PASSING OF ACCOUNTS: RECENT CASES FROM 2013

Justin W. de Vries and Angela Casey

INTRODUCTION

If a theme were to emerge from the contested passing of accounts cases that were decided in 2013, it would be "protect the innocent". In some cases, this theme manifested itself in decisions to remove trustees who acted improperly or to surcharge trustees who misappropriated funds. In other cases, judges protected honest (albeit imperfect) fiduciaries against spurious complaints. Many of the recent decisions emphasize that well-intended fiduciaries will not be held to a standard of perfection. Moreover, meritless or petty complaints by beneficiaries will be met with judicial disapproval and punished in costs.

COMPENSATION

Aber Estate

By a large margin, the objection most frequently raised on a passing of accounts application is the compensation claimed.

The estates and capacity bar is indebted to Justice Carole Brown for her reasons in *Aber Estate*[1], which contain a very clear and thorough application of the principles governing compensation of both executors and substitute decision makers under the *Substitute Decisions Act.* [2]

As summarized in the *Aber* decision, the right of an executor/trustee to receive compensation is set out in section 61 of the *Trustee Act*, which provides that "[a] trustee, guardian or personal representative is entitled to such fair and reasonable allowance for the care, pains and trouble, and the time expended in and about the estate, as may be allowed by a judge of the Superior Court of Justice."[3]

There is no regulation setting compensation for an executor or trustee.[4] Through the common law, certain standard percentages have come to be accepted as the starting point for the calculation of executor/trustee compensation:

> Since 1975, the Ontario guidelines or tariff has been as follows: fees charged against capital, at 2½% on capital receipts and on capital disbursements; fees charged against revenue, at 2½% on revenue receipts and revenue

> disbursements; a care and management fee, at 2/5 of 1% per annum on the gross value of the assets under administration. See *Laing Estate* at p. 573.[5]

The figure produced by applying the "percentage guidelines" is then cross-checked against the five factors set out in *Toronto General Trusts Corp v. Central Ontario Railway*[6], namely:

1. the size of the trust;
2. the care and responsibility involved;
3. the time occupied in performing the duties;
4. the skill and ability displayed; and
5. the success of the administration.[7]

By contrast, there is a regulation under the *SDA* (regulation 159/00) which prescribes compensation for attorneys for property or guardians of property as follows:

a. 3 per cent on capital and income receipts;
b. 3 per cent on capital and income disbursements; and
c. three-fifths of 1 per cent on the average value of assets as a care and management fee.

However, Brown J. confirmed in *Aber* that the prescribed percentages in the *SDA* are not conclusive.[8] As with compensation for executors/ trustees, "the court must still be satisfied that the compensation calculated in accordance with the percentages would be fair and reasonable."[9] Applying the 2005 decision in *Sworik (Guardian of) v. Ware*[10], the *Aber* decision reaffirms that the principles governing how to determine fair and reasonable compensation for estate trustees apply equally to attorneys and guardians under the *SDA*. First, the compensation should be calculated using the percentages prescribed by regulation, and then that figure should be cross-checked against the five factors set out in *Toronto General Trust Corp v. Central Ontario Railway*.

Notably, the standard percentages are different as between substitute decision makers and executors. For this and other reasons, even when the same person acts as both substitute decision maker and then as executor, the fiduciary should prepare two different sets of accounts: one pre-death as attorney or guardian and one post-death as executor/trustee.

Aber also answered an important question with respect to care and management fees: should these fees be awarded as a matter of course, or only when there are unique circumstances which render it necessary to extend the estate administration beyond the "executor's year"?

After reviewing the two lines of cases on this topic, Brown J. found that the weight of authority supported the conclusion that a care and management fee is an "extra allowance….based on special circumstances", as opposed to a standard element of compensation to be applied in each case.[11]

Moreover, care and management fees, too, are subject to judicial testing of reasonableness:

> Really, then, neither care and management fees, nor any other part of an estate trustee's compensation should be awarded as a matter of routine adherence to fixed percentages. Every case requires a careful examination of the facts to determine whether the compensation sought would be fair and reasonable.[12]

Hooke v. Johnson

This approach was echoed in another passing of accounts application decided in 2013, *Hooke Estate v. Johnson*.[13] In *Hooke*, the deceased had appointed her solicitor as estate trustee of her estate. The solicitor claimed both legal fees and executor compensation based on the usual percentages. A beneficiary objected on the basis that the claimed compensation was too high, given the uncomplicated nature of the work. Further, the objector argued that there was overlap between the work as lawyer and as estate trustee. Interestingly, the solicitor charged legal fees for completing the probate application based not on hourly rates but on "fixed percentages set by the York Law Association on an estate value of $425,000." "To that extent", the Court found, "the amount claimed cannot be held to constitute fair and reasonable compensation".[14] The Court accordingly reduced the legal bill from $6,037.50 to $4000.00 plus HST and disbursements.

