

# Tips and Tricks in applications for grants and estate administration

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# Topics to cover

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1. Key terminology;
  2. Uncontested grants of probate;
  3. Uncontested grants of letters of administration;
  4. The need for a grant;
  5. Special purpose grants;
  6. Powers of registrars;
  7. Role and appointment of the legal personal representative; and
  8. Administration of the estate
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# Key Terminology

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- A **grant of representation** is an umbrella term that applies to grants of all kinds such as probate, letters of administration, or special and limited grants. A grant of representation is evidence of the identity and date of death of a deceased person and the authority of the named executors or administrator.
  - The **legal personal representative** of an estate is the executor or administrator.
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# Key Terminology

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- A **grant in common form** is a grant of representation issued by a registrar of the Supreme Court. A grant in common form is the product of an administrative function of the Court as is therefore inherently revocable.
  - A **grant in solemn form** is a grant of representation issued on order of a judge following the provision of sufficient evidence to satisfy the Court of certain formal matters.
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# Key Terminology

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- **Probate** is a court order that confirms the validity of a will and any codicils and the authority of the executor to act in accordance with the terms of the will. Probate is the correct grant even if there is a partial intestacy.
  - **Letters of administration (no will)** is a grant of representation made to an administrator in the event that someone dies without a will.
  - **Letters of administration (with will)** is a grant of representation made to an administrator where there is a will but it has problems, or someone else is applying with consent. Sometimes referred to letters of administration *cum testament annexo / cta*.
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# Key Terminology

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- The **executor** is the person who applies for and is granted probate of a will by the court. A will alone does not necessarily empower an executor to administer an estate; this power rests with the Supreme Court.
  - An **executor de son tort** is a person who takes steps to administer an estate without authority to do so.
  - An **administrator** is the person to whom letters of administration is granted.
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# Key Terminology

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- **Estate assets** are those assets which up to the moment of death belonged absolutely and indefeasibly to the deceased. These must be truthfully disclosed and adequately identified in any application for a grant of representation.
  - **Non-estate assets** are those assets that the deceased did not own absolutely and indefeasibly up to the moment of death. Common non-estate assets are assets held in joint names, assets owned by a trustee of a trust, property owned by a company, life insurance, and superannuation.
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# Uncontested grants of probate

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## Steps

1. Publish Notice on Supreme Court website as early as possible to start notice period running.
  2. Prepare affidavit of executor (Form 3.11) and annexures being a certified or the original death certificate, any necessary certificate evidence, inventory of property, and copy of the probate notice. Remember to amend the affidavit as required.
  3. Take the opportunity to prepare such of the estate administration forms that you can.
  4. Once the notice period expires, sign the affidavit of executor and estate administration forms.
  5. File the affidavit with an originating application (Form 3.1), two draft grants (Form 3.4), a cheque, and a self-addressed express post envelope.
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# Uncontested grants of probate

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- Scale costs apply in NSW
- See Schedule 3, Legal Profession Uniform Law Application Regulation 2015

Value of estate	Allowed costs		
		\$ 2,500,000.00	\$ 7,960.00
\$ 100,000.00	\$ 1,373.00	\$ 3,000,000.00	\$ 8,800.00
\$ 150,000.00	\$ 1,670.00	\$ 3,500,000.00	\$ 9,350.00
\$ 200,000.00	\$ 1,893.50	\$ 4,000,000.00	\$ 9,900.00
\$ 250,000.00	\$ 2,117.00	\$ 4,500,000.00	\$ 10,450.00
\$ 300,000.00	\$ 2,340.50	\$ 5,000,000.00	\$ 11,000.00
\$ 350,000.00	\$ 2,564.00	\$ 5,500,000.00	\$ 11,450.00
\$ 400,000.00	\$ 2,787.50	\$ 6,000,000.00	\$ 11,900.00
\$ 450,000.00	\$ 3,011.00	\$ 6,500,000.00	\$ 12,350.00
\$ 500,000.00	\$ 3,234.50	\$ 7,000,000.00	\$ 12,800.00
\$ 750,000.00	\$ 4,352.00	\$ 7,500,000.00	\$ 13,250.00
\$ 1,000,000.00	\$ 5,470.00	\$ 8,000,000.00	\$ 13,700.00
\$ 1,500,000.00	\$ 6,300.00	\$ 8,500,000.00	\$ 14,150.00
\$ 2,000,000.00	\$ 7,130.00	\$ 9,000,000.00	\$ 14,600.00
		\$ 9,500,000.00	\$ 15,050.00
		\$ 10,000,000.00	\$ 15,500.00
		\$ 10,500,000.00	\$ 15,500.00

