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Passing of Accounts

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Introduction

A passing of accounts is the "presentation of formal accounts to the beneficiaries and the court, which are either approved in the form as presented, or amended by a court order and passed in a revised form, or not passed due to the fact that for some reason the court is not satisfied with the accounts or some aspect of the administration of the estate reflected in the accounts."[1] The procedure for a passing of accounts is addressed by Rules 74.16, 74.17 and 74.18 of the *Ontario Rules of Civil Procedure* (*Rules*). The overarching theme in the *Rules* with respect to a passing of accounts is that "any party with a financial interest in the assets should have an opportunity to review the accounts in a readable form and be in a position to determine all outstanding issues well in advance of the date of the court audit itself."[2] Although there is no requirement by law that personal representatives pass their accounts,[3] it is the duty of the personal representative to keep proper books and be ready to account if requested to do so.[4] In other words, the personal representative should be able to account at any given time.

While there is no obligation on the trustee to pass accounts, the trustee may voluntarily decide to have the accounts passed by the court. One of the benefits in doing so is the fact that the trustee "is relieved of any further accounting for the period except for items as a result of fraud or

[1] Schnurr, *Estate Litigation*: *Passing of Accounts and Executors' Fees* (Toronto: Carswell, 2012) at 5-1. (*Schnurr*)
[2] Living with the SDA, 1992: Some Practice Guidance at 14.
[3] Schnurr, *Supra* note 1.
[4] Albert H. Oosterhoff, *"Oosterhoof on Wills and Succession"*(Toronto: Carswell, 2011) at 53.

mistake."[5] Leaving aside a successful passing of accounts, a Trustee should be mindful of the necessity to request a clearance certificate. This is beneficial for the Trustee because any distribution made without a clearance certificate can put the trustee at risk of being personally liable to the CRA.[6]

This paper will provide an overview of the current state of the law with respect to passings of accounts in Ontario including compelling a passing of accounts, court format accounts, how to review accounts, notices of objections to accounts, executors' compensation issues, cost issues, an unopposed passing, procedural issues, reporting to the client (whether the applicant or the respondent on a passing), managing client expectations, reducing solicitor liability, mediation, and preparing for trial.

Although reference has been made to a passing of estate accounts, the matters raised in this paper apply to passings of accounts by trustees of an *inter vivos* trust, guardians, and attorneys. Any special issues related to such alternate applicants on a passing are noted separately.

1. Compelling a Passing of Accounts

(a) *Sword or Shield*?

Personal representatives can be compelled to or may voluntarily pass their accounts. Issues regarding the quantum or timing of compensation and/or the administration of the estate are two situations where beneficiaries often compel a passing of accounts. A passing of accounts, as discussed above, is a mechanism by which personal and regular representatives are held to

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[5] Living with the SDA, 1992: Some Practice Guidance at 18.
[6] *Income Tax Act*, Section 159(2).

account for their management of the trust or estate. A personal representative must be able to satisfy the beneficiaries and the court that the estate or trust is being properly managed, and perhaps more importantly, that there are sufficient assets in the estate or trust to satisfy all claims (tax, creditors, and beneficiaries). It is therefore good practice to disclose all receipts and other documents regarding the administration of the estate on a proactive and regular basis. This is important, as it may allay the suspicions of the beneficiaries and avoid the cost and uncertainty of litigation. Thus, a passing of accounts is used as a shield when it is done voluntarily or pre-emptively.

On the other hand, beneficiaries may use a passing of accounts as a sword. Thus, depending on the context, a passing of accounts can be utilized as a sword or shield. A personal representative may be called upon at any time to pass his accounts. As a fiduciary, there is a legal duty imposed on personal representatives to keep proper accounts. It is therefore essential that detailed and accurate records of all transactions relating to the estate or trust be maintained. A personal representative, with the exception of those who must formally pass their accounts due to the existence of a disabled beneficiary or court order, should avoid waiting for a beneficiary or any person having a financial interest in the estate to compel a passing of accounts. In this context a passing of accounts can be described as a sword – a sword in the hands of a sometime disgruntled, unsatisfied, suspicious or disenfranchised beneficiary, creditor etc.

The right to compel a passing of accounts arises from the following statutes and regulations:

- Section 50(1) of the *Estates Act* enables a person interested in the property of a deceased or a creditor of the deceased to compel a passing of accounts.

- Rule 74.15 (1) (h) of the *Rules of Civil Procedure* provides that in addition to a motion under section 9 of the *Estates Act*, any person who appears to have a financial interest in an estate may move for an order (Form 74.42) requiring an estate trustee to pass his or her accounts.

- Section 42 (1) of the *Substitute Decisions Act* provides that the court may, on application, order that all or a specified part of the accounts of an attorney or guardian of property be passed.

However, clients should be advised that the right to compel a passing of accounts is not absolute, and remains in the sole discretion of the court to refuse or grant an order.[7] Counsel should discuss the factors that the client should take into consideration in choosing whether to compel a passing of accounts. For example, clients should consider:

(i) the nature and extent of the estate;

(ii) the complexity of the administration;

(iii) whether there has been litigation;

(iv) the provisions of the Will, Trust, Power of Attorney document, Guardianship Judgment, or any other Court order;

(v) the status or terms of taking compensation and the provisions of the Will or Trust in that regard;

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[7] *Painter v. Painter Estate*, [2008] O.J. No. 3762, 2008 CarswellOnt 5633 (S.C.J.), aff'd *Painter v. Painter Estate*, 2008 ONCA 203 (CanLII)

(vi) liability factors, releases, and claims creditor claims; [8] and

(vii) the length of time since the death of the deceased.

