

Tips for finalising estate matters

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Once an estate has been distributed to the beneficiaries, it can be very difficult for an executor to claw back funds if needed. Lawcover receives a number of claims that could have been prevented if more care was taken before the estate was distributed to identify potential liabilities and to ensure the estate is distributed correctly. Be aware of the pitfalls and use the tips below to develop a checklist to minimise the risks when finalising your estate administration files.

Snapshot

- Before distributing the estate, take a step back and check whether everything is ready to go.
- Make sure all outstanding liabilities have been identified and paid.
- Double-check that the proposed distribution accurately reflects the terms of the will.

if a beneficiary is a non-deductible gift recipient tax-exempt entity, a superannuation fund or a non-resident taxpayer.

The estate will be liable to pay SDBT if a superannuation death benefit is received into the estate and passes to a beneficiary who is not a dependent for the purposes of division 302 of the *Income Tax Assessment Act 1997*.

It is important to ensure that the accountant preparing tax returns for the deceased and for the estate is fully briefed so that all tax liabilities are correctly identified, calculated and paid.

Tip 1: Advertise intended distribution and wait until the notice period expires

Publishing a notice of intended distribution under section 92 of the *Probate and Administration Act 1898* and section 93 of the *Succession Act 2006* may not be mandatory but is definitely prudent. Without publishing this notice, an executor or administrator can be personally liable for claims by creditors and family provision applicants who come out of the woodwork after an estate has been distributed. The Supreme Court website has detailed information about publishing the notice on the NSW Online Registry (supremecourt.justice.nsw.gov.au/Pages/sco2_probate/online_probate_notices/notice_intended_distribution.aspx).

Do not distribute immediately after publication, but wait until the notice period has expired – usually the later of 30 days from publication or six months from the date of death. If the executor is on notice of a potential family provision claim then wait until 12 months has passed from the date of death.

Tip 2: Have all the liabilities been paid? Don't forget the tax!

Do not distribute an estate if you are unsure whether all liabilities have been paid. Most claims relating to unpaid liabilities arise from tax obligations of either the deceased or the estate. An executor or administrator has a positive obligation to identify and pay all outstanding tax obligations of the deceased, as well as all tax obligations during the administration. The big ticket items that tend to cause problems for solicitors advising executors and administrators are Capital Gains Tax ('CGT') and Superannuation Death Benefits Tax ('SDBT').

CGT liabilities may arise where assets are disposed of in the course of the administration of the estate, and may also arise

Tip 3: Re-read the will and double check your calculations

Claims are sometimes made against solicitors where a distribution is made and it is later discovered that it was not made strictly in accordance with the terms of the will.

One reasonably common will provision that can cause difficulties is an adjustment clause that requires the distribution of the estate to take into account other benefits received by beneficiaries, such as inter vivos gifts, or superannuation death benefits paid directly to the beneficiary by the trustee of the deceased's superannuation fund. Read the will clause carefully to ensure that the calculation of distributions complies with the requirements of the will. If possible, have the calculations checked against the will by someone else in your office as well. It is prudent to forward a proposed distribution statement to the beneficiaries and explain to them the proposed application of the adjustment clause. If the adjustment clause is ambiguous it may be advisable to bring a construction suit to protect the executor against liability for an incorrect distribution.

Tip 4: Beware the bankrupt beneficiary

If a distribution is made to a beneficiary who is an undischarged bankrupt, the executor or administrator may be personally liable for the amount of the entitlement which should have been paid to the trustee in bankruptcy.

If the beneficiaries are well known to the executor or administrator there may be a degree of confidence that they are not bankrupt. However, some people do not disclose even to close family members that they are bankrupt. A bankruptcy search is relatively straightforward and inexpensive, and may prevent an executor or administrator from being personally out of pocket. **LSJ**