Dealing with the Problem Executor
DEALING WITH THE PROBLEM EXECUTOR

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I. Introduction

One of the most common areas of conflict in the administration of an estate is an executor who does not properly carry out the duties of her office.

This area is extremely broad, having had over 300 years of case law development, and there are numerous issues and nuances which cannot all be dealt with in this paper. It is simply a starting point for considering the major principles and common fact patterns, and how one might begin to deal with a problem executor.

This paper will focus on three main areas:

• the basic duties and obligations of an executor, and how to use that to control the executor;
• contested passing of accounts; and
• when and how to remove an executor.

It should also be pointed out that we are dealing here with an executor, not an administrator or trustee (collectively, an executor and administrator are known as the “personal representative” of an estate).
While there are tremendous areas of overlap, there are nuances which should be investigated before assuming that what is said here will apply to an administrator and trustee as well.

II. Basic Duties and Obligations of the Executor

In this section, a general overview will be provided of the (mostly) common law obligations of the executor. Very little case authority will be quoted here, as many of the statements are “motherhood” principles which are commonly understood to be the law. For specific authority, refer to Widdifield on Executors’ Accounts (both the 5th ed., 1967, and the 6th ed., 2002 (although that tends to be more Ontario-centric)); D.M. Waters, Waters’ Law of Trusts in Canada (3rd ed., 2005); Halsbury’s Laws of England; and the BC Probate & Estate Administration Practice Manual (CLE).

Once an executor has decided to take on the role of dealing with the estate, and actually “intermeddled” with it, she must continue with the administration. She cannot simply resign or back out once she is involved; she will need to be formally discharged.

A. Basic Duties

The basic duties of the executor are to:

• collect in the assets of the estate;
• deal with creditors and claims, including tax issues;
• administer the estate; and
• distribute the estate assets to the beneficiaries in accordance with will.

More particular duties or obligations may arise in a particular case, depending on the specific terms of the will appointing the executor.

1. Collect the Assets

The executor should look into the assets of the deceased—property, bank accounts, etc., as soon as possible. If there are wasting assets (e.g., livestock), the executor should take action immediately, or she could be held liable to the beneficiaries for any loss.

If the estate has a claim against someone for damages, the executor should, with legal advice, decide whether to pursue that claim. The overriding principle must be that if pursued, it should be in the best interest of the estate. This usually means in the best interest of the estate financially - in other words, will the pursuit of the claim result in a benefit, after the costs of pursuing it are taken into account?

2. Deal with Creditors

If there are claims against the estate, the executor is authorized to deal with them as a prudent business person would; no personal animosity should be involved, and it should be done in a timely fashion (i.e., the claim should not sit for ten years). The executor has the ability to compromise the claim, and settle it, if it is a prudent and reasonable settlement.

The executor is also supposed to be neutral in Wills Variation Act cases; if an executor actively gets involved in the negotiations or litigation, and then charge the beneficiaries for the expense, that charge should be challenged.
3. **Administer the Estate**

Once the assets have been collected, an executor is to convert it to cash, unless specifically directed to do otherwise by the will. The manner in which ultimately a question of discretion, and if exercised reasonably in the circumstances and done in good faith then there will be no liability.

Distribution *in specie* (i.e., the item or property itself is given to a beneficiary) can only be done if all the beneficiaries are *sui juris* and agree, or unless specifically directed in the will. Generally there is no power to postpone the sale of estate assets, subject to the executor’s year (see below).

### a. Investment Powers

The ability of the executor to invest estate assets (e.g., cash used to purchase equities pending distribution) is governed by legislation unless the will has express powers or limitations in that regard. Essentially the test is whether the investment is that of a prudent investor: *Trustee Act*, R.S.B.C. 1996, c. 464, ss. 15.1-15.6.

Occasionally an estate will involve an ongoing business. Absent an explicit direction in the will, there is an obligation to run the business for only so long as is necessary to sell it as a going concern, to maximize the value for the estate. It is often an area of some dispute, especially where the executor ends up as a director of the business and earns an income from that role.

4. **Distribute the Estate**

Once the assets have been collected, an executor has a fiduciary obligation to the beneficiaries to distribute the estate assets to the beneficiaries. However, the beneficiaries cannot compel the executor to distribute any portion of the estate until after one year from the date of death. This is known as the “executor’s year”, and is intended to provide the executor with time to do her job without the beneficiaries pressuring her for their inheritance.

If a specific legacy for a certain amount of cash is not distributed to the beneficiary after the executor’s year, then interest will accrue at 5%, pursuant to the *Interest Act*, R.S.C. 1985, c. I-15. The interest is only payable on pecuniary legacies, not on the residue of an estate, *in specie* gifts, or real estate.

