

Bulletin

Solicitor executors and their fees

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The issue of fees and charges a legal practitioner is entitled to charge often arises when practitioners act as executors of estates. The scenarios fall into the following categories:

- The will contains a clause entitling the practitioner to charge professional fees but is silent on claiming executor's commission;
- The will contains a clause entitling the practitioner to claim executor's commission and professional fees but no percentage is specified for the commission;
- The will contains a specific percentage that the practitioner can claim as executor's commission but the beneficiaries argue later that is too high or was improperly included in the will.

When can a practitioner acting as executor charge fees or commission?

An executor owes a fiduciary duty to the beneficiaries under the will. The *Administration and Probate Act 1958* (Vic) ('the Act') alters the common law position that a person in the position of a fiduciary is not entitled to benefit personally from that position. Section 65 provides that the court may allow an executor to charge commission not exceeding 5% of the value of the estate. The amount is to be determined by considering the executors 'pains and troubles' and must be 'just and reasonable'.

The executor may also charge commission if the will specifically provides for it, or if all of the beneficiaries agree.¹

Where the will is either silent on commission or silent as to the percentage that can be charged practitioners have asked the beneficiaries to agree on the commission payment. There have been several recent cases before the court where the practitioner has been criticised for the way in which they have asked for the agreement.

It is alleged against the practitioner that he or she failed to properly inform the beneficiaries of all the necessary matters to allow them to make an informed choice. What that necessary information is may vary from case to case but in *Walker & ors v D'Alessandro* Forrest J said the bare minimum was:

- a. The work that he has done to justify the commission. This should be done with particularity.*
- b. If he is invoicing the estate for legal fees and disbursements he ought identify with particularity what constitutes the basis for same. Only then can a beneficiary accurately measure the 'pains and troubles' occasioned to the executor beyond the subject matter of those legal fees and disbursements.*
- c. That the beneficiaries are entitled to have this Court assess his commission pursuant to s65 of the Act. This needs to be explained fully.*

¹ *Walker & ors v D'Alessandro* [2010] VSC 15

- d. That it is desirable that the beneficiaries seek independent legal advice as to their position on this issue of consent. In many cases where the beneficiaries are unsophisticated people and the issues are complex he ought insist upon them receiving independent legal advice and ought not enter into any commission agreement until they have.*

The courts have also been scathing of practitioners who imply in their correspondence to the beneficiaries that if they do not agree to the suggested executor's commission they will have to wait a long time for their money and/or it will cost them an exorbitant amount to seek the court's assessment.²

What is involved in drafting a will with a payment or commission clause in it?

Rule 10 of the Professional Conduct and Practice Rules 2005 (Vic) requires a practitioner who draws a will appointing the practitioner or an associate of the practitioner as executor to inform the will maker in writing before the will is signed:

- Of any entitlement of the practitioner, or the practitioner's firm or associate to claim commission;
- Of the inclusion in the will of any provision entitling the practitioner, or the practitioner's firm or associate, to charge legal costs in relation to the administration of the estate; and
- If the practitioner or the practitioner's firm or associate has an entitlement to claim commission, that the person could appoint as executor a person who might make no claim for commission.

The courts have reiterated that a will maker must give informed consent to a charging clause in a will³. In particular, the will maker should be told:

- a. There is no automatic right for an executor to receive commission, so a commission clause did not have to be included;
- b. In the absence of a commission clause the executors could still apply to the court for commission not exceeding 5% of the total assets of the estate for their 'pains and troubles as is just and reasonable';
- c. If the commission clause with specified percentage is included then the executors would be entitled to receive that percentage of the total assets of the estate without the court's independent scrutiny;
- d. If the commission clause with specified percentage is included then the beneficiaries would not be able to challenge the amount of commission paid; and
- e. The rates proposed where not fixed by law and could be reduced by the will maker.

What is the difference between charging commission and charging professional fees?

If a practitioner executor is entitled under the will to charge commission as well as professional fees for the legal work done by his firm then he or she needs to be very careful to distinguish between work done in the executor's or the firm's capacity as solicitor for the estate and work done in the practitioner's capacity as executor. All work done should be carefully itemised and allocated to either the legal or executorial roles. Professional fees

² Walker & ors v D'Alessandro; Re Estate of Zsuzanna Gray [2010] VSC 173;

³ Szmulewicz v Recht [2011] VSC 368, see [44-45]

cannot be charged for executorial work done and then a further claim made for commission. This would be considered 'double dipping'.

Some practitioners are of the view that when acting as an executor the practitioner should either charge professional fees for all work done or commission but not both. Daly ASJ in *Re Estate of Zsuzanna Gray* [2010] VSC 173 made the following observation⁴:

In my view, when a professional person such as a solicitor or an accountant acts as an executor, and charges the estate in accordance with his or her usual professional fees for the time spent by him or her on executorial duties, that rate would generally, (but not always), cover not only their 'troubles' but also reflects, at least to some extent, the degree of responsibility involved in their administration of the estate.

Whatever way practitioner-executors choose to go in terms of payment, they need to be very careful to:

- Ensure it complies with what is permitted under the will;
- Obtain the beneficiaries' informed consent or seek an order from the court if they want to vary what is permitted under the will;
- Keep detailed and accurate records of what was done and understand the difference between legal and executorial work; and
- Understand that the executorial role is one of a fiduciary and act accordingly.

⁴ [38]