

When a person dies, the Executor of the deceased's Will is charged with the responsibility of distributing the assets (estate) of the deceased. In many cases, a probate is necessary in order to release or transmit assets of the deceased.



A probate is essentially the Court's official recognition that a Will is legally valid. Practically, a probate ensures that the person seeking release of the deceased's assets has the correct authority to do so. Asset holders, such as banks, superannuation funds, insurance companies and stockbrokers often require a probate in order to protect themselves against the possible liability of transmitting assets to the wrong person.

A. TRANSMISSIONS REQUIRING PROBATE

Generally, a grant of probate is not required in instances where the asset, such as real estate is held in joint names. In such cases, the asset will automatically be transmitted to the surviving joint owner by the production of a death certificate. Other instances where a grant of probate may not be required include the transfer of chattels (goods), small funds in a bank account, and cash in hand.

However, it is necessary to make an application to the Supreme Court for a probate when transmitting assets which are held in the sole name of the deceased. Generally, an application for probate is also needed in cases where an asset is held as a tenant-in-common. A grant of probate will always need to be shown to the NSW Land Registry Services when transmitting real estate held in the deceased's name as a tenant-in-common.

A "Transmission of Assets Table", summarising some of the common assets and the documents needed to effect transmission from the deceased to the beneficiary is set out below. Reference to 'probate' in the Table refers to the grant of probate for sighting purposes only.

| ASSET | | DOCUMENTS REQUIRED | |
|-------|--|-------------------------|---|
| 1 | Bank account—savings (in sole name of the deceased) | 1 2 | Probate Bank statement |
| 2 | Bank account—cheque (in the sole name of the deceased) | 1 2 | Probate Bank statement |
| 3 | Torrens Title land - not joint tenancy | 1 2 3 4 | Probate Certificate of Title Real Property Act Transmission Form Notice of Sale Form |
| 4 | Shares | 1 2 3 | Probate Share Certificate (if a certified holding) The company's transmission form |
| 5 | Life Insurance Policies | 1 2 3 4 | Probate The insurance policy The company's completed claim form Death Certificate |
| 7 | Chattels* | None—passes on delivery | |



*No documentation is needed with respect to chattels in which title may pass by possession, for example household goods, jewellery, books and money in hand. However, either oral or written assent must be given by the executor or the administrator of the estate to enable the property to pass to the beneficiary.

B. APPLICATION FOR A PROBATE

An application for a probate is to be filed in the Supreme Court nearest to where the deceased lived. Therefore, if the deceased lived in New South Wales, the executor of the Will should apply to the Supreme Court of New South Wales for a grant of probate. An application for a grant of probate can still be made if the executor resides outside of New South Wales, as long as an address for service of documents within New South Wales is provided. It should be noted that where an application is for a grant of letters of administration, the administrator must reside within the state where the deceased lived.

There are a few standard steps that are to be taken in the application for a grant of probate. These include:

1. Placing a notice of your intention to apply for a grant of probate on the New South Wales Online Registry.
2. Fourteen days must elapse from the notice being published before the executor can take any further action. The period of 14 days is necessary to allow time for creditors to object to the grant of probate.
3. If no objections are made within the 14 day period, then the executor would need to file with the Supreme Court of New South Wales:
 - (a) a Summons for Probate;
 - (b) an Affidavit of the executor; and
 - (c) the original Will of the deceased. A filing fee will also need to be paid to the Supreme Court of NSW.

A grant of probate will generally be issued within a few weeks from the date the application is received by the Court. However, in some cases, additional information may be needed in order for the Court to grant the probate, and in such instances, requisitions (questions) will generally be made by the Court. The processing of the grant will be delayed until a response is made to the requisition.

In instances where the original Will cannot be found, an affidavit will be required, setting out details including where and with whom the Will was held, and searches conducted to find the Will.

C. LETTERS OF ADMINISTRATION

Letters of Administration are to be applied for where a person dies without a legal Will (intestate). Letters of Administration authorise a person (administrator) to

administer the deceased's estate and distribute assets.

In such circumstances, the Court will decide to whom the deceased's estate should be transferred to. Generally, since there is no executor, the deceased's spouse or next of kin will become the administrator of the estate and will be responsible for dealing with the deceased estate.

The deceased's spouse and next of kin can apply to the Court to have the administration of the estate granted to them jointly. The administrator will not have authority to deal with the deceased estate until a grant of letters of administration is made. The Succession Act provides how the assets are to be distributed.

If the deceased passed away with no spouse or relatives who are entitled to the estate, the State will become entitled to the whole estate.

The process for applying for a grant of letters of administration is generally the same as that for a grant of probate.

C.1. CHANGES TO THE LAW OF INTESTACY

The *Succession Amendment (Intestacy) Act 2009* (NSW), which commenced in March 2010, introduced significant changes, including:

1. Where a person who died intestate is survived by a spouse and children, the whole estate goes to the spouse (rather than divided between the spouse and children - which was the case before 2010).
2. If the deceased had children from another marriage or liaison, the spouse now receives \$350,000.00 (previously \$200,000.00) and half of the remainder of the estate. The other half of the estate goes to the children.
3. The concept of multiple spouses was introduced (e.g. a married spouse who was separated but not divorced from the deceased and a de facto partner). In this case, the married spouse receives the whole estate if the de facto relationship was less than 2 years. If the de facto relationship was over 2 years, the de facto partner and married spouse share the estate based on an agreement between them; an order by the Court; or half each on default.
4. There is no longer a distinction between half-blooded siblings and full-blooded siblings. All siblings receive a share of the estate equally, regardless of whether they are half-blooded or full-blooded.



5. Cousins of the deceased now have an entitlement to the estate if their parents (the deceased's aunt and uncle) pass away before the person who died intestate. They will receive their parents' entitlement.

D. DISTRIBUTING THE ASSETS

Once a grant of Probate or Letters of Administration has been issued by the Court and any outstanding debts are cleared, the deceased's estate may be distributed according to the Will or the intestacy rules.

An online notice of intended distribution may be advertised on the New South Wales Online Registry (not mandatory), which protects the executor or administrator from personal liability, if they distribute the estate 30 days after this notice and 6 months after the deceased's date of death [section 93 of the *Succession Act 2006* (NSW)].

When releasing the money owned in a bank account of the deceased, banks will check whether the relevant bank account was listed in the assets and liabilities submitted as part of the Probate application. Banks will require a certified copy of the grant of Probate or Letters of Administration to release the assets.

Property owned by the deceased must also be transmitted by presenting a grant of Probate or Letters of Administration to NSW Land Registry Services (LRS) and lodging documents including the Certificate of Title for the property, a notice of death, a certified copy of the Death Certificate and a notice of sale or Transfer. A lodgment fee also applies. If the deceased owned property as a joint tenant, the whole property will automatically pass to the surviving joint tenant.

Other assets can also generally be released and distributed by showing a copy of the grant of Probate or Letters of Administration to the relevant organisation or authority.

Comasters can help clients to apply for a grant of probate or a grant for letters of administration from the Supreme Court of New South Wales, and assist in distributing the assets to beneficiaries.

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