The Butler Bulletin

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What You Can Do if the Executor Won't Cooperate

When people make their wills they often name one of their children as the executor. This is extremely common, and it makes perfect sense – parents trust their children, and if they have a good relationship the parents can reasonably expect that the child will take care of the estate. Sometimes, however, the child chosen to be the executor doesn't follow the rules. For the siblings, this means there are arguments and potentially a lawsuit. So, if you are the sibling of an executor who isn't cooperating, what your options?

Firstly, let's clarify what an uncooperative executor is. The general rule is that if an executor won't respond to reasonable requests in a timely manner, he or she is not cooperating with the beneficiaries. A reasonable request doesn't have a specific definition, but things like beneficiaries asking for a copy of the will or an update on how the estate funds are being spent are reasonable. As long as the executor replies in a decent amount of time – say, within a week – the beneficiaries can rest assured that the executor is doing his or her best. Executors still have jobs and families, so not sending an immediate response can be understood.

In a situation where an executor isn't cooperating, there are a few options for beneficiaries. Each has its own pros and cons, and the option that is best for your situation may not be suitable for another family.

1 – Send a Formal Request for the Information

It is likely that you've asked the executor for information already. This may have been on the phone, by email, or over text. If you haven't tried sending a letter, now is the time. When you write the letter, try to focus on what it is you want rather than what the executor is doing wrong. Estates can be very emotional for families and playing the blame game won't encourage anyone to give you what you want. After your letter has been written, set it aside for a day or two, then revisit it. You may find that there are things you want to change. Also, consider asking a trusted friend to read it in order to see how it sounds to someone on the outside of the situation. A friend may tell you that it sounds reasonable, or that it comes across as rude.

The benefit of this option is that the executor may realize that you are legitimately trying to get information, rather than cause trouble. On the downside, this kind of communication can easily be ignored.

2 – Consult an Estate Lawyer

If you aren't sure whether or not the executor is being unreasonable, or if you don't know for sure what your rights as a beneficiary are, a good place to start is to consult an experienced lawyer. Someone who has been practicing estate law for a long time has likely seen your situation before and will be able to tell you what you can expect.

To make the most of your time in the consult, prepare your questions ahead of time. The most efficient way to tell your story is to start at the beginning and continue chronologically. While you have a solid understanding of what has happened, someone on the outside won't be able to follow if you jump around. If there are specific things you want to ask about, be sure to write them down. Also, bring any documents you have (e.g. the will).

A consultation with a lawyer can give you the peace of mind of knowing exactly where you stand. Of course, time with a lawyer costs money. You should expect to pay a consultation fee, or possibly the lawyer's hourly rate.

3 – Have the Lawyer Send a Letter

During your consult, the lawyer may recommend that he or she send a letter to the executor. Sometimes receiving a letter from a law firm is the push that people need to realize that this is a serious matter. It is easy to ignore your siblings, but it is much harder to ignore a formal letter from a lawyer.

This letter should clearly state what it is that you want. For example, if you are requesting an accounting of the estate transactions so far, or a copy of the will. It should also include a deadline for the executor to respond to the letter. Quite often the timeframe is thirty days. One month gives the executor time to collect the information to send, or to contact his or her own lawyer without making you wait too long.

A letter like this can be a precursor to starting a lawsuit. If the executor does not comply and maintains the stance that he or she is not obligated to provide you with answers, you will have the option to either drop the matter or proceed with litigation.

4 – Take the Matter to Court

Taking the issue to court can be done two ways – you can represent yourself, or you can hire a lawyer. If you are on the same page as some of your siblings, you can all be on the same "side". Either way, going to court is expensive, time-consuming, and emotionally draining. The court system is adversarial, which means that the parties are opposed. In theory, this means sending logically structured arguments back and forth via legal memos and affidavits. In reality, this means families fighting, and dredging up childhood resentments. This makes holidays very uncomfortable.

Litigation takes years to wrap up. Keep in mind that most lawsuits are settled without going to a full trial, but it still takes a long time to get to chambers – the lowest level of court. Since chambers is open to the public, the possibility exists that others will hear what you are arguing about.

5 – Case Management

If a case goes to court and the judge thinks there are smaller issues that can be worked out, he or she may direct that the estate go to case management. This is like a series of smaller court dates, but just for your family. The judge will set deadlines for when certain steps are to be completed, and it is up to the parties to do what needs to be done. Case management takes a big issue and breaks it down into more manageable chunks. It may not work for all estates, but it is a good alternative to trying to push for a trial.

6 – Mediation

If there is any chance that the parties can work towards finding a compromise, consider attending mediation. In mediation, the parties agree on a solution that is suitable for everyone. In a case like this, it may be setting a schedule for the executor to send out updates, answering the questions the beneficiaries have, or holding a reading of the will so that everyone is on the same page.

The best part of mediation is that it is designed to be non-confrontational. Each party gets a chance to speak without being interrupted, and everybody gets a say in terms of the outcome. Also, the fee for mediation is split evenly among all parties so one person doesn't get stuck with the bill.

Can I file the form I found on the Supreme Court website?

The website for the Supreme Court of Newfoundland and Labrador has links to a bunch of forms for different types of proceedings. The forms for estates can be filed by anyone, so if you are representing yourself you are allowed to file the forms.

The more important question is *should* you file the form. The answer to this question depends on several factors. If either of the following situations have happened, you can safely file the form yourself:

- You discussed the matter with a lawyer, and he or she recommended you file it.
- You have been representing yourself on an ongoing matter, and the clerks of the court informed you that you have the correct form.

