WEL ON FIDUCIARY ACCOUNTING

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GUARDIANSHIP, ATTORNEY, ESTATE & TRUST ACCOUNTS

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FOREWORD by Kimberly A. Whaley

WHALEY ESTATE LITIGATION ("WEL") have compiled this collection of materials in an effort to bring together in one place helpful tools and resources to assist the fiduciary in understanding and carrying out the duty to account.

Taking on the responsibility of a fiduciary is an onerous and challenging task and increasingly one which risks being less than fully compensable.

A fiduciary attracts scrutiny by virtue of the appointment itself. The role and responsibilities are further complicated by surrounding emotion, and often litigation is commenced by those to whom the fiduciary is accountable.

The role demands trust, integrity and transparency and exposes one to professional and personal liability.

Increasingly, fiduciaries are asked to account informally and more formally before a court.

There are processes and procedures which are mandatory as well as guidelines for best practices. Keeping proper accounts and being in a position to formally account is critical.

We hope that our collection will be a useful resource to help you navigate your accounting obligations.

WEL can help the fiduciary account, pass your accounts, prepare your accounts, defend your accounts and get your reasonable costs and compensation approved.

Please enjoy and share this book freely among your colleagues. If you would like to receive additional hard copies please contact us at (416) 925-7400. We also have electronic copies available in PDF format and would be more than happy to send you a copy. For more information about our firm please visit **www.welpartners.com**.

Thank you for your interest in our materials.

Kind regards,
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FIDUCIARY ACCOUNTS AND COURT PASSINGS

by Kimberly A. Whaley[1]

A passing of accounts is a formal procedure, governed by statute, for court approval of the accounts of a fiduciary (estate trustee, trustee, attorney, guardian, etc.) for a relevant period of administration or property management.

An application by a fiduciary to pass accounts, (also referenced herein as a *"passing of accounts", "passing" and "accounting")* is not strictly, in legal terms, a mandatory requirement. Rather, the fiduciary may choose to pass its accounts, or alternatively, may be compelled to do so by those legally entitled to request a passing. The legal duty is in the maintenance of the accounts as fiduciaries. The right to compel an accounting is not an absolute right, regardless of the circumstances, rather it remains within the discretion of the court to either grant or refuse such an order.

Where the beneficiary of an estate or trust is a minor or incapable person, and particularly in circumstances where compensation is being sought by the fiduciary, the policy of the Ontario Children's Lawyer (the "OCL") and the Ontario Public Guardian and Trustee (the "OPGT") generally, with exceptions, mandate for accounts to be passed.

The court has the discretion to grant or refuse an order for a formal passing of accounts. Many factors in choosing whether to pass accounts may need to be considered, including, but not limited to: the nature and extent of the estate or trust; the complexity of the administration; whether there has been litigation; the express provisions of the Will, Trust, Power of Attorney document, Guardianship Order, or other governing document; the status or terms governing the taking of compensation and the provisions of any governing document in that regard; as well as liability factors; releases; indemnities; claims; creditor claims; or other as applicable or necessary.

1. Jurisdiction of the Estate Trustee to Pass Accounts

The jurisdiction of the estate trustee to pass accounts arises from Section 23.1 of the *Trustee Act*.[2]

The jurisdiction does not impose a mandatory requirement upon the estate trustee to pass accounts, rather gives the estate trustee a choice in whether to apply for a passing of accounts to obtain court

1 Kimberly A. Whaley, Principal, Whaley Estate Litigation. This paper was first prepared in January 2008, for the LSUC Six-Minute Estates Lawyer, now revised and updated January 2016, also published in "Armstrong, Estate Administration: A Solicitor's Reference Manual", Carswell and Thomson Reuters, Release 2012-13, Vol. 4, p. SLL-32 – SLL-46.58, and Release 2014-15, and 2015 – Rel.12 SLL-32

2 *Trustee Act,* R.S.O. 1990, c. T.23. s. 23.1: A trustee desiring to pass the accounts of dealings with the trust estate may file the accounts in the office of the Superior Court of Justice, and the proceedings and practice upon the passing of such accounts shall be the same and have the like effect as the passing of executor's or administrator's accounts in the court.

approval of the estate or trust administration, or simply rely on releases and, where appropriate, indemnities.

The *Estates Act*, Section 48,[3] further provides that whether the office is that of an estate trustee, or solely a trustee, the potential requirement to pass accounts exists and is identical to each office.

The *Estates Act*, Section 50.(1),[4] indeed provides that an executor or an administrator shall not be required by any court to render an account of the property of the deceased, unless at the instance, or on behalf of some person interested in such property, or of a creditor of the deceased. This provision further provides that an executor or administrator is not otherwise compellable to account before any judge.

2. Jurisdiction of the Attorney and Guardian for Property to Pass Accounts

Similarly, while an attorney/guardian is required to keep accounts, an attorney is not required to pass those accounts. The court may, however, order that all, or a specified part and or period of the accounts of an attorney be passed.[5] Although a passing of accounts may not be required, it may nevertheless be advisable to make application for a passing, since once the accounts have been passed, they will have received court approval and cannot be questioned at a later date by persons having had notice of the passing of accounts (exceptions will apply in the case of fraud or mistake).

Prior to the enactment of the *Substitute Decisions Act, 1992*, S.O. 1992, (the "*SDA*") which came into force on April 3, 1995, an attorney could not be ordered by the court, under the provisions of

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3 *Estates Act,* R.S.O. 1990, c. E.21. s. 48: Every executor who is also a trustee under the will may be required to account for their trusteeship in the same manner as they may be required to account in respect of their executorship."

4 *Estates Act,* R.S.O. 1990, c. E.21, s. 50. (1): An executor or an administrator shall not be required by any court to render an account of the property of the deceased, otherwise than by an inventory thereof, unless at the instance or on behalf of some person interested in such property or of a creditor of the deceased, nor is an executor or administrator otherwise compellable to account before any judge.

5 *Substitute Decisions Act, 1992,* S.O. 1992, c. 30. Section 42(1) to 42(5): (1) The court may, on application, order that all or a specified part of the accounts of an attorney or guardian of property be passed.
(2) Attorney's accounts – An attorney, the grantor or any of the persons listed in subsection (4) may apply to pass the attorney's accounts.
(3) Guardian's accounts – A guardian or property, the incapable person or any of the persons listed in subsection (4) may apply to pass the accounts of the guardian of property.
(4) Others entitled to apply – The following persons may also apply:
1. The grantor's or incapable person's guardian of the person or attorney for personal care.
2. A dependant of the grantor or incapable person.
3. The Public Guardian and Trustee.
4. Children's Lawyer.
5. A judgment creditor of the grantor or incapable person.
6. Any other person with leave of the court.
(5) P.G.T. a party – If the Public Guardian and Trustee is the applicant or the respondent, the court shall grant the application, unless it is satisfied that the application is frivolous or vexatious.

the *Powers of Attorney Act,*[6] to pass accounts, except in a case where the grantor of the power had become incapable, in which case the attorney could be required to pass accounts for the period of the grantor's incapacity.

The relevant provisions of the *SDA,* ss. 42(1)–(8)[7] identify the circumstances in which a court passing of accounts may issue:

(a) by court order, on application;

(b) an attorney or grantor may apply to pass attorney accounts; and

(c) a guardian, incapable person, guardian/attorney for personal care, a dependant of the incapable person, the OPGT, the OCL, a judgment creditor, or any other person, with leave of the court may apply to pass the accounts of the guardian.

The court-appointed guardian of property is a fiduciary pursuant to the *SDA.*[8] As such, the guardian of property shall deal with an incapable person's property in accordance with the regulations, and keep accounts of all transactions involving the incapable person's property.[9]

A guardian of property is required to act in accordance with a court-approved management plan established for the property.[10] The only exception to this requirement concerns that of the OPGT, who is not required to file a management plan and acts in accordance with the policies of the OPGT. If there is a management plan, then pursuant to ss. 32(11) of the *SDA*, the plan may be amended from time to time with the OPGT's approval. Note that notwithstanding any requirement by a court order for court approval, the statute states that the OPGT may approve the amendment of a management plan.

Similar to the *Rules of Civil Procedure,* Rules 74.15-74.18,[11] Ontario Regulation 100/96 to the *SDA*, section 1, applies to attorneys under Continuing Powers of Attorney, Statutory Guardians of Property, Court-Appointed Guardians of Property, and Attorneys under Powers of Attorney for Personal Care as well as Guardians of the Person. This Regulation at subsection 2(1) sets out the specific components and the form of records and accounts to be maintained by a guardian of property and an attorney under a Continuing Power of Attorney.

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6 *Powers of Attorney Act,* R.S.O. 1990, c. P.20.
7 *Substitute Decisions Act, 1992,* S.O. 1992, c. 30, s. 42(1)-(8).
8 *Substitute Decisions Act, 1992,* S.O. 1992, c. 30, ss. 32(1): A guardian of property is a fiduciary whose powers and duties shall be exercised and performed diligently, with honesty and integrity and in good faith, for the incapable person's benefit.
9 *Substitute Decisions Act, 1992,* S.O. 1992, c. 30, ss. 32(6).
10 *Substitute Decisions Act, 1992,* S.O. 1992, c. 30, ss. 32(10).
11 *Rules of Civil Procedure,* R.R.O. 1990, Reg 194, Rules 74.15- 74.18.

In accordance with subsection 32(12) of the *SDA*, it is expressly stated that the *Trustee Act*[12] does not apply to the exercise of a guardian's powers or the performance of a guardian's duties.

The procedural requirements remain the same despite subsection 32(12) of the *SDA*, since subsection 23(1) of the *Trustee Act*[13] which provides that the proceedings and practice of the passing of accounts for a trustee are the same as for an estate trustee.

3. Jurisdiction to Compel Accounts: Generally

There is a great deal of historical case law setting out who may require a passing of accounts as well as who may be required to pass their accounts. For a review of the cases where such circumstances have arisen see *Widdifield on Executors and Trustees.*[14]

4. Court Jurisdiction

The jurisdiction and procedure for the passing of accounts by an estate trustee, and with necessary modifications, to the passing of accounts of trustees other than estate trustees, persons acting under a power of attorney, and guardians of property, are set out in the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as amended under the *Courts of Justice Act*, Rules 74.16 through 74.18 inclusive.[15] Certain applicable *Rules of Civil Procedure* concerning court applications to pass accounts have been revised and became effective January 1, 2016. (see note 15)

Any individual having a financial interest in an estate by virtue of the *Rules of Civil Procedure* Rule 74.15(1)(h),[16] may move for an order for assistance requiring an estate trustee to pass accounts, or otherwise compel a passing of accounts from an attorney or guardian whether on a contested, or uncontested basis.

The passing of accounts, the procedure, its form, the application, and form of judgment are governed

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12 *Trustee Act,* R.S.O. 1990 c. T. 23.

13 *Trustee Act,* R.S.O. 1990, c.T.23. at s.23(1): When trustee may file accounts – (1) A trustee desiring to pass the accounts of dealings with the trust estate may file the accounts in the office of the Superior Court of Justice, and the proceedings and practice upon the passing of such accounts shall be the same and have the like effect as the passing of executors' or administrators' accounts in the court."

14 *Widdifield on Executors and Trustees,* 6th ed., Chapter 14 – Passing Accounts, Marni M.K.Whitaker, at 14.2.2 on page 14-3 and 14-4; at 14.2.3 on pages 14-5 and 14-6 and 14-7

15 *Rules of Civil Procedure,* R.R.O 1990, Reg. 194. Rules 74.16 through 74.18, as amended by *Ontario Regulation* 55/12 made under the *Courts of Justice Act* April 11, 2012; Approved : April 18, 2012; and Filed: April 19, 2012, Amending Reg, 194 of R.R.O. 1990, and as amended by Ontario Regulation 193/15 made under the Courts of Justice Act, June 2, 2015, Approved July 8, 2015 and filed July 9, 2015, effective January 1, 2016.

16 *Rules of Civil Procedure,* R.R.O 1990, Reg 194, "Rule 74.15(1)(h) Order to Pass Accounts – for an order (Form 74.42) requiring an estate trustee to pass accounts…"

by these specific court rules and Forms 74.44 through 74.51.[17] The *Rules of Civil Procedure* and corresponding forms in effect, set out the steps to follow from start to finish regarding a passing of accounts both on a contested basis and on an uncontested basis, including service and notice requirements, persons to be served, the hearing time, the procedure for filing a Notice of Objection, costs, increased costs and the corresponding Tariff on costs—Tariff C.[18] Notably, the costs legislated under Tariff C on a court passing of accounts, was last amended effective on July 1, 2012.

As with any application, the court has the jurisdiction on an accounting application to grant the relief sought, dismiss, adjourn or direct a trial, in whole or in part, and with or without terms. This jurisdiction applies to applications to pass accounts in accordance with Rule 38.10(1)(a) of the *Rules of Civil Procedure.*[19]

The jurisdiction of the court, as it extends to specific powers of inquiry on an application to pass

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17 *Rules of Civil Procedure,* R.R.O 1990, Reg 194, Form 74.44-Notice of Application to Pass Accounts(amended as at April 11, 2012); Form 74.45 Notice of Objection to Accounts; Form 74.45.1 Request For Further Notice in Passing of Accounts; Form 74.46 Notice of No Objection to Accounts; Form 74.46.1-Notice of Non-Participation in Passing of Accounts; Form 74.47-Affidavit in Support of Unopposed Judgment on Passing of Accounts; Form 74.48-Notice of Withdrawal of Objection; Form 74.49Request For Costs (Person Other Than Children's Lawyer or Public Guardian and Trustee); Form 74.49.1-Request For Costs (Children's Lawyer or Public Guardian and Trustee);Form 74.49.2Request For Increased Costs (Estate Trustee) (amended as at April 11, 2012);Form 74.49.3-Request for Increased Costs (Person Other Than Estate Trustee(amended as at April 11, 2012);); Form 74.50-Judgment on Unopposed Passing of Accounts(amended as at April 11, 2012); Form 74.51-Judgment on Contested Passing of Accounts(amended as at April 11, 2012); The Table of Forms to the Regulation is amended and effective on April 11, 2012. Note: The Form numbers remain the same, but the Forms themselves have been revised.

18 **Tariff C – SOLICITOR'S COSTS ALLOWED ON PASSING OF ACCOUNTS WITHOUT A HEARING**

(1) Estate Trustee

Amount of Receipts	**Amount of Costs**
Less than $ $300,000	$2,500.00
$300,000 or more, but less than $500,000	$3,000.00
$500,000 or more, but less than $1,000,000	$3,500.00
$1,000,000 or more, but less than $3,000,000	$5,000.00
$3,000,000 or more	$7,500.00

(2)- Person with Financial Interest in Estate

If a person with a financial interest in an estate retains a solicitor to review the accounts, makes no objection to the accounts (or makes an objection and later withdraws it), and serves and files a request for costs, the person is entitled to one-half of the amount payable to the estate trustee.

(3) Children's Lawyer or Public Guardian and Trustee

If the Children's Lawyer or the Public Guardian and Trustee makes no objection to the accounts (or makes an objection and later withdraws it) and serves and files a request for costs, he or she is entitled to three-quarters of the amount payable to the estate trustee.

Note: If two or more persons are represented by the same solicitor, they are entitled to receive only one person's costs.

Note: A person entitled to costs under this tariff is also entitled to the amount of harmonized sales tax (HST) on those costs.

19 *Rules of Civil Procedure,* R.R.O 1990, Reg. 194, Rule 38.10(1)(a): "On the hearing of an application the presiding judge may (a)grant the relief sought or dismiss or adjourn the application, in whole or in part and with or without terms."

accounts, arise from the *Estates Act*, Section 49(1) through (10).[20]

The determination of the court jurisdiction as to where the accounts should be passed in the case of an estate trustee, is in the office of the Ontario Superior Court of Justice where the Certificate of Appointment of Estate Trustee issued, the Office of the Superior Court of Justice in the district where the trustee is resident, or where the trust assets are situate, where the guardianship order issued, or in the jurisdiction where the grantor of a Power of Attorney resides, or otherwise as agreed upon by the parties and their counsel.[21]

The court has the discretion to grant or refuse an order and instances when a court will exercise jurisdiction to refuse to compel are important to be aware of as evidenced by considerable historic case law.[22]

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20 *Estates Act,* R.S.O. 1990, c. E.21, Section 49(1) through (10):
"49.(1) Passing accounts by guardians – A guardian appointed by the Superior Court of Justice may pass the accounts of the guardian's dealings with the estate before the judge of the court by which letters of guardianship were issued.
Powers of judge on passing accounts – The judge, on passing the accounts of an executor, administrator or trustee under a will of which the trustee is an executor, has jurisdiction to enter into and make full inquiry and accounting of and concerning the whole property that the deceased was possessed of or entitled to, and its administration and disbursement.
Further Powers – The judge, on passing any accounts under this section, has power to inquire into any complaint or claim by any person interested in the taking of the accounts of misconduct, neglect, or default on the part of the executor, administrator or trustee occasioning financial loss to the estate or trust fund, and the judge, on proof of such claim, may order the executor, administrator or trustee, to pay such sum by way of damages or otherwise as the judge considers proper and just to the estate or trust fund, but any order made under this subsection is subject to appear.
May order trial and give directions as to pleadings, etc. – The judge may order the trial of an issue of any complaint or claim under subsection (3), and in such case the judge shall make all necessary directions as to pleadings, production of documents, discovery and otherwise in connection with the issue.
(5) [REPEALED: S.O. 1997, c. 23, s. 8]
(6) [REPEALED: S.O. 1997, c. 23, s. 8]
(7) [REPEALED: S.O. 1997, c. 23, s. 8]
Notice of taking accounts to be served on Public Trustee – Where by the terms of a will or other instrument in writing under which such an executor, administrator or trustee acts, real or personal property or any right or interest therein, or proceeds therefrom have heretofore been given, or are hereafter to be vested in any person, executor, administrator or trustee for any religious, educational, charitable or other purpose, or are to be applied by them to or for any such purpose, notice of taking the accounts shall be served upon the Public Trustee.
Where person to whom administration granted is not next-of-kin – Where a person has died intestate in Ontario and administration has been granted to some person, not one of the next-of-kin, and it appears to be doubtful whether the intestate left any next-of-kin surviving them or that there are no known next-of-kin resident in Ontario, notice of taking the accounts shall be served upon the Public Trustee.
Appointment of expert on examination of accounts – Where accounts submitted to the judge of the Superior Court of Justice are of an intricate or complicated character and in the judge's opinion require expert investigation, the judge may appoint an accountant or other skilled person to investigate and to assist him or her in auditing the accounts."

21 *Trustee Act,* R.S.O. 1990, c.T.23 section 2; Rule 13.1.01 of the *Rules of Civil Procedure; Salvador v Marshall,* 2009 CarswellOnt 2809*; Hallman v. Pure Spousal Trust (Trustee of)* 2009 CarswellOnt 5795*; Wilcox v. Flinstone Glass and Mirror Ltd.,* 2009 CarswellOnt 8217- but also see *Pearsall Estate (Re),* 2009 CanLII 25140 (ONSC)

22 For an account of the historic cases which illustrate the court's discretion see Widdifield on Executors and Trustees, 6th ed., Chapter 14 – Passing Accounts, Marni M.K.Whitaker, at 14.2.4, "When Will the Court Refuse to Compel" p. 14-7 through 14-9, Carmen S. Theriault (ed.)(Toronto: Carswell, 2002).

The *Estates Act*, Section 10[23] specifies and directs that an appeal from a passing of accounts judgment exceeding $200 is within the jurisdiction of the Divisional Court.

The powers of the court on a passing of accounts concerning the accounts of a guardian, or attorney are set out in subsections 42(1), (7) and (8) of the *SDA* and subsections 49(3) and (4) of the *Estates Act.*

It should be noted concerning proceedings where a person is under a disability, that disability is defined in Rule 1.03 of the *Rules of Civil Procedure*[24] to include a person incapable within the meaning of sections 6[25] and 45[26] of the *SDA,* and is governed by Rule 7 of the *Rules of Civil Procedure.*[27] Section 6 of the *SDA* applies to incapacity to manage property where a person is not able to understand information relevant to making a decision in the management of his or her property, or does not appreciate the reasonably foreseeable consequences of a decision or lack of a decision. Section 45 of the *SDA* applies to incapacity for personal care.

Rule 7.01[28] provides: *"Unless the court orders or a statute provides otherwise, a proceeding shall be commenced, continued or defended on behalf of a party under disability by a litigation guardian."*

Where a mentally incapable person does not have a guardian with authority to act as a litigation guardian, but has an attorney under a Power of Attorney, then that attorney shall act as litigation guardian.[29]

Where a proceeding is commenced against an incapable person who has no guardian, but who has

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23 *Estates Act,* R.S.O. 1990, c. E.21. s. 10.
10. (1) Right of Appeal – Any party or person taking part in a proceeding under this Act may appeal to the Divisional Court from an order, determination or judgment of the Superior Court of Justice if the value of the property affected by such order, determination or judgment exceeds $200.
(2) Rights of persons interested to appeal – Where the claimant or personal representative having a right of appeal does not appeal from the order, judgment or determination, the Children's Lawyer or any person beneficially interested in the estate may, by leave of a judge of the Divisional Court, appeal therefrom.
(3) Rights of persons interested to be heard at appeal – The Children's Lawyer or any person beneficially interested in the estate, may, by leave of a judge of the Divisional Court, appear and be heard upon any such appeal.

24 *Rules of Civil Procedure,* R.R.O 1990, Reg. 194, Rule 1.03:
..."disability" where used in respect of a person, means that the person is,
a minor,
mentally incapable within the meaning of section 6 or 45 of the Substitute Decisions Act, 1992 in respect of an issue in the proceeding, whether the persona has guardian or not..."

25 *Substitute Decisions Act, 1992,* S.O. 1992, c. 30, s. 6: A person is incapable of managing property if the person is not able to understand information that is relevant to making a decision in the management of his or her property, or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.

26 *Substitute Decisions Act, 1992,* S.O. 1992, c. 30, s. 45: A person is incapable of personal care if the person is not able to understand information that is relevant to making a decision concerning his or her own health care, nutrition, shelter, clothing, hygiene or safety, or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.

27 *Rules of Civil Procedure,* R.R.O 1990, Reg. 194, Rule 7, and particular Rules 7.01, 7.04 and 7.08.

28 *Rules of Civil Procedure,* R.R.O 1990, Reg. 194, Rule 7.01 provides: Unless the court orders or a statute provides otherwise, a proceeding shall be commenced, continued or defended on behalf of a party under disability by a litigation guardian.

29 *Rules of Civil Procedure,* R.R.O 1990, Reg. 194, Rule 7.02(1.1).

an attorney with a Power of Attorney and authority to act as litigation guardian, then the attorney must act as litigation guardian.[30]

Where there is no guardian or attorney under a Power of Attorney, and where the court believes that the person lacks the mental capacity to understand the proceedings and make decisions regarding the matter on their own behalf, the court may appoint the OPGT to act as litigation guardian, or if the nature of the disability is minority, the OCL. As litigation guardian, the OPGT or the OCL has a responsibility to protect the person's interest in the litigation. The OPGT and the OCL will provide instructions to the person's solicitor and make decisions respecting any settlements on behalf of the person under disability.

When a tentative settlement is reached where there has been a breach of duty with damages payable to an incompetent person, and where a guardian of property has not been appointed, the OPGT may wish to have a separate application made to have a guardian of property appointed before obtaining court approval of the proposed settlement. Resulting settlement funds are usually paid into court on behalf of a mentally incompetent person (until a guardianship order is made), and/or a minor, unless a judge orders otherwise.

Finally, where it appears to the court that a litigation guardian is not acting in the "best interests" of the party under disability, the court may substitute the OPGT or the OCL as the case may be, as litigation guardian.[31]

5. The Duty to Account and Relevant Limitation Periods to Consider

General

The duty to account refers to the duty of the estate trustee, attorney, or guardian to maintain continuous and ongoing comprehensive records concerning the management or administration of property belonging to the deceased, the grantor or the person under disability.

The passing of accounts is made on notice to those lawfully entitled to receive same in accordance with the relevant legislation whether they be beneficiaries, dependants, entitled by statute, or other third parties. The *Rules of Civil Procedure*, the *Estates Act,* and the *Trustee Act* do not fix any time within which accounts must be passed nor, likewise is there any limitation on the time within which those lawfully entitled to a passing of accounts can demand an accounting.

Since there is no mandatory legal requirement for an estate trustee, attorney, or guardian to pass

30 *Rules of Civil Procedure,* R.R.O 1990, Reg. 194, Rule 7.03(2.1).
31 *Rules of Civil Procedure,* R.R.O 1990, Reg. 194 , Rule 7.06(2).

accounts, and similarly there is no legislative requirement concerning the timing for a passing of accounts, one has to look at the circumstances of the particular facts in any administration. In the course of an estate administration, there exists what is known as an "*executor's year*" within which to administer an estate, and therefore to demand an accounting until after the expiration of that year may be imprudent, absent special circumstances[32].

Timing aspects respecting passings and filing objections on the passings, are to be distinguished from applicable statutory limitation periods pursuant to the *Limitations Act.*[33] Relevant too, to passings, were certain court decisions including that of *Bikur Cholim Jewish Volunteer Services v. Langston ("Bikur").*[34]

Limitations Act

The *Limitations Act*[35] took effect on January 1, 2004. Under the *Limitations Act* there is a basic limitation period of 2 years from the discovery of a claim, in addition to an ultimate limitation period of 15 years from the act or omission upon which the claim is based. There are exceptions and this paper is not intended to include a review of the provisions of the former and current *Limitations Acts* as each relates to estate proceedings and in particular, passing of accounts matters.[36] Rather, reference is made to highlight the importance of such considerations within the context of a passing. For further reference, see publication, "*Limitation Periods in Estates and Trusts Litigation"*.[37]

The Ontario Court of Appeal decision of *Bikur* above[38] and the trial decision[39] address the limitation period within which a claim can be brought against an estate trustee for breach of trust, and fraud in the context of both the former *Limitations Act*[40] and the current *Limitations Act.*[41] Though proceedings in the referenced case were not brought under Rules 74.16 through 74.18, the issues raised concerning fraud could well have been brought under a court passing of accounts application and are therefore relevant. The former *Limitations Act* and the current *Limitations Act*

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32 The Executor's year is a common law rule that allows the executor a one-year period starting from the death of the testator to administer the Estate and transfer specified gifts without incurring interest per *Re Lightfoot* [1948] 2 D.L.R. 418 (Ont. H.C.) at 420.

33 *Limitations Act, 2002,* S.O. 2002 c.24, Sch B.

34 *Bikur Cholim Jewish Volunteer Services v. Langston,* [2007] O.J. No. 415 (S.C.).

35 *Limitations Act,* 2002, S.O. 2002, c.24, Sch B.

36 For a more detailed review of the *Limitations Act* as it may relate to, *inter alia,* passing of accounts and in particular the trial Court and Ontario Court of Appeal decision in *Bikur Cholim Jewish Volunteer Services v. Langston*, [2007] O.J. No. 415, see article by Anne Werker, The Advocates Quarterly, Volume 34, Number 1, February 2008.

37 STEP Canada 15th National Conference, June 10-11, 2013, *Limitation Periods in Estate and Trust Litigation,* Michael W. Kerr, Miller Thomson LLP and Kimberly Whaley, available online: http://whaleyestatelitigation.com/blog/2013/06/kimberly-presented-two-papers-at-the-step-canada-15th-national-conference-in-toronto/ .

38 *Bikur Cholim Jewish Volunteer Services v. Penna Estate,* 2009 CarswellOnt 1105, 2009 ONCA, 196, 94 O.R. (3d) 401, 68 C.P.C.(6th) 209, 48 E.T.R. (3d) 22, 250 O.A.C. 129, 308 D.L.R. (4th) 494.

39 *Bikur Cholim Jewish Volunteer Services v. Langston,* [2007] O.J. No. 415 (SC).

40 *Limitations Act,* R.S.O. 1990, c. L.15.

41 *Limitations Act,* 2002, S.O. 2002, c 24, Sch B.

provisions may have to be read together with s. 38 of the *Trustee Act* as to the applicability of any relevant limitation periods.[42] Additional cases concerning the nature and extent of the potential limitation issues applicable to court ordered passings of accounts in accordance with the *Rules of Civil Procedure* would include the cases of *Waschowski v. Hopkinson Estate,*[43] *Cameron Estate v. Button,*[44] and *Hare v. Hare.*[45] The relevant sections of the former and current *Limitations Acts* should be reviewed and considered in the context of potential claims pursued in a court passing of accounts. The new basic two-year limitation period suggests it may even be prudent to ensure applications to compel accounts be brought within that time.[46]

The provisions of the current *Limitations Act* should be taken into consideration, and the case law arising from the decisions post coming into effect as precedent. Additionally, relevant statutes and their interplay should also be considered, for instance, the *Real Property Limitations Act.*[47]

Real Property Limitations Act

The *Real Property Limitations Act*[48] (the "*RPLA*") is an act that governs all limitation periods affecting land. The old *Limitation Act, 1990* was mostly repealed and replaced by the *Limitations Act, 2002*, however Part 1 of the 1990 act remained in force and was renamed the *RPLA*. Section 2 of the *Limitations Act, 2002* makes it clear that the new Act does not apply to proceedings to which the *RPLA* applies.

Some aspects of the *RPLA* apply to estate administration. The limitation period applicable to a claim for recovery of a legacy (including a share of residue) or a devise is in the *RPLA*, not the *Limitations Act, 2002*.[49] The *RPLA* provides for a ten (10) year limitation period which starts at the time the claimant has a vested interest in possession of the legacy (or devise) and not with discovery.[50] The recent case of *McConnell v. Huxtable*[51] deals with the interpretation and application of this limitation period in the *RPLA* to a constructive trust claim. Recovery of interest on a legacy is also governed by the *RPLA* which provides that a legatee has six years from the date that the interest became due to commence a claim for recovery.[52] The ten year limitation period under the *RPLA*

42 *Trustee Act,* R.S.O. 1990, c. L.15, s. 38(3): Limitation of actions – An action under this section shall not be brought after the expiration of two years from the death of the deceased.
43 *Waschowski v. Hopkinson Estate,* 2000 CarswellOnt 470, 47 O.R. (3d) 370; 184 D.L.R. (4th) 281; 129 O.A.C. 287; 44 C.P.C. (4th) 42; 32 E.T.R. (2d) 308; [2000] O.J. No 470.
44 *Cameron Estate v. Button,* 2005 CarswellOnt 1557, 16 E.T.R. (3d) 189.
45 *Hare v. Hare* [2006] O.J. No. 4955 (C.A.).
46 *Limitations Act, 2002,* S.O. 2002, c.24, Sch B,, s. 5.4.
47 *Real Property Limitations Act*, R.S.O. 1990, c.L.15.
48 *Real Property Limitations Act*, R.S.O. 1990, c. L.15.
49 *Real Property Limitations Act,* R.S.O. 1990, c. L.15, s.4.
50 See Anne Werker, "Limitation Periods in Ontario and Claims by Beneficiaries" (2008) 34:1 Advocates' Quarterly, at p.4 ("Werker").
51 2013 ONSC 948 ("*McConnell*").
52 *Real Property Limitations Act,* R.S.O. 1990, c.L.15 at s.17

does not apply to an intestate share of an estate.[53] The two year limitation period from the date of discovery under the *Limitations Act, 2002* would apply in that circumstance.

Schedule 19: Legislative Exceptions to the 2 Year Basic Limitation Period

Section 19 of the *Limitations Act, 2002* addresses other statutes which contain limitation periods and how such should be applied.[54]

It mandates that unless a specific limitation period in another piece of legislation is set out in the Schedule to the *Limitations Act, 2002*, it will have no force or effect and the two (2) year limitation period and the ultimate 15 year limitation period will prevail.

However, the Schedule to the *Limitations Act, 2002* lists the other legislation that is applicable in the estates context and which will override the basic two year limitation period: section 38(3) of the *Trustee Act*, sections 44(2), 45(2) and 47 of the *Estates Act*, section 17(5) of the *Estates Administration Act*, section 7(3) of the *Family Law Act* and section 61 of the *Succession Law Reform Act*. These specific sections which are listed in Schedule 19 and are exceptions to the two year limitation period.[55]

There are limitation period exceptions concerning those under disability.[56]

Failure to Account

Notably, it appears that even a fraudulent trustee may be able to reap the benefits of a limitation period if the cause of action has not been fraudulently concealed. Discoverability principles do not interfere with the running of time respecting the limitation period. Note that the limitation period

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53 Werker, *supra* note 50 at p.13

54 *Limitations Act,* S.O. 2002, Chapter 24, Sched. B, s. 19:

> 19. (1) A limitation period set out in or under another Act that applies to a claim to which this Act applies is of no effect unless,
> (a) the provision establishing it is listed in the Schedule to this Act; or
> (b) the provision establishing it,
> (i) is in existence on January 1, 2004, and
> (ii) incorporates by reference a provision listed in the Schedule to this Act.
> (2) Subsection (1) applies despite any other Act.
> (3) The fact that a provision is listed in the Schedule shall not be construed as a statement that the limitation period established by the provision would otherwise apply to a claim as defined in this Act.
> (4) If there is a conflict between a limitation period established by a provision referred to in subsection (1) and one established by any other provision of this Act, the limitation period established by the provision referred to in subsection (1) prevails.
> (5) Sections 6, 7 and 11 apply, with necessary modifications, to a limitation period established by a provision referred to in subsection (1).

55 STEP Canada 15th National Conference, June 10-11, 2013, *Limitation Periods in Estate and Trust Litigation,* Michael W. Kerr, Miller Thomson LLP and Kimberly Whaley.

56 *Limitations Act,* S.O. 2002, c. 24, Sched B. s. 6 and 7

referenced in Section 38 of the *Trustee Act* runs even if there is a person under disability.[57] Cases decided prior to the effective date of the new *Limitations Act, 2002* have held that the time period set out in Section 38 of the *Trustee Act* runs from death and is not subject to discoverability as stated above.[58]

Breach of Fiduciary Duty

In *Boyce v. Toronto Police Services Board,*[59] the Ontario Court of Appeal determined that claims for breach of fiduciary duty are caught by the phrase "claims pursued in court".[60] These claims do not fall within any of the exceptions under the *Limitations Act, 2002* and the 2-year limitation period applies.

Fraudulent Conveyances

If a fraudulent conveyance is discovered on or after January 1, 2004, it is subject to the 2-year limitation period in the *Limitations Act, 2002*. The law previously had provided no limitation period at all for such an action.[61] In *Toronto Standard Condominium No. 1703 v. 1 King St. West*,[62] the plaintiff wished to amend a Statement of Claim in December of 2008, to include a claim that two mortgages registered in November of 2006 were void as fraudulent conveyances. Master Glustein dismissed the plaintiff's motion for leave to amend as the claim for fraudulent conveyance was subject to the 2-year limitation period and was statute barred.

On appeal to the Divisional Court, the appellant submitted that "the proposed amended fraudulent conveyance pleading was not a "claim" as that term is defined in the *Limitations Act, 2002,* because no injury, loss or damage had yet occurred." The appellant also argued that the Master erred in applying the discoverability principle and for not concluding that s.16(1)(a) of the *Limitations Act, 2002* (that there is no limitation period for a proceeding for a declaration with no consequential relief) was applicable to this case. Justice Sachs, however, upheld the Master's decision and held that:

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57 Section 38 of the *Trustee Act*, R.S.O. 1990: (1) Except in cases of libel and slander, the executor or administrator of any deceased person may maintain an action for all torts or injuries to the person or to the property of the deceased in the same manner and with the same rights and remedies as the deceased would, if living, have been entitled to do, and the damages when recovered shall form part of the personal estate of the deceased; but, if death results from such injuries, no damages shall be allowed for the death or for the loss of the expectation of life, but this proviso is not in derogation of any rights conferred by Part V of the *Family Law Act*. (2) Except in cases of libel and slander, if a deceased person committed or is by law liable for a wrong to another in respect of his or her person or to another person's property, the person wronged may maintain an action against the executor or administrator of the person who committed or is by law liable for the wrong. (3) An action under this section shall not be brought after the expiration of two years from the death of the deceased.

58 *Waschowski v. Hopkinson Estate*, 2000 CarswellOnt 470, 47 O.R. (3d) 370; 184 D.L.R. (4th) 281; 129 O.A.C. 287; 44 C.P.C. (4th) 42; 32 E.T.R. (2d) 308; [2000] O.J. No 470

59 *Boyce v. Toronto Police Services Board*, 2011 ONSC 53, upheld 2012 ONCA 230.

60 *Boyce v. Toronto Police Services Board,* 2012 ONCA 230 at para.2.

61 *Toronto Standard Condominium No 1703 v.1 King St. West*, 2010 ONSC 2129 (Div. Crt), dismissing appeal from 2009 CanLII 55330.

62 *Toronto Standard Condominium v. 1 King St West,* 2010 ONSC 2129 (Div. Crt).

> *In my view, the Master was correct when he concluded that the proposed claim was a "claim" within the meaning of s.1 of the Limitations Act, 2002. The decision of the Court of Appeal in Perry, supra, has been superseded by the Limitations Act, 2002. Unlike an "action on the case" it is not essential that a "claim" under s. 1 of the Act "sound in damages" or "create a legal duty, the breach of which gives rise to a cause of action."*
>
> *The Plaintiff is alleging an injury, namely that assets that should be available to satisfy its claim against the Defendants have been put beyond its reach. According to the Plaintiff, that injury occurred as a result of the act of 1KW in granting two mortgages on its assets to HEL. Finally, the Plaintiff is seeking a remedy for its injury – first, a declaration that the transaction that put the assets out of its reach is void and, second, a declaration that its claims have priority over any claims that HEL might make against 1KW.*[63]

Justice Sachs also confirmed that the Master did not err in his application of the discoverability doctrine, nor in his decision that s.16(1)(a) of the *Limitations Act, 2002* did not apply in this case.

Fraud, Breach of Fiduciary Duty and Misrepresentation

Of notable relevance to estates matters, is also the decision in ***Portuguese Canadian C.U. v. Pires***[64] which held that the applicable limitation period for fraud, breach of fiduciary duty and misrepresentation under the *Limitations Act, 2002* is 2 years. The Court held that the plaintiff knew in May of 2006 that he had purchased something which was worth less than what he said was represented to him.[65] His claim, commenced in 2010, was statute barred.

In ***Fracassi v. Cascio***[66] the Ontario Superior Court of Justice also held that the applicable limitation period for breach of fiduciary duty and oppression under the *Limitations Act*, *2002*, is 2 years.[67]

Failure to Account for Trust Funds

In the decision in ***Syndicate Number 963 (Crowe) v. Acuret Underwriter***[68] it was accepted that the 2 year limitation period under the *Limitations Act*, *2002*, applied to an action arising out of a failure to account for trust funds.

Lloyd's Underwriters, representing Syndicate Number 963, claimed that Acuret failed to properly account for and pay out funds that were remitted to Acuret, in trust for Lloyd's, in January 2002. Lloyd's claimed that they did not become aware that the trust funds had not been accounted for or paid out until April of 2005. Lloyd's commenced an action in October of 2006. Acuret argued that

63 *Toronto Standard Condominium v. 1 King St West,* 2010 ONSC 2129 (Div. Ct) at paras. 28-29.
64 *Portuguese Canadian C.U. v. Pires*, 2012 ONCA 335 (Div.Ct.), affirming 2011 ONSC 7448 (CanLII).
65 *Ibid*.
66 2011 ONSC 178.
67 *Ibid*.
68 *Syndicate Number 963 (Crowe) v. Acuret Underwriter Inc*., 2009 CanLII 51195 (ONSC).

the claim was statute barred. The court held that the two year limitation period applied but as the claim was not discovered until April 2005, it was not statute barred in 2006.[69]

Notable too, is the case of *Rajmohan v Norman H Solmon Family Trust*[70] wherein the Court of Appeal confirmed that the *Trustee Act* provisions and the *Limitations Act* would bar an appellant's third party claim unless either of the doctrines of fraudulent concealment or special circumstances applied. In this case, such did not apply and the court dismissed the appeal. Importantly, on the *Limitations Act* issue the Court stated as follows:

> *[10] The applicable limitation period is prescribed by the Trustee Act and not the Limitations Act, 2002, S.O. 2002, c. 24, Sch. B. The appellant submits the doctrine of special circumstances continues to be available and permits the court to add parties to an existing action after the expiration of the limitation period. Thus, it argues that because the plaintiff's action was commenced within two years of Mr. Chandran's death, the court could allow it to institute its third party claim after the expiration of two years. We do not agree. A third party claim is itself an action under the Rules of Civil Procedure, R.R.O. 1990, Reg. 194, s. 1.03(1). The doctrine of special circumstances, if it applies, does not allow a party to commence a third party claim after the expiration of a limitation period: Joseph v. Paramount Canada's Wonderland, 2008 ONCA 469 (CanLII), 2008 ONCA 469, 90 O.R. (3d) 401, at para. 28.*[71]

Moreover, the provisions of Section 38 of the *Trustee Act* are not entirely clear insofar as determining whether the limitation period applies to all claims by or against a deceased person. There continue to be decisions clarifying the law and application of the *Limitations Act*.

Sections 6 and 7 of the new *Limitations Act,* however, clearly suspend the running of time when a plaintiff in a claim is a minor or under a disability and is not represented by a litigation guardian.[72]

Finally, in the decision of *Jacques v. The Canada Trust Company,*[73] the consequences of the limitation period respecting an accounting from an executor are highlighted and emphasized as demonstrating the importance of asking for an accounting in a timely manner. In this case, Parayeski J. found that the claim of a residuary beneficiary of the estate of her father who died in 1978, notwithstanding, the fact that she had never received an accounting of her share of her father's estate, was statute-barred under both the former and the new *Limitations Act*. The claimant waited 27 years before suing the estate trustee for her share of the Estate which she never received. The court considered the provisions of subsection 23(1) of the former *Limitations Act* allowing for a period of 10 years

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69 STEP Canada 15th National Conference, June 10-11, 2013, *Limitation Periods in Estate and Trust Litigation,* Michael W. Kerr, Miller Thomson LLP and Kimberly Whaley

70 *Rajmohan v Norman H. Solmon Family Trust*, 2014 ONCA 352.

71 *Rajmohan v Norman H. Solmon Family Trust*, 2014 ONCA 352 at para 10.

72 *Limitations Act, 2002* S.O. 2002, c 24 Sch B, see sections 6, 7, 11 and 19.

73 2011 ONSC 5259, aff'd by 2012 ONCA 371, leave to appeal refused by 2012 CarswellOnt 15242, 2012 CarswellOnt 14243 (SCC Dec 06, 2012).

within which to recover a legacy, yet, the court held that Section 23 of the former *Limitations Act* did not apply but rather subsection 43(2) of the former *Limitations Act* did apply, therefore imposing a 6-year limitation period. The court held that the discoverability principle applied as defined in subsection 5(1) of the new *Limitations Act*. The court concluded that in addition to the statutory bar, that the doctrine of *'laches'* and in particular acquiescence operated to bar the claim. Interestingly, the court also considered whether or not the doctrine of fraudulent concealment would operate such as to stop the running of the limitation period. The burden, however, of proving fraudulent concealment was upon the claimant and the court found that no such claim had been established. This decision was upheld by the Court of Appeal, and leave to appeal the Supreme Court of Canada was denied.[74]

6. Passing of Accounts: Procedure and Rules

Form

The proper form of the accounts is as set out in Rule 74.17 (1)(a) through (j), (2) and (3) of the *Rules of Civil Procedure*, as made under the *Courts of Justice Act.*[75]

The procedure requires the estate trustee, or trustee, attorney, or guardian to file an application setting out the particulars of the accounting period and the persons interested in the matter before the Ontario Superior Court of Justice in the jurisdiction where the Certificate of Appointment of Estate Trustee/probate was obtained, or the power granted or guardianship order made, or otherwise as the Rules and precedent permit.

Application

The application is accompanied by the accounts, verified by affidavit, a copy of the Certificate of Appointment of Estate Trustee or Probate, and a copy of any previous judgment on passing. The applicant on an application to pass accounts also serves the court's Notice of Application and files proof of service on all interested parties with the court, including, if required, the OCL and the OPGT, at least **60 days** before the hearing date specified in the notice of application.[76] The January 1, 2016 amendments to the *Rules of Civil Procedure*, clarify that where a person (other than the Public Guardian and Trustee) acts as an attorney under a continuing power of attorney for property or as a guardian of property for a person under disability who has an interest in the estate, that

74 For further reference, see pages 16-17 of the STEP Canada 15th National Conference, June 10-11, 2013, *Limitation Periods in Estate and Trust Litigation, Michael W. Kerr, Miller Thomson LLP and Kimberly Whaley, Whaley Estate Litigation.*

75 *Rules of Civil Procedure,* R.R.O 1990, Reg. 194, Rule 74.1.

76 *Rules of Civil Procedure*, R.R.O. Reg 194, Rule 74.18(4). Note that the notice of application must be served **75 days** before the hearing date specified in the notice of application if the recipient parties reside outside of Ontario. See Rule 74.18(5).

attorney or guardian must be served with the documents.[77]

The statements required, in accordance with the form of the accounts, include a list of the assets, capital and revenue receipts, capital and revenue disbursements, the investment account, unrealized assets, closing statements with respect to money investments, liabilities and, finally, a statement of the compensation proposed or claimed.

Jurisdiction

The accounts are passed before a judge who has jurisdiction to make full enquiry into the estate, its administration, distribution and estate trustee conduct. The judge may also inquire into any complaint against the estate trustee or trustee.[78] The procedure, service and notice requirements are set out at Rule 74.18, amended as of January 2016.[79]

Notice of Objection

When served with a Notice of Application to pass accounts, the recipient may serve and file a Notice of Objection at least **35 days** before the hearing date specified in the Notice of Application.[80]

Request for Further Notice Form

If the recipient does not want to make an objection, but wishes to continue to be served with notice of any further steps in the application, they may, as of January 1, 2016, serve and file a new form called a "Request for Further Notice" (Form 74.45.1) at least **35 days** before the hearing date specified in the Notice of Application. Only those who serve and file this new form will be entitled to receive notice of any further step in the application, receive any further document in the application; file material relating to costs and in the event of a hearing be heard at the hearing, examine a witness and cross-examine on an affidavit but only related to a request for increased costs.[81]

Uncontested

Where there is an uncontested passing of accounts and an unopposed order is sought, in many instances no court attendance is required before a judge as long as all of the requirements under Rule 74.18 have been complied with and there are no Notices of Objection to the accounts filed. The court may grant a judgment on passing accounts without a hearing if, at least **5 days** before the hearing date of the application, the applicant files with the court a record containing the precise

77 *Rules of Civil Procedure*, R.R.O. 1990, Reg 194, Rule 74.18(3.2).
78 *Estates Act, R.S.O. 1990,* c. E.21, Section 49.2.
79 *Rules of Civil Procedure,* R.R.O 1990, Reg. 194, Rule 74.18.
80 *Rules of Civil Procedure*, RRO 1990, Reg 194, Rule 74.18(7).
81 *Rules of Civil Procedure*, RRO 1990, Reg 194, Rule 74.18(8.1) and (8.2).

materials set out at Rule 74.18(9) and (10),[82] including any request for increased costs, and the corresponding Forms, as amended, for an unopposed order on a passing of accounts.

Contested

Where there is an objection and a contested hearing for a passing of accounts, Rules 74.18(11.5) through (13) apply.[83] Recent amendments to these sub-rules set out the court's authority to order a trial and provide direction with respect to its conduct at the hearing of the application to pass accounts. New sub-rule 74.18(11.5) provides that an applicant must file at least **10 days** before the hearing date of the application a consolidation of all the remaining notices of objection to accounts and a reply to notice of objections to the accounts.[84]

If the application to pass accounts proceeds to a hearing, the applicant must at least **5 days** before the hearing date file with the court a record containing certain documents set out in Rule 74.18(11.7) including, the application to pass accounts, any responses to the reply, a copy of any notice of withdrawal of objection, any request for costs or increased costs, and a draft order for directions or judgement sought, as the case may be.[85]

Anyone who served a notice of objection, which has not been withdrawn, may file an alternative draft order at least **3 days** before the hearing date (or at the hearing with leave of the court) if that person does not agree to the terms of the applicant's draft order.[86]

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82 *Rules of Civil Procedure,* R.R.O 1990, Reg. 194*,* Rule 74.18(9) and (10).

83 *Rules of Civil Procedure,* R.R.O 1990, Reg. 194*,* Rule 74.18(11.5) through (13).
Rules of Civil Procedure, R.R.O 1990, Reg. 194*,* Rule 74.18(10).

84 *Rules of Civil Procedure*, RRO 1990, Reg 194, Rule 74.18 (11.5):If one or more notices of objection to accounts are filed and not withdrawn, the applicant shall, at least **10 days before** the hearing date of the application, serve on the persons referred to in subrule (11.6), and file with proof of service,
(a) a consolidation of all the remaining notices of objection to accounts; and
(b) a reply to notice of objection to accounts (Form 74.49.4). O. Reg. 193/15, s. 12 (15).

85 *Rules of Civil Procedure*, RRO 1990, Reg. 194, Rule 74.18(11.7): If the application to pass accounts proceeds to a hearing, the applicant shall, **at least five days** before the hearing date, file with the court a record containing,
(a) the application to pass accounts;
(b) the documents referred to in subrule (11.5);
(c) any responses to the applicant's reply to notice of objection to accounts by the persons on whom the reply was served;
(d) in the case of any notice of objection to accounts that is withdrawn after the documents referred to in subrule (11.5) were served and filed, a copy of the notice of withdrawal of objection (Form 74.48);
(e) the notices of non-participation in passing of accounts of the Public Guardian and Trustee and the Children's Lawyer, if served;
(f) any requests for further notice in passing of accounts (Form 74.45.1);
(g) any requests for costs (Form 74.49 or 74.49.1) of persons served under subrule (11.5);
(h) any requests for increased costs (Form 74.49.2 or 74.49.3), costs outlines (Form 57B) and responses to requests for increased costs received under subrule (11.2); and
(i) a draft order for directions or of the judgment sought, as the case may be. O. Reg. 193/15, s. 12 (15).

86 *Rules of Civil Procedure*, RRO 1990. Reg 194, Rule 74.18 (11.9): If the applicant and every person referred to under subrule (11.6), as applicable, fail to agree to all of the terms of a draft order,
(a) the applicant shall indicate that it is the applicant's draft order; and
(b) any person referred to in clause (11.6) (a) may file an alternative draft order at **least three days** before the hearing date of the application or, with leave of the court, at the hearing. O. Reg. 193/15, s. 12 (15).

Trial May Be Directed

New sub-rules 74.18(13.1) & (13.2) provide that on a hearing of the application the court may order that the application, or any issue, proceed to trial and the court may provide direction with respect to the conduct of the trial. The court may also order that a mediation session be conducted in accordance with new Rule 75.2 (discussed below), even if not subject to mandatory mediation.

Costs

The costs of an unopposed Judgment are addressed in Rule 74.18(10),[87] and for an opposed hearing they are set out in Rule 74.18(13)[88] and Tariff C.[89]

In respect of costs, often the costs set out at Tariff C for an unopposed passing are insufficient. Regard should also be had to Rules 74.18(11) to 74.18(11.5)[90] and the form of Request for Increased Costs.

The Request for Increased Costs must be served at least **15 days** before the hearing date of the application. While the previous rule required all parties to be served with a Request for Increased Costs, under the amendments, only the applicant, objectors and and parties who have served a Request for Further Notice (and sometimes the PGT/ OCL) need to be served.[91] The Request should include a costs outline.

The Response to the Request is to be served either consenting or objecting to the Request for Increased Costs at least **10 days** before the hearing date of the application.[92] The applicant for increased costs must file any supplementary record at least **5 days** before the hearing date of the application.[93] The court has the discretion to modify costs awards.[94]

Judgment

The form of judgment received on a contested passing of accounts after a hearing is as set out in Form 74.51 under the *Rules of Civil Procedure.*[95]

The form of judgment received without a hearing is Form 74.50 under the *Rules of Civil Procedure.*[96]

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87 *Rules of Civil Procedure,* R.R.O 1990, Reg. 194, Rule 74.18(10).
88 *Rules of Civil Procedure,* R.R.O 1990, Reg. 194, Rule 74.18(13).
89 *Rules of Civil Procedure,* R.R.O 1990, Reg. 194, Tariff C.
90 *Rules of Civil Procedure,* R.R.O 1990, Reg. 194, Rule 74.18(11).
91 *Rules of Civil Procedure*, R.R.O 1990, Reg. 194, Rule 74.18(11.1).
92 *Rules of Civil Procedure,* R.R.O 1990 Reg. 194, Rule 74.18(11.2).
93 *Rules of Civil Procedure*, R.R.O 1990, Reg. 194, Rule 74.18(11.3).
94 *Rules of Civil Procedure,* R.R.O 1990, Reg. 194, Rule 58.01; *Courts of Justice Act,* s. 131; *Re Briand Estate,* (1995) 10 E.T.R. (2d) 99 (O.C.G.D.)
95 *Ontario Rules of Civil Procedure,* R.R.O 1990, Reg. 194, Form 74.51.
96 *Rules of Civil Procedure,* R.R.O 1990, Reg. 194, Form 74.50.

7. Toronto Consolidated Estates List Practice Direction[97]

The most recent Practice Direction for matters on the Estates List in the Toronto region came into effect on July 1, 2014. Part V (B) addresses the current practice in Toronto regarding Passing of Accounts Applications:

B. Passing of Accounts Applications[98]

16. When initiating an application for the passing of accounts in all circumstances – whether the passing of accounts of estate trustees or of any other person acting in a fiduciary capacity, including guardianships and those acting under powers of attorney – the applicant should book only 10 minutes on the list for Hearing Matters for the initial return date of the application.

17. If no notices of objection are received or if notices of objection are received but are withdrawn within the prescribed time in respect of the application to pass accounts, and no request for increased costs has been filed and served, the applicant may request, upon filing the material required by subrule 74.18(9), that the application proceed as an unopposed matter to be dealt with by a judge in chambers without the need for the parties to attend.

18. If no notices of objection are received or if notices of objection are received but are withdrawn within the prescribed time in respect of the application to pass accounts, and a request for increased costs has been filed and served, the judge hearing the matter on the initial return date may determine the amount of the costs at that time or, if the judge is of the view that there is not sufficient time on the initial return date to hear the matter on the initial return date, the judge can schedule a date for a further hearing on the costs issue.

19. If notices of objection are received and not withdrawn in response to the application to pass accounts, and if the parties can agree in advance of the initial return date on the terms of an order giving directions (including a timetable for each pre-hearing step and, where practicable, the hearing date), then parties can obtain a consent order giving directions on the scheduled initial 10 minute return date for the application.

20. If notices of objection are received and not withdrawn and if the parties cannot agree on an order for directions prior to the initial return date, the parties should file, at least two days in advance of the initial return date, copies of their respective draft orders giving directions, including timetables for each pre-hearing step and proposed hearing dates. If the dispute about directions can be resolved during the 10 minute appointment on the initial return date, the judge can issue an order giving directions, including a timetable for pre-hearing steps and a hearing date. If the argument about the terms of an order

97 Consolidated Practice Direction Concerning the Estates List in the Toronto Region: http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/estates/.

98 *Ibid*, Part V(B).

giving directions will require longer than the 10 minute appointment on the initial return date, the judge can schedule a date for the hearing of a contested motion for directions.

21. Draft orders giving directions should address the items described in paragraph 46 (below)[99]

46. Draft orders giving directions should address, where applicable, the following matters:

a. the issues to be decided;

b. who are the parties – who is propounding the will(s) and who is challenging the will(s), and who is submitting rights to the court;

c. whether there is any party under disability who requires representation and, if so, whether notice to the Public Guardian and Trustee or the Office of the Children's Lawyer should be directed;

d. whether an estate trustee should be appointed during litigation and the amount of security, if any, such an estate trustee should file;

e. who shall be served with the order for directions, and the method of and times for service;

f. whether the parties should exchange pleadings or put before the court their respective positions and the material facts upon which they rely by some other means;

g. procedures for bringing the matter before the court in a summary way;

h. the timing of a mediation session under Rule 75.1 and its conduct, including (i) whether the parties wish the mediator to provide any report to the court on procedural issues, (ii) the desirability of multiple mediation sessions, and (iii) when a pre-trial conference should be held in the event the mediation does not result in a settlement of the proceeding;

i. any other pre-hearing steps to be undertaken, including documentary disclosure, obtaining medical, accounting or legal records, examinations for discovery, and the availability of a motion for summary judgment;

j. the timing for the delivery of any expert report and the utility of a pre-hearing

99 Consolidated Practice Direction Concerning the Estates List in the Toronto Region: http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/estates/.

meeting between experts to narrow the issues in dispute;

k. the timing of a pre-trial conference, including how long after an unsuccessful mediation session the pre-trial conference should be held; and,

l. any matter relating to the conduct of the trial or hearing, including whether affidavits be used as witnesses' evidence-in-chief

8. Mediation

Mandatory mediation in contested passing of accounts matters prevails in the jurisdictions of Toronto, Ottawa, Windsor and Essex County. Rule 75.1 of the *Rules of Civil Procedure* specifically applies to contested applications to pass accounts.

Even where mediation is not mandatory under Rule 75.1, as of January 1, 2016, the court has the power to direct parties to attend mediation in an Order Giving Directions under Rule 75.06(3.1)(b) or on a contested Application to Pass Accounts under Rule 74.18(13.2). Mediations that are court-ordered under either sub-rule 74.18 (13.2) (b) or sub-rule 75.06 (3.1) (b) will be governed by the new Rule 75.2 "Court-Ordered Estates Mediation".[100]

Rule 75.1.05 ("Direction for Conduct of Mandatory Mediation") provides that the applicant must make a motion seeking directions respecting the conduct of the mediation, unless the Court has already given direction for the conduct of the mediation under 74.18(13.2) or 75.06(3.1)(a). Likewise, it may be prudent to explore the exemption provisions in respect of mandatory mediation at Rule 75.1.04.

9. Hearing / Trial

Often on a contested passing of accounts, directions may need to be sought in the form of an order giving directions setting out the objections not resolved and the potential triable issues. Regard should be had, however, to the statutory provisions mentioned herein at s. 49(3) of the *Estates Act*.

Further regard should be had to s. 49(4) of the *Estates Act*[101] which governs the jurisdiction of the court to give directions as to pleadings, productions, discovery and all other procedural steps necessary to dispose of the contested passing of accounts.[102]

In addition to Rules 74.15 through 74.18 of the *Rules of Civil Procedure*, Rule 75.06 provides the

100 *Rules of Civil Procedure*, RRO 1990, Reg 194, Rule 75.2.
101 *Estates Act,* R.S.O. 1990, c. E.21, s. 49(4).
102 *Turk v. Turk* [1957] 0.R. 482 (C.A.).

jurisdiction for any person having a financial interest in an estate to apply for the opinion, advice or direction of the court as the court may direct. Any court passing therefore may be initiated from Rule 74.15, or Rule 75.06.

Within the trial context, where a contested passings of accounts is concerned, serious regard must be made of the cost consequences concerning formal Rule 49 Offers to Settle.[103] Such offers are to be served at least eight (8) days before the hearing date.

Rule 58.08(1)[104] and S. 130 of the *Courts of Justice Act* also address the jurisdiction of the court on passings of accounts as well as s. 64 of the *Trustee Act.*[105]

Additional considerations may include where a fiduciary is responsible for multiple Wills, in which case the passing process must be completed for each Will even if the beneficiaries under the Will are the same. Furthermore, fiduciaries should be advised to obtain a Canada Revenue Clearance Certificate[106] to prevent associated personal liability in respect of estate taxes.

10. Order Giving Directions: Best Practices

As stated, Rules 74.16 to 74.18 of the *Rules of Civil Procedure* set out the procedure for starting an application to pass accounts. Previously the only guidance that these rules gave to the parties and the court after the Notice of Application was issued was that a hearing to grant judgment on an application to pass accounts shall proceed on the hearing date specified in the initial notice of application.[107] This had the possibility of leading to certain confusion and inconsistency in practice as the old rules had virtually no guidance on the materials and conduct of the hearing. New sub-rules introduced as of January 1, 2016 may provide some clarity, at least on the timing for the service and filing of documents. As discussed above at section 7, sub-rules 74.18(11.5) to (11.9) now set out the procedure and deadlines for filing material for a hearing of an application to pass accounts. Furthermore, new Rules 74.18(13.1) & (13.2) provide for the court's authority to order a trial or mediation (if required).

While the 2016 amendments have increased the service of a notice of objection to accounts to 35 days before the date specified in the notice of application (rather than 30 days before the

103 *Rules of Civil Procedure,* R.R.O. 1990, Reg 194 Rule 49.
104 *Rules of Civil Procedure,* R.R.O. 1990, Reg 194 Rule 58.08(1).
105 *Trustee Act,* R.S.O. 1990, s. 64: Costs may be ordered to be paid out of estate – The Superior Court of Justice may order the costs of and incidental to any application, order, direction, conveyance, assignment or transfer under this Act to be paid or raised out of the property in respect of which it is made, or out of the income thereof, or to be borne and paid in such manner and by such persons as the court considers proper.
106 *Income Tax Act*, RSC 1985, c 1 (5th Sup), Sec 159 (2).
107 *Rules of Civil Procedure*, R.R.O. 1990, Reg 194, Rule 74.18(11.5).

hearing date),[108] the applicant may still not have sufficient time to answer the objections, or, even if sufficient, the objector may not have enough time to evaluate the responses if any. The process of answering objections tends to be iterative, with more than one back-and-forth exchange between the applicant and the objector before it is clear that either an objection is satisfied, or cannot be satisfied. Certain objections may call for the applicant to respond by way of a further sworn affidavit, which the objector may wish to cross-examine on. These objections and issues may complicate the timing and process even before the initial hearing.

The procedure for conducting the hearing itself is also an open question: an application to pass accounts is essentially a court-supervised financial audit, which does not fit neatly into our adversarial system of application or trial adjudication without forethought and focused modification.

In the Toronto region, the new amendments setting out the timing for serving certain documents in a passing of accounts application should be read together with the Toronto Estates Practice Direction (discussed above) which provides that parties may obtain an Order Giving Directions. Note however that the practice direction in part provides guidance and direction but is no substitute for *Rules* of the Court.

An Order Giving Directions is, "designed to provide the parties with a procedural framework in which to prepare the proceeding for final adjudication."[109] It compels the parties to give the necessary forethought to implement a process and the procedure that is most likely to lead to a just, expeditious and cost-effective determination. The benefits of an Order Giving Directions are, generally speaking, their flexible and consensual nature.

Every application to pass accounts is unique. Some objections may be about the fiduciary's failure to keep accurate records; some may be about the propriety of claimed or stated expenses; some may be about the quantification of compensation; some may be concerns over poor investment decisions; and others may be about misappropriation/misallocation of assets; just to name some of the more common objections. Some applications will involve the disclosure and organization of large volumes of documentation, while others may involve little documentation but require the evidence of witnesses whether professional in the nature of experts or otherwise. Some applications might be most appropriately heard according to the ordinary procedure for applications under Rule 38, while others are more appropriately heard as trials with *viva voce* evidence.

While the amendments provide some more guidance on the timing for service of documents leading up the hearing date, other disclosures, processes and procedures may still need to be negotiated amongst the parties.

108 *Rules of Civil Procedure*, R.R.O. 1990, Reg 194, Rule 74.18(7).
109 Consolidated Practice Direction Concerning the Estates List, Toronto Region, July 1, 2014 at s. 44.

As the Toronto Estates List Practice direction states:

> *Rule 75.06 provides the court with considerable discretion and flexibility to put in place a process that will ensure the just, expeditious and least expensive determination of a proceeding on its merits. Parties are expected to take time and care in preparing proposed orders giving directions for consideration by the court*.[110]

Jurisdiction and Procedure

The court's jurisdiction and its source of guidance in making orders for directions come from three distinct sources:

1) Firstly, the jurisdiction of the Court as it extends to the specific powers of enquiry on an application to pass accounts, arise from the *Estates Act*, Section 49 (1) through 49(10). Specifically, section 49(4) of the *Estates Act* provides that a judge may order the trial of an issue of any complaint or claim by a person interested in the passing of accounts and shall make all necessary directions as to pleadings, production of documents, discovery and otherwise in connection with the issue;[111]

2) Secondly, rule 75.06, provides that any person who appears to have a financial interest in an estate may apply for directions, or move for directions in another proceeding under this rule, as to the procedure for bringing any matter before the court.[112]; and

3) Thirdly, but only applicable on the Toronto Estates list, is the Toronto Estates List practice direction referenced above, which provides specific guidance to parties in applications to pass accounts and provides that parties may seek an order giving directions.[113]

Also, under the new rule 74.18(11.7), one of the documents that must be in the record filed by the applicant at least five days before the hearing date, is a draft order for directions or the judgement sought, as the case may be.[114]

It has often been accepted by experienced counsel that the best practice in a contested application to pass accounts is to obtain an Order Giving Directions, even in regions where the practice direction does not apply. The Superior Court of Justice outside of Toronto clearly has broad jurisdiction to order directions pursuant to s. 49 of the *Estates Act* and Rule 75.06 of the Rules.

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110 Practice Direction, at s. 44.
111 *Estates Act*, R.S.O. 1990, c. E.21, s. 49(4).
112 *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 Rule 74.06(1).
113 It may be more accurate to define the practice direction as a source of principles to apply when the court exercises its discretion rather than a source of "jurisdiction". See *Tibbits v. York Central Hospital*, 2005 CanLII 2928 (ON SC) at paras. 11 and 12, but contrast, e.g., *Waxman v. Waxman*, 2011 ONSC 1129 (Commercial List) as paras. 12 to 15 and Practice Direction, *supra* at para 16, 19 and 20.
114 *Rules of Civil Procedure*, R.R.O. 1990, Reg 194, Rule 74.18(11.7)(i).

If parties cannot agree on the terms of an Order Giving Directions, any party can bring a motion for directions. The jurisdiction to bring a motion in an application to pass accounts is the same as in any other proceeding and is governed by Rule 37 of the Rules. Again, in Toronto, regard should be had to the July 2014 Practice Direction.[115]

The Potential Consequences of No Order Giving Directions

The consequences of not seeking a timely motion for directions can be potentially serious. In *Steven Thompson Family Trust v. Thompson et. al.,* the applicants brought an application to pass their accounts.[116] The respondent beneficiaries filed Notices of Objection. All of the parties filed written submissions or responding materials, and subsequently attended the hearing of the application on the scheduled date. The respondents, in their submissions, raised allegations of the applicant's gross negligence, bad faith, and willful misconduct. The applicants argued at the hearing that these claims would require findings of fact that could not be made on the record before the court. The respondents argued that, since they were not seeking any remedy other than the disallowance of trustee expenses and compensation, that there was no need for any additional record. The court agreed with the respondents and proceeded with the hearing that day, disallowing various trustee expenses and reducing compensation.[117] It is important to note that the applicant, who was resisting judgment being made that day, never brought a motion for directions. The Court again has broad discretion and inherent jurisdiction to dispose of the application, or order directions on any matter touching the accounts as it alone deems appropriate.

If there is a possibility that the parties to an application to pass accounts will not consent to an Order Giving Directions before the first appearance, the party/parties should arguably bring a motion for directions. The party/parties should not merely turn up in court with draft Orders in hand as this may be risky given the powers afforded to the court.

The Content of an Order Giving Directions (Toronto)

The Toronto Estates List practice direction gives some notion about the current content of an Order Giving Direction as set out above.[118]

Specifically, with respect to contested applications to pass accounts, the Order Giving

115 Practice Direction, *supra*, and s.7 referred to herein.
116 *Steven Thompson Family Trust v. Thompson et. al.*, 2012 ONSC 7138
117 *Steven Thompson Family Trust v. Thompson et. al.*, 2012 ONSC 7138, at para. 27. The correctness of this decision is questionable. The court stated that, as a contested passing of accounts, rule 38.10(4) operated to exclude an order for trial as an option for disposition. While it is correct that Rule 38.10(4) provides that an order under subrules (2) and (3) for a trial of issues is unavailable in an application to pass accounts, the court never refers to the availability of an order for a trial of issues under rule 75.06
118 Practice Direction*, supra,* at s.46.

Directions should arguably address the following, as applicable:[119]

- The timing and conduct of a mediation, if in a mandatory jurisdiction;
- The issues to be tried and each party's position on each issue;
- The timing and scope of relevant disclosure;
- The witnesses each party intends to call, the issues each witness intends to address, and the anticipated length of each witness' testimony (examination-in-chief and cross-examination);
- The procedure to be followed at the hearing, including the method of adducing evidence-in-chief; and

In addition to the *Rules of Civil Procedure,* creative thinking can give rise to useful procedures that might be appropriate to be employed in any given case. Brown J., has given the following guidance to counsel on the Commercial List, who are contemplating the mode of trial or summary judgment motion, and these reasons are worthy of consideration in the context of passing of accounts applications:

> *The 2010 amendments to the Rules of Civil Procedure made available to judges and counsel alike a big box of LEGO-like building blocks with which they can construct a wide variety of modes of trial: witnesses testifying by viva voce evidence; witnesses testifying, in whole or in part, by affidavit; using pre-hearing affidavits and cross-examinations as examinations for discovery; using pre-hearing affidavits as part of the trial evidence-in-chief of a witness and pre-hearing transcripts as part of the trial cross-examination of a witness; placing time limits on examinations at trial; using written opening statements; pre-trial hot-tubbing by experts; and, filing an agreed statement of facts. The range of alternatives is not limited by the specific examples identified in the Rules because a judge "may give such directions or impose such terms as are just" in respect of the trial and make such order as the judge "considers necessary or advisable with respect to the conduct of the proceeding".*
>
> *Under our Rules the "conventional trial" no longer exists as a norm; the Rules have made the civil trial modular in nature, with counsel and the judge able to fashion trials tailor-made to the circumstances of each a particular case. Our Court must use these trial building blocks to offer litigants creative, cost-attractive trial options if we stand any hope of limiting complex summary judgment motions to the role defined for them by the Court of Appeal in the Combined Air decision and preserving the role of the public courts as the primary adjudicators of civil cases*.[120]

The parties must, of course, remember that although the court's discretion is wide, it will be

119 *Practice Direction, supra,* at s.47.
120 *George Weston Limited v. Domtar Inc*., 2012 ONSC 5001 at paras. 36 & 37.

exercised in a principled way. In *Newell v. Newell*, an objector obtained an Order Giving Directions to cross-examine the applicant on his affidavit verifying accounts.[121] The applicant sought and was granted leave to appeal this Order. The Divisional Court found that the right to cross-examine at large on an affidavit verifying accounts was too broad.[122] Instead, the right to cross-examination should be confined to the cross-examination of those issues directed to be tried. The court said that the procedure on an application to pass accounts should be "informal and summary in nature" until after a judge decides that there are issues requiring a trial. A pre-hearing cross-examination should arguably not be construed as standard practice.

In crafting an Order Giving Directions, it may therefore be worth considering and adhering to the principles enunciated in the case of *George Weston Limited*[123] where it was opined that creative, flexible solutions are welcome. Moreover, the principle in *Newell* that the proposed Order Giving Directions satisfy other important values, such as procedural fairness and proportionality, especially where the motion for directions will be contested is of precedential value.

Example: Zucker Estate[124]

In this case, the estate had a significant value, approximately $43 million. Two of the residual beneficiaries made an application for the accounts of the estate to be passed, alleging that excessive executor's compensation was pre-taken and should be repaid to the Estate.

There were two executors, one of whom was a partner in an accounting firm. Pursuant to an agreement between the partner and the accounting firm, the firm received one-half of the executors' compensation that was paid to the partner personally.

The Court had previously made an Order Giving Directions that required the beneficiaries to serve Notices of Objection and for the co-executors to provide responses. The beneficiaries had complied with the Order, but the co-executors had not responded by the deadline.

The other co-executor (that is, the non-partner) sought to add the accounting firm partnership as a party to the proceeding since it might be liable to repay any excessive compensation pursuant to the *Partnership Act*.

The parties agreed that further directions were required, but they could not agree on the terms of an Order. This motion proceeded as a contested motion for directions. Two main issues were contested: the appropriate issues for trial and the schedule for the steps leading to trial. The parties

121 *Newell v. Newell*, 2010 ONSC 5010 (Div. Ct.) at para 29.
122 *Newell v. Newell*, 2010 ONSC 5010 (Div. Ct.) at para. 29.
123 *George Weston Limited v. Domtar Inc.*, 2012 ONSC 5001 at paras. 36 & 37.
124 *Zucker Estate*, 2012 ONSC 2262.

made submissions on these issues and the Court considered them in written reason and likewise in its endorsement made detailed orders for directions.

11. Estate Trustee Compensation

Estate trustees, like other trustees are entitled by statute to be compensated for their services and the compensation may be fixed on the passing of accounts.

The right to compensation is derived from Section 23(2)[125] and Section 61[126] of the *Trustee Act*.

Section 61 entitles the trustee to compensation based on a *"fair and reasonable allowance for his care, pains and trouble, and his time expended in or about the estate."* Section 23(2) confers the right on a trustee to be compensated on a passing of accounts. For a trustee there is no statutory guidance stating how compensation is to be calculated and no tariff mandated by statute. Instead, the procedure for assessing compensation has evolved mainly from the cases of *Laing Estate v. Laing Estate;*[127] *Flaska Estate;*[128] *Gordon Estate;*[129] and *Jeffery Estate.*[130]

The case law sets out what developed as the usual percentages and the tariff guidelines to be applied and how the process is to be approached. The case of *Re Toronto General Trust v. Central Ontario Railway Co.*[131] sets out the five factors to be considered as follows:

(1) the size of the trust;

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125 *Trustee Act,* R.S.O. 1990, s. 23(2):
(2) Fixing compensation of trustee – 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."

126 *Trustee Act,* R.S.O. 1990, S. 61
"61. Allowance to trustees, etc. – (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) Though estate not before the court – The amount of such compensation may be settled although the estate is not before the court in an action.
(3) Allowance to personal representative for services – 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) Allowance to barrister or solicitor trustee for professional services – 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) Where allowance fixed by the instrument – Nothing in this section applies where the allowance is fixed by the instrument creating the trust.

127 *Laing Estate v. Laing Estate* (1998), (sub.nom. Laing Estate, Re) 113 O.A.C. 335 (C.A.).

128 *Flaska Estate, Re* (October 20, 1998), Doc. CA C29542 (Ont. C.A.).

129 *Gordon Estate, Re* (October 20, 1998), Doc. CA C30225 (Ont. C.A.).

130 *Jeffrey Estate, Re* (1990), 39 E.T.R. 173 (Ont. Surr. Ct.).

131 *Re Toronto General Trust v. Central Ontario Railway Co.* (1905), 6 O.W.R. 350 (H.C.), at p. 354.

(2) the care and responsibility involved;

(3) the time occupied in performing the duties;

(4) the skill and ability shown; and

(5) the success resulting from the administration.

The five factors approach relies on the consideration of the factors first, followed by a determination of what is fair and reasonable compensation in accordance with s. 61(1) of the *Trustee Act*. The discretion of the court is quite broad. The five factors approach has been criticized in that it affords a great deal of discretion in the determination of compensation.

The percentages approach originated in or about the same time as the five factors approach by the case of *Farmers' Loan and Savings Company.*[132] The current percentage guidelines are:

(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 is not immediately distributable, an annual care and management fee of two-fifths of 1% of the average value of the gross assets under administration per annum.

In or about 1988, the Ontario Court of Appeal released its judgment in three compensation cases: *Re Laing Estate*; *Re Gordon Estate*; and *Re Flaska Estate*. These cases provide the foundation for the judgments that have followed and still prevail in determining compensation. There are comprehensive resources on the historical development of executor's compensation and its current application.[133]

The three Court of Appeal cases established that a two-step process in effect would take place where the usual percentages are first applied and then the appropriateness of the result checked against the five factors. Sometimes a special fee is sought as part of a compensation claim, but

132 *Farmers' Loan and Savings Co (Re)* (1904), 3 O.W.R. 837, at p. 389.

133 "*Executors' Compensation"* by Jordan Atin (1999), 19 E.T.P.J. 1; *"Estate Litigation"* by Schnurr, B.A., Estate Litigation, 2nd ed. (Toronto: Carswell), Chapter 5.7; and Jennifer J. Jenkins and H. Mark Scott, *"Compensation and Duties of Estate Trustees, Guardians & Attorneys"* Part I, Compensation for Estate Trustees, Chapters 1 through 4; Oosterhoff, A., "*Indemnity of Estate Trustees as Applied in Recent Cases* The Advocates Quarterly, April 2013, a revised version of Professor Oosterhoff's paper delivered at the STEP Toronto Branch Conference on January 9, 2013, para 6.2 and 6.3

generally speaking, is rarely awarded except in exceptional cases where there has been for example, protracted litigation or ongoing management and/or litigation concerning for instance, a business. Similarly, the court is sometimes asked to reduce compensation where the percentages approach would have the result of over-compensation having regard to the size of the estate.[134]

The court's jurisdiction and discretion is not absolute and exceptions apply where compensation is fixed by statute, or the instrument itself, for example the Will, Trust, Power of Attorney document, guardianship order, or otherwise by agreement, or contract.

12. Attorney/Guardian Compensation

In contrast to that of a trustee, The *SDA*, Section 40, provides that an attorney for property may take an annual compensation from the property under its control and in accordance with the prescribed fee schedule.[135] The current rate is set at 3% on receipts and disbursements and three-fifths of 1% as a care and management fee, provided there is no express provision in a Continuing Power of Attorney document for compensation. If the compensation is predetermined in a Continuing Power of Attorney for Property document, then that arrangement will govern the compensation to be taken. Under the *SDA* a guardian for property or an attorney, uniquely have a statutory right to compensation. The compensation may be taken monthly, quarterly, or annually.[136] If consent in writing is given by the OPGT and by the incapable person's guardian or attorney under a Power of Attorney for Personal Care, if any, the guardian of property or attorney for property may take compensation in an amount greater than the prescribed fee schedule.[137] Where the OPGT is the guardian or attorney, and where court approved, they may take an amount greater than the prescribed fee schedule as well.[138]

To some extent, the standard of care that applies to a guardian of property or attorney depends upon whether compensation is received or not. Subsection 32(8) of the *SDA* states that: *"A guardian who receives compensation for managing a property shall exercise a degree of care, diligence and skill that a person in the business of managing a property of others is required to exercise."* Likewise under subsection 32(9), the same applies to the OPGT. Under subsection 32(7), a guardian of

134 *Re Kilgore Estate* (April 25, 1984) Doc. 25014/47 (Ont. Surr. Ct.).

135 *Substitute Decisions Act, 1992,* S.O. 1992, c. 30, Ontario Regulation 26/95, s. 1(a) through (c).
"1. For the purposes of subsection 40(1) of the Act, a guardian of property or an attorney under a continuing power of attorney shall be entitled, subject to an increase under subsection 40(3) of the Act or an adjustment pursuant to a passing of the guardian's or attorney's accounts under section 42 of the Act, to compensation of,
(a) 3 per cent on capital and income receipts;
(b) 3 percent on capital and income disbursements; and
(c) three-fifths of 1 per cent on the annual average value of the assets as a care and management fee.

136 *Substitute Decisions Act, 1992,* S.O. 1992, c. 30, s. 40(2).

137 *Substitute Decisions Act, 1992,* S.O. 1992, c. 30, s. 40(3)(a).

138 *Substitute Decisions Act, 1992,* S.O. 1992, c. 30, s. 40(3)(b).

property who does not receive compensation is judged by a lower standard and is only required to "*exercise a degree of care, diligence and skill that a person of ordinary prudence would exercise in the conduct of his or her own affairs.*"

Rule 74.16 of the *Rules of Civil Procedure* applies similarly to passings of accounts by attorneys and guardians alike.

13. Pre-Taking of Estate Trustee Compensation

Generally speaking, although there is some discrepancy in the case law, the pre-taking of compensation by estate trustees or trustees in Ontario is considered to be unacceptable practice.

Historically, the case of *William George King Trust*[139] held that pre-taking was appropriate where the compensation was for work already performed or expenses already disbursed. However, the cases of *Pilo Estate,*[140] *Re Knoch Estate,*[141] and *Re Flaska,*[142] all support the premise of the court's general disapproval of pre-taking unless the estate trustee obtains court approval, or alternatively the pre-taking is on consent of all interested parties who are not under disability.

The court in *Re Andrachuk*[143] declined the application of *Re Knoch*[144] where compensation referred to directly in the Will permitted compensation to be paid from time to time. The court permitted the pre-taking of compensation in *Re Andrachuk.*[145] It is difficult to predict with any certainty, the outcome of the pre-taking of compensation given the inconsistent treatment by courts historically, and given some of the statutory provisions, for example, the *SDA*, s. 40,[146] which permits pre-taking compensation for guardians and attorneys.

Again, note the *SDA,*[147] a guardian or attorney can pre-take compensation monthly, quarterly or annually.[148]

14. Compensation Fixed by Will, Testamentary Instrument, or Agreement

Sometimes the Will document will fix the compensation to be awarded to the estate trustee. There

139 *Re William George King Trust* (1994), 2 E.T.R. (2d) 123 (O.C.G.D).
140 *Re Pilo Estate* [1998] O.J. No. 4521 (O.C.G.D.).
141 *Knoch, Re* (1982), 12 E.T.R. 162.
142 *Flaska Estate, Re* (October 20, 1998), Doc. CA C29542 (Ont. C.A.).
143 *Re Andrachuk Estate* (2000) 32 E.T.R. (2d) 1 (Ont. S.C.J.) See also *Cheney v. Byrne (Litigation Guardian of),* 9 E.T.R. (3d) 236
144 *Knoch, Re* (1982), 12 E.T.R. 162.
145 *Re Andrachuk Estate* (2000) 32 E.T.R. (2d) 1 (Ont. S.C.J.).
146 *Substitute Decisions Act, 1992,* S.O. 1992, c. 30, s. 40.
147 *Substitute Decisions Act, 1992,* S.O. 1992, c. 30, s. 40.
148 *Substitute Decisions Act,1992,* S.O. 1992, c. 30, , s. 40(2).

is a vast body of case law on this subject alone. The overall conclusion to be drawn from the case law seems to suggest that unless the Will document fixes the compensation with specificity, the compensation will be open to attack and can later be reduced or adjusted by the court.[149]

There is a presumption where there is a bequest in a Will to an estate trustee that this bequest is given in respect of full compensation for services rendered.[150]

Compensation may also be fixed by agreement, particularly where there are corporate or professional trustees appointed, or where an estate trustee during litigation is court appointed. The *Estates Act*, s. 28, provides for the reasonable remuneration of an estate trustee during litigation[151] which compensation should properly be the subject of a court order so as to limit controversial issues from arising on a future passing.

As to Compensation Agreements, the *Trustee Act*, ss. 23(2) and 61(5) remove from the court, the discretion and jurisdiction afforded in determining compensation when it is fixed by arrangement. The Agreement is binding if contained in the Will, Codicil, Trust or testamentary instrument incorporated by reference therein or directly related to the testamentary instrument.[152]

Compensation is also affected by the number of trustees—for example, where co-trustees exist, generally speaking, compensation is to be shared. If the trustees cannot agree on the terms of compensation, advice and directions may be sought from the court.

15. Compensation and the Power of Attorney Document

Section 40(1) of the *SDA* permits an attorney under a Continuing Power of Attorney for Property as well as a guardian of property to take compensation in accordance with the fee scale prescribed by the Regulation, mandating a statutory right to compensation (and to pre-take compensation). A different level of compensation may be contemplated and therefore, there may be a clause within the document or court order reflecting same. It is important to review the governing document, since a court will be reluctant to interfere with its terms on compensation.

149 *Re Andrachuk Estate* (2000) 32 E.T.R. (2d) 1 (Ont. S.C.J.).

