

Persons with Legal Authority to act as Executor of a Claimant's Estate

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Policy

1. Purpose

- 1.1 This Policy provides guidance on who can be an executor or administrator of a **veteran's** or **other claimant's** estate and what powers they have.

2. Legislative Reference

- 2.1 Administration Act 1969, sections 6-9, 13, 21, 23, 38, 63, 65, 70, 71, 73 and Part 3;

High Court Rules (in the Judicature Act 1908, Schedule 2), Rules 27 and 35 (4)

Family Protection Act 1955, sections 11 and 11A.

3. Eligibility to be executor of a claimant's estate

- 3.1 An executor is the person appointed in a will to control and distribute the will-maker's assets under the provisions of the will.

- 3.2 An executor can be:

- any adult over 20 who is of sound mind, or
- a trustee company under the Trustee Companies Act 1967.

Sections 13 and 63 of the Administration Act 1969.

- 3.3 If the deceased has named a minor to be sole executor of his/her estate, the court may grant administration of the estate to whom it thinks fit until the minor becomes entitled to and gains probate (i.e. permission from the court to distribute the estate).

Section 9 of the Administration Act 1969.

4. When more than one person is named executor

- 4.1 The deceased may name more than one executor and probate may be granted to one or some of all the named executors. Some executors may have specific powers assigned to them by the deceased's will. Each named executor exercises the specific powers assigned to them by the will or by the law as if all the executors agreed to them, i.e. other executors do not overrule the powers assigned to an individual executor.

Sections 23 and 38 of the Administration Act 1969.

5. The executor's role

- 5.1 An executor:

- gathers in the deceased's property, sells it if necessary, receives any payments to the estate, pays any debts and distributes what remains to the beneficiaries according to the will
- ensures as far as legally possible that the deceased's wishes, as set out in the will, are carried out
- is entitled to the deceased's body and is responsible for its disposal. The executor is entitled to choose the type of funeral and burial, but will generally follow what was said in the will or the wishes of family and friends.

6. Trustees

- 6.1 A trustee is a person or organisation responsible for holding any of the will-maker's property until it can be paid to the beneficiary who is entitled to the property. The roles of executor and trustee are usually combined.
- 6.2 In a will, legal ownership of the property passes to the trustee on the death of the will-maker, who must hold it for the beneficiaries and distribute it under the terms of the will.

7. Administrator of an estate

- 7.1 An administrator is the person appointed by the court to manage the estate of a person who dies without a will – called dying "intestate", or if there is a will but no executor, or if the will is not proven.

Section 6 of the Administration Act 1969; rules 27 and 35 (4) of the High Court Rules (in the Judicature Act 1908, Schedule 2.

- 7.2 Examples of where there may be a will but no executor include where:
- the executor named in the will dies before the will-maker, or
 - the will does not name an executor, or
 - the executor named in the will refuses or is unable to act.

8. The administrator's role

- 8.1 An administrator carries out the same functions as an executor, but, when there is no will, distributes the assets of the estate according to the laws of intestacy as set out in Part 3 of the Administration Act 1969. Where there is a will but no executor, the administrator administers the estate in accordance with the will.

Sections 11 and 11A of the Family Protection Act 1955.

- 8.2 The administrator has a duty to give the court all the relevant information they have about the financial affairs of the estate and the deceased person's

reasons for making the provisions in the will or for not making provisions for any person. The court must consider the deceased person's reasons.

9. Who may be an administrator of an estate

9.1 Usually a family member applies to the High Court in Wellington (pre-31 May 2013 to the nearest High Court) to be the administrator of an estate. They would usually apply through a lawyer, Public Trust or a statutory trustee company. They must give the court evidence that everyone of equal priority has either consented to or been given notice of the application.

9.2 The court will almost always appoint next of kin as the administrator unless they do not wish to have the job. If more than one person applies, the court will usually appoint an administrator according to the following order:

- the surviving spouse, civil union or de facto partner, then
- the children of the deceased, then
- the parents of the deceased, then
- brothers and sisters of the deceased, then
- grandparents, then
- uncles and aunts.

9.3 If there are any pending legal proceedings touching the validity of the deceased's will, or the grant of administration of the will, the court may grant administration of the estate to a person on a temporary basis. A temporary administrator will have limits placed on them by the court and will be under the court's control and direction. For example, the temporary administrator will not have rights to distribute the estate after paying debts, funeral and testamentary expenses, duties and fees.

Section 7(1) of the Administration Act 1969

9.4 If the administrator of the estate is residing outside of New Zealand after the claimant dies the court may decide to grant special administration to another person if an interested person applies on their own or another person's behalf. The court will decide what powers will be granted to the special administrator.

Section 8 of the Administration Act 1969

9.5 The court may decide to discharge an administrator if the administrator:

- is absent from New Zealand for 12 months without leaving a lawful attorney
- wishes to be discharged
- becomes incapable of acting as administrator or unfit to act.

- 9.6 In this case the court will vest powers of the discharged administrator upon a new appointee or other continuing administrators as it sees fit.

