

Specialist Accreditation



2021 Wills & Estates Assessment Requirements



THE LAW SOCIETY
OF NEW SOUTH WALES



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Performance Standard

Standard of an Accredited Specialist

The Standard of an Accredited Specialist in Wills and Estates Law is that of a 'specially competent practitioner' in the core skills and practical capabilities in the selected area of practice, as assessed against the spectrum of capability of all practitioners in that area of practice. This standard is to be distinguished from the idea that the Scheme requires the highest technical legal knowledge across all aspects of the selected area of practice.

Important

Candidates are advised to read and familiarise themselves with the 2021 Guide to Application and Assessment which contains important information regarding application, process, resources and special consideration etc. This document can be found at: lawsociety.com.au/specialists

Timetable

The shaded area below shows the core assessment period including the dates associated with each assessment.

Candidates need to focus on this core assessment timeframe and plan their workload well in advance.

Based on feedback reports from previous years, candidates are encouraged to dedicate and manage their time during this period to optimise their performance across all assessment tasks.

Candidates are reminded that participating in the Specialist Accreditation program requires a considerable level of commitment if candidates are to achieve their desired outcome.

Activity	Date
Question & Answer sessions for potential candidates	February 2021
Applications for Specialist Accreditation close	End March 2021
Candidature confirmed	Week commencing 3 May 2021
Mock File	Release: Wednesday, 12 May 2021 Due: Wednesday, 2 June 2021
Written Examination	Saturday, 24 July 2021
Simulated Interview	Sunday, 25 July 2021
Results released to candidates	Early October 2021
Reassessment and/or Appeal applications close	14 days from notification of results
Reassessment results released	December 2021
Appeal results released	December 2021

Core Skills and Knowledge Areas

Candidates wishing to become an Accredited Specialist should be able to:

- Display knowledge of the law and procedure which underpins the performance of tasks in this area of practice; and
- Demonstrate the following tasks to the level of the performance standard.

Core Skills

1. Obtains information and instructions from the client

1.1 Establishing a relationship with the client

The specialist acts in a professional manner to create an atmosphere to gain the client's confidence, communicate effectively and address the client's needs.

For the interview, the specialist:

- Obtains any prior relevant background information available to the specialist;
- Conducts the interview in an appropriate manner and setting;
- Is patient, reassuring and sensitive to the client's needs; and
- Discusses, and deals appropriately with, the issue of costs and expenses.

1.2 Eliciting information and facts

The specialist elicits information from the client and ascertains the client's objectives by:

- Observing the client, asking effective questions, listening carefully and confirming mutual understanding; and
- Guiding the process by knowledge of the relevant law and giving appropriate advice.

The specialist demonstrates thoroughness in ordering and recording accurately the information and advice.

2. Analyses information

2.1 Identifying facts and issues

The specialist analyses the information provided by the client and identifies:

- The relevant issues of fact and law; and
- Matters that require further research.

2.2 Conducting legal research

The specialist knows the sources most likely to be of assistance and carries out the necessary legal research arising from the issues.

2.3 Obtaining further information and verifying facts

The specialist knows what further information is required and when and how to verify the facts.

The specialist checks information received by checking with sources, such as government and other professionals, particularly details relating to:

- Assets and liabilities including superannuation, interest in trusts and private companies;
- Relationships;
- Capacity; and
- Domicile, residence and citizenship status.

2.4 Identifying solutions

The specialist analyses the key features of the client's instructions having regard to:

- All the information so far obtained;
- The law; and
- Procedural requirements.

The specialist then prepares initial strategies to be discussed with the client.

3. Develops plan

3.1 Advising the client

The specialist advises the client on the relevant law and the available options, including advice, for each option, on:

- Rights and obligations;
- Processes and time frames;
- Costs implications;
- Viability; and
- Settles the terms of the retainer with the client.

The specialist assists the client to formulate objectives taking into account the desired outcomes, priorities, resources and any special needs.

3.2 Confirming instructions

The specialist confirms the client's instructions and the terms of the retainer.

The specialist is aware and informs the client of the time normally required for each step of the proceedings.

The specialist acts:

- For a will - promptly and efficiently in relation to the client's instructions;
- For uncontested matters - with regard to the time required for each stage; and
- For litigious matters - with regard to the time limits imposed by legislation and the Court.

