COMPENSATION
AND PASSING OF ACCOUNTS

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1. Introduction

The title of my paper is intimidating, even daunting. It is the remit I've been given. But it suggests that I must discuss a shedload[1] of material. However, I have been allocated only a limited amount of time for my presentation, so I shall have also to limit the matters I cover in my paper.[2] Accordingly, I shall restrict my paper to an

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[1] No, this is not a typographical error. The expression is recognized as a well-established word by the online Oxford English Dictionary, though principally in British English. It means a large amount or number. I suspect that the vulgar North American equivalent came about because of a mishearing of the pronunciation of the English word.

[2] Helpful sources on the topic include: Kimberley A. Whaley, "Fiduciary Accounts and Court Passsings," in *WEL on Fiduciary Accounting: Guardianship, Attorney, Estate & Trust Accounts*, 2nd ed. (Toronto: in house publication, Fall 2016), p. 1 (reprinted in Anne E.P. Armstrong, *Estate Administration: A Solicitor's Reference Manual* (Toronto: Thomson Reuters/Carswell, 1988, loose leaf), p. SLL-32). See also chapter 2, "Uncontested Court Passings"; chapter 4, "Tips and Traps When Preparing Estate/Guardianship Accounts"; and chapter 5, "Court Passings: Persons under Disability". And see Jordan Atin, "Executors' Compensation" (1999), 19 E.T.P.J. 1; Brian A. Schnurr, *Estate Litigation*, 2nd ed. (Toronto: Thomson Reuters/Carswell, 1994, loose leaf), chapter 5.7; Jennifer J. Jenkins, H. Mark Scott, and Edward Olkovich, *Compensation and Duties of Estate Trustees, Guardians and Attorneys* (Aurora: Canada Law Book, 2006, loose leaf), Part I, "Compensation for Estate Trustees", chapters 1-4; *Macdonell, Sheard and Hull on Probate Practice*, 5th ed. by Ian M. Hull and Suzana Popovic-Montag (Toronto: Thomson Reuters/Carswell, 2016), chapters 22 and 23; *Widdifield on Executors and Trustees*, 6th ed. by Carmen S. Thériault (Toronto: Thomson Reuters/Carswell, 2002, loose leaf); *Waters' Law of Trusts in Canada*, 4th ed. by Donovan W.M. Waters, Mark Gillen, and Lionel Smith (Toronto: Thomson Reuters/Carswell, 2012), pp. 1221-31; *Oosterhoff on Trusts: Text, Commentary and Materials*, 8th ed. by A.H. Oosterhoff, Robert Chambers, and Mitchell McInnes (Toronto: Thomson Reuters/Carswell, 2014), §16.2.

outline of the right to compensation, how and when the amount is determined and allowed, whether fiduciaries can take interim compensation, and whether they will have to repay what they have taken in excess of the allowable amount. I shall then give an outline of the process of the passing of accounts. Consequently, I shall not discuss the intricate details of the procedure on a passing of accounts. However, they are dealt with in great detail in the sources already mentioned.

2. Compensation

2.1 Introduction

All trustees, estate trustees, attorneys, and other fiduciaries are entitled to be compensated for their services. This right may be included in an agreement or in a will. But the right to compensation is in any event conferred by statute. If it is not otherwise provided for, the compensation is usually determined when the fiduciary passes her accounts.

2.2 Estate Trustees and Trustees

2.2.1 Statutory Entitlement

The *Trustee Act*,[3] provides in s. 61(1) 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".[4] This and other provisions of the Act apply also to estate trustees, by virtue

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3 R.S.O. 1990, c. T.23.

4 Emphasis added. The full section provides:

> **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.
> (2) The amount of such compensation may be settled although the estate is not before the court in an action.

of s. 1, which defines "trust" to include "the duties incident to the office of personal representative of a deceased person" and "trustee" as having a corresponding meaning.

Further, s. 23(2) provides that on the passing of the accounts of the trustee, the judge has power to fix the amount of compensation payable to the trustee.[5] Thus, normally an estate trustee will be awarded compensation when its accounts are passed.

It is interesting that the Act does not give any guidance about how the compensation should be calculated. However, the case law has developed such guidelines. In an early Ontario case, *Toronto General Trust v. Central Ontario Railway Co.*,[6] the court identified five factors that should be considered in determining the quantum of the trustee's compensation:

(1) the magnitude of the trust;
(2) the care and responsibility springing therefrom;
(3) the time occupied in performing its duties;

> (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.
> (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.
> (5) Nothing in this section applies where the allowance is fixed by the instrument creating the trust.

[5] Subsection 23(2) of the *Trustee Act* states:

> Where the compensation payable to a trustee has not been fixed by the instrument creating the trust or otherwise, the judge upon the passing of the accounts of the trustee has power to fix the amount of compensation payable to the trustee and the trustee is thereupon entitled to retain out of any money held the amount so determined.

[6] (1905), 6 O.W.R. 350 (H.C.J.), at 354, 1905 CarswellOnt 449, *per* Teetzel J. The quotation has been split into separate lines for the sake of clarity.

(4) the skill and ability displayed; and
(5) the success which has attended its administration.

This approach requires the court to consider the five factors first and after that it determines what is fair and reasonable compensation under s. 61(1).

One year earlier, in *Re Farmer's Loan and Savings Co.*,[7] the court had spoken of the "well settled" practice of awarding compensation by way of percentages. The current percentages were described as follows by Killeen J. in *Re Jeffery Estate*:[8]

(1) 2.5% charged on capital receipts;
(2) 2.5% charged on capital disbursements;
(3) 2.5% charged on revenue receipts;
(4) 2.5% charged on revenue disbursements; and
(5) if the estate will not be distributed immediately, an annual care and management fee of two-fifths of 1% of the average value of the gross assets under administration.

In 1998 the Court of Appeal released judgments in three cases that addressed the issue of the calculation of executors' compensation: *Laing Estate v. Laing Estate*,[9] *Re Gordon Estate*,[10] and *Re Flaska Estate*.[11] These cases continue to be followed and form the basis for the modern approach to calculating compensation.

The three cases established that the court should first apply the usual percentages and then it should check the result against the five factors listed in *Toronto*

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7 (1904), 3 O.W.R. 837 at 839, 1904 CarswellOnt 462.

8 (1990), 39 E.T.R. 173 (Ont. Surr. Ct.), at 178 (what follows is a summary of what Killeen J. wrote).

9 1998 CarswellOnt 4037, 167 D.L.R. (4th) 150, 25 E.T.R. (2d) 139 (C.A.: Krever, Doherty, and O'Connor JJ.A.).

10 1998 CarswellOnt 2207, 24 E.T.R. (2d) 308 (C.A.: Boland, Dunnet, and Greer, JJ.A.).

11 1998 CarswellOnt 4059 (C.A.: Krever, Doherty, and O'Connor JJ.A.).

General Trusts[12] to ensure that the result is appropriate. This check may lead the court to reduce the compensation determined under the percentage approach if that approach would result in over-compensation, especially having regard to the size of the estate.

