
SUCCESSION LAWS

Submission on
the Consultation Paper on
Executors
by the Victorian Law Reform Commission

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Succession Laws: Consultation Paper I Executors

Charging clauses in Wills

Court review of costs and commission charged by executors

Question E1

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Should the Supreme Court have the power to review amounts charged by executors? If so—

- (a) should the scope of the power be limited to commission, or should it extend to disbursements, fees and any other amounts?
 - (b) should the Court be able to conduct a review on its own initiative or should it be able to do so only on the application of a person interested in the estate?
 - (c) should there be an exemption from review if the will-maker was advised to seek independent advice or the legal practitioner who prepared the will complied with rule 10 of the Professional Conduct and Practice Rules 2005?
 - (d) should there be a time limit within which an application for review should be made?
 - (e) should the Court be able to order costs against the applicant if the application is frivolous, vexatious or has no prospect of success?
 - (f) should the Court be required in normal circumstances to order the executor to pay the costs of the application if the amount is reduced by more than 10 per cent?
 - (g) should the same provisions apply to review of amounts charged by administrators, individual trustees and State Trustees?
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This is a question I am frequently asked when addressing seminars. Practitioners in the audience have expressed surprise that although the remuneration charged by trustee companies could be reviewed and reduced, no such avenue was available to the beneficiaries where the executor was a natural person.

There are only three modes of challenging such remuneration.

First, challenging the validity of the clause: that it was tainted in some way by undue influence, inadequate disclosure and the like, which it would be very difficult for beneficiaries to do.

Secondly, challenging the actual legal fees charged by the executor's firm. That, of course, would not affect remuneration charged by the executor if that remuneration was expressed as a percentage of corpus or income.

Finally, there is the possibility of making an application to abate some of the remuneration. This possibility was mentioned in obiter dicta by Gavan Duffy J in *Re McCutcheon, McCutcheon v Luxford*.¹ The case concerned the construction of a charging clause which allowed the executor to charge remuneration "in the same manner as is provided or permitted by law in respect of trustee companies in Victoria." Gavan Duffy J observed that

when the testatrix provided for the trustee to be remunerated for his work in the same manner as a trustee company, it would be a startling conclusion to draw, that whether he did little or much he was to be paid for doing the whole. If the trustee were in such a position, I should think that an application to the Court to abate some of the commission would be successful.

Paragraph (a)

Normally, one would suggest that the review should be limited to commission. However, if the charging clause is one which allows the executor to charge commission and the firm to charge legal fees, then there is a strong connection between both.

Often, virtually all the work is done by the firm. The only work, apart from the minimal work relating to obtaining a grant and signing the transmission application, are attendances on the solicitors of their firm and to read letters from their firm, for which the firm has charged the estate.

Consequently, the Court should have power to review both.

Paragraph (b)

Currently, the issue arises when the Register of Probates notices an inappropriate remuneration clause and refers the will to the judge in charge of the Probate List.

Apart from retaining this power, the Court should not have power to review remuneration on its own motion.

Paragraph (c)

¹ [1941] VLR 174 at 177.

No.

The proposal by the Probate Users Committee (paragraphs 2.82 to 2.85 of the Consultation Paper) is to be preferred to the proposal by the Law Institute of Victoria (paragraphs 2.86 to 2.89 of the Consultation Paper).

Paragraph (d)

The review should be commenced within a specified period after the administration has been completed. The period will be longer where the executor is a testamentary trustee and is charging remuneration for work as trustee.

Paragraph (e)

This submission makes no comment on this proposal.

Paragraph (f)

This submission makes no comment on this proposal.

Paragraph (g)

This submission makes no comment on this proposal.

Special rules for legal practitioners who act as executors and also carry out legal work on behalf of the estate

Question E2

Question E2

Should legal practitioner executors be required to instruct another law practice to act in relation to an estate?

This submission makes no comment on this proposal.

Question E3

Question E3

How could existing rules for ensuring that will-makers are fully informed about the possible costs to the estate of appointing a legal practitioner executor be improved? Should a will that appoints a legal practitioner executor have to be witnessed by an independent witness?

Yes.

Question E4

Question E4

Should rule 10 of the Professional Conduct and Practice Rules 2005 be incorporated into the Wills Act 1997 (Vic)?

No. In my experience, rule 10 of the Professional Conduct and Practice Rules 2005 is quite unsatisfactory. The law provides a better remedy. It is both unnecessary and undesirable to give it a legislative basis.

Question E5

Question E5

Should legal practitioner executors be required to disclose to beneficiaries the basis on which they charge the estate for their executorial and legal work? If so, should the requirement be set out in legislation or in professional rules?

It is not clear that whether this question is directed to the situation whether there:

(a) is no charging or other remuneration clause in the will; or

(b) is a charging or other remuneration clause in the will.

If there is no charging or other remuneration clause in the will and the executor is seeking the consent of the beneficiaries, then it would be appropriate that this requirement have a legislative basis. Trustee companies to whom the administration of a trust is being committed are required to provide this information.

Even where there is a charging or other remuneration clause in the will, the absence of communication on the method of charging can create tensions with beneficiaries. This submission makes no comment if this is the proposal.

Question E6

Question E6

Should the common law concerning the minimum information that should be disclosed to beneficiaries when they are being asked to consent to the payment of commission be set out in legislation?

The statement in paragraph 2.106 is an accurate description of what often occurs.

It would be appropriate that this requirement have a legislative basis. Trustee companies to whom the administration of a trust is being committed are required to provide this information.

Question E7

Question E7

Should legal practitioner executors be entitled to charge an hourly rate for executorial services, rather than being able to claim a percentage of the estate or its income, for commission? Should Victoria adopt the model provision proposed by the National Committee for Uniform Succession Laws?

This submission makes no comment on this proposal.