



Executor's Compensation: A Lesson in What Not to Do

by Sharon Davis

Executors have a fiduciary duty to look out for the best interests of the beneficiaries for whom they act and are held to very high standards in so doing. Unless waived or specified otherwise in the will, executors are entitled to compensation for their services based on "such fair and reasonable allowance for the care, pains and trouble and the time expended in and about the estate" pursuant to Section 61 of the *Trustee Act*, R.S.O. 1990, c. T.23 as amended.

Executors Compensation – General Guidelines

The usual percentages or tariff guidelines that have evolved over time in Ontario are 2½ per cent on capital receipts (amounts converted from the original assets) and capital disbursements; 2½ per cent on revenue receipts and revenue disbursements; and, in appropriate circumstances, a management fee of 0.4 per cent (2/5 of 1 per cent) per annum of the average annual market value of the trust assets. These percentages are based on the actual total receipts in the hands of the trustee, and not on the original assets.

However, these percentages are a guideline only, and are a starting point after which the following factors are considered to determine the appropriate amount of compensation:

1. Magnitude of the estate.
2. Care and responsibility required.
3. Time spent in performing the duties.
4. Skill and ability applied.
5. Success of the administration.

Unless specifically provided for in the trust document, the Trustee must not pre-take compensation without first passing his or her accounts, or obtaining permission of the beneficiaries to do so. The recent contested passing of accounts case of *McDougall Estate*, is instructive with respect to trustee compensation and considers the kinds of factors that might reduce compensation owing to a trustee. It is also illustrative of the consequences when a trustee pre-takes compensation without the requisite authority.

McDougall Estate, 2011 ONSC 4189 (CanLII)

In *McDougall Estate*, the testator passed away leaving a handwritten will and codicil that together constituted a valid holograph will (the "will"). The testator had one surviving relative, his 83-year-old sister who lived in Florida. The will did not name an estate trustee and so the testator's close friend applied for and obtained a Certificate of Appointment of Estate Trustee with a Will.

The Will

The will left the estate to the testator's sister, with a gift-over to "Eye Care research in Glaucoma and Catarach (sic)

research". The codicil said "this shall be expanded after all expenses and encumbrances (sic) including burial, and the portion to [illegible – the Court determined it was either "expand" or "eye and"] glaucoma ... At my death the remainder of my possession shall be bequathed (sic) to my sister Pearl McDougall, now residing in Florida."

In order to fulfill the charitable bequest, the estate trustee flew to Jamaica at a cost of \$859.00 to deliver a cheque for \$9,000.00 to a clinic for which the testator had a personal passion. She delivered the donation herself because she wanted to make sure the charity was legitimate.

Factors claimed in support of a reduction of compensation

The beneficiary objected to the estate trustee's compensation on the passing of her accounts. In issue was whether the estate trustee's compensation should be reduced because she:

1. Made an improper distribution to a charity that was not authorized by the will.
2. Failed to make an inventory of the contents of the testator's house and failed to offer the beneficiary any of the testator's personal effects.
3. Pre-took compensation.
4. Paid too much in legal fees out of the estate.

Failed charitable gift

The Court found that the will had to be read together with the codicil in which the testator clearly referred back to his original will. Reading the will as a whole, the testator intended to make a charitable gift for eye and glaucoma research. However, the charitable gift failed because the testator failed to specify an amount or share.

In the circumstances, the estate trustee's interpretation of the will was not unreasonable. She derived no personal benefit from the charitable gift and it was not suggested she had an ulterior purpose in travelling to Jamaica other than to investigate the charity and to make sure the money was delivered so as to avoid criticism by the beneficiary. She had good reason to select the charity based on the testator's own eye surgery, his prior charitable donations, and his connection with Jamaica, and for choosing to make a donation in the range of approximately 3% of the value of the estate.

Furthermore, the Court accepted the estate trustee's evidence that she informed the beneficiary of her intention to make the donation. The estate trustee was therefore not liable for an innocent mistake made in good faith and was not required to reimburse the estate or to have her compensation reduced for making a charitable donation pursuant to an ineffective gift.

