

A DISCUSSION PAPER FOR: THE NON-PROFESSIONAL EXECUTOR

The First Step to Being Prepared For This Honourable And Important Role.

“[Trustees will] be personally liable on obligations owed to third parties and they may incur personal liability...”

Justice Maurice Cullity

EXECUTOR: THE POSITION AND THE PERILS

Someone close to you may have asked you to be the executor for his or her estate. It's an important role and one you probably felt honoured or possibly obliged to accept. But have you considered the personal risk that comes with the responsibility?

The risk of being an executor is very real. While the tasks themselves might be significant, of greater concern is the reality that you are personally liable for negligence, including honest mistakes that you may make during the administration of an estate. It's a broad accountability to the beneficiaries and creditors for everything that happens, and your personal assets are exposed if things go badly.

Fortunately, the risk is now manageable. With the recent introduction of ERAssure®, a new insurance product designed specifically for executor protection, you are now able to protect yourself from many of the risks of the role.

Without ERAssure protection you, as executor, are vulnerable to any claim a beneficiary may make. You could be liable for the legal costs of a defense, or be required to make restitution for an error or oversight that caused loss in estate value.

THE EMERGING EXECUTOR RISK

Executors are at a greater risk of challenge by beneficiaries than ever before, owing to the convergence of social, technological and economic factors, including:

- The decline of the nuclear family and the rise of blended families has altered the family makeup and changed relationship dependencies. Executors can no longer rely on 'family and blood' to eventually sort many things out, as the dynamics of the family landscape have changed dramatically.
- The broad availability of data, information and opinion on the internet has created an "instant expert" mentality among beneficiaries. This perceived expertise is intensifying the critique of executor performance, as well as substantially raising the level of accountability for executors.
- The volatility of financial and real estate markets has increased the potential for real or perceived mismanagement by the executor. Market valuations can vary significantly and quickly, often having tremendous financial impact on the estate value and ultimately the beneficiaries.



ERAssure® is the exclusive Preferred Supplier of Executor Insurance for Canadian Bar Association members.

EXECUTOR PROTECTION

You will likely serve as an executor only once or twice in your life. This isn't enough to develop the role familiarity that breeds proficiency. Of the various parties involved in Wills and Estates law, executors are among the most exposed and the least protected.

Unlike lawyers, financial planners and accountants who are protected by professional errors and omissions insurance, estate executors have assumed financial responsibility in the absence of any protection.

Below are some examples of things that go wrong:

- The executor fails to investigate a beneficiary's claim that there is a debt owed to them from the estate. The executor disburses the proceeds of the estate to each of the beneficiaries without making provision for the claimed debt. An aggrieved beneficiary sues the executor successfully for the debt and the legal expenses, which the executor is now obligated to pay out-of-pocket after an unsuccessful attempt to recover the amount from the other beneficiaries.
- The executor distributes cash from the estate to the beneficiaries immediately following probate. A claim is brought under applicable family law provisions by the child of a former female friend of the deceased. The estate has been disbursed and the executor is now responsible to defend and settle the action personally.
- The executor sells the estate home privately to avoid paying real estate commissions. The purchaser successfully sues the estate for the cost of correcting serious structural deficiencies that existed, which the executor knew about, but failed to disclose to the purchaser. However, the estate assets had already been distributed to the beneficiaries. The executor is now responsible to the purchasers for the award of damages, since there are no estate assets available to the executor

These are issues of the executor, not the estate and the cost to the executor to defend can be significant, let alone the cost to indemnify if found responsible.

“The cost of an ERAssure policy would barely cover the cost of photocopies in a legal defense.”²

IAN H. HULL,
HULL & HULL LLP

THE SOLUTION

There is a solution. ERAssure covers executors for the costs of defense and indemnity for damages awarded against them that arise out of errors and omissions committed during the administration of an estate.

ERAssure is a simple product with a single intention: *to protect you and the estate*. In the event of an insurable claim against you, as executor, ERAssure will pay the costs of legal defense and, in the event you make an error and calamity occurs eroding the estate value, ERAssure preserves the estate for the benefit of the beneficiaries. Either way your personal assets are not on the line as they otherwise would be.

ERAssure is priced affordably, with a typical estate premium being less than the photocopy costs for a simple defense of a claim for damages.

BE PREPARED

Many people preparing Wills want their estate to be administered by someone with a personal relationship with the family. In many cases the best executors are those who have insight into family dynamics and loyalty to the intentions of the deceased.

