

---

## *SOLICITORS AS EXECUTORS – QUESTIONS AND ANSWERS*

---

### **Introduction**

With an ever increasing number of solicitors in NSW many solicitors must find new areas of work to maintain financial viability. Acting as an executor would seem to be a natural extension of the work of a solicitor. However, it is not without its pitfalls and risks. Some solicitors have faced misconduct proceedings and Lawcover claims. Others have had their charges disallowed by the Court. This paper is designed to assist solicitors in:

- Deciding whether to take on the additional responsibilities of being an executor, and
- Providing some guidance to those that do.

### **Should solicitors accept appointments as executor?**

#### The case for:

- A solicitor should bring experience and competence to the role of executor – both legal and managerial. Members of the general public would expect to be appointed as an executor once or twice in a lifetime, if that.
- Solicitors bring status and impartiality to the role of executor.
- Solicitors have experience in managing disputes.
- Solicitors have money management skills and account keeping processes in place.
- Solicitors should have good communication skills, which is essential in keeping beneficiaries properly informed.
- Carrying out the role of executor is a public service for clients who may not have anybody else to perform the role.
- Clients may wish to appoint someone independent if they expect a dispute, especially in blended families.
- Solicitors can perform the duties of executor more quickly and cheaply than trustee companies and the client is likely to prefer someone they know over an institution.
- The affairs of many willmakers are complex involving companies and trusts. Lawyers are expected to understand the laws relating to property, companies, trusts and taxation.
- Willmakers may be comforted by the added layers of ethical obligations and responsibilities reposed in lawyers and their accountability for the same.
- The payment of executor's commission will provide income to a solicitor's practice. It will also provide part time work and a source of income to a retired solicitor.

### The case against:

There are many solicitors who should simply not take on the role of executor and these include the following:

- Those that have not studied or practised the law of wills & estates.
- Those that do not have the time to take on the additional work load.
- Those who are not prepared to leave their office and deal with the non-professional work of ensuring that a house is cleaned out from all personal possessions and made ready for sale, dividing the personal possessions in accordance with the will and attending a weekend or evening auction as required.

There are also reasons why some solicitors may wish not to take on the role of executor, which includes the following circumstances:

- A lack of knowledge of the family and its dynamics may create friction during the process.
- Disgruntled family members may not allow access to the deceased's documents and make it difficult to identify the deceased's assets and liabilities.

If solicitors do accept the role, the following should be noted:

- There are academic and judicial warnings about accepting the role, though it is not prohibited.
- The task is time consuming and may not be rewarding financially unless a commercial rate of remuneration is written into the will.
- Great care needs to be taken to avoid complaints by beneficiaries and to avoid allegations of misconduct.

### **What is the difference between solicitors professional work & executorial (non professional) work?**

It is essential that the solicitor/executor appreciate the difference between solicitor's professional work for which normal legal charges apply and non professional executorial work for which executor's commission (and not legal costs) apply.

<b>Task</b>	<b>Executor</b>	<b>Solicitor/ Accountant /Agent</b>	<b>Variations/comments</b>
Identify estate assets	✓		
Arrange funeral	✓		
Advise family friends	✓		
Contact beneficiaries	✓		
Identify debts and	✓		

Task	Executor	Solicitor/ Accountant /Agent	Variations/comments
liabilities			
Apply for probate		✓	Scaled fee. Disbursements are not allowed except for the cost of publishing the online notice and filing fee for probate. Generally any work involved in answering requisitions or filing affidavits of additional assets should be included in the scaled fee. Additional charges will usually be appropriate in cases requiring advice on questions of informal wills, rectification, testamentary capacity, duress, undue influence, fraud, lack of knowledge and approval and forgery.
Obtain advice on responsibilities and administration of estate		✓	These actions may be needed from time to time to ensure that the executor is acting within his or her authority and performing duties in a timely way
Identifying whether certain assets form part of the estate, eg considering trust relationships, insurance, superannuation, etc		✓	
Advice on complex questions of interpretation of the will		✓	
Pay testamentary expenses, debts and liabilities	✓		
Take necessary steps to protect estate assets	✓	*	Legal advice may be required
Tax returns		✓	An accountant may be engaged by the executor to prepare tax returns. The solicitor may provide advice about the tax implications to the estate but it is the responsibility of the executor to engage the accountant and provide the relevant financial statements etc.
Arrangements for pets	✓		
Redirect mail	✓		
Cancel services	✓		
Open estate bank	✓		

