COURT OF APPEAL FOR ONTARIO

CITATION: Chambers Estate v. Chambers, 2013 ONCA 511
DATE: 20130812
DOCKET: C56024 & C56025

Gillese, Epstein and Lauwers JJ.A.

In the Estate of Herbert Washington Chambers, deceased

And in the Matter of an Application for a Certificate of Appointment of Estate Trustee with a Will

BETWEEN

Violet Agatha Chambers

Applicant (Respondent)

and

Michael Chambers, Clive Oliver Chambers, Marva Chambers, Velma Timol, Mazie May Thomas, Collette Harrison, Jennifer Chang (also known as Jennifer Chong), Natasha Chambers, Christopher Chambers, Andrea Chambers, Adrian Chang, Shara Chang, Michael Nassies Chambers Jr., Rayon Recardo Chambers, Claire Eden Elizabeth Chambers, Lisa Chambers, Rochelle Antonette Fraser, Kimora Chomas (also known as Kimora Camela Thomas) and The Office of the Children's Lawyer

Respondents (Appellant)

A. Sean Graham and Christopher M. B. Graham, for the appellant

Michael Kerr, for the respondent Violet Agatha Chambers

David Lobl, for the Bank of Nova Scotia Trust Company

Heard: April 26, 2013

On appeal from the judgments of Justice Anne Mullins of the Superior Court of Justice, dated August 21, 2012.

Gillese J.A.:

[1] These two appeals arise from applications brought in respect of Herbert Washington Chambers' ("Mr. Chambers") personal and corporate estates (the "Estate"). To resolve the appeals, this court must distinguish among a number of related concepts respecting estate trustees[1]: renunciation, resignation, removal, and passing over.

[2] Because the appeals arise from the same set of facts, this single set of reasons disposes of them both.

OVERVIEW

[3] On April 8, 2008, Mr. Chambers executed two wills. In the first will (the "Primary Will"), Mr. Chambers disposed of all of his assets, except shares in private corporations that he owned at the time of his death. In the second will (the "Corporate Will"), he disposed of those shares (the "Corporate Assets").

[4] Michael Chambers ("Michael Chambers" or the "appellant") is Mr. Chambers' son. He brought an application asking that he and a trust company be named as co-estate trustees of both wills.

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[1] Different terms are used to describe the person who administers an estate: executor, executrix, trustee, and estate trustee, to name but a few. For ease of reference, the term "estate trustee" is used in these reasons.

[5] Agatha Violet Chambers ("Mrs. Chambers") is the deceased's widow. After her husband's death, she acted as the estate trustee under both wills. She brought an application asking to be removed, or permitted to resign, as the estate trustee under both wills, and seeking to have a trust company named as sole succeeding estate trustee.

[6] The two applications were heard together. By two judgments dated August 21, 2012 (the "Judgments"), the applications judge ordered:

- Mrs. Chambers be removed as the estate trustee of both wills;
- Michael Chambers be removed or passed over as estate trustee; and,
- the Bank of Nova Scotia Trust Company (the "Bank") be the sole succeeding estate trustee in Mrs. Chambers' stead.

[7] Michael Chambers appeals.

[8] For the reasons that follow, I would dismiss the appeals.

THE BACKGROUND FACTS

The Primary Will

[9] In the Primary Will, Mr. Chambers appointed two trustees: Mrs. Chambers and his daughter, Collette Harrison. He did not name any alternate trustees.

[10] Under the Primary Will, Mrs. Chambers was to receive Mr. Chambers' personal effects, and his interest in the furniture and furnishings in the matrimonial home. Apart from that, the estate was bequeathed to his children, including Michael Chambers, grandchildren, relatives, and friends.

Pansy Miller

[11] In the Primary Will, Mr. Chambers directed his trustees to give Pansy Miller the option to purchase his interest in 7 Elderwood Drive, Richmond Hill (the "Elderwood property"), within one year of his death, at fair market value less 6 per cent, "the commission payable if sold on the open market." The Elderwood property was registered in the joint names of Mr. Chambers and Ms. Miller. In the Primary Will, Mr. Chambers also made a bequest of $75,000 to Ms. Miller.

[12] Ms. Miller had been an employee of Fairview Nursing Home Limited ("Fairview"), a 108-bed nursing home in Toronto that Mr. Chambers and Mrs. Chambers had founded.

[13] She brought a wrongful dismissal lawsuit against Fairview. Judgment in the matter was issued, on consent, on June 7, 2012, requiring Fairview to pay her $113,952.52.

