

## What is an Executor?

A legal personal representative is a person who is:

- an executor of another person's will;
- the administrator of deceased person's estate; or
- the trustee of a legally disabled person's estate or affairs.

In connection with wills, for example, the legal personal representative carries out the stated wishes of the deceased person.

Usually the legal personal representative is someone known to the deceased; he or she may be a family member, a trusted family friend, or a solicitor or accountant.

As the powers of a legal personal representative can be quite wide under the legislation or common law, there are corresponding duties that a legal personal representative must adhere to. In other words, with power comes responsibility.

### What is the role of the Executor or Administrator?

The duties of the legal personal representative include (but are not limited to):

- burying or cremating the deceased (as may be directed in the will);
- ascertaining and protecting the assets of the estate;
- ascertaining and discharging the debts of the deceased;
- applying to the Supreme Court for a grant of Probate or Letters of Administration;
- collecting outstanding debts due to the estate;
- lodge taxation returns;
- managing the assets of the deceased – which may include shares, cash on deposit, business affairs, and the like for the benefit of the beneficiaries;
- selling the assets of the estate, if required;
- establishing any trusts set up in the will;
- distributing the assets of the estate to the beneficiaries – in accordance with the will, or in accordance with the intestacy laws if there is no will;
- liaising with the beneficiaries; and
- keeping proper accounts for the estate.

### Can I appoint a solicitor to be my executor?

Yes. You can appoint anybody to be your executor, provided they are over 18 years old and are ready, willing and able to act in that capacity.

People generally appoint a family member, or a number of family members as their executor.

There are a number of reasons however why you might wish to appoint your solicitor or other advisor as your executor:

- Your personal affairs may be complicated, involving family companies, family businesses, family trusts, children's trusts, and the like. Family members may lack the experience or time to manage your affairs when you die.
- You do not have a family member who has the ability to take on that role – due to some physical or mental incapacity, or advancing age.
- Your children are minors. As such, they lack the capacity to undertake the role.
- You do not wish to burden your family members with the appointment as executor.
- You may not have a family member who resides in NSW to take on that role – rendering it impracticable for them to assume the role.
- You may seek an impartial and objective executor to administer your estate.
- You envisage there may be disputes if you select one family member over another as executor, and would prefer to have a third party manage the estate.
- You anticipate there may be disputes and possible Succession Act claims in relation to the bequests under your will. You might also anticipate that a family member will make a claim against your estate for greater provision. You therefore wish to have a professional in the role as executor in that event.
- Given the administrative burdens of being an executor, you may wish to appoint someone to the role with the experience and office infrastructure to handle the estate.

In such circumstances it makes sense to appoint a trusted advisor to the position of executor. Solicitors practising in the area of wills and estates have the expertise and experience to handle the matter. They also have the practice management systems, filing systems and controlled (trust) money systems already in place to manage an estate efficiently and effectively.

Solicitors would also be expected to act objectively and impartially in the administration of the estate. As such they would be divorced from the family politics and dynamics, and possible conflicts of interest, which might affect family members if they held the position as executor.

Solicitors are also subject to and must comply with additional legal requirements under the various statutes (such as the Legal Profession Act in NSW) and as such there is an additional layer of protection in the administration of an estate. Family members are not subjected to such statutory requirements.

In NSW, law firms are also regularly audited by Trust Inspectors appointed by the NSW Law Society. Family members are not subject to such tight supervision.

Some professionals do not wish to act in the role of executor so you need to speak with them beforehand prior to finalising your decision. At that time you might also wish to ask them about the professional fees they may charge for acting and the procedures they have in place for the management of executorial duties.

Lawyers at David Landa Stewart have acted as executors in the past and continue to act in that capacity, for all the reasons noted above. We also advise executors on their roles and responsibilities. Speak to us if you have any queries in relation to these matters.

### **What if I am appointed as Executor under a will?**

This is a very onerous position.

You should consult a solicitor as soon as possible so that you can understand what your short term and long term responsibilities are.

David Landa Stewart provides advice on such matters.

### **Do I have to accept the appointment as Executor under a will?**

If you do not want to be an executor (even if you earlier agreed to be one), you can renounce the executorship by signing a 'renunciation'.

The Solicitor for the estate will file it with the Probate Registry of the Supreme Court. We are happy to assist with this process. However, if you wish to renounce your responsibilities, you should do so promptly. Once you have intermeddled in the estate, you are often not able to renounce your responsibilities.

### **Do I have any legal protection as an Executor?**

Any executor can be personally liable for decisions or actions undertaken in administering the will of the deceased. It is important that an executor obtain proper advice as to the administration of the estate so that the potential for liability can be minimised.

### **Will I be paid for being an executor?**

You are entitled to apply to the Supreme Court for a commission for your work as executor. But if you are named also as a beneficiary in the Will the bequest will be presumed to be payment for your administration unless there are circumstances or something in the will to overturn that presumption.

The will might also provide that certain additional payment be made to an executor as acting as an executor can be a very time consuming task.

### **For further information, contact:**

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