

CITATION: Karrow v. Boghosian, 2026 ONSC 2425
COURT FILE NO.: CV-20-645-00ES
DATE: 2026/04/27

ONTARIO

SUPERIOR COURT OF JUSTICE

IN THE MATTER OF THE ESTATE OF ELIZABETH JOAN KARROW, DECEASED

BETWEEN:

NIEL ALEXANDER KARROW, BRIAN
D. CAMERON AND THOMAS PAUL
KARROW

Applicants

C. Bauman, Counsel for the Applicants

– and –

JORDAN BOGHOSIAN

Respondent

G. Pakozdi, Counsel for the Respondent

HEARD: April 16, 2025, and in Writing

THE HONOURABLE MR. JUSTICE I.R. SMITH

REASONS FOR JUDGMENT

1. Introduction

[1] The applicants, who are the estate trustees for the estate of Elizabeth Joan Karrow (“Elizabeth”), apply to pass their estate accounts. The respondent, Jordan Boghosian (“Jordan” or the “respondent”), objects. She argues that the trustees failed to act with an even hand, exercised their discretion inappropriately, and depleted the capital of the estate for the benefit of her father, the applicant Niel Karrow (“Niel”), and to the detriment of the respondent and her sister, Sarah Karrow (“Sarah”).

[2] For the following reasons, I find for the respondent.

2. Background

2.1 Elizabeth's will

[3] Elizabeth died in 2016. She left a will, dated January 31, 2003, which provided that after expenses and certain specific bequests were paid, the residue of her estate should be divided into four equal shares for the benefit of her grandchildren – the children of her four children. Each of those four shares was to be held in trust until the youngest of the grandchildren in each of the four sets of grandchildren reaches the age of 30. Before that time, with respect to two of the four shares, the trustees were authorized to make payments from those two shares in certain defined circumstances (which differed as between the two shares). One of these two one-quarter shares (the relevant trust in this case) was for the benefit of Niel's children, Jordan and Sarah.

[4] With respect to this share, the will directs the trustees to pay any amounts of capital, or income derived from it, as the trustees in their absolute discretion deem advisable for any one or more of Niel, Jordan, and Sarah, in situations of illness or disability of the children (Jordan and Sarah) or for the purpose of maintaining Niel's standard of living. Paragraph 3(s)(i)(b) of the will reads in part as follows:

TO KEEP INVESTED one (1) such equal share and to pay the whole or such part of the net income derived therefrom together with such part or parts of the capital thereof as my Trustees in their absolute discretion deem advisable to or for my son, NIEL ALEXANDER KARROW, and his children, or some one or more of them, to the exclusion of any one or more of them, in such proportions and in such manner as my Trustees in their absolute discretion deem advisable from time to time, provided however, that such payments shall be made to or for the children of my said son, NIEL ALEXANDER KARROW, only in situations where my Trustees in their absolute discretion consider such payment or payments to be advisable for the medical necessity or illness or disability of such child of NIEL and that payments shall be made to NIEL only in such situations as my Trustees in their absolute discretion consider such payments to be necessary to maintain NIEL'S standard of living...

[5] Among other things, the balance of this paragraph provides that when Neil's youngest child reaches the age of 30 (which Sarah, who is younger than Jordan, will do in 2030), the amount remaining in the trust is to be divided equally between Jordan and Sarah.

[6] In other words, this one-quarter share of the residue of Elizabeth's estate was to be for the benefit of her grandchildren, Jordan and Sarah, when the younger of them turns thirty, less costs incurred prior to that date for (i) their medical needs; or (ii) to maintain Niel's standard of living. Payment of any such costs was to be approved by the trustees.

[7] After accounting for liabilities, expenses and specific bequests, a total of \$1.5 million dollars of the estate's residue was distributed in four shares, each of \$375,000, including one such share for Niel and his daughters to be managed as described in paragraph 3(s)(i)(b) of the will.

2.2 The payments to Niel

[8] Acting on the authority of that paragraph, the trustees authorized two payments to Niel: \$50,000 on June 29, 2018, and \$95,000 on October 11, 2018.

[9] Niel deposes that he and his former wife, Jodie Boghosian ("Jodie"), separated in May of 2011 after almost 21 years of marriage. Prior to the dissolution of the marriage, he says that he and Jodie enjoyed a comfortable lifestyle, much of it in well-appointed homes on large properties. Moreover, Niel comes from a wealthy family, had a privileged upbringing, and is a university professor.

[10] Upon separation from Jodie, however, Niel says that he left the relationship with very few belongings and was forced to live in a series of rental accommodations. Because Jodie had made criminal complaints against Niel and had also launched family proceedings, he was forced to hire lawyers, which he says he did using a line of credit. Other costs, including spousal and child support payments, also contributed to him having to incur debt, something which he had not done before.