Task	Executor	Solicitor/ Accountant /Agent	Variations/comments
account			
Close deceased's bank acct	✓		
<b>Business of deceased</b>			
Operate business	✓		
Wind up or sell business	✓		
Draft contract for sale		✓	
Sale transaction		✓	
Attend to tax		✓	
<b>Real Estate</b>			
Maintain property	✓		
Collect rent		✓	May appoint a real estate agent to collect rents
Pay rates, services etc	✓		
Arrange insurance if necessary	✓		
Obtain valuation	✓		
Prepare real estate for sale	✓		
Prepare contract		✓	
Answer legal questions		✓	
Appoint real estate agent	✓		
Negotiate sale	✓		
Attendances on property eg open house, auction etc	✓		
Conveyance		✓	
<b>Sell/realise other estate assets</b>			
Sell shares	✓	*	Broker may sell shares for executor
Nursing home bond	✓		
Motor vehicles	✓		
Insurance policies / superannuation	✓		
<b>Distribution</b>			
Notice of intention to distribute		✓	Solicitor or executor may publish notice
Undertake a bankruptcy search for beneficiaries	✓		
Transfer assets to beneficiaries	✓	*	Solicitor may be engaged to undertake legal services eg transfer of title of property
Communicate with beneficiaries and	✓	*	If there is conflict between executor and beneficiaries the executor is

Task	Executor	Solicitor/ Accountant /Agent	Variations/comments
respond to reasonable request for accounts			entitled to engage his or her solicitor to deal with beneficiaries, in particular where a beneficiary has engaged a solicitor. An executor may also obtain legal advice about any duty to disclose to a beneficiary
Calculate and make distributions	✓		
Legal proceedings		✓	Including claims by beneficiaries or third parties against the estate
Keep and maintain proper accounts	✓		Statutory duty pursuant to s 85 PAA. Executor should maintain a record of all receipts, disbursements, bank statements etc. The executor may appoint a solicitor to prepare the accounts for passing but the practice of the Court is to disallow any costs relating to accounts and commission prior to any order of the court allowing such costs out of the estate. Where commission is sought, costs on the ordinary basis may be allowed out of the estate
Create any testamentary trusts	✓	*	The executor may obtain advice from his or her solicitor
Act as Trustee	✓	*	May obtain advice from solicitor from time to time
Invest trust assets	✓	*	May engage an expert to obtain investment advice
Wind up the estate	✓	*	May obtain advice from solicitor and accountant

The Court will not allow charges for the payment of executorial work unless there is a clear and unambiguous clause in the will stating that the solicitor/executor may so charge.

Even where there is a charging clause which allows for payment of work that is executorial in nature, the Court will not allow “double dipping” such as charging for executorial work and also claiming commission. It is recommended that a separate file be maintained for keeping a record of executorial work.

### What are the key responsibilities of an executor?

- Dispose of the body

- Ascertaining what are the assets of the deceased. There is a “clear positive duty of inquiry”. Drummond v. Drummond [1999] NSWSC 923.
- To protect the estate assets and prevent waste.
- Obtain a formal grant of probate or letters of administration, to authenticate his or her entitlement to act as LPR (Legal Personal Representative) in relation to that estate. Ludwig v. The Public Trustee [2006] NSWSC 890 at par 12.
- Calling in the relevant assets. This is also positive duty and the LPR must bring proceedings to that end even against relatives of the deceased. However, an LPR may set off a debt owed to the estate against a legacy due to a beneficiary. See Bird v. Bird (No 4) [2012] NSWSC 648 at par 104.
- Ascertaining what the liabilities of the estate are.
- Discharging those liabilities.
- Apportioning the burden of payment of liabilities among the beneficiaries.
- Keeping accounts and proper records of all dealings with the assets and liabilities of the estate. These accounts must be kept separate from the personal finances of the executor.
- Delivering accounts to those entitled to them.
- Distributing the net assets of the estate to the people entitled to receive them in an efficient and timely way.

