Pre-taking Compensation in Guardianships and Estates: Who, What, When and Why

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In general, a fiduciary is prohibited from making a personal profit or receiving a benefit for performing her duties. The one exception is the allowance for compensation, since estates trustees, attorneys for property and guardians for property are usually entitled to compensation for their work.

The rules regarding a fiduciary's ability to pre-take compensation varies depending on the specific role held by the individual.

Attorneys for property and guardians are expressly permitted to pre-take compensation pursuant to the *Substitute Decisions Act* (the "***SDA***"), unless prohibited by the power of attorney document.[1] Attorneys and guardians for personal care should not pre-take compensation, as there is no entitlement to compensation without express authorization from the grantor or the court.

For estate trustees, the general rule is that pre-taking compensation is improper – unless authorized by the will or *sui juris* beneficiaries, or by way of court order.

In this paper, I will provide an overview of the law – *who, what, when and why* – regarding substitute decisions-makers and estate trustees respectively pre-taking compensation. I will first outline the general approach to pre-taking compensation. I will then explore pre-taking compensation in the context of guardianships and powers of attorney. Finally, I will discuss the statutory and common law approaches for estate trustees pre-taking compensation.

[1] *Substitute Decisions Act, 1992*, SO 1992, c-30, as am [*SDA*], s 40.

What does it mean to "pre-take" compensation?

"Pre-taking" compensation refers to a fiduciary taking compensation for her role before a passing of accounts and/or in the absence of any juristic authority – such as the document appointing the fiduciary, a court order or by statute.

Compensation - Generally

Section 61 of the *Trustee Act* provides:

> **Allowance to trustees, etc.**
>
> **61** (1) A trustee, guardian or personal representative is entitled to such fair and reasonable allowance for the care, pains and trouble, and the time expended in and about the estate, as may be allowed by a judge of the Superior Court of Justice.
>
> **Though estate not before the court**
>
> (2) The amount of such compensation may be settled although the estate is not before the court in an action.
>
> **Allowance to personal representative for services**
>
> (3) The judge, in passing the accounts of a trustee or of a personal representative or guardian, may from time to time allow a fair and reasonable allowance for care, pains and trouble, and time expended in or about the estate.
>
> **Allowance to barrister or solicitor trustee for professional services**
>
> (4) Where a barrister or solicitor is a trustee, guardian or personal representative, and has rendered necessary professional services to the estate, regard may be had in making the allowance to such circumstance, and the allowance shall be increased by such amount as may be considered fair and reasonable in respect of such services.
>
> **Where allowance fixed by the instrument**
>
> (5) Nothing in this section applies where the allowance is fixed by the instrument creating the trust.[2]

[2] *Trustee Act,* RSO 1990, c T-23, s 61.

Sub-section 23(2) of the *Trustee Act* provides that, on a passing of accounts, the judge only has the authority to set the estate trustee's compensation where it has not been fixed by the instrument creating the trust or otherwise.[3]

The combined effect of sections 23(2) and 61(5) of the *Trustee Act* is to remove the jurisdiction of the court to fix an estate trustee's compensation where the testator included a provision for compensation in the will itself. Such a provision is binding upon both the estate trustee and the court.[4]

On a passing of accounts – for guardians or attorneys for property and for estate trustees – the court has the power to compel the guardian/attorney or estate trustee to repay to the estate any amounts that it deems just.[5] This includes any overpayments for pre-taken compensation.

While section 61 of the *Trustee Act* applies to guardians and trustees, the statutory and common law approaches differ as between estate trustees and substitute decision makers. Two important principles that the roles have in common are:

i. The terms of the instrument that creates the role (e.g. the will or power of attorney) will always take precedence over the default (statutory/common law) approach.
ii. Compensation for both substitute decisions makers and for estate trustees can be subject to judicial scrutiny and the quantum may be adjusted accordingly.

[3] *Ibid,* s 23(2).
[4] *Cheney v Byrne (Litigation Guardian of)*, [2004] OJ Np 2773, 132 ACWS (3d) 394, 2004 CarswellOnt 2674 (SCJ) [*Cheney*] at paras 84-85
[5] *Estates Act*, RSO 1990 c E-21, as am, s 49.