[11] In April of 2018, in difficult financial circumstances, Niel asked the other trustees of his mother's estate (his brother Thomas Karrow ("Tom") and family friend and financial advisor, Brian Cameron) to authorize a payment of \$50,000 from the money held in the trust so that he could pay off his line of credit. Niel, Tom and Mr. Cameron met with the estate's lawyer, Stephen Grant, to discuss the matter, and then Tom and Mr. Cameron met separately to consider the request in Niel's absence. They ultimately exercised their discretion to make the payment Niel sought. It was made on June 29, 2018, following which, Niel paid off his line of credit.

[12] On September 13, 2018, in the midst of negotiations relating to the family proceedings, through counsel, Jodie proposed to Niel that he retire his remaining spousal and child support obligations to her by making a lump sum payment. Niel wanted to do so but needed assistance in coming up with the money for that payment. Again, he asked Tom and Mr. Cameron to authorize a payment from the trust moneys, this time in the amount of \$95,000. Tom and Mr. Cameron spoke with Mr. Grant privately and then ultimately agreed to exercise their discretion in favour of making the requested payment to Niel, which was done on October 11, 2018. That money was used to settle the family litigation, to pay legal fees, and to pay Niel's Visa credit card bill.

[13] Niel made a third request for funds on April 7, 2019. He asked the trustees to approve a payment of \$80,000 so that he could purchase a home. After considering this request and consulting Mr. Grant, Tom and Mr. Cameron declined to approve the payment Niel had requested.

[14] Later, in May 2019, Niel was able to purchase a new home.

3. Positions of the parties

[15] Jordan takes the position that, in approving the payments to Niel, the trustees breached their fiduciary duties to Jordan and Sarah by considering only the interests of Niel and by failing to consider the interests of Jordan and Sarah at all. In other words, the trustees failed to act even-handedly. In *Re Carley Estate* (1994), 2 E.T.R. (2d) 142 (Ont. S.C.J.), Greer J. quoted Professor Waters for a statement of the "even hand principle" (at para. 20):

Executors have a duty to act impartially between beneficiaries. Waters on the *Law of Trusts in Canada*, 2nd ed. at p. 787 states the principle as follows:

It is a primary duty upon trustees that in all their dealings with trust affairs they act in such a way that, if there are two or more beneficiaries, each beneficiary receives exactly what the terms of the trust confer upon him and otherwise receives no advantage and suffers no burden which other beneficiaries do not share. In this way the trustees act impartially; they hold an even hand. The settlor or testator may choose to give disproportionate interests to various beneficiaries, and he very often does so in practice, but that is his privilege. It is still the duty of the trustees to carry out the terms of the trust as they find them, and to ensure that in the administration of the trust they do not give advantage or impose burden when that advantage or burden is not to be found in the terms of the trust.

[16] Jordan also submits that the trustees otherwise failed to abide by the terms of the will because they authorized payments to Niel without engaging in due diligence. This led them to approve payments which were not authorized by the will. In other words, the payments made were not “necessary to maintain Niel’s standard of living.”¹

[17] For these reasons, Jordan submits that the application to approve the estate accounts ought to be dismissed and that an order should be made requiring the trustees to return the payments made to Niel (with interest) for the benefit of Jordan and Sarah.²

[18] The applicants argue that the even hand principle has no application in the circumstances of this case. The very wording of the will, they argue, makes this plain insofar as it grants an unfettered discretion to the trustees to make payments which may result in the uneven treatment of the beneficiaries. So long as this was the intention of the testator, such uneven treatment is permissible. The test then, according to the applicants, is not whether the trustees have treated all

¹ Jordan also alleges that the legal advice which the trustees received was tainted by conflict of interest. While not abandoned, this argument was not pressed in oral argument and, in any case, given the conclusions I have come to, I have not considered it necessary to decide this issue.

² Jordan also submits that Mr. Cameron should not be compensated for his work as a trustee until after such repayment has been made. Her argument in this respect was contingent on Mr. Cameron not already having been so compensated. As the evidence suggests that Mr. Cameron’s compensation (\$10,000) has already been paid to him, and as Jordan concedes that Mr. Cameron’s work involved the entirety of the estate, not just the one-quarter share with which this application is concerned, and given the conclusions I have reached, I do not consider it necessary to make any order respecting Mr. Cameron’s compensation.

beneficiaries fairly, but whether the trustees have exercised the discretion conferred upon them by the will reasonably.

[19] Where such discretion exists, the courts will only disturb a trustee's decision in narrow circumstances. Again, for a statement of this principle, the courts rely on Professor Waters. In *Walters v. Walters*, 2022 ONCA 38, Pepall J.A. wrote as follows (at para. 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." [...]

[20] The applicants say that none of these pre-conditions to interference with the decision of a trustee exists in this case. The payments to Niel were reasonable, supported by the evidence available to the trustees, and authorized by the will.

[21] The applicants ask that the court approve the estate accounts.

4. Discussion

4.1 The 2024 affidavits of the applicants

[22] The respondent submits that affidavits filed by the applicants in 2024, after they had retained new counsel, are inadmissible because they were filed without leave of the court, contrary to Rule 39.02(2) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg 194.

