

**Wills, Trusts & Estates**

# The benefits of choosing an executor who's a team player

By **Stephanie Battista**

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(May 31, 2021, 8:38 AM EDT) -- Being asked by a loved one to act as an executor of their estate is not always the honour some think it is. Administering an estate can be a difficult and burdensome process, and coupled with grieving the loss of a loved one and dealing with demanding beneficiaries, the role of an executor can be a thankless job. Additionally, the role of executor comes with legal liability.

Given all of this, in many circumstances it is good practice that a person consider naming multiple executors on death to share this burden. But that is only assuming you choose the right people to act — the wrong mix of executors can lead to disastrous results.

In the course of settling an estate, executors will be called upon to make many decisions ranging from whom they should hire as advisers, when to make distributions to the beneficiaries and how to invest the estate funds until distribution. The types of decisions that the executors have to make

will depend on the terms of the will, the level of discretion provided to executors and the nature and complexity of the assets of the estate.

So, what happens when the executors cannot agree on these important decisions?

Under Ontario trust law, executors must act unanimously in all decisions being made, absent a provision to the contrary in the will. There is no opportunity for one executor to "take charge," so to speak, and make any unilateral decisions on behalf of all executors. If executors cannot agree on what to do, this of course will lead to delays in the administration of the estate, frustrated beneficiaries and possibly a breach of the executors' fiduciary duties.

If one executor does try and take steps alone and acts negligently, then the other executors may be jointly liable for this breach. Compensation issues can also cause friction among the executors, especially if one executor feels they did more work than the others.

Resolving stalemates among the executors can be challenging, as it is difficult under law to force an executor out of office. A beneficiary or co-executor can apply to the court to remove an executor, but in order to be successful, it must be shown that the executor neglected their fiduciary duty and has not acted honestly or for the benefit of the beneficiaries. This bar is higher than just disagreement among the executors on how to handle the administration. In some circumstances, a court may interfere with fighting executors, but only in clear cases where there is no other option available.

An executor can also choose to resign their position if the hostility among the co-executors is too much. Assuming that one of the executors does indeed decide to make things easier and resign, this could lead to a whole new set of issues depending on how far the executors were into the administration.

For example, renouncing prior to beginning to act and applying for a Certificate of Appointment is a much simpler procedure than after, which may involve a reissuing of a new certificate to the new executor team and a court process to be removed. As well, most wills generally have replacement executors named, so even if one executor steps aside, their replacement would step in and could face similar problems in working with the other executors.

Despite these potential problems, appointing co-executors may still make the most sense for your personal situation and can help alleviate some of the burden of this role. If you do decide to appoint multiple executors, there are some ways you can minimize the risk of, or avoid altogether, executor infighting.

As mentioned above, Ontario law dictates that executors must act unanimously. However, this can be overridden by a provision in the will. Whenever there are more than two executors acting, it is highly recommended that an umpire clause or a majority rule clause is included. You can even go one step further and appoint one executor to have a "tiebreaker" power, meaning that for all decisions they must form part of the majority.

Clients sometimes choose to forgo appointing loved ones altogether and instead opt for a professional adviser or a trust company. A third-party executor brings an expertise and a neutrality to the role. Costs, including compensation agreements, are something to consider when deciding if this is the right appointment for you and your situation.

Ultimately, the best piece of advice we can give to clients is simple: choose executors who are not just up for the challenge, but who also get along! It is a fair assumption that if they don't like each other now, they will not like each other when you are gone. Any tension present while you are alive will likely be heightened with the grief and stress involved in settling your estate.

Choosing your executors can be one of the more difficult decisions you make while you are preparing your will and appointing the wrong "team" can lead to unfortunate consequences. Being an executor is a job: it is not about honouring a loved one or ensuring there are no hurt feelings, but rather about who can work together and get the job done.

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