**Order Giving Directions – Estates List Proceedings – Passings of Accounts (Sample Terms)**

| **Issue** | **Sample Clause** | **Annotation/Comments** |
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| ***Procedural*** | | |
| Consolidation of Proceedings | THIS COURT ORDERS that the application brought by ⚫, bearing Court File No. ⚫ in the Ontario Superior Court of Justice, is hereby consolidated and joined with the within proceedings and that the hearings of said applications shall take place at the same time or one after the other. | Rule 6.01 of the *Rules of Civil Procedure* encompasses consolidation. See *Couls v Pinto*, 2007 CarswellOnt 7050 (SCJ) concerning the Court's discretion in deciding whether to consolidate proceedings.  NOTE: Attention should be given to which party or entity is responsible for transferring the court files to the appropriate registry if files from different courts are consolidated and transfer is necessary. |
| Leave Under the *Substitute Decisions Act* | THIS COURT ORDERS that leave of this Honourable Court, be and is hereby granted to the (applicants) to bring this application pursuant to Section 42(1) of the *Substitute Decisions Act*, S.O. 1992, c 30 as amended. | Sections 42(3)-(4) of the *Substitute Decisions Act, 1992*, list the individuals who may apply to the Court to compel a passing of accounts. Any person may do so with leave of the Court. |
| ***Substantive Relief*** | | |
| Accounting | THIS COURT ORDERS that ⚫, in his/her capacity as ⚫ (attorney for property, agent, de facto attorney, estate trustee, etc.), shall prepare accounts in the form provided by Rule 74.17 of the *Rules of Civil Procedure* for the period commencing ⚫ to the date of this Order, and shall commence an application to pass such accounts within sixty (60) days of the date of this Order. | The beneficiary of a trust or an estate has the right to hold the trustee to account for the administration of the trust property and to enforce the terms of the trust; See *Valard Construction Ltd. v Bird Construction Co.*, 2018 SCC 8 at para.18. |
| Damages | THIS COURT ORDERS that the Respondent is liable to the [incapable person] for damages resulting from any breach of fiduciary duty in respect of his/her activities as attorney for property during the period commencing ⚫ and concluding ⚫ pursuant to s. 33 of the *Substitute Decisions Act* 1992, S.O. 1992, c. 30.  THIS COURT ORDERS that the Respondent is liable to the Estate of the Deceased for damages resulting from any breach of fiduciary duty in respect of his/her activities as estate trustee during the period commencing ⚫ and concluding ⚫. |  |
| Tracing Order | THIS COURT ORDERS that a tracing Order shall be and hereby is granted in accordance with the provisions of the *Rules of Civil Procedure*, Rules 44 and 45, and Section 104 of the Courts of Justice Act, as deemed necessary and appropriate by the (applicants/ respondents) to ascertain assets for recovery in respect of (person ⚫ attorney for property ⚫ Estate Trustee). |  |
| ***Preservation of Assets*** | | |
| Non-Dissipation and Injunction Clauses | THIS COURT ORDERS that none of the assets of the Estate or the Deceased shall be invested, expended or dissipated or otherwise dealt with except with the prior written consent of all of the parties by their lawyers. [name of executor] shall not transfer funds from, draw cheques on, direct payment from or withdraw funds from, bank account no ⚫ without the prior written consent of the Parties by their lawyers. Investment of the assets of the estate of the deceased shall be determined by the parties, jointly, failing which, said assets shall be invested in Guaranteed Investment Certificates or Term Deposits, cashable after 30 days on the written instructions of lawyer for the Parties.  THIS COURT ORDERS that (x) shall be restrained from dissipating, selling, transferring, disposing of, or encumbering, any real or personal property that was once the property of the deceased, or that can be traced from property which was originally or previously owned by the deceased and the within Order shall be filed with any relevant entity to enforce the terms of the within Order.  THIS COURT ORDERS that ⚫ in his/her capacity as Estate Trustee of the Estate of the deceased, and the Estate shall not encumber, sell, transfer, or dispose of the ⚫, with the Municipal address ⚫, until such time as the within issues have been finally resolved or determined and until further order of this Court.  THIS COURT ORDERS that ⚫ in his/her capacity as Estate Trustee of the Estate of the deceased, and the Estate shall not distribute any of the property or assets of the Estate of the deceased to the beneficiaries, until such time as the within issues have been finally resolved or determined and until further order of this Court.  