What are your responsibilities if you agree to be an executor?

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Abstract: Clients often ask trusted advisers to act as executors of their wills. Acceptance of the role of executor by an independent professional comes with significant burdens and risks. While the executor’s role is to administer the deceased’s wishes, pay debts, and distribute the assets to the beneficiaries, there is significant capacity for executors to affect the position of the beneficiaries, and vice versa, for a long time. The purpose of this article is to explain the duties and responsibilities of executorship. The article discusses in detail the executor’s obligations to the deceased, to the beneficiaries and to creditors. Difficulties which an executor may encounter are considered. The author concludes that professionals may wish to explain to their clients that their value to the clients is in acting as advisers and that they could better serve the clients by partnering with third parties as executors.

Introduction
Many people will, as a result of family dynamics, be asked to be an executor at some stage in their life. As professionals within our own families, we are often volunteered for the role of executor within the family. As trusted advisers, some of our clients may ask us to act as their executor. The purpose of this article is to explain the responsibilities of the role so that you can give an informed consent to those requests (if you wish).

In the context of a will, an executor will usually become a trustee of any estate assets it holds on behalf of beneficiaries. An executor, like a trustee, is in a fiduciary relationship with beneficiaries under a will. The principal duties of an executor are to collect the assets of a deceased estate, pay debts, pay legacies under a will, and distribute the assets to the beneficiaries.

If an executor carries out an instruction under a will to set aside a fund and hold it on trust for a beneficiary, they will become a trustee of that property. An executor will act in that role until an estate has been fully administered. A trustee may act in that role for a longer time.1

Obligations to the deceased

Obtaining a grant
There is a principle of practice which states that the executor should realise estate assets, pay debts and expenses, and distribute the estate to the beneficiaries within a year of the deceased’s date of death. This will depend on the circumstances, but it has been said in Greyburn v Clarkson2 that, if the year has passed, the onus shifts on the executor to justify the delay.

In New South Wales, a person named as an executor must apply to the Supreme Court in order to obtain a grant of probate of the last will of the testator. A grant is a formal document that authorises the executor to administer a deceased estate. It should be noted that it is not always essential to go to the expense of obtaining a grant.

If there is no will, the deceased is said to have died intestate and there are statutory rules that determine how the estate is to be administered and distributed. If there is no will or if the deceased is partly intestate (that is, a will does not transfer all of the deceased’s assets), a person must apply to the court for a grant of letters of administration if they want authority to deal with assets of the deceased. In obtaining such a grant, that person is called the administrator. There are different rules for probate and administration. As this article’s title refers to executors, we will focus on probate.

Various family members, including some who may not have cordial relations, can apply to get such a grant. It is important, however, to note s 63 of the Probate and Administration Act 1898 (NSW) which indicates the persons who can apply for a grant of letters of administration, namely:

(a) the spouse (including a de facto spouse) of the deceased, or
(b) one or more of the next of kin, or
(c) the spouse conjointly with one or more of the next of kin,
or if there be no such person or no such person within the jurisdiction:

(i) who is, in the opinion of the Court, fit to be so trusted, or
(ii) who, upon being required in accordance with the rules, or as the Court may direct, to apply for administration, complies with the requirement or direction,
then to:
(d) any person, whether a creditor or not of the deceased, that the Court thinks fit."

Since 21 January 2013, before applying for a grant of probate or letters of administration, the applicant must advertise through the Supreme Court online registry. It is expected that this will result in difficulties and delays for luddite lawyers.

In most cases, an application for a grant is made in “common form” in circumstances where the will is not contested. However, if an executor has concerns about the validity of a will, the executor must apply for a grant of probate in “solemn form”. This would arise in matters where the executor has concerns about the deceased’s testamentary capacity, where the deceased had no knowledge of or did not approve of the contents of the will, or if the will does not appear to have been properly executed.

The Court may grant administration of the estate of an intestate person to the following persons, not being minors, that is to say to:

1. This is true in most states, but the time frame may vary.
2. Greyburn v Clarkson (1874) 26 VR 146.
or witnessed in accordance with s 6 of the Succession Act 2006 (NSW). In these cases, the executor must place evidence before the court and interested parties can be joined to the proceedings.

It is prudent for an executor to seek a grant in solemn form if there is any doubt as to the validity of a will or any possibility of its validity being challenged. If there is a later successful challenge to a grant originally applied for in common form, the court has the power to revoke the grant in common form and, after consideration of detailed evidence regarding validity of the will, the court has the power to make a grant in solemn form. An executor who distributes assets pursuant to the wrong will could be sued by the correct beneficiaries.

Once an executor or administrator obtains a grant from the Supreme Court, all real and personal property that was owned by the deceased in New South Wales will pass to or become vested in the executor or administrator from the date of death. An executor or administrator must take formal steps to transfer assets into their own name in their capacity as executor or administrator of the estate or directly to the beneficiaries.

Section 44 of the Probate and Administration Act 1898 (NSW) states that: “Upon the grant of probate of the will ... all real and personal estate ... shall as from the death of such person pass to and become vested in the executor to whom probate has been granted.” Until that time, the property of the deceased vests in the NSW Trustee and Guardian.

Pursuant to s 153 of the Conveyancing Act 1919 (NSW), an executor has the express power to sell, mortgage or lease real estate forming part of a deceased estate (see also s 46(2) of the Probate and Administration Act 1898 (NSW)).

As an application for a grant of probate or letters of administration is a state-based application, if assets are located in jurisdictions including “Her Majesty’s Dominions” (not being the state in which the grant was originally obtained), it will be necessary to apply for a reseal of the grant in each such jurisdiction. An application for reseal is similar to an application for the original grant. An application for reseal is also required where a grant is obtained in a Commonwealth country and the testator owned property in Australia. If the overseas grant was from a Commonwealth country, then an application for a reseal can be made in Australia. However, if the overseas grant was obtained in a non-Commonwealth country, an application for a grant in common form must, using an exemplification of a foreign grant, be obtained in Australia to deal with assets within Australia.

