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# The Executor's Duties: Summary & Sequence

INFORMATION AND INSTRUCTION KIT

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An Executor's obligations are to the Beneficiaries and the creditors of the Estate.

Largely, the role, duties and responsibilities that the Executor is required to perform for an Estate are:

- Arranging the funeral
- Securing and appraising the assets of the deceased
- Applying for probate, if necessary
- Paying the debts and taxes of the deceased
- Accounting to beneficiaries
- Distributing the assets of the estate.

Download or print Our Executor's Checklist here.

## THE DUTIES OF AN EXECUTOR ("ESTATE TRUSTEE")

An Executor must keep accurate financial records, including copies of all receipts, as well as a record of time spent in administering the Estate.

This serves two purposes.

**First**, the Executor must be able to satisfy the Court and beneficiaries that the Estate has been administered properly. Sometimes this is accomplished informally, but formally this requires preparing financial records in proper Court form, and presenting the records to the Court for approval. This process of Court approval is called a Passing of Accounts.

**Second**, the Executor is entitled to compensation which depends, in part, on the amount of work done and time spent by the Executor.

The following steps are required, not necessarily in the exact order:

### To Do Immediately

- Determine whether the deceased left a Will.
- Make funeral arrangements and pay for funeral.
- Retain a solicitor, to apply for Probate, if necessary.
- Open an Estate bank account.
- Notify beneficiaries of their interest in the Estate.

- List Estate assets and safeguard until distributed or sold.
- Arrange for management for the deceased's business, if applicable.
- Collect income generated by the Estate assets and/or payable to the deceased.
- Pay bills, mortgage payments, property taxes, income taxes, insurance premiums, credit cards.
- Check leases and tenancy agreements. Pay/collect rent, as appropriate.
- Redirect mail, cancel memberships and subscriptions to newspapers and magazines.
- Cancel health insurance, driver's licence, utilities, credit cards.
- Arrange for care of pets.
- Obtain death benefit from CRA (usually the Funeral Home attends to this).

### Interim Matters

Prepare an inventory of assets, including:

- Real estate.
- Money in deceased's bank accounts.
- Life insurance.
- Interest in an Estate or trust.
- Investments.
- Arrange for valuation of assets where necessary.
- Advertise for creditors and prepare inventory of debts.
- Re-register assets in Estate's name, if applicable.
- Prepare and file income tax returns for the year of death and prior years (if necessary).
- Make reasonable inquiries for next of kin, if required.
- Consider any claims or potential claims against the Estate and obtain legal advice (if necessary).
- Assess the rights of the surviving spouse under provincial family law.
- Assess the rights of any dependents who were financially dependent on the deceased.
- Set aside a reserve fund for estimated debts, taxes (including potential taxable capital gains), and the Estate Trustee's compensation.
- Prepare interim release and make interim distribution to Beneficiaries, if appropriate.(Get receipts)
- File terminal year tax return for the Deceased.



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## Final Matters

- Convert investments and other assets to cash and deposit funds into the Estate account, or invest the Estate balance in interest-earning investments, pending final distribution to Beneficiaries.
- File a T-3 income tax return (Estate Return).
- Obtain a clearance certificate from Canada Revenue Agency.
- Settle and pay all legitimate claims against the Estate.
- Arrange for transfer of real property.
- Arrange rollover of RRSP/RRIF/TFSA to spouse or dependent child.
- Prepare and maintain Estate accounts for approval by the Beneficiaries or examination by the court, where appropriate (Passing of Accounts).
- Have your solicitor prepare and send final releases to all Beneficiaries.
- If there is no Will, distribute assets according to rules for Intestate succession.
- Dispose of or distribute personally according to instructions in the Will.
- Prepare cheques, pay legacies, and transfer bequests.
- Invest assets for establishment of trusts.
- Pay balances due to residual beneficiaries.
- Close Estate account.

## EXECUTOR BASICS

The most fundamental principle of Estate law is that Executors are Trustees: they receive the Estate 'in trust from the deceased, and administer and then distribute it for the benefit of the Beneficiaries'. The formal contemporary legal terminology that Ontario has adopted (of referring to Executors as 'Estate Trustees' either with or without a Will) is not just accurate, it is a perfect reminder of the role, obligations, duties, rights and discretion of Executors, and of Beneficiaries.

Most of the key features of Estate law, and how the courts handle Estate issues flow fairly logically from the fiduciary role of Estate Trustees.

## DUTIES

As a Trustee, an Executor is a fiduciary and will be held to a very high standard. The Estate does not belong to the Executor – the Executor holds the Estate 'in trust' for the

Beneficiaries. Unless something to the contrary is expressly provided in the Will, some of the key duties of the Executor are to:

- avoid conflicts of interest;
- treat the Beneficiaries equally and fairly (the 'even-handed rule');
- administer the Estate properly (see below: obligations), and
- administer the Estate in a timely manner (a Trustee cannot wait indefinitely to administer the Estate). He/she will receive, administer and distribute the Estate.

