

Sue Fordyce

BARRISTER & SOLICITOR



ESTATES GUIDE

WELCOME TO MY GUIDE FOR ESTATES

I have written this guide because losing someone you love and care about is always an emotional time. Many people are not at all sure how to handle all the work that inevitably goes along with the end of their loved one's life.

I hope in the pages that follow you will not only find help to know what to do, but also enough information about the work and steps others will be taking, so that you can understand what happens to a deceased person's estate.

However, it is essential to realise that everything written here is very general. It is only a very simple guide. So you cannot read it as direct legal advice to you personally. You will always need to get your own specific advice about your own particular circumstances, and those of the deceased person, before you will be ready to start managing their estate.

CONTENTS

In this guide, you will find information on the following topics

- 04 → **What to do straight away**
- 06 → **The Will**
- 07 → **The estate lawyer's role**
- 08 → **Administering an estate**
- 11 → **Claims against an estate**
- 13 → **Small estates**
- 14 → **When can an estate be distributed to beneficiaries?**
- 15 → **What if there is no Will?**
- 16 → **Estate administration costs**
- 17 → **A first appointment checklist**

Remember - this is only a guide!

As I mentioned earlier I cannot possibly hope to write down everything you might need to know about your loved one's estate. This is only a beginners guide to some of the questions you may have about how to manage an estate.

The contents of this guide are not legal advice!

But I will be happy to give you personalised legal advice about any of the topics covered in this guide – please contact me in person or by phone to talk to me about your specific situation even for your more general questions.

WHAT TO DO STRAIGHT AWAY

Whether the death of your family member or close friend was expected or whether it was sudden, you will be finding it a time of grief and sadness, with many adjustments needed. So here are some immediate things that you should consider doing to help you not feel too overwhelmed.

Practical First Steps

One practical step is to buy yourself a large exercise book in which you can write notes about phone calls, what people have told you (because when you are sad, you'll find that you may forget things easily), ideas that you might have for the funeral or reminders to do things.

It's also a good place to record phone numbers and any addresses you might need, and to collect up business cards and staple them in.

The second important step is to see if you can locate a copy of the deceased's Will as soon as possible. It may have instructions in it about both the funeral and burial or cremation.

Who do you need?

The following people will be needed to help you manage immediately:

- The doctor to issue the medical certificate of cause of death.
- A funeral director if you are going to use one.
- The deceased person's lawyer.
- The executors of the Will.

Please note: Remember this is only a guide and not intended to be legal advice. Please refer to page three for our full disclaimer. You may not reproduce, publish, copy or transmit in any form, this document or parts of this document, without the prior permission of Sue Fordyce.

Legal Requirements

Death Certificate You need to get a medical certificate of cause of death signed by a doctor. If the death was in hospital, this will be arranged by the medical staff. If the death was at home, you should call their doctor who will arrange for this to be done. A medical certificate of cause of death is a legal requirement for cremation or burial. The estate's lawyer also needs this certificate, so remember to get it to them as soon as you can. It is a good idea to get your lawyer to certify several copies of the certificate, as you may need copies of it later on.

Telling the Executors The executors are named in the Will. It's their job to administer the estate and carry out the terms of the Will. They should be informed as soon as possible about the death as they have specific responsibilities for the assets of the estate.

Securing and caring for the home/business It's very important that the home of the person who has died is secure. This should be done as soon as possible after their death. The house should be checked by the family, or the executors. Advise the insurance company of this fact. It may be wise to remove valuables such as jewellery for safe-keeping. Some families arrange for a security guard to be at the property on the day of the funeral. It's not unknown for would-be thieves to check the daily death notices and burgle houses during a funeral.

People to tell as soon as possible

- The deceased's lawyer.
- Their employers or employees as the case may be.
- Work and Income (so any benefits and national superannuation can be stopped).
- Any private superannuation providers.
- Any insurance companies if life policies are in place.