After considering all of these factors, in addition to the time and expense involved in a formal passing of accounts, a beneficiary may choose to apply to the court to compel the personal representative to pass his or her accounts.

However, beneficiaries should be advised that it may not always be necessary to compel a passing of accounts. An informal accounting can reduce the cost, uncertainty and anxiety associated with a formal passing. An informal accounting, from the perspective of the beneficiaries, provides an opportunity to review the status of the administration of the estate, protect their interest in the estate and perhaps more importantly, to hold the personal representative accountable for his or her management of the estate. From the perspective of the personal representative, it provides an opportunity to "turn over to a clean sheet and close the book on the problems and perhaps contentions of a period of the administration."[9] Obviously it can also avoid court time and expenses. This type of informal accounting is pre-emptive in nature and may be used as a shield against subsequent allegations of mismanagement or other impropriety with respect to the administration of the estate. The representative can provide an accounting of transactions (as opposed to the format in the Rules discussed later in this paper) produce supporting documents, and negotiate outstanding issues.

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[8] Kimberly A. Whaley, *The Passing of Fiduciary Accounts*, January 2008 at page 2.
[9] Carmen S. Theriault, ed. *Widdifield on Executors and Trustees*, 6th ed., looseleaf (Scarborough, Ont.: Carswell, 2003) at page 14-2.

It is recommended that a personal representative secure a final release and indemnity directly from the adult beneficiaries (with the benefit of independent legal advice) upon resolution of the accounting. A release can confirm settlement issues around compensation and any allegations of impropriety with respect to the management of the estate during the accounting period. A release is a negotiated settlement between the beneficiary and the personal representative without the need for court approval. A release, while not a court order, will likely restrict the beneficiary who signed the release from seeking a formal passing of accounts.[10] This pre-emptive approach clearly avoids costly litigation.

If the beneficiaries are *sui juris* – over the age of majority and mentally competent and willing - the personal representative may avoid a formal passing of accounts by providing the following documents to the beneficiaries:

(i) a copy of the will, or trust document, if not provided earlier;

(ii) an inventory of original assets;

(iii) some form of accounting showing moneys received and paid out, for example, a statement of activity of the estate bank account and details of investments;

(iv) a statement of distribution;

(v) a statement of proposed compensation;

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[10] Jennifer J. Jenkins & H. Mark Scott, *Compensation & Duties of Estate Trustees, Guardians & Attorneys* looseleaf (Aurora, ON: Canada Law Book, 2011) at page 6-3.

(vi) vouchers; and

(vii) a release.[11]

However, if the beneficiaries are not *sui juris* then it will be necessary to formally pass the accounts. Unlike *sui juris* beneficiaries, a minor or an individual who is incapable of managing his affairs cannot execute a release. Thus, it is advisable that a power of attorney or guardian of property formally pass accounts whether or not compensation is sought. A personal representative may also be required to have the court pass the estate's accounts in the following situations:

(i) there are minor, unborn and unascertained or contingent beneficiaries;

(ii) a beneficiary challenges the actions of the Estate Trustee; or

(iii) a beneficiary challenges contents of the estate accounts prepared by the Estate Trustee.[12]

A *sui juris* beneficiary may be reluctant to acquiesce to an informal accounting. There may be deep-seated animosity between the personal representative and the beneficiary or suspicion of mismanagement of the estate. The beneficiary may want to retain counsel to review the accounts and there is no assurance that such legal fees will be paid by the estate as would normally occur on a formal passing. In such situations, beneficiaries often apply to the court to compel the

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[11] *Ibid*. at page 6-2.
[12] *The Law Society of Upper Canada, Passing of Accounts* (January 2011) online: <http://rc.lsuc.on.ca/jsp/ht/passingAccounts.jsp>

personal representative to pass his or her accounts.[13] From the perspective of the personal representative, if a negotiated settlement is not forthcoming he or she should apply to the court to pass their accounts. A judgment will serve to protect the trustee against allegations of impropriety and maladministration will permit the trustee to claim and take compensation.[14]

2. Court Format Accounts and Procedural Issues

(a) Format of Accounts

The format of the accounts to be delivered to the parties and the Court on a formal passing is specifically addressed by Rule 74.17. This Rule explicitly states that estate trustees should keep accurate records of the assets and transactions in the estate. It also stipulates what an estate trustee must include on a first passing of accounts versus any subsequent passing of accounts. Rule 74.17 provides that a trustee shall include:

(a) a statement of the assets of the estate on the date the accounts were opened (usually the date of death), cross-referenced to entries in the accounts that show the disposition, partial disposition or redemption of the assets;

(b) an account of all money received (excluding investment transactions);

(c) an account of all monies disbursed (excluding investment transactions);

(d) where the estate trustee has made investments for the estate or trust, a statement setting out details of all investments acquired, their repayment or realization, and a list of the

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[13] A. Sean Graham, "*Passing of Accounts from the perspective of a capital and income beneficiaries*" at 10-1.
[14] Jenkins and Scott at 6-6.

investments held on the last date of the accounting period.

(e) a statement of all assets of the estate or trust that are not realized as at the last date of the accounting period;

(f) a statement of all monies and investments in the estate or trust as at the last date of the accounting period;

(g) a statement of all liabilities of the estate or trust, contingent or otherwise, as at the last date of the accounting period;

(h) a statement of the compensation claimed or proposed by the estate trustee, and where such compensation includes a claim for a care and management fee, the basis upon which the management fee is determined, including a statement setting out the method of determining the value of the assets under administration.