4. Implements plan

4.1 Drafting wills

The specialist drafts the will and other appropriate documents:

- Accurately and concisely;
- Applying all relevant law to the facts;
- Giving effect to the client's confirmed instructions and having regard to the will maker's age, assets (estate and non-estate) and known circumstances; and
- Giving consideration to enduring powers of attorney; enduring Guardianship and Advance Healthcare Directives.

The draft is considered by the client, together with the appropriate advice given by the specialist on its provisions.

The specialist advises on the effects of any changes requested by the client and makes any amendments to the draft required by the client.

The specialist obtains proper execution of the final form of the will, advises on storage and the need for future revision, and costs the will.

4.2 Obtaining or contesting grants

The specialist has a thorough knowledge of the laws and practices relating to grants of probate and administration.

In uncontested matters the specialist:

- Must be able to prepare special and unusual grants;
- Prepares all documents accurately, efficiently and promptly;
- Obtains the grant without delay; and
- Properly identifies the person entitled to the grant.

In contested matters the specialist:

- Initiates, intervenes in or defends proceedings, and prepares court documents which present the case properly and comply with court rules and practices;
- Conducts any interlocutory procedure relevant to the jurisdiction and prepares witness statements and affidavits;
- Where necessary, advises on appeal; and
- Considers when to brief counsel, chooses an appropriate barrister and acts appropriately as the instructing solicitor.

4.3 Administration of estates

The specialist advises the client and acts, where instructed, on:

- The payment of debts, insolvent and solvent estates;
- The collection and transmission of assets, including overseas assets; and
- The keeping of accounts.

When undertaking these tasks, the specialist is:

- Guided by a thorough knowledge of:
 - The law involving the rights and duties of the personal representative and beneficiaries; and
 - The requirements of asset holders.
- Sensitive to the timing of transactions; and
- Aware of taxation and stamp duty implications.

4.4 Accounts

The specialist is aware of, and acts accordingly, with respect to:

- The rights of, and limitations upon, the personal representative to commission and reimbursement for expenses properly incurred; and
- The rights of the representative to have accounts passed as evidence of proper administration.

The specialist demonstrates knowledge of the required detail in accounts, procedure for passing accounts and, if required applying for commission.

4.5 Family provision

The specialist:

- Has a thorough understanding of, and acts in accordance with, the provisions of all relevant legislation;
- Is able to advise clearly and impartially on the eligibility of the applicant, the prospects of the application and the costs implications for both the applicant and the estate; and
- Acts promptly and efficiently in relation to time limits.

Knowledge Areas

1. **Core legislation/rules**
2. **Ancillary legislation**
3. **Core knowledge**

Candidates will be expected to demonstrate knowledge of the current law including applicable case law affecting succession including wills and intestacies, estate administration and family provision.

Note: The Wills & Estates Assessment Requirements were published in December 2020.

Candidates should be aware of all recent and impending amendments to legislation. All assessments will be based on the law as at the date of the assessment.

1. **Core legislation/rules**

- *Forfeiture Act 1995 (NSW)*
- *Guardianship Act 1987 (NSW)*
- *Interpretation Act 1987 (NSW)*
- *NSW Trustee and Guardian Act 2009 (NSW)*
- *Powers of Attorney Act 2003 (NSW)*
- *Probate and Administration Act 1898 (NSW)*
- *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015*
- *Succession Act 2006 (NSW)*
- *Supreme Court Rules 1970 (NSW)*
- *Trustee Act 1925 (NSW)*
- *Uniform Civil Procedure Rules 2005 (NSW)*

1.1 **Transitional legislation**

The following legislation (or parts thereof) has been repealed in whole or in part but may be relevant in some situations. Regard should be given to any transitional provision.

- *Family Provision Act 1982 (NSW)*
- *Testator's Family Maintenance and Guardianship of Infants Act 1916 (NSW)*
- *Probate and Administration Act 1898 (NSW)*
- *Succession Amendment (Family Provision) Act 2008 (NSW)*
- *Succession Amendment (Intestacy) 2009 (NSW)*

2. Ancillary legislation

There are portions of the legislation that are relevant to this area of law. You are expected to be familiar with those parts.

