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THE PASSING OF FIDUCIARY ACCOUNTS

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PASSING OF FIDUCIARY ACCOUNTS

A passing of accounts is not strictly, in legal terms, a mandatory requirement. Rather, an estate trustee, attorney, or guardian, may choose to pass its accounts, or alternatively, may be compelled to do so by those legally entitled. 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 beneficiaries of an estate are minors, or incapable of property management, and particularly in circumstances where compensation is being sought, the policy of the Ontario Children's Lawyer (the "OCL") and the Public Guardian and Trustee (the "PGT") generally, with exceptions, mandate for accounts to be passed.

The court has the discretion to grant or refuse an order for a 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, the complexity of the administration, whether there has been litigation, the provisions of the Will, Trust, Power of Attorney document, or Guardianship Order, the status or terms of taking compensation and the provisions of the Will or Trust in that regard, liability factors, releases, claims, creditor claims, or other.

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 move for a passing of accounts to obtain court approval of the estate administration, or simply rely on releases and, where appropriate, indemnities.

The *Estates Act*, Section 48,[2] further provides that whether an estate trustee, or solely a trustee, the potential requirement to pass accounts exists and is identical.

The *Estates Act*, Section 50.(1),[3] actually provides that an executor or an administrator shall not be required by any court to render an account of the property of the deceased, unless at the instance or on behalf of some person interested in such property, or of a creditor of the deceased. This section further provides that an executor or administrator is not otherwise compellable to account before any judge.

Jurisdiction of the Attorney and Guardian for Property to Pass Accounts

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 of the accounts

[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*, supra, 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."

of an attorney be passed.[4] Although a passing of accounts may not be required, it may still be advisable to make application for a passing, since once the accounts have been passed, they receive court approval and cannot be questioned at a later date by persons having notice of the passing of accounts (except in the case of fraud or mistake).

Prior to the enactment of the *Substitute Decisions Act, 1992*, 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 his or her accounts, except in the case where the grantor of the power had become incapable, in which case the attorney could be required to pass accounts for the period of the grantor's incapacity.

The relevant provisions of the *Substitute Decisions Act*, ss. 42(1)–(8)[6] identify the circumstances where a court passing of accounts may arise:

(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

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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

[6] *Substitute Decisions Act, supra*, s. 42(1)-(8)

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 *Substitute Decisions Act.*[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 the management plan established for the property.[9] The only exception to this requirement concerns that of the Public Guardian and Trustee, who is not required to file a management plan and acts in accordance with the policies of the Public Guardian and Trustee. If there is a management plan, then pursuant to ss. 32(11) of the *Substitute Decisions Act*, the plan may be amended from time to time with the Public Guardian and Trustee's approval. Note that notwithstanding any requirement by a court order for court approval, the statute states that the Public Guardian and Trustee may approve the amendment of a management plan.

Similar to the *Rules of Civil Procedure*, Ontario Regulation 100/96 to the *Substitute Decisions Act*, 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. The Ontario Regulation 100/96 to the *Substitute Decisions Act*, subsection 2(1) sets out the specific components and the form of records and accounts to be maintained by a guardian of property and an attorney under a Continuing Power of Attorney.

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[7]*Substitute Decisions Act, supra*, 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, supra*, ss. 32(6)

In accordance with subsection 32(12) of the *Substitute Decisions Act*, it is expressly stated that the *Trustee Act*[10] does not apply to the exercise of a guardian's powers or the performance of a guardian's duties. The procedural requirements, however, remain the same despite subsection 32(12) of the *Substitute Decisions Act*, since subsection 23(1) of the *Trustee Act*[11] provides that the proceedings and practice of the passing of accounts for a trustee are the same as for an estate trustee.

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.*[12]

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.[13]

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[9]*Substitute Decisions Act, supra*, ss. 32(10)
[10] *Trustee Act, supra.*
[11]*Trustee Act*, ss.23(1), *ibid*
"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."
[12]*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
[13] *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

Any individual having a financial interest in an estate by virtue of the *Rules of Civil Procedure* Rule 74.15(1)(h),[14] may move for an order for assistance requiring an estate trustee to

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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.
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.

[O. Reg. 484/94, s. 12; O. Reg. 69/95, ss. 18.20; O. Reg. 377/95, s. 6; O. Reg. 332/96, s. 4]"

[14] *Rules of Civil Procedure, supra*, "Rule 74.15(1)(h) *Order to Pass Accounts* – for an order (Form 74.42) requiring an estate trustee to pass accounts…"

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.[15] 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.[16]

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[15] *Rules of Civil Procedure, supra,*

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

[16] **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
$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.

The costs currently legislated under Tariff C on a court passing of accounts, do not currently reflect realistically the costs actually incurred.

As with any application, the court has the jurisdiction on an 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*.[17]

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).[18]

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[17] *Rules of Civil Procedure, supra*. 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."

[18] *Estates Act, supra*. 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.

(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."

The court jurisdiction where the accounts should be passed is determined in the case of an estate trustee, in the office of the 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.[19]

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 a great deal of historic case law.[20]

The *Estates Act*, Section 10[21] addresses appeals from a passing of accounts which directs the appeal of a judgment exceeding $200 in the jurisdiction of the Divisional Court.

The powers of the court on a passing of accounts concerning the accounts of a guardian, or attorney are set out in subsections 42(1), (7) and (8) of the *Substitute Decisions Act* 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*,[22] to include a person incapable

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[19] *Trustee Act, Section 23, ibid*

[20]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).

