

- Client Information Summary -

Executors – Selection, Duties & Planning Points

An Executor is the person named in the last Will and testament, who is responsible for administering and distributing the property of the deceased (testator).

It may seem that naming a family friend or relative as your executor is like bestowing an honour on them. In reality, it may be an imposition. An executor should possess specific qualities including **availability, capability, sympathy, reliability, and financial responsibility**. The choice may be an individual family member or friend, a professional executor (e.g. lawyer, accountant or trust company) or a combination of individual and corporate executors. Where more than one executor is appointed, they must act unanimously when making decisions about the estate (subject to provincial legislation).

Qualities of a Suitable Executor

The executor should be **conveniently located**, generally in the same area so that duties can be performed expeditiously and without undue expense or inconvenience. An executor's job is one that must be carried out in person. You should also provide for alternative executors so that if the person named in your Will should predecease you, there is still an executor of your choice. If your executor predeceases you and you have not named an alternate, then the executor of his/her estate has the option of becoming the executor of your estate, which may not be desirable. Preferably, one or more substitutes should be named in the event of death, incapacity or renunciation of the first-named individuals.

- § The executor should be **capable**, realizing that guidance may be required from various sources, for example, from a lawyer on legal matters, a financial advisor on financial matters.
- § The executor should be **empathetic**. If not a member of the family, the executor should be someone with whom your heirs can turn to for direction and understanding, preferably someone they know and trust.
- § An executor should be **reliable**. Being an executor may call for applying business judgement in the realization of assets, dealing with insurance, and overseeing a business to name a few. The choice of an executor should not be based solely on friendship or affection.
- § Finally, an executor should be **financially responsible**. An executor may be required to pay for mistakes such as failing to act properly.

Choice of Individual Executor

Your choice of individual executor could be your spouse, your children, family friends or business associates.

Spouse—It is a natural first choice and quite common to have the spouse of the testator (the deceased) named as executor. Where the estate assets are quite small, and the distribution is outright to the spouse, it may be appropriate to name the spouse as the sole executor. However, if there are other beneficiaries, it may not be prudent to name the spouse as sole executor. Why? Because the spouse may elect to use Section 5 of the Family Law Act (or similar legislation) if it gives the spouse a larger share of the estate than the Will. Under these circumstances, a spouse who is the executor might be placed in a conflict-of-interest situation in addition to the potential of disrupting family harmony.

Children—In situations where the children are mature adults, the testator will often want to name his or her children as executor(s). This choice requires careful consideration of the "Qualities of a Suitable Executor" and the impact of choosing a child or children as executors on family harmony.

Commonly, a professional co-executor and a child or children is a good balance of professional, objective experience and personal involvement.

Family Friends, Business Associates—Sometimes the testator may wish to name one or more of his/her close friends or business associates to act as executors. Such persons can often be good choices, if they have the ability, and a personal knowledge of the beneficiaries. However, there are two areas of potential difficulty. Firstly, because of business relationships, there may be a potential conflict of interest. If the executor was associated with the testator in a business capacity, the executor's personal desires may hinder his/her objectivity.

Corporate or Professional Executor

Trust Companies—There are advantages and disadvantages to appointing a trust company as executor or co-executor. Among the advantages are experience and reliability. If the estate assets remain in a trust, and the administration is to run for a long period of time, there is continuity of administration. While there may be some disadvantages in the areas of sympathy, flexibility and cost, if there is any question of family dissension, a trust company is a necessity as executor or co-executor. Routinely, trust companies decline to act in estates less than \$200,000, unless a fee memorandum has been drawn prior to the testator's death, with an agreement on fees.

Another advantage of using a trust company is that the estate is protected against dishonesty or financial irresponsibility of the executor. Finally, trust companies are professional executors, and as such are fully equipped to handle all facets of estate administration. They can offer a service administration package that can rarely be equalled.

With respect to disadvantages, the first would be the fact that trust companies are essentially bureaucracies with the drawbacks associated with bureaucracies - impersonality, potential unwillingness of personnel to make imaginative decisions, etc. However, trust companies try to compensate for the impersonality aspect by appointing an experienced trust officer to handle each estate so that the beneficiaries deal with only one representative. Also, trust companies will generally claim the maximum compensation allowed by law.

Lawyer, Accountant, Financial Advisor—The family lawyer, accountant or financial advisor is also a popular choice as an executor. However, unless they have some experience in estate administration, it may be more viable to simply have them retained as required, for their area of speciality.