- *Adoption Act 2000 (NSW)*
- *Bankruptcy Act 1966 (Cth)*
- *Births Deaths and Marriages Registration Act 1995 (NSW)*
- *Cemeteries and Crematoria Act 2013 (NSW)*
- *Charitable Trusts Act 1993 (NSW)*
- *Conveyancing Act 1919 (NSW)*
- *Corporations Act 2001 (Cth)*
- *Duties Act 1997 (NSW)*
- *Electronic Transactions Act 2000 (NSW)*
- *Family Law Act 1975 (Cth)*
- *Guardianship of Infants Act 1916*
- *Human Tissue Act 1983 (NSW)*
- *Imperial Acts Application Act 1969 (NSW)*
- *Income Tax Assessment Acts 1936 and 1997 (Cth)*
- *Legal Profession Uniform Law (NSW)*
- *Legal Profession Uniform Law Application Act 2014 (NSW)*
- *Marriage Act 1961 (Cth)*
- *Public Health Regulation 2012 (NSW)*
- *Relationships Register Act 2010 (NSW)*
- *Social Security Act 1991 (Cth)*
- *Status of Children Act 1996 (NSW)*
- *Superannuation Industry (Supervision) Act 1993*
- *Superannuation Industry (Supervision) Regulations 1994*
- *Surrogacy Act 2010 (NSW)*

3. Core knowledge

3.1 Wills

- Components of a will
 - Description of testator
 - Revocation of earlier wills
 - Appointment of executor and trustee
 - Appointment of a guardian of any minor children
 - Identification and description of property
 - Types of gifts
 - Definition provisions

- Powers, duties and directions
- Expression of wishes as to burial and commemoration
- Residue clause
- Donation of organs
- Execution clause

- Drafting and execution of a will
 - Preparation of a will
 - Preparation of a codicil
 - Identification of beneficiaries and potential family provision claimants
 - Identification of testator's assets, including location and assets outside Australia
 - Consideration of non-estate assets
 - Taxation considerations
 - Proper and timely execution

- Solicitor responsibilities
 - Assessing capacity
 - Ethical requirements, including conflicts of interest
 - Procedures after execution of will, including costs and safe custody
 - Duties and liabilities in drafting wills

- Other will and estate planning issues
 - Impact of family provision applications
 - Preparation of declarations or statements, including statements of the deceased which can be received into evidence for the purposes of family provision applications
 - Court authorised wills
 - Wills for minors
 - Mutual wills and other contracts to make a will
 - Special disability trusts
 - Planning for incapacity
 - Superannuation death benefits

3.2 Intestacy

- Entitlements for a grant
- Requirements and procedures
- Definition of the estate available for distribution
- Partial intestacy
- Order of death and survivorship
- Who is a spouse? – Marriage, registered relationships and de facto relationships
- Who are the issue including ex nuptial, adopted and artificially conceived children
- Entitlements of a single spouse
- Elections to acquire specific property by spouses
- Entitlements of multiple spouses and distribution agreements
- Entitlements of the issue
- Entitlements of other relatives
- Indigenous persons
- Absence of persons entitled and applications to the Minister for discretionary distribution
- Distribution on intestacy including next of kin inquiries.
- Administration Bond
- Proofs of entitlement

3.3 Family Provision (FP)

- Eligibility
 - Categories and grounds
- Jurisdiction
 - Approach to claims
 - Extraterritoriality
 - Further applications and joinder of parties
- Discretion
 - Factors relevant to exercise of discretion
 - Moral duty in FP context
 - Claims by spouses
 - Claims by adult children

- Grandchildren and other eligible persons
- Disabled beneficiaries
- Types of orders

- Procedures
 - Supreme Court Practice Note
 - Time limits
 - Commencing, defending and interlocutory proceedings
 - Evidence
 - Compromise
 - Mediation
 - Appeals
 - Orders

- Property available
 - Actual and notional estate

- Releases
 - Approval

- FP costs

3.4 Estate administration

- Obtaining the grant
 - Types of grants and documents in support:
 - Probate in common or solemn form;
 - Letters of Administration;
 - Letters of Administration, with the will annexed;
 - Resealing;
 - Grants for the purpose of Family Provision proceedings; and
 - Special grants.
 - Delegation
 - Renunciation
 - Lost wills
 - Revocation, republication, revival and alteration of wills
 - Presumption of death
 - Rectification

- Informal documents
- Incorporated documents
- Minors and disable persons
- Forfeiture
- Executor's delay in obtaining grant
- Service of required notices
- Executor's chain of representation
- Ademption.

