

A WHITE PAPER ON: THE EMERGING CLIENT RISK!

Estate Administration Liability For Non-Professional Executors.

“It has been estimated that Canadian baby boomers will inherit as much as \$1 trillion in the next 15-20 years, and that massive sum of money is causing a new focus on how estates are settled.”¹

TARA PERKINS, THE GLOBE AND MAIL

INTRODUCTION

If your profession brings you in contact with clients who are involved in estate planning (testators) and/or administration (executors/trustees), this white paper is written for you. It addresses the real but manageable risk that executors face. One of the most striking aspects of estate management is the fact that so many people in the executor function are uninformed about the risk associated with their roles. Just as concerning is the fact that executor risk is virtually unlimited as there are no statutes restricting the extent of personal liability.

Unlike most professional advisors – accountants, financial planners, lawyers – who are safeguarded by errors and omissions insurance, executors who make even honest mistakes have operated in the absence of any available protection. Today this is no longer true. Executors now have the opportunity to secure protection and manage their personal liability as they execute estate business.

This paper aims to provide a comprehensive discussion of the issues, evidence and opportunities relating to executor risk. The personal financial risk to executors has never been higher, but with the introduction of an innovative protection product there is now, for the first time, an opportunity for the management of executor risk.

OVERVIEW OF THE EXECUTOR TASK

“The role of executor is far more complex than making funeral arrangements and overseeing the distribution of assets according to the Will.”²

ANDREW MCLACHLAN,
THE ADVERTISER

Most people who serve as an estate executor do so only once or twice in their lives. This experience isn't enough to develop a proficiency at the job.

Being an estate executor today is something like being CEO of a company that you do not own, where you are personally liable to the shareholders and creditors for everything that happens, and your personal assets may be at stake if things go badly.

An executor's first duties are to locate the Will, oversee funeral and burial arrangements, and probate the Will. With probate, an executor has the legal authority to proceed with financial duties including: collection and securing of assets, determination and payment of debts, investment of estate funds and decision-making with regard to estate assets that may include management of ongoing business interests. Executors may be called upon to fulfill non-financial duties like decision-making regarding young children, or disabled adults. An executor's final duties are distribution of the assets and a final estate accounting.

The job of being an executor has grown more demanding because estates look different from the way they used to. During the last century the majority of estates included the decedent's home and car, a cash account and some investments. In contrast, estates today are frequently comprised of multiple properties, multiple vehicles, different types of investment securities, foreign investments, insurance policies, rights to stock options, and operating business interests.

HOW REAL IS EXECUTOR RISK?

Risk is, “the potential that a chosen action or activity (including the choice of an inaction) will lead to a loss”.³ There is risk in almost anything people do, with some endeavours generating more exposure than others.

In considering executor risk, three questions stand out: What are the chances an executor will be challenged? How big is the exposure to an executor who is challenged? What tools are available for managing executor risk?

Probability of challenge

“The risk of personal liability is an incident of the office of trustee.”⁵

JUSTICE MAURICE CULLITY

Whether they are aware or not, executors have, in the past, been totally exposed to the possibility of claims for damages, with no recourse other than litigation. [Neither homeowner nor automobile insurance policies cover executors for the cost of defending and settling legal actions that arise from estate administration activities.](#) Estate litigation is one of the fastest growth areas of law and testimony to the fact that the probability, while always high, is increasing dramatically.

Magnitude of exposure

“When you take on the job of executor, you are putting your own personal assets on the line”⁶

JORDAN ATIN,
HULL AND HULL LLP

There is no limitation of liability in favour of an executor who is found to have mismanaged an estate. Even in the case of an honest mistake, executors are legally responsible to the beneficiaries of an estate and can be held accountable for any losses an estate suffers. In estate management, action or inaction that is deemed negligent can leave executors personally liable to both estate beneficiaries and creditors.

Management of risk

Historically, there has been no mechanism to protect executors in the event of a legal statement of claim against them. In a comment from Corina Weigl, an estate and family business lawyer, she asserts that, “up until recently the ‘occasional executor’ was limited in protection to (i) the indemnity available under the Will or at law, (ii) the law related to the standard of care of an executor, and (iii) any excusing power that might be available under relevant legislation,”⁴ all of which typically require litigation to establish the extent of protection, if any.

