

Solicitors' and executors' commission: dangers, pitfalls, recent developments, case law and practical issue affecting lawyers

By

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Introduction

1. An executor owes a fiduciary duty to beneficiaries. Therefore, as a general rule, an executor may not pursue any personal interest and profit from the position and accordingly cannot charge for any work done by him or her. Therefore a solicitor who is an executor, and who acts as solicitor for the estate (another fiduciary relationship), cannot (and nor can his or her firm) charge for work done in relation to the administration of an estate (but work in conducting legal proceedings on behalf of an estate can be charged for¹). In *Re Will of Mary Irene McClung* (referred to below), an accountant/executor who had charged an estate for his professional services without the benefit of a charging clause in the will was ordered to refund his professional fees to the estate with interest.

2. There are exceptions to the general rule:
 - where the will contains a "charging clause" allowing remuneration for professional services performed in administering the estate.

 - where all beneficiaries, who are of full capacity, agree that the executor/solicitor can charge for professional services.

 - where the will provides for executor's commission.

 - where all beneficiaries, who are of full capacity, agree to executor's commission.

¹ *Cradock v. Piper*, (1850) 17 Sim 41; *Re Corsellis*, (1887) 34 Ch D 675.

- where the Court orders that an executor is allowed commission, pursuant to:

- s. 65 (1) of the *Administration and Probate Act* 1958, which provides that:

It shall be lawful for the Court to allow out of the assets of any deceased person to his executor administrator or trustee for the time being such commission or percentage not exceeding Five per centum for his pains and trouble as is just and reasonable.

- the inherent jurisdiction of the Court² (commission is not limited to 5%).

The percentage of commission (payable on assets realized) is selected by the Court after an assessment of the executor's "pains and trouble"³. "Pains" relates to responsibility, anxiety, and worry, and "trouble" relates to work performed by the executor in the administration of the estate⁴.

3. An executor is entitled to reimbursement of out of pocket expenses, whether pursuant to any right of indemnity in the will, or the statutory indemnity given by s. 36(2) of the *Trustee Act*. The statutory indemnity only relates to expenses properly incurred in the administration and distribution of the estate; whether or not expenses can be said to have been properly incurred is determined in each case on the particular facts.

Solicitor/executors

4. Obligations under the LIV *Professional Conduct and Practice Rules* 2005.

Rule 10 provides that a solicitor drawing a will appointing him or her or associated persons (such as the firm or business partners) as executor must inform the client in writing before the client signs the will:

- of any entitlement of the solicitor or associated person to claim commission, and that the client could appoint as executor a person who might not claim commission.

² *Nissen v. Grunden* (1912) 14 CLR 297; *Re Moore* [1956] VLR 132.

³ *Hawkins v Barkley-Brown and Anor* [2010] NSWSC 4.

⁴ Vance, *Executor's Commission*, at pp. 127 & 187.

- of the inclusion in the will of any provision entitling the solicitor or associated persons to charge legal costs in relation to the administration of the estate.

5. Observations of Evans M in *Re Will of Mary Irene McClung*⁵.

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 solicitor 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.

The solicitor is under a duty to inform the client seeking his services as executor that he would be entitled to make a claim for commission for doing so, as to the maximum rate of commission which could be charged and the possible burden such commission may impose both on the corpus and income of the estate.

Given the very real potential for a conflict arising between the interests of the client and the interests of the solicitor on such an occasion, it would be preferable that solicitors declined to act as executors. At the very least, the solicitors code of conduct should provide very clear guidelines as to the proper course of conduct on such an occasion and require the provision of written advice in relation to the decision to appoint a solicitor as executor.

Charging Clauses

6. An example of such a clause:

Any executor and trustee being a solicitor or other person engaged in any profession or business may act in a professional capacity and shall be entitled to charge and to be paid all professional and other charges for any business time expended or acts done by him or her, his or her firm, or his or her company, in connexion with the administration of my estate and the trusts hereof, including acts which an executor or trustee not being in any profession or business could or might have done personally.

⁵ [2006] VSC 209 at [34]-[36].

