TAB 6

The Process of Passing of Accounts

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The Process of Passing Accounts

BY

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"Passing Accounts" is

a) a voluntary or involuntary

b) court application

c) served on persons with a financial interest in the Estate containing

d) a detailed accounting of the estate and

e) the executor's claim for compensation and

f) giving the beneficiaries the right to raise objections to any of the entries in the Accounts

g) whereupon a Court decided the issues in question or if no objections are made

h) the Court may approve the Accounting

i) award costs and

j) grant Judgment Passing the Accounts.

a) VOLUNTARY AND INVOLUNTARY

A passing of accounts is not always required. In fact, in most estates, there is never a passing of accounts. Instead, the executor obtains releases from the beneficiaries.

However, where releases cannot be obtained, an executor may wish to voluntarily pass accounts in order to protect the executor from claims of maladministration of the estate. Examples of where a passing of accounts will likely be brought by an executor are:

- where there is a minor beneficiary;
- where there is an incapable beneficiary;
- where there are unborn or unascertained beneficiaries;
- where one or more beneficiaries refuse to provide a satisfactory release.

In some cases, an executor is forced to pass accounts. Beneficiaries are entitled to request a passing of accounts from the executor. If the executor refuses, a beneficiary may ask the Court to order the Executor to pass accounts.[1] Although the beneficiary may apply for an order without notice, the more recent view of the bench is that such a motion should be brought on notice.[2]

b) COURT APPLICATION

The commencement of a Passing of Accounts is brought by Application[3]. The Application to Pass Accounts consists of

- the Notice of Application to Pass Accounts[4];
- the estate accounts for the relevant period verified by affidavit of the estate trustee;
- a copy of the certificate of appointment of the applicant as estate trustee;
- a copy of the latest judgment, if any, of the court relating to the passing of accounts.

The current court fee for such an application is $322.00.

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1 Rule 74.15(1)(h)
2 xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx
3 Rule 74.18
4 Form 74.44

The application may be issued in any Court Office and does not need to be issued in the same Court as the Certificate of Appointment of Estate Trustee.[5]

c) SERVED ON PERSONS WITH A FINANCIAL INTEREST

The Application once issued must be served on all those with a contingent or vested interest in the estate. For example, if the estate involves a testamentary trust, the life tenant and all those who would be a beneficiary on the death of the life tenant ("a remainderman") would need to be served. In many cases, the remaindermen include issue who are alive on the death of the life tenant. This can include unborn or unascertained persons.

Where there are unborn or unascertained persons or where there are minors who have either a vested or a contingent interest, the Children's Lawyer must be served. Similarly, if there are incapable persons who have a financial interest, the Public Guardian and Trustee should be served.

In addition to serving the Notice of Application, the estate trustee must also serve a draft Judgment being sought. Although it is not required, it is common practice to serve a copy of the entire Application Record on those with a financial interest.

Service is effected by regular mail. For residents of Ontario, at least 45 days prior notice is required. For those outside Ontario, at least 60 days is required.

d) CONTAINING A DETAILED ACCOUNTING

To pass accounts, it is generally required that the accounting be in "Court Form". Rule 74.17 outlines the specific information that must be contained in the Accounting.

> 74.17 Form of Accounts — (1) Estate trustees shall keep accurate records of the assets and transactions in the estate and accounts filed with the court shall include,
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> (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;

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5 Salvador v. Marshall, 2009 CarswellOnt 2809

(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.

e) EXECUTOR'S CLAIM FOR COMPENSATION

Executor's compensation is likely the most litigated issue in estates practice, not only because it can involve significant sums of money, but also because of the wide discretion given to courts in determining it.

The sole statutory mandate for executor's and trustee's claims for compensation is s. 61(1) of the *Trustee Act*.[6]

> "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 Ontario Court (General Division)"[7]

Clearly, the discretion granted is quite broad.[8]

The fundamental issue in determining executor's compensation is the proper interpretation of section 61 of the *Trustee Act*. In a nutshell, how should a court decide what is "fair and reasonable"?