The Corporate Will

[14] In the Corporate Will, Mr. Chambers again named Mrs. Chambers and Collette Harrison as his estate trustees. However, he provided that if Mrs.

Chambers predeceased him or was, at any time, unable or unwilling to act or continue as estate trustee, Michael Chambers was to serve as estate trustee, together with Collette Harrison.

[15] In the Corporate Will, Mr. Chambers directed his trustees to distribute the net proceeds of the Corporate Assets equally among his seven named children, one of whom is Michael Chambers.

[16] Mr. Chambers' shares in Fairview are the most significant of the Corporate Assets. He owned 50 per cent of the shares in Fairview and served as an officer and director of the company. Mrs. Chambers owns the other 50 per cent of Fairview's shares and continues to serve as an officer and director.

Administration of the Estate before the Applications

[17] Mr. Chambers died on October 3, 2011. His Estate is worth millions of dollars. As will become evident over the course of these reasons, the Estate is complex and its administration is rife with problems.

[18] On December 13, 2011, Collette Harrison renounced her right to serve as estate trustee under both of his wills. She did not carry out any estate duties prior to renouncing, other than to attend at the bank with her mother in an attempt to learn about the bank accounts.

[19] Mrs. Chambers, on the other hand, assumed her role as estate trustee upon her husband's death, and began performing under both wills.

The Renunciation Order

[20] In March of 2012, Ms. Miller served Mrs. Chambers and Collette Harrison with motion material in which they were named as respondents. Through the motion, Ms. Miller sought to require Mrs. Chambers and Collette Harrison to file an application for a certificate of appointment as estate trustee with a will and produce all of Mr. Chambers' testamentary documents. As well, she sought an order permitting her to sell the Elderwood property and retain 25 per cent of the sale proceeds.

[21] On the advice of her then-solicitor, Mrs. Chambers did not respond to the motion. He told her it was not necessary.

[22] When Ms. Miller's motion was heard, no one appeared for the respondents.

[23] On April 4, 2012, the motion judge issued three orders.

[24] In the first order of that date (the "Renunciation Order"), Mrs. Chambers and Collette Harrison were required to file an application for a certificate of appointment of estate trustee with a will within 30 days, failing which they "shall be deemed to have renounced [their] right to be appointed."

[25] In the second order, Mrs. Chambers and Collette Harrison were ordered to produce all of Mr. Chambers' testamentary documents in their possession or under their control, within 30 days of the date of service of the order.

[26] The third order gave Ms. Miller the unilateral right to sell the Elderwood property and retain one quarter of the sale proceeds.

After the Renunciation Order

[27] Neither Mrs. Chalmers nor Collette Harrison filed an application for certificate of appointment as estate trustee, as required by the Renunciation Order.

[28] Mrs. Chambers attempted to comply with the deadline established by the second order but could not locate the original wills until May 31, 2012. On June 4, 2012, she presented the wills to the Registrar.

[29] The third order led to the Elderwood property being sold for $1,540,000 on May 31, 2012.

Michael Chambers

[30] Michael Chambers – formerly Michael Christie – is Mr. Chambers' son. He is 56 years of age and now a Canadian citizen. He is a discharged bankrupt.

[31] Under an arrangement with his father, Michael Chambers lived rent free at a farm property located on the Guelph Line in Milton (the "Guelph property"). Mr. Chambers and Mrs. Chambers jointly owned the Guelph property. They purchased it in 2008 for $2,650,000.

[32] Michael Chambers worked for his father from 2004 onwards. He primarily worked at the Guelph property but, from time to time, he also did maintenance work for Fairview.

[33] Mr. Chambers paid Michael Chambers $1,000 a month to look after the Guelph property. While Mr. Chambers and Michael Chambers were managing the horse operation on the Guelph property, the employees made numerous successful complaints to the Ministry of Labour.

[34] After his father's death, Michael Chambers continued to live on the Guelph property. Mrs. Chambers eventually advised him that the arrangement he had with his father was ended and that she intended to sell the Guelph property. She told him that he had to vacate.

[35] Michael Chambers did not accept that Mrs. Chambers had the right to require him to vacate the Guelph property. He interfered with the real estate agent's attempts to market the property to prospective purchasers. After he left the property, Mrs. Chambers and the real estate agent discovered that the keypad for the security system had been torn out of the wall and the house was "in a complete mess."

