

DUTIES OF AN EXECUTOR

The Disposal of the Body

The Executor has an obligation to arrange the funeral and the burial of the body of the deceased (unless someone else is more appropriate to do so and/or accepts that responsibility.)

To Obtain a Grant

A person who is appointed an Executor under a Will cannot be compelled to accept that office or that appointment. He may renounce – but he should do so promptly.

One of several Executors acting alone, lacks the power to sell or to deal with the deceased person's Estate, without the leave of the court.

If a person named in a Will as the Executor intermeddles in the Estate then he may be ordered to take out a Grant.

Calling in the Assets

Upon a Grant of Probate of a Will (or Letters of Administration in the case of an intestacy or partial intestacy), then all the real and personal estate of the deceased person shall, as from the date of death, pass to and vest in the Executor (or Administrator).

The vesting is an actual vesting of property which entitles the Executor to administer the estate – not in his own right – but **on behalf of** the deceased person. It will follow that the Executor cannot deal with the property **other** than in that capacity.

Thus, acts by an Executor before a Grant, are validated by the Grant, if done for the benefit of the Estate. Any real estate held by a person in trust or by way of mortgage also vests in the Executor from the date of death, subject to the trusts and/ or other existing equities affecting the land.

Solvent Estates

Where the Estate of a deceased person is solvent, the real and personal property of the Estate (subject to any charges on any property or any specific provision in the Will) are to be applied towards the payment and discharge of the funeral, testamentary, administrative expenses, debts and liabilities of the Estate.

The expressions “testamentary expenses” and “administrative expenses” include the costs of obtaining a Grant; the costs of getting in or calling in the assets of the estate; costs of any litigation (for example, a Family Provision Act claim, administration proceedings, or a construction suit) and/or commission, if so entitled.

Property which is subject to a secured debt, whether a legal mortgage or equitable charge (including a lien for unpaid purchase money, or land in respect of which there is a debt owing at the time of death or any money under a contract or purchase) is the asset primarily liable to bear that debt.

Payment of Debts

The real and personal estate of the deceased person are all available for the payment of all debts, duties and fees, and this includes the payment of the deceased person's outstanding liabilities.

An Executor may sell or mortgage any real estate that comes into his hands, without a power of sale, and convey the same to a purchaser or mortgagee in the same way as the deceased person could have done, during his/her lifetime.

Distribution

Distribution may be made when the assets have been called in, and all the debts paid.

The Executor will then hold the net distributable estate, subject, perhaps, to outstanding administration expenses and a claim for commission, for the beneficiaries named in the Will or, in the case of the administrator of an intestate estate, for those entitled to take on an intestacy. Obviously, obtaining a Grant, collecting all the assets of the estate, and paying the debts and expenses of the estate are a necessary pre-condition for the completion of the administration.

Completing those tasks may not necessarily complete the administration. For example, if there is some impediment to transferring an asset to the Executor, or those entitled thereto under the Will (assuming they are sui juris) then, at least so far as that asset is concerned, the duties of administration would not be completed.

It is when administration **is complete**, that the Executor thereafter holds the residual Estate as Trustee for the beneficiaries of the estate.

Before then, the Executor's statutory power of sale must be for the "purpose of administration" where "the purposes of administration" include "payment in due course of administration of the debts, funeral and testamentary expenses" and other related costs.

If all the other Executorial duties have been completed, except that land has not been transferred, and there is no impediment to the transfer to beneficiaries presently entitled and sui juris, the Executor becomes a Trustee.

If no impediment exists to transfer title to an asset, such as land, to those who are sui juris and presently entitled under the Will, while that task might be characterised as one of the duties of administration, the fact that the Executor continues to hold that asset may mean that they are holding it as constructive trustee.

The Duty at Law

An Executor is always obliged to keep “proper” accounts: i.e. accounts that are unambiguous, clear, and distinct so as to provide accurate information to the beneficiaries of the estate.

What is “proper” will depend upon the circumstances of the case, that is, upon the nature and type of assets in the estate.

The Obligation to Keep Accounts

An Executor (or Administrator) has an obligation to keep and maintain accounts.

Where the Executor (Administrator) is –

- a creditor of the estate;
- the guardian of a minor who is a beneficiary of the estate;
- the Executor /Administrator of an Estate where the whole or a substantial part of the estate passes to charity; or
- a person selected at random by the Court;
- a person otherwise required to do so by the Court;

then he may be required to “verify and file” or “verify, file and pass” accounts, relating to the Estate, within such time, and from time to time, and in such manner as may be fixed by the Rules, or as the Court may order.

The “passing” of accounts is an important part of the process of the maintenance of accounts. If accounts are misleading or insufficient, the Court will order proper accounts to be filed.

The obligation that may be placed on an Executor to pass accounts is quite distinct from their obligation to keep and maintain accounts

The minimum obligation which the law imposes upon an Executor is to keep a trust account separate from other matters, ensure that particulars of receipts and payments are supported by vouchers (which must be available for inspection), and the accounts must contain information as to the amount and state of the assets and property, and disclose particulars of all relevant liabilities and encumbrances.

Commission

The Court will allow commission to be paid from the assets of the estate to an Executor for his “pains and trouble, as is just and reasonable”.

If the Will provides for the payment of gift or legacy to an Executor then, absent unusual circumstances, the Court will normally **not** allow further commission to that Executor. A problem (of construction) may arise to determine whether a legacy given to an Executor excludes a right to commission. It has been held however that a gift of residue to an Executor does not raise a presumption that the gift is given in consideration of that beneficiary acting as Executor.

(An Executor may be disallowed commission if he neglects or omits without good reason to pass the accounts of the estate.)

If a testator authorises an Executor to charge for their services, the Executor may either make such charges as they consider reasonable (i.e. pursuant to the authority), and have the amount moderated or assessed on the passing of accounts, or he may make no charge but apply for commission in the usual way, by bringing the nature of the services rendered to the notice of the Court, by Affidavit.

If the Executor is a professional person (e.g. an accountant or solicitor) authorised by the Will to charge for both professional and other services, he may charge for his professional services, and shall, if required to, moderate his bill before the Registrar and, in respect of their other services, apply for commission.

The Court will take into account when deciding what, if any, commission should be allowed to an Executor, the conduct of the Executor in the performance of his duties.

In effect, a failure by an Executor to keep and maintain proper accounts constitutes a breach of their obligations.

An Executor who would otherwise be entitled to receive commission may lose some or all of that commission for breach of trust but the authorities show that a trustee will not necessarily be denied commission merely because they have acted “irregularly”.

(For further information please also see our website at www.fglaw.com.au)