The bottom line is executor risk is a very real, but manageable risk. The purpose of the sections that follow is to educate professionals whose field brings them into contact with clients who are either preparing Wills or named as executors or estate trustees. The following aims to emphasize the reality of the risks executors face, possible consequences of those risks, and the opportunities that exist for management of those risks.

WHAT ARE THE THINGS THAT CAN GO WRONG?

Executor responsibilities are fiduciary in nature, steeped in a conception of trust between parties that demands the highest standard of care. The role of estate executor is intended to protect the rights of those who have an interest in the estate. Any breach of these responsibilities, whether intentional or not, may carry significant penalty. The most common areas where executors run into trouble and expose themselves to personal liability are: *financial management, mismanagement of expectations, and family law impacts.*

Financial management. Executors frequently find themselves in need of assistance with investment, real estate, accounting, tax, legal and general estate administration questions. Even with relatively straightforward estates there is the possibility of uncovering unpaid debts, unforeseen creditor claims, unique family financial arrangements (whether documented or not), and loss or damage to estate property. More complex cases including very large estates, those with ongoing operating companies or self-managed investment accounts are host to a variety of challenging circumstances.

Mismanagement of expectations. LawPRO, an Ontario-based provider of professional errors and omissions insurance, cites error in client communications as the single greatest source of malpractice litigation in Wills and Estates law.⁷ The complexity of many estates, combined with the ever-increasing expectations of beneficiaries, is making the job of being an executor more demanding than ever.

Family law impacts. It is virtually impossible for the occasional executor to anticipate how family law will impact a particular estate, given the interests of the named and possible beneficiaries. Extended family, ex-spouses and dependent relatives make this a potential hotbed of dissension and action.

WHAT ARE THE CHANCES AN EXECUTOR WILL BE CHALLENGED?

Four factors increase the chances that estate executors will be challenged today:

1. Increased accountability of executors/expectations of beneficiaries

The Internet has created a standard of accountability for executors that didn't exist in the past. With easy access to on-line experts and financial data, many beneficiaries have developed a sense of their own ability to benchmark asset performance and judge executor decision-making.

2. **Changing demographic composition of families and beneficiaries** The dissipation of the traditional nuclear family, and consequent rise of blended families and more complicated relationship structures is contributing to greater conflict among beneficiaries, and more lawsuits against executors.

3. Volatility of markets

Financial and real estate market fluctuations intensify scrutiny and can generate tension as low interest rates and/or poor decisions can quickly erode estate values. In many families, dependencies upon and expectation of future estate benefits are already part of the beneficiaries' assumed assets, a problematic situation that is compounded with low interest rates, testators living longer and as people lose jobs and/or continue to increase their debt loads.

4. Increasing tendency toward litigation

The assessment of Canadians as reluctant litigators is an increasingly outdated perception. Canadians today are as likely to sue as Americans⁸ and according to LawPRO, Wills and Estates is their fifth most common area of malpractice claims.⁹

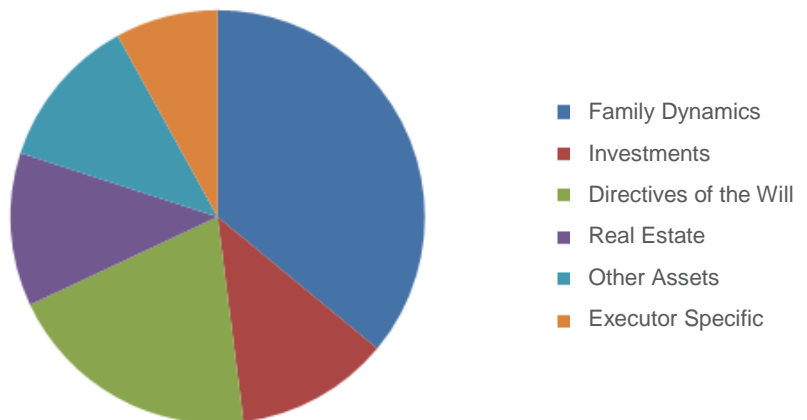
PROBABLE INDICATORS OF ESTATE CHALLENGE

“Longevity and a slew of changes that have transformed family relationships (ex-spouses, step kids, step grandkids, siblings living thousands of miles apart) are turning the already prickly matter of inheritances into a gargantuan challenge.”¹⁰

