



Administration Checklist

Part 78 Supreme Court Rules 1970 (SCR)

Probate and Administration Act 1898 (PAA)

Succession Act 2006 (SA). Note that Chapter 4 commenced on 1 March 2010. See transitional provisions on intestacy before this date

This checklist is intended as a guide for more straight forward applications when the deceased died intestate. For applications on intestacy where the deceased died before 1 March 2010 you should refer to the *Probate and Administration Act 1898* in force immediately prior to 1 March 2010. For more complex applications it is recommended that you refer to Geddes, Rowland & Studdert, *Wills, Probate & Administration Law in NSW* (soon to be updated) and Mason & Handler, *Succession Law & Practice (NSW)* available on LexisNexis.

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1. Intestacy – who can apply?

- Many applications for letters of administration are refused because the applicant does not have standing to apply.
- Probate is an interest jurisdiction. If there is no will, only a person who is entitled on intestacy has standing to apply.
- A person is entitled if they are next of kin** and survive the deceased by 30 days (s 107 SA where the deceased died on or after 1 March 2010). If deceased died prior to 1 March 2010, next of kin are entitled if they were alive when deceased died.
- “**Next of kin**” are defined by the statutory regime in **Chapter 4** of the *Succession Act 2006*.
- Each class of persons in Chapter 4 who would have a higher priority must be shown not to exist or to have predeceased the testator before the next class can be considered. Surviving issue of deceased children or siblings of the deceased take, as do children of aunts and uncles, before the next class is entitled. Certificate evidence must be filed to prove entitlement.
- When more than one person is entitled, but only one applies, the **Court prefers to make a grant to the person with a major interest** and the Court requires that all non-applying parties are served with notice or consent to the application.
- If a person is entitled (“the beneficiary”) but **dies before obtaining a grant** (in the “first estate”) and there is no other person entitled to apply, the persons entitled to the beneficiary’s estate cannot apply in the first estate without first obtaining a grant of probate or administration in the beneficiary’s estate. Once appointed, the executors or administrators in the beneficiary’s estate can apply for letters of administration in their capacity as “legal personal representatives” in the first estate.

2. Publication of Online Notice – r 3 SCR, s 42 PAA, Form 116

- “Applicant” is the proposed administrator (not the solicitor). Include the name of all persons who are applying.
- Ensure **spelling** of deceased’s name and other details are correct as creditors, interested parties and the Court rely on word searches to find the deceased on the online website (your entry also becomes the official record on Justicelink).
- Where the deceased was known by **more than one name** he or she should be referred to by the name widely known as, with other names in brackets, for example, Jane Anne Smith (also known as Annika Smyth).
- Your **case number** is the number generated by the online notice. A copy of the notice does not need to be filed.

3. Standard Documents – Part 78 SCR		
<input type="checkbox"/> Form 111 – Summons for Administration	→ file original only, no copies	r 8
<input type="checkbox"/> Form 119 – Affidavit of applicant for administration	→ file original only, no copies	r 12
<input type="checkbox"/> Certificate evidence of death, birth, marriage, divorce (decree absolute)	→ file original or certified copies	r 10
<input type="checkbox"/> Form 117 – Inventory of property (annexed to affidavit of applicant)	→ file original only, no copies	r 10
<input type="checkbox"/> Form 126 – Affidavit negating the existence of a <i>de facto</i> or <input type="checkbox"/> Form 127 – Affidavit establishing <i>de facto</i> status (if <i>de facto</i> is applying)	→ file original only, no copies	rr 21, 22 SCR s32G PAA ss 104, 105 SA
<input type="checkbox"/> Form 125 – Consents or Notice (no approved form of notice)	→ file original only, no copies	r 19
<input type="checkbox"/> Form 41 – Affidavit of service of notice (adapt for service by post)	→ file original only, no copies	r 19
<input type="checkbox"/> Form 112 – 2 SETS of Draft grant and copy of sworn inventory, each set stapled together		r 10
<input type="checkbox"/> Stamped or DX self-addressed A4 envelope		r 10
Other documents as required including:		
<input type="checkbox"/> Form 130 – Administration bond : s 64 PAA	→ file original only, no copies	r 23
<input type="checkbox"/> Form 131 – Affidavit of Surety – two should be filed: r 23 SCR	→ file original only, no copies	s 64 PAA
<input type="checkbox"/> Form 140 – Notice of proceedings . Necessary for interested witnesses, rectification or contested proceedings <input type="checkbox"/> Form 151 – Affidavit confirming [personal] service of notice of proceedings	→ file original only, no copies	rr 39, 57, 64 SCR
<input type="checkbox"/> Undertaking – Protocol for Minors (in lieu of bond: see Court Announcement on website 7/6/18) – May be adapted for incapable persons: see Sections 10 and 11 below.		
<input type="checkbox"/> Form 40 – Affidavits as required setting out additional evidence	→ file original only, no copies	rr 14 - 24
Please note:		
<input type="checkbox"/> Do not file more than one of each document except the draft grant (Form 112) and annexures. <input type="checkbox"/> Each form should be stapled individually (Forms 111, 119 & 2 x 112) and annexures stapled to affidavit. <input type="checkbox"/> Please do not file loose pages or put one giant staple through the entire application. <input type="checkbox"/> If you want an original death certificate returned file it separately, attach a certified copy to the affidavit of applicant and attach a post-it note to the death certificate requesting its return.		rr 10, 12
4. Common Issues		
Affidavits:		
<input type="checkbox"/> Evidence: When completing a pro-forma affidavit it is acceptable to use the wording provided but where an open-ended question is asked or when furnishing further evidence by affidavit the rules of evidence apply. For example: → <i>Affidavit negating the existence of a de facto (Form 126): it is not enough to state that the deceased was not in a de facto relationship. The deponent must furnish the material facts and also show how they are qualified to give that evidence, eg how regularly they saw the deceased until the date of death, statements made by the deceased etc.</i>		
<input type="checkbox"/> Ensure that all pages of the affidavit are signed by the applicant/s and the witness. <input type="checkbox"/> Nobody may sign on behalf of another person. <input type="checkbox"/> The front page of each annexure must be certified by the witness.		
Witnesses:		
<input type="checkbox"/> A JP or Australian legal practitioner may witness an affidavit: s 151 PAA. <input type="checkbox"/> A solicitor without a practising certificate may not be a witness. <input type="checkbox"/> For authorised witnesses outside NSW see s 26 <i>Oaths Act 1900</i> .		s 151 PAA s 26 OA
Address for service:		
<input type="checkbox"/> Applicants may apply for letters of administration if they are outside NSW but within Australia but must provide an address for service within NSW: s 97 PAA.		ss 72, 97, PAA

