A Review of Recent Trust Law Cases

Craig Vander Zee

Direct Dial: (416) 369-0316
Fax: (416) 369-1517
Email: cvanderzee@hullandhull.com

HULL & HULL LLP
Barrister and Solicitors

TORONTO
141 Adelaide Street West, Suite 1700
Toronto, Ontario M5H 3L5
TEL: (416) 369-1140
FAX: (416) 369-1517

OAKVILLE
228 Lakeshore Road East
Oakville, Ontario L6J 5A2
TEL: (905) 844-2383
FAX: (905) 844-3699

www.hullandhull.com
www.hullestatemediation.com

Subscribe to **Hull & Hull LLP** blogs and podcasts at http://estatelaw.hullandhull.com

A REVIEW OF RECENT TRUST CASE LAW

Craig Vander Zee[1] *and Sharon Davis*[2]

OVERVIEW

This paper considers several trust cases to highlight recent developments in the case law, including issues dealing with foreign trusts and trustees, the removal of estate trustees, constructive trusts, costs, and summary judgment. This paper is not intended, however, to be a comprehensive discussion of recent trust cases.

FOREIGN TRUSTS AND TRUSTEES

Two of the more noteworthy recent cases are the tax court decisions of *Garron Family Trust v. The Queen* 2009 TCC 450 ("*Garron*") and *Antle v. The Queen*, 2009 TCC 465, 2010 FCA 280 (CanLII) ("*Antle*"). There has been much commentary on these cases setting out all of the facts and issues. For a particularly entertaining article by Ed Esposto, "*Pyramids, The Wizard of Oz, Garron and Antle*", see the December 2009 edition of Deadbeat, Volume 28, No. 2. A very thorough treatment of the cases is also contained in an article by Suzana Popovic-Montag and Megan Connolly, "*Canadian taxpayers beware: foreign trusts may no longer be the same*", (2009) 7 T.Q.R. 23.

Both cases are appeals to the Tax Court of Canada from assessments made under the Income Tax Act with respect to off-shore trusts. Both cases were appealed to the Federal Court of Appeal ("FCA"). The appeal in *Antle* was released by the FCA ("FCA") in October,

[1] Craig Vander Zee is a partner at Hull & Hull LLP and can be reached at (416) 369-0316 or email at cvanderzee@hullandhull.com.
[2] Sharon Davis is an associate at Hull & Hull LLP and can be reached at (416) 640-3624 or email at sdavis@hullandhull.com.

2010. At the time this paper was written, the decision from the FCA regarding *Garron* had not been released.

<u>*Garron*</u>

In *Garron*, a Canadian resident tax payer(s) owned shares of a company and carried out a "re-organization" in 1998 that was similar in structure to an estate freeze. More particularly, two trusts ("Trusts") with Canadian beneficiaries were settled by an individual who was a resident of the Caribbean island of St. Vincent. The sole trustee of each trust was a corporation resident in Barbados. As part of the re-organization, the Barbados Trusts subscribed for shares of newly-incorporated Canadian corporations and the corporations in turn subscribed for shares of the company (which was in the business of manufacturing and assembling automotive parts). The transactions were effected at nominal consideration.

In 2000, as part of an arm's length sale of the company, the Trusts disposed of the majority of the shares that they held in the holding companies. Capital gains of over $450,000,000 were realized.

The Minister assessed the Trusts for capital gains on the basis that the exemption in Article XIV(4) of the *Agreement Between Canada and Barbados for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital* that "Gains from the alienation of any property, other than those mentioned in paragraphs 1, 2 and 3 may be taxed only in the Contracting State of which the alienator is a resident" did not apply because the trusts were resident in Canada. Assessments were issued to each of the Trusts in respect of the gains.

As such, the key question was the residency of the Trusts that had been established in Barbados. The dispute turned, however, to the legal principles relating to whether the

determination of a corporation's residence could apply to the determination of the residence of a trust.

