COURT OF APPEAL FOR ONTARIO

CITATION: Cahill v. Cahill, 2016 ONCA 962
DATE: 20161220
DOCKET: C61942

Simmons, Pepall and Huscroft JJ.A.

BETWEEN

Patrick Cahill

Applicant
(Respondent)

and

Kevin Cahill in his personal capacity and as
Estate Trustee of the Estate of Thomas Michael Edward Cahill,
Sheila Kehoe in her personal capacity and as
Estate Trustee of the Estate of Thomas Michael Edward Cahill,
Tom Cahill Memorial Fund, Alcoholics Anonymous,
Jessica Kehoe, Craig Kehoe, Calvin Cahill, Kevin Douglas Olson
and Corey Robert Olsen

Respondents
(Appellant)

William R. Hunter, for the appellant Sheila Kehoe

Miriam Vale Peters, for the respondent

Heard: November 15, 2016

On appeal from the judgment of Justice Sylvia Corthorn of the Superior Court of Justice, dated February 25, 2016, with reasons reported at 2016 ONSC 1385, 129 O.R. (3d) 401.

Pepall J.A.:

A. INTRODUCTION

[1] Thomas Cahill died in March 2010. In his will, he appointed his daughter, the appellant, Sheila Kehoe, and his son, Kevin Cahill, as executors and trustees of his estate. They were directed to set aside $100,000 in a trust fund for the benefit of their brother, Patrick Cahill, with the remainder to the testator's grandchildren. They failed to do so.

[2] The will directed that Patrick was to receive a payment of $500 each month from the trust fund. Kevin was to be the trustee of the trust fund with "sole discretion as to the investment of the monies" in the fund. However, Kevin used most of the $100,000 for his own benefit. Patrick then sued the two executors and trustees and claimed breach of trust.

[3] The application judge found in Patrick's favour. Sheila appeals from that judgment. Sheila submits that the application judge erred in concluding that she did not establish a trust fund, in holding her liable for losses caused by Kevin, and in failing to relieve her from liability pursuant to s. 35(1) of the *Trustee Act*, R.S.O. 1990, c. T.23.

[4] For the reasons that follow, I would dismiss the appeal.

B. BACKGROUND FACTS

(i) The Will

[5] Paragraphs 2 and 3(g) of the testator's will provided:

2. I HEREBY NOMINATE, CONSTITUTE AND APPOINT my daughter, SHEILA M.L. KEHOE, and my son, KEVIN T. CAHILL, to be the Estate Trustees, Executors of and Trustees under this my last Will and Testament and I shall hereinafter refer to them as my Trustees.

3. I GIVE, DEVISE AND BEQUEATH all my real and personal estate of any kind whatsoever and wheresoever situate of which I may die possessed, including any property over which I may have a general power of appointment, unto my Trustees upon the following trusts, namely:

...

(g) To set aside the sum of ONE HUNDRED ($100,000.00) in a trust fund for the benefit of my son, PATRICK E. CAHILL, during his lifetime (hereinafter referred to as "Patrick's Trust Fund"). I DIRECT that my son, KEVIN T. CAHILL, shall be the Trustee of Patrick's Trust Fund, and shall have sole discretion as to the investment of monies thereunder. I FURTHER DIRECT that my son PATRICK E. CAHILL, shall receive the sum of FIVE HUNDRED ($500) DOLLARS per month out of Patrick's Trust Fund during his lifetime, or until such fund is exhausted, whichever shall first occur.

UPON the death of my son, PATRICK E. CAHILL, or in the event that he shall have predeceased me, then I DIRECT that Patrick's Trust Fund, or any amount remaining therein, shall be divided equally amongst those of my blood grandchildren who are living at the date of Patrick E. Cahill's death, or at the date of my death if Patrick has predeceased me, as the case may be, share and share alike.

[6] The will also directed that the testator's real estate be sold, and it was. The estate received net proceeds of $223,013.75 from the sale of the testator's house. These funds were deposited in the estate's account at Scotiabank.

