

Wills & Estates
Winter Term 2026

Lecture Notes – No. 14

XVII. 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.

The Court's inquisitorial jurisdiction is present with respect to the admissions of testamentary instruments to probate and with respect to the appointment of an Estate Trustee. In **Re James Estate, 2024 ONCA 623 (C.A.)**, a disbarred lawyer sought appointment as an Estate Trustee. Gomery J.A. held:

[29] In Ontario, the Superior Court of Justice is responsible for granting probate or letters of administration pursuant to s. 7(1) of the Estates Act. This jurisdiction includes the determination of applications for a certificate of appointment of estate trustees with or without a will. Estate trustees play a critical role in the administration of estates. Using the authority conferred upon them by virtue of the court's appointment, they step into the shoes of the deceased, dealing with their property, taking legal action to enforce the estate's rights, determining which debts should be paid, and distributing the estate's assets based on their interpretation of the testator's instructions.

[30] In *Otis v. Otis* (2004), 7 E.T.R. (3d) 221 (Ont. S.C.), at paras. 22 to 24, Cullity J. observed that the Superior Court's jurisdiction over wills and estates pursuant to the Estates Act and rr. 74 and 75 of the Rules of Civil Procedure was transferred to it from the former Surrogate Courts. The role of those Courts was, to some extent, inquisitorial:

The role of the court is not simply to adjudicate upon a dispute between parties. The judgment of the court granting probate does not bind only the parties to the proceeding. Unless, and until, it is set aside, it operates in rem and can affect the rights of other persons.

[31] This court endorsed this view of the court's inquisitorial role in estates proceedings in *Neuberger v. York*, 2016 ONCA 191, 129 O.R. (3d) 721, at paras. 67-68, leave to appeal refused, [2016] S.C.C.A. No. 207. The court "has a special responsibility to the testator, who cannot be present to give voice to his or her true intentions": *Neuberger*, at para. 68. For that reason, an application for probate can be refused if there is no evidence to support it, and even if the estate's beneficiaries support it: *Otis*, at paras. 24-26; *McLaughlin v. McLaughlin*, 2015 ONSC 3491, 11 E.T.R. (4th) 183, at paras. 31-36.

[32] The court's supervisory role with respect to estate proceedings is recognized in rr. 74 and 75. Notably, pursuant to r. 75.06(3), a court may direct the issues to be decided in a contentious estate proceeding, the parties to be involved, and the procedure to be followed. A party seeking directions for the purpose of challenging a will or the appointment of an estate trustee must provide the court with evidence satisfying at least a minimal evidentiary threshold in support of the order ultimately sought: *Neuberger*, at para. 88; *Seepa v. Seepa*, 2017 ONSC 5368, at para. 27; *Martin v. Martin*, 2018 ONSC 1840, 38 E.T.R. (4th) 161, at paras. 30, 32.

[33] Section 5 of the Trustee Act, R.S.O. 1990, c. T.23, empowers the court to order the appointment of a new trustee "in substitution for or in addition to any existing trustee or trustees, or although there is no existing trustee". Even in the absence of the Trustee Act, the Superior Court of Justice has an inherent power to remove a trustee where circumstances require it: *Gonder v. Gonder Estate*, 2010 ONCA 172, 54 E.T.R. (3d) 193, at para. 26.

[34] In my view, this inherent jurisdiction also empowers a Superior Court judge to refuse to grant an application to appoint a trustee. It would be illogical if the court had the power to terminate a trustee's appointment in appropriate circumstances but did not have the power to prevent an inappropriate appointment.

...

[42] The equitable jurisdiction over the appointment and removal of trustees furthermore runs in parallel with any statutory powers to remove or appoint and is not supplanted absent clear and unambiguous language to that effect: *Gonder*, at paras. 40-46. The discretion flowing from this jurisdiction reflects the Superior Court's *parens patriae* jurisdiction and has been variously described as "overriding" (*Public Guardian and Trustee v. Duggan* (1998), 1998 CanLII 14929 (ON SC), 165 D.L.R. (4th) 713 (Ont. S.C.), at para. 22, rev'd on other grounds, (1999), 1999 CanLII 1388 (ON CA), 175 D.L.R. (4th) 466 (Ont. C.A.)); unfettered or unconstrained (*Mohammed v. Heera* (2008), 43 E.T.R. (3d) 273 (Ont. S.C.), at para. 29); and "unqualified" (*Re Lagrandeur Estate*, 2021 ONSC 3447, at para. 47).

[43] This discretion, in my view, may be exercised even if an application is unopposed, due to the inquisitorial nature of the court's role in estate proceedings, and its gatekeeping and oversight functions with respect to the appointment of trustees.

...

[50] The application judge identified the relevant factors in this case as the wishes of Mr. James' heirs, on the one hand, and "the overarching responsibility of the court to promote confidence in the administration of justice and uphold the rule of law" on the other. Although the application judge acknowledged that a disbarred lawyer is not precluded from acting as an estate trustee, he noted that the appellant had not offered any evidence to allay the court's concern that he might be engaged in the unlicensed practice of law. Having weighed the competing considerations, he concluded that the application should be dismissed.

[51] In my view, the application judge's initial concerns were legitimate given the appellant's professional history, his apparent involvement in executing Mr. James' will despite the revocation of his law license, the resignation of the named executor two days after Mr. James' death, and the steps taken by the appellant a few weeks later to secure the beneficiaries' consent to his application to be named as estate trustee. These concerns were unallayed when the appellant failed to respond to the September Direction, for example with evidence explaining his role in Mr. James' estate planning and management. In these circumstances, it was reasonable for the application judge to conclude that public confidence in the administration of justice would be undermined if he were appointed as estate trustee, giving him full authority to act on the estate's behalf.

