Canadian Financial Planner

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Being an Executor

As some of the important people in our lives get older, there comes a time for many Canadians when they are asked to act as an executor. It can be an honour to be asked to perform such an important duty, but before doing so, it is worthwhile considering whether one has the availability and necessary skills to take on such a potentially time consuming and stressful process.

For those that decide to accept the responsibility, it is important to clearly understand the duties of an executor and some of the main pitfalls. If the process is not carried out carefully, an executor can find themselves personally liable for unpaid taxes, debts and legal disputes arising from the death of the person whose estate they have been asked to administer.

In this edition of the Canadian Financial Planner, we will discuss some of the key factors that should be considered when deciding whether to take on the role of an executor. We will also discuss the main duties of an executor and when a grant of probate might be required. Finally, we will examine some of the common pitfalls of being an executor and how best to try to avoid them.

It should be noted that inheritance law in Canada is governed by provincial/ territorial legislation; as such, the rules differ somewhat, depending upon where the Will-maker was domiciled as of the date of death. In this article we will highlight general issues, and provide examples for some jurisdictions.

Specifically, we will discuss:

- PART 1: Factors to Consider When Deciding Whether to be an Executor
- PART 2: Duties of an Executor
- PART 3: Deciding Whether to Have a Will Probated
- PART 4: Common Mistakes Made by Executors

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PART 1: Factors to Consider When Deciding Whether to be an Executor

An executor is a person named in a Will to carry out the instructions set out in the Will. When the person who has made the Will (the "Will-maker") dies, their assets upon death form their estate (except for certain situations, which shall be discussed in PART 3). The role of the executor is to administer the estate by locating all of the Will-maker's assets, paying any taxes, debts and funeral costs and then distributing the remainder of the estate in accordance with the wishes of the deceased.

Being an executor can be relatively straight-forward if the Will-maker's estate is simple. However, the role can be challenging if any of the following applies:

- the Will-maker has a large and complex investment portfolio;
- the Will-maker has debts;
- the Will includes instructions relating to a trust;
- there is a dispute between the beneficiaries of the Will or those that feel that they should have been named as beneficiaries;
- the Will-maker is an owner of a business; or
- there is ongoing litigation involving the deceased at the time of death.

The executor is legally responsible for administering the estate. As such, the executor may be held liable for any unpaid taxes or debts. In addition, the executor could be sued personally over how the estate gets distributed, especially if there are ongoing disputes that have yet to be settled. An individual can decline when asked to be an executor and generally even renounce the duty after the Will-maker has died. However, once the executor has already begun administering the estate they are legally required to complete the process, unless they are relieved by a court order.

Clearly, accepting the role of executor should not be undertaken lightly. Some questions a prospective executor should consider asking themselves are as follows.

What is the potential for personal liability and how might I mitigate the risks?

The risk of personal liability cannot be eliminated entirely. For example, an executor is potentially on the hook for debts that may materialize years after the fact. However, by being careful, patient and methodical, an executor can avoid many of the potential pitfalls of the process (see PART 4 for further discussion).

How long are the duties likely to last?

It takes approximately a year to complete the process for a typical estate. However, it may take much longer if there are disputes, or if the deceased has set up a trust that needs to be administered for many years after the fact, for example.

How complex are the Will-maker's assets and other affairs, and do I have the skills necessary to administer the estate?

If the Will-maker's affairs are complex, the executor can get professional help from a lawyer and accountant if necessary and the fees will be paid out of the estate, provided that they are reasonable.

Are there any conflicts or family disputes that I do not feel able to handle?

It is quite common for an executor to be a family member. As such, the executor may also be a beneficiary of the Will. In these cases, if there is some previous bad blood or if conflicts are considered likely between the executor and other beneficiaries of the Will, it may be advisable to decline. An impartial professional firm could be named as the executor of the Will and, while the services are not inexpensive (for example, in B.C., the maximum allowable amount is 5% of the estate), this may be the best option in situations where there is a challenging family situation.

What fees, if any, will I receive to compensate me for my time and effort?

