CONTESTED PASSING OF ACCOUNTS – TIPS, TRAPS AND PITFALLS
(or…The Short and Happy Life of a Fiduciary)

by Justin W. de Vries[1]

Introduction

> The passing, or audit by the court, of an executor's accounts is a significant part of the administration of the estate. Central to an audit is the determination by the court that the executor has properly performed its duties in regard to the trust fund created by the testator. Generally speaking, the executor and any beneficiary properly attending and represented by a lawyer on the passing of accounts is awarded full compensation for his or her legal expenses from the trust fund, being the estate of the testator, administered by the executor. The audit of the executor's account is part of the administration of an estate and the legal expenses of the administrator, or executor, or an estate and of those beneficiaries properly attending on the audit are considered as expenses in administering the estate and are a first charge upon it… It is a well-settled principle that full indemnity of the trustee's proper costs, charges and expenses in administering an estate is the price to be paid by the *cestuis que trust* for services of the trustee and that the trustee must not be required to pay them personally…[2]

Most people feel honoured and/or touched when they learn for the first time (they are rarely asked beforehand) that they are named as an executor or a trustee. However, the honeymoon quickly wears thin when it becomes apparent to the newly appointed executor or trustee how much work is often required. The prospects darken further when the twin duties of reporting and accounting to the beneficiaries are explained to the executor or trustee.

It is trite law that fiduciaries are held to a higher standard. They are also, rightfully, required to account for their actions. Accounting to the beneficiaries is often where the trouble starts or, to put a more positive spin on it, the first step on the long road to emancipation for the executor or trustee. While an executor or trustee is not required *per se* to pass his/her accounts, an informal accounting is almost always required by the beneficiaries and a formal court application to pass accounts is often not far behind.

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[2] *Vano (Re)*, 2012 ONSC 262 (Can LII) at paragraph 27 quoting from *Josephs Estate, Re* (1993), 14 O.R. (3d) 628; 50 E.T.R. 216 at paragraph 7

This paper will consider contested passing of accounts in all of their various manifestations – contested accounting entries, claims of negligence and misconduct, contested compensation claims, requests for increased legal fees, etc. The paper will conclude by canvassing recent decisions of note.

In this paper, "**estate(s)**", will include trust(s), "**estate accounts**" or "**accounts**" will include trust accounts, and "**trustee(s)**" will include executor(s), estate trustee(s), and trustee(s) of a trust.

Voluntary or Compulsory Passing of Accounts

Passing of accounts is an archaic phrase. It refers to the formal presentation of accounts to the beneficiaries and the court for approval. The accounts detail the administration of the estate. Perhaps a better description than passing of accounts is "estate audit" or "approval of accounts".

The beneficiaries, of course, have the right to object to the accounts and the accounts can be passed by the court "as is" or as amended by the court. The court can also refuse to pass the accounts presented if the court is dissatisfied with the administration of the estate as particularized in the accounts. Depending on the judge, an application to pass accounts is not always automatic or a rubber stamp. Counsel should always be prepared to answer questions from the bench and justify the accounting or compensation claimed – just because the beneficiary(s) agrees does not mean the court will.

Obviously, a trustee can also be compelled to pass his or her accounts if a beneficiary(s) is unhappy with the way the estate has been administered. In addition, a trustee may have no choice but to formally pass his or her accounts if one of the beneficiaries is under a legal incapacity. Such a beneficiary, whether vested or contingent, lacks the ability or capacity to approve accounts. As such, an order passing the accounts is required.

Once the accounts are passed, the trustee is released from further complaint or liability to the beneficiary subject only to fraud, which is true of all orders and judgments. In other words, the trustee's administration has been approved by the court and the beneficiaries are barred from later complaining about or challenging the administration covered off by the approved accounting period. While the beneficiary can sign a release releasing the trustee from liability

when presented with an informal accounting such that a formal passing is not strictly required, a trustee often seeks the comfort and protection of a judgment passing his or her accounts.

By law, a trustee must maintain accounts but, as stated above, there is no requirement that a trustee pass his or her accounts.

Section 23(1) of the *Trustee Act*[3] deals with the voluntary passing of accounts. That section reads:

> A trustee desiring to pass the accounts of dealings with the trust estate may file the accounts in the office of the Superior Court of Justice, and the proceedings and practice upon the passing of such accounts shall be the same and have the like effect as the passing of executors' or administrators' accounts in the court.

Rule 74.15 of the Rules of Civil Procedure[4] deals with orders for assistance in estates and their administration. Rule 74.15(h) specifically empowers a beneficiary to move for an order "requiring an estate trustee to pass accounts". The language employed by the subsection is broad and refers to "… any person who appears to have a financial interest in an estate". In other words, any person, including a purported beneficiary, who can demonstrate in a supporting affidavit that they "may" have a financial interest in an estate, can compel a passing of accounts. The threshold is decidedly low and is, no doubt, designed to marry up with the requirement that a trustee readily account for his or her administration.

A motion under Rule 74.15(h) can be without notice. A notice of motion and a motion record is therefore not required. A party simply files a supporting affidavit and two draft orders with the court. Counsel is usually not required to attend. However, the supporting affidavit should be relatively detailed, not perfunctory, and set out the background of the estate, details of the administration to date, and whether any demands have been made of the trustee to pass his/her accounts.[5]

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[3] *Trustee Act*, R.S.O. 1990, c. T.23

[4] Rules of Civil Procedure R.R.O 1990, Reg. 194. Reference to "Rule(s)" throughout is to the Rules of Civil Procedure

[5] The court file number for an order for assistance or an application to pass accounts is almost always the same as the court file number assigned to an application for a certificate of appointment of estate trustee or a notice

Notwithstanding that a motion to compel a passing of accounts can be brought without notice, judges are often leery of without notice motions. It is therefore recommended that unless the moving party is clearly entitled to compel a passing of account, for example, the party is a named beneficiary or his/her financial interest is notorious, the motion be brought on notice. In the end, providing notice to the responding party, i.e. the trustee, rarely hurts.

