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FIDUCIARY ACCOUNTING OBLIGATIONS – HOW FAR WILL THE COURT GO? – RECENT CASELAW DEVELOPMENTS

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Fiduciary Accounting Obligations by Ian M. Hull and Suzana Popovic-Montag

INTRODUCTION

Litigation involving fiduciary accounting is often contentious, time-consuming and costly. With parameters set out in the *Trustee Act* and the *Substitute Decisions Act*, S.O. 1992 as amended, the focus on fiduciary accounting has changed fairly dramatically. While the obligations and responsibilities have not significantly changed, there has been a change in the nature of the litigation and the volume of complaints, problems and litigation arising from these circumstances, has increased.

Attorney's Accounts

There is clear statutory and common law authority for the proposition that a fiduciary or attorney has a duty to account¹.

Section 42 of the *Substitute Decisions Act* provides as follows:

- (1) **Passing of Accounts.** – The court may, on application, order that all or a specified part of the accounts of an attorney or guardian of property be passed.
- (2) **Attorney's Accounts.** – An attorney, the grantor or any of the persons listed in subsection (4) may apply to pass the attorney's accounts.
- (3) **Guardian's Accounts** – 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.

¹ See *Re Taerk*, [1957] O.R. 482 (C.A.), also see *Re Warsh* unreported decision of Sheard J., August 26, 1994, O.J. No. 3234/93 and Rule 74 of the *Rules of Civil Procedure*

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- (4) **Others entitled to apply** – The following persons may also apply:
- (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.
- (5) **P.G.T. a party** – 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.
- (6) **Filing of accounts.** – The accounts shall be filed in the court office and the procedure in the passing of accounts is the same and has the same effect as in the passing of executors' and administrators' accounts.
- (7) **Powers of court.** – 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) **Same.** - 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.

This provision is further expanded by section 49(3) of the *Estates Act*² which provides as follows:

The judge, on passing any accounts under this section, has power to inquire into any complaint or claim by any person interested in the taking

² R.S.O. 1990, c.E.21.

of the accounts of misconduct, neglect, or default on the part of the executor, administrator or trustee occasioning financial loss to the estate or trust fund and the judge, on proof of such claim, may order the executor, administrator or trustee, to pay such sum by way of damages or otherwise as the judge considers proper and just to the estate or trust fund, by any order made under this subsection is subject to appeal.

As to the common law authority, the Ontario Court of Appeal Re: Taerk³ stated:

It is plain to me that after the amendment to the *Surrogate Courts Act*, as now found in s.772(3), *supra*, a Judge on passing the accounts of an executor, administrator or such a trustee, has jurisdiction to enter into and make full inquiry and accounting of and concerning two classes of property, namely: (the numbering is mine) (1) The property which the deceased was possessed of at the time of his death. (2) The property which the deceased was entitled to at the time of his death. For the purpose of making such inquiry and accounting, a Judge is expressly empowered to "decide all disputed matters arising in such accounting subject to appeal". The scope of the inquiry and accounting which may be lawfully made by a Judge of the Surrogate Court is not limited to the property in possession of the deceased at the time of this death. It extends to and includes property which the deceased was entitled to at that time, and the Judge may decide all disputed matters arising in such accounting in respect of the title to such property. Thus, in my opinion, it was within the scope of s. 72(3) and the jurisdiction of a Judge of the Surrogate Court acting thereunder to enter into and make full inquiry concerning the rights of the deceased at the time of his death to the money, bonds and coupons owned by him in his lifetime and which during his lifetime had passed into the possession of the defendants, or the defendant Alexander J, Turk, as the case might be. If, upon such an inquiry, a Judge decided that the deceased was entitled to such money, bonds or coupons or any part of them, he had power under the subsection to compel the executors to make an accounting thereof.

³ [1975] O.R. 482 (C.A.).

Silver Estate

In *Re Silver Estate*⁴ the executors of the deceased's estate, where the deceased had prepared primary and secondary wills, were required to pass the accounts under both wills.

Initially, Cullity J. heard the matter on a uncontested basis and held that the application required adjudication on the question of whether or not accounts can be passed where probate has not been granted.

Justice Haley held that there was no requirement that an executor acting under an unprobated will (i.e. the secondary will) who wishes to pass his accounts before the Court, must first apply to obtain probate. Furthermore, the Court held (at paragraph 40) that the executor can be compelled to pass his accounts without probate and on that passing all accounts must be served upon all those with a financial interest in the assets of the unprobated will in question.

The Court held that it is within the Court's inherent jurisdiction that it may supervise executors without probate as well as executors with probate.

Roger Estate v. Leung

In *Roger Estate v. Leung*⁵ the Court considered an application for an order requiring the attorney to account for his actions taken under power of attorney, even though no incapacity of the grantor existed from the date of the grant to the date of death.

The Court held that an attorney has a duty to keep accounts of all transactions that he undertook and must be ready upon request to produce those accounts. This duty is an ongoing

⁴ (1999) 31 E.T.R. (2nd) 256.

⁵ [2001] O.J.No.2171.

obligation and should not be considered an imposition if an attorney failed in that duty over a long period of time. The attorney's obligation to account is simply that of a fiduciary.