The well-known decision of *Dill and Pearman, Trustees of the Thibodeau Family Trust v. The Queen*, 78 DTC 6376 (Fed. Ct. Tr. Div.) ("*Thibodeau*") has been applied to determine the residency of a trust; that is, that a trust is resident in the jurisdiction where its trustee resides. However, the Court in *Garron* applied the test which is used to determine the residence of a corporation; that is, where the central management and control of the corporation actually resides. The Court commented that *Thibodeau* did not prevent it from applying the central management and control test in the circumstances of the case before it because the Judge in *Thibodeau* intended to limit his decision to the particular facts of the case and did not purport to state a general test of trust residence.

The Court in *Garron* based its decision to apply the central management and control test on the following considerations:

1. Although there are significant differences between the legal nature of a trust and corporation, the functions of each, being at a basic level the management of property, are quite similar from the point of view of determining tax residence;

2. Adoption of a similar test of residence for trusts and corporations promotes the important principles of consistency, predictability and fairness in the application of tax law; and

3. In view of the above, it is desirable that the test for corporations and trusts be as similar as the circumstances allow.

The Court in *Garron* found that although the trustee of each trust was a resident of Barbados, the central management and control of each trust was in Canada. The corporate trustee's role was limited in nature and it deferred to and was controlled by those who were in Canada. The trusts were therefore taxable in Canada by virtue of the true trustees' residency.

The case is noteworthy because the Court rejected the proposition that a trust is resident in the jurisdiction where a trustee is resident and exercises his or her discretion.

Antle

Antle deals with the legality of a "capital property step-up strategy" whereby capital property with an accumulated gain (shares in a company) was shifted from the husband to a Barbados spousal trust. The trust sold the property to the beneficiary wife in exchange for a promissory note. The wife then sold the property to a third party purchaser and used the proceeds to pay off the promissory note. The trust distributed the funds to the wife as beneficiary, after which the trust was dissolved.

This scheme was designed to result in no tax because there was no capital gain taxable in Canada, as there would have been had the husband sold the capital property directly to the third party. The capital gain arose in the trust in Barbados where, of course, there was no tax on capital gains.

One might say though that the issue in this case was less of the residency of the trust and more as to whether a trust was created at all in the circumstances.

In order for a trust to be valid, there must be three certainties, namely, certainty of intention to create a trust, certainty in the subject matter of the trust, and certainty in the objects of the trust.

In this case, the Minister focused on the certainty of intention to create the trust and the certainty in the subject matter of the trust.

The dates on the documents belied the lack of intention to create a trust. The Trust Deed was dated December 5th but the husband did not sign the Deed until December 14th and it was only then that the trust could have been created. The dates on the documentation for the sale of shares from the trust to the wife (some time around December 8th) were such that the sale to her happened before the trust was created. The settling of the trust and the sale of the shares from the wife to the third party all happened on the same day, December 14th.

The Court found that there was no certainty of intention. The husband never intended to lose control of the shares or the money resulting from the sale and never intended to create a trust. The Court found that the husband's actions and the surrounding circumstances could not support a conclusion that signing the Trust Deed reflected any true intention to settle shares in a discretionary trust, no matter how clear the language in the Trust Deed itself. It simply did not reflect his intentions.

The Court also found that there was no certainty of subject matter. The shares purportedly settled on the trust were in the possession of an unrelated party who claimed a beneficial interest in them. The unrelated party was paid out an amount of money under duress by the husband on the final sale to the third party purchaser. The husband later successfully sued the unrelated party and recouped $1.38 million. The husband thereby retained an interest in

the shares purportedly settled on the trust. If the husband transferred anything to the trustee it was not his full interest in the shares because there was an element of his ownership in the shares that did not pass. This created a lack of certainty of subject matter.

Most importantly, the Court found that the trust was never constituted. It never came into existence because the shares were never transferred to the trust and were never in possession of the trustee. The shares remained in Canada throughout and no money ever reached the trustee. The timing and execution were such that the intended steps were not carried out sequentially so as to properly constitute the trust.

