

PASSING OF ACCOUNTS / FIDUCIARY  
ACCOUNTS

Osgoode PD

February 9, 2017

Kimberly A. Whaley



# Overview

- Duty to Account
- Process, Procedure & Format
- Compensation and Costs
- Trends in Case Law - Common Objections
- Questions

# DUTY TO ACCOUNT

# Duty to Account

- Duty to maintain continuous, comprehensive, detailed and accurate records of their management of assets
- These fiduciaries may be asked (or volunteer) to present those records, called accounts, to the court for approval in a formal proceeding called an application to pass accounts.

# Common Law Duty

- Administer the trust prudently and honestly
- Fiduciary responsibility to beneficiaries
- *Re Speight* (1833), 22 Ch.D. 727 (CA)

# Common Law Duties

## Trustees should:

- Maintain proper accounts from outset
- Keep detailed and organized records
- Keep copies of all back-up and
- Keep copies of all other related documents (income tax returns, accountant invoices etc.)

# Statutory Duty

- Each province has its own legislation dealing with estate trustees, attorneys under power of attorneys and guardianships
- These provisions underscore importance of a duty to account
- See handout chart/chapter 8 WEL Book for relevant provincial legislation

# Procedure

- Procedure is prescribed by **Rules 74.15-74.18** of the *Rules of Civil Procedure*:

*Material to be Filed*

*Notice of Application*

*Service*

*Person under Disability or Unknown*

*Notice of Objection to Accounts*

*No Response*

*Withdrawal of Objection*



# Procedure

- An application to pass accounts is made on notice to those lawfully entitled to receive the accounting. Who may initiate Application?
  - Beneficiaries
  - Dependants
  - Those entitled by statute, or
  - Other third parties: any individual with a “financial interest” in an estate

# Procedure

- No mandatory requirement to pass accounts
- May choose or be compelled
- Provides fiduciary with certainty and protection from liability for the period of the passing
- Minor or incapable person:
  - OCL and OPGT generally mandate accounts be passed
  - Close scrutiny of these accounts

# Do You or Don't You?

- Factors to consider in decision to pass accounts:
  - Nature and extent of the estate or trust
  - Complexity of the administration
  - Whether there has been litigation
  - Express provisions of the governing document
- Decision to pass must be weighed in light of value of administration and estimated costs

# Jurisdiction of the Fiduciary

- Arises from the various “Trustee Acts” or “Estate Administration Acts” per province
- In Ontario *Trustee Act* R.S.O 1990, c.T. 23 for Estate Trustees
- Court can compel Estate Trustee to pass accounts only on behalf of a person interested in such property, or a creditor of the deceased

# Limitation Periods

- No time period in legislation
- Provincial limitation legislation and the case law arising from the statute
- *Syndicate Number 963 (Crowe) v. Acuret Underwriter* 2009 CanLII 51195 (ONSC) that accepted 2 year limitation period – failure to account for trust funds
- Estate Administration: “Executor’s Year”
- Timing distinguished from applicable statutory limitation periods under *Limitations Act*

# THE PROCESS

The Conduct of the Audit

# Content of Application

- Generally, the application consists of:
  - An affidavit exhibiting the accounts,
  - Certificate of Appointment/Probate, and
  - A copy of any previous judgment on passing

# Jurisdiction of the Court

- The judge has jurisdiction to make full inquiry:
  - the estate (or assets),
  - administration,
  - distribution, and
  - estate trustee conduct (including any complaint)



# Informal Accounts

- In many cases, no formal passing of accounts ever takes place because the beneficiaries are satisfied to receive their share and waive their right to a formal passing of accounts

# Formal Accounts

- **Rules 74.17(1)(a)-(j),(2)(3):**
- Application commenced and verified by affidavit
- Copy of Certificate of Appointment of Estate Trustee (or Probate)
- Previous judgment on passing
- 60 days (or 75 days if outside of Ontario)