[21] *Estates Act, supra.* 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.

[22]*Rules of Civil Procedure, supra*, 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…"

within the meaning of sections 6[23] and 45[24] of the *Substitute Decisions Act* and is governed by Rule 7 of the *Rules of Civil Procedure.*[25] Section 6 of the *Substitute Decisions Act* 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 of lack of a decision. Section 45 of the *Substitute Decisions Act* applied to incapacity for personal care.

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."

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.[26]

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.[27]

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 Public Guardian

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[23] *Substitute Decisions Act, supra,* 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."
[24] *Substitute Decisions Act, supra,* 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."
[25] *Rules of Civil Procedure, supra,* Rule 7, and particular Rules 7.01, 7.04 and 7.08
[26] *Rules of Civil Procedure, supra,* Rule 7.02(1.1)
[27] *Rules of Civil Procedure, supra,* Rule 7.03(2.1)

and Trustee to act as litigation guardian, or if the nature of the disability is minority, the Children's Lawyer. As litigation guardian, the Public Guardian and Trustee or the Children's Lawyer has a responsibility to protect the person's interest in the litigation. The Public Guardian and Trustee and the Children's Lawyer will provide instructions to the person's solicitor and make decisions respecting any settlements on behalf of the person under disability.

Where a 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 Public Guardian and Trustee may wish to have a separate application made to have a guardian of property appointed before obtaining court approval of such settlement. Resulting settlement funds are usually paid into court on behalf of a mentally incompetent person (until guardianship order is made), and/or a minor, unless the 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 Public Guardian and Trustee, or the Ontario Children's Lawyer, as the case may be, as litigation guardian.[28]

The Duty to Account, When, to Whom, and 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 to those lawfully entitled 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, do they likewise address any limitation on the time within which those lawfully entitled to a passing of accounts can demand an accounting.

Since there is no mandatory legal requirement for an estate trustee, attorney, or guardian to pass 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 presented. In the course of an administration, there exists an "executor's year" within which to administer an estate, and therefore to demand an accounting until after the expiration of that year would be imprudent absent special circumstances.

Timing aspects respecting passings, are to be distinguished from applicable limitation periods pursuant to the *Limitations Act.*[29] There is currently a case under appeal[30] which addresses the limitation period within which a claim can be brought against an estate trustee for breach of trust or fraud and this case concerns both the applicability of the former *Limitations Act*[31] and the new *Limitations Act.*[32] 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 relevant. The former *Limitations Act* and the new *Limitations Act* provisions should be read together with s. 38 of the *Trustee Act* and its applicability.[33] Additional cases concerning the nature and extent of the potential limitation issues on a court ordered passing of accounts in accordance with the *Rules of Civil Procedure* would also be the cases of *Waschowski v. Hopkinson Estate;*[34] *Cameron Estate v. Button;*[35] and *Hare v. Hare.*[36] The relevant sections of the former and new *Limitations Act*

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[28] *Rules of Civil Procedure, supra*, Rule 7.06(2)
[29] *Limitations Act, 2002*, S.O. 2002
[30] *Bikur Cholim Jewish Volunteer Services v. Langston*, [2007] O.J. No. 415
[31] *Limitations Act*, R.S.O. 1990, c. L.15
[32] *Limitations Act, 2002, supra*, c. 24
[33] *Trustee Act, supra*. 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."
[34] *Waschowski v. HopkinsonEstate*, 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
[35] *Cameron Estate v. Button*, 2005 CarswellOnt 1557, 16 E.T.R. (3d) 189
[36] *Hare v. Hare* [2006] O.J. No. 4955 (C.A.)

should be reviewed and considered concerning potential claims pursued within the context of a court passing of accounts. The new basic two year limitation period suggests it may be prudent to ensure applications to compel accounts be brought within that time.[37]

There are limitation period exceptions concerning those under disability.[38]

The provisions of the new Act should be taken into consideration, and the case law arising from the decisions.

Procedure

The 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*, R.R.O. Reg. 194, as amended,[39] reproduced herein at footnote 13.

The procedure is that the estate trustee, or trustee, attorney, or guardian, files an application setting out the particulars of the accounting period and the persons interested in the matter in 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.

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 the previous judgment on passing, if any. The applicant on an application to pass accounts also files the court's Notice of Application and proof of service on all interested parties, including, if required, the Children's Lawyer, and the Public Guardian and Trustee.

[37] *Limitations Act, 2002, supra*, s. 5.4
[38] *Limitations Act, 2002, supra*, ss. 6 and 7
[39] *Rules of Civil Procedure*, Rule 74.17, *ibid*

The accounts are passed before a judge and the judge 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.[40]

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[41] and footnote 13.

Where there is an uncontested passing of accounts and an unopposed order is sought, in many instances no court attendance is required before a judge as long as all of the requirements under Rule 74.18 have been complied with and there are no Notices of Objection to the accounts filed. The 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)[42] and the corresponding Forms at footnote 15 for an unopposed order on a passing of accounts.

Alternatively, where there is a contested hearing for a passing of accounts Rules 74.18(11) through (13) apply.[43] The hearing will 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 its disposition.