Thereafter, Sheila and Kevin both signed a direction to Scotiabank to issue a draft for $100,000 from the estate's account, payable to London Life. The direction did not mention the trust, the trust fund, or Patrick.

[7] Kevin then opened a non-registered investment plan in the amount of $100,000 with London Life. On the application form, he described himself as the annuitant and Sheila as the contingent policy holder. The account information for Michael Cahill, another brother, was listed under the heading "Information for Pre-Authorized Payment Agreement / Direct Deposit". No mention was made of any trust, trust fund, or Patrick.

[8] The payments of $500 per month to Patrick were never paid directly from London Life to him. Rather, they were made payable to Kevin or to Michael, who in turn would pay the $500 to Patrick monthly. Patrick received $500 a month from either Michael or Kevin until the spring of 2014, when three consecutive monthly cheques were returned for insufficient funds. Patrick has received nothing since May 2014.

[9] Patrick subsequently discovered that in 2012, Kevin had borrowed the remaining money in the plan – $92,642.99 – as a "mortgage" for his business premises. The business failed, the bank realized on the premises, and there were no funds remaining in the London Life plan.

(ii) The Court Application

[10] Patrick successfully brought an application for payment of his entitlement under the will. He also sought the removal of Sheila and Kevin as executors and trustees of the estate and the removal of Kevin as trustee of Patrick's trust fund, but the application judge adjourned the determination of those issues until Sheila and Kevin had provided an accounting of the estate.

[11] During the course of the litigation, Sheila's lawyer told Patrick to communicate with him. Her lawyer wrote to Patrick stating:

> Neither Sheila nor her children received the money from the house sale, Kevin did. I do not know what he did with that money. But one thing for sure is that Sheila and her two children do not know either. They are not liable to you in any way.

[12] The application judge did not agree with this assessment. She found that Sheila was negligent. Moreover, both Sheila and Kevin had breached their fiduciary obligations to the beneficiaries of the estate, including Patrick and the testator's grandchildren.

[13] The application judge observed that the executors and trustees of an estate, not the beneficiaries, have the onus of establishing that the management and distribution of funds is consistent with the terms of the will. She concluded that neither Sheila nor Kevin had met that onus. They had failed to take the steps necessary to establish the trust fund. She found that a trust fund for Patrick's

benefit was never set aside as directed by the testator. It was not enough for Sheila to simply sign the direction to transfer the funds from Scotiabank to London Life.

[14] The application judge noted Sheila's evidence that Kevin had assured her that everything was being properly handled. The application judge rejected Sheila's submission that she relied on Kevin because of his qualifications in the field of financial management. The evidence did not support her submission and, in any event, she made insufficient, if any, inquiries of Kevin or London Life as to the details of the $100,000. Sheila acknowledged in her evidence that she did not have any knowledge of the administration of the trust fund other than her signature on the direction to transfer the funds to London Life. In finding that this was inadequate and that Sheila could not simply defer to her brother, her co-trustee, the application judge relied on *Fales v. Canada Permanent Trust Co.*, [1977] 2 S.C.R. 302; and *The Children's Lawyer v. Penman*, 2013 ONSC 1471, aff'd (*sub nom. Penman (Litigation guardian of) v. Penman*) 2014 ONCA 83, 119 O.R. (3d) 128.

[15] In essence, Sheila abdicated her duties as executor and trustee of the estate. She was required to take "real, active steps to ensure that the trust fund was set up in accordance with the Will", but she failed to do so. Specifically, the application judge stated, at paras. 58-60:

> If the Deceased had merely wished Kevin alone to have absolute authority and to make all decisions with respect to the Estate, he would not have appointed Sheila as an executor and trustee. Sheila's appointment in that role must be seen as reflective of the Deceased's wish that she not simply acquiesce to or rubber-stamp anything suggested or done by Kevin. Sheila was obligated to exercise her own judgment. She completely failed in that duty.
>
> Sheila had limited information at best and no documentation upon which to consider whether the transfer of $100,000 from Scotiabank to London Life was sufficient to satisfy the instructions in paragraph 3(g) of the Will. Sheila signed a single document, the Direction, which was completely uninformative with respect to the terms of the trust.
>
> ...
>
> Sheila assumed solely on the basis of assurances from Kevin that the trust fund was set up in accordance with the Will. As an executor and trustee of the Estate, Sheila had a duty to the beneficiaries of the Estate to do more. She had a duty to make inquiries to satisfy herself that the terms of the trust fund were in accordance with the Will. [Citations omitted.]