(i) Such other statements and information as the Court requires. In this regard, it is imperative to include a copy of the trust document or will from which the accounts originate.

In essence, the accounts should be drafted in a clear form that provides all of the necessary information of the estate, so that any person who is entitled to an accounting of the estate would be able to understand the information that is presented.[15]

There is a positive duty on the estate trustee to keep accurate records of the assets and

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[15] *Supra* note 2 at 18.

transactions in the estate, which confirms the common law duty upon a fiduciary.[16] The statement of assets on the opening date of the accounts must be cross-referenced to entries reflecting the disposition of the assets.[17] Moreover, on any subsequent passing of accounts there must be a statement of investments as at the opening date of the accounts. Furthermore, receipts and disbursements are to exclude investment transactions.[18] The statement of all liabilities as at the closing date of accounts is imperative, as it is often overlooked, which has been a major criticism directed at estate trustees and their counsel.[19] As noted, if the statement of compensation includes a management fee based upon the value of the assets of the estate, an additional statement must be provided indicating the method of determining the value of the assets. This requirement is helpful because it provides the beneficiaries further insight as to how the total value of the estate was determined by the trustee.[20] It should also be noted that on a subsequent accounting, the receipt, disbursement and investment accounts must start by showing the balance forward for each account.[21]

Although Rule 74.17 sets out the mandatory requirements on a formal passing of accounts, there are also a number of other general principles that should be followed. First, cash account rules apply to the form of accounts and therefore the accounts themselves should not reflect a balance sheet approach. Second, the process of a passing of accounts has been compared to that of a bank book. The accounts should specify each and every entry throughout a specific point in time and be set out chronologically. Third, Rule 74.17(3) stipulates that accounts need only be divided

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[16] *Schnurr*, *Supra* note 1 at 5-4.
[17] *Ibid*.
[18] *Ibid*.
[19] *Ibid*.
[20] *Supra* note 1 at 5-4.
[21] *Ibid*.

between capital and revenue in circumstances where there is some division of interest in the estate between capital and income beneficiaries. So, if the will provides for an outright distribution with no testamentary trusts, there would be no need to divide the accounts into separate revenue and capital accounts. Fourth, it is important to provide a comprehensive list of original assets at the beginning of the administration and that each original asset has a separate entry. Finally, the estate trustee is a fiduciary and is therefore obligated to keep all back-up and supporting documentation with regard to each entry, such as: receipts, invoices, cancelled cheques, investment statements and other vouchers.[22]

(b) Procedural Issues

(i) General

Rule 74.18 addresses the materials that need to be filed on an application to pass accounts. First, the personal representative must file an application setting out the accounting period and the persons interested in the matter. This should be filed with the court office from which the grant was obtained. Second, the application should be accompanied by a number of documents, which include the following: (1) the accounts, verified by affidavit; (2) a copy of the Certificate; and (3) a copy of any previous Judgment, if any, passing the accounts for a prior period. The applicant should also file the Notice of Application and proof of service on all interested parties.[23]

The Ontario Superior Court of Justice recently reviewed the form and procedure to be used in an application by a guardian for property to pass accounts in the *Estate of Divina Damm*.[24] In this case, the Court did not consider or grant what was actually an unopposed application to pass

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[22] *Supra* note 2 at 16.
[23] *Supra* note 4.
[24] *Estate of Divina Damm*, 2010 ONSC 5119 (CanLII) [*Damm*].

accounts because the accounts filed by the guardian of property were not in the proper form.[25] Justice Brown specifically referred to Rule 74.17 and made it clear that the Rules sets out, in considerable detail, the form of accounts that must be followed by guardians of property when they pass their accounts.[26] The Court indicated that the Rule:

> requires an itemized accounting of each receipt and disbursement of estate funds and disposition of estate assets. As a result, the practice is to divide the accounts into capital receipts and disbursements, revenue receipts and disbursements, statements of assets, concluding with an explanation of any claim for compensation by the fiduciary.

In this case, the guardian failed to provide the appropriate detail or itemization that is required by the *Rules*. The Court stated that it was impossible to link the particulars of the judgment sought with the evidence contained in the filed accounts, which was unacceptable.

(ii) Procedural Concerns

Rule 74 is the procedure used for all estates regardless of size. In *Damm*, the Court explicitly stated that a "case can be made for amending the requirements for the forms of accounts to be filed by fiduciaries." The Court posited that perhaps a different and more simplified form of accounts could be used for smaller estates, leaving the more complex Rule 74.17 format to estates of greater value. However, the Court stipulated that this was a matter for the Legislature and the Rules Committee to consider and not the courts.[27]

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[25] *Ibid* at para 3.
[26] *Ibid* at para 4.
[27] *Supra* note 24 at para 4 and 6.

(iii) Changes with respect to timing

Ontario Regulation 55/12 came into effect on July 1, 2012 and essentially changed the time lines for passing of account proceedings. The recent amendments to the *Rules* extend the time period for service of the Notice of Application to pass accounts, and increases the time within which a beneficiary must deliver any Notice of Objection. The amendments also increase the costs allowable upon an unopposed passing of accounts. With regard to timing, the amendments made the following changes:

- Notice of Application (Ontario Respondent): 60 days' notice prior to the return date of the application (up from 45);
- Notice of Application (outside Ontario Respondent): 75 days' notice prior to the return date of the application (up from 60);
- Notice of Objection: 30 days before the return date of the application (up from 20 days); and,
- Response from The Children's Lawyer or Public Guardian and Trustee: 30 days before the return date of the application (up from 20 days).

If a party seeks costs in excess of Tariff C.

