PRACTICE MADE PERFECT CLE BC

WESA AND THE NEW RULES: IS YOUR ESTATES PRACTICE READY?
PAPER 2.1

Passings of Accounts and the New Probate Rules

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PASSINGS OF ACCOUNTS AND THE NEW PROBATE RULES

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I. Introduction

The amendments to the *Supreme Court Civil Rules* effective on March 31, 2014[1] constitute a significant overhaul of the procedure involved for a passing of accounts and dealing with a personal representative's claim to remuneration. The intent of the amendments relating to these issues, largely found in Rules 25-13 and 25-14 of the new Part 25 of the *Civil Rules* (called the "Probate Rules" in this paper), is to allow the court to deal with accounts on a summary basis, or otherwise tailor the proceeding to resolve the issues in dispute in a manner consistent with the objects of the *Civil Rules*. The substantive law relating to the personal representative's duty to account and the manner of fixing remuneration is not changed by the Probate Rules or the *Wills, Estates and Succession Act*, S.B.C. 2009, c. 13 ("*WESA*").

In this paper, I will provide an overview of the changes introduced by the Probate Rules. The issues of accounts, the remuneration of personal representatives, and solicitor's remuneration are described in detail in the three chapters in the *British Columbia Probate and Estate Administration Practice Manual* (the "*CLE Probate*

1 B.C. Reg. 149/2013.

Manual") written by Gary J. Wilson of Borden Ladner Gervais LLP, which I have co-authored for nearly a decade. As with a recent CLE presentation[2], this paper is intended to be something of a companion piece to Chapters 15 to 17 of the *CLE Probate Manual*.

II. Overview of Changes Introduced by the *Probate Rules*

A. Passings of Accounts

1. Duty to Account

It is a fundamental duty of a trustee to account to the beneficiaries. A trustee must keep a proper record of his or her activities and be in a position at all times to prove that he or she has administered the trust prudently and honestly. Beneficiaries are entitled to the information that allows them to enforce the trust, and so as to satisfy themselves that the trust is being properly administered.[3]

Section 99(1) of the *Trustee Act*, R.S.B.C. 1996, c. 464, first enacted in 1943, provides that a trustee must pass their accounts within two years unless the accounts have been approved in writing by the beneficiaries.[4]

The new Probate Rules and the *WESA* introduce no changes to these basic principles.

There is reference to the obligation to account in the forms prescribed by the Probate Rules for a grant of probate or administration. The affidavit of the applicant for a grant of probate or grant of administration with will annexed (Supreme Court Civil Rules, Appendix A.1, Form P3 or P4) or the applicant for a grant of administration without will annexed (Form P5) does not specifically oblige a personal representative to pass accounts. In the prescribed affidavits, the applicant deposes that he or she "will prepare an accounting as to how the estate was administered" and be subject to the "legal responsibility of a personal representative" when doing so.

2. Form of the Accounts

In order to account to the beneficiaries, the personal representative must provide an account showing of what the original estate consisted, all monies received, and all monies remaining on hand.[5] At common law, there was no required form for executor's accounts. They just needed to be "self-explanatory and simple to follow".[6] Rule 21-5(72) [formerly Rule 61(60)] of the *Supreme Court Civil Rules*, which came into effect on July 1, 2005, prescribed the form that executor's accounts should take. The personal representative must file an affidavit in Form 107, and attach as an exhibit a Statement of Account in the prescribed format.

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2 M.S. Kerwin, "The Last Word: Passing of Accounts in Contentious Estates", *Estate Litigation Basics, 2012* (CLEBC, November 2012).

3 D.W.M. Waters, Q.C., *Waters' Law of Trusts in Canada* (3d ed.) (Toronto: Carswell, 2005), at p. 1077, cited in *Spelay (Litigation Guardian of) v. Spelay* (2007), 38 E.T.R. (3d) 84 (Sask Q.B.). See also: *Jackson v. King* (2003), 49 E.T.R. (2d) 19, 2003 BCSC 328 at para. 14.

4 The legislative history in British Columbia of requiring executors and trustees to pass their accounts, and the practice of referring accounts to the Registrar, was traced in my 2012 CLE paper at pp. 8.1.4 to 8.1.6. The current practice was largely established through 1943 amendments to the *Trustee Act* and the *Probate Rules:* see *Trustee Act Amendment Act, 1943*, S.B.C. 1943, c. 67.

5 *Bernard v. Wist*, 2011 BCSC 101.

6 *Re Lotzkar* (1970), [1971] 2 W.W.R. 234 at 237 (B.C.S.C.).

