

TAB 8A

Steps to a Successful Audit

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Estates Administration for Law Clerks 2010

March 2, 2010



The Law Society of
Upper Canada | Barreau
du Haut-Canada

Continuing Legal Education

STEPS TO A SUCCESSFUL AUDIT

by
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I. THE APPLICATION

1. The Accounts:

- To be prepared in court “format” (Rule 74.17);
- Review the Accounts from the point of view of a potential objector;
- Correct entries as necessary;
- Calculate compensation on Tariff basis even if trust document provides otherwise (for comparison purposes);
- Gather vouchers including the following:
 - Copies of all legal accounts;
 - Copies of all appraisals;
 - Copies of all reporting letters and for real estate copies of Agreements of Purchase and Sale and Statements of Adjustments.

2. The Application (Rule 74.18):

- Prepare a Notice of Application (Form 74.44);
- Accounts are to be verified by Affidavit (Form 74.43);
- Where one or more trustees refuse to verify the Accounts, include this in the Affidavit and name the co-trustees as Respondents;
- Get a scheduling date (in Toronto);
- Prepare Application Record containing:
 - Notice of Application;
 - Affidavit;
 - Accounts;

- copy of Will or Certificate of Appointment;
- copy of Judgment on last passing of accounts.

3. Service of the Application (Rule 74.18 (3)):

- Notice of Application and draft Judgment to be served on beneficiaries by regular letter mail;
- Can provide copies of the Accounts to beneficiaries;
- If the Children's Lawyer or the Public Guardian and Trustee represents a person who has an interest, the entire Application Record should be served on that office.
- Time for service is 45 days on persons served in Ontario and 60 days on persons served outside of Ontario.

4. Costs:

- Costs can be collected by the Applicant in one of three ways:
 - Costs awarded by the Court;
 - Costs paid by the Estate Trustee out of compensation;
 - Costs paid by the Estate Trustee personally;
- The Application will specify costs for the Applicant in accordance with Tariff C based on the total of income and capital receipts of the estate;
- If the Children's Lawyer or the Public Guardian and Trustee is being served, include in the Notice of Application reference to costs to be awarded to either of them equal to $\frac{3}{4}$ of the amount payable to the Applicant (note, these offices are required to serve and file a Request For Costs (Form 74.49.1) even if they have no objections);
- If the costs of the Applicant will exceed the Tariff C costs, in order to collect the additional costs from the estate, the Applicant must serve and file a Request for Increased Costs (Form 74.49.2);
- The Request for Increased Costs must be served and filed by the Estate Trustee during the period beginning 10 days after service of the Notice of Application is complete and ending the 10th day before the hearing date (Rule 74.18(11.1));
- In order to obtain a Judgment with increased costs, the hearing must proceed (Rule 74.18(11.2));

- At the hearing, the Court can either assess the costs or refer the issue of costs to an Assessment Officer (Rule 74.18(13)).

II UNCONTESTED PASSING OF ACCOUNTS

1. Judgment Record:

- If no Notice of Objection is received before the 20th day prior to the hearing date, a Judgment Record to be filed 10 days before the hearing containing the following:
 - Affidavits of Service of documents;
 - Notice of No Objection to Accounts (Form 74.46) or Notice of Non-Participation (Form 74.46.1) from the Children's Lawyer or Public Guardian and Trustee, if any;
 - Affidavit of the Applicant or the Applicant's lawyer (Form 74.47) confirming the Accounts were provided to any person served who requested a copy, that the time for filing for Notices of Objections has expired and no notice has been received or if a Notice of Objection was received, it was withdrawn as evidenced by the Notice of Withdrawal of Objection (Form 74.48) to be attached to the Affidavit;
 - Requests for Costs, if any (Form 74.49 and Form 74.49.1) or Request for Increased Costs (Form 74.49.2 and 74.49.3);
 - Certificate of Counsel for the Applicant stating all documents required to be included in the Record have been included;
- File the draft Judgment (Form 74.50) in duplicate with the Judgment Record;
- Judgment will be signed in chambers and forwarded to the Applicant, if there has not been a request for increased costs and otherwise the Applicant must attend at the return date to obtain Judgment;
- If attending because of request for increased costs, be prepared to prove costs with dockets and or Bill of Costs.

III CONTESTED PASSING OF ACCOUNTS

1. Notice of Objections (Form 74.45):

- Review the accounts and note objections;
- Contact the Applicant's counsel and request necessary vouchers such as tax returns, legal accounts, etc.;

- After reviewing vouchers, write to Applicant's counsel setting out the matters which require more information, explanation or documents (the objections);
- If the return date is approaching, request an adjournment, but note, in Toronto only one adjournment will be granted so ensure that the new return date gives sufficient time to deal with the issues;
- After the Applicant's lawyer responds to the informal objections and after any discussions between the counsel to try to resolve the objections, set down any remaining objections in the Notice of Objection (Form 74.45)
- Serve on the Estate Trustee and file the Notice of Objection at least 20 days before the hearing date (Rule 74.18(7));
- Include copies of any voucher or other material referenced in the Notice of Objection in a tabbed brief;
- The Notice of Objection can include background material if necessary;
- The Notice of Objection should be clear, precise, identify specific account entries and should be organized as the accounts are organized;
- If there is an objection to both the Accounts and to the claim for compensation, the objection to the Accounts should be dealt with in the Notice of Objection first;
- In objecting to the amount of compensation claimed, be specific regarding the amounts in dispute.

2. Response to Notices of Objection:

- There is no requirement under the Rules to prepare a formal response;
- A response to the Notices of Objection can be helpful to the Court and to the opposing counsel in an effort to resolve the objections;
- The Response should respond to the objections in the same order that they appear in the Notice of Objection;
- The Response should set out each objection before answering it;
- The Response can also include background or explanatory paragraphs if necessary;
- The Response should provide supporting documentation in a tabbed brief;
- The Response should be served on the Objector and file with the Court;

- Before the return date, counsel for the Applicant should contact counsel for the Objector to determine if the responses have satisfied any of the objections.

3. Mandatory Mediation (Rule 75.1):

- At the first return date (the Scheduling Date) the Court will deal with the matter as if hearing a motion for directions for the conduct of mediation (Rule 75.1.05(5));
- Counsel for the Applicant and the Objector should attempt to agree on directions for mediation;
- The Applicant should draft an Order directing mediation and dealing with the items specified in Rule 75.1.05(4);
- The Order directing mediation will generally set out a timeline for the conduct of the mediation, who has carriage of the mediation, what issues are to be mediated, who is required to attend and how they are to be served with the order, and how the costs of the mediation are to be apportioned;
- The parties must chose a mediator within 30 days of the Order (Rule 75.1.07), otherwise the mediator will be assigned from the designated list (Rule 75.1.06);
- The mediation agreement may outline what the mediator requires and the time limits for submitting material to the mediator prior to the mediation.
- Each party is required to prepare a Statement of Issues (Form 75.1C) and provide it to the other party and the mediator at least 7 days before the mediation (Rule 75.1.08)
- Each party should prepare a Mediation Brief:
 - It should include the Statement of Issues summarizing the issues and the positions of the parties on the issues;
 - It should not restate the objections and the responses to the objections;
 - It should set out legal and factual issues but should not argue law;
 - The value of the claim of the Objector should be specified;
 - Copies of the Notices of Objection and Response to Objection can be included in the Mediation Brief;
 - It should not include all vouchers but should include documents considered to be of central importance (Rule 75.1.08(3));

- Before attending the mediation, determine the best case scenario and the worst case scenario on each side of the issues, if possible;
- Before the mediation, meet with the client to discuss the best and worst case scenarios and get clear instructions on settlement parameters and ensure the client attending has the authority to settle;
- Before the mediation, instruct the client on the conduct of the mediation;
- Before the mediation calculate costs to date and estimate the costs of the trial;
- Bring time dockets to the mediation and be prepared to discuss costs.

4. The Settlement:

- The Parties and their lawyers are required to attend the mediation (Rule 75.1.09)
- All communications at the mediation are confidential and are deemed without prejudice settlement negotiations (Rule 75.1.11);
- If Minutes of Settlement are signed, prepare a consent Judgement including the award of costs, if any, for approval by all parties;
- If possible, before the return Scheduling Date, prepare a Judgment Record for the Court;
- On the return Scheduling Date for the Application, attend and submit the consent Judgment to be issued.
- See Rule 75.1.12 for more formal requirements

IV THE TRIAL

- If no settlement is reached at mediation, it will be necessary to obtain an Order for further directions on the return Scheduling Date;
- If the parties cannot agree on the Order for directions, it may be necessary for either party to bring a Motion for Directions under Rule 75.06;
- The Order giving directions will direct the following:
 - If it is an Order for Directions where pleadings will be directed (form 75.8) it will state:
 - (1) Who will be the plaintiff and who will be the defendant;

- (2) Directing the plaintiff to serve and file a statement of claim (Form 75.7) within a specified time, after which pleadings will proceed under Rule 75.07 or 75.07.1;
- If it is an Order for Directions where trial of the issues is directed (Form 75.10) it will identify who are the parties to the proceedings and the issues to be tried by listing which party affirms and which party denies each issue;
- Who is submitting their rights to the Court, if any;
- Directing the plaintiff and the defendant or the applicant and the respondent as the case may be, to serve and file affidavits of documents and submit to examinations for discovery in accordance with the Rules;
- Appointing an Estate Trustee During Litigation, if necessary;
- Who will be served with the Order for Directions (Form 75.8 or Form 75.9) and the methods of time of service;
- Ordering the issues to be tried by a Judge or by a Judge and jury;
- Dealing with costs;
- The matter will proceed as a trial.

