



Canada

ADVISING FAMILIES ACROSS GENERATIONS

# Connection

## Toronto Branch Newsletter



November 2016 - Vol. 4 No. 3

Read Eric Hoffstein's article "Trustee/Executor *de son tort*: Recognizing and Avoiding the Traps of Unintended Fiduciary Obligations" on page 2.

### In this Newsletter

Message From the Chair  
STEP Toronto Presents...  
Canada/US Tax and Estate Planning – Cross-Border Issues: a one-day STEP Canada course  
Upcoming Events, 2016–17  
January Celebration  
STEP Toronto Announces : "BRING A GUEST"  
In Case You Missed It  
Article: Trustee/Executor *de son tort*: Recognizing and Avoiding the Traps of Unintended Fiduciary Obligations  
Article: Case Comment: *Davidson and another v Seelig and others* [2016] EWHC 459 (Ch)  
About Connection

### STEP Toronto Executive

Brian Cohen, *Branch Chair*  
Ted Polci, *Branch Deputy Chair*  
Elaine Blades, *Secretary*  
Marina Panourgias, *Treasurer*  
Kimberly Whaley, *Branch Past Chair*  
Craig Vander Zee, *Programs Officer*  
Paul Keul, *Member Services Officer*  
Corina Weigl, *Student Liaison Officer*  
Daniel Dochylo, *Governance Liaison*  
Jeff Halpern, *Sponsorship Officer*  
Joan Jung, *Newsletter Officer*  
Chris Delaney, *Ex-officio (non-voting)*  
*Members at Large:*  
Harris Jones  
Ian Lebane  
Gillian Musk

## Article: Trustee/Executor *de son tort*: Recognizing and Avoiding the Traps of Unintended Fiduciary Obligations



By: Eric N. Hoffstein, Partner, TEP, LLB, Minden Gross LLP

From time to time, a person will take it upon themselves to hold and administer property for the benefit of another, without having been formally appointed as a trustee. This might occur with full knowledge that the person has no legal authority to deal with the property; or the person might unintentionally deal with property that is impressed with a trust. This person is known as a trustee or executor *de son tort*.

A person who takes on the responsibilities of an executor or trustee without proper authority may be held personally liable as a trustee for any loss or damage to the trust property. This makes it critically important to understand when a person's actions might attract fiduciary obligations, particularly when they have not knowingly or deliberately taken on a fiduciary role.

### Constructive Trust and Constructive Trustee

Constructive trusts have been used for centuries by the English courts of equity to describe certain situations and relationships. More recently, the common law provinces of Canada have used constructive trusts as a remedy to address unjust enrichment.<sup>1</sup> Imposing a constructive trust can give rise to personal liability on the part of the "constructive trustee". This can be confusing since there is not necessarily any property actually held in the trust. For example, a constructive trust may be applied to estate assets which have not yet been distributed.<sup>2</sup> Nonetheless, a person may be liable to account as a constructive trustee, just as any other trustee. This personal liability can arise in one or more of three situations: acting as a trustee *de son tort*; knowing assistance in the breach of trust by another person; or knowing receipt of trust property transferred in breach.<sup>3</sup> This article will focus on the first of these situations.

The Supreme Court of Canada clarified that personal liability will only arise where there has been some misconduct on the part of the trustee which would normally expose him to liability for breach of trust. The person is not liable simply from taking up the role of a trustee, but rather because he has taken possession of and administered trust property contrary to the terms of the trust, of which he is or

---

*The author gratefully acknowledges the research assistance of Carrington Hickey, Student-at-Law. A version of this paper was presented at the 19<sup>th</sup> Annual LSUC Estates & Trusts Summit on November 4, 2016.*

- 1 See e.g. the landmark decision in *Becker v. Pettkus*, [1980] 2 S.C.R. 834, 117 D.L.R. (3d) 257 (S.C.C.).
- 2 See e.g. *Paragon Finance plc v. D.B. Thakerar & Co.*, [1999] 1 All E.R. 400 (C.A.).
- 3 For additional detail and discussion, see Waters, DWM, Gillen, M and Smith, L, *Waters' Law of Trusts in Canada*, 4th Ed., (Scarborough, Ont.: Carswell, 2012) at sec. 11.11 (A) ("Waters").



