

# Deceased Estates

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## **What is a Deceased Estate?**

A deceased estate comprises all of a deceased person's assets such as their possessions and property including debts left by the deceased on their death. It also includes the deceased's rights and obligations with respect to those assets and debts. In brief, the estate consists of everything a person owns or has an interest in, and their liabilities on their death.

## **Probate**

Probate is the process that proves that the Will of a deceased is valid and confirms that the executor(s) appointed under the Will has or have power to administer the Will. When a person dies, the executor(s) of the Will must often apply to the court for a Grant of Probate. By granting Probate, the court recognises and approves the executor(s) named in the Will. This gives the executor(s) proper authority to deal with the deceased's estate.

## **Letters of Administration**

When a person dies without a Will or if the executor(s) named in the Will have or has died, it may be necessary that, before the estate can be distributed, a family member, such as a spouse or de facto partner applies for Letters of Administration. By granting Letters of Administration, the court appoints the applicant as administrator of the estate. The court will only do so if the court is of the view that the applicant is a "fit" person.

## **Administration**

Administration is the management of the estate of a deceased person. If the deceased left a Will, the estate is usually administered by the executor named in the Will. If any trusts are established under the Will, these are usually administered by the trustee or trustees named in the Will. If the deceased did not leave a Will or did not appoint an executor under their Will then generally the administration of the estate, either in accordance with the laws of intestacy or in accordance with the deceased's Will, is carried out by the administrator appointed by the court.

## **Inheritance Disputes**

Many members of a person's extended family and other people who were "dependent" in a very wide sense or in a "domestic relationship" or a "close personal relationship" with the deceased are "eligible persons" who may have a claim on a person's estate. Such a claim is generally made by way of an application called a "family provision claim" against the deceased's estate under the *Succession Act 2006* (NSW). Generally, people making a family provision claim must establish their own need as well as the inadequacy of any provision made for them in the Will or the failure to make provision for them in the Will.

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## **Frequently Asked Questions**

### **1. How is Probate Obtained?**

Probate is usually obtained by the solicitor for the executor(s) by providing the following documents, among others, to the Supreme Court:

- 1.1. Summons - a request that Probate of the Will be granted to the executor;
- 1.2. Affidavit of Executor - this document is usually quite lengthy and involved. The Affidavit contains detailed information regarding the estate including a complete list of assets and liabilities of the deceased and attaches a copy of the Death Certificate; and
- 1.3. the original Will.

If the court is satisfied with the application, Probate will be issued.

### **2. What Effect does Probate have?**

The Probate document itself confirms that the executor is allowed to deal with the deceased's assets. A Grant of Probate will be necessary when dealing with banks, public companies, land title registries in relation to real property and the like).

### **3. Why Obtain Probate?**

Most financial institutions and share registries require a certified copy of the Probate before they release funds or transfer ownership of shares. In most cases, the executor cannot deal with the deceased's property without first obtaining Probate. Moreover, no transfer or disposition of real property or an interest in real property under a Will can be registered without producing a Grant of Probate to the relevant registry.

### **4. What is an Administrator?**

An administrator is a person appointed by the court to administer an estate which does not have an executor. This is most often the case where the deceased did not leave a Will and died intestate. An administrator will also be appointed if the executor appointed in the Will has died or does not accept (renounces) the appointment.

### **5. What is Intestacy?**

An intestacy arises when a person dies and has not left a valid Will or has failed to dispose entirely of his or her property under their Will (partial intestacy).

### **6. What Happens on Intestacy?**

If a person dies intestate or partially intestate, the assets in the estate or the portion of the estate subject to the intestacy must be disposed of in accordance with the statutory order under the relevant State inheritance and succession legislation.

### **7. What are the Relevant Factors in a Family Provision Claim?**

In inheritance disputes made by way of a claim under the *Succession Act 2006* (NSW), and provided the applicant is an "eligible person" to make a claim, the court firstly considers the "needs" of the applicant in order to determine whether the applicant should be entitled to pursue their claim. If the applicant can demonstrate "need" then the Court has regard to the assets in the estate as well as

what the testator did or did not do in relation to his property before death. The court can also take "notional" estate (which was no longer owned by the deceased at their death) into account. The court can decide that the estate should be distributed differently from the manner stated in the Will. Some consideration must therefore be given to family histories and relationships as well as to the consequences of things which have occurred before death or would occur under the Will. However, the court is mostly concerned to know the financial position of all the parties involved and their respective needs. For further information about family provision claims see "Is there a Statutory Share Under Australian Law" (<http://www.schweizer.com.au/articles/00112655.pdf>).

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