



# The Closing Chapter

A practical guide to help deal with the death  
and estate of close family or friends  
2nd Edition



© NZ LAW Limited 2022 Publisher: NZ LAW Limited

Design/production: Mammoth Media, Onekawa, Napier

Print: Mammoth Media, Onekawa, Napier

NZ LAW Limited, PO Box 132, Napier.  
[www.nzlaw.co.nz](http://www.nzlaw.co.nz) ISBN: 978-0-473-25104-8

---

All rights reserved. No part of this booklet may be reproduced or used in any form or by any means, electronic or mechanical, including photocopying, recording or by any information storage and retrieval system, without permission in writing from the publisher and credit being given to the source.

Disclaimer: Material published in The Closing Chapter is true and accurate to the best knowledge of NZ LAW Limited. It should not be a substitute for legal advice. No liability is assumed by the publisher for any losses suffered by any person relying directly or indirectly on this booklet.

---

*We would like to thank contributors to this booklet:*

*Greg Kelly Law Limited and Adrienne Olsen, Adroite Communications.*



# Table of contents

<b>Introduction</b>	<b>5</b>
<b>Immediately after the death</b>	<b>6</b>
Practical advice	6
Telling people	6
The medical requirements	7
The funeral	7
The funeral director	7
– The family or close friends can help	8
Paying for the funeral / funeral costs	9
Securing and caring for home/business	10
<b>The Will</b>	<b>13</b>
Executors	13
Keeping everyone informed	14
Trusts created by a Will	14
Overseas assets	15
Correcting mistakes in Wills	15
Waiting before estate distribution	16
– Distributions in special circumstances	
<b>The estate lawyer's role</b>	<b>17</b>
Probate	18
Administering the estate	18
<b>The executors' role</b>	<b>19</b>
Executors' duties and responsibilities	19
<b>The trustees' role</b>	<b>21</b>
Trustees' duties and responsibilities	21
<b>Beneficiaries</b>	<b>23</b>
Rights of beneficiaries	23
Beneficiaries under 20 years old	23
<b>What can the family do?</b>	<b>24</b>



Provide useful information	24
<b>Claims against an estate</b>	<b>26</b>
Property (Relationships) Act 1976	26
Family Protection Act 1955	27
Testamentary promises	27
Other types of claims	28
<b>Small estates</b>	<b>29</b>
<b>What if there's no Will?</b>	<b>30</b>
Who gets what?	30
What the family should think about	32
Letters of Administration	32
If there's no executor but there is a Will	33
<b>Estate administration costs</b>	<b>34</b>
Court fees	34
Estate lawyer's fees	34
Other administration costs	35
<b>Asset planning for your own future</b>	<b>36</b>
Wills	36
Living Wills	37
Letter of wishes	37
Enduring Powers of Attorney	37
Asset protection	38
Contracting out agreements	38
Life insurance and funeral trusts	39
Getting your own affairs in order	39
<b>Checklists</b>	
Executors' checklist	40
First appointment checklist	41
<b>Glossary</b>	<b>43</b>
<b>Notes</b>	<b>48</b>



# Introduction

When someone close to you dies, whether family or a close friend, it's a time of shock and dealing with the unexpected, as well as your own feelings of grief and loss.

You're catapulted into thinking about organising a funeral, whether it will be a cremation or burial, and how to organise the day, and then you also need to think about the Will and all the ramifications of dealing with the estate.

This booklet provides an overview to help you if you're doing some pre-planning, or organising a funeral of a family member or close friend. We'll guide you through the steps you need to take from the time of your loved one's death through to their funeral.

Most of The Closing Chapter, however, focuses on what happens with the Will and the estate. There's information for executors, trustees, and beneficiaries as well as material about claims against an estate, dealing with small estates and what happens when there's no Will. We've also covered some topics, such as asset planning, that beneficiaries of the estate may find useful.

We've provided a checklist of what to bring to the first appointment with the estate's lawyer, as well as a step-by-step guide on clearing up the estate. At the back of the booklet there's a glossary of terms that you will hear as the necessary legal processes are worked through.

The Closing Chapter is designed for readers to 'dip into' and not necessarily for you to read cover-to-cover, so we have tried to ensure that each section is as complete as possible in itself. In order to do this, there is, of necessity, some repetition of material.

We hope this booklet helps to explain the processes and procedures around the death of a family member or close friend, gives some advice about organising a funeral, and guides you through what to do in dealing with their estate. We also hope that you get some comfort from knowing there's a guiding hand for you as you work through grief and, often, a major change in your life.

---

Our firm is a member of NZ LAW Limited, an association of independent legal practices with member firms located throughout New Zealand. There are more than 50 firms practising in over 70 locations.

NZ LAW member firms have agreed to co-operate together to develop a national working relationship. Membership enables firms to access one another's skills, information and ideas, whilst maintaining client confidentiality.

# Immediately after the death

Steps that must be undertaken immediately after the death.

## Practical advice

Our most practical piece of advice is to buy yourself a large exercise book in which you can write notes about phone calls, what people have told you (because you're shocked, 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. Stick in business cards of, say, the funeral director, the funeral celebrant, minister, or priest, the estate's lawyer, and any other person you come in contact with at this time.

You'll find this book to be invaluable as you work your way through all the arrangements that have to be made in the coming days, weeks, and months.

## Telling people

You'll want to make sure the appropriate people are told of the death. Usually this is done by family, but sometimes people prefer either the executor of the estate to do this, or the estate's lawyer. As a guide, the people you may need to contact include:

- ✦ Doctor to issue the medical certificate of cause of death.
- ✦ Family and friends. If you feel comfortable with this, email and social media can be useful for the wider circle of friends and relatives.
- ✦ Funeral director (see more on this on Page 8).
- ✦ The deceased's lawyer. If you're not sure who this is, their lawyer's name will be on the Will.
- ✦ The executors of the Will (see more in the section 'The executors' role' on Page 19).
- ✦ People or organisations making a regular payment to the person's bank account, eg: their employer, Work and Income or other superannuation payer.
- ✦ Neighbours.
- ✦ Business associates.
- ✦ Bank (noting that as soon as you notify the bank of the death, the person's accounts will be frozen).



## The medical requirements

You'll need to get a medical certificate of cause of death signed by a doctor. If the death was in hospital, this will be arranged with the medical staff. If the death was at home, for example, 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. This is different from the death certificate, which is issued after the funeral and burial or cremation have taken place.

## The funeral

You'll need to check the Will or separate funeral instructions for any funeral requirements, including whether a burial or cremation is requested. Many people are quite specific about what they want for their funeral, how they want their body dealt with (there may be cultural or religious requirements), who should be notified, and the form of service (whether it's religious or secular). Often the instructions include details about hymns or songs to be sung, music to be played, right down to what they'd like to be dressed in.