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[40] *Estates Act*, Section 49.2, *ibid*
[41] *Rules of Civil Procedure*, Rule 74.18, *ibid*
[42] *Rules of Civil Procedure*, Rule 74.18(9) and (10), *ibid*
[43] *Rules of Civil Procedure*, Rule 74.18(11) through (13), *ibid*

The costs of an unopposed order are addressed in Rule 74.18(10),[44] and for an opposed hearing they are set out in Rule 74.18(13)[45] and Tariff C.[46]

In respect of costs, often the costs set out at Tariff C are insufficient. Regard should be had to Rule 74.18(11)[47] and the form of Request for Increased Costs. This Request for Increased Costs must be served during the time between 10 days after service of the Notice of Application and 10 days before the date of the hearing as specified in the Notice of Application. The court, however, has the discretion to modify costs awards.[48]

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.*[49]

The form of judgment received without a hearing is Form 74.50 under the *Rules of Civil Procedure.*[50]

Mediation

Mandatory mediation in 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. 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.

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[44] *Rules of Civil Procedure*, Rule 74.18(10), *ibid*
[45] *Rules of Civil Procedure*, Rule 74.18(13), *ibid*
[46] *Rules of Civil Procedure*, Tariff C, *ibid*
[47] *Rules of Civil Procedure*, Rule 74.18(11), *ibid*
[48] *Rules of Civil Procedure, supra,* Rule 58.01; *Courts of Justice Act, supra,* s. 131*; Re Briand Estate,* (1995) 10 E.T.R. (2d) 99 (O.C.G.D.)
[49] *Rules of Civil Procedure,* Form 74.51, *ibid*
[50] *Rules of Civil Procedure,* Form 74.50, *ibid*

Trial

Often on a contested passing of accounts, directions will 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*[51] 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.[52]

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. The court passing therefore may initiate from Rule 74.15, or Rule 75.06.

Within the trial context, where contested passings of accounts are concerned, serious regard must be made of the cost consequences concerning formal Rule 49 Offers to Settle.[53]

Rule 58.08(1)[54] and S. 130 of the Courts of Justice Act also addresses the jurisdiction of the court on passings of accounts as well as s. 64 of the *Trustee Act*.[55]

Estate Trustee Compensation

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

The right to compensation is derived from Section 23(2)[56] and Section 61[57] of the *Trustee Act*.

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[51] *Estates Act*, s. 49(4), ibid
[52] *Turk v. Turk* [1957] 0.R. 482 (C.A.)
[53] *Rules of Civil Procedure, supra*, Rule 49
[54] *Rules of Civil Procedure, supra*, Rule 58.08(1)
[55] *Trustee Act, supra*, 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

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;*[58] *Flaska Estate;*[59] *Gordon Estate;*[60] and *Jeffery Estate.*[61]

The case law sets out the usual percentages and the tariff guidelines resulting in a two-step process to be applied against the five factors approach set out in the case of *Re Toronto General Trust v. Central Ontario Railway Co.,*[62] which are as follows:

(1) the size of the trust;

(2) the care and responsibility involved;

(3) the time occupied in performing the duties;

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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."

[56]*Trustee Act, supra*, 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."

[57] *Trustee Act, supra*, 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."

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

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

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

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

(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 and then determining 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 awards a great deal of discretion for 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.*[63] The current percentage guidelines are:

(1) 2.5% charged on capital receipts;

(2) 2.5% charged on capital disbursements;

(3) 2.5% charged on revenue receipts;

(4) 2.5% charged on revenue disbursements; and

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

In or about 1988, the Ontario Court of Appeal released its judgment in three compensation cases: *Re Laing Estate*; *Re Gordon Estate*; and *Re Flaska Estate*. These cases provide the foundation for the judgments that 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*"[64] by Jordan Atin,; and

[62] *Re Toronto General Trust v. Central Ontario Railway Co.* (1905), 6 O.W.R. 350 (H.C.), at page 354
[63] *Farmers' Loan and Savings Co (Re)* (1904), 3 O.W.R. 837, at page 389
[64] *"Executors' Compensation"* (1999), 19 E.T.P.J. 1; R.S.O. 1990, c. T.23, as am

"*Estate Litigation* by Brian Schnurr,[65] and "*Compensation and Duties of Estate Trustees, Guardians & Attorneys"*[66] 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 by way of compensation but is generally rarely awarded except in exceptional cases where there has been protracted litigation or ongoing management and\or litigation concerning a business. Similarly, the court is sometimes asked to reduce compensation where the percentage would have the result of overcompensation having regard to the size of the estate.[67]

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

Core and Management

Attorney, or Guardian Compensation

The *Substitute Decisions Act*, 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.[68] The current rate is set at 3% on receipts and disbursements and three-

[65]Schnurr, B.A., *Estate Litigation*, 2d ed. (Toronto: Carswell)
[66]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
[67] *Re Kilgore Estate* (April 25, 1984) Doc. 25014/47 (Ont. Surr. Ct.)
[68] *Substitute Decisions Act, supra,* 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."

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 would govern the compensation to be taken. Under the *Substitute Decisions Act* a guardian for property or an attorney, uniquely have a statutory right to compensation. The compensation may be taken monthly, quarterly, or annually,[69] or if consent in writing is given by the Public Guardian and Trustee 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 an amount of compensation greater than the prescribed fee schedule.[70] Where the Public Guardian and Trustee is the guardian or attorney and are court approved they may take an amount greater than the prescribed fee schedule.[71]

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 *Substitute Decisions Act* 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 Public Guardian and Trustee. Under subsection 32(7), a guardian of property who does not receive compensation is judged by a lower standard and is only required to "exercise a degree of care, diligence and skill that a person of ordinary prudence would exercise in the conduct of his or her own affairs."

