

Executors and Beneficiaries. An overview of duties, responsibilities and rights

By Kevin White

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If you are an accredited probate specialist or a highly experienced probate practitioner, read no more. The comments that follow are a general outline of the basic duties and responsibilities of executors and of the corresponding rights of beneficiaries. Prepared primarily to meet community demand on the office of the Legal Services Commissioner and the Society's Community Assistance Department, they may assist members generally in advising clients, both executors and beneficiaries.

The legal and fiduciary obligations of solicitor/executors are more extensive. Apart from statutory and regulatory obligations under the Legal Profession Act and Regulations and the Revised Professional Conduct and Practice Rules 1995, members should be aware of relevant case law relating to a solicitor's duty of care, referred to in the brief bibliography at the end of the general comments.

Above all, members should be aware in counselling and advising clients involved in estate disputes of the need to be courteous and restrained but, other than in cases requiring urgent application for injunctive or interlocutory relief, to take positive steps to encourage their clients towards alternative dispute resolution. Mediation (formal or informal) in particular, should be recommended rather than the adoption of an adversarial or uncompromising attitude leading frequently to costly legal proceedings and ultimate disillusion on the part of the clients.

Executors: their duties and responsibilities

The Will

- To verify the appointment under the will or codicil and to ascertain whether there is any allegation of, or evidence of, testamentary incapacity of the deceased at the time the will or codicil signed; to search for any other document setting out the deceased's testamentary intentions.

The funeral

To ascertain:

- whether there is a specific direction or wish of the deceased, whether expressed in the will or another document, regarding the nature and place of burial or cremation; and
- whether the cost has been prepaid or that the value of the assets of the deceased is sufficient to meet the funeral expenses; and
- whether the cost involved in the case of specific directions is reasonable, having regard to the value of the estate.
- Subject to these points, to arrange for the deceased's funeral, unless this has already been done by a member of the family or friend of the deceased.

Note: Any person, other than the executor, who makes arrangements for the deceased's funeral, will be personally liable for the cost, but may be reimbursed or indemnified by the executor out of the estate to the extent that the expenses is reasonable or that the assets are of sufficient value to meet the cost.

The estate

To ascertain:

- What are the deceased's assets?
- What are the deceased's liabilities s (including tax)?
- Whether superannuation or other entitlements form part of the deceased's estate.
- Who are the deceased's beneficiaries and whether they were living at the date of the deceased's death.
- Whether the deceased married or divorced subsequently to the date of the will.
- Whether the deceased at the date of death was living in a de facto relationship, relevant periods and particulars.

- Whether any deceased children of the deceased who are beneficiaries under the will, who died before the deceased, left children and/or grandchildren surviving them.

Note: "Children" includes adopted children and natural born children where, children are not named individually but described as "my children".

- Whether specific personalty or realty left under the will still owned by the deceased at the time of his/her death, and whether any such property is subject to a mortgage or charge, or is otherwise subject to a contract or agreement by the deceased to make mutual wills or to make a will in a specific form.
- The date and cost of acquisition of all property of the deceased either before 20.9.85, in the case of property not being the deceased's principal place of residence, or after that date in respect of all the property of the deceased.

Probate

- To apply for (within six months of the deceased's death) and obtain a grant of probate, except in the case of small estates comprising only bank or building society deposits up to about \$15,000 (the amount depends on individual banks or building societies) or items of personally (car. boat. furniture .personal effects and jewellery).

Note: A statement of assets and liabilities of the deceased at the date of death is required to be attached to the affidavit of the executor applying for probate. The executor is obliged to inform the court of any assets or liabilities subsequently discovered, and of the reason for any delay in making the application.

Administration.

- To properly administer the estate by collecting any income and getting in the assets and, subject to the terms of the will, realising them, and to file income tax returns in respect of any taxable income of the deceased or the estate.

