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Trusts and Estates Section
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The Envelope Please! The Decade in Review

Estates, Trusts and Capacity Law
2010 SCJ Spring Education Seminar

Justice D. M. Brown

And the Oscars Go To ...

Best Picture: (tie)

Estates and Trusts: *Pecore v. Pecore*, [2007] 1 S.C.R. 795.

Capacity Law: *Starson v. Swayze*, [2003] 1 S.C.R. 722

Best Screenplay by a Legislature:

Declarations of Death Act, S.O. 2002, c. 14

Best (Practical) Direction:

Hall v. Bennett Estate (2005), 64 O.R. (3d) 191 (C.A.)

Judges' Favourite (The lawyers' bane):

McDougald Estate v. Gooderham (2005), 255 D.L.R. (4th) 435 (Ont. C.A.)

Best International Film:

Schmidt v. Rosewood Trust, [2003] AC 709

Best Horror Movie:

Judicial comity prevents revealing the nominee

Deadbeat

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BEST PICTURE (tie)

Estates and Trusts: ***Pecore v. Pecore***, [2007] 1 S.C.R. 795

Bringing clarity to the realm of gratuitous transfers, the SCC re-affirmed the continuing role of the common law presumptions of resulting trust (legal title holder under obligation to return property to the original title holder) and advancement (a gift by a transferor to a transferee who, by marriage or a parent-child relationship, is financially dependent on the transferor).

The epic news? Where a parent transfers assets into a joint account with an adult child (whether independent or allegedly dependent), no presumption of advancement exists. Instead, there is a rebuttable presumption that the adult child is holding the property in trust for the ageing parent to facilitate the free and efficient management of that parent's affairs. The presumption can be rebutted by the transferee establishing, on the balance of probabilities, that the parent intended a gift to the adult child. The presumption of advancement is reserved only to transfers by parents to minor children.

In the case of joint accounts, the surviving joint account holder must prove that the transferor intended to gift the right of survivorship to whatever assets are left in the account to the survivor. Such right of survivorship, if established, vests when the joint account is opened and the gift of that right is *inter vivos* in nature.

To ascertain the intent of the transferor, a court may consider (i) evidence that arises subsequent to a transfer provided it is relevant to the intention of the transferor at the time of the transfer; (ii) the content of bank documents that reflect on the transferor's intent; (iii) the control and use of the funds during the lifetime of the transferor; (iv) whether the transferor granted the transferee a power of attorney over property; and, (v) who pays the taxes on the funds prior to the transferor's death. The SCC emphasized that no one factor is determinative.

Comments from the fans? Professor David Freedman of Queen's University wrote: "There really isn't any case that has had such an impact. Will-substitutes are more common than wills and this case goes to the heart of when a jointly held asset is and is not a valid will-substitute."

Capacity Law: ***Starson v. Swayze***, [2003] 1 S.C.R. 722

The law presumes a person is capable to decide to accept or reject medical treatment and the presumption can be displaced only by evidence that a patient lacks the requisite elements of capacity provided by the Act. Section 4(1) of the *Health Care Consent Act* describes the elements as follows:

A person is capable with respect to a treatment, admission to a care facility or a personal assistance service if the person is able to understand the information that is relevant to making a decision about the treatment, admission or personal assistance service, as the case may be, and able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.

Capacity involves two criteria:

- i) A person must be able to understand the information that is relevant to making a treatment decision. This requires the cognitive ability to process, retain and understand the relevant information;
- ii) A person must be able to appreciate the reasonably foreseeable consequences of the decision or lack of one. This requires the patient to be able to apply the relevant information to his or her circumstances, and to be able to weigh the foreseeable risks and benefits of a decision or lack thereof.

A patient is not required to describe his mental condition as an "illness", or to otherwise characterize the condition in negative terms, nor is he required to agree with the attending physician's opinion regarding the cause of that condition. Nonetheless, if the patient's condition results in him being unable to recognize that he is affected by its manifestations, he will be unable to apply the relevant information to his circumstances, and unable to appreciate the consequences of his decision. The Act requires a patient to have the ability to appreciate the consequences of a decision. It does not require actual appreciation of those consequences.

In practice, the determination of capacity should begin with an inquiry into the patient's actual appreciation of the parameters of the decision being made: the nature and purpose of the proposed treatment; the foreseeable benefits and risks of treatment; the alternative courses of action available; and the expected consequences of not having the treatment. If the patient shows an appreciation of these parameters - regardless of whether he weighs or values the information differently than the attending physician and disagrees with the treatment recommendation - he has the ability to appreciate the decision he makes. It is imperative that the Consent and Capacity Board inquire into the reasons for the patient's failure to appreciate consequences. A finding of incapacity is justified only if those reasons demonstrate that the patient's mental disorder prevents him from having the ability to appreciate the foreseeable consequences of the decision.

The legislative mandate of the Board is to adjudicate solely upon a patient's capacity. The Board's conception of the patient's best interests is irrelevant to that determination.

Comments from the fans? Laurie Redden, Deputy Public Guardian and Trustee and General Counsel wrote: "[A] clear application of statutory test of capacity to consent to treatment under the *Health Care Consent Act*."

BEST SCREENPLAY BY A LEGISLATURE

Declarations of Death Act, S.O. 2002, c. 14

An interested person may apply to the Superior Court of Justice, with notice to any other interested persons of whom the applicant is aware, for an order declaring that an individual has died if the court is satisfied that the conditions in either section 2(4) or 2(5) apply:

Section 2(4): (a) the individual has disappeared in circumstances of peril; (b) the applicant has not heard of or from the individual since the disappearance; (c) to the applicant's knowledge, after making reasonable inquiries, no other person has heard of or from the individual since the disappearance; (d) the applicant has no reason to believe that the individual is alive; and (e) there is sufficient evidence to find that the individual is dead;

Section 2(5): (a) the individual has been absent for at least seven years;(b) the applicant has not heard of or from the individual during the seven-year period; (c) to the applicant's knowledge, after making reasonable inquiries, no other person has heard of or from the individual during the seven-year period; (d) the applicant has no reason to believe that the individual is alive; and (e) there is sufficient evidence to find that the individual is dead.

The declaration of death applies for all purposes unless the court: (a) determines that it should apply only for certain purposes; and (b) specifies those purposes in the order: section 2(6).

Comments from the fans? Professor Freedman: "The statute aims to streamline the process of declaring a person dead where no remains can be located and allows a single application to be brought for a declaration that suits a wide variety of legal purposes. A very good statute for the family of those who perish in peril." Lisbeth Hollaman, Hollaman Estate Litigation: The Act "has been so helpful."

BEST PRACTICAL DIRECTION

Hall v. Bennett Estate (2005), 64 O.R. (3d) 191 (C.A.)

A clear, helpful checklist of what a solicitor must inquire into in order to conclude that a person possesses a "sound disposing mind" to make a will.

In order to have a sound disposing mind, a testator must: (i) understand the nature and the effect of a will; (ii) recollect the nature and extent of his property; (iii) understand the extent of what he is giving under the will; (iv) remember the persons that he might be expected to benefit under his will; and (v) where applicable, understand the nature of the claims that may be made by persons he is excluding from the will.

Common errors by solicitors include failing: (i) to obtain a mental status examination; (ii) to interview the client in sufficient depth; (iii) to properly record or maintain notes; (iv) to ascertain the existence of suspicious circumstances; (v) to react properly to suspicious circumstances; (vi) to provide proper interview conditions, such as failing to exclude the presence of an interested party; as well as (vii) proceeding to draft a will in the face of an improper relationship between the solicitor and the clients, such as preparing a will for a relative.

Comments from the fans? Professor Freedman: "Practical advice for solicitors drafting wills."

THE JUDGES' FAVOURITE

McDougald Estate v. Gooderham (2005), 255 D.L.R. (4th) 435 (Ont. C.A.)

