COUTTS
LAWYERS & CONVEYANCERS

COUTTS GUIDE TO Deceased Estates

Contents

YOUR DECEASED ESTATE Experts

The Wills & Estates Lawyers at Coutts are proud to offer clients more than just a Will.

The Coutts Probate Lawyers handle all Probate matters with professionalism and sensitivity.

Probate, the legal process of verifying a will, is a critical step in estate administration.

Our Probate Lawyers provide comprehensive legal services to guide executors through this process, from filing the appropriate documents with the court to managing the distribution of the estate in accordance with the deceased's Will.

Kaisha Gambell
Senior Associate

VALID WILL = Probate

When a person dies with a Will, the person responsible for managing and administering the estate is the “executor” appointed in the Will. In certain circumstances an executor under the Will, may need to apply to the Supreme Court for a “Grant of Probate”.

Probate is the process by which a Will is proved to be valid so that the property of the deceased person can be distributed to the beneficiaries in accordance with the Will. The Grant of Probate is a document certifying that the Supreme Court recognises that the Will is valid and gives the executor authority to deal with the estate.

How long will it take to obtain Probate?

An application for obtaining Probate should be filed with the Supreme Court of New South Wales within six (6) months from the date of death.

The administration of the estate should be finalised and distributed to the beneficiaries within twelve (12) months from the date of death. However, it is common for these matters to take a number of years due to their complexity and the burden of proving eligibility to apply.

Administration of Deceased Estates

After Probate has been obtained, we notify the beneficiaries of their entitlements under the Will, assist the executor to collect assets of the estate, pay any debts or expenses, deal with the sale or transfer of any properties or other assets, prepare final accounts and finally distribute the estate to the beneficiaries in the Will.

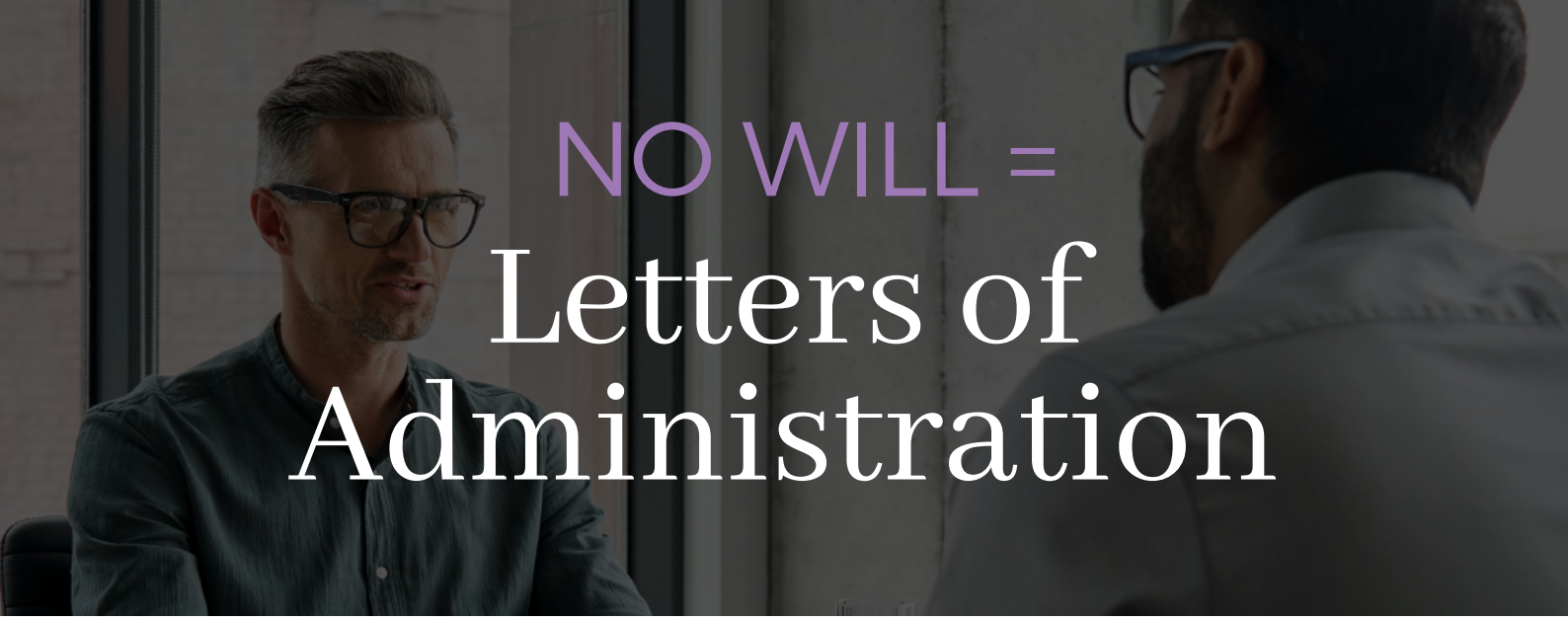
The time frame for administration of the estate will vary from estate to estate, but in a small to medium sized estate the estimated timeframe is generally between three (3) to four (4) months for most of the administration to take place. This is dependent on the particular circumstances of the matter and, if there are no complications or issues that arise.

