

MAY 2015 ■ VOLUME 14 NO. 2

# STEP Inside

NEWSLETTER OF THE SOCIETY OF TRUST AND ESTATE PRACTITIONERS (CANADA)



Carter v Canada: The Next Step in Canada's End-of-Life Rights  
Evolution – Page 5

Post Mortem Planning for Private Corporation Shares, Part 2 – Page 7

Senior Financial Literacy Strategy – Page 12

## ORDERING AN INTERIM DISTRIBUTION

### JOAN E. JUNG, TEP

Partner, Minden Gross LLP; Member, STEP Toronto

The recent Ontario Superior Court case of *Parson v. McGovern*, 2014 ONSC 1785, illustrates the principles that are applicable when a beneficiary seeks a court-ordered interim distribution from an estate. The facts of the case are relatively simple. A brother and sister were the two equal beneficiaries of their mother's estate. The sister and an unrelated individual were the estate trustees. Approximately three years after the mother's death, the brother brought a motion seeking a substantial interim distribution to both beneficiaries. At the time that the motion was brought, the parties were proceeding with a contested passing of accounts. The substantial asset in the mother's estate was a house in which the brother had resided rent-free for almost 2.5 years after the mother's death. The brother had interfered with the sale process, and the estate trustees ultimately had to seek a writ of possession and a court order to sell the house.

Within days of the closing of the house sale, the brother advised the estate trustees that he wanted an interim distribution. The estate trustees advised that they would prepare estate accounts and make a distribution when the accounts were approved. The accounts were produced approximately two weeks later, and a court date was obtained for the passing of accounts. The estate trustees proposed to make an interim distribution to each beneficiary, keeping approximately \$100,000 in reserve, if each beneficiary signed a waiver

of passing of accounts and release of trustees; if the beneficiaries did not sign such a waiver, the trustees would pass the accounts before making any further distribution.

The brother refused to sign the waiver and release. Shortly thereafter, he brought a motion to compel the estate trustees to make an interim distribution of almost all of the remaining assets of the estate to both beneficiaries before passing accounts.

The court held that the following five factors should be considered when deciding whether to order estate trustees to make an interim distribution to beneficiaries:

1. *Are the estate trustees deadlocked about the exercise of discretion?* In the earlier case of *Re Blow* (1977), 18 OR (2d) 516 (HCJ), a deadlock among the trustees was identified as a situation in which the court had jurisdiction to intervene in the exercise of discretion. In *Parson v. McGovern*, there was no deadlock.
2. *Have the estate trustees acted with mala fides?* This factor had also been identified in *Re Blow*. It was derived from the House of Lords decision in *Gisborne v. Gisborne* (1877 HL), which is the starting point for considering the extent of supervisory jurisdiction over the discretion of trustees. In *Parson v. McGovern*, the court noted that the estate trustees had proposed an almost final distribution but proceeded to arrange to pass their accounts when one beneficiary refused to sign a release and waiver, and alleged trustee negligence.
3. *Have the estate trustees failed to exercise their discretion?* The court noted that it had jurisdiction to intervene even in the absence

of mala fides if a trustee failed to exercise a power of discretion. In *Parson v. McGovern*, however, the court noted that the estate trustees did not refuse to exercise their discretion but rather exercised their discretion in deciding not to make an interim distribution.

4. *Have the estate trustees behaved unreasonably or breached their fiduciary duty and duty of good faith and fairness to the beneficiaries?* The court noted that the estate trustees did not act with any unreasonable delay; rather, the brother caused delay by continuing to reside in the mother's house. The estate trustees had invested the sale proceeds and were taking steps to pass their accounts. The court also noted that the brother sought damages only against one estate trustee (his sister), which was illogical and revealed the personal feelings at issue.
5. *Would a beneficiary suffer undue prejudice if an interim distribution were not made?* Because the passing of accounts would take place in a short time, the court decided that the brother would suffer only minimal prejudice.

On the basis of these factors, the brother was unsuccessful. While the facts of the case seem clearly to lead to the result, *Parson v. McGovern* is helpful for its elucidation of the principles applicable when a beneficiary seeks court intervention in an interim distribution.