The traditional approach to costs in estate litigation that the estate bears the costs of all parties has been displaced by the modern approach to fixing costs in estate litigation in which the court must carefully scrutinize the litigation and follow the costs rules that apply in civil litigation, unless the court finds that one of the following public policy considerations applies:

- i) where the difficulties or ambiguities that give rise to the litigation are caused, in whole or in part, by the testator, it seems appropriate that the testator, through his or her estate, bear the costs of their resolution;
- ii) if there are reasonable grounds upon which to question the execution of the will or the testator's capacity in making the will, it is in the public interest that such questions be resolved without cost to those questioning the will's validity.

As stated by the Court of Appeal:

The modern approach to awarding costs, at first instance, in estate litigation recognizes the important role that courts play in ensuring that only valid wills executed by competent testators are propounded. It also recognizes the need to restrict unwarranted litigation and protect estates from being depleted by litigation. Gone are the days when the costs of all parties are so routinely ordered payable out of the estate that people perceive there is nothing to be lost in pursuing estate litigation.

Comments from the fans? Curiously, no lawyer listed this case in his or her “top cases of the decade”.

BEST INTERNATIONAL FILM

Schmidt v. Rosewood Trust, [2003] AC 709 (P.C.)

A beneficiary's right to seek disclosure of trust documents, although sometimes not inappropriately described as a proprietary right, is best approached as one aspect of the court's inherent jurisdiction to supervise (and where appropriate intervene in) the administration of trusts. There is no reason to draw any bright dividing-line either between transmissible and non-transmissible (that is, discretionary) interests, or between the rights of an object of a discretionary trust and those of the object of a mere power (of a fiduciary character).

No beneficiary has any entitlement as of right to disclosure of anything which can plausibly be described as a trust document. Especially when there are issues as to personal or commercial confidentiality, the court may have to balance the competing interests of different beneficiaries, the trustees themselves, and third parties. Disclosure may have to be limited and safeguards may have to be put in place. Evaluation of the claims of a beneficiary (and especially of a discretionary object) may be an important part of the balancing exercise which the court has to perform on the materials placed before it. In many cases, the court may have no difficulty in concluding that an applicant with no more than a theoretical possibility of benefit ought not to be granted any relief.

Comments from the fans? Professor Freedman thought the Privy Council adopted a very sensible and principled approach to deciding when a court could compel a trustee to disclose information to a beneficiary – “an elegant solution and helpful in considering the exercise of trustee discretion”.

BEST HORROR MOVIE

Professor Freedman nominated two trusts cases which he viewed as holding that trusts were not really trusts - “not to be read late at night when there is a full moon out”. Neither case emanated from our Court (thankfully!), and judicial comity prevents their inclusion.

Justice D. M. Brown

** Many thanks to the members of the Academy and Bar who made the nominations: Professor David Freedman, Faculty of Law, Queen’s University; Laurie Redden, Deputy Public Guardian and Trustee; Lisbeth Hollaman, Hollaman Estate Litigation; Barry Corbin, Corbin Estates Law Professional Corporation; Anita Szigeti, Hiltz Szigeti; Kimberly Whaley, Whaley Estate Litigation.*

Case Comment: *Abrams v. Abrams* 2010 Carswell Ont 1135, 2010 ONSC 1254

*Ameena Sultan**

On March 1, 2010, Justice Brown issued a scathing endorsement following a case conference with counsel for the parties in this contested guardianship application. The endorsement received significant media attention, with reports in *The Globe and Mail* and *The Toronto Star* that week, highlighting Justice Brown’s concerns with the parties’ conduct and the larger issue of adult children who engage in litigation to deal with disputes relating to their elderly parents.

In his endorsement, Justice Brown used very pointed language to criticize the conduct of the parties, and at the same time to provide guidance to lawyers in this practice area about “how contested guardianship litigation under the *Substitute Decisions Act* should be conducted”.

The parties to the proceedings are the applicant, Stephen Abrams, and the respondents Judith Abrams, Ida Abrams and Philip Abrams. Ida and Philip Abrams are the parents of Stephen and Judith. Ida is 87 years of age and Philip is 92. Ida suffers from dementia.

In January 2008, Stephen brought an application seeking his appointment as guardian of property and personal care for Ida. The application apparently stemmed from a 2005 family dispute about Ida and Philip’s estate planning. The application challenged Ida’s Powers of Attorney for Property and Personal Care that named Philip as her attorney, and Judith as the alternate attorney.

The conference call with Justice Brown was preceded by more than two years of proceedings, some twenty-odd endorsements and two separate appeals.

Justice Brown's endorsement highlighted a history of the Court attempting to streamline the application. In a December 2008 Order for Directions, Justice Strathy emphasized the need for a tight timetable and a timely hearing and resolution of the dispute. Still more than a year after Justice Strathy's Order, the application had not even neared trial. The parties had delayed matters by challenging Justice Strathy's Order. Stephen appealed the Strathy Order to the Court of Appeal, which appeal was denied (with one variation that was unopposed by the respondents). Stephen sought leave to appeal another endorsement to the Divisional Court. That motion for leave was dismissed in March 2009.

For her part, Judith caused delays by failing to attend examinations for discovery and three separate orders were required to compel her attendance. Stephen's examinations for discovery were also delayed as were those of Philip.

In November 2009, Justice Brown agreed to act as the case management judge in the proceeding and set out a timetable for pleadings and outstanding examinations. Even those steps failed, however which led this endorsement and its strict timetable. The endorsement made it clear that a failure to abide by the timetable leading to trial would lead to costs consequences. Notably, Justice Brown did not place responsibility to abide by the timetable on the parties alone. He pointed out that those costs consequences could fall on counsel personally.

The context of the endorsement is the particular facts of the Abrams guardianship application and perhaps more importantly, contested guardianship applications in general. As Justice Brown stated, "the parties have lost sight of the key issue", that is, the best interests of the incapable person. The media attention surrounding the case also points to a societal interest in how elderly persons' needs are addressed and the role of the judicial system in meeting those needs. Although the *Substitute Decisions Act* sets out a mechanism for addressing incapable person's needs, it is clear that it is imperfect and still allows for matters to be dragged out while family disputes continue.

The message in *Abrams* is that the onus is on the parties -- and their counsel -- to ensure that guardianship applications are efficiently managed and targeted to meeting the incapable person's needs, and do not simply provide an alternate and costly forum for squabbling siblings to do battle.

**Ameena Sultan is an associate at Whaley Estate Litigation.*

Case Comment: *Bosch v. Bosch*

*Kaylie Handler**

Guardianship applications have increasingly become a forum to which individuals affiliated with the incapable person bring their baggage. These individuals often lose sight of the material issue – the best interests of the incapable person. The recent decision of the Honourable Justice D.M. Brown in *Bosch v. Bosch* 2010 ONSC 1352 is a reminder that even in those situations where these individuals are able to set aside their differences and appear to resolve their conflict by entering into a settlement, the best interests of the incapable person remains the main issue. The settlement must be more than a band-

aid solution. The settlement must be workable, practical, and of course, in the best interests of the incapable person.

Bosch involved two guardianship applications brought by Alan, the son of Michael and Maria. The subject of the dispute, Michael, had been in a nursing home since 2005. His wife, Maria, had been acting as his guardian of property and as his attorney for personal care since that time.

In the first application, Alan sought orders declaring his mother incapable and appointing him as her guardian of property and person. Alan brought the second application against his mother as guardian of property for Michael. Alan sought orders finding his father incapable of making personal care decisions, terminating Maria's authority as guardian of property of Michael, and appointing Alan as guardian of property and person for Michael.

