



WILLS – EXECUTORS & PROBATE

How can I make sure that my wishes are carried out?

You should appoint a person or persons called an **Executor** in your Will to handle your affairs after you die, — it should be someone you trust. An Executor can also be a beneficiary in your Will. The Executor(s) will be responsible for the management and distribution of your estate assets to your beneficiaries.

Duties of an Executor

Anybody can be Executor provided they are over the age of 18 years - your spouse, friend, relative, solicitor, the NSW Trustee and Guardian (*previously known as Public Trustee NSW*), or a private trustee company. Solicitors and companies will of course charge management fees and may take a percentage of your estate as well.

Note: As a general rule, solicitors will no longer take on the role of an Executor, but may be able to give advice / instructions to assist Executors. There are also companies that will help / share in the management of Executors duties, for a cost.

You must seek a person's consent to act as Executor before nominating them, as they may not be prepared to take on the legal responsibility and time consuming duties of an Executor. It is recommended you appoint someone who is competent to deal with your financial, taxation and legal affairs. The duties of an Executor are very involved and may include:

Obtain death certificate; notify Centrelink; arrange and pay for funeral; apply for probate; place notices in newspapers; cancel deliveries; apply for tax file number; secure the deceased's property if unoccupied; keep insured; welfare of any pets; determine what debts and liabilities have to be paid; assemble the assets which will be used to pay debts; work out the order in which assets have to be used to pay debts. (There are laws which tell you which assets to use first.)

All of these responsibilities must be carried out prior to the distribution of net estate to any beneficiaries.

It is advisable to appoint someone younger than yourself, and appoint two or more Executors in case one dies. If there is more than one Executor named in the Will, the forms need to be completed by all Executors. If you appoint only one person as an Executor and this person dies before you, the responsibility will pass down the line, and fall on the person that they have made Executor in their Will. Also if any person is unwilling or unable to act as your Executor, then another person may apply to act as your 'Administrator' in substitution. In both cases, this person may be someone whom you would not have wished to fulfil this role.

The Executor will need to have the original Will to perform their duties. If it was not in the possession of the deceased, it must be obtained, by right, from the person or solicitor who holds it.

The Registry of Births, Deaths and Marriages does not hold all records relating to Wills or Probate.

However, prior to January 2013 it maintained a voluntary 'Wills Register' that enabled a person to record where their Will was kept, who made the Will and who is Executor. Searches relating to Wills previously listed on the register may still be conducted. A fee will apply. Next of kin may search the register after providing proof of death of the testator. For more information phone: **13 77 88**

http://www.bdm.nsw.gov.au/bdm_dth/bdm_wil.html

TIP: Some people mistakenly believe that their funeral directions should be stipulated in their Will, but consider that the Will may not be read until several days after the funeral, hence in such an instance, it would be too late for your wishes to become known.

***Note:** "The funeral arrangements are at the discretion of the executor, directions in the Will relating to the funeral or body of the deceased are not legally binding." <http://diy-probate.com.au/about-us.php>

Probate

Probate is a court order saying that the Will is legally valid and that the Executor has the right to administer the estate. Typically it takes under two weeks for an application of probate to be granted, but if the estate is more complex, it may take longer to identify all assets and liabilities – thus blowing the process out to many months. In NSW, no fee is charged with application for probates under \$100,000. For estates over \$100,000 fees increase from \$666.00 and are calculated on the gross value of the estate. For list of fees – go to:

http://www.supremecourt.lawlink.nsw.gov.au/agdbasev7wr/assets/supremecourt/m670001f711802/fee_schedule_010713.pdf

Probate may not be necessary in every case, but financial institutions hoping to protect themselves against possible liability for passing on bank accounts and/or assets to the wrong person, may require proof of Grant of Probate to ensure that a person seeking release of assets has authority to deal with them. They will, however, often release modest amounts without the need for probate to be obtained (eg. if the estate is less than \$10,000). It is always advisable to make a list of everything the deceased owned or was entitled to, and then make contact with the financial institutions concerned, to establish if probate will be required. If the deceased person owned real estate, shares and/or insurances, held solely in the name of the deceased person, a Grant of Probate will always be required in order to deal with it.

➤ For more information, contact the Probate Division of the Supreme Court. (02) 9230 8111.

www.lawlink.nsw.gov.au/sc

➤ Checklist for filing simple applications for a grant of probate:

http://www.supremecourt.lawlink.nsw.gov.au/supremecourt/sco2_probate/sco2_filing_instructions/applying_for_probate.html

or Law Consumers - Probate Company (02) 9564 6933 <http://www.lawconsumers.org/probate-company>

Publication List: - To obtain a free copy of the following publications or any other information, contact **COTA (NSW) on (02) 9286 3860** (1800 449 102 outside Sydney)

➤ **Speaking for myself – Planning for later life decision-making**

(an easy to follow guide on Wills, Powers of Attorney, Guardianship, etc, by the Benevolent Society)

➤ **Executors and Probate** created by St Vincent de Paul Society; (02) 9560 8666

Reference List:

Benevolent Society www.bensoc.org.au; Ph: (02) 9339 8000

Guardianship Tribunal *Guardianship Tribunal*; Ph: (02) 9556 7600 or 1300 006 228

http://www.ncat.nsw.gov.au/ncat/guardianship/gt_matter_about/matter_guardianship.html

Land and Property Information <http://www.lpi.nsw.gov.au/> Ph: 1300 052 637

Law Access (free community legal information service) www.lawaccess.nsw.gov.au; Ph: 1300 888 529

Law Society of NSW (a directory of solicitors in NSW) www.lawsociety.com.au;

Ph: (02) 9926 0333 or 1800 422 713 outside Syd. Metro

NSW Register of Births, Deaths & Marriages <http://www.bdm.nsw.gov.au/> Ph: 13 77 88

Supreme Court of NSW <http://www.supremecourt.lawlink.nsw.gov.au/> Ph: 1300 679 272