

Brown Estate (Trustee of) v. Chin

The Bank of Nova Scotia Trust Company in their capacity as the Estate Trustee without a Will of the Estate of Robert Guy Brown, deceased, Moving Party, and Peter Chin, Patricia Brown, Brenda Nichols, Glen Brown, Susanne Vidito for and on behalf of a minor, the Children's Lawyer and Bonnie Brown, Respondents
Brenda Lynn Nichols, Applicant and the Bank of Nova Scotia, Estate Trustee for the Estate of Robert Guy Brown, Nicole Brown, Glen Brown and Susanne Vidito, Respondents

Citation: 2004 CarswellOnt 6597

Court: Ontario Superior Court of Justice

Judge: Howden J.

Judgment: November 19, 2004

Year: 2004

Docket: 03-2466, FL 741-04

Proceedings: additional reasons to Brown Estate (Trustee of) v. Chin (2004), 15 E.T.R. (3d) 60, 2004 CarswellOnt 4547 (Ont. S.C.J.)

Counsel: None given

Subject:

Estates and Trusts

Civil Practice and Procedure

Estates and trusts — Trustees — Powers and duties of trustees — Duties — Estate trustee brought motion for advice and directions — Parties sought clarification with respect to terms of order — Trustee has duty to ascertain and preserve assets of estate — Because no trustee was in place for over one year in case at bar, and other persons appeared to have dealt with estate assets without authority, order provided trustee with powers to do its duty — Order also provided process of discovery leading to trial of issues — Pending trial, trustee had to use its best judgment to ascertain and take possession of all property to which estate had legitimate claim and to hold such property pending trial — Nothing in new Rules of Civil Procedure takes away from court's authority and power to provide effective directional order to address trustee's duties to estate and its beneficiary.

Rules considered:

Ont. Rules of Civil Procedure, R.R.O. 1990, Reg. 194

Generally — referred to

R. 30.03 — referred to

R. 30.04(4) — referred to

R. 59.04 — referred to

ADDITIONAL REASONS to judgment reported at Brown Estate (Trustee of) v. Chin (2004), 15 E.T.R. (3d) 60, 2004 CarswellOnt 4547 (Ont. S.C.J.) with respect to nature of order.

Howden J.:

1 I have reviewed the submissions of counsel. The draft submitted to me by Ms. Whaley is amended in the particulars which follow.

2 First, however, I wish to address the submissions of Mr. Prost in his paragraph 3. Those submissions misconceive the position and duties of the Trustee pending trial. The

order is as it is because it must accommodate the Trustee's duties and provide an expeditions but fair process for disposition of the outstanding claims by Mr. Prost's client. The Trustee has a duty to ascertain and preserve assets of the Estate, and because no Trustee was in place for over one year in this case, and other persons appear to have dealt with Estate assets without authority, the order provides the Trustee with the powers to do its duty. It also provides a process of discovery leading to trial of the issues. Pending trial, the Trustee must use its best judgment to ascertain and take possession of all property to which the Estate has a legitimate claim, and to hold such property pending trial and disposition of Ms. Nichol's claims by the court. Nothing in the new Rules takes away from the court's authority and power to provide an effective directional order to address the Trustee's duties to the Estate and its beneficiary, as well as an expeditions and fair process in trial of the issues.

3 As to my concern for how the personal claim of Ms. Nichols would proceed, I have provided for both claims in paragraphs 1, 4, and 12. They will be amended to read as follows:

1) THIS COURT ORDERS that the parties to the proceedings should be those named herein and the issues to be determined shall be as follows:

i) the Moving Party, The Estate of Robert Guy Brown, deceased, and the Children's Lawyer deny, and Brenda Nichols affirms, that she has a constructive trust interest in the Estate of Robert Guy Brown, deceased, as well as a personal ownership interest in certain assets in possession of the Estate Trustee and/or certain respondents;

ii) if it is found that Brenda Nichols has a constructive trust interest in the assets of the Estate of the deceased, in what amount or proportions should such interest be satisfied?

iii) if it is found that Brenda Nichols is entitled to recover possession of certain personal property, which items in the possession of the Trustee or the said respondents are to be recovered by her?

4) THIS COURT ORDERS that the issues shall be tried before the court in Barrie. Ontario, without a jury, at a date to be fixed by the Trial Co-ordinator, and the Record shall consist of the Order Giving Directions herein, the summary of claims of Ms. Nichols, and of any responses filed under paragraph 12 of this Order, and any further Order Giving Directions made by this Honourable Court.

12) THIS COURT ORDERS that the timetable for the exchange of affidavits of documents in accordance with Rule 30.03, discovery in accordance with Rule 30.04(4) and examinations for discovery should be as follows:

a) that Brenda Nichols shall particularize her claims and provide a summary thereof, to the Trustee within thirty days of the date of this Order Giving Directions, and notify interested respondents of same;

b) exchange of affidavits of documents shall follow within forty days of the date of the Order Giving Directions herein;

c) the Trustee and respondents named in Ms. Nichols' particularized claims shall provide a response to the said claims within fifty days;

d) the examination of non-party witnesses shall occur within sixty days of the date of the Order Giving Directions herein;

e) exchange of witness statements shall occur within seventy-five days of the date of the Order Giving Directions herein; and

f) examination for discovery shall follow within ninety days of the date of the Order Giving Directions herein.

4 Susanne Vidito and Glen Brown shall be added to paragraph 7 because of the allegations involving each of them in taking possession of Estate property. I have deleted the surplus wording at the end of paragraph 11 commencing with the words, "on the basis that such application". Paragraph 13 was worded awkwardly and paragraph 14 was not understandable to me. Paragraph 13 shall read as follows:

13) THIS COURT ORDERS that all property of the Estate of the deceased in the custody of Glen Brown, Patricia Brown, Susanne Vidito, and Brenda Nichols be, and the same is hereby preserved until further order, and there shall be no disposal, transfer, sale of, or conversion of any such property pending further order of this court.

5 Paragraph 14 shall read as follows:

14) THIS COURT ORDERS that the Moving Parry shall recover possession of personal property belonging to the Estate of the deceased, within sixty days of this Order, in the possession of Patricia Brown and Brenda Nichols pending resolution of the litigation herein.

6 If I have misunderstood what was attempted to be conveyed by paragraph 14 of the draft order, I can be written to.

7 As the process issues have now satisfactorily been addressed in a slightly different way. my endorsement is amended by deleting the third to fifth sentences of paragraph 20 thereof, and substituting therefore the following:

The draft order provides for the particularization of Ms. Nichols' claims. To provide a proper Record for trial, the Order shall include as an issue for trial her claim against the Estate and respondents for return of personal property, and shall require a summary of her particularized claims and responses by the Trustee and interested respondents within specified time periods, in addition to the remaining procedural schedule.

8 As I have heard all submissions regarding the form and wording of the Order, the Order is settled with this endorsement, pursuant to Rule 59.04. I will sign the draft Order of November 1, 2004 amended as directed. Please leave the date blank as the Order will take effect on signing for purposes of the time periods.

9 I shall issue my decision on costs shortly, when I have the time to properly consider them.