#### **What duties do executors have towards the beneficiaries?**

- Once probate has been granted the executor must be open and transparent with the beneficiaries not only in the work the executor is performing but also the charges. Ultimately the beneficiaries (usually the residuary beneficiaries) bear the cost.
- Act personally, with such professional assistance as may be required.
- Avoid acting in his/her own interest to the prejudice or disadvantage of the beneficiaries. This includes acting expeditiously and efficiently so as not to incur unnecessary cost to the estate.
- Act impartially towards all beneficiaries, avoiding any preference to the interest or wishes of one over another.

- Take care to observe and comply with particular testamentary directions and trusts which are contained in the will or court orders affecting the entitlement to benefit.
- Avoid delay in the realisation and investment of the estate assets.
- Make the assets productive for the beneficiaries. Note: Solicitors trust accounts do not earn interest and therefore any interest foregone for the benefit of beneficiaries may result in a breach of trust.
- Obtain the best possible price in realising assets of the estate to receive them promptly and normally within the executor's year. An executor may be under a duty to make an interim distribution if it is clear that there is a substantial surplus available over anticipated liabilities and claims.
- Be aware of the statutory powers of investment, subject to due diligence and prudence and the duties, including that of periodic review, provided under section 14A of the *Trustee Act 1925*.
- Disclose the entitlement to the beneficiaries, the nature and extent of that entitlement, and the estimated time of distribution, indicating whether, having regard to the nature and extent of the assets and liabilities, it may be possible to make an interim distribution to beneficiaries, particularly those in need.
- Preserve the estate for the benefit of the beneficiaries.
- Be aware of the trustees right under section 63 of the *Trustee Act 1925*, to seek the opinion, advice or directions of the Supreme Court in complex issues regarding the management or administration of the estate assets, or regarding the interpretation of the will or other testamentary instruments. A good overview of the Court's role in providing judicial advice under Section 63 can be found in Application by Marilyn Joy Cottee; Estate of Gwenyth Shirley Smith [2013] NSWSC 47. However, the Court will not provide advice on commercial decisions to be made by an LPR. Crompton [2007] NSWSC 167.
- Keep proper accounts and retain all original receipts. The Court is likely to disallow disbursements where a receipt is not produced upon request.
- Be mindful of the executor's year in the administration of the estate. Interim distributions should be made if an estate is complex or there are delays in the administration of some assets.

## **Out of pocket expenses**

Caution should be exercised before incurring expenses prior to a grant. Approval should be sought from the beneficiaries to ensure reimbursement.

An executor should be prepared to incur out of pocket expenses for the benefit of the estate. For example, it may be necessary to immediately insure the estate property before a grant is made.

An executor is entitled to reimbursement of out of pocket expenses so long as they have been properly incurred and that is to be determined in each case on its particular facts. All original receipts should be retained.

## **What are the ethical obligations of the solicitor in accepting an appointment as executor?**

Master Evans of the Supreme Court of Victoria in Re McClung (Deceased) [2006] VSC 209 at par 34 said:

*“The occasion on which a solicitor receives instructions for the preparation of a will for a client by a solicitor can place the solicitor on the horns of a dilemma if the solicitor is asked to act as executor under the will. It is not a position which the solicitors should seek. It is reasonable for the solicitor to preface acceptance with a requirement that the will contain a charging clause in relation to any legal services performed for the estate. To request inclusion of a charging clause so wide as to enable the solicitor to charge for all executorial functions is not reasonable unless the solicitor ensures that the will provides that such charges may be made in lieu of any entitlement to commission and the full import of the clause is explained to the client.”*

1. A solicitor should consider Rule 12 of the Australian Solicitors Conduct Rules, the relevant parts of which state:
  - 12.1. A solicitor must not act for a client where there is a conflict between the duty to serve the best interests of a client and the interests of the solicitor or an associate of the solicitor, except as permitted by this rule.
  - 12.2. A solicitor must not exercise any undue influence intended to dispose the client to benefit the solicitor in excess of the solicitor’s fair remuneration for legal services provided to the client.



...

