Trusts Equity
Fall Term 2022

Lecture Notes – No. 10

VIII. ADMINISTRATION OF TRUSTS

The administration of a trust can be thought of like the operation of a business; the trust settlement is like the articles of the company's incorporation, the trustee is like the CEO, and the beneficiaries are like the shareholders (indeed trusts and equitable devices were used to organize business enterprises before the development of modern corporate law). However, because the beneficiary has little power and the orientation of the trust is often not commercial, the recognition of the trustee as a fiduciary hovers above the whole area.

In the absence of terms provided in the settlement, (and sometimes even where terms are provided) there is a statutory scheme provided that governs the rights, powers, obligations, and liabilities of the trustee. **A settlor may depart from the statutory scheme but should do so carefully.**

Please note that many of the cases arise in a testamentary context. The Estate Trustee is a trustee over the assets of the Estate and the Estate must account to creditors and those interested in the assets of the deceased. The Estate Trustee is a real trustee, but there are many augmentations that arise in respect of the administration of an Estate. We will not deal with those rules very much in this course.

A. INTRODUCTORY POINTS

The trustee is the key figure in trusts law once the trust has been established. He or she owes extensive duties to the beneficiary and others, any may suffer personal liability for their breach. These duties arise at in equity and under statute.

At the same time, **the trustee is decidedly not the insurer of the beneficiary's interest.** The trustee will be forgiven technical breaches of his or her duty of care where the trustee acts honestly and reasonably. If the position were otherwise no rational person would ever agree to occupy the office of trustee and the trust device would become an empty doctrine.

As is always the case with legal questions, there is a balancing of interests here – the protection of the vulnerable beneficiary from the incompetence or wrongful conduct of the trustee on the one hand, and, the protection of the trustee from liability for events beyond his or her control or reasonable contemplation on the other. Key to constructing such a balance are precise rules to govern such matters as investment of trust funds and delegation of powers by trustees. Where there remains uncertainty as to a contemplated course of conduct, the trustee may seek directions from the Court.

Please familiarize yourself with the provisions of the **Trustee Act, RSO 1990, c.T-23**; in the absence of provisions in the trust instrument on point, the statute sets out a number of relevant provisions respecting basic administration of the trust.

Basic Duties and Powers of the Trustee

The trustee owes a *general fiduciary duty of loyalty* as well as a *general duty of care*.

A number of non-compellable powers are also at the trustees' disposal – the most important of which is usually the power to sell the trust property**. It is important to note that the Court can rule as to whether a contemplated course of conduct is within the powers of the trustee but that the Court will not go beyond that – the Court will not exercise its own judgment to compel the trustee to exercise a discretionary power.**

For information on the trustee's obligations in respect of reporting to the CRA, see the CRA publications in respect of the T3 Filing available on the Internet at:

http://www.cra-arc.gc.ca/tx/trsts/menu-eng.html

Sources of Regulation

The trustee's conduct is regulated by three main sources:

(i) the trust instrument itself;
(ii) applicable statutes (especially the Trustee Act in Ontario);
(iii) thought the court's equitable jurisdiction.

The over-arching obligation of the trustee is to enforce the trust instrument and safeguard the entitlements of the beneficiaries – statute and equity may change the operation of the trust instrument itself, but it is the trust instrument which is the most important source in most cases.

Carroll v. Toronto-Dominion Bank
2021 ONCA 38 (Ont. C.A.)

Paciocco J.A.::

> [18] **Courts assumed inherent jurisdiction to supervise and administer trusts so that trusts could be given legal force**: Donovan W.M. Waters, Q.C., Mark R. Gillen & Lionel D. Smith, eds., Waters' Law of Trusts in Canada, 4th ed. (Toronto: Thomson Reuters, 2012), at pp. 1165-66; Daniel Clarry, The Supervisory Jurisdiction Over Trust Administration (Oxford: Oxford University Press, 2018), at para. 2.11. **The enforcement of trusts was not achieved by empowering courts to act as roving commissions of inquiry into their proper performance, but by empowering courts to assist those with an interest in trusts in enforcing and compelling the performance of those trusts.**
>
> [19] **Initially, the inherent jurisdiction to supervise and administer trusts was recognized "primarily to protect the interest of beneficiaries": Crociani v. Crociani, [2014] UKPC 40, at para. 36. Without the assumption of jurisdiction by courts, beneficiaries would lack legal authority to enforce trusts because trustees are the legal**

owners of trust property, and therefore hold the bundle of enforceable legal rights that property enjoyment entails. The only way to ensure that beneficiaries can enjoy trust property they do not own is for courts to take jurisdiction and impose personal obligations on trustees to use the legal rights they hold for the benefit of the beneficiaries, according to the terms of the trust: McLean v. Burns Philp Trustee Co. Pty. Ltd. (1985), 2 N.S.W.L.R. 637 (S.C.), at p. 933.

[20] **Given that trusts are enforced by imposing personal obligations on trustees, if courts did not intervene, a trust would fail where a trustee would not or could not discharge their personal obligations because of refusal or incapacity. Courts therefore accepted the inherent jurisdiction to assume the administration of such trusts, based on the maxim of equity that no trust should fail for want of a trustee**: Clarry, at para. 1.04.

[21] In this way, courts of equity claimed the inherent jurisdiction at the behest of beneficiaries "to supervise, and where appropriate intervene in, the administration of a trust where there is no trustee to carry it on, or where the trustee wrongfully declines to act or refuses to disclose trust accounts and supporting information or is otherwise acting improperly": Halsbury's Laws of England, Vol. 98, "Trusts and Powers" (London: LexisNexis, 2019), at para. 626.

[22] **Given the significant obligations that courts impose on trustees and the desire to "enable practical effect to be given to a trust", courts have also recognized the inherent jurisdiction to assist trustees in the administration of trusts where such assistance is required**: MF Global UK Ltd. (In Special Administration), Re, [2013] EWHC 1655 (Ch.), at paras. 26, 32. For example, there is inherent jurisdiction to assist trustees "where difficulties have arisen which cannot be removed without the assistance of the court, or where the decision of the court on a doubtful question connected with the trust or on its proper administration is sought by the trustee": Halsbury's, Vol. 98, at para. 626; Waters' Law of Trusts, at pp. 1165-66.

