

HOW TO IMPROVE THE CHANCE OF SUCCEEDING IN YOUR ESTATE TRUSTEE COMPENSATION CLAIM

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Being an estate trustee can feel like a thankless task. Depending on the size of the estate, the number of beneficiaries involved, and the complexity of the estate plan, the estate administration may be quite challenging. What adds further angst is that many trustees are performing these duties for the first time and are held to a fiduciary duty to act in the estate's best interests. Perhaps this is why legislatures, including Ontario's, have opted to override the prohibition in equity on trustees profiting from their trusteeships by statutorily entitling trustees to compensation for their work on behalf of the trusts under their administration.

This paper outlines a series of steps estate trustees (and their lawyers) should carry out to improve their chances of succeeding in their claims for compensation. Briefly: (1) confirm the entitlement; (2) know the law; (3) keep records; (4) avoid pre-taking; (5) do not double-dip; and (6) communicate with the beneficiaries about the work being undertaken on their behalf and, ideally, secure their consent to compensation for doing so.

1. Confirm the Entitlement

An estate trustee's claim for compensation is normally rooted in either the will or the *Trustee Act*. While the *Trustee Act* and the concomitant common law rules set out provisions and percentages for affixing an estate trustee's compensation, they rarely apply in situations where the will affixes

compensation or provides a specific mechanism for calculating it.¹ As such, it is important to review the will to determine whether it specifically entitles the trustee to compensation. If so, then that is what the estate trustee may take (or more precisely claim when passing his or her accounts).²

To derive an estate trustee's compensation from the will's terms, the will must provide either an amount or a means of calculating the amount. Where the will simply states that the trustee will be paid for their time, generally, the courts will resort to the provisions of the Act and the common law rules.³ For example, in *Andrachuk Estate*, the court had to consider the following will clause:

I AUTHORIZE my Trustees to pay to themselves from time to time from the capital and/or income of my estate or the trusts thereof such amounts as my Trustees may, in their discretion, consider reasonable as payments on account of any compensation to which they shall subsequently become entitled by reason of a Court order on any passing of accounts or by agreements with my beneficiaries; provided that any Trustee, who is also a beneficiary, shall only be entitled to be reimbursed for expenses and to receive a reasonable *per diem* payment for time spent on the affairs of my estate.⁴

In that case, the estate trustees concluded amongst themselves that a *per diem* of \$525 was reasonable and, as a result, sought interim compensation totalling \$105,341.25 for 200.65 days worth of work.⁵ The court rejected their claim after extrapolating the *per diem* rate to an annual income, which, even after deducting weekends, would have resulted in a yearly rate of \$133,875

¹ See *Trustee Act*, RSO 1990, c T.23, s 61(1), ss 23(2), 61(5) [*Trustee Act*].

² See Margaret E Rintoul, "Executor's Compensation" in Carmen S Theriault, ed, *Widdifield on Executors & Trustees*, 6th (Toronto: Thomson Reuters, 2020) at ch 11 at 11.2 [Rintoul].

³ See e.g., *Re Andrachuk Estate* (2000), 32 ETR (2d) 1, 2000 CarswellOnt 153 (Sup Ct) at para 45.

⁴ *Ibid* at para 4 [emphasis added].

⁵ *Ibid* at para 33.

for each estate trustee. In considering the sum in the context of the word “reasonable,” the court concluded, “no one could say that such a daily rate is just, fair or equitable.”⁶

Further problems may arise for an estate trustee when seeking to confirm his or her compensation if the will provided him or her with a legacy. At common law, where a testator has made a bequest to his or her estate trustee, there is a presumption that the legacy is intended as a substitute for compensation.⁷ In such a situation, an estate trustee may rebut the presumption by demonstrating that the legacy was intended *in addition* to compensation.⁸

Rebutting the presumption of legacy-as-compensation requires a careful examination of the terms of the bequest and an interpretation of the will, as a whole. So long as it is clear that the bequest is *not* meant to compensate the legatee for his or her work as estate trustee, then the estate trustee will likely be able to rebut the contrary presumption.⁹

In *Watterworth Estate*, for example, the court readily found the presumption of legacy-as-compensation rebuttable.¹⁰ In that case, shortly before the testator’s death, she changed her will to deprive her husband of one half of the amount that he received under her old will. She specifically limited his share to the amount he would be entitled to under the *Family Law Act* and proceeded to bequeath the balance of her estate to her brother and sister, who she appointed as her estate trustees.