Finally, it is important to note that Rule 74.15(h) is limited on its face to estates and does not apply to trusts or guardianships. The incapable, a dependant of the incapable, the Public Guardian and Trustee, The Children's Lawyer, a judgment creditor, and any other person with leave of the court are required to commence an application for an accounting pursuant to Rule 14.05(a) to (c) and section 42 of the *Substitute Decisions Act*.[6]

Estate Accounts

An obvious way to avoid a contested passing of accounts is to take the necessary care and time to prepare proper accounts. A quick and/or sloppy job will only invite objections from the beneficiaries and a reprimand from the court (which could, at the end of the day, impact on costs awarded). In addition, when preparing the accounts, take the time to consider what fair and reasonable compensation is. It is worth bearing in mind that compensation is not automatic and often hotly contested. Much paper has been filed and legal fees spent contesting inflated compensation claims.

The accounts have to be presented in the court prescribed format.[7] Court formatted accounting can be ponderous to prepare, but it is nevertheless necessary. Rule 74.17 sets out what the accounts should include both on a first passing and any subsequent passing of accounts. A beneficiary will certainly object to, and the court likely to reject, accounts that are not prepared in proper court format. There are a number of accountants or small accounting firms that specialize in preparing estate accounts; it is recommended that their services be utilized. In the

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objecting to a will. A universal court file number allows the court office to track and collate court proceedings pertaining to the estate.

[6] *Substitute Decisions Act*, 1992, S.O. 1992, c. 30

[7] Rule 74.17

Estate of Divina Damm[8], Justice Brown confirmed that guardians were equally bound by Rule 74.17(1) and required to prepare their accounts in proper court format.

In preparing the accounts, the trustee should make sure that he or she has all of the supporting entry vouchers (which the beneficiaries can ask to review once the accounts are circulated), any necessary appraisals of real property, art, or other valuables. Agreements of purchase and sale, as well as real estate reporting letters, together with accounting and legal invoices should be readily available when preparing the accounts. A trustee should have also turned his or her mind to an interim disbursement and what amount should be held back for on-going tax liabilities.

It is worthwhile to keep in mind that the accounts will ultimately be scrutinized by the critical eye of a beneficiary(s). As such, careful attention should be paid to each entry (i.e. does it make sense and is it properly supported by a voucher) and any errors corrected. In case where the Children's Lawyer is involved, the Children's Lawyer will want to satisfy herself that any disbursements made are authorized by the trustee and are reasonable. When reviewing account, the Children's Lawyer will be on high alert where a real or apparent conflict-of-interest exists between a trustee and a minor beneficiary. For example, if the trustee is a life tenant under the will with his or her children as capital beneficiaries. The Public Guardian and Trustee will take a similar stance when a real or apparent conflict-of-interest exists.

Compensation should be carefully calculated. Pursuant to subsection 61(1) of the *Trustee Act*: "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."

The court will also consider five "central" factors in determining the remuneration payable to trustees, namely: (1) the size of the estate/trust; (2) the care and responsibility involved; (3) the time occupied in performing the duties; (4) the skill and ability shown; and (5) the success resulting from the administration of the estate/trust.[9]

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[8] *Estate of Dinva Damm*, 2010 ONSC 5119 (Can LII)

[9] *Toronto General Trusts Corp. v. Central Ontario Railway* (1905), 76 O.W.R. 350 (H.C.)

As the courts have often noted, the percentages (2.5% of capital receipts, capital disbursements, revenue receipts, and revenue disbursements for a total of 5% of the value of the estate) should be used as a preliminary guide for the court, which should then crosscheck or confirm the mathematical result against the five factors listed above.[10] After the first year of death, a care and management fee of 2/5 of 1% of the average value of assets over the course of a year can be charged. A care and management fee is meant to recognize the work of a trustee in managing an on-going estate. However, delay on the part of the executor in managing the estate will likely preclude a claim for a care and management fee.

When calculating compensation, legal fees should be deducted if the executor also acts as the estate's solicitor (a form of double-dipping). The same principle applies to situations where the executor or trustee hires an agent (a lawyer, accountant or trust company) to carry out tasks normally assigned to a trustee. Mortgages should also be deducted when calculating compensation as should amounts reimbursed for the executor's out-of-pocket expenses.

Internal transfers of funds between bank accounts should also be excluded when calculating compensation as no real value is generated by such transfers. The same is true for rolling over GICs or over cashable investments from month to month. Compensation may be reduced by the court when assets are transferred "as is" or in kind/*in specie* to a beneficiary without the need for and the effort involved with a formal sale. Compensation may also be reduced on sizable assets that took little effort to liquidate or realize such as GICs or the perfunctory sale of publically traded shares. Finally, a care and management fee should generally not be charged where a trust company or other professional investment advisor is paid to actively manage the estate's investments.

In the end, common sense should prevail when it comes to calculating compensation. An executor or trustee should cast a critical eye on how compensation is calculated and the amount ultimately claimed, if he or she wants to avoid a protracted and expensive passing of accounts.

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[10] *Re Jeffery Estate* (1990), 39 E.T.R. 173 (Ont. Surr. Ct.)

