Wills & Estates
Winter 2019

Lecture Notes – No. 13

PROBATE AND ADMINISTRATION OF ESTATES

- A deceased person leaves his or her financial affairs to be wound up on his or her death. Rather than think about the deceased as an individual, think of him or her as a business which needs to be wound up – people need to be informed, creditors need to be paid, inventories of assets need to be created, taxes need to be paid, etc. Happily there are differences between people and businesses, lawyers notwithstanding.

- There may be a Will that names a specific person to administer the estate. We have referred to this person using the traditional terms executor or executrix, although we must now use the language of the statute and identify that person as the *Estate Trustee with a Will*.

- An Estate Trustee designated in a valid Will draws his or her authority from the Will itself and from the moment of the deceased's death. The *Certificate of Appointment* in such cases (probate as it was called) is conclusive evidence of the authority of the Estate Trustee named in the Will to administer the estate.

- A person might also die intestate in which case the Court may appoint (on application) an *Estate Trustee without a Will* to administer the estate (administration as it was called). Here the Estate Trustee draws his or her authority not from the Will but from the Court's certificate.

- **However appointed, the Estate Trustee is a fiduciary to those interested in the estate and will usually require the advice of a solicitor to discharge the duty of care applicable to him or her, as well as to avoid breach of fiduciary obligations.** Even where a solicitor acts as an Estate Trustee, the nature of the duties of each office are different and the level of remuneration differs accordingly – **a solicitor may not seek compensation at his or her normal rate for legal services for discharging his or her duties as Estate Trustee.**

- It is not always the case that a certificate of administration is required. A small estate of few assets may only require a true copy of the Will to allow the Estate Trustee named in it to deal with third parties.

FORM 74.13
Courts of Justice

CERTIFICATE OF APPOINTMENT OF ESTATE TRUSTEE WITH A WILL

ONTARIO

SUPERIOR COURT OF JUSTICE

IN THE ESTATE OF **Irma** [redacted], deceased,

late of **City of Toronto**

occupation **Business Person**

who died on **21 October** [redacted]

CERTIFICATE OF APPOINTMENT OF ESTATE TRUSTEE WITH A WILL

Applicant	Address	Occupation
Gary M. [redacted]	[redacted] **Toronto, Ontario,** [redacted]	**Barrister and Solicitor**
Maria [redacted]	[redacted] **Ontario,** [redacted]	**Bookkeeper**

This CERTIFICATE OF APPOINTMENT OF ESTATE TRUSTEE WITH A WILL is hereby issued under the seal of the court to the applicant named above. A copy of the deceased's last will (~~and codicil(s), if any~~) is attached.

DATE OCT 22 2015

Registrar

Address of court office Natasha Marjadsingh
330 University Avenue, 7th Floor
Toronto, Ontario M5G 1R7

Form 74.13 (rev. 11/10) CSD

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Sample Issued Certificate of Appointment

The Statutes

- The ***Estates Act***, R.S.O. 1990, c.E.21, deals with the process usually called probate (with a will) or administration (no will) – that is, the judicially recognized right of a living person to deal with the assets and affairs of a deceased person in the form of a formal Certificate issued by the Court.

- The ***Estates Administration Act***, R.S.O. 1990, c.E.22, deals with the general duties of the deceased's personal representative and gives him or her powers in dealing with property (particularly in a manner that eases strict rules in respect of real property at common law in respect to the transfer of title) which facilitates the discharge of the deceased's obligations to creditors and transfer of assets to those entitled to those assets. In general, the personal representative will have the property of the deceased vested in his or her name and owe a trust obligation to beneficiaries under the will and those entitled at law under the intestacy rules.

- The ***Estate Administration Tax Act***, 1998, S.O. 1998, c. 34, deal with the rate of tax and assets that are taxable where a Certificate of Appointment is required. The current rate is .5% on first $50K, and 1.5% thereafter. The tax and its collection is presently subject to statutory reform.

- The ***Rules of Civil Procedure*** deals with estates matters in Rules 74 and 75 specifically.

Types of Certificates of Appointment

See Rule 74 of the Rules of Civil Procedure, and, the applicable provisions of the Estates Act.

