Guide for Executors

The Wakefields Lawyers team includes highly experienced estate administration professionals who can help bereaved families every step of the way through the complex, time-consuming, and often emotionally draining process of ensuring the wishes of departed loved ones are met.

These wishes can relate to the desired funeral arrangements for the deceased as well as the distribution of the deceased's assets in the manner requested.

This guide describes what needs to be done and explains key aspects of estate administration. Much of this is not straightforward, but our experienced specialists can help with all aspects of estate management and deal with any issues that might arise.

Bereavement is an emotional and stressful time for everyone concerned, and it's very important that all arrangements are handled with care, as well as ensuring all the legal and financial processes are followed. Without appropriate care being taken, those involved risk incurring legal liabilities, as well as creating tensions and disagreements between family members or anyone else to whom the deceased wanted to leave a legacy.

Those with no prior experience of estate management are likely to find the requirements daunting. At Wakefields Lawyers, our team of experts help make the whole process as straightforward as possible for the surviving family and friends, while treating those involved with the care and consideration necessary at such times.

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Someone I know has recently died, what do I need to do?

It's very important to find out as soon as possible what the deceased's wishes are regarding their preferred funeral arrangements, who is responsible for the administration of the deceased's estate and how they want their estate divided. You firstly need to find out whether the deceased left a will, and, if so, where it is. Start by searching in the deceased's possessions, or failing that, contacting a lawyer or estate administration institution that you know the deceased dealt with to inform them of the death. Be aware that there are strict limits on what the lawyer or institution can disclose to you, even if you are a named beneficiary in the will.

The executor will need the original will before they can commence the administration of the estate. Any copies of the will that you find should detail who has the original will.

Once you find the will, contact the executor. If the executor named in the will is deceased, and there is no substitute executor named in the will, you should contact an estates lawyer who can advise you on the person(s) entitled to act as Administrator(s) of the estate.

If you find a document in the deceased's possessions that appears to give directions with regard to the deceased's wishes you should take this to a lawyer to discuss it.

If you are unable to find the will, contact an estates solicitor and request them to place a "Will Search" advertisement in the Law Society's publication "Law News/**LawTalk**" to determine if a will is held for the deceased by a New Zealand law firm.

If you have done all this and still can't locate a will, the estate is likely to be "intestate", meaning the deceased has not left a will. You or another family member will need to apply to the High Court to be appointed as the administrator of the deceased's estate. The Administration Act (1969) sets out who can apply to be appointed as administrator and how the estate will be managed and distributed.

The role and responsibilities of the administrator are essentially the same as those of an executor once appointed by the High Court. As with the role of the executor, applying to the High Court to be appointed administrator requires a knowledge of the legal process to be followed and the documentation that has to be prepared to accompany the application. You are likely to need help with this, and our experienced estates specialists can advise you on all the requirements, or if you wish, prepare and submit the application.