150 Jennifer J. Jenkins and H. Mark Scott, *"Compensation and Duties of Estate Trustees, Guardians & Attorneys"* Part I, Compensation for Estate Trustees, at Chapter 8, *"Legacies in Lieu of Compensation".*

151 *Estates Act,* R.S.O. 1990, c. E.21, at section 28:
"28. Administration pending action – Pending an action touching the validity of the will of a deceased person, or for obtaining, recalling or revoking any probate or grant of administration, the Superior Court of Justice has jurisdiction to grant administration in the case of intestacy and may appoint an administrator of the property of the deceased person, and the administrator so appointed has all the rights and powers of a general administrator, other than the right of distributing the residue of the property, and every such administrator is subject to the immediate control and direction of the court, and the court may direct that such administrator shall receive out of the property of the deceased such reasonable remuneration as the court considers proper."

152 *Re Robertson,* [1949] O.R. 427.

In contrast to attorneys for property, the *SDA* does not provide for compensation for an attorney for personal care. No regulation or statute exists to date that authorizes the taking of compensation by personal care attorneys. The case of *Re Brown*[153] provided for the first time, that the court does have jurisdiction to award compensation for legitimate services rendered by an attorney or committee of an incapable person. Since *Re Brown*, the case of *Cheney v. Byrne*[154] further supports the proposition of compensation made payable by court order to individuals acting as attorneys for personal care. However, regard should be had to the contrast in the decision of *Shibley Estate.*[155] In this case the Applicant's claim for personal care compensation was disallowed in part, due to conduct; and also on the basis that a parent is presumed to provide care without a requirement for compensation – decision of Molloy. J.

16. Compensation for Guardian of the Person / Attorney for Personal Care

The appointed guardian of the person may wish to apply to the court for compensation in respect of the person. The SDA does not regulate or prescribe compensation for a guardian of the person, though the Court has been known to make such awards on application. The guardianship of the person involves ethical implications concerning the payment of a person in carrying out life and death decisions being made on behalf of an individual with disability, and therefore compensation claimed remains in the jurisdiction and discretion of the court so as to prevent the obvious potential for abuse.

(a) The case of *Re Brown*[156] was a case where a trust company was appointed as the guardian of the property, and of the person. In the course of passing its accounts, an objection was raised by the OPGT to a claim for personal care services compensation. The Court made an award based on the following observations:

(b) there is no statutory prohibition against such compensation;

(c) the fact that the legislature has not passed a statute, or regulation providing for the payment of compensation to a guardian of the person, or fixed in the manner in

153 *Re Brown* (1999), 31 E.T.R. (2d) 164 (Ont. S.C.J.).

154 *Cheney v. Byrne,* (*Litigation Guardian of*) (2004) 9 E.T.R. (3rd) 236 (Ont. S.C.J.)

155 *Shibley Estate, Re* [2004] O.J. No. 5246 (Ont. S.C.J.).

156 *Re Brown-* 1999 CarswellOnt 4628, 31 E.T.R. (2d) 164, followed in *Cheney v Byrne* (Litigation Guardian of) 2004 CarswellOnt 2674, [2004] O.J. No. 2773, 9 E.T.R. (3d) 236 (Ont. S.C.J. Jun 23, 2004) Judicially considered 3 times), followed in *Kiomall v Kiomall,* 2009 CarswellOnt 2246 (Ont. S.C.J. Apr 27, 2009); and *Sandhu (Litigation Guardian of) v. Wellington Place Apartments*, 2006 CarswellOnt 3668, [2006] O.J. No. 2448 (Ont S.C.J. Jun 16, 2006) (Judicially considered 5 times) followed in: *Giusti (Litigation Guardian of) v, Scarborough Hospital*, 2008 CarswellOnt 2769, 167 A.C.W.S. (3d) 887,[2008] W.D.F.L. 3403, [2008] O.J. No. 1899, 57 C.P.C. (6th) 275 (Ont. S.C.J. May 13, 2008) (Judicially considered 5 times); *Marcoccia (Litigation Guardian of) v Gill,* 2007 CarswellOnt 2087 (Ont. S.C.J. Apr 05, 2007); *Ward v Manufacturers Life Insurance Co*., 2007 CarswellOnt 41, [2007] O.J. No. 37, 29 E.T.R. (3d) 233, 46 C.C.L.I (4th) 139, 25 B.L.R. (4th) 327 (Ont S.C.J. Jan 04, 2007) (Judicially considered 3 times).

which it is to be calculated, does not prevent the court from awarding it and fixing it;

(d) Section 32(12) of the SDA does not oust the application of Section 61(1) of the Trustee Act[157], as the basis for awarding compensation to a guardian. However, the use of the word "estate" in the latter section, implies a guardian of a property rather than a guardian of the person;

(e) The court does have jurisdiction to award compensation for legitimate services rendered by a committee of a person to an incapable person so found, provided there is sufficient evidence of the nature and extent of the services provided, and evidence from which a reasonable amount can be fixed for compensation;

(f) The court routinely deals with claims for compensation for work done or services rendered in a variety of situations, and there is no reason, in the absence of any statutory prohibition, for rejecting such a claim, simply because it is made by a committee of the person;

(g) Compensation for services rendered by a committee of the person must be determined differently from that awarded to a committee of property; in the latter case, traditionally, the courts have awarded compensation based upon a percentage of the value of the property administered. That method does not lend itself to fixing fair compensation for services rendered by a committee of the person;

(h) The hallmark of such compensation must be reasonableness. The services must have been either necessary or desirable and reasonable. The amount claimed must also be reasonable;

(i) The reasonableness of the claim for compensation will be a matter to be determined by the court in each case, bearing in mind the need for the services, the nature of the services provided; the qualifications of the person providing the services, the value of such services and the period over which the services were furnished. This is not meant to be an exhaustive list but merely illustrative of factors that will have to be considered, depending upon the context in question; and

(j) There must be some evidentiary foundation to support the claim for compensation.

In *Re Brown*, the Court observed there is no statutory prohibition against such compensation and, though concluding that the committee had acted reasonably and appropriately in providing the personal care services it did, with no duplication in the amounts claimed for compensation for acting as committee of the person, was however left without any evidentiary basis upon which to calculate the value of services and the reasonableness of the amount claimed, and therefore dismissed the claim for compensation for personal care services.

157 *The Trustee Act*, R.S.O. 1990 c. T.23.

This issue was also before the Court in *Cheney v Byrne*.[158] The Court found that there is no statutory prohibition against the making of an award of compensation to persons acting as attorneys for personal care, specifically referred to Section 46(3) of the SDA, providing that a person unrelated to the incapable person may not act as an attorney for personal care if the person also provides care for compensation. The Court referred to the test in Re Brown, and opined that courts routinely dealt with claims for compensation for work performed or services rendered in a variety of circumstances, akin to a quantum meruit claim for services rendered, and made an award to the personal care attorney, although discounted the hourly rate claimed. The court commented that the applicants kept serious and accurate dockets for the time spent in managing the person's personal care in that case.

In the *Sandhu* case[159] the court found in favour of a case for an award for compensation for a non-corporate guardian of the person in an amount of annual compensation.

In *Kiomall v Kiomall*[160] which is a more recent decision of the Honourable Mr. Justice Brown in 2009, compensation was sought in respect of a guardian of the person in the amount of $45,000.00 for a period spanning 3 to 4 years. The court made an analysis of the statutory provisions, referred to *Cheney v Byrne* and reviewed the hours spent providing care in the context of the value of the property of the incapable person. In this case, compensation was awarded to the guardian of the person. There was a reduction because the amount claimed was thought to be too high, with a degree of risk to the incapable person's property. Accordingly, the reasonableness of the amount of the compensation awarded had to be assessed in the context of the specific financial circumstances of the incapable person. In other words, the award had to be proportionate to the property.

Moreover, in the case of *Giusti,*[161], an allocation was made for past attendant care to the parents.

17. Compensation Generally

The conduct of the estate trustee can and will impact compensation as referenced in Section 49(2) of the *Estates Act*. The court may reduce compensation for the failure to discharge fiduciary duties and for improper conduct.[162]

158 *Cheney v Byrne* (Litigation Guardian of) 2004 CarswellOnt 2674, [2004] O.J. No. 2773, 9 E.T.R. (3d) 236 (Ont. S.C.J. Jun 23, 2004).

159 *Sandhu (Litigation Guardian of) v. Wellington Place Apartments*, 2006 CarswellOnt 3668, [2006] O.J. No. 2448 (Ont S.C.J. Jun 16, 2006).

160 *Kiomall v Kiomall*, 2009 CarswellOnt 2246 (Ont. S.C.J. Apr 27, 2009).

161 *Giusti (Litigation Guardian of) v, Scarborough Hospital,* 2008 CarswellOnt 2769, 167 A.C.W.S. (3d) 887,[2008] W.D.F.L. 3403, [2008] O.J. No. 1899, 57 C.P.C. (6th) 275 (Ont. S.C.J. May 13, 2008).

162 *Carley Estate, Re* (1944), 4 E.T.R. (2d) 102 (O.G.D.) and 4 E.T.R. (2d) 102

Notably, Section 35 of the *Trustee Act*[163] gives the court jurisdiction to excuse an estate trustee or personal representative in respect of a breach of trust. The estate trustee's conduct concerning a breach of trust where there is a loss sustained by the property of the deceased for failure to act prudently or to treat beneficiaries with an even hand, for loss of interest or improper payments, can all result in a reduction of compensation. Section 27 of the *Trustee Act* is also of assistance on the issue of relief from honest breach. The relevant provisions of the *Trustee Act* are as follows: s. 27(1), 27(7) and 27(8). Attorneys and guardians, as suggested above, must also act in accordance with the standard of care applicable to an attorney or guardian.[164]

That said, while attorneys and guardians must act in accordance with a particular standard of care, the *SDA* is not as extensive as s. 49 of the *Estates Act* in setting out the nature and extent to which the court may address such misconduct. Nevertheless, scrutinizing the conduct of fiduciaries is well within the inherent jurisdiction of the court.

Requests for the reduction and the increase of compensation, account for many of the applications brought before the court on passings of account. The requests for reduction of compensation often relate to the conduct of the trustee. The requests for increased compensation not only relate to the complexity of the proceedings, but often the conduct of the beneficiaries where the estate or the trust has involved litigation. The cost consequences in relation to these applications, which usually arise through the result of some protracted litigation, also account for increasing case law concerning all of these identified issues, on a passing of accounts. A synopsis of some significant court decisions will now follow.

Generally speaking, the Estate Trustee During Litigation is "entitled" to compensation on the same basis as an Estate Trustee.[165]

There are of course differences in the statutory language as between the *Estates Act*[166] and the *Trustee Act* that affect entitlement and the basis of the calculation.[167] The distinction is in the

163 *Trustee Act,* R.S.O. 1990, c. T.23 Section 35: (1) Relief of trustees committing technical breach of trust – (1) If in any proceeding affecting a trustee or trust property it appears to the court that a trustee, or that any person who may be held to be fiduciarily responsible as a trustee, is or may be personally liable for any breach of trust whenever the transaction alleged or found to be a breach of trust occurred, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust, and for omitting to obtain the directions of the court in the matter in which the trustee committed the breach, the court may relieve the trustee either wholly or partly from personal liability for the same. (2) Application – Subsection (1) does not apply to liability for a loss to the trust arising from the investment of trust property.

164 *Substitute Decisions Act, 1992,* S.O. 1992, c. 30, , Section 32(7), (8), (9), Section 38 and Section 32; A more in-depth analysis may be found in Jennifer J. Jenkins and H. Mark Scott, *"Compensation and Duties of Estate Trustees, Guardians & Attorneys"* Part I, Compensation for Estate Trustees, Chapter 10

165 *Re McLennan Estate,* [2002] O.J. No. 4716, referred to in *Church v. Gerlach*, 2008 CarswellOnt 11225, 174 A.C.W.S. (3d) 1238

166 *Estates Act*, R.S.O. 1990 c. E.21, S.28.

167 *Trustee Act*, R.S.O. 1990 c. T.23, S.61.

language of one statute being permissive entitlement to compensation and in the other mandatory.[168]

Finally, payments to third parties, for instance: to solicitors for estate trustee work,[169] for investment advice and accounting fees in respect of the preparation of accounts, and to real estate agents re commissions, may all impact the level of compensation to the estate trustee or trustee. The general principles affecting compensation may be more fully accessed in the referenced text of: *"Compensation and Duties of Estate Trustees, Guardians & Attorneys".*[170] Also be careful to note the provisions of the *Trustee Act*, s. 61(4).[171]

18. Lessons Learned: Recent Trends in Contested Passing Decisions

I. Estate Trustee Accounts

(a) Irwin v. Robinson[172]

In *Irwin v. Robinson*, the issues on a contested passing of accounts concerned the treatment of interest on monies paid out in error to a beneficiary, the amount of executor's compensation claimed, and the assessment of significant legal fees of the parties in the administration of a simple estate where there was significant delay.

As to the first issue of an amount of money wrongly paid out by the co-trustees to the benefit of one co-trustee, Horkins J., on the evidence presented to her, found that the co-trustee to whom the money had been paid, should pay back to the estate, 100% of the interest earned on the monies in a manner to be deducted from the co-trustee's share of the estate not yet received. One of the co-trustees was a solicitor on whom the other co-trustee purported to rely in terms of advice concerning the administration of the estate. On this point, Horkins J. stated:

> *I accept that at some point Robinson asked Irwin what she was supposed to do. However, there is nothing in writing to document these "repeated" requests that Robinson says she*

168 Schnurr's Estate Litigation, Chapter 24, "*The Estate Trustee During Litigation",* by Jordan Atin; and the Article by Paul Trudelle, Hull & Hull LLP: "*The Estate Trustee During Litigation*", http://www.hullandhull.com/Text-From-2009-Breakfast-Series-Presentations/june-2009-trustee.pdf.

169 *Re Schroeter Estate (*2001), 47 E.T.R. (2d) 137; *Bott v. Macaulay Estate*, 18 E.T.R (3d) 15, 76 O.R. (3d) 422; *Henry Estate, Re* (1998), 24 E.T.R. (2d) 139 (O.G.D.).

170 Jennifer J. Jenkins and H. Mark Scott,*"Compensation and Duties of Estate Trustees, Guardians & Attorneys"* Part I, Compensation for Estate Trustees, at Chapter 5

171 *Trustee Act,* R.S.O. 1990, c. T. 23 s. 61(4)*:* Allowance to barrister or solicitor trustee for professional services – 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 circumstances, and the allowance shall be increased by such amount as may be considered fair and reasonable in respect of such services.

172 *Irwin v. Robinson*, 2007 CarswellOnt 6368 (WL Can)(Ont Sup Ct J).

> *made. Ignorance of one's role as an estate trustee is not an excuse. If Robinson really believed she had an understanding that she was to rely "exclusively" on Irwin, I would expect to see such an understanding confirmed in writing and it was not.*

On the issue of compensation in respect of the solicitor co-trustee, the issues before the court were the amount of compensation to be received by Irwin and whether or not Irwin was entitled to a care and management fee. Horkins J., found that the skill and ability of the solicitor co-trustee, Irwin, was well below what is expected. Her Honour added that it should not have been necessary for the beneficiaries to retain counsel and obtain a court order to pass the accounts. Horkins J., found Irwin and Robinson both to blame for the poor administration of an estate that could have been finalized within the "executor's year." In applying the tariff guidelines, s. 61 of the *Trustee Act*[173] as well as the tariff percentage approach and the five factors approach in *Toronto General Trust Corporation v. Central Ontario R.W. Co.,*[174] Horkins J., considered the possibility of awarding zero compensation, but stated the outcome would be "too harsh" and reduced the tariff amount by 50% in respect of the solicitor co-trustee's compensation.

On the claim for a care and management fee, Horkins J., found no justification and denied any such award based on principles set out in *Brown Trust Re.*[175]

Finally, on the assessment of legal costs,[176] Horkins J., very critical of both trustees, stated they should never have been incurred in the first place and found all the legal fees and disbursements incurred by the solicitor co-trustee, Irwin, should be borne by her personally and not the estate. In respect of the other co-trustee, Robinson, Horkins J., ordered that 50% of her fees be made payable by the estate and the other 50% be made payable by her personally. As to the beneficiary's legal costs, Horkins J., ordered that they be made payable out of the estate.

(b) Drindak v. Bachinski Estate[177]

In respect of a solicitor's performing trustee's work, McCartney J., in *Drindak v. Bachinski Estate,* was asked to "top up" the usual fees on the basis of difficulty and delay in the administration brought about by the objections, of various beneficiaries. McCartney J., did make an additional partial award. McCartney J., distinguished entitlement to indemnification for costs as between

173 *Trustee Act,* R.S.O. 1990, c.T.23 s. 61
174 *Re Toronto General Trust v. Central Ontario Railway Co.* (1905), 6 O.W.R. 350 (H.C.)
175 *Brown Trust Re,* [1995] O.J. No. 1424, at paragraph 6
176 On costs per Rule 58.06 see Judgment of Cullity J. in *Bott Estate (Trustee of) v. Macaulay* 2005 CarswellOnt 3743; 18 E.T.R. (3d) 15; 76 O.R. (3d) 422
177 *Drindak v. Bachinski Estate*, 2007CarswellOnt 6776 (WL Can)(Ont Sup Ct J).

those reasonably incurred, including legal costs and the litigation costs; but stated the estate administration costs were a different matter which did not entitle the trustee to any additional fees based on the percentages and five factors approach. McCartney J., cited *Widdifield on Executors and Trustees*, 6th Edition, as follows:

> **4.5.6. SOLICITOR DOING TRUSTEE'S WORK**
>
> *An executor is entitled to employ a solicitor and be reimbursed for the fees incurred but not where the solicitor does work that the executor might properly have done himself, such as writing ordinary letters, attendances to pay premiums on policies, doing banking and, generally speaking performing services which an ordinary layman ought to be able to do without the intervention of a solicitor...*
>
> *Organizing the financial records relating to the deceased's business is executor's work and not generally something that a prudent executor would engage a solicitor to do... If a solicitor is paid from estate funds for doing executor's work, that should be considered in fixing the executor's compensation...*
>
> *In Smith, Re, supra, the solicitors fees were reduced by an amount attributable to services that should have been rendered by the executor. However, the solicitor was allowed, in addition to his fees for legal work, an amount for executor's work properly delegated to him.*

(c) Rade Estate[178]

In *Re Rade Estate,* Greer J., removed Joseph Pocock as estate trustee and ordered that Pocock personally bear 50% of the legal costs of the German beneficiaries who had to retain Ontario counsel in respect of the court passing. The amount Pocock was ordered to pay personally amounted to $36,639.08 by way of certified cheque or money order payable to the deceased's estate. The other 50% was ordered to be paid out of the capital of the estate.

A word of caution concerning this judgment—any of the fees deducted by Greer J., were ordered not to be borne by the German beneficiaries and the law firm representing them since, as Greer J., stated: "I have fixed the fee and the Law Firm will have to write the balance off accordingly with an order to go to that effect." In respect of Pocock's legal costs, he was ordered to pay all of his own accounts personally with no legal fees being charged to the estate. In respect of the law firm writing off the balance, it was noted in the deductions made by Greer J., that there was duplication of time by two senior counsel on the file which Greer J., stated: "...amounts to double billing". In this case, the court was extremely critical as evidenced in the outcome of the Orders and Judgment of the Estate Trustee's taking 13 years to administer an estate still not completed.

178 *Rade Estate, Re*, 2007 CarswellOnt 6190 (WL Can)(Ont Sup Ct J).

(d) Freeman Estate[179]

Re Freeman Estate, concerned a contested passing of accounts where three co-trustees made a claim for compensation in the amount of $71,722.19; and in respect of costs on the passing of accounts in the amount of $14,518.70.

The objections raised included: that the estate trustees' claim for compensation was excessive; the estate solicitor's fee was excessive and included executor's work; the estate trustees improperly pre-took compensation; and that the estate trustees should bear their own legal costs. Perell J., considered s. 61(1) of the *Trustee Act*[180] as well as the court's general approach to establishing an estate trustee's compensation as set out in the cases of *Laing Estate v. Hines; Re Jeffrey Estate; Re Toronto General Trust and Central Ontario Railway Co.* and *Re Gordon Estate,*[181] as well as *Re Schroeter Estate,*[182] *Wood Estate v. Wood;*[183] and *Re Mortimer.*[184] In fixing compensation, Perell J., followed the Court of Appeal's Judgment of Killeen J., in *Re Jeffrey Estate*[185] at page 179:

> *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, [1995] O.J. No. 536, supra. 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 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.* [186]

Perell J., was satisfied on the accounts before him that the co-estate trustees were entitled to the compensation claimed, including the compensation to complete the administration of the estate. Perell J., however, did order deductions in the amount of in or about $20,000.00 calculated on duplication of work that ought to have been done by the estate trustees as opposed to those

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179 *Freeman Estate, Re*, 2007 CarswellOnt 5654, [2007] O.J. No. 3402, 34 E.T.R. (3d) 157 (Ont. S.C.J. Sep 11, 2007) (WL Can) (Ont Sup Ct J)

180 *Trustee Act*, R.S.O. 1990, c. T. 23, s. 61(1)

181 *Re Toronto General Trust v. Central Ontario Railway Co.* (1905), 6 O.W.R. 350 (H.C.), at page 354; *Gordon Estate, Re* (October 20, 1998), Doc. CA C30225 (Ont. C.A.); *Jeffrey Estate, Re* (1990), 39 E.T.R. 173 (Ont. Surr. Ct.); *Laing Estate v. Laing Estate* (1998), (sub.nom. Laing Estate, Re) 113 O.A.C. 335 (C.A.).

182 *Re Schroeter Estate* (2001) 57 O.R. (3d) 8 (S.C.J.).

183 *Wood Estate v. Wood,* [2005] O.J. No. 4063.

184 *Re Mortimer,* [1936] O.R. 438 (C.A.).

185 *Jeffrey Estate, Re* (1990), 39 E.T.R. 173 (Ont. Surr. Ct.)

186 *Jeffrey Estate, Re* (1990), 39 E.T.R. 173 (Ont. Surr. Ct.) at 32.

delegated to perform the work, including accountant's invoices and legal fees, and loss of interest in respect of compensation that was pre-taken. Perell J., concluded that the estate trustees were not authorized to pre-take compensation and applied the principles in *Re Knoch*, *Cheney v. Byrne*, and *Re Pilo Estate.*[187]

There was a further deduction made for failure to invest, calculated at a *per diem* rate. In respect of the costs on the passing of accounts, Perell J., found that the estate trustees were entitled to their costs as there was divided success. The legal costs were allowed in full in respect of the estate trustees. In respect of the objector, $18,000.00 of the $43,947.73 for costs and disbursements and G.S.T. was allowed and awarded, payable out of the estate.

In additional reasons released on October 10, 2007,[188] costs of the passing were addressed. Perell J., on the basis that success was divided on the contested issues, did not find significant cause to deny any parties the costs payable from the estate. Perell J., did however, make mention of the view that counsel should have been able to settle the dispute without the need for a formal passing of accounts. His Honour noted the "intransigence" of the parties in the correspondence, but stated it to be bilateral to each party. Perrell J., noted one of the parties' costs to be excessive, and without written submissions as he directed. The other fees were viewed as fair.

(e) Archibald Estate[189]

In the contested passing of accounts matter of *Re Archibald Estate,* the issue concerned a fight over estate-trustee compensation and a care and management fee. Perell J., in his analysis concluded that executor's compensation was made payable pursuant to the terms of the Will of the deceased and not pursuant to s. 61 of the *Trustee Act*[190] and again applied the factors in the leading cases of *Laing Estate* and *Re Jeffrey Estate.*[191] Applying the percentages approach against the five factors approach, Perell J., concluded that the accounts should be passed as submitted, with the exception of the care and management fee claimed in the amount of $41,335.98, which should be reduced from the executor's compensation claim. In respect of the estate trustee's costs, written submissions were requested.

187 *Knoch, Re* (1982), 12 E.T.R. 162; *Cheney v. Byrne (Litigation Guardian of),* 9 E.T.R. (3d) 236, and *Re Pilo Estate,* [1998] O.J. No. 452 (Gen. Div.)
188 *Freeman Estate, Re*, 2007 CarswellOnt 6501, 35 ETR (3d) 191 (WL Can)(Ont Sup Ct J).
189 *Archibald Estate, Re*, 6 E.T.R. (3d) 219, 158 A.C.W.S. (3d) 510 (WL Can)(Ont Sup Ct J)
190 *Trustee Act,* R.S.O. 1990,c. T.23 , s. 61
191 *Laing Estate v. Laing Estate* (1998), (sub.nom. Laing Estate, Re) 113 O.A.C. 335 (C.A.); Jeffrey Estate, Re (1990), 39 E.T.R. 173 (Ont. Surr. Ct.)

(f) O'Sullivan v O'Sullivan [192]

In yet a further Judgment of Perell J., in the matter of *O'Sullivan v. O'Sullivan* where again the issue in contention concerned the compensation of the estate trustee, Perell J., applied s. 61(1) of the *Trustee Act*[193] as well as the leading cases of *Laing Estate; Re Jeffrey Estate; Re Toronto General Trust v. Central Ontario Railway Co.,* and *Re Gordon Estate*[194] in calculating the estate trustee's compensation. The compensation claimed, included a figure for a management fee, which was disallowed. Otherwise the compensation as claimed was reduced in accordance with the five adjusting factors set out in the case law. Perell J., ordered that each party's costs be paid and made payable from the estate.

(g) Re Anthony Estate[195]

In *Re Anthony Estate,* an estate trustee applied to increase his level of compensation, yet MacDougall J., found that the trustee failed to comply with his legal duties and contributed to delays and legal costs incurred in administering what was a small estate. No basis was found for an increased level of compensation so that compensation was fixed in accordance with the statement for $5,026.25. Though there was a pre-taking of compensation, the deceased's Will provided that any excess of compensation was to be repaid to the estate by the trustee. On the legal costs incurred, it appears all costs were made payable out of the assets of the estate.

(h) Hughson v Hume Estate[196]

In *Hughson v. Hume Estate,* the estate trustee claimed $38,964.25 for expenses he incurred on behalf of the estate in the administration, and a fee of $15,000.00 for compensation. The estate trustee claimed further that he had a claim for care, stating that he administered care to the deceased while she was alive. Bolan J., disallowed this claim. In respect of a further claim for compensation and expenses, Bolan J., determined that a fair and reasonable amount would be $5,000.00.

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192 *O'Sullivan v. O'Sullivan*, 2007 CarswellOnt 2462, 32 E.T.R. (3d) 135 (WL Can)(Ont Sup Ct J)
193 *Trustee Act,* R.S.O. 1990, c. T. 23 at s. 61(1).
194 *Laing Estate v. Laing Estate* (1998), (sub.nom. Laing Estate, Re) 113 O.A.C. 335 (C.A.); *Jeffrey Estate, Re* (1990), 39 E.T.R. 173 (Ont. Surr. Ct.); *Re Toronto General Trust v. Central Ontario Railway Co.* (1905), 6 O.W.R. 350 (H.C.); and *Gordon Estate, Re* (October 20, 1998), Doc. CA C30225 (Ont. C.A.).
195 *Re Anthony Estate,* 2006 CarswellOnt 8184 (SC).
196 *Hughson v. Hume Estate,* 30 E.T.R. (3d) 78, 2007 CarswellOnt 23 (SC).

(i) Watterworth Estate, Re[197]

The actions of beneficiaries insisting on a passing of accounts will be addressed by the courts contrary to the traditional awarding of costs in estate matters. In *Re Watterworth Estate* it was held by Fleury J., that, to permit the beneficiary to obtain costs against the estate in circumstances where the beneficiary was solely responsible for causing serious and unnecessary delay and complexity in the passing of accounts, would constitute a travesty of justice and would encourage parties in estate matters to be litigious. Although there is no authority to award costs against a beneficiary in the passing of an accounts, it was held that a beneficiary could be denied his own costs as a result of his behaviour, which was unnecessarily obstructionist

(j) Estate of Thomas Walter Wood[198]

The *Estate of Thomas Walter Wood* and the Judgment of Glass J., is worthy of note in that the objector, David Wood, objected to the passing of accounts of the estate trustee on the basis of excessive fees being charged throughout the administration of the estate. David Wood forced a contested passing of accounts wherein the court found there was nothing legitimately raised about which to complain. In addition, an offer to settle was made by the trustee with notice to David Wood that if he insisted on a formal passing of accounts there would be a request that he pay the costs. Glass J., found that David Wood caused a process that was not needed. The trustee's compensation was fixed as claimed, and the costs for the passing of the accounts and the application to wind up and dissolve two corporations was fixed in the amount of $44,621.00 inclusive of G.S.T., and ordered to be paid by David Wood. Glass J., stated that it would be unfair to the other beneficiaries to share in the unnecessary costs ultimately awarded against David Wood in his personal capacity fixed on a full indemnity basis.

(k) Estate of Michael Picov[199]

This principle of awarding costs against an unnecessarily obstreperous objector considered in the *Estate of Michael Picov, deceased*, where the highlighted issues appeared as follows:

> [7] *This claim by the Estate of Elsie Picov for costs, raises the following issues:*

197 *Watterworth Estate, Re*, 1995 CarswellOnt 2528, with additional reasons in 1996 CarswellOnt 296, 7 W.D.C.P. (2d) 86, [1996] O.J. No. 269 (WL Can)(Ont Gen Div).

198 *Wood Estate v. Wood*, 2005 CarswellOnt 4569 (WL Can) (Ont Sup Ct J).

199 *Estate of Michael Picov,* Judgment on Contested Passing; Reasons for Judgment on Costs, Ont. S.C.J. Court File No. 02-34/05, unreported, obtained from the Court file on request.

(a) Under what circumstances, if any, will a beneficiary who objects to the passing of accounts, be ordered to pay the costs incurred by the solicitors for the Estate Trustee and for other interested parties, in connection with the contested passing of accounts hearing?

(b) Should an order that the Objectors (or any one or more of them pay some or all of the costs incurred by the Estate Trustee and the Estate of Elsie Picov in connection with preparation for a contested passing of accounts hearing be made in this case?

(c) If so, what is the appropriate scale of costs?

(d) If, in my discretion costs are to be paid by any one or more of the Objectors, what amount(s) should be fixed for those costs?

In this case Spies J., at paragraph 51, takes into consideration the Re Watterworth[200] analysis. Spies J., provides the following worthy detailed analysis:

> *There is certainly a trend in the cases to order that an executor who has caused an estate unnecessary expense for one reason or another, be personally responsible for those costs...*

In this case[201] Spies J., did not make an order as to costs against the objectors for the costs of preparing for a contested passing of accounts for the reasons set out in her Judgment as follows:

> *[36] There appear to be no cases where costs have been awarded against objectors where there has been a late withdrawal of objections. Mr. Woods, counsel for the Elsie Estate, argues that the proceedings had become adversarial, due to the position of the Objectors, and as such they should personally pay the costs associated with the adversarial proceedings on a substantial indemnity basis.*
>
> *[37] Mr. Woods relies on Section 131(1) of the Courts of Justice Act, which provides that the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid. As set out below, that provision of the Courts of Justice Act applies here by there are a number of cases that consider how the court should exercise its discretion in cases involving contested passing of account hearings.*
>
> *[38] Mr. Woods referred me to Rules 23.05 and 37.09 of the Rules of Civil Procedure but in my view neither of those rules apply here. The Objectors did not discontinue a proceeding or abandon a motion.*

200 *Watterworth Estate, Re*, 1995 CarswellOnt 2528, with additional reasons in 1996 CarswellOnt 296, 7 W.D.C.P. (2d) 86, [1996] O.J. No. 269 (WL Can)(Ont Gen Div)

201 *Watterworth Estate, Re*, 1995 CarswellOnt 2528, with additional reasons in 1996 CarswellOnt 296, 7 W.D.C.P. (2d) 86, [1996] O.J. No. 269 (WL Can)(Ont Gen Div)

[39] Mr. Woods relies on a number of decisions, including Re Wright Estate[202]. In that case, Justice Sheard noted that it is usual in an estate audit, ***even when there are matters in dispute****, for all costs of the audit to be paid out of the estate (paras. 16-17). He found in that case, however, that the accounts of the executors were required to be brought in for audit at the insistence of one of the four residuary beneficiaries and that it thus became an adversarial proceeding, namely, that beneficiary versus the two executors, focused on the quantum of the compensation. The beneficiary was the successful litigant and as Justice Sheard noted, if costs of both sides were paid out of the estate, she, to the extent of her quarter interest, would be paying the legal expenses of her adversaries. He found that the costs of the beneficiary and the successful party, should be paid by the unsuccessful parties, namely, the two executors, and not out of the estate. Given Justice Sheard's observation that costs are usually paid out of the estate even when matters are in dispute, it is not clear from his decisions why he determined that this case crossed the line and was sufficiently adversarial to justify the costs order that he made.*

[40] A similar conclusion was reached by Justice Greer in Re Pilo Estate[203] following a six-day Contested Passing of Accounts. In that case, Justice Greer considered the matter of costs of that hearing as a usual adversarial proceeding and in reliance on the fact that the beneficiaries kept making reasonable offers to settle which ought to have been accepted by the executors and were not, found that they were entitled to reimbursement of their full solicitor/client costs. One of the executors also applied for costs. Justice Greer found that one executor, a lawyer, Peres, was unrealistic throughout the whole of the litigation regarding his own expectations as both a solicitor and as an executor. As an officer of the court he was deemed to know the law but did not, did nothing to verse himself in it and must therefore pay the consequences of all the time and trouble which the beneficiaries of the estate were put and the other executor was put, to bring matters to a conclusion.

[41] On this basis, the court ordered that Peres pay personally the costs of the beneficiaries and the other executor on a solicitor/client scale. It seems that the decision in this case to deviate from the usual rule in an estate audit that the estate bear the costs, was the unreasonable position taken by Peres, particularly given that he was a lawyer. The decision does not explain why costs on a solicitor/client scale were warranted.

[42] In Re Bedont Estate,[204] Justice D.J. Gordon considered whether the costs of a contested passing of accounts should be payable by the estate or by the objector or a combination of the two. He was dealing with a small estate and the accounts were approved as presented, there being no evidence presented by the objector to establish any basis for her objection. He concluded that the objector's dissatisfaction with the administration of estate could only be connected to her distrust of the executor or perhaps some other personal sentiment not relevant to the proceedings.

[43] Justice Gordon was of the view that a beneficiary is entitled to receive and

202 *Re Wright Estate* (1990), 43 E.T.R. 69, [1990] O.J. No. 3233, supplementary reasons at (1999), 43 E.T.R. 82, [1990] O.J. No. 3232 (Gen. Div.).

203 *Re Pilo Estate,* [1998] O.J. No. 4521 (O.C.G.D.).

204 *Re Bedont Estate,* [2004] O.J. No. 2015.

review the accounts and to make enquiry and is ***entitled to a passing of accounts****. He held that once such a process becomes necessary, the beneficiary is at risk of a cost award. The court relied on the decision of Townsend v. Doherty*[205] *in coming to this conclusion but no reasons are given for why and how the principles in the Townsend decision apply to the facts of that case.*

[44] On that basis, Gordon J. found that costs be awarded against the objector as her objections were not realistic and had led to significant expense for the estate trustees. He stated that if costs were directed to be paid out of the estate, in reality the main beneficiary would pay the costs to a significant extent. Gordon J. also relied on offers to settle to justify the costs award, which had been served by the estate trustees, which were reasonable and not accepted by the objector. He concluded that the estate trustees were entitled to a cost award against the objector on a complete indemnity basis. It appears that the decision to make the cost order was as a result of Gordon J.'s conclusion that the objector's position was unrealistic and motivated by distrust of the executor. Again there is no explanation for why costs were awarded on a complete indemnity basis.

[45] The decision of Justice Borins, as he then was, in Townsend v. Doherty dealt with costs following a trial on the issue of the validity of a residuary bequest in a will. The plaintiff, who challenged the validity of the will, was the mother of the testator and his brother, who was the executor. The plaintiff was not a beneficiary under the will and stood only to gain if she could successfully challenge the validity of the will. She was heir at law of the testator in the event of an intestacy. The estate was not large and the residue, after payment of debts, amounted to about $45,000. Counsel for the plaintiff submitted that the plaintiff and the defendant should each have their costs on a solicitor client scale out of the estate. Counsel for the defendant, the residuary beneficiary, strongly objected to that submission and took the position that costs should follow the event and that the plaintiff should pay the defendant's costs on a solicitor/client scale. It was argued that if the residual beneficiaries' costs were paid out of the estate this would be tantamount to awarding no costs to her, as the amount that the estate would pay for her costs would be deducted from the residue. This depletion of the residue would be significant as the trial required three and one half days and would seriously encroach on the testator's intention that she receives the residue of his estate. It was agreed that the executor who was added as a defendant should neither receive nor be required to pay costs.

[46] In considering the question of costs, Justice Borins began with the proposition that costs, including costs of estate litigation, are in the discretion of the court, pursuant to s. 131 of the Courts of Justice Act. He also stated that the general principle is that costs follow the event, which means that the successful party is generally awarded its costs. He referred to the decision in the Court of Appeal in Re Cutcliffe's Estate Cohen Le Duc v. Vaness as a helpful case setting out how a court ought to exercise its discretion in respect to the costs of "probate matters". In that decision the court in turn referred to the decision of Spiers v. English. Based on these decisions, the two main principles which should guide the court in determining that costs in a probate matter are not to follow the event are, firstly, where the testator or those interested in

205 *Townsend v. Doherty* [1993], O.J. No. 713 (Gen. Div.).

the residue have been the cause of the litigation; and, secondly, if the circumstances lead reasonably to an investigation, for example concerning the execution of the will or the capacity of the testator.

[47] In my view, these principles do not necessarily apply to a contested passing of accounts, without further consideration, because as a matter of law, an estate trustee is required to obtain court approval on the passing of accounts, with or without a hearing. This is unlike a case where a beneficiary or other person with a financial interest in an estate decides to challenge the validity of a will or some aspect surrounding the execution of the will and as a result litigation ensues. It would be too simplistic to say that since the Objectors in this case "caused" the litigation, in that their objections necessitated a hearing, that they are therefore responsible for the costs.

[48] In fact, it is clear that Justice Borins was not thinking of contested passing of account hearings when he considered the law dealing with costs for "probate matters" in the Townsend case. In a decision of his just a few months later, Re Joseph Estate[206] *Justice Borins considered whether or not post-judgment interest was payable on an award of costs made as part of an order following the passing of executors' accounts. He stated that generally speaking, the executor and any beneficiary* ***properly attending*** *and represented by a lawyer on the passing of accounts is awarded full compensation for legal expenses from the estate of the testator and that these expenses are considered expenses in administering the estate. On an audit, because there is no losing party to pay the costs, each party is responsible to pay his or her own legal expenses, which are ordered to be paid from the estate, as the trust fund created by the testator represents the only source of money to pay the costs. He contrasted this with "contentious", or adversarial, legal proceedings in which the general rule is that the successful party is awarded its costs, on the lower party-and-party scale, to be paid by the unsuccessful party (at pp. 3-4).*

[49] Also of interest is the fact that Justice Borins concluded that the motion before him was adversarial in nature and was necessitated by the applicant's claim for post-judgment interest. He found that it would be improper to require the estate to pay the costs of the successful parties and the executors as the motion did not involve the "administration of the estate" (at pp. 5-6).

*[50] That there is a difference in the disposition of costs in the case of passing of accounts from the usual adversarial matters before the court, where costs ordinarily follow the event, is made clear from the wording of the Notice of Application itself, that was served by Canada Trust in order to pass its accounts. The Notice of Application provides that "if there is no hearing, a person with a financial interest in the estate who retains a solicitor to review the accounts and makes no objection to them (****or makes an objection and later withdraws it****) but serves on the estate trustee and files with the court a request for costs, will be allowed one half of the costs allowed to the estate trustee" (Form 74.44 under the Rules of Civil Procedure, [emphasis added]). The application then sets out how a person with a financial interest in the estate may object. There is no suggestion that an order for costs may be made against an*

206 *Re Joseph Estate* (1993) 14 O.R. (3d) 628, [1993] O.J. No. 1672.

objector if the matter proceeds to a contested passing of accounts hearing. I note that the Objectors do not seek any costs in this matter.

[51] The only other Ontario case relied upon by counsel, dealing with costs in connection with a passing of accounts, is the decision of Fleury J. in Re Watterworth Estate[207]*. In that case Justice Fleury noted that estate proceedings are not normally considered litigious in character and that "there is no winner or loser in a normal passing of accounts", (at para. 5). In relying on Re Joseph's Estate, he concluded that although generally speaking full compensation is awarded to beneficiaries who appear on a passing of accounts, in the case before him, the only reason for the extensive delays in winding up the estate had been the obstreperous conduct of the beneficiary Watterworth, a barrister and solicitor, and that by his systematic obstruction he had forced the estate to spend much of the residue in legal and accounting fees that would not have been required had he adopted a more conciliatory attitude. He had in effect intervened "to such an extent as to render the entire proceedings highly contentious and adversarial" (at para. 5). Justice Fleury concluded however that there was no Rule or case law that would allow him to order a beneficiary to pay the costs of a passing of accounts and that although this might be the only fair result, he was prevented by the rules from awarding costs against Watterworth personally. It is not clear how Fleury J. came to this conclusion, as the only rule that he refers to is s. 131 of the Courts of Justice Act.*

[52] I am aware of other cases where cost orders have been made following a contested passing of accounts, but they are cases where the court found the estate trustee negligent or to have committed improprieties and as a result ordered the estate trustee to pay some or all of the costs personally. There is certainly a trend in the cases or order than an executor who has caused an estate unnecessary expense for one reason or another, to be personally responsible for those costs. That, of course, is not this case. Other cases deal with the impact of an offer to settle but again that does not assist me here. No formal offers to settle were exchanged.

[53] The other cases cited by Mr. Woods are cases where this is an attack on a will and the principles from the Townsend case clearly apply. Of assistance to the decision I must make however, is the decision of Justice Haley in Schweitzer v. Plasecki[208] *where Haley J. found that the defendants' inquiries were not motivated by a bona fide desire to have the court investigate the circumstances surrounding the making of the will and determine its validity but instead were motivated by family animosity and bitterness of long standing (at para. 30).*

(l) Marlow v. Marlow Estate[209]

In *Marlow v. Marlow Estate* Taliano J., on an application by a beneficiary to force the trustee to pass accounts, awarded the applicant her costs on a partial indemnity basis payable out of the

207 *Re Watterworth Estate* [1996] O.J. No. 269.
208 *Schweitzer v. Plasecki* [1998] O.J. No. 177.
209 *Marlow v. Marlow Estate*, 2007 CarswellOnt 4117, 33 E.T.R. (3d) 270 (WL Can)) (SCJ).

estate. Taliano J., did not award the beneficiary her full costs on the application since, though he found that the estate trustee was partially to blame for the insistence to pass accounts through delay and inaccuracies, no wrong doing or mismanagement on the part of the trustee was established and, therefore, it was not a case for substantial indemnity costs.

(m) Fair v. Campbell Estate[210]

However, in *Fair v. Campbell Estate* the relationship between the grantor of the power of attorney, who was at all times *sui juris* and the attorney was a relationship of principal and agent. The agent had a duty to account for only those actions performed without or beyond the scope of the principal's direction. Landgon J., found that the agent's duty to account was restricted to accounting to the principal, only.

In *Fair v. Campbell Estate* it was found, while an attorney is certainly a fiduciary, the *SDA*[211] seems to recognize that there are different duties to account depending on the capacity of the donor. The obligations imposed are at s. 38(1), s. 32 and s. 42(1).

On the standard of care that the attorney should be held to, Langdon J., referred to the case of *Fales v. Canada Permanent Trust Co.*[212] wherein the standard of care stated as required of an attorney, is the care and diligence of a man of ordinary prudence in managing his own affairs. There was no evidence before Langdon J., that the grantor was incapacitated and similarly no evidence that the attorney departed from the duty required of her. There was no finding of any breach of duty owed. The accounts were passed and the plaintiffs were ordered to pay the substantial indemnity costs of the accounting action and their concurrent challenge of the validity of the Deceased's Will.

(n) Ali v. Fruci[213]

In *Ali v. Fruci,* a motion for an order for leave to commence an action pursuant to s. 42 of the *SDA*[214] was successful and costs were awarded on a partial indemnity basis in respect of the motion and the costs consequences to the respondent were made payable out of the estate. In related litigation,

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210 *Fair v. Campbell Estate*, 2002 CarswellOnt 5481, 3 E.T.R. (3d) 48, additional reasons regarding issue of costs in 2002 CarswellOnt 5482, 3 ETR (3d) 67.
211 *Substitute Decisions Act,1992,* S.O. 1992, c. 30, s. 40, at s. 38(1), s. 32 and s. 42(1).
212 *Fales v. Canada Permanent Trust Co.* (1976), [1977] 2 S.C.R. 302.
213 *Ali v. Fruci,* 2006 CarswellOnt 2165, 22 E.T.R. (3d) 189; *Ali v. Fruci*, 2006 CarswellOnt 1706, 22 E.T.R. (3d) 187.
214 *Substitute Decisions Act,1992,* S.O. 1992, c. 30, s. 40, s. 42.

another claim brought by the same plaintiff (alleging that the testator lacked testamentary capacity and was unduly influenced) was dismissed for delay. However, the Court of Appeal recently set aside the motion judge's order and allowed the claim to proceed.[215] The motion judge had erred in finding that the delay had caused "actual" prejudice to the defendants' right to a fair trial. The Court of Appeal held that while there was inordinate delay, and two possible witnesses had passed away, there was extensive documentary evidence addressing the deceased's testamentary capacity. The plaintiff was awarded her costs of the appeal but not the costs of the motion.

(o) Estate of Shirley Bernice Redrupp[216]

In the *Estate of Shirley Bernice Redrupp* an order requesting the passing of an attorney's accounts was requested by the applicant and granted on two conditions: firstly, that the accounts be accepted for review in the form presented to the court without the expense of converting them to formal estate accounts; and secondly, that unless there is discovered some significant matter for which the attorneys other than the applicant are found to be properly chargeable, the cost of the estate for the passing shall be borne entirely out of the share of the applicant. The applicant was granted forty days in which to serve and file an election to pursue the passing on the two terms set out by Lane J., failing which the application to require the passing of accounts of the attorneys was to be dismissed.

In respect of the further request that the estate trustee pass accounts, Lane J., determined that it was premature, pending completion of the administration. In respect of costs, Lane J., made a conditional costs award on the basis that, if the passing does not take place, the cost of the hearing would be to the respondent fixed at $10,000.00. This Judgment of Lane J., clearly attempts to caution the unmeritorious insistence of a passing of accounts pre-empting the cost consequences.

(p) Church v. Gerlach[217]

In this decision the appellant appealed to the Divisional Court in respect of an application to pass accounts wherein the estate trustee appointed under the Will objected to the amount of compensation requested by the applicant. The court had fixed the amount of compensation but gave no reasons to support the amount awarded. Curiously too, the application judge did not pass the accounts or make any order for costs. The former estate trustee submits that the application judge erred in law in failing to give reasons for reducing the compensation claimed, in not applying

215 *Ali v. Fruci*, 2014 ONCA 586.
216 *Redrupp Estate v. Rea*, 2006 CarswellOnt 3495 (WL Can) (Ont Sup Ct J).
217 *Church v. Gerlach*, 2008 CarswellOnt 11225, 174 A.C.W.S. (3d) 1238 (WL Can) (Ont Sup Ct J – Div Ct).

the proper principles, and in not dealing with the balance of the application. The estate trustee requests that the judgment be set aside, the accounts passed and compensation in the amount of $23, 203.54 plus costs be ordered.

The court opined that while the application judge gave no reason for reducing the amount of compensation requested, the transcript discloses the view that the estate trustee should be compensated based upon time spent and his hourly rate as a lawyer. The Divisional Court therefore was satisfied that the application judge erred in principle as the approach is inconsistent with the applicable legislation and the approach developed in the jurisprudence. The court referencing the applicable statutory authorities, both under the Estates Act and the Trustee Act, as well as the Court of Appeal case of *Laing Estate v Hines*[218] as well as the *Flaska Estate (Re)*[219] and having regard to similar principles applicable to an Estate Trustee During Litigation[220] ("ETDL") the court determined that the estate trustee ought to be compensated, but not fully compensated as if the ETDL was required to perform all of the functions of an estate trustee. As such, half the amount of the full percentage approach reflects the degree of complexity as well as the estate trustee's efforts required to maintain and preserve the estate, while the litigation was outstanding in light of the five factors identified, and therefore fixed compensation at $17,500 all inclusive. The Divisional Court also applied the *Estates Act* [221]

The estate trustee was entitled to his costs for the passing of accounts fixed and made payable out of the estate as it was reasonable that the estate trustee be entitled to have his accounts passed. The estate trustee was entitled to his cost of appeal but such costs were reduced from $15,000 to $5,000 without analysis.

As a matter of common practice, the ETDL normally has a fee schedule court implemented on consenting to such an appointment.

(q) Re Kaptyn [222]

The case of *Re Kaptyn* is the subject of several judgments and orders and is mentioned here and the discrete issue of the jurisdictional issues giving rise to a passing of accounts and consideration of the appropriate forum.

218 *Laing Estate v. Hines* (1999), 41 O.R. (3d) 571.
219 *Flaska Estate* (Re), [1998] O.J. No. 4171 (C.A.).
220 *Re McLennan Estate,* [2002] O.J. No. 4716 at para 22 (S.C.J.).
221 *Estates Act,* R.S.O. 1990, c. E. 21, S. 28.
222 *Kaptyn, Re*, 2009 CarswellOnt 7548, 54 E.T.R. (3d) 313, 183 A.C.W.S. (3d) 300 (WL Can) (Ont Sup Ct J).

By way of background, pursuant to an order requiring the trustees to pass their accounts, one trustee commenced an application to pass accounts in Toronto; the other, in Newmarket. It was conceded that the applications ought to be consolidated, but the location remained at issue. Counsel for the Newmarket applicant argued that the applicable rule, Rule 13.1.02(2), requires the court to consider whether the transfer of a proceeding is desirable and in the interests of justice having regard to a number of factors.[223] The court accepted this position and assumed that the factors set out in the rule were applicable to the determination of where two consolidated proceedings should be heard.[224]

Although compelling reasons were tendered to support the continuation of the proceedings in Newmarket, the court balanced those against the following:

> (a) The Newmarket applicant was the only party in the proceedings requesting that the proceedings be consolidated in Newmarket;
>
> (b) Most of the counsel, including that of the Newmarket applicant, were based in Toronto;
>
> (c) Virtually all of the proceedings to date took place in Toronto;
>
> (d) The interpretation application was to be heard in Toronto;
>
> (e) There was a dedicated estates list in Toronto; and
>
> (f) A judge had been appointed pursuant to rule 37.15, to hear all motions in this proceeding.

In light of the requirements of Rule 13.1.02(2) and the above-mentioned factors, the court found that, although there were significant connections to York Region, in his view, the most important considerations were "the desire of the overwhelming majority of the parties to continue in Toronto and the fact that all proceedings to date [had] taken place in Toronto."[225] As stated by the court, "the already-established centre of gravity of the case [was] Toronto."[226]

Other relevant factors were the "convenience" of the parties and witnesses, that conducting the passing of accounts in Newmarket would further increase costs, and that it was "in the interests of justice that the overall supervision of this estate, including the passing of accounts, [...] take place in a single jurisdiction and [...] not be divided between two jurisdictions."[227] The court ordered that

223 *Kaptyn,* at par. 17.
224 *Ibid* at par. 17.
225 *Ibid* at par. 20.
226 *Ibid* at par. 20.
227 *Ibid* at par. 22.

the passing of accounts be consolidated, and heard in Toronto.

(r) Pachaluck Estate v. DiFebo[228]

The case of *Pachaluck Estate v. DiFebo* involved a contested passing of accounts. The objector took the position that the "usual percentages" ought not apply in this case, as the estate was simple, there was a delay in investing funds, there was an unjustified pre-taking of compensation, and there was a delay in producing an accounting, which, it was argued, was inaccurate and incomplete, thus necessitating an order for a passing of accounts. It was further argued that the solicitors' account should be reduced in light of the fact that some of the work performed was estate administration work. The estate trustee took the position that he performed his role diligently, reasonably, and conscientiously and that the size of the estate warranted the compensation claimed.

DiTomaso J., opined that the pre-taking of compensation is permitted [note continued inconsistency in the treatment by the court on pre-taking] provided that: (a) the work and services are earned at the date of pre-taking, and (b) the amount pre-taken is fair, as cited in *William George King Trust, Re* (1994), 2 E.T.R. (2d) 123 (Ont. Gen. Div.). However, an issue arose as to whether the pre-taking had been "fair." It was argued that it was not on the ground that the estate trustee had put himself in a conflict of interest by distributing specific bequests to his own family members, while delaying distribution of specific bequests and in-trusts to the objector's children until some time later. Upon review of the estate trustee's actions with respect to the investments, such as the fact that he experienced difficulty scheduling meetings with the financial planner and the fact that the mutual fund had not performed well due to the economic downturn, DiTomaso J., found that the estate trustee had not put himself in conflict and that there was a "perfectly valid explanation" for why the trust amounts were invested when they were and that he had acted as a prudent investor.

The court also found that the estate trustee did keep proper records and accounts. With respect to the work performed by the solicitor, DiTomaso J., did not find that the legal fees charged by the solicitor ought to be deducted from the estate trustee's compensation. The court accepted the estate trustee's evidence that he was unsure of "who was to do what as between him and his solicitor,"[229] and that he did what his solicitor told him to do.

The court reviewed section 61(1) of the *Trustee Act*, R.S.O. 1990, c. T. 23, the five factors set out in *Toronto General Trusts Corp v. Central Ontario Railway* (1905), 6 O.W.R. 350, and the tariff

228 *Pachaluck Estate v. DiFebo*, 2009 CarswellOnt 2278; additional reasons in *Pachaluck Estate v. DiFebo*, 2009 CarswellOnt 3980.

229 *Pachaluck Estate v. DiFebo*, 2009 CarswellOnt 2278; additional reasons in *Pachaluck Estate v. DiFebo*, 2009 CarswellOnt 3980, at par. 37.

guidelines, noting that, the factors and tariff guidelines, while not necessarily determinative in and of themselves, must be "meshed so as to yield an amount that is fair and reasonable" in light of the particular facts of the estate (*Laing Estate v. Laing Estate).*[230] The court cited the case of *Heron Estate,*[231] for the proposition that an application for the usual percentages can be reduced where a failure to do so would lead to serious over-compensation.

Applying the law to the facts, the court held that a reduced percentage ought to be applied to the capital receipts and capital disbursements, in so far as the transfer of property was concerned. According to the court, the administration of the condominium was fairly straightforward, and so reduced the applicable percentage from 2.5% to 1.5% for the capital receipt of the property. With respect to the remaining capital receipts, such as the disposal of specific bequests to adult beneficiaries *in specie*, the court reduced the rate to 2%. Accordingly, the court found that the estate trustee had been over-compensated and was ordered to repay the estate the outstanding amount.

With respect to costs, the court ordered that the parties provide written submissions if they were not able to reach an agreement. On July 3, 2009, DiTomaso J., provided additional reasons in *Pachaluck Estate v. DiFebo* (2009), 2009 CarswellOnt 3980. Therein, DiTomaso J., noted that there was a "mixed result" on the contested passing. In light of this mixed result, the court was not convinced that either party was entitled to costs either on a full indemnity, substantial indemnity, or even a partial indemnity scale. In the result, the court fixed both the objector's and the estate trustee's costs at an equal rate, payable within 30 days.

(s) Re Kostiw Estate[232]

Re Kostiw Estate concerned an application for a passing of accounts where the trustee claimed compensation of $70,000—an amount slightly less than the usual tariff. One of the beneficiaries objected to the compensation on a number of grounds, including the fact that there had been a delay in passing the accounts and the administration of the estate, and that, according to the beneficiary, the trustee and her counsel were in contempt of court for failing to advise the motion's judge of the fact that he ought to have been a joint co-trustee, as such was the initial testamentary request of the deceased, before she executed her second and final Will

Strathy J., dismissed all of the objections of the beneficiary and noted that the administration of

230 *Laing Estate v. Laing Estate* (1998), 113 O.A.C. 335 (Ont. C.A.).
231 *Heron Estate, Re* (1996), 10 E.T.R. (2d) 281 (Ont. Gen. Div.).
232 *Kostiw Estate, Re* 2009 CarswellOnt 221, 45 E.T.R. (3d) 268, 174 A.C.W.S. (3d) 297 (WL Can) (Ont Sup Ct J).

the estate was complicated by the beneficiary's "hostility and intransigence,"[233] however, the estate trustee's compensation was reduced from the requested $70,000 to $40,000. The court noted the five factors set out in *Toronto General Trusts Corp v. Central Ontario Railway* (1905), 6 O.W.R. 350, and held that compensation in the amount of $40,000 "would fairly reflect the magnitude of the trust, the care and responsibility arising from it, the difficulties faced by the trustee and the skill and ability she has displayed in bringing the estate to a conclusion within a reasonable period of time".[234] It appears that, in reaching its decision with respect to costs, the court took into consideration the likelihood that much of the work on the estate was carried out by the trustee's solicitor and accountant and that a significant portion of the capital receipts claimed consisted of the proceeds of sale of the deceased's property, transactions which, the court found, were largely dealt with by lawyers and real estate agents.

Thus, *Re Kostiw Estate* serves as a reminder of the importance of keeping time dockets and specific records of work done personally, in order to justify compensation.

(t) Re Raeburn Estate[235]

In *Re Raeburn Estate*, an application to pass accounts made by the estate trustees was objected to by one of the residual beneficiaries and an Order Giving Directions for the conduct of the contested passing of accounts was issued. It was the estate trustees' position that they were entitled to full indemnification for their respective costs. To support their argument they relied on the "general rule," as set out in *Goodman Estate v. Geffen*, [1991] 2 S.C.R. 353 (S.C.C.), that "trustees are entitled to be indemnified for all costs, including legal costs, which they have reasonably incurred,"[236] and the fact that the testator and one of the estate trustees (Royal Trust) had entered into a written agreement wherein the testator expressly stated that all of the estate trustees should be indemnified fully for their legal fees and expenses.

The residual beneficiary opposed the trustees' costs on the grounds that the matter proceeded on an uncontested basis. It was also his position that that the claim for two separate counsel was excessive and disproportionate."[237]

Boswell J., disagreed with the beneficiary's second argument, stating that "as litigation is about risk management" and as the beneficiary would have been aware of the risks involved in proceeding

233 *Kostiw Estate* at para 31.
234 *Kostiw Estate* at para 32.
235 *Raeburn Estate, Re,* (2009) 52 E.T.R. (3d) 150, 181 A.C.W.S. (3d) 654, 2009 CarswellOnt 6431 (WL Can) (Ont Sup Ct J).
236 *Ibid* at paras.7-8.
237 *Ibid* at par. 10.

with his objection to the estate accounts, "he would have known all along that he risked the costs of two sets of counsel coming out of the estate, or potentially worse yet, his own pocket."[238] According to the court, the beneficiary knew that the testator's written agreement expressly contemplated the payment of distinct sets of costs and that the trustees were represented by separate counsel, from the outset. The court did however find that the costs incurred were slightly out of proportion. As such, the global fees were reduced requiring that the fees submitted by each party be adjusted proportionately.

Since there was a possibility that there would be insufficient funds left in the estate to pay the fees, the issue arose as to who should be liable. Boswell J., noted that although the testator's agreement was with Royal Trust, such did not mean that the document should be read so as to favour that trustee in terms of payment. Rather, he said, the document expressly required that all trustees be compensated.

In the result, the court ordered that costs should first be paid from the estate with any shortfall to be covered by the beneficiary, personally. The court's reasons, as stated at paragraph 30 of the decision, were: (i) the shortfall in the estate was the result of interim distributions being made, primarily to the beneficiary; (ii) the traditional rule that costs of all parties are to be paid from the estate has been replaced by the modern approach of assessing costs in estate litigation in a fashion similar to other civil litigation; (iii) the estate trustees were clearly successful and all of the beneficiary's objections were withdrawn on the eve of the hearing of the contested application; and, (iv) the estate trustees should not be deprived of their assessed costs, when such costs were incurred as a direct result of the beneficiary's objections, all of which were resolved in favour of the trustees.

Simply because an account ultimately proceeds on an uncontested basis does not mean that the trustees should not be fully indemnified for costs incurred, provided such costs are reasonable. Objectors continue to run the risk of personal liability for costs.

(u) Helmuth Treugott Buxbaum Trust, Re[239]

This judgment by Gorman J., dealt with the application by a trustee to pass its accounts, with one of the beneficiaries filing an Objection. The Objector complained that the trustee did not exercise proper fiduciary duty to the beneficiaries, raised issues concerning overdraft charges and alleged conspiratorial behaviour. The Objector provided no evidence to the court that the trustee acted in

238 *Raeburn Estate* at par. 22.
239 *Helmuth Treugott Buxbaum Trust, Re,* 2009 CarswellOnt 14069, 182 A.C.W.S. (3d) 235 (WL Can) (Ont Sup Ct J).

any manner but a proper and professional one. The Objector did not cross-examine the preparer of the accounts. As such the court passed the accounts of the trustee and importantly, ordered that the Objector personally pay costs in the fixed amount, payable forthwith, of $15,738.98. The costs order reflected the court's concern that to pay the costs out of the estate would encourage the Objector to continue estate litigation without any foundation or evidence. Notably, the court also stated that a payment of costs out of the estate would unduly penalize the remaining beneficiaries.[240] A Judgment followed thereafter.[241]

(v) Mitchell Estate[242]

Brown J. issued an endorsement directing that an applicant must file certain materials where a request for increased costs is made on an unopposed application to pass accounts.

In this case, the application to pass the accounts of the Estate of John Mitchell, and two trusts set up under his will, came before Brown J. three times. Twice the court had asked for the filing of better materials to support the request for increased costs. The court held that, where an application to pass accounts will proceed unopposed, but with a request for increased costs so that a hearing must be held, the applicant should ensure the following materials are filed with the court:

> *(i) Proper initial application materials (Rule 74.18(1));*
>
> *(ii) A supplementary application record containing the materials specified by Rule 74.18(9);*[243] *and,*
>
> *(iii) Additional evidence - a simple affidavit either as part of the Rule 74.18(9) supplementary record or in a further record, depending on timing—which contains:*
>
> *a. the request for increased costs in proper form;*
>
> *b. proof of service of the request on all affected parties;*
>
> *c. a statement explaining the responses of affected parties to the request for increased costs (e.g. no response; consent; objection); and,*
>
> *d. the details of, and the reasons for, the request for the increased costs,*

240 *Helmuth Treugott Buxbaum Trust, Re, supra*, at para 11.
241 *Ibid*, Judgment dated May 15, 2009.
242 *Mitchell Estate, Re,* 2010 CarswellOnt 1662 (WL Can) (Ont Sup Ct J).
243 *Mitchell Estate, Re,* 2010 CarswellOnt 1662 (WL Can) (Ont Sup Ct J)at par. 4: According to the Court, "although this rule speaks of the record required on an unopposed application without a hearing, the same materials must be filed where a hearing must be held because of a request for increased costs. The reason is evident: the supplementary record specified by Rule 74.18(9) provides the court with the evidence that all parties entitled to notice have been served and that no objections to the accounts remain outstanding. Proof of these matters is required where either the application will proceed as unopposed without a hearing, or as unopposed but with a hearing because of the request for increased costs."

> *either through a detailed Bill of Costs or an easily understandable copy of the relevant dockets.*[244]

According to the court, "the rules require a hearing where a request for increased costs above the tariff amount is made because the court must review the request to ensure that it is fair and reasonable in the circumstances."[245] It is for this reason that the last item listed is significant: "[a] court cannot conduct such a review without having before it, evidence describing the work performed and time spent, as well as the value or cost of such work."[246] As suggested by the court, one means of placing such evidence before the court is by filing counsel's dockets and, should privilege be an issue, the court opined that, "at a minimum, a comprehensive Bill of Costs should be filed."[247] As it is the applicant who bears the burden of justifying the request for increased costs, it is the applicant who must file sufficient evidence.

Applied to the facts, the court noted that the supplementary record initially filed by the applicant did not contain a Request for Increased Costs in proper form, requesting as it did: "costs payable out of the estate, the amount of which is to be determined by the judge hearing the passing of accounts, which is greater than the amount allowed under Tariff C."[248] This form of request was deficient since the applicant had failed to request "the precise amount of increased costs sought," as is required by Forms 74.49.2 and 74.49.3. The reason for this requirement being that those receiving notice must know the amount being sought so they can decided whether or not to object.[249]

(w) Lloyd v. Myers Estate[250]

Lloyd v. Myers Estate involved a trustee (also a residual beneficiary) under his late father's Will who, in 36 years, never passed his accounts. In an attempt to get the estate settled, two of the other residual beneficiaries under the Will moved for production of a complete breakdown of all monies received from 1973 onward.

The revenue receipts all related to income derived from two apartment buildings, plus one parking space rental. It was found that there were at least fifteen different sources of income. The revenue receipts showed only one summary entry for each month under the heading "Property Income for the Month." The objectors submitted that it was impossible to review the accounts and determine whether or not the estate trustee had properly accounted for all revenue receipts and had properly managed the properties. In preparation of his accounts, the trustee hired an accountant to prepare

244 *Mitchell Estate, Re,* 2010 CarswellOnt 1662 (WL Can) (Ont Sup Ct J), at par. 4.
245 *Mitchell Estate, Re,* 2010 CarswellOnt 1662 (WL Can) (Ont Sup Ct J), at par. 5.
246 *Mitchell Estate, Re,* 2010 CarswellOnt 1662 (WL Can) (Ont Sup Ct J), at par. 5
247 *Mitchell Estate, Re,* 2010 CarswellOnt 1662 (WL Can) (Ont Sup Ct J), at par. 5
248 *Mitchell Estate, Re,* 2010 CarswellOnt 1662 (WL Can) (Ont Sup Ct J), at par. 9.
249 *Mitchell Estate, Re,* 2010 CarswellOnt 1662 (WL Can) (Ont Sup Ct J), at par. 9
250 *Lloyd v. Myers Estate*, (2009) 55 E.T.R. (3d) 213, 183 A.C.W.S. (3d) 876, 2009 CarswellOnt 8259 (WL Can) (Ont Sup Ct J)

the accounts in as much detail as possible for the past 36 years. The court found as fact from the testimony of the accountant that the records from the early years were "sparse to non-existent" and "would be next to impossible as well as not cost effective to produce in any further detail."[251]

The court reviewed the law applicable to estate accounts including section 49(2) of the *Estates Act* and Rule 74.17 which dictates that "estate trustees shall keep accurate records of the assets and transactions in the estate."[252] According to the court, "[it] has been clearly established since the early 19th Century, that a trustee must be ready at all times to give an accounting of the estate."[253] The court cited Lord Blanesburgh of the Privy Council in the case of *Campbell v. Hogg,*[254] for the principle that "accounts are to contain a true and perfect inventory of the whole property in question, and are to include normally: (1) an account showing of what the original estate consisted; (2) an account of all moneys received; (3) and [an] account of all money remaining in hand." That said, the court cited the cases of *Fales v. Canada Permanent Trust Co*.[255] and *Conrade Estate,*[256] for the principle that all of the relevant circumstances must be considered when determining whether a lesser standard of care is to be expected of a trustee, so as to excuse the trustee for breach of trust.

The court noted that although there was no excuse for the trustee's failure to pass accounts in the 36 years since the deceased's death, none of the beneficiaries called upon the trustee for accurate accounts at any time, despite their right to do so. It was also noted that the trustee had assumed the role of trustee when he was still a student at law in the early 1970's and, when he joined a law firm and obtained staff, his assistant handled the administration of the estate. Finally, it was noted that in 1994, the accounts were computerized. Taking into account these factors, the court stated that, although the objectors wanted a detailed accounting for the past 36 years, until at least 1994, "due to the manner in which [the trustee] managed the estate, this is simply not possible."[257]

The court ordered the trustee to provide detailed disclosure of the revenue received from the period of 1994 onward. According to the court, "by 1994, Mr. Lloyd had more than two decades experience as a lawyer running the Estate, the accounts were computerized, he had the assistance of staff, and he had been paying himself compensation from the Estate."[258] The court continued:

> *In making this order, I am not, in any way, condoning the manner in which Mr. Lloyd administered this Estate during the first 20 years. I am merely recognizing the reality*

251 *Ibid,* at par. 6.
252 *Ibid,* at para 3.
253 *Ibid,* at para 4.
254 *Campbell v. Hogg* (1930), 39 O.W.N. 85 (Ontario P.C.), at 86 -87
255 *Fales v. Canada Permanent Trust Co*. (1976), [1976] 6 W.W.R. 10, 11 N.R. 487, (sub nom. *Wohlleben v. Canada Permanent Trust Co.*) 70 D.L.R. (3d) 257, [1977] 2 S.C.R. 302, 1976 CarswellBC 240, 1976 CarswellBC 317 (S.C.C.)
256 *Conrade Estate, Re*, 2005 CarswellOnt 7058 (Ont. S.C.J.)
257 *Conrade Estate, Re*, 2005 CarswellOnt 7058 (Ont. S.C.J.) at para. 11.
258 *Conrade Estate, Re*, 2005 CarswellOnt 7058 (Ont. S.C.J.) at para. 12

> *that he does not have the documentation necessary to validate his administration of this Estate from 1973 to 1993. This lack of documentation will ultimately be dealt with when the accounts are finally passed.*[259]

The court's decision in this case is a practical one which does not however condone the actions of the trustee, nor negate the duty of a trustee to accurately keep records and accounts.

(x) Balanyk v. Balanyk Estate[260]

Balanyk v. Balanyk Estate involved two of the three children of the deceased, Nellie Balanyk. The estate was a relatively small one. Litigation arose not long after the deceased's death concerning two matters: the validity of the deceased's Will and dependant's support under the *Succession Law Reform Act* (the "*SLRA*").[261]

Early in the proceedings, Lofchik J., granted an order giving directions in the action regarding the validity of the Will. The order *inter alia* required the respondent to provide statements of account setting out the estate assets, receipts and disbursements.

On a motion before Justice D.J. Gordon, the applicant sought, among other things, enforcement of Lofchik J.'s order and an independent accounting of the estate assets and expenses. She challenged a number of the disbursements paid by the respondent, particularly regarding legal fees and other related matters which totalled $6,598.84. However, the applicant did not ask for an order for the respondent to pass his accounts. With respect to the estate accounts provided by the respondent, the court concluded that this was not the proper forum for a detailed review of and analysis of estate accounts. Rather, any such analysis ought to be reserved for a passing of accounts, where objections can properly be raised and addressed.

On the issue of whether an applicant can obtain an order appointing an independent accountant to perform an accounting of the estate assets and expenses, as of right, the court opined that "[t]here is no requirement for [the respondent] to provide the estate accounts prepared by an accountant."[262] Thus, *Balanyk v. Balanyk Estate* makes clear that 'interested parties' ought to be cautious of making such requests, since no such demand need necessarily be heeded to by an estate trustee; rather, this decision makes clear that it is the requesting party—and not necessarily the estate—that will have to assume the costs should they decide to retain such an expert.

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259 *Conrade Estate, Re*, 2005 CarswellOnt 7058 (Ont. S.C.J.), at para 14.
260 *Balanyk v. Balanyk Estate*, 2010 ONSC 3414, 190 A.C.W.S. (3d) 971, 2010 CarswellOnt 4448 (Ont Sup Ct J).
261 *Succession Law Reform Act,* R.S.O. 1990, c. S.26.
262 *Balanyk v. Balanyk Estate,* 2010 CarswellOnt 4448, at par. 19.

(y) Zimmerman v. McMichael Estate[263]

Mr. Zimmerman, a former crown attorney, an Estate Trustee who had acted as the attorney for property of Signe McMichael (the wife of Robert McMichael, the founder of the McMichaels' Art Collection), for the period from November 18, 2003 to September 30, 2008 and as the trustee of the Signe McMichael Trust, for the period from May 16, 2004 to September 30, 2008.

In an earlier case before the courts, it was determined that Mr. Zimmerman's conduct fell well below the standards expected of a trustee and that he had breached some of the most basic obligations of a trustee, such as: failing to properly account; making improper and unauthorized payments and loans to himself, benefitting himself out of the Trusts; mingling Trust property with his own property and using the two interchangeably for his own purposes; paying himself compensation of almost $450,000.00, without keeping proper records of his alleged pre-takings or the calculation thereof, and without the consent of the beneficiaries; and using other Trust assets such as a BMW and the McMichaels' Art Collection for his own personal benefit.

In reasons released May 20, 2010,[264] Strathy J., dealt, in part, with the application of Mr. Zimmerman to pass his accounts in his capacity as attorney for property of Mrs. McMichael and as the trustee of the Signe McMichael Trust, for the periods noted above. Strathy J., had ordered Mr. Zimmerman to repay compensation that he had taken in the amount of $356,462.50 Canadian, and $85,400.00, U.S., together with pre-judgment interest. He also ordered Mr. Zimmerman to repay $34,064.55, which he had paid to Reynolds Accounting Services for the preparation of accounts.

In a subsequent endorsement released on July 6, 2010*, Zimmerman v. Fenwick*[265], Strathy J., found that Mr. Zimmerman had presented accounts that were "manifestly inaccurate, incomplete and false," and delayed and obstructed the beneficiaries in search for answers. As such, Strathy J., was of the view that Mr. Zimmerman should pay all of the costs involved in getting to the truth, stating that there was no reason why Mr. Zimmerman should not personally pay costs that were incurred in bringing him to account. Consequently, Mr. Zimmerman was ordered to pay the costs of the respondents, John and Penny Fenwick in the amount of $167,978.52, as well as costs of the McMichael Canadian Collection in the amount of $116,383.67, both inclusive of disbursements and taxes.

In the judgment, dated October 4, 2010, concerns about the adequacy of Mr. Zimmerman's

263 *Zimmerman v. Fenwick,* 2010 CarswellOnt 8372.
264 *Zimmerman v. McMichael Estate*, 2010 ONSC 2947 (Ont. S.C.J.).
265 *Zimmerman v. Fenwick*, 2010 ONSC 3855.

response to the objections raised with respect to the accounts produced by him were repealed.[266] As such, Strathy J., afforded him yet another opportunity to respond to the objections by providing evidence, including affidavit evidence regarding the nature of each disbursements and why such expenses were incurred.[267] It was suggested that Mr. Zimmerman provide receipts and vouchers, if available, or, if not, that he provide an explanation.[268]

At the hearing held on September 15, 2010, Strathy J., was advised that Mr. Zimmerman was content to proceed, without any further response to the hundreds of objections raised by the objectors.[269] The court was left with no choice but to allow the objections, less a modest deduction in the amount of $5,147.38.10, for which an adequate explanation was provided by Mr. Zimmerman, and order Mr. Zimmerman to pay his successor trustees a total of $71,693.80 in relation to disbursements made out of Mrs. McMichael's property and $390,039.02, in relation to disbursements made out of the Trust. Mr. Zimmerman has since deceased. [270]

(z) Re Kalczynski[271]

The former attorney/then estate trustee had been ordered to pass her attorney and executor accounts. The trustee's sisters, also beneficiaries of the estate, objected to the fees charged by the former attorney as their mother's attorney for property, the disbursements made for personal care and the disbursements for rent.

The court found that the fees charged by the former attorney/estate trustee for managing the property of the deceased were within the amounts prescribed by the *SDA*. However, the court was not satisfied that the fees charged by the former attorney/current estate trustee for personal care work performed during the relevant period were appropriate.

The evidence showed that the former attorney/current estate trustee claimed that she had given up her job as a personal service worker to take care of her mother, who had Alzheimer's disease and suffered progressively from dementia and related disabilities, and, thus, sought compensation close to the amount she had been paid by her former employer for doing so. There was no evidence that the instrument creating the power of attorney for personal care made special provision for compensation of the attorney.

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266 *Zimmerman v. Fenwick*, 2010 CarswellOnt 8372, at par. 2.
267 *Zimmerman v. Fenwick*, 2010 CarswellOnt 8372, at par. 2.
268 *Zimmerman v. Fenwick*, 2010 CarswellOnt 8372, at par. 2.
269 *Zimmerman v. Fenwick*, 2010 CarswellOnt 8372, at par. 4.
270 See appended comparative chart analysis of the decisions in the *McMichael Estate* and *Penna Estate*.
271 *Re Kalczynski*, 2010 CarswellOnt 8326.

The evidence also showed that the former attorney/current estate trustee had initially charged her mother $575.00 per month to rent out the lower half of her duplex. When her mother moved into one of the bedrooms in the upper half of the duplex, the former attorney/current estate trustee charged her mother $1,000.00 per month. The deceased was later moved to a nursing home, where she remained until her death.

In reviewing the fees charged by the estate trustee, the court opined that an attorney for property is entitled to incur expenses for the grantor's benefit, and, pursuant to authority such as *Lanthier v. Dufresne Estate,*[272] an attorney can be compensated for services that she provided herself. However, the court was careful to note that in situations where an attorney compensates herself for services she provided herself, thus creating an inherent conflict of interest, any such payments will be subject to close scrutiny by the courts.[273]

The court did not think it reasonable for the former attorney/current estate trustee to expect to be paid close to the rate that she would have been paid by her employer for giving service to an arm's length client, especially in view of the fact that she was at the same time hiring outside help.[274] The former attorney/current estate trustee was ordered to repay to the estate the pre-taken amounts that were disallowed, which amounted to $65,704.00 in total.

For the same reasons, the court was not satisfied with the fees charged by the former attorney/current estate trustee for room and board. Consequently, the court disallowed the $1,000 charged for October 2004, when the mother was living in the nursing home, and of the remaining $30,000, disallowed all but $15,000. The court allowed $500 a month for room and board for 30 months.

The court permitted the former attorney/current estate trustee to obtain reimbursement out of the estate for the costs of retaining an accountant to prepare the reports used on the motion, and the fees of the mother's solicitor, capped at a total of $2,500.00. Both parties' costs were ordered to be paid out of the estate, unless there was disagreement as to the amount, in which case such could be determined by an assessment officer.

272 *Lanthier v. Dufresne Estate,* [2002] O.J. No. 3397 (S.C.J.).
273 *Kalczynski, Re,* 2010 ONSC 6081, 194 A.C.W.S. (3d) 1024, 2010 CarswellOnt 8326 (WL Can) (Ont Sup Ct J), at paras. 8 & 11.
274 *Kalczynski, Re,* 2010 ONSC 6081, 194 A.C.W.S. (3d) 1024, 2010 CarswellOnt 8326 (WL Can) (Ont Sup Ct J)par. 9.

(aa) DeLorenzo v. Beresh[275]

The holding of the court in *Craven v. Osidacz Estate* is at odds with that made in *DeLorenzo v. Beresh*, a similar case decided approximately two months prior and not referred to in *Craven v. Osidacz Estate*.

DeLorenzo v. Beresh involved the Will of the late Vincent Anthony DeLorenzo, the terms of which set up a trust for each of his grandchildren. At the time the motion was decided, there were three proceedings before the court relating to the estate. Throughout the course of the proceedings, the estate trustee used estate funds to pay all the legal fees he incurred with respect to the various proceedings. As in *Craven v. Osidacz Estate*, the question that arose was whether: "[i]n the absence of prior court approval, or the consent of all beneficiaries, [is it] appropriate for an estate trustee to use estate funds to pay legal fees incurred in connection with litigation between himself and the beneficiaries of the estate [...]"[276] One distinguishing factor in this case of worthy note is the estate trustee was not also a beneficiary and had no financial interest in the estate.

The court noted that counsel retained by an estate trustee is counsel to the estate trustee. The corollary of this then is that an estate trustee is personally liable to the solicitor for the fees they incur.

In its reasons, the court then drew a distinction between the different proceedings giving rise to legal costs incurred on behalf of the estate trustee, and how such costs ought to be treated.

The court noted that, generally speaking, the executor and any beneficiary properly attending and represented by a lawyer on a passing of accounts is awarded full reimbursement for his or her legal expenses from the estate.[277] The basis for same being "the well settled principle that full indemnity of the trustee's proper costs, charges and expenses in administering an estate is the price to be paid by the *cestuis que* trust for the services of the trustee and that the trustee must not be required to pay them personally."[278] According to the court, these charges and expenses are normally awarded at the time of the audit.[279]

According to the court, this is to be contrasted with contentious or adversarial legal proceedings,

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275 *DeLorenzo v. Beresh*, 2010 ONSC 5655, 62 E.T.R. (3d) 65, 193 A.C.W.S. (3d) 1031, 2010 CarswellOnt 7756, but see analysis by Professor Albert Oosterhoff, *"Indemnity of Estate Trustees as Applied in Recent Cases"* (2013), 41, The Advocates Quarterly 123, as cited in *Furtney Estate v. Furtney*, 2014 CarswellOnt 8904, 2014 ONSC 3774, which suggests the Estate Trustee is not required to obtain consent of the beneficiaries to draw on the Estate assets to pay legal costs.

276 *Delorenzo, supra* at para 12.

277 *Ibid* at para 20.

278 *Ibid* at para 20.

279 *Ibid* at para 21.

where, according to the court, the general rule on costs applies in that it is the successful party that is awarded its costs, on the lower party and party scale to be paid by the unsuccessful party.[280]

As noted by the court, when there is litigation between the estate trustee and the beneficiaries related to the question of whether or not the trustee has properly discharged his duties, different considerations may apply. In the circumstances, whether a trustee is entitled to charge the estate with his legal fees may turn on the outcome and it should be determined on a passing of accounts or court application, if not agreed to by the beneficiaries.[281]

The court ordered the estate trustee to repay the estate all legal fees deducted therefrom, inclusive of interest thereon, from the date such payments were made out of the estate. Also as in *Craven v. Osidacz Estate*, the court restrained the estate trustee from using estate funds to pay any further legal accounts with respect to the ongoing litigation between him and the beneficiaries without the consent of the beneficiaries or further order of the court. Note however is made of the fact that leave to appeal has been obtained on point. In this case it makes little sense on the facts made known in the reasons as to why such an order would be made. Firstly, the order interferes with the law as we have known it for centuries, and secondly, it raised the question of what estate trustee would ever accept such an office if its legal fees and disbursements were not paid out of the estate fund, particularly where the estate trustee has no financial interest in the estate. Moreover, the court proceedings largely appeared to be in respect of the estate, and not in relation to the estate trustees conduct which should well have been left to a passing of account application.

(ab) Craven v. Osidacz Estate [282]

The issue in *Craven v. Osidacz Estate* was whether an estate trustee ought to be prohibited from unilaterally paying litigation costs out of estate funds, without court or beneficiary approval, and prior to any resolution of the estate litigation or upon the passing of accounts.

In its analysis of the relevant legal principles, the court opined that, when counsel is retained by an estate trustee, counsel is the solicitor to the trustee and not, as is sometimes mistakenly believed, counsel to the estate.

