



SUCCESSION LAW

EXECUTORS' RIGHTS AND DUTIES

Level 5, 23-25 O'Connell St, Sydney NSW 2000

Tel: (02) 9223 9399

Fax (02) 9223 4729

Email: mail@schweizer.com.au Website: www.schweizer.com.au

DX: 10161 Sydney Stock Exchange All mail to: PO Box H283, Australia Square NSW 1215

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EXECUTORS' RIGHTS AND DUTIES

1. Introduction

An executor appointed under a will stands, in effect, in the testator's place after death. Similarly, an administrator stands in the place of the deceased even though he or she is appointed by the court.

An executor is ordinarily appointed by name in the testator's will or codicil. An executor may also be appointed by implication from the testator's will (e.g. where the testator fails to nominate a person in express terms but, on construction of the will, it appears that a particular person has been appointed to perform the essential duties of an executor. In such a case, the executor is known as an "executor according to the tenure").

A person may also take the position of an executor on himself by intermeddling with the assets of the estate. Such a person is known as an "executor de son tort".

If a person is appointed an executor under a will but does not wish to take on the role, he or she can "renounce probate" by filing the appropriate documents with the Supreme Court.

2. General Duties of an Executor or Administrator

An executor's or administrator's overall duties may be summarised as follows:

2.1. Arrange for Proper Disposal of the Body

The executor has the right and obligation to dispose of the deceased's body. The executor's decision in this regard is final, even overriding the wishes of the family.

2.2. Obtain a Grant of Probate

In most cases, an executor requires a grant of Probate and an administrator requires a grant of Letters of Administration in order to administer the will or the estate. These are obtained by filing the required documents with the Supreme Court.

2.3. Calling in the Assets

Section 44 of the Wills Probate and Administration Act ("WPAA") provides that upon:

2.3.1 a grant of probate of a will;

2.3.2 a grant of administration in the case of an intestacy or partial intestacy;
or

2.3.3 a grant of administration with the will annexed,

all the real and personal estate which a person is possessed of or entitled to in New South Wales at his or her death, passes to and vests in the executor or administrator as from the death of the person.

In relation to Section 44 of the WPAA, the words “pass to and vest in” are of particular significance. “Vesting” is an actual legal entitlement to property which authorises the executor or administrator to administer the estate, not in his or her own right but on behalf of the deceased person.

It follows that the executor or administrator cannot deal with the property other than in the capacity of an executor or administrator. Upon a grant of Probate or Administration, title to the property vests in the executor or administrator but relates back to the time of death. Any acts by the executor or administrator made before the grant are validated by the grant if those acts were carried out for the benefit of the estate.

2.4. Payment of Debts

2.4.1. Solvent Estates

Where the estate of the deceased person is solvent, the real and personal property in the estate should be applied towards the payment and discharge of funeral, testamentary and administrative expenses, and in payment of debts and liabilities in the order provided by Section 46 (2) C WPAA and Part 2 of the Third Schedule to the WPAA. The expressions “testamentary expenses” and “administrative expenses” include:

- 2.4.1.1. costs of obtaining the grant;
- 2.4.1.2. costs of getting in the assets of the estate;
- 2.4.1.3. costs of any litigation (for example a Family Provision Act claim);
- 2.4.1.4. costs of administration proceedings or a construction suit (an application to the court regarding the interpretation of a will); and
- 2.4.1.5. commission.

2.4.2. Insolvent Estates

Where an estate is insolvent, the funeral, testamentary and administration expenses have priority.

2.5. Obligation to Keep and Pass Accounts

2.5.1. Statutory Obligation (section 85 WPAA)

Section 85 WPAA imposes a specific obligation on an executor or administrator in regard to the verification and passing of accounts in certain situations. These are where:

- 2.5.1.1. the executor is also the guardian of a minor who is a beneficiary of the estate;
- 2.5.1.2. the executor is also a creditor of the estate;
- 2.5.1.3. the whole or a substantial part of the estate in question passes to charity;

2.5.1.4. a person (whether or not the executor is a beneficiary of the estate) is selected by the court at random; or

2.5.1.5. where the court requires this to be done.

Part 78 Rule 71 of the Supreme Court Rules provides that the filing of accounts is required within 12 months after the grant of probate or administration.

The expression “passing accounts” means that the registrar of the court acts as an auditor in relation to the accounts of the estate as prepared by the executor. In this instance, the court not only checks whether the sums entered on the disbursement side of the executor’s accounts have, in fact, been paid and proper vouchers or receipts produced, but also determines whether disbursements have been properly or improperly incurred. If the disbursements have been improperly made then they would be disallowed.

The order of the court allowing the accounts is prima facie evidence of their correctness and operates as a release (without any other formal order) after three years from the date of the order (Section 85 (3) WPAA).

2.5.2. Duty at Law

The obligation that may be placed on an executor or an administrator to pass accounts is quite distinct from the obligation to keep and maintain accounts. An executor and an administrator is always obliged to keep “proper” accounts.

