



SUPERIOR COURT OF JUSTICE

ENDORSEMENT

COURT FILE NO.: CV-23-00705618-00ES

DATE: 12 February 2024

NO. ON LIST: 4

TITLE OF PROCEEDING: THE HOSPITAL FOR SICK CHILDREN FOUNDATION, also known as SICKKIDS FOUNDATION v. FILOMENA NICHOLAS, IN HER CAPACITY AS ESTATE TRUSTEE OF THE ESTATE OF GIUSEPPE ANTONIO RUGGIERO et al.

BEFORE: MADAM JUSTICE DIETRICH

**PARTICIPANT INFORMATION**

**For Plaintiff, Applicant, Moving Party:**

Name of Person Appearing	Name of Party	Contact Info
Richard J. Worsfold	Lawyers for the Applicant, The Hospital for Sick Children's Foundation	richard.worsfold@millsandmills.ca

**For Defendant, Respondent, Responding Party:**

Name of Person Appearing	Name of Party	Contact Info
Fabio Gazzola	Lawyer for Antoinette Ruggiero	fabiog@flglaw.ca
Michael N. Freeman	Lawyers for Filomena Nicholas, Josey Corrente, in their capacity as Estate Trustees of the Estate of Giuseppe Antonio Ruggiero	mfreeman@ehpnf.com

**For Other, Self-Represented:**

Name of Person Appearing	Name of Party	Contact Info
Maureen Monaghan	Proposed Trustee	maureen@monaghanlaw.com

## **ENDORSEMENT**

### **Overview**

[1] Giuseppe Ruggiero (the “Deceased”) died on February 27, 2021. He left a last will and testament, dated November 6, 2006 (the “Will”). The validity of the Will has not been challenged.

[2] Under the Will, the Deceased appointed two of his cousins, the respondents Filomena Nicholas (“Ms. Nicholas”) and Josey Corrente (“Ms. Corrente”) as his executors and trustees (collectively, the “named Executors and Trustees”). Each of Ms. Nichols and Ms. Corrente is also entitled to a legacy of \$25,000. The Deceased created a trust of the residue of his estate (the “Estate”), for his mother, Immacolata Ruggiero, who had been living with him and who predeceased him. In the event that his mother predeceased the Deceased, the Will provides for the residue of the Estate to be paid to Sickkids Foundation, also known as The Hospital for Sick Children (the “Applicant”).

[3] The Deceased was survived by his sister Antoinette Ruggiero (“Antoinette”). Antoinette had also been residing with the Deceased in the Deceased’s residence at 36 Rosemeade Avenue, in Etobicoke, Ontario (the “Property”) for eight years prior to his death. Antoinette continues to reside there. The Property is the most significant asset of the Estate.

[4] The Deceased did not provide for Antoinette in his Will. However, Antoinette did receive approximately \$700,000 as a result of his death. The Deceased had designated her as the beneficiary of his OMERS pension and his life insurance. The Deceased and Antoinette also held a joint bank account, which passed to her by right of survivorship.

[5] It is anticipated that Antoinette will bring a claim for dependant’s support against the Estate. Fabio Gazzola is representing Antoinette in these proceedings.

[6] The named Executors and Trustees are also named as the Attorneys for Property and the Attorneys for Personal Care for Antoinette. There is no evidence to suggest that they have relied on their Powers of Attorney to make decisions on Antoinette’s behalf. It is undisputed that Antoinette, who is 67 years of age, has serious health issues, including substance abuse and drug addiction. Antoinette is bedridden and depends on personal support workers for care. Since the Deceased’s death, the named Executors and Trustees have also attended to Antoinette’s needs. They attest that they have worked extremely hard to gain her cooperation regarding the sale of the Property and the need for her to move out of the Property.

[7] In the three years since the Deceased’s death, little has been done to administer the Estate. The failure of the named Executors and Trustees to carry out their function as Estate Trustees caused the Applicant to file a Notice of Objection to their Application for a Certificate of Appointment of Estate Trustee with a Will and to commence the within application. The named Executors and Trustees applied for the Certificate of Appointment of Estate Trustee with a Will on December 22, 2022, but a Certificate has not been granted because of the Notice of Objection.

