of this, such as a Statutory Declaration. When creditors receive a Statutory Declaration and see that there are very few assets of any commercial value and a number of liabilities it is common that they write off the debt. Family members or friends of a deceased person who wish to follow this course need to ensure that they do not intermeddle with the estate.

Intermeddling

When a person dies and it is evident that the estate is insolvent, it is important that friends and family members do not dispose of any of the property of the deceased, even if it is of limited value. It is wise for them to leave all of the assets of the deceased where they are, or in safe storage until the matter is resolved. If they deal with the assets of the deceased by for example selling some items, then this is described as 'intermeddling' and they can be compelled to go on and administer the estate of the deceased in accordance with the provisions set out above at their own cost.

Superannuation

The general rule is that superannuation is not part of the estate of a deceased person. The reason for this is that the estate of a deceased person consists of the property they owned immediately before their death. Depending on the precise nature of the superannuation fund, a member has some rights pursuant to the scheme but does not own any property in the scheme before their death. After their death a right may arise in relatives of the deceased to receive a payment which will often be expressed to be in the discretion of the trustees of the fund. That is, the trustees of the fund will often have a discretion as to whom they pay the proceeds.

Superannuation entitlements of employees of the Western Australian government are set out in the State Superannuation Regulations 2001. Regulations concerning Gold State members (regulation 48), Weststate Super Scheme members (regulation 80) and GESB

Super Scheme members (regulation 121) provide that on the death of a member the funds are to be paid to the executor or administrator of the estate unless there is a binding death benefit nomination in place. The regulations provide that the benefits paid form part of the members estate but are not an asset in the members estate that is liable for payment of the members debts and liabilities.

A similar situation occurs in regard to life assurance. The ownership of the proceeds of the policy depends on the wording of the policy.

NOTES:

1. Rules of the Supreme Court 1971 Order 18 Rule 7

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