TFR-03 Transfers by or to an Executor/Administrator

Version 2 - 12/02/2018

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1 Overview

Where a registered proprietor dies intestate and Letters of Administration are granted to an administrator, the administrator, after entering transmission (see Policy and Procedure Guide DEC-03 Transmission Applications), is the registered proprietor of the land of the intestate deceased.

2 Transfers by Executors and Administrators with the Will Annexed

The personal representative, having entered transmission, is the registered proprietor of the land forming part of the deceased person’s estate. There are some cases where the personal representative is given a Grant of Probate subject to some limitations. This limitation is embodied in the memorandum shown on a title when transmission is entered. Where an executor, subject to such a limitation, proposes to transfer or deal with the land, evidence is required that the limitation has not affected the right to dispose of the land.

The most common of these limitations is a Grant of Probate to one or more persons reserving to another person or persons the right to come in and prove the will. This limitation generally arises where another appointed person named in the Will did not join in the initial application for Probate.

A search of the Probate Office must be made in such a case and a statutory declaration made to the effect that the person to whom leave was reserved to come in and prove has not done so. The search and declaration should be made on the day of registration of the dealing. (See LTRPM Form Examples - Example 12.)

A personal representative normally has a power of sale, but may not transfer land free of charge. Where the will restricts the normal power of the personal representative it is office practice to lodge a Registrar’s Caveat at the time transmission is entered.
The consents of beneficiaries, if of age, will be required before the Registrar’s Caveat will be withdrawn. If the beneficiaries are minors, evidence of the consent of the Courts to the transaction may be required before the caveat is lifted.

A personal representative may not, as a general rule sell land to himself or herself (see Section 4 ‘Transfer by Personal Representatives to Themselves or One of Them’). Where the consideration in a transfer is the terms of the will of the said deceased, the will must be produced with the transfer.

Where the land is being transferred to the Beneficiaries named in the Will, the appropriate panels of a transfer by a personal representative, who is shown on a certificate of title as such, should read:

Transferor:
A as executor of the will of B deceased

or

A as administrator with the will annexed of B deceased

Consideration:
terms of the will of the said deceased; or if a sale, X dollars.

Transferee:
C of (Address)

or

C of (Address) and D of (Address) as tenants in common in equal shares (or as the Will of B specifies)

Note:
Care must be taken when stating a tenancy in such transfers. Traditionally, beneficiaries bequeath a ‘share’, not a joint tenancy interest. Where the beneficiaries wish to alter the tenancy described in the Will, a dual consideration should be used, such as ‘terms of the Will of and the desire of the beneficiaries to hold the land as Joint Tenants or Tenants in common in equal shares’.

Where the name(s) of a beneficiary differ(s) from those stated in the Will, the Executor/Administrator or the beneficiary must provide a statutory declaration verifying the difference, similar to that of an Application to amend name, and provide any supporting evidence.

Where the land is being transferred by way of cash sale to a third party, the appropriate panels of a transfer by a personal representative, who is shown on a certificate of title as such, should read:

Transferor:
A as executor of the will of B deceased

or

A as administrator with the will annexed of B deceased

Consideration:
XX dollars

Transferee:

C of (Address)

2.1 No Transfer to beneficiary prior to their death

In those instances where the personal representative of the original owner failed to transfer the land to the beneficiaries prior to his/her death, a transfer may still be accomplished to the new beneficiaries. Where A dies and he/she bequeaths the land to B, but before a transfer to B is done/or never done the personal representative of A can transfer to the land to the beneficiaries of B.

The appropriate panels of a transfer by a personal representative of the original owner, who is shown on a certificate of title as such, should read:

Transferor:

A as executor of the will of B deceased

or

A as administrator with the will annexed of B deceased

Consideration:

terms of the will of B and terms of the will of C

Transferee:

D of (Address)

or

D of (Address) and E of (Address) as tenants in common in equal shares (or as the Will of C specifies)

3 Transfer by Administrator under Letters of Administration

3.1 General

Where a registered proprietor dies intestate (without a Will) and Letters of Administration are granted to an administrator, the administrator, after entering transmission (see DEC-03 Transmission Applications), is the registered proprietor of the land of the intestate deceased.

3.2 by Way of Sale

Where an administrator disposes of land by way of sale, sale to a third party for monetary value no investigation of the right to sell will be made (see DEC-03 Transmission Applications).
3.3 Transfer by Administrator by Way of Distribution or Appropriation

In all cases of transfer by way of distribution or appropriation, the administrator will be required to lodge with the transfer a statutory declaration stating the persons who are entitled in distribution under the Administration Act 1903, and their relationship to the deceased.

Where an administrator disposes of land by way of distribution to persons entitled under the above Act, those persons are determined arbitrarily by that statute.