Fees

You will only be required to pay us an upfront initial appointment fee and any applicable filling fee to the Supreme Court of New South Wales.

The balance of the legal costs incurred may be paid by the estate assets at the finalisation of the matter.

You may also be reimbursed from the estate assets for any estate expenses you have incurred personally.



NO WILL = Letters of Administration

When a person dies without a Will, the person responsible for managing and administering the estate is called the “administrator”. In certain circumstances an administrator, will need to apply to the Supreme Court of NSW for a “Grant of Letters of Administration”.

If your loved one passes away without a Will, they are deemed to have passed away ‘intestate’. The estate is then distributed in accordance with the “laws of intestacy” in place as at the date of death.

These rules operate without any regard to what their wishes were. The applicant and beneficiaries of the estate of your loved one depend on whether they were married, in a de facto relationship or had children at the date of their passing.

This is not an automatic entitlement, and the applicant and beneficiaries will need to prove they are entitled to receive the estate. This process is called Letters of Administration and may be required in order to allow the property of the deceased to be distributed to the beneficiaries in accordance with the law of intestacy. Similar, to Probate, the Grant of Letters of Administration is a document certifying that the Supreme Court recognises the applicant as being the person most entitled to receiving the estate of the deceased person and gives the administrator authority to deal with the estate.

The application for Letters of Administration would include:

1. Original documentation such as a marriage certificate and birth certificate (including any relevant translation), to show the Court that the applicant meets the criteria to apply as the administrator of the estate.
2. Additional affidavits in regards to the living arrangements of the deceased;
3. Proving that the deceased either did or did not have a de facto spouse; and
4. Attending to extensive searches to locate a possible Will.

All of these things may cause more heartache, prove more costly and time consuming than if a Will had been left by the deceased.

Who is entitled to apply for a Grant of Letters of Administration?

The people who are entitled to the estate under the laws of intestacy are also the people who are entitled to become the applicants for a Grant of Letters of Administration and become the "Administrators" of the estate.

Under the laws of intestacy, there is a statutory order of relatives created by the law to achieve a "blanket solution" to what the person who passed away without the Will might have done in their lifetime.

You must exhaust every relative who fits within the category before moving on to the next category. Once an eligible relative is found, the process stops, and that person or people become the applicant. If there is more than one person in a category, then these people are all entitled to become the administrators and equal beneficiaries of the estate.

The statutory order is as follows:

1. Spouse of the deceased (including a married or de-facto spouse, same-sex relationships or multiple spouses).
2. Current spouse of the deceased and any child(ren) from a previous relationship of the deceased.
3. Children of the deceased (including biological and formally adopted children but not stepchildren).
4. Parents of the deceased.
5. Full and half-blood brothers and sisters of the deceased.
   i. If a sibling has predeceased the deceased, then their share goes to any children they have (the nieces and/or nephews of the deceased).
6. Grandparents of the deceased.
7. Full and half-blood Aunts and Uncles of the deceased.
8. First cousins of the deceased.
9. The NSW Government.