Application to Pass Accounts

Pursuant to Rule 74.18(1), the estate trustee is to file the following documents with the court:

1. The estate accounts verified by affidavit (Form 74.43);
2. A copy of the certificate of appointment of estate trustee;
3. The latest order, if any, of the court relating to the accounts;
4. A draft notice of application to pass accounts (Form 74.44).

The court will then issue a notice of application and provide a return date for the application. Where one or more of the trustees refuse to swear an affidavit verifying the accounts, they should be named as a responding party. In Toronto, a scheduling appointment is required.[11] However, if the application is on consent, the scheduling appointment is usually used to approve the accounts and obtain judgment passing the accounts.

The application to pass accounts, together with a draft judgment, is served on any person who has a contingent or vested interest in the estate.[12] Where the Public Guardian and Trustee or the Children's Lawyer represents a person who has a contingent or vested interest in the estate, the Public Guardian and Trustee and the Children's Lawyer are required to be served with the application and judgment.[13] A person served in Ontario is provided with 45 days notice of the return date. If the person is served outside of Ontario, he or she is provided with 60 days notice of the return date. The long lead time allows a beneficiary to review the accounts and object if necessary. However, it is common for the trustee to answer the objections and for the beneficiary, if satisfied with the answers provided, to withdraw his or her notice of objections. As such, the more lead time that is provided before the return date the better.

[11] See Practice Direction Concerning the Estate List of the Superior Court of Justice In Toronto

[12] Rule 71.18(3)

[13] Rule 71.18(3.1)

Rule 74.18(9) deals with a passing of accounts without a hearing. Where the court grants judgment without a hearing, the costs awarded are assessed in accordance with Tariff C.[14] However, the court can always decline to grant judgment without a hearing. In that case, a hearing is then required notwithstanding there are no objections or a request for increased costs.[15] Not surprisingly, the court will decline judgment where it is not satisfied with the accounts as presented or has outstanding questions.

A beneficiary who wishes to object to the accounts must do so by serving a notice of objection to accounts on the executor at least 20 days before the hearing date.[16] Where a beneficiary does object, a notice of objection to the passing of accounts must specify with precision each item in the account which the objector takes issue, the reason for the objection, and the adjustment the objector asks the court to make to the accounts. General and vague objections are to be discouraged, as they inevitably increase legal fees.[17]

Increased Costs

When the trustee seeks costs greater than the amount allowed in Tariff C, the party must serve a request for increased costs on every other party to the application at least 10 days in advance of the hearing (Forms 74.49.2 or 74.49 3).[18] A hearing is then required to deal with the request for increased costs.

With a request for increased costs, the accounts themselves are not an issue as between the parties (though the court may still have questions of its own). The parties are simply reduced to arguing about costs and how much each party is entitled to with respect to raising and answering objections (negotiations can often be pronounced which will dramatically increase legal fees for all parties). As Justice Brown noted in *Re Estate of John Mitchell*:

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[14] Rule 74.18(10)

[15] Rule 74.18(11.2)(b)

[16] Rule 74.18(7)

[17] *Supra* at note 2 to case only

[18] Rule 74.18(11) and 74.18(11.1)

> 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.[19]

Typically, a request for increased costs is made in cases of some complexity or where significant objections were received in respect of the accounts which required time and expense to resolve.[20]

In *Re Estate of John Mitchell*[21], Justice Brown also clearly laid out what counsel should file where a request for increased costs is made on an unopposed application to pass account (i.e. the accounts are not disputed but the parties are looking for costs over and above the prescribed tariff amount). Justice Brown wrote:

> 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,

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[19] *Re Estate of John Mitchell*, 2010 ONSC 1640 (CanLII) at paragraph 8

[20] *Ibid* at paragraph 2

[21] *Ibid* at paragraph 1

(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.

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.[22]

Given that the request for increased costs has to be served well in advance of the hearing date, it can often be difficult to capture with precision the exact amount of costs a client is seeking to recover. For example, last minute negotiations regarding the beneficiaries' objections are not uncommon. Hard-fought settlements often come together on the eve of the hearing.

It is therefore recommend that counsel specifically state in his/her request for increased costs the period that the request covers (a beginning and end date) and a catch-all phrase that additional costs may be incurred and sought either at or immediately before the hearing. Counsel can also advise in the request for increased costs that he or she intends to seek the costs of preparing for and attending at the hearing (how long a court attendance will be is notoriously difficult to predict). A second request for increased costs can also be served for the stub or outstanding

[22] *Ibid* at paragraphs 4 and 5

period immediately before the hearing. Even though the request for increased costs for the stub period is technically out of time, the parties have nevertheless been put on notice that increased costs will be sought. A court will likely be sympathetic to a party's pleas that the request for increased costs could not have possibly captured all of the legal fees of last minute negotiations. Moreover, it can likely be successfully argued that a party has been put on notice that the request for increased costs may not necessarily capture all of the legal fees leading up to the hearing.

Finally, in a contested passing of accounts, Rule 74.18(12) states that no objection shall be raised at the hearing that was not raised in a notice of objection to accounts, unless the court orders otherwise. At the hearing, the court may assess, or refer to an assessment office, any bill of costs, account or charge of lawyers employed by the executor or estate trustee.[23]

Procedure on a Contested Passing of Accounts

In *Newell v Newell*[24], Justice Shaughnessy of the Ontario Divisional Court determined that there was reason to doubt the correctness of the lower court's decision, which provided that the respondents could cross-examine the applicant on his affidavit of verification, and granted leave to appeal.[25]

Justice Shaughnessy commented as follows at paragraph 22 and 23 of his Reasons:

> Rule 74.18 deals exclusively with the process of passing of accounts. The passing of accounts is not a motion, trial or a reference and the Affidavit of Verification of Accounts is filed in compliance with the rules in order to obtain an appointment from the court.
>
> The process then on passing of account is an informal procedure which is governed by section 49 of the *Estate Act*. There is a power granted to the Court at the hearing of a passing of accounts under Rule 75.06 and a motion for directions to *inter alia* direct the trial of issues to be decided.