The above Act has been successively amended from time to time with the amount to which a widow or widower is entitled becoming progressively larger. The date of death of the intestate deceased is the determining factor in establishing what amounts of money the persons entitled in distribution are to receive. A table of entitlements as they were varied over the years is set out in the 4th Schedule of the Act, published as a reprinted Act in 1980.

Further amendments were made to that schedule by Act 48 of 1982 (Operative where death occurred after 24 October 1984). Act 72 of 1984 (Operative 26 November 1984) set out provisions for the disposition of the estates of insolvent persons.

Where an administrator is appropriating certain lands as part of the entitlement of a particular person the provision of the Trustees Act 1962 s.30(1)(k) and 30(3) must be complied with. In addition to the declaration previously referred to, the administrator is required to supply, as an annexure to a declaration, a copy of the notice of intention to appropriate. The notice must be sent to each of the other persons of full age entitled in distribution or to the parent or guardian of any infant. Where the administrator is also the guardian of infants who are entitled in distribution, and where the appropriation would involve the sending of a notice to him/her self in his/her capacity as guardian or in any other capacity, a Court Order permitting the appropriation must be obtained and lodged with the transfer.

Alternatively, a transfer, together with the consent of all the persons set out in the declaration, if of age, will be sufficient to permit registration.

The above Act also sets out the right of widows or widowers to elect to have the matrimonial home appropriated as part of their share.

Where an administrator is appropriating the matrimonial home to a widow or widower, the declaration previously referred to should also incorporate, as an annexure, a copy of the election by the widow or widower requiring the appropriation of the matrimonial home.

The notice of election must be made within the time allowed and in the manner provided in the 4th Schedule to the Administration Act 1903.

Where the persons entitled in distribution (being all of age) and the administrator have entered into a Deed of Family Arrangement, in which they have agreed to vary the statutory provisions for distribution, a stamped copy of the Deed of Family Arrangement must be lodged with the transfer. No declaration is required in this case if the Deed itself gives full particulars of each beneficiary, and negates the existence of other beneficiaries.

Note:

Deed of family arrangements are retained by Landgate and filed inside the relevant transfer.

The appropriate panels of a transfer by an administrator who is shown on a certificate of title as such should read:
Where the administrator is distributing:

Transferor:
A as administrator of the estate of B deceased

Consideration:
the terms of the Administration Act 1903

Transferee:
C of (address)
or
C of (address) and D of (address) as to share

Where the administrator is appropriating:

Transferor:
as before

Consideration:
to appropriate the above described land as part of the transferee’s entitlement in the estate of the said deceased

Transferee:
C of (address)
or
C of (address) and D of (address) as to share

Where the entitled persons have altered the distribution of real property by a Deed of Family Arrangement:

Transferor:
A as administrator of the estate of B deceased

Consideration:
the terms of the Administration Act 1903 and a Deed of Family Arrangement dated (date).

Transferee:
C of (address)
or
C of (address) and D of (address) as to share

4 Transfer by Personal Representatives to Themselves or One of
Them

A transfer by personal representatives to themselves, or to one of themselves, will not be registered without justification, because it is prima facie a breach of trust and voidable at the instance of a beneficiary. The Registrar’s power to refuse such a transfer is illustrated by Templeton v Leviathan Proprietary Ltd. (1921) 30 C.L.R. 34.

A personal representative may transfer to him-/herself where:

- the will contains an express provision to that effect
- the transfer is to give effect to a contract of sale made during the lifetime of the deceased
- all the beneficiaries being of age, consent to the sale

or

- a Court Order is obtained permitting the transfer.

5 Transfer to a Personal Representative (Executor or Administrator)

Where land is transferred to the personal representative of a deceased person, e.g. on completion of a contract entered into by the deceased during his/her lifetime, no mention should be made in the transferee panel of the transferee’s capacity as personal representative.

Such a transfer should be prepared, using a transfer [Transfer of Land with additional pages form (double sheet)], with the consideration panel showing ‘see page 2’.

Under a heading consideration on page 2, the following should be recited (for the case given):

- the details of the contract;
- the death of the purchaser; and
- the Grant of Probate or Letters of Administration to the personal representative.

To support the above recital, an office copy or original Grant of Probate or Letters of Administration should be produced.

The resultant endorsement on the title would show the transferee as the absolute owner. The Commissioner, when it is considered necessary, will instruct the lodgement of a caveat to protect the interest of the persons entitled under the will or estate of the deceased.

The purpose of the caveat is to give notice that the executor holds the land in trust, and on the presentation of a transfer, either to carry out the terms of the Will, or in exercise of the powers granted to the executor by statute, the caveat will be withdrawn, by the internal procedures of Landgate.

6 Also see

- TFR-01 Transfers - Common Scenarios