MILTONS ESTATES LAW

Estate Disputes in Ontario

A practical guide

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A short, practical guide to estate disputes in Ontario.

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About Us

We are **Miltons Estates Law**. a team of Ontario lawyers dedicated to providing estate law services in Ontario.

We do not draft wills or assist with estate planning.

We act for parties to estate disputes, advise executors with probate and other non-contentious estate issues, and we act as the estate trustee in certain estates.

Our advice is practical, cost-effective, and results-oriented.

Contact us at 1-888-995-0075, or
at www.ontario-probate.ca

Terminology

An 'executor' is a person named in a will to administer the estate of the testator.

The person appointed by the Courts to administer an estate, whether there is a will or not, is the 'estate trustee'. Usually, the executor has the first right to be appointed the estate trustee, but if they are unable or unwilling to act another individual can be appointed.

In Ontario, the formal legal term is 'appointment of the estate trustee' for the process historically known as 'probate' or 'probate of a will'. Again, these terms are used interchangeably.

Depending on whether or not the deceased had made a will, the appointment will be either 'estate trustee with a will' or 'estate trustee without a will'. Dying without a will is known as being 'intestate'.

Similarly, formally Ontario does not have 'probate fees' or 'probate tax'. These charges are now known as 'estate administration tax'.

About this book

Estate law is very parochial – it varies from state to state, province to province, and country to country. In effect there are over 60 different estate law jurisdictions in North America alone and each is different, sometimes profoundly so.

Ontario is a common law jurisdiction, and estate law in civil law jurisdictions (such as Quebec, and most of the EU) tends to be quite different.

This eBook is exclusively about estate law in Ontario.

This is intended to be short informal guide for non-lawyers about the nature of estate disputes and the tools and techniques available to address them. This is not precise legal analysis, legal advice about your particular situation, or a how-to-guide for DIY litigants.

Estate disputes do not exist in a vacuum. They always involve a matrix of legal, factual and emotional issues which are crucial but beyond the scope of this eBook. In particular, this eBook is not a comprehensive list of executor duties nor a guide to estate administration, although it does provide guidance on the nature and scope of executor duties and the pitfalls if these duties are breached.

This eBook is divided in to three sections:

- A brief description of the fundamental principles applicable to estates
- A description of the legal rules, tools and methods available to address disputes to get them resolved
- Short notes on some of the most common causes of estate disputes and how to handle them

Other eBooks in this series

This eBook is one of a series. The others are:

- Wills: A Practical Guide
- Powers of Attorney: A Practical Guide
- Probate In Ontario: A Practical Guide
- The Executor's Checklist.

While there is some overlap in the material, these eBooks cover different material. For the most thorough understanding of the subject matter, we recommend that you consult all of them together.

Fundamental principles

A brief description of the fundamental principles applicable to estates follows to provide some context for discussion of estate disputes. These issues are discussed in more detail in our other eBooks.

The duties of the estate trustee

The duty of the estate trustee is to administer the estate fairly in the best interest of the beneficiaries and in accordance with the law in a timely manner.

Separate elements of this duty include:

- Arranging the funeral and burial
- Probating the will, if necessary (for a full discussion, see our eBook on Probate)
- Preserving and protecting all estate assets
- Monetizing assets, and where appropriate invest the estate prudently
- Determining all debts of the estate, including preparing and filing tax returns
- Paying all debts and expenses, including taxes
- Providing a full accounting of assets, liabilities, income and expenses to the beneficiaries
- Distributing the estate, after payment of debts and expenses, among the beneficiaries

The rights of beneficiaries

Beneficiaries are entitled:

- To have the estate trustee administer the estate properly,
- To receive a full accounting of the estate, and
- To receive their entitlement in a *reasonable* period of time.

Beneficiaries are **not** entitled to a running report in real time on the estate, nor are they entitled to participate in administration of the estate or to supervise or control it.

Often an estate trustee will consult with beneficiaries before making major decisions (like selling a family cottage) and provide interim reports and updates. This is to be encouraged, and is often the best practice. However, beneficiaries are not actually entitled to be consulted or to direct what the trustee does. The tools available to beneficiaries to hold an estate trustee to account are described later in this eBook.

The value of the estate

The estate of a deceased person is composed of the assets of the deceased immediately following their death, less all liabilities of the deceased.

The assets of the deceased

All property including real property and personal property (tangible and intangible) owned by the deceased on their death falls into their estate and must be dealt with by their estate trustee. This raises the key issue: what assets are in the estate? Some of the most contentious issues are often jointly owned assets and financial assets with designated beneficiaries. These are discussed briefly below.

Estate assets – the limits of property rights

Currently, in Ontario pets are considered tangible personal property and thus can be estate 'assets'.

Intellectual property rights, such as ownership of copyright to songs, literary works, images and videos are intangible personal property and can form part of an estate.

On the other hand, most users of digital 'services' such as Facebook, Instragram and LinkedIn have no ownership rights to their accounts or things that they have posted on them. In addition, only the registered user is entitled to access the account. Therefore, the estate trustee may have a very difficult time accessing these accounts, as access is limited or prohibited by the owners of the services and there is no statutory rule in Ontario that ensures that the estate trustee can access the deceased's accounts.

RESPs are contracts between the provider and the subscriber (usually parent or grandparent). The assets in an RESP do not belong to the named children, and absent clear language in a will to confirm a 'successor subscriber' the RESP assets are an asset of the estate of the subscriber.

Joint ownership

Many assets are owned by more than one person. However, there are different types of 'co-ownership'. In the case of real property in Ontario, it is very important to distinguish between ownership by "joint tenants with a right of survivorship" (JTWRS) and ownership by "tenants-in-common". These two different forms of ownership have **very** different consequences on the death of one co-owner.

When real estate is owned 'in joint tenancy with a right of survivorship', then when the first co-owner dies, the deceased ceases to have any ownership of the property and the surviving co-owner is now the sole owner of the property. Note that there is no 'transfer' of the asset to the survivor, the deceased simply drops off title. JTWRS is the most common form of co-ownership of houses in Ontario as between spouses. A property held in JTWRS does not need to be probated.

JTWRS is also one of the most common causes of estate disputes in Ontario, especially when the two co-owners are not spouses.

When property is owned by tenants-in-common and one tenant-in-common dies, the ownership of the deceased **does** fall into their estate. As a result,

the estate becomes one of the tenants-in-common that co-owns the property. In these cases, usually the estate must be probated in order to transfer the property held by tenants-in-common.

Beneficiary designations & pensions

Some financial 'assets' can pass directly to a designated or named beneficiary and as a result do not fall into the estate of the deceased. These beneficiary designations are most relevant to life insurance, TFSAs, and RRSPs/RRIFs. These assets pass directly to the named beneficiary, and no consent or approval of the estate trustee is necessary for them to be paid out to the named beneficiary. However, they can be subject to 'dependent support claims' (discussed below) and thus often should not be paid out within 6 months of death unless they are payable to the sole financial dependent of the deceased.

Except where a will is very clearly drafted to over-rule a previous designation, a beneficiary designation will usually prevail regardless of whether the deceased had a will or not.

