COMPENSATION
AND PASSING OF ACCOUNTS

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1. Introduction

The title of my paper suggests that I must discuss a shedload[1] of material. Unfortunately, I have been allocated only a limited amount of time for my presentation, so I am unable to speak to all the matters I cover in my paper.[2] Accordingly, I shall restrict my presentation to an outline of the right to

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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 resources 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); Sara Beheshti, "Estate Trustee Compensation: Considerations When Advising Clients in the Estate Planning Interview" (2021), 40 E.T.P.J. 298; *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*, 9th ed. by A.H. Oosterhoff, Robert Chambers, and Mitchell McInnes (Toronto: Thomson Reuters/Carswell, 2019), §§16.2, 16.3.

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. Although I refer to the process of the passing of accounts, I shall not discuss the intricate details of the procedure on a passing. However, they are dealt with in great detail in the sources already mentioned and are also discussed by the other panelists.

2. Compensation

2.1 Entitlement

All trustees, executors, attorneys, and other fiduciaries are *prima facie* entitled to be compensated for their services. The amount of an executor's compensation may be fixed in an agreement or in a will. But if it is not, the right to compensation is in any event conferred by statute. Absent a contrary intention, the compensation is usually determined when the fiduciary passes her accounts.

2.2 Executors 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 executors, by virtue of s.

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

[4] Emphasis added. The full section provides:

1 of the Act, 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, a trustee and an executor will normally be awarded compensation when its accounts are passed.

In the 1990s Ontario made the unfortunate decision to change the term "executor" (and "administrator") to "estate trustee". This is regrettable because: (a) no other jurisdictions has done this, so we are out of line; and (b) it suggests that executors (and administrators) are trustees; they are not, and the two offices should not be confused. But Rule 74.16 does that when it provides: "Rules 74.17 and 74.18 apply

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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.
(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.

to accounts of estate trustees … and to accounts of trustees other than estate trustees…"!

2.2.2 Calculation

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 Trusts Corp v. Central Ontario Railway*,[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;
(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 Surr Ct J in *Re Jeffery Estate*:[8]

(1) 2.5% charged on capital receipts;

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

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

[8] (1990), 39 E.T.R. 173, 1990 CarswellOnt 503, para. 13 (Surr. Ct.).

(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 General Trusts Corp*[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

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[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.).

[12] Footnote 6, *supra*. For a recent case applying these principles, see *Estate of Françoise Poitras v. Canadian Cancer Society*, 2021 ONSC 406, 67 ETR 4th 140.

business. However, the court stated that such a special fee must remain unusual and special fees are indeed not common.

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]
>
>> 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 circumstances. The result of this testing process should enable the judge to determine whether the claims are

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[13] Footnote 9, s*upra*.

[14] Footnote 6, s*upra*.

[15] Footnote 8, s*upra*, at E.T.R. 179.

[16] Footnote 6, s*upra*.

> 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.

Note that the award of a management fee is the exception rather than the rule.[19] Hence, if the management of the estate is straightforward, the court is likely to refuse to award it.[20]

As is apparent from s. 61(4) of the *Trustee Act*,[21] 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

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

[18] Footnote 8, *supra*.

[19] *Re Archibald Estate*, 2007 CarswellOnt 3872 (SCJ).

[20] See, *e.g.*, *Estate of Françoise Poitras v. Canadian Cancer Society*, footnote 12, supra.

[21] Footnote 3, *supra*.

an account for professional services, the account is likely to be reduced to the extent it includes time properly attributable to trustee work.[22]

2.2.3 Reduction in Compensation

In practice the courts often reduce the amount that would have been paid under the percentage approach.[23] They will do so, for example, if the executors have done a poor job of administering the estate,[24] because of the fiduciary's improper conduct and failure to discharge her fiduciary duties, or simply because the amount claimed is too high in the circumstances.[25]

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

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

24 *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.

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

2.2.4 Disallowance of Compensation

The courts can also disallow compensation entirely because of unconscionability or other troubling conduct on the part of the fiduciary,[26] or because of his defalcation,[27] or other flagitious actions. The courts will also often disallow a claim for a management fee.[28]

Note that the court has jurisdiction to make a full inquiry in these matters by virtue of s. 49(2) of the *Estates Act*.[29] Further, s. 49(3) gives the court jurisdiction to consider any "misconduct, neglect, or default" on the part of the executor or trustee in the administration of the estate or trust when a beneficiary raises these issues on a passing of accounts. If the objections are more complex, s. 49(4) allows beneficiaries, or the trustee or executor to raise them in a separate triable issue.

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[26] *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. And see *Richter v. Chemerinski*, 2020 ABQB 307, 60 E.T.R. 27, in which the court denied compensation to an attorney for breaching his fiduciary duties, failing to account fully for his actions by not keeping accurate and complete records, commingling estate and personal assets, exercising the power of attorney to the detriment of the estate, treating the estate's property as his own, and not exercising the standard of care and diligence required of an attorney.