[36] Michael Chambers accused Mrs. Chambers (and her daughter Lisa Chambers and her husband) of breaking into his residence on the Guelph property, and taking documents and $1,150 in cash. He made the accusation

repeatedly, including to the Ontario Provincial Police. The authorities investigated and chose to not act on the accusation.

[37] Further, Michael Chambers did not accept that Mrs. Chambers was the estate trustee. His lawyer sent Mrs. Chambers' lawyer a notice of objection to the issuance of a certificate of appointment of estate trustee to her, dated May 8, 2012.

Mrs. Chambers

[38] At the time the applications were brought, Mrs. Chambers was 81 years of age, partially deaf and suffering from significant mobility problems. She is not in the best of health. She has been devastated by the death of her husband and from "discovering some of his undisclosed personal life." While she had attempted to administer the Estate, she deposed that "the nature and extent of the issues arising on his death have overwhelmed [her]." She was unable and unwilling to continue to act as estate trustee. Further, she had been advised by her solicitor that she had claims against the Estate and was, therefore, in a position of conflict of interest.

[39] The conflict of interest arose, in part, from events relating to Fairview.

[40] After Mrs. Chambers partially retired from Fairview in 1996, Mr. Chambers mismanaged it. As a result, in 2008, the Ministry of Health put Fairview into "enforcement". In order to continue operating the business, Mr. Chambers was

obliged to agree to retain professional managers. The Ministry of Health took the position that Fairview owed it $800,000 and deducted $35,000 per month from its operating payments to Fairview.

[41] While serving as estate trustee of her late husband's estate, Mrs. Chambers learned that he had diverted Fairview funds to his own benefit and to the benefit of others, without her knowledge and approval. For example, for many years the dividends on the Fairview shares had been paid to Mr. Chambers and her on a 65/35 basis, instead of the 50/50 basis required because they each owned 50 per cent of the shares. There were also tax arrears claimed in respect of Fairview and various lawsuits filed against it.

[42] On August 7, 2012, the Toronto Dominion Bank made a demand on Fairview for the immediate payment of its loans of $1,160,914.88. It asserted that Mr. Chambers had personally guaranteed the debt. Mrs. Chambers advanced $115,000 of her own money to forestall a receivership.

[43] Mrs. Chambers is also exposed to liabilities that her late husband incurred, for which she will seek indemnity from the Estate.

[44] Mrs. Chambers has a poor relationship with Michael Chambers and wishes to have no contact with him.

Michael Chambers' Application

[45] In June 2012, Michael Chambers brought an application in which he sought an order appointing him and a trust company as co-estate trustees of both the Primary Will and the Corporate Will. He swore an affidavit, dated June 19, 2012, in support of the application.

[46] Certain factual aspects of Michael Chambers' affidavit are worthy of note. First, in it, he repeated his accusation that Mrs. Chambers broke into his home at the Guelph property, after which he discovered documents and cash were missing. He said that "[a]pparently [Mrs. Chambers] felt entitled to [break into his home] because she and [Mr. Chambers] were joint owners." He acknowledged that the Guelph property passed to Mrs. Chambers by right of survivorship, but deposed that her conduct "underscores that it may be to the Estate's benefit that [Mrs. Chambers and Collette Harrison] renounced." Second, he also accused Mrs. Chambers of having given away or sold horses that had been housed on the Guelph property, and of having kept the sale proceeds, despite the fact that the money belonged to the Estate, not her.

[47] In his affidavit, Michael Chambers also set out his belief as to the legal foundation for his application. He deposed that as a result of non-compliance with the Renunciation Order, both Mrs. Chambers and Collette Harrison had renounced their appointments as estate trustees, and he was therefore the

estate trustee under the Corporate Will, having accepted his appointment under that will.

[48] Michael Chambers further deposed that he believed it was in the Estate's best interests that a trust company be appointed to act as his co-estate trustee. In his view,

> a co-estate trustee arrangement respects [Mr. Chambers'] testamentary wish that I be estate trustee of his Corporate Will while ensuring the highest level of administrative expertise, especially when it comes to helping me fulfill my duties to administer [Mr. Chambers'] shares.

[49] Finally, on the basis that Mrs. Chambers and Collette Harrison had renounced under the Primary Will and no substitute trustee was in place, he deposed that it would be more efficient for him and the trust company to act as co-estate trustees in respect of the Primary Will, as well as the Corporate Will.

Mrs. Chambers' Application

[50] By the time that Michael Chambers served his application, Mrs. Chambers had decided to resign as estate trustee and seek to have an institutional trustee appointed in her stead. She brought an application asking to be removed, or permitted to resign, as estate trustee. Her affidavit filed in support was sworn on June 27, 2012.

