

# APPLICATIONS FOR GRANTS OF PROBATE OR ADMINISTRATION

Effective 1 July 2010

## Introduction

The Supreme Court of South Australia is the Court that has exclusive jurisdiction in this State to make orders in relation to the validity of a will of a deceased person, the appointment of an executor or an administrator and the administration of a deceased estate.

The Probate Registry is the Registry of the Court that deals with applications for grants of probate or administration and other related matters. The Probate Registry keeps a register of probates and administrations granted by the Court.

On application for a grant the Court determines what document or documents constitute the last will of the deceased and / or who is entitled to be the personal representative of the deceased (i.e. the executor or administrator). When these determinations have been made a grant is issued in respect of the estate of the deceased person.

There are three types of grants - probate, letters of administration with the will annexed and letters of administration. When necessary a grant will be limited in duration, in respect of property or to any special purpose. The term "grant" is used to mean whatever type of grant is issued. A grant is the official recognition by the Court of the right of the personal representative named in the grant to administer the estate of a deceased person and of the vesting in the personal representative of the title to the deceased's estate.

## Need for a grant

The Court does not decide whether or not a grant is required. That depends on the nature and extent of the assets to be administered and the requirements of the institutions holding the assets. The applicant must address this before seeking a grant from the Court.

Many estates may be administered informally, without a grant. For this reason the person undertaking the administration of the estate should first inquire from each institution holding an asset belonging to the deceased whether the institution is prepared to release the asset without seeing a grant. For example, banks and insurance companies may release money without a grant if the amount is small and there are no complications. However, conditions may be imposed.

A grant will *not* be required when the only assets are held by joint tenants. For example, real estate in the names of husband and wife as *joint tenants* becomes the property of the survivor by operation of law and requires only the registration of the death on the title.

On the other hand, a grant will always be required if the deceased owned real estate in his or her *own name* or held an interest in real estate with another party as *tenant in common*. The Lands Titles Registration Office will not process a transfer of the deceased's interest to another person without a grant.

If there is a requirement for a personal representative to prove his or her title to an asset in the deceased's name it might be necessary to obtain a grant.

A bank, insurance company, share registry or other institution may require a grant before it will allow a personal representative to deal with a substantial estate asset.

The distribution of the assets in the deceased's estate is the responsibility of the person named in the grant and the grant is proof that the person named in it is entitled to collect and distribute the estate of the deceased.

## **If a Grant is Required to Administer the Estate**

All applications for grants must be in accordance with the Rules of Court. Those Rules govern who is entitled to claim the grant and the manner in which the application must be made.

**Option 1** - Prepare the documents necessary to make the application personally.

### ***Some guidance and a word of warning***

***A personal application is likely to be far more onerous than your friends and family will tell you.***

***Making an application for a grant is not simply a matter of filling in forms and paying the fee.***

***In particular, the person or persons applying for a grant should be aware that:***

- ***The Rules of the Court preclude Probate Registry staff from giving legal advice;***
- ***Documents leading to the grant require various undertakings to the Court;***
- ***The correct administration of a deceased estate may involve the application of technical legal rules;***
- ***Applying for probate and administering an estate are technical processes that require an understanding of the law and both Court practice and Court procedure.***
- ***There may be taxation consequences and responsibilities arising from the administration of the trust estate;***
- ***An executor or administrator may be personally liable for both breach of trust and damages arising from negligence.***

The administration of a deceased estate should not be undertaken lightly.

If you have any doubt about your legal position and responsibilities, you should obtain legal advice from a solicitor who specialises in probate work.

The Law Society of South Australia, 124 Waymouth Street Adelaide, South Australia (Telephone: (08) 8229 0200) can provide you with the names of firms that specialise in probate work.

Before proceeding with a personal application, it is also worth considering the following:

- ***The Probate Registry does not endorse any of the “do it yourself probate kits” available on the internet. In particular, because the procedures vary from State to State, probate kits offered by sources outside of South Australia may not be appropriate in this State.***
- ***A “typing only” service may cost more than having a solicitor prepare the application and lodge it on your behalf.***

- ***If you decide to do a personal application, then you will need to attend to any requisitions raised by the examining officers.***

***If a requisition is raised, you should not telephone or attend at the Registry seeking advice. Rule 7.09 of The Probate Rules directs that no legal advice be given to a personal applicant by any officer of the Court.***

- ***If a solicitor makes the application on your behalf, you will not have to attend at the Registry.***

**Certain problems or deficiencies with a will are likely to cause difficulties.**

Difficulties that are frequently encountered include:

- Paper clip marks or additional staple holes in the will.
- A signature of the person who made the will where the signature is not clear or which suggests frailty.
- A signature of the person who made the will where the surname or initials differ from the name at the head of the will.
- The absence of a date to the will.
- The date of the will being obscured, incomplete or altered.
- The use by the person who made the will and the witnesses to the will of different pens thereby raising doubt as to whether they were all present together when the will was executed.
- Any unsigned alteration to the text of the will.

