

Fiduciary Services



An executor's risks and responsibilities

I About us

At Sanlam we believe an inheritance is about more than money. To us it's about leaving your legacy and having the peace of mind that your loved ones will be provided for. That's why we treat your affairs with the proper care and respect it deserves. That's what makes us Wealthsmiths™.

The responsibilities of an executor

An executor's powers, duties and responsibilities commence once the Master of the High Court has issued an official letter confirming his/her appointment as executor. The executor's term of office is terminated automatically if he/she dies, or when the Master, or a court, relieves him or her of the office.

When an executor is declared insolvent, it has to be reported to the Master. Criteria will then be set for the executor to possibly remain in office. If an executor is declared incapable of entering into a contract, the Master will cancel his or her appointment.

When an executor resigns in writing, he or she is relieved of office only once the Master has appointed an alternate executor. If an alternate executor is appointed, it does not mean the executor who has resigned or has been discharged is relieved of the responsibilities, legal proceedings or risks regarding matters that occurred during his/her term of office.

Depending on the types of assets, an executor's duties remain the same, regardless of the size of an estate. Only in the case of estates (including joint estates) with a gross value <R250 000 for which no executor was appointed, does a Master's representative have fairly few duties.

The duties and responsibilities of an executor end when the estate has been finalised and the Master has issued a filing note. The executor must apply in writing to be discharged from his or her duties, and his/her office ends once the Master has discharged him or her in writing.

The risks of being an executor

The risks involved in being an executor can differ from estate to estate. If more than one executor is appointed, all are subject to the same risks, even if only one of them administers the estate. When an agent is appointed to act on behalf of the executor, it also does not mean the executor is relieved of his/her responsibilities or risks. An executor can be penalised and/or imprisoned if he or she does not abide by the laws as set out in the Administration of Estates Act (Act No. 66 of 1965). He/She can also be held personally responsible for, among other things, the following:

- ④ Losing an original will that was in his/her possession and not yet lodged with the Master as a result of negligence, resulting in heirs possibly suffering damages, or in wasted costs.
- ④ Failing to publish the first estate notice in the *Government Gazette* as well as a local newspaper, or publishing it in the wrong newspaper. The same applies to the second notice of the estate account being open for inspection, or failing to arrange for it to be open for inspection in a Magistrate's Court.
- ④ Receiving objections or submitting claims after the estate has been finalised.
- ④ Failing to follow the correct instructions and procedures if a claim (including a maintenance claim) is not accepted, or is contested, ignored or submitted late, and the claimant insists on payment after the finalisation of the estate.
- ④ Failing to attend to an objection or following the correct procedures before finalising the estate.



- ⌚ Temporarily investing estate funds in a risky investment, and/or speculating, and/or using the funds for personal or other unauthorised purposes. The beneficiaries may try to hold the executor accountable for loss of income on funds, or other assets not generating any income over a reasonable period of time, or for the late payment of interest-bearing claims against the estate when funds yielding a lower rate of interest than the claim were available.
- ⌚ Failing to check the estate(s) of a predeceased spouse or spouses to determine whether limited rights had been created or not, and if it is the case, ignoring them or dealing with them incorrectly.
- ⌚ Dealing incorrectly with donations in an antenuptial contract, or with claims in terms of a Divorce Order or deed of settlement, or calculating accrual claims incorrectly.
- ⌚ Ignoring pending legal action and matters that originated during the deceased's lifetime, or making incorrect decisions regarding settlement or continuation.
- ⌚ Signing incorrect or invalid contracts (for example the sale of immovable property in the estate).
- ⌚ Ignoring claims in favour of the estate (debtors), or allowing claims to become prescribed.
- ⌚ Not submitting claims to a medical fund, or short-term mortgage or credit life insurance in time and letting them lapse.
- ⌚ Dealing incorrectly with existing businesses (including farms), whether a sole proprietorship, partnership, sole member of a closed corporation, or shareholder (director) of a private company, especially because of a lack of knowledge of a business, and in particular those that have ongoing commitments to meet.
- ⌚ Failing to submit outstanding SARS returns or to submit them in time.
- ⌚ Not obtaining any clearance certificate (including for Capital Gains Tax and VAT) and finalising the estate.
- ⌚ If the deceased was registered for VAT, failing to determine whether or not assets may be transferred VAT-free to the heirs.
- ⌚ Interpreting the will incorrectly, or applying the Intestate Succession Act or the substitution of heirs incorrectly.
- ⌚ Incorrect payouts or transfer of assets (such as shares, but excluding fixed property, which will probably be noticed by the Deeds Office) that cannot be recovered.

- ⌚ Failing to make sure that when assets such as shares, unit trusts and loans are transferred, they are done so with written proof.
- ⌚ Failing to make sure that transferable assets that were bequeathed to heirs are indeed transferred correctly.
- ⌚ Cancelling mortgage bonds in favour of the deceased when it is prejudicial to do so.
- ⌚ Giving one-sided advice/instructions to a client, especially in the case of the massing of estates.
- ⌚ Giving advice/instructions on VAT registrations that could later result in losses for heirs.
- ⌚ Providing advances to heirs and/or transferring assets prematurely.

Sound executor practice

An executor must be impartial. Neither he/she, nor his/her family, friends, may benefit unfairly (for example from the sale of an asset). He/She must carry out the instructions in the will, as well as reasonable instructions of the heirs. Quarrels with heirs should not interfere with his or her duties. There must be no conflict of interest.

If the heirs cannot or do not want to assume liability for a debt, or if a particular asset cannot be transferred, the executor should dispose only of what is necessary to settle the debt. If the will does not authorise the disposing of an asset, the executor must obtain the written consent of the heirs who have an interest in the asset to do so. They must also give written consent regarding the sale price (even if the sale is authorised in the will). If listed shares are to be sold, the executor may not speculate for a better price. If possible, these shares should also be sold as soon as written instructions to do so have been received. The executor must sell only what is necessary, and must start with the 'less good' assets. Any rash selling could result in a Capital Gains Tax liability that might be prejudicial to the heirs and result in a liability for the executor.

An executor must be transparent and deal with the estate assets cautiously. Regular reports and copies of the will, the estate account, as well as final settlement statements should be provided to the heirs.

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