[51] Mrs. Chambers deposed that she supported the appointment of an institutional trustee because the Estate is large, complex and in some disarray,

and the appointment of a professional trustee would be in the best interests of all beneficiaries.

[52] Mrs. Chambers does not view Michael Chambers as suitable or qualified to assist in the administration of the Estate.

[53] Two of the Chambers' children opposed Michael Chambers appointment as the co-estate trustee. All consented to the Bank's appointment as succeeding estate trustee.

THE DECISION BELOW

[54] The applications judge described the Estate's assets and debts as follows. The assets of the primary estate are approximately $3,000,000, against which there are debts for unknown income tax and known tax liabilities of approximately $420,000. The assets in the corporate estate were estimated to be worth about $1,000,000 and the debts at approximately $240,000. In addition, Fairview might be worth as much as $5,000,000, against which there are registered mortgages of $3,200,000.

[55] The applications judge noted that Mrs. Chambers might make claims against the Estate in relation to: real property held solely in Mr. Chamber's name at 98 Concorde Avenue, Toronto; income distributions made from Fairview: and, liabilities incurred by her late husband for which Mrs. Chambers stands exposed and for which she will seek indemnity from the Estate.

[56] The applications judge identified concerns about the administration of the Estate, most notably the preservation of the Fairview asset, adding that: (1) to forestall a receivership, Mrs. Chambers advanced $115,000 of her own money; (2) the mortgagee had delivered a notice to enforce security; and (3) historically, Mr. Chambers' management of Fairview was "problematic."

[57] The applications judge set out Michael Chambers' position: Mrs. Chambers and Collette Harrison were deemed to have renounced, as a result of the Renunciation Order; he had accepted the appointment as estate trustee of the Corporate Will; and, as estate trustee, he could be removed only in exceptional circumstances, which did not exist.

[58] The applications judge acknowledged that the appointment of an estate trustee under a will ought not to be lightly interfered with but noted that Michael Chambers was a named alternate trustee under only one of the two wills, that two of the beneficiaries did not consent to his appointment, and that all beneficiaries consented to the appointment of the Bank as succeeding estate trustee.

[59] The applications judge also commented on the complexities of the Estate, adversity of interest between Mrs. Chambers and the Estate, and the need for Fairview's proper management and disposition so that the best value would be

realised for the beneficiaries and the burden on Mrs. Chambers, as the owner of the other 50 per cent of Fairview's shares, would be eased.

[60] The applications judge concluded that the welfare of the beneficiaries would be best served if a trust company acted as sole estate trustee given its expertise and credibility, and the economies associated with having a single estate trustee for both wills.

THE ISSUES

[61] Michael Chambers submits that Mrs. Chambers' application should have been dismissed. He contends that she could not be removed because she had already been deemed to have renounced. Furthermore, he says, there was no basis on which to remove him as the estate trustee of the Corporate Will or pass him over. He does not appeal the appointment of the Bank as the sole estate trustee under the Primary Will.

[62] Specifically, the appellant submits that the applications judge erred in failing to:

(1) find that Mrs. Chambers had renounced;

(2) interpret the wills in light of the purported renunciation;

(3) apply the proper test for his removal; and

(4) apply the proper test for his passing over.

RENUNCIATION

[63] Michael Chambers' application to be named the estate trustee (in conjunction with a corporate trustee) was based, in part, on his submission that the Renunciation Order deemed Mrs. Chambers to have renounced and that order had never been overturned or varied. He complains that while the applications judge noted this submission, she did not address it. He renews this submission on appeal, saying that Mrs. Chambers must be found to have renounced and suffer the statutory consequences of renunciation dictated by ss. 25 and 34 of the *Estates Act*, R.S.O. 1990, c. E.21.

[64] I acknowledge that the applications judge did not expressly deal with this submission. Nonetheless, I would not give effect to this ground of appeal.

[65] Renunciation is defined as "[t]he formal act whereby an executor entitled to a grant of probate (or person having the right to a grant of administration) renounces such right": James MacKenzie, *Halsbury's Laws of Canada, Wills and Estates*, 1st ed. (Reissue) (Markham: LexisNexis Canada Inc., 2012), at p. 537; James MacKenzie, *Feeney's Canadian Law of Wills*, loose-leaf, 4th ed. (Markham: LexisNexis Canada Inc., 2000), at para. 7.26; and *MacDonald v. MacIsaac* (1983), 58 N.S.R. (2d) 199 (C.A.), at para. 22.