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[23] Rule 74.18(13). See also *Bott v. Macaulay*, 2005 ONSC 29341 (CanLII)

[24] *Newell v. Newell*, 2010 ONSC 5010 (CanLII). No decision is available on the substantive appeal to the Ontario Divisional Court; the parties likely settled.

[25] *Ibid* at paragraph 28

In addition, Justice Shaughnessy held that he had "serious doubts that it is standard practice", as the respondents had argued, to cross-examine on such an affidavit to verify accounts. Instead Justice Shaughnessy held that the passing of accounts procedure should be "informal and summary in nature and only after a hearing judge decides that there are issues requiring a trial should the process as detailed under the Rules be directed".[26] Therefore, leave to appeal was granted to the Ontario Divisional Court.

Subsections 23 and 61 of the *Trustee Act*, section 49 of the *Estates Act*[27], and Rules 74.18 and 75.06 all come into play in a contested passing of accounts.

Section 49(2) of the *Estates Act* sets out the powers of a judge on a passing of accounts and cloaks the court with the jurisdiction to make a full inquiry and accounting relating to the property of the deceased.

Section 49(3) provides a judge with further powers and specifically allows a judge to inquire into any complaint or claim by a beneficiary of misconduct, neglect or default on the part of the trustee resulting in financial loss to the estate. The court can order the trustee to pay "such sum by way of damages or otherwise as the judge considers proper and just to the estate or trust funds, but any order made under this subsection is subject to appeal".

Subsection 49(4) of the *Estates Act* allows a judge to order the trial of an issue of any complaint or claim of misconduct, neglect or default. The judge can "make all necessary directions as to pleadings, production of documents, discovery and otherwise in connection with the issue". In addition, the court can rely on subsection 49(10): "Where accounts submitted to the judge of the Superior Court of Justice are of an intricate or complicated character and in the judge's opinion require expert investigation, the judge may appoint an accountant or other skilled person to investigate and to assist him or her in auditing the accounts". When allegations of misconduct, neglect or default are made, it is almost certain that the application to pass the accounts will be adjourned and converted to a trial of an issue. An application is not designed to cope with the scale, complexity, and factual disputes such allegations inevitably invite.

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[26] *Ibid* at paragraph 29

[27] *Estates Act*, R.S.O. 1990, c. E.21

Where the contested passing of accounts is restricted to the accounting or compensation claimed (as opposed to allegations of negligence and misconduct), an order for directions should be obtained setting out the procedure to be followed. For example, the trustee should provide sworn or *viva voce* evidence in support of the compensation claimed and/or the accounting, along with any supporting vouchers, information or dockets, and the beneficiary should be entitled to cross-examine the trustee. A beneficiary should, in turn, be required to articulate his or her objections under oath.

The court will be flexible when it comes to "designing" the appropriate procedure to fit the issues in dispute. There is no reason that the procedure cannot include sworn affidavit evidence, cross-examinations on affidavits before a judge with time limits, examinations for discovery and the exchange of witness statements if a trial is scheduled, and/or a requirement to mediate. In fact, a mini-trial as envisioned under Rule 20.04(2.2) can be looked to for inspiration in a contested passing of accounts as can the directions and terms set out in Rule 20.05 where a summary judgment motion is refused and a trial is necessary.

However, a beneficiary can always decide (and a trustee can argue) that the costs of converting an application to a trial are simply too high and disproportionate to the issues in dispute and try to argue the issues before the judge hearing the application to pass accounts based on the notice of objection and any answers filed. While this may seem somewhat unorthodox as there is no formal evidentiary record before the court, the issue(s) in dispute are often quite discrete and can be decided on the basis of oral submissions. Often there is no real evidentiary dispute between the parties as the entries in the estate accounts and the supporting vouchers are not disputed *per se*; what is disputed is whether, for example, the actions by the trustee were proper.

In fact, subsection 23(2) of the *Trustee Act* allows the court to fix the amount of the executor's compensation "[w]here the compensation payable to a trustee has not been fixed by the instrument creating the trust or otherwise". Pursuant to subsection 23.1(2) of the *Trustee Act*, the court may disallow a payment by the executor out of the estate or, if the executor paid the expense personally and was reimbursed by the estate, disallow such recovery.

The court therefore has the jurisdiction and limited ability to address relatively discrete accounting issues or disputed compensation. However, if the issues are hotly contested between

the parties, overly complex, or financially significant, a more robust procedure, including the requirement to file or give evidence, is required.

In general, a beneficiary should serve a detailed notice of objection outlining his/her complaints. Boiler plate notice of objections should be avoided and will likely attract the ire of the court or result in cost sanctions.

The beneficiary should immediately request production of supporting vouchers for the estate account entries that are being challenged. Where compensation is an issue, the beneficiary should ask for information and any supporting documents that go to the calculation of compensation, the usual percentages, and the five factors that a court will consider in determining compensation (i.e. the care and responsibilities involved in administering the estate, the time he or she spent in performing duties, the skill and ability shown, and his successful administration of the estate). The more information disclosed by the trustee the better - a trustee is, after all, required to account for his or her actions. If a special fee is claimed by the executor, time dockets should be requested.

