

DANGERS FOR ACCOUNTANTS IN BEING EXECUTOR OF AN ESTATE

LIVE CHAT: QUESTIONS AND ANSWERS

INTRODUCTION

Accountants are increasingly being approached to be named as an executor for their client's future estates.

Whilst often initially considered to be an honour, accountants are increasingly regretting this undertaking when they are confronted with the role of administering the former client's deceased estate.

In this arena of ever increasing litigation, real life claims examples made against accountants include:

- a sole practitioner who was appointed as one of three trustees to a large multi-million dollar estate. Due to a significant conflict between one trustee and the investment portfolio, the trustees were dragged into a significant litigated settlement with the beneficiaries of the estate.
- a second example is an accounting firm, with a long and close relationship with their client, whereby as the executors of the estate they were ultimately accused of overstepping the mark of an executor (if a deceased estate or trustee if a Testamentary Trust) in relation to running the estates ongoing businesses.

In this live chat, our experts addressed questions on such issues as

- your personal liability and exposure
- your responsibility for funeral arrangements
- what to do with testators' family maintenance claims (TFM).

The three biggest questions facing unsuspecting practitioners are:

1. whether your professional indemnity insurance will cover this
2. can you recover your time
3. can you charge for your work?

The experts who addressed members' questions were:

- Ian Raspin FCPA, Director – Estates and Trusts, BNR Partners
- Bryan Mitchell, Managing Director, Mitchells Solicitors
- Drew Fenton CPA, Managing Director, Fenton Green and co.

TOP RISKS

The two main causes of bother for accountants when administering an estate are:

- failing to seek advice
- seeking advice from a non-specialist resulting in flawed advice.

In addition, for non-legally qualified professionals the most costly risk to reputation and hip pocket is:

- drafting wills for clients either directly or indirectly (such as through an online service).

Other risk areas for accountants acting as executors include, but are not limited to:

- misunderstanding what is chargeable and what is not chargeable despite what might appear to be a broad charging clause in the will
- misunderstanding the power of appropriation under the will
- failure to comprehend various conflicts of interest
- misunderstanding that an executor must engage in the due administration of an estate and that the ATO's position on three years has absolutely no relevance to that obligation
- providing benefits to beneficiaries under the will too soon
- failure to search for and identify informal documents that may be regarded as testamentary in nature
- failure to manage risk concerning tax obligations of the deceased and the estate
- misunderstanding the meaning of the will
- failure to identify ambiguity in the will that must be resolved
- failure to treat beneficiaries fairly
- failure to identify a trust or trusts under the will where one or more beneficiaries have a contingent interest
- failure to comprehend one's trustee obligations of any trusts that form under the will
- failure to obtain valuations from a registered valuer prior to the disposal of assets
- succumbing to the demands of beneficiaries and thus failing one's obligations as an executor/trustee.

Disclaimer

The answers given by our presenters are given as a general guide only. Care is taken in providing answers, however, due to the format of the event, it was not possible to provide a complete suite of answers that address all possible circumstances that may exist. We recommend that participants seek individual expert advice to address their specific scenarios.

GENERAL COMMENT ON WILLS

There are some big ideas that must be put forward when talking about the meaning of clauses in a will.

The phrase that lawyers use in relation to the meaning of a will and the clauses in it, is the "construction of the will".

When working out the construction of wills completely different legal principles are used compared to say contracts.

If there is ambiguity in the construction of will, the starting point is to consult with a wills & estates accredited specialist, who may or may not recommend a court application for a judge to construe the will, to declare its meaning. The ambiguity in a will cannot be ignored. It creates a personal risk to the executor.

Another big idea (which is a separate idea) is that sometimes what is written in the will is different to what the will maker asked for. In other words the will drafter sometimes makes mistakes in drafting and subject to the necessary proof of that mistake an application can be made to the court for the will to be rectified.

Returning now to the first idea, the meaning of the will, as per the words in front of us, the construction of the will, the overarching principle is that a will is to be given the meaning so intended by the will maker, and that intention is to be derived by the words used in the will. There are several other common law rules of construction and there are some statutory powers as well.

This is a complex area and none of it is straight forward.

QUESTIONS AND ANSWERS

What are the consequences if I am appointed in the will as Executor, and my client has not previously spoken to me about this?