⁶ *Ibid* at para 43.

⁷ See Rintoul, *supra* at 11.2.

⁸ *Ibid*.

⁹ See e.g., *Re Robertson*, [1949] OR 427, 1949 CarswellOnt 41 (SC (H Ct J)) (i.e., “a fair construction of the whole document demonstrates that the several bequests to the original executors were given independently of their having been named to that office”); *Re Watterworth Estate* (1995), 56 ACWS (3d) 1144, 1995 CarswellOnt 2528 (Ct J (Gen Div)) [*Watterworth*].

¹⁰ *Watterworth*, *supra*.

In challenging the will, her widower husband sought to deprive the estate trustees of their compensation on several grounds; one of which being that the legacies given to the executors should be interpreted as a legacy in lieu of compensation. However, the court concluded the testator's desire to limit her husband's benefit to his entitlement to under the *Family Law Act* was insufficient evidence that she intended to deprive the estate trustees of compensation. As the court observed, "before an intention to deprive the executor of his compensation can be garnered, there must be no indications in the will of any contrary intention by the testator."¹¹

It is also worth noting that the presumption of a legacy-as-compensation does not arise where the estate trustee is bequeathed a share of the residue of the estate.¹²

2. Know the Law

In addition to any provisions in the will, estate trustees are statutorily entitled to compensation pursuant to the *Trustee Act*. Section 61 of the Act entitles an estate trustee to be compensated based on a "fair and reasonable allowance for his care, pains and trouble, and his time expended in or about the estate."¹³ The Act also confers upon judges the discretion to "fix the amount of compensation payable to the trustee," upon the passing of accounts.¹⁴ Absent legislative or regulatory guidance, courts interpreted the meaning of "fair and reasonable" and developed a framework for assessing and awarding compensation pursuant to the Act.

¹¹ *Ibid* at para 12.

¹² See e.g., *Boys Home of Hamilton v Lewis* (1883), 4 OR 18 at 25, 1883WL18037 (Ch).

¹³ *Trustee Act*, *supra*, s 61(1).

¹⁴ *Ibid*, s 23(2).

Appellate courts in Ontario affirmed a two-step process for determining what constitutes “fair and reasonable” compensation.¹⁵ First, the court applies the “percentages approach,” which has come to be understood as:

2 1/2 per cent percentages against the four categories of capital receipts, capital disbursements, revenue receipts and revenue disbursements, along with, in appropriate cases, a management fee of 2/5 of 1 per cent per annum on the gross value of the estate.¹⁶

The following are examples of compensable capital receipts, capital disbursements, revenue receipts and revenue disbursements:

Capital receipts:

- Income tax returns¹⁷
- Insurance benefits¹⁸
- Dividends (if the individual dies after the record date)¹⁹

Capital disbursements:

- Disbursements made to a chartered accountant²⁰
- Payment of bequests and legacies²¹

¹⁵ See *Laing Estate v Laing Estate* (1998), 41 OR (3d) 571, 1998 CarswellOnt 4037 (CA) [*Laing*]; see also *Flaska Estate, Re* (1998), 83 ACWS (3d) 532, 1998 CarswellOnt 4059 (CA); *Gordon Estate, Re* (1998), 24 ETR (2d) 308, 1998 CarswellOnt 2207 (Div Ct), rev’g on other grounds 1998 CarswellOnt 4036 (CA).