<ul style="list-style-type: none"> <input type="checkbox"/> An applicant may <i>not</i> apply for letters of administration if they are outside Australia. The proper application is for that person to appoint a Power of Attorney pursuant to s 72 PAA or for a person with an interest who lives in NSW to apply. <input type="checkbox"/> The Court will not make a “composite grant”, that is, where one person is entitled to a full grant and the other is only entitled to a limited grant, eg a beneficiary and an attorney. <input type="checkbox"/> A Power of Attorney pursuant to s 72 PAA must be resident in NSW and may only be appointed when the beneficiary is outside NSW. <input type="checkbox"/> An Enduring Power of Attorney who is resident in NSW, may apply on behalf of a beneficiary who is resident in NSW and has lost capacity. See details below at Sections 10 and 11 below. <input type="checkbox"/> Include your email address as the primary contact address for inclusion on the court’s record. 	
<p>Caveats:</p> <p>If a caveat has been filed against the estate your options are:</p> <ol style="list-style-type: none"> (1) To may wait for the caveat to lapse and as long as the caveator doesn’t extend the caveat, the grant can be made without Court proceedings. Note: a caveat lapses after 6 months. (2) The caveator may withdraw the caveat. This may happen as a result of negotiation between the parties. (3) If you feel that the caveator doesn’t have a legitimate interest you may file a notice of motion to have the caveat cease to be in force pursuant to r 73 SCR. (4) If the caveator has a legitimate interest, then you (or the caveator) should commence contentious proceedings by way of statement of claim. <ul style="list-style-type: none"> <input type="checkbox"/> The matters in (3)-(4) will be listed before the Registrar for case management and a timetable for evidence. 	<p>Div 10 Pt 78 SCR ss 144- 148 PAA</p>
<p>Consent:</p> <ul style="list-style-type: none"> <input type="checkbox"/> Where a consent is obtained the person whose consent is required must have capacity at law to give that consent and the consents must be filed. <input type="checkbox"/> If the applicant for a grant of administration is the legal guardian applying on behalf of a minor, or the financial manager or enduring power of attorney applying on behalf of an incapable person, he or she may not consent to dispense with the bond and must file an administration bond and two sureties or comply with the Protocol for Minors (adapted for incapable persons where appropriate). See Sections 10 and 11 below. 	<p>r 23 SCR s 64 PAA Forms 125, 133, 134</p>
<p>Notices:</p> <ul style="list-style-type: none"> <input type="checkbox"/> A person served with notice must have capacity at law to understand the effect of the notice. <input type="checkbox"/> The written consent of the legal guardian of a minor, or the consent of the financial manager or enduring power of attorney of an incapable person, must be filed before an administration bond can be dispensed with or before a variety of applications, set out in this checklist, can proceed. A tutor may need to be appointed. See next paragraph and Sections 10 and 11 below. 	<p>rr 19, 23, 61 SCR s 64 PAA</p>
<p>If an administration bond cannot be obtained:</p> <ul style="list-style-type: none"> <input type="checkbox"/> If an administration bond is required and cannot be obtained the applicant may comply with the Protocol for Minors (adapted for incapable persons). This provides for the funds due to the minor (or incapable person) to be deposited with NSW Trustee & Guardian until the minor achieves their majority. See Sections 10 and 11 below. 	<p>rr 19, 23 SCR s 64 PAA</p>
<p>Next of kin including half-blood:</p> <ul style="list-style-type: none"> <input type="checkbox"/> It is a common mistake to overlook issue from other/unknown relationships, particularly for more remote next of kin and ex-nuptial children. If you are unable to conduct comprehensive searches to confidently identify all persons entitled you should consider referring the matter to the NSW Trustee & Guardian which has a fully equipped genealogy division to trace next of kin both in Australia and overseas. 	<p>Chapter 4 SA</p>
<p>5. Summons for Administration – Form 111, r 8 SCR</p>	
<ul style="list-style-type: none"> <input type="checkbox"/> The filing fee is calculated on the gross value of the estate at the date of death. Property owned as joint tenants or property outside the jurisdiction is not included in the gross value of the estate. <input type="checkbox"/> Check with the superannuation or insurance provider to confirm whether or not the funds are estate assets. Normally superannuation is a non-estate asset. <input type="checkbox"/> If a grant of administration has been made but the administrator is unable to complete the administration and a 	<p>s 29 SA s 44 PAA</p>

