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FIDUCIARY ACCOUNTS AND COURT PASSINGS

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FIDUCIARY ACCOUNTS AND COURT PASSINGS

Passing of Accounts: General Principles

An application by a fiduciary to pass accounts, (also referenced herein as a "*passing of accounts" and "passing" and "accounting")* is not strictly, in legal terms, a mandatory requirement. Rather, an estate trustee, trustee, attorney, guardian or otherwise—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.

A passing of accounts is a formal procedure governed by statute that results in court approval of the relevant period of administration or property management.

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 compensation and the provisions of any governing document in that regard; as well as liability factors; releases; indemnities; claims; creditor claims; or other.

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*.[1]

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

The *Estates Act*, Section 48,[2] 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),[3] 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

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[1] *Trustee Act, R.S.O. 1990, c. T.23. S. 23.1: "**When trustee may file accounts** - 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."*

[2] *Estates Act, R.S.O. 1990, c. E.21. S. 48: "**Accounting by executor trustee** – 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."*

[3] *Estates Act, R.S.O. 1990, c. E.21, S. 50. (1): "**At whose instance executors or administrators compellable to account** – 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."*

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.[4] 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 the *Powers of Attorney Act,*[5] to pass accounts, except in a case where the grantor

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[4] *Substitute Decisions Act, S.O. 1992, c. 30. Section 42(1) to 42(5): "42. Passing of accounts – (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."

[5] *Powers of Attorney Act, R.S.O. 1990, c. P.20*

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)[6] 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 dependent of the incapable person, the Ontario Public Guardian and Trustee, the Ontario* Children's Lawyer, 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.*[7] 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.[8]

A guardian of property is required to act in accordance with a court-approved management plan established for the property.[9] 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.

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[6] *Substitute Decisions Act, S.O. 1992, c. 30, s. 42(1)-(8)*
[7] *Substitute Decisions Act, S.O. 1992, c. 30, ss. 32(1)*
"32. Duties of guardian – (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."
[8] *Substitute Decisions Act, S.O. 1992, c. 30, ss. 32(6)*
[9] *Substitute Decisions Act, S.O. 1992, c. 30, ss. 32(10)*

Similar to the *Rules of Civil Procedure,* Rules 74.15-75.18,[10] 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.

In accordance with subsection 32(12) of the *SDA*, it is expressly stated that the *Trustee Act*[11] 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*[12] 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.*[13]

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[10] *Rules of Civil Procedure, R.R.O. 1990, Reg 194, Rules 74.15- 74.18*
[11] *Trustee Act, R.S.O. 1990*
[12] *Trustee Act, R.S.O. 1990, ss.23(1)*
"23. 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."
[13] *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*

4. Court Jurisdiction

The jurisdiction and procedure for the passings of accounts by an estate trustee, attorney, and guardian for 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.[14]

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[14] *Rules of Civil Procedure, R.R.O 1990, Reg. 194. Rules 74.16 through 74.18*

*"**74.16** Rules 74.17 and 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 the 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.*

[O. Reg. 484/94, s. 12; O. Reg. 69/95, s. 13]

FORM OF ACCOUNTS

***74.17** (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;*
- *(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 capital and income, the accounts shall be divided to show separately receipts and disbursements in respect of capital and income.

[O. Reg. 484/94, s. 12]

APPLICATION TO PASS ACCOUNTS

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 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 subrule (1), the court shall issue a notice of the application to pass accounts (Form 74.44).

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).

(4) Where the person is served in Ontario, the documents shall be served at least 45 days before the hearing date of the application.

(5) Where the person is served outside Ontario, the documents shall be served at least 60 days before the hearing date of the application.

Appointment of Person to Represent Interest

(6) Where a person who has a financial interest in an estate is under a disability or is unknown and the Public Guardian and Trustee or Children's Lawyer is not authorized to represent the interest under any Act and there is no guardian or other person to represent the interest on the passing of the accounts, the court may appoint a person for the purpose.

Notice of Objection to Accounts

(7) Subject to subrule (8), a person who is served with documents under subrule (4) or (5) and who wishes to object to the accounts shall do so by serving on the estate trustee and filing with proof of service a notice of objection to accounts (Form 74.45), at least 20 days before the hearing date of the application.

(8) Where a person who has a contingent or vested interest in the estate is represented by the Public Guardian and Trustee or Children's Lawyer, the Public Guardian and Trustee or Children's Lawyer, as the case may be, shall serve on the estate trustee and file with proof of service, at least 20 days before the hearing date of the application, a notice of objection to accounts (Form 74.45), a notice of no objection to accounts (Form 74.46) or a notice of non-participation in passing of accounts (Form 74.46.1).

Judgment on Passing of Accounts Granted Without Hearing

(9) The court may grant a judgment on passing accounts without a hearing if the estate trustee files with the court, at least 10 days before the hearing date of the application,

- *(a) a record containing,*
  - *(i) an affidavit of service of the documents referred to in subrule (4) and (5),*
  - *(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 solicitor 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, and*
  - *(v) the certificate of a solicitor stating that all documents required by subclauses (i) to (iv) are included in the record;*
- *(b) a draft of the judgment sought, in duplicate; and*
- *(c) if the Children's Lawyer or the Public Guardian and Trustee was served with the notice of application and did not serve a notice of non-participation in the passing of accounts, a copy of the draft judgment approved by the Children's Lawyer or the Public Guardian and Trustee, as the case may be.*

(10) Where the court grants judgment without a hearing, the costs awarded shall be assessed in accordance with Tariff C.

Request for Increased Costs

(11) Where the estate trustee or a person with a financial interest in the estate seeks costs greater than the amount allowed in Tariff C, the estate trustee or other person shall serve a request for increased costs (Form 74.49.2 or 74.49.3) on every other party to the application and file it, with proof of service.

(11.1) Unless the court orders otherwise, a request for increased costs may be served and filed only during the following period.

1. *In the case of an estate trustee, the period beginning 10 days after service of the notice of application is complete and ending 10 days before the hearing date specified in the notice.*

Any individual having a financial interest in an estate by virtue of the *Rules of Civil Procedure* Rule 74.15(1)(h),[15] 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 by these specific court rules and Forms 74.44 through 74.51.[16] 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.[17]

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2. In the case of a person with a financial interest in the estate, the period beginning 10 days after the notice of application is served on the person and ending 10 days before the hearing date specified in the notice.

Hearing

(11.2) The hearing shall proceed on the date specified in the notice of application if

(a) a request for increased costs has been filed; or

(b) the court declines to grant judgment without a hearing.

(12) No objection shall be raised at the hearing that was not raised in a notice of objection to accounts, unless the court orders otherwise.