As for the claimed executor's compensation, the Court found that the "determination of fair and reasonable compensation does not necessarily involve maintaining fidelity to fixed percentages. These percentages do not confer a license to charge at rates that do not reflect the time spent, complexity of the work performed or the value of the estate."[15] In *Hooke*, in addition to the reduction to the legal bill, the Court reduced the executor's compensation from $21,900.93 (as originally claimed – the claimed compensation was reduced just prior to trial) to $8,986.84.

In other cases, an executor has received full compensation even for an uncomplicated estate.

Where extraordinary time is required to administer an estate due to litigation and/or multiple objections, an estate trustee may be entitled to full compensation, even though the estate was a relatively simple one in terms of the types of assets held. This was the case in *Aber*. The assets consisted of a house, plus some simple investments, including GICs, bonds and cash.

Nevertheless, the Court awarded full compensation because "while the estate was not complicated, it was time-consuming due the delays occasioned by the numerous demands by the objector for more and more detailed explanations of expenditures, much of which had been provided previously."[16] In other words, one can be awarded full compensation, even when at least one of the five factors (care and responsibility involved) would otherwise militate in favour of a reduction from the usual percentages.

Another question addressed in *Aber* is whether an estate trustee is entitled to charge compensation in respect of a legacy payment from herself as executor to herself as beneficiary. Applying Re: *Cohen*, Brown J. found that this is proper. There is a difference, the Court found, between compensation charged on a legacy required by the will and compensation charged on services provided to the Estate. "There is a clear distinction", wrote Justice Brown, "between the payments made by an executor which an executor is duty-bound to make regardless of their identity and payments made by an executor to himself which are the result of choosing to hire himself and consist in essence of collecting his own bill for legal services."[17]

Another interesting issue discussed in *Aber* is how to deal with the potential for over-compensation when the same individual acts as both attorney for property and then as estate trustee. The attorney for property could charge compensation for a capital receipt in the attorney accounts and then charge again for receiving the same asset into the estate. In *Aber*, the Court found that there was no over-compensation because the estate's most significant asset, the family home, was not included in the calculation of attorney compensation. Rather, compensation was charged for the house transfer only in the executor accounts.[18] The Court therefore dismissed the objection that there was double compensation.

The objector in *Aber* also challenged compensation on the grounds that the estate trustee lacked skill and ability. She complained that the estate trustee did not retain an investment advisor to produce a greater return for the estate. This objection, too, was dismissed. While the 2012 decision in *Re: Young* confirmed that investment management fees may be appropriately paid from a trust (and not deducted from the trustees' compensation), it is certainly not necessary in every estate to retain an investment professional, particularly where there are no ongoing testamentary trusts.

Brown J. also considered whether allowing incapable parents to handle some cash on their own constituted mismanagement. She found that it did not. In *Aber*, the attorney elected to cash certain pension cheques totalling approximately $113 per month, and provided this sum to her

incapable father as “pin money”. The attorney reasoned that although her father was incompetent to manage his finances, it helped him maintain feelings of independence to have some spending money of his own, and her parents could afford it. Further, she felt that it was, after all, her parents’ own money and they were entitled to it. The objector complained, alleging that this amounted to mismanagement. Further, the objector protested that the parents used much of this spending money to make gifts to the attorney’s own children (the donors’ grandchildren), such that these payments had the impermissible effect of benefitting the attorney. These objections were dismissed. Justice Brown found that these small amounts were provided to the father in good faith and that they were properly managed.[19]

The objector also raised a concern that the estate trustee cashed a bond before maturity, resulting in lost interest of $266.66. The estate trustee explained that she had received legal advice to liquidate the bond immediately (before the maturity date), because the estate would be wound up quickly. Unfortunately, this did not prove to be the case. Nevertheless, the Court found that it was reasonable for the estate trustee to have liquidated the bond based on her expectations at that time. The Court was satisfied that cashing the bond was “at most, an innocent error and that there was no mismanagement in that regard”.[20]

Villa v. Villa

Similarly in *Villa v. Villa*[21], the Court found that an honest mistake should not deprive an attorney of compensation. Despite a finding that the attorney had committed a breach of fiduciary duty by comingling the donor’s funds with his own, the Court found that “this was an honest but misguided mistake”,[22] and awarded the attorney full compensation at the prescribed rate. “Since he did not maliciously misuse access to these funds”, the Court held, “he is entitled to compensation for the effort and grief of trying to resolve the assets of this modest Estate”.[23]

Standing to Compel Passing under the *SDA*: *Lehtonen v. Neill, Aber*

Two 2013 decisions considered who has standing to compel a passing of accounts. Pursuant to section 42 of the *SDA*, the following persons may apply to compel a passing of accounts by an attorney or guardian of property:

1. a guardian of property/attorney;
2. the incapable person/grantor;
3. the grantor’s/incapable person’s guardian of the person or attorney for personal care;

4. a dependant of the grantor/incapable person;
5. the PGT;
6. The Children's Lawyer;
7. a judgement creditor of the grantor/incapable person.

