TAB 11

Developments in Estate Accounting and Trustee Compensation

Susannah B. Roth
O'Sullivan Estates Lawyers Professional Corporation

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Continuing Professional Development

Developments in Estate Accounting and Trustee Compensation

Susannah B. Roth, O'Sullivan Estate Lawyers Professional Corporation

1. COMMON MISTAKES IN ESTATE ACCOUNTING

a. Capital and income allocations and apportionments

i. Corporate distributions – are they capital or income? Mistakes often occur in categorizing corporate distributions that are not controlled by the trustees – the form rule is the law in Ontario, and generally in the normal course should be followed in such circumstances. If the corporation is controlled by the trustees, the situation will be much more complex and trustees should obtain advice prior to making any major distributions.

ii. Apportionment of corporate dividends, annuity payments etc. between capital (i.e. the original estate assets) and income, and between the income beneficiary and the capital remainderman/men – look at the complex rules in the *Apportionment Act* (Ontario).

iii. Other allocations that need care to be dealt with properly – depreciation, repairs and legal and accounting fees.

b. Improper recording of entries

i. Real estate and mortgages – accounting for the proceeds should be done on a net basis if there is a mortgage on the real estate, and any other adjustments should be recorded on a net basis as well. However, care should be taken that all details of such adjustments and mortgage(s) are included in the accounts – recording of a net amount alone is insufficient.

ii. Solicitor's trust account entries – especially applies regarding real estate transactions but also in other situations, do not duplicate the solicitor's trust account entries in the estate accounts, although any transactions related to estate assets should be noted where appropriate.

iii. Investment proceeds and reinvestments – should appear in the investment account, not with capital receipts and disbursements.

iv. Investment entries - profits should be recorded as capital receipts, losses as capital disbursements, reinvested dividends and interest income should be properly recorded (these can be complex issues which may require professional advice).

v. Insufficient entry descriptions – a general problem. All entries should be sufficiently clear and contain enough detail so that a beneficiary or their advisor can specifically identify the transaction as well as evaluate it.

c. Original assets issues

i. Cross-referencing original assets – the list of original assets should include cross-references to all capital disbursement entries relating to the disposition of each asset or the asset should appear on the unrealized assets list. Also, every original asset should have a reference to its distribution (including if it was distributed *in specie* or donated as having no value, etc.) or be noted as unrealized.

ii. Expenses relating to a property that is specifically devised to a beneficiary – the reasonableness of the dates the expenses are paid and the length of time they are paid for should be examined. Also, there is case law which has held that the expenses of a property that is the subject of a specific bequest should be paid by the legatee and not the estate from the date of death onwards – see *Ontario (Public Guardian and Trustee)* v. *Hodgins Estate*, 1996 CarswellOnt 1106, 11 E.T.R. (2d) 90 (Gen. Div.), but see also *Currie* v. *Currie Estate*, 2005 CarswellPEI 108, 759 A.P.R. 178 (P.E.I.T.D.) and s. 49(1) of the *Trustee Act* (Ontario) regarding the allocation of estate expenses to the capital of the estate.

iii. Joint assets – suspicions are often aroused if joint assets are not at least noted and explained if circumstances call for it, and executors should consider what information to provide to beneficiaries regarding such assets. In particular, if the executor is the joint asset holder with the deceased and is claiming ownership of the asset on the deceased's death, such assets should likely be disclosed or at least referenced so that beneficiaries are made aware of their existence and can make further inquiries if they wish.

d. Compensation

i. Claim for a care and management fee for immediately distributable estate – this is not appropriate. If the executor feels that the usual

percentages are not adequate compensation in the circumstances, he/she should claim a special fee.

ii. Deductions to be made from the account totals when calculating compensation – deductions from the totals on which compensation is calculated should generally be made for: transfers between accounts and between or to/from testamentary trusts; income tax refunds; net losses on investments; amounts paid to the executor/trustee or their company/firm, including compensation; and, accounting entries not representing actual transactions (this list is not exhaustive – these are the highlights in terms of what is often forgotten).

iii. Transfers from an attorney for property to the executor where the attorney and executor are one and the same person(s) – best practice is probably to exclude these amounts from compensation as essentially being book entries, although claims for compensation on these amounts are frequently made.

iv. Percentage rate claimed for compensation - should be reduced for large items of less-than-average complexity in many circumstances. If not, a thorough explanation should be included as to why the executor/trustee is entitled to the full 2.5% rate regarding the disposition of the asset in question.

v. Calculation of executor's compensation – care should be taken not to improperly calculate the compensation, for example, by using 5% of the gross value of the estate instead of 2.5% on the receipts and disbursements.

e. Overall and miscellaneous issues

i. Do the accounts balance? Do the investments balance? If not, fix it.

ii. Failing to keep adequate records generally, including all necessary vouchers.

iii. Non-arm's length transfers to the executor/trustee without the appropriate consent or court order.

iv. Improper payment of income tax - e.g. charitable deductions not claimed, income not allocated out to low-income beneficiaries to reduce income payable by estate/trust.

