WHEN A BENEFICIARY IS BANKRUPT

Executors may be tested by desperate or bankrupt beneficiaries in this current pandemic environment.

The windfall of a bequest from a deceased estate may be more welcome than ever before for some beneficiaries, especially as many people have lost jobs and are in correspondingly difficult financial situations. Practitioners and executors may face more pressure than usual from desperate beneficiaries to release money quickly. Here are some things to keep in mind if you are in that position.

Waiting the appropriate time after probate

It is always prudent for executors or administrators to wait the time frames set out in sub-s99A(3) of the *Administration and Probate Act 1958* (Vic) before distributing estates. The subsection provides that a legal personal representative (LPR) will not be personally liable if they properly distribute the estate six months after probate or letters of administration are granted. This only applies if two other conditions are met. First, the executor had not received any notice of an intention by someone to make a family provision claim. Second, it has been more than three months since they received such a notice, and they had not received a written notice that the family provision application had been made to the court.

In practice this means practitioners need to warn the LPR, particularly where there are demanding and desperate beneficiaries, of the risk of personal liability on the LPR if distributing before the six months, and three months if the requisite notice has been given. This warning should be confirmed in writing.

Bankruptcy implications

There is a heightened chance in the current environment that a beneficiary may be bankrupt. It is worth remembering that the *Bankruptcy Act 1966* (Cth) provides, at s58(1)(b), "after acquired property of the bankrupt vests, as soon as it is acquired by, or devolves on, the bankrupt" in the trustee in bankruptcy. The decision of *Official Trustee in Bankruptcy v Schultz*[1] makes it clear that a beneficiary has a chose in action before the assets of the estate are received. That chose in action is a right to the proper administration of the estate by the LPR, as well as an expectation that their bequeathed assets will pass to them subject to all liabilities and costs being paid. When the beneficiary becomes bankrupt the chose in action along with the "expected fruits of that chose in action" pass to the trustee in bankruptcy.[2] If an LPR knows the beneficiary is bankrupt, the practitioner acting for the estate or the LPR should contact the trustee in bankruptcy to ascertain the value of that chose in action in the trustee's hands so that the proper amount from the bequest can be paid to the trustee. The inheritance may be more than is required to discharge the bankruptcy or there may be other complicating factors and this needs to be understood in order to determine where and when to pay the bequest.

The other issue LPRs can face with a bankrupt beneficiary is the pressure from a bankrupt to hold on to the money until they are discharged from bankruptcy. This should not be entertained as it is an attempt to defraud creditors of the bankrupt and the LPR has an obligation to properly administer the estate. The interests that vest in the trustee in bankruptcy during the bankruptcy belong to the trustee even after the bankrupt is discharged, so holding on to the money will not change that.

Acting in the administration of estates is often difficult, particularly when LPRs and beneficiaries don't understand the process. LPLC recommends you provide them with its Guide for Executors and Guide for Beneficiaries. For more information on claims in administering estates see our practice risk guide Weather-proofing wills and estates. ■

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1. *Official Trustee in Bankruptcy v Schultz* (1990) 170 CLR 306
2. *Official Trustee in Bankruptcy v Schultz* (1990) 170 CLR 306 at 313 [16]

TIPS

1. Remind executors that they may be personally liable if they distribute the estate before six months have passed since the grant of probate or within three months from receiving notice a family provision claim may be made to the court.
2. If a beneficiary is bankrupt, contact the trustee in bankruptcy before distributing the beneficiary's bequest to determine what sum is required to be paid to the trustee.
3. Do not be involved in any attempts by a bankrupt to defraud their creditors by not informing the trustee in bankruptcy of the bankrupt's inheritance or by deliberately delaying distribution of an estate until after the bankrupt has been discharged from bankruptcy.

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