The court also noted that an estate trustee is "entitled, indeed, obliged to defend claims against the estate so long as the estate assets are expended *reasonably*"[283] [emphasis added] and not

280 *Ibid* at para 22.
281 *Delorenzo, supra* at para 23.
282 *Craven v. Osidacz Estate,* 2010 CarswellOnt 8975.
283 *Craven v. Osidacz Estate,* 2010 CarswellOnt 8975 at para 21.

for their own benefit. And, whether an estate trustee has acted reasonably is to be determined by reference to the applicable case law such as the Supreme Court of Canada case of *Goodman Estate v. Geffen*[284] and *Coppel v. Coppel Estate*.[285] In *Goodman Estate v. Geffen*, the Supreme Court considered the test of "reasonableness" at 390 and 391, as follows:

> *The Courts have long held that trustees are entitled to be indemnified for all costs including legal costs which they have reasonably incurred. Reasonable expenses include the cost of an action reasonably defended.... Insofar as such person [trustee] does not recover his costs from any other person, he is entitled to take his costs out of the fund held by him unless the court orders otherwise; and the court can otherwise order only on the ground that he has acted unreasonably or in substance for his own benefit, rather than for the benefit of the fund.*

Although the court was of the view that, as an estate trustee has a duty to defend claims and a right to be indemnified if he or she acts reasonably in doing so,[286] the court noted that where an estate trustee and family are the beneficiaries of the estate, the estate trustee's duty may be seen in a different light. The court stated:

> *In cases where the executor and close family members have a personal interest in the outcome of the litigation against a beneficiary or person with an interest in the estate akin to a beneficiary (this may include a creditor with a crystallized claim), it would be inequitable to use the assets of an estate as a kind of ATM machine from which withdrawals automatically flow to fund the litigation whether reasonable or not. Requiring the parties including the executor to fund the litigation from their own resources on a "loser pays" basis brings needed discipline to civil litigation by requiring the parties to assess their personal exposure to costs before launching down the road for the lawsuit or a motion. Whether a right to indemnity or reimbursement exists is a matter between the estate trustee and the beneficiaries of the estate and is to be determined either by agreement with them or on a passing of accounts. In itself the existence of nonexistence of such a right, does not affect the liability of the estate trustee to the estate solicitor.*[287]

The court opined that in cases where monies are already expended by an estate trustee, a determination as to whether such expenditures were reasonably made is best determined at the outcome of the litigation and ought to be determined on a passing of accounts.[288]

With respect to future expenditures on the litigation, however, the court found that it would be

284 *Goodman Estate v. Geffen*, [1991] 2 S.C.R. 353 (S.C.C.), at 390 and 91.
285 *Coppel v. Coppel Estate*, [2001] O.J. No. 5246 (Ont. S.C.J.).
286 *Craven v. Osidacz Estate,* 2010 CarswellOnt 8975, at para 26.
287 *Craven v. Osidacz Estate,* 2010 CarswellOnt 8975, at para 23, citing to *Salter v. Salter Estate*, 2009 CarswellOnt 3175 (Ont. S.C.J.).
288 *Coupland Estate Re*, 2005 CarswellOnt 8868 (Ont. S.C.J.) , at para 24.

inequitable in the circumstances of this particular case for the estate trustee to pay for the litigation out of the assets of the estate, given his personal interest as a beneficiary in the outcome.

Notably, Professor Albert Oosterhoff examined both *DeLorenzo* and *Craven* (2 above) in his insightful paper entitled: "*Indemnity of Estate Trustees as Applied in Recent Cases*" [289] finding that such diverged from established principles of indemnification.

(ac) Diament v. Ockrant[290]

This application concerned inter alia an accounting by an attorney with allegations of fraud, breach of fiduciary duty, breach of trust, and fraudulent misrepresentation. The applicants moved for summary judgment which was ultimately granted in the amount of $776,133.04.

During the tenure of the attorneyship, the respondent withdrew the entire amount of the funds of both husband and wife as grantors of powers of attorney for property. The facts read that it is undisputed that the funds withdrawn by the attorney were either used for the living expenses of the husband and wife, or for the attorney's personal use.

The attorney asserted that the amounts taken for personal use were gifts from the grantors. The court found that there was no evidence corroborating any gift of money from the grantors of the powers of attorney.

The attorney admitted that he spent money taken from the grantors as if it was his own. There were a number of court orders and endorsements requiring inter alia a full accounting of the monies taken during the attorneyship. The respondent resisted the productions and accounting.

The court found that there were significant cash transactions supporting the damages claimed in the summary judgment motion.

The court opined per Whitaker J., that there was adequate information before the court to permit findings of liability and quantum. The court concluded that the attorney put his own interest before the interest of the grantors, failed to advise, and took advantage of their vulnerability as elderly relatives who clearly trusted him.

The court opined that the attorney was obliged to keep accurate and complete accounts and he

289 Published The Advocates Quarterly, April 2013, publication is the revised version of Professor Oosterhoff's paper delivered at the STEP Toronto Branch Conference on January 9, 2013, para 6.2 and 6.3.

290 *Diament Estate v. Ockrant*, 2011 ONSC 2175, 2011 CarswellOnt 2466, affirmed by *Diament Estate v. Ockrant*, 2012 ONCA 84, 212 A.C.W.S. (3d) 200, 2012 CarswellOnt 1341.

failed to do so.

As such, the court concluded that the attorney breached his fiduciary obligations and committed fraud and granted summary judgment.

Moreover, the court costs of the applicant were fixed at $70,000.00[291].

On appeal, the Court of Appeal dismissed the appeal stating that it was clearly a case for summary judgment on liability and the appellant clearly breached his fiduciary obligation. Costs were fixed to the respondent of $2,000.00 on dismissal.[292]

(ad) Chan Estate v. Chan Estate[293]

The accounting firm of firm of Bennett, Gold, Chartered Accountants was mistakenly appointed as estate trustee of the estate of the deceased, Mr. John Kwock Keung Chan, by way of consent order, after one of its predecessors renounced and the other resigned from their positions. Once it was determined, however, that, as a limited liability partnership, the firm was not able to deal with certain estate assets and that an individual ought to have been appointed, Mr. Robert Gold of that firm was appointed as estate trustee. He was later succeeded first by Ms. Vivian Wong and then by Ms. Lai Fan Wu. Ms. Wong was one of Ms. Wu's former lawyers. Ms. Wu was the former wife of the deceased and the mother of the primary beneficiaries, the deceased's two children.

Mr. Gold brought an application to pass his accounts for the period during which he was estate trustee, pursuant to a consent order. Ms. Wu opposed his passing. Among the objections raised by her, Ms. Wu took issue with Mr. Gold's claim for excess compensation. Although the court found that there was "no doubt that [Mr. Gold] spent countless additional hours on the administration of this estate largely due to the interventionist tactics of Ms. Wu,"[294] as the estate accounts filed indicated that Mr. Gold's firm pre-took compensation, that there was no consent by the beneficiaries or the litigation guardian to do so, and nor was there a court order approving same. The court reduced the amount of compensation claimed by Mr. Gold by the amount that was pre-taken by him.

On the legal costs incurred by Mr. Gold, the court found that much of Ms. Wu's objections had to do with her criticisms of her prior lawyers. The court found that the accounts for the period up to 2008 consisted of detailed dockets showing the date, description, hours spent, amount charged and the

291 *Diament*, at para 34.
292 *Ibid*, para 4.
293 *Chan Estate v. Chan*, 2011 ONSC 3423, 69 E.T.R. (3d) 260, 2011 CarswellOnt 5810, additional reasons in *Chan Estate v. Chan Estate*, 2012 ONSC 55, 74 E.T.R. (3d) 1, 2012 CarswellOnt 463.
294 *Chan Estate,* para. 22.

lawyer or law clerk involved. They also detailed the firm's involvement with both Ms. Wu and the many prior legal counsel involved up to the consent order that terminated Mr. Gold's appointment and substituted Ms. Wu as the estate trustee, subject to Mr. Gold's passing of accounts and completing certain work for the estate. It was found that the dockets also included a detailed description of ongoing work after the court order, up to the final invoice on the schedule submitted by Mr. Gold. As the court was satisfied that the legal fees invoiced to Mr. Gold were necessary and proper legal services to the estate trustee, it approved those accounts.

With respect to the accounts for 2009 and 2010 submitted by Mr. Gold, the court was "satisfied that these services rendered to Mr. Gold as Estate Trustee [...] were necessary in order to assist Mr. Gold in preparation for a difficult and arduous passing of accounts where every step was disputed and where his reputation was challenged and to allegations of fraud and misconduct."[295] As such, the court approved these accounts as well, with interest.

The court found, respecting costs, that Mr. Gold had "achieved a substantial measure of success with respect to this passing of accounts," and, as such, held that if the parties could not agree on costs, Mr. Gold would be entitled to a period of 20 days after the date of the judgment to make submissions as to costs. Ms. Wu would then have a period of 20 days to respond to any such submissions.

Mulligan, J., previously invited the parties to reach an agreement in respect of costs, given the substantial measure of success against the Estate. In the 2012 costs decision no agreement was reached. Accordingly, costs submissions were made by the applicant and none were submitted by the respondents, despite further invitation from the court to make responding submissions. The applicant sought costs on a partial indemnity basis.

Mulligan, J., made note of the ongoing litigation and the significant allegations of criminal and quasi criminal conduct on the part of the accounting firm which were of utmost professional importance. The court referenced the lengthy, disorganized, repetitive and unclear affidavits of the objectors which resulted in unnecessarily complex, lengthy proceedings that were considered unmeritorious.

Though the applicant enjoyed a substantial measure of success on the passing, there had been somewhat of a harsh result in that the compensation was reduced by the amount pre-taken. That said, in the end the applicant was successful in obtaining its full partial indemnity costs. It is unknown why the respondents who were self-represented did not file costs submissions or whether indeed any such costs submissions would have made a difference to the end result.

295 *Chan Estate,* at para 57.

This is another example of costs being awarded on a partial indemnity basis following the principle of degree of success on the application. [296]

(ae) Langston v. Landen[297]

The numerous decisions arising from the case of *Langston v. Landen* illustrate the severe consequences of failing to adhere to an order requiring an estate trustee to pass accounts. As this case demonstrates, in certain egregious circumstances, the courts will not shy from making an order for imprisonment. *Langston v. Landen*[298] involved a motion brought by Ronald Rutman ("Mr. Rutman"), the Estate Trustee During Litigation (the "ETDL") of the *Estate of Paul Penna* (the "Estate"). Among other things, Mr. Rutman sought a declaration and finding that Mr. Landen was in contempt of certain court orders. Greer J. agreed with the motion brought by Mr. Rutman, finding Mr. Landen in contempt of court for breach of the following Orders:

1. The *Mareva Order*, dated March 2, 2005, by which he was ordered to advise the court, by way of sworn affidavit, of all of his dealings with the Estate accounts frozen by the *Mareva Order* and to produce all documents in his possession in connection with that. Greer J., found the affidavit prepared by Mr. Landen to be incomplete, as it did not disclose other assets he controlled, among other things. She further found that, subsequently, Mr. Landen repeatedly and deliberately violated the terms of the *Mareva Order*;

2. The Order, dated April 7, 2006, which ordered him to file an application to pass his accounts, which, Greer J. found, he never filed, nor did he make any attempts to pass his accounts as one of the estate trustees;

3. The Order, dated July 7, 2006, which ordered him to provide counsel with an update concerning the assets listed in his (incomplete) affidavit, which, Greer J. found to be false; and

4. The Order, dated February 27, 2009, which ordered him to attend at an examination in aid of execution, which he was found to have deliberately violated.[299]

In finding that Mr. Landen in contempt, Greer J., stated the following:

> *The steps Landen took in the face of such Orders, were egregious in nature and showed the extent of Landen's sociopathy when he knowingly, deliberately and wilfully breached his fiduciary duties to the Estate and [its] beneficiaries, committed breach*

296 *Chan Estate*, 2012 CarswellOnt 463 (S.C.J.) 2012 ONSC 55.
297 *Langston v. Landen,* 2012 CarswellOnt 16824; *Langston v Landen*, 2013 CarswellOnt 11799, 2013 ONSC 4241; *Langston v. Landen*, 2010 CarswellOnt 9919; *Langston v. Landen*, 2011 CarswellOnt 1948.
298 *Langston v. Landen*, 2010 ONSC 4730, 195 ACWS (3d) 687, 2010 CarswellOnt 8815.
299 *Langston,* at para 78.

> *of trust, defrauded the Estate of millions of dollars, failed to keep or produce estate accounts, treated the deceased's widow with total disrespect and defrauded her by never paying her the money she was entitled to under the Estate.*[300]

Based on her findings on the contempt motion—that no accounts were ever produced by Mr. Landen, that not all of the legacies were paid by him, that millions of dollars were stripped from the assets of the Estate and the company solely owned by the Estate, and that Mr. Landen deliberately breached a number of court orders (noted above), thus placing him in contempt— Greer J., was of the view that, of the various orders available to a court to deal with sanctions against a person found to be a contemnor pursuant to subrule 60.11(5) of the *Rules*, the appropriate sanction for Mr. Landen was imprisonment. Greer J., sentenced Mr. Landen to 14 months imprisonment, noting that in civil contempt matters, unlike criminal sentencing, there is no method of parole. In Greer J.'s view, a situation such as this called out for deterrence, "given that the message is that such persons who have an obligation to keep accounts must realize the severity of sanctions against them if no accounts are kept and they have personally taken and used estate assets."[301]

Mr. Landen attempted to appeal Greer J.'s decision,[302] however, the Court of Appeal refused to interfere with the sentence, finding that it was fit in the circumstances and ordered costs to the Estate Trustee of $15,000.00.

In the latest, and final decision arising on October 10, 2012, Landen appeared before Greer, J. after his 14 month sentence was completed.[303] A relative of Landen's had hired an accountant to go over the records to assist with the Court's request for answers as to where the millions of dollars went. However much of the missing money and shares could not be traced or located. Greer, J. was not impressed with this: "Another accounting was not what I had in mind. I expected that Landen would prepare an Affidavit setting out how he had used the funds and what he had done with various missing shares".[304]

In deciding whether or not to sentence Landen to a further 6 months in jail for further contempt, Justice Greer had this to say:

> I agree with counsel for the Estate Trustee during Litigation that the law of diminishing returns is at work in a case such as this. I agree that there is little likelihood of locating any further eligible assets. I saw no remorse or regret by Landen in what he did. I found him to be untruthful in saying he did not know what happened to the missing assets.

300 *Langston v. Landen*, 2010 ONSC 4730, 195 ACWS (3d) 687, 2010 CarswellOnt 8815 at para 77.
301 *Ibid* at para 46.
302 *Langston v. Landen*, 2011 CarswellOnt 1948 (Ont. C.A.).
303 *Langston et al v. Landen,* 2012 ONSC 7290, 85 ETR (3d) 288, 2012 CarswellOnt 16824.
304 *Langsten,* at para 3.

> Landen really did not purge his contempt. He left it to [the accountant] to try to do it for him. He filed no Affidavit and no letter of apology. He showed absolutely no remorse in the witness box and had a selected memory of events he did not wish to discuss, such as the missing shares.
>
> The question then is, "Would it serve the public's interest to sentence him to a further 6 months in prison?" I have reluctantly concluded that it would not. He is living along in a friend's house and is said to be in receipt of social assistance. His life has become a narrow existence in comparison to the salad days of living in Forest Hill, attending the Leaf's games, and driving luxury cars, all on other people's money.
>
> I withdraw my Order that Landen Pass his Accounts in the Estate as it is an impossible task for him. The [accountant's] reports are the best evidence there is.[305]

The Court concluded that the matter had come to an end and that Landen not be returned to prison. While the Court really had no other option and the decision seems appropriate, this is rather an unsatisfactory conclusion to the beneficiaries and to this long and infamous case. Ultimately, the many charities that were to benefit under the Will, will never see any of the money misappropriated by Landen.

(af) Bikur Cholim Jewish Volunteer Services v. Langston [306]

Mr. Penna passed away on August 29, 1996. His will appointed his wife, Ms. Penna, a Mr. Langston, and a Mr. Landen as executors and trustees of his estate. The court found that Ms. Penna began exhibiting symptoms of incompetency from at least October 1999. Ms. Penna passed away on December 18, 2003. On February 28, 2005, the forensic accountant produced a report suggesting misconduct on the part of Mr. Landen. On March 1, 2005, an action was commenced by Mr. Langston, Mr. Sheriff, and Mr. Jakmin against Mr. Landen, his wife, and his company. On March 31, 2005, a statement of claim was issued by Mr. Langston, Mr. Sheriff, and Mr. Jakmin. On April 20, 2005, counsel met and discussed the possible claim against the estate of Ms. Penna (the "appellant") for damages arising from her negligence while she acted as an executrix. On May 13, 2005, counsel for one of the applicants, a charity and residual beneficiary under Mr. Penna's will, sent a letter to the appellant regarding the negligence of Ms. Penna. December 18, 2005 marked two years from the date of Ms. Penna's death. On April 7, 2006, the charities and the appellants were added as plaintiffs to the March 31 action.

Mr. Landen, Mr. Sheriff, and Mr. Langston were removed as estate trustees of Mr. Penna's estate and ordered to pass their accounts. On December 4, 2006, the motion judge issued an order giving

305 *Langsten,* at paras 33-35.

306 *Bikur Cholim Jewish Volunteer Services v. Langston*, 2009 CarswellOnt 1105 (Ont. C.A.); reversing 2007 CarswellOnt 655 (SCJ)

directions regarding the summary judgment motion and ordering that the estate of Ms. Penna by her estate trustees (the appellant and Mr. Landen) bring an application to pass their accounts from the date of the death of Mr. Penna to the date of death of Ms. Penna.

The appellant argued that section 38(3) of the *Trustee Act* applied and, accordingly, the two-year limitation period therein had expired on December 2005, the date of Ms. Penna's death. The appellant's further argued that the transition provisions under the *Limitations Act, 2002* did not apply in this case. This position would facilitate the appellant to arguably get around the basic two-year limitation period established by section 4 of the *Limitations Act, 2002*, also known as the "discoverability principle" which, if accepted would have meant that the two-year period would have commenced from the date the forensic accountant produced his report, as this was, arguably, the date the claim was discovered. As a result, the claim would not have been statute-barred.

The respondent's argued that even if section 38(3) applied, the two-year limitation period did not run because of sections 43 and 44 of the former *Limitations Act* which concern claims based on "fraud or fraudulent breach of trust" which provide as follows:

> *43(1) In this section, [...] "trustee" includes an executor, an administrator, a trustee whose trust arises by construction or implication of law as well as an express trustee, and a joint trustee.*
>
> *(2) In an action against a trustee or a person claiming through a trustee, except where the claim is founded upon a fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property or the proceeds thereof, still retained by the trustee, or previously received by the trustee and converted to the trustee's use, the following paragraphs apply:*
>
> *1. All rights and privileges conferred by any statute of limitations shall be enjoyed in the like manner and to the like extent as they would have been enjoyed in such action if the trustee or person claiming through the trustee had not been a trustee or person claiming through a trustee.*
>
> *44(2) Subject to section 43, no claim of the beneficiary of a trust against the trustee for any property held on an express trust, or in respect of any breach of such trust, shall be held to be barred by any statute of limitations.*

The respondents contended that their action fell within section 43(2) as it was a claim "founded upon a fraud or fraudulent breach of trust to which the trustee was a party or privy".

The Court of Appeal followed the principle in *Edwards v. Law Society of Upper Canada*[307] and held

307 *Edwards v Law Society of Upper Canada,* (2000), 48 O.R. (3d) 321 (Ont. C.A.); leave to appeal refused (2000), 2000 CarswellOnt 4459 (S.C.C.) at para. 13.

that the intent of sections 43 and 44 is to "*free actions against trustees from all statutory limitation periods [including section 38(3) of the Trustee Act] where they fall within the kinds of action specified in s. 43(2).*" However, the court found that although Ms. Penna may well have been negligent for allowing Mr. Landen "free reign over the administration of the estate," such was not enough to bring her within the exception in section 43(2) as "party or privy to [Mr. Landen's] fraud."[308] According to the court, while she may have breached her duties to the beneficiaries of the estate, such did not make her a party or privy to Mr. Landen's fraud. She could not have been a party to Mr. Landen's fraud "without at least knowing or being wilfully blind to the fraud."[309]

The respondents submitted that the broad jurisdiction under subsections 49(2) and (3) of the *Estates Act* gives the judge "power to inquire into any claim by any person interested in the taking of the accounts."[310] However, the court found that there is nothing in section 49 "that suggests a judge has the power to award damages in respect of a claim that is statute-barred."[311] Rather, in *Simone v. Cheifetz,*[312] the Court of Appeal suggested that "an audit under s. 49 is not the appropriate vehicle for litigating a claim of breach of trust."[313]

The respondents attempted to add the appellant as a defendant in the proceedings pursuant to the doctrine of special circumstances. As was noted by the Court of Appeal in *Giroux Estate v. Trillium Health Centre,*[314] the common law doctrine of fraudulent concealment applies to suspend the running of the limitation period in section 38(3) and survives the *Limitations Act, 2002*. As stated by the Court of Appeal in *Giroux Estate v. Trillium Health Centre*:

> *s. 38(3) was exempted from the new Act so that its common law status would be preserved and it would remain immune from the discoverability rule. In other words, the legislature intended that s. 38(3) should continue to be governed by common law principles. The doctrine of fraudulent concealment is one such principle.*

The Court of Appeal, in concurrence with *Giroux Estate v. Trillium Health Centre* and in *Swain Estate v. Lake of the Woods District Hospital,*[315] opined that the doctrine of special circumstances is available to permit a court to add parties to an existing action, in spite of the expiration of the limitation

308 *Bikur Cholim Jewish Volunteer Services v. Penna Estate,* 2009 CarswellOnt 1105, 2009 ONCA, reversing (2007) 2007 CarswellOnt 655 (Ont. S.C.J.), at para 37.
309 *Bikur Cholim Jewish Volunteer Services v. Penna Estate,* 2009 CarswellOnt 1105, 2009 ONCA, reversing (2007) 2007 CarswellOnt 655 (Ont. S.C.J.).
310 *Bikur Cholim Jewish Volunteer Services v. Penna Estate,* 2009 CarswellOnt 1105, 2009 ONCA, reversing (2007) 2007 CarswellOnt 655 (Ont. S.C.J.), at para 49.
311 *Bikur Cholim Jewish Volunteer Services v. Penna Estate,* 2009 CarswellOnt 1105, 2009 ONCA, reversing (2007) 2007 CarswellOnt 655 (Ont. S.C.J.), at para 49.
312 *Simone v. Cheifetz* (2000), 36 E.T.R. (2d) 297 (Ont. C.A.), at para 17.
313 *Simone v. Cheifetz* (2000), 36 E.T.R. (2d) 297 (Ont. C.A.), at para 17.
314 *Giroux Estate v. Trillium Health Centre* (2005), 74 O.R. (3d) 341 (Ont. C.A.); additional reasons at (2005), 2005 CarswellOnt 721 (Ont. C.A.).
315 *Swain Estate v. Lake of the Woods District Hospital* (1992), 9 O.R. (3d) 74 (Ont. C.A.).

period in section 38(3). However, the court found that this was not a case for the application of the doctrine of special circumstances to permit adding the appellant as a defendant:[316]

> *In my view, the special circumstances doctrine should be applied with care when it is sought to add an estate as a defendant. As Abella J.A. observed in Waschkowski at para. 9 the policy consideration underlying the clear time limit in s. 38(3) is to favour disposition of estate matters with finality. The two year window makes access to a remedy "available for a limited time without creating indefinite fiscal vulnerability for an estate". In my view, there is an additional policy consideration: the difficulty an estate may have in defending against a stale claim. This case provides an obvious example. Not only is Lorraine Penna not around to defend herself, but it seems that from at least 1999 she was incompetent.*

The case was argued in the context of a summary judgment motion. Specifically, the appellant sought a declaration before the motion judge on the following terms:

> *(a) for a Declaration that the Partial Summary Judgment Motion brought on by Rutman, as Estate Trustee during Litigation, as well as any future claims for damages brought against the Estate of Lorraine Penna, or its executors, arising out of any alleged breach of legal duty by Lorraine Penna while acting as an executor of the Estate of Paul Penna, are statute-barred;*
>
> *(b) for a Declaration that subparagraph (a) above be a defence to any and all subsequent claims for damages brought against the Estate of Lorraine Penna, or its executors, arising out of any alleged breach of legal duty by Lorraine Penna while acting as an executor of the Estate of Paul Penna, in these or related proceedings*[317]

The Court of Appeal allowed the appeal, but only to the extent of the motion for summary judgment was barred by section 38(3) of the *Trustee Act*. Costs were awarded in favour of the appellant.

(ag) Langston v. Landen[318]

In the June 20, 2013 judgment concerning the passing of account of Ronald Rutman, the Estate Trustee During Litigation, the court addressed the objections primarily relating to the sale of the estate's house, and the compensation taken thereon, as well as the taking of 2 ½ % on a single large capital receipt and disbursement. The court noted that Ronald Rutman was an excellent appointment and diligently pursued the tracing of assets into the hands of Barry Landen, the former estate trustee, his wife, all of which were fraudulently used by them and family members. The court accredited Rutman for untangling the corporate web of Jakmin Investments Ltd., and traced other assets that had disappeared during the administration of the estate by Landen. The court moreover,

316 *Swain Estate v. Lake of the Woods District Hospital* (1992), 9 O.R. (3d) 74 (Ont. C.A.) at para. 56.
317 *Swain Estate v. Lake of the Woods District Hospital* (1992), 9 O.R. (3d) 74 (Ont. C.A.).
318 *Langston v Landen*, 2013 ONSC 4241.

accredited Ronald Rutman for tracing Landen's assets frozen by the original Mareva Injunction, and brought on the Motion for Contempt when Landen had stripped the assets out of all of the frozen accounts, and her Honour stated: "*this was not just a care-taking position".*[319]

Ronald Rutman used an accounting program to assist with the preparation of the accounts, but in some instances time spent was missing. The court states that the trustee is now aware of the case law that suggests that all costs for the preparation of accounts should be deducted from the trustee's compensation.[320]

The court was of the view that the complications involved in the administration of the estate was on onerous one. The number of motions, appeals, contempt motions and general estate litigation was highly unusual. Added to this was the necessity to wind up a company, and determine missing tax returns and assets. In the administration of estates, trustees can be awarded a special fee for extra complexities in bringing the administration to its conclusion and the court opined that in the circumstances of this case, it was not prepared to reduce the compensation from the amount requested on the basis that the trustee would otherwise be entitled to a special fee in addition to the amount requested. As such, the trustee's claim for $162,478.01 representing the balance of the compensation was ordered payable.

This is in stark contrast to the treatment of the court in *Church v Gerlach*[321], referenced herein, where the court used a different analogy to fix the cost of the Estate Trustee During Litigation

(ah) The Estate of Roman Krentz[322]

This case involved the contested passing of accounts application over fees. The lawyer, accountant and bookkeeper were named as the deceased's trustees in accordance with his Will. The estate trustees sought compensation payable out of the estate. The beneficiaries of the estate who were the deceased's children in their capacity as beneficiaries objected to the accounts on a number of grounds, therefore asking the court to reduce compensation. The argument was made that the trustees' compensation should be reduced since they were paid professional fees for most of their work in respect of which compensation was claimed in their capacity as estate trustees. The Will contained a provision permitting the trustees who are professionals to bill for their professional time in addition to their work as trustees. However, on cross-examination, the solicitor who drafted the

319 *Langston v Landen*, 2013 ONSC 4241 at para 6.
320 *Knight Estate*, Re. (1999), 30 E.T.R. (2d) 225 (Ont. S.C.J.).
321 *Church v Gerlach*, 2008 CarswellOnt 11225, 174 A.C.W.S. (3d) 1238.
322 *Krentz Estate v. Krentz*, 2011 ONSC 1653, 66 E.T.R. (3d) 132, 2010 CarswellOnt 1651, additional reasons in *Krentz Estate v. Krentz*, 2011 ONSC 4375, 69 E.T.R. (3d) 193, 2011 CarswellOnt 5886.

Will stated that the deceased had not expressly requested this clause.

The court, upon review of the terms of the Will, noted that there was a particular paragraph authorizing the estate trustees to pay reasonable compensation and a separate paragraph authorizing the trustees to charge professional fees and other charges for work done. The court found that the two clauses were boilerplate clauses and did not clearly illicit that the lawyer would be paid for professional work and also be paid for compensation as a trustee. What is interesting in the court's analysis, is the analogy drawn in respect of compensation for a lawyer who is both trustee and a lawyer in the context of contingency fee arrangements.

The court concluded that in both situations, payments may not easily be quantified. The court noted that the lawyer who is a trustee and seeks both professional fees and trustee compensation has an obligation to satisfy the beneficiaries of an estate and the court that the testator understood the provision in the Will. The court was not satisfied in this instance. The court in the end accepted the trustees' claim for compensation based on the percentages without reduction. The trustees also claimed a special fee in this instance, which was rejected.

(ai) Vincent Estate Re[323]

This case involved an application by the Bank of Nova Scotia Trust Company as Estate Trustee of the Estate of Orlie Audrea Vincent, to pass its accounts. One of the beneficiaries of the Estate objected to the accounts. The nature of the objections included objections to the Estate Trustee During Litigation's legal fees, requesting an order for taxation or assessment.

Pursuant to the Reasons for Decision of Corrick J. dated June 17, 2011[324], J. Corrick ruled that the objections as they related to the legal fees of Scotiatrust to Gowlings and to O'Sullivan Estate Lawyers, were determined in that Her Honour held that Mr. Vincent was estopped from having those legal accounts rendered prior to March 1, 2010 assessed. Mr. Vincent was permitted however, to have any legal accounts rendered after March 1, 2010 assessed, yet Mr. Vincent did not pursue the further objections permitted to be assessed.

Pursuant to the Reasons for Decision of Justice Corrick dated September 26, 2011, Justice Corrick therefore passed the accounts of the Bank of Nova Scotia Trust Company, fixed the accounts rendered post March 1, 2010[325], and made the following disposition with respect to costs[326]:

323 *Vincent Estate, Re*, 2011 ONSC 3806, 204 A.C.W.S. (3d) 214, 2011 CarswellOnt 5896.
324 *Vincent Estate, Re*, 2011 ONSC 3806, 204 A.C.W.S. (3d) 214, 2011 CarswellOnt 5896.
325 *Vincent Estate* (Re) 2011 ONSC 5625 – unreported.
326 *Vincent Estate* (Re) 2011 ONSC 5625 – unreported.

[15] In summary, I make the following disposition:

a. […]

b. The costs of the passing of the accounts shall be paid as follows:

(i) To Whaley Estate Litigation for its account up to May 4, 2011, $5,000.00 including HST payable out of the estate; and

(ii) To Whaley Estate Litigation for its account up to May 4, 2011, $19,144.94 including HST out of David Vincent's share of the estate, and any disbursement to David Vincent of estate funds shall be net of this amount.

c. David Vincent shall pay Janice Vincent costs in the amount of $9,000.00 inclusive of disbursements and HST. Any disbursement to David Vincent of estate funds shall be net of this amount.[327]

Mr. Vincent appealed the endorsement and corresponding Order of 20120210[328] of Corrick J. pursuant to section 10 of the Estates Act, to the Divisional Court.

Pursuant to an endorsement dated February 10, 2012, the Divisional Court[329] allowed the appeal of paragraphs 1–6 of the motion judge's order, yet was silent with respect to the judgment on passing of accounts, and the costs so ordered thereunder pursuant to the Reasons of 20110926[330]. The Divisional Court at paragraph 8 stated as follows[331]:

[8] The appellant argues that the process adopted was flawed: he was deprived of the opportunity to submit evidence in support of his objection, and the motions judge, in effect, followed, as contemplated by the Practice Direction…

[9] in our view, the motions judge erred in proceeding to determine the substantive issue of estoppel rather than resolving the conflict respecting the draft orders giving directions. The result of her decision was to deprive the appellant of an opportunity to present evidence and make his full case respecting his ability to challenge the legal fees.

[10] While the respondent argues that the appellant had an adequate opportunity to present such evidence before the hearing, we accept the submission of appellant's counsel that there was no reason to put forth evidence relating to the substantive issues for that attendance, given that the parties were making a first appearance on

327 *Vincent Estate* (Re) 2011 ONSC 5625 – unreported.
328 *The Bank of Nova Scotia Trust Company v. Vincent,* Div. Court, 2012 ONSC 940 – unreported April 24, 2012.
329 *The Bank of Nova Scotia Trust Company v. Vincent*, Div. Court, 2012 ONSC 940 – unreported April 24, 2012.
330 *The Bank of Nova Scotia Trust Company v. Vincent*, Div. Court, 2012 ONSC 940 – unreported April 24, 2012.
331 *The Bank of Nova Scotia Trust Company v. Vincent*, Div. Court, 2012 ONSC 940 – unreported April 24, 2012.

> *a contested motion for directions. As a result, there was no affidavit evidence from either party addressing the issue of estoppel.*
>
> *[11] Therefore, the appeal is allowed and paragraphs 1 through 6 of the motions judge's order are set aside. The contested motion for directions shall be referred back for determination by a judge hearing matters on the Estates List. Given our conclusion on the process, we need not address the appellant's alternative argument that the motions judge erred in law in finding estoppel and in failing to address the issues of waiver.*[332]

The Divisional Court fixed the appellant, Mr. Vincent's costs at $9,500.00 on a partial indemnity basis and requested written submission of the issue of the estate trustees' entitlement to costs.

On April 24, 2012, the Divisional Court[333] determined that the Estate Trustee, the Bank of Nova Scotia Trust Company, is entitled to be indemnified for its costs reasonably incurred pursuant to *Geffen v. Goodman Estate*[334] but on the quantum of costs, determined that the costs were excessive. It is unclear whether or not the Divisional Court reviewed the costs pursuant to the factors sets out in *Cohen v. Kealey* [335] or Rule 58 of the *Rules of Civil Procedure* in determining the costs to be "excessive." The Divisional Court fixed the Estate Trustee's costs of the appeal at $15,000.00 inclusive of HST and disbursements payable out of the Estate.

Notably, though the Divisional Court agreed that the Estate Trustee was entitled to be fully indemnified for its costs, the costs were characterized to be excessive even on a substantial or full indemnity basis, without reasons as to how it was determined that they were "excessive". Given the requirements of the rules as they relate to appeals, it is difficult to reconcile an award of $15,000.00 inclusive of HST and disbursements, indeed, filing the records required pursuant to the rules in triplicate would mean a substantial part of the $15,000.00 awarded in costs would have gone to photocopying costs alone.

The Appellant in his cost submissions took the position that the Divisional Court in allowing the appeal, set aside in effect the costs ordered by the application Judge.

On this, the Divisional Court took the position that the Appellant sought to raise for the first time, an issue concerning the cost order by Corrick J., and the Divisional Court in return, ruled that that matter was not properly before the court and declined to address it, and therefore the costs as set out in the Reasons for Decision of Corrick J. on September 26, 2011 stand.

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332 *The Bank of Nova Scotia Trust Company v. Vincent*, Div. Court, 2012 ONSC 940 – unreported April 24, 2012.
333 *The Bank of Nova Scotia Trust Company v. Vincent*, Div. Court, 2012 ONSC 940 – unreported April 24, 2012.
334 *Geffen v Goodman* (1991), 42 E.T.R. 97 (S.C.C.).
335 *Cohen v Kealey,* 1985 CarswellOnt 1906, [1985] W.D.F.L. 1978, 26 C.P.C. (2d) 211, 10 O.A.C. 344.

The application subsequently settled and order following Judgment issued.

Again, Professor Albert Oosterhoff provides interesting commentary on the integrity of the Divisional Court decision.[336]

(aj) Sheard Estate , Re[337]

This decision of Mesbur J., concerned a motion by the grandchildren, residuary beneficiaries of the estate.

By way of background, the estate trustees provided the grandchildren with two distributions. In respect of the first, a formal receipt was requested and received, and in the case of the second, the cover letter to the release enclosed a set of accounts for in or about a 2-year period of the administration, which also proposed a third distribution schedule, which ultimately contained an error later rectified. However, thereafter the grandchildren retained counsel instructing their lawyer to write a letter raising questions about the proposed distribution, the accounts and the compensation claimed.

The executors commenced an application to pass their accounts for the period from July 1, 2009 to June 30, 2012, not from death, having received a release for the prior period on the first distribution from December 28, 2007. The grandchildren filed a Notice of Objection seeking an order requiring the executors to file a complete set of accounts together with vouchers, and seeking the dispensing of mandatory mediation.

Greer J., on September 13, 2013, noted that the full accounting sought included a period which they had already released the executors for, and ordered that if the grandchildren wished to receive such release, they were required to amend their motion to ask for an order to set aside the releases.

Moreover, Greer J., ordered the executors to update their accounts for the period to include up to August 31, 2013.

The grandchildren thereafter delivered an amended Notice of Motion to set aside the initial releases and requiring the executors to pass their accounts for the period covered by the releases as well as the accounts for the later period.

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336 The Advocates Quarterly, April 2013, publication is the revised version of Professor Oosterhoff's paper delivered at the STEP Toronto Branch Conference on January 9, 2013, para 6.5.

337 *Sheard Estate, Re*, 2013 ONSC 7729, 94 E.T.R. (3d) 130, 2013 CarswellOnt 17587, additional reasons in *Sheard Estate, Re*, 2014 ONSC 807, 94 E.T.R. (3d) 141, 2014 CarswellOnt 1228.

The executors opposed the relief sought, taking the position that a statutory limitation period applied to the first set of accounts, and that there was no jurisdiction to dispense with the requirement for mandatory mediation on a contested passing of accounts. The court determined that the claim to set aside the releases being more than 2 years from the date of the releases was clearly time-barred.

The court refused to dispense with mandatory mediation, dismissed the motion with respect to setting aside the releases and directed a Scheduling Appointment to schedule the mediation and all further steps required for the passing of accounts application. The grandchildren did not succeed in their motion and as such, were ordered to pay the costs of the estate on a partial indemnity basis.

(ak) Maasbree Group (Trustee of) v. Maasbree Group Trust (Trustee of)[338]

The decision of Charbonneau J., is notable in that the applicant sought an order compelling the respondent trustee to pass his accounts, and the trustee in turn, sought a motion asking for an order compelling the applicant to pay $50,000.00 into court as security for costs.

The motion of the trustee was dismissed. The court's reasons for doing so included that the trustee has a duty to pass his accounts and has been ordered to do so for a 10-year period; the objections would be dealt with at the hearing of the passing of accounts, which is a right of the beneficiaries of the trust; that other beneficiaries have an interest in the proceedings; and that the applicant's claim is not frivolous, vexatious, or void of merit.

Costs were not addressed. Arguably, the estate trustee was not acting in a manner said to be accountable, transparent or with an even hand. Security for costs orders in estates matters are rare. The costs treatment silent, it would have been interesting to know the result.

(al) Nicolou v McLennan & Associates[339]

This decision of the Divisional Court, per Skarica J., for the most part addressed a request to overturn the decision of the Small Claims Court on the basis of an error in law. It is however the analysis within this decision regarding the estate litigation fees and the determination of the reasonability obligation that is instructive[340].

338 *Maasbree Group (Trustee of) v. Maasbree Group Trust (Trustee of),* 2013 CarswellOnt 12498, 2013 ONSC 5503.
339 *Nicolou v. McLennan & Associates* (2013), 307 OAC 56, 2013 CarswellOnt 3002, 2013 ONSC 1622 (Ont. Div. Ct.).
340 *Ibid* paras 9-12.

Skarica J., referenced the case of *Bott v. Macaulay*[341], wherein Cullity J., held that it was the estate trustee, not the estate that was the solicitor's client. Clarifying, of course, that an estate is not a juridical person and cannot retain anyone, or incur liabilities. An estate solicitor is one performing services to a personal representative acting as such.[342]

Per Cullity J., therefore it is the estate trustee, and not the estate, that is personally liable to the estate solicitor for fees; Though the estate trustee is entitled to be indemnified or reimbursed from the estate for the amounts owing to the solicitor. Per Cullity J., whether a right to indemnity or reimbursement exists, is a matter between the estate trustee and the beneficiaries of the estate and is to be determined either by agreement, or on a passing of account. Of particular importance, the existence – or non-existence – of such a right does not effect the liability of the estate trustee to the estate solicitor[343]. In this decision, Skarica J., found that the estate trustee was personally liable to the estate solicitor in respect of the legal fees and as such is entitled to challenge the amount of the fee by requesting an assessment. The court noted that the assessment is to proceed pending the completion of the appeal but in the interim found that the estate trustee is personally liable for the legal account fees for the estate litigation in the full amount of the invoice, subject to any reductions that may occur by the assessment. The distinction clarified here is that an estate trustee who wishes to challenge the fees or disbursements charged by the estate solicitor, appropriately should proceed by an assessment pursuant to the *Solicitor's Act*, unless on a passing of accounts the beneficiaries have challenge the reasonableness of the fees as an expense incurred by the estate trustee, or further unless the estate trustee wishes to have an order approving the right to an indemnity or reimbursement. In either event, the court may order an assessment, or, in some cases, may review the reasonableness of the accounts at the passing.

Per Skarica J., the right of an estate trustee to proceed by way of an assessment under the *Solicitor's Act,* is implicit from the decisions in *Re Freeburne*[344], and *Hardy v. Rubin*[345]. These decisions also provide precedent for permitting beneficiaries to do so without, or previous to, a passing of accounts. In each of the cases cited as authority by Skarica J., it was accepted that the beneficiaries could only tax a solicitor's bill "as the trustees could have done" citing *Re Massey*[346]. Particularly, Skarica J., notes in *Re Freeburne*, a defence available to a solicitor under section 11 of the Act, would also be available against the beneficiaries.

341 *Bott v. Macaulay,* [2005] O.J. No. 34931 (S.C.J.).
342 *Bott v Macaulay*, [2005] O.J. No. 34931 (S.C.J.).
343 *Bott v Macaulay*, [2005] O.J. No. 34931 (S.C.J.).
344 *Re Freeburne,* [1973] 1 O.R. 423 (H.C.J.).
345 *Hardy v. Rubin,* [1998] O.J. No. 2312, 20 C.P.C. (4th) 372 (Gen. Div.).
346 *Re Massey* (1865), 34 Beav. 470, 6 New Rep. 195 (M.R.).

(am) Prubant v Society for Pastoral Counselling Research [347]

In this decision of Patrick Smith J., the issue raised relevant to the estate trustee's passing of account application concerned the question of solicitor-client privilege and whether it belongs to the client alone or whether in the passing of accounts forum, the "joint interest" principle applies permitting a beneficiary to access to the solicitor files. The court cited the decisions of *Goodman Estate v Geffen*[348]*, Ballard Estate (Re)*[349]*and Haydu v. Nagy*[350] and its result which provided for the opinions received in the course of determining the proper distribution of the trust in this instance would be available to the beneficiaries of the estate.

The court drew a distinction between allowing production as between opinions procured by the trustee for its own protection in relation to claims made against it, and that of opinions received in the course of determining the proper distribution, citing that the beneficiary is entitled to the latter but not to the former. In the *Haydu v. Nagy* decision which is a BC 2012 decision, the court was asked to address whether legal fees incurred by an executor were protected by solicitor-client privilege and the court did adopt the reasoning in the *Ballard Estate* noting that "*privilege cannot be asserted by the executor respondent as against the beneficiary petitioner as the interest were common*". The court referred to this principle as the joint interest principle which is considered to be the appropriate test by which to assess claims of privilege by an executor as against a beneficiary.

(an) Pirani v. Esmail[351]

This Court of Appeal decision was an appeal of the Judgments of Greer J., dated February 22, 2012, and May 31, 2012, and her cost order dated June 29, 2012, all of which all involved a dispute regarding the management and sale of rental property subject to a trust.

The relevant outcome to the fiduciary accounting is in the consideration of the divided decision, the majority of the court finding that the reconstructed expert's accounts are not reliable evidence.

At the trial the appellants and the respondent called competing experts. Stemming from a lack of proper accounting records, the experts attempted to reconstruct the accounts for certain rental property and the administration of same. The experts in the result had different conclusions

347 2014 CarswellOnt 389, 2014 ONSC 347.
348 *Goodman v Geffen Estate*, [1991] 2 S.C.R. 353 at para. 57.
349 *Ballard Estate (Re)* (1994), 20 O.R. (3d) 350 (Gen. Div.).
350 *Haydu v. Nagy*, 2012 BCSC 1870, 42 B.C.L.R (5th) 107.
351 *Pirani v Esmail*, 2014 ONCA 145, as appealing the Judgments of Greer J., dated February 22, 2012 and May 31, 2012, *Pirani v Esmail*, 2014 ONCA 279 (CanLII); *Pirani v Esmail*, 2012 ONSC 3843 (endorsement of June 29, 2012); *Pirani v Esmail* et al, 2012 ONSC 992 (Judgment of Greer J. dated Feb 22, 2012)

regarding the accounts and the profitability of the trust property. The appellants' expert concluded that the trust property comprising of a rental property, operated at a net loss, and as such the appellants were owed money. On the other hand, the respondent's expert concluded that the trust rental property earned a profit and that the respondent was owed money.

The trial judge accepted the calculations of the respondent's expert. Moreover, the court found the appellants liable for breach of trust, for breach of fiduciary duty, and as such, awarded damages, including aggravated damages and substantial indemnity costs to the respondent.

Accordingly, the appellants appealed the decision, challenging the respondent's expert's report that the trial judge relied on in particular to assess damages. Notably, this decision also speaks to the trial judge finding the solicitor who acted for the respondents on the sale and who was a cross-applicant, liable for breach of trust, breach of fiduciary duty and negligence.

The court allowed the appeal in part and the cross-appeal.

The decision of the trial judge is reiterated at paragraphs 29 through 43[352], and the issues set out on appeal at paragraph 45.

Per Rouleau J., Weiler J., agreeing, the Appeal Court noted that the trial judge faced significant challenges in the case for reasons which included the appellants being a self-represented initially and during trial retaining counsel; the respondent changed lawyers twice and the judge was called upon to settle accounts of a trust in the almost total absence of records for over a 13-year period of the trust operation.

Notably too, many of the trial judges' findings are not challenged on the appeal, the primary submission being that the trial judge ought to have rejected the respondent/plaintiff's expert report and therefore as such the trial judge erred in relying upon it as a basis for calculating damages.

The Court of Appeal opined that the trial judge erred in accepting and relying on the expert report in that the factual findings were clearly wrong and did not withstand scrutiny when tested.

The Appeal Court did not interfere with the trial judge's determination on aggravated damages, the finding of joint and several liability, substantial indemnity costs, however as it did reject the expert's report, the court found it appropriate to revisit the quantum of such costs. In other words, not changing the substantial indemnity award, but simply reducing the amount. As to the cross-appeal,

352 *Pirani v Esmail*, 2014 ONCA 145, as appealing the Judgments of Greer J., dated February 22, 2012 and May 31, 2012, para 29-43.

it was allowed, dismissing the claim against the solicitor.

As to the remedy, the Court of Appeal did not order a new trial, relying on the finding that the trial judge made all the necessary findings of credibility, there being no reason to interfere with same. Moreover, the court noted that a new trial should not be ordered unless there exists some substantial wrong or miscarriage of justice has occurred. The court finding that the only issue remaining was with respect to the quantum of damages.

In the end, no award was made to the respondent/plaintiff in respect of profits from rental property and the appellants/defendants were ordered to repay the respondent/plaintiff contributions made to cover losses, applying the assumptions that the property generated neither an overall gain nor an overall loss during the period at issue. In its decision, the Court of Appeal reduced the damage award, awarded by the trial judge to zero, and only changed the further damages award ever so slightly based on the mathematical error in respect of the in or about $45,000.00, the court set aside a smaller insurance payment award and adjusted some smaller amounts awarded by the trial judge, ultimately substituting the trial judge's award of $67,815.67 with an award of $49,527.07.

The costs of the appeal were also fixed.[353]

Pepall J. dissented, rejecting the disposition of the majority. Stating instead that Her Honour would have dismissed the appeal of the appellants/defendants and allow the cross-appeal.

The overriding result of this decision underscores the importance of fiduciaries in the keeping of full, accurate and detailed accounts, ready to account to the beneficiaries. This decision is an example of a great deal of litigation costs and other professional costs, including accounting costs, being incurred as a result of the fiduciaries not keeping accounts at first instance. The exercise of reconstructing the accounts was both expensive and insufficient in the result to account to the beneficiaries. It is the essence of the office of a fiduciary to keep accounts and to be accountable and transparent.

(ao) Kuzyk Estate v Blando[354]

A motion to determine the costs on an unreported passing of accounts decision which was pronounced on January 23, 2014. The court noting that even though costs in the passing of accounts in estate matters were traditionally paid out of the estate, in modern times such costs tend to be considered

353 *Pirani v Esmail*, 2014 ONCA 145, as appealing the Judgments of Greer J., dated February 22, 2012 and May 31, 2012, para 108-112

354 2014 CarswellOnt 3906, 2014 ONSC 1120.

on the normal principles used in assessing costs in contested actions. Interestingly, in this case, the estate trustee retained a law firm to assist in the administration of the estate and in preparation of the accounts. There was a disagreement with respect to those accounts and as such, the objector requested a formal passing of accounts in two related estates. The estate trustee then decided to retain a second law firm to prepare another set of accounts.

The court noted that there seemed to be very little difference in the final accounting as between the two sets of accounts. As such, the court did not see the justification for the estate trustee retaining a second firm to prepare a new set of accounts, rather than merely adjusting the old accounts and as such, ordered that the estate trustee's compensation be reduced by the approximate amount of the claim of the objector.

In determining how costs should be paid, the court was concerned over the estate trustee's personal accounts to the estates for professional engineering services and the merits of their objectives. The court opined on the question as to whether such costs were fair and proper for the estate to pay, determining that such were incurred in advance of the estate trustee's own interests and not in the interest of the estate declined to order the costs payable by the estate trustee.

The court apportioned the costs of the combined estates and fixed the costs to be apportioned between the two estates and from the applicant and objector personally.

(ap) CNIB v Vincent[355]

In this decision the applicants sought an order for contempt of court in the failure of the estate trustee to comply with certain orders of court, including to file her accounts.

Notably, the estate trustee did not appear on the contempt hearing in person. Counsel for the CNIB and other charities attempted to reach the solicitor for the estate trustee by telephone but he was out of the office.

Greer J., found the estate trustee to be in contempt of court in respect of her failure to account, as well as in respect of other court orders.

With respect to the sanctions, having regard to Rule 60.1(4) the court iterated its jurisdiction to issue a warrant for the arrest of the estate trustee for her failure to appear, having found her in contempt. The court stated that it could have sent the estate trustee to prison for a period of time,

355 *CNIB v Vincent*, 2014 CarswellOnt 8423, 2014 ONSC 3421

levied a fine and ordered her to comply. However, the court decided not to impose a prison sentence at the present time, given that there appeared to some evidence in support of the contention that estate funds may be sitting in the trust account of the estate trustee's counsel. Counsel was unable to be reached and as such the court made orders removing the estate trustee, vesting the remaining assets of the estate in the new estate trustee once determined. The court notably was satisfied in the evidence before it that the criteria to make a finding of contempt as set out in the three-pronged test in *Prescott-Russell Services*[356] had been met. Greer J., emphasized that the prior orders of the court were clear and unequivocable and that the estate trustee deliberately disobeyed them. The court in its endorsement also cited as authority the *Estate of Paul Penna*[357] discussed herein. In the end, the court also issued the following direction: *"if the Court finds that the balance of the Estate assets is missing, counsel for the Applicants shall appear before me with Ms. Vincent, the estate trustee, and her counsel, to review the sanctions made"*.[358]

In the result, Greer J., also ordered the applicant's costs fixed on a substantial indemnity basis made payable forthwith by the estate trustee personally within 30 days.

(aq) Broze v Toza[359]

This decision also one of Greer J., a motion for contempt of a prior court order for an accounting against the estate trustee, in that he did not comply with the terms of a court order, that he attend to be examined under oath, and pay costs of the motion on a full indemnity basis.

Greer J., notably states that Motions for Contempt are serious in nature and must be strictly complied with by the alleged contemnor. Again, in this case, the estate trustee did not appear personally at the contempt hearing, but counsel to the estate trustee did appear. The court read the rule to counsel explaining the quasi-criminal nature of the proceeding and addressed the matter of the order of Mr. Justice Stinson which had not been complied with. The court ordered counsel to call his client to seek his attendance in the court by 2:30 that day.

The estate trustee's position was that he complied with the order in a 14-page letter. However Greer J., found that the letter did not comply and did not provide a list of assets as at the date of death and the values of the estate. Notably, the circumstances that the applicants request for compliance were set out in the judgement, evidencing the extent that the applicants went to before bringing a Motion for Contempt. As such, Greer J., was of the view that the delays in failing to comply with

356 *Prescott-Russell Services fr Children and Adults v. G. (N.)* 2006, 82, O.R. (3d) 686 (C.A.) in para 27.
357 *Estate of Paul Penna*, 2010 ONSC 6993.
358 *CNIB v Vincent*, 2014 CarswellOnt 8423, 2014 ONSC 3421, para 15.
359 *Broze v Toza*, 2014 CarswellOnt 8422, 2014 ONSC 3302.

the order were "unconscionable."[360] Moreover, Greer J., cited that there was no proper statement of assets and values ever produced to the beneficiaries. The estate cottage appears to have been sold without evaluation as to its fair market value. In this case, the court found that the order of the court which had been breached, and the estate trustee in contempt of, was clear and simple. The court found that the estate trustee deliberately ignored all of the requests of the applicants. Greer J., found contempt beyond a reasonable doubt and that the estate trustee's counsel failed to respond in providing the data required from the beginning after the deceased died, and therefore found the estate trustee in contempt of court. With respect to the purging of contempt, the court ordered that the estate trustee must comply with the following further orders:

> (1) *file with the court what was ordered by Mr. Justice Stinson – a statement of the nature and value at the date of death, of each of the assets of the Estate. This must be done within 15 days of this Order.*
>
> *(2) the Estate Trustee must put his Accounts in the form required by the Rules for a Passing of the Estate Accounts, being relief asked for by the Applicants when no data was forthcoming. The 2 lists provided in Mr. Watson's August 2013 letter are insufficient and the NFP Statement is not acceptable. This shall be done within 30 days of this Order.*
>
> *(3) The Estate Trustee must provide copies of the Vouchers supporting the Estate Accounts, including valuation letters and appraisals of properties to all the Estate Beneficiaries when they are served with a copy of the accounts by the Estate Trustee.*
>
> *(4) the Estate Trustee must provide, with the above materials, a copy of all legal bills presented by Mr. Watson and any other lawyer to the Estate.*
>
> *(5) the Estate Trustee must provide in the Accounts, a Statement of all assets and values on hand now and supported by bank statements to show what assets remain as undistributed.*
>
> *(6) a Statement of Compensation shall be included in the Accounts.*

Finally, the court ordered that the estate trustee pay the applicant's cost personally in the amount of $4,234.55.

Contempt orders involving incarceration are on the rise post *Landen*[361] and *McMichael*.[362]

360 *Broze v Toza*, 2014 CarswellOnt 8422, 2014 ONSC 3302 at para 14.
361 *Langston v. Landen*, 2010 ONSC 4730, 195 ACWS (3d) 687, 2010 CarswellOnt 8815
362 *Zimmerman v. McMichael Estate*, 2010 ONSC 2947 (Ont. S.C.J.)

(ar) (Re) Aber Estate[363]

In *Aber Estate* the Divisional Court of the Ontario Superior Court of Justice allowed an appeal of a trial judge's decision on trustee compensation and costs. The case involves a long-standing dispute between two sisters. One sister, the Respondent in the appeal, was appointed the attorney for property of her late mother and her estate trustee. The estate was worth approximately $1.5 million at the date of death. The Appellant objected to her sister's application to pass attorney and trustee accounts. After a five day trial, the trial judge awarded the respondent approximately $120,000.00 in attorney and trustee compensation and full indemnity costs of the trial of over $190,000.00 to be paid by the Appellant, personally.

On appeal, the Divisional Court upheld the Respondent's compensation and care and management fee as an attorney for property and trustee compensation. However, the trial judge's approval of the Respondent's trustee care and management fee of $6500.00 was overturned, as was the award of full indemnity costs which was replaced with an award of partial indemnity costs.

With respect to the trustee care and management fee, the Divisional Court noted that while the trial judge acknowledged the need for special circumstances, she never examined whether there were special circumstances that required a care and management fee. The Court concluded that the care and management fee was not justified given the size of the estate, the disposition of the bulk of the estate in the executor's year, the lack of evidence of any supervision and management of the remaining assets, and the generous compensation provided on the percentages award for capital and revenue. The Court reviewed several authorities that confirm that the care and management fee ought not to be awarded routinely or automatically.[364]

(as) Tierney (Estate) v Brown

In *Tierney (Estate) v. Brown*, the Court granted the beneficiaries request for the removal of the estate solicitor and his firm on the basis of conflict of interest in a contested passing of accounts application as he was the solicitor who handled most of the transactions in issue and would be a key witness. The estate solicitor had acted as solicitor for the attorney under a power of attorney for property for the deceased; had handled a sale of property on instructions of the attorney; handled the deceased's wife's estate; handled the sale of the deceased's property after his death; and administered the compensation payable to the attorney. The Court found that it was apparent that the lawyer's extensive involvement in the deceased's affairs and subsequently his estate evolved to

363 *Re Aber Estate,* 2015 ONSC 5123 (Div Ct).
364 *Aber Estate* 2015 ONSC 5123 (Div Ct) at paras. 38-39.

a potential conflict situation in the context of the hotly disputed passing of accounts.[365]

II. Attorney, Guardian Accounts

(a) Strickland v. Thames Valley District School Board[366]

In the matter of *Strickland v. Thames Valley District School Board,* the issues before Ross J., concerned the contested passing of accounts of both the attorney accounts, and estate trustee accounts of two estates.

On the matter of the power of attorney accounts, Ross J., analyzed the case of *Stickells Estate v. Fuller,*[367] in response to the argument that the attorney could be compelled to pass accounts for the period of time in which the deceased was competent. Ross J., in her judgment, considered *Roger Estate v. Leung*[368] and the law of agency in analyzing the position of the attorney in respect of the attorney's duty to account and to whom such duty was in fact owed. Disclosure is essential to the estate trustees who stand in the shoes of the deceased to enforce the duty owed by the agent. Haley J. in *Roger Estate v. Leung*[369] stated in her Reasons:

> *Following the grant of a power of attorney, the attorney has a duty to account for all transactions which he undertakes for the grantor. The attorney is the one who has the information. An estate trustee stands in the shoes of the grantor for the enforcement of the duty owed by the attorney as agent to the deceased as principal. There is a duty on the attorney to keep accounts and to be ready upon request to produce those accounts. It is an ongoing obligation and should not be considered an imposition on the attorney if he has failed in that duty over a long period of time.*

In the circumstances of this case, Ross J., found that there was no evidence that the deceased ever lacked capacity and that in there was already an outstanding order to pass accounts which was not appealed, and therefore the court was bound by the order made. It was accepted however that in accordance with *Stickells Estate,*[370] the duty was to account to the principal grantor of the power of attorney, not the beneficiaries, though noted that the estate trustee could compel the attorney to account. Ross J., found that in respect of that which the attorney could not account, that compensation ought not to be awarded and that deductions from disbursements ought to be made. The amount of $797,673.10 was deducted from the attorney's receipts in calculating

365 *Tierney Estate v. Brown*, 2015 ONSC 4137 at paras.5-6.
366 *Strickland v. Thames Valley District School Board*, 2007 WL 2884417 (Ont. S.C.J.), 2007 CarswellOnt 6248.
367 *Stickells Estate v. Fuller,* [1998] O.J. No. 2940 at page 9, para. 40.
368 *Roger Estate v. Leung,* [2001] O.J. No. 2171 at page 10, para. 41.
369 *Roger Estate v. Leung,* [2001] O.J. No. 2171 at page 12, para. 42.
370 *Stickells Estate v. Fuller,* [1998] O.J. No. 2940 at page 9, para. 40.

compensation, leaving the sum of $160,760.90 upon which compensation may be calculated in accordance with the *SDA.*[371] Ross J., found that the compensation with respect to the attorney's accounts would amount in total to $9,000.00 when all of the deductions were taken into account.

On calculating estate trustee compensation, Ross J., relied upon the "percentages approach" cross-checked against the "five factors approach" as referenced in *Laing Estate v. Hines* and *Toronto General Trust v. Central Ontario Railway Co.*[372] Ross J. concluded there should be a reduction in compensation and fixed the estate trustee's compensation awarded at 30% of the proposed compensation for a final amount of $7,500.00.

In respect of the estate trustee accounts of the second estate, Ross J., taking into consideration s. 49(2) and s. 49(3) of the *Estates Act,*[373] found that Strickland failed to act with the prudence required of an executor for reasons including unnecessary delay in administration, poor investment decisions, personal benefit, delegation of trustee duty, lack of skill and ability, in breach of fiduciary duty in spending estate assets, and accordingly reduced compensation to $2,470.00.

More notably, the court ordered the estate trustee to pay the second estate the sum of $64,394.00 inclusive of interest and post-judgment interest, and a further $9,648.00 plus post-judgment interest, such that the total amount of compensation in respect of the attorneyship in both estates amounted to $18,970.00 was ordered to be set off against the amount that the estate trustee was ordered to repay to the estate.

In respect of the costs treatment of the proceedings, there appear to be no reasons for judgment as yet reported.

(b) Re Coupland Estate[374]

The issue that arose in *Re Coupland Estate* was whether the expectation lessened in a situation where the evidence was uncontradicted that the deceased was capable throughout the duration of the relationship, and the only power of attorney relied upon was a general or bank power of attorney.

371 *Substitute Decisions Act, 1992,* S.O. 1992, c.30.

372 *Laing Estate v. Hines, 1998 CarswellOnt 4037, (sub nom. Laing Estate, Re)* 113 O.A.C. 335, (sub nom. Laing Estate v. Hines) 167 D.L.R. (4th) 150, *(sub nom. Laing Estate v. Hines)* 41 O.R. (3d) 571, 25 E.T.R. (2d) 139, [1998] O.J. No. 4169; *Toronto General Trust v. Central Ontario Railway Co.*, (1905), 6. O.W.R. 350 (H.C.).

373 *Estates Act*, R.S.O. 1990, c. E.21, ss. 49(2) and 49(3).

374 *Coupland Estate, Re*, 2005 CarswellOnt 8868 (Ont. S.C.J.).

The court found that there was no evidence at all that deceased was mentally incapable at any time prior to his death. It was also found that the attorney acted solely at the deceased's discretion and discussion in dealing with the accounts and his money, even learning to balance the cheque book for his review. As well, it was found that the attorney documents in favour of the attorney were merely general/bank powers of attorney and thus limited the scope of the attorney's authority to deal with the grantor's property.

Based on these findings and other medical evidence tending to support the fact that the deceased had capacity, the court concluded that the deceased had not been "incapable" as that term is defined in the *SDA*. In the court's view, this fact, combined with the specific nature of the attorneys granted by the deceased, meant that the provision of the *SDA* regarding accounts did not apply. While the court acknowledged that there is a common law duty "to account for funds dealt with by one person for another, the beneficial owner"[375] and that, although no records were kept by the attorney at the time and the accounts were provided from the reconstructed materials on this basis, the court found that the former attorney had met her common law duty to account. As stated by the court:

> *The concern of the trustees appears to centre on this: in addition to the funds that Ms. McDonald was to receive under her cohabitation agreement she received other funds. With respect again, I point out that there was no evidence that Mr. Coupland was incapable. He was entitled to give his wife whatever he wished to do so. He was required to pay the minimum set out in the [cohabitation] agreement, however he was free to give her the rent money (perhaps done for income splitting), additional monthly payments or whatever he wished. Clearly he ignored the release of his estate provisions when he voluntarily agreed to bequeath assets to Ms. McDonald under his will. She was his wife as well as his power of attorney.*[376]

In light of the foregoing, the court ordered that the estate accounts filed by the applicant were passed. Compensation was denied to the attorney in the circumstances and the parties were invited to speak to costs, if agreement could not otherwise be reached on same.

Notably, the decision of Tucker J., was appealed by the estate trustees.[377] However, the Court of Appeal dismissed the appeal, stating:

> *On the merits of the appeal, the evidence clearly supported the finding of the motion judge that the respondent wife had satisfactorily accounted to the husband during his lifetime for all transactions she executed pursuant to the two specific powers of attorney. Indeed, the appellant fairly concedes that there was evidence to support that finding. In our view, the motion judge was also entitled to her finding that the husband*

375 *Coupland Estate, Re*, 2005 CarswellOnt 8868 (Ont. S.C.J.), at par. 4.
376 *Coupland Estate, Re*, 2005 CarswellOnt 8868 (Ont. S.C.J.), at par. 5.
377 2006 CarswellOnt 3071 (Ont. C.A.).

> *was both entitled to and did bestow gifts on the respondent wife.*[378]

The costs of the appeal were ordered and payable to the respondent from the appellants' share as beneficiaries of the estate.[379]

(c) Cornacchia v. Cornacchia[380]

In the decision of *Cornacchia v. Cornacchia,* Shaughnessy J., referred to the decision in *Nystrom v. Nystrom*[381] on which he notes the facts as similar. Shaughnessy J., ordered that the discrete proceeding concerning capacity and undue influence in respect of bank documents, the conduct of the attorney, the suspicious circumstances, and allegations of breach of duty should be by way of action rather than application under the *SDA.*[382]

Though s. 49 of the *Estates Act*[383] gives the court wide discretion in considering breach and misconduct, Shaw J., in the *Nystrom* case decided that the applicant adult child had standing to bring an action to protect her vested interests under the Will of her mother, even though she was not the attorney under the Power of Attorney. In this case, Shaughnessy J., further found that the plaintiff, through her litigation guardian, was the appropriate party to commence and litigate these proceedings.

Contrast *Nystrom*[384]and *Cornacchia*[385] with *Disera*[386] where the defendants sought an order that the estate action proceed as a passing of accounts. Clark J., referred to the Court of Appeal decision in *Simone v. Cheifetz*[387] as follows:

> *In the first case, the court indicated that it is not desirable to permit parties to litigate a substantial claim for damages for breach of trustee's fiduciary duties through the medium of an audit.*

Clark J., provided directions adding that it made little sense to have two parallel proceedings ongoing to litigate closely related, although not identical, issues; and ordered that the matters be heard together with the plaintiff's action with no order as to costs.

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378 *Coupland Estate, Re*, 2005 CarswellOnt 8868 (Ont. S.C.J.), at par. 2.
379 *Coupland Estate, Re*, 2005 CarswellOnt 8868 (Ont. S.C.J.), at par. 4.
380 *Cornacchia v. Cornacchia,* 2007 WL 129717 (Ont. S.C.J.), 2007 CarswellOnt 223.
381 *Nystrom Estate v. Nystrom,* 2007 WL 576570 (Ont. S.C.J.), 2007 CarswellOnt 1064.
382 *Substitute Decisions Act,1992,* S.O. 1992, c. 30, s. 40.
383 *Estates Act,* R.S.O. 1990, c. E.21, s. 49.
384 *Nystrom Estate v. Nystrom,* 2007 WL 576570 (Ont. S.C.J.), 2007 CarswellOnt 1064.
385 *Cornacchia v. Cornacchia,* 2007 WL 129717 (Ont. S.C.J.), 2007 CarswellOnt 223.
386 *Re Disera et al. v. Disera et al., Endorsement, Clark J.,* Ont. S.C.J. Court File No. 6209/02.
387 *Simone v. Cheifetz,* [2005] O.J. No. 4191; [2005] O.J. No. 2992.

(d) Marcoccia (Litigation Guardian of) v. Gill[388]

In *Marcoccia (Litigation Guardian of) v. Gill,* the issue of determining what compensation should be allowed for future services to be provided by a corporate co-guardian and a third guardian of property should properly be made in respect of anticipated guardianship costs and anticipated future legal costs for the estate of the person under disability. Witnesses gave evidence on guardianship and legal expenses which included lawyer's evidence, as well as the evidence of a trust company, in addition to medical evidence underlying a future guardian and legal expenses claim. Moore J., took into account the likely guardianship fees of the mother appointed as co-guardian of the property of her son together with a corporate co-guardian and fees associated therewith. Moore J., proceeded to come up with a figure for the gross present value of future individual guardian fees, as well as a gross present value of future legal fees and, finally, the gross present value of future corporate co-guardian fees. It is interesting to note the analysis undertaken in fixing compensation for a court-appointed guardian. The fees of the corporate co-trustee were estimated at lower than the *SDA*[389] rate which applies to attorney compensation. The analysis further takes into consideration a flat fee as well as a management fee.

(e) Volchuk Estate v. Kotsis[390]

In the contested passing of attorney accounts in *Volchuk Estate v. Kotsis,* Brockenshire J., disallowed the compensation claim in its entirety due to a failure to administer properly and misapplied assets. The court ordered that the entire claim for compensation be disallowed. Brockenshire J., found that the transactions went so far as to be "unconscionable." There was evidence of misappropriation and, on the issue of forgery, Brockenshire J., stated as follows:

> *In my reasons above I have commented repeatedly on the absence of evidence from Kanela Kotsis. In Vieczorek et al. v. Piersma et al., 36 D.L.R. (4th) 136 (Ont. C.A.), Cory J.A. at pages 4 and 5 stated, with supporting authority that:*
>
> > *It is perfectly appropriate for a jury to infer, although they are not obliged to do so, that the failure to call material evidence…was an indication that such evidence would not have been favourable to them. It is a common sense conclusion that may be reached by a trier of fact.*
>
> *Here, repeatedly not only was the evidence of Mr. Kotsis not corroborated, the common sense inference is that if called, Kanela Kotsis would not have supported that evidence.*[391]

388 *Marcoccia (Litigation Guardian of) v. Gill,* 2007 CarswellOnt 2087(SCJ).
389 *Substitute Decisions Act, 1990,* S.O. 1992, c. 30, s. 40.
390 *Volchuk Estate v. Kotsis,* 2007 CarswellOnt 4668(SCJ).
391 *Volchuk Estate v. Kotsis,* 2007 CarswellOnt 4668 (SCJ), para. 159.

Brockenshire J., concluded that there had been a blatant misappropriation of funds. In this matter, written submissions as to costs were invited and did not form part of the judgment.

(f) Nystrom v. Nystrom[392]

In the first of two decisions concerning the *Nystrom v. Nystrom,* leave was granted to the applicant to apply to have Ms. Nystrom's attorney pass his accounts pursuant to s. 42(4)(6) of the SDA[393] and that the passing of accounts proceed from the date on which he assumed control of his mother's affairs. Shaw J., felt that the further issues of capacity, undue influence, and the investment accounts, were better dealt with by way of a separate action. On the further hearing of costs in respect of the July 11, 2006 judgment, Shaw J., ordered that there to be no order as to costs on the basis that the July 11, 2006 judgment was dealt with in a summary fashion and that much of the preparation done for that hearing would be used on the future passing of accounts. In the further judgment of January 24, 2007,[394] Shaw J., heard the objections with respect to the application to pass accounts and a claim that Roy Nystrom not be entitled to take compensation which he claimed.

Shaw J., cited the provisions of the *SDA*[395] at s. 40, which provide for the annual taking of compensation in accordance with a prescribed fee schedule set out in Regulation 26/95.[396] However, the Continuing Power Attorney for Property document executed by Phyllis Nystrom contained the following paragraph:

> ***Compensation of Attorney***
>
> *9. I do not authorize my attorney to take compensation from my property under the Substitute Decisions Act, 1992, the Regulation passed under the Act, or otherwise.*

Accordingly, Shaw J., concluded that he could not grant compensation to Roy Nystrom as an attorney. The *SDA*[397] makes the taking of compensation by an attorney subject to the provisions respecting compensation contained in a Continuing Power of Attorney for Property. Shaw J., concluded that he was unable to accept that the court had discretion to ignore the express provisions in the Power of Attorney document. Shaw J., added that:

> *An attorney acting under a Continuing Power of Attorney for Property assumes his or her responsibilities voluntarily. He or she does not have to accept the appointment. In this case Roy Nystrom would have known, before accepting the appointment, that*

392 *Nystrom v. Nystrom,* 25 E.T.R. (3d) 297.
393 *Substitute Decisions Act, 1992,* S.O. 1992, c. 30, s. 40, s. 42(4)(6).
394 *Nystrom Estate v. Nystrom,* 2007 CarswellOnt 1064 (SCJ).
395 *Substitute Decisions Act, 1992,* S.O. 1992, c. 30, s. 40, s. 40.
396 *Substitute Decisions Act,1992,* S.O. 1992, c. 30, s. 40, O. Reg 26/9.
397 *Substitute Decisions Act, S.O. 1992,* c. 30.

> *his mother did not authorize him to take compensation for acting as her attorney. He accepted the appointment subject to that condition and is now precluded from seeking an order overriding that condition.*

Shaw J., did award the costs of the attorney for the passing of the accounts as being payable out of the capital of the estate and, similarly, allowed the costs of the objector.

(g) Craig Estate v. Craig Estate[398]

In the matter of *Craig Estate v. Craig Estate,* an attorney made application to pass her accounts under a Power of Attorney for Property which was not contested. However, issues were raised on the passing of accounts including the standard of accounting the attorney should be held to, and for what period should the accounts be produced. There was no evidence of SDA[399] and in particular ss. 32 and 38. Lofchik J., referred to the decisions in *Harris v. Rudolph* and *Fair v. Campbell Estate*[400] relying on the decisions therein and concluded as follows:

> *If the grantor is sui juris he makes the decisions. He is not obliged to involve the attorney in all or any of them. He is not obliged to ask the attorney to help him to implement all or any of the decisions. Where the grantor is sui juris, imposition of a duty to account can cast an impossible burden on the attorney. He could be required to account for decisions over which he had no influence and for transactions that he did not implement in whole or in part…While the Act contemplates the power of a competent grantor to require his attorney to account, that is surely a necessary power to prevent abuse of authority by a negligent or dishonest attorney…*

(h) Bagnall v. Bruckler[401]

In *Bagnall v. Bruckler*, the guardians' based their compensation (calculated in accordance with section 1 of *O. Reg. 26/95* of the *SDA*) on the revenue receipts, a large portion of which consisted of rents collected from the two apartment buildings. However, it was found that, pursuant to the court-approved management plan, one of the guardians was to "manage the two properties" and her compensation for undertaking this role would be "free rent." Thus, this raised the issue of whether approval of the accounts would result in overcompensation of the guardians.

It was the guardian's position that "management of the property" covered only the physical maintenance and upkeep of the buildings and did not cover the management of the rental of the apartments. Brown J., however, did not agree with this approach and held that it was "not open

398 *Craig Estate v. Craig Estate (Trustee of),* 2007 CarswellOnt 395 (SCJ).
399 *Substitute Decisions Act, 1992,* S.O. 1992, c. 30, s. 40, ss. 32 and 38.
400 *Harris v. Rudolph* [2004] O.J. No. 2754 (Ont. S.C.J.); *Fair v. Campbell Estate* (2002), 3 E.T.R. (3d) 67 (Ont. S.C.J.).
401 *Bagnall v Bruckler,* 2009 CarswellOnt 5062 (Ont. S.C.J.).

to the guardians to claim compensation relating to the receipt of rents from the units in the two buildings,"[402] since, on the evidence before him, the work performed fell within the ambit of the "rent-free" arrangement. Accordingly, he reduced the revenue receipts by the value of rents-received for the purpose of calculating the guardians' compensation. He made a similar adjustment to the revenue disbursements.

The final question for the court was whether the guardians were entitled to recover compensation as prescribed by the *SDA*. *Sworik (Guardian of) v. Ware* (2005), 18 E.T.R. (3d) 132 (Ont. S.C.J.), at para. 119 was referenced in support of the proposition that "the compensation rates prescribed in the [*SDA*] do not constitute fixed entitlements to compensation at those rates" and, "ultimately, the courts must ensure that guardians receive compensation which is fair and reasonable for the care, pain, trouble and time expended," on the facts before him, Brown J. found that it "is fair and reasonable to calculate the guardians' compensation at the prescribed rate".[403]

(i) Re Damm Estate[404]

In answering the question of "what form of accounts must a guardian of property use when filing an application to pass accounts?"[405] Brown J., affirmed an important principle of law, stating that subsection 42(6) of the *SDA*[406] makes it clear that accounts filed by a guardian of property "shall be filed in the court office *and the procedure in the passing of the accounts is the same* [...] *as in the passing of executors' and administrators' accounts*"[407] [emphasis added]. Practice that has been developed in the estates bar, is to divide the accounts into capital receipts and disbursements, revenue receipts and disbursements, statements of assets, concluding with an explanation of any claim for compensation by the fiduciary.

The policy underlying the detail required by the *Rules* as highlighted by Brown J., is to ensure that a respondent "can properly understand the conduct for which the fiduciary seeks court approval" and such that a reviewing judge "can link the particulars of the judgment sought with the evidence contained in the filed accounts".[408]

Brown J., rejected the application to pass accounts brought by the former guardian of property on the basis that the accounts as filed were not in the proper form. As a result, the applicant was

402 *Bagnall v Bruckler,* 2009 CarswellOnt 5062 (Ont. S.C.J.) at par. 12.
403 *Bagnall v Bruckler,* 2009 CarswellOnt 5062 (Ont. S.C.J.), at par. 16.
404 *Damm Estate, Re,* 2010 CarswellOnt 6938.
405 *Damm Estate, Re,* 2010 CarswellOnt 6938 at par. 1.
406 *Substitute Decisions Act*, *1992*, S.O. 1992, c. 30.
407 *Damm Estate, Re,* 2010 CarswellOnt 6938, at par. 5.
408 *Damm Estate, Re,* 2010 CarswellOnt 6938, at par. 5.

directed to re-serve and re-file accounts prepared in proper form.

Interestingly, in *obiter*, Brown J., noted at paragraph 6 that:

> *It may well be that a case can be made for amending the requirements for the forms of accounts to be filed by fiduciaries so that a simple form of accounts can be used for smaller estates, leaving the more complex Rule 74.17 format to estates of greater value.*[409]

However, Brown J. concluded that such is a matter for the Legislature and the Rules Committee to consider but, until then, accounts must comply with the format set out in Rule 74.17(1).

(j) Vano Estate[410]

The *Vano* Estate has a long history of contested passing of the accounts by the Estate Trustees During Litigation (the "ETDL"). Low J., in this 2011 decision was asked to determine the ETDL's costs of the passing which spanned a six-day hearing. The ETDL was substantially successful on the passing.

Low J., in making her decision states:

> *[26] It is important not to conflate an appropriate amount to be approved for fees for administration of the estate with an appropriate amount to be fixed for legal costs on the contested passing of accounts. In fixing costs of the proceeding, the court is to have regard to the factors in Rule 57.01 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194 and in this case, the provisions of Rule 57.01(c), (e), (f), and (g) are of particular relevance.*
>
> *[27] Insofar as the principle of indemnity is concerned, I am persuaded that, subject to my determination as to what costs were reasonably incurred, those costs are payable on a full indemnity basis. In this, I have been referred to and rely on Josephs Estate, Re (1993), 14 O.R. (3d) 628, 50 E.T.R. 216 wherein Borins J. stated at para 7:*
>
> *The passing, or audit by the court, of an executor's accounts is a significant part of the administration of an estate. Central to an audit is the determination by the court that the executor has properly performed its duties in regard to the trust fund created by the testator.*
>
> *Generally speaking, the executor and any beneficiary properly attending and*

409 *Damm Estate, Re,* 2010 CarswellOnt 6938, at para 6

410 *Vano Estate, Re*, 2011 ONSC 1429, 66 E.T.R. (3d) 272, 2011 CarswellOnt 1719, additional reasons in *Vano Estate, Re*, 2011 ONSC 2685, 2011 CarswellOnt 2925, 201 A.C.W.S. (3d) 867, further additional reasons in *Vano Estate, Re*, 2012 ONSC 262.

> *represented by a lawyer on the passing of accounts is awarded full compensation for his or her legal expenses from the trust fund, being the estate of the testator, administered by the executor. The audit of the executor's accounts is part of the administration of an estate and the legal expenses of the administrator, or executor, or an estate and of those beneficiaries properly attending on the audit are considered as expenses in administering the estate and are a first charge upon it: Dale, Greenwood, Williams and Stringer, Daniell's Chancery Practice, (7th ed., 1901) 998-9: Re Beddoe, [1893] 1 Ch. 547 (C.A.); Re Dingman (1915), 35 O.L.R. 51 (H.C.).*
>
> *The executor and beneficiaries, being named in the testator's will, should not be penalized for having been named in the will when they incur a lawyer's fee in the administration of the testator's estate. This is to be contrasted with contentious, or adversarial, legal proceedings in which the general rule is that the successful party is awarded its costs, on the lower party and party scale, to be paid by the unsuccessful party. On an audit, because there is no losing party to pay the costs, each party is responsible to pay his or her own legal expenses which are ordered to be paid from the estate, as the trust fund created by the testator represents the only source of money to pay the costs. It is the well-settled principle that full indemnity of the trustee's proper costs, charges and expenses in administering an estate is the price to be paid by the cestuis que trust for the services of the trustee and that the trustee must not be required to pay them personally: Turner v. Hancock (1882), 20 Ch.D. 303 (C.A.)....*[411]

The Court was very critical of the objector, Mr. Vano and his conduct before the court. Also noted by the court was the fact that the ETDL made an Offer to Settle in accordance with Rule 49.10. Yet, Low J., found the costs of het ETDL as claimed were excessive and importantly states in her reasons for reducing the ETDL's costs, the following:

> *[36] The principle of indemnity is not a carte blanche for costs to be drawn from the estate corpus on a passing of accounts any more than it would be in a typical adversarial proceeding where there is a loser and a winner. The court must in every case address the question of the amount in costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed. Here, the fees claimed are $332,609.*
>
> *[37] Solicitors for the ETDL, a large law firm, deployed three different lawyers, a student, two law clerks and two court filing clerks in this matter. Hourly rates ranged from $160 per hour for a court filing clerk to $500 per hour for the lead counsel, called to the bar in 1999.*
>
> *[38] Delegation can, in some cases, result in economies, but does not always do so. It can also result in duplication, inefficiencies, and time spent communicating that would be unnecessary in the absence of delegation. I am not satisfied that it was efficient or economical in this case to have had two different clerks and three solicitors working this file. The fee items detailed in the costs outline do not suggest that such division was reasonably necessary or cost efficient. Although it is commendable that law firms train junior lawyers and while clients may often choose to have the level of*

411 *Vano Estate, Re* 2012 ONSC 262at paras 26, 27.

> *service that multiple lawyers and clerks provides, the cost of so doing should not be laid at the feet either of losing parties, or, in this case, at the expense of the estate.*
>
> *[39] In my view, a reasonable amount in costs for this proceeding, even taking into account its tortured history and the conduct of Mr. Vano whose positions made for a far lengthier hearing than was truly warranted, is $220,000 in fees. To this should be added HST. The disbursements are not challenged and are allowed.*[412]

Proceedings are ongoing in this estate matter.

(k) Patterson v. Patterson [413]

The objecting beneficiary in this passing of accounts case failed to prove his case.

After finding the objections to be without merit, DiTomaso, J., ordered that the objecting beneficiary was responsible for his own costs. The Court also, however, rejected the Estate Trustee's argument that the Estate's legal expenses should be paid by the beneficiary personally. DiTomaso, J., was "not satisfied that [the beneficiary was] entirely at fault as a result of his conduct with the result that he should pay $22,329 to the Estate."[414] DiTomaso, J., concluded the costs decision with these words:

> *The haemorrhaging in respect of this Estate must and will end now. Both the Estate and [the beneficiary] have incurred considerable legal expense. [The beneficiary] and the Estate will bear their own legal expenses. To make any other order under the circumstances would most certainly wipe out whatever small amount remains to be distributed in respect of [the] Estate as between [the beneficiaries]. It would also complicate an Estate not worth complicating. Such a result would be totally perverse in all the circumstances and not acceptable to this Court.*[415]

(l) Baldwin (Re)[416]

In this contested passing of accounts case a settlement was reached of the objections which saw costs sought on a substantial indemnity basis of approximately $87,000.00.

In analyzing the costs award, the Honourable Justice Hourigan relied on Rule 57 of the Rules of Civil Procedure, the case of Boucher[417] and the principle that the court is bound by what is fair and reasonable given the expectations of the parties. Hourigan, J., also reviewed cases where an award of costs on a higher scale was warranted including *Hunt v. TD Securities*, 2003 CanLII 3649 (ON.C.A.) and *McBride Metal Fabricating Corp. v. H&W Sales Co.*, 2002 CanLII 41899 (ON.C.A.).

412 *Vano Estate, Re* 2012 ONSC 262 at paras. 36-39.
413 *Patterson v Patterson*, 2012 CarswellOnt 9794 (S.C.J.) 2012 ONSC 4625 ("*Patterson*").
414 *Patterson* at para 46.
415 *Patterson,* at para.48.
416 *Baldwin (Re)*, 2012 ONSC 7235.
417 *Boucher v Public Accountant's Council for the Province of Ontario,* [2004] O.J. No. 2634 (C.A.).