The amount that an executor may be paid differs between provinces and territories. Some jurisdictions stipulate only that the fees must be "reasonable", others specify a range (typically around 3% - 5% of the estate). Executors may be reimbursed for their out-of-pocket expenses as well; again provided that they are "reasonable". In general, any amounts paid to the executor should reflect the amount of work that is required to administer the estate, with complex and time consuming estates paying higher compensation. To reduce the risk of conflict after the Will-maker dies, the Will can actually stipulate the fees that the executor is due to receive. Nevertheless, it is quite common for executors to refuse any compensation if they were close to the deceased.

PART 2: Duties of an Executor

The main duties of an executor are set out below, listed in the typical order in which they take place.

1. Find the Will

Ideally, the Will-maker will make it clear where they are planning on storing the Will. This may be somewhere in the Will-maker's home, in a bank safety deposit box or at the office of the lawyer or notary public that helped to draft the Will, for example. The Will is needed soon after the Will-maker dies as it may contain instructions for burial/ cremation, organ donation and the funeral or memorial service. The Will must be the Will-maker's last Will, as multiple Wills may have been drafted over the years and updated to reflect changes in circumstances. If the Will was drafted by a lawyer, they may have sent a Wills notice to the local vital statistics agency for each Will that was prepared. However, filing a Wills notice is not mandatory. As such, there may not be an up-to-date record of the Will or its location in the registry. In order to pick up the Will from a safety deposit box at a financial institution, the executor will need a death certificate and the Will must name them as one of the executors of the estate.

2. Obtain a death certificate

This may be done through the funeral services provider or via application to the local vital statistics agency. Contact details for the vital statistics agencies for each province and territory and can be found at the following web address - www.ontario.ca/faq/where-are-vital-statistics-offices-each-canadian-province.

3. Check that the Will is valid

Wills that have not been properly signed and witnessed may not be valid. Also, Wills must have been drafted by a person who had legal capacity to do so. A Will may also be deemed invalid if there appears to be evidence of the Will-maker having been coerced into altering its content by another person. It is generally advisable to seek legal advice if there is any doubt as to the validity of a Will.

4. Protect the estate

It is the responsibility of the executor to protect the assets of the estate. This may involve:

- Locking up the residence of the deceased (if it is now vacant) and ensuring that there is appropriate insurance coverage in place. In some cases, insurance coverage is automatically cancelled if the home is vacant.
- Locate any valuables and ensure their safekeeping.
- Ensure that there is appropriate insurance for any vehicles. If the vehicles will not be in use for the time being, it may be appropriate to get storage insurance coverage.
- Cancel credit cards and any ongoing subscriptions.
- Re-direct any mail to the executor. This step is important as any correspondence from the Canada Revenue Agency or from lawyers and

accountants will be mailed to the address of the deceased.

- If the Will-maker had an investment portfolio, check that the portfolio remains well-balanced and appropriately invested. Given that the assets will likely be liquidated soon, it may be advisable to move the investments into low risk fixed income securities. The focus of the executor should be to conserve, rather than increase the value of the estate until such time as it gets distributed.
- If the Will includes a trust, it is common for the executor to be named as one of the trustees. It is the responsibility of the trustees to ensure that the assets of the trust are appropriately invested, that the trust returns are filed and that the distributions to the beneficiaries of the trust take place in accordance with the terms of the trust.
- If the Will-maker was a business owner, the executor needs to take steps to arrange for continued day-to-day management. A business may comprise a significant proportion of the value of the deceased's estate; as such, it is important to protect the value of the business to the greatest extent possible by ensuring that the existing customer base continues to be well served.
- The executor also needs to apply for the Canada Pension Plan (CPP) death benefit; a one-time, lump-sum payment to the estate on behalf of the deceased CPP contributor. The amount depends on how much and for how long the Will-maker contributed, up to a maximum of $2,500. Note that if there is a surviving spouse, they may be entitled to CPP survivor benefits, depending upon how much was contributed by the deceased, the age of the surviving spouse and how much is being received in CPP benefits by the surviving spouse (up to a maximum of 60% of the CPP benefits of the deceased contributor).
- The executor also needs to cancel CPP and Old Age Security (OAS) benefits. When a CPP and OAS beneficiary dies, their benefits must be cancelled. Benefits are payable for the month in which the death occurs; benefits received after that will have to be repaid.

