



ADLV LAW
FIERCELY ON YOUR SIDE

SOLUTION BRIEF

Guide to probate in South Australia

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If a loved one has passed away, you will need to consider whether someone needs to apply for probate or letters of administration to finalise their estate.

01

How do I finalise the deceased's estate?

What is probate?

'Probate' is the official recognition by the Supreme Court that a Will is legally valid.

A 'grant of probate' is a document which certifies that the Supreme Court recognises that the document presented is the last valid Will of the deceased, and that the executors now have the authority to deal with the estate assets and liabilities.

A grant of probate also acts as further proof of death of the deceased for the purposes of dealing with third parties, e.g. banks, share registries, etc. (without having to also present the formal Death Certificate).

A grant of probate allows the executors of the deceased's Will to collect in the deceased's assets, to pay any debts of the deceased, and then finally to distribute the remaining estate to beneficiaries as directed by the Will.

What are letters of administration?

If the deceased did not leave a Will (or did not make a legally valid Will), their next of kin may need to apply to the Supreme Court for letters of administration, so that they can be appointed as the Administrator of the estate of the deceased. An Administrator under letters of administration performs the same role as the Executor under a grant of probate.

The person (or persons) who can take on the role of Administrator is determined by their relationship to the deceased. The following people can apply to be the Administrator, and in the following order of priority:

1. The deceased's spouse or partner;
2. One or more adult children of the deceased;
3. The deceased's mother and father;

4. One or more siblings of the deceased (i.e. their brothers and sisters);
5. A grandparent of the deceased; or
6. The deceased's uncles and aunts.

Alternatively, one or more of the above listed people may directly nominate themselves as the Administrator. This is usually possible so long as people with a higher priority agree to the nominated person taking on this role by 'renouncing' their priority in the role.

Probate versus letters of administration

The main difference between probate and administration is that under Administration, the Administrator must distribute the assets of the estate (after meeting any debts and liabilities) to the people and in the proportions prescribed by law (as opposed to according to the wishes of the deceased as expressed in a Will).

02

Do I need to apply for probate or letters of administration?

The main reason that probate (or letters of administration) is required is that some organisations that hold the deceased's assets, or maintain registers that record title to such assets, will not release them or record a transfer to the executor or the administrator for distribution to the beneficiaries unless they have first seen the grant of probate or letters of administration from the Supreme Court.

Producing a grant of probate or letters of administration provides these organisations with evidence that the person dealing with the deceased's assets is authorised and legally entitled to do so.

Jointly held property

Probate or letters of administration will not be required for any of the deceased's assets (such as real property bank accounts) that are held as 'joint tenants' with another person, (but not 'tenants in common'). For example, people often hold their family home as joint tenants with their spouse. The deceased's interest in the jointly held asset will automatically pass to the 'surviving joint tenant', without probate being required.

It may be necessary to lodge a 'Notice of Death' with Land Services SA and other various registries to record the passing of the joint interest to the surviving owner. This is usually a relatively simple process, and only requires a copy of the Death Certificate and an appropriate notification.

Low value assets

An estate can also generally avoid probate or letters of administration when the only assets of the deceased are of a low value, such as small share parcels or bank accounts (usually these will need to have a value less than \$20,000).

Each financial institution and share registry has its own low-value 'cap', being the value that the asset must reach before it considers that probate or letters of administration are required to transfer ownership of the asset.

Once again, to transfer low-value assets it is generally necessary to prove that you would be the person administering the estate if probate (or letters of administration) were granted (e.g. a copy of the Will), and that the owner has died (by means of producing the Death Certificate).

The decision process

To decide whether probate or letters of administration are required, the following steps should be taken:

- A list of all assets in the deceased's name (both solely and jointly) should be compiled.
- If all assets are held as joint tenants, there is no need for probate or letters of administration.
- If some assets are held solely or as tenants in common, then each organisation with which those assets are held should be contacted to determine their deceased estate transfer policy. If the value of the assets held with each organisation is under their low value threshold, then probate or letters of administration are not required.
- If any of the assets that are held solely or as tenants in common exceed the particular organisation's low value threshold, then probate or letters of administration will be required before those assets can be transferred to the beneficiary.

03

I need to apply for probate (or letters of administration), what documents do I need?