Pre-taking Compensation by Substitute Decision-Makers

Guardian for Property/Attorney for Property Compensation – Generally

Compensation for guardians and attorneys for property is relatively straight forward, since the *SDA* provides the express authorization for compensation, prescribed rate for compensation and guidance as to when compensation may be taken.

Section 40 of the *SDA* provides:

> **Compensation**
>
> 40 (1) A guardian of property or attorney under a continuing power of attorney may take annual compensation from the property in accordance with the prescribed fee scale.
>
> (2) The compensation may be taken monthly, quarterly or annually.
>
> (3) The guardian or attorney may take an amount of compensation greater than the prescribed fee scale allows,
>
> (a) in the case where the Public Guardian and Trustee is not the guardian or attorney, if consent in writing is given by the Public Guardian and Trustee and by the incapable person's guardian of the person or attorney under a power of attorney for personal care, if any; or
>
> (b) in the case where the Public Guardian and Trustee is the guardian or attorney, if the court approves.
>
> **Effect of power of attorney**
>
> (4) Subsections (1) to (3) are subject to provisions respecting compensation contained in a continuing power of attorney executed by the incapable person if,
>
> (a) the compensation is taken by the attorney under the power of attorney; or
>
> (b) the compensation is taken by a guardian of property who was the incapable person's attorney under the power of attorney.

The prescribed rate for compensation for guardians and attorneys for property is set out in the Regulation, pursuant to sub-section 90(1)(c) of the *SDA* (the "**Regulation**"):

> 1. For the purposes of subsection 40(1) of the Act, a guardian of property or an attorney under a continuing power of attorney shall be entitled, subject to an increase under subsection 40 (3) of the Act or an adjustment pursuant to a passing of the guardian's or attorney's accounts under section 42 of the Act, to compensation of,
>
> (a) 3 per cent on capital and income receipts;
>
> (b) 3 per cent on capital and income disbursements; and
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> (c) three-fifths of 1 per cent on the annual average value of the assets as a care and management fee.[6]

The percentages in *SDA* Regulation are not absolute or a "minimum" amount of compensation payable, as the court has jurisdiction to adjust compensation payable to the attorney or guardian for property.[7] The court has the jurisdiction to adjust the quantum on a passing of accounts. In doing so, the court will consider the "five-factors" set out in *Toronto General Trusts Corp v Central Ontario Railway,* which is oft-cited in the estates context. These factors are:

1. the size of the trust;
2. the care and responsibility springing therefrom;
3. the time occupied in performing duties;
4. the skill and ability displayed; and
5. the success of the administration of the trust.[8]

[6] *Genera*l, O Reg 26/95, s 1.
[7] *Sworik v (Guardian of) v Ware*, [2005] OJ No 3404, 2005 CarswellOnt 3549 (SCJ) [*Sworik*] at para 119.
[8] *Re Toronto General Trusts Corp v Central Ontario Railway* (1905), 6 OWR 350 (HC) [*Re Toronto General Trusts*], cited in i*bid* at paras 116-117.

The case law is clear that the court will not exercise its discretion to award compensation to an attorney for property, where the power of attorney document expressly prohibits payment of compensation from the grantor's property.[9] In accepting the role of attorney for property, the attorney accepts the terms contained in the power of attorney document.

Guardians/Attorneys for Property & Pre-taking Compensation

As set out above, the pre-taking of compensation is permissible for attorneys and guardians for property at the prescribed rate, but the court has discretion to adjust compensation and may require the guardian or attorney to repay some – or all – of the compensation paid.[10]

The *SDA* expressly authorizes attorneys and guardians for property to pre-take annual compensation on a monthly, quarterly or annual basis.[11] However, as noted above, this is subject to adjustment by the court on an application for the attorney or guardian to pass her accounts.[12]

In *Sworik (Guardian of) v Ware*, Justice Zelinski considered percentages in the Regulation as the maximum amount of compensation that an attorney or guardian for property may be entitled to.[13] Attorneys and guardians for property should be mindful, when taking compensation, that there is always a possibility for the downward adjustment of their pre-taken compensation.

[9] *Nystrom Estate v Nystrom*, [2007] OJ No 668, 2007 CarswellOnt 1064 (SCJ).
[10] *Fiacco v Lombardi*, [2009] OJ No 3670, 2009 CarswellOnt 5288 (SCJ).
[11] *SDA, supra* note 1, s 40(1).
[12] *Armitage v Salvation Army* (2016), 2016 ONCA 971, [2016] OJ No 6636, 2016 CarswellOnt 20023 at para 31.
[13] *Sworik, supra* note 7 at para 122.