12.4. A solicitor will not have breached this rule merely by:

12.4.1. drawing a will appointing the solicitor or an associate of the solicitor as executor, provided that the solicitor informs the client in writing before the client signs the will:

- (i) of any entitlement of the solicitor, or the solicitor's law practice or associate to claim executor's commission'
- (ii) of the inclusion in the will of any provision entitling the solicitor, or the solicitor's law practice or associate, to charge legal costs in relation to the administration of the estate; and
- (iii) if the solicitor or the solicitor's law practice or associate has an entitlement to claim commission, that the client could appoint as executor a person who might make no claim for executor's commission.

12.4.2. drawing a will or other instrument under which the solicitor (or the solicitor's law practice or associate) will or may receive a substantial benefit other than any proper entitlement to executor's commission, and proper fees, provided the person instructing the solicitor is either:

- (i) a member of the solicitor's immediate family; or
- (ii) a solicitor or a member of the immediate family of a solicitor who is a partner, employer or employee of the solicitor.

It is best practice to advise the will maker in writing of the provisions of Rule 12.4.1. A signed copy of that letter should be kept as an acknowledgement by the will maker receiving that advice and should be placed with the original will in safe custody.

A sample letter is **attached**.

2. Do not leave substantial sums of money in your trust account, nor for any length of time unless the foregone interest is less than the costs of a further tax return which can be avoided.
3. Solicitor/executors may not charge for preparation of their legal bills.
4. Solicitor/executors cannot charge for their legal research unless the question is something requiring specialist knowledge. A solicitor is appointed to provide legal

services and shortfall in their knowledge is a matter for their professional development and should not be charged to the estate.

### **How is a solicitor/executor remunerated for legal work?**

A solicitor/executor may only charge legal costs for legal work in obtaining a grant of probate and administering an estate if there is a charging clause in the will. If there is no charging clause in the will an application will need to be made for “special commission” as part of the process of passing accounts. Special commission will usually be allowed for payment at professional rates for legal work.

### **Who can have your bill of costs for legal work assessed?**

Section 198 of the *Legal Profession Uniform Rule* provides that “applications for assessment of costs may be made by:

- (a) A client who is paid or is liable to pay them to the law practice;
- (b) A third party payer who has paid or is liable to pay them to the law practice or the client....”

Section 171 of the *Legal Profession Uniform Law* provides that “a person is a third party payer, in relation to a client of a law practice, if the person is not the client and:

- (a) is under a legal obligation to pay all or any part of the legal costs for legal services provided to the client; or
- (b) has already paid all or part of those legal costs under such an obligation....”

The solicitor executor is the client of the law firm and is unlikely to seek an assessment of legal costs. It is the executor, not the beneficiaries that are under an obligation to pay legal costs for legal services provided by the law firm. Beneficiaries do not have a right to have the executor’s legal costs assessed.

The legal expenses to obtain probate and to advise an executor on the administration of the estate is a testamentary expense for which an executor has a claim for indemnity out of the estate assets. However, the amount recoverable from the estate may be moderated (reduced) by the Registrar as part of the process of passing estate accounts.

### **How can a solicitor/executor be paid for carrying out executorial work?**

There are several ways in which an executor might be remunerated for their “pains and troubles” being:

1. The will providing a legacy in favour of the executor in consideration of being the executor;
2. The will indicating the rate of commission on capital and income or the right to charge professional rates for non professional work;
3. The will indicating an entitlement to commission on capital and income according to the same rates to which the NSW Trustee & Guardian or a trustee company is entitled;
4. By agreement with relevant beneficiaries so long as they are sui juris;
5. By the executor making application to the Court for determination of commission at the same time as passing accounts.

The difficulty with specifying the amount of commission in the will in accordance with paragraphs 1, 2 & 3 is that it may bring a solicitor/executor into conflict with Rule 12. The Court generally does not favour charging professional rates for non professional work which should be charged at lower rates.

If there is a charging clause then there must be:

1. Clear evidence to explain the effects of the charging clause; and
2. Clear evidence to show that the testator understood its effect. This may be done by showing worked calculations at the time the will is made based on the estate at that time signed and approved by the will maker as being reasonable.