In the three cases the Court of Appeal also expressed the opinion that a special fee may sometimes be awarded in exceptional circumstances, for example, when there has been protracted litigation, or complex management issues in the running of a business. However, the court stated that such a special fee must remain unusual.

In *Laing* [13] the Court of Appeal described the process of calculating the amount of compensation as follows:

> 8 The issue to be determined here is the manner in which the factors identified in *Toronto General Trusts Corp. v. Central Ontario Railway*, [14] and the tariff guidelines are to be meshed so as to yield an amount which is "fair and reasonable" in all the circumstances. Having reviewed the six factums filed in these appeals, considered the oral submissions and examined the relevant authorities, it appears that all parties favour the approach set down by Killeen J. in *Re Jeffery Estate*: [15]
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> > To me, the case law and common sense dictate that the audit judge should first test the compensation claims using the "percentages" approach and then, as it were, cross-check or confirm the mathematical result against the "five-factors" approach set out in *Re Toronto General Trusts and Central Ontario Railway*. [16] Usually, counsel will, in argument, set out a factual background against which the five factors can be brought to bear on the case at hand. Additionally, the judge will consider whether an extra allowance should be made for management, based on special

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12 *Supra*, footnote 6.

13 *Supra*, footnote 9.

14 *Supra*, footnote 6.

15 *Supra*, footnote 8, at p. 179.

16 *Supra* footnote 6.

> circumstances. The result of this testing process should enable the judge to determine whether the claims are excessive or not and, in the result, will enable the judge to make adjustments as required. The process is not scientific but is not intended to be: in the estate context, it is a search for an award which reflects fairness to the executor; in a real sense, the search is for an appropriate quantum meruit award in a unique setting.

The Court of Appeal stated:[17]

> We agree with and adopt the approach taken in *Re Jeffery Estate*. [18] In our view, it best achieves the appropriate balance between the need to provide predictability while, at the same time, tailoring compensation to the circumstances of each case.

As is apparent from s. 61(4) of the *Trustee Act*,[19] when a solicitor is an estate trustee and has rendered professional services to the estate, the court may increase the compensation to reflect those services. However, when the solicitor/trustee submits an account for professional services, the account is likely to be reduced to the extent it includes time properly attributable to trustee work.[20]

In practice the courts often reduce the amount that would have been paid under the percentage approach.[21] They will do so, for example, if the estate trustees have done a poor job of administering the estate,[22] because of the fiduciary's improper conduct and failure to discharge her fiduciary duties, or simply because the amount

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17 Footnote 9, *supra*, para. 9.

18 Footnote 8, *supra*.

19 Footnote 3, *supra*.

20 *Krentz Estate v. Krentz*, 2011 ONSC 1653, additional reasons 2011 ONSC 4375.

21 See Macdonell, Sheard and Hull, *supra*, footnote 2, pp. 555-57.

22 *Irwin v. Robinson*, 2007 CarswellOnt 6368 (S.C.J.); *Re Wood Estate*, [1977] 2 W.W.R. 538 (Sask. Surr. Ct), late filing of income tax returns; *Re Goldlust Estate* (1991), 44 E.T.R. 97 (Ont. Gen. Div.), failure to respond in a timely fashion to legitimate requests for information *Re Rumford Estate* (1996), 14 E.T.R. (2d) 300, delay in administering estate and loss of jewelry.

claimed is too high in the circumstances.[23] The courts can also disallow compensation entirely because of unconscionability or other troubling conduct on the part of the fiduciary,[24] or because of his defalcation.[25] Section 49(2) of the *Estates Act*[26] provides that the court has jurisdiction to make a full inquiry in these matters. The courts will also often disallow a claim for a management fee.[27]

If there is more than one estate trustee, they must normally share the compensation equally. However, if one estate trustee has done most of the work and the others do not agree that she should receive the bulk of the compensation, the parties can seek advice and directions from the court. The court has jurisdiction to apportion the compensation in accordance with the fiduciaries' respective services.[28]

2.2.2 Fixed by Instrument

The testator may fix the compensation in the will. In that case, the jurisdiction of the court to determine the compensation is ousted, as is apparent from ss. 23(2) and 61(5) of the *Trustee Act*, quoted above.[29] However, if the will does not fix the

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23 *Strickland v. Thames Valley District School Board*, 2007 CarswellOnt 6248 (S.C.J.).

24 *Volchuk Estate v. Kotsis*, 2007 CarswellOnt 4668 (S.C.J.); *Bolton v. Armstrong*, 2017 ONSC 1781; *Re Gibson*, [1930] 2 W.W.R. 400 (Man. C.A.), failure to keep proper accounts; *Re Lowe Estate* (1996), 14 E.T.R. (2d) 300 (B.C.S.C.), delay resulted in income loss, accounts were deficient and trustee failed to produce documentation. The court can also deny compensation to attorneys for failure to keep proper accounts, failure to produce supporting documents, and inability to explain disbursements: *Fareed v. Wood*, 2005 CarswellOnt 2572.

25 *Aragona v. Aragona (Guardian of)*, 2012 ONSC 1495, affirmed 2012 ONCA 639.

26 R.S.O. 1990, c. E.21.

27 See, *e.g.*, *Re Archibald Estate* (2007), 6 E.T.R. (3d) 219 (Ont. S.C.J.); *O'Sullivan v. O'Sullivan* (2007), 32 E.T.R. (3d) 135 (Ont. S.C.J.); *Re Aber Estate*, 2015 ONSC 5123 (Div. Ct.), paras. 38-39.

28 Macdonell, Sheard and Hull, footnote 2, *supra*, p. 566.

29 In footnotes 4 and 5, *supra*.

compensation with any specificity, a party can attack the provision and the court can adjust the compensation upward or downward.[30]

If the will gives a legacy to the estate trustee, it is presumed that the legacy is intended as a substitute for compensation.[31] However, the presumption can readily be rebutted.[32]

When the will appoints professional or corporate trustees, it is common for the testator and the estate trustees to fix the compensation by agreement outside the will.[33] However, such an agreement binds only the original estate trustees, not their successors.[34]

It is also common for compensation to be fixed by the court order that appoints an estate trustee during litigation. The court has power to direct that the ETDL "shall receive out of the property of the deceased such reasonable remuneration as the court considers proper."[35] The courts have held that therefore an ETDL is normally

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30 *Re Andrachuk Estate* (2000), 32 E.T.R. (2d) 1 (Ont. S.C.J.). The will contained the following compensation provision:

> I AUTHORIZE my Trustees to pay to themselves from time to time from the capital and/or income of my estate or the trusts thereof such amounts as my Trustees may, in their discretion, consider reasonable as payments on account of any compensation to which they shall subsequently become entitled by reason of a Court order on any passing of accounts or by agreements with my beneficiaries; provided that any Trustee, who is also a beneficiary, shall only be entitled to be reimbursed for expenses and to receive a reasonable *per diem* payment for time spent on the affairs of my estate.

The court reduced the compensation claimed by the two nephews who were beneficiaries and the remaining estate trustees, holding that the *per diem* rate had to be reasonable.

