

## COMPENSATION FOR EXECUTORS AND TRUSTEES

Executors and trustees are entitled to be compensated for their work in the administration of estates, as provided in Ontario's *Trustee Act*, R.S.O. 1990, c. T.23, s. 61(1), which says: "A trustee, guardian or personal representative is entitled to such fair and reasonable allowance for the care, pains and trouble, and the time expended in and about the estate, as may be allowed by a judge of the Superior Court of Justice."

The Act contains no rules as to the calculation and amount of the compensation. In Ontario, as in other Canadian jurisdictions, there is no tariff that can be applied to the estate to determine an amount of compensation. However, over the years, the courts have applied a "rule of thumb" tariff, and it is departed from only in special circumstances. In such cases, the court will reduce or increase the compensation or may permit a special fee.

The tariff at its present level is often calculated as follows:

- (a) 2.5% to 3% of capital receipts;
- (b) 2.5% to 3% of capital disbursements;
- (c) 2.5% to 3% of income receipts;
- (d) 2.5% to 3% of income disbursements; and
- (e) for ongoing trusts, 2/5 of 1% or 3/5 of 1% of the average annual market value of the trust assets as the fee for ongoing care and management, and 5% to 6% of income generated by the trust.

It is preferable that compensation be paid on a regular basis to avoid a heavy tax burden on the trustee and to ensure a more even cash flow in the estate. Thus, it is possible to include a clause in the will permitting trustees to take reasonable instalments of compensation, a practice I generally follow.

The following circumstances are proper to be taken into consideration in fixing the amount of compensation payable to an executor and trustee:

- (a) the magnitude of the trust;
- (b) the care and responsibility arising therefrom;
- (c) the time occupied in performing duties;
- (d) the skill and ability displayed;
- (e) the success which has attended the trust's administration.

In the case of *Laing Estate v. Hines* (1998), 167 D.L.R. (4<sup>th</sup>) 150 at para. 8, 41 O.R. (3d) 571 (C.A.), the judge, quoting *Jeffery Estate (Re)* (1990), 39 E.T.R. 173 (Ont. Surr. Ct.), at p. 179, said:

"To me, the case law and common sense dictate that the audit judge should first test the compensation claims using the 'percentages' approach and then...cross-check or confirm the mathematical result against the 'five-factors' approach set out in *Re Toronto General Trusts and Central Ontario Railway*

[(1905), 6. O.W.R. 350 (H.C.)]. Usually, counsel will, in argument, set out a factual background against which the five factors can be brought to bear on the case at hand. Additionally, the judge will consider whether an extra allowance should be made for management, based on special circumstances. The result of this testing process should enable the judge to determine whether the claims are excessive or not and, in the result, will enable the judge to make adjustments as required. The process is not scientific but it not intended to be: in the estate context, it is a search for an award which reflects fairness to the executor; in a real sense, the search is for an appropriate...award in a unique setting.”