Any person who is appointed as an Executor under a will can upon the death of the will maker decide not to be an Executor and renounce. No-one named as an Executor in a will can be compelled to take on the role. That is why it is wise for will makers to talk to the people they wish to appoint as Executors under their will to reduce the chance of that person renouncing. Having said that, even if a person to be appointed as Executor under a will has indicated their consent to take on the role prior to the death of the will maker, that person can still renounce after the death of the will maker.

My client died appointing me as the executor. What should I consider before accepting the role?

Before an accountant accepts any engagement as executor of a client's deceased estate, I would advise the accountant to contact their insurance broker as your professional indemnity insurance (PII) policy may not cover you acting in the role as executor so confirm it before accepting the role.

Before deciding whether to accept the role, you should consider your skill set and understanding of what an executor needs to do and is responsible for. This is a very complex and involved appointment which contains personal risk.

If you don't accept the executorial role, you can assist (in your role as the accountant) by providing tax advice to the executor and attending to all outstanding tax matters of the deceased.

As a reminder, appropriate PII is required under CPA Australia's By-Laws for any member providing public, private or honorary accounting services, whether paid or unpaid.

What is the ATO's rights as a creditor?

This used to be covered under Chapter 32 of the Australian Taxation Office's former "Receivables Policy" which has now been archived. Generally, the ATO is treated as a creditor of the estate and the executor must allow for the tax liability before making final distributions from the estate. Otherwise, the executor can be made personally liable for this debt as the ATO is barred from recovering the tax from the beneficiaries. This principal

was established in a high court case DCT v Brown (1958), where the commissioner failed in his attempt to recover tax from the beneficiaries.

The taxpayer has a SMSF with corporate trustee. Should the accountant, as executor, be appointed the director of the SMSF once the taxpayer has died?

The answer to your question depends on a few things. Prior to the death of the member, for the fund to be compliant, the member merely needs to be a director. Are we to assume the member is the sole member?

Sole Member Scenario

If the member is the sole member then, unless thoughtful planning things have been arranged in the constitution of the corporate trustee, there could be some delay prior to someone being appointed to the board of directors (by way of a shareholders meeting) to actually take steps on behalf of the fund.

If the member was domiciled in NSW, then once again without some thoughtful planning concerning the constitution of the corporate trustee, a shareholders meeting cannot take place until the executor has obtained a grant of probate.

Two Member Scenario

If we assume there were two members to the fund and let's assume all of the issued shares of the corporate trustee were owned half by the deceased member and the other half by a living member.

Subject to some thoughtful planning changes to the constitution of the corporate trustee, the surviving member/shareholder does not need to co-operate in a shareholders meeting to appoint the executor of the deceased member. This of course could be a big problem.

How long can a SMSF run for once the member has died if no other members? The SMSF has commercial property to sell to be able to pay out the death benefit to his beneficiaries/estate.

Ian's response

Under Division 307 of the ITAA, the assets need to be sold and benefits paid to the estate or beneficiary by the latest of:

- 6 months of date of death, or
- 3 months after grant of probate or letters of administration, or
- 6 months after cessation of legal actions, or
- 6 months after identifying potential beneficiaries when there is an issue locating beneficiaries.

From 01 July 2012, for the tax exemption to continue in a pension fund on the death of the pension member, the benefits will have to be paid as 'soon as practicable', i.e. 6 months or the trustees will need to demonstrate why it could not pay the death benefit within 6 months. (Income Tax Assessment Amendment (Superannuation Measures No 1) Regulation 2013)

Waiting for the "market to be right" to sell assets or properties may not be a good enough reason to the ATO for the delay in paying the death benefits.

Aside from investment earnings on assets already held by the fund at the date of death, the tax exemption does not apply to amounts that are added to the deceased member's interest after death. E.g. life insurance policies proceeds, anti-detriment payments (being abolished), or self-insurance proceeds.

Bryan's response

There are two issues here.

Issue One: Compliance of the Fund under section 17A SIS Act in relation to who are the trustees/directors of the corporate trustee.

Issue Two: Time limitations in finalising what is to take place concerning the deceased member's benefits.