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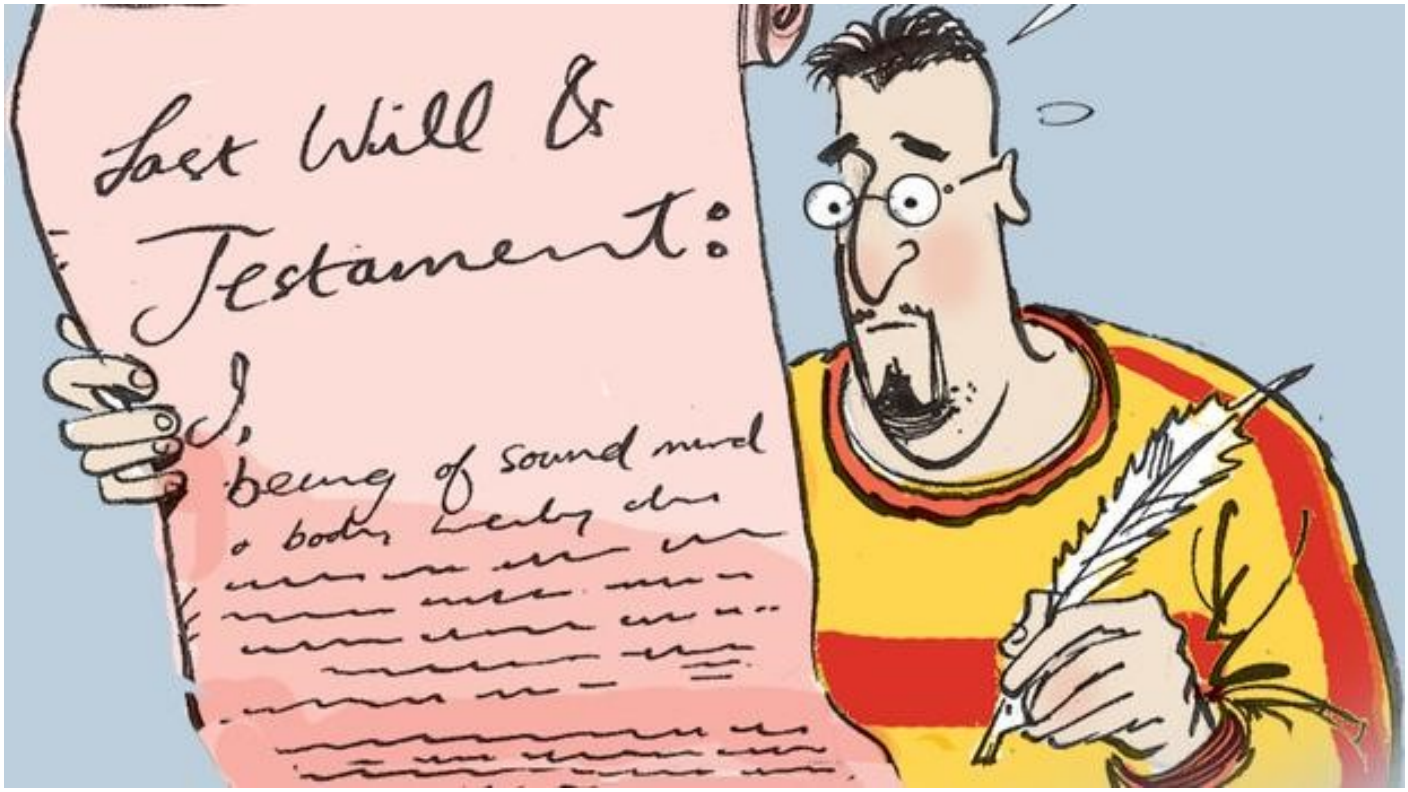
I have been named in a will as the executor; what does that mean?

The will-maker, also known as the testator, nominates an executor or executors to administer their estate after their death. If you are named as an executor in the will, you have responsibilities to fulfill, and actions to take, to ensure the will-maker's wishes are met. The wishes usually include how the estate will be divided between the beneficiaries named in the will and can also cover the deceased's preferred funeral arrangements (although these are not legally binding). An executor is responsible for ensuring this is all done in compliance with relevant New Zealand laws.

"The wishes usually include how the estate will be divided between the beneficiaries named in the will and can also cover the deceased's preferred funeral arrangements."



What are my responsibilities?

As the named executor, you are responsible for:

- Applying to the High Court to obtain a grant probate of the will (if necessary, see page 6 for more information). A grant of probate formalises the final will and gives the executor the legal authority to act for the deceased estate.
- Managing all the practical aspects of administering the estate, such as selling or distributing assets, paying rent and outstanding or final utility bills or other debts, or the ongoing management of a business the deceased operated. You will need to keep detailed records of all these transactions so they can be produced if requested.
- Ensuring all the legal requirements and financial processes, such as the preparation of tax returns and payments, are completed.
- Managing the investment and eventual disbursement of benefits assigned by the will to minors, such as the deceased's children or grandchildren.
- Initiating litigation to uphold the will in the event of disputes, or if there are other claims on the assets of the estate or, in some cases, making claims on the estate's behalf for any funds the estate may be entitled to e.g. a share of relationship property or debt recovery.
- Managing trusts established by the will. Wills can establish trusts to manage assets for beneficiaries for their remaining lives – testamentary trusts. If the will names you as the "executor and trustee", you are responsible for the ongoing management of those trusts, potentially for many years.