However, in the earlier case of *Bagnall v Bruckler*, the court approved a guardian for property's rent-free accommodation in a building owned by the incapable person as a form of pre-taken compensation, *in addition to* the percentage amount the guardian was otherwise entitled to in accordance with the Regulation.[14] Accordingly, it is not settled as to whether or not the percentages constitute a "maximum" amount claimable. In most cases, the courts will consider the percentages from the Regulation and apply the reasonableness test in light of the "five-factors", on a case-by-case basis.

The case of *Lanthier v Dufresne Estate* demonstrates this principle in practice. In this case, the attorney brought an application to pass her accounts for her management of her mother's assets. The attorney sought compensation in accordance with the Regulation under the *SDA,* which totaled $14,264.[15] The attorney had used her mother's funds to pay for a cruise for her wedding anniversary – she claimed these funds were pre-taken compensation in the amount of $8,585. The attorney could not account for approximately $50,000 in cash withdrawals. Even though the court found that the attorney had failed to meet the standard required of an attorney, she had dutifully paid her mother's bills for over 4.5 years and cared for her mother. The court awarded compensation in the amount pre-taken, which represents approximately 60% of the amount the attorney would have received using the percentages form the Regulation alone.[16]

<u>Guardian for Personal Care/Attorney for Personal Care Compensation – Generally</u>

Sub-section 90(1)(c.1) of the *SDA* provides as follows:

> 90 (1) The Lieutenant Governor in Council may make regulations,
>
> > (c.1) prescribing circumstances in which a person's guardian of the person or attorney under a power of attorney for personal care may be compensated from the person's property for services performed as guardian or attorney, and prescribing the amount of the compensation or a method for determining the amount of the compensation.[17]

[14] *Bagnall v Bruckler*, [2009] OJ No 3559, 2009 CarswellOnt 5062 (SCJ) at para 16.
[15] *Lanthier v Dufresne Estate* (2002), 2002 CanLII 2653 (SCJ) at para 59.
[16] *Ibid* at paras 58-61.
[17] *SDA, supra* note 1, s 90(1)(c.1).

To date, no such regulations have been enacted prescribing compensation for guardians or powers of attorneys for personal care. There is, however, jurisprudential authority for the provision of compensation for guardians or powers of attorney for personal care.[18]

The court has jurisdiction to award compensation for guardians and attorneys for personal care, so long as legitimate services are provided to the incapable person and that there is sufficient evidence of the nature and extent of those services for the court to determine the appropriate quantum.[19]

In fixing the quantum, the threshold is reasonableness – rather than a prescribed percentage. The test was set out in *Re Brown:*

> "The hallmark of such compensation must be reasonableness. The services must have been either necessary or desirable and reasonable. The amount claimed must also be reasonable.
>
> "The reasonableness of the claim for compensation will be a matter to be determined by the court in each case, bearing in mind the need for the services, the nature of the services provided, the qualifications of the person providing the services, the value of such services and the period over which the services were furnished."[20]

In *Cheney v Byrne*, the two attorneys for personal care sought compensation and the power of attorney for personal care was silent as to compensation.[21] In finding the attorneys for personal care were entitled to compensation, the court considered evidence regarding:

- the condition of the incapable person and the amount of care needed;
- the level and quality of care provided; and
- the detailed time-dockets maintained by the attorneys for personal care.[22]

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[18] See for example: *Cheney, supra* note 4; *Sandhu (Litigation Guardian of) v Wellington Place Apartments* (2006), 2006 CarswellOnt 3668 (SCJ); *Childs v Childs* (2015), 2015 ONSC 6616, 2015 CarswellOnt 9627 (SCJ) [*Childs*]; *Sworik, supra* note 7 and Angela Casey, "Show me the Money: Compensating Fiduciaries" (Paper delivered at Critical Issues in Preparing and Passing Fiduciary Accounts, Ontario Bar Association, Toronto, 7 December 2016) ["Casey"].

[19] *Re Brown* (1999), 31 ETR (2d) 164, 1999 CarswellOnt 4628 (SCJ) [*Re Brown*] at para 4.