Rule 74.16 of the *Rules of Civil Procedure* applies the Rules applicable on a passing of accounts as applicable to attorneys and guardians.

Pre-taking of Compensation

[69]*Substitute Decisions Act, supra*, s. 40(2)
[70]*Substitute Decisions Act, supra*, s. 40(3)(a)

Generally speaking, although there is some discrepancy in the case law, 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*[72] held that pre-taking was appropriate where the compensation was for work already performed or expenses already disbursed. However, the cases of *Pilo Estate*[73] the *Knoch Estate*[74] and *Re Flaska*[75] have generally indicated court disapproval of pre-taking unless the estate trustee had court approval or the pre-taking was on consent of all interested parties who are not under disability.

The courts in *Re Andrachuk*[76] declined application of *Re Knoch*[77] where compensation referred to in the Will permitted compensation to be paid from time to time. The court permitted pre-taking compensation in *Re Andrachuk.*[78] It is difficult to predict with certainty the outcome of the pre-taking of compensation given the case law history, and given some of the statutory provisions, for example, the *Substitute Decisions Act*, s. 40,[79] which permits pre-taking compensation for guardians and attorneys.

Under the *Substitute Decisions Act*,[80] a guardian, or attorney can pre-take compensation monthly, quarterly or annually.[81]

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 great body of case law on this subject alone. The conclusion of the case law

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[71] *Substitute Decisions Act, supra*, s. 40(3)(b)
[72] *Re William George King Trust* (1994), 2 E.T.R. (2d) 123 (O.C.G.D)
[73] *Re Pilo Estate* [1998] O.J. No. 4521 (O.C.G.D.)
[74] *Knoch, Re* (1982), 12 E.T.R. 162
[75] *Flaska Estate, Re, supra*
[76] *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
[77] *Knoch, Re, supra*
[78] *Re Andrachuk Estate, supra*
[79] *Substitute Decisions Act, supra*, s. 40
[80] *Substitute Decisions Act, supra*
[81] *Substitute Decisions Act, supra*, s. 40(2)

seems to suggest that unless the will document fixes the compensation with specificity, the compensation is still open to attack and can later be reduced or adjusted by the court.[82]

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.[83]

Guardianship, or Estate Trustee During Litigation Compensation

Compensation may also be fixed by agreement, particularly where there are corporate trustees or where an estate trustee during litigation is appointed. The *Estates Act*, s. 28, provides for the reasonable remuneration of an estate trustee during litigation[84] which compensation should be properly the subject of a court order and schedule.

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.[85]

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

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[82]*Re Andrachuk Estate, supra;*
[83]"*Compensation and Duties of Estate Trustees, Guardians & Attorneys", supra,* at Chapter 8, "Legacies in Lieu of Compensation"
[84]*Estates Act, supra*. 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."
[85] *Re Robertson*, [1949] O.R. 427

Compensation and the Power of Attorney Document

Section 40(1) of the *Substitute Decisions Act* permits an attorney under a Continuing Power of Attorney for Property, in addition to a guardian of property, to take compensation in accordance with the fee scale prescribed by the Regulation, giving them a Statutory right to compensation (and pre-take compensation). On occasion, however, a different level of compensation is contemplated and, therefore, there may be a clause within the document reflecting same.

In contrast to attorneys for property, the *Substitute Decisions Act* 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*[86] 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*[87] further supports the proposition of paying compensation to individuals acting as attorneys for personal care. However, regard should be had to the contrast in the decision of *Shibley Estate.*[88] 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..

Finally, payments to third parties, for instance, to solicitors for estate trustee work,[89] for investment advice and accounting fees in respect of the preparation of accounts, and to real estate agents re commissions, all may impact the level of compensation to the estate trustee or trustee. The general principles affecting compensation may be more fully referenced for example in the

[86] *Re Brown* (1999), 31 E.T.R. (2d) 164 (Ont. S.C.J.)
[87] *Cheney v. Byrne, supra*
[88] *Shibley Estate, Re* [2004] O.J. No. 5246 (Ont. S.C.J.)
[89] *Re Schroeter Estate* (2001), 47 E.T.R. (2d) 137;

text in: *"Compensation and Duties of Estate Trustees, Guardians & Attorneys"*. [90] Also note the provisions of the *Trustee Act*, s. 61(4).[91]

Additionally, the conduct of the estate trustee can and will impact compensation as referenced in Section 49(2) of the *Estates Act*. The court will reduce compensation for the failure to discharge fiduciary duties and for improper conduct.[92]

Note that Section 35 of the *Trustee Act*[93] 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.[94]

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.)

[90] *"Compensation and Duties of Estate Trustees, Guardians & Attorneys", supra,* at Chapter 5

[91] *Trustee Act, supra*, 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."

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

[93] *Trustee Act, supra.* 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."

[94] *Substitute Decisions Act, supra*, Section 32(7), (8), (9), Section 38 and Section 32
A more in-depth analysis may be found in *"Compensation and Duties of Estate Trustees, Guardians & Attorneys", supra*, Chapter 10

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

Requests for the reduction and for the increase of compensation, account for many of the applications 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 relates to the complexity of the proceedings, but often the conduct of the beneficiaries where the estate or the trust has been overly litigious. The cost consequences in relation to these applications, which usually arise through the result of some protracted litigation, also account for increasing case law concerning all of these identified issues, on a passing of accounts. A synopsis of this past year's significant court decisions will now follow.