(13) At the hearing the court may assess, or refer to an assessment officer, any bill of costs, account or charge of solicitors employed by the estate trustee.

Form of Judgment

(14) The judgment on a passing of accounts shall be in Form 74.50 or 74.51."

[15] *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…"*

[16] *Rules of Civil Procedure, R.R.O 1990, Reg 194, Form 74.44 Notice of Application to Pass Accounts; Form 74.45 Notice of Objection to 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 74.49 Request 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 74.49.2 Request For Increased Costs (Estate Trustee);Form 74.49.3-Request for Increased Costs (Person Other Than Estate Trustee); Form 74.50-Judgment on Unopposed Passing of Accounts;Form 74.51-Judgment on Contested Passing of Accounts*

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

(1) – Estate Trustee

Amount of Receipts	*Amount of Costs*
Less than $100,000	*$ 800*
$100,00 or more, but less than $300,000	*1,750*

The costs legislated under Tariff C on a court passing of accounts, do not currently realistically reflect the costs actually incurred. The relevant Rule and Tariff are being considered for review and change.

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.*[18]

The jurisdiction of the court, as it extends to specific powers of inquiry on an application to pass accounts, arise from the *Estates Act*, Section 49(1) through (10).[19]

$300,000 or more, but less than $500,000	*2,000*
$500,000 or more, but less than $1,000,000	*2,500*
$1,000,000 or more, but less than $1,500,000	*3,000*
$1,500,000 or more, but less than $3,000,000	*4,000*
$3,000,000 or more	*5,000*

(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 G.S.T. on those costs.
Note: Legislative revisions to these Rules are currently under review and are expected to be revised in the future.

[18] *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."

[19] *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.*
(2) 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.

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.[20]

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.[21]

The *Estates Act*, Section 10[22] specifies and directs that an appeal from a passing of accounts judgment exceeding $200 is within the jurisdiction of the Divisional Court.

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(3) 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.

(4) 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]

(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.

(9) 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.

(10) 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."

[20]Trustee Act, R.S.O. 1990, 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

[21]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 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*[23] to include a person incapable within the meaning of sections 6[24] and 45[25] of the *SDA,* and is governed by Rule 7 of the *Rules of Civil Procedure.*[26] 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.

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[22] *Estates Act, R.S.O. 1990, c. E.21., Section 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.
[23] *Rules of Civil Procedure, R.R.O 1990, Reg. 194, Rule 1.03*
"1.03(1)…"disability" where used in respect of a person, means that the person is,
(a) a minor,
(b) 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…"
[24] *Substitute Decisions Act, S.O. 1992, c. 30, Section 6*
"6. Incapacity to manage property – 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."
[25] *Substitute Decisions Act, S.O. 1992, c. 30, Section 45*
"45. Incapacity for personal care – 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."
[26] *Rules of Civil Procedure, R.R.O 1990, Reg. 194, Rule 7, and particular Rules 7.01, 7.04 and 7.08*

Rule 7.01[27] 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.[28]

Where a proceeding is commenced against an incapable person who has no guardian, but who has an attorney with a Power of Attorney and authority to act as litigation guardian, then the attorney must act as litigation guardian.[29]

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.

[27] *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.*
[28] *Rules of Civil Procedure, R.R.O 1990, Reg. 194, Rule 7.02(1.1)*
[29] *Rules of Civil Procedure, R.R.O 1990, Reg. 194, Rule 7.03(2.1)*

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.[30]

5. The Duty to Account—When? to Whom? Relevant Limitation Periods to Consider

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, or otherwise 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 any limitation on the time within which those lawfully entitled to a passing of accounts can demand an accounting.

[30] *Rules of Civil Procedure, R.R.O 1990, Reg. 194 , Rule 7.06(2*

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

Timing aspects respecting passings and filing objections on the passings, are to be distinguished from applicable limitation periods pursuant to the *Limitations Act.*[31] And relevant too, to passings, is the court decision of *Bikur Cholim Jewish Volunteer Services v. Langston ("Bikur").* [32]

The new *Limitations Act*[33] was proclaimed in force to take effect on January 1, 2001. Under the new *Limitations Act* there is a 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 law on the provisions of the former and new *Limitations Act* as each relates to estate proceedings and in particular, passing of accounts matters.[34] Rather, reference is made to highlight the importance and considerations within the context of a passing.

[31] *Limitations Act, 2002, S.O. 2002*
[32] *Bikur Cholim Jewish Volunteer Services v. Langston, [2007] O.J. No. 415*
[33] *Limitations Act, 2002, S.O. 2002*
[34] *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.*

The Ontario Court of Appeal decision of *Bikur* above[35] and too the trial decision[36] addresses 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*[37] and the new *Limitations Act.*[38] 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 new *Limitations Act* provisions may have to be read together with s. 38 of the *Trustee Act* as to the applicability of any relevant limitation periods.[39] Additional cases concerning the nature and extent of the potential limitation issues in court ordered passings of accounts in accordance with the *Rules of Civil Procedure* would also be the cases of *Waschowski v. Hopkinson Estate;*[40] *Cameron Estate v. Button;*[41] and *Hare v. Hare.*[42] The relevant sections of the former and new *Limitations Act* 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.[43]

There are limitation period exceptions concerning those under disability.[44]

The provisions of the new *Limitations Act* should be taken into consideration, and the case law arising from the decisions post coming into effect.

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[35] *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 ; Ontario Court of Appeal, 2009*
[36] *Bikur Cholim Jewish Volunteer Services v. Langston, [2007] O.J. No. 415*
[37] *Limitations Act, R.S.O. 1990, c. L.15*
[38] *Limitations Act, 2002, R.S.O. 1990, c. L.15, c. 24*
[39] *Trustee Act, R.S.O. 1990, c. L.15, Section 38(3)*
"(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."
[40] *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*
[41] *Cameron Estate v. Button, 2005 CarswellOnt 1557, 16 E.T.R. (3d) 189*
[42] *Hare v. Hare [2006] O.J. No. 4955 (C.A.)*
[43] *Limitations Act, 2002, R.S.O. 1990, c. L.15, s. 5.4*
[44] *Limitations Act, 2002, R.S.O. 1990, c. L.15, ss. 6 and 7*

In the event of the facts unique to the passing of accounts proceedings, the new *Limitations Act* applies, 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. A review of the limitation period of two years in Section 38 of the *Trustee Act* should be made and noted that the period commences on the date of death. Moreover, discoverability principles do not interfere with the running of time respecting the limitation period. Note that the limitation period referenced in Section 38 of the *Trustee Act* runs even if there is a person under disability.[45] The cases decided prior to the effective date of the new *Limitations Act* 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.[46]

Similarly the provisions of Section 38 of the *Trustee Act* are not entirely clear insofar as whether the limitation period applies to all claims by or against a deceased person.

