



An Executor's Duty: Passing of Accounts v Wilful Default

Introduction

An important decision a person makes when preparing their Will is who they should appoint as an executor. Just as important is whether you should accept the position, and the not insignificant responsibilities and duties associated with being an executor. Are you aware that as an executor you have an obligation to pass accounts? Do you know what that is?

Passing of accounts v wilful default

When administering an estate, an executor is required to keep proper financial records. The evidence required includes detailed receipts, payments and transfers of all estate assets as well as distributions made. Materially, if a beneficiary is concerned about the administration of an estate they can apply to the Supreme Court seeking an order which compels the executor to file and pass accounts.

The expression "passing accounts" means that the Registrar of the Supreme Court acts as an auditor in relation to the accounts of the estate as prepared by the executor. The duty to pass accounts is provided for in section 43(1)(b) of the *Administration Act 1903* (WA) which is expanded upon by regulation 37 of the *Non-Contentious Probate Rules 1967* (WA).

If there are objections to the passing of accounts such as:

- whether an agreement in fact exists;
- whether a document is fabricated; or
- if there has been a breach of fiduciary duty,

these are matters to be dealt with in the contentious jurisdiction of the Court. A separate application should be made to the Court on the basis of wilful default. Wilful default focuses upon negligence or omissions which have something to do with what ought to have been done. It is clear that specific knowledge, an intention or appreciation of the breach of duty are not requisite.

Thus the procedure for a non-contentious application is for the passing of accounts. However, if there will be allegations of a serious nature, proceedings should be commenced in the Supreme Court.

Case study

In Western Australia annually there are approximately 7,000 applications for grant of probate. Out of these, there are approximately 100 applications for passing of accounts. This amounts to 1.43%, which is considered a significant amount.

Recently, one particular application heard in the Supreme Court is *In Re Ellis; Ellis -V- Ellis* [2015] WASC 77 by Heenan J.

In this case, Victoria Ellis (**Victoria**) passed away in July 2008 at 69 years old. She was survived by 3 adult children, Clive (residing in Western Australia), Paul (residing in



New Zealand) and Spencer (residing in United Kingdom). Victoria named Clive and Spencer as her executors. Clive took out the grant of probate with the consent of Spencer.

The assets in Victoria's estate included a half share of a property in Mount Claremont which she owned jointly with Clive and his wife. Victoria's share of the property was approximately \$600,000. She had some cash balances in bank accounts and her personal effects taking her estate to about \$650,000.

Her liabilities, as described by Clive, were as follows:

- \$29,500 payable to Clive Ellis in respect of his mother's half share of the renovation cost for works;
- \$5,000 payable to Clive Ellis in respect of his late mother's half share of the deposit on the initial purchase of the property; and
- \$7,480 payable to Clive Ellis in respect of his late mother's half share of the stamp duty paid by him on the initial purchase of the property.

As the relationship between the brothers was strained, Paul's lawyers requested the Probate Registry to require the executor to pass Victoria's estate's accounts. The accounts were filed at the Supreme Court registry and Paul's lawyers made several general objections. The objections in summary were:

- Potential failure to account for interest on bank balances held in accounts not in deceased's name;
- Failure to pay interest to beneficiaries receiving distributions later in time; and
- Potential failure to pay interest on potential loans of the estate's assets by the executor in his personal capacity and/or by his wife.

Further, in the course of submissions, Paul's lawyers argued that:

1. the agreement for the half share payment of an initial deposit and stamp duty for the Mount Claremont property were false and fabricated;
2. invoices raised by the executor in relation to the work done in renovating the house at Mount Claremont were fabricated; and
3. the executor breached his fiduciary duties for example, by using improper means, that is, companies, to benefit himself by doing works on the relevant property.

The Court held that the objections and arguments made by Paul's lawyers go beyond the process allowed for the passing accounts. Justice Heenan said "[t]he Court's jurisdiction on the passing of accounts is exactly that, a passing of accounts, an assessment of vouchers and at most whether or not expenses are appropriate or whether vouchers can in fact be produced. The proceeding is not contentious."

Once the Court is satisfied on the vouching of the accounts, a certificate is issued which indicates that the accounts have been settled.

On the other hand, the Court said "if an interested party alleges that there has been a breach of trust resulting in a loss in the estate, there will be a need for distinct proof of a wilful breach before an account is ordered on the basis of wilful default."



The outcome of this case was the Court upheld the decision by the Registrar stating that the objections made by Paul's lawyers go beyond passing accounts. As the allegations are quite contentious, the appropriate course of action is to commence proceedings by writ or originating summons against the executor, in his personal capacity!

Conclusion

- If you accept the position of being an executor, it is important to keep detailed accurate records of all the dealings in the estate;
- If you are a beneficiary, be aware that there are different procedures to follow in order to scrutinise an executor's accounts. The passing of accounts should not be used to pursue more contentious allegations.

If you require any further information about Estate Administration, please contact Murfett Legal by telephone on +61 8 9388 3100, via our website at www.murfett.com.au or email one of the following directors:

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