B. **General Obligations**

In addition to the general duties of the executor outlined above, there are also the general obligations which govern the execution of the duties and the actions of the executor. There are numerous obligations, but only the major obligations are touched on in this paper.

I. **No Self-Dealing**

The overriding obligation of the executor is to act in best interest of the beneficiaries. An executor is a fiduciary, which means that there is the obligation of utmost good faith in their behaviour and actions.

In particular, executors are not to gain a benefit from their position, such as purchasing assets from estate, or taking payments from the estate for services, for remuneration, or otherwise. There are exceptions where there is consent among all the beneficiaries, or where explicitly allowed by the will, but a good starting point is that the executor should not profit from their position. The executor is to be reimbursed for reasonable expenses, however.
2. **“Even-Hand” Principle**

An executor must deal with the income beneficiary (e.g., a life tenant) and the capital beneficiary (e.g., a residuary beneficiary) on an “even-handed” basis. “Even-handed” means exactly what it sounds like; a personal representative is not to unfairly disadvantage one over the other (e.g., an estate property is painted; to pay for it entirely from capital would be unfair to the capital beneficiary, especially when the life tenant is the one who gains the benefit and it has little impact on retaining the capital value of the property). In other words, actions taken by the executor cannot prefer or benefit one class of beneficiary more than the other.

Particular examples of scenarios where this issue arises include:

- payment of expenses—from income or capital?; and
- investment of assets—is it to generate income or capital appreciation? If the executor invests in such a way so as to maximize income, but with no capital growth, then it is unfair to the capital beneficiary, and vice-versa.

It is certainly not a precise science. It is really a common-sense evaluation in each case as to whether the decision is generally fair to the two classes of beneficiaries involved.

3. **Keep Accounts and Vouchers**

An executor must keep records and vouchers of the administration of the estate, and account to the beneficiaries as to her actions. Occasionally the accounts must be taken before the court and “passed” before the Registrar. This is known as the “passing of accounts”.

A residuary beneficiary is entitled to see all the accounts and vouchers, as they get what is left at the end of the administration of the estate. A beneficiary who simply receives a specific legacy is not entitled to see all the records, but just those which are related to receiving the specific legacy (i.e., if the executor says there were insufficient funds to pay out that bequest).

There is a significant legal question as to whether beneficiaries are entitled to see legal documents produced during the administration of the estate. It is too large a subject to address here, but is worth keeping in mind when pursuing information from the executor.

4. **Passing the Accounts**

An executor is required to formally pass her accounts within two years of the grant of probate: *Trustee Act*, R.S.B.C. 1996, c. 494, s. 99(1). However, a beneficiary can insist on the executor passing her accounts annually, or as otherwise ordered: s. 99(2).

There is a specific form of accounts required for the passing, as set out in Rule 61(60). It is not a normal cash in, cash out type of accounting.

C. **Remuneration of the Executor**

An executor usually receives remuneration for the work done as executor. There are three grounds for the executor to receive remuneration:

- by the terms of the will;
- by legislation (s. 88, *Trustee Act*, R.S.B.C. 1996, c. 494);
- by prior agreement with the testator (usually in the case of trust companies).
In most cases, the remuneration will be on the basis of s. 88 of the *Trustee Act*, which states that an executor can receive up to a maximum of 5% on capital and income as remuneration, plus up to 0.4% of the average market value of the assets as a care & management fee.

The maximum amount is not always awarded. There are numerous factors considered in determining what percentage should be used, including the:

- magnitude of the estate;
- care and responsibilities involved;
- time occupied in the administration;
- skill and ability displayed; and
- success achieved in maximizing the estate assets.

Absent serious misconduct or mismanagement, an executor should receive remuneration for their work. However, the amount of the executor’s remuneration is one of the most common sources of conflict between the executor and the beneficiaries. There are numerous issues which arise in this context, including:

- pre-taking remuneration before the accounts are formally passed or approved by the beneficiaries; while there is conflicting case law on this point, it is not generally a good idea;
- seeking maximum remuneration on an interim passing; this does not leave any incentive for the continued good work by the executor;
- a paid agent doing the executor’s work; if remuneration is granted in that situation, then the estate is paying twice for the same service;
- charging professional fees if the executor is a professional (a lawyer or accountant), although if there is a charging clause, this is acceptable (although the specific wording should be carefully reviewed); and
- a gift to the executor is presumed to be in lieu of compensation, absent a contrary intention expressed in the will.

