Legal Practitioners as Executors

By Karen O'Keefe, Senior Legal Officer, Law Society Professional Standards

It is fairly common for a legal practitioner to be appointed as an executor of an estate. However, some legal practitioners are unsure about whether they can charge fees for carrying out executor duties and whether accounts in which estate moneys are deposited constitute trust accounts for the purposes of the *Legal Practitioners Act* 1981 (Act) and the *Legal Practitioners Regulations* 2009 (Regulations). This article seeks to clarify these issues.

When a legal practitioner is appointed executor of an estate, in what circumstances is he or she entitled to appropriate costs?

The general rule is that an executor must act with no expectation of being paid. A legal practitioner-executor will only be entitled to charge for his or her services (and appropriate trust money towards payment of these charges) in the following circumstances:

- Where there is a charging clause in the will and the legal practitioner-executor charges in accordance with it. The charging clause must set the scope or type of work for which charges may be made and how work is to be charged or the rates to be charged. Charging clauses are strictly construed. A charging clause will not necessarily authorise the legal practitioner-executor to charge for all work done as executor.
- Where the legal practitioner-executor has made application to the Supreme Court under section 70 of the *Administration and Probate Act* (APA) or the inherent jurisdiction of the Court and has been granted remuneration or commission by the Court.
- Where remuneration is taken in accordance with a prior agreement reached with affected beneficiaries (not being under a legal disability) with their fully informed consent.
- Where the legal practitioner-executor is entitled to charge pursuant to one of the miscellaneous exceptions to the general rule. For example, the principles applying to litigation involving the legal practitioner-executor and co-executors.

Is a legal practitioner entitled to executor's commission in addition to costs?

In general, no executor has a right, or is entitled, to commission except where this is expressly provided for in the will itself, or by fully informed consent of affected beneficiaries (not being under a legal disability), or allowed by order of the Supreme Court.

In theory, the Court may allow a legal practitioner-executor to receive both remuneration and commission, but usually the legal practitioner-executor who has received remuneration at a professional rate of charge for acting as executor is unlikely to be allowed further commission by the Supreme Court for his or her "pains and troubles" for acting as executor.

A legal practitioner-executor who has not been remunerated at professional or commercial rates for acting as executor or has been remunerated only for some work carried out as executor, may have greater prospects of being allowed commission in addition to remuneration by the Court.

If there is no charging clause in the will can a legal practitioner be paid for work done in administering the estate?

If there is no charging clause in the will, a legal practitioner-executor is not entitled to be paid unless:

- The legal practitioner-executor first makes application to the Supreme Court (under section 70 of the APA or via its inherent jurisdiction) and the Court grants to the legal practitioner-executor remuneration out of the estate; or
- Each affected beneficiary has legal capacity and gives informed consent to the executor charging for his or her services; or
- One of the miscellaneous exceptions applies (which happens rarely). These exceptions relate to litigation involving the legal practitioner-executor (a legal practitioner-executor who is one of a number of executors may act in litigation for him or herself and also on behalf of co-executors) and where a legal practitioner-executor is a partner in a firm and employs his or her partners to act for him or her and the legal practitioner-executor's co-executors but does not personally benefit from the charges made by his or her firm.

If a legal practitioner-executor does not take out a grant of probate, what does the legal practitioner need to do to establish an entitlement to be paid from trust?

Where there is no grant of probate and the will has a charging clause, the legal practitioner-executor will be entitled to be paid in accordance with that clause.

Where there is no grant of probate and no charging clause, the legal practitioner-executor can only charge for his or her services if:

- The Supreme Court grants remuneration (the legal practitioner-executor has to apply); or
- Affected beneficiaries (not being under a legal disability) agree and they have given fully informed consent; or
- One of the miscellaneous exceptions applies.

In what circumstances would a legal practitioner-executor be limited to charging in accordance with the Supreme Court scale?

