

SO YOU'VE BEEN APPOINTED EXECUTOR

Tom Carter and Elyssa Lockhart

Self-Counsel Press

(a division of)

International Self-Counsel Press Ltd.

Canada USA

Copyright © 2021 by G. Thomas Carter and Self-Counsel Press.

All rights reserved.

No part of this book may be reproduced or transmitted in any form by any means — graphic, electronic, or mechanical — without permission in writing from the publisher, except by a reviewer who may quote brief passages in a review. Any request for photocopying, scanning, or information storage and retrieval systems of any part of this book shall be directed to Access Copyright, the Canadian Copyright Licensing Agency. To make a transactional permission request please use the on-line Title Search & Permission tool found on the website www.accesscopyright.ca.

Self-Counsel Press acknowledges the financial support of the Government of Canada for our publishing activities. **Canada**

We also gratefully recognize the Coast Salish, Tsleil-Waututh, Squamish, Sto:lo, and Musqueam peoples, on whose land our offices are located.

Printed in Canada.

First edition: 2002; Reprinted: 2003, 2004, 2005, 2006

Second edition: 2008; Reprinted: 2009, 2010, 2011, 2012 (2); 2014

Third edition: 2015; Reprinted: 2016, 2018

Fourth edition: 2021

Library and Archives Canada Cataloguing in Publication

Title: So you've been appointed executor / Tom Carter and Elyssa Lockhart.

Names: Carter, Tom (G. Thomas), 1950- author. | Lockhart, Elyssa L., author.

Series: Self-Counsel legal series.

Description: 4th edition. | Series statement: Legal series

Identifiers: Canadiana 20210137800 | ISBN 9781770403345 (softcover) |

ISBN 978-1-77040-460-1 (epub) | ISBN 978-1-77040-461-8 (kindle)

Subjects: LCSH: Executors and administrators—Canada—Popular works.

Classification: LCC KE831 .C37 2021 | LCC KF778 .C37 2021 kfmod |

DDC 346.7105/6—dc23

Material on page 94 is from Canada Revenue Agency and is reproduced with permission of the Minister of Public Services and Procurement Canada.

Self-Counsel Press

(a division of)

International Self-Counsel Press Ltd.

North Vancouver, BC
Canada

Bellingham, WA
USA

Contents

Introduction	xi
Part I: To Be, or Not to Be, an Executor	1
1 Finding or Choosing an Executor	3
1. It's Tough to Choose a Good Executor	3
2. It's Tough to Be an Executor	4
3. How We Discovered What Being an Executor Is All About	4
4. The Need Will Never Go Away	6
5. Who This Book Is For	7
2 The FAQs of Life for Executors	9
1. What Is an Executor?	9
2. What Are Sole, Joint, and Alternate Executors?	10
3. To Whom Am I Responsible As Executor?	10
4. The Will Says I'm Executor, So I Am, Right?	11
5. What Is Probate, and Why Do I Need It?	12
6. When Does My Authority As Executor Begin?	14
7. What Do I Have to Do As Executor?	16
8. What Liabilities Do I Face As Executor?	17
9. What Are the Attributes of a Good Executor?	18
10. What If I Don't Want to Be Executor?	18
11. How Do I Decide to Be an Executor or Not?	19
12. Can I Change My Mind after I Start?	20
13. Can I Get Help?	21
14. Who Can Help Me and How Do I Find Them?	21

