



Hi Howard,

The first place to look to for guidance with regard to estate trustee's compensation is the Will signed by the Deceased. If the estate trustee's compensation is fixed by the provisions of a will or in a separate agreement between the testator and the estate trustee and referred to in the will, the amount of compensation to which that estate trustee is entitled to is governed by the provisions of the will or the agreement and not by the legislation and the case law. If the document is silent then the estate trustee should follow the process developed by Ontario courts which is a three-step process for determining what is a "fair and reasonable allowance" under subsection 61(1) of the Trustee Act.

First, a court applies guidelines which have been developed for awarding remuneration for administering an estate or trust. The amount of remuneration is usually limited to the following amounts:

- 1) 2.5% charged on capital receipts,
- 2) 2.5% charged on capital disbursements,
- 3) 2.5% on revenue receipts, and
- 4) 2.5% on revenue disbursements.

There is also the potential for a care and management fee of 2/5 of 1% on the average value of the gross assets under administration per annum. This only applies to ongoing estates where there is not immediate distribution.

Second, a court applies the five factors to determine whether the amount set by the guideline is reasonable. Generally, in assessing what fair and reasonable means in a particular scenario, the courts look at five factors:

- i) the size of the trust,
- ii) the care and responsibility involved,
- iii) the time occupied in performing the duties,
- iv) the skill and ability shown, and
- v) the success resulting from the administration.

Third, the court will consider whether a care and management fee is warranted.

Compensation based on percentages is a very blunt way to assess compensation and the Court is increasingly open to ordering more or less than the customary 5% compensation to determine a “fair and reasonable” level of compensation. For example, with rising real estate values, there is caselaw which states that 5% on the value of real property may not be appropriate if there was not a lot of care, responsibility and time occupied in disposing of the real estate. However, it is not reasonable to suggest that an Estate Trustee is not entitled to any compensation with respect to the sale of a property. It is highly unlikely that a court will decide that “no compensation” is appropriate but there may be “reduced compensation.” Courts have held that an estate trustee is not held to a standard of perfection but, rather, to a standard of reasonable behaviour.

Also, although, the estate trustee retains the discretion to decide when distributions should be made to beneficiaries, there is caselaw that states that the estate trustee should consider making further interim distributions of the Estate as long as he holds back sufficient funds for the anticipated expenses of the estate (i.e. taxes, accounting fees, legal fees and trustee compensation) and those assets are called the “distributable assets.” Content collaboration with [Natalie Schernitzki](#).

I invite you to [set up a Zoom](#) appointment with me to discuss your Estate Planning and drawing your Will and Powers of Attorney.

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