D. How to Use the Above to Control the executor

The above duties and obligations can be used as a touchstone to reign in the wild executor by insisting on the rights of the beneficiary. In most cases, this will likely involve explaining the obligations and duties to lay executors who usually did not seek legal advice before taking the actions which are causing the problems. Once the legal obligations are explained, an executor can often be brought to heel.

In that regard, the requirement for providing accounts and vouchers often gives the most important element for control—information. In many cases the beneficiary has concerns because he simply does not have any knowledge of what the executor is doing. Once that information is provided, it either forms the basis for showing there is no need for concern, or it shows that the executor is not behaving properly, which can then lead to further action if necessary.

The primary leverage which a beneficiary has to control a misbehaving executor is to force a passing of accounts and/or object to her claim for remuneration. If that does not bring about a change in behaviour, then ultimately the beneficiary’s ultimate weapon is to apply for her removal as executor.
III. Contested Passing of Accounts

If matters progress to the point that the executor’s accounts cannot be accepted, or alternatively if the executor does not prepare the accounts, then it is necessary to proceed with a formal passing of the accounts before the court.

Key reference material for this process, and a more detailed description of how it is to be done and the legal issues and concerns, can be found in the Probate & Estate Administration Practice Manual (CLE), as well as Practice Before the Registrar (CLE). Only a very brief overview will be provided in this paper.

The basics of how a passing of accounts proceeds are: an order for the passing of accounts is obtained (by Petition); an appointment date before the registrar is set; if needed, a pre-hearing hearing can be held in which orders for document productions, etc., can be issued (Rule 32(11)); prior to the hearing, a description of the complaints should be provided (Rule 32(14)); the actual hearing; the registrar issues a report and recommendation; and then, confirmation of registrar’s report by a judge (assuming that the original order for the passing of accounts did not order that the registrar’s report be certified and binding, in which case there is no need for a confirmation by a judge).

An issue which should be considered carefully is service on the beneficiaries where there are minor, incapable, or contingent unborn beneficiaries. It may be necessary for the appointment of a litigation guardian in those scenarios, or service upon the Public Guardian and Trustee.

The actual hearing of the passing of accounts, while slightly less formal than a trial, is still in essence a mini-trial. There are live witnesses, documentary issues, expert evidence (valuation or appraisal evidence), and opening and closing submissions.

It is also worth noting that the evidence obtained at the passing of accounts (i.e., the evidence of the executor) can be used in a proceeding to remove the executor at a later date.

IV. When, Why and How to Remove the Executor

In this paper and presentation, we will only be dealing with the situation where the executor is actively opposing removal. If a settlement is reached, and the executor voluntarily agrees to step down as executor, then that will involve an application under ss. 27-30 of the Estate Administration Act, R.S.B.C. 1996, c. 122, whereby an executor applies for a discharge. Note that an executor cannot simply resign using s. 27 of the Trustee Act, R.S.B.C. 1996, c. 464: see Re Berg Estate (1994), 90 B.C.L.R. (2d) 237 (S.C.).

It should again be pointed out that this paper deals with an executor, not an administrator or trustee. While there are tremendous areas of overlap, there are nuances which should be investigated before assuming that what is said here will apply to an administrator and trustee as well.

A. When Should an Executor be Removed?

The process to remove an executor is involved, and can often involve significant fees and expense. It is extremely important to analyze the situation from both a strategic sense as well as from a cost benefit point of view.

For example, are the issues being raised ones which should more properly be dealt with on a passing of accounts or in terms of the executor’s claim for remuneration? Can the supply of further information reduce or eliminate the controversy or suspicions? If so, then why go to the trouble of removing the executor - simply deal with the issues when the executor passes her accounts.
5.1.7

Furthermore, there is a large hidden cost of applying to remove the executor. Once the executor is removed, there will still have to be a passing of the executor’s accounts, and you will have to deal with her claim for remuneration. The newly appointed executor will also likely insist on remuneration, which could possibly be in addition to the remuneration of the original executor.

Finally, there is the issue of costs of the application. If the evidentiary foundation for removal is weak, or if there was a somewhat legitimate basis for the executor to oppose it, there is a real possibility that the executor will receive special costs of the application from the estate.

The decision to apply to remove the executor should be made after all other avenues to resolve issues have failed. It is really only effective in situations where there is the potential for harm or prejudice to the estate assets, or where no action whatsoever is being taken by the executor to administer and distribute the estate. Most other complaints can be dealt with on a passing of accounts. Having said all that, it is ultimately a question of strategy in any given case.

