

## Chapter 6

# Personal Representatives: Duties and Powers

### Chapter Objectives

On completion of this chapter you should have a basic knowledge on:

- The Principles of Law that Regulate the Duties of Personal Representatives
- The Different Types of Personal Representatives
- The Powers Conferred on Personal Representatives
- Estate Planning Issues Relevant to Personal Representatives

## Chapter 6

# Personal Representatives: Duties and Powers

### Introduction

In planning for the future, a client must be naturally careful as to who is going to take charge of his estate when he is no longer around. He must appoint the most suitable person(s) or corporation to carry out and execute his wishes and instructions as efficiently as possible so that his objectives are met in the best interest of the beneficiaries of the estate. Of course, on the other hand, there are many who do not plan at all. If death occurs to these individuals, the affairs of the estate must be nevertheless handled by someone. In these circumstances, the law plays a great role, in that whoever is appointed to take charge of the estate will have certain duties imposed as well as powers conferred on them. These legal duties and powers are found mainly in two legislations i.e. the

- i) Probate and Administration 1959 (P & A Act) and the
- ii) Trustee Act 1949

Over and above these two Acts, judicial precedents have also laid down the legal principles that apply when circumstances arise, for which the legislative provisions are silent. The person who takes charge of the affairs of the estate is called the **personal representative** (or PR) and in this chapter we will learn about his duties, powers, responsibilities as well as his liabilities and related matters.

### Who is the Personal Representative?

The definition of a “personal representative” is found in the P & A Act which defines it to mean “*the executor, original or by representation, or administrator for the time being of a deceased person, and as regards any liability for payment of death duties includes any person who takes possession or intermeddles with the property of a deceased person without the authority of the personal representatives or the Court*”.

The Act further states that “**representatives shall not be granted to more than four persons in regard to the same property**”. This effectively also means that at anytime there may be minimum

of one person acting as a PR but not more than four. However, the Act also states that if beneficiaries are minors (i.e. below 18 years of age), there must be a minimum of two PRs. This requirement of two persons is not applicable if the PR is a Trust Corporation which can act on its own, even if the beneficiaries of the estate are minors.

In a testacy, the executor is appointed by the testator and there are usually no significant problems that may arise in confirming his role as one. However, in the case of an intestacy, then it is for the courts to decide as to who is the person that is most suitable to administer estate. The administrator must be someone who has an interest in the estate, such as a family member or dependent or even creditors of the estate. Of course, it is also a requirement that the PR must not be a minor, must be of sound mind and not be a bankrupt.

- i) The **executor** or executrix (female executor) is the person appointed by the testator to carry out the instructions in the Will. He derives his powers from the Will but nevertheless must obtain the Grant of Probate from the court before he is authorised to carry out his duties and responsibilities. In appointing an executor, the testator must be confident that he is competent and willing to carry out the duties expected of him. The responsibility can be very 'heavy' and there have been cases where executors were unwilling to carry out their duties. In these circumstances, the appointed executor must renounce his role as executor so that any other person may make an application to the court to be the PR.
- ii) The **administrator** or administratrix (female administrator) is the person appointed by the court to administer the estate. He must be someone who has an interest in the estate and once confirmed, his duties and responsibilities are similar to that of an executor. An administrator can only exercise his powers upon obtaining the letters of administration which also gives him the powers to act accordingly.
- iii) An **executor de son tort** (latin phrase for an executor in his own wrong) is someone who intermeddles with the affairs of the estate. He acts as the PR although he is neither an executor or administrator. Although he has none of the privileges of a PR he nevertheless is personally liable for any wrong or loss to the estate, as a result of his actions.
- iv) An **administrator de bonis non** is one who is appointed when the sole or surviving administrator dies without completing the administration of the estate. He is to carry out the duties as an administrator for the "goods left unadministered". This, he can only do after he receives the letters of administration de bonis non from the court.

The P & A Act provides that an executor or a sole or last surviving executor of a testator shall be the executor of that testator. So long as the chain of representation is unbroken, the last executor in the chain of representation is the executor of every preceding executor. For example, if a son is the sole or surviving executor dies prior to completing the administration of the estate of his father then the executor of the estate of the son's would administer his estate and continue the administration of the estate of the father as well. This chain of representation will continue until it is broken by a failure to appoint an executor.

However, there are no such chains of representation for the administrator. If a sole or surviving administrator dies without completing the administration of the estate then the office of an administrator dies with him. To continue with the administration of the estate another application must be made to court for an administrator to be appointed. In such circumstances, the administrator would obtain a grant of administration de bonis non.

### **The Personal Representative's Duties**

The first responsibility of a PR is to arrange for the funeral of the deceased i.e. if the family does not make the appropriate arrangements. If the PR takes on this task he should abide by any specific wishes of the deceased. His next duty is to determine if the deceased had died testate or intestate. In the case of a testacy, he must ensure that the Will is the last Will, and there are no others in existence. He would need to engage the services of a lawyer to obtain the Certificate of Grant of Probate of the Will from the High Court. Towards this objective he should have the following available, and subsequently declare the required information in a affidavit (a sworn document) to the court.