The B.C. Law Institute invited comments on Form 107, but did not recommend any significant changes to the form of executor's accounts.[7]

Form 107 will now be replaced by a Statement of Account Affidavit in Form P40. The "statement of account" to be attached as Exhibit "A" to this affidavit is substantially the same as the current Form 107. The Statement of Account Affidavit, which must be filed by the personal representative, must:

(1) describe the assets and liabilities of the estate as at the later of:

  (a) the date of the deceased's death, and

  (b) the last day of the period covered by the most recent of the accounts passed under Part 25 or approved and consented to in writing by all beneficiaries;

(2) describe, in chronological order, capital transactions that occurred since the applicable date referred to in paragraph (1);

(3) describe, in chronological order, income transactions that occurred since the applicable date referred to in paragraph (1);

(4) describe the assets and liabilities of the estate as at the last day of the period covered by the accounts to be passed;

(5) describe all distributions made and any distributions anticipated to be made out of the estate;

(6) include a calculation of the remuneration, if any, claimed by the applicant for

  (a) the applicant, and

  (b) any current and previous personal representative or trustee for whom a claim for remuneration has not yet been made; and,

(7) include any other details or information the court may require or the applicant may consider relevant.

B. Remuneration of Personal Representative

The issue of whether the personal representative should be compensated for their "care, pains and trouble" in administering the estate, and the time spent for this otherwise "thankless job"[8], is often a central dispute in these cases. Unless a compensation agreement is in place, section 88(1) of the *Trustee Act* governs the fixing of remuneration. The personal representative may be awarded up to 5% of the "gross aggregate value" of the capital of the estate, and 5% of the income earned during the administration. The courts in British Columbia have adopted the following criteria from an Ontario case[9] for determining the applicable fee:

(1) the magnitude of the trust;

(2) the care and responsibility springing therefrom;

(3) the time occupied in performing the duties;

(4) the skill and ability displayed;

(5) the success which has attended its administration.[10]

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7 BCLI, *Consultation Paper on New Probate Rules*, Report (May 2010), pp. 88-89; BCLI, *Report on New Probate Rules*, Report No. 57, (October 2010), pp. 95-97.

8 *Re Chevrefils Estate,* 2010 BCSC 753 at para. 27.

9 *Toronto General Trusts Corporation v. Central Ontario Railway Company* (1905), 6 O.W.R. 350 (H.C.J.).

10 *Re McColl* (1967), 65 W.W.R. (N.S.) 110 (B.C.S.C.); *Allen v. Allen Estate* (1991), 57 B.C.L.R. (2d) 351 (S.C.); *Re Cohen*, 2005 BCSC 1049 at para. 128.

An annual "care and management fee" not exceeding 0.4% of the market value of the trust may also be claimed. The amount of the personal representative's remuneration must be approved either by the beneficiaries or by the court, unless the will allows for some form of pre-taking.[11] A more complete discussion of these issues can be found at §16.10 to §16.14 of the *CLE Probate Manual*, along with the additional comments in my 2012 CLE paper.

The statutory authority for awarding compensation to personal representatives and trustees (section 88 of the *Trustee Act*) is not changed by the *WESA* or the Probate Rules.

The Probate Rules introduces some significant changes to the *process* of claiming remuneration. In particular, Rule 25-13 makes clear that the fixing and approval of the personal representative's remuneration can be dealt with separately from the passing of the accounts. Section 89 of the *Trustee Act* already contemplates such an application, but is little-used in isolation from a passing of accounts. This explicit distinction between the accounts and the claim for remuneration will be discussed further below in relation to the rule in *Kanee Estate*.

Another possible change brought about by the *WESA* involves the remuneration available to an administrator *pendente lite* (APL). Section 103(2)(*c*) of the *WESA* provides that an APL is entitled to reasonable compensation under the *Trustee Act* or "as otherwise determined by the court". The current provision for APLs, found in section 10 of the *Estate Administration Act*, makes no reference to the *Trustee Act* but refers to "reasonable remuneration the court thinks fit". This provision has been interpreted to mean that the upper limit of a 5% capital and income fee is not applicable.[12] The phrase "as otherwise determined by the court" in s. 103 suggests that a similar result could still occur under *WESA*.

C. Professional Fees Incurred By Personal Representative

Claims by the personal representative to have his or her legal costs paid out of the estate, especially after earlier rounds of estate litigation, are often challenged by the residuary beneficiaries at a passing of accounts.

It is important to remember that the lawyer's client is the personal representative, not "the estate" (which is not a legal person). The personal representative is responsible for paying the lawyer's bill[13] and then seeks indemnity from the estate for such costs, in the same manner as other out-of-pocket expenses. The general test is that trustees are entitled to be indemnified for expenses incurred in the discharge of their duties, as long as such expenses were "not improperly incurred".[14] If the costs were "improperly incurred", then the trustee cannot be indemnified.[15] In practice, the solicitor's bill is often reviewed in conjunction with a passing of the accounts.