Even if you think you already know their wishes about their funeral, do check personal papers in their home and also with their lawyer. Sometimes funeral directions have been found in the oddest of places (wardrobes, tax files, etc), so without turning the house over, do have a good look. It's comforting to know that you've been able to carry out their wishes for this most important farewell.

## The funeral director

Once you know what the funeral instructions are (if any), the next step is to arrange a funeral director. The funeral director is, in effect, the master of ceremonies for the funeral. He or she will look after not only the legal requirements such as applying for the death certificate, but also the way the funeral is arranged.

You may already know of a funeral home or ask other people for a recommendation. Alternatively you can Google "funeral directors" - there's usually quite a lot of choice.

Although the funeral director can run the entire funeral from start to finish, these days most families and close friends want to be involved. The lists below may help you with who does what.

The funeral director:

- + Collects the person from the place of death.
- + Ensures the medical certificate of cause of death has been completed.

- ✦ Organises the cremation or burial details.
- ✦ Orders a coffin.
- ✦ Carries out the embalming, if required.
- ✦ Organises transport to and from the funeral and to the cemetery or crematorium.
- ✦ Arranges the funeral service, if required.
- ✦ Arranges any function afterwards, if requested.
- ✦ Arranges for the death certificate to be issued.

Before you see your chosen funeral director you may want to think about the family's preferences for a funeral and, more importantly, the choices of the person who has just died.

### **The family or close friends can help with:**

- ✦ Guiding the funeral director and the funeral celebrant on any cultural or religious requirements or wishes.
- ✦ Talking with the funeral celebrant, minister or priest about the location, day, time, and type of funeral that's required.
- ✦ Drafting the death notice for the daily newspapers and emailing it (to help prevent spelling errors) to the funeral director who will arrange placement.
- ✦ You may want to consider asking for donations to a favourite charity rather than people sending flowers. This information goes into the death notice and online tribute page.
- ✦ Writing a eulogy or asking people to speak at the funeral.
- ✦ Organising and/or arranging the flowers for the coffin and the funeral venue.
- ✦ Choosing music (songs, hymns, processional music, background music, etc).
- ✦ Writing the order of service in conjunction with the priest or celebrant, and getting it designed and printed.
- ✦ Selecting photographs or memorabilia for a slideshow during the funeral, for the order of service, or to place on top of the coffin. Children or grandchildren may like to write a letter or place a special memento into the coffin.
- ✦ Choosing pallbearers.
- ✦ Arranging the function afterwards. This is sometimes held in the church hall, in the funeral director's premises, or at a relative's home.





## Paying for the funeral

Many people establish a special funeral trust that will pay for their funeral expenses. Others may have ensured that there are sufficient funds on hand in a savings account to pay for their funeral.

Some people, however, have simply enjoyed their lives and have given little thought to their funeral or how it will be paid for. In most cases, their estate will have sufficient funds to pay for the funeral after probate is granted. Their bank will also be prepared to release funds to pay for the funeral, even though the account is otherwise frozen. If there are genuinely no funds available to pay for a funeral, family members may want to chip in or the executors can apply to Work and Income for a funeral grant. If the death is the result of an accident, you can apply to ACC for a funeral grant.


If the person who has died had a Super Gold Card, funeral directors in some locations offer a discount, although certain conditions apply. See [www.supergold.govt.nz](http://www.supergold.govt.nz) for more details.

If you're unsure how the funeral will be paid for, talk to the funeral director or to the estate's lawyer. They will be able to give you some good advice.

## Funeral costs

There are three main areas of cost for a funeral:

1. Professional fee paid to the funeral director: this covers fixed overheads of receiving instructions, use of facilities, embalming (if required), use of vehicles such as a hearse, liaison with doctors for the medical certificate of cause of death, making arrangements with the crematorium or cemetery, etc. The funeral director will also register the death with the Department of Internal Affairs and will apply for the death certificate.
2. Expenses paid on behalf of the family: These can include the cost of the medical certificate of cause of death, death notices in newspapers, flowers, catering, order of service sheets, death certificate, and so on.
3. Coffin (or casket). There is a wide range of coffins available made from the cheaper MDF to the more expensive models of solid wood; or you could decide on an eco-coffin. The funeral director will be able to guide you on this.



There are ways to rationalise funeral costs if you're prepared to do some of the work yourself. For example, you can organise the flowers and arrange the order of service and the catering for the function afterwards.

We do, however, recommend that you liaise early on with the funeral director to ensure that it's clear who is responsible for which arrangements. You don't want to inadvertently double up, nor do you want to make an assumption that something has been done and it hasn't.

## **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, to ensure that what is probably the estate's major asset is safe and looked after.

If the property is now empty, you'll need to:

- ✦ Check all windows are closed, and the property is locked.
- ✦ Remove all valuables such as jewellery to a safe place, and notify the estate's lawyer of the location. You'll need to list all those valuables removed from the house, and this list should be given to the executors.
- ✦ Turn off hot water and unnecessary appliances such as the TV and computer (not the refrigerator!).
- ✦ You may want to put a timer on for several inside lights, so it looks as though the property is occupied.
- ✦ If there's a burglar alarm, make sure it's turned on. If the alarm isn't monitored, you may want to consider contacting the alarm company to arrange monitoring in the meantime.
- ✦ Newspaper deliveries should be stopped.
- ✦ Contact NZ Post to ensure the mail is redirected; also ask a neighbour to clear the box regularly of advertising material and community newspapers.
- ✦ Arrange for the lawns to be mowed regularly and the garden looked after.
- ✦ Pets will need to be rehoused. Remember to take their pet food from the house.
- ✦ Check whether any bills are falling due such as rates, insurance, etc and arrange for appropriate invoices to be paid. Talk to the estate's lawyer about this, as these become an estate expense. Alternatively, a family member can pay the invoices, and the estate can reimburse them later.



- ✦ Notify the insurance company to say the house is unoccupied, and that the valuables have been removed to a safe location. The insurance company may want to have a list of valuables.
- ✦ You may also want to arrange for the house to be temporarily occupied by a relative or short-term tenant, so it's kept well-aired and cared for. Check first with the executors before making arrangements.

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.

## **Working life**

If the person who has died was in paid employment, their desk will need to be cleared and their personal items removed from their workplace. Their employer may also be liable to pay out annual leave and other entitlements to the estate.

It may also be necessary to ensure that businesses are looked after. Is there a trusted employee who can keep things going in the short term, or will it be necessary for someone to step in quickly to pay wages/bills, talk to suppliers/customers and so on?

*There's a great deal to do after the death of a family member or a close friend. Don't worry too much about the Will or the legal side of things at this stage. Spend your time securing their home, keeping in touch with the executors, and organising the funeral to reflect their wishes and give them a good send-off.*





# The Will

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

## 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. There's more about this under 'Securing and caring for the home/business' on Page 10.