<p>new grant is necessary, the filing fee is calculated on the value of the unadministered estate at the date of the filing of the new summons.</p>	
<p><input type="checkbox"/> Ensure that the “relief claimed” clearly sets out what you are applying for, including your claim for administration plus any additional claim for revocation, administration of the unadministered estate or passing over a person not entitled, eg pursuant to the forfeiture rule.</p>	<p>UCPR 6.12</p>
<p><input type="checkbox"/> Ensure you correctly state in what capacity the applicant is applying. See Section 6 below.</p>	
<p>6. Intestacy – who is entitled? – ss 62, 63 PAA</p>	
<p>Spouse solely entitled: ss 104, 105, 111 and 112 SA</p> <ul style="list-style-type: none"> <input type="checkbox"/> “<i>Spouse</i>” includes a person to whom the deceased was legally married or in a de facto or registered relationship. Includes same sex marriage after 9 December 2017 and “recognised same sex marriage” prior to this date. <input type="checkbox"/> Where children of the deceased are also children of the spouse, the spouse receives the whole estate. <input type="checkbox"/> If the estate is valued at less than the statutory legacy (s 106 SA) the spouse receives the whole estate, but note: <ul style="list-style-type: none"> o A <i>de facto</i> spouse <i>must</i> serve notice on any persons who would have received “but for” the <i>de facto</i>. o Other spouses are not required to serve notice if the estate is valued at less than the statutory legacy. <input type="checkbox"/> If the estate exceeds the statutory legacy evidence is required to establish that the deceased had no children other than those with the applicant. <input type="checkbox"/> File the marriage certificate or registration of relationship or file an affidavit establishing <i>de facto</i> (Form 127). <input type="checkbox"/> File an affidavit negating the existence of a <i>de facto</i> (Form 126). File an affidavit stating whether the deceased was married to anyone other than the applicant, if so how many times and file certificate evidence of divorce or death of other spouses. <p>Basis of grant: “Letters of administration. Spouse/<i>de facto</i> spouse [or Widow/widower] of the deceased.”</p>	<p>r 19, 21 ss 104, 106, 111- 112, Sched 1 Part 5 SA Forms 125, 126, 127</p>
<p>Multiple spouses entitled: s 122 SA</p> <ul style="list-style-type: none"> <input type="checkbox"/> Existence of all spouses must be established by certificate or affidavit evidence. The spouses share the whole estate if all children of the deceased are also their children. The estate is shared by agreement, by distribution order or equally. <input type="checkbox"/> All other documents and notices required are as above for spouse. <p>Basis of grant: “Letters of administration. Spouses of the deceased.”</p>	<p>rr 19-23 ss 122- 126 SA ss 64-68 Form 125</p>
<p>Spouse and child/ren of another relationship (or their issue) entitled: ss 113 and 124 SA</p> <ul style="list-style-type: none"> <input type="checkbox"/> “<i>Children</i>” includes adopted or surrogate children (check dates and legislation in force) but not step-children. <input type="checkbox"/> If children of the deceased are also children of the spouse, the spouse receives the whole estate. <input type="checkbox"/> If the estate is valued at less than the statutory legacy the spouse receives the whole estate, but note: <ul style="list-style-type: none"> o A <i>de facto</i> spouse <i>must</i> serve notice on any persons who would have received “but for” the <i>de facto</i>. o A married spouse does not need to serve notice if the estate is valued at less than the statutory legacy. <input type="checkbox"/> Where the estate is valued at more than the statutory legacy and the deceased had children who are not children of the spouse, the spouse is entitled to the statutory legacy, the personal effects and half the residue. All children of the deceased (or their issue if they have died) share the other half of residue. <input type="checkbox"/> Some only, or all those entitled, may apply. If only one applies the spouse is the preferred applicant as he or she has the major interest. Persons entitled who do not join the application must file their consents or be served with notice of the application and the applicant must file an affidavit of service of notice. <input type="checkbox"/> File an affidavit stating whether the deceased ever married and if so how many times and name all the children of the deceased. Annex certificate evidence of any marriages, divorces (decree absolute), birth of the deceased's last born child, death of any child who failed to survive the deceased by 30 days (and birth certificate of deceased child's youngest child if any) and death of any spouses. If the birth certificate of the youngest child doesn't name older siblings, file the birth certificates of all children. A <i>de facto</i> must establish <i>de facto</i> status (Form 127) and a spouse must file an affidavit negating the existence of a <i>de facto</i> (Form 126). <input type="checkbox"/> Notice must be served on, and an affidavit of service filed, or the consent obtained from, all non-applying persons. <input type="checkbox"/> If the consents or notices do not include a recital to dispense with an administration bond, an administration bond with two sureties must be filed for the share of the non-applying beneficiaries: r 23 SCR, ss 64-68 PAA. 	<p>rr 19, 21, 23 ss 104, 105, 113, 127, Sched 1 SA ss 64-68 Form 125</p>

<p><input type="checkbox"/> A person under a legal incapacity may not consent. A notice may be served on the legal guardian of a minor or the financial manager or enduring power or attorney of an incapable person, but a recital to dispense with the bond has no effect without the consent of the guardian, financial manager or enduring power of attorney. In some cases a tutor may need to be appointed: r 61 SCR. The administration bond will not be dispensed with if the applicant represents the incapable person. See Sections 10 and 11 below.</p> <p>Basis of grant: "Letters of administration. Spouse/<i>de facto</i>/child/ren of the deceased."</p>	
<p>Multiple spouses and issue from other partnerships entitled: s 123 SA</p> <p><input type="checkbox"/> Existence of all spouses and issue must be determined by certificate and affidavit evidence. The spouses jointly share the personal effects, statutory legacy and half of the residue (shared by agreement, by distribution order or equally). Children of the deceased (or their issue) share the other half of residue.</p> <p><input type="checkbox"/> All other documents and notices required are as above for spouse and children of another relationship.</p> <p>Basis of grant: "Letters of administration. Spouse/s and/or <i>de facto</i>s and child/ren of the deceased."</p>	<p>rr 19-23 ss 124, 127 SA ss 64-68 Form 125</p>
<p>Children of deceased entitled [or their issue if they have died]: s 127 SA</p> <p><input type="checkbox"/> Clear off the spouse and/or <i>de facto</i> by filing an affidavit stating whether the deceased ever married and if so how many times. File certificate evidence of any divorce (decree absolute) or the death of any spouse and an affidavit negating <i>de facto</i> (Form 126).</p> <p><input type="checkbox"/> File an affidavit naming all children of the deceased, and file the birth certificate of the deceased's last born child. If the birth certificate of the youngest child doesn't name all older siblings, file the birth certificates of all children. File the death certificate of any child who failed to survive the deceased by 30 days and file the birth certificate of their last born child if any (note the presumptive share to issue of deceased children: s 127 SA).</p> <p><input type="checkbox"/> Notice must be served on, and an affidavit of service filed, or the consent obtained from, all non-applying persons.</p> <p><input type="checkbox"/> If the consents or the notices do not include a recital to dispense with an administration bond, an administration bond with two sureties must be filed for the share of the non-applying beneficiaries: r 23 SCR, ss 64-68 PAA.</p> <p><input type="checkbox"/> A person under a legal incapacity may not consent. A notice may be served on the legal guardian of a minor or the financial manager or enduring power or attorney of an incapable person, but a recital to dispense with the bond has no effect without the consent of the guardian, financial manager or enduring power of attorney. In some cases a tutor may need to be appointed: r 61 SCR. The administration bond will not be dispensed with if the applicant represents the incapable person. See Sections 10 and 11 below.</p> <p>Basis of grant: "Letters of administration. Child/ren/grandchild/ren/great grandchild/ren of the deceased."</p>	<p>rr 19, 23 ss 109, 109A + 127 SA ss 64-68 Forms 125, 126, 127</p>
<p>Parents of deceased entitled: s 128</p> <p><input type="checkbox"/> Clear off spouse, <i>de facto</i> and children (and their issue), (as above, accompanied by certificate evidence as necessary).</p> <p><input type="checkbox"/> File the birth certificate of the deceased to establish parents of deceased.</p> <p><input type="checkbox"/> If both parents do not apply file the death certificate of the non-applying parent or if they are alive serve notice on them and file an affidavit of service, or obtain their consent to the application; r 19 SCR.</p> <p><input type="checkbox"/> If the consent or notice doesn't include a recital to dispense with an administration bond, an administration bond with two sureties must be filed for the share of the non-applying parent; r 23 SCR, ss 64-68 PAA.</p> <p><input type="checkbox"/> A person under a legal incapacity may not consent. A notice may be served on the legal guardian of a minor or the financial manager or enduring power or attorney of an incapable person, but a recital to dispense with the bond has no effect without the consent of the guardian, financial manager or enduring power of attorney. In some cases a tutor may need to be appointed: r 61 SCR. The administration bond will not be dispensed with if the applicant represents the incapable person. See Sections 10 and 11 below.</p> <p>Basis of grant: "Letters of administration. Parent/s of the deceased."</p>	<p>rr 19, 23 s 128 SA ss 64-68</p>
<p>Siblings of deceased entitled [or their issue if they have died]: s 129 SA</p> <p><input type="checkbox"/> Please provide a family tree. Clear off spouse, <i>de facto</i>, children (and their issue) and parents (as above, accompanied by certificate evidence as necessary) and file the birth certificate of the deceased.</p> <p><input type="checkbox"/> File birth certificate of youngest child of the parents of the deceased. If the birth certificate of the youngest child doesn't name older siblings or children from other partnerships, file the birth certificates of all children. File death certificate of any sibling of the deceased who failed to survive the deceased by 30 days and file the birth certificate of their last born child if any (note the presumptive share to issue of deceased children; s 127 SA). Adopted or</p>	<p>rr 19, 23 s 129 SA ss 64-68</p>