Subsection 42(4) also authorizes the Court to grant leave to any other person. In *Lehtonen v. Neill*[24], the Court granted leave to the incapable person's son to seek a passing of accounts by his sister-in-law in her capacity as attorney for property. Leave was granted, "on the grounds that he [was] a child of Donna Lehtonen and has an interest in her and her affairs."[25]

One should not, however, assume from this finding that leave will be granted in every case to a child of the incapable person. In *Aber*, the Court dismissed an earlier application by one daughter to compel a passing by the other daughter as attorney for property. In the 2003 application, the applicant daughter sought a passing of accounts and production of her parents' wills. The father swore an affidavit attesting that he did not wish to provide the applicant daughter with information about his property and his will prior to his death. Accordingly, the Court dismissed the application.

The Latest on Releases: *Sheard and Denofrio*

Re: Sheard Estate[26] represents an interesting look at releases and their enforceability. In *Sheard*, the estate trustees made an initial interim distribution and asked the beneficiaries, including the grandchildren of the deceased, to sign a receipt for it. Each did. The estate trustees later made a second interim distribution. It was accompanied by a letter from their lawyer which stated:

> We are enclosing a set of accounts for the estate for the estate for the period from December 28, 2007 [the date of death] to June 30, 2009 for your review. If they are satisfactory, please date and sign the enclosed release and return three copies to the undersigned.[27]

These releases were executed by each of the grandchildren. The releases were witnessed and stated to be "signed, sealed and delivered."[28] The first two accounting periods ended on June 30, 2009.

The estate trustee made a third distribution and again requested a release. This time, the grandchildren refused to sign the requested release. Although there was some discussion about holding back the third distribution until after the releases were signed, the estate trustees ultimately paid the third distribution on December 13, 2012. The executors then proceeded with

an application to pass accounts for only the periods of time that had not been released (i.e. from July 1, 2009 onwards). The grandchildren filed a notice of objection to the application. One of their objections was that the estate trustees should be required to pass accounts beginning from date of death. At the initial return date, Justice Greer ordered the beneficiaries to bring a motion to set aside the releases as an initial procedural step.

The grandchildren sought to set aside the releases on the grounds that (a) they were signed without consideration (b) they did not reflect a fully informed intention to be legally bound, (c) the beneficiaries had no independent legal advice, when they were signed and (d) the accounts were incomplete, contained substantial errors and did not balance.

The motion to set aside the releases was dismissed on the basis that it was out of time and therefore precluded by operation of the *Limitations Act*[29]. The Court found that any motion to set aside the release should have been brought within 2 years of the date that they were signed and thus, the motion was out of time. Although the grandchildren argued that their motion was not a "proceeding" within the meaning of the *Limitations Act*, the Court found that the grandchildren's claim to set aside the releases was really a new claim asserted in an estates application and accordingly should be treated in the same way as an originating process starting a proceeding.[30]

Moreover, the Court found that even if the motion had not been statute-barred, there was no reason to set aside the releases. Only one of the objecting grandchildren filed an affidavit. Tellingly, nowhere in the affidavit did the grandchild suggest that he did not intend to be legally bound when he signed the release. Similarly, the affiant did not suggest that he did not know what he was signing. From his statement that the release was signed "without the benefit of costly legal advice", the Court inferred "(a) that he knew he could obtain legal advice and (b) that he assumed it would be costly and therefore proceeded without it."[31] In the end, the Court found that "although it might have been better for the estate trustees' lawyer to suggest independent legal advice", this was not fatal to the enforceability of the releases.[32] In response to the submissions regarding the alleged errors contained in the releases, Justice Mesbur pointed out that she was referred to no authority to suggest that this would negate the effectiveness of a release.