A settlement was reached at mediation among Alan, Maria and Charlotte (sister/daughter), subject to court approval. The settlement provided that Alan's first application to become the guardian of his mother be dismissed without costs. The proposed settlement further provided that the second application be settled by having Maria and Alan appointed as joint guardians of the person for Michael and requiring \$2,000 of the costs of the mediation to be paid out of Michael's assets, with Alan paying the balance of the cost of the mediation. Maria was to seek court approval of the settlement and her reasonable costs of the motion for approval would be payable from Michael's assets on a full indemnity basis.

The Court declined to approve the settlement. In addition to requiring further evidence regarding Michael's incapacity to make personal care decisions, Justice Brown questioned the practicality of appointing Alan and Maria, two competing litigants, as joint guardians for Michael's personal care and wrote:

How, might I ask, will Michael's best interests be served by appointing as his joint guardians two persons who have engaged in litigation against each other? If there is a history of lack of co-operation between son and mother, I do not see how appointing them as joint guardians will suddenly change their relationship into one of harmony and co-operation. Absent clear evidence of the unalterable willingness of two disputing persons to put their personal differences to one side and to act together only with a view to the best interests of an incapable person, joint guardianship can become a minefield with the incapable person the loser.

Although the decision does not define what "clear" and sufficient evidence is required to demonstrate that competing litigants are able "to put their differences to one side and to act together with a view to the best interests of an incapable person", especially in *Bosch*, where Alan had previously sought an order declaring his mother incapable, the practical implications of the decision are clear. Settlements must be more than what is palatable to the competing parties. Settlements should be demonstrably in the best interests of the incapable person.

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Rectification in Wills – A Summary of the 2009 Trilogy of Cases

*Dina Stigas**

In 2009, a trilogy of Ontario Superior Court of Justice cases dealt with mistakes in wills and the use of the equitable remedy of rectification to correct them, providing us with an indication of the current state of the law with respect to adding and deleting words in a will (where it is established that an executed will contains an error).

1. *Lipson v. Lipson, et al.*

In *Lipson v. Lipson, et al.*,¹ the court was asked to both add and delete words in a will to rectify a mistake. The facts (based on affidavits, cross-examinations and *viva voce* evidence) were as follows:

Upon the suggestion of his accountant, the testator, Mr. Lipson, asked his lawyer to draft two wills: the primary will (dealing with all of his assets except the shares in his private corporation), and the secondary will (dealing with all of his private corporation shares). Since the bulk of his assets were the company shares, a multiple will strategy was used to save probate taxes. The testator's wife was named the estate trustee and primary beneficiary under both wills.

The draft wills were prepared by Mr. Lipson's lawyer and sent to Mr. Lipson's accountant, as per Mr. Lipson's authorization. However, the lawyer's assistant inadvertently e-mailed a version of the secondary will which contained a drafting error in Article I of the will. The error resulted in the revocation of the primary will. Furthermore, it only dealt with the assets described in the primary will and not the corporate shares. This effectively resulted in an intestacy with respect to the shares. Mr. Lipson signed the wills in the presence of his accountant, without the knowledge of his lawyer. The accountant did not carefully review the documents before meeting with Mr. Lipson, nor did he read it in detail to Mr. Lipson.

Upon Mr. Lipson's death, his wife sought the opinion, advice and direction of the court whether the mistaken language in the secondary will could be deleted and replaced with language to include the assets of the corporation by way of rectification.

In his analysis of the court's power to rectify mistakes in wills, Justice Pattillo stated that a court could add or delete words not only when a word or words were omitted, but also when an incorrect word or words were included in the will. He also provided the following factors which the court must consider before correcting an error:

- i) Upon a reading of the will as a whole, it is clear on its face that a mistake has occurred in the drafting of the will;
- ii) The mistake does not accurately or completely express the testator's intentions as determined from the will as a whole;

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- iii) The testator's intention must be revealed so strongly from the words of the will that no other contrary intention can be supposed; and
 - iv) The proposed correction of the mistake, by the deletion of words, the addition of words or both must give effect to the testator's intention, as determined from a reading of the will as a whole and in light of the surrounding circumstances.

Justice Pattillo concluded that when the primary and secondary will were read together as a whole, the mistake in Article I of the secondary will was apparent and did not reflect the testator's intentions. He concluded that the mistake was a result of two errors: 1) the lawyer's assistant attached the wrong document to the e-mail; and 2) the accountant saw to the execution of the wills without consulting the lawyer.

The deceased's intention was to leave everything to his wife, including the corporate shares. He did not intend for an intestacy with respect to the shares. To correct the mistake, the court amended Article I by deleting words instead of both deleting and adding words.

2. *Binkley Estate v. Lang*²

In 1996, the deceased executed her first will providing for, *inter alia*, a legacy of \$2,500.00 to each of her friend's three children. In 2006, she advised her nephew of some changes she wanted to make to her will (not affecting these legacies). The nephew asked the testator's lawyer to make the changes. However, in the drafting process, the lawyer inadvertently changed the amounts to \$25,000.00 from \$2,500.00. The testatrix signed the will without having regard to the changed amounts in these legacies. After the testator died, the estate trustee brought an application for rectification.

The testatrix's lawyer deposed that he "inadvertently" typed the bequest as \$25,000.00 rather than the original \$2,500.00, and that the mistake was not noticed until after her death. He did not read the will in detail with the testatrix, but rather focused on the changes she had requested.

In his discussion, Justice Harris noted that the use of rectification was at the discretion of the court and must be corrective, not speculative, and utilized with abundant caution. Having regard to the evidence, he found that the mistake was a typographical error made without the knowledge or approval of the testatrix. As well, the likelihood of her changing the amount of the legacy so drastically without advising her trustee or making comment was improbable. There was no evidence from the respondents to the contrary.

To rectify the error, Justice Harris deleted the words "twenty-five thousand dollars", and the comma and the decimal were changed in the numeric so that they rested in the appropriate spots.

3. *Balaz v. Balaz, et al.*

Justice Brown's endorsement in *Balaz v. Balaz, et al.*,³ resulted in the deletion of wording to conform to the wishes of the testatrix. In that case, Mrs. Balaz instructed her lawyer to create a spousal trust in her secondary will (the "will"). After her death, it was discovered that certain wording in her will relating to

the trustee's powers could be construed to provide a benefit for other beneficiaries, potentially resulting in an invalid (or tainted) spousal trust for purposes of the *Income Tax Act*.

The deceased's estate trustee, her husband, applied to have the said wording deleted to avoid the acceleration of significant taxes triggered by the death of the testatrix. The Department of Justice Canada, on behalf of the Minister of National Revenue, and the Office of the Children's Lawyer consented to the application.

In his analysis, Justice Brown stated:

A will is only valid to the extent the testatrix knew and approved its contents. As a result, a court may strike out passages or phrases in a will which have been inserted by mistake where it can be demonstrated that the testatrix did not intend or approve of those words.

In taking into account the evidence of the surrounding circumstances in the making of the will, the Court heard the deceased's lawyer's evidence who deposed that the testatrix intended and instructed him to create a spousal trust to avoid triggering capital gains taxes. Justice Brown found that his evidence was clear and uncontradicted. He was satisfied that the lawyer included the mistaken language inadvertently without the knowledge or approval of the testatrix.

To rectify the mistake, Justice Brown held that the wording in question be deleted to reflect the intentions of Mrs. Balaz and that this action would not prejudice any beneficiary.

Summary

The above trilogy of cases demonstrates that a court has the discretion to use the remedy of rectification, by adding or deleting words, if the evidence is clear that the mistake was made without the knowledge or approval of the testator/testatrix. Surrounding circumstances and direct evidence of intention, including *viva voce* testimony, can be heard. The overriding principle seems to be the Court's willingness to uphold the testamentary wishes of the deceased.

To read a more detailed analysis of rectification in wills, please refer to Liza Sheard's article, "Rectification of Wills: Repair of Drafting Errors After Death", presented at the OBA Institute 2010.

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¹ 2009 CanLII 66904 (ON S.C.)

² [2009] O.J. No. 2167

³ 2009 CanLII 17973 (ON S.C.)