[23] **To be sure, on occasion access to the inherent jurisdiction of courts has been extended to others who have an interest in a trust, such as creditors or those with contingent interests, particularly where that jurisdiction is supported by statute**: see McLean v. Burns Philp; Waters' Law of Trusts, at p. 1122**. However, it can readily be seen that the inherent jurisdiction to supervise and administer trusts exists to assist the parties to the trust relationship or those who are interested in the trusts.** As such, the inherent jurisdiction of courts to supervise and administer trusts is not inconsistent with the imposition of standing requirements. To the contrary, it is entirely in keeping with the role inherent jurisdiction performs to ensure that those who seek to invoke the inherent jurisdiction to supervise or administer trusts have an interest in the trusts they seek to enforce.

B. APPOINTMENT, RENUNCIATION, RENEWAL, RETIREMENT & REMOVAL OF TRUSTEES

***Trustee Act*, ss. 2-8:**

Retirement of trustees

2 (1) Where there are more than two trustees, if one of them by deed declares a desire to be discharged from the trust, and if the co-trustees and such other person, if any, as is empowered to appoint trustees, consent by deed to the discharge of the trustee, and to the vesting in the co-trustees alone of the trust property, then the trustee who desires to be discharged shall be deemed to have retired from the trust, and is, by the deed, discharged therefrom under this Act without any new trustee being appointed.

Application of section

(2) This section does not apply to executors or administrators.

Appointment of New Trustees

Power of appointing new trustees

3 (1) Where a trustee dies or remains out of Ontario for more than twelve months, or desires to be discharged from all or any of the trusts or powers reposed in or conferred on the trustee, or refuses or is unfit to act therein, or is incapable of acting therein, or has been convicted of an indictable offence or is bankrupt or insolvent, the person nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust, or if there is no such person, or no such person able and willing to act, the surviving or continuing trustees or trustee for the time being, or the personal representatives of the last surviving or continuing trustee, may by writing appoint another person or other persons (whether or not being the persons exercising the power) to be a trustee or trustees in the place of the trustee dying, remaining out of Ontario, desiring to be discharged, refusing or being unfit or incapable.

Survivorship

(2) Until the appointment of new trustees, the personal representatives or representative for the time being of a sole trustee, or where there were two or more trustees, of the last surviving or continuing trustee, are or is capable of exercising or performing any power or trust that was given to or capable of being exercised by the sole or last surviving trustee.

Authority of surviving trustee to appoint successor by will

4 Subject to the terms of any instrument creating a trust, the sole trustee or the last surviving or continuing trustee appointed for the administration of the trust

may appoint by will another person or other persons to be a trustee or trustees in the place of the sole or surviving or continuing trustee after his or her death.

Power of court to appoint new trustees

5 (1) The Superior Court of Justice may make an order for the appointment of a new trustee or new trustees, either in substitution for or in addition to any existing trustee or trustees, or although there is no existing trustee.

Limitation of effect of order

(2) An order under this section and any consequential vesting order or conveyance does not operate as a discharge from liability for the acts or omissions of the former or continuing trustees.

What may be done

6 On the appointment of a new trustee for the whole or any part of trust property,

increase in number

(a) the number of trustees may be increased; and

separate trustees for distinct trusts

(b) a separate set of trustees may be appointed for any part of the trust property held on trusts distinct from those relating to any other part or parts of the trust property, even though no new trustees or trustee are or is to be appointed for other parts of the trust property, and any existing trustee may be appointed or remain one of such separate set of trustees or, if only one trustee was originally appointed, then one separate trustee may be so appointed for the first-mentioned part; and

where not less than two to be appointed

(c) it is not obligatory to appoint more than one new trustee where only one trustee was originally appointed or to fill up the original number of trustees where more than two trustees were originally appointed but, except where only one trustee was originally appointed, a trustee shall not be discharged under section 3 from the trust unless there will be a trust corporation or at least two individuals as trustees to perform the trust; and

execution and performance of requisite deeds and acts

(d) any assurance or thing requisite for vesting the trust property, or any part thereof, in the person who is the trustee, or jointly in the persons who are the trustees, shall be executed or done. R.S.O. 1990, c. T.23, s. 6.

Powers of new trustee

7 Every new trustee so appointed, as well before as after all the trust property becomes by law or by assurance or otherwise vested in the trustee, has the same powers, authorities and discretions, and may in all respects act as if the trustee had been originally appointed a trustee by the instrument, if any, creating the trust.

Nominated trustee dying before testator

8 The provisions of this Act relative to the appointment of new trustees apply to the case of a person nominated trustee in a will but dying before the testator.

(a) Appointment

An express trust proceeds from a settlement – written or oral – wherein the settlor conveys to the trustee the subject-matter of the trust in favour of the objects of the trust, the beneficiaries. It is the settlor that chooses the trustee and the trustee must consent to his or her appointment. Once fully constituted, the settlor loses all power to deal with the property. Quite simply, it is now the property of the trustee.

What if the trustee is no longer able or willing to act?

If the trust documents provides a procedure for retirement and a new appointment, then its provisions will be followed. For example, the settlor may reserve a power of further appointments to herself or set out a list of substitutes – this is really just a matter of construing the trust instrument and following the procedures set out therein.
In the absence of such provisions, or where such provisions are defective, the statute's provisions provide the framework for appointment, renewal, retirement, and removal. It is important for a person drafting a settlement to be aware of these provisions. **In most cases, it is most convenient to follow the statutory scheme.**

Re Brockbank
[1948] Ch 206; cb, p.876

This was a typical sort of dispute. There was a testamentary trust established in favour of the widow for life with a gift-over to the children. There were two trustees and one wished to retire; the beneficiaries had a preferred replacement trustee but the retiring trustee disagreed and would not join the other trustee in exercising their joint power to appoint a replacement. The beneficiaries sought to force his hand; the judge declined to make the requested Order, holding that **the beneficiaries cannot compel a trustee not to exercise or not exercise a statutory or trust-created power of appointment of new trustees; the beneficiaries may either wind up the trust if all are sui juris or allow the trustee to act as he or she is entitled to act**.