15. Lawyers	22
15.1 Advantages of using lawyers	22
15.2 Lawyers' fees	23
15.3 Finding a good estate lawyer	23
15.3a Step 1: Get the names of five good lawyers	24
15.3b Step 2: Work the phone	24
15.3c Step 3: Visit the prospects	26
16. Accountants	26
16.1 Advantages of using accountants	26
16.2 Accountants' fees	27
16.3 Finding a good estate accountant	27
17. Trust Companies	27
17.1 How trust companies become executors	28
17.2 When to consider a trust company	28
17.3 Advantages of a trust company	28
17.4 Trust company fees and fee agreements	29
17.5 Finding a good trust company	29
18. The Challengers: Paralegal Services	30
18.1 Advantages and disadvantages of paralegals	30
18.1a Clarify what they will do	31
18.1b Keep control of the estate assets yourself	31
18.1c Be clear on fees	31
18.1d Finding paralegals	31
19. Specific Services	31
19.1 Tax-preparation services	31
19.2 Real estate agents	32
19.3 Personal property appraisers, evaluation specialists, and auctioneers	33
Part II: The Eight Duties of the Executor	35
3 Duty Number 1: Make Reasonable Funeral Arrangements	37
1. The Executor Makes Decisions about the Funeral	37
2. The Costs Must Be Reasonable	38
3. What If the Deceased Made Arrangements?	39
4. Be Careful with Headstones	40
4 Duty Number 2: Find and Take Control of the Assets of the Deceased	41
1. Putting on the Rubber Gloves: Tom's Trust Company Experience	41
2. Securing the Residence	42
3. Perishable Items	43
4. Valuables That Grow Legs	43
5. Important Papers	44
6. Credit Cards	44
7. Safety Deposit Box Key	45
8. Mail	45

9. Insurance Policies	45
10. Household Furnishings	46
11. Lists and Memoranda	47
12. Unspecified Items: To Sell or Not to Sell?	48
13. Vehicles	49
14. Contacting Banks and Financial Institutions	49
15. CPP, GST/HST, and OAS	50
16. Businesses, Land, and Rental Properties	51
17. Collections	52
18. Loans Owing to the Deceased	52
5 Duty Number 3: Prepare an Inventory, Value the Assets, and Keep an Account	53
1. Open an Estate Account	53
2. Start an Estate Inventory	54
3. Take Pictures	54
4. Valuing Estate Assets	54
4.1 Real estate	54
4.2 Vehicles	55
4.3 Livestock	55
4.4. Active businesses	55
5. Five Reasons to Keep an Inventory and Accounts	56
5.1 For probate fees	56
5.2 For taxes	56
5.3 For the beneficiaries	57
5.3a Who are the beneficiaries?	57
5.3b Per capita and per stirpes	57
5.3c What if there are no alternative beneficiaries in the will?	58
5.3d Special status for spouses and children	58
5.3e The expanding definition of spouse	59
5.4 For the creditors	59
5.5 For your own protection	59
6 Duty Number 4: Find and Probate the Will, If Necessary	61
1. What If You Don't Have the Will?	61
2. Calling the Lawyer	61
3. What If the Lawyer Didn't Keep the Will?	62
4. Looking for the Will	62
5. What If You Don't Find a Will?	63
6. What If All You Have Are Copies of the Will?	64
7. You Have the Will but Do You Need Probate?	64
8. Two Kinds of Assets That Do Not Need Probate	65
9. How Probate Protects the Executor	67
9.1 Advertising for creditors	67

