Law Society of Ontario | Barreau de l'Ontario

26th Estates and Trusts Summit – DAY ONE

CO-CHAIRS

Clare Burns
WeirFoulds LLP

Kathleen McDormand
Borden Ladner Gervais LLP

October 18, 2023

CLE23-0100700-D-WEB

Law Society of Ontario | Barreau de l'Ontario

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26th Estates and Trusts Summit – DAY ONE

CO-CHAIRS: **Clare Burns,** *WeirFoulds LLP*

Kathleen McDormand, *Borden Ladner Gervais LLP*

October 18, 2023
9:00 a.m. to 4:30 p.m.
Total CPD Hours = 5 h Substantive + 1 h 30 m Professionalism P

Law Society of Ontario
Donald Lamont Learning Centre
130 Queen St. W.
Toronto, ON

SKU CLE23-0100700

Agenda

DAY ONE:

9:00 a.m. – 9:05 a.m. **Welcome and Opening Remarks**

Clare Burns, *WeirFoulds LLP*

Kathleen McDormand, *Borden Ladner Gervais LLP*

9:05 a.m. – 9:35 a.m. **Vicarious Trauma (Compassion Fatigue)** (30 m P)

The Honourable Justice Patrice Band, *Ontario Court of Justice*

9:35 a.m. – 9:45 a.m. **Question and Answer Session** (10 m P)

9:45 a.m. – 9:55 a.m. **Banks' Duty to Warn Clients about Potential Fraud**

Alex Smith*, Henein Hutchison Robitaille LLP*

9:55 a.m. – 10:00 a.m. **Question and Answer Session**

10:00 a.m. – 10:20 a.m. **Tax Issues: Non-resident Beneficiaries**

Brian Cohen, *Gowling WLG (Canada) LLP*

Sébastien Desmarais, Tax and Estate Planner,
TD Wealth Advisory Services

10:20 a.m. – 10:25 a.m. **Question and Answer Session**

10:25 a.m. – 10:45 a.m. **Break**

10:45 a.m.– 11:45 a.m. **Snapshot Session:**

Lou-Anne Farrell, *Harrison Pensa LLP*

Gillian Fournie, *de VRIES LITIGATION LLP*

Andrea McEwan, *WeirFoulds LLP*

Matthew Rendely, *Loopstra Nixon LLP*

11:45 a.m. – 12:00 p.m. **Question and Answer Session**

12:00 p.m. – 1:00 p.m. **Lunch Break**

1:00 p.m. – 1:35 p.m.	**Disclosure Orders and Orders for Directions**
	Alexandra Mayeski, *MayLex Litigation P.C.*
	Tanisha Tulloch, *Torkin Manes LLP*
	David Wagner, TEP, *Wagner Sidlofsky LLP*
1:35 p.m. – 1:45 p.m.	**Question and Answer Session**
1:45 p.m. – 2:05 p.m.	**Disclaimers and Renunciations**
	Kavina Nagrani, C.S., TEP, *NIKA LAW LLP*
2:05 p.m. – 2:10 p.m.	**Question and Answer Session**
2:10 p.m. – 2:25 p.m.	**Family Law Update**
	Kristine Anderson, *Fern Law*
2:25 p.m. – 2:30 p.m.	**Question and Answer Session**
2:30 p.m. – 2:50 p.m.	**Break**
2:50 p.m. – 3:15 p.m.	**Approval of Settlements, A Word from the New PGT and the Children's Lawyer**
	Dianne Carter, *Office of the Children's Lawyer*
	Sidney Peters, *Public Guardian & Trustee*
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3:20 p.m. – 3:35 p.m.	**POA Litigation** Brendan Donovan, *Donovan Kochman LLP*
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3:40 p.m. – 4:00 p.m.	**Representations to the Court; How to Deal with Self-Represented Litigants, Interactions with Opposing Counsel, Objections, Using Analogies or Quotations** (20 m Ⓟ) Kelly Charlebois, *Miller Thomson LLP* David Lobl, *Gowling WLG (Canada) LLP*
4:00 p.m. – 4:05 p.m.	**Question and Answer Session** (5m Ⓟ)
4:05 p.m. – 4:25 p.m.	**Fireside Chat with a Superior Court Judge** (20 m Ⓟ) The Honourable Justice Fred Myers, *Superior Court of Justice*
4:25 p.m. – 4:30 p.m.	**Question and Answer Session** (5m Ⓟ)
4:30 p.m.	**End of Day One**

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TAB 1

26th Estates and Trusts Summit – DAY ONE

This is Not a Scam: A Warning About the Duty to Warn

Alex Smith
Henein Hutchison Robitaille LLP

October 18, 2023

cpd

This is Not a Scam: A Warning About the Duty to Warn

by

Alex Smith[1]

Scams targeting the credulous are ubiquitous and their consequences for victims are devastating. Scam artists ruthlessly prey on the fears, and exploit the panic, of the vulnerable. While such scam artists are universally seen as disgusting, some of their lies are so hackneyed and transparent that it is hard to believe they ever convince anyone. The reassuring view, after the fact and from the safe distance of an armchair after, is often that they are a source of loss particular to the unsophisticated or otherwise vulnerable.

That assessment may be wrong and can be risky. A recent decision of the Court of Appeal for British Columbia suggests that scams aren't just a problem of the credulous. *Zheng v. Bank of China (Canada)*[2] raises sobering questions about the potential liability of banks and other sophisticated actors facing suits by victims of scams.

When will a sophisticated actor's familiarity with such scams give rise to a duty to warn potential victims that they may be a target? That is the question, refined through two appeals, at the heart of *Zheng*, and the answer is not "never".

The Scam

Here are the facts. In 2018, the plaintiff, who was employed as a sales professional at a jewellery retailer, was contacted by a person purporting to be from the Chinese consulate. This person, who had the number of the plaintiff's recently-issued driver's license, advised that "international police" were looking for her in connection with a money laundering investigation. She was shown an arrest warrant and threatened with the freezing of her assets and the prospect of being jailed in China. She was then told that she must do one of two things: fly back to China and be imprisoned while the investigation unfolded, or…

And then came a scam artist's leitmotif as familiar as the "shark theme" from *Jaws*. The plaintiff could transfer funds to Hong Kong. The funds, naturally, would be returned after the "Hong Kong Independent Commission Against Corruption" completed its investigation. Finally, she was strictly instructed to keep the investigation confidential or face imprisonment and directed to report in twice daily to the perpetrator.

[1] Alex Smith is Co-Chair of Civil Litigation at Henein Hutchison Robitaille LLP.
[2] 2023 BCCA 43.

The Trip to the Bank

The plaintiff went to the bank and sought a teller's assistance in transferring almost all the money in her account – $69,000 – to an account in another person's name at a Hong Kong branch of the same bank.

The branch's Control and Compliance Officer later deposed that he helped the teller locate the signature specimen card and, because the amount was greater than $10,000, asked about the plaintiff's relationship to the intended recipient.

The plaintiff did not answer.

The Control and Compliance Officer later deposed that since the plaintiff was entitled to keep private her relationship to the intended recipient, he asked her no further questions. The plaintiff alleged that the Control and Compliance Officer later told her that he did not ask her any questions because she looked worried and stressed.

The transaction proceeded. The bank had the plaintiff sign an Application for Remittance, which included an exclusion of liability clause.

The Suit

After the money was transferred, the plaintiff discovered she had been scammed. She also said that she learned local media had reported this type of fraud before her trip to the bank. She returned to the bank, where she got nothing but the alleged admission that the Control and Compliance Officer thought she looked worried and stressed at the time of the transfer.

The plaintiff, acting on her own behalf, brought an action to recover her lost funds and seeking other damages from the bank. The pleading was evidently imperfect but, importantly, she alleged that the bank had knowledge of the "prevailing fraud" at the time of her transaction.

The bank brought a motion for summary judgment. Evidence was filed by the bank but, as later proved fatal, no evidence refuting the plaintiff's claim that the bank had knowledge of the prevailing fraud.

The motion was apparently argued based on whether the bank owed the plaintiff a fiduciary duty. The presiding Master granted the motion. The plaintiff retained counsel, who refined her position, and appealed to a judge of the Superior Court. The Court ruled that the circumstances of the case raised an otherwise triable issue about the bank's duty to make inquiries regarding a potential fraud, but that the claim was nonetheless bound to fail because of the exclusion of liability clause.

The Decision

The plaintiff appealed again to the Court of Appeal for British Columbia, this time with complete success. The Court held that because the bank filed no evidence in support of its summary judgment application as to whether it had knowledge of a prevailing fraud similar to that which affected the plaintiff, there was a genuine issue for trial: in the circumstances of this case, did the bank have a duty to inquire and to warn her?

The Court also held that if the Bank knew of the prevailing fraud and did not warn her after she advised she wanted to make the transfer, then there were other genuine issues for trial: did the exclusion clause in the Application for Remittance apply? Was it unconscionable and unenforceable?

The Court was clearly compelled by the underlying facts complained of by the plaintiff and was prepared to read the claim generously. The Court concluded that:

- The plaintiff had an available argument that the duty to warn arose when she first advised the teller that she wanted to make a $69,000 transfer and before she signed the Application for Remittance.
- The bank's failure to file evidence that addressed the plaintiff's pleading that it knew of the prevailing fraud was fatal to the bank's position that there was no genuine issue for trial in respect of the duty to warn.
- The bank's failure to file evidence that addressed the alleged unconscionability of the exclusion clause in the Application for Remittance was fatal to the bank's position there was no genuine issue for trial in respect of the exclusion clause.
- The plaintiff's personal account information form, which was filed by the bank on the motion, supported an argument that the plaintiff:
    - Was not a sophisticated person with a large income;
    - Was vulnerable to the prevailing fraud; and
    - Intended a transaction that was highly suspicious in light of:
        - the large sum involved;
        - the fact that it virtually emptied her bank account;
        - the funds were transferred outside of the jurisdiction; and
        - the bank's knowledge of her employment and the intended use of her account, which was "income saving" and "family support for living expense around $30,000".[3]

The Court set aside the judge's order and restored that part of the claim based on the bank's alleged duty to inquire and warn the plaintiff.

[3] Para. 60.

Some Implications

This decision is helpful to counsel assisting victims of scams who have no realistic prospect of recovering against perpetrators and instead seek recovery against proximate sophisticated actors. To the extent that a case involves similar or analogous circumstances, they can be pleaded as grounding a duty to warn.

For defence counsel, the case presents more questions than answers. There was no evidence that the bank was aware of the prevailing fraud, but the Court found that, under British Columbia's rules, the plaintiff's pleading that the bank was aware of the prevailing fraud gave rise to an obligation in the circumstances of the summary judgment motion to file evidence that the bank was *not* aware of the prevailing fraud.[4] What are the risks of bringing a summary judgment motion if you must lead evidence of a lack of knowledge of a prevailing fraud? What is a "prevailing" fraud, anyway? What makes it distinct from other, similar frauds? How can a large, complex organization tender convincing evidence that it was unaware of a "prevailing" fraud? What are the risks of subjecting an affiant to cross-examination on such questions? Will a motion for summary judgment merely give plaintiff's counsel a first bite at the apple?

The decision also raises vexing operational questions for sophisticated actors and organizations seeking to mitigate the risks of failing to fulfill a potential duty to warn victims of scams. Should they scan the horizon for prevailing frauds and regularly update front-line staff? What if staff don't read the emails? If a client simply refuses to answer inquiries, as was the case here, what does staff do next? If the bank – or another sophisticated actor, like an investment advisor – refuses to process the transaction, what about the risk of liability for failing to process transactions in accordance with contractual obligations?

These questions await answers in future cases. What is apparent now is that such scams create risks not only for the unsophisticated, but for the sophisticated.

[4] Para. 33.

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TAB 2

26th Estates and Trusts Summit – DAY ONE

Taxation of Non-Resident Beneficiaries of Canadian Estates

Sébastien Desmarais, Tax and Estate Planner
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October 18, 2023

cpd

26th Estates and Trusts Summit 2023
Taxation of Non Resident Beneficiaries of Canadian Estates

Sébastien Desmarais, TD Wealth Advisory Services
Brian Cohen and Andrew Coates, Gowling WLG (Canada) LLP

I. INTRODUCTION

As families become more global, the issue of dealing with non-resident beneficiaries is becoming more and more common. To properly administer the estate and to protect themselves from liability, estate trustees need to ensure that their obligations under the *Income Tax Act* (Canada) (the "**Act**") are met on a timely basis. This paper provides a summary of some of the more common issues that an estate trustee may encounter when administering an estate with non-resident beneficiaries.

II. TAX STATUS OF AN "ESTATE"

Subsections 104(1) and 248(1) of the Act define a trust for tax purposes as including an estate.[1] Accordingly, all of the provisions of the Act applicable to trusts are applicable to estates.

A. Residency of an Estate

The residency status of an estate for tax purposes is a question of fact to be determined by the Canada Revenue Agency (the "**CRA**") according to the circumstances of each estate.

In *Fundy Settlement v. Canada,*[2] the Supreme Court of Canada clarified that residence of a trust for income tax purposes will be determined by the principle that a trust resides "…where its real business is carried on, which is where the central management and control of the trust actually takes place."[3]

The management and control of an estate is exercised by the executors and trustees (the "**estate trustees**"). For estates with multiple estate trustees that do not all reside in Canada, the estate will reside in the jurisdiction in which the *more* substantial central management and control actually takes place.

CRA will generally consider the following relevant factors in making a determination as to the jurisdiction in which the central management and control of an estate is exercised:[4]

- the factual role of a trustee and other persons with respect to the estate property, including any decision-making limitations imposed thereon, either directly or indirectly, by any beneficiary, settlor or other relevant person; and

- the ability of a trustee and other persons to select and instruct advisors with respect to the overall management of the estate.

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[1] Income Tax Act, RSC 1985, c 1 (5th Supp) [*ITA*], ss 104(1) and 248(1).

[2] 2012 SCC 14 (CanLII) [*Fundy*].

[3] *Ibid* at para 15.

[4] Income Tax Folio S6-F1-C1, Residence of a Trust or Estate at 1.6.

For this purpose, the CRA will look to any evidentiary support that demonstrates the exercise of decision-making powers and responsibilities over the estate.

B. Tax Treatment of a Resident Estate

An estate falls within the definition of "taxpayer" in subsection 248(1) of the Act and is taxable on its worldwide income under Part I of the Act. Many specific provisions of the Act relating to taxation of estates can be found in sections 104 to 108.

Estates and testamentary trusts are subject to the highest combined marginal tax rates, which vary by province. In Ontario, this is currently 53.53%. However, estates can be designated as a graduated rate estate ("**GRE**") for the first 36 months of existence, allowing the GRE to be subject to graduated tax rates and choose a non-calendar year-end. The estate must designate itself as a GRE in the first T3 trust income tax and information return (the "**T3 return**") and choose the year-end at that time.

Income, including taxable capital gains, earned by the estate can be distributed to beneficiaries and retain its tax characteristics as a "flow through" to them. For instance, a capital gain or capital dividend will be taxed as such in the hands of the beneficiary as if it had been received from the source directly by the beneficiary and not routed through the estate. As long as the income is "paid or payable" to the beneficiary in the tax year, the estate can deduct the income under subsection 104(6) and the income will be taxed in the hands of the beneficiary under subsection 104(13).

C. Section 94 of the Act: Deemed Residency of an Estate

Estates that are not factually resident in Canada pursuant to the above-noted factors may still be deemed to be resident in Canada for a tax year under the deemed residency rules for non-residents in section 94 of the Act. Discussion of the intricacies of section 94 is beyond the scope of this paper, but at a high level, section 94 deems a non-resident trust to be subject to Canadian income tax payable under Part I of the Act if there is:

(i) a resident contributor to the estate, or

(ii) a resident beneficiary of the estate.

If an estate is deemed resident in Canada for income tax purposes, both the estate and the resident contributor and / or beneficiary are jointly and severally liable for the Canadian tax liability. This has the potential to be an expensive proposition for the unaware Canadian resident contributor or beneficiary of an otherwise foreign estate. These provisions are often a trap for the unwary where a Canadian resident estate makes a distribution to a foreign trust, which many would, at first instance, consider to be a foreign trust not subject to the Act, however, the resident contributor rule and resident beneficiary rules may both need to be fully considered in any such situation.

III. DISTRIBUTIONS TO NON-RESIDENT BENEFICIARIES

Subsection 70(5) of the Act deems all capital property owned by the deceased immediately prior to their death to have been disposed of at that time in return for proceeds equal to the fair market value ("**FMV**") of the property (the "**Deemed Disposition**").[5] Deferral of the Deemed Disposition and associated tax payable is available if the capital property is transferred to a Canadian resident spouse under a Will, held in a qualified spousal trust for the life of the spouse, or to children in the case of qualified farm or fishing property. However, the Deemed Disposition is only deferred until the spouse or child disposes of

[5] *ITA*, *supra* note 1 at ss 70(5).

the property ("disposal" including both sale and death). Eventually, the Deemed Disposition will occur and the respective estate will hold FMV capital property that needs to be distributed to beneficiaries.

When capital property is ultimately distributed to a beneficiary, subsection 107(2) of the Act permits a "rollover" of capital property distributed to a resident beneficiary at the estate's adjusted cost base ("**ACB"**) (subject to the comments regarding certain "rollovers" above, being FMV at the Deemed Disposition date plus any capital improvements made by the estate).[6]

If the distribution date of the capital property is relatively soon after the Deemed Disposition date, the estate's ACB and the FMV of the capital property may be identical. However, if the capital property is held in the estate for an extended period of time (for example, due to necessary post-mortem planning or an extended estate administration or in accordance with the terms of a testamentary trust), there may be a considerable difference between the estate's ACB and appreciation of the FMV of the capital property at the distribution date such that it may be tax advantageous for the resident beneficiary to receive the capital property at the estate's ACB.

A. Subsections 107(2.1) and 107(5) of the Act

Distributions of the majority of categories of capital property from Canadian resident estates to non-resident beneficiaries do not qualify for the rollover of property at the estate's ACB under section 107(2) of the Act. Instead, the combination of subsections 107(2.1) and 107(5) of the ITA deems the estate to have distributed the property at FMV and the non-resident beneficiary to have disposed of their capital interest in the estate as well.[7]

The following example illustrates the application of subsection 107(2.1): If a non-registered investment account with a FMV of $250,000 and an ACB, or "book value", of $100,000 was distributed to a non-resident beneficiary, the tax consequences under subsection 107(2.1) would be as follows:

- subsection 107(2.1)(a) deems the estate to have disposed of the property for proceeds equal to FMV: $250,000;

- subsection 107(2.1)(b) deems the non-resident beneficiary to have acquired the property at a cost equal to the FMV: $250,000; and

- subsection 107(2.1)(c) deems the non-resident beneficiary's proceeds of disposition to be equal to the amount, if any, by which the FMV exceeds the difference between the FMV and the estate's ACB: $250,000 - ($250,000 - $100,000) = $100,000. In this example, as the amount determined under 107(2.1)(c) is equal to the ACB there is therefore no capital gain for the beneficiary.

The estate can elect to have the capital gain of $150,000 (i.e. the amount determined under 107(2.1)(a) calculated as $250,000 FMV - $100,000 ACB) taxed in the estate (potentially taking advantage of any capital losses trapped in the estate) or in the hands of the beneficiary as income under subsection 107(2.11). The capital gains inclusion rate in Canada is 50%, so capital gains tax would be payable on $75,000 at either the highest combined marginal tax rate or the graduated tax rates if the estate is a GRE as explained above. If the estate elects to distribute the capital gain as income to the non-resident beneficiary, the estate would be required to withhold and remit to CRA Part XIII tax as explained below, potentially at a rate lower than that ultimately payable by the estate.

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[6] *Ibid*, at ss 107(2).

[7] *Ibid*, at ss 107(2.1).

Subsection 107(5) carves out a few specific categories of capital property described under subparagraphs 128.1(4)(b)(i) to (iii) that do qualify for the rollover treatment to a non-resident beneficiary pursuant to subsection 107(2), most notably real property situated in Canada. Therefore, real property can be rolled over to a non-resident beneficiary at the estate's ACB thereby deferring the capital gain, if any, until disposition by the non-resident beneficiary, subject to the caveat of section 116 discussed below.

B. Part XII.2 Tax on Designated Income

Part XII.2 applies if the estate has designated income and has one or more designated beneficiaries.[8] The term "Designated Income" is a defined term that can be summarized as an estate that generates taxable capital gains from the sale of taxable Canadian property,[9] rental income or Canadian business income which has been distributed to a beneficiary and the estate has a non-resident beneficiary.[10] The term "designated beneficiary" is also a defined term and for the purpose of this paper, includes a non-resident beneficiary.[11]

Essentially, Part XII.2 imposes a tax on non-resident beneficiaries if the estate earns designated income that would, if earned directly by a non-resident, be subject to tax under Part I of the Act. Its purpose is to prevent a non-resident beneficiary from paying a lower rate of Canadian tax on specific income earned in Canada.

It is worth noting that there is no Part XII.2 tax payable by a trust that was throughout the year:

(i) a graduated rate estate,

(ii) a mutual fund trust,

(iii) exempt from tax under Part I because of subsection 149(1),

(iv) a trust to which paragraph (a), (a.1), or (c) of the definition of trust in subsection 108(1) applies, or,

(v) a non-resident trust.[12]

Part XII.2 Tax Calculation

The calculation of Part XII.2 tax is complex. An estate must pay Part XII.2 tax for a taxation year of forty percent (40%) of the least of:

(i) its designated income for the tax year,

(ii) the amount that would be the income of the estate for the year if no amount were deducted under subsection 104(6) in computing the estate income in respect of amounts that became payable

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[8] *Ibid,* at ss. 210(1).

[9] Defined in ss. 248(1).

[10] Under subsection 210.3(1), Part XII.2 tax is only applicable if the trust has a designated beneficiary.

[11] The definition of "designated beneficiary" is broad and should be reviewed in its entirety but for the purpose of this paper, it will focus on non-resident beneficiary.

[12] *ITA, supra* note 1 at ss. 210(2).

in the year to a beneficiary or in respect of tax paid by the estate for the year under Part XII.2, and

(iii) 100/60[13] of the amount deducted by the estate under paragraph 104(6)(b), an amount that became payable in the year to a beneficiary or that were included in a beneficiary's income for the year by reason of subsection 105(2), in computing the income of the estate for the year.[14]

From the above, it is important to appreciate that Part XII.2 tax will only apply to an estate in a year where a portion of its income was distributed or became payable in the year to beneficiaries. When applicable, the amount of Part XII.2 tax will be forty percent (40%) of the designated income of the estate for that taxation year.

It is the responsibility of the estate (i.e. its trustees) to pay Part XII.2 tax but the tax paid is deductible in computing the estate's income for that year.[15] In other words, the estate may treat Part XII.2 as if it was distributed to beneficiaries.

The beneficiaries of the estate who are not a designated beneficiary are considered eligible beneficiaries and may claim a Part XII.2 refundable tax credit for Part XII.2 tax that is attributed to them. If there is more than one eligible beneficiary, a formula determines the amount of refundable tax credit to be reported.[16]

Responsibility of the Estate Trustees

The estate trustees must complete Schedule 10 and file it with the T3 return if it is allocating income to designated beneficiaries.

The application of Part XII.2 tax may be easier to understand by way of an example:[17]

An inter vivos trust resident in Canada has two (2) beneficiaries: Karson, who is a Canadian resident (eligible beneficiary), and Teagan, a non-resident beneficiary (designated beneficiary). Each beneficiary is entitled to receive an equal share of the trust that is distributed annually.

The trust generated $1,400 net income for the year which includes net business income (from a business carried on in Canada) of $1,000 and net interest income of $400.

The $1,000 of business income is designated income while the $400 of interest income is not. Part XII.2 tax of 40% is payable on the designated income, $400 ($1,000 x 40%). Then calculate the amount of refundable taxable Part XII.2 tax credit to be allocated to the eligible beneficiary.

Part XII.2 is complex. Advisors should appreciate that when an estate has a non-resident beneficiary, there is a possibility that Part XII.2 tax of forty percent (40%) may apply and if so, the trustees must complete Schedule 10 within the prescribed period.

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[13] 166%.

[14] *ITA, supra* note 1 at ss. 210.2(1).

[15] *Ibid,* at ss. 104(30).

[16] *Ibid,* at ss. 210.1(3).

[17] The following example is provided by the CRA in the T3 Trust Guide – 2022.

C. Part XIII Withholding Tax

Part XIII tax is a tax withheld at source when income is paid to a non-resident. For Canadian estate purposes, Part XIII requires a non-resident beneficiary to pay tax on certain amounts that a Canadian estate pays or credits (or is deemed to pay or credit) to such non-resident beneficiary.[18] Income payable by a Canadian resident estate to a non-resident beneficiary is subject to Part XIII withholding tax at a rate of twenty-five percent (25%),[19] subject to a reduced rate where Canada has a tax treaty with the other contracting state in which the beneficiary resides.[20]

Application of Part XIII

For Part XIII withholding tax to apply to a payment by an estate to a non-resident beneficiary, the payment must be for an amount that is "income of or from a trust or estate" under either trust law or the Act.[21]

For estate trustees, the analysis must go further. Subsection 212(11) provides that an amount paid or credited by an estate to a non-resident beneficiary is deemed to be income of the estate,[22] regardless of its source from which the income was derived by the estate. Essentially, subsection 212(11) aims at imposing a withholding tax on a distribution made by an estate where that distribution may reasonably be considered to relate to a capital dividend received by the estate[23]; this can easily be overlooked by estate trustees and their advisors.

The Part XIII withholding tax applies notably, but not exclusively, to dividends on shares of Canadian resident corporations, interest income,[24] royalties and capital gains (from non-taxable Canadian Property). It is also worth noting that capital dividends paid to the estate and then distributed to the non-resident beneficiary are subject to Part XIII[25] tax even if they were paid in a prior year and distributed as capital of the estate.[26]

Part XIII tax is imposed on the estate's income if the amount is included in computing the income of the non-resident beneficiary[27] or that can be reasonably considered to be a distribution of, or derived from, an amount received by the estate as a capital dividend from a Canadian resident corporation.

Responsibility of the Estate Trustees

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[18] *ITA, supra* note 1 at para 212(1)(c).

[19] *Ibid,* at subpara 212(1)(c)(ii).

[20] Prior to withholding less than 25%, the payer should obtain a completed Form NR301 as evidence the payee qualifies for treaty relief.

[21] The distinction is relevant since income under trust and law tax law may differ at times.

[22] *ITA, supra* note 1 at para 212(1)(c).

[23] CRA Views, 9409560 "Capital amount paid by trust to non-resident" dated May 2, 1994.

[24] Withholding tax applies on non-arm's length interest unless it is "fully exempt interest" [defined in 212(3)].

[25] *Ibid,* at para 212(2)(b).

[26] *Ibid,* at subpara 212(1)(c)(ii).

[27] *Ibid*, ss. 104(13).

It is the responsibility of the payer (the resident or deemed resident in Canada) to withhold the Part XIII tax at the appropriate rate and to remit it directly to the Receiver General by the fifteenth of the month following the month of payment.[28]

If the estate trustee fails to withhold the tax, he or she shall be held liable to pay the withholding tax plus interest and a penalty of ten percent (10%) may also be charged on the withholding tax.[29] For estate trustees, Part XIII will require professional advice since the potential liability associated with a failure or omission to withhold can be significant.

D. Section 116 Tax and Clearance Certificate

As noted above, when an estate makes a capital distribution to a non-resident beneficiary, the beneficiary is deemed to dispose of the part of the beneficiary's capital interest in the estate to which such distribution relates.

Pursuant to section 116 of the Act,[30] where the capital interest in an estate is "taxable Canadian property" ("**TCP**"), the vendor of the TCP (i.e. the beneficiary who is deemed to be "disposing" of their interest in the estate) must apply for a clearance certificate from CRA either in advance of the disposition or within 10 days of the disposition. Typically this will not result in a tax liability, however the certificate process outlined below, together with the necessary withholdings, is still required.

One notable exception applies to real or immovable Canadian property (or shares that derive their value from real or immovable Canadian property): if said property is not more than 50% of the value of the non-resident beneficiary's interest in the aggregate estate property for the period of 60 months leading up to the date of disposition, then section 116 does not apply and no section 116 clearance certificate is required.

The point of the section 116 clearance certificate process is for the CRA to receive the appropriate amount of capital gains tax at the time of disposition so that the CRA does not have to enforce collection against a non-resident.

Subsection 116(2) is applicable when a vendor (beneficiary) applies for a section 116 clearance certificate in advance of the disposition of TCP. In order to obtain the section 116 clearance certificate, the relevant CRA form applicable to the type of TCP[31] along with 25% of the anticipated capital gain, or an amount of security acceptable to the CRA, must be submitted to the CRA at least 30 days in advance of the disposition. As it is not common for the actual date of distribution to be known or whether the CRA would issue a certificate in time, the application in advance of the disposition is less common than the process described for subsection 116(3), below.

Subsection 116(3) is applicable when a vendor (beneficiary) applies for a section 116 clearance certificate after the disposition date. The same CRA forms required under section 116(2) are submitted along with 25% of the actual capital gain, or an amount of security acceptable to the CRA, within 10 days of the disposition date.

Subsection 116(5) imposes liability on the purchaser (i.e. the estate) to withhold and remit to the CRA 25% of the entire purchase price (and not just the capital gain) if the vendor does not provide a section

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[28] Canada Revenue Agency, "Remitting Part XIII deductions" (22 December 2016).

[29] *ITA*, supra note 1 at ss. 227(8) and (8.3).

[30] *Ibid*, at s. 116.

[31] Canada Revenue Agency, "Disposing of or acquiring certain Canadian property" (27 June 2023).

116 clearance certificate to the purchaser (which under 116(3) would not have yet been issued). Unlike the non-resident beneficiary, the CRA does have strong collection measures available to receive and enforce payment of the tax owing from the resident estate.

If a tax treaty exists between Canada and the non-resident beneficiary's resident country, subsection 116(5.01) may apply such that Canada has jurisdiction to tax the capital gain of the non-resident beneficiary and a section 116 clearance certificate does not need to be obtained for the "treaty-protected property."[32] One helpful treaty provision provides that the 60 month test noted above is reduced to a test of the proportion of real property in Canada at a particular time.

However, if the non-resident beneficiary and estate are related (as defined under subsection 251(2))[33] then subsection 115(5.02) requires Form T2062C to be filed within 30 days.[34] The specifics of each tax treaty must be examined in order to determine if subsection 116(5.01) and (5.02) apply. Subsection 116(5.2) applies to life insurance policies, Canadian resource property, timber resource property, depreciable TCP, and non-capital real property.[35] The vendor must obtain a section 116 clearance certificate by submitting a form and 50% of the anticipated or actual capital gain, or an amount of security acceptable to the CRA. The same liability under subsection 116(5) is imposed on the purchaser if the vendor does not obtain the section 116 clearance certificate.

Finally, subsection 116(8)[36] allows CRA to deny issuing a section 116 clearance certificate if the real property at issue has not complied with the filing and tax remittance requirements of the *Underused Housing Tax Act* (Canada).[37]

The application, or non-application, of section 116 to dispositions by non-residents of their capital interest in an estate is best illustrated by way of the following examples:

1. Brokerage Account Owning Publicly-Traded Securities

An estate holds a brokerage account owning traditional "blue chip" publicly-traded securities (i.e. bank stocks, fortune 500 companies, etc.) that do not derive 50% of their value from TCP (i.e. real or immovable property situated in Canada, Canadian resource properties, timber resource properties, and options in these types of property). If some or all of the securities were distributed to a non-resident beneficiary, then the distribution would be considered a disposition of some or all of the non-resident beneficiary's capital interest in the estate. However, because the securities are not TCP, there is no requirement for the non-resident beneficiary "vendor" to obtain a section 116 clearance certificate and remit 25% of either the anticipated capital gain or actual capital gain.

2. Muskoka Cottage

The only asset in an estate is a cottage in Muskoka, Ontario. The cottage meets the definition of TCP and since it is more than 50% of the value of any one or more beneficiary's interest in the estate, the distribution of all or part of it to a non-resident beneficiary is considered a disposition of the non-resident beneficiary's capital interest in the estate and requires the non-resident beneficiary as "vendor" to obtain a section 116 clearance certificate. If the section 116 clearance certificate is not provided, then the estate

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[32] *ITA, supra* note 1 at ss 116(5.01).

[33] *Ibid*, at ss 258(2).

[34] *Ibid*, at ss. 116(5.02.)

[35] *Ibid,* at ss 116(5.2)

[36] *Ibid,* at ss 116(8).

[37] SC 2022, c 5, s 10.

will be liable to withhold and remit to the CRA 25% of the entire purchase price, even if no tax is ultimately payable.

E. Capital Dividends Paid to Non-Residents

Private Canadian corporations are entitled to maintain a capital dividend account that, at a general level, includes the total of:[38]

(i) the amount, if any, by which the non-taxable portion of capital gains after 1971 exceeds allowable capital losses;

(ii) capital dividends received from other private corporations; and,

(iii) certain life insurance proceeds paid to the corporation after 1971 in excess of the adjust cost basis of the policy.

Pursuant to subsection 83(2) of the Act, a capital dividend can be paid to Canadian resident shareholders of any class of shares of capital stock and no part of the dividend is included in the income of the shareholder if the prescribed elections are filed. The effect is to return capital to Canadian resident shareholders free of tax.

Subsection 104(20) of the Act allows capital dividends to flow through an estate to a Canadian resident beneficiary preserving the tax-free character of subsection 83(2).

However, non-resident shareholders / beneficiaries do not receive the same tax-free treatment of capital dividends. Subsection 212(2)(b)[39] of the Act requires non-resident shareholders in receipt of a capital dividend to pay Part XIII tax as discussed above.

In the case of a capital dividend paid to a non-resident beneficiary by an estate, two subsections of the Act work in conjunction to levy the same 25% Part XIII Tax (subject to any further reductions under a tax treaty). Subsection 212(11) deems any amount paid to a beneficiary of an estate, for the purpose of paragraph 212(1)(c), to be a distribution of income regardless of the source from which the estate derived it.[40] Paragraph 212(1)(c)(ii) defines estate income as "income of or from an estate or a trust to the extent that the amount can reasonably be considered (having regard to all the circumstances including the terms and conditions of the estate or trust arrangement) to be a distribution of, or derived from, an amount received by the estate or trust as, on account of, in lieu of payment of or in satisfaction of, a dividend on a share of the capital stock of a corporation resident in Canada, other than a taxable dividend."[41]

The effect of 212(1)(c)(ii) on 212(11) is that an estate cannot circumvent Part XIII Tax by holding a capital dividend from one year to the next such that the capital dividend becomes capital of the trust which can then be distributed to a non-resident beneficiary as a capital distribution.

While the foregoing may appear punitive to the non-resident beneficiary, it may be important for Canadian resident estate trustees to consider the overall tax incurred on a distribution by the Canadian and non-resident beneficiaries. While there may be tax on the capital dividend to the non-resident, the rate is likely lower than what the Canadian may pay on a normal dividend, therefore if there is a mix of

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[38] Canada Revenue Agency, Tax Folio S3-F2-C1, "Capital Dividends" (25 July 2019) at para 1.4.

[39] *Ibid* at ss 212(2)(b).

[40] *Ibid* at ss 212(11).

[41] *Ibid* at ss 212(1)(c)(ii).

taxable and non-taxable dividends available for distribution, care should be taken to determine what amounts should be allocated and whether the after tax value needs to be considered or not.

CONCLUSION / QUICK TAKEAWAYS

1. Estates are considered “trusts” under the Act.

2. Estates are resident for tax purposes where the "central management and control of the estate actually takes place.”

3. Estates can be deemed resident of Canada under section 94 of the Act if there is a resident contributor or resident beneficiary.

4. Other than a few specific categories of property (Canadian real estate being one), distributions of capital property to non-resident beneficiaries do not happen on a “rollover” basis at the estate’s ACB – the estate is deemed to dispose of the capital property at FMV and capital gains tax is payable, if any, by either the estate or the non-resident beneficiary depending on whether an election is filed.

5. When TCP is distributed to a non-resident beneficiary, the non-resident beneficiary is deemed to dispose of their capital interest in the estate and this disposition may engage section 116 of the Act such that the non-resident beneficiary must obtain a clearance certificate from the CRA after remitting 25% of the anticipated or actual capital gain.

6. Capital dividends distributed to a non-resident beneficiary are subject to Part XIII Tax withheld by the estate and remitted on behalf of the non-resident beneficiary to the CRA.

Law Society of Ontario | Barreau de l'Ontario

TAB 3A

26th Estates and Trusts Summit – DAY ONE

Case: Aroma Franchise Company Inc. et al. v. Aroma Espresso Bar Canada Inc. et al.