THE WILL

A Will is a legal document that specifies how you want your personal assets to be administered and distributed after your death.

In most cases, Wills are prepared by a lawyer or trustee company, and held by them in safe-keeping. The person who has died will usually have a copy of their Will amongst their personal papers. After the funeral, the executors should meet with the estate lawyer to discuss the Will and make sure they understand it.

The executors have a strict duty to administer the estate in accordance with the requirements of the Will, unless:

- The court orders otherwise, or
- All of the beneficiaries are adults and able to direct the trustees to do something different (this needs to be recorded or in writing).

What if you cannot find a Will?

If you cannot find a copy of a Will for the deceased among their papers, then if you know who their lawyer is, it is wise to ask at their office if they hold a Will.

If you are not sure who their current lawyer is, or if they don't have a copy of the Will, then see if anyone among family or close friends knows of any past lawyers the deceased has used and check with them.

If all of those steps come up with a blank, then you can approach the local branch of the New Zealand Law Society and they will circulate a notice among local lawyers asking them to check their records for you.

If that is still no help, the New Zealand Law Society can help you advertise nationally in their magazine to see if a Will can be found.

THE ESTATE LAWYER'S ROLE

The law governs much of what needs to happen after a person's death, and there are specific procedures set down for the various aspects of winding up their personal and business affairs.

As the executors appointed in the Will are often family members or friends, unfamiliar with the law and their responsibilities, the estate's lawyer's main jobs are to give as much guidance as necessary throughout the administration process, and prepare documents as required. In most cases, the estate's lawyer undertakes almost all the administration and legal tasks in consultation with the executor/s.

There are, however, a number of families who are willing to do some of the 'donkey work' for the estate such as collecting documents, obtaining signatures in documents and so on. Most lawyers are very happy for families to help in this way. Not only can this save the estate money, but it may also help families be involved and give them some sense of closure.

The estate's lawyer will liaise with the executors to ensure that they understand the Will and their responsibilities, and guide them through the process.

The estate's lawyer will explain

- The executor's responsibilities.
- The three pieces of legislation under which claims can be made against an estate, (see the later section "Claims against an estate"), and
- The procedures needed if there's no Will.

Probate

Probate is an order of the High Court to confirm that the last Will of the deceased is valid, and also to give the executor's authority to administer the estate.

Probate must be applied for, unless the deceased's only assets are either very minor personal assets or cash, or investments that don't exceed \$15,000 at any one institution. The application for probate must be made to the High Court, in a very specific format, with equally specific information requirements. It's usual for the estate's lawyer to prepare these documents.

As part of the application for probate, each executor must swear an affidavit to carry out the terms of the Will. Anyone who doesn't want to swear on the Bible, may make an affirmation instead of a sworn oath.

Until probate is granted, the estate goes into a sort of holding pattern where nothing much can happen, except making some preparations for, say, the deceased's home to be sold. Bank accounts and investments in the name of the deceased person are frozen and there is often not much that can be done while the probate application is being processed. This is often a surprise to family and executors to find that there can be unexpected times of waiting in administering an estate.

Probate is usually granted between four to eight weeks after the documents have been lodged at the High Court.

Please note: Remember this is a only a guide and not intended to be legal advice. Please refer to page three for our full disclaimer. You may not reproduce, publish, copy or transmit in any form, this document or parts of this document, without the prior permission of Sue Fordyce.

ADMINISTERING AN ESTATE

Once probate has been granted, other documents will need to be prepared, witnessed and (if necessary) registered. These include documents to be presented to banks, finance companies and share registries in order to cash up assets and transfer property. In the case of land, it's usually necessary to sign forms so that the estate's lawyer can have the deceased's property transferred into the names of the executors.

The Executor's Role

It is the executors whose job is to administer the estate and carry out the terms of the Will. There may be only one person or there may be several. Executors can also often be called trustees.