But these “occasional” executors often lack the financial and procedural knowledge that helps to keep estate administration running smoothly. Many look to experts for help, but it’s important to know that while you can offload some of the tasks, you cannot offload your responsibility. This is why, as an executor, it’s to your advantage to explore how to protect yourself, and beneficially the estate assets, while you’re serving the interests of the estate.

With ERAssure you can meet the promise you made to a close family member or friend who carefully selected you as his or her executor, while protecting both yourself and the estate.

“A client won’t have to put his or her own house on the line (with ERAssure) when granted the ‘honour’ of acting as executor.”³

JORDAN ATIN,
HULL & HULL LLP

KNOWING IS BELIEVING

As an executor you may be confident you can discern whether there are issues with the estate or not. Many prominent estate lawyers would agree with you that it's easy to spot the few obvious problem estates, but they will also be the first to tell you that it's *impossible to forecast the vast majority*...money and emotions change everything.

The testator asked you to fulfill a role on their behalf because they had the confidence in you to do a good job for them. They didn't intend for you to put yourself or your assets at risk, nor were they expecting you to rely on the benevolence of the beneficiaries and creditors.

THE RIGHT DECISION:

- **As a Testator**, is to include provisions in your Will for your executor to purchase insurance and secure their peace of mind, and support to handle the role confidently on your behalf.
- **As an Executor**, is to purchase an ERAssure insurance policy to protect you personally and additionally, to encourage the preservation of the estate.

Exhibit A: **Estate Risk Profile** is a simple tool intended for executor risk assessment.

Rather than guess, do a quick check to see if there are any variables that might bring cause for concern along the way. The total score of 1-3 or 4 and over may indicate a potential liability exposure you would be prudent to insure against.

END NOTES

1. Cullity, Justice Maurice. "Personal Liability of Trustees and Rights of Indemnification." Estate and Trusts Journal. Vol.16 (1996-7),115.
2. Hull, Ian. Hull & Hull LLP. "Cost of an Estate Claim." ERAssure Video Accessed: August 15, 2012.
<<http://erassure.com/cost-of-an-estate-claim> > .
3. Atin, Jordan. "Executor's Insurance: Protecting Executors from Liability." Web log post. The Lawyer's Weekly. March 4, 2011.
<<http://www.lawyersweekly.ca/index.php?section=article&articleid=1360>>.

EXHIBIT A: ESTATE RISK PROFILE

The following questionnaire is a simple tool for executor risk assessment. Circle the number corresponding to your answer to each question, and total your score at the bottom of the page.

Family Dynamics	YES	MAYBE	NO
Are there any unique family dynamics such as a second marriage, blended family, a history of acrimony between family members OR spouses; any financial issues with any of the beneficiaries or their children, or health or drug related concerns?	2	1	0
Has there been any unique handling of family members by such as unequal cash or property distributions or access to heirlooms; any potential 'black sheep' in the family OR extended family; have any beneficiaries held a disproportionate care-giving role that might be looking to be recognized for their efforts?	2	1	0

Executor Specific	YES	MAYBE	NO
Are there multiple Executors involved; do they share the same relationship to you; are they all in agreement in how best to involve the use of professionals for legal, tax, accounting, investments and real estate; are any of the Executors or service providers to the estate seen as potentially having personal conflict; is the Executor(s) also your Power of Attorney?	2	1	0

Investments	YES	MAYBE	NO
Are there any significant financial assets of the estate that might be complex in nature; are there debts of the estate, or did you secure any unpaid loans on behalf of anyone including family members, beneficiaries or others and are they clearly documented; are there any charitable groups listed as beneficiary?	2	1	0

Directives of the Will	YES	MAYBE	NO
Is there a legal Will, or is it handwritten or done by do-it yourself methods; are the instructions within the Will clear, logical and likely to avoid contest by any of the beneficiary group; do all the beneficiary group know the contents of the Will; has anyone been left out, or is there disproportionate allotment of the estate assets?	2	1	0

Real Estate	YES	MAYBE	NO
Is there a cottage or family assets/antiques or heirlooms that might have significant emotional value to one or all family members; has any one of the beneficiary group or extended family been living in your principal residence or have primary use of the cottage; any foreign or rental properties?	2	1	0

Non-Real Estate Assets	YES	MAYBE	NO
Is there a family business or other business assets that require management or sale; is there a clear succession plan in place; is it in harmony with the Will directions and expectations of the beneficiaries?	2	1	0

TOTAL ESTATE RISK PROFILE SCORE:

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A moderate to significant profile score would suggest that Executor Liability Insurance protection would be advisable for the benefit of the estate and executors.

Score: **0** = low risk;
1-3 = moderate risk;
4 or over = significant risk

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