[8] In the within application, the Applicant seeks a variety of relief, including an order removing the named Executors and Trustees as Estate Trustees of the Estate and appointing Maureen Monaghan (“Ms. Monaghan”) as Estate Trustee or Estate Trustee During Litigation of the Estate. Ms. Monaghan is a practising lawyer and an experienced trustee. The Applicant also seeks orders regarding occupation rent owing by Antoinette, Antoinette’s entitlement to dependant’s support, an accounting by the named Executors and Trustees, and a passing of accounts, among other relief. In this proceeding, the principal relief sought by the Applicant is the removal of the named Executors and Trustees and the appointment of Ms. Monaghan. The named Executors and Trustees contest this relief. The Applicant also seeks ancillary relief as set out in its draft Order attached as Schedule “A” to its

factum. The ancillary relief is consented to or unopposed with one exception. Mr. Gazzola, on behalf of Antoinette, asks that there be flexibility in the timeline for Antoinette to vacate the Property.

[9] The named Executors and Trustees concede that they are unable to perform many of the tasks required of an estate trustee in this case. They do not oppose the appointment of Ms. Monaghan as the Estate Trustee of the Estate. However, they bring a motion for an order that they be permitted to act as Estate Trustees for the limited purpose of carrying out the sale of the Property. Following the closing of the sale transaction, they say they would step aside, pass their accounts, seek reasonable compensation, and otherwise fully cooperate with Ms. Monaghan as Succeeding Estate Trustee or as Estate Trustee for all aspects of the Estate going forward.

### **Issue**

[10] The sole issue arising out the Applicant's application and the motion brought by the named Executors and Trustees is whether Ms. Nicholas and Ms. Corrente, as the named Executors and Trustees of the Will, should be given a limited grant as Estate Trustees for the sole purpose of preparing the Property for sale, listing it, and selling it, or whether they should be removed as Executors and Trustees of the Estate, and Ms. Monaghan should be appointed as Estate Trustee or Estate Trustee During Litigation.

### **Conclusion**

[11] For the reasons that follow, I find that Ms. Nicholas and Ms. Corrente should be removed as the named Executors and Trustees of the Estate, and Ms. Monaghan should be appointed as the Estate Trustee of the Estate for all aspects of the Estate administration.

### **Positions of the Parties**

[12] The Applicant submits that it has been three years since the Deceased died, and the named Executors and Trustees have not discharged their duties as Executors and Trustees. The Applicant submits that they have ignored its interests as the residual beneficiary of the Estate. The Applicant further submits that the named Executors and Trustees have not been transparent in their dealing with Estate assets, and they have not been accountable for the Deceased's funds that they have spent. Further, the Applicant submits that the named Executors and Trustees are in a conflict of interest. They are Antoinette's Attorney for Property and Personal Care. Should they be required to act in those roles, their duty to act in Antoinette's interests would conflict with their duties as Estate Trustees to act in the best interests of the Applicant. They cannot simultaneously act in the best interests of both. For these reasons, the Applicant submits that the Estate should be administered by Ms. Monaghan, as an experienced and neutral estate trustee.

[13] The named Executors and Trustees submit that the Deceased entrusted them with the administration of the Estate, and they wish to respect his wishes at least as far as the sale of the Property is concerned. They submit that they have already taken steps to improve the Property for sale, and they have engaged a real estate agent. They further submit that it took great persuasion to get Antoinette to agree that she must leave the Property and that without their involvement, she may refuse to leave. The named Executors and Trustees also submit that courts do not interfere lightly with a testator's choice of executor and trustee, and the court should not interfere with the Deceased's choice of them, at least as far as the sale of the Property is concerned. The named Executors and Trustees contend that they should be granted a Certificate of Appointment of Estate Trustee for the limited purpose of selling the Property.

### **Law**

[14] The court may make an order for the appointment of a new trustee or trustees, either in substitution for or in addition to any existing trustee or trustees: *Trustee Act*, R.S.O. 1990, c. T. 23, s. 5.

[15] The test is not whether the estate trustee executed her functions perfectly or ideally, but rather whether the estate is likely to be administered properly in accordance with the fiduciary duties of the estate trustee and with due regard to the interest and welfare of the beneficiaries: *Meuse v. Taylor*, 2022 ONSC 1436, at para. 14.