These difficulties require the applicant to submit one or more additional affidavits in support of the application. The preparation of the additional affidavits may involve technical research and is likely to take considerable time. If the application is made by a personal applicant, such affidavits must be sworn in the Registry.

Addresses within an oath, affirmation or affidavit should use the description "South Australia" in full – not "SA." However, the address of the lodging party on a backsheet may use the abbreviation "SA."

Postcodes should not be included in the text of documents. Postcodes should be included only on the backsheet as part of the address for service of notices.

**Option 2 - Instruct a solicitor of your choice to make the application on your behalf.**

The Law Society of South Australia, 124 Waymouth Street Adelaide SA, (Telephone: 8229 0222) will provide you with the names of law firms who specialise in this jurisdiction.

**Option 3** - Request the Public Trustee or any one of the Trustee Companies (being a company authorised under the Trustee Companies Act, 1988) to act as an executor or administrator of the deceased estate.

**IN ANY EVENT DO NOT** remove staples or binding etc. from the will in order to photocopy the will **AND DO NOT** attach anything to the will by way of a pin, glider clip or staple. Holes caused by removal of staples and indents from glider clips or the like must be explained by affidavit.

Do not laminate the will, the death certificate or any other document relating to the probate application.

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**If it is decided to lodge a personal application then the applicant must be aware of the practice and procedure:**

#### **A. General**

- ***Officers of the Probate Registry are not permitted to give legal advice or assist in the completion of forms or pre-examine documents prior to the lodgement or recommend a particular legal practitioner.***
- The application must be prepared in accordance with “**The Probate Rules 2004**”. **Rule 7 specifically deals with Personal Applications.** The application must not be signed at the time of lodgement at the Registry.
- A personal applicant must attend in person in the Probate Registry to lodge an application for a grant.
- **Personal applications will be received only between 9.30am and 10.30am, on business days.**
- Personal applications by post will not be accepted.

A personal application will not be received through an agent nor may a personal applicant be attended by a person acting or appearing to act as the applicant’s adviser.

- **The Probate Rules and the Forms required to make an application are not available from the Probate Registry** but can be purchased or downloaded as follows:
  - ❖ “The Probate Rules 2004” may be purchased at the EDS Building (Service SA Counter) - [www.service.sa.gov.au](http://www.service.sa.gov.au), Ground Floor, 108 North Terrace, Adelaide, SA, Monday to Friday 9.00am – 5.00pm, Telephone 13 23 24

OR

- ❖ Visit our website (<http://www.courts.sa.gov.au> - Link “For Lawyers and Unrepresented Parties” then “Rules & Forms”) where access may be gained to “The Probate Rules 2004” along with further information about the Courts.

It is suggested the RTF format be selected.

- **In due course**, after the application has been examined and found to be in order (see below), the applicant will be required **to attend at the Probate Registry again** to execute the documents, either under oath or by affirmation, before a Registrar or designated officer.

## B. Documents required

- The **original Will** and the **original Death Certificate** must be lodged with the application. These documents or any other documents required in support of the application are retained by the Court and will not be returned to the applicant.
- The documentation to be prepared by the applicant for:

### ❖ PROBATE

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|---------|--|
| Form 39 | Draft Probate with attached back sheet   |
| Form 40 | Executor's Oath with attached back sheet   |
| Form 68 | Affidavit of Assets and Liabilities together with the Statement marked "A" ( <b>see notes and the example Statement in Form 68</b> ) and attached back sheet. Note that Form 68 is used only if the date of death occurred after the 1 <sup>st</sup> July 1987.                            |
| Form 70 | Registrar's Certificates may be required in relation to some assets. The provision of a Registrar's Certificate is optional but it is likely to facilitate the administration. <b>A separate certificate is required for each asset.</b> No back sheet is required for these certificates. |

### ❖ LETTERS OF ADMINISTRATION WITH A WILL

- |         |  |
|---------|--|
| Form 47 | Draft grant of Letters of Administration with a will with attached back sheet  |
| Form 48 | Administrator's Oath with attached back sheet  |
| Form 55 | Sureties Guarantee with attached back sheet  |
| Form 5  | Affidavit of justification of sureties with attached back sheet<br>If widow/er applying, then only one surety is required<br>If not widow/er of deceased then two sureties are required. |
| Form 68 | Affidavit of Assets and Liabilities (as described above) with attached back sheet  |
| Form 70 | Registrar's Certificates – no back sheet   |

### ❖ LETTERS OF ADMINISTRATION - (if no will)

- |         |   |
|---------|---|
| Form 51 | Draft grant of Letters of Administration with attached back sheet |
| Form 52 | Administrator's Oath with attached back sheet                     |
| Form 55 | Sureties Guarantee with attached back sheet                       |

Form 5	Affidavit of justification of sureties with attached back sheet If widow/er applying then only one surety is required. If not widow/er of deceased then two sureties are required.
Form 68	Affidavit of Assets and Liabilities (as described above) with attached back sheet
Form 70	Registrar's Certificates – no back sheet

- The circumstances of the matter may require the provision of additional evidence - see Rules 17 to 27. Any additional affidavits must have a back sheet attached.