[16] The application judge concluded that Sheila's negligence and breach of fiduciary duty caused or contributed to the dissipation of the money intended for the trust fund pursuant to para. 3(g) of the will.

[17] The application judge also held that Kevin failed in his duties. Moreover, having never established the trust fund, Kevin had no authority to direct the investment of the funds. Further, Sheila and Kevin failed to fulfil their obligations

to the testator's grandchildren, assuming one or more of the grandchildren survived Patrick.

[18] The application judge then considered whether relief was available under s. 35(1) of the *Trustee Act*, although neither party had raised the issue. Section 35(1) states:

> If in any proceeding affecting a trustee or trust property it appears to the court that a trustee, or that any person who may be held to be fiduciarily responsible as a trustee, is or may be personally liable for any breach of trust whenever the transaction alleged or found to be a breach of trust occurred, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust, and for omitting to obtain the directions of the court in the matter in which the trustee committed the breach, the court may relieve the trustee either wholly or partly from personal liability for the same.

[19] The application judge noted that there was no evidence establishing that Sheila had failed to act honestly. However, she had not acted reasonably. As such, the application judge declined to exercise her discretion to grant relief under s. 35(1) of the *Trustee Act*.

[20] The application judge held that Sheila and Kevin were jointly and severally responsible for $80,642.99, being the outstanding principal necessary to fund the monthly $500 payments to Patrick, as required under the will.

C. GROUNDS OF APPEAL

[21] Sheila focused on three grounds of appeal. She submits that the application judge erred:

(i) in finding that a trust was not established;

(ii) in finding that the appellant was liable for any loss occasioned by Kevin; and

(iii) in denying the appellant relief under s. 35(1) of the *Trustee Act*.

D. ANALYSIS

(i) Failure to Establish the Trust Fund

[22] Sheila submits that the application judge erred in finding that a trust was not established. The three certainties required to establish a trust were met by the language of the will, and the trust was constituted when the funds were placed with London Life. She argues that the payments to Patrick established that the trust was declared, constituted and therefore created, and the absence of Patrick's name on the documents did not deprive him of his beneficial interest.

[23] As such, the application judge ought not to have concluded that the appellant failed in her duties to Patrick and the grandchildren.

[24] I disagree.

[25] In *The Law of Trusts*, 3d ed. (Toronto: Irwin Law Inc., 2014), at pp. 154-55, Gillese J.A. describes the nature of a trustee's role:

> Trusteeship is an extremely onerous position. Trustees are subject to the specific duties created by the trust instrument and by legislation. In addition, they have a great many duties placed upon them by equity.
>
> ...
>
> An understanding of the common law duties imposed upon trustees has as its starting point the fact that a trustee is a fiduciary. The trustee exists to administer the property on behalf of the beneficiary.
>
> ...
>
> Because of the dependency relationship and the fact that the trustee controls the beneficiary's property, the trustee is held to the most exacting standards of all fiduciaries.

[26] Justice Gillese goes on to observe that a breach of trust occurs "whenever a trustee fails to fulfill his or her obligations with respect to the administration of the trust", and liability arises whether the breach is innocent, negligent or fraudulent. Liability "exists even if the loss would have occurred without the breach. In general, liability is imposed not to punish trustees but to restore the beneficiaries to the position they would have been in had the breach not occurred": p. 178.

[27] In this case, the will was clear: Sheila and Kevin were to set aside $100,000 in a trust fund for the benefit of Patrick. Kevin then was directed to invest those funds and make monthly payments to Patrick of $500. In the event that Patrick pre-deceased any of the testator's grandchildren, the trustees were to distribute the remaining trust funds to those beneficiaries.

[28] The application judge made a finding that the trust fund was never established. I see no reason to interfere with that finding.