Note: The executor has the legal right to sell real estate "for the purposes of administration" and to lease real estate for a period "not exceeding three years". This legal right should however be exercised responsibly and, subject to any specific provision or power stated in the will, not in a manner which will result in delay in the winding up of the estate or disadvantage or loss to a particular beneficiary or beneficiaries.

- To advise the beneficiaries of any legal proceedings by or against the deceased at the date of death which continue notwithstanding the deceased's death and of any claims or legal proceedings against the estate and of the likely outcome to the extent that it affects the amount or date of likely distribution to the beneficiaries.

Note: Because the role of executor is a fiduciary one, in which great care should be exercised, beneficiaries can, by way of extension of the note immediately above, properly expect to be told in summary form of any steps taken to have an action mediated or otherwise resolved or settled to avoid costs and delay.

Payment

- To publish a formal notice of intention to distribute after one month from the date of publication, giving notice to creditors or others having claims against the estate.

Note: The executor is protected against any claims not made within the one month period following publication in a newspaper circulating in the district where the deceased resided in NSW at the date of death or, in other cases, in a Sydney daily newspaper.

- To arrange for payment, firstly out of the realisation of assets not specifically left in the will, and otherwise in the order of application of assets prescribed under the Wills Probate & Administration Act, of the following:
 - Funeral expenses;
 - Costs and expenses of administration (including reasonable legal costs and expenses agreed between the executor and the solicitor).

Note: Where the executor is also the solicitor or accountant for the estate, legal or professional costs of administration can only be charged if there is a "charging" clause in the will and, as a solicitor or accountant/executor cannot agree with him/herself. agreement on costs and expenses will need to be made with the beneficiaries, or at least the major beneficiaries;

- Other debts of the deceased, including tax;

- Specific legacies (gifts of money). These legacies, if unpaid within 12 months after the death of the deceased, bear interest at the rate prescribed in the Wills Probate and Administration Regulation (currently at 15.96, eight per cent per annum).
- Subject to the payments mentioned above, and subject to any specific provisions in the will or to any supervening court order, to transfer or deliver to beneficiaries or other persons entitled:
- Specific items of personalty;
- Specific parcels of real estate.
- To realise the residuary (remaining) estate assets.

Note: The executor should take expert advice regarding the possibility of any capital gains tax liability in respect of the realisation of assets and particularly regarding the period during which disposal of the deceased's principal place of residence may be subject to exemption from such liability.

Commission/accounts

- To apply to the Court for commission, if the executor wishes to do so.

Note: The executor, if not a beneficiary, will be entitled to apply to the court for commission in respect of his/her administration of the estate. This application is made when the estate accounts are filed and passed by the court. If commission is not applied for, the filing and passing of accounts is a matter for the court's discretion; however, if the executor is a solicitor or an accountant the court will require the accounts to be filed and passed. The court can disallow any excessive expenditure or costs and may order the executor to refund the excess to the estate.

Final distribution

- To make a final distribution of the estate, including a statement of distribution in accordance with the will or any supervening court order.
- If any gift under the will or testamentary instrument fails or if there are assets in the estate not specifically disposed of and there is no residuary gift of the balance of the estate, the executor has a duty to distribute those assets in accordance with any discretionary order of the court or otherwise under the laws of intestacy.

Note: The court has certain discretionary powers under sections 13 and 18A of the Wills Probate & Administration Act where the will has been witnessed by a beneficiary or the spouse of a beneficiary or where the will or testamentary instrument is defective in form. Where a testator's marriage has terminated by dissolution or annulment after November 1989, a gift or appointment in favour of the former wife is revoked unless the court is satisfied that the testator did not then intend such revocation; in all cases an executor should obtain legal advice in respect of such occurrence.

Duty of care

- The executor must at all times act with care and, in the interests of the beneficiaries, must endeavour to administer the estate in accordance with any direction or power in the will as quickly as possible including distribution, or even partial distribution to the beneficiaries where for some reason a complete distribution is not immediately possible.