The Probate Rules, and other amendments to the *Civil Rules*, remove any distinctions as to how the legal costs incurred by personal representatives are assessed, as opposed to other lawyer-clients relationships.

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11 *Dunbar v. Dunbar Estate*, 2007 BCSC 1642, at para. 6.

12 *Wright v. Canada Trust Company* (1984), 55 B.C.L.R. 349 (S.C.), affirmed (1985), 21 E.T.R. 80 (B.C.C.A.).

13 The issue of whether the lawyer's bill is reasonable is separate from the issue of whether the personal representative can seek indemnity from the estate to pay the bill: *Allen v. Allen Estate* (1991), 57 B.C.L.R. (2d) 351 at 359 (S.C.); *Bott v. Macaulay* (2005), 76 O.R. (3d) 422 (S.C.J.).

14 *Thompson v. Lamport*, [1945] S.C.R. 343; *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353; *Royal Trust Corporation of Canada v. Clarke* (1989), 35 B.C.L.R. (2d) 82 at 86-87 (C.A.); *Neill v. Birston* (2006), 23 E.T.R. (3d) 107 (Ont. Sup. Ct. J.) at para. 10; *Re Beddoe*, [1893] 1 Ch. 547 at 558 (C.A.).

15 See *Re Anderson Estate,* 2011 ABQB 806, further reasons on costs at 2012 ABQB 517 at para. 13, in which the Court held that "the matter falls to be determined in accordance with the general rule that executors are entitled to be indemnified from the estate for expenses, including legal fees, *reasonably and properly* incurred by them in the course of their administration of that estate".

Prior to 1990, the concept of "solicitor and client costs" formed the basis upon which fees were charged for legal work in the administration of estates. In the 1976 Rules, solicitors' fees were based upon a prescribed percentage of the aggregate value of the estate.[16] The *Rules of Court* introduced in September 1990 – in particular, Rule 57(5) and the application of the criteria for "special costs" to estates matters – substantially changed the basis on which fees were charged. Legal work involving "noncontentious business" led to an award for special costs pursuant to Rule 57(5), whereas legal costs for work that fell outside the meaning of "noncontentious business" would be reviewed under the *Legal Profession Act*.[17]

Following the introduction of the *Civil Rules* in July 2010, this regime was maintained in Rule 14-1(6) and Rule 21-5.

The Probate Rules will eliminate the distinction between "contentious" and "noncontentious" matters. Section 3 of BC Reg. 149/2013 also amends Rule 14-1(6) to remove reference to "non-contentious business under Rule 21-5" in relation to special costs. (This amendment will be discussed further below). The combined effect of such amendments is to eliminate the bifurcated review of legal costs under both Rule 14-1 and the *LPA*. All aspects of a solicitor's bill for legal work relating to an estate will be reviewed under Part 8 of the *Legal Profession Act*. Whether the personal representative can then be indemnified for such costs from the estate is a separate analysis.[18]

III. Procedural Changes

I now turn to the changes introduced by the Probate Rules relating to the procedure for having the accounts of the personal representative or the claims for remuneration resolved by the court.

A. Passings of Accounts

1. Current Practice

The usual procedure in British Columbia to resolve issues involving the executor's accounts and claims for remuneration is to refer the matter to the Registrar.[19]

The personal representative may initiate the process by applying on a without notice basis, pursuant to Rule 21-5(70), for an order directing that the accounts be passed before the Registrar. The reference order will deal with matters such as service, and whether the Registrar will certify the results of the hearing.

If a beneficiary initiates the process, then it must be commenced by petition within a new court file. Once again, the result would typically be an order that the matter be referred to the Registrar, and a formal hearing then takes place pursuant to Part 18 of the *Civil Rules*.

If the matter is expected to be contentious, a pre-hearing conference will be required by the Registrar. At the conclusion of the hearing, the Registrar will prepare a report that deals with both the accounts to be passed and a recommended remuneration. A further chambers application will then be made for the report to be confirmed by the court.

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16 Appendix C, Schedule 4, Item 25 of the 1976 Rules.

17 The differences in the two regimes were noted by Master Bouck in *Bernhard v. Wist*, 2011 BCSC 101, at paras. 109-110.

18 See my 2012 CLE paper "The Last Word" at p. 8.1.12.

19 See the neat summary of the process by Mr. Justice Voith in *Deutschmann Estate v. Fallis*, 2011 BCSC 1009 at para. 53, leave to appeal refused 2011 BCCA 404.

2. Procedure Under Rule 25-13

The enactment of Rule 25-13 of the *Supreme Court Civil Rules* fundamentally changes the procedure for a passing of accounts. There will now be one court file for matters relating to the estate. Either the personal representative or "a person interested in an estate" will initiate the process by the filing of a notice of application within the existing court file. If there is no existing court proceeding for the estate, then the process may be initiated pursuant to Rule 25-14(1) by requisition.