What are the timeframes for a Grant of Letters of Administration?

An application for Grant of Letters of Administration should be filed with the Supreme Court of New South Wales within six (6) months from the date of death.

The administration of the estate should be finalised and distributed to the beneficiaries within twelve (12) months from the date of death. However, it is common for these matters to take a number of years due to their complexity and the burden of proving eligibility to apply.

How can Coutts help?

This process may prove difficult or burdensome to the next-of-kin while grieving especially if there are multiple persons entitled to inherit under the relevant laws. We assist the applicant by providing first stages of advice at the initial appointment, proving entitlement to apply, preparing the Letters of Administration application for the Supreme Court of New South Wales, liaising with asset holders and creditors of the estate, preparing final accounts and finally

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SUPERANNUATION & Life Insurance

Superannuation is a compulsory payment made by an employer on behalf of an employee or a voluntary contribution made by you towards your future retirement. This money is set aside in a superannuation fund so that upon ceasing employment, the person will have enough money for a comfortable lifestyle.

Upon somebody's death, superannuation funds can often contain thousands of dollars, especially if the deceased was still working at the time of their passing.

You may or may not be aware that your superannuation does not automatically form part of your Will! This is because your Will only covers assets that you personally own (such as your car, your house and your bank accounts). Whilst it is in an accumulation or pension phase, your superannuation is a sum of money that is held for you in a trust, managed by your superannuation fund and governed by superannuation laws.

Due to the superannuation laws governing how your superannuation is dealt with, this means you will be required to ensure your superannuation beneficiary nomination is up to date from time to time. The reason for doing this is because after your death, the trustee of your superannuation fund will have discretion in deciding who to pay the balance of your superannuation death benefit to if you have not nominated a beneficiary. In exercising this discretion, the trustee will collect information about your particular circumstances and details of all persons who are or could be considered your 'dependent'.

You are able to limit or remove the trustee's discretion by nominating one or more beneficiaries to receive your superannuation when you pass away.

To nominate your beneficiaries, you must complete a superannuation form called a "Binding (or Non-Binding) Death Benefit Nomination". Different superannuation funds may offer different types of death benefit nominations depending on their governing rules, but it is common for each of them to offer either or both of a non-binding death benefit nomination and a binding death benefit nomination.

Binding vs non-binding beneficiaries

Binding beneficiaries are legally entitled to receive your Superannuation death benefit and the trustee is bound to follow the nomination (provided it is valid).

Alternatively, a non-binding beneficiary is not legally binding and is regarded as a suggestion to the trustee of the superannuation fund of who should be considered to receive your death benefit.

For a binding death benefit nomination to be considered valid, it must nominate one or more eligible person(s), in either equal or unequal proportions, and the total amount of the proportions must be in round numbers (for example: 25% not 25.3%) and equal 100%.

A non-binding nomination is also a written direction to the trustee to pay your superannuation death benefit to one or more of your eligible persons. However, the trustee is not bound to follow the direction you give regarding your preferred beneficiaries but will take your preference into account in determining the best method of distributing the funds after your death.

Who is eligible to receive the Death Benefit?

The people entitled to receive the death benefit are knows as "dependents' and includes:

1. Your spouse (including a married or de-facto spouse and same sex relationship);
2. Your children (including step, adopted and ex-nuptial children);
3. Any person(s) financially dependent on you;
4. A person in an interdependent relationship with you; or
5. Your legal personal representative. This directs your death benefit to form part of your estate. The superannuation is then distributed by the executor in accordance with the terms of your Will, if you have one, or by the administrator pursuant to the rules of intestacy, if you don't have a Will.

How do I ensure my Death Benefit is binding?

The nomination will only bind the trustee where it complies with the following formal requirements:

1. It is in writing;
2. It states the proportion of the benefit payable to each nominated beneficiary (if more than one) and the total is equal to 100%;
3. It is signed by the deceased in the presence of two (2) witnesses who are over the age of 18 and who are not the persons nominated to receive a benefit; and
4. It is signed and dated by the witnesses.