Case Summary: Estate of Viola Mildred Binkley

David M. Lobl*

The Times They Are A Changing...

There has been much commentary on The Honourable Justice Brown's recent decision in *Bilek v. Salter Estate* [2009] O.J. No. 2328 (OSCJ), wherein he eloquently stated that:

parties cannot treat the assets of an estate as a kind of ATM bank machine from which withdrawals automatically flow to fund their litigation. The "loser pays" principle brings needed discipline to civil litigation by requiring parties to assess their personal exposure to costs before launching down the road of a lawsuit or a motion. There is no reason why such discipline should be absent from estate litigation.

Recently, the "loser pays" principle was applied against the respondents who unsuccessfully opposed the will rectification application in the Estate of Viola Mildred Binkley (the "Estate").¹

The Rectification Application

After Mrs. Binkley (the "Deceased") passed away, the Estate Trustee of her Estate discovered a typographical error contained in her Last Will and Testament (the "Will"). Essentially, the Deceased intended to bequeath \$2,500.00 to each of the three named respondents, but instead the Will provided for a \$25,000.00 bequest to each of them. Affidavit evidence was filed in support of the rectification application brought by the Estate Trustee, supported by the lawyer who drafted the Will. The lawyer conceded that the typographical mistake was made by him, and swore that he received no instructions from the Deceased to increase the bequest to each of the respondents to \$25,000.00. The respondents vigorously opposed the matter despite proffering no evidence to counter the affidavit evidence filed. The application Judge found that there was a "simple typing mistake" which ought to be rectified so as to give effect to the Deceased's true intentions.

The Costs Award²

After receiving submissions on costs, The Honourable Justice Harris awarded costs to the Estate Trustee (which award amounted to a full indemnity), payable by the respondents. Justice Harris held that it was clear that there was a typographical error and that all the surrounding circumstances corroborated that fact. Specifically, he stated as follows:

[1] On the evidence it was likely from the start that [the lawyer who drafted the Will] had quite simply made a "typo". All the surrounding circumstances corroborated that fact.

...

[3] In all of the circumstances here, the Estate should not be put to **any** loss of its financial integrity. Accordingly, the Estate Trustee Nugent shall have costs from the Respondents fixed at \$12,343.49 inclusive, jointly and severally.

[emphasis added]

Motion for Leave to Appeal³

A motion for leave to appeal Justice Harris' costs award was brought by the respondents, and was denied. In denying leave to appeal the decision of Justice Harris, the Honourable Justice C.S. Glithero found as follows:

What is relevant to the outcome of this application for leave to appeal, in my judgment, is that the application judge essentially found the case to be quite overwhelming in favour of rectification, and in a sense, not surprisingly so, given the fact that there was no evidence to the contrary placed before him.

Upholding Justice Brown's decision in *Salter, supra* and following the modern approach to costs, Justice Glithero held that the traditional approach to costs in estate litigation matters has been displaced with a new approach. This new approach requires careful scrutiny of the litigation and provides that costs will follow the event (as it does in traditional civil litigation matters), unless the court finds that one or more public policy considerations apply. Justice Glithero further held that since the application Judge found "that it was likely from the start that this was a typo" and that "all the surrounding circumstances corroborated that fact", the "Estate should not be put to any loss of its financial integrity". In other words, the record was clearly and overwhelmingly in favour of rectification and in light of that, the respondents ought not to have opposed the application "without any evidence to the contrary". Justice Glithero stated:

"the only evidence put forward in favour of rectification was strong and was un-contradicted, once that became known, there was no point in continuing to oppose the application".

Leave to appeal was denied and a further cost award was granted against the respondents.

Justice Glithero's reasons suggest that had the respondents stopped their opposition to the Will rectification application after cross-examinations were completed, then perhaps a cost award against them would have been inappropriate. However, once it was clear that the evidence was strong and overwhelmingly in favour of rectification, and since there was no evidence to the contrary, costs ought to be awarded to ensure that the needed discipline is brought to estate litigation.

**David M. Lobl is an associate at Fraser Milner Casgrain LLP.*

¹ [2009] O.J. No. 2167 (Ont. SCJ)

² [2009] O.J. No. 2879 (Ont. SCJ)

³ [2009] O.J. No. 5876 (Ont. SCJ)

Costs and the New Order – Is the Debate Over?

Mark Scott*

In the attempt to deal with the problem of increasing - if not excessive - legal costs in estate litigation, we have experienced two major developments in the area. The first occurred approximately 10 years ago. The second is recent and more troubling.

Mediation became mandatory (at least in Toronto and other high end jurisdictions) and was promoted elsewhere. While no assessment has been conducted to determine its success, it is my sense that the Bar and Bench are reasonably satisfied that mediation has had a positive effect on costs.

More recently, we have witnessed a rush to accept the concept that costs in estate litigation ought to be treated in the same way as other civil litigation, i.e. loser pays. The Court of Appeal scripted this approach in its 2005 decision in *MacDougald Estate v. Gooderham*. Some, but fortunately not all, courts have embraced the trend.

The concern with costs is understandable. We have all experienced the bad faith client who believes he or she has nothing to lose or seeks to exact revenge in an attempt to reduce the ultimate recovery to legitimate beneficiaries. The profession is not blameless either. Many lawyers see beyond the humour in the anecdotal tale of the estate litigator who, upon being advised that costs would not be recovered from the estate, uttered, "But my Lord, should you do this, the deceased will have died in vain".

It is surprising, however, that no one has questioned why the rationale embodied in such ancient cases as *Mitchell v. Gara* and *Spiers v. English* is no longer valid. No less jurists than Cullity and Sheard, both of whom practised in the field before distinguished careers as a judges, fully endorsed the concept. In *Mitchell v. Mitchell* (2001), 57 O.R. 259 (Ont.S.C.J.), Cullity J. considered the issue of costs by first making reference to high Court decisions (including Supreme Court of Canada cases) and their approval of the traditional approach. Cullity J. commented:

These decisions on costs appear to reflect both the public interest that only valid wills be admitted to probate and the investigative, or inquisitorial, jurisdiction of the Court.

He then quoted the classic judgment of Sir J.P. Wilde in *Mitchell v. Gard*:

It is the function of this Court to investigate the execution of a will and the capacity of the maker, and having done so, to ascertain and declare what is the will of the testator. If fair circumstances of doubt or suspicion arise to obscure this question, a judicial inquiry is in a manner forced upon it. Those who are instrumental in bringing about and subserving this inquiry are not wholly in the wrong, even if they do not succeed. And so it comes that this Court has been in the practice on such occasions of deviating from the common rule in other Courts, and of relieving the losing party from costs, if chargeable with no other blame than that of having failed in a suit which was justified by good and sufficient grounds for doubt.

Justice Sheard quoted the same passage in *Re Olenchuk Estate* (1991), 43 E.T.R. 146 (Ont. Ct. (Gen Div.)).

The traditional approach acknowledged the policy interest in exposing disputed wills to scrutiny. Thus, public policy reasons are - or were - cited as the reason to treat estate litigation differently.

We now have the so called “modern” approach. If the recent case of *Salter v. Salter Estate* (2009) E.T.R. (3d) 139 (Ont.S.C.J.) is any indication, estate litigation is to be viewed as a subset of litigation and that estate litigants, like other litigants, should be put to the test of assessing their personal liability in costs before commencing the process. It is submitted that this concept not only glosses over the policy reasons for treating estate litigation differently, but also presents a legitimate litigant with a significant hurdle.

The modern approach ignores the *in rem* aspect of estate proceedings and the importance in determining such issues as a will’s validity or its correct interpretation, the appointment of the appropriate guardian or the approval of a set of accounts.