5. Make the funeral arrangements

The Will-maker will usually leave instructions as to their preferences in the Will. Key considerations are where the funeral should be held, whether the deceased is to be buried or cremated and whether there should be an obituary published in the local paper. The executor should also consider involving relatives to help ensure that there is a fitting memorial service for their loved one.

6. Reach out to the beneficiaries

The executor should communicate with all of the beneficiaries of the Will, shortly after the funeral service. It is important to set expectations as to how long it will take to distribute the estate and how the Will-maker specified that his assets should be divided, along with any other terms in the Will.

7. Identify the assets of the deceased

The executor is responsible for making an inventory of the assets and liabilities of the Will-maker, valued as at the date of death. Note that assets held jointly with the right-of-survivorship will not form part of the estate and as such, would not be the responsibility of the executor to distribute, other than to assist with the transfer of the property (refer to PART 3 for further discussion). Generally, the executor will need to produce an original or notarized copy of the death certificate, original (or in some cases) notarized copy of the Will and photo ID in order for various third parties to agree to share the details of the deceased's accounts and property holdings.

Typical assets of the estate include:

- Bank accounts – the executor should communicate with the financial institution of the deceased to gather information on any chequing, savings and loan account balances. The bank may recommend consolidating the account balances into an estate account to which access will be restricted to the executors.
- Real estate – the properties of the deceased

should be appraised as of the date of death and any mortgages should be listed.

- Personal property – any other property of the Will-maker should be listed and the value estimated. Where the property is significant and difficult to value, it should be appraised.
- Investment portfolio – obtain the market value of any securities held as of the date of death. Any stock certificates should be located.
- Life insurance policies – contact the insurance company and file a claim. The Will-maker may also have been a participant in a group life insurance plan at their work-place.

Common types of liabilities to be considered include: debts of the Will-maker, such as mortgages, loans and credit card balances; personal income and property taxes; if the Will-maker was a business owner there may be corporate taxes, payroll remittances (such as EI and CPP), and HST/GST remittances to make; unpaid bills for subscriptions, utilities and strata fees; funeral expenses; probate fees (if applicable); and any ongoing litigation involving the Will-maker on the date of death.

8. Pay off outstanding debts and tax liabilities

After paying off the known debts, it is generally advisable to advertise for creditors to help guard against future claims after the estate has been distributed. Depending upon the province in which the Will-maker resided it may be appropriate to advertise in the local paper or in a local government publication, such as the BC Gazette (for residents of British Columbia).

To settle the outstanding taxes of the deceased, the following tax returns will need to be filed:

- Final personal income tax return for the year of death. There are other optional returns as well, such as the "Return for Rights or Things", which is a return for amounts that had accrued to, but had not been paid out to the Will-maker at the time of their death (e.g. unpaid salary, interest or dividends declared due before the date of death). One of the key benefits of filing multiple returns is that it may be possible to claim certain tax credits on more than one return in addition to accessing the marginal tax rates twice. For further information on preparing returns for deceased persons, refer to the following CRA web page - www.cra-arc.gc.ca/E/pub/tg/t4011.
- Tax returns for previous years that were not filed.
- Annual estate returns, if the estate earns income before the assets have been distributed.
- If there is a trust, annual trust returns will need to be filed.
- If the deceased had a business, there may be corporate tax returns to file.

Once the notices of assessment have been issued for all of the relevant tax returns, the executor can apply for a clearance certificate by filing form TX19 with the CRA, which certifies that all amounts due to the CRA by the deceased have been paid.

9. Prepare accounts of the estate for the beneficiaries to review

Before distributing the assets to the beneficiaries, the executor should prepare complete accounts for the administration of the estate, including a listing of all assets (along with their appraised values) and liabilities as well as all expenses of the estate (such as legal, accounting, probate, executor and any other fees). If any of the beneficiaries dispute the accounts, are minors, or lack mental capacity, the executor is required to obtain an approval from the courts, a process known as "passing of accounts". If the beneficiaries agree with the accounts and the planned distribution, the executor should obtain a signed release from each beneficiary, and each potential claimant, to indicate their acceptance of the accounts and the manner in which estate is due to be distributed.