Further, solicitors/executors should note the following:

1. There is a suggestion that the testator should give express instructions to include a charging clause.
2. There should be a letter of advice which should:
  - (a) Differentiate between professional work and non professional work that they can charge for;
  - (b) Delineate how and what the estate can be charged for, such as the professional fees and disbursements and what other staff members may be involved in assisting in estate management;
  - (c) Identify the current charge out rates, that the rates may increase in the future, and that the charge out rates that apply at the time the administration will be the relevant ones;
  - (d) Explain how it is difficult to estimate the charges to the estate and what factors may affect them such as the behaviour of others such as beneficiaries and unanticipated issues; and
  - (e) Advise the client that they can always appoint someone else who may not charge.

The client should acknowledge the advice received by signing a copy of the letter and giving it to the solicitor to be retained with the original will.

3. The solicitor/executor should not be a witness to the signing of the will as he or she effectively becomes an interested witness. See section 10, *Succession Act 2006*.
4. The solicitor/executor should not draft the will.
5. The solicitor should be reminded that Judges construe charging clauses very narrowly.
6. Even where a solicitor/executor is entitled to charge for their work, work should be delegated to a person with the relevant skill and the charges should reflect this, for example, by charging clerks rates for paying estate bills etc.
7. There should be no double dipping by charging professional rates for executorial work and by also claiming commission.
8. Usually the court will regard itself bound by a charging clause in the will.

Payment of executors' commission is taxable income.

### **Obtaining the informed consent of beneficiaries to commission or charges for executorial work**

This will be necessary if there is no charging clause in the will. Consent cannot be obtained unless all beneficiaries are adult and of sound mind and all agree.

In Walker v D'Alessandro (2010) BSC 15, Justice Forrest set out what he considered to be the bare minimum disclosure requirements of an executor who is also solicitor for the estate in order to obtain an informed consent from the beneficiaries (at 30):

- The work done to justify the commission;
- If the estate is being invoiced for legal fees and disbursements the solicitor ought to identify what constitutes the basis for charging;
  - 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;
- The fact that the beneficiaries are entitled to have the court assess the commission and this needs to be explained fully;
- That it is desirable that the beneficiaries seek independent legal advice as to their position on the issue of consent, particularly as the beneficiaries may be unaware of the complex legal issues. Beneficiaries should be informed that they have a right to get the Court to assess commission but that there is a cost attached. Accordingly, it is in their interests to seek to agree on the amount of commission.

### **What is an appropriate rate of payment for executorial work?**

Lindsay J in Re Estate Gowing; Application for Executor's Commission [2014] NSWSC 247 made the following comments:

- The starting point for consideration of an application for executor’s commission remains that the office of an executor, administrator or trustee is, prima facie, a gratuitous one. The jurisdiction to award executor’s commission under section 86 of the *Probate and Administration Act 1896* requires a preparedness on the part of the Court to move beyond that point and to do so by reference to the particular circumstances of each case (paragraph 44).
- Section 86(1) states: “The Court may allow out of the assets of any deceased person to the deceased person’s executor, administrator, or trustee for the time being, in passing the accounts relating to the estate of the deceased person, such commission or percentage for the executors, administrators or trustees pains and trouble as is just and reasonable, and subject to such notices (if any) as the Court may direct”.
  - The inherent jurisdiction of the Court to allow remuneration to an executor, administrator or trustee is extensive and it could extend to allowing an executor, administrator or trustee to receive a commercial return for services supplied in administration of an estate (paragraphs 74 and 75).
  - However, the Court’s inherent jurisdiction is not routinely exercised to grant a commercial rate of remuneration to the business interests engaged in the administration of a deceased estate (paragraph 76).
  - An executor, administrator or trustee who wants more than a moderate allowance should, in the ordinary case, make a special arrangement (paragraph 80).
  - Section 86(1) should not, ordinarily, be deployed to grant a professional person a commercial rate of remuneration, for professional or executorial work, that he, she or it could, and should have negotiated with the testator, or testatrix at the time a will was made (paragraph 83).
  - If a prospective executor, administrator or trustee of a deceased estate wants to accept an appointment to one of those fiduciary offices as a business proposition, it is incumbent upon that person:
    - (a) to reach an agreement with the testator or testatrix before death;
    - (b) at an appropriate time, to secure the agreement of all interested parties, such as beneficiaries or creditors; or
    - (c) to obtain approval to remuneration (from the Court, exercising probate jurisdiction, or from an appointor under a trust instrument) as a condition of appointment to the office (paragraph 93).