HAYA EL NASSER, USA TODAY

The most significant determinants of conflict within an estate’s administration may be found in the composition of an estate’s beneficiaries. Some factors like the size and complexity of an estate, clarity of the Will directives, and volatility of market conditions have a major influence. However, the wild card is the family dynamics that may generate conflict leading to litigation.

Leading Indicators of Estate Conflict



SOURCE: ESTATE RISK PROTECTION PLAN INC.

“Pandora’s Box”. When a parent dies it tends to open “Pandora’s Box” in terms of family members’ emotions. This is especially true with the death of the second parent, often releasing any sense of restraint children may have exercised in their communications while that parent was alive. A Will is often seen as mom or dad’s final statement of the position a child held within the family – regardless of the clarity of the Will, the directives can lead to any number of responses. For instance, the “black sheep” may feel unappreciated; the adult children who assumed proportionately higher amounts of responsibility for the care of the parent may feel unjustly treated by a Will that divides assets equally; an allocation of a highly prized family heirloom, like the cottage or the family painting, can lead to undue strain. See [Exhibit A: Estate Risk Profile](#) for a more detailed review of some of the contents of “Pandora’s Box”.

AN OVERVIEW OF ERAssure®

What is ERAssure?

ERAssure is the first product on the market that 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. In addition to covering the estate executor, ERAssure can also protect a professional who is appointed executor, provided he or she is not concurrently acting for the estate.

ERAssure coverage is available for estates of any size. Policy premiums depend upon the estimated size and complexity of the estate, type of assets, number and qualification of executors, and the amount of coverage. For a typical estate valued at less than \$1 million, the approximate cost would be about \$2,500 for a three-year term.

How does ERAssure work?

ERAssure is purchased at the time an executor begins administering an estate. With both the executors and estate beneficiaries obtaining benefit from the protection, the estate is expected to fund the premium in the majority of cases.

Claims are processed in a straightforward manner. The policyholder must notify ERAssure of any circumstances that may be expected to result in a claim for damages. Upon receipt of notice from a policyholder, a claims representative will contact the policyholder for additional information and determine the appropriate action.

ERAssure covers many, if not most, errors that may occur during the course of estate administration. There are exclusions and limitations that apply to all insurance policies which may include, although are not necessarily restricted to, the following: fraud, tax liability, professional liability arising out of the executor providing concurrent professional services to the estate, failing to purchase asset and related liabilities insurance including pollution risk, claims brought strictly in respect to executor compensation matters, and cross claims between executors.

“As a best practice approach on every case of advising a testator of an estate, lawyers should relay the availability of executor insurance to their clients.”¹¹

MARK WEINTRAUB,
CLARK WILSON LLP, MAY 2012

ESTATE LAWYERS ARE RECOMMENDING ERAssure TO THEIR CLIENTS

According to LawPRO, an average malpractice claim in Wills and Estates law in Canada is around \$42,000.¹² Claims for smaller amounts in the \$10-15,000 range happen at greater frequencies. Wills and Estate claims account for 7% of legal malpractice activity and 8.3% of claims.¹³ It is difficult to predict which estates are vulnerable to conflict and, for most trustees, the prospect of funding \$15,000 or more in defense of a claim is daunting. This personal liability could deter the best prospects from serving as executors.

“I think the product is an interesting idea because very few people, in my experience, recognize the liabilities that executors face.”¹⁴

HILARY LAIDLAW,
MCCARTHY-TETRAULT
LLP

Close friends and family members make especially suitable trustees given their relations with testators and appreciation of family dynamics. A solution that mitigates risk for the occasional executor goes a long way to protecting estate interests. Lawyers are talking to estate clients about ERAssure because the cost of the insurance is modest compared to the price of a legal defense. Ian Hull, a prominent Ontario estate litigator, says the typical ERAssure policy will cost, “less than the bill for photocopies on a typical defense” in estate litigation.¹⁵

Ultimately, professionals are expected to encourage their clients to consider ERAssure because it benefits both the beneficiaries and trustees of an estate, but equally for the value add it offers these professionals in supporting risk mitigation for their clients. If estate mismanagement leads to real loss of value, ERAssure will cover the executor’s personal liability and help keep the beneficiaries’ inheritance intact. If an executor incurs the cost of a legal defense, ERAssure pays for this, not the executor and not the estate.