[66] Renunciation is generally not available if a party has already "intermeddled" with the estate. Intermeddling is the term used to describe the

acts of a person who deals with an estate without having been formally recognized as the estate trustee. As Kennedy J. explained, "while executors may renounce at any time, (a right which is usually exercised before applying to probate) the courts have been reluctant to allow an executor to renounce after having intermeddled in the estate, or after having applied for probate": *Stordy v. McGregor* (1986), 42 Man. R. (2d) 237 (Q.B.), at para. 9. Even a slight act of intermeddling with a deceased's assets may preclude an executor from afterwards renouncing: see *Cummins v. Cummins* (1845), 8 I. Eq. R. 723 (Ch.), at pp. 737-38. However, this rule has been applied with some flexibility: see e.g. *Holder v. Holder*, [1968] Ch. 353 (C.A.).

[67] In *Waters' Law of Trusts in Canada*,[2] the authors explain:

> Once a trustee has accepted the office, he cannot refuse, or to use the correct terminology, disclaim it. He can then only resign, his acts between acceptance and resignation being those of a duly appointed trustee. Disclaimer is available to all those who have been appointed trustees, whether as original trustees, new trustees, or additional trustees, but who have not expressly accepted and who have done no act which is deemed implied acceptance.

[68] In respect of Collette Harrison, there is no question that she renounced. She did so expressly on December 13, 2011, without having carried out any

[2] Donovan W.M. Waters, Mark R. Gillen & Lionel D. Smith, *Waters' Law of Trusts in Canada,* 4th ed. (Toronto: Thomson Reuters Canada Limited, 2012), at p. 884.

estate duties. Her renunciation was effective when made. The Renunciation Order, in deeming Collette Harrison to have renounced, changed nothing.

[69] What then is Mrs. Chambers' position as a result of the Renunciation Order? At the time that the Renunciation Order was made, Mrs. Chambers was already administering the Estate under both wills. It is self-evident that she could not renounce, given that renunciation can take place only prior to any act of administration having been performed.

[70] However, for the purpose of deciding this issue and in light of the collateral attack doctrine, I will assume that the Renunciation Order had effect and Mrs. Chambers is deemed to have renounced. On that assumption, what are the consequences?

[71] In my view, pursuant to s. 25 of the *Estates Act*, Mrs. Chambers' right to serve as the named estate trustee would have ceased, but because of her continued administration of the Estate, the role of estate trustee would nonetheless have devolved to her on the basis of intermeddling, or the trustee *de son tort* principle.

[72] Section 25 reads as follows:

> 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.* [Emphasis added.]

[73] The Renunciation Order required Mrs. Chambers to make an application for a certificate of appointment with a will – in effect, she was summoned to take probate. She did not appear, within the meaning of s. 25, in that she did not make the application. Consequently, s. 25 provides, her right to serve as estate trustee ceased.

[74] However, s. 25 goes on to provide, administration of the Estate "goes, devolves and is committed" as if Mrs. Chambers had not been appointed executor. To whom does it devolve? In my view, it would devolve on Mrs. Chambers. Why? Because Mrs. Chambers alone continued to administer the Estate, the intermeddling or trustee *de son tort* principle would apply, with the result that the office would devolve to her. Consequently, and contrary to the appellant's submission, she could be relieved of that role only through following the appropriate process for removal or resignation.

[75] Under the trustee *de son tort* principle, a person who is not appointed a trustee, but who "take[s] upon [himself or herself] to act as such and to possess and administer trust property" may nonetheless be treated as one: *United Rubber Estates, Ltd. v. Cradock (No. 3)*, [1968] 2 All E.R. 1073 (Ch.), at p. 1095; see e.g. *Coleman v. Ryan* (1923), 55 O.L.R. 182 (H.C.); *Pickering v. Thompson* (1911),

24 O.L.R. 378 (Div. Ct.); and *Charles J. Ellison Ltd. v. Murray*, [1949] O.W.N. 398 (C.A.).

[76] As Rutherford J. explained in *Re O'Reilly (No. 2)* (1980), 28 O.R. (2d) 481 (H.C.), at p. 486, aff'd 33 O.R. (2d) 352 (C.A.):

> [i]t is trite law that a person not lawfully appointed an executor or administrator may by reason of his intrusion upon the affairs of the deceased be treated for some purposes as having assumed the executorship, as having constituted himself an executor *de son tort.*

[77] In this case, Mrs. Chambers' continued administration of the Estate is "indicative of an intention to usurp the functions or authority" of a trustee, and the trustee *de son tort* principle applies: *Re O'Reilly (No. 2)*, at p. 486. Consequently, as I have said, as a result of Mrs. Chambers' "intermeddling" after the deemed renunciation, the administration of the Estate would have devolved to her pursuant to s. 25.

