

Let's chat

Acting as executor? Think again – February 2021

With:

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Information provided is general in nature; precise application depends on specific circumstances

Context

- Executor role usually fulfilled by family and friends
- Up to four at any one time
- Professionals usually engaged to assist executor
- Why act?
 - No suitable family and friends
 - Independence in case of estate challenge
 - Strengthening relationship with next generation
 - Client wants to be a 'control-freak'

Duties of executor

- Section 52 *Succession Act 1981* (Qld)
 - (1) The personal representative of a deceased person shall be under a duty to—
 - (a) collect and get in the real and personal estate of the deceased and administer it according to law; and
 - (b) when required to do so by the court, exhibit on oath in the court a full inventory of the estate and when so required render an account of the administration of the estate to the court; and
 - (c) when required to do so by the court, deliver up the grant of probate or letters of administration to the court; and
 - (d) distribute the estate of the deceased, subject to the administration thereof, as soon as may be; and
 - (e) pay interest upon any general legacy—
 - (i) from the first anniversary of the death of the testator until payment of the legacy; or
 - (ii) in the case of a legacy that is, pursuant to a provision of the will, payable at a future date—from that date until payment of the legacy; at the rate of 8% per annum or at such other rate as the court may either generally or in a specific case determine, unless any contrary intention respecting the payment of the interest appears by the will.

Duties of executor

- Per 'common law':
 - Obligation to dispose of the body (usually via arranging the funeral)
 - Fiduciary duty to act in best interest of beneficiaries of the estate:

The principal is entitled to the single-minded loyalty of his fiduciary. A fiduciary must act in good faith; he must not make a profit of his trust; he must not place himself in a position where his duty and his interests may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal.

-Bristol and West Building Society v Mothew [1998] Ch 1, Millett LJ

- Fiduciary duties includes:
 - not to allow a conflict of interest and duty;
 - not to obtain an unauthorised benefit from the relationship;
 - the duty to perform and adhere to the terms of the trust;
 - the duty to keep and render accounts; and
 - the duty to act personally.

Where does the risk arise?

- Risk generated by the nature of the estate
 - Non-estate assets
 - Passive v active v businesses
 - Life insurance (beneficiary is important)
- Risk arising from co-executors
 - Must act unanimously in Qld (section 49(4) *Succession Act 1981* (Qld))
 - Improper behaviour
- Risk arising from beneficiaries
 - Challenges, disputes and complaints
- General risk
 - Remuneration – charging clause in Will, claims for executor and trustee commission
 - Right of indemnity – allowing to indemnify executor out of estate assets for expenses incurred
 - Insurance - Covered under professional indemnity insurance?

Mitigating the risks

- Due diligence
- Renounce
 - You are not obliged to take on such roles and are always able to remove yourself from such position
- Seek good professional advice
 - Seek quality professional advice to reduce ability to critic decisions and perhaps leverage on professional indemnity insurance
- Seek judicial advice
 - Costly but if done properly, no action can be sought against you

Due diligence

- Certified copy of Will and death certificate
- Complete schedule of assets and liabilities
- Any uncertainties easily resolved?
- Jointly owned assets, trusts, companies and superannuation benefits
- Sufficient funds to meet deceased's liabilities/estate debts
- Operational businesses to be aware of?
- Co-owners and how well do you know them
- Beneficiaries and how well do you know them
- Family tensions and expected claims
- Guidance available to you from Willmakers?
- Potential for delay and potential for you to be personally liable
- Charging clause in Will
- Covered by insurance

Contact details

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