#### **i) List of Assets**

The executor must trace and identify all the deceased's assets and liabilities and prepare a list of them accordingly.

#### **ii) Ownership Rights**

The extent of ownership rights or beneficial interests of the deceased in the assets must be determined. Outright ownership, joint ownership of assets or holding as a trustee, are some of the various interests of an individual that must be clearly identified.

#### **iii) Solvency**

At the application stage for the Probate, the executor must be able to ascertain whether the estate of the deceased is solvent or insolvent

#### **iv) Beneficiaries**

The executor must determine, identify and give a list of all the beneficiaries and creditors of the estate

#### **v) Witnesses**

In applying for the Grant of Probate, sometimes the court may require confirmation from witnesses. For these reasons the executor should make every effort to locate the witnesses. The absence of witnesses to the Will is not fatal to the application for Probate, but their declaration is a matter for the court's discretion.

### **Grant of Probate**

In applying for the Grant of Probate from the court, the following requirements must be complied with, which are specified in the Rules of the High Court 1980 (as applied to non-contentious applications)

- a) A petition verified by oath which must be contained in an affidavit sworn by the executor, must be made to the court.
- b) The petition must state the date, time and place the deceased died and his domicile at the time of death. Details of the deceased's assets, both movable and immovable property and their respective values (at the time of death) and details of debts and names of persons to whom the sums are owed must be given, in addition to details of funeral expenses incurred i.e. the (Schedule of Assets).
- c) The original Will together with a certified true copy of the Will must be annexed with the petition.
- d) A certified true copy of the Death Certificate from the Registrar of Births and Deaths must also be annexed with the petition.
- e) An affidavit of due execution of the Will by the witnesses is only required as a matter of discretion of the court if there appears to be some doubt of the execution. However, it has become a matter of practice that the requirement of an affidavit from witnesses to the due execution of the Will, will be filed into court.
- f) If there is no attesting witness conveniently available, then the Registrar may, as he thinks fit, accept an affidavit from any other person who was present at the time the Will was executed.
- g) Upon the court's satisfaction of the above, a Grant of Probate will be given to the executor to administer the estate.

### **No Will or No Executor**

***If there is no Will or no proving executor***, then anyone interested in the estate of the deceased can apply to court to be the personal representative of the deceased's estate. The person "interested" usually is the spouse of the deceased, the children or parents of the deceased. However, if the estate is insolvent, a creditor may also apply. Prior to the application to court, the person "interested" would have to attend to the following:

- a) must trace all the deceased's assets and liabilities and prepare a list of assets of these items accordingly.

- b) to investigate whether the estate of the deceased is solvent or insolvent.
- c) to ensure that all the properties held by the deceased is actually his and not property held by him on trust for another.
- d) must also trace all the beneficiaries and creditors of the deceased.
- e) must seek the assistance of a lawyer to enable him to obtain the Letters of Administration from the Court.

### **Application for Letters of Administration**

In an intestacy where an application for letters of administration is necessary the following requirements and rules apply (for non-contentious applications).

- a) A petition verified by oath together with an affidavit sworn by the applicant must be filed in the court.
- b) The petition must state the date, time and place that the deceased died and his domicile at the time of death. Details of the deceased's assets both movable and immovable properties and their respective values (at the time of death) and details of debts and names of persons to whom the sums are owed must be given, in addition to details of funeral expenses incurred i.e. the (Schedule of Assets);
- c) Whether there are any minority or life interests which arise under the intestacy;
- d) A certified true copy of the Death Certificate from the Registrar of Births and Deaths must also be annexed with the petition;
- e) Upon the application being made, it is the court's discretion to appoint such person or persons as the court deems fit to administer the estate;
- f) Prior to the court granting Letters of Administration, the court requires an administrative bond signed by the administrator; and
- g) 2 sureties attested by the Commissioner for Oaths. This is an undertaking by the administrator to pay the court the amount in which the estate within the jurisdiction is sworn.

However, no security is required where the gross value of the estate does not exceed RM50,000.00. When the administrator is entitled to the whole of the estate after payment of the debts, sureties in the bond may ordinarily be dispensed with by the Registrar.

Further, there is no need for an administration bond (surety), if:

- a trust corporation is being appointed as the administrator;
  - the administrator is the sole beneficiary.
- h) An Administrative Oath attested by the Commissioner for Oaths must be given to the court. With this, the administrator agrees to faithfully administer the estate of the deceased.
- i) Upon the court's satisfaction of the above, the Letters of Administration will be given to the administrator to administer the estate.

### **Insolvent estate**

If the estate is deemed to be insolvent, the following rules shall apply to the estate administration process:

- a) the funeral, testamentary and administration expenses take priority.
- b) Subject to the aforesaid, the same rules shall prevail and be observed as to **the respective rights of secured and unsecured creditors** and as to debts and liabilities provable and as to the valuation of annuities and future and contingent liabilities respectively, and as to the priorities of debts and liabilities, as may be in force for the time being under the law of bankruptcy with respect to the assets of persons adjudged bankrupt.

i.e., the funeral, testamentary and administration expenses take priority and then, the rights of secured creditors, preferred creditors, preferential creditors and lastly unsecured creditors.

