

COURT OF APPEAL FOR ONTARIO

CITATION: Heston-Cook v. Schneider, 2015 ONCA 10

DATE: 20150113

DOCKET: C59177

Weiler, Sharpe and Blair JJ.A.

In the Estate of Stefanie Aber, Deceased

BETWEEN

Brunhilde Heston-Cook

Plaintiff (Appellant)

and

Ernestina Schneider, in her personal capacity  
and in her capacity as estate trustee

Defendant (Respondent)

Gregory Sidlofsky, for the appellant

Lisbeth Hollaman, for the respondent

Heard: January 6, 2015

On appeal from the order of Justice Herman J. Wilton-Siegel of the Superior Court of Justice, dated July 15, 2014.

ENDORSEMENT

[1] The appellant, Brunhilde Heston-Cook (Hilda), and the respondent, Ernestina Schneider, are both daughters of the deceased, Stefanie Aber. The

respondent was Aber's Attorney for Property and Personal Care before Aber's death, and then became Aber's estate trustee.

[2] The deceased's will bequeathed "any residence in which I reside and own at the time of my decease, and the contents thereof" to the respondent and the sum of \$100,000 of the residue to the appellant. The balance of the residue was divided equally.

[3] The deceased remained in her home until her death and the house was transferred to the respondent in accordance with the terms of the will. The appellant did not object to the transfer and accepted her \$100,000. The appellant now alleges that at the time she was unaware of the respondent's breaches of her duties of care towards their mother and it was only when medical reports were obtained during the passing of accounts that she became aware of these breaches.

[4] The appellant brought this action against the respondent alleging that the respondent put her own interests ahead of her mother's and breached the duties she owed to her mother under her power of care by maintaining her in the house rather than having her cared for in a nursing home or other assisted living institution. The appellant seeks the disgorgement of the benefit obtained by the respondent or damages in the alternative.

[5] The respondent brought a motion under Rule 21 for an order striking out the appellant's statement of claim as disclosing no cause of action or alternatively dismissing the claim on various other grounds.

[6] The first motion judge determined that any claim for breach of fiduciary duty owed to the deceased belonged to the estate and that the appellant had no standing to assert that claim. He adjourned the Rule 21 motion to allow the appellant to bring a cross-motion to remove the respondent as estate trustee.

[7] The appellant brought that motion and sought to replace the respondent with herself or her friend.

[8] The second motion judge found that if replaced as estate trustee, the appellant would be as conflicted as the respondent and dismissed the motion.

[9] The appellant submits that she should be appointed as estate trustee during litigation for the purpose of pursuing the action and that the motion judge erred in principle by not exercising his discretion to appoint her. Before us, the appellant submitted that the order could stipulate that she not receive costs from the estate to cover the costs of that litigation pending further order.

[10] We do not agree that the motion judge erred in principle. It has been determined that the claim is that of the estate and whoever has carriage of the claim on behalf of the estate needs to be able to make an objective assessment of the overall interests of the estate and whether it is in the best interests of the

estate to take this proceeding. Replacing the respondent with the appellant would not accomplish this. Furthermore, as the motion judge recognized, the appellant is also appealing the passing of accounts and would be in a position of conflict vis-à-vis the estate in that situation. While the motion judge considered whether an order could nonetheless be made, in the end he declined to do so.

[11] We see no error in principle in the motion judge's refusal to exercise his discretion to appoint the appellant.

[12] Having regard to the submissions made, we make one further comment. It is trite law that an appeal is always from the order of the court and not the reasons. In dismissing the appeal, the motion judge stated in obiter that, "[T]he respondent should have the right to assert any limitation period defences that may also arise as a result of the need to commence a new action in view of the defective action commenced by the applicant." Any motion invoking a limitation period defence will have to be determined on the basis of the proceedings and pleadings as they stand at the time that motion is heard and the motion judge's comments should not be taken to be determinative of the outcome of that issue.

[13] The appellant also seeks leave to appeal the costs order of the motion judge against her in the amount of \$12,000. She submits that there is no general rule that costs are to be awarded on a full indemnity scale against her on the basis that the successful party is an estate trustee or executor and her conduct of

the proceeding is not such as to merit an award of full indemnity costs against her.

[14] The estate trustee successfully defended her removal as estate trustee and we agree that she is entitled to be fully indemnified. This does not mean that the unsuccessful party should pay more than costs on a partial indemnity scale in bringing the proceeding when his or her conduct would not otherwise merit such an award. A blended award, in which costs on a partial indemnity scale are awarded against the unsuccessful party and the remainder of the costs are paid from the estate would appear to strike the appropriate balance. See e.g. *Sawdon Estate v. Watch Tower Bible and Tract Society of Canada*, 2014 ONCA 101 at para. 96. In our opinion the motion judge erred in principle in ordering the appellant to fully indemnify the respondent.

[15] Accordingly, we allow the appeal and order that the appellant pay partial indemnity costs of the motion fixed at \$7,500 and that the respondent recover the balance of her costs from the estate.

[16] In all other respects the appeal is dismissed.

[17] The respondent is entitled to her costs of this appeal fixed at the amount agreed to by the parties, namely, \$10,000, inclusive of disbursements and taxes.

“K.M. Weiler J.A.”

“Robert J. Sharpe J.A.”

“R.A. Blair J.A.”