¹⁶ *Laing, supra* at para 7, citing *Jeffrey Estate, Re* (1990), 39 ETR 173 at 178, 1990 CarswellOnt 503 (Surr Ct).

¹⁷ See e.g., *Schroeter Estate, Re* (2001), 57 OR (3d) 8, 2001 CarswellOnt 4351 [*Schroeter*].

¹⁸ *Ibid.*

¹⁹ See Brian A Schnurr, *Estate Litigation*, 2nd (Toronto: Carswell, 2018) at ch 5 at 5.5.

²⁰ See e.g., *Cohen, Re* (1977), 1 ETR 80, 1977 CarswellOnt 391.

²¹ *Ibid.*

- Legal fees²²

Revenue receipts:

- Recoupment of tax by way of credit²³
- Monthly interest payments²⁴
- Rent receipts/managing rental properties²⁵

Revenue disbursements:

- Property taxes²⁶

Once the court calculates the amount a trustee should be compensated using the percentage approach, it considers whether this amount is appropriate in the circumstances. To do so, courts consider the following factors:

- the magnitude of the estate;
- the care and responsibility required;
- the time spent in performing the duties;
- the skill and ability applied; and,
- the success of the administration.²⁷

²² See e.g., *Vano Estate, Re*, 2011 ONSC 1429 [*Vano*].

²³ *Ibid.*

²⁴ See e.g., *Schroeter*, *supra*.

²⁵ See e.g., *Bagnall v Bruckler* (2009), 179 ACWS (3d) 1195, 2009 CarswellOnt 5062 (Sup Ct).

²⁶ See e.g., *Vano*, *supra*.

²⁷ *Laing*, *supra* at paras 5, 8.

Courts will often decrease an estate trustee's compensation where relying on the usual percentages would otherwise over-compensate the trustee for their work.

[D]epending on the idiosyncrasies of the particular estate, the care, pains and trouble and time expended may be disproportionate to the actual size of the estate. A small, complex estate may make more demands upon the trustee's care and time and skill than a much larger estate of a simpler nature; conversely, even in a large estate with many complex problems, assessment of the compensation by the adoption of what might be said to be "the usual" percentages would result in a grossly excessive allowance.²⁸

In other words, applying the usual percentages to an estate with significant assets results in sizeable compensation, which, as Rhys Newman and Jordan Atin have noted, "often provokes argument from beneficiaries and consideration by the court as to whether the guidelines should be applied in the same manner to large estates."²⁹ Consequently, where the care and responsibility required of an estate trustee is inconsistent with the estate's magnitude, courts are more likely to reduce compensation, rendering the compensation commensurate to the trustee's work to administer the estate.

Consider *McSween Estate*, in which the court reduced the estate trustee's compensation for administering a high-value estate over a two year period, from the 574 hours claimed to 235 hours, because the court considered the estate easy to administer.³⁰ The estate consisted of one piece of real property; four bank accounts; three GICs; several investment funds; an RRSP; and, a limited

²⁸ *Re Atkinson*, [1952] OR 685 at 698, 1951 CarswellOnt 404 (CA).

²⁹ Rhys Newman & Jordan M Atin, "Size Matters: Estate Trustee Compensation for Larger Estates" (Paper delivered at the Law Society of Upper Canada's 16th Annual Estates and Trust Summit, Toronto, 12 November 2013) at 5-29 [Newman & Atin].

³⁰ See *McSween Estate, Re* (1997), 30 OTC 291, 1997 CarswellOnt 1751 at paras 19-20 (Ct J (Gen Div)).

interest in a company made up entirely of the trust's assets.³¹ As the court noted, the estate trustee only had to reinvest GICs as they matured, convert mutual funds into estate accounts, realize on the bank accounts, and set up the estate accounts.³²

Also consider *Pascale v Stark*, in which the court awarded compensation based on the effort involved in the various stages of selling the testator's home. The court maintained the 2.5% compensation rate for the trustee handling the sale of a house due to the additional effort involved. But, for the trustee's work in distributing the sale proceeds to the beneficiaries, the court reduced the rate to 1.5% because it required minimal effort.³³

Courts also have the discretion to increase an estate trustee's compensation beyond what the usual percentages would provide in exceptional circumstances. This is known as a "special fee."