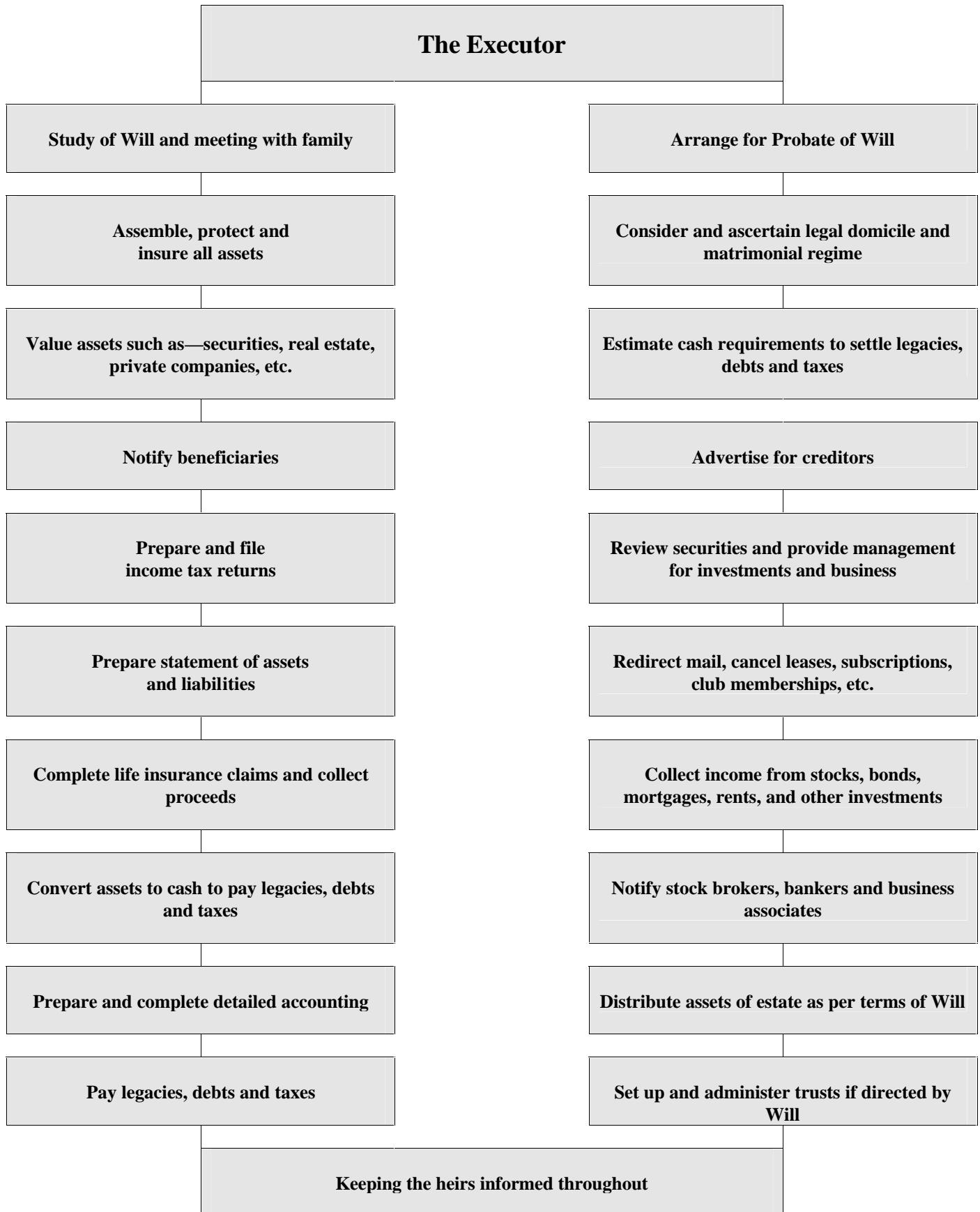
Regardless of whether you choose an individual or professional executor, it is prudent to ask permission before naming someone. It is also good business, as someone who has been asked in advance is not likely to refuse to act when needed. If the individual is unable or unwilling to act, then select someone else. It should be respected that not everyone is willing to accept the responsibility.

Conclusion

In summary, the following points should be considered as general guidelines in choosing an executor:

- 1) In the case of a relatively simple estate with outright distribution, one or more family members should be considered for executors, where appropriate.
- 2) When choosing individuals as executors, be aware of possible conflicts of interest, family harmony and mortality of potential executors.
- 3) Although one may first assume that one's lawyer, financial advisor, or accountant would be a suitable choice as executor due to their intimate knowledge of the family's affairs, it may be better for them to be retained in their professional capacity rather than to be named as executor.
- 4) In the case of a trust estate and/or a more complex estate, consider a trust company as executor or possibly co-executor with a family member or friend. Trust companies offer expertise, experience and impartiality.
- 5) Fees relative to executor ship and possible trusteeship should be a consideration, although not the main consideration. If the work of the executor is not properly done, the resultant legal fees at a later date may well offset any advantage in fees.
- 6) Consult your executors before naming them in your Will.

The Executor



Certain provincial statutes will vary these duties