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Passing Accounts: The Disgruntled Beneficiary

What Does it Mean to "Pass Accounts"?

Passing accounts means making disclosure to the Court and the beneficiaries of the Executor's dealings with the Estate assets, and having the beneficiaries, and in some cases the Court approve those dealings.

Accounts resemble a chronological transaction record, disclosing each and every financial activity, as well as details about any "in kind" disbursement of physical assets.

Frequently, though not necessarily, Executors who wish to claim a fee for their administration of the Estate (executor "fees" or "remuneration") use a passing of accounts hearing to get Court approval for that fee, as well as approval for the accounts themselves.

When Does the Court Have to Approve Accounts (i.e. "pass accounts")?

From a strictly legal standpoint, an executor of an Estate is required to pass his or her accounts within two years of the date of the grant of probate or administration, unless all beneficiaries consent to the accounts presented by the Executor. If an Executor fails to produce these accounts on time, a beneficiary can force the Executor to do so.

From a more practical standpoint, Executors also normally want to get the beneficiaries' consent to the accounts or to pass accounts prior to making a distribution from the Estate, in order to protect themselves. As part of the account passing process, the executor would ask that the beneficiaries sign a Consent & Release Agreement, saying that, upon payment to the beneficiary of the sum that he/she is entitled to per the accounts, the beneficiary will release the Executor from further liability with respect to the Executor's dealings with the Estate assets. Obtaining this release is critically important from an Executor's point of view, and usually goes hand in hand with the Executor account approval process.

In the vast majority of Estates, all beneficiaries consent, so there is no need for a formal passing of accounts before the Court. However a formal passing of accounts (i.e. court hearing) is necessary if:

- One or more beneficiaries is unable to consent – for instance, a minor or is mentally incapable
- One or more beneficiaries refuses to consent – the feared 'disgruntled beneficiary'

Procedure

Fortunately, the Wills, Estates and Succession Act (WESA) has brought in new rules that substantially streamline the process of passing accounts, which previously involved multiple applications to Court.

If the passing of accounts is necessary only because one of the beneficiaries cannot consent (for example, if he/she is a minor child or mentally incapable), then it is normally a simple and brief matter to get the Court to approve the accounts. The Executor will usually show the Court that all the other beneficiaries and the guardian (if any) have consented to the accounts, and that the Public Guardian and Trustee has been alert-ed. In these cases, it is rare that the Court will take any issue with the accounts.

On the other hand, if the passing of accounts arises because one of the beneficiaries refuses consent, the matter is much more complicated. The hearing will likely be lengthy and resemble a full trial.

The Executor will normally take the stand to provide oral testimony about his/her dealings with the Estate, and is subject to cross-examination by the beneficiary. The Executor may also call other witnesses to support the propriety of the accounts and to convince the Court to accept same.

The beneficiary then can give evidence or call his or her own witnesses, and both parties will make legal arguments to the Court as to why it should or should not accept the accounts.

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High Standard of Conduct

Executors are trustees and, as such, owe fiduciary duties to the Estate and to the beneficiaries. Courts are very protective of the beneficiaries, and as such Executors can expect that they will be held to an extremely high standard of conduct. Their dealings with the Estate will likely be subject to intense scrutiny should they be forced by a beneficiary to pass their accounts before the Court.

Fees

As mentioned above, a passing of accounts also often involves getting Court approval for the Executor's fees. There are three types of fees that an Executor can charge – a 'capital fee' based on the gross aggregate value of the Estate (no more than 5%), an 'income fee' based on a percentage of income earned by the Estate in a given period (no more than 5%), and an annual 'care and management fee' based on the average market value of the Estate assets in the year in question (no more than 0.4%).

Before approving fees for executors, Courts will inquire into the size and complexity of the Estate, and the time occupied and skill displayed by the Executor in its administration, as well as whether the Executor's efforts brought financial success to the Estate.

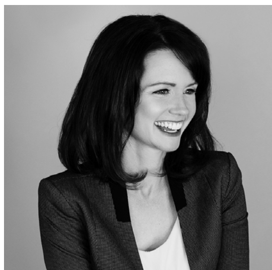
Outcomes

In the end, the Court will either certify the accounts, in which case the Executor can proceed with distribution, or not. If not, the Executor will have to re-do the accounts and try to pass them again. The Court's refusal to certify the accounts may lead to the Executor compromising and reaching an out-of-court settlement to satisfy the disgruntled beneficiary.

If the Court does agree with a disgruntled beneficiary that the Executor was doing something wrongful in his or her dealings with the Estate, the beneficiary might also take the pro-active step of suing the Executor for breach of fiduciary duty or for negligence, as the case may be.

It is, therefore, prudent that executors (and other trustees) obtain legal advice respecting their duty to pass accounts, the high standard to which their conduct will be held, and the potential for expensive litigation to result if a beneficiary is not satisfied.

Questions? Contact a member of our experienced Estate Team:



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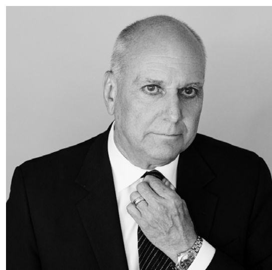

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