Addressing the submission that the releases were invalid because they lacked consideration, the Court wrote:

> …the grandchildren's counsel says the releases are without consideration and not signed under seal. The releases and receipts contained in the motion records all appear to have been signed under seal. All are witnessed and all contain the words, "signed, sealed and delivered." I therefore conclude that they were all executed under seal and therefore have consideration.[33]

Although this finding was strictly *obiter* (the case had turned on the limitations issue) this comment leaves a reader to wonder whether consideration would have been found *absent* the words "signed, sealed and delivered". Could a beneficiary argue that a release without these words lacks consideration because the payment to the beneficiary represents money to which the beneficiary is already entitled under the will?[34] Although the beneficiary is entitled to his gift under the will, the estate trustee is also entitled at law to pass his accounts. It could be argued that when an estate trustee makes a distribution in exchange for a release, the consideration flowing to the beneficiary is the estate trustee's agreement to pay the beneficiary without first passing his accounts. Still, counsel advising estate trustees would be wise to pay attention to the protection that the words "signed, sealed and delivered" provided to the estate trustees in this case.

Together with a 2012 case, *In the Estate of John A Denofrio (*discussed below*)*,[35] *Sheard* informs best practices around demanding releases from beneficiaries. The practice of "release first, then money" has been the subject of judicial criticism dating back to at least as early as 1845; a summary of caselaw criticizing the practice appears in *Bronson v. Hewitt*[36]. The 2005 decision in *Rooney Estate v. Stewart Estate*[37] has been frequently cited as authority for the proposition that it is improper for an estate trustee to ask that a release be signed prior to making a distribution. In *Rooney,* the Court noted : "[t]he manner of sending the release first and the cheque later suggests the "beneficiary was held hostage for the release."[38] However, *Denofrio and Sheard* suggest that it may be appropriate for a fiduciary to ask for a release in conjunction with a beneficiary distribution.

Rooney was distinguished in the *Sheard* decision. The Court noted that in *Sheard*, the beneficiaries were provided with their bequests at the same time as they were asked to sign the releases whereas in *Rooney*, the solicitor demanded a release from the beneficiary *before delivering the accounts*, and also implied that payment to the beneficiary was conditional on delivery of a release.[39]

In *Denofrio*, the testator left the residue of his substantial estate to be divided into two shares: one for his wife and one to be divided amongst his children. The testator named three estate trustees: his nephew, his close business associate and one of his four children. The gifts to his

children were to be paid out monthly over a period of 10 years. It seems from the decision that three of the children were disgruntled and threatened litigation. The wife commenced litigation against the estate.

The estate trustees sought to pass their accounts, and took the position that they should be entitled to pass their accounts *before* making any of the required monthly payments to the beneficiaries.

The objecting beneficiaries complained that it was improper for the estate trustees to withhold payment of their monthly entitlement under the will until the beneficiaries signed a release and/or the estate trustees first passed their accounts. There was some discussion in the reasons about the appropriate breadth of the proposed releases, with the estate trustees acknowledging that it would not be appropriate to request the beneficiaries to release them from future potential liabilities.

The Court noted that no authority had been provided for the proposition that accounts must be passed before any payments could be made to the beneficiaries. Similarly, the will contained no such provision. Nevertheless, the trial judge found that "based on this threat of litigation, the Court is satisfied that the estate trustees were justified in not paying the bequests pending the passing of accounts."[40]

This finding was appealed. In reasons released in April 2013, The Divisional Court found that there was ample evidence to support the application judge's conclusion that the request for a release was not improperly motivated and was reasonable in light of the threats of litigation.[41]

FORM OF ACCOUNTS

Statutory Framework

The form of accounts required of estate trustees is set out in Rule 74.17 of the *Rules of Civil Procedure*. It requires the estate trustee to prepare a statement of assets as of the date of death, a statement of money received (other than investments which are separately tracked), disbursements, an investment statement, a statement of unrealized assets, a statement of all money and investments as of the closing date, a compensation statement, "and such other statement as the court requires". Where a trust deals separately with capital and income, the accounts must record income and capital receipts and disbursements separately.

Section 32(6) of the *SDA* requires an attorney to keep accounts in accordance with the regulations. Regulation section 2(1) prescribes the form of accounts required of a substitute decision maker (i.e. attorney for property or guardian) under the *SDA*:

> Regulation section 2(1) prescribes the following form of accounts and records:
>
> (a) List of all incapable person's assets as of the date of first transaction, including real property, money, securities, investments, motor vehicles, other personal property;
>
> (b) Ongoing list of all assets acquired and disposed of, including date and reason, and from or to whom acquired or disposed;
>
> (c) Ongoing list of all money received, date, reason for payment, particulars of account and into which deposited;
>
> (d) Ongoing list of all money paid out, amount, date, purpose, and to whom paid;
>
> (e) Ongoing list of all investments made, amount, date, interest rate, type of investment;
>
> (f) List of all incapable person's liabilities as of date of first transaction;
>
> (g) Ongoing list of liabilities incurred or discharged, date, nature of and reason for liability;
>
> (h) Ongoing list of all compensation taken by attorney, amount, date, method of calculation, and
>
> (i) List of assets, value of each, used to calculate attorney's care and management fee.