In some cases, a binding death benefit nomination will lapse after three (3) years. It is important to review your nomination on a regular basis to check if it is up to date, or to amend the persons nominated should your circumstances change.

What About Self-Managed Superannuation Funds?

If you have a self-managed superannuation fund (SMSF), someone will need to take your place as trustee after your death. This person is usually nominated in your SMSF Trust Deed, or may even be the executor/administrator of your estate. The person who steps in as trustee will then be bound by

WILL Disputes

If you have not been included in a Will or have not received an equal share to others in the Will, you may be able to make a claim against the Will, either on the basis that the Will is invalid or that you have not been left adequate provision in the Will.

This will depend on many factors including the nature of your relationship with the testator (The person who made the Will), the testator's state of mind at the time the Will was created and whether any fraud was involved in the drafting of the Will.

There are two types of Will disputes:

1. Contested Proceedings: You believe the Will is invalid due to incapacity of the testator at the time of writing the Will, fraud or duress (pressure or influence by someone on the testator).
2. Family Provision Claims: The Will is valid however, you feel you have not been left adequate provision and you have an identifiable need for further provision, as a result of

Book an appointment

Schedule a FREE, no-obligation case review to receive professional legal advice in relation to your Will dispute. Call Coutts on 1300 268 887.

Pay at end arrangements

Coutts offers a "pay at end arrangement" policy for eligible clients going through the Will disputes process. This means you won't be required to pay the legal fees of your Will dispute until your claim is finalised.

*Interest fees apply

FAMILY PROVISION Claims

We understand that there are some difficult situations that come with the passing of a loved one and there are times that people may feel as if they have been inadequately provided for in the Will, or completely left out of the Will of a deceased person.

Whilst a person has the freedom to make a Will and give the property and other assets of their estate to whomever they wish, this freedom is subject to the rights given to certain people under Part 3 of the Succession Act 2006 in New South Wales. These rights exist to ensure that adequate provision is provided to the eligible family members or significant people in the deceased person's life.

If you were left out of the Will or left without adequate provision, you must first establish that you are an eligible person and demonstrate to the Supreme Court of New South Wales that there is some reason or need for you to receive a benefit from the estate. The Court will review your financial situation and personal circumstances if need is established and can alter the terms of the Will.

As an eligible person, there is a moral obligation on the deceased to provide for your maintenance, education and advancement in life. What has to be established is that given your financial situation and position in life, the deceased should have provided you with adequate provision to meet your personal and financial needs.

In order to make a family provision claim, you must satisfy the following 3 tests:

1. Be an "eligible person" under the relevant laws;
2. Have been left out of the Will entirely or demonstrate the benefit you have received is not adequate for your needs; and
3. Show the Court that you have a need for further provision (i.e. a further benefit) from the estate.

Who can make a Family Provision Claim?

A family provision claim can only be made by an "eligible person" under section 57 of the *Succession Act 2006* (NSW).

The following are "eligible persons":

1. A husband or wife of the deceased person;
2. A de-facto partner of the deceased person;
3. A former husband or wife of the deceased person;
4. A child of the deceased person (including adopted and biological);
5. A person who at any time, was wholly or partially dependent on the deceased person and who was either a grandchild or member of the household that the deceased person lived; or
6. A person with whom the deceased person lived with in a close personal relationship.

If the eligible person is under the age of 18 years, then the family provision claim may be made by someone else on their behalf.

There are some cases when a deceased person, makes a promise prior to their death, that in return for a service such as care in old age or some other form of maintenance, a particular reward or item or monetary sum will be left to you. For example:

1. When you have lived with the deceased and provided them care;
2. You and the deceased cared for other;
3. You were dependent on the deceased either wholly or partly in their lifetime;
4. You were a member of the deceased person's household;
5. You may be a person with whom the deceased was living in a close personal relationship.

In such circumstances you may be eligible to make a family provision claim. In the alternative, there may be some rarer occasions where a Court might consider you to be a creditor or that the estate holds some item or benefit on trust for you. Consideration in such circumstances must be the subject of a detailed case assessment by us.