31 See Jenkins, Scott, and Olkovich, footnote 2, *supra*, Part I, ch. 8, "Legacies in Lieu of Compensation."

32 See, *e.g.*, *Re Watterworth Estate*, 1995 CarswellOnt 2528 (Gen. Div.).

33 See, *e.g.*, *Re Daniel Estate*, 2019 ONSC 2790, paras. 21-22

34 *Re Robertson*, [1949] O.R. 427. (H.C.).

35 *Estates Act*, footnote 26, *supra*, s. 28.

entitled to compensation on the same basis as a trustee and an estate trustee.[36] Even if the court applies the principles applicable to trustees, it will typically adjust the amount of the compensation, since the duties of an ETDL are often less extensive that those of a regular estate trustee.[37]

Other courts have held that the compensation must be determined in accordance with the language of the legislation that permits the appointment of an ETDL, since it differs from that governing the entitlement of trustees to compensation.[38] However they may have to reconsider this opinion in light of the recent decision in *Meyers v. Rubin*.[39] It holds that s. 28 of the *Estates Act*,[40] is not the exclusive authority for the court to appoint an ETDL. That section applies only when the validity of a will or of probate is in issue. But, as the court noted, it has broad and inherent powers to supervise the management of an estate and to control its own processes. Accordingly, it can appoint an ETDL in other circumstances too. Since such an ETDL would not be subject to s. 28, the court is likely to apply trustee principles in determining her compensation.

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36 *Re McLennan Estate*, 2002 CarswellOnt 4153, 48 E.T.R. (2d) 59 (S.C.J.). And see *Church v. Gerlach*, 2008 CarswellOnt 11225 (S.C.J.).

37 See, *e.g.*, *Church v. Gerlach*, *supra*, footnote 36, at para. 14.

38 See, *e.g.*, *Wright v. Canada Trust Co.* (1984), (*sub nom.* Re Wright) 10 D.L.R. (4th) 481 (B.C.S.C.), affirmed (1985) (*sub nom.* Re Wright) 21 E.T.R. 80 (B.C.C.A.). The *Wills, Estates and Succession Act*, S.B.C. 2009, c. 13, s. 103(2)(c) now provides that an administrator pending legal proceedings "is entitled to reasonable compensation under the *Trustee Act* [R.S.B.C. 1996, c. 464] or as otherwise determined by the court."

39 2017 ONSC 3498, additional reasons 2017 ONSC 4121. See also *Class v. Smith*, 2018 ONSC 623, para. 38.

40 *Supra*, footnote 26.

2.2.3 When the Estate Trustee Becomes Entitled to Take Compensation

A fiduciary is entitled to retain estate assets in payment of her compensation when the amount of the compensation has been determined. This is because the compensation is a first charge or lien on the estate property, just as expenses for which the estate trustee is entitled to be indemnified are a first lien on the estate property.[41] Thus, the fiduciary is entitled to retain the property until the compensation is satisfied. Moreover, the lien lies against the entire estate property, both income and capital, so that all beneficiaries must bear the cost rateably.[42] This is, of course, subject to the will or other arrangement, which may have imposed a different regime. Whether the fiduciary can recover compensation directly from the beneficiaries under the rule in *Hardoon v. Belilios*,[43] appears never to have been decided.[44]

It is important to remember that the lien is lost if the fiduciary has distributed the assets. However, he can recover the property to satisfy the compensation, but only under a court order.[45]

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41 *Life Assn. of Scotland v. Walker*, 1876 CarswellOnt 182, 15 Gr. 405 (Ch.); *Re Ermatinger* (1896), 28 O.R. 106, affirmed with a variation *sub nom*, Re Tilsonburgh Lake Erie and Pacific Railway Company (1897), 24 O.A.R. 378 (C.A.)

42 *Waters' Law of Trusts in Canada*, 4th ed. by Donovan W.M. Waters, Mark Gillen and Lionel Smith (Toronto: Thomson Reuters/Carswell, 2012, pp. 1224-25. See also Albert H. Oosterhoff, "Some Aspects of Indemnification of Trustees," Law Society of Upper Canada, 16th Annual Estates and Trusts Summit – Day One, 11 November 2013, §4.

43 [1901] A.C. 118 (P.C.). The rule permits trustees to recover expenses directly from the beneficiaries in limited circumstances. The rule is discussed in Oosterhoff, *ibid*, §2 and in A.H. Oosterhoff, "Indemnification of Trustees: The Rule in Hardoon v. Belilios" (1978), 4 E.T.Q. 180.

44 See Waters, *supra*, footnote 42, p. 1225, note 90.

45 See *Patterson v. MacKenzie*, [1924] 3 D.L.R. 234 (Sask. Q.B.).

The compensation may be determined by the will or other instrument and it may also allow the fiduciary to take interim compensation. If interim compensation is permitted, the fiduciary may, of course, retain estate assets from time to time in payment of the compensation, subject to having to repay excessive takings. The fiduciary may also retain assets to satisfy the amount of the compensation by obtaining releases from all the beneficiaries, but if some refuse to grant a release, or some are not *sui juris*, a formal passing of accounts may be required.[46]

If interim compensation is not permitted and releases cannot be obtained, the fiduciary must normally wait until the court has fixed the compensation on a passing of accounts. Section 23(2) of the *Trustee Act*[47] provides that once the compensation has been fixed by the court, the fiduciary is entitled to retain the amount so determined.

2.2.4 Interim Compensation

The heading of this section may seem strange. Most people speak of "pre-taking" compensation instead. In my opinion that is a silly expression, because it is a *non sequitur*. It suggests that you are taking something before actually taking it, which is impossible.[48] My opinion is supported by s. 65 of the *Uniform Trustee Act,*[49]

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46 See Macdonell, Sheard and Hull, *supra*, footnote 2, pp. 545-48.

47 *Supra*, footnote 3, *supra*.

48 Perhaps the term is a derivative of the expression "pre-planning" that is common in the funeral industry. That term is total nonsense, of course. Planning is something you do before an event. The prefix "pre," which means "before," is therefore totally redundant. "Planning" by itself is sufficient.

49 This Act was promulgated by the Uniform Law Conference of Canada in 2012. It can be found online at http://www.ulcc.ca/images/stories/2012_pdfs_eng/2012ulcc0028.pdf. The term "interim compensation is not actually used in s. 65, but is used in the section's heading. For a discussion of the Act, see Albert H. Oosterhoff, "Trust Law Reform: The Uniform Trustee Act" (2014), 34 E.T.P.J. 329.

which allows a trustee, subject to certain conditions, to take *interim compensation* without court approval.[50]

Apart from statutory permission such as that found in the *Uniform Trustee Act*, it is generally accepted that estate trustees and trustees may not take interim compensation, unless the instrument appointing them contains a charging clause that permits it,[51] all the beneficiaries consent, or the court approves it on a passing of accounts. In *Re William George King Trust*[52] Misener J. suggested that taking interim compensation without court approval is not inappropriate for work already done in a continuing trust, so long as the amount taken is reasonable. Taking interim compensation saves the beneficiaries the expense of a passing of accounts. Similarly, in *Pachaluck Estate v. DiFebo*[53] the court allowed an interim taking because the work and services had been earned at the time of the taking and the amount taken was fair. Also, in *Gefen v. Gaertner*[54] an estate trustee during litigation brought a motion for an order allowing him to take interim compensation before the passing of accounts. Since the amount was just and equitable, the court granted the motion, subject to adjustment on final passing of accounts. However, most cases excoriate the practice and hold that unauthorized taking of interim

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50 In fact, the Ontario Law Reform Commission recommended that trustees be allowed to take interim compensation more than 30 years ago. See *Report on the Law of Trusts* (Toronto: Ministry of the Attorney General, 1984), pp. 255-61.