Name	**Description**	**Reference**
certificate of appointment of estate trustee with a will	issued where there is a valid will and named estate trustees are able and willing to act (includes the appointment of trustee where there is a will, no named estate trustee trustee is alive or able or willing act)	R.74.04
certificate of appointment of estate trustee without a will	issued where there is no valid will	R.74.05
certificate of appointment of foreign estate trustee's as estate trustee without a will	issued where a foreign trustee nominates an estate trustee to administer assets in Ontario	R.74.05.1
certificate of appointment of	issued where a second	R.74.06

estate trustee to succeed estate trustee with a will	supplemental grant is required, such as on the happening of event that requires the addition of another named estate trustee	

	under the will. This also includes the appointment of a trustee to replace the estate trustees and trustees initially named in the will.	
certificate of appointment of estate trustee to succeed an estate trustee without a will	issued where an administrator of an estate dies leaving assets unadministered.	R.74.07
confirmation by resealing of the appointment of an estate trustee with or without a will	issued where a grant of probate has been given by a Commonwealth court outside Ontario; the grant may be "resealed" by the Superior Court of Justice of the county in which the deceased had assets	R.74.08
certificate of ancillary appointment of an estate trustee with a will	issued where a grant had been given by a non-Commonwealth court, an ancillary grant in Ontario is required to administer assets situated in Ontario	R.74.09
certificate of appointment of an estate trustee during litigation	issued in order to preserve assets of an estate where an action has been commenced that contests the validity of the will	R.74.10

Duties of the Administrator and Solicitor Distinguished

Examples:

Personal Representative / Administrator	**Solicitor**
Locate the will	Review contents of the will with the estate trustee
Make funeral and burial arrangements, and arrange for organ donation(s)	
Retain solicitor	Advise on the retainer of other professional as needed.
Determine assets and liabilities	Assist in determining assets and liabilities; advise on legal actions, etc.
Ascertain identities and contact information for beneficiaries and interested parties	Determine nature of elections and other important information to advise beneficiaries and interested parties
File tax returns and pay tax	Review forms and seek advice where necessary
Maintain proper accounts	Advise estate trustee on setting up and passing accounts; review remuneration
Invest assets when appropriate	Advise on selection of investments and delegation issues under the Trustee Act
Distribute the assets	Advise on the distribution scheme, ademption, abatement, etc

FAQ

When is a Certificate of Appointment with a Will Required?

A certificate of appointment is necessary where there is a Will *and the nature of the asset* requires the personal representative to be formally appointed – but this is properly a matter of the law (usually statute or regulation) that regulates disposition of that particular type of property. For example, real property usually requires a certificate but this is not always true and is truly a matter resolved by regulation under the Registry Act or the Land Titles Act according to value.

Why not always obtain a Certificate of Appointment with a Will?

The process of probating the Will is expensive. Moreover, Estate Administration Tax is payable on the value of the estate set out in the Will.

For an estate valued at $1,000,000, the probate fee is (50 x 5) + (950 x 15) = $14,500, a not insubstantial sum. – more so, once the legal fees to obtain the Certificate are factored into the analysis.

What is the Procedure on an Intestacy?

To obtain a *certificate of appointment of estate trustee without a will* (necessary as property will not vest in the estate trustee without it, and thus property cannot pass to those entitled under the intestacy rules), an application must be brought under the Estates Act, s.29:

> 29. (1) Subject to subsection (3), where a person dies intestate or the executor named in the will refuses to prove the will, administration of the property of the deceased may be committed by the Ontario Court (General Division) to,
>
> (a) the person to whom the deceased was married immediately before the death of the deceased or person of the opposite sex or the same sex with whom the deceased was living in a conjugal relationship outside marriage immediately before the death;
>
> (b) the next of kin of the deceased; or
>
> (c) the person mentioned in clause (a) and the next of kin,
>
> as in the discretion of the court seems best, and, where more persons than one claim the administration as next of kin who are equal in degree of kindred to the deceased, or where only one desires the administration as next of kin where there are more persons than one of equal kindred, the administration may be committed to such one or more of such next of kin as the court thinks fit.

Where there are no relatives at all, the Public Guardian and Trustee will be the appropriate party under the *Crown Administration of Estates Act*, R.S.O. 1990, c. C.47, s.1.

The general procedure is set out in R.74.05(1):

> 74.05 (1) An application for a certificate of appointment of estate trustee without a will (Form 74.14 or 74.15) shall be accompanied by,
>
> (a) an affidavit (Form 74.16) attesting that notice of the application (Form 74.17) has been served in accordance with subrules (2) to (5);
>
> (b) a renunciation (Form 74.18) from every person who is entitled in priority to be named as estate trustee and who has not joined in the application;
>
> (c) a consent to the applicant's appointment (Form 74.19) by persons who are

entitled to share in the distribution of the estate and who together have a majority interest in the value of the assets of the estate at the date of death;

(d) the security required by the *Estates Act*; and

(e) such additional or other material as the court directs.