Claims for special fees are justified where extra or specialized work by the estate trustee is necessary as a result, for example, of the complexities in the administration arising from the nature of the assets, taxation problems, numerous categories of beneficiaries, or litigation by or against the estate. The estate trustee must establish that the special work performed was outside the "average" estate such that the estate trustee would not be compensated adequately for all the work required to be done.³⁴

Where, for example, an estate trustee also contends with an oil spill, pursues an insurance claim, and processes the sale of the house belonging to the estate, the court concluded the estate trustee undertook work that was outside the average estate.³⁵ Excessive travel time required for the estate

³¹ *Ibid.*

³² *Ibid.*

³³ See *Pascale v Stark*, 2014 ONSC 6684 at para 25 [*Pascale*].

³⁴ *Bluestein Estate v Bluestein* (2000), 33 ETR (2d) 18, 2000 CarswellOnt 1054 at para 20 (Sup Ct).

³⁵ *Ibid* at para 21.

trustee to properly administer the estate has also been found to justify a special fee;³⁶ as did liquidating an estate's art collection and collectables,³⁷ and determining how to distribute compensation payments for tainted blood from the Canadian Blood Services.³⁸

To that end, when applying for a special fee, it is advisable to keep in mind the five factors, outlined above, and to undertake the following:³⁹

- Submit a detailed petition setting out the hours spent and a supplementary brief of supporting case law;
- Adduce supporting evidence to verify the time and trouble involved in the estate administration (e.g., memoranda describing extra services performed, litigation briefs, company ledgers, time sheets, affidavits); and,
- Have key personnel involved in the administration of the estate, where relevant, provide evidence about the work and services provided by the estate trustee.

The percentages approach may seem like a straightforward calculation in theory. In practice, however, depending on the size and scope of the estate, the calculation is complicated. As such, and as is discussed in greater detail below, it is imperative that estate trustees maintain accurate and detailed accounts in order to ensure they are properly compensated.

At the same time, it is important to keep in mind the following cardinal rules regarding compensation: a trustee is not entitled to compensation for simply taking over the trust; nor are

³⁶ See *Frye Estate, Re* (1992), 34 ACWS (3d) 354, 1992 CarswellOnt 1888 at para 59 (Ct J (Gen Div)) [*Frye*].

³⁷ See *O'Brien Estate v O'Brien* (1996), 21 OTC 264, 1996 CarswellOnt 4885 at para 25 (Ct J (Gen Div)).

³⁸ *Ibid.*

³⁹ See Ann EP Armstrong, *Estate Administration: A Solicitor's Reference Manual* (Toronto: Carswell, 2020) at ch 4 at 4.4.3 [Armstrong].

trustees necessarily entitled to compensation for investing or reinvesting the funds of the estate.⁴⁰ Moreover, compensation cannot be claimed on a capital disbursement, which is sold at a loss.⁴¹

3. Keep Detailed Records

An estate trustee's fundamental obligation, as a fiduciary, is their duty to account and to make those accounts available to the beneficiaries upon request – even if they do not anticipate the need for a formal passing of accounts.

As part of that accounting, it is prudent for estate trustees to also keep track of their work on behalf of the estate, including the hours they have spent doing so. After all, estate trustees have a duty to, “give to the trust property and the record keeping the same care and attention as a prudent man would give to his own personal affairs, and this includes his claim for compensation.”⁴²

In other words, estate trustees seeking compensation are obligated to identify and establish the time and effort they expended on behalf of the estate.⁴³

This does not mean the trustee must establish the work performance for each minute. There must nonetheless be sufficient detail to satisfy the audit Judge that the time allocated is at a minimal reflective of the work listed. By example, to docket two hours for a very short letter, or to indicate administration with a recorded time and without further, or being able to give details of performance, or specifics of how the time was spent, does not satisfy these criteria and the compensation may be lost.⁴⁴

⁴⁰ See *Mortimer, Re*, [1936] OR 438, 1936 CarswellOnt 37 at para 11 (CA), citing *Re Berkeley's Trusts* (1879), 8 PR 193 at 196.