*Experienced,  
Independent,  
Professional Advice.*

Ted Polci, CLU, TEP  
tedp@fyork.com 416-966-9675

should be aware. As Iacobucci JA said in *Air Canada v. M & L Travel Ltd*;<sup>4</sup>

“...a trustee *de son tort* will not be personally liable simply for the assumption of the duties of a trustee, but only if he or she commits a breach of trust while acting as a trustee.”

The trustee *de son tort* will therefore be personally liable if he acts in a way which would constitute a breach of trust for a properly appointed trustee.

The trustee *de son tort* is treated as a properly appointed trustee from the moment she takes possession of the trust property and starts to administer it, knowing or constructively knowing that it is trust property. As the English House of Lords recently said:

“...we would do better today to describe such persons as *de facto* trustees. In their relations with the beneficiaries they are treated in every respect as if they had been duly appointed. They are true trustees and are fully subject to fiduciary obligations. Their liability is strict; it does not depend on dishonesty.”<sup>5</sup>

Although the hallmark of the trustee *de son tort* is that he has no proper authority as trustee, the trustee need not be acting dishonestly. In actual fact, most trustees who find themselves in this position are well-intentioned.<sup>6</sup>

### The Innocent Executor

The recent Ontario case of *Chambers v. Chambers*<sup>7</sup> ties together the principles of renunciation and intermeddling in the context of estate administration and presents a novel situation in which an executor *de son tort* can be found. The *Estates Act*<sup>8</sup> provides that if a named executor fails to either apply for probate or renounce her appointment, and fails to respond to a summons to appear in court to apply, her right of appointment ceases:

25. When an executor survives the testator, but dies without having taken probate, and when an executor is summoned to take probate, and does not appear, the executor’s right in respect of the executorship wholly ceases, and the representation to the testator, and the administration of the testator’s property, without any further renunciation, goes, devolves, and is committed in like manner as if such person had not been appointed executor.

It is well established, and repeated in the *Chambers* decision, that renunciation is generally not available once an executor has taken even minor steps to administer the estate. Rather, an executor who has started to administer the estate must apply to court to be removed from that role. Similarly,

4 [1993] 3 S.C.R. 787 at 809 (“*Air Canada*”), and *Nova Scotia (Attorney General) v. Axford* (1885), 13 S.C.R. 294 at 300, both as cited in *Waters*, *ibid*.

5 *Dubai Aluminium Company Ltd. v. Salaam* (2002), [2003] 2 A.C. 366 at para. 138 (Eng. H.L.).

6 See e.g. *Selangor United Rubber Estates Ltd. v. Cradock*, [1968] 2 All E.R. 1073 at 1095 (Eng. Ch. Div.).

7 [2013] O.J. No. 3659, (2013), D.L.R. (4<sup>th</sup>) 151, 90 E.T.R. (3d) 161 (C.A.) (“*Chambers*”).

8 R.S.O. 1990, c. E.21, s. 25.

an executor *de son tort* will not be allowed to renounce her executorship after even a minor act of intermeddling in the Estate. Such was the case in *Chambers*.

The deceased had primary and secondary wills, both of which appointed his wife and daughter as estate trustees. The daughter renounced her right to serve and the wife began administering the estate. An order was made requiring the wife to apply for a Certificate of Appointment of Estate Trustee or be deemed to have renounced her appointment. She failed to respond to that order and, by the operation of s. 25, her right to serve as executor ceased. She nonetheless continued to deal with the business which was owned by the estate. On an application to appoint a new executor, the court held that although the wife's right to act as executor ceased, the role nonetheless devolved to her as an executor *de son tort* due to her intermeddling in the Estate assets. The court held that the wife could only be removed through the appropriate process for executor removal or resignation.

In contrast to the *Chambers* decision, the courts will not necessarily consider all minor intermeddling to constitute the person as an executor *de son tort*. In *Re O'Reilly (No. 2)*,<sup>9</sup> for example, one beneficiary carried on the deceased's farming business, maintained the property and paid property taxes and insurance premiums. The court concluded that the question of whether a person is an executor *de son tort* is a question of law. The court held that where a person acts in the *bona fide* belief that they are entitled to receive the particular asset (as was the case here), that person is not an executor *de son tort*. The person's conduct must be indicative of an intention to take over the executor's role, and not just consistent with an independent claim to ownership of the trust property.