2. SOLICITORS CLAIMING EXECUTOR/TRUSTEE COMPENSATION AND RENDERING ACCOUNTS FOR LEGAL FEES – PRINCIPLES & PITFALLS

a. Executor's work versus solicitor's work

i. A solicitor cannot charge his/her professional hourly rates for completing executor/trustee work unless the Will specifically allows for this (and even then the quantum is subject to the review of the court regarding conduct etc.). See Dickson, Mary Louise, "The Lawyer as Executor and Solicitor for the Estate", *8th Annual Estates and Trusts Summit* (2005), for a list of proper lawyer and executor services. See also Re McIntosh (1964), 46 D.L.R. (2nd) 416 (Sask. C.A.), at p. 418, for a good discussion of the difference between executor's and solicitor's work.

ii. One issue to be aware of - are you covered by LPIC for these services? Generally, LawPRO has stated that LPIC coverage will only apply if you are acting in your professional legal capacity or your executor/trustee responsibilities arise out of your practice (e.g. acting for a family member as an executor/trustee will not generally qualify).

b. Solicitor's accounts rendered to the estate when the solicitor is the executor/trustee

i. *Re Goldlust Estate* (1991), 44 E.T.R. 7 (Ont. Gen. Div.) – the solicitor-executor/trustee must keep accurate and separate dockets for all time spent in both capacities in order to successfully claim fees for solicitor's work and executor's compensation separately.

ii. *Schnurr* v. *Dunbar,* [2000] O.J. No. 2836 (S.C.J.) at para 33 – the onus is on the solicitor to establish that there has been no duplication of efforts between the matters covered in the solicitor's account and the matters covered in the claim for executor's compensation. If the solicitor cannot provide a satisfactory breakdown, the accounts for solicitor's work may be disallowed entirely or in part.

iii. *Re Schroeter Estate* (2001), 57 O.R. (3rd) 8, 47 E.T.R. (2nd) 137 (Ont S.C.J.) – it is reasonable for the solicitor-executor/trustee to render and pay from the estate his/her legal accounts for solicitor's work prior to the passing of accounts. This is not a breach of the

solicitor-executor's fiduciary duty. Rather it is reasonable and appropriate as a fair and the least expensive custom (versus making a request for increased fees under section 61(4) of the *Trustee Act* (Ontario), which would be an expensive and time-consuming process for the estate).

iv. *Fareed* v. *Wood*, 2005 CanLII 22134 (ON. S.C.) – the solicitor-executor/trustee needs to keep very detailed dockets to back-up the solicitor's accounts. General description docket entries are not sufficient.

c. Rendering a solicitor's account to an executor/trustee for executor's/trustee's work done by the solicitor - see *Re Solicitors* (1973), 2 O.R. (2d) 104 (Ont. Assess. O.). The solicitor must have expressly explained to the executor/trustee that such charges are payable by the executor personally and will be billed to the executor by the solicitor, or any account rendered to the executor for such work may be disallowed by the court/assessment officer.

d. Compensation for the solicitor-executor/trustee

i. Compensation is calculated and assessed in the same manner as for any executor/trustee.

ii. *Re Brand Estate,* [1995] O.J. No. 3551 (Gen. Div.) – the solicitor-executor/trustee must ensure that there has been no double-dipping in claiming compensation. He/she must keep records scrupulously separate as between the two roles.

iii. *Schnurr v. Dunbar,* [2000] O.J. No. 2836 (S.C.J.) at para 33 – while the onus is on the solicitor-executor/trustee to establish that there has been no duplication between his/her two roles in claiming fees and compensation, there should also be no reduction in executor/trustee compensation payable to the solicitor where the expertise obtained regarding professional fees paid or claimed has been beneficial to the estate.

iv. Hiring outside counsel to advise on matters within the expertise of the solicitor-executor/trustee is not an estate expense, and the cost will be deducted from the compensation otherwise payable to him/her – see *Re Pilo Estate,* 1998 CarswellOnt 4270 (Gen. Div.).

v. See *Bluestein Estate* v. *Bluestein*, 2000 CarswellOnt 1054, 33 E.T.R. (2nd) 18 (S.C.J.) for a good discussion of special fees and the circumstances in which they may be appropriate.

vi. *Arnold* v. *Arnold Estate*, [2009] O.J. No. 134, 47 E.T.R. (3d) 78 (Ont. Div. Ct.) – this case is of interest as in it the Divisional Court reiterated the test for an appeal court interfering with a lower court's determination regarding executor's/trustee's compensation. An appeal court should not interfere with a determination of the amount of compensation awarded to an executor/trustee unless the awarding judge committed an error in principle or the amount of compensation is grossly excessive. (See also *Laing Estate* v. *Hines*, [1998] O.J. No. 4169 (Ont. C.A.)).

e. Common deficiencies in the files/accounts of solicitors acting as executors/trustees noted by LSUC:

i. Delay in administering the estate/trust;

ii. Non-filing/late filing of income tax returns;

iii. Incomplete/missing vouchers;

iv. Lack of separate dockets for solicitor's and executor's work;

v. Lack of detailed dockets for solicitor's accounts rendered to the estate;

vi. Charging the estate/trust solicitor's regular hourly rates for executor/trustee's work where not specifically allowed to do so according to the terms of the will/trust deed;

vii. Pre-taking compensation where not specifically allowed to do so according to the terms of the will/trust deed;

viii. Improper calculation of executor's compensation, e.g. using 5% of the gross value of the estate instead of 2.5% on the receipts and disbursements; and,

ix. Placing estate/trust funds in high-risk investments.

3. REQUESTS FOR INCREASED COSTS ON UNOPPOSED PASSINGS OF ACCOUNTS

Unfortunately, there is a dearth of caselaw on this issue, most likely as the parties agree to the costs between them or the matters in dispute are settled in mediation.

However, I have attached *Re Mitchell Estate*, 2010 ONSC 1640 (CanLII), 56 E.T.R. (3d) 38 (S.C.J.), a recent decision of Mr. Justice D.M. Brown. In this case he sets out in detail the filing requirements of the solicitor requesting the increased costs and any objecting party regarding claims for increased costs on uncontested passings of accounts. He notes that typically these requests are made in circumstances where objections were made and then withdrawn but which took time and expense to resolve, although other situations exist where such a claim is appropriate. Mr. Justice Brown then lays out in detail the fulsome materials to be filed regarding such claims, and emphasizes that detailed information regarding the time spent by the solicitor and the reasons for the time having been spent and for the request for increased costs should be filed so that the court can make an informed decision regarding the claim. A detailed bill of costs or copies of the detailed docket entries, among other materials, should be provided.