Lou-Anne Farrell
Harrison Pensa LLP

October 18, 2023

CITATION: Aroma Franchise Company Inc. et al. v. Aroma Espresso Bar Canada Inc. et al., 2023 ONSC 1827
COURT FILE NO.: 22-00689891-CL
DATE: 20230320

ONTARIO

SUPERIOR COURT OF JUSTICE – COMMERCIAL LIST

BETWEEN:	
AROMA FRANCHISE COMPANY, INC., SHEFA FRANCHISES LTD., AROMA ESPRESSO BAR LTD., AROMA USA, INC., YARIV SHEFA, OSHRAT KATRI and AROMA GLOBAL LTD. Applicants	Matthew J. Latella and Ben Sakamoto, for the Applicants
– and –	
AROMA ESPRESSO BAR CANADA INC., HALVA INVESTMENTS LIMITED, 6605702 CANADA INC. and EARL GORMAN Respondents	Allan D.J. Dick and Daniel Hamson, for the Respondents
	HEARD: January 11, 12, and 13, 2023

J. STEELE J.

[1] This is an application to set aside two international arbitral awards. The applicants ask that the arbitration awards be set aside and the matters at issue in the arbitration be decided by a different arbitrator.

[2] The applicants assert that, among other things, there was a reasonable apprehension of bias, the Arbitrator exceeded his jurisdiction, and the Arbitrator gave inadequate reasons.

[3] Arbitrators, like judges, are expected to maintain high standards of impartiality. Further, it is presumed that arbitrators are impartial. However, circumstances can arise where an informed person would have doubts that the arbitrator, whether consciously or unconsciously, could decide

the matter fairly. This case is primarily about whether the arbitrator ought to have disclosed a subsequent retainer from the same lawyer while the case was ongoing, and whether, in the circumstances of this case, his failure to do so would give rise to a reasonable apprehension of bias.

[4] For the reasons set out below, I have determined that there was a reasonable apprehension of bias, and the arbitration awards shall be set aside. As highlighted below, in coming to this conclusion, context matters.

[5] As I have determined that the awards shall be set aside on the basis of reasonable apprehension of bias, I do not find it necessary to address all of the grounds raised by the applicants on this appeal. I highlight briefly below my views on certain of the other grounds raised.

Background

[6] Aroma Espresso Bar Canada Inc. ("AC") was the master Canadian franchisee of Aroma Franchise Company Inc. ("AF"). AC essentially acted as a middle person between AF and the individual coffee shop owners in Canada.

[7] The Master Franchise Agreement made in 2007 between Aroma USA, Inc. (subsequently assigned to Aroma Franchise Company Inc.) and Aroma Espresso Bar Canada Inc. (the "MFA") contained the following arbitration clause (article 17.4.1):

> Subject to Section 17.3 and upon written notice to all parties by either party, all controversies, disputes or claims arising between Franchisor, any of its affiliates or any of their respective officers, directors, agents, employees and attorneys and Master Franchisee, any of its affiliates or any of their respective Owners, arising out of or in connection with this Agreement or in respect of any legal relationship associated with or derived from this Agreement including its negotiation, validity, existence, breach, termination, construction or application, or the rights, duties or obligations of any party to this Agreement (the "Dispute") shall be settled by binding arbitration using the facilities and National Arbitration Rules then in force (the "Rules") of the ADR Institute of Canada ("ADR Institute") or its successor organization, at the office of the ADR Institute located in or nearest to Toronto, Ontario or at such other location as the parties may mutually agree. The parties shall jointly select one (1) neutral arbitrator from the panel of arbitrators maintained by the ADR Institute. The arbitrator must be either a retired judge, or a lawyer experienced in the practice of franchise law, who has no prior social, business or professional relationship with either party. [...]

[8] A dispute arose regarding the cancellation by AC of supply orders from Aroma Israel, which had been the sole supplier of coffee for about 12 years. AF, the franchisor, took steps under the MFA to terminate the agreement and assume AC's role vis-à-vis the individual franchisees.

AC had also alleged various breaches of the MFA by AF prior to the delivery of the notice of default to AC by AF.

[9] The matter went to arbitration before P. David McCutcheon (the "Arbitrator"). The applicants and respondents advanced claims and counterclaims against one another in the arbitration. Among other things, the Arbitrator determined that AF had wrongfully terminated the MFA and ordered Aroma Franchise to pay Aroma Canada the sum of $10 million in damages. Aroma Franchise and Aroma USA, Inc., were also ordered to pay $200,000 in damages for breach of the statutory duty of fair dealing. AF was successful in its claim for certain unpaid royalties in the amount of $69,000.

[10] Unbeknownst to the applicants, approximately 17 months into the Aroma arbitration matter, the Arbitrator was retained as the sole arbitrator on another matter by Allan Dick, counsel for the respondent.

[11] On January 7, 2022, just prior to releasing his decision, the Arbitrator emailed the parties (through counsel) to advise that the Final Award was completed. He requested an additional payment before releasing the award. In his email, he copied Daniel Hamson, a lawyer from Sotos LLP, who had not been involved in the Aroma Arbitration at all prior to this point. The Sotos LLP team had previously included Allan Dick, Andy Seretis and Michelle Logasov, but neither Mr. Seretis nor Ms. Logasov were copied on the email from the Arbitrator. The applicants responded to inquire why Mr. Hamson was copied on the email but not the other lawyers who had been involved in the file. Mr. Dick replied stating: "Thanks, Matt. Please continue to add Michelle." There was no mention of the other matter that the Arbitrator was now working on with Mr. Dick and Mr. Hamson at Sotos.

[12] The Arbitrator delivered the Final Award, dated January 7, 2022 (the "Final Award"), by email on January 11, 2022, again copying Mr. Hamson. It is not clear whether the Arbitrator knew that Mr. Hamson was going to be involved in the Aroma matter going forward, and if so, how.

[13] On January 13, 2022, counsel for the applicants wrote again to the Arbitrator and Mr. Dick to inquire as to why Mr. Hamson had been copied on recent emails, stating:

> ...in light of [Mr. Hamson's] inclusion in this email thread, our clients wish to have clarification as to why he was copied, including whether there is or has been any other relationship of any kind between Mr. Arbitrator and Sotos LLP, including any other appointments as arbitrator or mediator.

[14] The Arbitrator replied the same day stating: "That was my mistake. Mr. Hamson should not have been copied." That email did not answer the question posed. Four minutes later, the Arbitrator sent a further response stating: "Sotos has retained me as an arbitrator on another matter which is ongoing." This other matter is referred to herein as the "Other Sotos Engagement".

[15] On January 14, 2022, the applicants posed a series of questions to the Arbitrator regarding his involvement in the Other Sotos Engagement. The Arbitrator replied:

> In answer to your questions, Mr. Hamson has had day-to-day carriage on the file but Mr. Dick has had involvement from time to time. I was retained on October 16, 2020. I understood that the parties agreed on my appointment. Mr. Hamson signed the terms of appointment for his client and I understand that he has full authority to act. I don't think there is anyone else at Sotos who is acting for their client[.] I am the sole arbitrator. The issues in that case do not involve franchise law but there are contract issues in an industry completely unrelated to the Aroma business and in a different contractual relationship. I believe the contract issues are not in any way related to the contract issues in the Aroma case. I don't believe there is any overlap in the issues between the two cases. I am not aware of any connection between the parties in that arbitration and the Aroma arbitration.

[16] On January 18, 2022, the applicants posed further questions to the Arbitrator regarding the Other Sotos Engagement, to which the Arbitrator replied.

[17] On January 20, 2022, the applicants advised the Arbitrator that they intended to apply to this Court to set aside the Final Award "including on the basis of reasonable apprehension of bias." The applicants indicated that this would "obviously impact on the appropriateness of any further steps in this arbitration."

[18] The Arbitrator invited submissions as to whether he should proceed with the award of interest and costs. He subsequently delivered an order on the sequence of submissions on costs and interest.

[19] The Arbitrator made a costs and interest award dated October 11, 2022 (the "First Costs Award") and a second, correcting costs and interest award on December 13, 2022 (the "Correcting Costs Award").

[20] On April 14, 2022, the applicants filed the application to set aside the Final Award.

Analysis

The Court's Jurisdiction on a Set Aside Application

[21] The applicants ask the Court to set aside the Arbitrator's awards. This was an Ontario seated arbitration.

[22] Under the *UNCITRAL Model Law on International Arbitration* (the "*Model Law*"), which is adopted in the *International Commercial Arbitration Act, 2017,* S.O. 2017, c. 2, Sched. 5 (the "ICAA"), an arbitral award may be set aside by the Court in limited circumstances. Section 34 of the *Model Law* provides:

(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.

(2) An arbitral award may be set aside by the court specified in article 6 only if:

a) The party making the application furnishes proof that:

i. [...]

ii. [...]

iii. The award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matter submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

iv. The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

[...]

(3) The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

[23] Even where grounds may exist for the setting aside of an arbitrator's award, the Court may exercise its discretion to not set aside the order.

[24] As set out in *Popac v. Lipsyc*, 2016 ONCA 135, 129 OR (3d) 321, at para. 45, when considering whether a procedural error is such that article 34(2) of the *Model Law* is invoked, "the essential question remains the same – what did the procedural error do to the reliability of the result, or to the fairness, or the appearance of the fairness of the process?"

[25] The respondents ask the Court to not exercise this discretion in the event the Court finds grounds sufficient to warrant the setting aside of the Arbitrator's award.

[26] The applicants submit that the use of this discretion to not set aside an award, is a safety net for where there have been procedural errors and the Court must weigh whether such procedural errors impacted the reliability of the result or the appearance of fairness of the process.

Reasonable Apprehension of Bias – the Court's Jurisdiction

[27] The applicants submit that the arbitral awards ought to be set aside. The applicants submit that the Court may do this based on reasonable apprehension of bias and/or on the cumulative effect of the alleged improprieties: *Stuart Budd & Sons Limited v. IFS Vehicle Distributors ULC*, 2016 ONCA 60, 129 OR (3d) 37.

[28] Under the *Model Law*, an arbitral award may be set aside where the arbitrator's conduct gives rise to a reasonable apprehension of bias. One of the grounds to set aside an arbitral award is if the arbitral procedure was not in accordance with the *Model Law*: article 34(2)(a)(iv).

[29] Article 18 of the *Model Law* requires that "[t]he parties shall be treated with equality and each party shall be given a full opportunity of presenting his case." Where an arbitrator's conduct gives rise to a reasonable question of bias, article 18 of the *Model Law* is violated: *Jacob Securities Inc. v. Typhoon Capital B.V.*, 2016 ONSC 604, at para 33, additional reasons at *Jacob Securities Inc. v. Typhoon Capital B.V.*, 2016 ONSC 1478. Accordingly, under article 34(2)(a)(iv) of the *Model Law* the violation of article 18 would be grounds for the Court to set aside the arbitral award.

Was the Arbitrator Required to Disclose the Other Sotos Arbitration?

[30] The starting point of the analysis on the reasonable apprehension of bias issue is the Arbitrator's failure to disclose the Other Sotos Arbitration to the applicants.

[31] Article 12 of the *Model Law* provides:

> (1) When a person is approached in connection with his possible appointment as an arbitrator, **he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him.**
>
> (2) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made. [emphasis added]

[32] In addition to Article 12 of the *Model Law*, there are guidelines, principles and case law that are of assistance in considering whether the Arbitrator ought to have disclosed the Other Sotos Arbitration.

(a) The IBA Guidelines

[33] The applicants submit that the *IBA Guidelines on Conflicts of Interest in International Arbitration*, (London: International Bar Association, 2014) (the "*IBA Guidelines*") are instructive. The respondents state that the *IBA Guidelines* were not adopted by the parties. However, Mew J. in *Jacob Securities*, at para. 41, stated that the *IBA Guidelines* "are widely recognized as an authoritative source of information as to how the international arbitration community may regard particular fact situations in reasonable apprehension of bias cases."

[34] The *IBA Guidelines* state, in para. 1, that arbitrators are often unsure about the scope of their disclosure obligations and note that "disclosure of any relationship, no matter how minor or serious, may lead to unwarranted or frivolous challenges." The guidelines further provide, in para. 1, that "it is important that more information be made available to the parties, so as to protect awards against challenges based upon alleged failures to disclose, and to promote a level playing field among parties and among counsel engaged in international arbitration."

[35] Part 1 of the *IBA Guidelines* sets out the general standards regarding impartiality, independence and disclosure. Article 3(a) provides:

> If facts or circumstances exist that *may, in the eyes of the parties*, give rise to doubts as to the arbitrator's impartiality or independence, the arbitrator *shall* disclose such facts or circumstances to the other parties, [...] prior to accepting his or her appointment or, if thereafter, as soon as he or she learns of them. [emphasis added]

[36] Part II of the *IBA Guidelines* sets out practical application of the general standards. The *IBA Guidelines* set up a stop-light type system for what ought to be disclosed by the arbitrator – red for no-go (subject to a potential waiver for items on the waivable red list), orange for potentially a problem and green for go. The orange list includes: "The arbitrator has, within the past three years, been appointed on more than three occasions by the same counsel, or the same law firm." This effectively recognizes that an arbitrator may be engaged more than once by the same counsel. It does not automatically fall on the orange list unless the appointment has been more than three times within the past three years. As discussed below, the orange list is non-exhaustive.

[37] Article 6 of the Practical Application of the General Standards regarding the *IBA Guidelines'* non-exhaustive Orange List provides:

> Situations not listed in the Orange List or falling outside the time limits used in some of the Orange List situations are generally not subject to disclosure. *However, an arbitrator needs to assess on a case-by-case basis whether a given situation, even though not mentioned in the Orange List, is nevertheless such as*

> *to give rise to justifiable doubts as to his or her impartiality or independence.* Because the Orange List is a non-exhaustive list of examples, there may be situations not mentioned, which, *depending on the circumstances*, may need to be disclosed by an arbitrator. Such may be the case, for example, in the event of repeat past appointment by the same party or the same counsel beyond the three-year period provided for in the Orange List, or when an arbitrator concurrently acts as counsel in an unrelated case in which similar issues of law are raised. **Likewise, an appointment made by the same party or the same counsel appearing before an arbitrator, while the case is ongoing, may also have to be disclosed, depending on the circumstances.** [emphasis added]

[38] The applicants argue that the circumstances here are such that the Other Sotos Engagement, which was taken on by the Arbitrator while the Aroma matter was ongoing, ought to have been disclosed. An arbitrator needs to assess on a case-by-case basis whether a given situation, even though not listed on the orange list, is nevertheless one that ought to be disclosed given the circumstances.

[39] The applicants submit that the circumstances are such that the Arbitrator ought to have disclosed the Other Sotos Engagement, which circumstances include: the expectations of the parties in the selection of the Arbitrator, the fact that the Arbitrator was the sole arbitrator in the Aroma arbitration and not part of a panel (and therefore controlled the outcome), the existence of overlapping issues between the Other Sotos Engagement and the Aroma arbitration, the terms of the MFA, and the correspondence between counsel regarding the sorts of things that would be a concern prior to the engagement of the Arbitrator.

(i) Selection of Arbitrator

[40] As noted above, the MFA required that "The arbitrator must be either a retired judge, or a lawyer experienced in the practice of franchise law, who has no prior social, business or professional relationship with either party." This provision of the MFA was included in the letter to the Arbitrator when counsel for the parties reached out to enquire about his availability and interest to assist with the Aroma arbitration.

[41] Prior to counsel reaching out to the Arbitrator, there was significant correspondence between them regarding various proposed arbitrators for this matter. Initially a retired judge was put forward by Mr. Dick, counsel to the respondents, as a potential mediator/arbitrator. However, the applicants would not agree to this individual because Mr. Dick had reached out to the potential mediator/arbitrator prior to contacting counsel for the applicants, Mr. Latella. Mr. Latella expressed the view that the arbitrator had to be selected based on consultation and jointly approached by counsel. The emails between counsel as they were trying to select an arbitrator shed light on key concerns for the parties:

- Mr. Dick stated with regard to proposed arbitrator, Leslie Dizgun (email dated May 24, 2019 to Mr. Latella): "Matthew, I have no personal or social

relationship with Mr. Dizgun. He is only recently of his firm so I can't account for what the firm promotes or doesn't promote. I have used him on one (failed) mediation for a franchisor though I appreciated his expertise in the franchising area during that experience. [...] I suspect others in my firm may have used him as a neutral in the past but I would have to ask to be sure."

- Mr. Latella replied to Mr. Dick (email dated May 27, 2019): "Kindly provide the same level of disclosure for both Messrs. Dizgun and Richler, including any cases either of them have mediated or presided over as arbitrator involving your firm. Regarding Mr. Dizgun, you stated that you "suspect others in [your] firm may have used him as neutral in the past but [you] would have to ask to be sure." Have you made those inquiries and, if so, what were the results? Please distinguish between instances of using him as an arbitrator, as opposed to a mediator."

- Mr. Dick replied on May 28, 2019 stating that others in his office have used Mr. Dizgun 7-8 times as a mediator in franchise cases and as an arbitrator. Mr. Latella replied on May 30, 2019: "Can you please advise of the timeframe over which your firm has engaged Mr. Dizgun 7-8 times as a mediator? Are there any ongoing engagements involving your firm and Mr. Dizgun?" In this same email, Mr. Latella proposes Mr. McCutcheon and states that: "[He has] not spoken to David ... in over 10 years, but know[s] him by reputation to be one of the most respected international arbitrators in the city. [He and David] were once both involved in a ground lease arbitration as counsel, many years ago. [He does] not recall any other professional dealings with [David McCutcheon]."

- Mr. Dick replied on May 30, 2019 that his firm had an international arbitration with Mr. Dizgun that was ongoing. With regard to David McCutcheon, Mr. Dick confirmed that: "[He and David] were opposing counsel on a major piece of litigation at least a few years before [he] came [to his firm] in 2006."

- Mr. Dizgun was rejected by the applicants because of the business relationship he had with the respondents' counsel's firm.

- By letter, dated June 21, 2019, Mr. Dick informed Mr. Latella that his client was prepared to appoint David McCutcheon as arbitrator based on certain conditions, including: "you advise as to the source of the recommendation to you to appoint Mr. McCutcheon so we have a better understanding of the connection that you, your firm or your clients have with Mr. McCutcheon."

[42] That last letter illustrates that Mr. Dick also wanted to understand any connection that Mr. Latella, Mr. Latella's firm or clients had with any proposed arbitrator.

[43] Ultimately the Arbitrator was selected. Counsel for the applicants had never engaged him before as an arbitrator or mediator, nor had counsel for the respondents.

[44] The evidence of Dany Michel, the CEO of Aroma Espresso Bar Ltd. and Shefa Franchises Ltd., which I accept given the correspondence regarding the selection of an arbitrator, was that had the Arbitrator disclosed any other engagements with respondents' counsel, the applicants would not have supported his appointment as arbitrator.

[45] Mr. Michel's evidence was also that had he learned of the Other Sotos Engagement during the course of the Aroma arbitration, he would have objected to the Arbitrator continuing to act. I note that Mr. Michel's evidence is hindsight evidence. However, it is supported by the email correspondence that was engaged in by counsel regarding the selection of an arbitrator.

[46] In cross-examination, Ms. Logasov, a colleague of Mr. Dick's, in reference to the above correspondence, agreed that on the facts of this case it would be appropriate for the parties to make disclosure of past business relationships with arbitral candidates. Ms. Logasov was also asked whether the "Other Sotos Engagement" constitutes a professional relationship within the meaning of the MFA. She agreed that it was a professional relationship. Mr. Dick, however, agreed that the Other Sotos Engagement was a professional relationship but not under the MFA. Mr. Dick also agreed in cross examination that had the Other Sotos Engagement existed at the time the Arbitrator was being engaged in this matter, it "would have been an expected disclosure."

[47] Based on the correspondence, it is clear that the applicants were concerned that any appointed arbitrator did not have a prior relationship with counsel to the parties, and the respondents were aware of this concern. The respondents state that this was not a shared understanding. In a letter to Mr. Latella from Mr. Dick, dated July 12, 2019, Mr. Dick wrote:

> You rejected Mr. Dizgun for a so-called business relationship with our firm which is not the test under the MFA. Our firm is not a party to the arbitration. He is used by us, amongst a number of other arbitrators, because he is one of a handful of arbitrators with the experience in the area we practice in most.

The applicants' counsel did not respond to this email to correct the respondents' contrary view.

[48] However, from cross-examinations of Mr. Dick, he certainly expected that if an arbitrator was engaged by a party or counsel prior to, or at the time of, his or her engagement that would have been disclosed. The obvious rhetorical question flows from this – If it was necessary to disclose an engagement of an arbitrator prior to engaging him or her, why would it not be required to disclose an engagement of the arbitrator by the same lawyer on another matter while the arbitration is extant?

(ii) Overlapping Issues

[49] The applicants argue that there is significant overlap in the issues between the two arbitrations. The Arbitrator stated in his January14, 2022 email that he did not believe that there was overlap in the issues. Mr. Dick wrote in an email the same day that "there is no connection between our clients in the respective arbitrations."

[50] The details regarding the Other Sotos Engagement were contained in the pleadings, as the matter had commenced in Court before moving to arbitration. Ms. Logasov's evidence was that the Aroma arbitration and the Other Sotos Engagement "are completely unrelated." She stated: "Among other differences, the parties are not the same or related to the Parties to the Aroma Arbitration, the Unrelated Arbitration is not a franchise dispute, it is a domestic arbitration, it involves a manufacturing and distribution between the litigants and it does not relate to the same industry." The Other Sotos Arbitration is extant and is not proceeding to a hearing on the merits until sometime in 2023. However, the Other Sotos Arbitration was started in September 2020 with the expectation that it would conclude in 2020.

[51] The applicants argue that where there are overlapping issues there is a potential concern regarding fairness. Specifically, one party may have the advantage of seeing how an arbitrator deals with an issue in one arbitration and can use that knowledge in the other arbitration. The applicants submit that if the Other Sotos Arbitration had proceeded on schedule, the respondents would have had the benefit of seeing how the Arbitrator addressed any overlapping issues.

[52] In *Halliburton Company v. Chubb Bermuda Insurance Ltd.* [2020] UKSC 48, 2 All ER 1175, the U.K. Supreme Court (the "UKSC") noted, at para. 131, that where an arbitrator has appointments in multiple matters with the same or overlapping issues with one common party, "this may, depending on the relevant custom and practice, give rise to an appearance of bias."

[53] Although not significant, there are some overlapping issues between the two matters, including allegations of conspiracy to misappropriate the other side's intellectual property and allegations of engaging in secret meetings and communications/misuse of confidential information.

[54] However, given that the Other Sotos Arbitration did not involve a franchise dispute and was in a different industry, the fact that there may have been some overlapping contractual issues does not assist the applicants in their position regarding disclosure/reasonable apprehension of bias.

(iii) Arbitrator was Sole Arbitrator

[55] The applicants submit that the fact that the Arbitrator was the sole arbitrator, and not part of a panel is another factor weighing in favour of disclosure of the Other Sotos Arbitration. I agree that this is a factor.

(b) The UNCITRAL Arbitration Rules

[56] Article 17.4.1 of the MFA adopted the *ADR Institution of Canada Arbitration Rules* ("ADRIC Rules"). Under those rules, if the arbitration is international, the *United Nations Commission on International Trade Law Arbitration Rules* ("UNCITRAL Rules") govern: 1.3.2 of the ADRIC Rules.

[57] Article 11 of the UNCITRAL Rules provides:

> When a person is approached in connection with his or her possible appointment as an arbitrator, **he or she shall disclose any circumstances *likely* to give rise to justifiable doubts as to his or her impartiality or independence**. An arbitrator, **from the time of his or her appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties** and the other arbitrators unless they have already been informed by him or her of these circumstances. [emphasis added]

[58] In *Halliburton*, the UKSC stated, at para. 113, that the word "likely" in article 11 of the UNCITRAL Rules "must be interpreted in the context of the Model Law itself, which appears to suggest that the obligation to disclose arises if the circumstances could reasonably give rise to justifiable doubts."

(c) ADR Institute of Canada Code of Ethics

[59] The applicants further point to the *ADR Institute of Canada Code of Ethics*. Section 6 of the code provides that "[a] Member shall disclose any interest or relationship likely to affect impartiality or *which might create an appearance of partiality or bias*" (emphasis added).

(d) Case Law

[60] *Halliburton* addressed a situation where an arbitrator accepted appointments in multiple, overlapping cases, arising out of the same incident, without disclosure. In *Halliburton*, the arbitrator was the chair of the arbitral panel and had been involved with prior arbitrations involving Chubb, including having been appointed by Chubb. The arbitrator's prior involvement with Chubb was disclosed prior to his appointment as chair of the panel. He then accepted subsequent appointments by Chubb, which were not disclosed.

[61] The U.K. Supreme Court determined, at para. 145, that the arbitrator had a "legal duty" under UK law to disclose his subsequent appointments because the arbitrations with one common party may overlap was a circumstance "which might reasonably give rise to the real possibility of bias." The UKSC noted, at para. 146, that the disclosure should have included the identity of the common party seeking the arbitrator's appointment on the second reference, whether the proposed appointment in the second reference was to be a party-appointment or a nomination for appointment by a court or third party, and a statement of fact that the second reference arose from

the same incident. However, taking into account the relevant facts and circumstances in that case, the UKSC determined that that there was not a reasonable apprehension of bias.

[62] The UKSC provides some helpful guidance regarding this issue. First, as noted above, the UKSC determined that there was a legal obligation of the arbitrator to disclose the other two new arbitrations on which he was engaged. Second, the UKSC made clear, at para. 118, that the failure to disclose may in some cases amount to apparent bias.

[63] In my view, taking into account the correspondence regarding the selection of the arbitrator, the provisions of the MFA, the *IBA Guidelines*, and the *Halliburton* case, it is clear that the Arbitrator ought to have disclosed the Other Sotos Engagement to the applicants.

Was there a reasonable apprehension of bias?

[64] The applicants submit that there was a reasonable apprehension of bias on the part of the Arbitrator. The applicants point to the undisclosed Other Sotos Engagement as giving rise to a reasonable apprehension of bias. As noted, the applicants did not learn of the Other Sotos Engagement until after the Final Award had been released.

[65] As a starting point, none of this is to say that an arbitrator can never have two ongoing arbitrations from the same lawyer or law firm at the same time. Of course, they can. The issue is whether the second engagement ought to have been disclosed in the circumstances of this case, which I have determined it ought to have been, and whether, in the circumstances of this case, there is a reasonable apprehension of bias.

[66] In *Committee for Justice and Liberty et al. v. National Energy Board et al.*, [1978] 1 S.C.R. 369, at p. 394, the Supreme Court of Canada endorsed the following test for determining whether there was a reasonable apprehension of bias:

> [W]hat would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.

[67] As set out in *Jacob Securities*, at para. 37, this test equally applies to an arbitrator acting in a judicial or quasi-judicial capacity. However, although the test may equally apply, as noted in *Halliburton*, at para. 55, there are "differences in nature and circumstances between judicial determination of disputes and arbitral determination of disputes." The UKSC in *Halliburton* discusses the differences at paras. 56-62. The differences include the fact that courts resolve civil disputes, which are generally open to the public, whereas arbitration is generally conducted in private. Arbitrators and the parties are often under a duty of privacy and confidentiality.

[68] The UKSC also notes that judges hold public office, whereas an arbitrator is appointed to act by the parties and is paid by the parties. The UKSC references an arbitrator's financial interest and states, at para. 59, that

> "[the arbitrator] is appointed only for the particular reference and, if arbitral work is a significant part of the arbitrator's professional practice, he or she has a financial interest in obtaining further appointments as arbitrator. Nomination as an arbitrator gives the arbitrator a financial benefit."

[69] In addition, the UKSC notes, at para. 61, that due to the private nature of most arbitrations, where the same arbitrator is a member of a tribunal of more than one case concerning the same or overlapping subject matter, the party that is not involved in the various arbitrations "has no means of informing itself of the evidence led before and legal submissions made to the tribunal (including the common arbitrator) or of that arbitrator's response to that evidence and those submissions in the arbitrations in which it is not a party."

[70] The test re reasonable apprehension of bias is described by J. Brian Casey on page 412 in *Arbitration Law of Canada: Practice and Procedures, 4th ed. (Huntington: JurisNet LLC 2022)* as follows:

> The test is, in the eyes of a neutral third party, is there a reasonable apprehension of bias or justifiable doubts as to a lack of impartiality or independence. There is no need to prove it actually exists.

[71] I agree with the respondents' submission at paragraph 36 of their factum that the elements necessary to find a reasonable apprehension of bias and the level of proof that is needed before an arbitral award is set aside, includes the following relevant principles:

- The threshold for a finding of real or perceived bias is a high one since it calls into question both the personal integrity of the adjudicator and the integrity of the administration of justice. The grounds must be substantial, and the onus is on the party seeking to disqualify to bring forward evidence to satisfy the test: *A.T. Kearney Ltd. v. Harrison*, [2003] O.J. No. 438 (Ont. S.C.J.), at para. 7

- The presumption of impartiality is high: *Wewaykum Indian Band v. Canada*, 2003 SCC 45, [2003] 2 SCR 259, at para. 59.

- The inquiry is objective and requires a realistic and practical review of all the circumstances from the perspective of a reasonable person: *Committee for Justice and Liberty et al. v. National Energy Board et al.*, [1978] 1 S.C.R. 369. The courts will not entertain the subjective views of the parties in making such determination: *Dufferin v. Morrison Hershfield*, 2022 ONSC 3485, at para. 163.

- A challenge based on reasonable apprehension of bias will not be successful unless there is evidence to support the allegation beyond a mere suspicion that the hearing officer would not bring an impartial mind to bear. Mere

> suspicion is insufficient: *G.W.L. Properties Lt. v. W.R. Grace & Co. of Canada Ltd.*, 74 BCLR (2d) 283 (B.B.C.A.), at para. 13, cited in *Dufferin*, at para. 112.
>
> - When considering bias, context matters: *Telesat Canada v. Boeing Satellite Systems International, Inc.*, 2010 ONSC 4023, cited in *Dufferin*, at para. 112. Any review of an arbitrator's conduct must be considered in context and not through the review of selected excerpts or specifically chosen terms, phrases, or questions posed: *Dufferin*, at para. 114.

[72] The respondents argue that there has never been a case where an international commercial arbitration has been set aside for reasonable apprehension of bias where the arbitrator had accepted another mandate from the same lawyer while an arbitration was extant. However, as noted in *Dufferin*, context matters. It is the context here that is critical.

[73] The applicant submits that the outcome in *Halliburton* is distinguishable due to the differences in the applicable legislation. First, under the UK legislation, there is an additional hurdle, not present under the *Model Law*, that the applicant must show that substantial injustice has been or will be caused. In addition, there was no statutory disclosure requirement in the U.K. legislation similar to s. 12(1) of the *Model Law*.

[74] The applicants argue that based on *Conmee v. Canadian Pacific Railway Co.*, [1888] 16 O.R. 639, "the mere intimation of future financial award" offered to an arbitrator by a party during an extant arbitration may be fatal to the arbitrator's role in the arbitration. The applicants argue that this case lays out the fact that money talks. In *Conmee* the company involved in the arbitration offered a job to the arbitrator, while the arbitration was ongoing. The arbitrator accepted the job offer after the case was decided. *Conmee* is different from the instant case as it involved a lucrative job offer to the arbitrator by a party. That is not the case here. None of the parties engaged the Arbitrator in another ongoing engagement. The respondents' lawyer did.

[75] However, the applicants submit that the fact that the offer to the Arbitrator for another job came from the respondents' lawyer and not the party is not of consequence to them. There was a live dispute between the parties and there was a proffering of money (through another engagement) to the neutral party by counsel to one of the parties while the case was ongoing. As noted above, the UKSC in *Halliburton* identified the fact that an arbitrator has a financial interest in obtaining further arbitral appointments as one of the differences between arbitrators and judges. The applicants state that arbitral appointments, although made in consultation with the clients, are generally made by counsel.

[76] In *Szilard v. Szasz*, [1955] S.C.R. 3, at pp. 6-7, which is factually different from the instant case, the Supreme Court of Canada made the following statements regarding impartiality:

> These authorities illustrate the nature and degree of business and personal relationships which raise such a doubt of impartiality as enables 'a party to an

> arbitration to challenge the tribunal set up. It is the probability or the reasoned suspicion of biased appraisal and judgment, unintended though it may be, that defeats the adjudication at its threshold. *Each party, acting reasonably, is entitled to sustained confidence in the independence of mind of those who are to sit in judgment on him and his affairs.* [emphasis added]

[77] *Jacob Securities* is a recent case from this Court regarding an application to set aside an arbitral award. In that case, the applicants had argued that the arbitrator should have known that his former law firm had acted for one of the parties. The Court determined that there was no reasonable apprehension of bias. In my view, *Jacob Securities* is factually distinguishable from this case. The fact that an arbitrator's former law firm had earned income from one of the parties is different. This would not be income to the arbitrator in any way. He was no longer working with the firm and did not have access to the firm's conflicts check system or client list when he accepted the role as arbitrator. By contrast, the Arbitrator accepted the Other Sotos Engagement, from which he would earn income, while this matter was ongoing. There was no evidence regarding the quantum of income the Arbitrator has earned from the Other Sotos Engagement.

[78] While it is a high bar to set aside an arbitral award, courts have made clear that the independence and neutrality of arbitrators is of utmost importance. In *SA Auto Guadeloupe Investissements v. Colombus Acquisitions Inc.*, Cour de Cassation, Civ. 1, 16 December 2015, N D14-16.279, which involved a Canadian arbitrator, France's highest court confirmed that an arbitrator's failure to disclose the fact that another office of his large, global law firm had an engagement involving one of the parties, of which the arbitrator was completely unaware, was sufficient to cause doubt regarding the arbitrator's independence and impartiality. The arbitrator's award was annulled, despite the time and effort that had been spent by the parties on the case. The Court in France confirmed the scope of disclosure obligations under French law, which includes a continuous obligation to disclose facts or circumstances that may give rise to issues regarding an arbitrator's impartiality throughout the proceedings. The party challenging the arbitrator in *Auto Guadeloupe* was the party who proposed the arbitrator in the first place, which the court determined did not matter.

[79] It is clear from the case law and the *IBA Guidelines* that the determination of whether a reasonable apprehension of bias exists is extremely fact specific.

[80] There was evidence from Mr. Michel on this set aside application that something did not "feel right in his guts" while the arbitration was ongoing. However, the evidence does not support that anything was awry. The arbitration was a long process over more than two years with about 7 motions, among other things. There was no complaint made along the way about the Arbitrator. The bias issue was not raised until after the Final Award was issued; however, it was not until then that the applicants learned of the existence of the Other Sotos Engagement, which had been ongoing for about 15 months. I note that the applicants enquired about why Mr. Hamson was copied on the email from the Arbitrator before the issuance of the Final Award (i.e., when the outcome was unknown).

[81] The heart of the applicants' complaint was that the Arbitrator was acting on the Other Sotos Arbitration and this was not disclosed to the applicants. Mr. Michel's evidence was:

> [He] was shocked and extremely disillusioned to have it confirmed that the arbitrator who [they] had selected had secretly taken another engagement from counsel for the Respondents, while [their] arbitration was ongoing, and chosen not to disclose that business relationship to [them]. It was very important to [them] to ensure that [they] were treated with equality and [they] took steps in this regard with the Respondents and their counsel. The existence of the [Other Sotos Engagement], especially it being kept secret from the Applicants and [their] counsel for approximately 15 months and only disclosed after the Final Award and under direct questioning by [their] counsel, fatally undermines the Applicants' confidence in the entire process of the Arbitration.

[82] The Arbitrator was not engaged by one of the parties to do the Other Sotos Arbitration. He was engaged by counsel to preside as an arbitrator on another unrelated arbitration. When the Arbitrator was engaged to act as arbitrator on the Aroma arbitration he was informed of the pertinent clause in the MFA, providing that the selected arbitrator must have "no prior social, business or professional relationship with either party." The letter did not specify that he could not act as an arbitrator on other matters with the same counsel or firms. In his engagement letter, when he accepts the retainer, the Arbitrator confirms that he has found no conflicts and sets out the terms of his engagement. Again, there is nothing in the engagement letter that specifically restricts the Arbitrator from accepting another engagement from counsel at either law firm.

[83] As set out above, the presumption of impartiality by an arbitrator is high. The fact that the Arbitrator accepted another unrelated arbitration from the same law firm that co-engaged him on this matter does not in and of itself give rise to a reasonable apprehension of bias.

[84] The respondents included an affidavit of Michelle Logasov, an associate at Sotos, in their materials. In her affidavit, Ms. Logasov confirms that neither Mr. Dick nor Andy Seretis, who acted as counsel to the respondents on the Aroma arbitration, had any communications with the Arbitrator *relating to the Aroma Arbitration* apart from the communications attached to her affidavit, which were not in the presence of the applicants' counsel. However, they did have communications with the Arbitrator relating to the Other Sotos Engagement. Ms. Logasov confirmed that "Mr. Dick and Mr. Hamson represent [their] clients in the [Other Sotos Engagement]" and that "Mr. Dick and Mr. Hamson [advised her] that at no time during the course of the [Other Sotos Engagement] was any mention ever made of the Aroma Arbitration with the Arbitrator." Ms. Logasov also states in her affidavit that "[her] firm, together with counsel to the opposing parties in the [Other Sotos Engagement], appointed the Arbitrator." There is a lot that is left unsaid regarding the circumstances of the Other Sotos Engagement.

