

The Liability of Executors and Their Protection

When making their Will, some people choose as their Executors, friends or family members; others select professional Executors such as Munday's LLP; we channel such appointments through our Trust Corporation, Munday's Trustee Services Limited. Some choose a combination. This leaflet aims to advise private Executors as to their responsibilities and liabilities in accepting the role.

Liability to Third Parties

Executors who make contracts with third parties (for example estate agents) in the course of administering an estate are directly liable to them under contract law. The Executors can recoup the cost from the assets of the estate, where they entered the contract in the proper course of the administration. However, their liability is *not limited* to the extent of the assets of the deceased's estate; if the third party claims more than the value of the assets still held by the Executors, the Executor will be *personally liable* for the shortfall.

Where the deceased was a tenant or lessee of premises, either alone or as a partner in a business, the Executors are liable to pay all future rent and other charges under the lease. These liabilities can be very heavy, and could extend in value to the whole estate. The law allows Executors to close the administration and distribute assets to beneficiaries, only if they have paid all current outstanding sums and have reserved enough to cover all future liabilities under the relevant leases.

The Executors' liability under leases is usually not personal, but they will become liable *personally* if they enter possession of the premises. Executors who are also partners in the old business, for example, will automatically be deemed to have taken possession and become personally liable.

Executors may also be liable outside the law of contract, for their acts or omissions in administering the estate. For example, an Executor might libel a third party. Where it can be shown that the Executor was acting in the reasonable management of the estate administration, he will be entitled to be indemnified (in other words financially covered) out of the assets of the deceased's estate. However, even then, if the claim exceeds the value of those assets then the Executor will be *personally liable* for the shortfall. Where the Executor incurred the liability otherwise than in reasonable management of the estate, he will *not be entitled* to any such indemnity.

Finally, there will be debts incurred by the deceased that are still outstanding at his or her death. Even possibly debts incurred by a former partner who held property jointly with the deceased, who has subsequently become insolvent and whose creditors may want to pursue that property as an available asset. Those creditors (of the deceased or of the former partner) can look to the Executors to settle their claim, and if the Executor has inadvertently distributed the assets of the estate to the beneficiaries, without making a sensible reserve, then the creditor may *pursue the Executor personally*. Executors have to take care not to distribute all the assets to the beneficiaries until they are certain that all known or likely liabilities have been discharged.

Liability to Beneficiaries

An Executor who causes loss to the estate will be *liable to the beneficiaries* for wasting the assets. It is not at all uncommon for private Executors to make mistakes in an administration, especially if they are not professionally advised, and for the beneficiaries thereby to suffer loss; an obvious example is where an Executor misinterprets a Will, and makes a payment to a beneficiary that is beyond what the beneficiary is entitled to, so that others suffer.

Much less rarely, Executors might misappropriate assets from the estate, and use them for their own purpose; clearly they will then be *personally liable*, without limit, for the loss suffered by the beneficiaries.

The Trustee Act 2000 has imposed on all executors a *statutory duty* to exercise care and skill in the administration of the estate. Professional executors will be tested more rigorously than lay executors, which (whilst comforting for the lay executors) may make beneficiaries uneasy.

The Act imposes particularly onerous responsibility on executors, to *review investment performance* and keep agents on their toes, when delegated any of the executors' powers.

Liability to Inland Revenue

Executors are personally responsible for completing self-assessment tax returns during the administration of the estate, and for payment of assessed tax. The tax may be payable after the administration is concluded, and it is essential such liabilities are allowed for in distributing the estate. Delay in lodging returns, or in payment of tax, and especially under-declaration of income or gains, can now lead to significant penalties, which *may not be recoverable* from the assets of the estate.

In addition, Executors have a statutory responsibility to the Inland Revenue to advise them of all circumstances which might lead to the payment of inheritance tax. They are expected to make appropriate inquiries about possible lifetime gifts made by the deceased. Failure to account to the Revenue can lead to severe penalties, which fall on the Executors personally and *not usually be recoverable* from the estate unless they can be shown to have done all they could to uncover taxable gifts.

Liability to beneficiaries' creditors

Executors may be personally liable to creditors of a bankrupt beneficiary, if they pay the beneficiary direct and cannot recover it from him. Our policy is to make bankruptcy searches against beneficiaries before making payments to them exceeding £5,000.

Duty to Account

Executors are required to keep clear and accurate accounts of their dealings with the deceased's assets and liabilities, and beneficiaries are entitled to inspect them. Where an Executor has no experience of the preparation of accounts, he is under a *duty* to delegate the task to a competent person. Otherwise, the court might intervene and demand an account.

Extent of Liability

The general rule is that an Executor is responsible only for his own acts or omissions, not for those of his Co-Executor; but an Executor can be guilty of "wilful default" where the Executor is reckless about the conduct of his Co-Executor, and allows him to cause loss without doing anything about it. The Executor might thereby also fail in applying the statutory duty of care under the Trustee Act 2000.

Protection Against Liability

It is frequently difficult to be certain that one has been made aware of every single debt owed, at his or her death, by a deceased person. Executors can protect themselves by advertising notices under Section 27 of the Trustee Act 1925 in the London Gazette and in local newspapers in the area where the deceased owned any land. In practice, it is best to advertise whether land is owned or not.

The notice specifies a two-month period for claimants to contact the Executors, and once that time has expired the Executors are permitted to distribute the estate having regard only to those claims of which they have actual notice (or "constructive" notice, i.e. they ought to have known). A creditor who is too late can, however, *pursue the beneficiaries* who have received distributions from the estate.

Relief from Liability

The court, on application, has power to relieve the Executor (wholly or partly) from personal liability for any breach of trust or duty, but it is not wise to place over-reliance on this, especially in the light of the Trustee Act 2000.

Missing Beneficiaries

A particular area of risk for Executors is the case where a beneficiary exists, but the Executor is un-aware. Section 27 of the Trustee Act 1925 will usually protect Executors, where they do actually know or believe that the beneficiary exists, but are not aware of his whereabouts and therefore omit him from distribution. Special techniques are available to protect Executors who are placed in this difficult position.

For more information or advice
please contact Munday's LLP:

☎ 01932 590555
✉ ray.walley@munday's.co.uk
🌐 www.munday's.co.uk

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