



The Role of Executor

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Unless the correct executor is chosen, together with the appropriate powers to administer and settle the estate and funding is available, costs, delays and disputes could occur to shrink the value of the estate.

The executor (Executrix if a woman) is the person named in a Will who assumes responsibility of settling an estate according to the terms of a Will. Depending on the complexity and circumstances of an estate, the role of an executor requires time, diligence and some degree of commercial expertise.

Generally, this role is performed by a surviving partner or close family member or friend. Other alternatives for executors include a:

- Public Trustee of your State or Territory; or
- Solicitor or Accountant; or
- Professional Trustee Company.

When selecting an executor, it is advisable to choose carefully. An executor plays the central role in an estate's Administration. The appointment of an executor (and a substitute executor) is one of the most important actions in a Will. An estate represents a lifetime's work. What is not realised is that a person is their own executor whilst they are alive, but after death they need to have someone to watch over the estate and make sure their wishes are carried out. An executor performs this function.

If an executor is not designated, someone can come forward (maybe a family member who you would not have chosen) and claim the right, or the court may appoint someone, expert but a complete stranger, to handle the job.

Before choosing someone as an executor, potential executors should understand their responsibilities. For that matter, all clients need to be aware of an executor's responsibilities so that they can select the most appropriate person.

What follows is an overview of the duties and responsibilities of the executor and the strategies needed to prevent estate shrinkage.

Duties of an Executor

Before Probate: The tasks that an executor, that is the Legal Personal Representative (LPR) needs to perform in respect to the Administration of an estate of a deceased person include:

- Obtaining custody of the body, check for organ transplants, anatomical research, dispose of body (cremation or burial);
- Locating the Will;
- Obtaining details of family dependants, assets and liabilities;
- Collecting assets, check entitlements, stop pension or other regular payments and take actions such as obtaining valuation, insuring all assets, investing estate funds and preserving business



as either a going concern or preserving business assets;

- Checking liabilities;
- Advertising for an application for Probate;
- Applying for Probate with Supreme Court.

After Grant of Probate, the executor's role is to:

- Notifying Beneficiary(s), obtain a Tax File Number, prepare the Tax return and advertise the intention to Distribute estate;
- Collecting Assets;
- Determining Distribution - pay all debts including final tax assessment, set aside a reserve to pay all debts, determine final assets and amount to distribute; and
- Distributing Assets - declare transfers of transmission application to any Testamentary Trusts and / or to the beneficiaries.

Qualities of an Executor

An executor can practically be anyone, but is usually one of the following:

- Family Member;
- Friend;
- Business Associate;
- Solicitor;
- Corporate executor.

The person that is selected to be the executor must possess certain characteristics that are needed to perform their duties including:

- Trustworthiness;
- Honesty;
- Dependability;
- Good Organisation;
- Common Sense Judgement;
- Fairness; and

- Geographical proximity to your property.

An executor needs these characteristics in order to properly administer an estate. For example, an executor needs to be fair because one of the hats he or she wears is often as a referee to settle disputes that can arise in an estate.

Geographical proximity to an estate is helpful in an estate's administration. (Long distance relationships are difficult enough when you are alive and even more complicated when you are dead).

Many people choose their spouse as their executor. After all, they have spent a lifetime with their spouse (or their spouse has just made it seem like a lifetime) and who knows better? Besides, their spouse most likely is receiving the largest part of an estate.

Nevertheless being an executor is time consuming and tedious. Hence make sure that the spouse or anyone else nominated to be an executor considers and understands what is expected. If there is a somewhat complex estate that involves numerous beneficiaries and creditors, select an appropriate executor and notify them of the estate assets in advance.

Avoiding Disputes

"An executor divided against itself cannot stand!" If there are three adult children, all about the same age and equally well off financially, there is a risk of slighting two of those children if only one child is selected as an executor. Never mind that pretty much anyone who has ever served as an executor agrees that the job is basically one of dealing with details and complications - and plenty of aggravation - for months on end. The other children may



conceivably think that the child selected as an executor is somehow favoured, and this can cause all kinds of family disunity and hard feelings for years to come.

In such circumstances there maybe a temptation to designate two or more children as co-executors of an estate. This approach may cause unnecessary disputes and complications if two or more people share that role and then start to use an estate as a battleground for disputes between themselves.

A better alternative than co-executors is to ask a solicitor or perhaps a lifelong trusted friend who understands the beneficiaries and has knowledge of estate assets to be an executor.

Locating the Will and Assets

Furthermore make sure the Will and assets can be located. It is recommended that information is kept up to date. It is a good idea to have an up to date copy of assets stored with the Will. To keep information up to date, use an executor's Kit and print out a copy and save a copy and let an executor know where you kept it.

Special Attention to Principals of an Enterprise

Principals of a Business or Professional Practice need to pay special attention as to whom they designate as an executor. An executor may have to keep the enterprise going. But if the named executor has no experience in the enterprise, or doesn't have the time to devote to the enterprise, a significant portion of an estate's value maybe lost. Therefore, if your client owns an enterprise, they need to either select an executor who can represent their interests and keep the enterprise going, or make other

business continuity arrangements separate from the usual executor responsibilities.

Furthermore the Will should give the executor power to keep the enterprise going as well as flexible powers of sale. Should such powers not exist within the Will the executor may have no choice but to liquidate the enterprise. Otherwise the executor may be held to be personally liable for any loss that could be incurred if the executor acts outside the powers outlined in the Will.

Paying an Executor

"Thanks for a job well done" cannot be said if an executor does a good job, because the Willmaker is dead. An executor is typically entitled to receive a commission, which is decided by the court and depends on the size and complexity of the estate. However, an arrangement can be made between the executor and the beneficiaries, provided all the beneficiaries are over 18 years of age. Doing this is in everybody's best interest as getting the court to decide inevitably involves more costs and so less estate assets for everyone. If the fee is claimed (and in the case of family members or close friends, it often isn't), it is paid at or near the end of the Probate process.

Thinking Things Through When Someone Asks Your Client To Be an Executor

Accepting the role of an executor has its pitfalls. An executor can be personally liable for any claims, lawsuits, or other monetary obligations of the estate if the executors act outside their authority or acts negligently.

The executor is expected to carry out his or her duties to



an accepted standard. Therefore make sure that your client completely understands the specific rules and obligations that govern how they act as an executor.

An executor, is entitled to receive a commission for their services. The commission is typically a percentage of the Probate estate. Many executors waive their commission, as the payment received is taxed as ordinary income. The potential executor may be better off from a tax point of view if they come to an agreement that they left a specific item of property in their Will as payment for the task.

Despite the hassles and occasional aggravation, the vast majority of executors find the job to be a little bit personally rewarding. They have a feeling of helping a friend or family member complete his or her final wishes and intentions. But again, as with anything in life, make sure what your client understands their function.

To find out more about ili courses and workshops in respect to the role of an executor, Estate and Succession Planning please visit our website www.ili.com.au.

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