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THE LIABILITY OF THE EXECUTOR IN ESTATES

**Originally published in ACTLA's "The Barrister" Magazine, Issue 112*

The role of the Executor of a deceased person's estate is increasingly becoming a more difficult task and fraught with personal liability, as the nature of the estates to be administered and the assets involved in administering the estate become more complicated. Whether the estate involves potential claims by an adult interdependent partner or a represented adult, the running of an active business, or the sale of various rental properties, the Executor should keep not only their fiduciary duty to the beneficiaries of the estate at the forefront of their mind, but also the fact that an Executor is liable both in contract law and tort law.

An Executor who makes contracts relating to an estate is personally liable to the contract, as long as the contract has no relation to some obligation of the testator. An Executor is also liable in tort law for negligence. Negligence by the Executor can make the Executor personally liable to any beneficiaries or creditors of the estate. Examples where Executors could be found negligent include, but are not limited to:

- not properly following the terms of the testator's will;
- missing an heir;
- failure to pay the legally enforceable debts;
- improper investments;
- improper payment of debts or legacies;
- breaching the even-hand rule;
- not properly protecting the estate assets;
- improper delegation of duties;
- failure to keep accurate records of the administration; and
- failure to pay all the taxes owing by the deceased and/or the deceased's estate.

In *Gibbons Estate (Re)*, 2009 ABQB 587, several of the residual beneficiaries of an estate brought an action to remove an Executor who failed to produce a satisfactory accounting report despite repeated court orders ordering him to do so. The Court found that the beneficiaries were

unlikely to ever receive a proper accounting report, given the Executor's lack of cooperation. The Court concluded that the Executor had breached his fiduciary duty and was guilty of misconduct vis-à-vis his irresponsible and unreasonable performance of duties as Executor, and removed him as the Executor of the estate. The Court also found that the Executor was personally responsible for paying a portion of the legal fees incurred by the estate while he was the Executor. The Executor appealed the decision and the appeal was dismissed.

However, one obstacle to suing an Executor in negligence could be the Executor's right to be indemnified for tortious acts arising in the course of the administration of the estate, depending on whether or not the Executor acted honestly (per *Bibby Estate*, 2009 ABQB 321). In addition, even where there has been a finding of negligence, default or misfeasance on the part of the Executor, an honest Executor may be excused and not found liable, by operation of section 41 of the *Trustee Act* (Alberta), which states as follows:

41 If in any proceeding affecting trustees or trust property it appears to the court

(a) that a trustee, whether appointed by the court or by an instrument in writing or otherwise, or that any person who in law may be held to be fiduciarily responsible as a trustee, is or might be personally liable for any breach, whether the transaction alleged or found to be a breach of trust occurred before or after the passing of this Act, but

(b) that the trustee has acted honestly and reasonably and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the court in the matter in which the trustee committed that breach,

then the court may relieve the trustee either wholly or partly from personal liability for the breach of trust.

In *Taubner Estate (Re)*, 2010 ABQB 60, a granddaughter and beneficiary brought an action claiming that the Executor of her grandfather's estate had conducted transactions which caused losses to the estate. The Court dismissed this action on the basis that any shortcomings on the Executor's part in managing the estate were excused because he acted in good faith and was not an expert in the type of transactions (share purchase transactions) which he was required to perform.

Particularly in cases of non-professional Executors (meaning someone other than a trust company), the Courts have been relatively slow to find an Executor responsible for errors made honestly and in good faith. Thus, it is important to keep in mind that there are differences between the liabilities of an Executor and the liabilities of other tortfeasors. However, this merely underlines the obligation of an Executor to act honestly, reasonably, with the utmost of good faith, in accordance with the testator's will, if one exists, and with the care, diligence and skill that a prudent person would exercise.

Even if an allegation of negligence against an Executor is successfully defended in Court, the Executor is still put to the expense of defending such a claim. It is possible in some cases that the costs awarded to a successful Executor may not completely indemnify him or her and therefore, the Executor may become personally liable to a certain extent for his or her own defence costs.