7. This typical "extended charging clause" authorizes a solicitor/executor to charge for work done of a professional nature, and of a non professional nature. Costs for work of a "professional nature", referred to in *McClung* as work that "required the exercise of legal skill and judgement", in obtaining a grant of probate are scale costs and prescribed by Rule 9.01 of the *Administration and Probate Rules*, and additional charges that may be made in relation to fees, charges or expenses reasonably incurred, and for special or unusual work under R. 9.03 (in accordance with *Practitioners Remuneration Order*). Work of a "non professional nature" is work capable of being done by a lay executor, described in *McClung* as "executorial duties which could have been performed by a reasonably intelligent adult unburdened by legal training". Non professional work cannot be charged for at professional rates⁶, and cannot be charged for at all unless it is expressly permitted by the charging clause. Non professional charges are open to investigation by the beneficiaries, and they should be made on an appropriate costs scale (such as the Practitioners Remuneration Order), a solicitor's attendance charge not being reasonable in the case of routine office work of a clerk⁷.
8. A solicitor/executor has four options with such a clause:
- not to charge for either professional or non professional work at all and claim commission instead (the Court will take professional work performed in to consideration in fixing commission, and it may be a reason for increasing the allowance of commission⁸).
 - to charge for professional work only and claim commission.
 - to charge for both professional and non professional work and not claim commission.
 - to charge for both professional and non professional work and claim commission as well.

⁶ *Estate of D A Lindsay* [2004] NSWSC 575 at [8]-[9], *Hawkins v Barkley-Brown and Anor* [2010] NSWSC 48 at [26].

⁷ Vance, p. 144

⁸ *Re Craig*, (1952) 52 SR (NSW) 265

The option selected will depend on things such as the size of the estate, the amount of work that has been involved, and difficulties encountered in the administration of the estate.

9. Charging for professional work will usually diminish the amount of commission that would otherwise be awarded if no such charge were made, but it does not necessarily result in no commission being awarded.
10. A solicitor/executor would usually charge for both professional and non professional work and not claim commission in uncomplicated administrations where any award of commission would be unlikely to exceed the amount charged for non professional services. An application for commission by a solicitor/executor was dismissed in *McClung*⁹, Evans M finding that the executors' pains and trouble had been rewarded by charges made for both professional and non professional services.
11. If a solicitor/executor elects to take the benefit of an extended charging clause, and charges for professional and non professional work and claims commission, the non-professional charges must be taken into account in fixing the quantum of commission, so that the estate does not pay twice in respect of the same work ("double dipping")¹⁰.

Professional fees

12. The solicitor/executor is only entitled to reasonable legal costs. He or she has a duty to read bills of costs rendered by his or her firm or other solicitors and satisfy himself or herself that the costs are properly chargeable to the estate. Evans M, in *McClung*¹¹, found that that was not possible on a simple reading of bills in summary form, and stated that it would have been desirable for the solicitor/executor there to have prepared itemised bills of costs that were capable of proper evaluation by the accountant co executor. The solicitor/executor had rendered bills to the estate that were in summary form and had not distinguished between professional and non

⁹ [2006] VSC 209

¹⁰ Vance, pp. 37, 143-144.

¹¹ at [16] & [17].

professional work. In *Atkins v Godfrey*¹² commission was reduced where the executor had paid legal fees without scrutinising them and the fees had subsequently been partially refunded after taxation.

Commission clauses and agreements for commission

13. An example of a common commission clause:

I authorize my trustees proving my will to charge and retain from my estate commission of an amount equal to *% of the gross capital value of my estate and an amount equal to *% of the income received by my trustees *and in the absence of any contrary agreement by my trustees I direct that the commission shall be divided equally amongst my trustees.

14. Where the will does not provide for commission the solicitor/executor can enter into an agreement with the beneficiaries (provided that all are *sui juris*) that provides for payment of commission to him or her, either in substitution for, or in addition to, the legal costs of administering the estate.