<p>surrogate children may apply (check dates and legislative provisions) but step-children are not entitled.</p> <ul style="list-style-type: none"> <input type="checkbox"/> Notice must be served on, and an affidavit of service filed, or the consent obtained from, all non-applying persons. <input type="checkbox"/> If the consents or the notices do not include a recital to dispense with an administration bond, an administration bond with two sureties must be filed for the share of the non-applying beneficiaries: r 23 SCR, ss 64-68 PAA. <input type="checkbox"/> A person under a legal incapacity may not consent. A notice may be served on the legal guardian of a minor or the financial manager or enduring power or attorney of an incapable person, but a recital to dispense with the bond has no effect without the consent of the guardian, financial manager or enduring power of attorney. In some cases a tutor may need to be appointed: r 61 SCR. The administration bond will not be dispensed with if the applicant represents the incapable person. See Sections 10 and 11 below. <p>Basis of grant: "Letters of administration. Sibling/niece/nephew/great niece/nephew of the deceased."</p>	
<p>Grandparents of deceased entitled, s 130 SA</p> <ul style="list-style-type: none"> <input type="checkbox"/> Please provide a family tree. Clear off spouse, <i>de facto</i>, children (and their issue), parents and siblings (and their issue), (as above, accompanied by certificate evidence as necessary). <input type="checkbox"/> File the birth certificates of the deceased and the parents of the deceased to establish the grandparent's identity. File the death certificates of any grandparents who are deceased (If they would be over 102 years old affidavit evidence is sufficient and no certificates are required). <input type="checkbox"/> Notice must be served on, and an affidavit of service filed, or the consent obtained from, all non-applying persons. <input type="checkbox"/> If the consents or the notices do not include a recital to dispense with an administration bond, an administration bond with two sureties must be filed for the share of the non-applying beneficiaries: r 23 SCR, ss 64-68 PAA. <input type="checkbox"/> A person under a legal incapacity may not consent. A notice may be served on the legal guardian of a minor or the financial manager or enduring power or attorney of an incapable person, but a recital to dispense with the bond has no effect without the consent of the guardian, financial manager or enduring power of attorney. In some cases a tutor may need to be appointed: r 61 SCR. The administration bond will not be dispensed with if the applicant represents the incapable person. See Sections 10 and 11 below. <p>Basis of grant: "Letters of administration. Grandparent/s of the deceased."</p>	<p>rr 19, 23 s 130 SA ss 64-68</p>
<p>Aunts and uncles [or their children if they have died, but <i>not</i> more remote issue]: s 131 SA</p> <ul style="list-style-type: none"> <input type="checkbox"/> Children of deceased aunts and uncles are entitled but not more remote issue, but only if the deceased died on or after 1 March 2010. Prior to this date the estate devolves to the State if aunts and uncles predecease. <input type="checkbox"/> Please provide a family tree. Clear off spouse, <i>de facto</i>, children (and their issue), parents, siblings (and their issue) and grandparents (as above, accompanied by certificate evidence as necessary). <input type="checkbox"/> File birth certificates of deceased and youngest sibling of both parents of the deceased (or their birth certificate if they are the youngest). If the birth certificate doesn't name all siblings file birth certificates of all aunts and uncles. <input type="checkbox"/> The 30 day rule does not apply if the result would be that the estate would devolve to the State: s 107 SA. <input type="checkbox"/> Notice must be served on, and an affidavit of service filed, or the consent obtained from, all non-applying persons. <input type="checkbox"/> If the consents or the notices do not include a recital to dispense with an administration bond, an administration bond with two sureties must be filed for the share of the non-applying beneficiaries: r 23 SCR, ss 64-68 PAA. <input type="checkbox"/> A person under a legal incapacity may not consent. A notice may be served on the legal guardian of a minor or the financial manager or enduring power or attorney of an incapable person, but a recital to dispense with the bond has no effect without the consent of the guardian, financial manager or enduring power of attorney. In some cases a tutor may need to be appointed: r 61 SCR. The administration bond will not be dispensed with if the applicant represents the incapable person. See Sections 10 and 11 below. <p>Basis of grant: "Letters of administration. Aunt/uncle/cousin of the deceased."</p>	<p>rr 19, 23 ss 107, 131 SA ss 64-68</p>
<p>The State: s 136 SA</p> <ul style="list-style-type: none"> <input type="checkbox"/> Where no-one is entitled to take the estate passes immediately to the Crown. <input type="checkbox"/> The 30 day rule is not applied if, as a result of its application, the intestate estate would pass to the State. <input type="checkbox"/> The NSW Trustee and Guardian may issue a certificate that the estate is <i>bona vacantia</i> or an applicant may make an application to the Court for an order (note the latter requires rigorous genealogy searches and certificate evidence). In either case the estate is remitted to the Crown and funds deposited into consolidated revenue. <input type="checkbox"/> An application to the Crown pursuant to s 137 enables the Minister to waive the rights of the State in favour of 	<p>ss 107, 136, 137 SA</p>