51 See, *e.g.*, *Re Andrachuk Estate*, *supra*, footnote 30.

52 (1994), 113 D.L.R. (4th) 701, 2 E.T.R. (2d) 123, 1994 CarswellOnt 645 (Gen Div.).

53 2009 CarswellOnt 2278 (S.C.J.), para. 23, additional reasons 2009 CarswellOnt 3980 (S.C.J.). The court followed *Re William George King Trust*, *ibid*.

54 2018 ONSC 5698, 44 E.T.R. (4th) 157, appeal to CA quashed 2019 ONCA 233 as appeal lay to Divisional Court, further reasons 2019 ONCA 327.

compensation is impermissible and may render the trustee liable for breach of trust.[55]

For this reason, professional trustees usually insist on a clause in a will or trust that permits interim taking of compensation. It may be desirable to insert such a clause into most wills, subject to appropriate safeguards.[56]

2.2.5 Repayment of Excess Compensation

An estate trustee may be ordered to repay excess compensation taken. This usually happens on a passing of accounts and typically concerns an unauthorized interim taking by the estate trustee. However, it may also happen when the will authorizes interim taking, but the amount taken is excessive.[57]

If the estate trustee has taken interim compensation without authorization, the court may require repayment of the amount on a passing of accounts.[58] However, courts are often lenient in the matter. For example, in *Re Wright Estate*[59] the court charged the executors interest only on the amount by which the interim compensation exceeded the amount of the compensation allowed by the court.

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55 See, *e.g.*, *Re Knoch* (1982), 12 E.T.R. 162 (Ont. Surr. Ct.); *Re Gordon Estate* (1998), 114 O.A.C. 312 (Div. Ct.); *Re Freeman Estate*, 2007 CarswellOnt 5654, 34 E.T.R. (3d) 157 (Div. Ct.).

56 For a discussion of such safeguards, see those imposed by s. 65 of the *Uniform Trustee Act*, *supra*, footnote 49. These can be modified or expanded as circumstances require.

57 See, *e.g.*, *Re Anthony Estate*, 2006 CarswellOnt 8184 (S.C.J.), in which the will directed that any excess compensation should be repaid to the estate. For another example see the clause in the will in *Re Andrachuk Estate*, *supra*, footnote 30.

58 *Zimmerman v. McMichael Estate*, 2010 ONSC 2947 (S.C.J.).

59 (1990), 43 E.T.R. 69 (Ont. Gen. Div.), additional reasons (1990), 43 E.T.R. 82 (Ont. Gen. Div.), para. 19.

2.3 Guardians and Attorneys

2.3.1 Guardians and Attorneys for Property

The rules are quite different for guardians and attorneys. Section 40(1) of the *Substitute Decisions Act, 1992* [60] provides that a guardian of property or an attorney under a continuing power of attorney "may take annual compensation from the property in accordance with the prescribed fee scale" and they may take it monthly, quarterly, or annually.[61] The scale provides for a rate of three per cent on capital and income receipts, three per cent on capital and income disbursements, and three-fifths of one percent on the annual average value of the assets as a care and management fee.[62]

Section 40(3) of the Act provides that the guardian or attorney may take a greater amount of compensation if the Public Guardian and Trustee and the guardian or attorney of the person consent in writing or, if the PGT is the guardian or attorney, if the court approves. I am not aware of any reported cases in which the PGT has consented to, or has sought approval for, a greater amount of compensation. Section 40(4) provides that subsections (1) to (3) are subject to provisions respecting compensation contained in a continuing power of attorney.

It is noteworthy that the Act imposes a higher standard of care on guardians, including the Public Guardian and Trustee, who receive compensation for managing property. Subsections 32(8) and (9) mandate such persons to "exercise the degree of care, diligence and skill that a person in the business of managing the property of others is required to exercise." In contrast, subs. 32(7) provides that a

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60 S.O. 1992, c. 30.

61 *Ibid*., subs. (2).

62 O. Reg. 26/95, as amended, s. 1.

guardian who does not receive compensation is required to exercise only "the care, diligence and skill that a person of ordinary prudence would exercise in the conduct of his or her own affairs." These provisions apply also to attorneys under a continuing power of attorney, by virtue of. s. 38(1).

The higher standard for "professional" guardians and attorneys is noteworthy, because, although Canadian courts have considered the issue, they have not thus far recognized such a higher standard for trustees.[63] However, the *Uniform Trustee Act*[64] does impose the higher standard and it is likely that the higher standard will in due course be adopted in the Canadian provinces. A higher standard for trustees has been adopted in many jurisdictions.[65]

2.3.2 Guardians and Attorneys for the Person

The *Substitute Decisions Act* does not make provision for compensation to a guardian or attorney for the person, but neither does the Act prohibit it. In *Re Brown*[66] the court held that it has jurisdiction to award compensation to persons in a variety of circumstances, including substitute decision makers who are guardians or attorneys of the person. The basis of the award is not the percentage method. Rather the basis is reasonableness, both in respect of the services rendered and in the amount claimed. To succeed in a claim, the applicant must adduce the necessary evidence that will allow the court to determine the reasonableness of the claim and its amount. In *Brown*, which involved a trust company as guardian of the property and of the person, the court dismissed the guardian's claim for

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63 See *Fales v. Canada Permanent Trust Co.; Wohlleben v. Canada Permanent Trust Co.*, [1977] 2 S.C.R. 302, 70 D.L.R. (3d) 257.

64 *Supra*, footnote 49, ss. 26(3) (generally) and 31 (investments).

65 See Oosterhoff, Trust Law Reform, *supra*, footnote 49, §4.1 (especially note 8) and §5.

66 (1999), 31 E.T.R. (2d) 164 (Ont. S.C.J.)

compensation as guardian of the person for lack of evidence. In *Cheney v. Byrne (Litigation Guardian of)*[67] the court confirmed that it has jurisdiction to award compensation also to an individual who serves as an attorney for personal care. However, in *Re Shibley Estate*[68] Molloy J. partially disallowed a claim for compensation made by a parent, who served as attorney for personal care. The court was critical of the attorney's conduct and also noted that a parent is presumed to provide care without compensation.[69] In *Re Daniel Estate*[70] the court allowed generous compensation to the attorneys for the extensive services they provided to the grantors of the powers of attorney for personal care. The case is instructive on the issue of the kind of information the attorneys must provide to substantiate their claims.