The unexpected consequences of beneficiary designations, often made years ago with limited legal advice in a bank or other financial institution, are among the most common causes of estate disputes and hard feelings.

Life insurance

Life insurance is a contractual commitment to pay an amount to a beneficiary on the death of the insured. Often life insurance has no value to the deceased before or after death. Life insurance should usually be paid automatically to the named beneficiary without the requirement to probate the estate.

If there is no surviving designated beneficiary, then the policy will be paid to the estate of the deceased.

The proceeds of a life insurance policy are not taxable income.

Pensions

In Ontario, by statute, most 'survivor's pensions' pass to the person who was the spouse of the deceased at the time when the deceased died. This statute over-rides most designations of pensions that are governed by the

laws of Ontario. (Pensions from other jurisdictions may be governed by other laws). Where there was a separation but not a divorce before death, the pension may pass to a new common law spouse and not the married spouse.

If, but only if, the deceased did not have a spouse at their death can the pension benefits pass to another named beneficiary.

TFSAs

There are two different types of beneficiary designations for TFSAs:

a) A successor annuitant. If the spouse of the TFSA holder is named as a successor annuitant, then the entire TFSA rolls over to the spouse, remaining a TFSA and thus can continue to grow tax free for the life of the surviving spouse, in addition to any TFSA contributions made by the surviving spouse before or after the death.

b) A named beneficiary, who receives the proceeds of the TFSA tax free but the funds in it cease to be inside a TFSA and cease to grow tax free.

RRSPs and RRIFs

RRSPs and RRIFs can pass by designation directly outside the estate. Where there is no designation, or the named person has pre-deceased, the value does fall into the estate.

The end of an RRSP or RRIF on death has significant income tax consequences for the estate. Unless these taxes are planned for properly, the consequences are often painful and the cause of many estate disputes.

An RRSP or RRIF can be rolled-over tax free to a surviving spouse. When a roll-over to a spouse occurs, the value of the RRSP/RRIF is not included in the taxable income of the deceased and the funds retain their character as funds inside an RRSP/RRIF. Accordingly, the funds in the plan can continue to grow tax free, and the recipient subsequently includes in their taxable income withdrawals from the plan when they make actual withdrawals. Clearly, most plan holders will want to roll-over RRSPs and RRIFs to their surviving spouses, either by designation in a legal will or with the plan documents.

When the beneficiary is anyone other than the spouse of the deceased, the entire value of the RRSP or RRIF must be included as taxable income of the deceased in the year of their death. This often results in significant tax liabilities for the estate which must be paid from assets in the estate.

If the beneficiary is anyone other than the estate of the deceased, the estate trustee must pay this tax liability, even though the funds in the RRSP/RRIF pass outside the estate to the named beneficiary.

Even though the estate must pay the taxes, there is no easy way for the estate trustee to claim the taxes owing against the designated beneficiary who received the funds in the RRSP/RRIF. [On the other hand, CRA can pursue the beneficiary for the unpaid taxes if the estate fails to pay all of the taxes of the deceased.] **This is why beneficiary designations of RRSPs/RRIFs to anyone other than the spouse or estate of the deceased are the cause of so many estate disputes.**

The liabilities of the deceased and the estate

The estate trustee must identify and pay all liabilities of the deceased, and all debts incurred by the estate.

If the deceased did not keep good records, it can be a challenge to identify liabilities of the deceased.

Estate trustees are protected from personal liability from undisclosed liabilities if they advertise prior to distributing the estate. Traditionally these advertisements were placed in local newspapers; now some online notices are acceptable.

Estate trustees are not personally liable for debts of the deceased. They are liable for ensuring that all debts that they incur are paid, and for ensuring that they pay all known debts before making any distribution to beneficiaries. For a discussion of insolvent estates, see our eBook on Probate.

For a discussion of debt claims against an estate, see below under *Common estate disputes.*

Lawyers

Engagement terms

The estate trustee is not obliged to retain a lawyer, or any lawyer in particular. There is absolutely no obligation on the estate trustee to engage the lawyer who drafted the will for any reason, even if the will says otherwise.

Most parties to estate disputes should hire a lawyer with experience in the area. Estate litigation is complex, and can easily bog down in unnecessary, expensive, delays. Experienced counsel can focus on the issues and use the best tools for cost-effective, time-sensitive resolution of the dispute.

There is no such thing as "the estate's lawyer"

An estate is not a person.

An estate is a trust. A trust cannot hire a lawyer.

There is no such thing as 'the lawyer for the estate' or 'the estate's lawyer'. There is only "the lawyer for the estate trustee(s)".

When an estate trustee hires a lawyer, that lawyer **advises the trustee who hired them.** This lawyer will owe duties to the estate trustee who hired them and not to the estate, any other estate trustees (unless the all agreed to retain the same counsel), the beneficiaries, or any other person.

If co-executors have a disagreement, they should hire separate legal counsel.

If a beneficiary disagrees with the conduct of the executor(s), that beneficiary should hire their own legal counsel. A beneficiary should never expect the estate trustee's lawyer to look out for the beneficiary's interests. In fact, it is quite common for lawyers acting for an estate trustee to refuse to speak to a beneficiary directly.

When you engage a lawyer, you should be comfortable with the lawyer and their engagement terms, including price, expertise, manner and service. As long as you pay all outstanding accounts, you can switch lawyers at any time. You can engage another lawyer for a second opinion.

Estate trustees are responsible for hiring, firing, and compensating any lawyer they hire. The estate trustee is responsible for ensuring that the compensation that they pay from estate funds to anyone who assists them, including any lawyer, is reasonable.

Some lawyers who act for estate trustees wish to charge a fee that is a percentage of the estate for all aspects of advising the estate trustee, from probate through distribution. Depending on the value of the estate and the actual work required, this may result in an extremely high fee. This is generally an old-fashioned way of charging. Estate trustees are **not** obliged to accept these terms.

The accounts of lawyers are subject to supervision by the Courts under a process known as 'assessment'. Invoices must be fair having regard to all of the relevant circumstances which include time, effort, skill, quality of work and outcome, the important of the matter in issue, and the risk (if any) taken by the lawyer. If you are unhappy with the fees charged to you by a lawyer, you should use this process to ensure that the fees charged were fair. Beneficiaries who are unhappy with the fees paid by the estate trustee to any professional, including a lawyer, should use the 'passing of accounts' process to challenge the estate trustee's actions.

Contingency Fees

Some lawyers in Ontario agree to act in certain disputes on a contingency fee basis. This means that the lawyer is only paid by their client 'on success'. Often (but not always) the fee payable to the lawyer is a percentage of the amount recovered by their client. Contingency fees are often in the range of 25-33% range (depending on many factors, including the amount recovered), with the percent decreasing as the amount recovered increases.

Contingency fee engagements must be in writing and are regulated by the Law Society of Ontario and subject to supervision by the Courts. Ultimately, the fees paid must be reasonable.

Contingency fee agreements are often they are the only way that some people can access the judicial system to assert their rights and recover what they are entitled to. In our experience, contingency fee engagements are particularly suitable for beneficiaries of limited means who are being improperly denied their inheritances by aggressive estate trustees.

