

# Letters of Administration

*Division 3, Probate & Administration Act (NSW) 1898  
Succession Act (NSW) 2006*

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The Supreme Court will appoint an Administrator when a person with assets in NSW dies without a will, the will cannot be located, it fails to appoint an executor or the named person refuses to act as executor.<sup>1</sup> Every lawyer in NSW should understand the process of seeking Letters of Administration in order to advise and represent their clients effectively. This paper is designed to assist legal practitioners in the state of NSW.

## Who Can Apply?

Letters of Administration will only be granted to a person whom the court finds to be fit.<sup>2</sup> This is usually the next of kin of the deceased but can also be a person whom the court believes will be able to administer the estate in the best interest of the beneficiaries.<sup>3</sup> If there is more than one appropriate person who is eligible to administer the estate, then consent must be obtained by the intended administrator from all the beneficiaries.

## Notice of Intended Application

Before you apply to the Supreme Court for letters of administration, you must first publish a notice on the NSW Online Registry website.<sup>4</sup> This is called a 'Notice of intended application'. After you have published the Notice, you must wait at least 14 days before approaching the Supreme Court for Letters of Administration.

## The Application

The Applicant must file the following documents:

- A Summons for Letters of Administration,
- Two copies of the draft Grant for Letters of Administration,
- An affidavit of the Applicant for Administration,
- Birth and death certificates of beneficiaries,
- An affidavit regarding the married status of the deceased,
- Marriage / Divorce certificates,
- Two copies of an inventory of assets and liabilities,
- The original will, and
- The deceased Death Certificate.

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<sup>1</sup> s74 Probate & Administration Act 1898 (NSW)

<sup>2</sup> s63 Probate & Administration Act 1898 (NSW)

<sup>3</sup> s40 Probate & Administration Act 1898 (NSW); In the Goods of William Loveday [1900] P 154 at 156

<sup>4</sup> <https://onlineregistry.lawlink.nsw.gov.au/content/probate-notices>

# Funeral

The first duty of the Administrator is to ensure the deceased is buried <sup>5</sup> and to pay for the funeral out of the estate funds. The funeral has usually already occurred by the time of the grant, so it is a matter of reimbursing whoever has paid for the funeral.

## Getting in the Estate

It is the Administrator's duty to locate and preserve all the deceased's assets. Identifying the assets is known as 'getting in the estate'. Preserving the estate means making sure that assets continue to earn income and that nothing goes to waste. For example, if a farmer dies with crops in the ground, the Administrator must arrange for them to be harvested. Houses should not be left empty and machinery should not be left idle when they can be earning income for the estate.

Once the assets are identified, the deceased's creditors must be paid and a 'date of death' tax return filed. If anything is left over after the debts have been paid, a Notice of Intention to Distribute must be filed.<sup>6</sup> After six months, the estate may be distributed in accordance with the rules in Chapter 4, Succession Act (NSW) 2006.

## Order of Distribution

The order depends on survivorship.<sup>7</sup> If at the time of death of the deceased, the next of kin survive the deceased by 30 days,<sup>8</sup> then the order of distribution is:

1. Spouse,
2. Children (if no spouse),
3. Grandchildren (if no spouse or children),
4. Parents (if no spouse, children or grandchildren),
5. Siblings (if no spouse, children, grandchildren or parents),
6. Nieces & nephews (if no spouse, children, grandchildren, parents or siblings),
7. Grandparents (if no spouse, children, grandchildren, parents, siblings or nieces & nephews),
8. Uncles & aunts (if no spouse, children, grandchildren, parents, siblings, nieces & nephews or grandparents, and finally,
9. Cousins. It stops here.

It is the duty of the Administrator to do everything to find the next of kin. If they cannot be found, then the estate goes to the State Government. Moreover, failing to find the next of kin could result in the Administrator being liable for the loss suffered by the next of kin.

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<sup>5</sup> Williams v Williams (1882) 20 Ch D 659 at 665 per Kay LJ

<sup>6</sup> ss92 & 93 Probate & Administration Act 1898 (NSW)

<sup>7</sup> ss107 & 108 Succession Act 2006 (NSW)

<sup>8</sup> s35 Succession Act 2006 (NSW)

## Statutory Legacy

If the deceased leaves a spouse (including a de facto <sup>9</sup>) and children from their marriage, the spouse will get the entire estate.<sup>10</sup> If the children of the deceased are not the children of the surviving spouse, then the spouse is entitled to:

- the personal effects of the deceased,<sup>11</sup>
- a statutory legacy of approximately \$ 537,112.17 (as of September 2022) adjusted by the Consumer Price Index,<sup>12</sup> and
- half of everything left over (the remainder of the estate).<sup>13</sup>

The other half of the remainder is distributed to the deceased's children in equal shares.<sup>14</sup>

## Right to Elect

The surviving spouse can also elect to acquire <sup>15</sup> property from an intestate estate. An election can be made if the statutory legacy is not covered by one asset, for example, if the value of a piece of real estate is greater than the statutory legacy, the spouse can elect to take the real estate and pay compensation to the estate to be distributed to the other beneficiaries. <sup>16</sup>

As you can imagine, it is a long and painful process with plenty of scope for disagreement and legal action.

I am available every day if you have any interesting issues.

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<sup>9</sup> s104 Succession Act 2006 (NSW); s21C *Interpretation Act 1987* (NSW)

<sup>10</sup> s112 Succession Act 2006 (NSW)

<sup>11</sup> s101 Succession Act 2006 (NSW)

<sup>12</sup> s106 Succession Act 2006 (NSW) (Statutory legacy = \$350,000.00 x ([CPI](#)/83.8))

<sup>13</sup> s113 Succession Act 2006 (NSW)

<sup>14</sup> s127 Succession Act 2006 (NSW).

<sup>15</sup> ss104 & 105 Succession Act 2006 (NSW)

<sup>16</sup> ss104 & 105 Succession Act 2006 (NSW)