Fair v. Campbell

An important further development in law in respect to the passing of accounts was dealt with in the decision of *Fair v. Campbell Estate*⁶. In this case there was an action commenced for an accounting against an attorney and there were allegations of incapacity on the part of the grantor. Allegations of undue influence and fraud were also alleged. At trial, the Court held that there was no evidence found to support either allegation and held that the attorneys had no duty to account in these circumstances. The Court held that the applicants did not possess sufficient standing to require an accounting and the discretion of the Court to oppose such accounting was refused.

The Court made it clear that an attorney is in fact a fiduciary; however, pursuant to the provisions of the *Substitute Decisions Act*, different duties to account depended upon the capacity of the donor. The Court indicated that a *sui juris* donor was not obliged to involve an attorney in all decisions and therefore the attorney was not required to account for decisions over which he had no influence and for transactions that he did not implement in whole or in part.

As noted above, Section 42(1) of the *Substitute Decisions Act* gives the Court the general discretion to order that all or part of an attorney's accounts be passed. The *Substitute Decisions Act* goes on to provide that, outside the enumerated list of parties who can apply, others can also seek leave of the Court to compel a passing of accounts.

Section 42(4)(6) of the *Substitute Decisions Act* provide as follows:

⁶ 2002 3 E.T.R. 3rd 67, Langdon J.

42.(4) Others entitled to apply

The following persons may also apply:

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. 1992, c. 30, s. 42 (4); 1994, c. 27, s. 43 (2).

Filing of accounts

42.(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. 1992, c. 30, s. 42 (6).

Cornacchia v. Cornacchia

In *Cornacchia v. Cornacchia*⁷ the Court held that a person need not be a personal representative of the deceased to compel an attorney to pass accounts, nor does the fact that the person challenging the transaction might benefit personally from doing so preclude them from obtaining an accounting.

Furthermore, the Rules of Civil Procedure in Ontario (Rule 74.15)(1)(h) allows for a person having a financial interest in the deceased's estate to apply to the Court to compel an estate trustee to pass his or her accounts. The Rule defines an estate trustee as "an executor, administrator or administrator with the will annexed" and the term "executor" is not limited to an executor named under a will.

⁷ [2007] O.J.No.157 (Sup.Ct.J.) at paragraphs 17,20 and 30.

Stickells Estate v. Fuller

In *Stickells Estate v. Fuller*⁸ Justice Lack heard an application to compel a passing of accounts from the date of the appointment of the attorney which commenced prior to incapacity. There were concerns and suspicions arising out of the attorney's dealings as there were substantial cheques written to the attorney by the grantor during this period.

The Court ordered the attorney to pass its accounts from April 3, 1995, (the date the *Substitute Decisions Act* came into force), even though the grantor was not then incapable.

Lack J. notes (at paragraph 13) s. 42(1) of the *Substitute Decisions Act* does not restrict a grantor, with capacity, to request a passing of accounts. Further, that by natural extension the estate trustee of the grantor, may also request the passing.

Fareed v. Wood

In the Decision of *Fareed v. Wood*⁹ the Court continued to consider the issue of the duty of an Attorney for Property to account.

In *Fareed v. Wood* a solicitor who is also acting as Attorney for Property was acting on behalf of his client for many years. In 1987 the client had made a Will appointing him as Estate Trustee and in 1992, at 83 years of age, she granted a Power of Attorney for Property to Mr. Wood. The client died in 1999 and Mr. Wood was asked to pass his accounts.

The Court held that an Attorney has a duty to account for all transactions during the time of the Attorney's involvement, including the time that the grantor may have undertaken transactions herself. Justice Gordon noted:

⁸ [1998] O.J.No.2940 Ontario Court of Justice (General Division).

⁹ 2005 WL 1460361 (Ont.S.C.J.), see also Nimalid. Gamage's helpful article in Volume 24, No. 2 of Ontario Bar Association's Publication Deadbeat.

It is not uncommon for a grantor to retain the ability to attend to some functions while directing the Attorney to perform others. In some respects, it allows for a transition period as the grantor adjusts to changes in life resulting from age. The separation of responsibilities can co-exist, however, the Attorney assumes full responsibility of all financial activities once he or she assumes some duties. In my view, the Attorney cannot avoid liability by simply saying the grantor paid or transferred her own funds to another.

Executor De Son Tort

Someone who intermeddles in the estate of another may be deemed to be an executor *de son tort*.

It should be noted that an executor may renounce his position at any time, although this right is usually exercised before applying for probate and the courts are typically reluctant to allow an executor to renounce after having intermeddled in the estate or after having applied for probate.¹⁰

As long as the person renounces the office before performing acts that amount to an acceptance of the office, he or she may freely renounce the office and the Court will then simply appoint an administrator.¹¹

However, slight acts of intermeddling, such as paying the deceased's debts are not typically held to be enough to make a person an executor, they must have the character of an assumption of authority to the office of a personal representative.¹²

¹⁰ *Stordy v. McGregor* (1986), 42 Man. R. (2nd) 237 (Man.Q.B.).

¹¹ Feeney's Canadian Law of Wills (4th Edition) Butterworths page 8.2.

¹² Feeney's Canadian Law of Wills (4th Edition) Butterworths page 8.1.

CONCLUSION

In these circumstances, separation must be given to a financial advisor, an accountant or solicitor and the expansive expectations of the duty to account which exist in the *Fareed* decision and which has developed over the years.