[27] *Aragona v. Aragona (Guardian of)*, 2012 ONSC 1495, affirmed 2012 ONCA 639.

[28] 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.

[29] R.S.O. 1990, c. E.21.

2.2.5 Apportioning Compensation

If there is more than one executor, they must normally share the compensation equally. However, if one executor 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.[30]

2.2.6 Compensation 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.[31] However, if the will does not fix the compensation with any specificity, a party can attack the provision and the court can adjust the compensation upward or downward.[32]

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[30] Macdonell, Sheard and Hull, footnote 2, *supra*, p. 566.

[31] In footnotes 4 and 5, *supra*.

[32] *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 executors, holding that the *per diem* rate had to be reasonable.

If the will gives a legacy to the executor, the law presumes that the legacy is intended as a substitute for compensation.[33] However, the presumption can readily be rebutted by evidence from the will itself, or from surrounding circumstances.[34] Note that the presumption does not arise if the gift to the executor is a share of the residue rather than a legacy.[35]

When the will appoints a trust company as executor, it is common for the testator and the executor to fix the compensation by agreement outside the will.[36] However, such an agreement binds only the original executor, not any successors.[37]

2.2.7 Compensation for Estate Trustee During Litigation

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."[38] The courts have held that therefore an ETDL is normally entitled to compensation on the same basis as a trustee and an executor.[39] Even if the court applies the principles applicable to trustees, it will typically adjust the amount

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33 See Jenkins, Scott, and Olkovich, footnote 2, *supra*, Part I, ch. 8, "Legacies in Lieu of Compensation"; Jessica Feldman Chittley, "To Give or Not to Give? An Examination of Bequests in Lieu of Executor's Compensation" (2020), 39 E.T.P.J. 243.

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

35 Boys' Home of Hamilton (City) v. Lewis (1883), 4 O.R. 18 (H.C.).

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

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

38 *Estates Act*, footnote 29, *supra*, s. 28.

39 *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.); *Estate of Georgia Manos, deceased*, 2023 ONSC 1962.

of the compensation, since the duties of an ETDL may be less extensive that those of a regular executor.[40]

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.[41] However, *Meyers v. Rubin*[42] suggests that this is incorrect. It holds that s. 28 of the *Estates Act*,[43] 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 the principles legislated for trustees and executors in determining her compensation.

In any event, a person who agrees to act as an ETDL is well advised to make it a condition of appointment that he be paid at a specified hourly rate, that she be entitled to take interim compensation, and that her compensation not be reduced by the cost of preparing his accounts.

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40 See, e.g., Church v. Gerlach, ibid., para. 14.

41 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."

42 2017 ONSC 3498, additional reasons 2017 ONSC 4121. See also *Class v. Smith*, 2018 ONSC 623, para. 38; *Baran v. Cranston*, 2020 ONSC 589.

43 Footnote 29, s*upra*.

2.2.8 Taking Compensation

A fiduciary is entitled to retain estate assets in payment of the expected amount of his compensation. This is because the compensation is a first charge or lien on the estate property, just as expenses for which the executor is entitled to be indemnified are a first lien on the estate property.[44] 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.[45] 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*,[46] appears never to have been decided.[47]

It is important to remember that the lien is not lost if the fiduciary has distributed the assets. The reason is that the lien the fiduciary holds in support of her right to compensation arises in equity and is not possessory in nature. In that respect it is different from a common law lien, which is possessory and which is therefore lost once the lien holder disposes of the property. The equitable lien that the fiduciary

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[44] *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.)

[45] *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.

[46] [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.

[47] See Waters, footnote 45, *supra*, p. 1225, note 90.

has for her compensation is proprietary and therefore continues even if the fiduciary (as yet unpaid) retires and is replaced by her successor.[48]

If the compensation is fixed by the will or other instrument, 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 on a passing of accounts. 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* and therefore cannot consent, a formal passing of accounts may be required.[49]

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*[50] provides that once the compensation has been fixed by the court, the fiduciary is entitled to retain the amount so determined.

2.2.9 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

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[48] See *Equity Trust (Jersey) Ltd v Halabi* and *ITG Ltd v Fort Trustees Ltd*, [2022] UKPC 36.

[49] See Macdonell, Sheard and Hull, footnote 2, *supra*, pp. 545-48.

[50] Footnote 3, *supra*.

is impossible.[51] My opinion is supported by s. 65 of the *Uniform Trustee Act,*[52] which allows a trustee, subject to certain conditions, to take *interim compensation* without court approval.[53]

Apart from statutory permission such as that found in the *Uniform Trustee Act*, it is generally accepted that executors and trustees may not take interim compensation, unless the instrument appointing them contains a charging clause that permits it,[54] all the beneficiaries consent, or the court approves it on a passing of accounts. The Ontario Court of Apeal endorsed this view in *Wall v Shaw*.[55] In *Re William George King Trust*[56] 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*[57] the court allowed an interim taking because the work and services had been earned at

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

[52] 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.

[53] 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.