SCHEDULES:

- A. Sample Objections to Accounts and to Compensation
- B. Sample Response to Notice of Objection
- C. Sample Order for Directions-Mediation
- D. Sample Mediation Brief

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SCHEDULE A

SAMPLE OBJECTIONS TO ACCOUNTS AND COMPENSATION

OBJECTIONS TO ACCOUNTS

WITHOUT WAIVING the right to make additional objections after receiving and reviewing voucher material and further particulars with respect to the accounts of <*>, the Estate Trustees [**“Executor and Trustee” for an unprobated Will, “Trustee” for inter vivos trust, “Attorney” for property attorney and “Guardian” for guardian of property**] for the Estate of <*>(the “Estate”), I, <*> (the “Objector”), object to the accounts of the Estate Trustees on the following grounds:

I. Generally

1. The accounts are not in the format required by Rule 74.17(1) of the *Rules of Civil Procedure* and must be re-cast.
2. The Estate Trustees failed to keep a proper and accurate accounting of receipts and disbursements in the Estate.
3. No detailed information has been provided by the Estate Trustees regarding the capital and revenue receipts or capital and revenue disbursements of <*>, a corporation wholly owned by the deceased at the date of death and which is now controlled by the Estate Trustees. The stated value of the shares of the corporation has not changes and the shares are recorded as an original asset remaining at the end of the period. However, receipts and disbursements have taken place within the corporation at the direction of the Estate Trustees and which will affect the value of the shares. Furthermore, the corporation has investment assets yet no dividends have been paid out of the corporation during the period covered by the accounts. the Objectors require

copies of all financial statements of the corporation beginning the with the fiscal year during which the deceased dies, together with profit and loss statements and copies of all corporate ledgers recording the receipts and disbursements within the corporation..

II. Statement of Original Assets (“SOA”)

4. The Estate Trustees have failed to satisfy the Objector that these accounts record all assets owned by the deceased as at the date of death.

5. The SOA is not cross referenced to entries in the Capital Receipts to that show the disposition or partial disposition of assets for each original asset converted by the Estate Trustees.

6. The SOA sets out a total value for the Estate assets of \$<*> as at the date of death. Capital Disbursement No. <*> records payment of estate administration tax of \$<*>, which is the amount payable on an Estate worth at least \$<*>. An explanation of this discrepancy is required.

7. The Estate Trustees have failed to account for all of the deceased’s assets. The SOA does not record any personal effects for the deceased, including household contents and the deceased’s automobile.

8. The Estate Trustees have failed to account for all of the deceased’s assets. It appears the Estate Trustees have allowed the assets to pass to <*> as surviving joint tenant. The SOA does not record the assets registered in the joint names of the deceased and <*>, which are now being held by <*> on a resulting trust.

9. The Estate Trustees have failed to account for all of the deceased's assets. The SOA does not record interest calculated to the date of death on the following interest bearing assets: <*>

10. The SOA does not include an adequate description of the deceased's assets.

11. The SOA records <*> as an asset at the date of death. There is no Capital Receipt recording the realization of this asset. The asset also does not appear on the Statement of Unrealized Original assets at the end of the period. An explanation is required. If the assets has been realized, the Objector requires a copy of all documentation evidencing the realization. If the asset has not been realized, the Objector requires evidence that it remains an asset in the name of the deceased.

12. The SOA records as an asset at the date of death, a shareholders loan in the amount of \$<*> owing to the deceased from <*>, a corporation which the deceased wholly owned. this loan is payable on demand and does not bear interest. Accordingly, the loan should have been collected and the proceeds recorded as a Capital Receipt and then invested for the Estate.

13. The Objector requires copies of all documentation in connection with the identification and valuation of the assets owned by the deceased at the date of death, including monthly statements for the month of death for all bank and investment accounts (including all accounts registered in joint names of the deceased and any other person) and all appraisals for real and personal property.

14. The Estate Trustees did not receive an appropriate rate of return on investments as a result of the Estate Trustees not taking an active role in the investment of Estate Assets.

II. Capital Receipts (“CR”)

15. All Original Assets received should be recorded in the CR and cross referenced back to the SOA.

16. There is no CR recorded for the personal and household item belonging to the deceased. An explanation is required.

17. The SOA records <*> Bank Account Number <*> as having a value at the date of death of \$<*>. CD Item <*> records receipt from the bank on <*> of \$<*>. The accounts do not contain any explanation of the discrepancy and there has been no accounting for the deposits to and withdrawals from this bank account between the date of death and the date the account was closed.

18. CR Item <*> records receipt of the net proceeds of sale for the real estate owned by the deceased. the Objector requires the following in connection with the sale:

- (a) Copy of the Agreement of Purchase and Sale;
- (b) Copies of any appraisal or opinions of value obtained by the Estate Trustees;
- (c) Copy of the statement of Adjustments; and
- (d) Copy of the reporting letter from counsel who acted on the sale. together with a copy of the legal account.

IV. Capital Disbursements (“CD”)

19. The first entry in the CD account is payment to the Province of Ontario in the amount of \$ <*> for probate fees, yet the SOA reflects assets valued at death of \$<*>. The Objector requires evidence of all of the Original Assets of the deceased showing the value as at the date of death.

20. CD <*> is a payment to <*> in the amount of \$<*> for removal of the contents of the residence. The accounts do not reflect the contents of the residence as an Original Asset and do not record receipt of the proceeds of sale of the contents. An explanation is required.

21. CD Item <*> records a payment to <*> of \$<*> which is described as “reimbursement for other Estate expenses”. No details of the expenses paid have been given and therefore the Estate Trustees have failed to account for the sum of \$<*>. Accordingly, repayment of this amount to the Estate, together with the interest, is required.

22. The accounts do not reflect a payment of income tax until <*> when there was payment made on account of \$ <*> a further payment on account of \$ <*> was made. It will be necessary to review the income tax returns of the deceased for the year of death, all T3 returns filed, and all assessments received, in order to determine if there have been any late filing penalties or interest charges paid by the Estate as a result of the failure to file returns on a timely basis.

23. Legal fees paid as shown at CD Items <*> and <*> appear to be excessive. Copies of the accounts together with time dockets will be required, together with copies of all reporting letters and legal memoranda produced for the benefit of the Estate Trustees.

24. The legal accounts rendered by <*> (Tab <*>) disclose that from and after the receipt of the Certificate of Appointment, the services comprise Executor’s work and the account as it relates to these services should not be paid by the Estate.

25. Substantial legal fees have been paid and are claimed and it appears from the accounts rendered by the law firm of <*> that a large percentage of the time spent was in fact spent

performing executors' duties and not legal work. The amounts involved, once determined, must be deducted from compensation and not paid out of the capital of the Estate.

26. CD Item <*> records an encroachment of capital for the benefit of <*> by the transfer of the deceased vehicle to <*>. The objector requests a copy of the request made by <*> for the capital encroachment and evidence that the request was made before the vehicle was transferred.

27. CD Items <*> record losses on investments totalling \$ <*> for the period. The amount of the losses is significant given the total value of the assets under investment and the short period of time covered by these accounts.

28. Fees for preparation of tax returns in the total amount of \$ <*> (C.D. <*>) should be borne by the Estate Trustees out of compensation as it is the obligation of the Estate Trustees to prepare and file tax returns. Alternatively, to the extent the returns calculate and pay tax on income as opposed to realized capital gains, fees for the preparation of the T-3 trust returns should be paid as a Revenue Disbursement and not out of capital.

29. Fees for preparation of financial statements in the total amount of \$ <*> (C.D. <*>) for the Estate should not be paid by the Estate. The Estate Trustees were advised financial statements would not be an acceptable format for accounting to the Objector (Tab).

30. Amounts paid to Revenue Canada for income tax on account of income as opposed to realized capital gains, (CD Items <*> and <*>) should be paid out of income. The refund (CR Item <*>) should also be recorded as a Revenue Receipt.

31. The Estate Trustees have not accounted for the Canada Pension Plan death benefit.

32. CD Item <*> records a payment to <*> for the preparation of the Accounts. The costs of preparation of the Accounts are to be paid by the Estate Trustees out of the compensation awarded and not out of the Estate.

V. Investment Account (“IA”)

33. The IA does not balance. The difference between the cost of the investments and the proceeds of redeemed investments is \$<*>. The cost of investments on hand at the end of the period recorded on the Summary page of the Accounts is \$<*>. The Objector requires an explanation and evidence of the cost value of each investment purchases and the amount of proceeds received for each investment realized during the period.

34. The Estate Trustees have invested in shares, however, the IA does not record details of the classes of shares purchased, the price per share paid or received as the case may be.

35. The IA records the total proceeds of the realization on investments, rather than just receipt of the original cost. This is improper as it artificially inflates the value of the investment account.