Hourigan, J., observed that "one of the functions of the costs system generally, and the awarding of costs on a substantial indemnity basis more particularly, is to discourage frivolous and unnecessary litigation."[418]

Hourigan, J., had "no hesitation in concluding that this case fell within those rare exceptions where costs on a higher scale are warranted"[419] and ordered the estate trustee to pay the substantial indemnity costs of the objectors. Hourigan, J., based this costs ruling on the fact that the estate trustee engaged in a massive misappropriation, first admitted to the misappropriation then denied any malfeasance under oath, failed to voluntarily produce an account, forced the other side to prove every aspect of the case and she failed, despite court order, to make proper production.

(m) Young Estate (Re) [420]

The succeeding estate trustees with a will who sought an Order to pass the estate accounts for the 4 year period of administration.

The only objection and sole issue before the Court was by the Children's Lawyer whether the investment management fees paid to TD's Private Investment Counsel ("TD-PIC") for its services should be deducted from the trustees' compensation in their passing of accounts.

Canada Trust argued that investments were very sophisticated and complex and that an estate trustee must be able to access professional investment expertise to properly administer an Estate and should be, in accordance with case law, fully indemnified for all costs and expenses properly incurred to do so. Additionally, Canada Trust argued that if the TD-PIC's fees were deducted from its compensation, it would be left with no compensation for services.

The analysis undertaken by the Court saw a review and interpretation of various authorities with the result being that the Court did not agree with the position taken by the Children's Lawyer. The Court indeed found that neither Canada Trust, nor, the co-trustee had the necessary investment expertise to prudently manage the Estate assets. Moreover, the Court found that the estate trustees made a reasonable and prudent decision to engage TD-PIC as private investment counsel with such decision having been approved by all current and contingent beneficiaries of the Estate who were sui juris at the time. The Court agreed that Canada Trust should be fully indemnified for all costs and expenses properly incurred during the course of administering the Estate, noting in particular that "in today's complex and sophisticated investment market, executors should be entitled to hire

418 *Baldwin,* 2012 CarswellOnt 16871 (S.C.J.) 2012 ONSC 7235, at para. 17.
419 *Baldwin,* 2012 CarswellOnt 16871 (S.C.J.) 2012 ONSC 7235, at para. 21.
420 *Young Estate,* 2012 CarswellOnt 577 (S.C.J.) 2012 ONSC 343.

investment counsel to assist them in making investment decisions and the fees for doing so should not be deducted from their compensation". [421]

The Court noted the provisions under section 27.1(1) of the Trustee Act[422] which contemplates that an executor may engage an investment advisor in order to manage the Estate's assets as a prudent investor would. In the result, therefore, the Court passed the trustees' accounts and approved the costs filed including the investment management fees paid to TD-PIC on a full indemnity basis. As to the disposition of the costs of the proceedings, there has been no known decision as yet.

(n) Zucker Estate[423]

In this passing of accounts matter, a motion for directions was brought in the context of a contested passing of accounts.

The Estate was of significant value, approximately $43 million. The co-executors included a partner in an accounting firm. Two of the residual beneficiaries made an application for the accounts of the Estate to be passed, alleging that excessive executor's compensation was pre-taken and should be repaid to the Estate. A trial of an issue to determine if any executor's compensation was excessive, and if so, how much was excessive and who should repay it, was ordered. The co-executor, who was not the accountant, sought a trial of the issue to determine whether the extensive legal costs incurred in the proceedings related to the executorship were payable by the Estate. He also sought to add the accounting firm as a necessary party to the passing on the basis that if a finding was made that executor's compensation was excessive, that the co-executor accountant and its firm and partners would be required to repay any amounts determined to be excessive. Once the objections were filed, neither executor provided or served a response to the notice of objections. Later, both executors were removed and a successor trustee, a Toronto lawyer, was appointed. The Court ordered triable issues to be determined at the hearing of the passing of accounts as well as a timetable.

The issues ordered to be tried were comprehensive.[424]

The resultant decisions in the three proceedings were irreconcilable in the result.

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421 *Young Estate,* 2012 CarswellOnt 577 (S.C.J.) 2012 ONSC 343, at para 26.

422 *Trustee Act*, R.S.O. 1990, c. T.23.

423 *Zucker Estate,* 2012 CarswellOnt 4348 (S.C.J.) 2012 ONSC 2262 ("*Zucker Estate*"); *Zucker v. Moore*, ONSC File No.: 01-2521/04, 2011 02 02 (endorsement of Grace J.,); *Zucker v Moore*, 2011 ONSC 7165 (endorsement of Greer J.); *Zucker Estate* 2012 ONSC 2212 (Reasons for Judgment, Lofchik J.).

424 *Zucker Estate,* 2012 CarswellOnt 4348 (S.C.J.) 2012 ONSC 2262 at para 54; *Zucker v. Moore*, ONSC File No.: 01-2521/04, 2011 02 02 (endorsement of Grace J.,); *Zucker v Moore*, 2011 ONSC 7165 (endorsement of Greer J.); *Zucker Estate* 2012 ONSC 2212 (Reasons for Judgment, Lofchik J.).

(o) Denofrio Estate (Re) [425]

This was a contested passing of accounts case where the objecting beneficiaries had two main complaints: 1) that the legal fees incurred by the Estate in defending a family law action were unreasonable and excessive; and 2) the compensation claimed by the Estate Trustees was excessive. The Estate had a value of approximately $11.5 million.

With regard to the first complaint the Honourable Justice Kershman reviewed the legal fees and opined that the estate trustees were under an obligation to defend against the family law action, preserve the Estate and administer the Estate in accordance with the terms of the Will and as prudent Estate Trustees. Kershman, J., found that the Estate Trustees satisfied these obligations and that the legal fees were not excessive.

In analysing the appropriateness of the compensation claimed by the Estate Trustees, Kershman, J., canvassed the legislation and historical and leading case law. Kershman, J. started with section 61(1) and (3) of the Trustee Act which provide that estate trustees are entitled to "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," [426] and the law as set out in Jeffery Estate (Re),[427] Re Toronto General Trusts Corporation v. Central Ontario R.W. Co.,[428] and Re Atkinson,[429] and cross-checked against the five factors as set out in Re Toronto General Trusts Corporation v. Central Ontario R.W. Co. [430]

Kershman, J., concluded that the 2.5% sought by the applicants was "a little high, but not by a large amount"[431] and reduced the compensation to 2.25%.

Kershman, J., also awarded the Estate Trustees their substantial indemnity costs for the application and notably awarded no costs to the objecting beneficiaries as "their success was very minimal".[432]

On appeal to the Divisional Court[433] the appellants argued that the application judge made palpable and overriding errors in particular in finding that the releases requested by the estate trustees were partial, and not final, and as such it was reasonable to make the request for releases. Additionally, they argued an error in finding there was a threat of litigation presenting an obstacle to partial

425 *Denofrio,* 2012 CarswellOnt 7448 (S.C.J.) 2012 ONSC 3408.
426 *Trustee Act*, R.S.O. 1990, c. T.23.
427 *Jeffrey Estate (Re)* (1990), 39 E.T.R. 173 (Ont. Surr. Ct.).
428 (1905), 6 O.W.R. 350 (Ont. H.C.).
429 [1952] O.R. 685 (C.A.).
430 *Toronto General Trust, (*1905) 6 O.W.R. 350 (Ont. H.C.)
431 *Denofrio*, 2012 CarswellOnt 7448 (S.C.J.) 2012 ONSC 3408, at para.130.
432 *Denofrio*, 2012 CarswellOnt 7448 (S.C.J.) 2012 ONSC 3408, at para.146.
433 *Denofrio v Denofrio,* 2013 CarswellOnt 4102, 2013 ONSC 2106.

distribution.

The Divisional Court found that there was no palpable and overriding errors and that the application judge was justified in determining the amount of compensation to which the estate trustees were entitled, and similarly, finding that the demand for releases was reasonable, given that the matrimonial litigation had not been settled at the time of the hearing.

Moreover, the appellants did not take any legal steps to seek an order for a partial distribution, instead they chose to wait until the passing of accounts to pursue their objection about the distribution. The Divisional Court affirmed the discretion afforded to the application judge in respect of the award of compensation.

The respondents also sought leave to appeal the costs awarded by the application judge and leave to appeal such costs was granted, but dismissed, the court finding that the application judge made no error in principle in ordering the costs of the respondent estate trustees to be paid from the estate. The decision does not speak in detail to the issue of the estate trustee's costs being awarded on a substantial indemnity basis, rather than a full indemnity basis and as such, it is difficult to provide any analysis, except that the Divisional Court did state that it would not interfere with the application judge's determination of the amount awarded, stating it was a reasonable amount.

(p) Aragona v. Aragona (Guardian of)[434]

In 1999, Beniamino Aragona was appointed guardian of property for his mother Maria Emilia Aragona who suffered from Alzheimer's disease and lived in a nursing home. In 2001 the son was ordered to pass his accounts, which he did. In 2004, he was ordered to pass his accounts again, and to do so every three years thereafter. The son chose to ignore this order.

In March 2010, when Mrs. Aragona had passed away, he was again ordered to bring an application to pass his accounts. His appeal of the order to the Court of Appeal was dismissed.

When the son eventually filed his application to pass accounts, it revealed that from 2001 to 2010 he had withdrawn over $120,000.00 in cash from his mother's account without a valid explanation for the monies' usage. Despite this discrepancy in the accounting, which showed significant monies unaccounted for, the son sought increased compensation. He relied on the decision in Re Assaf Estate, [2009] O.J. No. 1086 (S.C.J.) in which Justice Strathy had allowed the executor one-half the standard compensation despite the fact that he had engaged in questionable conduct, including

434 *Aragona, v. Aragona (Guardian of)*, 2012 ONSC 1495 (S.C.J.) , aff'd 2012 CarswellOnt 11914 (C.A.), 2012 ONCA 639.

forging signatures, and swearing false affidavits.

The Court disagreed with the son's position and instead denied his request for compensation in its entirety. The Court also denied the son his legal costs, and ordered him to repay the Estate $132,628.00 which included the monies that he had taken as well as additional legal fees that had been paid out of the estate. The additional legal fees were fees paid on behalf of the estate for certain proceedings commenced against Beniamino's brothers relating to the estate of their late father. Justice Gray was not persuaded that the legal fees were "appropriate" to be paid out of Mrs. Aragona's estate.

In his decision, Justice Gray criticized the son's conduct and stated: "I am constrained to say that the conduct of Beniamino Aragona has been shocking. He has literally helped himself to many thousands of dollars from his mother's estate, at a time when his mother had Alzheimer's disease and was unable to look after her own affairs. Beniamino Aragona treated the money in the estate as if it was his own."[435]

Justice Gray distinguished Re Assaf Estate from the present case as the executor had managed to provide substantial service to the Estate and had not harmed the Estate. This was in contrast to Beniamino's conduct, which had effectively depleted the Estate.

Justice Gray's decision issued a tough rebuke to a son who had taken advantage of his position as guardian of property and had treated his mother's money as his own.

The son appealed the decision to the Ontario Court of Appeal[436] asserting various grounds of appeal including that the application judge erred in depriving him of compensation as guardian of his mother's property and in not adequately explaining his decision requiring the appellant to repay the $132,628.00. The Court of Appeal rejected these grounds of appeal, yet did allow one ground of appeal. The application judge had ordered that legal fees not be paid by the estate relating to lawsuits the appellant initiated against his brothers on behalf of the estate. The appellant appealed the application judge's finding that the estate should not be responsible for the legal fees associated with those proceedings as they were "ill-advised given the financial stability" of the mother's estate.

The appellant argued that the application judge failed to take into account the possibility that the estate could actually benefit from the proceedings, as there was a cost award in favour of the estate arising from a motion in those proceedings. The appellant argued that it would be unfair for the estate to receive a benefit from the motion without having to incur any of the associated costs.

435 *Aragona* at para 34.
436 *Aragona v. Aragona (Guardian of)*, 2012 ONCA 639.

The Court of Appeal was swayed by this argument and ordered that if the estate collects the total amount, that it reimburse the appellant for legal fees he can demonstrate he paid and that led to this award.

As the majority of the appeal was dismissed, the Court of Appeal awarded costs of the appeal to be paid by the appellant personally.

(q) Steven Thompson Family Trust v. Thompson et al[437]

In this passing of accounts application the beneficiaries of the Steven Thompson Family Trust filed Notices of Objection and contested the application. The beneficiaries were the wife and children of the deceased Steven Thompson. The trust owned 50% of a fuel company. The other 50% was owned by the deceased's brother, Paul, with whom the trust had become involved in litigation regarding the value of the shares of the fuel company.

An accountant had acted as trustee of the trust from 2009 until 2010 when he resigned due to a conflict of interest. The trustee had been the long time accountant of the fuel company and of the deceased's brother. After the resignation of the accountant as trustee, the parents of the deceased and the brother were named as trustees. The parents immediately retained the prior trustee accountant to act as their agent to administer and operate the trust. In 2011 the parents were removed as trustees (no reasons were provided in this decision as to why they were removed) and were ordered to pass their accounts. The beneficiaries objected to twenty-one incurred and paid revenue disbursements on the passing of accounts.

The applicants relied on exculpatory clauses in the trust document which they claimed fully indemnified them from any errors in judgment or mistakes made by them.

There was an initial procedural matter that was addressed by the Court. The applicants sought a trial of the issues. The Court rejected this request on various grounds including the fact that no authority was produced that would mandate the trial of issues in a contested passing of accounts even in the face of a privative clause. McCarthy, J. relied on this passage from Newell v. Newell, 2010 ONSC 5010 at paragraph 29: "The passing of accounts procedure should be informal and summary in nature and only after a hearing judge decides that there are issues requiring a trial should the process as detailed under the Rules be directed."

In analysing the applicants' case, McCarthy, J., first observed that the existence of an exculpatory

437 *Thompson*, 2012 CarswellOnt 15843 (S.C.J.) 2012 ONSC 7138.

clause in a trust document does not necessarily relieve a trustee from exercising his or her fundamental duties including the duty to not delegate his or her office to others, the duty to not profit personally and the duty to act honestly and with a level of care of a reasonable business person.

The Court went on to observe that the law is clear that a privative or exculpatory clause cannot be a licence to a trustee to act in any manner he or she wants and such a clause will not be effective where a trustee failed to exercise discretion at all, acted dishonestly, failed to exercise the level of prudence to be expected of a reasonable business person, and failed to hold the balance evenly between beneficiaries or acting in a manner prejudicial to the interests of the beneficiaries.

McCarthy J., also opined that where a trustee retains an agent, that agent acts for the trustee and not the estate. In order to relieve a trust from having to pay twice for the same services, a trustee may see his or her compensation reduced by the amount paid out for services. It is the trustee who bears the ultimate onus of satisfying the court that an expense was properly incurred.

The Court concluded that the decision by the trustees to hire the accountant was a poor one and was a failure to comply with the duty not to delegate duties and to adhere to the standard of a reasonably prudent business person. McCarthy, J., ordered that the expenses incurred as a result of the accountant's administration services were to be borne by the trustees themselves:

> *A passing of accounts requires the court to assess the propriety of an expense and to either allow it or disallow it. Section 21(2) of the Trustee Act provides that remedy to the court. The disallowing of an expense post facto results in an obligation on the trustee to repay that amount to the trust. This may be an unhappy result, but it is the only available remedy to right the wrong that has been done to the beneficiaries*.[438]

McCarthy, J., went on to disallow other expenses, such as the duplicate valuation report and certain legal fees which were not properly incurred. The legal fees were incurred by a lawyer hired by the accountant to assist with the litigation on behalf of the trust. Yet at the same time, in addition to assisting with the litigation, the lawyer was providing services to the accountant including reviewing the trusts account, advice on compensation and fees, valuation of corporate assets etc. The Court found that the lawyer had:

> *...become the de facto general counsel for the administrator as well as the litigation counsel for the trust. Exactly how [the lawyer] saw his role vis-a-vis the beneficiaries is not at all clear. Nor is it clear whether he ever turned his mind to his own conflict of interest in attempting to defend the interests of the trust in the litigation brought by [the brother Paul] on the one hand, and the interests of the administrators/trustees of*

438 2012 CarswellOnt 15843 (S.C.J.) 2012 ONSC 7138, at para 36.

the trust who were being challenged by the beneficiaries of that trust on the other.[439]

In the end, the Court held that a substantial portion of the legal fees paid to the lawyer were not of any benefit to the trust and the trustees failed to meet the onus of satisfying the Court that the expenses were properly incurred and that they should have been paid by the trustees or their agent and not out of trust property.

(r) Villa v Villa [440]

In the judgment of April 30, 2013, the accounts of Enzo Villa were eventually passed for the period in question, but the court found that the fiduciary had comingled accounts and ordered that the accounts be separated and the proceeds of Mrs. Villa's estate be held separately in estate account. The court awarded reduced compensation. Notably, the court ordered that the accounting fees and the legal fees be paid out of the Estate, and on the subsequent judgment of July 23, 2013, the court ordered having regard to the case of *McDougald Estate v Gooderhan,*[441] the loser pays principal, Rule 57 of the Rules of Civil Procedure and Salter v Salter Estate[442] as well as having regard to an Offer to Settle rejected, ordered the Respondent to pay costs on a partial indemnity basis up to a certain date, and thereafter on a substantial indemnity scale and a selection of disbursements.[443]

The analysis provided by O'Marra J., is instructive in that the court in considering the duty of an attorney to account under the *Substitute Decisions Act*, had regard to the decision in *Zimmerman v Fenwick*[444] wherein Strathy J., stated that a proper accounting is a condition precedent to being awarded compensation on the basis of the principle that without a proper accounting, the court is unable to assess the conduct of the fiduciary and to determine the compensation to which the fiduciary is entitled.[445] Moreover, O'Marra J., had regard to *Re Assaf Estate*[446], wherein Strathy J., also cited the principle that only where exceptional misconduct should a fiduciary be deprived of remuneration.[447]

The court found in this instance that the fiduciary met his duty of keeping contemporaneous and

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439 2012 CarswellOnt 15843 (S.C.J.) 2012 ONSC 7138, at para 39.
440 *Villa v. Villa*, 2013 CarswellOnt 5158, 2013 ONSC 2202; 2013 CarswellOnt 10107, 2013 ONSC 4421; Docket 06-005/12.
441 *McDougald Estate v Gooderham*, [2005] O.J. No. 2432.
442 *Salter v Salter Estate*, 2009 CanLII 28403 (ONSC).
443 *Villa v. Villa*, 2013 CarswellOnt 5158, 2013 ONSC 2202; 2013 CarswellOnt 10107, 2013 ONSC 4421; Docket 06-005/12, the July 23, 2013 decision .
444 *Zimmerman v Fenwick*, 2010 ONSC 2947.
445 *Zimmerman v Fenwick*, 2010 ONSC 2947at para 34.
446 *Re: Assaf Estate*, [2009] O.J. No. 1086.
447 *Villa v. Villa*, 2013 CarswellOnt 5158, 2013 ONSC 2202; 2013 CarswellOnt 10107, 2013 ONSC 4421; Docket 06-005/12, the April 13, 2013 Judgment.

accurate records as required by the governing legislation.

The court referenced the standards of care set out in the SDA, which include the degree of care, diligence and skill of a person or ordinary prudence in the conduct of his/her own affairs[448] or, if receiving compensation in the business of managing the property of others.[449] The court opined that recent cases have held that the higher standard does not automatically apply when a person is claiming compensation. The allegations of breach were characterized as improperly mixed assets, improperly invested assets and a question of whether or not certain property passed by survivorship or otherwise on the presumption of resulting trust.

On the mixing of estate money with private money, the court directed that the onus is on the fiduciary to distinguish the estate funds and pay the estate funds back first and make good on any loss to the estate and cited authority for relying on this principle.[450] With respect to the improper investment of mutual funds, the court did not find any merit to this allegation. With respect to the improper accounting of the survivorship interest, the court found that the presumption of resulting trust was rebutted. Accordingly, the only breach the court found was the comingling of funds. As such the justification in awarding reduced compensation was on the basis of the standard of perfection being too high and that the fiduciary had claimed a reduced rate in reflection of the comingling allegation.

Notably, in this instance, the court ordered the accountant fees to be paid out of the estate as having been necessarily incurred only after the applicant refused to settle the accounts informally.

(s) McMaster v McMaster[451]

This decision of Whitten J., concerns inter alia the passing of accounts of a co-attorney, the one co-attorney not aware that he was appointed a joint attorney, other pivotal issues of the application concerned the removal of the one attorney for breach of duty and collateral to that, a finding by the court of mental incapacity.

Notably, although section 42 of the SDA grants the court the discretion to order a passing of accounts of an attorney, the issue is academic as the co-attorney agreed to pass his accounts. In this case the court opined that the co-attorney's management of his mother's fortune did not present as being in satisfaction of his duty to manage substantial funds for the grantor's benefit nor,

448 Sec 32. of the *Substitute Decisions Act*.
449 S. 32.8 of the *Substitute Decisions Act*.
450 *Re: Saskatchewan General Trusts Corp*. (1938) 3 D.L.R. 544 (Sask. C.A.) and Re: Norman [1951] O.R. 752 (Ont. C.A.)
451 2013 CarswellOnt 2341, 2013 ONSC 1115.

to preserve a fund for her care. The court stating those objectives appear to have been completely lost. The court was critical of the co-attorney's ability to financially manage his mother's fortune in the amount of in or about $5M, and particularly admonishing his investment in go-kart tracks as nothing more than a manifestation of personal interest. Indeed the court stated: "it is impossible to comprehend that a reasonably objective financial manager would recommend such an investment to an elderly person". The court described this investment as high-risk and without consideration of conservative low risk guaranteed investment such as government bonds.[452]

The court opined that the co-attorney's management of his mother's assets put her remaining assets in jeopardy noting that property taxes had lapsed, income taxes were not addressed and that the legal obligations of the attorney in the exercise of his fiduciary duty were not met.[453]

The court noted that there was no explanation for monies that had been withdrawn and that there was no transparency by the attorney with respect to the accounts and investments. The court went so far as to state that the "fiscal stewardship of the attorney has been a disaster for his mother. He has literally blown through at least $2,000,000. If there was ever a case for removal of an attorney this is it. It will prevent the further haemorrhaging of his mother's assets".[454]

In this case the court ordered the co-attorney to commence an application to pass his accounts as an attorney for property from 1994 to the date of the February 20, 2013 order. As such, the duty to account during the lifetime of the grantor.

(t) Hooke Estate v. Johnson [455]

Pursuant to the Judgment by André J., the applicant estate trustee of the Estate brought an application to pass the accounts of the estate over the express objections of the respondent beneficiaries.

Notably, the applicant sought global compensation of in or about $30,000.00 for work performed both as estate trustee and as attorney. However on the morning of the hearing, the applicant reduced his claim for executor's compensation by in or about half but the respondents sought a further reduction. The court ultimately decided that the global compensation to be awarded was in or about $13,000.00 and as such, was asked to decide whether or not an award of cost was then appropriate and if so, the quantum.

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452 2013 CarswellOnt 2341, 2013 ONSC 1115, para 58.
453 2013 CarswellOnt 2341, 2013 ONSC 1115, para 60.
454 2013 CarswellOnt 2341, 2013 ONSC 1115, para 63.
455 2013 CarswellOnt 5119, 2013 ONSC 2556, additional reasons, 2013 CarswellOnt 3502, 2013 ONSC 1674 (Ont.S.C.J.).

In its analysis, the court cited its jurisdiction as section 131(1) of the *Courts of Justice Act*, its discretion, section 23(2) and 61 of the *Trustee Act,* and the case of *Geffen v Goodman Estates.*[456] The court also clearly stated that: "where there are insufficient funds to pay any costs awarded to a trustee, on account of distributions to beneficiaries, the court may make the beneficiaries personally liable for the assessed cost and cited the authority of *Raeburn Estate (Re).*[457]

The court decided that the respondents were largely successful in their objection to the passing of the accounts, noting that while the applicant significantly reduced his claim for global compensation before the hearing, he did not offer to settle at least seven days or earlier before the hearing as required by Rule 49.10. In the end the court ordered that the applicant would be entitled to costs of $1,000.00 inclusive and the respondents in the amount of $2,500.00 inclusive, both payable out of the estate after the payment of executor's compensation.

(u) Carfagnini v White Estate [458]

This decision of Greer J., wherein inter alia the applicant asked the court to make an order for an accounting by the attorneys for property for a deceased person (former trustee) who had a life interest in another estate by virtue of the fact that the attorneys had acted as de facto trustees of the life estate having access (although not legally) in doing so by virtue of their attorney appointed. As such the applicants asked for an order that the attorneys for property pass their accounts in respect of the management of the now deceased trustee who also had a life interest in the life estate.

The respondents who are specific legatees under the now deceased grantor's estate, took the position that the applicants had no right to ask for an accounting.

Per Greer J., the court determined as follows:

> *[18] If Ida's Will of 2008 is overturned at Trial, the Applicants become residuary beneficiaries along with the 3 daughters of Ida, because the residue in that Will is shares "per stripes" so they would stand in the place of their father, Anthony, who predeceased Ida. Under S.42(9).6 of the Substitute Decisions Act, 1992, S.O. 1992, c. 30 ("the SDA"), the Court has the power to grant leave to any other person, to ask for a passing of accounts of an attorney for property. As noted in his Endorsement dated August 27, 2008, in Estate of Lois Harriet McAllister and Ian McAllister v. Gail Alexandra Hugin, Court Docket 05-70/07, (O.S.C.J.), Mr. Justice Pattillo said that S.42 is clearly discretionary. He says the Court should consider two main questions, namely*

456 *Geffen v Goodman Estate*, [1991] 2 S.C.R. 353.
457 *Raeburn Estate*, (re), 2009, 52 E.T.R. (3d) 105 (S.C.J.).
458 2014 CarswellOnt 8786, 2014 ONSC 3575.

> *the extent of the attorney's involvement in the grantor's financial affairs and secondly, whether the applicant has raised significant concern in respect of the management of the grantor's affairs to warrant an accounting. In my view the Applicants have. Ida's Estate has very few assets left in it. Each change made by Ida in the management of her affairs, leads to that conclusion. The Attorneys are hereby ordered to Pass their Accounts for the period from March 2008 to the date of Ida's death.*

As such, the attorneys were so ordered to pass their accounts.

(v) Osmulski Estate

Osmulski Estate v. Osmulski, 2014 ONSC 6370 addresses the issue of compensation for a guardian of the person. On an application to pass accounts, the applicant was the son and court-appointed guardian of the person and property of an incapable woman. The accounts covered a 10-year period. The applicant had nine other siblings. None of them stepped up to be the guardian. The applicant managed his mother's finances and personal care on his own and with the assistance of his wife. During the period of the applicant's guardianship, the incapable person resided exclusively in long-term care facilities. She suffered from dementia and was confined to a wheelchair.

The court was critical of the applicant's recordkeeping and found him to have breached his fiduciary in several instances. The applicant was also found to have helped himself to his mother's money and treated it as though it were his own. With respect to the applicant's claim for compensation in the personal care arena, the court made the following observations:

1. The applicant did nothing extraordinary in his capacity as a guardian for personal care;

2. All his claims for extra compensation arising from his actions as guardian for personal care were unfounded and unproven;

3. The incapable person's affairs were relatively straightforward to administer from a personal care perspective; and

4. The applicant did the essentials of what was required and nothing else. There was no fault in his work but he did nothing out of the ordinary that merits any extra compensation.

The applicant's evidence as to what he did as a guardian of the person was deficient. His evidence lacked particularity and there was no record of the hours he spent.

Iil. Passing of Accounts and Orders Giving Directions

(a) *In the Matter of the Estate of Pauline Medynski, deceased and In the Matter of the Guardianship of Andrew Medynskid*

The recent decisions In the *Matter of the Estate of Pauline Medynski, Deceased and In the Matter of the Guardianship of Andrew Medynski*[459] demonstrate how Passing of Accounts hearings can become complex and drawn-out matters in the absence of a comprehensive Order Giving Directions. These cases, (which proceeded as one matter) (***"Medynski"***) concerned a contentious Passing of Accounts, both with respect to a Trust Company's role as Estate Trustee for Pauline's Estate (the wife) and Guardian of Property for Andrew (the husband).

There were three daughters in the family. Two of the daughters approved the Trust Company's Accounts. One of the daughters raised approximately 80 Objections to the Trust Company's Accounts.

In large part, these objections related to minor issues or discrepancies which were of insignificant monetary value.

Responses to the Objections were provided and the Objections were then amended to include new Objections, which were also responded to.

Notably, in the Order Giving Directions, no cross-examination of the Trust Company in its capacity as Estate Trustee or Guardian was sought, and the Order Giving Directions specifically provided that the Applicant or the Respondents on the Passing "shall be at liberty to bring a motion for further directions pursuant to 75.06 within 30 days of the Respondents' receipt of service of the Applicant's Response to Amended Objections."

No further Order Giving Further Directions was sought, and in particular, no Directions were sought regarding the admission of viva voce evidence via cross-examination on the Affidavit of Verification of the Trust Officer at the hearing of the matter.

Approximately 60 days before hearing of the Application, the Objector served a motion seeking, *inter alia*, an Order permitting *viva voce* evidence to be adduced at the trial of the Application. The motion was dismissed, save and except for the potential for cross-examination of the Affiant Trust Officer on the Affidavit of Verification, at the discretion of the trial judge.

459 2016 ONSC 3353; and 2016 ONSC 4257. Please see the case law at the end of this collection for the full text of the decisions

Approximately 30 days before trial of the Application, the Objector filed over 50 Requests to Admit, seeking to admit various allegations relating to the Trust Company's tenure as Estate Trustee and Attorney for Property.

At the hearing of the Application, the Court granted the Objector a right to cross-examine the Affiant Trust Officer on the Accounts filed. The Objector cross-examined the Trust Officer for over 2 court days, and the Trust Officer was then re-examined by Applicant's counsel for approximately an hour.

Counsel then made submissions for approximately a day and a half on the evidence adduced in the conduct of the proceeding and the evidence filed.

After receiving all submissions, the Court ultimately dismissed the vast majority of the Objections filed, stating, *inter alia*, the following:

> *[41] Some of the objections are more an expression of discontent over the perceived shortcomings in the accounting of the other two beneficiaries for the time prior to [the Trust Company's] involvement.*
>
> *[42] Other objections are very general and/or not capable of quantification. This court does not go so far as to call them nit-picking as counsel for [the Trust Company] suggests. They are, however, disproportionate to the value of the assets and the time required to fully assess and litigate every objection.*
>
> *[43] There was delay on the part of [the Trust Company] but, overall, that delay was not unreasonable, given the circumstances. There were, however, delays in responding to many inquiries and requests. Communication on the part of [the Trust Company] was not as responsive as it might have been. While no possible loss can be quantified, the communication shortcomings, the delays and the failures to follow up must be found to have possibly put the assets/income at risk.*
>
> *[44] On the other hand, some of the objections appear to have been more than merely a good faith inquiry.*

In its decision on costs, the Court stated, *inter alia*, the following:

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

The Court Ordered costs payable by the Objector in the amount of $69,000.00 plus disbursements of $7,325.72.

The new amendments to Rule 74.18 of the *Rules of Civil Procedure* now provide for an Order Giving Directions and Passing of Accounts. Prior to the introduction of the new Rules, in Passing of Accounts Applications, Objections to the Accounts and Responses to the Objections to the Accounts would be filed, but unless a party sought an Order for Directions, often, no clarity existed as to how the matter should proceed.

The new Rule 74.18 (13.1) provides:

> *On the hearing of the application [to pass accounts], the court may order that the application or any issue proceed to trial and give such directions as are just, including directions,*
>
> *(a) respecting the issues to be tried and each party's position on each issue;*
>
> *(b) respecting the timing and scope of any applicable disclosure;*
>
> *(c) respecting the witnesses each party intends to call, the issues to be addressed by each witness and the length of each witness' testimony; and*
>
> *(d) respecting the procedure to be followed at the trial, including methods of adducing evidence. O. Reg. 193/15, s.12 (17).*

In *Medynski*, no comprehensive Order for Directions was sought as the application was initially brought before the new Rules came into effect. This case highlights the confusion that can be caused where there are not specific Orders Giving Directions, and in particular, where no Order as to the procedure and evidence to be adduced is sought.

Medynski is also interesting in that the Court found that some of the Objections were more of an expression of discontent over the perceived shortcomings of the accounting of the other beneficiaries, prior to the Trust Company's involvement as Estate Trustee and Guardian.

To the extent that Objectors do not express themselves in a manner that either calls to light the fiduciary obligations of the Estate Trustee or Guardian, or that allows for a reasonable reduction of the compensation, the objector may have difficulty in having the fiduciary's compensation reduced in a material fashion. Ultimately, in *Medynski*, the Court reduced compensation of the Trust Company by 6%.

The problems which may arise when a comprehensive Order Giving Directions is not obtained are further highlighted in the case of *The Estate of Ingrid Loveman, Deceased,* 2016 ONSC 2687. In

Loveman It does not appear that there was a proper Order for Directions obtained by the parties to address the issue of evidence which would be admissible, and the manner in which it would be adduced. The Court ultimately held that its decision would be based solely upon evidence properly placed before it in the proceeding. Evidence in the proceeding would constitute oral testimony, agreed facts and documentary evidence properly tendered and marked as exhibits during the hearing.

The court noted specifically that in the Passing of Accounts hearing, a Notice of Objection is not evidence and neither is a Reply to a Notice of Objection. Such documents are merely designed to frame the issues with respect to which admissible evidence must be presented to form the foundation of the court's deliberations.

This case further highlights the ambiguity that can be created surrounding Objections where there is no proper Order for Directions sought.

CONCLUSIONS

Recent trends from in or about 2007 to current date concerning trustee passing of accounts applications see the court consistently applying the percentages and the five factors approach which has developed over time in measuring the appropriateness of compensation claims that the courts are being asked to reduce or increase.

Absent agreement or court order, care and management, or special fees claimed appear to be rarely awarded.

The court's overriding and clear message to trustees, estate trustees and fiduciaries alike, as well as beneficiaries iterates that conduct must be reasonable or the consequences attendant to unreasonable conduct will be costs awards, which are punitive in nature.

Moreover, the time and expense devoted to the question of the passing, and the passing itself, ought to be proportionate to what is at stake in the accounting.

The courts continue to exercise the wide discretion afforded in passing of accounts matters, both in respect of compensation and costs as well as disposition of the proceedings.

Some precedent now exists albeit of limited application and unclear whether the decision is correct for the proposition that the court is required to follow the Practice Direction for Estates (Toronto

specific) as it applies to a Passing of Estate Trustee Accounts.[460] However, see Oosterhoff[461] for comments on probative value and precedent in support thereof in the 2014 decision, *Furtney v Furtney*.[462]

Recent changes to the *Rules of Civil Procedure, and* the 2014 Toronto Practice Direction considered together with the apparent uncertainty arising out of the accounting process, indeed means that the profession may benefit from a review and overhaul of both to provide clarity to the process and procedure governing court passings.

Passing of Accounts Applications can be complex and adjudication of same, complicated. Given the increasing occurrence of court passings and the importance placed on accountability by fiduciaries, simplification of the process and procedure, and clarification of expectations may result in a more effective and proportionate process.

This paper and appended chart is intended for the purposes of providing information only and is to be used only for the purposes of guidance. This paper is not intended to be relied upon as the giving of legal advice and does not purport to be exhaustive.

Kimberly A. Whaley, Whaley Estate Litigation *January 2016*

460 *The Bank of Nova Scotia v Vincent,* 2012 ONSC 940 (Div. Crt.)

461 The Advocates Quarterly, April 2013, publication is the revised version of Professor Oosterhoff's paper delivered at the STEP Toronto Branch Conference on January 9, 2013

462 *Furtney v. Furtney,* 2014 ONSC 2439 (CanLII), 95 ETR (3d) 331; 2013 ONSC 6687, 95 ETR 3d 312; 2014 ONSC 3774.

APPENDIX TO "FIDUCIARY ACCOUNTS AND COURT PASSINGS"

Comparative Analysis of *Zimmerman*[463] and *Penna*[464]

	Zimmerman	Penna (Landen)
WHO ARE THEY?	• former crown attorney • son of a judge • Jeopardy contestant (2nd Place) • Member of RCYC	• younger business associate of Penna's • Penna treated him like a son
History of Court Appearances	• July 2008 Fenwicks brought application declaring POA and Trust were void and an order requiring Zimmerman to pass his accounts • August 7, 2008 - return of application - Justice Kitely ordered Zimmerman to pass his accounts on or before September 30, 2008. He did not. • December 3, 2008 - Justice Roberts ordered that Zimmerman pass his accounts by December 5, 2008. He did not issue his application until December 18, 2008 returnable on April 16, 2009. • February 24, 2009 - Fenwicks filed initial Notice of Objections (revised later to include objections from the Collection as well) • March 9, 2009 - Fenwicks brought contempt motion for Zimmerman's contempt of August 7, 2008 Kitely Order. Justice Stinson on consent of the parties ordered that Zimmerman be removed as Trustee and Fenwicks appointed successor trustees. Contempt motion adjourned.	• 13 Court Orders and Endorsements • March 2, 2005 - Mareva Injunction issued - Justice Wilton-Seigel (Landen in contempt) Landen filed an incomplete affidavit in response. • January 2006 - Justice Greer appointed as Case Management Judge • April 7, 2006 - Appearance before Justice Greer. Ordered removal of trustees and appointment of ETDLs; Ordered Landen to pass accounts. Decision date May 10, 2006 (Landen in contempt) • July 6, 2006 - April Order was revised - added mandatory mediation • July 7 2006 Order by Justice Greer that Landen provide updated list of assets per Mareva Injunction and Pauline must provide mortgage info re house. (Landen in contempt) Landen filed a false affidavit, the purpose and intent was to deceive the court.

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

464 *Langston v. Landen, 2012* CarswellOnt 16824; *Langston v Landen*, 2013 CarswellOnt 11799, 2013 ONSC 4241; *Langston v. Landen*, 2010 CarswellOnt 9919; *Langston v. Landen*, 2011 CarswellOnt 1948

	Zimmerman	Penna (Landen)
History of Court Appearances (continued)	• April 16, 2009 - Zimmerman failed to attend on initial return date. Justice Brown ordered that he attend for cross-examination on April 29-May1, 2009 and that he file response to the notices of objection by June 12, 2009. • June 23, 2009 - Justice Stinson ordered Zimmerman to pass his accounts from September 30-March 9, 2009 when he was removed. He did not. • October 13-15, 2009 - Application to pass accounts was scheduled. Zimmerman failed to appear. His counsel appeared to remove themselves from record. Zimmerman ordered to pay Fenwick and Collection costs of $9,000 each. Costs never paid. • January 13-15, 20, 25 2010 - Application to Pass Accounts heard. Decision released in May (the May Passing of Accounts Decision) Justice Strathy • July 6, 2010 - costs decision released (July Costs Decision) Justice Strathy • September 15, 2010 - Continuation of Passing of Accounts hearing. Zimmerman provided one last chance to account. He did not. Decision released October 4, 2010. (October Decision) Justice Strathy • February 2, 2011 - Zimmerman dies.	• December 4, 2006 - Adjournment of application to pass accounts • December 20, 2006 - Justice Greer allows Landen to take out more money from his frozen accounts to pay for legal fees. • September 2007 - two motions before Justice Greer - partial summary judgement against Landen was granted and ordered that wife Pauline no beneficial interest in matrimonial home because money came from estate. • April 2, 2008 - wife Pauline appeals Greer's Sept 2007 decision. Loses appeal. • February 27, 2009 - Landen ordered to attend examination in aid of execution. (Landen in contempt) • June 11, 17 2010 - contempt motion. Decision released October 14, 2010. • November 24, 2010 - Sentencing hearing • March 25, 2011 - Decision March 28, 2011 - Appeal to court of appeal (Landen lost appeal) • October 10, 2012 - Re-appeared before Greer. Decision December 20, 2012. Contempt purged.

	Zimmerman	Penna (Landen)
What they took	• From November 2003-September 30, 2008 he took: $356,462.50 CAD and $85, 400.00 US. Which he claimed as compensation. • These included unexplained cash withdrawals from ATMs, restaurant meals, groceries, automobile and parking expenses, limousines, liquor, clothing and travel. • Claims he was told he could take between 1.6% and 2.0% of value of assets under administration. • Hung artwork from the Trust in his own home and lent one to a friend. Lost a Lismer sketch. • No remorse - stubborn answers in cross-examination etc.	• $millions - more than $5 million known but many more unknown. • Purchased a house in Forest Hill, leased luxury cars, season tickets for the Raptors, Maple Leafs,
	May Passing of Accounts Decision • Conduct fell well below the standards expected of a trustee and that he breached some of the most basic obligations (para. 44 - May Decision) • List of breaches at para. 44 - extensive • Entitled to NO COMPENSATION **July Costs Decision** • Zimmerman made no submissions on costs • Fenwicks and the Collection sought and were given Full Indemnity Costs **October Decision** • Zimmerman did not intend to file an affidavit as ordered to do so. • provided no further explanation, content to treat evidence as closed	**October 2010 Decision** • Landen agreed he had breached the Mareva Order • Landen had perpetrated a major fraud against the Estate • Landen found to be in contempt of the four orders above **December 2010 Sentencing Decision** • Oral apology was done "without any sincerity or feeling of or expression of remorse" (para. 23) Greer found apology insincere. • by not probating the Will none of the charities were aware of the bequests. Greer said first step in fraud on Estate

	Zimmerman	Penna (Landen)
Remedy	**May Passing of Accounts Decision** • Required to repay the amounts that he had pre-taken in the total amounts listed above plus interest • Repay Accounting firm $34,064.55 for preparation of accounts • Reimburse trust $2000 for missing Lismer sketch • ALSO - the Court provided him with one more chance to account and respond to the notices of objection. (see para. 119-120) wanted to give him "one final opportunity to avoid a second and severe consequence for his failure to do so." • Hearing was to continue within 60 days. • Within 40 days Zimmerman to deliver to counsel an affidavit, supporting vouchers, responding in detail to each challenged disbursement. **July Costs Decision** • Ordered to pay full indemnity costs to both Fenwicks and the Collection ($167,000.00 and $116,000.00) **October Decision** • Judge allowed almost all objections and Zimmerman was ordered to repay $390,039.02	**December 2010 Sentencing Decision** • Sentenced to 14 months in prison. • On the completion of his sentence he was to return to the Superior Court of Justice to tell the Court what he did with the balance of the estate assets. This includes an explanation as to how he and his wife used the $500,000 line of credit registered against the house when it was sold.
Recovery	Zimmerman died. Estate claim?	None: Landen supposedly broke
What went wrong	• only one Trustee for the Trust • no one discovered fraud until too late. • why did they not get a mareva injunction?	• the will was drafted with three executors but Landen was able to control the wife and friend • it did not occur to a nephew who replaced the wife as executor, to ask for financial statements • for 7 years no one at the company had seen the will or noticed the lavish lifestyle • most of the charities were not notified that they were in the will • the bank destroyed all the account records after six years • the accountants only filed tax returns but were not retain

CHAPTER 2

UNCONTESTED COURT PASSINGS

KEEPING IT SIMPLE: UNCONTESTED PASSINGS OF ACCOUNTS

UPDATED January 2016, Kim Whaley

While much of the focus on applications to pass accounts is on contested passing of accounts, many applications proceed on an uncontested basis, and without a hearing.

The Rules provide that judgment may be granted on an application to pass accounts without a hearing where all the requirements under Rule 74.18 have been complied with and there are no Notices of Objection filed, or any objections filed have been withdrawn.

While uncontested passing of accounts applications are certainly more straight-forward than those applications involving numerous objections, it is still essential that the fiduciary consider and abide by the relevant *Rules of Civil Procedure*.

Below are the Rules and considerations that apply to uncontested passing of account applications.

The Rules Apply to All Fiduciary Accounts: Rule 74.16

The Rules respecting the form of accounts and the application itself apply to the accounts of estate trustee accounts, and only subject to necessary modifications, as well as to those of trustees (other than estate trustees), persons acting under a power of attorney, guardians of property as well as other persons with similar duties who are directed by a court to prepare accounts in respect of the management of property, assets or money.

Keeping Records: Rule 74.17

Rule 74.17 sets out the manner in which accounts are to be kept and recorded. As points of practice, fiduciaries should:

- Maintain proper accounts from the outset
- Keep detailed and organized records
- Keep copies of all back-up documents, including receipts, invoices, cancelled cheques, bank and investment statements and other vouchers,
- Retain copies of other related documentation including probate application, income tax returns, real estate appraisals, appraisals of estate assets, solicitor invoices, accountant invoices

In an application to pass accounts, the accounts must detail all assets, capital receipts, investments, disbursements, liabilities and trustee compensation in the following manner:

Statement of Assets

- *On a first passing, statement of assets should refer to all date of death assets*
- *On a subsequent passing, statement of assets should refer to all assets the date the*

accounts were opened

- *Cross-reference to entries in accounts showing disposition or partial disposition of assets*
- *Statement of investments (if any) on date accounts opened*

Capital Receipts[1]

- *Account of all monies received – except for investment transactions (addressed in Statement of Investments)*
- *Show balance forward*

Capital Disbursements

- *Account of all monies disbursed – except for investment transactions (addressed in Statement of Investments)*
- *Show balance forward Statement of Investments*
- *Required where the fiduciary has made investments:*
- *Details of all monies paid to purchase investments*
- *Details of all monies received by way of repayments or realization on investments in whole or in part*
- *Balance of all investments as of the closing date of the accounts*
- *Show balance forward*
- *Statement of Revenue Receipts*
- *Account of all monies received – except for investment transactions Statement of Revenue Disbursements*
- *Account of all monies disbursed – except for investment transactions Statement of Unrealized Assets*
- *Statement of original assets on hand at closing date ofaccounts Statement of Money and Assets At End of Period*
- *Statement of all money and investments in the estate at closing date of accounts*

Statement of Liabilities

- *Statement of all liabilities (contingent or otherwise) at closing date of accounts*

1 The distinction between Capital Receipts/Disbursements and Income Receipts/Disbursements is required where the estate distinguishes between capital and income beneficiaries. Where there is no distinction, the accounts do not need to reflect a division.

- *Statement of Estate Trustee Compensation*
- *Where a care and management fee is charged, the trustee should include statement setting out how the fee is calculated*

Bringing the Application: Rule 74.18(1) and (2)

An application to pass accounts is brought in the Superior Court of Justice. It does not have to be brought in the same court where the Certificate of Appointment of Estate Trustee (if obtained) was issued.

The following documents must be filed with the Court:

- Affidavit Verifying Estate Accounts: sworn by the fiduciary with the estate accounts attached as Exhibit "A" to the affidavit
- Where applicable, copy of the Certificate of Appointment of Estate Trustee
- Where applicable, copy of the most recent Judgment on Passing of Accounts
- Copy of the draft Judgment sought
- Notice of Application: this is only issued by the court once the above-listed items have been received by the court, with payment of the application fee.

Hearing Date

The Notice of Application sets out the hearing date. While in uncontested applications it is possible that judgment can be granted without a hearing, it is important to keep the hearing date in mind as the relevant deadlines for the filing of materials relate to that hearing date.

Service: Rule 74.18(3) to (5)

Once the Notice of Application has been issued by the court, the fiduciary is to serve the following on each person with a contingent or vested interest in the estate by regular mail:

- Notice of Application
- Blank Notice of Objection
- Copy of draft Judgment sought

In the event the Public Guardian and Trustee or Children's Lawyer represents a person with a contingent or vested interest in the estate, the fiduciary shall serve the following on them:

- Notice of Application
- Copy of the Affidavit Verifying Accounts with Accounts attached
- Blank Notice of Objection

- Copy of draft Judgment sought
- Copy of Certificate of Appointment of Estate Trustee (where applicable)
- Copy of previous judgment (where applicable)

Where a person other than the Public Guardian and Trustee acts as an attorney under a continuing power of attorney for property or as a guardian of property for a person under disability who has a contingent or vested interest in the estate, the fiduciary shall serve the following on them:

- Notice of Application
- Copy of the Affidavit Verifying Accounts with Accounts attached
- Blank Notice of Objection
- Copy of draft Judgment sought
- Copy of Certificate of Appointment of Estate Trustee (where applicable)
- Copy of previous judgment (where applicable)

While it is not necessary to serve the accounts on the beneficiaries (except those represented by the Public Guardian and Trustee or Children's Lawyer), it is generally good practice to respond to requests from beneficiaries to provide accounts and vouchers once they have received the Notice of Application.

If the person to be served is in Ontario, these documents must be served at least **60 days** before the hearing date specified in the Notice of Application.

Where the person resides outside of Ontario, these documents must be served at least **75 days** before the hearing date specified in the Notice of Application.

Rule 74.18(8) to (8.1): Request for Further Notice

Any person who must to be served with the Notice of Application, other than the Public Guardian and Trustee or the Children's Lawyer, and who does not object to the accounts, may file a request to receive notice of any further steps in the application. A Request for Further Notice must be served on the applicant and filed with court, along with proof of service, at leats 35 days before the hearing date specified in the Notice of Application.

A person who serves and files a request for further notice is entitled to:

- Receive notice of any further steps in the application
- Receive any further document in the application
- File materials relating to requests for costs and requests for increased costs
- At any hearing regarding a request for increased costs, be heard, examine a witness, and cross-examine on an affidavit

Rule 74.18(8.6): Request for Costs

Subject to any request for increased costs, any person who must be served with the Notice of Application and who wishes to seek costs may, at least ten days prior to the hearing of the application, serve on the applicant a request for costs and file the same with the court along with proof of service.

Rule 74.18(9): Judgment without a Hearing

The court may grant judgment in writing (without a hearing) if:

- the beneficiaries do not file objections to the accounts, or withdraw any objections made
- (where applicable) the Public Guardian and Trustee or the Children's Lawyer were served and provided a Notice of No Objection to Accounts or Notice of Non-Participation or approved the draft Judgment sought

In order to obtain an order without a hearing, the Applicant should file the following at least five days before the scheduled hearing date:

1. A record containing:
   - Affidavit of service of all documents required to be served on the parties (see "Service", above)
   - Notices of No Objection to Accounts or Notices of Non-Participation by the Public Guardian and Trustee or the Children's Lawyer (where applicable)
   - Affidavit of the Applicant or counsel for the Applicant stating as follows:
     i) that a copy of the accounts was provided to each person who was served with the Notice of Application and requested a copy;
     ii) that the time for filing notices of objections to accounts has expired and that no notice of objection to accounts was received from any person served, or that, if a notice of objection was received, it was withdrawn as evidenced by a notice of withdrawal of objection attached to the affidavit
   - Requests for costs of persons served, if any
   - Any requests for increased costs, costs outlines and response to requests for increased costs; and
   - Certificate of a lawyer stating that all documentation required (and set out above) are included in the record
2. A draft of the Judgment sought (in duplicate)
3. Where applicable, a copy of the draft Judgment approved by the Public Guardian and Trustee or Children's Lawyer

Rule 74.18(11): Requests for Increased Costs

In general where there is no hearing, the court will award costs which are assessed in accordance with Tariff C unless the court orders otherwise in light of a Request for Increased Costs.

In cases where the fiduciary (or a person served with documents set out above under "Service") seeks the payment of costs in excess of the amount allowed (as set out in Tariff C) he or she must serve, at least 15 days before the hearing date of the application, a Request for Increased Costs (specifying the amount of costs sought) and a Costs Outline on:

- every person who has served and filed a Notice of Objection to accounts, even if he or she has since withdrawn it;
- every person who has served and filed a Request for Further Notice (Form 74.45.1)
- The Public Guardian and Trustee or Children's Lawyer if applicable, if they were served but did not file a notice of non-participation.

In response, a party may object or consent to the Request for Increased Costs form no later than ten days before the hearing date of the application.

At least five days before the hearing date, the Applicant (or other person requesting increased costs) shall file a supplementary record containing the following with the court:

- The documents served on the parties respecting the Request for Increased Costs with the affidavits of service
- Affidavit containing:

  i) A summary of the responses to the Request for Increased Costs received and a list of persons who did not respond to the Request for Increased Costs; and

  ii) The factors that contributed to the increased costs.

The court may grant judgment on a Request for Increased Costs without a hearing. The court may also order additional information from the party seeking increased costs.

Compensation

Section 61 of the *Trustee Act* provides that fiduciaries are "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…"

In Ontario, the generally accepted guidelines for determining compensation of a trustee, guardian or attorney are as follows:

- 2.5% on capital receipts and capital disbursements
- 2.5% on revenue receipts and revenue disbursements

- Management Fee: 2/5 of 1% (0.4%) per annum on the average annual market value of trust assets

As with all matters relating to accounts, fiduciaries are well-advised to keep careful records and accounts to support claims for compensation. Fiduciaries who bill by the hour (such as lawyers or accountants) should carefully keep dockets for work completed.

Courts have discretion to review compensation claimed.

Conclusion

An uncontested passing can mean significant savings to an estate or trust or other form of account for which a passing is required in that a hearing can be avoided. In order to get to the point of an uncontested passing, and a judgment without a hearing, a fiduciary is well-advised to abide carefully by the *Rules of Civil Procedure* and the requirements to keep careful accounts and records, report and account to beneficiaries, and keep in mind the relevant timelines.

CHAPTER 3

GUIDELINES FOR DISTINGUISHING BETWEEN INCOME AND CAPITAL

Guidelines for Distinguishing Between Income and Capital

In this chapter, we discuss the distinction between income and capital transactions in estate and trust accounts and the trustee obligation to maintain an even hand between income beneficiaries and remaindermen (i.e. capital beneficiaries).[1]

This chapter is meant as a helpful guide in day-to-day trust and estate administration in identifying when it is necessary to distinguish between capital and income and the relevant considerations in doing so. However, it is not authoritative and cannot replace legal advice and reference to relevant legal authorities. This discussion is also only applicable to trusts and estates administered in Ontario.

Pursuant to Rule 74.17(3) of the *Rules of Civil Procedure*, where a trust or estate differentiates between income and capital, the transactions must be separated into an income account and a capital account. The trustee is under an obligation to properly allocate every transaction to either the income account or the capital account (not including investment transactions, which are dealt with in a separate investment account).

The distinction between capital transactions and income is important when the benefit of each of these accounts is allocated to a different beneficiary. A common example is a testamentary trust that gives the testator's spouse a life interest in the income of the residue of the estate and then makes a gift of the remainder of the residue to the children when the spouse dies.

The trustee has an obligation to characterize every transaction as either capital or income. Therefore, trustees – particularly professional trustees - need to be familiar with the rules regarding the distinction between income and capital transactions. To some extent, this is a discussion about substantive trust and estate law rather than about the procedure, process, and the formal requirements of an application to pass accounts. This is because the superficially simple question about whether a piece of property received or disbursed by a trustee is either income or capital cannot usually be answered by reference to a dictionary definition of "income" and "capital" or a definitive list of types of transactions. The distinction comes from the proper exercise of the trustee's judgment to allocate the transaction to either account according to general rules and precedent.

In some instances, the decision to characterize a transaction as income, capital or part of each may go beyond the application of rules and require the trustee to exercise a discretion. This arises out of the trustee's duty to maintain an even hand between the income and capital beneficiaries.

These duties belong to the trustee, and it is a general rule that trustees may not delegate their duties to others. An important consequence of this fact is it is not acceptable for the trustee to

1 This chapter draws on discussions of capital and income in D. Waters, Waters' Law of Trusts in Canada, 4th ed., (Toronto: Carswell, 2005) ("Waters") and C.S. Theriault, Widdifield on Executors and Trustees, 6th ed., (Toronto: Carswell) ("Widdifield"). For more detailed discussions, see Waters, chapter 19, Part III, and Widdifield, chapter 7.

simply leave the categorization of transactions to the bookkeeper or account-preparer when the time comes to prepare accounts in passing form. Trustees must make these decisions themselves. This chapter will look at how to allocate between income and capital and the importance of recording that exercise so that the accounts can be prepared properly.

WHEN TO FOLLOW THE RULES

In some estates and trusts, maintaining careful distinctions between capital and income accounts is critically important. In others, it may serve little or no purpose.

The distinction is critical where there are separate income and capital beneficiaries, or where the will or trust instrument directs the income or capital to be used for different purposes (e.g. a trust for a minor that allows income to be paid out for the advancement of the minor until a certain age when the capital will be distributed).

However, the distinction may be irrelevant when the estate is immediately distributable to its capital beneficiaries. In such an estate, any income that the estate earns can simply be added to capital and distributed as such. Customary practice is to prepare separate income and capital accounts, but we suggest that this could be dispensed with to reduce cost and complexity in an appropriate case.

The trustee should make a decision at the outset of the administration as to what level of attention will be given to distinguishing capital and income or whether it will not be necessary to distinguish them at all in the accounts.

DISTINGUISHING INCOME AND CAPITAL

A. The Will or trust instrument

The first step is to analyze the will or trust instrument. These documents will define the trusts upon which the assets will be held and name the beneficiaries. The assets may be settled on trusts for sale and conversion of the assets into money, or they may be trusts to hold particular property. If there are successive interests (i.e. beneficiaries of the income for a time, followed by a gift of the whole remainder to capital beneficiaries), then it will be necessary to characterize all trust transactions as belonging to either of the two accounts.

It is also important to carefully review the language of the dispositive clauses and the trustee's administrative powers because the settlor or testator is free to direct that certain kinds of receipts and disbursements should be characterized as income or capital. These clauses may exclude the statutory and common law rules that otherwise govern when a will or trust deed is silent. In particular, look for any definition or direction regarding capital and income. Does the document define what receipts or disbursements will be considered capital or income? Does the document direct that any particular disbursements will be paid out of one, the other or both accounts? If so, then the default rules below may not apply.

B. Receipts

The general rule

Generally speaking, the capital of a trust is made up of the assets of the trust, while the income of the trust is made of the fruit of those assets. For example, a capital share of a corporation is part of the capital of the trust, while a cash dividend made as a distribution of corporate profits from the same corporation is income.

The law tends to look at the form over the substance of the receipt when determining whether a transaction is income or capital although there are exceptions.

Particular receipts

a) Payments and benefits to shareholders of corporations

Payments by corporations to their shareholders are dividends. We tend to think of a dividend as income, but this is not necessarily the case. Whether a dividend is capital or income in the trustee's hands depends on the form of the dividend declared by the corporation, not the substance. This is called the "form rule".[2]

If the form of the dividend is a payment out by the corporation, whether in cash or in kind, as a distribution of corporate profits, then it is income. Counterintuitively, this includes capital dividends: i.e. capital dividends are income, not capital.[3]

However, if the dividend is in the form of a capitalization (i.e. a rolling back in of the profits in the company) then it is capital in the trustee's hands. This includes several different kinds of dividends or other shareholder benefits, including options to purchase shares, payments to redeem or retract shares, issue of new shares to shareholders (i.e. stock dividends), increases to share capital, purchase of shares for cancellation, and others.

The form rule is sometimes disregarded if it causes a particularly unjust result. This can be the case where a corporation is wound up and its entire assets are distributed by way of an ordinary dividend and certain other conditions are met. That would result in what had been the capital value of the shares being received by the trustee solely for the benefit of the income beneficiaries.[4]

Because it is the form of the corporate distribution that matters, not the substance, the task of the trustee to allocate these transactions is relatively straightforward. However, the trustee must still investigate the directors' resolutions or other corporate acts to determine the nature of the payment.

b) Business profits

2 *Hill v. Hill v. Permanent Trustee Co. of N.S.W. Ltd*. [1930] All E.R. Rep. 87.
3 Waters at 1082.
4 See *Re Waters*, [1956] SCR 889, *Re Welsh*, 1980 CanLII 1763 (ON SC), and *Smith Estate v. Smith Estate* (2001) 37 E.T.R (2d) 151.

The trustee may only continue the testator's business if there is a specific authorization in the will to do so. Otherwise, the business can only be continued for the time necessary to arrange an appropriate sale.

If the trustee is authorized to continue the business, then the business profits are income. The typical approach to determining the amount of the profits is to use the same principles as normally apply in business financial accounting.[5]

If the trustee is not authorized to continue the business, then its profits may be apportioned between the capital and the income, since they are part of the total value being extracted by a plan to wind up the business and not truly part of the income.

c) Rent

Rent is typically income. However, the income may be reduced by the amount of a depreciation reserve from which repairs may be made. Unusual receipts of rent, including penalties, accelerated payments, bonuses, forfeiture of deposits, etc., may be treated differently and need more careful consideration.

d) Income on funds or property that are set aside to pay debts

If the estate must satisfy a debt of the deceased at some future time and sets aside funds to do so, any returns earned on those set aside funds is income. Similarly, if the trustee is contractually obligated to deliver property, like rent-earning land, to a creditor in the future, the rent will be attributed to income, not capital.

e) Debts owed to the deceased and sale proceeds of trust or estate property

In general, debts and sale proceeds are capital amounts. However, if there is a delay in realizing the debts or assets, or if the debts or assets do not mature until sometime in the future, then it may be necessary to apportion the proceeds in part to income as well as capital. This is discussed in more detail below in the section on the trustee's duty to maintain an even hand.

C. Disbursements

The general rule

There are two general rules that apply to characterizing disbursements.

First, one-time disbursements, or disbursements for major occasional expenditures, are made from capital, while recurring, ongoing, day-to-day, and/or continuous disbursements are made from income.

Second, disbursements that protect the capital or the trust as a whole are paid out of capital,

5 See Widdifield at 7.2.4.

while disbursements to collect, maintain, or are related only to income are paid out of income. If disbursements serve both the income and the capital beneficiaries, usually they will be paid out of capital because both the income and capital beneficiaries will shoulder that burden (the income beneficiary will earn less income by the erosion of capital), but in appropriate circumstances they may be also apportioned between capital and income.

Particular disbursements

a) Administration expenses

Administration expenses are generally payable out of capital unless a contrary intention appears in the will. These include funeral expenses, preparation of the terminal income tax return, publishing for creditors, estate administration taxes, legal fees, and other trustee expenses in administering the estate or trust.

However, if the expense relates to the income account alone, then the expense will be paid out of income. For example, the expense of an agent to collect rent (i.e. income) from estate land would be paid out of income.

b) Debts owed by the deceased

If the deceased owed a debt, then the balance of the debt will be paid out of capital. If the debts are paid out of capital sometime after death and the capital generates a return in the meantime, that return is characterized as income.[6]

c) Investment advisor fees

Investment advisor fees are paid out of capital,[7] although there is a question about whether these fees are for the benefit of both the income and capital beneficiaries, they should both contribute.

d) Income taxes

Income taxes owing at the date of death or as a result of death as reported in the terminal income tax return are paid out of capital.

Income taxes for income earned for the period after death are borne entirely by income. However, where the income that is a taxable capital gain, the income tax on that portion is paid out of capital.

e) Carrying costs of land

Income: Property taxes, utilities, ordinary maintenance and upkeep, and other ongoing expenses

6 *Trustee Act*, R.S.O. 1990, c T.23, s. 49.

7 Widdifield at 7.1.3 and see *In the Estate of Alaine Jackson Young*, 2012 ONSC 343 (CanLII), where investment adviser fees were paid out of capital, although no party argued otherwise and the capital and income beneficiary was the same.

are payable out of income. Mortgage interest is also payable out of income.[8]

Capital: Major repairs and renovations are payable out of capital. Mortgage principal is payable out of capital.

Insurance may be treated differently than other expenses. Insurance on income-producing properties (e.g. rental units) should be paid out of income. Income on non-income-producing properties (e.g. the life tenant's home) should be paid out of capital or apportioned between the two.[9]

f) Investment losses

Most investment losses are easily characterized. If an investment loses value and is sold, a capital loss will accrue, of course, to capital.

However, if the loss consists of a loss to both income and capital, then it may be shared between the two accounts. For example, where an estate holds a mortgage that goes into default and the trustee forecloses and sells the property for an amount less than the principal of the mortgage, it may be necessary to apportion the sale proceeds between income and capital. This principle might apply to other similar investment losses as well.[10]

g) Business losses

A trustee may not carry on a business, except to sell it promptly, without express authority from the will.

If there is authority in the will to carry on the business, then its profits are credited to and its losses entirely borne by the income.

If there is no authority to continue the business, and it is only to be wound up, then the losses must be apportioned between the capital and income beneficiaries.[11]

h) Depreciation and capital cost allowance

If the trustee is authorized to carry on a business or maintain a depreciable asset, then the trustee may charge against income an amount for depreciation or a reserve for depreciation. The discretion belongs to the trustee to decide what is adequate.[12]

Although they are related concepts, a depreciation reserve is not the same as a claim for capital cost allowance and has a different treatment in estate accounting. Under the *Income Tax Act*, a taxpayer may claim capital cost allowance, which is a tax deduction for the notional amount that a depreciable asset loses value. By claiming capital cost allowance, the estate income taxes are

8 Widdifield at 7.1.4, Waters at 1090.
9 See Widdifield 4.10.2 and Waters at 1105.
10 See Waters at 1102.
11 Waters 1103.
12 *Re Zive Estate,* 1976 CarswellNS 271 (NS TD), reversed 1977 CarswellNS 392 (NS TD).

reduced. This therefore leaves more of the income to be paid out by the trustee. However, capital cost allowance should not be used to increase the income paid to the income beneficiary. It properly benefits the capital, as it is meant to offset the capital's loss of value.

In summary, a depreciation reserve may be kept from income to cover any amounts that should properly be paid out of income to maintain a depreciable property or business. However, if capital cost allowance is claimed to reduce income taxes with respect to a depreciable asset, then the value of the tax savings are credited to capital, not income.[13]

i) Preparation of trustee accounts in passing form

A trustee is expected to maintain accounts and if it is necessary to incur an expense to have the accounts put into court passing form, it is generally considered to be payable out of the trustee's compensation and not out of the assets of the trust. However, this rule is not always adhered to, and it may be reasonable in complicated estates and trusts to retain the services of an accountant whose fees would be payable out of the assets of the trust. If so, then it is suggested that the cost be apportioned fairly between the capital and income in the same proportion as trustee compensation.

j) Trustee compensation

There is debate over the payment of compensation. It is commonly accepted that compensation is payable 2/3 out of capital and 1/3 out of income, unless otherwise specified in the will or trust instrument. However, it has also been said that the compensation is a long-term expense to protect the trust as a whole and should therefore be paid out of capital.[14] The duty to maintain an even hand likely applies to this decision. That is, there is not necessarily a hard and fast rule, and the trustees may have to exercise their discretion to decide how to fairly split the compensation between the income and the capital of the estate.[15]

k) Legacies

Legacies are paid out of capital unless a contrary intention appears in the will.

The payment of annuities generally depends on the interpretation of the will, but, if the will is silent, they usually are charged first against income with any excess charged against capital.[16]

THE EVEN HAND RULE

D. The general rule

13 However, for some differing views, see Widdifield at 7.1.11.
14 Waters at 1090; see footnote 421.
15 Waters 1091.
16 Waters at 1099.

A discussion about allocating transactions to income and capital is incomplete without a discussion of the even hand rule. While the discussion above dealt with defining what is income and what is capital, the even hand rule is concerned with the trustee making choices to ensure that there will be an appropriate balance between income and capital.

In simple terms, the main obligation imposed on trustees by the even hand rule is that they must treat beneficiaries with successive interests fairly and impartially.[17] The trustee must not prefer the interest of the life tenants (income beneficiaries) to the interest of the remaindermen (capital beneficiaries), or vice versa.

The even hand rule is a default rule. It only applies if the will or trust deed do not explicitly or impliedly authorize or direct the trustee to do something that favours the interests of one beneficiary over another.[18] For example, the settlor or testator may oust the default rule by directing the trustee to retain or purchase assets that favour the income beneficiary over the capital beneficiary, or vice versa. As another example, the will or trust could contain an explicit discretion to treat beneficiaries differently, for example by including a power of encroachment on capital, a general power of appointment, etc. Therefore, the first step in the administration is to carefully analyze the terms of the trust deed or will so that the trustee understands how the interests of the capital and income beneficiaries will be balanced, and will be able to do so consistently throughout the administration.

E. Practical aspects

The even hand rule has a practical impact in two areas:

1 – Exercise of the power to invest

Capital and income beneficiaries are interested in different things. The income beneficiary is looking for the best possible yield. By contrast, the capital beneficiary is looking for the growth of the fund and its safety. These two interests are in tension. High yield is earned by accepting high risk or low growth potential or a combination of both. These are the opposite investment strategies than those which would benefit the capital beneficiaries, who would prefer to encourage preservation or growth of the capital and are willing to sacrifice yield to do so. Unless the will or trust instrument authorizes the trustee not to act with an even hand, the trustee must find an appropriate balance in the exercise of the power to invest.

How does a trustee strike that balance? By exercising discretion in contemplation of relevant factors and the statutory investment rules in Section 27.1 of the *Trustee Act*. The applicable factors might include the testator's relationship with the income and capital beneficiaries, the concept of fairness, the needs of the life tenant, etc. The court has noted that there is no way to weigh the interests of the beneficiaries directly as if using scales since what is being balanced are unknown quantities that involve predictions about the future.[19]

17 *Re Smith*, 1971 CanLII 577 (ON CA).
18 *Josephs v. Josephs Estate*, 1992 CanLII 7669 (ON SC) per Rosenberg J., dissenting, reversed by 1993 CanLII 8532 (ON CA) adopting Rosenberg J.'s reasons.
19 Waters at 1027-8.

The law does provide some specific guidance about the even-handed exercise of the power to invest where there are assets that are inconsistent with maintaining an even hand between the capital and income beneficiaries.[20] These include assets that are unproductive (e.g. land that cannot be rented), of a wasting nature (e.g. annuities that eat up their capital or vehicles that depreciate quickly), are hazardous (e.g. shares of a private corporation), or represent future assets (amounts owing that will not mature until some known future date like a debt, or unknown future date like a life insurance policy payable on another person's death). In general, if there is no specific intention by the testator about whether these kind of assets should be sold and converted or kept in their specific form, the trustee's duty is to sell and convert the assets into cash and invest the proceeds more appropriately. Note that the rule does not apply the same way to an inter vivos trust. In an inter vivos trust, the rule is that the testator meant that the precise assets put into trust were to be enjoyed by the beneficiaries, so the trustees are not required to sell and convert them.

This rule about selling and converting assets is known as the rule in *Howe v. Lord Dartmouth* (the first branch of the rule; the second branch will be considered below). It is worth mentioning that the rule is often excluded by the terms of the will, often by giving the trustee a power to postpone sale and conversion (a weak exclusion of the rule) or to retain the asset (a stronger exclusion of the rule).

2 – Apportionment of receipts and disbursements

Delayed timing of receipts and disbursements throws an additional complication into appropriately balancing income and capital.

If the sale of an estate asset – i.e. a receipt – is delayed and that asset is unproductive in the meantime, it would deprive the income beneficiary of expected returns until the proceeds are realized and properly invested. If instead the asset is overproductive, it may represent a depletion of the capital or a loss of opportunity for its growth.

Similarly, if a debt of the estate is payable in the future, is it fair for the income beneficiary to take the income on the amount that will be necessary to pay the debt? Or should that income be used to help pay the debt?

For both future receipts and future disbursements, the amounts might not be known at the present time, complicating things further.

Delayed receipts and disbursements therefore cause unfairness or an imbalance between the income and capital beneficiaries. The problems for delayed receipts is the flip side of the problem for delayed disbursements, but the rules for dealing with them are somewhat different.

With respect to receipts, the trustee may be obligated to apportion the sale proceeds between the income and capital beneficiaries to re-balance the benefits to them properly. This is the second branch of the rule in *Howe v. Lord Dartmouth*, the first branch which was discussed above. There have been formulas developed in various cases to properly apportion, but it is not clear whether and

20 *Howe v. Lord Dartmouth* (1802), 7 Ves. Jun. 137, 32 E.R. 56 (Eng. Ch.). Also see Waters at 1030.

how they are applied today. Many wills and trusts are drafted to explicitly exclude any obligation to apportion, although the effectiveness of these provisions is also unclear.

With respect to disbursements, historically there was a rule regarding the apportionment of the burden of the debt between capital and income. However, this has been significantly abolished by legislation. Under Section 49 of the *Trustee Act*, all debts of the deceased that are owing or paid later than the date of death are paid out of capital without any contribution from income unless the capital is not sufficient to pay the debts.

These rules are not discussed by the courts very often. It is not clear whether, despite these rules, the trustee is still under an independent duty to re-balance income and capital where a delayed receipt or disbursement seems to undermine what the testator intended.[21]

Apportionment can be complicated from both legal and accounting perspectives. If it seems that the capital or income beneficiaries will be disadvantaged at the expense of the others by a delayed/future receipt or disbursement, then more detailed consideration is warranted.

THE TRUSTEE'S RECORD-KEEPING OBLIGATION

Practically speaking, a trustee who does not allocate each transaction to either the capital or income account and record that exercise of discretion at the time of the transaction will end up deferring it to the person who prepares the accounts. The preparer may have little familiarity with the will or trust documents, the beneficiaries, the history of the administration, and the assets, liabilities and business dealings of the trust. This might not cause a problem if there is no distinction between the beneficiaries of capital versus income. However, it will have a significant impact when there are different capital and income beneficiaries. We suggest that it may in some cases even be a breach of fiduciary duty to defer allocation decisions until the time to prepare accounts. Accordingly, it is our recommendation that the trustee record every estate and trust transaction as being either income or capital at the time that the transaction is made or at least on a periodic (e.g. monthly) review. These decisions can be revisited later, especially with input from the person preparing the accounts, but it will ensure that the accounts are prepared more or less properly in the first place and the trustee will not be accused of neglecting this obligation.

21 See Waters at 1026.

CHAPTER 4

TIPS AND TRAPS WHEN PREPARING ESTATE / GUARDIANSHIP ACCOUNTS

TIPS AND TRAPS WHEN PREPARING ESTATE / GUARDIANSHIP ACCOUNTS

by Birute Lyons

Some common issues to be aware of to avoid triggering objections:

1. Lack of detail in accounting presented for passing as required by the *Rules of Civil Procedure.* Vague descriptions provide little information to a reviewer or beneficiary to understand a transaction and may cause suspicion where full disclosure and transparency is not evident. In a matter before Justice Brown he reflected on the form of accounts brought by a guardian for property when a question arose as to whether a respondent "can properly understand the conduct for which the fiduciary seeks court approval".[1] Justice Brown could not hear the matter due to lack of detail in the accounts.

***Tip**: Arrange for posting of transactions from information in source documents rather than bank/ investment statements alone so detail can be included*.

2. Provisions in Will or Management Plan not complied with. It is key for preparers of accounts to be familiar with the governing documents prior to preparing the accounts to ensure that the recording of income and capital transactions are in accordance with the terms in a Will or Management Plan.

***Tip**: Regular monitoring of expenses for a person under disability to keep on budget with the Management Plan is suggested. It is important to be aware whether the approval of the Public Guardian and Trustee, as to any increases in expenses, is required before a passing.*

3. Accuracy – Preparers ought to verify the accuracy of their math and the following:

- the number of shares or units of securities remaining at the end of an accounting period reconciled with those actually purchased and subsequently sold throughout the accounting period
- stock splits or other changes in holdings are recorded as book entries
- real estate transactions are recorded setting out the net value of sale rather than the gross value
- that non-compensable transactions are properly deducted from Capital/Revenue Receipt/ Disbursement totals prior to calculating compensation
- care and management fees are not included for any immediately distributable estates
- where an estate/shareholder receives a corporate distribution, that the proper allocation to either Capital or Revenue is made based on how the corporation has chosen to distribute

1 *Estate of Divina Damm*, 2010 CarswellOnt 6938, at par. 5

its profits. The form of the receipt determines the allocation

- that a statement of liabilities at the end of an accounting period is included
- that a statement of compensation showing the calculation of compensation is included
- that any remaining original assets and/or trustee investments at the end of an accounting period are complete and correct
- having source documents available and organized i.e. vouchers, copies of cancelled cheques and bank statements etc. to support each entry in the accounts

***Tip**: Having a preparer verify the above prior to passing the accounts to a reviewer can be cost effective and time saving.*

4. Compensation allowed on a passing is an issue in all estates/guardianships and is determined by considering the five factors [2], in the absence of a Compensation Agreement or under the *SDA*[3]. In simple estates the court is willing to reduce compensation e.g. where a deceased held a condominium and several bank accounts in a straightforward and uncomplicated estate, the court reduced compensation.[4] Where there is a Compensation Agreement and a co-trustee, the co-trustee's compensation is not commonly fixed by the Compensation Agreement and the Agreement may state that any co-trustee's compensation is in addition to any compensation fixed for a Corporate trustee.

***Tip:** If a testator/trix at the time of preparing their Will could fix an amount or percentage to which a co-trustee would be entitled and put that in writing it would be ideal, however, where the Will is silent it may be useful to set the expectations in place with the co-trustee at the outset of the administration and possibly confirm in writing the arrangement rather than having it become an issue on a passing of accounts.*

2 *Re Toronto General Trusts and Central Ontario Railway* (1905), 6 O.W.N. 350 (H.C.)
3 Substitute Decisions Act, S.O. 1992, c 30
4 *Pachaluck Estate v. DiFebo, 2009 CarswellOnt 2278*

CHAPTER 5

COURT PASSINGS: PERSONS UNDER DISABILITY

PASSING OF ACCOUNTS OF PERSONS UNDER DISABILITY

FIDUCIARY ACCOUNTS: PREPARING, PASSING AND REVIEWING
Passing of Accounts of Persons under Disability

CHAPTER CONTENTS

1. GENERAL

A guardian of property is a fiduciary pursuant to Sec. 32 of the *Substitute Decisions Act, 1992*[1] "whose powers and duties shall be exercised and performed diligently, with honesty and integrity and in good faith, for the incapable person's benefit". As such, a guardian of property shall deal with an incapable person's property and "in accordance with the regulations, keep accounts of all **transactions** involving the property" (ss. 32(6)).

A guardian of property is required to "act in accordance with the management plan established for the property" (ss. 32(10)), with the exception of the Public Guardian and Trustee, who is not required to file a management plan and acts in accordance with the policies of the Public Guardian and Trustee. If there is a management plan, then pursuant to subsection 32(11) of the *Substitute Decisions Act, 1992*, the plan "may be amended from time to time with the Public Guardian and Trustee's approval". The language of this subsection is not entirely clear and it would appear that no court Order is necessary as long as the Public Guardian and Trustee approved the amendment. Ontario Regulation 100/96, s. 1, applies 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. Ontario Regulation 100/96, subsection 2(1) sets out the specific components and the form of accounts and records to be maintained by a guardian of property and an attorney under a continuing power of attorney, as follows:

> **2.** (1) The accounts maintained by an attorney under a continuing power of attorney and a guardian of property shall include,
>
> (a) a list of all the incapable person's assets as of the date of the first transaction by the attorney or guardian on the incapable person's behalf, including real property, money, securities, investments, motor vehicles and other personal property;
>
> (b) an ongoing list of assets acquired and disposed of on behalf of the incapable person, including the date of and reason for the acquisition or disposition and from or to whom the asset is acquired or disposed;
>
> (c) an ongoing list of all money received on behalf of the incapable person, including the amount, date, from whom it was received, the reason for the payment and the particulars of the account into which it was deposited;
>
> (d) an ongoing list of all money paid out on behalf of the incapable person, including the amount, date, purpose of the payment and to whom it was paid;
>
> (e) an ongoing list of all investments made on behalf of the incapable person, including the amount, date, interest rate and type of investment purchased or redeemed;
>
> (f) a list of all the incapable person's liabilities as of the date of the first transaction by the attorney or guardian on the incapable person's behalf;
>
> (g) an ongoing list of liabilities incurred and discharged on behalf of the incapable person, including the date, nature of and reason for the liability being incurred or discharged;
>
> (h) an ongoing list of all compensation taken by the attorney or guardian, if any, including the amount, date and method of calculation;

(i) a list of the assets, and value of each, used to calculate the attorney's or guardian's care and management fee, if any. O. Reg. 100/96, s. 2 (1)."[1]

A guardian of property continues to maintain such accounts until the guardian of property ceases to have authority to act and the guardianship is terminated by the court on a passing of accounts under Sec. 42 of the *Substitute Decisions Act, 1992.*

In accordance with Sec. 42 of the *Substitute Decisions Act, 1992,* a guardian of property has a statutory duty to account and may choose to voluntarily pass accounts or may be required to pass accounts by Order of the court. Subsections 42 (2), (3) and (4) of the *Substitute Decisions Act, 1992* set out who is entitled to apply to pass the accounts, whether it is a guardian of property, an attorney or other person(s) and subsections 49(3) and (4) of the *Estates Act*[2] set out the powers of a judge on the passing of any accounts.

Subsection 32(12) of the *Substitute Decisions Act, 1992,* states that "the *Trustee Act* does not apply to the exercise of a guardian's powers or the performance of guardians' duties". It would however appear that the procedural requirements remain the same despite subsection 32(12) of the *Substitute Decisions Act*, as subsection 23(1) of the *Trustee Act* provides that the proceedings and practice for a passing of accounts for a trustee are the same as for an estate trustee.

2. PROCEDURES TO PASS ACCOUNTS

The procedures to deal with the obligation to prepare accounts and the requirement to keep and maintain accurate records in a specific format, when a guardian of property or an attorney brings in and passes accounts, are set out in Rules 74.16 to 74.18 of the Rules of Civil Procedure.

As indicated by Rule 74.16 of the *Rules of Civil Procedure*, Rules 74.16 to 74.18 apply to accounts of estate trustees and, with necessary modifications, to accounts of trustees other than estate trustees, persons acting under a power of attorney, guardians of the property of mentally incapable persons, guardians of property of a minor and persons having similar duties who are directed by the court to prepare accounts relating to their management of assets or money.

The following reproduces the relevant text from these Rules, and provides brief annotations with more detail on procedures for compliance. The Rules and annotations reflect the changes coming into effect on January 1, 2016.

FORM OF ACCOUNTS

117 (1) Estate trustees shall keep accurate records of the assets and transactions in the estate and accounts filed with the court shall include,

(a) on a first passing of accounts, a statement of the assets at the date of death, cross-referenced to entries in the accounts that show the disposition or partial disposition of the assets;

(b) on any subsequent passing of accounts, a statement of the assets on the date the accounts for the period were opened, cross-referenced to entries in the accounts that show the disposition or partial disposition of the assets, and a statement of the investments, if any, on the date the accounts for the period were opened;

1 *Substitute Decisions Act,* 1992 – Ontario Regulation 100/96.
2 R.S.O. 1990, c. E.21.

(c) an account of all money received, but excluding investment transactions recorded under clause (e);

(d) an account of all money disbursed, including payments for trustee's compensation and payments made under a court order, but excluding investment transactions recorded under clause (e);

(e) where the estate trustee has made investments, an account setting out,

(i) all money paid out to purchase investments,

(ii) all money received by way of repayments or realization on the investments in whole or in part, and

(iii) the balance of all the investments in the estate at the closing date of the accounts;

(f) a statement of all the assets in the estate that are unrealized at the closing date of the accounts;

(g) a statement of all money and investments in the estate at the closing date of the accounts;

(h) a statement of all the liabilities of the estate, contingent or otherwise, at the closing date of the accounts;

(i) a statement of the compensation claimed by the estate trustee and, where the statement of compensation includes a management fee based on the value of the assets of the estate, a statement setting out the method of determining the value of the assets; and

(j) such other statements and information as the court requires.

(2) The accounts required by clauses (1)(c), (d) and (e) shall show the balance forward for each account.

(3) Where a will or trust deals separately with the capital and income, the accounts shall be divided to show separately receipts and disbursements in respect of capital and income.[7]

Material to be Filed

74.18 (1) On the application of an estate trustee to pass accounts, the estate trustee shall file,

(a) the estate accounts for the relevant period verified by an affidavit of the estate trustee (Form 74.43);

(b) a copy of the certificate of appointment of the applicant as estate trustee;

(c) a copy of the latest judgment, if any, of the court relating to the passing of accounts.