B. Why Will an Executor be Removed?

The test for removal of an executor is quite stringent, and is based on whether there is prejudice to the estate or the beneficiaries’ welfare. A testator is entitled to appoint the executor he chooses and that discretion will not lightly be interfered with, even in circumstances where there is some unsavoury or dubious behaviour on the part of the appointed executor: *De Cotiis v. De Cotiis*, 2008 BCSC 1206. As noted in the seminal case of *Conroy v. Stokes*, [1952] 4 D.L.R. 124 (B.C.C.A.), the executor would have had to have acted “in a manner that endangered the estate, or that as executor she acted dishonestly, without proper care, or without reasonable fidelity.”

It is difficult to categorize exactly what circumstances that general statement covers. Each case will rely very much on its own particular facts. Some of the more common incidents which cause applications for removal are:

- failure of the executor to pass her accounts - this alone is rarely grounds for removal; see *Conroy v. Stokes*, *supra*; *Re Adams* (1989), 62 D.L.R. 758 (B.C.C.A.);
- fraud or gross misconduct—clearly this is grounds for removal, but as with all claims of fraud or misconduct, it will have to be clearly documented before the court will make a finding of that nature. It should also be anticipated that such an allegation may push the matter over to the trial list, which could cause significant delays; however, an argument could be made for the appointment of an interim administrator in the interim;
- endangering assets of the estate—again, a clear ground for removal, but there should be persuasive evidence of this, not simply speculation;
- conflict of interest of the executor—it is unclear whether a conflict of interest alone will warrant a removal, although recent decisions suggest that it is: *Veitch Estate*, 2007 BCSC 952;
- personal animosity or hostility between the executor and beneficiaries—again, the courts have not been consistent in this category. It will largely depend on the particular fact situations, but the generally accepted starting point is that by itself, it is not enough: *Erlichman v. Erlichman*, 2000 BCSC 173;
- failure to keep an even hand—if it can be shown that the executor is deliberately favouring one class of beneficiaries over another, it may be grounds for removal: *Re Smith*, [1971] 16 D.L.R. (3d) 130 (Ont. H.C.J.), varied [1971] 2 O.R. 541 (C.A.);
- incompetence—may be grounds for removal if it can be shown that the incompetence (not incapacity) endangers the trust property;
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- penury or bankruptcy—being poor is not grounds for removal, but being declared bankrupt is: *Re Barker* (1875), 1 Ch. D. 43, per Jessel M.R.;
- failure to distribute the estate—if the executor does not distribute within a reasonable time after the executor’s year has passed, then there could be grounds for removal: *Alexander v. Royal Trust Co.*, [1949] 2 D.L.R. 824 (Alta. C.A.), per Parlee J.A. at 836-7; and
- want of reasonable fidelity—this can be grounds for removal; see, e.g., *Re Moon Estate* (August 23, 1994), Vancouver Registry No. A942041 (B.C.S.C.).

C. How is an Executor Removed?

Assuming one has the evidentiary basis to remove an executor, the procedure is usually to initiate the application by way of petition with supporting affidavits. The underlying legislation to remove an executor, subject to the point below about the court’s ability to remove an executor, would likely be s. 97 of the *Trustee Act*, R.S.B.C. 1996, c. 494.

It should be considered whether the factual issues will require viva-voce evidence, and whether the matter should be set over to the trial list, or whether it would be sufficient to cross-examine the deponents on their affidavits. If so, perhaps consideration should be given to discussing the matter with opposing counsel, and perhaps moving the matter to the trial list by consent. However, strategic considerations should be kept in mind. For example, if there is some urgency to the matter, it may be necessary to obtain interim relief regarding the administration of the estate pending the hearing.

Service issues should be considered at the outset as well, especially in situations where some of the beneficiaries are minors, incapable, or unborn contingent beneficiaries. It may be necessary to appoint a litigation guardian or serve the materials upon the Public Guardian and Trustee.

A topic which is more esoteric than this paper warrants is whether the court has the authority to remove an executor before the executor takes on the role of trustee (e.g., before all the assets have been collected). This is where the distinction between an executor, administrator and trustee becomes quite important. In particular, s. 31 of the *Trustee Act*, R.S.B.C. 1996, c. 494, cannot be used to remove an executor, although it can be used to remove a trustee: *Mackay v. Martin*, [1986] B.C.J. No. 674 (QL) (B.C.). It is worth noting s. 97 of the *Trustee Act*, R.S.B.C. 1996, c. 494, might provide a complete answer in that regard, though.

In practice, many judges and counsel simply ignore the distinction between an executor, administrator, or trustee, and use s. 31 of the *Trustee Act*, R.S.B.C. 1996, c. 494, or rely upon the inherent jurisdiction of the court as the authority for court’s ability to remove the executor. It is worth noting, however, that the executor is not appointed by the court, but by the testator pursuant to the will, and hence the court may not have any inherent jurisdiction over an executor.