To prepare an application for probate or letters of administration the following documents will be required:

- The deceased's original Last Will (if the deceased made a Will);
- Death Certificate;
- Records of all assets of the deceased and their value at the time of death, including:
 - Bank statements;
 - Share dividend statements;
 - Superannuation fund statements;
 - Certificate of Title and rates notices of any real property;
 - Registration papers of motor vehicles; and
 - Copies of any relevant agreements whereby the deceased is owed money (loan agreements, mortgages, accommodation bond refunds etc); and
- Records of all debts and other liabilities of the deceased, including:
 - Mortgage statements;
 - Outstanding bills (outstanding as at date of death);
 - Funeral expenses; and
 - Copies of any relevant agreements whereby the deceased owed money to someone else.

The probate (or letters of administration) application is a snapshot in time of the deceased's assets and liabilities as at their date of death. The application should include details of all assets and liabilities at that date, even if assets have been sold or they are not located in South Australia. You

should write to each institution that the deceased held assets or liabilities with to confirm the value of those assets or liabilities as at the deceased's date of death.

04

How do I prepare the probate (or letters of administration) application?

Applications for probate and letters of administration are generally lodged electronically through CourtSA in accordance with the current Supreme Court probate procedures. The online form will set out a series of questions to be answered.

In addition to completing the online application, the original Will needs to be 'marked' and physically deposited at the Probate Registry. The Will must be marked on the reverse side of the last page with the following:

- Signature of the Applicant.
- Signature of the witness who saw the Applicant sign the back of the Will. The witness must be a person authorised in the State to take an oath. They will also need to write their full authority beneath their signature, for example "Bob Smith, A Commissioner for taking Affidavits in the Supreme Court of South Australia" for a lawyer, or "Bob Smith, A Justice of the Peace in and for the State of South Australia and a person duly authorised to administer oaths in that State" for a Justice of the Peace.
- The date it was signed.
- The suburb where the marking occurred.

The marking must not cover any content of the Will.

The Applicant must also have their identity verified. If the Applicant is representing themselves, the person who witnessed their marking on the back of the Will must also complete a Certificate of Identity, which includes certified copies of the Applicant's identity documents.

05

Common problems

There are several common problems in Wills that may need to be dealt with as part of the application:

- Misspellings. If the deceased's name is spelt incorrectly in the Will, the Applicant will need to explain that in the application. If the executor's name is spelt incorrectly, the Applicant may need to also complete an Affidavit of Identity.
- Damage to the Will. This may include tea stains, tears in the paper, missing staples or water damage. This will not necessarily invalidate the Will, but it will need to be explained in an Affidavit of Plight and Condition which sets out what happened to the Will to cause the damage.
- There is doubt about the capacity of the deceased. Where the deceased was elderly when they wrote their Will or their handwriting is unclear, an Affidavit of Due Execution by a witness to the Will may be required.
- Discrepancies in the Will. Where there are different coloured pens or handwriting, an Affidavit of Due Execution by a witness to the Will is required.
- Deceased went by more than one name. It is common for people to be known by more than one name, for example a married name and a maiden name. Both names will need to be included in the application, and an Affidavit as to Alias will be required.

07

Superannuation death benefits

If the deceased had superannuation, the deceased's superannuation entitlements (plus any applicable life insurance held within superannuation) generally convert to death benefits at the time of the deceased's death.

You will need to make enquiries as to who is entitled to receive the death benefits. The actual recipient of the superannuation death benefits will be determined based on whether or not a valid binding nomination was in place at the date of death. It is common for couples to nominate their surviving spouse or partner as the recipient of all the death benefits, or to nominate their estate as the recipient (in which case the death benefits will be dealt with together with the rest of the estate).

If no valid binding nomination is in place, the trustee of the superannuation fund will have discretion to pay to any one or more of the deceased's 'superannuation dependants', or alternatively to the deceased's estate.

You only need to include the deceased's superannuation death benefits on the probate application if the death benefits will be paid to the deceased's estate.

08

Life insurance payouts

Any benefits payable under any life insurance policies on the life of the deceased will generally be paid directly to the nominated beneficiaries of the policies, and therefore will not form part of the deceased's estate. However, if the life insurance is going to be paid to the Estate, it will need to be included on the application as an asset of the Estate.



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TALK TO US

What next?

Our aim is to help you obtain a grant of probate or letters of administration in a compassionate and efficient way, so that you can focus on yourself and the deceased's family and friends during this difficult time. If you would like to speak to someone about applying for probate or letters of administration, call us on 1300 654 590 or email us at wehelp@adlvlaw.com.au.

Further information can also be found on our website at www.adlvlaw.com.au.

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