[23] I am satisfied that the affidavits may be admitted as the applicants had not already cross-examined on an affidavit delivered by the respondent. I do, however, consider that the late addition of these affidavits (among other things) may affect the weight which I give to them. I note also that, in some respects, the respondent relies on the new affidavits.

4.2 The even hand principle

4.2.1 Preliminary objection

[24] As noted above, Jordan argues that the trustees failed to adhere to the even hand principle. As a preliminary matter, the applicants object that reference to the even hand principle was not made in Jordan's notice of objection to the accounts and, therefore, that she is estopped from raising that issue on this application. In this respect, the applicants refer to Rule 78.18(12) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg 194, which provides as follows:

No objection shall be raised at a hearing on a passing of accounts that was not raised in a notice of objection to accounts, unless the court orders otherwise.

[25] It is true that Jordan's notice of objection does not employ the phrase "even hand", but it does allege broadly that the applicants "breached their fiduciary duties" by approving the payments made to Niel. In my view, this reference to fiduciary duties was sufficient to permit Jordan to rely on the even hand principle in this matter, that principle being a key component of an estate trustee's fiduciary duties where there is more than one beneficiary: *Carley*, at para. 20.

[26] In any case, the Rule affords the court a discretion to allow an objector to advance objections not set out in the notice of objection: *Re Nicholson Estate* (2000), 35 E.T.R. (2d) 126 (Ont. S.C.J.), at para. 4. Were it necessary, I would grant Jordan leave to rely on the even hand principle given that I see no prejudice to this argument being made in the context of the other objections being made, all of which are factually and legally related.³

4.2.2 Does the even hand principle apply in this case?

[27] With respect to the even hand principle, the primary argument of the applicants is that the principle has no application to this case. It will be recalled (see para. 15, above) that Prof. Waters wrote that a testator may relieve the trustee of the need to act even-handedly but must do so expressly in the will:

³ Here, I add that it is apparent that the applicants anticipated an attack based on a lack of even-handedness given that Mr. Cameron's 2020 affidavit refers to the even hand principle and asserts that he was advised that it had no application in this case.

The settlor or testator may choose to give disproportionate interests to various beneficiaries, and he very often does so in practice, but that is his privilege. It is still the duty of the trustees to carry out the terms of the trust as they find them, and to ensure that in the administration of the trust they do not give advantage or impose burden when that advantage or burden is not to be found in the terms of the trust.

[28] In the present case, the applicants point to the text of paragraph 3(s)(i)(b) of the will as evidence of Elizabeth’s intention that the trustees were to have unfettered discretion that is unconstrained by the even hand principle. In particular, the applicants rely on the words of that paragraph emphasized here:

TO KEEP INVESTED one (1) such equal share and to pay the whole or such part of the net income derived therefrom together with such part or parts of the capital thereof as my Trustees in their absolute discretion deem advisable to or for my son, NIEL ALEXANDER KARROW, and his children, or some one or more of them, to the exclusion of any one or more of them, in such proportions and in such manner as my Trustees in their absolute discretion deem advisable from time to time, provided however, that such payments shall be made to or for the children of my said son, NIEL ALEXANDER KARROW, only in situations where my Trustees in their absolute discretion consider such payment or payments to be advisable for the medical necessity or illness or disability of such child of NIEL and that payments shall be made to NIEL only in such situations as my Trustees in their absolute discretion consider such payments to be necessary to maintain NIEL’S standard of living...

[29] It is argued that this paragraph makes plain that Elizabeth intended that the trustees could have authorized the use of the whole of the capital in the one-quarter share set aside for Jordan and Sarah, to their complete exclusion, for the purpose of maintaining Niel’s standard of living. In other words, it is argued that this paragraph relieves the trustees of any duty to act with an even hand.

[30] Jordan argues that Elizabeth would have had to use much more explicit language to override the even hand principle, a fundamental feature of a trustee’s common law duties, had she so intended.

[31] I agree with Jordan that the language of paragraph 3(s)(i)(b) did not relieve the trustees of the obligation to act even-handedly. The language of that paragraph grants “absolute discretion”

to the trustees, but even absolute discretion is limited. Corthorn J. put the point as follows in *Clayton v. Clayton*, 2021 ONSC 5811 (at para. 57; citations omitted):

Nevertheless, conferring a trustee with absolute discretion does not, without something more, eliminate the trustee’s common law duties. For example, if the testator intends that the trustee is not required to fulfill the common law duty to act with an even hand, then the testator must say so [...]

[32] In that case, the will conferred “uncontrolled discretion” on the trustees to make investment decisions and permitted them to make such decisions (see para. 151; emphasis added):

... whether or not such would have the effect of conferring an advantage on any one or more of the beneficiaries at the expense of any one or more of the other beneficiaries or could otherwise be considered but for the foregoing as not being an impartial exercise by my Trustees of their duties hereunder or as not being the maintaining of an even hand among the beneficiaries (without being liable for any loss occasioned thereby).

