

Important Information for the Executors of your Will

LAST WILL AND TESTAMENT

I, John Smithson, an adult residing at 1234
of sound mind, declare this to be my last
previously made by me.

I appoint Johnson Smithson as my
he/she is permitted to serve with
Smith. I am unwilling or unable
Representative and ask that he/
posting

I direct my Personal Representative to pay my debts and taxes, state inheritance taxes, and to seek relief from seeking relief if

Important Information for Executors and Families

The following are a series of frequently asked questions we routinely get from executors.

As you read through, you'll notice that estate administration is more than a lot of work - it has significant financial risk for both the beneficiaries and the executors.

Estate risk and the potential for litigation increase with the size of the estate.

When problems arise, legal action is typically required to resolve them. The financial cost is significant, while longstanding emotional and relationship damage is often the result.

Inexpensive risk solutions are available. Call me if you wish to discuss, or see the instructions on how to arrange estate administration insurance that follow the FAQ's.

The executor role is complex, challenging, and often time consuming. For most executors, this is a once or twice in a lifetime role, with a steep learning curve and little room for error, while making the myriad of decisions you're facing.

Frequently Asked Questions

Q. What do "estate" and "executor" mean?

An **estate** is the total property (both real and personal) that is owned by the deceased immediately prior to death.

The executor is the *personal representative* of the deceased person and *has essentially the same rights, duties and obligations that the deceased person had while they were alive*. The executor is able to sue other parties, and is the individual that is sued by other parties in respect to issues related to the estate. This may come as a surprise to family members who thought the "estate" is a specific legal entity.

Q. What is the executor's legal duty?

The executor has a *fiduciary duty* to the parties to the estate. A fiduciary duty is a much higher standard of care and performance than is typically required in a non-fiduciary role, because it involves the management and distribution of money belonging to other parties. The required standard of care is often *much higher than a person might generally exercise in respect of their own personal business*.

Q. Who is the executor responsible to?

The executor is *personally liable* for his or her actions to the following groups or individuals:

- » Beneficiaries and creditors for investment losses and breaches of trust; and
- » Other parties, with whom the deceased may have had dealings, for contractual obligations and wrongs in law (tort)

Q. Do I as executor have a financial obligation if I make a mistake?

People don't typically think about the role of executor as having a personal financial risk but nothing could be further from the truth.

It's important that people understand they are effectively *pledging their own personal assets against a significant loss of estate value* that is attributed to their negligence in administering the estate as the executor.

If you are asking someone to act as executor on your behalf, it's equally important to understand the imposition.

Q. Who pays when the estate gets sued?

Traditionally, it was acceptable to use the beneficiaries' money from the estate to defend and pay for legal actions brought against the estate during administration.

Courts today are re-examining the traditional access to estate money in respect to lawsuits; they may impose restrictions or prohibit the executor from using estate money to fund the cost of litigation against the estate.

If the executor is determined to be negligent and causes the estate to shrink, he or she may be required to make restitution out of his/her personal assets to the beneficiaries, creditors or other parties that suffered a financial loss.

Q. Does my home insurance cover liabilities occurring when acting as an executor?

No, typical home insurance covers injuries and property damage to other parties but *does not cover estate administration errors* that result in financial loss to other parties.

Q. What kinds of tasks am I responsible for as executor?

This is a brief summary of tasks pertaining to the financial aspects of your duties. There are a number of non-financial related tasks that must be performed as well.

- obtaining the probated will of the decedent;
- advertising for and/or notifying creditors and claimants/beneficiaries;
- accounting for the assets and liabilities of the estate;
- collecting and securing the assets of the estate;
- protecting the assets of the estate;
- determining tax liabilities by jurisdiction or residency
- paying the liabilities of the estate and collecting any receivables;
- filing final tax returns of the estate
- verifying claims against the estate, including dependent relief claims;
- liquidating the assets of the estate.
- distributing the assets of the estate; and
- accounting for the administration of the estate.

Please note that this is not an exhaustive list. ERAAssure has an Executor Guide that may help you identify and track the tasks you are required to perform. Please call 1-855-636-3777 and ask for one.

Q. Can an ex-spouse have a claim on the estate even though they were not named in the will?

Given the frequent nature of divorce and remarriage, family law issues that may frustrate the efforts of the executor trying to settle the affairs of the estate are not unusual. Family law issues involve some tension. Lawsuits arising out of the executor or estate not recognizing or providing for obligations under Family Law are not uncommon.

Q. After acting as a parent's Power of Attorney for Property -- should we be concerned if we also act as executor?

Beneficiaries are often much more vigilant in examining the actions of the executor who has previously managed the financial affairs of the deceased. Some beneficiaries, including charitable organizations to which the decedent has left a gift, may look critically at executor performance following their activities as power of attorney.

Q. We put Mom's investments and her house in our joint names. Who gets the money?

Many individuals conclude, often incorrectly, that the ownership of joint investments or real estate holdings pass to the joint account holder automatically when the other account holder dies. ***A joint account, including ownership of property and or financial assets, is a common and growing area of potential litigation in estate administration. It can have serious tax and estate implications for all parties involved.***

Q. Just in case we forget something, we are planning to hold back money from distribution until we're more comfortable. Is this an issue?

Maybe not. Withholding money to allow for contingencies may be prudent if you can establish good grounds for doing so. Beneficiaries are not consistently patient with this practice and sometimes take legal issue with it.

