

PROBATE GUIDE

How to Distribute an Estate
Applying for Probate
What Happens When There is No Will
and other Information about Estate
Administration in New South Wales

halc

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LAW AND JUSTICE
FOUNDATION

OF NEW
SOUTH WALES

This booklet contains the relevant law in New South Wales on probate and succession. The law is applicable to applying for Grant of Probate or Letters of Administration in New South Wales as at 1 December 2011. This document has been prepared by the HIV/AIDS Legal Centre (HALC).

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Every effort has been made to ensure that the information contained here and in the accompanying documents is as up to date and accurate as possible but it is no substitute for legal advice. Use this document as a guide only.

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INTRODUCTION AND INSTRUCTIONS

This guide is designed to make estate distribution in New South Wales easier. We believe that a lay person is more than capable of applying for a simple Grant of Probate or Letters of Administration without a solicitor acting for them, and we hope that this guide will assist in this process.

Read it and answer the questions in Part A to determine if your application should be for a Grant of Probate or for Letters of Administration.

The documents listed down the right hand side of each page indicate which forms need to be completed and when. Draft forms and pro forma documents can be found on our website: www.halc.org.au under Guides – Probate. These forms have been created using court forms but they are tailored to exclude all references to legal representation.

At the back of this guide is a glossary of terms that explains difficult or confusing terms.

This guide and the pro forma documents are current as at 1 December 2011. The law changes often, and although we try to keep the electronic copy of this document as well as the pro forma documents on the website up-to-date, we suggest that you check the accuracy of the forms and documents BEFORE PREPARING THEM FOR LODGING. You can contact the Supreme Court Registry – Probate Division on (02) 9230 8111 or visit their website http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/sco_probate_forms to confirm that you will be filing the correct documents.

WARNING

Executors can be PERSONALLY LIABLE (responsible) if they act improperly or make mistakes in relation to estate distribution. It is important that you seek legal advice if you have any concerns or are uncertain about what you are doing. Executors may also be liable for loss or damage to estate property before it is distributed. Ensure that appropriate insurance cover is in place, and that goods are stored securely.

You CANNOT distribute any assets, including both money and property, until the appropriate steps have been followed. It is particularly important that if you have any questions about the distribution, then you should NOT distribute anything until you have obtained legal advice.

1. Is there a Will?

YES - Go to Question 2

NO - Go to Part D: Applying for Letters of Administration

2. Is there any real estate held solely or as a tenant in common?

YES - Go to Part B

NO - Go to Question 4

3. Is there superannuation?

YES - Go to next question

NO - Go to Part B

4. Has the deceased nominated a beneficiary with their superannuation provider(s)?

YES - Go to Part B

NO - Go to Part C

PART B: ESTATES LESS THAN \$50,000

1. Is the estate more than \$50,000?

YES - Continue to Part C and Complete

NO - If the Estate is less than \$50,000 then it is classified as a *small estate*. There are no filing fees required for probate applications for *small estates*. Furthermore, depending upon what the deceased's assets are, you may not need to apply for a Grant of Probate at all. Note that real estate held as a joint tenant passes automatically to the remaining tenants and does not form part of the deceased estate. Therefore, a person whose main asset was an interest in their home held jointly with their partner may well leave only a *small estate*.

If you are the executor of a *small estate*, then you should contact the deceased's bank and their other financial institutions and find out whether or not they will release funds without a Grant of Probate. Usually if there is superannuation included in the estate then a Grant of Probate or Letters of Administration will be needed before the super company will release funds.

If you believe that you do not need to apply for a Grant of Probate, please contact a solicitor or the Supreme Court Registry Probate Division (02) 9230 8111 to confirm this. Once confirmed, proceed to No. 16 in PART E of this guide and continue.

PART C: GRANT OF PROBATE

A Grant of Probate can only be applied for by a person named as the executor in the Will and only if the original Will is available. If you are the executor named in an **original will** then you should make an application for a Grant of Probate.

To apply for a Grant of Probate you must:

1. First, place a notice in a newspaper that has circulation in the local area where the deceased lived or a Sydney daily newspaper if there is no local paper. If the beneficiaries are known to live in any other area you might consider placing a notice in their local newspaper. For example, where there is a beneficiary in Melbourne you might place a notice in The Age.