9.2	Issuing notices	67
9.3	Passing of accounts	67
10.	Probate Confirms the Will Is Valid	68
11.	Avoiding Probate in Small, Cash-Only Estates	68
12.	A Brief Note on COVID-19	69
7	Duty Number 5: Deal with Debts and Claims Against the Estate	73
1.	Debts of the Deceased	73
1.1	Looking for debts	73
1.2	Business or partnership debts	74
1.3	Medical bills and claims by caregivers	74
1.4	Insured debts	75
1.5	Advertising for creditors	75
1.6	Challenging claims by creditors	76
1.7	Child or spousal support	76
1.8	Leases and mortgages	76
1.9	Lawsuits against the deceased	76
1.10	Unenforceable debts	77
1.11	Claims by spouse or children for more of the estate	77
1.12	Paying debts	77
1.12a	Enough for the debts but not for the beneficiaries	77
1.12b	Not enough for the debts	78
1.13	The CRA always comes first (sort of)	78
1.14	Keeping the house going	78
2.	Debts Relating to the Death	79
3.	Debts Incurred by the Executor	79
8	Duty Number 6: Pay Any Taxes Owing by the Deceased and the Estate	81
1.	Capital Gains Tax	81
2.	Tax Deferrals and Rollovers	84
3.	Tax-Free Assets	86
4.	Tax Returns at Death	86
5.	Returns for the Deceased	87
5.1	The terminal return	87
5.2	Three optional returns	89
5.2a	Optional return 1: The rights and things return	90
5.2b	Optional return 2: Business income return for partner or proprietor	90
5.2c	Optional return 3: Testamentary trust income return	90
5.3	Claiming credits on optional returns	91
6.	Unfiled Returns for the Years before Death	91
7.	Returns for the Estate	91
7.1	T3 return for the estate	91
7.2	Graduated rate estates	92

8. Tax and the Beneficiaries	92
9. Clearance Certificates and Holdbacks	93
10. GST/HST at Death	95
9 Duty Number 7: Account to, and Get Releases from, the Beneficiaries	97
1. Why You Must Keep Accounts	97
2. It's a Self-Policing System	97
3. What the Beneficiaries Want	98
4. What the Executor Wants	98
5. What Unhappy Beneficiaries Can Do	99
6. Protect Yourself with Good Accounts	99
7. Beneficiaries Hate Silence	99
8. The Beneficiary Who Won't Sign but Does Nothing Else	100
9. Your Executor Fees	101
10. Avoiding Trouble over Executor Fees	102
11. Calculating Your Fee	102
12. Setting a Reasonable Fee	102
13. Some Executors Don't Charge a Fee	103
14. Can You Charge a Fee If You Also Receive a Gift?	103
10 Duty Number 8: Distribute to the Beneficiaries	105
1. Conversion to Cash or Distribution in Specie	105
2. Missing Beneficiaries	106
3. Deceased Beneficiaries	106
Part III: Two Typical Estates	107
11 Applying the Eight Duties to Two Typical Estates	109
1. Estate 1: Mary Smith — Sam's Wife and Mother of Their Children	109
1.1 The eight duties of an executor and the estate of Mary Smith	116
1.1a Duty 1: Make reasonable funeral arrangements	116
1.1b Duty 2: Find and take control of the assets of the deceased	116
1.1c Duty 3: Prepare an inventory, value the assets, and keep an account	116
1.1d Duty 4: Find and probate the will, if necessary	116
1.1e Duty 5: Deal with debts and other legitimate claims	116
1.1f Duty 6: Pay any taxes owing by the deceased and the estate	117
1.1g Duty 7: Account to and get releases from the beneficiaries	117
1.1h Duty 8: Distribute to the beneficiaries	117
2. Estate 2: Sally Smith — Sam's Mother, an Elderly Widow	117
2.1 The eight duties of an executor and the estate of Sally Smith	126
2.1a Duty 1: Make reasonable funeral arrangements	126
2.1b Duty 2: Find and take control of the assets of the deceased	128
2.1c Duty 3: Prepare an inventory, value the assets, and keep an account	129
2.1d Duty 4: Find and probate the will, if necessary	129

2.1e	Duty 5: Deal with debts and other claimants against the estate	129
2.1f	Duty 6: Pay any taxes owing by the deceased and the estate	129
2.1g	Duty 7: Account to and get releases from the beneficiaries	130
2.1h	Duty 8: Distribute to the beneficiaries	131
Appendix		133
Glossary		137
Samples		
1	TX19 — Asking for a Clearance Certificate	94
2	Indemnity	115
3	Renunciation	121
4	Initial Inventory for Estate of Sally Smith, Deceased	122
5	Final Inventory for Estate of Sally Smith, Deceased	127
6	Account for Distribution Purposes, Estate of Sally Smith, Deceased	128
7	Release	130
Tables		
1	Dependant Relief Laws	60
2	Names of Intestate Succession Laws by Province and Territory	63
3	Probate Fees by Province and Territory for a \$500,000 Estate	65

