Trusts & Equity – Law 463
Fall Term 2024

Lecture Notes No. 13

VIII. ADMINISTRATION OF TRUSTS

C. POWERS

(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.968

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…
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> I adopt the language of Middleton, J., in the case of *Re Fulford* (1913), 29 O.L.R. 375 at p. 382 as follows:
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> '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)** 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.977

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) Review of Discretion

Fox v. Fox Estate
(1996), 28 O.R. (3d) 496 (C.A.); cb, p.998

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:
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> > 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.
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> 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.
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> 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.

The Trustee, then, must act rationally and not on the basis of extraneous factors.

D. INVESTMENT

Trustee Act, s.27

> 27.
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> (1) In investing trust property, a trustee must exercise the care, skill, diligence and judgment that a prudent investor would exercise in making investments.
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> (2) A trustee may invest trust property in any form of property in which a prudent investor might invest.

The first two sub-sections of s.27 set out above reflect the traditional position that it is of the utmost importance for the trustee to select investments that meet the standard of a ‘prudent investor’. In some jurisdictions, the governing statute only permits trustees to select investments approved in the trust instrument or as set out in statute and regulation (a so-called ‘legal list’ regime); **Ontario uses the ‘prudent investor’ rule** as do most jurisdictions. Note, however, that **the trust instrument remains paramount and the settlor may fetter the trustee’s discretion in selecting investments. Thus, the basic rule is that ‘…a trustee is not a surety, nor is he an insurer; he is only liable for some wrong done by himself, and loss of trust money is not per se proof of such wrong;’ *Re Chapman* [1896] 2 Ch 763, 775 per Lindley LJ.**

(i) Impartiality: The 'Even-Hand' Principle

The trustee must *select investments prudently*, but must also *deal with the trust property fairly*; that is to say, the trustee must accommodate the differing needs of different classes of beneficiaries. Key to fairness is

(i) inquiring into the differing interests of different classes of beneficiaries, including obtaining advice;

(ii) considering the effect of any proposed course of action on different classes of beneficiaries;

(iii) acting to maintain 'an even hand' and not favouring one class of beneficiaries over another. This is easier said than done, as the interests of these various parties may conflict and one must also keep in mind the intentions expressed by the settlor in respect of preference of interests (and the settlor should be encouraged to guide the trustee in the instrument).

Thus, such matters as diversification of investments raise questions respecting prudent investment but are difficult to review as a matter of ascertaining whether prudence requires diversification.

Re Smith
[1971] 1 OR 584 (HC); varied, 18 DLR (3d) 405 (Ont C.A.); cb, p.1014

Here the father left shares in a trust for the son. The son created a trust of part of the shares' income for his mother for life, remainder to the son (but if the son pre-deceased the mother, she would attain his share and vice-versa). The trustee refused to diversify the portfolio to increase income to the mother in preference to leaving the trust property as it was upon the original inheritance. The trustee was inordinately deferential to the remainderman at the expense of his mother and was replaced.

E. COMPENSATION & INDEMNIFICATION

The original approach to trustee compensation was to deny all compensation unless specifically provided in the trust settlement or the Will. The position is now reversed. One presumes compensation unless specifically denied and if the trustee accepts those terms of his or her appointment. The allowance of compensation has allowed a thriving industry in professional trusteeship to arise which can be extremely useful in situations where trustees are not otherwise available, the assets require professional management, the trustees are locked in conflict, or the trustees simply lack the skills required to administer a trust competently.

Trustees in Ontario are entitled to compensation that may be approved either during the administration of the trust or on the terminal passing of accounts. Where the beneficiaries are all *sui juris* the trustee can take compensation on consent, in other cases the trustee would apply to the court.

The **Trustee Act**, s.23.1, 61 provides:

> 23.1 (1) A trustee who is of the opinion that an expense would be properly incurred in carrying out the trust may,
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> (a) pay the expense directly from the trust property; or
>
> (b) pay the expense personally and recover a corresponding amount from the trust property.
>
> (2) The Superior Court of Justice may afterwards disallow the payment or recovery if it is of the opinion that the expense was not properly incurred in carrying out the trust.
>
> …
>
> 61. (1) A trustee, guardian or personal representative is entitled to such fair and reasonable allowance for the care, pains and trouble, and the time expended in and about the estate, as may be allowed by a judge of the Superior Court of Justice.
>
> (3) The judge, in passing the accounts of a trustee or of a personal representative or guardian, may from time to time allow a fair and reasonable allowance for care, pains and trouble, and time expended in or about the estate.
>
> (5) Nothing in this section applies where the allowance is fixed by the instrument creating the trust.

An overall tariff is used:

- 2½ % of the total value of capital & revenue receipts
- 2½ % of the total capital & revenue disbursements
- annual fee of 2/5ths of 1% of the average annual market value of the capital (in the case of an ongoing trust)

Laing Estate v Laing Estate
(1998), 41 OR (3d) 571 (CA); cb, p.1039

In this case [as well as **Re Gordon Estate [1998] O.J. No. 4170 (C.A.)** and **Re Flaska Estate [1998] O.J. No. 1517 (C.A.)**], the Court of Appeal discussed the two traditional approaches: a set percentage of the trust funds being the measure of compensation, and, the so-called '5 factors' approach to determining 'reasonable compensation': size of the trust, care and responsibility, time required, skill and ability required, and success. In the end, a three-stage process was established:

1. Apply the approved tariff of fees (there is a schedule of fees based on the nature of the distribution and the types of assets based on a percentage of the assets);

2. Adjust the fees for complex cases to ensure it is fair and reasonable – factors: magnitude of the trust, risks assumed by fiduciary, time spent, skill and ability required, and results obtained;

3. Adjust the fees for special circumstances.

The Court, *per curiam*, discussed the standard of appellate review in such cases:

> 10 The fixing of compensation under s. 61(1) of the Trustee Act is far from an exact science. As Adams J. observed, at p. 284, it "is an issue over which reasonable minds may differ". Appellate review of that assessment must be restrained so that it does not become merely the substitution of one reasonable assessment for another reasonable assessment. In *Re Smith*, [1953] O.R. 185 at 189 (C.A.), Pickup C.J.O. observed:
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> > ... but the Court of Appeal should interfere if there is any error in principle, or if, in its opinion, the amount allowed is grossly insufficient or excessive.
>
> 11 In addition to appellate review to determine compliance with the applicable principles and to ensure that the result is not grossly insufficient

or excessive, an appellate court may review findings of fact upon which an assessment under s. 61(1) of the Trustee Act is based. It will interfere with those findings only where they can be said to be unreasonable: *Equity Waste Management of Canada v. Halton Hills* (1997), 35 O.R. (3d) 321 at 335-6 (C.A.).

12 If an appellate court determines that the audit judge has made an unreasonable finding of fact, erred in principle, or reached a manifestly wrong result, it should, if possible, go on to determine the appropriate compensation. In doing so, the appellate court will accept any findings of fact made by the assessment judge which the appellate court has not found to be unreasonable. On occasion when the appellate court finds reversible error, it will be necessary to order a new hearing.