

TAB 12

Passing of Accounts Involving the OPGT

Dana F. De Sante
Counsel, Charitable Property Program
The Office of the Public Guardian and Trustee

The Six-Minute Estates Lawyer 2009



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Passings of Accounts Involving the Public Guardian and Trustee

**Six-Minute Estates Lawyer
Law Society of Upper Canada
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**Presented by
Dana De Sante
Legal Counsel
Charitable Property Program
Public Guardian and Trustee**

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When OPGT is Required to be Served on Passings

Overview

The OPGT may be required to be served when:

- An incapable person, absentee or charity has a beneficial interest in an estate or trust
- A guardian or attorney of an incapable person or absentee applies to pass accounts

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Incapable Persons

General Rule

Rule 16.02 (1) (k) requires the OPGT be served with the original process when there is neither a guardian nor an attorney with authority to act in the proceeding



Incapable Persons with an Interest in an Estate or Trust

- When an incapable person is a beneficiary of an estate or trust in which the estate trustee or trustee has applied to pass accounts, the OPGT is required to be served if the incapable person does not have a guardian or trustee with authority to act in the proceedings
- The incapable person must also be served

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Incapable Person with an Interest in Estate or Trust

- If there is no person willing or able to act as litigation guardian for the purposes of the passing, and no other person with a similar interest in the estate, the OPGT will perform this function as last resort
- Generally, no medical evidence is required to be provided but the OPGT must be satisfied the person is incapable



Incapable Person with an Interest in an Estate or Trust who has a Guardian or Attorney

- When an estate trustee or trustee is passing accounts involving an incapable person who has a guardian or attorney for personal care with authority to act in the proceeding, there is no obligation to serve the OPGT
- Rule 16.02 (1) (k) (i)

Power of Attorney Authorized to Act in Proceeding

- **When there is no guardian or attorney for personal care but an attorney with authority to act in a proceeding, such as a power of attorney appointing a litigation guardian, the passing is required to be served on the attorney and the incapable person**
- **The OPGT is not required to be served**
- **Rule 16.02 (1) (k) (ii)**



Incapable Person with an Interest in an Estate or Trust who has a Guardian or Attorney

- Exception: If the estate trustee or trustee is also the guardian or attorney of the incapable person then service on the OPGT is required
- There is no obligation to serve the incapable person but it is good practice

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Guardian or Attorney Passing Accounts

- When a guardian or attorney of an incapable person, applies to pass accounts of their administration of the incapable person's estate, the OPGT is required to be served



Other Parties to be Served by Guardian

- **The incapable person should also be served**
- **Each person who has a contingent or vested interest in the incapable person's estate (Rule 74.18 (3) – includes spouse and dependent children) should be served**
- **As a matter of practice, adult children are frequently served**

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When Incapable Person is a Minor

Estates

- If the incapable person is a minor with an interest in an estate or trust and does not have a guardian or attorney, service is required to be made on The Children's Lawyer only

Guardianship

- If a guardian or attorney is passing accounts of an incapable person who is a minor, service is required to be made on The Children's Lawyer only (unless a Committee was appointed for a mentally incapable minor under the *Mentally Incompetency Act* repealed April 3, 1995 in which case the OPGT is to be served)

SEE RULE 74.18 (3.1)



When Incapable Person is Deceased

- **When a guardian or attorney passes accounts of a deceased incapable person, service should be made on the estate trustee or administrator of the incapable person's estate**
- **There is no requirement to serve the OPGT unless the court orders otherwise**

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Absentees

- **An absentee is (a) a person whose whereabouts are unknown; and, (b) there is no knowledge as to whether the person is alive or dead.**
- **An absentee is different from an ‘unborn or unascertained’ person – usually refers to issue who if born, would be heirs under a will**
- **The OPGT is required to be served with passing unless the absentee has a guardian or attorney**



Absentees Continued

- **If the beneficiary is an absentee minor, then the Children's Lawyer should be served**
- **Formal order declaring person is an absentee is not required but must provide satisfactory evidence that diligent efforts were made to find the person**
- **Rule 16.02 () (i)**

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When OPGT and OCL are Served with a Passing

- **In cases when the OPGT and Children's Lawyer are served on a passing and the interests are identical or very similar, only one office will participate. The two offices will consult with each other and usually the one with the greater interest will respond**



Appointment as Litigation Guardian

- **When OPGT participates in a passing in the capacity as litigation guardian, the Judgment on Passing of Accounts should include the following:**
“THIS COURT ORDERS that the Public Guardian and Trustee be appointed the litigation guardian of X for this proceeding only”.

