

CASE COMMENTARY

Estate Trustees held accountable for failure to exercise discretion



September 2024 | *Di Santo v Di Santo Estate*, 2023 ONCA 464

When we consider the discretion afforded an estate trustee under the terms of a Will, we often consider the prospective risk attracted to actions undertaken by such estate trustee, but what of inaction?

As Howard J. Ross once wrote: “[p]eople in power positions may be unconsciously more susceptible to selfishness and reduced empathy, without ever realizing it.” Often, these sage words are applicable when an estate trustee has been found to run afoul of his or her duties.

And where one has failed to conduct oneself in accordance with one’s duties, by inaction, what consequences may arise?

The Situation

Mr. Vincent Di Santo died on October 26, 2019, leaving Wills executed in 2018. The Wills in question appointed two of Mr. Di Santo’s three surviving children – John and Carmela – as Estate Trustees, together with two additional individuals. John, together with these same two individuals, also acted as trustees of a related family trust.

The deceased’s third child – Ottavio – “was not gainfully employed[,] had many challenging personal issues, including a heroin addiction[, and had] been permitted to live where he wanted and lead the life he wanted [while the deceased was alive].”

Ottavio was afforded an express provision of \$1,000 per week under the terms of his father’s Will, which the Estate Trustees paid, “[e]xcept during a brief period.” However, the Estate Trustees failed to exercise the discretion afforded them to “pay additional income or encroach on capital”.

As a result, Ottavio had money problems and was compelled to bring a motion seeking dependant support under Part V of the *Succession Law Reform Act*, together with a request for the removal of the Estate Trustees.

This motion was brought under an existing Application concerning, *inter alia*, a Wills challenge asserting undue influence exerted by John and Carmela over their deceased father, given that earlier Wills of the deceased were more generous towards Ottavio.

As a consequence of the motion, an order was issued by the motion judge removing the Estate Trustees and replacing them with CIBC Trust Corporation. Additionally, the motion judge ordered an interim payment for the benefit of Ottavio, which temporarily resolved the money problems he faced.

The Estate Trustees challenged the order of the motion judge on the basis that their removal was on an interim – not a final – basis.

The Court Decision

Unfortunately for the Estate Trustees, the Court was unconvinced by their rationale, which was two-pronged. First, the Estate Trustees argued that Ottavio did not request relief for their permanent removal and, second, that the “motion judge erred at law by failing to consider whether it was necessary to order their replacement.”

However, no transcript evidence was offered by the Estate Trustees supporting the notion that their permanent removal and replacement was not the remedy advocated for by Ottavio, nor was any evidence adduced to suggest that the Estate Trustees would have modified their submissions had they known their permanent removal and replacement was sought.

Even though “the motion judge cautioned herself that the threshold for the removal of a trustee is a high one”, the threshold was found to be met. In fact, the motion judge quite specifically considered the factors relevant to the removal of a trustee as

set out in *Virk v Brar Estate*, 2014 ONSC 4611, which are as follows:

- a) the court will not lightly interfere with the testator’s choice of estate trustee;
- b) there must be a “clear necessity” to interfere with the discretion of the testator;
- c) removal of an estate trustee should only occur in the clearest of evidence that there is no other course to follow;
- d) the court’s main guide is the welfare of the beneficiaries;
- e) it must be shown that the non-removal of the trustee will prevent the proper execution of the trust; and
- f) the removal of an estate trustee is not intended to punish for past misconducts; rather it is only justified if past misconduct is likely to continue and the estate assets and interests of the beneficiaries must be protected.

As set out at paragraph 29 of the instant case, the Court of Appeal’s decision in *Di Santo*, the motion judge concluded that “the Trustees are either in a position of conflict, have acted unilaterally or cannot objectively exercise their discretion”. The Court of Appeal summarized the motion judge’s reasons as follows:

1. Ottavio has no children, so John and Carmela will benefit from any gift over from the Family Trust.
2. Ottavio’s claim of undue influence in relation to the Wills puts the Trustees in conflict of interest.
3. The Trustees have not exercised their discretion to pay any additional amounts to Ottavio since the deceased’s death.
4. John and Carmela are influenced by their views on Ottavio’s lifestyle choices and his



behaviour and have a level of animus towards Ottavio.

5. The Trustees have not provided important information to Ottavio.
6. The removal of the Trustees is necessary to ensure a level playing field in the litigation.

The Court of Appeal saw no judicable defect with this reasoning.

Lessons Learned

1. John and Carmela allowed their personal biases concerning their brother's lifestyle choices to affect their decision-making as Estate Trustees. Much of the problems they faced could have been avoided had they acted objectively.

Namely, the Estate Trustees could have carefully considered the true financial needs of Ottavio and exercised their discretion to advance him further funds accordingly.

2. Had John and Carmela carefully considered the circumstances surrounding the objections to their conduct as Estate Trustees, including the fact that they were being accused of undue influence in the drafting of their father's Wills, they may have come to realize that a reasonable conclusion would have been that they were acting in a conflict of interest as Estate Trustees.

More specifically, earlier Wills of their deceased father were more favourable to the financial interests of Ottavio, and thus commensurately less favourable to John and Carmela.

3. John and Carmela stood to benefit financially from their failure to advance additional funds to their brother, Ottavio. Moreover, their conduct in refusing to comply with legitimate requests from Ottavio for disclosure might reasonably be interpreted as having been heavy-handed in nature.

In the result, the Court saw no option but to intervene by permanently removing the Estate Trustees.

4. The overarching lesson, therefore, is that one should be mindful that the privilege of serving as Estate Trustee is exactly that – a privilege. It is not an invitation for one to conduct oneself as one sees as subjectively best in the circumstances, especially where there is an air of legitimacy to an allegation of a conflict of interest.

As an Estate Trustee, it is possible to allow your view of the proper exercise of your discretion to be coloured by your subjective view of the proper needs of the beneficiary and your biases concerning the beneficiary's lifestyle and circumstances.

Many estate administration problems can be avoided by seeking legal advice on the duties of an Estate Trustee, and the consequences of failing to carry out such duties.

Michael von Keitz
Senior Associate Lawyer

The comments offered in this Case Commentary are meant to be general in nature, are limited to the law of Ontario, Canada, and are not intended to provide legal or tax advice on any individual situation. In particular, they are not intended to provide legal or tax advice. Before taking any action involving your individual situation, you should seek legal advice to ensure it is appropriate to your personal circumstances.

Copyright © 2024 O'Sullivan Estate Lawyers LLP, all rights reserved.