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.[47]

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[45] Section 38 of the Trustee Act, R.S.O. 1990, 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.

[46] *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*

[47] Limitations Act, 2002 S.O. 2002, see also sections 6,7, 11 and 19 of the New Limitations Act

In the more recent decision of *Jacques v. The Canada Trust Company,*[48] 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 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 case is currently under appeal.

6. Passing of Accounts: Procedure and Rules

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*,[49] reproduced herein at footnote 13 above.

[48] 2011 O.N.S.C. 5259, CanLII
[49] *Rules of Civil Procedure, R.R.O 1990, Reg. 194, Rule 74.1*

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.

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.

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.[50]

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.

The procedure, service and notice requirements are set out at Rule 74.18[51] and footnote 13 above.

[50] *Estates Act, R.S.O. 1990, c. E.21, Section 49.2*
[51] *Rules of Civil Procedure, R.R.O 1990, Reg. 194, Rule 74.18*

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. Any Notices of Objection must be received by the court in order to prevent an unopposed order at least 20 days before the hearing date of the application. The precise materials to be filed with the court are set out at Rule 74.18(9) and (10)[52] and the corresponding Forms at footnote 15 above, for an unopposed order on a passing of accounts.

Where there is an objection and a contested hearing for a passing of accounts, Rules 74.18(11) through (13) apply.[53] The hearing may proceed on the date specified in the Notice of Application to Pass Accounts on the objections raised in the Notices of Objection to the Accounts as filed. The attendance may result in disposition of the matter or an Order Giving Directions respecting steps to be taken to its disposition.

The costs of an unopposed Judgment are addressed in Rule 74.18(10),[54] and for an opposed hearing they are set out in Rule 74.18(13)[55] and Tariff C.[56]

In respect of costs, often the costs set out at Tariff C for an unopposed passing are insufficient. Regard should also be had to Rule 74.18(11)[57] and the form of Request for Increased Costs. This Request for Increased Costs must be served during the time between 10 days after service

[52] *Rules of Civil Procedure, R.R.O 1990, Reg. 194, Rule 74.18(9) and (10*
[53] *Rules of Civil Procedure, R.R.O 1990, Reg. 194, Rule 74.18(11) through (13)*
[54] *Rules of Civil Procedure, R.R.O 1990, Reg. 194, Rule 74.18(10*
[55] *Rules of Civil Procedure, R.R.O 1990, Reg. 194, Rule 74.18(13)*
[56] *Rules of Civil Procedure, R.R.O 1990, Reg. 194, Tariff C*
[57] *Rules of Civil Procedure, R.R.O 1990, Reg. 194, Rule 74.18(11)*

of the Notice of Application and 10 days before the date of the hearing as specified in the Notice of Application. The court has the discretion to modify costs awards.[58]

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.*[59]

The form of judgment received without a hearing is Form 74.50 under the *Rules of Civil Procedure.*[60]

7. Mediation

Mandatory mediation in contested passing of accounts matters prevails in the jurisdictions of Toronto, Ottawa and Essex County. Rule 75.1 of the *Rules of Civil Procedure* specifically applies to contested applications to pass accounts. Notwithstanding the requirement for mandatory mediation in these jurisdictions, there is nothing preventing the obtaining of a mediation order in other jurisdictions where the parties agree or where the court so orders in accordance with the inherent jurisdiction of the court,[61] and the broad discretion afforded to the court in passing of accounts matters. Rule 75.1.05 provides for the applicant on a passing of accounts to obtain directions at the initial return date of the application. Likewise it may be prudent to explore the exemption provisions in respect of mandatory mediation at Rule 75.1.04.

[58] *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.)*
[59] *Ontario Rules of Civil Procedure, R.R.O 1990, Reg. 194, Form 74.51*
[60] *Ontario Rules of Civil Procedure, R.R.O 1990, Reg. 194, Form 74.50*
[61] *Ontario Rules of Civil Procedure, R.R.O 1990, Reg. 194, Rule 1, Courts of Justice Act, R.S.O. 1990, C. c.43, Section 11*

8. 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 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*[62] 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.[63]

Finally, in addition to Rules 74.15 through 74.18 of the *Rules of Civil Procedure*, Rule 75.06 provides the 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.[64]

Rule 58.08(1)[65] 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.*[66]

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[62] *Estates Act, R.S.O. 1990, c. E.21, s. 49(4)*
[63] *Turk v. Turk [1957] 0.R. 482 (C.A.)*
[64] *Rules of Civil Procedure, R.R.O. 1990,, Rule 49*
[65] *Rules of Civil Procedure, R.R.O. 1990, Rule 58.08(1)*
[66] *Trustee Act, R.S.O. 1990, s. 64*
"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."

9. 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)[67] and Section 61[68] 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. Instead, the procedure for assessing compensation has evolved mainly from the cases of *Laing Estate v. Laing Estate;*[69] *Flaska Estate;*[70] *Gordon Estate;*[71] and *Jeffery Estate.*[72]

[67] *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."
[68] *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."
[69] *Laing Estate v. Laing Estate (1998), (sub.nom. Laing Estate, Re) 113 O.A.C. 335 (C.A.)*
[70] *Flaska Estate, Re (October 20, 1998), Doc. CA C29542 (Ont. C.A.)*
[71] *Gordon Estate, Re (October 20, 1998), Doc. CA C30225 (Ont. C.A.)*
[72] *Jeffrey Estate, Re (1990), 39 E.T.R. 173 (Ont. Surr. Ct.)*

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.*[73] sets out the five factors to be considered as follows:

(1) the size of the trust;

(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.*[74] 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.

[73] *Re Toronto General Trust v. Central Ontario Railway Co. (1905), 6 O.W.R. 350 (H.C.), at page 354*
[74] *Farmers' Loan and Savings Co (Re) (1904), 3 O.W.R. 837, at page 389*

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. For a comprehensive article on the historical development of executor's compensation and its current application, see "*Executors' Compensation*"[75] by Jordan Atin; and "*Estate Litigation"* by Brian Schnurr,[76] and "*Compensation and Duties of Estate Trustees, Guardians & Attorneys"*[77] by Jennifer J. Jenkins and H. Mark Scott.

These three Court of Appeal cases established that a two-step process in effect would take place where the usual percentages or tariff guidelines were 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 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.[78]

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.