3. Accounts

3.1 Introduction

As mentioned earlier,[71] absent other arrangements compensation is usually determined and allowed on a passing of accounts by the fiduciary. In this section I shall briefly discuss the fiduciary's obligation to account and then give an outline of the process of the passing of accounts.

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67 (2009), 9 E.T.R. (3rd) 236 (Ont. S.C.J.).

68 [2004] O.J. No. 5246 (S.C.J.).

69 For other cases in which the court has awarded compensation to guardians and attorneys for personal care, see: *Sandhu (Litigation Guardian of) v. Wellington Place Apartments*, 2006 CarswellOnt 3668 (S.C.J.); *Kiomall v. Kiomall*, 2009 CarswellOnt 2246 (S.C.J.); and *Giusti (Litigation Guardian of) v. Scarborough Hospital* 2008 CarswellOnt 2769 (S.C.J.).

70 2019 ONSC 2790, paras. 26-29.

71 *Supra*, §2.2.1.

3.2 Duty to Account

Before discussing the passing of accounts, it is well to remember that estate trustees, trustees, and substitute decision makers have a duty to account. They are fiduciaries and thus must be ready to prove that they are faithful to the trust reposed in them.[72] This means that they must keep proper records and accounts of their dealings with the estate or trust property. Moreover, they must be ready always to produce them for inspection and examination by the beneficiaries. However, they are allowed a reasonable time to assemble the accounts after a beneficiary requests them. The beneficiary is entitled to inspect the accounts and make copies or extracts, but normally the fiduciary is not required to provide copies to the beneficiary.[73] If the fiduciaries cause expense because of their failure to furnish accounts, they must bear the expense personally.[74] They may also be required to pay the costs of the beneficiaries if there is delay in administering the estate with a resulting income loss and the accounts are deficient.[75]

Fiduciaries must also regularly give beneficiaries accurate and full information and explanations of the state of the estate or trust when the beneficiaries request such information.

Although the duty to account and provide information does not specifically require it, fiduciaries are well-advised, quite apart from their duty to provide information on request, to keep beneficiaries informed of what is happening in the administration of an estate or trust. If they keep the beneficiaries apprised of

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72 *Cf.* 1 Cor 4:2.

73 *Sandford v. Porter* (1889), 16 O.A.R. 565 (C.A.).

74 *Re Smith*, [1952] O.W.N. 62 (H.C.), reversed on other grounds [1952] O.W.N. 170 (C.A.).

75 *Re Lowe Estate* (2002), 45 E.T.R. (2d) 248 (B.C.S.C.).

expenses incurred, the fiduciaries' legal right to compensation and its amount, and the progress of the administration, they may well be able to avoid a contested passing of accounts and the concomitant expense of such a passing. Section 28 of the *Uniform Trustee Act*[76] codifies and expands the common law duty of a trustee to account and provide information to the beneficiaries. It requires the trustee to deliver a report to every "qualified beneficiary"[77] for every fiscal period of the trust. In my opinion, such a provision will go a long way to keep beneficiaries content and therefore, even in a jurisdiction that does not have such a provision, estate trustees and trustees are well-advised to follow its spirit and intent.

Nonetheless, if requested by the beneficiaries, estate trustees are required to account for their actions. That is clear in the case of estate trustees and trustees, but it may be less clear in the case of substitute decision makers. When a person grants a power of attorney and in it appoints an attorney, the attorney is often not required to begin acting as such until later, that is, when the grantor is losing the capacity to deal with her property by herself. When the attorney then begins to act, he is accountable only for his actions, not for what happened before he assumed his duties. However, sometimes there is initially an overlap of duties: the grantor may continue to exercise some of her powers, but the attorney also assumes some responsibilities. Clearly, the attorney will be accountable for his actions. But can he also be held accountable for hers during the period of overlapping duties? *Fair v. Campbell Estate*[78] addresses this question. The grantor remained capable

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76 *Supra*, footnote 49.

77 Section 1 of the Act defines this term as a beneficiary who has a vested beneficial interest in the trust property, as well as a beneficiary who does not have such an interest but wants to be treated as a qualified beneficiary and has delivered a notice to that effect to the trustee.

78 2002 CarswellOnt 5481, 3 E.T.R. (3d) 48 (main action), additional reasons 2002 CarswellOnt 5482, 3 E.T.R> (3d) 67 (costs decision).

throughout and she made all her own decisions. The attorney's role was limited to executing her decisions, not making them. In those circumstances the court held that while he was accountable for his actions, he was not accountable for hers.[79]

However, another case, *Fareed v. Wood*,[80] takes a different view. A solicitor drafted a will for a client and the client appointed him her attorney for property. The grantor continued to make some decisions for herself, but the attorney also made decisions. During this time the grantor signed cheques in favour of a person who was not a beneficiary under her will, but who ended up with most of her estate. The evidence showed that the attorney had numerous meetings with the grantor and also with the recipient of the grantor's money, and that he monitored her bank accounts. The attorney's accounts were very deficient. He was unable to substantiate a large number of disbursements and failed to produce supporting documents. Nor did he provide notes from his file or explanations for the disbursements and failed to give evidence of instructions he received from the grantor while she was alive. In those circumstances the court held that the attorney assumed full responsibility for all financial activities once he assumed some duties and was fully accountable for them. The court refused to approve his accounts, denied the solicitor compensation, and required him to repay compensation he had taken to the estate.

It would seem that *Fair* and *Fareed* can readily be distinguished on the facts, but these cases do emphasize the importance of the duty to account. This is also clear from a slightly different case, *McMullen v. McMullen*.[81] The grantor had given his

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79 See also *Ekelshot-Kumelj v. Bradley*, which is to the same effect.

80 2005 CarswellOnt 2572.

81 (2006), 27 E.T.R. (3d) 304 (B.C.S.C.).

two daughters a power of attorney. They were concerned about his ability to manage his financial affairs when he began to spend money on a friend, although doctors had not found him incapable of managing his affairs. Acting in what they believed was his best interest, they signed a document transferring his interest in his condominium without his knowledge. The court held that they breached their duty to account and to act in accordance with their father's intentions. It declared that the transfer was void and directed that title be retransferred to the grantor.

3.3 Passing of Accounts

3.3.1 Informal Passings

An informal passing is possible in some situations if the beneficiaries agree, the fiduciary's compensation has been arranged, and the fiduciary's position is otherwise protected. The advantage of an informal passing is that it avoids the considerable expense of a formal passing and having to put the accounts in statutory format.[82] In an informal passing the fiduciary will normally want to obtain the releases of all the beneficiaries, if possible, to protect themselves from later disputes. Obtaining such releases has been a common practice in Ontario for many years.[83] The fiduciary will need to make sure, of course, that the person signing the release has capacity.[84]

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82 For an informative article on informal passings, see Susannah B. Roth, "Informal Fiduciary Accounting: Who, What, Where and Why" (2017), 37 E.T.P.J. 71.

83 *Re Sheard Estate*, 2013 ONSC 7729.