⁴¹ See e.g., *Pascale*, *supra* at para 16.

⁴² *Frye*, *supra* at para 27.

⁴³ *Ibid* at para 36.

⁴⁴ *Ibid* at para 37 [emphasis added].

That said, an estate trustee's obligation to identify and establish the time and effort expended on behalf of the estate does not necessarily mean he or she needs to keep detailed time dockets. However, doing so is considered prudent and strongly advised – especially when an estate trustee has expended significant time administering the estate and he or she seeks a special fee.⁴⁵

For example, in *Denofrio*, the estate trustees had made a claim for compensation, which a number of the estate's beneficiaries contested.⁴⁶ The estate was sizeable and had to be carefully managed – and the court concluded the estate trustees had exercised a high degree of skill and ability in administering a complicated and large estate, including complicated matrimonial litigation.

One of the three estate trustees did keep dockets outlining the time spent administering the estate. The court found that the dockets kept disclosed a significant amount of time was spent administering the estate.⁴⁷ In other words, the dockets confirmed the court's conclusion that the estate had been complex and required inordinate time to administer.

4. Avoid "Pre-Taking" Compensation

When we speak of "pre-taking" compensation, we, in fact, mean taking compensation before a passing of accounts – or *interim* compensation. Unless the will expressly provides for it, all the beneficiaries consent to it, or the court approves it on a passing of accounts, interim compensation is generally prohibited and also inadvisable.⁴⁸ Indeed, the prevailing jurisprudential view in

⁴⁵ See e.g., *Denofrio v Denofrio*, 2012 ONSC 3408 at para 99, aff'd 2013 ONSC 2106 (Div Ct); *Pascale*, *supra* at para 32.

⁴⁶ *Denofrio*, *supra*.

⁴⁷ *Ibid* at paras 100-101.

⁴⁸ See *Wall v Shaw*, 2018 ONCA 929 at paras 43-44 [*Wall*]; see also Rintoul, *supra* at 11.11; Armstrong, *supra* (the case law has not resolved the issue of the pre-taking of compensation by estate trustees: while previous decisions appeared to have settled on the principle that pre-taking was appropriate where the compensation was for work already performed or expenses already disbursed, recent decisions have cast doubt upon whether this is, indeed, appropriate); Albert H Oosterhoff, "Compensation and Passing of Accounts" (Paper delivered at the Law Society of Upper Canada's Practice Gems: Administration of Estates 2017, Toronto, 29 September 2017) at 2.2.4.

Ontario is that an estate trustee will be ordered to reimburse the trust in respect of the interest that would have been earned on interim compensation taken⁴⁹ and may even be liable for breach of trust.⁵⁰

Where, for example, an estate trustee pre-took compensation totalling \$14,322.50, which equalled 5% of the estate's value, as originally calculated, the court ordered the estate trustee to repay the estate the interest on that amount.⁵¹ The court calculated the interest, totalling \$360, using the applicable pre-judgment interest rates in the *Courts of Justice Act*.⁵²

Even where the will expressly provides for interim compensation, the estate trustee is nevertheless obligated to ensure that the pre- taking is reasonable, which requires the trustee to reasonably calculate the compensation; and preserve a record of the taking and the calculation. Absent this record, the court and the beneficiaries have no way of distinguishing between a taking of compensation, a loan, or a defalcation.⁵³

5. Do Not Double-Dip

An estate trustee is, of course, permitted to hire external professionals to assist with administering the estate.⁵⁴ Indeed, it is oftentimes the prudent thing to do when the estate trustee, him or herself, does not possess the requisite skills to undertake certain tasks.