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Failure to prepare an inventory of personal property

The beneficiary also objected to the manner in which the estate trustee dealt with the testator's personal effects. The beneficiary argued that the estate trustee's compensation should be reduced because she neglected to prepare an inventory of the contents of the testator's house and failed to offer the beneficiary any personal effects, which were items of sentimental value.

The Court found that the contents of the house were of little value and had to be cleaned out for sale, that the beneficiary never indicated that there was anything of sentimental value that she wished to receive, and that, therefore, the estate trustee's compensation should not be reduced for the manner in which she dealt with the personal effects.

Relevant factors re determination of proper compensation

The estate trustee pre-took compensation of \$14,322.50, which was 5% of the value of the estate as originally calculated. However, she admittedly overpaid herself by \$1,163.24 because she included an incorrect amount for payment to a utility company, and calculated compensation based on the gross, rather than the net, proceeds of sale for the house. The estate trustee therefore was ordered to repay the \$1,163.24 to the estate.

In determining the appropriate amount of compensation, the Court considered the five central factors enumerated earlier in this article: The size of the trust, the care and responsibility involved, the time to perform the duties, the skill and ability required, and the success of the administration.

The estate trustee was the only person who was willing to apply for a Certificate of Appointment of Estate Trustee with a Will and expended a great deal of time and energy looking after the testator's affairs before and after his death. While the estate was not large, it was time-consuming to administer.

Pre-taking compensation

The Court noted that the law is clear that estate trustees ought not to pre-take compensation unless authorized in the trust document or the executor's accounts have been approved by the beneficiaries.

Interestingly, the estate trustee did not know she was entitled to compensation until told by a bank employee that she was entitled to 5%, shortly after which she took compensation. She was wrong to do so. As is all too common, she did not seek legal advice prior to pre-taking.

The proper remedy for the pre-taking of compensation was payment of interest (according to the applicable pre-judgment interest rates in the Courts of Justice Act R.S.O. 1990, C.C.43 as amended) on the amount pre-taken. Accordingly, the estate trustee was ordered to repay to the estate the \$1,163.24 she overpaid herself plus interest of \$360 on the total amount pre-taken.

Legal fees

The beneficiary claimed that the estate trustee should be personally responsible for paying for some or all of the \$14,853.36 in legal fees paid out of the estate.

The fees paid to obtain the Certificate of Appointment were a reasonable estate expense; especially considering the sole beneficiary lived out of the jurisdiction.

An estate trustee is personally responsible to prepare accounts. If they are prepared by someone else such as

an accountant or lawyer then the costs of preparation are deducted from the trustee's compensation.

Fees incurred to address a beneficiary's concerns about the administration of the estate would be ordinarily payable personally by the estate trustee subject to an order for reimbursement after the conduct of the trustee has been examined.

It was not unreasonable for the estate trustee to seek legal advice to respond to the inquiries from the beneficiary's lawyer. While amounts paid to respond to questions about the administration of the estate were not, at first instance, a proper charge to the estate, such costs were allowed because they were properly incurred by her to respond to the beneficiary's challenges to her administration of the estate.

The payment of legal fees by the estate that ought to have been paid at first instance by the estate trustee was a form of pre-taking of compensation and so the estate trustee was liable for interest on that amount, which was fixed at \$70.00.

Costs of the passing of accounts

It is also worth noting that the estate trustee did not get her costs on the passing of accounts itself. Even with the adjustment for the utilities there were still discrepancies and the beneficiary was entitled to a proper accounting of the balance remaining in the estate. Therefore, the retainer for the passing of accounts was ordered to be repaid to the estate.

Conclusion

The lesson here is that an executor's conduct and performance are directly relevant to the compensation they will be entitled to for their services, and will be scrutinized on passings of accounts.

Pre-taking compensation is risky business because you can never be sure that the standard tariff amounts will be paid at the end of the day. When pre-taking compensation, trustees should always ensure they have the requisite permission – even if they richly deserve every penny requested.



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