[78] A consideration of s. 34 of the *Estates Act* leads to a similar analysis and conclusion. Section 34 reads as follows:

> 34. *Where a person renounces probate* of the will of which the person is appointed an executor, *the person's rights in respect of the executorship wholly cease*, 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.* [Emphasis added.]

[79] On a plain reading of s. 34, assuming that the Renunciation Order is treated as having the effect of a renunciation of probate, Mrs. Chambers' right to administer the Estate by virtue of being the named estate trustee ceased.

Administration of the Estate would devolve as if she had not been appointed executor. However, after the Renunciation Order, Mrs. Chambers alone continued to carry out the duties of the estate trustee. Therefore, under s. 34, in the circumstances of this case, administration of the Estate devolved to her, pursuant to the intermeddling or trustee *de son tort* principle.

[80] This ends the analysis of renunciation in respect of the Primary Will. An additional question remains in respect of the Corporate Will, however. Does the fact that Michael Chambers was named as an alternate estate trustee in the Corporate Will affect the foregoing analysis? In my view, it does not.

[81] By the express terms of the Corporate Will, Michael Chambers is named as alternate estate trustee in the event that Mrs. Chambers is unable or unwilling to act or continue to act. However, that condition precedent to Michael Chambers' appointment was not met until Mrs. Chambers brought her application. The deemed renunciation, assuming it could operate, did not render Mrs. Chambers unable to act – it simply caused her right to administer the Estate, based on having been the named estate trustee, to cease. And, Mrs. Chambers only became unwilling to act at the time that she brought her application.

[82] Thus, although Michael Chambers purported to accept an appointment as the estate trustee under the Corporate Will, prior to the hearing of the

applications, he was not able to because the condition precedent to his appointment had not been met.

[83] Moreover, and contrary to the appellant's assertion, the applications judge committed no error in deciding Mrs. Chambers' application. It was necessary for Mrs. Chambers to bring such an application in order to be relieved of the role of estate trustee.

INTERPRETATION OF THE WILL

[84] Michael Chambers submits that ss. 25 and 34 of the *Estates Act* required the applications judge to interpret the wills as if neither Mrs. Chambers nor Collette Harrison had been named as the estate trustees. Thus, he says, he is the only named trustee in the Corporate Will and there was no named trustee in the Primary Will at all.

[85] I see nothing in this submission. Neither ss. 25 nor 34 says anything about the interpretation of the will. There is no basis for reading into the legislation the requirement that if a court finds that either provision applies, the will in question must be interpreted as if the named estate trustee had never been named.

[86] This ground of appeal must fail.

REMOVAL

[87] Michael Chambers complains that the applications judge did not distinguish between removal and passing over, and that it is unclear on what

basis she refused to appoint him as the estate trustee under the Corporate Will. He submits that the most accurate characterization is that he was removed as the estate trustee.

[88] I accept that the applications judge does not explain whether she removed Michael Chambers as the estate trustee or passed him over. This is evident from para. 5 of the Judgment rendered in Michael Chambers' application, which reads as follows:

> **THIS COURT ORDERS** that the relief sought to have Michael Chambers 'removed' or 'passed over' however it might best be expressed, is hereby granted.

[89] In my view, properly understood, the applications judge passed over Michael Chambers as estate trustee under the Corporate Will.

[90] An estate trustee is removed after he or she has received a certificate of appointment, whereas an executor is passed over before the issuance of such a certificate: see *Windsor v. Mako Estate* (2008), 43 E.T.R. (3d) 255 (Ont. S.C.), at para. 35. Put another way, a person is removed as estate trustee after he or she has assumed authority to administer the estate, whereas a person is passed over as estate trustee prior to having assumed authority to administer the estate.

[91] At the time the applications were heard, Michael Chambers was not the estate trustee and, therefore, could not have been removed. He had not received a certificate of appointment nor had he been acting as estate trustee.

Although he purported to have accepted an appointment as the named alternate estate trustee under the Corporate Will on the basis that Mrs. Chambers was unable or unwilling to act, as I have explained, he could not accept such an appointment as, prior to the applications, Mrs. Chambers was neither unable nor unwilling to act as the estate trustee.