Reference can also be made to *Re Szewczyk Estate*, 1997 CarswellOnt 3207, 39 O.T.C. 159 (Gen. Div.), in which Mr. Justice Gans states that the intention of the rule allowing a request for increased costs on an unopposed passing of accounts is to compensate solicitors for their time in reviewing and assessing accounts, even if this review results in an unopposed passing (at para. 3). In this case, Mr. Justice Gans was not impressed by the evidence presented, calling it "anything but clear, cogent and convincing" and stating that it did not provide him with what he needed to make "a reasoned assessment of the matter" (at para. 4), and denied the increased costs sought.

4. TAXATION OF TRUSTEE COMPENSATION

GST/HST on executor's/trustee's compensation is only payable by the estate where the executor/trustee is a professional trustee, or where the executor/trustee takes on such a role as part of his/her business and earns more than $30,000 annually in such role/roles.

Income tax is generally payable by executors and trustees on compensation earned by them. Advice should be given to executors and trustees regarding this issue before any compensation is claimed or taken, especially where the executor/trustee is also a beneficiary of the estate/trust.

Income tax payable by the executor/trustee on their compensation is a personal expense, not payable by the estate.

Indemnify Me!

Examining the principle that the cost of preparing executor's accounts is always a personal expense of the executor

By Susannah B. Roth, O'Sullivan Estate Lawyers Professional Corporation[i]

The payment of professional fees from an estate for various types of advice and document preparation has been the cause of much disagreement between executors and beneficiaries. These disagreements sometimes focus on the propriety of the executor hiring such professionals and paying them out of the estate, but usually the main contention is whether or not such fees should be deducted from the executor's compensation, even if they were properly paid. These days, it is accepted that an executor can properly hire a real estate agent, a solicitor (to do solicitor's work), and an investment advisor, and the fees charged by such professionals will be payable from the estate, within certain limits, without being deductible from the executor's compensation. The payment of fees to an accountant for various services remains a more contentious issue. Fees charged to the estate for necessary tax advice are rarely disallowed unless patently unreasonable, and claims for fees for the preparation of income tax returns for the estate are now routine and usually uncontroversial. Much more problematic are claims by executors for accounting fees for the preparation of accounts for passing from the estate. Despite popular opinion, however, in certain circumstances a court will hold that such fees are proper estate expenses, and should not be paid personally by the

executor. In my view, while accounting to the beneficiaries should remain a personal expense of executors, the costs of preparing accounts in court format should be seen as an expense of the administration of an estate and not a personal expense of the executor in most circumstances.

1. Executor/Trustee's Right to Indemnification

The starting principle regarding the payment of expenses from an estate is that an executor is entitled to be indemnified for all proper expenses incurred in the administration of the estate, and to be reimbursed for such expenses if he[2] paid them personally.[3] If challenged, the payment of or reimbursement for any particular expense from the estate will depend on whether the expense in question was or was not properly incurred by the executor on behalf of the estate.[4]

When the expense under scrutiny is the fees of an agent for the performance of certain duties that the executor has delegated to the agent, the starting point for a court in examining whether or not an expense is a proper estate expense is often whether it was proper for the executor to have delegated these duties to the agent. Originally, an executor was not allowed to delegate any of his duties to an agent. This principle has now been modified to a certain extent at common law and by statute[5]. An executor may now delegate his administrative duties to an agent, as long as he retains all decision-making authority himself[6], and, of course, provides proper supervision of the agent. He may even delegate tasks requiring expertise that he himself possesses (although this will most likely affect his reimbursement from the estate for the expense paid or his compensation allowed from the estate, discussed below)[7]. If the duties being delegated require expertise to be properly carried out and the executor does not possess such expertise, he will be justified in retaining an expert to carry out these duties. This principle is only logical, especially when one considers that in certain

circumstances it is prudent and in others necessary for an executor to hire a professional to perform certain duties or to provide advice regarding certain matters.

Where the executor has properly retained an agent to perform certain duties, the inquiry may then examine whether the duties delegated to the agent were properly the executor's work that reasonably could and should have been performed by him, thus making the fees for the agent payable by him personally. In the case of certain types of professional agents, it has long been established that it is reasonable and necessary for an executor to hire such a professional to perform certain of his duties which fall within the professional's area of expertise, and that such duties could not be effectively or properly performed by the executor. If this is the case, it will be found to be reasonable in the circumstances for the executor to have hired the agent, and the agent's fees will be payable from the estate and not by the executor personally.

2. Professional Fees Allowed Out of Estates

One type of professional whose fees are, with few exceptions, automatically allowed out of an estate is real estate agents. In *Reference Re Trustee Act*[8], the court held that for almost all executors, it would not be practicable to attempt the sale of real estate without the help of a real estate agent. The only exception would be if the executor is himself a real estate agent. The court stated that the principle involved was that "where the work is not such as the executors themselves are qualified to do, it is reasonable that they should employ the services of such agents as may be necessary" (at para. 7), and the fees for such services are proper estate expenses.

Another such type of professional is solicitors.[9] In *Reference Re Level Estate*[10], for example, fees paid to solicitors for collecting a certain debt owing to the estate were allowed out of the estate, as the court recognized that the executors were in need of expert help in collecting this debt, due to the fact that the debtor in question was refusing to pay. The court stated that the guiding principle regarding whether or not these fees were a proper estate expense and whether they were deductible from executor's compensation was the reasonableness of the expense in the circumstances of the estate and the executors' own knowledge regarding the duties in question.