Notice of Application

(2) On receiving the material referred to in sub-rule (1), the court shall issue a notice of the application to pass accounts (Form 74.44).

In addition to following the Rules, the particular requirements of the local court office through which the accounts are being passed (including any Practice Directions) should be checked in advance as minor procedural steps (e.g. procedure for choosing the hearing date) can vary among the court offices.

1) Documents To Be Filed with the Court

Pursuant to the above Rules the following documents, with necessary modifications, must be filed at the court in order to have it issue a notice of application to pass accounts (the precedent documents provided as Appendices "A" and "B" have been modified for passing of guardianship accounts:

i) Affidavit Verifying Guardianship Accounts

This is prepared on Form 74.43 under the *Rules*. The accounts themselves are attached as Exhibit "A" and the guardian of property swears or affirms that the accounts are complete and correct and that all persons having a financial interest in the property of the person under disability have been named in the notice of application to pass accounts. If there is more than one guardian (or estate trustee in the case of an estate) they must each swear an affidavit unless sworn or affirmed jointly at the same time.

APPENDIX "A" – Affidavit Verifying Guardianship Accounts (Form 74.43).

ii) The Accounts

As mentioned above, the accounts are attached as Exhibit "A" to the Affidavit Verifying Guardianship Accounts (Form 74.43). The evident intention is that the accounts must be consistent with the form set out in Rule 74.17 of the Rules and shall contain a full and detailed list of all the incapable person's assets as of the date of the first transaction by the guardian of property, cross-referenced to entries in the accounts that show the acquisition or disposition of the assets, an account of all money received and disbursed on behalf of the incapable person (separated as to capital and revenue), a statement of property remaining, an investment account (investment items recorded are not included when calculating compensation only used to determine a care and management fee), a statement of compensation claimed/taken by/paid to the guardian of property, if any, including the method of calculating the compensation, and a statement of liabilities contingent or otherwise at the date of the accounts.

In the case of a subsequent passing, the current accounts must show the balance carried forward from capital and revenue from the previous accounts, there should be a statement of the assets on hand at the date the accounts for the period were opened, a statement of the investments on that date and a statement of liabilities. If there was a previous accounting, the original assets and trustee investments, if any, listed on Schedule A of an earlier Judgment should be the same as the starting assets of the current accounts.

The guardian of property must be familiar with the transactions in the accounts and be in a position to provide an opportunity for the accounts to be reviewed, if required, and to satisfactorily respond to any reasonable questions raised by a person with a financial interest in the assets of a person under disability.

Although not forming part of the accounts submitted to the court, all receipts, cancelled cheques (or electronic copies of same provided by the bank) and vouchers to support each entry, often referred to as source documents, must be kept and be available to the judge if the accounts are

passed at a hearing and may also be viewed by any opposing parties on a passing.

Cancelled cheques (or electronic copies of same as are now provided by banks) retained and filed with receipted accounts, for capital and revenue disbursement items, in a chronological file will simplify voucher assembly.

The court may also require such other statements and information, for example, appraisals of assets or where anything that has to be calculated that is not readily obvious, for example, a statement of income paid out.

iii) Notice of Application to Pass Accounts – Objection

Incorporated in the Notice of Application is a notice to any person having a financial interest in the property of the person under disability that such a person can object to the accounts (Form 74.45).

Appendix "B" – Notice of Application to Pass Accounts (Form 74.44)

Appendix "C" – Notice of Objection to Accounts (Form 74.45)

iv) Copy of the guardian's authority and prior judgment

A guardian of property or an attorney under a continuing power of attorney shall also keep, together with the accounts, a copy of the continuing power of attorney, certificate of statutory guardianship or court Order constituting the authority of the attorney or guardian, a copy of the management plan, if any, and a copy of any court Orders relating to the attorney's or guardian's authority or to the management of the incapable person's property (O. Reg. 100/96. s. 2 (2)).

A copy of any previous Judgment of the court relating to the passing of accounts is filed in order to prove the starting point for the new accounts.

v) Application Record to Pass Accounts

In addition to the standardized court forms generally used, the print and paper requirements dealing with the legibility, text pitch size, paper quality and back sheet for other court documents is set out in Rules 4.01(1) to (3) and 4.02(3) of the Rules. The required documents to apply for a passing of accounts are compiled to form a "Record", consisting of a cover page entitled "Application Record to Pass Accounts", including the name, address, telephone and fax numbers and Law Society registration number of the lawyer acting including the law firm for the applicant and the names and addresses of all the persons being served. Tabs are usually inserted marking an index page, which lists the documents being filed, and the documents themselves backed with a light blue backing sheet all of which are then bound prior to filing and serving. The original Application Record to Pass Accounts is filed at the court offices. The applicant's solicitor's copy of the Application Record to Pass Accounts and the copies to be served are then marked up to be an identical true copy of the court version. Note that the Public Guardian and Trustee and the Children's Lawyer, are served with an Application Record to Pass Accounts containing all the documents filed with the court along with a copy of a draft of the judgment being sought. Other persons being served receive only a true copy of the notice of application and a copy of the draft judgment sought.

The Rules do not have a requirement of service of the accounts themselves on interested parties; however, the notice of application states that a copy of the accounts may be obtained from the applicant or the applicant's solicitor, or may be inspected at the court offices. In certain circumstances, ordinary courtesy suggests that a copy of the accounts be sent to save the interested

parties the extra effort of requesting them. As the applicant's aim is to pass the accounts without confrontation, the accounts could be served with the notice of application to pass accounts.

There are no court fees applicable on filing the Application Record to Pass Accounts where there is a court declaration that the individual whose accounts are being passed is incapable. However, where there is no court declaration as to the individual being incapable and the applicant is acting under a power of attorney to pass accounts the court fee is applicable, currently $322.00 payable to the 'Minister of Finance'.

2) Service of documents and notice requirements

Rule 74.18 (3) to (5) of the Rules clearly set out the service requirements, as follows:

> *Service*
>
> (3) The applicant shall serve the notice of application and a copy of a draft of the judgment sought on each person who has a contingent or vested interest in the estate by regular lettermail.
>
> (3.1) Where the Public Guardian and Trustee or the Children's Lawyer represents a person who has a contingent or vested interest in the estate, the Public Guardian and Trustee or the Children's Lawyer shall be served with the documents referred to in subrules (1) and (3).
>
> (3.2) Where a person other than the Public Guardian and Trustee acts as an attorney under a continuing power of attorney for property or as a guardian of property for a person under disability who has a contingent or vested interest in the estate, the attorney or guardian shall be served with the documents referred to in subrules (1) and (3).
>
> (4) Where the person is served in Ontario, the documents shall be served at least **60** days before the hearing date specified in the notice of application.
>
> (5) Where the person is served outside Ontario, the documents shall be served at least **75** days before the hearing date specified in the notice of application.
>
> *Person under Disability or Unknown*
>
> (6) If a person referred to in subrule (3) is under disability or is unknown, the court may appoint someone to represent the person on the passing of accounts if,
>
> (a) neither the Public Guardian and Trustee nor the Children's Lawyer is authorized under any Act to represent the person, and
>
> (b) there is no litigation guardian to act for the person on the passing of accounts.

Lengthy notice periods of **60 days before the hearing date specified in the notice of application if service is in Ontario** and at least **75 days for service outside of Ontario** are required to give the persons served time to prepare, serve, and file their objections, if any.

3) Between Service and Judgment

Objections and Requests for Further Notice

Rules 74.18(7) to (8.1) specify the options open to someone served with the notice of application and draft judgment. Such a recipient may file a notice of objection if they wish to object, or – as of January 1, 2016 – if they do not object but wish to continue to be served with notice of any further steps in the application, they may serve a new form called a "Request for Further Notice" (Form 74.45.1), included below:

> ***Notice of Objection to Accounts***
>
> 74.18 (7) A person who is served with documents under subrule (3) or (3.2) and who wishes to object to the accounts shall, at least **35** days before the hearing date specified in the notice of application, serve on the applicant, and file with proof of service, a notice of objection to accounts (Form 74.45).
>
> ***Request for Further Notice*** **[Please note new form effective January 1, 2016]**
>
> 74.18 (8) A person who is served with documents under subrule (3) or (3.2) and who does not object to the accounts but wishes to receive notice of any further step in the application, including a request for costs or a request for increased costs, shall, at least **35** days before the hearing date specified in the notice of application, serve on the applicant, and file with proof of service, a request for further notice in passing of accounts (Form 74.45.1). (O. Reg. 193/15, s. 12 (4).
>
> (8.1) Unless the court orders otherwise, a person who serves and files a request for further notice in passing of accounts is entitled to,
>
> (a) receive notice of any further step in the application;
>
> (b) receive any further document in the application;
>
> (c) file material relating to costs under subrule (8.6), (11) or (11.2); and
>
> (d) in the event of a hearing, be heard at the hearing, examine a witness and cross-examine on an affidavit, but with respect only to a request for increased costs under subrule (11).

Appendix "D" – Request for Further Notice in Passing of Accounts (Form 74.45.1)

Next Steps Before Hearing

Rules 74.18(8.2) to (14) specify next steps between service of the notice of application and draft judgment and the ultimate disposition.

These steps, and who is involved in them, differ depending on whether any notices of objection or requests for further notice have been filed.

The applicant should use this time between service and judgment to settle outstanding issues. Vouchers are made available for inspection and questions answered with as much co-operation as possible. If objections have been served, they can be withdrawn on Form 74.48 by the objector.

If a hearing appears to be necessary, the applicant's presentation should be diligently prepared. The file should be organized and well labelled with sub-folders for easy quick-reference. Vouchers should be numbered to correspond with the account entries. Bank statements, broker statements, appraisals, cancelled cheques or electronic copies of cancelled cheques, duplicate deposit slips, copies of tax returns including tax slips, and relevant correspondence should be organized separately and chronologically.

No Response

74.18 (8.2) Unless the court orders otherwise, a person who is served with documents under subrule (3) or (3.2) but does not serve and file either a notice of objection to accounts or a request for further notice in passing of accounts, is not entitled to,

(a) receive notice of any further step in the application;

(b) receive any further document in the application;

(c) file material on the application; or

(d) in the event of a hearing, be heard at the hearing, examine a witness or cross-examine on an affidavit.

Response to Application – Public Guardian and Trustee or Children's Lawyer

74.18 (8.3) If the Public Guardian and Trustee or the Children's Lawyer is served with documents under subrule (3.1), the Public Guardian and Trustee or the Children's Lawyer, as the case may be, shall, at least **30** days before the hearing date specified in the notice of application, serve on the applicant and file with proof of service,

(a) a notice of objection to accounts (Form 74.45)

(b) a request for further notice in passing of accounts (Form 74.45.1);

(c) a notice of no objection to accounts (Form 74.46); or

(d) a notice of non-participation in passing of accounts (Form 74.46.1).

Withdrawal of Objection

74.18 (8.4) A person who wishes to withdraw a notice of objection to accounts shall, at least **15** days before the hearing date of the application, serve on the applicant, and file with proof of service, a notice of withdrawal of objection (Form 74.48). O. Reg. 193/15, s. 12 (4).

When a Hearing is not Required

74.18 (8.5) An applicant may seek judgment on the passing of accounts without a hearing under subrule (9) if,

(a) no notices of objection to accounts are filed; or

(b) every notice of objection to accounts that was filed is withdrawn before the deadline set out in that subrule. (O. Reg. 193/15, s. 12 (4))

Request for Costs

74.18 (8.6) Subject to subrule (11), any person served with documents under subrule (3), (3.1) or (3.2) who wishes to seek costs shall, at least **10** days before the hearing date of the application, serve on the applicant a request for costs (Form 74.49) or 74.49.1) and file the request with proof of service. (O. Reg. 193/15, s. 12 (4).)

4. Requesting Judgment

i) Without A Hearing

Under Rule 74.18(9) the court can pass accounts without a hearing. The applicant must file at least **five clear days** before the hearing date of the application, a Record with an index listing the following:

(i) an affidavit of service of the documents served under subrule (3), (3.1) or (3.2),

(ii) the notices of no objection to accounts or notices of non-participation in passing of accounts of the Children's Lawyer and Public Guardian and Trustee, if served,

(iii) an affidavit (Form 74.47) of the applicant or applicant's lawyer stating that a copy of the accounts was provided to each person who was served with the notice of application and requested a copy, that the time for filing notices of objection to accounts has expired and that no notice of objection to accounts was received from any person served, or that, if a notice of objection was received, it was withdrawn as evidenced by a notice of withdrawal of objection (Form 74.48) attached to the affidavit,

(iv) requests (Form 74.49 or 74.49.1), if any, for costs of the persons served,

(iv.1) any requests for increased costs (Form 74.49.2 or 74.49.3), costs outlines (Form 57B) and responses to requests for increased costs received under subrule (11.2), and

(v) the certificate of a lawyer stating that all documents required by subclauses (i) to (iv.1) are included in the record; (O. Reg. 193/15, s. 12 (8))

A draft judgement sought in **duplicate** accompanies the Record. Note if the Children's Lawyer or Public Guardian and Trustee were served with a notice of application and did not serve a notice of non-participation in passing of accounts, a copy of the draft judgment approved by the Children's Lawyer or Public Guardian and Trustee must accompany the Record (Rule 74.18(9)(b)&(c))

Appendix "E" – Sample index for a Record for an Unopposed Judgement

Appendix "F" – Affidavit in Support of Unopposed Judgement on Passing of Accounts (Form 74.47)

Appendix "G" – Certificate of Completeness of Record OR

Appendix "H" – Certificate of Solicitor

(Note Appendices "G" and "H" are sample forms that have been used by estate law clerks in Toronto and accepted by the court but are not official forms)

Appendix "I" – Judgement on Passing of Accounts (unopposed)

ii) Costs

Costs in connection with the passing of accounts are readily obtainable for the lawyer who reviews the accounts and does not oppose the accounts and serves and files a request for costs as well as for the lawyer for the applicant. If two or more persons are represented by the same lawyer, the lawyer is only entitled to receive one person's costs. The unopposing lawyer is entitled to one-half the amount awarded to the applicant. If the Children's Lawyer or Public Guardian and Trustee makes no objection and serves and files a request for costs they are entitled to three-quarters of the amount awarded to the applicant. Harmonized Sales Tax is charged on the lawyer's accounts but not on those of the Children's Lawyer or Public Guardian and Trustee. Where the court grants judgement without a hearing, the costs awarded shall be assessed in accordance with Tariff C, except as provided under subrules (11) to (11.4).

Appendix "J" – Tariff C

Request for Increased Costs

Where the applicant or a person served seeks greater than the amount allowed in Tariff C, they shall serve a request for increased costs (Form 74.49.2 or 74.49.3) specifying the amount of costs being sought; and a costs outline (Form 57B) at least **15 days** before the hearing date of the application on everyone who has served and filed an objection even if they have withdrawn it; everyone who has served and filed a request for further notice and the PGT or Children's Lawyer as the case may be if they were served with documents and did not serve and file a notice of non-participation.

Objection or Consent to Request for Increased Costs

> 74.18 (11.2) Any objection or consent to a request for increased costs shall be made by returning the completed Form 74.49.2 or 74.49.3, as the case may be, to the person making the request so that he or she receives it at least **10 days** before the hearing date of the application. O. Reg. 193/15, s.12 (13).

Supplementary Record – Filed At Least Five Days Before

> 74.18 (11.3) Where a request for increased costs is served under subrule (11), the person making the request shall, at least **five days** before the hearing date of the application, file with the court a supplementary record containing, O. Reg. 193/15, s. 12 (14))
>
> (a) the documents served under that subrule, together with an affidavit of service of those documents; and

(b) an affidavit containing,

(i) a summary of the responses to the request for increased costs received under subrule (11.2), and a list of the persons who failed to respond, and

(ii) the factors that contributed to the increased costs. O. Reg. 55/12, s. 12 (5).

Note that a filing of a request for increased costs compels a passing of accounts with a hearing.

iii) Contested Passing of Accounts with a Hearing

A hearing is held on the date specified in the notice of application if, as mentioned above, a request for increased costs has been filed or the court declines to grant judgement without a hearing. Unless the court otherwise allows, no objections shall be raised other than those raised in properly served and filed objections. The lawyer attending the hearing should have a list of all who are expected to attend, and should arrive at the court early enough to meet them so as to be able to identify them to the judge when the hearing starts.

The specific powers of the court are set out in subsection 42(1),(7) and (8) of the Substitute Decisions Act, 1992 and subsection 49(2) and (3) of the Estates Act provides broad powers of enquiry and sanctions to the judge. Note also that a judge may grant relief sought or dismiss or adjourn the application in whole or in part with or without terms under the general application of Rule 38.10 of the Rules of Civil Procedure.

As of January 1, 2016 the Rules were amended to set out further information on the procedure of a contested passing of accounts hearing. Including that if one or more notices of objection to the accounts are filed and not withdrawn then the applicant must at least **10 days** before the hearing date of the application serve a consolidation of all the remaining notices of objection to accounts and a reply to notice of objection to accounts Form 74.49.4 (see Rule 74.18 (11.5)). These documents must be served on:

(a) every person who has served and filed a notice of objection to accounts and not withdrawn it;

(b) every person who has served and filed a request for further notice in passing of accounts; and

(c) the Public Guardian and Trustee or Children's Lawyer, as the case may be, if the Public Guardian and Trustee or the Children's Lawyer was served with documents under subrule (3.) and did not serve and file a notice of non-participation in passing of accounts. O. Reg. 193/15, s. 12 (15).

Then, pursuant to Rule 74.18 (11.7) at least **five days** before the hearing date the applicant must file with the court a **record** containing:

(a) the application to pass accounts;

(b) the documents referred to in subrule (11.5) (above);

(c) any responses to the applicant's reply to notice of objection to accounts by the persons on whom the reply was served;

(d) in the case of any notice of objection to accounts that is withdrawn after the documents referred to in subrule (11.5) were served and filed, a copy of the notice of withdrawal of objection (Form 74.48);

(e) the notices of non-participation in passing of accounts of the Public Guardian and Trustee and the Children's Lawyer, if served;

(f) any requests for further notice in passing of accounts (Form 74.45.1);

(g) any requests for costs (Form 74.49 or 74.49.1) of persons served under subrule (11.5);

(h) any requests for increased costs (Form 74.49.2 or 74.49.3), costs outlines (Form 57B) and responses to requests for increased costs received under subrule (11.2); and

(i) a draft order for directions or of the judgment sought, as the case may be. O. Reg. 193/15, s. 12 (15).

If the applicant and every person served agree to all of the terms of a draft order then the applicant must indicate that it is a "joint draft order" see Rule 74.18 (11.8). However if they fail to agree to all of the terms of the order the applicant must indicate that it is the applicant's draft order and any person who served and filed a notice of objection may file an alternative draft order at least three days before the hearing date of the application or, with leave of the court, at the hearing (Rule 74.18(11.9))

Trial May be Directed

Also as of January 1, 2016, the court may direct a trial regarding a passing of accounts application and provide direction regarding mediation, even where no mandatory mediation exists:

74.18 (13.1) On the hearing of the application, the court may order that the application or any issue proceed to trial and give such directions as are just, including directions,

(a) respecting the issues to be tried and each party's position on each issue;

(b) respecting the timing and scope of any applicable disclosure;

(c) respecting the witnesses each party intends to call, the issues to be addressed by each witness and the length of each witness' testimony; and

(d) respecting the procedure to be followed at the trial, including methods of adducing evidence. O. Reg. 193/15, s. 12 (17).

Directions regarding mediation

74.18 (13.2) In making an order under subrule (13.1), the court may, in addition to giving any direction under that subrule,

(a) give any direction that may be given under subrule 75.1.05 (4), in the case of a proceeding that is subject to Rule 75.1 (mandatory mediation); or

(b) in the case of a proceeding that is not subject to Rule 75.1, order that a mediation session be conducted in accordance with Rule 75.2, and, for the purpose, give any direction that may be given under subrule 75.1.05 (4). O. Reg. 193/15, s. 12 (17).

Appendix "K" – Judgment on passing of accounts (opposed) (modified where the person under disability is also a minor)

(iv) Preparing and Obtaining Judgment

The judgment is prepared on Form 74.50 if unopposed or Form 74.51 if opposed. If the hearing has been opposed, the applicant's lawyer will prepare the judgment and generally have it approved in draft by lawyers that appeared at the hearing. Two copies of the judgment are filed along with a copy of the approvals. If properly prepared, the judge signs the judgement, the Registrar enters it in the court records, and it is returned to the applicant's lawyers signed and stamped as entered.

3. PUBLIC GUARDIAN AND TRUSTEE AS LITIGATION GUARDIAN

The representation in court proceedings of a party under disability as defined in Rule 1.03(b) of the Rules as including a person incapable within the meaning of section 6 and 45 of the *Substitute Decisions Act, 1992* is governed by Rule 7 of the Rules.

Section 6 of the *Substitute Decisions Act, 1992* applies to incapacity to manage property where a person is not able to understand information relevant to making a decision in the management of his or her property, or does not appreciate the reasonably foreseeable consequences of a decision or lack of decision. Section 45 of the *Substitute Decisions Act, 1992* applies to incapacity for personal care.

Rule 7.01 states that unless the court orders or a statute provides otherwise, a proceeding shall be commenced, continued or defended on behalf of a party under disability by a litigation guardian. Where a mentally incapable person does not have a guardian with authority to act as litigation guardian but has an attorney under a power of attorney then that attorney shall act as litigation guardian (Rule 7.02(1.1)). Where a proceeding is commenced against an incapable person who has no guardian but who has an attorney with a power of attorney with authority to act as litigation guardian then the attorney must act as litigation guardian (Rule 7.03(2.1)).

Where there is no guardian or attorney under a power of attorney and where the judge believes that the person lacks the mental capacity to understand the proceeding and make decisions regarding the matter on their own behalf the court may appoint the Public Guardian and Trustee

to act as litigation guardian.

As litigation guardian, The Public Guardian and Trustee, has a responsibility to protect the person's interest in the litigation. The Public Guardian and Trustee would provide instructions to the person's lawyer and make decisions about any settlements on the person under disability's behalf. Where a settlement may be required for a breach of duty leading to liability for damages and a guardian of property has not been appointed, the Public Guardian and Trustee may wish to bring a separate application to have a guardian of property appointed before obtaining court approval of a settlement in the event the court orders payment of funds to a guardian of property. Where it appears to the court that a litigation guardian is not acting in the best interests of the party under disability, the court may substitute The Public Guardian and Trustee as litigation guardian (Rule 7.06(2)).[26]

4. COMPENSATION

Section 40 of the *Substitute Decisions Act, 1992* provides that an attorney for property may take an annual compensation from the property under control, in accordance with a prescribed fee scale[27] currently set at 3% on receipts and disbursements and three-fifths of 1% as a care and management fee, provided there is no express provision in a continuing power of attorney for compensation. If the compensation is predetermined in a continuing power of attorney then that arrangement would govern the compensation to be taken. Under the *Substitute Decisions Act, 1992,* a guardian for property or an attorney, uniquely have a statutory right to compensation. The compensation may be taken monthly, quarterly or annually (s. 40(2)) or if consent in writing is given by the Public Guardian and Trustee and by the incapable person's guardian of person or attorney under a power of attorney for personal care, if any, the guardian or attorney may take an amount of compensation greater than the prescribed fee scale (s. 40(3)(a)).

Where the Public Guardian and Trustee is the guardian or attorney and the court approves they may take an amount greater than the prescribed fee scale (s. 40(3)(b).

The standard of care that applies to a guardian of property or attorney depends on whether compensation is received or not. Subsection 32(8) of the *Substitute Decisions Act, 1992* states that "a guardian who receives compensation for managing the property shall exercise the degree of care, diligence and skill that a person in the business of managing the property of others is required to exercise". Similarly under ss. 32(9) the same applies to the Public Guardian and Trustee. Under ss. 32(7) a guardian of property who does not receive compensation is judged by a lower standard and is only required to "exercise a degree of care, diligence and skill that a person of ordinary prudence would exercise in the conduct of his or her own affairs".

In conclusion, guardians of property or attorneys have a serious responsibility to keep good, detailed and understandable accounts that reflect their diligence and transparency. The accounts are really a snapshot of their handling of a person under disability's property. In doing so, guardians of property or attorneys rarely have difficulties and do not find themselves in an unpleasant adversarial position. If the assets are administered over long periods of time and are of considerable volume, guardians of property or attorneys may wish to pass their accounts every few years. This relieves them of any liability to further account for transactions during the period of accounts that have been passed.

5. APPENDICES

APPENDIX “A” – Affidavit Verifying Guardianship Accounts (Form 74.43) (modified where the person under disability is also a minor)

APPENDIX “B” – Notice of Application to Pass Accounts (Form 74.44) (modified where the person under disability is also a minor)

APPENDIX “C” – Notice of Objection to Accounts (Form 74.45)

APPENDIX “D” – Request for Further Notice in Passing of Accounts (Form 74.45.1)

APPENDIX “E” - Sample Index for a Record for an Unopposed Judgment

APPENDIX “F” – Affidavit in Support of Unopposed Judgment on Passing of Accounts (Form 74.47)

APPENDIX “G” – Certificate of Completeness of Record

APPENDIX “H” – Certificate of Solicitor

(Note: Appendices “G” and “H” are sample forms that have been used by estate law clerks in Toronto and accepted by the court but are not official forms)

APPENDIX “I” – Judgment on Passing of Accounts (unopposed)

APPENDIX “J” – Tariff C

APPENDIX “K” – Judgment on Passing of Accounts (opposed) (modified where the person under disability is also a minor)

APPENDIX "A"

AFFIDAVIT VERIFYING ESTATE ACCOUNTS

(Form 74.43 under the Rules)

Court File No. 09-0011/14

ONTARIO
SUPERIOR COURT OF JUSTICE

IN THE MATTER OF THE GUARDIANSHIP OF THE PROPERTY OF (name of person under disability/ child)

AFFIDAVIT VERIFYING GUARDIANSHIP ACCOUNTS

I, ***(name of trust officer)***, of the City of Toronto, in the Province of Ontario MAKE OATH AND SAY/

AFFIRM:

1. I am a trust officer with the Honest Trust Company ("Honest Trust").
2. Honest Trust and (*name of mother*) were appointed as guardians of the property of (*namev of child*), a minor born on December 1, 2004, pursuant to the Judgment of Mr. Justice Fair dated August 16, 2013.
2. The accounts marked as Exhibit "A" to this affidavit are complete and correct.
3. The information contained in the notice of application to pass accounts with respect to the guardianship of the property of (*name of child*) is true.
4. All persons having a financial interest in the property of (*name of child*) are named as respondents in the notice of application to pass accounts.
5. For any party with a disability, a representative has been identified in the notice of application.

SWORN/AFFIRMED BEFORE me)
)
at the City of Toronto, in the Province)
)
of Ontario, this day)
)
of _____ 2016)

A Commissioner etc.

APPENDIX "B"

NOTICE OF APPLICATION TO PASS ACCOUNTS
(Form 74.44 under the Rules)

Court File No. 09-0011/14

ONTARIO
SUPERIOR COURT OF JUSTICE

IN THE MATTER OF THE GUARDIANSHIP OF THE PROPERTY OF *(name of person underdisability/child)*

NOTICE OF APPLICATION TO PASS ACCOUNTS

This application to pass accounts will be heard on day, the day of ,2016, at 10:00 a.m. at the court house at 330 University Avenue, 8th Floor, Toronto, Ontario, if any person having a financial interest in the guardianship of the property of *(name of child)* objects to the accounts or to the compensation claimed and doesn't withdraw the objection, or if a request for increased costs is served and filed.

Honest Trust and (*name of mother*) were appointed as guardians of the property of, *(name of child),* a minor born on December 1, 2004, pursuant to the Judgment of Mr. Justice Fair dated August 16, 2012.

The accounts are for the period from August 16, 2012 to August 14, 2014.

The compensation claimed by the Honest Trust payable out of the property of *(name of child)*, is *$ Cdn. and $ U.S.* (inclusive of H.S.T.).

If there is no hearing, the costs of the application claimed by Honest Trust under Tariff C are: *$* , plus disbursements and H.S.T. of *$* , for a total of *$*.

If there is no hearing, a person with a financial interest in the property of *(name of child)* who retains a lawyer to review the accounts and makes no objection to them (or makes an objection and later withdraws it) but serves on the guardians of the property of *(name of child)* and files with the court a request for costs (Form 74.49 under the Rules of Civil Procedure), will be allowed one-half of the costs allowed to the guardians of the property of (name of child).

However, where two or more persons are represented by the same lawyer, they are entitled to receive only one person's costs. If the Children's Lawyer or the Public Guardian and Trustee makes no objection to the accounts (or makes an objection and later withdraws it) but serves on the guardians of the property of *(name of child)* and files with the court a request for costs (Form 74.49.1), he or she will be allowed three-quarters of the costs allowed to the guardians of the property of *(name of child)*.

If the guardians of the property of *(name of child)* or any person with a financial interest in the property of *(name of child)* seeks costs of the application greater than the amount allowed in Tariff C, the guardians of the property of *(name of child)* or other person shall serve on every other party and file, a request for increased costs (Form 74.49.2 or 74.49.3 under the Rules of Civil Procedure) together with a Cost Outline in Form 57B, at least 20 days before the date fixed for the hearing.

Any person with a financial interest in the property of *(name of child)* who wishes to object to the accounts shall do so by serving upon the guardians of the property of *(name of child)*, or the lawyer for the guardians of the property of *(name of child)*, a notice of objection to accounts (Form 74.45 under the Rules of Civil Procedure, a copy of which is attached to this notice of application), and by filing a copy of the notice in the court office at least 30 days before the date fixed for the hearing.

Any person with a financial interest in the property of *(name of child)* who wishes to object to a request for increased costs shall do so by returning the completed form 74.49.2 or 74.49.3, as the case may be, to the person making the request so that he or she receives it at least 12 days before the date fixed for the hearing. The person making the request for increased costs shall, at least 10 days before the date fixed for the hearing file with the court a supplementary record described in subrule 74.1 (11.3) containing (i) the documents served under subrule 74.18(11.1) together with an affidavit of service of those documents (ii) an affidavit containing a summary of the responses to the request for increased costs and a list of persons who failed to respond and (iii) the factors that contributed to the increased costs.

At the hearing, the only issues upon which the court adjudicates are those raised in the notices of objection to accounts and requests for increased costs that have been filed, unless the court grants leave to a party to raise other issues.

If no notice of objection to accounts is served and filed, the estate trustee may, without a hearing, obtain a judgment passing the accounts and allowing the compensation and costs claimed.

On a request for increased costs, the court may, in consideration of the documents in the supplementary record, grant judgment without a hearing. If the court declines to grant a request for increased costs without a hearing, the hearing shall proceed on the date fixed.

NOTICE OF APPLICATION TO PASS ACCOUNTS
(Form 74.44 under the Rules)

Any person may contact the guardians of the property of *(name of child)* or the guardians of the property of *(name of child)*'s lawyer to find out whether there will be a hearing. A copy of the accounts may be obtained from the guardians of the property of *(name of child)* or the guardians of the property of *(name of child)*'s lawyer, or may be inspected in the court office during regular business hours.

DATE: , 2016. _____

Registrar

ARGUE &PHIBBS

Barristers and Solicitors
1 Chambers Circle,
Suite100 Toronto, Ontario
M0M 1S8
Don T. Argue (LSUC #A007)
Tel: (416) 363-1234 Fax: (416) 367-4321
Lawyers for Honest Trust

TO: (*Father of child*)

1 Maple Road
Toronto, Ontaio
M8B 3R8

AND TO: The Children's Lawyer

393 UniversityAvenue 14th Floor
Toronto, Ontario M5G 1W9
Tel: (416)314-8000
Fax: (416)314-8050

on behalf of the minor, *(name of child)*

APPENDIX "C"

NOTICE OF OBJECTION TO ACCOUNTS (ATTACH TO FORM 74.44)

(Form 74.45 under the Rules)

Court File No. 09-0011/14

ONTARIO
SUPERIOR COURT OF JUSTICE

IN THE MATTER OF THE GUARDIANSHIP OF THE PROPERTY OF *(name of person under disability/child).*

NOTICE OF OBJECTION TO ACCOUNTS

1. I,

object to the amount of compensation claimed by the guardians of property of *(name of child)* on the following grounds:

(If applicable, set out each objection in separate consecutively numbered paragraphs. Attach a separate sheet if necessary.)

(a)

2. I,

object to the accounts of the guardians of property of *(name of child)* on the following grounds:

(If applicable, set out each objection in separate consecutively numbered paragraphs. Attach a separate sheet if necessary.)

(a)

DATE:

(Name, address, telephone and fax numbers of objecting person or lawyer for objecting person)

TO: (*Name and address of guardians of property of (name of child)*) *or lawyer for guardians of property of (name of child)).*

APPENDIX "D"

FORM 74.45.1

Courts of Justice Act

REQUEST FOR FURTHER NOTICE IN PASSING OF ACCOUNTS

ONTARIO

SUPERIOR COURT OF JUSTICE

IN THE ESTATE OF *(insert name)*, deceased.

REQUEST FOR FURTHER NOTICE IN PASSING OF ACCOUNTS

I *(insert name)* have been served with a notice of application to pass accounts. By serving this request for further notice, I acknowledge that:

I do not object to the accounts but wish to receive notice of any further step in the application, including a request for costs or a request for increased costs, and

I shall, at least 35 days before the hearing date specified in the notice of application, serve on the applicant, and file with proof of service, this request for further notice.

I further acknowledge that, unless the court orders otherwise, I am entitled to,

(a) receive notice of any further step in the application to pass accounts;

(b) receive any further document in the application;

(c) file material relating to a request for increased costs on the application at least 10 days before the hearing date of the application; and

(d) in the event of a hearing, be heard at the hearing, examine a witness and cross-examine on an affidavit, but with respect only to a request for increased costs.

DATE

SIGNATURE

(Name, address and telephone number of person requesting further notice)

RCP-E 74.45.1 (February 1, 2015)

APPENDIX "E"

ONTARIO
SUPERIOR COURT OF JUSTICE

IN THE MATTER OF THE GUARDIANSHIP OF THE PROPERTY OF *(name of person under disability/child)*

RECORD FOR AN UNOPPOSED JUDGMENT ON PASSING OF ACCOUNTS

INDEX

ARGUE & PHIBBS

1 Chambers Circle,
Suite 100 Toronto, Ontario
M0M 1S8

Don T. Argue (LSUC No.)
Tel: (416) 363-1234
Fax: (416) 367-4321

Lawyers for the Applicant

APPENDIX "F"

AFFIDAVIT (UNOPPOSED PASSING OF ACCOUNTS)
(Form 74.47 under the Rules)

Court File No. *

ONTARIO
SUPERIOR COURT OF JUSTICE

IN THE MATTER OF THE GUARDIANSHIP OF THE PROPERTY OF *(name of person under disability or child)*

AFFIDAVIT IN SUPPORT OF UNOPPOSED JUDGMENT ON PASSING OF ACCOUNTS

I, *Don T. Argue*, of the City of Toronto, in the Province of Ontario, Lawyer, MAKE OATH AND SAY/AFFIRM:

1. I am a lawyer with the law firm of *Argue & Phibbs*, lawyers for the applicant for an unopposed judgment on the passing of accounts in this estate with respect to estate accounts from August 16, 2012 to August 31, 2014.

2. A copy of the estate accounts has been provided to each person who was served with the notice of application and who requested a copy of the accounts.

3. The time for filing notices of objection to the estate accounts has expired.

4. No notice of objection has been received from any person served with the notice of application.

OR

Any notice of objection that was received has been withdrawn by the filing of a notice of withdrawal of objection.

SWORN BEFORE me at the City of)
)
Toronto, in the Province of Ontario)
)
this day of 2016)
)
A Commissioner etc.

APPENDIX "G"

ONTARIO
SUPERIOR COURT OF JUSTICE

IN THE MATTER OF *

CERTIFICATE OF COMPLETENESS OF RECORD
FOR AN UNOPPOSED JUDGMENT ON PASSING OF ACCOUNTS

I, *Don T. Argue* lawyer for the applicant, certify that the Record for an Unopposed Judgment on Passing of Accounts in this estate contains all documents required pursuant to Rule 74.18(9) of the Rules of Civil Procedure.

Date: _____ 2016

Don T. Argue

ARGUE & PHIBBS
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Lawyers for the Applicant

APPENDIX "H"

Court File No. *

ONTARIO
SUPERIOR COURT OF JUSTICE

IN THE MATTER OF *

CERTIFICATE OF SOLICITOR

Rule 74.18(9)(v) of the *Rules of Civil Procedure*

I, *Don T. Argue,* lawyer at the law firm of *Argue and Phibbs* lawyers for the applicant, do hereby certify that this Record does include the following:

1. Affidavit of Service of Notice
2. Affidavit Verifying Accounts with enclosures
3. Copy of Notice of Non-Participation in Passing of Accounts from the Children's Lawyer's Office
4. Copy of Judgment sought
5. Affidavit in Support of Unopposed Judgment on Passing of Accounts
6. Certificate of *(name of solicitor)*

Being all of the documents required by subclauses (i)(ii)(iii) and (iv) under Rule 74.18(9) (v) of the the *Rules of Civil Procedure* dated at Toronto this day of , 2016.

Don T. Argue (signature of lawyer)

ARGUE & PHIBBS
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Toronto, Ontario
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Lawyers for the Applicant

APPENDIX "I"

JUDGMENT ON UNOPPOSED PASSING OF ACCOUNTS
(Form 74.50 under the Rules)

Court file no. 09-0011/14

ONTARIO
SUPERIOR COURT OF JUSTICE

THE HONOURABLE	)	MONDAY, THE DAY
	)	
JUSTICE	)	OF 2016

IN THE MATTER OF THE GUARDIANSHIP OF THE PROPERTY OF

(name ofperson underdisability/child)

JUDGMENT ON PASSING OF ACCOUNTS

THIS APPLICATION was read on *(date)* at the Court House at 330 University Avenue, 8th Floor, Toronto, Ontario M5G 1R7.

ON READING THE NOTICE OF APPLICATION TO PASS ACCOUNTS, the affidavit of service and the affidavit in support of an unopposed judgment on passing of accounts, as filed, and as there are no objections to the accounts or the claim for compensation by the guardians of property of *(name of person under disability/child),*

1. THIS COURT DECLARES that the guardianship accounts, as filed by (*name of applicants)* (the Applicant) for the period from August 16, 2012 to August 31, 2014, are hereby passed.

2. THIS COURT DECLARES that the capital receipts and capital disbursements of the applicant for the period are as follows:

CAPITAL ACCOUNT

Credit balance forward *(if applicable)*	$555,678.54	
Receipts	$ 12,235.09	
Disbursements	$104,645.04	
Credit balance		$463,268.59

JUDGMENT ON UNOPPOSED PASSING OF ACCOUNTS
(Form 74.50 under the Rules)

3. THIS COURT DECLARES that the revenue receipts and revenue disbursements of the applicant for the period are as follows:

REVENUE ACCOUNT

Credit balance forward *(if applicable)*	$ 15,187.65	
Receipts	$ 80,320.73	
Disbursements Credit balance	$ 86,269.17	
		$ 9,239.21

4. THIS COURT ORDERS that the applicants shall be paid as fair and reasonable compensation for services as guardians of the property of *(name of person under disability/child)* and for disbursements expended in administering the affairs of the guardianship of property of *(name of person under disability/child)* during the period the total amount of $14,739.05, inclusive H.S.T., $1,916.07 of which $1,916.07 has been pre-taken from revenue, leaving a balance payable of$12,822.98 of which $8,548.65 shall be paid from capital and $4,274.33 shall be paid from revenue.

5. THIS COURT ORDERS that the costs of the passing of the accounts allowed in accordance with Tariff C, and payable out of the capital of the estate, are as follows:

   To the applicant $3,200.00, plus H.S.T. and disbursements of $1,133.65, for a total of $4,749.65.

6. THIS COURT DECLARES that the accounts show that there remains in the applicant's hands the original assets as set out in Schedule "A" attached.

_____

(Signature of judge or registrar)

APPENDIX "J"

Tariff C – Lawyers' Costs Allowed on Passing of Accounts without a hearing

(1) Estate Trustee

Amount of receipts	Amount of costs
Less than $300,000	$ 2,500.00
$300,000 or more, but less than $500,000	3,000.00
$500,000 or more, but less than $1,000,000	3,500.00
$1,000,000 or more, but less than $3,000,000	5,000.00
$3,000,000 or more	7,500.00

(2) Person with Financial Interest in Estate

If a person with a financial interest in an estate retains a lawyer to review the accounts, makes no objection to the accounts (or makes an objection and later withdraws it), and serves and files a request for costs, the person is entitled to one-half of the amount payable to the estate trustee.

(3) Children's Lawyer or Public Guardian and Trustee

If the Children's Lawyer or Public Guardian and Trustee makes no objection to the accounts (or makes an objection and later withdraws it) and serves and files a request for costs, he or she is entitled to three-quarters of the amount payable to the estate trustee.

Note: If two or more persons are represented by the same lawyer, they are entitled to receive only one person's costs

Note: A person entitled to costs under this tariff is also entitled to the amount of harmonized sales tax (H.S.T.) on those costs.[1]

[1] O. Reg. 484/94, s. 14; 332/96, s. 10

APPENDIX "K"

JUDGMENT ON UNOPPOSED PASSING OF ACCOUNTS
(Form 74.51 under the Rules)

Court file no. 09-0011/14

ONTARIO
SUPERIOR COURT OF JUSTICE

THE HONOURABLE	)	MONDAY, THE DAY
	)	
JUSTICE	)	OF 2016

IN THE MATTER OF THE GUARDIANSHIP OF THE PROPERTY OF (*name of child*).

JUDGMENT ON PASSING OF ACCOUNTS

THIS APPLICATION was heard on *(date)*, at the Court House, 330 University Avenue, 8th Floor, Toronto, Ontario, M5|G 1R7 in the presence of counsel for Honest Trust and (*mother's name*), the applicants, The Children's Lawyer, and (*father's name*) appearing in person. ***(where applicable add "and no one appearing for [name], although properly served as appears from the affidavit of service filed)***

ON READING THE NOTICE OF APPLICATION TO PASS ACCOUNTS,

and on hearing submissions made;

1) THIS COURT DECLARES that the guardianship accounts, as filed by the applicants for the period from August 31, 2012 to August 31, 2014 are hereby passed.

2) THIS COURT DECLARES that the capital receipts and capital disbursements of the applicants for the period are as follows:

CAPITAL ACCOUNT

Credit balance forward	$2,016,862.73	
Receipts	$ 287,783.82	
Disbursements	$ 512,829.66	
Credit balance		**$1,791.816.89**

3) THIS COURT DECLARES that the revenue receipts and revenue disbursements of the applicants for the period are as follows:

REVENUE ACCOUNT

Credit balance forward	$ 74,809.73	
Receipts	$ 236,866.39	
Disbursements	$ 250,832.51	
Credit balance		$**60,843.61**

4) THIS COURT ORDERS that the applicants shall be paid as fair and reasonable compensation for services as guardians of the property of (name of child) and for disbursements expended in administering the affairs of the property of (name of child) during the period the total amount of $35,420.80 (inclusive of H.S.T.), which shall be paid as follows: $17,934.56 shall be paid out of the capital and $17,486.24 shall be paid out of the revenue of the account of the property of (name of child).

5) THIS COURT ORDERS that the costs of the passing of the accounts allowed and payable out of the capital of the property of (name of child), are as follows:

To *Argue and Phibbs*, lawyers for the applicants - $3,390.00, inclusive of disbursements and H.S.T.

To the Children's Lawyer - $2,250.00

JUDGMENT ON UNOPPOSED PASSING OF ACCOUNTS
(Form 74.51 under the Rules)

6) THIS COURT DECLARES that the accounts show that there remains in the hands the applicants original assets as set out in Schedule "A" attached.

7) ***[THIS COURT ORDERS that the Guardians of Property shall apply to pass its accounts the subsequent *-year period ending October 31, 200*, within a reasonable time thereafter. - omit if not so ordered by Court]***

_____

Judge or Registrar

[add Schedule "A" as an attachment]

CHAPTER 6

AUDIT CHECKLIST

AUDIT CHECKLIST

(for guardianship or estate trustee's accounts)

1. Read the governing document(s)

- ☐ note names of guardians/estate trustees and the investment powers given
- ☐ management/guardianship plan (for guardians)/scheme of distribution (for estates with Will)
- ☐ provisions re payments on behalf of person under disability/to legatees and distributive share(s)to beneficiaries re estates, including specific instructions regarding compensation
- ☐ is there a Will (note the Will is considered to be the property of the person under disability and guardians should be familiar with its terms)/is an Application for a Certificate of Appointment with a Will being filed and has Notice been received (re estates)
- ☐ had the person under disability (deceased re estate) made any previous funeral arrangements

2. Earlier Order/Judgment

If there is an earlier Order/Judgment from a passing of accounts, check the balances carried forward from Capital and Revenue accounts

- ☐ Are the balances carried forward the first figures to appear in the Capital Receipts and Revenue Receipts accounts (provided the balances carried forward are credit balances) or the Capital Disbursements and Revenue Disbursements account (if the balances carried forward are debit balances)?
- ☐ Is the list of Investments on hand at the end of the earlier period identical to the list of Investments on hand at the beginning of the current accounting period?
- ☐ Is the list of unrealized Original Assets on hand at the end of the earlier period identical to the list of unrealized Original Assets on hand at the beginning of the current accounting period?

3. Original Assets and Capital Receipts

- ☐ review the list of Original Assets are they cross-referenced to the Capital Receipts items?
- ☐ are there any receipts, which are much higher or much lower than the Original Asset value? Is there any explanation for the difference?

☐ if the person under disability (deceased re estate) owned real property and the values vary significantly,

a. ask for appraisals to compare to the sale price;

b. determine whether the estate accepted a mortgage back on the sale of the property. If so, only the cash portion of the sale proceeds should be recorded as a Capital Receipt (with the mortgage back reflected as an unrealized Original Asset to the extent that it is outstanding at the end of the period). The ongoing mortgage payments are recorded as received and allocated between Capital (for the principal portion of payments) and Revenue (for the interest portion of payments)

☐ is every Original Asset, shown as realized or unrealized or written off? Are all of the unrealized Original Assets reflected on the list of unrealized Original Assets at the end of the current accounting period?

☐ are the Capital Receipt items all proper Capital Receipts?

☐ are there any receipts, which record the proceeds of Investments made by the guardian (estate trustee re estates)?

☐ for estates, if there are capital and revenue beneficiaries, do the accounts correctly record accrued interest to the date of death on items such as bank accounts, mortgages, promissory notes? (those accrued to the date of death should be recorded under Capital)

4. Capital Disbursements

☐ are the liabilities those you would reasonably expect? Do they include the liabilities listed in the statement of liabilities from an earlier passing of accounts?

☐ for estates, is the funeral expense in proportion to the size of the estate?

☐ are there entries for the purchase of investments?

☐ for estates, were the legacies paid within one year of the date of death or did the payments attract interest? If so, why?

☐ are the payments in accordance with the management plan (are the distributions in the correct amount and proportion, if a percentage or per a distribution scheme re estates) and to the correct recipients?

☐ for estates, are there encroachments on Capital, are they permitted by the Will, and are they reasonable in size?

☐ are there legal and accounting accounts reflected in the entries? If they seem high ask

for copies of the accounts which are sufficiently detailed to allow you to assess whether the accounts contain charges for work which is ordinarily considered to be executor's work (applicable to estates). For example, if the legal account contains charges for all of the banking transactions, there ought to be some deduction from compensation for the dollar value of those services (applicable to estates).

☐ if there are legal accounts for the sale of real property, request and review a copy of any appraisal(s), the statement of adjustments, the lawyers legal bills and Trust ledger to ensure that there is no duplication of charges.

☐ if there are entries regarding repayment of loans, promissory notes, etc., particularly to persons who are not at arm's length to the person under disability (deceased re estate), consider whether supporting information is required to substantiate the person under disability's (deceased's re estate) obligation.

☐ are there any unusual entries e.g. for estates, are there continuing rent or mortgage payments and what are the plans for dealing with these assets?

☐ are there any disbursements for improvements to capital properties passing to beneficiaries?

5. Investment Account

☐ do the investments comply with the provisions of the deceased's Will *i.e.* unlimited investments or *Trustee Act* investments? (note guardians are not restricted under *Trustee Act* for investments) Are there other restrictions pursuant governing documents?

☐ are the profits and losses earned on the sale of Investments properly recorded i.e. profits as Capital Receipts and losses as Capital Disbursement items?

☐ does the account deal only with Capital monies?

☐ if the person under disability (deceased re estate) has investments in mortgages, does the Investment account record receipt of the principal portion of the mortgage payment only (and is the interest portion reflected in the Revenue Receipts accounts)?

☐ is there more than $100,000.00 invested in one financial institution? (CDIC insures up to $100,000.00 per institution inclusive of compounded interest).

☐ for estates, has a Corporate estate trustee invested in its own securities? (This could impact on compensation for investing in its own products or mutual funds if a management fee component is included in the mutual fund).

☐ for guardianship, has the guardian a conflict of interest relating to investments in securities?

☐ does the investment account balance including the number of shares or units at the end of the accounting period after reviewing all purchased and any split shares and/or sold shares or units when compared with the opening balances of securities held?

6. Revenue Receipts

☐ are all of the entries proper Revenue Receipts?

☐ has the dividend/interest income been received in a timely manner and in full?

7. Revenue Disbursements

☐ is the revenue being paid out properly on behalf of the person under disability (to the correct legatees and/or beneficiaries re estates)?

8. Summary

☐ do the accounts balance? i.e. does the total from Capital and Revenue Receipts less the total from Capital and Revenue Disbursements equal the Investments on hand plus the balance in the bank account?

9. Compensation

☐ compare totals in accounts to figures on statement of compensation that attract compensation.

☐ for estates, should reduced percentages apply i.e. are there any very large receipt or disbursement items (bank accounts, insurance policy proceeds, disbursements to CRA) or is the estate comprised of entirely liquid assets?

☐ are there proper deductions for items that do not attract compensation i.e. transfers, refunds, net losses on investments, legal and/or accounting fees paid to firms where the guardian/estate trustee is an employee/partner?

☐ guardians of property are entitled to charge a care and management fee.

(Is the estate trustee entitled to claim a care and management fee? [there is no entitlement to same in an immediately distributable estate or on an intestacy or during the first year of an ongoing administration]. Do the accounts disclose <u>active</u> management of estate assets?)

☐ if there is entitlement to a care and management fee check the basis for the calculation of "average market value of the estate". The method for calculating should be included.

Deductions from Compensation (for estates only)

a) executor's work completed and billed by lawyer/accountant

b) fees for preparation of income tax returns (deductibility depends on expertise of executor and particularly if executor is Corporate trustee);

c) fees for the preparation of estate accounts;

d) pre-taken compensation.

☐ is H.S.T. payable on compensation? (commonly only if a Corporate trustee OR if the estate trustee is in the "business of estate administration").

10. Vouchers (for passing of accounts – usually reviewed by a lawyer acting on behalf of a person having a financial interest in the process of representing an interested party on a passing of accounts)

☐ Review supporting vouchers (cancelled cheques/receipted accounts etc.) for Capital and Revenue disbursement items to verify any discrepancies, if necessary.

CHAPTER 7

SAMPLE ESTATE ACCOUNTS

ESTATE OF GEORGIA SMITH

for the period September 26, 2011 to June 14, 2014

46 King Street W. Apt. 911
Toronto, ON M8X 2T3

ESTATE OF GEORGIA SMITH
SUMMARY
as at June 16, 2014

Capital Account				
Balance Forward (no previous accounting)		$ -		
Receipts		$ 1,073,605.61		
Disbursements		$ 767,285.51		
Capital Balance			**$**	**306,320.10**
Revenue Account				
Balance Forward (no previous accounting)				
Receipts		$ 6,663.93		
Disbursements		$ 133.53		
Revenue Balance			**$**	**6,530.40**
Total Balance			$	312,850.50
Consisting of:				
Trustee Investments			$	-
CIBC, 42 Richmond St., Main Floor, Toronto, ON M1M B4U Estate Acct. Balance	Account No. 00010-998046	$ 312,850.50	**$**	**312,850.50**
TOTAL			**$**	**312,850.50**

ESTATE OF GEORGIA SMITH
STATEMENT OF ORIGINAL ASSETS
as at September 26, 2011

Asset No.			Value as at date of death	Disposed of
1	Sherwood Estates - Unit 201 - 2000 Vaughan Lane, Toronto, Ontario L5G 6R2	$	500,000.00	CR20
	Royal Bank of Canada 20 Yonge Street, Toronto, ON M1K O8L			
	Bank Accounts			
2	Signature Plus Sixty Plus Account 02900-000**7501**	$	25,306.07	CR4, CR5
3	Calculator Plus Sixty-Plus Account 02900-005**8430**	$	9,081.92	CR6
4	Tax-Free Savings Account 56290**8757**	$	5,126.48	CR7
5	Accrued int. TFSA to d.o.d 87 days @ .1658	$	14.42	CR8
	Guaranteed Investment Certificates			
6	Non-Redeemable, 1.50%, due Jan. 11, 2012 Account 0072000222-0**0036**	$	28,086.71	CR9
7	Accrued interest to d.o.d. 258 days @ $1.15	$	296.70	CR10
8	Non-Redeemable, 1.40%, due Sept. 29, 2011 Account 0072000222-**0038**	$	85,000.00	CR1
9	Accrued interest to d.o.d. 362 days @ $3.26	$	1,180.12	CR2
10	Non-Redeemable, 1.50%, due Mar. 7, 2012 Account 0072000222-0**0039**	$	21,854.72	CR11
11	Accrued interest to d.o.d. 203 days @ .895	$	181.68	CR12
12	Non-Redeemable, 1.45, due April 25, 2012 Account 007000222-0**0040**	$	6,242.40	CR13
13	Accrued interest to d.o.d. 154 days @ .247	$	38.04	CR14
	Bank of Nova Scotia 200 Bay Street - Main Floor Toronto, ON M5J 2K2			
	Investment Account			
14	Five-In-One GIC, 2.00%, due Aug. 6, 2016 Account 0018014**4957**	$	360,000.00	CR17, CR18
15	Accrued interest to d.o.d. 51 days @ $19.67	$	1,003.17	CR19

ESTATE OF GEORGIA SMITH
STATEMENT OF ORIGINAL ASSETS
as at September 26, 2011

Asset No.		Value as at date of death	Dispose d of
	Other		
16	Bell Canada refund	$ 68.35	CR3
17	CPP Death Benefit	$ 2,500.00	CR15
18	Happy Acres - nursing home refund	$ 580.01	CR16
	TOTAL UNREALIZED ASSETS	**$ 1,046,560.79**	
	TOTAL REALIZED ASSETS	$ -	
		$ -	
	REMAINING UNREALIZED ASSETS	**$ -**	
	TOTAL ASSETS	**$ 1,046,560.79**	

ESTATE OF GEORGIA SMITH
STATEMENT OF LIABILITIES
as at September 26, 2011

Creditor	Particulars	Outstanding Balance	
Argue & Phibbs	Legal fees re application for guardian of property and solicitor's work re Estate administration (Invoice #949 and #1003)	$ 3,404.54	CD6
Just Right Self Storage	Storage of personal effects from condominium - 3 months @ $129.95 per month	$ 389.85	
Receiver General	2011 Final T1 Tax Return	To be determined	CD9
	Total Liabilities	**$ 3,794.39**	

ESTATE OF GEORGIA SMITH
STATEMENT OF ASSETS
as at June 14, 2014

	Value as at date of death
UNREALIZED ORIGINAL ASSETS	
No unrealized original assets	$ -
TOTAL UNREALIZED ORIGINAL ASSETS	**$ -**

ESTATE OF GEORGIA SMITH
STATEMENT OF LIABILITIES
as at June 14, 2014

Creditor	Particulars		Outstanding Balance
Just Right Self Storage	Storage of personal effects from condominium - 3 months @ $129.95 per month	$	389.85
	Total Liabilities	**$**	**389.85**

ESTATE OF GEORGIA SMITH
CAPITAL RECEIPTS
September 26, 2011 to June 14, 2014

Item	Date	Particulars		Amount
1	29-Sep-11	RBC - Non Redeemable 1.40% due Sept. 29, 2011 Acct No. **0038** - matured (Asset No. 8) [deposited to CIBC 8046]	$	85,000.00
2	29-Sep-11	RBC - Non Redeemable 1.40% due Sept. 29, 2011 Acct. No. **0038** accrued int. to d.o.d. (Asset No. 9) [deposited to CIBC 8046]	$	1,180.12
3	1-Oct-11	Bell Canada refund (Asset No. 16) [deposited to RBC Signature Plus Sixty Acct. 7501]	$	68.35
4	12-Oct-11	RBC - Signature Plus Sixty Plus Account **7501** - partial realization (Asset No. 2) [deposited to CIBC 8046]	$	8,194.46
5	27-Oct-11	RBC - Signature Plus Sixty Plus Account **7501** - partial realization (Asset No. 2) [deposited to CIBC 8046]	$	17,081.01
6	27-Oct-11	RBC - Calculator Plus Sixty-Plus Account **8430** - realization (Asset No. 3) [deposited to CIBC 8046]	$	9,081.92
7	31-Oct-11	RBC - Tax-Free Savings Account **875**7-realization (Asset No. 4) [deposited to CIBC 8046]	$	5,126.48
8	31-Oct-11	RBC - Tax-Free Savings Account **8757** accrued interest to d.o.d. (Asset No. 5) [deposited to CIBC 8046]	$	14.42
9	2-Nov-11	RBC - Non-Redeemable, 1.50%, due Jan. 11, 2012 Account **0036** redemption (Asset No. 6) [deposited to CIBC 8046]	$	28,086.71
10	2-Nov-11	RBC - Non-Redeemable, 1.50%, due Jan. 11, 2012 Acct. **0036** accrued int.-redemption (Asset No. 7) [deposited to CIBC 8046]	$	296.70
11	2-Nov-11	RBC - Non-Redeemable, 1.50%, due Mar. 7, 2012 Account **0039** redemption (Asset No. 10) [deposited to CIBC 8046]	$	21,854.72
12	2-Nov-11	RBC - Non-Redeemable, 1.50%, due Mar. 7, 2012 Account **0039** accrued int.-redemption (Asset No. 11) [deposited to CIBC 8046]	$	181.68
13	2-Nov-11	RBC - Non-Redeemable, 1.45, due April 25, 2012 Acct **0040** redemption (Asset No. 12) [deposited to CIBC 8046]	$	6,242.40
14	2-Nov-11	RBC - Non-Redeemable, 1.45, due April 25, 2012 Acct **0040** accrued int.-redemption (Asset No. 13) [deposited to CIBC 8046]	$	38.04
15	12-Dec-11	CPP death benefit (Asset No. 17) [deposited to CIBC 8046]	$	2,500.00
16	2-Mar-12	Happy Acres-refund-4 days Sept. (Asset No. 18) [deposited to CIBC 8046]	$	580.01
17	6-Aug-12	Bank of Nova Scotia - Five-In-One GIC - annual distribution to Acct **4957** (Asset No. 14) [deposited to CIBC 8046]	$	72,000.00
18	29-Aug-12	Bank of Nova Scotia - Five-In-One GIC - partial redemption to Account **4957** (Asset No. 14) [deposited to CIBC 8046]	$	288,000.00
19	29-Aug-12	Bank of Nova Scotia - Five-In-One GIC Account **4957** -accrued interest to d.o.d. on partial redemption of $288,000.00 (Asset No. 15) [deposited to CIBC 8046]	$	1,003.17
20	4-May-14	Balance due on closing re sale of Unit 201-2000 Vaughan Lane, Toronto, ON - Sale price - $560,000 Less: Remax commission at 5% + HST($31,640), legal fee and disb. ($2,458.35) Plus: Realty Taxes Allowed $743.90 (Asset No. 1) [deposited to CIBC 8046]	$	526,645.55
21	31-May-14	Really Safe Ins. Co. - refund of contents insurance Policy #1234	$	429.87
	TOTAL			**$ 1,073,605.61**

ESTATE OF GEORGIA SMITH
CAPITAL DISBURSEMENTS
September 26, 2011 to June 14, 2014

Item	Date	Particulars		Amount
1	12-Oct-11	Weburyum Funeral Home - balance of deposit for funeral (bank draft #908-54452-6)	$	8,194.46
2	3-Nov-11	Happy Acres - nursing home fees for November and December 2011 (cheque #002) [issued from CIBC 8046]	$	7,214.95
3	8-Nov-11	Reimbursement to Faith Holmes re Mt. Pleasant Cemetery-purchase of Niche (cheque #003) [issued from CIBC 8046]	$	6,068.10
4	28-Nov-11	Mount Pleasant Cemetery re Niche inscription (cheque #004) [issued from CIBC 8046]	$	912.48
5	30-Nov-11	Leaky-Fix -repair shower fawcet Unit 201-2000 Vaughan Lane-Invoice WTR259 (cheque #006) [issued from CIBC 8046]	$	130.54
6	1-Dec-11	Argue & Phibbs re invoices #949/1003 for legal fees re guardianship and Estate (cheque #005) [issued from CIBC 8046]	$	3,404.54
7	14-Dec-11	Weburyum Funeral Home re transportation of urn to Toronto (cheque #007) [issued from CIBC 8046]	$	84.75
8	21-Feb-12	Receiver General reimburse HST tax credit period Oct/11-Apr/12 Estate not eligible (cheque #008) [issued from CIBC 8046]	$	96.50
9	4-May-12	Receiver General re income tax liability on filing 2011 Final T1 (cheque #009) [issued from CIBC 8046]	$	19,835.57
10	13-Nov-12	Really Safe Ins. - annual premium re contents coverage Vaughan Lane (cheque #010) [issued from CIBC 8046]	$	1,343.62
11	27-Dec-12	Legacy to Michael Smith in accordance with Will (cheque #011) [issued from CIBC 8046]	$	10,000.00
12	30-Jan-13	Legacy to Joyce Williams in accordance with Will (cheque #012) [issued from CIBC 8046]	$	10,000.00
13	15-May-14	Interim distribution to Joshua Smith re 50% residue pursuant to Will (cheque #013)	$	350,000.00
14	15-May-14	Interim distribution to Lionel Smith re 50% residue pursuant to Will (cheque #014)	$	350,000.00
			$	**767,285.51**

ESTATE OF GEORGIA SMITH
REVENUE RECEIPTS
September 26, 2011 to June 14, 2014

Item	Date	Particulars		Amount
1	29-Sep-11	RBC - Non Redeemable 1.40% due Sept. 29, 2011 Account No. **0038** - bal. of interest on $85,000.00 GIC [deposited to CIBC 8046]	$	9.88
2	27-Oct-11	RBC - Signature Plus Sixty Plus Account **7501** -int. on realization of account balance of $111,496.07 [deposited to CIBC 8046]	$	0.81
3	27-Oct-11	RBC - Calculator Plus Sixty-Plus Account **8430**-int. on realization of account balance of $9,081.92 [deposited to CIBC 8046]	$	0.97
4	31-Oct-11	RBC - Tax-Free Savings Account **8757**-interest on realization of account balance of $5,126.48 [deposited to CIBC 8046]	$	5.48
5	2-Nov-11	RBC - Non-Redeemable, 1.50%, due Jan. 11, 2012 Account **0036** - balance of int. on redemption of GIC [deposited to CIBC 8046]	$	43.80
6	2-Nov-11	RBC - Non-Redeemable, 1.50%, due Mar. 7, 2012 Account **0039** - balance of int.on redemption of GIC [deposited to CIBC 8046]	$	33.87
7	2-Nov-11	RBC - Non-Redeemable, 1.45, due April 25, 2012 Account **0040** - balance of int. on redemption of GIC [deposited to CIBC 8046]	$	9.33
8	7-Aug-12	Bank of Nova Scotia - Investment Acct. **4957**- balance of annual int. @ 2.00% of $360,000.00 [deposited to CIBC 8046]	$	6,196.83
9	5-Sep-12	Bank of Nova Scotia - Investment Account **4957** - int. adj. on partial redemption of $288,000.00 [deposited to CIBC 8046]	$	362.96
	TOTAL		**$**	**6,663.93**

ESTATE OF GEORGIA SMITH
REVENUE DISBURSEMENTS
September 26, 2011 to June 14, 2014

Item	Date	Particulars		Amount
1	14-Oct-11	CIBC - Estate Account **8046** - partial monthly fee 11 days @ $0.13	$	1.43
2	15-Nov-11	CIBC - Estate Account **8046** monthly fee	$	4.00
3	17-Nov-11	CIBC - Estate Account **8046** overdraft interest	$	0.10
4	15-Dec-11	CIBC - Estate Account **8046** monthly fee	$	4.00
5	13-Jan-12	CIBC - Estate Account **8046** monthly fee	$	4.00
6	15-Feb-12	CIBC - Estate Account **8046** monthly fee	$	4.00
7	15-Mar-12	CIBC - Estate Account **8046** monthly fee	$	4.00
8	13-Apr-12	CIBC - Estate Account **8046** monthly fee	$	4.00
9	15-May-12	CIBC - Estate Account **8046** monthly fee	$	4.00
10	15-Jun-12	CIBC - Estate Account **8046** monthly fee	$	4.00
11	13-Jul-12	CIBC - Estate Account **8046** monthly fee	$	4.00
12	15-Aug-12	CIBC - Estate Account **8046** monthly fee	$	4.00
13	14-Sep-12	CIBC - Estate Account **8046** monthly fee	$	4.00
14	15-Oct-12	CIBC - Estate Account **8046** monthly fee	$	4.00
15	15-Nov-12	CIBC - Estate Account **8046** monthly fee	$	4.00
16	14-Dec-12	CIBC - Estate Account **8046** monthly fee	$	4.00
17	27-Dec-12	CIBC - Estate Account **8046** counter cheque fee	$	2.00
18	15-Jan-13	CIBC - Estate Account **8046** monthly fee	$	4.00
19	30-Jan-13	CIBC - Estate Account **8046** counter cheque fee	$	2.00
20	15-Feb-13	CIBC - Estate Account **8046** monthly fee	$	4.00
21	15-Mar-13	CIBC - Estate Account **8046** monthly fee	$	4.00
22	15-Apr-13	CIBC - Estate Account **8046** monthly fee	$	4.00
23	15-May-13	CIBC - Estate Account **8046** monthly fee	$	4.00
24	14-Jun-13	CIBC - Estate Account **8046** monthly fee	$	4.00
25	15-Jul-13	CIBC - Estate Account **8046** monthly fee	$	4.00
26	14-Aug-13	CIBC - Estate Account **8046** monthly fee	$	4.00
27	14-Sep-13	CIBC - Estate Account **8046** monthly fee	$	4.00
28	16-Oct-13	CIBC - Estate Account **8046** monthly fee	$	4.00
29	15-Nov-13	CIBC - Estate Account **8046** monthly fee	$	4.00
30	14-Dec-13	CIBC - Estate Account **8046** monthly fee	$	4.00
31	15-Jan-14	CIBC - Estate Account **8046** monthly fee	$	4.00
32	14-Feb-14	CIBC - Estate Account **8046** monthly fee	$	4.00
33	15-Mar-14	CIBC - Estate Account **8046** monthly fee	$	4.00
34	13-Apr-14	CIBC - Estate Account **8046** monthly fee	$	4.00
35	15-May-14	CIBC - Estate Account **8046** monthly fee	$	4.00
36	15-Jun-14	CIBC - Estate Account **8046** monthly fee	$	4.00
	TOTAL		**$**	**133.53**

ESTATE OF GEORGIA SMITH
TRUSTEE INVESTMENTS
September 26, 2011 to June 16, 2014

Item No.	Date	Transaction	Purchase	Sale
1	6-Aug-12	Non-Redeemable GIC 2.15% due Aug 6, 2017 purchase	$ 72,000.00	
2	29-Aug-12	Non-Redeemable GIC 2.15% due Aug 6, 2017 redemption [deposited to CIBC 8046]		$ 72,000.00
		Sub-totals	**$ 72,000.00**	**$ 72,000.00**
		Balance Invested at end of period	$ -	**$ -**
		Totals	**$ 72,000.00**	**$ 72,000.00**

ESTATE OF GEORGIA SMITH
COMPENSATION STATEMENT
September 26, 2011 to June 16, 2014

	Capital Receipts	$ 1,073,605.61		
less:	Non-feeable Capital Receipts	$ -		
	2.5% of net amount	$ 1,073,605.61	**$**	**26,840.14**
	Capital Disbursements	$ 767,285.51		
less:	Non-Feeable Capital Disbursements	$ -		
	2.5% of net amount	$ 767,285.51	**$**	**19,182.14**
	Revenue Receipts	$ 6,663.93		
less:	Non-feeable Revenue Receipts	$ -		
	2.5% of net amount	$ 6,663.93	**$**	**166.60**
	Revenue Disbursements	$ 133.53		
less:	Non-feeable Revenue Disbursements	$ -		
	2.5% of net amount	$ 133.53	**$**	**3.34**

Total Compensation	**$**	**46,192.21**
Care and Management		
2/5 of 1% per annum on Average Market Value of $ for years		
Total Care and Management	**$**	**-**
TOTAL COMPENSATION CLAIMED	**$**	**46,192.21**

CHAPTER 8

CROSS-SECTION SUMMARY: WHAT ARE OTHER PROVINCES DOING?

CROSS-SECTION SUMMARY: WHAT ARE OTHER PROVINCES DOING?

This summary briefly reviews the procedures, formats, processes (or where to find them) cross-provincially with respect to passing of accounts applications, as well as calculation of trustee compensation and a review of some contested passing of account decisions based on common objections.

Statutory / Common Law Duty to Account

Each province has its own legislation dealing with passing of accounts by estate trustees, trustees, guardians, attorneys, or otherwise. No matter where a trustee resides, it is his or her fundamental duty to account to the beneficiaries. A trustee must keep a proper record of his or her activities and be in a position at all times to prove that he or she has administered the trust prudently and honestly. Beneficiaries are entitled to the information that allows them to enforce the trust, and so as to satisfy themselves that the trust is being properly administered.[1] Throughout Canada passing of accounts applications are typically governed by that province's trustee and/or probate legislation as well as the provincial court rules with respect to process, procedure, and format.

In **British Columbia,** the duty of an estate trustee to pass accounts is found in the *Trustee Act* RSBC 1996, c 464 at section 99 (1) which provides that a trustee must pass his or her accounts within two years unless the accounts have been approved in writing by the beneficiaries.

In **Alberta,** the statutory framework for a passing of accounts applications can be found in the *Trustee Act*, RSA 2000 c T-8, and the *Surrogate Rules*, AR 130/95A. Rule 97(1) of the *Surrogate Rules* requires a personal representative to give an accounting of the administration of the estate at regular intervals (every two years) by preparing financial statements and providing them to the beneficiary (unless the Court orders otherwise). Rule 97(3) allows for a "person interested in the estate" to apply for an order requiring an accounting at any time.

In **Saskatchewan,** sections 52-56 of the *Trustee Act*, 2009 SS 2009, c.T-23.1 relate to passing of accounts by trustees as well as Rules 16-49 to 16-57 of the *Queen's Bench Rules*[2] of court. Rule 16-49 provides that a personal representative may file accounts at any time for passing, but also sets out when a personal representative is obligated to do so (i.e. when the administration has

1 D.W.M. Waters, Q.C., *Waters' Law of Trusts in Canada* (3d ed.) (Toronto: Carswell, 2005), at p. 1077, cited in *Spelay (Litigation Guardian of) v. Spelay* (2007), 38 E.T.R. (3d) 84 (Sask Q.B.). See also: *Jackson v. King* (2003), 49 E.T.R. (2d) 19, 2003 BCSC 328 at para. 14.

2 Effective July 1, 2013, amendments effective as of August 1, 2016.

been completed, unless they have obtained an order to be discharged without passing).

In **Manitoba,** jurisdiction for a trustee to pass accounts arises from section 86-88 of the *Trustee Act* CCSM c. T160.

In **Quebec,** the liquidator (executor) has the same duties to account for the liquidation of an estate under the *Civil Code of Quebec* CQLR c CCQ 1991. The designation and responsibilities of the liquidator are set out in Chapter II (Liquidator of the Succession) Division I s.783-793 of the CCQ.

Furthermore, in **Nova Scotia** the duty to account is found in section 69 of the *Probate Act,* SNS 2000 c 31;[3] in **New Brunswick** see section 66 of the *Trustees Act* SNB 2015 c 21 and sections 69-72 of the *Probate Court Act*, SNB 1982, c P-17.1; in **Prince Edward Island** see sections 53-57 of the *Probate Act* RSPEI 1988 c P-21; and in **Newfoundland** see section 129 of the *Judicature Act* RSNL 1990 c J-4.

Procedure to Pass Accounts / Format / Process

The procedure to pass accounts is similar across each province in that an application needs to be brought for a formal passing of accounts which results in a court order.[4] Also, the legislation allows an "interested" person to apply to the court for an order that the estate trustee or personal representative pass his or her accounts. Who that person can be differs somewhat throughout the provinces (i.e. in Ontario the "interested" person must have a "financial interest" in the estate, while in British Columbia any "person interested in an estate" may initiate the passing of accounts but "some limits must apply" [5]).

The required financial accounts and statements to be filed in a passing of accounts in each province are also similar and typically require a description of the assets and liabilities of the estate, date of death and last day of period covered by accounts to be passed, capital transactions, income transactions, distributions made and anticipated to be made, calculation of remuneration, and any other details or information the court may require, etc.

In **British Columbia,** sub-rule 25-14(1)(o) of the *Supreme Court Civil Rules* deals specifically with applications for passing accounts. The process may be initiated by filing a notice of application within the existing court file. The Court may refer the passing of accounts to the registrar for a hearing pursuant to Rule 25-13(3)(b). The required format can be found in Rule 25-13 of the *Supreme*

3 See "Checklist – Passing the Accounts of an Estate in Probate Court" http://www.courts.ns.ca/Probate_Court/nspbc_docs/NSPBC_checklist_passingaccts_06-03.pdf

4 "Informal" passing of accounts (where accounts are settled between trustee and beneficiaries without a formal court order) are also available.

5 *Drummond v. Moore* 2012 BCSC 496.

Court Rules and the personal representative must file a Statement of Account Affidavit in Form P40.

The procedure to pass accounts in **Alberta** can be found in Part 3 of the *Surrogate Rules* Alta Reg 130/1995. The required format of the financial statements to be prepared can be found at Rule 98(1).

In **Saskatchewan,** the procedure for the passing of accounts is found in Rules 16-52 to 16-56 of the *Queen's Bench Rules of Court* including the format, procedure for referring disputed accounts to Court, obtaining an examination of accounts, and obtaining an order for passing of accounts. Also see sections 54 and 55 of the *Trustees Act*, 2009, SS 2009, c –T23.01.

In **Manitoba** the process, format, and procedure for an application to pass accounts is set out in Rule 74.12(1)-(9) of the *Court of Queen's Bench Rules*, Man Reg 553/88.

In **Quebec,** the process, procedure, and format for the accounting by the liquidator can be found in Chapter IV "End of Liquidation" Division I "Account of the Liquidator" sections 819- 822 of the C.C.Q..

Furthermore, in **Nova Scotia** sections 55-59 of the *Regulations* to the *Probate Act* set out the process, format and procedure for passing of accounts applications and section 67 on hearing contentious passing of accounts matters; in **New Brunswick** see Rule 3.08 of the *Probate Rules*, NB Reg 84-9; in **Prince Edward Island** see Rules 65.42-65.49 of the *Annotated Rules of Civil Procedure*; and in **Newfoundland** see sub-rules 56.25-56.29 of the *Rules of the Supreme Court*, 1986, SNL 1986, c 42, Sch D. and section 129 of the *Judicature Act*.

Method for Calculating Compensation Payable to Trustee/Executor

Calculation of the compensation payable to a trustee or executor throughout Canada is based on what is "fair and reasonable" as set out in each provinces applicable legislation. Furthermore, most provinces have adopted a flexible "percentages approach" to assist with this determination, but with the caveat that the percentages approach does not work with every case and that the ultimate consideration is what is fair and reasonable with respect to the facts of the particular case. Most provinces have also adopted the "five factors" criteria from the Ontario Court of Appeal case of *Toronto General Trusts Corporation v. Central Ontario Railway Company* (1905), 6 OWR 350 (HCJ) (or similar criteria) for determining the applicable executor fee: the magnitude of the trust; the care and responsibility springing therefrom; the time occupied in performing the duties; the skill and

ability displayed; and the success which has attended its administration.[6]

In **British Columbia,** unless a compensation agreement is in place, section 88(1) of the *Trustee Act* governs the fixing of remuneration. The personal representative may be awarded up to 5% of the "gross aggregate value" of the capital of the estate, and 5% of the income earned during the administration. An annual "care and management fee" not exceeding 0.4% of the market value of the trust may also be claimed. Rule 25-13 of the *Probate Rules* makes it clear that the fixing and approval of remuneration can be dealt separately from the passing of accounts.

In **Alberta**, entitlement for compensation for a personal representative is found in section 4 of the *Trustee Act*, RSA 2000, c T-8. In addition to the *Trustee Act*, the determination of the appropriate compensation is set out in Part 1 of Schedule 1 of the *Surrogate Rules* (although neither set out exact percentages). Suggested Fee Guidelines published by the Legal Education Society of Alberta also provide some assistance. For example, the Guidelines recommend 3-5% on the first $250,000.00 capital and 2% to 4% on the next $250,000.00 and ½ of 1% to 3% on the balance.[7]

Under Rule 16-52 of the Queen's Bench Rules of Court in **Saskatchewan**, the accounts must set out the proposed compensation for the estate trustee or personal representative. Also, section 52 of the *Trustee Act* provides that an estate trustee is entitled to remuneration although it does not set out any percentages or ways to calculate compensation. While some Saskatchewan court cases have relied on a percentages calculation (1% - 3.5%)[8] it is noted that a percentages based approach does not invariably work.[9] The question is always what is fair and reasonable on the particular facts of the case.[10]

In **Manitoba**, Rule 74.12(7) of the *Court of Queen's Bench Rules* provides that the Court may fix compensation for a trustee or personal representative, and Section 90(1) of the *Trustee Act* provides that a personal representative is entitled to a "fair and reasonable allowance". The "rule of thumb" guideline for professional executors is between 3-5% of the total value of the estate, however, once again it is noted that the percentage approach is only to be used as an aid or guideline.[11]

In **Quebec,** section 789 of the C.C.Q. provides that a liquidator is entitled to remuneration if he or she is not an heir. If the liquidator is an heir he or she may be remunerated if the Will so provides,

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6 For more information on passing of accounts in British Columbia see "Passing of Accounts and the New Probate Rules" by M. Scott Kerwin for the Continuing Legal Education Society of British Columbia, November 2013: https://www.cle.bc.ca/PracticePoints/WILL/14-PassingsofAccounts.pdf

7 See the Legal Education Society of Alberta https://www.lesaonline.org/ and see *Podulsky Estate (Re)* 2015 ABQB 509 at para. 75.

8 See *Preboy Estate (Re)* (1989), 1989 CanLII 4523 (SKSU), affirmed 1989 CanLII 4427 (SKCA) and Verbonac (Re) 1984 CanLII2295 (SKSU).

9 See *Kirkpatrick Estate (Re)* 1996 CanLII 6882 (SKQB) and *Manchester v Kluck* 2004 SKQB 136.

10 *Beecher Estate (re*), 2015 SKQB 19 at para.11

11 *The Estate of Verna Osiowy*, 2008 MBQB 301 at paras.17-18.

or the heirs agree. If the remuneration is not fixed by the testator, it is fixed by the heirs or in case of disagreement among the interested persons, by the court.

In **Nova Scotia,** section 62(3) of the *Probate Court Practice, Procedures and Forms Regulations* set out the factors to be considered by the court when deciding the amount of commission to allow to a personal representative.[12] For **New Brunswick,** see section 63 of the NB *Trustee Act*; **Prince Edward Island**'s section 11 of the *Probate Act* states that no personal representative shall make a profit from an estate but the court may allow him or her a commission on the gross amount, not to exceed 5% over and above expenses; and in **Newfoundland** section 52 of the *Trustee Act* RSNL 1990, c T-10 sets out the remuneration of a trustee with remuneration capped at 1/20 of the value of the assets (among other restrictions).

Common Objections in Contested Passing of Accounts

There are several common objections that appear when there is a contested passing of accounts. These include failure to properly account, failure to maintain books and records, failure to adhere to the "prudent investor rule", improvident realization of assets, failure to maintain an even hand, acting in conflict of interest, breach of trust etc. Below we canvass some cases throughout the country that deal with common objections:

In the **Manitoba** case of *The Estate of Sophie Zelzniak* 2009 MBQB 326, the Court determined that the Estate Trustee failed to properly account.[13]

See also the **Alberta** case of *Chustkoff Estate (Re)* 2014 ABQB 341 where the personal representatives were held in contempt of court (and one was ordered to serve 30 days in jail)[14] for failing to comply with court orders to pass accounts of the estate.[15]

In the **Nova Scotia** case of *Loughead Estate (Re)*, 2013 NSSC 236 the Court removed the personal representative for acting in a conflict of interest and failing to properly account. Also, see the **Nova Scotia** case of *Critchley v. Critchley* 2006 NSSC 219 where the Court found that the trustee maintained "investment objectives and risk tolerances that [were] inconsistent with the 'prudent investor' rule."[16]

In the **Yukon** case of *Tom Estate (Re)*, 2012 YKSC 30, Justice Veale confirms the court's supervisory

12 Which reflect the five factors set out in *Toronto General Trusts Corporation v. Central Ontario Railway Company* (1905), 6 OWR 350 (HCJ)
13 2009 MBQB 326 at para.8
14 See *Chustkoff Estate v. Bonora* 2014 ABCA 444 at para.8.
15 *Chutskoff Estate (Re)* 2014 ABQB 341.
16 *Critchley v. Critchley* 2006 NSSC 219 at para. 115.

authority in a passing of accounts application and reiterates a trustee's obligation to put the interests of an estate ahead of any personal interest of the trustee or family disputes.[17]

See also the recent **PEI** case of *Thomas v. Thomas Estates* 2016 PECA 13 where the Court of Appeal refused to allow an extension of time to appeal two passing of accounts orders, after the beneficiary waited nine months after he accepted and cashed his cheque from the estates to appeal.[18]

In the **Saskatchewan** case of *Jarvis Parker v. Jarvis*, 2012 SKQB 147 , the court refused to allow the passing of accounts application and determination of trustee remuneration to be heard at the same time as a breach of trust action against the trustee, finding that the "factual overlap can sew confusion".[19]

Finally, in the recent **British Columbia** case of *Zadra v. Cortese* 2016 BCSC 390 the Court found that a trustee's pre-taking of remuneration was a breach of trust contrary to Rule 25-13 of the *Supreme Court Civil Rules*.[20]

17 *Tom (Estate of),* 2012 YKSC 30 at para.4.
18 *Thomas v. Thomas Estates* 2016 PECA 13 at paras. 15&18.
19 *Jarvis Parker v. Jarvis*, 2012 SKQB 147 at paras. 5-14.
20 *Zadra v. Cortese*, 2016 BCSC 390 at paras. 90-92 & 102.

CHAPTER 9

INDEMNITY OF ESTATE TRUSTEES AS APPLIED IN RECENT CASES

by

Professor Albert H. Oosterhoff

INDEMNITY OF ESTATE TRUSTEES AS APPLIED IN RECENT CASES[1]

Prepared by Albert H. Oosterhoff[2]
(for The Advocates' Quarterly, Vol. 14 No. 1, April 2013)

1. Introduction

I had assumed that the law of indemnity for estate trustees was well settled and well understood. However, a number of recent cases suggest that the courts do not understand the principle of indemnity or have a mistaken understanding of it, for some of the cases have significantly limited the right of estate trustees to be indemnified. There are many cases that are concerned with the right to indemnity and a significant number deny or restrict indemnity in their particular circumstances. That is because the cases are fact-driven and often the right to indemnity is lost in whole or in part because the claim is excessive. In other words, the facts of cases lead to different outcomes when the principle is applied. However, most of those (older) cases do not question the long-established law of indemnity, while the recent cases do. It seemed good to me therefore to review this area of the law and to examine where the cases have gone astray in the last number of years.

