

: Disputes and litigation

Some common issues that can arise

Introduction

Sometimes, there is a need to question the behavior of an executor and how they are managing the estate and the Will.

Duties of an executor

The main duties of an executor are to identify all the estate assets, pay any expenses and liabilities of the Willmaker, distribute the estate in accordance with the Will and produce an accounting of the estate.

An executor is expected to complete their duties with honesty and care and to act in the best interests of the estate and the beneficiaries.

Removal of an executor

If a beneficiary has grounds to believe an executor is not carrying out their duties properly and has breached those duties, an application can be made to the court to have the executor removed and a new executor appointed in their place.

In *Denby v Power & Anor* [2016] VSC, executors were successfully removed by the wife of the deceased who was the sole beneficiary of her husband's estate.

The court found that, amongst other actions, the executors had challenged the payment of the deceased's superannuation binding death benefit nomination in favour of the wife and sought to have the funds paid to the estate, which caused unnecessary costs and delays.

Their actions were not in the best interests of the wife.

Accounting of an estate

Executors must provide beneficiaries with information when requested concerning the administration of the estate and the accounting of the estate.

If an executor refuses to provide information to beneficiaries, it is possible to apply to the court and demand that an executor provides to the court a proper accounting of the estate.

In *Re Anthony; Rogan v Rogan* [2017], the Victorian Supreme Court stated that "...an executor owes a duty to account to the persons who are to take under a testator's Will. Essential to this duty is the requirement that an executor keep proper accounts and records. These records should be unambiguous, clear and distinct so as to provide accurate information to the beneficiaries sufficient to inform them as to the state of the administration. To this end, receipts, vouchers or other documentation should support each transaction."



Payment of executor's commission

It is common for executors to carry out their role without receiving any payment. There are however, three main ways for an executor to receive payment, which is known as executor's commission. They are:

1. A clause in the Will that states an executor is entitled to be paid, usually with the rate of payment included;
2. All of the beneficiaries of the Will agree to the payment; or
3. The executor applies to the court for payment.

Because there is no automatic entitlement to the payment of executor's commission, an executor is not allowed to decide for themselves whether they should receive a payment.

Summary

If you are the beneficiary of a Will and you believe an executor may not be acting appropriately, we will provide initial advice obligation free. Please call us on **03 8621 9000** for assistance.

For information on challenging a Will please see our 'Will challenges' insight for information.

Contact us

Please call us for an obligation free chat on **03 8621 9000** or send us an email info@irongrouplawyers.com.

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