



## Dealing with a Missing Beneficiary: Executor Responsibilities and the Use of a Benjamin Order in Victoria

Administering a deceased estate carries significant legal responsibilities, particularly for executors. Among these is the duty to locate and distribute the estate to all named beneficiaries under the Will. However, complications may arise where a beneficiary cannot be located. In such cases, an executor may need to consider applying to the Supreme Court of Victoria for a Benjamin Order.

### Executor's Legal Obligations

The fundamental obligations of an executor of a Will are as follows:

1. Obtain legal authority to manage the deceased's estate (probate) which you have now obtained;
2. Manage the assets of the estate (collect and value assets); and
3. Distribute those assets in accordance with the Will.

Therefore, executors are required to locate the beneficiaries of the Will and distribute their share of the estate. When a beneficiary's contact or address details are no longer accurate it is expected that further searches are conducted in order to locate them.

### Reasonable Searches for a Missing Beneficiary

Executors are expected to take all reasonable steps to find a missing beneficiary. These may include:

1. Contacting family members or friends of the missing person (including genealogy searches);
2. Advertising in publications such as a local newspaper;
3. Applying to government agencies for information and tracing, such as Births, Deaths and Marriages; and
4. Contacting organisations, the missing person may be a member of, such as sporting clubs, charities or the like.

Such searches must be clearly documented to demonstrate that all reasonable avenues have been exhausted. This documentation will be essential should a court application become necessary.

### What is a Benjamin Order?

If the beneficiary remains unlocated after reasonable enquiries, the executor may apply to the Supreme Court for a Benjamin Order. This is a type of court order which assists the executor to finalise the distribution of the deceased's estate when it is uncertain whether a beneficiary is alive. An application for a Benjamin Order can be made through the Supreme Court of Victoria and once granted, it removes the executor's personal liability for distribution should the missing beneficiary ever come forward.

To obtain a Benjamin Order, the Court must first be convinced beyond a reasonable doubt that the missing beneficiary has died before the testator. This can usually be proven with a death certificate. If a death certificate isn't available, the executor must demonstrate to the Court that they have made extensive efforts to locate the missing beneficiary (i.e. the examples of searches listed above). These efforts must be thorough and well-documented to show that you have taken all reasonable steps to find them.

Once the Court determines that a Benjamin Order is appropriate under the circumstances, it will grant the executor the authority to proceed with distributing the estate's assets to the known beneficiaries.



### **Key Considerations and Risks**

When seeking a Benjamin Order, it's important to consider the potential costs involved in conducting additional searches for the missing beneficiary. The court is mindful of these costs, as they can reduce the amount of the estate available for distribution to beneficiaries.

Additionally, a Benjamin Order does not always prevent a missing beneficiary from claiming their share later on. If they come forward after the estate has been distributed, they may be able to reclaim their interest. However, the court will consider practical factors like how much time has passed before deciding on such claims.

### **Conclusion**

Where a beneficiary cannot be located, an executor must proceed cautiously and with due diligence. Obtaining a Benjamin Order may provide the necessary legal authority to distribute the estate without the risk of personal liability, but the process requires careful consideration and detailed evidence of the efforts made to locate the missing party.

For further advice, please contact our office to arrange a consultation.