

Decision shifts onus to beneficiaries: lawyer

Daughter stymied in dispute over former cabinet minister's estate

BY JULIUS MELNITZER
For Law Times

A new Superior Court decision improperly shifts the onus to beneficiaries who allege they haven't received a proper distribution of an estate, the lawyer for the plaintiff in the case says.

"This case sets a really high bar for people seeking to recover what was due to them because it puts the burden of proof on the beneficiary instead of recognizing the executor's duty to account," says Hull & Hull LLP's David Smith, who represented Norma Irene Jacques in the case against the Canada Trust Co. That matter is currently under appeal.

The case centred around the will of Norman Hipel, a former Ontario cabinet minister who died in 1953. He left a life interest in his estate to his wife Olive with the remainder to be divided equally between his

children, George and Norma.

Olive died in 1978. In an action commenced in 2005, Jacques claimed she never received her share.

Olive and Waterloo Trust Co., which later merged with Canada Trust, were co-executors of the father's estate. By the time the action began, Waterloo's file had been lost. Court records showed that no formal passing of accounts had occurred.

Justice Michael Parayeski ruled that Jacques had in fact not received her share and that Canada Trust was liable to her for failing to make a proper distribution.

But Ross Earnshaw of Gowlings Lafleur Henderson LLP's Waterloo, Ont., office argued that the claim was statute-barred. Smith countered that Jacques discovered her claim in June 2004 when her daughter ascertained that it existed and therefore the action had begun

in time under the terms of Ontario's new Limitations Act. It came into force on Jan. 1, 2004.

Parayeski, however, ruled that the new act didn't apply because the documentary evidence in the case showed that the claim could reasonably have been discovered before the statute came into force.

"The defence asserts that Norma could have learned all that was necessary within a year of Olive's death, and I accept that as reasonable," Parayeski concluded. "Accordingly, the limitation period began to run in March 1979 and thus expired six years later in March of 1985."

As well, the equitable doctrine of laches operated to bar Jacques' claim. The first branch of the doctrine inquired whether it was reasonable for the plaintiff to be ignorant of her legal rights given her knowledge of the underlying facts relevant to a possible legal claim.

"I have already found the plaintiff had, by means of her having read and executed the deeds referred to above, knowledge that she was a remainderman in respect of one half of her father's estate," Parayeski noted. "Reasonable inquiry any time after 1955 and or 1956 could have easily led to the particulars she now says she was missing until her daughter undertook investigation in 2004."

Finally, the second branch of the laches doctrine, which focuses on prejudice to the defendant, also applied to bar Jacques' claim. In this regard, Earnshaw argued that Canada Trust had been prejudiced in its defence because of the loss of Waterloo Trust's file, other documents, and the death of multiple witnesses.

But Smith submitted that Canada Trust was responsible for the loss of the estate file. He also suggested that the loss was

an attempt to cover up Waterloo Trust's alleged negligence.

Parayeski didn't see it that way.

"Files go missing from time to time in any business or profession," he wrote. "Sometimes, they do so quite innocently. Other times, they are indeed disposed of to eliminate damning evidence. The plaintiff's cynicism in respect of the loss of the file, however reasonable it might appear to her in the context of this action, does not constitute evidence that the file was deliberately lost."

At the same time, other files had gone missing and important witnesses had died. The plaintiff herself had suffered a stroke that had impaired her memory and made her subject to suggestion.

"Under all of these circumstances, I find that indeed the delay in bringing this case has created or permitted a situation to arise which it would be unjust to disturb," Parayeski ruled. "The plaintiff's claim is barred under the second branch of the doctrine of laches as well."

Nor could the plaintiff rely on the doctrine of fraudulent concealment. That doctrine states that a court won't invoke laches or toll a limitation period when a defendant had a special relationship with the plaintiff and was guilty of wilful or conscious wrongdoing and such actions were unknown to the other side due to knowing or reckless concealment.

Clearly, Waterloo Trust had a special relationship with Norma in its capacity as estate executor. But the evidence didn't establish either conscious wrongdoing or reckless concealment.

"Even if the term 'fraudulent' is to be given a broad interpretation in the context of considering this doctrine, the plaintiff has not convinced me that the defendant has engaged in wilful or conscious wrongdoing," Parayeski wrote. "What she alleges comes to negligence in the administration of the estate, perhaps even very serious negligence, but that is not enough. None of the cases she cites equates negligence with wilful and conscious wrongdoing."

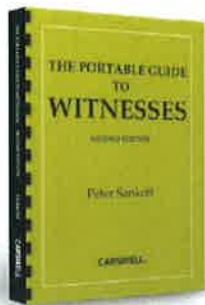
Smith maintains that Parayeski's reasoning improperly shifts the burden of proof.

"The reason this is such an important case is because it represents a departure from the long-standing principle that a fiduciary has a duty to account," he says. "While it's true that businesses may lose files from time to time, a trust company is in a different position as the name of the business implies. Also, had Waterloo Trust fulfilled its duty to pass the accounts, there would have been a clear record of accounting to my client."

Earnshaw tells *Law Times* he can't comment as the case is still before the courts. ■

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