- A prospective executor, administrator or trustee who does not make such a special arrangement, and accepts a fiduciary office that is prima facie a gratuitous one, cannot, in the ordinary course, complain if a discretionary allowance of remuneration out of the estate is at a rate which, although “just and reasonable” for the “pains and trouble” by the fiduciary, is less than a commercial rate, less than what might have been negotiated at an earlier time or less than a perceived entitlement” (paragraph 94).

### The going rates for commission

Justice Lindsay in Gowing states that the traditional approach is to allow a percentage for capital realisations, income collections and assets transferred in specie. However, this must still be governed by the overarching requirement of what is “just and reasonable” for the pains and trouble taken by an executor who applies for commission (paragraphs 45 and 46). His Honour quotes 4 separate authorities for the ranges of percentages normally allowed. This is set out below.

	<u>Capital Realisations</u>	<u>Assets transferred in specie</u>	<u>Income collections</u>
Estate of Joel <sup>1</sup>	0.25% to 2.5%	1% to 2%	1% to 5%
Mason & Handler <sup>2</sup>	0.25% to 2.0%	1% to 2%	2% to 4%
Geddes, Rowland & Studdert <sup>3</sup>	0.25% to 2.5%	0.25 to 1%	1% to 5%
Hastings & Weir <sup>4</sup>	0.75% to 2.5%		1% to 5%

1. In Phillips, Re Estate of Joel [2007] NSWSC 639 per Windeyer J
2. Slattery J in Hawkins v Barclay Brown [2010] NSWSC 48 accepted the rates published in Mason & Handler Succession Law and Practice NSW (Lexis Nexis 1985).
3. R S Geddes, C J Rowland and P Studdert Wills Probate and Administration Law in New South Wales (LBC 1996).
4. Hastings and Weir Probate Law and Practice, 2<sup>nd</sup> Edition (LBC 1948)

Any amount calculated on percentages will be reality checked by looking at the total quantum and considering what is “fair and reasonable” for the executor’s pains and troubles. The larger the estate the lower the percentages.

## Trustee company rates

	<u>Capital Realisations</u>	<u>Assets transferred in specie</u>	<u>Investment</u>
NSW Trustee and Guardian	<p>One-off executor fee – Based on value of assets:</p> <p>Up to \$100,000 – 4.4%</p> <p>From \$100,001 - \$200,000 – 3.85%</p> <p>From \$200,001 - \$300,000 – 2.75%</p> <p>Over \$300,000 – 1.65%</p> <p>Minimum fee of \$220</p> <p>Estate management:</p> <p>0.77% per year on value of assets held</p> <p>Account keeping:</p> <p>\$132 per year</p>	The same as capital realisations	0.11% per year of value of assets invested in NSWTG investment funds
Australian Executor Trustees	<p>Gross value of estate:</p> <p>First \$500,000 – 4% Executor fee</p> <p>Next \$500,000 – 3% Executor fee (Minimum fee \$5000 pa)</p> <p>Over \$1 million – 1%</p>		
Perpetual Trustee	<p>Capital fee:</p> <p>5.50% gross value of assets of estate up to \$1,000,000</p> <p>3.30% gross value of assets of estate over \$1,000,000 up to \$3,000,000</p> <p>2.20% gross value of assets of estate over \$3,000,000 up to \$5,000,000</p> <p>1.65% gross value of assets of estate over \$5,000,000</p>		5.775%

There are some concessions for principal place of residence.

There appears to be no reason based on principle that suggests professional executors such as solicitor ought to charge less than the trustee companies. However, it is unlikely that the Court would allow commission at such a high rate.

Consideration should be given to including the charging clause in the will. Great care must be taken in seeking a balance between obtaining the commercial rate of remuneration and having a rate that may suffer reduction.

### **Reduction of excessive commission**

Section 86A of the *Probate and Administration Act 1898* provides:

*“Where the Court is of the opinion that a commission or amount charged or proposed to be charged in respect of any estate, or any part of any such commission amount is excessive, the Court may, of its own motion, or on the motion of any person interested in the estate, review the commission, amount or part and may on that review, notwithstanding any provision contained in a will authorising the charging of the commission, amount or part, reduce that commission, amount or part.”*

This provision and Rule 12 can act as a brake against solicitors proposing to charge more than a reasonable amount for executor’s commission.