***Parts of this paper are adapted from an article originally published in the *Estates Trusts & Pensions Journal*- (1999), 19 E.T.P.J. 1.

[6]R.S.O. 1990, c. T.23, as am.

[7] This provision is similar to those in all common-law jurisdictions. Alberta - *Surrogate Rules* Alta. Reg. 130/95, Sch. 1, Part 1, Rules 1 to 7, British Colombia - *Trustee Act*, R.S.B.C. 1996, c.464, ss.88 to 90,Manitoba - *Court of Queen's Bench Rules*, Man. Reg. 553/88, Rule 74.12(7),New Brunswick - *Trustees Act*, R.S.N.B. 1973, c. T-15, s.38 (am. S.N.B. 1987, c..6, s.115.), Newfoundland - *Trustee Act*, R..S.N. 1990, c. T-10, ss. 52(1) to (4), 53(1), Nova Scotia - *Probate Act*, R.S.N.S. 1989, c.359, ss.76 and 77,Ontario -*Trustee Act*, R.S.O. 1990 c. T.43, s. 61, Prince Edward Island - *Trustee Act*, R.S.P.E.I. 1988, c.T-8, s.31, Saskatchewan - *The Trustee Act*, R.S.S. 1978, c.T-23, ss. 80 to 84, (am. S.S. 1992, c. 62, s.33(3)).

[8] Contrast this with the manner in which compensation for attorneys and guardians of property under the regulations to the *Substitute Decisions Act* S.O. 1992, c. 30, am S. O. 1994, c. 27, ss. 43(2), 62(1), (2); 1996, c. 2, ss. 3-60 is calculated. In that Act, attorneys are *prima facie* entitled to apply the percentage guidelines.

There are two general ways of calculating "fair and reasonable" compensation which have emerged over the years. One is the more discretionary "five factors approach" and the second is the more mechanical "percentage approach".

The Five Factors Approach

This approach relies on the consideration of the following factors in determining "fair and reasonable" compensation:

a) the size of the trust;
b) the care and responsibility involved;
c) the time occupied in performing the duties;
d) the skill and ability shown; and
e) the success resulting from the administration.[9]

These five factors are intended to reflect the "care, pains and trouble, and the time expended in and about the estate".

The criticism of this approach is the amount of discretion which remains in the determination of the compensation. What is lacking from this approach is some consistency in the weighting and application of each of the five factors, and a benchmark against which the five factors can be considered.

The Percentage Approach

To overcome the deficiencies of the five factors approach, and to bring predictability and consistency to the calculation of executor's compensation, the practice of determining compensation as a percentage of the value of the estate developed.[10]

Neither the percentage approach, nor the actual guidelines, are sanctioned by statute or regulation. They were developed by the estates bar and Surrogate Court Judges and became an unofficial tariff. In some provinces, the guidelines have been incorporated into the statutes as maximum compensation.[11]

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[9] *Re Toronto General Trusts and Central Ontario R.W. Co.* (1905), 6 O.W.R. 350 (H.C.) at p. 354.

[10] To be perfectly accurate, the percentage approach originated at about the same time as the five factors approach. *Re Farmers' Loan & Savings Co.* (1904), 3 O.W.R. 837 (Chambers) at p. 839.

[11] See the relevant acts of British Columbia, Newfoundland and Nova Scotia in note 6, supra ;

While the percentage guidelines have changed over the years, the current "guidelines" are:

a) 2.5% charged on capital receipts
b) 2.5% charged on capital disbursements
c) 2.5% charged on revenue receipts;
d) 2.5% charged on revenue disbursements; and
e) If the estate is not immediately distributable, an annual care and management fee of 2/5 of 1% on the gross value of the estate.

The criticism of the percentage approach is that undue emphasis is placed on the size of the estate and that the use of percentages is arbitrary and does not accurately reflect the broad discretion granted by the statute.