- At least 20 days before the hearing, the party seeking increased costs serves a Request for Increased Costs ("RIC") and Costs Outline on every other party;
- At least 12 days before the hearing, any other party must deliver any objection to the RIC, or consent to the increased costs; and,

- At least 10 days before the hearing, the party seeking increased costs must file a supplementary record containing:

  (a) the RIC and Costs Outline, together with affidavits of service for each; and

  (b) an affidavit setting out

  (i) the responses received from each party (i.e. consent, objection, no response) and

  (ii) the factors that contributed to the increased costs.

Finally, the amendments addressed costs. The tariff (Tariff C) for costs allowable on an uncontested passing now allows for increased costs to be claimed. The costs range from $2,500 for an estate having a value of less than $300,000 to $7,500 for an estate having a value of $3,000,000 or more (increased up from a range of $800 to $5,000). The Public Guardian and Trustee and The Children's Lawyer are still entitled to claim 75% of the Tariff C costs, while other beneficiaries are entitled to claim 50% of the Tariff C costs, if they have filed a request for costs (Forms 74.49 or 74.49.1)

3. Reviewing Accounts

The review of estate or trust accounts begins with the underlying document, namely the Will, trust, etc. These documents will typically outline the scope of the personal representative's responsibilities *vis-à-vis* the beneficiaries and others with a financial interest in the estate or trust. The review should be consistent with the formula set out in the underlying document. It must also be consistent with the Rules. All accounts are historical in nature. They will detail all transactions during the accounting period. The estate or trust accounts must balance. A balanced account will avoid objections from disgruntled beneficiaries and provide a basis for the

executor's compensation.

The first question to address when you are reviewing estate accounts is to determine "who is the client". There are different classes of clients with an interest in the estate, for example capital beneficiaries, income beneficiaries and personal representatives. Each class will review the accounts through a different lens. While there may be areas of common interest, these parties may disagree on certain issues. It is clear that all beneficiaries want to see the estate administered properly. However, a capital beneficiary may want to see less distributions being made, while an income beneficiary may want to encroach on capital. The capital beneficiaries may want the trustee to invest in equities which provide for greater capital growth while the income beneficiaries may want to maximize revenues.

Both capital and income beneficiaries will, as a part of the review process, analyze the following:

1. whether the receipts or disbursements are paid from income or capital;
2. the Will or trust document;
3. the investment account;
4. the original assets; and
5. former passings of accounts.

The personal representative must exercise an even-hand in his or her dealings with all classes of beneficiaries. This means that the personal representative should ensure that there is a sufficient flow of income concurrent with protection of, or, if possible, growth of the estate's capital.

However, investment and distribution may not always be compatible, especially in the marketplace as it is now. This may pose hardship on the personal representative.[28]

4. Notices of Objections to Accounts

Beneficiaries should be proactive should they wish to object to the accounts. Any beneficiary objecting to the accounts must serve upon the estate trustee and file with the court a Notice of Objection (in prescribed form) at least 30 days before the return date of the Application to Pass Accounts.[29] If a beneficiary fails to do so, then the beneficiary may face an unopposed Judgment on Passing of Accounts without any further notice.[30]

The prescribed form of the Notice of Objection was recently addressed in *Re Vano Estate*.[31] In this case, there was a long and tortured history of objections and replies to those objections. The case finally proceeded to the point where the court ordered the objector to particularize his objections, since the volume and nature of the objections were unclear. In particular, the court ordered that a concise and comprehensive list of objections be provided to the judge hearing the matter, so that he could understand the precise issues raised by the objector and the changes or adjustments that the objector was seeking in respect of each issue. However, the objector failed to comply with the order. The court in its reasons made it clear that general and vague language in a notice of objection was unacceptable. Rather, "a notice of objection to the passing of accounts must specify with precision each item in the account with which the objector takes issue, the reasons for the objection, and the adjustment the objector asks the court to make to the

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[28] See generally, *Supra* note 13.
[29] *Ontario Rules of Civil Procedure*, Rule 74.18(9).
[30] *Ibid.*
[31] *Vano Estate (Re)*, 2012 ONSC 262, 2012 CarswellOnt 74 (Ont Sup Ct J).

accounts."[32] In other words, the objector must clearly and specifically articulate his or her objections.

The Notice of Objection also serves as a limitation mechanism because "no objection shall be raised at the hearing that was not raised in a notice of objection to accounts, unless the court orders otherwise."[33] This provision is particularly helpful in hearings where a party wants to simply have the court review the accounts on a line by line basis. The court is obliged only to deal with objections (unless it raises its own concerns). In addition, this provision is useful because it provides the court with the legal authority to "stop the frivolous allegations or tangents that can side-track hearings." These situations can frequently occur when dealing with beneficiaries who do not have legal counsel.

The most common type of objection to a passing of accounts involves executors' compensation. The Ontario Superior Court of Justice recently addressed the topic of executors' compensation in *Re Denofrio Estate*, which will be discussed in more detail, *infra*. However, many objections also arise out of a claim of alleged negligence of the estate trustee. Recent examples of negligence claims include *Re McDougall Estate* and *Zimmerman v. Fenwick*.