Per Vaisey J:

> It seems to me that the beneficiaries must choose between two alternatives: Either they must keep the trusts of the will on foot, in which case those trusts must continue to be executed by trustees duly appointed pursuant either to the original instrument or to the powers of s. 36 of the Trustee Act, 1925, and not by trustees arbitrarily selected by themselves; or they must, by mutual agreement, extinguish and put an end to the trusts, with the consequences which I have just indicated.
>
> The claim of the beneficiaries to control the exercise of the defendant's fiduciary power of making or compelling an appointment of the trustees is, in my judgment, untenable. The court itself regards such a power as deserving of the greatest respect and as one with which it will not interfere… [i]f the court, as a matter of practice and principle, refuses to interfere with the legal power of appointment of new trustees, it is, in my judgment, a fortiori not open to the beneficiaries to do so. As I have said, they can put an end to the trust if they like; nobody doubts that; but they are not entitled, in my judgment, to arrogate to themselves a power which the court itself disclaims possessing, and to change trustees whenever they think fit at their whim or fancy - for it follows from Mr. Cross' argument for the present plaintiffs (as appeared from his reply to a question I put to him during the course of the hearing) that whenever the beneficiaries choose to say that they do not like their trustee, they can order him to retire and order him to appoint anyone they like to succeed him. That seems to me to show a complete disregard of the true position.

Indeed, this same policy governs where the trustee wishes to exercise a statutory power and wishes to force the hand of the other trustees to agree. Again, the trustee can exercise the power or remain in office or not, but it's not for the court to involve itself:

Re Moorhouse
[1946] OWN 789 (HCJ); cb, p.876, 881

Here one of the trustees wished to retire but only on the condition that a person whom she nominated – her own lawyer - would be appointed by the Court. The judge refused holding that she was in essence trying to remain in place (through her lawyer) while retiring and calling upon the Court to exercise a power which it did not have.

Per Barlow J:

> 6 Mary Elizabeth Butler Moorhouse does not ask to retire unconditionally as trustees She only asks to be discharged if Eric G. Moorhouse is appointed in her place and stead. If he is not to be appointed by the Court she wishes to continue…
>
> 7 This places in the Court not only the power to appoint but also there goes with it a discretion as to the person to be appointed.

…

10 Where there is a continuing trustee, I do not find in The Trustee Act any power permitting one trustee to retire and to dictate the person to be appointed in his or her place or stead. If a trustee wishes to retire, he must retire unconditionally, leaving it to the continuing trustee or to the Court to appoint a new trustee, if it appears advisable. It therefore follows that Mary Elizabeth Butler Moorhouse has no power to appoint Eric G. Moorhouse a trustee in her place and stead, and furthermore she ought not to be permitted to hamper the Court in its discretion by attempting to dictate whom the Court should appoint.

11 Furthermore, Eric G. Moorhouse is the personal solicitor of Mary Elizabeth Butler Moorhouse, who is now a trustee and the life tenant. If he were to be appointed trustee it may very well be that his interest as trustee and his interest as solicitor for the life tenant would come in conflict. For this reason alone he ought not to be appointed: In Re Kemp's Settled Estates, (1883) 24 Ch. D. 485; Lewin on Trusts, 14th Edn. p. 445 and In Re Norris, Allen v. Norris, (1884) 27 Ch. D. 333.

12 For the above reasons it would be improper to grant the application. The application will be refused. The costs of the Premier Trust Company will be paid by the applicant.

(b) Retirement:

Re McLean
(1982), 135 DLR (3d) 667 (Ont HCJ); cb, p.886

Whilst a trustee may resign, an executor (now ‘estate trustee’) may not (although the court may allow substitution) and thus a person who holds both offices must seek release from both under separate processes. Why? Although the two offices share many features, the Estate Trustee owes more extensive duties to those interested in the assets of the estate (creditors) and has made an undertaking to the efficient administration of the estate (upon appointment).

Gonder v Gonder Estate
2010 ONCA 172 (Ont. C.A.)

Here a brother and sister fought over the sole asset of their late sister’s estate. The sister and her husband were the estate trustees. The house was left to the testarix’s mother for life, gift over in differential shares to others including both the brother and the sister. Taxes were owed and their was a lien on the house in favour of the CRA. The brother said he was the true owner of the house, sued the Estate, and obtained a Certificate of Pending Litigation (which prevented it from being sold). The upshot was that the estate trustees had to manage an asset, but could not sell it to settle the action or satisfy the lien. The sister brought an application to be allowed to retire.

At trial, **(2009), 49 E.T.R. (3d) 152 (Ont Sup Ct)**: the court allowed the trustee to retire even without a replacement as the brother could apply himself to be appointed. In essence, the Court told the brother that he was holding up the administration of the Estate and was in a position to himself take it on.

On appeal, Rouleau and and Epstein JJ.A. held:

> **22** The role of trustee is a difficult one. **A trustee must act in the best interests of the beneficiary, even at personal hardship. However, if such obligations were unlimited, and if no relief were available, "no one would undertake the task of trusteeship":** see Donovan W.M. Waters, *Waters Law of Trusts in Canada* 3d ed. (Toronto: Carswell, 2005), at p. 841.
>
> **23** In the specific circumstances of this case there were three objectives that ought to have been considered and addressed by the motion judge: (1) ensuring the orderly administration of the estate in the interests of the beneficiaries; (2) recognizing the plight of the respondents; and (3) providing for the timely resolution of the disputes concerning the estate.
>
> **24 Although the interests of the beneficiaries must be the primary concern of both trustees and the courts, as we see it, the courts can meet each of these concerns, and do justice to all of the parties without requiring that a replacement trustee be immediately appointed, so long as there are steps taken to ensure the proper administration of the estate.** We reach this conclusion based on the following: First, the courts have historically exercised an inherent equitable jurisdiction to remove trustees, even if it would, for a period, leave no trustee to administer the estate, so long as provision was made for the estate's orderly administration. Second, no statute has removed this power. Finally, there may be reasonable alternatives to the immediate appointment of a new trustee that can ensure the proper administration of the estate.
>
> **25 The motion judge erred not because he removed the respondents as trustees without appointing a replacement. Rather, the error was to remove them without making alternate provisions for the proper administration of the estate.** It is for this reason alone that the matter must return to the Superior Court to be reconsidered.
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> …
>
> **33** We recognize that there is good reason to ordinarily require a replacement trustee to be located. The fiduciary nature of the trustee role ensures that they "put the beneficiary's interests first in the performance of any act and the exercise of any powers or duties": see Gillese, at p. 130. History has proven that trustees are effective actors in ensuring that the estates of deceased persons are administered properly. When a trustee wishes to resign, it will ordinarily fall to that person to locate a replacement trustee. The modern reality is that the court is ill suited to locate replacements.
>
> **34** However, as we will discuss below, a trustee is not the only entity that can ensure the proper administration of an estate. **In the very rare cases**

where equity demands that a sole trustee be removed, but no replacement is forthcoming, courts possess an inherent jurisdiction to order the trustee's removal and provide for the orderly administration of the estate.

