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# INSURANCE ISSUES: *Risk Management*

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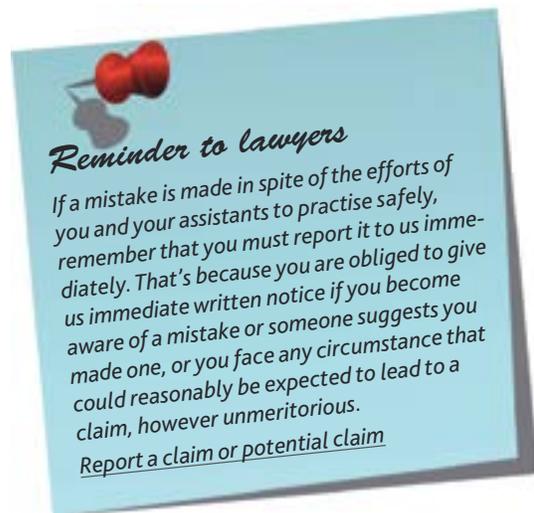


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## Lawyers as executors: Traps and tips

*Are you about to accept the role of executor and trustee?\* Based on our claim reports, the role is often not as simple or straightforward as you may think. If you say yes, appreciate that you are about to take on obligations that may be quite foreign to you. So read our tips to avoid falling into the traps that have caught other lawyers who ventured forth, ill-prepared.*

*But first, double check that you're insured, as this may influence your decision to accept the role or decline (read more at [Executors, trustees and other fiduciaries](#)). And if there is the potential for significant losses flowing from any successful negligence claim, buy [excess insurance](#).*



## Real-life scenarios from our claim files involving lawyers acting solely as executors

- » Beneficiaries questioned investments made on behalf of an estate, alleging that the lawyer executor didn't do enough to maximize the estate's potential value.
- » A lawyer executor made a significant donation to a political party out of an estate, not appreciating that she was contravening her duties as an executor.
- » A lawyer executor transferred real property to a sole beneficiary without first determining whether the estate owed taxes or obtaining a clearance certificate from CRA. The lawyer executor now faces personal responsibility for taxes.
- » A lawyer executor faces personal liability to a creditor in his claim against the estate, as the estate's inability to pay any judgment was not raised as a defence.
- » A lawyer executor delayed filing an estate's tax returns. Penalties and interest may now be assessed against the estate, leaving the executor exposed to a claim.
- » As one of two co-executors, a lawyer delegated responsibility for managing the estate investment portfolio to his co-executor. The portfolio has been wiped out through improvident investments, and the beneficiaries are claiming breach of trust against the lawyer.
- » A testator's disinherited daughter discovered that her claim under the *Wills Variation Act* was statute-barred. She sues the lawyer executor, alleging that she relied on his advice that there was no need to sue under that legislation.
- » An estate had a tenuous claim to half of the proceeds from the sale of a property. The lawyer executor did not pursue the claim, and the beneficiaries sued the lawyer and his co-executor for failing to do so.

## Before you accept the role

- Don't get tripped up by assuming that because you are a lawyer — even a seasoned, senior lawyer — you know what it takes to be an executor. This is a dangerous assumption. The legal issues can be devilish. And a court may ultimately hold you to a higher standard qua trustee than a lay person, presuming that you will know the law and duties of a trustee, given your legal training.
- Make sure that you know or learn about

the duties and obligations that you're taking on, and that you are willing to dedicate the time required to discharge them properly.

- If you are new to the role, read the sample retainer letters in the *Probate and Estate Administration Practice Manual*, loose-leaf and online (CLEBC, 2014) that set out the separate responsibilities of the estate's executor and lawyer — they'll help introduce you to the scope of the role you may be accepting.
- Thoroughly review the terms of the document pursuant to which you are appointed (e.g. will or trust deed) and any relevant legislation (e.g. the *Wills, Estates and Succession Act*, the *Trustee Act*).

And if you find yourself in the situation of one lawyer who felt compelled to accept

because of a dying client's pleas, and later reported a claim, either resist or explain that you will need to hire the appropriate experts to help you properly manage your responsibilities.

- Recognize that some breaches of statutory duties will expose you to personal liability. For instance, if you distribute an estate in advance of a clearance certificate, you are personally liable to CRA for any of the estate's unpaid taxes. If you are late in filing an estate's tax return, penalties and interest may be assessed against you personally (and there is no coverage for penalties under the Policy).
- The type, extent and potential magnitude of the responsibilities that you assume qua fiduciary are very different from those that fall to you qua lawyer. They will also vary depending on the nature of the fiduciary obligation you are assuming — administering a simple estate, for instance, is very different from administering or managing a trust. Bear in mind that:
  - The role may require you to make business or investment decisions, and will impose on you obligations to account. Although the *Trustee Act* may provide you with some statutory protection, you risk finding yourself sued, as did one lawyer, for negligently investing in a fund that resulted in a loss.
  - As executor, you have to deal with some very basic matters. Are you prepared to take on decisions about the deceased's body, food in the fridge, pets? As one lawyer advised

\* In this article, executors includes executrices and may also include acting as a trustee. Executors may be referenced as personal representatives under the *Wills, Estates and Succession Act*.

us, he was reluctant to act as a trustee given a previous experience in which he “was required to attend a deceased’s apartment that was a total mess (finding \$4,000 in Canada Savings Bonds in the garbage) and arrange for pickup of clothing and cleaning of the apartment.”

- You may be stepping into, as one lawyer told us, “dysfunctional family relationships.” That claim related to the lawyer acting as an attorney under a power of attorney but the advice — “next time recommend a financial institution with more resources to manage this file” — applies to any of these fiduciary roles.
- Ask yourself if you have the time that proper performance of the role will require. If you don’t, decline. Delays that may be of no consequence in one context may translate into hard losses for the estate, and you, in another. You are at particular risk in volatile markets, where delays in realizing on assets may result in significant losses.
- Remember that you cannot avoid responsibilities by accepting a role as co-trustee and simply delegating to others. You are equally as answerable to the beneficiaries.

### *If you do accept the role*

- Recognize duties that you are not comfortable discharging without assistance.
  - If you’re operating in an area outside of your expertise, you may need legal, investment and/or accounting advice. Get the help that you need.
  - As always, be clear if you are relying on the advice of others and make sure that your reliance is confirmed in writing. One lawyer, acting as an executor and trustee, signed income tax returns that were incorrect, triggering substantial interest and penalties. That lawyer was extremely grateful that there was no subsequent dispute as to who was responsible for preparing the tax returns, thanks to written confirmation as to where that responsibility lay (not with her).
- Appreciate that those to whom you



owe a duty will look to you when things go wrong. Beneficiaries, unhappy with the amount ultimately realized from an estate, may claim that you didn’t do enough to maximize the estate’s potential value. One beneficiary may allege that you preferred another, to that beneficiary’s prejudice, or that you were somehow acting in a conflict of interest. Discharge your duties properly, and

recognize and manage the risk of unhappy beneficiaries.

- Be clear as to which role you are taking on — executor or lawyer. And if you assume both, be alert to the potential risks. Even if the legal work is handled by other lawyers at your firm and not you, the situation may create risks. [Read more](#) on the Law Society website.



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