This notice is called a Notice of Intended Application for Probate (or Form 91). This notice instructs anyone who may have claims over the estate, for example a person to whom the deceased owed money, to come forward and notify you so that they can be included in the probate application. You should contact the local paper and ask them what their fee is, and how they prefer to accept payment.

You cannot file the probate application until 14 days after this notice has appeared in the paper.

Form 91 SCR with pro forma cover letter

2. You will need to notify financial institutions and businesses (utilities, insurance etc) of the death and have them halt further charges on outstanding balances or halt services in some cases as appropriate.

3. You will need to know the complete financial details of the estate. We suggest, that to be sure of the exact contents of the estate, you should send letters to the deceased's bank and other financial institutions (including superannuation providers) holding their funds or where funds are owing and inform them that the person has passed away. When doing this you should include a certified copy of the death certificate, a certified copy of your identification and of the Will.

The financial institution may forward to you particular forms that they require to be completed before they will release the funds upon Grant of Probate and they should be able to indicate what amount is owing or the amount of funds available. If you are not in a financial position to pay any small debts (eg credit card bills) that require immediate payment, you can ask if the institution is willing to waive the debt, if not it will have to be paid out of the estate.

Pro forma letter

4. 14 days after the Notice of Intended Application has appeared in the newspaper you may file for the Grant of Probate. To file for probate you need to complete and file the **original plus two copies** of the following:

- a. Summons for Probate (Form 111 UCPR)
- b. Draft Grant (Form 112 UCPR)
- c. Affidavit of Executor (Form 97 SCR).

Form 111 UCPR
Form 112 UCPR
Form 97 SCR

Attach the following to this affidavit:

- i. Original Will
- ii. Original Death Certificate
- iii. (If the primary or joint executor is not willing or able to act, complete a Form 94 SCR – renunciation of executor)
- iv. Tear sheet (or clipping) from the newspaper of the Notice of Intended Application (Form 91 SCR).
A tear sheet must include a copy of the notice as published, the date, page number and name of publication
- v. Inventory of assets (Form 96 SCR)
- vi. Certified copy of executor’s driver licence or other identification

(Form 94 SCR if applicable)

- d. A stamped self-addressed envelope and
- e. The relevant court fee (bank cheque, money order or credit/debit card in person). Prior to filing, you should confirm what the fee is so it can be written into the Form 97 SCR.

e. Continued...

To determine what the filing fee is go to http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_courtfees . The fees are based upon the gross value of the estate. If you are unable to pay the fee, complete a fee waiver application.

Ensure that you have multiple certified copies of the original Will and death certificate before filing the originals with the court. Various financial institutions etc will require certified copies of these documents.

If the application is in order, then the grant will be made and the sealed grant will be returned in the stamped self-addressed envelope that you provided, usually within 5 working days. However, if the court finds any problems with the application you have made and requires changes to the forms, then the court will return them to you with a Probate Requisition Sheet that sets out the deficiencies. You will not be required to pay the fee again, so even if you are not completely certain that you have correctly completed the forms, you can still go ahead and file and the court will let you know if anything is missing.

Fee waiver
application

GO TO PART E

PART D: GRANT OF LETTERS OF ADMINISTRATION

(where there is no Will or no original Will or the Executor is not willing or able to act)

If there is no Will and you are a relative entitled to whole or part of the deceased estate **OR** if there is a Will but the executor is not able to act and you are named as a beneficiary, **OR** there is only a copy of the Will and not the original and you are the named executor, then you should apply for Letters of Administration.

Generally speaking you are classified as a relative entitled to whole or part of an estate if you are a spouse or de facto partner, or a child of the deceased. If the deceased does not have a partner and/or children, you may be entitled to part or whole of the estate as a parent or sibling of the deceased.

Please note, if you are not entitled to apply for Letters of Administration but you go ahead and do so anyway, then the court may award costs against you for making a false claim.