The language of the regulation suggests that compensation may be appropriately charged on only those assets which are actively managed by the attorney/guardian rather than on all of the incapable person's assets. While section 2(1)(a) requires a list of *all* of the incapable person's assets, section 2(1)(i) requires a list of the assets used to calculate the case and management fee, suggesting that the two lists will not inevitably be the same.

In *Aber*, the attorney did not charge a care and management fee in respect of the incapable donors' house, as she was not required to dispose of the house as part of her duties as attorney for property. Later, in her role as estate trustee of her parents' estates, she charged compensation to transfer the house in accordance with the terms of the will (to herself). Brown J. approved of this approach, although she did reduce the estate trustee's compensation because of her finding that the value of the house was overstated.

In *Villa v. Villa*, the attorney's accounting listed his mother's assets at the date of the first transaction, contained an ongoing list of all assets acquired, disposed of, and monies received or paid out as well as investment transactions. He did not, however, list the value of his mother's personal property as required by regulation by section 2(1)(a).[42] Despite this technical breach, the Court found that the attorney met his duty of keeping contemporaneous and accurate records as required by the regulation enacted under the *SDA*.

Kulyski v. Kulyski

From time to time, particularly in modest estates, the parties will agree to, or the Court will order an "informal accounting" by the fiduciary. In *Kulyski v. Kulyski*[43], Justice Greer provided some judicial guidance as to what does (and does not) constitute an "informal accounting". The respondent had been ordered to provide an informal accounting of her actions as attorney for property for her mother. She left a plastic folder with the court (she was self-represented at the time) which she first described as an affidavit, but later suggested was a "statement of accounts of Stella Kulyski". Commenting on what had been filed, Justice Greer wrote:

> The so-called "Accounts" consisted of a folder of loose papers, not numbered. These were not Accounts. In her so-called Statement, Patricia wrote that "mom did not keep good records". The papers included copies of Royal Bank statements with notations by Patricia as to what some cheques referred to, and some deposits such as "Ann's estate". There were many "cash withdrawals" not accounted for.[44]

The Court concluded that what had been produced did not constitute an informal accounting.

The attorney then retained counsel, who filed a second set of accounts, which Justice Greer also found to be deficient. Certain estate funds flowing to her mother as beneficiary of another estate were transferred by the attorney into the attorney's own bank account. The attorney claimed that these funds were a gift from her mother and the deceased, both of whom wanted her to have this money in gratitude for the support she provided to both of them. This explanation was not accepted by the Court. In addition, Justice Greer found that other amounts were improperly taken by the attorney. In the end, the judge ordered the attorney to repay $21,133.12.

Curiously, although not entirely clear from the decision, this amount seems to be much more than any party had sought from the attorney. Paragraph 47 of the decision suggests that although the applicant, the PGT and Section 3 counsel all took the position

that the attorney had improperly taken funds, no one took the position that she had taken more than $9,700.00.

OBJECTIONS: LEGAL AND ACCOUNTING FEES PAID FROM ESTATE

Villa v. Villa

The *Villa* decision (discussed earlier) contains a good discussion of whether legal and accounting fees should be paid out the estate of an incapable person.

In *Villa*, the Court found that Enzo (the attorney) did not act perfectly. The Court found that it was a technical breach of his fiduciary duties to have instructed the bank to pay the proceeds of his mother's mutual funds into his personal bank account. This, the Court held, was an honest but misguided mistake, as Enzo continued to list the proceeds of the mutual funds in his attorney accounts. The proper remedy, the Court found, was for Enzo to pay these funds back to the estate. Further, the onus was on Enzo to distinguish the estate funds from his personal funds. If he could not distinguish or separate the funds, then the entire account would be considered property of the estate.