[33] This express reference to the even hand principle was sufficient to override the principle for investment purposes, but insofar as such language was not repeated respecting other “absolute” or “unfettered” discretions provided to the trustees (for example, the discretion to make loans or advances), the even hand principle could not be said to have been overridden: *Clayton*, at para. 154.

[34] In *Carley*, the language of the will permitted the trustees to encroach on the capital of the trust that had been created for the ultimate benefit of her grandchildren in order to make payments to their father. The relevant portion of the will read as follows (see *Carley*, at para. 2):

Notwithstanding the above, I give to the Trustees of the David Meredith Carley Trust full power and authority should they in their sole and absolute discretion consider it desirable or necessary to encroach on the capital of the said Trust from time to time for the benefit of my said son, David Meredith Carley.

[35] Greer J. considered this language⁴ and concluded that the will “did not exonerate the Executors from keeping an even-hand, and failing such an exoneration, the Executors at law had a duty to maintain an even-hand”: *Carley*, para. 12. Greer J. also referred to the case of *Re Fleming*, [1973] 3 O.R. 588 (High Ct.), where the will granted trustees even wider discretion by using the phrase “uncontrolled discretion.” Even in that case, Osler J. referred to and applied the even hand principle: see para. 10.

[36] The applicants rely on two cases where the even hand principle is said to have been set aside and in which, so they submit, the language of the will was similar to that employed in para. 3(s)(i)(b) in this case. The first such case is *Cheadle v. Mayotte* (1995), 7 E.T.R. (2d) 167 (Ont. Ct. (Gen. Div.)). In my view, *Cheadle* is of no assistance to the applicants given that it uses language which much more clearly excuses the trustees from even-handedness.⁵ The applicants also point to the case of *Edell v. Sitzer* (2001), 55 O.R. (3d) 198 (S.C.J.); affirmed (2004), 9 E.T.R. (3d) 1 (Ont. C.A.). The relevant wording from the trust in that case was as follows (see para. 34):

The Trustees shall have the right at any time or times before the Distribution Date to pay to or for some one or more of the said children and more remote issue of Paul Sitzer and Geraldine Sitzer who are then living and are at least eighteen (18) years of age, to the exclusion of any other or others, such amount or amounts out of the capital of the Trust Property in such proportions as the Trustees in their unfettered discretion shall determine advisable or expedient.

[37] There are several problems with the applicants’ reliance on this case. In addition to a more complex factual background involving an “estate freeze”, *Edell* is distinguishable because the trial judge’s conclusion that the language of the trust permitted the encroachments in that case was

⁴ I note that the language employed in the will in *Carley* was more permissive than the language in para. 3(s)(i)(b) of Elizabeth’s will insofar as payments could be made where it was “desirable or necessary” (not only where “necessary”) and for the “benefit” of the payee (rather than for the particular purpose of maintaining a standard of living).

⁵ Among other things, the will in *Cheadle* provided as follows: “It is expressly intended that, the trustees may discriminate amongst the potential beneficiaries and, in particular, may at any time pay to any one or more of the beneficiaries all or any part of the capital of the Trust fund or of the income therefrom and it shall not be necessary for the trustees to provide any explanation for the manner in which they exercise their discretion hereunder to benefit one or more of the beneficiaries in preference to other beneficiaries or potential beneficiaries hereunder. Notwithstanding any other provisions of this agreement, the trustees are expressly authorized to pay at any time or from time to time any or all of the income of the Trust fund and whole or any part of the capital of the Trust fund to the said William Russell Mayotte or to his wife or to any one or more of the other members of W. R. Mayotte Family to the exclusion of the other or others.” See *Cheadle*, at para. 4.

arrived at only after “considering the purpose of the estate freeze and the creation of the [trust]”: *Edell* (C.A.), at para. 11. Part of that purpose was to preserve the trust property – shares in the family business – for the benefit of future generations: *Edell* (S.C.J.), at paras. 19 and 172. These conclusions were arrived at only after considering the complex background to which I have referred, the family and corporate history, and relevant documents.

[38] Moreover, it is far from clear to me that the trial judge in *Edell*, Cullity J., dispensed entirely with the even hand principle. Indeed, he appears to have embraced it in that case, albeit bearing in mind the wording of the trust documents and their factual context. Cullity J. wrote as follows (at paras. 173 and 175; emphasis added):

Mr. Underwood relied on the well-established duty of a trustee to act impartially – the so called even hand rule. This, he submitted, required Paul to consider and give weight to Jodi's interests when exercising the power of encroachment. While such a proposition has meaning, and is supported by authority, in the context of administrative powers, it is clear that it cannot be applied strictly and literally to preclude any exercise of a dispositive power in favour of a single beneficiary where the power is, as here, expressed in the trust instrument to be exercisable in favour of one or more beneficiaries to the exclusion of the others. The correct position is, I believe, as stated in *Edge v. Pensions Ombudsman* [[2000] Ch. 602 (C.A.)], at p. 627 Ch.:

Properly understood, the so-called duty to act impartially . . . is no more than the ordinary duty which the law imposes on a person who is entrusted with the exercise of a discretionary power: that he exercises the power for the purpose for which it is given, giving proper consideration to the matters which are relevant and excluding from consideration matters which are irrelevant. If . . . trustees do that, they cannot be criticised if they reach a decision which appears to prefer the claims of one interest . . . over others. The preference will be the result of a proper exercise of the discretionary power.