36. The IA, together with the CD recording losses and CR recording gains, reflect only the net receipt and do not identify the costs associated with each sale, such as broker’s fees.

37. It appears from the IA that the Estate Trustees have invested chiefly in income producing investments and have not attempted to achieve the capital growth necessary in order to preserve the purchasing power of capital.

VI. Revenue Receipts (“RR”)

38. RR Items <*> and <*> are unidentified deposits for which full particulars are required.

VI. Revenue Disbursements (“RD”)

39. The accounts do not include the “purpose of the payment and to whom it was paid” for RD Items , , and as required.

40. RD Item is properly a capital disbursement.

41. RD Item refers to a “cash withdrawal” of \$. Particulars and vouchers are required to show how these funds were expended for the Estate.

42. RD Items all record bank overdraft interest charges totalling \$. As the Estate Trustees was in control of the investments, the funds should have been managed to avoid overdraft interest.

43. RD Items record payment of “management fees” to . Copies of all invoices for fees paid and any contract with are required.

44. Copies of vouchers are required for the following RD Items:

VII. Date of Death Liabilities (“DDL”)

45. The DDL records the sum of \$ as owing by the deceased to the Estate Trustees. Documentation evidencing the loan and the amount outstanding is required.

VIII. Assets on Hand at the end of the Period

46. The accounts reflect a balance in the bank account of \$ at the end of the period, however, the Summary in the Accounts show a credit balance in the capital account of \$ and in the revenue account of \$, for a total of \$. An explanation of this discrepancy is required.

OBJECTIONS TO COMPENSATION

WITHOUT WAIVING the right to make additional objections after receiving and reviewing voucher material and further particulars with respect to the accounts of <*>, the Estate Trustees [**“Executor and Trustee” for an unprobated Will, “Trustee” for inter vivos trust, “Attorney” for property attorney and “Guardian” for guardian of property**] for the Estate of <*>(the “Estate”), I, <*> (the “Objector”), object to the compensation claimed by the Estate Trustees on the following grounds:

1. The amount claimed for compensation is excessive having regard to the nature of the original assets, the simplicity of the Estate, the lack of time or skill displayed by the Estate Trustees, the size of the Estate and the fact that the administration has not yet been completed.
2. The stated original assets of the Estate included <*> The Estate Trustees have done nothing except transfer the <*>, pay a small number of bills and pay the legacies. No special skill was required and the Estate Trustees showed a lack of skill in this administration as is set out further herein.
3. A care and management fee is inappropriate having regard to the fact that <*>% of the assets are Original Assets not yet dealt with by the Estate Trustees.
4. The Estate Trustees did not act with reasonable care and prudence and failed generally to discharge their duties as Estate Trustees, in that they failed to keep proper accounts, failed to respond to requests for information about the Estate in a timely manner and failed to determine the original assets of the Estate in a timely manner.

5. The Estate Trustees failed to keep a proper and accurate accounting of receipts and disbursements in the Estate. The accounts are not in the form required by Rule 74.17. There is no cross referencing of entries in reflecting the disposition of Original Assets.

6. The Estate Trustees has failed to account for all the assets of the deceased at the date of death as more particularly described in Objection Nos. <*> and <*> set out above.

7. The Estate Trustees should not be compensated as they have failed to satisfy the Objectors that these Accounts include all assets owned by the deceased as at the date of death

8. The Accounts do not accurately reflect what has happened with the deceased's assets since the date of death, and more particularly described in Objection Nos. <*> and <*> set out above.

9. The Estate Trustees have pre-taken compensation in the amount of <*> notwithstanding that the Will of the deceased does not provide for the pre-taking of compensation. The compensation should be reduced by an amount equal to interest at the pre-judgment rate of <*>% on all amounts pre-taken to the date of Judgment .

10. The Estate Trustees have claimed compensation at the rate of 2½% on the sum of \$<*>(Capital Disbursements) which includes capital losses of \$<*>. The Estate Trustees should not be compensated for losses incurred by them and the compensation claimed on the capital disbursement account should therefore be reduced by 2½% of \$<*> which equals a reduction of \$<*>.

11. The capital and revenue disbursements include payment of investment management fees to <*>. As investment management is one of the duties of the Estate Trustees, the aggregate

amount of \$<*> paid for these services should be deducted from the amount of compensation claimed.

12. The Estate Trustees have failed to act impartially between the beneficiaries and maintain an even hand between the income and capital beneficiaries in the following manner:

- (a) investments in income producing assets have been retained and no effort has been made to achieve capital growth notwithstanding that this was brought to the attention of the Estate Trustees in <*>;
- (b) term deposits held as original assets were not realized as soon as they should have been after death, but rather were left to mature;
- (c) the investments made by the Estate Trustees include only guaranteed investment certificates;
- (d) the Corporation is an investment corporation and the assets in which it has invested are primarily income producing investments, which will not provide any capital growth in the Corporation;

13. The Estate Trustees are not ensuring prudent investment of Estate assets notwithstanding <*> is paid a substantial salary by the Corporation to make investments. In addition, there are tax considerations which make it important to dispose of the shares **[within a year of the deceased's death][before the death of the deceased's spouse]** in order to avoid double taxation.

14. The Estate Trustees, <*>, has profited by the administrations at the expense of the Estate by retaining Estate assets, namely <*>, in his own hands which is far in excess of compensation which might be awarded to an Estate Trustees for managing the investments held by the Corporation, and by reimbursing himself for airfare which should not be paid from the Estate.

15. The Estate Trustees, <*>, has profited by the administration at the expense of the Estate by accepting \$<*> for legal fees for which he has produced time dockets for services totalling \$<*>.

16. Fees paid for the preparation of the Estate accounts and tax returns should be paid by the Estate Trustees.

17. The amounts paid to the Estate Trustees for salary by the Corporation are unreasonable in relation to the services provided, especially in light of the fact that these services include investment services even though proper investments are not being made and included keeping the books of the Corporation. The Corporation has no minutes book and has kept no corporate records. The Estate Trustees have not executed annual minutes during the period of their trusteeship and have taken no steps to bring the corporate records up to date. As of <*>, the deceased is still shown as the sole officer and director of the Corporation on the records of the Ministry of Consumer and Commercial Relations. The only liabilities of the Corporation are for shareholder advances which the Estate Trustees made no effort to repay to the Estate and invest as Estate funds.

18. The Estate Trustees should be obligated to account monetarily for the loss to the Estate by their failure to invest Estate assets in an even handed manner in the amount of \$<*>, and the

payment of an unreasonable salaries to them by the Corporation in the aggregate amount of \$<*>.

19. No care and management fee should be allowed as this was an immediately distributable Estate.

20. Compensation claimed on the receipt and disbursement of the deceased's <*> should be allowed at 1% and not 2.5% and this was an in specie transfer of the asset to the beneficiary which did not require any time or effort on the part of the Estate Trustees.

21. Substantial legal fees have been paid and it appears from the legal accounts rendered by the law firm of <*> that a large percentage of the docketed time was spent performing executors' duties and not legal work. Accordingly, the total amount of \$<*>, which is estimated to be the value of the time spent on Executors' services should be deducted from the claim for compensation .amounts once determined must be deducted from compensation.

22. No compensation should be allowed on receipts and disbursements or investment of those amounts held in trust the trust account of the solicitors for the Estate Trustees.

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SCHEDULE B
SAMPLE RESPONSE TO NOTICE OF OBJECTION

Court File No. <*>

ONTARIO
SUPERIOR COURT OF JUSTICE at <*>

IN THE ESTATE OF <*>, deceased

RESPONSE TO NOTICE OF OBJECTION

The <*> (“Applicant”), the co-executor and trustee with <*> of the estate of <*>, and the applicant in these proceedings, replies to the Notice of Objections filed on behalf of <*> and <*> (the “Objectors”) as follows:

1. Objections to the Amount of Compensation

- (a) The Objectors state the care and management fees are excessive.

Applicant has calculated its care and management fee on the same basis as it has in prior audits, which is the usual percentage of 2/5 of 1% of the average value of the assets under investment for each year or part year of the period covered by the accounts.

The total care and management fee for the period covered by this audit was \$<*> (see **Accounts, page <*>**) which has been correctly charged 2/3 to capital and 1/3 to income.

The care and management fee was calculated using the following annual values to determine the average value:

<*> \$<*> (\$<*> for <*> Property)

<*> \$<*> (\$<*> for <*> Property)

<*> \$<*> (including of realized proceeds of sale of <*> Property)

The value of the estate's interest in the [REDACTED] Property was understated in the asset value totals [REDACTED] and [REDACTED].

The capital beneficiaries have made no objection to the accounts or to the compensation claimed. Only \$[REDACTED] of the care and management fee has been charged to revenue which is less than \$[REDACTED] per year. Given the time spent in the management of this estate including administering a 1/4 interest in commercially rented real property, and the complexity involved in completing the sale of the estate's interest in this real property (the "[REDACTED] Property"), as discussed in 1(d) below, Applicant submits the amount claimed is reasonable in all respects.

- (b) The Objectors state the care and management fees are disproportionate to the amount of revenues received by the estate.

The care and management fee is not a revenue-based fee and is in no way dependent on the amount of revenue received by the estate.