After the funeral, the estate's lawyer will be in touch with the executors so they can read through the Will and familiarise themselves with its contents. There's more about the role of the executors on Page 19.

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 estate's lawyer will arrange to meet with the executors to discuss the Will and make sure they understand it. The lawyer may have emailed or sent it to the executors beforehand, just so everyone is familiar with it. If any of it is unclear the executors should ask the estate lawyer to explain it to them.

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

- ✦ The court orders otherwise (see section on 'Claims against an estate' on Pages 26-28), or
- ✦ All of the beneficiaries are adult and able to direct the trustees to do something different (this needs to be recorded in writing).

There are a number of standard clauses which appear in most Wills:

1. Cancel all earlier Wills: in order for the court to approve probate, it needs to be clear that any earlier Will has been cancelled or revoked.
2. Appoint executors and trustees: these are the people who will administer the estate and carry out the terms of the Will (there may be only one person or there may be several who are executors).

- 
- 
3. Specific gifts of money (legacies) to named people or bequests to charities or other organisations. There may also be specific gifts of various items, for example, a gift of furniture and household items to be divided among the family.

---

  4. There should be a clause saying what should happen to the rest of the estate (sometimes called the 'remaining estate' or 'residue') after payment of the funeral costs, taxes, and other liabilities.

---

  5. There will usually be some further clauses setting out the powers and authority the trustees have to administer the estate. Although the law gives executors some automatic rights, these are restricted and many Wills will have this set out more fully.
- 

In addition, the Will may have other clauses such as naming a guardian for any children who are under-age, and directions about a funeral or cremation. The executors have a duty to ensure the deceased is buried or cremated; and they should usually take into account the directions stated in the Will, although these aren't legally binding. Although the family or close friends usually organise the funeral, the executors are responsible for ensuring appropriate funeral arrangements are carried out: early consultation with whānau can prevent misunderstandings later on.

## **Keeping everyone informed**

Despite what you may have seen in the movies or on TV, there's no legal formality known as the 'reading of the Will'. There's no requirement for the estate lawyer or anyone else to do this and many families don't want this to happen.

The estate beneficiaries are, however, entitled to be kept informed about the administration and the progress of the estate. The beneficiaries who will receive a share in the remaining estate will usually be given a copy of the whole Will.

Beneficiaries who are simply to receive a bequest of a particular item or a legacy of a specified sum of money will usually be told what is said in the particular clause relevant to them, and aren't usually given a copy of the entire Will.

## **Trusts created by a Will**

Sometimes trusts are created by a Will: these are known as 'testamentary trusts'. Quite often the terms of the Will can mean that part of the estate has to be held on trust for a particular time. An example is where part of the estate is left to under-age children. Unless the Will directs otherwise, this must be held on trust for them until they reach the age of 18.



Another type of trust that is sometimes seen in Wills is what's called a 'life interest trust'.

Common examples are:

- ✦ The right for a named person to live in the deceased's home for a specified period or until the person concerned is no longer able to live there.
- ✦ The right to receive the income or interest from a specified amount of money or particular investments, for example, the rent from a particular property. This arrangement can continue during the lifetime of the named person.
- ✦ The Will may set aside an amount of money or investments to be held on trust for a named group of people (possibly the deceased's young children or grandchildren) and this may be used for their education or other needs.

The beneficiaries have a right to be kept informed during the course of the estate administration. In the case of beneficiaries aged under 18, their parent or guardian should be kept informed.

The law also lays down strict requirements for funds to be invested as a prudent person would invest when looking after someone else's money. Appropriate advice should be obtained if there is a large amount to be held on trust or it is to be invested for any length of time.


## **Overseas assets**

Assets in another country can cause complications. The New Zealand probate document may need to be re-sealed (approved) by the court of a Commonwealth country, for example, Australia or the UK. In other countries, such as the USA, it may be necessary to apply for a separate grant of probate in each country. It's also necessary to comply with the tax laws of those countries. This will often include payment of death duties and capital gains taxes. As a consequence, the administration of the estate can be delayed for several years whilst all this is sorted out.

To avoid problems such as this, Will-makers with assets in different countries are sometimes advised to have a different Will in each country. This allows the assets in each country to be dealt with separately without holding up what is happening in any other country.

## **Correcting mistakes in Wills**

Sometimes mistakes occur in the preparation of a Will. Fortunately the Wills Act 2007 now allows the High Court to correct drafting errors. The Court can make changes to ensure the Will correctly carries out the Will-maker's intentions. These problems don't arise very often which is fortunate as there's considerable cost involved in applying to the High Court. If the Will hasn't been signed and



witnessed correctly, it's also possible to apply to the High Court to declare the Will to be valid. Again, the Court must be satisfied that the document carries out the Will-maker's intentions.

## **Waiting before estate distribution**

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 as the Will can be challenged.

There is always the possibility that a claim could be made on the estate, for example, someone could bring a claim under the Family Protection Act or other similar laws. How and when this can happen is explained in the later section on 'Claims against an estate', see Pages 26-28. 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 to pay, the executors may have to pay up from their own funds. Because of this risk, most executors wait 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. However, the notice is only valid for three months and can't be renewed after that.

These rules apply only to a claim by someone who wants a share of the estate. Different rules apply to debts owing by the deceased. Executors are personally liable to pay the estate debts unless they have given notice to potential creditors under s 79 of the Trusts Act 2019.

## **Distributions in special circumstances**

There are times, however, when a portion of the estate can be distributed earlier than the usual six-month mark. This could be when the estate is of a significant size and there's no valid reason, as far as the executors are concerned, for holding up the distribution of some of the funds, or there may be a situation where one beneficiary could use their legacy for a specific purpose. In such cases, a healthy portion of the estate is retained, and the beneficiaries usually sign an indemnity that releases the executors from liability.

Another situation where early distribution can be made is when funds are needed for a beneficiary's education or welfare, even though a claim against the estate is likely.





# 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, they will usually be unfamiliar with the law and their responsibilities. The role of the estate's lawyer is to give as much guidance as necessary throughout the administration process, and prepare documents as required. In many cases the estate's lawyer will actually undertake 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 on documents and so on. Most lawyers are very happy for families to help in this way. Not only can this save the estate some money, but it may also help families be involved and give them some sense of closure. We have more on this in the section 'What can the family do?' on Pages 24–25 and a checklist on Pages 41–42.

As a result of this pivotal role in the estate, the estate's lawyer is one of the first people you'll need to inform after the death, preferably before the funeral although most of your contact will be after the funeral.

When a death is notified, the lawyer will check to establish if their firm is holding a Will for the deceased and, if so, whether it's the most recent one.