dependants of the intestate and certain other specified persons and organisations for whom the intestate might reasonably have been expected to make provision (this application is not made to the Court).

7. Affidavit of Applicant – Form 119

- Para 1:** If there is **no cause of death** on the death certificate and the death is **pending a decision of the coroner**, include a paragraph in the affidavit of applicant which describes briefly the circumstances of the deceased's death and whether any charges have been brought in respect of his/her death.
 - o If charges have been laid against a beneficiary for the unlawful killing of the deceased the grant may be delayed until the case is finalised.
 - o The forfeiture rule applies if a beneficiary is convicted of murder at which time the estate can be distributed as if the convicted person predeceased the testator.
 - o If the person is found not guilty by reason of mental illness or guilty of a lesser charge than murder, his or her share should be held on trust until the period has lapsed in which they, or an interested person, can make an application pursuant to the *Forfeiture Act 1995*.
- If the deceased **died overseas** a translation of the death certificate is required and a person who knew the deceased and saw the body must file an affidavit confirming his or her death.
- If the body of the deceased has not been recovered, he or she is referred to as the "propositus", and the grant should be sought on **presumption of death**. The online notice should be to this effect and further evidence will be required setting out fully the facts and circumstances supporting a presumption of death: ss 40A, 40B PAA. Unless there is clear evidence as to when death was likely to have taken place the propositus is presumed to be dead as at the date of commencement of the proceedings. Note that this may have ramifications for those entitled.

ss 40A,
40B PAA

- Para 2: Disclose all documents**, including informal documents, which appear to represent the testamentary intentions of the deceased:
 - o If a document appears to have been **executed in accordance with Part 2.1 SA** but it is claimed that it is invalid and should be passed over because:
 - the testator lacked testamentary capacity
 - the testator lacked knowledge and approval or
 - there were suspicious circumstances surrounding its preparation or execution,
 the application must be listed in Court where it will be **referred to the Probate Judge** for determination.
 - o Serve notice of proceedings personally on all persons who would be adversely affected if the document were not admitted to probate and file an affidavit confirming service of notice of proceedings.
 - o **Exceptions:** If a will is deemed to be invalid because it is inoperative, was revoked by marriage or evidence can be furnished to satisfy the Court that it was revoked by the deceased, the application can be dealt with by a registrar in chambers.

rr 14, 19,
33, 42,
57, 64. ss
6, 8 SA.
Forms
140, 151

Note: If a document has **not been executed in accordance with Part 2.1 SA** the applicant **must disclose the document** to the Court, whether or not it is propounded, and serve notice on all persons who would be beneficially or adversely affected by the document. An affidavit of service must be filed: s 8 SA, rr 14 & 42.

- Para 3:** As a minimum, furnish evidence of searches for a will in the personal effects of the deceased and enquiries for a will with the NSW Trustee & Guardian and the solicitors and banks of the deceased.

- Para 4 + 5:** See Section 6 above ("Intestacy") re those entitled. File affidavit and certificate evidence as necessary. Please note that **death certificates are not evidence of birth of children or marital status**.

- Para 7:** A bankrupt or person who has assigned or disclaimed their interest may not be appointed administrator.
- If an attorney, nominee, LPR or other appointee is applying on behalf of a beneficiary a recital should be included which confirms that neither the applicant nor the person represented is an undischarged bankrupt and neither has assigned or encumbered their interest in the estate.

- Para 10:** Distinguish between **property** owned as joint tenants and tenants in common. The former is not the subject of probate as it devolves automatically to the survivor: s 101 *Real Property Act 1900*. It should be disclosed in a separate table but not form part of estate.

- Assets must be described with **sufficient particularity** to be able to identify them. See Section 9 below.
- If **additional assets** come to your attention after the application is filed, but before a grant issues you should file