Subrule 25-14(1)(*o*) deals specifically with applications for the passing of accounts, but such an application may be brought in conjunction with other applications brought under Rule 25-14(1).

a. Initiating the Process

If the personal representative initiates the passing of accounts, the application must be supported by the Affidavit in Support of Application to Pass Accounts (Form P38) and the Statement of Account Affidavit (Form P40) discussed earlier. The "statement of account" found at Exhibit "A" to Statement of Account Affidavit constitutes the estate accounts. It will consist of the following:

(1) Statement of Assets and Liabilities as at the *commencement date*;

(2) Statement of Capital Transactions;

(3) Statement of Income Transactions;

(4) Statement of Assets and Liabilities as at the *effective date*;

(5) Statement of Proposed Remuneration;

(6) Statement of Distribution;

(7) Statement of Proposed Distribution of Residue of the Estate.

A passing of accounts may also be initiated by a "person interested in an estate". This latter phrase is not defined. I note that Rule 18-1(11) provides that a "person" may apply for a furnishing of accounts from an executor, administrator, or trustee. In *Drummond v. Moore*, 2012 BCSC 496, the court noted that this rule, unlike its Ontario equivalent, does not require the applicant to have a "financial interest" in the estate, but "some limits must apply". The court doubted that a plaintiff in a *Wills Variation Act* proceeding, with no present interest in the estate, has sufficient standing to compel a passing of accounts. A similar approach may be taken to the wording of Rule 25-13(1).

As noted above, the beneficiary or other "person interested in an estate" does not need to follow the cumbersome process of filing a petition in a new court file, but may initiate the process by filing a notice of application within the existing court file. Pursuant to Rule 25-13(6)(*b*), when a person other than the personal representative applies to the court for a passing of accounts, the applicant must also file an affidavit explaining why an accounting is required.

b. Service

Rule 25-14(5) provides that the notice of application and the application materials must be served upon the personal representative (if not the applicant) and all other persons who may be affected by the order sought. Part 25 did not include a recommendation of the BCLI that there be a provision stating that it is unnecessary to serve the application on a person who has already consented in writing to the accounts.

c. Consent Orders

Rule 25-13(2)(*a*)(*iii*) provides that an application for a passing of accounts may proceed by way of a consent order if each interested person has consented to the accounts.

d. Directions Hearing

Rule 25-13(3) sets out the authority of the court when hearing an application for the passing of accounts. The court may "hear and decide any matter relating to the accounts". The court may also refer the matter to the registrar pursuant to Rule 25-13(3)(*b*) or make any other order that it considers appropriate [Rule 25-13(3)(*c*)].

The combined effect of Rule 25-13(3) and Rule 25-14(8) – which deals generally with procedural matters in estate applications – is to provide the court with considerable discretion to structure the procedure to resolve the issues in dispute. The intent of these changes is to allow for the passing of accounts to be resolved in a single step where possible. The court may resolve any dispute on a summary basis, without referring them to the registrar to make necessary findings.[20] The court may also give directions pursuant to Rule 25-14(8) as to how the matter should proceed forward. Such directions may involve the identity of parties, how evidence may be presented, document discovery, and what issues are to be decided. These provisions therefore allow the Court to tailor the proceeding to resolve the issues in dispute in the most effective and proportionate manner. The issue of the executor's accounts may be determined at the time of other matters in dispute. This point will be noted further below in regard to "missing assets".

e. Registrar's Hearing

If the court refers the personal representative's accounts to the registrar for a passing of accounts pursuant to Rule 25-13(3)(*b*), the default rule will now be that the registrar will certify the results of the accounting, so as to avoid the need for a confirmation hearing: Rule 25-13(5). Form P39 is the prescribed form of Certificate that may then be filed under Rule 18-1(9). Rule 25-13(5)(*b*) provides that, once filed, the Certificate is binding upon the following:

(1) the persons interested in the estate who had notice of the inquiry, assessment or accounting;

(2) the persons interested in the estate who had already consented to the accounts; or

(3) the persons subject to an order made under Rule 18-1(20)(b), involving situations in which it is impracticable to serve a person, that the person be bound by the Certificate as if the person had been served with the application.

A party to the proceeding may appeal the results of the inquiry, assessment or accounting contained in the Certificate.

It is only when the court "orders otherwise" that the current two-step process involving a registrar's report and a confirmation hearing would be used.