[85] There was no evidence from AC on the issue of the Arbitrator having been retained on the Other Sotos Engagement. The pleadings in the other matter (as the matter started in Court) list

Mr. Dick as the only lawyer for the plaintiff. There was no evidence provided by the respondents on the following issues related to the Other Sotos Engagement:

- What was the quantum of money the Arbitrator received on the Other Sotos Engagement?
- Who suggested that the Arbitrator be retained on the Other Sotos Engagement?
- Who reached out to the Arbitrator to retain him on the Other Sotos Engagement?
- Was AC aware that the Arbitrator was retained on the Other Sotos Engagement?
- Were the parties in the Other Sotos Engagement aware of the ongoing Aroma arbitration?

[86] The lack of evidence on these points speaks volumes.

[87] With all the commercial arbitrators in Toronto, why was it necessary that this Arbitrator be retained on the Other Sotos Engagement while the Aroma arbitration was ongoing? It is not as though the Arbitrator was previously Sotos' go to arbitrator for franchise arbitration, or arbitration in general – quite the contrary in fact. As set out in Michelle Logasov's affidavit – Mr. Dick advised her "that neither he nor anyone at [Sotos] had any previous experience with the Arbitrator as an arbitrator" and that his "only previous experience with the Arbitrator was in practice, where he and the Arbitrator were on opposing sides of a bitterly contested dispute." It is a bad look that mid-way through the Aroma arbitration, where Mr. Dick is the lead partner, the Arbitrator is retained on another matter in respect of which Mr. Dick is the lead partner.

[88] The respondents noted that there were no checks for all of the worldwide offices of the applicants' counsel to determine whether any other lawyer in the international firm, outside the firm's Toronto office, had any relationship with the Arbitrator. In my view, it is abundantly clear that, when considering the question of whether there is a reasonable apprehension of bias, it is different if a lawyer in another office of an international law firm retains the same arbitrator on a different matter versus the same lawyer retaining the same arbitrator on another matter while a matter is ongoing without disclosing this. In fact, depending on the context, the same law office or even the same lawyer may engage the same arbitrator at the same time.

[89] It comes down to context. As set out in *Dufferin* at para. 112, citing *Telesat*: "when considering bias, whether actual or the appearance of bias, context matters." A significant factor in this matter is the emphasis that was placed, in the pre-appointment correspondence, on whether there had been any prior dealings with the chosen arbitrator by the parties, their lawyers or law firms. As set out in detail above, it was very important to both parties, but perhaps even more

important to the applicants, who are not based in this country, that the selected arbitrator not have a professional or personal relationship with either party or their counsel. After considerable correspondence and at least three proposed and rejected potential arbitrators, the parties ultimately selected an arbitrator that had not acted as a mediator or arbitrator previously for either party or their lawyers. The "neutral" status of the arbitrator was clearly important to the parties in selecting the arbitrator. It is not as though it would be less important while the arbitration was extant.

[90] The Other Sotos Engagement remained hidden from the applicants for about 15 months while the Aroma arbitration was ongoing. It was only discovered due to the inadvertent copying of Mr. Hamson on an email sent by the Arbitrator. As noted, Mr. Hamson, who is involved with the Other Sotos Engagement, did in fact become involved with the Aroma matter following this correspondence. It begs the question as to whether the Arbitrator was already aware of this.

[91] In my view, in all the circumstances of this matter, a reasonable person in the applicants' position would lose confidence in the fairness of the proceeding and, in particular, the equal treatment of the parties. I have determined that a fair-minded and informed person, considering the facts and circumstances of this matter, would conclude that circumstances exist that give rise to a reasonable apprehension of bias.

[92] Having determined that there was a reasonable apprehension of bias, in my view the Awards must be set aside and a new hearing ordered.

Other Grounds

[93] The applicants raised other grounds to set aside the Arbitration Awards, including allegations that the Arbitrator exceeded his jurisdiction and failed to provide a reasoned award. As I have determined that the Awards are set aside on the basis of reasonable apprehension of bias, I will only briefly highlight my views on certain other grounds raised.

[94] First, the applicants allege that the Arbitrator made jurisdictional errors in failing to follow the provisions of the MFA regarding the enforcement of the contract and in making an unexplained and incorrect "proper party" finding.

[95] With regard to the applicants' position that the Arbitrator effectively re-wrote the MFA, it is my view that the Arbitrator did not exceed his jurisdiction in this regard. The Arbitrator interpreted the MFA. The applicants may disagree with his interpretation, but this is not a reviewable error.

[96] The applicants argue the Arbitrator made an unexplained and incorrect proper party finding at paragraph 296 of the Final Award, with regard to Mr. Gorman. The Arbitrator stated that Mr. Gorman was not a proper party to the arbitration agreement in the MFA and the arbitration. The applicants state that the Arbitrator did not give the parties the opportunity to address this issue, and there was a breach of procedural fairness and natural justice contrary to article 34(2)(a)(ii) of the *Model Law*. I agree with the applicants that the statement that Mr. Gorman was not a proper party

was not addressed by the parties at the arbitration. In this regard, there was a breach of procedural fairness.

[97] The applicants also argue that the Arbitrator failed to provide a reasoned award, contrary to Article 31 of the *Model Law*. The applicants' position is that Arbitrator failed to address certain issues that were raised, and the Arbitrator failed to provide adequate reasons in respect of certain other issues. The respondents argue that arbitrators are required to seize the substance of the matter, dispose of the issues submitted, and address the relevant evidence and arguments. They are not required to refer to all the evidence they considered to arrive at their decision or address every argument advanced. I agree with the respondents. The Arbitrator did not fail to provide a reasoned award.

Disposition and Costs

[98] For the above reasons, I set aside the Arbitrator's awards. I direct a new arbitration be conducted by a new arbitrator.

[99] If the parties cannot agree on costs, by April 14, 2023, they shall notify my judicial assistant. In such case, they may file written submissions as follows: The applicants' written submissions (not to exceed 5 pages, plus Bill of Costs) shall be delivered by April 28, 2023. The respondents' written submissions (not to exceed 5 pages, plus Bill of Costs) shall be delivered by May 12, 2023. A copy of the submissions shall be sent by email to my judicial assistant.

J. Steele J.

Released: March 20, 2023

CITATION: Aroma Franchise Company Inc. et al. v. Aroma Espresso Bar Canada Inc. et al., 2023 ONSC 1827

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

AROMA FRANCHISE COMPANY, INC., SHEFA FRANCHISES LTD., AROMA ESPRESSO BAR LTD., AROMA USA, INC., YARIV SHEFA, OSHRAT KATRI and AROMA GLOBAL LTD.

Applicants

– and –

AROMA ESPRESSO BAR CANADA INC., HALVA INVESTMENTS LIMITED, 6605702 CANADA INC. and EARL GORMAN

Respondents

REASONS FOR JUDGMENT

J. Steele J.

Released: March 20, 2023

Law Society of Ontario | Barreau de l'Ontario

TAB 3B

26th Estates and Trusts Summit – DAY ONE

Joint Tenancy and Third-Parties – Whose Rights Prevail?

Gillian Fournie
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October 18, 2023

Joint Tenancy and Third-Parties – Whose Rights Prevail?

Gillian Fournie and Jonathon Vander Zee
de VRIES LITIGATION LLP

While the right of survivorship is often thought of as the defining characteristic of joint tenancy, joint tenancy is primarily defined by "four unities." Justice Perell described joint tenancy in *Royal & SunAlliance Insurance Company v Muir*, 2011 ONSC 2273 as follows:

> *A joint tenancy is distinguished by what are known as four unities: (1) unity of title, the co-owners take under the same instrument; (2) unity of interest, the co-owners take an equivalent interest; (3) unity of possession; and (4) unity of time, the interest of all the co-owners vests at the same time. Joint tenants have identical undivided interests in the same property. Each joint tenant holds "*totum tenet et nihil tenet*" or "*per mie et per tout*" which means each holds everything and yet holds nothing.*

Despite having a "unified" interest in the property, co-owners often lead very different lives. For example, one co-owner may run up significant debts while the other lives frugally. In that case, can the third-party creditor seize the interest of the non-debtor joint tenant in order to satisfy the debt? In general, the answer is no. However, there are narrow circumstances in which the third-party creditor may sever the joint tenancy in order to access the debtor's interest in the property.

When Will a Creditor Succeed in Severing Joint Tenancy?

There are three ways *co-owners* can sever a joint tenancy: (i) the unilateral act of one joint tenant with respect to their interest; (ii) the mutual agreement of the joint tenants; and (iii) any course of dealing which shows that the interests of all were mutually treated as constituting a tenancy in common.

The courts have recognized at least one circumstance where a third party can sever a joint tenancy: when an execution creditor takes "sufficient steps" to execute the judgment against the debtor's interest in the property. What constitutes "sufficient steps" is not well defined and will be fact specific to each case. However, the courts have determined that "sufficient steps" must be more than simply delivering a writ of execution.[1]

A recent example of when a third-party creditor was successful in severing the joint tenancy is found in *Royal & SunAlliance Insurance Company v. Muir*, 2011 ONSC 2273.

In that case, a husband and wife purchased a condominium unit in Barrie as joint tenants in April 1992 (the "**Barrie Property**"). In December 1998, a third-party creditor obtained a default judgement against the husband in the amount of $731,793.15. In January 1999, the creditor obtained a writ of seizure and sale and filed it against the Barrie Property.

In June 1999, the husband paid $43,932.80 towards the judgment. However, he made no further payments towards the debt.

On August 3, 2001, the Enforcement Office of the Court Services Division of the Ministry of the Attorney General (the "**Enforcement Office**") sent identical letters to both the husband and wife informing them that if they did not reply with 10 days, each of their respective interests in the Barrie Property would to be sold.

The husband and wife never formally acknowledged receipt of the letter. Accordingly, on September 10, 2001, the Enforcement Office sent further identical letters to the husband and wife stating that the Barrie Property was to be sold. Included in these second letters was the

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[1] For a reminder of how judgments and orders may be enforced, see Oliver Moore and Matthew Perron's paper "Executions: Everything You Need to Know & Were Afraid to Ask" prepared for the 23rd East Region Solicitors Conference, available on CanLII here.

date and time of the sale along with confirmation that the sale was being advertised in both the Ontario Gazette and a local paper.

While the Enforcement Office put the Barrie Property up for sale, a buyer could not be found and the condominium remained unsold. In November 2008, the wife died.

After the wife died, the creditor brought an application seeking an order removing the wife's name as an owner of the Barrie Property, leaving the husband as the sole owner. The husband argued that the joint tenancy had been severed by the creditor's actions and that the Barrie Property was now owned by the husband and his wife's estate as tenants-in-common.

The court found that the creditor had moved well past the beginning stages of the enforcement process, having not only filed the writ of seizure and sale but also advertised the property for sale in accordance with subrules 60.07(17-20) of the *Rules of Civil Procedure* (which deals with enforcement orders). The court held that creditor's actions, especially advertising the sale, constituted "sufficient steps" such that the joint tenancy of the Barrie Property was severed in September 2001.

Having found that the joint tenancy was severed in September 2001, it followed that the wife's 50% interest as tenant in common fell into her estate on her death in 2008. Among other things, this meant that the creditor could only seek to enforce the writ of seizure and sale against the husbands 50% interest in the Barrie Property.

Can a Creditor Seize the Full Interest in Jointly Held Property?

Sections 9(1) and 10(6) of the *Executions Act,* RSO 1990, c E.24, authorize the seizure and sale of property held in joint tenancy. However, joint tenancy poses a risk for creditors: if the debtor dies before the joint tenancy is severed, their interest in the property passes outside of their estate directly to the other joint tenant via the right of survivorship. Once ownership is

vested in the surviving joint tenant, the property is out of reach of the creditor. In *Senthillmohan v Senthillmohan, 2023 ONCA 280*, the Court of Appeal provided the following example:

> *…where property is jointly held and one joint tenant dies, the remaining joint tenant acquires the entire interest in the property through their right of survivorship. And, where a writ is filed against jointly held land before the debtor joint tenant's death, it does not continue to bind the surviving non-debtor's complete interest in the property acquired through their right of survivorship.*

While joint property may be seized to satisfy a creditor's claim, the courts have clarified that the creditor is only entitled to the *debtor's* interest in jointly held property: the creditor's rights do not extend to the non-debtor's interest in the property. A creditor sought to test this principle in *Senthillmohan v Senthillmohan, 2023 ONCA 280.*

In that case, a husband and wife were in the process of getting divorced. In January 2021, they obtained an order directing them to sell the matrimonial home (which was held in joint tenancy) and to hold the net proceeds in trust pending the resolution of the wife's equalization claim.

In September 2021, a default judgment was obtained against the husband by a third-party creditor in a civil action. The third-party creditor obtained a writ of execution and registered it against title to the jointly owned matrimonial home.

The husband and wife entered into an agreement of purchase and sale in October 2021. The third-party creditor agreed to temporarily lift the writ to facilitate the sale. The net proceeds, after the discharge of the existing mortgage and sale costs, was approximately $925,000.

In November 2021, before the sale closed, the wife brought an emergency motion and obtained an order severing the joint tenancy.

In February 2022, the wife brought a motion in family court seeking the release of her 50% share of the net sale proceeds. The third-party creditor attended the motion and argued against the release of any funds prior to the repayment of his debt. The third-party creditor argued that the husband and wife were joint tenants when default judgment was obtained and when the writ was filed; therefore, he had priority over the wife's interest in the property. The motion judge disagreed and granted the wife's request to an immediate distribution of her 50% share of the net proceeds.

The third-party creditor appealed the motion judge's decision. Among other reasons, the third-party creditor argued that the motion judge erred by failing to consider that the writ attached to the property *before* the wife severed the joint tenancy.

The third-party creditor was unsuccessful on the appeal. The Court of Appeal found that "a creditor cannot seize the interest of a non-debtor joint tenant." For this reason, it was irrelevant when the severance occurred. The Court of Appeal further held:

> *The process of seizure and execution on debts only contemplates the execution against the debtor's exigible interest in the land held in joint tenancy. For instance, when a sheriff takes sufficient steps to seize property, the joint tenancy is severed and, once severed, the debtor joint tenant has no claim to the whole. So, too, for the creditor, who can now execute against the debtor's share of the tenancy in common.*

For these reasons, the creditor's appeal was dismissed and they had to make do with only half of the net proceeds.

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TAB 3C

26th Estates and Trusts Summit – DAY ONE

Case: Di Michele v. Di Michele, 2014 ONCA 261

Andrea McEwan
WeirFoulds LLP

October 18, 2023

COURT OF APPEAL FOR ONTARIO

CITATION: Di Michele v. Di Michele, 2014 ONCA 261
DATE: 20140403
DOCKET: C56711 and C56712

MacPherson, Cronk and Gillese JJ.A.

In the Matter of the *Partition Act*, R.S.O. 1990, c. P.4, ss. 2 and 3

And in the Matter of the *Mortgages Act*, R.S.O. 1990, c. M.40, s. 24

And in the Matter of the *Trustee Act*, R.S.O. 1990, c. T.23, ss. 5(1), 16(1) and 16(2)

And in the Matter of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, rules 14.05(c), (d) and (e)

BETWEEN

Roberto Di Michele

Applicant (Appellant/
Respondent by way of cross-appeal)

and

Antonio Di Michele, Estate Trustee of the Estate of Adalgisa Di Michele, deceased, Antonio Di Michele, Michele Di Michele, 909403 Ontario Limited, Marsica Investments Limited, Cesidio Ranieri, Gilberto Olivieri, Alberto Ramelli, Capital One Bank and Avrum Slodovnick, and The Director of Titles, party pursuant to s. 57(14) of the *Land Titles Act*

Respondents (Respondents/
Appellants by way of cross-appeal)

AND BETWEEN

909403 Ontario Limited, Marsica Investments Ltd., Cesidio Ranieri and Alberto Ramelli

Applicants (Respondents/
Appellants by way of cross-appeal)

and

Antonio Di Michele also known as Tony Di Michele, Michele Di Michele also known as Michael Di Michele, and Roberto Di Michele also known as Robert Di Michele

Respondents (Appellant/
Respondent by way of cross-appeal)

D. Loucks, for the appellant/respondent by way of cross-appeal

Mark Ross, for the respondents/appellants by way of cross-appeal

Heard: February 24, 2014

On appeal from the judgment of Justice Beth A. Allen of the Superior Court of Justice, dated February 6, 2013, with reasons reported at 2013 ONSC 870, 86 E.T.R. (3d) 178.

Gillese J.A.:

[1] This appeal raises significant questions about the scope of an estate trustee's power to mortgage property governed by the *Land Titles Act*, R.S.O. 1990, c. L.5.

OVERVIEW

[2] Adalgisa Di Michele died on September 5, 1996, leaving behind her three sons: Roberto, Michele and Antonio. Under Mrs. Di Michele's will (the "Will"), Antonio was named the estate trustee. Because the three brothers have the same last names, I will refer to each of them by their first names.

[3] The Will provided that after all debts had been paid, Mrs. Di Michele's estate was to go, in equal shares, to those of her "issue alive at the date of distribution".

[4] On March 21, 2002, in his capacity as estate trustee, Antonio registered a Transmission by Personal Representative to take title to the family home that his mother had owned and lived in until her death. The home was located at 269 Angelene Street, Mississauga, Ontario (the "Property") and is within the land titles system. By that point, all the estate debts had been paid and it was ready for distribution.

[5] Roberto and Michele never registered on title any interest in, or claim to, the Property.

[6] Starting in 2002, Antonio was embroiled in personal litigation with 909403 Ontario Limited, Marsica Investments Ltd., Cesidio Ranieri and Alberto Ramelli (collectively "Marsica" or the "respondents").

[7] In June 2008, Antonio put up the Property as security in favour of Marsica by means of a mortgage (the "Mortgage").

[8] In 2010, Marsica obtained judgment for $1.5 million against Antonio.

[9] In 2011, Marsica brought an application in which it sought to have the Property sold.

[10] Roberto (the "appellant") lived with his parents on the Property for many years prior to their deaths. He and his wife have continued to live on the Property until the present time. He says that he and his brothers agreed that after their mother's death, the Property would be his.

[11] Roberto brought a counter-application, disputing Marsica's right to sell the Property and asserting sole entitlement to it.

[12] By judgment dated February 6, 2013 (the "Judgment"), among other things, the trial judge:

1. declared that the Property vested in Antonio, Roberto and Michele on March 21, 2002, in equal one-third shares;
2. declared the Mortgage to be valid;
3. ordered the partition and/or sale of the Property "in accordance with the interests of the parties entitled to share in it"; and
4. dismissed Roberto's counter-application.

[13] Roberto appeals. He asks this court to set aside the Mortgage and that part of the Judgment giving relief under the *Partition Act*, R.S.O. 1990, c. P.4, and order that he replace Antonio as the estate trustee.

[14] Marsica cross-appeals, arguing that the trial judge erred in finding that the Mortgage binds only Antonio's one-third interest in the Property.

[15] For the reasons that follow, I would allow the appeal in part and allow the cross-appeal.

BACKGROUND

The Will

[16] The key provisions in Mrs. Di Michele's Will are set out below. As will become evident, the breadth of the power to postpone sale given to the estate trustee is significant to the resolution of this appeal.

> I GIVE, DEVISE AND BEQUEATH all of my estate, both real and personal, … unto my Trustee upon the following trusts, namely:
>
> a) To pay all my just debts, funeral expenses and testamentary expenses …;
>
> b) To pay out of the residue of my estate all [duties and taxes];
>
> c) ***To deliver all the rest and residue of my estate then remaining to my issue alive at the date of distribution in equal shares per stirpes***.
>
> IN ORDER TO CARRY OUT the provisions of this my Will, ***I give my Trustee power to sell***, call in ***and convert into money***, ***all of my estate at such time or times, in such manner and upon such terms as my Trustee in his discretion may decide upon, with power and discretion to postpone such conversion*** of such estate or any part or parts thereof, ***for such length of time as he may think best***, and I hereby declare that ***my Trustee may retain any portion of my estate in the form in which it may be at my death … for such length of time as my Trustee in his discretion may deem advisable,*** without responsibility for loss, to the intent that investments or assets so retained shall be deemed to be authorized investments for all purposes of this my Will. [Emphasis added.]

Antonio Acts as Estate Trustee

[17] On December 16, 1997, Antonio obtained a Certificate of Appointment of Estate Trustee with a Will. The estate's only asset was the Property.

[18] On March 21, 2002, the Property was transferred to Antonio by Transmission by Personal Representative.

[19] The Property had been the Di Michele family home for several decades. The parents of the Di Michele brothers lived on the Property until their deaths. The father died in 1987 and the mother in 1996. The mother gained title to the Property on her husband's death.

[20] At the time of the Property transfer to Antonio, he signed a certificate confirming that all the estate debts had been paid.

The 2002 action against Antonio

[21] In 2002, Marsica commenced an action against Antonio in connection with a failed real estate investment scheme (the "2002 action").

[22] A trial date was scheduled for March 31, 2008. In the weeks leading up to trial, it appeared that the matter would settle on the basis of a payment over time secured by a mortgage from Antonio over his cottage property in Bala, Ontario.

[23] Antonio's lawyer, Avrum Slodovnick (“Slodovnick”) told Marsica’s lawyer Simon Schonblum (“Schonblum”) that the settlement was 99% completed and that Antonio was just waiting for the blessing of his financial advisor.

[24] The estimated length of the trial was 10 days. On the basis that the parties were so close to a settlement, counsel agreed to vacate the trial date.

[25] Shortly after the trial date was vacated, Schonblum searched title for the Bala cottage property and found that Antonio had registered a $350,000.00 mortgage against it on April 4, 2008, thereby exhausting the remaining equity in the property.

Antonio seeks adjournment of 2002 action and grants the Mortgage

[26] On June 4, 2008, a pre-trial conference was held in relation to the 2002 action. At that point, the trial was scheduled to proceed on June 16, 2008. Antonio sought an adjournment of the trial because he did not have his financial evidence in order.

[27] Faced with yet another possible delay in the trial and in light of Antonio having encumbered the Bala cottage property after having offered it to Marsica as security, Marsica was concerned about securing funds for a possible judgment in the 2002 action.

[28] A suggestion was made that Antonio might provide mortgage security in exchange for an adjournment so that Antonio could provide further documents and obtain a forensic accounting.

[29] The parties were caucusing separately. At one point, Slodovnick pulled Schonblum out of his room and said that Antonio had given him instructions to mortgage the Property as security for any judgment that might follow trial. In exchange, Marsica was to consent to an adjournment to allow Antonio to obtain a forensic accounting.

[30] Slodovnick then showed Schonblum a parcel register for the Property. On the face of the parcel register, under "Owners' Names", it said Antonio Di Michele. Under "Capacity" were the initials "TWW", which stand for "Trustee With a Will".

[31] The parties ultimately reached an agreement, under the terms of which: Marsica agreed to adjourn the trial; Antonio granted security for any judgment that might arise in relation to the 2002 action by means of a blanket mortgage of $350,000.00 on the Bala cottage property and the Property; and the parties agreed to jointly retain a forensic accountant and split the cost of a review of further productions from Antonio of the books and records relating to the real estate investment (the "Agreement"). The parties were to return for a further pre-trial conference in November 2008.

[32] On June 6, 2008, in his capacity as Antonio's lawyer, Slodovnick registered the mortgage against the Property.

Antonio's defence struck and judgment obtained in 2002 action

[33] On April 1, 2010, Antonio's defence was struck by order of Master Dash. On June 22, 2010, Antonio's appeal of Master Dash's order was dismissed.

[34] On October 11, 2010, the trial proceeded as an undefended trial before Stinson J.

[35] By judgment dated October 14, 2010, Stinson J. awarded Marsica damages against Antonio in the sum of approximately $1.5 million.

Attempted enforcement of judgment in 2002 action

[36] Acting on the judgment obtained in the 2002 action, the respondents obtained a writ of seizure and sale. They filed the writ against the Property with the Sheriff in the Peel region.

[37] The Sheriff posted a notice at the Property that there would be a sheriff's sale. Roberto and his wife were living in the house. Roberto had lived at the Property while his parents were alive and continued living there after their deaths. By the time of trial, he had lived on the Property for some 50 years. He claimed that after his mother's death, he and his brothers had agreed that the Property would be his.

[38] Roberto's lawyer wrote to counsel and the Sheriff to advise that he would be bringing an application to assert his interest in the Property.

The Application and Counter-Application

[39] The respondents brought an application in which they sought, among other things, the sale of the Property. Roberto brought a counter-application in which he asserted sole ownership of the Property. He sought, among other things, an order directing Antonio to transfer the Property to him and appointing him in Antonio's stead as the estate trustee.

[40] The two matters were converted into trials and heard together.

[41] At trial, Michele took no position and filed no documents. Antonio appeared on his own behalf. He denied knowledge of the Will, his appointment as the estate trustee, and that the Property had been transmitted to him.

THE TRIAL DECISION

[42] The trial judge rejected Antonio's evidence, stating that he was a "most unreliable and deceptive witness". She rejected his claim that someone else applied for the Certificate of Estate Trustee with a Will in his name and then registered the transmission of the Property to him as estate trustee without his knowledge. She found that Antonio was aware of the Will, of his appointment as estate trustee, and that the Property had been registered in his name as estate trustee.

[43] The trial judge set out the parties' positions on the many issues that had been raised.

[44] She then analysed and rejected Roberto's arguments that the Mortgage was fraudulent and invalid because Antonio had given it and he had no interest in the Property. She concluded that while Antonio was not forthright about the nature of his interest in the Property – that he held title only as estate trustee and that he shared beneficial interest in the Property with his two brothers – this alone did not place him within the bounds of fraud as defined in s. 1 of the *Land Titles Act*. Antonio was the registered owner of the property, he was not posing as a fictitious person, and there was no forgery.

[45] The trial judge also rejected Roberto's argument that Antonio had no property interest in the Property when he gave the Mortgage, though she did not conclude that Antonio owned the whole Property. In her view, the Property automatically vested in the estate's beneficiaries (the three brothers), three years after Mrs. Di Michele's death, pursuant to s. 9 of the *Estates Administration Act*, R.S.O. 1990, c. E. 22. As a result, rather than owning the whole Property as estate trustee, Antonio owned only the third of the property to which he was beneficially entitled under the Will. The trial judge took note of s. 10 of the *Estates Administration Act*, which provides that nothing in s. 9 derogates from a power granted to an estate trustee in a will. She concluded that although the Will gave the estate trustee the power to sell the Property and to postpone such sale

for such length of time as he deems advisable, this did not evidence a clear intent to oust s. 9 and delay the vesting of the estate.

[46] The trial judge concluded that the Mortgage was valid. However, because she found that the brothers' beneficial interests in the Property had vested by the time that Antonio granted the Mortgage in 2008, she concluded that Antonio could only have granted a mortgage against his interest in the Property.

[47] The trial judge further found that because the 2002 action was against Antonio personally, and not in his capacity as the estate trustee, he could only give as security that which he owned in his personal capacity.

[48] Accordingly, the trial judge found the Mortgage to be enforceable only against Antonio's one-third interest in the Property.

[49] She then ordered partition or sale of the Property in accordance with the interests of the parties entitled to share in it.

THE ISSUES

[50] The appellant raises a number of issues that can be summarized as follows. Did the motion judge err in:

1. finding that the Mortgage was valid;

2. finding that the respondents were entitled to a remedy under the *Partition Act*; and

3. failing to appoint Roberto as the estate trustee?

[51] The respondents raise one issue by way of cross-appeal. Did the motion judge err in:

4. failing to find that the Mortgage bound the entire Property?

ANALYSIS

1. Was the Mortgage valid?

[52] The appellant makes three arguments going to the validity of the Mortgage. First, he submits that Antonio had no interest in the Property, either personally or in his capacity as estate trustee, over which he could grant a mortgage. Second, he argues that the respondents were not *bona fide* purchasers for value without notice. Third, he says that the lawyers involved at the time that the Mortgage was granted were unaware that Antonio was not the legal owner of the Property. Consequently, he contends, the Mortgage was a product of Antonio's fraudulent representation that he was the owner of the Property and, therefore, is a nullity.

[53] I would not accept any of these submissions.

(a) Did Antonio have an interest in the Property?

[54] The appellant's first submission – that Antonio had no interest in the Property – cannot stand in light of the relevant statutory provisions.

[55] Section 2(1) of the *Estates Administration Act* provides that upon a person's death, all of that person's property vests in the estate trustee:

> ***All real and personal property that is vested in a person*** without a right in any other person to take by survivorship, ***on the person's death***, whether testate or intestate and despite any testamentary disposition, ***devolves to and becomes vested in his or her personal representative*** from time to time as trustee for the persons by law beneficially entitled thereto, and, subject to the payment of the person's debts and so far as such property is not disposed of by deed, will, contract or other effectual disposition, it shall be administered, dealt with and distributed as if it were personal property not so disposed of. [Emphasis added.]

[56] Pursuant to s. 120 of the *Land Titles Act*, on Mrs. Di Michele's death, the land registrar was entitled, upon receiving an application from the estate trustee, to register the estate trustee as owner in place of the deceased:

> ***On the death of the sole registered owner*** or of the survivor of several joint registered owners ***of freehold land, such person shall be registered as owner*** in the place of the deceased owner or owners ***as may***, on the application of any person interested in the land, ***be appointed by the land registrar, regard being had*** to the rights of the several persons interested in the land and ***in particular to the selection of any such person as for the time being appears to the land registrar to be entitled according to law to be so appointed***, subject to an appeal to the Divisional Court in the prescribed manner by any person aggrieved by an order of the land registrar under this section. [Emphasis added.]

[57] Section 63 of the *Land Titles Act* provides that in respect of registered dealings with land, the person registered in the place of a deceased owner is in the same position as if that person had taken the land under a transfer for valuable consideration:

> ***Any person registered in the place of a deceased owner*** or to whom a patent is issued as executor[,] administrator or estate trustee or in any representative capacity shall hold the land or charge, in respect of which the person is registered, upon the trusts and for the purposes to which the same is applicable by law and subject to any unregistered estates, rights, interests or equities subject to which the deceased owner held the same, but otherwise in all respects, ***and in particular as respects any registered dealings with such land or charge, the person shall be in the same position as if the person had taken the land or charge under a transfer for valuable consideration.*** [Emphasis added.][1]

[58] As a result of these provisions, it is clear that Antonio had the legal right to grant the Mortgage. The Property vested in him, as the estate trustee, on his mother's death: *Estates Administration Act*, s. 2(1). He was entitled to be registered as owner of the Property in his mother's stead: *Land Titles Act*, s. 120. He had the Property transferred into his name. He was thereafter the person registered in the place of his mother, the deceased owner: *Land Titles Act*, s. 63. The Mortgage was a registered dealing with the Property. Antonio was in the same position as if he had become the registered owner of the Property under a transfer for valuable consideration: *Land Titles Act*, s. 63. A registered owner has the right to grant a mortgage over his or her land: *Land Titles Act*, s. 93(1).[2]

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[1] I have quoted this provision of the *Land Titles Act* as it exists today, rather than as it existed at the time of Mrs. Di Michele's death in 1996. In 1998, the Ontario legislature amended this provision to include a reference to estate trustees (the previous versions of s. 63 had referred only to executors and administrators, which are categories of estate trustees): S.O. 1998, c. 18, Sched. E, s. 126. This amendment has no bearing on the issues raised in this appeal.

[2] Section 93(1) reads as follows: "A registered owner may in the prescribed manner charge the land with the payment at an appointed time of any principal sum of money either with or without interest or as security for any other purpose and with or without a power of sale."

[59] Accordingly, it cannot be said that Antonio had no interest in the Property that entitled him to grant the Mortgage.

(b) Were the respondents *bona fide* purchasers for value without notice?

[60] With respect to this submission, I begin by noting that the questions of value and consideration were not raised before the trial judge. Issues ought not to be raised for the first time on appeal. In any event, however, the contention that the respondents were not *bona fide* purchasers for value without notice must fail.

[61] The first question is whether the respondents were *bona fides* when they took the Mortgage. In my view, the fact that Antonio's lawyer offered the mortgage as security eliminates any question of a lack of *bona fides*. Because Antonio's lawyer offered the Property as security, the respondents were entitled to operate on the assumption that Antonio was acting lawfully in granting the Mortgage. They were not obliged to go behind that implicit representation.

[62] The next question is whether the respondents gave value for the Mortgage. This, too, is easily disposed of.

[63] The Mortgage was granted as part of the Agreement. In exchange for the Mortgage, the respondents agreed to adjourn the trial and share the cost of the forensic accountant that Antonio required. Even if the adjournment alone does not constitute value within the meaning of the term "*bona fide* purchaser for value

without notice", the cost of the forensic accountant borne by the respondents clearly does.

[64] I turn next to the question of notice.

[65] The appellant points to the fact that the Property register shows Antonio as holding the Property in the capacity of "TWW", meaning "Trustee With a Will". He says that this shows that the respondents had actual notice of the Will. Accordingly, he says, the respondents could not have simply accepted the Mortgage as security – they had to first inquire into whether Antonio could lawfully mortgage the Property.

[66] I would reject this argument. In my view, s. 62(2) of the *Land Titles Act* provides a complete answer to it.

[67] It is correct that when the parties entered into the Agreement, they were aware that Antonio held the Property as estate trustee. As the appellant points out, the lawyers for both parties had the parcel register in hand at that time and the parcel register showed Antonio as owner but in the capacity of "TWW" (Trustee With a Will).

[68] However, s. 62(2) of the *Land Titles Act* provides that: (1) describing the owner of land as a trustee shall be deemed **not** to constitute notice of a trust, and (2) the description (of the owner as trustee) does **not** impose a duty on the

person dealing with the owner to make inquiry as to the power of the owner in respect of the property. Section 62(2) reads as follows:

> ***Describing the owner of*** freehold or leasehold ***land*** or of a charge ***as a trustee***, whether the beneficiary or object of the trust is or is not mentioned, ***shall be deemed not to be a notice of a trust*** within the meaning of this section, ***nor shall such description impose upon any person dealing with the owner the duty of making any inquiry as to the power of the owner in respect of the land or charge*** or the money secured by the charge, or otherwise, ***but, subject to the registration of any caution or inhibition, the owner may deal with the land or charge as if such description had not been inserted.*** [Emphasis added.]

[69] Thus, Antonio's description as "TWW" (Trustee With a Will) is deemed not to be notice of a trust and it imposed no duty on the respondents to make any inquiry as to his power as owner to charge the Property.

[70] Further, s. 62(2) provides that the owner may deal with the land as if the description as a trustee had not been inserted. This is subject to the registration of any caution or inhibition. However, in the present case, no caution or inhibition had been registered on the title to the Property.

[71] Accordingly, I would reject the appellant's contention that the respondents were not *bona fide* purchasers for value without notice.

(c) Were the Lawyers operating under a misapprehension that Antonio was the owner?

[72] In light of the evidence about the parcel register, the appellant's contention that the parties were all labouring under a misapprehension that Antonio was the owner of the Property must fail and with it, his argument that the

Mortgage was obtained by fraud on Antonio's part. In this regard, the appellant has confused the notion of a fraudulent transaction with a valid transaction that might amount to a breach of trust. The former may invalidate the transaction. The latter does not. Rather, it gives rise to an action by the beneficiaries against the trustee.

[73] While Roberto and Michele may have recourse against Antonio for what appears to be a breach of his obligations as the estate trustee, that does not mean that the Mortgage was granted fraudulently nor does it render the Mortgage invalid.

(d) Conclusion

[74] For these reasons, I would dismiss this ground of appeal.

2. Were the respondents entitled to a remedy under the *Partition Act*?

[75] The appellant contends that even if the Mortgage were valid, an order under the *Partition Act* could not be made because Marsica does not have a crystallized right of possession.

[76] Marsica concedes this point. However, it contends that the end result of enforcement of the Mortgage will be such an order and the relief ordered pursuant to the *Partition Act* was an attempt by the trial judge to save the parties the cost and trouble of going through the intermediate steps relating to foreclosure.

[77] Marsica is likely correct about the trial judge's motivation in ordering partition and sale. However, the law is clear: only persons entitled to the immediate possession of an estate in property may bring an action or make an application for its partition or sale.

[78] Section 3(1) of the *Partition Act* reads as follows:

> ***Any person interested in land*** in Ontario, or the guardian of a minor ***entitled to the immediate possession of an estate therein***, ***may bring an action or make an application for the partition*** of such land ***or for the sale thereof*** under the directions of the court if such sale is considered by the court to be more advantageous to the parties interested. [Emphasis added.]