an affidavit with an amended inventory, <i>not</i> an affidavit of additional assets.	
<input type="checkbox"/> Para 13 + 14: This section must be completed when a <i>de facto</i> is applying. <input type="checkbox"/> Those who would be entitled on intestacy “but for” the <i>de facto</i> must be proven with certificate evidence. <input type="checkbox"/> Notice must be served on, or the consents obtained of, all persons who would take “but for” the <i>de facto</i> and an affidavit of service filed: rr 19, 21(3), 22(3)(b), Form 128.	Ch 4 SA rr 19, 21, 22 SCR, Form 128
8. Affidavit re De Facto – Form 126 or 127 (adapted for domestic partner)	
Negating <i>de facto</i>, Form 126 <ul style="list-style-type: none"> <input type="checkbox"/> All applications must include an affidavit negating <i>de facto</i> even if the deceased was married to the applicant for long period of time or was living with the deceased at the time of death. <input type="checkbox"/> It is not enough to state that the deceased was not in a <i>de facto</i> relationship. The deponent must furnish evidence from his or her personal knowledge, to establish that the deceased was not a party to a relationship which falls within the definition of <i>de facto</i> (ss 104, 105 SA, s 32G PAA, s 21C IA). <input type="checkbox"/> The deponent must explain how he or she is qualified to furnish the evidence. <input type="checkbox"/> Importantly, the deponent must demonstrate that they had regular contact with deceased in the last two years. <input type="checkbox"/> The form of notice where there may be a <i>de facto</i> or domestic partnership is Form 128. 	s 32G PAA ss 104, 105 SA s 21C IA rr 19-23, Form 128
Establishing <i>de facto</i>, Form 127 <ul style="list-style-type: none"> <input type="checkbox"/> If a <i>de facto</i> is applying the applicant must establish that his or her relationship with the deceased falls within the definition of <i>de facto</i> (ss 104, 105 SA, s 32G PAA, s 21C IA). <input type="checkbox"/> Comply with notice requirements immediately above at paragraphs 13+14 of Form 119. <input type="checkbox"/> The form of notice where there may be a <i>de facto</i> or domestic partnership is Form 128. 	
9. Annexures and Other Documents	
Certificate Evidence: <ul style="list-style-type: none"> <input type="checkbox"/> Certificate evidence of deaths, births, marriages and divorces (decree absolute) must be filed to establish who is entitled on intestacy. Certified copies are acceptable. <input type="checkbox"/> Death certificates are not evidence of birth of children nor are they evidence of marriage/divorce etc as, except for the death of the deceased, these forms are self-reporting and often contain errors or omissions. 	r 10 SCR
Inventory of Assets – Form 117, ss 81A, 81B PAA, ss 4, 29-31 SA <ul style="list-style-type: none"> <input type="checkbox"/> Only property solely owned by the deceased is the subject of a grant, not property owned as joint tenants. A deceased may own a share of a property, eg 25%, and this part is included as property solely owned by them. <input type="checkbox"/> Property of the deceased outside NSW or owned as joint tenants should be disclosed in a separate table but it is not included in the total value of the estate. <input type="checkbox"/> Property must be described with sufficient particulars to identify it. This means bank account details, property addresses, number of shares and type and the name of an insurance or superannuation provider. 	r 10 SCR
Other Documents <ul style="list-style-type: none"> <input type="checkbox"/> All original affidavits setting out additional evidence must be filed. <input type="checkbox"/> Affidavit of service and administration bonds and sureties where necessary. <input type="checkbox"/> Original power of attorneys executed for the purpose of a grant must be filed. A certified copy of an enduring power of attorney is acceptable. 	
10. Cases where Sole Person Entitled Lacks Capacity	
Sole beneficiary on intestacy is alive but does <i>not</i> have capacity to apply <ul style="list-style-type: none"> <input type="checkbox"/> An application may be made seeking Letters of Administration, for the use and benefit of the beneficiary, limited until he or she recovers from his or her disability, by one of the follow people, groups of people or entities: <ol style="list-style-type: none"> (1) The beneficiary's financial manager (if one has been appointed) (2) The beneficiary's enduring power of attorney (if one has been executed) (3) The beneficiary's appointed executor in his or her will (if a will has been executed prior to the beneficiary losing capacity) 	

<p>(4) Those entitled to the beneficiary's estate on intestacy</p> <p>(5) An appointment of the NSW Trustee and Guardian</p> <ul style="list-style-type: none"> <input type="checkbox"/> The above list is in order of priority, so for example, a power of attorney may not apply if a financial manager has been appointed and the appointment has not been revoked. <input type="checkbox"/> An affidavit furnishing current medical evidence of the beneficiary's incapacity must be filed in categories (2) to (5) <input type="checkbox"/> If the application is by the financial manager file evidence that the appointment has not been revoked. <input type="checkbox"/> File a copy of the instrument appointing the applicant for categories (1) to (3) or an affidavit attaching certificate evidence proving entitlement in (4). <input type="checkbox"/> A recital should be included in categories (1) to (4) which confirms that neither the beneficiary nor the applicant is an undischarged bankrupt and the former has not assigned or encumbered their interest in the estate. <p>Note:</p> <ul style="list-style-type: none"> <input type="checkbox"/> In the case of a financial manager applying in category (1) above, he or she must serve notice of the incapable person's entitlement on NSW TG in accordance with the requisition at "Annexure A" attached. <input type="checkbox"/> In categories (2) and (3) notice should be served on the executors and beneficiaries named in the beneficiary's will and an affidavit of service filed. <input type="checkbox"/> In category (4) notice should be served on all persons who would be entitled to the beneficiary's estate on intestacy and an affidavit of service filed. <input type="checkbox"/> In categories (2) to (4) above, an administration bond is required: See Section 12 below, or see Court's Protocol for Minors which can be adapted for an incapable person (See the announcement of Lindsay J on 7 June 2018 "Protocol for a Minor's Share on Intestacy" on the Court's website, under "Older announcements"). <input type="checkbox"/> A recital should be included in categories (1) to (4) which confirms that neither the beneficiary nor the applicant is an undischarged bankrupt and neither has assigned or encumbered their interest. <p>Basis of grant: "Letters of administration. [Capacity of applicant] of [name of incapable beneficiary] for the use and benefit of [name of incapable beneficiary], limited until he/she recovers from his/her disability and obtains a grant."</p>	
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11. Administration Bond and Sureties

<p>Bond and sureties for the share of all persons not joining the application</p> <ul style="list-style-type: none"> <input type="checkbox"/> All persons entitled on intestacy should join the application. An administration bond (Form 130) and two sureties (Form 131) must be filed for each beneficiary who is not applying, which is equal to the value of their share. <input type="checkbox"/> The applicant and both sureties must swear the administration bond. The two sureties must each swear a surety, which sets out the real estate which they can call upon to service the bond if required to do so. <input type="checkbox"/> If a surety owns property as joint tenant the other joint tenant must also swear the bond and surety. <input type="checkbox"/> The applicant may not be a surety to the bond. <input type="checkbox"/> The applicant may dispense with the bond for beneficiaries who are <i>sui juris</i> if a notice of his or her intention to dispense with the bond is served on them. <input type="checkbox"/> A person under a legal incapacity may not consent. A notice may be served on the legal guardian of a minor or the financial manager or enduring power of attorney of an incapable person, but a recital to dispense with the bond has no effect without the consent of the guardian, financial manager or enduring power of attorney. In some cases a tutor may need to be appointed: See r 61 SCR. <input type="checkbox"/> The bond will not be dispensed with if the applicant is the representative of an incapable person who is a beneficiary, eg the legal guardian of a minor, or the financial manager or enduring power of attorney of a person lacking capacity. If a bond and sureties cannot be obtained the applicant may comply with the Protocol for Minors (adapted as necessary). See the announcement of Lindsay J on 7 June 2018 "Protocol for a Minor's Share on Intestacy" on the Court's website, under "Older announcements". 	<p>rr 19, 23, 61 SCR ss 64-68 PAA Div 4, Part 7 UCPR Forms 130, 131</p>
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12. Draft Grant – Form 112 – "2 x Sets"

