Record Keeping and Accounting by Estate Trustees, Attorneys and Guardians of Property

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Peel Law Association
Continuing Professional Development

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Estate Trustees

Estate Trustees are fiduciaries and must act in the best interests of the beneficiaries of the estate. Estate Trustees have a common law duty to maintain accounts of what they have done with the trust property[1].

The Trustee is obliged to provide a complete set of accounts, a true and perfect accounting at all times[2].

While the formal rule is that Estate Trustees have a duty to constantly be ready to account, in practice, it is not always practical to produce accounts on the spot. Timing of the delivery will depend on the circumstances and should be governed by common sense[3]. Although Estate Trustees are usually given one year to administer an estate of average complexity, an Estate Trustee would be wise to be ready to account before the "executor year" expires.

Strictly speaking, an Estate Trustee does not have to account without being asked to do so or being ordered to do so by the court. In the vast majority of cases, the Estate Trustee will voluntarily account to the beneficiaries as part of the process to complete the administration of the estate. An estate is said not to be complete until the beneficiaries or the courts have approved the administration of the estate. Beneficiaries will not approve the administration without first reviewing the accounting. An Estate Trustee should not distribute the estate without getting some assurance that the beneficiaries are satisfied with the administration and will not be making claims against the Estate Trustee in the future.

A Trustee will need to account if the Trustee is seeking compensation. In the absence of an accounting, the Trustee may be disentitled to compensation[4].

Where all of the beneficiaries of the estate are sui juris and have legal standing to approve the accounts, it is standard and accepted practice on an interim or final distribution, in lieu of a passing of accounts, to deliver the accounts and to ask the beneficiaries to sign a Release[5].

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[1] The comments and opinions expressed in this paper are those of the author and are provided for information purposes only. They do not constitute nor should they be relied upon as legal advice.

[2] *Advocate General v. Rocca* [1996] O.J. No. 121 (Ont. C.J.)

[3] *Sanford v. Porter* (1889), 16 O.A.R. 565 (Ont. C.A.)

[4] *Zimmerman v. Fenwick* (2010) 103 O.R. (3d) 25

[5] *Bedout Estate* [2004] O.J. No. 4267, 9 E.T.R. (3d) 59

If a beneficiary is not willing to provide a Release, the Estate Trustee will usually seek formal approval of the accounts from the courts. The Judgment on a passing of accounts has the same practical effect as the Release.

It would be improper to hold the beneficiary's share of an estate as ransom until a Release is delivered. It is proper, however, to hold back some portion of the estate to cover the expenses of a formal passing of accounts. How much to hold back will depend on the circumstances and the issues in dispute.

If beneficiaries are asked to sign a Release and the Estate Trustee plans to rely on it , the Estate Trustee must also ensure that the beneficiaries receive competent, independent advice when reviewing the accounts[6]. It is common practice for the solicitor for the Estate Trustee to forward the accounts to the beneficiaries with the form of Release. The beneficiaries should be advised to obtain independent legal advice. Each beneficiary should also be advised that he or she is entitled to question any aspect of the administration of the estate. It is good practice to advise the beneficiary of the right to object and, if necessary, to seek a formal passing of accounts in court.

At common law, there is no specific form in which is the estate accounts must be kept or produced. However, if the accounts are being approved by the court, the accounts must be in the form set out in the Rules of Civil Procedure[7]. This is commonly referred to as "court form accounting". It is now common practice to prepare court form accounts even if the accounts are not being approved by the court, although every case will depend on the circumstances.

If all of the beneficiaries are not willing to provide a Release or if all the beneficiaries are not sui juris, one or more persons with a financial interest in the estate may compel the Estate Trustee to pass accounts[8]. The Estate Trustee may also voluntarily issue an application to pass accounts[9].

Although persons with a financial interest may ask the court to order an Estate Trustee to pass accounts, there are cases where the court will refuse to do so, especially if the person seeking the order is acting in a vexatious manner or the cost of passing formal accounts is disproportionate to the size of the estate. Similarly, if the beneficiary was involved in the administration of the estate and knew of decisions and acquiesced in what the Estate Trustee did, the court may refuse to order a formal accounting. In other

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[6] *Rooney Estate v. Stewart Estate* [2007] O.J. No. 3944

[7] Ontario Rules of Civil Procedure, Rule 74.17

[8] Ontario Rules of Civil Procedure, Rule 74.15(1)(h) and *Estates Act*, R.S.O. 1990, c. E.21, section 50

[9] *Kenny v. Jackson* (1827) 162 E.R. 523; *Trustee Act*, R.S.O. 1990, c. T.23, s. 23

words, the person with a financial interest does not have an absolute right to a formal accounting. The courts have an overriding discretion to compel a passing of accounts[10].