Interestingly, the Court determined that the above circumstance was not a sham, as also alleged by the Minister, as the transactions themselves were not disguised.

As noted above, the appeal to the FCA was dismissed in October 2010.[3] The FCA stated that "it is not necessary to go beyond the Tax Court judge's conclusion that the Trust was not validly constituted in order to dispose of the appeals". The FCA went further, however, concluding that "the Tax Court judge was bound to hold that the Trust was a sham based on the findings that he made".[4]

Herring Estate (Re), 2009 CanLII 44707 (ON. S.C)

Another case that merits mentioning in the category of foreign trustees is *Herring Estate (Re)*. This is a decision by the Honourable Justice D.M. Brown that provides clear and helpful guidance as to the circumstances under which a foreign trustee can act as ancillary estate trustee.

[3] *Antle v. Canada*, 2010 FCA 280 (CanLII).
[4] *Supra* note 3 at 8, 22.

In this case the Deceased was a US resident who created an inter vivos trust in North Carolina naming a licensed trust company (the "trust company") there as the sole trustee. The trust company was also named executor of his Will. The Deceased's wife was the sole beneficiary of the trust and the trust was the sole beneficiary of his residuary estate. Probate of the Deceased's Will was issued in North Carolina for the estate, which was substantial in value.

The Deceased owned a new condo unit in Toronto worth $360,000 but with respect to which the estate would owe $126,831 on occupancy date, which had not yet occurred. There were no debts owing in Ontario at the time of the application.

The trust company's application for a certificate of ancillary appointment of estate trustee with a will was rejected by the Local Estates Registrar because the trust company was not an approved registered trust corporation under section 175(2) of the *Loan and Trust Corporations Act*, R.S.O. 1990, c. L.25 (no certificate could be issued to it).

The Court found that while section 175 *permitted* it to grant probate to a trust corporation registered under the Act without having to post security for acting as an executor or trustee, it *did not prohibit* the appointment as estate trustee, under an ancillary application, of a foreign trust company that is not registered under the Act.

Section 213(1) of the Act, which provides that "no person, other than a registered corporation, shall conduct, undertake or transact in Ontario the business of a loan corporation or of a trust corporation" also did not disqualify the trust company from acting as

ancillary estate trustee. By fulfilling its duties under the will and the inter vivos trust, the trust company would not be offering its services to the Ontario public.

The trust company was awarded the certificate of ancillary appointment of estate trustee with a will but was ordered to post a bond in the amount of $125,000, which was the approximate amount owing on the closing of the condominium.

Since the estate had significant assets and no existing debts in Ontario and the beneficiary consented, a bond of twice the value of the Ontario Property was inappropriate. Some security was required because the affidavit from the trust company did not contain a clear, unambiguous statement that the company, as estate trustee, intended to make the payment due on the interim occupancy date. There was insufficient evidence before the Court to determine whether a failure to do so would constitute a breach of the contractual arrangements regarding the purchase and sale of the condominium. Since section 35 of the *Estates Act* R.S.O. 1990, c. E.21 seeks to protect both the beneficiaries and creditors of an estate, the $125,000 bond was appropriate.

REMOVAL OF A TRUSTEE

Courts are generally reluctant to remove trustees unless it can be shown that they are unfit or unable to fulfil their duties and that the trust or estate is at risk. Having said that, if an estate trustee fails to properly manage an estate asset, same may be grounds to be removed.

Bergmann v. Amis Estate, 2009 CanLII 66389 (ON S.C.) affirmed by 2010 ONCA 377 (CanLII)[5]

In *Bergmann v. Amis Estate* the three daughters of the Deceased (Amis), who were the beneficiaries of the Deceased's estate, sought, amongst other things in the proceedings, an order removing the estate trustee. The only asset of significant value was the Deceased's house. Bergmann moved into the Estate Home and cohabitated with Amis. There was a dispute as to when cohabitation began. Bergmann remained in the house following the Deceased's death and refused to pay the realty taxes after the Deceased's death. There were issues with other expenses of the house. The City eventually indicated an intention to institute a tax sale with respect to the home. The daughters argued that the estate trustee had demonstrated indifference to their best interests as beneficiaries of the estate and had acted in a manner that preferred the interests of Bergman over theirs. The trial court ordered that the estate trustee be removed.

