ACCOUNTANTS AND ESTATE WORK

LIVE CHAT: QUESTIONS AND ANSWERS

INTRODUCTION

It takes a quick thinking and time-rich person to properly discharge all the obligations of being an executor.

Accountants are often tasked to fill this role but it comes with risks. Shortcomings, shortfalls, missed payments, incorrect distributions or innocent mistakes may become a personal liability of the executor.

A recent live chat provided members with an opportunity to ask questions about the boundaries between the advice an accountant may provide and when to seek professional advice from an estate specialist as well as the key issues accountants need to consider before accepting an executorship role:

- will contents and the deceased's family
- time commitment
- remuneration
- opportunity costs
- professional skills
- risk threshold.

The experts were:

- Ian Raspin FCPA, Director of Estates and Trusts at BNR Partners
- Katerina Peiros, Accredited Specialist in Wills and Estates (VIC), founder of Hartwell Legal.

RESOURCES

- Accountants as executors: Does it add up?
- It's your funeral – the (frequently thankless) role of the executor

- Say no to being an executor and still keep the client
- Wills and estates

QUESTIONS AND ANSWERS

What kinds of advice can accountants provide? Can accountants help prepare clients' wills?

Accountants cannot provide legal advice. Preparation or advice on any of wills, powers of attorney, agreements, death benefit nominations, probate, property transfers, etc. is unequivocally legal advice.

Undertaking such work not only exposes the accountant to professional risk (query whether the professional indemnity insurance will cover it), but also is an offence in each State and Territory.

For example, in Victoria and NSW, the Legal Profession Uniform Law section 10 says that engaging in legal practice (i.e. advice, preparation of documents, representation in court, etc.) is punishable by a fine of approx. $40,000 or imprisonment of 2 years or both.

Is preparing standard pension forms with reversionary details appropriate for accountants to perform or does that stray into the area of legal work? The same question applies to preparing standard binding death benefit nomination forms and any standard super nomination form for that matter. This is in relation to the new rules and the need to roll back to accumulation to receive reversionary benefit.

In our view, preparation of pension forms and nominations is legal advice and should not be undertaken by accountants.

The reason it is legal advice is that any such document is not merely a standard form, it has to be prepared carefully complementing the terms of the trust deed, otherwise it can be invalid.

Although the deed may provide the form, the words used in the form and how the form is signed are very important. For example, if nominating the estate as the beneficiary on a nomination, does the deed require the use of the words 'legal personal representative' or 'my executor' or 'my estate'? are these terms defined? To make a valid nomination, the correct term, as required by the deed, must be used.

This is only a basic example, but it can have dire consequences (and did in Munro & Anor v Munro & Anor [2015] QSC 61).

Katerina currently has a file which is the subject of a complaint at the Superannuation Complaints Tribunal - the retail superfund has determined the nomination prepared by an accountant is invalid, because the nomination has an unattested correction on it. The witness to the nomination corrected the date of execution from '14/02/3016' to '14/02/2016' by simply writing over the '3'. Despite the fact that there is no ambiguity about the date the nomination was signed, the superfund has said that both witnesses and the member should have initialed the change and as they hadn't, there is no certainty they were all present at the time of signing. The accountant who prepared, witnessed and submitted the nomination did not read the fine print and is not familiar with the rules of execution of important legal documents.

Question arises whether the accountant's indemnity insurance will cover this mistake if Katerina cannot get the Tribunal to see her point of view.

It is an offence to provide legal advice without having the qualifications of a lawyer.

These 'standard' forms are deceptively simple and are a trap for the unheeding accountant.

A common question asked is if an accountant is appointed as an executor, how can he/she ensure they get paid for their work and the work their firm undertakes?

There are only three ways that an executor can be remunerated for their time:

1. The Will must provide the charging clause. It must be specific, is the entitlement to be paid based on hourly rate, commission or some other basis? This clause should be prepared in consultation with the accountant, so the accountant is treated fairly/commercially and can set their own terms of engagement.