…

43 As we read it, **s. 37(4) does not constrain the power of the court to remove a sole remaining trustee and provide for an alternative mechanism for administering the trust in those rare cases where a replacement trustee is not available and the exercise of inherent jurisdiction is required.**

44 The purpose of s. 37(4) is to give the court discretion to decide not to replace a removed trustee when one or more trustees remain. In other words, there is no obligation to ensure that the "status quo" is maintained by appointing a replacement. In the spirit of simplifying the trusteeship regime, s. 37(4) also provides for how the powers and rights of the removed trustee devolve in the event that he or she is not replaced. The authority of the removed trustee vests in the remaining trustees.

45 Such a clarification is understandable. **Older decisions, such as *Mitchell*, express a judicial preference against moving from multiple estate trustees to a single trustee on the premise that a testator's choice to appoint more than one trustee initially represents a desire to avoid their estate falling into the control of a single person: see *Mitchell*, at p. 449. This may be a relevant consideration in appropriate circumstances. Section 37(4) merely provides that such considerations need not predominate in all cases.**

46 In summary, it appears to me that no single provision of the *Trustee Act*, nor the Act as a whole, ousts the inherent equitable jurisdiction of the court to remove a trustee. This is true even if such a removal would leave the trust without a trustee, so long as the court ensures proper administration of the estate in the best interests of the beneficiaries.

…

56 The motion judge had before him two motions: one for removal, and another for directions. In the latter motion, the respondents sought to have the court order the sale of the home. While the motion judge dismissed the motion for directions as moot, having already released the respondents from their trusteeship, for the reasons given above, this was not the correct approach. Without commenting on the merits of the motion for directions, the difficulties caused by the removal of the respondents as estate trustees might have been addressed by an order for a sale.

57 A practical impediment to the sale of the home is the presence of a certificate of pending litigation registered on title. So long as it remains, no one would realistically purchase the property.

58 On a new motion for removal, the respondents might renew the request to sell the property and seek an order discharging the certificate. This should

be done on notice to all potentially interested parties and may require additions to the record. As an equitable instrument, a certificate may be discharged by the court "on any ... ground that is considered just": see *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 103(6)(c). On such a motion, "the Judge must exercise his discretion in equity and look at all of the relative matters between the parties in determining whether or not the certificate should be vacated": see *Clock Investments v. Hardwood Estates Ltd. et. al.* (1977), 16 O.R. (2d) 671 (Div. Ct.), at p. 674.

59 Because no motion was brought under r. 42.02 of the *Rules of Civil Procedure*, for a discharge of the certificate, there is insufficient information before the court to speculate on whether the equities would ultimately favour a discharge.

…

64 A second potential option would be to address the problems that the life interest in the house are currently creating by resort to the court's inherent "salvage and emergency jurisdiction": see Waters, at pp. 1293-96. The court possesses an inherent jurisdiction to vary the terms of a trust in support of the settlor's intentions when circumstances "might 'reasonably be supposed to be one not foreseen or anticipated' by the testator, or one where his trustees were 'embarrassed by the emergency'": see *Tornroos v. Crocker*, [1957] S.C.R. 151, at p. 158.

…

CONCLUSION

68 The removal of a sole trustee without appointment of a replacement is an extreme remedy, and will be inappropriate in most cases. It will only be available when no other option is realistically available. In our view, given the limited value of the estate, the conflict of interest that the respondents are now in as creditors of the estate, and the lack of viable replacement trustees, this is one such exceptional case.

69 That said, the motion judge was wrong to remove the respondents as trustees without also crafting a mechanism by which the estate could continue to be administered.

70 This is a case that cries out for a practical solution. It is in that spirit that the judge hearing this matter should approach the task.

71 The suggestions for solutions that we have outlined above are merely that: suggestions. Nothing in these reasons should be read as preventing the motion judge from finding other equitable mechanisms for ensuring the proper administration of the estate and the protection of the interests of the beneficiaries.

72 On further evidence, it may be clear that some of these options are illusory, while other as of yet not contemplated solutions may exist. What is necessary is that, together with any order removing the trustees, there must be an order that protects the best interests of the beneficiaries.

> **73** We also note that the true core of the dispute in this case is between the appellant and the respondents in their capacity as beneficiaries, not as trustees. The dispute should proceed with this reality in mind.
>
> **74** **Taking all these circumstances into account, in our view, the appropriate order is that the appeal be allowed and remitted to the Superior Court to consider the application for removal in conjunction with a motion for directions assessing how to administer the estate. Any person having a claim to the property or the estate should be served with the motion for directions and this judgment. We would order that the issue of the costs of the motion under appeal be reserved to the judge hearing the motion. We would make no order as to the costs of the appeal.**
>
> **75** Given our finding on the first issue raised by the appellants, it is unnecessary to comment on the passing of accounts.
>
> **76** Regrettably, this disposition resolves very little and essentially remits the matter to the Superior Court for resolution. Given the amounts at issue and the cost of further litigation, this appears to be a case that cries out for early resolution and some form of consensual out-of-court resolution. If the parties are prepared to consider that avenue and require the court's assistance, we may be approached through the Registrar to make appropriate arrangements

(c) Removal:

The Court may remove trustees through its inherent jurisdiction to supervise trusts and its statutory jurisdiction to remove and replace trustees as an extreme response to trustee wrongdoing or trustee conflict. In such cases, removal and replacement is necessary to ensure the proper administration of the trust and protect the beneficiaries. In **Radford v. Radford Estate (2008), 43 E.T.R. (3d) 74, para. 113 (Ont. S.C.J.),** Quinn J. held:

> Friction between co-estate trustees is likely to warrant the removal of either or both of them because it is prone to impact the decision-making process. However, this is a more remote likelihood where the friction is between a trustee and a truculent beneficiary. Of course, in either case, the friction must be of such a nature or degree that it prevents, or is likely to prevent, the proper administration of the trust.