Once an administration is complete, the executor holds whatever assets might remain as trustee for the beneficiaries of the estate. The interest of a beneficiary during administration of an estate confers no beneficial interest in a particular piece of property. The only “interest” that a beneficiary has at that stage is a right by the way of a chose in action, that is, to see the proper administration of the estate.

To dispose of the body of the deceased

It is the duty of an executor to arrange for the burial or cremation of the deceased. It is surprising to see how many disputes arise from a disagreement about whether a deceased should be buried or cremated, especially in circumstances where there is no direction in the will as to what the testator wanted. In families where there exists a level of disharmony between members, this is usually the first of many disputes. Other disputes can be focused on where ashes are to be stored or scattered. Ultimately, the decision lies with an executor who is not even bound to follow the testator’s wishes in this regard. Often a testator will express funeral arrangements in their will but a will is frequently not read until after a funeral takes place.

Regulation 77 of the Public Health Regulations 2012 (NSW) prohibits a person from cremating or authorising the cremation of a deceased person if the “proposed cremation would be contrary to a written direction left by the dead person”. An executor should be careful to check whether a deceased executed written directions as to the manner in which their body is to be disposed upon their death.

Upholding a deceased’s wishes or promises

An executor should investigate any promises or agreements in a will or otherwise by the deceased to leave assets to third parties. In Delaforce v Simpson-Cook, the Court of Appeal held that a promise made by a man to leave a property to his former spouse was enforceable against his estate which he bequeathed by will to his cousin. The promise was made pursuant to a notation to Family Court orders and it was found that the former wife relied on that promise to her own detriment. Accordingly, equity intervened in favour of the former wife and she was found to be entitled to the whole of the property.

Similarly, a deceased may leave a list of instructions directing the distribution of certain chattels or personal items to specific persons which is separate to an earlier will. It then becomes a question of whether the document was properly executed, testamentary in nature, and whether it revokes earlier wills. An executor is bound to uphold the terms of the last will (as amended). Instructions by the deceased for distribution of chattels or personal items that are not contained within the will can be problematic in that:

(1) sometimes a beneficiary is one of two people who are witnesses to the document and those gifts fail unless the court or the other beneficiaries agree; and

(2) if such a document was created and properly executed after the last will and there is any conflict between that document and the will, it could lead to a question of construction and the court is often asked to construe these documents in the event of conflict.

Therefore, prudence dictates that lists of chattels and/or personal items of the testator ought to be included in the will or annexed to the will prior to its execution. This creates a further obligation on an executor to carefully scrutinise the paperwork and documents of a deceased person. The executor may be in a difficult position if such documents come to light after an estate has been distributed.

Obligations to beneficiaries

Legal proceedings on behalf of estate

An executor may commence or defend proceedings with creditors or third parties on behalf of an estate in relation to an estate asset. However, an executor is not obliged to commence or defend legal proceedings at his or her own expense. The executor should seek to be indemnified from estate assets or provided with funds by beneficiaries interested in pursuing such action.

An executor may, to carry out his, her or their duties, be required to institute or defend proceedings, including:

(1) seek injunctive relief (including removal of a trustee, compel performance of duties or contracts) if there is a danger
of the estate assets being sold, wasted etc;
(2) file a caveat under r 61 of the *Supreme Court Rules 1970*;
(3) apply to revoke the grant of probate and for a new grant;
(4) apply for a vesting order into the name of new trustees;
(5) on receipt of the grant, apply to the court by way of summons for advice under s 63 of the *Trustee Act 1925 (NSW)* (the Act);
(6) issue a statement of claim for a dispute with beneficiaries, so this is addressed further below.

To prepare and file accounts
An executor is required to keep proper financial records in relation to the administration of the estate. If a beneficiary has concerns regarding the proper administration of an estate, they can apply to the Supreme Court seeking an order which compels the executor to file and pass accounts. An executor must be scrupulous in their document management and recording of their administration of the estate and all dealings with estate assets, particularly if they are later required to prepare accounts for the court. Filing accounts is a long process; the current waiting time for determinations by the court is in excess of 12 months.

An application to file accounts may be required in the following circumstances:
(1) where a solicitor is an executor;
(2) where an executor is making a claim for commission and the beneficiaries have not consented to payment of the commission to the executor; or
(3) where the court otherwise orders an executor to file and pass accounts.

Filing and passing accounts involves including detailed evidence of all receipts and payments and transfers of all estate assets, as well as detailed evidence and receipts for all distributions made in accordance with the grant of probate. It is a detailed audit and accounting process which is usually a last resort as it adds costs to the administration of an estate and delays finalisation of the administration of an estate. If, however, the executor seeks commission and the beneficiaries have not consented to the payment of commission, an application to file and pass accounts must be made. Alternatively, where the solicitor who drafted the will is the sole executor, the court often requires the filing and passing of accounts. An application can be made to the court to delay the application for filing accounts indefinitely to enable the estate to be wound up without complying with the requirement to file and pass accounts.

With the passing of accounts, the court may order the executor, administrator or trustee to refund to the estate of the deceased any amount disallowed (s 85(4) of the *Probate and Administration Act 1898 (NSW)*).

The filing of accounts can be a battleground for a dispute with beneficiaries, so this is addressed further below.

To collect the assets of the estate
An executor should collect all assets, including debts payable to the estate, as promptly as possible. This may also include commencing proceedings against third parties for the purpose of enforcing a debt or obtaining an asset. If an executor delays in collecting the assets of the estate, he or she could be personally liable for legacy interest or losses (see below).

Preserve assets and invest
Executors must not allow assets to waste. Accordingly, an executor would be prudent to lease and insure real property in the estate. Executors must invest estate funds and may be liable to beneficiaries for lost interest if they do not invest prudently. Accordingly, all funds in bank accounts and cash should be invested into interest-bearing accounts or term deposits as soon as practically possible and at least within six months from the date of death. The investments must be in the form authorised by the will, legislation or the court. An executor is liable to make good any losses to the estate as a result of unauthorised investments.

Where an executor has failed to preserve an asset of an estate, he or she could be personally liable if they lose a claim in “devastavit” which is a breach of duty or failure by the personal representative of a deceased estate to properly preserve, protect and administer estate assets which causes loss to the estate.

