



How to Choose Your Executor

Your choice of an executor is one of the most important decisions for you to make in your estate planning. Your executor will be responsible for the administration of your estate and for carrying out the provisions of your Will and must do so in compliance with all relevant laws. It is usually best to make your choice of the executor as the last step in your estate planning. At that point, you will understand your estate needs and have chosen the beneficiaries of your estate. You may then consider the types of skills and abilities your executor should have and those persons who would be able to carry out your wishes and make your estate plan a success. Every estate varies in terms of complexity and responsibilities of the executors. For this reason, sometimes a family member may not be the most appropriate choice. For some estates, appointing multiple executors can be an effective strategy, particularly where there are substantial business assets or family assets.

Factors to Consider in Your Choice

Your executor steps into your shoes to deal with your assets, pay your debts and taxes, and carry out your wishes as set out in your Will. Different factors may be relevant in determining who to appoint as your executor. Factors that you should consider include:

- The nature of your assets, e.g., business or foreign assets;
 - The relationships among family members, friends and professional advisors;
 - Blended family considerations and whether you have children from more than one marriage;
 - Specific dependent issues, such as substance abuse, physical or mental disability, financial irresponsibility of the beneficiary and potential creditors of the beneficiary;
 - The duration and complexity of your estate;
 - The time and skill required to administer your estate, and any time constraints of the potential executors; and
 - The residence of the executor.
- Your Will provides for a trust for your spouse (the “spousal trust”), with broad powers to encroach on the capital of the spousal trust;
 - You have children from a former marriage who are beneficiaries of your will; or
 - Your spouse does not have the necessary experience or desire to deal with the financial responsibilities or administration of a spousal trust.
- **Adult children** - One or more of your adult children may be an appropriate choice for the executors. If you wish to appoint two or more of your children as the executors, you need to consider whether they will be able to work together in the administration of your estate. If there is a history of disharmony between or among your children, they should not be the executors.
 - **Business associate** - Knowledge of your business may make a business associate a good choice to be an executor. Care must be taken to avoid a conflict of interest between the business associate’s personal interest in business assets and his or her duty as an executor to act in the best interests of the estate.
 - **Lawyer, accountant or other professional advisor** - A lawyer, accountant or other trusted advisor may be an appropriate choice as an executor in certain circumstances, such as where there may be conflict among the beneficiaries. In certain circumstances, a professional advisor may be able to more efficiently and harmoniously administer an estate than a family member. While there are advantages to having a professional advisor administer your estate, the professional advisor may charge professional fees to the estate for acting as executor. Some conflict of interest issues may also arise, and you may wish to appoint multiple executors/trustees to ensure the best interests of your estate are always foremost in circumstances where a conflict of interest arises.

From a practical standpoint, it will be less costly and time consuming for the executor to deal with your assets if he or she lives in the same city as where your home and personal assets are located. The residence of the executor also determines the residence of your estate for income tax purposes. It is generally advisable to have the executor be a resident of Canada in order to have your estate be a Canadian resident taxpayer.

Common Choices for an Executor

- **Surviving spouse** - If your spouse is the sole beneficiary of your Will, your spouse is an obvious choice to be the sole executor. There are some situations when a co-executor/co-trustee may be necessary. For instance, your spouse should not be the sole executor/trustee if:

Another alternative is to give your executor/trustee the power to seek the professional advice of specified lawyers or other professional advisors in the administration of your estate.

- **Guardian of Dependent Children** - The guardian of dependent children may be an appropriate choice as an executor/trustee because of his or her first-hand knowledge of the needs and welfare of the children. However, the appointment of a guardian to act as executor/trustee may result in a conflict of interest. For example, a guardian who is appointed as trustee of a trust for your children may be unwilling to use the trust funds to purchase a larger home or may personally pay for many of your children's expenses to avoid depleting the trust funds. To avoid the potential conflict of interest that arises where the guardian both determines what expenses are to be incurred for the benefit of the children and, as the sole trustee, decides whether those costs are to be paid from the children's trusts, it is advisable for the guardian not to be appointed as the sole trustee. Where multiple trustees have been appointed, the trustee who is not the guardian, may insist on the recovery of expenses by the guardian and ensure that your children live in the lifestyle that you would choose for them.
- **Trust Company** - A trust company will be an appropriate choice as an executor where skill, experience, impartiality and longevity are required in the administration of your estate, such as in the following circumstances:
 - **Blended Families** - There may be potential disputes between your children of a previous marriage and your spouse. The trust company can work through these issues, impartially, to preserve the estate and professionally manage the assets pending resolution of the disputes;
 - **Long term trusts are required** - The trust company will be able to administer the trust for as long as needed, e.g. for the lifetime of a disabled person, a spendthrift child or other challenging long-term trusts. The trust company can assume the burden of managing the assets in the trust and minimize the long term responsibility and stress on family members;

- **Children** - The strategy of appointing a trust company as the sole executor/trustee protects your estate from the depletion of any funds held in trust for your children by the guardian and also ensures that enough funds will be given to the guardian to raise your children comfortably. The trust company can balance the needs of your children with the preservation of their future inheritance.
- **Business owner** - the executor must either immediately close down and liquidate the business, continue to operate the business, or sell the business. At an emotional time, your spouse and family members may not be able to make the critical business decisions needed to be made. A trust company has the knowledge and ability to make the necessary decisions in a timely manner.

Co-Executors/Trustees and Alternates

In certain circumstances, it may be appropriate to appoint multiple executors. For instance, in some estates it may be appropriate to appoint a spouse to act as executor together with a trust company or to appoint the guardian of your dependent children to act as executor together with a trust company. Appointing an uneven number of co-executors/trustees in a combination of the above choices is a particularly effective strategy to prevent deadlock in decision making when the Will expressly states that decisions of the executors/trustees will be made by majority. It is also advisable to appoint alternates since there is the possibility the executor/trustee may be unable or unwilling to act or may wish to resign or may otherwise be unable to complete the administration of your estate, either because of death, illness or some other unforeseen circumstance.

The Final Word

Choosing the right executor requires careful consideration and planning. You should consider your wishes and all of your options in building the appropriate team to efficiently and successfully administer your estate. Your choice of executor can mean the difference between an estate that is administered efficiently and one that is caught up in legal and financial complications.

Sources:

- 1) Wealth Planning Strategies for Canadians 2011, by Christine Van Cauwenberghe, CARSWELL
- 2) The Estate Planner's Handbook - 2nd Edition, by Robert Spenceley, CCH
- 3) Canadian Estate Planning Guide - CCH Inc.