This principle continues to hold true even where a tariff rate for legal fees has been introduced by statute or regulation. In *Merry Estate* v. *Merry Estate*[11], Mr. Justice Cullity stated that Ontario civil procedure rules changes fixing costs according to the applicable tariff rate had no impact on the quantum of executors' costs payable from the estate.

> If costs have been properly incurred, there is no more reason for limiting the trustee's right of indemnity with respect to them -- so that the trustee would be personally liable for any excess -- than there would be for providing less than a full indemnity with respect to any other expenses properly incurred by the trustee in administering the trust whether such expenses related, for example, to the investment of assets or were incurred in repairing premises that are included in the assets of the trust. (At para. 48)

Another such type of professional is investment advisors. In *Re Miller Estate*[12], the court allowed fees for an investment counsel to be paid out of the estate without deducting them from the executors' compensation. In this case, neither of the executors had specialized investment expertise, and one of the beneficiaries had in fact specifically suggested that investment advice be obtained. The court noted that in the past, executors have been permitted to charge fees paid to solicitors, real estate agents, and accountants regarding tax advice to the estate "because executors could not be expected to have the necessary expertise to act in these areas" (at para. 8), but that the categories of professionals whose fees are a legitimate estate expense are not closed. The court concluded that executors "are entitled to retain persons with special expertise in investment matters for reasons similar to those recognized by the Court for the use of solicitors" (at para. 8). As investing money is no longer a simple matter (since the abolition of the list of authorized investments for trusts), the "ordinary prudent person in the conduct of his or her own investment affairs turns now as a matter of course to investment counselors and advisers and it would be unfortunate if executors were not permitted to obtain such advice without deduction from compensation" (at para. 8). The court then goes even further than this, stating that in circumstances where the executors are not limited in their investment decisions by the testator they might even be criticized for not obtaining investment advice for the estate, making it even more unfair for the fees charged for such advice to be payable by executors personally.

3. When Professional Fees May Not Be Allowed

Given caselaw and the indemnification in the *Trustee Act* (Ontario) for trustees who obtain and follow investment advice, as long as the fees for the advice are reasonable, they will be proper estate expenses. However, care should be taken by

trustees to ensure that the fees are reasonable. For example, in *Cheney* v. *Byrne (Litigation Guardian of)*[13], the court deducted the bulk of fees paid to an independent financial advisor for investment advice from the executors' compensation awarded, based largely upon the fact that the estate was also paying a monthly wealth management fee of $2,000 to the institution holding the investment assets. The court acknowledged that obtaining the advice of the financial advisor had been prudent on the part of the executors, but the size and overlapping nature of the fees paid made them unreasonable.

While reasonable professional fees will be proper estate expenses if the executor hires a third party to perform the services paid for, such fees will not be allowed if the executor performs the services himself, and then purports to charge the estate an extra fee for such services.[14] In such cases, the courts have stated that in appointing the executor, the testator knew of the executor's expertise and relied upon him using it, thus the usual compensation for executors adequately covers the executor's work as well as any fees he would normally charge for this expertise. Notable exceptions to this rule are where the testator states otherwise in the Will, or solicitors' fees where the solicitor is acting as an executor. Other reasons why a court might refuse to allow an agent's fees from the estate, even if the fees are found to be a proper estate expense and the delegation itself by the executor is reasonable, include bad faith or negligence on the part of the executor and a gross disproportionality between the complexity of the service provided and the size of the fees charged for it.

A related issue is whether the delegation of responsibilities itself, where the agent's fees are paid from the estate, should have any impact on the executor's compensation. The argument has been made that such a delegation lessens the executor's burden of administration, and therefore he should not be allowed the full amount of the normal rate of compensation. This issue was explored in *Laing Estate* v. *Laing Estate*[15]. In this case, the executor was a retired solicitor who hired accountants and lawyers for the estate, and relied heavily upon their advice during the course of its administration. The beneficiaries did not dispute that the fees paid to the professional advisors were properly incurred nor that they were payable by the estate, but instead argued that the reliance by the executor upon the advice paid for by the estate was an important factor to consider in the calculation of his compensation, and should be taken into account to reduce the compensation awarded to him. The reasoning advanced on behalf of the beneficiaries was that the usual percentages would overcompensate the executor, given that the burden of his responsibilities was considerably lightened due to his obtaining professional advice on many issues. The Divisional Court rejected this argument (and was affirmed on appeal), noting that the executor retained ultimate responsibility for the decisions made based upon the advice obtained, and that the complex nature of the estate had made for a very onerous burden on the executor, despite the professional advice he received. Even though he relied heavily upon professional advice to make his decisions, and this advice was paid for out of the estate, the usual percentages would not overcompensate him, given the size (the approximate value of the original estate assets was $10 million) and complexity of the estate.

4. Accountants Fees Payable Out of Estates

Hiring an accountant to provide tax advice to the estate when the estate has tax issues that require professional advice is another example of delegation to a professional agent that is generally acceptable, as such delegation is seen as similar to retaining a solicitor to do legal work for an estate. Unless an executor happens to be a tax expert (see the previous section for a discussion of this principle), he will not be expected to provide such advice himself, and the fees for such advice are payable from the estate.[16] The preparation of income tax returns, on the other hand, was historically considered to be part of the executor's work, and therefore fees paid to an agent for such preparation were deducted from the executor's compensation.[17] Over the past two decades or so, however, the fees paid for the preparation of the estate income tax returns have been treated more and more as a legitimate estate expense, as the proper preparation of income tax returns themselves has increasingly been seen as outside of most executors' abilities. Accounting fees for the preparation of income tax returns will now almost always be allowed from the estate, as the modern majority view is that the preparation of estate income tax returns has become a specialized area of expertise that an ordinary executor is not expected to be able to be personally familiar with.[18] If an ordinary person with an uncomplicated personal tax return often feels the need to hire and pay an expert to prepare their income tax return these days, there is even more reason for an executor to do the same for estate income tax returns. Of course, fees that are grossly disproportionate to the complexity of the estate's tax situation[19], or fees an executor purports to charge for tax services he himself renders to the estate[20] are not proper estate expenses.