To apply for Letters of Administration you must:

1. First, place a notice, called a Notice of Intended Application for Letters of Administration (Form 92), in a newspaper that circulates in the local area where the deceased lived. . This notice instructs anyone who may have claims over the estate, for example a person to whom the deceased owed money, to come forward and notify you so that they can be included in the probate application. You should contact the local paper and ask them what their fee is, and how they prefer to accept payment. You cannot file the probate application until 14 days after this notice has appeared in the paper.

Form 92 SCR with
pro forma letter

2. You will need to notify financial institutions and businesses (utilities, insurance etc) of the death and have them halt further charges on outstanding balances or halt services in some cases as appropriate.

3. You will need to know the complete financial details of the estate. We suggest, that to be sure of the exact contents of the estate, you should send letters to the deceased's bank and other financial institutions (including superannuation providers) holding their funds or where funds are owing and inform them that the person has passed away. You should include a certified copy of the death certificate and a certified copy of your identification. The financial institution may forward to you particular forms that they require to be completed before they will release the funds upon Grant of Probate and they should be able to indicate what amount is owing or the amount of funds available. If you are not in a financial position to pay any small debts (eg credit card bills) that require immediate payment you can ask if the institution is willing to waive the debt.

In the situation where there is a Will, but the executor is unwilling or unable to act, then you will need to also include a copy of the Will and a copy of the renunciation of executor (Form 94 SCR).

pro forma letter

Form 94 SCR

4. 14 days after the notice has appeared in the paper you may file for Letters of Administration. To file, you need to complete and file the **original and two copies** of the following:

- | | | |
|------|---|-----------------------------|
| a. | Summons for Probate (Form 111 UCPR) | Form 111 |
| b. | Draft Grant (Form 112 UCPR) | Form 112 UCPR |
| c. | Affidavit of Administrator (Form 98 SCR) | Form 98 SCR |
| | Attach the following to this affidavit | |
| i. | Original Death Certificate | |
| ii. | (If the executor/s are unwilling or unable to act, complete a Form 94 SCR – renunciation of executor) | (Form 94 SCR if applicable) |
| iii. | Tear sheet (or clipping) from the newspaper of the Notice of Intended Application (Form 91 SCR).
A tear sheet must include a copy of the notice as published, the date, page number and name of publication | |
| iv. | Inventory of assets (Form 96 SCR); | |
| v. | Certified copy of executor's driver licence or other identification | Form 96 SCR |
| f. | Stamped self-addressed envelope and | |
| g. | The relevant court fee (bank cheque, money order or credit/debit card in person). Prior to filing, you should confirm what the fee is so it can be written into the Form 98 SCR. To determine what the filing fee is go to
http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_courtfees | |

g. Continued...

The fees are based upon the gross value of the estate. If you are unable to pay the fee, complete a fee waiver application.

Ensure that you have multiple certified copies of the original death certificate before filing the original with the court. Various financial institutions etc will require certified copies of this document.

If the application is in order, then the grant will be made and the sealed grant will be returned in the stamped self-addressed envelope that you provided, usually within 5 working days. However, if the court finds any problems with the application you have made and requires changes to the forms, then the court will return them to you with a Probate Requisition Sheet that sets out the deficiencies. You will not be required to pay the fee again, so even if you are not completely certain that you have correctly completed the forms, you can still go ahead and file and the court will let you know if anything is missing.

PART E: AFTER THE GRANT OF PROBATE OR LETTERS OF ADMINISTRATION

After probate or Letters of Administration has been granted but before you distribute ANY of the estate, you must place a Notice of Intended Distribution of Estate (Form 114 UCPR) in the newspaper.

Form 114 UCPR
with pro forma
cover letter

You cannot distribute any of the estate until the later of 6 months after the deceased's death AND 30 days after this notice has appeared in the paper.

1. Obtain a Tax File Number (TFN) for the Deceased Estate through the Australian Taxation Office at <http://www.ato.gov.au/individuals/content.asp?doc=/content/22579.htm>
To apply for a TFN for the estate, as executor/administrator you will have to provide identification, and certified copies of Grant of Probate or Letters of Administration and Death Certificate.

2. Open a bank account in the name of the Deceased Estate. It should be called: 'The estate of the late (name of deceased)'.