The Ontario Court of Appeal found that the motion judge properly instructed himself on the relevant principles relating to the removal of an estate trustee and that there was no reason to interfere with the determination that the estate trustee demonstrated indifference towards, and acted contrary to, the interests of the beneficiaries of the estate, he was incompetent in his administration of the estate, and that he did not take proper steps to preserve and protect the principal asset of the estate, being the Deceased's house.[6]

The Court of Appeal cited leading authors Donovan W.M. Waters, Mark R. Gillen and Lionel D. Smith in their text *Waters' Law of Trusts in Canada*, 3rd ed., (Toronto: Thomson Carswell, 2005), where they state at page 845:

---

[5] MacPherson, Blair and Juriansz JJ.A.

[6] The Court of Appeal found at para 42 that "Although Bermann has no title or judicially determined right to occupy the Estate home, she has continued to occupy the property" and at para 46 "he must put the interests of the beneficiaries and the Estate ahead of those of an unsecured claimant".

If persons having an express or statutory power to appoint new trustees purport to replace a trustee on the grounds that he refuses to act, is unfit to act, or is incapable of acting, and the trustee disputes that he falls in to the category alleged, the court can be asked to determine what constitutes unfitness or incapability. The court will have to make a similar decision if it is asked to remove a trustee, whether or not it is also asked to make a new appointment. The question therefore arises as to what circumstances justify this removal.

Canadian Courts have consistently followed the general guidelines set out by Lord Blackburn in Letterstedt v. Broers *where he said that the courts' "main guide must be the welfare of the beneficiaries." If it is clear that the continuation of the trustee would be detrimental to the execution of the trust, and on request he refuses to retire without any reasonable ground for his refusal, the court might then consider it proper to remove him. He went on to quote from Story that "the acts or omissions must be such as to endanger the trust property, or to show a want of honesty, or a want of proper capacity to execute the duties, or a want of reasonable fidelity."*

The Court of Appeal also referred to the case of *Radford v. Radford Estate*.[7] The Court specifically affirmed that in *Radford v. Radford Estate*, J.W. Quinn J. thoroughly reviewed the considerations to be taken into account on an application to remove an estate trustee. The considerations noted by Quinn J. can be summarized as follows:

(1) the court should not lightly interfere with the discretion exercised by a person in choosing the person or persons to act as his executors and trustees;

(2) interfering with the discretion and choice of a person in preparing his last will and testament must not be only well justified, but must amount to a case of clear necessity;

(3) removal of an estate trustee should only occur on the clearest of evidence that there is no other course to follow;

(4) in deciding whether to remove an estate trustee, the court's main guide should be the welfare of the beneficiaries;

(5) it must be shown that the non-removal of the trustee will likely prevent the proper execution of the trust;

(6) the removal of an estate trustee is not intended to punish for past misconduct; rather, it is justified on the basis that past misconduct is likely

---

[7] [2008] O.J. No. 3526 (S.C.J.).

to continue and that the estate assets and the interests of the beneficiaries must be protected. (see paras. 100-107)

Gonder v. Gonder Estate, 2010 ONCA 172 (CanLII)

In *Gonder v. Gonder Estate*, the issue was whether an estate trustee could be removed without providing for the appointment of an alternate estate trustee or otherwise providing for the orderly administration of the estate.

In this case the estate trustees brought a motion under section 37 of the *Trustee Act* for an order removing them as estate trustees of the Deceased's estate on the basis of their personal circumstances, location, other responsibilities and financial stress. They had also become creditors of the estate and were in a conflict of interest situation.

Pearl Gonder died on January 23, 2008, leaving an estate consisting of about $25,000.00 in cash or cash equivalent, and a modest home in Hamilton, Ontario.