Issue One:

See subsection 17A(3) of SIS Act:

(3) A superannuation fund does not fail to satisfy the conditions specified in subsection (1) or (2) by reason only that:

(a) a member of the fund has died and the legal personal representative of the member is a trustee of the fund or a director of a body corporate that is the trustee of the fund, in place of the member, during the period:

(i) beginning when the member of the fund died; and

(ii) ending when death benefits commence to be payable in respect of the member of the fund; or

It appears the executor must become the trustee or director within 6 months of death (unless of course the membership entitlement of the deceased member are validly dealt with within 6 months of death).

See sub-section 17A(4) SIS Act:

(4) Subject to subsection (5), if a superannuation fund that is a self managed superannuation fund would, apart from this subsection, cease to be a self managed superannuation fund, it does not so cease until the earlier of the following times:

(a) the time an RSE licensee of the fund is appointed;

(b) 6 months after it would so cease to be a self managed superannuation fund.

Issue Two:

If the trusteeship is not corrected so the fund is compliant, then you will note under subsection 17A(4) there are 6 months within which to deal with the deceased member's entitlements.

However, if the trusteeship is corrected within 6 months of death, there appears to be no time frame given within which the deceased member's benefits must be dealt with.

There of course would be an overarching obligation on the part of the executor who becomes a director to engage in the due administration of the estate.

The BDBN has directed that the benefits be paid to the Estate. There are cash distributions to be paid to various parties to the will who are not dependent upon the deceased. So when should the taxation implications be sorted given the balance of the estate is to be paid to the adult children were not co-dependent upon the deceased?

As the adult children are non-dependents of the deceased, the death benefits received by the estate will be taxed against the executor as though no beneficiary is presently entitled to the income. The maximum amount of tax is capped at either 15% or 30%. Accordingly, in this type of scenario, the adult children would not be required to include the death benefits again in their personal tax return.

If the deceased made clear expressed wishes of how certain matters should be taken care of but did not put these items in the will should the executor take these wishes into consideration when dealing with the estate?

The will is the only source. A will can be made up of more than one document. Documents made by the deceased "after" the formal will could be construed as codicils to that will even though they do not meet the formal requirements of a will. Once again the opinion of a specialist would be necessary.

How do we deal with the conflict of interest between the Executors who is also a beneficiary?

Conflict of interest is not a straight forward idea. The deceased may have consented to the conflict. A legal opinion from a specialist would be required on that point.

I will make a couple of assumptions. I will assume the executor is not engaging in the due administration of the estate, which is the primary obligation of an executor. I will also assume the executor is not engaging in the due administration of the estate because it is to the executor's personal benefit to delay.

If both my assumptions are correct, then one or more of the beneficiaries under the will affected by this can apply to the court for the removal of the executor or executors. Once again, none of this is straight forward and specialist advice would need to be sought.

What are the financial reporting obligations of the Executors towards the beneficiaries during the period of winding up an estate?

An executor must keep and render accounts. The format of those accounts is something a specialist in this area of law should be able to advise on. A beneficiary has legal rights concerning a review of those accounts. This is a very serious obligation and perhaps one of the more pressing reasons why an executor should seek and follow specialist advice not only prior to the administration of an estate, but also during it.

Regarding an inherited estate and the last parent dies. The estate is held under the names of the parents and two daughters but not the son. If the son wants to have his share is there any way he could obtain his portion?

You state that the estate is held under the names of the parents and two daughters but not the son. I have two questions. Firstly, do you know whether the property is held as joint tenants or tenants in common? Secondly, is the property in question in New South Wales or are the parents in New South Wales?

I will make some assumptions to answer your question.

If the property is held as joint tenants and the two parents die, their interest in the property will pass to the daughters by way of survivorship and not form part of the estate of the parents.

This position could only be challenged by the son where the NSW Supreme Court has jurisdiction. If the property is in NSW or if the parents are domiciled in NSW, then and only then would the NSW Supreme Court have jurisdiction. If the NSW Supreme Court does not have jurisdiction then there is little the son can do about assets that do not form part of the estate of the parents. If the NSW Supreme Court has jurisdiction then (and only then) the son could apply to the court upon the death of the parents to have that share of the property that flows to the daughters by way of survivorship designated as Notional Estate for the purpose of a Family Provision Claim.

