

Frequently Asked Questions Regarding Probate

These questions represent those most commonly asked of the duty Deputy Registrar in the Probate Registry. While every care is taken with the responses they are of a general nature and should be taken as a guide only.

1. Do I need probate?

There is no statutory requirement that probate be obtained in every case, but to ensure that a person seeking release of assets (eg bank accounts) has authority to deal with them, and to protect themselves against possible liability for handing assets to the wrong person, asset holders (eg banks, insurance companies or superannuation funds etc) may require probate before releasing or transferring assets. They will, however, often release modest amounts without the need for probate to be obtained. Real estate held solely in the name of the deceased person or as tenant in common will always require a grant in order to deal with it.

2. Can an executor outside New South Wales apply for probate?

Yes, however he or she must provide an address for service of documents within New South Wales. Where the application is for a grant of letters of administration, not a grant of probate, the administrator must reside within New South Wales.

3. What happens when the executor is not capable of applying for probate (for example, due to ill health)?

If the executor is not the sole beneficiary, one of the beneficiaries should apply for *administration with will annexed*. If the executor is also the sole beneficiary, the application is usually brought by the executor's next of kin. These grants may be subject to limitations or conditions imposed by the Court.

4. What documents do I need for probate and where do I get them?

The forms that are required to apply for a straightforward grant of probate may be downloaded from the Internet* or purchased from most legal stationery suppliers whose addresses can be found in the Yellow Pages directory. Forms may be purchased either individually or as a set. The forms usually required for an ordinary probate application are forms 90, 91, 95 (if applicable), 96 and 97*. A set of forms currently costs less than \$10.00. Completed forms may be either typed or legibly handwritten. Only original documents are accepted (no photocopies or extract certificates). Prior to filing the application it is important that you check the completed documents to ensure that all the relevant information is included and that there are no omissions or errors. This can go a long way toward ensuring that your application is in order and is granted in the least time possible. At present, applications that are in order are granted within 2 working days of filing and the probate parchment is issued within a further 3 working days.

5. How do I stop probate from being granted ?

The Supreme Court Rules provide for the filing of a caveat to prevent the granting of probate. A caveat remains in force for 6 months from the date on which it is filed. A caveat may be struck out by the Court if it is filed by a person who has no proper reason to file it. A letter or telephone call is not recognised as a means of preventing a grant from being made once the application is in order. Form 114 shows how a caveat can be set out.

6. What assets have to be disclosed in the inventory ?

Generally, only the New South Wales assets have to be disclosed. Assets which do not form part of the estate, such as joint tenancies and assets outside the State, do not have to be disclosed but should be *noted* in the inventory of property.

7. Are valuations of assets required?

The Court does not require formal valuations, but nevertheless a realistic estimate of value should be made by the executor. For other purposes, such as taxation, it may be necessary to have assets formally valued.

8. Can the executor's attorney swear affidavits in an application for probate?

No. The affidavit must be by the person making the application for probate.

9. Who can witness an affidavit in New South Wales and outside the State?

Within New South Wales affidavits must be sworn before a justice of the peace or solicitor. Outside New South Wales, affidavits must be sworn before a notary public, a person having authority to administer an oath in that country or place, or a British or Australian Consular Officer.

10. Can an affidavit have more than one deponent and can deponents swear it separately?

There may be multiple deponents to an affidavit and they may swear the affidavit on separate occasions or at different places. To see how an affidavit is set out, refer to Form 49*.

11. Is the filing fee based on the gross or net value of the estate?

The Supreme Court (Fees and Percentages) Regulation* provides that the filing fee is based on the gross value of the estate as sworn in the application for probate. These fees are set by Parliament and are regularly reviewed and subject to change.

12. Can I have access to the Court file?

After a grant is made, the will becomes a document of public record and a copy is available to any person upon request and payment of the appropriate fee. Access to the file is available to the executor or administrator, a beneficiary, a party to a related proceeding, his or her legal advisor and any person with sufficient reason *authorised by the Registrar*. The request is made by way of a letter or by completing a request form available from the Registry and providing suitable means of identification.

13. Can certificates be returned after grant?

Certificates that are annexed to an affidavit form part of the permanent record of the Court and are not usually released. A discretion may be exercised in appropriate cases such as where the certificate is from overseas and not readily replaceable. The death certificate is not released as it is fundamental to the grant. The original will is never released as section 30 of the Wills, Probate and Administration Act 1898* requires the Court to retain custody of it.

14. Who is able to swear the affidavit negating de facto relationship?

This affidavit must be sworn by a person who can establish personal knowledge of the deceased and his or her living circumstances. It is not sufficient to be merely a relative. To see how this affidavit is set out, see form 98A*.

15. Why do I need an administration bond?

An administration bond is required to protect the interest of any minor (child) or other incapable beneficiary. It means that the administrator and/or sureties will pay a nominated amount if there is default in the administration of the estate. The sureties to the bond may be an approved guarantee company or private persons (see below). The bond may be dispensed with or its amount reduced by the Court in certain circumstances.

16. Who can be a surety to an administration bond?

A surety may be any person within New South Wales who is independent of the administrator and can show that he or she has worthwhile assets that cover the amount required in the administration bond.

17. Can the executor resign after obtaining probate?

A person may resign or retire from being an executor if he or she appoints the Public Trustee or a trustee company in his or her place. Otherwise an executor is generally not allowed to resign or retire as executor. If the executor is just holding the assets as a trustee, he or she may retire (as trustee) and appoint a new trustee.

18. Do I need to advertise before distributing the estate?

Not necessarily, but an executor/administrator may in certain circumstances obtain a personal protection from any liability from claims of which he or she has no knowledge if a proper notice has been published. If an executor or administrator decides to advertise, the notice should be in the terms shown in form 121* and, if the deceased was a resident of New South Wales, published in a newspaper circulating in the district where the deceased resided.

19. What are probate "accounts" and do I need to lodge them?

Every person who is administering an estate is under a duty to account to the beneficiaries but whether formal accounts are required to be filed in Court depends on whether the estate comes within the categories set out in section 85 of the Wills, Probate and Administration Act 1898*.

20. What do I do when a later will is found after probate has been granted?

You must first make an application to the Court to revoke the grant and, second, also make a fresh application for probate of the later will. Even though they are separate applications the Court will deal with them simultaneously.

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