The powers of investment are contained in s 14 of the Act and these can be displaced or amended in the will. Under the Act, a trustee includes an executor or administrator.

Section 14A(2) of the Act states:

“A trustee must, in exercising a power of investment:
(a) if the trustee’s profession, business or employment is or includes acting as a trustee or investing money on behalf of other persons, exercise the care, diligence and skill that a prudent person engaged in that profession, business or employment would exercise in managing the affairs of other persons,
(b) if the trustee is not engaged in such a profession, business or employment, exercise the care, diligence and skill that a prudent person would exercise in managing the affairs of other persons.”

Section 14A(4) of the Act requires a trustee to review the performance (individually and as a whole) of trust investments at least once a year.

Under s 14B of the Act, the following principles of law and equity continue to apply, except if they are inconsistent with any legislation or the will:
(1) a duty to exercise the powers of a trustee in the best interests of all present and future beneficiaries of the trust;
(2) a duty to invest trust funds in investments that are not speculative or hazardous;
(3) a duty to act impartially towards beneficiaries and between different classes of beneficiaries; and
(4) a duty to take advice.

Section 14C of the Act lists the following matters that a trustee must, so far as they are appropriate to the circumstances of the
trust, have regard to when exercising the power of investment:

1. the purposes of the trust and the needs and circumstances of the beneficiaries;
2. the desirability of diversifying trust investments;
3. the nature of, and the risk associated with, existing trust investments and other trust property;
4. the need to maintain the real value of the capital or income of the trust;
5. the risk of capital or income loss or depreciation;
6. the potential for capital appreciation;
7. the likely income return and the timing of income return;
8. the length of the term of the proposed investment;
9. the probable duration of the trust;
10. the liquidity and marketability of the proposed investment during, and on the determination of, the term of the proposed investment;
11. the aggregate value of the trust estate;
12. the effect of the proposed investment in relation to the tax liability of the trust;
13. the likelihood of inflation affecting the value of the proposed investment or other trust property;
14. the costs (including commissions, fees, charges and duties payable) of making the proposed investment, and
15. the results of a review of existing trust investments in accordance with s 14A(4) of the Act.

A trustee may obtain and consider independent and impartial advice from a person whom the trustee reasonably believes to be competent to give the advice and pay out of trust funds the reasonable costs of obtaining the advice (s 14C(2) of the Act). Given the long list above, it is the author’s suggestion that executors avail themselves of this “get out of jail free card”.

To distribute the estate assets to the persons entitled
An executor has a strict duty to ensure that they transfer the estate assets to the persons entitled. Further, an executor is liable for any debts of which he or she has notice prior to distributing to beneficiaries. However, there are ways that an executor can protect himself or herself by the publication of notices (see below).

Legacies are required to be paid to the legatee within 12 months of the date of death. If the legacy is not paid within 12 months, then, pursuant to s 84A of the Probate and Administration Act 1898 (NSW), interest is payable at the relevant rate. The relevant rate of interest is 2% above the cash rate last published by the Reserve Bank of Australia before 1 January in the calendar year in which interest begins to accrue. As a general rule, interest commences to accrue after one year from the date of death of the testator unless a different period is specified in the will.

Under s 84 of the Probate and Administration Act 1898 (NSW), a beneficiary may apply to the court for such order as the court sees fit in cases where an executor or administrator, after being requested in writing, neglects or refuses to:

1. sign an acknowledgment (which is a prescribed form under the Supreme Court Rules regarding old system land which states that a devisee is entitled to that land);
2. execute a conveyance of land devised to a devisee; or
3. pay or hand to the person entitled any legacy or residuary bequest.

The court can order the execution of an acknowledgment, a conveyance, or payment of a legacy or residuary bequest. The court may also make an order vesting property in the applicant, direct a person to execute a conveyance in the name of the executor, or direct the executor to bring in accounts.

A beneficiary must show that they are clearly entitled to the interest claimed and, where there is a legacy, there must be sufficient estate assets to pay it.

Executors should familiarise themselves with the rules regarding the order of paying debts and how the law adjusts legacies if there are insufficient assets to pay all legacies.

Solicitors
A solicitor who drafts a will owes a duty to a beneficiary. In the case of Hill v Van Erp, a solicitor was held to owe a duty of care to the intended beneficiary of part of the estate. A beneficiary did not inherit because of the solicitor’s negligence in allowing the intended beneficiary’s husband to attest the execution of the will by the testator which, under the law at the time, invalidated that gift.

Obligations to creditors
Pay the debts of the deceased
An executor should pay the lawful debts of the deceased.

All creditors of an estate are to be treated as standing in equal degree and to be paid out of the assets of the estate in the order specified in Pt 2 of Sch 3 (s 82 of the Probate and Administration Act 1898 (NSW)). However, the rights of secured creditors are not prejudiced by this rule. While general debts of the testator are paid from estate funds prior to distribution, secured debts are to be met firstly from the asset against which they are secured, and any balance remaining is paid from estate funds prior to distribution.

Previously, the law permitted an executor to pay a statute-barred debt unless it had been judicially declared by a court to be barred. This has now changed with s 63 of the Limitations Act 1969 (NSW) which provides that a creditor’s right to a debt is extinguished on the expiry of the relevant limitation period. Therefore, executors are now prevented from paying debts which are outside the period permissible for a creditor to make a claim.

The executor should be very careful about paying unenforceable debts.

Section 85(1AA) of the Probate and Administration Act 1898 (NSW) states that, where the executor is a creditor of the estate, he must verify and file accounts relating to the estate within such time, and from time to time, and in such manner as may be fixed by the Supreme Court Rules or as the court may order.

Disputes and claims
Publication of notices
An executor who intends to distribute the assets of an estate may obtain protection against subsequent claims in accordance with s 92 of the Probate and Administration Act 1898 (NSW) and s 93 of the Succession Act 2006 (NSW). The requirements are:

1. the assets are distributed at least six months after the testator’s or intestate’s death;
2. the executor must give notice (in the approved form) that the executor intends to distribute the assets in the estate after the expiration of a specified time;
3. the time specified in the notice is not less than 30 days after the notice is given;
(4) the time specified in the notice has expired; and

(5) at the time of distribution, the legal representative does not have notice of any application or intended application for a family provision order affecting the estate of the deceased person.