[...]

Paul was satisfied that the exercise of the power was required to preserve the trust property for the benefit of some of his descendants who were objects of the power and that a failure to do so would be detrimental to all of his issue. I do not believe that his decision can be legitimately criticized on the ground that he ignored Jodi's interests when the threat to the interests of the objects of the power

was perceived to arise on the basis of her behaviour in the past and likely behaviour in the future.

[39] I take *Edell* to support the proposition that, where the wording of the will permits a result which affects beneficiaries unequally, the trustees must consider – not ignore – the interests of all beneficiaries before approving such a result.

[40] In summary then, my review of the cases leads me to the conclusion that the language deployed in para. 3(s)(i)(b) of Elizabeth’s will does not have the effect of relieving the trustees of the application of the even hand principle. On the contrary, in my view, when considering Niel’s requests for payments the trustees were required to consider the interests of Jordan and Sarah. The mere fact that the language of the will permitted uneven treatment, did not mean that their interests could be ignored or given short shrift.

4.2.3 Were the trustees even-handed?

[41] In my view, the trustees were not even-handed in this case. I come to this conclusion for three reasons.

[42] First, at least Mr. Cameron received advice that he was not required to act with an even hand (a position the applicants maintain on this application).

[43] In his original affidavit, Mr. Cameron swore to the following facts:

I am advised and verily believe to be true that the language of [para. 3(s)(i)(b)] allows the Trustees to administer the ... Trust with broad discretion, without the need to act with an even hand as between the beneficiaries of Trust. [...]

[44] It is not clear either who advised Mr. Cameron that he was not required to act with an even hand, or when he was so advised. I note in this regard that on cross-examination all questions or requests for documents respecting legal advice were refused on the basis of solicitor-client privilege. Further, the applicants continue to assert privilege in their 2024 affidavits even though they rely on the legal advice they received as evidence of their good faith in this matter.

[45] Second, there is no evidence that the trustees considered the interests of Jordan and Sarah.

[46] Nothing in Mr. Cameron’s first affidavit indicates that he considered the interests of Jordan and Sarah. Nothing in Niel’s first affidavit indicates that he asked Tom and Mr. Cameron to consider the interests of his daughters when deliberating about whether to grant his requests for payments from the trust. Initially, Tom provided no affidavit. After these first two affidavits were filed, Mr. Cameron and Niel were cross-examined. At no point during their cross-examinations did either of these two applicants suggest that the interests of Jordan and Sarah were considered when Mr. Cameron and Tom considered Niel’s requests for funds.

[47] After the cross-examinations, certain email communications were disclosed to the respondent pursuant to undertakings given at the cross-examinations. Nothing in these communications indicates that any consideration was given to the interests of Jordan and Sarah when the trustees considered Niel’s first request for \$50,000.

[48] With respect to Niel’s second request, this time for \$95,000, email correspondence reveals that the reason for this request was first disclosed to Tom, Mr. Cameron and Mr. Grant by email on September 17, 2018. Niel wrote to all three of them, and to his lawyer in the family litigation (Mr. Robert Bickle), as follows:

I would like to propose that we delay informing the trustees about the amount of funds in the accounts for a little longer. The reason being is that my ex-wife has proposed to make and Offer to settle (attached); I am meeting Rob Bickle tomorrow to discuss my options, one of which could include a payout offer that would “greatly affect my standard of living”. Thanks N

[49] This email was provided to Jordan in answer to the undertaking given during Mr. Cameron’s examination that he produce “any emails from Niel ... that outlined the potential arrangement to settle a lump sum payment with his ex-wife.”

[50] The reference to “the trustees” in the email⁶ makes little sense given that the email was addressed to the trustees and given that each of the trustees would already have information, or at least access to it, respecting the “amount of funds in the accounts.” The only other people entitled to know the amount of money in the accounts were the beneficiaries, Sarah and Jordan, who are

⁶ I note also that the subject line of the email is “regarding communication with trustees”.

the daughters of Niel's ex-wife. It seems to me very likely that Niel's email meant to refer to the "beneficiaries" rather than the "trustees" and that Niel wanted to delay disclosure of the funds in the accounts to Jordan and Sarah until after his request for funds from the trust had been considered.