Enzo's brother, Renzo also objected to Enzo's legal and accounting fees being paid out of their mother's assets. Enzo countered that it was not until Renzo refused to settle the accounts informally that he retained an accountant and lawyer for the purpose of passing his accounts. On this issue, the Court reasoned:

> A trustee (or attorney) is entitled to full indemnity for any proper charges in administering the Estate but will only be reimbursed to the extent that the fees were "reasonably incurred for the purpose of performing their responsibilities in administering, or distributing, the estate or trust. In each case there is a question whether the services were provided for advice and assistance to the client in relation to his or her personal interest rather than those of the estate".
>
> The answer to this question often depends on the outcome. In *DeLorenzo v. Beresh* the court held that "when there is litigation between the estate trustee and the beneficiaries related to the question of whether or not the trustee has properly discharged his duties, including timely steps to pass his accounts, different considerations apply in my view. Ultimately, the issue of whether the trustee is entitled to charge the estate with his legal fees may turn on the outcome and it should be determined on a passing of the accounts or court application, if not agreed to by the beneficiaries".
>
> While Enzo breached, to some degree, his fiduciary duties by mixing Estate funds with his personal funds, the extent of the breach is much less than alleged by Renzo and certainly not with malicious intent. It was in the interest of the Estate to defend this litigation as the accounts could not be passed and the

> litigation could not be resolved until Enzo defended the claims against him. The result is that the legal and account fees should be paid out of the Estate. An attorney is permitted to seek expertise in managing the property.[45]

Similarly, in *Aber*, the objector complained that the attorney paid her own legal fees in respect of an earlier court application out of her parents' assets. The earlier application was also initiated by the objector and dismissed by the Court. The actual legal fees paid by the attorney for responding to the application were $7,712.00 in respect of her own legal fees, plus $6,005.83 for the father's legal fees to the application. Both of these amounts were paid out of the parents' assets. In dismissing the 2003 application, the Court had ordered the applicant (objector) to pay costs of $3,500.00 to the attorney and $4,000.00 to the father.

Years later, on the passing of accounts application, the objector argued that the attorney should not have paid her own legal fees relating to the earlier application from the parents' assets. The Court disagreed. Brown J. reasoned that the application had been brought against the attorney in her capacity as attorney and not personally. The Court was satisfied that the attorney's legal fees were properly payable from the parents' assets, as they related to the management and administration of the parents' estate. The fact that the Court had fixed costs of the earlier application payable by the objector did not detract from the attorney's right to full indemnification from her parents' assets for *all* of her legal fees.

In a case decided in 2012, *Barltrop v. Bensette*[46], the Court took this even further, and allowed not only the guardian's full indemnity legal indemnity legal fees to be paid out of her mother's assets, but also the interest on a loan that the guardian had taken out to pay her legal fees in respect of the bitterly contested guardianship application. The guardian was awarded her full indemnity costs in respect of the earlier guardianship application.

The guardian later sought to pass her accounts. The objector (her brother) complained that in addition to the costs awarded in the first application, the guardian reimbursed herself for (a) the interest she had paid on a loan taken out to pay her legal fees and (b) a bill from her lawyers in respect of the cost submissions of the guardianship application. The objector argued that these costs should have been sought as part of the guardianship application. The Court disagreed on the basis that the earlier costs award did not include the legal fees incurred to argue costs. The additional legal bill to argue the costs was therefore allowed in full. The Court also allowed the guardian's interest costs to be reimbursed from the mother's assets. Bryant J. reasoned that the decision to retain counsel benefitted the mother and the costs resulting therefrom were therefore payable from the mother's assets in accordance with section 32(1.1) of the *SDA*.

Steven Thompson Family Trust

In *Steven Thompson Family Trust v. Thompson*[47], the Court disallowed accounting and legal expenses because the estate trustees had acted in conflict of interest.

Thompson involved a contested passing of accounts in the context of a testamentary family trust ("Trust"). The Trust owned 50% of the shares of Thompson Fuels Ltd., a family owned business. The other 50% of the shares were owned by the deceased's brother, Paul. A dispute arose between Paul and the Trust as to how much Paul should pay the Trust for its shares, and litigation ensued by Paul against the Trust over the value of the Trust's shares. The trustee of the Trust was Paul's long-time accountant, Mitchell. This placed Mitchell in a conflict position. On the one hand, Mitchell's duty was to maximize the price that Paul would pay the Trust for its shares of the business. On the other hand, Mitchell's long-time client, Paul, would naturally want to minimize the price he paid for the shares.

Mitchell openly criticized a valuation report obtained by McColl Turner for having valued the Trust's shares *too high* (a rather strange position for someone whose duty is to maximize the value of the Trust's assets). Unsurprisingly, the beneficiaries of the Trust complained that Mitchell's conflict necessitated his removal as trustee. After receiving advice from a lawyer about his conflict of interest, Mitchell agreed and resigned. The parents of the deceased were appointed to take over from Mitchell as trustees of the Trust. The parents, in turn, promptly retained Mitchell as their agent, who was seemingly oblivious to the fact that his conflict should have also precluded him from acting as agent for the new trustees.