Executors' duties and responsibilities

Executors are required to carry out the terms of the Will. Executors' duties and responsibilities include:

- Studying the terms of the Will to make sure they understand it. If anything in the Will is unclear they should ask the estate's lawyer to explain it.
- Ensuring the deceased is buried or cremated, preferably in accordance with any wishes expressed in the Will. These wishes are, however, not legally binding.
- Ensuring steps have been taken to secure the house, business or other assets of the deceased.
- Ensuring all wishes of the deceased as expressed in the Will are carried out, as far as possible.
- Ascertaining details of the deceased's assets, and undertaking or overseeing their transfer to beneficiaries.

Details that will be needed from the executors and the family

- Names, occupations and addresses of the executors, and their IRD numbers.
- Names and addresses of the beneficiaries.
- Details of bank accounts, bonus bonds, investments, shares and debentures, unit trusts, mortgage investments, managed funds, Kiwisaver or other superannuation schemes, life insurance, any business interests, real property (residential home, investment property, etc.) and motor vehicles.
- Details of any jointly owned property.
- Details of any liabilities.
- Insurance policies held for property, contents and motor vehicles.
- Insurance policies held on the life of the deceased.
- Name of employer, details on any work-related superannuation scheme and any other employee benefits payable on the death of the employee.
- Passport and/or drivers licences for identification.

Please note: Remember this is a only a guide and not intended to be legal advice. Please refer to page three for our full disclaimer. You may not reproduce, publish, copy or transmit in any form, this document or parts of this document, without the prior permission of Sue Fordyce.

Note: The executors must ensure all debts owed by the estate are paid. They must also ensure all tax and legal issues are dealt with appropriately.

Joint Assets

Any jointly held assets automatically pass to the surviving owner and don't form part of the estate. Examples of jointly held assets are joint bank accounts or investments and jointly owned property.

It is, however, often necessary to provide a certified copy of the death certificate to the banks, and any other institutions that may hold jointly held assets with a request to transfer the asset to the surviving owner. In the case of land owned jointly, it is necessary for the title to the land to be transferred into the name of the surviving owner. The estate's lawyer will prepare this documentation, and arrange signing and registration.

The executor's role ends when all distributions are made to adult beneficiaries, and all expenses and tax have been paid. Executors will continue as trustees if money is held for under-age beneficiaries.

Beneficiaries

A beneficiary is a person or organisation who benefits from an estate, either as provided for in the Will or, if there's no Will, by the provisions in the Administration Act 1969.

Before any beneficiary receives what they're entitled to, all debts and expenses must first be paid from the estate's assets.

Right of Beneficiaries

Beneficiaries have the right to receive the share of the estate that's due to them in a timely manner. It must be done in accordance with the Will.

Beneficiaries have a right to be kept informed of matters relating to their share of the estate at all stages of the estate's administration.

The executors and trustees should give beneficiaries information relating to any benefit due to a beneficiary when requested by the beneficiary.

It's important that executors and trustees are open and honest with beneficiaries.

In some cases, the estate will turn into a trust if, for example, one of the beneficiaries is under age. The trustees must carry out their responsibilities to invest prudently and in the best interests of the beneficiaries, and to keep the beneficiaries informed about the details of their entitlement and the investment of it. This information should be provided when requested by the beneficiary. Ideally, a full report should be made to all beneficiaries on an annual basis on the investment of their share of the estate.

If a beneficiary has serious concerns about the administration of the estate, they can ask for an audit to be carried out.

Please note: Remember this is only a guide and not intended to be legal advice. Please refer to page three for our full disclaimer. You may not reproduce, publish, copy or transmit in any form, this document or parts of this document, without the prior permission of Sue Fordyce.

Young Beneficiaries

The Will can specify at what age a beneficiary must be to receive a share of the estate. If the Will doesn't say this, then the share is distributed when the beneficiary turns 20.