# Formal Accounts

- The statements required:
  - Statements of assets and liabilities
  - Capital and revenue receipts
  - Capital and revenue disbursements
  - Investment account
  - Unrealized assets
  - Statement of compensation (proposed or claimed)

# Ontario: “*The Reality*”

- Procedure in Ontario under the *Rules* is anything but clear
- Procedure varies from judicial district to judicial district, i.e., Toronto is different than Ottawa
- However, actual procedures vary greatly-  
Practice Direction Toronto for example

# Contested vs. Uncontested

## **Uncontested Passing**

- Applications where no objections
- No hearing required
- Least costly

## **Contested Passing**

- Where objection(s) are raised
- Hearing is required
- Directions may be sought, or other issues and irregularities raised

# Court Directions

## Order Giving Directions

- Rarely possible to proceed to a hearing on initial hearing date, where there are objections
- Process is 'back and forth':
  - objection / response / reply
  - means a procedural framework is in place, as every application to pass accounts is unique

# Any Certainty ?

- At all times, in any jurisdiction, the Court retains jurisdiction to control the proceedings
- Notwithstanding common practice in any judicial district, the procedure for the conduct of a hearing is not clearly delineated in the *Rules*
- *Parties may obtain certainty by bringing a motion for directions early in the proceeding regarding...*

# Motions for Directions

- The nature and scope of the evidence
- The procedural “rules” the Parties will follow
- Filing requirements for materials
- Calling or responding to evidence
- The need for witnesses
- If necessary, the trial of an issue
- Practice Directions, if any



# Considerations

## No Order Giving Directions?

- Then, no clear process and potentially serious consequences
- Matter may be disposed of in an unanticipated manner (*Medynski, Loveman*)

# Trial of an Issue

- Allegations akin to breach of fiduciary duty / bad faith
- Audit proceeding, and ought not to be corrupted to permit the trial of an issue which should be brought in another proceeding
- Why? Because of the potentially limited evidence available to a Court on a Passing of Accounts

# Viva Voce Evidence

- Generally, in Toronto, Passing of Accounts proceed as Applications:
  - Evidence is adduced by way of Affidavit or otherwise on the written record
  - *Viva voce* evidence is rare
  - Cross Examination likely happens, if at all, out of court

# Viva Voce Evidence

Outside of Toronto, the procedure may be:

1. Brief examination-in-chief of the fiduciary in open court;
2. Cross examination of the fiduciary on the accounts and affidavit of verification;
3. Re-examination of the fiduciary; and
4. Submissions of counsel on evidence and law in accordance with general principles of trial advocacy.

# Mediation & Settlement

## Mediation

- Mandatory: Toronto, Ottawa, Windsor and Essex County
- Court may order in any event. Your client may benefit from in any event. Seek agreement?

## Offers to Settle

- In Ontario, possible Rule 49 protection on costs

# Other considerations

## **Multiple Wills**

- Means multiple passings, one for each will even if they all have the same beneficiary

## **Taxes**

- Fiduciaries should be advised to obtain Canada Revenue Clearance Certificate

# COMPENSATION

# Calculation

- Method for calculating compensation payable to trustee / executor:
  1. By instrument
  2. Pursuant to statute
  3. Common law



# Compensation

## Estate Trustee Compensation

- Entitled by statute, s.23 of the *Trustee Act*
- Compensation may be fixed on the passing
- *Trustee Act, s.61: “fair and reasonable allowance for his care, pains and trouble, and his time expended in or about the estate”*

# Compensation cont.

- In Ontario, for Trustees, no statutory guidance on compensation calculation
- Compensation guidelines have developed through case law:

*Laing Estate v. Laing Estate; Flaska Estate; Gordon Estate; and Jeffery Estate*

# Compensation cont.

- **“Five Factors”** *Toronto General Trusts Corporation v. Central Ontario Railway Company*
  1. Magnitude – size of trust;
  2. care and responsibility involved;
  3. time performing duties;
  4. skill and ability; and
  5. Success resulting from administration