In Toronto and other judicial districts where mandatory mediation is required for contested passing of accounts, the order for directions would direct mediation, the timeline for mediation, how a mediator is to be selected, the issues to be mediated, costs of the mediation, etc.[28] Rule 75.1 sets out other procedural requirements for the mediation if the parties cannot otherwise come to terms.

CASE LAW

Walling v. Walling, 2011 ONSC 508 (Can LII)

James Walling died in July 1999. His two sons, Michael and Stephen, were equal residual beneficiaries of his estate. Kevin Walling was named as the deceased's executor. The trustee never made an application for a certificate of appointment of an estate trustee. Pursuant to the

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[28] Rule 75.1.05(5). In Toronto, regard should be had to the Practice Direction Concerning the Estate List of the Superior Court of Justice in Toronto regarding contested passing of accounts, orders for directions, mandatory mediation, hearings and trials.

terms of the deceased's will, the estate was to be distributed once his youngest child reached the age of 21 years. Stephen was the youngest child and turned 21 on December 12, 2007. Michael and Stephen obtained an order that the trustee pass his accounts, which was personally served on the trustee. Unfortunately, the trustee did not comply with the order to pass his accounts. Michael and Stephen then sought an order that the trustee be found in contempt for failing to pass his accounts.

The trustee was found in contempt and fined $1,000, payment of which was suspended conditional upon the trustee's compliance with the original order to pass his accounts. The executor again failed to pass his accounts. Stephen and Michael brought a second contempt motion and the executor was again found in contempt for his continued failure to comply with three orders to pass his accounts and fined $1,500. When the matter came before Justice Fregeau, the trustee had still not passed his accounts. Stephen and Michael suggested that the trustee be sentenced to three months incarceration for contempt. They further suggested that it was open to the trustee, once incarcerated, to purge his contempt and then secure his immediate release.

In coming to its decision, the court noted that the relevant case law suggested that imprisonment was imposed for contempt only when other methods used to secure compliance were to no avail.

> The executor has repeatedly ignored and thereby violated several Orders of this court. Other penalties, short of imprisonment, have been imposed and have not had the desired effect of having the Respondent [executor] discharge his obligations. Incarceration is the only reasonable sentence.[29]

The court ordered the trustee to be imprisoned for seven days. The enforcement of the order was suspended for approximately two months to again afford the executor yet another opportunity to purge his contempt. The court fixed the costs of the motion at $2,000 payable by the trustee to the Michael and Stephen forthwith.

[29] *Walling v. Walling*, 2011 ONSC 508 (Can LII) at paragraph 12

***McDougall Estate*, 2011 ONSC 4189 (Can LII)**

Nugent McDougall died on October 7, 2008. He left a handwritten will and codicil comprising a valid holograph will (the "**Will**"). He did not name an estate trustee in either document. Mr. McDougall bequeathed his "property and sole belongings and any businesses [sic] or transaction or proceeds" to his sister Pearl McDougall ("**Pearl**"). The deceased's friend, Delgado Chambers, applied for and obtained a certificate of appointment of estate trustee with a will.

Ms. Chambers' understanding was that the Will (in particular, the codicil) required her to make a donation to a charity involved in eye care research in glaucoma and cataracts. The deceased had undergone cataract surgery. Ms. Chambers decided to donate $10,000 to a clinic in Jamaica for which the deceased had a passion and $10,000 to a clinic in Canada. While Ms. Chambers travelled to Jamaica to make the donation and to ensure that the charity was "legitimate", the donation in Canada was never made. The court accepted that the Jamaican charity was, in fact, legitimate. The court also noted that Pearl never suggested that Ms. Chambers derived any personal benefit from making the donation or travelling to Jamaica to deliver the funds.

Pearl asserted that the Will did not authorize a gift to charity. The court found, reading the Will as a whole, that the deceased intended to make a charitable gift for eye and glaucoma research before the residue would fall to his sister. However, the charitable gift nevertheless failed as the deceased failed to specify the amount or portion of his estate to be directed to the charitable purpose. As noted by the court: "The authorities are clear that a gift of a specific legacy with no certain amount will fail".[30]

However, the court went on to hold that Ms. Chambers was not liable for making an improper charitable donation. Ms. Chambers acted honestly and reasonably in carrying out what she understood were the intentions of the deceased. Her interpretation of the Will was not unreasonable. She acted in the belief that the Will required the donation to be made. Moreover, it was not unreasonable for Ms. Chambers to travel to Jamaica to ensure that the charity was *bona fide*. Ms. Chambers derived no personal benefit from the charitable gift and it was not suggested that she had an ulterior purpose in travelling to Jamaica. Ms. Chambers was neither

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[30] *McDougall Estate*, 2011 ONSC 4189 (Can LII) at paragraph 28

required to reimburse the estate nor have her compensation reduced as a result of her mistaken donation to the Jamaican charity. However, her compensation was reduced on other grounds as set out below.