15. An agreement for commission was set aside recently in *Walker v D'Alessandro*¹³. The estate had assets exceeding \$1.6 million and the beneficiaries had consented to the solicitor/executor receiving commission at 3% in addition to the solicitor/executor's firm's legal fees. The beneficiaries had been advised that an early partial distribution would be recommended if they allowed commission at 3%, and that any distribution would be delayed if application had to be made to the Court for commission.

16. The beneficiaries succeeding in setting aside the consents, as:

- the relationship between executor and beneficiaries being a fiduciary one, the executor could not benefit from the relationship without the informed consent of the beneficiaries.
- no informed consent had been obtained.
- the executor/solicitor had breached his fiduciary duty by pressuring the beneficiaries to agree to commission by implying that there could be no distribution until they all agreed to commission.

¹² [2006] WASC 83.

¹³ [2010] VSC 15

17. T Forrest J set out¹⁴ what he considered to be the bare minimum disclosure requirements of an executor as fiduciary who is also solicitor for the estate in order to obtain an informed consent, as follows:

- the work done to justify the commission, with particularity.
- if the estate is being invoiced for legal fees and disbursements the solicitor ought identify with particularity what constitutes the basis for same. 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 pursuant to s 65 of the *Administration and Probate Act*. 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. In many cases where the beneficiaries are unsophisticated people and the issues are complex the solicitor ought insist upon them receiving independent legal advice and ought not enter into any commission agreement until they have.

18. His Honour found¹⁵ that the beneficiaries' consent was not informed in this case as the solicitor/executor had not:

- provided any information as to how the percentage of commission had been determined.
- provided any information as to how his legal costs had been calculated, so that the beneficiaries could not measure the appropriateness of the level of commission.
- suggested that the beneficiaries obtain independent legal advice.

¹⁴ at [30].

¹⁵ at [32].

19. *Walker* was followed in *Re Estate of Zsuzanna Gray*¹⁶. In that case a solicitor/executor applied for commission at 3.5% in addition to legal fees, on the basis that that percentage would compensate him for his "trouble" i.e., work done in the administration of the estate, and for his "pains", i.e. the responsibility, anxiety, and worry generated by his executorial function (difficulties in selling real estate in a flattening property market, difficulties dealing with financial institutions, and the "increasingly rancorous" atmosphere in which he carried out his executorship).
20. Daly AsJ awarded 2% commission for "trouble", but nothing for "pains", her Honour finding that the executor's "pains" were largely of his own making, as he had:
- written a letter substantially similar to the letter in *Walker*, giving the beneficiaries the impression that distribution was contingent on them agreeing to commission, and not informing them that they could contest the claim for commission in any application to the Court or that it was a matter for the Court to determine what an appropriate amount of commission was.
 - refused to provide a detailed bill of costs, which if it had been provided would have allayed any concerns of double dipping and would have enabled the beneficiaries to make a meaningful assessment of the claim for commission.
 - taken his costs for bringing his claim for commission from the estate.
21. A solicitor/executor who took legal costs and executor's commission at 5% from an estate was found guilty of misconduct in *Legal Services Commissioner v Hession*¹⁷. The will contained a charging clause but not a commission clause. The solicitor, inexperienced in probate matters, said in defence that he had been advised by a costs consultant that he was entitled to claim reasonable costs and take commission of 5% "as you go". He immediately replaced funds when subsequently advised by a Law Institute trust account inspector that he was not entitled to charge and take commission. On the same day that he repaid the funds he wrote to beneficiaries in relation to commission, advising them that he could either apply to the Court for

¹⁶ [2010] VSC 173.

¹⁷ (Legal Practice) [2010] VCAT 1328 (11 August 2010)

commission or they could agree on commission, payable in accordance with “the guidelines of the Supreme Court” at up to 7% of the realised estate, and at between 3%-5% on income. He was found guilty of misconduct at common law (conduct reasonably regarded as disgraceful or dishonourable by legal practitioners of good repute) for taking commission from estate monies held by him. Although in breach of his fiduciary obligations in sending the letter that he sent, he was not found guilty of misconduct at common law and not guilty of professional misconduct (the definition of which in the *Legal Profession Act 2004* is “not a fit and proper person to engage in legal practice”), but was found guilty of unsatisfactory professional conduct (conduct falling short of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian practitioner). He was fined \$30,000 and ordered to pay the Legal Services Commissioner’s costs of approximately \$38,000¹⁸. The Tribunal considered that a degree of punishment was required, which would be adequately addressed by the fine and the costs order. It was considered unnecessary to deprive him of his right to practise for a period of time as he had a good “track record” and, as a sole practitioner, loss of his right to practise would have adverse consequences for his staff and his family, and potentially cause him financial ruin.

