



Can I sell property of a deceased estate before probate is granted?

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If you have been appointed as the executor of a [deceased estate in NSW](#), and the deceased left real property in NSW, you may be wondering when you can legally sell the property and if you need a Grant of Probate before moving forward. This blog outlines some of the possible considerations to be aware of when selling real property of the deceased.

Please note that this is not an exhaustive list of considerations and is intended as a guide only. If you need specific advice related to your individual circumstances, feel free to speak with one of our probate lawyers.

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Understanding probate in NSW

In NSW, a Grant of Probate is an order from the Court recognising the Will as the last Will of the deceased and authorising the executor to act on behalf of the estate.

Following a Grant of Probate, the executor (the person nominated in the Will to manage the estate) has the authority to deal with the estate's assets. This Grant provides assurance to third parties, like banks and real estate agents, that the executor has the legal right to manage and distribute the assets of the deceased according to the Will.

Do you need a Grant of Probate to sell a property in NSW?

It is possible to list a property for sale before obtaining probate and exchange contracts for the sale of property, but the property cannot be legally transferred to a purchaser until probate is granted. Settlement or completion of the sale must wait until a Grant of

Probate has been obtained from the Court.

If an executor chooses to proceed with the sale of a property prior to probate being granted, it is important to ensure that the Contract is carefully drafted to make settlement/completion subject to a Grant of Probate being obtained.

In a nutshell, a Grant of Probate is required before settlement of a sale of property in NSW can be completed. Probate establishes the executor's authority, and is required for the property to be transmitted to the executor's name to finalise the sale. Without probate, the executor will not be able to finalise the sale.

What should an executor consider before trying to sell a property prior to a Grant of Probate?

Before an executor considers attempting to sell a property prior to obtaining a Grant of Probate, there are several key factors to weigh carefully.

Delayed completion

As an executor cannot legally transfer title without a Grant of Probate, and settlement/completion of a property of a deceased estate will be delayed until probate is received, it can lead to substantial delays for the parties.

The executor should consider the likely timeframe for obtaining probate. If there are delays (due to the complexity of the estate, the Court estimated processing times, or potential challenges to the Will), this may affect the timing and feasibility of the sale. For extremely complex estates or an estate at higher risk of challenge, it may be more appropriate for the executor to delay the sale of the property until closer to the time that a Grant of Probate will be obtained.

Due to this risk of delay, it can impact a purchaser's confidence or willingness to agree to the purchase.

Rescission (right to cancel the contract of sale)

If selling property of a deceased estate before probate is granted, it is common to include in the contract a right for either party to rescind if a Grant of Probate is not obtained within an agreed period of time (often several months).

It is beneficial to include a right of rescission in the Contract in case there are significant delays in obtaining probate or if the executor does not receive probate for any reason (including if [the Will is being contested](#)).

A properly drafted clause permitting the parties a right of rescission after a specified time will allow the purchaser to recover their deposit and the parties to go their separate ways. However, this will also mean that after a sale has been negotiated, and due to delays in obtaining probate, the sale falls through, and any sale will need to be renegotiated.

Tax implications for deceased estate property sales

There are often tax considerations when selling a deceased estate property, and the timing of the sale can affect the tax that may be payable. It is essential to seek professional advice on any tax obligations before proceeding with the sale.

Whenever considering a sale of estate property, particularly prior to a Grant of Probate being obtained, the executor should obtain legal advice prior to proceeding.

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Does this also apply to jointly held property?

No. If the property was owned jointly with another person as joint tenants, then upon the passing of one of the joint tenants, title will typically pass to the surviving joint owner immediately upon death. A Grant of Probate will not be necessary before the surviving joint owner can proceed to sell their property.

In order to bring title of the property into the surviving joint tenant's sole name, a Notice of Death would need to be registered on the title of the property with the NSW Land Registry Services. This can usually be completed once a copy of the Death Certificate has been obtained.

Notably, this only applies where the parties own the property as joint tenants. If the parties own the property as [tenants in common](#), then a Grant of Probate will be required to deal with the deceased's interest in title.

What if the property was subject to a contract for sale before the owner died?

If the deceased was selling their property and had already entered into a Contract for Sale but died before settlement of the sale was completed, then settlement will be delayed until a Grant of Probate is obtained. In these circumstances, the time it usually takes to obtain a Grant of Probate could lead to significant delays beyond the contractual settlement date and put the estate at risk of default under the Contract.

In these circumstances, an executor may be justified in applying to the Court for an urgent Grant of Probate, limited to complete the sale of the property. The Court would usually only make such a grant where there is an urgent need to manage specific estate assets before a full Grant of Probate can be issued.

If the deceased was merely contemplating the sale but had not entered into a Contract for Sale, then an urgent limited grant would be unlikely to be obtained.

Legal advice should be sought urgently if the deceased had already exchanged Contracts for the sale of their property.

Get help from an estates/property lawyer

Selling a property from a deceased estate requires careful planning and adherence to legal procedures. For executors in NSW, they may be able to commence negotiating a sale of property before obtaining a Grant of Probate, but this should be carefully considered to determine whether it is appropriate given the specific circumstances of the estate.

While this guide provides a general overview of some considerations when selling a property on behalf of a deceased estate, it should be noted that each situation is unique. Speaking with an estates/property lawyer can help you navigate the legal and financial complexities of managing the sale of the property.

E&A Lawyers have a dedicated and experienced estates and property law team who can help you. For more information or to arrange a consultation with a lawyer, you can call or email us.

Contacting E&A Lawyers

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