[79] This court has interpreted s. 3(1) and its predecessors as permitting only those entitled to immediate possession of the property to apply for partition: see *Morrison v. Morrison* (1917), 39 O.L.R. 163 (S.C. (A.D.)), at pp. 168 and 171-72; and *Ferrier v. Civiero* (2001), 147 O.A.C. 196 (C.A.), at paras. 6 and 8.

[80] Because the respondents were not entitled to immediate possession of an estate in the Property, they were not entitled to a remedy under the *Partition Act.*

[81] Accordingly, I would allow this ground of appeal.

3. Should Roberto be appointed Estate Trustee in Antonio's stead?

[82] In his counter-application, Roberto asked to be appointed as the estate trustee in Antonio's stead. The trial judge did not address this aspect of his

counter-application. Roberto renews his request in this court, saying that Antonio and Michele "do not claim any interest in the estate" and "have shown that they have no interest in receiving a share of the estate". Roberto also states that Antonio "gifted" his share of the estate to him.

[83] Section 37(1) of the *Trustee Act*, R.S.O. 1990, c. T.23, empowers the court to remove a personal representative (which is another term for an estate trustee)[3] and appoint "some other proper person". Section 37(1) reads as follows:

> The Superior Court of Justice may remove a personal representative upon any ground upon which the court may remove any other trustee, and may appoint some other proper person or persons to act in the place of the executor or administrator so removed.

[84] The court will remove an estate trustee only if doing so is clearly necessary to ensure the proper management of the trust: *Re Weil*, [1961] O.R. 888 (C.A.), at p. 889. Situations in which removal may be justified include where the estate trustee has acted in a way that has endangered the trust property or otherwise shown a lack of honesty, proper capacity, or reasonable fidelity: *Letterstedt v. Broers* (1884), 9 A.C. 371 (P.C.), at pp. 385-86; *Bathgate v.*

[3] A "personal representative" and an "estate trustee" are both defined as an executor, administrator, or administrator with the will annexed. Under s. 1 of the *Trustee Act* personal representative is defined as "an executor, an administrator, and an administrator with the will annexed") and under rule 74.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, estate trustee is defined as "an executor, administrator or administrator with the will annexed".

National Hockey League Pension Society (1994), 16 O.R. (3d) 761 (C.A.), at p. 778.

[85] Thus, on the record, it appears that there may be good reason to remove Antonio as the estate trustee.

[86] However, in my view, Roberto is not a "proper" person to serve as his replacement. I say this because Roberto's personal interests would seriously conflict with the obligations he would undertake as the estate trustee.

[87] As a general rule, a person will not be appointed as a trustee if that person's duties as trustee would conflict with either his or her personal interests or duties which that person has undertaken apart from as trustee: see *Re Parsons*, [1940] Ch. 973, at p. 983; *Re Moorhouse*, [1946] 4 D.L.R. 542 (Ont. H.C.), at p. 544; and *Re Becker* (1986), 57 O.R. (2d) 495 (Surr. Ct.), at pp. 498-99.

[88] Two examples illustrate why Roberto's appointment as replacement estate trustee would run afoul of the general rule precluding those in a conflict position from being named estate trustee.

[89] The first example flows from the estate trustee's overriding obligation to duly administer the estate. As the legal owner of the Property, the estate trustee will have to comply with the court orders flowing from these proceedings, including those relating to the Mortgage. However, the record makes it plain that

Roberto claims the Property as his own and that he plans on appropriating the Property for himself. Rather than respecting and implementing the court orders in respect of the Property, it seems likely that he will resist all actions associated with enforcement of the Mortgage. In any event, his personal interests would be in conflict with his duties as the estate trustee in this regard.

[90] The second example flows from the successor estate trustee's obligation to take steps to recover, for the estate, any losses caused by the prior estate trustee's defaults: see *Bennett v. Burgis* (1846), 5 Hare 295 (Ch.), at p. 297. This would require Roberto, if he were appointed the successor estate trustee, to consider taking action against Antonio for any losses that Antonio may have caused the estate in his capacity as the initial estate trustee. But, it will be recalled, Roberto claims that Antonio made a gift to him of his interest in the estate. So, if Roberto *qua* estate trustee found that he ought to pursue Antonio, would he have to consider attacking the gift? It is self-evident that in such a situation, Roberto's obligation if he were the estate trustee would conflict with his personal interests.

[91] I would add that the foregoing examples stand apart from the respondents' contention that the alleged gift from Antonio to Roberto of his interest in the estate was for the purpose of defeating, hindering or avoiding a creditor. By virtue of accepting the "gift" of Antonio's interest, Roberto would be

complicit in such an act. Thus, this allegation also raises serious questions about whether Roberto is a proper person to serve as estate trustee.

[92] Accordingly, I would dismiss this ground of appeal.

THE CROSS-APPEAL

4. Did the Mortgage bind the entire Property?

[93] The trial judge concluded that although the Mortgage was valid, it was binding only on the one-third share that she found Antonio was entitled to receive as a beneficiary under the Will. In reaching this conclusion, the trial judge relied on s. 9 of the *Estates Administration Act*.

[94] Section 9 of the *Estates Administration Act* reads as follows:

> ***Real property not*** disposed of, conveyed to, divided or ***distributed among the persons beneficially entitled thereto*** under section 17 by the personal representative ***within three years after the death of the deceased is*** … ***thenceforth vested in the persons beneficially entitled thereto under the will*** … unless such personal representative, if any, has signed and registered, in the proper land registry office, a caution in Form 1 ... [Emphasis added.]

[95] The trial judge saw that the Will gave Antonio, as estate trustee, an unqualified power to postpone sale of the Property. Nonetheless, in her view, "there is no clear intention in the Will that … Anthony have discretion beyond three years" to distribute the estate.

[96] As a result, pursuant to s. 9 of the *Estates Administration Act*, the trial judge found that the Property vested in the beneficiaries three years after Mrs. Di

Michele's death, in the same manner as if the estate trustee had conveyed it to them. On this view, the vesting occurred before the Mortgage was granted. Therefore, the Mortgage could attach only to Antonio's one-third beneficial interest in the Property.

[97] With respect, I do not agree. In my view, the Mortgage is binding on the whole of the Property. I reach this conclusion for three reasons.

[98] First, s. 9 of the *Estates Administration Act* does not apply in the circumstances of this case. Section 9 (and its predecessors) was not enacted to limit the powers given to an estate trustee under a will. Rather, it was intended to give estate trustees additional powers, but only to the extent that the additional powers do not conflict with the provisions of the will. The intention of the deceased, as expressed in his or her will, is always paramount: *Re Leblanc* (1978), 18 O.R. (2d) 507 (C.A.), at pp. 513-15.

[99] This can be seen from s. 10 of the *Estates Administration Act*, which provides that nothing in s. 9 derogates from any right possessed by a trustee under the will. Section 10 reads as follows:

> Nothing in section 9 derogates from any right possessed by an executor or administrator with the will annexed under a will or under the Trustee Act or from any right possessed by a trustee under a will.

[100] The paramountcy of the testator's intention is confirmed in the jurisprudence. Where a will gives the estate trustee a power to sell property at

such times and in such manner as the estate trustee sees fit, s. 9 of the *Estates Administration Act* will not limit the scope of that power by requiring that the property vest after a specific period of time: *Re Proudfoot Estate* (1994), 3 E.T.R. (2d) 283 (Ont. Gen. Div.), at paras. 8 and 11-12, var'd on other grounds (1997), 19 E.T.R. (2d) 150 (Ont. C.A.). See also *Re Leblanc*, at p. 515.

[101] It will be recalled that the Will gave Antonio, as estate trustee, the power to sell the Property "at such time or times, in such manner and upon such terms as my Trustee in his discretion may decide upon". It went on to expressly provide that the estate trustee could postpone sale:

> for such length of time as he may think best, and I hereby declare that my Trustee may retain any portion of my estate in the form in which it may be at my death … for such length of time as my Trustee in his discretion may deem advisable...

[102] On a plain reading of these provisions in the Will, the estate trustee was given the power to postpone sale of the Property for whatever length of time he deemed advisable. Thus, in my view, the trial judge erred in finding that the Will contained no clear intention that Antonio had the discretion to delay selling the Property beyond the three year limit in s. 9 of the *Estates Administration Act*. Consequently, s. 9 did not apply and the Property did not vest in the beneficiaries.

[103] Second, the beneficiaries' entitlement under the Will did not amount to a property interest in the Property. The Will does not give the beneficiaries a

specific bequest of the Property. Rather, it gives them a contingent interest in the residue of the estate. In this regard it will be recalled that the Will provided that the residue of the estate was to go to Mrs. Di Michele's "issue alive at the date of distribution". Accordingly, to become entitled, a beneficiary had to be alive on the date of distribution. Until distribution, the beneficiaries had only a contingent beneficial interest in the residue of the estate, as well as the personal right to compel the estate trustee to duly administer the estate.

[104] A contingent beneficial interest in an estate does not give rise to a property interest in any specific asset of the estate, prior to or absent an appropriation of such asset to the beneficiary by the trustee: *Spencer v. Riesberry*, 2012 ONCA 418, 114 O.R. (3d) 575, at para. 37.

[105] The estate had not been distributed at the time that the Mortgage was granted. Therefore, the beneficiaries' contingent interests in the residue had not vested. Hence, Antonio did not have a one-third interest in the Property at the time of the Mortgage.

[106] Third, pursuant to s. 93(3) of the *Land Titles Act*, the Mortgage was registered free from any unregistered interest of the beneficiaries. Section 93(3) reads as follows:

> The charge, when registered, confers upon the chargee a charge upon the interest of the chargor as appearing in the register subject to the encumbrances and qualifications to which the chargor's interest is subject, but free from any unregistered interest in the land.

[107] Under Ontario's land titles system, the rights of a *bona fide* purchaser (which includes a mortgagee) for value who has registered its interest in the property trump any prior unregistered interests in the property: *719083 Ontario Limited v. 2174112 Ontario Inc.*, 2013 ONCA 11, 28 R.P.R. (5th) 1, at para. 12; *MacIsaac v. Salo*, 2013 ONCA 98, 114 O.R. (3d) 226, at para. 39.

[108] In the present case, as I have already explained, the respondents were *bona fide* purchasers for value without notice. They registered their interest (the Mortgage) in the Property. Their interest would trump those with a prior unregistered interest in it. Therefore, even if the beneficiaries had an interest in the Property that pre-existed the granting of the Mortgage, that interest was unregistered and therefore was trumped by the registered Mortgage.

[109] Accordingly, the Mortgage binds the entire Property.

[110] Thus, I would allow the cross-appeal.

DISPOSITION

[111] Accordingly, I would allow the appeal in part and delete the references in the Judgment to relief under the *Partition Act*. I would allow the cross-appeal and, therefore, delete para. 2 of the Judgment.

[112] The appellant succeeded only in respect of the second issue, which the respondents had conceded and which occupied a very small part of the appeal.

In all other respects, the respondents were successful. Accordingly, I would order costs in favour of the respondents, fixed at $13,500, all inclusive.

Released: April 3, 2014 ("J.C.M.")

"E.E. Gillese J.A."
"I agree. J.C. MacPherson J.A."
"I agree. E.A. Cronk J.A."

Law Society of Ontario | Barreau de l'Ontario

TAB 3D

26th Estates and Trusts Summit – DAY ONE

Case: Mayer v. Rubin et al., 2023 ONSC 4214

Matthew Rendely
Loopstra Nixon LLP

October 18, 2023

CITATION: Mayer v. Rubin et al., 2023 ONSC 4214
COURT FILE NO.: CV-21-00670157-00ES
DATE: 20230718

SUPERIOR COURT OF JUSTICE – ONTARIO

ESTATES LIST

RE: Annie Mayer, Applicant

AND:

Morris Eric Rubin, in his personal capacity and in his capacity as a Trustee of the Ida Rubin Trust, Sarah Werner, in her personal capacity and in her capacity as a Trustee of the Ida Rubin Trust, Faigy Esther Hammer, in her capacity as a Trustee of the Ida Rubin Trust, by her Litigation Guardian, Joseph Pernica, and the Bank of Nova Scotia Trust Company in its capacity as the Succeeding Estate Trustee of Johann (Jay) Rubin, Respondents

BEFORE: C. Gilmore, J.

COUNSEL: *Arieh Bloom* and *Jessica Karjanmaa*, Counsel for the Applicant

Sharon Kour, Counsel for the Moving Party, Caitlin Fell, in her capacity as Administrator of the Estate of Ida Rubin and Trustee of the Ida Rubin Trust

Henry Juroviesky, Counsel for the Respondent Sarah Werner (via Zoom)

John Adair and *Rebecca Kennedy*, Counsel for the Respondent Faigy Hammer

David Lobl, Counsel for the Bank of Nova Scotia Trust Company in its capacity as Succeeding Estate Trustee of the Estate of Johann Rubin

Mark Ross and *Jacqueline Cole*, Counsel for the Respondent Morris Rubin

Andrea McEwan, Counsel for Arsandco Investments Limited

HEARD: June 26, 2023

ENDORSEMENT ON MOTION

Introduction

[1] The court-appointed Administrator ("the Administrator") of the estate of Ida Rubin (the "Ida Estate") brings the within motion for appointment of KSV Advisory Inc. as investigator ("the Investigator") to review the accounts and assets of Ida Rubin ("Ida"), the Ida Estate, and the estate of Ida's late husband Johann Rubin ("the Johann Estate",

"Johann" and together with the Ida Estate "the Estates") which assets and the income derived therefrom should have been available to Ida upon Johann's death.

[2] Specifically, the Administrator seeks an Order which permits the following:

(a) Appoints KSV as the Investigator under s. 49(10) of the *Estates* Act, R.S.O. 1990, c. E.21 (the "***Estates Act***") and s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 (the "**CJA**");

(b) (b) authorizes the Investigator to investigate and report on, for the period commencing from and after May 20, 2004, being the date Johann passed (the "**Review Period**"), the following:

(i) the treatment of property that comprised or should have otherwise comprised the Johann Estate and its testamentary trusts;

(ii) any property that flowed out of the Johann Estate after the death of Johann, including to Jay Rubin Holdings Limited;

(iii) the treatment of property in the name of Ida or that should have been distributed to Ida from the Johann Estate (the "**Ida Property**"); and

(iv) the treatment of the Beneficiaries *vis-à-vis* each other in respect of amounts received by or on behalf of a Beneficiary from the Ida Property and the Johann Estate;

(c) empowers and authorizes the Investigator to investigate and report on any transactions or other financial matters occurring during the Review Period that directly involve the Johann Estate or the Ida Property, including but not limited to the business carried out by and transactions occurring in respect of the entities listed in Schedule "A" to the proposed Investigation Order, being corporate entities in which the Johann Estate was known to have direct or indirect interests (the "**Corporate Entities**");

(d) authorizes the Investigator to request and obtain records from any bank or financial institution for transactions identified by the Investigator as relevant to the investigation in respect of the Johann Estate and the Corporate Entities, and requiring any such bank or financial institution to search for records that it is able to locate, acting reasonably and having regard to the limitations of its retention and storage policies and practices; and

(e) orders that any fees paid out of the Johann Estate by the Bank of Nova Scotia Trust Company ("Scotia Trust"), in its capacity as the trustee of the Johann Estate, to the Investigator and any person engaged by it, shall not be reviewable on a passing of accounts of Scotia Trust.

[3] While the Appointment Order appointing the Administrator entitles her to engage agents and advisors to assist in the administration of the Ida Estate and to have its fees paid for such assistance, the Administrator seeks Court approval given the disagreement amongst the beneficiaries with respect to the appointment of an Investigator. Specifically, the Administrator seeks Court approval to avoid future disputes with the siblings related to the Investigator's mandate and the validity of KSV's appointment.

[4] The Applicant Annie Mayer ("Annie"), and the Respondents Morris Rubin ("Morris"), Faigy Hammer ("Faigy") and Sarah Werner ("Sarah") are the children of Johann and Ida ("the beneficiaries" or "the Respondent siblings" or "the siblings"). They are the beneficiaries of their mother's estate. Ida was the sole beneficiary of the Johann Estate. The Johann Estate remains under administration by Scotia Trust and the Ida Estate remains under administration by the Administrator.

[5] Annie supports the Administrator's motion. Sarah and Morris oppose the motion. Faigy seeks to limit the terms of the appointment as does Scotia Trust. Sarah, Morris, Faigy and Scotia Trust raise many concerns about the appointment, including the cost as well as any associated delays.

[6] For the reasons set out below, the relief sought is granted in the hybrid form suggested by the Administrator with some terms and conditions.

Background Facts

[7] As Case Management judge, I am well aware of the rather tortured seven-year litigation history of this matter. However, for the sake of the record, some background is necessary to put this motion in context. The parties have agreed that I may hear this motion notwithstanding my role as Case Management judge.

[8] Johann died in 2004. Ida died on July 13, 2021 without a Will. Both Estates remain under administration with no significant progress due to what can only be described as prodigious acrimony amongst the Respondent siblings.

[9] During her lifetime and pursuant to Johann's Will dated September 28, 1995, Ida was entitled to assets of the Johann Estate including two testamentary trusts created in Johann's Will. Specifically, the Will created a family trust ("the Family Trust") and a spousal trust ("the Spousal Trust"). The Family Trust property was to be invested for Ida's maintenance, education and for the benefit of Ida and the children. The Spousal Trust property was to be invested for Ida's maintenance, advancement and benefit.

[10] All four siblings as well as Johann's brother Joseph ("Joseph") were appointed as Estate Trustees of Johann's Will. The Will permitted the Estate Trustees to allocate assets from the Johann Estate to either the Family or the Spousal Trust. In the event that no assets were allocated to the Family Trust within 36 months of the date of death, the Family Trust would hold $1.00 and all of the assets would be allocated to the Spousal Trust.

[11] The Estate Trustees allocated only nominal assets to the Family Trust. As such, most of the assets were automatically allocated to the Spousal Trust according to the terms of Johann's Will.

[12] During her lifetime, Ida settled the Ida Rubin Trust ("the Ida Trust") and appointed Ida, Morris and Sarah as trustees. The main asset of that trust was the property at 65 Regina Avenue in Toronto (now sold). Upon her death, the balance of the Ida Trust was to be distributed equally amongst the siblings.

[13] On January 14, 2022, I removed Morris and Sarah as the trustees of the Ida Trust and appointed Caitlin Fell as Estate Trustee without a Will of Ida's Estate and the Succeeding Trustee of the Ida Rubin Trust ("the Administrator Order").

[14] The Respondent siblings have been engaged in litigation since 2016. Annie brought an Application against Morris, Sarah, Faigy and Arsandco Investments Limited ("Arsandco") alleging that Morris and Sarah breached their fiduciary duties as Estate Trustees and delegated their authority over the assets of the Johann Estate, amongst other relief. That litigation was precipitated by Annie's inability to obtain an accounting or disclosure from Morris and Sarah regarding her father's Estate.

[15] Annie estimates that the value of the Johann Estate is $100M CDN. However, the exact value of the Johann Estate is not known. No party has been able to independently confirm the value of the Johann Estate or the value of its originating assets.

[16] In her 2016 Application, Annie alleges that assets of the Johann Estate were transferred to third party companies including the Corporate Entities. Further, Annie alleges that companies owned by Johann were amalgamated by resolutions passed by Joseph, Morris and Johann's brother-in-law Abraham Rappaport ("Abraham") to the exclusion of the Johann Estate. Both Joseph and Abraham have since died.

[17] As Annie alleged that Sarah, Morris and Joseph breached their fiduciary duties while acting as Estate Trustees, she sought their removal and an accounting for the Johann Estate during their tenure as Estate Trustees. On June 6, 2017, Morris, Sarah, Ida and Annie were suspended from acting as Estate Trustees of the Johann Estate and the testamentary trusts. Scotia Trust was appointed as ETDL. Morris and Sarah were ordered to pass their accounts for the period of May 20, 2004 to June 6, 2017.

[18] The application to pass accounts was commenced by Morris in February 2020. Objections and a reply to those objections have been filed. No judgment has been rendered with respect to the 2020 Application, however, Morris has indicated that he is prepared to move ahead with the accounting based on the available record. Morris engaged a lawyer, Ms. Patricia Robinson, to prepare the Estate accounts. In her affidavit sworn March 22, 2023, she commented that the records of the Johann Estate were incomplete and that the value of the original assets is unknown.

[19] On October 3, 2018, Sarah was ordered to pass her accounts with respect to Ida's bank accounts and to go as far back as banking records would permit. Sarah has never commenced that application.

[20] On October 3, 2018, Morris was ordered to provide an informal accounting of Ida's bank accounts for all transactions over $1,000 for as far back as banking records would permit. Morris was to do so in his capacity as Ida's Attorney for Property.

[21] By my order dated January 14, 2022, Morris and Sarah were ordered to pass their accounts in their capacity as trustees of the Ida Trust. No application to pass accounts has been commenced.

[22] On November 24, 2017, Scotia Trust was appointed as the sole Succeeding Estate Trustee of the Johann Estate and Morris, Sarah and Ida were permanently removed as Estate Trustees. Ida was exempted from passing her accounts.

[23] In removing Morris and Sarah as Estate Trustees of the Johann Estate by Court Order, the Court found that Morris and Sarah were in a conflict of interest and had breached their fiduciary duty by using their control over their mother's cheque writing and the Estate's assets to benefit themselves while punishing Annie for suing them. The Court found that Sarah had engaged in "inappropriate tactics." The tactics between the parties over seven years of litigation have been commented on repeatedly by this Court and the Court of Appeal. Justice Myers comments in his 2017 decision that Ida was "a wealthy woman being kept minimally content while her trustees bathe in her millions."

[24] The Estate Trustees of Joseph's Estate are Ray Rubin and Anne Rubin (the "Joseph Estate Trustees"). Abraham was Johann's brother-in-law. Joseph Rappaport, Eric Rappaport and Sharon Slansky are the Estate Trustees of Abraham's Estate (the "Abraham Estate Trustees"). The Abraham and Joseph Estate Trustees are only involved in this litigation because it relates in part to assets owned by the Estates of Johann, Joseph and Abraham. Their Estates each hold a beneficial interest in the Extended Family Corporations.

[25] Ray Rubin and Joseph Rappaport are the directors of Arsandco, Arsco Investments Limited, Duration Investments Limited, Eruv Holdings Inc. and Winter Park Realty Corp. ("the Corporations") all of which are Extended Family Corporations.

[26] The Corporations hold cash and investments worth tens of millions of dollars. The most significant investment owned by the Johann Estate is an interest in Arsandco which owns a valuable commercial property on Woodbine Avenue in Toronto. The Woodbine property has over 350 rental units. Arsandco also owns other valuable properties in Toronto. Morris delegated the management of the Johann Estate's interest in Arsandco and other family corporations to Joseph and Abraham. No accounting has ever been received with respect to that management.

[27] The Estates' holdings are complicated. As a result of transfers out of the Johann Estate, it holds either directly or beneficially shares in corporations controlled by extended family

members and their affiliates. The value of those holdings is unclear including what dividends or income has been generated by those holdings.

[28] In 2009, Gerald Taub of Robins Appleby, advised Joseph, Abraham and the Estate Trustees of Johann's Estate to transfer ownership of properties owned by them from tenants in common to joint tenants to avoid paying probate taxes. He then recommended that the properties be transferred to Arsandco.

[29] At its core, the dispute is about how the Estate Trustees of Johann's Estate conducted their administration and how Ida's Attorney for Property managed her funds.

[30] Scotia Trust has not passed its accounts, taking the position that it cannot do so until there is a judgment on Sarah and Morris' passing of accounts. No accounts have been passed in the Ida Estate.

[31] Scotia Trust has delivered quarterly reports to the beneficiaries since November 10, 2021. Scotia Trust has also compiled a Relativity database containing some 18,000 documents. The database is accessible by all parties.

[32] Prior to Ida's death, the siblings received a total of $6,521,787 as dependants of the Johann Estate and $1,469,023 directed to their legal fees. Following Ida's death, the siblings have received total interim distributions as beneficiaries exceeding $12M. Scotia Trust reports that the liquid assets of the Johann Estate are currently $5,575,379.

The Positions of the Parties

The Administrator

[33] The Administrator submits there is lack of clarity concerning the assets of the Johann Estate, assets which ought to have benefitted Ida. The Administrator cannot pass her accounts, make distributions or wind down the Ida Estate without an investigation into the Ida Estate to determine what assets should have benefitted Ida. Apart from Ms. Robinson's accounting (which she admits is not complete), there has never been a fulsome forensic investigation of the assets of the Estates and what their value may be.

[34] The allegations made by Annie are, to date, unrefuted and unresolved. Those include allegations that assets of the Johann Estate were transferred to the Corporate Entities and to extended family corporations, that monies from Ida's bank accounts disproportionately benefitted certain beneficiaries, and that loans and distributions made to some beneficiaries were made to the detriment of others. The Administrator cannot address these allegations without a forensic accounting.

[35] On March 29, 2022, the Court endorsed the appointment of a forensic investigator in order to facilitate settlement and finalize the outstanding passing of accounts. Despite this endorsement, the parties could not agree on the appointment of an Investigator or the form of the Investigation Order. As such, the Administrator has brought the within motion.

[36] The Administrator submits that the investigation is required to conduct a meaningful analysis of assets in which the Johann Estate should or had an interest, including the corporate and extended family entities. It is expected that the Investigator will need to gather certain documents, but it is conceded that many documents already exist in the Scotia Trust Relativity database, the Regina database or in Ms. Robinson's possession, thereby avoiding any duplication of work.

[37] The Administrator submits there are three options for the parties at this point; appoint an Investigator, schedule a trial, or arrive at a hybrid arrangement whereby a trial date is set and the steps leading to trial and the forensic investigation proceed in tandem.

[38] The Administrator clarified that the appointment of the Investigator is not intended to be strictly a document gathering exercise. Much of that has already been done. If there are missing documents, the Investigator will have the authority to gather documents on its own without having to go through counsel.

[39] The relief sought is also not intended to be a form of Receivership in circumstances where fraud or oppression are alleged. No such allegations are made by the Administrator in this case. Rather, this investigation is intended to analyze the treatment of property that was in the Johann Estate on the date of death, what flowed out of the Johann Estate and what property in the Ida Estate should have been distributed to Ida from the Johann Estate.

[40] The Administrator, in her Second Report dated September 14, 2022 has detailed the intended parameters of the investigation as follows:

(a) what assets comprised the Johann Estate at the time of Johann's death;

(b) why assets were not transferred to the Testamentary Spousal Trust if they were not allocated to the Testamentary Family Trust;

(c) whether assets of Johann Rubin were commingled with third party assets through the amalgamation of various corporate interests, and the implications of such amalgamations and commingling;

(d) what assets were transferred out of the Johann Estate and the current state and value of those assets;

(e) whether proceeds were received for any transfers of assets, where the proceeds were received, and where the proceeds are currently located;

(f) what the value of the Johann Estate is, including the assets held by the Johann Estate through various corporate entities or held by corporate entities on behalf of the Johann Estate;

(g) the historical transactions involving the assets that were or ought to have been legally or beneficially vested in the Johann Estate or to Ida Rubin as a beneficiary of the Testamentary Spousal Trust;

(h) the quantum of funds historically received by each beneficiary or from which each Beneficiary benefitted directly or indirectly;

(i) what equalization, if any, would need to occur in order to ensure that the four Beneficiaries each receive an equal portion in aggregate; and

(j) the appropriateness of payments made to professional advisors in respect of, *inter alia* the Amalgamation Transactions and other tax advice in light of the allegations raised in the Mayer Application.

[41] According to the Administrator, none of the abovementioned issues have been adequately addressed nor can they be without a proper investigation and analysis.

[42] Further, the investigation must apply to both Estates because they are intertwined due to the Testamentary Trusts.

[43] The Administrator concedes that the Administration Order provides her with the authority to engage third party professionals, such as a forensic accountant. However, given the toxic litigation history of this matter, the Administrator submits that any appointment she might make would be attacked by the parties. Any conclusions made by that accountant would likely also be attacked and as the Administrator submitted, the issues raised by Faigy Hammer would be increased tenfold if the Administrator appointed a private accountant.

[44] The Administrator seeks a level of protection and describes the parties as "ungovernable." Under the *Estates Act* it is the Court that makes the appointment and reviews the report of the Investigator. Ultimately, the Court decides what weight to give the report. There are therefore no cost savings or other advantages in having the Administrator appoint its own expert.

[45] The Administrator submits that the test under s. 49(2) is met in that the accounts are complex and there are unexplained issues. For example, there are questions about estate funds being allocated to third parties and to charities. Those transfers were initiated by Morris and Sarah but may not have benefitted either Ida or the other beneficiaries. The main issue, however, is that there is no opening balance available for the Johann Estate against which can be measured any increase or decrease in the value of the Estate. As Scotia Trust will not account for any period prior to their appointment, there is no party that will undertake to account for the period between 2004-2017.

[46] The Administrator submits that the lack of case law in relation to s. 49(2) should not deter the Court from appointing an Investigator in this case.

[47] In response to the positions taken by Morris, Faigy and Sarah, the Administrator responds that pushing the parties into an adversarial process at this point is futile. The Investigator's report can either be used as a basis for a global settlement or to narrow the

issues for trial. The Administrator does not agree that it is a foregone conclusion that the parties would retain their own experts to dispute the report. As well, the Court may rely on the report to direct a narrowing of issues.

[48] Finally, the Administrator reminded the Court that it has no vested interest in the outcome of this motion. She is simply pursuing her court-ordered mandate.

Annie Mayer

[49] Annie submits that despite the extensive database created by Scotia Trust and the documents gathered by Ms. Robinson, Annie's requests for information over the years have been responded to in a piecemeal fashion. For example, her request for an accounting of the revenue generated by the Woodbine property remains unanswered. Scotia Trust has taken the position that it will not account for rental or business income generated prior to its appointment.

[50] Counsel for Arsandco and the Estate Trustees of the Estates of Abraham and Joseph have refused to answer document requests from Scotia Trust claiming the documents have already been produced and that it is not their responsibility to fix the disarray in which Scotia Trust finds itself.

[51] Annie submits that in this case the proceedings are complex and include shares of private companies. The Investigator's report will assist in narrowing the issues for the Court and shorten any anticipated trial. There is significant distrust amongst the siblings and only a neutral investigation will assist with settlement.

[52] If Scotia Trust will not involve itself in any accounting which pre-dates their appointment, there is a gap in time which cannot be filled except with the assistance of an Investigator.

[53] In response to Morris' complaints that the appointment of an Investigator would be a duplication of work, Annie submits that Ms. Robinson's work on behalf of Morris was done specifically to assist Morris with the preparation of his accounts for Johann's Estate. Ms. Robinson is therefore not a neutral party. Further, she has not prepared a comprehensive report, she has simply gathered documents to assist her client. Annie submits that the mere fact that Ms. Robinson had to be hired to complete a limited task speaks to the complexity of the Estates as a whole.

[54] In response to Scotia Trust's concern about liquidity issues and payment for the Investigator, Annie submits that Scotia Trust has failed to put any evidence before the Court to support that the Johann Estate could not pay for an expert's report.

[55] Annie does not agree that setting these matters down for trial will resolve anything. She points out that the litigation brought by Scotia Trust against Robins Appleby with respect to advice given on transfers of various properties has been tolled. Annie queries whether that litigation will be heard with the other claims. Further, both Sarah and Morris have been ordered to pass accounts in the Ida Estate but there are no pleadings. The parties must know

the case they have to meet. Right now, there is no clarity as to what is actually out there in terms of litigation.

[56] Annie remains concerned about the lack of disclosure in relation to the Johann and Joseph Estate. For example, in a memorandum from Robins Appleby to the Executors of the Johann Estate dated May 12, 2006, there is a statement that Joseph had already distributed $964,000 from the Estate and other funds as well, possibly to Ida's Trust. These are the types of transactions for which there has not yet been an accounting. It is also unclear as to whether Joseph had renounced as Estate Trustee at that point, or was acting in a fiduciary capacity. Morris concedes in his affidavit sworn in January 2020 that he did not have much involvement with Arsandco or his father's other assets as he left that management to Joseph and Abraham.

[57] Annie points to a letter to Scotia Trust from her counsel dated September 2, 2022 outlining repeated requests for information related to Arsandco. Her counsel's position is that the quarterly reporting from Scotia Trust is insufficient and does not address some key issues such as rental income from the Woodbine property from 2004 to 2017, information about the mismanagement of Woodbine, the cost of remediation of Woodbine, investigations undertaken by Scotia Trust with respect to the various foundations that received thousands of dollars from the Estate, and why the claims against Robins Appleby and Deloitte have not been advanced amongst other enquiries. Scotia Trust takes the position that it will not provide any disclosure or accounting for any period prior to their appointment. They point to the Relativity database which is dense, disorganized and impossible for the beneficiaries to parse through. Annie suggests that the documents provided by Scotia Trust are in a state of disarray. Morris does not disagree. In his affidavit affirmed January 5, 2023, he describes the database as disorganized, duplicative and jumbled.

[58] According to the Investigator's Second Report, she expects that one of the Investigator's first steps would be to inventory the information provided to Scotia Trust. Annie agrees with the Administrator that this is not a document gathering exercise, the Investigator would primarily be involved in an analysis of the available documents.

[59] Annie reminds the Court that Sarah is in breach of Court Orders requiring her to pass accounts in relation to the Ida Trust and to pass accounts in relation to her bank accounts. Sarah has never commenced the required court applications for the passing of accounts. Annie refers to a portion of Myers' J. endorsement dated September 24, 2018 which sets out as follows:

> The proposed motion was a pretense to try to prevent the litigation guardian and the applicant, Ms. Werner's sister, from tracing funds that their mother had received while she was incapacitated from the estate of their father. The funds to be accounted for were taken by Mrs. Rubin's children including Ms. Werner. Ms. Werner's proposed new motion made hyperbolic claims of violations of Mrs. Rubin's privacy and *Charter* rights by the litigation guardian in relation to his efforts to obtain banking records to trace where Mrs. Rubin's funds were directed

(or perhaps misdirected in breach of fiduciary duty or perhaps converted) by some or all of her children.

[60] Annie also directed the Court to Morris' examination on October 10, 2017. Morris was shown several cheques totalling over a million dollars. He confirmed that the funds were paid from the Estate to the Jay Rubin Foundation and other foundations which were not beneficiaries of the Estate. His evidence was vague about his involvement and in some instances he could not recall cheques for large amounts being issued. Annie points to this as evidence of the complexity of the Estate as large amounts of money from the Estate were transferred to various foundations over several years, none of whom were beneficiaries. She also points to Morris' evidence that Sarah unilaterally transferred funds from the Johann Estate to Ida's bank account so that she could have control over those funds. Sarah must be required to account. Her attempt to characterize a sheaf of redacted bank account statements as an accounting is beyond unacceptable.

[61] Annie confirms her agreement with the appointment of an Investigator and requests that costs be awarded against any party who does not agree to the appointment.

Morris Rubin and Sarah Werner

[62] Morris' position is aligned with that of Sarah. They are opposed to the appointment of an Investigator and submit that this case does not need another group of professionals. What it does require is a peremptory trial date which will force the parties to work backwards and set timelines. Morris and Sarah support Faigy's counsel's efforts to canvass each party's issues for trial and proceed with a Motion for Directions. Following the normal trial process will force the parties to comply with requests for productions with the Court drawing adverse inferences with respect to those who fail to cooperate.

[63] Morris and Sarah submit that the appointment of an Investigator will inevitably lead to more delay in this case. They estimate it will take KSV at least three months to become familiar with the case, and another 12 months after that to produce a report. If the parties decided to retain their own experts to do responding reports that will add at least another six months to the process. It seems inevitable that the Investigator's conclusions will be attacked at trial. All of this to say that the appointment of an Investigator will simply lead to more case conferences, more disputes and an increase in challenges in an already unwieldy case.

[64] If the Administrator is having difficulty with document production that can be dealt with by cooperation or Court Orders. The Investigator's enquiries will not yield any further documentary information than what is already available.

[65] Further, pursuant to this Court's Order made in January 2022, the Administrator already has the authority to hire its own forensic accountant, obtain appraisals and conduct a tracing. Once a tracing exercise has been performed, an Investigator will be in no better position than an accountant hired by the Administrator. That is, the Investigator cannot

draw conclusions about whether there was wrongdoing, it can only present an analysis to the Court.

[66] Morris has done his best, through the retention of Ms. Robinson to prepare an accounting and produce documents. He is not hiding or burying anything and has kept all parties apprised of the limits on available documents. The proper forum for this litigation is by way of a Passing of Morris and Sarah's accounts at which time the Court may order the accounts to be passed or order a Forensic Accountant to assist. Ms. Robinson has also deposed that the appointment of an Investigator is not necessary. Both Scotia Trust and Ms. Robinson concur that there is no further information left to procure.

[67] Morris submits that the Administrator has not particularized what more should or could be done and has not reviewed the Arsandco documents produced to Scotia Trust. This should be a starting point for the Administrator. Further, any other documents required from the banks, Robins Appleby or Deloitte can be obtained through the Order made by Myers J. in 2019 as the Estate is the client. The Investigator will be in no better position than any other party to obtain documents given that the retention period only goes back to 2010.