What about a Foreign Will?

Where the foreign will has been probated in a Commonwealth court it can be 'resealed' for use in relation to assets in Ontario (and tax must be paid here on those assets). Thus the Rules provide:

74.08 (1) An application for confirmation by resealing of the appointment of an estate trustee with or without a will that was granted by a court of competent jurisdiction in the United Kingdom, in a province or territory of Canada or in any British possession (Form 74.27) shall be accompanied by,

(a) two certified copies of the document under the seal of the court that granted it, or the original document and one certified copy under the seal of the court that granted it;

(b) the security required by the *Estates Act*; and

(c) such additional or other material as the court directs.

How long, in general, does it take to complete the administration of an Estate? Is it up to the Estate Trustee?

At common law, it is traditional to talk of the 'executor's year'; that is, we expect that in most cases administration should take about a year. The Estates Administration Act provides in respect of intestacies:

26. Subject to section 53 of the *Trustee Act*, no distribution shall be made on an intestacy until after one year from the death of the intestate, and every person to whom in distribution a share is allotted shall, if any debt owing by the intestate is afterwards sued for and recovered or otherwise duly made to appear, refund and pay back to the personal representative the person's rateable part of that debt and of the costs of suit and charges of the personal representative by reason of such debt out of the part or share so allotted to the person, thereby to enable the personal representative to pay and satisfy such debt, and shall give bond with sufficient sureties that the person will do so.

In a simple estate, a year may not be required at all. In a complex estate, many years may have to be spent on administration. Complicating circumstances include:

- Sale of realty, particularly commercial real estate;
- Sale of operating or foreign businesses;
- Unpaid income taxes which must be determined and paid.

How and when does the Estate Trustee get paid?

Fees charged by the estate trustee are set in principle by the Trustee Act, RSO 1990, c.T.23:

> **61. (1) 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.**
>
> (2) The amount of such compensation may be settled although the estate is not before the court in an action.
>
> (3) The judge, in passing the accounts of a trustee or of a personal representative or guardian, may from time to time allow a fair and reasonable allowance for care, pains and trouble, and time expended in or about the estate.
>
> (4) Where a barrister or solicitor is a trustee, guardian or personal representative, and has rendered necessary professional services to the estate, regard may be had in making the allowance to such circumstance, and the allowance shall be increased by such amount as may be considered fair and reasonable in respect of such services.
>
> (5) Nothing in this section applies where the allowance is fixed by the instrument creating the trust.

<u>An overall tariff is used:</u>

- 2½ % of the total value of capital & revenue receipts
- 2½ % of the total capital & revenue disbursements
- annual fee of 2/5ths of 1% of the average annual market value of the capital (in the case of an ongoing trust)

Thus, on an estate with a net value of combined real/personal property of $1,000,000, the Estate Trustee can look to a fee of approximately $50,000 where all assets must in some way or another be received by the trustee and then later disbursed.

In appropriate cases, the fees are adjusted to reflect the simplicity or complexity of the work involved (overall 'fair and reasonable' compensation) with reference to 5 factors:

- the size of the estate
- the actual care and responsibility involved
- the time occupied in performing the duties

- the skill and ability shown; and
- the success resulting from the administration.

The Estate Trustee can be paid when he or she finishes their work (and the all beneficiaries are of legal age and consent) or, more formally, when he or she 'passes accounts' under Trustee Act and R.74.18. This is an audit of the work of the estate trustee and may be passed without a hearing, or there may be opposition and a hearing will be required.

SELECTED ISSUES – LITIGATION

A. Claim Against the Estate

Granger v. Granger
2016 ONCA 945 (Ont. C.A.)

This was an appeal taken in relation to a claim in unjust enrichment made by a son against his mother seeking a beneficial interest in her house; the son had lived in the house with his spouse without paying rent, and thus the case was one of mutual benefits having been exchanged. A narrow point was highlighted by the Court: the application judge had wrongly considered the value of the benefits exchanged as part of the analysis testing the claim advanced rather than in relation to defences to the claim and/or the question of remedy (and set-off) as mandated by the Supreme Court of Canada in *Kerr v. Baranow*, 2011 SCC 10 (S.C.C.). The case is note worthy in that the careful analysis of Jurisz J.A. should be of assistance in understanding such claims against estates.