Should the modern approach prevail, litigators are squarely on notice that their clients are at risk. *Salter* unambiguously states that a litigant must assess his or her personal liability in costs before commencing any process. It is not difficult to predict that many a proceeding will not be initiated despite the assessment that a suspicious or ambiguous will, or questionable transaction or accounts, should bear further scrutiny.

The concept also fails to appreciate the common experience that, while a litigant’s suspicions or concerns are valid, his or her actual evidence is weak. An incapable person cannot adequately express his or her preference and dead men tell no tales. A challenger to a will, a litigant who questions whether survivorship was intended in the case of a joint account, or an objector who seeks a passing of accounts, often undertakes the process without the benefit of hard evidence. I have always advised that a litigant’s lack of knowledge was not a bar to undertaking litigation.

It is surprising that the Bar has rolled over without the slightest hint of a challenge. To my knowledge, no one has argued that *Gooderham* has been overstated. There are two parts to this argument.

First, *Gooderham* does not hold that the loser automatically pays. The Court of Appeal stated:

The modern approach to fixing costs in estate litigation is to carefully scrutinize the litigation and, unless the court finds that one or more of the public policy considerations set out applies, to follow the costs rules that apply in civil litigation.

There is, in taking a closer look at *Gooderham*, ample room to argue that public policy considerations still apply in support of the traditional approach.

Second, and with respect to other types of estate litigation, there is nothing in *Gooderham* that prevents a litigant from successfully arguing that public policy reasons should be considered.

I am hopeful that some forum could accommodate a debate on the issue, perhaps at the next LSUC summit or OBA Institute, such as a four-person interactive debate with each side represented by a lawyer and a judge. This would be a way to expose the issue to further consideration.

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Brown Bag Lunch Update

Bianca La Neve and Suzana Popovic-Montag***

Our February Brown Bag Lunch was held on **February 17, 2010**.

We began with a discussion regarding the appropriate venue for commencing proceedings in estate matters. Further to a recent Endorsement by the Honourable Justice Brown, *Pearsall Estate (Re)*, 2009 CanLII 25140 (On. S.C.), estate-related proceedings may be commenced in any jurisdiction permitted by statute and the *Rules of Civil Procedure*. They do not necessarily need to be commenced in the jurisdiction in which a testator passed away. However, where a person applies under Rules 74.04 or 74.05 for a certificate of appointment of estate trustee, section 7(1) of the *Estates Act* provides that the application shall be filed in the “office for the county or district in which the testator or intestate had at the time of death a fixed place of abode”.

We then discussed the recent guidelines set down by the Honourable Justice Brown in *Re Henderson*, 2008 CanLII 69136 (On. S.C.), regarding administration bonds and dispensing with same. There seemed to be a general consensus that due to practical difficulties, it is extremely difficult to obtain bonds in some jurisdictions. We discussed alternatives to bonds in such situations. One suggested alternative mechanism was a letter of credit payable to the Accountant of the Superior Court for twice the stated value of the estate.

We next discussed estates which hold closely-held companies and some of the issues that may arise. One such issue is where beneficiaries want dividends increased, and may retain corporate litigation counsel to commence a claim against the estate on the basis of oppression. We discussed what the threshold test may be for granting relief in an oppression claim. We touched on the case of *Re Tenenbaum Estate*, in which it was held that a testator’s “letter of wishes” (i.e., a precatory document) can be considered by the Court in determining the best interests of a corporation. We discussed various ways in which a testator could successfully control the direction of a company from beyond the grave, such as carefully delineating between estate trustees and directors.

A participant then introduced the topic of a domestic trust with a “protector”. There was a general discussion regarding the roles and liabilities of a “protector”, that is, a person with veto power over distributions from the trust and liquidation of the trust. The advice and direction of the court will be useful in resolving ambiguous situations involving “protectors”. The inclusion of a “protector” provision seems to be rare and restricted to very large trusts.

Another participant raised an issue regarding whether an estate trustee is entitled to compensation when the estate trustee receives a bequest in a Will. It was noted that according to the case law on this issue, the specific provisions of the Will may influence whether the bequest is subsequently ruled to be

in lieu of compensation. It was also noted that an estate trustee may choose not to claim compensation, where they receive a sizeable bequest, as the compensation is taxable.

An issue was then raised regarding a solicitor's ethical obligations and possible liability for the actions of a client. Specifically, a participant asked what was the duty of an estate trustee's solicitor in cases where the estate trustee refused to disclose to beneficiaries the existence of joint bank accounts held with the deceased. This led to a lively discussion, and no clear consensus emerged. We discussed whether the extent of the solicitor's knowledge could be sufficient to be viewed as counselling a breach of trust. The estate solicitor could refuse to commission any affidavit sworn in support of a probate application that did not reference the joint accounts. We also discussed asking the Law Society for guidance or bringing a motion for the Court's advice and direction under seal.

We next discussed issues regarding the payment of the estate administration tax. It was generally agreed that an asset impressed with a resulting trust for the benefit of an estate is subject to such tax. We also discussed the liability of an unsuccessful challenger to a Will for estate administration tax, where the litigation commenced by the challenger leads to an application for probate that may otherwise have been unnecessary. The general view was that the costs associated with the probate application could be sought against the unsuccessful challenger.

We ended our February lunch with a discussion regarding whether a testator can require an estate trustee to retain a particular lawyer for the estate. The consensus was that any such provision in a Will is not binding on an estate trustee. Estate trustees should have the choice to choose their advisors.

Our next Brown Bag Lunch was held on **March 24, 2010**.

We began with a discussion about the use and drafting of multiple Wills. In particular, we discussed provisions that leave it to the estate trustee(s) to decide whether a grant of probate is required for particular assets, which are not always specifically defined. The estate trustee(s) have discretion to include certain assets in the Secondary Will, which usually is not probated. We discussed the need for some degree of certainty in identifying the asset or asset class at issue.

We next discussed various tax issues, including whether a trust company can be an estate trustee for an estate that holds a Canadian controlled private company. Apparently, this issue is currently being revisited by Canada Revenue Agency. We also discussed recent changes to the definition of a taxable Canadian company and the effect on the need for Certificates of Compliance (formerly s. 116 Certificates) when distributing to non-resident beneficiaries.

A participant then canvassed the group for views on whether a lawyer witness to the execution of a Will should commission the Affidavit of Execution of the second witness to the Will. Historically, it appears that this was frowned upon and court offices would not accept an Affidavit of Execution by one witness if commissioned by the other witness to the same Will. Recently, it appears that this may no longer be a problem. However, the general consensus appeared to be that one should have a third party

commission the Affidavit of Execution. We also discussed the use of Affidavits of Subscribing Witnesses for powers of attorney for property. The general consensus appeared to be that many do not prepare such affidavits, although it was recognized that a third party may ask for one.

Another participant then raised an interesting issue regarding whether the obligations of a shareholder, assumed during their lifetime, survive after death. A particular scenario was presented in which, in the context of an estate freeze, the parents gave a personal undertaking to buy back shares of a company if so demanded by their children. The parents were no longer shareholders of the company, as all shares had been distributed to their children per the agreement. The agreement signed with the children had the usual covenant that the agreement was binding on "heirs, successors and assigns". The parents passed away years ago and their respective estates were distributed. It was now the case that one of the children was demanding that the parents' estates buy back their shares. A lively discussion ensued as to whether the demand purchase obligation survived death, the various defences that could be made to any such claim, and whether the beneficiaries of the parents' estates were now at risk of having to satisfy the demand purchase obligations.

We then discussed the issue of competing RRSP beneficiary designations, one held by a financial institution and one set out in a Will, and the provisions of the *Succession Law Reform Act* in this regard. It was noted that an RRSP planholder is entitled to rely on their own documentation regarding the beneficiary designation and, accordingly, one should always ensure that the planholder is on notice of any competing/late RRSP beneficiary designation.