By complying with the above requirements, an executor will be protected against claims subsequently made by applicants seeking family provision orders. Executors who distribute assets after the expiration of the period specified in the notice and in accordance with the statutory provisions are not liable with respect to any person who may have a claim unless they had notice of that claim prior to distribution.

If the deceased was a resident of New South Wales as at the date of death, the notice must be published in a newspaper circulating in the district where the deceased resided or, in other cases, in a Sydney daily newspaper.

Where notices are given and the estate is distributed in accordance with the relevant legislation and subsequently a family provision claim is brought, the court has the power to claw back the assets (if possible) and designate them as notional estate under s 79 of the Succession Act 2006 (NSW).

In D’Albora v D’Albora,7 the executor, who was sole beneficiary of the estate and grandson of the deceased, advertised his intention to distribute the estate. The deceased’s granddaughter commenced family provision proceedings within the time prescribed by the legislation but after the distribution date. The main asset of the estate was a property at The Entrance on the Central Coast. The property was sold and the executor applied the balance of the proceeds, together with a personal mortgage, to acquire a property in Wentworthville. The court designated the property in Wentworthville as part of the notional estate and made provision in the amount of $30,000.00 to the granddaughter plus her legal costs. The court made this order mainly because the executor had not sought further protection from the court in accordance with an old provision of the legislation that permitted the executor to apply to the court seeking an order which reduced the period for an eligible applicant to commence proceedings. There is no longer a provision allowing the court to shorten the period for an eligible applicant to commence family provision proceedings.

Barring claims

Section 93 of the Probate and Administration Act 1898 (NSW) sets out the process for disposing with claims served on an executor after publishing a notice under s 92 of that Act. If the executor or administrator disputes the claim, they can serve on the person who submitted the claim a notice calling on the person to take proceedings to enforce their claim within three months from the date of service of the notice.

If after a notice has been served on a person in accordance with the section, the three-month period for giving notice has expired and the person does not satisfy the court that they are prosecuting their claim, the court may:

(1) make an order barring the claim of that person; or

(2) make such other order as it thinks just and equitable including orders as to costs.

Further protection

Section 92A of the Probate and Administration Act 1898 (NSW) permits an executor to make distributions to a person who was wholly or substantially dependent on the deceased and will be entitled to a part or all of the estate by virtue of surviving the deceased. The distribution must be an adequate amount that is for the proper maintenance, support and education of the person. The executor can also make that distribution with notice of an application or intended for family provision. At all times, the distribution must be made in good faith.

Section 94 of the Succession Act 2006 (NSW) also states that an executor is not liable for a distribution made “for the purpose of providing those things immediately necessary for the maintenance or education of an eligible person who was wholly or substantially dependent on the deceased person immediately before his or her death … that is properly made". This provision applies whether or not the executor had notice of an application or intended for family provision.

Further, s 94(4) of that Act states that, where an executor is given notice of an application or intended application for family provision, they are not liable for any distribution if made in accordance with the requirements of s 93(1) of that Act and not earlier than 12 months after the date of death of deceased. Therefore, an executor who distributes between six months from the date of death and 12 months from the date of death could be held liable for any claims to an asset that are distributed during this period.

In relation to children of the deceased, further protection is available to an executor who applies for a certificate under s 50 of the Births, Deaths and Marriages Registration Act 1995 (NSW) which certifies whether or not a deceased person is recorded as being a parent of any child or children (including children of the deceased by virtue of an adoption or a parentage order).

Approaching the court

In addition to the proceedings set out above, there are a number of circumstances in which it may be necessary for an executor or administrator to make an application to the court seeking orders regarding:

(1) conferral of powers;

(2) construction of a will;

(3) opinion, advice or direction of the court; or

(4) executor’s commission.

Conferral of powers

Section 81 of the Act permits an executor to apply to the court for a conferral of a power in cases where they do not have a power under a will but they consider it appropriate that they exercise that power. The court has wide jurisdiction to confer powers where it considers it expedient to do so. This may be relevant to the power of sale where conditions have been imposed in accordance with s 153 of the Conveyancing Act 1919 (NSW) or in cases where not all executors agree to the sale of an estate property. This is also commonly seen when dealing with shares in a private company.

Construction of a will

This is relevant for the interpretation of ambiguous clauses in a will or if a will has not been executed in accordance with the requirements of the Succession Act 2006 (NSW).

Opinion, advice or direction or the court

Section 63(1) of the Act entitles an executor to apply to the court for:

“an opinion, advice or direction on any question respecting the management or administration of the trust property, or respecting the interpretation of the trust instrument.”
Executors and trustees should apply to the court where there is doubt as to the extent of their powers or as to whether they would be justified in exercising a discretion in a particular way. For example, the author’s firm has acted in a case where a deceased person was survived by a disabled child whereby a portion of the residuary estate was put, through another draftsman, on trust for the “maintenance, support, education, advancement and benefit of the child”. While it would have been more beneficial for the trust funds to be placed in a special disability trust, the question was whether the executors had the power to transfer the capital to such a trust. As it was unclear from the terms of the will, an application to the court could be made under s 63 of the Act.

Other cases where direction is sought include where a charity is nominated in the will but the charity as set out in the will no longer exists or has changed its name or has been amalgamated with another charity. In these cases, unless the will provides a solution, direction is required from the court.

Executor’s commission

Executors can apply under s 86 of the Probate and Administration Act 1898 (NSW) to the court seeking orders for commission for the pain and trouble of performing their executorial duties where the beneficiaries have not consented to the payment of commission. This is the case even where there is a commission charging clause in the will, as the amount of commission must still be determined.

Where there is a claim for commission, the court will require accounts to be filed. Traditionally, awards of commission are expressed in terms of a percentage of the capital and income of the estate. However, the actual approach used by the court is to consider exactly what has been attended to by the executors in the context of the matters mentioned above and then to establish a fair level of remuneration for the work in all the circumstances. That level of remuneration is then expressed in terms of a percentage of the estate’s income and capital.