Mitchell, acting as agent, hired his own former accounting firm (and the firm used by Thompson Fuels) to do a second valuation for the purpose of Paul's buyout of the Trust's shares. The Court described this move as "almost farcical." The Court held that commissioning the second valuation at a cost of $31,234.63 and paying for it out of the Trust was unnecessary. The Court ordered this unnecessary expense to be repaid by the trustees. The trustees were also required to repay the Trust for a portion of the legal fees paid to the lawyer who acted for them and Mitchell.

SECURITY FOR COSTS IN A PASSING OF ACCOUNTS APPLICATION

In *Maasbree Group (Trustee of) v. Maasbree Group Trust (Trustee of)*[48], the Court dismissed a motion for security costs by the trustee in a passing of accounts application. In an earlier proceeding, the Court granted a consent order requiring the trustee to pass accounts and

adjourned other relief sought by the applicant to the passing of accounts application. The application to pass accounts was adjourned several times. With cross-examinations pending, the trustee brought a motion for an order requiring the applicant to post security for costs on the basis that the applicant resided outside of the province and had insufficient assets to pay any costs awarded against him.

The applicant admitted that he was a university student in Alberta and had few, if any, financial resources. Nevertheless, the trustee's motion was dismissed on the basis that:

- the trustee has a duty to pass accounts;
- the parties had already agreed that other relief sought by the applicant against the trustee would be heard at the same time as the passing of accounts. As such, the application was not a separate proceeding but "part and parcel" of the right of beneficiaries to demand a passing;
- there were other beneficiaries involved in the proceedings; and
- The claim was not frivolous, vexatious or devoid of merit because the trustee had an obligation to account.[49]

In a short costs endorsement[50], the judge agreed with the applicant's submission that the motion was "ill advised" and ordered substantial indemnity costs payable by the trustee to the applicant. This case suggests that the grounds on which a trustee could successfully bring a security for costs motion in a passing of accounts application are quite narrow, given that a trustee is under a duty to account.

COSTS OF CONTESTED PASSING OF ACCOUNTS APPLICATIONS

In *Villa* (discussed above), costs were ordered against the objector at an increased scale based on an offer to settle made by the attorney. In considering the factors set out in Rule 57.01, the Court found that the conduct of the respondent (objector) in this application was unreasonable and rendered a rather straight forward matter unnecessarily complex. There was an offer to settle made by the attorney on May 1, 2012 that the Court found would have reasonably resolved the issues on this modest estate. Accordingly, the Court ordered the objector to pay partial indemnity costs up to the date of the attorney's offer, and substantial indemnity costs following the date of the offer.

In *Hooke v. Johnson* (discussed above), the Court decided the costs of an application to pass accounts where the primary issue was the compensation claimed by the estate trustee. The

objectors were partially successful in that compensation was reduced. In deciding costs of the contested passing of accounts application[51], the Court considered the trustee's right to be fully indemnified on the one hand against the "loser pay" principle on the other hand. The Court considered the fact that the estate trustee did offer to reduce his compensation just prior to the hearing (although he did not do so 7 days in advance of the hearing, did not beat his offer in the result, and the offer to reduce was not as much as the Court's reduced compensation). Still, the Court considered that the trustee had significant experience, had completed his duties (albeit with some errors along the way), and had made a clear attempt to resolve the matter. Accordingly, the Court awarded him $1000 in costs payable from the estate, despite being the unsuccessful party. The partially successful objectors were entitled to $2500 in costs out of the estate.

CONCLUSION

As seen in *Kulyski,* where a fiduciary has misappropriated funds, the Court will be prepared to intervene. However, it appears from recent contested passing of accounts decisions that the Court will not be anxious to reduce compensation based on complaints centring around small disbursements and petty complaints (the court expects some degree of proportionality).

Recent passing of accounts decisions have demonstrated that a fiduciary who has made significant and honest efforts to fulfill his duties will be entitled to pass his accounts and receive fair compensation. This will be true even in the face of small mistakes such as mathematical errors in the accounts, or even an honest but misguided mistake in judgment, as in *Villa*, where the attorney co-mingled estate funds with his own.

Indeed, while expressing judicial disapproval over the disproportionate amount of court time spent on relatively small monetary matters (a duplicate payment for train fare in the amount of $107, interest charges in the amount of $102.85), the Court in *Barltrop* noted the irony that it was precisely *because* the guardian's accounts were so comprehensive that the objector was able to identify small duplicate or overpayments to complain about.[52] Despite some small errors that the attorney freely admitted and corrected, the Court held that she ably satisfied the statutory standard of care as attorney and was entitled to the full compensation claimed.

