

Executor Duties and Liability



The executor role is an expansive one, involving hundreds of tasks both large and small. Unfortunately, very few executors are aware of their legal obligations while carrying out these administrative tasks or of the significant liability that they can face if they fail to meet these obligations.

Executor duties

Executors have a number of legal duties to follow while administering the estate. First and foremost, executors must act with diligence and in good faith. This means that that an Executor needs to take the role of administering the deceased's estate seriously and to do the job in an efficient and careful manner. Executors should not take short cuts or quick decisions simply because it is easier than giving their full, undivided time and attention to the task of administering an estate.

A prudent executor will ensure that they weigh out all decisions, that they act without undue delay, and that they both use and oversee professionals, such as lawyers and accountants, where advisable.

Tied into this duty is the requirement to “maintain an even hand” – i.e. an executor must not favour the interests of some beneficiaries over others. It's also important that the executor avoid any conflicts of interest, which can be particularly difficult where the executor is a beneficiary and/or related to one or more beneficiaries. For example, an executor who wants to purchase the family cottage from the estate may be tempted to give the cottage a low valuation in order to spend the least amount of money. However, this is not in the best interests of the other beneficiaries, who want to have the value of the estate, and therefore of the cottage, maximized.

When an executor fails to carry out their legal duties, they can become personally liable and may be sued for any damages that result.

Executor liability

Being “personally liable” means that an executor may need to pay, out of their own funds, for financial losses suffered by the estate or by others due to the executor's actions.

1. Who is the executor liable to?

Executors can be held liable by any number of individuals, from beneficiaries to creditors, to third parties with whom the executor has contracted to provide services for the estate. Beneficiaries may hold the executor liable if the executor has failed to accomplish the necessary administrative tasks or has breached any of their legal duties, and where this failure results in less money available to the beneficiary than they otherwise would have received. Creditors, including the Canadian Revenue Agency, can turn to the executor's personal funds for reimbursement where the executor has unknowingly distributed the estate assets before paying all creditors. Finally, when an executor enters into a contract with a third party, such as a funeral home or real estate agent, on behalf of the estate, they are agreeing to be held personally responsible for the fees of this third party. Generally, the executor is entitled to pay those fees from the estate funds, but there are cases in which the executor has been required to pay some or all of the fees personally.

2. To what extent is the executor liable?

Typically, the executor is liable towards the beneficiaries of an estate up to the value of the estate because a beneficiary cannot recover more from the executor than they would have been entitled to in the first place. However, an executor's potential liability towards a third party, through a contract, could be more or less than the value of the estate depending on the type of contract that they entered into.

Executors may be able to purchase executor liability insurance if they qualify, but such policies may still have many exclusions.

Common executor errors

While the potential pitfalls for executors are seemingly endless, the following are some more common errors seen in the administration of estates:

1. Misinterpreting the will and failing to seek legal advice where the will is vague;
2. Not following the will;
3. Failure to pay all debts/expenses before distributing the estate;
4. Failure to properly manage the estate assets and therefore preserve their value;
5. Undue delay in administering and distributing the estate;
6. Acting in a conflict of interest;
7. Income tax errors and failure to get a clearance certificate before the final estate distribution;
8. Failure to keep complete and accurate records of the estate and its administration.

Avoiding liability as an executor

In order to avoid the potential pitfalls and accompanying liability of an executor, individuals tasked with this role should be sure to take the time to understand the executor's role and accompanying obligations. Before deciding whether to accept the role of an executor, an individual should also ensure that they understand the estate's financial situation, distribution scheme, potential legal concerns, and beneficiary relationships. If choosing to accept the role, it is crucial for an executor to maintain proper records during the administration of the estate and to ensure frequent communication with all beneficiaries and other interested parties. Finally, executors can seek professional help, such as engaging a trust company, to ensure prudent and efficient management of the estate on their behalf.



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