To fulfill these responsibilities correctly, an executor should have a detailed understanding of the relevant law and regulations, as well as good financial management skills. If, like many people named as executor, you do not have the necessary experience or if you feel you require assistance with the High Court application or administration of the estate, we recommend seeking help from experienced estate specialists such as those at Wakefields Lawyers.

The responsibilities of an administrator are similar, in that you may need to apply to the High Court for formal administration, whether that is Letters of Administration with will annexed (if the named executor died during the will-maker's lifetime) or Letters of Administration (if the deceased died without leaving a will "intestate")). However, with an intestate estate the distribution of the estate is determined by the provisions of the Administration Act (1969).

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Is formal administration required?

The threshold that determines whether or not formal administration (Probate or Letters of Administration) is required is currently $15,000.

If all of the deceased's assets are jointly owned with another person, for example a spouse or partner, **or** if the assets in the deceased's sole name are less than $15,000 then formal administration should not be required. The joint owner(s) of the assets can arrange for the assets to be transferred to their sole name, usually by producing the death certificate. Similarly, the executor(s) can arrange closure of accounts, claim policies, etc. by producing the death certificate and signing any forms required by the institution.

However, if any asset held in the deceased's sole name has a value of $15,000 or more in any type of institution (e.g. bank accounts, KiwiSaver, life insurance policies) or if the deceased has real estate in his or her sole name, including a share in real estate (if tenants in common), then formal administration will be required.

Please see page 8 for further information regarding formal administration and do not hesitate to contact one of our experienced estate advisors at Wakefields Lawyers if you need any advice or assistance.

As an executor, what do I need to do?

1. ***Understand the will***

   - Read and understand the terms of the will.
   - If possible, ensure the funeral arrangements for the deceased are made in accordance with their wishes. Expressed wishes are not legally binding, but it is preferable to comply. You can choose to enable the deceased's family to make all the funeral arrangements.

2. ***Identify the assets***

   - Determine exactly what assets the deceased has and the nature of the ownership of those assets. Most importantly, determine if the assets in the estate are likely to exceed $15,000 in value. Estates that include assets with a value exceeding $15,000 require formal administration. If the assets do not exceed $15,000 in value, no formal administration is required, and you can set about distributing the assets immediately as per the will, or if there is no will, as described by the Administration Act 1969.
   - Assets that the deceased owned jointly with another person will become the sole property of the survivor and will not become part of the estate available for distribution. This commonly occurs when partners own assets together, or when assets are held in a family trust. Such assets may be real estate, bank accounts, or other investments. The transfer of the joint ownership to sole ownership is relatively straightforward once you have obtained a death certificate. Banks and other institutions will usually record the change of ownership once you present them with the death certificate. Similarly, a conveyancing lawyer can assist with the transmission of real estate once you present them with a death certificate.
   - All other assets owned by the deceased's sole name at the time of death will be included in the deceased's estate. This includes assets held as "tenants in common" (in respect of real estate) or held as a percentage share.