- (c) The Objectors state the care, responsibility and time employed by Applicant does not warrant the amount of compensation claimed.

The time expended by the trust officers, assistants and investment advisors in the administration of this estate for this accounting period has been significant, in part due to the following:

- (i) Contacting and obtaining decisions from the co-executor, [REDACTED], has taken much time. She is often difficult to reach while sojourning in Florida. It often takes more than one letter, email or telephone call to reach her. In addition, her son, [REDACTED], the other income beneficiary, has acted as an intermediary between Applicant and [REDACTED], which delayed some decisions and increased the amount of time spent by employees of Applicant. **See TAB 1** for an example.
- (ii) Applicant provided the income beneficiaries with monthly and annual financial reporting on this trust. Applicant also replied to various inquiries made by the

income beneficiaries on this reporting. See **TAB 2** for copies of email exchanges between the Objector, <*>, and Applicant explaining one of the reports.

- (iii) Only the Applicant, and not <*>, took responsibility for the day to day management of the trust. As co-executor and trustee, <*> participated in decisions regarding the trust investments, disbursements and the sale of the <*> Property, but did not otherwise participate in the management of the trust.
- (iv) During this accounting period, Applicant had to manage the estate's interest in the <*> Property, which was a commercial property, and at the end of this accounting period, in <*>, this property was sold. This involved a great deal of time and effort on the part of Applicant, beginning in <*> with negotiations with the co-owner. The estate only owned a one-quarter interest in the property but Applicant wanted to ensure the estate received the best possible price for the asset and that the interests of the beneficiaries are protected.
- (v) A meeting was held on <*>, attended by <*> for Applicant, the co-trustee, <*>, Mr. <*>, the 75% owner, and <*>, the accountant for the head tenant. The head tenant was moving out in <*> and the remaining tenant was leaving in <*> and therefore the 75% owner wanted to sell the building. Mr. <*> was also a real estate agent with <*> and he had already put a "For Sale" sign on the property without the knowledge of Applicant and without a signed listing agreement.
- (vi) In the meeting, Mr. <*> advised there were two 8' x 12' oil tank's buried on either side of the property. This was the first indication Applicant had of any environmental issues with respect to the property. Mr. <*> indicated he wanted to sell the property "as is". Applicant was concerned about getting market value and about the potential liability because of the oil tanks. Applicant, with the consent of <*>, the co-executor, agreed to get one appraisal and one letter of opinion to establish value.
- (vii) Because of the existence of the oil tanks, Applicant wanted to obtain a separate legal opinion on what would be the potential liability for the estate if they were

not removed. <*> LLP was retained. See TAB 3 for an internal memorandum from <*>, an environmental specialist, to <*>, counsel to Applicant. See TAB 4 for a copy of the letter dated <*> from <*> LLP to <*>, counsel for the co-owner, outlining the environmental issues and the potential liability of the estate.

- (viii) The appraisal obtained in <*> estimated a value based on the assumption the oil tanks would be removed and there would be no environmental contamination (see TAB 5, p.11). The letter of opinion also gave an opinion on value on the assumption the site was clean and free from contamination (see TAB 6, p.2).
 - (ix) The opinion of counsel for Applicant was that the tanks had to be removed. <*>, the co-executor, agreed and in fact, provided Applicant with the name of a possible contact for a quote on the clean up.
 - (x) If Applicant had not retained competent counsel to protect the estate's interest in the <*> Property, this may have resulted in continued liability of the estate.
- (d) The Objectors state the value of the estate's 1/4 interest in the <*> Property is excessive.

This is a meaningless statement.

The <*> Property was carried on the accounts as an original asset at its date of death value of \$<*> (see page 2 of the Accounts). Its appraised value in <*> was between \$<*> and \$<*> (see TABS 5 and 6). The <*> Property was listed for sale in <*> for \$<*> and was sold in <*> on the open market to a willing and unrelated purchaser. The price paid for the property of \$<*> (the estate's interest being worth \$<*> before adjustments) was its fair market value. Furthermore, the objector, <*>, in her capacity as a co-Trustee, signed the listing agreement and approved the sale of the <*> Property and all expenses related thereto. She cannot now object to her own actions.

- (e) The Objectors state the market value for the estate upon which the applicant has calculated its care and management fee is excessive.

The care and management fee was calculated on the same basis as it has been in past audits, by taking the value of the assets under investment at the beginning of the period

and averaging it with the value of the assets under investment at the end of each year during the period and applying the usual tariff to the average value. **See 1 (a) above.** In this case the period was <*> years and <*> days. The value of the estate on which the fee was calculated was not overstated or excessive.

- (f) The Objectors state the value of the estate is relatively nominal such that a flat fee percentage for compensation based on the tariff is inappropriate.

Applicant is entitled to be paid compensation as it has in previous audits of this estate, calculated at the usual tariff rates if, after applying the five factors, including the size of the estate, expertise of the trustee, conduct of the trustee, time spent in administration and results achieved, the amount would not be unreasonable.

The size of this estate is not minimal. It is approximately \$<*> million. The Objectors have not identified any misconduct by Applicant. More importantly, Applicant at all times has acted with the utmost good faith in the best interests of the beneficiaries. The claim is not excessive having regard to amount of time spent by the Applicant in the administration during this audit period. The time spent was tremendous due to the issues involving the sale of the <*> Property as discussed in 1(c) above. The results of the sale of the <*> Property were of significant benefit to the estate.

The total compensation claimed for the period is just over \$<*> or approximately \$<*> per annum. Part of this compensation is a capital receipt fee on the value of the estate's interest in the <*> Property, which was an original asset. This capital receipt fee was 2.5% of \$<*> (the net proceeds of sale) or \$<*>. Applicant has not claimed compensation on refunds, including final distributions on the <*> Property (**See CR 4, 7 – 11 and Compensation Statement p. 78**). The compensation other than this capital receipt fee is only approximately \$<*>, which is an average fee of approximately \$<*> per year. Furthermore, the total compensation charged to revenue over the period was only approximately \$<*>, or \$<*> per year. The capital beneficiaries have not objected to the amount of capital compensation claimed. For all of these reasons, Applicant submits the amount claimed is not unreasonable or excessive.

- (g) The Objectors state Applicant is charging disbursement fees for services rendered as a trustee and in addition to that is charging trustee fees for the same services giving rise to double compensation and an inherent conflict of interest.

The Objectors will have to provide additional details of this Objection. Applicant has not charged compensation more than once or in excess of the usual tariff and there is no conflict of interest.

- (h) The Objectors state the income beneficiaries have repeatedly requested that Applicant invest in sources outside of the common trust funds, many of which have resulted in significantly reduced income to the beneficiaries.

(i) Applicant is entitled to invest in its own common trust funds pursuant to the provisions of the *Trustee Act* (Ontario). Such investments are not detrimental to the estate and in fact, provide certain benefits, because the funds do not incur management fees like mutual funds which are “front” or “rear” loaded. Because the investments are being made on behalf of a large group of investors, the brokerage fees on purchases and sales of individual stocks and bonds, are spread among many unit holders, reducing the cost to each individual unit holder. Attached at **TAB 7** is a summary of the investment rationale for the use of common trust funds, which summary contains tables showing the annual rates of return enjoyed by the estate, as well as comparisons of the returns on the US and International common trust funds as compared to benchmarks.

(ii) There was no “reduction” of income to the beneficiaries by investing in common trust funds. At the beginning of the period of this audit, the total value of investments, other than the original assets, was approximately \$[*] of which approximately \$[*] was invested in common trust bond funds and only \$[*] was invested in common trust equity funds. This means that over 75% of the investments were geared toward income producing assets. Similarly, at the end of the accounting period in question, out of approximately \$[*] in investments 72% was invested in common trust bond funds.

- (iii) The common trust equity funds were also income producing for the benefit of the income beneficiaries.
- (iv) Attached at **TAB 8** is an email received by Applicant from the Objector, <*> dated <*>, indicating he and his mother, <*>, did not want further investments made in the common trust funds and instructing that, as investments in the common trust funds “matured”, Applicant was not to invest in any fund that had any association with Applicant or TD. This email also referred to approval of a purchase of a <*> bond. As a recommended replacement for common trust bond funds. See **TAB 9** for the approval for the purchase signed by <*> on <*>.

Attached at **TAB 10** is an email from Applicant to <*> explaining that common trust funds are not investments in Applicant, <*> or any affiliates and that in fact, the funds are prohibited from investing in offerings of <*> Bank or its affiliates.

Applicant made no further investments in common trust funds after being requested not to by <*> and <*>. Attached at **TAB 11** is a copy of an internal report to Applicant confirming that in the meeting with <*> in <*>, Applicant agreed to increase the equity component in the estate and not to invest further in common trust funds. Following this internal report, Applicant was to meet with <*> to discuss changes to the investments but she later advised she could not meet because she had to attend <*> (See **TAB 12**).

<*> was asked to approve portfolio changes under cover of letter dated <*> (See **TAB 13**), in part to raise funds for expenses associated with the sale of the Colville Property. She did not agree to the investment changes, but agreed Applicant could raise \$<*> to pay bills (See **TAB 14**).