   If charging on a time basis, the clause should set out whether the executor is only entitled to charge for their professional time or for all of their time, and whether they may engage their firm to assist with the work.

2. By agreement of residuary beneficiaries.

   If there is no charging clause, but all the beneficiaries who are entitled to a share of the residue agree, then the executor may be paid.

   The beneficiaries must be adults and of full capacity. They must give fully informed consent, in other words, the executor must give full disclosure of what he seeks to be paid for and why. The beneficiaries must also be notified of their right not to agree to the payment.

3. By order of the court.

   Again, if there is no charging clause, the executor may apply to the court to be remunerated for their time. The executor must submit detailed affidavits setting out the time and effort they have invested and why they deserve to be paid.

   Essentially, they must show why a payment is in order, when the Willmaker did not include a charging clause (i.e. presumption that the Willmaker didn't want the executor to be paid).

   Clearly, the most efficient, peaceful and proper way is for the will to have a detailed charging clause, as it sets out not only the Willmaker's wishes but also the agreement with the executor.

Another common question is who are executors accountable to and what should the accounting look like?

The executors are accountable to the beneficiaries in the first instance. They are accountable for all decisions, payments and receipts.

If the attention of the court is drawn to the conduct of an executor, the court also has an inherent jurisdiction to inspect and intervene.

The court also has power to direct an executor to do something or refrain from doing something, remove the executor altogether and to order the executor to compensate the estate.

Proper accounting to which beneficiaries are entitled should include all of the following:

- dates of transactions
- detailed descriptions of transactions
- all payments and receipts
- all distributions
- all tax calculations
- details of assets sold or transferred and why – e.g. ' 1 May 2016 transfer of 300 BHP shares to Jane Smith pursuant to clause 5 of the will'
- explanations of loans forgiven or transferred

- what is still held in the estate.

The probate and administration rules in all States and Territories set out the format that the courts expect the accounting to be in. It is a good idea to use that format from the beginning in case the accounts do get reviewed by the courts. It is also a format that lawyers are familiar with, so it will be easier for the lawyers to provide advice.

If the executor is an accountant, is he/she held to a different standard of performance? Does being a professional and charging for acting in the role affect their obligations?

Professionals who act as executors are held to a higher standard of conduct than a lay person, especially professionals who charge for their time. This means that a lay person may be off the hook for poor record keeping or forgetting to sell the shares at the price spike, but an accountant executor will not be forgiven so easily.

The reasoning for this is simple, the Willmaker appointed the accountant because of the special skills the accountant possesses, and these special skills raise the bar on the standard of performance, care and service.

If the standard is not maintained, the liability may be personal, and the executor may not be entitled to an indemnity from the estate. The courts are more likely to hold a professional accountant liable, then a family member or friend.

Is there a role for accountants in estate planning and are they required to be RG 146 compliant?

I suggest there is a big role for accountants in assisting in estate planning, we are often the best equipped to understand a client's structures and know the history of the structure and relationships. This is critical information for successful estate planning. It should, however, also involve a legal practitioner and team approach. I am not sure that estate planning falls under RG 146, but do know that financial planners are also restricted from preparing Wills etc. but are often very proactive in gathering preliminary intel for lawyers.

I act as the executor of my client's estate. The estate holds $120,000 Twenty Century Fox shares. The solicitor advised me that there may be US tax implications but the broker who undertook the sale never mentioned it. My client is an Australian resident and never lived in the US. Who is right?

Unfortunately, many Australians have been unknowingly caught in the US estate tax rules when they owned News Corp shares prior to News Corp relocation to US and have held onto them till death. There is a requirement to lodge Form 706-NA within 9 months after date of death if the value of US assets exceeds USD60,000. The assets also include shares of other US companies. Lodgement of the form does not necessary mean there is US death duties to pay but there is a requirement to lodge. Professional US tax advice need to be sought.

In relation to assembling a list of assets and liabilities for the probate application, when should formal or expert valuation be sought? It can be difficult to know the value of an item, particularly antique or personal jewellery.

The rules require the inventory to be as accurate as possible to the best of the executor's/administrator's knowledge. So the executor/administrator must make best effort, but it doesn't need to be perfect.