3. ***Seek third party assistance***

   - By this stage, you would have formed an understanding of the size and complexity of the deceased's estate. If you have no prior experience in administering a deceased estate, you need to decide whether you want to perform all the required tasks yourself, or whether you should involve specialist third parties.
   - We recommend you seek professional help. Estate lawyers, administrators, and professional accountants have detailed knowledge of the legal requirements and complexities, as well as the necessary record-keeping, and knowledge of relevant tax regulations and processes to be followed. Administering an estate can also be very time-consuming, at what is already a stressful and emotional time. Worse still, if you choose to do it all yourself, and don't do it properly, you risk incurring personal financial liabilities. You may also upset the family or friends of the deceased if they feel they have received an inadequate distribution from the estate or believe the estate has been mismanaged.

- You can choose to assign all, or some, of your responsibilities to a third party. For example, you could ask an estates lawyer to assist with an application to the High Court for probate or letters of administration, and a professional accountant to prepare the tax returns, while you do everything else required to administer the estate through to final distribution. It's worth remembering that any costs you incur in obtaining professional help will be paid from the estate itself before final distributions.
- If you decide to seek the services of a third party estate specialists, unless they are appointed as your co-executor you are not restricted to using the institution that held the final signed will. You are entitled to have the will uplifted to another institution, such as another law firm, of your choice.

4. Apply for formal administration

- Within three months of the date of death, you will need to apply to the High Court for formal administration. Applying for probate or letters of administration with will annexed is the process of "proving" the will to the High Court, and having the will formally accepted as the last will. Estate lawyers usually conduct the application as it requires an affidavit sworn by the executor/administrator, the preparation of the application document itself, as well as the probate or letters of administration document which has a copy of the will attached detailing how the estate will be administered and distributed. Once probate is granted, the will becomes a public document, and anyone can apply to the High Court to obtain a copy. Our team at Wakefields Lawyers can help with all aspects of this process.
- Besides funeral expenses, you cannot make payments from the estate, or sell estate assets, before the High Court grants formal administration. During this period, you may have to pay estate expenses, but these can be reimbursed from the estate once formal administration is granted.

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5. Administer the legal, financial, and practical aspects of the estate

- Once the Court grants formal administration ('court order'), you will need to contact all relevant asset registers, banks, and insurers, producing the court order along with any other documentation they may require (e.g. original policy documents, certified copies of your ID, etc.) and instructions for where the funds should be paid.
- Cash assets and the proceeds of other assets sold are usually deposited into an interest-bearing trust account of the estate lawyers who hold them on behalf of the beneficiaries until they can be distributed. Other non-cash assets, such as real estate or shares, which you plan to hold and distribute to the beneficiaries intact, are held in your name (as executor/ administrator or trustee), on behalf of the deceased estate, until the assets are distributed.
  The estate will need to continue to honour any ongoing commitments relating to these assets. For example, you will need to pay the ongoing rental costs of leased premises for a business that continues to operate.
- You will need to retain detailed records supporting all transactions made on behalf of the estate. These are required for prudent management of the estate's affairs, as well as to support calculations for tax purposes and distributions from the estate to beneficiaries and any successful claimants. Also, the High Court may request to see these records if the will is contested.
- All the physical or "real" assets of the estate, such as property, need to be protected from loss while the estate is under administration. This includes keeping the property physically protected from theft or vandalism, and making sure it is appropriately covered by insurance policies and that the insurance premiums are paid on time. If you fail to adequately insure the property you could be held personally liable for any damage caused to the property which is not covered by insurance.
- The will is unlikely to identify the liabilities of the estate, other than possibly stating that the funeral expenses are to be paid. So, you are responsible for taking all reasonable steps to ensure you identify all liabilities. To help achieve this you should:
  - ◊ Arrange a mail re-direction or regularly check the mailbox of the deceased's last place of residence.
  - ◊ Check the deceased's bank statements to see what direct debits and automatic payments are in place; and
  - ◊ Place a "Notice to Creditors" in the Public Notices sections of the local newspaper to invite potential creditors to forward claims on the estate to you for consideration. Placing this notice also serves to demonstrate that you have indeed taken all reasonably steps to identify claims. You may need to rely on this after distribution if future claims are made on the estate. This may be particularly important if there was no death notice issued which could have notified any potential creditor(s) of the deceased's death.