Current Trends in Contested Passings of Accounts

In *Irwin v. Robinson*[95] 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 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 100% of the interest earned on the monies back to the estate in a manner to be deducted from the co-trustees share of the estate not yet received.

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

One of the co-trustees was a solicitor whom the other co-trustee purported to rely on 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."

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*[96] as well as the tariff percentage approach in combination with the five factors approach in *Toronto General Trust Corporation v. Central Ontario R.W. Co,.*[97] Horkins J. seriously 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*.[98]

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[96] *Trustee Act, supra*, s. 61
[97] *Toronto General Trust Corporation v. Central Ontario R.W. Co., supra*
[98] *Brown Trust Re*, [1995] O.J. No. 1424, at paragraph 6

Finally, on the assessment of legal costs,[99] 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.

In respect of a solicitor doing Trustee's work, McCartney J., in *Drindak v. Bachinski Estate*,[100] where the court was asked to "top up" the usual fees by the extra fees set out in three Bills of Costs on the basis of difficulty and delay in the administration brought about by the objections of various beneficiaries, and refusal to entertain offers to settle. McCartney J. did make an additional award in light of the foregoing, but not approximating the amount claimed. 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.*

[99] 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
[100] *Drindak v. Bachinski Estate* 2007 WL 3077449 (Ont. S.C.J.), 2007 CarswellOnt 6776

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."

In the matter of *Strickland v. Thames Valley District School Board*[101] the issues before Ross J. concerned the contested passing of accounts of both 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,*[102] 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*[103] 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.

[101] *Strickland v. Thames Valley District School Board*, 2007 WL 2884417 (Ont. S.C.J.), 2007 CarswellOnt 6248
[102] *Stickells Estate v. Fuller*, [1998] O.J. No. 2940 at page 9, para. 40
[103] *Roger Estate v. Leung*, [2001] O.J. No. 2171 at page 10, para. 41

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*[104] 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 circumstances where there was already an outstanding order to pass accounts which was not appealed, however, the court was bound by the order made. It was accepted though that in accordance with *Stickells Estate,*[105] the duty was to account to the principal grantor of the Power of Attorney, not the beneficiaries, though the estate trustee could compel the attorney to account. Ross J. found that in respect of the matters that the attorney could not account for, that compensation ought not to be provided for work claimed that was not done 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 *Substitute Decisions Act.*[106] 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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[104] *Roger Estate v. Leung*, [2001] O.J. No. 2171 at page 12, para. 42
[105] *Stickells Estate v. Fuller, supra*
[106] *Substitute Decisions Act, supra*

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.*.[107] 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,*[108] found that estate trustee, 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 display of skill and ability, in breach of fiduciary duty in spending estate assets, and accordingly reduced compensation to $2,470.00, but more importantly, 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.

In *Re Rade Estate,*[109] Greer J. removed Joseph Pocock as estate trustee and as a result of protracted litigation respecting that removal and a contested passing of accounts which resulted, Greer J. 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

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[107] *Laing Estate v. Hines, supra*
Toronto General Trust v. Central Ontario Railway Co., supra
[108] *Estates Act, supra*, ss. 49(2) and 49(3), *ibid*
[109] *Rade Estate, Re*, 2007 WL 2852604 (Ont. S.C.J.); 2007 CarswellOnt 6190

ordered to pay personally amounted to $36,639.08 by way of certified cheque or money order payable to the deceased's estate. The other 50% was ordered to be paid out of the capital of the estate. A word of caution concerning this judgment, any of the fees deducted by Greer J. were ordered not to be borne by the German beneficiaries and the law firm representing them since as Greer J. stated: "I have fixed the fee and the Law Firm will have to write the balance off accordingly with an order to go to that effect." In respect of Pocock's legal costs, he was ordered to pay all of his own accounts personally with no legal fees being charged to the estate. In respect of the law firm writing off the balance, it was noted in the deductions made by Greer J. that there was duplication of time by two senior counsel on the file which Greer J. stated: "…amounts to double billing". In this case the court was extremely critical as evidenced in the outcome of the Orders and Judgment, of the Estate Trustee taking 13 years to administer the Estate still not completed.

Re Freeman Estate,[110] concerned a contested passing of accounts matter 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*[111] as well as the court's general approach to establishing an estate trustee's compensation as set out in the cases of *Laing Estate v. Hines; Re Jeffrey Estate; Re Toronto General Trust and Central Ontario Railway Co.*

[110] *Re Freeman Estate*, 2007 WL 2678195 (Ont. S.C.J., 2007 CarswellOnt 5654
[111] *Trustee Act*, *supra*, s. 61(1), *ibid*

and *Re Gordon Estate,*[112] as well as *Re Schroeter Estate,*[113] *Wood Estate v. Wood;*[114] and *Re Mortimer*[115] and making note of the Court of Appeal's Judgment of Killeen J., in *Re Jeffrey* Estate[116] at page 179, in respect of the compensation calculation process it was 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 as 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

[112] *Laing Estate v. Hines, supra*; *Re Jeffrey Estate, supra; Re Toronto General Trust v. Central Ontario Railway Co., supra*, and *Re Gordon Estate, supra*
[113] *Re Schroeter Estate* (2001) 57 O.R. (3d) 8 (S.C.J.)
[114] *Wood Estate v. Wood*, [2005] O.J. No. 4063

trustees were not authorized to pre-take compensation and applied the principles in *Re Knoch*, *Cheney v. Byrne*, and *Re Pilo Estate.*[117]

There was a further deduction made for failure to invest calculated at a *per diem* rate. In respect of the costs on the passing of accounts Perell J. found that the estate trustees were entitled to their costs as there was divided success and the estate trustees' claim for net compensation was upheld significant but deductions were applied. 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,[118] 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.