[92] Accordingly, the question of Michael Chambers' removal does not arise and this ground of appeal fails.

PASSING OVER

[93] Michael Chambers submits that if the applications judge passed him over as the estate trustee under the Corporate Will, she did so in error and without considering or applying the proper legal test.

[94] I do not accept this submission.

[95] The applications judge was fully alive to the legal principle that the court should not lightly interfere with a testator's choice of the person to act as his or her estate trustee: *Re Weil*, [1961] O.R. 888 (C.A.), at p. 889. Just as a court should remove an estate trustee only on the "clearest of evidence", so too they should be reluctant to pass over a named executor unless "there is no other course to follow": *Windsor*, at para. 41, citing *Crawford v. Jardine* (1997), 20 E.T.R. (2d) 182 (Ont. C.J. (Gen. Div.)), at para. 18. As Wright L.J. explained, "passing over of an executor and granting administration to other parties is an

unusual and extreme course, though it is within the discretion of the Probate Court": *Re Leguia (No. 2)* (1936), 155 L.T.R. 270 (C.A.), at p. 276.

[96] Thus, the wishes of the testator will generally be honoured, "even if the person chosen is of bad character": *Carmichael Estate (Re)* (2000), 46 O.R. (3d) 630 (S.C.), at para. 17. In fact, an executor named in a will should not be passed over simply because he or she is of bad character or bankrupt, or there is likely to be friction between co-executors: see *Harris v. Gallimore* (1925), 57 O.L.R. 673 (C.A.), at p. 678; *Re Agnew*, [1941] 4 D.L.R. 653 (Sask. C.A.), at p. 657; *Re Wolfe* (1957), 7 D.L.R. (2d) 215 (B.C.C.A.), at p. 221; and *Crompton v. Williams*, [1938] O.R. 543 (H.C.), at pp. 586-87. That being said, courts have passed over an executor because he was in a conflict of interest with the estate (e.g. *Re Becker* (1986), 57 O.R. (2d) 495 (Surr. Ct.), at pp. 498-99; *Thomasson Estate (Re)*, 2011 BCSC 481, [2011] B.C.W.L.D. 4763, at paras. 29-30) or because she had a conflict and was in poor health (e.g. *Re Bowerman* (1978), 20 O.R. (2d) 374 (Surr. Ct.), at p. 377).

[97] In this case, Michael Chambers is correct when he says that the applications judge failed to implement the provisions of the Corporate Will appointing him as the alternate estate trustee. And, I accept that Mr. Chambers knew that Michael Chambers was a discharged bankrupt at the time he made his wills. Nonetheless, in my view, the applications judge made no error in passing Michael Chambers over as the estate trustee under the Corporate Will.

[98] It is clear from the record that Michael Chambers holds a strong animosity towards Mrs. Chambers. I need not repeat the facts around the allegations he has made in respect of Mrs. Chambers to justify this statement. His animosity rises above mere friction and satisfies me that due administration of the corporate estate would be compromised were he to be appointed a co-estate trustee with the Bank as he wishes.

[99] It is trite law that trustees must act jointly. The central task of the estate trustee in respect of the Corporate Will is to ensure that Fairview is properly managed and sold. Given that Mrs. Chambers owns 50 per cent of Fairview's shares and the Estate owns the other 50 per cent, there is every reason to believe that Michael Chambers' strong animosity towards Mrs. Chambers would create a deadlock in relation to the management and sale of Fairview if he were appointed a co-estate trustee with the Bank. His decisions in respect of Fairview could not fail to be coloured by his overriding animosity towards Mrs. Chambers.

[100] Mrs. Chambers is a founder and one-half shareholder of Fairview. She has injected personal funds to stave off receivership. These are not irrelevant considerations, as the appellant would have it. They are very much tied up with Fairview's proper management and disposition. Decisions regarding the preservation and sale of Fairview must be made with care and dispatch. The risk of deadlock between Michael Chambers and the Bank is real. For this reason,

and having regard to the beneficiaries' best interests, the applications judge, in my view, made no error in passing over Michael Chambers.

CONCLUSION

[101] Despite the Renunciation Order, because Mrs. Chambers continued to administer the Estate, she required a court order in order to be released from the position of estate trustee. Sections 5 and 37 of the *Trustee Act*, R.S.O. 1990, c. T.23 give the court the authority to remove a trustee and appoint another trustee in his or her place.[3] In addition, the court has an inherent power of appointment and removal: see *Evans v. Gonder*, 2010 ONCA 172, 259 O.A.C. 295, para. 42. Therefore, when deciding Mrs. Chambers' application, the applications judge had the power both to remove her as estate trustee and to appoint her successor.