6. *Finalise the deceased's tax obligations*

- You will need to finalise the deceased's tax obligations, accounting for taxable income, tax payments, and relevant tax-deductible expenses incurred during their final tax year up to the date of death. Depending on the IRD's requirements, you may need to prepare a final tax return or simply advise the IRD of the deceased's death and request closure of the IRD number,
- Also, you will need to manage and finalise the tax obligations of the estate while it is under administration. For this, the estate needs a separate IRD number; a separate tax return to be prepared; and final payment made to the IRD before distribution to the beneficiaries.

7. *Perform the distribution of assets as per the terms of the will*

- When you are ready to make an interim distribution of the estate you should send an interim distribution statement to each beneficiary of the estate detailing what they will receive, and asking them to agree to the distribution.
- You can perform the initial distribution once you have received agreement from all the beneficiaries and have submitted the final tax return for the estate. Retain a proportion of the estate funds in trust until you receive tax clearance from the IRD. After tax clearance is received, you can make the final distribution of the estate funds once the estate has paid all additional costs like legal and accounting fees.
- If professional estate administrators and accountants are administering the estate and preparing final tax returns, you will need to sign the tax return and supporting accounts submitted to the IRD.

Every situation is different so if you are in any doubt about your role as executor you should contact an estate specialist. Wakefields Lawyers are able to help you at all stages of the administration.

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For how long will I need to administer the estate?

We recommend you do not distribute the estate until six months after the grant of probate. This is to ensure you have received all claims on the estate before distribution, and it is particularly important for you as the executor. You can be held personally liable for claims that are successfully made on the estate before the end of the six months if you have already performed a distribution to the estate's beneficiaries and there are insufficient funds available to cover the claim.

Claims can be made against a deceased's estate under various pieces of legislation including the Property (Relationships) Act 1976, Family Protection Act 1955and the Law Reform (Testamentary Promises) Act 1949. For more information on these types of claims see page **13**.

In some circumstances, where there is certainty that there will be no claims on the estate, you may decide to distribute the estate before the six months. In this circumstance, we recommend you ask any beneficiaries to sign an indemnity in respect of any future claims that arise, effectively taking on the liability for such claims. We can assist with preparing these letters of indemnity.

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I was named in the will as the “trustee”, what does that mean?

The will-maker, also known as the testator, may choose in their will that distributions from their deceased estate to be placed into a testamentary trust created by the will. That trust continues to exist, potentially for many years after the testator’s death, to ensure their wishes are met. As a trustee of a testamentary trust, you are responsible for ensuring the assets held in trust are prudently managed until they are needed to honour the wishes of the deceased.

A will may include the set-up of a testamentary trust to hold distributions from the deceased estate on behalf of children, for their benefit, until they are old enough to manage their own financial affairs. This may include the guardianship of children, or assisting with their schooling, university fees, or as a deposit on their first home.

Seek professional advice if you have concerns about your ability to take on such important, potentially long-term responsibilities. Our estate management specialists at Wakefields Lawyers can advise you on all matters relating to testamentary trusts.

What claims can be made on an estate?

If any party believes they have a claim against the estate they lodge their claims with the executor for consideration. Claims made against the estate during the first six months after the High Court grants probate are the responsibility of the executor, who, as previously mentioned, can be personally liable for these claims if estate distributions have been made without the ability to recover them from the beneficiaries. Claims can still be made against an estate at any time, but after 12 months from the grant of formal administration the claimant needs to apply for leave.

Claimants can be business or personal creditors of the deceased, but there are other types of claims resulting from the relationship between the deceased and the claimants. These are described below. It is worth considering that a successful claim will reduce the value of the estate to be distributed to the beneficiaries named in the will. Similarly, a successful claim would affect the distribution of an intestate estate. So, these types of claims need to be handled carefully, with due consideration of the rights of the claimant, other potential claimants, and the named beneficiaries.