Conroy v Stokes
[1952] 4 DLR 121 (BCCA); cb, p.893

The beneficiary has no power to compel a trustee to act in a certain way and the court ought not to intervene merely to force the trustee to act in a manner that meets the beneficiary’s expectations. Where the trustee acts in bad faith or in a manner that endangers the trust property, the court may intervene to safeguard the interests of the beneficiary (the collective interests of the beneficiaries rather than their individual or

collective desires). Most important in such a determination is a lack of honesty or fidelity on the part of the trustee; in such cases, the court may invoke its jurisdiction to replace the trustee by court order. Per Bird JA:

> The learned trial judge has recited in his reasons for judgment the various grounds for the applicants' dissatisfaction with the administration of the trust, which need not be repeated here. Suffice it to say that the learned judge does not find misconduct or breach of trust on the part of the trustees, or that the acts or omissions complained of are such as to endanger the trust property, but founds the order for removal of the trustees appointed by the testator upon the sole ground that friction had developed between the applicants and the trustees, relative to the latter's conduct of the affairs of the estate, arising out of dissension between the applicants and the widow of the testator, the latter being his second wife, and the former the children of his first wife. The learned judge held therefore: 'It is in the interest of all parties under the circumstances that the administration should be placed in the hands of an independent administrator..
> …
>
> Here the acts or omissions complained of do not, in my opinion, support a conclusion that the conduct of the trustees has endangered the trust property, or show a want of honesty or of proper capacity to execute the duties, or a want of reasonable fidelity. The failure of the trustees to account to the beneficiaries annually and to pass their accounts annually are perhaps matters for criticism on the basis of neglect of duty, but such omissions, as is said by Story, are not such as to induce the court to remove trustees unless persisted in. Moreover, it appears that since the initial complaint in this regard by the applicants, the trustees have remedied the omissions except in respect of moving the court to confirm the registrar's report on the passing of the accounts for the years 1950 and 1951, which we are told have been submitted to the beneficiaries, passed by the registrar and, but for these proceedings, would have been the subject of an application for confirmation by the court.
> …
>
> In the circumstances I find nothing in the evidence to support a conclusion that the "welfare of the beneficiaries," and that phrase I think must be taken to mean the "benefit of the beneficiaries collectively," has not been impaired by any act or omission of the trustees.
>
> Consequently, I think, with great respect, that the discretion of the learned trial judge has been exercised on wrong principles and that he has omitted to apply the correct and guiding principles laid down in the decisions cited. In these circumstances the order made below cannot be sustained…

(d) Powers/Duties of the Trustee

(i) To Seek the Court's Direction

Superior courts have a number of specialized functions. Normally, a judge is thought of in terms of exercising his or her adjudicative functions; that is, to decide a court case between adversaries. In the law of probate, a judge has an "inquisitorial jurisdiction" to determine whether a Will or other testamentary instrument is valid, which is important given that rights to the property of a deceased person will vest in an executor who will at some point transfer title, directly or indirectly, to a creditor or dependant or beneficiary. It is important that such transactions remain unimpeachable as a matter of ordinary business. In the law of trusts, the Court has an "advisory" jurisdiction that is special. Conceptually, the jurisdiction allows the trustee to bring a contemplated course of conduct before a Judge before action is taken to ensure that so acting will not be a breach of the trustee's fiduciary obligations and expose the trustee to personal liability. Thus, this advisory jurisdiction was (and remains) principally one that was oriented to trustee protection. It was not (and is not) a jurisdiction oriented at determining competing interests in the trust. It is a natural companion to the special trustee's defence to breach of trust (that is, breach of the trustee's duty or care) where he or she did not seek direction from the Court but still acted "honestly" and "reasonably".

The operative phrase used in most statutes - the "opinion, advice or direction" of the Court - can be traced to the mid-nineteenth century statutory reforms of the law of property and trusts enacted by the British parliament. Section 30 of the *Law of Property and Trustees Relief Amendment Act* (1859), 22 & 23 V., c.35 ("Lord St. Leonards' Act") provided:

> Any Trustee, Executor, or Administrator shall be at liberty, without the Institution of a Suit, to apply by Petition to any Judge of the High Court of Chancery, or by Summons upon a written Statement to any such Judge at Chambers, for the Opinion, Advice or Direction of such Judge on any Question respecting the Management or Administration of the Trust Property or the Assets of any Testator or Intestate, such Application to be upon or the Hearing thereof to be attended by all Persons interested in the Application, or such of them as the said Judge shall think expedient; and the Trustee, Executor or Administrator acting upon the Opinion, Advice or Direction given by said Judge shall be deemed, so far as regards his own Responsibility, to have discharged his Duty as such Trustee, Executor, or Administrator in the subject matter of said Application; provided, nevertheless, that this Act shall not extend to indemnify any Trustee, Executor, or Administrator in respect of any Act done in accordance with such Opinion, Advice or Direction as aforesaid, if such Trustee, Executor, or Administrator shall be guilty of any Fraud or wilful Concealment or Misrepresentation in obtaining such Opinion, Advice or Direction; and the Costs of such an Application as aforesaid shall be in the Discretion of the Judge to Whom the Application was made.

Lord St. Leonards called his Bill "a great benefit to trustees, and, by substituting a cheap and simple process of determining questions, prevent the necessity of expensive suits." Notwithstanding the fact that "cheap" and "simple" processes are few and far between in the law, the objective has considerable merit.

The jurisdiction is now contained in Ontario's *Trustee Act*, section 60(1):

> 60. (1) A trustee, guardian or personal representative may, without the institution of an action, apply to the Superior Court of Justice for the opinion, advice or direction of the court on any question respecting the management or administration of the trust property or the assets of a ward or a testator or intestate.

Re Wright
(1976), 14 O.R. (2d) 698 (Ont. H.C.J.); cb, p.904

Here the Court refused an attempt to force non-consenting trustees to act where the majority of trustees favoured action, nor would the Court replace the non-consenting trustee.

Per Craig J.:

> This is a case where the executors and trustees are in agreement to sell these shares [subject of a testamentary trust], and they only differ as to the adequacy of the price…
>
> I adopt the language of Middleton, J., in the case of *Re Fulford* (1913), 29 O.L.R. 375 at p. 382 as follows:
>
> 'The executors are protected from all liability if they honestly and with due care exercise the discretion vested in them. But the responsibility is theirs, and cannot be shifted upon the Court. The executors cannot come to the Court and ask whether the present is a good time or a bad time to sell stock or anything else, or ask whether a price offered is sufficient or insufficient. The advice which the Court is authorised to give is not of that type or kind; it is advice as to legal matters or legal difficulties arising in the discharge of the duties of executors, not advice with regard to matters concerning which the executors' judgment and discretion must govern.'