The court also addressed Ms. Chambers' pre-taking compensation equivalent to 5% of the value of the estate. The court noted the language in section 61 of the *Trustee Act* and then considered the five "central" factors relevant to trustee compensation: (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 shown; and (5) the success resulting from the administration of the trust. The court was careful to state that the percentages (2.5% of capital receipts, capital disbursements, revenue receipts and revenue disbursements) were to be used as a preliminary guide for the judge, who should then cross check or confirm the mathematical result against these five factors.[31]

Counsel for Pearl asserted that the trustee's compensation should be reduced as a result of her negligence in handling of the estate and her improper pre-taking of compensation. According to counsel, apart from her improper donation to the Jamaican eye clinic (which the court already concluded would not justify a reduction in trustee compensation), Ms. Chambers neglected to prepare an inventory of the contents of the house, and she failed to send Pearl any of the deceased's personal effects which were items of sentimental value. However, Justice van Rensburg wrote at paragraph 47 of his Reasons:

> Ms. Chambers was a friend of the deceased and the only person willing to apply for a certificate of appointment as estate trustee. She assisted Mr. McDougall when he was ill, and had moved into a nursing home. After his death she arranged the funeral, including catering and flowers and the headstone, contacted his friends and sister and dealt with the sale of his home which had been in progress but was aborted after his death. She collected rent from his tenants, renewed the home insurance, paid utilities', and dealt with the real estate agent to list and then sell the property. She cleaned out the house and dealt with its contents, giving some items of furniture to charity. She closed the two bank accounts of the deceased and opened an estate account. Ms. Chambers dealt with the charitable donation and spoke frequently with Ms. McDougall [Pearl], the beneficiary. Ms. Chambers lived in Brampton and works in Oakville. The deceased's house and bank accounts were in Toronto. She took time from work to attend to estate matters. Although the estate was not very large, it was time-consuming to administer.

[31] *Ibid* at paragraph 46

The court did not reduce Ms. Chambers' compensation for the manner in which she dealt with the personal effects of the deceased. The court accepted Ms. Chambers' evidence that the contents of the house were of little value and that she never received an indication from Pearl that there was anything of sentimental value among her brother's belongings that she wished to receive.

On the issue of pre-taking, the court noted that the law was clear that an estate trustee ought not to pre-take compensation absent authorization in the trust documents or approval of the executor's accounts by the beneficiaries.[32] Justice van Rensburg held that it was wrong for Ms. Chambers to pre-take compensation; she relied on the advice of a bank employee that she was entitled to 5% of the estate's value to her detriment. She never sought legal advice in this regard. However, according to Justice van Rensburg, the remedy was not to reduce Ms. Chambers' compensation but rather order Ms. Chambers to pay the interest earned on the amount she pre-took. The amount in this case was a paltry $360 calculated using the pre-judgment interest rates set out in the *Courts of Justice Act*.

Finally, the court considered whether Ms. Chambers should be personally responsible for some or all of the legal fees paid by the estate. Counsel for Pearl asserted that Ms. Chambers ought to pay the legal fees personally as they were incurred to assist Ms. Chambers in responding to Pearl's concerns, and, as such, were in respect of her duty to account. According to the court, where the conduct of a trustee is challenged, the cost of responding was for initially her own account, until payment of such fees from the estate was approved by the beneficiaries or the court.

Justice van Rensburg wrote: "[t]here is no question that the bulk of the contested fees were incurred in responding to the beneficiary's concerns about Ms. Chambers' administration of the estate".[33] The question then before the court was whether Ms. Chambers was entitled to be compensated by the estate for some or all of the fees incurred. Ultimately, the court allowed Ms. Chambers to be reimbursed by the estate for her legal fees:

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[32] *Ibid* at paragraph 52

[33] *Ibid* at paragraph 64

> Ms. Chambers had no practical choice other than to retain counsel, when she received a letter from a lawyer acting on behalf of the beneficiary. This is not to say that the concerns of the objector [Pearl] were improper. Rather, I have found that Ms. Chambers acted at all times in good faith, attempting reasonably to fulfill the intentions of the testator.[34]

As such, Ms. Chambers was entitled to be indemnified for the costs of responding to questions about her conduct as estate trustee. Moreover, where counsel for a beneficiary requested an informal accounting, and then had numerous communications through counsel challenging the estate trustee's conduct, this was not, in Justice van Rensburg's view, "part and parcel of the preparation of accounts".[35]

***Zucker et a. v. Moore et al.*, 2011 ONSC 7165 (CanLII)**

Irving Zucker was a well known Hamilton philanthropist. He died in 2002 and left a substantial estate valued at $43,000,000. He left his estate outright to his children. He named two accountants as his executors – Keven Liebow and Michael Moore ("**Estate Trustees**"). The moving parties were two of the deceased's three children who raised a number of issues arising out of the administration of the estate, including the payment of past and future legal fees by the Estate Trustees, compensation taken to date by the Estate Trustees, and the removal of an estate trustee.

The estate was relatively simple to administer, except for a "few" legal claims made after the deceased's death. Three-quarters of the estate assets was in government bonds. The total compensation pre-taken without consent of the beneficiaries was $2,964,000, inclusive of a special fee of $215,000. No releases or consent were signed by the children. The Estate Trustees ultimately issued an application to pass their accounts.

The accounting firm of Taylor Leibow, in which Mr. Leibow was a former partner and Mr. Moore a partner, was also named as a party in the proceedings. The estate had paid Taylor Leibow close to $1,200,000 for "executor's services". Mr. Moore was ultimately terminated as a

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[34] *Ibid* at paragraph 72

[35] *Ibid* at paragraph 73

partner of Taylor Leibow and now claimed to be impecunious. However, Mr. Moore was suing Taylor Leibow for wrongful dismissal.

For his part, Mr. Leibow had transferred what appeared to be his only major asset, a condominium, to family members. A motion on the grounds that it was a fraudulent conveyance was still pending.

When the matter finally came before Justice Greer regarding the children's request that a letter of credit in the amount of $3,000,000 be posted jointly and severally by all of Messrs. Leibow and Moore, as well as Taylor Leibow, there had been at least six court appearances resulting in six separate orders.