In most parts of Canada, the law requires that a Will-maker make adequate provision for their

spouse and dependents. If adequate provision has not been made, the spouse or children can typically challenge the Will through the courts. Generally, if an action is brought by beneficiaries of the Will, or those that feel that they should have been beneficiaries, the executor will seek to have the Will probated (see PART 3 for further discussion).

10. Distribute the estate to the beneficiaries

When distributing the estate, the executor must first distribute any gifts of specific property, and legacies. Once that has been done, the executor can distribute the remainder (known as the "residue") to the other beneficiaries in accordance with the instructions of the Will. If there is no residue clause in the Will, the remaining assets in the estate will need to be distributed according to the rules of intestacy (i.e. as if no Will had been drafted). Each province/ territory has its own intestacy rules, which set out a prescribed formula for how the deceased's assets should be distributed in the event that they die without a Will.

Tip: The executor should not seek to distribute the estate assets until all claims and liabilities have been settled, including those that are contingent on the outcome of a legal challenge. Provincial legislation also sets specific timelines on distribution.

PART 3: Deciding Whether to Have a Will Probated

Probate is the legal process of confirming the validity of a Will. Once the process is completed, the court will issue a grant of probate (or "letters probate") to the executor, which confirms their authority to administer the estate of the deceased.

A Will generally needs to be probated in the following situations:

- **Real estate forms part of the estate**

  In a typical scenario where spouses jointly own real estate, there are two standard options for how the joint ownership is characterized; (a) joint tenancy, and (b) tenancy-in-common. Under joint tenancy, when the Will-maker dies, the property is automatically transferred to the surviving spouse. As such, the real estate does not form part of the estate to be divided amongst the beneficiaries. Under tenancy-in-common, the share owned by the Will-maker passes to their estate, rather than automatically to the surviving spouse. For the latter, a grant of probate will be required.

- **The Will-maker has life insurance policies and RRSPs where their estate is named as the beneficiary**

  If a life insurance policy or RRSP names specific individuals as beneficiaries, the insurance company or financial institution will generally distribute the policy proceeds directly to those beneficiaries upon receiving a death certificate as proof of death. In this situation, the proceeds bypass the estate. However, if there are no beneficiaries specifically named other than the estate itself, a grant of probate will generally be needed, as the RRSPs and policy proceeds will form part of the estate.

- **The Will-maker owns assets that are held in their name alone**

  If the deceased had any other substantial assets that were not jointly owned, such as bank deposits, investments or other valuable personal effects, they will pass to the estate. This would mean that a grant of probate would be required.

- **When the Will is being challenged by beneficiaries or other claimants**

  Depending upon the jurisdiction, there may be a limit on how long potential claimants have to challenge a Will. In some cases, the clock starts on the limitation period when the grant

of probate is obtained. As such, executors may wish to probate the Will in order to establish a time frame for settling ongoing disputes.

In general, financial institutions holding substantial assets of the deceased will likely refuse to release them without a grant of probate. Banks and life insurance companies try to mitigate the risk of being sued by other claimants of the estate by insisting on a grant. Without probate they have no certainty that the Will is valid or that the executor is acting with the appropriate authority.

Tip: The probate process can be complicated. Executors may wish to consider hiring a qualified legal representative to guide them through the procedure. Legal fees will be paid by the estate if they are deemed to be reasonable.

How much does it cost to probate a Will?

Probate fees (excluding the cost of discretionary legal advice obtained by the executor) depend upon the province or territory in which the Will-maker was ordinarily resident. For example, in Ontario probate fees are 0.5% of the total value of the estate, where it is between $1,000 and $50,000. For estates in excess of $50,000, a probate fee of 1.5% is charged on the amount over $50,000. In contrast, in Alberta, the maximum probate fee is $525 for estates of more than $250,000. So, for large estates, the jurisdiction can make a significant difference to the probate fees levied. A listing of probate fees by province/ territory can be found at the following web address – www.taxtips.ca/willsandestates/probatefees.htm.