Our firm acts on some matters on contingency. Contact us to discuss.

Types of estate disputes

Estate disputes usually involve one or more of these claims by the aggrieved party, which are not mutually exclusive and are often made together or in the alternative:

1) Too much of the estate goes to one person by will; for example, a claim that will unduly benefits one individual is often based on an allegation that the extra benefit arose because of 'undue influence' exercised by the beneficiary on the testator and therefore the testator's last will is invalid;

2) Too little of the estate goes to one or more people; these claims are usually to the effect that the deceased has not:

    a) Properly compensated an individual who provided goods or services to the deceased before death; these claims may be:

        i) For repayment of an agreed debt;

        ii) Reimbursement for the value of services rendered by the claimant to the deceased (often referred to as *quantum meruit* claims); and,

        iii) Recovery of a share of the value of something obtained by the testator because of the contributions of the claimant. These are often referred to as *constructive trust* or *unjust enrichment* claims, and often involve real estate (houses, farms) or businesses that have appreciated in value.

b) Made proper provision for their spouse; or

c) Made proper provision for someone, spouse or otherwise, who was financially dependent on the testator

3) Someone applying for probate is unsuitable to be appointed estate trustee;

4) Someone who was appointed estate trustee has done a poor job of administering the estate; and,

5) The estate trustee is claiming excessive compensation.

Examples of each of these claims are discussed below under *Common Disputes.*

The Costs of Litigation

Litigation is expensive largely because of the amount of effort and attention to detail that is required. Litigation is unlike your ordinary argument or business deal. Litigation requires a level of rigour unlike almost any other normal activity in our society.

In litigation, the stakes are high for the parties and the Courts demand a high level of 'proof'. The Courts do not rely on conjecture or guesses or hunches or estimates. In civil matters, the Courts require 'proof on a balance of probabilities' (50%) on actual evidence before the Court.

In order to be considered, evidence must be 'before the Court' in proper form. In estate litigation, this often means written affidavit evidence with documents attached as Exhibits, provided well in advance, with all opposing parties having the opportunity to cross-examine the affiant before any Court hearing.

The evidentiary burden is high because the Courts have enormous power to impose decisions on the parties. Before a Court imposes a decision, the judge wants to have all the facts before them and they genuinely want to try to make the right decision. Judges hate making rash, ill-formed decisions that could be wrong, unfair, or embarrassing.

As a result, in litigation the parties must spend enormous amounts of energy collecting and presenting the facts, and sometimes, in attacking the version of the facts presented by the other parties.

Who pays?

Initially, each party to estate litigation must pay their own costs.

Ontario follows 'loser pays' rules cost rules in litigation. At the conclusion of litigation, the loser usually must pay the winner, in addition to any amount awarded, 'a portion of the winner's legal costs'. This portion usually ranges between 30% and 70% of the winner's actual costs (it is not full recovery). Thus, the winner must pay a portion of their own costs, and the loser must pay 100% of their own costs and a portion of the winner's costs.

In estate litigation, sometimes a portion of a party's legal fees are borne by the estate, however this is by no means the norm:

- If an issue arises because of a mistake or failure by the testator (such as unclear will terms) the legal fees will usually be borne by the estate.

- If the estate trustee acted reasonably and incurs reasonable legal expenses defending the estate their legal fees will usually be reimbursed from the estate. However, an estate trustee is not always entitled to have their legal fees paid by the estate. When an estate trustee fights to defend their own personal interest (such as their inheritance from the estate or unreasonable compensation) then their legal fees should not a cost of the estate.

- If a party (for instance a beneficiary) is compelled to commence proceedings in order to force the estate trustee to perform their obligations properly, then that party has a strong argument that some (and perhaps all) of their legal fees should be reimbursed by either the estate trustee or the estate.

Your Costs Risks As a Litigant

If your claim fails (or your defence is rejected) you may be liable for costs to the other side. If you start a claim, you cannot just arbitrarily abandon or discontinue it without some potential liability to the defendant for costs.

The risk of being liable to the other side for 'costs' cannot be entirely eliminated but it can be controlled. In estate litigation, the over-arching requirement is that you "should be reasonable":

- Do not to take unreasonable positions;
- Do not make unreasonable accusations;
- Do not take unnecessary steps or force unnecessary actions on the other side;
- Make reasonable offers to settle;
- Accept reasonable offers from the other side.

Partial Indemnity, Substantial Indemnity and Full Indemnity

If Party A is to receive '**partial indemnity**' of their costs from Party B, Party A will likely recover approximately 20-40% of the actual amount they incurred in legal fees from Party B. In other words, Party A will have to pay 60-80% of Party A's legal fees, and Party B will pay the remainder. Partial indemnity costs are the norm.

If Party A is to receive '**substantial indemnity**' of their costs from Party B, Party A will likely recover approximately 50-80% of the actual amount they incurred in legal fees from Party B. In other words, Party A will have to pay 20-50% of Party A's legal fees, and Party B will pay the remainder. Substantial indemnity costs are common where Rule 49 settlement offers are involved (see below) and to sanction 'inappropriate behaviour'.

If Party A is to receive '**full indemnity**' of their costs from Party B, Party A should recover 100% of the actual amount they incurred in legal fees from Party B. In other words, Party A will have to pay 0% of Party A's legal fees, and Party B will all of them. 'Full indemnity costs' are not common outside the world of prior contractual agreements (for instance, in banking and loan agreements, mortgages, guarantees and the like). They are occasionally used in estate litigation to punish particularly outrageous conduct. This is rare.

Offers to settle

Settlement offers can dramatically affect "who pays who what costs". In Ontario, Rule 49 of the *Rules of Civil Procedure* establishes some very important tweaks to the basic rule that the "loser pays winner a portion of winner's costs".

To encourage settlement, Rule 49 changes the general rule for costs to:

> A who party who achieves a better result at trial than they offered to settle for is usually entitled to recover from the other side partial indemnity costs to the date of their offer to settle, and substantial indemnity costs from that point forward.

Thus, a defendant, even if they 'lose' in Court, can recover 'costs' from the plaintiff.

Here is an example:

> A sues B for $100.
>
> B offers to settle by paying A $75. A rejects the offer.
>
> A obtains judgement at trial against B for $50.

Note that "A has won their case against B", but for less than they hoped, and B has 'done better in Court than their offer to settle'.

As a result, A would receive $50 from B, but B would be entitled to recover back from A 'partial indemnity costs to the date the offer was made, and substantial indemnity costs from the date of the offer to the end of trial'. So if B's costs were $10 to the date of offer, and $20 from offer to trial, B might recover back from A $15 (30% of $10 + 60% of $20 = $15). Clearly, A would have been much better off to accept B's offer, as A would have received $75, rather than netting $35 ($50 - $15 = $35) before paying their own lawyers, and this after enduring all the cost and stress of a trial.

Well thought-out offers to settle put pressure on the other side. A good Rule 49 offer puts the receiving party under significant, enduring pressure, as they are now gambling that they need to 'beat your offer in Court' by a wide margin to end up better off. A good Rule 49 offer should not be a 'low ball'. It should be a very realistic assessment of the amount at risk.

