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## Compensation for Executors and Attorneys under Power of Attorney

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Acting as an attorney under a Continuing Power of Attorney for Property (PoA) for an incapable person or as the Executor of an Estate, can involve considerable time and effort. In recognition of the time spent and the care taken to manage an incapable person's property, or to administer an Estate, Ontario laws provide that compensation (or an allowance) may be payable.

Under the Substitute Decisions Act, 1992, S.O. 1992, c. 30 ("S.D.A."), a guardian of property or an attorney under a PoA may take compensation annually, monthly or quarterly in accordance with a prescribed fee scale. Currently, the prescribed fee scale is as follows: 3% on capital and income receipts; 3% on capital and income disbursements; and three fifths (3/5ths) of 1% of the annual average value of the assets, as a care and management fee (although this last fee has been determined to be an extra fee, and is only included as part of compensation in some circumstances).

This fee scale is generally followed unless, in certain circumstances, the Office of the Public Guardian and Trustee objects or a Court determines that it is not appropriate. Furthermore, the fee scale is subject to any specific instructions with respect to compensation that may be contained in the PoA document itself.

An Executor for an Estate may also receive compensation. Unlike the compensation for attorneys under POA, there is no prescribed fee scale set out in the legislation. Instead, section 61 of the Trustee Act, R.S.O. 1990, c. T.23, simply states that "[a] Trustee, guardian or personal representative is entitled to such fair and reasonable allowance for the care, pains and trouble, and time expended in and about the Estate, as may be allowed by a judge of the Superior Court of Justice." (This section of the Trustee Act also applies to compensation for attorneys under Powers of Attorney for Personal Care, whereas the section of the S.D.A.,

above, deals only with Continuing Powers of Attorney for Property). Although the Trustee Act is silent on the quantum of compensation, a compensation fee scale has evolved at common law (i.e., through cases decided by the Courts) over the years: 2.5% of capital receipts; 2.5% of capital disbursements; 2.5% of income receipts and 2.5% of income disbursements. This fee scale is generally followed, unless the Will specifically states otherwise, or the Court determines that it would be unreasonable or unfair to do so.

It is important to note, however, that being an attorney under PoA or an Executor does not guarantee compensation. In the 2013 case, *Aber Estate*, 2013 ONSC 6363, Justice Carole Brown confirmed that the Court, in considering compensation, must be satisfied that compensating the guardian of property or the attorney under PoA based on the prescribed fee schedule would be fair and reasonable. This is the same governing principle that exists in determining an Executor's compensation.

What is fair and reasonable?

In *Aber Estate*, Justice Brown refers to the 1905 Ontario case, *Toronto General Trust Corp v. Central Ontario Railway*, which sets out five factors to be considered when determining what is "fair and reasonable": 1) the size of the trust; 2) the care and responsibility involved; 3) the time occupied in performing the duties; 4) the skill and ability displayed; and 5) the success of the administration.

While compensation may be available to attorneys under Power of Attorney and Executors, it is by no means guaranteed. The work done by an attorney or an Executor has to warrant compensation, and the quantum of compensation, if any, can change accordingly.

The issue of compensation for attorneys under PoA (for Property or for Personal Care) and for Executors is an important factor to



consider when drafting your Will and Powers of Attorney. If you wish to designate the same person as your attorney under PoA and as the Executor of your Estate, consider that he or she could, in theory, take compensation for acting in both roles. One way of addressing double compensation is to include specific instructions in your Will and/or Power of Attorney.

Designating someone as your attorney under PoA or as your Executor is not an easy task, just as it is not an easy task to act as an attorney or Executor. Taking extra care in planning your Will and Powers of Attorney and in designating your representatives is recommended.

### **About the Author** **Elikem Deley**

Elikem Deley is a member of the estates group and practises in the areas of wills, powers of attorney, estate administration and estate litigation.