⁴⁹ See e.g., *McDougall Estate*, 2011 ONSC 4189 at para 54 [*McDougall*]; *Pilo Estate (Re)* (1998), 83 ACWS (3d) 709, 1998 CarswellOnt 4270 at paras 57-58 (Gen Div); *Tigert Estate, Re* (2002), 48 ETR (2d) 301, 2002 CarswellOnt 3296 at para 16 (Sup Ct).

⁵⁰ See e.g., *Wall, supra*; *Macivor Estate*, 2011 ONSC 4175 at para 35; *McDougall, supra* at para 52; *Zimmerman v McMichael Estate*, 2010 ONSC 2947 at paras 74-75 [*Zimmerman*].

⁵¹ See *McDougall, supra* at paras 40-42, 54.

⁵² *Ibid.*

⁵³ See *Zimmerman, supra* at para 77.

⁵⁴ See *Trustee Act, supra*, s 61(3).

However, it is important to remember that, by enlisting the help of external professionals, like an external solicitor, an estate trustee is, in effect, reducing the estate's reliance on his or her own time and effort in the administration of the estate. Consequently, his or her compensation ought to be reduced accordingly.⁵⁵ Simply put, an estate trustee cannot seek to be compensated personally for work he or she outsourced to a professional.

Estate trustees also need to be mindful of those tasks they ought to be able to do themselves. They run the risk of being personally liable for the costs of any professionals retained, should the court deem the professional unnecessary.

In other words, estate trustees must carry out themselves the routine tasks of the estate, which any layperson would be considered capable of performing.⁵⁶

The executor is entitled to employ a solicitor and charge for his services but not for doing work which he might have properly done himself. The solicitor is solicitor for the executor and not of the estate; and costs recoverable by him against the executor can be charged against the estate by the executor only if he shows they are necessary and proper charges against the estate. An executor is not entitled to employ a solicitor to do work which he could do, such as writing ordinary letters, attendances, and paying premiums on policies, attending at the bank to make transfers and other ordinary attendances; services which an ordinary layman ought to do without the intervention of a solicitor.⁵⁷

⁵⁵ Newman & Atin, *supra* at 5-14.

⁵⁶ See Donovan WM Waters, Mark R Gillen & Lionel Smith, *Water's Law of Trusts in Canada*, 4th ed (Toronto: Carswell, 2012) at 1214.

⁵⁷ *Smith, Re*, [1972] 2 OR 256, 1972 CarswellOnt 462 at para 38 (Surr Ct).

When assessing whether external solicitor fees are appropriate, courts look to the fees charged for the services on the entire estate and assess them on a *quantum meruit* basis – with a particular focus on the extent of the responsibility the solicitor assumed.⁵⁸

It is also important to remember that solicitors carrying out the role of estate trustees are compensated differently depending on the nature of the work performed (i.e., the estate trustee is compensated as a lawyer for legal work undertaken on behalf of the estate, whereas he or she is compensated pursuant to the *Trustee Act* or the terms of the will for work undertaken in his or her role as estate trustee).⁵⁹

Rooney Estate, for example, “arrived at the doorstep of the court because of the confusion in roles between the estate trustee and the solicitor she retained.”⁶⁰ The estate, valued in excess of \$600,000, had been a simple one to administer: a co-executor renounced her appointment; there was no real estate to preserve or sell and no foreign assets; there were no beneficiaries under the age of majority.⁶¹ Notwithstanding this fact, the solicitor, retained by the estate trustee, charged the estate \$31,061.35 for legal fees.

In charging all of their time as legal fees, “the solicitor rendered one account, not two. The different services performed – trustee’s work and solicitor’s work – were not broken out in the accounts rendered.”⁶² As the court observed, “Generally, the role of the solicitor is to apply for a certificate of appointment for the trustee and to attend upon a passing of accounts ... [T]he solicitor is entitled

⁵⁸ See e.g., *Cook, Re* (1975), 10 OR (2d) 61, 1975 CarswellOnt 953 (SC); *Bott Estate (Trustee of) v Macaulay* (2005), 76 OR (3d) 422, 2005 CarswellOnt 3743 at para 24 (Sup Ct) [*Bott*].