Controlling costs

To some degree the costs of litigation are out of your hands – they are, in part, dictated by the process and how the other side behaves.

However, you can dramatically affect your litigation costs by:

- Remaining focused on key issues and not getting distracted with petty squabbles;

- Taking and maintaining reasonable positions and not allowing yourself to be sucked into opposing everything that the other side puts forward;

- Providing your counsel with full, well organized factual records as early as possible. The most expensive part of litigation that you can control is 'collecting and presenting your version of the facts'.

- Seeking early settlement, including through mediation and via reasonable offers to settle.

Techniques for resolving estate disputes

There are three core Court procedures available for resolving estate disputes:

- Passing accounts: used when the issues relate to whether the estate trustee performed their duties properly, and whether any compensation claimed by the trustee is reasonable.

- Applications: used to interpret and enforce contracts and wills.

- Trials: used when 'who said what when' and credibility are in issue.

In addition, mediation is a very useful and often effective technique for resolving disputes outside Court.

Mediation is mandatory in Toronto and Ottawa.

Mediation is most effective if it occurs shortly before the parties incur substantial additional expense on the road to going to Court. The prospect of a) substantial additional costs, and b) a Court-imposed decision, are usually crucial for getting the parties to compromise. For this reason, even for disputes that clearly from the outset 'should settle' it is often wise to commence litigation and have it pushing inexorably forward towards a Court decision, in order to get the parties to the table willing to mediate and compromise.

Passing accounts, applications and mediation are discussed in more detail below.

Passing accounts

An estate trustee has a duty to account to the beneficiaries of the estate. This includes accounting for the assets recovered, the liabilities of the estate, the income generated, the fees incurred, and the distribution of the estate. Executors must be prepared to account in full on every estate.

The estate trustee should almost always provide the residual beneficiaries with a full accounting, albeit an informal one not in Court format prior to asking for a release from a beneficiary.

A beneficiary should never sign a Release without receiving an accounting for the estate that the beneficiary is comfortable with. This accounting may be quite informal, but it should be provided by the trustee on request. The trustee has no right to demand that a beneficiary sign a Release before receiving funds and without receiving a full accounting.

Note that receiving "accounts" does not mean "receiving copies of all back up material".

Usually there is no reason for a beneficiary to demand copies of all bank statements, vouchers, receipts, and cheques, to verify the 'accounts', and a beneficiary who does demand excessive supporting documentation without good reason may have to bear the cost consequences.

When accounts are passed

For Powers of Attorney

Powers of attorney have a duty to account. However, this duty is owed to the grantor of the POA. If the grantor has passed away, the duty is owed to the estate trustees. The beneficiaries of an estate do **not** have a general right to demand that someone who acted as power of attorney for the deceased before death pass their accounts.

Generally, where beneficiaries of an estate are unhappy with the accounting provided by a POA prior to death, the Courts will consider an order requiring the POA to provide information or an explanation about specific transactions (as opposed to full accounting). This is especially true if the POA acted without compensation or acted for an extended time or the POA was granted but not used for many years.

These orders to provide information can encompass joint accounts, held jointly by the deceased and POA, and hence may not have 'technically' been accessed using the POA.

For estates

The process by which the Courts 'supervise' the conduct of estate trustees is known as the 'passing of accounts'. By no means are accounts passed for all estates. Most estate trustees provide an informal accounting that satisfies the beneficiaries.

If all beneficiaries approve the accounts of the estate trustee, then a formal passing of accounts can be dispensed with. Conversely however, where all beneficiaries cannot or will not consent to the estate trustee's accounts, then a formal passing of accounts is required. If one or more of the beneficiaries is a) a minor, or b) under disability, then they likely cannot waive the requirement for a formal passing of accounts no matter how complete or accurate the informal accounts.

Generally, estate trustees should not resist or delay a passing of accounts if they are requested or required. Beneficiaries have a right to an accounting, and a request for accounts does not imply criticism of the integrity of the trustee.

Accounts are usually only passed once, at the end of the administration of the estate, it is crucial for the estate trustee to maintain excellent records throughout the entire administration process.

The Limitations Act does not limit the time period when beneficiaries may demand an estate trustee pass their accounts, nor preclude objections to accounts filed years after the transactions occurred.

Passing of accounts is a complex process, and it is very important to do it well, with thorough knowledge of the law and, where required, various dispute resolution techniques.

Format of accounts

Accounts presented to the Court must follow a precise format that is unlike other accounting. Informal accounts such as a simple spreadsheet are often easier to understand than formal accounts, and thus are often to be preferred when there is no dispute. However, the Court format must be followed for Court proceedings. Accounts in Court format are also quite different from conventional financial statements prepared by accountants for businesses – unlike financial statements which are composed of a balance sheet, income statement and statement of cashflows together with accompanying notes, in estate accounts in Court format the following are required:

a) a statement of the assets at the date of death, cross-referenced to entries in the accounts that show the disposition or partial disposition of the assets;

b) an account of all money received, but excluding investment transactions recorded under clause (d);

c) an account of all money disbursed, including payments for trustee's compensation and payments made under a court order, but excluding investment transactions recorded under clause (d);

d) where the estate trustee has made investments, an account setting out,

    (i) all money paid out to purchase investments,

    (ii) all money received by way of repayments or realization on the investments in whole or in part, and

    (iii) the balance of all the investments in the estate at the closing date of the accounts;

e) a statement of all the assets in the estate that are unrealized at the closing date of the accounts;

f) a statement of all money and investments in the estate at the closing date of the accounts;

g) a statement of all the liabilities of the estate, contingent or otherwise, at the closing date of the accounts;

h) a statement of the compensation claimed by the estate trustee and, where the statement of compensation includes a management fee based on the value of the assets of the estate, a statement setting out the method of determining the value of the assets; and

i) such other statements and information as the court requires.

Because of the unusual format of estate accounts and the importance of preparing them accurately and completely, estate trustees should engage someone with experience preparing estate accounts to assist them. Often this means that the estate trustee should get advice from an estate law firm, and not an accounting firm, to finalize the accounts.

The **accounts** in court form do not include the supporting or original material (bank statements, cheques, receipts, vouchers).

The process for passing accounts

The *Rules of Civil Procedure* establish the rules:

- Probate is required before a passing of accounts can take place. Even if the estate can be fully administered without probate, if a passing of accounts is required, then probate must be undertaken/forced first.

- The beneficiaries can force the estate trustee to pass their accounts, by securing a Court Order compelling the passing.

- If the estate trustee wants to pass their accounts, they can proceed provided probate has been completed.

- The estate trustee must prepare their accounts in Court format, and then file with the Court the accounts together with the Order they seek from the Court.

- Once the accounts have been filed, the beneficiaries can deliver objections. Objections must be made within the time provided. The objections should be specific.

- The trustee should respond to the objections within the time provided.

- Some or all objections may be resolved or withdrawn. Objections that are not withdrawn remain open for determination by the judge.

- Ultimately, the presiding judge reviews the accounts, and determines which aspects of the accounts to allow and which to disallow or modify, and this results in a final Court order.