[54] See, *e.g.*, *Re Andrachuk Estate*, footnote 32, *supra*.

[55] 2018 ONCA 929, paras 43-44. The appeal was brought before the Court of Appeal, but it was reconstituted as a panel of the Divisional Court. In *Pfisterer Estate v Hoepfinger-Pfisterer*, 2022 ONSC 4117, paras 90-92 the court followed *Wall* on this point.

[56] (1994), 113 D.L.R. (4th) 701, 2 E.T.R. (2d) 123, 1994 CarswellOnt 645 (Gen Div.).

[57] 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*.

the time of the taking and the amount taken was fair. Also, in *Gefen v. Gaertner*[58] 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 the final passing of the accounts. However, most cases excoriate the practice and hold that unauthorized taking of interim compensation is impermissible and may render the trustee liable for breach of trust.[59]

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.[60]

2.2.10 Repayment of Excess Compensation

An executor 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 executor. However, it may also happen when the will authorizes interim taking, but the amount taken is excessive.[61]

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[58] 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.

[59] 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.).

[60] For a discussion of such safeguards, see those imposed by s. 65 of the *Uniform Trustee Act*, footnote 52, *supra*. These can be modified or expanded as circumstances require.

[61] 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. And see *Re Vanmaele Estate*, 2018 ABQB 840, varied 2019 ABCA 499, For another example see the clause in the will in *Re Andrachuk Estate*, footnote 32, *supra*.

If the executor has taken interim compensation without authorization, the court may require repayment of the amount on a passing of accounts.[62] However, courts are often lenient in the matter. For example, in *Re Wright Estate*[63] 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.

2.3 Compensation for 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* [64] 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.[65] 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.[66]

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[62] *Zimmerman v. McMichael Estate*, 2010 ONSC 2947 (S.C.J.).

[63] (1990), 43 E.T.R. 69 (Ont. Gen. Div.), additional reasons (1990), 43 E.T.R. 82 (Ont. Gen. Div.), para. 19.

[64] S.O. 1992, c. 30.

[65] *Ibid.*, subs. (2).

[66] O. Reg. 26/95, as amended, s. 1.

Note however, that despite the scale, on a passing of accounts by an attorney for property the court retains discretion to adjust the compensation claimed to an amount that is fair and reasonable.[67]

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 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."

All of these provisions apply also to attorneys under a continuing power of attorney for property, 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

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[67] *Re Andriesky Estate*, 2022 ONSC 242, para. 5.

recognized such a higher standard for trustees.[68] However, the *Uniform Trustee Act*[69] does impose the higher standard and it is likely that the higher standard will in due course be adopted in the Canadian provinces.[70] A higher standard for trustees has been adopted in many jurisdictions.[71]

2.3.2 Guardians and Attorneys for the Person

The *Substitute Decisions Act* does not make provision for compensation for a guardian or attorney for the person, but neither does the Act prohibit it. Section 90(1)(c.1) authorizes the Lieutenant Governor in Council to prescribe the circumstances in which a guardian or attorney for personal care may be compensated for services performed. But no regulations have ever been made for that purpose. However the courts have assumed jurisdiction to award compensation.[72] In *Re Brown*[73] 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

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68 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.

69 Footnote 52, *supra*, ss. 26(3) (generally) and 31 (investments).

70 New Brunswick adopted the higher standard in its *Trustees Act*, S.N.S. 2015, c. 21, ss. 30, 37(1), and Alberta did the same in its *Trustee Act*, SA 2022, c T-8, ss. 27(3) and 35(2), both provinces have enacted the *Uniform Trustee Act*.

71 See Oosterhoff, Trust Law Reform, footnote 52, *supra*, §4.1 (especially note 8) and §5.

72 See Ruth M Corbin and Barry S Corbin, 'Disputes over Parental Care When the Dutiful Child Wants to Be Paid', 2017 *Annual Review of Civil Litigation* 121, reprinted (2018, 37 ETPJ 119.

73 (1999), 31 E.T.R. (2d) 164 (Ont. S.C.J.)

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 compensation as guardian of the person for lack of evidence. In *Cheney v. Byrne (Litigation Guardian of)*[74] 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*[75] 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.[76] In *Re Daniel Estate*[77] 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.[78]

3. 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

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[74] (2009), 9 E.T.R. (3rd) 236 (Ont. S.C.J.).

[75] [2004] O.J. No. 5246 (S.C.J.).

[76] 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.).

[77] 2019 ONSC 2790, paras. 26-29.

[78] For a case in which the attorney for personal care failed to provide the necessary evidence to support a claim for compensation see *Ventura v Ventura*, 2022 ONSC 6351.

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 retains the discretion to disallow and it does disallow compensation in appropriate cases. s and accounts from the outset. And second it is important that the fiduciary keep the beneficiaries apprised of what is happening in the administration of an estate on a regular basis. Doing so will keep them content and may well avoid costly proceedings later. The old proverb, “You catch more flies with honey than with vinegar,” holds true also for estate administration.