In *Re McDougall Estate*,[34] the objector contested the passing of accounts and alleged that the estate trustee was negligent in her administration of the estate. The court had to determine whether the estate trustee acted improperly in making a charitable donation and in pre-taking of compensation. The court determined that although the testator intended that a charitable gift be

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[32] *Ibid* at para 19.
[33] *Ontario Rules of Civil Procedure*, Rule 74.18(12).
[34] *McDougall Estate (Re)*, [2011] O.J. No. 3327, 2011 ONSC 4189.

made, the gift failed because the amount was not specified in the will. The court also determined that the pre-taking of compensation was improper. However, the estate trustee was relieved from liability, as she successfully established to the court that the charitable donation was an innocent mistake. The court recognized that the estate trustee had acted honestly and reasonably in carrying out what she understood were the testator's intentions. However, the estate trustee's compensation was reduced, not for the manner in which she dealt with the administration of the deceased's estate and her actions, but instead for having pre-taken compensation, which was not authorized by the will or the beneficiary.

In *Zimmerman v. Fenwick*,[35] the issue the court had to examine was a complaint made by the Objectors concerning an attorney's alleged negligent conduct. The court made it clear that "an attorney is a fiduciary whose powers and duties must be exercised and performed diligently, with honesty and integrity and in good faith."[36] Furthermore, "an attorney who receives compensation for managing property must exercise the degree of care, diligence and skill that a person in the business of managing the property of others is required to exercise." The attorney (as is the case with a trustee) has a duty to keep accurate accounts and must make proper accounting a priority before receiving compensation. Poor or careless misconduct on the part of the attorney or trustee may justify the court depriving the trustee or attorney of his or her compensation. However, only exceptional circumstances should deprive the individual of the right to any remuneration. This case is a clear example of negligence because the attorney misappropriated funds and used them to pay for personal loans and trips, including numerous cash withdrawals when he took an extended sailing trip to the Caribbean. Clearly, the attorney used the trust property for his own

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[35] *Zimmerman v. Fenwick*, 2010 ONSC 2947, 2010 CarswellOnt 3481.
[36] *Ibid* at para 29.

personal benefit, which was not only unacceptable, but a breach of his fiduciary duty. To further aggravate the situation, he failed to deliver a response to the Objectors' notices of objections. Not only was he "grossly indifferent" to his duty to account, he carelessly obstructed the Objectors in their attempts to obtain a proper accounting. Ultimately, the court held that the attorney's conduct fell well below the standards expected of an attorney and breached the most basic obligations of a fiduciary; therefore, he was not entitled to any compensation and was ordered to pay back all the compensation taken to date.

There are a number of other acts or omissions that are often discovered in reviewing accounts and give rise to concerns by objectors, and the court's sanction. These include: investments by the fiduciary which are not authorized by the will or by the law;[37] failure to provide a proper mix of investments; negligent or improper investments; failing to maintain or grow the capital of the assets; failing to make appropriate elections or make prompt filings under the *Income Tax Act;* failing to dispose of wasting assets; surcharging accounts; falsifying accounts; preferring the interests of one beneficiary over another; acquiring trust property without authority or proper appraisals; being in a conflict of interest with the estate or a beneficiary; and, the incorrect recording of entries.[38]

5. Executors' Compensation Issues

(a) *Common law and Statutory Principles*

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[37] *Living with the SDA, 1992*: Some Practice Guidance at 24-25.
[38] *Ibid.*

A myriad of issues arise around the calculation of executors' compensation. Before addressing these issues, it is important to consider the judicial and legislative basis for executors' compensation. Personal representatives are entitled to be reasonably compensated for the work they perform on behalf of the estate or trust. The problem, however usually lies in the quantum of compensation that a personal representative may claim. Executors' compensation is one of the driving forces behind a passing of accounts, whether compelled or done voluntarily. If the passing is compelled, it may be with regard to a dispute about the quantum of compensation. On the other hand, if the passing of accounts is done voluntarily it is usually the executor's way of justifying to the beneficiaries and the court why the amount of compensation claimed is fair and reasonable. Personal representatives are permitted under statute and the common law to claim compensation for their efforts in the administration of the estate. Compensation may also be fixed by a specific instrument, for instance the Will, Trust, Power of Attorney document, guardianship order, or by contract. However, the court still has discretion to award an amount in variance with such documents.

A trustee's right to compensation is derived from section 61 of the *Trustee Act* which provides that:

> 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.

Subsection 23(2) of the *Trustee Act* gives the trustee the right to have his or her compensation fixed on a passing of accounts. However, there is no statutory guideline that determines how compensation is to be calculated. Guiding principles have instead been developed by the common law. The common law has developed a two-step process for calculating compensation.

First, the court will take into consideration the “usual” percentages and “guidelines”, which break down as follows:

(i) 2.5% of the Capital Receipts;

(ii) 2.5% of the Capital Disbursements;

(iii) 2.5% of the Revenue Receipts;

(iv) 2.5% of the Revenue Disbursements; and

(v) a management fee of two-fifths of one percent of the average annual value of the gross assets under administration if the estate or trust has been administered for a period in excess of one year.

These are then cross-referenced with the five factors developed in *Re Toronto General Trust v Central Ontario Railway Co*. (1905), 6 O.W.R. 350 (Ont. H.C.), namely:

(i) the size of the trust;

(ii) the care and responsibility involved;

(iii) the time occupied in performing its duties;

(iv) the skill and ability displayed; and

(v) the success which has attended its administration.

The entire process of the estate’s or trust’s administration will be examined by the court to determine the proper quantum of compensation which should be awarded to the executor or

trustee. The Court of Appeal in *Re: Jeffrey Estate*[39] stated that the approach of looking at the "usual" guideline amount and reviewing the factors in *Re: Toronto General Trusts in Central Ontario* and the estate administration as a whole "best achieves the appropriate balance between the need to provide predictability while at the same time, tailoring compensation to the circumstances of each case."