We ended our lunch with a discussion regarding the recent Endorsement of the Honourable Justice Brown in *Re Mitchell Estate* 2010 ONSC 1640, in which His Honour outlines what materials will have to be filed with the Court on a go forward basis on all uncontested applications to pass accounts where there is a request for increased costs.

Our next Brown Bag Lunch was held on **April 20, 2010**.

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Case Comment: *Re Estate of John Mitchell*

Heather Mountford*

In *Re Estate of John Mitchell*, Justice Brown addresses a gap in Rule 74.18 regarding the materials required to be filed with the court in support of an unopposed application to pass accounts where a request for increased costs has been submitted.

Justice Brown clarifies that when an application to pass accounts is unopposed, but will proceed to a hearing because a request for increased costs has been filed, the applicant is required to file the following materials with the court:

1. proper initial application materials specified in Rule 74.18(1);
2. the supplementary record required under Rule 74.18(9) when an application to pass accounts will proceed without a hearing;
3. an affidavit containing:
 - a) the request for increased costs in the proper form;
 - b) proof of service of the request on all affected parties;
 - c) a statement explaining the response of each of the parties to the request, such as whether they consent, object or take no position; and
 - d) details of the request for increased costs, either in the form of a detailed bill of costs or a copy of the solicitor's dockets.

The supplementary record, as described in Rule 74.18(9), must be filed even though the application is proceeding to a hearing. This is required so that there is evidence before the court to prove that all parties entitled to notice have been served with the initial application record, and to confirm that there are no outstanding objections to the accounts.

Justice Brown further clarifies that a request for increased costs is not in the proper form, unless it discloses the amount of increased costs sought. The purpose of this requirement is to ensure all parties in receipt of a request have adequate notice of the amount of costs sought, and can decide whether or not to object.

If a party in receipt of a request for increased costs objects to the amount sought, a notice of objection should be served and filed "as far in advance of the hearing date as possible", instead of raising their objections for the first time at the hearing of the application. Justice Brown indicates that waiting until the hearing to raise objections to a request for increased costs may be grounds for the court to impose costs sanctions.

This case highlights the importance of providing sufficient evidence outlining the details and reasons for the request for increased costs. The court cannot determine whether the request is fair and reasonable in the circumstances without sufficient evidence outlining the work performed, time spent, and the value or cost of such work.

It is important to remember that Rule 74.18(11.1)1 and 2 require a request for increased costs to be served and filed only during the period beginning 10 days after the notice of application to pass accounts has been served and 10 days before the hearing date specified in the notice. The requirement for the request for increased costs to disclose the amount of costs sought will pose difficulties in cases where significant additional costs may be incurred after the time for serving and filing a request for increased costs has passed, as counsel will need to include a reasonable estimate of future fees in the request for increased costs or seek to amend the amount stated in the request.

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Hall Estate v. Picketts, [2009] B.C.J. No. 1415 (B.C.C.A.); leave to appeal to the S.C.C. dismissed: Common Law Spouses and Moral Considerations following *Tataryn*

*Susan J. Stamm**

Coleman Hall died in 2002. He was survived by his two adult sons and his common law spouse, Helen Picketts.

Mr. Hall and Ms. Picketts began living together in 1981. He was 75 and she was 54. When he died, she was 75 and they had lived together for 21 years. He had reneged on a promise to marry her but promised that he would provide for her, as if she was his wife. Ms. Picketts testified that she never pushed Mr. Coleman to marry her, as she was “too old fashioned”.

Mr. Hall was a very wealthy man before he met Ms. Picketts. His estate, consisting primarily of liquid investments, was worth \$18 million when he died. Ms. Picketts claimed it was worth more than this (\$30 million) depending on whether certain shares held by one of the deceased’s sons fell into the estate or not. Ms. Picketts had no idea of the extent of Mr. Hall’s wealth until after he died.

Ms. Picketts had worked at Birks in downtown Vancouver as a salesperson, when she met Mr. Hall, and remained in her job for four years after moving in with Mr. Hall. She left her job after he told her that he would marry her in 1985.

Despite Mr. Hall’s wealth, the couple led a comfortable, but not a lavish, lifestyle. They shunned extravagance. Mr. Hall provided Ms. Picketts with \$450 per month for groceries and incidentals, which

he later increased by \$100. They spent winter months at a condominium Mr. Hall owned in Hawaii and spent the rest of the year in his condominium in Vancouver.

When he became ill in the 1990s, Ms. Picketts cared for him at home, later with the assistance of home care.

Mr. Hall died in 2002, and was survived by his two adult sons and Ms. Picketts. Under his will, made in 1992, he provided for Ms. Picketts as follows:

- his personalty (some of these were valuable, worth \$106,740);
- his condominium in Vancouver (valued at \$297,300);
- \$2,000 per month, indexed to the cost of living; and
- the use of the Hawaii condominium for up to 3 months per year, and 10% (up to \$75,000) of the net sale proceeds of the condominium.

His provision for her represented his view of the lifestyle that they led.

He left the residue of the estate, unequally (60/40) to his two sons.

At the time he died, Ms. Picketts had limited savings. Shortly after he died, she inherited funds from her brother's estate of \$425,000 (half of which she gave to her daughter).

The sons were the executors and agreed that the will did not adequately provide for Ms. Picketts. They increased her monthly payments up to \$6,000 per month.

Ms. Picketts brought an application under the B.C. *Wills Variation Act* ("WVA") R.S.B.C. 1996 c. 490, s. 2, relying on the moral obligations set out in the Supreme Court of Canada ("S.C.C.") decision in *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807.

B.C.S.C. Decision

Justice Bauman did not consider the issue of whether the additional shares fell into the estate. He noted that both brothers agreed the shares belonged to the one brother, and that for Ms. Pickett's claim, "[a]t a certain point, the size of a wealthy estate becomes irrelevant to the task of ascertaining the proper provision for the adequate, just and equitable award ... at least under the *Tataryn* moral obligations standard."

His Honour distilled the following principles from the case law:

- the court must implement the testator's wishes unless these fail to accord with the WVA;
- the legal support obligation is the minimum acceptable level of what is adequate, just and equitable (the couple were not married – he had a legal support obligation to her only);
- judicial interference with testamentary autonomy should be minimized; and
- societal norms must be considered in determining what is adequate, just and equitable, i.e., what a judicious person would do in contemporary community standards; and

-
- it is not the purpose of the *WVA* to enable a claimant to build up an estate, but rather to ensure proper support during a claimant's life.

His Honour awarded an annual sum of \$175,000 to Ms. Picketts, indexed, for the rest of her life. He also awarded her \$405,000 to renovate the Vancouver condominium. He also permitted her to receive \$100,000 from the sale of the Hawaii condominium.

Both Ms. Pickett and the Estate Trustees appealed.

B.C.C.A.

The Court of Appeal was critical of the Trial Judge's maintenance-based analysis, in view of the fact that Mr. Hall had decided never to marry Ms. Pickett, and therefore she had no claim to his assets.

Justice Low, who delivered the reasons, considered the import of *Nova Scotia (Attorney General) v. Walsh*, 2002 S.C.C. 83. In that case, the S.C.C. found that it was not unconstitutional to exclude unmarried spouses from provincial matrimonial property legislation. She noted that unlike the claimant in *Walsh*, Ms. Pickett was included as a proper claimant under the *WVA*.

Justice Low noted that under the B.C. *Estates Administration Act*, Ms. Pickett would have been considered a "spouse" in the unlikely event of intestacy in this case. In B.C., the definition of spouse was amended in both intestacies and in claims for support in 1999.

Justice Low noted that the intestacy provisions did not directly affect the legal considerations under *Tataryn*, but noted the amendments to "spouse" as reflective of the societal norms of the day.

Accordingly, even though, if the couple had separated while Mr. Hall was living, Ms. Picketts would not have had a claim for property, that would not limit the court under the *WVA* in its consideration of moral circumstances to providing her with periodic support: "The moral aspect of the claim is not restricted to a reasonable or even a generous level of maintenance" wrote Justice Low.

