



# THE COSTLY APPOINTMENT OF EXECUTOR



Andrew Lubke completed a will-kit. He wrote that his executor was “Brian Claridge Accounting”. The trouble was that there was no entity by that name, even as a business name. Andrew Lubke’s accountant was Brian Claridge Accounting Pty Ltd. That company had Brian and Nelson Claridge as directors and shareholders. On the application by Lubke’s beneficiary for construction of the executor appointment clause, the Supreme Court concluded that the deceased’s intention was to appoint as executor the entity which was his accounting practice. The Court considered that there remained a choice between the company and an individual, and it resolved that by holding that the clause appointed Brian Claridge or his successor as executor. How much do you think that cost? Now think about the cost of a properly prepared Will. Andrew Lubke’s will-kit was mighty expensive, wasn’t it?

## Executor’s duties

An executor has a broad range of responsibilities. They include:

- deciding how the deceased’s remains be dealt with (being buried or cremation),
- organizing the funeral arrangements,
- ascertaining the existence of a will (or other testamentary document) and, if so, taking possession of it,
- ascertaining the nature and extent of the deceased’s assets,
- locating and obtaining details of beneficiaries,
- considering if there is any doubt about the effectiveness of the will,
- obtaining Probate if required,
- collecting, selling and otherwise dealing with the deceased’s assets so that expenses of administration may be paid and the estate prepared for distribution,
- defending and resolving legal

- proceedings,
- preserving (which may include insuring) and investing the assets pending a distribution,
  - ascertaining the deceased's debts and any expenses of the estate,
  - attending to pay the proper debts and expenses,
  - paying remuneration,
  - producing accounts for the executor's financial transactions, and
  - distributing the estate according to the will and the law.

### An Executor's attributes

Given the duties that an executor must perform, it is desirable that the executor have particular attributes, such as:

- Being able to deal with legal issues,
- Being consciences with paperwork
- Organized
- Able to deal with tedious work
- Able to withstand unreasonable demands
- Willing to delegate and work with others
- Able to take advice
- Willing to comply with legal requirements in the will, and
- Willing to keep beneficiaries informed

### Removing an executor

Hugh Davison appointed his brother Murray as his executor. Hugh died in November 2010 leaving the whole of his estate to 5 beneficiaries, 3 of whom were his brother's children. In June 2015 the 2

beneficiaries who were not Murray's children brought an application to have Murray removed as the executor. They relied on various facts which go to the essence of an executor's duty. For instance they pointed to

- the general dilatoriness in the executor administering the estate—four and a half years at the date of filing the Court proceedings and five and a half years at the date of hearing is a long time to take to administer estate. Most estates are finalised within 6 to 18 months.
- the brother living rent free in a property part owned by the estate, an obvious conflict of interest.
- a conflict of interest with another estate asset, being shares in a family company.
- the failure to pass accounts, an essential obligation of a fiduciary like an executor.



The Court removed Murray as executor and ordered that he personally pay the costs of the aggrieved beneficiaries. This case shows the importance of choosing the executor having regard to his or her ability to promptly, carefully and prudently attend to the legal obligations of that position.



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