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Appointing the Right Executor:

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INTRODUCTION

Every Will is different, each carefully drafted to deal specifically with the unique circumstances of the Willmaker. At its completion, a Will is a distinctly personal document and is usually the result of considerable thought and meticulous planning.

For most, the preparation of a Will involves a delicate balancing act between the wishes of the Willmaker and the anticipated future expectations of those who will be left behind.

At the Willmaker's death there is usually at least one person who thinks that the Willmaker got it wrong.

It is in this context that each Willmaker must decide who is to manage the estate after their passing. Many Willmakers feel an obligation to pass the responsibility to direct family members for fear of offending, regardless of whether or not they consider them suitable or able to adequately complete the task.

The natural corollary of this is that sometimes people are appointed as executors without wanting the task or understanding the nature of the obligation imposed on them under the Will.

The purpose of this article is to:

- summarise the duties of an executor; and
- offer guidance as to when an independent or professional executor should be considered.

DUTIES OF AN EXECUTOR

An executor's duties are often vast and varied.

Locating the Will

The first task is to locate the original Will. Copies are often found amongst the deceased's personal papers or at the bank. The copy document should direct the executor to the whereabouts of the original (that is usually stored at the lawyer's office).

Once the Will is located, the executor will usually seek legal assistance with the administration of the estate particularly where a Grant of Probate is required.

An executor is not obliged to consult with the lawyer who prepared the Will regarding the administration of the estate.

The Funeral

It is the executor's responsibility to attend to the funeral arrangements. This is usually done in consultation with close family.

In the first instance, the executor should read the Will to ascertain whether or not the deceased expressed any particular wishes regarding the funeral and other related matters such as a preference for burial or cremation. In most cases such wishes are not legally binding on the executor.

Location of Assets

The executor must locate the assets and liabilities of the deceased. A thorough search of the deceased's personal papers or discussions with people familiar with the deceased's affairs will assist in this regard.

It will be necessary for the executor to correspond with banks and other investment organisations to determine the precise date of death balances of investments and any outstanding liabilities and requirements for dealing with these items.

This can be a tedious and time consuming process.

Protecting the Assets

Once the assets of the estate have been located, the executor will need to make arrangements to collect and preserve the assets.

The executor should ensure that the house and its contents are secure and insured.

Appropriate decisions regarding the care of pets must also be made.

If the deceased was in business, the assets of the business must also be preserved, even to the extent of taking over the running of the business. This may require interaction with the deceased's accountant and senior employees.

Applying for Probate

A decision will need to be made as to whether or not it is necessary to apply for a Grant of Probate of the Will in order to take possession of the deceased's assets.

The Will gives an executor the right to administer the estate and a Grant of Probate is the evidence of this right.

It may be possible for the executor to take possession of some assets of the estate and distribute them to the beneficiaries without requiring a formal Grant of Probate. This depends upon the nature and value of the estate's assets.

In order to obtain a Grant of Probate, the executor must apply to the Supreme Court. The application consists of a range of court documents including an Affidavit of the executor and an inventory of assets and liabilities for the estate.

Taxation

It is the executor's responsibility to ensure that outstanding income tax returns are filed on behalf of the deceased up to the date of death and then on behalf of the estate from the

date of death until the administration of the estate is complete. The executor must ensure that all taxation liabilities relating to the deceased and the estate are paid in full, including any capital gains tax liabilities.

Distribution of the Estate

When the assets are in the possession of the executor and all debts and expenses have been paid, the executor may then distribute the assets of the estate in accordance with the terms of the Will. As part of this process, decisions will need to be made regarding whether assets are distributed in specie or whether the entire estate is converted to cash and distributed.

Where beneficiaries are under the age of 18 years or where the Will contains specific restrictions on when a beneficiary can take his/her entitlement, it is the executor's responsibility to manage the funds until the beneficiary is of age or the conditions contained in the Will have been satisfied.

APPOINTING AN INDEPENDENT OR PROFESSIONAL TRUSTEE

Given the complexity of the executor's role, many Willmakers appoint a professional executor.

Circumstances that give rise to the appointment of a professional executor include the following:

1. lack of suitable family members to assume the role;
2. potential for family members to disagree and delay the finalisation of the estate;
3. the inclusion in the Will of trust or other arrangements that require ongoing supervision over a number of years such as a life tenancy or right of residency;
4. the existence of beneficiaries with special needs (such as spendthrift beneficiaries and disabled beneficiaries) that justify the additional skills that a professional executor offers;
5. the existence of complex and/or valuable assets that require particular expertise in their handling.

Essentially, a professional executor offers expertise and objectivity in the administration of an estate and is able to deal with the issues arising throughout the administration with impartiality.

Costs of a Professional Executor

As with all executors, a professional executor is entitled to a commission for acting as executor. The maximum rate of commission allowable is 5% of the gross value of the estate. However, very few estates justify commission at the top rate.

It is open to the Willmaker to seek to fix the rate of commission at the time of making the Will.

Alternatively, an agreement can be sought with the beneficiaries regarding an appropriate rate of commission or a determination sought from the court.

Moore's Legal offers clients the option of appointing them as the executor of Wills and trustee of estates.