Supporting and original documentation, if required, is provided during the objection phase.

Who pays for what in a passing of accounts

The estate trustee has a duty to prepare accounts. Accordingly, the estate trustee cannot 'charge more' for preparing accounts. If the estate trustee hires a third party to prepare estate accounts, generally this cost should reduce compensation otherwise due to the estate trustee.

A beneficiary has a right to demand an accounting. Therefore, the legal fees incurred by the estate trustee to file an Application to pass their accounts are paid by the estate as a whole and not any one beneficiary, to a maximum fixed by the Court.

Generally, if the beneficiaries must incur legal fees to secure an Order compelling the estate trustee to pass their accounts, these fees should be recoverable from the estate.

Once the accounts have been prepared and an Application to pass them filed with the Court, the legal fees incurred by the parties to a contentious passing of accounts should, generally, follow the usual rules about 'costs' in litigation, including the usual 'loser pays' principle, and with the usual rules about Offers to Settle. For this reason, beneficiaries should focus their objections and should avoid making blanket demands for 'all supporting documents'.

Applications in estate litigation

Estate litigation is often conducted 'by way Application' rather than by trial. Applications are particularly useful where the parties ask for the Court's direction to resolve a specific issue such as the proper interpretation of a clause in a will or to determine issues when the facts are not in dispute.

For instance, if the estate trustee has not acted at all or does not know how to deal with a particular situation (for instance, whether a step-child is a 'child' under the will), an Application is often the best way to get directions from the Court on how the estate trustee should act.

Starting a proceeding by Application is different from starting by 'Statement of Claim'. A Statement of Claim is the conventional way that lawsuits are started, and they ultimately lead to a regular trial. Applications are appropriate when the dispute involves issues that can be resolved based on documents without credibility issues.

> A dispute about what certain documents mean → application
>
> A dispute that turns on who said/saw/did what when to whom → trial

An Application usually leads to a hearing in Court where each party puts its evidence before the Court in writing by way of sworn affidavits with Exhibits. The parties cross-examine the affiants, if they wish, in private and prior to the Court hearing. At the Court hearing, no witnesses are called and only the lawyers make submissions. The parties do not have to be present when an Application is heard by the Court.

Proceedings by Application tend be a less expensive and get to Court faster than proceedings started by Statement of Claim.

Many challenges to wills – especially ones based on an allegation of 'undue influence' - require a trial. This explains the cost, delay, and complexity of will challenges.

The Steps in an Application

Getting an Application from start to Court decision involves a number of steps and the entire process takes months to complete:

- Draft the application.

  The application must set out the issues, the legal basis for the applicant's claim, the evidence the applicant will rely on, and the relief the applicant is requesting.

- File the application with the Court and secure the first 'return date'.

  The first date is usually not chosen with any involvement from the respondent. Accordingly, the Application is almost never heard on the merits on this date – adjournments are very likely

- Serve the Application on the Respondent

  Either by personal service on the Respondent, or delivery to their lawyer

- Serve on the Respondent (and file with the Court) the supporting affidavit material

  This step is sometimes done at the same time as the Application, sometimes not. It is certainly helpful to have as much evidence as possible assembled prior to filing the Application. The applicant's evidence will be in one or more affidavits (a sworn statement made by an individual), and usually has various documents such as the will, correspondence and bank statements attached as exhibits. The applicant's evidence should set out their entire case – all information that the applicant relies on must be properly before the Court via these affidavits, so it is very important to make the affidavit very thorough.

- The Respondent serves their affidavit material on the Applicant

  The affidavits filed by each party should put forward their full version of the facts (they are not opinion or argument). Where possible, the affiants should have direct personal knowledge of the facts deposed to.

The affidavits should include, by way of attachment, the documents relevant to the case – including wills, bank statements, etc. as required. Documents are crucial, especially documents created by third parties. Ideally, the entire case should be determined based on the Exhibits, with the affidavits merely setting up and providing context for the Exhibits.

- First Court date

  The date set in the Application or a later date if the first date is adjourned. Often used to fix a schedule for next steps in the proceeding, secure orders of production from third parties if necessary (eg. Lawyers, banks) etc.

- Cross-examinations of the affiants on their affidavits

  The parties often choose to cross-examine each other on their affidavits. Cross-examination on an affidavit is similar to, but narrower in scope, than 'examinations for discovery' which take place in regular law suits. The parties may waive cross-examinations if they wish.

  Cross-examination usually takes place at a law firm or court reporter's office. It is in private. It is always in the presence of opposing counsel and a Court report.

  Cross-examination is most commonly used to narrow or qualify the statements in the affidavits, and sometimes to identify and probe missing evidence and unclear or vague statements. A well-prepared affidavit, where the bulk of the relevant information is contained in Exhibits which have been created by third parties in the normal course of business limits the role of cross-examinations. Cross-examination is useful for 'poking holes in the affiant's evidence', but it is rarely a useful way to build a case. Each party's case should be built upon evidence in the affidavits and Exhibits, not the cross-examination.

- Mediation

  Mediation is often mandatory, and almost always recommended. Mediation takes place at a time and place and with a mediator of the parties' choosing. Mediation is often very effective for resolution of estate cases.

- Court hearing

  If some or all of the issues proceed to Court, the parties are required to file factums. A factum is a concise written document that succinctly summarizes the relevant facts, the law, the party's argument, and the relief requested by the party.

  Hearings in applications are before a single judge, who hears from the lawyers. These are 'paper-based' hearings. It is not necessary for the clients to be present, and there will be no witnesses to give evidence.

- Decision and Order

  The judge will make a decision – sometimes the day of the hearing, sometimes after a period to consider the evidence and write a written decision (usually a few days or weeks, sometimes as long as several months). Once the judge has released a decision, the parties must create and have the Court sign an Order. The order is what is ultimately enforced – for instance, if the involvement of the sheriff is need to expel a tenant from a property.

- Costs award

  The issue of 'who pays what costs to whom' is usually reserved for the very end. If the parties are unable to agree on costs, they are usually fixed by the judge after receiving brief submissions of the parties.

Timelines for applications

- Nothing ever happens as quickly as you expect in litigation
- The Courts have a substantial backlog so first available dates are often far into the future
- Adjournments are very common
- It is incumbent on the Applicant to press forward – if you want the matter resolved, you must keep forcing the issue forward

- Budget several months per 'step' above

- The total time from filing to resolution is best measured in months – 6-18 being a common time frame. This is much faster than matters proceed to trial.

Mediation

Mediation is a dispute resolution technique. It is different from arbitration or adjudication, where a third party 'makes a decision' and it is imposed on the parties to the dispute. In mediation, the parties fashion their own outcome.

Mediation can be conducted at almost any time. It can be conducted more than once. It can be conducted completely outside or before any litigation. However, it generally works best when a Court-imposed decision is imminent. Unless there are significant issues of 'credibility' of witnesses at stake (which is only sometimes the case in estate matters), effective mediation in estate disputes can often be conducted once the parties have 'as full as possible' access to the key facts (for instance, financial records) – which is usually after the exchange of affidavits, but often before any cross-examinations.

