

Executor's commission

From privilege to pains and trouble

“You are not obliged to accept the role of personal representative”¹ is advice I typically give my personal representative (PR) clients.

Often their response is confusion as they seek to reconcile that advice with their own sense of responsibility. On the one hand they consider the appointment a privilege, on the other they know it is a heavy responsibility which will impact their daily life.

Generally, their sense of duty to the deceased, family and friends prevails and they accept the role. Nevertheless, these days most estates carry a level of complexity not experienced by previous generations. That complexity can and does cause significant disruption to the lives of the PR.

From managing complex assets in multiple jurisdictions, to family relationships peppered with bitterness and conflict, to the prospect of litigation at every turn, in many cases actual litigation, the position of a PR is not merely time-consuming, it is a heavy burden, fraught with personal distress and great risk. It is therefore not surprising there is an increase in PRs seeking commission for their pains and trouble in the administration of an estate.

In last month's *Proctor* I wrote about Chapter 15, Part 10 of the *Uniform Civil Procedure Rules 1999* (Qld) (UCPR)² in the context of estate administration disputes and the passing and filing of accounts. This month I address the second portion of Part 10 – the law and process of applying for commission.

The law – entitlement to claim

Section 68 *Succession Act 1981* (Qld) gives power to the Supreme Court to authorise the payment of commission. Although s68 is couched in discretionary terms, there is clear case authority that PRs are entitled to the payment of commission when they have discharged their obligations and responsibilities in the administration of an estate and/or trust.³

The award of commission is usually made with reference to the size of the estate and the 'pains and trouble' incurred in the estate administration by the executors; 'pains' applying to the responsibility and consequent worry undertaken, and 'trouble' covering the work done.⁴

Application for commission

An application to the court for an order that commission be assessed and paid is complex and expensive. For this reason, the court recognises and encourages agreements between PRs and beneficiaries to save the costs and time of making such an application. An application can be avoided if all beneficiaries are of full age and provide their consent to the amount paid.

Where no agreement can be reached, or the beneficiaries are unable to consent because they are minors, or they lack capacity and their attorney does not consent, it may be necessary to make an application to the court under Part 10. The mechanics of the application process are set out in rules 657C to 657F UCPR.

Rule 657C identifies the right of a trustee⁵ of an estate to make an application for commission. It itemises the information that must be deposed to in an affidavit and filed in support of the application.

Rule 657E outlines the matters that the court may take into account, which includes any estate account assessment.

Many practitioners would be aware that it is customary for the courts to allow commission as a percentage of entries in the estate accounts. However, application of a percentage rate does not govern the performance of the task when assessing the quantum of executors' commission – it simply provides guidance. On this point, the New South Wales Supreme Court recently said:⁶

“To focus unduly on the application of percentage rates that might be perceived to be those that have been, or should be, 'ordinarily' or 'usually' applied is an invitation to error. They can be a useful guide to decision making, and their utility is not to be discounted because of a need to adapt them to the facts of the particular case, but they are no more than a guide...”

“...If and to the extent that reference is made to 'ordinary' or 'usual' rates, as a compendious way of referring to accumulated experience, care needs to be taken to place that reference in the context of a determination of what is 'just and equitable' for the executor's 'pains and trouble'. Whatever intermediate calculations are made by reference to the categories, an assessment of remuneration that is 'just

and reasonable' requires the ultimate, resultant dollar amount to be weighed in the balance...

“...The concept of a 'just and reasonable allowance' likewise counsels caution against an application of standards of reasonableness that might be applied in other areas of law, such as on a quantum meruit claim (a claim of right) at common law. In the application of the court's probate and equitable jurisdiction, discretionary in character, regard must be had to a range of factors (including the summary nature of the jurisdiction, the size and nature of the deceased's estate, the terms of any will and the rights of beneficiaries) rather than taking refuge in standard rates of remuneration that may guide a common law claim in contract or restitution.”

The task remains one of assessment of an allowance for the “pains and trouble” taken by a PR who applies for commission. Essentially, the court will place a value on the pains and trouble of the PR by considering the facts of each particular case, the work done by the PR, and what is a reasonable allowance for that work with reference to the estate accounts.

For these reasons, quantification of an allowance for commission is notoriously difficult. Accordingly, while not necessary a court may under r657D require the applicant to pass and file estate accounts⁷ before determining commission.

Planning

There is an old adage: Those who fail to plan, plan to fail. To that end, if commission is granted, either by the court or by agreement, it is important to advise PRs from the outset to seek independent financial advice about the prospect of receiving commission, as it is typically treated as taxable income in the hands of the PR.⁸

If the PR is in receipt of a government benefit, the benefit may be affected. Alternatively, if the PR is a high-income individual, the award of commission may affect their taxation rate. Note also that s114 of the *Trusts Act 1973* (Qld) provides that executor's commission is deemed to be a testamentary expense.



with Christine Smyth

For these reasons, but more particularly for ensuring evidence gathering to support r657E factors, practitioners are recommended to advise their PR clients about commission at the outset. That way their client may properly plan whether they will seek commission. Conversely, if you are acting for beneficiaries, advising them of the prospect of commission can equally prepare and forearm them for the process.

Christine Smyth is a former President of Queensland Law Society, a QLS Accredited Specialist (succession law) – Qld, and Consultant at Robbins Watson Solicitors. She is an Executive Committee member of the Law Council Australia – Legal Practice Section, Court-Appointed Estate Account Assessor, member of the QLS Specialist Accreditation Board, Proctor Editorial Committee, QLS Succession Law Committee and STEP, and an Associate Member of the Tax Institute.

Notes

- ¹ 'Personal representative' is defined in *Acts Interpretation Act 1954* – Schedule 1: "[P]ersonal representative of a deceased individual means the executor (whether original or by representation) or administrator of the individual's estate." See also s5 *Succession Act 1981* (Qld) where it is defined to mean "the executor, original or by representation, or administrator of a deceased person".
- ² Referred to in this article as Part 10.
- ³ RS Geddes, CJ Rowland and P Studdert, *Will, Probate and Administration Law in New South Wales* (1996) [86.02]; see also *Re Lack* [1983] 2 Qd R 613, 614 (McPherson J); and Section 101 of the *Trusts Act 1973* (Qld), which provides that the court may authorise a person to charge remuneration for their personal services in carrying out their trustee's duties.
- ⁴ *In Re Allan McLean (Deceased)* [1911] 31 NZLR 139 at 144; *Luck v Fogaerty* (Unreported, Supreme Court of Tasmania, Zeeman J, 22 March, 1996) 2; *Re Gowling: Application for Executor's Commission* [2014] NSWSC 247 at para 77.
- ⁵ See r644, which sets out certain definitions particular to this part. There, 'trustee' includes a personal representative of a deceased individual.
- ⁶ *Re Estate Gowling: Application for Executor's Commission* [2014] NSWSC 247 at paragraphs 54, 61 and 62.
- ⁷ Refer to the April 2019 edition of *Proctor* (pp38-39) for guidance on the process of filing and passing estate accounts.
- ⁸ See Australian Taxation Office interpretive decision 2014/44.

DGT Costs Lawyers

Shedding light on legal costs for 30 years

General
costing
services

Costs
Assessment

Mediation
services

Kerrie Rosati and Leanne Francis are our court appointed costs assessors and are available to assess costs in all types of disputes including solicitor/client assessments and complex litigation matters.

www.dgt.com.au costing@dgt.com.au
Sydney: (02) 9977 9200 | Brisbane: (07) 3834 3359 | Canberra: (02) 6248 8077



DGT Costs
Lawyers