What is “proper” will depend on the circumstances of the case. The minimum obligations which the law imposes on an executor are:

2.5.2.1. to keep a trust account separate from other matters;

2.5.2.2. to ensure that particulars of receipts and payments are supported by vouchers and are available for inspection; and

2.5.2.3. to ensure that the particulars contain information as to the amount and state of the assets and property, and disclose particulars of liabilities.

2.6. Commission

Section 86 WPAA allows such commission to be paid from the assets of the estate to the executor or administrator for his or her “pains and troubles” – as is just and reasonable. The expression “pains” covers responsibility, anxiety and worry, while the expression “trouble” covers the work done.

2.7. Distribution

Distribution may be made when the assets have been collected and the estate debts paid.

2.8. Executor's Year

Various court judgments in New South Wales have confirmed the existence of a so-called "executor's year" which is a rule of convenience to allow the executor to get in the estate. The effect of the "executor's year" is that:

- 2.8.1. unless there is a contrary intention found in the will, interest will not run on legacies until one year after the testator's death;
- 2.8.2. after one year from the testator's death, the executor should distribute the estate if he or she is able to do so; and
- 2.8.3. if the executor has completed the getting-in of the estate, the beneficiaries are entitled to distribution within a reasonable period of his or her doing so.

3. **How the Executor or Administrator Can Protect Himself or Herself**

3.1. Judicial Advice

Usually people are appointed both as executors and trustees under a will. An executor commonly becomes a trustee after completion of his or her executorial duties. Executorial duties include:

- 3.1.1. application for grant of probate, if necessary;
- 3.1.2. collection of estate assets; and
- 3.1.3. payment of all estate liabilities including tax.

After completion of executorial duties, the executor then holds the estate assets as trustee for the beneficiaries of the estate. Traditionally the courts have therefore applied the provisions of the Trustee Act 1925 (NSW) to executors as well as to trustees.

Section 63 of the Trustee Act gives the trustee the right to apply to the court for its opinion, advice or directions on any question in respect of the management or administration of a trust. An application under this section allows a trustee to seek the advice of a judge with respect to the trustee's powers and duties of management or administration of the trust. The Section may, however, not be used to determine matters of controversy between trustees or other persons interested in a trust.

Section 63 (2) of the Trustee Act is important because it provides that if the trustee acts in accordance with the opinion, advice or direction of the court, he or she will be protected.

Proceedings are commenced by summons accompanied by a statement of facts. The summons does not usually join a defendant. Part 70 of the Supreme Court Rules sets out the procedures to be followed when making an application.

3.2. Administration Proceedings - Part 68 of the Supreme Court Rules

Administration proceedings are proceedings for the administration of an estate under the court's direction, and allow questions relating to the administration of an estate to be dealt with in a practical way.

The proceedings are commenced by summons supported by affidavits. All the executors of the will or all the administrators of the estate must be parties. It is not necessary that all persons having a beneficial interest in or claim against the estate are made parties, and an executor or administrator may nominate such parties to the proceedings as he or she thinks fit.

Administration proceedings may be brought in order to compel an executor or administrator to do any of the following things:

- 3.2.1. furnish accounts;
- 3.2.2. pay estate funds into court; or
- 3.2.3. do or abstain from doing any act.

Administration proceedings may also be brought for:

- 3.2.4. an order approving any sale, purchase, compromise or other transaction by an executor or an administrator; or
- 3.2.5. an order directing any act to be done in the administration of an estate as if the administration were under the direction of the court.

3.3. Summons for Construction

Most problems relating to construction concern the interpretation of wills. The only evidence usually required to support the summons will be the will itself. Evidence of what the testator's intention may have been when the will was made, is not admissible in the proceedings. There is one exception to this rule however, namely extrinsic evidence will be admitted to ascertain what the testator may have intended to do in his will. The use of extrinsic evidence does not permit evidence of the testator's intention as to the meaning of certain words contained in the will, but is limited to matters within the testator's knowledge in order to clarify any ambiguity. This is known as the "armchair rule".

3.4. Departing from the Terms of the Will (Section 81 of the Trustee Act)

As stated above, the provision of the Trustee Act also apply to executors. Section 81 of the Act allows the court to depart from the terms of the will if the executor's proposed dealings are advantageous to the estate. The test prescribed in Section 81 is that of expediency. The terms of the court's powers under the Section are wide and are not constrained by any contrary provision in the trust instrument.

4. **Executor's Obligations in respect of Family Provision Act Claims**

- 4.1. Generally an executor or administrator is obliged to uphold the will and to ensure that all relevant material, in particular, evidence pertaining to the needs and circumstances of the beneficiaries, is placed before the court.