Hence, a range of percentages appear in the cases, reflecting the need to adjust the percentage figure up or down in arriving at a fair remuneration for the executors in the circumstances of the particular estate.

The court normally prefers to allow commission on the basis of a percentage of the income, capital or assets transferred in specie rather than a lump sum. In the case of Hawkins v Barkley-Brown, Justice Slattery considered the law relating to claims for commission. Justice Slattery noted that, if the executor is a professional person and the will allows the executor to charge professional fees, the professional executor can only charge fees for those tasks which are professional tasks as opposed to tasks arising from the administration of the estate.

The ranges of commission awarded in practice are:

- on capital realisations, between .25% to 2%;
- on income collections, between 2% and 4%; and
- on assets transferred in specie, from 1% to 2%.

The power to allow commission is discretionary and the awards vary, sometimes based on whether the executor has received other benefits from the estate.

It is often more economical to agree to pay commission rather than delay the administration of the estate and pay for the costs of applying to the Registrar who will require detailed evidence of all receipts and outgoings.

Where might you come unstuck?

Conflict of interest

It is often the case that the executors are also beneficiaries or creditors. While this may appear to be a conflict of interest, the courts are generally reluctant to interfere with the testator’s decision to nominate a particular executor as such a perceived conflict will have been obvious to the testator. In Otto v Redhead, the Court of Appeal in Queensland declined to overrule a decision where it was alleged that the executor had a conflict of interest. The court found that the removal of the executor would delay the final administration of the estate, and if the plaintiff suffered loss as a result of any misconduct, he would be able to bring proceedings for recovery of that loss after the executors had distributed the assets of the estate.

The circumstances justifying removal are not defined in closed categories. Each case is determined on its particular facts and ultimately calls for the exercise of a judicial discretion.

In Morgan v MacRae, Young CJ in Eq said that a conflict of interest or duty arises where the executor prefers interest to duty or intends to neglect duty. In Rutter v McCusker, it was found that a conflict was not sufficient by itself to justify a revocation of the grant, particularly if the testator appointed the executor knowing of the potential for that conflict:

“A potential for conflict between duty as an executor and interest as a beneficiary or debtor of the estate is not sufficient on its own to justify revocation of a grant to that executor, particularly if the testator has appointed the executor knowing of the potential for that conflict. An executor is assumed to know the facts existing at the time of appointment and the Court infers that he or she is nevertheless willing to trust in the loyalty and integrity of the appointee in administering the estate. For this reason, the appointment of a particular executor by a testator is not lightly to be set aside by the Court.”

One of the duties of an executor is to collect the just debts owed to the estate. Problems can arise where the executor disputes the debt to the estate. In Dallens v Watkins, Teague J confirmed that, before a court will act in a conflict situation to remove an executor, the situation “must have already given rise to mischief of a level of seriousness that is reasonably high or there must be a reasonably high level of risk arising in the future”.

Time is of the essence if there is a wish to remove the executor. Proceedings must be taken before there is assent and completion of the administration of the estate.

In Titterton v Oates, Crispin J confirmed that, if the conduct of the person acting as executor is serious enough for a removal from office, the preference by the testator for that executor to act becomes secondary to the obligation for the proper execution of the trust in the interests of the beneficiaries.

Remuneration

A testator’s will may specify what remuneration an executor can receive if they are acting in the capacity of a professional such as a solicitor or accountant.

The decision of Chick & Anor v Grosfeld (No.3) involved the interpretation of a charging clause in a will. The executor was an accountant and had charged over $200,000 to perform executorial duties.
This included the executor’s duties that did not require the skill or expertise of an accountant or a lawyer.

As the clause in the will did not contain the phrase “whether in the ordinary course of his profession or business or not”, the accountant was only entitled to charge and be paid for such work as an executor, but not for their work as an accountant. Accordingly, the executor had to reimburse the estate for some of the fees he had been paid.

The effect of this decision is that, if a professional person agrees to act as executor, they should ensure that the will contains a charging clause that allows them to be paid for their fees in performing professional services and non-professional services.

A solicitor who draws a will on this basis has a legal obligation to explain the effect of the clause to the testator. It was stated In the Will of Shannon by Holland J:

“In order that the testator should understand fully the effect upon his estate of the words proposed to be inserted, it is the duty if the solicitor or other advising draftsmen to spell out to the testator the operation of such provision so as to draw his attention to the fact that his estate would, or might, thereby be charged more for administration that if he appointed a lay executor or left it to the Court to fix remuneration.”

Rule 11 of the NSW Solicitors Rules prescribes what precisely a solicitor must advise a client in writing of before they sign their will in circumstances where the solicitor is to be appointed as executor under a will and entitled to charge.

Disputes about accounts
Section 85(1AA) of the Probate and Administration Act 1898 (NSW) applies to an estate of a person who died on or after 31 December 1981 where persons who are granted probate or letters of administration must verify and file or verify, file and pass accounts relating to the estate within such time fixed by the Supreme Court Rules or as the court may order if they are:

1. a creditor of the estate of the deceased;
2. the guardian of a minor who is a beneficiary of the estate of the deceased;
3. the executor or administrator of the estate where the whole, or a part which, in the opinion of the court, is a substantial part, of the estate passes to one or more charities or public benevolent institutions;
4. a person, not being a beneficiary, or, in the opinion of the court, a substantial beneficiary, of the estate, selected at random by the court;
5. a person otherwise required to do so by the court.

An executor or administrator may wish to obtain an order to verify and pass accounts in circumstances where there are disputing beneficiaries or a trustee wishes to retire and obtain a release for the work as trustee or executor.

An interested person may apply for an order from the court requiring the executor or administrator to produce and verify accounts (s 85(2) of the Probate and Administration Act 1898 (NSW)). An application to have the executors pass accounts can bring issues of delay by executors to a head: see Re Estate of Rodgers v Rodgers where an executor was removed for a persistent failure to pass accounts.

Common requisitions issued by the court before making a grant in common form
Where an application for a grant of probate or letters of administration does not provide the court with the information it requires, the Registrar issues a requisition to the filing parties requiring that they comply with the requisition before the grant can be made. The rules are reasonably complex and practitioners who do not perform a lot of this work may fall foul of some. Clients may not be pleased with the consequential delays in securing the grant.