84 In *Foisey v. Green*, 2017 ONSC 7149 the application judge ordered a formal passing because the fiduciary was unable to show that she had reasonable grounds to believe that a beneficiary was capable when she signed a release. However, that decision was reversed on appeal to the Divisional Court 2019 ONSC 4989.

3.3.2 Contested Passings

It is regrettable that statutory provisions regarding the passing of accounts are spread over several statutes, rules, and regulations. This seems to be largely an accident of history, but it makes very little sense today, since the procedure for passing accounts is largely the same for all fiduciaries. A consolidation and rationalization of these provisions would be desirable. In Toronto there is a practice direction on the matter, but not elsewhere. This means that there is inconsistency in procedure and in outcome across the province and that is clearly undesirable.

Fiduciaries are not required to pass their accounts, except when compelled to do so by court order at the request of a beneficiary.[85] However, the beneficiary does not have a right to a formal passing of accounts. The court retains the discretion to grant or refuse an order to pass the fiduciary's accounts.[86] This jurisdiction is acknowledged in Rule 38.10(1)(a) of the *Rules of Civil Procedure*.[87] It provides that on the hearing of an application the presiding judge may "grant the relief sought or dismiss or adjourn the application in whole or in part and with or without terms." Moreover, s. 42(1) of the *Substitute Decisions Act*[88] provides that the court "*may* … order" the accounts of attorneys and guardians of property to be passed and that, apart from named persons who have a right to apply for such an order, the

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85 For a detailed review of the case law that addresses the question who may require a passing of accounts, see Marni M.K. Whittaker, "Passing Accounts", in Widdifield*, supra*, footnote 2, chapter 14; Macdonell, Sheard and Hull, *supra*, footnote 2, pp. 528-34.

86 See, *e.g.*, *Tinline v. Tinline Estate*, 2013 SKQB 167; *Gastle v. Gastle Estate*, 2014 ONSC 7099, additional reasons 2015 ONSC 718.

87 R.R.O. 1990, Reg. 194, as amended.

88 Footnote 60, *supra*.

court may also allow any other person "*with leave of the court*" to apply.[89] Hence under the Act there is also no right to a passing of the fiduciary's accounts.[90] Thus the court is likely to refuse to make the order if the attorney's involvement in the grantor's financial affairs was limited.[91]

Section 42(4) of the *Substitute Decisions Act* provides that a number of persons, other than the attorney or the grantor, may apply to have the attorney's accounts passed. The list includes "Any other person with leave of the court". The test to be applied whether a person should be granted leave is the court is convinced: (1) that the person has a genuine interest in the grantor's welfare; and (2) that the court hearing the application may order the attorney to pass the accounts.[92] However, even if a person has standing to apply, the court retains discretion to make such an order. The factors the court considers in exercising its discretion "include the extent of the attorney's involvement in the grantor's financial affairs and whether the applicant has raised a significant concern in respect of the management of the grantor's affairs to warrant an accounting".[93]

Lewis v. Lewis[94] was a case in which an elderly couple appointed the respondents, two of their six adult children, as their attorneys for property. The other four children sought leave to require the respondents to pass their accounts. The judge of first instance dismissed their application. The court agreed that the first part of the test was satisfied, in that the applicants had a genuine interest in their parents'

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89 Emphasis supplied.

90 See, *e.g.*, *Estate of Ronald Alfred Craymer v. Hayward*, 2019 ONSC 4600.

91 *McAllister Estate v. Hudgin* (2008), 42 E.R.T. (3d) 313 (Ont. S.C.J.), para. 13.

92 *Ali v. Fruci* (2006), 22 E.T.R. (3d) 187 (Ont. S.C.J.), para. 3.

93 *Dzelme v. Dzelme*, 2018 ONCA 1018, 46 E.T.R. (4th 43, para. 7

94 2020 ONCA 56, affirming 2019 ONSC 4595.

welfare. But the second part of the test was not satisfied, because "the record falls far short and lacks evidentiary stamina to suggest that there is any direct allegation of misfeasance or wrongdoing".[95] The applicants appealed but the Court of Appeal held that the application judge did not err in dismissing the application for the reason given. The court did agree that leave can be granted in the absence of significant concerns about misfeasance or wrongdoing if, for example, the applicants raise significant concerns about the management of the grantor's affairs to warrant an accounting, or if there has been a significant erosion of the grantor's financial position. However, such conditions did not exist in this case.

Nonetheless, even if a beneficiary does not require them to do so, fiduciaries will often pass their accounts voluntarily since, as already mentioned, in the absence of other arrangements, the court will normally fix their compensation at the time of the passing of accounts.[96]

Section 23(1) of the *Trustee Act*[97] permits a trustee (and an estate trustee) to file the accounts in the office of the Superior Court of Justice and states that the practice on the passing of the accounts will be same as for the passing of the accounts of executors or administrators. Further, subsection (2) provides that the court has power to fix the amount of the trustee's compensation when it has not been fixed by the instrument creating the trust or otherwise. And then it goes on to provide that once the court has fixed the compensation, the trustee is entitled to retain it out of any money held in trust.

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95 *Ibid.*, para. 8.

96 See §2.2.3, *supra*.

97 *Supra*, footnote 3.

Section 48 of the *Estates Act*[98] provides that an executor who is also a trustee under a will may be required to account as trustee in the same way as for the executorship. Section 49 of the Act deals with the passing of accounts by guardians. Finally, s. 50(1) provides that executors and administrators shall not be required by a court to render an account of the deceased's property, otherwise than by an inventory of the property, unless at the instance of a person interested in the property or of a creditor of the deceased. And it states that an executor or administrator is not otherwise compellable to account.

Section 42 of the *Substitute Decisions Act*[99] provides that the court may, on application, order a guardian or attorney for property to pass the accounts. It also states that the guardian of property, the incapable person, or other persons listed in the section may apply to pass the accounts. Similarly, it provides that an attorney, or grantor, or other persons listed in the section may apply to pass the accounts.

Rule 74.16 of the *Rules of Civil Procedure*[100] provides that Rules 74.17 and 74.18 (which contain detailed provisions about the form of accounts and of the procedure on the application to pass the accounts, respectively) "apply to accounts of estate trustees and, with necessary modifications to accounts of trustees other than estate trustees,[101] persons acting under a power of attorney, guardians of the property of mentally incapable persons, guardians of the property of a minor[102] and persons

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98 *Supra*, footnote 35.

99 *Supra*, footnote 60.

100 *Supra*, footnote 87.

101 In my opinion this is an egregious solecism: an estate trustee is not a trustee, although the will may, of course, appoint him a trustee as well as an estate trustee.

102 An Oxford (or serial) comma seems to be needed here and would have improved the readability of the turgid legal prose of this rule.

having similar duties[103] who are directed by the court to prepare accounts relating to their management of assets or money."