How can the cost of probate be reduced?

Probate fees tend to vary in proportion to the total value of the estate. As such, probate fees can typically be reduced by shrinking the size of the estate. This can sometimes be achieved by directing certain assets to specific beneficiaries (such as RRSPs) and holding other assets jointly so that they pass outside of the estate. For example, if the Will-maker were to have bank accounts held jointly with their spouse, a house held in joint tenancy and RRSPs and life insurance policies naming their spouse as the beneficiary, probate fees would not need to be paid on the value of any of these assets. If there were no other assets, the executor may not need to have the Will probated at all.

The Will-maker should consult with the named executor before they pass away. As such, the executor may be able to help the Will-maker structure their affairs such that probate fees are reduced or avoided altogether. Nevertheless, it is important to note that there may be significant tax and legal consequences to the manner in which assets are transferred to beneficiaries after the Will-maker dies. Prospective executors should consider advising the Will-maker to seek professional tax and legal advice when preparing a Will, especially for larger and more complex estates.

Tip: One potential down-side of probating a Will is that it makes the estate and the affairs of the Will-maker public. If the Will-maker would prefer to pass certain assets to beneficiaries in a private manner, he should consider whether there are ways of transferring assets to beneficiaries outside of the estate, as previously discussed.

PART 4: Common Mistakes Made by Executors

Performing the role of an executor can be challenging. Unsurprisingly, executors occasionally make mistakes that can expose them to a considerable amount of personal liability.

Failing to communicate with the beneficiaries

Beneficiaries are entitled to be informed as to how the estate is being handled, what steps are likely to be involved and what the timeframe is expected

to be. If executors fail to be open and transparent, disputes can arise as the beneficiaries may assume that the executor is not acting in good faith. Executors should try to be clear and transparent with all of the beneficiaries of the Will.

Failing to carry out the instructions in the Will

In some cases, executors may feel that the instructions in the Will are unfair or ill conceived. However, it is not up to the executor to make any changes to the Will. They could find themselves personally liable for addressing shortfalls that result from a deviation from the Will-maker's plan. Beneficiaries should be sure to carefully and faithfully execute the wishes of the deceased exactly as they are set out in the Will (barring any successful legal challenges relating to the estate). That being said, in some cases, if all beneficiaries agree, there may be the possibility to distribute assets in a different fashion.

Being careless with estate monies

Expenses paid out of the estate will be visible to the beneficiaries in the accounts of the estate. If beneficiaries dispute how funds were put to use while settling the estate, the executor could be liable for covering any shortfalls. Executors should exercise a high degree of care when making decisions about how to use estate funds, especially when determining whether expenses are reasonable or not. Note that if an executor is also a beneficiary, no amount of due diligence will assist them in protecting their distributions as a beneficiary of the estate.

Distributing estate assets before settling all liabilities

Executors may be held personally liable for paying any taxes owing or other liabilities of the estate if they distribute the assets too hastily. When considering the liabilities of the estate, executors should ideally have completed the following before distributing any assets:

- filed all tax returns and obtained a clearance certificate from the CRA;
- advertised for potential creditors and paid off any debts;
- waited for the limitation period to expire (i.e. the period during which claimants against the estate can bring legal challenges), where applicable; and
- obtained signed releases from all potential claimants and beneficiaries of the estate.

Failing to obtain appropriate professional advice

Most of us do not have all of the necessary skills to administer a complex estate without getting advice from experienced professionals. There may be tax returns to file, investments to oversee, ongoing litigation and a probate process to administer. An executor may need to get help from lawyers, accountants and financial advisers to successfully perform all of these duties.

Conclusion

Prospective executors should carefully consider whether they have the time and necessary skills to carry out such an important duty. Those that decide they are willing to take on the responsibility should be careful and thorough to avoid becoming personally liable for the debts of the loved one whose final wishes they are trying to carry out.