Compensation for guardians for property and attorneys under a continuing power of attorney is set out in section 40 of the *Substitute Decisions Act*, and Section 1 of Regulation 26/95 as amended April 1, 2000. The percentages are as follows:

(i) 3 per cent on capital and income receipts;

(ii) 3 percent on capital and income disbursements; and

(iii) three-fifths of 1 per cent on the annual average value of the assets under the control and administration of the attorney or guardian as a care and management fee.[40]

The *Substitute Decisions Act* provides a guardian for property or an attorney with a statutory right to pre-take compensation. The compensation may be taken monthly, quarterly, or annually. However, if consent in writing is given by the Public Guardian and Trustee and by the incapable person's guardian or attorney under a Power of Attorney for personal care, if any, the guardian of property or attorney for property may take an amount of compensation greater than the prescribed fee set out in the Regulation. Where the Public Guardian and Trustee is the guardian,

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[39] *Re: Jeffrey Estate* (1990), 39 E.T.R. 173 at page 142 (Ont. S.C.J.)
[40] Regulation 26/95

she may be entitled to an amount greater than the prescribed fee schedule with Court approval.[41] The standard of care required of a guardian of property or attorney is set out in subsections 32 (7), 32 (8), and 32 (9) of the *Substitute Decisions Act*. The standard of care depends on whether the guardians of property or attorney are compensated. The standard of care is lower if no compensation is received; whereas the standard is higher if compensation is received.[42]

(b) *Pre-taking compensation*

There is no express prohibition against pre-taking executors' compensation; however, the case law in Ontario for the most part forbids same. The first case to deal with such an issue was *Re: Knoch Estate*[43] where the court held that executors could not prepay themselves compensation unless the trust document permitted pre-taking of compensation or beneficiaries had specifically agreed to the pre-taking. In *Re: William George King Trust*[44], the court held that if the executor took payment for services already rendered and the compensation was fair and not excessive, pre-taking of compensation might be permitted. However, a series of cases since then have taken a much harder line. Generally, executors may not pre-take compensation and in fact the court will charge the executor interest on the amount pre-taken in addition to requiring the executor to repay the amount of compensation improperly pre-taken[45] by the executor back to the estate.

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[41] *Supra* note 8 at page 22.
[42] *Ibid* at page 22-23.
[43] *Re: Knoch Estate* (1982), 12 E.T.R. 162 (Ont. Surr. Ct.)
[44] *Re: William George King Trust* (1994), 2 E.T.R. (2d) 123 (Ont. Gen. Div.)
[45] *Re: Pilo Estate* [1998] O.J. No. 4521 (Ont. Gen. Div.) and *Re: Flaska* [2000] O.J. No. 2176 (Ont. C.A.)

Obviously, an executor should not pre-take compensation unless authorized to do so by the will. Similarly, trustees under an *inter vivos* trust may not pre-take compensation unless permitted by the trust instrument or with the approval of the beneficiaries.[46] Uniquely, under the section 40 of the *Substitue Decisions Act*, a guardian or attorney is permitted to pre-take compensation.

(c) *Compensation Agreements*

The Will or Trust document may fix the compensation awarded to the estate trustee. However, the wording of the document, as it relates to compensation must be specific to avoid interference from the court in reducing or adjusting the compensation received by the trustee.[47] As noted, if there is negligence or malfeasance on the part of the trustee, the court will likely reduce the compensation.

(d) *Compensation for an Estate Trustee During Litigation*

Pursuant to section 28 of the *Estates Act* the court has the jurisdiction to award an estate trustee during litigation (ETDL) with reasonable remuneration from the estate. In many cases, however, the ETDL's fee is determined in the order appointing the ETDL.

(e) *Compensation for attorney for personal care*

There exists no regulatory or statutory basis for providing compensation for attorneys for personal care. The court, however, has the jurisdiction to award compensation. In *Re Brown*, the court held that "the fact that the legislature has not passed a regulation providing for the payment

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[46] *McDougall Estate*, 2011 ONSC 4189 para 52. *Salter Estate (Re),* 2009 CanLII 9762 (ON SC), at para 39.
[47] *Re Andrachuk Estate* (2000), 32 E.T.R. (2d) 1. *Cheney v.Byrne(Litigation Guardian of)* 2004 CarswellOnt 2674

of compensation to an attorney for personal care, or fixing the manner in which it is to be calculated, does not prevent the court from awarding and fixing such compensation."[48]Thus, reference must be made to the common law to determine whether compensation can be received.

(f) *Reductions and Increases to compensation*

The court may reduce compensation in the following circumstances:

(i) failure to discharge fiduciary duties and for improper conduct;

(ii) breach of trust which results in loss sustained by the deceased's property;

(iii) loss of interest or improper payments;

(iv) failure to properly account;

(v) excessive solicitors' and accountants' fees;

(vi) administration of primary asset was fairly straight forward;[49]

(vii) mismanagement of estate[50]

(viii) consideration of other monies paid to the executor or trustee.

It is not uncommon to find estates where the size or value of the estate is significant, but the actual work done by the executor or trustee in liquidating and distributing the estate is relatively modest. For example, an estate with a significant stock portfolio of $2,000,000 plus a GIC of

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[48]1999, CarswellOnt 4628
[49] In *Pachaluck Estate v. DiFebo* (2009), 2009 CarswellOnt 2278
[50] *Denofrio v. Denofrio*, 2012 CarswellOnt 7448.

$250,000, managed by a brokerage, can be liquidated by "one telephone call". The brokerage would take responsibility for selling the assets of the estate. If all of the assets of the estate were then to be paid over to one charity, the actual work involved in liquidating and distributing the estate would be minimal. In such circumstances, it is not unusual for the beneficiaries to request and the court to grant a reduction in the 2.5% on capital receipts and disbursements to a lower 1% or 1.5% when calculating executor's compensation.

