



HEIDTMAN & CO.

LAWYERS

PROBATE

What Is Probate?

Before the assets of the deceased can be distributed to the beneficiaries under the Will, the Executor may be required to apply to the Supreme Court for a Grant of Probate. This is a document that authorises the Executor to obtain access to such assets such as bank accounts, shares in a company or real estate. Probate is official recognition that the Will of a deceased is valid and that authority to administer a deceased estate has been granted to the Executor.

A Grant of Probate protects asset holders from potential liability, which could arise from handing the deceased's assets to the wrong person. Some examples of asset holders include banks, insurance companies and superannuation funds.



Is A Grant of Probate Always Necessary?

Not necessarily. Although there is no statutory requirement that Probate be obtained in every case, some people or organisations holding assets of the deceased will not release or transfer them without sighting a Grant of Probate. This is understandable given that many asset holders will want to ensure that they are releasing the assets to the person who has authority to deal with them. However, in some instances asset holders will release modest amounts without the need for

Probate to be obtained. It is worth checking first with the asset holders involved what each would require for the release of assets before embarking on the application for a Grant of Probate.

A Grant of Probate is always required to deal with real estate when it is held solely in the deceased's name or as a tenant in common.

A Grant of Probate is not required to deal with the assets of the deceased if:

- (a) the assets are held in joint names (e.g. the family home); and
- (b) the assets comprise of proceeds of life insurance which do not exceed \$50,000.00.

A Grant of Probate may not be required to deal with the assets of the deceased if they comprise of:

- (a) small funds in a bank account;
- (b) cash in hand;
- (c) bearer bonds;
- (d) chattels (e.g. a television set); and
- (e) shares in certain companies where the asset holder does not require a Grant of Probate.

How Do I Apply For A Grant of Probate?

If a Grant of Probate is required to deal with the assets of the estate, the Executor will need to apply to the Supreme Court. A Grant of Probate will only be issued once the Supreme Court is satisfied that the Will the Executor seeks to act on is the *last* Will of the deceased. If there are any errors in the documents filed with the application for Probate or further evidence is required (e.g. the facts and circumstances surrounding the execution of the Will are in doubt) the Supreme Court may raise requisitions (or questions) of the filing party. These requisitions must

be attended to before the grant can be made.

A notice must be published in a newspaper circulating in the district in which the deceased resided or a national newspaper (if the deceased resided outside of NSW) advertising the Executor's intention to apply for a Grant of Probate. Fourteen (14) clear days must be allowed before proceeding to file the following documents to give others (usually creditors) time to object if they want to. Advertising helps protect Executors and Administrators (also known as a Legal Personal Representative) from personal liability arising from claims of which they had no prior knowledge.

Provided you receive no objections to your intention to apply for a Grant of Probate, a Summons for Probate is prepared and filed together with an Affidavit of Executor, and the Will of the deceased.

The Affidavit of Executor provides confirmation in relation to a number of matters including the identification of the Will of the deceased, evidence as to the advertisement of the notice of intended application, whether the deceased married after the Will was made, evidence of the deceased's death, and the assets and liabilities of the deceased. The original Will of the deceased is usually filed as a separate document.

In the majority of cases, the Executor will require legal assistance and representation for the Summons and the Affidavit of Executor.

What Happens If The Original Will Has Been Lost?

Where the original Will has been lost and a grant is sought of a copy of the original Will, an affidavit would be required setting out the circumstances of:

- (a) its loss and who drew and

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- held the original Will;
- (b) the search for the Original Will;
- (c) the proper execution of the original Will; and
- (d) identification of the copy as a true copy of the original Will.

Further affidavits may be required in certain circumstances to rebut the presumption that the lost Will has been destroyed with the intention to revoke it.

In circumstances where the Supreme Court considers that any doubt exists concerning the application to obtain a grant of a copy of an original Will, it will also be necessary to file verified consents of persons who would be affected by the grant (i.e. beneficiaries entitled on an intestacy) or affidavits of service of notice of intention to make the application upon all non-consenting persons.

How Long Does The Process Take?

Once Probate has been granted it is then sent by the Probate Registry to the filing party. The entire process usually takes approximately five working (5) days. The Probate can then be used as evidence of the grant, the death of the deceased, the terms of the deceased's Will and the property included in the estate when calling in and distributing the assets and paying the debts, funeral and testamentary expenses.

How Much Does It Cost?

The greater part of the costs in relation to obtaining a Grant of Probate will be towards the court filing fee. The cost of the court filing fee is determined by reference to the Supreme Court's sliding scale of fees which is based on the disclosed gross value of the assets of the deceased estate as sworn in the application for Probate.

The fees solicitor's may charge in respect to obtaining Grants of Probate including the preparation of the Probate documents are fixed by a scale of costs prescribed by legislation.



What If There Is No Will At All?

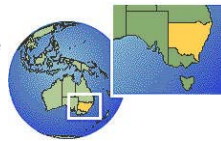
If a person dies without leaving a Will, a similar grant known as a grant of "Letters of Administration" can be made by the Supreme Court. As there is no Executor appointed, an application will need to be made by the deceased's spouse, one or more of the next of kin, or the spouse jointly with the next of kin to have administration of the estate granted to them. The person or persons to whom Letters of Administration is granted are known as the "Administrator". A grant of Letters of Administration is proof that the person or persons named in the Letters has the authority to deal with and administer the estate.

Are The Contents Of A Will Private?

Once the original Will is filed at the Probate Registry together with the Probate documents, it is on public record, and anyone can see it upon payment of a small fee.

Can An Executor Outside NSW Apply For Probate?

Yes, however they must provide an address for service of documents within New South Wales. Conversely, where the application is for Letters of Administration, the Administrator must reside within New South Wales.



Can I Stop Probate From Being Granted?

Any person who claims to have an interest in an estate can object to a Grant of Probate being made by filing with the Supreme Court a caveat in the prescribed form. The caveat will remain in force for six (6) months until it either lapses, is withdrawn or an application is made for its extension. The Supreme Court may remove a caveat where it appears the person who filed it had no reason to file it. It is very important that you obtain proper advice before embarking upon filing a caveat because if your application is defended, and you lose, you may be ordered to pay the successful party's legal costs.

Can The Executor Resign After Obtaining Probate?

A person may retire or resign from being an Executor after obtaining a

Grant of Probate provided that they appoint the Public Trustee or a trustee company in their place. However, if the deceased gave a direction in their Will that the office of Executor cannot be delegated (or should not be delegated) the appointment may be invalid.

What Else Am I Required To Do?

An Executor has many duties, such as:

- (a) calling in or taking control of estate property;
- (b) advertising for any debts owing, and paying those debts out;
- (c) finalising any financial or business affairs;
- (d) paying out legacies;
- (e) lodging tax returns and finalising tax affairs; and
- (f) distributing or transferring the estate property according to the Will.

An Executor must be very careful in the administration of an estate, because they can be held accountable for any losses.

If Probate has been granted and a later will is subsequently discovered, an Executor is required to make two (2) fresh applications with the Supreme Court. First, to have the original Grant of Probate revoked, and secondly, for a new, separate Probate based on the second, later Will.

Do I Need To Consult A Solicitor?

No, but, other than in the simplest of situations, it is a good idea to consult a solicitor before applying for either a Grant of Probate or Letters of Administration. You may decide that it could be much cheaper and less time consuming in the long run to engage a solicitor or other professional than to do it yourself. However, as with so many important situations, a solicitor can recognise potential problems and help you avoid them.

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