



Removing misbehaving Executors

Will makers are entitled to choose whomever they wish to be their executor but what can beneficiaries do if they believe that the nominated executor is failing to administer the estate, acting fraudulently or not in the best interests of the beneficiaries?

The Executor's Role and Duties

An executor is the person appointed in a Will to carry out the wishes of a person after that person dies. The Executor organises to collect the assets of the deceased, pay any debts and distribute the estate assets to the beneficiaries as set out in the deceased's Will. The duties of an Executor include:

- Arranging the funeral and burial or cremation of the deceased.
- Locating the deceased's Will and obtaining a Death Certificate
- Identifying the assets and liabilities of the deceased
- Obtaining Probate of the deceased's Will.
- Administering the Estate by selling the estate assets, paying any debts and taxation liabilities of the estate
- Defending the Estate in any legal proceedings including applications to contest the Will
- Distributing the Estate in accordance with the Will; and
- Maintaining accounts and keeping proper records of the estate.

The "Executor's Year"

The Courts have developed a common law "rule of thumb" when determining what is or is not an acceptable timeframe for the administration of estates and the payment of bequests to beneficiaries. Because the duties of an executor include the sometimes slow task of obtaining a Grant of Probate and discharging the deceased's debts, generally speaking the Courts have determined that the executor has one year from the date of the deceased's death (called "the executor's year") to finalise the administration of the estate and distribute it to the beneficiaries.

If an executor fails to realise and distribute any estate assets within the executor's year, the onus is on the executor to establish some valid reason for the delay. In the absence of a valid reason the executor may become liable to pay compensation to the beneficiaries for the delay.



Executors Obligations towards Beneficiaries

An executor stands in a fiduciary relationship to all beneficiaries of an estate which effectively means a relationship of trust. This relationship is central to both the rights of the beneficiaries and to the obligations of the executor as the executor has been entrusted with the assets of the estate and the power to administer the estate for the benefit of the beneficiaries. Consequently, an executor must discharge their duties with due care and loyalty to beneficiaries and their obligations to beneficiaries include:

- (a) Preserving the estate for the benefit of the beneficiaries.
- (b) Acting personally, with such professional assistance as may be required.
- (c) Avoiding acting in their own interest to the prejudice or disadvantage of the beneficiaries.
- (d) Acting expeditiously and efficiently so as not to incur unnecessary cost to the estate.
- (e) Acting impartially towards all beneficiaries, avoiding any preference to the interest or wishes of one over another
- (f) Being mindful of the executor's year in the administration of the estate.
- (g) Obtaining the best possible price in realising assets of the estate.
- (h) Taking care to observe and comply with particular testamentary directions and trusts which are contained in the Will or court orders affecting the entitlement to benefit.
- (i) Avoiding delay in the realisation and investment of the estate assets.
- (j) Making the assets productive for the beneficiaries.
- (k) Being aware of the statutory powers of investment and the duties, provided under section 14A of the *Trustee Act 1925*.
- (l) Keeping proper accounts and retaining all original receipts; and
- (m) Considering making Interim distributions to beneficiaries if an estate is complex or there are delays in the administration of some assets.

Executors Behaving Badly

Generally, any competent person aged 18 and over can be appointed by a will maker as their executor and prima facie, the person so appointed is entitled to apply for and obtain a Grant of Probate of the will on the will maker's death.

However, circumstances may arise, either prior to an application being made for Probate of the Will or after Probate is granted, that leads the beneficiaries of the estate to question the executor's capacity and/or their ability to deal with the estate in the manner in which they are obligated to. These circumstances may include where the Executor:

- is of bad character (have committed a serious crime or are in prison).
- has taken no steps to obtain Probate of the Will.
- has otherwise neglected their duties.
- has interfered with the estate.
- has misappropriated assets of the estate.
- is overseas for a prolonged period.



- is in ill health.
- doesn't have legal capacity and are not competent to deal with the estate.
- is of unsound mind, or
- cannot be located.

The Courts as a rule will not lightly interfere a will maker's discretion to appoint an executor of their choosing. Generally, as a starting point, the Court's position is that the will maker made a considered judgement about appointing their executor and held a view at that time that the person appointed had the ability to complete the role fairly and competently.

However, as the Court is primarily concerned about the due and proper administration of the estate and the interests of the beneficiaries, if there is ample evidence that an executor is not complying with their duties and their conduct is serious enough to warrant their removal as executor, the Court will disregard the will maker's right to choose their executor to ensure that the interests of the beneficiaries are protected.

“Passing Over” and Removing Executors

If an executor needs to be relieved of their duties **before** probate has been granted, they are “passed over” as executor by an order made by the Court pursuant to the provisions section 74 or 75 of the Probate and Administration Act, 1898 ('PAA'). This means in effect means that the executor is removed before they have a chance to legally act as executor.

If an executor needs to be removed **after** probate has been granted, the executor's Grant of Probate must be revoked, meaning that their executor duties are brought to an end. The Court can make an order revoking a Grant under section 40(C)(3) of the PAA and if it does so it becomes necessary for a fresh application to be made by another person to obtain a new Grant.

In both circumstances, an application must be made to the Supreme Court supported by evidence to show why the executor should be passed over or removed. Interested parties, for example beneficiaries under the Will, can apply to the Court to have the executor passed over or removed.

In making its decision, the Court will consider what is necessary for the due and proper administration of the estate and also the interests of the estate's beneficiaries. In the case of incapacity there will generally be a need for the submission of medical evidence to prove the incapacity of the executor.

The Court also needs to consider whether the executor is likely to be temporarily or permanently incapacitated. If it believes that the executor is likely to recover from their incapacity, then it may make a limited order that someone else can act on the executor's behalf while the executor is incapacitated. A general order is made when the incapacity of the executor is permanent so that someone else can permanently take over as executor.

If the executor is passed over or removed and there is no substitute executor named in the Will, the party making the application may ask the Court to appoint another person as the administrator of the deceased's estate.

The executor of a deceased estate has a very important role and appointing an executor is a decision that should be given detailed consideration. However, even when an appointment is made with the greatest of care, unexpected events can happen down the track which may impact on beneficiaries' rights and entitlements. If you're experiencing issues with an executor the best course of action to take is to seek legal advice sooner rather than later.



If you would like further information about removing an Executor from their role or wish to update your current Will to nominate a different executor please contact [Lisa Delalis](mailto:Lisa.Delalis@batemanbattersby.com.au) or [Ken Gray](mailto:Ken.Gray@batemanbattersby.com.au) of our office 02 4731 5899 or email willsestates@batemanbattersby.com.au.