

Executor of an estate

Naming one, being one

You've been asked to be the executor of someone's estate, and you feel honoured. It's understandable and appropriate to feel that way, as it shows trust and confidence in you when you're asked to take on such an important role. Now, let's think practically.

The role of an executor – also called a representative, liquidator, administrator or estate trustee in some provinces – is to 'execute' the instructions in a Will. Whatever the term used, it is a large responsibility and significant personal commitment.

This article provides an overview of what executorship entails, to help someone making a Will (a testator) determine who best to name, or for a potential executor to decide whether to accept.

The job ahead

Conceptually, there are three stages to the administration of an estate, with some overlap among them:

1. Identifying and collecting the deceased's property,
2. Securing and managing the property (including converting to cash as required), satisfying debts to creditors, corresponding with government departments, fulfilling tax obligations, and
3. Distributing property to beneficiaries.

A proposed executor will want to find out whether to anticipate complications. These may relate to the testator personally, characteristics of the beneficiaries or the nature of the property.

Whether or not such complications are apparent, it will be helpful to an executor if the testator has kept a summary of key property and important relationships. Forms for this purpose may be obtained from the testator's estate planning lawyer, financial advisory firm or trust company.

Candidate characteristics

As that broad range of tasks suggests, it is indeed a job to be an executor, one that can take a lot of time and effort. In simple situations it can run for a year or two, extending out according to the size and complexity of the deceased's property and scope of people involved.

An executor must be physically available to take care of tasks personally, and/or to meet with professionals who may be hired to provide assistance. It's not constant, but will be concentrated at times, particularly in the first months after death.

Comfort with financial, legal and tax matters is an asset, at least sufficient to instruct these professionals. And in the area of non-technical skills, a diplomatic disposition will go a long way, particularly when there are agitated (and agitating?) beneficiaries to deal with.

Legal nature of a fiduciary

With those practical matters in mind, let's turn to the legal aspect of the role.

The executor is the trustee of the property in the deceased's estate. A trustee is a legal owner, but must not take or use the property personally. The testator's Will lays out the beneficiaries to whom the property will eventually

pass once the administration of the estate is complete. Often the executor is one of those beneficiaries, which adds a layer of complexity to carrying out the role.

As trustee, the executor has what is known as a fiduciary duty. This includes acting in good faith, personally doing or overseeing the work, and not playing favourites among the beneficiaries. It's summed up as always acting in the best interests of the beneficiaries as a whole.

Accepting the role

Sometimes a testator may name an executor without having previously discussed it with that person. Just because you were named, you don't have to accept. This emphasizes why communication between the testator and the desired executor is so important, without which there could be uncertainty.

If you begin acting as executor, you may be compelled to continue the work. If the beneficiaries will not release you from the obligation, a court application may be necessary. It's important to note here that this does not invalidate the Will, but does leave it unclear who will be exercising those executor powers.

A formal appointment?

It is the Will that gives legal authority to the executor. Even so, those holding the deceased's property may require proof of the Will's validity before releasing it to the executor. Historically, this was known as a probate application, though each province now has its own terms for this approval process.

Most provinces charge a tax or fee for this application, which can run from a few hundred dollars up to about 1.5% of the estate property. There are some simple ways to avoid this cost such as making gifts while living, naming insurance & registered plan beneficiaries, and holding real estate in joint ownership. These avoidance steps may lead to other costs and concerns however, so it's best to first consult a lawyer.

Ready to distribute

Once all debts and claims have been settled and taxes filed, the executor is in a position to distribute to those beneficiaries. Before doing so, it may be prudent to obtain a clearance certificate from the Canada Revenue Agency confirming there are no further taxes owing. While the tax attaches to the deceased's property, if that property has been distributed then the executor may be personally liable for the tax.

Once satisfied, the executor may proceed with distribution to the beneficiaries. The distribution must follow a specific order with bequests of specific items first, legacies of specific dollar amounts next, and then finally, distribution of the residue. Usually the residue is the bulk of the estate, but a testator may choose to set it up otherwise.

Investing trust funds

Due to the relatively short duration of an estate, an executor's first priority is to preserve estate funds for distribution to beneficiaries. Appropriate options may be a cash account or guaranteed interest deposit.

However, if a Will directs a beneficiary's entitlement to be held in trust for a number of years, inflation could erode that value. A trustee should obtain a lawyer's opinion as to whether active investing is called for. If so, a recommended next step would be to retain an investment advisor.

Executor compensation

An executor is entitled to compensation, unless the Will explicitly prohibits it. More likely the Will is silent on the issue, or possibly states an amount or formula for determining compensation.

If there is no reference to compensation in the Will, the executor may claim compensation in the course of final reporting to the residual beneficiaries of the estate. Since this is a direct reduction of their inheritances, if the beneficiaries approve the amount then that's the end of it.

If the Will says nothing, and there is disagreement about the compensation, a court application may be necessary. The executor will have to provide records of the work performed. A court officer will evaluate the

application based on factors such as how much time was required, the size & complexity, and whether the executor delivered exceptional results, for example a premium price on selling a business.

Based on case law (or a published fee schedule in some provinces), potential compensation may be as much as 4-6% of the value of the estate, though the court officer may award less in a given situation.

The fact that an executor is entitled to compensation emphasizes the seriousness and commitment that the job entails.

Consult a qualified estate lawyer or a trust company representative for more information about this very important role.

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