5. Costs of Accounting to the Beneficiaries

Accounting to the beneficiaries is a fundamental duty of an executor, and is seen as one of the main tasks which gives rise to the executor's right to be compensated. It is the fundamental nature of this duty that underpins the traditional view that the preparation of the executor's accounts is a personal expense of the executor, not an estate expense.[21] An executor may employ a professional to prepare his accounts, especially where the accounts are of a complicated nature and where a prudent man acting for himself would do so, and may even pay the accountant out of the estate without this being found to be a breach of trust, but in most cases the preparation of the accounts has been found to be within the realm of the executor's ordinary duties, and the fees paid from the estate for the preparation of the executor's accounts have therefore been deducted from the executor's compensation awarded.[22]

A review of the caselaw reveals that many courts have simply followed this view without examining it. For example, in *Re Wood Estate*[23], the payment of accounting fees for the preparation of the executor's accounts was ruled to be a proper disbursement of the estate, but the amount paid was taken into account in fixing the executor's compensation. In *Re Goldlust Estate*[24], the estate was of average complexity and the executor was a fairly experienced solicitor, and based on these facts (without a discussion of the issues) the accounting fees for the preparation of the executor's accounts were deducted from the executor's compensation. In *Vanek* v. *O'Hara*[25], neither executor had accounting training, but one executor was a solicitor with some experience in estate matters. The estate was complicated due to the business owned by the deceased, but the court found that the executors' accounts themselves were not particularly complex and could have been completed by the executors given the one executor's experience in estate matters. The court therefore deducted the fees

for the preparation of the executors' accounts from the executors' compensation awarded.

Two cases which follow the prevailing view on this issue, but which do provide additional reasons after an examination of the principles involved, should be examined. Both are decisions of Madame Justice Greer. In *Re Carley Estate*[26], the executors were passing their accounts after a period of 30 years. They had failed to keep appropriate records, and this had necessitated a lot of extra work on the part of the accountants who were hired to complete the accounts. This lack of proper accounting and record-keeping on the part of the executors was a major factor in the decision of Madame Justice Greer to deduct the accounting fees from the executors' compensation owing. In *Re Blea Estate*[27], a considerable delay in the administration of the estate, which was caused by the executrix personally, resulted in additional accounting fees paid by the estate for tax advice and tax return preparation. Madame Justice Greer deducted the fees for the preparation of the executrix's accounts from her compensation awarded, specifically referring to this delay and to the executrix's failure to properly administer the estate in other ways. Although it is clear from these and other of Madame Justice Greer's decisions (see *Re Gordon Estate* discussed below) that she agrees with the prevailing view regarding fees paid for the preparation of executor's accounts, it is also clear in both of the above judgments that the executors' failure to properly administer the estate and/or keep records to account for the estate to the beneficiaries were major factors in her conclusions on this issue. In addition, it is important to note that both cases involved estates of average or less-than-average

complexity for which it should have been easy and inexpensive to prepare accounts, had the executors acted properly.

In contrast to the prevailing view, there is caselaw going back to 1833 in which fees for the preparation of the executor's accounts were allowed out of the estate and not deducted from the executor's compensation. *Taylor* v. *Magrath*[28] is widely cited as authority for deducting the fees for the executor's accounts preparation from the executor's compensation. However, a closer reading of the case reveals that a different principle should also be taken from it. In this case, the original executor of the estate had his accounts for passing prepared by an agent, but died before these accounts could be passed in court. The executors of the original executor took over as the succeeding executors of the estate in question, and had the accounts redrafted to claim thousands of dollars more in executor's compensation than the original executor had claimed in the accounts prepared for him. The court allowed the payment of the agent's fees for the preparation of the original executor's accounts out of the estate without deduction from his compensation awarded, based upon the earlier case of *New* v. *Jones*[29]. It was the fees for the preparation of the new accounts of the succeeding executors that were not allowed (neither, unsurprisingly, was the inflated claim for executor's compensation). The court found the behaviour of the succeeding executors to be unjustifiable and repugnant, and it is fairly clear that this view of their behaviour was a major factor in the court's decision not to allow the fees for the new accounts from the estate. However, the fees for the original executor's accounts were allowed out of the estate without deduction from the executor's compensation awarded, unfortunately without discussion or comment. Similarly, in *Re Kirk*[30], the fees for the preparation of the executor's accounts were allowed out of the estate, but again without

much useful discussion as to why. The court in *Re Kirk* cites *Taylor* v. *Magrath*, but its discussion of the case is not illuminating.