<p>IMPORTANT → File 2 x draft grants (Form 112) with a copy of the inventory annexed.</p> <ul style="list-style-type: none"> <input type="checkbox"/> Annex a copy of the sworn inventory to each draft grant. <input type="checkbox"/> Check deceased's name is spelt correctly. <input type="checkbox"/> Check the applicant's names are spelt correctly and their addresses are included. 	<p>r 10</p>
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<ul style="list-style-type: none"> <input type="checkbox"/> Check date of death is correct. <input type="checkbox"/> Ensure "Basis of grant" is correctly stated → see Section 6 above. 	
13. Special Grants of Administration	
<ul style="list-style-type: none"> <input type="checkbox"/> The term <i>"special administration"</i> is typically used to refer to grants of <i>pendente lite</i>, <i>ad litem</i> and <i>ad colligenda</i>. <ul style="list-style-type: none"> o These particular grants are limited and are intended to protect estate assets or allow persons to represent the estate in some way pending a final grant of probate. o An administrator for these grants are required to protect and hold assets but should not distribute. <input type="checkbox"/> The other forms of special administration below are not limited in respect of estate administration but the appointment may be in a representative capacity only and limited, for example, until such time as the person represented recovers from their disability or a minor reaches their majority. 	s 73 PAA
<p>Administration <i>pendente lite</i></p> <ul style="list-style-type: none"> <input type="checkbox"/> An administrator is appointed to allow the administration of the estate pending probate litigation. A party to the proceedings will not normally be appointed unless all parties consent. The consent of the person appointed and an affidavit of fitness should be filed. It is usually granted to a person without an interest in the litigation. The grant continues until the probate proceedings are finalised. It is a limited grant and does not allow distribution. See Annexure "B" for draft orders. 	s 73 PAA
<p>Administration <i>ad litem</i></p> <ul style="list-style-type: none"> <input type="checkbox"/> A person is appointed to represent the estate for the purpose of commencing or defending proceedings or doing other specific acts. The grant is normally made to a person who is <i>not</i> interested in the action and they may be required to get in the estate or a part of it to satisfy the judgment. The grant continues until the proceedings are finalised. It is a limited grant and does not allow distribution. See Annexure "B" for draft orders. 	s 74 PAA
<p>Administration <i>ad colligenda</i></p> <ul style="list-style-type: none"> <input type="checkbox"/> An administrator may be appointed to protect the estate or particular assets, including carrying on a business, being appointed director of the deceased's company or other relevant matters if a delay in obtaining a full grant would place the estate or particular assets in danger. Genuine urgency and the likelihood of a delay in obtaining a full grant must be proven. The grant is made to a person qualified to perform the tasks or undertake an office and this may be the person who is entitled to a full grant. It is limited as to time, property and how that property can be dealt with and does not allow distribution. The grant continues for six months <i>only</i> or earlier grant of probate. See Annexure "B" for draft orders. 	s 74 PAA
<p>Administration dbn: administration of the unadministered estate if last administrator has died</p> <ul style="list-style-type: none"> <input type="checkbox"/> If the last surviving administrator has died without fully administering the estate an application should be made seeking revocation and a new grant by a person who is themselves entitled or is the legal personal representative of a person entitled. Note that if all executorial duties have been performed and only trustee duties remain a new trustee should be appointed under s 6 of the <i>Trustee Act 1925</i>. The affidavit of applicant must describe the property remaining to be administered and the inventory (and filing fee) should only include the unadministered estate which is valued at the date of the filing of the new summons. The original grant must be produced. 	r 19 s 63 PAA
<p>Administration dbn: administration of unadministered estate if last administrator has lost capacity</p> <ul style="list-style-type: none"> <input type="checkbox"/> If the last surviving administrator has lost capacity and is no longer able to act, but is not the sole beneficiary, then an application for a new grant may be made by a person who is themselves entitled or is the legal personal representative of a person entitled. Note that if all executorial duties have been performed and only trustee duties remain a new trustee should be appointed under s 6 of the <i>Trustee Act 1925</i>, rather than a new administrator. The affidavit of applicant must describe the property remaining to be administered and the inventory (and filing fee) should only include the unadministered estate which is valued at the date of the filing of the new summons. Evidence of the administrator's incapacity must be filed. The original grant must be produced. The grant is not revoked but impounded and the appointment is limited until the administrator recovers from his or her disability and seeks to reinstate the original grant. <input type="checkbox"/> If the last surviving administrator has lost capacity and they are solely entitled to the estate, an application should be made in accordance with Section 10 above. The original grant must be produced. The grant is not revoked but impounded and the appointment is limited until the administrator recovers from his or her disability and seeks to reinstate the original grant. 	r 19 s 63 PAA