In <*>, further investment changes were recommended to further reduce the investments in common trust funds. <*> was asked for approval under cover of letter dated <*>, and she signed her approval (See **TAB 15**).

In <*>, further investment recommendations were made in part to invest the proceeds of sale of the <*> Property (See **TAB 16**). These recommendations

were not approved by <*> prior to the end of this accounting period. However, following the end of this accounting period, all common trust funds were eliminated and replaced with segregated investments approved by the co-trustee <*>.

- (v) The revenue receipts for this accounting period (about <*> months), were approximately \$<*>. Approximately \$<*> of this income was attributable to rent on the <*> Property. The remaining \$<*> in revenue was earned on the other investments. At an average investment value of \$<*> (excluding the <*> Property), the revenue would be approximately 12% over the period. This is greater than 4% per annum, which is a high rate of income.
- (vi) The Objector, <*>, refused to approve certain changes in investments away from common trust funds as noted above and in her capacity as co-executor, approved the investments and changes made by Applicant and cannot now object to her own actions.
- (i) The statements made by the Objectors in paragraph 1(i) of the Notice of Objections should be disregarded by this Court.

The Objectors are not entitled to speculate what may have been in the mind of the testator at the time of making the Will, and are certainly not entitled to recount unsupported hearsay. The Will speaks for itself. The testator appointed a trust company to act as one of three executors and trustees (originally) and Applicant is the successor in interest to <*>. Compensation payable to an executor and trustee is not based on whether the executor is an individual or a corporate trustee and it is not based on the size of the corporate trustee.

- (j) The Objectors state that despite good economic times during the period of these accounts, the estate has consistently underperformed in its investments resulting in reduced income to the beneficiaries despite increased costs rendered by the trustee.

The costs rendered by Applicant have not increased. The compensation is based on the same tariff which has been approved in past audits. Furthermore, the estate has not underperformed. See 1(h) above.

2. **Objections to Accounts**

- (a) The Objectors have itemized various capital receipts and disbursements.

Applicant fails to see how the Objectors can object to any of the capital receipts and the Objectors have not identified any reason for the objection.

With respect to the itemized capital disbursements, Applicant has provided vouchers for all but capital disbursement [REDACTED] and capital disbursement [REDACTED] (which recorded small losses on the disposition on some of the [REDACTED] Funds) as follows:

- (i) C.D. [REDACTED], C.D. [REDACTED], [REDACTED] and [REDACTED] were payments of the estate's 25% of invoices from [REDACTED] for necessary structural repairs and infilling on the property. [REDACTED] was asked to approve payment. Applicant paid these accounts before receiving [REDACTED] approval because otherwise a lien could have been registered against the property. **See TAB 17.** [REDACTED] approved these payment and all other payments from the trust income and capital between [REDACTED] and [REDACTED] and signed this approval on a copy of the account statement for this period which is at **TAB 18.** This was done because [REDACTED] spent the winter in Florida and her written approvals for expenses could not be obtained while she was away.
- (ii) C.D. [REDACTED] and [REDACTED] represent the estate's share of the invoices from [REDACTED] dealing with the contaminated soil. [REDACTED] approved these payments. (**See TAB 18.**)
- (iii) C.D. [REDACTED] and [REDACTED] were invoices from [REDACTED] LLP for legal fees. The larger account was forwarded to [REDACTED] for approval on [REDACTED]. When she had not approved by the end of February because she was in Florida, Applicant paid the outstanding invoice on [REDACTED], in order to avoid accrued interest. The fees of \$[REDACTED] had been reduced from the original amount of \$[REDACTED], (a 23% reduction). **See TAB 19.** In addition, [REDACTED] approved these payments (**see TAB 18.**)

- (iv) C.D. [REDACTED], [REDACTED] and [REDACTED] were the estate's share of accounts from [REDACTED] for preparing for and doing the Phase 1 environmental assessment and tasks related thereto. [REDACTED] approved the payments. **See TAB 20.**
- (v) C.D. [REDACTED], C.D. [REDACTED] and [REDACTED], were invoices for legal fees from [REDACTED] LLP. Each one provided a discount to the estate and accordingly Applicant determined the fees were reasonable. [REDACTED] also approved these invoices for payment. **See TAB 21.**
- (vi) C.D. [REDACTED], [REDACTED], [REDACTED] and v were payments for the estate's share of invoices related to the environmental assessment, and cleanup. [REDACTED] approved them. **See TAB 27.**

The Objectors state Applicant failed to provide a proper accounting as to the valuation of the estate's interest in the [REDACTED] Property and paid more than the estate's share of the disbursements on the sale, including legal fees of \$[REDACTED]. The Objectors refer to "incomplete appraisals, environment assessments, maintenance and repairs" as unnecessary expenses and seek explanations.

Applicant has properly accounted for the value of the estate's interest in the [REDACTED] Property. The [REDACTED] Property was sold at fair market value on the Multiple Listing Service (MLS) and the estate received its 1/4 interest in the net proceeds of sale on [REDACTED], as shown in Capital Receipts [REDACTED] - [REDACTED]. See comments at 1(c) and 1(d) above. Attached at **TAB 21** are copies of correspondence from the lawyer for the co-owner, who acted on the sale, enclosing the net proceeds of sale, a list of disbursements made and accounting for the estate's 25% portion and the amended statement of adjustments, accounting for the estate's share of the deposit remaining and accounting for the estate's share of various post closing refunds.

The legal fees were not relative to the completion of the sale of this property which was performed by the co-owner's lawyer. The fees dealt with negotiations with the co-owner as to terms of sale and the environmental issues as referred to in the letter to Applicant at **TAB 4**. The executors are entitled to retain their own counsel to provide advice. The

retention of separate counsel from the other co-owner of the <*> Property was necessary as the interests of the two owners were not ad idem. All invoices were net of discounts from <*> LLP and Applicant determined the fees were reasonable.

Applicant has not paid any disbursements on the real estate transaction in excess of its interest in the property.

The Objectors state that multiple appraisals of the property were unnecessary but in the same objection state that Applicant has failed to obtain a proper accounting of the value of the estate's interest in the <*> Property. The Estate Trustee obtained a letter of opinion as well as a formal appraisal of the <*> Property prior to sale (see TABS 5 and 6). This is usual practice to ensure the property being sold is listed at the correct price.

The Objector, <*>, in her capacity as co-executor, approved all actions taken with respect to the appraisal, clean up and sale of the <*> Property and cannot now object to her own actions.

- (b) The Objectors have itemized certain revenue receipts in paragraph 1(b) of the Notice of Objection.

All of the itemized receipts refer to income earned and received by the estate on the <*> Funds and the <*> Funds (except for item <*> which was income on the money market fund) and the Objectors have not provided any reason for the objection. Rather than objecting to these receipts, the Objectors, on the contrary, should be satisfied that notwithstanding the investment of approximately 1/4 of the investable assets of the trust in equity funds, the equity funds were, in fact, producing income for the income beneficiaries.

- (i) The Objectors state the estate has consistently invested in poor performing investments directed by the Trustee itself and persistently lost money in the <*> Fund and the <*> Fund, despite the fact that other safer investments were consistently producing higher returns during the same investment period.

The Objectors have not provided any information on “other safer available investments consistently producing higher returns during the same investment period”. As stated in paragraph 1(j) above, the return on investment for the benefit of the income beneficiaries has been more than reasonable during the period (see **TAB 7**). Although a small loss was incurred on the sale of units of the <*> Fund and the <*> Fund, the performance of Applicant is not to be judged on any single recorded loss and in this estate, the overall performance of the investments has been more than reasonable.

- (ii) The Objectors state that the income beneficiaries have repeatedly requested the estate change its investment practices by investing in assets other than common trust funds and the income of the estate has been significantly reduced as a result of Applicant’s investment practices.

The Objectors requested no further investments be made in common trust funds in <*> (see **TAB 8**) and this was confirmed in the meeting with <*> in <*>. In fact, after <*> 003, Applicant did not make any new investments in common trust funds, except Money Market Funds, which are funds the unit value of which does not fluctuate. Money Market Funds were used to hold cash for liquidity when was necessary to pay bills or while Applicant waited for investment approvals from the co-executor and trustee, <*>.

Applicant is entitled to invest in its own common trust funds under the *Trustee Act* (Ontario). The respondent’s income has been consistent throughout the period. The Objectors have not provided any evidence of income being diminished. Applicant takes the position that, in fact, the opposite is true and the income of the Objectors was more than reasonable during the accounting period.

- (iii) The Objectors refer to the investment receipts and disbursements disclosed by the accounts and state that Applicant failed to invest a significant portion of the estate in long term investments yielding a higher rate of return of interest.

This is not correct. Investments in common trust bond funds, which made up approximately 75% of the investable assets in this estate during the accounting period, means that the estate is invested in long, medium and short term bonds. The funds themselves contain bonds of various terms. However, it is more beneficial for the income beneficiaries where the trust holds bonds through a common trust fund. If the estate held specific short and long term bonds, the income on each bond would have been payable annually or semi-annually and the beneficiaries would not have been entitled to receive any income from the estate until the bond income was paid. The common trust funds, on the other hand, paid income monthly so the income beneficiaries did not have to wait until the bonds in the fund paid the annual or semi-annual income in order to receive a distribution. Investment in these bonds made it possible for Applicant to distribute steady monthly income to each of <*> and <*> in the amount of \$<*> per month during the period of these accounts. The Objectors have not provided any financial information to support the allegations that Applicant could have invested prudently in higher yielding investments and they have not identified any specific actionable loss to the estate.

