

Article Information

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Service: Dispute Resolution & Litigation, Estate & Succession Planning, Estate Administration, Trust & Estate Litigation, Wills & Estate Planning

Sector: Private Clients

Estate Costs: Executors need to be timely but beneficiaries should also hasten to caution

The recent Supreme Court decision in *Victoria of Re Howden; Howden v Rackstraw* [2020] VSC 315 is a reminder for executors that they must administer estates in a timely and efficient manner. It suggests that a failure to properly respond to the reasonable requests of beneficiaries may mean losing a right of indemnity from the estate for legal costs they incur in dealing, or rather not dealing, with those requests.

Background and facts

Howden commenced as an application by a beneficiary to remove an executor on the basis of delay and being unable to act impartially. The parties ultimately agreed on consent orders replacing the executor with the beneficiary, so that aspect of the action was not adjudicated on its merits. The judgment was then left to deal with a dispute as to whether the discharged executor was entitled to her right of indemnity from the estate in respect of her legal fees.

Generally, an executor or trustee is entitled as of right to be reimbursed or indemnified out of the trust for any properly incurred costs (including legal fees). The onus is on a person seeking to deny an executor or trustee their right of indemnity to prove that costs have been improperly incurred.

In deciding whether to deny the executor her right of indemnity, Justice McMillan assessed the reasonableness of the executor's conduct both before and after the proceedings were begun, having regard to:

- the executor's delay of approximately seven months in making the application for probate;
- the failure to properly respond to the plaintiff's requests for information and that the estate be administered because the plaintiff was in financial hardship;
- the executor's failure to provide requested updates on the progress of the administration of the estate or provide to the plaintiff information regarding life insurance, superannuation and the calling in of assets of estate;
- the fact that the executor did not call in real estate, enquire as to rental arrangements, organise rental payments or attend to transmission of the properties; and
- generally that the executor's responses to the plaintiff's requests both before and after proceedings began were inadequate.

In summary, Her Honour found that the executor "*failed to carry out her executorial duties in a timely or efficient manner and ... no doubt precipitated the litigation*". The executor was denied her right of indemnity from the estate, was ordered to pay her own legal costs, and also reimburse the estate for approximately \$6,700 in legal costs already paid from the estate.

While it was a relevant consideration that the executor had consented to being replaced relatively early in the proceedings, that did not outweigh her failure to act beforehand with the necessary care and diligence she ought to have exercised.

Interestingly, and despite the findings about the conduct of the Defendant, her Honour also found that while the plaintiff had some cause for concern "*it cannot be said that the plaintiff was left with no recourse but to take the step of issuing the proceedings*", and also ordered the plaintiff to bear her own costs.

Insights

Executors should make sure that they are, in a timely manner, fulfilling their duties to:

- respond appropriately to reasonable queries from beneficiaries for information regarding the administration of the estate;
- apply for and obtain probate (if appropriate); and
- ascertain and get in the assets of the estate.

If they fail to do so, they may risk not only being removed as executor, but also losing their right of indemnity from the estate for legal costs, whether incurred in litigation or not.

Aggrieved beneficiaries should also be confidently sure, that before taking the serious step of asking a court to remove an executor, that court proceedings are indeed the last resort or risk personally paying the costs.