### **Liability of the Executor/Trustee *de son tort***

The overarching principle, which serves as a rationale for imposing liability on an executor *de son tort*, is that third parties should be able to rely on his authority. An executor *de son tort* is treated as an executor for the purpose of fixing liability. As such, the executor *de son tort* is liable to the rightful personal representatives to the extent of any assets received in the estate, less any proper payments made on the estate's behalf.<sup>10</sup>

In this context, there are distinctions to be drawn between an executor *de son tort* and a trustee *de son tort*. Whereas an executor *de son tort* is treated as an executor, duly appointed to that office, a trustee *de son tort* is not considered to be appointed to that office. Rather, the law imposes liability on the trustee *de son tort* for interfering with trust property in a way that prejudices the beneficiaries. The trustee *de son tort* incurs personal liability only where they perpetrate or participate in a breach of trust while acting as trustee. A trustee *de son tort* is not liable for simply taking up the office of trustee, but rather for administering the trust property contrary to the terms of the trust, of which they are or should be aware.

The actions of both executors and trustees *de son tort* are good and valid as against third parties, and binding on the rightful representatives of the estate or trust.<sup>11</sup> Additionally, where the executor *de son*

9 (1981), 28 O.R. (2d) 481 (H.C.) at 485–86, aff'd 33 O.R. (2d) 352 (C.A.) ("*O'Reilly*").

10 See *Tsang v. Chen*, 2005 Carswell Alta 1678 (ABQB) ("*Tsang*") and *Cook v. Dodds*, 1903 CarswellOnt 1603 at para. 13 (Ont. Div. Ct.) ("*Cook*").

11 *Cook*, *ibid*.

*True wealth planning is more than investments, tax efficiency and estate planning.  
It's about protecting what matters most and giving purpose and meaning to family wealth.*

STONEGATE  
*Private Counsel*

a division of CI Private Counsel LP

*tort* is subsequently appointed as the proper executor, any acts performed prior to that appointment for the benefit of the trust beneficiaries are ratified.<sup>12</sup>

This area of the law is far from static. There has been recent case law which considered whether an executor *de son tort* is entitled to compensation.<sup>13</sup> As well, there has been some thought given in the academic sphere to how an attorney might incur similar liability. Stay tuned for developments in these issues.

---

12 See e.g. *Murray v. Munroe*, 1916 CarswellNS 12 (NSSC).

13 See *Ontario (PGT) v. Patsalas Estate*, 2000 CarswellOnt 37 (ONSC), aff'd 2001 CarswellOnt 61 (ONCA).

---



### **Invest in a future of healthy children**

Imagine a world where every child is healthy. You have the ability to improve the lives of children. Please consider a gift in your will to SickKids Foundation and make a difference that will last a lifetime.

**Help make their tomorrow as good as your today.**

For more information, please contact 416-813-8271  
or [gift.planning@sickkidsfoundation.com](mailto:gift.planning@sickkidsfoundation.com).

**SickKids®**

## About Connection

Please note that each advertiser is linked to their web page (as are our program sponsors on the last page). Please click through to their web pages to learn more about each of our sponsors and advertisers.

STEP Toronto publishes 'Connection' for our membership 6-7 times per year between September and May. We welcome your feedback and contributions. Please send any comments or inquiries to Joan Jung [jjung@mindengross.com](mailto:jjung@mindengross.com).

## Letters, announcements, opinions, comments from members

If you have an article or an idea that would be of interest to other members of STEP, please send them to [paul.keul@scpllp.com](mailto:paul.keul@scpllp.com) for inclusion in our next edition of the STEP Toronto Connection.

STEP continues to grow and we welcome membership inquiries. As a reminder, there are three routes to full membership; one based on experience (Experienced Practitioner) and two education routes (essay or exam). If you know anyone who would be a good candidate for STEP membership, please direct them to the [STEP Canada website](#) for information.

## Connection Newsletter Contacts

Joan Jung - [jjung@mindengross.com](mailto:jjung@mindengross.com)

Nicole Hastings - [nhastings@millerthomson.com](mailto:nhastings@millerthomson.com)

Teresa F. Lee - [teresa@leewillsandestates.ca](mailto:teresa@leewillsandestates.ca)

Arieh A. Bloom - [arieh@welpartners.com](mailto:arieh@welpartners.com)

## Program Sponsors

### PREMIER SPONSORS



### EVENT SPONSORS



### SUPPORTING SPONSORS

de VRIES LITIGATION LLP, PPI Advisory, Thorsteinssons LLP, Torkin Manes LLP