B. Remuneration of Personal Representative

If it is not possible to obtain the approval of all the beneficiaries, the remuneration of the personal representative must be determined by the court. Rule 25-13(1) provides that the personal representative or a person interested in the estate may apply for an order to fix and approve the personal representative's remuneration. Such an application may be heard at the same time as the passing of the personal representative's accounts, or may be dealt with separately.

Generally speaking, the same procedures discussed above with respect to the accounts would apply to proceedings that deal solely with remuneration. For instance, Rule 25-13(2)(*a*)(*iii*) would allow for an order to be made by consent, pursuant to Rule 8-3, if each interested person has consented to the remuneration.

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20 One example in the caselaw of accounts being passed on a summary basis, without reference to the Registrar, is *Re Cleverley Estate*, 2000 BCSC 1454.

IV. Further Issues

A. Dealing With the "Missing Assets"

In my 2012 CLE paper, I discussed the limits of the Registrar's jurisdiction and how a Registrar's hearing is not the proper place for certain disputes relating to the estate.[21] In particular, the issue of "missing assets" was discussed in detail: if the beneficiaries claim that certain assets, such as property jointly-owned by the Deceased and others, properly form part of the estate, but is not listed in the accounts as estate assets, is that a matter for a passing of accounts? It was my view that the limited nature of a Registrar's jurisdiction in British Columbia prevented such issues being determined in a passing of accounts. In contrast, the statutory regime in Ontario, which had been specifically amended in 1905 after such issues had been raised in a case[22], allow for such issues to be judicially resolved at the same time as auditing the accounts.[23]

In order to bring such claims, beneficiaries would typically be forced to commence a separate proceeding to obtain an order declaring that such "missing assets" properly form part of the estate. Claims that an executor has failed to collect assets of the estate, or has converted them to his or her own use, may be framed as a breach of trust action. The usual practice would be for a Registrar's reference to be adjourned generally pending the resolution of the separate proceeding.

As discussed above, the Probate Rules allow either the personal representative or "a person interested in an estate" to apply for an order for the passing of accounts or to fix and approve the remuneration of the personal representative. At the directions hearing, the Court may "hear and decide any matter relating to the accounts or remuneration of a personal representative" or "make any other order or give any direction that the court considers appropriate". The Court may give directions concerning the procedure to be followed in any matter covered by the Rule, including "the issues to be decided" and a trial of any issues. The purpose of these subrules, as set out in the BCLI's report on the draft rules, is to allow the Court to tailor the procedure to resolve the issues in dispute.[24] On the basis of such powers, the court at the directions hearing should be able to tailor the procedure in such a way to deal with the issue of the "missing assets" while also dealing with the accounts and the claim for remuneration. The cumbersome procedure in the current regime, which leads to a multiplicity of proceedings, may be avoided.

B. Costs

1. General Principles

The general rule in civil litigation, as set out in Rule 14-1(9), is that costs follow the event unless the Court orders otherwise. This general rule applies to many forms of estate litigation, such as claims under the *Wills Variation Act*. Nevertheless (and despite *obiter* suggestions about a "modern approach"[25] to costs in estate

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21 M.S. Kerwin, "The Last Word", at pp. 8.1.14 to 8.1.18.

22 *Re Russell,* (1904), 8 O.L.R 481 (Div. Ct.).

23 The amendments to the Ontario *Rules of Court* in 1905 granted the Surrogate Court judge the jurisdiction to "fully inquire" into the whole property of the estate. The effect of this amendment was plain: at a passing of accounts, the judge could decide all disputed matters, including whether there were assets missing from the inventory and accounts. *Re Taerk; Turk v. Turk* (1957), 9 D.L.R. (2d) 601 at 607, 609-610 (Ont. C.A.); *Re Critelli* (1960), 24 D.L.R. (2d) 510 (Surr. Ct).

24 BCLI, *Consultation Paper on New Probate Rules*, Report (May 2010); BCLI, *Report on New Probate Rules*, Report No. 57, (October 2010), pp. 98-99.

25 *Woodward v. Roberts Estate*, 2007 BCSC 1549.

litigation), this general rule does not always apply. In some forms of estate litigation, it is "not uncommon" for the costs of all parties to be paid out of the estate.[26] The policy considerations underlying these rules are discussed more fully in my earlier CLE papers.[27]

2. Application to Registrar's Hearings

A personal representative is generally entitled to be indemnified for the costs of the passing of accounts. The legal costs incurred have typically been viewed by the courts as a matter of estate administration, and therefore paid from the estate as a proper expense. A passing of accounts may be necessary due to the refusal of all beneficiaries to approve the accounts, and the costs of the personal representative will normally be paid out of the estate unless there was some conduct that is reprehensible and deserving of rebuke.[28]

The former Rule 14-1(6) explicitly provided that the costs for any non-contentious estate business would be assessed as special costs. Since applications for passing of accounts and remuneration fell under the "non-contentious" rule, personal representatives were usually indemnified for the costs of applying to the Court for an order fixing or settling their remuneration. The fact that the beneficiaries opposed the personal representative's claim for remuneration did not take the matter out of the "non-contentious" category. This was the basis of the *Re Kanee Estate* decision to be discussed below.