Finally, the *Sheard* and *Denofrio* decisions suggest that a release signed by a beneficiary will afford valuable protection to a fiduciary who has acted reasonably in obtaining it. A would-be objector would be wise to think seriously before engaging in a protracted battle over relatively trivial matters.

[1] In the Estate of Stefanie Aber, deceased, and In the Matter of the Passing of Accounts, 2013 ONSC 6363 (Canlii)

[2] *Substitute Decisions Act*, R.S.O. 1992, c. 30 ("SDA")

[3] *Aber*, at paragraph 20.

[4] *Aber*, at paragraph 21.

[5] *Aber*, at paragraph 22.

[6] *Toronto General Trust Corp. v. Central Ontario Railway* (195), 6 O.W.R. 350 (H.C.). ("Central Ontario Railway")

[7] *Central Ontario Railway*, at p. 354.

[8] *Aber*, at paragraph 19.

[9] *Aber*, at paragraph 19.

[10] *Sworik (Guardian of) v. Ware*, 18 E.T.R. (3d) 132 (Ont. S.C.J.).

[11] *Aber*, at paragraph 25.

[12] *Aber*, at paragraph 26.

[13] *Hooke Estate v. Johnson*, 2013 ONSC 1674, 226 A.C.W.S. (3d) 1223, 86 E.T.R. (3d) 92.

[14] *Hooke Estate*, at paragraph 15.

[15] *Hooke Estate*, at paragraph 11.

[16] *Aber,* at paragraph 42.

[17] *Aber*, at paragraph 29.

[18] *Aber*, at paragraph 35.

[19] *Aber*, at paragraph 54.

[20] *Aber*, at paragraph 36.

[21] *Villa v. Villa,* 2013 ONSC 2202, 227 A.C.W.S. (3d) 1199, 89 E.T.R. (3d) 49.

[22] *Villa*, at paragraph 27.

[23] *Villa*, at paragraph 35.

[24] *Lehtonen v. Neill*, 2013 ONSC 1497, 226 A.C.W.S. (3d) 892 ("Lehtonen").

[25] *Lehtonen*, at paragraph 8.

[26] *Sheard Estate*, 2013 ONSC 7729 ("Sheard").

[27] *Sheard,* at paragraph 4.

[28] *Sheard*, at paragraph 6.

[29] *Limitations Act*, 2002, S.O. 2002, c. 24, Sched. B

[30] *Sheard,* at paragraph 24.

[31] *Sheard*, at paragraph 37.

[32] *Sheard,* at paragraph 31.

[33] *Sheard*, at paragraph 28.

[34] See argument to this effect in Anne Werker's paper, *"Discharge of a Trustee by Deed of Release and the Function of a Seal"*, The Advocate's Quarterly, Volume 41, p. 451.

[35] *In the Estate of John A Denofrio*, 2012 ONSC 3408 (Ont. S.C.J.) ("Denofrio").

[36] *Bronson v. Hewitt, 2010 Carswell B.C. 285.*

[37] *Rooney Estate v. Stewart Estate,* 2007 Car*swell Ont 6560 (S.C.J.) 161 A.C.W.S. (3D) 177*

[38] *Rooney*, at paragraph 39.

[39] *Sheard*, at paragraph 34.

[40] *Denofrio*, at paragraph 59.

[41] *Denofrio v. Denofrio*, 2013 ONSC 2106, 227 A.C.W.S. (3d) 598, (Ont. Div. Crt.), at paragraph 5.

[42] *Villa*, at paragraph 10.

[43] *Kulyski v. Kulyski*, 2013 ONSC 719 (Ont. S.C.J.), 226 A.C.W.S. (3d) 590

[44] *Kulyski*, at paragraph 18.

[45] *Villa*, at paragraph 35 – 37.

[46] Barltrop v. Bensette, 2012 ONSC 2196 (Ont. S.C.J.), 214 A.C.W.S. (3d) 654, 78 E.T.R. (3d) 287

[47] *Steven Thompson Family Trust v. Thompson*, 2012 ONSC 7138, 224 A.C.W.S. (3d) 233, 84 E.T.R. (3d) 24 (Ont. S.C.J.) ("Thompson").

[48] *Maasbree Group (Trustee of) v. Maasbree Group Trust (Trustee of)*, 2013 ONSC 5503, 232 A.C.W.S. (3D) 550.

[49] *Maasbree*, at paragraph 7.

[50] *Maasbree Group (Trustee of) v. Maasbree Group Trust (Trustee of)*, 2013 ONSC 5503, 232 A.C.W.S. (3D) 550.

[51] *Hooke v. Johnson*, 2013 ONSC 2556 (Ont. S.C.J.)

[52] Barltrop, at paragraph 77.