<p>Administration during minority</p> <p><input type="checkbox"/> If the only person entitled to a grant of administration is a minor the Court may make a grant of administration to his or her guardian during their minority. The grant is for the use and benefit of the minor and limited until they are 18 yrs of age and obtain a grant. An administration bond will not be dispensed with. Note the requirements regarding an administration bond or the Protocol for Minors at Section 11 above.</p>	<p>rr 50-52 ss 63, 70 PAA Forms 130, 131</p>
<p>Administration where the administrator is out of the jurisdiction for over 6 mths</p> <p><input type="checkbox"/> If, at the expiration of six months from the death of the deceased, an administrator who has obtained a grant of administration is residing outside the jurisdiction, a creditor, legatee, next of kin, the NSW Trustee & Guardian or a trustee company may make an application for a special grant <i>durante absentia</i>. It would be a limited grant and would be rescinded upon the administrator returning to the jurisdiction.</p>	<p>ss 76-80 PAA</p>
<p>Administration for purposes of Chapter 3 of <i>Succession Act 2006</i>, s 91</p> <p><input type="checkbox"/> This appointment is sought in the summons commencing a family provision application only (not Form 111).</p> <p><input type="checkbox"/> The appointee only represents the estate in the family provision proceedings but cannot administer the estate.</p>	<p>s 91 SA</p>

[Louise Brown](#)

Registrar in Probate

Supreme Court of NSW

June 2019

Annexure "A"

Procedure for Notice on NSWTG of beneficiary's entitlement by Financial Manager

The Court's usual practice when a grant is made in a representative capacity where the beneficiary does not have the ability to consent to the appointment or to the dispensation of the bond, is to order that an administration bond and two sureties be filed, to the value of the beneficiary's share. However, as you are the financial manager of the protected person you may, as an alternative to a bond, do the following:

- 1) Serve a letter on Client Establishment, NSWTG at NSW Trustee and Guardian, Level 6, 160 Marsden Street, Parramatta, Attention of Client Establishment, which:
 - Names the applicant/financial manager and the protected person
 - Provides details of the appointment of the financial manager, and attaches a copy of the order or other evidence appointing the financial manager
 - Confirms the most recent date when accounts were produced to NSWTG on behalf of the protected person.
 - Advises NSWTG that the protected person is a beneficiary under the will, or on intestacy, in the estate of [name of deceased]
 - Advises NSWTG of the estimated value due to the protected persons and attaches a plan of management of the funds
 - Attaches a copy of the inventory and will (or in the case of an intestacy, a list of persons entitled on intestacy)
 - Confirms that the funds will be subject to the supervision of NSWTG and agrees to produce accounts as and when required by NSWTG.

- 2) Please request that NSWTG confirm:
 - receipt of the above notice and
 - that previous accounts have been produced by the financial manager as and when requested,
 - by sealing, signing and dating a copy of the letter and posting, DX or emailing it the Registrar in Probate at:
 - The Supreme Court of NSW, Law Courts Building, Queens Square, 184 Phillip Street,
Sydney NSW 2000, or
 - DX 829 Sydney, or
 - sc.probate@justice.nsw.gov.au

- 3) Upon receipt of this confirmation by NSWTG the grant will be issued.

Annexure “B”

Draft Standard Orders – Special Administration

~ add supplementary powers and limitations as necessary ~

Pendente Lite

DECLARATION:

- (1) I note that a [grant of probate/administration or validity of a will] is in dispute in the estate of [deceased] and a special grant of administration is required to protect the estate;
- (2) I note that the executors and beneficiaries are aware of this application;
- (3) I note that the plaintiff is not aware of any circumstances which raise doubt as to [his/her] entitlement to a grant.

THE COURT ORDERS:

- (4) That, pending determination of proceedings in case number [case number], in the estate of [deceased] who died on [date], a grant of special administration *pendente lite* be granted and [name of applicant] (“the administrator”) be appointed administrator of the personal estate and receiver of the real estate, limited to:
 - a. the duration of the proceedings or earlier grant of probate or administration;
 - b. [set out property the subject of the special grant]
 - c. [set out powers and limitations of the special grant. See “Supplementary Orders” below]
- (5) That the grant not include the power to distribute assets;
- (6) That publication of notice of intention to make this application be dispensed with;
- (7) That the administration bond and sureties be dispensed with;
- (8) That further compliance with the Probate Rules be dispensed with in respect of this application;
- (9) That there be liberty to apply.

Ad Litem

DECLARATION:

- (1) I note that [proceedings have been commenced OR need to be commenced OR a specific act must be performed] on behalf of the [deceased/estate] and a special grant of administration is required to appoint a person to [represent the estate in the proceedings OR perform the specific act];
- (2) I note that the executors and beneficiaries are aware of this application;
- (3) I note that the plaintiff is not aware of any circumstances which raise doubt as to [his/her] entitlement to a grant.

THE COURT ORDERS:

- (4) That a grant of special administration *ad litem* be granted to [name of applicant] (“the administrator”) in the estate of [name of deceased] (“the deceased”) who died on [date of death], to [represent the estate to commence and/or carry on proceedings, (in case number xxxx if commenced), in (name of court) at (location) (“the proceedings”) for the purpose of (describe type of proceedings) OR to (describe what act needs to be performed)], limited to:
 - a. the duration of the proceedings or earlier grant of probate or administration;
 - b. [set out property the subject of the special grant];
 - c. [set out powers and limitations of the special grant. See “Supplementary Orders” below].
- (5) That the grant not include the power to distribute assets;
- (6) That publication of notice of intention to make this application be dispensed with;
- (7) That the administration bond and sureties be dispensed with;
- (8) That further compliance with the Probate Rules be dispensed with in respect of this application;
- (9) That there be liberty to apply.

Ad Colligenda

DECLARATION:

- (1) I note that the deceased [owned business/property OR was a director of a company] and a special grant of administration is required to [protect that property OR a person needs to be appointed director/manager of that company/business to continue trade, OR as required];
- (2) I note that the executors and beneficiaries are aware of this application;
- (3) I note that the plaintiff is not aware of any circumstances which raise doubt as to [his/her] entitlement to a grant.

THE COURT ORDERS:

- (4) That a grant of special administration *ad colligenda* be granted to [name of applicant] (“the administrator”) in the estate of [name of deceased] (“the deceased”) who died on [date of death], limited to:
 - a. a period of six months or earlier grant of probate or administration;
 - b. [set out property the subject of the special grant];
 - c. [set out powers and limitations of the special grant. See “Supplementary Orders” below].
- (5) That the grant not include the power to distribute assets;
- (6) That publication of notice of intention to make this application be dispensed with;
- (7) That the administration bond and sureties be dispensed with;
- (8) That further compliance with the Probate Rules be dispensed with in respect of this application;
- (9) That there be liberty to apply.