Further, it is important to look behind the accounts when a corporation forms part of the assets of the deceased's estate. If the executor has been managing the company as a director, officer or employee of the company, he or she may have received a salary, management fee, director's fees or bonuses. The payment of these sums should be taken into account when considering compensation and may in fact reduce executor's compensation. It is important, always, when reviewing accounts to look behind the corporate financial statements and ask the appropriate questions to deal with such issues.

The court may also increase the executor's compensation in certain circumstances. For example, the court can increase compensation because of the complexity in administering the estate or the trust. Other examples may include: operation of a private company, business or farm, and ongoing litigation.

Again, using the corporate reference, a court has awarded a "special fee" when claimed by an executor, for the management of business interests. In *Re: Bellomo Estate*[51], the court awarded a special fee to a corporate trustee (as part of executor's compensation) where the trustee had been

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[51] *Re: Bellomo Estate* (1989), 36 E.T.R. 123 (Ont. Gen. Div.)

involved in the consideration of many Agreements of Purchase and Sale with respect to an apartment block which was shown only at book value in the accounts, but which entailed very significant amounts of time on behalf of the trustee to deal with issues relating to planning and development matters.

Another situation where the court might increase compensation is when the only asset of the estate may involve a cottage or some other property which is of modest value, but which creates significant work and time spent by the executor. Cottage properties are often difficult to sell, require repairs and maintenance and may have very difficult title issues. Again, in those circumstances, the court may increase the usual 2.5% to take into account the work actually done by the executor or trustee.

6. Reporting to your client

Following your initial interview with the executor, trustee, guardian or attorney it is helpful to follow up with a detailed reporting letter. In the interview and the subsequent reporting letter, you should advise the client to docket his or her time, and to keep all vouchers and supporting information relating to the administration of the estate. You must stress to the client that it is important to be prepared in the event of a compelled passing.

You may also want to put in the reporting letter the cost of litigation – not just financial but emotional as well. The client should be advised that seeking a judgment on passing may serve to protect him or her against allegations of impropriety and maladministration. Armed with a judgment the personal representative can administer the estate with greater confidence. As discussed earlier, another approach may be for the personal representative to informally circulate

his or her accounts to the beneficiaries, seek their written consent to the accounting and compensation (securing a release) and avoid a formal passing.

7. Managing client expectations

Managing the client's expectations can be the most challenging aspect of the retainer. The type of client –personal representative or beneficiary or both – will determine how counsel will attempt to manage the client's expectation.

Counsel should also be aware that not all legal costs may be recoverable. For example, if counsel is faced with an irrational client who overly uses your time, it is perhaps prudent to restrict the retainer and remind the client that he/she will be personally liable for costs not recovered from the Estate. The client must be reminded of the Tariff C costs and the difficulty in securing increased costs without justification. Counsel should demarcate their professional relationship with the client. The client should be told from the outset that counsel is not equipped to remedy any non-legal issues.

A solicitor should always be very careful to ensure that the executor is aware that any work done by the solicitor which is truly executor's work, will reduce the executor's compensation. The concept is quite simple. If the lawyer undertakes executor's work (which would require little or no legal training) then that is work which the executor was intended to do. To the extent that the solicitor has billed the executor client for such work, the amount will likely be deducted from executor's compensation. [52]

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[52] *Re: Briand Estate* (1995), 10 E.T.R. (2d) 99 (Ont. Gen. Div.)*; Re: Estate of Charles Goldlust* (1991), 44 E.T.R. 97 (Ont. Gen. Div.)

a) If the client is the beneficiary/objector

It is imperative that beneficiaries appreciate that an application to pass accounts can be a costly and uncertain process. This point was recently demonstrated in *Pachaluck Estate v. DiFebo*.[53] In this case, the beneficiary had objected to the compensation the estate trustee had taken. Unfortunately for the parties, the court determined a mixed result upon review of the application, which led to excessive costs for both the applicant and respondent. Costs from the estate were reduced because neither party had served an offer to settle. Overall, the court awarded each party less than half the costs that were sought. In particular, both parties were personally responsible for paying more than half the costs each had incurred. Although the court ordered a reduction in the executor's compensation, the reduction was not as much as had been requested by the beneficiary and was ultimately outweighed by the costs associated with bringing the application. In other words, the compensation that was repaid to the estate as a result of the litigation was less than the legal fees that ended up coming out of the estate to reimburse the parties. Therefore, an Objector should recognize that some cases are not worth pursuing through litigation.[54]

Not only must beneficiaries assess whether it is cost effective to pursue litigation, they must also be reasonable in their demands and behaviour towards the estate trustee. It is not uncommon for there to be tension amongst family members when the identity of the estate trustee is revealed. For instance, siblings may feel a certain animosity towards one another when they find out that a brother or sister was chosen as a parent's estate trustee. However, it is inappropriate for the beneficiaries to transfer their feelings of anger towards the parent to the estate trustee merely

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[53] *Pachaluck Estate v. DiFebo*, 2009 CanLII 34777 (ON SC).

[54] Hull & Hull LLP, http://estatelaw.hullandhull.com/.

because the trustee was given this responsibility. Therefore, it is important to inform clients, who are beneficiaries, to be respectful, fair and reasonable when dealing with the estate trustee, as co-operative behaviour will only aid in the effective and efficient administration of the estate.

b) If the client is the estate trustee

If your client is the estate trustee or Attorney for Property, it is essential to inform him or her of his or her role and duties. One of the most important obligations of a trustee is to provide reasonable and timely information to the beneficiaries. Therefore, lawyers should instruct their clients to provide vouchers, receipts and reports to the beneficiaries on an ongoing basis. While a trustee should be prepared to account at any given time, the continuous disclosure of information will provide an added level of transparency and assurance to the beneficiaries that the estate is being administered correctly.