[75] *"Executors' Compensation" (1999), 19 E.T.P.J. 1*
[76] *Schnurr, B.A., Estate Litigation, 2nd ed. (Toronto: Carswell), Chapter 5.7*
[77] *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*
[78] *Re Kilgore Estate (April 25, 1984) Doc. 25014/47 (Ont. Surr. Ct.)*

10. Attorney or 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.[79] 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.[80] 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.[81] 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.[82]

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 property who does not receive compensation is judged by a lower standard

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[79] *Substitute Decisions Act, 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."
[80] *Substitute Decisions Act, S.O. 1992, c. 30, s. 40(2)*
[81] *Substitute Decisions Act, S.O. 1992, c. 30, s. 40(3)(a)*

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.

11. 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*[83] held that pre-taking was appropriate where the compensation was for work already performed or expenses already disbursed. However, the cases of *Pilo Estate,*[84] the *Knoch Estate,*[85] and *Re Flaska,*[86] 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*[87] declined the application of *Re Knoch*[88] 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.*[89] It is difficult to predict with any certainty, the outcome of the pre-taking of compensation given the inconsistent treatment by

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[82] *Substitute Decisions Act, S.O. 1992, c. 30, s. 40(3)(b)*
[83] *Re William George King Trust (1994), 2 E.T.R. (2d) 123 (O.C.G.D)*
[84] *Re Pilo Estate [1998] O.J. No. 4521 (O.C.G.D.)*
[85] *Knoch, Re (1982), 12 E.T.R. 162*
[86] *Flaska Estate, Re (October 20, 1998), Doc. CA C29542 (Ont. C.A.)*
[87] *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*
[88] *Knoch, Re (1982), 12 E.T.R. 162*

courts historically, and given some of the statutory provisions, for example, the *SDA*, s. 40,[90] which permits pre-taking compensation for guardians and attorneys.

Again, note the *SDA,*[91] a guardian or attorney can pre-take compensation monthly, quarterly or annually.[92]

12. Compensation Fixed by Will or Testamentary Instrument

Sometimes the Will document will fix the compensation to be awarded to the estate trustee. There 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.[93]

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.[94]

13. Guardianship or Estate Trustee During Litigation Compensation

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

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[89] *Re Andrachuk Estate (2000) 32 E.T.R. (2d) 1 (Ont. S.C.J.)*
[90] *Substitute Decisions Act, S.O. 1992, c. 30, s. 40*
[91] *Substitute Decisions Act, S.O. 1992, c. 30, s. 40*
[92] *Substitute Decisions Act, S.O. 1992, c. 30, , s. 40(2)*
[93] *Re Andrachuk Estate (2000) 32 E.T.R. (2d) 1 (Ont. S.C.J.)*
[94] *" 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"*

litigation[95] 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.[96]

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.

14. 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.

[95] *Estates Act, R.S.O. 1990, c. E.21, 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."
[96] *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*[97] 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*[98] 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.*[99] 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.

15. Personal Care Guardian Compensation

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.

[97] *Re Brown (1999), 31 E.T.R. (2d) 164 (Ont. S.C.J.)*
[98] *Cheney v. Byrne*, (*Litigation Guardian of*) (2004) 9 E.T.R. (3rd) 236 (Ont. S.C.J.)
[99] *Shibley Estate, Re [2004] O.J. No. 5246 (Ont. S.C.J.)*

(a) The case of Re Brown[100] 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 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[101], 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

[100] *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)

[101] *The Trustee Act*, R.S.O. 1990

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.

This issue was also before the Court in *Cheney v Byrne*.[102] 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[103] 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*[104] 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

[102] *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)
[103] *Sandhu (Litigation Guardian of) v. Wellington Place Apartments*, 2006 CarswellOnt 3668, [2006] O.J. No. 2448 (Ont S.C.J. Jun 16, 2006)
[104] *Kiomall v Kiomall*, 2009 CarswellOnt 2246 (Ont. S.C.J. Apr 27, 2009)

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*[105], an allocation was made for past attendant care to the parents Finally, payments to third parties, for instance: to solicitors for estate trustee work,[106] 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".* [107] Also be careful to note the provisions of the *Trustee Act*, s. 61(4).[108]

Additionally, 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.[109]

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[105] *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)

[106] *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.)*

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

[108] *Trustee Act, R.S.O. 1990, s. 61(4)*
"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."

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

Note that Section 35 of the *Trustee Act*[110] 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.[111]

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,

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[110] *Trustee Act, R.S.O. 1990, Section 35*
"35. 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."
[111] *Substitute Decisions Act, 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*

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.

16. More Recent Trends Elicited in Some Noteworthy Contested Passing of Accounts Cases

I Estate Trustee Accounts

(a) Irwin v. Robinson[112]

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 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.*"

[112] *Irwin v. Robinson 2007 WL 2939048 (Ont. S.C.J.), 2007 CarswellOnt 6368 at page 12*

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*[113] as well as the tariff percentage approach and the five factors approach in *Toronto General Trust Corporation v. Central Ontario R.W. Co.,*[114] 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.*[115]

Finally, on the assessment of legal costs,[116] 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.

[113] *Trustee Act, R.S.O. 1990, s. 61*
[114] *Re Toronto General Trust v. Central Ontario Railway Co. (1905), 6 O.W.R. 350 (H.C.)*
[115] *Brown Trust Re, [1995] O.J. No. 1424, at paragraph 6*
[116] *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*

(b) Drindak v. Bachinski Estate[117]

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 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., stated 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: Sharp v. Lush, supra; Harbin v. Darby (No. 1)(1860), 28 Beav. 325, 54 E.R. 391; Chalinder & Herrington, Re, [1907] 1 Ch. 58 and Mott v. Roemer, supra….* 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: *Vanek v. O'Hara, supra*. … If a solicitor is paid from estate funds for doing executor's work, that should be considered in fixing the executor's compensation: *Lloyd, Re.* (sub nom. *Lloyd v. Williams)*(1954), 12 W.W.R. (N.S) 445 (Man. C.A.) and *Preboy Estate, Re, supra*. 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[118]

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

[117] *Drindak v. Bachinski Estate 2007 WL 3077449 (Ont. S.C.J.), 2007 CarswellOnt 6776*
[118] *Rade Estate, Re, 2007 WL 2852604 (Ont. S.C.J.); 2007 CarswellOnt 6190*

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.

