

# RPA News

## Regulation. Protection. Action.

*News update for all practitioners from the Victorian Legal Services Board + Commissioner*

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### Fiduciary duties of executors, and claiming executor's commission

As part of our statutory obligation to monitor, promote and enforce professional standards we work to identify the sorts of areas where lawyers make mistakes, and then proactively seek to influence change in these practices to prevent breaches of regulatory and ethical obligations.

One notable area of concern is probate and estate law. This area not only ranks highly in our annual complaints statistics but also features prominently in both VCAT disciplinary findings and the internal disciplinary decisions made by my office.

The issues I see range from communication failures and unacceptably lengthy delays through to the [deliberate deception of beneficiaries](#). In a matter determined in the past 12 months, the conduct was so egregious that the solicitor in question was [struck-off by the Supreme Court of Victoria](#).

More commonly I come across situations where solicitors have failed to understand how and when executor's commissions can be claimed. This occurs in relation to both solicitors acting for executors in deceased estates, and those acting in the role of a solicitor-executor themselves.

#### **Executors have fiduciary duties**

Executors do not have an automatic right to claim payment of a commission for their work on an estate.

It is a well-established equitable principle that a trustee of a deceased estate has a fiduciary duty to the beneficiaries of the estate. The ordinary proposition is that an executor may not obtain a benefit from their position. It also requires the executor to not place him or herself in a position where his or her interests might conflict with those of the beneficiaries.

Before a claim for a commission can be made, one of three pre-requisite conditions must exist. Either:

- the Will contains a clause granting payment of a commission;
- the Supreme Court of Victoria makes an order under section 65 of the *Administration and Probate Act 1958 (Vic)* for the executor to receive a commission for their 'pains and troubles'; or
- the beneficiaries give the executor their *fully informed consent* for the executor to take a commission.

### **What constitutes the beneficiaries' fully informed consent?**

The decision by T Forrest J in [Walker & Ors v D'Alessandro](#) (at [30]) establishes that 'fully informed consent' of the beneficiaries requires that the beneficiaries are, at bare minimum, provided with:

- a detailed justification for the commission being claimed;
- a statement advising that the beneficiaries may have the claim assessed by the Supreme Court; and
- their rights to seek independent legal advice about the claim.

Solicitor-executors are also required to particularise the basis for any fees and disbursements charged. This is to enable the beneficiaries to distinguish between the fees and disbursements charged and the executor's commission claimed.

### **Choose your language carefully**

Another problem I see all too frequently is where the solicitor has misled the beneficiaries as to their rights in disputing an executor's commission.

Practitioners should choose their language carefully when corresponding with executors and beneficiaries so as not to imply that seeking the Court's intervention about payment of a commission would be futile. Similarly, language that suggests the estate is being held to ransom until the beneficiaries agree to a commission, or that implies that the estate would be liable for significant legal costs associated with a claim for commission, are also matters about which VCAT has made disciplinary findings.

### **Know your subject area**

Practitioners who work in this area of law are strongly encouraged to keep up to date with developments in probate and estate law. Attending seminars run by the various CPD providers and reading the legal literature can help reduce the risk of making mistakes similar to those above.

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