How does mediation work?

The parties to a dispute (with their counsel) meet with a mediator, who is an independent third party. Mediation words best if all the parties are physically present in the same place on the same day (mediations by telephone or video conference are sometimes possible but are much less likely to be productive). Each party must be represented by someone with full authority to settle (without the need to get approval from someone else not present).

The mediator tries to help the parties negotiate a resolution. The mediator may suggest possible ways to resolve the dispute, but the mediator will

never impose a decision (that is arbitration, a very different means of resolving disputes).

The mediation is strictly confidential, and privileged – this means, that no party can disclose, ever, what was discussed in a mediation. The parties cannot use anything discussed in the mediation at trial, and no one can call the mediator as a witness at trial. Accordingly, you are free to speak your mind in mediation without fear that it will hurt you later.

A successful mediation results in a negotiated settlement agreement between the parties. Frequently, mediations end with the parties signing "minutes of settlement". One of the great strengths of mediation is the flexibility of the potential settlements, which can often address issues very differently from the remedies available to a judge. This is particularly useful for estates where non-commercial, family-related disputes with historical grievances often have significant non-monetary elements that require solutions beyond the jurisdiction of a judge.

The process of mediation

First, the parties must choose a mediator and set a date.

Second, the parties enter into a mediation agreement. This agreement confirms the compensation of the mediator, the fact that the mediation is strictly privileged and confidential, and that no party may call the mediator as a witness at trial for disclosure of what took place at mediation. **The mediation agreement is often signed by all parties at the very beginning of the mediation – do not be surprised if you are asked to sign before the mediation begins.**

Third, the parties submit to the mediator and to each other mediation briefs which set out their positions, key documents and facts, and the outcome they hope to achieve. A properly prepared mediation brief should not just be a recitation of the other materials in the litigation (the pleadings, for instance). The mediation brief should provide a full and frank assessment of your own case and the case of the other sides. Indeed, the clearer you are about everyone's strengths and weaknesses in your mediation brief, the better.

At the mediation itself, the mediator often meets at the beginning with all parties and their counsel together at once (referred to as a plenary session). In a plenary session the mediator will explain the process, their role, and the role of everyone else. Plenary sessions can be waived when they would not assist.

Sometimes, but not often in estate disputes, the parties will present their position to the other parties and the mediator plenary session. Often in estate disputes this is not required and would be counter-productive.

After the plenary session, the parties break into separate rooms. This phase is referred to as "caucus" or "caucusing". During this phase, the mediator meets with the parties separately to try to find areas of common ground, issues that need to be worked on, and settlement options.

The best mediators do not take sides, but have the experience, credibility and skill to provide each party in confidence a frank assessment of the strengths and weaknesses of their case (called "evaluative mediation"). Often mediators remind the parties of the painful alternatives to settlement and the costs of on-going litigation.

Does mediation work?

Yes.

Mediation is often successful at resolving an entire dispute. Even when the parties do not resolve the full dispute, mediation can still be helpful for resolving some issues and narrowing the scope of the dispute. It also provides an opportunity to see the other parties and their counsel in action – which can be very useful information about their personalities, dispositions, skills, and understanding of the case.

What does mediation cost?

Mediation is not free. A reasonable estimate is that a one-day mediation will cost each party approximately $10,000 +HST. Each party must pay their counsel to prepare and to attend. Also, each party must pay their share of the mediator's costs (which are roughly what senior lawyers charge).

Common estate disputes

The executor will not show the will to family

Family members and beneficiaries do not have a blanket right to see or receive a copy the will. There is no right to a 'reading of the will' in Ontario.

If the executor probates the will, the executor must provide notice (with a copy of the relevant portions of the will) to each beneficiary under the will. If a 'potential beneficiary' has not received such a notice then either the executor has not filed for probate, or, the individual is not an actual beneficiary.

If the executor has not applied for probate, then the solution is to commence proceedings to either a) have them passed over as the estate trustee, or b) compel them to 'apply or renounce'. These proceedings can usually be prosecuted by Application.

Objecting to a will and will challenges

Ontario is a 'testamentary freedom' jurisdiction. A testator in Ontario has no obligation to gift anything to anyone who was not either a) their married spouse or b) financial dependent on them before their death (these claims are discussed below). The law is very different in other places (most civil law jurisdictions, and some common law provinces like British Columbia).

Adult children of the deceased who were not financially dependent on the deceased prior to their death have no enforceable claim against the estate just because they were a child of the deceased. The deceased can unilaterally cut one or all of their adult non-dependent children 'out of their will'.

Challenging a properly signed will to have it set aside is possible, but usually very difficult. The most common grounds of a direct will challenge are:

- Lack of capacity. For a will to be valid, the testator must have the capacity to make a will at the time it is made. A testator must have a reasonable understanding of their finances, their

financial obligations, and the consequences of the choices in their will. A precise or detailed understanding is not required, but a general comprehension is. Thus, a testator who suffers from severe dementia and is unaware of their finances or family members may lack capacity. Note, however, that the mere fact that someone has been diagnosed with dementia does not mean that they lack the capacity to make a will. The capacity to make a will is a legal test, based on a number of factors, and the threshold is relatively low.

- the testator was 'unduly influenced' by a beneficiary; undue influence requires proof that the will of the testator was unduly swayed by pressure exerted on them by the beneficiary. Note that 'some influence' among family members is to be expected, especially from spouses and children and is actually a regular and important part of loving relationships. The mere fact that a spouse or one favoured child receives a disproportionate share of the estate does not prove that the individual exercised undue influence over the testator. Undue influence is very hard to establish among spouses; it is more plausible if the allegation is that a child or third party caregiver threatened or coerced a vulnerable testator, especially if the caregiver controlled all aspects of the testator's life and prevented others from visiting or speaking to the testator. In order for a will to be set aside for undue influence it is outright and overpowering coercion of the testator, which must be considered. The party attacking the will bears the onus of proving undue influence on a balance of probabilities.

[Note that in some challenges to the transfer of assets by the deceased before they died the onus is reversed – there may be a presumption of undue influence, which must be rebutted for the *inter vivos* transfer to be upheld].

In a will challenge, the onus is on the challenger to prove that the impugned will is invalid. However, gathering evidence to meet this burden can be difficult and expensive. Even gathering enough evidence to determine if there is a possible case can be difficult, time-consuming and expensive.

Often the challenger has limited access to the medical records of the testator, and no knowledge about how the will was made. The testator's lawyer owes a duty of confidentiality to the testator and cannot readily disclose information received from the testator to anyone other than the estate trustee. Moreover, if the allegation is one of undue influence by a primary caregiver then the challengers may have very limited knowledge of the true relationship (especially if they allege that the caregiver controlled access to the testator). Accordingly, a Court order is often required for the beneficiaries to access the lawyer's file and medical records, which the beneficiaries need before they can determine whether the will challenge has any merit and any prospect of success. This creates a significant hurdle for many beneficiaries.

Most will challenges involve issues of credibility and therefore require a trial.