Consistent with the modern trend in estate litigation on costs, there is no automatic rule that all parties will be indemnified for their costs out of the estate following a Registrar's hearing. The Court may consider a number of factors when determining an appropriate costs award such as whether the parties' positions were reasonable, any offers to settle, and who will ultimately pay for the costs. The conduct of the parties in the litigation will be scrutinized. For instance, if a beneficiary unreasonably refuses to approve the executor's accounts, thereby requiring a formal passing of accounts, the costs of the hearing can be paid out of his or her share of the estate.[29] The Court may also order the executor to pay the costs of the beneficiaries, or bear his or her own costs, in certain circumstances such as declining a reasonable offer to settle or if the accounts were wholly inadequate.[30]

3. Whither *Kanee Estate*?

As noted above, the decision in *Re Kanee Estate*[31] is currently authority for the proposition that the settlement of executors' compensation is part of the administration of the estate, and is "noncontentious business" within the meaning of Rule 14-1(6) and Rule 21-5. Accordingly, costs "must be assessed as special costs" unless the court orders otherwise. The underlying argument would be that the executor's compensation claim falls within the ordinary course of the office of executor and he or she should be fully indemnified for the

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26 *Re Collett Estate* (2005), 48 B.C.L.R. (4th) 102, 2005 BCCA 291; *Mawdsley v. Meshen*, 2011 BCSC 923 at para. 34.

27 M. Scott Kerwin, "Probate Actions" (Estate Litigation Basics CLE, 2010); M. Scott Kerwin, "Settlement of Estate Litigation" (Estates Litigation – 2011 Update, 2011).

28 *Bigras v. Bigras Estate*, 2011 BCSC 950 at para. 64.

29 *Re Chevrefils Estate,* 2010 BCSC 753; *Andersson v. Khan* (2006), 23 E.T.R. (3d) 40*,* 2006 BCSC 521 at para. 97; *Re Curtis Estate* (2003), 3 E.T.R. (3d) 42 (B.C.S.C.); *Re Bedont Estate* (2004), 9 E.T.R. (3d) 67 (Ont. S.C.J.).

30 *MacLean v. MacLean*, 2009 BCSC 292 at para. 59; *Re Hautakoski Estate,* 2009 BCSC 868; *Bigras v. Bigras Estate*, 2011 BCSC 950 at para. 64; *Re Stead Estate*, 2009 BCSC 821; *Re McDonald Estate*, 2012 ABQB 704.

31 *Re Kanee Estate* (1992), 69 B.C.L.R. (2d) 89 (C.A.), affirming (1991), 43 E.T.R. 292, [1991] B.C.J. No. 2857 (C.A.), dismissing leave to appeal, (1991), 41 E.T.R. 263, [1991] B.C.J. No. 3018 (S.C.), aff'g [1991] B.C.J. No. 3000 (Master).

legal costs incidental to realizing that claim.[32] Such a result may occur even though a dispute over executor's compensation can only be described as "contentious", and may be the primary reason for dragging the matter into court.[33]

The Probate Rules are contained in section 8 of BC Reg. 149/2013. Section 3 of this regulation also amends Rule 14-1(6) as it relates to costs in proceedings under the *Estate Administration Act*. Currently, Rule 14-1(6) provides that if costs are payable for any "non-contentious business under Rule 21-5", such costs **must** be assessed as special costs. The opening wording of this subrule ("Unless the court on application otherwise orders …") allows the Court discretion to depart from this general rule. After March 31, 2014, Rule 14-1(6) will read:

> Unless the court on application otherwise orders, if costs are payable <u>in relation to any proceeding under Part 25 in which a notice of civil claim has been filed</u>, those costs
>
> (a) must be assessed as special costs, and
>
> (b) may be assessed without an order of the court,
>
> and subrules (3) and (5) of this rule apply (emphasis added).

This amendment is difficult to understand. There are no proceedings under Part 25 that would involve the filing of a notice of civil claim. All proceedings would involve the filing of an application under Rule 25-14. The only exceptions are:

- if there is no existing estate file, a party may apply by filing a requisition;
- if there is no existing estate file, Rule 25-14(4) allows for proceedings for an order proving a will in solemn form to be commenced by petition (rather than Requisition).

Accordingly, the reference to a "notice of civil claim" in the amended Rule 14-1(6) seems meaningless. For the purposes of this paper, the more important issue is whether this amendment, insofar as it removes the reference to "non-contentious business", undermines the authority of *Kanee Estate*.