(d) Freedman Estate[119]

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., taking into consideration s. 61(1) of the *Trustee Act*[120] 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*

[119] *Re Freeman Estate, 2007 WL 2678195 (Ont. S.C.J., 2007 CarswellOnt 5654*
[120] *Trustee Act, R.S.O. 1990, s. 61(1)*

Co. and *Re Gordon Estate,*[121] as well as *Re Schroeter Estate,*[122] *Wood Estate v. Wood;*[123] and *Re Mortimer*[124] and making note of the Court of Appeal's Judgment of Killeen J., in *Re Jeffrey* Estate[125] at page 179, in respect of the compensation calculation process, stated:

> *"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."*

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 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.*[126]

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

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[121] *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.)*
[122] *Re Schroeter Estate (2001) 57 O.R. (3d) 8 (S.C.J.)*
[123] *Wood Estate v. Wood, [2005] O.J. No. 4063*
[124] *Re Mortimer, [1936] O.R. 438 (C.A.)*
[125] *Jeffrey Estate, Re (1990), 39 E.T.R. 173 (Ont. Surr. Ct.)*
[126] *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.)*

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,[127] 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[128]

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*[129] and again applied the factors in the leading cases of *Laing Estate* and *Re Jeffrey Estate.*[130] 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

[127] *Freeman Estate, Re., 2007 WL 2985493 (Ont. S.C.J.), 2007 CarswellOnt 6501*
[128] *Re Archibald Estate, 2007 WL 1765686 (Ont. S.C.J.), 2007 CarswellOnt 3872*
[129] *Trustee Act, R.S.O. 1990, , s. 61*
[130] *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.)*

$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.

(f) O'Sullivan v O'Sullivan [131]

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*[132] 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*[133] 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[134]

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.

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[131] *O'Sullivan v. O'Sullivan, 2007 WL 1219777 (Ont. S.C.J.), 2007 CarswellOnt 2462*
[132] *Trustee Act, R.S.O. 1990, s. 61(1)*
[133] *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.)*
[134] *Re Anthony Estate, 2006 CarswellOnt 8184*

(h) Hughson v Hume Estate[135]

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.

(i) Watterworth Estate, Re[136]

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 and therefore, though 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 where unnecessarily obstructionist

(j) Estate of Thomas Walter Wood[137]

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

[135] *Hughson v. Hume Estate, 30 E.T.R. (3d) 78*, 2007 CarswellOnt 23
[136] *Watterworth Estate (Re) [1996] O.J. No. 269*
[137] *Wood Estate v. Wood, [2005] O.J. No. 4063*

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[138]

This principle was impressed upon 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:*
> *(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[139] analysis. Spies J., provides the following worthy detailed analysis:

[138] *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*
[139] *Watterworth Estate (Re) [1996] O.J. No. 269*

> *"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[140] 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.*
>
> *[39] Mr. Woods relies on a number of decisions, including Re Wright Estate[141]. 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[142] 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*

[140] *Watterworth Estate (Re) [1996] O.J. No. 269*
[141] *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.)*
[142] *Re Pilo Estate, [1998] O.J. No. 4521 (O.C.G.D.)*

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,[143] 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 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[144] 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

[143] *Re Bedont Estate, [2004] O.J. No. 2015*
[144] *Townsend v. Doherty [1993], O.J. No. 713 (Gen. Div.)*

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 intestity. 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 receive 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[145] 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[146]. 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 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[147] 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*

[145] *Re Cutcliffe's Estate Cohen Le Duc v. Veness [1959] P. 6*
[146] *Speirs v. English [1907] P. 122*
[147] *Re Joseph Estate (1993) 14 O.R. (3d) 628, [1993] O.J. No. 1672*

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 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[148]. 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

[148] *Re Watterworth Estate [1996] O.J. No. 269*

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[149] *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[150]

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 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[151]

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

[149] *Schweitzer v. Plasecki [1998] O.J. No. 177*
[150] *Marlow v. Marlow Estate, 2007 CarswellOnt 4117*
[151] *Fair v. Campbell Estate (2002), 3 E.T.R. (3d) 67 (Ont. S.C.J.)*

In *Fair v. Campbell Estate* it was found, while an attorney is certainly a fiduciary, the *SDA*[152] 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, Lofchik J., referred to the case of *Fales v. Canada Permanent Trust Co.*[153] 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 Lofchik 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 there was no Judgment with respect to costs.

(n) Ali v. Fruci[154]

In *Ali v. Fruci,* a motion for an order for leave to commence an action pursuant to s. 42 of the *SDA*[155] 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.

[152] *Substitute Decisions Act, S.O. 1992, c. 30, s. 40, at s. 38(1), s. 32 and s. 42(1)*
[153] *Fales v. Canada Permanent Trust Co. (1976), [1977] 2 S.C.R., 302 (S.C.C.)*
[154] *Ali v. Fruci, 2006 CarswellOnt 2165, 22 E.T.R. (3d) 189; Ali v. Fruci, 2006 CarswellOnt 1706, 22 E.T.R. (3d) 187*
[155] *Substitute Decisions Act, S.O. 1992, c. 30, s. 40, s. 42*

(o) Estate of Shirley Bernice Redrupp[156]

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) Re Kaptyn [157]

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.

[156] *Estate of Shirley Bernice Redrupp, Endorsement, Lane J., Ont. S.C.J. Court File No. 01-2039/03, unreported*
[157] *Re Kaptyn*, 2009 CarswellOnt 7548 (Ont. S.C.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.[158] 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.[159]

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

[158] *Re Kaptyn, 2009 CarswellOnt 7548 (Ont. S.C.J.)* at par. 17.
[159] *Re Kaptyn, 2009 CarswellOnt 7548 (Ont. S.C.J.),* at par. 17.

Toronto and the fact that all proceedings to date [had] taken place in Toronto."[160] As stated by the court, "the already-established centre of gravity of the case [was] Toronto."[161]

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."[162] The court ordered that the passing of accounts be consolidated, and heard in Toronto.

(q) Pachaluck Estate v. DiFebo[163]

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

[160] *Re Kaptyn, 2009 CarswellOnt 7548 (Ont. S.C.J.),* at par. 20.
[161] *Re Kaptyn, 2009 CarswellOnt 7548 (Ont. S.C.J.)* , at par. 20.
[162] *Re Kaptyn, 2009 CarswellOnt 7548 (Ont. S.C.J.),* at par. 22.
[163] *Pachaluck Estate v. DiFebo*, 2009 CarswellOnt 2278; additional reasons in *Pachaluck Estate v. DiFebo*, 2009 CarswellOnt 3980.

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,"[164] 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 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*[165]). The court cited the

[164] *Pachaluck Estate v. DiFebo*, 2009 CarswellOnt 2278; additional reasons in *Pachaluck Estate v. DiFebo*, 2009 CarswellOnt 3980, at par. 37.
[165] *Laing Estate v. Laing Estate* (1998), 113 O.A.C. 335 (Ont. C.A.)

case of *Heron Estate,*[166] 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.

[166] *Heron Estate, Re* (1996), 10 E.T.R. (2d) 281 (Ont. Gen. Div.)

