

ESTATE PLANNING

BY DANNY J. DOCHYLO

Appointing the right executor

A family member may not always be the most appropriate choice.

Picking an executor is one of the most important decisions when your clients have a will drafted.



DOCHYLO

Generally speaking, an executor implements your client's last will and testament—his instructions and wishes. More specifically, the role includes identifying and collecting assets; determining and paying liabilities; preparing and filing tax returns and paying taxes on time; and communicating with beneficiaries about the status of the estate's administration, and the nature, extent and timing of receipt of their interest in the estate.

While clients can appoint anyone they want as an executor, the named executor has the ability to renounce or refuse to assume that role upon the client's death. So, an alternate executor or executors should be named in that event.

Every estate administration

varies in terms of complexity and the related responsibilities of the executors. For that reason, a family member may not be the most appropriate choice where litigation is likely between relatives of the same or a different level.

The concept of having multiple and separate executors can be effective for those with substantial family or business issues. If the client appoints more than one executor, they will either act together or jointly in respect of all responsibilities. Or, the client can appoint separate executors for each area.

Your client may, for instance, appoint one general executor responsible for administering all the typical or characteristic aspects of any estate administration. He could then appoint one special executor responsible for a specific area of concern. But while it's pos-

sible to divide up or separate many responsibilities, there's only one estate, so there will almost inevitably be areas of overlap.

In a family context, having one specific executor to deal with a special-needs child or an ill or disabled spouse may be necessary.

In a business context, having a separate executor may be necessary to try and substitute for the key person who was the testator.

Other issues could include the inability or undesirability of liquidating the business because of its nature, the economy or the testator's interest in the business, or devolution of the testator's interest in the business to more than one person, coupled with the desire to avoid or minimize conflict or litigation between them. There may also be a need to provide for interim decision-making to ensure the ultimate succession of control.

When appointing multiple executors, the will's structure needs to ensure they can function cooperatively when necessary and independently otherwise. To that end, there's need for their respective roles to be defined. In areas of overlap or joint responsibility, for instance, expenditures for special purposes that require access to general estate revenues or capital, care should be taken to provide for a means of breaking a deadlock.

Deadlocks can be devastating to the course of administering an estate, and costly if the will does not provide the means to break them. It's better to provide either for a majority clause, such that two of three executors will carry a decision in areas of overlap, or that one of several executors will be given a limited decisive vote or veto in such matters. It's also possible to require that the executors engage in mediation in an effort to resolve differences of opinion between them.

Of course, each of a group of multiple executors are entitled to ask to be paid for their work, and most expect to receive part of the

compensation agreed or allowed.

To help advise clients on such fees, many jurisdictions have an informal tariff or percentages applied to capital and revenue, along with a care and management fee also calculated on a percentage basis. In setting compensation for executors, bear in mind the common-law or statutory rules where the client resides as they relate to assets and whatever separate or special responsibilities the executors are to discharge.

In the absence of compensation provisions in the will, it will either be determined upon agreement of the executors with the beneficiaries, or in court.

Whether you appoint one person or a trust company, or multiple executors, the important thing is to be realistic about what you want to achieve, and to appoint those you trust. ^{AER}

DANNY J. DOCHYLO is a partner at Borden Ladner Gervais and national chair of the Estate and Family Law Litigation Focus Group.