

# Applying for Probate

*Probate & Administration Act*

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Probate is the legal process where the Supreme Court validates a will and grants the executor power to handle the deceased's affairs and then distribute their estate. Every lawyer needs to know how to draft a will and seek probate when the time comes. This paper aims to assist legal practitioners in the state of New South Wales.

## Grant of Probate

Probate is a Latin verb that translates as 'to prove'. When seeking a grant of probate you are seeking to 'prove the will' meaning that it has been validly made and that you are appointed as the executor. For information on drafting a valid will please see my paper ['How to Draft a Will'](#).

Once you become aware that you are the executor, there are several things they must do to get a grant of Probate:

- Arrange and pay for the funeral,
- Locate the original will,
- Obtain the death certificate,
- Seek a grant of probate.

## Funeral

The first duty of the executor is to ensure the deceased is buried <sup>1</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 executor'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 executor 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>2</sup> After six months, the estate may be distributed according to the instructions in the will.

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<sup>1</sup> Williams v Williams (1882) 20 Ch D 659 at 665 per Kay LJ

<sup>2</sup> ss92 & 93 Probate & Administration Act 1898 (NSW)

Where more than six months have elapsed from the death of the deceased, then the executor will not be personally liable if they distribute the estate. However, an executor may be personally liable if they distribute assets without reference to the possibility of future proceedings for a family provision order.

## Family Provisions Act

Finally, even if the Will is validly made, an eligible person<sup>3</sup> can make an application for a family provision order under Chapter 3 Succession Act 2006 (NSW).<sup>4</sup> In New South Wales, testators have a moral duty to make adequate provisions for their dependents and, if they fail to do so, the Supreme Court can intervene and amend the will to make provision for the dependent.<sup>5</sup>

Because of the complexities listed above, the executor should seek advice from a lawyer.

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

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<sup>3</sup> s57 Succession Act 2006 (NSW)

<sup>4</sup> s55 Succession Act 2006 (NSW)

<sup>5</sup> s59 Succession Act 2006 (NSW)