In *Wright*, Craig J also approved dicta in **Tempest v Lord Camoys (1882), 21 Ch D 571 (Eng CA); cb, p.947** for the 'principle that the Court has no power, save in the case of *mala fides* or a refusal to discharge the duty undertaken, to put a control on the exercise of the discretion which the testator has left to the trustees.'

(ii) Delegation

See Trustee Act, ss. 27.1.

> Trustee may delegate functions to agent
>
> 27.1 (1) Subject to subsections (2) to (5), a trustee may authorize an agent to exercise any of the trustee's functions relating to investment of trust property to the same extent that a prudent investor, acting in accordance with ordinary

investment practice, would authorize an agent to exercise any investment function. 2001, c. 9, Sched. B, s. 13 (5).

Investment plan or strategy

(2) A trustee may not authorize an agent to exercise functions on the trustee's behalf unless the trustee has prepared a written plan or strategy that,

(a) complies with section 28; and

(b) is intended to ensure that the functions will be exercised in the best interests of the beneficiaries of the trust. 2001, c. 9, Sched. B, s. 13 (5).

Agreement

(3) A trustee may not authorize an agent to exercise functions on the trustee's behalf unless a written agreement between the trustee and the agent is in effect and includes,

(a) a requirement that the agent comply with the plan or strategy in place from time to time; and

(b) a requirement that the agent report to the trustee at regular stated intervals. 2001, c. 9, Sched. B, s. 13 (5).

Trustee's duty

(4) A trustee is required to exercise prudence in selecting an agent, in establishing the terms of the agent's authority and in monitoring the agent's performance to ensure compliance with those terms. 2001, c. 9, Sched. B, s. 13 (5).

Same

(5) For the purpose of subsection (4),

(a) prudence in selecting an agent includes compliance with any regulation made under section 30; and

(b) prudence in monitoring an agent's performance includes,

(i) reviewing the agent's reports,

(ii) regularly reviewing the agreement between the trustee and the agent and how it is being put into effect, including considering whether the plan or strategy of investment should be revised or replaced, replacing the plan or strategy if the trustee considers it appropriate to do so, and assessing whether the plan or strategy is being complied with,

(iii) considering whether directions should be provided to the agent or whether the agent's appointment should be revoked, and

> (iv) providing directions to the agent or revoking the appointment if the trustee considers it appropriate to do so. 2001, c. 9, Sched. B, s. 13 (5).

Traditionally, and in the absence of express authority in the trust instrument or Will, trustees are expected to perform personally on their obligations that involve such important matters as exercising discretionary powers or making distributions. The difficulty is where the draw the line and whether to begin from a position allowing or disallowing delegation. Equity firmly comes down on an attitude disfavouring delegation consistent with the rather ominous sounding maxim, *delegatus non potest delegare* (a delegate may not delegate).

Trust administration is ultimately a practical business and the law has coalesced doctrine that disallows delegation of ***dispositive duties*** (eg. to distribute the trust property to those entitled to it under the trust) or the exercise of ***fiduciary discretions***. It is a breach of trust for trustees to delegate such discretionary functions and they are liable for any consequent loss.

The prohibition on the delegation of their fiduciary powers does not however preclude the delegation by them of powers to do acts **'merely ministerial'**. Although this distinction between fiduciary powers and ministerial acts is easily stated, the dividing line between those functions which only a trustee may perform and those which may be delegated is not easily drawn. In general, one can say that the trustee may delegate as permitted by the trust instrument or the statute as is reasonable, but must still act personally in matters that are at the core of trusteeship. Judicial supervision of the exercise of discretionary powers divorced from obligations is considered below.

Speight v Gaunt
(1883), 9 App Cas 1 (H.L.); cb, p.912

The beneficiaries suggested to the trustee that he invest in stocks. The trustee agreed and employed a stockbroker. £15,000 was provided to the stockbroker to effect an agreed-upon investment. The stockbroker misappropriated the funds rather than closing the transaction. The trustee complained but the stockbroker was declared bankrupt. The beneficiaries argued that the trustee should have completed the trade directly with the vendor rather than using the services of the stockbroker as an agent.

In the CA, Lindley LJ observed that:

> [a] trustee has no business to cast upon brokers or solicitors or anybody else the duty of performing those trusts and exercising that judgment and discretion which he is bound to perform and exercise himself.

Thus, the trustee may appoint an agent to do a ministerial act – the trustee is only liable for the acts of the agent based on the trustee's own "willful default". In the House of Lords, the appeal was dismissed accepting the principle a trustee investing trust funds is justified in employing a broker to procure securities authorized by the trust and in paying

the purchase-money to the broker, if he follows the usual and regular course of business adopted by ordinary prudent men in making such investments.

[***Does this distinction really make any sense nowadays?*** Indeed, given the complexities of managing money, should we not encourage delegation of many tasks to licensed and insured professionals. Compare to the law in England and Wales under the Trustee Act 2000:

11. - (1) Subject to the provisions of this Part, the trustees of a trust may authorise any person to exercise any or all of their delegable functions as their agent.

(2) In the case of a trust other than a charitable trust, the trustees' delegable functions consist of <u>any function other than</u>-

(a) [power of distribution] any function relating to whether or in what way any assets of the trust should be distributed,

(b) [power to deduct payments from income or capital] any power to decide whether any fees or other payment due to be made out of the trust funds should be made out of income or capital,

(c) [power to appoint trustees] any power to appoint a person to be a trustee of the trust, or

(d) [power to appoint further nominees] any power conferred by any other enactment or the trust instrument which permits the trustees to delegate any of their functions or to appoint a person to act as a nominee or custodian.]

(iii) Abuse of Discretion

Fox v. Fox Estate
(1996), 28 O.R. (3d) 496; cb, p.935

Here the testator left his widow a life interest in 75 percent of the residue and his son a life interest in the remaining 25 percent, with remainder to the son if he survived his mother. The widow had two powers to encroach on capital, one in favour of the son, the other in favour of the son's children. The son announced to his mother that he was going to marry a woman of another faith; the mother disapproved. The mother made a new Will disinheriting the son and also made a series of encroachments on the capital in favour of the son's two children. The net effect of the encroachments was that all the residue was transferred to the children and the son lost all interest in it. The son challenged the exercise of the power of encroachment. In the Court of Appeal, Justice Galligan held that it was improper for the mother to consider the son's marriage against his family's wishes as extraneous to the exercise of her discretionary power to encroach on the capital of the trust.