I have a client who is joint Power of Attorney with her sister where the mum has dementia. When the mother was of sound mind, she wanted her 2 daughters to share 50 / 50 in her estate. Since the dementia was diagnosed one of the sisters has been taking advantage of her mother & took her to a solicitor to change her will.

When she was of sound mind, the mum also provided the 2 girls with a list of jewellery and a split between the two girls which the manipulative sister says means nothing after mum passes away.

My client has asked for details from her sister of any new lawyers & any new documents and the sister who has been manipulating her mother's affairs will not admit to anything.

What happens when the mother passes away and suddenly there are 2 wills the original one that is split 50 / 50 and a second will, which is split say 70 / 30 ...since the mother has close to \$10 million in assets the changes made could affect my client by \$2 million.

What should my client do when her mum passes away to try and secure her real entitlements / share of the estate ?

It is very sad when people take advantage of older people. Unfortunately, protecting people from those who wish to take advantage of them is complicated.

Dementia is a terrible disease which appears to take most people out within a 10 year period. There is an assumption at common law that we each have full legal capacity unless found by a court of competent jurisdiction to be otherwise.

Having said that, "capacity" is a misleading word. In a legal sense the word "capacity" should always have a "to" after it. To put it another way, one can have "capacity to understand where one wishes to live" or "capacity to engage a lawyer" or "capacity to do a will" or say "capacity to execute an Enduring Power of Attorney".

Capacity is task specific and time specific.

The parents may or may not have "capacity to do a will". That is a legal test that only a court of law can determine. Best practice for a lawyer who wishes to practice in this area of law is to take will instructions alone with the clients and to exclude from the room any person who may take under the will directly or indirectly. There is an ethical obligation to prepare wills where cogent instructions are received from clients even where there are concerns regarding "capacity to do a will".

Influencing someone to do a will in a certain way is not undue influence. Undue influence to do a will is a special form of undue influence and is essentially akin to coercion. This is arguably a terrible gap in the law.

There may be scope for the daughter, who is concerned, to make an application for a court made will to settle the matter. Court made wills are available for those who lack capacity to do a will. There are cases (and I have been involved in one) where a court will order a will to overcome financial elder abuse.

This is highly complicated and specialised law and your client should consult with an Accredited Specialist in Wills and Estates sooner rather than later.

I am the executor of a client's estate. My client promised one of his children that he would get the family holiday home. But the parent's Will split the property three ways between the 3 children. The son has been advised by a friend to challenge the Will. To resolve the issue and minimise the legal costs, all parties have entered into a deed of family arrangement that the son will get the property. Can he still access the CGT rollover relief since the property was transferred contrary to the Will?

Division 128 governs the CGT rollover relief provisions. An asset can still pass tax free to a beneficiary in the estate under a deed of arrangement. This is despite the fact that the property is transferred differently to what is in the Will. Please note that the deed must be in place prior to the estate being finalised.

My client is making his Will. He intends to appoint his daughter who resides in the UK to be the executor. Are there issues with this?

An estate is a trust for tax purposes. For Australian tax purposes, a trust is an Australian tax resident if at least one of the trustee or the central management and control is in Australia. If the daughter is the sole executor and is based in the UK making the decisions, the estate will be considered a non-resident trust and taxed as a non-resident without access to the resident tax free threshold of \$18,200.

If a beneficiary is not treated fairly per the will how would the aggrieved beneficiary get recourse?

The beneficiary may enforce his/her rights by court process. There are preliminary steps he/she or a Litigation Guardian can take.

What is an acceptable amount of time for a beneficiary to stay in the deceased house?

I do not see any legal right in the will for a beneficiary to stay to use an asset of the deceased to reside in either rent free or at all. Specialist legal advice should be sought on how to deal with the beneficiary in question and adjustments that may need to be made for unpaid rent.

As an accountant are the same risks present when being named an Executor to a family member's estate?

Yes, an accountant will be exposed to the same risks as a family member acting as an executor. However professionals are held to higher accountability to normal executors, so the risks are greater. It is critical that accountants understand their limits in knowledge and also ensure that their PII cover will cover them acting in this capacity.

If you are appointed an independent Administrator of a clients affairs by VCAT, are there similar obligations to that of being appointed executor ?