[102] I see nothing in Michael Chambers' contention that Mrs. Chambers sought to resign conditionally on the appointment of her chosen successor, as in *Re Moorhouse*, [1946] 4 D.L.R. 542 (Ont. H.C.J.), at p. 544. Her wish to be removed was unconditional. She did not attempt to dictate whom the court should appoint as her successor. Rather, she offered her views on the needs of the Estate and the qualities her successor should possess.

[3] The full text of ss. 5 and 37 is included in Appendix A to these reasons.

[103] It was clear from Mrs. Chambers' application that she sought to have Michael Chambers passed over. Thus, there is also nothing in the appellant's submission that the applications judge gave relief that had not been sought and was not properly in issue.

[104] As I have already noted, the applications judge was fully alive to the legal principle that a court ought not to lightly interfere with a testator's choice of estate trustee. However, she concluded that the welfare of the beneficiaries would be best served if a trust company were appointed the successor estate trustee because of its expertise and credibility, and the economies associated with a single trustee for both wills. She considered the complexity of the Estate administration, including the problems associated with Fairview, which all parties acknowledged. She also considered Michael Chambers' suitability before arriving at this conclusion.

[105] Importantly, although the applications judge did not allude to this, as I have already explained, there is the very real possibility that the appellant's appointment as co-estate trustee with the Bank would have led to a deadlock situation. In order to avoid that, as well as for the reasons articulated by the applications judge, I see no error in her conclusion that the Bank alone should be appointed as the successor estate trustee.

DISPOSITION

[106] Accordingly, I would dismiss the appeals with costs to the respondent payable from the Estate, fixed in the amount of $10,000, all inclusive.

Released:

"AUG 12 2013"
"EEG"

"E.E. Gillese J.A."
"I agree Gloria Epstein J.A."
"I agree P. Lauwers J.A."

APPENDIX A

Trustee Act, R.S.O. 1990, c. T.23

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. R.S.O. 1990, c. T.23, s. 5 (1); 2000, c. 26, Sched. A, s. 15 (2).

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. R.S.O. 1990, c. T.23, s. 5 (2).

…

Removal of personal representatives

37. (1) The Superior Court of Justice may remove a personal representative upon any ground upon which the court may remove any other trustee, and may appoint some other proper person or persons to act in the place of the executor or administrator so removed. R.S.O. 1990, c. T.23, s. 37 (1); 2000, c. 26, Sched. A, s. 15 (2).

Security by person appointed

(2) Every person so appointed shall, unless the court otherwise orders, give such security as would be required to be given if letters of administration were granted to the person under the Estates Act. R.S.O. 1990, c. T.23, s. 37 (2).

Who may apply

(3) The order may be made upon the application of any executor or administrator desiring to be relieved from the duties of the office, or of any executor or administrator complaining of the conduct of a co-executor or co-administrator, or of any person interested in the estate of the deceased. R.S.O. 1990, c. T.23, s. 37 (3).

When new appointment unnecessary

(4) Where the executor or administrator removed is not a sole executor or administrator, the court need not, unless it sees fit, appoint any person to

act in the place of the person removed, and if no such appointment is made the rights and estate of the executor or administrator removed passes to the remaining executor or administrator as if the person so removed had died. R.S.O. 1990, c. T.23, s. 37 (4).

Chain of representation

(5) The executor of any person appointed an executor under this section shall not by virtue of such executorship be an executor of the estate of which his or her testator was appointed executor under this section, whether such person acted alone or was the last survivor of several executors. R.S.O. 1990, c. T.23, s. 37 (5).

Copy of order to be filed

(6) A certified copy of the order of removal shall be filed with the Estate Registrar for Ontario and another copy with the local registrar of the Superior Court of Justice, and such officers shall, at or upon the entry of the grant in the registers of their respective offices, make in red ink a short note giving the date and effect of the order, and shall also make a reference thereto in the index of the register at the place where the grant is indexed. R.S.O. 1990, c. T.23, s. 37 (6); 2000, c. 26, Sched. A, s. 15 (2).

Endorsement

(7) The date of the grant shall be endorsed on the copy of the order filed with the Estate Registrar for Ontario. R.S.O. 1990, c. T.23, s. 37 (7).