The Court of Appeal in *Re Laing Estate*[12] adopted the approach set out in the case of *Re Jeffrey Estate*[13]. Killeen J. set out the approach as follows:

> "To me, the case law and common sense dictate that the audit judge should first test the compensation claims using the "percentages" approach and then, as it were, cross-check or confirm the mathematical result against the "five-factors" approach set out in *Re Toronto General Trust and Central Ontario Railway*, supra. Usually, counsel will, in argument, set out a factual background against which the five factors can be brought to bear on the case at hand. Additionally, the judge will consider whether an extra allowance should be made for management, based on special circumstances. The result of this testing process should enable the judge to determine whether the claims are excessive or not and, in the result, will enable the judge to make adjustments as required. The process is not scientific but it 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 meriut award in a unique setting."[14]

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[12] 1998 CarswellOnt 4037, 113 O.A.C. 335
[13] (1990), 39 E. T. R. 173 (O.C.G.D.)
[14] *Re Jeffrey Estate* supra at p. 179.

The Court of Appeal stated: "We agree with and adopt the approach taken in Re Jeffrey Estate. In our view, it best achieves the appropriate balance between the need to provide predictability while, at the same time, tailoring compensation to the circumstances of each case."[15]

Adjustments to Compensation

After determining compensation using the *Re Jeffrey* approach, adjustments are often made by the Court, either by increasing or decreasing the amount of compensation awarded.

(a) Additions

(i) Care and Management Fee

Although, often regarded as part of the percentage approach, a "care and management fee" is sometimes viewed as an addition to the "2.5% in and out" formula[16].

The usual care and management fee is 2/5 of 1% on the gross value of the estate on an annual basis. However, this amount, like the other percentages, must not slavishly applied and instead the Courts may look to the effort put in by the executors in the management of the assets.[17]

A care and management fee is only properly sought where the estate or part of it is, is to be held in trust and not distributed to the beneficiaries within the executor's year.

If the estate, by the terms of the Will, ought to have been distributed within the executor's year and has not been, due to the actions of the executors, no care and management fee should be awarded.[18]

(ii) Special Fees

In addition to the "usual percentages", a special fee may be sought by the executors where the administration is extraordinarily complex or time-consuming.

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[15] *Re Laing Estate*, supra at p. 574.

[16] See Re Jeffrey Estate, supra at p. 179 and Re William George King Trust, supra

[17] *Forrest Estate v. O'Donohue* (1991), 44 E.T.R. 171 (O.C.G.D.)

[18] *Re McKenzie Estate* [1993] O.J. NO. 3158. If the delay was caused by an application to interpret the Will, a care and management fee may be awarded. See *Re Cohen* (1977), 1 E.T.R 80 (Ont. Surr. Ct.)

Some examples of circumstances where a special fee may be awarded are:

a) Where the estate has been involved in litigation[19];
b) Where the executors were required to operate the deceased's business[20]; or
c) Where the executors were required to deal with new legislation[21].

In order to satisfy the Court of the necessity of a special fee, the executor must provide specific evidence, such as affidavits, time dockets and memoranda, outlining the circumstances which required the additional services and proof of those services.

(b) Reductions/Deductions

In addition to the reduction of the usual percentages for *in specie* transfers[22] or for simple transactions[23], deductions from compensation may be made in the following circumstances:

(i) Use of Agents

Since an award of compensation based on a percentage of receipts and disbursement is intended to compensate the executor for performing all of his or her duties ("executor's work"), where an executor retains another to act as an agent to perform some or all of those duties, the agent's fees are deducted from the executor's compensation. Otherwise, the estate would be paying twice for the same work.

(A) Trust Companies

Where a trust company is retained on an agency basis to administer an estate or trust, fees paid to the trust company ought to be deducted from the executor's compensation.[24]

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[19] See for example, *Re Stanley Estate* (1996), 13 E.T.R. (2d) 102 (O.C.G.D.)
[20] *Re Bellomo Estate* (1989) 36 E.T.R 123 (Ont. Dist. Ct.)
[21] *Re Jones* (1973), 1 E.T.R 88 (Ont. Surr. Ct.)
[22] See for example, *Re Philp Estate* (1989), 35 E.TR. 210 (Ont. Surr. Ct.)
[23] See for example, *Forrest Estate v. O'Donohue, Re Heron Estate* and *Re Campin Estate*, (1992), 49 E.TR. 197 (O.C.G.D.).
[24] See for example, *Re Lawson Estate* (1993), 41 A.C.W.S. 93d) 225 (O.C.G.D.)