While a testator can provide some direction about the form of accounting that an Estate Trustee will be required to provide to a beneficiary, the testator cannot oust the jurisdiction of the court to compel an accounting and any clause in a Will purporting to do so will be unenforceable. Estate Trustees are always subject to the supervision of the courts[11].

In addition to providing the accounts, the Estate Trustee must also be ready to produce various underlying records to confirm the entries in the accounts. Such records would include vouchers, receipts, valuations, cancelled cheques, bank statements, legal bills and business and corporate records. All documents that are needed for a complete explanation of the accounts should be available for inspection[12]. If a beneficiary wants a copy of any record, the beneficiary is usually responsible for the cost of producing a copy.

Some documents, such as the Trustee's minutes of meetings relating to discretionary decisions, do not have to be produced to the beneficiaries.

The accounts for the estate must also be separate from the personal accounts of the Estate Trustee. If an Estate Trustee mixed estate assets with personal accounts, the personal accounts can be deemed to be property of the estate and personal information may also need to be provided.

Where the beneficiary has alleged lack of good faith or breach of fiduciary duty, certain privileged communications such as communications with the estate solicitor can be compelled to be produced[13].

In practice, there is some confusion about whether all beneficiaries, including contingent beneficiaries, are entitled to an accounting and records. The general rule is that all beneficiaries, including contingent beneficiaries, are entitled to all information that relates to the beneficiary's interest in the estate. For example, a beneficiary entitled to a cash legacy is not entitled to an accounting unless the beneficiary's interest is affected by the costs and expenses of administration that result in the loss or diminution of the legacy. A beneficiary who is entitled to a share of residue is usually entitled to all

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[10] *Rose v. Rose* 2006 CanLII 20856 (Ont. S.C.) at 79

[11] *Schmidt v. Rosewood Trust Ltd.* [2003] UKPC 26 (P.C.)

[12] *Pearse v. Green (1819) 1 J.W. 135*

[13] *Ontario Attorney General v. Ballard Estate* (1994) 20 O.R. (3d) 350 (Ont. G.D.)

records and accounts relating to the administration of the estate. If the beneficiary's interest is held in trust and may pass to an alternate beneficiary, the contingent beneficiary is entitled to a full accounting for all matters that affect that trust. Creditors may also be entitled to an accounting to the extent that their interests are affected.

Where the primary or contingent beneficiary is not sui juris or is under a legal disability, the Children's Lawyer will represent the interests of minors and the Public Guardian and Trustee will represent the interests of mentally incapable persons. The Children's Lawyer does not have formal authority to approve the accounts and cannot give a Release on behalf of a minor.

Effective January 1, 2015, the Minister of Finance of Ontario is also entitled to records relating to the administration of the estate if a Certificate of Appointment of Estate Trustee is required with or without a Will. The Minister of Finance has audit powers under the *Estate Administration Tax Act* of Ontario ("EATA"). Under section 4.9 of the EATA, the Estate Trustee must keep records and books of account that will enable the accurate determination of the tax payable.

Attorneys for Property and Guardians of Property

Section 42 of the *Substitute Decisions Act, 1992*[14] ("SDA") provides as follows:

> Passing of accounts
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> (1) The court may, on application, order that all or a specified part of the accounts of an attorney or guardian of property be passed.
>
> Attorney's accounts
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> (2) An attorney, the grantor or any of the persons listed in subsection (4) may apply to pass the attorney's accounts.
>
> Guardian's accounts
>
> (3) A guardian of property, the incapable person or any of the persons listed in subsection (4) may apply to pass the accounts of the guardian of property.
>
> Others entitled to apply
>
> (4) The following persons may also apply:

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

1. The grantor's or incapable person's guardian of the person or attorney for personal care.

2. A dependant of the grantor or incapable person.

3. The Public Guardian and Trustee.

4. The Children's Lawyer.

5. A judgment creditor of the grantor or incapable person.

6. Any other person, with leave of the court.

P.G.T. a party

(5) If the Public Guardian and Trustee is the applicant or the respondent, the court shall grant the application, unless it is satisfied that the application is frivolous or vexatious.