## PROFESSIONAL ADVICE

An Executor has the right to seek professional advice. Indeed, frequently, in order for the Executor to meet her/his duties, she effectively has an obligation to seek out professional advice. Estates are complex and can touch on a wide range of complex subjects; accordingly, the range of possible professional advice required is wide and includes lawyers, accountants, investment advisors (to manage Estate investments prudently), real estate agents, and artifact appraisers.

Generally, the costs of professional advice – if the needs were reasonable and the cost were reasonable – will be borne by the Estate, not by the Executor personally. However, where professionals are used to do tasks that the Executor is normally expected to do, the compensation paid to the professionals may be deducted from the Executor's compensation.

## EXECUTOR COMPENSATION

Being an Executor is a demanding activity, requiring skill, effort and attention to detail. Executors are not expected to work for free, and as a general rule are entitled – when they act properly – to compensation, from the Estate, for their efforts. Executor compensation is owed by the Estate. When it is contested, it is supervised by the courts, through a process known as 'passing of accounts', which actually is a broader form of review and approval of all of the Executor's actions, not just Executor compensation.

Passing of accounts can be complex, and certainly is an activity that requires care, skill and effort. Many Executors retain lawyers to assist them with the passing of accounts



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– and many Beneficiaries retain lawyers to assist them in reviewing, and if necessary, challenging proposed Executor accounts.

- The proper calculation for Executor fees is:
- 2.5% of capital receipts
- 2.5% of capital disbursements
- 2.5% of income receipts
- 2.5% of income disbursements
- 0.4% per annum for 'care and maintenance' (often expressed as 2/5 of 1%).

A proper set of Estate accounts should show all transactions, broken into the four receipts and disbursement categories noted above.

## **HOW LONG SHOULD ADMINISTRATION OF THE ESTATE TAKE?**

The rough general rule is that an Executor has approximately one year to administer an Estate (not including any long-term trusts). This rule is commonly referred to as "the Executor's Year", and courts will very rarely sanction an Executor for failure to complete the administration in this period, or longer if circumstances warrant. However, very lengthy administration of simple Estates beyond this Executor's Year – especially where delay is motivated by self-interest of the Executor – is not appropriate and would be sanctioned by the courts.

## **CO-EXECUTORS**

When more than one person is appointed to act as 'co-executors', decision-making as between the Executors will be governed by the Will. If the Will is silent on the issue, then unanimous consent is required. Therefore, Wills frequently set out a 'majority rule' standard for decision making. A co-executor should not act unilaterally, nor hide information or facts from the other Executors.

## **THE DUTY TO ACCOUNT**

Executors have a duty to account to the Beneficiaries. This means, provide an accounting of all of the assets of the Estate, all income (and losses of the Estate), all expenses of the Estate, and all distributions of the Estate. This duty is supervised by the Courts via the process of 'Passing of Accounts'.

## **ESTATE ASSETS**

Executors have a duty to maximize the recovery, and value, of Estate assets.

## **ESTATE LIABILITIES AND EXECUTOR LIABILITY**

An Executor does not incur personal liability for the debts and liabilities of the deceased upon the deceased's death.

However, the Executor could incur personal liability for debts incurred by the Estate Trustee during administration of the Estate, especially if the debts incurred were inappropriate. In addition, Estate Trustees can be found personally liable for Estate debts if the Executor distributes assets of the Estate to beneficiaries and fails to make adequate provision for payment of all Estate debts. This potential liability is particularly significant with respect to taxes, and is the reason that prudent Executors ensure that they have resolved all outstanding tax matters and received a clearance certificate prior to making final distribution to the Beneficiaries.

## **JOINT BANK ACCOUNTS**

It is very common for elderly persons to open joint bank accounts with one of their adult children, who may or may not be the Executor of their Estate. While this can be a practical and convenient way to deal with day-to-day expenses, it can create substantial problems after death, especially if the joint holder of the account is not the sole beneficiary of the Estate but simply assumes that they are now the sole rightful owner of the bank account.

This assumption is often incorrect. In fact, the prevailing presumption in Canadian law is that bank accounts held in joint tenancy by the deceased with an adult child of the deceased does, in fact, form part of the Estate, and should be turned over to the Executor and administered as part of the Estate. Technically, this is known as a rebuttable presumption of resulting trust, to the effect that the joint bank account is held in trust by the survivor for the benefit of the Estate, not the joint tenant. This presumption is rebuttable, but rebutting it requires compelling evidence that the intention of the deceased was that the only the surviving joint tenant should benefit from the funds in the account, and not the other Beneficiaries of the Estate.



