

Letters of administration *durante dementia*

Procedural guidance



Overview

This guidance relates to an application for probate or administration in circumstances where the sole beneficiary named in a will (or on intestacy) is mentally incapable of applying for a grant, and there is no provision in the will for a substituted executor to apply in the event the instituted executor is unable to act.

There are two potential types of applications that can be made in this situation; an application for letters of administration *durante dementia*, or an application by State Trustees pursuant to s 5 of the *State Trustees (State Owned Company) Act 1994*. This guidance relates to the former.

The executorial appointment clause must be read carefully to determine if any substituted executor has a right to apply, or whether this is the appropriate type of application to be made.

Below is an example of a common executorial appointment clause where this type of application would be appropriate:

‘In the event AAA survives me by 30 days, I appoint them executor of my will and sole beneficiary of my estate. If AAA does not so survive me then I appoint BBB as executor in their place.’

In the event AAA has survived by more than 30 days and is mentally incapable of obtaining a grant this type of application must be made.

If a grant of probate or administration has already been issued, and the legal personal representative has become incapacitated, consideration ought to be given to the provisions of s 34(1) of the *Administration and Probate Act 1958* and s 48 of the *Trustee Act 1958*.

Type of application

If the deceased died leaving a valid will the application must be made for letters of administration with the will annexed. If the deceased died intestate (without a valid will) the application must be for letters of administration upon intestacy (no will).

Who applies

Ordinarily, the plaintiff(s) should be one or more persons entitled to share in the distribution of the sole beneficiary’s estate if they were to die intestate. This is the circumstance even if the sole beneficiary has a valid will in place or has an administrator appointed under the *Guardianship and Administration Act 2019*.

For more information see *Re Shaw* [1992] 2 VR 457.

Advertisement – Letters of administration (with will)

When preparing the application in RedCrest-Probate, on the "Plaintiff(s) Details" tab, select "A person entitled to share in the estate of the sole beneficiary of the will if they died without a will" as the reason the plaintiff(s) can apply. On the "Executor(s) Not Applying" tab, select "Unable to Act" as the reason why the incapable executor is not applying. On the "Advertise" tab, click the "Add further information" button and include the following: "The plaintiff(s) make this application in their capacity as person(s) entitled to share in the estate of [insert incapable persons name] were they to die intestate."

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Advertisement – Letters of administration (no will)

When preparing the application in RedCrest-Probate, on the "Plaintiff(s) Details" tab, select "A person entitled to share in the estate of the sole person entitled to share in the estate if they died without a will" as the reason the plaintiff(s) can apply. On the "Advertise" tab, click the "Add further information" button and include the following: "The plaintiff(s) make this application in their capacity as person(s) entitled to share in the estate of [insert incapable persons name] were they to die intestate."

Documents required in support

In addition to the usual documents required in support of an application (e.g. advertisement, affidavit of administrator) the plaintiff must file an affidavit of the incapacitated sole beneficiary's treating doctor confirming their mental incapacity to act as executor/administrator of the estate.

Within the affidavit of administrator the plaintiffs must state all persons who would be entitled to share in the incapable beneficiaries estate were they to die intestate. In addition, if there are persons entitled in the incapable beneficiaries estate who are not applying their verified consent to the plaintiff's obtaining administration must be filed.

Surety Guarantee

As a pre-condition of being granted administration *durante dementia* the Registrar of Probates will generally require a surety guarantee be filed pursuant to r 7.01 of the *Supreme Court (Administration and Probate) Rules 2014*.

If the plaintiff(s) are unable to provide a surety guarantee, consideration will be given to waiving this requirement if two or more persons are jointly making the application and an undertaking is provided by affidavit to file an administration account within 12 months of obtaining the grant.

Limitation on Grant

The grant issued will be limited until the beneficiary becomes capable, applies for and obtains a grant and this limitation will be endorsed on the grant. If there are executorial or administrative duties remaining and the sole beneficiary becomes capable they may obtain a grant in their own right.