

Executors' and Administrators' Rights and Duties

1. Introduction

One of the most important decisions a person must make when preparing his or her Will is who to appoint as executor or executors. An executor appointed under a Will, in effect, stands 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 usually appointed by name in the Will. An executor may also be appointed by implication from the wording used in the 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" of the Will).

A person may also take the position of an executor on himself by "intermeddling" or dealing 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

2.1. An executor's or administrator's position is an extremely important and relatively powerful one so far as administration of the deceased's estate is concerned. Their overall duties may be summarised as follows:

2.1.1. Arrange for Proper Disposal of Body

The executor has the right and obligation to dispose of the deceased's body. This includes organising any funeral or related services. The executor's decision in this regard is final, even overriding the wishes of the family.

2.1.2. Obtain 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 deal with or administer the Will or the estate. These are obtained by filing the required documents with the Supreme Court.

2.1.3. Collect Assets

The executor or administrator is responsible for collecting, maintaining and protecting the assets of the estate pending on their final distribution. Section 44 of the *Probate and Administration Act* ("PAA") provides that on:

- 2.1.3.1. a grant of Probate of a Will;
- 2.1.3.2. a grant of Administration in the case of an intestacy or partial intestacy; or
- 2.1.3.3. 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 PAA, the words "pass to and vest in" are of particular significance. "Vesting" means 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. The grant of Probate or Administration effectively confirms the vesting of the title to the property in the executor or administrator as from the date of death. Any acts done by the executor or administrator before the grant is validated by the grant, if those acts were carried out for the benefit of the estate.

2.1.4. Payment of Debts

2.1.4.1. 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 of the deceased and the estate in the order provided by Section 46C PAA and Part 2 of Schedule 3 PAA. The expressions "testamentary expenses" and "administrative expenses" include:

- 2.1.4.1.1. costs of obtaining the grant of Probate or Administration;
- 2.1.4.1.2. costs of getting in or collecting the assets of the estate;

2.1.4.1.3. costs of any litigation (for example a family provision claim under chapter 3 of the *Succession Act 2006* (2006) ("SA"));

2.1.4.1.4. costs of administration proceedings or a construction suit (an application to the court regarding the interpretation of a Will); and

2.1.4.1.5. commission.

2.1.4.2. Insolvent Estates

Where an estate is insolvent, the funeral, testamentary and administration expenses have priority (Section 46C and Part 1 of Schedule 3 PPA).

2.1.5. Pay Deceased's and Estate's Tax

Any outstanding tax liability by the deceased is an estate debt. If the estate is solvent and the deceased earned income prior to his or her death then the executor or administrator is responsible to lodge any outstanding tax return(s) up to the date of death and, when the assessment(s) issues, to pay the outstanding tax out of the estate. If the estate has earned income then the executor should obtain a separate tax file number (TFN) for the estate and lodge any estate tax return(s) as necessary. Similarly, once the estate's assessment(s) issues, the executor must pay the tax liability out of the estate. Moreover, the executor may be made personally responsible to pay the estate's tax liability if he or she distributes the estate without first paying or taking the outstanding tax debt into account.

2.1.6. Establish and Administer Trusts

If the Will creates any trusts such as trusts for minors or testamentary discretionary trusts and the executor has also been appointed the trustee of the trust(s) then the executor must set the relevant estate funds or assets aside and, in the case of estate funds, establish appropriate bank or other investment accounts and, in the case of estate assets such as real property, register the assets in the executor's name as trustee of the trust(s). The executor must then administer the trust(s) in accordance with the terms of the Will. If the Will appoints a separate trustee for the trust(s) then the executor must transfer the relevant funds or assets to that trustee to enable the trustee to establish and administer the trust(s).

2.1.7. Keep and Pass Accounts

2.1.7.1. Statutory Obligation

Section 85 (1AA) PAA imposes a specific obligation on an executor or administrator in regard to the verification and passing of accounts in certain situations. These are where:

- 2.1.7.1.1. the executor is also the guardian of a minor who is a beneficiary of the estate;
- 2.1.7.1.2. the executor is also a creditor of the estate;
- 2.1.7.1.3. the whole or a substantial part of the estate in question passes to charity;
- 2.1.7.1.4. a person (whether or not the executor is a beneficiary of the estate) is selected by the court at random; or
- 2.1.7.1.5. where the court requires this to be done.

Part 78 Rule 71 of the Supreme Court Rules ("SCP") requires that accounts be filed within 12 months after the grant of Probate or Administration.

The expression "passing accounts" means that the registrar of the Supreme 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 have been kept and produced, but also determines whether disbursements have been properly or improperly incurred. If the disbursements have been improperly incurred then they will 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) PAA).

2.1.7.2. 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. Executors and administrators are 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:

- 2.1.7.2.1. to keep a trust account separate from other matters;
- 2.1.7.2.2. to ensure that particulars of receipts and payments are supported by vouchers and are available for inspection; and

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

2.1.8. Distribute Estate

Executors and administrators are responsible to see that the beneficiaries receive their inheritance. Accordingly the executor is responsible to distribute the estate to the beneficiaries in accordance with the provisions of the Will. Administrators must ensure that the statutory beneficiaries receive their correct entitlements or shares of the estate in accordance with the Succession Act.

