

## Ch-Ch-Ch-Ch-Changes (to Estate Trustee Compensation) in *Eve v. Wilhelm Estate*

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Although the title of this article suggests that a David Bowie quote will be used, attention is instead turned to Benjamin Franklin who was famously quoted for saying that there were only two things certain in life, death and taxes. An estate litigator though, would likely add a third in claims by an Estate Trustee for compensation. Almost all estates require attention to be turned to compensation claims, whether compensation ends up being taken or not. Given the commonplace of these claims, this article considers the proper approach in reviewing claims for compensation in light of the recent decision in *Eve v. Wilhelm Estate (Trustee of)*,<sup>1</sup> and the ch-ch-ch-ch-changes that the Court may impose on compensation.

The starting point for Estate Trustee compensation is section 61 of the *Trustee Act*<sup>2</sup> which states that:

“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”.

So, the natural question that follows is how does an Estate Trustee quantify ‘such fair and reasonable allowance’?

To answer this, attention must be turned to the Tariff Guidelines which provides assistance to the Courts in quantifying compensation. The Guidelines permit 2½% on capital receipts and disbursements, 2½% on revenue receipts and disbursements, and a care and management fee of 2/5 of 1% per annum on the gross value of the assets under administration.<sup>3</sup> This is referred to as the percentage approach.

The analysis does not end with the percentage approach as the amount calculated must then be checked against the following factors as set out in *Toronto General Trust Corp. v Central Ontario Railway*,<sup>4</sup> being: (1) the size of the trust; (2) the care and responsibility involved; (3) time occupied in performing the duties; (4) the skill and ability displayed; and (5) the success of the administration. This is referred to as the five-factors approach.

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<sup>1</sup> 2016 ONSC 1496 (CanLII) (“*Wilhelm Estate*”).

<sup>2</sup> RSO 1990, c T.23.

<sup>3</sup> See for example *In the Estate of Stefanie Aber, deceased*, 2015 ONSC 5123 (CanLII).

<sup>4</sup> (1905), 6 OWR 350 (Ont. H.C.).

So, a two-step analysis is performed by the Courts whereby they first apply the percentage approach, with the quantified amount checked against the five-factors approach. In *Laing Estate*,<sup>5</sup> the Court of Appeal stated:

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, as it were, cross-check or confirm the mathematical result against the “five-factors” approach set out in *Re Toronto General Trusts and Central Ontario Railway*, supra. 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 is 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 quantum meruit award in a unique setting.

This approach was applied by Justice P.R. Sweeny in *Wilhelm Estate*, a contentious estate administration, with numerous claims having been commenced by one of the adult children of the deceased, who was one of the residuary beneficiaries of the Estate.

The Estate administration appeared to be somewhat complicated given that the assets were comprised of an annuity, bank accounts, Sun Life shares, machinery, real property and its contents, a car, motor home, and shares in a corporation (a radiator, repair, services, manufacturing business).<sup>6</sup>

Although the core issue was the authority and improvidence of the sale of corporate shares by the Estate Trustee (the sister of the deceased), there was also an Application to Pass Accounts made by the Estate Trustee for the period February 25, 2008 to August 25, 2011 (being a 3½ year administration).

The Estate Trustee claimed compensation in the amount of \$49,709.73 (presumably based on the percentage approach). Justice Sweeny examined this claim for compensation against the five-factors approach.

However, before beginning the analysis, Justice Sweeny noted that the Estate Trustee prepared additional accounts with no additional compensation being sought, which could have resulted in an additional claim of \$22,500 based on the capital and revenue disbursements.

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<sup>5</sup> *Laing Estate v Hines*, 1998 CanLII 6897 (ON CA).

<sup>6</sup> *Wilhelm Estate* at para 14.

Moreover, no care and management fee was being claimed over the course of the administration of the Estate.

*(1) Size of the Trust*

Given that the trust was approximately \$1.4 million, Justice Sweeny opined that although not enormous, on a straight tariff basis, the Estate would yield a fee in the range of \$80,000.

*(2) Care and Responsibility Involved*

Most of Justice Sweeny's analysis took place here, and noted that the Estate Trustee took her duty seriously, spending significant time cleaning the real property, and attending to the sale of the corporate shares. With respect to the latter, Justice Sweeny indicated that the Estate Trustee spent considerable time negotiating the sale of the shares to ensure the fair market value was obtained. Interestingly, in the circumstances, Justice Sweeny found that the Estate Trustee was not required to engage in management decisions, nor take any steps with respect to the operation of the company.

*(3) Time Occupied in Performing the Duties*

The Court considered the time that the Estate Trustee recorded, as well as time that was not recorded (yet supported by evidence of attendance at meetings), finding that the Estate Trustee was involved in her duties.

One of the few negating factors noted by Justice Sweeny was that some of the Estate Trustee's duties were performed by her lawyers and accountants.

*(4) Skill and Ability Displayed*

The conduct of the Estate Trustee was found to meet the standard expectation. To support this finding, Justice Sweeny noted that the Estate Trustee retained experts to assist her in administering the Estate when appropriate, received fair market value for the sale of the corporate shares, and handled the other Estate assets appropriately.

*(5) Success of the Administration*

Overall, the Court found that the Estate was handled well.

What seems to primarily consist of praise by the Court with respect to the conduct of the Estate Trustee, and on the basis that the Estate Trustee was no 'Rebel Rebel', compensation was nonetheless reduced to \$40,000.

Accordingly, *Wilhelm Estate* highlights the importance of applying the two-step approach and the careful examination the Court undertakes in this respect. Notwithstanding the amount sought based on the percentage approach, and the quality administration, compensation must be examined to ensure it is fair and reasonable.