[29] The will described the trust, but it was incumbent on Sheila and Kevin to establish the trust *fund*. They failed to do so. The record disclosed that:

- the direction to Scotiabank did not mention any trust, trust fund, or Patrick; and
- neither did the application to London Life.

[30] Although payments of $500 were made to Patrick, these came from either Michael or Kevin. There was a dearth of evidence showing that a trust fund had been established.

[31] Based on the record before her, it was open to the application judge to make the finding that a trust fund had never been established.

(ii) The Appellant's Liability

[32] Sheila submits that once the trust was established, she had no further obligation with respect to its management. The will was clear in giving Kevin sole discretion over the investment of the trust funds, and any liability for the loss rested with him. Similarly, Sheila argues that it was Kevin's duty to distribute any remainder in the trust to the testator's grandchildren who had been designated beneficiaries, and Kevin's personal representative would assume his duties if something happened to him.

[33] The obligation of a co-trustee is well established and described in numerous textbooks on trusts and trustees. David Hayton, Paul Matthews and Charles Mitchell write in *Law of Trusts and Trustees*, 8th ed. (Markham: LexisNexis, 2010), at p. 839:

> It is not unusual to find one of several trustees spoken of as the 'acting trustee', meaning the trustee who actively interests himself in the trust affairs, and whose decisions are merely endorsed by his co-trustees. The court, however, does not recognize any such distinction; for the settlor has trusted *all* his trustees and it beholds each and every one of them to exercise his individual judgment and discretion on every matter, and not blindly to leave any questions to his co-trustees or co-trustee.

[34] Similarly, Carmen S. Thériault, in *Widdifield on Executors and Trustees*, looseleaf (2016-Rel. 9), 6th ed. (Toronto: Thompson Reuters, 2016), at para. 8.7.2, states:

> Not only must trustees be unanimous in the exercise of their powers, but each trustee must actively consider his discretion and will not be exonerated for passively acquiescing in the actions of the co-trustee.

[35] Lastly, Donovan W.M. Waters writes in *Waters' Law of Trusts in Canada*, 4th ed. (Toronto: Carswell, 2012), at p. 43:

> [A trustee] is not entitled to shrug off the wrongful actions of a co-trustee on the basis that he knew nothing of what the other was doing; as a fiduciary, he is responsible for all acts of trusteeship, and he therefore carries a several, as well as a joint, liability for all that is done in the name of the trust or through the exercise of the office of trustee.

[36] These principles are also reflected in the applicable jurisprudence: see *Mickleburgh v. Parker* (1870), 17 Gr. 503 (Ont. Ch.), and *Fales*.

[37] The application judge found that Sheila failed to discharge her obligations as an executor and trustee of the estate, because the trust fund for Patrick was never established. The application judge found, at para. 56, that "by her own admission, Sheila had virtually no involvement in the administration of the estate." Sheila had abdicated her duties. Again, the record supports that key finding. The fact that Sheila thought that she was acting responsibly does not excuse her inaction. Doing nothing was not a luxury available to her as a co-trustee. Justification supporting this conclusion is readily available.

[38] First, the will reflects the testator's testamentary intention, and he appointed and entrusted two executors and estate trustees, not one. As the application judge noted, Sheila's appointment as executor and estate trustee reflects the testator's wish that *both* she and Kevin administer his estate.

[39] Second, an executor or estate trustee is entitled to remuneration for his or her services, either pursuant to the terms of the will or, if the will is silent, under s. 61(1) of the *Trustee Act*. The existence of a statutory entitlement to compensation further demonstrates that an executor or estate trustee's responsibilities are to be taken seriously.

[40] Third, if a party who is named as executor and trustee is unable, unwilling or incapable of accepting the responsibility, it is open to him or her to renounce the appointment. As Sheila did not renounce the appointment, she was obligated to properly fulfill her duties as executor and estate trustee.