In response, the court encumbered the assets of Messrs. Moore and Leibow, including any damages that Mr. Moore might receive from his wrongful dismissal claim against Taylor Leibow and the condominium that Mr. Leibow's transferred to family members. The court then suggested that a separate motion be brought against Taylor Leibow to ask that it post security in the proceedings.

In terms of the motion to remove Mr. Moore as an estate trustee, which was also before Justice Greer, Justice Greer wrote:

> The main guideline in cases where a personal representative/executor/trustee is removed and replaced is the welfare of the beneficiaries… this Estate cries out for the removal of Moore as the Executor, given that he is now impecunious".[36]

Mr. Moore was therefore removed as an estate trustee and ordered to prepare supplemental estate accounts from the last date of the accounts already filed. Mr. Moore was also ordered to account to the estate as to why he paid himself $117,000 in the face of impending litigation. He was also to explain where the money went and where it was spent.

***Vano (Re)*, 2011 ONSC 1429 (CanLII) and *Vano (Re)*, 2012 ONSC 262 (Can LII)**

Justice Low had the unenviable task of hearing and deciding a contested passing of accounts that, in the words of Justice Low, had a "…long and tortured history".[37]

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[36] *Zucker et a. v. Moore et al.*, 2011 ONSC 7165 (CanLII) at paragraphs 22 and 23

Two issues ultimately came before Justice Low: (1) BMO Trust, as the estate trustee during litigation ("**ETDL**"), sought to pass its accounts for 9 years and 16 days from January 15, 1998 to January 31, 2007. The objector was Steven Vano, a surviving child of the deceased and a practicing lawyer;[38] (2) The ETDL ultimately sought its costs of the application to pass accounts in the amount of $332,609 in fees, plus disbursements and taxes for a combined total of $374,020.67.[39]

Passing of Accounts

The chief objection of Mr. Vano was that the ETDL compensation was too high and that fees paid by it to its solicitors were excessive. However, according to the court, the estate was complex and "fraught with litigation".[40] In addition, the assets required significant management as the bulk of the estate consisted of a portfolio of 18 real properties spread out over several cities in Ontario and Florida, some with questionable title. Many of the real properties were in a poor state of repair. There were also a number of investment instruments, some raising legal issues as to beneficial ownership.

Illiquidity beset the administration of the estate from the beginning as the terminal tax return revealed a tax payable of $435,000. A further layer of complication was the fact that the widow filed an election under the *Family Law Act* to take an equalization of the net family property. As a result, valuations were required of assets as of the date of marriage and as of the date of death. Ultimately, the ETDL brought a motion to approve the settlement with the widow, which was granted.

After numerous delays and court orders caused by Mr. Vano's inability to articulate his objections with precision, the application to pass accounts was heard over the course of six days. According to Justice Low in her subsequent cost decision: "… the ETDL was successful in

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[37] *Vano (Re)*, 2012 ONSC 262 (CanLII) at paragraph 2. Note: to distinguish between the substantive and cost decisions reference will be made in the footnotes to the full citation of the decision cited.

[38] *Vano (Re)*, 2011 ONSC 1429 (CanLII)

[39] *Vano (Re)*, 2012 ONSC 262 (Can LII)

[40] *Vano (Re)*, 2012 ONSC 262 (CanLII) at paragraph 9

satisfying the court that the estate had been reasonably administered…”.[41] In fact, Mr. Vano was not able to substantiate the vast majority of his objections and allegations. In addition, Mr. Vano had not focused his objections. As Justice Low wrote: “The fact that the hearing itself stretched to six days in total (some of which were not full days) was attributable entirely to the unwillingness or inability of Mr. Vano to comply with the directions of the court, to focus, to be prepared, and to refrain from repetitious editorializing both in his testimony and in submissions.”[42]

The court considered the disbursements of legal fees, which was one of Mr. Vano’s primary complaints. According to Justice Low, it was not the function of the court on a passing of accounts to perform a line by line assessment of the accounts rendered. The court was satisfied that in an estate where there was much litigation, where there were significant assets and the assets were not simple, and the beneficiaries failed to get along, it was not unreasonable to have litigation counsel involved.

In addition, the fact that most of the court applications were initiated by the ETDL was a neutral factor in determining compensation. The ETDL was, in fact, required by court order to seek court approval to dispose of real property. As Justice Low noted: “In all the circumstances, given the lack of cooperation and level of obstruction that Mr. Vano posed to the ETDL and the resulting litigation, I am not satisfied that the total legal expenses was outside the range of reasonable”.[43]

The court then turned to the question of compensation claimed by the ETDL. The ETDL was granted permission under the order appointing it to pre-take compensation, but had not done so since 2000 as a result of lack of liquidity. The order appointing the ETDL provided that it was to be compensated on an hourly basis. Time dockets were kept and compensation was calculated using an hourly rate of $175 for a senior trust officer and $75 for a junior trust officer. There was no evidence that the time was not spent. The order appointing the ETDL also gave it

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[41] *Vano (Re)*, 2012 ONSC 262 (CanLII)at paragraph 24

[42] *Vano (Re)*, 2012 ONSC 262 (CanLII) at paragraph 30

[43] *Vano (Re)*, 2011 ONSC 1429 (CanLII) at paragraph 152

permission to retain agents, including property managers, accountants and solicitors to assist in the administration of the estate. Moreover, the court found that it was reasonable for the ETDL to consult with its litigation counsel and its property managers as was revealed in the ETDL's time dockets.

The court then considered the five factors in determining the ETDL's compensation. The court held that that the estate was a substantial one, as well as complex. There was a lack of cooperation from and amongst the beneficiaries. The court therefore held that the care and level of responsibility assumed by the ETDL was significant.