(B) Solicitors

Fees for legal work, as contrasted with executor's work, in respect of the administration of an estate, are not generally deducted from executor's compensation. If the fees represent truly legal services, those fees are correctly payable from the estate.[25]

However, where a solicitor performs executor's work, the fees relating thereto ought to be deducted from the executor's compensation. Some common examples of solicitors performing executor's work[26] are:

a) Compiling of an inventory of estate assets;
b) keeping accounts;
c) paying bills;
d) making investments; or
e) opening estate accounts.

Thus, solicitors should keep separate dockets for executor's work and solicitor's work.[27] As well, it should be made clear to the executor-client that any executor's work performed by the solicitor will likely be deducted from his or her compensation.

(C) Accountants

The preparation of income tax returns have traditionally been considered to be executor's work[28]. Therefore, payment to an accountant for such services will be deducted from the executor's compensation.

However, recently, that view has been reconsidered. In *Re Holt Estate*[29], Greer J. stated that the question of who should pay for the preparation of income tax returns should be decided on a case by case basis because of "the diversity among estates".

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[25] *Re Briand Estate* (1995), 10 E.T.R. (2d) 99 (O.C.G.D.)

[26] See Feeney, *The Canadian Law of Wills*, Vol 1 (3rd ed.) (Toronto: Butterworths, 1987) p. 230 and Armstrong, A. E., *Estate Administration: A Solicitor's Reference Manual* (Toronto: Carswell, 1984) chpt. 1.3

[27] Re Briand Estate, supra

[28] *Re Campin Estate*, supra *Re Clowater Estate* (1993), 49 E.T.R. 184 (N.B. Prob. Ct.)

[29] (1994), 2 E.T.R. (2d) 163 (O.C.G.D.)

The costs for preparation of accounts in court format for a Passing of Accounts are typically deducted from the executor's compensation.[30]

(D) Investment Advisors

The fees of investment counsel were not deducted from executor's compensation and were properly charged against the estate in *Re Miller Estate*[31]. This authority is likely further strengthened by amendments to the *Trustee Act* which now specifically authorizes a trustee to retain investment advisors[32].

(ii) Payments to Executors

Compensation should not be charged on disbursements to an executor/solicitor for legal services provided by him or her.[33] However, compensation is properly charged on bequests made pursuant to the Will to the executor/beneficiary in his capacity as a beneficiary.[34]

(iii) Interest for Pre-taken Compensation

It is generally understood that, absent an express provision in the Will an executor is only entitled to receive compensation when:

(a) the amount of compensation has been agreed to by all beneficiaries; or
(b) a Court Order fixes the amount of compensation.

To take compensation before one or the other has occurred is referred to as "pre-taking" compensation. The prohibition against pre-taking was confirmed in *Re Knoch*[35] and more recently, Greer J. has re-confirmed that pre-taking is improper[36].If an executor has improperly pre-taken compensation, interest on the compensation is deducted from the executor's compensation.[37]

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[30] *Re Goldlust Estate*, (1991), 44 E.T.R 97 (O.C.G.D.); Vanek v. O'Hara (1995), 7 E.T.R. (2d) 187 (O.C.G.D.)
[31] (1987), 26 E.T.R. 188 (Ont. Surr. Ct.)
[32] s. 27 (7), R.S.O. 1990, c. T.23, as am. S.O. 1992, c. 32, s. 27; 1993, c. 27, Sched.; 1994, c. 27, s. 43(2); 1998, c. 18, Sched. B, s. 16 .
[33] *Re Mortimer* [1936] 3 D.L.R. 380 (Ont. C.A.); *Forrest Estate v. O'Donohue*, supra
[34] *Re Cohen* (1977), 1 E.T.R. 80 (Ont. Surr. Ct.); *Re Stanley Estate* (1996), 13 E.T.R. (2d) 102 (O.C.G.D.)
[35] (1982), 12 E.T.R. 162 (Ont. Surr. Ct.)
[36] *Re Pilo Estate* [1998] O.J. No. 4521 (O.C.G.D.)
[37] In some circumstances interest is charged on the entire amount of compensation which has been pre-taken. See *Re Bellomo Estate* (1990), 36 E.T.R. 123 (Ont. Dist. Ct.) and *Re Goldlust Estate*, supra. In others, interest is only calculated on the amount in excess of the amount eventually awarded by the Court on the Passing of Accounts. See *Re Wright Estate* (1990), 43 E.T.R. 69 (O.C.G.D.)