Galligan J.A. wrote:

16 There is another reason why the discretion which Miriam exercised in this case was improper and must be set aside. It is abhorrent to contemporary community standards that disapproval of a marriage outside of one's religious faith could justify the exercise of a trustee's discretion. It is now settled that it is against public policy to discriminate on grounds of race or religion. This is made clear in the reasons delivered by Robins J.A. in Canada Trust Co. v. Ontario (Human Rights Commission) (1990), 74 O.R. (2d) 481 (C.A.), at pp. 495-96:

> To say that a trust premised on these notions of racism and religious superiority contravenes contemporary public policy is to expatiate the obvious. The concept that any one race or any one religion is intrinsically better than any other is patently at variance with the democratic principles governing our pluralistic society in which equality rights are constitutionally guaranteed and in which the multicultural heritage of Canadians is to be preserved and enhanced. The widespread criticism of the Foundation by human rights bodies, the press, the clergy, the university community and the general community serves to demonstrate how far out of keeping the trust now is with prevailing ideas and standards of racial and religious tolerance and equality and, indeed, how offensive its terms are to fair-minded citizens.
>
> To perpetuate a trust that imposes restrictive criteria on the basis of the discriminatory notions espoused in these recitals according to the terms specified by the settlor would not, in my opinion, be conducive to the public interest. The settlor's freedom to dispose of his property through the creation of a charitable trust fashioned along these lines must give way to current principles of public policy under which all races and religions are to be treated on a footing of equality and accorded equal regard and equal respect.

17 In that case, Robins J.A. was discussing the restraint which public policy puts upon the freedom of the settlor to dispose of his property as he saw fit. If a settlor cannot dispose of property in a fashion which discriminates upon racial or religious grounds, it seems to me to follow that public policy also prohibits a trustee from exercising her discretion for racial or religious reasons.

18 I am of the view that in this case it would be contrary to public policy to permit a trustee effectively to disinherit the residual beneficiary because he dared to marry outside the religious faith of his mother. While there were decisions in the past which have upheld discriminatory conditions in wills, in response to a query from the bench, counsel in this case were not prepared to argue that any court would today uphold a condition in a will which provides that a beneficiary is to be disinherited if he or she marries outside of a

particular religious faith. I find compelling Mr. Eastman's argument that if a testator could not do so then his trustee could not do it for him.

19 Counsel for the grandchildren argued that if Ralph were still alive there would have been nothing to prevent him from revoking his will and making a new one in which he left nothing to Walter. She argued therefore, that in the exercise of her absolute power to encroach Miriam should be able to do that for him. Even if it were accepted that Ralph, if alive, would have disinherited Walter because of his intention to marry out of Ralph's religious faith, that argument cannot succeed.

20 It is of course a given, assuming testamentary capacity, that a person is entitled to dispose of property by will in any fashion that he or she may wish. The exercise of a testator's right of disposition is not subject to supervision by the court. But a trustee's exercise of discretion is subject to curial control. Admittedly, because he would not be subject to judicial supervision, Ralph, if alive, could have disinherited Walter for reasons which would have contravened public policy. However, Ralph is not alive and is not preparing a new will. Miriam, while acting as a trustee, on the other hand is subject to judicial control and that control can and must prevent her from exercising her discretion in a fashion which offends public policy.

21 With great deference to the experienced trial judge who held a different view, it is my opinion that Miriam's exercise of discretion to the prejudice of Walter because he married outside of Miriam's and his own religious faith was unlawful and must be set aside. It follows that as a result of her improper dealing with the assets of the estate Miriam can no longer remain the executrix.

Walters v. Walters
2022 ONCA 38 (Ont. C.A.)

Does the Court have the power to review a Trustee’s decision to exercise or refuse to exercise a discretionary power to encroach on capital in favour of an income beneficiary?

Pepall J.A.:

ANALYSIS

(a) Consideration of Extraneous Matters

[35] In her will, Ollie provided her Trustees with an absolute discretion to pay such part or parts of the capital of the residue of her Estate as they considered necessary or advisable to or for the benefit of her husband from time to time. She advised her Trustees that her husband’s comfort and welfare were her first consideration and for this reason, it was her desire that her Trustees exercise their powers to encroach on the capital in a manner which would ensure his comfort and well-being.

[36] The question raised by this appeal is the purport of these provisions; what was Ollie's intention?

[37] A testator's intention is ascertained from a consideration of the will and the surrounding circumstances. The court puts itself in the position of the testator at the time the will was made: Trezzi v. Trezzi, 2019 ONCA 978, 150 O.R. (3d) 663, at para. 13, and Ross v. Canada Trust Company, 2021 ONCA 161, 458 D.L.R. (4th) 3, at paras. 35-41. This is known as the armchair principle.

[38] This appeal involves a discretionary trust. Such a trust arises "when property is vested in trustees and a class of beneficiaries or named persons appear as trust objects, but the trustees have complete discretion as to the payment of the income, or the capital, or both.": D.W.M Waters, Mark R. Gillen & Lionel D. Smith, Waters' Law of Trusts in Canada, 4th ed. (Toronto: Carswell, 2012), at p. 650.

[39] As emphasized in the jurisprudence and academic commentary, it is not for a court to simply substitute its discretion for that of a trustee clothed with a discretionary power. Put differently, the court may not intervene simply because it would not have come to the same decision itself: Re Gulbenkian's Settlement, (1968), [1970] A.C. 508, [1968] 3 All E.R. 785 (U.K.H.L.); McPhail v. Doulton (1970), [1971] A.C. 424, [1970] 2 All E.R. 228 (U.K.H.L.); Waters, at p. 989. However, as I will explain, the presence of a discretionary power does not mean that a court has no role to play.