(iv) With respect to the objections described in 2(b) and (b)(i) to (iii) above, <*>, as co-executor, approved the investments and changes in investments and cannot now object to her own actions.

(c) The Objectors have itemized certain revenue disbursements by specific number.

All disbursements itemized by the Objectors are reflected on page <*> in the compensation calculated on the Revenue Receipts (\$<*>) and the compensation calculated on Revenue Disbursements (\$<*>).

The compensation on Revenue Disbursements is not for merely disbursing cheques to the Objectors for their monthly income. The Revenue Disbursement fee, calculated on the allowable tariff, also takes into account all of the other disbursements made by the trustees, communications with the co-trustee and the other income beneficiary, and the preparation and keeping of the accounts themselves. It is not reasonable to suggest that

Applicant is being compensated for merely transferring income to the two income beneficiaries.

- (i) The Objectors also state that these fees are in addition to the “account fees” charged by Applicant and represent double compensation.

There was no doubling of the compensation charged by Applicant.

- (ii) The Objectors also state that realty and other tax disbursements should be paid out of capital and not income or alternatively, the proportion should be reduced.

The Objectors have not specified any items which they believe were inappropriately charged to income. Revenue Disbursement [REDACTED] was for \$[REDACTED] paid to the City of Toronto for a tax certificate. This is the only questionable item in the Revenue Disbursements and is de minimus. Other than this item, only disbursements [REDACTED], [REDACTED] and [REDACTED], totalling \$[REDACTED], were paid for maintenance and repairs of the [REDACTED] Property. No other disbursement out of revenue was made on account of the [REDACTED] Property. These items were properly charged to revenue as they reflect ordinary maintenance. In addition, the Objector, [REDACTED], as co-executor, approved these disbursements made by Applicant and cannot now object to her own actions.

- (iii) The Objectors state all that real estate costs attributed to the sale of [REDACTED] Property should be taken completely out of capital.

No other costs related to the [REDACTED] Property were charged against income.

- (d) The Objectors state the amounts paid to them as income beneficiaries are nominal and unsatisfactory due to mismanagement by Applicant and improper charges against income.

Applicant takes the position that the beneficiaries have received all income to which they are entitled. The amount of income earned and paid to the beneficiaries was not nominal. The amounts received into the estate was approximately \$[REDACTED] and the amount paid to the beneficiaries, net of expenses and taxes paid on their behalf, during the period was

approximately \$<*> which consisted of the \$<*> paid to each income beneficiary per month, the income taxes paid on behalf of the beneficiaries and other additional income distributions. There has been no mismanagement of the estate assets by Applicant. There have been no payments of capital expenses out of income.

For all of the reasons set forth in this Response to the Notice of Objection filed by the Objectors, the Applicant submits that the accounts should be passed as filed and compensation should awarded to Applicant in the amount claimed.

DATE:

TO:



Solicitors for the Objectors

6027895.1

AIRD & BERLIS LLP

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Solicitors for The Applicant

SCHEDULE C

SAMPLE ORDER FOR DIRECTIONS- MEDIATION

Court File No <*>

**ONTARIO
SUPERIOR COURT OF JUSTICE at <*>**

The Honourable) <*> DAY, the <*> day of
)
Justice) <*>, 20<*>




IN THE ESTATE OF <*>, deceased

O R D E R

THIS APPLICATION was read on <*>, 2009, at 330 University Avenue, Toronto, Ontario.

ON READING THE NOTICE OF APPLICATION TO PASS ACCOUNTS of <*>, the executor of the Estate of <*>, deceased, for a Judgment passing the accounts for the period <*> to <*>, and on reading the affidavit of service and upon hearing the submissions of counsel for the Applicants and counsel for <*> and <*>, beneficiaries who intend to object to the accounts and to the claim for compensation, Respondents in these proceedings,

1. **THIS COURT ORDERS** that the application is adjourned to a Scheduling Appointment on <*>.
2. **THIS COURT ORDERS** that the Respondents shall serve any Notice of Objection with respect to the passing of accounts on or before <*>.
3. **THIS COURT ORDERS** that if no Notice of Objection is filed on or before <*>, the Applicant may file a Judgment Record in support of an unopposed passing with costs on the basis of full indemnity, payable one-half (1/2) from the income and one-half (1/2) from the capital of the estate.

4. **THIS COURT ORDERS** that if a Notice of Objection is filed on or before , counsel and their respective clients shall attend on and conduct a mediation on or before , in Toronto, Ontario, and before a mediator as agreed between the parties. In the event the parties cannot agree upon a mediator, either party may make a motion to this Court on or before , to have the Court appoint a mediator to conduct the mediation.
 5. **THIS COURT ORDERS** that the parties shall exchange mediation briefs ten days before the date scheduled for the mediation.
 6. **THIS COURT ORDERS** that in the event the Parties fail to reach a settlement on or in advance of the mediation, the Applicant shall make a motion to this Court for further directions returnable on the Scheduling Appointment date referred to in Paragraph 1 of this Order.
 7. **THIS COURT ORDERS** that the Parties shall bear their own costs of preparing for and attending on the mediation without prejudice to the right of either party to argue that the costs should be borne by the estate or by the other party, whether on the mediation or on the final hearing.
 8. **THIS COURT ORDERS** that the costs of the mediator and this appearance shall be in discretion of the judge hearing the passing of accounts.
-

IN THE ESTATE OF <*>, deceased

**ONTARIO
SUPERIOR COURT OF JUSTICE**

O R D E R

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Solicitors for the Applicant

<*>

Executor and Trustee of the
Estate of <*>

**SCHEDULE D
SAMPLE MEDIATION BRIEF**

Court file number <*>

***ONTARIO*
SUPERIOR COURT OF JUSTICE AT <*>**

IN THE ESTATE OF <*>, deceased.

MEDIATION BRIEF OF <*>

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LSUC # 21877N
Solicitors for <*>, Applicant

DATE OF MEDIATION: <*> day, <*>, 20<*> at <*>

MEDIATOR: <*>

SOLICITOR FOR THE APPLICANT: <*>

SOLICITOR FOR THE OBJECTORS: <*>

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B	Relevant Documents
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2	Court Status Certificate
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3	Application to Pass Accounts
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4	Accounts <*> to <*>
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5	Notice of Objections of <*> and <*>
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6	Response to Notice of Objections from <*>
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7	Request for Increased Costs of <*>
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8	Request for Increased Costs of <*>
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MEDIATION STATEMENT OF <*>

I. BACKGROUND

1. <*> (the Deceased”) died on <*>, leaving a last Will and Testament dated <*> (the “Will”).

2. Letters Probate of the Will were issued to <*>, <*> and <*> on <*> (**Mediation Brief Tab B-1**).

3. <*> died on <*>.

4. The Court issued a Status Certificate to <*> and <*> (“Applicant”), as successor in interest to <*>, as continuing Estate Trustees for the estate of the Deceased (the “Trustees”) on <*>. (**Mediation Brief Tab B-2**).

5. The Will of the Deceased provided that the residue of the estate was to be held in trust (the “Trust”) and the net income derived from it was to be paid one-third (1/3) to each of <*>, <*> and <*>. The share of income of any deceased beneficiary was to pass to the other or others then alive, until the death of the last survivor, when the Trust is to be divided equally between <*> and <*> (collectively the “Capital Beneficiaries”).

6. <*> is deceased. Accordingly, the net income of the Trust is divided equally between <*> and her son, <*> (collectively the “Income Beneficiaries”).

7. The Trustees passed their accounts of the administration of the Trust for the following periods:

(a) <*> (the date of death of the Deceased) to <*>;

(b) <*> to <*>; and

(c) <*> to <*> (the date of death of <*>).

8. One of the original assets of the Trust was a one-quarter (1/4) ownership interest in commercial real property (the “<*> Property”). It was carried on the accounts as an original asset at its date of death value of \$<*> (see page 2 of the Accounts).

9. During this accounting period, the Applicant had to manage the estate’s interest in the <*> Property until it was sold. This involved a great deal of time and effort on the part of the Applicant, beginning in <*> with negotiations with the co-owner, who wanted to sell once the head tenant gave notice it would not be renewing its lease and the remaining tenant also did not renew its lease.

10. In the fall of <*>, the Trustees were advised there were two 8’ x 12’ oil tank’s buried on either side of the property, which was the first indication the Applicant had of any environmental issues with respect to the property. The 75% owner indicated he wanted to sell the property “as is”. the Applicant was concerned about whether this affected market value and about the potential liability because of the oil tanks. the Applicant, with the consent of <*>, agreed to get one appraisal and one letter of opinion to establish value.

11. The value came in between \$<*> and \$<*> on the assumption the oil tanks would be removed and there would be no environmental contamination.