Q. There are two charities named as beneficiaries -- should we be concerned?

The realities of modern corporate governance require charities to no longer be simply patient and grateful to receive a bequest. ***Many charities are now much more diligent in their review of executor performance, and less likely to forgive any errors that impact the financial value of their bequest.*** Certain prominent charities describe themselves as “professional beneficiaries”; they may try to impose strict rules upon the administration of the estate. This may include litigation against the executor if the organization believes that such action will improve the financial result.

Q. We are managing the financial investments and selling the real estate privately – do we have a risk?

A growing number of people opt for “Do it Yourself” in an effort to reduce commissions related to real estate or financial investments. *DIY activities can cause the estate to lose some or all of the statutory consumer protections which exist at law by using a licensed advisor or real estate agent.* This may mean that the estate is exposed to the legal liability risks that arise from these activities - potentially expensive in the case of real estate sales.

Q. Mom left some valuable jewelry to our sister but we can't find it. What now?

The question of when the asset went missing is important. *The executor is responsible to protect the assets of the estate*, including changing the locks if necessary. Many don't, and the members of the family “help themselves” because they feel entitled, or believe that Mom or Dad promised an item to them while they were alive. Ultimately this can result in significant problems for the executors, even when the property has no significant value.

Q. Mom loaned some money to my nephew a few years ago. She never told anyone about it while she was alive, but we found the promissory note in her papers. My sister says Mom told my nephew that he doesn't have to repay the loan. What now?

The executor is required to not only pay the bills of the estate, but must collect and account for any monies owed to the estate, including loans to the beneficiaries and their families. *This is a common source of tension that can result in litigation when such loans, perhaps poorly documented, are required to be withheld from one of the beneficiaries, or collected from their family members.*

Q. Mom left a small trust to our nephew who has some serious disabilities. Should we be concerned?

A testamentary trust may go on for some time, and ultimately will be required to be liquidated and distributed in terms of the will.

This may be far in the future, but the trustee (sometimes the executor, or other times another individual) has a fiduciary duty to the individual named in the ongoing trust.

Q. It looks like Dad made some serious investment mistakes and we think his estate may be bankrupt. Should we be concerned?

Maybe not; there are established guidelines that the executor can follow to deal with a bankrupt estate. One risk, however, is that there may be unsatisfied creditors that pursue the executor after the estate has been distributed and the cost of defending yourself in such a case may be a financial burden for the executor.

Q. The will has some obvious problems -- it's not clear who gets what. Should we be concerned?

If the beneficiaries, including any charities, or creditors believe that the executor's interpretation of the will is incorrect, they may choose to litigate the matter through the court.

Q. As her health failed, Mom made several wills with different provisions and beneficiaries all within the last few years. Should we be concerned?

Probably. Legal capacity issues are a common and growing area of estate litigation.

Q. Our brother has been living in Mom's house for 20 years and insists that Mom said he could live there as long as he wants. We need him to vacate in order to sell the house. Should we be concerned?

Probably. In the event he can't be convinced to leave on his own, it may require stronger measures which may end up in litigation at potentially significant cost to all parties. Some of the cost may be allowed to be paid out the estate, but depending on the circumstances, may not be allowed.

Q. The bank suggested that we hire its trust company to help with the technical parts of the administration. Does this eliminate our personal liability?

Trust companies that act as the Executor's agent may help you perform the duties with more confidence, but the executor is ultimately personally liable for the estate administration. If there is a lawsuit against both you and the trust company because of negligent administration, *the trust company is not obligated to defend on behalf of the executor.*

Q. What happens if one of us dies while acting as executor?

The liabilities that arise out of activities when acting as executor for another person become a liability of your own estate which will need to be administered by your executor. When this happens, these liabilities arising may require monies to be withheld from the beneficiaries of your own estate.

Q. What happens if the estate gets sued after the estate is distributed to the beneficiaries?

There are statutory limitation periods that exist at law which represent dates after which no claims may be brought against the estate. The limitation period may be as short as two years from the last date of certain activities; in other cases, the window to sue remains open for much longer. In order to claim protection under an applicable limitation period, ***the executor may be required to pay personally in order to defend or settle a claim.*** Ultimately, some or all of the cost of defense may have to be "clawed back" from the beneficiaries.

Q. Is insurance available for protecting the assets of the beneficiaries from mistakes during estate administration?

Yes. Insurance can be purchased at nominal cost and covers many aspects of the risks of estate administration. It simply has an insurer pay the covered legal expenses and judgment for damages imposed to make the estate whole.

Insurance allows for the settlement of many typical problem scenarios without causing the family to "go to war" financially and emotionally.

Please call ERAssure at 1-855-636-3777 to determine what risks may be present in the estate you're handling, and arrange for insurance, if the risk assessment indicates so.

Q. How do I purchase insurance?

Arranging insurance protection is simple - call 1-855-636-3777 and arrange for an application to be emailed to you, or complete one over the phone.

ERAssure will provide a proposal in as little as 15 minutes.

Send the application, along with a copy of the will and payment to ERAssure to have the coverage put into effect.

Payment is accepted by credit card, estate cheque or electronic funds transfer (EFT). Note: Insurance coverage is not in place until premiums have been paid in full.

Timing is important - please contact ERAssure as soon as possible after the executor role begins.

ERAssure
405 - 30 Duke St. W.
Kitchener, ON N2H 3W5

info@erassure.com

1-855-636-3777



www.ERAssure.com

1-855-636-3777