[51] The settlement proposal made on behalf of Jodie, which was attached to Niel's email and was dated September 13, 2018, noted that the lump sum she proposed (approximately \$113,000) would cover both spousal support and child support for Jordan and Sarah.

[52] Mr. Bickle prepared a draft reply to Jodie's counsel and a draft counteroffer, both for Niel's consideration. That draft counteroffer also proposed lump sum payments for spousal and child support. It further proposed that Niel be relieved of the obligation to maintain life insurance as security for child support. On September 25, 2018, Niel forwarded Mr. Bickle's cover email, draft letter and draft settlement to Tom and Mr. Cameron. Niel's email reads as follows:

Hi Brian and Tom, This is the settlement offer to Jodie. If it is agreed upon, I will need agreement with both of you to use the trust to pay this and legal expenses. I plan to increase my life insurance to make sure the girls are compensated for this depletion. n

[53] The reference in this email to the "depletion" of Jordan and Sarah's interest in the trust is the only reference respecting their interests in the documents relating to the second payment. There is no evidence that either Tom or Mr. Cameron considered it important in deciding whether to make a payment to Niel. Further, there is no evidence that Niel ever did increase his life insurance to make up for the depletion. It seems unlikely that he did, however, given that his offer to settle proposed terminating his obligation to have life insurance for the benefit of his daughters. Further, it is not clear to me how maintaining life insurance from which Jordan and Sarah might benefit when Niel dies at some unknown point in the future would operate to offset the depletion of funds they are entitled to have when Sarah turns 30, especially in the absence of any detail around the plan to increase his insurance. In any case, there is no evidence that Tom or Mr. Cameron made any inquiry whatsoever about this proposal to compensate Niel's daughters.

[54] In the end, Niel and Jodie settled, and, on October 1, 2018, Fowler-Byrne J. made a final order based on that settlement. She ordered payments from Niel to Jodie in the amounts of \$60,000

for spousal support, \$5,652 for child support, and \$10,000 for future special and extraordinary expenses for Jordan and Sarah, including post-secondary education costs (pursuant to s. 7 of the *Federal Child Support Guidelines*, SOR/97-175 (“FCSG”)), for a total of \$75,652. The order also terminated Niel’s obligation to maintain life insurance for his daughters.

[55] As noted above, Niel received \$95,000 from the trust on October 11, 2018.

[56] With respect to Niel’s third request for funds, made in April of 2019, which request was denied, Niel testified on cross-examination that he was told that the request was denied because it was “felt that we need to pass the accounts before any other discussions came up.”

[57] The email communications produced after the examinations tend to confirm this evidence. Niel wrote on April 15, 2019, and advised that he had found a home in Guelph which he wished to purchase. He said that he had saved \$40,000 but that he required about \$80,000 more for a sufficient downpayment. He wrote that “I would like to request funds from Mom’s estate for the remaining down payment.”

[58] Tom responded that same day, saying as follows:

This in my opinion fits the wording of maintaining your life. For over 20 years you have been unable to afford one.⁷ I’m sure mom would approve.

Others?

[59] The next day, Mr. Cameron wrote and said that he “would agree that this appears to fit under the broad directive of “maintaining your lifestyle” but said that he was interested to have Mr. Grant’s opinion on the matter.

[60] After reviewing the will, Mr. Grant wrote to the applicants on April 23, 2019, and said that he thought that Jordan and Sarah might argue that the proposed encroachment was not authorized by the will, although he did not think this argument would be successful. Nevertheless, he advised

⁷ It is not clear to me what Tom is referring to here as the evidence shows that, at the time of this email, Niel had owned homes with Jodie within the preceding 20 years.

that the estate accounts should be passed so that the encroachment could be considered by the court.⁸

[61] In his first affidavit, Mr. Cameron said that there was much discussion between he and Tom about this third request, and that they consulted counsel. Ultimately, Mr. Cameron said that he and Tom determined that the third payment was not necessary to maintain Niel's standard of living and they denied the request.

[62] None of this reveals that the trustees considered Jordan and Sarah's interests when considering Niel's third request (although, certainly, denying it was in their interests). Mr. Grant's advice appears to be based instead on the possibility that they might complain because the payment was not necessary to maintain Niel's lifestyle, not on an even-handed consideration of their interests.

[63] As noted above, Niel purchased a house without the assistance of a payment from the trust in May 2019.

[64] In 2024, after retaining new counsel, Mr. Cameron and Niel filed new affidavits. For the first time, Tom also filed an affidavit. None of these affidavits asserts that the trustees considered the interests of Jordan and Sarah when determining whether Niel's requests for funds ought to be granted. Both Tom and Mr. Cameron say that they approved payments because they were necessary to maintain Niel's standard of living and both say they relied on Mr. Grant's advice while at the same time asserting privilege over that advice.

[65] In summary, to the extent that there is evidence of the considerations of the trustees, it seems that the only considerations respecting Niel's three requests for funds were whether granting the request was necessary to maintain Niel's standard of living and whether Jordan and Sarah might complain if an encroachment was approved.