The Court also has the power to moderate the amount of costs to be borne by the estate which could (and regularly does) result in executors paying back to the estate the excess amount.

Conduct such as breaches of trust or duty may impact the amount of commission allowed.

### **Will I be covered by Lawcover?**

Clause 4(a) of the Professional Indemnity Insurance Policy 2018/19 states:

*“We agree to indemnify the insured against civil liability for a claim that:*

*(a) Arises from the provision of legal services by the law practice in Australia or elsewhere;”*

Generally, a solicitor acting in their professional capacity as an executor will be covered by Lawcover. However, this will only be the case in a situation where the executor is appointed in their capacity as a solicitor and the work is being done by the insured law practice. Cover may be declined in circumstances where you have been appointed as a family member and it is only coincidental that you happen to be a solicitor, or where a solicitor has retired from general practice and is no longer covered by a current Lawcover policy.



## Conflicts of interest

Practitioners should be aware of the following areas where their personal interests may conflict with their duty to the beneficiaries:

- In charging the estate for legal work and executorial work there is a clear conflict between maximising your personal gain against the interests of the beneficiaries.
- Even when a charging clause allows the solicitor/executor to be paid for executorial work they should not “double dip” by also claiming commission.
- Executors should not coerce agreement on executor’s commission by using a strategy of delaying proper distributions to the beneficiaries.
- The Court usually awards commission once the bulk of the estate has been distributed unless the funds are held in an ongoing trust.
- Do not give advice to the beneficiaries. Beneficiaries should be advised that the law firm of the solicitor/executor does not act for them and nothing that told to the beneficiaries should be taken as legal advice. They should be informed to get their own independent legal advice.

## Further issues for consideration

Solicitors are officers of the Court and the Court has an inherent jurisdiction over the conduct of solicitors and to moderate their charges.

President Jeune in Goods of Loveday (1900) P 154 at 156 stated:

*“After all, the real object which the Court must always keep in view is the due and proper administration of the estate and the interests of the parties beneficially entitled thereto; and I can see no good reason why the Court should not take fresh action in regard to an estate where it is made clear that its previous grant has turned out abortive or inefficient.”*

The ultimate sanction that a Court could impose on an executor who is not properly performing his or her duties is to revoke the grant of probate. The executor may be ordered to pay costs from their own pocket which cannot be reimbursed from the estate. See Bates v Messner (1967) 67 SR(NSW) 187 and Mavrideros v Mack [1998] NSWCA 286.

## ATTACHMENT 1

Sample - Rule 12 letter

*“Dear*

*I thank you for asking me to be the Executor of your Will.*

*I am obliged under the Solicitors’ Rules to provide you with the following information.*

*The Will drafted by our firm on your instructions includes a charging clause [and provision of entitlement for commission] as follows:*

*INSERT WORDING OF CLAUSE(S)*

*The effect of the clause(s) is that if I, (or someone else from this firm or its successors), am ultimately required to act as Executor, I will be involved in work both of a professional and non professional nature. Professional work consists of work essentially of a legal nature such as advising on the terms of the Will, preparing Court documents (including probate documents) and Court appearances etc. whilst non professional work covers such matters as banking of money received, paying accounts, investing funds and maintaining properties etc.*

*In the light of my intended appointment it is my duty under the Solicitors’ Rules to inform you that:*

- (a) The Will contains a provision entitling me or my firm to charge usual solicitor’s fees for the professional work carried out in the administration of the estate;*
- (b) I am entitled to claim commission for work of a non professional nature carried out by me. That claim, if made, is made to the Supreme Court which will consider affidavit evidence supplied by me and assess what it regards as just and reasonable recompense for my work and involvement; and*
- (c) It is open to you to appoint someone other than me as Executor who, although entitled to make a similar claim, might choose not to do so.*

*Also, we would encourage you to seek independent legal advice in relation to the proposed appointment of me/our firm before finalising your Will.*

*Please do not hesitate to raise any queries in relation to any of the above.*

*Thank you for your instructions.”*