It is often costly to have antiques and jewellery valued, so the inventory usually contains an estimate, such as 'valued by Executor at'. The probate registries accept that.

Of course, for distribution purposes or if there is a dispute about the estate division, proper valuations must be agreed on or obtained.

A few clients have asked me to be the executor of their wills as they do not trust their children to take care of this in a fair and equitable manner or their children do not have the skills. I know this is a time consuming task. Should I consider it and if so, what are the main issues that I need to be aware of before making a decision?

By all means consider the appointment, but there are a number of issues you should take into account in your decision. Firstly, and very importantly, are you covered by PI insurance (not all policies will cover this sort of work). Secondly, do you have the required skills and experience necessary to perform the task. Professionals are held to a higher accountability than non-professionals. Are you prepared to be the middleman in a family dispute? And you are correct, there is a significant time commitment that is often difficult to recover. Please consider what you would need to be paid for your role in order to make it worth your while. This charging clause should be included in the Will.

Are there any specific CPA studies or requirements to consider before accepting an executor role?

See the response above. There are no specific CPA studies, however, you will be held to higher accountability as a professional. Ensure you have the right skills and experience, not to mention insurance cover. I speak regularly at a number of succession law conferences, last year it was really interesting to see that at three of these conferences that there were presentations to the lawyers (many accredited estate specialists) about why they should not act as an executor. The risks are very high, and I think the fact that this is being suggested to lawyers who have training in this field, speaks volumes.

Lots of clients are drafting wills and are appointing up to three people to be the executors, either family and/or friends, financial planners and accountants. Should we as accountants not accept to be the executor and only be appointed as the accountant to use for preparing the accounts for testamentary trusts and assist/advise how the earning should be distributed in a tax effective manner?

Basically, being an executor is extremely time consuming and will affect your professional and personal life.

It is also very risky professionally, as there are many pitfalls for executors.

Our articles (listed on pages 1-2 of this transcript) suggest how to retain the client currently and engage with the estate without taking on the role of executor.

For example, the Will can nominate you as the accountant for the estate or direct the executors to seek your advice or for you to have veto decision making on certain issues or to be a deadlock resolver between the other executors.

As a member in public practice, is there a potential problem for me acting as an executor for an estate and my role, for example, acting as a director for a client's company (and unconnected to the estate)? If I were caught up in a legal action as a director, is it possible that my role as an executor may place the assets of the estate at risk?

As executor, you are responsible for the estate assets. If the estate has a debt, it is paid from the estate, not from another pocket.

So estate debts are limited to what is in the estate.

An executor can only become personally liable if they are dishonest or negligent or fraudulent. This will be a personal liability, it would not expose the assets of another client for whom you act as executor/director/attorney, etc.

Similarly, your personal wealth held in SMSF or family trust should be safe in such situations.

You may, however, become personally exposed to liability should you, for example, fail to provide for income tax from the estate and have distributed the corpus of the estate. Refer to section 2564(1)(e) of the ITAA (1936), which provides the trustees personal liability for income tax.

What advice do you give to a client who has been asked to be an executor, and has little idea of their responsibilities?

They should really seek legal advice to better understand their obligations. I would recommend seeking such advice from an accredited specialist, who will give sufficient information for the person to really understand what they are getting into. If someone has already died, your client would be well advised to do likewise, before formally accepting the appointment. They are not forced to accept the appointment. Just watch they do not intermeddle with estate administration prior to this, as it is then very difficult for them to renounce their appointment, should they wish to do so.

If the estate trust has not been finalised and estate assets remain in the estate of the late person after three years from date of death, does it work as normal trust until full administration is finished?

Refer to IT 2622. The ATO essentially sees an estate in three stages. Once the estate administration per se has finished, then the beneficiaries are presently entitled to both income and assets. Prior to this, income would normally be assessed against the executor, unless an interim distribution of income was made during estate administration, at which point it would be necessary to both work out their proportion of trust income and advise them of same. In the first three years of estate administration, the estate will be taxed at standard adult marginal tax rates, thereafter section 99 rates apply (essentially adult marginal rates, less the tax-free threshold). A note of caution, where the commissioner considers that an estate administration has been unduly delayed, he has the right to impose section 99A rates on all estate income (48% in every dollar).

