



How Executors Avoid Personal Liability

A handbook for executors and beneficiaries

Lynne Butler, **LAWYER**

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Dedication

This book is dedicated with thanks to everyone who reads my blog, buys my books, and attends my seminars. Your questions have fueled my passion for Wills and Estates law for 30 years.



Introduction

You are an executor. Most of us who act as an executor do so only once in our lives, and for most, once is plenty. The person who named you as his or her executor probably intended it to be an honour for you, but it may not always feel that way once you start the actual work. It can be a tough job. There are stacks of unfamiliar paperwork, and endless discussions with lawyers, accountants, land title clerks, and bankers. There are countless questions from family members, not all of which you know how to answer. There are laws to learn and new procedures to follow.

The majority of executors are completely unprepared for the job in the sense that there is no official training for it and they have to feel their way along as they go. Who could blame you for wondering what you have gotten yourself into?

It is also true that beneficiaries are becoming more willing to consult the courts when an estate grinds to a halt due to what they may feel is executor mismanagement. At one time, estates were considered private family affairs and, at times, privacy was maintained at

the expense of proper estate administration. Litigation is no longer seen as an embarrassment or failure; these days it is regarded more as a necessary tool. Any executor should realize that a shift in attitude such as this could well affect how the beneficiaries of an estate will react to the executor's behaviour.

By now you may have read the will that appoints you and have a general idea of what you need to do as executor. Or, if there is no will, you are the person who is going to step forward to be appointed by the court as the estate administrator. You are considering your options, doing some research, and perhaps hiring a lawyer to help you. You may already have heard or read that as an executor or administrator, you may be personally liable for mistakes you make while administering an estate: Any financial loss to the estate by the executor may result in the executor repaying that loss out of his or her own pocket.

One of the most complicating factors in any estate is that the people involved are likely emotionally volatile. Everyone, most of the time including the executor, has just lost someone dear to them and has been thrown into an unwanted situation. Family members are grieving and emotions are easily triggered. The executor ends up being blamed for everything that happens, even when that is completely unfair. This makes an already intimidating job even more challenging for an executor.

It can be pretty difficult under these conditions to carry out your duties as executor in a way that pleases everyone. However, this does not mean that you are doomed to endure months of harassment at the hands of the beneficiaries, or to end up in a lawsuit. It does not have to be that way. There are several steps that you can take to ensure that you do not regret taking on the executor's role or becoming the most hated person in the family.

This book looks at the ways that you, as an executor or a court-appointed estate administrator, may conduct yourself in a way that will not result in you becoming personally liable for your actions when looking after an estate.

We will also look at several of the ways that executors and administrators tend to get into trouble, with explanations of exactly what can go wrong. We will then discuss ways to avoid those particular minefields. This book contains information, examples, tips, and ideas that executors can use. The last chapter of the book contains some additional liability-reduction tips that are wonderfully effective, but so little-known and so underused they could almost be considered secrets.

Many of the problems and struggles encountered by executors during the estate administration are with the beneficiaries of the estate. You will notice as you read this book that the beneficiaries loom large in the majority of the issues raised. However, this does not mean that conflict with the beneficiaries is the only source of executor liability. In this book we will look at how co-executors may cause liability for each other. We will also touch on how an executor can become liable to third parties.

In this book, the word “executor” will mean either an executor named in a will, or a court-appointed administrator. In almost every respect, these jobs are the same once they are underway. However, administrators can incur liability in additional ways that executors cannot. Chapter 15 is dedicated to court-appointed administrators to cover a few issues that relate strictly to them, and not to executors named in wills.

What you will gain from using this book:

- You will gain knowledge of the most common mistakes executors and administrators make without realizing they are causing a problem. You will be able to head off problems before they start by being aware of the issues that are likely to arise and how your decisions and actions will either aggravate them or prevent them.
- You will gain an understanding of the various ways in which the courts deal with executors who break the rules intentionally, or who accidentally make mistakes. You will realize the importance of carrying out your executor’s duties to the best of your ability by comprehending how seriously the legal system will consider any breach.
- You will gain practical ideas and information about how to avoid conflict and errors when working as an executor. This book will go beyond telling you how not to do things; it will provide information about how to proceed the right way.
- You will gain knowledge of the laws and legal processes with which an executor must deal. This book will help you focus on the areas that most need your attention at a time when you may feel overwhelmed with new information and responsibilities.
- You will gain the confidence you need to deal with an estate effectively and to manage the expectations of the beneficiaries. You will know that the beneficiaries have confidence in your abilities because you are showing them confidence, compassion, and leadership.

- You will know how to protect yourself from personal liability when acting as an executor. You probably agreed to act as executor because you felt it is your duty to do so. This book will help you carry out that duty without regretting your decisions.