⁸ It is not clear why the applicants have produced this email given that they continue to assert privilege over their communications with Mr. Grant.

[66] The third reason for my conclusion that the trustees did not act with an even hand relates to the size of the two payments to Niel.

[67] Together, the two payments totalled \$145,000. The entirety of the one-quarter share set aside for Jordan and Sarah was \$375,000 less expenses related to their medical care or to maintaining Niel's standard of living. The payments to Niel, then, amounted to nearly 40% of the capital of that one-quarter share.

[68] Compare the case of *Carley*, which bears some similarity to this case. There, the trust in question held a share of the estate and from that share the income it generated was to be paid to the deceased's son David during his lifetime. The executors were also permitted to approve encroachments on the capital of the trust "from time to time for the benefit" of David. Upon David's death, the remaining capital was to be distributed to his children. In that case, Greer J. criticized encroachments approved by the executors totalling over \$16,000, or 14.75% of the capital of the trust: see para. 18. She concluded as follows (at paras. 20 and 24):

The deceased's Will gives the Executors no power to ignore the even hand principle. There was no sanction for the Executors to distribute large sums of capital to person including David himself. To have paid over \$16,000 from the capital of the Trust within a few months to keep David out of debt was a complete negation of the even hand principle. ...

[...]

To encroach on the capital of a trust for the "benefit" on the income beneficiary does not mean one can do so without keeping the even-hand principle in mind. Encroachments must be looked at in light of the competing interests of the income and capital beneficiaries, and at the reasonableness of the request and the magnitude of the request.

[69] Here, percentage-wise, the "magnitude of the request" made by Niel (for about 40% of the capital) far exceeded the criticized encroachments made in *Carley* (about 15%). In my view, that total far exceeds what might have been reasonable to maintain Niel's standard of living bearing in mind the interests of Niel's children in the capital of the trust.

[70] I am fortified in this view by the structure of Elizabeth's will and the wording of paragraph 3(s)(i)(b). With respect to the structure of the will, I note that each of the four one-quarter shares

was intended for the ultimate benefit of Elizabeth’s grandchildren. It was obviously her intention that the grandchildren benefit from a generous inheritance from her, divided equally as between her four children, given that the will almost completely passes over the generation between Eliabeth and her grandchildren (which generation includes Niel). For two sets of those four sets of grandchildren, before the youngest in each set turns 30, the will permits payments out as described above with respect to the share for Niel’s children, and for the upkeep of the family cottage with respect to the share for Tom’s children.

[71] It seems to me that at the time she created her will (see *Walters*, at para. 37), Elizabeth intended that all her grandchildren, including Jordan and Sarah, be well-provided for. This conclusion is supported to some extent by the language of para. 3(s)(i)(b), the opening words of which approve of the use of the “whole” of the income of the trust for payments out for the defined purposes before Sarah turns 30, but only the use of “part or parts” of the capital of the trust. Encroachments on the capital available to Jordan and Sarah, then, should have been of a magnitude that respected Elizabeth’s intention that her grandchildren be her primary beneficiaries. In my view, the encroachments approved for Niel did not do so.

[72] This is especially so when one considers that a significant portion of the payments made to Niel was used by him to pay for things which were the right of Jordan and Sarah to receive, albeit indirectly. With respect to the first payment of \$50,000, in his 2024 affidavit, Niel explains that among the reasons he had “maxed out” his line of credit and needed help paying it off included his obligation to pay child support after his separation from Jodie.⁹ With respect to the second payment of \$95,000, it will be recalled that \$5,652 of the total lump sum settlement amount of \$60,000 that Niel paid to Jodie (which was the chief reason for this second payment), was for child support. That is, it was money intended to allow Jodie to care for Jordan and Sarah. Moreover, another portion of that lump sum payment – \$10,000 – was for the post-secondary education expenses of Jordan and Sarah. Contrary to the submission of the applicants, child support is not just some amount of money that one pays to one’s ex-spouse, it is the *right of the child* that her payee parent receives it: *D.B.S. v. S.R.G.*, 2006 SCC 37 at para. 38. Further, it was also Niel’s obligation to pay

⁹ Tom’s 2024 affidavit also says that he was advised that Niel’s financial difficulties were caused in part by Niel’s obligation to pay child support.

his fair share of the reasonable expenses associated with Jordan and Sarah’s post-secondary education (FCSG, s. 7(1) and (2)), and that share was for their benefit, not Jodie’s.

[73] In other words, by approving the payments to Niel, the trustees were allowing Niel to encroach on capital that was being held in trust for Jordan and Sarah for the purpose of fulfilling obligations he had to Jordan and Sarah. No even-handed consideration of the purpose of Niel’s request for the payments could have permitted such an outcome. In this respect, I note that Mr. Cameron acknowledged in cross-examination that he was aware that Niel intended to use the second payment in part to fulfil his support obligations, but a question about whether this was a concern to him was refused because it was said to call for a “legal conclusion.”¹⁰ In any case, I am satisfied that it ought to have been a concern to the trustees, and that the approval of the payment for this purpose was not even-handed.