Notice to Readers

Laws are constantly changing. Every effort is made to keep this publication as current as possible. The author, the publisher, and the vendor of this book make no representations or warranties regarding the outcome or the use to which the information in this book is put and are not assuming any liability for any claims, losses, or damages arising out of the use of this book. The reader should not rely on the author or publisher of this book for any professional advice. Please be sure you have the most recent edition.

Note: Fees set by provincial and territorial governments are subject to change without notice. For current fees at any specific time, please check with the court registry or appropriate government office nearest you. Prices, commissions, fees, and other costs mentioned in the text or shown in the samples in this book probably do not reflect real costs where you live. Inflation and other factors, including geography and area of professional specialty, can cause the costs you might encounter to be much higher or even much lower than those we indicate. The dollar amounts are simply intended as representative examples.

Website links often expire or web pages move; at the time of this book's publication, the links were current.

Introduction

Each and every one of us has friends, family, or loved ones and even though we don't like it, the fact is that they — and we ourselves — are getting older every day. It goes without saying that we will all die eventually, and when we do, our debts and assets will have to be addressed properly. That means each of us has to know something about what it means to be an executor so we will know what to do when the time comes.

There is another reason why we need to know something about what it means to be an executor. We all know that we should prepare our own wills, and if we know what being an executor is all about, we will be able to choose the right person, for the right reasons, to do the job in our own estates.

We wrote this book to explain to you what you need to know when you are an executor, and to help you choose the best executor for your own estate. If you decide you need assistance, we hope that the information we provide about the various professionals and resources available will help you get that assistance, at a reasonable cost. Finally, we hope it will help you avoid some agony when you are faced with one of the toughest decisions when you make your own will — who to name as your executor.

Throughout the book you will find tables of useful information and sample forms. Please note, each province and territory has its own forms for probate applications. To provide examples of each approved form for each jurisdiction would take two or three books the size of this one. Instead, in order to give you an idea of what those forms look like and what they say, we

have created our own generic sample forms that contain the basic information commonly required across the country. If you are looking after an estate yourself, you will have to get the correct forms for your province or territory, as ours are not intended to be used in practice.

Please note, this book is not intended to give you detailed information on each and every challenge that can arise in the course of looking after an estate; it is not an encyclopedia of the law of executorship. Nor does it try to give you precise technical details about the forms and legal requirements of each province and territory. It is not a comparative law treatise. If you have questions about the laws or procedures in your province or territory, you should consult a lawyer, an accountant, or another estate professional in your area.

What this book does give you is an introduction to the predictable and unavoidable issues that each and every executor will face regardless of the size of the estate involved. These are the issues that our clients have dealt with over and over again during our decades of experience in private practice, and also in Tom's years as a trust officer with a major trust company.

Being an executor is a fascinating experience. Sometimes it is a short and simple task that only takes a little common sense. More often, however, it is a long and tiring experience that leads you into a tangle of legal jargon and principles that is overgrown with the unrealistic expectations of beneficiaries and the deep, sometimes unsettling, emotions that affect all of us when a loved one dies.

The purpose of this book is to give you a general idea of what you need to know to get through that tangled thicket called being an executor. I hope it gives you the knowledge and confidence you need to make that journey successfully. Also, if you decide that you need professional help, we hope this book helps you find it.

When you get right down to it, we are talking about two priceless gifts that are merely the flip sides of the same coin — honouring the wishes of a deceased person as quickly and cost effectively as possible and providing peace of mind for your loved ones and yourself in your will. When you think about it, it is within the power of each of us to give these gifts to those we love. We believe this book will help you do that.

Thank you for choosing this book, and good luck.

