

Removing an estate trustee: How bad is bad enough?

By **Richard Worsfold**

Law360 Canada (March 26, 2024, 10:35 AM EDT) -- The courts in Ontario have repeatedly emphasized that they are reluctant to remove named executors or estate trustees at the request of beneficiaries of the estate. The principle of testamentary freedom provides that the testator's wishes as to who should manage their estate should be respected except for the most extreme cases of malfeasance.

A recent decision of the Ontario Superior Court, however, confirms that the court will use the discretion it has to remove a misbehaving estate trustee where such an order is necessary to ensure that an estate is administered properly in accordance with the fiduciary duties of the estate trustee and with due regard to the interests and welfare of the beneficiaries.



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In the matter of ***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***, Justice Bernadette Dietrich was considering an estate where the deceased had named two of his cousins as his executors prior to his death in February 2021. By February 2024, however, no Certificate of Appointment had yet been obtained from the probate court.



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The primary beneficiary under the estate brought an application seeking to remove the executors as it was alleged that the executors had delayed unreasonably and further as it was alleged that the named executors were in a conflict of interest, preferring the interests of their cousin, the deceased's sister, over the interests of the estate. The cousin had been living in the home owned by the deceased and had been allowed to stay there rent-free since his passing.

Justice Dietrich noted the principles that she had set out in *Henderson v. Sands*, [2023] ONSC 897 to the effect that the court should not interfere lightly with the testator's choice of estate trustee and

that such interference must not only be well justified but must amount to a case of clear necessity.

Justice Dietrich further noted the test for removing estate trustees as set out in the 2022 decision of *Meuse v. Taylor*, 2022 ONSC 1436, which required the court not to determine if the estate trustee had performed her functions perfectly or ideally but to determine whether the estate was likely to be administered properly in accordance with the fiduciary duties of the estate trustee and with due regard to the interests and welfare of the beneficiaries if the estate trustee was not removed.

In the matter that was before her, Justice Dietrich noted that from bank investments of approximately \$632,000 at the time of the testator's death, the evidence showed that the estate trustees had dissipated approximately \$300,000 for expenses that had not been properly documented.

Justice Dietrich further noted that the estate trustees appeared to be blind to the conflict between their concern for the deceased's sister, their cousin, and their duty to the estate. They had not taken steps to remove her from the home and had paid all of the expenses of the home in which the cousin was residing from the estate despite the fact that the cousin had received \$700,000 as a beneficiary of the deceased's pension and life insurance.

Justice Dietrich also noted that it had been three years since the deceased had died and that the executors had not even notified the primary beneficiary of their entitlement until December 2022.

Finally, Justice Dietrich was concerned about the executor's behaviour in the face of the application that was before her. She noted that the named executors had signed a listing agreement to sell the real estate owned by the estate despite receiving the application to remove them and found that they had not been forthright with the broker that they had no authority to sell the property or even that the property was owned by a deceased person.

Overall, Justice Dietrich found that the applicant's lack of confidence in the named executors and trustees was well-grounded. She found the named executors had placed the interests of themselves and their cousin ahead of the interests of the residual beneficiary and noted that they had gone so far as to suggest in correspondence from their solicitor that, "in a perfect world," they would like to share the estate equally with the residual beneficiary as trustees for their cousin.

Justice Dietrich held that the court's main concern is the welfare of the beneficiaries and that these actions of the executors cumulatively justified their removal as estate trustees.

While the test to remove a misbehaving estate trustee is undoubtedly a high bar, this decision shows that the court will act in cases of necessity, provided that evidence is before them that shows the need to remove the estate trustees to ensure that the estate is properly administered.

Richard Worsfold is a partner at Mills & Mills LLP, a full-service firm where he practices civil and estates litigation. He was counsel for the applicant in this matter. Richard would like to thank Fatima Jawando, student at law, for her assistance with this matter.

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