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# Uncontested grants of letters of administration

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- Similar observations as for probate.
  - Process is largely the same.
  - Note that documentary/certificate evidence takes a central role. Will need to prove or negative de facto relationships.
  - Consents to administration make it easier, but you can also just give notice of your client's intention to apply.
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# Need for a grant of representation

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- A grant of representation is better seen as a right than a legal obligation.
  - Most often the need for a grant comes from an asset holder requiring it to release assets. For example, interests in real property or significant bank accounts/shares.
  - Estates with limited estate assets can reasonably be administered without a grant.
  - Turn your mind to whether the administration of non-estate assets may nevertheless require a grant.
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# A word on special purpose or limited grants

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- Complex area.
- Examples include:

Name	Description
Administration pendente lite	Used when probate litigation is on foot and someone is to be appointed to administer an estate while the litigation is ongoing
Administration ad litem	Used when the estate wishes or needs to participate in litigation of some other kind.
Administration de bonis non (cum testamento annexo)	Used when the executor dies before the administration of the estate is completed. Not appropriate where the administration has been completed.
Administration durante minore aetate	Used when and only while the appointed executor is under the age of eighteen.
Administration durante dementia	Used when and only while the appointed executor is under a physical or mental disability.
Administration ad colligenda bona	Used on a limited basis to protect vulnerable assets.

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# Powers of the Registrar

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- Grants are almost always issued by a registrar.
  - Powers of registrar in uncontested matters is broad and includes informal wills and passing over wills.
  - Note that registrar's powers are limited by *Court Procedures Rules 2006 (ACT)*, Schedule 5, Part 5.1. The most important items for our purposes are Items 44 to 54.
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# Powers of the Registrar

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- It is not uncommon for a settlement to be reached in contested probate proceedings leading to an agreement as to which will is probated or whether an informal will be admitted to probate.
  - A grant of probate is an act of the court. Since it lies within the purview of the court, parties to a dispute cannot simply agree how the court will exercise its power.
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# Powers of the Registrar

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*Estate Kouvakas; Lucas v Konakas* [2014] NSWSC 786, per Lindsay J:

[271] Because a grant of probate or administration is a public act, the Court will not make an order for a grant merely because parties have agreed that one should be made: *Phillpot v Olney* [2004] NSWSC 592 at [7]. Of itself, the consent of parties interested in an estate does not prove a will: *In the Estate of Clarence Gilbert Alcorn* (Powell J, unrep, 9 August 1991) BC 9101691 at 6, and *Smith v Smith; Estate of Smith* [2007] NSWSC 116 at [34], citing *In the Goods of Watts* (1837) 1 Curt 594 at 595; 163 ER 208 at 208 and *In the Estate of Muirhead* [1971] P 263 at 265-266 and 267-268 (and 269H).

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# Powers of the Registrar

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- *Cassarino v Cassarino* [2020] NSWSC 454, per Hallen J:

[20] The principles to be applied in a case such as this are clear. In broad terms, if the last will of a testator is not to be admitted to probate, but an earlier one is, the last will has to be pronounced against and the earlier will (if there is one) pronounced for. Where a genuine doubt exists as to the validity of a testamentary document, the court, as part of a compromise, may be willing to pronounce against that testamentary document, but the court will not, as part of a compromise, be willing to pass over a testamentary document (either a will or codicil) which is, apparently, a valid document, and as to which there is no evidence of invalidity. Where the evidence filed is insufficient, the court may refuse to approve the compromise and instead direct a trial on written evidence, even where the matter is agreed or uncontested.

