

Who Will Guard the Guards? Holding Executors and Attorneys Accountable

Prepared for: Legal Education Society of Alberta
Estate Litigation Fundamentals

Presented by:

Malkit Atwal

Field LLP

Edmonton, Alberta

For presentation in:

Edmonton, Alberta – April 5, 2017

Calgary, Alberta – April 12, 2017

WHO WILL GUARD THE GUARDS?¹
HOLDING EXECUTORS AND ATTORNEYS ACCOUNTABLE

INTRODUCTION

It is a well-recognized principle in estate law that executors and attorneys have a duty to account. The duty refers to the obligation on the part of the executor or an attorney to maintain continuous and ongoing comprehensive records concerning their management or administration of property belonging to the deceased or to the donor. The passing of accounts is made to those who are entitled to it pursuant to the relevant legislation.

A lack of understanding or knowledge on the part of the executor or the attorney about this important requirement inevitably leads to problems. A review of the case law dealing with estate accounting issues reveals certain themes:

1. executors and attorneys treating the estate or the donor's property as their own;
2. beneficiaries or family members who do not trust the appointed person, scrutinizing and questioning every act and decision he or she makes;
3. executors or attorneys who appear to have been acting in the best interest of estates or donors but have failed to maintain appropriate records of their management or administration; and,
4. executors and attorneys who do nothing or otherwise do not fulfill their obligations.

This paper provides an overview of the duty to account of executors and attorneys, with reference to legislation and case law touching on the themes set out above. A brief overview of the procedural steps required to bring an application for an accounting will also be provided.²

DUTY TO ACCOUNT BY ATTORNEYS UNDER THE *POWERS OF ATTORNEY ACT*

In addition to an express obligation to provide regular accounting to certain individuals as imposed by an enduring power of attorney, an attorney can also be compelled to provide an accounting pursuant to section 10 of the *Powers of Attorney Act*.³ That section reads:

¹ *Quis custodiet ipsos custodes?* is a Latin phrase traditionally attributed to the Roman poet Juvenal from "Satire VI" in his *Satires* (Christopher Kelk, *The Satires of Juvenal: A Verse Translation* (Lewiston, NY, 2010) at 126). The phrase is literally translated as: "who is to keep guard over the guards themselves?" (Juvenal, *The Sixteen Satires*, translated by Peter Green (London: Penguin Books, 1974 at 140).

² For a more detailed paper on the topic, see Malkit Atwal, "Rules and Requirements of an Acceptable Accounting" (Paper delivered at the Estate Accounting 2015/2016 Seminar of the Legal Education Society of Alberta, Edmonton & Calgary, 29 September & 1 October 2015), online: LESA <http://ftp.lesaonline.org/Attachments/Papers/61963_02.pdf>.

Accounting

- 10(1) An application may be made to the Court for an order directing an attorney to bring in and pass accounts in respect of any or all transactions entered into in pursuance of the enduring power of attorney.
- (2) The application under this section may be made
- (a) by the donor, the donor's personal representative or a trustee of the donor's estate, or
 - (b) if the donor is unable to make reasonable judgments in respect of matters relating to all or part of the donor's estate, by an interested person.
- (3) A copy of the application and any order granted in respect of the application shall, unless the Court provides otherwise, be served on the donor and the attorney.
- (4) On hearing an application under subsection (1), the Court may grant whatever order for accounting it considers appropriate in the circumstances.
- (5) This section applies notwithstanding any agreement or waiver to the contrary.

An application for an attorney to account may be made by the donor, the donor's personal representative, a trustee of the donor's estate, or by any interested person. Section 10 does not restrict an application against an attorney to be commenced during the donor's lifetime and the specific ability of a donor's personal representative to commence such an application implies that such an application can be commenced or continued against an attorney after the death of the donor.⁴

Although the term "interested person" in section 10(2)(b), above, is not defined in the legislation, case law provides some guidance. An analysis of the relationship between the interested person and the donor and the nature of the interested person's interest were considered relevant to an inquiry about whether someone was an interested person in *Re Taubner Estate*.⁵ The Court emphasized, however, that being an interested person only gives that person the right to make an application. It does not give that person a right to any particular remedy. Whether a person's interest is sufficient to warrant a remedy will have to be decided on the specifics of who the person is and what the interest is.

³ R.S.A. 2000, c. P-20

⁴ *Eliuk v. Ellaschuk*, 2008 ABQB 255 is an example of a situation where an application for an accounting was commenced prior to the donor's death, but continued by the estate pursuant to the *Survival of Actions Act*, RSA 200, c. S-27.

⁵ *Re Taubner Estate*, 2010 ABQB 60, at paras. 216 to 219.