12. Because of the existence of the oil tanks, the Applicant wanted to obtain a legal opinion on what would be the potential liability for the Trust and the Trustees if they were not removed and the property cleaned. The co-owner did not want to do this and therefore the Applicant had

to hire its own lawyer, who provided an opinion that the existence of the tanks had to be disclosed, a Phase I assessment had to be done and the property had to be remediated before the sale. If the Applicant had not retained competent counsel to protect the Trust's interest in the <*> Property, this may have resulted in continued liability of the Trust and the Trustees.

13. The <*> Property was listed for sale for \$<*> and was sold in <*> on the open market to a willing and unrelated purchaser. The price paid for the property was \$<*> (the Trust's interest being \$<*> before adjustments).

II. THE DISPUTE

14. The Applicant made an application to the Court (**Mediation Brief Tab B-3**) to pass the accounts of the Trust for the period from <*> to <*>, (**Mediation Brief Tab B-4**) which is the subject of this mediation.

15. Neither of the Capital Beneficiaries has responded to the application to pass accounts and neither has objected to the accounts or to the claim for compensation of the Applicant.

16. The claim for compensation made by the Applicant is as follows:

CAPITAL COMPENSATION

Capital Receipt Fee	\$ <*>
Capital Disbursement Fee	<*>
Capital Care and Management Fee	<*>
TOTAL CAPITAL FEE	\$ <*>

REVENUE COMPENSATION

Revenue Receipt Fee	\$ <*>
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Revenue Disbursement Fee	<*>
Revenue Care and Management Fee	<*>
TOTAL REVENUE FEE	\$<*>
TOTAL COMPENSATION CLAIMED	\$<*>

17. The Income Beneficiaries served and filed a Notice of Objection, objecting to the accounts submitted by the Applicant and objecting to the Applicant's claim for compensation **(Mediation Brief Tab B-5)**.

18. The Applicant served and filed a Response To Objections **(Mediation Brief Tab B-5)** to which was attached vouchers as requested by the Income Beneficiaries, as well as evidence of the authorizations given by <*> as co-trustee to expenditures to which she now objects.

III. FACTUAL AND LEGAL ISSUES IN DISPUTE

19. The Income Beneficiaries object to the amount of compensation claimed by the Applicant on the following general grounds:

- (a) the fees are excessive in amount for the reasons set out in the Notice of Objections;
- (b) the investments made by the Trustees have underperformed and the Applicant should not have invested in common trust funds; and
- (c) the Applicant has charged more than once for the same services giving rise to double compensation.

20. The Income Beneficiaries object to the Accounts submitted for audit on the following general grounds:

- (a) The Trust paid more than its share of disbursements relative to the sale of the <*> Property based on its ¼ ownership interest;
- (b) The Trust paid too much in legal fees and disbursements relative to the sale of the <*> Property and should not have retained separate counsel to act for the Trustees;
- (c) The income of the Income Beneficiaries has been diminished because of the investments made by the Applicant, which were not prudent, and because of the double compensation charged by the Applicant; and
- (d) Certain disbursements made in connection with the sale of the <*> Property were charged to income and should have been charged to capital.

IV. POSITION OF APPLICANT

21. With respect to the claim for compensation, the position of the Applicant is as follows:

- (a) The income beneficiaries only have the right to object to the compensation charged to income which amounts to \$ <*> for the period.
- (b) The Applicant is entitled to its full claim for compensation for the period, which has been charged on the usual allowable tariff, the same basis as in the last audit, and is not in any way excessive.
- (c) The Income Beneficiaries have failed to provide any evidence that the investments made during the period under performed. On the contrary, the accounts disclose a significant amount of income being generated based on the value of the assets in the Trust. Furthermore, the Applicant was entitled to invest in common trust funds as allowed by statute.
- (d) The Applicant did not charge and did not receive any form of double compensation and the Income Beneficiaries have failed to demonstrate that the Applicant did this.

- (e) No investment was made by the Applicant without the approval of its co-trustee, <*>, who cannot now object to the investments made.

22. With respect to the objections to the accounts, the position of the Applicant is as follows:

- (a) The Income Beneficiaries have been provided with all vouchers requested in connection with expenses charged to the Trust.
- (b) <*>, the co-trustee, approved the disbursements made out of the Trust and cannot now object to them.
- (c) The Applicant paid only the Trust's share (1/4) of the costs of the sale of the <*> Property as disclosed by the vouchers provided to the Income Beneficiaries, and the Income Beneficiaries have provided no evidence to the contrary.
- (d) The Applicant was entitled to retain its own counsel in connection with the environmental issues surrounding the sale of the <*> Property, the environmental assessment and the clean up. The Trust and its beneficiaries benefited from these services and the amount paid was reasonable in all respects. The income Beneficiaries have failed to provide any evidence that the amount paid was unreasonable.
- (e) The Income Beneficiaries have failed to provide any evidence that the investments made during the period were not prudent or that the Applicant charged double compensation.
- (f) All of the disbursements made on account of the sale of the <*> Property were charged to capital except \$<*> paid to the City of Toronto for a tax certificate and a total of \$<*> paid for maintenance and repairs to the <*> Property. These items were properly charged to income as they reflect ordinary maintenance. No other disbursements were paid out of income on account of the <*> Property.

IV. COSTS

23. The costs of the application to pass accounts, had it proceeded on an uncontested basis, would have been \$[*] plus disbursements and GST to the Applicant and \$[*] plus disbursements and GST to the Income Beneficiaries. The solicitors for each of the Applicant and the Income Beneficiaries have filed a Request for Increased Costs, requesting costs out of the estate on the basis of full indemnity.

24. The legal fees payable by the Applicant for the services rendered to [*], are approximately \$[*] of which \$[*] was incurred for legal services rendered in connection with the contestation of the audit by the Income Beneficiaries.

Date: [*]

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TAB 8B

8B

Passing of Accounts: The Children's Lawyer's Perspective

Susan Stamm
The Office of the Children's Lawyer

Estates Administration for Law Clerks 2010
March 2, 2010



The Law Society of
Upper Canada | Barreau
du Haut-Canada

Continuing Legal Education

PASSING OF ACCOUNTS: THE CHILDREN'S LAWYER'S PERSPECTIVE¹

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A. The Role of The Children's Lawyer

In estates cases, The Children's Lawyer is served with all applications to pass accounts where minor children or unborn contingent beneficiaries are interested in the Estate, however remote (Rule 74.18(3.1)).

Unlike the Public Guardian and Trustee, The Children's Lawyer cannot be an estate trustee of an estate.

The Children's Lawyer is often already involved in the estate for various reasons. All of these types of cases can often lead to a formal passing of accounts.

1. The Children's Lawyer was served with the Application for a Certificate of Estate Trustee with or without a Will.

Rule 74.04 (4) and (5) and 74.04 (4) and (5) mandate service on The Children's Lawyer of all applications for certificates of appointment of estate trustees with and without a will, where minor and/or unborn or unascertained beneficiaries are interested in the estate.

Assuming The Children's Lawyer is not objecting to the issuance of the certificate, the Office of The Children's Lawyer ("OCL") will send a letter to the estate trustee or his or her counsel advising what information the OCL requires. Typically, the OCL requests a list of original assets and liabilities and an informal estate accounting. We expect to

¹ This paper, subject to minor modifications, was first presented at the Ontario Bar Association program, Passing of Accounts: Getting Cost Effective Results on November 29, 2007.

receive such an accounting within the executor's year, or one year following the issuance of the certificate.

If the OCL receives an unsatisfactory response (or no response), the OCL compels a passing of accounts.

2. The Children's Lawyer was served with legal proceedings concerning the Estate.

Under rule 16.02(1)(j), The Children's Lawyer is served with all litigation where the proceeding is in respect of a minor's interest in an estate or trust. Accordingly, where minors or unborn contingent beneficiaries are interested in estates, we are served with will challenges, constructive trust claims, *quantum meruit* claims, variation of trust applications, interpretation applications and any other claim against the estate.

The Children's Lawyer is also served with all Part V SLRA support claims made by litigation guardians on behalf of minors under this rule, whether or not the child is interested in the estate.

Although we will follow the litigation and determine what level of involvement we should have, if we have otherwise not been involved in the estate, we typically follow up on the estate accounting.

3. The Children's Lawyer received information from an interested party or third party.

In some cases, the OCL opens files because we are contacted by letter or call and told of an estate where a child or unborn unascertained beneficiary or class of beneficiary is not being properly protected. The Children's Lawyer determines what action to take, such as whether to apply for orders for assistance and/or an order compelling a passing of accounts.

4. Guardianship Orders

The Children's Lawyer is served with all applications for appointment of guardianship of a minor's property. Common types of applications result from the following:

- (a) Minors being designated beneficiaries of RRSPs or RRIFs;
- (b) Minors being designated beneficiaries of insurance policies or annuities;
- (c) Minors receiving personal injury settlements; and
- (d) Intestacies where minors are beneficiaries of the estate.

In an intestacy, Estate Trustees (and their lawyers) often do not appreciate that they have no legal authority to hold a minor's share in trust, and that there is no legal authority to pay child support to a child's parent from a child's own funds. The distributive share must either be paid into court (to the Accountant of the Superior Court of Justice) or an application must be brought to appoint a guardian of the child's property under the *Children's Law Reform Act*, R.S.O. 1990. c.12.