In the contested passing of accounts matter of *Re Archibald Estate,*[119] 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*[120] and again applied the factors in the

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[115] *Re Mortimer*, [1936] O.R. 438 (C.A.)
[116] *Jeffrey Estate, Re., supra*
[117] *Re Knoch, supra; Cheney v. Byrne, supra*, and *Re Pilo Estate*, [1998] O.J. No. 452 (Gen. Div.)
[118] *Freeman Estate, Re.*, 2007 WL 2985493 (Ont. S.C.J.), 2007 CarswellOnt 6501
[119] *Re Archibald Estate*, 2007 WL 1765686 (Ont. S.C.J.), 2007 CarswellOnt 3872
[120] *Trustee Act, supra*, s. 61, *ibid*

leading cases of *Laing Estate* and *Re Jeffrey Estate.*[121] Applying the percentages approach against the five factors approach, Perell J. concluded that the accounts should be passed as submitted with the exception of the care and management fee claimed in the amount of $41,335.98, which should be reduced from the executor's compensation claim. In respect of the estate trustee's costs, written submissions were requested.

In yet a further Judgment of Perell J., in the matter of *O'Sullivan v. O'Sullivan,*[122] where again the issue in contention concerned the compensation of the estate trustee, Perell J. applied s. 61(1) of the *Trustee Act*[123] 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*[124] 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.

In *Hughson v. Hume Estate*[125] the estate trustee claimed $38,964.25 for expenses he incurred on behalf of the estate in the administration, and a fee of $15,000.00 for compensation. The estate trustee claimed further that he had a claim for care, stating that he administered care to the deceased while she was alive. Bolan J. disallowed this claim. In respect of a further claim for compensation and expenses, Bolan J. determined that a fair and reasonable amount would be $5,000.00.

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[121] *Laing Estate, supra; Re Jeffrey Estate, supra*
[122] *O'Sullivan v. O'Sullivan*, 2007 WL 1219777 (Ont. S.C.J.), 2007 CarswellOnt 2462
[123] *Trustee Act, supra*, s. 61(1), *ibid*
[124] *Laing Estate, supra; Re Jeffrey Estate, supra; Re Toronto General Trust v. Central Ontario Railway Co., supra;* and *Re Gordon Estate, supra*
[125] *Hughson v. Hume Estate*, 30 E.T.R. (3d) 78

In *Re Anthony Estate,*[126] 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. MacDougall J. found that there was no basis for an increased level of compensation and fixed the compensation in accordance with the statement for $5,026.25. Through 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.

Finally, the *Estate of Thomas Walter Wood*[127] and the Judgment of Justice Glass is worthy of note in that the objector, David Wood, objected to the passing of accounts of the estate trustee on the basis of excessive fees being charged throughout the administration of the estate. David Wood forced a contested passing of accounts where the court found there was nothing legitimately raised to complain about. 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. Justice Glass 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 fixed in the amount of $44,621.00 inclusive of G.S.T. which was ordered to be paid by David Wood. Justice Glass 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.

[126] *Re Anthony Estate*, 2006 CarswellOnt 8184
[127] *Wood Estate v. Wood, supra* Is this the same Wood Estate as cited at Footnote 114

The actions of beneficiaries in 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*[128] 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 delays and complexities 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. This principle was impressed upon in the Estate of Michael Picov, deceased,[129] where the issues were set out 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?"

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

In this case Spies J. at paragraph 51 takes into consideration the *Re Watterworth*[130] analysis. Spies J. at paragraph 52 of her Judgment states:

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

In this case 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*[131]*. 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 ad the successful party, should be paid by the*

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[129] *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
[130] *Watterworth Estate, supra*
[131] *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.)

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[132] following a six-day Contested Passing of Accounts. In that case, Justice Greer considered the matter of costs of that hearing as a usual adversarial proceeding and in reliance on the fact that the beneficiaries kept making reasonable offers to settle which out 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,[133] 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[134] 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

[132] *Re Pilo Estate, supra*
[133] *Re Bedont Estate*, [2004] O.J. No. 2015
[134] *Townsend v. Doherty* [1993], O.J. No. 713 (Gen. Div.)

settle to justify the costs award, which had been served by the estate trustees, which were reasonable and not accepted by the objector. He concluded that the estate trustees were entitled to a cost award against the objector on a complete indemnity basis. It appears that the decision to make the cost order was as a result of Gordon J.'s conclusion that the objector's position was unrealistic and motivated by distrust of the executor. Again there is no explanation for why costs were awarded on a complete indemnity basis.