(r) Re Kostiw Estate[167]

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 the estate was complicated by the beneficiary's "hostility and intransigence,"[168] 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." [169] 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.

[167] *Re Kostiw Estate, 2009 CarswellOnt 221 (Ont. S.C.J.).*
[168] *Re Kostiw Estate, 2009 CarswellOnt 221 (Ont. S.C.J.)* at par. 31.

(s) Re Raeburn Estate[170]

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,"[171] 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."[172]

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 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."[173] 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

[169] *Re Kostiw Estate, 2009 CarswellOnt 221 (Ont. S.C.J.),* at par. 32.
[170] *Re Raeburn Estate, 2009 CarswellOnt 6431 (Ont. S.C.J.).*
[171] *Re Raeburn Estate, 2009 CarswellOnt 6431 (Ont. S.C.J.).* at paras. 7-8.
[172] *Re Raeburn Estate, 2009 CarswellOnt 6431 (Ont. S.C.J.).* at par. 10.
[173] *Re Raeburn Estate, 2009 CarswellOnt 6431 (Ont. S.C.J.).* at par. 22.

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.

(t) Mitchell Estate[174]

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);[175] 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, either through a detailed Bill of Costs or an easily understandable copy of the relevant dockets.[176]

[174] *Mitchell Estate, Re*, 2010 CarswellOnt 1662 (Ont. S.C.J.)
[175] *Mitchell Estate, Re*, 2010 CarswellOnt 1662 (Ont. S.C.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."
[176] *Mitchell Estate, Re*, 2010 CarswellOnt 1662 (Ont. S.C.J.), at par. 4.

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."[177] 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."[178] 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."[179] 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."[180] 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.[181]

(u) Lloyd v. Myers Estate[182]

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

[177] *Mitchell Estate, Re*, 2010 CarswellOnt 1662 (Ont. S.C.J.), at par. 5.
[178] *Mitchell Estate, Re*, 2010 CarswellOnt 1662 (Ont. S.C.J.), at par. 5
[179] *Mitchell Estate, Re*, 2010 CarswellOnt 1662 (Ont. S.C.J.), at par. 5
[180] *Mitchell Estate, Re*, 2010 CarswellOnt 1662 (Ont. S.C.J.), at par. 9.
[181] *Mitchell Estate, Re*, 2010 CarswellOnt 1662 (Ont. S.C.J.), at par. 9
[182] *Lloyd v. Myers Estate*, 2009 CarswellOnt 8259 (Ont. S.C.J.).

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 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."[183]

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."[184] 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."[185] The court cited Lord Blanesburgh of the Privy Council in the case of *Campbell v. Hogg,*[186] 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*

[183] *Lloyd v. Myers Estate*, 2009 CarswellOnt 8259 (Ont. S.C.J.)., at par. 6.
[184] *Lloyd v. Myers Estate*, 2009 CarswellOnt 8259 (Ont. S.C.J.). at par. 3.
[185] *Lloyd v. Myers Estate*, 2009 CarswellOnt 8259 (Ont. S.C.J.). *at par. 4.*
[186] *Campbell v. Hogg (1930), 39 O.W.N. 85 (Ontario P.C.), at 86 -87*

Trust Co.[187] and *Conrade Estate,*[188] 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 1970s 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."[189]

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."[190] 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 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.*[191]

[187] *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.)
[188] *Conrade Estate, Re*, 2005 CarswellOnt 7058 (Ont. S.C.J.)
[189] *Conrade Estate, Re*, 2005 CarswellOnt 7058 (Ont. S.C.J.), at par. 11.
[190] *Conrade Estate, Re*, 2005 CarswellOnt 7058 (Ont. S.C.J.), at par. 12.
[191] *Conrade Estate, Re*, 2005 CarswellOnt 7058 (Ont. S.C.J.), at par. 14.

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.

(v) Balanyk v. Balanyk Estate[192]

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*").[193]

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.

[192] *Balanyk v. Balanyk Estate, 2010 CarswellOnt 4448*
[193] *Succession Law Reform Act, R.S.O. 1990, c. S.26.*

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."[194] 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.

(w) Zimmerman v. McMichael Estate[195]

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.

[194] *Balanyk v. Balanyk Estate, 2010 CarswellOnt 4448, at par. 19.*
[195] *Zimmerman v. Fenwick, 2010 CarswellOnt 8372.*

In reasons released May 20, 2010,[196] 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*[197], 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 response to the objections raised with respect to the accounts produced by him were repealed.[198] 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

[196] *Zimmerman v. McMichael Estate*, 2010 ONSC 2947 (Ont. S.C.J.)
[197] *Zimmerman v. Fenwick*, 2010 ONSC 3855 (Ont. S.C.J.)
[198] *Zimmerman v. Fenwick*, 2010 CarswellOnt 8372, at par. 2.

disbursements and why such expenses were incurred.[199] It was suggested that Mr. Zimmerman provide receipts and vouchers, if available, or, if not, that he provide an explanation.[200]

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.[201] 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.

(x) Re Kalczynski[202]

The former attorney/current 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.

[199] *Zimmerman v. Fenwick*, 2010 CarswellOnt 8372, at par. 2.
[200] *Zimmerman v. Fenwick*, 2010 CarswellOnt 8372, at par. 2.
[201] *Zimmerman v. Fenwick*, 2010 CarswellOnt 8372, at par. 4.
[202] *Re Kalczynski*, 2010 CarswellOnt 8326.

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.

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,*[203] 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.[204]

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

[203] *Lanthier v. Dufresne Estate*, [2002] O.J. No. 3397 (Ont. S.C.J.).
[204] *Re Kalczynski*, 2010 CarswellOnt 8326, at paras. 8 & 11.

help.[205] 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.

(y) DeLorenzo v. Beresh[206]

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*.

[205] *Re Kalczynski*, 2010 CarswellOnt 8326, at par. 9.
[206] *DeLorenzo v. Beresh 2010 CarswellOnt 7756 (Ont. S.C.J.)*

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 [...]"[207] 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.[208] 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

[207] *DeLorenzo v. Beresh 2010 CarswellOnt 7756 (Ont. S.C.J.)* , at par. 12.
[208] *DeLorenzo v. Beresh 2010 CarswellOnt 7756 (Ont. S.C.J.),* at par. 20.

must not be required to pay them personally."[209] According to the court, these charges and expenses are normally awarded at the time of the audit.[210]

According to the court, this is to be contrasted with contentious or adversarial legal proceedings, 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.[211]

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.[212]

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

[209] *DeLorenzo v. Beresh 2010 CarswellOnt 7756 (Ont. S.C.J.), at para 20*
[210] *DeLorenzo v. Beresh 2010 CarswellOnt 7756 (Ont. S.C.J.),* at par. 21.