[20] *Ibid*.

[21] *Cheney, supra* note 4 at para 34.

[22] *Ibid* at paras 30-43, 144, 148, 150.

The court found that the attorneys for personal care did their best to ensure the incapable person had every comfort and benefit. The court also found that the attorneys were entitled to compensation even though they hired specialists to attend to the incapable person's day-to-day needs, as the attorneys made all of the decisions regarding the incapable person's care and one of them was always available 24-hours a day. The court awarded an amount less than the attorneys claimed, to account for any duplication of charges for services provided.[23]

The issue before the court in *Childs v Childs* was whether the court should vary the amount of compensation a guardian for personal care was to receive because of a change of circumstances.[24] The amount of compensation was lowered from the amount initially ordered, as that previous amount contemplated the daughter looking after her mother on a full-time basis and she had since started working full-time and could no longer provide the same level of care. In making that decision, the court considered the amount of time the daughter spent caring for her incapable mother, the benefits the mother received and her mother's quality of life.[25]

The court will have a view to the entire circumstances of the individual case. For example, in cases where there is excellent care, but the incapable person's resources are limited, the compensation ordered may be less than what the court would think is fair and reasonable if more assets were available.[26]

[23] *Ibid* at paras 38, 131.
[24] *Childs, supra* note 18.
[25] *Ibid* at para 59.
[26] *Kiomall v Kiomall* (2009), 2009 CanLII 20349 (Ont SCJ).

Guardians/Attorneys for Personal Care & Pre-taking Compensation

As set out above, prior authorization or an order of the court is necessary for an attorney or guardian for personal care to receive any compensation.

There is no automatic right for attorneys or guardians for personal care to receive compensation, unless expressly authorized by the power of attorney or court order and falls completely within the discretion of the court. It follows that it will *always* be improper for an attorney or guardian for personal care to pre-take compensation, unless expressly authorized.[27]

In order to preserve the likelihood of receiving compensation, attorneys and guardians for personal care should ensure that they maintain detailed dockets of time spent caring for and arranging for the care of the incapable person.[28]

Pre-taking Compensation by Estate Trustees

Estate Trustee Compensation – Generally

In addition to the statutory provisions set out above, the common law approach is more or less settled for the compensation of estate trustees.

The leading case of *Laing v Laing Estate* from the Ontario Court of Appeal sets out the general approach in the jurisprudence.[29] In the absence of an overriding direction in the will, the court's approach is first to calculate the estate trustee's compensation in accordance with a customary formula and then to test or adjust the mathematical result of that formula upward or downward against five factors.[30]

[27] *Re Brown, supra* note 19.
[28] Casey, *supra* note 18.
[29] *Laing v Laing Estate*, [1998] ON No 4169, 113 OAC 335, 1998 CarswellOnt 4037 (CA) [*Laing Estate*] at paras 6-9.
[30] *Re Freeman Estate*, [2007] OJ No 3402, 160 ACWS (3d) 388, 2007 CarswellOnt 5654 (SCJ) [*Re Freeman Estate*] at para 30.

The "customary formula" – also known as the "usual approach" is set out in *Re Jeffrey:*

> "…in Ontario at least, a practice has developed of awarding compensation on the basis of 2 1/2 per cent against the four categories of capital receipts, capital disbursements, revenue receipts and revenue disbursements, along with, in appropriate cases, a management fee of 2/5 of 1 per cent per annum on the gross value of the estate… [T]he award of a management fee requires special circumstances and will not be allowed automatically or routinely."[31]

The five adjusting factors that the court will consider, as noted above, were first set out in *Toronto General Railway*, namely:

1. the size of the estate;
2. the care and responsibility involved;
3. the time occupied in performing the duties;
4. the skill and ability shown; and
5. the success resulting from the administration.[32]

The rationale for adjusting the compensation based on the five factors is that applying the "usual" percentages could lead to over-compensation in some cases – and arguably, under-compensation for very complex estates.[33]

<u>Estate Trustees & Pre-Taking Compensation</u>

In general, an estate trustee cannot pre-take compensation unless:

a. pre-taking compensation is expressly provided for under the will;
b. all beneficiaries are *sui juris* and agree; or
c. by order of the court.[34]

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[31] *Re Jeffrey Estate,* [1990] OJ No 1852, 39 ETR 173, 1990 CarswellOnt 503 (Surr Ct J) [*Re Jeffrey*] at para 13.
[32] *Re Toronto General Trusts, supra* note 8, cited in *Re Jeffrey, supra* note 31 at para 13.
[33] *Re Jeffrey, ibid* at paras 15-16.
[34] *Re Knoch* (1982), 12 ETR 162, 1982 CarswellOnt 4532 (Surr Ct) [*Re Knoch*] at para 29.