[68] The Extended Family Corporations and directors have been cooperative. The Scotia Trust Relativity database has over 18,000 documents now available for review by all parties.

[69] The appointment of an Investigator is an extraordinary remedy which should be approached with caution by the Court. Such an Order should not be made based on mere suspicion, go no further than necessary and not be made if other less drastic means are available to achieve the same result.

[70] Further, the cost of an Investigator outweighs the potential benefits. The appointment of an Investigator is not needed to break the logjam in this case as there is no evidence that such an appointment will uncover what is already known and available. Finally, there is simply no discernable benefit to hiring an Investigator at this time.

Faigy Hammer

[71] Faigy does not believe that the appointment of an Investigator will bring this litigation to an end. She does not disagree that this litigation relates to accounting claims and alleged breaches of fiduciary duty nor that the litigation is mired down with ungovernable parties. Her view is that the Court should exercise caution when considering the Administrator's request. She uses the sale of the Regina Avenue property as an example. Multiple case conferences were required to deal with the cataloguing and distribution of the contents. There is still a Landlord and Tenant Board proceeding outstanding with respect to that property.

[72] Annie complains that Sarah has frustrated the Court process by her failure to comply with her obligations. It is unlikely that the appointment of an Investigator will change that.

[73] The appointment of an Investigator will also not narrow the issues in the case because it is unlikely that all parties will accept the Investigator's findings in any event. What is likely,

is that even if an appointment is made, the parties will continue to fight over the Investigator's mandate, access to information, work product and fees. If the parties were acting rationally, perhaps the Investigator's report could be used as a platform to narrow issues. However, some of these parties do not have a history of acting rationally. The appointment of an Investigator will simply open up another battleground for skirmishes between the parties.

[74] Faigy is aligned with Morris in her belief that the appointment of an Investigator will delay this litigation for another six to twelve months and may result in the parties obtaining their own responding expert's reports which would result in further delay.

[75] There are already two Court officers appointed in this matter and there has already been significant correspondence and miscommunication between them. Adding another Court Officer would be ineffectual.

[76] Faigy submits that the Investigator will not assist with the settlement of this matter. That would not be part of KSV's mandate. After 6.5 years of litigation, the parties are no closer to settlement. An Investigator cannot assist with the significant mistrust which exists between these parties.

[77] Faigy requests that the motion be dismissed, a peremptory date set for Faigy's motion for directions and the Court direct the parties to confer on the issues for trial in order to present a timetable at the motion for directions. The trial process will lead to the answers the parties need. For example, Mr. Bloom provides excerpts from Morris' cross-examination with what could be characterized as unsatisfactory evidence. Morris can be cross-examined at trial on those same issues and the presiding judge can draw his or her own conclusions. The pleadings can be regularized quite easily. All four accounting applications and Sarah's litigation can be combined into one hearing which deals with the core issues in this case; where the money went, whether it was improperly distributed and where the money is now.

Scotia Trust

[78] While Scotia Trust does not oppose the appointment of an Investigator, it does not consent to the appointment due to the clear dissension between the beneficiaries. Further, Scotia Trust expresses a concern that the mandate of the Investigator sought by the Administrator makes all of its actions since its appointment in June 2017 reviewable by the Investigator. The investigation should not be permitted to turn into an informal passing of accounts of Scotia Trust as the Estate Trustee. Therefore, Scotia Trust's position is that if an Investigator is appointed, the investigation should be limited to the period of May 20, 2004 to June 5, 2017.

[79] Scotia Trust is also concerned that the Johann Estate is being asked to fund the cost of an Investigator. Further, if the purpose of appointing an Investigator is to force Sarah to properly account, there are other means of achieving that objective.

[80] Scotia Trust submits that if the Investigator finds that Ida was owed another $1M in income, the beneficiaries are the same so that accounting exercise will make no difference to the bottom line.

[81] Scotia Trust is aware that the beneficiaries intend to seek another interim distribution. They have already each received approximately $3.5M. Scotia Trust requests that there be no further distributions until trial and that the parties be required to pay their own legal fees. Up until now, the beneficiaries have received interim distributions plus a further distribution for legal fees. Scotia Trust submits that this has enabled the parties with respect to their continuing legal conflicts.

The Non-Parties

[82] The Joseph and Abraham Estate Trustees do not take a position as to whether the Investigator should be appointed. However, in the event that the Court does make such an appointment, they will object to the Investigator looking behind the Extended Family Corporations or into the Joseph and Abraham Estates and specifically into assets owned solely by those Estates.

[83] The non-parties take the position that the Administrator is effectively seeking pre-action discovery in the form of a Norwich Order, a remedy which must be exercised with caution. The Administrator has not met the necessary test to obtain pre-action discovery.

[84] The Joseph and Abraham Estate Trustees have fully cooperated with Scotia Trust and produced all documents in their power, possession and control as requested. This has been done at significant expense to the Joseph and Abraham Estates, for which they have not been reimbursed.

[85] The documents produced to Scotia Trust have been placed in their Relativity database and are accessible to all parties to the litigation. The documents do not reveal any wrongdoing on the part of the Joseph or Abraham Estates or the directors of the Extended Family Corporations. The third parties have complied with all reasonable disclosure requests.

[86] It appears that there has not been any in depth review of the documents produced by the third parties, in the Relativity database or the database from documents retrieved from the Regina property. The third parties take no position on who should do that review or analysis.

Analysis

[87] This is a motion brought pursuant to s. 49(2) of the *Estates Act*, requesting an appointment under s. 49(10) of the *Estates Act.* Those sections are reproduced below:

> **Powers of judge on passing accounts**
>
> (2) The judge, on passing the accounts of an executor, administrator or trustee under a will of which the trustee is an executor, has jurisdiction to enter into and make

full inquiry and accounting of and concerning the whole property that the deceased was possessed of or entitled to, and its administration and disbursement. R.S.O. 1990, c. E.21, s. 49 (2).

(3) The judge, on passing any accounts under this section, has power to inquire into any complaint or claim by any person interested in the taking of the accounts of misconduct, neglect, or default on the part of the executor, administrator or trustee occasioning financial loss to the estate or trust fund, and the judge, on proof of such claim, may order the executor, administrator or trustee, to pay such sum by way of damages or otherwise as the judge considers proper and just to the estate or trust fund, but any order made under this subsection is subject to appeal. [emphasis added].

Appointment of expert on examination of accounts

(10) Where accounts submitted to the judge of the Superior Court of Justice are of an intricate or complicated character and in the judge's opinion require expert investigation, the judge may appoint an accountant or other skilled person to investigate and to assist him or her in auditing the accounts. R.S.O. 1990, c. E.21, s. 49 (10); 2006, c. 19, Sched. C, s. 1 (1).

[88] It is clear from the wording of s. 49(10) that any report produced by the Investigator would be an expert report for the Court's purposes as opposed to an expert report offered by one of the parties. As such, the Court has the authority to decide what weight the report is to be given and to accept or reject any portion of the report. The objectivity of the Investigator is key in this case given the discord amongst the beneficiaries. The Investigator will provide the Court with a much-needed unbiased analysis.

[89] The Court also has the power to appoint an Investigator pursuant to s. 161 of the *Ontario Business Corporations Act*, R.S.O. 1990, c. B.16. While that provision relates to a request by "a registered holder or a beneficial owner of a security", the test for the appropriateness of appointing an Investigator is analogous as per *Khavari v. Mizrahi*, 2016 ONSC 4934, 61 B.L.R. (5th) 313, at para. 41:

[41] The third part of the test, consideration of the appropriateness of appointing an inspector, arises from both the fact that the remedy is discretionary and that it is an extraordinary remedy. In considering the issue of appropriateness, the courts have had regard to a number of factors, including:

a) Whether the applicant needs access to the information;

b) Whether there are better less expensive means to acquire the information;

c) Whether the proposed investigation would give a tactical advantage to the applicant; and

d) The expense of the investigation as compared to the benefits.

[90] The possibility of appointing an Investigator was raised by the Administrator in early 2022 as a way to break the logjam amongst the parties and provide a proper report and most importantly, an analysis, of the accounting of the Estates. In my endorsement of March 29, 2022, I stated as follows:

> Ms. Fell has suggested, and counsel agree, that a forensic accountant should be appointed to do a forensic investigation related to the outstanding Passing of Accounts. It is hoped that the report can be used to further settlement and to assist in finalizing the three outstanding Passing of Accounts. I have invited Ms. Fell to provide me with an Order appointing the forensic accountant.

[91] Since the date of that endorsement, the parties' positions have changed. Three of the parties no longer agree to the suggested appointment. Morris, Sarah and Faigy have expressed concern that the appointment of a further Court Officer (there are already two; the Administrator and Scotia Trust as Succeeding Estate Trustee) will not assist with any resolution. Their position is that such an appointment will only lead to more cost and delay.

[92] Appointing a forensic investigation in a passing of accounts is not unique. In *Jones v. Warbick,* 2019 ONSC 88, 44 E.T.R. (4th) 243, the Court dealt with a case in which a previous judge refused to approve the accounts and appointed a forensic accountant to review and report to the Court on the Estate accounts (at para. 13). A timetable was set with respect to the preparation of the report and the parties' responses to it. The accountant was paid from Estate funds at first instance with a final determination as to apportionment of fees left to the judge hearing the application.

[93] Of interest in that case is that a portion of the report was dedicated to determining amounts paid from and to the Estate by beneficiaries. The "Beneficiary Equity Accounts" tracked amounts paid to beneficiaries and those in dispute were dealt with individually by the Court. The accountant's evidence was given at the hearing as a court-appointed expert. The Court accepted the form and substance of the expert accounting report. The accounts were passed. In doing so the Court noted at para. 33 that the forensic accountant's report was "invaluable" to the parties and to the Court in understanding what happened to the Estate assets. I note that in *Warbick*, the Estate holdings were less complex than in this case, being made up of two pieces of real estate which had already been sold and no corporate holdings.

[94] In the case at bar, one of the requests which has repeatedly been made by Annie is for an analysis of amounts received by the beneficiaries such that an equalization calculation can be made. Based on the evidence available it appears that funds flowed through the Johann Estate to the Ida Spousal Trust and were deposited in Ida's bank account. From there, Morris, Sarah and Faigy distributed funds as they saw fit as they had signing authority on the account. In large part it appeared that Sarah was making the decisions about those funds although I do not make a finding in that regard.

[95] This equalization exercise, similar to the Beneficiary Equity Account calculations done by the accountant in *Jones* is necessary to put to an end to the ongoing allegations and denials

about what happened to Ida's income entitlements during her lifetime and whether any beneficiary improperly profited from those entitlements or received a disproportionate share of them. It is this Court's view that an Investigator can efficiently and impartially complete that exercise. I do not agree with Scotia Trust's submission that it is all a wash because the beneficiaries of the Trust and the Estate are the same. The key here is that some beneficiaries may receive far more/less than others once an equalization accounting has taken place, a request that Annie has been making for years.

[96] In *Estate of Paul Penna*, 2010 ONSC 6993, a forensic accountant was appointed. The Estate paid the entire cost of $143,000. The accountant uncovered a massive fraud which led to the removal of all of the Estate Trustees. One of the Estate Trustees was found to have used Estate funds to buy and renovate a large home in Forest Hill. The Court vested title to the home in the ETDL. While fraud is not alleged in the case at bar, there are allegations that large amounts of Estate funds were paid to charitable foundations which were not beneficiaries and without the consent of all beneficiaries.

[97] The duties of Estate Trustees and Trustees are clear in law. Trustees must act honestly and with a reasonable level of skill and prudence, they must not delegate their office to another and they cannot profit personally from their dealings with trust property or the beneficiaries (see *Valard Construction Ltd. v. Bird Construction Co.*, 2018 SCC 8, [2018] 1 S.C.R. 224, at para. 17). Breaches of these obligations are what have been alleged by Annie with respect to both the Johann and the Ida Estates and the Ida Trust.

[98] In *Cahill v. Cahill*, 2016 ONCA 962, 26 E.T.R. (4th) 207, the Court of Appeal for Ontario dealt with a case in which a Will designated that a trust be set up for one of the deceased's children ($100,000) and that $500 per month be paid to that child. The trust fund was never set up, a few payments were made and then the payments stopped. One of the Estate Trustees used the balance to fund a mortgage for his business. The funds were lost in an enforcement proceeding. The trial judge found that both Estate Trustees were liable to repay the balance of the fund to their brother. The Estate Trustee who was not involved in the payments to her brother ("Sheila") appealed the trial judgment claiming that she should not be liable for any losses suffered by her brother.

[99] The Court of Appeal upheld the trial judgment with several important findings. First, the Court of Appeal found that a trust fund was never established, second the Court upheld Sheila's liability claiming she had abdicated her responsibilities for setting up and administering the trust fund to her brother and finally the Court found that although Sheila did not act dishonestly, she did not act reasonably in failing to fulfill her duties as an Estate Trustee.

[100] Many of the allegations in the case at bar go to the issues raised in *Cahill* including the allegations related to the conduct of Morris and Sarah as Estate Trustees of the Johann Estate and as Trustees of the Ida Trust.

[101] The Investigator would also have the critical authority to investigate the Corporate Entities including the Extended Family Corporations. This is essential given that the Johann Estate

has direct or indirect interests in those holdings which should have formed part of the Ida Property. The Administrator submits, and I accept, that there is no intention that the Investigator interfere with the business or financial affairs of the extended family. The scope of the Investigator in the Administrator's proposed Order is defined as narrowly as possible. Leaving out the Extended Family Corporations from the investigation would result in an incomplete report.

[102] There are complaints by Morris and Sarah about the cost of the Investigator. I note that Ms. Robinson has been paid $316,898 to date and Morris has still not passed his accounts. The cost of the Investigator can be paid for from the Estates with a redistribution of costs by the judge hearing the applications. While there is no doubt the cost of the investigation will be high, it is the only way to move forward in this Court's opinion.

[103] Given all of the above, I grant the relief sought by the Administrator for the following reasons:

a. This is a complex matter involving the tracing of assets between two Estates. While document production has taken place, there is no analysis of the available documents.

b. It is this Court's sincere hope that the Investigator's report will narrow the issues for what will inevitably be a trial of at least 30 days in length.

c. There is dysfunction and mistrust between the beneficiaries. A neutral expert providing a neutral report, supervised by the Court, is the only way forward in terms of making sense of these matters and providing a neutral playing field.

d. Scotia Trust will not seek documents or perform any analysis for the period prior to its appointment in 2017. That gap in essential information must be filled.

e. While the beneficiaries take the position that the majority of them (Faigy, Morris and Sarah) are against the appointment of an Investigator, the Court does not view this matter with the same lens. The very parties who have been subject of allegations of breaches of their fiduciary duty (Morris and Sarah) are the parties most strenuously objecting. Based on previous comments made by this Court (in particular those of Myers J.), the Court is concerned that Morris and Sarah have the least to gain by an in-depth analysis of their past management of Estate assets. Faigy's protests relate more to wanting the litigation to end. A laudable concern but not one which will accomplish the end goal.

[104] I also wish to deal with the issue of Sarah's Passing of Accounts, legal fees and distributions moving forward, taking into account Scotia Trust's view of that situation. These issues must be dealt to ensure the Investigator can properly do its job and the case does not continue to be mired in never ending conferences.

[105] Sarah has **not** passed her account or put them into proper Court form. In the examination of Ms. Fell, Sarah's counsel suggested that "the formalist aspects of the order [to pass

accounts] should be overlooked, and the substance, the meat and potatoes of the accounts should be looked at" (page 28 of the transcript). That suggestion is not accepted by this Court. Sarah has provided hundreds of pages of redacted accounts which, respectfully, speak to nothing. Without being put into proper Court form such that objections can be filed, and sense made of the documents, what she has produced is meaningless. Sarah must, therefore, be required to put her accounts into proper order within a very short time frame so that objections may be filed and responded to for review by the Investigator.

[106] Further, the endless spats between these parties must have cost consequences that are real. I agree with Scotia Trust that the only way to bring this home to the parties is by way of financial consequence. As such, no further distributions to beneficiaries for legal fees will take place until this matter is either settled or heard. Further, when a Case Conference is requested, there will be costs consequences determined by me at the conclusion of each conference (the Administrator is excepted from this consequence). This will hopefully give the parties pause before they return to Court to squabble over minor issues.

[107] As Case Management judge, I provide below further specific directions to respond to the concerns of Faigy and Morris with respect to this matter moving forward.

Orders and Costs

[108] The draft Order of the Administrator is acceptable to the Court but must be amended to reflect this Court's further directions as set out below.

a. The Investigator's Report shall be available for review by the Court and the parties by December 31, 2023. If required, the Investigator's counsel may apply to me as Case Management judge for further directions.

b. Any party who wishes to file a responding expert's report must give notice of its intention to do so by January 31, 2024.

c. Any responding experts' report(s) are due by March 31, 2024.

d. With respect to Annie's 2016 Application, any party who has not filed a responding record must do so by September 30, 2023, failing which they will not be permitted to present any defence evidence to that Application at the ultimate hearing of this matter.

e. The tolling of the claims commenced by Scotia Trust shall end as of July 31, 2023. Defences/Responding Records to those claims are due by September 30, 2023 without exception. A copy of the claims and defences are to be provided to all parties and the Administrator and Investigator.

f. Sarah is required to issue an Application to Pass Accounts pursuant to Chiapetta's J. Order dated October 3, 2018 by August 31, 2023. The accounts must be in proper Court form. Objections to those accounts must be filed by September 30, 2023 and any reply to those Objections by October 31, 2023. Sarah may not apply for or

receive any distribution from either Estate until the abovementioned schedule is complete. All accounting, pleadings and documents must be shared with the Administrator and the Investigator.

g. Morris and Sarah are to commence an Application to Pass Accounts with respect to the Ida Rubin Trust by August 31, 2023. The accounts must be in proper Court form. Objections to those accounts must be filed by September 30, 2023 and any reply to those Objections by October 31, 2023. Neither Sarah nor Morris may apply for or receive any distribution from either Estate until the abovementioned schedule is completed. All accounting, pleadings and documents must be shared with the Administrator and the Investigator.

h. If there are any further steps to be taken in Court File 02-006/20 – the Johann Estate Passing of Accounts (commenced by Morris), those steps are to be taken by July 31, 2023 such that the matter is ready for a hearing (other than examinations if outstanding).

i. Once the Investigator's Report is available, the parties are to return for a two-hour Case Conference before me in January 2024 to set a litigation timetable. I have directed the Trial Coordinator to set aside four trial weeks commencing September 30, 2024.

Costs

[109] The Administrator sought costs at the conclusion of the hearing but had not put the parties on notice that it would be doing so. The Administrator sought costs from those parties who opposed the appointment of an Investigator.

[110] Those parties who opposed the appointment were reasonable in their approach which was more aligned with finding an efficient solution to the current problem than opposition to the relief sought.

[111] As such, the parties shall be responsible for their own costs other than the Court-appointed officers who shall be indemnified for their costs by the Estates. A review of the Administrator's Bill of Costs, however, gives the Court pause with respect to the amounts sought. As such, both the Administrator and Scotia Trust may provide written submissions on costs not exceeding three pages and due 10 days following the release of this decision. The costs submissions may be uploaded to Caselines.

C. Gilmore, J.

Date: July 18, 2023

Law Society of Ontario | Barreau de l'Ontario

TAB 4

26th Estates and Trusts Summit – DAY ONE

Disclosure Orders & Order for Directions

Case: Soper v. Springett, 2020 ONSC 2911

Tanisha Tulloch
Torkin Manes LLP

Alexandra Mayeski
MayLex Litigation P.C.

David Wagner, TEP
Wagner Sidlofsky LLP

October 18, 2023

cpd

DISCLOSURE ORDERS & ORDER FOR DIRECTIONS

Tanisha G. Tulloch, Alexandra V. Mayeski & David Wagner

MODEL ORDERS

Please refer to the Toronto Estates List https://www.ontariocourts.ca/scj/practice/regional-practice-directions/estates/ for model orders with respect to will challenges, dependant's relief, power of attorney and guardianship litigation.

LIST OF AUTHORITIES

Ontario (Attorney General) v. Ballard Estate, 1994 CarswellOnt579 (Gen.Div.).

Neuberger v. York, 2016 ONCA 191.

Seepa v. Seepa, 2017 ONSC 5368.

Borges v. Borges, 2018 ONSC 3451.

Martin v. Martin, 2018 ONSC 1840.

Soper v. Springett, 2020 ONSC 2911 (see attached).

Johnson v. Johnson, 2022 ONCA 682.

Goyetche v. Woodruff, 2022 ONSC 927.

White v. White, 2023 ONSC 3740.

Culiner Estate – CV-22-00689830-00ES – Endorsement of Justice Gilmore dated July 20, 2023 (see attached)

Gilbert v. Girouard, 2023 ONSC 4445.

Giann v. Giannopoulos, 2023 ONSC 5412.

SUPERIOR COURT OF JUSTICE

COUNSEL SLIP/ENDORSEMENT

COURT FILE NO.: CV-22-00689830-00ES **DATE:** July 20, 2023

NO. ON LIST: 5

TITLE OF PROCEEDING:

BEFORE JUSTICE: GILMORE

For Plaintiff, Applicant, Moving Party, Crown:

Name of Person Appearing	Name of Party	Contact Info
David Smith	Applicants	[redacted]
Mark Lahn	Applicants	[redacted]

For Other, Self-Represented:

		Contact Info
Stephen Turk	Richard Simpson	[redacted]

ENDORSEMENT OF JUSTICE GILMORE ON MOTION FOR DIRECTIONS:

Introduction

1. This is an opposed Motion for Directions brought by the Applicants, the Estate Trustees of the Estate of the late Elaine Culiner. The Estate Trustees are Elaine's son-in-law Robert Janson ("Janson") and her former lawyer Thomas White ("White").

2. In the main Application, the Applicant seeks, amongst other relief, to vacate the Notice of Objection field by the Respondent, Richard Simpson ("Richard") such that a Certificate of Appointment of Estate Trustee may be issued.

3. The main area of disagreement in this motion relates to the scope of productions. The Applicants are prepared to produce the deceased's medical records. Richard wants the files of the Applicant White who drew the last three Wills of the deceased. He also seeks cross-examination of White.

4. The Applicants object to the breadth of disclosure sought by Richard on the grounds that he has not adduced any evidence that would call into question the validity of the deceased's six Wills. The medical records will fully address the one issue of capacity raised by Richard.

5. I agree with the Applicants. Richard appears to be using this litigation as a platform to continue his former litigation against his mother for reasons that relate more to previous conflicts with her rather than an evidence-based challenge of her Wills. The disclosure of the deceased's medical records is sufficient to meet the required threshold.

Background

6. The deceased died in November 2021 and was survived by her three children Robert Simpson, Richard Simpson (the Objector) and Ellen Simpson. Ellen died in December 2022.

7. The grounds for Richard's Objection are a challenge to the validity of a Will dated March 18, 2017. Richard raises issues of testamentary capacity, suspicious circumstances, and undue influence. However, no Will was executed by the deceased on March 18, 2017. The last Will executed by the deceased was on March 28, 2017.

8. The within Application was commenced in November 2022. Richard filed his responding materials on March 17, 2023.

9. The deceased made six separate Wills: September 23, 2011, March 16, 2012, December 10, 2015, November 8, 2016, February 2, 2017, and March 28, 2017. The 2011 and 2012 Wills were drafted by Ian White and left nothing to Richard. The 2015 Will was drafted by Lucy Main and left Richard $25,000. The last three Wills were drafted by the Applicant White. Each of those Wills also left Richard $25,000 but the last two Wills contained an *in terrorem* clause in the event Richard commenced litigation against the Estate.

10. Richard commenced litigation against his mother in 2006 claiming he left the country in exchange for her providing financial support for him and his children and that she breached that agreement. Elaine filed a Statement of Defense. There is a disagreement about how the litigation ended but it was either dismissed on consent without costs or administratively dismissed.

11. In support of his Objection, Richard relies on certain remarks made by Robert Simpson during a eulogy at his mother's funeral. The relevant remarks are set out below:

" ... There was many good times, don't get me wrong. Six kids is a battle ... journey. And obviously everyone here knows the stories. So I have to give her a lot of credit for enduring that. And ... I know she was an anxious person. And ... but vodka helped I know that. But she was very ... good, until about 8 or 10 years ago when she, when her mind, I think everyone here knows, started to lose. She started to lose it slowly but surely, just random thoughts would come out of her head that made no sense whatsoever. But, she was good.

12. Richard also relies on the fact that at the relevant times his mother was a resident of Baycrest, a long-term care facility for older adults.

13. Given the remarks made in the eulogy, the Applicants consent to the production of the deceased's medical records. Richard is not satisfied with that as set out above. He wants the medical records and the records of White who drew the last three Wills along with the opportunity to cross examine White.

The Positions of the Parties

The Applicants

14. The Applicants' counsel submits that Richard has not met the minimum threshold to obtain all the evidence he seeks. The Applicants will consent to the production of medical records to address the issue of capacity raised in the eulogy. However, the capacity issue is also frivolous because if Richard cannot show that his mother could not make a Will prior to 2011 then he is left with the Wills made after. The period of time referred to in the eulogy would not have encompassed the 2011 Will.

15. For Richard to be successful, he would have to set aside all six Wills. Further, the testator's intentions are clear. She did not want to benefit her son Richard. Richard himself describes their difficult relationship at length in his materials. Further, Richard sued his mother. The deceased's intention to give Richard either nothing or a nominal share of her Estate is entirely understandable. The *in terrorem* clause only bolsters the Applicants' position.

16. The production of Mr. White's files is moot given that the three prior Wills similarly did not benefit Richard.

Richard's Position

17. Richard submits that in consenting to the production of the deceased's medical records, the Applicants have conceded that he has met the minimum threshold.

18. Richard raises the issue that there has been no response to his comprehensive affidavit and, as well, no affidavit from White. He questions the weight to be given to Janson's affidavit since he was not present for much of the history of this matter. He makes bald statements about the

relationship between Richard and his mother but does not say where he obtained that information.

19. The lawyer's files are required in order to answer some glaring questions. Why were six Wills done in such a short time? Who took his mother to the appointments? What was discussed during the appointments? Who was there? Were capacity assessments done before any of the Wills were signed? These questions cannot be answered without production of White's files.

20. The Court must strike a balance between meeting the threshold and allowing Richard the tools he needs to put his best foot forward.

Analysis and Ruling

21. In dealing with threshold issues such as the one raised in this motion, the Court is guided by the principles in *Seepa v. Seepa,* 2017 ONSC 5368 which followed the legal principles set out in *Neuberger v. York,* 2016 ONCA 191 (CanLII).

22. Justice Myers rightly points out in *Seepa* at para 27 that "…it is simple for a disgruntled relative to make an allegation. If that were enough to cause an estate to go through formal proof in solemn form, smaller estates could be wiped out just by the process alone. That outcome might well serve the goals of the disgruntled relative who can thereby scorch the earth for all of the real beneficiaries. But it is hardly just."

23. Most importantly in para. 49 of *Seepa,* Justice Myers writes as follows:

> The court should be very reluctant to consign estates and beneficiaries to intrusive, expansive, expensive, slow, standard form fishing expeditions that do not seem to be planned to achieve the goals of civil justice for the parties. But processes that show some thought to customize a process to the evidence so as to promote efficiency, affordability, and especially, proportionality, with use of a scalpel rather than a mallet, use of summary proceedings where possible, use of case management, mediation, and similar efforts to minimize the expense, delay, distress, and the overwhelming disruption caused by the process itself, are to be greatly encouraged.

24. I view the process suggested by the Applicants as the customized process envisaged by Justice Myers. The medical records will most likely answer the capacity issues raised by Richard's evidence of the eulogy and the residency at Baycrest.

25. The Court is given pause by some of the statements in Richard's affidavit such as "I did nothing to deserve this unequal treatment given Elaine's history with me, and her history with my siblings." And, "I expected her to honour her commitments to me which in the end she did not do. That I was not included in her alleged Last Will as an equal child was in fact a broken promise to me as I will explain." Those statements resonate as ones from the type of disgruntled beneficiary referred to in *Seepa* as opposed to one who is looking to set aside a Will or Wills based on evidence.

26. Further, much time is spent in Richard's affidavit discussing the 2006 litigation. He parses through his mother's Statement of Defense calling it a fabrication and then remarks that his mother thought of him as an "embarrassment and a "humiliation" to her. He clearly states that the reason for his objection is that he still believes he had an agreement with his mother, which she breached, and which entitles him to an equal share of the Estate.

27. This is much removed from providing any clear position on suspicious circumstances, or undue influence. Rather, it appears to be a rehashing of old grudges.

28. Richard relies on the endorsement of Justice Dietrich in *Stone v. Firestone* dated June 14, 2022, in which the Applicant (who was not a beneficiary) sought medical and legal productions. The Respondents submitted that he did not meet the minimum evidentiary threshold. Justice Dietrich referred to the evidentiary threshold as being "low" as per *W.(W.) v. Y.(Y), 2016 ONSC 2387.* She found that the Applicant in *Stone* barely met that low threshold and allowed production of the records. However, if the Applicant was unable to corroborate his evidence with those documents, the respondents could schedule a summary judgment motion.

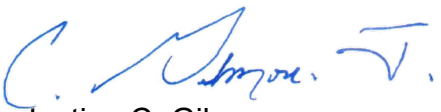
29. I agree with Justice Dietrich that the threshold is low, but there is still a threshold. Further, I do not agree with Richard that the Applicants' consent to the production of medical records means that they have conceded that the threshold has been met. Rather, I view the Applicants' approach to be entirely in line with the process Justice Myers envisaged in *Seepa* in para. 49. The consent to the production of medical records to address the one area in which Richard has raised a reasonable evidentiary issue is consistent with the efficiency, affordability, and proportionality of a customized process as per *Seepa.*

Orders and Costs

30. The Motion for Directions is granted in relation to the medical records. Costs of this motion are reserved to the judge at the final hearing of this Application.

31. Mr. Smith may provide an approved draft Order for my review and signing based on the decision herein.

July 20, 2023 (released July 21, 2023)



Justice C. Gilmore

CITATION: Soper v. Springett, 2020 ONSC 2911
COURT FILE NO.: 1784/19
DATE: 20200508

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: Lori Soper and Kelly Griffith, Applicants

AND:

Harris Butler Springett and Daisy Pomeroy, Respondents

BEFORE: RADY J.

COUNSEL: Dagmara Wozniak, for the applicants
Ian Wright, for the respondent Harris Butler Springett
Erin Rankin Nash, for the respondent Daisy Pomeroy

HEARD: March 4, 2020

Endorsement

Introduction

[1] The applicants commenced this application pursuant to the *Substitute Decisions Act,* 1992, S.O. 1992, c. 30. They seek production of the respondent, Mr. Springett's medical records from last year to present from a variety of enumerated sources; an order releasing the medical professionals from privilege; the notes, records and reports of two capacity assessors; and Mr. Springett's legal files from 2000 to present from three named solicitors and "any other lawyer or law firm in possession or control of such records, notes or files". They ask for the notes and records of Mr. Vandenbosch regarding his interactions with Mr. Springett and Daisy Pomeroy between January 1, 2019 and March 30, 2019.

[2] This motion is the first of three seeking several heads of relief. Prior to this motion, Mr. Springett's family doctor's medical records were produced to the applicants.

Background

[3] The applicants are the daughters of Harris Butler Springett. Mr. Springett is an 85 year old widower who is residing in a long-term care facility. Daisy Pomeroy has been Mr. Springett's companion for the last 19 years. She is 82. The applicants allege that Ms. Pomeroy persuaded Mr. Springett to change his Power of Attorney and his Will to add her as a substitute decision maker in the place of one of them, and as a beneficiary under his Will sharing the residue of his Estate equally with his four children. The applicants allege that Mr. Springett lacked capacity to make these changes and that he was unduly

influenced by Ms. Pomeroy to do so. I pause here to note that there is a parallel proceeding challenging the Will on the same basis.

[4] Mr. Wright represents Mr. Springett pursuant to s. 3 of the *Substitute Decisions Act*.

[5] In support of the motion, Ms. Soper deposes that:

- notwithstanding its longevity, the relationship between Mr. Springett and Ms. Pomeroy was a casual one;
- Mr. Springett told his children he did not intend to marry Ms. Pomeroy and he valued their independent lives;
- beginning in June 2018, Mr. Springett became increasingly withdrawn from his family and for the first time, he missed family celebrations;
- in January 2019, Ms. Pomeroy moved in with Mr. Springett without his children's knowledge;
- she asserted control over Mr. Springett and he became isolated from his family;
- tensions between Ms. Pomeroy and the children escalated and in May 2019, a notice was posted on the door of Mr. Springett's residence advising them that they were not welcome and police had been notified; and
- between May and November, the children were unable to have contact with their father, which only resumed through judicial intervention.

[6] It is clear that there is now considerable animosity between the children and Ms. Pomeroy although the relationship had been amiable in the past.

[7] The applicants point to four transactions in particular that are concerning, namely in January and February 2019, when Mr. Springett changed the beneficiary designation on his TFSA to Ms. Pomeroy and opened a joint bank account with her depositing $63,000 of his funds into it; in February 2019, when Mr. Vandenbosch declined to prepare a new Power of Attorney and Will for Mr. Springett; and on May 15, 2019, when a new Power of Attorney and Will prepared by Mr. Elliott were executed. They suggest that Mr. Springett did not have capacity or that he was unduly influenced to make these changes. They surmise that Mr. Vandenbosch may have declined to prepare the Power of Attorney and Will because of concerns over Mr. Springett's capacity. They submit that there is evidence that Mr. Springett experienced increasing cognitive impairment from January through June 2019 and he was suffering from depression.

[8] Mr. Springett underwent two capacity assessments, one in January 2020 by Dr. Paul Ferner and the other in May 2019 by Ike Lindenburger. Mr. Lindenburger concluded that

Mr. Springett had capacity at the time of his assessment. The applicants believe that Dr. Ferner concluded Mr. Springett lacked capacity by the time of his assessment but his report has not been produced because a claim of privilege is asserted. The applicants have consulted Dr. Shulman, a geriatric psychiatrist, to perform a retrospective capacity assessment.

[9] Ms. Pomeroy takes no position on this motion, but she filed two affidavits in response to the application, one sworn by her and the other sworn by Ms. Ross who has been Mr. Springett's private banker for the last 13 years.

[10] Ms. Ross was also examined by the parties and a transcript was prepared and filed. Essentially, Ms. Ross testified that:

- Mr. Springett and Ms. Pomeroy had a close relationship;
- Mr. Springett wanted to ensure Ms. Pomeroy was provided for if he died;
- she has always taken instructions only from Mr. Springett;
- she had no concerns respecting Mr. Springett's ability to provide her with instructions respecting his bank accounts.
- she did not have any concerns about Ms. Pomeroy improperly influencing him; and
- Mr. Springett's children were not actively involved in his life.

[11] Ms. Pomeroy denies any allegation of undue influence or that Mr. Springett lacked capacity. She points out that on January 14, 2019, they visited Mr. Springett's doctor who advised him that he had a large aneurysm and that he should get his affairs in order because he might not survive surgery. Ms. Pomeroy says that it was in this context that arrangements were made to change the Power of Attorney and Will and to change a bank account to joint ownership. She says that the children caused their father upset and stress by their interference in his personal affairs – for example, by contacting Ms. Ross expressing concern about his competence and seeking to act upon the existing Power of Attorney, which was contrary to his wishes.

[12] Mr. Springett has filed an affidavit in which he deposes that he does not want his children to have access to his medical records and legal files. He wants Ms. Pomeroy to continue to help him with his financial and personal health matters. He deposes at paragraph 11: "If Lori and Kelly are requesting information or documents from people whom I have seen as lawyers or doctors or care givers to assist them in ending or changing my relationship with Daisy or stopping Daisy from assisting me, I do not support or consent to these requests". He says he would like the litigation to stop.

[13] He was cross-examined on his affidavit. The applicants say that contrary to his affidavit, Mr. Springett expressed the view in response to questions that they should have the documentary access they seek.

Jurisdiction

[14] Fundamental to the disposition of this motion is whether the court has jurisdiction to make the orders sought. If it does, the issue becomes whether the request is over-broad and disproportionate to the importance and complexity of the issues.

[15] The applicants submit that there is an overlap of principles respecting challenges to Powers of Attorney and Wills. Consequently, many of the authorities on which they rely are cases involving a testator's competence to make a Will and the kinds of productions that are made in those situations. It is fair to say that much more expansive disclosure is made in cases involving issues of testamentary capacity.

[16] In any event, they say that they have met the minimal evidentiary threshold necessary to warrant documentary discovery, consistent with the test set out in *Neuberger Estate v. York*, 2016 ONCA 191, which is referred to in many of the authorities that they cite. They submit that the court has jurisdiction to make the orders sought either pursuant to the *Substitute Decisions Act*; or its inherent jurisdiction; or its *parens patriae* jurisdiction.