THIS COURT ORDERS that ⚫ Defendant shall provide to the lawyer for the Estate Trustee any and all papers and property which belonged to the deceased and which now belong to the Estate within twenty (20) days of the date of this Order Giving Directions and in advance of the within ordered mediation. | Section 101 of the *Courts of Justice Act* and Rule 45 of the *Rules of Civil Procedure* are the enumerative provisions dealing with injunctive relief and the Court’s jurisdiction for granting such relief. See the Supreme Court of Canada jurisprudence on mandatory interlocutory injunctions in *R v Canadian Broadcasting Corp*., 2018 SCC 5, at para. 18. |
| Certificate of Pending Litigation | THIS COURT ORDERS the local registrar for the County of ⚫ in the Province of Ontario to issue a Certificate of Pending Litigation against the real property known municipally as ⚫ and having a legal description of ⚫ registered in the name of ⚫.  THIS COURT ORDERS that a Certificate of Pending Litigation be and is hereby granted, subject only to the filing of the required documents giving effect to the registration of the same, and such Certificate of Pending Litigation shall be registered against title to the property municipally known as ⚫, legally described as ⚫ and defined herein as (identify property) and the costs of effecting the same shall be borne by ⚫ person ⚫ estate ⚫ attorney. | See section 103 of the *Courts of Justice Act*, Rule 42.01 of the *Rules of Civil Procedure* and the decision of Master Glustein (as he then was) in  *Perruzza v Spatone*, 2010 ONSC 841 at para. 20 for the principles surrounding the jurisdiction and discretion of granting leave for a CPL.  A beneficial interest in a trust or an estate that holds land is not a specific interest in the land for a beneficiary; See *Spencer v Reisberry*, 2012 ONCA 418. |
| ***Productions*** | | |
| Powers of Attorney | THIS COURT ORDERS that the Respondent shall produce to the Applicants a copy of the Power of Attorney for Property appointing the Respondent as attorney for property for the Deceased, purportedly dated ⚫, within thirty (30) days of this Order. |  |
| Testamentary Documents | THIS COURT ORDERS that a copy of any Will or other testamentary document of the Deceased, including, without limitation, any beneficiary designation or joint account agreement, be delivered to the lawyer for the Applicant forthwith. | Under Section 9 of the *Estates Act*, the Court has the jurisdiction to order the production of any testamentary documents of the deceased. |
| Vouchers | THIS COURT ORDERS that any vouchers in respect of entries listed in the accounts for the period commencing ⚫ and concluding ⚫ shall be available for inspection by the Objector upon request by the lawyer for the Objector. The costs of reproducing any copies of the vouchers shall be paid out of the assets of the Estate of ⚫, subject to a contrary Order by the Judge hearing the trial of issues. |  |
| Production of Financial Records | THIS COURT ORDERS that the ⚫ be and is hereby entitled to compel production of all financial records, banking records, tax records, and any and all records regarding the assets, liabilities, income and expenses relating to ⚫ prior to death or while under attorneyship, either solely or jointly by ⚫ with another, for the period commencing ⚫ and concluding ⚫, from any financial advisor, corporation, bank, trust company, insurance company, accountant, or other authority in possession, power, or control of such records, and any predecessors or successors in interest, whether in Canada, or the United States, or elsewhere, in the same manner and to the same extent as ⚫ would have been able, if he/she were alive, including but not limited to records to which ⚫ was entitled to inspect as a shareholder pursuant to sections 140, 140.1, and 145 of the *Business Corporations Act*, R.S.O. 1990, c. B 16*.* The ⚫ will, upon receipt of any such documents, produce copies to the lawyer(s) for the Parties, with the cost incurred in relation to the production and copying of said documents to be paid from the assets of the estate by ⚫ and with the final determination as to payment of such costs and expenses to be reserved to the Trial Judge, unless otherwise agreed upon by the Parties. | Section 32(6) of the *Substitute Decisions Act, 1992*, creates a fiduciary obligation on an attorney or guardian to keep accounts of all transactions. In addition the addition of an adult child to an elderly parent’s account is sufficient to create a fiduciary duty in relation to the parent’s account. See *Borges v Borges*, 2018 ONSC 3451 at para. 27. |