Under the Deceased's Will, the named beneficiaries were the testatrix's sister, Margaret Evans, her mother, Katherine Gonder, and her brother, the appellant, Allan Gonder. More specifically, the testatrix left a life estate in the Hamilton property to her mother, who was still living but was no longer able to stay in the house. The will further directed that the residue of the estate was to be divided equally among the testatrix's mother, sister and brother.

In February 2008, the appellant (the Deceased's brother) commenced an action against the estate, claiming that he was the beneficial owner of the Hamilton property. He claimed that, in 1974, he transferred title to the property to Pearl Gonder in trust for himself and for his children.

The testatrix named the respondents, Margaret Evans and her husband Graeme, as the estate trustees ("Estate Trustees") of her Estate. In the event they were unwilling or unable to act, the testatrix appointed her niece, Tanya Evans.

The Estate Trustees, who live in British Columbia, agreed to undertake the role of estate trustees. A "Certificate of Appointment of Estate Trustee with a Will" was issued to them on September 10, 2008.

In March 2009, Tanya Evans formally renounced any right to a "Certificate of Appointment of Estate Trustee or Succeeding Estate Trustee with a Will."

A 2008 market appraisal of the property valued it at between $135,000.00 and $145,000.00. Canada Revenue Agency has registered a lien against it in the amount of approximately $32,000.00 for tax arrears owned by the Deceased.

The Estate Trustees had been unable to sell the property or to distribute the residue of the estate because of the appellant's certificate of pending litigation registered on title. The Estate Trustees submitted that, as a result, they had been required to spend some $40,000.00 of their own money to defend the appellant's lawsuit against the estate.

Without prior court approval or beneficiary consent, the Estate Trustees registered a $100,000.00 mortgage against the property to secure the expenses they claim to have incurred in the administration of the estate. The appellant disputes the validity of this mortgage.

At the time of the removal motion, the Estate Trustees moved for directions seeking, among other forms of relief, an order that the house be sold and the proceedings of the sale paid into court pending the resolution of the competing interests.

The Public Guardian and Trustee indicated that it did not intend to become involved in the estate.

The motions judge found that the continued service as Estate Trustees would cause substantial physical and financial hardship on the Estate Trustees and they had become creditors through no fault of their own. They now had a conflict of interest with the heirs because they had become creditors of the estate. Furthermore, the motions judge found that section 37 of the *Trustee Act* did not require a trustee to provide a replacement before applying to be removed and allowed the motion.

The Ontario Court of Appeal found that the motion judge erred not in removing the trustees without appointing a replacement, but rather in removing them without making alternate provisions for the proper administration of the estate.[8]

The Court of Appeal found in the specific circumstances of this case there were three objectives that ought to have been considered and addressed by the motion judge: (1) ensuring the orderly administration of the estate in the interests of the beneficiaries; (2) recognizing the plight of the respondents; and (3) providing for the timely resolution of the

---

[8] The role of trustee is a difficult one. A trustee must act in the best interests of the beneficiary, even at personal hardship. However, if such obligations were unlimited, and if no relief were available, "no one would undertake the task of trusteeship": see Donovan W.M. Waters, *Waters Law of Trusts in Canada*, 3d ed. (Toronto: Carswell, 2005), at p. 841.

disputes concerning the estate. Although the interests of the beneficiaries must be the primary concern of both trustees and the courts, the Court of Appeal stated that "the courts can meet each of these concerns, and do justice to all of the parties without requiring that a replacement trustee be immediately appointed, so long as there are steps taken to ensure the proper administration of the estate."

The Court commented that the Trustee *Act* is not a complete code and did not provide for a comprehensive system for the administration of trusts. However, a trustee is not the only entity that can ensure the proper administration of an estate. In the very rare cases where equity demands that a sole trustee be removed, but no replacement is forthcoming, courts possess an inherent jurisdiction to order the trustee's removal and provide for the orderly administration of the estate.