If no Will can be found, the lawyer will need to apply for Letters of Administration. There's more on this in the section 'What if there's no Will?' – see Pages 30–33.

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

Each executor must swear an affidavit (usually done at the estate lawyer's office) 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.

The estate's lawyer will need the death certificate (previously obtained by the funeral director) in order to complete the documents, so remember to get it to them as soon as you can. (It's also worth getting your lawyer to certify several copies of the certificate, as you may need it for things later on.)



## Probate

Probate is an order of the High Court to confirm the last valid Will of the deceased, and also the executor's right to administer the estate (grant of administration).

Probate must be applied for unless the deceased's only assets are financial assets 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. If the forms don't comply with the rules, the Registrar of the Court will reject them, which will cause delays in the administration of the estate. It's not the time for do-it-yourself, and it's therefore usual for the estate's lawyer to prepare these documents.

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.

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

## Administering the 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 necessary to sign forms so the estate's lawyer can have the deceased's property transferred into the names of the executors.

Some of this work may be undertaken by the executor or the trustee, but whoever is doing it should keep all parties informed. It's the executors' responsibility to ensure that all duties and tasks are carried out and that the estate is distributed in accordance with the law and the terms of the Will. The estate's lawyer should explain what is required.

The estate's lawyer will also explain:

- ✦ The executors' responsibilities,
- ✦ The three pieces of legislation under which claims can be made against an estate, see section 'Claims against an estate', Pages 26–28, and
- ✦ The procedures needed if there's no Will, see 'What if there's no Will?' on Pages 30–33, which includes a section on 'Letters of administration' on Pages 32–33.



# The executors' role

The executor/s are the person or people named in the Will whose job is to administer the estate and carry out the terms of the Will.

## Executors can also be trustees

In many or most cases executors are named also as trustees. Duties and responsibilities of executors and trustees are very similar, with the difference that the executors' role finishes when the Will is finalised and all distributions made, whilst the trustees' role may continue for some time if trusts have been set up (see below).


## 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. If the executor is a professional executor or not a family member, they may leave it to the family to make the funeral arrangements.
- ✦ Ensuring steps have been taken to secure the house, business, or other assets of the deceased (see above). There's more on this under 'Immediately after the death' on Page 6.
- ✦ Ensuring all wishes of the deceased as expressed in the Will are carried out, as far as possible. There are sometimes unforeseen issues to be dealt with which are covered in the sections on 'Claims against an estate' on Pages 26–28 and 'Correcting mistakes in Wills' on Pages 15–16.
- ✦ Ascertaining details of the deceased's assets, and undertaking or overseeing their transfer to beneficiaries. Family members will usually be able to provide this information. It's normal practice for the estate's lawyer to help the executors through this process.

The details required about the deceased's assets include:

- ✦ Names, occupations and addresses of the executors, and their IRD numbers.
- ✦ Names and addresses of the beneficiaries.
- ✦ Dates of birth of any beneficiaries under 18 years of age (anything left to beneficiaries under the age of 18 must be held on trust until their 18th birthday unless the Will states otherwise).

- 
- ✦ Details of bank accounts, 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.
  - ✦ Any liabilities.
  - ✦ Insurance policies held for property, contents, and motor vehicles.
  - ✦ Name of employer, details of any work-related superannuation scheme and any other employee benefits payable on the death of an employee.
  - ✦ Passport.
  - ✦ Driving licence.

The executors must ensure all debts owed by the estate are paid: executors are personally liable to pay the estate debts unless they have advertised in a local newspaper under s 79 of the Trusts Act 2019.

They must also ensure all tax and legal issues are dealt with appropriately.

Any jointly held assets automatically pass to the surviving owner and don't form part of the estate.

It is, however, necessary to provide a copy of the certified 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's 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 executors' 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.

We've provided a handy checklist on Page 40 of items to be completed by the executors before the estate is finalised.

# The trustees' role

In some cases the estate may continue to exist in the form of a trust, even after the administration is otherwise complete.

This can occur for a variety of reasons, for example, there may be under-age beneficiaries, or life interests to deal with, and/or there may be property that the estate wishes to hold onto in the meantime.

The trustees will usually be the existing executors of the estate unless otherwise provided for in the Will. A trustee is a person appointed to hold the trust's assets for the benefit of beneficiaries. The trustees are obliged to act honestly and in good faith for the benefit of all the beneficiaries. Trustees have legal control of the trust's assets, hold title to the assets in their own name, and have the power (subject to the Will) to deal with those assets as they see fit.

Trustees must be:

- + Over 18 years of age.
- + Mentally capable.
- + Aware they have personal liability for any losses that may be incurred by the trust because of their own dishonesty, wilful misconduct or gross negligence.

Trustees should also:

- + Understand that they may be personally liable for taxes and other charges such as property rates, payable by the trust.
- + Acknowledge that they may be personally liable for trust debts, or guarantees given by the trustees.
- + Be trustworthy, as they must manage the trust's affairs in a way that will provide the maximum benefits possible to the beneficiaries.

## Trustees' duties and responsibilities

Trustees have a number of legal duties and responsibilities set out in the Trusts Act 2019: some are mandatory and some apply by default but may be modified or negated by the Will. It's also important that trustees remember that they are only allowed to do those things which they have legal power to do. Again, there are some standard powers set out in law, but the Will can expand on these.



The mandatory duties of trustees (all references are to the Trusts Act 2019) are to:

- ✦ Know and adhere to the terms of the Will (s 23 & s 24).
- ✦ Act honestly and in good faith (s 25).
- ✦ Act for the benefit of the beneficiaries (s 26).
- ✦ Exercise their powers for a proper purpose (s 27).

The default duties of trustees (which may be modified by the Will) are to:

- ✦ Invest prudently (s 30, and also s 58 and s 59 which set out a number of factors which trustees should take into account, where appropriate, when making investment decisions).
- ✦ Not exercise any power for their own benefit (s 31).
- ✦ Actively and regularly consider whether they should be exercising one or more of their powers or discretions (s 32).
- ✦ Not agree in advance to place a limitation or restriction on the future exercise of any discretion (s 33).
- ✦ Avoid conflicts of interest (s 34).
- ✦ Treat the beneficiaries (or different groups of beneficiaries) impartially – which doesn't mean they have to be treated equally (s 35).
- ✦ Not make any profit from being a trustee, and act without being paid (except for refunds of reasonable out-of-pocket expenses) unless it's provided for in the Will (s 36, s 37).
- ✦ Act unanimously, unless the Will provides that a decision of the majority of the trustees is binding (s 38).

In addition, trustees have a 'general duty of care' (which may be higher if they have special knowledge or experience, or are acting in their professional capacity, such as a lawyer or accountant).