22. The issue of informed consent came before the Court again late last year in *Szmulewicz v Recht*¹⁹, an unsuccessful strike out application against a proceeding alleging breach of fiduciary duty by a testator’s solicitor and accountant (brought on the ground that the plaintiffs had failed to disclose a cause of action). The solicitor and accountant had acted for the testator for some time, the solicitor had prepared the will, the will was made when the testator, who had a psychiatric illness, was in hospital after major surgery, the solicitor and accountant were appointed executors, and the will contained a charging clause allowing commission on corpus at 3.5%. The estate had been distributed and invoices for legal fees and commission had been rendered. The plaintiff’s case was that the creation of the commission clause in the will had created a conflict between the solicitor’s duty of loyalty to the client and his personal interest, as executor, in gaining a commission that the law might not otherwise allow. The contention was that, as an advisor, the solicitor had a duty of disclosure to inform the testator about the nature and effect of the clause and how it was conferring a benefit which he and the accountant would not otherwise be entitled to under law, or at least may not be entitled to without proper proof as required under the executors’

¹⁸ [2010] VCAT 1687

¹⁹ [2010] VSC 447.

commission provisions. In order to successfully defend the case by “neutralising” the breach of fiduciary duty the solicitor and accountant will have to show that they obtained the fully informed consent of the testator.

The level of commission

23. Last year, in *Hawkins v Barkley-Brown*²⁰ Slattery J said that the ranges of commission in practice are:

- from 0.25% to 2% on capital realisations;
- from 2% to 4% on income collections;
- from 1% to 2% on assets transferred in specie.

24. Mukhtar AsJ observed in *Szmulewicz* that, in his experience in deciding executors’ commission cases, 3.5% on corpus tended to be “at the top end of the scale”.

Conclusions

- Comply with Rule 10 of the *Professional Conduct and Practice Rules* before the will is signed.
- Get informed consent to the insertion of a commission clause in the will. Explain the significance of the commission clause to the testator, and confirm in writing (or at least make a file note). The explanation should include the fact that there is no automatic right to commission, that the alternative is an application to the Court that will be scrutinised, and that any commission charged might be in addition to legal fees.
- Similarly, get informed consent to the insertion of a charging clause in the will. Fully explain the effect of any extended charging clause.
- If agreeing with beneficiaries about commission and/or legal fees, make sure you get their informed consent (i.e. disclose the work done to justify the commission, disclose expected legal costs, advise that the Court can assess commission, suggest/insist that they get their own legal advice). In wills that do not have a provision as to where

²⁰ [2010] NSWSC 48 at [68],

commission is payable from but have the “standard” residuary clause that refers to “testamentary expenses” commission on corpus is borne by the residuary estate²¹, and if the residuary estate is insufficient it is borne by the rest of the estate assets in accordance with the statutory order prescribed by s. 39(2) of the *Administration and Probate Act*²². Commission on income is payable from income²³. The part of the estate from which commission is payable is otherwise a matter of the interpretation of the particular will.

- Separate legal files and executorial files.
- Keep detailed records of non professional work.
- Prepare an itemized bill.
- Don’t take commission, or apply for commission, until the estate has been got in, debts have been paid, any legacies have been set aside, legal costs have been paid or provided for, any trust created in the will has been set up, and assent has taken place²⁴.
- Be conservative with the commission percentage.

²¹ *Wyndham v Mackenzie* (1918) 25 CLR 172.

²² *Fowler v Neild* (1961) SR (NSW) 152.

²³ *Re Dowling* (1961) VR 15 at p. 624.

²⁴ Vance, at pp. 9-10.