The Court noted that the Ontario Law Reform Commission's Report on the law of Trusts (Toronto: O.L.R.C. Rep., 1984) rejected the notion of a codification of the law of trustees, preferring a statue that supplemented and clarified the judge-made law of trusts. Commentators widely accept that Superior Courts of equitable jurisdiction have an inherent power of appointment and removal that exists in parallel with provisions such as section 37 of the *Trustee Act*.

The Court of Appeal held that section 37(4) does not constrain the power of the court to remove a sole remaining trustee and provide for an alternative mechanism for administering the trust in those rare cases where a replacement trustee is not available and the exercise of inherent jurisdiction is required.

The Court of Appeal also held no single provision of the *Trustee Act*, nor that Act as a whole, ousts the inherent equitable jurisdiction of the court to remove a trustee. This was true even if such a removal would leave the trust without a trustee, so long as the court ensures propery administration of the estate in the best interests of the beneficiaries.

The trustees had a compelling case for removal and in exceptional circumstances the Court has the jurisdiction to remove a sole trustee without appointing a replacement. However, this power may only be exercised where an alternative mode of administration can be put in place that secures the best interests of the beneficiaries and ensures that the estate's assets are properly maintained. The Court of Appeal held it will only be available when no other option is realistically available.[9]

CONSTRUCTIVE TRUSTS

Videchak v. Giarratano, 2009 CanLII 29914 (ON S.C.)

Videchak v. Giarratano deals with, amongst other situations, the common situation of a child holding assets jointly with a parent. *Pecore v. Pecore* [10] would tell us that in such situations, after the death of the parent, it is up to an adult child, who is not a dependant, to rebut the presumption that a resulting trust arises such that the asset, received for no consideration, is

[9] The purpose of s. 37(4) is to give the court discretion to decide not to replace a removed trustee when one or more trustees remain. In other words, there is no obligation to ensure that the "status quo" is maintained by appointing a replacement. In the spirit of simplifying the trusteeship regime, s. 37(4) also provides for how the powers and rights of the removed trustee devolve in the event that he or she is not replaced. The authority of the removed trustees vests in the remaining trustees.

Because of this error, this matter was remitted to the Superior Court to reconsider the removal application. Any order made then was to protect the interests of the beneficiaries and take into account and facilitate the timely resolution of the underlying litigation over title to the house. Interestingly, the Court of Appeal went on to suggest potential options for addressing the issues in the case.

[10] [2007] 1 S.C.R. 795 (S.C.C.)

held for the benefit of the estate. Thus, where the transfer into joint ownership is made for no consideration, the onus is placed on the child to demonstrate that a gift was intended.

In this case, the Ontario Superior Court held that the presumption applied to a joint bank account held by the Deceased together with one of her children, Anna. While Anna and two of her siblings, Joe and Nina, gave evidence that they were all aware that the joint account was to go to Anna on their mother's death, there were no bank or other documents and no independent persons (the beneficiaries could not corroborate one another's evidence) to provide evidence upon which a court could make a finding that the presumption of resulting trust was rebutted. The Judge found that it is well known that elderly people have a joint bank account in order to make sure the debts are paid on time, and to ease the pain of probate. The courts have said that there is still an onus on the person trying to benefit because of this. The account was found to be an asset of the estate.

Perhaps, the most interesting thing about this case is that the Court came to the opposite conclusion with respect to a GIC jointly held by the Deceased with Joe and Nina. The GIC clearly stated the three names on it and was different than the bank account "because it is basically a savings item and not to be used to pay ongoing debts." The Judge held that the GIC document spoke for itself and the two owners of it at the death of the Deceased were Nina and Joe. One might argue that this case seems to exempt jointly held GIC's from the application of *Pecore.*

COSTS

Nolan v. Kerry (Canada) Inc., 2009 SCC 39, [2009] 2 S.C.R. 678

This case provides guidance as to when costs, arising from litigation regarding a pension trust fund, are payable out of the pension trust fund. Though *Nolan v. Kerry* is a pension

case, the analysis could apply to a context where there is a legitimate uncertainty as to how to properly administer a trust, and/or where there is a trust dispute (whether or not the proceeding is brought by trustees or by beneficiaries).