In practical terms, the Will states who is to get what, and where and when any estate funds are to be paid. It's the trustees' duties to carry this out. In doing so, they should:

- ✦ Act promptly.
- ✦ Not delegate any of their responsibilities, unless permitted to do so.
- ✦ Where appropriate, take specialist accounting advice to ensure the estate complies with its tax obligations.
- ✦ Pay the correct beneficiaries at the correct times.
- ✦ Keep proper accounts and give information to beneficiaries as required.



# Beneficiaries

**A beneficiary is a person or organisation who benefits from an estate.**

Beneficiaries are either provided for in the Will or, if there's no Will, by the provisions in the Administration Act 1969 (see section on 'What if there's no Will?' on Page 30). Before any beneficiary receives what they're entitled to, all debts and expenses must first be paid from the estate's assets.

## Rights 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.
- ✦ A full report to the beneficiaries on a yearly basis in relation to the investment of their share of the estate.

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 (see Page 21), 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.

## Beneficiaries under 18 years old

The Will can specify 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 18. This is different from the usual 'age of majority', which is 20 years old.

If the beneficiary is under 18 years old, the trustees must invest prudently until the beneficiary is entitled to receive their share. If, however, a beneficiary is incapacitated, their share will need to be held in trust for them beyond their 18th birthday.



# What can the family do?

There's a wide variety of work required in the administration of an estate, from the date of death until the final distribution and wind-up of the estate.

While much of this is work completed by the estate lawyer, as well as the executors and/or trustees, there's quite a lot that the family can do to help. This may not only save some money, but it may also help the family feel involved in the estate 'business' and help them with the grieving process.

## **Provide useful information**

Family members usually know the deceased's personal background in terms of assets and financial investments, employment history and any possible benefits due to him or her, their liabilities, and memberships of clubs and organisations that may pay out funds such as friendly societies, freemasons' lodges, etc. More significantly, family members will have access to the deceased's home and will be able to go through the relevant paperwork and locate many of the relevant documents. There's a checklist on Pages 41-42 that will help you get these documents together. Put all this material into a folder or boxes and bring everything (whether you think it's relevant or not) into the estate lawyer so all assets and liabilities can be ascertained and recorded.

It's worth noting here that some people keep their affairs neat and tidy, and it's easy for the family to find all the relevant documents that are needed to administer the estate. Some others, however, are not particularly orderly and it can take the family some time and effort to find all the papers that are needed. You may find all sorts of documents and may not be sure if they're relevant or not. When in doubt, bring in all financial information that can be located, even if it appears old or out of date. The estate's lawyer will be able to track everything and ensure the executors can get a full picture on the estate's assets and liabilities.

Don't worry too much if it takes your family some time to locate everything: estate lawyers are used to this happening. There are sometimes a few surprises – good and not so good – and sometimes you can be very amused at what you discover.





The family can also provide a useful overview of the deceased's life, details as to where they were born, who their parents and siblings were, husbands, wives, partners, children and grandchildren, and details of any adopted or step-children. They can also provide information on the deceased's friendships, and whether there's any possibility of them having had work or services carried out (such as housekeeping) for which they may have made promises to reward in their Will.

Do feel free to ask any questions of the estate lawyer. It's good to discuss the estate, and sometimes things crop up that wouldn't otherwise have seen the light of day.



# Claims against an estate

In New Zealand you're largely free to leave your estate as you wish in your Will. Many countries don't give Will-makers such complete freedom.

New Zealand law does however allow, 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. Unfortunately, the possibility that a claim might be made means it's not always possible to distribute the estate immediately. For more on this see the section on 'Waiting before estate distribution' on Page 16.

## Property (Relationships) Act 1976

This is the legislation (often known as the PRA) which sets out the presumption of equal sharing of relationship property if a couple separate or divorce. In general terms, relationship property is the assets you acquire together during your 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 partner A's name, those assets will need to be dealt with as part of their estate. If their spouse or partner is still alive, they may claim that these assets were relationship property and that they are entitled to half of them under the PRA.

Unless the Will explicitly states otherwise, 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, in the example above, the surviving partner would be required to choose either:

- ✦ Option A – bring a claim under the PRA and abandon any entitlement under the terms of the Will, or
- ✦ Option B – take what they have been given under the Will and give up any claim under the PRA.

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 already 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 parents. There are some time limits on these types of claims.

In the past it was quite common for the courts to completely rewrite a Will if it was seen to be not entirely fair. More recently the Court of Appeal has emphasised that courts should only intervene in cases of proven need for maintenance and support, or recognition as a family member. Each case 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 PRA. 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 only a small amount under this 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 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 the terms in future.

Claims of this type can only be dealt with by the High Court. Claims under the PRA, Family Protection Act and testamentary promises legislation can be dealt with in the Family Court at less expense, or (in the case of family protection and testamentary promises claims) the Māori Land Court if the claim relates only to Māori land.

To avoid the cost of drawn-out and expensive court battles, it's often recommended that estate beneficiaries try to settle any disputes 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, and superannuation proceeds. However, if land is involved, the executors will have to apply for probate through the estate lawyer.

If the estate qualifies as a small estate, no grant of administration is required. 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 copy of the death certificate, and may need an indemnity from the person entitled to receive the asset.

Once the requirements are known, the necessary forms and documents should be sent to the bank or other institution with a bank account number for payment of the proceeds. It's best to set up an estate account for this purpose, either through the estate lawyer's trust account or directly with a bank.

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.

# 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.

## Who gets what?

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 s 77 will apply to the part of the estate not covered by the Will. The various situations are covered in the table below.

If there is a ...	They will receive ...
Spouse or partner <sup>1</sup> but no parents, children or other descendants	Spouse or partner receives the whole estate
Spouse or partner and children or other descendants	Spouse or partner will receive the personal chattels <sup>2</sup> plus \$155,000 <sup>3</sup> (with interest) and one third of anything that is left. The children receive the remaining two thirds. If any of them have died, their children receive their share and so on for each generation.
Spouse or partner and parents but no children or other descendants	The spouse or partner is entitled to the personal chattels plus \$155,000 (with interest) and two thirds of anything that is left. The parents receive the remaining third.
Children or other descendants but no spouse or partner	The children receive the whole estate equally and if any of them have died, their children receive their share and so on for each generation.



No spouse or partner and no children or descendants but a parent or parents survive	The whole estate is divided between the parents or if only one is alive that parent will receive the whole estate.
No spouse or partner, no surviving parents, no children or other descendants but one or more brothers or sisters	The whole estate is divided among the brothers and sisters and if any of them have died their children receive their share and so on for each generation.
None of the above surviving but one or more grandparents or uncles/aunts survive	Half the estate for mother's family i.e. her parents or if they have died then all of the deceased's uncles and aunts on the mother's side. Half the estate for the father's side of the family i.e. his parents or if they have both died then the deceased's uncles and aunts on the father's side. Again, if any uncle or aunt has died his or her children receive that share and so on through each generation.
None of the above	Everything passes to the State. Dependents and anyone who might reasonably expect to have benefited may apply to the New Zealand Treasury which may pay out some of the estate to them.