- 2.2. A number of other matters are relevant for executors and administrators in the administration of estates. These include:

2.2.1. Commission

Section 86 PAA allows for payment of such commission 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 "troubles" covers the work done.

2.2.2. Distribution

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

2.2.3. 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 collect the estate. The effect of the "executor's year" is that:

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

3. How an Executor or Administrator Can Protect Himself or Herself

3.1. Judicial Advice

Often 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 a grant of Probate, if necessary;

3.1.2. collection of estate assets; and

3.1.3. payment of all estate liabilities including tax.

Once the executor has completed his or her executorial duties, the executor then holds the estate assets as trustee for the beneficiaries of the estate. Accordingly, the courts have traditionally applied the provisions of the *Trustee Act 1925 (NSW)* ("TA") to executors as well as to trustees.

Section 63 TA gives a trustee the right to apply to the court for the court's 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 not, however, be used to determine matters of controversy between trustees or other persons interested in a trust.

Section 63 (2) TA 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 is not usually issued against any particular person but, rather, seeks a court ruling on the facts as presented. Part 55 of the Uniform Civil Procedure Rules 2005 ("UCPR") sets out the procedures to be followed when making an application.

3.2. Administration Proceedings

Part 54 UCPR allows an affected party to bring proceedings to determine questions of law or interpretation involved in the administration of estates and trusts. Administration proceedings are, in effect, 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, among other things, 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

Many problems relating to the construction of documents dealt with by the courts 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 generally 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 evidence which may be presented in order to clarify ambiguities is not evidence of the testator's actual or supposed intention as to the meaning of certain words contained in the Will, but is limited to matters which were, at the time the Will was made, within the testator's knowledge. This is known as the "armchair rule".

3.4. Departing from the Terms of the Will

As stated above, the provisions of the Trustee Act also apply to executors. Section 81 TA 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 the section 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 (i.e. the Will).

4. **Executor's Obligations in respect of Family Provision 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 Succession Act (an "eligible person") then Supreme Court Practice Note SC Eq7 obliges the executor to file an affidavit which sets out:

- 4.1.1. allegations of facts contradicting facts alleged in the claimant's affidavit;
- 4.1.2. the nature and value of the assets and liabilities in the estate as at the date of death;
- 4.1.3. the likely nature and value of any distributed estate and the net distributable estate;
- 4.1.4. the nature and value of any property which, in the executor's opinion, is or may be the subject of a "prescribed transaction" or a "relevant property transaction". These terms cover what section 63(5) SA calls "notional estate" of the deceased person. Notional estate includes property which has been disposed of to another person on trust or without the person having given full valuable consideration for the property (Sections 75, 76 and 77 SA). It can also include an omission to do something which has the same result;
- 4.1.5. the names and addresses of every person who, in the executor's opinion, is or may be an eligible person;
- 4.1.6. all persons beneficially entitled to the distributable estate;
- 4.1.7. any recipient who, as a result of a prescribed transaction or relevant property transaction, holds property (whether or not as a trustee);
- 4.1.8. any person holding property as a result of a distribution from the estate; and
- 4.1.9. the persons to whom notice of the plaintiff's application was given under Schedule J SCR. This rule requires the executor or administrator to serve a notice on the following persons:
 - 4.1.9.1. the surviving spouse of the deceased person;
 - 4.1.9.2. every child of the deceased person;
 - 4.1.9.3. every person not referred to in 4.1.9.1 or 4.1.9.2 above who is entitled to a share in the distributable estate of the deceased person;
 - 4.1.9.4. any person mentioned by the plaintiff in the application and not referred to in 4.1.9.1, 4.1.9.2 or 4.1.9.3 above; and
 - 4.1.9.5. 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 10 UCPR.

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. Notice of Intended Distribution of Estate

Section 93 SA in effect provides that if an executor or administrator of the estate of a deceased person has published a Notice of Intended Distribution of the estate in the manner and form approved under section 17 of the *Civil Procedure Act 2005 NSW* ("CPA") then, provided that certain further conditions are met, the executor or administrator is not liable for claims for family provision that were unknown to the executor or administrator at the time of distribution. In order for the executor or administrator to gain the protection of the section, the notice:

- 4.2.1. must be in the prescribed form; and
- 4.2.2. give potential claimants at least 30 days in which to give notice of their claim.

In addition, the executor or administrator must not distribute the property in the estate until:

- 4.2.3. at least 6 months after the deceased's death; and
- 4.2.4. the time specified in the notice has expired.

An executor or administrator cannot defeat a family provision claim which has been made in time by attempting to distribute the estate prematurely. If the executor or administrator:

- 4.2.5. has notice from any source of a likely or intended claim; and
- 4.2.6. the statutory period for making claims (generally not later than 12 months after the date of death of the deceased person) has not expired,

then the executor or administrator makes the distribution at his or her own peril.

An executor or administrator who acts in breach of his or her statutory notice obligations may be personally liable to a successful applicant who suffers loss as a result. If the executor or administrator has reason to suspect that a claim is likely to be made by a potential applicant then it is also prudent to write to the potential applicant seeking confirmation as to his or her intentions.

If the above steps are followed and an application for a family provision order is made after the property of the estate has been distributed then, provided the executor or administrator did not have notice of the application at the time of distribution, the executor or administrator will not be liable to the applicant in respect of the distribution.

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