How long do you have to make a Family Provision Claim?

You must commence a family provision claim with the Supreme Court of New South Wales within twelve (12) months of the date of death of the deceased person.

The Court may give an eligible person permission to apply if this time has lapsed in very special circumstances, but it is important that you seek professional legal advice and make your claim within the strict time period.

What will the Court consider in a Family Provision Claim?

There are no hard and fast rules about how a family provision claim will be finalised, how long the claim will take or what decision the Court will make because each and every estate has its own unique facts and circumstances.

In every family provision claim, the Court will consider evidence about:

1. The relationship of the applicant to the deceased person;
2. The nature and extent of the estate assets;
3. The nature and extent of any obligations owed by the deceased person to the applicant;

4. The financial circumstances of the applicant;
5. The financial circumstances of anyone else that the applicant is living with;
6. Any physical, intellectual or mental disability of the applicant;
7. The applicant's age;
8. Any contribution by the applicant to the deceased person's estate;
9. Any contribution by the applicant to the deceased person's welfare;
10. Whether the deceased person made any provision for the applicant during their lifetime;
11. Any evidence of testamentary intentions of the deceased person (in their will, any earlier will or verbal statements they may have made);
12. The character and conduct of the applicant and any other relevant person;
13. Any relevant Aboriginal or Torres Strait Islander customary law; and
14. Any other matter the Court considers to be relevant.

What is the process of making a Family Provision Claim?

1. The first step is to file the application in the Supreme Court of NSW, together with a detailed affidavit addressing all the things the Court will consider listed above.
2. The matter is then listed for a compulsory mediation.
3. If the matter is not successfully resolved at a mediation, then the matter will be listed for a Court hearing at a later date.

CONTEST THE Will

Disputes about the validity of Wills or entitlements under Wills arise in a number of circumstances.

On some occasions, disappointed beneficiaries (or other persons including the executor named in the Will) approach the Court in respect of the validity of the Will. The circumstances might include:

- Where there are two Wills made close together
- Where this is a doubt about whether the testator has actually executed the Will
- Where there is a degree of doubt about whether the testator had the mental capacity to make the Will which is subject of the dispute

How do I challenge or contest a Will?

If you decide you wish to challenge or contest the validity of a Will because you believe the Will is fraudulent, or undue influence was used on the testator when the Will was drafted, you should contact us for a consultation as soon as possible as time limits to your claim may apply.

During the consultation, we will request information from you such as your relationship with the deceased, the circumstances surrounding the drafting of the Will in question, the contents of the Will, and why you consider the Will to be invalid. We may also ask for additional documentation from you to assist in assessing the type and merits of your claim.

Book an appointment

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*Interest fees apply

DEFENDING the Will

If you have been named the executor of a Will, you have certain responsibilities, including defending any challenges made to the Will by other people.

You should be aware of the different types of challenges that can be made for a Will, including challenges to the validity of the Will and Family Provisions Claims.

Executor Duties

As the executor in a Will, you have certain duties to defend the estate or attempt to uphold the terms of the Will where a challenge has been made. There are a number of duties that the executor bares when challenges to a Will are made which include:

- Providing relevant information on request of the Court;
- Protecting, collecting and gathering the real and personal assets of the deceased estate;
- Paying all estate debts and discharging liabilities;
- Notifying all interested parties, including the beneficiaries named in the Will;
- Providing to the Supreme Court an inventory of the assets comprising the estate;
- Applying for the required Grant of Probate or if applicable, Letters of Administration from the Supreme Court;
- Finalising income tax returns of the deceased Estate; and
- Taking necessary steps to distribute the Estate pursuant to the Will, or any order made by the Court.

Executors should obtain legal advice whenever they are confronted by another person who intends to challenge the Will or make a claim upon the estate of a deceased person.

Fees

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CALL US ON
1300 268 887

"Coutts is a powerful female founded law firm with a core value system that puts people first. Our reputation as the legal business of choice is recognised by our achievements and awards."

Adriana Care
Managing Partner

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