There are a shockingly large number of wills made late in life by individuals of diminished capacity that result in an abrupt change of their estate plans, and often to the complete detriment of all but the person serving as their caregiver. These cases are very suspicious and troubling. They also raise significant ethical and insurance issues for any lawyer involved in preparing this 'late stage will'. Because disputes about these wills are so painful and expensive, hopefully there will be a trend towards much better and clearer documentation of the testator's capacity and wishes – often a video of the testator giving will instructions and expressing their intentions would, for instance, be very helpful.

There are alternatives to direct will challenges. These cases can often be prosecuted by way of Application without a Trial, and often have a lower or reversed onus, such that the challenger does not have to meet as onerous an evidential burden. Some of these claims are discussed below.

Debt and Quantum Meruit Claims

People die owing money. Sometimes, these debts are sometimes addressed by way of bequest in the will, but when they are not, the creditor has other remedies.

Some of these claims are for fixed amounts due from the deceased to the creditor (a loan for instance). These are "debt claims". Other claims are for 'fair and reasonable compensation" for services rendered by the claimant to

the deceased. These are also debt claims, but are frequently referred to as 'quantum meruit' claims which refers to the amount of 'fair and reasonable compensation'.

If the deceased fails to pay money to anyone they owe money to (a creditor), the creditor has a debt claim that they can make against the estate. The estate trustee is personally liable if they fail to pay any valid debt of the deceased before they distribute the estate to the beneficiaries. Accordingly, the estate trustee is highly motivated to resolve debts of the deceased prior to distribution of the balance of the estate.

Debt claims rank above all inheritances and must be paid in full before anyone inherits from the estate assets. The *Estates Act* and the *Rules of Civil Procedure* provide a summary means for resolution of claims by creditors against the estate. These proceedings can be tailored to the circumstances, and thus should be faster and less expensive than the usual 'law suits to recover debts'.

Child and spousal support owed by the deceased

Child support and spousal support that was due before the death is a debt due by the deceased on their death and must be paid by the estate prior to any distribution of estate assets to beneficiaries.

Child support that might be due for the period after the death is a more complex issue. It is important to determine a) whether support remains due, or whether, for instance, proceeds of a life insurance policy are instead of future support (the precise wording of a separation agreement or court order may be extremely important), and b) the value of the future support due. Complex valuation issues can arise, as support is often contingent on a number of factors which are difficult to estimate in advance. For instance, if the deceased dies when their child is 17, how is one to estimate the likelihood and cost of supporting that child through post-secondary education?

Unjust enrichment and constructive trusts

Sometimes an individual has contributed to the acquisition, creation, or preservation of an asset but the asset is owned solely by the deceased and it appears very unfair if the contributor receives none of the benefit of their contributions when the owner dies.

Examples of these claims include contributing to the growth of the family farm or business without owning any of it, or paying premiums for insurance on the life of the deceased, only for the proceeds to be paid to a third party on the death of the insured.

Claims of this nature are based on the equitable doctrine of 'unjust enrichment', which is often related to 'constructive trusts'. Constructive trusts and unjust enrichment are tools for addressing manifest unfairness. Not all uncompensated contributions are grounds for unjust enrichment. To establish a claim for unjust enrichment, the claimant must prove that:

a) the recipient received value from them;
b) the claimant has suffered a corresponding deprivation; and
c) there is no 'juristic reason' for the deprivation.

Unjust enrichment claims are very fact dependent.

May unjust enrichment claims arise when there is little or no written documentation to support claim. The outcome often depends greatly on the evidence of a number of witnesses, each of whom may have less than perfect recollection and many of whom are biased. These are difficult, expensive cases to prosecute.

Family Law Act claims

In Ontario, a married spouse is entitled to elect to take:

- If there is a will, then either –
    - what they will inherit under the will, or,
    - what they will receive by way of equalization payment under the Family Law Act as if their relationship ended on the day before the spouse died, or
- if there is no will, then either –
    - what they are entitled to receive under the *Succession Law Reform Act* or,
    - what they are entitled to receive by way of equalization payment under the Family Law Act as if their relationship ended on the day before the spouse died.

This means, in effect, that a married spouse cannot be completely disinherited under a will and can never be forced to receive less than what they would receive as an equalization payment 'in a divorce' (which, is approximately 50% of the gain in value of net family property by the parties during the marriage).

If the surviving married spouse elects to take their entitlement under the Family Law Act, then the remaining estate of the deceased is distributed under the will or *Succession Law Reform Act* as if the surviving spouse pre-deceased the deceased spouse.

These elections must be made within 6 months of the death. If they are not made in this time frame, then the spouse will receive as provided in the will or under the *Succession Law Reform Act*.

These Family Law Act remedies are **not** available to common law spouses in Ontario.

Dependent support claims

Where the deceased, whether testate (with a will) or intestate, has made inadequate provision for the support of a person who the deceased was either supporting financially or was legally obliged to support financially at the time of their death, the Court may make an Order to support the dependent person 'from the assets of the deceased'.

Dependent support orders made under the *Succession Law Reform Act* are a very powerful tool to address unfairness to individuals who were financially dependent on the deceased. Dependent support claims are particularly useful for financially dependent common law spouses (and ex-spouses) when the deceased failed to make a will (intestacy).

A wide range of assets that can be considered by the judge for payment of dependent support. These include many assets that often fall outside the true estate of the deceased. For instance, dependent support orders can consider and apply to the proceeds of life insurance on the life of the deceased, jointly owned assets (such as bank accounts and real estate), and assets that pass by beneficiary designation such as RRSPs, RRIFs, and TFSAs.

Interim orders for dependent support are possible.

A claim by a dependent for support must be filed within 6 months of the grant of probate for the estate of the deceased.

This limitation period explains why is often unwise for an estate trustee to distribute the estate of the deceased sooner than 6 months after the grant of probate.

Jointly owned houses and bank accounts

Sometimes the issue is not 'is the will valid' but 'were assets that should be in the estate transferred before death' so that they no longer fall into the estate? In particular, significant concerns can arise related to:

- Joint ownership of assets (real estate, bank accounts), and
- Beneficiary designations (life insurance, RRSP/RRIF, TFSA).

While the effect of the transfer often only becomes apparent on death, the 'transfer' or change in tile or designation actually took place before death.

Beneficiary designations for registered investment funds (RRSPs, RRIFs, TFSAs) are difficult to attack. There are possible grounds of attack if the testator did not actually make the designation (ie. It was made by someone other than the testator), or the testator lacked capacity when the beneficiary designation was made, or the testator was coerced or unduly influenced into making the designation. However, it is important to keep in mind that these are narrow grounds, difficult to prove, and rarely supported by the evidence.

Where assets (real estate, bank accounts) are transferred into joint ownership the law makes a crucial distinction based on who the joint owner is. Joint ownership between spouses is normal and expected (even if the spouse is recent and common law). Joint ownership between spouses is extremely difficult to attack because the presumption is that spouses wish to support each other and share their assets.

Joint ownership between a parent and their adult child is an entirely different matter. Joint ownership of a bank account with an adult child is often established so that the child can assist the parent with their banking, in lieu of acting under a power of attorney. This joint ownership for administrative convenience does not prove an intention by the parent to gift the balance of the joint account to the child on their death. Similarly, many transfers of real estate by a parent to joint ownership with an adult child were intended to minimize estate administration tax and not as and outright gift to the adult child.