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.

(z) Craven v. Osidacz Estate [213]

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*"[214] [emphasis added] and not 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*[215] and *Coppel v. Coppel Estate*.[216] 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*

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[211] *DeLorenzo v. Beresh 2010 CarswellOnt 7756 (Ont. S.C.J.),* at par. 22.
[212] *DeLorenzo v. Beresh 2010 CarswellOnt 7756 (Ont. S.C.J.),* at par. 23.
[213] *Craven v. Osidacz Estate, 2010 CarswellOnt 8975*
[214] *Craven v. Osidacz Estate, 2010 CarswellOnt 8975, at par. 21.*
[215] *Goodman Estate v. Geffen*, [1991] 2 S.C.R. 353 (S.C.C.), at 390 and 91.
[216] *Coppel v. Coppel Estate*, [2001] O.J. No. 5246 (Ont. S.C.J.).

> *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,[217] 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.*[218]

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.[219]

With respect to future expenditures on the litigation, however, the court found that it would be inequitable in the circumstances of this particular case for the estate trustee to pay for the

[217] *Craven v. Osidacz Estate, 2010 CarswellOnt 8975,* at par. 26.
[218] *Craven v. Osidacz Estate, 2010 CarswellOnt 8975,* at par. 23, citing to *Salter v. Salter Estate*, 2009 CarswellOnt 3175 (Ont. S.C.J.).
[219] *Coupland Estate Re, 2005 CarswellOnt 8868 (Ont. S.C.J.)* , at par. 24.

litigation out of the assets of the estate, given his personal interest as a beneficiary in the outcome.

(aa) Chan Estate v. Chan Estate[220]

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,"[221] 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.

[220] *Chan Estate v. Chan Estate*, 2011 CarswellOnt 5810 (Ont. S.C.J.).

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 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."[222] 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.

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[221] *Chan Estate v. Chan Estate*, 2011 CarswellOnt 5810 (Ont. S.C.J.), par. 22.
[222] *Chan Estate v. Chan Estate*, 2011 CarswellOnt 5810 (Ont. S.C.J.), at par. 57.

(bb) Langston v. Landen[223]

The subsequent 2010 decision of *Langston v. Landen* is an important case that demonstrates 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* 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

[223] *Langston v. Landen, 2010 CarswellOnt 9919.*

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.

In light of her findings of contempt, Greer J., stated the following:

> "T*he 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 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."*[224]

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."[225]

[224] *Langston v. Landen,* 2010 CarswellOnt 9919. at par. 77.
[225] *Langston v. Landen,* 2010 CarswellOnt 9919. par. 46.

Mr. Landen attempted to appeal Greer J.'s decision,[226] however, the Court of Appeal refused to interfere with the sentence, finding that it was fit in the circumstances.

(cc) Bikur Cholim Jewish Volunteer Services v. Langston [227]

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 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.

[226] *Langston v. Landen*, 2011 CarswellOnt 1948 (Ont. C.A.).
[227] *Bikur Cholim Jewish Volunteer Services v. Langston*, 2009 CarswellOnt 1105 (Ont. C.A.); reversing (2007), 2007 CarswellOnt 655 (Ont. S.C.J.).

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*[228] and held 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."[229] 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."[230]

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."[231] 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."[232] Rather, in *Simone v. Cheifetz,*[233] the Court of Appeal suggested that "an audit under s. 49 is not the appropriate vehicle for litigating a claim of breach of trust."[234]

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[228] *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 paragraph 13*
[229] *Bikur Cholim Jewish Volunteer Services v. Penna Estate, 2009 CarswellOnt 1105, 2009 ONCA, reversing (2007) 2007 CarswellOnt 655 (Ont. S.C.J.), at par. 37.*
[230] *Bikur Cholim Jewish Volunteer Services v. Penna Estate, 2009 CarswellOnt 1105, 2009 ONCA, reversing (2007) 2007 CarswellOnt 655 (Ont. S.C.J.)*
[231] *Bikur Cholim Jewish Volunteer Services v. Penna Estate, 2009 CarswellOnt 1105, 2009 ONCA, reversing (2007) 2007 CarswellOnt 655 (Ont. S.C.J.),* at par. 49.
[232] *Bikur Cholim Jewish Volunteer Services v. Penna Estate, 2009 CarswellOnt 1105, 2009 ONCA, reversing (2007) 2007 CarswellOnt 655 (Ont. S.C.J.),* at par. 49.
[233] *Simone v. Cheifetz* (2000), 36 E.T.R. (2d) 297 (Ont. C.A.), at paragraph 17
[234] *Simone v. Cheifetz* (2000), 36 E.T.R. (2d) 297 (Ont. C.A.), at paragraph 17

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,*[235] 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,*[236] 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 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:[237]

> *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*

[235] *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.),
[236] *Swain Estate v. Lake of the Woods District Hospital* (1992), 9 O.R. (3d) 74 (Ont. C.A.)
[237] *Swain Estate v. Lake of the Woods District Hospital* (1992), 9 O.R. (3d) 74 (Ont. C.A.), para 56

> *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;*[238]

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.

(dd) The Estate of Roman Krentz[239]

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

[238] *Swain Estate v. Lake of the Woods District Hospital* (1992), 9 O.R. (3d) 74 (Ont. C.A.)
[239] *Estate of Roman Krentz*, 2011 O.N.S.C. 1653

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.

II Attorney, Guardian Accounts

(a) *Strickland v. Thames Valley District School Board*[240]

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,*[241] 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*[242] 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*[243] 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,*[244] 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 compensation, leaving the sum of $160,760.90 upon which compensation may be calculated in accordance with the *SDA.*[245] 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.

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[240] *Strickland v. Thames Valley District School Board, 2007 WL 2884417 (Ont. S.C.J.), 2007 CarswellOnt 6248*
[241] *Stickells Estate v. Fuller, [1998] O.J. No. 2940 at page 9, para. 40*
[242] *Roger Estate v. Leung, [2001] O.J. No. 2171 at page 10, para. 41*
[243] *Roger Estate v. Leung, [2001] O.J. No. 2171 at page 12, para. 42*
[244] *Stickells Estate v. Fuller, [1998] O.J. No. 2940 at page 9, para. 40*
[245] *Substitute Decisions Act, S.O. 1992, c.30*

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.*[246] 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,*[247] 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.

[246] *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.)*
[247] *Estates Act, R.S.O. 1990, c. E.21, ss. 49(2) and 49(3)*

(b) *Re Coupland Estate*[248]

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.

