



## Case Comment - Miller v. Miller: *Ad Hoc* Fiduciary Duty

By *Ameena Sultan\**

In *Miller v. Miller*,<sup>1</sup> the Court considered the issue of a daughter's fiduciary duty toward her mother.

In this case, the daughter, Verity Miller, was not acting pursuant to a power of attorney but rather was (purportedly) assisting her mother, Diane Miller, with her finances.

Diane left the home she shared with her husband, Larry Miller, and stayed with Verity, and Verity's common law spouse, Cory, for a short time. She, then moved into a women's shelter while she took steps to find her own home.

Diane was the beneficiary of a trust fund that paid her nominal income. In order to pay for a house purchase, Diane requested that the trustee encroach on the trust so that Diane could receive the capital in the fund. The trustee agreed and Diane received some \$230,000.00 from the trust between March and April 2009. Those monies were deposited into joint accounts in Diane's and Verity's names so that Verity could assist her mother with banking transactions. Verity held all the cards, bank records and passwords for the joint accounts.

Starting in March, and unbeknownst to her mother, Verity transferred funds from her mother's accounts to her own lines of credit, withdrew cash and purchased a truck for her common law husband for more than \$40,000.00.

On May 5, not knowing that her money was being depleted, Diane signed an Agreement of Purchase and Sale to purchase a house for the amount of \$180,000.00.

One week later, Diane learned her money was missing. When a confrontation ensued, Verity called 911 and alleged that her mother had Alzheimer's disease, was hitting herself and others, and threatened to kill her lawyer and her doctor. The police attended at Verity's home and took Diane to a psychiatric ward against her will. That same day, Verity emptied the last of Diane's bank accounts.

Diane remained at the psychiatric ward for nearly two weeks, "penniless and homeless," until her husband came and took her home.

At trial, Diane testified that she had had no knowledge that her monies were being taken out of her accounts until the accounts had been depleted. Verity, on the other hand, testified that all the transactions were undertaken by her mother without the knowledge of Verity. The Court found Diane to be credible in her evidence and Verity to be "totally lacking in credibility."

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<sup>1</sup> 2011 CarswellOnt 14404, 2011 ONSC 7239,

After outlining the facts in precise detail, T.A. Heeney J. reviewed the law on *ad hoc* fiduciary duty apart from the traditional categories, as outlined in the Supreme Court of Canada's ruling in *Alberta v. Elder Advocates of Alberta Society*. Justice Heeney noted that *ad hoc* fiduciary duty requires, in addition to vulnerability in the relationship, that:

1. "The alleged fiduciary gave an undertaking of responsibility to act in the best interests of a beneficiary;
2. The duty is owed to a defined person or class of persons who must be vulnerable to the fiduciary in the sense that the fiduciary has a discretionary power over them; and
3. The alleged fiduciary's power may affect the legal or substantial practical interests of the beneficiary."<sup>2</sup>

The Court noted that Diane was emotionally, physically and financially vulnerable, and that Verity was in a position of power and control over Diane's money. The Court found that Verity owed a fiduciary duty to Diane, and that she had breached that duty by acting in her own interests and not in Diane's best interests.

Justice Heeney also briefly considered the issue of conversion, and held that there was no evidence that Diane had intended to gift any of the monies to Verity.

The Court found that Diane was entitled to judgment in the full amount of monies that had been taken by Verity.

The Court characterized this case as "a story about initial good intentions being overcome by greed and misguided feelings of entitlement." Justice Heeney carefully detailed the facts in the case to show the responsibility and trust bestowed on Verity by her mother, and the manner in which Verity had betrayed that trust. No doubt the Court intended to convey a cautionary lesson to would-be fiduciaries that the law and Courts take those duties very seriously.

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<sup>2</sup> At paragraph 87