Some of the most common requisitions made by the court include:

1. where an application for a grant of letters of administration is made and any of the eligible beneficiaries under the statutory scheme are minors, sureties must be provided to the court. These are akin to guarantees and executors may struggle to find independent parties to provide same. The alternative is to deposit the minor’s legacy with the NSW Trustee and Guardian until the minor turns 18;
2. where sureties are provided and the basis of the surety is ownership of real estate, it is necessary to prove that the real estate is owned solely by the person providing the surety, and if the property is owned jointly with another person, then the other joint owner must join in providing the surety. If a mortgage is secured on the title, evidence of the value of the property and value of the mortgage needs to be provided in the affidavit of surety;
3. where there are multiple executors nominated as the primary executors in the will and one or more of those executors is not proving the will but has not renounced, evidence must be provided that they have been given notice of the application;
4. where the primary executor nominated by the deceased has died before the deceased and the back-up executor is applying for the grant, it is a common mistake for the applicant to omit the death certificate to prove that the primary executor has passed away. The court will not make the grant until one can provide a certified copy of the death certificate of the primary executor to prove the basis on which the back-up executor is applying; and
5. similarly to the death of an executor nominated in the will, where a beneficiary has died before the testator, it is necessary to prove the death of the beneficiary by annexing a certified copy of their death certificate to explain in the executor’s affidavit why that person is not named as a beneficiary.

Directions regarding the administration of the estate
Rule 54.3 of the Uniform Civil Procedure Rules 2005 (NSW) permits beneficiaries to seek orders regarding the administration of the estate for matters such as:

1. the furnishing or verification of estate accounts;
2. to pay funds of the estate into court; or
3. to do or abstain from doing an act.

Acting in role before obtaining a grant
Under the common law, the entitlement of executors to act derives from a will which is confirmed by the court when it makes a grant. The entitlement commences from the date of death. However, where there is no will, an administrator must be appointed and their entitlement commences from the date of grant of letters of administration.

In New South Wales, by legislation, an estate vests in the NSW Trustee and Guardian until a grant is obtained. Once a grant is obtained, the property vests in the legal representative and relates back to the date of death. At that point any acts performed by an executor that are not
ultra vires prior to a grant being issued are validated. An executor or an administrator cannot commence proceedings on behalf of an estate until they have obtained a grant of probate.

Where an executor performs acts before obtaining a grant, he, she or they run the risk of being held to be an executor de son tort. This is defined as a person who, although not appointed as executor or administrator, administers the estate of a deceased person without authority, and these acts render him or her liable to be sued by the rightful personal representative, creditor or beneficiary of the deceased estate for any property received or any loss or damage to the estate arising from these acts. These acts are called “intermeddling”.

The law has developed so that, in circumstances where a person has intermeddled with an estate, he or she will then be unable to renounce the executorship. In Murray v Ogilvie,10 one of the named executors arranged the clemation of the deceased with a funeral director, as is usual, before a grant was obtained. Justice Needham stated:

“The questions of what acts will make a person an executor de son tort and of what acts make it impossible for a person named as executor to renounce probate cannot be said to have instant and convincing answers. There are many decisions on each of these points, most of them comparatively ancient, but it is not possible, I think, to reconcile them.”

The court held that the executor’s actions were not enough to amount to intermeddling and the executor was entitled to renounce.

There is current high-profile litigation involving pre-grant dealings in the estate of Phillip Mark Griffin which is before the NSW Supreme Court. The facts are:

- The deceased died by his own hand between 18 and 21 October 2007.
- He appointed three executors under his will:
  - David Raymond Coe — former chairman of the collapsed Alco Finance Group Ltd and recently deceased;
  - Neil Sydney Matthews — the deceased’s solicitor from time to time; and
  - Timothy John Christiansen — the deceased’s accountant from time to time.

- The deceased was the sole director and shareholder of PMG Holdings Pty Ltd which held over 7,000,000 shares in Alco Financial Group Ltd (Alco).

- On 8 November 2007, Christiansen lodged notification of his appointment as sole director and secretary of PMG Holdings. Coe and Matthews were aware of his appointment.

- As at 19 October 2007, each Alco share was worth $8.73, but on 18 and 19 September 2008, the value of the shares had declined to $0.13.

- A grant of probate of the deceased’s will was obtained on 22 May 2008 and administrators and receivers were appointed to Alco on 4 November 2008.

- A tutor was appointed for two of the beneficiaries of the deceased’s estate who were minor children. The tutor brought a claim against the executors alleging that they were intermeddled with the estate as executors de son tort before the grant was obtained. They alleged that the shares should have been sold much earlier or soon after obtaining the grant of probate.

- The maximum amount being claimed personally against the executors for loss of the value of the shareholdings was $17,479,220.20.

- By way of interlocutory hearing before Justice Davies of the NSW Supreme Court, Matthews was successful in having the claim against him for any losses during the pre-probate dismissed.18

- Matthews had performed some acts prior to the grant being obtained, such as attending meetings with the other executors and corresponding with other solicitors on behalf of the estate. Justice Davies commented that the combination of these activities could amount to a finding of intermeddling by Matthews.

- However, Justice Davies further found that none of these acts (including his agreement for Christiansen’s appointment as director of PMG Holdings) amounted to taking into possession, dealing with or receiving the shares in PMG Holdings and therefore there could be no finding of devastavit. His Honour stated that: “Merely conferring about the need to value assets is not taking them into possession nor dealing with them. Nor, for that matter, would obtaining a valuation for them …”

- The claim against Matthews was dismissed with respect to the pre-probate period but the plaintiff could re-plead their case with respect to the post-probate period.

- In Griffin v Matthews,19 the NSW Court of Appeal overturned Justice Davies’ decision to dismiss the action against Matthews for the pre-probate period primarily on the basis that further evidence may come to light, and if the matter went to trial, there was the possibility that findings could be made against all of the executors in relation to their pre-probate activities.

- The proceedings are now currently before the Supreme Court and it will be interesting to see what findings the court will make against the executors, particularly as one executor is now deceased.