**Notes to table:**

- <sup>1</sup> The spouse or partner who may benefit would include a civil union partner and any de facto partner or same sex partner. If there's more than one spouse or partner, they must share this entitlement.
- <sup>2</sup> Personal chattels are defined to include almost anything that can be moved, for example vehicles, boats, aircraft, horses and equipment for them, as well as furniture and personal items such as clothing and jewellery.
- <sup>3</sup> The figure of \$155,000 is current at the time of writing. It has increased steadily over the years and is likely to be increased with inflation in future. Interest is payable on this amount from the date of death until the date when it's actually paid out. The rate of interest is updated from time to time.

## What the family should think about

If it's likely that there is no Will, the family need to think about several possibilities:

- ✦ Is it possible to deal with the estate without letters of administration from the High Court? There's more on this in the section on 'Small estates' on Page 29.
- ✦ If formal administration documents are required, who should apply to be appointed administrator/s?
- ✦ Get a form of consent signed by the other beneficiaries, that is, the people listed in the table above.
- ✦ Collect together all the birth, death, and marriage certificates and other family history documents so that you can work out who is entitled to the estate.
- ✦ Check with any lawyers who might hold a Will or who might have information relating to the estate or the family.
- ✦ Don't throw out ANY documents until you're sure the estate lawyer won't need them.

If there are no close relatives and the estate is likely to be distributed among a wide number of family members, there may be a problem locating some of these people or even knowing if they are still alive. In some cases the administrators may need to reach agreement with the known beneficiaries to make a distribution with a promise that if anyone else ever turns up the beneficiaries will pay back what's necessary to give these people their share. This is usually referred to as an indemnity. Legal advice is recommended before doing this.

## Letters of Administration

As well as working out who will be entitled to benefit from an intestate estate, a decision also needs to be made about who will administer the estate. The High Court must approve the appointment of administrators and give them a document called Letters of Administration on 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 by the Court.

You or the estate lawyer will need to obtain specific information to enable an Application for Letters of Administration to be completed. This includes:

- ✦ Establishing that there's definitely no Will in existence including:
  - Writing to any previous lawyers and banks the deceased was associated with.





- Writing to the major trust companies: Public Trust, Perpetual Guardian and Trustees Executors.
- Advertising in a New Zealand Law Society newsletter.
- Asking the family to search all papers and files of the deceased.
- + Finding out if there is a spouse, civil union and/or de facto partner, whether there was a divorce or separation order in existence at the time of death and, if so, obtain a copy of that divorce or separation order. If a surviving spouse, de facto partner or civil union partner applies for Letters of Administration, then consideration will need to be given to election under the Property (Relationships) Act 1976 (see the 'Claims against an estate' section on Pages 26-28).
- + Obtaining full details of all children of the deceased (including a child who pre-deceased the deceased and who may have left any children). It's also necessary to go through all papers left behind by the deceased to search for reference to any other children, and to check with any lawyer who was known to act for the deceased.
- + Instigating a search of the Births, Deaths and Marriages Register to verify whether there are any other children of the deceased. A certificate needs to be obtained: there's a fee for this.
- + Ascertaining full details of the assets and liabilities of the estate.

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 will be almost complete.

There will also need to be an affidavit by the person applying for administration. This affidavit will include the information established above, together with other information as required by the High Court Rules.

The documents are then filed in the High Court. Once the High Court approves the Grant of Administration, a sealed order is released by the High Court. This can take up to six weeks. Once the order is granted, the Administrator can then proceed with administering the estate.

## **If there's no executor but there is a Will**

Where there's no executor named in a Will, 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 where a person dies leaving a valid Will but the Will doesn't name an executor, or the executor has died or, for whatever reason, can't or won't apply for probate.



# Estate administration costs

Administration is the process of carrying out the terms of the Will or, if there's no Will, following the rules on intestacy (see Page 30).

Usually there are costs involved in administering an estate. Costs include court fees for applying for probate or a grant of administration, lawyer's fees for work done in administering the estate, and other costs such as advertising for creditors.

## Court fees

If the value of one of the estate's assets is \$15,000 or more, the executor of the Will or administrator of an intestate estate must apply to the High Court for probate or Letters of Administration. 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 (see section on 'Claims against an estate' on Pages 26–28), 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, to name just two examples.

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 a cost estimate.

To help save on the estate lawyer 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 fee.



## 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's cash available from redeemed investments. If the invoice for the funeral has already been paid by a family member or friend, that person should be reimbursed for this payment.

Administration costs, such as advertising for creditors (see the section on 'The Will' on Pages 13-16) are paid from estate funds.

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





# Asset planning for your own future

When circumstances change, such as on the death of a family member, it's timely to think about your own strategies for the future.

If you're an executor, administrator or beneficiary of an estate you'll inevitably be thinking about your own situation.

Beneficiaries of estates, in particular, will have inherited some property and should set some time aside to re-assess their asset planning arrangements.

## Wills

Having a Will is an asset planning strategy. Wills should be reviewed and updated regularly, every three to five years. If you've inherited some property, now is a good time to review your Will and make sure it reflects your new financial situation and your wishes.

You may want to review the appointment of executors. It may be that one of your executors is no longer able to fulfil that role, or you may wish to appoint an independent executor.

Your connection with a beneficiary may have changed or there may be a new person you wish to name as a beneficiary. People named in your Will may have died, leaving part of your estate without a beneficiary.

Many people want to leave money to a favourite charity: this is a good time to think about which charities you may like to name in your Will. If you're considering leaving a significant sum to a charity, you may wish to talk with them about it during your lifetime to ensure the bequest is channelled to the most appropriate project or fund.

Everyone needs an up-to-date Will. Now is a good time to review your current Will and make any necessary changes.



## Living Wills

A Living Will is sometimes called an 'advance (healthcare) directive' or a 'declaration of wishes regarding life prolonging medical treatment'.

A Living Will allows you to state your wishes about administration of medical treatment at a future date. This document will set out what actions should be taken during your lifetime for your health if you're no longer able to make decisions or communicate those decisions due to illness or incapacity.

An example of this may be a person with a debilitating disease who may not want treatment prolonged, and wants only enough medical intervention for them to remain comfortable and out of pain.

Make sure you've talked with your GP or other medical professional about this document. It's also very important that you talk with your family to ensure they understand and support your wishes.

Your lawyer can prepare this document for you. It's often signed at the same time as a Will, though it's important to note that it is not binding. When your Living Will is signed, do make sure your family has a copy of this, as well as your GP and other medical specialists.