| Production of Lawyer’s Records | THIS COURT ORDERS that the ⚫ be and is hereby entitled to compel production of all lawyer records, notes and files relating to ⚫, for the period commencing ⚫ and concluding ⚫, from any lawyer or law firm in possession of such relevant legal records in the same manner and to the same extent as ⚫ would have been able, if he/she was alive, and that all productions received be produced to the other parties on request. The charges for the production of the records and files shall be paid from the Estate by ⚫, and the final determination as to payment of such cost and expenses shall be reserved to the Trial Judge. | See *Ballard Estate*, [1994] CarswellOnt 579 (ON SC), as to the joint interest principle in privilege as between beneficiaries and trustees concerning the legal opinions given about the administration of the trust to a trustee. |
| Production of Lawyer's Real Estate File | THIS COURT ORDERS that the lawyers involved in the transfer of (property) on or about (date), forthwith provide all files, documentation, and information to the lawyers for the applicants/respondents, respecting matters relating to the deceased during the period commencing ⚫ and concluding ⚫. |  |
| Privilege | THIS COURT ORDERS that any claim in respect of the deceased, of lawyer/client privilege, financial advisor/client privilege, or any other professional privilege, including medical privilege, or the duty of confidentiality relating to the instructions for, making of, or execution of, any of the deceased’s testamentary or personal documentation, financial documentation, or documentation relating to property, real estate, or a corporation of the deceased, inclusive of any privacy regulations and legislation which may prohibit the obtaining of such information, including personal; health information in respect of the deceased, documentation in respect of the deceased governed by the *Personal Information Protection and Electronic Documents Act* (the “PIPEDA”), and the *Personal Health Information Protection Act* (the “PHIPA”), shall be and hereby is waived by the Order Giving Directions herein. | The general policy that supports the exception of the privilege that normally attaches where there is a will challenge is that the interests of the deceased client are furthered in the sense that the purpose of allowing evidence of the drafting lawyer’s notes and testimony about the execution of the will allows the Court to ascertain what the deceased’s true intentions are. See *Goodman Estate v Geffen*, [1991] 2 SCR 353 and *Hope v Martin,* 2011 ONSC 5447 at paras 19-20 for a review of the wills exception to privilege. |
| ***(Scheduling of) Next Steps in Litigation*** | | |
| Notice of Objection to Accounts | THIS COURT ORDERS that any party wishing to do so shall file a Notice of Objection to Accounts within thirty (30) days. |  |
| Mediation | THIS COURT ORDERS that the parties attend for a Mediation before a Mediator pursuant to Rule 75.1 of the *Rules of Civil Procedure* and makes the following Directions:  (a) the issues to be mediated are those set out in the Notice of Objection to Accounts or as otherwise set out in this Order Giving Directions;  (b) the Moving Parties and the Respondent are designated parties with the Moving Parties having carriage of the Mediation and the Respondent responding to it;  (c) the Notice of Mediator giving the date, place, and time of the Mediation shall be served on the designated parties by an alternative to personal service pursuant to Rule 16.03 of the *Rules of Civil Procedure*;  (d) the fees of the Mediator shall be paid out of the Estate of ⚫; and  (e) any matters arising out of the mediation requiring further direction of the Court shall be referred to me or such other Judge who is available.  THIS COURT ORDERS that the parties referred to herein, within ⚫ days of the date of the Order herein, or in the alternative, within ⚫ days of the parties obtaining copies of all medical, financial, lawyer’s records and report, shall attend for mediation before ⚫, pursuant to Rule 75.1 of the *Rules of Civil Procedure* and the following directions apply to such Order:  or in the alternative, within 60 days of the parties obtaining copies of all medical, financial, lawyer’s records and reports, shall be required to attend a mediation, prior to Examinations for Discovery, and in accordance with Rules 75.1 of the *Rules of Civil Procedure* and the following directions apply to such Order: |  |
| Examinations for Discovery | THIS COURT ORDERS that the Moving Parties and the Respondent shall serve and file Affidavits of Documents and attend and submit to Examinations for Discovery in accordance with the *Rules of Civil Procedure*. |  |