Given the large size of the estate, Mr. Hall's moral obligations to all beneficiaries could be satisfied.

Justice Low noted the independence of the two sons; the 21 year "marital relationship"; the fact that she gave up her career thus depriving herself of the ability to accumulate her own estate; the necessity she now faces of dipping into her own savings to maintain her lifestyle; the loving and effective care she provided when he was sick; his promise to take care of her as if she was his wife; and the size and liquidity of the estate.

The Court of Appeal awarded her \$5 million plus the Vancouver condominium, plus the \$100,000 from the Hawaii condominium, and the personalty. She also received the interest earned by the Estate on the \$5 million since the date of death, less the amounts she had received from the Estate.

S.C.C.

The Supreme Court of Canada denied the application for leave to appeal by the Estate Trustees.

This case comment represents the opinion of the author and does not represent or embody the official position of The Children's Lawyer or the Ministry of the Attorney General.

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Case Comment: *Evanoff Estate (Re)*, (2009) 98 O.R. (3d) 251, 2009 Can LII 44701 (S.C.J.)

This endorsement of Justice Brown, recently reported in the *Ontario Reports*, provides a useful analysis of standing to move to set aside judgments granted in uncontested passings of accounts, as well as some reminders about the grounds for setting aside judgments.

Lucy Evanoff died in November 2005. Litigation amongst the beneficiaries of her estate ensued and Canada Trust Company was appointed Estate Trustee During Litigation ("ETDL") in February 2006. A settlement was approved by the court in 2008, the ETDL was discharged and the court directed that a certificate of appointment of estate trustee be issued to one of the beneficiaries, Sharon Andrzejewski. Implementation of the settlement failed: Ms. Andrzejewski caused delays and further litigation. Court intervention was required to implement the settlement.¹

Canada Trust was required to pass its accounts as ETDL on Notice to Ms. Andrzejewski, and she filed objections to those accounts. At the hearing of the application, Ms. Andrzejewski's objections were struck because of her failure to comply with costs orders made against her and the application was dealt with as unopposed. Canada Trust's compensation was fixed at \$15,148.33 and their legal fees at \$132,776.54. Among the reasons for allowing the fees, far in excess of the Tariff C amount, was Ms. Andrzejewski's actions which necessitated repeated and costly court attendances.

At the end of the day, about \$8,000.00 remained to satisfy Ms. Andrzejewski's entitlement to the Estate. Deverett law firm ("Deveretts") represented Ms. Andrzejewski until it was removed as her solicitor of record in October 2008. At an assessment hearing, Deveretts and Ms. Andrzejewski entered into an agreement certifying Deveretts' fees at \$55,936.60 and agreeing that Deveretts and Ms. Andrzejewski would share equally in whatever funds might be recovered if the order of Justice Mesbur was set aside and the legal fees of Canada Trust were reduced. Deveretts, and not Ms. Andrzejewski, proceeded to move to set aside Justice Mesbur's Judgment.

Deveretts, however, lacked standing to bring such a motion. As a creditor of an estate beneficiary, Deveretts held neither a contingent nor vested interest in the estate of Lucy Evanoff, as required under Rule 74.18(3), to participate in a passing of accounts. Had Deveretts been a creditor of the deceased, pursuant to s. 50(1) of the *Estates Act*, R.S.O. 1990 c. E-21, it would have had standing to compel an accounting.

Justice Brown's analysis of how to set aside a judgment on a passing of accounts is instructive: he accepted the argument of Deveretts that a passing of accounts which has proceeded as uncontested, because objections were struck, is akin to the signing of a default judgment against a defendant whose defence has been struck.

The *Rules* offer several methods to set aside judgments obtained on passings of accounts. For example, if a person with a financial interest in an estate fails to file an objection to accounts through accident, mistake or insufficient notice, he or she may move to set aside or vary a judgment on that passing under Rule 38.11(1). Rule 59.02 allows a person to move to set aside judgment on a passing of accounts on the grounds of fraud or based upon facts arising or discovered after judgment has been made.

Rule 19.08, relied upon by Deveretts, can also be used to set aside judgment rendered against the financial interests of a beneficiary of an estate. Striking Ms. Andrzejewski's objections was akin to striking a defence; with the objections struck, a hearing proceeded and judgment was rendered against the financial interests of Ms. Andrzejewski. A motion to set aside the judgment would have been the appropriate remedy for Ms. Andrzejewski to pursue in the circumstances, as established by the Court of Appeal in *Halow Estate, v. Halow* (2002), 59 OR (3d) 211.

The test which must be met to succeed on a motion to set aside default judgment has been well established in the case law. To succeed, the court must be satisfied that the motion to set aside judgment was brought without delay after the defendant learned of the default judgment. The court must also be satisfied that there is an adequate explanation for the circumstances giving rise to the default and determine whether the defendant had an arguable defence on the merits.² In the circumstances of this case, Ms. Andrzejewski's actions were found to be the cause of much of the protracted litigation and the resulting costs of Canada Trust: Ms Andrzejewski's objections would likely not have succeeded had there been a trial on the merits, and to permit her to re-litigate the passing of accounts would amount to an abuse of the process of the court.

The *Evanoff* decision addresses standing to re-open an application to pass accounts and the tools available within the *Rules* to do so. In addition to the procedural analysis, *Evanoff* is a good reminder of the need to approach the court with clean hands when asking to re-open protracted litigation.

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¹ See *Re Evanoff Estate*, [2008 CanLII 58151 \(ON S.C.\)](#) and [2009 CanLII 12534 \(ON S.C.\)](#)

² See *HSBC Securities (Canada) Inc. v. Firestar Capital Management Corp.*, (2008) ONCA 894 at paras. 21 and 30 citing *Peterbilt of Ontario Inc. v. 1565627 Ontario Ltd.* (2007), 87 O.R. (3d) 479 (Ont. C.A.), at para. 2

Investment Duties of Trustees - Can a Trustee Hold Private Company Shares as the Sole Trust Asset?

Clare A. Sullivan*

Often, the only asset of a trust established as part of an estate freeze will be non-voting common shares in the family business corporation or in a holding corporation. If the trust deed is a standard format and with general wide powers of investment, such shares would not necessarily constitute an authorized investment by the trustee.

The power of a trustee to invest is, to the extent it is not specifically limited by the terms of the trust, a discretionary power which can only be exercised within the limits prescribed by common law, by statute, and by the trust instrument.¹

At common law, trustees are required to act prudently, with reasonable care, and impartially.² There is no common law 'duty' to diversify investments. However, a failure to diversify can be a breach of the duty of impartiality.

In *Re Smith*,³ the trust property was a single corporate stock with little income. The Ontario court held that holding only this stock was a breach of the trustee's duty to maintain an even hand among the beneficiaries.

The common law also imposes a duty to convert, also known as the Rule in *Howe v. Lord Dartmouth*,⁴ which also stems from the duty to act impartially. The rule presumes that the person who settled the trust intended the income and capital beneficiaries to be treated equitably and accordingly compels the conversion of unproductive assets, unless the trust document demonstrates an intention that assets be enjoyed in specie.

The Ontario High Court, in *R. v. Wright*,⁵ articulated the duties of trustees with respect to the sale and retention of assets:

1. Where there is an absolute trust to sell or convert, to which is added a power to retain, the duty is to convert.
2. Where there is an absolute trust to retain with a discretionary power to convert, the duty is to retain.
3. Where there is a power to sell or convert with an equal power to retain, the duties are equal but the overall duty to act impartially will apply.

With respect to investments, it is generally in the interest of the income beneficiaries to maximize current income, while the capital beneficiaries wish to ensure capital growth. In balancing these competing interests, the trustee's duty is to ensure that investment results do not prejudice one class of beneficiaries at the expense of another.⁶ Retention of assets which do not have either adequate income returns or capital growth will not satisfy this duty since one or the other of the income or capital interests will be prejudiced.