More recent caselaw allowing such fees from the estate without deduction from executor's compensation has examined the issues in more detail, although not always to a better understanding of the principles involved. One interesting example is *Re Cohen*[31]. In this case, the court allowed the accountants' fees for the preparation of the executor's accounts to be paid out of the estate and not deducted from executor's compensation, but only on the basis that these fees were a small part of the accountants' total fees paid by the estate, were not separately billed, and the specific amount relating to them could not be determined at the hearing. However, the court affirmed the prevailing view, stating that generally speaking the preparation of the accounts is part of the executor's duties and fees paid for such preparation are his personal responsibility. Mr. Justice Lazier specifically states that had the amount for the preparation of the executor's accounts not been a small amount of the total accountants' fees, he would have deducted the fees for the preparation of the executor's accounts from the executor's compensation awarded. It seems that Mr. Justice Lazier found the expense to be reasonable and not deductible based on its small size, but the principle behind such a finding is not clear, given that an expenses that should be paid by the executor personally should be deducted from his compensation, however small the expense might be. Size is generally irrelevant. Also, if it was possible to determine that the fees were relatively small, the court should have been able to fix an amount for them fairly easily.

In *Re Gordon Estate*[xxxii], the audit judge, citing *Re Miller Estate*[xxxiii] for the proposition that the list of categories of professional fees payable from estates is not closed, ruled that the accountants' fees paid out of the estate for the preparation of the executor's accounts should not be deducted from the executor's compensation in this case due to the size of the estate (approximately $2.6 million). On appeal to the Divisional Court, Madame Justice Greer allowed the appeal on this issue, stating that while *Re Miller Estate* is good law, it cannot be taken as authority for the proposition that fees paid for the preparation of executor's accounts could come out of the estate and not be paid by the executor personally. The Court of Appeal allowed the appeal, reversed the Divisional Court ruling and restored the audit judge's decision on this issue, stating that there was no basis for the Divisional Court to have interfered with the audit judge's findings, as the judge did not err in principle. Unfortunately, the Court of Appeal decision chose not to comment on the principle involved, however, their statement can be taken as general approval of the audit judge's statements regarding these fees, and thus that in certain situations at least accounting fees for the preparation of executor's accounts are a proper estate expense not deductible from the executor's compensation.[xxxiv]

One final case of note is *Re Flaska Estate*[xxxv], in which the executors paid approximately $18,000 for the preparation of executors' accounts. The estate in question was quite large (I was unable to determine from the judgment itself exactly how large the estate was, but it appears to have been over $10 million). This was the third passing of accounts, for a period of six years. The court characterized this payment as pretaking of compensation, and therefore improper, as well as finding the form of the accounts to be deficient. However, interestingly, it did not find that these fees were not proper estate expenses, and the amount paid for the accounts preparation was not specifically deducted from the executors' compensation awarded by the court (despite urging by counsel for the objecting beneficiaries to do so),

although their compensation was reduced by a certain amount due to their failure to diversify the investments of the estate.[xxxvi]

6. Conclusions

As explored above, despite the prevailing view on this issue, several Canadian courts have held that accounting fees for the preparation of executor's accounts are proper estate expenses that are not deductible from executor's compensation. The reasons laid out in these cases are, in my view, compelling. In addition to these reasons, the traditional view regarding the fees for the preparation of executors' accounts does not accord with the principle of full indemnification, which has been upheld regarding related expenses of executors. For example, in *Re Kanee Estate*[xxxvii], followed in several cases, it was held that an executor is entitled to be indemnified for his costs on a passing of accounts, including the costs of collecting his compensation. This principle is well enunciated in *Widdifield on Executors and Trustees*: "[t]he settlement of executors' compensation is part of the administration of an estate, and when the executors defend their claim to compensation, they are fulfilling part of their duty to account. The executors' claim falls within the ordinary course of their duties to the estate and accordingly they should be fully indemnified for their legal fees incidental to realizing that claim"[xxxviii]. Why then should it be that the preparation of the accounts themselves is not an estate expense, and must be paid for by the executor personally? Surely the accounts themselves are a necessary part of the executor's claim for compensation, since he cannot advance such a claim without preparing such accounts.

The distinction may be explained by categorizing accounting as a fundamental duty of the executor, while compensation is a fundamental right of the executor, with a corresponding difference in the reimbursement for costs of each. However, even if this

distinction is accepted, it is my view that the preparation of accounts for passing in court form should not be looked on as part of the fundamental duty to account, but should instead be viewed as a necessary expense of an executor's formal claim for compensation, as well as a matter requiring the help of a professional expert to complete, and that therefore the fees for the preparation of accounts in court form should be considered a proper estate expense, not deductible from compensation. Accounts in court form are not easy to produce, and many experienced estate law practitioners have accounts for passing prepared by accounting professionals who are well versed in the complexities of such accounts. If such experienced practitioners do so, an ordinary person cannot reasonably be expected to be able to produce such accounts, and therefore it is reasonable that the fees paid to produce them be borne by the estate. Any expenses incurred in merely accounting to the beneficiaries should, of course, continue to be the executor's personal responsibility, and the executor should be responsible for providing the basic information of the estate accounting to the professional in preparing the accounts. In addition, if the professional does more than prepare the accounts in court form, the fees for the additional services rendered regarding the accounting may be the executor's personal expense, depending on the circumstances. The adoption of this principle would be logical and fair, would reconcile the conflicting caselaw, and would uphold the best aspects of the law while eliminating those aspects that are no longer appropriate.

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1. This article was originally published in the Estates, Trusts & Pensions Journal, Vol. 29, No. 1, pp. 5-16 (December, 2009). It has been updated to include references to a few recent cases.

2. The author uses the masculine pronoun in this paper for her own convenience and that of the reader.

3. See, for example, Carmen S. Thériault, ed., *Widdifield on Executors and Trustees*, 6th Ed. (Toronto: Thomson Carswell, 2006) at 4-1.

4. See, for example, *Trustee Act* (Ontario), section 23.1, and similar legislation in other provinces. For a detailed discussion of a trustee's right to indemnification, see Suzana Popovic-Montag, "Revisiting a Trustee's Right to Indemnification" (2003) 50 E.T.R. (2d) 161.