When appointing **Moore's Legal** as executor and trustee, a principal of the firm is nominated as executor and trustee.

In order to provide certainty for clients and referrers, it is **Moore's Legal's** policy to set the rate of commission with the Willmaker at the time the Will is prepared.

Is Your Will Safely Stored?

For many, the decision to make a Will is a difficult one. There is much to be considered. However, perhaps one of the most important decisions arises after the Will is made; *Where is the original document to be stored?*

Typically, the storage options are:

- The lawyer's strongroom.
- The filing cabinet at home
- A safety deposit box at the bank

This decision has significant implications for the future.

Failure to store the original Will in a suitable location or failure to notify family and others of its existence and whereabouts can have a number of unwanted and unfortunate consequences.

Intestacy

If the original Will cannot be located after death or if family members are unaware of its existence then the likely result is that the estate will be distributed as if no Will had been prepared.

In this scenario the intestacy rules would apply and the estate would be disbursed according to the rigid formula contained in the Administration and Probate Act. The specific instructions and directions recorded in the Will cannot be implemented.

Presumed Revocation

Secondly, if the original Will cannot be located and the last person to have possession of the document was the Willmaker, the presumption is that the Willmaker destroyed the original document thereby revoking the provisions contained therein.

In this case, it is not possible to seek to obtain Probate of a copy of a Will.

Again, the intestacy provisions would apply to the estate.

If it can be demonstrated that the Willmaker lacked mental capacity for the entire period in which he or she had possession of the document, the presumption of destruction can be rebutted and Probate of a copy Will sought. However, rebutting the presumption in these circumstances is difficult.

Avoiding the Problems

To minimise the risks and consequences associated with a lost Will, an original Will should never be stored at home.

The safest option is to leave the original document in a lawyer's strongroom or other storage facility such as a bank and to retain a photocopy of the signed document.

Usually, the first place the executor or family go when seeking the original Will is the lawyers' office. For this reason, a lawyer's strongroom is an ideal storage option. Further, lawyers usually do not charge a fee to store original documents and the process for accessing the Will after death is easier than those implemented by the banks.

Whatever storage arrangements are made, it is essential to notify your executor of the document's existence and of its whereabouts and retain information confirming these arrangements amongst your personal papers.

Moore's Legal has a safe, secure and free Wills storage service. Please feel free to contact Andrew Simpson on 9843 2163 for further information.

Ademption – The Failure of a Specific Bequest

It is not unusual for a Will to contain a specific bequest of an asset.

Consider the following:

"I give to my son Raymond all of my interest in the property at 123 John Street, Box Hill for his own use and benefit absolutely".

While a bequest clause of this nature appears simple and non contentious, a change in the Willmaker's circumstances may significantly alter the distribution of the deceased's assets.

For example, if at the Willmaker's death, the property is no longer owned by the deceased, then the gift fails (is "adeemed") and the Willmaker's son Raymond will not receive the property by way of gift.

A number of events may impact the make up of an estate. The property may have been sold by the Willmaker during his/her life-time, compulsorily acquired by a third party or altered in a material way so as to change the nature of the property.

In most cases, the proceeds of sale of the property disposed of cannot be traced through the estate and will be distributed to those beneficiaries entitled to the residuary estate of the Willmaker.

Usually this outcome is unintended and results from a failure to update the Will to reflect a change in circumstances.

Ademption can be avoided in a number of ways:

1. Altering a Will regularly as circumstances change; However, this is not always possible and practical. If an asset is disposed of and the Will is not changed

- immediately, any subsequent loss of capacity by the Willmaker will make it impossible for them to alter the Will.
2. Including a clause in the Will that provides an alternative distribution in the event that the subject matter of the gift no longer exists at the date of death. This may be a gift of cash in lieu or a sum equivalent to the net sale proceeds of the property.
 3. Refrain from specifically gifting substantial assets to a beneficiary in lieu of an entitlement to the residue of the estate.

If the disposal of the asset is attended to on behalf of the Willmaker by a third party such as an Enduring Power of Attorney (Financial) or appointed Administrator and not by the Willmaker further issues arise.

Section 53 of the *Guardianship and Administration Act 1986* provides that where an Administrator appointed by the Victorian Civil and Administrative Tribunal disposes of the Willmaker's property prior to the Willmaker's death, the proceeds are to be treated in the same manner as if the property had not been sold. For this to be possible the proceeds must be identifiable.

Until recently, the view was that disposal of property by an appointed Attorney did not offer the same protection to a beneficiary of a specific bequest. However, the Supreme Court in the case of *Mulhall v Kelly* [2006] VSC 407 considered this scenario and concluded that the disposal of a piece of real estate to raise funds for a nursing home bond did not result in the ademption of the gift. In this case the fact that the Willmaker was unaware of the sale through lack of capacity was critical to the decision.

Therefore, conversion of an asset by a third party acting on behalf of a Willmaker who lacks capacity is quite different from conversion undertaken by a Willmaker personally.

The risk of ademption should be carefully considered when determining the manner of asset distribution via a Will and advice sought about how to minimise the risks of a specific gift failing inadvertently.

The Moores Legal Elder Law Team

We have a range of practitioners who are able to assist with any minor queries or major issues you may have. If you require further information, please contact a member of our Team

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