Filing of accounts

(6) The accounts shall be filed in the court office and the procedure in the passing of the accounts is the same and has the same effect as in the passing of executors' and administrators' accounts.

Powers of court

(7) In an application for the passing of an attorney's accounts the court may, on motion or on its own initiative,

(a) direct the Public Guardian and Trustee to bring an application for guardianship of property;

(b) suspend the power of attorney pending the determination of the application;

(c) appoint the Public Guardian and Trustee or another person to act as guardian of property pending the determination of the application;

(d) order an assessment of the grantor of the power of attorney under section 79 to determine his or her capacity; or

(e) order that the power of attorney be terminated.

(8) In an application for the passing of the accounts of a guardian of property the court may, on motion or on its own initiative,

(a) adjust the guardian's compensation in accordance with the value of the services performed;

(b) suspend the guardianship pending the determination of the application;

(c) appoint the Public Guardian and Trustee or another person to act as guardian of property pending the determination of the application; or

(d) order that the guardianship be terminated.

When the Attorney for Property or Guardian of Property is ordered to pass accounts, the accounts should be in court form under Rule 74.17. Rule 74.16 provides that Rule 74.17 applies, with necessary modifications, to accounts of persons acting under a Power of Attorney and Guardians of Property. See also Section 42(6) of the SDA which provides that the accounts shall be filed in the court office and the procedure in the passing of accounts is the same as the passing of accounts for an Estate Trustee. Ontario Regulation 100/96 also spells out the accounts and records that Attorneys and Guardians must maintain.

Section 42(4) of the SDA lists the persons who may apply to court requesting an Attorney for Property or Guardian of Property to account. The SDA also allows any person to request an accounting with leave of the court.

A Guardian of Property may be appointed by court Order. The Order of the court appointing the Guardian usually directs the Guardian to pass accounts and usually specifies when the accounts must be passed.

To be appointed a Guardian of Property, the person must submit a Management Plan for the administration of the incapable person's property. The Guardian has a duty to manage property in accordance with the Plan and future accounting should tie in with the Management Plan[15].

When an Attorney for Property is appointed by the grantor, the Attorney may be authorized to act even if the grantor is not incapacitated. In other cases, the Attorney may not be authorized to act until there is a finding that the grantor is incapable of managing property. The Attorney for Property may therefore act both as an agent and a fiduciary and, depending on the facts, the courts may find that an agent also acted in a fiduciary capacity.

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[15] *Substitute Decisions Act, 1992,* s. 32(6)

A Guardian of Property is always a fiduciary[16].

In cases where the grantor of the power was able to monitor the activity of the Attorney, the grantor may request the Attorney to account. If the grantor of the power subsequently dies, the Estate Trustee of the estate may request the Attorney to account, even though the grantor had no incapacity while he was alive[17].

If the grantor of the power dies, the Estate Trustee of the estate may request an accounting from the Attorney for Property. However, the person seeking an accounting after the death of the grantor may be someone other than the Estate Trustee[18]. The accounting can be requested by a beneficiary or a creditor.

In *Fair v. Campbell Estate*[19], Langdon J. held that different duties to account depend on the capacity of the donor. In a case where the Attorney did not manage all financial transactions, the Attorney is not obliged to account for the decisions over which he or she did not have control or influence. However, in *Fareed v. Wood*[20], the judge, on the facts of that case, ordered the Attorney to account for all transactions even those that the grantor undertook herself.

In summary, the court has discretion to order that all or part of an Attorney's accounts be passed, whether the grantor was capable or not, and each case will depend on the circumstances.

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[16] *Substitute Decisions Act, 1992,* s. 32(1)

[17] *Roger Estate v. Leung* [2001] O.J. No. 2171

[18] *Cornacchia v. Cornacchia* [2007] O.J. No. 157

[19] *Fair v. Campbell Estate* (2002) 3 E.T. R (3d) 67

[20] *Fareed v. Wood* (2005) WL 1460361 (Ont. S.C.J.)