

Is acting as an executor a good idea?

If someone asks you to act as their executor¹, or you learn to your surprise that you are named as an executor after the person's passing, there are a number of things that you should consider before accepting such a responsibility. Given the significant duties involved in such a role, it is important to be aware of the potential for personal liability.

An Executor's Legal Duties

An executor is a fiduciary and, as such, s/he owes a duty to exercise the care, diligence and skill that a person of ordinary prudence would exercise in dealing with the property of the deceased.

Furthermore, an executor owes a "duty of loyalty", which has been described as the duty to act honestly and in good faith, and to use powers solely for the purposes for which they were granted (see *Oosterhoff on Trusts: Text, Commentary and Materials*, 8th ed.). The "duty of loyalty" means that:

- a) An executor must exercise powers and perform duties solely in the interest of the estate.
- b) An executor must not knowingly permit a situation to arise where:
 - i. The executor's personal interest conflicts in any way with the exercise of powers or performance of duties; or
 - ii. The executor derives a personal benefit or a benefit to a third party, except as far as the law or the Will expressly permit.

Additional legal duties of an executor are:

- The "prudent investor" rule which ensures that the executor properly invests the estate assets;
- The "even-hand" rule which ensures that the executor acts impartially among all the beneficiaries;
- The "duty of transparency" which ensures that the executor provides information to the beneficiaries; and
- The "duty to account".

Some Practical Considerations

From a practical stand point it is also prudent to consider the overall complexity of the estate and what type and quantity of work will be expected from you in your role as an executor. Certainly, some executors can be compensated for the work they perform; however, there is a limit to what one may claim and it largely depends on the circumstances.

There are certain tasks that an executor may want to delegate to third parties; however, there is a limit as to what type of work may be delegated and what is considered reasonable.

You should consider whether the Will properly sets out the powers as well as the responsibilities of the executor which will aid you in the future, should any of your decisions be challenged. Another useful consideration is whether there are any third parties, or specifically, any beneficiaries who may be difficult to deal with in your role as an executor, or may want to challenge your authority in the future.

In making the decision whether or not to act as an executor, it may also be a good idea to speak to a lawyer regarding whether taking on this role may present an unacceptable legal risk for you in the future.

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¹ Estate trustee in Ontario

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