If the legal practitioner-executor is entitled to charge for his or her services, the legal practitioner-executor would be limited to charging in accordance with the Supreme Court scale and limited to charging for professional work covered by that scale unless:

- The Supreme Court allows remuneration to be paid on another basis. This rarely happens.
- Where there is a charging clause and it is broad enough to allow charging on a basis other than the scale and/or for work done as executor which is not professional work covered by the scale.
- Where agreement about a different rate is reached between the affected beneficiaries (not being under a legal disability) and they give fully informed consent.

What about the bank accounts in which the estate moneys are kept – are they trust accounts?

In order to facilitate the getting in and distribution of estate moneys, and the

payment of any estate-related fees or debts, it is usually necessary to operate a bank account into which estate moneys are deposited and withdrawn as required.

The question is whether, if such an account is operated by a legal practitioner as sole or co-executor, that account is classed as a legal practitioner's trust account for the purpose of the Act and Regulations.

Section 5(1) of the Act defines trust money.

The following points should be noted with respect to this definition:

- If money is in an account operated by a legal practitioner-executor, and to which he or she is a signatory, the legal practitioner-executor is considered to have *received* that money.

- The person receiving the money must be a *legal practitioner* as defined by the Act but the definition does not state that the money must be received by the legal practitioner-executor in his or her professional capacity only. Care should be exercised by a legal practitioner when acting in a personal capacity as an executor because, if fees are charged to the estate by the legal practitioner concerned (whether they be executor's fees or disbursements such as the cost of probate or postage) it is likely that the work done constitutes "practising the profession of the law" as defined in Section 21 of the Act. At the very least, in order to avoid an assertion that the practitioner is acting in his or her legal capacity, any costs payable by the estate in such a situation, such as filing fees or postage, should be paid directly by the estate. In any event, it is recommended that legal advice be sought on this issue and any potential professional indemnity issues) by any legal practitioner who wishes to act as executor of an estate in a personal capacity.

- The money must be money *to which the practitioner is not wholly entitled both at law and in equity*. This would be the case except where the legal practitioner-executor is the sole beneficiary under the subject will.

Section 5(4)(a) of the Act refines the definition further as follows:

"A reference in this Act to trust money received by a legal practitioner includes a reference to -

(a) money coming under the direct control of the legal practitioner, whether or not by the exercise of an express power or authority or by operation of law."

Regardless of whether a legal practitioner-executor is the sole operator/signatory, or one of a number of operators and co-signatories, to the subject account, the money is under his or her *direct control*. The result is that estate moneys being held in an account operated by a legal practitioner-executor (subject to the application of Section 21 of the Act as discussed above) are trust moneys as defined by the Act and that the account is usually a trust account which must then be regulated in accordance with the Act and Regulations.

The legal practitioner-executor may invest estate moneys for the benefit of the estate. Such investments are not considered to be trust accounts under the Act and Regulations but legal practitioners should ensure that an account that may be set up for investment purposes does, in fact, satisfy the definition of "investment". The main distinguishing feature between an investment and a trust account is that the investment will be non-operational or non-transactional. An investment is made for the purpose of earning interest. It is made for a set time and on set terms. Investment moneys tend not to be accessible prior to the conclusion of the term, whether this be for credit or debit. The balance in an investment must be stable to allow for the accrual of interest. Although an investment is not classed as being a trust account, legal practitioner-executors do have obligations with respect to them under Regulation 21.

A transactional account operated by a legal practitioner-executor which contains estate moneys relating to a single estate or client is a trust account. However, pursuant to section 57A(1) of the Act, the interest accrued in such an account does not have to be paid into the statutory trust account as would be the case otherwise. In this case, the interest is able to be accrued to the benefit of the single estate or client concerned.

In summary, most accounts operated by a legal practitioner-executor will in fact be trust accounts which are subject to the requirements of the Act and Regulations. If you need advice on whether you are entitled to charge executor fees, or whether an account operated by you as an executor is a trust account under the Act, please contact the Professional Standards Section of the Society on telephone 8229 0229 to discuss the matter.

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