It would seem that Rule 74.17 does not apply to attorneys under continuing powers of attorney, statutory guardians of property, court-appointed guardians of property, attorneys under powers of attorney for personal care and guardians of the person, *i.e.*, substitute decision makers under the *Substitute Decisions Act*. This is because a regulation makes detailed provisions for the accounts and records of such substitute decision makers.[104] In itself that is not objectionable, but it does unnecessarily duplicate similar provisions that apply to estate trustees and others. However, Rule 74.18 does apply to substitute decision makers, since s. 42(6) of the *Substitute Decisions Act* provides that the procedure in the passing of accounts of substitute decision makers "is the same and has the same effect as in the passing of executors' and administrators' accounts." For this reason, the court can reject an application by a substitute decision maker whose accounts are not in the proper form and require that they be refiled in the correct form.[105]

It should be noted that the court's jurisdiction on a passing of accounts is very broad. Thus, for example, in an egregious case it can even hold an estate trustee in contempt under Rule 60.11 of the *Rules of Civil Procedure*.[106] and sentence him to imprisonment for failing to pass his accounts and breaching court orders.[107]

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[103] A comma seems to be needed here as well, since the subordinate clause that follows is surely intended to apply to all of the persons named earlier and not simply to "persons having similar duties."

[104] See O. Reg. 100/96.

[105] *Re Damm Estate*, 2010 CarswellOnt 6938 (S.C.J.).

[106] *Supra*, footnote 87.

[107] See *Langston v. Landen*, 2010 ONSC 4730, para. 46, appeal dismissed 2011 CarswellOnt 1948 (C.A.). See also *CNIB v. Vincent*, 2014 ONSC 3421; *Broze v. Toza*, 2014 ONSC 3302.

3.3.3 Uncontested Passings

Most of the case law on passing of accounts deals with contested passings. However, accounts are not always contested. If no interested party, having received notice of the application, objects to the accounts and the compensation claimed by the fiduciary, the accounts can be passed without a hearing. Subrules 74.18(8.5) and (9) make provision for an uncontested passing.

However, as already mentioned, the rules apply to all fiduciary accounts[108] and therefore, also on an uncontested passing, the fiduciary must ensure that she complies with the requirements of Rules 74.17 and 74.18.

Re Daniel Estate[109] is an example of a case in which the applications to pass the accounts of guardians of property and personal care and of the estate trustees of one of the estate of one of the grantors were uncontested. As the application judge noted, this was a "good news" story. The attorneys had acted selflessly for the grantors for many years and had performed many services for them, much beyond what might have been expected of them. They had never claimed a penny for their services, but brought their applications at the suggestion of the surviving grantor, who remained mentally sharp. She supported the applications by her affidavit in which she stated that she was content with the compensation sought. The court granted the applications, including counsel fees.

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[108] See Rule 74.16.

[109] 2019 ONSC 2790.

3.3.3 Costs

It is common practice in a contested passing, whether by estate trustees or substitute decision makers, that the costs of the parties to the audit will be paid out of the estate on a full indemnity basis.[110] And this is so even when there are matters in dispute. However, when the audit becomes adversarial, the court may order the costs to be paid by the unsuccessful parties, including the estate trustees.[111] The court may also deny costs to a beneficiary who is solely responsible for delay in the passing,[112] or whose objections are without merit.[113] Similarly, it may deny a substitute decision maker's costs because of his shocking conduct in misappropriations from the estate.[114] The court may even order a beneficiary who forces an unnecessary formal passing to pay the costs of the passing.[115] And it may reduce the costs claimed by a party when they are excessive.[116]

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110 *Re Wright Estate* (1990), 43 E.T.R. 69, supplementary reasons (1990), 43 E.T.R. 82 (Ont., Gen. Div.), paras. 16-17; *Re Josephs Estate* (1993) 14 O.R. (3d) 628, 50 E.T.R. 216, at para. 7, *per* Borins J. (Ont. Gen. Div.); *DeLorenzo v. Beresh*, 2010 ONSC 5655, 62 E.T.R. (3d) 65, para. 20; *Re Vano Estate*, 2011 ONSC 1429, 66 E.T.R. (3rd) 272, para. 27. See also Albert H. Oosterhoff, "Indemnity of Estate Trustees as Applied in Recent Cases" (2013), 41 Adv. Q. 123 at 131-32, and *passim*; Albert H. Oosterhoff, "Some Aspects of Indemnification of Trustees", footnote 42, *supra* (This article and paper were applied by the court in *Furtney v. Furtney*, 2014 ONSC 3774, 100 E.T.R> (3d) 312.); Albert H. Oosterhoff, "Ensuring Full Indemnification of Legal Fees and Disbursements", paper prepared for the Law Society of Upper Canada Program, "Practice Gems: The Administration of Estates", 10 September 2015.

111 *Re Wright Estate*, *ibid.*; *Re Pilo Estate*, [1998] O.J. No. 4521 (Gen. Div.); *Zimmerman v. Fenwick*, 2010 ONSC 3855; *Re Baldwin*, 2012 ONS C 7235.

112 *Re Watterworth Estate*, 1995, CarswellOnt 2528, additional reasons 1996 CarswellOnt 296 (Gen. Div.)

113 *Patterson v. Patterson*, 2012 ONSC 4625; *Re Medynski Estate*, 2016 ONSC 4257.

114 *Aragona v. Aragona (Guardian of)*, 2012 ONSC 1495, affirmed 2012 ONCA 639.

115 *Wood Estate v. Wood*, 2005 CarswellOnt 4569 (S.C.J.); *Re Helmuth Treugott Buxbaum Trust*, 2009 CarswellOnt 14069 (S.C.J.).

116 See, *e.g.*, *Re Vano Estate*, *supra*, footnote 110, paras. 36-39 (excessive legal fees).

Suppose that a fiduciary desires to pass his accounts, but is not required to do so by a beneficiary. Can he be penalized financially for choosing to pass the accounts, given that there is a cost component to a passing? In theory this is possible, but in practice it is unlikely to happen. The court does indeed have full discretion over awarding and denying costs.[117] But on the other hand, the estate trustee is entitled to pass his accounts in order to have his compensation determined.[118] Therefore, he should not be denied his costs of the passing, unless he is found to have engaged in objectionable conduct, such as a misappropriation of assets. Of course, if the estate trustee were to seek to pass his accounts too frequently, he may be denied his costs on the ground that this is excessive, unnecessary, and too costly for the estate. The question then becomes: when does an application to pass the accounts become too frequent? *Widdifield on Executors and Trustees*[119] says that the practice in Ontario for professional trustees is to pass their accounts every three to five years and such intervals seem to be appropriate.

3.4 Passing of Accounts and Limitations

Does the *Limitations Act, 2002*[120] apply to a passing of accounts? This question was explored in a helpful article in 2016.[121] The Act limits civil claims after a specified limitation period[122] and defines a "claim" as a "claim to remedy an

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117 *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 131.

118 *Trustee Act*, *supra*, footnote 3, s. 23(1).

119 *Supra*, footnote 2, para. 14.2.1. In British Columbia accounts must be passed every two years: *Trustee Act*, R.S.B.C. 1996, c. 464, s. 99. Manitoba allows accounts to be passed annually: *Trustee Act*, C.C.S.M., c. T160, s. 86.