Realistically, resolving these claims to the satisfaction of all parties is unlikely to be straightforward, and will require specialist advice. Wakefields Lawyers' estate specialists have experience in resolving all types of deceased estate claims.

If you are the executor, and are also a beneficiary named in the will, you will need to take care to ensure that your actions are impartial, treating all claims fairly. You will need legal assistance to ensure there is no possible conflict of interest in how you administer the estate, and to ensure no future claims can be brought against the estate, or you personally, based on a real or perceived conflict of interest.

1. A spouse or de facto partner

If the deceased's spouse or de facto partner consider the estate distribution provided for under the will does not appropriately reflect the nature of their relationship, they can elect to make a claim on the estate under the Property (Relationship) Act 1976 (PRA). Claimants can only make PRA claims within the six months following the grant of probate. After six months, the party is treated as having accepted the distribution provided for in the will if they have not elected to make a claim.

For example, a spouse or a partner in a de facto relationship of more than three years duration can presume that property will be shared equally before the distribution of the estate. Such a claim must be dealt with by the executor before any distribution of the estate can be made.

2. *Testamentary promises*

A testamentary promise claim arises from a promise made by the deceased that they would recompense the claimant for services performed. The Law Reform (Testamentary Promises) Act 1949 allows a claimant to seek recompense from the deceased estate if the deceased had promised to reward them, in their will, for services performed while the deceased was still alive, but no provision was made. There is no restriction on who can make claims under this Act, but claimants will need to prove:

- the promise was made by the deceased.
- the claimant performed the service based on the promise, during the deceased's lifetime.
- the deceased made no provision for the claimant in the will, or that a provision made does not sufficiently remunerate the claimant.

The service performed needs to go beyond what could reasonably be expected depending on the nature of the relationship. For example, providing comfort and support to an elderly neighbor would qualify, but doing the same for a parent probably wouldn't as it would be considered normal behavior in such circumstances.

3. *Family protection*

A family member can make a claim on the estate under the Family Protection Act 1955 if they consider the deceased has not made adequate provision for them. Claims under this Act can be brought by the deceased's spouse or de facto partner, children, grandchildren, stepchildren, or parents.

Claimants will need to demonstrate to the executor (or the Court if litigation ensues) that the deceased had a moral obligation to provide for them in the will and has not done so. For example, a child or de facto partner excluded from the will could make a claim under this Act. Special conditions apply for parents of the deceased, as well as for stepchildren and grandchildren.

Claims under this Act can be made within one year from the date probate was granted. This is one of the reasons that professional executors will often wait twelve months before the final distribution of the will.

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What is a Deed of Family Arrangement?

When the distribution of the estate is not made in accordance with the will or the laws of intestacy that apply, the executor and the beneficiaries, will need to have a Deed of Family Arrangement (DOFA) document prepared to record the distribution.

Such alterations may be necessary when the terms of the will are unclear, beneficiaries choose to alter the distribution between themselves, or a successful claim is made on the estate.

Should the need for a DOFA arise, the document should be prepared by an experienced estates solicitor to minimise the risk of it being challenged by a beneficiary. In addition, letters of indemnity, signed by all beneficiaries of the will are necessary to protect the executor from any liabilities that might arise from carrying out the terms of the DOFA. Our estates specialists at Wakefields Lawyers have extensive experience of DOFAs.

"Should the need for a DOFA arise, the document should be prepared by an experienced estates solicitor to minimise the risk of it being challenged by a beneficiary."

Final Thoughts

When you are named as the executor in a will, it is because the will-maker has considered you trustworthy and reliable, and they are placing the fulfillment of their wishes after death, in your hands. At Wakefields Lawyers, we recognise the importance of this role, and our estate administration and trust specialists are helping New Zealand families navigate the many and varied responsibilities. Contact us if you need help with any aspects of estate and trust administration.

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