Because this book is about liability, it must of course focus on financial losses that you as an executor might cause to an estate. However, there is another way in which you and the beneficiaries may well lose if you cannot properly discharge your duties as an executor: the emotional cost of family disharmony.

The number of families adversely affected by the fraudulent, negligent, or arrogant behaviour of an executor is simply staggering. The majority of families end up in a dispute of some sort during an estate administration. Some break up completely and are never mended. Often, this is the direct result of the actions of the executor.

While this kind of loss is important and worthy of consideration, it is not measurable in terms of money. It is not going to end up in court. The consequences are personal, not legal. This book will concentrate on keeping you out of court and out of the lawyer's office as a result of financial losses and legal mistakes. The added benefit of family harmony that will result from a smooth estate administration is a significant bonus.

There are endless variations on estates. Each is unique in terms of assets, liabilities, family, beneficiaries, and documents, and as a result there is no limit on the mistakes available for you to make. However, the mistakes tend to fall into general categories as we will discuss in this book.

It is important to realize that many mistakes by executors are made by honest, well-intentioned people just like you. While there are some executors who behave as if they have personally won the lottery when they are made executors, most take it more seriously than that. Most want to do a good job. It is easy to make a serious error, even when you are honest and paying attention, simply because you are not aware of a law, regulation, form, or process.

Some rules and laws that govern estates do not make a lot of sense to people who do not work with those rules often. In particular, executors and beneficiaries alike will complain that the estate taxation rules seem difficult to understand. This may be the case if you do not know the theory behind them, but as an executor you are probably not very interested in learning tax theory; all you likely want to know is how not to fall on the wrong side of the law.

Congratulations on choosing this book; you are already ahead of the game, since many executors do not even realize they may face personal liability until they are standing in a courtroom and wondering how they got there. By reading the descriptions and examples in the following chapters of the mistakes that executors frequently make, you will be able to avoid them yourself.



1

General Laws and Rules for Executors

In this chapter, you will find a brief review of the laws, regulations, and procedures that set out how an executor must behave in Canada. All statutes (written laws) that apply to wills, probate, and estate administration are provincial, so there are surprisingly wide differences between them. However, the general rules and principles are the same across the country. In the downloadable kit that accompanies this book, you will find a list of the laws that apply to each province and territory.

Laws regarding taxation of estates are made federally so they are the same for all Canadians.

The goal of this chapter is to guide you towards greater understanding of your role as executor and to help you find the resources you need.

1. Where Does It Say That?

A question asked over and over again during estate administration is, “where does it say that?” This question is asked by executors who

have read the will thoroughly and simply do not see where it tells them that they cannot commingle (mix) the estate money with their own, or that they must wind up the estate in one year, or a hundred other things.

You may not see these things written in the will. In fact, it is highly unlikely that you will. However, they exist and they affect you.

A legal document of any kind, including a will, is prepared in the context of the laws of the land that relate to that document. An executor who is administering a will is expected to educate himself or herself as to the duties, rights, and obligations of an executor, no matter what is written in the will. You have to make it your business to find out which laws and regulations govern estates and executors, and to abide by them. Saying that you did not know the law will not help you if you are sued.

Therefore, realize right from the beginning that the will is a summary of what you must do, and the laws of your province and of Canada fill in the details of how you must do it.

2. An Executor Is a Type of Trustee

Words used in a will have definitions that are well-entrenched in law, because wills have been around for many hundreds of years. Our Canadian laws are based on British laws and processes that go back to the years before Canada existed in its current form.

These definitions bring with them legal rights and responsibilities that may be invisible to you when you read the will, but that exist in any event. For example, if you asked an average person to define the word “executor,” you would probably hear something like “the person who looks after the will and pays everyone their inheritance.” That is true as far as it goes. However, there is much more to it, as the word “executor” has been used in legal cases for hundreds of years. The law says that an executor of an estate is considered to be a trustee and must behave as a proper trustee.

Because an executor is a trustee, a mistake made by an executor is usually referred to as a breach of executor’s duty.

Every province and territory has a *Trustee Act* which governs the rights and responsibilities of an executor or estate administrator. You might not know it from simply reading the will, but those obligations apply to you. It would be a good idea for you to read the *Trustee Act* for your province. Guidance that is typically found in a provincial *Trustee Act* includes:

- How an executor may or may not invest estate funds.
- Whether an executor may delegate his or her investment decisions to an advisor.
- How and when a substitute executor may be appointed, if that becomes necessary.
- How an executor can request to be removed as executor.
- Rules for selling the estate's real property.
- Information about the liability of executors.
- How an executor may use trust funds to look after a minor beneficiary.
- How an executor is to deal with creditors of the estate.

