

# Wills, probate and letters of administration

This information contains a summary of the law and is correct at the date of publication. It is not legal advice. You should always seek legal advice about your individual situation.

## What are wills, probate and letters of administration?

All of these words have a special meaning in law. Some you will know and some you might not.

*Probate and letters of administration* are documents issued by the Court which are the official evidence of the executor's or administrator's authority to deal with the deceased person's property. Banks and other financial institutions, Landgate, and share registries may refuse to allow any dealings in relation to a deceased person's property until the Court has made a grant.

Below are the meanings for these words and some others which might be useful when someone dies.

### Will

A will is a legal document setting out who gets part or all of a person's property when they die. Your property is called your "estate". A badly written will can lead to delays and disputes. It is best to use a lawyer if you can, rather than writing your own will.

### Executor

An executor is the person named in a will to carry out the wishes of a person after they die. They organise to collect the assets of the deceased, pay the debts and distribute the property as set out in the deceased's will. If the will sets out the deceased's wishes on funeral arrangements or organ donation, the executor needs to make the necessary arrangements.

### Intestate

When a person dies without leaving a will, they are said to have died "**intestate**". Intestacy also occurs when a deceased person has left a will that only deals with part of their estate.

### Probate

Probate is the process of proving and registering the last Will of a deceased person in the Supreme Court. When a person dies, somebody has to deal with their estate. It is usually the executor of their Will who administers the estate and handles the disposal of their assets and debts. In order to get authority to do this, they usually need to obtain a legal document called a 'Grant of Probate'.

### Letters of administration

If a person dies without a will, the spouse, de facto partner or next of kin should apply to the Probate Office of the Supreme Court for letters of administration. **This does not apply to small estates below \$10 000 where the process might be simpler (see further information below)**. If the application is successful, the court grants 'letters of administration' to someone who then has the authority to deal with the estate. This person will have the task of finalising the

deceased's affairs. The application is quite complicated and may require a lawyer.

## When someone dies

The first thing you must work out in relation to their legal affairs is whether the person who died had a will. If a person dies without a will, the law sets out how their property will be shared out after all the debts have been paid. Without a will, it can be hard to work out who should apply for permission to deal with the deceased's estate.

## If the person had a will

If the person who dies had a will then you should read the will to see who is named as the 'executor'. It is the job of the executor to make sure that the estate of the deceased person is handled properly. It can be a difficult and complicated task and sometimes you might need legal advice.

If the will includes instructions about funeral arrangements or organ donation, the executor needs to make the necessary arrangements. The executor should try to keep in mind the wishes, if any, of the deceased person, what the estate is and how much it is worth.

If the estate does not have enough assets to cover the funeral costs, the surviving members of the deceased's family who authorised the funeral arrangements will be responsible for the costs.

The executor must:

1. Notify all beneficiaries named in the will.
2. Manage the property or goods left in the will to:
  - i. take care of any business interests
  - ii. safeguard any income
  - iii. invest money not needed immediately
  - iv. collect any valuables
  - v. insure all property.
3. Value the estate and keep a list of the valuations. The estate includes all:
  - i. cash
  - ii. business interests
  - iii. personal effects
  - iv. securities
  - v. real estate
  - vi. sale of property
  - vii. debts due
  - viii. debts owing.
4. Complete income tax returns and get a clearance from the Australian Tax Office.
5. Obtain authority to administer the estate:
  - i. Apply for a grant of probate or letters of administration if necessary.
6. Pay all debts owing, including selling assets, if necessary, to pay any liabilities.
7. Establish trusts.
8. Divide the estate:
  - i. Prepare statements for each of the beneficiaries.
  - ii. Distribute cash and or assets to beneficiaries according to the provisions in the will.

If the deceased had bank accounts, shares, real estate or other such assets in their name or was a "tenant in common" in real estate with another party, you may need to apply for a grant of probate in order to finalise the estate.

## Grant of probate

A grant of probate is permission from the Supreme Court of WA for an executor to carry out the terms of a deceased's will. You may or may not require a grant of probate.

### **You may require a grant of probate as executor if:**

1. The deceased had assets at the date of death such as bank accounts, shares or real estate solely in his or her name.
2. The deceased owned real estate at the date of death as tenants in common with another party.

### **You may not require a grant of probate if;**

- The deceased owned real estate at the date of death as a joint tenant with another person such as a spouse or partner. In this case the title can be transferred to the surviving party without a grant of probate being required. Forms are available from [Landgate](#) for this purpose.
- The deceased's bank account was jointly held with another person such as a spouse or partner. Such bank accounts will normally be transferred to the surviving party on production of a death certificate to the bank by the surviving party.
- The deceased's only other assets were personal possessions.
- The only property left by the deceased (other than items of personal property) is a car or a motor bike. Please contact the Department of Transport to clarify whether a grant of probate is required to transfer a vehicle licence.

If you are unsure of how the deceased's assets were held, you should first enquire with those institutions (banks etc) most likely to be holding those assets. If there are assets solely in the name of the deceased, the institution will usually advise you whether they require a grant of probate to release those assets.

*You should see a lawyer if you are still unsure of how the deceased's assets were held and as to whether you require a grant of probate.*

To get a grant of probate, you must satisfy the court that the will is valid. You must show that:

- there are no later wills
- the deceased was 18 or over when the will was signed
- the deceased was of sound mind and was not under undue influence when the will was signed
- the will was signed in the way the law requires.