[41] Although the will did provide Kevin with the responsibility for investing the monies in the trust fund, this did not absolve Sheila, as co-trustee, of her responsibility to ensure that the trust fund was properly set up. Further, the testator directed that Patrick's trust fund be divided amongst his grandchildren who are living at the time of Patrick's death. This obligation to divide any remainder of the trust fund among the grandchildren was a continuing one; it bound Sheila and was not confined to Kevin (or his personal representative, should he die).

[42] For these reasons, I would not give effect to this ground of appeal.

(iii) Section 35(1) of the *Trustee Act*

[43] The appellant brought a motion for leave to file a supplementary notice of appeal and factum so as to pursue an additional ground of appeal relating to s. 35(1) of the *Trustee Act*. Feldman J.A. heard that motion and determined that the panel hearing the appeal should decide whether or not to allow Sheila to raise the issue on appeal.

[44] The decision of whether to grant leave to allow an appellant to advance a new argument on appeal is a discretionary decision, guided by the balancing of the interests of justice as they affect all parties: *R. v. Wasing* [1998] 3 S.C.R. 579, pp. 590-92; *Kaiman v. Graham*, 2009 ONCA 77, 245 O.A.C. 130, at para. 18.

[45] The application judge acknowledged that s. 35(1) of the *Trustee Act* was not raised in argument before her, but she considered it nonetheless. She stated, at para. 64 of her reasons:

> There is no evidence to support a finding that Sheila failed to act honestly. However, as noted above, I find that Sheila breached her fiduciary obligations to the beneficiaries of the estate. She did not act reasonably. As a result, she is not entitled to relief pursuant to s. 35(1) of the *Trustee Act*.

[46] While I would permit Sheila to advance this ground of appeal, for the reasons that follow, I would not give effect to this ground.

[47] Sheila submits that she should be afforded relief under s. 35(1) of the *Trustee Act*, because any breach by her was neither dishonest nor unreasonable, but rather reflected an honest mistake.

[48] Section 35(1) of the *Trustee Act* provides an opportunity for court-sanctioned relief where the trustee "has acted honestly and reasonably, and ought fairly to be excused for the breach of trust."

[49] That said, s. 35(1) is discretionary. Absent any palpable and overriding error, deference is owed to the application judge's exercise of discretion.

[50] The trustee has the burden of proof with respect to the three elements in s. 35(1): (1) that he or she acted honestly; (2) that he or she acted reasonably; and (3) that he or she ought fairly to be excused.

[51] Whether a trustee has acted honestly and reasonably will depend on the facts of the particular case. In *The Law of Trusts*, Gillese J.A. notes, at p. 190, "Generally, the courts have interpreted 'honestly' as an active involvement in the affairs and decisions of the trust administration." Whether a trustee's conduct is "reasonable" is generally determined on the basis of what an ordinary prudent business person would have done in the circumstances.

[52] Courts are to consider a trustee's breach of trust in the light of all of the circumstances. The relevant factors will include whether the breach was technical in nature or a minor error in judgment; whether the trustee was paid; and whether the trustee is a professional: see *Fales*, p. 319; Gillese, J.A., p. 191.

[53] In *Penman*, at para. 86, the application judge held that the trustee had not acted reasonably:

> [The trustee] failed to consider all relevant criteria in determining whether the proposed investments were appropriate; she completely delegated the exercise of her discretion to [her co-trustee]; and she failed to make any reasonable inquiries about the proposed investments or to follow up regarding their status.

> Section 35 of the *Trustee Act* does not excuse a person who does nothing.

[54] For similar reasons, the application judge in this case found that Sheila did not act reasonably. Sheila made no inquiries and took no steps to fulfill her duties owed to the beneficiaries. The application judge gave extensive and thoughtful reasons and was alert to the factual context. I see no basis on which to interfere with the application judge's decision.

[55] Accordingly, while I would permit Sheila to advance the ground of appeal involving s. 35(1) *Trustee Act*, I would not give effect to it.

Disposition

[56] For these reasons, I would dismiss the appeal. I would order Sheila to pay the respondent's costs fixed in the amount of $10,000, inclusive of disbursements and applicable tax.

Released: DEC 20 2016

"S.E. Pepall JA"

"I agree G.A."

"Doherty JA"