[45] The decision of Justice Borins, as he then was, in Townsend v. Doherty dealt with costs following a trial on the issue of the validity of a residuary bequest in a will. The plaintiff, who challenged the validity of the will, was the mother of the testator and his brother, who was the executor. The plaintiff was not a beneficiary under the will and stood only to gain if she could successfully challenge the validity of the will. She was heir at law of the testator in the event of an 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[135] 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[136]. 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

[135] *Re Cutcliffe's Estate Cohen Le Duc v. Veness* [1959] P. 6
[136] *Speirs v. English* [1907] P. 122

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[137] Justice Borins considered whether or not post-judgment interest was payable on an award of costs made as part of an order following the passing of executors' accounts. He stated that generally speaking, the executor and any beneficiary ***properly attending*** *and represented by a lawyer on the passing of accounts is awarded full compensation for legal expenses from the estate of the testator and that these expenses are considered expenses in administering the estate. On an audit, because there is no losing party to pay the costs, each party is responsible to pay his or her own legal expenses, which are ordered to be paid from the estate, as the trust fund created by the testator represents the only source of money to pay the costs. He contrasted this with "contentious, or adversarial, legal proceedings in which the general rule is that the successful party is awarded its costs, on the lower party-and-party scale, to be paid by the unsuccessful party (at pp. 3-4).*

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

*[50] That there is a difference in the disposition of costs in the case of passing of accounts from the usual adversarial matters before the court, where costs ordinarily follow the event, is made clear from the wording of the Notice of Application itself, that was served by Canada Trust in order to pass its accounts. The Notice of Application provides that "if there is no hearing, a person with a financial interest in the estate who retains a solicitor to review the accounts and makes no objection to them (****or makes an objection and later withdraws it****) but serves on the estate trustee and files with the court a request for costs, will be allowed one half of the costs allowed to the estate trustee"(Form 74.44 under the Rules of Civil Procedure, emphasis added). The application then sets out how a person with a financial interest in the estate may object. There is no suggestion that an order for costs may be made against an 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[138]. In that case Justice Fleury noted that estate proceedings are not normally

[137] *Re Joseph Estate* (1993) 14 O.R. (3d) 628, [1993] O.J. No. 1672
[138] *Re Watterworth Estate* [1996] O.J. No. 269

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 no clear how Fleury J. came to this conclusion, as the only rule that he refers to is s. 131 of the Courts of Justice Act.

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

[53] The other cases cited by Mr. Woods are cases where this is an attack on a will and the principles from the Townsend case clearly apply. Of assistance to the decision I must make however, is the decision of Justice Haley in Schweitzer v. Plasecki[139] 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)."

In the case of *Volchuk Estate v. Kotsis,*[140] Brockenshire J., in a contested passing of attorney accounts, where the compensation for the attorney had been calculated using the usual estate percentages for capital compensation, income compensation and care and management fee, as well as a further claim for a special fee, disallowed the claims in their entirety due to a failure to administer properly and misapply assets. Brockenshire J. ordered that the entire claim

[139] *Schweitzer v. Plasecki* [1998] O.J. No. 177
[140] *Volchuk Estate v. Kotsis*, 2007 WL 2111406 (Ont. S.C.J.), 2007 CarswellOnt 4668

for compensation be disallowed. Brockenshire J. found that the transactions went so far as to be "unconscionable." There was evidence of misappropriation and, on the issue of forgery, Brockenshire J. stated as follows:

> "In my reasons above I have commented repeatedly on the absence of evidence from Kanela Kotsis. In *Vieczorek et al. v. Piersma et al.*, 36 D.L.R. (4th) 136 (Ont. C.A.), Cory J.A. at pages 4 and 5 stated, with supporting authority that:
>
> > It is perfectly appropriate for a jury to infer, although they are not obliged to do so, that the failure to call material evidence…was an indication that such evidence would not have been favourable to them. It is a common sense conclusion that may be reached by a trier of fact.
>
> Here, repeatedly not only was the evidence of Mr. Kotsis not corroborated, the common sense inference is that if called, Kanela Kotsis would not have supported that evidence."[141]

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.

In the first of two decisions concerning the *Nystrom v. Nystrom*,[142] 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 *Substitute Decisions Act*[143] and that the passing of accounts proceed from the date on which he assumed control of his mother's affairs. Justice Shaw 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

[141] *Volchuk Estate v. Kotsis*, *supra*, at page 21, para. 159
[142] *Nystrom v. Nystrom*, 25 E.T.R. (3d) 297

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,[144] Shaw J. heard the objections with respect to the application to pass accounts and a claim that Roy Nystrom not be entitled to take compensation which he claimed.

Shaw J. cited the provisions of the *Substitute Decisions Act*[145] at s. 40, which provide for the annual taking of compensation in respect with the prescribed fee schedule set out in Regulation 26/95.[146] 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 *Substitute Decisions Act*[147] 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

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[143] *Substitute Decisions Act, supra*, s. 42(4)(6)
[144] *Nystrom Estate v. Nystrom*, 2007 WL 576570 (Ont. S.C.J.), 2007 CarswellOnt 1064
[145] *Substitute Decisions Act, supra*, s. 40
[146] *Substitute Decisions Act, supra*, O. Reg 26/95, *ibid*
[147] *Substitute Decisions Act, supra*

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.