These principles were articulated in *Re Knoch* and represent the general approach to pre-taking compensation. Yet, there are cases, including *Re William George King Trust*, in which the *Re Knoch* approach was not strictly applied.[35] In *Re William George King Trust*, the court referred to the pre-taking of compensation as "trivial" and did not penalize the trustee because the amounts pre-taken were equal to amounts agreed-to in prior passing of accounts applications.[36]

In *Pachaluck Estate v DiFebo*, the court refused to penalize an estate trustee for pre-taking compensation in a situation where the assets were substantially ready for distribution, the estate trustee took the compensation on the advice of his solicitor and the amount taken was considered to be fair and reasonable.[37]

However, in the majority of cases, pre-taking compensation "is to be discouraged" as a general proposition, subject to exceptions set out in *Re Knoch*.[38] In many cases, the estate trustees are penalized for pre-taking compensation. This is especially true in contentious estate matters, where "…*it is improper for an estate trustee to pre-take compensation without authorization from all affected parties*".[39]

The rationale was well articulated by Justice Haley in *Re Flaska*:

> "Too often the effects of pre-taking are ignored as being *de minimis* in the overall accounting. However what is happening is that executors are using estate or trust assets to pay for the fulfillment of their obligation to account. In doing so they are depriving the estate of those monies and the interest that might have been earned thereon to the benefit of the income beneficiaries. The executors are in effect appropriating to their own use monies which they hold in trust… [E]xecutors are not entitled directly or indirectly (as in payment for preparation of their accounts) to use estate monies in this fashion."[40]

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[35] *Re William George King Trust* (1994), 113 DLR (4th) 701, 1994 CarswellOnt 645 (Gen Div).
[36] Ian M. Hull & Suzana Popovic-Montag, *Macdonell, Sheard and Hull on Probate Practice*, 5th ed (Toronto: Thomson Reuters Canada, 2016 ["*Macdonell, Sheard and Hull on Probate Practice*"] at 570.
[37] *Pachaluck Estate v DiFebo*, [2009] OJ No 1737, 176 ACWS (3d) 1203, 2009 CarswellOnt 2278 (SCJ) at paras 23, 44-4, 65.
[38] *Walsh v Whitford* (2017), 2017 ONSC 4532, 2017 CarswellOnt 11627 (SCJ) at paras 27-28; *Re McDougall Estate* (2011), 2011 ONSC 4189, 69 ETR (3d) 280, 2011 CarswellOnt 6849 [*McDougall*] at para 52; and *Freeman, supra* note 30 at para 43.
[39] *Salter v Salter Estate* (2009), 2009 CarswellOnt 1272 (SCJ).
[40] *Re Flaska*, [2001] OJ No 2176, 2001 CarswellOnt 2000 (SCJ) at para 22.

Based on the specific facts in *Re Flaska*, the estate trustee was not required to repay any funds to the estate and there was no order compelling estate trustee to pay interest.[41]

An estate trustee who also acted as the deceased's attorney for property should also be careful when considering pre-taking compensation. Where an attorney latter becomes an estate trustee – effectively managing and then distributing the same assets – her compensation (either as attorney or trustee) may be reduced to avoid overcompensating the trustee, sometimes referred to as "double-dipping".[42]

In *Re Vano Estate*, a beneficiary objected to the quantum of compensation claimed and pre-taken by the Estate Trustee During Litigation (the "**ETDL**"), even though the pre-taking was authorized by the order appointing the ETDL. The ETDL was ultimately successful, largely due to the fact that the ETDL maintained detailed time dockets, which demonstrated the extent of the work required in the circumstances.[43]

Notwithstanding the jurisprudence, pre-taking compensation by estate trustees is common in practice.[44] However, given the potential deleterious consequences, estate trustees should be exercise caution before doing so.