## Letter of wishes

In addition to your Will, you can provide a letter, or memorandum, of wishes to the executors and trustees of your estate about specific things you want to happen on your death. A letter of wishes isn't legally binding and shouldn't be attached to your Will, but it should be kept with your papers at your lawyer's office.

It may contain detailed instructions to your executors about your funeral, or list particular items and how the executors should distribute them. You can explain your reasons in this document.

## Enduring Powers of Attorney

There are two types of Enduring Power of Attorney (EPA): an EPA for personal care and welfare, and an EPA for property. Both EPAs operate during the lifetime of the person (called the donor) and give the attorney/s authority to act on the donor's behalf. An EPA cannot be used once the donor has died.

An EPA for personal care and welfare can only take effect if the donor becomes mentally incapable. Assessment of capacity must be undertaken and certified by a doctor before the attorney can act. Only one attorney can be appointed at a time.



An EPA for property can take effect immediately the appropriate form is signed and will continue after loss of capacity; it may be held by more than one person at a time. It may also be held by an organisation such as a trustee company. Alternatively, an EPA for property may take effect only if the donor becomes mentally incapable, in which case a medical certificate must be obtained (as above). Property covered by the EPA includes real estate, bank accounts and investments.

EPAs shouldn't be confused with a simple power of attorney, a document which names a person or people who may sign documents or make decisions on your behalf, for example while you are overseas, but is cancelled if you are no longer mentally competent.

## **Asset protection**

Everyone who owns assets, even if it's only cash in the bank, should think about asset planning. That may involve regularly reviewing your Will or completing EPAs.

For some, asset protection is an important future planning tool. They may be in business and concerned about creditor protection or liability. With the increase in blended families and the impact of relationship property claims, there may be unintended consequences for those whose assets are divided up by separation or death.

Family trusts are useful asset protection tools. You can read more about the benefits of trusts in *To Trust or Not to Trust – A practical guide to family trusts* published by NZ LAW Limited. Please ask us for a copy.

## **Contracting out agreements**

Agreements between couples to contract out of the Property (Relationships) Act 1976 (PRA) are another asset protection tool. These agreements, often called relationship property agreements, allow couples to decide how their assets and income are to be divided in the event of separation or death. Couples can 'contract out' of the PRA and decide that they don't want this law to apply to them. Married or civil union couples, or those in a relationship for more than three years, can agree to retain some or all of their property as separate property.

If you want to contract out of the PRA, you must each get independent legal advice.

It is important to note that you cannot use a relationship property agreement to contract out of the right to bring a claim under the Family Protection Act after death.



## Life insurance and funeral trusts

If you have a mortgage or dependent children, a life insurance policy may help ensure your debts can be paid and those financially dependent on you can be provided for from your estate.

Funeral trusts can avoid family members having to pay funeral costs themselves while estate assets are frozen. These plans are often arranged through funeral directors, trustee companies or sometimes through lawyers.

Work and Income will exclude as an asset a funeral plan, with a recognised provider, of up to \$10,000 in the means assessment for eligibility for a residential care subsidy.

Some banks will release funds before probate is granted and pay the funeral account directly to the funeral director. To enable payment, banks will need a certified death certificate, a copy of the funeral director's invoice and completed bank forms.

If there are genuinely no funds to pay for a funeral, Work and Income can make a funeral grant. If the death is a result of an accident, ACC may be able to fund some, or all, of the funeral. There's more about this in the section 'Immediately after the death' on Pages 6–11.

## Getting your own affairs in order

Dealing with someone else's death and their estate often acts as a catalyst for getting your own affairs in better order.

Now is a good time to collate personal and family information such as dates of birth, parents' names and dates/places of birth, mother's maiden name, children's names and dates of birth, and dates of arrival in New Zealand if you're the first generation in this country.

Financial information is important – bank account numbers, property owned, shares and other investments.

Remember to note down your service number if you've served in a defence force. You may have been awarded an honour such as an MNZM, and you may have degrees or other qualifications that allow you to have letters after your name.

You may have been a member of a number of organisations for years: it's a good idea to write these down, including the dates you were involved with them, and any office held such as president or chair, and the dates of those terms.

It's useful to review this list every year to ensure it's up to date.



# Executors' checklist

## Clearing up the estate.

Executors have many duties and responsibilities in the administration of the estate, and before the estate can finally be wound up.

Below is a handy checklist for executors where you can tick off each task as it's completed.

- ☐ All assets cashed up and paid to the estate.
- ☐ Joint property transferred to surviving joint owner.
- ☐ All accounts and debts paid.
- ☐ Insurance companies notified for house, contents, car, etc.
- ☐ Administration and distribution statements finalised and approved by trustee.
- ☐ Indemnities prepared and signed where necessary.
- ☐ Do the executors need to wait a few months prior to distribution (possible estate claims)?
- ☐ Does the estate's lawyer need to advertise prior to distribution (debts owing)?
- ☐ Has consideration been given to the Property (Relationships) Act?
- ☐ Final distributions made to beneficiaries or invested as required in terms of the Will.
- ☐ Final tax returns filed.

Notes

---

---

---

---

---

---

---

---

---

---





# First appointment checklist

## What to bring to the first appointment.

In the section 'What can the family do?' on Pages 24–25 there's a note that the family can provide the estate lawyer with useful information about the deceased's assets and financial affairs. The checklist below will help you gather that documentation together.

You'll need to find details of all assets held by the estate including:

- ☐ Bank statements, including joint accounts.
- ☐ Property owned (including residential home and investment properties), rates instalments, insurance, etc.
- ☐ Share portfolio summary (ring their stockbroker for this or check records on computer or share registry), stock and debenture certificates (if available), details about unit trusts, mortgage investments, etc.
- ☐ Motor vehicle details and insurance.
- ☐ Insurances
  - ☐ Life insurance.
  - ☐ Medical Insurance.
  - ☐ Trauma insurance.
  - ☐ Income protection insurance.
  - ☐ House and contents insurance.
- ☐ 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 investments and/or current employment.
- ☐ Details of any business interests 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, even though the estate lawyer will have the latest copy.





# Glossary

**Administrator/s:** The person or people who administer an estate. If the Will names executors, they will do this. If not, the court can appoint administrator/s (see Letters of Administration on Page 32).

**Affidavit:** A sworn statement that is to be filed in court. The person making the affidavit must swear on the Bible, or another holy book. If you prefer, you can sign an affirmation which means you don't have to swear on the Bible. When applying for probate or Letters of Administration, the executor or administrator must complete an affidavit (or affirmation) to say they will administer the estate in accordance with the law. An affidavit, or affirmation, must be witnessed by a lawyer, Justice of the Peace, or court official.