120 S.O. 2002, c. 24, Sched. B.

121 Matthew Furrow and Daniel Zacks, "The Limitation of Applications to Pass Accounts" (2016), 46 Adv. Q. 230.

122 *Limitations Act*, *supra*, footnote 120: a basic period of two years, subject to discoverability (ss. 4 and 5), and an ultimate 15-year period (s. 15).

injury, loss or damage that occurred as a result of an act or omission."[123] The authors approached the question by asking, rightly, in my opinion, whether an application to pass accounts is a claim and concluded that an application by a fiduciary is not a claim, since it does not involve wrongful conduct or damage.[124] They also concluded that an application to compel a fiduciary to pass her accounts is not a claim, since there is no loss involved.[125] As they say: "A successful application to force a fiduciary to pass accounts may be a means toward a remedial end, but is not itself a remedy that provides consequential relief to a beneficiary."[126]

In *Armitage v. Salvation Army*[127] the Ontario Court of Appeal agreed in substance with the authors' argument, holding that an application by an attorney to pass her accounts is not subject to the Act and that therefore her claim for compensation was not statute-barred. The court awarded the applicant compensation in her capacities as attorney and also as executor. The court noted that historically in Ontario there was no limitation period for passing of accounts and the Act did not change the common law. On the other hand, the equitable doctrines of acquiescence and laches can be used to limit an application to compel the passing of accounts.[128] The party relying on the equitable defence of laches must show

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123 *Ibid*. s. 1.

124 Furrow and Zacks, *supra*, footnote 121, p. 238.

125 *Ibid*.

126 *Ibid*., p. 239

127 2016 ONCA 971, 23 E.T.R. (4th) 1.

128 See, *e.g.*, *Jacques v. Hipel Estate*, 2011 ONSC 5259, affirmed 2012 ONCA 371, leave to appeal refused *sub nom.* Jacques v. Canada Trust Co. 2012 CarswellOnt 15242 (S.C.C.), although in that case the beneficiary brought a claim for damages after a 27-year delay, instead of seeking a passing of accounts. See also *Estate of Ronald Alfred Craymer v. Hayward*, 2019 ONSC 4600.

delay and prejudice. If those are shown to exist, it will be unfair to allow the plaintiff to proceed with the action.[129] However, even if the plaintiff cannot be blamed for the delay, the court may still, in the exercise of its discretion, refuse to order a passing of accounts if that would result in injustice as between the parties.[130]

It has been argued that the Act does apply to any claim asserted in an application to compel the passing of accounts.[131] Similarly, it has been argued that a notice of objection contains a claim if it seeks a remedy for any loss or damage allegedly caused by the fiduciary and is thus subject to the Act.[132] However, in a recent, compelling case the Divisional Court held otherwise. *Wall Estate* concerned a passing of accounts by an estate trustee.[133] The major beneficiary had brought an application to compel him to pass his accounts and subsequently filed a notice of objection to accounts, as well as a successful motion to remove and replace the estate trustee. The estate trustee brought a motion to strike the notice of objection. The estate trustee did not dispute his obligation to pass his accounts, but argued that he was not required to address the objections to accounts that were more than two years old, on the ground that they were barred by the Act, or by laches, or because the beneficiary acquiesced in the accounts.

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129 *Estate of Ronald Alfred Craymer*, *ibid.*, para. 35.

130 *Ibid*., paras. 37, 38. The attorney had died and it would be unjust to have her estate trustee account for the attorney's actions.

131 Furrow and Zacks, *supra*, footnote 121, p. 244.

132 *Ibid*., p. 246.

133 2018 ONSC 1735, 38 E.T.R. (4th) 38, affirmed *sub nom*. Wall v. Shaw, 2018 ONCA 929, further reasons on costs 2019 ONSC 5063 in which the court assessed costs on a full indemnity basis payable by the appellant estate trustee, because he "acted unreasonably and in his own self-interest". And see Albert H. Oosterhoff, "Is a Notice of Objection to Estate Accounts Subject to Limitations", http://welpartners.com/blog/2019/01/is-a-notice-of-objection-to-estate-accounts-subject-to-limitations/.

At first instance the court held, applying *Armitage*, that just as a passing of accounts does not constitute a claim, neither does a notice of objection. Justice Mulligan also held that the doctrine of laches did not apply on the facts and that the beneficiary had not acquiesced in the annual statements the estate trustee provided. The Divisional Court dismissed the estate trustee's appeal. The court held that a notice of objection is not the equivalent of a counterclaim to an existing procedure and does not, therefore constitute a claim. It also agreed with Justice Mulligan's logic that if an application to pass accounts is not a claim, then neither is a responding objection to the accounts that a beneficiary makes. Further, the fact that the notice of objection effectively seeks a reduction in compensation does not make it a claim. It is simply a factor the court considers when determining the estate trustee's compensation. Moreover, there are serious policy and practical implications to making a notice of objection subject to the two-year limitation period. Among other things, it would risk insulating an estate trustee's actions in the estate from effective scrutiny.

The court considered these cases in the recent case, *Canada Trust v. Ross*.[134] The testator, who died in 1971, had left her cottage property to her two daughters, Margaret and Mary, for life. Mary died in 2002 and Margaret died in 2015. The cottage was sold in 2013. Canada Trust was the estate trustee of the testator's estate and obtained a judgment passing its accounts. Then Gordon Ross, one of Margaret's sons, brought a motion for an order that the passing of accounts judgment be amended. He claimed that Margaret had made capital expenditures on the cottage during her life and argued that the judgment should show a liability to

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134 2019 ONSC 1165.

Margaret's estate for those expenditures. Gordon had no legal status to act on behalf of Margaret's estate, since he was not its estate trustee during litigation, but Canada Trust and the other beneficiaries advised the court that they would allow the matter to go forward. However, they took the view that the claim was barred. Gordon claimed that the *Limitations Act, 2002*[135] does not apply to a claim advanced in the context of a passing of accounts. The court dismissed the motion. Justice Broad relied on the above cases and held that on a passing of accounts a judge only has power to enquire into a claim by a person interested in the taking of the accounts. The court has no power to inquire into a claim by an alleged creditor of the estate, or a claim by a beneficiary of an alleged creditor for payment by the estate to such creditor. Justice Broad held further that a motion to show liability to the estate of Margaret was a claim within the meaning of ss. 1 and 4 of the Act and that the claim was discoverable more than two years before Margaret's death. Accordingly, it was barred.[136]

4. Conclusion

It is clear that all fiduciaries are *prima facie* entitled to compensation for their work. The rules for calculating the compensation have existed for many years and have been refined and reconfirmed in recent years. It is also clear, however, that fiduciaries are not entitled, as of right, to the amount of the compensation calculated in accordance with the percentage method. The court retains full discretion to decrease the amount so calculated in particular circumstances. It also

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135 Footnote 120, *supra*.

136 See further a blog on this case by Marian F. Passmore at: http://welpartners.com/blog/2019/03/motion-to-amend-judgment-on-passing-of-account-statute-barred/