- **Percentages Approach: Ontario**
- 2.5% charged on capital receipts;
- 2.5% charged on capital disbursements;
- 2.5% charged on revenue receipts;
- 2.5% charged on revenue disbursements; and
- if estate not immediately distributable, an annual care and management fee of two fifths of 1% of the average value of the gross assets under administration per annum

# Trilogy of Cases

- Three Ontario Court of Appeal cases (*Laing*, *Gordon*, *Flaska*) established a two-step process:
  - 1) Usual percentages are first applied and
  - 2) Appropriateness of the result checked against the five factors

# Compensation cont.

## Pre-taking Estate Trustee Compensation

- Generally pre-taking of compensation by trustees is unacceptable
- Some discrepancy in the case law, though

# Compensation cont.

## **Fixed by Will, Testamentary Instrument or Agreement**

- Unless Will fixes the compensation, it is open to attack and can be adjusted by court
- Presumption exists that any bequest in a Will to an Estate Trustee equals full compensation for services rendered

# Cont..

## Fixed Compensation cont...

- Or can be fixed by agreement, particularly where corporate or professional trustees appointed or Estate Trustee During Litigation (“ETDL”)
- The *Estates Act*, s.28 provides for reasonable remuneration for ETDL
- Should properly be subject of a court order



# Compensation cont..

- Compensation is also affected by number of trustees:
  - If co-trustees, compensation is generally shared
  - If trustees cannot agree on the terms, advice and direction may be sought from court

# Costs & Indemnity

- Costs of an uncontested passing are set according to a Tariff in Ontario
- Request for Increased Costs:
  - where there have been objections or costs above the Tariff
  - Strict time requirements
  - Include costs outline

# Trustee Indemnity

- Recently there has been some departure from the traditional premise that a trustee be reimbursed for disbursements and reasonable professional fees (S. 23.1 *Trustee Act*)
- However, in *Furtney Estate v. Furtney*, Estate Trustee ought to be fully reimbursed and indemnified from estate-see Oosterhoff chapter
- Hopefully courts will be back on track with this long standing principle

# Warning

- Overriding Message:
- an estate trustee engaging the services of a lawyer is responsible for the legal fees subject to review on a passing and even where full indemnity costs are not ordered

# COMMON OBJECTIONS

## And Recent Trends

# Case Law Trends

- Recent trends, suggest, absent specific agreement or court order, care and management or special fees claimed are rarely awarded
- Conduct must be reasonable or the consequences will be adverse costs awards / punitive in nature
- Time and expense devoted to question of passing should be proportionate to what is at stake in the accounting

# Trends cont.

- Courts continue to exercise wide discretion in respect of compensation, costs and overall disposition
- Process largely unlegislated, developed in best practices of counsel for its success

# Common Objections

- Failure to properly account
- Failure to maintain books / records
- Failure to adhere to prudent investor rule
- Improvident realization of assets
- Failure to maintain “even hand”
- Acting in conflict of interest, breach of trust etc...



# *Medynski and Loveman*

***Re Medynski, 2016 ONSC 3353***

***Re Loveman, 2016 ONSC 2687***

- Passing of Accounts brought by 1 beneficiary of Estate and child of incapable person under Guardianship of fiduciary, a trust company.
- Objector Advanced many objections through:
  - Notice of Objection;
  - Reply to Notice of Objection;
  - Second Reply to Notice of Objection;
- Minimal or low monetary value

## *Medynski Cont'd*

- Motion brought in which Objector sought to admit *viva voce* evidence at trial
- Court granted *limited* right to *viva voce* evidence, the scope of which was to be determined by the hearing judge in a pre-hearing motion
- Less than a month before the hearing, Objector served more than 50 Requests to Admit
- Hearing proceeded as a trial, with examination-in-chief of the fiduciary representative, cross examination and re-examination

## *Medynski Cont'd*

- Total monetary value of objections was approximately \$30,000.00
- Legal fees incurred in the course of proceeding vastly exceeded this amount
- Hearing lasted a total of approximately 5 days
- Parties re-attended for a 1.5 day hearing on costs

## *Medynski Cont'd*

- Court found:

[40] Upon a review of the nature of the objections and the findings of this court, the only specific monetary reduction in [the fiduciary's] compensation can be the \$3,800.00 that was conceded by [the fiduciary] to be appropriate. The issue as to whether there should be any further reduction is the real issue for this court to determine.