FORM 74.13
Courts of Justice

01- [redacted] /15

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

N. Marjadsingh
Registrar

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



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	R.74.05.1

	administer assets in Ontario	
certificate of appointment of estate trustee to succeed estate trustee with a will	issued where a second supplemental grant is required, such as on the happening of event that requires the addition of another named estate trustee	R.74.06
	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 $(50 \times 5) + (950 \times 15) = \$14,500$, 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.

Compensation and Passing Of Accounts

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.

An overall tariff is used:

- 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.

**Laing Estate v. Laing Estate; Laing Estate v. Hines
1998 CanLII 6867 (Ont CA)**

This case remains the leading Ontario case in respect of trustee compensation and the method of analysis – it is a guideline to be followed in determining a highly discretionary decision.

Per Curiam:

[5] The language of the statute is, of necessity, broad. Modern judicial efforts to structure the assessment required under s. 61(1) so as to yield results which were fair to the trustee and the beneficiaries and reasonably predictable can be traced as far

(1905), 6 O.W.R. 350 (H.C.), where Teetzel J. said, at p. 354:

From the American and Canadian precedents, based upon statutory provision for compensation to trustees, **the following circumstances appear proper to be taken into consideration in fixing the amount of compensation: (1) the magnitude of the trust; (2) the care and responsibility springing therefrom; (3) the time occupied in performing its duties; (4) the skill and ability displayed; (5) the success which has attended its administration.**

[6] The five factors set out by Teetzel J. have been recognized as appropriate considerations in determining "fair and reasonable" compensation under s. 61 of the *Trustee Act*: e.g. see *Re Mortimer*, [1936] O.R. 438 at 441 (C.A.).

[7] In a further effort to bring predictability to the assessment of a trustee's compensation, the practice developed of determining the trustee's compensation as a percentage of the probate value of the estate. These percentages are sometimes referred to as the "tariff guidelines." These guidelines are not sanctioned by statute or regulation, but were developed by the estates bar and judges of the former Surrogate Court: B. Schnurr, *Quantifying Executor's Compensation*; Canadian Bar Association, Continuing Legal Education, November 8, 1991, pp. 5-7. **Those guidelines are described in *Re Jeffery Estate* (1990), 39 E.T.R. 173 at 178 (Ont. Surr. Ct.):**

There are many later cases which show that, in Ontario at least, a practice has developed of awarding compensation on the basis of 2 1/2 per cent percentages against the four categories of capital receipts, capital disbursements, revenue receipts and revenue disbursements, along with, in appropriate cases, a management fee of 2/5 of 1 per cent per annum on the gross value of the estate:

...

[10] The fixing of compensation under s. 61(1) of the *Trustee Act* is far from an exact science. As Adams J. observed, at p. 284, it "is an issue over which reasonable minds may differ." Appellate review of that assessment must be restrained so that it does not become merely the substitution of one reasonable assessment for another reasonable assessment. In *Re Smith*, [1953] O.R. 185 at 189 (C.A.), Pickup C.J.O. observed:

... but the Court of Appeal should interfere if there is any error in principle, or if, in its opinion, the amount allowed is grossly insufficient or excessive.

[11] In addition to appellate review to determine compliance with the applicable principles and to ensure that the result is not grossly insufficient or excessive, an appellate court may review findings of fact upon which an assessment under s. 61(1) of the *Trustee Act* is based. It will interfere with those findings only where they can be said to be unreasonable: *Equity Waste Management of Canada v. Halton Hills* 1997 CanLII 2742 (ON C.A.), (1997), 35 O.R. (3d) 321 at 335-6 (C.A.).

[12] If an appellate court determines that the audit judge

has made an unreasonable finding of fact, erred in principle, or reached a manifestly wrong result, it should, if possible, go on to determine the appropriate compensation. In doing so, the appellate court will accept any findings of fact made by the assessment judge which the appellate court has not found to be unreasonable. On occasion when the appellate court finds reversible error, it will be necessary to order a new hearing.

...

[15] There can be no doubt that time spent is one of the relevant factors in fixing compensation. Nor could one argue with the proposition that trustees of large estates would be well advised to thoroughly document their time spent on work related to the estate. We cannot, however, agree that time spent on the administration of the estate can be the dominant consideration in fixing compensation, or that compensation should be reduced to "punish" a trustee who has not kept adequate records. The time spent by the trustee on the estate is but one factor and cannot become the ultimate measuring stick against which compensation is determined any more than any one of the other relevant factors can be given a dominant position. Reducing the assessment required by s. 61(1) of the *Trustee Act* to the mere product of hours spent multiplied by a reasonable hourly rate is inconsistent with the statutory command that the compensation be "fair and reasonable", and that, in addition to time spent, it reflect "the care, pains and trouble" expended in the administration of the estate.

[16] We agree with Adams J., at p. 285, when he said:

... Wright J. erred in principle in attributing the overriding significance he did to the manner in which the Executor accounted for his time.

[17] This was a large, complex estate and even allowing for the deficiencies in the respondent's accounting for his time, he clearly spent a great deal of time on the administration of this estate. The skill and ability shown by the respondent met or exceeded any reasonable standard of competence. Applying the approach described by Killeen J. in *Re Jeffery Estate, supra*, at 179, we conclude, as did the majority of the Divisional Court, that the amount fixed under the tariff guidelines provided "fair and reasonable" compensation for the respondent.