3. Contact financial institutions or superannuation companies holding the deceased's funds and direct that the funds be released into the newly set up bank account. Complete any forms the institutions require and return them with a certified copy of the Grant of Probate or Letters of Administration, your identification, the deceased's identification and a copy of the death certificate.

Pro forma letter

4. All debts need to be paid. If debts cannot be paid out of the available funds you will need to sell some of the estate's assets to do so. Debts should be paid in the following order of priority:

- i. Funeral expenses;
- ii. Executor to be paid any expenses incurred relating to the administration of the estate (eg. filing fees, solicitors' and accountancy fees, valuations of property.) The executor can apply for commission for services at the same time as application for probate if they are not a beneficiary;
- iii. Other debts;
- iv. Taxes.

PART F: DISTRIBUTING THE ESTATE

1. Before distributing ANYTHING carefully consider the following:

- i. Did any of the beneficiaries witness the signing of the Will?
- ii. Are you unsure about what the terms of the Will are or how the deceased person wanted you to distribute the estate?
- iii. Has anyone filed any documents in court indicating that they are challenging the Will?
- iv. Has anyone indicated that they may challenge the Will?

1. Cont...

- v. Is there any family member or dependent, either current or former, who might seek a Family Provision Order (a claim against the estate made by a person who believes that they were not adequately provided for in the Will or under the intestacy rules) and if so, has it been less than 12 months since the deceased's death?

If you answered 'yes' to any of the above questions, or if you are in doubt of any of the answers, then STOP and obtain legal advice. If you distribute the estate at this time you may be personally liable.

2. Once debts and taxes have been paid, assets are distributed as follows;

If there is a Will (copy or original): distribute according to the terms in the Will or they are sold so that money can be divided among the beneficiaries.

If there is no Will: distribute according to Intestacy provisions or they are sold so that money can be divided among the appropriate beneficiaries.

If beneficiaries choose to keep various household goods or other items that are not specifically gifted to them, then reasonable allowances must be made for the value of these items.

Table of Intestacy provisions

3. After distribution of the estate, the executor is required to prepare a distribution report and statement for the beneficiaries. This report should outline:

Pro forma Report

- i. what the assets were;
- ii. how much money resulted from any sale of assets;
- iii. what expenses and debts were paid from proceeds; and
- iv. who the beneficiaries were and what they received.

FOR YOUR NOTES

GLOSSARY OF TERMS

Administrator A person granted Letters of Administration by a Supreme Court to administer an estate for a deceased person.

Beneficiary A person entitled to receive a benefit of a deceased estate, either named in a Will or with an interest in an estate.

Codicil A supplementary document to a will that demonstrates a testator's intention to add to, alter, revoke, explain or confirm the original Will.

Distribution To divide and pay out from a deceased estate the legacies to beneficiaries according to terms of a Will or under intestacy legislation to those entitled to receive benefit, in the correct order as outlined by legislation.

Estate In relation to a deceased person, the estate includes the total property of the deceased that is able to be distributed to beneficiaries after debts etc have been paid.

Executor The person named in a Will to administer an estate for a deceased person.

Intestate A person who died without a valid Will.

Letters of Administration An authorisation issued by a Supreme Court when a person dies intestate, OR where only a copy of the Will can be found, OR where an appointed executor is unable or unwilling to act, giving power to an administrator to distribute an estate in accordance with intestacy legislation.

Plaintiff For the purposes of the attached document the plaintiff will be the executor named in the Will or the person applying for Letters of Administration.

Probate A certificate granted by a Supreme Court confirming that the will of the deceased has been proved as valid and registered and that authority to administer the deceased estate has been granted to the executor named in the original Will.

Tenant in Common A tenant in common owns property with one or more other people in a tenancy in common. Their shares in the property may be equal or unequal, and each person may usually sell or bequeath their own share as they wish. The property is held in common, undivided, and no one has exclusive possession of any part of it.

Testator A deceased person who died with a valid Will.

Trust A device by which one person holds property for the benefit of another person. This power may be given in a Will and obliges the person (trustee) to deal with the property for the benefit of the other person (beneficiary).

Trustee The person obliged to hold property in trust for a beneficiary.

Will A written declaration that provides instructions for distribution of an estate, which takes effect upon death.

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