In the case of a **secured creditor** (e.g. a bank), the secured creditor enjoys priority over the deceased's funeral, testamentary and administration expenses as they would have the right to dispose off the said property, then less the sum that is due to them and return the remainder to the estate of the deceased.

**Preferred debts are moneys or assets held by the deceased** on behalf of others. Such moneys do not belong to the deceased and need to be returned to the rightful owner.

**Preferential debts are moneys owed to preferential office** i.e. the Income Tax Department, Employee Provident Fund (EPF) and wages of the employees of the deceased.

- c) **If specific assets** are to be given to certain beneficiaries, the executor must **ensure** that the asset is **being transferred** to the beneficiaries accordingly. It should be noted that minors are not allowed to own immovable properties. If a testator has given a land to a minor then the executor has to hold the said land on trust until the minor attains the age of majority (18 years). In such circumstances, all income derived from the land belongs to the minor.

## **Powers of Personal Representatives**

A power of the personal representative is the ability conferred on the executor or the administrator, being any one who has an interest in the estate of the deceased by law, to administer the estate of the deceased in the best interest of the beneficiaries named under the Will, or beneficiaries by virtue of the distribution laws, and it differs from a right, in that there are no accompanying duties.

The executor derives his powers from the Will in the case of testacy where a testator can give certain powers to the executor to act and in the case of intestacy, the administrator may exercise its power from the various provision of the Probate and Administration Act 1959 and the Trustee Act 1949.

Over and above the powers given by a Testator in a Will, the court recognises that certain powers are conferred on the personal representative under the Trustees Act 1949 so that the personal representative can administer the estate efficiently.

Furthermore, the various provisions in the Trustees Act 1949 that are applicable to a trustee's power also apply to the personal representative in his capacity as a Trustee.

The following is the list of **powers** which can normally be exercised by personal representatives. It must be always remembered that the power comes with the fiduciary duty to always act in the best interest of the estate and the beneficiaries.

- a) To sell or dispose off assets
- b) To borrow
- c) To purchase or enhance assets
- d) To invest and convert bonds or other securities
- e) To lend, provided it is a secured loan
- f) To make advancements to beneficiaries or to withhold distribution of assets
- g) To provide for maintenance of beneficiaries
- h) To pay taxes and expenses
- i) To continue business and legal dealings
- j) To retain trust property



### **Advancement and Maintenance**

For purposes of providing for the family and beneficiaries, the power of advancement and provision for maintenance are very important responsibilities of the PR. The following table highlights the comparison of these two powers.

	<b>Advancement</b>	<b>Maintenance</b>
01	Payment of part of the trust capital is given to the beneficiary for certain non-recurrent purposes, eg. to start a business or purchase a house.	The purpose is recurrent like the purchase of food, payment of boarding, lodging and medical bills.
02	More than one payment can be made but the total cannot exceed RM10,000 or 50% of the interest of the beneficiary, whichever is greater.	There is no such restriction
03	Must be made bona fide or for a genuine purpose.	Must be made after careful consideration of the facts and circumstances of the case.
04	Must always be for the benefit of the beneficiary.	To maintain a beneficiary means to provide for the costs of necessities of the beneficiary.

### **Personal Representatives and Trustees**

The duties and powers of PRs and Trustees are similar in nature but there are slight differences. For example, we have already seen that PRs have powers similar to those given to Trustees by virtue of the Trustee Act 1949. Let us see a comparison of these two offices and the table below will definitely help.

	<b>Comparison</b>	
<b>Subject Matter</b>	<b>Personal Representative</b>	<b>Trustee</b>
Powers	Provided for under the P & A 1959 Act and Trustee Act 1949	Provided for under the Trustee Act 1949
	The exercise of powers depends on the context of the Will for testacy and on the two Acts, if intestacy	The exercise of powers depend on the context of the Will if testacy or trust deed and depends on the Trustee Act 1949
Duties	Can reject acceptance of appointment under the Will though he may be appointed under the Will and the duties are less onerous than a trustee, and the fiduciary duty does not arise until acceptance of the role.	Fiduciary duty arises upon appointment of the Trustee pursuant to a Trust Deed.
	An obligation to apply for grant of representation, if accepting the appointment.	No duty to apply for the grant of representation unless he has taken the role of the personal representative pursuant to the Trustee Act 1949.
Role	Responsible for the administration of the estate of the deceased .	A wider role which covers also the administration and management of the estate of the deceased .

## **Conclusion**

The duties and responsibilities of a Personal Representative (PR) are enormous. This is because he is expected to carry out these functions in an efficient manner with the responsibility of a fiduciary role with regards to the beneficiary of the estate. Clients must therefore seriously consider appointing the right PRs to fulfill their wishes long after they have passed away. Careful planning and detailed instructions will be most useful depending on the type of assets in the client's estate. The laws are there to protect beneficiaries but PRs have nevertheless a great discretion in the execution of their duties. Thus if individuals are appointed as PRs, the character and integrity of such individuals should be a foremost requirement to be considered.