**Revocation of a grant**

Revocation of a grant can occur for a number of reasons, namely:

1. the deceased turns out to be alive;
2. a later testamentary instrument is found appointing a different executor;
3. if there has been fraud or mistake; or
4. where the due and proper administration of the estate is in jeopardy.

The court has an inherent jurisdiction to revoke a grant of probate.20 In Rutter v McCusker,21 Justice Palmer stated:

“The principles upon which the Court acts in revoking the grant of probate in circumstances involving conflict of interest and duty upon the part of the executor are clear and well established. The Court has an inherent jurisdiction to revoke a grant of probate. That is because the grant of probate is an order of the Court. The Court, in granting probate or revoking it, is concerned to ensure the due and proper administration of the estate in the interests of the beneficiaries. If circumstances arise after the grant of probate which make it clear that the due and proper administration is put in jeopardy or has in fact been prevented or frustrated by the executor, the Court will revoke the grant of probate to that executor and appoint another.”

In New South Wales, the courts also have a legislative power to revoke a grant under s 66 of the Probate and Administration Act 1898 (NSW) which states that:

“… the Court may at any time, upon the application of any person interested in the estate … revoke the administration already granted.”

If an application to revoke a grant is not brought, the court may still give directions in respect of the administration of the
Not performing any acts to administer the estate and misappropriation

In Bates v Messner, the executor was a solicitor who had done nothing in the way of performance of his duties apart from paying a death duty. He also misappropriated estate funds and was later struck off. The grant to the solicitor was revoked on the basis that he was not fit and proper to perform his executorial duties.

Non-cooperation between executors

If solicitors cannot obtain joint instructions, they should not act. Where an executor has obtained a grant of probate they cannot renounce. Sometimes executors may agree that one of them should be removed from office because they conflict. A joint grant should be revoked where one executor acknowledges that there is an actual or a potential conflict between himself and the administration of the estate and the other executor or executors consent to an order of revocation. Palmer J confirmed this in Gormann v Maguire. In that case, an awareness of the conflict at the time of applying for the grant was held to be a reason for that person not getting their legal costs in the proceedings seeking to revoke the grant.

In the case of Schaverien v Jones, the deceased had appointed his three daughters as executors. Two of the daughters made an application to the court seeking revocation of the grant of probate and a fresh grant to issue to them to the exclusion of the third daughter (the defendant). They alleged that the defendant had failed and refused to permit the plaintiffs to join as co-executors to complete the due and proper administration of the estate which had been jeopardised and delayed by her acts and omissions and that she was not a fit and proper person to carry out the duties which she was obliged to perform by law.

Justice Bryson stated “... where personal conflicts brought estate administration to something near paralysis, there is a need for an expedient solution, even if that solution may be less than perfectly fair to someone who is affected by it”.

Later, Justice Bryson found that the true source of the conflict rested in the personal relations amongst the executors who "appear to suffer from insurmountable difficulty in achieving co-operation and practical outcomes". Key considerations included:

- each executor had consulted one or more solicitors;
- there were significant estate matters that still required attendance;
- there was a non-disclosure of jewellery, furniture and personal effects in the probate application and the executors were unable to agree on a list for jewellery items and the value of such items;
- in relation to the estate property, the defendant held off signing the transfer until the day before settlement;
- there was a remarkably large volume of correspondence among the parties and their respective solicitors; and
- the defendant’s correspondence was usually confrontational and marked with vehemence and hostility and included a letter of demand which outlined an elaborate scheme/formula on how the estate shareholdings could be shared equally among the beneficiaries and to avoid taxation consequences.

Justice Bryson found this letter to be particularly provocative in that it stated that there would be litigation unless there was immediate and entire acceptance of what the defendant demanded. He stated: “Executors cannot involve themselves in a beneficiary’s taxation affairs and in my opinion they act reasonably if they distribute each holding of shares in specie among beneficiaries according to each beneficiary’s proportionate entitlement.”

His Honour found that, when the proceedings were commenced, the estate affairs were in deadlock and that distributions were prevented by the defendant making demands that were not possible to comply with and that the plaintiffs had no other course available to them but to ask the court to remove the defendant. His Honour further found that there were some shortcomings on the part of the plaintiffs but, as no trustee company was available to act, he had no other option but to revoke the original grant and issue a fresh grant to the plaintiffs.

Conduct entitling removal

In Re Estate of Crane, Justice Besanko referred to cases where the court had removed an executor from office. The cases included where an executor was of bad character, where the executor was suffering ill health, where an executor was of unsound mind, and where an executor was not competent to take probate.

Crimes

There is no law that automatically removes an executor who is suspected of having committed a crime. However, where an executor was of bad character (having been convicted of the manslaughter of the deceased) and was serving a life sentence, they can be removed. In Re Pedersen, it was stated that “a certificate of conviction is not itself admissible as proof of guilt but only of conviction and sentence, but it is sufficient justification for a refusal of probate”.

In the case of Troja v Troja, a wife killed her husband and, as a result, lost her benefit as the principal beneficiary under the husband’s will. Douglas J in State of Queensland v Byers, stated that Troja “establishes that where a person who would otherwise obtain a benefit by the death of another has brought about that other’s death by violent means, she shall not be entitled to take that benefit”. Under the old NSW legislation, her application was refused on the basis of disentitling conduct.

In Tanner v Public Trustee, where there may have been undue influence at play, the court put the onus on the beneficiaries to prove what is called “the righteousness of the transaction”.

Property owned as joint tenants reverts to the survivor on the death of one of the joint tenants. In New South Wales, the courts have held that the legal estate does pass to the killer by survivorship but they must hold it on trust for the estate of the victim.

In Re Stone, Justice McPherson preferred the “alternative view prevailing in New South Wales ... that the slaying of one joint tenant by another did not affect the incidence of survivorship inherent in a joint tenancy, by which the interest of the deceased passes to the surviving joint tenant or tenants, subject however to the imposition of a constructive trust upon the killer to the extent to which his interest is enlarged by his killing of his co-owner.”
It appears that attention needs to be directed to the circumstances of the killing, the state of mind of the killer etc. Where there is diminished responsibility, or even insanity, it may be that there is no forfeiture or holding on trust for any other party. In that case, where the estate of the deceased made certain payments in relation to the property thinking that it was wholly theirs, the judge suggested that, if a trustee for sale is appointed, there would be some adjustment and allowance to be made in the accounts before a final distribution of the proceeds was made.