No application can be made until 14 days after the death of the deceased. If there is more than one executor, any one or all of them can apply.

Where there is only a small amount of property involved, it may not be necessary to seek a grant of probate. This will depend on the type of property involved.

You should read the probate FAQs on the Supreme Court website before you apply. As executor you may apply in person or get a lawyer to do the work. You can make a probate application online at the [Supreme Court](#) website and then download the forms, or buy the forms from a Citizens Advice Bureau office. Read these forms carefully and complete them according to the instructions.

### **Which documents do I need to file the application?**

The documents to file with your standard application for probate are:

- a motion for probate
- an affidavit from you, the applicant
- a statement of the deceased's assets and liabilities
- the original will
- the deceased's death certificate – the original and a copy and
- the filing fee.

Important note: You have to be very careful in how you deal with the original will. Don't:

- remove any staples or bindings in the original will, even if you need to photocopy it
- staple, pin, or paper clip anything to the original when preparing your application
- write on or make any marking in the original or
- fold the original.

### **What should I do if I can't find the current address of a witness to the will?**

You must provide the current residential addresses of the witnesses to the will. If you can't find a witness' current address, you should explain in your affidavit the attempts you made to find it. These could include searching the phone book and state electoral roll and contacting solicitors' offices or other institutions where the deceased signed the will. If the witness was a lawyer, then their current legal practice address can be given as their current address, but this is the only exception.

## Letters of administration

There are two situations when you might need to apply for letters of administration;

1. If a person dies without a will, the spouse, de facto partner or next of kin should apply to the Probate Office of the Supreme Court for letters of administration.
2. If there IS a will but the executor is deceased or unable to act, or if no executor was appointed in the will. This type would be called '*Letters of Administration with Will annexed*'.

If the application is successful, the court grants '*Letters of Administration*' or '*Letters of Administration with Will annexed*' to someone who then has the authority to deal with the estate. This person will have the task of finalising the deceased's affairs. The application is quite complicated and may require a lawyer.

If the person had a small estate of less than \$10000 you would usually be interviewed at the office and assisted with making your application for letters of administration. If the value of the assets is small and only includes household items and small sums of money, it may be possible for the spouse, de facto partner or next of kin to distribute the assets without getting letters of administration. In working out the total value of the estate, you do not take into account life insurance policies or the value of land or houses held in joint tenancy (usually with the surviving spouse or de facto partner). Banks and building societies with less than \$6 000 in the deceased's name can release the money to pay funeral expenses and to pay the balance to the surviving spouse, parent or child.

If the estate is larger than \$10 000 then you will need to make an application for letters of administration.

### **Who makes the application?**

Someone entitled to benefit from the deceased person's estate applies for letters of administration. This is usually the deceased's spouse or child; or if they didn't have a spouse or

child, their parent or sibling. If none of these people exist, another extended family member can apply.

### **What are letters of consent?**

Sometimes there is more than one person who is entitled to apply for letters of administration or letters of administration with will annexed. In this case, all of those people who are entitled to make the application, but aren't applying, must each provide letters of consent.

### **What are sureties or guarantees or a Section 17A Deed?**

If there is a beneficiary who is a minor (under 18), then the applicant must get two people to guarantee that they (the sureties or guarantors) will make good any financial loss that minor beneficiary might suffer from the applicant's actions. This is to make sure the minor beneficiary's interest is protected.

### **What documents do I have to file with my application for letters of administration?**

The documents to file with your letters of administration application are:

- a motion for letters of administration
- an affidavit (a written and sworn statement that can be used as evidence in court) from you, the applicant, with a statement of the deceased's assets and liabilities (what they owned and owed)
- letters of consent (if any) from all other people entitled to benefit from the estate who aren't applying
- any sureties, guarantees, or Section 17A Deeds (if required)
- the deceased's death certificate – the original and a copy and
- the filing fee.

### **What documents do I have to file with my application for letters of administration with will annexed?**

The documents to file with your letters of administration with will annexed application are:

- a motion for letters of administration with will annexed
- an affidavit from you, the applicant, with a statement of the deceased's assets and liabilities
- letters of consent (if any) from all other people entitled to benefit from the estate who aren't applying
- any sureties, guarantees, or Section 17A Deeds (if required)
- the original marked will
- an Affidavit of Due Execution from a witness (if required)
- the deceased's death certificate – the original and a copy and
- the filing fee.

### **What is "marking" a will?**

You and your witness have to sign the original will, referred to as "marking" the will. Your signatures shouldn't obscure the will's content – it's advisable you sign on the cover or back of the will.

## I need more help

**If you would like some legal advice specific to your circumstances, please make an appointment at the Fremantle Community Legal Centre on 08 9432 9790.**

**We are located at:**

Shop 11, Queensgate Building, 10 William Street, Fremantle  
08 9432 9790 (9.00 am- 4.00 pm weekdays)

**You might also find the following services useful:**

**Legal Aid WA**

Telephone infoline: 1300 650 579

(General enquiries) Infoline open Monday to Friday 8.30 am to 4.30 pm (Australian Western Standard Time) except public holidays

Translating and Interpreting Service 131 450

National Relay Service (for hearing and speech impaired) 133 677

[www.legalaid.wa.gov.au](http://www.legalaid.wa.gov.au)

**Supreme Court of WA - Probate section**

Stirling Gardens, Barrack Street

Perth, 6000

08 9421-5333

[www.supremecourt.wa.gov.au](http://www.supremecourt.wa.gov.au)

**Alternative formats available on request**