Assuming that you are referring to a living person, an administrator has fiduciary roles to manage the affairs of the person they are representing. The role does have similarities to that of acting as an executor / administrator of an estate, but does differ as it is governed by different legislation.

I have been appointed as joint Executor together with a solicitor. The Will states that "If my Executor shall be a solicitor he shall be entitled to retain a commission at the usual rate..." There is no reference to a commission payment to the accountant. Am I also allowed to charge a commission?

No, this is not automatic at all. It is necessary to apply to the court for them to assess at their full discretion.

Is CPA PI insurance cover the risk for accountant acting as an executor?

The CPA Australia PII Scheme taken out through Fenton Green affords cover for executor's duties. We would highlight that other policies in the market may be different and you should review the policy coverage before undertaking activities as an executor.

Is there a fundamental conflict of interest in acting as executor and continuing to provide the tax and accounting services to the client including the estate?

There is a conflict, as you are unable to benefit from a fiduciary role. Moreover, other conflicts could also arise when you are acting as both an executor of a former client's estate and trying to also manage the business /tax interest of a beneficiary of the estate.

Must there be a clause in the Will to allow an Accountant to charge for any Executor services as distinct from Accounting Services?

If the accountant is appointed as the executor it is a conflict of interest to retain the accounting firm to supply accounting services. The appointment of executor is personal. Therefore if the will is silent there is a problem.

If you are the executor (a) for a particular person (b) and that person is the executor for someone else(c), do you then become the executor for person (c) if person (b) dies?

If the will does not have a clause that appoints another executor in such an event, then provided that executor who just died has taken out a grant of probate, the executor of that person by representation can act.

But, it all depends on what is in the will at the end of the day. It would be best to see a specialist for a final answer.

I am a professional accountant in business, and have been asked to become the executor of my mother-in-law estate (in a personal capacity). What (if anything) should I consider in relation to my exposure in a professional capacity?

An executor is a personal appointment. You need to touch base with a specialist wills and estates solicitor prior to acting. There is enormous risk.

Does the assigned lawyer have any responsibility regarding the distribution to beneficiaries that is controlled by the executor?

The assigned lawyer has a duty of care to carry out the legal work you have asked the assigned lawyer to do. As the saying goes, you don't know what you don't know. There is no substitute for specialist advice. See an accredited specialist in Wills and Estates.

Is there any checklist that we can use to help mitigate any problems in being an executor?

There are a lot of risks in acting as executor and personally, although my practice specialises in the taxation of deceased estates, I refuse to act as an executor as frankly my professional expertise and knowledge does not equip me to perform this role. Professionals are held to a higher level than normal executors. I would personally recommend actually referring the work to an accredited wills and estate practitioner, who may very well have such a checklist. I suggest sticking to what you are good at and know and leave the risk of this role to those who specialise in it. As an executor, you can be held personally liable for a number of things such as loss to the beneficiaries and also for outstanding tax obligations post the administration of the estate.

So in a 2 partner firm, if one is appointed executor of the client's estate and that client also has a SMSF, if the other partner still deals with the administration side of things for the SMSF, I gather that is OK then to still be able to charge for the "usual stuff" that we would have had to do, had the client not died?

Yes, it is. The SMSF is separate taxpayer and legal entity to the estate. In fact, the SMSF and member balance may not form part of the estate.

What is the process for a new executor to be appointed if an accountant was originally "elected" and renounces this position?

The will dictates if there is an appointment in substitution of this person. If there is no appointment in substitution of this person then those entitled to seek Letters of Administration will attached will need to apply to the court. An accredited specialist in wills & estates should be able to give guidance.

How long do executors need to retain the records of the deceased for? If there is unlimited time for challenging a will?

There is a saying "once an executor always an executor". If you take on the role then you are forever an executor. You should keep the records for as long as you live and perhaps even for the benefit of your estate as any liability against you will attach to your estate too.

There are many remedies against an executor for which there are no time limitations.

Further to your response to John's question concerning potential liability of executors for the taxation liabilities of the deceased if inadequate provision is made prior to distributions, what is the situation where adequate provision is made and known taxation debts are settled, the estate is finalised, but the ATO subsequently issues an amended assessment?