The issues *Nolan v. Kerry* were related to the obligations of an employer under a pension plan for its employees. In particular, the appeal concerned (1) whether the employer was responsible for paying plan expenses or whether such expenses were properly payable from the pension trust fund; (2) whether the employer could use actuarially determined surplus pension funds to satisfy its contribution obligations in respect of both defined benefit ("DB") and defined contribution ("DC") components of the pension plan; (3) whether the Financial Services Tribunal ("Tribunal") had the authority to award costs to the appellants out of the pension trust fund; and (4) when on judicial review of a pension decision, the Court should exercise its discretion to award costs out of the pension trust fund.

The Supreme Court of Canada dismissed the appeal and affirmed the decision of the Ontario Court of Appeal in favour of the respondents, the employer and the Superintendent of Financial Services. The Court of Appeal had declined to award costs to the DCA Employees Pension Committee (the "Committee") from the Fund (as the unsuccessful party). The Supreme Court of Canada held: "In the end, of course, costs awards are quintessentially discretionary." The key question was, however, whether the litigation was adversarial or whether it was aimed at the due administration of the pension trust fund. The Supreme Court of Canada found that the rules in both *Buckton* v. *Buckton*[11] and *Sutherland v. Hudson's Bay Co.*[12] *(2006)* would allow a court to award its costs out of the fund where

[11] [1907] 2 Ch.406.

[12] (2006), 53 C.C.P.B. 154 (Ont. S.C.J.): A decision of Mr. Justice Cullity, who found, "Orders for payment of costs out of trust funds are most commonly made in either of two cases. One is where the rights of the unsuccessful parties to funds held in trust are not clearly and unambiguously dealt with in the terms of the trust

there is a legitimate uncertainty as to how to properly administer the trust and where the dispute is not adversarial. Adversarial claims in this context did not qualify for a costs award from the trust fund. Here, the litigation was adversarial in nature because it was ultimately about the propriety of the employer's actions and because the Committee sought to have funds paid into the Fund to the benefit of the DB members only. The employer was successful in this case and there was no reason to penalize it by diminishing the Fund surplus, thereby reducing its opportunity for contribution holidays.

SUMMARY JUDGMENT

The *Rules of Civil Procedure* regarding summary judgment have undergone substantial changes. Prior to the recent amendments, in determining whether or not to grant summary judgment, the Court needed to determine whether a genuine issue exists as to a material fact for trial. In so deciding, the Court was arguably not permitted to make findings of fact based on the weighing of evidence or drawing inferences, assessing credibility, or deciding questions of law.[13] Summary judgment was reserved for claims and defenses that are factually unsupported. A genuine issue for trial is not "spurious" or "frivolous".[14]

Rule 20 of the *Rules of Civil Procedure* governs the procedure for summary judgment motions.

---

instrument. In such cases, the order is sometimes justified by describing the problem as one created by the testator or settler who transferred the funds to the trust. The other case is where the claim of the unsuccessful party may reasonably be considered to have been advanced for the benefit of all of the persons beneficially interested in the trust fund."

[13] *Dawson v. Rexcraft Storage and Warehouse Inc.*, (1998) 164 DLR (4th) 257 (Ont. C.A.) at 13.

[14] *Irving Ungerman Ltd. v. Galion Solid Waste Materials Inc.* (1998) 38 O.R. (3d) 161 (C.A.) at 22; *Gold Chance International Ltd. v. Daigle and Hancock*, 2001 CarswellOnt 899 (S.C.J.) at 52.