10. When more than one person claims to be the executor/administrator

- 10.1 Persons claiming to be the executor or administrator of the deceased claimant's estate must provide Veterans' Affairs with a copy of the court order granting administration for all of the claimant's estate or for the particular aspect of the estate for which the court has given the person powers. Similarly, where a court has applied an order to the Public Trust or Māori Trustee to administer all or part of the estate, a copy of this order should be provided.
- 10.2 As a further check, if necessary, once administration has been granted, it (and any will) becomes a public record, and can be obtained by applying through the correct High Court where probate was granted. Up to 31 May 2013 this was the High Court closest to where the deceased person lived at the time of their death. From 4 June 2013, this has been the High Court in Wellington. (For further details see <http://www.justice.govt.nz/courts/high-court/apply-for-probate-and-get-copy-of-will/>. The fee for finding a will is currently \$30.

11. When a grant of probate is not required

- 11.1 If the value of the estate is small and does not include ownership of land or an interest in land, it may not be necessary to obtain a grant of probate. In this case the estate can pay out the claimant's family members or beneficiaries without the need for probate to be obtained.

Section 65 of the Administration Act 1969

- 11.2 Up to
- \$15,000 in bank account funds; and
 - \$15,000 in shares; and
 - \$15,000 in life insurance policies; and
 - \$15,000 in Government stock; and
 - \$15,000 in local authority stock

may be transferred or paid to the executor without requiring probate. The executor will need to provide evidence of the death (e.g. death certificate), to the organisations holding the funds.

- 11.3 Veterans' Affairs would rely on the veteran's or claimant's family to inform us that the estate is small, and pay out any outstanding claims to the estate on receipt of a copy of the death certificate. If in doubt, we could check with the Wellington High Court whether probate has been granted.

12. Living Overseas

- 12.1 If a person with an estate in New Zealand dies abroad, and probate has been granted and sealed by a court in that country, and if a copy of that grant has been deposited with a Registrar of the High Court of New Zealand and resealed in New Zealand, the probate will be accepted in New Zealand as if originally granted here. This does not apply to the situation described in section 11.

Sections 70, 71 and 73 of the Administration Act 1969

- 12.2 Veterans' Affairs would rely on the executor or administrator of a veteran's or other claimant's estate to indicate if the estate is wholly held in the veteran's or other claimant's overseas country of residence.

Glossary

child [section 7]

In relation to a veteran,—

- (a) means a natural child of the veteran; and
- (b) includes—
 - (i) an adopted child of the veteran; and
 - (ii) a child of whom the veteran is or has been a guardian; and
 - (iii) a grandchild or a whāngai of the veteran in relation to whom the veteran acts or has acted as a parent or guardian; and
- (c) includes any other child who would ordinarily be regarded as a child of the veteran because the veteran—
 - (i) is or has been the spouse or partner of one of the child's parents; and
 - (ii) acts or has acted as a parent of the child.

dependant [section 7]

In relation to a veteran, means any of the following persons:

- (a) a person (not being the spouse, partner, or child of the veteran) who —
 - (i) is under 18 years of age; and
 - (ii) is wholly or primarily dependent on the veteran for financial support; and
 - (iii) ordinarily resides with the veteran;
- (b) a person (not being the spouse, partner or child of the veteran) who —
 - (i) is 18 years of age or more; and
 - (ii) is under the care of the veteran; and
 - (iii) ordinarily resides with the veteran because the person is unable to live independently of the veteran due to disability, illness or advanced age;
- (c) a person who —
 - (i) is the child of the veteran; and
 - (ii) is 18 years of age or more; and
 - (iii) is under the care of the veteran; and
 - (iv) is unable to live independently of the veteran due to physical or mental infirmity.

guardian [section 7]

Has the same meaning as in section 15 of the Care of Children Act 2004.

member of the armed forces [section 7]

Means a person who is or has been a member of the New Zealand armed force raised by the Governor-General on behalf of the Sovereign,—

- (a) whether in New Zealand or elsewhere; and
- (b) whether before or after the passing of this Act.

other claimants [section 7]

Means—

- (a) persons who have served as members of the armed forces before 1 April 1974 and whose injury or illness was caused by, contributed to by, or aggravated by routine service in New Zealand or overseas; and
- (b) spouses and partners of veterans; and
- (c) children of veterans; and
- (d) dependants of veterans; and

- (e) persons (other than the spouse or partner, or a child or dependant, of the veteran) who provide non-professional support to veterans for the purposes of section 107.

partner [section 7]

Means a civil union partner or a de facto partner.

qualifying operational service [section 8]

Means–

- (a) service in any deployment treated as a war or emergency for the purposes of the War Pensions Act 1954; or
- (b) service on any deployment declared to be operational service under section 9.

qualifying routine service [section 8]

Means service in the armed forces before 1 April 1974 that is not qualifying operational service.

qualifying service [section 8]

Means–

- (a) qualifying operational service; or
- (b) qualifying routine service.

veteran [section 7]

Means–

- (a) a member of the armed forces who took part in qualifying operational service at the direction of the New Zealand Government; or
- (aa) a member of the armed forces who took part in qualifying routine service before 1 April 1974; or
- (b) a person:
 - (i) who has been:
 - (A) appointed as an employee of the Defence Force under section 61A of the Defence Act 1990; or
 - (B) seconded to the Defence Force with the permission of the Chief of Defence Force; and
 - (ii) who took part in qualifying operational service at the direction of the New Zealand Government; or
- (c) a person who, immediately before the commencement of Part 3 of this Act, is eligible for a pension under the following provisions of the War Pensions Act 1954:
 - (i) section 19 (but only if the person was a member of the forces);
 - (ii) section 55 or 56;
 - (iii) Parts 4 and 5.

whāngai [section 7]

Means a child adopted by the veteran in accordance with Māori custom.