The old English case of Re Robinson found that, where a beneficiary knows that the distribution received by them has been improperly made, they become a constructive trustee of those assets in favour of the person properly entitled.

Loss of capacity

The court in Re Wild allowed the donee of an enduring power of attorney to apply on behalf of an executor but only to the extent or during the time that the executor was suffering mental incapacity. In that case, the executor had dementia and was unlikely to recover. AA Preece in Lee’s Manual of Queensland Succession Law has suggested that “there is a possibility of a temporary grant of letters of administration for the requisite period to [a] prisoner’s attorney” (at p 114).

In Uniting Church v Millane, Justice Windeyer stated:

“In ordinary terms, competent would mean a person not disqualified by infancy or lunacy or the like. These questions were discussed by Young J in Bowler v Bowler when he made it clear that generally all executors named are entitled to apply for a grant and only in very special circumstances can a named person be passed over …”

Monty Financial Services Ltd v Delmo was a case for removal of an executor on the ground that he was “unfit to act in office … unfitness and questions of competence are not necessarily the same”.

In Re Estate of Crane, Justice Besanko referred to cases where the court had removed an executor from office. They included:

- where an executor was of unsound mind;
- where an executor was not competent to take probate.

Fail to prove or renounce will

In cases where an executor neglects or refuses to prove a will or fails to renounce probate within three months from the date of death of the testator (or within three months from the date that an executor attains the age of 18 years) or if the executor is unknown or cannot be found, an application under s 75 of the Probate and Administration Act 1898 (NSW) can be made by:

1. any person interested in the estate;
2. the NSW Trustee and Guardian; and
3. any creditor of the testator.

The court has the power to grant probate of a will to that executor or order that administration of the will be granted to the applicant or make such other order for the administration of the estate as appears just. This three-month period is rarely enforced by the court but it means that executors can be put under pressure from that time to apply for a grant.

Delay

In Mavrideros v Mack, the executor had performed executorial duties but there were delays in the administration of the estate. There was a sole beneficiary of the estate who resided in Greece. He appointed solicitors in Sydney to correspond with the executor’s solicitor. There was a significant amount of correspondence between the respective parties whereby the solicitors acting for the sole beneficiary were requesting, among other things, the transfer of the estate property to the beneficiary. Verbal claims had been made to the executor by a family who cared for the deceased regarding a promise made by the deceased to leave the estate property to them. The following acts were alleged against the executor:

- he engaged a real estate agent before he had instructions from the beneficiary to sell the property;
- he later said that he was following directions in the will to sell the property by public auction, however, there were no such directions on the will;
- he delayed in taking steps to publish a notice of an intention to distribute the estate even after receiving advice from counsel;
- he delayed in serving a notice on the family under s 93 of the Probate and Administration Act 1898 (NSW), forcing them to bring their claim after receiving advice from counsel;
- he delayed in passing accounts at the request of the solicitors acting for the beneficiary and only filed the accounts once the beneficiary commenced legal proceedings;
- he repeatedly delayed administration for a rather simple estate by seeking advice from senior counsel;
- he had failed to respond to the request from solicitors acting for the beneficiary to lease the property on a short term basis; and
- his daughter was a solicitor and he selected for her to do most of the work.

The trial judge at first instance was not prepared to revoke the grant and stated, “the administration could have been more efficient, but it has not got to the stage where the executor’s conduct amounts to anything like paralyzing the administration of the estate because of his misconduct”. His Honour applied Bates v Messenger and stated, “... the Court will only think that those interests are prejudicially affected when the executor’s administration shows that he is not duly and properly administering the estate and that the estate has been put in jeopardy. That usually will come about through a person’s mental infirmity, ill health or conduct such as to show that he is she is virtually useless as an executor. That degree of uselessness has not been demonstrated in this case to my satisfaction”.

The NSW Court of Appeal held that the power to revoke a grant is not confined to circumstances where the executor had not performed any executorial duties.

The Court of Appeal found that the trial judge had erred in his application of Bates v Messenger and determined that the question was “whether the due and proper administration of the estate had either been put in jeopardy or had been prevented either by reasons of acts or omissions on the part of the executor or by virtue of matters personal to him, for example, mental infirmity, ill health, or by virtue of the proof of other matters which established that the executor was not a fit and proper person to carry out the duties he had sworn to perform”.

It is worth pointing out that executors and administrators must swear to act in a particular way. Public allegations, even if not proven, can be professionally damaging.

In the recent case of Farrow v Fincher, Estate of Fincher, the two children of the
deceased were appointed as executors and shared in the estate equally. The deceased died in March 2009. The son moved into the estate property and failed to pay rent. The daughter made requests for the property to be sold and also made an offer to purchase the other’s share. The son did not respond to these requests so the daughter approached the court in September 2012 (over three years from the date of death). Justice White applied the Mavrideros v Mack decision and stated that: “It is the duty of executors to realise the assets with reasonable diligence, both so as to repay any debts of the deceased, and also to enable distribution to be made to beneficiaries.” His Honour was satisfied that the son, by his inaction, was not fit and proper to carry out his duties and he ordered that the property be vested in the daughter as sole executor to be held on the trusts of the will. His Honour further ordered that the grant appointing the son be revoked and a fresh grant to issue to the daughter alone.

Conclusion
Clients often ask trusted advisers to act as executors in their affairs. Sometimes, significant emotional pressure is applied by the client. The acceptance of the role of executor by an independent professional comes with significant burdens and risks. Executors can renounce before a grant issues, but that arguably means that their duties to the deceased have not been fulfilled and the deceased has lost control of the important option of choosing an alternate executor. While the executor’s role is to administer the deceased’s wishes, there is significant capacity for him, her or they to affect the position of the beneficiaries, and vice versa, for a long time.

Professionals may want to, instead, explain to clients that their value to the client is in acting as adviser and that they could better serve the client by partnering with a third party who could step into the shoes of the client.

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