This is not an exhaustive list by any means, but these examples should be sufficient to indicate just how important the *Trustee Act* is to an executor. It contains valuable instructions and definitions which affect the executor. By agreeing to be an executor, you are agreeing to work within all of the rules and guidelines set out in this Act, even if you do not see those rules set out in the will.

Links to provincial *Trustee Acts* can be found in this book's download kit.

Each province and territory has its own laws, rules, processes, and forms that apply to wills, trusts, and probate matters. The will you are administering must be interpreted within those guidelines. Always ensure that any reference material you use is relevant to your particular province and is up to date.

3. An Executor Is a Fiduciary

Executors, by definition, are fiduciaries. This legal term refers to anyone who holds property, money, or information for someone else and who has a duty towards the person or people for whom those assets are held. This aspect of being an executor is arguably the most important characteristic of the executor's job. It will give rise to most of the complaints and questions about executors, even though the word "fiduciary" most likely does not appear in the will. This is because by accepting the job as an executor, you have accepted the fact that you owe a duty of loyalty to the estate, even when that loyalty conflicts with your best interests.

Some professionals, such as lawyers, accountants, bankers, and brokers, are also fiduciaries, and there are rules in place to ensure that they use the assets of an estate for the right purposes.

An executor is in conflict of interest if he or she cannot reconcile his or her personal interests with that of the estate, or if it appears to others that they cannot be reconciled. Few people can really overlook his or her own wishes when it comes to an estate. This may make it difficult to fulfill the fiduciary duties required.

A commonly seen example of an executor who is in a conflict of interest position is that of a spouse or child of the deceased who is the executor, but who wants to make a claim for a larger portion of the estate. The conflict arises because it is the executor's job to represent and defend the estate when any claim is made. It is impossible to sue the estate and defend the estate on the same lawsuit. An executor who is in a conflict of interest should step down as executor because it is impossible for him or her to properly act as a fiduciary.

Another important issue for executors that arises from their positions as fiduciaries is that of improper delegation. The general rule is that an executor cannot delegate his or her discretion. In other words, the deceased has asked you to step into his or her shoes to make decisions; you cannot then ask someone else to make those decisions.

We know that executors are allowed to hire people to help with an estate. As an executor, you may hire someone to help you carry out the decisions you have made, but you must be careful not to cross the line into letting others actually make the decisions for you. Executors are allowed to delegate tasks that are purely administrative, which allows you to hire a lawyer to apply for probate, an accountant to prepare a tax return, or a realtor to sell a property.

The key to avoiding liability when delegating these tasks is that you must make the decision to obtain probate and to place the values on the estate. You must decide that a return needs to be filed. You must decide that a property is to be sold and decide whether any particular offer is to be accepted. You have the responsibility and the liability for those decisions.

There is also a "reasonability" test. This means that executors are allowed to hire agents for assistance where it is reasonable to do so. Not every estate is complicated or large in value, and not every task is complex. An executor should only hire an agent when it is reasonable to do so in the circumstances of a particular estate. As a general rule, the courts have agreed that it is reasonable for executors to hire financial advisors or money managers to assist with investments, so you will not be held liable for delegating the management of a portfolio to them.

Executors and administrators are also affected by Canada's income tax laws, whether or not those laws are mentioned in the will.

This is because our *Income Tax Act* specifically says that any legal representative (which includes executors and administrators) is responsible for any taxes that are not paid if the legal representative pays out the beneficiaries before paying the tax. Again, this is something that you may not see in the will, but you are expected to find out when you start acting as an executor.

4. Common Law

Other rights and obligations for executors and administrators are not always written down in a rule book anywhere. They have developed over the years from what we call the “common law.” This refers to a history or accumulation of cases that have been interpreted and decided by our courts (and before them, the courts of England). We rely on those cases as having set precedents, so that we can extrapolate the findings of those cases to our own situations. The reliance on precedent is intended to guide, interpret, and control the actions of executors, administrators, beneficiaries, creditors, and claimants.

Provincially, only Québec does not use the common-law system; it has its own legal system known as a civil-law system.

An example of a common-law rule that affects executors is the concept of the executor’s year. This concept means that unless there are difficulties or complexities in an estate, the executor should be able to finalize it and pay out the beneficiaries within a year. It sets a goal for the executors, and it also alerts the beneficiaries not to expect the job to be done overnight.

The fact that a rule arises from a common-law precedent and not a written statute (except in New Brunswick where the one-year rule is set out in the *Devolution of Estates Act*) does not change the fact that an executor must abide by it, and may face consequences if he or she does not do so.

5. Summary of the Executor’s Responsibilities

The following is a summary of the responsibilities of the executor that are created by statute and by the common law:

- The executor must follow the will.
- The executor must be impartial and fair towards all beneficiaries.
- The executor must protect and maximize the assets of the estate.
- The executor must give information as needed to beneficiaries, tax officials, creditors, agents, and third parties.
- The executor must delegate only matters that are appropriate.