### C. Document preparation

- All documents must be in black type on International A4 size good quality paper with a 4cm left hand margin, double line spacing and lodged with back sheets correctly intituled for the estate (see an example of a back sheet below). Unlike all the other documents, the statement of assets and liabilities will be accepted in one and a half rather than double spacing.
- A copy of the statement of assets and liabilities is annexed to the Affidavit of Assets and Liabilities. The statement has the letter "A" at the top of the first page to enable it to be identified as the annexure referred to in the Affidavit. The page with the letter "A" at the top is the first page and subsequent pages should be numbered "2, 3, etc."
- The full given name and the current residential address of each applicant must be stated in full. Postal abbreviations, postal addresses and postcodes should not be used in an oath, affirmation or affidavit - Refer Rule 13 (Probate) and Rule 14 (Administration).
- The practice of the Court is that a physical address for service within 50 kilometres of the Adelaide GPO must appear on the back sheet to each document – see Rule 59.03.

### D. Document Lodgement

- **Personal applicants must attend at the Supreme Court Registry between 9.30am and 10.30am, on business days. Appointments for a specific time or day are not available.**
- Personal applicants present at the Probate Registry and submit the proposed application to an examining officer who makes an initial assessment of the application.
- **If the application is incomplete or does not comply with the Rules, then it will not be accepted.** The examining officer will return the documents to the applicant for further consideration. There is then no need for the applicant to remain in the Registry. The application must be put in order before being submitted again.
- If the application appears to be complete and satisfactory, it will be received. The applicant will then be required to produce evidence of his or her identity and to pay the Court fee.
- **The Registrar does not examine the application at this time.** The assessment establishes only that the application may be received.

- Once the Court fee has been paid the application is queued for examination with the applications lodged by lawyers.

#### **E. Examination of the application**

- Once the application has been examined the applicant will be contacted by letter and:
  - ❖ If the application is in order, the applicant will be requested to attend in the Probate Registry to swear or affirm the application one of the examining officers.

OR

- ❖ If the application is not in order, the applicant will be notified of the matters requiring further attention before the application can proceed.
- On issue, the grant is posted by registered mail to the applicant at the address appearing on the back sheet to the application documents unless arrangements are made by the applicant to collect the grant from the Registry. The applicant should make this arrangement at the time he or she attends in the Registry to sign the application.

#### **F. Court Fee payable**

- On acceptance of the application the Court fee is payable. [View current Court fees.](#)
- The Court fee may be paid by personal cheque, money order, cash or credit card.

EXAMPLE OF A BACKSHEET Preparation notes below (*in italics*):

*This document should be aligned to the right*

**SOUTH AUSTRALIA  
IN THE SUPREME COURT  
TESTAMENTARY CAUSES JURISDICTION**

❖ *Type in the name of the deceased*

**In the estate of**

**JOHN CITIZEN**

**Deceased**

❖ *Type in the name of the document here*

**DRAFT PROBATE**

e.g. *DRAFT PROBATE*

*EXECUTOR'S OATH or*

*AFFIDAVIT OF ASSETS AND LIABILITIES*

❖ *Enter the name, address & phone number of applicant*

*(show details of one applicant only and delete  
either "executor" or "administrator")*

**THE EXECUTOR/ADMINISTRATOR**

**MARY CITIZEN**

**1 Smith Street**

**ADELAIDE SA 5000**

**Telephone : #**

## GLOSSARY

**ADMINISTRATION:** This is the process of collecting the assets, paying the debts and distributing the balance of a deceased's estate according to the will of a deceased person. If there is no will, or the will does not dispose of the deceased's estate in whole or in part, then the undisposed of estate is distributed in accordance with the rules of intestacy.

**ADMINISTRATOR:** a person appointed by the Court to administer the estate of a deceased person when a person dies intestate, or when an executor is not appointed by will, or when the executor does not or cannot act.

**EXECUTOR:** a person appointed by will to administer the estate of a deceased person.

**GRANT OF REPRESENTATION ("GRANT"):** a certificate issued under seal by the Court appointing an administrator, or authenticating the right of an executor, to administer the estate of a deceased person and vesting title to assets in the executor or the administrator.

**INTESTATE:** a person dying without a will or a valid will. A person is said to die partially intestate when a will does not dispose of the whole of the deceased's assets. For example, the will may only appoint an executor or dispose of part only of the deceased's assets; see administration.

**LETTERS OF ADMINISTRATION:** a grant by the Court appointing an administrator to administer the estate of a deceased person.

**LETTERS OF ADMINISTRATION WITH THE WILL ANNEXED:** a grant by the Court appointing an administrator when there is a will but no executor or when the executor does not or cannot act.

**PROBATE:** a grant by the Court certifying that the deceased's will is valid or "proved" and that authority to administer the estate has been granted to the executor.

**PERSONAL REPRESENTATIVE:** an executor or administrator.

**PERSONAL APPLICANT:** a person who seeks to obtain a grant without the intervention of a practitioner.

**WILL:** a document whereby a testator disposes of the testator's property on death and usually appointing an executor to administer the estate.