Analysis

[17] It is helpful to begin the analysis by remembering the purpose of the *Substitute Decisions Act*. As the court observed in *Beretta v. Beretta*, 2014 ONSC 7178: "It is designed to protect both personal autonomy on the one hand and those who are vulnerable by reason of incapacity on the other. Intrusions into personal autonomy are warranted only to the extent necessary to protect the vulnerable. The least intrusive means of ensuring that protection must be chosen".

[18] The wishes of the allegedly incapable person are an important consideration.

[19] Mr. Springett's wishes as expressed in his affidavit sworn February 24, 2020 are quite clear. He opposes the applicants' requests for any information and documents that will end or change his relationship with Ms. Pomeroy or prevent her from assisting him.

[20] During oral submissions, Mr. Springett's wishes were reiterated by his s. 3 counsel, who Mr. Springett is presumed capable of retaining and instruct pursuant to s. 3(1)(b) of the *Substitute Decisions Act* as the applicants recognize. However, it appears that they are critical of s. 3 counsel. They suggest that where capacity to give instructions is absent, s. 3 counsel is not to act. Rather a litigation guardian should be appointed. Until that occurs, s. 3 counsel's role is limited to making the person's wishes known to the court. See *Sylvester v. Britton*, 2018 ONSC 6620.

[21] The applicants suggest there is no basis to oppose their request for production of the medical and legal files. I do not agree. It seems to me that the court is entitled to assume that s. 3 counsel understands his role and that he has been appropriately instructed by Mr. Springett.

[22] I return to the *Beretta* decision where Justice Penny declined to order the production of certain records for want of jurisdiction. He observed:

> 73 It is not clear to me on what basis I have the jurisdiction to order, contrary to the patient's wishes, the production of her medical records. No authority was cited for the order sought. Indeed, such authority as has been cited seems to be to the opposite effect, *Nystrom v. Nystrom*, 2006 CarswellOnt 4310 (Ont. S.C.J.) at para. 12.

[23] I note that in *Beretta*, like here, the allegedly incompetent respondent was represented by s. 3 counsel who communicated his client's opposition to the disclosure sought. As already noted, Mr. Springett has clearly expressed his opposition in his affidavit and through his counsel. I do not agree with Ms. Wozniak that Mr. Springett said during his cross-examination that disclosure should be made. As I read the transcript, Mr. Springett was somewhat confused and suggestable. At best, he was equivocal about his wishes respecting disclosure. What he was very clear about was that he did not wish his relationship with Ms. Pomeroy to be altered. In the circumstances, I have concluded that I do not have jurisdiction to order the production sought in the face of Mr. Springett's objection.

[24] The few authorities dealing with challenges to Powers of Attorney provided by the applicants are of limited assistance. In *Abrams v. Abrams*, 2008 CarswellOnt 7786 (S.C.J.), counsel for the allegedly incompetent person admitted her lack of capacity. It is not clear from the endorsement whether the production order made respecting medical records was on consent or unopposed.

[25] In *Borges v. Borges*, 2018 ONSC 3451, s. 3 counsel had not yet been appointed. An order for the production of medical records was made but there is no discussion of the basis on which the order was made, nor what the wishes of the allegedly incompetent person were. The motions judge appears to have concluded that because some disclosure had already been made, further production should follow.

[26] Finally, in *Chuvalo v. Chuvalo*, 2018 ONSC 5873, Mr. Chuvalo's lack of capacity was admitted and in fact, the court made such a declaration. An order for the production of medical records was made and it appears that no objection was raised by Mr. Chuvalo's s. 3 counsel.

[27] In my view, there is similarly no jurisdiction for the court to override or abrogate solicitor and client privilege respecting Mr. Springett's legal files in the context of challenge to a Power of Attorney. I am not persuaded the so-called wills' exception applies in a case

where the client is alive and asserts privilege. I note that the court reached a similar conclusion in *Borges supra* at para. 24, and *Chuvalo* at para. 26.

[28] Courts have long assiduously guarded solicitor and client privilege. It has been described as a "fundamental civil and legal right": *Solosky v. Canada*, [1980] 1 S.C.R. 821 C 839. The privilege belongs to the client and only she can waive it. See *Goodman Estate v. Geffen*, [1991] 2 S.C.R. 353. In this case, Mr. Springett does not waive solicitor and client privilege.

[29] For these reasons, the relief sought on this part of the motion is dismissed. If the parties cannot agree, I will receive brief submissions on costs in writing by May 29, 2020.

Justice H. A. Rady
Justice H. A. Rady

Released: May 8, 2020

Law Society of Ontario | Barreau de l'Ontario

TAB 5

26th Estates and Trusts Summit – DAY ONE

Disclaimers & Renunciations of Gifts

Kavina Nagrani, TEP, CS
NIKA LAW LLP

October 18, 2023

cpd

LAW SOCIETY OF ONTARIO

The 26th Estates and Trusts Summit

October 2023

DISCLAIMERS & RENUNCIATIONS OF GIFTS

Written By:

Kavina Nagrani, JD, TEP, CS*

NIKA LAW LLP[1]

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*Certified Specialist, Estates & Trusts; https://nikalaw.ca/kavina-nagrani/

[1]With gratitude for the contributions and research by Associates, Victoria Holland, Marie Kazmer, and Jack Fallon and Student-at-law, Monica Martel-Oh.

INTRODUCTION

Believe it or not, no one may want your favourite watch or antique clock. This paper speaks to what happens (or should happen) legally, when a beneficiary refuses a gift made by Will – or, more specifically, "disclaims" or "renounces" a gift. Disclaimer and renunciation each have their own timing considerations, and distinct legal results. As readers will appreciate, there is always room for drafting solicitors to improve the clarity of testators' intentions in Wills, particularly in this often, overlooked consideration.

PART I – DISCLAIMERS

The average person ascribes to the mistaken belief that a bequest made to them under a Will **must** be accepted. Estate Trustees do not typically give beneficiaries the choice to accept or disclaim one's interest – but should they? Explaining the possibilities of disclaimer and renunciation is not only worth considering, but doing so is arguably an obligation for lawyers who are engaged in estate advisory services or acting as Estate Trustee themselves. Knowledge of this right can fundamentally alter the distribution of an estate – and sometimes, in a positive way.

"Disclaiming" an interest in an estate or trust refers to a voluntary act of refusing the gift. The effect is that the gift becomes void *ab initio.*[2] This is distinct from divesting oneself of a proprietary interest once received, which is more accurately referred to as a renunciation, dealt with below. To be clear then, a disclaimer cannot be made *after* a gift has been received or accepted. Furthermore, disclaimers can only apply to a gift as a whole; one cannot disclaim *part* of a gift.[3]

---

[2] *Jung (Re)*, 1979 CanLII 628 (BC SC) at 23 [Jung (Re)].

[3] *Skinner (Re)*, 1970 CanLII 360 ONSC.
In Re Joel, [1943] 1 Ch.D. 311, where there was a bequest of a house together with contents, the house and contents were held to be a single gift, and the legatee could not disclaim the gift of the house while accepting its contents.
In Re Hotchkys (1886), 32 Ch.D. 408, where there was a gift of "all my freehold and leasehold estates", the Court held this to be one gift, and it was not open to the beneficiary to accept one life tenancy and refuse the other.

Why Disclaim?

Disclaimers usually arise in the context of estates and trusts when the effect of the gift would result in a negative consequence for the recipient. Consider, for example, US beneficiaries who might face steep tax consequences for receiving income or capital from a Canadian-resident trust or estate. Along similar lines is the loss of deferred/roll-over treatment of capital property in Canada when bequeathed to someone *other than* the spouse of the testator. Another example is where an *in-specie* gift is simply too onerous and burdensome to acquire. Consider, for example, a gift of real property or land that may be difficult to sell, but also expensive or burdensome to maintain. For this and other reasons, drafters should consider making *in-specie* gifts (particularly of real property) in Wills more flexible. More specifically, Wills should contemplate whether the *intended* beneficiary should be entitled to the proceeds of sale of a particular asset in the place of the asset itself, and whether they should be given the power and authority to direct the Estate Trustee to liquidate or sell the asset from the Estate as opposed to having it transferred first to the beneficiary only to be sold soon thereafter. Is the testator's true intention that a particular beneficiary "must" receive an asset *in specie* – or merely that they have a right of first refusal to take the asset *in specie?* It is more likely the latter, if appropriately fleshed out by the drafter in the planning stage. These important questions can provide clarity and more importantly, flexibility, in the administration of the Estate. Furthermore, by giving more options and spelling out the contingent path for every asset and portion of the residue, the effect of disclaimed interests becomes more certain.

Disclaimers to avoid creditors

Where bankruptcy of a beneficiary may be looming, inheritances *may* be disclaimed to avoid creditors, however it is important to note that the protection of gifts to avoid creditors of an undischarged bankrupt is not permitted. Once assets are vested in a bankrupt beneficiary, they must

be turned over to the Licensed Insolvency Trustee for distribution to the bankrupt's creditors. This strategy is sometimes used to avoid or reduce family law-related obligations such as spousal or child support. Although this arguably offends public policy and appears unjust for families, our review of case law has shown that the Court will not invalidate a disclaimer on public policy grounds.[4]

In *Sembaliuk v Sembaliuk*, for example, married spouses had separated, and the wife had custody of the children.[5] Although the husband had agreed to pay maintenance for the wife and the children, he was in arrears. In order to defeat his wife's claim for the support in arrears the husband disclaimed the gift left to him when his father died. If the disclaimer was found to be valid, the disclaimed money would remain with the father's estate and pass to the husband's brother-in-law as residuary beneficiary under the father's will. The court held that since a disclaimer is not a conveyance, it could not be set aside as a fraudulent conveyance. Moreover, the fact that the husband had an obligation to support his dependants did not impose a legal or equitable obligation on him to accept the bequest.

Likewise, disclaimers to avoid tax otherwise payable to the Canada Revenue Agency have been accepted, and indeed, this is very commonly the primary reason why inheritances are disclaimed. In 2015, the CRA published *Income Tax Folio S6-F2-C1, Disposition of an Income Interest in a Trust* which confirmed that "a disclaimer is an outright refusal to accept a gift or interest. A taxpayer who executes a valid disclaimer (not in favour of any person) of an income interest in a trust will be considered not to have acquired that income interest."

In *Rubner v Bistricer*, a daughter, who was a non-resident beneficiary of an *inter-vivos* trust, disclaimed her interest to protect the adverse tax consequences for the trust. The result was that the

[4] *Sembaliuk Estate v Sembaliuk*, 1984 ABCA 340.
[5] Ibid.

disclaimed interest reverted back to her living mother, who paid the tax on the income and then passed the accumulated income to her daughter as a gift.[6] This case raised an interesting question about the effect of a disclaimer, and specifically about whether the daughter's disclaimer of her interest in the trust also related to the capital and future income generated by her mother. The mother put the daughter's 'would be' interest into a separate account which she then gifted back to the daughter. As might be expected, the siblings took issue with this and argued that because the daughter disclaimed her interest in the trust the mother could not have held these assets 'in trust' for her daughter. Ultimately the Court held that the daughter was entitled to whatever her mother had held in trust for her or gifted to her, even if those proceeds were derived from capital that the daughter had initially disclaimed. It seemed to satisfy the Court of Appeal that, when examined, the daughter made it clear that she had no intention of disclaiming any future income or proceeds from her disclaimed interest.

Effect of a Disclaimer

Section 23 of the *Succession Law Reform Act,* R.S.O. 1990, c. S.26 states:

> **Disposition of property in void devise**
>
> **23** Except when a contrary intention appears by the will, property or an interest therein that is comprised or intended to be comprised in a devise or bequest that fails or becomes void by reason of,
>
> (a) the death of the devisee or donee in the lifetime of the testator; or
>
> (b) the devise or bequest being disclaimed or being contrary to law or otherwise incapable of taking effect,
>
> is included in the residuary devise or bequest, if any, contained in the will. R.S.O. 1990, c. S.26, s. 23.

[6] *Rubner v Bistricer*, 2019 ONCA 733 at para 44. [*Rubner*]

If a disclaimer is effective, the failure of the gift dates back to the date of the testator's or intestate's death. This means that if the gift is testamentary and specific, it falls into residue unless there is a contrary intention in the will. For charitable gifts, this is where the *cy-près* doctrine becomes important. If the will-maker does not provide express and clear language in the Will to confirm the charitable intent, or purpose of a particular gift to a charity, and if the intended recipient institution disclaims the gift, it will fall to the residue of the testator's Estate.[7] If, on the other hand, the gift is residuary, it will pass on intestacy. If the disclaimer is of a share of an intestate estate, it has the effect of augmenting the shares of the other next of kin.[8]

Form

The form of a disclaimer is not prescribed. A disclaimer does not need to be in writing (although it is recommended), nor does it need to be filed with any form or record with the Trustee. Deliberate conduct of a party and oral expression of disclaimer have been accepted to affect the result.[9] In the *Rubner* case that we discuss above, the daughter's disclaimer was oral, which, in our view, contributed to the prolonged arguments as to what, exactly, she disclaimed. In this and other cases, a simple form signed by the disclaiming party clearly identifying i) the date of disclaimer, ii) the subject of the disclaimer, and iii) whether the disclaimer extends to future income and assets traced from the disclaimed interest, would have provided the parties and the Court with clarity.

Timing

While *form* may not be a significant consideration *timing* is. A valid disclaimer of an interest in an estate must take place after that interest has crystallized – in other words, *after* the death of the

[7] CED 4th (online), *Estates and Trusts, "*Charities" at § 1 Definition.
[8] *Stewart (Re),* 2014 BCSC 2321 at 502 and 504; *Metcalfe (Re)*, 1972 601 (ON SC) at 600 and 602.
[9] *Rubner,* supra note 5 at 128, and Anthony R. Mellows, The Law of Succession, 3rd ed, p 508.

testator – because before then the beneficiary has nothing more than a *spes successionis* or an expectancy.[10] Wills can be changed and revoked before the testator's death, thereby leaving nothing for a beneficiary to disclaim prior. It follows then, that a disclaimer cannot be made earlier, and, once made, is retroactive to the date of death of the deceased.

Another way to assess the validity of a disclaimer is to ensure that the beneficiary has not yet derived any benefit from the gift. In *Biderman v The Queen*, a taxpayer attempted to disclaim an interest in property inherited from his wife's Estate, Justice Létourneau of the Federal Court of Appeal made these detailed remarks:

> *…[t]he Tax Court judge found that Mr. Biderman had not truly disclaimed under the will because he benefitted from the assets for almost three years by having a home for himself and his children and because he used the assets to negotiate a deal with Revenue Canada with respect to his debt.*
>
> *Moreover,* ***the subsequent conduct of Mr. Biderman is wholly inconsistent with his disclaimer****. While he purported to renounce both the gift and the powers of administration, he began and continued to act subsequently to it as executor to his wife's estate. In such capacity, he probated the will on May 15, 1992. Furthermore, he signed on October 6, 1994, the Transfer/Deed of Land with respect to the family home as well as a Transfer of the shares and a Declaration of transmission of those shares on September 30, 1994.* [Emphasis added]
>
> *In the context of wills and estates, a disclaimer is the act by which a person refuses to accept an estate which has been conveyed or an interest which has been bequeathed to him or her.* ***Such disclaimer can be made at any time before the beneficiary has derived benefits from the assets.***[11]

PART II – RENOUNCING A GIFT

The terms 'renounce' and 'disclaim' have been erroneously used interchangeably in a number

[10] *Wolfson Estate v Wolfson*, 2005 CarswellOnt 7667, [2005] OJ No 6083, 22 E.T.R. (3d) 255 at para 32.
[11] *Biderman v The Queen*, 2000 DTC 6149 at paras 8-14. [*Biderman*]

of written material, and even in some court decisions, as if the terms were synonymous, but they are not. There is actually a clear legal distinction between a disclaimer and renunciation of a gift or interest. The fundamental distinction is that the beneficiary who assigns or renounces is disposing of his own property, while the beneficiary who disclaims is refusing to acquire the property of another.[12] Renouncing can be viewed as an *assignment* or a *surrender* of an interest or a disposition – whereas a disclaimer operates by way of *avoidance*.[13]

Effect of Renunciation

If, after it has been accepted, a gift or interest in an estate or trust is subsequently assigned, released, or surrendered, such interest will pass from the original beneficiary to some other person by virtue of the deliberate act of the former.[14] In some cases, depending on the source characteristics of the subject matter being renounced, the Will or laws of intestacy may govern or restrict whom such interests may ultimately devolve to – otherwise, the subject of the renunciation may take on an independent existence.

The main concern for those who would renounce a gift is the adverse tax consequences that may result. Unlike disclaimers, a renunciation is more likely to be treated as a disposition of property by the beneficiary for the purposes of the *Income Tax Act ("ITA")*, because the property would have already vested in the beneficiary and the renunciation merely has the effect of transferring the property from the beneficiary to whomever is next entitled to it by the will, intestacy, or otherwise by assignment.[15] Accordingly, whatever tax treatment would normally be applied to a transfer of the type of property in question will most likely be applied to the transferor of the property being renounced.

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[12] Maurice C. Cullity, "Will -- Income Interests -- Renunciation After Acceptance -- Partial Renunciation -- Taxation" (1978) 56:2 Can. B Rev, p 317-330.
[13] *Paradise Motor Co Ltd. (Re)*, [1968] 2 All ER 625, p 632 (CA).
[14] *Rubner,* supra note 5, p 319.
[15] *Income Tax Act* (RSC, 1985, c 1 (5th Supp)).

Where the renouncing party or "transferor" is someone who is indebted to the Canada Revenue Agency (CRA), section 160 of the *ITA* becomes relevant. This section reads:

> **Tax liability re property transferred not at arm's length**
>
> **(1)** Where a person has, on or after May 1, 1951, transferred property, either directly or indirectly, by means of a trust or by any other means whatever, to
>
> > **(a)** the person's spouse or common-law partner or a person who has since become the person's spouse or common-law partner,
> >
> > **(b)** a person who was under 18 years of age, or
> >
> > **(c)** a person with whom the person was not dealing at arm's length,
>
> the following rules apply:
>
> > **(d)** the transferee and transferor are jointly and severally, or solidarily, liable to pay a part of the transferor's tax under this Part for each taxation year equal to the amount by which the tax for the year is greater than it would have been if it were not for the operation of sections 74.1 to 75.1 of this Act and section 74 of the *Income Tax Act*, chapter 148 of the Revised Statutes of Canada, 1952, in respect of any income from, or gain from the disposition of, the property so transferred or property substituted for it, and
> >
> > **(e)** the transferee and transferor are jointly and severally, or solidarily, liable to pay under this Act an amount equal to the lesser of
> >
> > > **(i)** the amount, if any, by which the fair market value of the property at the time it was transferred exceeds the fair market value at that time of the consideration given for the property, and
> > >
> > > **(ii)** the total of all amounts each of which is an amount that the transferor is liable to pay under this Act (including, for greater certainty, an amount that the transferor is liable to pay under this section, regardless of whether the Minister has made an assessment under subsection (2) for that amount) in or in respect of the taxation year in which the property was transferred or any preceding taxation year,

Nothing in this subsection limits the liability of the transferor under any other provision of this Act, nor of the transferee for the interest that the transferee is liable to pay under this Act on an assessment in respect of the amount that the transferee is liable to pay because of this subsection. A common example is that of a taxpayer who inherits an interest which he then renounces in favour of his spouse or minor child. In this scenario all of income earned from the property will be attributed back to the taxpayer, pursuant to the *ITA*.[16]

The application of this subsection 160(1) was described simply in *Michelle Leclair v Her Majesty the Queen*, in which the Court held that certain conditions made the transferor liable to pay tax at the time of the transfer.[17] First, he was already indebted to the CRA at the time that he transferred his interest for an amount in excess of the value of the property. Second, there was an actual transfer of property, and third – the parties were not dealing at arm's length. Finally, the transaction was not made for fair market value consideration.

The Court went on to clarify that in order to determine whether there has been an actual transfer of property, it must be determined whether all the essential requirements of a gift have been met, namely: intention and capacity of the donor to make the gift, completed delivery to a donee, and acceptance of the gift by the donee. It is important to contrast this with the above paragraphs relating to disclaimers – in this case, had the transferor made a valid disclaimer, CRA may have absolved him of the tax responsibility associated with that property – given their established view that where there is a valid disclaimer, there is no transfer of property, direct or indirect, and paragraph 160(1)(c) would

[16] Albert Oosterhoff, *Disclaimer* (December 2021), online: WEL Blog <https://welpartners.com/blog/2021/12/disclaimer/#_ftn26>

[17] *Michelle Leclair v Her Majesty the Queen*, 2011 TCC 323.

not apply.[18] Clearly, failed testamentary gifts are not caught by section 160, as long as there is no completed transfer.

PART III – ACCELERATED INTERESTS

Sometimes a beneficiary is motivated to disclaim or renounce a gift by the hope that doing so will accelerate the vesting of a remainder beneficiary's interest in the gift. Unfortunately, whether an interest will accelerate is not always clear. While there is a presumption at law in favour of acceleration, that presumption is rebutted where the testator makes clear a contrary intention.[19]

Brannon v British Columbia (Public Trustee) is one of the leading modern cases that addresses this situation. [20] In this case, the testator drafted a will in 1975 in which she directed her executors to pay her husband $400 per month until the earlier of his death or remarriage (the termination date). On the termination date, the trustees were to divide the estate into as many equal shares as there were children of the testator then living, with gifts over to the issue of any child who died before that date. The children would be paid their shares when they reached age 30. The testator and her husband had three sons. She died in 1987. In 1988, when the youngest son turned 30, the husband disclaimed any interest in his wife's estate, with the intent that the gift of residue would vest absolutely and immediately in the three sons. The four of them brought an application for an order so declaring. The chambers judge granted the application, but the Public Trustee appealed on the ground that the sons' interests could not be accelerated, since they were subject to being divested if they did not survive the father. The Court of Appeal dismissed the appeal.

[18] *Biderman,* supra note 11, at para 46.
[19] See, *e.g.*, *Brannon v British Columbia (Public Trustee)*, 1991 CarswellBC 103, 41 ETR 210 (CA)[*Brannan*], at para 30; *Skerrett v Bigelow (Estate of)*, 2001 NSSC 116, at para 14.
[20] *Brannan,* supra note 18.

In dismissing the appeal, the Court stated that "acceleration is not excluded by words defining the time of distribution by reference to the natural ending of the particular estate, for instance, a direction for distribution upon the death of the life tenant or by a direction that distribution is to be made among persons then living".[21] The scheme of the will provided for the order of the gifts but not the time of distribution, indicating only that the distribution was to take place on the termination of the husband's interest. To conclude, the Court helpfully asserted that "[t]o limit acceleration only to cases where the testator specifically contemplated that a beneficiary would refuse a gift or to exclude acceleration in any case where there is the contingency of survivorship would be contrary to the weight of authority and to the very concept of acceleration."[22]

PART IV – TIPS FOR SOLICITORS

Disclaimers and renunciations of interests and gifts in the context of estates and trusts are important considerations for lawyers who draft Wills and trusts, for estate litigators, and also for those who provide advice to Trustees in the course of administration, and who take the office of Trustees themselves.

In the drafting and estate planning stage of a file, solicitors should be alert to the effects of disclaimers of interests and make the required inquiries with testators as to their intentions for any such disclaimed benefits. Should the Will be read as if the intended beneficiary predeceased the testator? Should the gift devolve to a contingent beneficiary? Should contingent interests accelerate? Should disclaimed charitable gifts be made to an organization of similar purpose? These are all relevant questions that are often overlooked which can lead to unintended results and/or court applications for directions and assistance.

[21] *Brannan,* supra note 18, at para 16.
[22] Ibid, at para 29.

When advising an Estate Trustee during an administration where a beneficiary has disclaimed, or is contemplating disclaimer of, a gift, lawyers must understand the effect of the disclaimed interest and who is to ultimately benefit. As discussed above, the first point of reference is the Will itself, as the testator's intention is paramount.

When advising beneficiaries who are contemplating a disclaimer, lawyers must ask why, and thereafter evaluate the validity of the disclaimer. Lawyers must also observe whether the decision to disclaim was made in a reasonable time, and whether, in particular, it was before receiving or enjoying any benefits from the property. If it was not, the "disclaimer" is more likely to be treated as a renunciation, with all the tax consequences that may follow.

Finally, although disclaimers are not prescribed at law to be in writing, it would be prudent to formalize these decisions which clearly have such significant effects both to disclaiming parties and others. Clarity is not always achieved to the extent required to mitigate against all risks, but *something* in writing is generally preferred to the afterthought of what was meant by one's conduct.

PART VI – IN CLOSING

As with all areas of the law, seldom is anything simple or clear. Disclaimers and renunciations are no different. While *"[t]he law certainly is not so absurd as to force a man to take an estate against his will"*, it would be illogical not to understand and contemplate the consequences of one's refusal or renunciation of a gift. [23]

[23] George William Keeton, *Williams on Executors and Administrators*, 14th ed. vol.2 (London: Stevens & Sons, Ltd., 1960), p 761, para 1170.

Legislation

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Law Society of Ontario | Barreau de l'Ontario

TAB 6

26th Estates and Trusts Summit – DAY ONE

Family Law Update

Kristine Anderson
Fern Law

October 18, 2023

26th Annual Estates and Trusts Summit[1]
Family Law Update

Kristine Anderson *Fern Law*

Being aware of and alert to the intersection of estates law and family law is becoming more of a necessity for estate lawyers in Ontario as the clientele we advise have increasingly complex lives and relationships. Further, recent changes to the *Succession Law Reform Act*[2] ("SLRA") were in direct response to the rising issue of predatory marriages and protecting the property of our vulnerable aging population.

This is not intended to be an exhaustive review of the case law in these areas. This brief paper will serve as a high-level survey of the issues to be attuned to when advising your client.

AMENDMENTS TO THE SUCCESSION LAW REFORM ACT

A. Marriage no longer revokes a Will

Section 16 of the *SLRA* was repealed on January 16, 2022. This section provided that a Will is revoked upon marriage, except in specific circumstances. The impact of predatory marriages was the primary motivation for repealing this section,

It should be noted, there is no retroactive effect to this change in the legislation if the was Will made before December 31, 2021, and the marriage occurred before December 31, 2021, the Will is revoked unless it was made explicitly in contemplation of marriage.

This change, while a positive step towards modernizing estate law in Ontario, could also present other challenges as now when an individual marries or remarries after they have made their Will, they must remember to change or update their existing Will to include their new spouse, so they don't inadvertently leave them out.

B. Separated Spouses can lose Entitlements

The previous s. 17 of the *SLRA* stated that unless a contrary intention is expressed in the Will, when the testator's marriage is terminated through divorce or declared a nullity, any entitlements the former spouse may have had under the Will are revoked, and the former spouse will be considered to have died before the testator. Therefore, your divorced spouse would become disentitled to any gifts or beneficial interest in your estate, they also could not be appointed as executor or trustee of the estate.

However, this section did not address separated couples who had not yet obtained their divorce judgment or had never bothered to get a divorce. As the litigators in this area

[1] October 18, 2023
[2] RSO, 1990, c. S. 26

know this created a situation where ex-spouses often benefited from certain entitlements that the deceased may not have desired.

Section 17(3) was added to address this legislative gap. The new section now provides that a spouse shall not inherit any of their deceased spouse's property if the parties were "separated" at the time of the testator's death.

Separated is defined as:

1. Immediately before the deceased's death, both parties were living separately for at least three years as a result of their marriage breakdown;
2. The parties entered into a valid separation agreement;
3. The court made an order to settle their affairs with respect to the marriage breakdown; or
4. A family arbitration award was made with respect to their rights and obligations arising out of the marriage breakdown;

and

5. At the time of the deceased death, both parties were living separately as a result of marital breakdown.

The area in this amendment that is ripe for litigation, is whether the parties were living separately due to marital breakdown for 3 years prior to death. As family lawyers well know, the date of separation can be a hotly disputed date. As well, couples amid marital breakdown can separate and attempt to reconcile and separate again. There is lots of fodder for disagreement. I could not locate a case on this issue in the estate context. However, there is a plethora of case law to assist the court in determining the date of separation that will be relied upon from the family courts.

Separation is not defined in the Family Law Act[3]. However, part of the definition of valuation date (which is typically the date of separation) is defined at s. 4(1) as, "The date the spouses separate and there is no reasonable prospect that they will resume cohabitation". Case law prescribes the date of separation occurs when both spouses physically separate from one another or when one of the parties has expressed to the other their intent to end the marriage and follows up with an act or acts that are consistent with the intent to end the marriage. Actions such as sleeping in separate rooms, cessation of conjugal relations, living in separate homes, announcing to friends or family as separated, attending social events separately and separating finances amongst other actions can all be used as evidence for determining the date of separation. As you can imagine, determining the date of separation is very fact driven.[4]

[3] RSO, 1990, c. F.3

[4] A very good resource on determining the separation date is David Frenkel and Yunjae Kim's paper entitled, *Separation Date Principles and Assessment Guide*, 2022 40 C.F.L.Q. 335

I have also often wondered what would happen if a scenario presented before the court where someone had been separated for 2 years and 11 ½ months. Would the court be willing to apply s. 17(3) in this situation?

C. Intestate Succession

Intestate succession is an area where the unexpected consequences of their being no impact in the application of the legislation if there was separation may have been felt the strongest. In particular, if there were no children and a spouse who had been separated for sometimes decades suddenly inherits all of their ex-spouse's property.

Part II of the *SLRA* dealing with intestate succession was also amended to address the same concerns around couples who have separated but are not divorced and provides a mirror definition of separation. Section 43.1 of the SLRA now provides that a former spouse shall not inherit any of their deceased spouse's property if the parties were separated at the time of the deceased's death.

Note that these amendments also will not apply retroactively as they will only affect separations that occur on or after January 1, 2022.

PREDATORY MARRIAGE

When an elderly person marries a significantly younger spouse we immediately think "gold-digger" – and this may be for a good reason. Until the recent changes to the SLRA, unless there was a declaration in contemplation of marriage, the elderly testator's previous Will was revoked allowing the younger spouse to inherit on an intestacy, leaving the elderly person's beneficiaries (likely their children) with a costly and difficult legal battle to regain their full inheritance.

To the best of my knowledge the last Ontario case addressing the issue of a predatory marriage is Tanti *v.* Tanti, 2021 ONCA 71 ("Tanti"). The applicant was the son of an elderly person who had married a much younger woman when he was 89. There was a trial of the issue of Paul Tanti's capacity to enter the marriage. The trial judge held Paul had the capacity to marry and the marriage was valid. This decision was upheld on appeal.

The capacity needed to marry is defined as being able to understand the nature of the marriage contract and the duties and responsibilities that flow from it. Like much of what I have been discussing above, the inquiry into the validity of a marriage is situation specific.

While there was some indication of Paul Tanti's cognitive decline prior to the marriage, the trial judge found his cognitive status at he time of the marriage had not diminished to the point that he was unable to make decisions regarding his day-to-day affairs or living arrangements.

The effects of the older legislation permitting marriage to revoke the Will was part of the facts of Tanti and certainly the driving force behind the litigation.

RECENT RELEVANT FAMILY LAW CASES FOR ESTATE LAWYERS

I have also pulled a few 2023 cases that estate lawyers should be aware of in their practice.

1. **Anderson *v.* Anderson**, 2023 SCC 13

   I draw your attention to this case as it is seen in the family law bar as opening the door to the loosening of the tight restrictions around there being full financial disclosure when preparing prenups or cohabitation agreements and separation agreements. Domestic contracts most often come into play in the context of Dependant's Relief cases and this is a case I expect you will start to see being sited.

   In *Anderson*, at the end of a three-year marriage the spouses drafted their own separation agreement and did not prepare financial disclosure. The SCC upheld the agreement as binding.

   The SCC first addressed whether there were any ordinary contract law principles that would lead to the conclusion that the agreement was not binding. Finding none, they then looked at the procedural integrity of the process examining whether there was undue pressure, exploitation, a power imbalance, or other vulnerability. Safeguards such as financial disclosure and independent legal advice provide critical protection in the family law context, but they are not required by the legislation. The SCC found that unless the court is satisfied that the agreement arose from an unfair bargaining process, the agreement is entitled to serious consideration. The court will then assess the substantive fairness of the agreement, in order to determine how much weight to afford the agreement in fashioning an order for property division.

2. **Sparkman *v.* Sparkman, 2023 ONSC 41**

   This case involved the sale of a matrimonial home by way of an application under the Partition and Sale Act, RSO 1990, c. P.4 and whether the outstanding equalization issues are sufficient to bar the partition and sale of the matrimonial home. The husband was attempting to prevent the sale of the property. The court looked at whether there was prejudice to a substantive right of the husband under the Family Law Act and whether an order for sale would be oppressive, malicious, or vexatious.

The court found that as the husband's net family property calculation was not complete and therefore that the equalization process was not imminent. And further stated, "…where the opposition to the sale is based upon a desire to have funds available for payment of an eventual equalization claim, the courts have generally allowed the sale to proceed".

In the facts of this case there were three proceedings outstanding and none of them were moving very quickly. The court found that in the context of the whole proceedings between the parties a partition and sale of the matrimonial home was appropriate. Also, a factor was that the trial was far from imminent, and the court did not wish to allow one party to hold the house hostage until their claim has been adjudicated.

Although this is not an estate case, I thought it an important case for estate trustees to consider before they bring a partition and sale application to sell the deceased's home if the spouse has elected to equalize or otherwise has a claim on the property.

3. Ahluwalia *v*. Ahluwalia, 2023 ONCA 476

Again, this is not a case with an estate element, but bringing a claim against an abusive deceased spouse may be contemplated in an estate matter and this case would be helpful to assist in how that needed to be framed.

The spouses had been married for 17 years. After separation the wife brought a claim which, if granted, would have resulted in the creation of a new tort of Family Violence. This new tort intended to capture the full spectrum of behaviours that can constitute family violence and the cumulative harm that occurs with a pattern of violence over time.

The wife gave evidence that the husband was physically and mentally abusive throughout the marriage and displayed a pattern of emotional abuse and financial control.

The court of appeal declined to recognize a new tort stating, "The existence of family violence does not, by itself, justify the creation of a new tort. The creation of a new tort is only appropriate when there is a harm that "cries out" for a legal remedy that does not exist.". The court of appeal felt the harm suffered could addressed by the existing torts including battery, assault, and intentional inflection of emotional distress.

The court did allow a damage award in the amount of $100,000 as compensatory damage through the application of existing torts and aggravated damages.

Law Society of Ontario | Barreau de l'Ontario

TAB 7A

26th Estates and Trusts Summit – DAY ONE

Guardian of Property for a Child's Property

Dianne Carter
Office of the Children's Lawyer

October 18, 2023

GUARDIAN OF PROPERTY FOR A CHILD'S PROPERTY:

Applying to be a Guardian of a Minor's Property and the Responsibilities of a Guardian of Property appointed under the *Children's Law Reform Act*

By Katherine Antonacopoulos,[1] Samantha Preshner[2] and Kirsten Cockburn[3]

The following is information about commencing an application for a judgment appointing a guardian of property for a minor person (a minor is a person under the age of 18 years[4]) and approval of a Management Plan. It explains when a minor might need a guardian to manage the minor's property, how a guardian of a minor's property is appointed, and the duties, obligations and authority of a guardian of property.

The law that governs guardians of minors' property comes mainly from the *Children's Law Reform Act* ("*CLRA*"). The following is general information about applying to be appointed as the guardian of property for a minor. It is not comprehensive, nor is it legal advice.

The *CLRA* provisions about guardians are only for guardianships over minors' property. The *Substitute Decisions Act* applies to guardianships over incapable adults' property. Please see the Office of the Public Guardian and Trustee's website for information about guardianships for incapable adults. The *Substitute Decisions Act* and its regulations, including the forms in the regulations, do not apply to guardianships over minors' property.

As guardianships under the *CLRA* are not frequently commenced, the Office of the Children's Lawyer welcomes the opportunity to discuss the merits of an application if one is considering such an application, and strongly encourages this to be done as the first step before legal fees are incurred even preparing a draft application. The Office of the Children's Lawyer can also comment on draft Management Plans before a guardianship application is filed with the court, and can also provide sample terms for a guardianship judgment. The Office may be contacted at:

Property Rights Department Office
of the Children's Lawyer 393
University Avenue, 14th Floor
Toronto, ON M5G 1W9

Tel. (416) 314-8000
Fax (416) 314-8056
Email: OCL.Inquiries@ontario.ca

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[2] Counsel, Property Rights Department, Office of the Children's Lawyer
[3] Counsel, Property Rights Department, Office of the Children's Lawyer
[4] Section 1, *Age of Majority and Accountability Act*

1. THE NEED FOR A GUARDIANSHIP

In Ontario, a "guardian of property" is a person appointed by the Court, on notice to the Children's Lawyer, to receive and manage a minor's property. A parent or other person with custody of a minor is not automatically the "guardian of property" of that minor's property and is not automatically entitled to receive and manage their own minor child's money. A parent, or other person, can only receive guardianship over a minor's property by court order. However, it is usually not necessary to appoint a guardian of property because a minor's property can almost always be paid to the Accountant of the Superior Court of Justice (see below for information about the Accountant of the Superior Court of Justice).