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Bank accounts held in joint tenancy with a spouse or a minor child (not an adult) still fall outside the Estate, as does real estate held in joint tenancy (whether with an adult child or any other person).

Please be careful here: Just changing a Parent's bank account to Joint ownership will, if contested, usually result in the account being determined to be only that of the Parent and therefore part of the Estate, with Probate fees applicable.

## **HOUSES, PROBATE & ESTATE ADMINISTRATION**

An Estate may often include the house lived in by the deceased, and perhaps additional properties, including cottages, condominiums, second homes in places like Florida. These houses are often the most valuable assets of the Estate, and are often a primary driver for needing to Probate the Will.

The prudent Executor should ensure that the value of the property does not decline during the administration of the Estate. Houses and other real properties create a number of challenges for Executors. These include:

- a) The duty to protect and maintain assets. For houses, cottages and other properties, this includes a duty to ensure that the property is insured adequately: the prudent Executor will immediately confirm that there is adequate insurance on the home and that the deceased did not allow the insurance to lapse.
- ii) This also includes duty to protect the property from the elements, and maintain the property (very important for cottages, and other remote properties).
- b) The duty to maximize income from the property during the Estate administration. Unless the Will clearly provides an exemption from occupation rent, anyone who is occupying a house owned by the Estate should pay 'occupation rent' to the Estate, even if the occupant is also an Executor or Beneficiary of the Estate. Occupation rent should be reasonable market rent, not an absurdly low figure.
- c) The duty to sell the property for fair market value. Unless the Will expressly provides for a life interest in the property,

or, another express provision for either the Estate to retain the property or to bequeath it directly to a named Beneficiary, the house is simply an Estate asset and should be converted to cash in a timely fashion. The mere fact that a house was 'the family house' does not change this general rule.

The Executor should attempt to maximize the value recovered from the house, and as a general rule this means selling it, (perhaps after making minor cost-effective improvements or repairs), for fair market value, as soon as practicable. Often one Beneficiary expresses an interest in acquiring the family home from the Estate of a deceased parent. Unless the Will provides otherwise, or the other Beneficiaries expressly consent, the purchaser must still pay fair market value for the property.

There are a number of ways that this value can be determined, including, for instance, listing the property for sale and soliciting offers, and then providing the Beneficiary who wants to buy the property a time-limited time to match or beat the best offer received from strangers (note that the offer to purchase from the Beneficiary to purchase should be in the form of a legally binding written offer to purchase that can be accepted in writing by the Executor, and not a vague oral commitment).

## **HOUSES OCCUPIED BY EXECUTORS**

A common problem is that one of the Executors, often a child of the deceased, occupies a house owned by the Estate. This raises a host of potential problems including conflicts of interests, lack of even-handedness, and unreasonable delay in administering/distributing the Estate assets.

Generally, the occupant should pay occupation rent, and the property should be sold in a timely manner, to someone (including perhaps a Beneficiary or Executor) for fair market value.

The prudent Executor will take considerable care to ensure that these principles are adhered to, and, that the Executor has good records of adhering to these principles - including, for instance, the way that fair market value is determined.



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## **HAVING RIGHTS AND ENFORCING RIGHTS**

What the rights, obligations, duties, and liabilities of an Executor or Beneficiary are is 'the law' (see above for a very brief summary of some of the key elements).

Enforcing the law – and forcing someone to behave when they are misbehaving – is a separate issue entirely. Ultimately, most enforcement in the Estates context is through the courts, followed by enforcement of court orders. By necessity, a) the courts start from a presumption of deferring to the wishes of the Testator (the deceased), and thus to the discretion of an Executor, and b) the courts impose a heavy burden on parties seeking relief (at the very least, to prove their case 'on a balance of probabilities'). As a result, before judges make orders and permit other arms of 'the state' (e.g. the police and sheriff) to begin enforcing court orders, judges want to be very certain that they are not acting prematurely, or based on incomplete, inaccurate, or biased information, or over-reaching the minimum required to address the proven problem. Accordingly, if you want relief from a court (a court order for something), you must be prepared to submit a well-organized, well-presented, well-documented case that clearly demonstrates the wrong being done that needs to be rectified, and why the relief that you seek is the right relief for the problem.

Enforcement of rights in the Estate context can be very expensive. Fortunately, however, if your position is reasonable and well-presented, there is a strong likelihood that a portion of your legal expenses will be reimbursed by the Estate.



## Want more information?

**ARE YOU INTERESTED IN A CONSULTATION WITH PETER R. WELSH?  
CONTACT ME AT [PETER@SMARTWILLS.CA](mailto:peter@smartwills.ca) BY TELEPHONE 416-526-3121  
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