To that end, I shall describe the historic view of indemnity as discussed in leading cases, both in England and Canada, and in provincial statutes. In doing so, I shall quote extensively from the primary sources. I shall then provide a critique of the recent cases.

My paper is thus limited in scope. It does not address the law of indemnity generally. Nor does it examine a number of aspects of the law of indemnity as it affects estate trustees and trustees[3] specifically. Thus, I shall not consider the following topics, even though some of them arise incidentally in the recent cases: (a) the nature and extent of the estate trustee's lien against the estate assets and whether the estate trustee's creditors have a right to be subrogated to the estate trustee's lien; and (b) the circumstances in which trustees and estate trustees are entitled to claim indemnity from trust or estate beneficiaries.

While I shall mention some of the older cases, I shall by no means survey all of the case law on this topic, for the cases are but examples of circumstances in which indemnity is either granted or denied after application of the basis principle. There are in any event a number of other sources that provide a broad overview of this law.[4]

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1 This article is a revised version of a paper I delivered at the STEP Toronto Branch Conference on 9 January 2013. My co-panelists were The Hon. Maurice Cullity and Archie Rabinowitz. I am indebted to them for their comments on earlier drafts of this article.

2 Professor Emeritus, The University of Western Ontario, Faculty of Law.

3 Although our topic only concerns estate trustees, I shall speak promiscuously of trustees and estate trustees, since the rules for both are largely identical in the context of indemnity.

4 See, *e.g.*, M.C. Cullity, "Personal Liability of Trustees and Rights of Indemnification" (1996), 16 E.T.J. 115; *Widdifield on Executors and Trustees*, 6th ed. by Carmen S. Theriault, ed. (Toronto: Thomson Carswell, 2002), c. 4; Suzanna Popovic-Montag, "Revisiting a Trustee's Right to Indemnification" (2003). 50 E.T.R. (2d) 161; *Waters' Law of Trusts in Canada*, 3rd ed. by Donovan W.M. Waters, Mark R. Gillen, and Lionel D. Smith (Toronto: Thomson Carswell, 2005), c. 22. See also Jennifer J. Jenkins, *Compensation & Duties of Estate Trustees, Guardians & Attorneys* (Toronto: Canada Law Book, 2011), c. 22.

2. Why We Need Indemnity

In our legal system an estate is not a juridical person. Neither is a trust. Thus, neither incurs expenses. Rather, its representative, the estate trustee, or trustee in the cases of a trust, does. It follows that an estate or trust is not directly liable for such expenses. The estate trustee or the trustee is. It also follows that third parties cannot sue an estate or a trust. The only person they may have had dealings with is the estate trustee or the trustee It is that person whom they must sue. The defendant will undoubtedly incur expenses and costs in the course of the litigation and it is appropriate that she be able to recover them from the estate or trust, assuming they were incurred properly. Similarly, a trust or an estate cannot commence an action.[5] The trustee or estate trustee must do so. Again, if the action is appropriate he should be able to recover the expenses and costs. In other words, third parties deal with a trustee or an estate trustee as principal. She is not an agent for the trust or estate, nor for the beneficiaries. Thus, third parties cannot normally recover their costs from the beneficiaries.

It is astounding that some lawyers do not realize that an estate and a trust are not juridical persons and cannot sue or be sued. This matter arose in a couple of the recent cases to be considered. The courts quite rightly corrected the lawyers' mistaken notion of the nature of estates and trusts. On that issue at least they were correct.

Further, an estate trustee will likely incur various expenses in the course of administering an estate, including typical administration expenses. He may also incur liability in contract, tort, or under statute. It is not fair that he should bear those himself, but should be able to recover them from the assets of the estate in priority to the beneficiaries.

3. The Right to Indemnity

Consequently, the courts have always held that trustees and estate trustees are entitled to be indemnified for their reasonable expenses. In the early case, *Worrall v. Harford*, Lord Eldon put it thus:

> It is in the nature of the office of trustee, whether expressed in the instrument or not, that the trust property shall reimburse him for all the charges and expenses incurred in the execution of the trust. It is implied in every such deed.[6]

To the same effect is the following statement of Rand J, speaking for the majority in *Thompson v. Lamport*,[7] a case I shall also refer to later in another context:

> The general principle is undoubted that a trustee is entitled to indemnity for all costs and expenses properly incurred by him in the due administration of the trust: it is on that footing that the trust is accepted. These include solicitor and client costs in all proceedings in which some question or matter in the course of the administration is raised as to which the trustee has acted prudently and properly.

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5 But see Rule 9.3 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as amended, which states that such an action is not a nullity and that the court may order that the proceeding be continued against the proper executor or administrator and may impose terms.

6 (1802), 8 Ves. Jun. 4 at 8, 32 E.R. 250 (Eng. Ex. Ch.).

7 [1945] S.C.R. 343 at 356, [1945] 2 D.L.R. 545.

See also *Goodman Estate v. Geffen*,[8] in which Wilson J. stated and applied the following principle:

> The courts have long held that trustees are entitled to be indemnified for all costs, including legal costs, which they have reasonably incurred. *Reasonable expenses include the costs of an action reasonably defended*.[9] In *Re Dallaway*[10] Sir Robert Megarry stated the rule thus:[11]
>
> > *In so far as such person [trustee] does not recover his costs from any other person, he is entitled to take his costs out of the fund held by him unless the court otherwise orders*; and the court can otherwise order only on the ground that he has acted unreasonably, or in substance for his own benefit, rather than the benefit of the fund.

There are many other cases decided by lower Canadian courts to the same effect. The principle of indemnification is thus firmly embedded in Canadian law.

This principle was codified in Canadian statutes in the 19th century.[12] Thus, for example, the Ontario *Trustee Act*[13] now provides:

> **23.1** (1) A trustee who is of the opinion that an expense would be properly incurred in carrying out the trust may,
>
> (a) pay the expense directly from the trust property; or
>
> (b) pay the expense personally and recover a corresponding amount from the trust property.
>
> (2) The Superior Court of Justice may afterwards disallow the payment or recovery if it is of the opinion that the expense was not properly incurred in carrying out the trust.

Saskatchewan recently enacted a new *Trustee Act*.[14] Section 43, which addresses indemnity, *inter alia*, is in some respects clearer than the Ontario provision and the statutes in some of the other provinces, in that it provides specifically for expenses to settle an action or satisfy a judgment, and for legal fees and costs. Section 43 provides:

> **43.**

. . .

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8 [1991] 2 S.C.R. 353, 81 D.L.R. (4th) 211, 42 E.T.R. 97, at para. 75, emphasis added.

9 See *Re Dingman* (1915), 35 O.L.R. 51.

10 [1982] 1 W.L.R. 756, [1082] 3 All E.R. 118.

11 *Ibid*., at All E.R. 121, emphasis added.

12 The current statutory provisions are: *Trustee Act*, R.S.A. 2000, c. T-8, s. 25; R.S.B.C. 1996, c. 464, s. 95; C.C.S.M. 1987, c. T160, s. 78; R.S.N.L. 1990, c. T-10, s. 29; R.S.N.S. 1989, c. 479, s. 29; R.S.N.W.T. 1988, c. T-8, s. 5; R.S.N.W.T. (Nu.), c. T-8, s. 5; R.S.O. 1990, c. T.23, s. 23.1, added by S.O. 2001, c. 9, Sched. B, s. 13(1); S.S. 2009, c. T-23-01, s. 43; R.S.Y. 2002, c. 223, s. 8; *Trustees Act*, R.S.N.B. 1973, c. T-15, s. 13(2). Note, however, that most of these provisions are not as extensive as Ontario's s. 23.1. P.E.I. does not have comparable legislation.

13 R.S.O. 1990, c. T.23, s. 23.1, added by S.O. 2001, c. 9, Sched. B. s. 13(1). This provision also applies to estate trustees. See *Trustee Act*, *ibid.*, s. 1, which defines "trust" to extend to and include "the duties incident to the office of personal representative [*i.e.*, estate trustee] of a deceased person." I have always thought it odd that while the *Rules of Civil Procedure*, supra, footnote 5, were changed by O/Reg. 484/94 to create the title of "estate trustee," corresponding statutory provisions, such as s. 1 of the *Trustee Act* still speak of "personal representative," or in other contexts of "executor" and "administrator," the terms used in the rest of the common law world.

14 *Trustee Act, 2009*, S.S. 2009, c. T-23.01, s. 43.

(3) A trustee may reimburse himself or herself for, or pay or discharge out of the trust money, all expenses reasonably incurred in or about the execution of the trustee's trust or powers.

(4) A trustee may:

(a) be indemnified out of trust money with respect to:

(i) liabilities and expenses, including an amount paid to settle an action or satisfy a judgment, arising out of any matter or thing done honestly and in good faith relating to the exercise or attempted exercise of the powers and duties of the trustee; and

(ii) legal fees and costs relating to a claim for which this subsection provides an entitlement to an indemnity; and

(b) receive out of the trust money an advance of money for the purpose of meeting an expense for which the trustee may be reimbursed or indemnified pursuant to this section.

(5) A trustee shall repay the money advanced to the trustee pursuant to clause (4)(b) if the trustee is found not to be entitled to be reimbursed or indemnified with respect to the expense for which the advance was made.

Most of the other statutes are of an older vintage and incorporate the right of trustees and estate trustees to pay themselves expenses incurred in the administration of the estate or trust in a section dealing with the liability of trustees for assets received. The Alberta provision is typical. It provides:[15]

25. A trustee

. . .

may reimburse the trustee or pay or discharge out of the trust property all expenses incurred in or about the execution of the trustee's trust or powers.

4. The Nature of Indemnity

As the word itself suggests, the right to be indemnified implies that estate trustees should bear the costs and expenses themselves first and then seek reimbursement from the estate assets. But this presents a problem. Many trustees and estate trustees do not have the wherewithal to pay the costs out of their own pocket. Nor should they have to. Their office is a socially desirable one which at one time, at least in the case of trustees, was carried out without remuneration.

Of course, a person who has been named to the office does not have to accept it. He may renounce. Most people would probably want to renounce once apprised of the fact that they must pay for all costs and expenses personally and can recover them only afterwards. On that basis few people would agree to take on the office. That is certainly not desirable, for the administration of estates is a socially necessary and desirable function that the law should promote and foster. And so it has long been the practice and the courts have long since recognized that trustees and estate trustees

15 *Trustee Act*, R.S.A. 2000, c. T-28, s. 25.

may pay the costs and expenses out of estate or trust assets.[16] Thus the statutes set out and referred to above also rightly codify this aspect of the principle of indemnity.

5. Limits on the Right of Indemnity

It is obvious that the right to indemnity may be abused by trustees and estate trustees, especially if they take costs and expenses out of the trust fund or estate assets before they are permitted by the beneficiaries or authorized by the court to do so.[17] But even if they pay these initially themselves, they may be refused indemnity subsequently by the courts or be required to repay the trust or estate. The principle set out above and codified in the statutes also recognizes this possibility. The expenses and costs must have been reasonably or properly incurred. If they were not, the trustee or estate trustee is not entitled to be indemnified for them.

This issue normally arises when the trustees or estate trustees apply to pass their accounts or when they are forced to do so by the beneficiaries. However, it may also arise on an application for advice and directions. The onus is on the estate trustee to prove that the expenses were proper.[18]

So the question is what kinds of expenses are reasonable or proper. A singularly unhelpful explanation is that of Lindley L.J. in *Re Beddoe*[19] who said, "the words 'properly incurred' in the ordinary form of order are equivalent to 'not improperly incurred.'" That does not gain us a clearer understanding of the words. For that we need to go the cases.

A number of general principles emerge from the older cases:[20]

> (1) The expenses must have been incurred on behalf of or in the course of the administration of the trust or estate. If they were not, they are not recoverable, even though they were incurred in a related matter and, if not incurred, would have had a deleterious effect on the trust.[21] If they were incurred on behalf of the trust, however, they are recoverable.[22]
>
> (2) Expenses voluntarily assumed by a trustee are not recoverable.[23]
>
> (3) Trustees and estate trustees are not entitled to be indemnified for expenses that arose out of their own misconduct.[24]

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16 See, *e.g.*, *Re Dallaway*, *supra*, footnote 10 and the excerpt from that case quoted in the text at that location.

17 I have eschewed the use of the unfortunate terms "pre-take" and "pre-taking," which are found in many modern cases. They are undoubtedly convenient shorthand and everyone knows what they mean, but they are bad English, just like the term "pre-planning," which is in common use in the funeral industry. The prefix "pre" means "before," so the expressions "pre-taking" and "pre-planning" are silly. Literally, they mean that you are not doing anything. Having said this I confess to being shocked that the OED does recognize "preplan" as meaning "plan in advance," but I am pleased that it does not mention "pre-take." It is well to recognize that the OED is descriptive in its entries, *i.e.*, it describes what people say, not what they ought to say. I suggest that we refer such taking as "interim payment of expenses."

18 *Carter v. Blaney* (1989), 34 E.T.R. 229 (B.C.C.A.).

19 [1893] 1 Ch. 547 at 558 (Eng. C.A.), on appeal from an order of Kekewich J.

20 See generally Waters, *supra* footnote 4, at 1152ff; and Popovic-Montag, *supra*, footnote 4, both for a discussion of the general principles and a wealth of examples in which indemnity was either granted or refused.

21 *Fultz v. McNeil* (1906), 38 S.C.R. 198.

22 *Ceepeear (School District No. 3069) v. Security Trust Co.*, [1919] 1 W.W.R. 615 (Alta. C.A.).

23 See *Vermont Loan & Trust Co. v. Ennis* [1933] 2 W.W.R. 397 (Sask. C.A.).

24 See, *e.g.*, *Tebbs v. Carpenter* (1816), 1 Madd. 290, 56 E.R. 107; and *Morton v. Miller* (1906), 1 E.L.R. 91 (N.S.S.C.).

These principles clearly make sense and continue to be accepted in modern case law. However, their application in particular cases is not always clear. And, as argued by Waters,[25] if the expenses, though incurred outside the scope of the trust, in fact benefit the trust, perhaps the estate should be required to indemnify the trustees on the ground that the beneficiaries are unjustly enriched.

The principles apply to all costs and expenses incurred by the trustees or estate trustees. It should not matter whether they arose directly in the administration of the estate; whether they are contractual, tortious, or statutory obligations of the trustees; or whether they consist of legal costs incurred in litigation conducted by the trustee or estate trustee on behalf of the estate or trust either as plaintiff or defendant in an action, or as applicant or respondent in applications or motions.

Legal costs can, of course, arise in different ways. Some will clearly be incurred in the context of the administration of the estate. These include legal advice on the duties of estate trustees and on the interpretation of the testator's will. Normally, the estate trustee is entitled to be indemnified for them. However, the cases also make it clear that legal advice on the amount of compensation to which the estate trustee is entitled, legal costs on an application for advice and directions, and legal services provided on the contested passing of accounts are also true administration expenses and the estate trustee is entitled to be indemnified for them, unless the expenses are excessive.[26]

The matter is more complex when it involves litigation brought either by the estate trustee, by a beneficiary, or by a third person. The modern rule is that costs in estate litigation are treated the same as costs in other civil litigation. Thus, the general rule is that costs follow the event, unless (a) there are reasonable grounds upon which to question the execution of the will or the testator's capacity, or (b) when the difficulties or ambiguities in the will that gave rise to the litigation were caused in whole or in part by the testator, in which case the costs are still normally awarded out of the estate.[27] In other cases, such as challenges to the propriety of the estate trustee's actions and contested claims against the estate, costs usually follow the event. In such cases the estate trustees may be awarded full indemnity or partial indemnity for their legal costs or indeed be denied costs. The question then arises whether they may claim the difference between what they have awarded and their actual costs out of the estate. Usually they can.

It is certainly clear that courts tend to scrutinize legal costs more closely than other expenses, perhaps to prevent unnecessary litigation at the cost of the beneficiaries.[28] One principle that arises out of this closer scrutiny is that trustees are not normally indemnified for the costs of an appeal, since it may not be for the benefit of the beneficiaries. They should normally be satisfied with the judgment at first instance. However, this principle is also subject to exceptions.[29]

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25 Waters, *supra*, footnote 4, at 1153-54.

26 See, *e.g.*, Jenkins, *supra*, footnote 4, para. 22:20.20; *Re Kanee Estate* (1991), 41 E.T.R. 263 (B.C.S.C.); *Re Watterworth Estate*, 1995 CarswellOnt 2528 (Ont. Ct., Gen. Div.); *Chabros v. Anderson*, 2011 ABQB 806, 75 E.T.R. (3d) 281. Clark J. in that case disagreed, rightly, I submit, with *Re Preboy Estate* (1989), 72 Sask. R. 33 at 43 (Surr. Ct.), affirmed (1989) 74 Sask. R. 223 (C.A.); and with *Widdifield*, *supra*, footnote 4, at 4-21, which came to the opposite conclusion.

27 See *McDougald Estate v. Gooderham* (2005), 255 D.L.R. (4th) 435 (Ont. C.A.). See also Rule 57 of the *Rules of Civil Procedure*, *supra*, footnote 5, which contains detailed provisions to guide the court in exercising its discretion to award costs.

28 See, *e.g.*, *Re Foote Estate*, 2010 ABQB 197 at para 16, *per* Graesser J.

29 *Smith v. Beal* (1894), 25 O.R. 368 (C.A.). And see *The Canada Trust Company (Trustee of the Poloniato Grandchildren's Trust v. Brown*, 2011 ONSC 731 (application for advice and directions); 2011 ONSC 4400 (costs endorsement of L.A. Pattillo J.); 2012 ONCA 862 (the Ontario Court of Appeal affirmed the decision on the application with full indemnity costs to all parties appearing on the appeal payable out of the estate).

Goodman Estate v. Geffen, already mentioned,[30] is a clear example of such an exception. A person with mental illness had inherited property from her mother. With input from her brothers, she settled the property upon trust for herself for life, with remainder to her children, nieces and nephews. Two of her brothers and a nephew were named as the trustees. After her death, her son sued the trustees in his personal capacity and as executor of his mother's estate, alleging that the brothers had exercised undue influence over their sister. The trial judge found that there was no undue influence. The Alberta Court of Appeal reversed on the ground of the presumption of undue influence. On further appeal, the Supreme Court of Canada restored the trial judgment, holding that the presumption was rebutted. The trustees obviously had to defend the action and the appeal to the Court of Appeal. But should they have brought the appeal to the Supreme Court? The Supreme Court did not address the issue directly, but appears to have had no difficulty with the appeal. On the issue of costs, the son argued that the trustees should not be allowed their costs out of the estate, since they were acting for their own benefit. However, the court held that there could be no question that the trustees had acted reasonably and were thus entitled to be indemnified. Justice Wilson went on to say:[31]

> Nor can there be any serious question that the appellants in defending the action were acting, not for their own benefit, but for the good of the trust. For [the nephew trustee], of course, defending the action promoted both his personal interest as well as that of his fellow beneficiaries. While we have not been referred to a case in which trustees seeking indemnification from a trust were also beneficiaries of the trust, I do not consider the co-existing interest of trustee and beneficiary a valid basis for denying costs. Similarly, the fact that the Geffen brothers were acting in the interests of their children, nephews and nieces, does not, in my view cast any doubt upon the propriety of their actions.

The court awarded the trustees full reimbursement from the trust property for their actual and reasonable costs, including legal fees, while requiring the son to bear his own costs.

Thus, statements to the effect that when executors are seeking compensation they are to be regarded as ordinary litigants in respect of costs, appear to be incorrect.[32] I submit that since executors are entitled to compensation for the work they have done, their costs incurred on their application for compensation are an administration expense.[33]

I want to look a bit more closely at another case already mentioned, *Thompson v. Lamport*.[34] It is significant for the broad principles applied by Rand J. The case concerned an action by the executors of a will which directed them to set up a trust for the testator's daughter with a capital sum of $100,000. She was to receive income from the trust for life. She would also receive the corpus if she should survive her husband, but the corpus would fall into residue if she predeceased her husband. The residue of the estate was left to her two brothers. The brothers and a trust company were appointed the executors and trustees. The daughter brought an action against the trustees, alleging various improprieties. The trial judge dismissed the action with costs. The party and party costs, as

30 *Supra*, footnote 9.
31 *Ibid*., at para. 77.
32 See, *e.g.*, *Widdifield*, *supra*, footnote 4, at 4-21. *Re Preboy Estate*, *supra*, footnote 26.
33 See, *e.g.*, Jenkins, *Compensation*, *supra*, footnote 4, at para. 22:20.20; and *Re Kanee Estate* (1991), 41 E.T.R. 263 (B.C.S.C.), followed in *Re Watterworth Estate*, *supra* footnote 26, in which the Ontario Court (General Division) said at para. 38 that the time spent by an estate solicitor responding to the executor's questions concerning compensation to which they are entitled is a legitimate expense and that it is in the estate's best interests that legitimate compensation be paid.
34 *Supra*, footnote 7.

taxed, were being paid out of the income paid to the daughter. The solicitor and client costs were also taxed and the trustees sought to recover the difference between the two assessments from the trust fund. The daughter objected. The application judge directed that the difference should be recovered out of the capital of the trust. The Ontario Court of Appeal was of opinion that trustees can only recover costs from a trust if they have benefited it. Here the only benefit was to the residue and so the court directed that the trustees could only recover the difference between the two sets of costs from the residue. The trustees then appealed to the Supreme Court of Canada.

In the course of his judgment for the majority, Rand J. referred to and applied *Walters v. Woodbridge*.[35] The trustee of an estate had obtained court approval for the sale of the partnership interest of the deceased. Pursuant to a compromise, the proceeds were to be held on the trusts of the will. Some beneficiaries then brought a bill in equity to have the court's decree set aside for misrepresentation. The bill was dismissed with costs, but the trustee was unable to recover his taxed costs from the beneficiaries. He brought an application to have his solicitor and client costs taxed and charged against the estate. Lord Romilly dismissed the application for lack of jurisdiction, since the action was defended by the trustee to clear his own character. The Court of Appeal reversed and James, L.J. said the following:[36]

> It is agreeable to me personally that we are not obliged to put a trustee in a position which would be disgraceful to the administration of justice. The Court is very strict in dealing with trustees, and it is the duty of the Court, as far as it can, to see that they are indemnified against all expenses which they have honestly incurred in the due administration of the trust. Lord Romilly says that the trustee here defended himself against a false charge, and was in the same position as any other person who so defended himself; but it was a charge against the trustee in respect of acts done by him in the due administration of the trusts; and his defence was beneficial to the trust estate, for it has been decided that the compromise was an advantageous one. In such a case it is impossible to split the defence, and say that because the trustee at the same time defended his own character he is only to have a part of the costs.

Justice Rand had this to say about the "benefit":[37]

> Now, what are the characteristics of this benefit? There [in *Walters*] the proposed sale required the prior approval of the court, and the effect of the judgment dismissing the bill was to confirm that approval. But what of the case where the trustee carries through a transaction which does not require such an approval? What is to be the measure or test of benefit? Can it be anything more than that the act was properly done within the duty of the trustee? Must the court examine the details of the transaction challenged and find not only propriety but a "benefit" as against what is alleged ought to have been done?
>
> Where the trustee is resisting the assertion of a right by a third person against the trust estate, obviously his action is for its benefit. But a new element is introduced when the complaint is by the beneficiary for a breach of duty, such as fraud or negligence. In that case the trustee is in fact defending both his administrative act and his own interest. In the latter aspect, he has no special privilege in costs over an ordinary litigant: he is in the same

35 (1878), 7 Ch. D. 504 (C.A.).
36 *Ibid*. at 510.
37 *Thompson*, *supra*, footnote 7, at 357-58.

> position as any other person improperly accused of a wrong, and any outlay over the costs allowed by law must be borne by himself as the price of his own vindication. The question in such cases is whether the personal defence is incidental to that in his representative capacity: if it is, the costs will not be split.
>
> From this the Court of Appeal has drawn the conclusion that in suits by beneficiaries it must appear that the defence is for the benefit of the trust in virtually the same sense as in cases brought by third persons: that the trustee is warding off an attack upon his funds: and the court in fact looked upon the litigation as essentially, if not exclusively, a claim against the residue. But, with the utmost respect, that is not, in my opinion, the principle of *Walters v. Woodbridge*[38] where, as here, the court is called upon to determine whether an act or transaction carried through by the trustee can be said to have been done within his authority and duty: and where the undoing of the act is the direct object of the litigation.

Taking all this into account, Rand J. directed that the solicitor and client costs of the trustees, as well as the costs of the other parties, should be borne by both the trust fund and the residue of the estate in proportion to their respective values.

These cases therefore make it abundantly clear that the basic rule entitles trustees and estate trustees to recover full indemnity, including legal costs, out of the funds under their management. However, there is also a caveat and it is an important one, namely, they are only entitled such costs as were reasonably incurred in the administration of the trust or estate.

As regards prior approval by the court or the consent of the beneficiaries, the latter will often not be available because there is already animosity between the estate trustee and the beneficiaries, or because some or all of the beneficiaries are incapable. In circumstances in which the estate trustees are in doubt about the propriety of a proposed expense they may be well-advised to seek advice and directions from the court. That way they will avoid a nasty surprise later if the court should disallow the expense. Perhaps testators and settlors might be advised to authorize the taking of expenses from the estate or trust fund by the estate trustee or trustee if they deem them to be reasonable and proper.

The cases also make clear that costs are normally recoverable out of the capital of the fund, although in fact the whole fund, including the income, is liable for them. And they make clear that the courts should not attempt to make fine distinctions between the extent to which trustees, who are also beneficiaries, have benefited the estate and the extent to which they have benefited themselves in conducting litigation. In other words, there is no distinction between the case of a trustee defending an action by a beneficiary against himself, and the case of a third person who brings an action against the trustee. In all cases the question is whether the trustee's actions were carried out within scope of her authority and whether the expenses were properly incurred. However, if the action is solely for the trustee's benefit, she may have to bear any costs awarded against her personally.

6. The Recent Case Law

This brings us to an examination of the recent cases. Have they applied the principles stated above correctly and have they found against the estate trustee solely on the facts? Or have they diverged from the established principles? I shall examine them *seriatim*, give a brief statement of the facts, and then consider the foregoing questions.

38 *Supra*, footnote 35.

6.1 *Coppel v Coppel Estate*[39]

This was an uncontested motion for further directions by a beneficiary. The issue was whether an estate trustee may, without court approval or the consent of all the beneficiaries, use estate funds to pay legal fees incurred in defending an action brought by a beneficiary. Counsel was unable to find any authority on point.

Quinn J. noted in passing that the solicitors for the defendant were not the solicitors of the estate, as they claimed, but solicitors for the estate trustee.[40]

> *This is correct, as discussed above.*

However, he then held that therefore it is impermissible for an estate trustee to pay litigation accounts from estate funds without approval or consent.[41]

> *This is incorrect since there was direct authority to the contrary at the highest level in* Goodman Estate v. Geffen.[42] *Further, s. 23.1 of the* Trustee Act[43] *was enacted in the year* Coppel *was decided and is clear authority for such taking. In any event, its predecessor, s. 33,*[44] *also allowed it. Neither section was referred to by the court. Accordingly, the decision was made* per incuriam.

In *dictum*, Quinn J. went on to say, "…it is also impermissible for non-litigation, but estate-related accounts to be paid without prior court approval or the consent of the beneficiaries."[45]

> *This is also incorrect for the same reason.*

Quinn J. directed that the estate trustee reimburse the estate for all legal accounts incurred in defending the action, presumably because he believed that the taking was improper. Also, because the estate trustee failed to respond to the plaintiff's motion, the court awarded the plaintiff substantial indemnity for his costs, payable by the estate trustee personally. It did not award costs to the estate trustee.

> *The costs award may have been appropriate because of the estate trustee's failure to respond to the motion.*

6.2 *DeLorenzo v. Beresh*[46]

Residuary beneficiaries under a will brought a motion in which one of them, having reached the specified age under a testamentary trust, sought to have the estate trustee, who was also a solicitor, transfer the capital of her interest under the trust to her. At the time there were three other

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39 [2001] O.J. No. 8457 (S.C.J.).
40 *Ibid.,* para. 8
41 *Ibid*.
42 *Supra*, footnote 8 and excerpt there quoted in the text.
43 *Supra*, footnote 13, quoted in the text at that point.
44 *Trustee Act*, *supra*, footnote 13, repealed by S.O. 1998, c. 18, Sch. B, s. 16(1). I suspect that the gap between the repeal of s. 33 and the enactment of s. 23.1 is because: (a) the repeal of section 33 was part of the repeal of all sections of the Act dealing with trust investments and their replacement with the new regime of the prudent trustee in 1998; (b) it was realized later that the repeal of s. 33 also repealed the codification of the right of indemnity; and (c) that required the enactment of s. 23.1 to reinstate, clarify, and expand the right of indemnity.
45 *Coppel*, *supra*, footnote 38, para. 9.
46 [2010] ONSC 5655.

proceedings before the court, two being the estate trustee's applications to pass his accounts from the testator's death to the end of 2004, and an application by the residuary beneficiaries for an order removing the estate trustee. The estate trustee had not yet applied to pass his accounts from 2005 to date and it appeared that he may have been dilatory in obtaining a tax clearance certificate. In addition, he had not yet fulfilled certain undertakings. He resisted the claim to transfer the capital to the one beneficiary, since he claimed a lien for compensation and expenses on the estate funds. Meanwhile, he had paid his legal costs in the various proceedings from estate funds.

Lofchik J. acknowledged that on a passing of accounts the estate trustee is normally fully indemnified for the costs of administration, including legal costs, but distinguished such indemnity from legal costs incurred in contentious or adversarial legal proceedings between the estate trustee and beneficiaries, or between the estate trustee and third parties. In such cases each party should pay their own costs until the litigation is finished, after which the court, on the passing of the accounts can determine whether, or to what extent the estate trustee should be indemnified for them. Consequently, Lofchik J. applied *Coppel*,[47] since the estate trustee had not obtained court approval or consent of the beneficiaries and ordered reimbursement of the amounts taken with post-judgment interest.

> *For the reasons given in the discussion of* Coppel*, I submit that this is wrong. In this case the court also failed to refer to s. 23.1 of the* Trustee Act,[48] *which permits such taking.*

Lofchik J. also held that while the estate trustee was entitled to a lien, this did not entitle him to withhold payment of the whole of the capital of the beneficiary's interest. Lofchik J. directed that he pay her 80 percent. The court also held that if he should later be found liable for payment of income tax or other expenses, he could make a claim for reimbursement from the beneficiaries.

> *The court may well have been influenced by the estate trustee's delays, but the holding on the lien is troubling. In the circumstances, the order to pay 80 percent to the beneficiary was probably satisfactory, but in other cases a court might, on this basis, defeat an estate trustee's lien entirely.*

6.3 *Craven v. Osidacz Estate*[49]

The deceased stabbed his son to death during an access visit and was about to kill his estranged spouse when he was shot to death by the police. He had appointed his brother his estate trustee and the brother and their mother were the sole beneficiaries under the deceased's will. The spouse sued the estate for the wrongful death of her son and for the assault against her and engaged in litigation with the estate about the sale of the matrimonial home and for dependants' support. The estate trustee used estate funds to pay legal fees in excess of $100,000 to defend these claims. He and his mother alleged that they had approved this payment. The spouse brought a motion to restrain the estate trustee from takint further expenditures from the estate without court approval and directing the estate trustee to repay the moneys already taken to the estate.

Lofchik J., citing *Goodman*[50] and *Coppel*,[51] noted that an estate trustee has a duty to defend claims

47 *Supra*, footnote 39.
48 *Supra*, footnote 13.
49 2010 ONSC 6637.
50 *Supra*, footnote 8.
51 *Supra*, footnote 39.

against an estate, so long as the estate assets are expended reasonably. The estate trustee may be indemnified for his expenses, but only if the costs were reasonable and properly incurred. When both the estate trustee and others are beneficiaries or otherwise have a personal claim against the estate and their interests conflict, it is improper to use the estate "as a kind of ATM machine from which withdrawals automatically flow to fund the litigation whether reasonable or not."[52] For the estate trustee must use his best judgment about whether to litigate after considering the interests of the beneficiaries and others. If in doubt, the estate trustee should seek the court's approval or the consent of the beneficiaries. The applicant had a financial interest in the estate and, thus, had standing to object to the payment of the expenses from the estate.

Lofchik J. refused to order repayment of the moneys already taken, stating that the reasonableness of the taking would be best measured on the passing of the accounts. However, the court did restrain the estate trustee from taking further estate funds to pay further legal accounts without the consent of the beneficiaries, including the applicant, or the court's approval.

> *Despite the uncritical reference to* Coppel*, I submit that this was a reasonable order in the circumstances. It confirmed and protected both the right of estate trustees to use estate funds to defend claims against the estate and the right of beneficiaries to prevent unreasonable use of such funds. The case does not make it clear when the passing of accounts would take place. The facts suggest that it might be some time, so it is somewhat surprising that the respondent was not required to repay the moneys taken by him from the estate. Section 23.1 was not referred to.*

6.4 *Bott v. MacCaulay*[53]

This case is different from the others in that it concerns the claim of a solicitor who was engaged by the estate trustee to perform legal services for the estate, as well as some "executor's work," that is, work normally performed by an estate trustee. The estate trustee had signed a retainer that made a distinction between the two types of services, but it did not, as the court found, entitle the solicitor to claim five percent of the value of the estate as the equivalent of an estate trustee's compensation. The solicitor submitted two accounts, one for the legal services and one for the "executor's work," and paid himself from estate assets. The estate trustee applied to have the second account assessed under the *Solicitor's Act*[54] and submitted an affidavit detailing the "executor's work" he had done. The solicitor claimed that such an assessment could only take place on a passing of accounts.

Cullity J. held that he had jurisdiction to order the assessment, since the solicitor was not solicitor to the estate, but to the estate trustee. Thus, the latter was entitled to have the solicitor's accounts assessed. An estate trustee may agree to pay a particular amount for services rendered by a solicitor but, as the court found, there was no such agreement in this case.

Cullity J. also held that if there is no special agreement between the parties, the solicitor may charge only on the normal *quantum meruit* basis, *i.e.*, one based on the time spent, labour, degree of difficulty and other factors. These principles apply to accounts for legal work and for solicitor's work. Even if the retainer amounted to an agreement to pay the solicitor a specific amount, the

52 *Craven*, *supra*, footnote 49, para. 23.
53 (2005), 76 O.R. (3d) 422 (S.C.J.).
54 R.S.O. 1990, c. S.15.

court would still have power to declare the agreement void on the ground that its terms were unfair and unreasonable.

Cullity J. directed the solicitor to deposit the amount taken pursuant to the second account into an interest-bearing trust account pending completion of the assessment.

> *This decision is clearly right. It applies correct principles and comes to an eminently reasonable conclusion.*

6.5 *Re Vincent Estate*[55]

A beneficiary began proceedings to challenge the validity of his mother's two wills and an estate freeze. This led to litigation between him and his sister, the other beneficiary. The court appointed a trust company as estate trustee during litigation. Prior to March 1, 2010, the estate trustee during litigation, represented by counsel, made three court appearances and the court awarded the estate trustee its costs on a full indemnity basis to be paid from the estate. The parties then reached a settlement which the court approved. The order provided that reasonable legal fees and disbursements relating to the transfer of a condominium to the sister should be paid out of the estate. It also provided that the estate trustee was entitled to be reimbursed for legal costs and disbursements and other properly incurred charges and reasonable out-of-pocket expenses. The son took part in negotiating the terms of the order.

The lawyers' accounts during the litigation had been regularly provided to the beneficiaries after they had been paid and the son had not objected to them. However, when the estate trustee applied to pass its accounts, the son objected to the legal accounts paid during the litigation and for the condominium transfer.

Prior to the return of application on 4 May 2011, both the estate trustee and the son served draft orders, but the draft order of the estate trustee raised as one issue whether the son was prevented from raising objections on the ground that those objections had already been adjudicated and were subject to existing court orders. Corrick J. held in an endorsement, dated 4 May 2011, that the order approving the settlement estopped the son from objecting to the legal accounts paid before the date of the order, but that he was entitled to have legal accounts paid after the date of the order assessed. His sister did not object to the passing of the accounts.

The endorsement was followed by the judgment of Corrick J., also dated 4 May 2011, passing the accounts as presented. The judgment in turn was followed by the order of Corrick J., dated 17 June 2011, which ordered that the son was estopped from objecting to the legal accounts prior to 1 March, 2010, but permitted him to contest the accounts rendered after that date. He subsequently declined to have those assessed. The judgment was followed by the reasons for decision of Corrick J, dated 26 September 2011. In those reasons, Corrick J. dealt with the daughter's costs and a request for increased costs by the estate trustee. Justice Corrick granted the latter request, passed the estate trustee's accounts to April 30, 2010, assessed the costs of passing the accounts of the solicitor for the estate trustee, and directed that the larger portion of the latter costs, as well as the costs awarded to the sister be paid out of the son's share of the estate.

55 2011 ONSC 3806 (endorsement, Corrick J, 4 May 2011), reversed 2012 ONSC 940 (Div. Ct., endorsement, 6 February 2012). See also Court File No. 02-105/10 (Judgment on Passing of Accounts, Corrick J., 4 May 2011, and Order of Corrick J., 17 June 2011); and 2011 ONSC 5625 (Reasons for judgment of Corrick J., 26 September 2011).

The son appealed. He argued that: (a) he did not present evidence in support of his objections at the 4 May, 2011 hearing because it was only a motion for directions; (b) Corrick J. failed to follow the appropriate procedure as contemplated by the Practice Direction Concerning the Estates List in Toronto dated 18 February 2009, but decided the substantive issue of estoppel; and (c) therefore the order deprived him of the opportunity to make his case. By an endorsement of 6 February 2012, the Divisional Court accepted the son's argument and set aside all but one of the provisions of the order of Corrick J, of 17 June 2011.

But this is the strange part: While the court set aside the order of 17 June, it did not refer to the Reasons for Decision of 26 September. I understand that the court was not informed of them. The result, I submit, is that those Reasons are still in effect and that leaves the parties in a quandary about where they stand.

> *With respect, I find the decision of the Divisional Court strange. It speaks of an application for directions, but the order made by Corrick J was actually made on an application to pass accounts. Thus, Corrick J. clearly had jurisdiction to deal with the substantive issues under s. 49 of the* Estates Act,[56] *as well as under the* Trustee Act,[57] *and the* Rules of Civil Procedure.[58] *I submit that a Practice Direction cannot override those legal provisions. In addition, it would seem that the son had sufficient opportunity to provide timely details of his objections. Finally, in light of the modern approach to decide matters summarily if there are no reasonable issues for adjudication, I submit that it made sense for Corrick J. to make the findings and decide the matter as she did.*

6.6 *Zucker v. Moore*[59]

This is a bizarre case that involved numerous applications and orders. We are concerned with three of them. The case concerns the administration of a $42 million estate. The testator left his estate to his three children and named a family friend who was a retired partner of an accounting firm and another partner of that firm as estate trustees. The friend was not active for long as an estate trustee because of age and was eventually removed. He was paid $500,000 as compensation and the costs of some of the litigation that ensued. The continuing estate trustee was paid $1.2 million in compensation personally, as well as costs of the litigation, and the firm was paid $1.1 million in fees. Two of the beneficiaries raised objections, while the third concurred in their actions. The will was silent on the matter of taking compensation before approval.

The first proceeding was a motion by the beneficiaries for an order requiring the estate trustees to pass their accounts, directing them to repay all moneys taken by them for compensation and prohibiting them from being paid further compensation or reimbursement for legal and accounting fees. Grace J. took note of cases that permitted the taking of compensation before approval, as well as cases and other authorities that objected to the practice. He concluded that such taking appears normally to be unlawful unless the will or the court authorizes it, or all the beneficiaries consent, and possibly also if the estate involves ongoing administration and the interim compensation is reasonable. He held: (a) that the estate trustees were entitled to take interim compensation if the amount is reasonable and the accounts are passed expeditiously; (b) if consent was required,

56 R.S.O. 1990, c. E.21.
57 *Supra*, footnote 11.
58 *Supra*, footnote 5.
59 *Zucker v. Moore*, ONSC File No, 01-2521/04, 2011 02 02 (Endorsement of Grace J.); *Zucker v. Moore*, 2011 ONSC 7165 (Endorsement of Greer J.); *Re Zucker Estate*, 2012 ONSC 2262 (Reasons for judgment of Lofchik J.).

the evidence showed that the beneficiaries consented through 2005; and (3) whether there was consent post-2005 could not be determined on the evidence. He expressed concern about the amount of the compensation taken, but concluded that the estate trustees should not be ordered to repay the amounts taken since the issue was not really the taking without authority, but the quantum. Accordingly, he ordered the passing of the accounts and prohibited the further taking of compensation without court approval or beneficiaries' consent. He also directed the estate trustees to post an irrevocable letter of credit. It was never posted. Meanwhile, the continuing estate trustee was terminated by his accounting firm and he brought an action against it for wrongful dismissal.

The second proceeding was a motion on various issues, including the removal of the continuing estate trustee and an increase in the letter of credit. Justice Greer ordered that alternative security be posted in the form of an irrevocable direction by the continuing estate trustee to the trustees of an *inter vivos* trust of which he was a beneficiary, to assign his interest in the trust to the beneficiaries' law firm in trust. She also directed the estate trustee to assign all his right, title and interest in his lawsuit against his former accounting firm to that law firm and she directed the estate trustee who had been removed earlier to assign his interest under a trust of a condominium to the law firm if the beneficiaries should be successful in their fraudulent conveyance motion against him. In addition, Justice Greer ordered the removal of the remaining estate trustee, replaced him with another person, and directed that the removed trustee take no further compensation from the estate.

The third proceeding was a further motion for directions. Justice Lofchik gave various directions for the trial of issues concerning the compensation and legal costs taken by the original estate trustees.

> *The case is bizarre in that so much court time was taken up to attempt to resolve it, caused, it seems, in large part by the recalcitrance of the surviving estate trustee and by his apparent (though yet to be determined) egregious taking of excessive compensation and reimbursement of legal expenses. In view of the facts, it is surprising that Justice Grace did not require repayment, but concluded that the issue should be dealt with on the passing of accounts. I submit that this is the correct approach, but that in circumstances such as this an order prohibiting further taking of compensation or reimbursement of expenses was appropriate. The case is also important on the issue of an estate trustee or trustee taking compensation before court approval on a passing of accounts. The cases disagree on their right to do so. It is to be hoped that an appellate decision will soon provide clarity on this issue.*
>
> *It seems to me that many of the problems that arose in this case could be avoided if the judge originally assigned to the case remains seized of it until it is concluded. The judge can then move the case along as quickly as possible. As it is, with different judges deciding various motions and applications, it often seems as though the right hand does not know what the left hand is doing.*

6.7 *The Canada Trust Company (Trustee of the Poloniato Grandchildren's Trust) v. Browne*[60]

This case involved an application by the trustee of an *inter vivos* trust for advice and directions concerning the interpretation of the twice-varied trust. The parties sought payment of their costs from the trust. In the case of the trustee the issue concerned the quantum. In the case of the

60 *Supra*, footnote 29.

Children's Lawyer and some of the beneficiaries it concerned their entitlement.

Pattillo J. rightly noted the modern rule that costs in estate litigation follow the cost rules that apply in civil litigation cases generally, except when the litigation arose because of the actions of the testator or the residuary beneficiaries, or when the litigation is reasonably necessary for the proper administration of the estate or trust. In the exceptional cases, if the litigation was reasonable, the estate will bear the costs of the litigation. An application for advice and directions is normally regarded as reasonably necessary for the proper administration of the estate, although the estate will not have to bear the costs if the court finds that the application was unwarranted or unnecessary.[61]

Pattillo J. found that the application was reasonable and properly brought by the trustee and that, in the circumstances, the quantum was reasonable. The court awarded full indemnity costs allocated one-third against income and two-thirds against capital. The court also found that the Children's Lawyer's costs were reasonable and awarded full indemnity costs to be paid from the capital of the trust. Several of the income beneficiaries were represented by different counsel. Pattillo J. noted that while the parties were entitled to retain their own counsel, that did not mean they were entitled to have their counsel's costs paid by the trust on a full indemnity basis. Pattillo J. stated, "[t]he days of trusts or estates being bank machines for litigation costs are over,"[62] found that the interests of the income beneficiaries were aligned, and held that they were thus entitled to the costs of one counsel on a full indemnity basis, to be paid from the capital of the trust. The court also allowed the costs of another law firm, allocated one-third against income and two-thirds against capital. It awarded no costs to certain capital beneficiaries, because their position in support of the income beneficiaries could have been presented to the court by letter.

> *I submit that this costs decision is unexceptional. It does not concern a taking without approval or consent, but does affirm: (a) a trustee's entitlement to indemnity, including legal costs; (b) the modern rule regarding costs in estate litigation; and (c) the principle that although costs are usually payable from capital, they are the costs of the entire estate or trust, unless otherwise allocated.*

The Court of Appeal affirmed and granted full indemnity costs to all parties, payable out of the estate.

6.8 *Chabros v. Anderson*[63]

A beneficiary had contested the compensation claimed by the executors. Clark J. held the claim to be grossly disproportionate and reduced it by about 60 percent. The parties then sought a decision on the matter of costs.

In the course of the reasons, Clark J. referred to the modern rule regarding costs in estate litigation, but noted that the litigation model did not apply to the circumstances of the case. There is no adversity in interest between the estate and executors in the determining the amount of the compensation, because the estate owes the executors a reasonable remuneration. As regards the legal costs incurred by the executor in respect of the determination of what they are entitled to by way of compensation, they are also entitled to be indemnified for them, but only to the extent that the costs are reasonably and properly incurred.

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61 See, *e.g.*, *Re Preymac* (1964), 45 D.L.R. (2d) 554 (B.C.S.C.).

62 *Supra*, footnote 29, para. 47 (Pattillo J.).

63 *Supra*, footnote 26.

Clark J. then noted that the solicitor is the solicitor for the executor and not the estate and that the executor can only recover the legal fees from the estate if they are reasonable and proper. The judgment cited *Widdifield*[64] and *Coppel*[65] to support the statement that without prior court approval or consent of all the beneficiaries, executors may not pay themselves litigation costs in defending proceedings brought by a beneficiary.

Clark J. went on to say:[66]

> It is clear then, that executors are not entitled to assume that their legal fees will be reimbursed by the estate, regardless of circumstances or quantum. If an executor wishes to seek out "gold-plated" legal representation and/or retain counsel to do work not necessarily required by the estate, he may do so, but he may expect to be indemnified only for the portion of that cost reasonably required for the administration of the estate.

Similar sentiments are found in other cases, typically when the conduct of the estate trustees is egregious. Indeed, Clark J. expressed concern that executors and estate lawyers regard a large estate as a "dripping roast" that allows them to claim excessive compensation and legal costs and decried that attitude.[67] Consequently, Clark J. fixed the legal costs of the estate trustees at less than 10 percent of the amount claimed and awarded full indemnity to the beneficiary, both to be paid from the estate.

> *Clearly the conclusions of the court on: (a) the modern rule about litigation costs and its adaptation on applications for compensation; (b) the principle that the legal costs must be reasonable and proper; and (c) the position that a solicitor is the solicitor for the executors, not the estate, are correct. However, I submit that its conclusion that executors may not pay themselves litigation costs without prior court approval or beneficiaries' consent, is incorrect for the reasons discussed above under* Coppel.[68] *The court did not cite or consider s. 25 of the* Trustee Act,[69] *reproduced above, which provides otherwise. In that respect the case was, therefore, decided* per incuriam.

7. Conclusions

It is difficult to draw definitive conclusions about the recent case law, since the cases are very much fact-driven. However, I suggest that we can derive the following principles from the jurisprudence:

1. A trust and an estate are not legal entities. Hence they can neither sue nor be sued, nor incur expenses. The trustee or estate trustee, acting as principal, is the person who incurs the expenses. Moreover, a third person must sue the trustees or estate trustees and the trustees or estate trustees are the proper parties to bring actions against third persons or beneficiaries.

2. It follows from the first principle that trustees and estate trustees are personally liable for the costs of litigation and, indeed, for any expenses of administration.

3. The basic principle that an estate trustee and a trustee are entitled to be indemnified out of

64 *Supra*, footnote 4 at 4-8.3.
65 *Supra*, footnote 39.
66 S*upra*, footnote 26 para. 15.
67 *Supra*, footnote 63, para. 50.
68 *Supra*, footnote 39.
69 Reproduced in the text at footnote 15, *supra*.

estate or trust assets for expenses they have incurred in the course of their administration is undoubted in the case law and is codified in statute. Not only are they entitled to be indemnified, but the cases and statutes permit them to take the expenses from the estate or trust unless the will or trust instrument provides otherwise. The proviso is that the expenses are reasonable and properly incurred.

4. The principle of indemnification also applies to the costs of litigation, whether the litigation is brought by the estate trustee, a beneficiary or a third party, subject to the same proviso.

5. The fact that an estate trustee or a trustee benefits incidentally from the expenses incurred, even in proceedings by a beneficiary against the trustee or estate trustee, does not disentitle her to indemnity. However, if the proceedings are exclusively for the estate trustee or trustee's benefit, she must bear the expenses personally.

6. It is, however, true that courts will look more closely at the costs of litigation than at other costs because they seek to prevent the depletion of an estate by unnecessary litigation at the cost of the beneficiaries.

7. It is astounding that the recent cases fail to cite long-established cases of the highest authority and statutes that endorse the right of indemnification and permit estate trustees and trustees to take expenses from the estate or trust. It is even more remarkable that many rely on the *Coppel* case, which was a decision on an uncontested motion and, thus, a weak authority, and which, as we saw, was decided *per incuriam*. This bespeaks sloppy or non-existent research on the part of counsel.

8. The proviso that the expenses must be reasonable or proper is normally measured by the court on the passing of accounts. To the extent the expenses were not reasonable or proper, the estate trustees or trustees will have to reimburse the trust or estate and they may be charged with interest on the amount disallowed.

9. If a trustee or estate trustee is unsure about a proposed expense, such as the cost of litigation, he should obtain the consent of the beneficiaries or the approval of the court.

10. It would be desirable for an appellate court to clarify the circumstances in which trustees and estate trustees may take interim compensation from the funds they administer before they obtain a judgment on a passing of accounts.[70]

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70 The remarks of Misener J. in *Re William George King Trust* (1994), 2 E.T.R. (2d) 123, para 12 (Ont. S.C.J.), a case involving an application to pass accounts, have much to recommend them, I submit. He acknowledged the general rule that estate trustees and trustees are prohibited from taking interim compensation without approval, but thought the general rule ought not to apply to a continuing trust such as the one before the court. He said:

> Passing accounts is an expensive procedure. It is expensive to the beneficiaries and, in theory at least, to the public as well. It seems to me that, unless the beneficiaries insist that it should be otherwise, accounts in a continuing trust such as this ought not to be passed any more than every three years. Even that seems too frequent to me. It is unfair to ask trustees to defer their compensation for that period of time. Applications for interim allowances are expensive as well, and so should be discouraged. The alternative is the so-called prepayment or pre-taking. So long as the trustees pay themselves for services already rendered (i.e. in arrears), and so long as the amount taken does not exceed what is fair compensation for those services, I see nothing at all wrong with it when, as I have said, the administration of the trust or of the estate is a continuing one. Indeed, I think it is the right thing to do.

CHAPTER 10

SOME ASPECTS OF INDEMNIFICATION OF TRUSTEES

by

Professor Albert H. Oosterhoff

SOME ASPECTS OF INDEMNIFICATION OF TRUSTEES

by Albert H. Oosterhoff [1]

Paper prepared for the Law Society of Upper Canada
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1. Introduction

Earlier this year I delivered a paper on indemnity of estate trustees at the STEP Toronto Branch Conference. The paper focused on recent cases that restricted the right of estate trustees and trustees to be indemnified for costs incurred in the administration of the estate or trust and even denied indemnity in some instances.[2] This paper focuses on other aspects of the right of indemnity of estate trustees and trustees not considered in my earlier paper,[3] in particular, the right to be indemnified by beneficiaries in certain circumstances, the right to be indemnified by the settlor of an *inter vivos* trust, the right to a lien on trust assets, and the right of the trustees' creditors to be subrogated to the trustees' right to be indemnified.[4]

In my earlier paper I answered the question why indemnity is necessary, and summarized the right to indemnity, its nature, and limits on the right. In brief, indemnity is the trustee's right to be reimbursed for expenses incurred in the administration of the estate from the trust property. Although the concept of indemnification implies reimbursement, equity for a long time and, more recently, statutory provisions have permitted the trustee to pay such expenses from the trust property. We need a right to indemnity because we cannot expect trustees to pay expenses out of their own resources. Nor is it reasonable to forbid trustees from taking the expenses out of the trust property. The right to pay the expenses from the trust property can be abused, however, and therefore the law places limits on the right to do so and on the right to be indemnified. Those limits include: the expenses must have been incurred on behalf and in the course of the administration of the trust or estate, they must have been properly incurred, and they must not have arisen out of

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1 Professor Emeritus, Western University, Faculty of Law; sometime Adjunct Professor, University of Toronto, Faculty of Law.

2 The conference took place on 9 January 2013. A revised version of my paper was published later. See Albert H. Oosterhoff, "Indemnity of Estate Trustees as Applied in Recent Cases" (2013), 41 Adv. Q. 123. and Chapter 8 in this volume.

3 As in my earlier paper, I shall speak promiscuously of estate trustees and trustees, since the rules for both are largely identical in the context of indemnity.

4 There are a number of excellent resources that provide a detailed discussion of the law of indemnification. See, *e.g.*, M.C. Cullity, "Personal Liability of Trustees and Rights of Indemnification" (1996), 16 E.T.J. 115; *Widdifield on Executors and Trustees*, 6th ed. by Carmen S. Theriault, ed. (Toronto: Thomson Reuters/Carswell, 2002), c. 4; Suzanna Popovic-Montag, "Revisiting a Trustee's Right to Indemnification" (2003), 50 E.T.R. (2d) 161; *Waters' Law of Trusts in Canada*, 4th ed. by Donovan W.M. Waters, Mark R. Gillen, and Lionel D. Smith (Toronto: Thomson Reuters/Carswell, 2012), c. 22. See also Jennifer J. Jenkins, *Compensation & Duties of Estate Trustees, Guardians & Attorneys* (Toronto: Canada Law Book, 2011), c. 22; *Lewin on Trusts*, 18th ed, by W.J. Mobray *et al.* (London: Thomson/Sweet & Maxwell, 2008), ch. 21; *Underhill and Hayton, Law Relating to Trusts and Trustees*, 18th ed. by David J. Hayton with Paul Matthews and Charles Mitchell (London: LexisNexis, 2010), ch. 20, art. 81; *Snell's Equity*, 32nd ed. by John McGhee (London: ThomsonReuters/Sweet & Maxwell, 2010), ch. 7, part 3.3; H.A.J. Ford and W.A. Lee, *The Law of Trusts*, 4th ed. (Sydney: ThomsonReuters, 2010), chs. 13 and 14.

the trustee's own misconduct. Much of the case law is concerned with these limits.

2. Right to Recover from the Beneficiaries

It may happen that the estate or trust assets are insufficient to indemnify the trustees or estate trustees fully or at all. The question then arises whether the trustees can recover from the beneficiaries. Clearly, they cannot do so if the trustees have agreed to forego their right to indemnification by the beneficiaries, a provision that is common in income trusts.[5] There may also be situations in which it is clearly implied that the beneficiaries are not obliged to indemnify the trustees.[6] Equally clearly, however, the trustees can recover from the beneficiaries if they have agreed to indemnify them, expressly or by implication.[7] Further, if the beneficiaries have requested the trustees to act in that capacity, they will be liable to indemnify the trustees.[8] The trustees can even obtain indemnity from the beneficiaries after they have distributed the property to them.[9]

If there is no agreement about the matter, recovery is possible in limited circumstances. The leading case is *Hardoon v. Belilios*.[10] A share brokerage bought 50 shares in a bank and registered them in the name of its employee, Hardoon. He had no beneficial interest in the shares and executed a blank transfer of them. In due course, Belilios obtained the certificate for the shares as security for a loan. After default, Belilios realized on his security and became the absolute owner of the shares. Belilios refused to transfer the shares into his name, so over a period of time Hardoon paid Belilios dividends on the shares and Belilios paid Hardoon for calls on the shares. However, when the bank went into liquidation, and the liquidator made calls on the shareholders, including Hardoon, which he paid, Belilios refused to indemnify Hardoon. Hardoon then sued Belilios.

The Privy Council found that there was a trust between the parties, which arose out of the simple fact that Hardoon held the legal title to the shares, while Belilios enjoyed the full beneficial interest and sought to exercise that interest at the expense of Hardoon. Lord Lindley, on behalf of the Board stated:

> The plainest principles of justice require that the cestui que trust who gets all the benefit of the property should bear its burden unless he can shew some good reason why his trustee should bear them himself. The obligation is equitable and not legal.... Even where trust property is settled on tenants for life and children, the right of their trustee to be indemnified out of the whole trust estate against any liabilities arising out of any part of it is clear and indisputable...[11]

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5 See *Waters*, *ibid.*, at 122

6 See, *e.g.*, *Graybriar Industries Ltd. v. South West Marine Estates Ltd.* (1988), 21 B.C.L.R. (2d) 256 (S.C.). That was a case in which a creditor of the trustee sought the appointment of a receiver to enforce a judgment against the trustee. The trustee refused to make a claim against the beneficiaries of the trust and the creditor did not have a direct right of action against the beneficiaries. The court granted the application so that the issue of entitlement to indemnification could be determined in proceedings brought by the receiver.

7 See, e.g., *Jervis v. Wolferstan* (1874), L.R. 18 Eq. 18; *Hobbs v. Wayet* (1887), 36 Ch. D. 256.

8 *J.W. Broomhead (Vic.) Pty. Ltd. (In Liquidation) v. J.W. Broomhead Pty. Ltd.*, [1985] V.R. 891 (Vict. S.C.).

9 *Jervis v. Wolferstan*, footnote 6, *supra*; Popovic-Montag, *supra*, footnote 3, at 172.

10 [1901] A.C. 118 (P.C.). For a discussion of this case, see A.H. Oosterhoff, "Indemnification of Trustees: The Rule in Hardoon v. Belilios" (1978), 4 E.T.Q. 180.

11 *Hardoon v. Belilios*, *ibid.*, at 123-24.

His Lordship continued:

> But where the only cestui que trust is a person sui juris, the right of the trustee to indemnity by him against liabilities incurred by the trustee by retention of the trust property has never been limited to the trust property; it extends further, and imposes upon the cestui que trust a personal obligation enforceable in equity to indemnify his trustee.[12]

The trust in *Hardoon* was a bare trust, but subsequent case law is not restricted to such trusts, nor to the factual matrix of the case. For example, one case allowed recovery against the beneficiaries personally for liability under a contract entered into by the trustee,[13] although another disallowed it in special circumstances.[14] There may also be other circumstances in which it would seem right to allow recovery against beneficiaries, such as liability for taxes and absolute liability torts.[15]

The case imposed certain limits on the right of indemnification. One limit is that it only applies if the beneficiary is not in a position to disclaim the beneficial interest. A beneficiary is entitled to disclaim when learning of the gift. If a beneficiary does disclaim, the right to recover from that beneficiary is lost.[16] However, once the beneficial interest has been accepted unequivocally, disclaimer is no longer possible[17] and the trustee may then be able to make a claim against the beneficiary.

Another limit is that the rule applies only to a single beneficiary who is *sui juris*. However, *Matthews v. Ruggles-Brise*[18] extended the rule to more than one beneficiary. Two partners in a firm of ten entered into an onerous lease on behalf of the firm. Thus, they became trustees for the firm. Later the partners agreed to assign the lease to a corporation and the surviving partner-trustee carried out the agreement. He died subsequently, but when the corporation became insolvent his estate was required to pay the rent owing under lease. The estate sued the former partners for indemnification. The court held that the assignment of the assets to the corporation did not release the partners from their liability to indemnify the trustee's estate.

The Canadian case, *Clarkson v. McLean*,[19] also applied the rule to several capacitated beneficiaries. The action was brought by the liquidator of a bank against the administrator and beneficiaries of an estate to recover the amount of the double liability that arose on certain bank shares that had already been transferred to the beneficiaries. The beneficiaries' liability was limited to the shares and other assets transferred to them.

A third limit on the rule in *Hardoon* is that the beneficiary will not have bear the burden of

12 For earlier cases that came to a similar conclusion, see Ex p. Chippendale (1853), 4 De G.M. & G. 19, 43 E.R. 415; and Castellan v. Hobson (1870), L.R. 10 Eq. 47.

13 *Matthews v. Ruggles-Brise*, [1911] 1 Ch. 194.

14 *Wise v. Perpetual Trustee Co. Ltd.*, [1903] A.C. 139 (P.C).

15 See, *e.g.*, *X. v. A., B., C.*, [2000] EWHC Ch 121, [2000] 1 All E.R. 490 (Ch.). It concerned the potential cost of a statutorily imposed obligation to remediate environmentally contaminated land. The court held that the trustees were entitled to retain the trust assets under their lien in order to make provision for the potential cost, even though the beneficiaries had become absolutely entitled to the trust property.

16 *J.W. Broomhead (Vic.) Pty. Ltd.*, *supra*, footnote 7; *Jervis v. Wolferstan*, *supra*, footnote 6.

17 See, *e.g.*, *Re Hodge*, [1940] Ch. 260. And see Albert H. Oosterhoff, *Oosterhoff on Wills and Succession: Text, Commentary and Materials*, 7th ed. (Toronto: Thomson Reuters/Carswell, 2011), at 597.

18 *Supra*, footnote 12.

19 (1918), 42 O.L.R. 1 (H.C.J.).

indemnification if the beneficiary can show a good reason why the trustees should bear the burden themselves. This limit was considered in the following two cases.

Re Reid,[20] another Canadian case, also applied the rule to more than one beneficiary. A testatrix, domiciled in England, left property in trust to two life tenants, with remainder to the appellant and his brother. Hence the case involved successive beneficiaries as well, although the issue of liability for indemnity only arose after the death of the life tenants, but before distribution of the capital. While most of the assets were situate in British Columbia, there were also some assets in England. The executors appointed the respondent, an English trust company that also did business in British Columbia, as trustee of the testamentary trust. The respondent was obliged to pay estate duty in England and did so, but the English assets were insufficient to pay the duty. The appellant was entitled to one-half of the assets under the remainder interest in his own right and to the other half as executor of his deceased brother. He demanded that the trustee distribute all the British Columbia assets to him. The trustee refused to do so, claiming to be entitled to indemnity out of those assets under the rule in *Hardoon v. Belilios*. The court dismissed the appellant's motion for an order requiring the trustee to distribute the assets to him. He appealed and argued that a court ought not to enforce, directly or indirectly, the tax claims of a foreign state. The court distinguished cases applying that principle, since the case did not involve an assertion of sovereign authority by the United Kingdom in British Columbia. Thus the appellant had failed to show any good reason why the trustee should bear the duty himself. Accordingly the court applied *Hardoon* and dismissed the appeal.[21]

However, in *Stringham v. Dubois*,[22] the Alberta Court of Appeal refused to follow *Reid*. The case involved an Arizona estate. The testatrix left real property in Alberta, which represented the bulk of the probate assets, to her niece. The will directed that the American estate taxes be paid out of the residue of the estate, which she left to a bank in trust. An Arizona court ordered that part of the estate taxes be paid out of the probate assets. However the American probate assets were insufficient to pay the apportioned share. The niece applied for an order that the Alberta assets be transferred to her. The bank's representative counter-applied for an order directing the sale of those assets and payment of the United States taxes from the proceeds. The application judge granted the niece's application and the bank's representative appealed. The court dismissed the appeal on the ground that the substance of the proceeding was the indirect enforcement of the tax laws of the United States and that the principle forbidding the enforcement of foreign tax laws overrode the right of indemnification of a trustee. In other words, the principle forbidding the enforcement of foreign tax laws constituted a good reason to exclude the right of indemnification.

Professor Waters has pointed out however, that the principle that courts should not enforce foreign revenue laws has been eroded in recent cases. Indeed, Canada has entered into tax treaties with a number of jurisdictions that provide for the reciprocal enforcement of tax laws.[23] Hence, a case like *Stringham* would likely be decided differently today.

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20 (1970), 17 D.L.R. (3d) 199, [1971] 2 W.W.R. 121 sub nom. *Hill v. Yorkshire and Canadian Trust Ltd.* (B.C.C.A.).
21 For a similar case, see *Balkin v. Peck* (1998), 43 N.S.W.L.R. 706, which came to the same conclusion.
22 (1992), 48 E.T.R. 248, [1993] 3 W.W.R. 273 (Alta. C.A.).
23 *Waters*, *supra*, footnote 3, at 1218, note 60.

The Australian case, *J.W. Broomhead (Vic.) Pty. Ltd. (in liquidation) v. J.W. Broomhead Pty. Ltd.*,[24] which involved a business trust, also applied the rule to several beneficiaries. The court considered the rule in great detail. The plaintiff was incorporated to serve as trustee of a construction business. The defendants were the beneficiaries. They held trust units in varying proportions. The plaintiff went into liquidation and, since its liabilities greatly exceeded its assets, its liquidator claimed indemnity from the beneficiaries under the principle of *Hardoon*. Relying on that principle, the court held that: (a) the liquidator was entitled to by indemnified by the beneficiaries; (b) the right to indemnity is not limited to cases in which there is only beneficiary, but applies to more than one if they are all *sui* juris and entitled to the same interest as absolute owners; (c) the right can also extend to trustees of sub trusts, even if the beneficiaries of the sub trusts are minors; and (d) the liability of each beneficiary to indemnify the trustees is limited to the proportion of that beneficiary's interest in the trust: it is not increased because a beneficiary has disclaimed and is thus not liable, nor by the fact that another beneficiary is insolvent and thus cannot pay.

The question may be raised why the *sui juris* beneficiaries must be entitled to the same interest as absolute owner as *Broomhead* maintains. I submit that if the basic principle is sound that the owners of the beneficial interest must bear the burden, there is no reason why the burden cannot also be imposed on successive beneficiaries who are *sui juris* and together absolutely entitled to the trust property. In those circumstances the burden should be imposed on all in proportion to the value of their interests.

The courts have not always applied the rule in *Hardoon*. One such case was *Wise v. Perpetual Trustee Co. Ltd*.[25] The case involved a members' club. Its trustees had entered into an onerous lease of the club premises. When the club became defunct, the trustees were required to pay the rent for the balance of the term. Only one trustee was able to do so and his estate sued the former members of the club for indemnification. Lord Lindley also delivered the Board's advice in this case. He held that the rule did not apply because in the case of a members' club the members join on the understanding that they are not liable for any anything other than the subscriptions imposed by the rules. The decision is not convincing, I submit, since it conflicts with the general principle enunciated in *Hardoon*. If the general principle holds true, why should the innocent trustees bear the loss, while the beneficial owners are enriched at the trustees' expense?[26] *Wise* has been applied to unincorporated societies generally.[27]

The Supreme Court of Canada refused to apply the rule in *Elliott v. Canadian Credit Men's Trust Association Ltd*.[28] A corporation purchased land and caused it to be registered in the name of Elliott, its president, a major shareholder. Elliott was thus a bare trustee for the corporation, Elliott mortgaged part of the land. Later the corporation made an assignment in bankruptcy. Elliott sued the trustee in bankruptcy, seeking indemnity for his liability under the mortgage. The court held

24 *Supra*, footnote 7.
25 *Supra*, footnote 13.
26 For a criticism of the case see Williams, "Club Trustees' Right to Indemnity: A Criticism of *Wise v. Perpetual Trustee C. Ltd*." (1903), 19 L.Q.R. 386. The author concludes that the cases relied on by the Board did not warrant the conclusion that members of a club are not liable beyond the annual and special dues.
27 See, *e.g.*, *Bradley Egg Farm, Ltd. v. Clifford* [1943] 2 All E.R. 378 (C.A.); *Robinson v. Boardman* [1999] UKEAT 1224_96_1509 (Employment Appeal Tribunal); *Davies v. Barnes Webster & Sons Ltd*., [2-11] EWHC 2560 (Ch.).
28 [1935] S.C.R. 1, [1935] 1 D.L.R. 353.

that the rule could not be applied, for in bankruptcy the bankrupt's property vests in the trustee in bankruptcy in its official capacity and the trustee in bankruptcy is thus not the sole and absolute owner. Professor Waters notes that today the application of the unjust enrichment principle that lies at the heart of the *Hardoon* rule would probably be applied against the bankrupt's creditors, since they would otherwise be unjustly enriched at the expense of the corporation's president.[29] Indeed, it can be argued that the unjust enrichment principle underlies the entire principle of indemnification.

The American law differs significantly from that pertaining in England and the Commonwealth. Trustees in the United States are entitled to indemnity out of the trust estate. However, the beneficiaries do not have a personal obligation to indemnify the trustees unless, of course, they have agreed to do so.[30]

3. Right to Recover from the Settlor of an *Inter Vivos* Trust

A settlor is not normally liable to indemnify the trustees of an *inter vivos* trust even though she has asked the trustees to serve in that capacity. However, if the settlor has promised to indemnify the trustees if they agree to assume the office, she will be liable to do so.[31] Further, if the settlement is for the settlor's benefit, she will usually be liable to indemnify the trustees.[32] That is clearly the case if the settlor is also a beneficiary.[33]

The settlor may also be liable to indemnify the trustees if she has retained sufficient powers to direct the trustees what to do in the administration of the trust. In effect the trustees are then agents as well as trustees. An example of this is *Trident Holdings Ltd. v. Danand Investments Ltd*.[34] Danand held title to certain lands under an agreement which stated that it held title as bare trustee on behalf of six beneficiaries. The court found that since the agreement did not confer any powers on Danand, its sole obligation was to hold title to the land and to deal with it in accordance with the directions of the beneficiaries as principals. Danand entered into a contract with the plaintiff for the construction of buildings on the land. The court held that the beneficiaries were liable to the plaintiff after a dispute arose about the contract that rendered the plaintiff liable. It may be, however, that the decision should be restricted the circumstances of bare trusts[35] and, perhaps, business trusts.[36]

4. The Right to a Lien

Trustees have a lien against the entire trust property, both income and capital,[37] to recover expenses

29 *Waters*, *supra*, footnote 3, at 1219.
30 See *Scott and Ascher on Trusts*, 5th ed. by Austin Wakeman Scott, William Franklin Fratcher, and Mark L. Ascher (Boston: Aspen Publishers/Wolters Kluwer, 2007) § 22.6.
31 Popovic-Montag, *supra*, footnote 3, at 171.
32 *Ibid.*; Ford and Lee, *supra*, footnote 3, at 14.1050.
33 *Ex p. Chippendale*, *supra*, footnote 11; *Hughes v. Rees* (1884), 10 P.R. 301 (Ont. Master), reversed on other grounds (1885), 9 O.R. 198 (Ch. Div.).
34 (1988), 64 O.R. (2d) 65, 40 D.L.R. (4th) 1 (C.A.).
35 See Cullity, *supra*, footnote 3, at 137-38.
36 See *ibid*., at 133ff.
37 *Stott v. Milne* (1884), 25 Ch. D. 710 (C.A.); *Thompson v. Lamport*, [1945] S.C.R. 343.

properly incurred in the administration of the estate. This lien is a first charge on the trust property[38] with priority over all other claims.[39] The right is not lost if the trustee is also a trust beneficiary.[40] Nor is it lost if the estate is insolvent.[41] To ensure that the trustees are paid promptly, the court may even order a mortgage on or sale of assets and direct payment to the trustees from the proceeds, unless that would endanger the purposes of the trust.[42]

The lien entitles the trustees to retain the trust assets until they are paid their expenses.[43] Further, it extends to future and contingent liabilities. [44]If they have not retained the trusts assets, they cannot recover the property except by court order.[45] If necessary, they can assert their lien in any proceedings and are entitled to claim their costs of the proceedings.[46] If trustees are indebted to the trust they may also assert their lien, but it will extend only to the amount their expenses exceed the amount of their debt.[47]

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38 *Octavo Investments Pty. Ltd. v. Knight* (1979), 144 C.L.R. 360. The reasons for judgment of Stephen, Mason, Aickin and Wilson JJ. state at 367:

> 13. We do not understand the general principles concerning the bankruptcy of a trading trustee to be in dispute. It is common ground that a trustee who in discharge of this trust enters into business transactions is personally liable for any debts that are incurred in the course of those transactions. . . . However, he is entitled to be indemnified against those liabilities from the trust assets held by him and for the purpose of enforcing the indemnity the trustee possesses a charge or right of lien over those assets. . . . The charge is not capable of differential application to certain only of such assets. It applies to the whole range of trust assets in the trustee's possession except for those assets, if any, which under the terms of the trust deed the trustee is not authorized to use for the purposes of carrying on the business.
>
> 14. In such a case there are then two classes of persons having a beneficial interest in the trust assets: first, the cestuis que trust, those for whose benefit the business was being carried on; and secondly, the trustee in respect of his right to be indemnified out of the trust assets against personal liabilities incurred in the performance of the trust. The latter interest will be preferred to the former, so that the cestuis que trust are not entitled to call for a distribution of trust assets which are subject to a charge in favour of the trustee until the charge has been satisfied (case references omitted).

39 *Burn v. Gifford* (1879), 8 P.R. 44 (Ch.).

40 *Ibid.*, at 47, *per* Proudfoot V.C.

41 *McLennan v. McLennan* (2000), 36 E.T.R. (2d) 145 (Ont. S.C.J.); *Re McLennan Estate* (2002), 48 E.T.R. (2d) (Ont. S.C.J.). And see Snell, *supra*, footnote 3, at 7-034; *Waters*, *supra*, footnote 3, at 1215, note 44.

42 See Popovic-Montag, *supra*, footnote 3, at 175, citing *Re Pumfrey; The Worcester City and Banking Company v. Blick* (1882), 22 Ch. D. 255; *Tennant v. Trenchard* (1869), 4 Ch. App. 537; and *Darke v. Williamson* (1858), 25 Beav. 622, 53 E.R. 774.

43 *Re Ermatinger* (1896), 28 O.R. 106, affirmed (with a reduction in the amount of the compensation) sub nom. *Re Tilsonburgh Lake Erie and Pacific Railway Company* (1897), 24 O.A.R. 378 (C.A.). the case concerned the deposit of municipal debentures with a bailee (the junior judge of the County Court of Elgin County) for delivery to the railway company when the railway was completed. The court held that the bailee was a trustee, that he was entitled to be compensated for his care and trouble in performing the trust, and that he held a lien on the trust property until he was paid. The style of cause in the O.A.R. appears to contain a typographical error, since it misspelled the name of the municipality that was part of the company's name. The company was incorporated as "Tilsonburg, Lake Erie and Pacific Railway Company" by S.C. 1890, c. 56. The reasons at first instance correctly identify the company by that name. In fact, however, the name of the town is "Tillsonburg" (with a double "l"). The case appears to have been concerned solely with the trustee's right to compensation, not his right to indemnification for expenses. However, as the case holds, trustees also have a lien on trust property until they are paid their compensation. *Cf. Waters*, *supra*, footnote 3, at 1224-25, who also observes, *ibid*. at 1225, note 90, that the question whether trustees can invoke the rule in *Hardoon* for the payment of their compensation appears not yet to have arisen.

44 See *X. v. A., B., C. supra*, footnote 14, paras. 18, 19.

45 See *Patterson v. MacKenzie*, [1924] 3 D.L.R. 234 (Sask. Q.B.). This is actually not a trusts case, but one involving co-owners, each of whom occupied one-half of certain property. One of them had paid more than his share of the cost of acquisition of the property. He sought to occupy the other half of the property as well to assert his lien.

46 *Waters*, *supra*, footnote 3, at 1216. See, *e.g.*, *Re Ermatinger*, *supra*, footnote 42, in which the bailee-trustee was awarded his costs of the proceedings brought to enforce his right to indemnity.

47 *Waters*, *supra*, footnote 3, at 1216, citing Re *Knott* (1887), 56 L.J. Ch. 318.

Trustees who have breached the trust are not entitled to be indemnified and, thus, also do not have a lien. However, they can recover both rights if they cure the breach by paying the trust what is owing in consequence of the breach. They can then claim reimbursement for the amount of their expenses and assert their lien.[48]

Courts are not always consistent in recognizing or applying the right to the lien. *DeLorenzo v. Beresh*,[49] which I criticized in my earlier article, is an example. A residuary beneficiary under a testamentary trust, whose interest had vested, made an application for an order directing the estate trustee to transfer the capital of her interest to her. There were other proceedings before the court: the trustee's application to pass his accounts and the residuary beneficiary's application to have him removed as trustee. The estate trustee resisted the claim because he claimed a lien for expenses and compensation. Lofchik J. held that although the estate trustee was entitled to a lien, he was not entitled to deny payment of the whole of the capital of a beneficiary's interest and ordered him to pay the beneficiary 80 per cent of her interest. Lofchik J. stated that if the estate trustee should later be found liable for payment of income tax or other expenses, he could make a claim for reimbursement from the beneficiaries. I submit that this is incorrect, since it effectively denies the lien. One factor that appears to have influenced the court was that estate trustee had paid his legal costs in various proceedings from estate funds. Lofchik J. held that this was improper, relying on an uncontested case which so held, but which was decided *per incuriam*. As noted in my earlier article, this part of the decision is wrong, since it is contrary to long-established authority at the highest level. It also conflicts with s. 23.1 of the *Trustee Act*,[50] which the court did not cite or discuss.

5. The Right to Subrogation

A trust and an estate are not juridical persons. The trust and the estate are managed by trustees or estate trustees and it is those persons who incur debts or obligations. This means, *inter* alia, that creditors of trustees and estate trustees cannot sue to recover what is owed them from the trust or the estate. They can only recover the amount owed from the trustees or estate trustees.[51] The creditors of the trustees are entitled to be subrogated to the beneficial interest of the trustees[52] if the debts were incurred properly in the course of the administration of the trust or estate.[53] However, they can only exercise their right of subrogation if the trustees are insolvent or are unlikely to be able to pay the expected judgment.[54] Moreover, their right is derivative and is, thus, dependent on

48 See Popovic-Montag, *supra*, footnote 3, at 175, citing *Jacubs v. Rylance* (1874), L.R. 17 Eq. 341.

49 2010 ONSC 5655, 62 E.T.R. (3d) 65.

50 R.S.O. 1990, c. T.23, added by S.O. 2001, c. 9, Sched. B, s. 13(1).

51 See Oosterhoff, "Indemnity of Estate Trustees," footnote 1, *supra*, at 124; Ford and Lee, *supra*, footnote 3, at 14.010.

52 *Viz*., the trustees' lien.

53 *Merritt v Doherty* (1924), 52 N.B.R. 215 (C.A.); Ford and Lee, *supra*, footnote 3 at 13.030, 14.6030.

54 *Fairland v. Percy* (1875), L.R. 3 P. & D. 217; *Ex p. Garland* (1804), 10 Ves. Jun. 110, at p 120, 32 ER 786, at p 789. The reasons for judgment of Stephen, Mason, Aickin and Wilson JJ. in *Octavo Investments Ltd Pty. Ltd. v. Knight*, *supra*, footnote 37, state at 367-68:

15. The creditors of the trustee have limited rights with respect to the trust assets. The assets may not be taken in execution . . . but in the event of the trustee's bankruptcy the creditors will be subrogated to the beneficial interest enjoyed by the trustee. . .

16. These principles lead naturally to the conclusion that the beneficial interests which, by subrogation, the creditors whose claims arise from the carrying on of the business have in the assets held by a bankrupt trustee form part of the property of the bankrupt divisible amongst his creditors . . . (case and statutory references omitted).

the trustee's entitlement. Thus creditors cannot assert a right to subrogation: (a) if and to the extent that the trustees are indebted to the trust;[55] (b) if the trust instrument prevents indemnification; (c) if the indebtedness was incurred in breach of trust, unless the breach was committed in good faith and benefited the trust property;[56] and (d) if the trustees have already transferred the assets to the beneficiaries.[57] However, one case has held that although the trustees have breached their trust, the creditors may be entitled to recover the amount owing on a *quantum meruit* basis.[58]

6. Conclusion

One might prefer the rules governing the trustees' entitlement to a lien and to be indemnified by the beneficiaries to be more perspicuous. They are not as clear as one would like. Moreover, they are subject to a number of exceptions and limitations. However, the basic principles are well-established and are clear enough. They provide significant rights and remedies for trustees that can be used in appropriate cases.

55 *Re Knott*, *supra*, footnote 46.
56 See Popovic-Montag, *supra*, footnote 3, at 169.
57 *Ibid*.
58 *Weldon v. Canadian Security Co.* (1966), 64 D.L.R. (2d) 735 (N.S. Co. Ct.), in which the estate's solicitor was permitted to collect his fee from the surety under the administrator's bond.

CHAPTER 11

LIMITATION PERIODS IN ESTATE AND TRUST LITIGATION

Limitation Periods in Estate and Trust Litigation

by Kimberly A. Whaley

INTRODUCTION*

Limitation periods are a necessary part of our legal system. Their purpose is to ensure that litigation is commenced in a timely manner and to protect defendants from being blindsided by a claim that arises from events that took place many years ago. Public policy demands that justice with certain closure be served. Limitation periods are helpful in limiting record keeping costs in business practices. Evidence for a claim may erode over time, documents may be lost or destroyed, and witnesses may forget or die, another reason for limitation periods. Having an unlimited amount of time to commence a claim would be detrimental to the carriage of justice.

Basic Principles of Limitation Periods

The History of Equitable Claims and Limitation Acts

In 1969 when the ***Report of the Ontario Law Reform Commission on Limitation of Actions*** (the "Report")[1] was released, many recommendations were made to improve limitation periods in the trust and estate context. Unfortunately, not all of these recommendations were followed. One of the observations that the *Report* made was that the former limitation act was "complex, confused, and obscure". The former act did not prescribe limitation periods for most equitable claims. The Report also observed that there were many problems about the operation of the former limitations act when a trustee, including a constructive trustee, commits a breach of trust.[2] Under the old limitations act constructive (and other non-express) trust claims, were not subject to any fixed limitation period. Instead they were subject to the equitable doctrines of *laches* and acquiescence. These doctrines conferred discretion on the court to determine whether or not, on the facts of the case, the trust claim ought to be allowed to proceed despite any delay in commencing a claim. [3]

The Report was not implemented by the government but over the years various discussion papers were put forward and consultation groups were formed. Bills introduced in 1992, 2000 and 2001 did not proceed.[4] Finally a bill in 2002 did proceed however no clause by clause consideration was completed by a committee and the bill was passed without amendment. Equitable causes of action in general and constructive trusts in particular were not discussed in the Legislature at all.[5] The new *Limitations Act, 2002* took effect from January 1, 2004.

Now, based on the cases below, it appears that equitable claims are generally covered under the

1 *Originally prepared for STEP Canada National Conference, June 10-11, 2013, by Kimberly A. Whaley, of Whaley Estate Litigation, presented with Michael Kerr, of Miller Thomson LLP, updated by Whaley Estate Litigation, September 2014
Ontario Law Reform Commission, *Report on Limitation of Actions* (Toronto: Department of the Attorney General, 1969) ("*Report*").

2 *Ibid*. at pp.53-63, see also *Pirani v. Karmali*, 2012 ONSC 1647 at para. 56.

3 *Report, supra* note 1 at pp.18-22 and 53-61 and *McConnell v. Huxtable, infra* note 33 at para. 71.

4 *McConnell, infra* note 33 at para.68.

5 *Ibid.* at para. 70.

new *Limitations Act, 2002*.[6]

In the estates context, limitation periods can cause some confusion as historically equitable claims were not governed by limitation statutes. However, with the enactment of the *Limitations Act, 2002*, c.24, Sch. B and recent case law outlined below this has changed.

