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Compensation Fixed by Will

The amount of compensation payable to an estate trustee can be a thorny issue on a passing of accounts, often leading to litigation. Where problems can be foreseen, it may be advisable to address compensation in the will.

The traditional approach to calculating compensation is based on a formula, which is then adjusted according to five factors if the mathematical result is thought not to be "fair or reasonable" within the meaning of section 61 of the [Trustee Act](#).

As a starting point, compensation is calculated to be the sum of 2.5% of the capital receipts, 2.5% of the capital disbursements, 2.5% of the revenue receipts, and 2.5% of the revenue disbursements. If the estate is ongoing, the trustees may sometimes charge a care and management fee, typically 0.4%. The formula produces a fair result in many cases, but it must be tested against the five factors in *Toronto General Trusts Corp. v. Central Ontario Railway Co.* (1905), 6 O.W.R. 350 (H.C.):

- The magnitude of the trust;
- The care and responsibility involved;
- The time occupied in performing the duties;
- The skill and ability displayed; and
- The success which has attended its administration.

There is a great deal of subjectivity with respect to these factors, which can lead to litigation down the road.

The [*Trustee Act*](#) provides that compensation can be fixed by the instrument creating the trust, which can include a will. In order to avoid a dispute over an estate trustee's entitlement to compensation and the quantum thereof, it may be advisable to discuss with the client whether he or she wishes to explicitly address the estate trustee's compensation in the will. The drawback, of course, is that if unforeseen circumstances arise, the amount chosen may be too much or too little compensation for the amount of work involved.