When a bank account or real property is placed into joint ownership by a parent with an adult child, the law presumes that the child will hold the asset in trust for the estate of the parent, and the asset will not pass automatically

to sole ownership by the joint-owner child. The is known as the rebuttable presumption of resulting trust.

For the child to take the asset outright, the onus lies on the child to prove that the parent intended to gift the asset to them, to the exclusion of the parent's estate and other heirs. This is how the presumption is rebutted.

This shifting of the onus of proof is very important. Beneficiaries aggrieved by a joint ownership situation do not need to prove that the asset belongs to the estate – it is presumed to belong to the estate unless the joint owner child can rebut this presumption.

These issues can often be dealt with by way of Application. The Application can be filed with relatively little evidence from the Applicant, and forces the joint owner child to disclose what evidence they have that the asset was gifted to them.

If a parent wants to gift an asset to one of their adult children and ensure that it is not impressed with a resulting trust and is pulled back into their estate to be shared with all heirs, the parent should document the intention to gift. A written, signed document expressing the intention is preferred; a mere transfer of title of a property by a real estate lawyer is not sufficient.

Objecting to an executor (Passing over and removal of an estate trustee)

*"**Passing over**" occurs when the Courts choose not to appoint an executor named in the will as the estate trustee.*

*"**Removal**" of an estate trustee occurs when the Courts terminate the appointment of an estate trustee who has previously been granted a Certificate of Appointment.*

A testator has the right to choose their executor, and the Courts prefer to respect that choice. The test that the Courts apply for passing over or removal is the same, and it is onerous. Only in very clear cases will the Courts over-rule the wishes of the testator. The evidence must show that the appointment of the named individual will imperil the proper administration of the estate. Examples include where the individual has a clear conflict of interest, is disregarding the terms of the will, or the trustee is so hostile to certain beneficiaries that the trustee is disregarding their obligations.

Note that hostility of the beneficiaries to the trustee is not normally reason to remove a trustee.

The basic principles the Court will consider are:

- The testator's choice of estate trustee should not be lightly interfered with;
- The removal of the estate trustee should only occur on the clearest of evidence and there is no other course to follow;
- The Court's main guide should be the welfare of the beneficiaries;
- The applicant must show that non-removal of the trustee will likely prevent the trust from being properly executed;
- Removal is not intended to punish past misconduct; and,
- Friction alone is not a reason for removal.

Passing over and removal proceedings can often be prosecuted by Application.

Challenging the behavior of the estate trustee

Delay probating the estate

An executor is permitted a 'reasonable' period of time to probate a will. It is unreasonable to expect probate to have occurred within days or a few weeks of the death.

However, when an executor has failed to probate for a long period of time (especially if it is over a year) an Application can be brought to compel the named executor to 'probate or renounce' in a reasonable timeframe.

Alternatively, the executor's delay probating can be evidence used to support an Application to pass over that executor and have someone else appointed the estate trustee.

After probate, the estate trustee is not administering the estate properly

Beneficiaries are not entitled to micro-manage the estate trustee. However, when the estate trustee is unreasonably slow, or is clearly failing to administer the estate properly (or at all) or is incurring unnecessary or excessive expenses, the beneficiaries are not without rights or remedies. In all of these cases, beneficiaries must offer proof of misconduct, not mere speculation or personal grievances.

One common cause of slow estate trustees is that the estate trustee has a built-in conflict of interest (for instance, the estate trustee may be living rent-free in the house of the deceased, with no desire to sell the house). Another is that the estate trustee is unwilling or incapable of addressing contentious issues (for instance, that a sibling lives in the house of the deceased and refuses to leave) or the estate trustee may simply too overwhelmed by grief and the tasks required to administer the estate. In

these cases it is important to focus on the facts, and usually not very important to focus on 'blaming the estate trustee'.

These cases can often be prosecuted by Application. Generally, but not always, it is preferable to focus on compelling the estate trustee to complete the administration of the estate and a distribution to the beneficiaries, rather than focusing on having the estate trustee removed and replaced.

Challenging estate trustee compensation

Estate trustee compensation is a very common cause of disputes. An estate trustee is entitled to reasonable compensation for performing the role.

- It is not reasonable to expect the estate trustee to perform the role for free.
- The estate trustee is not entitled to unreasonable or excessive compensation.

Unreasonable and excessive interventions of beneficiaries can significantly increase the compensation due to the estate trustee as well as the fees of the estate trustee's lawyer.

There is a very rough rule of thumb that the executor is entitled to compensation equal to 5% of the value of the estate. This is a very rough guide, and is not the law. It is not a justification for excessive compensation.

What is reasonable compensation depends on a wide range of factors, including in particular the complexity of the issues, the time, skill, and effort of the trustee, the amounts in issue, and the number of years the estate needed to be open. Size is not determinative: some large estates can be much simpler to administer than much smaller estates, and the mere fact that an estate is large should not result in a windfall to the estate trustee (this is particularly true where large but simple investment portfolios or a single piece of residential real estate have resulted in the estate being large but simple). The amount of effort expended by the trustee is a guide, but not determinative, of the actual complexity of the estate and thus the magnitude of reasonable compensation. Compensation should not increase

for trustees who are unreasonably slow to act or inefficient or perform tasks personally that could have been handled much more efficiently by third parties.

Sometimes estate trustees claim compensation on the incorrect value of the estate. For instance, it is usually incorrect to claim compensation on the gross value of real estate and on the mortgage and real estate commissions, rather than on the net proceeds received from the real estate lawyer after sale of the property and payment of all related debts and expenses.

Another frequent cause for complaint is double dipping – this occurs when the trustee claims compensation when they have a third party (especially a lawyer) to perform estate trustee tasks. The amount paid to the third party should be deducted from the trustee's compensation.

Trustee compensation is best challenged in a passing of accounts. If the estate trustee has not applied to pass their accounts, the beneficiaries can secure a Court order compelling the estate trustee to pass them. Because it is an obligation of the estate trustee to provide accounts, no reason must be provided to compel an accounting. The costs of commencing these applications (to pass accounts, and to compel a passing of accounts) are usually borne by the estate.

A demand for a passing of accounts is not a challenge to the trustee's integrity. Trustees faced with a request for accounts should not be insulted – they should simply get on with the job of providing and passing their accounts.

It is an obligation of the estate trustee to prepare their accounts, and accordingly if a third party is hired to prepare the accounts in Court format these fees should usually be deducted from executor compensation.

The legal fees incurred both making and responding to objections to the accounts (by both beneficiaries and the estate trustee) are open for consideration by the judge presiding over the passing of accounts. Generally, the 'loser pays' approach of civil litigation should apply. Offers to settle objections should have an impact on both who owes whom and how much.

About Us

We are **Miltons Estates Law** a team of Ontario lawyers dedicated to providing excellent estates law services. We act for parties to estate disputes, advise executors with non-contentious estates, and act as estate trustees. We focus on providing advice that is practical, cost-effective, and results-oriented.

We do not draft wills.

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