

# Executors and Guardians

## Roles and Responsibilities

### Introduction

An important part of having a Will prepared is nominating an executor who will be responsible for carrying out their instructions in the Will.

If the Willmaker has young children, another important decision to make is who to nominate as guardian who will step into the role of carer when both are deceased.

The responsibilities and duties of an executor and guardian call for maturity and fairness. When making these important decisions a Willmaker should consider the following:

- Do I trust this person to take on these responsibilities?
- Do I think they are capable of taking them on?
- Would they be willing to do it?

### The executor

A Willmaker appoints an executor to carry out the terms of a Will upon their death. Usually spouses/partners, appoint each other. They should also appoint an alternative executor in case:

1. Both pass away at the same time; or



2. The surviving partner forgets to amend their Will to add a new executor following the death of their spouse or partner.

The Willmaker may choose more than one person to be an executor or alternative executor and this person can also be the guardian if desired.

### What does an executor do?

The executor is responsible for two main functions:

#### 1. Obtaining a Grant of Probate

Before the estate can be distributed a Grant of Probate (from the Supreme Court) is usually necessary. This is the official recognition that the Will is valid and gives authority to the executor to deal with the assets of the estate.

The executor is responsible for applying to the Supreme Court for that Grant of Probate.

Due to the legal complexities involved however, lawyers are usually employed to undertake the process. The executor's role therefore usually involves selecting a lawyer and assisting with the preparation of the relevant documents that are sent to the court.

#### 2. Acting as trustee of the estate

Once the Willmaker has died, the executor becomes the trustee of the deceased's estate.

Following the Grant of Probate, if there are no conditions to be met, the trustee distributes the estate to the beneficiaries according to the provisions of the Will.

If there are conditions to be met before certain beneficiaries can inherit (e.g., waiting for the children to reach a particular age) then the trustee is responsible for those parts of the estate that are awaiting distribution.

The trustee is responsible for managing the undistributed assets and keeping records of investments and money paid out in the interests of the beneficiaries.

With a standard Will, once a beneficiary turns 18, they can usually direct the trustee to pass over their inheritance despite the age designated in the Will.

If the Willmaker wants to extend the age at which the beneficiary gains control beyond 18, their Will must contain testamentary trust provisions. Only then will the trustee have the power to retain control of the designated income and capital until the age determined by the Willmaker.

To ensure the children are cared for up until that specified age however, the trustee may distribute part or all of the income produced, or part or all of the capital, to the beneficiaries. This must however, be to provide for their maintenance, support, education, advancement, or benefit.

Allowing the trustees to have this discretion is important as they can respond to unforeseen circumstances such as medical expenses.

### Can an executor collect financial reimbursement?

Yes. The executor can claim all costs

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associated with administering the estate. If the case is very complex and time consuming an executor can also apply for a commission.

This can be applied for to the Supreme Court or with approval of the beneficiaries of the Will or it may be provided for in the Will. Depending on the size of the estate, commission can be up to 5% of the estate's value. The maximum amount will usually only be awarded when the estate management is complex.

## Who should you appoint as executor if you don't have a spouse, or as alternative if you do?

If you die leaving young children, appointing their guardian as executor is a common choice. If that person is trusted with the children then most people feel comfortable handing responsibility for management of the inheritance to them until the children can take over control. This certainly makes it easier for the guardian to not have to continually ask an executor for funds to pay for the children's living and education expenses.

If the Willmaker is not comfortable with the guardian's financial abilities, they can appoint someone different as their alternative executor. It is best for spouse/partners to appoint the same person based on who is considered most capable of managing the role effectively.

If there are older children inheriting, they could be appointed to the role. More than one child, if not all children, are usually appointed to act jointly. Note, they would need to be older than the age at which the Willmaker wants them to get control.

If there is no spouse or children inheriting then the main beneficiaries would be the next likely choice.

This may be siblings or friends and if more than one, it would be the one considered the most capable amongst these beneficiaries.

If there are no suitable relatives or friends a third party can be appointed. Whilst this could be a Financial Adviser it is not recommended as there may be a conflict of interest in administering the estate if the Financial Adviser is also to receive fees for assisting with that.

A third party trustee company can be appointed, however, it is important to understand that fees will be applicable. The trustee companies have a commercial purpose with the estate usually not only paying a commission based on the total estate value but also a commission on any income earned during administration.

Remember the executor can always have the Financial Adviser assist with the estate administration - they do not need to be a financial expert themselves.

## The guardian

The guardian steps into the role of parent and primary care giver and is responsible for the long-term welfare of the children until they reach the age of 18.

For this reason it is important for the Willmaker to choose a guardian who not only cares for their children but one who is also likely to live until the children reach the age of 18.

## Who can be appointed as guardian for the children?

The choice is entirely for the Willmaker to make. The Willmaker can appoint any one they see fit and they do not have to be related to the children.

Each parent has the right to appoint a

guardian or guardians to take care of the children after their death but the guardianship usually takes effect when there are no surviving parents.

In some circumstances, for example if one parent is not fit to take care of the children, it is possible to include this in the Willmaker's Will. They can state that they would like joint responsibility with the surviving parent and the chosen guardian or the Willmaker can give reasons to completely exclude the surviving parent from any responsibility.

## Can the Willmaker appoint more than one guardian?

We recommend that only one guardian be appointed. Sometimes the Willmaker wants to appoint a married couple as joint guardians. However, problems may arise if the couple later divorce. If more than one guardian is considered desirable, then we suggest that one is appointed the guardian and the other is appointed as the alternative guardian, if for some reason the first named person is unable or unwilling to perform that role.

## Can the executor and guardian be the same person?

They can and it may be considered convenient for the person responsible for "parenting" the children to also be managing their inheritance. If different people are appointed to the roles, it is essential that they are able to co-operate in the interests of the children.

## Summary

If you are considering who to appoint as executor or guardian and wish to discuss any issues, please call us on **03 8621 9000** or send us an email **info@irongrouplawyers.com** and we will work with you to develop a solution to meet your needs.