Consequences of Pre-Taking Compensation

The court has the power to compel the guardian/attorney or estate trustee to repay to the estate any amounts that it deems just.[45] This includes any overpayments for pre-taken compensation.

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[41] *Ibid.* The estate was worth over $20 million dollars and the estate trustee claimed over $400,000 in compensation. The pre-taken amount was less than $19,000. In the circumstances, Healey J. determined that no penalty was warranted.
[42] *MacIvor Estate* (2011), 2011 ONSC 4175, 2011 CarswellOnt 6843 (SCJ) at para 36.
[43] *Re Vano Estate* (2011), 2011 ONSC 1429, 199 ACWS (3d) 671 [*Re Vano*].
[44] *Macdonell, Sheard and Hull on Probate Practice*, *supra* note 36.
[45] *Estates Act*, *supra* note 5.

In addition to any repayment, the consequences of pre-taking compensation may include:

1. decrease in the quantum of compensation to which the individual would otherwise be entitled, due to the fact that the compensation was pre-taken without the requisite authority;
2. the levy of interest on the sums pre-taken, payable by the fiduciary;
3. damages for breach of the fiduciary's duties; and/or
4. an order requiring the fiduciary to pay her own costs or an award of costs against the fiduciary personally.[46]

If the amount of pre-taken compensation exceeds the fair compensation payable to the substitute decision-maker or trustee, the individual will be ordered to repay the excess amount to the trust/estate and will usually be charged interest.[47]

In *Re Freeman Estate*, Justice Perell found that the estate trustees must "…*account for interest lost by this premature payment of the compensation*".[48] In this case, in addition to paying interest to the estate, the estate trustees' claimed compensation was reduced by over $10,000 for having taken pre-taken compensation improperly.[49]

If the amount pre-taken would otherwise be considered "fair and reasonable" by the court, then the most common penalty is the requirement that the guardian/attorney or estate trustee pay interest to the estate, on the amount of the pre-taken compensation.[50]

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[46] See: *Wall v* Shaw, 2018 ONCA 929, 2018 CarswellOnt 19383; Zimmerman *v McMichael Estate* (2010), 2010 ONSC 2947, 57 ETR (3d) 101, 2010 CarswellOnt 6849; *Macdonell, Sheard and Hull on Probate Practice*, *supra* note 36 at 568.
[47] *Re Wright Estate* (1990), 43 ETR 69 (Ont Gen Div). See also: *Re Zimmerman, ibid.*
[48] *Freeman, supra* note 30 at para 43.
[49] *Ibid* at para 45.
[50] *Re Tigert Estate* (2002), 48 ETR (2d) 301 (Ont SCJ).

Even in cases where the estate trustee is authorized by the will to pre-take compensation, the court reserves the jurisdiction to adjust the quantum of compensation.[51] The standard is whether or not the compensation is fair and reasonable in light of all of the circumstances.[52]

Conclusion

There is an inherent risk for any fiduciary pre-taking compensation – authorized or otherwise – that the amount will be reduced by the court and the fiduciary will be liable to the estate or incapable person. The liability can be both to repay funds taken and to pay funds personally on account of interest, damages, costs – or some combination thereof.

Pre-taking compensation is permissible for attorneys and guardians for property at the prescribed rate, but it is very possible that the court will require the guardian or attorney to repay some – or all – of the compensation paid.

There is no automatic right for attorneys or guardians for personal care to receive compensation, unless expressly authorized by the power of attorney or court order, and the award of such compensation falls completely within the discretion of the court. Accordingly, it follows that pre-taking compensation is inadvisable for any attorney or guardian for personal care.

While a common practice, it is improper for an estate trustee to pre-take compensation unless the will so authorizes, all of the beneficiaries are *sui juris* and consent or by order of the court. The mere fact of pre-taking compensation can be a factor in reducing the quantum of compensation that the estate trustee ultimately receives.

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[51] *Cheney, supra* note 4 at para 8.
[52] *Ibid; Re Vano, supra* note 43*;* see also: *Zimmerman, supra* note 46.

In all of these cases, a fiduciary should be careful about pre-taking compensation. Regardless of the situation, the court has great power to compel a fiduciary to re-pay any amounts it deems improperly pre-taken and in some cases, charge interest on those amounts. Fiduciaries should always seek legal advice prior to pre-taking any compensation.