Note: in terms of procedure, this is a regular Application made against the Estate as a defendant.

B. Claim by the Estate Trustee for Indemnification for Litigation Costs

Craven v. Osidacz
2017 ONSC 1757 (Ont. S.C.J.)

This case is painful to have to read. The strict legal issue is the indemnification for legal expenses claimed by an estate trustee in defending claims against the estate, which was denied. The deceased and his spouse were separated. He had been convicted of assault against her. The deceased killed his 8-year old child, forcibly confined his former spouse, and shot to death by the police who intervened to rescue the former spouse. The brother of the deceased was appointed his Estate Trustee and aggressively defended against litigation brought by the former spouse for damages. After settling liability for damages and other claims,

Lofchik J. turned to the question of legal fees:

> **[63] Michael denies that he acted outside of his duties and was unreasonable in his role as estate trustee, and denies that he should be held personally liable to repay the legal fees expended to defend the**

Estate. Further, he denies that he should be personally liable for all legal costs of Julie Craven.

[64] From the total value of the assets of the Estate of $408,912.76 as mentioned above, the Estate has made the following expenditures:

...

4. Estate litigation fees: Deborah Ditchfield of Waterous Holden Amey Hitchon LLP was retained by Andrew in and around April 2002 with respect to family law matters between himself and Julie Craven. Upon Andrew's death, Ms. Ditchfield continued to act for the Estate.

In regards to the wrongful death/assaults action, the total amount of legal fees expended by the Estate trustee from the Estate was $71,000.00 with an additional $80,000.00 left owing. The defendant negotiated a reduction to $20,000.00 of these outstanding monies which has now been paid out of the Estate for a total payout of $91,000.00 in legal fees.

...

[68] The general principle that estate trustees are indemnified for all costs including legal fees that are reasonably incurred is codified in s. 23.1 of the *Trustee Act* which reads as follows:

23.1 (1) A trustee who is of the opinion that an expense would be properly incurred in carrying out the trust may,

(a) pay the expense directly from the trust property; or

(b) pay the expense personally and recover a corresponding amount from the trust property.

...

(2) The Superior Court of Justice may afterwards disallow the payment or recovery if it is of the opinion that the expense was not properly incurred in carrying out the trust.

[69] From this, I conclude that the executor is entitled, indeed, obliged to defend claims against the estate so long as the estate assets are expended reasonably.

[70] **Where the reasonableness of expenses incurred by the trustee is in question, the estate trustee must show that they acted in good faith and had good reason to believe the expenditures were necessary for the benefit of the estate at the time the expense was incurred, and further, has the onus of proving that defending a proceeding is reasonable.**

Carmen Theriault, *Widdifield on Executors and Trustees*, 6th Ed. (Toronto: Carswell, 2003), at 4-2.

[71] *Geffen v. Goodman* is the leading case on the role of an estate trustee in covering expenses of the estate, both during administration of the estate and with respect to litigation involving the estate. The court stated:

> The courts have long held that trustees are entitled to be indemnified for all costs, including legal costs, which they have reasonably incurred. Reasonable expenses include the costs of an action reasonably defended: see Re Dingman (1915), 35 O.L.R. 51. In *Re Dallaway*, [1982] 3 All E.R. 118, Sir Robert Megarry V.C. stated the rule thus at p. 122:
>
> In so far as such person [trustee] does not recover his costs from any other person, he is entitled to take his costs out of the fund held by him unless the court otherwise orders; and the court can otherwise order only on the ground that he has acted unreasonably, or in substance for his own benefit, rather than for the benefit of the fund.
>
> *Geffen v. Goodman Estate*, 1991 CanLII 69 (SCC), [1991] 2 SCR 353 at para. 74

[72] It is the plaintiff's position that Michael Osidacz should be personally liable for repayment of the $91,277.98 (plus interest) in legal costs paid to Waterous Holden LLP without a court order.

[73] The courts have held that a trustee may risk the expense of litigation as part of discharging his duties to "collect the assets". However, if there is some question as to whether the proceedings are "meritorious" and whether it is "prudent or appropriate" for a trustee to pursue them, "the appropriate course of action is for the trustee to apply to the court for its directions".