**Beneficiary:** A person or organisation that receives a distribution or benefits from an estate.

**Bequest:** A gift in a Will (usually, but not always, a gift of a specific item or items).


**Distribution:** Payment or transfer of assets from an estate to a beneficiary.

**Estate:** Everything you own at your death which is able to be disposed of by your Will. Jointly owned assets usually pass automatically to the other joint owner on your death and don't form part of your estate. (In law, the word 'estate' can have different meanings depending on the context, but this definition indicates what is meant when we talk about the estate of a deceased person).

**Enduring Power of Attorney (EPA):** Under an EPA another person is appointed to act on your behalf. This power can apply to your personal property, and/or your personal care and welfare. A property EPA can either be effective immediately it is signed, or only if you lose mental competence (the choice is yours). Your EPA is not effective after you have died.

**Executor/s:** The person or people named in the Will who are to carry out its requirements. Usually a Will appoints executors and trustees – trustee duties often arise as part of the executor's role and the Will should combine the two roles.

**Guardian:** A person, or people, who are responsible for decisions about a child's upbringing and welfare. It's not the same thing as 'day-to-day care'. Guardianship ends at the age of 18. You can name a guardian for your children in your Will – that's called a 'testamentary guardian'.



**Grant of administration:** A court order giving the executor/s or administrators authority to administer the estate. The most common form of grant of administration is probate. Where there is no Will, the grant of administration is called 'Letters of Administration'. If there is a Will, but no executor, then the grant is called 'Letters of Administration with Will annexed', see definitions below.

**Indemnity:** A promise that, if someone does what you've asked them to do and they suffer financial loss as a result, you will make good all the loss. A common example is where estate beneficiaries would like the estate distributed as soon as possible, but there is a risk to the executors that someone may bring a claim, see Page 16. The executors may be prepared to distribute some of the estate earlier than the usual period of around six months if they are given an indemnity signed by the beneficiaries.

**Intestate:** If someone dies without leaving a valid Will, he or she is said to 'die intestate'. Administration of an intestate estate is called an 'intestacy' and the beneficiaries are the people described in the table on Pages 30–31.

**Legacy:** A gift in a Will (often, but not always, a gift of money).

**Letter of wishes:** A written summary of goals and objectives for your executors and trustees. It can also be known as a 'Note for Guidance for Trustees' or a 'Memorandum of Wishes'.

**Letters of Administration:** An order of the High Court appointing an administrator to administer the estate. Letters of Administration are required if someone has died intestate (without a Will). If the deceased left a Will but the named executor/s cannot or will not administer the estate, the High Court can appoint an administrator or administrators and grant them Letters of Administration with Will annexed.

**Letters of Administration with Will annexed:** Letters of Administration with Will annexed are needed in some situations. Examples are where a person dies leaving a valid Will, but the Will doesn't specify an executor, or the executor has died, or for some reason can't or won't apply for probate.

**Life interest:** Where money or assets are held on trust for one person's benefit until he or she dies and then the money or assets are distributed to another person or people. For example, a house property might be held on trust so that A can live in it or receive the rent from it and, when A dies, the property is to be transferred to B and C. Alternatively shares or other investments could be held on trust, and the dividends or interest payable to A during his or her lifetime.



**Power of Attorney:** A document which names a person or people who may sign documents or make decisions on your behalf. A simple power of attorney is cancelled if you are no longer mentally competent but an Enduring Power of Attorney (EPA) remains in force even if you become mentally incapacitated.

**Probate:** An order of the High Court confirming the last valid Will. This also confirms the executor's right to administer the estate.

**Property:** Anything you can own. This doesn't just mean land and buildings; it includes shares, bank accounts, household items and even intellectual property (patents and copyrights).

**Resealing:** If the estate includes assets in another Commonwealth country or Ireland, the New Zealand probate or letters of administration can simply be resealed by the court in that country and this gives authority to deal with those assets. A whole new grant of probate is required in other countries such as the USA.

**Testamentary:** Anything relating to or covered by a Will. Your testamentary intentions are what you intend to achieve by signing your Will. A testamentary guardian is a guardian appointed by a Will. A testamentary trust is a trust set up by your Will.

**Trustee:** A person appointed to hold assets for the benefit of the beneficiaries. A trustee has legal control of the assets.

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

**Will-maker:** The person who signs the Will. In the past lawyers used the terms 'testator' (male) and 'testatrix' (female). The Wills Act 2007 uses the word 'Will-maker' to cover both.



# Index

## A

---

Administration of estate 18  
Administration Act 1969 23, 29, 30  
Assets 19  
Asset planning 36  
Asset protection 38

## B

---

Beneficiaries 14, 23  
Beneficiaries under 18 years old 14, 15  
19, 23

## C

---

Claims against estate 16, 26–28  
Contracting out agreements 38  
Creditors, advertising for 20, 35

## D

---

Death certificate 6, 7, 8  
Debts owing by the deceased 20, 35  
Distribution of estate 16

## E

---

Enduring Powers of Attorney 37  
Estate administration costs 34–35  
Estate lawyer 17–18  
Executors 6, 13–14, 19–20  
Executors' checklist 40

## F

---

Family Protection Act 1955 16, 27  
Family trusts 38  
Funeral plans 7–10

## G

---

Grant of administration 17, 29, 33  
Guardianship of children 14, 27

## I

---

Indemnity 16, 29, 32  
Inland Revenue 29, 35  
Intestate 30, 32, 34

## J

---

Jointly held assets 20

## L

---

Law Reform (Testamentary Promises)  
Act 1949 (see Testamentary promises) 27  
Letters of Administration 17, 32, 34  
Letters of Administration with Will  
annexed 33  
Letter of Wishes 37  
Life insurance 39  
Life interest trust 15 Living Wills 37



## M

---

Medical certificate of cause of death  
6, 7, 9  
Mistakes in Wills 15

## O

---

Overseas assets 15

## P

---

Probate 15, 17–18, 33–34  
Proper maintenance and support 27  
Property (Relationships) Act 1976 26,  
33, 38

## R

---

Relationship property 26  
Relationship property agreements 38

## S

---

Securing home/business 10, 11  
Small estates 29

## T

---

Taxation 21, 29, 35  
Testamentary promises 27–28  
Testamentary trusts 14  
Trustees 21–22  
Trusts Act 2019 16, 21, 22

## W

---

Will 13–16, 36  
Wills Act 2007 15, 30  
Will, absence of 17, 30  
Work and Income 6, 9, 39

48









## **GILLESPIE YOUNG WATSON**

Level 4, Forsyth Barr Tower, Queensgate, 45 Knights Road | PO Box 30 940, Lower Hutt 5040

Level 5, 342 Lambton Quay, Wellington

Level 5, CBD Towers, 84-90 Main Street, Upper Hutt

T: 04 569 3997 | F: 04 569 3933

contact@gylaw.co.nz | [www.gylaw.co.nz](http://www.gylaw.co.nz)