Probate – A Fact Sheet

What is Probate?

Probate is the process that you need to go through when someone has died and left a Will that names you as their executor. It involves making an application that proves that the will-maker is deceased, their Will is valid, and the person who is making the application is the executor. If all that is proven, the Court will grant that person permission to deal with the deceased's estate.

Who makes the application?

The executor named in the Will makes the application. If the named executor has died before the will-maker or is unable or unwilling to act and there is a substitute executor named in the Will, the substitute executor can apply for a grant of Probate. In that case, it will be necessary for the substitute executor to provide the court with a copy of the predeceased executor's death certificate or signed renunciation of Probate from the first-named executor.

Does the executor need to appoint a lawyer to prepare the application for Probate?

No. The Supreme Court of Western Australia has an online Probate application on its website which anyone can use to prepare the required documents. However, many executors find the process complex and the online application is not suitable in some circumstances. Seek legal advice if you need help with the application. We can assist you with this.

When can the application be made?

An application for Probate can be made 14 days after the will-maker's death.

Where does the executor make an application for Probate?

Apply to the Probate Office of the Supreme Court of Western Australia, located on the 11th Floor at 28 Barrack Street, Perth.

I live in a remote area of WA. How do I lodge a Probate application?

If you live more than 30 kilometres from Perth, you can post your application to the Probate Office. You should send the documents by registered post and keep a copy of the documents for your records.

Are there any circumstances when Probate isn't required?

The executor doesn't have to make an application for Probate if the deceased:

- only owned real property (ie land) as a joint tenant with another person – if this applies, you as executor can take all actions necessary to transfer the property to the surviving joint tenant without applying for Probate;
- only owned assets jointly with another person (for example bank accounts or shares) – if this applies, you as executor can negotiate with the bank or share registry for the release of funds/transfer of assets to the beneficiaries in the Will without a grant of Probate. However, be aware that often financial institutions have policies about the release of deceased estate assets which may require a grant of Probate;
- had very few personal possessions;
- had a vehicle as their only personal property – if this applies, contact the Department of Transport to find out

if you can transfer the vehicle licence without applying for Probate.

Note that if the fund in a bank account of the deceased is less than the amount prescribed by section 139 of the *Administration Act 1903* (WA), the bank can pay it to the deceased person's spouse or next of kin without Probate. The prescribed amount varies from time to time.

There are some situations where a Probate application isn't required even though the deceased has bank accounts, or superannuation funds solely in their name. In these cases, it's advisable for you to get legal advice to find out if Probate is needed.

Do I need to apply for Probate if the deceased had assets in another State but none in Western Australia?

In this case you need to apply for Probate in the other State, not in WA. The deceased must have at least one asset in WA for you to apply for Probate here. If the deceased had assets in WA as well as in another Australian State, you can make the application in WA and include the assets located in the other State in that application. The grant then needs to be resealed in the other State.

What if the will-maker has appointed more than one executor in their Will?

If more than one person is named as executor, then generally all of the executors will make the application for a grant of Probate together. If one of the executors has died or does not wish to apply for Probate, then the remaining executors should apply for a grant of Probate. An explanation must be given to the Court as to why only some of the named executors are applying for a grant of Probate.

What if the will-maker has appointed another person and me as executors, but the other person doesn't want to apply for a grant?

Yes, you can apply. The Court can grant Probate to you and the other appointed executor can consent to your application (the other executor can apply in future if there is a need) or renounce their appointment (the other executor may decide not to apply at all and renounce their appointment).

What documents do I need for an application for Probate?

The documents to prepare for your application for Probate are:

- a motion for Probate;
- an affidavit (a written and sworn statement that can be used as evidence in court) from you, the applicant; and
- a statement of the deceased's assets and liabilities (what they owned and owed) at the date of their death.

You will also need to file with the application:

- the original Will. Make sure you keep the Will in the same condition in which you found it;
- the deceased's death certificate – the original and a copy; and
- the Supreme Court filing fee.

You may need other documents as well and it's a good idea to get legal advice about what those might be.

If I want a lawyer's assistance with my application for Probate, what documents and information do I need to show them?

The documents you need to provide for the appointment are:

- the original Will;
- the deceased's death certificate;
- a statement of the deceased's assets and liabilities at the date of their death; and
- the full names and current residential addresses of the Will's witnesses.

If the first executor is dead and you're applying for Probate as the substitute executor, you also need the date of the first executor's death and a copy of their death certificate. You should also inform your lawyer if the deceased married, had an annulment, or divorced after making their Will, because any of these actions may have revoked the Will.

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

You must try to 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 their addresses.

These are the usual searches — white pages, electoral roll, google, social media and Metropolitan Cemetery Board. You could also contact the solicitors' offices or other institutions where the deceased signed the Will.

The only exception is if the lawyer is a witness. You can provide the current business address of the lawyer.

I've completed my application for Probate. What do I do now?

You have to swear that all the information in your affidavit is true and correct, and you and your witness must sign the documents to be filed before either a Justice of the Peace or an experienced lawyer who has held a practice certificate for at least two years. You and your witness must sign at the bottom of each page of the affidavit and the final page where indicated. Both of you must also sign on the cover of the Will or, if that's not possible, somewhere on the Will that doesn't interfere with its content. This is called "marking" the Will.

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Important note: You have to be very careful in how you deal with the original Will. Please do not:

- remove any staples or bindings in the original Will, even if you need to photocopy it;
- staple, pin, or paperclip anything to the original Will when preparing your application;
- write on or make any marking in the original Will (other than marking the Will as stated above); or
- fold the original Will,

as any marks on the original Will will need to be explained satisfactorily to the Court, which can delay or cause problems with the Probate application.

Is there anything I need to do as executor before the grant of Probate has been obtained?

Yes, although you should not deal with the assets of the deceased until a grant is obtained, there are certain things you can and should do beforehand.

As the executor, you have a duty to make sure that the assets of the estate are maintained and preserved, where possible - for example, keeping the assets of the estate in good repair and insured, ensuring bank interest is paid on term deposits before their withdrawal, dealing with perishable items of the estate or animals and farm products that need your immediate attention, and so on.

Make sure you keep receipts for all expenses you incur on behalf of the estate as once the grant of Probate is obtained, you will be reimbursed for any reasonable expenses incurred when administering the estate.

It is also advisable to send a certified copy of the death certificate to notify all the deceased's financial institutions, utility service providers, and local authorities that they have passed away. Once they receive that notification they should cease taking payments from the deceased's account eg mortgage payments or direct debits from the deceased's account. These things become an estate debt.

Refer to our fact sheet on **Duties of an Executor** for further information.

Once I've been granted Probate, what do I do?

Please refer to our fact sheet on **Administering the Estate of the Deceased after a Grant of Probate has been Obtained** for further information.