When a party seeks to be appointed guardian, The Children's Lawyer will not provide her consent unless there is a suitable management plan in place. The OCL often challenges the payment of legal costs out of the child's funds if there is no good reason why the funds could not have been paid to the Accountant of the Superior Court of Justice.

For the management plan, the OCL has a suggested format. Our office expects to see what percentage of the funds will be held in cash, fixed income and equities. The OCL requests that if compensation is to be requested, it is set out in the order. The order should also address accounting for the guardianship of property, either by provision of accounts to the OCL, or, in some cases, a formal passing within a fixed period of time. For example, the OCL may request provision of accounts within 6 months so that we can make an early determination of how the funds are invested (i.e. whether the formulae in the management plan are being complied with) and then formal accounts (or an application to pass accounts) two years later.

B. Informal Accounting or Passing of Accounts

It is not necessary or desirable to have a formal passing in every estate. Some estates are not large enough to justify the expense of counsel and preparation of formal accounts. In some estates, the estate trustee is not seeking compensation and has provided our office with suitable informal accounts and vouchers evidencing the investments and transactions. In a large number of the cases we have in our office, accounts are never formally passed.

However, size is not the only consideration. In some estates, other considerations, such as apparent mismanagement or conflict of interest of an estate trustee, can cause the OCL to compel to a formal passing.

If the accounting is informal, The Children's Lawyer cannot provide any form of release to the estate trustee or guardian of property. At best, we could say that we would not object to the accounts if they were formally passed. For many people, this is enough. However, there is nothing preventing the minor child, when he or she attains majority, or another adult acting as litigation guardian for the child, from compelling a formal passing of the accounts. Accordingly, in such cases, a trustee or guardian should ensure he or she keeps his or her accounts in a safe place and up-to-date.

If the OCL is not concerned about mismanagement issues, and is of the view that the estate is being well managed, the OCL typically will not compel a formal passing of estate or guardianship accounts.

Estate trustees may seek to pass their Accounts in any event for self-protection.

C. Payments Into or Out of Court

Our Office is often involved with payments being made to the Accountant of the Superior Court of Justice ("ASCJ") and requests for payments being made out of court.

The Children's Lawyer cannot serve in her appointed capacity as an Estate Trustee. Similarly, she cannot serve as Trustee for a minor in that capacity. Accordingly, unless the trust document (Will or Trust Deed) names an individual or trust company and authorizes him or her to hold the minor's property in trust, or the property is \$10,000 or less and can be paid to a parent/guardian in trust, a minor's property must be deposited with the ASCJ².

Further, if a Trustee, appointed under a Will or Trust document wishes, he or she may also deposit minor's property with the ASCJ under s. 36(6) of the *Trustee Act*, R.S.O. 1990, c. T.23. Section 36(6.5) provides that payment into court serves as "sufficient discharge for the money paid into court". Therefore, if a Trustee makes such a payment into court, he or she need not otherwise account for the funds in court. He or she has relieved himself, or herself, of the obligation to account for the funds that have been so deposited. He or she will still have to account for the estate or trust prior to that date and for any funds not paid into court.

Once the funds are with the ASCJ, they may not be accessed without a court order. Quite frequently, the parent/guardian of a minor child will seek access to the funds. They can seek to do so directly, by bringing an application or motion under rule 72.03(10) on notice to the OCL.

However, under rule 72.03(3), the OCL operates a procedure to facilitate payments out of court without the expense of a motion. Under the procedure commonly known as the "fiat procedure", a parent/guardian seeking to access funds held in court for minor children completes an application by way of a letter and a financial statement. In essence, the OCL needs to know that the expenditure that the parent/guardian is seeking to make is for the child's benefit, and is something that the parent/guardian could not otherwise afford to provide to the child. In some cases, where the parent/guardian is unable to otherwise

² E. Dianne Caldwell, Catherine M. Romanko & Anita Sothall, "Kids Stuff: Minor's Property Issues in Ontario, Manitoba and British Columbia", *Estates Trusts & Pensions Journal*, Vol 26, p. 230

provide for the child, monthly support payments are sought. This is a useful tool in intestacies where the Estate Trustee has no legal authority to encroach on the funds for the child's benefit. It can also be used where children are named beneficiaries of insurance policies, RRSPs and RRIFs and no trustee is named to hold the funds for them. In many insurance policies, even when a Trustee is named, there is no authority to encroach on the funds.

Counsel at the OCL brings the fiat applications before a Judge who presides over the fiat list. The Judge decides whether the payment out of court may be made.

D. Common Problems and Objections

The Children's Lawyer, like every other party, wants the accounts to be accurate and to reflect competent estate administration. In most estates, we are either acting for a child who has a vested interest in an estate or trust, or a contingent unborn interest in the estate or trust.

When acting for a contingent interest, we consider whether the party who is in line before the contingent beneficiary will otherwise protect the interest. If we are satisfied that they will, we may choose not to participate in the accounting as we do wish to duplicate efforts already being made.

However, if we have any concerns that appropriate efforts will not be made or there is no other party participating, we participate. In particularly contentious estates, likely to involve accounting irregularities, it would be unusual for us not to participate in an estate accounting.

1. Common problems we encounter with Original Assets:

- (a) Real estate and/or vehicles being sold without an appraisal being first obtained.

- (b) Assets being sold to non-arms' length parties.
- (c) Shares of a private company with no explanation as to the private company or its business.
- (d) A statement of original assets that is much less or much more than the amount as set out on the application for a certificate of appointment of estate trustee.
- (e) Joint accounts (or an absence of joint accounts) that per *Pecore/Saylor*³ should be estate accounts.

2. Common problems we encounter with Capital Receipts and Disbursements:

- (a) Failure to pay legacies in a reasonable time leading to claims for interest.
- (b) Capital encroachments being made without specific power to do so in the will.
- (c) Provision of loans to non-arms' length family members, without proper documentation.
- (d) Improvement of capital property that was directly devised to adult beneficiaries (especially when the adult beneficiaries are non-arms' length to the estate trustee/s).
- (e) The estate account shows little to no activity as the Estate receipts and disbursements took place through a wholly owned corporation, and the corporate accounts are not disclosed.

³ *Pecore v. Pecore*, [2007] S.C.C. 17 No. 31202; *Madsen Estate v. Saylor*, [2007] S.C.C. 18 No. 31262

- (f) Failure to explain large payments of income or corporate taxes.
3. Common problems we encounter with Investment Accounts:
- (a) Investments do not meet specific instructions in will.
 - (b) Imprudent investments and/or large investment losses.
 - (c) Mixing up revenue receipts and capital receipts.
 - (d) Investment in non-arms' length ventures or businesses.
 - (e) An investment account that does not balance.
4. Common problems we encounter with Revenue Receipts:
- (a) Rental income is not recorded for capital real estate that was rented out following the death of the deceased.
 - (b) Failure to account for interest income.
5. Common problems we encounter with Revenue Disbursements:
- (a) Failure to pay out income to income beneficiary
 - (b) Overpayment of income beneficiary leading to a negative balance of income account.

E. Executor's Compensation

We often find problems in claims for compensation. Common areas we object to are as follows:

1. Failure to deduct compensation on non-compensable items.
2. Failure to deduct pre-taken compensation.
3. Claims for a care and management fee during the first year of administration.
4. Claims for care and management fee when limited active estate administration during the year in question.
5. Failure to disclose the method of calculation of the annual average market value of the estate.
6. Claims for compensation based upon the percentages of the *Substitute Decisions Act, 1992*.
7. Claims for percentages when estate administration was very simple or consisted of liquid assets.

F Procedural Issues

Applications to pass accounts may be served on the OCL at 393 University Avenue, 14th Floor, Toronto, ON M5G 1W9. The Children's Lawyer must be served with all applications to pass accounts where there are minor, unborn or unascertained beneficiaries (rule 74.18(3.1)).

When the OCL is served with an application to pass accounts, a file search is conducted to see if the OCL has any open or closed files relating to the same trust or estate. The file is then assigned to in-house counsel. Counsel will need to decide whether to handle the passing in-house or whether to retain an agent to appear for us.

The Children's Lawyer can file a Notice of Objection (Form 74.45), like any other interested party. If a suitable response is provided, the Children's Lawyer can withdraw her objection by filing a Notice of Withdrawal of Objection (Form 74.48).

When the Children's Lawyer is not participating, our Office must file a Notice of Non-Participation in Passing of Accounts (Form 74.46) at least 20 days before the hearing. In such instances, the OCL need not approve the final judgment on the passing of accounts.

When the Children's Lawyer is participating, but is satisfied with the accounts, the OCL must file a Notice of No Objection to Accounts at least 20 days before the hearing (Rule 74.18(8)). In order for the passing to occur without a hearing, the OCL must also approve the Judgment as to form and content (Rule 74.18(9)).

E. Legal Fees

In an uncontested passing of accounts, the Children's Lawyer's fees are governed by Tariff C of the Rules of Civil Procedure. If Children's Lawyer makes no objection, or later withdraws her objection, she is entitled to three-quarters of the amount payable to the estate trustee for costs.

Where the accounts are complex, concern a long period of time, or raise numerous issues, and counsel at the OCL (or an agent) spends many hours resolving them, the OCL may make a Request for Increased Costs.