## *Medynski Cont'd*

[41] Some of the objections are more an expression of discontent over the perceived shortcomings in the accounting of the other two beneficiaries for the time prior to [the fiduciary's] involvement.

## *Medynski Cont'd*

[42] Other objections are very general and/or not capable of quantification. This court does not go so far as to call them nit-picking as counsel for [the fiduciary] suggests. They are, however, disproportionate to the value of the assets and the time required to fully assess and litigate every objection.

## *Medynski Cont'd*

[43] There was delay on the part of [the fiduciary] but, overall, that delay was not unreasonable, given the circumstances. There were, however, delays in responding to many inquiries and requests. Communication on the part of [the fiduciary] was not as responsive as it might have been. While no possible loss can be quantified, the communication shortcomings, the delays and the failures to follow up must be found to have possibly put the assets/income at risk.

## *Medynski Cont'd*

[44] On the other hand, some of the objections appear to have been more than merely a good faith inquiry.



## *Medynski Cont'd*

[45] Given the foregoing considerations and findings, together with the applicable law set out above, this court has determined that a very modest reduction in the compensation sought by [the fiduciary] is in order. The amount sought in accordance with the draft order is \$27,655.05. That total is to be reduced by 6% and a further \$3,800.00.

# *Medynski: Costs – 2016 ONSC 4257*

- The Court found:

[17] The objector had only a very modest degree of success. As the court observed during the course of submissions, [the fiduciary] might not have received an A+ for the manner in which it conducted the trusteeship, but it certainly was entitled an A. [The Fiduciary] was clearly more successful than [the Objector][...]

## *Medynski: Costs Cont'd*

[19] [The Fiduciary] had a burden, far beyond the norm to respond to not only the objections but also to the notices to admit.

[20] [The Fiduciary] acted reasonably in responding to what it perceived to be an allegation that it was in breach of its fiduciary obligation to the beneficiaries.

## *Medynski: Costs Cont'd*

[21] A beneficiary who is considering making objections on a passing of accounts would certainly not imagine the possibility of a costs award against herself/himself requiring the payment, if unsuccessful, in excess of \$260,000.00. An award of that magnitude becomes an access to justice issue. It would have a chilling effect on most potential objectors.

## *Medynski: Costs Cont'd*

[22] One must bear in mind that costs in this matter became extremely disproportionate to the potential value of all of the objections. All of the parties, to a greater or lesser extent, share responsibility for that result.

## *Medynski: Costs Cont'd*

### **RESULT:**

[23] Given all of the foregoing, with particular emphasis on reasonableness, fairness, proportionality and the reasonable expectation of the unsuccessful party, I have concluded that an award of costs to [The Fiduciary], payable by the objector, [...], must be limited to \$69,000.00 plus disbursements of \$7,325.72. Any amount beyond that would be both excessive and unreasonable.

# Medynski: Lessons & Best Practices Guidelines

1. A comprehensive Order Giving Directions should be obtained early in the proceeding to govern all evidence and procedural aspects of the proceeding.
2. Objectors should carefully weigh their decision to Object: *de minimis non curat lex*
3. Objectors must restrain the allegations against the fiduciary to what is appropriate and provable: i.e., allegations of bad faith

# *Medynski:* Lessons

4. The Costs incurred must be proportionate to the monetary value of the objections in issue: a Passing of Accounts should not become a “nit-picking” exercise.



**THANK YOU & QUESTIONS?**