A review of the *Kanee Estate* decision is helpful to this analysis.

Dr. Kanee died on January 2, 1985 leaving an estate worth $3.5 million. An interim passing of accounts lasted six days, leading to a registrar's report in June 1988. A final passing of accounts took place in September 1989. The executors had sought close to the maximum remuneration allowed by the *Trustee Act*, but received approximately 25% less than that. The remuneration was fairly close to what the objecting beneficiary Goldman had proposed.

The issue of whether the executors should be indemnified for their costs of the proceeding was referred back to Master Doolan in 1990. He determined that, at the interim passing in 1987-88, the objecting beneficiary took "no real issue" with the accounts, but only contested the issue of remuneration. By the time of the final passing of accounts in September 1989, however, the beneficiary's position had changed. The executor's accounts themselves were in issue, as they related to legal costs, not just the claim for remuneration. Master Doolan noted that the beneficiary could have consented to the accounts and sought an order under what is now s. 89 of the *Trustee Act* to settle the issue of compensation. There was a "change of game plan" by the beneficiary at the final passing of accounts to place the accounts "very much in issue".

Master Doolan held that the executors were entitled to special costs payable out of the estate. He reasoned that they were required to pass their accounts due to the fact that the beneficiary Goldman would not approve them, and the passing of accounts was a prerequisite to the ultimate discharge of the executors by the court. Even though there was an element of self-interest, in relation to the claim for remuneration under

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32 *MacLean v. MacLean*, 2009 BCSC 292 at para. 58; *Neill v. Birston* (2006), 23 E.T.R. (3d) 107 (Ont. Sup. Ct. J.) at para. 16.

33 Voith J. makes a similar comment in *Deutschmann Estate v. Fallis*, 2011 BCSC 1009 at para. 52, leave to appeal refused 2011 BCCA 404.

the *Trustee Act*, that does not taint the nature of the proceeding. Master Doolan was not concerned that the executors had sought the maximum amount possible, noting that "if you don't ask, you won't get it". He gave little weight to the settlement offer made by the objecting beneficiary, since it would have involved the beneficiary obtaining the right to scrutinize all future estate expenses. Rule 57(5) [now Rule 14-1(6)] required "special costs" for non-contentious estate business. The fact that the beneficiary Goldman opposed the accounts and the claim for remuneration did not convert the proceeding into contentious estate business. Special costs, payable by the estate, were awarded.[34]

Mr. Justice Donald dismissed an appeal from the Master's order.[35] He agreed with the executors that the accounts were very much in issue, and that it was the strategy of the beneficiary Goldman to question several aspects of the accounts to demonstrate that the executors had made costly mistakes (thereby weakening the claim for remuneration). As with Master Doolan, Donald J. emphasized that the refusal of a beneficiary to approve the accounts made it necessary for the executors to have their accounts passed by the court. The legal costs incurred by the executors were an estate expense. Further, the proceeding constituted "non-contentious business" and the rule for special costs would apply.

Donald J. found some merit in the argument of the beneficiary Goldman that when remuneration is the only issue, the ordinary rule for costs would be appropriate since the executors are acting solely in their own self-interest. On the other hand, he also observed that the litigation model does not adequately fit, since the issue of remuneration is intimately connected with the estate accounts. Subject to considerations like reasonableness and honesty, costs relating to a claim for remuneration should be dealt with the same way as other aspects of the passing of accounts. In the end, Donald J. held that he was bound by the factual finding of Master Doolan that the passing of accounts was not exclusively concerned with remuneration, but that the accounts were also at issue. The award of special costs was affirmed.

Such findings were echoed by Macfarlane J.A., in chambers, at the leave application to the Court of Appeal a few months later.[36] He dismissed the leave application on the basis that the appellant Goldman had no reasonable chance in persuading the Court of Appeal that Donald J. had made a reversible error. The fixing of remuneration is done in connection with the passing of accounts, and "a usual and an integral part of that process is to examine the accounts to determine the care, pains, trouble, and time expended in and about the administration of the estate". If there were errors in the administration of the estate, as revealed by the accounting, it would affect the remuneration awarded by the court. The fixing of remuneration is a step in the process of the due administration of the estate, and the administration of the estate cannot be closed until the issue is resolved.

A full panel of the BC Court of Appeal dismissed the appeal brought by the appellant beneficiary.[37] The arguments put forward by the beneficiary Goldman had some traction, but ultimately failed due to the wording of Rule 57. The main judgment was written by Chief Justice McEachern, and he referred to the issues raised in the appeal as "an important question of estate practice". It was noted that the Public Trustee had intervened in the appeal due to the importance of the case to estates practice.