8. Preparing for Trial

Trial preparation will, in large part, be dictated by the outstanding issues/objections. It was recently held that "an application to pass accounts can be brought in any county, regardless of where the Certificate of Appointment may have been issued."[55] If Notices of Objections are not withdrawn, (and the matter does not settle at mediation which is mandatory in certain jurisdictions) the court may give directions on the conduct of the trial/hearing. In Toronto the Estate Practice Direction may be used to craft an Order Giving Directions.

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[55] *McMichael Estate (Re)*, 40 E.T.R. (3d) 285, 2008 CarswellOnt 3463.

a) Without a Hearing

One of the objectives of the Rules is to establish a detailed procedure where the court has all the essential information to resolve all matters and in turn the ability to sign a Judgment without the necessity of any attendance before a judge. This is known as an "unopposed Judgment". If there are no objections or an objection has been satisfied and resolved, then an unopposed Judgment may be applied for at any point up to 10 days prior to the return date of the application. A Record containing information detailed in Rule 74.18(9)(a) of the Rules of Civil Procedure can be filed.

In *Re Mitchell Estate* the court reviewed the materials that should be filed on an unopposed hearing.[56] This case dealt with a Request for Increased Costs. Justice Brown referred to Rule 74.18 and indicated that the Rule specifies the materials that must be filed initially on an application to pass accounts. The court then listed the additional materials that an applicant should file with the court in an unopposed application, which include the following:

> proper initial application materials (Rule 74.18(1)); a supplementary application record containing materials specified by Rule 74.18(9); additional evidence (a simple affidavit) that contains: the request for increased costs in proper form; proof of service of the request on all affected parties; a statement explaining the responses of affected parties to the request; and, the details of the reasons for the request, either through a detailed bill of costs or an easily understandable copy of the relevant dockets.[57]

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[56] *Mitchell Estate (Re)*, 2010 ONSC 1640, 2010 CarswellOnt 1662.
[57] *Ibid* at para 4.

Justice Brown stressed the last point and reiterated the fact that adequate evidence is essential because a court cannot conduct a review of the request for increased costs and ensure it is fair and reasonable without evidence describing the work performed, the time spent, and the value of the work or the cost of such work. Therefore, it is imperative to provide the necessary details and specific facts in an application for increased costs to ensure the court has adequate information to efficiently review the application. This is now of course codified in the recent amendment to Rule 74.18.

b) With a Hearing

If a notice of objection is filed and there are unresolved objections, or the court refuses to grant an unopposed judgment, then a hearing will be required. In addition, if the application is filed in Toronto, the contested application will be subject to mandatory mediation.[58] Rule 75.1 details the procedure for mediation and indicates that the parties should address the following issues: the timing and conduct of a mediation; the issues to be tried and each party's position on each issue; the timing and scope of relevant disclosure; the witnesses each party intends to call; the issues each witness intends to address, and the anticipated length of each witness' testimony (examination-in-chief and cross-examination); and, the procedure to be followed at the hearing, including the method of adducing evidence-in-chief.[59] If an agreement is reached resolving some or all of the issues in dispute, then the agreement is to be signed by the parties or their solicitors, pursuant to Rule 75.1.12(4). Furthermore, if the agreement resolves all issues in dispute, then the party with carriage of the mediation is to file a notice to that effect with the Court. Alternatively,

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[58] *Supra* note 1 at 5-7.
[59] *Rules of Civil Procedure*, Rule 75.

if there is no agreement amongst the parties, then the matter shall proceed in accordance with any directions given or a motion made as soon as possible pursuant to Rule 75.1.12(7). As the executor will no doubt want the protection of a Judgment, it is advisable to have the written agreement incorporated into a Judgment on the passing of accounts.

If the contested application proceeds from mediation to a hearing, it is often the case that the hearing will continue in a relatively informal manner, subject to any Order Giving Directions to the contrary. At the hearing, counsel should be prepared to present legal arguments dealing with the disputed aspects of the passing. However, as already mentioned, the court will theoretically limit the objections to those raised in the Notices of Objection. The estate trustee will be required to give evidence regarding the matters in dispute. For instance, counsel for the estate trustee may conduct a direct examination of the estate trustee. Moreover, the parties who take issue with the accounts may cross-examine the estate trustee. The estate trustee and beneficiaries may also call other witnesses to give evidence, and/or the beneficiaries may give evidence. After consideration of the evidence, the court will render its decision immediately, or it may reserve.

While most hearings proceed in a relatively informal manner, it is not uncommon to obtain an Order Giving Directions setting out the issues and procedures at the first court date in cases involving a contentious passing of accounts. Moreover, if the issues in the case are highly contentious or complicated, the judge has the discretion to adjourn the passing of accounts and order a trial of the issues instead. For instance, the court may make an order setting out the issues to be tried, the parties who will participate, ordering that there be examinations for discovery and production of documents, and specifying when the matter will proceed to trial.

Conclusion

Applications for passings of accounts are at first instance, quite technical. However, like most areas of practice, after time the practice and procedures become routine. Contested Applications provide marvellous trial experience for counsel, but the considerable costs of contested hearings encourages parties to compromise or settle. The few cases which do not get resolved and proceed to trial are often reported.