5. An example of a statutory modification of this rule can be found in the *Trustee Act* (Ontario), section 27.1, which authorizes trustees to delegate investment decisions to an agent, within the parameters of that section. For an in-depth examination of the old principle of *delegatus non potest delegare* see D.W.M. Waters, ed. *Waters' Law of Trusts in Canada*, 3rd Ed. (Toronto: Thomson Carswell, 2005) at 858ff.

6. See, for example, *Haughton* v. *Haughton Estate* (1995), 6 E.T.R. (2d) 221 (Ont. C.A.), leave to appeal refused (1995), 9 E.T.R. (2d) 154 (NOTE) (S.C.C.). Note that this principle is somewhat modified in Ontario, for example, for delegation of investment authority if a plan is drawn up that an investment advisor is to follow, per the provisions of the *Trustee Act* (Ontario).

7. *Widdifield on Executors and Trustees, (supra)* at 9-2.

8. Also indexed as *In re Sinclair Estate*, [1944] 1 W.W.R. 509, 1943 CarswellBC 98 (B.C. S.C.).

9. This is true as long as the solicitor does not perform any executor's work. The issues of solicitor's versus executor's work, and of executors who are also solicitors charging the estate for solicitor's work, are fully explored in many text on estate administration, and are not discussed here.

10. [1927] 1 W.W.R. 1000, 1926 CarswellBC 101 (B.C. C.A.).

11. (2002), 48 E.T.R. (2d) 72 (Ont. S.C.J.).

12. (1987), 26 E.T.R. 188 (Ont. Surr. Ct.).

13. (2004), 9 E.T.R. (3d) 236 (Ont. S.C.J.).

14. See, for example, *Murphy* v. *Ritchie*, 1987 CarswellNB 252, 83 N.B.R. (2d) 19, 212 A.P.R. 19 (N.B. Prob. Ct.).

15. (1996), 89 O.A.C. 321, 1996 CarswellOnt 775 (Ont. Div. Ct.), aff'd (1998), 25 E.T.R. (2d) 139 (Ont. C.A.).

16. See, for example, *Re Goldlust Estate* (1991), 44 E.T.R. 97 (Ont. Gen. Div.), and *Cheney v. Byrne (Litigation Guardian of), (supra* at note 12).

17. See, for example, Jennifer J. Jenkins, *Compensation for Estate Trustees* (Toronto: Canada Law Book, 1997) at 108-109.

18. See *Re Holt Estate* (1994), 2 E.T.R. (2d) 163 (Ont. Gen. Div.), *Vanek* v. *O'Hara* (1995), 7 E.T.R. (2d) 187 (Ont. Gen. Div.), *O'Brien Estate* v. *O'Brien* (1996), 21 O.T.C. 264 (Ont. Gen. Div.), *Re Blea Estate*, [1999] O.J. No. 22, 1999 CarswellOnt 26 (Ont. Gen. Div.), and *Re Bedont Estate* (2004), 9 E.T.R. (3d) 59 (Ont. S.C.J.).

19. See, for example, *Re Holt Estate* (*supra* at note 17).

20. See, for example, *Re William George King Trust* (1994), 113 D.L.R. (4th) 701 (Ont. Gen. Div.) and *Re Clowater Estate* (1993), 49 E.T.R. 184 (N.B. Prob. Ct.).

21. *Compensation for Estate Trustees*, (*supra*) at chapter 5.

22. *Widdifield on Executors and Trustees, (supra)* at 9-24 - 9-25.

23. [1977] 2 W.W.R. 538 (Sask. Surr. Ct.).

24. *Supra* at note 15.

25. *Supra* at note 17.

26. (1994), 2 E.T.R. (2d) 142 (Ont. Gen. Div.).

27. *Supra* at note 17.

28. (1886), 10 O.R. 669 (Ch. Div.).

29. (1833), 47 E.R. 1562, 1 H. & Tw. 632n (Eng. Ex. Ch.).

30. [1955] 1 D.L.R. 225 (N.S. S.C.).

31. (1977), 1 E.T.R. 80 (Ont. Surr. Ct.).

32. [1994] O.J. No. 2237, 1994 CarswellOnt 3217 (Ont. Gen. Div.), varied by (1998), 24 E.T.R. (2d) 308 (Ont. Div. Ct.), reversed by (1998), 125 O.A.C. 272 (Ont. C.A.).

33. *Supra* at note 11.

34. See also *Re Watterworth Estate*, 1995 CarswellOnt 2528 (Gen. Div.). In this case, Justice Fleury allowed the solicitor's fees paid by the executors to prepare the estate accounts from the estate without deduction from executors' compensation where an extremely contentious and litigious beneficiary had occasioned much of the legal fees incurred by the estate generally, and where Justice Fleury concluded that this beneficiary created many difficulties in the estate administration relating to the estate accounting (at para. 34).

35. (2001), 39 E.T.R. (2d) 171 (Ont. S.C.J.).

36. See also *Zimmerman* v. *Fenwick*, [2010] O.J. No. 2162, 57 E.T.R. (3d) 101 (S.C.J.), where Justice Strathy states that there is authority that a trustee should bear the costs of the preparation of the estate accounts, implying that there is authority for the opposite proposition as well (at para. 99/page 22).

37. (1991), 41 E.T.R. 263 (B.C. S.C.), leave to appeal refused 43 E.T.R. 292 (B.C. C.A.), refusal of leave to appeal affirmed (1992), 46 E.T.R. 1 (B.C. C.A.).

38. *Supra*, at 14-27.