If proceedings in respect of a will are commenced by a person entitled to do so under the Family Provision Act 1982 ("FPA") then Part 77 Rule 59 of the Supreme Court Rules obliges the executor to file an affidavit which sets out:

- 4.1.1. the nature and value of the assets and liabilities in the estate as at the date of death;

- 4.1.2. the likely nature and value of any distributed estate and the net distributable estate;
- 4.1.3. the nature and value of any property which, in the executor's opinion, is or may be the subject of a "prescribed transaction". A prescribed transaction is defined in Section 22 FPA to broadly mean the disposition of property to another person on trust or without the person having to pay the proper price in money or money's worth for the asset. It can also include an omission to do something which has the same result;
- 4.1.4. the names and addresses of every person who, in the executor's opinion, is or may be an eligible person;
- 4.1.5. all persons beneficially entitled to the distributable estate;
- 4.1.6. any disponent who, as a result of a prescribed transaction, holds property (whether or not as a trustee);
- 4.1.7. any person holding property as a result of a distribution from the estate; and
- 4.1.8. the persons to whom notice was given under Part 77, Rule 63 (2) of the Supreme Court Rules. This rule requires the executor or administrator to serve a notice on the following persons:
 - 4.1.8.1 the surviving spouse of the deceased person;
 - 4.1.8.2 every child of the deceased person;
 - 4.1.8.3 every person not referred to in 4.1.8.1 or 4.1.8.2 above who is entitled to share in the distributable estate of the deceased person;
 - 4.1.8.4 any person mentioned by the plaintiff in the application and not referred to in 4.1.8.1, 4.1.8.2 or 4.1.8.3 above; and
 - 4.1.8.5 any other person who, in the executor's opinion, is or may be an eligible person.

The notice informs the recipient of the fact that an application has been made and invites the recipient, if he or she is entitled to do so, to make a claim. The notice must also indicate to the recipient that if he or she does not make a claim, the court may deal with the plaintiff's application without regard to the recipient. The notice should be served in accordance with Part 63, Rule 15 of the Supreme Court Rules.

It is the duty of the executor to put material before the court which any beneficiary desires should be submitted, unless the executor believes that the material in question is false.

4.2. Section 35 of the Family Provision Act (FPA)

Section 35 FPA provides that if an executor or an administrator of the estate of a deceased person has published a Notice of Intended Distribution of the estate in the manner and form prescribed by the court rules, the executor or administrator is not liable to any person whose application the executor or administrator did not have notice of at the time of the distribution.

4.3. Conflict Between the Executor's Year and the Time Limit for filing an FPA Claim

In *D'Albora -v- D'Albora (1999) NSW SC 468*, the plaintiff was the sister of the defendant. The deceased was the grandmother of the plaintiff and the defendant. The deceased left real property (which comprised the whole of her estate) to the defendant. The defendant was also the executor. Four months after the deceased's death, a grant of probate was obtained by the defendant and a Notice of Intended Distribution was published. One month later, the defendant sold the real property and then used the proceeds of sale to purchase another property. Just short of 18 months after the deceased's death, the plaintiff filed a claim under the FPA. No prior warning of the commencement of the proceedings was sent to the defendant/executor. Before her death, the deceased had said to the defendant that everything should be divided equally between the defendant and his sister. The defendant denied that he had agreed to this division. Further, the deceased had said to a home-care assistant that she had left everything to the defendant because she knew that he would look after his sister. The plaintiff's claim was successful.

The following points about the decision should be noted:

- 4.3.1 the executor was also the sole beneficiary;
- 4.3.2 the executor's/beneficiary's conduct was far from equitable towards his sister; and
- 4.3.3 the court found that the intention behind the introduction of Section 35 FPA was to impose personal liability on an executor if he or she distributed an estate before the time for making claims under the Act had expired.

In this instance, even though the executor had published a Notice of Intended Distribution which complied with the obligations set out under S35 FPA, S60 of the Trustee Act and S62 WPAA, the Court still found him personally liable.

While the *D'Albora* decision may have been fair or just in the circumstances of that particular case, personal liability imposed on executors as demonstrated in the case may not sit so well under different sets of circumstances. Consider, for example, a situation where:

- 4.3.4 the executor is not a blood relative but rather a friend, a trusted acquaintance, a trustee company, a solicitor, an accountant or other professional;
- 4.3.5 the assets of the estate have been collected and the executor has performed his duties within the executor's years and, to use the words of Justice Young in the *D'Albora* case, "the beneficiaries are entitled to a distribution within a reasonable time";
- 4.3.6 the executor publishes a notice pursuant to Section 35 FPA;
- 4.3.7 the executor enquires of the beneficiaries if there are any eligible persons pursuant to Section 6(1) FPA, and is told that there are none;
- 4.3.8 on the basis of the advice received, the executor distributes the estate 12 months after the date of death of the deceased;

4.3.9 within 18 months of the death of the deceased and within the time allowed pursuant to Section 16 FPA, a de-facto spouse makes an application; and

4.3.10 the deceased led a double life, etc., all of which are accepted by the court.

In such a scenario, if the beneficiaries have dissipated their inheritance, there will be no notional estate left from which the executor could claim indemnity. In cases like this, on the basis of the D'Albora decision, the executor would be personally liable. As the law stands at present, the only safe course for an executor is to wait the 18 months and resist any pressure from the beneficiaries to distribute the estate before then.

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*Norbert Schweizer
Kerstin Glomb
Schweizer Kobras
Level 5, 23-25 O'Connell Street
Sydney NSW 2000
Tel: ++61 2 9223 9399
Fax: ++61 2 9223 4729
Email: mail@schweizer.com.au
Website: www.schweizer.com.au*