If neither of these situations has happened, you may want to reconsider filing anything until you have consulted a lawyer. For example, the form for an originating application seems straightforward enough – you explain the matter, and in the next paragraph you say what you want to have happen.

While this is what you put in, this form has a serious impact. An originating application is used to start a lawsuit.

The originating application form does tell the court who is involved, and what you want, but it is then sent to the other party so that they can file their own materials in response.

Similarly, the form for an order has a spot to fill in what you are asking for, and a spot for the judge to sign off on it. It looks like you are asking the judge for something. However, an order is only granted after the judge has heard the case, and the decision may not be in your favour. If you submit an order for a case that has not been heard, the clerks might not accept it, or it will be rejected by the judge.

Some forms are not quite so severe. Take, for example, the forms for Letters of Probate. If you make a mistake on the forms or submit the wrong one, the clerks will give it back and ask you to resubmit it with corrections. The worst that can happen is that you will have to do them over.

If you aren't sure whether or not you should file a form, consult a lawyer. The clerks at the court can tell you what each form is for, and how it needs to be completed, but they are not lawyers and therefore cannot give you advice as to whether or not you should take any particular action.

Taking the time to talk to a lawyer can save you a great deal of trouble down the road, and potentially prevent you from finding yourself in the middle of a court battle.

Why Legal Aid Isn't Available for Estates

The Legal Aid Commission of Newfoundland and Labrador is funded by the federal and provincial governments, and in part by the provincial Law Foundation. Legal aid primarily represents client involved in criminal matters, young offenders, family matters, and other civil matters such as worker's compensation. Each client must meet the financial parameters and undergo a review by the staff of their income and expenses. If someone has an income higher than the organization's threshold, that person does not qualify for legal aid.

Estate law is not covered, and clients who are hoping to find a lawyer to represent them on an estate must hire someone from a private firm.

Each of the types of law practiced at Legal Aid are considered to have high-impact consequences. For instance, a person could be facing several years in prison, or losing custody of his or her children. With an estate, the biggest risk is that someone will not receive part of it, or that it will go to someone the deceased did not intend. Even though some estate clients would meet the financial requirements of Legal Aid, and receiving an inheritance would be life changing, estate work is not considered to have the same kind of lasting influence as something like a criminal charge.

Unfortunately, there is only so much money to go around, and there is not enough to cover all kinds of law. The funding that is available is reserved for things like indictable offences, custody battles, and cases with offenders under the age of 17.

Behaviours That Are Not Acceptable in Court

Most people don't find themselves in court on a regular basis. However, the vast majority of individuals naturally know to be on their best behaviour. After all, you want to put your best foot forward since you are there to ask the court for something. There are some things that people do in the courthouse that are not allowed. Here are some of the behaviours that top the list.

Fighting in the hallway.

Clients have gotten into arguments with the family members on the opposing side of the issue. This happens in families, but it's worse when it is in the hallway outside the courtroom. Complete disaster strikes when it ends in a physical altercation.

Making inappropriate jokes.

Just like the airport has signs up that they take jokes about terrorism seriously, the sheriffs will assume you mean it when you joke about busting someone out of custody.

Trying to bring in weapons.

There are metal detectors for a reason. While this security measure is fairly new, their presence should tell you that it is not OK to bring any sort of weapon into the courthouse.

Talking in the courtroom.

Clients don't get to speak while court is in session– that's what the lawyer is for. However, there are some clients who struggle to keep mum. Personal conversations need to be taken outside.

Flagging down the judge.

Much like talking is a distraction, so is waving at the judge from the viewing seats. The goal is to try to get the judge to notice so that the person can say something. Popular variations of this include holding a hand in the air, standing up at the end of the row, and wiggling in the seat.

Talking to someone else's lawyer.

Each person has their own representation for a reason. Discussing the case with another persons' lawyer is highly inappropriate.

"I hired a lawyer for a case in court, and some of the work was done by the articling student. What does this mean?"

An articling student is a new lawyer who has completed law school but has not been called to the bar yet and therefore cannot practice alone. Much like doctors spend time completing a residency, new lawyers must complete articles. In a nutshell, this means they are being mentored by an experienced lawyer to learn how to apply what they learned in law school, how a law firm works, and what being a lawyer is like on a day-to-day basis.

Articling students work under the close supervision of a senior lawyer, who is called the "principal". When a student works on a client's file, the principal reviews everything to make sure the work is right.

From a client's perspective, this means a few things. New lawyers do not charge the same hourly rate as a more senior lawyer. Since articling students do not have the same experience as practiced lawyers, it would not be fair for them to charge the same rate. This is reflected on the client's invoice by showing a lower charge for the hours worked by the student.

The time the principal spends reviewing the work is still billed at the higher rate, but the amount of time is significantly less than if the principal did all the work.

The actual work that the student does includes things like legal research, preparing and swearing affidavits, filing documents, and sending emails and letters to other parties on the file.

Articling students can also appear in court. Although they cannot represent clients on all types of matters, students can represent clients for most kinds of things.

Did you know…?

Money you inherit from your parents is not considered jointly owned by you and your spouse.

If you spend the money on something for both of you, like a down payment on a house, then this rule no longer applies. However, if you keep the money separate and don't use it for a joint purchase, the funds are not considered joint if you end up separating or getting divorced.

The easiest way to keep your inheritance from being mixed with jointly held funds is to keep them in a bank account with only your name on it.

As long as the only funds in this individual account are from your inheritance, it will be excluded from being split.

"OK, guilty on all counts isn't great. But on the bright side, it's a clean sweep!"

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