CITATION: Re Estate of John Mitchell, 2010 ONSC 1640
COURT FILE NO.: 02-125/09
DATE: 20100317

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: IN THE MATTER OF THE ESTATE OF John Frederick Mitchell, deceased, and the Virginia Gayle Mitchell Trust and the Heather Ann Mitchell Trust

BEFORE: D. M. Brown J.

COUNSEL: B. Cohen, for the Applicant

HEARD: March 1, 4 and 17, 2010

REASONS FOR DECISION

I. Requests for increased costs on applications to pass accounts

[1] This application to pass the accounts of the Estate of John Mitchell, and two trusts set up under his will, came before me three times. Twice I asked for the filing of better materials to support the request for increased costs – the applicable Tariff C amount is $5,000.00; the estate trustee is seeking approval of costs totaling $18,926.00. The reason for the deficiencies appeared to lie in a misunderstanding about the materials that an applicant should file where a request for increased costs is made on an unopposed application to pass accounts. Since the applicable Rules contain some ambiguity, I am writing this brief endorsement to clarify the expectations of the court.

[2] As Rule 74.18 of the Rules of Civil Procedure currently stands, where an application to pass accounts will proceed on an unopposed basis, a hearing must be held where a request for increased costs has been filed: Rule 74.18(11.2). Typically, a request for increased costs is made by the applicant fiduciary in cases of some complexity or where significant objections were received in respect of the accounts which required time and expense to resolve. However, such a request may come from a person with a financial interest in the estate who seeks costs greater than the amount allowed in Tariff C: Rule 74.18(11).

[3] Rule 74.18 specifies the materials which must be filed initially on an application to pass accounts (Rule 74.18(1)) and where the application will be unopposed and proceed without a hearing (Rule 74.18(9)). However, the Rule does not expressly stipulate the materials that should be filed where the application will proceed unopposed, but with a request for increased costs. It is that apparent slight gap in the Rules which I wish to address.

II. What should be filed for the hearing of an unopposed application to pass accounts with a request for increased costs?

[4] Simply stated, where an application to pass accounts will proceed unopposed, but with a request for increased costs, so that a hearing must be held, the applicant should ensure the following materials are filed with the court:

(i) Proper initial application materials: Rule 74.18(1);

(ii) A supplementary application record containing the materials specified by Rule 74.18(9). Although this rule speaks of the record required on an unopposed application without a hearing, the same materials must be filed where a hearing must be held because of a request for increased costs. The reason is evident: the supplementary record specified by Rule 74.18(9) provides the court with the evidence that all parties entitled to notice have been served and that no objections to the accounts remain outstanding. Proof of these matters is required where either the application will proceed as unopposed without a hearing, or as unopposed but with a hearing because of the request for increased costs. These materials initially were not filed by the applicants, leading to my endorsement of March 1, 2010 that they do so; and,

(iii) Additional evidence - a simple affidavit either as part of the Rule 74.18(9) supplementary record or in a further record, depending on timing – which contains:

a. the request for increased costs in proper form;

b. proof of service of the request on all affected parties;

c. a statement explaining the responses of affected parties to the request for increased costs (e.g. no response; consent; objection); and,

d. the details of, and the reasons for, the request for the increased costs, either through a detailed Bill of Costs or an easily understandable copy of the relevant dockets.

[5] The last item is significant. The Rules require a hearing where a request for increased costs above the tariff amount is made because the court must review the request to ensure that it is fair and reasonable in the circumstances. A court cannot conduct such a review without having before it evidence describing the work performed and time spent, as well as the value or cost of such work. Filing copies of counsel's dockets is an easy way to place such evidence before the court. If privilege concerns might attach to some docket entries, then at a minimum a comprehensive Bill of Costs should be filed so that the court can understand what work was done, when it was done, who did it, and how much was charged. It is the applicant who bears the burden of justifying the request for increased costs, so the applicant must file adequate evidence.

[6] Some estates or trusts require administration over long periods of time, giving rise to successive applications to pass accounts. Sometimes on an earlier application the affected parties may reach a settlement about how to calculate increased costs on later applications. In such cases an affidavit should explain the agreement reached, so that the court can understand the basis of the request for increased costs.

[7] In short, the person seeking increased costs must file adequate evidence that will educate the judge on the nature of and reasons for the request, so that the court possesses an evidentiary record upon which it can make its decision.

[8] One final point before turning to the specifics of the present application. Although the Rules do not require that a person who objects to a request for increased costs file a notice of objection, common sense dictates that a notice of objection should be served and filed as far in advance of the hearing date as possible. Courts do not take kindly to parties lying in the weeds and then popping up at a hearing to give notice of an objection for the first time. Such tactics prevent pre-hearing discussions that may settle the objection, waste the time of the court, waste the time of the other parties, and could well attract cost sanctions from the court. Such an approach is to be very strongly discouraged.

III. The present application

[9] On March 4, 2010 the applicant filed a supplementary record dealing with the matters covered by Rule 74.18(9). However, those supplementary materials did not contain a Request for Increased Costs in proper form. The request served failed to disclose the amount of increased costs sought; instead it stated that the applicant requested "costs payable out of the estate, the amount of which is to be determined by the judge hearing the passing of accounts, which is greater than the amount allowed under Tariff C." That form of request was deficient. Forms 74.49.2 and 74.49.3 stipulate that the claimant must specify the precise amount of increased costs sought, for an obvious reason – those receiving the notice must know the amount being sought so that they can decide whether or not to object.

[10] The applicant has now remedied that defect by serving and filing proof of service of a request for increased costs in proper form.

[11] I have reviewed the application materials. I am now satisfied that judgment should go in accordance with the draft filed, which I have signed.

D. M. Brown J.

Date: March 17, 2010