1) Basic Limitation Period

In Ontario, limitation periods are governed mainly by the *Limitations Act*, 2002 c.24, Sch. B. (the "*Limitations Act, 2002*" or the "*Act*") and through other applicable acts such as the *Real Property Limitations Act*, R.S.O. 1990, c.L.15 ("*RPLA*") (discussed below).

The *Limitations Act, 2002* provides for a basic two (2) year limitation period subject to the doctrine of discoverability (discussed below). Section 4 of the *Limitations Act, 2002* states:

> **4.** Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the ***second anniversary of the day on which the claim was discovered***. 2002, c. 24, Sched. B, s. 4. [emphasis added]

Under the *Act*, a "claim" means "a claim to remedy an injury, loss or damage that occurred as a result of an act or omission".[7]

2) Discoverability

Section 5 of the *Limitations Act, 2002* codifies the common law discoverability principle:

> **5.** (1) A claim is discovered on the earlier of,
> (a) the day on which the person with the claim first knew,
> (i) that the injury, loss or damage had occurred,
> (ii) that the injury, loss or damage was caused by or contributed to by an act or omission,
> (iii) that the act or omission was that of the person against whom the claim is made, and
> (iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and
> (b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a). 2002, c. 24, Sched. B, s. 5 (1).

Therefore, the two year limitation period will not commence until the claim is "discovered". However, that does not mean that plaintiffs have forever to commence a claim if it is not "discovered". The *Limitations Act, 2002* provides for an ultimate limitation period of 15 years.[8] If 15 years have passed, no claim can be commenced regardless of when the act or omission that would give rise

6 See also *Bouchan v. Slipacoff*, 2010 ONSC 2693 (rectification of a contract); *Schneider v. State Farm*, 2010 ONSC 4734 at para. 49 (breach of fiduciary duty); Graeme Mew, *The Law of Limitations*, 2nd ed (2004), at 37; and *Placzek v. Green*, 2009 ONCA 83, at paras. 25,34-5 and 50.

7 *Limitations Act, 2002*, c.24, Sch. B. section 1("*Limitations Act, 2002*").

8 *Limitations Act*, *2002, supra* note 7, section 15.

to a claim was discovered.

The Limitations Act, 2002 also includes a *"rebuttable presumption"* that a claim is discovered on the day that the act/omission on which the claim is based takes place.[9] The burden therefore is on the claimant to establish that he or she did not know or could not have known, with reasonable diligence before the expiry of the limitation period that the injury/loss/damage was caused by or contributed to by an act or omission of another party.[10]

When the material facts on which the claim is based have been discovered, or ought to have been discovered, is the time at which the cause of action arises for the purposes of the *Limitations Act, 2002*.[11]

It is important to note that a plaintiff is not required to know *all* of the facts underlying a claim at the time of *discovery,* rather only 'enough facts'; and as such, then the claim would be considered to have been *discovered,* and the limitation period beings to run.[12]

It is the plaintiff who bears the evidentiary burden to prove a claim is issued within the limitation period prescribed by the *Limitations Act, 2002*.[13] In ***Ferrara v Lorenzetti,***[14] Justice Lauwer found that the plaintiff's action was statute barred because the action crystallized when the plaintiff entered into a settlement which the court found was the requisite time that the damage was suffered. The effort to set aside the settlement was an attempt to reverse the damage. In the end, the failure of that attempt did not revive the negligence claim.

However, in a split 2-1 decision at the Ontario Court of Appeal,[15] Ferrara's appeal was allowed and the Court declared that his action was not statute-barred by the *Limitations Act, 2002*. The majority relied on the following comment from Molloy J. in ***Kenderry-Esprit (Receiver of) v. Burgess, MacDonald, Martin, and Yonger***,: "The date upon which the plaintiff can be said to be in receipt of sufficient information to cause the limitation period to commence will depend on the circumstances of each particular case." [16]

In *Ferrara*, minutes of settlement were entered into in June of 2005. A post-closing dispute arose which was adjudicated in 2009. In a decision released by Justice Belobaba, in July 2009, Ferrara lost. Ferrara appealed to the Ontario Court of Appeal in 2010, but the 2009 decision was upheld. Ferrara sued his lawyer, Schwartz in 2011 for solicitor negligence for negligently preparing the minutes of settlement and for failing to ensure that the minutes were properly implemented. While the judge at first instance, Lauwer J., had held that the limitation period began to run on September 19, 2006, when the post-closing claim was commenced, the majority of the Court of Appeal held that the claim was not discoverable until July 2009 when Justice Belobaba released his decision.

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9 *Limitations Act*, *2002, supra* note 7, section 5(2).
10 *Blinn v Burlington (City)*, 2010 ONSC 3446.
11 *Kenderry-Espirt v. Burgess, MacDonald, Martin and Younger*, 2001 CanLII 28042 (ONSC).
12 *Lawless v. Anderson,* 2010 ONCS 2723 (CanLII), aff'd 2011 ONCA 102.
13 *Ferrara v Lorenzetti, Wolfe Barristers and Solicitors*, 2012 ONSC 151 (CanLII) ("*Ferrara*").
14 *Ibid*.
15 2012 ONCA 851.
16 (2001), 53 O.R. (3d) 208 (S.C.J.) at para. 19.

Laskin J. based this finding on the fact that Schwartz (who was Ferrara's lawyer for over 20 years) repeatedly assured Ferrara that he was right, as well as Ferrara's uncontradicted evidence that no one told him otherwise.[17]

In dissent, Justice Epstein would have dismissed the appeal. While Epstein J. disagreed with the motion judge that the cause of action arose when the post-closing claim was commenced, she held that the fact that Ferrara retained three sets of litigation counsel during the dispute was enough to trigger the discoverability rule. Ferrara claims that none of these sets of counsel suggested to him that he had a claim against Schwartz. Epstein J. found this hard to believe:

> This assertion is difficult to accept. First, it begs the question of why these lawyers and their firms have not been named as defendants in this action. Second, given the issues raised in the [post-closing claim] and the way in which they were described by Belobaba J., the implication being that it should have been relatively easy for Schwartz to have identified his error, and the level of experience of these lawyers, it is a difficult assertion to accept without clear and convincing evidence.[18]

In the recent Ontario Court of Appeal case of ***Lipson v. Cassels Brock***,[19] the Court examined the discoverability principle in connection with the certification of a class action against a law firm for solicitor negligence and negligent misrepresentation. In *Lipson*, a motion judge had determined that the proposed class action was statute-barred based on when the representative party first discovered the claim. The Court of Appeal allowed the appeal and overturned the motion judge's decision.

Lipson involved a class of investors who relied on a legal opinion from a law firm which opined on the likelihood of the Canadian Customs and Revenue Agency (the "CCRA") successfully denying anticipated tax credits from a donation to a "Timeshare Tax Reduction Program". The legal opinion indicated that it would be "unlikely" that the CCRA could successfully deny the tax credits.

In 2004, the CCRA notified the representative party, Lipson, that it intended to disallow the tax credits. Immediately, Lipson and other donors sought legal and accounting advice. In 2006 two of the donors launched challenge proceedings against the CCRA as a test case against the denial of the tax credits. In 2008 the CCRA settled the test case whereby the donors would receive some but not all of their tax credits. Lipson and other members of the class entered into similar settlements with the CCRA.

In April of 2009 Lipson commenced the proposed class action against the law firm for negligence and negligent misrepresentation. In November 2011, Justice Perrell issued an order dismissing the action, holding that it was statute-barred by the two-year limitation period in the *Limitations Act, 2002*. Perrell J. held that based on the Supreme Court of Canada decision in ***Central Trust Co. v. Rafuse***, [1986] 2 S.C.R. 147 *("Central Trust")* and a review of the facts alleged in the statement of claim, the claims for negligence and negligent misrepresentation should have been discovered

17 2012 ONCA 851 at para. 72.
18 *Ferrara, supra* note 13 at para. 46.
19 2013 ONCA 165 ("*Lipson*").

in 2004 when the CCRA denied the validity of the tax credits or, at the very latest, in 2006 when Lipson retained legal counsel to sue the CCRA.[20]

The Court of Appeal held that the motion judge erred in interpreting and applying *Central Trust* and when interpreted correctly it was apparent that the record before the motion judge did not disclose whether Lipson's claim was statute-barred. The facts in *Central Trust* involved a challenge to a mortgage registered against a property. The mortgage was registered in 1969 and a subsequent action in 1977 found that the mortgage was *void ab initio*. In 1980 Central Trust sued the solicitors who acted for it in the mortgage transaction.

The issue before the court was when the limitation period began to run. Justice Le Dain in *Central Trust* had this to say:

> Since the [lawyers] gave the [Central Trust] a certificate on January 17, 1969 that the mortgage was a first charge on the Stonehouse property, thereby implying that it was a valid mortgage, *the earliest that it can be said that [Central Trust] discovered or should have discovered the respondents' negligence by the exercise of reasonable diligence was in April or May 1977 when the validity of the mortgage was challenged in the action for foreclosure.* Accordingly [Central Trust's] cause of action in tort did not arise before that date and its action for negligence against the [lawyers] is not statute-barred. [emphasis added]

Perrell J., in *Lipson*, interpreted this passage as such:

> It should be noted that the damage suffered by Central Trust occurred when it accepteda mortgage that could be challenged as illegal. It later transpired that the mortgage was challenged, *and Justice Le Dain held that the limitation period for the claim of solicitor's negligence commenced running with the manifest challenge to the mortgage*, even though the actual declaration of invalidity of the mortgage would occur still later.[emphasis added]

The Court of Appeal found this interpretation to be incorrect and that Justice Le Dain had not concluded that the limitation period commenced running with the manifest challenge to the mortgage but rather that Justice Le Dain concluded that the *earliest date* on which the claim for solicitor's negligence could have commenced running was the date on which the validity of the mortgage (and therefore the validity of the solicitor's opinion) was challenged.[21]

The Court of Appeal went on to observe that in ***Kenderry-Esprit (Receiver of) v. Burgess, MacDonald, Martin and Younger***[22] Justice Molloy recognized that Central Trust is not binding authority for the proposition that the limitation period in an action for solicitor negligence begins to run on the date of a manifest challenge to the solicitor's opinion.[23] Instead, Molloy J. held that "the date upon which the plaintiff can be said to be in receipt of sufficient information to cause the limitation period to commence to run will depend on the circumstances of the particular case." The Court of Appeal

20 *Lipson*, *supra* note 19 at para. 56.
21 *Lipson, supra* note 19 at para.73.
22 (2001), 53 O.R. (3d) 208 at para.19.
23 *Lipson*, supra note 19 at para. 75.

agreed with this conclusion and held that:

> In our view, neither the fact that the CCRA was challenging the claimed tax credits nor the fact that the class members may have been incurring professional fees to challenge the CCRA's denial of the tax credits is determinative of when the class members reasonably ought to have known they had suffered a loss as a result of a breach of the standard of care on the part of [the law firm].[24]

Under s.5(1)(a) of the *Class Proceedings Act*, (the reasonable cause of action prong of the certification), no evidence is admissible. The legal opinion stated that it was *unlikely* that the CCRA could *successfully challenge* the tax credits claimed. The Court found that the pleadings implied that Lipson and the other class members were not advised until January 2008 of the *likelihood* that the CCRA's disallowance of the tax credits *would not succeed* at least in part. Therefore the claim was not statute-barred when it was commenced in 2009.

Also, it should not be assumed that a limitation period only begins to run when related litigation is resolved.[25] In ***Isailovic v. Vojvodic***,[26] the Court held that the plaintiff's claim for solicitor negligence was statute barred as the plaintiff's entire cause of action upon which the plaintiff sought to rely crystallized when the plaintiff entered into a settlement and not four years later when the plaintiff's attempt to set aside the settlement ended at the Court of Appeal. This has particular relevance to solicitor's negligence claims raised in the estates arena. Potential claims against a drafting solicitor, if any, therefore must be looked at within the 2-year period from the date of death.

See also the case of *Waschkowski v. Hopkinson Estate* (2000), 47 O.R. (3d) 370 where the Ontario Court of Appeal held that the discoverability principle did not apply to the two year limitation period under section 38(3) of the *Trustee Act* and that the two year limitation period could not be extended.

3) Minors or Incapable Persons

The basic two year limitation period does not run against minors or incapable persons. The *Limitations Act, 2002* provides for an extension of the limitation period until the minor has reached age of majority or is represented by a litigation guardian.[27] The limitation period will not run against incapable persons until they are represented by a litigation guardian.[28] However, a person is presumed to be capable of commencing a proceeding unless proven otherwise.[29]

4) Exclusions and Exceptions

The *Limitations Act, 2002* applies to all claims except those listed in section 2 of the *Act* and where the limitation period is preserved by other statutes set out in the schedule to section 19 of the *Act*. Section 2 of the Act states:

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24 *Ibid*. at para. 82.
25 See *Isailovic v. Voyvodic*, 2011 ONSC 5854; *Ferrara*, *supra* note 13 and *Lipson, supra* note 19.
26 *Isailovic, ibid*.
27 *Limitations Act, 2002*, *supra* note 7, s.6.
28 *Limitations Act, 2002*, *supra* note 7, s.7(1).
29 *Limitations Act*, *2002*, *supra* note 7, s.7(2).

Application
2. (1) This Act applies to claims pursued in court proceedings other than,
(a) proceedings to which the *Real Property Limitations Act* applies;
(b) proceedings in the nature of an appeal, if the time for commencing them is governed by an Act or rule of court;
(c) proceedings under the *Judicial Review Procedure Act*;
(d) proceedings to which the *Provincial Offences Act* applies;
(e) proceedings based on the existing aboriginal and treaty rights of the aboriginal peoples of Canada which are recognized and affirmed in section 35 of the *Constitution Act, 1982*; and
(f) proceedings based on equitable claims by aboriginal peoples against the Crown. 2002, c. 24, Sched. B, s. 2 (1).

The ***Real Property Limitations Act***[30] (the "*RPLA*") is an act that governs all limitation periods affecting land. The old *Limitation Act, 1990* was mostly repealed and replaced by the *Limitations Act, 2002*, however Part 1 of the 1990 act remained in force and was renamed the *RPLA*. Section 2 of the *Limitations Act, 2002* makes it clear that the new Act does not apply to proceedings to which the *RPLA* applies.

Some aspects of the *RPLA* apply to estate administration. The limitation period applicable to a claim for recovery of a legacy (including a share of residue) or a devise is in the *RPLA*, not the *Limitations Act, 2002*.[31] The *RPLA* provides for a ten (10) year limitation period which starts at the time the claimant has a vested interest in possession of the legacy (or devise) and not with discovery.[32] The recent case of ***McConnell v. Huxtable***[33] (discussed below) deals with the interpretation and application of this limitation period in the *RPLA* to a constructive trust claim. Recovery of interest on a legacy is also governed by the *RPLA* which provides that a legatee has six years from the date that the interest became due to commence a claim for recovery.[34] The ten year limitation period under the *RPLA* does not apply to an intestate share of an estate.[35] The two year limitation period from the date of discovery under the *Limitations Act, 2002* would apply in that circumstance.

Schedule 19: Legislative Exceptions to the 2 Year Basic Limitation Period

Section 19 of the *Limitations Act, 2002* addresses other statutes which contain limitation periods and how they should be applied:

Other Acts, etc.
19. (1) A limitation period set out in or under another Act that applies to a claim to which this Act applies is of **no effect unless**,

30 R.S.O. 1990, c. L.15 ("*RPLA*").
31 *Ibid*, s.4.
32 See Anne Werker, "Limitation Periods in Ontario and Claims by Beneficiaries" (2008) 34:1 Advocates' Quarterly, at p.4 ("Werker").
33 2013 ONSC 948 ("*McConnell*")
34 *RPLA, supra* note 30 at s.17.
35 Werker, *supra* note 32 at p.13.

(a) the provision establishing it is listed in the Schedule to this Act; or
(b) the provision establishing it,
(i) is in existence on January 1, 2004, and
(ii) incorporates by reference a provision listed in the Schedule to this Act. 2002, c. 24, Sched. B, s. 19 (1); 2008, c. 19, Sched. L, s. 3.

Act prevails
(2) Subsection (1) applies despite any other Act. 2002, c. 24, Sched. B, s. 19 (2).

Interpretation
(3) The fact that a provision is listed in the Schedule shall not be construed as a statement that the limitation period established by the provision would otherwise apply to a claim as defined in this Act. 2002, c. 24, Sched. B, s. 19 (3).

Same
(4) If there is a conflict between a limitation period established by a provision referred to in subsection (1) and one established by any other provision of this Act, the limitation period established by the provision referred to in subsection (1) prevails. 2002, c. 24, Sched. B, s. 19 (4).

Period not to run
(5) Sections 6, 7 and 11 apply, with necessary modifications, to a limitation period established by a provision referred to in subsection (1). 2002, c. 24, Sched. B, s. 19 (5).

In other words, unless a specific limitation period in another piece of legislation is set out in the Schedule to the *Limitations Act, 2002*, it will have no force or effect and the two (2) year limitation period and the ultimate 15 year limitation period will prevail.

However, the Schedule to the *Limitations Act, 2002* lists the following legislation that is applicable in the estates context and which will override the basic two year limitation period: section 38(3) of the *Trustee Act*, sections 44(2), 45(2) and 47 of the *Estates Act*, section 17(5) of the *Estates Administration Act*, section 7(3) of the *Family Law Act* and section 61 of the *Succession Law Reform Act*. These specific sections which are listed in Schedule 19 and are exceptions to the two year limitation period are discussed below:

a) Claims by and Against an Estate (s.38(3) of the Trustee Act)

The Schedule to the *Limitations Act, 2002*, preserves the 2-year limitation period set out in section 38(3) of the *Trustee Act*.

The two Acts, read together provide a 2-year limitation period from the date of the deceased's death for an estate trustee to sue for all torts or injuries to the deceased person or to the property of the deceased.

Section 38(1) of the *Trustee Act* is as follows:

> Actions by executors and administrators for torts
>
> 38. (1) Except in cases of libel and slander, the executor or administrator of any deceased person may maintain an action for all torts or injuries to the person or to the property of the deceased in the same manner and with the same rights and remedies as the deceased would, if living, have been entitled to do, and the damages when recovered shall form part of the personal estate of the deceased; but, if death results from such injuries, no damages shall be allowed for the death or for the loss of the expectation of life, but this proviso is not in derogation of any rights conferred by Part V of the *Family Law Act*.
>
> Actions against executors and administrators for torts
>
> (2) Except in cases of libel and slander, if a deceased person committed or is by law liable for a wrong to another in respect of his or her person or to another person's property, the person wronged may maintain an action against the executor or administrator of the person who committed or is by law liable for the wrong.
>
> Limitation of actions
>
> (3) An action under this section shall not be brought after the expiration of two years from the death of the deceased.

The limitation period in section 38(3) of the *Trustee Act* begins to run from the date of death. Discoverability principles do not apply to overcome the statutory bar imposed by section 38(3) of the *Trustee Act*.[36]

At common law, there is no cause of action available to an estate for any tort or injury to the deceased or the deceased's property. Section 38 of the *Trustee Act* was enacted to provide a statutory remedy for the estate trustee to bring a claim within 2 years of the date of death for torts or injuries to the person and property of the deceased.

Courts have held that a breach of contract is a *personal injury* which falls within the ambit of section 38(1) of the *Trustee Act.*[37] A breach of contract claim is governed by the 2-year limitation period prescribed by sections 4 and 5 of the *Limitations Act*.

In the Ontario Court of Appeal decision in ***Bikur Cholim Jewish Volunteer Services v. Penna Estate***,[38] the court applied the two year limitation period under the *Trustee Act*. Therefore the discoverability provisions under the *Limitation Act,* did not apply.

The motion judge in *Bikur*, Justice Greer, found that no limitation period applied and dismissed a motion for a declaration that the claims against the estate of an executor were statute-barred. Her Honour held that the combined effect of the *Trustee Act*, the former *Limitations Act*, the *Limitations Act, 2002* and the *Estates Act* provided for no limitation period. The Court of Appeal disagreed and

36 *Lafrance Estate v. Canada Attorney General* 2003, CarswellOnt 994, at para 47
37 *LeCour Estate v. North American Life Assurance Co.*, 2000 CanLII 16849.
38 2009 ONCA 196 ("*Bikur*").

held that s.38(3) of the *Trustee Act* applied:

> Section 19(1) of the *Limitations Act, 2002* is engaged since the claim in this case is one to which a provision set out in or under another Act applies, specifically section 38(3) of the *Trustee Act*. It is also one to which the *Limitations Act, 2002* applies, since the claim is pursued in court proceedings and does not fall within any of the exceptions in s.2. In these circumstances s. 19(4) is clear. If there is a conflict between a limitation period established by any other provision of the *Limitations Act*, 2002, the limitation period established by a provision such as s. 38(3) prevails.[39]

The Court held that the motion for summary judgement was barred by section 38(3) of the *Trustee Act*.

b) Notice of Claim to Extend the Limitation Period (s.47 of the Estates Act)

Section 47 of the *Estates Act* provides that the limitation period in the *Trustee Act* will not apply where notice of a claim (giving full particulars of the claim and verified by affidavit) is provided to the estate trustee at any time prior to the date upon which the claim would be barred by the *Trustee Act.* Where no estate trustee (or administrator) has been appointed, the notice may be filed in the office of a local registrar of the Superior Court of Justice. Section 47 also provides that where the claim of a person against any other person would be barred by the *Trustee Act* at any time within three months after the death of the person having the claim, the claim shall for all purposes be deemed not to be barred until three months after the date of such death.

Where an estate trustee has notice that claim or demand has been made against the estate, sections 44 (liquidated claim) and 45 (unliquidated claim) of the *Estates Act*[40] permits the estate trustee to serve a Notice of Contestation of the Claim. The claimant has 30 days to apply to a judge of the Superior Court of Justice for an order allowing their claim. The thirty days can be extended to up to three months if the claimant successfully brings an application for an extension. These sections in the *Estates Act* basically expedite the administration of an estate by giving the estate trustee a reasonable about of time to determine the validity of any claims that may be made against the estate.

In ***Bikur,*** the beneficiaries sought to sue the Estate of Lorraine Penna for Lorraine's breach of duty as an Estate Trustee. No claim had been commenced within the two year limitation period from Lorraine Penna's death set out in s.38(3) of the *Trustee Act.* However, at a meeting which was held within the two year period, the solicitor for Lorraine Penna's estate was "informed of a possible claim".[41] The Court of Appeal held that this was sufficient notice to "invoke the procedure in s.47 of the *Estates Act*, which would have stopped the s.38(3) clock from running."[42]

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39 *Bikur, supra* note 38 at para. 26.
40 R.S.O. 1990, c.E.21 ("*Estates Act*").
41 *Bikur*, *supra* note 38 at para. 54.
42 *Bikur, supra* note 38 at para. 54.

c) The Estates Administration Act (s.17(5)

Section 17 of the *Estates Administration Act*[43] governs the powers of estate trustees for selling and conveying real estate. Section 17(5) governs the limitation period for distribution of the estate by court order:

> *Distribution by order within three years from death:*
> (5) Upon the application of the personal representative or of any person beneficially entitled, the court may, before the expiration of three years from the death of the deceased, direct the personal representative to divide or distribute the estate or any part thereof to or among the persons beneficially entitled according to their respective rights and interests therein.

d) Family Law Act Claims (s.7.3)

When a spouse dies, the surviving spouse may elect to take the benefits under the will by election, seek an equalization payment of the net family property under the *Family Law Act*. If there is no will, the spouse can elect to take under the intestacy rules.

Section 7(3) of the *FLA* sets out a 6 month limitation period (commencing with the other spouse's date of death) for the surviving spouse to make an election. If no election is made within that time the surviving spouse is deemed to have chosen to take under the will or the intestacy rules.

However, a spouse may apply for an extension of this limitation period pursuant to section 2(8) of the *FLA*. For a court to grant an extension, the spouse must meet the following test:

a) There must be apparent grounds for relief;
b) relief is unavailable because of delay that has been incurred in good faith; and
c) no person will suffer substantial prejudice by reason of the delay.[44]

In ***Webster v. Webster Estate***[45] the Court found that Mrs. Webster's delay in seeking an election had not been incurred in good faith. There had been an opportunity for Mrs. Webster to obtain legal advice upon the death of her husband and she failed to do so. This failure amounted to "wilful blindness".[46] The Court also held that there would be substantial prejudice for Mrs. Webster's delay based on her declining health and diagnosis of suffering from Alzheimer's disease.[47]

e) Succession Law Reform Act Claims (s.61)

Under the *Succession Law Reform Act* (the "*SLRA*")[48] where a deceased, has not made adequate provision for the proper support of his or her dependant(s), the dependant may seek an order for proper support and the Court may make such a provision as it considers adequate out of the

43 R.S.O. 1990, c.E.22 ("*Estates Administration Act*").
44 *Ibid*., s.2(8), see also *Webster v. Webster Estate*, 2006 CarswellOnt 22941 (S.C.J.) ("*Webster*").
45 *Webster, supra* note 44.
46 *Ibid.* at para. 38.
47 *Ibid.* at para. 48.
48 R.S.O. 1990, c. S.26 ("*SLRA*").

deceased's estate.[49]

Section 61 of the *SLRA* requires the Application to be made no later than 6 months after the grant of letters of probate or letters of administration, now known as a Certificate of Appointment. However, under section 61(2), the Court has discretion to extend the six month limitation period if it considers it to be proper and there are assets that remain undisturbed at the time of the application. Estate Trustees should consider obtaining a Certificate of Appointment as Estate Trustee to trigger the running of the limitation period.

5) Equitable Claims

Until the *Limitations Act,* 2002, there was no limitation period in which to bring equitable claims.

Boyce v. Toronto Police Services Board[50] holds that the *Limitations Act*, 2002, includes actions in equity.

Breach of Fiduciary Duty

In ***Boyce v. Toronto Police Services Board,***[51] the Ontario Court of Appeal determined that claims for breach of fiduciary duty are caught by the phrase "claims pursued in court".[52] These claims do not fall within any of the exceptions under the *Act* and the 2-year limitation period applies.

Fraudulent Conveyances

If a fraudulent conveyance is discovered on or after January 1, 2004, it is subject to the 2-year limitation period in the *Limitations Act*, 2002. The law previously had provided no limitation period at all for such an action.[53] ***Toronto Standard Condominium No. 1703 v. 1 King St. West***,[54] in that action, the plaintiff wished to amend a Statement of Claim in December of 2008, to include a claim that two mortgages registered in November of 2006 were void as fraudulent conveyances. Master Glustein dismissed the plaintiff's motion for leave to amend as the claim for fraudulent conveyance was subject to the 2-year limitation period and was statute barred.

On appeal to the Divisional Court, the appellant submitted that "the proposed amended fraudulent conveyance pleading was not a "claim" as that term is defined in the *Limitations Act, 2002,* because no injury, loss or damage had yet occurred." The appellant also argued that the Master erred in applying the discoverability principle and for not concluding that s.16(1)(a) of the *Limitations Act, 2002* (that there is no limitation period for a proceeding for a declaration with no consequential relief) was applicable to this case. Justice Sachs, however, upheld the Master's decision and held that:

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49 *Ibid.* at s.58.
50 2012 ONCA 230 ("*Boyce*"), leave to appeal dismissed 2012 CanLii 66225.
51 *Boyce*, *supra* note 50.
52 *Ibid*. at para.2.
53 *Toronto Standard Condominium No 1703 V 1 King St. West*, 2010 ONSC 2129 (Div. Crt), dismissing appeal from 2009 CanLII 55330 ("*Toronto Standard Condo*").
54 *Ibid.*

> In my view, the Master was correct when he concluded that the proposed claim was a "claim" within the meaning of s.1 of the *Limitations Act*, 2002. The decision of the Court of Appeal in *Perry*, supra, has been superseded by the *Limitations Act*, 2002. Unlike an "action on the case" it is not essential that a "claim" under s. 1 of the Act "sound in damages" or "create a legal duty, the breach of which gives rise to a cause of action."
>
> The Plaintiff is alleging an injury, namely that assets that should be available to satisfy its claim against the Defendants have been put beyond its reach. According to the Plaintiff, that injury occurred as a result of the act of 1KW in granting two mortgages on its assets to HEL. Finally, the Plaintiff is seeking a remedy for its injury – first, a declaration that the transaction that put the assets out of its reach is void and, second, a declaration that its claims have priority over any claims that HEL might make against 1KW.[55]

Justice Sachs also confirmed that the Master did not err in his application of the discoverability doctrine, nor in his decision that s.16(1)(a) of the *Limitations Act, 2002* did not apply in this case.

Fraud, Breach of Fiduciary Duty and Misrepresentation

Of notable relevance to estates matters, is the decision in ***Portuguese Canadian C.U. v. Pires***[56] which held that the applicable limitation period for fraud, breach of fiduciary duty and misrepresentation under the *Limitations Act, 2002* is 2 years. The Court held that the plaintiff knew in May of 2006 that he had purchased something which was worth less than what he said was represented to him.[57] His claim, commenced in 2010, was statute barred.

In ***Fracassi v. Cascio***[58] the Ontario Superior Court of Justice also held that the applicable limitation period for breach of fiduciary duty and oppression under the *Limitations Act*, *2002*, is 2 years.[59]

Failure to Account for Trust Funds

In the decision in ***Syndicate Number 963 (Crowe) v. Acuret Underwriter***[60] it was accepted that the 2 year limitation period under the *Limitations Act*, *2002*, applied to an action arising out of a failure to account for trust funds.

Lloyd's Underwriters, representing Syndicate Number 963, claimed that Acuret failed to properly account for and pay out funds that were remitted to Acuret, in trust for Lloyd's, in January 2002. Lloyd's claimed that they did not become aware that the trust funds had not been accounted for or paid out until April of 2005. Lloyd's commenced an action in October of 2006. Acuret argued that the claim was statute barred. The court held that the two year limitation period applied but as the claim was not discovered until April 2005, it was not statute barred in 2006.

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55 *Toronto Standard Condo*, *supra* note 54 at paras.28-29.
56 *Portuguese Canadian C.U. v. Pires*, 2012 ONCA 335 (Div.Ct.), affirming 2011 ONSC 7448 (CanLII).
57 *Ibid*.
58 2011 ONSC 178 ("*Fracassi*").
59 *Ibid*.
60 *Syndicate Number 963 (Crowe) v. Acuret Underwriter Inc.*, 2009 CanLII 51195 (ONSC).

Rectification Claims

In the ***Estate of Blanca Esther Robinson (Re)***[61] it was determined that rectification claims are subject to section 4 of the *Limitations Act,2002* and a 2-year period applied. Rectification claims were not governed under the old *Limitations Act,* however, they could be barred by the doctrine of laches.

Constructive Trust (and other non-express trust) Claims

McConnell v. Huxtable[62] dealt with limitation periods for constructive trust claims, albeit in a family law context.

The applicant brought an application in 2012 for a constructive trust claim against her former common-law spouse. She claimed that they had co-habited from the early 1990's until 2007 and that she had an interest in the house which was registered in the respondent's name alone. The applicant acknowledged that in 2007 she was aware of a potential constructive trust claim.

The respondent, acknowledged there had been a relationship, but denied that they ever co-habited. He argued that her constructive trust claim was statute barred as the *Limitations Act*, *2002* applied and it had been more than two years since she had discovered her claim. The applicant argued that no limitation period applied as there was a legislative gap for this situation, or in the alternative, a ten year limitation period applied under section 4 of the *RPLA* as this was for a claim to "recover" land/property.

After a thorough review of all of the law, Perkins J. concluded that section 4 of the *RPLA* did apply to the facts of this case because as it was a claim to recover lands. Therefore, he held that the applicant's constructive trust claim was not statute-barred:

> The plain words of the section, "action to recover any land", seem to apply comfortably to the applicant's claim in this case. The rest of the *Real Property Limitations Act* talks about various kinds of claims other than trust claims but does not indicate any intention that constructive trust claims are not properly within the meaning of section 4. The repeal of the former Parts II and III of the old *Limitations Act*, R.S.O. 1990, c. L.15, does not shed light on the meaning of section 4. **A ten year period for constructive trust claims seeking ownership of land is not inconsistent with the rest of the *Real Property Limitations Act* or with the general scheme of the *Limitations Act, 2002*, which expressly defers to the *Real Property Limitations Act*.**"[63] [emphasis added]

Perkins J. did not decide whether the discoverability principle applied to section 4 of the *RPLA*.[64]

Perkins J. also went on to examine and analyse the applicant's claim that there was a legislative gap

61 *Estate of Blanca Esther Robinson (re)*, 2010 ONSC 3484, aff'd 2011 ONCA 493, leave to appeal dismissed 2012 CanLii 8365 (SCC).
62 *McConnell*, *supra* note 33.
63 *McConnell, supra* note 33 at para. 79.
64 *McConnell, supra* note 33 at para. 83.

for limitation periods for constructive trust claims in the family law context. After looking at the basic limitation period (s.4) and the four elements required to "discover" a claim under the *Limitations Act, 2002* and start the two year limitation period running (s.5), Perkins J. concluded that:

> [i]t is impossible to apply sections 4 and 5 of the *Limitations Act, 2002* to constructive trust claims in family law. . . Claims to recover land aside, the *Limitations Act, 2002* may have been meant to but does not manage to encompass constructive trust claims. . . .In other words, while I cannot find that a legislative policy of a two year limitation period for family law constructive trust claims is "absurd", I find there is no coherent, sensible or reasonable way to apply sections 4 and 5 of the *Limitations Act, 2002* to such claims. **I am therefore driven to conclude, that aside from section 4 of the *Real Property Limitations Act*, there is no applicable statutory limitation period for constructive trust claims in family law cases and that there is a legislative gap, as submitted by the applicant**.[65] [emphasis added]

Perkins J.'s final observation was a call for legislative reform, stating that that *"[o]nly a comprehensive legislative approach to these matters will result in a coherent and consistent limitations scheme."*[66].

Will Challenges

The issue of limitation periods in will challenges has been rather murky. Under the *Limitations Act, 2002* no limitation period applies to a claim for a declaration without any consequential relief.[67] It has been argued that this applies to will challenges, such that will challenges are not subject to the two-year limitation period.[68]

The rationale for this position is that a will challenge often simply seeks a declaration by the court on the validity of wills. In the case of ***Oestrich v. Burnhubber***, [2001] CarswellOnt 273 (S.C.J.) the court held that the then-*Limitations Act* did not apply where a declaration of validity or invalidity of a will was sought.

Still, in such cases where a will is found invalid, the estate trustee will be bound to comply with the terms of the older will.

In ***Lund v. Rossiter***, 2012 ONSC 6777, the estate trustee told a beneficiary that certain assets formed part of the estate and provided him with an accounting. More than two years after the deceased died and after he received the accounting, the beneficiary took the position that the will was invalid. He alleged that he should have inherited the assets by right of survivorship. The beneficiary maintained that he was asking for declaratory relief. The estate trustee took the position that the beneficiary was really asking for a consequential order that the estate trustee remedy a breach of her fiduciary duty. Justice Pollak concluded that "the summary judgment motion procedure was inappropriate" for the application and dismissed the motion.[69]

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65 *McConnell, supra* note 33 at para. 144-145
66 *McConnell, supra* note 33 at para. 152.
67 *Limitations Act, 2002, supra* note 7 at s.16(1)(a) and see also *Boyce, supra* note 50 at para. 3.
68 See Werker, supra note 32; and Archie Rabinowitz, "Limitation Periods in Estate Litigation", Practice Gems: The Administration of Estates 2012; September 13, 2012 ("*Rabinowitz*").
69 2013 ONSC 1338.

In two 2010 decisions, the court found that the limitation period begins to run when a certificate of appointment of estate trustee is issued[70]. In *Kenzie,* the court specifically declined to rule on the issue of whether the operation of s.16(1)(a) of the *Limitations Act* serves to eliminate the limitation period for will challenges[71]. In that case, Healy J. found that no limitation period applied to the will challenge, as the will had not been probated, but held that a limitation period did run for other transactions related to the administration of the estate, including a beneficiary designation[72]. As Poyser points out, this decision, if it is good law, creates a situation where wills may be treated differently by the courts in terms of limitations as compared to other testamentary dispositions made at the same time.

The recent decision in ***Leibel v. Leibel,*** 2014 ONSC 4516 (CanLII) provides much-needed clarity on the issue of limitation periods in will challenges. In that case, the potential challenger, Blake Leibel commenced proceedings in respect of his mother, Eleanor Leibel's will, more than two years following the date of death. He also, in the time between his mother's death, and the commencement of proceedings, received significant monies in the estate, undertook a corporate loan with legal advice and received personal property from the estate. Blake argued there was no limitation period, in part relying on the decision in *Oestrich v. Burnhubber*, referred to above.

On the issue of when the limitation period starts to run, Madam Justice Greer clarified at paragraph 36, that it is the date of death:

> **Since a Will speaks from death, namely June 4, 2011, Blake's Application is out of time under the Act**. No steps were ever taken by Blake to extend the period under the Act. All Blake's actions and his receipt of the proceeds of various bequests to him, were steps which said to the Estate Trustees that Blake accepted the terms of the 2011 Wills.[73]

In response to Blake's argument that there is no limitation period in will challenges Justice Greer wrote in part:

> [52]..**To say that every next-of-kin has an innate right to bring on a will challenge at any time as long as there are assets still undistributed or those that can be traced, would put all Estate Trustees in peril of being sued at any time.** There is a reason why the Legislature replaced the six-year limitation in favour of a two-year limitation. [emphasis added]

As a result, the will challenge was found to be statute-barred.

Two years from the date of death then, ends the limitation period in most will challenges.

However, will challenges engage important public policy considerations, and generally speaking, the court has been hesitant to strictly limit a party's ability to challenge a will. In *McLaughlin (Estate*

70 *Kenzie v. Kenzie* (2010), 2010 ONSC 4360, affirmed 2011 ONCA 53 [Kenzie]; *Sawdon Estate v. Watch Tower Bible & Tract Society of Canada* (2010), 2010 ONSC 4066, 61 ETR (3d) 132, 2010 CarswellOnt 5922.

71 *Kenzie* at para 6

72 *Ibid* at paras 6-9. See John E.S. Poyser, "Limitation Periods and the Effect of Delay," *Capacity and Undue Influence,* 2nd Ed. (Toronto: Carswell, manuscript in preparation) [Poyser].

73 Para. 36

of) v. McLaughlin, Price J. voiced concern about the public policy effects of the limitation of will challenges:

> There has been a recent trend in the jurisprudence to apply limitation periods, and the principle of estoppel by convention, to curtail the ability of children and, by implication, the court, to require wills to be proven in solemn form. It is true that at some point, estate trustees and beneficiaries require certainty and closure in the administration of a testator's estate. However, it should be presumed that children are entitled to have their parents' wills proven in solemn form in the absence of compelling reasons why the court should not entertain their request.[74]

In *Neuberger v. York*, the Court of Appeal echoed Justice Price's concerns about limiting the ability of an interested party to challenge a will.[75] In overturning the motion judge, who found that a period less than two years represented an undue delay by the co-estate trustee in bringing about a will challenge, the court held that:

> The motion judge's reasoning would place estate trustees with doubts as to the validity of a will in an untenable position. They would either have to bring about a premature will challenge…or take no steps in the administration of the estate while investigating the testator's capacity, for fear of being deemed unduly dilatory or as having affirmed the validity of the will.[76]

Therefore, while a two year limitation period will apply in most cases, the court still may have cogent public policy reasons for allowing a will challenge more than two years after the death of a testator. If the facts of the case demand it, the court's discretion to extend the limitation period beyond two years is embedded in the discoverability principle in the *Limitations Act*, as well as the unsettled law concerning whether or not a will challenge is a declaration without consequential relief (and therefore not subject to any limitation period per s.16(1)(a) of the *Limitations Act*).

6) Other Applicable Equitable Doctrines

While the *Limitation Act, 2002* is the main source for limitation periods, the equitable doctrine of *laches* and the common law doctrines of fraudulent concealment and special circumstances may have an effect on those limitation periods.

a) Doctrine of Laches

Historically, statutes of limitations did not apply to equitable claims, so courts of equity developed their own equitable remedies. The doctrine of *laches* is one such remedy. It prevents recovery to a plaintiff who is guilty of their unreasonable delay in commencing an action. The leading case is the Supreme Court of Canada case of ***M(K) v. M(H)***.[77] The defendant must demonstrate that the delay amounted to the plaintiff's acquiescence to the defendant's conduct or has caused the defendant to alter its position in reasonable reliance on its acceptance of the *status quo* or otherwise permitted

74 2015 ONSC 4230 at para 46.
75 2016 ONCA 191.
76 *Ibid.* at para 121.
77 [1992] 3 S.C.R. 6 (*MK v. MH*).

a situation to arise which it would be unjust to disturb.[78]

In the estates context, even when a limitation period does not bar a claim, a defendant may plead the doctrine of *laches*. See the cases of ***Hipel Estate, Re***[79] and ***Johnson v. Futerman et al***.[80]

b) Doctrine of Estoppel

Estoppel is a common law doctrine concerned with preventing a party from asserting a given position when, through their previous words or acts, they have implied or stated a contrary position. In *Leibel*, discussed above, Greer J. suggested that estoppel by representation and estoppel by convention are grounds on which a will challenge may be dismissed, but found in that case that the application was statute-barred by the *Limitations Act*. Subsequently, Greer J. dismissed a will challenge on the basis of the doctrine of estoppel at the trial level in Neuberger, also discussed above. On appeal, however, the court held that "there is nothing in the jurisprudence to support the extension of the equitable doctrines of estoppel by convention or representation to matters involving the validity of a will."[81] Therefore, pending any appeal in *Neuberger*, estoppel by convention and estoppel by representation do not serve to limit applications to challenge a will.

c) Doctrine of Fraudulent Concealment

Another remedy is the doctrine of fraudulent concealment. This doctrine can be used by a plaintiff to toll a limitation period when material information has been concealed from them by a defendant. In *Giroux Estate v. Trillium Health Centre*[82] the Ontario Court of Appeal held that the doctrine of fraudulent concealment applied to suspend the running of the limitation period in s.38(3) of the Trustee Act. The Court of Appeal also held that this doctrine survived the new *Limitations Act, 2002*:

> In my view s. 38(3) was exempted from the new Act so that its common law status would be preserved and it would remain immune from the discoverability rule. In other words, the legislature intended that s.38(3) should continue to be governed by common law principles. The doctrine of fraudulent concealment is one such principle.[83]

Fraudulent concealment applies to situations where 1) the defendant and plaintiff are in a special relationship, 2) given the special or confidential nature of their relationship, the defendant's conduct amounts to "an unconscionable thing for the one to do towards the other"; and, 3) the defendant conceals the plaintiff's right of action, either actively or recklessly.[84]

The relationship between an estate trustee and a beneficiary, an inter vivos trustee and a beneficiary or the person holding a power of attorney for property for another would appear to fall within a special relationship.

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78 *Ibid*. at para.98.
79 2011 ONSC 5259, aff'd 2012 ONCA 371, leave to appeal dismissed 2012 CanLii 76984 (SCC).
80 2012 ONSC 4092.
81 *Supra,* note 72 at para 115.
82 2005 CanLii 1488 (ONCA) ("*Giroux*").
83 *Giroux, supra* note 74 at para. 33.
84 *Ibid.* at para. 23 and 28.

c) Doctrine of Special Circumstances

The doctrine of special circumstances is derived from the Supreme Court of Canada decision of ***Basarsky v. Quinlan***, [1972] S.C.R. 380. The plaintiff had brought a claim within the applicable limitation period, but later sought to add a new claim after the limitation period had expired. The SCC held that an amendment cannot be made that would prejudice the other party, except in peculiar or special circumstances that warrant the amendment. In *Basarsky*, the SCC found that the defendant was not prejudiced and allowed the amendment on the basis of special circumstances including the fact that all of the facts relating to the claim and liability were pleaded in the original statement of claim and that the defendants admitted responsibility.

However, in the 2008 decision in ***Joseph v. Paramount Canada's Wonderland***,[85] of the Ontario Court of Appeal held that courts cannot extend an expired limitation period under the new *Limitations Act, 2002* on the basis "special circumstances". The Court decided that litigants need certainty when it comes to limitation periods and therefore a court should not be allowed to extend limitation periods at its own discretion.

In ***Meady v. Greyhound Canada Transportation Corp***., released concurrently with *Joseph*, the Court of Appeal also held however that the *Limitations Act, 2002* did not repeal the doctrine of special circumstances, despite the fact that the doctrine has been abolished by s. 20 of the *Limitations Act, 2002* for cases governed by the limitation periods set out in that *Act.*

The Ontario Court of Appeal held that the doctrine of special circumstances is available to permit a court to add parties to an existing action, despite the expiration of the limitation period in s.38(3) of the *Trustee Act*.[86]

In 2009, the Ontario Court of Appeal examined the doctrine of special circumstances in the estate context in ***Bikur v. Penna Estate*** (discussed above). The Court held that the doctrine of special circumstances was available to extend the limitation period under s.38(3) of the *Trustee Act.* However, it declined to add the estate of Lorraine Penna as a Defendant to the existing action, because there was no "special or peculiar circumstances" on the facts of the case.

Conclusion

It is apparent that not all relevant limitation periods can be found in one place for estate litigation. It is important to be aware of all possible sources for limitation periods.

The relative unimportance of limitation periods in estates and trusts litigation has been radically altered by the *Limitations Act,* 2002. Every case must be immediately assessed from the perspective of limitations. The plaintiff or applicant's solicitor should diarize all potential limitations when the file is opened. Counsel defending a claim must be alert to potential defences based on missed limitations. Given the uncertainty as to some of the limitation periods, the best course of action will be to commence a claim or enter into a tolling agreement.

85 2008 ONCA 469 ("*Joseph*"), see also *Meady v. Greyhound Canada Transportation Corp*. (2008), 90 O.R. (3d) 774 (C.A.), released concurrently with *Joseph*.

86 See *Bikur*, *supra* note 38 at para. 51.

CASE LAW

FURTNEY V. FURTNEY, 2014 ONSC 3774 (CanLII)

Furtney v. Furtney, 2014 ONSC 3774 (CanLII)

Date:	2014-06-26 (Docket: FD251/13)
Citation:	Furtney v. Furtney, 2014 ONSC 3774 (CanLII), <http://canlii.ca/t/g7qtp>

CITATION: Furtney v. Furtney, 2014 ONSC 3774

COURT FILE NO.: FD251/13

DATE: June 26, 2014
SUPERIOR COURT OF JUSTICE – ONTARIO
FAMILY COURT

RE: Ronald Scott Furtney, the estate trustee of the late Philip Leroy Furtney, the applicant
AND:
Mary Diane Furtney, respondent
BEFORE: MITROW J.
COUNSEL: Terry Hainsworth for the applicant
Stephen McCotter for the respondent
HEARD: April 25, 2014

ENDORSEMENT

INTRODUCTION

[1] The applicant brings a motion for two orders from the court: a) that the sum of $100,000 be set aside from the estate on account of anticipated legal fees and disbursements to be incurred by the estate trustee's solicitor, Harrison Pensa, that the accounts be rendered quarterly to the estate, with copies to the respondent, and that if the respondent disputes the accounts, then she should serve a notice of dispute on Harrison Pensa and that the dispute can then be referred to me as the case management judge for assessment; and b) that certain disclosure be made by the respondent in relation to the respondent's net family property.

[2] The disclosure issue was not argued as the parties were consenting to an order to go as asked in the applicant's factum at paragraph 26(B) on page 7. That consent order is included in the order set out below.

[3] For reasons that follow, the relief sought by the applicant is granted.

FACTS

[4] A number of relevant background facts were discussed in my endorsement dated December 3, 2013 relating to two motions: a motion brought by the applicant dismissing the proceeding on the basis of delay; and the respondent's motion for preservation of the estate assets to meet a potential equalization payment.

[5] A number of the facts were dealt with in that endorsement and will not be repeated here.

[6] The late Phillip Leroy Furtney, who died on September 21, 2007 ("the deceased"), and the respondent married in 1982 and separated in 2005.

[7] In February 2007, the deceased commenced an application seeking a divorce, equalization of net family properties, freezing assets, costs and pre-judgment interest.

[8] The respondent filed an answer containing a claim for divorce, spousal support, equalization of net family properties, freezing assets, sale of property, pre-judgment interest, costs and an accounting from proceeds of the business activities on disposition of assets within the States of Oklahoma, Texas and Florida, and also an accounting of all proceeds for a malicious prosecution pursuant to a lawsuit filed by the deceased against authorities in the State of Florida (hereinafter referred to as "the Florida action").

[9] The order made December 3, 2013 dismissed the applicant's motion for dismissal for delay.

[10] That order also provided that pending the disposition of this proceeding on a final basis, that the administration of the estate is suspended to the extent of $2.2 million and that that amount had to be retained by the estate, and not to be paid out, but that the order was without prejudice to the right of either party to bring a further motion to change this amount if subsequent fresh evidence became available that may affect the potential equalization payment owing to the respondent.

[11] That order charged the applicant with the responsibility to ensure that adequate assets were retained within the estate at all times to ensure compliance with the order.

A. The Value of the Estate

[12] The Florida litigation was discussed in the endorsement dated December 3, 2013 and the relevant facts are summarized in paras. 85 to 87 as follows:

> [85] The respondent deposes that during the 1990s the deceased ran a number of Florida bingo halls through a Florida corporation called Bradenton Group Inc. ("Bradenton") and that Bradenton is a corporation that is wholly owned by 800438 Ontario Limited, in respect of which the deceased disclosed a 50% interest. This interest was valued by the deceased at date of separation at $155,000 in his financial statement.
>
> [86] In the mid 1990s, the deceased was arrested and imprisoned in the State of Florida for racketeering and Bradenton's operations were shut down by the State of Florida under racketeering and corruption legislation. The charges against Bradenton and the deceased were eventually dropped and Bradenton and its subsidiaries sued the State of Florida for damages. The litigation arose during the 23 year marriage of the respondent and the deceased.
>
> [87] The complicating factor arises because on the valuation date the status of the litigation was that the Bradenton lawsuit for damages had been dismissed by a jury. Therefore, the

> applicant takes the position that the Florida action had a value of nil on the valuation date. The respondent deposes, and the applicant does not dispute, that Bradenton was eventually successful in its appeal and that in August 2012 the State of Florida paid to Bradenton slightly in excess of $6.6 million in damages and interest as a result of the lawsuit that arose during the marriage of the respondent and the deceased.

[13] In his current motion, the applicant agrees that the damages were assessed at over $6.6 million and states that there is no disagreement between the parties that ultimately 800438 Ontario Inc. would be the beneficiary of those damages and that the estate has a 50% interest in 800438 Ontario Inc. The damages would be subject to various liabilities including legal fees.

[14] The previous endorsement noted (at para. 89) that no evidence was filed on the motion as to the current value of the estate. There was evidence filed in the form of an exhibit on the motion being the judgment on the passing of accounts that showed the value of the estate as at May 1, 2012 at just under $3.8 million.

[15] However, since that time, additional information has become available and the numbers have now been refined in the affidavit material filed by the parties in the present motion.

[16] The respondent has prepared a draft net family property statement (that is appended to the applicant's affidavit). The respondent's draft net family statement shows an equalization payment owing to the respondent in the amount of a little over $744,000. This amount does not include any potential amount owing from the proceeds of the Florida judgment.

[17] More importantly, and as confirmed in the respondent's affidavit, a preliminary summary of the net asset position of the estate has been prepared by KPMG dated March 5, 2014. Although this report has not formally been filed as an exhibit, a copy of this report has been provided to the court and this report will be treated as if it was an exhibit in the material. There is no dispute between the parties as to what the report states. The court had previously ordered that the cost of this report be paid out of the estate assets.

[18] The report indicates that at this preliminary stage the net asset position of the estate is estimated to have a fair market value ranging from a low of $379,000 to a high of $1.233 million.

[19] The significant range of the potential net asset position of the estate arises primarily because of the current difficulty of valuing some of the potential liabilities of the estate. The KPMG report also warns that there may be income tax liabilities to the estate and that the impact of income tax liabilities, late filing fees and interest charges "may be material."

[20] The respondent estimates, at a maximum, that the Florida litigation would add approximately $860,000 to the equalization payment, resulting in a total potential equalization payment of approximately $1.56 million, an amount that exceeds the highest net asset position of the estate as estimated by KPMG. However, it is noted that this is the respondent's current best case scenario based on a draft net family property statement.

[21] It is also noted that the respondent's draft net family property statement has not included values for amounts due to shareholder from the respondent's corporation 1379798 Ontario Limited and the amounts apparently owing from various corporations in which the deceased had an ownership interest. The net family property statement shows these amounts to be determined.

[22] In relation to the equalization payment shown in the respondent's draft net family property statement, the applicant submits that it is simply "just that – a draft" and that it is the applicant's position that there are valuation errors contained in the draft net family property statement that may have a material impact on the equalization payment. However, the applicant has not provided his own draft net family property statement, nor has he otherwise attempted to quantify the valuation errors alleged.

[23] In the previous endorsement, at para. 88, the analysis based on the information available to the court at that time was that the equalization payment owing to the respondent may be as high as $2.176 million including the Florida litigation. That "high water mark" has now been reduced to approximately $1.56 million as discussed above and according to the respondent's affidavit material.

POSITIONS OF THE PARTIES ON THIS MOTION

[24] The applicant submits that absent improper or unreasonable conduct on his part, that as estate trustee he is entitled to defend the claims brought by the respondent against the estate and to treat the legal costs arising therefrom as a proper estate expense, and to be reimbursed for those expenses from the estate.

[25] The applicant submits that he should not be called upon personally to pay the costs of this litigation, given that he is required to defend this litigation in his capacity as the estate trustee.

[26] The applicant points out that his elderly uncle was the original estate trustee and that the applicant (being the son of the deceased) later stepped in and consented to an order to act as estate trustee.

[27] The applicant also does not dispute that he, along with his brother, are the two residuary beneficiaries of the estate; that the applicant is a 30 per cent beneficiary and that his brother is a 70 per cent beneficiary.

[28] The respondent's position is that the applicant has a personal interest in the estate as a residuary beneficiary. The respondent submits that given the potential maximum amount of the equalization payment, and considering that this exceeds the high range of current estimated net asset value of the estate, that there is a real likelihood that if any money is allocated now for the applicant's fees that this could result, in effect, in the respondent having the fees come out of the equalization payment that is due to her.

[29] The respondent submits that the applicant should fund the fees of the estate litigation himself and that the issue as to whether any portion of those fees should be reimbursed by the

estate should await the final conclusion of this matter. The respondent points out that she is currently funding her own fees and that allowing the applicant to have his fees reimbursed by the estate would be an unfair advantage to the respondent, especially considering the applicant's personal interest as a residuary beneficiary.

DISCUSSION

[30] An important legal principle at play in the applicant's motion deals with the right of the applicant, as estate trustee, to be indemnified for fees incurred in defending the respondent's claim for an equalization payment (and other claims advanced by the respondent as summarized earlier).

[31] On the motion, the arguments centred around the respondent's claim for an equalization payment.

[32] In a recent article [1] Professor Albert H. Oosterhoff discussed the right of an estate trustee to be indemnified by the estate in respect of expenses reasonably incurred by the estate trustee in the execution of his or her duties, including indemnity for legal fees incurred in relation to legal actions involving the estate.

[33] Professor Oosterhoff explained the nature of the right of an estate to be indemnified as follows at pages 127-128 (footnote omitted):

> As the word itself suggests, the right to be indemnified implies that estate trustees should bear the costs and expenses themselves first and then seek reimbursement from the estate assets. But this presents a problem. Many trustees and estate trustees do not have the wherewithal to pay the costs out of their own pocket. Nor should they have to. Their office is a socially desirable one which at one time, at least in the case of trustees, was carried out without remuneration.
>
> Of course, a person who has been named to the office does not have to accept it. He may renounce.
> Most people would probably want to renounce once apprised of the fact that they must pay for all costs and expenses personally and can recover them only afterwards. On that basis few people would agree to take on the office. That is certainly not desirable, for the administration of estates is a socially necessary and desirable function that the law should promote and foster. And so it has long been the practice and the courts have long since recognized that trustees and estate trustees may pay the costs and expenses out of estate or trust assets. ...

[34] As Professor Oosterhoff points out (at page 125), the courts have always held that estate trustees (and also trustees) are entitled to be indemnified for their reasonable expenses.

[35] The right to indemnity extends to legal fees. In *Re Thompson Estate*, 1945 CanLII 2 (SCC), [1945] S.C.R. 343, Rand J. for the majority states at page 356:

> ... The general principle is undoubted that a trustee is entitled to indemnity for all costs and

> expenses properly incurred by him in the due administration of the trust: it is on that footing that the trust is accepted. These include solicitor and client costs in all proceedings in which some question or matter in the course of the administration is raised as to which the trustee has acted prudently and properly. ...

[36] The fact that a trustee (or an estate trustee) may have a co-existing interest as beneficiary has not been viewed as a valid basis for denying costs. This issue was examined by the Supreme Court of Canada in *Geffen v. Goodman Estate*, 1991 CarswellAlta 91 (S.C.C.). In that case, a woman, having a mental illness, inherited property. She settled the property upon a trust for herself for life, with the remainder to go to her children, nieces and nephews. The woman's brother gave her input in settling the trust. Two of the woman's brothers, and her nephew, were named as trustees. Following her death, the woman's son, in his personal capacity and as executor of his mother's estate, sued the trustees alleging undue influence. This action ultimately proved unsuccessful after the trustees were vindicated in the Supreme Court of Canada. On the issue of co-existing interests of a trustee, as beneficiary, the Court stated at para. 77:

> 77 Nor can there be any serious question that the appellants in defending the action were acting, not for their own benefit, but for the good of the trust. For William Geffen, of course, defending the action promoted both his personal interest as well as that of his fellow beneficiaries. While we have not been referred to a case in which trustees seeking indemnification from a trust were also beneficiaries of the trust, I do not consider the co-existing interest of trustee and beneficiary a valid basis for denying costs. Similarly, the fact that the Geffen brothers were acting in the interests of their children, nephews and nieces does not, in my view, cast any doubt upon the propriety of their actions.

[37] Further, in *Geffen, supra*, the Supreme Court of Canada clarified that trustees are entitled to recover legal costs reasonably incurred, stating as follows at para. 75:

> 75 The courts have long held that trustees are entitled to be indemnified for all costs, including legal costs, which they have reasonably incurred. Reasonable expenses include the costs of an action reasonably defended: see *Re Dingman* (1915), 35 O.L.R. 51. In [page 391] *Re Dallaway*, [1982] 3 All E.R. 118, Sir Robert Megarry V.C. stated the rule thus at p. 122:
>
> > In so far as such person [trustee] does not recover his costs from any other person, he is entitled to take his costs out of the fund held by him unless the court otherwise orders; and the court can otherwise order only on the ground that he has acted unreasonably, or in substance for his own benefit, rather than for the benefit of the fund.

[38] Section 23.1 of the *Trustee Act*, R.S.O. 1990, c T.23, codifies the right of a trustee (and this would include an estate trustee by virtue of the definition of "trust" in s. 1) to have expenses paid directly from trust property, or to be reimbursed from trust property:

> 23.1(1) A trustee who is of the opinion that an expense would be properly incurred in carrying out the trust may,
>
> (a) pay the expense directly from the trust property; or

(b) pay the expense personally and recover a corresponding amount from the trust property.

(2) The Superior Court of Justice may afterwards disallow the payment or recovery if it is of the opinion that the expense was not properly incurred in carrying out the trust.

[39] Although the respondent relies on *Craven v. Osidacz Estate*, [2010] O.J. No. 5154 (S.C.J.), I find that the result in that case assists the applicant more than the respondent. In that case, Lofchik J. dismissed a motion by the deceased's spouse requiring the executor to repay to the estate all amounts received by the executor from the estate, representing legal fees incurred by the executor in defending two actions brought against the estate by the deceased's spouse, including a claim against the deceased's estate arising from the deceased stabbing to death the parties' eight-year-old son. The executor and his mother were the only beneficiaries of the deceased's estate.

[40] Lofchik J. acknowledged the duty of the executor to defend the claims made against the estate; the issue of repayment of fees reimbursed to the executor was ordered adjourned to the passing of accounts by the executor. As to the request that the executor be restrained from using estate funds to pay further legal accounts, Lofchik J. ordered that the executor was restrained from doing so absent consent of all beneficiaries, and the deceased's spouse, or approval of the court.

[41] In the case at bar, the applicant has a duty to defend the respondent's claim; although he has a co-existing interest as beneficiary of the estate to extent of 30 per cent, that does not defeat his right to be reimbursed for legal fees reasonably incurred.

[42] The applicant's proposal for court oversight as to payment of further fees is not dissimilar to the approach in *Craven, supra*.

[43] The respondent relies on *DeLorenzo v. Beresh*, [2010] O.J. No. 4367 (S.C.J.) and *Coppel v. Coppel Estate*, [2001] O.J. No. 5246 (S.C.J.). However, in *Coppel*, the court did not consider s. 23.1 of the *Trustee Act* (or its predecessor) in finding that it was impermissible for the estate trustee to pay litigation accounts from estate funds without the consent of the beneficiaries or a court order. This is specifically noted by Professor Oosterhoff (see page 136). The subsequent decision in *DeLorenzo* relied, in part, on *Coppel*.

[44] I do accept the analysis by Professor Oosterhoff, coupled with the authorities cited earlier in these reasons, and also considering s. 23.1 of the *Trustee Act*, that an estate trustee does not require the consent of the beneficiaries or a court order prior to having litigation expenses, reasonably incurred by the estate trustee, paid from estate funds.

[45] In the present case, the estate trustee, however, is faced with my previous order suspending the administration of the estate to the extent of $2.2 million. Although subsequent evidence now shows that the maximum potential equalization payment is in the range of $1.56 million (according to the respondent) and that the maximum estimated net asset value of the estate is less than that, no motion has been brought to amend the previous order as to the amount to be preserved by the estate.

[46] The applicant seeks, instead, an order specifically allowing the applicant's fees to be paid

from the estate.

[47] The respondent argues this case should be analogized to a situation where a spouse's assets are frozen by court order to meet a potential equalization payment; where the assets may be insufficient to make the equalization payment; and where the spouse has asked to access some of the frozen assets to pay legal fees.

[48] I find that the respondent's position ignores an important reality – which is the existence of an estate trustee and the duties and obligations of an estate trustee. This differentiates the case at bar somewhat from a case of a living spouse.

[49] I find, in all the circumstances, and taking into account the controversial and significant issue as to the value of the Florida litigation, that the applicant's request is reasonable.

[50] The order below adds some additional protection to the respondent as the order is made without prejudice to the respondent's right at trial to seek an order that the applicant reimburse the estate for any legal fees paid from the estate as a result of this order.

[51] The order below also addresses some case management matters.

ORDER

[52] For reasons set out above, an order shall issue as follows:

1. The sum of $100,000 shall be set aside on account of anticipated legal fees and disbursements from Harrison Pensa LLP in relation to this case.

2. Harrison Pensa shall render accounts quarterly to the applicant for its services in relation to this case, and provide copies to the respondent.

3. If the respondent wishes to dispute any of the accounts, she shall serve notice of dispute on Harrison Pensa.

4. Any dispute can be referred to me, as the case management judge, for assessment.

5. In the absence of a notice of dispute, the account shall be paid within 30 days, or the amount as assessed shall be paid.

6. The respondent shall produce within 30 days (or longer if agreed to by both parties) documents that confirm the following:

a) the value of her registered retirement savings plan(s) on the valuation date; and

b) proof of all of certificates of deposit, guaranteed investment certificates, or other interest-bearing accounts as of the valuation date.

7. The parties, through counsel, shall schedule a settlement conference, before me, in consultation with the trial coordinator. Counsel may request that the settlement conference be up to two hours in length. The settlement conference shall be scheduled for not later than October 31, 2014, unless otherwise ordered. Both parties are required to be present at the settlement conference.

8. This order is without prejudice to the respondent's right, at trial, to request that all, or any part,
of the amount set out in paragraph 1 for legal fees and disbursements, be repaid by the applicant to the estate, irrespective of whether a notice of dispute was filed or whether the court approved the amount.

9. The respondent shall file the affidavit of Mary Diane Furtney, sworn April 10, 2014, in the continuing record.

10. If the parties are unable to agree on costs, the parties may make written submissions as to costs of the motion, addressed to the trial coordinator, within 30 days, not to exceed 3 pages, plus copies of any offers, time dockets or authorities.

"Justice Victor Mitrow"
Justice Victor Mitrow

Date: June 26, 2014

[1] Oosterhoff, Albert H., *Indemnity of Estate Trustees as Applied in Recent Cases* (2013), 41 The Advocates' Quarterly 123

CASE LAW

EVE V. BROOK, 2016 ONSC 1496 (CanLII)

Eve v. Brook, 2016 ONSC 1496 (CanLII)

Date:	2016-03-01 (Docket: ES-756-11)
Citation:	*Eve v. Brook*, 2016 ONSC 1496 (CanLII) , <http://canlii.ca/t/gnrp3>

CITATION: *Eve v. Brook*, 2016 ONSC 1496

COURT FILE NO.: ES-756-11

DATE: March 1, 2016

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: Roslynn Valera Eve, Plaintiff

AND: Heather Brook as Estate Trustee of the Estate of Lillian Wilhelm as Estate Trustee of the Estate of the late Russell Bernard Phillips and in her personal capacity, Gregory Phillips as Estate Trustee of the Estate of Arthur Earl Phillips, Gregory Phillips as Estate Trustee for the Estate of Earl Phillips in trust, 345023 Ontario Inc. also known as Phillips Bros. Radiator Service Limited, Gregory Earl Phillips, Phillips Bros. Radiator Service Ltd., Miller Thomson LLP, Clark, Pollard & Gagliardi, Defendants

BEFORE: SWEENEY J.

COUNSEL: Jarvis K. Postnikoff, April Postnikoff, for Plaintiff
Heather Brook, for himself
Randell K. Thomson, for Defendants, Gregory Earl Phillips, Phillips Bros. Radiator Service Ltd., Arthur Earl Phillips, Earl Phillips in trust, and 345023 Ontario Inc. also known as Phillips Bros. Radiator Service Limited
David M. Lobl, Amer Pasalic, for Defendant, Miller Thomson LLP
Ruth A. Henneberry, Reine E. Reynolds, for Defendant, Clark, Pollard & Gagliardi

REASONS FOR DECISION

Introduction

1 On February 25, 2008 Russell Bernard Phillips ("Russ") died. In his Will, he named his older sister Lillian Wilhelm ("Lillian") as his Executrix. His adult children Roslynn Eve ("Roz") and Garry Phillips ("Garry") were the residual beneficiaries of his estate. One of the assets in the estate were shares that Russ held in 345023 Ontario Inc. ("345") which was a corporation that he owned 50% with his oldest brother Arthur Earl Phillips ("Earl"). The shares were sold by Lillian to Earl on November 30, 2009. Roz asserts that the sale was not authorized by the Will and was, in any event, improvident. Roz also asserts that Lillian did not act properly in the administration of the estate.

2 Roz issued a claim against Lillian; Lillian's lawyers at the time, Miller Thomson LLP; the accountants who acted for Russ, Earl and their companies for over 25 years, Michael Pollard of

Clark, Pollard & Gagliardi; her uncle Earl; 345, and Phillips Bros. Radiator Service Ltd., the company that carried on the radiator manufacturing, repair, service and installation business that Earl and Russ had operated for 30 years.

3 In addition to these claims, Roz and Garry object to the estate accounts prepared by Lillian.

4 In June 2011, Sloan J. ordered that the action be tried immediately before or at the same time as the application to pass accounts.

5 These are my reasons for decision on the issues raised in the action and the passing of accounts.

Parties and Interested Persons

6 The following is a list of parties and other interested persons who figure prominently in this proceeding:

Russell Bernard Phillips ("Russ") - businessman, father of Roslynn and Garry, separated from his wife June in 1995, died February 25, 2008.

Arthur Earl Phillips ("Earl") - brother of Russ, in business with Russ in the manufacture, repair and service of radiators for 30 years, died October 30, 2014.

Lillian Wilhelm ("Lillian") - sister of Russ and Earl, Executrix of Russ' estate, died August 11, 2014.

Lorne Wilhelm - husband of Lillian

Heather Brook - daughter of Lillian and Lorne, estate trustee for Lillian's estate in this proceeding.

Roslynn Eve ("Roz") - the daughter of Russ and June, sister of Garry, residual beneficiary of Russ' Estate, and plaintiff in the action.

Dean Eve - husband of Roslynn Eve

Garry Phillips ("Garry") - son of Russ and June, brother of Roz, and residual beneficiary of Russ' Estate.

Phillips Bros. Radiator Services Limited ("Limited") - company incorporated in 1976, owned 50% each by Russ and Earl, carried on business as a radiator repair and service business until December 2005.

Phillips Bros. Radiator Service Ltd. ("Ltd") - corporation owned by Greg that purchased the operating assets of Limited in 2005, Ltd. went bankrupt in 2013.

345023 Ontario Inc. ("345") - corporation that held the remaining assets of Limited when the operating assets were sold to Ltd.

Gregory Phillips ("Greg") - son of Earl, cousin of Roz and Garry, worked in the radiator business for 25 years, estate trustee for the Estate of Arthur Earl Phillips in this proceeding.

Steven Finch ("Finch") - litigation lawyer at Miller Thomson LLP who acted on behalf of Lillian on the passing of accounts up to the date the claim was issued.

Jamie Martin ("Martin") - the lawyer at Miller Thomson who acted on behalf of Lillian with respect to estate matters from December 2008 to 2011.

Steven Lubzcuk ("Lubzcuk") - partner in Voisin, Lubzcuk who acted for Lillian after the death of George Voisin in July 2008, joined Miller Thomson LLP October 7, 2008.

Mike Pollard ("Pollard") - accountant who acted for Russ, Earl and their businesses for approximately 30 years.

Clark, Pollard & Gagliardi LLP ("CPG") - accounting firm in which Mike Pollard was a partner.

Background

7 Russ and Earl worked together for over 30 years in the radiator repair/service/manufacturing business. In 1976 they incorporated Limited. In 2005 they sold the operating assets of Limited to Greg's company, Ltd.

8 On February 11, 2000, Russ made a Will naming Lillian as the Executrix. The residual beneficiaries were Roz and Garry. The Will had a clause relevant to the shares of 345 (the holding corporation owned 50% by Russ and Earl). The Will provides at paragraph 3:

> I give and appoint to my trustees all my property wherever located, including any property over which I may have a power of appointment, upon the following trusts:
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> . . .
>
> (c) I direct my executors to consult with the other shareholders/owners of any business or property I own at the time of my death and to co-operate with such shareholders and partners to ensure that my executor can transfer, *in specie*, shares and interests to my beneficiaries in such a way as to restrict or exclude my beneficiaries' involvement in the business, including conversion of shares into nonvoting shares and having my estate execute agreements having the effect of binding my beneficiaries.
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> . . .
>
> (g) To divide the residue of my estate equally among those of my children ROSLYNN EVE, and GARRY PHILLIPS, who are alive (10) clear days after my death, but if a child of mine is not then alive, and the deceased child leaves any lineal descendants then alive, those descendants are to receive in equal shares *per stirpes* the share that the deceased child would have received if then alive.

9 The Will also contains certain specific powers given to the estate trustees. These are set out in paragraph 4, in part, as follows:

> To carry out the terms of my will, I give my trustees the following powers:
>
> (a) To sell or otherwise dispose of, at the time or times and in the manner that my trustees in their discretion decide upon, assets, investments, or money.
>
> (b) To retain assets or investments of my estate in whole or in part in the form in which they are at my death until they are distributed, sold or otherwise disposed of and even though they are not authorized for trustees, they are considered to be authorized for the purposes of my Will.
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> . . .
>
> (e) To invest from time to time and reinvest assets of my estate and those securities and investments inside or outside of Canada, without being limited to those investments to which the trustees are otherwise restricted by law.
>
> (f) To make a division of my estate or set aside or pay any share or interest in it either wholly or in part in the assets forming my estate at the date of my death or at the date of division, setting aside or payment and my trustees shall determine the value of my estate or any part of it for the purpose of making a division setting aside or payment and their determination is binding upon all persons concerned.
>
> . . .
>
> (h) To continue and renew any bills, notes, guarantees or other securities for contracts relating to them, but only for the purpose of facilitating an orderly liquidation of those obligations without undue embarrassment to members of my family.

10 Lillian was appointed Estate Trustee with a Will on April 15, 2008.

11 Lillian had spoken with Russ on occasion about his wishes. Lillian had a habit of tape recording phone and in-person conversations. There were tapes of Lillian's telephone conversations with Russ entered into evidence. Russ expressed concern about the running of the business. Lillian believed that he appointed her because she could mediate between the parties - that is, Earl and his family and Roz and Garry. In her evidence, Roz also said that it was so she might receive some money as Executrix.

12 On February 25, 2008, after being hospitalized first in Arizona and then in Ontario, Russ died. There was extensive evidence surrounding his return home. Roz went to Arizona and brought him back. She alleged that Lillian did not move quickly enough in bringing Russ back. This set the stage for things to come.

13 Immediately after Russ' death, Garry came back from China, where he had been living, for the funeral and visited the house. Roz and Garry divided up some of the assets. Roz and Dean gathered up some papers and took them to Lillian. They dropped off keys, but Lillian thought it took too long and she had trouble accessing the house. Lillian also complained that it was left a mess and that Roz was somehow responsible.

14 The Estate consisted of an annuity, several bank accounts and GICs, Sun Life shares, a piece of machinery, the house and contents, a car, a motorhome, and Russ' shares in 345.

15 Following Russ' death, Lillian consulted with George Voisin, the longtime lawyer for Russ and Earl and the business. George had acted for Russ, Earl and Greg on the sale of the operating assets of Limited to Ltd. in 2005. Unfortunately, George died on July 24, 2008. After George's death, his partner Steven Lubzcuk, mainly a family law lawyer, took over helping Lillian. He met with her on several occasions. He was told of the perceived problems Lillian was having with Roz. Lillian was also concerned because Russ' ex-wife June was involved as a representative of her son Garry. There was an issue with respect to the sale of the house. Ultimately, Roz and Garry agreed that the house should be transferred to Roz. In October 2008 Lubzcuk joined Miller Thomson's Waterloo office. The house was transferred to Roz on December 2, 2008. Martin became involved with the estate on December 7, 2008.

16 The issue of the shares of 345 was important to Lillian. She believed that the best way to deal with the shares was to sell them to Earl. She believed this would fulfill the wishes expressed to her by Russ. Lillian sought advice from Pollard on this issue. She also sought advice from Martin. She was concerned that Roz and Garry would cause trouble or interfere with the business. Based on her discussions with Russ and the terms of the Will, she believed that to fulfill her duties as estate trustee she should negotiate the sale of the shares to Earl.

17 She expressed this intention to Roz in a telephone call in December 2008. Roz responded by email and said Lillian should not negotiate on Roz and Garry's behalf. Lillian did not heed this warning. She continued to do what she believed was her duty; that is, to sell the shares for a fair price.

18 Over the course of the next 11 months, Lillian negotiated and sold the shares of 345 to Earl. Roz says that she did not have authority under the Will to sell the shares and that, in any event, she sold them for too little. Aside from the issue of shares, Roz complains that Lillian breached her duty as Executrix in a number of ways. She failed to provide information requested by Roz. She failed to invest properly the estate funds. She paid lawyers and accountants for work that she was to do as estate trustee and she paid them too much. She sold some shares in Sun Life for too little.

19 On June 29, 2010, Lillian brought an application to pass her accounts. It was originally

returnable September 30, 2010. Roz served her first notice of objection to accounts on September 7, 2010. Further notices of objection were delivered on behalf of Roz and further estate accounts were delivered on behalf of Lillian. On June 9, 2011, a consent order of Kent J. provided for an interim distribution to Roz and Garry. On June 13, 2011, Sloan J. made an order (incorrectly dated June 9, 2011) allowing for the service of a statement of claim relating to some of the issues in the application, providing for a process for discovery and disclosure of documents and providing for the removal of Lillian as estate trustee after certain funds were paid into court. The balance of the funds remaining in the trust account of Miller Thomson was paid into court.

20 Following the orders of Kent J. and Sloan J., additional documents were provided to Roz, the Statement of Claim in this action was issued, and examinations were held of various parties.

21 In May 2013, Roz brought a motion to require the payment into court of the proceeds of the sale of real properties owned by 345. On May 13, 2013, Sloan J. issued an order requiring that the proceeds of the sale of the properties be held pending further order of the court.

22 The trial commenced September 16, 2015 and was held over the course of 23 days.

Issues to Be Determined

23 There are a number of issues which must be determined. The main issue surrounds the sale of the shares in 345. Roz asserts that the sale was not authorized under the Will and that the sale was improvident. Lillian responds that the sale was authorized; even if the sale was not authorized, the conduct of Roz precludes her from now complaining; and, in any event, the share price was not improvident.

24 There are also allegations with respect to the failure to provide documentary disclosure, allegations about the mismanagement of 345, and an issue about the shares in Ahead Inc.

25 I will address the following issues:

(1) Was the sale of the shares of 345 authorized under the Will?

(2) What is the effect of the communication between the parties surrounding the sale of the shares of 345?

(3) What is the fair market value of the shares of 345, which requires a determination of the fair market value of the properties owned by 345?

(4) Was there inadequate documentary disclosure which caused a loss to the plaintiff?

(5) Was there mismanagement of 345 which caused a loss to the plaintiff?

(6) Did the plaintiff suffer some loss as a result of the handling of the shares of Ahead Inc.?

(1) Was the Sale of the Shares of 345 Authorized under the Will?

26 The clause in the Will with respect to the shares is unusual. Specifically, I set it out again:

> (c) I direct my executors to consult with the other shareholders/owners of any business or property I own at the time of my death and to co-operate with such shareholders and partners to ensure that my executor can transfer, *in specie*, shares and interests to my beneficiaries in such a way as to restrict or exclude my beneficiaries' involvement in the business, including conversion of shares into nonvoting shares and having my estate execute agreements having the effect of binding my beneficiaries.

27 It directs the executors to "consult with other shareholders" and to "co-operate with such shareholders … to ensure that my executor can transfer, *in specie*, shares … in such a way as to restrict or exclude my beneficiaries' involvement in the business." This is a significant problem, given that a shareholder has rights under the *Ontario Business Corporations Act* even if a nonvoting shareholder. The oppression remedy is available to the shareholder. There is also a specific prohibition in the articles of incorporation of 345 against a transfer of shares without the consent of a majority of the directors.

28 Martin's view of the clause 3(c) was that it created a requirement that the estate trustee first consult with other shareholders to ascertain their view in respect to a potential change in ownership. If the outcome of those consultations was positive, the estate trustee could transfer the shares to the beneficiary in the form of "nonvoting" shares which would have required an amendment to the articles of 345. If, however, the other shareholders were not agreeable to the transfer of the shares, then the estate trustee could proceed to sell the shares under clause 4 which gives the estate trustee power to sell shares. In contrast to the view of Miller Thomson, Roz asserts, in her supplementary notice of objection to the accounts, that the clause was too vague and ambiguous to be acted upon and the Will should be read as if the clause was not there. If the clause was not in the Will, then Lillian had the authority to sell the shares under clause 4 in the Will. Given that the articles of incorporation required the consent of the directors to the transfer, and given the family dynamics, there is no doubt Earl would not have agreed to the transfer. The shares would have had to be sold by the estate trustee.

29 I find that the Executrix was authorized to sell the shares in 345 under the Will and did not breach any duty in selling the shares.

(2) Communication between the Parties Surrounding the Sale of the Shares

30 Lillian formed the belief that she was required to sell the shares very early in her administration of the Estate. She discussed the issue with Pollard and Martin. In a December 2008 telephone call, Lillian told Roz that she was in the process of selling the shares. An email response was sent by Roz on December 8, 2008 at 12:54 a.m. The email reads as follows:

> Hi,
>
> IN RESPONSE TO YOUR LAST PHONE CALL WHERE YOU INFORMED US THAT YOU INTEND TO REPRESENT US IN THE PURCHASE OR SALE OF OUR INTERESTS OF PHILLIPS BROS. WE WILL REPRESENT OURSELVES OR USE A LAWYER OF OUR OWN. YES, YOU REPRESENT DAD AS FAR AS DISBURSING THE ESTATE GOES.
>
> THE OWNERSHIP OF PROPERTY/SHARES IS OURS AS INTENDED IN THE WILL. WE HAVE NOT ASKED YOU TO DO ANYTHING BUT GIVE THEM TO US. PLEASE DO NOT REPRESENT YOURSELF AS OUR REPRESENTATIVE WITHOUT OUR WRITTEN PERMISSION. UNCLE EARL AND HIS REPRESENTATIVES ARE ALWAYS WELCOME TO CONTACT US.
>
> RESPECTFULLY,
>
> ROZ.

31 There is no response to this email found anywhere in the evidence.

32 On March 16, 2009, lawyer Mr. Darrel Hawreliak ("Hawreliak") wrote to Martin. In that letter Hawreliak stated that he had been consulted by Roz and requested a list of the assets, summary of the activities completed to date, a summary of what was anticipated left to be done, and an estimated date for completion of the estate.

33 On March 17, 2009, Martin responded advising that he would be away on vacation and he would be meeting with his client shortly after his return. He advised that they were waiting for completion of an environmental assessment on the property owned by 345. On May 28, 2009, Martin provided a more substantive response to Hawreliak. He advised that "a Phase II environmental site assessment" had been conducted and the estimated costs of the remediation were in the range of $120,000 to $240,000. The letter specifically states:

> Mrs. Wilhelm is currently having discussions with her brother, Earl, regarding the possibility of the shareholding owned by the estate being purchased by Mr. Earl Phillips. At the time of sending this report, I am not aware of the details of those discussions nor any outcome.

34 On June 8, 2009, Hawreliak responded advising that Roz believed she was also a shareholder of Ltd. and he inquired with respect to the share structure, the identity of all shareholders, and whether or not the shares owned by Roz were voting shares. He also advises that in the event that Roz does own shares she wants to participate through Hawreliak's office in the disposition of shares. On July 27, 2009, Hawreliak provided a more detailed response to the letter of May 28, 2009. On the issue of the sale of shares he states:

> 5. With respect to the shares owned by the estate, we note that paragraph 3(c) of the Will provides that the Executor is not to sell the shares, but to 'transfer, *in specie*,' shares and interest to my beneficiaries in such a way as to restrict or exclude my beneficiaries involvement in the business including conversion of shares into non-voting shares and have my estate

> execute agreements of having the effect of binding my beneficiaries. According to our reading of the Will, the Estate Trustee cannot simply sell the shares to Mr. Earl Phillips.

35 On August 13, 2009, Martin responded to the letter of July 27th. With respect to the sale of shares, the letter read as follows:

> In the meantime, however, I want to confirm a voicemail message that I left in your voicemail on August 10 having to do with the shares and the holding company. With respect, we disagree that the Will requires our client to transfer *in specie* the shares. We do not interpret that paragraph in that method at all and our client has seriously questioned whether or not non-voting shares in the corporation would be of any benefit for your clients.

36 The letter goes on to say that the trustee has determined that it is in the best interests of the estate of the beneficiaries that the shares be sold. The letter states:

> Accordingly, in the event that your client feels that the provisions of the Will are mandatory, I would urge you to take immediate steps to have the matter clarified as our client clearly is moving towards selling the shares.

37 On September 2, 2009 Martin wrote a further letter to Hawreliak. The letter specifically stated as follows:

> As advised in our letter of August 13, 2008, our client's intention is to proceed to sell the shares. She has made this decision after careful consideration. We remind you that the Testator had great confidence in his sister and duly appointed her as his personal representative. He did not appoint his children. As indicated in our earlier correspondence, if your client insists that your interpretation is correct, we advise you to take appropriate steps.

38 On October 27, 2009 Hawreliak wrote to Martin in response to the September 2nd letter. The letter states:

> Our client does not propose to respond to each paragraph in your letter at this time. However, we wish to follow up on certain items contained in your letter.