If the beneficiary is under the age for distribution of their share of the estate, the trustees must invest prudently until the beneficiary is entitled to receive their share. Sometimes a Will will provide for the beneficiaries to receive assistance with living or education costs while they are under the age for distribution. In this case, it will be the executors, acting as trustees, who will consider any requests to distribute funds out of the estate and make decisions in that regard.

CLAIMS AGAINST AN ESTATE

In New Zealand, you're largely free to leave your estate as you wish in your Will.

New Zealand law does allow, however, some people to make claims against an estate after the Will-maker has died. This may mean the court will override the Will to some extent. Because a claim might be made, it's not always possible to distribute the estate immediately.

Property (Relationships) Act 1976

This is the legislation (often known as the PRA) which requires equal sharing of relationship property if a couple separate or divorce or, even if they are a happy couple, but one of them dies. In general terms, relationship property consists of the assets acquired together during a relationship, as well as other assets the couple has acquired to use and enjoy. The PRA applies to all couples - married, de facto and same sex.

The PRA can also apply after one of the couple has died. For example, if most of the assets were in the one spouse's name, those assets will need to be dealt with as part of their estate. If the other spouse is still alive, they may claim that these assets were relationship property and they are entitled to half of them under the PRA.

The law doesn't allow the surviving spouse or partner to benefit under the Will and claim under the PRA as well: you have to make a choice. So the spouse would be required to choose either:

- **Option A:** Bring a claim under the legislation and abandon any entitlement under the terms of the Will, or
- **Option B:** Take what they are given under the Will and give up any claim under the Act.

In some cases, the choice is quite easy, although there are some time constraints. If you receive the whole estate under your partner's Will, there is no point bringing a claim under the PRA as well. However, it's not always clear whether you would be better off choosing Option A or Option B. The law requires that the spouse or partner must have independent legal advice before making this decision. The estate lawyer can't give this advice; it must be another lawyer from a different law firm.

In some rare cases, the estate may have a claim to half the relationship property if this property is in the name of the surviving spouse.

Resolving these sorts of issues is complex and expensive; if you think there's a possibility of a claim under the PRA, do get independent legal advice.

Family Protection Act 1955

Under this legislation, some close family members have a right to claim more from the estate if they believe they haven't received enough for their proper maintenance and support. The only people who can claim are spouses, partners, children, grandchildren, dependent step-children and dependent partners. There are some time limits on these types of claims.

Recent Court of Appeal Cases have emphasised that courts should only intervene in cases of proven need for maintenance and support. Each case, however, is different and the courts need to look at individual circumstances.

A surviving spouse or partner can bring a claim under the Family Protection Act as well as under the Property (Relationships) Act. Claims brought on behalf of a young child (usually initiated by the child's guardian) are likely to be successful if the child is in need of support or needs money for education costs. An adult child of the deceased, who is able to work, is likely to receive either nothing, or only a small amount under the legislation, unless some particular medical or other need can be demonstrated.

Testamentary Promises

The Law Reform (Testamentary Promises) Act 1949 allows claims where someone has helped the deceased in exchange for a promise of reward under the Will. The person claiming needs to show that a promise was made, and work or services were performed for the deceased in reliance on that promise. Claims under this legislation are sometimes made by people who have worked unpaid to, say, care for an elderly person and have been told that "they'll be looked after" in their Will.

Day to day family activities such as household cleaning or cooking meals for a relative aren't usually considered grounds to allow a claim under this Act. There are some things that family members do because they are family, and not because of any promise that might have been made.

Other Types of Claims

There are other ways in which a Will may be challenged. It may be claimed that the deceased wasn't mentally competent to sign the Will, or was subject to undue influence and didn't freely sign the Will of their own accord. It may be that the deceased had made a binding agreement with someone to make a Will in a particular way. For example, a couple may agree that they will sign mutual Wills and won't change their terms in the future.

Claims of this type can only be dealt with by the High Court. Claims under the Property (Relationships) Act, Family Protection Act and testamentary promises legislation can be dealt with in the Family Court at less expense.