> *Bank of Nova Scotia Trust et al. v. Pressman* et al., 2006 CanLII 22143 (ON SC) at p. 12

[74] In the present case, the Estate trustee never sought directions from the Court concerning whether or not the defences and claims it was advancing were "meritorious" and whether or not it was "prudent or appropriate" to proceed; that is, embarking on a vigorous "tooth and nail" defence or denying significant claims without evidence (even after liability was established).

[75] There is considerable evidence, given Michael Osidacz's interactions with the plaintiff and her family, of significant personal animosity – dare I say hate – between Michael Osidacz and Julie Craven and her family. Such animosity, it would appear, prevented him from exercising the fair and impartial judgment necessary of an estate trustee. Michael Osidacz also appears to have personal opinions about the events of April 2002 and March 18, 2006 contrary to facts found by impartial parties that influenced his judgment and overall approach to the litigation. Thus motivated, Michael Osidacz soldiered on with his agenda of hostility

and denial. Viewing the relevant facts objectively, this would seem to be anything but "prudent or appropriate", in clear violation of the principles established *in Bank of Nova Scotia Trust et al. v. Pressman et al*., 2006 CanLII 22143 (ON SC) at p. 12.

[76] As indicated in *Bank of Nova Scotia Trust et al. v. Pressman et al*., supra, direction should have been immediately sought from the court as to whether or not the intended path of the estate trustee was "prudent or appropriate", especially where, as here, the vigorous defence of the litigation was not specified in the will, an aggressive approach to same could (and did) lead to significant expense and circumstances where the estate trustee was both personally and emotionally involved.

…

[80] To incur approximately $160,000.00 in legal fees defending an action that was clearly likely to succeed with virtually no evidence upon which to base the defence was totally irrational and reckless conduct on the part of the Estate trustee, amounting to dissipation of the assets of the overall modest size of the Estate.

[81] Spending tens of thousands of dollars in legal fees advancing frivolous and groundless defences either to see to it that Julie Craven saw no or at least the minimal amount of the assets of the Estate or to prevent personal liability from attaching to Michael Osidacz for legal fees is not a valid basis to "preserve" estate assets and does nothing for the creditors or the beneficiaries of the Estate.

[82] The "modern approach" to awarding estate litigation costs was set out in the decision of McDougald Estate v. Gooderham, 2005 CanLII 21091 (ON CA), [2005] OJ No. 2432 (CA). Essentially, it incorporates the modern "loser pays" approach to awarding costs of litigation as follows: "The modern approach to fixing costs in estate litigation is to carefully scrutinize the litigation and, unless the court finds that one or more of the public policy considerations set out above applies, to follow the costs rules that apply in civil litigation".

[83] Such approach displaces the "traditional" approach to costs whereby the costs of a proceeding were generally paid out of the estate subject to certain exceptions as follows: "The practice of the English courts, in estate litigation, is to order the costs of all parties to be paid out of the estate where the litigation arose as a result of the actions of the testator, or those with an interest in the residue of the estate, or where the litigation was reasonably necessary to ensure the proper administration of the estate".

McDougald Estate v. Gooderham, supra

[84] Essentially, Michael Osidacz ran up his legal bills to a maximum until he was stopped by an order of this Court. Michael Osidacz exercised dubious judgment at best and generally tried to evade responsibility by shifting blame for most decisions either to the lawyers, or the legal advice received, or to Julie

Craven.

> **[85] The fact that Michael Osidacz received legal advice, per se, does not permit him to abdicate his responsibilities as trustee or immunize him from the ultimate decisions made. That is especially where, as here, the decisions he personally made, including raising unnecessary and unsubstantiated defences – such as limitation periods, denying obvious claims and asserting that Julie Craven's injuries were a result of events prior to March 18, 2006, without any evidentiary basis, had enormous consequences resulting in a situation where the Estate trustee essentially used estate funds to bankroll his legal fees and run up a gigantic bill without regard to any of the consequences. I find it would be inequitable to allow Michael Osidacz to have used the assets of the Estate as kind of an ATM machine, from which withdrawals automatically flowed, to fund litigation that was totally unreasonable.**
>
> **[86] Based on the foregoing, it is ordered that there be no indemnity of the legal costs incurred by Michael Osidacz and that he repay to the Estate the sum of $91,277.98, save and except for some limited costs which would be reasonably incurred in relation to the investigation and initial receipt of the claims which I fix at $20,000.00, leaving the amount to be repaid to be $71,277.98.**
>
> [Emphasis added.]