- Administering an estate
 - Rights and duties before grant
 - Ascertainment of assets, valuations, foreign assets
 - Executors and administrators, multiple, out of jurisdiction, special grants
 - Effect of grant
 - Collection and transmission of assets, joint tenancies
 - Realising foreign assets, resealing
 - Payment of debts and legacies, interest considerations
 - Trusts, protective, special disability, life estates
 - Investment by executor, powers of sale, leasing, mortgaging
 - Taxation issues
 - Protection of executor, notices, barring claims, family provision considerations
 - Litigation by executor, re: Beddoe orders, opinion, advice or direction of Court
 - Insolvent estates and bankrupt beneficiaries
 - Distribution, winding up, receipts, releases
 - Gifts to charities, cy-pres schemes
 - Deeds of family arrangement
 - Transition from executor to trustee

- Accounts and commission
 - Procedure
 - Documentation/format
 - Executorial and non-executorial work; including position of a professional executor
 - Commission
 - Rights of interested parties s 85(2) *Probate and Administration Act 1898* (NSW) including objections
 - Distinction between capital and income both in receipts as well as in payments

3.5 Contested proceedings

- Procedure - commencing, defending, intervening, alternative dispute resolution procedures, interlocutory applications, appeals

- The types of contested matters can include (but is not limited to):
 - Removal of executor or revocation of grant
 - Disputes between executors
 - Breach of trust
 - Review of an attorney's actions
 - Forfeiture
 - Rights of burial
 - Ademption
 - Construction suits
 - Testamentary capacity
 - Knowledge and Approval
 - Undue influence
 - Rectification
 - Informal documents
 - Cy-pres schemes
 - *S66G Conveyancing Act 1919 (NSW)*

- Caveats

- Notices

- Costs
 - Contested, uncontested proceedings, administration assessment and
 - moderation

Methods of Assessment

There are three methods of assessment. Candidates must pass **all three** in order to gain Specialist Accreditation.

Mock File

Release date: 10am, Wednesday 12 May 2021

Due date: 4pm, Wednesday 2 June 2021

The purpose of the mock file is to assess the candidate's ability to perform tasks undertaken by specialists in this area of practice.

The mock file will be made available to candidates on the indicated release date. Candidates will be required to work independently and to return the completed work on the specified due date.

Assessment Criteria

In your response you will be assessed on the following general performance criteria. You will be required to perform each criterion to the level of the performance standard.

- a. Analysing the facts and identifying relevant legal principles;
- b. Review alternatives with client;
- c. Implement and review plans and finalise a matter; and
- d. Demonstrate an ability to draft appropriate documents.

Written Examination

Examination date: Saturday, 24 July 2021

Venue: TBC*

The purpose of the written examination is to assess the candidate's breadth and level of knowledge.

The written examination will be closed book with candidates permitted to take into the examination room **clean copies of statutes only**. Candidates may use tabs and highlight any hard copies of legislation. There must be no written or typed annotations. Candidates must bring their own calculators.

The examination is three hours duration plus 20 minutes reading time, consisting of problem solving and knowledge questions and short or long answer questions.

Assessment Criteria

In your response you will be assessed on the following performance criteria. You will be required to perform each criterion to the level of the performance standard.

- a. Knowledge of relevant law and procedure;
- b. Identifying the relevant law and applying it to the relevant facts; and
- c. Providing advice on the given fact situation having regard to the relevant legal principles.

**All candidates will be notified of the examination time and venue in advance of the examination date.*

Simulated Interview

Interview date: Sunday, 25 July 2021

Venue: TBC*

Candidates will be required to conduct a simulated interview (either an initial or subsequent interview) with a person acting the role of a client.

Twenty minutes prior to the interview, candidates will be provided with a set of facts by way of background.

The interview will take up to 45 minutes and will be recorded for assessment purposes. At the conclusion of the interview candidates will be given 10 minutes to prepare a brief file note which records, in point form, the steps to be taken following the interview. This file note, along with the interview recording will be assessed. Candidates may take notes throughout the interview but are not permitted to submit these as part of their file note.

Candidates will be provided with a file note template which they may use for completion of this part of the assessment.

The time allocated for the interview and completion of the file note will be strictly enforced.

Candidates are not permitted to bring any reference materials into the interview room. Clean paper and pens are permitted only.

The assessment is intended to assess the knowledge component, and skills relating to performance criteria.

Assessment Criteria

In your response you will be assessed on the following performance criteria. You will be required to perform each criterion to the level of the performance standard.

- a. Elicit information and instructions from client;
- b. Listening to and questioning the client at the interview;
- c. Appraising and responding to the situation;
- d. Identifying and explaining appropriate options to the client; and
- e. Assisting client to choose the course of action.

**All candidates will be notified of the interview time and venue in advance of the interview date.*