McEachern C.J.B.C. observed a "curious anomaly where an objecting beneficiary who succeeds in reducing the amount of claimed remuneration may find the saving more than cancelled by the payment of the costs incurred by the Executors in the remuneration process". The appellant beneficiary, supported by the PGT, argued that the usual costs rule in litigation should apply: the loser pays the costs of discrete issues. This argument was rejected for three interconnected reasons:

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34 (22 January 1991), [1991] B.C.J. No. 3000 (S.C.-M.).

35 (29 May 1991) 41 E.T.R. 263, [1991] B.C.J. No. 3018 (S.C.).

36 (19 September 1991) (1991), 43 E.T.R. 292, 4 B.C.A.C. 287 (C.A.).

37 (2 July 1992) (1992), 69 B.C.L.R. (2d) 89, 46 E.T.R. 1 (C.A.).

(1) The proceedings were not just concerned with remuneration, but the accounts were also in issue. McEachern C.J.B.C. referred to the statutory scheme – in particular, Rules 61(1)*(b)(iii)* and 61(58) – which contemplates that accounts and remuneration be considered together.

(2) There is now a "clear statutory scheme" for these matters. The proceedings are brought under Rule 61(58) and are considered non-contentious business. Rule 61(1)*(b)(iii)* specifically refers to "the fixing of remuneration and passing of accounts" in the definition of non-contentious business. The Court could not agree that proceedings can become "contentious in fact" and therefore not caught by the rule.

(3) Rule 57(5) provides that costs for non-contentious business shall be assessed as special costs. The opening words "unless the courts … otherwise orders" clearly allow a discretion, but such discretion must be exercised judicially. The statutory scheme "mandates" that the costs of remuneration proceedings be assessed as special costs unless the court orders otherwise. It is the "normative" assessment, and the Court of Appeal found no basis for interfering with how Master Doolan and Donald J. had exercised their discretion not to "order otherwise".

The Court of Appeal agreed with respondent executors that special costs are usually ordered at the conclusion of a passing of accounts unless some good reasons are shown to the contrary. The appeal was therefore dismissed.

The authority of *Kanee Estate* has subsequently led to a "curious anomaly" in many cases. Beneficiaries can successfully challenge an excessive claim for compensation, only to see the benefits cancelled out by the legal costs paid out of the estate to the executor at the conclusion of the passing of accounts.

The introduction of the Probate Rules in March 2014, along with the amendment to Rule 14-1(6), may lead to a reconsideration of *Kanee Estate*. The "clear statutory scheme" reviewed by Chief Justice McEachern is gone. The Probate Rules abolish the concepts of "contentious" and "non-contentious" estate business. Rule 25-13 also explicitly cuts the link between a passing of accounts and an application to fix remuneration for the executor, as they can be dealt with separately. Have such amendments effectively undermined the *Kanee Estate* decision, so that the "normative" rule will no longer be that personal representatives are entitled to their legal costs payable from the estate? Has the "curious anomaly" identified by Chief Justice McEachern been removed?

The B.C. Court of Appeal certainly emphasized the statutory scheme as precluding the arguments put forward by the appellant beneficiary (and the PGT) in *Kanee Estate*. Due to the amendment to Rule 14-1(6), and the new regime under Rule 25-13, there seems a strong argument that the main basis of the *Kanee Estate* decision is removed. The effect of such statutory changes is to "undermine" the case for the purposes of *stare decisis*.[38] If prior decisions were based upon a statutory scheme no longer in effect, then the courts need not follow it.[39]

If the *Kanee Estate* decision is no longer binding authority, that does not necessarily mean that personal representatives will be denied costs in remuneration hearings. It should be noted that both Master Doolan and Mr. Justice Donald in *Kanee Estate* gave additional reasons for why the costs of a remuneration hearing should be paid by the estate, regardless of whether the executors fall short in their claim. They emphasized that resolving the issue of remuneration is part of "estate administration" and, accordingly, the general rule of indemnification should apply (i.e., full indemnity unless the legal costs are not properly incurred). This approach may be questioned since trustees do not have a right at common law to remuneration; it is a statutory right under s. 88 of the *Trustee Act*. There are also inherent difficulties in fully separating the issue of

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38 I discussed this argument in my article "*Stare Decisis* in the BC Supreme Court: Revisiting *Hansard Spruce Mills*," *The Advocate* (July 2004) at p. 550.

39 *Pittalis v. Grant,* [1989] 1 Q.B. 605 ("the statutory support which gave [the rule] life at last turned off").

remuneration from what is in the accounts – a challenge to a personal representative's claim may involve a review of how the estate was administered. Nevertheless, if an application is brought under Rule 25-13(1)(*b*) – and the beneficiary is careful to limit the application to the issue of remuneration only – there seems a strong basis for reconsidering the authority of *Kanee Estate*.