⁵⁹ See e.g., *Bott, supra* at paras 26-29.

⁶⁰ *Rooney Estate v Stewart Estate* (2007), 161 ACWS (3d) 177, 2007 CarswellOnt 6560 at para 15 (Sup Ct).

⁶¹ *Ibid* at paras 4, 7.

⁶² *Ibid* at para 27.

to be paid *for these legal services* from the estate.”⁶³ As such, the court required the solicitor to, among other things:

submit for passing his account for legal services properly provided to the estate;
and ... to repay to the estate the balance of the amount withdrawn from the estate
by him for fees and disbursements incurred in administering the estate on behalf
of the estate trustee without prejudice to the solicitor's right to submit an account
to the estate trustee personally for reimbursement for doing her work...⁶⁴

Solicitors-as-estate-trustees must, therefore, take great care not to conflate the professional services they performed on behalf of the estates under their administration and their work as estate trustees.

6. Communicate Regularly with the Beneficiaries and Secure their Consent

The *Rules of Civil Procedure* draw a distinction between non-contentious and contentious estate proceedings.⁶⁵ Unquestionably, it is preferable to avoid a contentious estate proceeding, like a contested passing of accounts (on the basis, for example, of a dispute over estate trustee compensation). One of the most effective ways of avoiding a contest is for the estate trustee to secure the beneficiaries’ consent to the compensation he or she is seeking for his or her work on behalf of the estate. Indeed, as has been discussed, securing the beneficiaries’ consent may even permit the estate trustee to “pre-take” compensation.⁶⁶

⁶³ *Ibid* at para 21.

⁶⁴ *Ibid* at para 43.

⁶⁵ RRO 1990, Reg 194, rr 74, 75.

⁶⁶ See note 48.

One of the most effective ways for an estate trustee to secure that consent is by maintaining regular communication with the estate's beneficiaries. By letting them know about the work he or she is performing on behalf of the estate, and the time it is taking to do so, the estate trustee can engender much goodwill and trust (so long as the work and time spent are reasonable and appropriate).

Conclusion

Estate trustees in Ontario are entitled to be compensated for their work – pursuant to the *Trustee Act* and court-developed formulae, or the terms of the testamentary instruments themselves. In either case, by following several, straight-forward steps, estate trustees can dramatically improve the likelihood of successfully recouping the full amount of the compensation they claim.

1. Confirm the entitlement: Clarify whether the will, itself, provides an amount for compensation, or a specific mechanism for calculating it precisely. And where the will provides a legacy to the estate trustee, clarify whether such a bequest is intended as compensation, or in addition to it.
2. Know the law: Understand the two-step process courts use to determine what constitutes “fair and reasonable” compensation.
3. Keep detailed records: Identify and establish the time and effort expended on behalf of the estate, ideally with time dockets; especially helpful if claiming a special fee where the estate required an outsized effort relative to its magnitude.
4. Avoid “pre-taking” compensation: Unless the will expressly provides for it, all the beneficiaries consent to it, or the court approves it on a passing of accounts, interim compensation is inadvisable, and may even result in a breach of trust.

5. Do not double-dip: Hire professionals only when necessary and do not seek compensation for work they undertake. Solicitors-as-estate-trustees must take particular care not to conflate the professional services they performed on behalf of the estates under their administration and their work as estate trustees.
6. Communicate: Keep the beneficiaries apprised of the work being done on their behalf to administer the estate, and the time involved in doing so.

By doing the above, estate trustees should have little trouble securing the beneficiaries' consent for any compensation claimed; in turn, minimizing, if not eliminating, a contested passing of accounts, and thereby dramatically improving the chances of succeeding with such a compensation claim.