

Does the executor of a Will get paid?

Author: Kerry-Ann Smith
Email: kerryann@smithfamilylaw.com.au
Date: Monday May 15, 2023

An executor is the person you appoint in your Will who will be responsible for distributing your assets after death in accordance with your Will. You can appoint one or more executors. The tasks an executor undertakes can sometimes be complex and time-consuming. An executor of a Will may seek payment for their efforts and time in administering an estate. In this blog, we look at how executor's commission is addressed.

What is executor's commission?

In accordance with the *Administration and Probate Act 1958* ('The Act'), an executor, administrator or trustee of an estate may apply to the Court to be paid commission for their 'pains and trouble' in discharging their obligations as legal representative of the estate. The commission sought must be 'just and reasonable'.

However, executors and administrators of a deceased estate must be aware that they do not have an automatic right to receive commission.

Who is eligible to claim executor's commission?

Before a claim for a commission can be made by an executor of a deceased estate, at least one of three prerequisites prescribed by the Act must exist.

1. The Will contains a clause granting payment of a commission; or
2. The Supreme Court of Victoria makes an order under section 65 of the Act for the executor to receive a commission for their 'pains and troubles'; or

3. The beneficiaries of the Will give the executor their**fully informed consent**for the executor to take a commission.

Executor remuneration clauses in Wills

Generally, an executor is expected to perform their duties for free. However, you can choose to include a provision in your Will which entitles the executor to receive a commission for administering your estate. This is the simplest way to ensure your executor receives remuneration or payment for the time and effort involved in administering your estate.

When implementing a payment or remuneration clause in your Will, it is important for the Will-maker to follow the steps in s65B of the Act. Pursuant to s65B of the Act, an executor is only able to rely on a remuneration clause where:

1. the Will-maker has given written informed consent for the inclusion of a remuneration clause in their Will; and
2. that written informed consent was given by the testator (the Will-maker) before the Will was executed.

Obtaining consent of beneficiaries to pay an executor's commission

If there is no executor remuneration clause in the Will, the beneficiaries can give the executor their fully informed consent to take a commission.

For this to be effective, each beneficiary must be over the age of eighteen years and each beneficiary must give 'fully informed consent' in writing.

To ensure beneficiaries' 'fully informed consent' is effective, the beneficiaries should:

- be given specific details of the work carried out by the executor:
- be advised that they are entitled to ask the Court to assess a commission claim; and
- be informed that they should seek independent legal advice regarding their rights.

Call us for advice: 03 8625 8957

Application to the Supreme Court for executor's commission

If there is no executor's commission clause in the Will or written informed consent was not obtained from the testator, an executor can make an application to the Supreme Court of Victoria to obtain an order to be paid a commission for their 'pain and trouble in administering the estate.

How is 'pain and trouble' assessed when administering a deceased estate?

- '**Pains**' is the responsibility, anxiety and worry of the executor; and
- '**Troubles**' is the work carried out by the executor.

An application to the Supreme Court requires an executor to file the estate accounts with the Court. This means the executor must provide a breakdown of the estate assets and liabilities, detailing how the estate was managed and essentially proving that the estate was dealt with in accordance with the Will.

The Court may take many factors into account when deciding whether the executor should be paid and how much compensation they should receive. These may include:

- the size and complexity of the estate;
- the work that was carried out by the executor; and
- the length of time taken in administering the estate.

How is the executor’s commission calculated?

There is no fixed scale or fee for what an executor might be entitled to charge.

The amount of the commission received by an executor depends on the size and complexity of the estate they were appointed to administer. Pursuant to the Act, the maximum allowable amount of commission for an executor is 5% of the gross estate value (that is, the value of the estate prior to the payment of liabilities).

What If I appoint a lawyer as my executor?

If you appoint a lawyer (or law firm) as your executor, a distinction must be drawn between the legal fees charged by the solicitor for any professional work performed in administering the estate and the commission to which the individual executor is entitled to claim.

This can be done by inserting a charging clause into your Will that allows the lawyer to charge their professional fees when acting in their capacity as an executor.

Need help from a Wills &estates lawyer?

The process of applying for executor's commission from the court can be a timely and costly process. We can help if you are the executor of a deceased estate in obtaining a Grant of Probate and administering the estate, including any matters related to executor's commission.

Contacting Smith Family Law

03 8625 8957

info@smithfamilylaw.com.au

Find this article useful or interesting?

You may also like to read:

- What happens when executors do not agree?
- The risks of DIY Will kits

This blog is of a general nature and should not be relied upon as legal advice. If you require further information, advice or assistance for your specific circumstances, please contact us.