In the decision of *Cornacchia v. Cornacchia,*[148] Shaughnessy J. referred to the decision in *Nystrom v. Nystrom*[149] on which he notes the facts as similar. Justice Shaughnessy ordered that the discrete proceeding concerning capacity and undue influence in respect of bank documents should be by way of action rather than application. This is particularly so when there are triable issues respecting the conduct of the attorney, including suspicious circumstances, undue influence, and a breach of duty, which may be brought by the plaintiff under the provisions of the *Substitute Decisions Act.*[150]

Though s. 49 of the *Estates Act*[151] gives the court wide discretion in taking into consideration breach and misconduct, Justice Shaw 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, Justice Shaughnessy further found that the plaintiff, through her litigation guardian, was the appropriate party to commence and litigate these proceedings.

Contrast *Nystrom*[152]and *Cornacchia*[153] with *Disera*[154] in that in this case the defendants sought an order that the estate action proceed as a passing of accounts. Justice Clark referred to the Court of Appeal decision in *Simone v. Cheifetz*[155] as follows:

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[148] *Cornacchia v. Cornacchia*, 2007 WL 129717 (Ont. S.C.J.), 2007 CarswellOnt 223
[149] *Nystrom v. Nystrom, supra*
[150] *Substitute Decisions Act, supra*
[151] *Estates Act, supra*, s. 49, *ibid*
[152] *Nystrom v. Nystrom, supra; Nystrom Estate v. Nystrom, supra;*
[153] *Cornacchia v. Cornacchia, supra*
[154] *Re Disera et al. v. Disera et al.*, Endorsement, Clark J., Ont. S.C.J. Court File No. 6209/02

"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."

Justice Clark 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.

In *Marlow v. Marlow Estate*[156] Justice Taliano, 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. Justice Taliano 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.

In *Marcoccia (Litigation Guardian of) v. Gill,*[157] the issue of determining what compensation should be allowed d for future services to be provided by a corporate co-guardian, and a third guardian of property should be properly 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. In that regard, Moore J. came up with a figure for the gross present

[155] *Simone v. Cheifetz,* [200] O.J. No. 4191; [2005] O.J. No. 2992
[156] *Marlow v. Marlow Estate*, 2007 CarswellOnt 4117

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 taken into consideration in fixing compensation for a court appointed guardian, the fees of the corporate co-trustee were estimated at lower than the *Substitute Decisions Act*[158] which applies to attorney compensation. The analysis further takes into consideration a flat fee set up account as well as a management fee.

In the matter of *Craig Estate v. Craig Estate,*[159] an attorney made application to pass her accounts under a Power of Attorney for Property which was not contested, however, issues were raised on the passing of accounts including the standard of accounting the attorney should be held to, and for what period should the accounts be produced. There was no evidence of incapacity. The analysis provided by Lofchik J. included the framework established in the *Substitute Decisions Act*[160] and in particular ss. 32 and 38. Lofchik J. refers to the decisions in *Harris v. Rudolph* and *Fair v. Campbell Estate*[161] relying on the decisions therein stated 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

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[157] *Marcoccia (Litigation Guardian of) v. Gill*, 2007 WL 109530 (Ont. S.C.J.), 2007 CarswellOnt 2087
[158] *Substitute Decisions Act, supra*
[159] *Craig Estate v. Craig Estate (Trustee of)*, 2007 WL 260509 (Ont. S.C.J.), 2007 CarswellOnt 395
[160] *Substitute Decisions Act, supra*, ss. 32 and 38
[161] *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.)

grantor to require his attorney to account, that is surely a necessary power to prevent abuse of authority by a negligent or dishonest attorney…"

However, in *Fair v. Campbell Estate*[162] 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 principle.

In *Fair v. Campbell Estate*[163] it was found while an attorney is certainly a fiduciary, the *Substitute Decisions Act*[164] 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. refers to the case of *Fales v. Canada Permanent Trust Co.*[165] 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.

In *Ali v. Fruci*[166] a motion for an order for leave to commence an action pursuant to s. 42 of the *Substitute Decisions Act*[167] was successful and costs were awarded on a partial indemnity

[162] *Fair v. Campbell Estate, supra*
[163] *Fair v. Campbell Estate, supra*
[164] *Substitute Decisions Act, supra*, at s. 38(1), s. 32 and s. 42(1)
[165] *Fales v. Canada Permanent Trust Co. (1976), [1977] 2 S.C.R., 302 (S.C.C.)*
[166] *Ali v. Fruci*, 2006 CarswellOnt 2165, 22 E.T.R. (3d) 189; *Ali v. Fruci*, 2006 CarswellOnt 1706, 22 E.T.R. (3d) 187
[167] *Substitute Decisions Act, supra*, s. 42, *ibid*

basis in respect of the motion and the costs consequences to the respondent were made payable out of the estate.

In the *Estate of Shirley Bernice Redrupp*[168] an order requesting the passing of an attorney's accounts was requested by the applicant and granted on two conditions: One, 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 shall have 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, Justice Lane 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. The Judgment of Lane J. attempts to caution the unmeritorious insistence of a passing of accounts preempting the costs consequences.

CONCLUSION:

The current trend in the case law sees 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.

[168] *Estate of Shirley Bernice Redrupp*, Endorsement, Lane J., Ont. S.C.J. Court File No. 01-2039/03, unreported

The courts appear to be sending a clear message to trustees, estate trustees and fiduciaries alike, as well as beneficiaries, that their conduct must be reasonable or they will face costs awards, punitive in nature, in the context of court passings.

The courts continue to exercise wide discretion afforded in contested passing of accounts matters, both in respect of compensation, and costs.