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"[249] 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*

[248] *Coupland Estate, Re*, 2005 CarswellOnt 8868 (Ont. S.C.J.).
[249] *Coupland Estate, Re*, 2005 CarswellOnt 8868 (Ont. S.C.J.), at par. 4.

> *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."*[250]

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.[251] 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 was both entitled to and did bestow gifts on the respondent wife."*[252]

The costs of the appeal were ordered and payable to the respondent from the appellants' share as beneficiaries of the estate.[253]

(c) *Cornacchia v. Cornacchia*[254]

In the decision of *Cornacchia v. Cornacchia,* Shaughnessy J., referred to the decision in *Nystrom v. Nystrom*[255] on which he notes the facts as similar. Shaughnessy J., ordered that the

[250] *Coupland Estate, Re*, 2005 CarswellOnt 8868 (Ont. S.C.J.), at par. 5.
[251] 2006 CarswellOnt 3071 (Ont. C.A.).
[252] *Coupland Estate, Re*, 2005 CarswellOnt 8868 (Ont. S.C.J.), at par. 2.
[253] *Coupland Estate, Re*, 2005 CarswellOnt 8868 (Ont. S.C.J.), at par. 4.
[254] *Cornacchia v. Cornacchia, 2007 WL 129717 (Ont. S.C.J.), 2007 CarswellOnt 223*
[255] *Nystrom Estate v. Nystrom, 2007 WL 576570 (Ont. S.C.J.), 2007 CarswellOnt 1064*

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.*[256]

Though s. 49 of the *Estates Act*[257] 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*[258]and *Cornacchia*[259] with *Disera*[260] 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*[261] 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.

[256] *Substitute Decisions Act, S.O. 1992, c. 30, s. 40*
[257] *Estates Act, R.S.O. 1990, c. E.21, s. 49*
[258] *Nystrom Estate v. Nystrom, 2007 WL 576570 (Ont. S.C.J.), 2007 CarswellOnt 1064*
[259] *Cornacchia v. Cornacchia, 2007 WL 129717 (Ont. S.C.J.), 2007 CarswellOnt 223*
[260] *Re Disera et al. v. Disera et al., Endorsement, Clark J., Ont. S.C.J. Court File No. 6209/02*
[261] *Simone v. Cheifetz, [200] O.J. No. 4191; [2005] O.J. No. 2992*

(d) *Marcoccia (Litigation Guardian of) v. Gill*[262]

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*[263] 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*[264]

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:

[262] *Marcoccia (Litigation Guardian of) v. Gill, 2007 WL 109530 (Ont. S.C.J.), 2007 CarswellOnt 2087*
[263] *Substitute Decisions Act, S.O. 1992, c. 30, s. 40*
[264] *Volchuk Estate v. Kotsis, 2007 WL 2111406 (Ont. S.C.J.), 2007 CarswellOnt 4668*

> *"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."*[265]

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*[266]

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[267] 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,[268] 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.

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[265] *Volchuk Estate v. Kotsis, 2007 WL 2111406 (Ont. S.C.J.), 2007 CarswellOnt 4668, para. 159*
[266] *Nystrom v. Nystrom, 25 E.T.R. (3d) 297*
[267] *Substitute Decisions Act, S.O. 1992, c. 30, s. 40, s. 42(4)(6)*
[268] *Nystrom Estate v. Nystrom, 2007 WL 576570 (Ont. S.C.J.), 2007 CarswellOnt 1064*

Shaw J., cited the provisions of the *SDA*[269] at s. 40, which provide for the annual taking of compensation in accordance with a prescribed fee schedule set out in Regulation 26/95.[270] 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*[271] 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 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*[272]

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

[269] *Substitute Decisions Act, S.O. 1992, c. 30, s. 40, s. 40*
[270] *Substitute Decisions Act, S.O. 1992, c. 30, s. 40, O. Reg 26/9*
[271] *Substitute Decisions Act, S.O. 1992, c. 30*
[272] *Craig Estate v. Craig Estate (Trustee of), 2007 WL 260509 (Ont. S.C.J.), 2007 CarswellOnt 395*

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[273] and in particular ss. 32 and 38. Lofchik J., referred to the decisions in *Harris v. Rudolph* and *Fair v. Campbell Estate*[274] 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*[275]

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 to the guardians to claim compensation relating to the receipt of rents from the units in the two

[273] *Substitute Decisions Act, S.O. 1992, c. 30, s. 40, ss. 32 and 38*
[274] *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.)*
[275] *Bagnall v Bruckler, 2009 CarswellOnt 5062 (Ont. S.C.J.)*

buildings,"[276] 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".[277]

(i) *Re Damm Estate*[278]

In answering the question of "what form of accounts must a guardian of property use when filing an application to pass accounts?"[279] Brown J., affirmed an important principle of law, stating that subsection 42(6) of the *SDA*[280] 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*"[281] [emphasis added]. Practice that has been developed in the estates bar, is to divide the accounts into capital receipts and

[276] *Bagnall v Bruckler, 2009 CarswellOnt 5062 (Ont. S.C.J.) at par. 12.*
[277] *Bagnall v Bruckler, 2009 CarswellOnt 5062 (Ont. S.C.J.),* at par. 16.
[278] *Damm Estate, Re*, 2010 CarswellOnt 6938.
[279] *Damm Estate, Re*, 2010 CarswellOnt 6938 at par. 1.
[280] *Substitute Decisions Act*, 1992, S.O. 1992, c. 30.
[281] *Damm Estate, Re*, 2010 CarswellOnt 6938, at par. 5.

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".[282]

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 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.*[283]

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).

(i) *Vano Estate*[284]

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

[282] *Damm Estate, Re*, 2010 CarswellOnt 6938, at par. 5.
[283] *Damm Estate, Re*, 2010 CarswellOnt 6938, at par. 6.
[284] *Vano Estate, Re 2012 CarswellOnt 74, 2012 ONSC 262*

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 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.)....*[285]

[285] *Vano Estate, Re 2012 CarswellOnt 74, 2012 ONSC 262, paras 26, 27*

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 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.*[286]

[286] *Vano Estate, Re 2012 CarswellOnt 74, 2012 ONSC 262, paras 36, 37, 38 39*

CONCLUSIONS

Recent trends over the past few years from in or about 2007 to date, in trustee passing of accounts applications see the court consistently applying the percentages and the five factors approach which has developed over time in the case law in measuring the appropriateness of compensation claims that the courts are being asked to reduce or increase.

Care and management, or special fees claimed are rarely awarded.

The courts appear to be sending a clear message to trustees, estate trustees and fiduciaries alike, as well as beneficiaries, that conduct must be reasonable or the consequences attendant to unreasonable conduct will be costs awards, which are punitive in nature.

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.

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