[16] In *Henderson v. Sands*, 2023 ONSC 897, at para. 8, this court summarized the principles that guide the court's discretion in removing trustees as follows:

[8] The principles that guide the court's discretion in removing an estate trustee chosen by the deceased are set out by Quinn J. in *Radford v. Radford Estate* (2008), 43 E.T.R. (3d) 74 (Ont. S.C.), at paras. 97-113. They can be summarized as follows:

- a) The court should not interfere lightly with the testator's choice of estate trustee;
- b) Such interference must be not only well justified but must amount to a case of clear necessity;
- c) Removal of an estate trustee should only occur on 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 is not every mistake or neglect of duty that will lead to removal. It must be shown that non-removal will likely prevent the trust from being properly executed. The acts or omissions must be such as to endanger the trust property or to show a want of honesty, capacity or reasonable fidelity;
- f) Removal is not intended to punish past misconduct but to protect the assets of the trust and the interests of the beneficiaries; past conduct that is likely to continue will often be sufficient to justify removal; and
- g) Friction alone is not itself a reason for removal. The question is whether it would be difficult for the trustee to act with impartiality. The friction must be of such a nature or degree that it prevents, or is likely to prevent, the proper administration of the trust.

## Analysis

[17] The named Executors and Trustees argue that they have satisfactorily addressed all the concerns raised by the Applicant and that they are proposing to limit their role as Executors and Trustees to one task, namely the sale of the Property. They submit that they have already agreed that the proceeds of sale may be secured by such means as this court deems appropriate. The named Executors and Trustees submit that Ms. Monaghan may monitor the sale process if the Applicant so wishes.

[18] The named Executors and Trustees assert that the court should respect the intention of the Deceased, which was to have the named Executors and Trustees oversee the sale of the Property. They also contend that there is a much greater chance of interference in the sales process by Antoinette if Ms. Monaghan oversees the sale because Ms. Monaghan is a stranger to Antoinette, and Antoinette can be difficult.

[19] I do not find the arguments of the named Executors and Trustees persuasive. The Applicant is not satisfied with the named Executors and Trustees' response to their concerns. The named Executors and Trustees ask that the Applicant wait for their accounting, which they say will explain how they accessed and spent or distributed

nearly \$300,000 of the Deceased's liquid investments. The named Estate Trustees have not provided the Applicant with a single invoice or receipt in respect of this spending and distribution.

[20] The named Executors and Trustees suggest that Ms. Monaghan could supervise the sale process and act as a watchful eye over it. But no explanation is given as to exactly how such supervision would occur. If Ms. Monaghan is to apply to be the Succeeding Estate Trustee following the sale of the Property, she would have no legal authority to make any decision with respect to the sale of the Property or to prevent any decision from being made. She would have no standing. Even if Ms. Monaghan were appointed as Estate Trustee at the same time as the named Executors and Trustees were issued a limited grant of probate to permit them to sell the Property, Ms. Monaghan would be precluded from interfering with the decisions of the named Executors and Trustees, who would be legally authorized to make all decisions regarding the sale of the Property. I find that the proposal offered by the named Executors and Trustees is flawed and does not protect the interests of the Applicant, as sole residual beneficiary of the Estate.

[21] In considering the principles that guide the court in exercising its discretion to remove a trustee, as set out in *Meuse* and *Henderson*, I find that the principle that is particularly apt in this case is whether the estate is likely to be administered properly in accordance with the fiduciary duties of the estate trustee and with due regard to the interest and welfare of the beneficiaries. As noted in *Henderson*, the court's main guide is the welfare of the beneficiaries.

[22] The Applicant has not been well served by the named Executors and Trustees. It has been three years since the Deceased died. The Applicant was not even made aware of its entitlement until December 2022, 21 months after the Deceased's death. Even considering the effects of the COVID-19 pandemic on the process, the delay is unwarranted.

[23] Apart from the delay, the named Executors and Trustee have failed to act in the best interests of the sole beneficiary of the Estate in the following ways:

- a) The named Executors and Trustees confirmed that the Deceased had bank investments of \$632,000 at the time of his death. For unknown reasons, it appears that The Royal Bank of Canada gave the named Executors and Trustees access to the Deceased's bank account despite the fact that they had no Certificate of Appointment of Estate Trustee with a Will. Of the \$632,000, it appears that the named Executors and Trustees have spent or distributed approximately \$300,000.
- b) The named Executors and Trustees explain the withdrawals and expenditures as follows:
  - i. \$36,415.80 for funeral and other expenses;
  - ii. \$50,019.90 to pay themselves their legacies;
  - iii. \$69,609.95 to the accountant (No invoice or explanation for why this amount was paid to the accountant, or for what purpose, has been provided); and
  - iv. \$92,914.95 for repairs to the Property, including cleaning, painting, removing waste, and maintaining and cleaning the exterior of the Property on a weekly basis (No contract, quotation, or proof that this work has been done has been provided.).
- c) Ms. Nicholas deposed that she instructed counsel to the named Executors and Trustees to send a letter to the Applicant's lawyer, which included this statement: "In a perfect world our clients [Ms. Nicholas and Ms. Corrente] would like to share the estate equally with your client."