f) RIGHT TO RAISE OBJECTIONS

If after receiving the accounts, the beneficiaries have objections to any of the entries or to the compensation claimed, they may file a Notice of Objection to Accounts. The Notice of Objection sets out any of the concerns the beneficiary has with respect to the accounts or to the administration generally. For example, the beneficiary may object to certain of the investments made by the estate trustee or to the legal fees paid from the estate.

The Notice of Objection to Accounts must be served on the Estate Trustee and filed with proof of service at least 20 days prior to the return of the Application.

The Notice of Objection to Accounts may be withdrawn by the beneficiary.

g) HAVE THE COURT DECIDE THE ISSUES

If a Notice of Objection is filed and remains outstanding, the Court will typically, on the first appearance make an Order for Directions.

The Order for Direction will set out what the issues to be heard will be, whether there will be mediation and whether any additional disclosure is required. The parties should also indicate how the hearing will proceed whether by summary trial with affidavit evidence, viva voce evidence or some combination of the two.

No objection shall be raised at the hearing that was not raised in a notice of objection to accounts, unless the court orders otherwise. At the hearing the court may assess, or refer to an assessment officer, any bill of costs, account or charge of lawyers employed by the estate trustee.

h) COURT MAY APPROVE THE ACCOUNTS

If no objections are filed before 20 days prior to the scheduled return of the Application to Pass Accounts, the estate trustee may obtain a Judgment without a hearing.[38]

To do so, the Estate Trustee files a Judgment Record which confirms, among other things, that no Objections have been filed. The Judgment Record must be filed between 10 and 20 days prior to the return date.

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[38] Rule 74.18 (9)

The Judgment Record must contain

- an affidavit of service of the documents referred to in subrule (4) and (5),
- 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,
- an affidavit (Form 74.47) of the applicant or applicant's lawyer stating that a copy of the accounts was provided to each person who was served with the notice of application and requested a copy, that the time for filing notices of objection to accounts has expired and that no notice of objection to accounts was received from any person served, or that, if a notice of objection was received, it was withdrawn as evidenced by a notice of withdrawal of objection (Form 74.48) attached to the affidavit,
- requests (Form 74.49 or 74.49.1), if any, for costs of the persons served, and
- the certificate of a lawyer stating that all documents required by subclauses (i) to (iv) are included in the record;

As well, you must file a draft Judgment in duplicate.

i) AWARD COSTS

On an unopposed Passing of Accounts, the Court will normally order costs to the parties in accordance with Tariff C of the Rules of Civil Procedure.

Tariff C sets out the costs for the Estate Trustee depending on the value of the receipts for the period of the accounts.

For a beneficiary to receive costs, he or she must file a Request for Costs. A beneficiary who hires a lawyer to review the accounts, but who does not file a Notice of Objection to Accounts is entitled to one-half of the amount payable to the estate trustee under Tariff C.

If the amount under Tariff C is insufficient to cover the legal costs of the parties, any party may file a Request for Increased Costs.[39] If a Request for Increased Costs is filed by any party, a Judgment cannot be granted without a hearing.

j) GRANT JUDGMENT

Whether with or without a hearing, once the court is satisfied with the Accounts, it will grant a Judgment. The Judgment will be in Form 74.50 or 74.51 depending on whether there was a hearing or not.

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[39] Form 74.49.2 or 74.49.3