39 The letter makes no mention of paragraph 5 dealing with the sale of shares.

40 On November 10, 2009, Martin writes:

> I believe the parties are in agreement on those items upon which you are silent and I will be proceeding accordingly.

This would include the sale of the shares.

41 On November 24, 2009, Martin writes:

> As you know, the original value set out for estate purposes was $232,000 and my client has successfully negotiated a sale for $265,000.

42 The letter also states:

> I believe the sale of the corporate interest will be closing fairly shortly.

43 The transaction closed on November 30, 2009. On December 8, 2009, Hawreliak responded to Martin's letter of November 24th. The letter states:

> You indicate in your letter that your client has 'successfully negotiated a sale for $265,000'. Please provide immediate particulars as we are instructed to apply to the court, if necessary, for an order restraining the sale until such time as the proper valuation of the company and the shares can be obtained.

44 This letter also addressed a number of issues with respect to the sale of shares and with respect to the valuation of the shares, the operation of Ltd., and the administration of the estate. At the time of this letter, the shares had been sold.

45 Roz was cross-examined on the exchange of correspondence between Martin and Hawreliak. It appears that throughout the course of communications with respect to the sale of shares, Roz was seeking to "hedge her bets". She was being told explicitly that Lillian intended to sell the shares. Her lawyer stated the position that Lillian could not simply sell the shares. When Martin stated his position that it was authorized, he received no immediate challenge to that position. In fact, when he advised that a deal had been negotiated for the sale of the shares, the response was not that Lillian had no authority, but that she had sold the shares for undervalue. This is different than advising she had no authority to sell the shares. While Roz asserts that she set out her position in December 2008, the correspondence sent by Martin clearly requested an explicit position on the sale.

46 An application to interpret the Will would have increased legal costs. If Roz agreed that the shares could be sold, that cost would be avoided. I accept that it is the trustee's obligation to administer the trust and the trustee's obligation to comply with the terms of the Will, and if there is uncertainty, the trustee ought to take steps to interpret the Will. However, in this case, if Hawreliak had responded to the letters of August 13 and September 2 that his client continued to disagree and that it was the trustee's obligation to act appropriately, Lillian may have taken different steps. However, that was not the communication received. In her evidence, Roz said that she was told that she would have to wait till the end to make a complaint. In the circumstances, in light of the communication made by Martin that Lillian planned to sell the shares, the failure to say something would lead Lillian to believe that Roz did not, in fact, oppose the sale of the shares. Therefore, I find Lillian acted reasonably in proceeding to sell the shares.

(3) What is the Value of the Shares?

47 Although I have found that Lillian's conduct in selling the shares was reasonable, she is still obligated to sell the shares for fair market value. Roz complains that the shares were undervalued. Therefore, I must proceed to determine the fair market value of the shares of 345. In order to determine the fair market value of the shares of 345, it is necessary to determine the value of the properties which are the significant assets of 345.

Appraisals of the Properties

48 Russ had the properties appraised in 1995 when dealing with the valuation of assets for the purposes his matrimonial proceeding with June. Otto & Kirwin were retained to provide the appraisal. Because of this prior experience, the successor to Otto & Kirwin, Otto & Company, was retained to appraise the properties in 2008. Otto appraised the properties all together as one, although they are separate parcels, for $600,000. Chung & Vander Dolen Engineering Ltd. ("Chung") provided an independent Phase II environmental site assessment on February 11, 2009 which concluded that the cost of remediation was in the range of $120,000 to $240,000. Otto & Company appraised the value of the property at $360,000 by deducting the maximum amount for remediation of the property.

49 The Otto & Company appraisal was challenged by Roz. Roz retained James Griesbaum ("Griesbaum") of City Management & Appraisals (2006) Limited to appraise the properties. Mr. Griesbaum appraised the properties as if they were not contaminated and without the benefit of a site visit. He appraised the properties at an aggregate value of $1,175,000.

50 The defendants retained David Atlin ("Atlin") of Integris Real Estate Counsellors ("Integris") to comment on the valuation of the property conducted by Griesbaum. Atlin and Griesbaum met on August 26, 2015 and prepared a Memorandum to identify areas where they agree in principle, and was silent on areas where there remains differences. The Memorandum was attached to the Agreed Statement of Facts (Exhibit 1). The Memorandum set out a range of values for the property taking into consideration the proposed remediation necessary. This resulted in a range of value from $420,000 to $730,000. The low end valuation came as a result of the sale of a property which was across the street from the subject properties. It represented a value of $40 per square foot. In his evidence, Griesbaum agreed with this comparable. Atlin and Griesbaum agreed that the properties ultimately sold for $455,000 in May 2013. While the subsequent sale price of properties cannot be relied upon because the appraisals were done prior in time to the sale, the actual sale price of a property can be used as a method of testing the accuracy of appraisals (see *Jackson v. Jackson* [2009 CarswellOnt 4784 (Ont. S.C.J.)], 2009 CanLII 43105). The sale of the properties in May 2013 was to an arm's length purchaser after a significant exposure to the market. Therefore, it represents fair market value of the properties in May 2013. Given the sale price of the properties at that time, it lends credibility to the appraised value of $420,000 for the properties in 2009. Based on all the evidence, including the evidence of Griesbaum and Atlin, I find that $420,000 would represent the fair market value for the properties in 2008/2009.

Valuation of the Shares

51 The property appraisal is then used by business valuators as one component for the valuation of the shares of 345. The plaintiff retained Tim Rickert of BDO to prepare a share valuation. Mr. Rickert is a certified business valuator ("CBV"). The defendants retained Nancy Rogers of NRogers & Associates, a CBV, to value the shares. Each gave evidence at the trial.

52 On the issue of share valuation, there were really two areas of difference between the experts. These were: (1) the value of the property and (2) the value placed on the debt owed by Ltd. to 345. This debt represented the balance of the promissory note given by Ltd. on its purchase of the assets of Limited and the outstanding rental payments owed by Ltd. to 345.

53 In closing submissions, the plaintiff agreed with Ms. Rogers' position with respect to the valuation. The plaintiff asserted that the $420,000 sale could not be used because it was the modified Otto appraisal value. However, the evidence is clear that the $420,000 was based on a comparable sale. In that case, the plaintiff then determined that she would rely on Ms. Rogers' evidence for her upper two values, but the Mr. Rickert's evidence of the $420,000 appraisal was found to be this value.

54 Mr. Rickert, in analyzing the outstanding debt, assumed $.54 on each dollar would be recovered on the unsecured debt owed by Ltd. to 345. Ms. Rogers used a zero to 50% recovery. Mr. Rickert's recovery assumed 100% recovery without any deduction for the costs of realization. In my view, this is an unreasonable assumption and Ms. Rogers' analysis using the range of zero to 50% was more appropriate. Ms. Rogers' valuation of the shares held by the Estate, with an assumption of the real estate value of $420,000, is a range of $225,000 to $301,500 as at February 25, 2008 and $157,500 to $238,500 as at November 30, 2009.

55 As Mr. Rickert acknowledged, a sale at the top end of the range or at the bottom end of the range, would still be a fair market value.

56 Based on the evidence, I find that the sale of the shares for $265,000 represented the fair market value for the shares of 345.

(4) Was there Inadequate Documentary Disclosure which caused a Loss to the Plaintiff?

57 Roz asserts that Lillian failed to provide disclosure of documents to her in a timely fashion and, accordingly, Roz is entitled to damages for such failure. The evidence discloses constant, continual, relentless requests for documentary disclosure by Roz. The plaintiff's request for documentary disclosure commenced with the Hawreliak letter dated March 16, 2009. Although some disclosure was provided, Martin refused to provide the legal accounts in his letter of September 2, 2009.

58 Martin had proposed an interim distribution. Martin indicated the trustee wished releases to be executed or they would move to pass the accounts. Before Roz could agree to sign off to get the distribution, she wanted to look at the file at Miller Thomson's office. Roz and Dean booked May 3, 2010 to go and look at the file. They brought a scanner with them and scanned documents for three and a half hours. They made copies of many receipts, for example receipts for cleaning supplies and

a battery for the motorhome. Roz was not satisfied with the disclosure received. She wanted more time and more documents produced. On May 13, 2010, Martin wrote to Hawreliak and advised that Lillian would formally pass the accounts.

59 Finch became involved in the file in May 2010 because the matter would be proceeding to a passing of accounts. The application record for the passing of accounts was served in June for a date for the application in September. Roz' retainer with Hawreliak was terminated at the first appearance for the application. Roz was upset that Hawreliak did not set up enough time for the application to be heard. Roz was then unrepresented for some time. On December 17, 2010 Finch provided a significant number of documents to Roz. Roz requested more documents.

60 On February 15, 2011, Finch wrote to Roz and reviewed what he believed were the outstanding disclosure issues. He inquired as to whether there were any specific additional requests. Roz had requested documents necessary to review every single transaction. She sought to examine each receipt, no matter the size of the disbursement, and every piece of paper with respect to the estate, including all prior corporate documents with respect to 345 and the banking records of 345 from 2005 forward. The documents requested were far beyond what normally would need to be produced. The trustee was obligated to produce what she had, but not necessarily documents she did not have. The response to the request for information required a detailed review and increased the time spent by Miller Thomson and the legal fees incurred.

61 Lillian was obligated to provide the legal accounts of Miller Thomson, and it was unfortunate that those were not immediately provided. However, I find that the provision of those documents would have made no difference. The plaintiff ultimately received all the documents requested which consisted of in excess of 1,600 pages. The plaintiff's document brief consisted of 15 volumes. The defendant's document brief consisted of five volumes. It is evident that from the date of Finch's involvement in the file, significant efforts were made to comply with all disclosure requests. Finch requested documents from third parties including Pollard and Krakovsky, the lawyer who acted on behalf of Earl with respect to the 345 share sale in 2009. Significant time was spent in responding to the request for information and to collate, copy and provide the documents to Roz.

62 Prior to May 22, 2011, Roz was receiving advice from lawyer Karen Scherl ("Scherl"). Scherl was appointed as Roz' lawyer on May 22, 2011. Scherl then brought an application for interpretation of the Will; the removal of Lillian as Estate Trustee; and, the production of documents.

(5) Was there Mismanagement of 345?

63 A significant amount of trial time was spent reviewing issues of the management of 345. Roz says that it was not properly managed by Lillian and Earl after Russ' death. She raises several issues, including: (1) no effort was made to pursue Ltd. for repayment on the promissory note, (2) no effort was made to collect the rent from Ltd., and (3) if no rent was paid, no effort was made to evict Ltd.

64 Russ was the owner of 50% of the shares and a director of 345. He and Earl sold the operating assets to Ltd. so that Greg could continue to run the business, which had been losing money. Greg

inherited several long-term employees, with the concomitant obligations of severance. Greg had worked in the company for more than 20 years. He had no other income aside from his income from the radiator repair and service business. It is important to appreciate that decisions made in small closely-held family corporations take in consideration many values and interests. The owners of related corporations are family members. Any claims made by 345 with respect to rent arrears and the promissory note would have a significant impact on the operation of Ltd.

65 The debt, as represented by the promissory note, consisted of the receivables and assets of the operating portion of 345. The financial statements of 345 for the year ended November 30, 2006 were approved by Russ and Earl as directors. They explicitly signed the financial statements. The financial statements for the year ended November 30, 2007 were approved by Russ and Earl in a meeting in January of 2008. These financial statements show the status of the debt owed by Ltd. to 345. There is no reason to go behind the financial statements and question the underlying transactions. While Roz reviewed the bank statements of 345 from 2005 to the date of the sale of the shares, that review was unnecessary. There was no obligation on the Estate Trustee to make such inquiries and, in any event, the financial statements were approved to November 30, 2007.

66 The evidence disclosed that the debt was increased from $161,294 to $194,366 on the basis that Ltd. directly received a dividend from Ahead Inc.

67 The Executrix was not required to become involved in management of the corporation and, in particular, it would not have been appropriate for her to take any steps to seek to recover on the promissory note from Ltd. Given the relationship between 345 and Ltd., it would not be reasonable for the Executrix to expect that Earl would ever agree that 345 should evict Ltd. as a tenant for nonpayment of rent. This is precisely the interference in the operation of the business which Russ did not want. In my view, Lillian should not be criticized for failing to take more proactive steps with respect to the management and operation of the corporations.

(6) Did the Plaintiff Suffer some loss as a Result of the Handling of the Shares of Ahead Inc.?

68 Ahead Inc. was a buying group consisting of nine shareholders. They would get discounts for bulk purchases and rebates for paying on time. The income was distributed to the participants by way of a dividend. The dividend was an inter-corporate dividend and, so, not taxable.

69 Ahead Inc. was incorporated sometime prior to the sale of the assets of 345 to Ltd. There is no indication of the Ahead Inc. shares being sold as part of the deal. This is odd, given that the income earned was income generated by the operating company. That is, it was return of money that had been paid by Ltd.

70 There was evidence of a dividend paid in 2008 in the amount of $33,043.00. This dividend was paid to Phillips Bro. Services. It was deposited by Greg into the account of Ltd. The T4 from Ahead Inc. was issued to 345. The income was received on paper by 345. Pollard determined that he would show the fact that it was deposited into Ltd.'s account by simply increasing the amount Ltd. owed to 345. There was also a dividend declared in 2009.

71 What is the effect of all this? In the valuation of 345, each expert included an amount for the shares of Ahead Inc. BDO and Nancy Rogers valued the investment at $51,400.00. Pollard valued them at $50,000.00. There was no challenge to these numbers. The valuation of the shares was made based on the financial statements of Ahead Inc. for 2007. The Estate did receive value for the shares, which included the amounts that were ultimately dividend out. Therefore, there is no loss to the Estate as a result of the dividends paid on the Ahead Inc. shares.

Claims Against Defendants

72 In the context of these factual findings, I will now consider the claims made against the various defendants.

73 I shall review the claims made against the various defendants in the following order:

(1) Claims against Greg, Earl, 345 and Ltd;

(2) Claims against Lillian;

(3) Claims against Clark, Pollard & Gagliardi;

(4) Claims against Miller Thomson LLP;

Claims against Greg, Earl, 345 and Ltd

74 Roz claims as against 345 and Earl for:

(1) Breach of fiduciary duty;

(2) Knowingly assisting in a breach of trust;

(3) Knowingly assisting in a breach of fiduciary duty;

(4) Knowingly receiving trust property in breach of trust;

(5) Knowingly receiving trust property in breach of fiduciary duty;

(6) Negligence;

(7) Oppression under the *Ontario Business Corporations Act;*

(8) Unjust enrichment;

(9) Collusion and inadequate consideration under s.18 of the *Trustee Act*. R.S.O. 1990, c T-23.

75 The plaintiff claims as against Ltd and Greg:

(1) Knowingly assisting in a breach of trust;

(2) Knowingly assisting in a breach of fiduciary duty;

(3) Unjust enrichment;

(4) Collusion and inadequate consideration under s.18 of the *Trustee Act.*

76 In addition, the plaintiff claims prejudgment interest, post-judgment interest and legal fees.

77 The defendants 345 and Earl Phillips raise the defence that a full and final release was provided by Lillian to them on the sale of the shares. In the context of the sale transaction, Lillian provided a release which released Arthur Earl Phillips and 345023 Ontario Inc. In this case, Lillian was the trustee and had authority to provide a release on the sale of the shares. There is no evidence that Earl or Greg were aware of any limitations on Lillian's ability to sell the shares. Therefore, the executed release is a defence to a claim against them arising out of the sale of the shares or any action taken with respect to the corporation. Roz sought to set aside the release, but that is not appropriate. There was no evidence of fraud which could vitiate the release. The release is a valid defence to any claim made by Roz against these defendants.

Breach of Fiduciary Duty

78 In *Louie v. Lastman* (2001), 54 O.R. (3d) 286, [2001] O.J. No. 1888 (Ont. S.C.J.), Benotto J. (as she then was) described a fiduciary relationship as follows:

> The essence of fiduciary relationship is that one party exercises power on behalf of and either expressly or impliedly pledges to act in the other's best interest. The ability to exercise that power in a damaging way is what makes the imposition of a fiduciary duty necessary. While it may not always be necessary to unilaterally undertake the role of fiduciary, there still must exist a situation where the fiduciary looks after the interests of the beneficiary in order to establish a relationship.

79 In this case, neither Earl nor 345 nor Greg owed a fiduciary duty to Roz. They never acted in a position of trust or control over the trust property. Therefore, as no fiduciary duty exists, there is no breach of fiduciary duty on behalf of 345, Ltd., Earl or Greg.

Knowing Receipt of Trust Property and Knowing Assistance in Breach of Trust

80 In *Locking v. McCowan*, 2015 ONSC 4435 (Ont. S.C.J.), Belobaba J. set out the elements of knowing assistance as follows:

> The three elements that must be established for a claim of knowing assistance to succeed are:
>
> (i) An act of fraud or dishonesty on the part of the trustee;

(ii) The defendant has knowledge of the trustee's dishonest conduct; and

(iii) The defendant assists the trustee in perpetrating the dishonest conduct.

81 In this case, Lillian's conduct was not dishonest or fraudulent. She was explicit in saying she was selling the shares. If there is no fraud or dishonesty, then Greg, Earl and 345 cannot have knowledge of the dishonesty. They also cannot be liable for knowing receipt of trust property.

Negligence

82 A successful claim in negligence requires the plaintiff to establish the following: (1) a duty owed by the defendant to the plaintiff, (2) breach of that duty, (3) damages, and (4) the damages must be causally linked to the breach of duty.

83 In this case, 345, Earl and Greg owed no duty to Roz. For the purposes of the transaction with respect to the sale of shares, Earl was merely a party purchasing from another party, that is, Lillian on behalf of the estate. There is no duty owed in the circumstances of this case and, accordingly, the claim for negligence cannot succeed.

Unjust Enrichment

84 A claim for unjust enrichment requires that the defendant receive a benefit and the plaintiff suffer a detriment and there be no juristic reason. This was a sale of shares for a consideration and there can be no claim for unjust enrichment.

Collusion and Inadequate Consideration under the Trustee Act, s.18

85 Collusion is defined as "a secret or illegal cooperation in order to cheat or deceive others" (Concise Oxford English Dictionary, 12th Ed. (2011)).

86 The *Trustee Act*, s. 18 reads:

> **18(1) Sales by trustees not impeachable on certain grounds**
>
> A sale made by a trustee shall not be impeached by any beneficiary upon the ground that any of the conditions subject to which the sale was made were unnecessarily depreciatory, unless it also appears that the consideration for the sale was thereby rendered inadequate.
>
> **18(2) Collusion between purchaser and trustee**
>
> Such sale shall not, after the execution of the conveyance, be impeached as against the purchaser upon the ground that any of the conditions subject to which the sale was made were unnecessarily depreciatory, unless it appears that the purchaser was acting in collusion with the trustee at the time when the contract for the sale was made.

87 In this case, the sale of the shares was done with knowledge of Roz that it was being done.

There was no cooperation to cheat or deceive. In any event, given my finding on the value of the shares, the sale was not depreciatory. Therefore, Roz has no claim under s.18 of the *Trustee Act.*

Oppression under the Ontario Business Corporations Act

88 The oppression remedy is available under s. 248 of *Ontario Business Corporations Act*, R.S.O. 1990, which reads as follows:

> 248.(1) A complainant and, in the case of an offering corporation, the Commission may apply to the court for an order under this section.
>
> (2) Where, upon an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates,
>
> > (a) any act or omission of the corporation or any of its affiliates effects or threatens to effect a result;
> >
> > (b) the business or affairs of the corporation or any of its affiliates are, have been or are threatened to be carried on or conducted in a manner; or
> >
> > (c) the powers of the directors of the corporation or any of its affiliates are, have been or are threatened to be exercised in a manner,
>
> that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer of the corporation, the court may make an order to rectify the matters complained of.

89 A "complainant" is defined under s.245 as:

> (a) a registered holder or beneficial owner, and a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates,
>
> (b) a director or an officer or a former director or officer of a corporation or of any of its affiliates,
>
> (c) any other person who, in the discretion of the court, is a proper person to make an application under this Part.

90 In this case, Roz cannot meet the definition of "complainant". She is not a registered holder or beneficial owner of the securities. The shares of the corporation were never transferred to her. They were owned by Russ and then Russ' estate. She has no standing to bring an application under the *Ontario Business Corporations Act*. In any event, there was no oppression in this case.

91 The claims against the Phillips defendants are dismissed.

Claims against Lillian Wilhelm

92 The plaintiff asserts the following claims against Lillian Wilhelm:

(1) Breach of trust;

(2) Breach of fiduciary duty;

(3) Gross negligence;

(4) Collusion and inadequate consideration under s.18 of the *Trustee Act;*

(5) An order setting aside the releases signed by Lillian as estate trustee;

(6) An order that she reimburse the Estate for all invoices which were paid to lawyers, accountants and other experts and advisor;

(7) Damages representing the foregone interest which the Estate would have earned had the Estate money been better invested;

(8) General damages for failing to properly manage the deceased's property prior to his death and failure to keep proper accounts;

(9) Interest on the sum of $650,300 which should have been disbursed without the request for a release.

(10) Reimbursement of $9,000.38 legal fees paid by the plaintiff in obtaining the order of Kent J.;

(11) Reimbursement to the plaintiff of $2,323.66 for legal costs of the motion which resulted in the order of Sloan J. dated June 9, 2011;

(12) Damages in the sum of $10,000 for the refusal to discharge the $50,000 mortgage against the plaintiff's residence;

(13) Damages of $10,100 representing the loss as a result of the failure to sell Sun Life Financial shares in a timely manner;

(14) Damages in the amount of $2,000 for not having provided the plaintiff with all the documentation, information within time limits set out in certain orders and depriving the plaintiff of the ability to incorporate same into the Statement of Claim.

93 Lillian Wilhelm was Russ' personal caregiver, confidante, POA and his older sister. Lillian was named Executrix in Russ' Will. Lillian had many conversations with Russ and the tapes of some of those conversations were evidence in this proceeding.

94 Following Russ' death, Lillian took steps to ascertain the assets of the Estate and any debts owed by Russ. She engaged professional advisors immediately upon Russ' death starting

with George Voisin. She consistently relied upon professional advisors in her administration of the Estate.

95 Lillian and Lorne were actively involved in the administration of the Estate. They took steps to clean Russell's house after his death. Lillian took seriously her duties as trustee. She wanted to fulfil her brother's wishes. Communication between Lillian and Roz became difficult. There appeared to be a distrust between them. The evidence discloses that Roz was consistently communicating with Lillian by email but there are few, if any, responses from Lillian in the evidence. Lillian repeatedly expressed to her professional advisor her concern for the beneficiaries in ensuring that each received their appropriate entitlement. She was concerned that Garry was not fully apprised of the position being taken by Roz. She was concerned that June was involved on behalf of Garry, which she thought could complicate the administration of the Estate.

Breach of Trust and Breach of Fiduciary Duty

96 As the trustee of the Estate, Lillian owed a fiduciary duty to the beneficiaries.

97 The estate trustee also has an obligation to properly administer the Estate. In administering the Estate, the trustee must act honestly and with a level of skill and prudence which would be expected of a reasonable man at business administering his own affairs. (See D.W.M. Waters*, The Law of Trusts in Canada*, 2nd Ed. (Toronto, Ont) Carswell, 1994 at pp. 690-695.)

98 With respect to the sale of shares, as stated in *McKay Estate v. Love* (1991), 6 O.R. (3d) 511 (Ont. Gen. Div.); affirmed (1991), 6 O.R. (3d) 519 (Ont. C.A.):

> "The duty of a trustee is to ensure that the sale is in the best interests of the beneficiaries. The performance of that duty requires the court to be satisfied that the sale price is the best which can be obtained.

99 The standard of care of the trustee was set out in *McConnell v. LeBlanc*, 2008 NBQB 335 (N.B. Q.B.), as follows:

> 14 In Widdifield, *On Executors and Trustees*, Carswell, 6th edition, the author comments at pages 8-2 and 8-3 as follows:
>
> **8.12 Standard of Care**
>
> Assuming that the trustee acts within the scope of the powers conferred upon him, the exercise of his discretion will be subject to the general standards and rules which the courts have developed to control the actions of trustees. While it is an intangible thing to describe, there is law relating to the mental processes of the trustee in coming to conclusions and decisions in his administration. The trustee cannot be criticized for lack of training or experience but the court will try to enforce good faith, proper motives, and a minimum of good judgment. The law

requires that the trustee turn his mind to his various tasks and exhibit the same degree of diligence in the exercise of his discretion as would be expected from a man of ordinary prudence in the management of his own affairs. The test is whether a reasonable and honest man might have come to the same conclusion rather than whether the judge would have handled the matter otherwise: see *Learoyd v. Whiteley* (1887), 12 App. Cas. 727 (U.K. H.L.); *Tabor v. Brooks* (1878), 10 Ch.D.273 (Eng. Ch. Div.); *Bell, Re* (1923), 23 O.W.N. 698 (Ont. H.C.).

Scott on Trusts, 3rd ed., p. 1501, analyses the circumstances which may be considered determining whether the trustee has acted reasonably:

> In determining whether the trustee is acting within the bounds of a reasonable judgment the following circumstances may be relevant: (1) the extent of discretion intended to be conferred upon the trustee by the terms of trust; (2) the existence or non-existence, the definiteness or indefiniteness, of an external standard by which the reasonableness of the trustee's conduct can be judged; (3) the circumstances surrounding the exercise of the power; (4) the motives of the trustee in exercising or refraining from exercising the power; (5) the existence or non-existence of an interest in the trustee with that of the beneficiaries.

15 The author goes on to say at page 8-4:

> The court retains an inherent jurisdiction over the actions of trustees and will normally require that a trustee discharge his duties with good faith and with the standard of care of a reasonable and prudent man of business. However, where a trustee is granted powers which are to be exercised at his discretion, the court traditionally will not interfere unless the trustee has not turned his mind to the exercise of his discretion or has acted unfairly or in bad faith: *Tempest v. Lord Camoys* (1882), 21 Ch. D. 571 (Eng. Ch. Div.); *Bell, Re* (1923), 23 O.W.N. 698 (Ont. H.C.); *Haasz, Re*, [1959] O.W.N. 395 (Ont. C.A.); *Floyd, Re* (1960), [1961] O.R. 50 (Ont. H.C.: *Edell v. Sitzer* (201), 55 O.R. (3d) 198 (Ont. S.C.J.), affirmed (2004), 9 E.T.R. (3d) 1 (Ont. C.A.). leave to appeal refused (2005), 2005 CarswellOnt 96 (S.C.C.)...

100 Roz characterized the duty owed by Lillian set out in para. 30 of the Statement of Claim as follows:

> Pursuant to that fiduciary duty of care, Wilhelm was required to exercise the reasonable degree of care, skill, diligence, independent judgment and intelligence expected of a competent and prudent estate trustee and fiduciary including, but not limited to, the duty to:
>
> (a) be unwaveringly loyal to the beneficiaries set out in the Deceased's Last Will in carrying out the provisions in it in a manner that would protect and promote only their interests ahead of everyone else's interests;
>
> (b) ascertain the nature and value of all the Deceased's assets, collect or take possession of them, and safeguard them for the benefit of the beneficiaries of the Estate;

(c) ascertain the nature and value of all debts and money owed to the Deceased or his Estate either directly or indirectly;

(d) ascertain the nature and amount of all debts owed by the Deceased and his Estate;

(e) communicate openly, regularly, civilly, in good faith, and in a timely manner with the beneficiaries of the Estate about the assets and liabilities of the Estate and ascertain the beneficiaries' interests and wishes with respect to particular assets of the Estate;

(f) apply to the court for an interpretation of, or an order for directions with respect to, any ambiguous or troublesome provisions in the Deceased's Last Will;

(g) minimize, pay, and settle the Deceased's and the Estate's debts and liabilities including income taxes in a timely manner;

(h) collect money owed to the Deceased directly and indirectly or at least make reasonable attempts to collect as much as possible;

(i) sell assets of the Estate only after having obtained the express consent of the affected beneficiaries to the terms of such proposed sale, or in the absence of such agreement seek the prior direct and advice of the Court;

(j) fully account to the beneficiaries of the Estate for all actions taken by her and by anyone on her behalf in administering the assets and debts of the Estate;

(k) distribute to the beneficiaries of the Estate in accordance with the Deceased's Last Will the assets of the Estate net of reasonable estate administration expenses;

(l) not delegate her decisionmaking authority as a trustee to anyone else;.

101 Roz asserts that Lillian breached her duty of care in a number of ways. These are set out in para. 31 of the Statement of Claim as follows:

Wilhelm breached that standard of care required of her as an executrix and Estate Trustee by, among other things,:

(a) failing to carry out to the provisions of the Deceased's Last Will in a manner that protected and promoted the interests of the beneficiaries set out in it.

(b) failing to exercise her shareholder rights as the Deceased's legal representative with respect to 345023 to the detriment of the residuary beneficiaries;

(c) failing to make other reasonable or timely or independent inquiries and investigations and failing to engage qualified experts in order to ascertain the fair market values of 345023's real estate holdings and the Deceased's shareholdings in 345023 for the benefit of the affected beneficiaries of the Estate before agreeing, without their prior express consent and contrary to their then express wishes of which she had knowledge, to sell such shares to

Earl at an unreasonably low and undervalued price;

(d) failing to exercise her rights as a co-shareholder in 345023 with Earl to make other reasonable or timely or independent inquiries and investigations in order to ascertain the debts owed by Phillips Bros. and others to 345023 in which the Deceased held 50% of the voting shares, and failing to take any or any appropriate steps to try to collect any such money owed;

(e) failing to thoroughly and intelligently assess and analyze and independently confirm information made available to her from CPG about the true fair market values of 345023's real properties and the Deceased's shares in 345023 before agreeing to sell those shares to Earl for an unreasonably low price;

(f) failing to undertake additional or more extensive independent inquiries and investigations about the values of the Deceased's share in 345012;

(g) refusing or failing to fully account to the residuary beneficiaries of the Estate about all the assets and liabilities of the Deceased and for all actions taken by her and by others on her behalf in administering the assets and debts of the Estate until court orders for such accounting were obtained by the residuary beneficiaries;

(h) failing to communicate openly, regularly, civilly, in food faith, or in a timely manner with the beneficiaries of the Estate about the assets and liabilities of the Estate.

(i) failing to ascertain the beneficiaries' interests and wishes with respect to particular assets of the Estate before unilaterally disposing of them in total disregard to what their interests or wishes or proposals with respect to such assets might have been;

(j) failing to apply to the court for an interpretation of, or an order for directions with respect to, ambiguous clauses in the Deceased's Last Will in order to obtain clarification as to what extent, if any, it obligated or entitled her to favour the interests of Earl, 345023, Phillips Bros., and Gregory over the interests of the residuary beneficiaries of the Estate;

[no (k) in original]

(l) failing or refusing in February 2010 to distribute Estate assets to the beneficiaries of the Estate in accordance with the Deceased's Last Will by requiring them to sign a release and indemnity of all claims against her as a condition to their receipt of that proposed interim distribution of assets when no such condition appears in the Deceased's Last Will, forcing the plaintiff to incur the unnecessary expense of obtaining a court order in June 2011 against her that such interim distribution be made;

(m) abdicating all her decisionmaking authority as a trustee to Miller Thomson LLP and to CPG; and

(n) such other breaches as may be proven at the trial of this action.

102 The plaintiff became demanding and aggressive in her approach to Lillian. The communication was severely strained. Lillian was ultimately diagnosed with dementia and died before this matter was resolved. The portrait of Lillian painted in the tapes and through her written communication is of a woman who was considerate and always seeking to act in the best interests of the beneficiaries and also to fulfill the terms of the Will.

103 On the whole, Lillian fulfilled her duties as trustee appropriately. She proceeded to collect, take possession, and value the assets of the Estate. She ascertained the nature and the amount of debts, and paid them. Lillian interpreted the Will with respect to the shares that they could be sold. She understood that this was the Testator's intention. She sought advice from lawyers about the administration of the Estate. She sought advice from Mr. Pollard with respect to the appropriate price for the shares. She was concerned about the beneficiaries. She negotiated the sale price for the shares with a view to obtaining fair market value for the shares.

Collusion and Inadequate Consideration under the Trustee Act, s.18

104 As I indicated above at paragraph 81, the sale of the shares was done with Roz' knowledge. I have found that the shares were sold for fair market value and, therefore, the sale was not depreciatory. Roz has no claim against Lillian under s.18 of the *Trustee Act*.

Setting Aside Releases

105 The releases were signed by Lillian on behalf of the Estate as part of the sale of the shares. There was no fraud or any other basis to set aside the releases signed by Lillian.

Reimbursement Professional Fees

106 The claim with respect to the fees paid to advisors is properly addressed in the context of the passing of accounts. Lillian appropriately retained advisors and experts to assist her in her duties as trustee. The extent to which there was some overlap in the legal work with trustee work, and questions with respect to the quantum of the fees, those are addressed in the passing of accounts below.

Failure to Properly Manage the Deceased's Property Prior to his Death

107 There is no evidence that Russ was incapable of managing his affairs at any time prior to his death. Lillian acknowledged that she used the power of attorney for the purpose of payment of certain funds necessary for transporting Russ back to Ontario. Aside from payment of modest amounts of money, which Roz acknowledged, she did not manage his property prior to his death and so had no obligation to keep accounts. This claim is dismissed.

No Interim Distribution without Release

108 Lillian proposed to make a further interim distribution to Roz and Garry, but requested that a release be executed before the distribution was made. In the absence of a release, Lillian would proceed to pass her accounts.

109 The plaintiff alleges that Lillian refused to make the proposed interim distribution without requiring her to sign "overly broad releases and indemnities" first.

110 There is no entitlement for a beneficiary to receive an interim distribution. An estate trustee is entitled to request a release and waiver before making a distribution, provided that the beneficiaries are advised. If the beneficiary does not agree, the estate trustee will be required to formally pass their accounts and the beneficiary will have an opportunity to make the objections.

111 In proposing the interim distribution, Martin was explicit that if the release indemnity was not be signed, they pass their accounts. The requirement for release is a prudent step to be taken by an estate trustee and, accordingly, the plaintiff is not entitled to any damages for the failure to make the distribution.

Reimbursement of Legal Fees on Motions

112 The claim for legal fees with respect to the orders of Kent J. and Sloan J. are dismissed. These costs are properly recoverable either in the context of the motion or the passing of accounts. It is not appropriate to seek damages for those costs incurred in the context of this action.

Discharge of $50,000 Mortgage

113 A mortgage of $50,000 was placed on Roz' home to secure a debt to Russ. The mortgage was discharged when a request was made by Roz. The plaintiff has established no loss as a result of any alleged delay in discharging the mortgage.

Failure to Invest

114 Roz asserts that the Estate Trustee failed to prudently invest and re-invest the cash annuities and GICs. The Estate Trustee responds that at all times she reasonably believed that there would be a distribution of the Estate and accordingly was not appropriated to utilize any long term investments. In any event, the appropriate investments would be modest and I find that there is no want of due care and attention on the part of the Estate Trustee in failing to invest the estate assets in the more lucrative investments.

The Sale of the Sun Life Shares

115 The Sun Life shares were sold within the executor's year. Unfortunately, there was a significant drop in the market in 2008. However, the conduct of the trustee in selling the shares to realize their value was not negligent. The sale of the shares in all the circumstances was reasonable and I find no want of due care and attention on the trustee with respect to the sale of the Sun Life Shares.

Documentary Disclosure

116 Roz requested disclosure of documents repeatedly. Some of the material requested went far beyond what might be considered reasonable. This includes copies of all bank records for 345 and

going back to 2005. There was disclosure provided and there was no loss suffered as a result of the failure to provide more timely disclosure. The plaintiff acknowledged that no amendments were made to the Statement of Claim even after full disclosure of all documents was provided. While it would have been better if the disclosure occurred earlier, it would have made no difference.

Claim against Clark, Pollard and Gagliardi

117 The plaintiff claims against CPG for:

(1) Knowing assistance in breach of trust or breach of fiduciary duty;

(2) Negligence;

(3) Collusion and inadequate consideration under s.18 of the *Trustee Act*.

118 Pollard had worked more than 20 years as the chartered accountant for Russ, Earl, and their companies. From 2005, onward he acted as accountant for Greg. Pollard was retained by Lillian to assist her as estate trustee. Pollard prepared income tax returns, provided advice to Lillian with respect to the value of the estate including the value of the shares of 345. Lillian's decision to sell the shares for the price that she determined was based, in a large measure, on Pollard's valuation of the shares. There is no doubt that Pollard owed a duty to Lillian.

119 Pollard was in a conflict of interest. He had a longstanding relationship with Earl, Russ and Greg. Earl was the driving force behind the business. Pollard did not provide the best advice to Lillian. She asked if she should talk to the beneficiaries. He encouraged her to talk to Earl and Greg. There is no doubt that Lillian relied upon Pollard for an opinion on the value of the shares for the purposes of the sale. Pollard ultimately acknowledged that in his evidence. His analysis was not detailed. He assumed that there would be no recovery on the debt owed by Greg owed to 345. He did not advise Lillian to get an independent valuation, which may have clarified issues. Pollard provided advice on the Will and the sale of the shares of the company. He raised the issue of selling early in his conversation with Lillian on April 4, 2008. She relied on that advice. She met with Greg. She tried to make sure the price was fair. In the context of the negotiations, Pollard explained the number of $250,000.00 given by Greg to Lillian. He advised her on the negotiation with Greg in tape recorded conversation. When she specifically asked if she should speak to the beneficiaries, he said she did not have to speak to them legally, but morally was another issue. He did not encourage her communication with them.

120 Pollard provided an estimated value for the shares. He initially valued the shares at $405,000. He then did a further analysis and found the shares to have a value of $232,000. Pollard's analysis assumed that none of the debt owed by Ltd. would be recovered and accepted the $360,000 value of the Otto appraisal for the properties. The plaintiff criticized Pollard for his analysis. The plaintiff also pointed to Pollard's conflict of interest.

121 In acting for the Phillips defendants and Lillian, Pollard was in a conflict of interest. However, Pollard asserts that Lillian consented to the conflict. Lillian was aware that he was the accountant

for all the different parties. In my view, while there may be some issue as to whether she truly appreciated the potential problems arising out of the conflict, Lillian was aware of Pollard's interest and accepted advice from him. In the circumstances, while Pollard's share valuation methodology may have been flawed, Lillian ultimately sold the shares for fair market value. The plaintiff suffered no loss as a result of the conduct of Pollard.

Knowing Assistance in Breach of Fiduciary Duty

122 I have set out above at paragraph 80 the elements of knowing assistance. As I have found Lillian's conduct was not dishonest or fraudulent, the claim for knowing assistance cannot succeed against CPG.

Negligence

123 A successful claim in negligence requires that the plaintiff establish the following: (1) A duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) damages, and (4) the damages must be causally linked to the breach of duty.

124 Roz asserts that Pollard owed a duty of care to her. Given that I find that Pollard's conduct did not give rise to any loss, it is not necessary to analyze whether or not he, in law, owed a duty of care to the beneficiaries. However, I will say that in my view Pollard did not owe a duty of care to Roz in the circumstances of this case. He owed a duty to Lillian, and if that duty was breached and a loss was suffered, Lillian would have a claim over against him. CPG was not retained by Roz so there is no specific accountant/client relationship which is in existence upon which to base a duty of care.

125 As the Supreme Court of Canada stated in *Hercules Management Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165 (S.C.C.):

> A duty of care will only be owed to those persons who the accountant could reasonably foresee would rely on the accountant's work and where such reliance was reasonable.

126 In this case, there is no evidence that Roz relied on Pollard. If she did, that reliance was not reasonable. Roz had counsel acting on her behalf. Pollard was providing advice to Lillian and also to the Phillips defendants. He was provided no advice to Roz. In the circumstances, there is no duty owed by Pollard or CPG to the Roz.

127 Even if a duty was owed, Roz provided no evidence with respect to the standard of care or the elements of the duty that would be required by an accountant. Given my finding with respect to the value of the shares, the plaintiff Roz suffered no loss as a result of any alleged breach of duty on behalf of CPG.

Collusion and Inadequate Consideration under the Trustee Act, s.18

128 I have set out in paragraphs 85 and 86 above the definition of collusion and s.18 of the *Trustee Act*. In this case, there was no collusion and, give my finding on the sale of the shares, the sale was not depreciatory. CPG is not liable under the *Trustee Act*.

129 The claim against Pollard and CPG is dismissed.

Claims Against Miller Thomson

130 The plaintiff claims against Miller Thomson as follows:

(1) Miller Thomson was a constructive trustee;

(2) Miller Thomson knowingly assisted the trustee in breach of trust;

(3) Negligence;

(4) Breach of trust;

(5) Breach of fiduciary duty;

(6) Gross negligence;

(7) Collusion and inadequate consideration under s.18 of the *Trustee Act;*

(8) An order setting aside the releases signed by Lillian as estate trustee;

(9) An order that she reimburse the Estate for all invoices which were paid to lawyers, accountants and other experts and advisor;

(10) Damages representing the foregone interest which the Estate would have earned had the Estate money been better invested;.

(11) General damages for failing to properly manage the deceased's property prior to his death and failure to keep proper accounts;

(12) Interest on the sum of $650,300 which should have been disbursed without the request for a release.

(13) Reimbursement of $9,000.38 legal fees paid by the plaintiff in obtaining the order of Kent J.;

(14) Reimbursement to the plaintiff of $2,323.66 for legal costs of the motion which resulted in the order of Sloan J. dated June 9, 2011;

(15) Damages in the sum of $10,000 for the refusal to discharge the $50,000 mortgage against the plaintiff's residence;

(16) Damages of $10,100 representing the loss as a result of the failure to sell Sun Life Financial shares in a timely manner;

(17) Damages in the amount of $2,000 for not having provided the plaintiff will all the documentation, information within time limits set out in certain orders and depriving the plaintiff of the ability to incorporate same into the Statement of Claim.

131 The majority of the claims outlined above were addressed in the context of the claim against Lillian and will not be reviewed with respect to the claim against Miller Thomson. I shall address the claim of negligence, trustee *de son tort*, knowing assistance, and the claim for legal fees.

Negligence

132 Dealing first with the claim of negligence against Miller Thomson, I note the Statement of Claim does not plead negligence against Miller Thomson. The allegations are that Miller Thomson acted as *de facto* trustee or that Miller Thomson knowingly assisted in the breach of trust by Lillian.

133 In this case, Miller Thomson was retained by Lillian. The solicitor for the trustee owes a duty to his client, the trustee. A duty of care has been found owed by a solicitor who prepares a will to a disappointed beneficiary in very limited circumstances. The potential conflict between the duty owed to the client and the duty owed to the beneficiaries would preclude the finding of a duty of care in the circumstances of this case. In any event, the plaintiff has established no loss as a result of the conduct of Miller Thomson.

Trustee de Son Tort

134 In this case, there is no evidence that Lillian abdicated her decision-making authority to Miller Thomson. In fact, the opposite appears from all the communications. Lillian was always acting as the trustee. She sought advice from Miller Thomson but did not abdicate her responsibilities and her duties to Miller Thomson. Accordingly, Miller Thomson has no liability as trustee *de son tort*.

Knowing Assistance

135 The law with respect to knowing assistance is set out in paragraph 80 above. In this case, the trustee committed no act of fraud or dishonesty and, accordingly, Miller Thomson cannot be liable for knowing assistance in breach of trust.

Legal Fees

136 The plaintiff also claimed reimbursement of legal fees from Miller Thomson. The legal fees represent work done by Miller Thomson in fulfilling its duty to Lillian. Roz' complaint with the legal fees rests with Lillian and will be addressed in the context of the passing of accounts.

The Passing of Accounts

137 This battle was initially waged in the context of an application by Lillian to pass her accounts as Estate Trustee. The initial application to pass accounts was issued on June 9, 2010 and scheduled for September 30, 2010. It was adjourned on consent by Hawreliak and Finch. Hawreliak's retainer was then terminated and the application was adjourned again to January 2011 and then to June 2011.

138 Lillian prepared Estate accounts for the following periods: February 25, 2008 to December 31, 2009; January 1, 2010 to January 31, 2011; and February 1, 2011 to August 25, 2011.

139 Roz prepared six sets of objections to the accounts. Many of the issues raised in the action are also raised in the objections. Therefore, many of the issues have already been addressed earlier in these reasons. The combination of Roz' focus on detail, Lillian's issues, and Miller Thomson's involvement led to an inordinate amount of time and expense associated addressing relatively minor issues.

140 For example, Roz raised an issue with respect to the failure to include the value of the Lincoln Town car in the capital assets. However, the plaintiff had agreed that the Lincoln Town car would be transferred to her father's friend, Kelly. Roz objected to the value of 24 Anthony Place as being expressed as $229,000.00 as that is more than the appraised value from one appraiser. $229,000.00 was the amount the plaintiff agreed to value the principal residence. It was the amount set out in an email sent by her. Although the plaintiff sought to correct that amount, it was the amount that was used consistently by Lillian and is appropriate. This focus on formality and detail significantly increased the time spent in the administration of the Estate. A trustee is not held to a standard of perfection. In the context of administering an estate, mistakes will be made.

141 In the context of the passing of the accounts, I shall address the following issues: (1) Estate Trustee Compensation, (2) Legal Fees, (3) Accounting Fees, and (4) Alleged Failure to Invest Properly.

142 I have already addressed the issue of the sale of the shares. The sale of the shares was authorized by the Will, and the estate trustee received fair market value for the shares. I will not revisit the issue of the shares in the context of the passing of the accounts.

Estate Trustee Compensation

143 The estate trustee's entitlement to compensation is found in s.61 of the *Trustee Act*, R.S.O. 1990, c T.23, which states that: "A trustee, guardian or personal representative is entitled to such fair and reasonable allowance for the care, pains and trouble, and the time expended in and about the estate, as may be allowed by a judge of the Superior Court of Justice."

144 The *Trustee Act* confers the right to receive compensation but it does not provide a formula or rates for calculation of that compensation. Percentage guidelines have been developed by the court to assist in quantifying compensation in order to bring more predictability to the assessment of the trustee's compensation. The Ontario "tariff guidelines" are as follows: fees charged against capital at 2-1/2% on capital receipts and on capital disbursements; fees charged against revenue at 2-1/2% on revenue receipts and revenue disbursements; and a care and management fee of 2/5 of 1% per annum on the gross value of the assets under administration (see *Laing Estate v. Laing Estate* (1998), 41 O.R. (3d) 571 (Ont. C.A.) at p. 573 citing *Jeffery Estate, Re* (1990), 39 E.T.R. 173 (Ont. Surr. Ct.) at p.178).

145 In *Laing Estate*, the Court of Appeal approved the approach taken by Killeen J. in *Jeffery Estate, Re* as follows:

> 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*, supra. 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 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.

146 The five factors set out in the case of *Toronto General Trusts Corp. v. Central Ontario Railway* (1905), 6 O.W.R. 350 (Ont. H.C.) are: (1) the size of the trust; (2) the care and responsibility involved; (3) time occupied in performing the duties; (4) the skill and ability displayed; and (5) the success of the administration.

147 In the initial application to pass accounts, the Estate Trustee claimed compensation of $49,709.73. The compensation was claimed on capital receipts of $1,377,412.60, capital disbursements of $528,150.11, revenue receipts of $67,664.40 and revenue disbursements of $14,921.88. Although the trustee prepared two more sets of accounts, no further compensation was claimed. There was no care and management fee claimed over the course of the administration of the Estate. Given that the Estate was essentially distributed August 25, 2011, the trustee could have claimed an additional approximately $22,500 under the tariff on the capital and revenue disbursements made during the course of her administration. This is aside from any care and management fee.

148 The $49,709.73 claimed should be examined against the five factors.

Size of the Trust

149 The trust was about $1.4 million. The trust was not enormous; however, the Estate would yield a fee in the range of $80,000 on a straight tariff basis The amount claimed is not at the high range.

Care and Responsibility Involved

150 Lillian took her job seriously. She spent significant time cleaning the house. She made an effort to deal with the shares of the corporation. It was not a simple, straightforward estate because of the existence of the shares in the corporation. Lillian retained experts to assist her in the administration of the Estate. Roz was critical of Lillian for not taking active steps with respect to the operation of the corporation. In my view, it would be inappropriate for the trustee to seek to take any steps with respect to the operation of 345. Any interference by her was unjustified and would be inappropriate. She was not required to engage in management decisions with respect to the corporation simply by being the Estate Trustee. In her efforts to sell the shares, she spent

considerable time negotiating to ensure she was getting the fair market value for the shares.

Time Occupied in Performing the Duties

151 Lillian recorded some of the time that she had spent in performing her duties. The time claimed appears to be significantly underreported when one considers the number of meetings that she attended. It appears she was very involved in her duties. There was time spent in performing some duties of the Estate Trustee by the lawyers and the accountant which should be considered in looking at this factor.

Skill and Ability Displayed

152 In all the circumstances, Lillian met the standard expectation of an estate trustee in her conduct. She retained experts to assist in her administration. She relied on the experts. She received fair market value for the shares. She transferred the house.

Success of the Administration

153 Essentially the Estate was completely distributed and notwithstanding the protestations of Roz, it was handled well.

154 In all the circumstances, I find that compensation of $40,000.00 is appropriate compensation for the Estate Trustee.

Legal Fees

155 The Estate paid legal fees of $89,293.70 to Miller Thomson. In addition, Miller Thomson did not pursue legal fees in the amount of $44,505.00, plus disbursements in excess of $6,000.00. These fees were for services rendered from December 31, 2010 to August 18, 2011 (the date of service of the Statement of Claim on Miller Thomson). Throughout this period, Finch and others at Miller Thomson provided legal advice to Lillian, responded to correspondence from Roz and her lawyers, and prepared and attended at court for proceedings. In the normal course, these services would be the responsibility of the Estate. The Estate has received a benefit by Miller Thomson not pursuing these fees.

156 Roz raises several objections to the legal fees. These are that the fees: (1) include executor's work; (2) include fees for the sale of shares; (3) are not properly paid to the extent that the fees are incurred in the context of the passing of accounts; and (4) are excessive. I shall address each of these objections.

Executor's Work

157 Roz and her husband went through each account for the approximately $50,000.00 in legal fees and commented on each individual entry. In some instances, the entry was disputed because too much time was spent or they did not feel there was an adequate explanation. In other cases, it was determined to be trustee's work. There was one entry in an account which was not related to

this file. The entry was .6 @ 485.00 for Martin. The fees will be reduced by $291.00. This will be recovered as a deduction from the Estate Trustee's compensation.

158 An estate trustee is entitled to receive legal advice with respect to the administration of the estate and her duties and responsibilities. But a professional who undertakes estate trustee's work should be reimbursed from the executor's compensation for such tasks.

159 I have reviewed all the accounts and, in my view, $10,000.00 of fees in the accounts are matters related to trustee work. Therefore, the Executor's compensation will be reduced by $10,000.00, plus HST, for that work done. I note that much of the work in preparing the Estate accounts was done by Lynn Brohman at $130 per hour.

160 In the context of administering the Estate, Lillian intended to make an interim distribution of $10,000.00 to each of Roz and Garry. She went to Western Union to determine the cost and misunderstood the information she received. The quote from Western Union included exchanging funds from Canadian to American, which resulted in an approximately $2,000.00 difference. Lillian thought this was the costs associated with the wire transfer. She thought it was excessive. She advised Miller Thomson and steps were undertaken to seek to pay the $10,000.00 other than by Western Union. This was an error on Lillian's part. It was compounded when Miller Thomson failed to appropriately follow up with Lillian. I find that the legal fees which were unnecessarily incurred related to the transfer of that to be $1,325.00 inclusive of HST. This amount shall be paid by Lillian as a reduction of her executor's compensation.

Sale of Shares

161 The sale of the shares of 345 was completed by Lillian. The Will authorized the sale of shares and, accordingly, the legal fees associated with the sale of shares are properly paid by the Estate. There will be no reduction to the legal fees on account of the fees incurred for the sale of shares. Roz' objection to the sale of the shares focuses mainly on the "failure to obtain fair market value". Had her claim been successful, Roz would have been entitled to the difference between the fair market value and the actual amount received on the sale of the shares. Legal fees would have been incurred in any event to realize that sale and so would be appropriately paid.

Passing of Accounts Related Legal Fees

162 This claim essentially relates to the account rendered on December 24, 2010 in the amount of $32,902.64. This account was from May 2010 and much of it was related to the passing of accounts.

163 Legal fees incurred on a contested passing of accounts are true administration expenses. An estate trustee is entitled to be indemnified for them unless the expenses are excessive (see *Kanee Estate, Re* (1991), 41 E.T.R. 263, [1991] B.C.J. No. 3018 (B.C. S.C.)). Roz says that they should not have been paid without court approval. I accept the cogent analysis of Professor Oosterhoff in his article, *Indemnity of Estate Trustee on Applied in Recent Cases*, (2013) *The Advocates' Quarterly*, Volume 41, that the trustee is entitled to be reimbursed for the legal expenses for contested passing of accounts from the Estate. It is not improper to pay those

without court approval. However, on the passing of accounts, the court will determine whether the fees were reasonable.

Excessive Fees

164 The total legal fees, inclusive of HST and disbursements, paid to Miller Thomson are significant. After deducting for the Executor's work, the wrong entry, and the time spent on the Western Union issues, the balance is approximately $75,000.00, inclusive of disbursements and HST. The net legal fees only are in the range of $65,000.00.

165 In reviewing the accounts, there are instances of interoffice consultations and research being conducted. The hourly rates charged are generous. In all the circumstances, a 20% or $13,000.00 ($14,690.00 with HST) reduction is warranted.

166 In summary, the total legal fees, inclusive of HST and disbursements, in the amount of $89,293.70 shall be reduced by $291.00 for the wrong docket entry, $11,300.00 for the executor's work done, $1,325.00 for the Western Union issue, and $14,690.00 on the basis that the total time spent was excessive. Accordingly, the total legal fees are reduced by $27,606.00, and the legal fees allowed are $61,687.70. The difference of $ 27,607.00 will be deducted from the executor's compensation granted to Lillian.

Accounting Fees

167 The accounts for CPG consists of two accounts; one dated June 26, 2009 for $8,400 and one dated May 31, 2010 for $1,575. For these accounts, Roz and her husband once again reviewed each item indicating the amount sought and "reason disbuted"(sic). Of these accounts, some time was spent doing work which could be considered estate trustee work. Roz objects to the work done as estate trustee and any time spent on the sale of the shares. Given my decision with respect to the sale of the shares, in my view the time for sale of shares is appropriately paid by the Estate. Roz was also critical of the time spent on the preparation of the T-3 returns. The time spent was reasonable in the preparation of the tax returns. Accordingly, of the total claimed for accountants' work, I reduce the amount by $1,710.00 ($1,932.30 with HST) as representing time spent on estate accounting. Accordingly, Lillian's trustee compensation will be reduced by $1,932.30.

Judgment on the Passing of Accounts

168 I have reviewed the accounts and the objections raised to the accounts. While there is some issue with respect to the presentation of certain capital receipts not included, and Roz' claim for a reduction in the amount of compensation based on the inclusion of amounts paid, in all the circumstances, the compensation to which Lillian would have been entitled on the tariff is in excess of $70,000.00. I have fixed the compensation at $40,000.00. That $40,000.00 is to be reduced by $29,538.30, for a balance of $10,461.70.

169 The trustee is entitled to payment of $10,461.70 from the amount paid into court. The balance shall be held pending my decision on costs.

Disposition

170 The claim of the plaintiff is dismissed against all the defendants.

171 The Estate accounts are passed, with the executor's compensation fixed in the amount of $40,000.00 and a reduction of the executor's compensation for the legal fees and accounting fees as set out above.

172 The Order of Sloan J. dated August 8, 2013 is hereby set aside. The costs of the motion may be addressed in the costs submissions.

173 If there are any additional orders necessary to give effect to these reasons, counsel should consult each other and, if necessary, I will receive correspondence on behalf of all counsel at my chambers in Welland.

Costs

174 Costs submissions with respect to this matter shall be made in writing addressed to me at my chambers in Welland. The costs submissions of the defendants, limited to 10 pages, together with Bills of Costs and any offers to settle, shall be delivered within 20 days of the release of this decision. The plaintiff shall have 20 days to respond, with a Bill of Costs. The defendants will have a further right of reply within 10 days.

Plaintiff's action dismissed; accounts passed with $10,461.70 payable to trustee.

CASE LAW

IN THE MATTER OF THE ESTATE OF PAULINE MEDYNSKI, DECEASED AND IN THE MATTER OF THE GUARDIANSHIP OF ANDREW MEDYNSKI, 2016 ONSC 3353 (CANLII)

CITATION: In the Matter of the Estate of Pauline Medynski, deceased and In the Matter of the Guardianship of Andrew Medynski, 2016 ONSC 3353

COURT FILE NO.: CV39/15 &CV40/15
DATE: 2016-05-30

ONTARIO

SUPERIOR COURT OF JUSTICE

IN THE MATTER OF THE ESTATE OF PAULINE MEDYNSKI, DECEASED

– and –

IN THE MATTER OF THE GUARDIANSHIP OF ANDREW MEDYNSKI

Applicant, BMO Trust Company,
Counsel K. Whaley, L. Tupman and A. Bloom

Respondent/Objector, Lillian Sawchuk, Counsel N. Pizzale

Beneficiary, Aileen Young,
Counsel P. Amey and H. Alexander

Beneficiary, Carol Medynski,
Counsel M. McEniry

HEARD: April 25, 27, 2016 and May 2, 2016

THE HONOURABLE J.C. KENT

REASONS FOR JUDGMENT

INTRODUCTION

[1] Pauline Medynksi and her spouse, Andrew Medynksi are both deceased. Sadly, their three adult daughters have been unable to work together to manage their parents' affairs both before and after their parents' deaths. Pursuant to a court order, BMO Trust Company became involved. As matters have evolved, all of the parties are now before this court on an application by BMO Trust Company to have its accounts for its services in the matter of the Estate of Pauline Medynski and in the matter of the Guardianship of Andrew Medynski passed by the court. Unfortunately, this is a highly contentious matter in which legal costs far beyond the total monetary measurement of any objections will be a matter that the court will ultimately need to determine.

[2] Fortunately, the court has had the benefit of submissions by very experienced counsel. Counsel were able to assist the court by providing a chronology of how everyone reached this point. That chronology is as follows:

DATE	EVENT	NOTES
August 3, 2007	Will of Pauline Medynski	Referred to in the Guardianship Order of Andrew Medynski
July 9, 2008	Date of Death: Pauline Medynski	
	Lillian Sawchuk, Aileen Young and Carol Medynski (collectively "Daughters" of Pauline and Andrew Medynski) named as Estate Trustees in Will of Pauline Medynski; unable to effectively work together consented to an Order to appoint BMO as Estate Trustee	
October 27, 2009	(appears to have been recorded in some pleadings as October 29, 2009) BMO appointed as Estate Trustee re Estate of Pauline Medynski on October 27, 2009 on hearing of Application of Carol Medynski	Order of the Honourable Justice Arrell dated October 27, 2009 in Court file #CV-09-547
	Daughters acted as attorneys for property and personal care for Andrew Medynski following Pauline Medynski's death [July 8, 2008 until appointment of BMO as Guardian of Property October 29, 2010]. Daughters could not work together, legal wrangling. Daughters continued as attorneys for personal care of Andrew Medynski	
August 9, 2010	Certificate of Appointment of Estate Trustee re Pauline Medynski issued to BMO pursuant to Order of Justice Arrell dated October 27, 2009	

October 29, 2010	Pauline's husband, Andrew Medynski, declared incapable of managing his property and BMO is appointed as Guardian of Property	Order of the Honourable Justice Arrell dated Friday, October 29, 2010 in Court file #CV-09-547 • Note the order refers to court file nos. CV-09-547
	• Daughters shall jointly retain BMO to prepare on their behalf an accounting for their dealings of Andrew's property from July 9, 2008 to October 29, 2010	
September 24, 2011	Date of Death of Andrew Medynski	
	Issues re validity of Andrew Medynski's Wills dated February 22, 1995. January 3, 2007 and August 3, 2007	
April 10, 2012	Application by Carol Medynski re validity of Wills of Andrew Medynski; mediation to take place; • Adam Capelli shall be appointed as Estate Trustee During Litigation re Andrew Medynski • BMO to deliver to Adam Cappelli all documents in their possession re Andrew Medynski	Order Giving Directions of the Honourable Mr. Justice Whitaker on Tuesday, April 10, 2012 in Court File No. 05-101-11
July 3, 2012	Adam Capelli is appointed ETDL by way of Certificate of Appointment of ETDL issued under Court File No. 01/1803/12 for the Estate of Andrew Medynski	
July 25, 2012	BMO delivered all documentation regarding Andrew Medynski to Adam Capelli	
October 4, 2012	BMO delivered coin and stamp collection held in BMO vault for safekeeping to Adam Capelli	
January 28, 2015 (Application Records served February 5/6, 2015)	Applications to Pass Accounts by BMO • re Estate of Pauline Medynski for the period of July 9, 2008 to November 18, 2013 • re: the Guardianship of Andrew Medynksi for the period from October 29, 2010 to September 24, 2011 (returnable April 17, 2015)	

March 12, 2015	Notices of Objection by Lillian Sawchuk re Estate of Pauline Medynski and the Guardianship of Andrew Medynski	
April 22, 2015	Motion Record filed by BMO's counsel re Order Giving Directions for timetable for delivery of materials re hearing of Applications to Pass Accounts re Estate and Guardianship (returnable May 1, 2015)	Re Application for Estate of Pauline Medynski Court File No. CV-15-39 and Guardianship of Andrew Medynski Court File No. CV-15-40
May 1, 2015	Order Giving Directions in Court File No. CV-15-39 the Estate of Pauline Medynski: • The Applicant shall serve and file a response to Lillian Sawchuk's Notice of Objection dated March 12, 2015 • Lillian Sawchuk will serve and file an Amended Notice of Objection, within 45 days of receipt of BMO's Response to her Objections • BMO shall serve and file a Brief of Responses to Lillian Sawchuk's Amended Notice of Objection within 30 days of receipt of her Amended Notice of Objection • Documents in the Response to Amended Objections shall be deemed to be authentic unless Respondents give notice within 30 days of service of the Response to Amended Objection of specific documents that are not admitted • Applicant or Respondent shall be at liberty to bring a motion for further directions pursuant to Rule 75.06 within 30 days of the Respondents' receipt of service of Applicant's Response to Amended Objections • Hearing shall be scheduled for a full day by the Registrar, BMO to serve its Factum 14 days before the hearing and Lillian Sawchuk's Factum to be served 7 days before the hearing	Order of the Honourable Justice Arrell in Court file #CV-15-39

May 1, 2015	Order Giving Directions in Court File #CV-15-40 in respect to the Guardianship of Andrew Medynski: • BMO shall serve and file a Response to Lillian Sawchuk's Notice of Objection within 60 days of the date of this Order • Lillian Sawchuk shall serve and file an Amended Notice of Objection to Accounts within 45 days of the date of her receipt of BMO's Response to her Notice of Objection • BMO shall respond to Lillian Sawchuk's Amended Notice of Objection within 30 days of BMO's receipt of same • Documents in the Response to Amended Objections shall be deemed to be authentic unless Lillian Sawchuk gives notice within 30 days of service of the Response to Amended Objection of specific documents that are not admitted • Applicant or Respondent shall be at liberty to bring a motion for further directions pursuant to Rule 75.06 within 30 days of the Respondents' receipt of service of Applicant's • Hearing of the Application shall be a full day on a date scheduled by the Registrar and the Factum shall be served by BMO 14 days before the hearing and Lillian Sawchuk's Factum shall be served 7 days before the hearing	Order of the Honourable Justice Arrell dated May 1, 2015
July 1, 2015 (served June 30, 2015)	Response to Notice of Objection filed by BMO re Pauline Medynski and Andrew Medynski	
July 8, 2015	Amended Response to Notice of Objection filed by BMO re Pauline Medynski and Andrew Medynski	
August 26, 2015	Reply to Amended Response to Notice of Objection served by Lillian Sawchuk	

October 30, 2015 (served November 2, 2015)	Response to Amended Objections by BMO	
November 11, 2015 (served November 12, 2015)	Request for Increased Costs by BMO re Pauline Medynski and Andrew Medynski	
November 15, 2015	Offer to Settle by BMO	
November 30, 2015	DEADLINE by both parties to seek directions to convert an application into an action or submit other evidence	
March 3, 2016	Motion Record of Lillian Sawchuk • two Applications CV-15-39 and CV-15-40 re Estate and Guardianship be heard together • evidence in one Application be accepted as evidence on other • BMO representative to present its evidence in chief followed by cross-examination and any reply evidence, followed by evidence of Lillian Sawchuk to be provided by viva voce evidence in chief followed by cross-examination and reply	
March 16, 2016	Request to Admit served on BMO re Pauline Medynski	
March 17, 2016	Request to Admit served on BMO re Andrew Medynski	
March 18, 2016	Court dismissed Lillian Sawchuk's Motion with an Endorsement • (a) and (b) two Applications be heard together and evidence on one accepted as evidence on other as per consent • (c) Refused [that representative of BMO and Lillian Sawchuk to provide viva voce evidence in chief followed by cross-examination and reply] • Issue to what extent BMO representative may be cross-examined remains live and may be determined by presiding Judge	Endorsement of the Honourable Justice Kent
March 24, 2016	Further Request to Admit served on BMO re Pauline Medynski	

March 24, 2016	Further Request to Admit served on BMO re Andrew Medynski	
March 28, 2016	Costs Outline - BMO re Pauline Medynski and Andrew Medynski	
March 28, 2016	BMO Supplementary Request for Increased Costs re Andrew Medynski	
March 29, 2016	Supplementary Request for Increased Costs by BMO re Pauline Medynski	
March 31, 2016	Revised Further Request to Admit served on BMO re Pauline Medynski	
March 31, 2016	Request for Increased Costs by Lillian Sawchuk served	
April 4, 2016	Response to Lillian Sawchuk Request for Increased Costs by BMO	
April 6, 2016	Factum re Lillian Sawchuck served	
April 6, 2016	Response to BMO Supplementary Request for Increased Costs by Aileen Young	
April 7, 2016	Responses to Request, Further Request and Revised Further Request to Admit re Pauline Medynski served on Lillian Sawchuk	
April 7, 2016	Factum and Brief of Authorities re BMO served	
April 7, 2016	Response to BMO Supplementary Request for Increased Costs by Carol Medynski	
April 7, 2016	Supplementary Record on Increased Costs of BMO re Pauline Medynski and Andrew Medynski (including Costs Outline) filed	
April 8, 2016	Responses to Request and Further Request to Admit re Andrew Medynski served on Lillian Sawchuk	
April 15, 2016	Supplementary Record of Lillian Sawchuk – Request for Increased Costs re Andrew Medynski	
April 15, 2016	Supplementary Record of Lillian Sawchuk – Request for Increased Costs re Pauline Medynski	

April 25, 27 and May 2	Cross examination of BMO trust officer completed and submissions completed. Decision reserved. Both Applications adjourned for costs submissions to be heard during week of 20 June, not to be called before 21 June, 2016	

COMPENSATION AGREEMENTS

[3] For its services to the Pauline Medynski estate, BMO agreed to accept a flat rate of $12,000.00 plus HST. The provisions of the 29 October 2010 order of Justice Arrell provided that BMO would administer the guardianship of Andrew Medynski and set the terms for BMO's compensation and indemnification for costs. It provided protection to BMO for transactions that occurred before its appointment.

[4] Paragraph 11 of the aforementioned order provided that BMO's compensation would be paid as follows:

a) 2% of capital receipts;

b) 0.65% of the average annual market value of the assets;

c) work done on behalf of the adult daughters to assist them with their own accounting to be charged at the rates in the Substitutes Decisions Act;

d) time to obtain and provide access to documents to the adult children to be billed at a reasonable hourly rate;

e) indemnification and reimbursement for out of pocket expenses.

[5] A compensation agreement was executed by all three adult daughters of Pauline and Andrew Medynski. The work done and the transactions carried out by BMO in its capacity as Estate Trustee of the Pauline Medynski estate and the guardianship of Andrew Medynski in the accounting period is set out in the Statement of Accounts.

[6] The trust officer in the employ of BMO with carriage of both the estate and the guardianship provided affidavits swearing that the Statement of Accounts were complete and correct. Until this matter was scheduled for hearing, neither the objector Lillian Sawchuk or her counsel sought to cross-examine on those affidavits. BMO has received its compensation in the Pauline Medynski estate and does not seek any additional compensation for its services in that regard.

[7] After Andrew's death, litigation was commenced between the adult daughters and other family members regarding the validity of Andrew's various last wills and other issues.

At the time, BMO was holding assets in accordance with its responsibility in the guardianship of Andrew. It was possible that BMO may have been appointed as an Estate Trustee During Litigation, however, on 10 April 2012, Whittaker, J. made an order, inter alia, appointing Adam Capelli as the Estate Trustee During Litigation. The order required BMO to give him all originals or copies of Andrew's testamentary documents in its possession.

[8] BMO complied with the above order and transferred all assets of Andrew in its possession to the estate Trustee during litigation. This would appear to have been completed by 25 July 2012 and on 5 February 2015 BMO's applications to pass its accounts in both the estate and guardianship were served.

[9] Aileen Young and Carol Medynski do not oppose BMO's request for judgment for passing its accounts. They do, however, oppose increased costs being paid on these applications and have instructed counsel to appear on their behalf. The third adult daughter, Lillian Sawchuk, served a Notice of Objection in both the estate and guardianship proceeding. She has raised approximately 80 objections although different quantities could be calculated depending on how one considered the numbers of the sub-paragraphs to the objections. Since that date, and subject to the order of Arrell, J. made 1 May 2015; responses to Lillian Sawchuck's objections have been provided. The objections have been amended and further responses to the amended objections have been given. In addition, shortly before this matter came on for hearing, a number of requests to admit were served upon BMO by counsel for the objector, Lillian Sawchuck.

THE NATURE OF THE OJECTIONS

[10] Most of the objections were detailed and specific, but they do not conveniently lend themselves to a monetary or other determination.

[11] For example, if the court were to find that a particular question or series of questions were not fully answered by the trust officer, or a request not fully complied with, what is the remedy?

[12] If a request has never been complied with or responded to, what is the remedy?

[13] If something is reported to have occurred in the year before BMO was appointed, does BMO have a responsibility to address that?

[14] If an item is not set out correctly in the accounts but the end result makes no difference financially, should there be a remedy?

[15] If a joint asset passes by survivorship, should that right of survivorship be presumed or should there be an analysis or investigation conducted? If that investigation was not conducted, what is the remedy?

[16] If there is disagreement as to whether a particular benefit should have been applied for,

is there a remedy?

[17] If questions arise from a perusal of various estate documents, what investigation is called for? If no investigation is conducted, what is the remedy?

[18] Where matters were not addressed during the guardianship, but will need to be addressed by the Estate Trustee During Litigation at an expense to the estate, is there a remedy as against the trustee?

[19] The answer to the foregoing questions would appear to be that if, cumulatively, such objections lead the court on a passing of accounts to a conclusion that the trustee failed to meet the legal standard of care/conduct, trustee compensation can be reduced or refused.

[20] This court will review some of the case law concerning the standard of care/conduct later in these reasons.

[21] Certain of the objections do lend themselves to a consideration of a monetary determination and these will next be addressed.

1. The Sunlife/Massey Ferguson

[22] BMO has acknowledged that it failed to make a claim for a $10.00 per day benefit that was available to pay for Andrew's care while he was in a nursing home. If BMO made that claim on 23 November 2010 when it received the guardianship order, it could have obtained a total of $3,800.00. BMO acknowledges a loss to Andrew's assets in the guardianship in the amount of $3,800.00 and it is content that its compensation be reduced by that amount.

2. Line of Credit Treatment in Pauline Medynski Estate

[23] The underlying objection appears to arise from a concern that another beneficiary may have not repaid a loan that she had obtained from Pauline. That concern was elevated by the manner in which the BMO trust officer addressed the issue in the accounts. The bottom line, however, is that there is evidence that supports BMO's position that the loan was, in fact, repaid.

3. Retaining Counsel

[24] BMO retained counsel on the hearing before Whittaker, J. resulting in Adam Capelli being appointed as the estate trustee during litigation. Counsel for the objector argues that BMO should have just provided written consent to continue as estate trustee during litigation in the event that the court wished to order that. Counsel argues that the legal fees of $5,974.88 for counsel were, therefore, unnecessary. That, in hindsight, is arguable, but on its own, it is insufficient to constitute a basis for reduction in compensation. It was a reasonable step for BMO to have taken.

4. Sale of Andrew's Toyota Motor vehicle

[25] The evidence is that it was sold in an arm's length transaction at an amount of at least its wholesale value and perhaps slightly more. It was a reasonable step for BMO to have taken.

5. Pauline Medynski's Joint Investment with Benjamin Marco

[26] BMO contends that on Pauline's death, this investment went to Benjamin Marco by survivorship. He is the adult son of the beneficiary Carol Medynski. Counsel for the objector points out that BMO should have inquired into whether a presumption of trust applied. Such an inquiry was required by the Supreme Court of Canada in Pecore v. Pecore, 2007 SCC 17 (CanLII), [2007] 1 S.C.R. 795. BMO's trust officer conceded that no such inquiry was made. At this point, there was no evidence upon which any finding can be made other than finding that a follow would have been helpful.

6. Unanswered Questions, Failure to Follow up, Delays in Action and Possible Losses as a Result

[27] The evidence supports a finding that all of the foregoing occurred during the period when BMO provided services to both the estate of Pauline Medynski and the guardianship of Andrew Medynski. Keeping in mind that the total under administration was almost 1.9 million dollars and that 234 transactions are noted in the accounts, it is not surprising that some follow up may still be required. That follow up will have to be completed by the Estate Trustee during litigation. Mr. Capelli, he may be able to follow up on things such as: Bank of Nova Scotia cheque(s), a coin and stamp collection, one or more income tax refund(s), and government bond interest. Unfortunately, at this point no monetary quantification can be made of loss, if any, regarding any of these items.

[28] Counsel for the objector is correct that, in hindsight, the simplest way out of many of the areas of objection would have been to specifically address the concerns of the objector. He suggests that a refusal to answer reasonable questions and to take specific steps that the objector requested and to do so in a timely manner may have saved the huge costs that are ultimately going to need to be considered by the court.

[29] The problem is that even if that did or did not occur, how can a result or non-result be quantified for the purpose of reducing compensation. Counsel suggests that the court could find that the objections, cumulatively, have demonstrated that BMO has breached its fiduciary obligation as a trustee and thereby disentitled itself to compensation.

[30] The court will turn then to whether the case law would support such a ruling, if the findings sought by the objector were made in whole or in part.

THE LAW

[31] It is a fundamental principle in any Trusteeship that an obligation is owed by the Trustee to the Beneficiaries of a trust. Within reasonable limits, a Trustee may exercise its discretion. Ultimately, the Trustee is required to act honestly and with the level of skill and prudence which would be expected of a reasonable person of business in administrating his/her own affairs. See: Thompson Family Trust v. Thompson, 2012 ONSC 7138 (CanLII) at paragraph 22.

[32] When the Trustee's work is deficient or falls below the above-standard, what can be done?

[33] There is authority to award damages against the Trustee for neglect or omission on a Passing of Accounts, but a breach of fiduciary obligation action and trial is the preferable course of conduct. See: Simone v. Chiefetz 2000 CanLII 16978 (ON CA), 2000 CANLII 16978 ONCA paragraph 17.

[34] This court, and all involved in this matter, have endeavoured to avoid the much more costly step of a trial. One must, however, be mindful of the need to avoid turning a Passing of Accounts into a trial in the guise of what is really an audit. See: Thompson Family Trust v. Thompson, 2012 ONSC 7138 (CanLII) at paragraph 27 and 28.

[35] There is authority to consider deficiencies on the part of a Trustee as alleged by an objector and where deficiencies are found to have occurred, the court may reduce or eliminate compensation on a Passing of Accounts. See: Zimmerman v. McMichael Estate, 2010 ONSC 2947 (CanLII) and Loveman Estate 2016 ONSC 2687 (CanLII).

[36] There is also authority to require a Trustee whose work has been found deficient to reimburse an estate. See: Re Carley Estate (1994) 2 ETR (2d) 142.

[37] Every case, however, must be decided on its own circumstances and must be governed by reason and common sense. See: Sanford v. Porter [1889] O.J. No. 43 (C.A.).

[38] Sometimes that minutia should be ignored because the precise details, while interesting, may make no significant difference in the outcome. See: Eve v. Brook, 2016 ONSC 1496 (CanLII) at paragraph 61.

[39] When what may seem at the outset to be a good faith inquiry by an objector crosses a line and becomes a grand inquisition, with an ulterior motive relating to other beneficiaries, an objector risks the possibility of costs being awarded against him/her. See: Re Bedont Estate [2004] O.J. No. 4267 at paragraph 37 and Graves v. Nigro, 2016 ONSC 44 (CanLII) at paragraph 86.

CONSIDERATIONS AND FINDINGS

[40] Upon a review of the nature of the objections and the findings of this court, the only

specific monetary reduction in BMO's compensation can be the $3,800.00 that was conceded by BMO to be appropriate. The issue as to whether there should be any further reduction is the real issue for this court to determine.

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

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

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

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

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

COSTS

[46] In their factums, counsel made submissions as to costs. This court has set a date for oral submissions concerning costs on 21 June 2016.

[47] Counsel are directed to attend on that date and provide the court with a written outline of their submissions not exceeding three pages together with a costs outline in the usual format. This direction applies as well to counsel for the two beneficiaries who appeared at the outset of the proceedings and were excused until the date when costs were to be addressed.

The Honourable J.C. Kent
Released: May 30, 2016

CASE LAW

IN THE MATTER OF THE ESTATE OF PAULINE MEDYNSKI, DECEASED AND IN THE MATTER OF THE GUARDIANSHIP OF ANDREW MEDYNSKI, 2016 ONSC 4257 (CANLII)

CITATION: In the Matter of the Estate of Pauline Medynski, deceased and In the Matter of the Guardianship of Andrew Medynski, 2016 ONSC 4257

COURT FILE NO.: CV39/15 &CV40/15
DATE: 2016-July-14

ONTARIO

SUPERIOR COURT OF JUSTICE

IN THE MATTER OF THE ESTATE OF PAULINE MEDYNSKI, DECEASED

– and –

IN THE MATTER OF THE GUARDIANSHIP OF ANDREW MEDYNSKI

Applicant, BMO Trust Company,
Counsel K. Whaley, L. Tupman and A. Bloom

Respondent/Objector, Lillian Sawchuk, Counsel N. Pizzale

Beneficiary, Aileen Young,
Counsel P. Amey and H. Alexander

Beneficiary, Carol Medynski,
Counsel M. McEniry

COSTS SUBMISSIONS HEARD: June 23 and 24, 2016

THE HONOURABLE J.C. KENT

REASONS FOR COSTS ORDER

INTRODUCTION

[1] As noted in the Reasons for Judgment released on the 30th day of May 2016, BMO Trust Company made application to this court to have its account for services in the matter of the Estate of Pauline Medynski and in the matter of the Guardianship of Andrew Medynski, passed by this court.

[2] Pursuant to the Reasons for Judgment aforementioned, this court passed the accounts, as amended and directed that the compensation sought in the amount of $27,655.05 be reduced by 6% and a further $3,800.00.

[3] Counsel have now had an opportunity to make submissions concerning costs for the passing of accounts. This court has had the benefit of submissions on behalf of BMO Trust Company; the objector, Lillian Sawchuk; the beneficiaries, Aileen Young and Carol Medynski and has received costs outlines from the respective parties.

[4] Unfortunately, this became a highly contentious matter and the total of the costs claims for what is a summary proceeding now exceed $300,000.00.

[5] The hearing itself took 3 court days and the costs argument 1.5 court days.

THE AGREEMENT

[6] When the three adult daughters of Pauline and Andrew Medynski were unable to work together to manage their parents' affairs both before and after their parents' deaths, they entered into an agreement with BMO Trust Company to act as Estate Trustee for the Estate of Pauline Medynski and as a guardian of property for Andrew Medynski. The agreement that they executed provided that BMO Trust Company, in addition to compensation for its services, would be reimbursed for all legal fees, costs, disbursements and out of pocket expenses. The legal obligation of the 3 daughters then is to indemnify BMO Trust Company in accordance with the agreement that they signed.

[7] By March 28, 2016, BMO noted that its legal costs were already above the normal tariff and served a request for increased costs. At the time of the request and before preparing for and attending at the hearing for the passing of accounts, BMO's costs were already well beyond $80,000.00. As of the costs hearing, they now amount to $263,171.10.

[8] Clearly, a costs order of that magnitude would be most detrimental to the estate and all beneficiaries, if ordered payable by the estate. If ordered payable by the objector whose success at the hearing was very limited, it would be a burden far out of proportion to any value that might be placed on the objections made by Lillian Sawchuck.

LAW

[9] Historically, our courts have held that trustees are entitled to be indemnified for all costs including legal costs. See: Goodman Estate v. Geffen, [1991] 2. S.C.R. 353. That is the legal obligation that the 3 daughters agreed to assume in this case.

[10] Costs must, of course, be reasonable and not excessive. See: Fiacco v. Lombardi, 2009 CanLII 46170 (ON SC), 2009 CANLII 46170 at para. 35 and Vano Estate, 2012 ONSC 262 (CanLII) at para. 27 and 35-36. Costs may be ordered payable out of an estate or by an individual or the costs order may be "blended" by a combining of both. See: Sawdon Estate, 2014 ONCA 101 (CanLII) at para. 95-97.

[11] Current jurisprudence makes it clear that an estate is no longer almost automatically required to fund costs of litigation and generally the "loser pays" principle followed in other

civil matters should be applied. See: McDougald Estate v. Gooderham, 2005 CanLII 21091 (ON CA), 2005 Carswell Ont. 2407 at para. 85; Villa v. Villa, 2013 ONSC 4421 (CanLII) at para. 3 and Brown v. Rigsby 2015 ONSC 1777 (CanLII) at para. 26.

[12] While the compensation agreements provide and some case law supports requiring full indemnification of the trustees' legal costs, it is implicit that those legal costs be reasonable and not excessive. We have reached a point in time where the courts no longer regularly make costs awards, for some or even all parties, payable out of the estate. The accepted guidelines applicable to costs in other civil proceedings are now to be considered when determining costs in a trustee/estate situation. Those concepts include: a consideration of the factors in Rule 57.01; fairness and reasonableness; proportionality; the reasonable expectation of a party who is unsuccessful; consistency with other cases; access to justice. See: Davies v. Clarington, 2009 ONCA 722 (CanLII) at para. 51.

CONSIDERATIONS

[13] It is very doubtful that an estate beneficiary who is properly advised concerning making objections on a passing of accounts would anticipate a risk of having to pay a costs award in excess of one quarter of a million dollars upon the completion of a summary proceeding.

[14] Both counsel for the objector and counsel for BMO contend that a considerable portion of their involvement was motivated by the need to prove a matter of principle. BMO was required to respond to an extremely large number of objections. More importantly, however, as a professional trustee BMO felt it was required to respond fully to what it perceived to be an attack on its ability carry out its fiduciary obligations to beneficiaries.

[15] One can understand that any professional would feel a need to respond when his professional expertise was under attack. In such circumstance, the party under attack is entitled to "pull out all stops" in its response. The issue then becomes to what extent some other party should be required to pay for the preparation and arguing of that response.

[16] One wonders whether non-objecting beneficiaries should bear a risk of a very significant reduction in their share of an estate when they are quite prepared to accept the accounts as presented. If all parties had their costs paid out of the estate, the estate would be reduced by more than $315,000.00.

ANALYSIS

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

[18] Lillian Sawchuk and her counsel could not have reasonably foreseen that this passing of accounts, a summary proceeding, would generate costs in excess of $260,000.00 on the

part of the trustee.

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

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

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

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

RESULT

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

[24] Based upon the shared responsibility referred to in paragraph 22, no costs award is made for or against any other party or the estate of Andrew Medynski.

The Honourable J.C. Kent
Released: July 14, 2016