A minor may acquire money or other property in any of the following circumstances:

- under a court order for damages in a personal injury or other civil case;
- as a beneficiary of an estate (with or without a will);
- as a beneficiary of a life insurance policy;
- as a beneficiary of an RRSP, RRIF, TFSA or pension plan; and
- from a death or accident benefit.

In some circumstances, an adult may be given authority to receive and hold the minor's funds without being appointed as a guardian of property. For example, a will or insurance policy may contain a term authorizing an adult to hold the minor's property in trust for the minor. However, in many cases there is no authority for a parent or other adult to hold the funds on behalf of the minor.

The *CLRA* and the *Act*'s corresponding regulation were amended in 2021 to allow a maximum of $35,000.00 to be paid to or on behalf of a minor:

- To the minor, if the minor has a legal obligation to support another person;
- To a parent with whom the minor resides; or
- To a person who has lawful custody of the minor.

If the total amount of money a minor is to receive is over $35,000.00 and no adult person has the legal authority to receive the monies for the minor (either through trust provisions or a guardianship of property order), the money must be paid to the Accountant of the Superior Court of Justice for the minor. For example, if a minor receives more than $35,000.00 from an intestate estate (meaning there was no will), no adult, including the minor's parents or the estate trustee, has the authority to receive or hold the minor's inheritance in trust unless an adult obtains a court order to be appointed as guardian of property.

A person who receives and holds property on behalf of a minor within the $35,000.00 exception has the same responsibilities as a guardian of property for the care and management of the minor's money or personal property, and cannot use the funds for any reason unless specifically authorized by the court, under s. 59 of the *CLRA*. This means that, even if a will or insurance policy contains a term authorizing an adult to hold the minor's property in trust, that adult does not have the power to encroach unless that power is stipulated in the will or trustee designation. This is particularly the case in trustee designations for an insurance policy. In those cases, the trustee is holding the funds as bare trustee, solely with the power to invest the funds for the minor but not to use the funds for the minor's benefit.

2. ACCOUNTANT OF THE SUPERIOR COURT OF JUSTICE

Payment into Court (to the Accountant of the Superior Court of Justice)

The Accountant of the Superior Court of Justice manages funds on behalf of minors. The Accountant of the Superior Court of Justice accepts payments into court and manages the funds or holds other assets until the Accountant of the Superior Court of Justice is required to pay out the money, either pursuant to an order or statute or when the minor reaches the age of entitlement.

Benefits of Monies in Court

The benefits of payment of a minor's money to the Accountant of the Superior Court of Justice include:

- Funds will be invested prudently and earn interest. Currently, minors' funds deposited with the Accountant are invested in the Fixed Income Funds and, depending on several factors, a portion of the minor's funds may be subsequently invested in other funds to enhance income, minimize taxes or provide investment diversification.
- It eliminates the risk of payments being made from the minor's funds without legal authority. The funds cannot be paid out of court unless approved by a judge, or the minor reaches the age of entitlement.
- There is no need for a court application to appoint a guardian of property and the associated legal costs.
- There is no annual expense of posting a bond and no expense of getting an order to have the bond released at the end of the guardianship. Further information about the bond requirement is below.
- There is no need to keep guardianship accounts and all the supporting bank and investment statements, bills, receipts etc., and it avoids the costs associated with a court application to pass accounts.

- There is no need to decide what are prudent investments, and it eliminates the potential liability on the part of a person appointed as guardian of property (for example, liability associated with the failure to properly invest or manage the money).
- It reduces family conflict over the control and management of the minor's money.
- If any funds are required for the direct benefit of the minor before the age of 18 years, the minor's parent or caregiver may apply through the Office of the Children's Lawyer's Minors' Funds Program for payment out of court for the direct benefit of the minor when the parent cannot afford the expense. This Program also provides for a certain flexibility as a minor's needs and expenses and a parent's circumstances may change over time.

In many cases the option of payment into court has benefits over a guardianship. These benefits are a factor that the Children's Lawyer considers in assessing a guardianship application. A guardianship application may not be in that minor's interest, particularly when the minor's property is of modest value and the applicant seeks an order that the guardianship funds be used to pay for expenses like the legal costs of the guardianship application, the ongoing cost of the bond or accounting-related expenses. If the minor will soon reach the age of 18 years, a guardianship application may also not be in that minor's interest.

Fees charged by the Accountant

No fee is charged on the payment of money into court for a minor.

A fee of 3% is charged on investment income credited to the minor's account and on all payments out of court (but the fee charged on a withdrawal will never be more than the amount earned in the month of the withdrawal, so on the final payment out to the entitled individual the fee will, at most, amount to the final month's interest).

In addition, a care and management fee of 0.60% per annum on the average annual value of the funds under management is charged.

More information about the fees charged by the Accountant of the Superior Court of Justice is available here: Paying money into, and out of, court | ontario.ca.

When considering a guardianship of property application, a parent should also consider that there are usually fees/costs associated with investments that they may be considering, and the Children's Lawyer will ask about those fees/costs.

Minors' Funds Program

When a minor has money paid into court and the minor's parent cannot afford an expense that is necessary for the direct benefit of the minor, the parent may submit a request for funds to the Minors' Funds Program. This Program is also available to non-parents who are primarily caring for a minor. The Office of the Children's Lawyer does not currently charge a fee for processing a request.

A lawyer with the Office of the Children's Lawyer appears before a judge approximately every 4 to 6 weeks to put forth requests for payments out of court. The judge decides whether or not to grant each request for money from a minor's court account.

Information about how to make a request for payment out of court can be found here: Minors' Funds Program | ontario.ca.

The forms to use to make a request for payment out of court are located here: http://ontariocourtforms.on.ca/en/office-of-the-childrens-lawyer-forms/.

The forms, as well as the supporting documents, should be sent by one of the following means to the attention of Minors' Funds Inquiries:

Email: MinorsFunds@ontario.ca
Fax: (416) 314-8056
Mail: 393 University Ave, 14th Floor, Toronto, ON M5G 1E6

3. APPLYING TO BE APPOINTED AS GUARDIAN OF PROPERTY

Who can apply to be Guardian of Property?

A parent, or any other person or a trust company, may apply to be appointed as guardian of a minor's property. Subject to court order or agreement between the parties, parents of a minor child are equally entitled to be appointed as guardians. Parents are preferred over non-parents. If a non-parent is appointed, the court has no discretion to waive the requirement to post a bond. Trust companies do not have to post a bond as they carry their own indemnification.

More than one guardian may be appointed. Multiple guardians are jointly responsible (s. 48 *CLRA*). Where the amount of money is substantial, the court may require a trust company to act as guardian.

What factors does the court consider in appointing a guardian?

The court considers all the circumstances of the minor, the quantum and source of the minor's property, and the requirements set out in s. 47 to s. 59 of the *CLRA.*

Ability to Manage Property

To address the applicant's ability to manage the property, the applicant provides affidavit evidence about the applicant's education and experience, particularly those that relate to management of property and acting as a fiduciary, such as experience keeping accounts. The abilities required will vary depending on the value and nature of the minor's property to be managed (s. 47 *CLRA*). To address suitability to be a guardian of property, applicants provide evidence about whether they have been found guilty of any offence relating to financial mismanagement under the *Criminal Code,* or whether they are an undischarged bankrupt or have ever made an assignment into bankruptcy, or whether they have ever been held liable in a civil proceeding relating to fraud, breach of trust or any other type of financial mismanagement.

Merits of the Management Plan

The Management Plan must clearly and specifically identify the nature and value (dollar amount) of the property the applicant seeks court authority to manage, and the particulars of how the applicant will manage the property.

The Management Plan, once approved by a judge, sets out the parameters of the guardian of property's authority to manage the guardianship property.

The applicant must provide evidence to establish the nature and the monetary value of the minor's property. This information must be available before the guardianship application is commenced, as neither the Office of the Children's Lawyer nor the court can assess the merits of a plan without evidence of the value and nature of the property the guardianship will cover.

The applicant must also provide a Management Plan with details about the following:

- the proposed investment (including a breakdown as among cash, equities and fixed income, and particulars of any loads, commission etc. to be paid on the investments);
- the risks involved with the proposed investments; and
- the anticipated rate of return from the proposed investments.

The general Management Plan form for *CLRA* guardianship applications can be found here: Form 1 Management Plan Schedule A to judgment 2021 (ontariocourtforms.on.ca). There is a different specialized Management Plan form for applicants seeking to be appointed as the guardian of a minor's personal injury settlement proceeds or an award at trial, found here: Form 2 Management Plan Schedule A to judgement 2021 (ontariocourtforms.on.ca).

If a proposed guardian wants the authority to spend any of the minor's funds, the affidavit should provide evidence in support of the need to encroach on the minor's funds and the applicant must put forward a Management Plan that sets out what items (and the cost for those items) will be paid from the minor's funds. In determining whether to approve a plan to spend any of the minor's funds, the court will consider that a parent has an obligation to support a minor child (s. 31 of the *Family Law Act*). This obligation means that if a parent wants to use a minor's property for that minor's support, the parent will need to demonstrate that the parent's circumstances justify doing this instead of the parent providing the support for their minor child. A minor child does not have an obligation to support themself.

Child's Views and Preferences

The Children's Lawyer represents the minor for the purpose of the guardianship application. Depending on the minor's age and the circumstances of the guardianship, including any requests to encroach on the minor's property, counsel for the Children's Lawyer may take steps to ascertain the minor's views and preferences, pursuant to s.49(c) of the *CLRA.*

Is a guardian required to post a bond?

The bond is mandatory unless the applicant is a parent or a trust company with its own indemnification, in which case the court may dispense with a bond (s. 55 *CLRA*). A bond is a guarantee that the minor will be paid their money by a third party if the guardian of property does not meet their obligations. The third party, usually an insurance company, charges a fee to provide this type of guarantee.

Even if the applicant is a parent, the parent will be required to post a bond unless a judge agrees that it would not be appropriate to do so. If a parent wishes to request that a bond not be required, then the affidavit should provide evidence in support of a request for an order dispensing with the bond, such as the parent's employment history, assets and debts, and other evidence addressing the appropriateness of such an order. This generally includes evidence of the following:

- the parent applicant has not been found guilty of any offence relating to financial mismanagement under the *Criminal Code*;
- the parent applicant is not an undischarged bankrupt nor has the parent applicant ever made an assignment into bankruptcy; and
- the parent applicant has not been held liable in a civil proceeding relating to fraud, breach of trust or any other type of financial mismanagement.

Usually the court will not dispense with a bond where the applicant parent does not have assets in excess of the amount of the minor's funds.

If the applicant is not the minor's parent, the court cannot grant an order dispensing with the bond.

If the applicant is a trust company, a bond via a third party is not required, as it already has its own indemnification.

Who is served with a Guardianship of Property Application?

The applicant must serve the following people with the guardianship application:

- the Children's Lawyer, on behalf of the minor respondent (s. 47 *CLRA*);
- the minor's parent(s) (if they are not the applicants);
- any person who has demonstrated a settled intention to treat the minor as a child of that person's family;
- a person who had the actual care and upbringing of the minor immediately before the application; and
- any other person whose presence as a party is necessary to determine the matters in issue (s. 62(3) *CLRA*).

4. THE RESPONSIBILITIES OF A GUARDIAN OF PROPERTY

Duties of a Guardian of Property

A guardian of property is responsible for the care and management of the minor's property (s. 47(2) *CLRA*).

The guardian must act in accordance with the Management Plan approved by the court. A guardian's obligations include (but are not limited to) the following:

- keeping careful records (called "accounts") of all dealings (investments, receipts and disbursements) with the minor's money or property;
- holding the minor's property separately to ensure that the minor's property is not mixed or combined with the guardian's personal accounts or other property;
- investing the minor's money as required by the Management Plan approved by the court;
- not encroaching (spending) the guardianship funds unless explicit authority to do so is set out in the Management Plan approved by the court in the guardianship order; and
- transferring all the property to the person when they attain age 18 (s. 53 *CLRA*). If the minor has a legal obligation to support another person, the court will terminate the guardianship before the minor is 18 on the minor's application (s. 56 *CLRA*). The court has no jurisdiction to extend a guardianship beyond the person's 18th birthday.

All *CLRA* guardianships terminate upon the minor reaching the age of majority.

Expenditures by a Guardian

A guardian of minor's property may only expend the guardianship funds if authorized under the Management Plan, and only for those purposes stated under the Management Plan. Unless specifically authorized by the Management Plan, the guardian cannot use the minor's money to pay a lawyer for legal fees relating to the guardianship application.

Unlike a guardian of property appointed for an adult incapable person under the *Substitute Decisions Act*, a guardian of property appointed under the *CLRA* cannot make gifts, loans, donations or commence legal proceedings.

Changing the Management Plan

Sometimes a minor's or parent's circumstances change with the result that the guardian would like to invest or use the guardianship funds in a manner that is not authorized in the Management Plan approved by the court. If that is the case, the Management Plan must be amended.

Only the court has the power to approve amendments to a Management Plan under the *CLRA*. A guardian of a minor's property must bring a motion to the court to amend the Management Plan. This motion is made on notice to the Children's Lawyer.

Maintaining and Passing Accounts

A guardian of property has a legal obligation to keep complete and accurate accounts of the guardianship assets. This means that they must keep careful records of all expenditures and other dealings with the minor's money or property, and this includes the records showing how the money is invested.

A guardian of property should keep copies of all investment and bank statements. If the Management Plan authorizes the funds to be used for any purpose, the guardian of property should keep a copy of any invoices, bills and cancelled cheques showing how the funds were expended in accordance with the terms of the Management Plan.

The *Rules of Civil Procedure* set out the format required for guardian of property accounts, at rules 74.16 and 74.17.

An Application to Pass Accounts is a formal court proceeding through which a guardian obtains the court's approval of the accounts, after having given the Children's Lawyer notice of the application on behalf of the minor.

Terminating a Guardianship

If a guardian of property is no longer able or willing to manage a minor's money, they may bring a motion to terminate the guardianship. Such a motion must be brought on notice to the Children's Lawyer and the minor's funds will either need to be paid to the Accountant of the Superior Court of Justice or to a succeeding guardian of property appointed by the court. There may also be a need for the guardian of property to pass their accounts for the period up until their removal as guardian of property.

When a guardian of property has misappropriated or misused the minor's property, or refuses to account, the Children's Lawyer may bring an application or motion to have the guardian of property removed and for the minor's monies to be paid to the Accountant of the Superior Court of Justice.

OFFICE OF THE CHILDREN'S LAWYER
GUARDIANSHIP OF PROPERTY JUDGMENT (SAMPLE TERMS)*

Judgment	Issue	Sample Clause
1. Standard	Appointment of the Children's Lawyer as litigation guardian	**THIS COURT ORDERS** that the Children's Lawyer is hereby appointed litigation guardian for the minor C [insert name of minor child], born ●, for the purposes of this application.
	Appointment of the guardians of property	**THIS COURT ORDERS** that A and B [insert name(s) of proposed guardian(s) of property] are hereby appointed guardians of the property of C and that the property for the purposes of the Guardianship is: [State particular property, for example the XYZ insurance proceeds. Include particulars: financial institution, policy/account number, value of property etc.]
	Investment of property under the Guardianship	**THIS COURT ORDERS** that A and B shall invest the property of C in accordance with the management plan attached hereto as Schedule "A" and, generally, in accordance with the provisions of the *Trustee Act*, R.S.O. 1990, c. T.23, as amended.
	Evidence of Receipt and Investment of the Property	**THIS COURT ORDERS** that within 30 days of the date of this Judgment, the guardians of property will provide the Children's Lawyer with documentation evidencing the receipt and investment of C's property in accordance with the management plan attached hereto as Schedule "A".

Judgment	Issue	Sample Clause
	Accounts	**THIS COURT ORDERS** that the guardians of property shall keep accounts and pass their accounts for the period ending [insert time] from the date of this Judgment within six months of that date, and thereafter provide draft accounts if required by the Children's Lawyer and pass their accounts as required by the Children's Lawyer or the Court. **OR** **THIS COURT ORDERS** that the guardians of property shall keep accounts and provide draft accounts to the Children's Lawyer for the period ending [insert time] from the date of this Judgment within six months of that date and pass their accounts if required by the Children's Lawyer or the Court, and thereafter provide draft accounts if required by the Children's Lawyer and pass their accounts as required by the Children's Lawyer or the Court.
	Posting of bond/security	**THIS COURT ORDERS** that the posting of a bond or security by the applicant parents is hereby dispensed with. **OR** **THIS COURT ORDERS** that this Judgment is to take effect upon the filing with the Court a bond payable to the minor C in the amount of $[insert amount] and in the event that such bond is not filed within ● days of the date of this Judgment, this Judgment is of no force and effect.

Judgment	Issue	Sample Clause
		THIS COURT ORDERS that the costs of the bond payable to the minor C, in the amount of $[insert amount], will be paid from the property of the minor C.
	Compensation	**THIS COURT ORDERS** that A and B, guardians of property, shall not receive any compensation.
	Income tax returns	**THIS COURT ORDERS** that the guardians of property shall file annual tax returns for C for any income earned on the property of C under the Guardianship and any other sources, and that the income taxes payable by C shall be paid from the funds held by the guardians of property under the Guardianship.
	Further direction from Court	**THIS COURT ORDERS** that the guardians of property and the Children's Lawyer be permitted to seek further direction and advice from the Court regarding any aspect of the Guardianship from time to time.
	Transfer of property to child	**THIS COURT ORDERS** that the guardians of property shall transfer to the child, C, all property of C in the care of the guardians of property once C attains the age of eighteen years.
	Costs	**THIS COURT ORDERS** that costs shall be fixed as follows:

Judgment	Issue	Sample Clause
		(a) The applicant[s] will personally pay the Children's Lawyer's costs in the amount of $●, plus H.S.T. in the amount of $●; and (b) No costs are payable to the applicant[s]. **OR** **THIS COURT ORDERS** that costs shall be fixed as follows: (a) costs of the applicant[s] in the amount of $●, plus H.S.T. in the amount of $●; and (b) costs of the Children's Lawyer in the amount of $●, plus H.S.T. in the amount of $●. Such costs to be paid from or allowed for as against the proceeds of [insert financial institution] [insert investment type], account number [insert account number]. **OR** **THIS COURT ORDERS** that costs shall be fixed as follows:

Judgment	Issue	Sample Clause
		(a) costs of the applicant[s] in the amount of $●, plus H.S.T. in the amount of $●; and (b) costs of the Children's Lawyer in the amount of $●, plus H.S.T. in the amount of $●. Such costs to be paid from the funds held by the Accountant of the Superior Court of Justice to the credit of C. **OR** **THIS COURT ORDERS** that no costs are payable.
2. Annuity	Purchase of annuity	**THIS COURT ORDERS** that A is hereby authorized to purchase and will purchase an eligible tax-deferred annuity on behalf of C with the proceeds and accrued interest, less statutory withholding, if any, from [insert financial institution] [insert investment type], account number [insert account number], valued at $[insert amount] on [insert date] of which account C is entitled to a [insert amount] percent interest.
	Execution of documents	**THIS COURT ORDERS** that A is hereby authorized to execute any application form and documentation of any nature which may be required by the issuer of the annuity policy in order to effect the purchase of the annuity for C.
	Financial institution to act on instructions	**THIS COURT ORDERS** that [insert financial institution] shall act on the instructions of the applicant, A, with respect to the transfer of [insert financial institution]

Judgment	Issue	Sample Clause
		[insert investment type], account number [insert account] to an eligible tax-deferred annuity on behalf of C.
	Annuity terms	**THIS COURT ORDERS** that the eligible tax-deferred annuity purchased by A on behalf of C pursuant to paragraph ● shall include the following terms: a) the Accountant of the Superior Court of Justice [or the guardian of property] is the owner of the annuity in trust for C as the annuitant; b) the beneficiary of the annuity is the estate of C; c) the annuity term will expire on or before C's eighteenth* birth date on [insert date] at which time the principal and any interest accumulated shall be paid out to C; and d) the annuity instalments will be paid to the Accountant of the Superior Court of Justice [or to the guardian of property] to the credit of C until C attains the age of eighteen years, after which C is entitled to receive the funds directly. * In certain circumstances, based on accounting advice, it may be necessary to extend the term of the annuity beyond the child's eighteenth birthday, ending some time before the child's nineteenth birthday.
	No signature required	**THIS COURT ORDERS** that any requirement for signature by C, on behalf of C, or by the Accountant of the Superior Court of Justice, in order to effect the purchase of the annuity is hereby dispensed with.

Judgment	Issue	Sample Clause
	Withholding tax refund-payment to the Accountant of the Superior Court of Justice	**THIS COURT ORDERS** that if there is any refund payable to C with respect to the tax returns filed on C's behalf and C is under 18 years of age, A will pay the refund to the Accountant of the Superior Court of Justice to C's credit within 30 days of receipt of the funds and provide the Office of the Children's Lawyer with documentation evidencing this payment, as well as a copy of the income tax return filed on A's behalf and notice of assessment (and re-assessment, if applicable). These funds are to be held in accordance with paragraph ● of this Judgment.
	No other disbursement of funds	**THIS COURT ORDERS** that A shall not disburse or authorize the transfer of any funds from the property of C described in paragraph ● other than to effect the purchase of the annuity for C and to make the payments directed by this Judgment.
	Authority limited to purchase of annuity	**THIS COURT ORDERS** that the authority of A to manage or deal with the property described in paragraph ● is limited to the terms provided by this Judgment
	Compensation	**THIS COURT ORDERS** that A shall not receive any compensation for carrying out his/her responsibilities pursuant to this Judgment.
	Evidence of annuity purchase	**THIS COURT ORDERS** that within 30 business days of the date of this Judgment, A shall provide documentation to the Children's Lawyer which evidences the purchase

Judgment	Issue	Sample Clause
		of the annuity described in paragraph ●, including a copy of the annuity statement and the annuity application forms.
	Transfer of funds to child	**THIS COURT ORDERS** that the funds held by the Accountant of the Superior Court of Justice for C pursuant to this Judgment will be paid to C with any interest once C attains the age of eighteen years on [insert date].
	Income tax returns	**THIS COURT ORDERS** that A shall file annual tax returns for C for any income earned on the property of C held by the Accountant of the Superior Court of Justice and any other sources. Reasonable accounting fees for the preparation of C's income tax returns and the income taxes payable by C shall be paid from the funds held by the Accountant of the Superior Court of Justice to the credit of C following receipt by the Office of the Children's Lawyer of documentation evidencing the amount of the accounting fees and the income taxes payable by C.

***THESE SAMPLE TERMS ARE NOT INTENDED TO BE USED IN GUARDIANSHIP OF PROPERTY APPLICATIONS TO MANAGE A MINOR'S PERSONAL INJURY SETTLEMENT. PLEASE CONTACT THE OFFICE OF THE CHILDREN'S LAWYER FOR SAMPLE TERMS FOR PERSONAL INJURY SETTLEMENTS.**

The Management Plan for the estates context can be found here: Form 1 Management Plan Schedule A to judgement 2021 (ontariocourtforms.on.ca) .

Office of the Children's Lawyer Resources:

Management Plan

Form 1 - Management Plan – Schedule "A" to Judgement (CLRA – estate context)

Form 1 Management Plan Schedule A to judgement 2021 (ontariocourtforms.on.ca)

Form 2 - Management Plan - Schedule "A" to Judgment (CLRA – personal injury context)

Form 2 Management Plan Schedule A to judgement 2021 (ontariocourtforms.on.ca)

Minors' Funds Information Sheet

minors_funds_information_sheet_2020.pdf (ontariocourtforms.on.ca)

Law Society of Ontario | Barreau de l'Ontario

TAB 7B

26th Estates and Trusts Summit – DAY ONE

When and How to Work With the Office of the Public Guardian and Trustee (OPGT)

Sidney Peters
Public Guardian & Trustee

October 18, 2023

cpd

LSO Estates and Trusts Summit: When and How to Work With the Office of the Public Guardian and Trustee (OPGT)[1]

General Information about the OPGT

The OPGT is part of the Victims and Vulnerable Persons Division of the Ministry of the Attorney General (MAG). The Public Guardian and Trustee's (PGT's) authority – and scope of that authority – is set out in the *Public Guardian and Trustee Act.*[2]

Most estate and trust lawyers will be familiar with the PGT in the context of her roles under the *Substitute Decisions Act, 1992*,[3] but she is often also engaged in estate proceedings in a variety of other capacities. Some of the other estate and trust related functions performed by the OPGT can be described as follows:

1. **Regarding Incapable Adult Beneficiaries**: As a Guardian of Property and/or Litigation Guardian, the PGT protects the interests of adults who are mentally incapable with respect to the issues in the estate administration or litigation;
2. **Regarding Charities**: The PGT protects the public's interest in charitable property; and
3. **Regarding Certain Estates**: The OPGT administers estates of persons who have died in Ontario intestate and without next of kin.

Each of the above roles will be considered in more detail in this paper, with particular focus on the first one: when and how to work with the OPGT in estate litigation when an incapable adult beneficiary has no one else to act on their behalf.

You can learn more about each of the above functions, as well as the many other roles of the OPGT, by visiting the OPGT's web pages within the website maintained by MAG:

https://www.ontario.ca/page/office-public-guardian-and-trustee

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[1] With thanks to Heather Hogan, Counsel OPGT, who wrote this piece for the 26th Annual Law Society of Ontario's Estates and Trusts Summit presented by Sidney Peters, Public Guardian and Trustee on October 18, 2023.

[2] *Public Guardian and Trustee Act*, RSO 1990, c P.51 (the PGT Act).

[3] *Substitute Decisions Act, 1992*, SO 1992, c 30 (the SDA).

1. Incapable Adult Beneficiaries

You and/or your clients, as Estate Trustees or Trustees, may need to engage the PGT if a person with an interest in the estate or trust lacks capacity within the meaning of the Rules of Civil Procedure[4] and has no one else who can act on their behalf. The chart below lists three common estate proceedings in which the PGT may have a role to play on behalf of incapable adult beneficiaries.

Proceeding	Commentary
Applications or Certificates of Appointment of Estate Trustee (CAET) involving adult beneficiaries who are under disability	Subrules 74.04(5) and 74.1.03(6) require service of Notice, and additional prescribed documents, on the PGT if: • the PGT is already authorized to act as guardian of property for an incapable person with an interest in the estate[5]; or • the incapable person has no guardian or attorney for property with the authority to act as litigation guardian.[6]
Applications to pass ***estate***[7] accounts involving adult beneficiaries who are under disability	If the PGT is already acting as guardian of property for an adult beneficiary who is under disability, the PGT can represent that adult without the necessity of a court order appointing the PGT as litigation guardian.[8] In the absence of a person authorized under subrule 7.03(2.1), the rules generally require a motion to appoint a litigation guardian for a respondent under disability. However, in applications to pass accounts, that requirement for a litigation guardian is permissive.[9] Unless the PGT is already authorized to act under subrule 7.03(2.1), the PGT's authority as litigation guardian to bind the incapable adult to a position in the

[4] Rules of Civil Procedure, RRO 1990, Reg 194 (the Rules).
[5] Rules 74.04(5)(a), and 74.04(6) / 74.1.03(6)(a), and 74.1.03(6.1).
[6] Rules 74.04(5)(c), and 74.04(6) / 74.1.03(6)(c), and 74.1.03(6.1).
[7] The process in passing Attorney or Guardianship accounts differs slightly. In those applications, there is no issue regarding the capacity of the subject of the accounts (the incapable adult who is under guardanship or attorneyship), and the attorney or guardian is clearly unable to review their own accounts as litigation guardian for the incapable adult. The PGT is therefore more likely to agree to act as litigation guardian without the necessity of a formal motion to appoint a litigation guardian in applications to pass guardianship and attorney accounts.
[8] Rule 7.08(2.1)(a).
[9] Rule 74.18(6).

Proceeding	Commentary
	proceeding is conferred by court order at the hearing of a motion by the applicant to appoint a litigation guardian. The PGT may agree to begin acting as litigation guardian for incapable adult beneficiaries in estate passings without the necessity of a formal motion if: - there is no other person without a conflict who can act as litigation guardian; - the applicant satisfies the PGT that the definition in subrule 1.03 of "party under disability" [10] is met; - the allegedly incapable adult was served with the application and would likely not oppose a motion or appeal an appointment order if the applicant moved to appoint a litigation guardian; and - the final Judgment includes a paragraph that appoints the PGT as litigation guardian.
Estate litigation, generally, involving adults under disability: • Will challenges • Directions • Dependant Support • Variation of Trust • Vacant Possession • Etc. …	As with any other civil proceeding, rule 7.03 governs the representation of parties under disability in estate proceedings. If your estate issue will be adjudicated in Family Court, see rules 4(2), 4(3) and 18(2) of the Family Law Rules.[11] Motions are generally necessary to appoint a litigation guardian in civil proceedings for a respondent/defendant[12] unless there is someone authorized to act as litigation guardian under rule 7.03 (2.1), in which case that person "shall" act[13] and "shall" file the necessary affidavit before acting.[14] If seeking the PGT's appointment as litigation guardian, the motion must be on notice to the PGT. Before advising of the PGT's position, OPGT counsel will need:

[10] Rules, *supra* note 4, rule 1.03: a "person" includes a party to a proceeding, and that "disability", where used in respect of a person, means that the person is,
(a) a minor,
(b) mentally incapable within the meaning of section 6 or 45 of the *Substitute Decisions Act, 1992* in respect of an issue in the proceeding, whether the person has a guardian or not, or
(c) an absentee within the meaning of the *Absentees Act.*
[11] Family Law Rules, O Reg 114/99.
[12] Rules, *supra* note 4, subrule 7.03(1).
[13] Rules, *supra* note 4, clauses 7.03(2.1)(a) and (b).
[14] Rules, *supra* note 4, subrule 7.03(2.2).

Proceeding	Commentary
	- the evidence of lack of capacity within the meaning of the rules, - the position, if any, of the allegedly incapable adult, and - an indication of what steps were taken to find any other appropriate litigation guardian given the PGT's role as a litigation guardian of last resort.

TIPS:

- To serve documents on, provide documents to, or leave documents with the PGT, email the documents to: PGT-Legal-Documents@ontario.ca.[15]

- Use your covering letter to cite the statute, rule, and/or or reason that you are serving the PGT, specifically. This is especially helpful when it is not readily apparent on the face of the material why the PGT has been served. Your guidance in a covering letter helps our frontline staff ensure that your matter is quickly assigned to the appropriate practice area.

- If you or your client are not sure whether the PGT is already authorized to act under rule 7.03 (2.1) for a beneficiary, or whether any other person is authorized as a guardian of property, contact the Toronto Regional Office and follow the prompts to be connected to the Intake department. They can share with you the publicly-available information in the OPGT's Register which includes whether the PGT or anyone else is acting as guardian of property or the person.[16] The best way to obtain current contact information for our Toronto Regional Office is to visit us online: https://www.ontario.ca/page/office-public-guardian-and-trustee

- The definition of "disability" within the meaning of the rules is similar to, but not the same as, the definition of lack of capacity to manage property or personal care in the SDA.[17] If you think that an adult respondent might be under disability, consider exploring this definition further with your client. What is the nature and extent of the alleged disability? What leads your client to believe that the adult in question would be unable to appreciate or understand the issues in the proceeding?

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[15] Rule 16.03 (9), and see the "contact" section at the bottom of MAG's website for the OPGT: https://www.ontario.ca/page/office-public-guardian-and-trustee

[16] SDA, *supra* note 3, O Reg 99/96.

[17] In other words, an adult is incapable **[with respect to the issues in the proceeding]** if they are not able to understand information that is relevant to making a decision **[about the issues in the proceeding]**, or are not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision **[about the issues in the proceeding]**.

- The SDA provides that the PGT is a statutory party to certain proceedings brought under the SDA.[18] It is appropriate to name the PGT as respondent in those proceedings. However, in any other proceeding, if your goal is to propose the PGT as a potential court-appointed litigation guardian, you need not name the PGT as a respondent. Simply serve the PGT with notice. If the PGT is subsequently appointed, the title of proceeding will be amended in the appointment order.

- Some of your clients and their family members may not appreciate the difference in the scope of authority conferred on a court-appointed litigation guardian versus a guardian of property who is authorized by rule 7.08 (2.1) to act as a litigation guardian. The latter has all the powers and duties under the SDA and the powers and duties of a litigation guardian under rule 7.05, while the former has only the power and duties of a litigation guardian under rule 7.05. Similarly, some clients may not understand the different outcomes achieved by:
    a) moving to appoint the PGT as litigation guardian under the Rules,
    b) reporting their concerns to the OPGT's Guardianship Investigation Unit for the purpose of section 27 of the SDA, or
    c) arranging for a capacity assessment under section 16 of the SDA.

  Those above three approaches will yield three distinct outcomes. Consider clarifying those distinctions, and your client's expectations, before obtaining instructions. The OPGT's website and brochures can help: https://www.ontario.ca/page/office-public-guardian-and-trustee

- The PGT has no authority to bind an adult respondent to a position or a settlement unless the PGT is either already authorized to act on their behalf under rule 7.03 (2.1) or is appointed by court order as a litigation guardian. We cannot consent to settlements in proceedings in which we have no authority to bind an adult respondent. We encourage litigants to be mindful of capacity as a threshold issue pursuant to Rule 7.01(1) and to address that issue proactively and as early as possible in the proceeding.

[18] SDA, *supra* note 3, s. 69(8).

2. Charities

The PGT protects the public's interest in charitable property and must be served in certain proceedings relating to estates.

Section 49(8) *Estates Act*[19] provides that an applicant commencing an application to pass accounts must serve the PGT if the will or trust:

- includes a bequest to a named charity – remember to serve the charity, too;
- includes a bequest for charitable purposes; or
- grants power to the Estate Trustee or Trustee to name or select the charities to receive charitable bequests.

Section 5(4) of the *Charities Accounting Act*[20] requires applicants to serve notice on the PGT of any proceeding to set aside, vary or construe a will or other document that establishes a charitable gift or trust. The PGT is entitled by that statute to participate in the proceeding if the PGT determines her participation is necessary.

Upon receipt of service of either of the above proceedings, counsel in the OPGT's Charitable Property Program will review the material and let you know whether the PGT intends to participate.

You can learn more about the PGT's role in respect of charitable property and find current contact infromation for the Charitable Property Program by visiting the relevant page on MAG's website: https://www.ontario.ca/page/charities-ontario or by clicking on the Charities section of the OPGT's webpage.

3. Certain Estates

The PGT may protect the interests of potential heirs when an Ontario resident dies leaving an estate and there is no one who can administer it. The PGT may administer certain estates of Ontarians if:

1. the deceased was an Ontario resident **or** owned real estate here; and

[19] *Estates Act*, RSO 1990, c E.21, s. 49(8).
[20] *Charities Accounting Act*, RSO 1990, c C.10, s. 5(4).

2. the deceased did not make a Will **or** the deceased did make a Will but the executor has since died or become incapable; and
3. there are no known next of kin living in Ontario **or** the next of kin are minors or mentally incapable adults; and
4. the estate is valued at a minimum of $10,000.00 after payment of the funeral and all debts owing by the estate.

The PGT may be granted a CAET but shall not be appointed as an estate trustee or trustee, by a court or otherwise, without his or her consent in writing.[21] The necessity of the PGT's consent is discussed in *Potrzebowski v Potrzebowski*, 2016 ONSC 6981 (CanLII).

The PGT may, but need not, exercise powers of an executor in certain circumstances if the PGT was guardian of property of an incapable person immediately before that person's death.[22]

The best way to find current contact information for the OPGT's Estates Unit, and other resources pertaining to estates and the PGT's role in estate administration, is to visit the "Administering Estates" section of MAG's website: https://www.ontario.ca/page/administering-estates or click on the "Administering Estates" section of the OPGT's webpage: https://www.ontario.ca/page/office-public-guardian-and-trustee.

Conclusion

The OPGT delivers a unique and diverse range of services that safeguard the legal, personal and financial interests of certain private individuals and estates. It also plays an important role in helping to protect charitable property in Ontario.

If you have questions relating to estate proceedings involving the OPGT in general, visit us online or contact the Toronto Regional Office at the number listed for that office on our webpage:

https://www.ontario.ca/page/office-public-guardian-and-trustee

[21] PGT Act, *supra* note 2, sections 7(1) and (1.1).
[22] SDA, *supra* note 3, s. 35.

