Estate planning

The role of executors and trustees

Key points

- An executor does not have to accept an appointment as an executor, administrator or trustee
- Executors have certain duties and liabilities and, if they breach those duties, they may be held personally liable
- An executor can be reimbursed for expenses properly incurred in administering the estate

Does the executor have to accept an appointment?

1. An executor does not have to accept a nomination to act as an executor, administrator or trustee. Any person who is nominated as an executor, administrator or trustee can renounce the role if they have not already participated in the estate administration, in which case, it will pass to another person.

2. If the executor chooses to accept the role, there are duties and liabilities that will attach to it.

3. In this document, any reference to a 'trustee' includes someone acting as executor or administrator.

What legislation governs the affairs of a trustee and executor?

4. The duties of trustees and executors are set out in these Acts (in Queensland):

   (a) *Trusts Act 1973* (Qld)

   (b) *Trusts (Investments) Amendment Act 1999* (Qld)

   (c) *Succession Act 1981* (Qld)

What are the duties and liabilities of trustees?

5. The overarching duty of trustees and executors is to preserve and maximise the trust or estate property for the beneficiaries. In their role, they must act in good faith and in accordance with the terms of the trust deed or Will of the deceased and any relevant legislation.

6. Importantly, a trustee or executor who breaches their duties may be personally liable for any loss to the beneficiaries of the trust that is caused by their actions.

Assumed roles of responsibility

7. While administering a deceased estate, an executor or administrator may be required to take on roles that expose them to liability, such as being a director of a company in which the deceased held shares or as a partner in a business partnership.

8. When the executor or administrator takes on these roles, they may also become personally liable for:

   (a) any liabilities that the deceased had attaching to these roles

   (b) any losses to the businesses run by the company or partnership.

9. However, existing liabilities that relate to specific assets are usually limited to recovery only against those assets.

10. If a trustee thinks they are likely to be involved in running businesses or become a partner in a partnership with some potential for liability, we suggest they obtain more specific advice about the issues in their case before proceeding.

Duty to preserve and maximise trust property

11. A trustee has an obligation to preserve and maximise trust property for the beneficiaries by investing it, where appropriate.

12. The trustee must act with care and diligence when making and managing investments and should take a cautious investment approach.

13. However, under the relevant law a trustee may invest the trust funds in any form of investment they consider appropriate, unless expressly forbidden by the trust deed or Will.

14. The relevant law in Queensland requires a trustee to consider certain things when making investment decisions, such as the:
    (a) purposes of the trust and the needs and circumstances of the beneficiaries
    (b) desirability of diversifying trust investments
    (c) nature of and risk associated with existing trust investments and other trust property
    (d) risk of capital loss or depreciation
    (e) potential for capital appreciation.

15. A trustee must also get advice from a qualified independent financial adviser each year and consult with an accountant and legal adviser in relation to these issues on a regular basis.

Duty to insure trust property

16. A trustee has a duty to insure certain trust property, especially where it is very valuable or is at significant risk of damage.

17. For example, if the trust owns a motor vehicle or property, these items should be insured for their full replacement value to cover events such as accident, theft, fire and flood.

18. If the trustee does not take out adequate insurance on particular trust property and it is lost or damaged, the trustee may be liable to reimburse the trust up to the replacement value of the property.

Duty to act in good faith and to follow the trust deed or Will

19. A trustee must always act in the best interests of the beneficiaries and should not deal with the trust property for their own benefit, or otherwise profit from the trust.

20. A trustee must adhere to and carry out the terms of the trust deed or Will, unless they have approval from the court to do otherwise.

Duty to keep accounts and supply information

21. A trustee must keep proper accounts and keep the beneficiaries informed.

22. Generally, the trustee will engage accountants to prepare the accounts and tax returns.

Duty to consider and act impartially between beneficiaries

23. The trustee must exercise their powers and discretions in good faith with a proper regard to their duties.

24. If a trustee has the power to exercise a discretion, they should consider it carefully. However, they are not generally required to give reasons for their decisions. Extreme care should be taken if reasons are given as it can expose the decision to scrutiny.

25. A trustee must act impartially between beneficiaries, particularly in matters concerning the distribution of the income and capital of the trust, unless otherwise authorised by the trust.

Duty in relation to early distributions

26. An executor or administrator of a deceased estate should not distribute any estate assets before the expiry of six months after the death of the deceased person. If an executor or administrator distributes assets

within six months of the date of death, they may be personally liable to reimburse the estate up to the value of the distributed assets.

27. This is because in Queensland, a deceased person's spouse, child or dependent has six months from the date of death to give notice to the executors of their intention to challenge a Will.

28. If an executor or administrator receives notice that a person intends to challenge the Will, they should not distribute any estate assets before the expiry of nine months after the death of the deceased person. This is because in Queensland, a person has nine months from the date of death to file an application in the court to challenge a Will. Again, if an executor or administration distributes assets within nine months of the date of death having received notice of an intention to make a claim, they may be personally liable to reimburse the estate up to the value of the distributed assets.

29. If an application to challenge a Will is filed in court, an executor or administrator must not distribute any estate assets until the court proceedings are finalised and if they do so, they again may be personally liable to reimburse the estate up to the value of the distributed assets.

What are the powers and rights of a trustee?

Powers

30. A trustee's powers are found in the trust document or Will and the law. A trustee can also be granted powers by a court. A trustee cannot delegate their powers unless they are authorised to do so and must act personally. If there is more than one trustee appointed, they must act unanimously.

Rights

31. A trustee is entitled to be reimbursed for trust expenses that they properly incur in administering the trust or estate.

32. Professional trustees and executors/administrators are able to charge fees for their services if the trust deed or the Will allows it. Otherwise, trustees and executors are not generally entitled to a fee for their services.

33. Executors and administrators of a deceased estate can charge commission in some circumstances.

34. If a trustee is in doubt about their powers or duties, they have a right to seek the opinion, advice and direction of the court. Provided the trustee puts all relevant information before the court when making that request, they will be protected if they act in accordance with the court's decision.