

Executorship and estate administration: a substantial opportunity for advisers

Overview

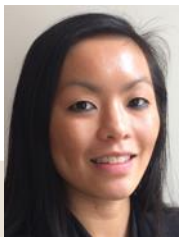
Almost one in two people will at some point in their lives be required to act as the executor of a deceased loved one's estate. With the majority of adults being married (formal or de facto), the death of a partner usually means they will be the executor of that partner's estate — either alone or with another family member.

Children, particularly the eldest ones, can also expect to fill the role when parents pass away. Thus, it is not surprising then a common question is, "What is it precisely that I'm supposed to do as executor?"

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Learning objectives

After reading this article you should be able to:

- Discuss the magnitude and depth of executors' responsibilities
- Propose ways that advisers can assist with probate and estate administration
- Explain executor remuneration and factors that can affect the amounts paid.

Knowledge areas and accreditation

Knowledge area: Estate Planning (45 minutes/0.75 points).

FPA CPD points 0.75 Dimension: Capability (FPA 008606).

AFA CPD points 0.75 (AFA 01022009).

CPA Australia CPD points 0.75 (CPA 000160).

What is an executor?

An “executor” is a person who administers a deceased person’s Will. If the deceased did not leave a Will, then the person administering the deceased’s estate is, not surprisingly, called “the administrator”.

An ordered society needs rules to ensure that a deceased person’s wishes regarding their estate are followed. Different societies use greater or less levels of prescription, and some even have public officials directly overseeing the process.

Australia uses the English system of officially appointing a person to take responsibility for the estate’s administration and making that person liable if things go wrong.



Did you know?

The word “probate” comes from the Latin noun “probatum” which means “a thing approved” and the associated Latin verb “probare” meaning “to test and find good”. Probate is the official proving to a court of a Will as authentic or valid.

However, probate is much more. It is essentially the process of identifying all the deceased’s assets, securing those assets and then dealing with them in the manner outlined by the deceased in their Will. In addition, the executor must ensure that the deceased’s civil obligations are met from their estate as well, including repayment of debts and payment of taxes.

An executor’s duties

Following are the 13 things an executor must do in administering a deceased’s affairs.

1. Make the funeral arrangements

Funeral arrangements are often done by immediate family, regardless whether they are officially the executor or not. In the absence of anyone else prepared to do it, the executor should step into this role. It is wise to check the Will before doing so, as often now Wills contain the deceased’s wishes about their funeral arrangements.

For instance, it would be embarrassing to find out after the cremation and a civil ceremony that the deceased was Jewish and wanted to be buried in accordance with Jewish laws and customs.

2. Locate the Will and identify the assets

It is always good practice for a person making a Will to ensure their executor knows they have been appointed and where the original Will is located. When the time comes, it makes everyone’s job a lot easier. Simultaneously, the executor must identify the assets and secure them, pending the grant of probate.

3. Value the estate

The application for probate may require the executor to know the value of the estate’s assets. Care should be taken as to what level of precision the court requires. Will it be

necessary to have a formal valuation by a qualified valuer or will a commercial valuation be enough?

4. Obtain the grant of probate

The precise technicalities may differ among the various states, but essentially this involves completing the necessary court forms with the required information about the estate, including approximate value, and lodging those forms once the necessary public advertisement period has expired.



Did you know?

One's intention to apply for a grant of probate must be advertised, so that debtors and others interested in the estate can make whatever claims on the estate they can justify.

Ultimately, the court will issue to the executor a court-sealed document called the grant of probate, and that document forms the licence for the executor to deal with the deceased's assets to the exclusion of all others.

5. Collect the assets of the estate

Armed with the grant of probate, the executor ensures that the assets are transferred to the executor or directly to the beneficiary to whom they have been gifted by the deceased. Neither the transfer to the executor nor the transfer by the executor to the named beneficiary are capital gains tax (CGT) events, though the beneficiary will potentially have a CGT obligation in respect of the assets at some point in the future.

6. Protect the assets from being wasted

If there is likely to be any delay in finalising the administration of the estate, the executor should protect the value of the assets, for instance, invest the money, insure the property, safeguard the valuable chattels, monitor the investments, and so on.

7. Complete income tax returns

It will be necessary to file tax returns for the period from the last return to the date of death and thereafter for each financial year until the estate is fully administered.

8. Pay the deceased's debts

The manner and order in which the deceased's debts are paid depends on whether the estate is solvent and what, if anything, the deceased said about payment of debts in their Will. It is possible for a deceased to request certain assets be used for the payment of debts in order to shield other assets, but the success of the shield again may depend on solvency and the law relating to bankruptcy.



Consider

Executors also need to be cautious when incurring debts on behalf of the estate because even though they are entitled to be indemnified from the estate for those debts, if there is a shortfall, the executor may be personally liable.

9. Defend the estate

An executor is duty bound to defend the estate from unwarranted or unsustainable claims. Obviously, the executor would need to consult with a lawyer in order to assess the credibility of any claim made.