If I agree to be an executor for a client, then when the time comes to deal with the estate the beneficiaries and/or family of the client are very difficult and make dealing with the estate harder than it should be, am I within my rights to back out and if so, how is a replacement executor nominated?

Yes, you are. You can either renounce before any act is undertaken by you as executor or you will need leave of the court to retire after probate has been granted.

The replacement executor named in the Will would then take over. If no replacement is named then usually the beneficiaries with the largest interest in the estate apply to administer the will. If there is no agreement between beneficiaries, then a trustee company or another independent professional applies to be appointed to administer the will.

However, in my experience clients with peaceful families and uncomplicated affairs do not appoint professional executors. Accountants and lawyers get asked to be executors when the client foresees trouble. So perhaps exploring the reasons for your appointment when you are asked is a good idea, so you can give informed consent.

I think of it in this way - if the client relies on you to sort out the mess and you have given your word, it's not ideal to back out, it's better to say no to the client's face so they can find another solution.

Is the definition of financial dependent the same for superannuation and taxation purposes?

They are slightly different. For example, the SIS Act considers a child over 18 who is not financially dependent as a dependent, whereas the ITAA does not. Equally, a former spouse under the SIS Act is not a dependent but is for tax purposes.

When an amount has been gifted to a capital protected trust from the sale of a property, the funds are posted in the trust as a credit to capital. What is the process from a tax perspective, when the trustees allocate a capital distribution in the trust to the capital beneficiary/ies during the year? Is it similar to the general trust distribution statement done in May/June each year in a regular trust?

To the extent that the capital distribution triggers a CGT event (i.e. by disposal of assets), the proportional CGT value distributed to the beneficiary, will be taxed in the hands of the beneficiary, and should be shown as a distribution of a capital gain in the annual distribution statement. In the event that the beneficiary lacks capacity, the return should be prepared to ensure that the ATO raises an assessment notice under section 98 against the trustee on behalf of the beneficiary. If there is a discretionary element to the distribution of a portion of the gain, a minute would be required to stream the gain to the capital beneficiary in line with the terms of the governing document.

If you hold power of attorney for a client are you allowed to receive remuneration for services provided in that role?

The power of attorney needs to specify that you are permitted to charge.

If the charging clause is not in the power of attorney, you may not be able to charge.

Legislation about powers of attorney prohibits attorneys being in a conflict between the attorney's and the principal's interests - charging for your time is considered a type of conflict.

Most tribunals will not authorise you to charge if there is no power in the document.

If the client still has capacity (as opposed to those who don't and where you are taking over their affairs because of their disability), you may be able to enter into a cost agreement with the client and a copy should be retained with the power of attorney.

Do you or CPA Australia have templates available for the asset and liability listing and also the estate transaction accounting for an executor to use?

No. The inventory of assets and liabilities is part of the probate/Letters of Administration application to the court (i.e. it is a court form). These forms are set out in the rules or legislation in each jurisdiction, samples can be found on the court websites in each jurisdiction. The website and legislation also provide the format required for record keeping by executor and administrators.

Can the beneficiaries of an estate dispute the appointment of the executor? If so, on what grounds?

Yes, they can.

If the beneficiaries can show that the nominated executor is not a fit and proper person to act in the role and that it is in the best interests of the estate for someone else to do the work.

This application is called a 'passing over' application. It is a quite common application, but the court does not interfere with the Willmaker's choice easily. There has to be a really good reason for the court to pass over an executor, such as the executor stole from the Willmaker but the Willmaker didn't know it or the executor owes the estate a lot of money and is refusing to pay it back, etc.

This application is usually brought by an interested beneficiary under the Will.

How are charitable bequests treated for tax purposes, e.g. $500,000 left to local church, can this be offset as a donation against a capital gain?