Note: The executor may be liable in damages to beneficiaries for negligence in respect of any avoidable delay which results in loss to the beneficiaries either in relation to lost investment income or a lost opportunity to invest.

Communication

- The executor should keep the beneficiaries informed as to the date and amount of likely distribution, and if there is some unavoidable delay, should inform them promptly explaining the reason.

Costs

- The executor should seek to ensure that the costs of administration are reasonable and in respect of legal costs are the subject of scale charges prescribed by regulation or a costs agreement under Part 4 of the Legal Profession Act. If they are not, application can be made to the Court under section 86A of the Wills Probate and Administration Act to reduce costs, commission etc, which the court considers are excessive, or for assessment under the provisions of the Legal Profession Act.
- The executor should realise that where a professional such as a solicitor or accountant is retained to carry out executorial work, costs of such work are payable by the executor, although the costs of general estate administration are payable by the estate.

Other proceedings

- If an "eligible person" commences proceedings under the Family Provision Act within 18 months of the deceased's death, the executor should seek expert legal advice as to the desirability of mediation where the applicant has reasonable grounds for seeking relief, but otherwise the executor has a duty to uphold the will of the deceased and to oppose any such application subject to instructions from the beneficiaries affected by the application.

Note: An executor (being an eligible person) who wishes to make a claim against the estate under the Family Provision Act has to renounce his/her appointment as executor and to do so must not have intermeddled (carried out any administration in the estate), other than to arrange the deceased's funeral.

- Under the Family Law Act liabilities under a maintenance order that arose before the death of a person bound by the order may, by leave of the Family Court, be enforced against the estate of the person liable.

Note: Property proceedings under the Family Law Act which have not been completed at the death of either spouse may be continued after that death by the surviving spouse or the executor or administrator of the deceased spouse in substitution for the deceased. The court needs to be satisfied that it would have made an order if the deceased had not died and that it is still appropriate to make a property order.

Beneficiaries' rights

- To be informed promptly of their entitlement under the will of the deceased or if there is no will of their entitlement on the deceased's intestacy. A beneficiary is not entitled to a copy of the will except with the consent of the executor.
- To be informed of the date of likely distribution of the asset(s) or proportion of the estate to which they are entitled.
- To be informed of any possible liability facing the beneficiaries whether in respect of tax, costs or otherwise.
- To be informed of the reason for any delay and of the expected date of distribution, either partial or total.
- To be advised of the nature and particulars of any claim or proceedings against the estate under the Family Provision Act or against the deceased under the Family Law Act or otherwise which affects their entitlement under the will or, if there is no will, under the laws relating to intestacy.
- To be advised of any legal proceedings by or against the deceased at the date of death which continue notwithstanding the deceased's death and of the likely outcome to the extent that it affects the amount or date of likely distribution to the beneficiaries.

Note: Because the role of executor is a fiduciary one in which great care should be exercised, beneficiaries can properly expect to be told in summary form of any steps taken to have an action mediated or otherwise resolved or settled to avoid costs and delay.

- Where the beneficiaries are due to receive a legacy, to receive that legacy within 12 months of the deceased's death or otherwise to be paid the legacy, or if paid outside that period, to be paid the legacy together with interest at the prescribed rate, currently eight per cent per annum as at 1 May 1996.
- To receive their entitlement and a statement of distribution which properly accounts for that entitlement.

Note: Where a particular part or parts of the estate is liable to meet the costs and expenses of administration, the beneficiaries involved are entitled to receive a proper statement of distribution showing realisations and payments including commission (if any) and the manner of final distribution.

- Beneficiaries are not entitled to have their legal costs relating to the estate paid by the estate unless ordered by a court in relation to any legal proceedings involving the beneficiaries and the estate.

CAUTION: This outline is a general description of the duties and responsibilities of executors and of the rights of beneficiaries. It is not an exhaustive statement of probate law and practice.