| Notice of Objection, Amended | THIS COURT ORDERS that, following the examinations for discovery, the Objectors shall deliver an Amended Notice of Objection setting out only those objections which remain at issue in such specificity as to accurately identify the nature and scope of the objection. |  |
| Notice of Objection, Reply | THIS COURT ORDERS that the ⚫ shall provide a reply to the objections raised in the said Notice of Objection within sixty (60) days of the date of receipt of the Notice of Objection. |  |
| Trial Record | THIS COURT ORDERS that the Trial Record shall consist of the Notice of Application to Pass Accounts, the Notice of Objection, the Estate Trustee’s reply to the Notices of Objection, this Order Giving Directions, and any subsequent Order Giving Directions or other material filed by either party which this Court may add to the Record. |  |
| Hearing/Trial | THIS COURT ORDERS that the issues be tried without a Jury in Toronto, Ontario at a date to be fixed by the Registrar, and the Trial Record shall consist of this Order Giving Directions and any other Order For Directions made by this Court. Following the mediation in this proceeding, any party shall be at liberty to set this proceeding down for trial without the consent of the other party. | Under Section 108(2) of the *Courts of Justice Act*, the issues of fact and the assessment of damages in an action shall be tried without a jury in respect of a claim for, *inter alia*, declaratory relief and the execution of a trust. |
| Further Directions | THIS COURT ORDERS that the parties are hereby granted leave to move for further directions as may appear advisable or necessary. |  |
| ***Ancillary Orders*** | | |
| Service of Attorneyship Accounts Upon Applicant | THIS COURT ORDERS that any application to pass accounts commenced by ⚫ in accordance with paragraph ⚫ above shall be served upon the Applicants and that the Applicants shall not be precluded from asserting any claims for damages pursuant to s. 33 of the *Substitute Decisions Act* in the course of their objections to the application to pass accounts. |  |
| Service by Email | THIS COURT ORDERS that service of all documents in this proceeding on a lawyer of record, other than documents that must be served by personal or alternative to personal service, may be served in accordance with Rule 16.05(1)(f) of the *Rules of Civil Procedure*. |  |
| Service within Ontario | THIS COURT ORDERS that service of this Order shall be effected upon all Parties with a known or discovered financial interest in the Estate, other than the Respondents, by personal service or by an alternative to personal service.  THIS COURT ORDERS that this Order Giving Directions shall be served by regular mail on the following persons: [name individuals]. |  |
| Validation of Service | THIS COURT ORDERS that service upon ⚫ of the application record, motion record returnable ⚫ is hereby validated pursuant to Rule 16.08 of the *Rules of Civil Procedure*, because copies of these documents were left with ⚫ (person) at ⚫ (address) on ⚫ (date). |  |
| Third Party Rights | THIS COURT ORDERS that any person affected by this Order, if they object, can make submissions to the Court. | Particularly where an order that is made may affect the rights of third parties, such as drafting lawyers, through production orders or other relief, it is essential that those third parties are able to move to vary or set aside orders that are not made on notice to them. |
| ***Costs*** | | |
| Costs | THIS COURT ORDERS that the costs of and incidental to the (applicants) in the bringing of this application, shall be paid on a full indemnity, lawyer and client basis by (person ⚫estate of the deceased ⚫ Estate Trustee ⚫ Attorney ).  THIS COURT ORDERS that costs of this attendance are reserved to the Judge hearing the final adjudication of this matter, or as the Court may further Order. | Where public policy considerations are at play in estates litigation, including (1) where the difficulties or ambiguities that gave rise to the litigation are caused, in whole or in part, by the testator, and (2) the need to ensure that estates are properly administered, the Court can order blended costs awards in which a portion of the costs is payable by the losing party and the balance is payable out of the estate where one or more of the relevant public policy factors are engaged; see *Neuberger v York*, 2016 ONCA 303 at para. 24-25.  Otherwise, in circumstances where public policy considerations are not involved, the "loser pays" principle is likely to apply (as it does in other civil litigation proceedings); see *McDougald Estate v Gooderham*, 2005 CanLII 21091 (ONCA). |

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