



WILLPOWER PLUS

Estates



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Estates

There are usually three stages involved in finalising a deceased's legal and financial affairs (called an "estate"). The first is obtaining the grant of representation (which is usually Probate). The second is administering the estate. The third is distributing the estate.

1. What is Probate?

Probate is the name given to an order of the Supreme Court of New South Wales which, upon proof of the deceased's valid Will, confers power on the executor named in the deceased's will to deal with the deceased's assets and affairs. To obtain a grant of Probate there must be a will. (If there is no will, see 7 below.)

Except where the deceased's estate is very small, Probate is required before the executor can deal with the deceased's legal and financial affairs.

2. What is required to obtain a grant of Probate?

Before it will grant Probate the Supreme Court requires proof that:

- 2.1 the person has died - usually this is provided by a death certificate
- 2.2 the person has left assets within the jurisdiction of the court, which means land within New South Wales or assets anywhere of a deceased domiciled in this State at death— usually this is provided by setting out a list of the deceased's assets
- 2.3 the person made a valid will – this is satisfied by providing the will to the court, and evidence that the will maker did not marry after making the will.



- 2.4 the will validly appoints the executor – this is usually evident from the will
- 2.5 persons who may have wished to challenge the will have been advised of the application for probate – this is done by the executor advertising the proposed application; and
- 2.6 the beneficiaries have an entitlement to receive the deceased's estate. This may not be the position if a beneficiary witnessed the will, or the deceased divorced the beneficiary after the will was made, or the beneficiary is bankrupt.

In some circumstances other information may need to be provided to the Court.

3. What is involved in administering an estate?

Administration describes the work required to enable the executor to distribute the estate to the beneficiaries. An Executor or, if Letters of Administration are granted because there is no will or no executor, the Administrator has various legal obligations in dealing with the deceased's estate. These include:

- 3.1 deciding how the deceased's remains are dealt with (being burial or cremation)
- 3.2 organising the funeral arrangements
- 3.3 ascertaining if the deceased had a will (or other testamentary document) and, if so, taking possession of the last will
- 3.4 ascertaining the nature and extent of the deceased's assets
- 3.5 locating and obtaining details of beneficiaries
- 3.6 considering if there is any doubt about the effectiveness of the will (eg if the deceased married after making the will, or divorced)
- 3.7 obtaining Probate (see 2 above, or for Letters of Administration, see 7 below) if required
- 3.8 collecting, selling and otherwise dealing with the deceased's assets so that expenses of

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- administration may be paid and the estate prepared for distribution
- 3.9 defending and resolving legal proceedings involving the deceased or the deceased's estate (such as family provision claims or claims by creditors)
- 3.10 preserving (which may include insuring) and investing the assets pending a distribution
- 3.11 ascertaining the deceased's debts and any debts or expenses of the estate. This may require the executor to lodge tax returns
- 3.12 attending to pay the proper debts and expenses of the deceased and the estate
- 3.13 paying him or herself remuneration (if the Will allows this) or seeking commission from the court or with the agreement of beneficiaries. *For further information see the article "When is a Professional Executor and Fiduciary entitled to remuneration?"*
- 3.14 producing accounts to either the Court or beneficiaries for the executor's financial transactions.

4. What is involved with distributing an estate?

A beneficiary is not entitled to any part of the estate until administration has been completed. Once that occurs, an executor must distribute the assets in accordance with the will, subject to two exceptions. The first exception is where a court orders that there be a different distribution. For instance, this may occur if there is a successful family provision claim. *For further information see Q2 in "Challenging a Deceased Estate" InfoSheet.* The other exception is where the beneficiaries and the executor agree otherwise. That type of agreement is usually recorded in a Deed of Family Arrangement.

The distribution to a beneficiary may be made by a cash payment or by transfer of a specific asset, and sometimes by a combination of each.

If the distribution is made to beneficiaries who are minors (or less than the age specified in the will) at the date of distribution or who lack capacity at that

time, the distribution is made to a trustee for the beneficiary.

5. How long does it usually take to finalise an estate?

Probate is usually obtained between eight weeks and four months after the deceased's death. The position is different with Letters of administration: see 7 below.



The time taken to attend to the other parts of the estate work, administration and distribution, will depend upon the complexity of the deceased's legal and financial affairs. It may depend upon the prospect of a claim against the deceased's estate, as a claim for greater provision from an estate can be brought at any time within 12 months of the deceased's death.

Sometimes, for tax purposes, an estate will not be finalised until more than three years after the deceased's death. However most estates are resolved within seven to twelve months of the deceased's death.

6. What are the costs involved in finalising an estate?

There are professional fees payable for each of the three stages of legal work. The professional fees for the grant of Probate is regulated. The professional fees for the other legal work are charged on a time basis, as the work required for each estate can vary greatly.

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There are expenses involved in obtaining a grant of Probate. The expenses may include the filing fee paid to the Supreme Court. The filing fee is also fixed by a scale. There are expenses in advertising the intended application for Probate. There will usually be expenses involved in the other legal work but, as with the professional fees, these depend on the specific circumstances of the estate.

Usually, the person entitled to be the administrator is the beneficiary with the largest interest in the estate. This is decided by reference to the list of beneficiaries set out in the legislation (referred to at 7.1 above). For instance, if the deceased left a spouse, the spouse would usually be the administrator of the estate.

7. What is different if there isn't a will?

There are a number of differences:

7.1 the beneficiaries are decided by legislation, and depend upon fitting within the highest category of relatives specified in the legislation. There are a number of possibilities. For instance, where the deceased died on or after 1 March 2010, and the deceased had no children or only children of the spouse and the deceased, the spouse takes the whole of the estate.

If the deceased left children by someone other than the surviving spouse, the spouse receives an amount of money (which is presently about \$450,000) and half the rest of the estate.

If there is no spouse, children take the whole estate. If there are no children the estate is divided among the deceased's parents. Then brothers and sisters, and so on. Ultimately, if no one comes within any of the 6 categories of beneficiaries, the deceased's assets are paid to the State. There are additional complications if the deceased left more than one spouse, such as a married spouse and a de facto spouse. There may be other complications depending on the deceased's domicile or an earlier date of death.

7.2 obtaining permission to deal with a deceased's estate is called Letters of Administration. (If there is a will, it is called probate.) The person entitled to obtain Letters of Administration from the Supreme Court is called the administrator (compared to an executor for a will).

7.3 different information must be provided to the Supreme Court. Items 2.3 and 2.4 are not required, because there is no will.

However a person's entitlement to be the administrator must be established, usually by evidence of marriage or birth. Secondly, there must be convincing evidence that the deceased did not leave a will.

7.4. the rules of inheritance mean that the beneficiaries of an intestate's estate can be rather unexpected. Certainly, if there is no will, the process of dealing with a deceased's affairs is more complex and the time frame is usually lengthier.



7.5. the extra work involved means that the costs will usually be more, and possibly significantly more, than involved with an estate where there is a will.



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