The amended Rule was recently interpreted in *Healey v. Lakeridge Health Corporation*.[15] In this case, patients were diagnosed with tuberculosis, and the hospital notified 4,402 persons that they had come into contact with the patients. The Plaintiffs received said notices, tested positive for tuberculosis, and commenced a class action against the hospital. Perell J. pointed out that, prior to the amendments, summary judgment should be granted where there is no genuine issue for trial, whereas following the amendments, summary judgment should be granted where there is no genuine issue requiring a trial.[16] The reasoning for the change was twofold: the former test was regarded as too strict and as a result the rule was not achieving its purposes, and "the utility of the rule was being impaired by case law that held that a motions judge could not assess credibility, weigh evidence, or find facts on a motion".[17]

Perell J. explained that the amendment constitutes a reversal of the previous case law that prohibited a judge from assessing credibility, weighing evidence, or finding facts, and furthermore, a judge may now, for the purpose of weighing evidence, evaluating credibility, and drawing inferences require that oral evidence be presented by one or more of the parties.[18] The purposes of the change, then, is to make summary judgment more available to parties, and to "recognize that with the court's expanded forensic powers, although there may be issues appropriate for trial, these issues may not require a trial because the court has the power to weigh evidence on a motion for summary judgment".[19]

[15] 2010 ONSC 725.
[16] *Supra* note 17 at 19.
[17] *Ibid.* at 20.
[18] *Ibid.* at 22.
[19] *Ibid.* at 23.

Summary judgment is available in contested estate proceedings, and more specifically in a Will challenge.[20] However, summary judgment motions are risky. The moving party must first meet its onus of proving that there is no genuine issue requiring a trial. It must also be remembered that if the motion is unsuccessful costs sanctions may be imposed under Rule 20.

That said, risk lies on the shoulders of the responding party as well. Unsupported responding allegations will not likely win the motion, nor will an affidavit suffice if it is replete with speculation, innuendo, hearsay, gossip and rumour - one must lead trump or risk losing.

A motion for summary judgment may short circuit a frivolous Will challenge in the appropriate case. If summary judgment is being considered, the Order for Directions should contemplate a summary judgment motion and give the parties leave to seek further directions if and as necessary regarding the motion.

---

[20] See Craig Vander Zee, "Short Circuiting the Frivolous Will Challenge: Summary Judgment and Offers to Settle," *11th Annual Estates and Trusts Summit* (Toronto: Law Society of Upper Canada, 2008). See also cases including *Straus v. Bainbridge*, (1999) 38 E.T.R. (2d) 110 (Ont. Gen. Div.), affirmed (1999) 38 E.T.R. (2d) 119 (Ont. C.A.), *Davidson (Litigation Guardian of) v. Edwards Estate (2000)* CarswellOnt 5013 (Ont. S.C.J.), *Re Brown Estate* (2001), 39 E.T.R. (2d) 1 (Ont.), *Oestrich v. Brunnhuber* (2001), 38 E.T.R (2d) 82 (Ont. S.C.J.), *Knox v. Trudeau* (2001), 38 E.T.R. (2d) 67, *McGlynn v. McGlynn*, [2002] O.J. No. 2047 (Ont. Div. Ct.), *Stern v. Stern* (2003), 49 E.T.R. (2d) 129 (Ont. S.C.J.), *Stern v. Stern* (2003), 49 E.T.R. (2d) 129 (Ont. S.C.J.), *Ven Den Oetelaar v. Ven Den Oetelaar Estate* (2004), 7 E.T.R. (3d) 246 (Ont. S.C.J.), *Ettore Estate, Re* (2004), 11 E.T.R. (3d) 208 (Ont. S.C.J.), *Slater v. Slater* (2004), 12 E.T.R. (3d) 246, [2004] (Ont. S.C.J.), *Carega v. Silver* , [2005] O.J. No. 2160 (Ont. S.C.J.), 2005 CarswellOnt 2145, *Trotman v. Thompson* (2006), 23 E.T.R. (3d) 129 (Ont. S.C.J.), *Black Estate v. Black* (2006), 32 E.T.R. 282 (Ont. S.C.J.), and *Papageorgiou v. Vikki Lyons* (2008), 42 E.T.R. (3d) 305 (Ont. S.C.J.).