The common law “prudent investor” rule has been statutorily recognized in Ontario in the *Trustee Act*⁷ which requires a trustee to exercise the care, skill, diligence and judgment that a prudent investor would exercise in making investments,⁸ and also sets out criteria which MUST be considered in planning investments.⁹

One of the criteria requires consideration of “the expected total return from income and appreciation of capital”, which confirms the common law principle that in investing trust property, trustees must comply with the duty to maintain an even hand between successive beneficiaries.

In addition to the foregoing, trustees are statutorily **required** to diversify investments to the extent appropriate to the requirements of the trust and general economic and investment market conditions.¹⁰ Holding growth shares in one company as the only asset of the trust would not satisfy the requirement to maintain even-handedness or to diversify.

The provisions requiring the consideration of criteria and diversification are expressed in mandatory terms. Accordingly, if the trust document is silent on these points, the requirements in the *Trustee Act* must be met regardless of any general powers of investment given to the trustee in the trust document.

However, the *Trustee Act* also provides that these sections do not authorize or require a trustee to act in a manner which is inconsistent with the terms of the trust.¹¹ Section 67 of the *Trustee Act* provides that the powers and rights conferred by the *Act* are **in addition to** those conferred by the trust document and are **subject to** the terms of the document. For greater certainty, section 68 provides that nothing in the *Trustee Act* authorizes the trustee to do anything forbidden **in express terms** by the trust instrument.

The Ontario Court General Division held, in *Crawford v. Jardine*,¹² that the trust document can direct trustees to act in a manner which favours one beneficiary or class of beneficiaries, or can specifically provide that the trustees are not required to maintain even-handedness. On the other hand, in *Re Carley Estate*,¹³ the trustees were given full power and authority in their sole and absolute discretion, to encroach on capital for the benefit of the income beneficiary. But nothing in the trust deed specifically released the trustees from the even handedness rule. The Court said the trustees could not exercise the power to encroach without regard for the even-handed principle and the rights of the capital beneficiaries. In *Worts v. Worts*,¹⁴ the court found that a clause which allowed the trustees to invest in such securities as the trustees thought proper, did not justify the trustees investing the assets of the estate in a business.

In *Re Power*,¹⁵ the court stated that a non-income producing investment which produces only capital growth was a clear example of an investment favouring the remaindermen, which was not authorized by any statutory provision. In commenting on what would be necessary to authorize such an investment, the court said such investments can only be purchased pursuant to an express clause in the document. The key is that the trust terms must be specific or express. As stated by one author, “it is likely only the clearest language in a trust instrument would be effective in cutting down or altogether eliminating the criteria set out ..” in subsections 27(5) and (6) of the *Trustee Act*.¹⁶ Parker & Mellows, in the *Modern Law of Trusts*,¹⁷ confirms that “such clauses are necessary for non-income producing investments...they are also advisable if a settlor wishes trustees to be able to retain particular investments such as shares in his own or his family companies without having to be concerned about their obligation...to diversify

investments.... However, it must be emphasized that the statutory duty of care applies just as much to the exercise of express powers of investment as it does to statutory powers of investment.”

*Waters’ Law of Trusts in Canada*¹⁸ agrees that it is the settlor who determines what powers the trustees have. “It has always been understood that, if he chooses, the settlor...may set out according to his own wishes, the scope of the investment power his trustees are to have. He may require that all trust funds are to be invested in one security...or at the other extreme, he can give complete discretion to the trustees.”¹⁹

Therefore, if the trust document directs a trustee to hold a particular asset, the trustee will not be required to sell it as part of the requirement to diversify. But if the trust document contains only a general, wide power to invest, the common law duties of prudence and impartiality will apply to the exercise of investment discretion by the trustee.

A trust to be used in an estate freeze should contain a clause directing the trustee to acquire the particular investment and to hold it for the duration of the trust notwithstanding its yield or lack of yield or its value from time to time and without being required to: (i) adhere to the provisions of the *Trustee Act* regarding investment criteria; (ii) diversify (specify that it can be the sole asset of the trust); (iii) maintain even-handedness; or (iv) invest prudently. This would give a trustee complete authority, without being subject to challenge or liability for loss, to hold the asset specified. In fact, where a trustee is directed to do this, the trustee would be liable for breach of trust if he did not.

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1 Parker and Mellows, *The Modern Law of Trusts, 9th ed.* (Toronto: Carswell, 2008) p.225 [Parker and Mellows].

2 Donovan W.M. Waters, *Waters’ Law of Trusts in Canada (3rd Edition)* (Toronto: Carswell 2005) at p. 963 [Waters].

3 [1971] 1 O.R. 584 (Ont. H.C.) upheld on appeal.

4 (1802), 32 E.R. 56 (Ch.).

5 (1976), 14 O.R. (2d) 698 (H.C.J.).

6 Waters, *supra* note 1 at p.941.

7 R.S.O. 1990, c. T.23, as amended.

8 *Ibid.*, subsection 27 (1) and (2).

9 *Ibid.*, ss. 27(5).

10 *Ibid.*, ss. 27(6).

11 *Ibid.*, ss.27(9).

12 (1997) 20 E.T.R. (2d) 182.

13 (1994) 2 E.T.R (2d) 142 and 4 E.T.R(2d) 102.

14 (1889), 18 O.R. 332.

15 [1947] Ch. 572.

16 Jenkins & Scott, *Duties of Estate Trustees, Guardians and Attorneys*, (Ontario: Canada Law Book Inc., 2000) at p. 53.

17 *Supra* note 5 at p.674.

18 *Supra* note 1 at 941.

19 Waters, *supra* note 1 at 963.

Spelling and Grammar Query

Sean Lawler*

Deadbeat readers suggested the following topics for this article:

Is 'Loan' a Verb and a Noun?

Is it proper to say "*I will loan you my car*", or is it only correct to say "*I will lend you my car*"? There is no consensus.

Gordon Cooper at Miller Thomson LLP reports that the late Wolfe Goodman, a stickler for grammatical accuracy, always had a concern about using 'loan' as a verb. However, *The New Shorter Oxford English Dictionary* lists 'loan' as a noun and a verb. It says that both 'loan' and 'lend' have Germanic roots. Apparently, while 'loan' as a noun became part of English prior to 1149 - at the same time as 'lend' - 'loan' as a verb entered the language between 1150 and 1349.

Bryan Garner's *A Dictionary Of Modern American Usage* says that 'lend' is the verb and 'loan' is the noun. The entry continues: "*the verb 'loan' is considered permissible, however, when used to denote the lending of money (as distinguished from the lending of things).*"

'Same' as a Pronoun

"*A will may be revoked by destroying same.*" This is legalese: it alienates the reader, and makes the writer think that he is being more precise than he really is.

H.W. Fowler wrote that using 'same', in place of 'it', 'them', or the noun itself, "*is avoided by all who have any skill in writing.*" Bryan Garner says that those who use 'same' in this way "*seem bent on giving the worst possible impression of themselves*".

Kindly

The New Shorter OED says that 'kindly' means, "benevolently; affectionately ... in a way that pleases the recipient" and notes that the word is used "chiefly in polite requests and ([is used] ironically) in demands".

One *Deadbeat* reader pointed out that lawyers write him to "...**kindly ask** you to provide me with...", when those lawyers should "...ask you to **kindly provide** me with...". The writer is making a 'polite' request; the word 'kindly' acknowledges that the recipient of the letter would be 'kind' by providing fulfilling the request. The recipient of the letter can judge for himself whether the writer's request is 'kindly'.

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Solicitors as Attorneys, Trustees and Estate Trustees - What You Need to Know

Date: Thursday, May 20, 2010

Time: 1:00 PM

Location: OBA Conference Centre, 20 Toronto Street, 2nd Floor, Toronto

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