We have seen this occur. The executor still wears the risk and personal responsibility for this tax obligation. Applications can be made to try and obtain some relief, but they are generally not forthcoming. Essentially the executors should have anticipated the tax obligations. We see a number of assessment notices that are incorrect, particularly from super death proceeds. I would strongly recommend double checking all assessment notices

Is it the same with a Testamentary Trust - the trustee should not supply accounting services?

Yes, a trustee of any trust is a fiduciary. A fiduciary must not (and the relative of fiduciary must not) benefit from such a role.

Could you clarify the term present entitlement for assessable income for tax purposes between the estate and the beneficiaries?

When it comes to present entitlement deceased estates differ to that of inter vivos trusts (discretionary trusts). The commissioner sets out his position in relation to this in Taxation Ruling IT2622. This is based on the High Court finding in *FCT v Whiting* (1943). It is also worth noting IT2622 position in relation to the final year of estate administration, as it effectively permits you to split the income between the estate and that of the beneficiaries where certain conditions are met.

If there is a challenge to a Will. Are all the legal fees paid by the Deceased Estate?

There is no straight forward answer to this question. The involvement in the litigation by the executor must be reasonable. The conduct of the executor must be reasonable. The legal fees must be reasonable. And there are many other contingencies. The estate is not a blank cheque. There are enormous risks to executors being involved in litigation, which is not sanctioned by the court. The only way to get some measure of comfort is to seek advice from accredited specialist in wills and estates.

If you are aware that your client has appointed you as an executor but you don't want to actually take on the risks, (which this live chat has indicated are very high), can you wait until the client dies and then refuse to be executor and then appoint a specialist estate lawyer. Or is there a duty to advise the client that you do not intend to accept the role due to the risks?

There is no duty to tell the client now that you will renounce when they die and there is no ethical duty to do so. It would be polite to do so as that may affect how they draft their will and ultimately save a great deal of time and money. Unless the will provides for a back up appointment of executor, there may not be one.

If an accountant is appointed Executor and then seeks the assistance of a solicitor in the administration of an Estate, is he automatically entitled to have the Estate pay these legal costs or does some special provision need to be added to the Will to allow this claim?

An executor is entitled to seek legal advice and follow it. The cost of that legal advice must be reasonable. It is the executor who retains the lawyer and is liable to pay the lawyer. Separate to that the executor has a right of indemnity from the estate. That right of indemnity is not unlimited. The legal fees must be reasonable.

What I interpret from your previous responses is that any accountant (regardless of whether he/she is a business owner or mere employee) has to have PI insurance if they are appointed as an executor to an estate. And there are additional problems if they are also likely to be a beneficiary of the estate (practical situation - parents appoint their kids to administer their estate, and one is an accountant). It isn't only clients who may appoint their accountant. Can you please clarify?

In this case, the roles are really different roles if you are acting as an executor to say your parent's estate, and not as an executor of a client. I would still suggest, however, that if you were acting as an executor for your parents,

that it would be appropriate to seek legal advice on your role and responsibilities. Particularly if you are not the sole beneficiary, as again if the other beneficiaries suffer loss because you failed to act in a certain manner, than you could still be held to account at a higher standard.

It is also worth noting that there is usually an exclusion within professional indemnity insurance policies relating to undertaking work for family members.

Is it possible to claim that no beneficiary is presently entitled to income of the deceased estate in the same year that you have commenced to distribute assets? i.e. can you distribute assets but not income? It is within three years of death.

Most Trustee companies have the practice of maintaining a separate income and capital accounts in part for this reason. If a distribution can be clearly shown as being made from capital then this is different to a payment of say income, and accordingly the income will still be assessed within the estate. I understand that there is also a principal at law, that where an asset is transferred, any income from that asset is to also be enjoyed by the beneficiary of that asset, and accordingly could end up being assessed to that beneficiary.

What responsibility do executors have to inform each beneficiary of the contents of the will and what each beneficiary will receive? What if some family members expecting to be beneficiaries are not named in the will? Do the executors need to provide them the will?

A beneficiary of an estate may request and must receive a copy of the will. A beneficiary has right to request and receive a full accounting at any point in time along the administration process.

Each state provides for statutory rights as to who may ask for and receive a copy of the will. You will need to seek advice from an accredited specialist in wills and estates. There could be some strategy in what you do.

What do you do if you are an accountant and do not realise until after the death of your father that you have been named in the will as one of three executors of your father's estate?