- The executor must act in good faith.

Those general responsibilities each break down into several dozen individual tasks to be completed by an executor. In the downloadable kit included with this book you will find a more detailed list of executor's specific duties for you to use as a checklist as you work on your tasks as executor. When using the checklist, you should realize that as each estate is different, not every item on the list may apply to your situation.

6. Specific Language in a Will

It is important to realize that the powers and limitations of an executor as described in the previous sections of this chapter exist, but may be changed or augmented by specific language used in a will. The general rule is that the existing law is used as the default position unless it is varied by the will itself.

Not every wish or instruction given by a testator in a will is legal or binding. Sometimes testators will include clauses that simply cannot be followed, such as a man leaving a gift to his daughter only if she divorces her husband, or one that requires someone to repay an inheritance to the estate if he picks up the habit of smoking. If the will you are administering contains any unusual clauses like these, you should take the will to a lawyer for a discussion of how to handle the instructions.

However, most instructions left in a will that are intended to override the usual way of doing things are valid and should be followed. A few examples of clauses that validly direct the executor to manage things in a way that is outside the usual are:

- Directing that the beneficiary who inherits an asset pays the tax on that asset. Normally the taxes are paid by the general estate, regardless of who receives the taxable asset. This means that in the absence of any specific instructions, one person might inherit the deceased's cabin, while all beneficiaries have to bear the tax burden from the cabin. Sometimes testators who are aware of the way tax rules work will include a clause in the will directing that the beneficiary who gets the cabin (or business, land, or other taxable asset) will pay the taxes. As an executor, it is essential that you understand the source of tax payments, so pay close attention to any instructions in the will that reference payment of taxes.
- Directing that the share of someone who predeceases the testator is not to be shared among the deceased's children. We are used to seeing wills that say the inheritance of a person who has

died should be paid to that person's children instead. In fact, this concept is the basis for intestacy law in most of Canada. However, if the will says that the inheritance is not to be divided among that person's children but is to go somewhere else instead, those instructions are valid.

- Directing that the entire estate be liquidated and the money divided. These days it is rare to see an estate that is completely sold off. However, if a testator wants that to happen with his or her estate, and sets out these instructions in a valid will, you are obligated to follow it.

7. The Executor's Powers Provided by the Will

The quality of any given will depends on the expertise of the lawyer or other person who drew it up, as well as the circumstances under which the will was prepared. Wills that are done hurriedly, such as death bed wills, may be simpler and may even be prepared without the benefit of legal advice. Some testators use will kits or forms found on the Internet; this can work quite well if care is taken to select a form for the right jurisdiction and if the kit's instructions are carried out properly. Mistakes can be made, whether or not a lawyer has been involved.

The best wills contain paragraphs that are referred to as "executor's powers" or "executor's authorities." When you begin working as an executor, you should read the will carefully to note which powers are provided for you. The purpose of these powers is to smooth the administration of the estate by allowing the executor to take certain steps without needing the permission of the beneficiaries or of the court.

As mentioned, the quality of wills varies. The better the quality of the will, the more you, as executor, are protected. This is because the lawyer who drew the will would have anticipated the steps you are going to take to administer the estate and would have included the specific powers you need to do that. In an estate where there are no disputes or struggles, the powers may be less crucial, but in most estates, the executor must rely on the powers for his or her legal authority to carry out certain tasks.

Even though federally it is implied that administrative tasks may be outsourced by the executor, some of the specific powers that you should be able to find in the will you are administering are:

- Power to sell real estate.
- Power to make income tax elections.
- Power to hire agents such as accountants, lawyers, or realtors.

- Power to give items to beneficiaries in specie, which means the ability to give a beneficiary an actual item without having to sell the item and give the beneficiary the funds.

Some wills need more powers than others, based on the needs of the person whose will it is. For example, a person who owns a business should have a will that allows his or her executor to carry on the business until the company is sold, and to deal with corporate matters such as registry filings and corporate resolutions.

When there are minor beneficiaries of the estate, further powers are needed to let the executor know who may handle money on behalf of the minor.

The lack of these powers in the will is a tricky situation for executors. Where the powers are present in the will, you can carry out the steps you need to take based on the will. Where the powers are absent, local law often requires either the written consent of all of the beneficiaries, or an order of the court allowing you to take the step. Be cautious when you want to carry out steps for which there is no specific power given. You may wish to consult a lawyer for an opinion on whether you have the legal authority to take steps such as:

- Selling, winding down, or carrying on a business.
- Selling a home even though there is enough money in the estate to pay the debts without selling the home.
- Rolling over an RRSP or RRIF to a spouse.
- Settling a lawsuit or claim on behalf of the estate.