Unfortunately, a testamentary gift to a charity is not tax deductible to the estate. You will, however, need to check if the gift is to a deductible gift recipient (DGR) or not. There is a deemed CGT event K3 when assets pass to a tax advantaged entity such as a non-resident, or tax-exempt entity, unless that tax-exempt entity is a DGR.

I have been named as an executor for a friend - does this mean I may have problems because I am an accountant?

If you are appointed as a friend, it should be ok.

But if you are appointed because you are a friend with special skills, you may be at risk.

If the will appoints my accountant, you may be at risk, even though you are friends.

If you take on the role and you make a mistake, regardless of why you were appointed, you will be held to a higher standard of conduct than a lay person would be, because you do have special skills.

In relation to wills can accountants explain the tax benefits of having wills to incorporate testamentary trusts? Also explain the asset protection available by having the deceased assets owned by the testamentary trust rather than the son or daughter that is running a business (ultimately protecting the assets from potential future creditors)? We refer the clients to Solicitors to prepare the wills and power of attorneys.

Yes, accountants can explain tax advantages of having TT wills.

Asset protection probably falls within legal advice, but you could provide general information (accountants are very knowledgeable about this, but it is legal advice and you could find yourself in hot water - please see earlier question about accountants providing legal advice).

The lawyers you refer to, should work with you to go through the tax advantages and to determine what happens with SMSFs, family trusts, loan accounts, etc. and to determine the specific asset protection benefits.

I've been contacted by a client with regards to estate planning. She has asked for advice on whether super should be left to the estate rather to an individual (BDN). I'm assuming from a taxation point - is this something I should be advising on or something a financial planner or legal representative should be advising on?

As an accountant, you are best placed to advise on the tax implications of leaving the super death benefits to the estate or to some other SIS beneficiary.

However, advice about the choice of beneficiary is legal advice. Taxation of benefits is not the only consideration that will be taken into account by the lawyer in advising the client. Other considerations include potential that the Will may be challenged, who will get control of the proceeds, is there a vulnerable beneficiary, the client's overall estate plan and intentions, etc.

From a tax perspective, it needs to be established whether or not a financial dependency relationship existed, so that it can be determined whether or not a distribution to a beneficiary was taxable or tax-free. Can accountants legally make this determination or should we rely on a lawyer to make this determination and prepare the estate return in accordance with the lawyers determination?

The dependency is established according to legal principles and caselaw. It's not an easy question even for lawyers.

Ultimately, if it is ambiguous or there is no agreement by the parties, it would be prudent to seek a legal opinion or a private binding ruling (PBR) from the ATO.

Where the Willmaker (while alive) has gifted money to a beneficiary over a period of time, is it possible to treat those gifts as payments in advance against the beneficiary's final share of the estate upon the death of the Willmaker?

Yes, it is possible, either the will has to provide for that or there has to be a separate agreement about it.

In other words, it has to be documented in some legitimate (not handshake/gentleman's agreement) way that this was the intention.

When a former spouse is not a dependent under the SIS Act but is for tax purposes, if the trustee of a SMSF pays a death benefit to a former spouse according to a Binding Death Benefit Nomination, is it a breach?

THE BDBN can only nominate the estate or financial dependents (at time of death) of the fund member, so this BDBN would be invalid. It would be a breach to pay the proceeds directly to the former spouse from the SMSF.

EDTITORIAL COMMENT

I came across an estate matter recently where the deceased was a CPA sole practitioner with no succession plan. The issue has left the family in a real mess and the possibility of the quick depletion of any business value. This demonstrates the importance of having a succession plan in place for the practice. Succession planning is outside of today's topic but there is a change to APES 325 Risk Management for Firms from 1 April 2018 that will require practitioners to have a documented succession plan as part of their risk management framework. The succession plan should include specific actions that a firm will undertake in the event of a partner's unexpected incapacity to provide professional services to clients. CPA Australia will be running an event around this.

FURTHER INFORMATION

Connect with Ian and Katerina on LinkedIn at:

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For help or to suggest other topics for live online chats please email livechats@cpaaustralia.com.au

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