[40] Although dealing with an executor, in Cowper-Smith v. Morgan, 2017 SCC 61, [2017] 2 S.C.R. 754, at para. 41, McLachlin C.J. stated that courts may interfere with an executor's discretion where there is a breach of its fiduciary duty. Like executors, trustees are fiduciaries. That said, the question of the degree of control which the court can and should exercise over a trustee who holds an absolute discretion is filled with difficulty: Fox v. Fox Estate (1996), 1996 CanLII 779 (ON CA), 28 O.R. (3d) 496 (C.A.), leave to appeal refused, [1996] S.C.C.A. No. 241, at para. 11. Professor Donovan Waters described the dilemma in his treatise, Waters' Law of Trusts in Canada, at pp. 985-87:

> **The settlor or testator may create a power which by its nature is discretionary, or he may add that it is to be exercised at the discretion or at the absolute and uncontrolled discretion of the trustees. In the latter situation, he is attempting to underline that he wishes no interference with the trustees, and, since the beneficiaries have no such power to intervene in any event, his meaning can only refer to the courts. Indeed, all trustee discretions involve the question of how far the courts are thereby excluded …. The creator of the trust … does not intend the court to make the discretionary decisions.**
>
> **…**

> **On the other hand, the principle of law is that no settlor or testator can take away from the courts their ultimate jurisdiction. There has to be a limit to the extent to which the court can be excluded.**
>
> **…**
>
> **[T]he courts are in a difficult position. The rule of behaviour required of trustees in the discharge of their duties is good faith and the care of the reasonable business person. Yet, as we have suggested, the conferment of discretion appears to make the trustees their own judges of what is reasonable. In attempting to uphold the court's necessary jurisdiction on the one hand, and the trust creator's intention on the other, different courts have described the extent of the court's power of intervention in different ways.**

[41] The traditional formulation of the law was anchored in the good faith requirement referenced by Professor Waters; a court would not interfere with the exercise of a trustee's absolute discretion unless the trustee exercised that discretion with mala fides. This principle dates back to the House of Lords decision in Gisborne v. Gisborne (1877), 2 App. Cas. 300 (U.K.H.L.). This was the formulation used by this court in Fox in 1996.

[42] In Fox, Galligan J.A. reasoned that intervention based on mala fides had not always been limited to fraud but could extend to circumstances where the trustee's decision was influenced by extraneous matters. At para. 12, he quoted with approval from Hunter Estate v. Holton (1992), 1992 CanLII 7735 (ON SC), 7 O.R. (3d) 372 (Gen. Div.), at p. 379:

Trustees must act in good faith and be fair as between beneficiaries in the exercise of their powers. There is no allegation of bad faith in the present case. A court should be reluctant to interfere with the exercise of the power of discretion by a trustee. I adopt the following criteria in [Re Hastings-Bass, [1975] 1 Ch. 25 (U.K.H.L.), at p. 41], as being applicable to the court's review of the exercise of such power:

To sum up the preceding observations, in our judgment, where by the terms of a trust (as under section 32) a trustee is given a discretion as to some matter under which he acts in good faith, the court should not interfere with his action notwithstanding that it does not have the full effect which he intended, unless (1) what he has achieved is unauthorized by the power conferred upon him, or (2) it is clear that he would not have acted as he did (a) had he not taken into account considerations which he should not have taken into account, or (b) had he not failed to take into account considerations which he ought to have taken into account.

[43] The court in Fox decided that the trustee's exercise of her discretionary power had been motivated, at least in part, by a factor that she ought not to have considered: her disapproval of the religion of the woman her son proposed to marry. This was considered to be an extraneous matter that

justified the court's intervention on the basis of mala fides, and accordingly, the trustee's exercise of the power was set aside.

[44] In Edell v. Sitzer (2001), 2001 CanLII 27989 (ON SC), 55 O.R. (3d) 198 (S.C.), aff'd 2004 CanLII 654 (ON CA), 9 E.T.R. (3d) 1 (Ont. C.A.), leave to appeal refused, [2004] S.C.C.A. No. 372, at para. 159, noting that non-interference is still the general rule, Cullity J. said this about mala fides:

The grounds on which the court will strike down an attempt by a trustee to exercise discretionary powers – even where, as here, the discretion is intended [to] be as unfettered as possible – have been described in different terms over the years. The old approach that limited the court's intervention to cases of "mala fides" has been reformulated in the more recent cases in terms of a concept of abuse of discretion ….[2]

[45] He also described this approach more fully in Banton v. Banton, (1998) 1998 CanLII 14926 (ON SC), 164 D.L.R. (4th) 176 (Ont. Gen. Div.), at p. 234.

It is established in this jurisdiction that, in the exercise of their powers, trustees must give careful consideration to the scope of the power and the purpose for which it has been conferred. The terms, and the purpose, of the power indicate the facts that are relevant to its exercise. If the trustees ignore relevant factors or give significant weight to irrelevant considerations, they will have abused their discretion and the purported exercise of the power will be set aside by the Court …. These principles flow from their fiduciary status as trustees and apply even where the power is expressed to be absolute or uncontrolled.[3]

[46] In that case, the trustees were provided with a discretionary power to encroach on capital for the maintenance and support of a beneficiary. They exercised their discretion and gave part of the trust capital to the beneficiary for two reasons: the beneficiary had expressed a desire for it, and in any event, the trustees considered that the capital belonged to him. Cullity J. intervened. He determined that the two reasons relied upon by the trustees constituted extraneous matters; instead, the trustees should have been considering whether the beneficiary required the capital for maintenance or support.

[47] The court's approach in Canada to intervention with the exercise of a trustee's discretionary power is described in Waters' Law of Trusts in Canada at p. 989: "The court will intervene, however, if (1) the decision is so unreasonable that no honest or fair-dealing trustee could have come to that decision; (2) the trustees have taken into account considerations which are irrelevant to the discretionary decision they had to make; or (3) the trustees, in having done nothing, cannot show that they gave proper consideration to whether they ought to exercise the discretion." See also Ghag v. Ghag, 2021 BCCA 106, 46 B.C.L.R. (6th) 351; and Corina S. Weigl, "Keeping Fiduciaries Fit: The Exercise of Discretion," Canadian Bar Association of Ontario, Institute of Continuing Legal Education, The Outer Limits: Exploring Issues and Opportunities in Agency, Attorney and Trusteeship, January 28, 1999.[4]

> **[48] To sum up, court intervention into the exercise or failure to exercise a discretionary power flows from a trustee's fiduciary status. The court may intervene even where the testator has conferred an absolute discretion on the trustee. Mala fides and improper consideration of extraneous matters are encompassed by this analytical framework. Applying this framework to this appeal, the focus of the appeal was the application judge's intervention on the basis of the Trustees' consideration of extraneous or irrelevant matters.**

Here the Trustee's decision was based on personal animosity towards the beneficiary and thus could be reviewed by the Court.