Part I

TO BE, OR NOT TO BE,
AN EXECUTOR

1

Finding or Choosing an Executor

1. It's Tough to Choose a Good Executor

In the practice of law, estate planning lawyers work with many people who are struggling with deeply emotional issues. They are trying to make their wills, and they can't always easily decide what to put in them. Whether the person making the will is single or married, has children or not, there are so many difficulties to work through. For some, the most challenging decision may be who to choose as beneficiaries and what to give each of them. Others, however, feel a more exquisite pain. They grapple with choosing the right executor — someone they can trust, absolutely and unconditionally, to carry out their wishes after they are gone.

One thing all estate planning lawyers will quickly tell you, is that clients often have strong, preconceived ideas about who they “should” be naming as their executor and how people “should” go about choosing an executor. People with families often don't want to hurt anyone's feelings; they wanted to name everyone to act together as joint executors, so no one will feel left out. Others assumed that it is right to always name the eldest adult child, regardless of that child's demonstrated ability to do the job. Those without family worry about burdening their friends with the job; they are often interested in hiring a professional person to handle the work, but they are anxious about the extra cost that might involve, and about the possibility of delay in getting things done.

Sometimes the struggle to choose the right executor becomes so difficult that people are brought to a standstill and their wills run the risk of never being completed. Thankfully, that is very rarely the case when they seek advice from a professional with experience in this field.

2. It's Tough to Be an Executor

We have each worked with many executors, those who had been named in a will and were then called on to step in after the person died. These executors always knew it was an important job but they were usually in the dark about what they were supposed to do and when they were supposed to do it. Some of them didn't even know they had been selected as executor until after the person died and the will came out of a lawyer's vault or a safety deposit box. They had no chance to prepare themselves for this unique and demanding job.

We have observed that most people who are named as executor don't like it. They may initially have felt honoured to have been named to such an important role, but frequently later found the experience to be much more difficult and time consuming than they expected. As the days and weeks wear on, any honour that might have been attached to the appointment typically fades. They often wished that the dearly departed had never thought of them at all. It is not uncommon for an executor to say "never again" as an estate administration matter is winding up, whether they have taken the opportunity to obtain professional help all along, or worked their way through most of the process on their own.

Even lawyers who routinely assist executors with the administration of estates are not always fully aware of the work that is required. A lawyer usually prepares the legal paperwork from the comfort of their desk, while the executor handles everything else — making funeral arrangements, sorting through papers, disposing of foodstuffs and other perishable items, deciding what clothes to sell and what to send to charity, holding a garage sale for unwanted furniture or sending it to auction, tracking down bank accounts and other valuable assets, cancelling utility accounts, paying outstanding bills, filing claims for government and insurance benefits, getting a house or apartment cleaned and ready for sale or return to a landlord, finding and working with a real estate agent and accountant, and more.

3. How We Discovered What Being an Executor Is All About

Although Elyssa's practice does include acting as a professional executor, Tom discovered that he really didn't know anything about the physical side

of being an executor until he left law to become a trust officer with a trust company. Trust companies are sometimes appointed executor in the wills of people who have no one else to choose and when that is the case, trust officers are the ones who do the executor work for the trust company.

For obvious reasons of privacy, we can't tell you anything about the actual cases we have worked on, but here is a typical, fictional case to illustrate. It's about Fred.

At the trust company, the first thing Tom did every morning was check the obituaries in the local newspaper. Then he checked those names against his records to see if he had a will for any of those people in the trust company's storage vault. In Elyssa's practice, she is almost always made aware of the poor health of one of her clients by the client themselves, an immediate family member or by a treating physician prior to their death, but every once in a while an obituary does provide the first notification. In Fred's case, Tom discovered that a client of the trust company had died when he read the morning obituaries. Fred had died, and because he had appointed the trust company his executor, Tom had his will in his storage vault.