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Charities

The OPGT is required to be served when:

- **a charity or charitable trust applies to pass its accounts**
- **an estate trustee applies to pass its accounts in relation to a will with a charitable bequest (the named charity is also required to be served)**
- **Subsection 49 (8) *Estates Act***



When OPGT Will Participate in a Charity Passing

The OPGT will generally participate in a passing when:

- A charity or charitable trust applies to pass accounts
- An estate trustee applies to pass accounts in which the charitable beneficiary is a charitable purpose, or a power of appointment is given to select a charity or the estate trustee is in conflict of interest situation with the charitable beneficiary

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When OPGT will not Participate

If an estate trustee is passing its accounts in which the charity is named and in existence and there is no conflict of interest, then the OPGT will generally not participate in the passing, as the charity is competent to protect its own interest



Service / Appointment as Litigation Guardian

**In respect of all passings
involving the OPGT:**

- **Service should be made on the OPGT's Toronto office unless there have been dealings in the past with a satellite office**
- **45 days notice is required (Rule 74.18 (4)) – strict compliance is required**

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Documents to be Served on OPGT

- **Notice of Application to Pass Accounts**
- **Accounts**
- **Affidavit of Verification**
- **Will or guardianship order or power of attorney, as the case may be**
- **Latest Judgment on Passing of Accounts**
- **Relevant Orders, if any**
- **Draft Judgment on Passing of Accounts**
- **Only such vouchers as are specifically requested**



Common Issues Seen on Passings of Accounts

- **Failure to keep adequate accounts, vouchers and supporting records**
- **Required records described in O. Reg.100/96 under *Substitute Decisions Act*, which are consistent with the requirements of the court format for passing accounts set out in Rule 74.17 (1) and (2)**

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Common Issues Continued

- **Insufficient description of transactions to allow OPGT to understand entries**
- **Accounts are separated into capital and revenue when it is not necessary to so. When a will makes a bequest of capital to one beneficiary and income to another, then it is necessary to distinguish between capital and income in accounts. However, when a guardian or attorney is passing accounts, it is usually unnecessary to maintain separate accounts for capital and revenue**



Common Issues Continued

- **If an accountant is employed to prepare the accounts, such costs are usually required to be charged against compensation**
- **The accounts do not balance. Formula: receipts minus disbursements = cash and investments on hand at end of accounting period**
- **Legal accounts and accounting invoices do not adequately distinguish between executor's work and professional services**

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Common Issues Continued

- **Income tax returns are not filed promptly or at all**
- **Non-arms' length transfers to guardian / attorney / estate trustee**
- **The amount of compensation pre-taken when administering an incapable person's estate, is greater than the amount awarded**
- **Compensation is claimed on items that are not compensable, such as book entries, net losses on investments, accrued interest, payments of compensation, income tax preparation**



Common Issues Continued

- **Improper payment of a care and management fee to an estate trustee during the executor's year. An estate trustee is entitled to a care and management fee following the executor's year only when the will creates an on-going trust or distribution is delayed for reasons beyond the control of the estate trustee**
- **More than \$100,000 is invested in one financial institution**

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Common Issues Continued

- **Improper payment of income tax when will establishes charitable trust**
- **Joint bank accounts or other joint assets are not identified - question of resulting trust**
- **Percentages in large estates of average complexity are not reduced**



Contact Information

**Office of the
Public Guardian and Trustee
595 Bay St., Suite 800
Toronto, ON M5G 2M6**

**Tel: (416) 314-2800 (Toronto)
In Ontario 1-800-366-0335 (Toronto)**

Website www.attorneygeneral.jus.gov.on.ca

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