10. Account to the beneficiaries

Executors need to ensure that appropriate accounts are prepared in order to communicate to the beneficiaries the proper financial administration of the estate. The probate court may request that the executor prove to the court that the estate has been properly administered, including via a formal process of obtaining court approval of the accounts.

11. Establish any trusts set up by the Will

The Will may require one or more trusts to be set up. These could include:

- Trusts for assets to be held until a beneficiary attains a certain age
- A life interest trust permitting a person an interest in a deceased's asset only until that person dies
- More complex trusts (e.g. a testamentary discretionary trust).

12. Distribute the estate assets in accordance with the Will

The rubber hits the road for the executor when they distribute the estate assets to the beneficiaries. It goes without saying that the executor must follow carefully the terms of the Will and ensure that the distribution is strictly in accordance with those terms. Executors should publish a notice of intended distribution in order to protect themselves against any claim by unknown estate creditors.

There is also the prospect of having beneficiaries promise to refund part of the estate if unknown liabilities subsequently surface. Depending on the circumstances, the executor may be personally liable for those late-coming liabilities.

13. Ongoing estate administration

Executors may have ongoing responsibilities that extend for years into the future for administering life estates, holding assets until beneficiaries reach the age imposed by the deceased or acting as the trustee of a testamentary discretionary trust. There may even come a time when the executor will want to pass the obligation on to someone else.

Executor remuneration

The preceding 13 points show the depth of the work required and that executorship is a serious role. Generally, when an executor of a deceased's estate is a spouse or family member, for instance, they are not entitled to remuneration, particularly if they have already received a benefit under the deceased's Will.

Other types of people who act as executors such as friends, professional advisers or even professional executors, obviously should receive remuneration.

If an executor is not remunerated under a specific clause of the Will, they can make an application to the court, which has the discretion to allow an executor remuneration for their services where it is just and reasonable (see section 98 of Western Australia's *Trustees Act 1962*; other states, including New South Wales, have an equivalent provision).



Case study

The grounds for reducing executor commissions: *Atkins v Godfrey*

In *Peter Henry Atkins as executor of the estate of Robert Charles Godfrey v Godfrey* [2006] WASC 83, the court stated that it was just and reasonable for the executor (who was a friend of the deceased) to receive remuneration, as there was evidence to show that during a five-year period, the executor had spent over 380 hours on the administration of the estate and that the executor had rendered substantial services over that time.

Factors reducing remuneration

However, the court has the power to refuse an executor's remuneration on a number of grounds, including positive fraud and dishonesty or if there has been misconduct in the execution of the executor's duties.

While in the above case there were no acts of fraud or dishonesty, there were two factors which reduced the amount of remuneration the court awarded the executor:

1. Failure to administer the estate with due expedition
2. Overpayment of the solicitors.

The first instance of failure to pursue the administration of the estate with due expedition occurred as follows. Once the assets of the estate were distributed, a dispute arose relating to legal fees paid to the solicitors assisting with the administration of the estate, and who represented the executor in relation to a claim against the estate from the deceased's family member.

This conflict caused a delay in relation to finalising the accounts of the estate, and the court found that the evidence showed the executor did not take steps to ensure the conflict was resolved expediently. As a result, there was unnecessary delay, which reduced the amount the court awarded the executor to reflect that the administration of the estate should have been finalised earlier.

The second issue was when the executor overpaid the solicitors involved in the administration of the estate due to a failure of the executor to scrutinise the invoices to ensure the amounts charged were proportionate to the work undertaken. This meant the solicitors had to refund to the estate approximately \$19,000. The court decided that as a result of this, a modest reduction to the executor's remuneration would be appropriate.

Other factors

Other factors relevant to the amount of remuneration awarded in this case included:

- The amount of time the executor spent on the estate (over 380 hours)
- The responsibility the executor assumed in relation to the court action against the estate
- The involvement of solicitors and accountants in relation to the estate

The fact that the estate was not complex for the executor (i.e. the Will was not difficult to interpret, with most assets being distributed straight to the beneficiaries and not needing to be sold).

Independent executors can be paid by the estate, though it is wise to say so in the Will. The amount they can receive is clearly dependent on the particular estate, but also on the level of efficiency they exhibit in carrying out their role.

Conclusion

Whether or not financial advisers volunteer to act as their client's executor or co-executor, there is a major role for them in the probate and estate administration process for deceased clients.

Further, there is considerable opportunity for financial advisers in this area to advise and assist with regard to:

- The investment of estate assets, pending their distribution
- Ensuring that asset structuring is maintained to achieve the goals established with the deceased at the time of their estate planning
- The use and investment of estate assets by the deceased's beneficiaries for the purpose of their financial planning and asset structuring.

It would be in no-one's interest to see the deceased's estate planning ignored to the detriment of the surviving beneficiaries, simply because the estate administration was mishandled. Advisers should be proactive about such a situation and not allow themselves to be sidelined by solicitors wanting to control the process.

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