To avoid the cost of drawn-out and expensive court battles, many estate beneficiaries try to settle any dispute by agreement with the claimants. Sometimes a mediator (usually much cheaper than a court hearing) can be called in to help the claimants and beneficiaries reach an agreement.

SMALL ESTATES

The Administration Act 1969 allows an estate to be administered without probate if there are only financial assets and none of the individual assets exceeds \$15,000 in value. Financial assets include funds held in bank accounts, life insurance, superannuation or Kiwisaver proceeds. If land is involved however, the executors will have to apply for probate.

If the estate qualifies as a small estate any institution holding assets, such as a bank, needs to be advised of the death, and should be asked what their requirements are to pay out or transfer the asset to the administrator or beneficiaries. Institutions are likely to need a certified death certificate, they may want to see a copy of the Will and they may need an indemnity from the person entitled to receive the asset.

All estate debts must be paid from funds received before any distribution is made to the beneficiaries. This includes checking with Inland Revenue to ensure all tax requirements have been met.

Finally, the estate may be distributed to the beneficiaries under the Will or, if there is no Will, the people entitled to benefit under the Administration Act.

WHEN CAN AN ESTATE BE DISTRIBUTED TO BENEFICIARIES?

Many people think that once probate has been granted, the estate can be distributed immediately. There are, however, a number of very good reasons to wait some months.

Firstly, there is always the possibility that a claim can be made on the estate. For example, someone could bring a claim under the Family Protection Act or other similar laws. The possibility of a claim such as this affects the time it will take before the estate can be distributed. Executors act at their own personal risk if they distribute the estate too soon after the grant of probate. If a successful claim is brought later, the executors may be forced to claim back some of what was previously distributed to the beneficiaries under the Will. If the beneficiaries are no longer able or unwilling to pay, the executors may have to pay up from their own funds. Because of this risk, most executors wait at least six months to see if there's any possibility of a claim against the estate.

Anyone who is planning to bring a claim of this type can give the executors a notice of intention to claim. Again, the executors act at their own risk if they make a distribution after receiving a notice of intention.

Secondly, there may be debts owing by the deceased. Executors are personally liable to pay the estate debts, unless they have advised for creditors in a local newspaper under s35 of the Trustee Act 1956.

If the executors want to make, or beneficiaries want to receive, early distributions from an estate they should always get legal advice before doing so. At a minimum, executors will need to get indemnities from the beneficiaries before doing so to protect themselves.

WHAT IF THERE'S NO WILL?

In New Zealand, most estates of any size are administered under the terms of the person's Will.

Sometimes, however, the deceased hasn't made a Will. In that case the person is said to have died intestate, and the law steps in to say who is entitled to share the estate. These rules also apply where the deceased attempted to make a Will, but it wasn't completed correctly – unless the High Court is willing to validate the Will under the Wills Act 2007.

Section 77 of the Administration Act 1969 sets out who is entitled to benefit if a person dies without a valid Will. If there is a Will, but it only deals with part of the estate, then S77 will apply to the part of the estate not covered by the Will.

Letters of Administration

If there is no Will, then unless the estate is very small, the High Court must approve the appointment of administrators and give them a document called Letters of Administration of Intestacy. There is an order of priority for who may apply for these Letters of Administration. Basically, this is the person or people who will receive most of the estate under the table on the previous pages. However, other people can be appointed administrators with the consent of the beneficiaries.

After you, or the estate's lawyer has established whether Letters of Administration are required, and who is to apply for them, then the application documentation must be completed and filed at the High Court.

Once the order is granted, the Administrator can then proceed with administering the estate.

What about if there's no executor, but there is a Will?

Where there's no executor, for example, if the executor named in a will has predeceased the person who has died, the court will appoint an administrator to carry out the requirements of the Will. This is called 'Letters of Administration with Will Annexed'.