WHY YOU SHOULD TALK TO YOUR CLIENTS

“No good deed goes unpunished.”

It's a sad truth that acts of kindness often backfire on those who offer them. It is not uncommon for executors to become the target of a claim for damages, even with small and seemingly straightforward estates. Here are a few samples from case law illustrating how dissension between executors and beneficiaries can commonly lead to litigation.

Wagner versus Van Cleef 43 ETR 115

Ms. Wagner, an Austrian resident, came to Canada to settle her sister's estate. She did not speak English and asked Mr. Van Cleef, age 75, whom she met through the Austrian Embassy for assistance. Van Cleef was appointed as the estate trustee and executed power of attorney in favor of an estate lawyer, Mr. Mayhew, to conduct the administration. He had no reason to question Mayhew's qualifications or capabilities at the outset of the administration. Mayhew absconded, however, after misappropriating \$215,000 of the estate's assets.

The Court held that Van Cleef had breached his duty as administrator by improperly delegating his duties to the estate lawyer and failing to supervise his activities. Although Van Cleef was not found to be dishonest, was perhaps acting as a Good Samaritan, and stood to be wiped out financially, he was held personally liable to the estate for the loss under Sec. 35 of the Trustee Act.

Morrison Estate 2009 BCSC 217

A father died leaving his estate to be divided into four equal shares amongst his children with one son appointed as the executor. The father had advanced money to three of the children prior to his death. Without prior consultation, the executor withholds the advanced amounts as debt owed by the beneficiaries to the estate, from the inheritance of two of the siblings, but “forgives” similar debt to the third sibling on compassionate grounds.

Morrison Estate 2009 BCSC 217, Continued

Two of the beneficiaries advance an action against the executor alleging favouritism, failure to investigate and prove the debt of the beneficiaries, and for instructing the lawyer for the estate to withhold material information from the beneficiaries.

Court awards in favour of the beneficiaries and requires the executor to reimburse the estate approximately \$11,000, repay \$2,000 in legal expenses to the estate and also awards the beneficiaries their legal costs incurred as a result of the executor's improper conduct.

Barbieri v Triasso 2010 ONSC 3734

A mother appointed her two sons and a daughter to act as her Personal Care Power of Attorney and her Power of Attorney for Property, prior to having a stroke and being hospitalized. The daughter moved her mother out of the nursing home and back into her mother's house, where the daughter would live and care for her in the remaining two years of her life. Before her death, the sons and daughter each borrowed money from their mother. The sons allege that their sister removed the cash from their mother's home prior to her death and, as such, believed it should come out of her share of the estate and withheld her share of the proceeds from the sale of one of their mother's properties. The daughter claims compensation owed to her for the care of her mother following her stroke. Next, the daughter claims one of her brothers owes the estate rent for living in one of their mother's properties after her death. In response, the brother claims his sister owes money she borrowed from their mother to the estate. The sister claims she repaid some of the money. . .

The Court awards approximately \$100,000 to the daughter against the estate and the executors jointly and separately, including costs.

Conclusion... There is no straightforward predictability to the question of which estates are most likely to become embroiled in conflict and litigation. As executors, your clients are susceptible to challenge, and may be personally liable for legal costs or restitution, and would benefit from knowing more about how ERAssure can protect them.

Visit www.ERAssure.com or call one of our ERAssure specialists for more information at 855-636-3777.

END NOTES

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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

| | | | |
|---|---|---|---|
| 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

| | | | |
|---|---|---|---|
| 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

| | | | |
|--|---|---|---|
| Is the Will 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

| | | | |
|---|---|---|---|
| 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

| | | | |
|--|---|---|---|
| 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:

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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