The will was about 15 years old. It left everything in trust to Fred's only son, who lived hundreds of miles away. Unfortunately, the rest of the information in the file was dated and sketchy. Tom could see that Fred was divorced, lived in a small condo in an unassuming part of town, and had a small bank account with the trust company. Other than that, there was no information about assets, and Tom wondered why Fred had appointed the trust company at all. Trust companies charge significant fees for the executor work they do so they are usually appointed only when an estate is large enough to justify those fees, and there was nothing in the file to suggest that Fred's estate was large.

Tom called the funeral home that published the obituary and discovered that Fred's son was in town handling the arrangements. He was staying in a hotel, and he was desperately looking for his dad's will. Tom got in touch with the son and arranged a meeting at the funeral home. He came in looking confused, upset, and embarrassed. As he spoke, Tom learned why. He and his father had been on very bad terms and hadn't seen each other, or even spoken to each other, for many years. He had never visited the condo and wasn't sure in which part of town it was located. He didn't even know that his dad had been ill. He had received a call from the hospital the day his father was admitted, and even though he had caught the next flight, by the time he reached the hospital door Fred was dead.

The son said he was prepared to cover the cost of the funeral if necessary, but Tom was able to assure him that there was enough money in Fred's bank account for that. He was further relieved to learn that Tom had the will, but he was as puzzled as Tom was about the trust company's appointment — because of their estrangement, he had no better idea of his dad's financial situation than Tom did. At that point, the funeral director produced a key that he had taken from Fred's pocket. Assuming it to be for the condo, Tom and Fred's son set off to take a look.

The condo was a modest two-bedroom in an older part of the city. Being the home of a single, ailing man, it had a lived-in look. From speaking with neighbours, they discovered that Fred was a loner and his only social activity was going to bingo at a nearby social hall. The son said that he was overwhelmed and didn't know where to start. He also said he had pressing business engagements back home and would be leaving right after the funeral. Tom told him that as executor, the trust company would look after everything, and that all fees could be paid out of the sale of the condo. A few days after the funeral, the trust company's employees put on the rubber gloves and set to work.

By the time they were done they had discovered assets totalling \$1 million. Fred had investments with a variety of other financial institutions that had done very well over the years. It was now obvious why Fred had appointed a trust company as his executor, and we were happy to carry on with our responsibilities. Tom reported to the son, who was as astonished as we were, and who was happy that Tom was there to look after everything for him.

4. The Need Will Never Go Away

Being an executor is a difficult, complex job. It requires awareness of the laws of wills, estates, trusts, and taxes; comfort with a large amount of paperwork; willingness to work with various bureaucracies, as well as accountants, financial planning advisors and realtors; familiarity with banking and insurance; excellent conflict-resolution skills; a lot of hard physical work; and the wisdom to recognize not only when you need help but also where to go to get it. Many who have seen the process up close hope it is a job that they will never have to do.

Unfortunately, as difficult or upsetting as the job of executor may be, the need for executors will never go away, because loved ones die. And as the population of this country gets older and passes on, one thing is certain to happen — more of us will make our wills and more of us will discover that we have been named the executor of the estate in a friend or family member's will.

5. Who This Book Is For

In Canada, the law of wills and estates is a provincial responsibility, which means that each province or territory sets its own rules and regulations for executors. A book of this size can't begin to provide specific details of procedures, requirements, and forms for each province or territory. However, even though those rules and regulations are not identical across the country, and the precise number and nature of tasks that have to be done vary according to the size and complexity of each estate, the basic idea is the same.

If you are mourning the death of a loved one who chose you as his or her executor, if you are trying to choose someone to be your executor in your will; if you are wondering what the executor of an estate you are a beneficiary of needs to do before distributing your inheritance to you; or if you just want to inform yourself for that day in the future when you wake up and discover you are now an executor, continue reading because this book is written with you in mind. You'll learn what an executor must do, what pitfalls to avoid, when to consider getting help, and how to find it.