This procedure is used also where an executor, for whatever reason, can't or won't apply for probate.

ESTATE ADMINISTRATION COSTS

These are some of the costs that will be payable.

Court Fees

If the value of one of the estate's assets is more than \$15,000 or there is land involved, the executor of the Will, or administrator of an intestate estate, must apply to the High Court for probate or Letters of Administration and pay the necessary fees. Currently the court fee is \$200 including GST.

Estate Lawyer's Fees

The work involved in administering an estate can vary greatly. It depends on the extent of the assets and liabilities, where they are held, the availability of the executors and the circumstances of the beneficiaries. If there's a claim against the estate, resolution of the claim may be time consuming and add to the estate lawyer's fees.

Lawyers charge in a variety of ways: their fees may be based on the time taken at a set rate per hour, or there may be a fixed fee for specific tasks. Sometimes the fees are a combination of these charging methods.

You can ask the estate lawyer to give you information on how fees are charged, and to give an indication of what they may estimate their fees to be for administering an estate of this size. It may be difficult for them to give a quote, but all estate lawyers should be able to give information about how fees will be charged and may be able to estimate costs.

To help save on the estate lawyer's costs, gather together as much information as you can for the estate and respond quickly to requests for information or answers to questions the estate lawyer may ask. Asking repeatedly for information, or having to follow up requests of executors and/or beneficiaries can lead to an increase in the costs.

Other administration costs

The executor or administrator must ensure the estate's debts are paid. This can be done once probate or letters of administration have been granted and there are funds available from redeemed investments. If the invoice for the funeral, or other similar expenses have already been paid by a family member or friend, that person can be reimbursed for this payment.

Inland Revenue must be notified and a date of death tax return filed if required. Any tax payable is an estate debt. It is the executor or administrator's responsibility to ensure all tax requirements for the estate are completed; the estate's lawyer and/or accountant can help the executors with this.

FIRST APPOINTMENT CHECKLIST

What should you bring to the first appointment with the estate's lawyer?

Family members can often provide the estate's lawyer with very helpful information about the deceased's assets and financial affairs. The checklist below will help you gather useful documentation together.

- Bank Statements, including joint accounts
- Property owned (including residential home and investment properties), rates instalments, insurance etc.
- Bonus Bonds Certificates (if available).
- Share portfolio summary (ring the stockbroker for this or check records on computer or share registries), stock and debenture certificates (if available), details about unit trusts, mortgage investments, etc.
- Motor vehicles' details and insurance.
- Insurance
 - Life insurance
 - Medical insurance
 - Trauma insurance
 - Income protection insurance
 - House and contents insurance (see above).
- Tax information (including details of previous returns filed, IRD number and current resident withholding tax (RWT) certificates).
- Employer's name and contact details.
- Income details from investment and/or current employment.
- Details of any business interest the deceased may have: this may include directorships, trusteeships, investment in companies, etc.
- Details of any pensions or superannuation including Work and Income, and UK pensions (if applicable), Kiwisaver, managed funds, etc.
- Copy of the last Will.
- Details of executors, including full names, addresses and IRD numbers.
- Details of beneficiaries including full names, addresses and bank details for payment of any fund owing to them.
- All accounts payable and details of all debts owing by the estate (including the funeral account if available).
- Medical certificate of cause of death, and the birth certificate if available.
- Passport.
- Driver's licence.
- Any other papers that you may consider necessary (the estate lawyer can sort through any papers you are unsure of and give back to you those that aren't required)

Please note: Remember this is a only a guide and not intended to be legal advice. Please refer to page three for our full disclaimer. You may not reproduce, publish, copy or transmit in any form, this document or parts of this document, without the prior permission of Sue Fordyce.

Sue Fordyce, Barrister & Solicitor/LL.B 324 Broadway Ave, Palmerston North
Phone: 06 355 0531 › **Mobile:** 027 4452213 › **Website:** www.suefordyce.co.nz