Law Society of Ontario | Barreau de l'Ontario

TAB 8

26th Estates and Trusts Summit – DAY ONE

Attorney Battles: Invalidating Powers of Attorney and Attorney Removal

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October 18, 2023

cpd

26th Estates and Trusts Summit 2023

Attorney Battles:
Invalidating Powers of Attorney and Attorney Removal

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INTRODUCTION

In the sage words of Ben Parker: “With great power comes great responsibility.” Of course, this adage applies not only to web-slinging, but also to many other types of fiduciary relationships, including attorneyships. A person who holds power of attorney over another person has tremendous power, especially in situations where the grantor suffers from diminished capacity.[1] Giving an unscrupulous attorney free rein can have dire consequences.[2]

When attorneys misbehave, there are legal remedies available to grantors, beneficiaries, co-attorneys, and certain other interested persons. This paper covers case law surrounding two such remedies: (i) invalidating powers of attorney; and (ii) the removal of attorneys. It does not cover the vast array of other possible causes of action, *e.g.*, unjust enrichment, passings of accounts, civil or criminal fraud,[3] or guardianship.

This paper is organized into two parts. Part I deals with ways to invalidate a power of attorney. It examines the formal requirements of execution, the capacity required of the donor, and the doctrines of undue influence and suspicious circumstances. Part II deals with the removal of attorneys. It examines the statutory powers of removal as well as the court’s inherent jurisdiction. For both Part I and II, recent jurisprudence is reviewed.

PART I – Invalidating a power of attorney

1.1 – Types of powers of attorney

One accepted definition of a power of attorney is: “An instrument in writing whereby one person, as principal, appoints another as his agent and confers authority to perform certain specified acts or kinds of acts on behalf of the principal. An instrument authorizing another to act as one’s agent or attorney.”[4] However, not every agency relationship is a power of attorney.

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[1] See section 9(2) of the *Substitute Decisions Act, 1992*, S.O. 1992, c. 30 [“***SDA***”].

[2] Misuse of a power of attorney is a significant concern to the Ontario legislature. This is why part of the statutory test for capacity to grant a continuing power of attorney for property includes the grantor’s appreciation of the potential for misuse. See the *SDA*, *supra* note 1, s. 8(1)(g). This concern is illustrated by cases such as *Reviczky v. Meleknia* (2007), 88 OR (3d) 699, 2007 CanLII 56494 (ON SC) [“***Reviczky***”] where a fraudulent power of attorney instrument was used for identity theft and mortgage fraud, or cases such as *R. v. Hooyer*, 2016 ONCA 44 and *R. v. Kaziuk*, 2013 ONCA 217, where attorneys defrauded grantors of their assets, leaving them in challenging financial situations.

[3] Sections 331, 332(1), 334(a), and 380(1) of the *Criminal Code*, RSC 1985, c. C-46. have all been used in criminal proceedings to address severe cases of power of attorney misuse. While section 380(1) deals with fraud generally, sections 331, 332 and 334 address theft specifically by persons holding powers of attorney.

[4] *Black's Law Dictionary*, 6th ed., *sub verbo* "power of attorney"; *Leung Estate v. Leung* (2001), 38 ETR (2d) 226, 2001 CarswellOnt 1972 at para. 7.

In Ontario, there are at least two types of powers of attorney.[5] The first is a continuing power of attorney for property (variously shortened to "CPOA" or "POAP" or "POA for Property"), which is governed by sections 7 to 14 of the *Substitute Decisions Act, 1992* (the "*SDA"*). The second is a power of attorney for personal care (variously shortened to "POAPC" or "POAC" or "POA for Personal Care"), governed by sections 46 to 53 of the *SDA*.

The POA for Property may authorize the attorney to "do on the grantor's behalf anything in respect of property that the grantor could do if capable," except make a last will and testament.[6] The POA for Property becomes effective immediately upon execution, unless otherwise specified in the document,[7] and continues as valid even if the grantor becomes incapable of managing property.[8]

The POA for Personal Care may authorize an attorney to "make, on the grantor's behalf, decisions concerning the grantor's personal care."[9] This may include decisions surrounding health care, nutrition, shelter, clothing, hygiene, and safety. It may also empower the attorney to make decisions about treatment, personal assistance services, and admission to a care facility, pursuant to the provisions in the *Health Care Consent Act, 1996* (the "*HCCA*").[10]

1.2 – Invalidation by revocation, death, resignation, etc.

A POA for Property is terminated if the grantor revokes it, or if the designated attorney dies, becomes incapable, or resigns (unless there are multiple attorneys who are authorized, willing and able to act).[11] Termination also occurs if the court appoints a guardian of property under section 22 of the SDA,[12] if a new POA of Property is executed (unless the grantor specifies that multiple POAs of Property are permitted), or if the grantor dies.[13]

Comparable termination clauses for POAs for Personal Care are set out in section 53 of the *SDA*.

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[5] It is still possible to execute a general power of attorney under the old *Powers of Attorney Act*, R.S.O. 1990, c. P.20. These general powers of attorney are akin to continuing powers of attorney for property but expire upon the incapacity of the grantor. For more details, see Andrea McEwan, "General Power of Attorney – *Power of Attorney Act*" in WEL Partners, *WEL on Powers of Attorney* (Toronto: WEL Partners, 2016) 7 at 8.
[6] *SDA, supra* note 1, s. 7(2).
[7] Helen Burgess, "Continuing Power of Attorney for Property – *Substitute Decisions Act*" in WEL Partners, *WEL on Powers of Attorney* (Toronto: WEL Partners, 2016) 13 at 16.
[8] *SDA, supra* note 1, s. 9(1) and 9(2); the issue of capacity to manage property under section 6 of the *SDA*, or to grant a POA for Property under section 8 of the *SDA*, is dealt with in more detail below.
[9] *Ibid*, s. 46(1).
[10] S.O. 1996, c. 2, Sched. A. The decision-making authority of an attorney for personal care is referenced throughout the HCCA.
[11] *SDA, supra* note 1, s. 12(1)(a).
[12] *Ibid*, s. 12(1)(c).
[13] *Ibid*, s.12(1) (d), (e), (f).

1.3 – Invalidity due to lack of formalities of execution

Formal execution requirements are meant to prevent fraud.[14] The specific execution requirements for a POA for Property are set out at section 10 of the *SDA*. The execution requirements for revocation of a POA for Property are analogous.[15] Section 10 states:

> Execution
> 10 (1) A continuing power of attorney shall be executed in the presence of two witnesses, each of whom shall sign the power of attorney as witness. 1996, c. 2, s. 6 (1).
> Persons who shall not be witnesses
> (2) The following persons shall not be witnesses:
> i. The attorney or the attorney's spouse or partner.
> ii. The grantor's spouse or partner.
> iii. A child of the grantor or a person whom the grantor has demonstrated a settled intention to treat as his or her child.
> iv. A person whose property is under guardianship or who has a guardian of the person.
> v. A person who is less than eighteen years old. 1992, c. 30, s. 10 (2).

There are comparable formalities of execution for a POA for Personal Care.[16]

Failure to comply with these formalities of execution may lead to the invalidation of the POA. This type of invalidation is illustrated in *Kostiw Estate (Re)*[17] with respect to a POA for Property, and in *CC (Re)*[18] with respect to a POA for Personal Care.

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[14] *Reviczky*, *supra* note 2 at para. 64.
[15] *SDA*, *supra* note 1, s. 12(2).
[16] *Ibid*, s. 48.
[17] (2007) 33 ETR (3d) 198, 2007 CanLII 19423 (ON SC) at para. 5. This case involved an application to appoint the applicant as a co-estate trustee alongside the named estate trustee. Kay Kostiw ("**Ms. K**") died February 6, 2007, leaving a 2001 will that named her daughter, Kathleen Kodaric ("**Kathleen**"), as the estate trustee, and her granddaughter, June Kodaric ("**June**"), as the alternate. Kathleen predeceased Ms. K, making June the sole estate trustee. Michael Kodaric ("**Michael**"), Ms. K's son, applied to become a co-estate trustee and to prevent a certificate of appointment of estate trustee with a will from being issued solely to June. In D. Brown J.'s decision, His Honour considered Ms. K's testamentary intent to appoint June and not Michael. This intention was consistent with the fact that all valid POAs for Property created during Ms. K's lifetime appointed only June and Kathleen. Subsequent POAs for Property, possibly naming other attorneys, were found to be invalid by Lax J. due to non-compliance with section 10(2) of the *SDA*.
[18] 2019 CanLII 47094, (ON CCB). CC was a 77-year-old widow survived by immediate family. She was found incapable of consenting or refusing consent to admission to a long-term care facility. A previously made POA for Personal Care named HH as attorney. When HH attempted to make this decision as CC's attorney, Erie St. Clair's Local Health Integration Network considered the POA for Personal Care invalid due to HH's husband being a witness to CC's execution. HH applied to be appointed as CC's representative under the *HCCA.* On review, the Consent and Capacity Board confirmed the POA for Personal Care's invalidity due to breach of formal execution requirements but did authorize HH as CC's representative under the *HCCA*.

Notably, the formalities under the *SDA* only govern execution, not the style or form of the documents.[19] This was recently noted in *Vrantsidis v. Vrantsidis.*[20] In this case, Dietrich J. held that a single document which contained both a POA for Property and POA for Personal Care was valid, as: "There is nothing in the *SDA* to suggest that a power of attorney for property and a power of attorney for personal care must be separate and cannot be combined into one document."[21]

Finally, subsections 10(4) and 48(4) of the *SDA* grant substantial compliance powers to judges. In essence, powers of attorney that do not comply with the formalities of execution may be "saved" from invalidity as long the court is satisfied that it would be in the interests of the grantor.[22]

1.4 – Invalidity due to lack of capacity to grant, lack of knowledge and consent

A power of attorney is only valid if the grantor was legally capable of granting it at the time of execution.[23] Correspondingly, a power of attorney conferred by a legally incapable person, and everything done under it, is void *ab initio*, and not merely voidable.[24]

This sounds simple, but capacity is highly nuanced. There is no universal legal test for capacity.[25] Instead, the test for capacity depends upon the task in question.[26] Because capacity is task-specific, the capacities to grant or revoke a POA for Property, to manage property, to grant or revoke a POA for Personal Care, to manage personal care and make

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[19] See *Reviczky, supra* note 2 at para. 67. The only requirements as to content of a POA for Property are set out at subsection 7(1) of the *SDA*. A POA for Property must clearly state it is continuing and must express the intention that the attorney's authority remains effective on the grantor's incapacity to manage property.

[20] 2023 ONSC 321 ["***Vrantsidis***"]. This case involved the management of Alpida Vrantsidis's property and personal care. In 1995, Alpida executed a single document containing both a POA for Property and a POA for Personal Care (the "**1995 POAs**"). She appointed her husband as the attorney for both, with her children Bill, Mary, and John as alternates, requiring at least two of them to agree on decisions. Following her husband's passing, Alpida faced cognitive decline. While Mary and Bill believed she lacked decision-making capacity, John disagreed. John's skepticism led banks and medical professionals to reject the 1995 POAs, prompting Bill and Mary to seek a court declaration clarifying decision-making authority. Bill and Mary's application aimed to confirm all three children as co-attorneys, approve the "majority rules" clause for disagreements, and require John to account for $61,000 he received from Alpida, alleging he held it on a resulting trust for her. John sought an adjournment but was denied. Shortly before the hearing, he filed his own application to remove Bill and Mary as attorneys and to declare the 1995 POAs invalid, citing their single-document combination as the reason. Notably, John failed to present evidence supporting Bill and Mary's removal. Dietrich J. held that there was insufficient evidence to justify attorney removal, and validated the combined 1995 POAs, which is allowed under subsection 7(7.1) of the *SDA*.

[21] *Ibid* at para. 40.

[22] In the case of the POA for Property, the court may consider the best interests of the grantor or his or her dependants.

[23] Laura Cardiff, "Capacity to Give and Revoke Powers of Attorney" in WEL Partners, *WEL on Powers of Attorney* (Toronto: WEL Partners, 2016) 25.

[24] CED 4th (online), *Contracts* (Ont) "Parties to a Contract: Capacity to Contract: Natural Persons: Mentally Incompetent Persons (IV.B.1) at §38.

[25] *Starson v Swayze*, 2003 SCC 32 ["***Starson***"] at paras. 77 and 78.

[26] American Bar Association & American Psychological Association, *Assessment of Older Adults with Diminished Capacity: A Handbook for Psychologists* (ABA Commission on Law and Aging and APA, 2008) [ABA & APA, "A Handbook for Psychologists"] at 16.

healthcare decisions, are all different.[27] A grantor who lacks the capacity to manage property may well be capable of granting a POA for Property.[28] But that person's capacity may change over time as a result of fluctuating health. Thus, capacity is sometimes said to be "decision, time, and situation specific."[29]

The statutory test for the capacity to grant a POA for Property is found at section 8 of the *SDA*:

> 8 (1) A person is capable of giving a continuing power of attorney if he or she,
>
> a. knows what kind of property he or she has and its approximate value;
> b. is aware of obligations owed to his or her dependants;
> c. knows that the attorney will be able to do on the person's behalf anything in respect of property that the person could do if capable, except make a will, subject to the conditions and restrictions set out in the power of attorney;
> d. knows that the attorney must account for his or her dealings with the person's property;
> e. knows that he or she may, if capable, revoke the continuing power of attorney;
> f. appreciates that unless the attorney manages the property prudently its value may decline; and
> g. appreciates the possibility that the attorney could misuse the authority given to him or her. 1992, c. 30, s. 8 (1).

Crucially, the above factors must be "determined on a case-by-case basis depending on the past habits and practices of the individual."[30] For instance, a high-net-worth grantor with complex corporate holdings and a diverse stock portfolio, who has always relied on professional advisors, may not be aware of the specifics of their own property. In this case, a lack of knowledge as to subsection 8(1)(a) does not indicate a lack of capacity. Rather, it would indicate a designation of these responsibilities of asset management.[31]

Notably, the wording of section 8 of the *SDA* makes knowledge and consent into requirements for the capacity to grant a POA for Property. As such, a POA for Property can be invalidated by demonstrating a lack of knowledge and consent on the grantor's

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[27] Burgess, *supra* note 7 at 14-15. See section 6 of the *SDA* with respect to capacity to manage property. See section 45 of the *SDA* with respect to capacity for personal care. See section 47 of the *SDA* with respect to capacity to grant a POA for Personal Care. According to *Stewart v. Zawadzinski,* 2023 ONSC 387 ["***Stewart***"] the capacity to make or revoke a POA for Personal Care are the same, with necessary modifications. These modifications are, for instance, instead of the appreciation that unless an attorney manages property prudently, its value may decline, the grantor will need to appreciate the risk of being unable to prudently manage his or her own property. See *Re Grav,* 2007 BCSC 123 at para. 11. See also *Johnson v Huchkewich,* 2010 ONSC 6002 at para. 34 for the difference between testamentary capacity and various types of capacity to give a power of attorney.

[28] *Rudin-Brown et al. v. Brown,* 2021 ONSC 3366 ["***Rudin-Brown***"] at para. 133; see also *SDA, supra* note 1, s. 9(1).

[29] Burgess, *supra* note 7 at 14.

[30] *Abrams v. Abrams,* 2009 CarswellOnt 1580 (ON SC) at para. 52. See also *Rudin-Brown, supra* note 30 at paras. 134-135, which suggests that which section 8 factors are applicable is also case dependent.

[31] Cardiff, *supra* note 23 at 27.

part on the date of execution. This was the case in *Nguyen-Crawford* v *Nguyen*,[32] where Price J. held that a previously executed POA for Property was invalid. While the grantor possessed a general capacity to decide whether to delegate decisions about her property to an attorney, due to a language barrier, the grantor did not knowingly consent to that delegation when the POA for Property was executed.

The statutory test for the capacity to grant a POA for Personal Care is found at section 47 of the *SDA*. It is generally regarded as being a much less stringent test:

> 47 (1) A person is capable of giving a power of attorney for personal care if the person,
>
> a. has the ability to understand whether the proposed attorney has a genuine concern for the person's welfare; and
> b. appreciates that the person may need to have the proposed attorney make decisions for the person. 1992, c. 30, s. 47 (1).

1.5 – Proving incapacity to grant a power of attorney

At common law, there is a general presumption of legal capacity. All persons who are *sui juris* are deemed capable of making decisions until this presumption is rebutted by clear evidence.[33] This presumption is enshrined, in part, in section 2 of the *SDA*.

In the context of power of attorney litigation, any instrument may be invalidated if it can be established, on a balance of probabilities, that the grantor lacked the requisite capacity at the time of execution.

The evidence of incapacity may come from lay witnesses, solicitor's notes, medical records, or expert opinions. However, capacity is a legal conclusion; it cannot be determined solely via a medical analysis.[34] Capacity assessment reports by qualified professionals may be valuable to the court, but only insofar as the assessor analyzes the correct statutory considerations.[35]

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[32] 2010 ONSC 6836 ["***Nguyen-Crawford***"] at para. 95. *Nguyen-Crawford* involved a dispute amongst five siblings over the validity of a POA for Property and POA for Personal Care executed in 1998 by their mother, Ms. Nguyen. In 1998, the youngest sibling, Thuy, was designated as attorney under the disputed POA for Property and POA for Personal Care. Ms. Nguyen suffered a stroke in 2008, triggering Thuy's decision-making power. Four other siblings obtained new power of attorney documents in 2009, which were held to be invalid as she had already lost capacity at that point. Price J. found that while the grantor had the general capacity to make decisions regarding the delegation of power, the fact that she spoke no English, and used a solicitor who did not speak Ms. Nguyen's native Vietnamese, meant that she lacked the requisite knowledge for capacity.

[33] *Starson, supra* note 25 at para 77.

[34] *Birtzu v McCron*, 2017 ONSC 1420; *Starson, supra* note 25 at para. 77.

[35] See *Halar v. Bacic,* 2019 ONSC 5887 at para. 15.

One illustrative decision is *Lewis v. Lewis*.[36] In that case, the Ontario Court of Appeal dismissed an appeal and upheld the application judge's ruling regarding the capacity to grant a POA for Property and a POA for Personal Care. The panel held that the application judge had correctly presumed capacity at first instance. The application judge was also correct in stating that various chronic medical conditions did not prove incapacity to grant powers of attorney. The application judge went on to give more weight to the evidence of the grantor's longstanding solicitor and "basically no weight" to a letter from her family physician.

1.6 – The doctrine of undue influence

Even if a grantor had sufficient capacity to grant a power of attorney, the instrument may still be set aside if the grantor was unduly influenced into signing.[37] According to the doctrine of undue influence, the party seeking to prove undue influence must show that more than simple persuasion was brought to bear – more than imploring, pleading, cajoling, nagging, badgering, and bothering. The influence must rise to the level of coercion.[38] However, this analysis is also contextual. Where a grantor suffered from an "unsoundness of mind or a weakened mental state," he or she may have been more vulnerable than an otherwise healthy adult, so less influence would be required to constitute coercion.[39]

Proving undue influence can be notoriously difficult.[40] This is because undue influence almost always occurs behind closed doors.[41] It is only in rare cases that the court has audio recordings demonstrating undue influence in power of attorney litigation.[42]

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[36] 2019 ONCA 690. This was an appeal of the earlier application judge's decision regarding an estate dispute between the children of the late Marie Lewis ("**Ms. L**") regarding Ms. L's estate. The issue to be determined before the application judge was whether Ms. L had the requisite capacity to execute an April 16, 2013, POA for Property and POA for Personal Care. In this case, the application judge held that the appellants did not meet the onus of either establishing incapacity or to shift the onus by establishing suspicious circumstances. The application judge preferred evidence of capacity, such as the fact that the POA for Property and POA for Personal Care were drafted by Ms. L's longtime solicitor, and gave evidence of incapacity, being a letter from Ms. L's family physician, "basically no weight".

[37] See for instance *Rudin-Brown, supra* note 28 at para. 153.

[38] *Rudin-Brown, supra* note 28 at para. 153, citing *Scott v Cousins,* [2001] O.J. No 19, 37 ETR (2d) 113 (ON SCJ) at para. 112. See also the *fons et origo* case of *Wingrove v. Wingrove* (1885), 11 P.D. 81, at para. 82, which states: "to be undue influence in the eye of the law there must be – to sum it up in a word – coercion".

[39] *Stewart, supra note* 27 at para. 47.

[40] Justin w. de Vries and Gillian Fournie, *The Herculean Task of Proving Undue Influence* (November 2012), online: <https://devrieslitigation.com/legal-resources/legal-papers/herculean-task-proving-undue-influence/>.

[41] *Kozak Estate (Re),* 2018 ABQB 185 ["**K*ozak***"] at para. 14.

[42] *Rudin-Brown, supra* note 28. In this case, Ms. Carolyn Brown ("**Ms. B**"), a 91-year-old residing in her Ottawa home for 60 years with her son Gordon Brown ("**Gordon**"), faced issues with memory and confusion, especially noticeable around 2012. In September 2016, Ms. B signed a new POA for Property and POA for Personal Care, appointing Gordon as the sole attorney (the "**2016 POAs**"). This replaced previous power of attorneys naming her daughter Jeanne as the sole attorney and, earlier, naming her granddaughter Missy and Jeanne as co-attorneys. Missy and Jeanne jointly filed an application to invalidate the 2016 POAs and remove Gordon as attorney. Gordon filed a competing application to validate the 2016 POAs. Both Gordon and Missy submitted secret recordings of each other's conversations with Ms. B as evidence. These were admitted despite the court's reservations about admitting surreptitious recordings generally. In her decision, H.J. Williams J. concluded that the 2016 POAs were invalid due to undue influence. Her reasoning

Therefore, most challengers will rely upon circumstantial evidence, which is admissible to establish undue influence in power of attorney litigation.[43] In *Tate v. Gueguegirre*, the Ontario Divisional Court provided a list of 14 types of circumstantial evidence in the will challenge context, most of which would also apply in power of attorney litigation.[44] For instance, in *Simpson v. Mehta*, it was argued that: (i) the isolation of the grantor; (ii) the fact that the attorney made the arrangements for the grantor to meet with the lawyers; and (iii) the fact that the attorney remained with the grantor during the signing of the powers of attorney, were all indicative of undue influence.[45]

Thankfully for challengers, there may sometimes be a presumption of undue influence. In cases where the relationship between grantor and attorney is one in which there is a strong potential for domination by the attorney, the Courts will shift the burden to the attorney to prove the validity of the power of attorney. This shift occurred in *Brown* v. *Rudin-Brown*, where the Court held:

> [156] I find that the relationship between Carolyn and Gordon at the time the powers of attorney were signed in September 2016 triggers the presumption of undue influence. Carolyn was 86 years old at the time and, more significantly, was suffering from memory lapses and confusion. Family members thought Carolyn should consider moving to an assisted living situation before her condition worsened. By September of 2016, Gordon had been living with Carolyn for 12 to 14 years. Carolyn wanted to stay in her own home, and she needed Gordon in order to stay there. Carolyn had accepted Gordon's narrative that she should no longer trust Missy, Dr. Salamon or Jeanne. There was evidence from Carolyn Mossman that Gordon was verbally abusive toward Carolyn. In 2008, Carolyn had called the police after they had a fight. On July 4, 2016, Missy had accused Gordon of treating Carolyn like a slave. I find that Carolyn was highly dependent on Gordon at this time and that theirs was a relationship with the potential for domination.
>
> [157] To rebut the presumption of undue influence, Gordon must show that Carolyn gave Gordon her powers of attorney as a result of her own

included: 1. Gordon failed to prove Ms. B's capacity to execute the 2016 POAs based on medical evidence from Dr. Shulman. 2. A presumption of undue influence arose due to the potential for domination between Gordon and Ms. B as an adult child and an elderly mother incapable of making decisions. Gordon did not sufficiently demonstrate that Ms. B executed the 2016 POAs of her own free will. 3. The 2016 POAs were directly invalidated due to the presence of undue influence.

[43] *Kozak, supra* note 41 at para. 14, citing *Banton v. Banton* (1998), 164 DLR (4th) 176, 1998 CarswellOnt 3423 (ON SC) at para. 61.

[44] Cardiff, *supra* note 23 at 35.

[45] *Simpson* v. *Mehta*, 2023 ONSC 3063 at para. 8.

> "full, free and informed thought." (*Geffen*, citing *Zamet v. Hyman*, [1961] 3 All E.E. 933 at p. 938.)

This is very different from the doctrine of undue influence in will challenges. In a will challenge, the onus always lies upon the challenger to prove undue influence on a balance of probabilities. But in the arena of power of attorney litigation,[46] the challenger may be aided by this rebuttable presumption.

1.7 – The doctrine of suspicious circumstances

The doctrine of suspicious circumstances is another mechanism used to shift the onus to the attorney to prove the validity of the power of attorney.[47]

The doctrine was first developed in the context of will challenges but migrated into power of attorney litigation via the decision of Price J. in *Nguyen-Crawford v. Nguyen* in 2010.[48] While the decision has been widely followed in Ontario since then,[49] it has also received some criticism.[50]

The recent case of *Stewart v. Zawadzinski* describes the doctrine.[51] Dietrich J. wrote:

> [44] The doctrine of suspicious circumstances extends to powers of attorney. In *Nguyen-Crawford* v. *Nguyen*, 2010 ONSC 6836, at para. 85, Price J. stated:
>
> > Where there are suspicious circumstances of undue influence surrounding the execution of a power of attorney, the presumption of capacity under s. 7 of the SDA does not operate and the burden of proof with respect to capacity shifts to the grantee of the power of attorney.
>
> [45] Suspicious circumstances may arise from: (1) circumstances surrounding the preparation of the document; (2) circumstances tending to call into question the capacity of the grantor; or (3) circumstances tending to show that the free will of the grantor was overborne by acts of

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[46] de Vries & Fournie, *supra* note 40 at 3; see also *Rudin-Brown, supra* note 30 at para. 155, citing *Geffen v. Goodman Estate,* [1991] 2 SCR 353 (SCC).
[47] See *Stewart, supra note* 27 at para. 44. See also Cardiff, *supra* note 23 at 37.
[48] *Nguyen-Crawford, supra* note 32 at para. 85. See also *Vanier v Vanier,* 2017 ONCA 561 ["***Vanier***"] at para. 61.
[49] See cases such as *Rudin-Brown, supra* note 28, *Graham v. Graham,* 2019 ONSC 3632, and *Stewart, supra note* 27.
[50] *Vanier, supra* note 48 at para. 61, where the respondent, Rita Vanier, argued that the law regarding suspicious circumstances has historically only been applied to wills and therefore, that the recent case of *Nguyen-Crawford* was wrongly decided. The panel, consisting of Gloria Epstein, M.L. Benotto, and G.T. Trotter JJ. A. declined to address this issue at para. 66 of their reasons.
[51] *Stewart, supra note* 27.

coercion or fraud: *Vout* v. *Hay*, 1995 CanLII 105 (SCC), [1995] 2 S.C.R. 876, at para. 25.

[46] Suspicious circumstances in any of the three categories affect the burden of proof. In determining whether there are suspicious circumstances, the court may consider the extent of the physical and mental impairment around the time the powers of attorney were signed; whether the powers of attorney in question constitute a significant change from the former powers of attorney; the factual circumstances surrounding the execution of the powers of attorney; and, whether any grantee was instrumental in the preparation of the powers of attorney: *Rudin-Brown et al. v. Brown*, 2021 ONSC 3366, 155 O.R. (3d) 750, at paras. 89, 93-125.[52]

In other words, there might be two separate onus-shifting mechanisms at play in power of attorney litigation – the presumption of undue influence and the doctrine of suspicious circumstances. While the existence of these mechanisms might make it seem easy to set aside a power of attorney, the outcome will always depend upon the unique facts of the case as well as the credibility of the key witnesses.

PART II – Removal of attorneys

2.1 – Statutory authorities

There are many situations where the removal of an attorney is necessary. Non-contentious reasons might include the incapacity (or inability) of the attorney. Contentious reasons might include the attorney abusing his or her power, or irreconcilable conflicts between multiple attorneys.

The simplest way to "remove" an attorney is for the grantor to simply revoke the power of attorney. Of course, this is not always possible, especially where the grantor does not have capacity to revoke. Practically, the next best option is for the attorney to resign[53] or to be removed by provisions within the power of attorney itself.[54]

If the above options are not available, it may be necessary to bring an application under the *SDA* terminating the power of attorney. There are several provisions in the *SDA* that may be of use:

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[52] *Ibid* at para. 46.
[53] If an attorney has acted under a power of attorney, their resignation must be tendered in writing and delivered to a statutorily prescribed set of people. See *SDA, supra* note 1, ss. 11(1) and ss. 52.
[54] This is most easily done if the power of attorney document names a "protector", whose role it is to dismiss, replace or appoint new trustees or attorneys, and who can oversee the attorneys' execution of their functions. In Canadian law, this concept is foreign, see para. 10 of *Whitefox Air Inc. v. Canada (Attorney General)*, 2009 SKPC 112 where B. Morgan Prov. J. indicated that the term "is not a phrase that is familiar to me". However, this title has been recently recognized in *Gierc Jr. v. Wescon Cedar Products Ltd.*, 2021 BCSC 23 at para 56.

Subsection 12(1) – power to terminate a POA for Property by appointing a guardian of property under section 22;

Subsection 27(8) – power to suspend a POA for Property during the term of any temporary guardianship;

Section 39 – power to give directions on any question arising in connection with the POA for Property;

Subsection 42(7) – powers to suspend and/or terminate a power of attorney on a passing of accounts[55];

Subsection 53(1) – power to terminate a POA for Personal Care by appointing a guardian of the person under section 55;

Subsection 62(9) – power to suspend a POA for Personal Care during the term of a temporary guardianship; and

Section 68 – power to give directions on any question arising in connection with the POA for Personal Care.

2.2 – Inherent jurisdiction

The powers in the *SDA* exist in tandem with the court's inherent jurisdiction to protect the vulnerable. The Ontario Superior Court has a *parens patriae* jurisdiction to act for the protection of those incapable people who cannot defend themselves.[56]

2.3 – Common law test

Notwithstanding all the above, the power to remove an attorney appointed under a valid power of attorney is a power the court will use sparingly. The court will not lightly interfere with the decision of a capable grantor to appoint a decision-maker on his or her behalf.

The common law test for the removal of an attorney is therefore stringent. In *Teffer* v. *Schaefers*, Fragomeni J. set out the test as follows:

1. There must be "strong and compelling evidence of misconduct or neglect on the part of the attorney before a court should ignore the clear wishes of the donor."

[55] See para. 21 of *McMaster v. McMaster*, 2013 ONSC 1115 ["***McMaster***"].
[56] Para. 25 of *St. Joseph's Health Centre v. Dzwiekowski*, 2007 CarswellOnt 7642 (ON SC) ["***St. Joseph***"], citing *Letterstedt v. Broers* (1883-84) (1884), (1883-84) L.R. 9 App. Cas. 371 (South Africa P.C.); see also *McMaster, supra* note 55 at paras. 26-28.

2. The court must be of the opinion that the best interests of the incapable person are not being served by the attorney.[57]

This test has been applied in many different contexts,[58] but always with care not to interfere with the decision of the grantor unless necessary. This approach is broadly in line with the one in subsection 22(3) the *SDA,*[59] which indicate that the remedy of guardianship is a remedy of last resort:

> (3) The court shall not appoint a guardian if it is satisfied that the need for decisions to be made will be met by an alternative course of action that,
>
> a. does not require the court to find the person to be incapable of managing property; and
> b. is less restrictive of the person's decision-making rights than the appointment of a guardian. 1992, c. 30, s. 22 (3).

2.4 – Examples of attorney removal

Following *Teffer v. Schaefers*, Penny J. removed an attorney for property in *Nicoletti v. Nicoletti* for misconduct, neglect and acting against the best interest of the grantor.[60] In that case, the removed attorney was found to have acted recklessly in transferring the grantor's funds to an account held jointly by the attorney, and to have caused the grantor to add the attorney on as co-owner to the grantor's home for no consideration.

In another recent case following *Teffer v. Schaefers,* Kurz J. removed two attorneys for property in *Carey v. Carey.*[61] In that case, the two attorneys mismanaged the funds of the

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[57] *Teffer* v. *Schaefers* (2008), 93 OR (3d) 447, 2008 CanLII 46929 (ON SC).
[58] See *Valente v. Valente*, 2014 ONSC 2438, at para. 31, *Giovanna Nicoletti* v. *Bruna Nicoletti*, 2014 ONSC 4545 ["***Nicoletti***"] at para. 34; *Crane* v. *Metzger*, 2018 ONSC 5382; *Carey* v. *Carey*, 2018 ONSC 4564 ["***Carey***"]; and *Adam* v. *Adam*, 2023 ONSC 3093 at para. 25.
[59] The corresponding section for a POA for Personal Care is found at subsection 55(2) of the *SDA*.
[60] *Nicoletti, supra* note 58. In this case, matriarch Vittoria Nicoletti ("**Mrs. N**") was an elderly woman with three adult children: Pietro, Giovanna and Bruna. Mrs. N's husband died 9 years prior to her becoming incapable of managing property, in 2010. Mrs. N's first POA for Property was executed in 1994, appointing all three adult children as co-attorneys. Subsequently, in 2010, Bruna took Mrs. N to Bruna's own lawyer to execute an updated POA for Property and POA for Personal Care, appointing herself as sole attorney. Then, in 2011, Mrs. N attended at her own lawyer's office to sign a new POA for Property and POA for Personal Care, once again appointing all three children equally. Between 2010 and 2011, using her powers as attorney, Bruna transferred her mother's savings to a jointly held account between the two of them. Then, Bruna caused Mrs. N to also add Bruna on as co-owner to Mrs. N's house. On learning this, Giovanna brought an urgent *Mareva* injunction to prevent the sale of the house. The injunction was further ordered to continue until the date of the hearing of the application, which Giovanna brought for, among other things, the removal of Bruna as joint attorney. Penny J. found the transfer of funds and change of title on the house to be misconduct by Bruna. Further, due to the dysfunctional relationship between Giovanna and Bruna, it was not in the best interest of Mrs. N to allow Bruna to continue on as co-attorney.
[61] *Carey, supra* note 58. In this case, matriarch Jennie Carey ("**Mrs. J**") had seven children. She left home to live with her two sons, Arthur and Douglas. The application was initially brought by the other five children, alleging that Arthur and Douglas kidnapped Mrs. J to gain control of her finances using a POA for Property executed shortly before the move. The five children sought to, among other relief, remove Arthur and Douglas. Near the date of the hearing, three of the five other children switched sides and no longer wished to remove Arthur and Douglas. Kurz J. found strong and compelling evidence of misconduct and neglect in Arthur and Douglas' actions of failing to explain how they managed to spend all of Mrs. J's pension income when she had no independent housing costs, no car, and no notable expenses.

grantor and disobeyed a number of court orders requiring financial disclosures to be produced.

CONCLUSION

As the Canadian population ages, more and more people are turning their minds to powers of attorney to plan ahead.[62] Unfortunately, as noted by J. Macdonald J. in *Reviczky*, a power of attorney is a powerful tool which, when misused, can have dire consequences for the grantor.[63] When a financial predator gains power of attorney over an incapable or vulnerable person, concerned friends or family members may seek to invalidate the document or remove the attorney. The challengers might argue:

i. That the power of attorney did not comply with the formalities of execution (and that the lack of compliance cannot be cured).
ii. That the power of attorney is void because the grantor lacked the requisite capacity at the time of execution.
iii. That the power of attorney is void because the grantor was subjected to undue influence.
iv. That there is a presumption of undue influence that shifts the onus to the attorney to prove that the power of attorney was signed as a result of the grantor's own full, free and informed thought.
v. That suspicious circumstances shift the onus onto the attorney to prove the validity of the power of attorney.
vi. That the attorney ought to be removed (or the power of attorney suspended) under one of the relevant sections of the SDA.
vii. That the attorney ought to be removed pursuant to the common law test for removal.

Of course, an ounce of prevention may be worth a pound of cure. Litigation is uncertain and costly. Grantors should exercise a high degree of caution in selecting an attorney so that the problems and remedies addressed in this paper can be avoided altogether.[64]

Further, they failed to adequately account for the whereabouts of Mrs. J's mortgage funds, and disobeyed a number of court orders requiring disclosure, and showed little skill in prudently investing Mrs. J's funds. However, it was also found that Mrs. J was and felt well cared for by Arthur and Douglas. Therefore, while Arthur and Douglas were removed as attorneys under the POA for Property, they were removed and re-appointed along with another adult child as joint guardians for personal care to Mrs. J.

[62] Kimberly Whaley, "Introduction" in WEL Partners, *WEL on Powers of Attorney* (Toronto: WEL Partners, 2016) 1.

[63] *Reviczky*, supra note 2 at para. 67. In this case, the power of attorney was used to conduct identity theft and mortgage fraud.

[64] For a checklist of considerations for grantors, see "WEL Checklists" in WEL Partners, *WEL on Powers of Attorney* (Toronto: WEL Partners, 2016) 215 at 227-232.

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TAB 9

26th Estates and Trusts Summit – DAY ONE

Vicarious Trauma (Compassion Fatigue)
Case Citation List

The Honourable Justice Patrice Band
Ontario Court of Justice

October 18, 2023

Vicarious Trauma (Compassion Fatigue)

The Honourable Justice Patrice Band
Ontario Court of Justice

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