The disposition of the issues in this case seems eminently reasonable.

Can a Judge Authorize Litigation by a Trustee?

This issue separates the Canadian approach to the administration of estates and trusts from the approaches taken in England, Australia and other comparative jurisdictions. Where the trustee contemplates bringing an action against a third party who owes a debt to the trust, controversy does not usually arise. The trustee can retain counsel and counsel will provide an opinion on the merits of litigation. If the action is worthwhile given the litigation risk, the trustee will normally rely on the opinion or, at best, seek the consent of the beneficiaries to bring the action. This is what is sometimes called "friendly" litigation in that the trustee and beneficiaries all have interests that are aligned. What of "hostile" litigation; litigation where one trustee wishes to apply to have another trustee removed or bring a claim for breach of fiduciary duty. In many cases, trustees often have personal interests in the trust property – would a judicial license for one side or the other to litigate be unfair?

Re Beddoe; Downes v. Cottam
[1893] 1 Ch. 548 (C.A.)

At issue in this case was a claim by the trustee for indemnification against litigation costs; that is, the costs of an unsuccessful defence of an action taken against the trustee for detinue of deeds. The trustee refused to deliver up the deeds and was wrong to do so. The trustee, having lost the litigation, took his fees and costs from the trust fund and the matter was brought before

the Court on the question of whether he was allowed to do so. The English Court of Appeal held that while he was wrongly advised he also acted wrongly in indemnifying himself as he had done - what he ought to have done was seek the court's authority to defend the action taken against him in the first place.

Lindley L.J.:

> I entirely agree that a trustee is entitled as of right to full indemnity out of his trust estate against all his costs, charges, and expenses properly incurred: such an indemnity is the price paid by *cestuis que trust* for the gratuitous and onerous services of trustees; and in all cases of doubt, costs incurred by a trustee ought to be borne by the trust estate and not by him personally. The words "properly incurred" in the ordinary form of order are equivalent to "not improperly incurred." This view of a right of a trustee to indemnity is in conformity with the settled practice in Chancery...
>
> But, considering the case and comparatively small expense with which trustees can obtain the opinion of a Judge of the Chancery Division on the question whether an action should be brought or defended at the expense of the trust estate, I am of opinion that if a trustee brings or defends an action unsuccessfully and without leave, it is for him to shew that the costs so incurred were properly incurred. The fact that the trustee acted on counsel's opinion is in all cases a circumstance which ought to weigh with the Court in favour of the trustee; but counsel's opinion is no indemnity to him even on a question of costs.

Bowen L.J.:

> If a trustee is doubtful as to the wisdom of prosecuting or defending a lawsuit, he is provided by the law with an inexpensive method of solving his doubts in the interest of the trust. He has only to take out an originating summons, state the point under discussion, and ask the Court whether the point is one which should be fought out or abandoned. To embark in a lawsuit at the risk of the fund without this salutary precaution might often be to speculate in law with money that belongs to other people.

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Canadian courts have never embraced (or really rejected) the *Beddoe Order* as a feature of Canadian trusts practice. Such dicta as is available in the jurisprudence has been skeptical of such judicial intervention in the adversarial process.

Re Kaptyn Estate
(2009), 48 E.T.R. (3d) 278 (Ont. S.C.J.)

The testator's Primary and Secondary wills and a Codicil to the Secondary Will had been admitted to probate in contentious proceedings. Separate proceedings were commenced in respect of the interpretation of the wills by each of the two estate trustees (who were brothers). D.M. Brown J. held in a subsequent costs award that the trustees were to be denied full indemnification in those proceedings. In yet another twist, D.M. Brown J. considered the estate trustee's applications for

advice on how an action on behalf of the estate might be brought and against whom, where the two estate trustees could not agree how to proceed (to be precise, each had by this stage been appointed as an estate trustee during litigation but neither had applied for a sole appointment). Here the fly in the ointment was the limitations period which was to shortly bar the potential claims. Both estate trustees applied for directions, in essence seeking a judicial blessing to litigate as he proposed. In his judgment, D.M. Brown J. noted that the estate trustees were fiduciaries and were mandated to act together. Moreover, D.M. Brown J. held that the trustees could not merely shift the decision in respect of how and who to sue to the court:

> [30] While courts, in appropriate circumstances, may intervene to ensure the due performance of powers granted to executors by a will regarding the sale or retention of estate assets, it is quite another matter to seek the intervention of the court on the issue of whether or how executors should commence an action on behalf of the estate. **As a general rule, courts do not give advice or directions as to whether or how a person should commence an action. (The lifting of statutorily-imposed stays in some circumstances operates as a limited exception to this principle.) Instead, courts adjudicate actions once commenced; they do not offer advice as to whether to sue, whom to sue, or how to sue.**
>
> **[31] It is the obligation of the executors, not the courts, to decide whether an action should be commenced for the benefit of the estate and how to do so. Any risks associated with a decision about whether or not to sue should rest squarely on the shoulders of the executors.** As I perceive these motions, both executors are attempting to shift much of that risk off their shoulders because if they secure a court order, then section 60(2) of the *Trustee Act* provides that an executor who acts upon the opinion, advice or direction of the court "shall be deemed, so far as regards that person's responsibility, to have discharged that person's duty as [executor] in the subject matter of the application..." I have no idea whether the litigation proposed by the executors has merit or is frivolous, and it is not the business of the court to make such an inquiry before litigation has been commenced. To grant the directions sought by the executors in my view risks cloaking, improperly, any resulting action on behalf of the estate with the apparent sanction of the court.
>
> [Emphasis added.]

C. Passing of Accounts

The Ontario statute is representative of the statutory obligation of the Estate Trustee to account:

Trustee Act, R.S.O. 1990, c.T.23, ss. 23, 23.1:

> 23. (1) 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.

It is important to distinguish between two words, "accounts" and "an accounting". Conventionally,

"accounts" (or perhaps more properly "Statements of Account") refer to the creation and development of standard accounting statements. Typical "trustee accounts" include the following statements: Statements of Original Assets, Capital Receipts and Capital Disbursements, Revenue Receipts and Revenue Disbursements, Investment Account, Schedules of Current Assets, Liabilities, and Investment; Schedule of Compensation. An "accounting" conventionally refers to a type of proceeding; that is, the application by the trustee or a beneficiary to have the Court approve the trustee's accounts as accurate. The proceeding is called a "Passing of Accounts" and is conventional litigation (although usually in the way of a summary trial) with the full application of the costs rules. A "Passing of Accounts" usually arises after the trustee presents his or her statements of account to the beneficiaries together with a "Release" whereby the beneficiaries agree that the accounts are accurate (particularly with respect to the trustee's actual or claimed indemnification for proper trust expenses) and release the trustee from liability for taking his or her compensation for the relevant period. Where the beneficiaries disagree with the accounts, the matter must be brought into Court for decision. In terms of process, the trustee will usually serve a Notice of Application to pass the accounts, the parties in disagreement will serve and file Objections, and the judge will decide whether each objection is valid. Such a proceeding can be expensive and trustees and beneficiaries alike strive to avoid this sort of litigation.

A trustee must maintain accounts of the trust property and all actions taken in relation to that property. Upon reasonable notice and as far as practicable (in the sense of maintaining the reasons for the trustees acting as they chose to do as confidential), the beneficiaries have a right to inspect the accounts. Not all information needs to be disclosed and the trend is for the courts to consider carefully the nature of the documents held by trustees that are sought by persons interested in the trust on matters such as confidentiality.

Despite the formal process of a judicial audit of trustee accounts through a "Passing of Accounts" such proceedings are relatively uncommon. Most administrations will feature the presentation of informal accounts and reasonable adjustments being made based upon queries and objections. Often, the Passing of Accounts proceedings are not really about a conventional accounting but rather as a timely and efficient manner to bring into Court complaints about trustee misconduct, and the application for accounts to be passed may be brought together with an application to remove and replace trustees and a claim against the trustees for breach of trust and breach of fiduciary duty.

Where there is litigation and it is found that the Estate Trustee has acted badly, the Estate Trustee may be held to be disentitled to compensation (in whole or in part) and face ***surcharge*** (compensation for omissions in the accounts for credits which should have been given) or ***defalcation*** (an order to make compensation for false debits in the accounts) orders.

Jones v. Warbick
2019 ONSC 88 (Ont. S.C.J.)

Here the Estate Trustees' accounts were so deficient and the conduct complained of so serious that the Court ordered a forensic accounting to be held. The Estate Trustees tried to hold back liability somewhat by disclaiming compensation. The losses occasioned to the Estate (including the costs of the forensic accounting) were to be paid out of the Estate Trustees' shares of the estate, plus any litigation costs.