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# Role and appointment of LPR

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- The LPR steps into the shoes once the grant issues.
  - Until the grant, vests in NSW TAG: *Probate and Administration Act 1989*, section 61. However, note *Carolyn Deigan as executrix for the estate of the late James Boyd Lockrey v Barnard James Fussell* [2019] NSWCA 299 per White JA:
    - [174] First, the title of the NSW Trustee under s 61 is a bare legal title carrying no active duties and no powers of management or administration because the Ordinary in England in 1858 had no such duties or powers. This is so notwithstanding that in *Andrews v Hogan* Fullagar J contemplated that the Public Trustee had the capacity to surrender a lease vested in him. That statement was obiter and unsupported by reference to the position of the Ordinary.
  - Note LPR is an officer of the court and may be required to file and pass accounts.
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# Role and appointment of LPR

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- The legal personal representative ceases to occupy that role and becomes a trustee once the residue of the estate can be determined and distributed to the beneficiaries.
  - Up until this point the beneficiary of residue has a mere right to due administration. Note bankrupt beneficiaries.
  - Where an executor dies during the course of the administration of the estate then, depending on the drafting of the clause appointing the executor, the executor's executor becomes entitled to administer the estate.
  - If the chain of executors is broken, then the appropriate grant is a grant of administration DBN CTA.
  - If administration is complete but you need to deal with estate property for some other reason then the correct course is to change the trustee. For example, life estates.
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# Administration of the estate

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- Responsibilities of the LPR include:
    - Securing and insuring the assets;
    - Transfer any specific gifts;
    - Close bank accounts;
    - Transferring assets in specie;
    - Selling or disposing of unwanted illiquid assets;
    - Arranging tax returns; and
    - Attend to a final distribution.
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# Administration of the estate

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- Communication directly with beneficiaries is generally desirable.
  - Seek instructions to do so, noting it is a cost of the estate. The form of the communication can be molded to the circumstances. Some LPRs will provide direct updates themselves. Some will pass on an email from the solicitor. Some will prefer you correspond directly with the beneficiaries.
  - Clear communication minimises conflict and may help to avoid a dispute.
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# Administration of the estate

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- Tax is a significant risk for an LPR.
  - LPR is entitled to an indemnity for expenses from the estate assets.
  - If the estate is distributed and an estate liability arises later then that may be a cost for the LPR to bear personally.
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# Administration of the estate

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- LPRs may limit this risk by publishing a notice of intention to distribute under section 64 of the *Administration and Probate Act 1929*.

## **64 Notice before distribution of assets**

- (1) An executor or administrator of a deceased person's estate may give public notice before distributing the assets of the estate.

*Note 1* Public notice may be given before making a distribution under the following provisions:

- (a) the *Family Provision Act 1969*, s 21 (Protection of administrator);
- (b) the *Trustee Act 1925*, s 60 (Distribution after notice).

*Note 2* If a form is approved for a particular purpose under the *Court Procedures Act 2004*, s 8 the form must be used for that purpose.

- (2) The public notice must state that—

- (a) a creditor or anyone else may give the executor or administrator their claim against the estate within the period stated in the notice, being at least 1 month after the notice is given; and
  - (b) the executor or administrator intends to distribute the estate after the later of the following:
    - (i) the end of the period stated in the notice;
    - (ii) 6 months after the day probate or administration was granted; and
  - (c) the executor or administrator will only consider claims that are given to the executor or administrator when distributing the estate.
- (3) The executor or administrator must consider each claim given within the period stated in the notice.
- (4) The executor or administrator is not liable to any person for any distributed assets if the executor or administrator—
- (a) gave notice under subsection (1); and
  - (b) did not have notice of the person's claim when the distribution was made.

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# Administration of the estate

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*public notice*, if required by a Territory law, means—

- (a) a dated notice on an ACT government website; or
  - (b) notice in a daily newspaper circulating generally in the ACT.
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# Administration of the estate

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## Elements:

- Public notice;
  - In the prescribed form; and
  - Give a date, at least 1 month after publication and 6 months after the date of the grant, for the intended distribution.
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# Administration of the estate

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The legal personal representative ceases to occupy that role and becomes a trustee once the residue of the estate can be determined and distributed to the beneficiaries: *Commissioner of Stamp Duties (Qld) v Livingston* (1964) 112 CLR 12

## Retirement of LPRs

- LPRs may not retire without court involvement.
- The court may remove an executor and appoint an alternative executor or administrator. This is not common nor easy to achieve.

## Retirement of Trustees

- Trustees may retire and appoint alternative trustees under the *Trustee Act 1925*.
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# Administration of the estate

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- The easiest approach will almost always be to complete the administration, become a trustee, and change the trustee role once the administration is complete.
  - This is particularly useful to bear in mind in the context of life estates or long-term trusts for minor children where the executor is not a parent of the minor.
  - The power to do this is always subject to the terms of the will.
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Questions?



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# Thank you for coming

I am always happy to help colleagues though not everyone is comfortable with public settings.

If you have a question that you do not want to ask publicly, please reach out to me directly.

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