Estates and trusts casebook

Here's a trio of cases that captured our interest in the past few months.

Testator found to have capacity despite schizophrenia, lack of knowledge of asset value

In *Hoffman v. Heinrichs*,[1] the court of Queen's Bench in Manitoba rejected a would-be beneficiary's challenge to a will on the basis that the testatrix had schizophrenia.

Ann Ogilvie, a widow, had no children of her own. Though she was one of eight children, she left her entire estate to her twin brother, with a gift over to his youngest son. She and her twin Jake, several years younger than the rest of their siblings, had been close all their lives. Jake farmed land belonging to Ann, and after Ann's husband's death, had helped manage her finances, without ever becoming her attorney. Upon Jake's death, one of his sons (not the beneficiary) had taken over helping Ann, who by then was in an assisted living residence.

After Ann's death in 2009, one of her nephews challenged Ann's 1980 will on the basis of lack of capacity. At the time of her death, Ann's estate was worth $1.1 million, and if distributed according to the intestacy rules, her assets would have been shared by more than 80 next of kin, including the plaintiff nephew.

The plaintiff challenged the will on the basis that the testatrix, having suffered from schizophrenia for most of her life, lacked capacity to make a will, and that she was unduly influenced by her brother, who was the sole beneficiary while he was alive. The plaintiff presented evidence that his aunt had, over the years, demonstrated some unusual behaviour and was "tactiturn" and not very communicative with some people. He also relied on evidence that she was not aware of the full value of her estate at the time she made her will. He argued that where a testator is mentally ill and/or makes a will that is "inofficious" in that it disinherits relatives, there is a presumption of suspicious circumstances surrounding the making of the will that must be overcome by the party seeking to have the will upheld.

The court held that the fact that the testatrix suffered from schizophrenia constituted a "suspicious circumstance" with respect to the preparation of the will, and that the onus was on the defendant (the gift-over beneficiary) to disprove his aunt's incapacity at the time the will was made. The court accepted the nephew's proof, which included documentary (medical) evidence and the testimony of the administrator of the facility in which Ann had lived, and of relatives who were testifying against their own interest (i.e., who would have benefited from a finding that the will was invalid). The court found that based on her history and relationships, Ann's decision to leave her estate to Jake alone was understandable, that there had been no undue influence, and that the lawyer's actions in preparing the will were careful and appropriate even though the lawyer did not require

[1] 2012 MBQB 133 (CanLII)

a valuation of the estate at the time the will was prepared. The fact that Ann did not know the full value of her estate in 1980 did not, either in itself or in combination with her schizophrenia, affect her capacity to make a valid will.

Interestingly, the plaintiff asked that the court treat the lawyer's preparation of a memorandum documenting her work in preparing the will as evidence of the lawyer's concerns about Ann's capacity. Instead, the court characterized the lawyer's actions in doing so as "prescient" in light of the potential—which was eventually realized – for a future challenge to the will (because the testatrix had disinherited her other siblings).

Lawyer liable when bequest fails due to misidentification of property owner in will

In its decision in *Meier v. Rose*[2] the Alberta Court of Queen's Bench found a lawyer liable in negligence to a disappointed beneficiary after an intended bequest failed due to misidentification of the owner of the property.

The lawyer had a longstanding relationship with the testator, having represented him in at least 50 other (mostly real estate) matters. The testator visited the lawyer without an appointment in July, 2000 and gave instructions for the preparation of a will, which the testator wanted completed within 24 hours.

The testator was a wealthy individual who owned a number of properties. The testator instructed the lawyer to include in the will a bequest of four quarter sections of a rural property to his brother. The lawyer requested a full legal description of the property, which the testator provided later the same day. The lawyer included the bequest in the will, identifying the testator as the owner of the property.

After the testator died in August 2001, the brother learned that the legal owner of the property was not the testator himself, but rather the testator's company. The misidentification of owner in the will caused the bequest to the brother to fail.

The brother sued the lawyer for negligence.

The court found first that the lawyer owed the intended beneficiary a duty of care. Next, the court found that the lawyer had fallen below the standard of care required in failing to discover and address the fact that the land was owned by the testator's company: "A reasonably competent solicitor in those circumstances would, at a minimum, have asked who owned land to be gifted in the will or done a search to ascertain in ownership."

The lawyer knew that the client used corporate vehicles, but did not ask whether the land was held by a corporate vehicle, and did not perform a title search. The limited time stipulated for completion of the will did not limit the standard of care required of lawyer. Evidence was adduced to establish that a title search could have been obtained on a "same day" basis.

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[2] 2012 ABQB 82 (CanLII)

The court awarded damages to the brother in an amount equal to the value of the land as of the date of the death of the deceased testator, plus prejudgment interest. Added to that amount was some $11,200 which would have been earned by the brother as surface lease income had the bequest been successful.

When will the costs of an application to interpret the terms of a trust be payable out of the trust?

Shaw v. Healthcare of Ontario Pension Plan[3] provides a useful primer about when costs of a (failed) application to determine the details of a trust will or will not be ordered against the trust.

Shaw, an employee of a hospital association, applied to the Superior Court of Justice for a declaration that certain "retention bonuses" he received under his employment agreement constituted pensionable earnings under the Healthcare of Ontario Pension Plan (HOOPP) for the purpose of calculating his pension benefits under the Plan. The court, after considering and interpreting the provisions of the HOOPP, a pension fund, held that the bonuses were NOT pensionable earnings, and dismissed the application.

Shaw sought an order that his costs for the failed application be paid by the fund. In deciding whether to grant that order, the court canvassed a line of cases from trusts litigation, including *Nolan v. Ontario (Superintendent of Financial Services)*[4], *Sutherland v. Hudson's Bay Co. Limited*[5], *Re Buckton*[6], *Nolan v. Kerry (Canada) Inc.*[7], *Burke v. Governor and Co. of Adventurers of England Trading into Hudson's Bay*[8], and *McCann v. Canada Mortgage and Housing Corp*[9].

The court's review of these authorities yielded the following general rules about when the costs of an unsuccessful application to interpret trust terms should payable from the trust itself:

1. the proceeding for which costs are sought was necessary to ensure the due administration of the trust fund (for example, to clear up ambiguities about terms); OR
2. the decision sought by the person bringing the proceeding would benefit all the beneficiaries of the trust.
3. If the first condition but not the second is satisfied, costs will not be payable where the proceeding was "adversarial" in nature;

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[3] 2012 ONSC 4828 (CanLII)
[4] 2007 ONCA 605 (CanLII), 2007 ONCA 605 (C.A.)
[5] [2006] O.J. No. 2009
[6] [1907] 2 Ch. 406
[7] 2009 SCC 39 (CanLII), [2009] 2 S.C.R. 678
[8] 2008 ONCA 690 (CanLII), 2008 ONCA 690
[9] 2012 ONCA 243 (CanLII), 2012 ONCA 243

4. The adversity contemplated by #3 above usually consists of a situation in which the decision benefits one or some trust beneficiaries and not others (i.e., with respect to the decision, the beneficiaries are adverse in interest).
5. If neither condition 1 nor condition 2 is satisfied, or condition 1 is satisfied but the proceedings are "adversarial", the "normal" costs rules will apply; i.e., the successful party will generally have his or her costs.

Because Shaw's application, had it been successful, would have required the fund to make a payment to him to the detriment of the other beneficiaries (to the extent that it would deplete the fund), Shaw was not entitled to have his costs paid out of the fund. The court, however, declined to order costs AGAINST him in favour of the fund, because it found that the terms of the fund were "not clear", and the question was one of first impression.