- d) The named Executors and Trustees appear to have been blind to the conflict of interest between their concern for their cousin Antoinette and their duty to the Applicant. They continued to pay from the Deceased's funds all the costs of the Property, in which Antoinette was living on a rent-free basis, notwithstanding that Antoinette had received \$700,000 as the beneficiary of the Deceased's pension and life insurance. They appear to have given no thought to asking Antoinette to make a contribution to the Property through the payment of rent or Property expenses. Unfortunately, most of the \$700,000 has now been spent.
- e) In spite of the fact that the Applicant had filed a Notice of Objection to the issuance of a Certificate of Appointment of Estate Trustee with a Will to the named Executors and Trustees, and notwithstanding that they had been served with the within application in which the Applicant is seeking an order to have them removed as Executors and Trustees, the named Executors and Trustees engaged a real estate broker and signed a listing agreement to sell the Property. In doing so, they were not forthright with the broker. They did not advise him that they had no authority to sell the Property, or that the Property was owned by a deceased person. Instead, they told the broker that they were "Powers of Attorney" for the owner, which was inaccurate.

[24] The Applicant's lack of confidence in the ability of the named Executors and Trustees to act in its best interests and with a view to its welfare is well grounded. The named Executors and Trustees have not shown themselves to be impartial. On the contrary, they have shown themselves to be inclined to put the interests of Antoinette, and themselves, ahead of the interests of the residual beneficiary, to whom they owe fiduciary duties.

[25] This is a case of clear necessity, in which the court must interfere with the Deceased's choice of executors and trustees.

[26] I acknowledge that the named Executors and Trustees have played a valuable role in assisting Antoinette in matters relating to the Estate, including persuading her that she will need to vacate the Property. I am satisfied that the named Executors and Trustees can be of assistance to Ms. Monaghan, as Estate Trustee, and it is appropriate to order that she consult with them and seek their assistance, where possible and practical, in preparing and listing the Property for sale, arranging for vacant possession of the Property, and rehousing Antoinette. Ms. Monaghan has had an opportunity to review the draft Order, which includes this relief.

### **Disposition**

[27] The relief sought by the Applicant in the within application is granted, with the exception of the timeline for Antoinette to vacate the Property, which shall be extended to not later than March 30, 2024; and Antoinette shall use best efforts to vacate before that date. The balance of the relief sought in the within application is adjourned to a date to be set at a scheduling appointment. The motion brought by the named Executors and Trustees is dismissed.

[28] An Order shall issue removing the respondents, Ms. Nicholas and Ms. Corrente, as the Executors and Trustees of the Estate, appointing Ms. Monaghan as Executor and Trustee/Estate Trustee of the Estate, and granting ancillary relief in the form signed by me. The Order is effective as of February 12, 2024, and it does not need to be entered.

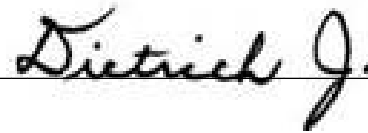
### **Costs**

[29] The Applicant has been successful in obtaining the relief it seeks and in defending against the motion brought by the named Executors and Trustees. It is entitled to costs.

[30] Each of the parties has submitted a Bill of Costs. The Applicant seeks costs of \$26,618.22, inclusive of disbursements and HST, on a partial indemnity basis, for the entire application to date, as opposed to costs related only to the relief sought in this proceeding and defending against the named Executors and Trustees' motion. Had the named Executors and Trustees succeeded in this proceeding, they would have sought costs of \$12,842, inclusive of disbursements and HST, on a partial indemnity basis.

[31] The named Executors and Trustees submit that costs in this proceeding should be limited to the issue of the removal and appointment of Estate Trustees and no other aspects of the within application that remain to be adjudicated. I agree. Apart from the matter of the timelines imposed on Antoinette, the ancillary relief the Applicant sought was granted on consent or was unopposed.

[32] If the parties cannot agree on the matter of costs, the Applicant shall prepare a Bill of Costs limited to the relief sought in this proceeding and the motion brought by the named Executors and Trustees. That Bill of Costs, together with any written submissions on costs that the Applicant would like to make (not exceeding two pages in length), shall be served and filed within 14 days. If so advised, the named Executors and Trustees shall serve and file written costs submissions (not exceeding two pages in length) within 14 days thereafter. Reply submissions may only be made with leave.

A handwritten signature in cursive script, reading "Dietrich J.", is positioned above a horizontal line.

**Dietrich J.**

**Released:** February 20, 2024