With the benefit of specialist legal advice you decide whether you will act or renounce.

In the dark dim past you were able to get a ATO "clearance" in respect of a deceased estate, this procedure appears not to be available. Is this Correct?

Yes, that is correct. This was withdrawn in April 2011 when the ATO withdrew Chapter 32 of its Receivables Policy. Since this date, there has been an ever increasing uncertainty as to the executors personal liability post the admin of the estate.

I have acted as a Joint Executor of my client's estate and faced many problems, especially as the other Executor lived in another city. Is it always preferable to have a Sole Executor?

The tyranny of distance should always be considered in appointed executors who must act unanimously. There is no straight forward answer to this. There are advantages and disadvantages in having one executor or more than one executor.

If a client comes in with a letter from the ATO detailing outstanding tax return lodgments and this has never been dealt with by the solicitors who administered the estate, and there was no Will, then who is responsible for payment of the outstanding tax debts on lodgment?

If there was no will, then it is normal for Letters of Administration to be applied for which would provide the authority to administer the estate (otherwise known as dying intestate). However, if the solicitors acted to administer the estate, the responsibility then lies with them. They may try and subsequently claw this back from the beneficiaries, but this is not easy, particularly if no indemnity was put in place prior to distribution.

Can the conflicts of interest reduce if the accountant is only a joint executor? Conflicts such as use of the accounting firm to provide tax and or accounting advice?

No, the role is one of a joint and several nature.

What can you do where you believe a will has been changed where a person has been subject to elder abuse?

Elder Abuse is a broad term. There may or may not be something that can be done. You would need to seek advice from an accredited specialist who is also expert in Elder Law. The dodgy will may be the tip of the iceberg concerning abuse.

CPA Australia provides resources for members on the [financial abuse of older people](#), which may also be of use.

Can you please elaborate a little more on the executor's "right of indemnity" from the estate?

We must remember that an estate is not a separate legal entity. The legal face of estate is the executor. So it is the executor who pays all the bills of the estate etc., with a right of indemnity from the estate. However, the executor must act reasonably and there are risks that an executor does not act reasonably and does not get the benefit of a full indemnity. It is best to seek advice from an accredited specialist in wills and estates.

If the will does not specify that the executor can be compensated, can the director of a professional accounting firm charge for their time in deal with the estate matters?

The appointment as an executor is personal to the person appointed. The starting point is that person cannot charge but may, at the discretion of the court, be entitled to a commission. Unless the will specifies the retaining of that person's accounting firm, that would be a breach of the role.

I have been appointed as executor and trustee of a will by a client. The will specifically states that I am entitled to be paid for work done by me or my firm on the same basis as if I was not an executor but was employed to act on behalf of the executor. Am I still entitled to charge for estate work performed?

Much depends on the wording of the clause. You would need to be very careful about charging \$300 per hour for assisting in cleaning out the house or other non skilled work. None of this is straight forward. You should seek advice from an accredited specialist in wills and estates before you start charging.

What possible additional personal exposures do you have if you have become an executor of a bankrupt estate?

You could be personally liable. There are certain assets that do not form part of the bankrupt estate. It may be the case that there should be an appointment of a trustee in bankruptcy. You would continue to hold the protected assets. This is a very technical and highly risky area of law and you should seek advice from an accredited specialist.

RESOURCES

The following material is freely available:

- [Estate planning – trustee risks](#)
- [Common estate planning mistakes: blog](#)
- For more estate blogs go to <http://www.mitchellsol.com.au/news>
- [Specialising in estates and trusts: YouTube video](#)
- [How accountants can help identify financial abuse of older people and how to respond](#)

CONTACT

E: livechats@cpaustralia.com.au

Copyright © CPA Australia Ltd (“CPA Australia”) (ABN 64 008 392 452) 2016.

DISCLAIMER: CPA Australia Ltd has used reasonable care and skill in compiling the content of this material. However, CPA Australia Ltd makes no warranty as to the accuracy or completeness of any information in these materials. The above material is only general in nature and not intended to be specific to the reader’s circumstances. Further, as laws change frequently, all practitioners, readers, viewers and users are advised to undertake their own research or to seek professional advice before making any decisions or relying on the information provided.