However, the court did fault the ETDL in two areas where the skill and ability displayed by the trustee did not meet what Justice Low called the standard of reasonable and prudent administration. The first area was the storage of a car for more than nine years at $772.20 per month[44]; the other problematic area was the incurring of overdraft interest paid to BMO Trust as a result of illiquidity. The "unwarranted expenditure of estate assets" in the combined amount of $103,312.33 was ultimately deducted by the court from the compensation claimed by the ETDL (i.e. $231,878.26 – $103,312.33 = $128,565.93 (inclusive of GST)). From the ETDL's point of view, it was a rather harsh result given that the estate was from all indications a nightmare to administer.

Costs

Nine months later, the court issued its cost award in respect of the contested passing of accounts. As stated above, Justice Low noted that the ETDL was substantially successful on the passing of accounts. In her cost decision, Justice Low noted that Mr. Vano delivered four sets of objections, made bald allegations that were unsubstantiated and frequently irrelevant, and delivered a 175 paragraph factum. He also called evidence that was irrelevant. Furthermore, the ETDL also acted reasonably throughout the passing of accounts as demonstrated by its offer to settle and the offer ought reasonably to have been accepted by Mr. Vano. These factors

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[44] See the clarifying decision in *Vano Estate (Re)*, 2011 ONSC 2685 (CanLII). The $772.20 "monthly" car storage fee was actually the sum expended over an 11 month period. The total car storage expense was therefore $5,851.68 up to the end of the accounting period rather than the $64,864 originally calculated by the court. The sum of $5,851.68, not $64,864, was therefore to be deducted from the trustee's compensation.

explained why the ETDL was seeking an amount significantly higher in costs than a six day passing would ordinarily attract.

However, as Justice Low noted the principle of indemnity is not a "carte blanche" for costs to be paid by the estate. The court was required to carefully consider the amount in costs that an unsuccessful party could reasonably expect to pay. According to Justice Low, solicitors for the ETDL, a large law firm, deployed three different lawyers, a student, two law clerks and two court filing clerks. Hourly rates ranged from $160 per hour to $500. Justice Low wrote:

> Delegation can, in some cases, result in economies, but does not always do so. It can also result in duplication, inefficiencies, and time spent communicating that would be unnecessary in the absence of delegation. I am not satisfied that it was efficient or economical in this case to have had two different clerks and three solicitors working this file. The fee items detailed in the costs outline do not suggest that such division was reasonably necessary or cost efficient. Although it is commendable that law firms train junior lawyers and while clients may often choose to have the level of service that multiple lawyers and clerks provides, the cost of so doing should not be laid at the feet of either the losing parties, or, in this case, at the expense of the estate.[45]

In the court's view, the reasonable amount in costs for the proceedings, even taking into account the "long and tortured history" of the proceedings, was $220,000 plus HST and disbursements (which were not challenged by Mr. Vano). No doubt, the ETDL was again disappointed with the result.

If nothing else, both the application to pass accounts and the subsequent cost decision highlight the importance of managing the legal fees associated with a contested (and tortured) passing of accounts application.

***Watson Estate v. Beatrice Watson-Atcheson Foundation*, 2010 ONSC 7120**

In the *Watson Estate*, Justice Lederer was asked to determine how much compensation should be awarded to an estate trustee who had breached her duty of honesty and utmost good faith, was prepared to simply cut a cheque to pay out a claim against the estate without any investigation

[45] *Vano (Re)*, 2012 ONSC 262 (CanLII) at paragraph 38

into its merits, and was prepared to use the threat of destroying the testator's beloved pets as a means to try to extract benefits for her friends and herself?

Justice Lederer ultimately held that the estate trustee, Josephine Polk, who had been removed as an estate trustee in an earlier decision[46] was entitled to no compensation and, in fact, had to pay back the $42,035 which she pre-took in compensation during her tenure as an estate trustee. According to Justice Lederer, being asked to be a trustee of an estate is not a gift. Being a trustee is a responsibility through which the deceased seeks the help of people he or she has faith in to distribute or dispose of estate assets consistent with the deceased's desires. Justice Lederer made it clear that to misuse or fail to understand the task was a breach of the faith of the person who is dead.

The first of Ms. Polk's failings was her failure to disclose her own debt to the estate in the amount of $145,000. When a piece of paper evidencing the debt was unearthed by the other estate trustees, she then used estate funds to have her lawyers research whether or not the estate trustees had the power to forgive her debt.

Her second chief failing was her inadequate handling of the claims asserted against the estate by the handyman who lived and worked at the deceased's farm. It appeared that each time the handyman made a claim against the estate (first asserting a life interest in his home on the farm, and then alleging a personal injury), Ms. Polk (who was not a beneficiary) appeared willing to simply pay out the claims without any analysis of their validity.

Finally, although the dollars involved were modest, the court found that her handling of the deceased's animals amounted to a breach of trust. The deceased loved animals and left the bulk of his estate to a foundation dedicated to their protection. He had 2 cats and 3 dogs. Rather than take steps to find the animals a permanent home, Josephine Polk moved all five animals into her home with her 6 dogs and 15 cats. She then used estate funds to pay acquaintances to walk and care for all of the animals, including her own. What bordered on the "unspeakable" was Ms. Polk's threat that if her own debt to the estate was not forgiven, she would have to destroy the

[46] *Watson Estate v. Beatrice Watson-Atcheson Foundation*, 24 E.T.R. (3d) 124 (Ont. S.C.J.)

deceased's animals. For these actions, the court found, the appropriate amount of compensation was none at all.

A word to the wise: it is never so easy to be an estate trustee and the associated duties cannot be lightly undertaken.