4.3 Did the trustees act reasonably?

4.3.1 The failure to act with an even hand

[74] The applicants’ primary position is that they were not required to apply the even hand rule, that they acted reasonably in approving the payments to Niel, and that there is no basis upon which to interfere with their exercise of discretion.

[75] I have already found that the even hand rule ought to have been applied by the trustees and that its application was an important part of their duties as fiduciaries. Failing to apply it, then, was a breach of those duties, and a breach of fiduciary duty is a basis upon which to interfere with a trustee’s exercise of discretion: *Cowper-Smith v. Morgan*, 2017 SCC 61, at para. 41. Such a breach amounts to bad faith, or at least an absence of good faith, and good faith and fairness as between beneficiaries are necessary ingredients in the exercise of a trustee’s discretionary powers: *Walters*, at para. 42; *Hunter Estate v. Holton* (1992), 7. O.R. (3d) 372 (Gen. Div.), at p. 379. If trustees have ignored relevant factors, they will have “abused their discretion ... even where the

¹⁰ The question was as follows” “Did it concern you, Mr. Cameron, that you were effectively taking money away from Jordan and Sarah, to give to Niel to in turn satisfy his court obligation for child support for his daughters, did that concern you?”

power is expressed to be absolute or uncontrolled.”: *Banton v. Banton* (1998), 164 D.L.R. (4th) 176 (Ont. Ct. (Gen. Div.)), at p. 234; *Walters*, at para. 45.

[76] Ignoring the interests of Jordan and Sarah, then, amounts to a failure to apply the even hand rule, a breach of fiduciary duty, an absence of good faith, and an abuse of discretion. In these circumstances, the trustees cannot be said to have acted reasonably in approving the payments to Niel.

[77] There are further reasons, however, to come to the conclusion that the trustees acted unreasonably. These reasons relate to Elizabeth’s intentions, the conduct of the trustees, and the reasonableness (or lack thereof) of Niel’s requests.

[78] In *Walters*, Pepall J.A., provided the following guidance (at para. 65; emphasis added):

Having examined the jurisprudence and the commentary, one can extract certain threads. The starting point is that effect must be given to the testator's intentions as ascertained from the language of the will and surrounding circumstances. Trustees must therefore carefully examine the wording of the will or trust instrument. "The duty to consider all relevant matters has as its obvious corollary, a duty to make all necessary inquiries so that the trustee is adequately equipped to make a decision": Cullity, *Judicial Control of Trustees' Discretions*, at p. 116. Absent other direction in the will, I fail to see how a trustee can satisfy itself that payment of capital to the income beneficiary is necessary or advisable without considering the beneficiary's financial circumstances. [...]

4.3.2 The meaning of the will

[79] Starting with Elizabeth’s intentions then, I have already observed that the structure of the will and the wording of para. 3(s)(i)(b) satisfy me that it was intended that her grandchildren be the primary beneficiaries of her estate.¹¹ I have also already concluded that the language of the will did not permit the trustees to ignore the interests of Jordan and Sarah when deciding whether to encroach on the trust for purpose of maintaining Niel’s standard of living. The meaning of the will, insofar as it permits payments intended to allow Niel to “maintain [his] standard of living,”

¹¹ I note that Niel’s email of September 25, 2018, in which he recognizes the “depletion” which payments to him represent for Jordan and Sarah, tends to confirm that Niel shared this interpretation of the will.

must therefore be consistent with these limitations. In other words, payments to Niel for the purpose of maintaining his standard of living could not be of such a magnitude that they defeated the primary purpose of providing a generous inheritance to grandchildren.

[80] The will does not in any way define Niel’s “standard of living,” but Elizabeth’s intentions may also be determined by reference to the “armchair rule”, whereby the “court puts itself in the position of the testator at the time the will was made”: *Walters*, at para. 37, emphasis added.

[81] At the time Elizabeth signed the will in 2003, Niel had enjoyed a privileged upbringing and had secured several university degrees, including a Ph.D. He was an associate professor at the University of Guelph. He was married and he had two small children. His separation and divorce were still many years in the future. He had no debt. He and Jodie enjoyed a comfortable life.

[82] There is no evidence before me as to why in 2003 Elizabeth provided for payments to maintain Niel’s standard of living. There is no evidence that Elizabeth might have had reason to be especially concerned that Niel alone, of her four children, might be unable to maintain his standard of living. Indeed, the evidence before me of circumstances in 2003 points to the opposite conclusion.

[83] Nevertheless, I infer from these facts that Elizabeth hoped that Niel would continue to have a standard of living that was comfortable as might befit a professional person from a moneyed background. She envisaged that it was possible, even if not likely, that he may need assistance at some point in the future and that, where “necessary,” encroachment on the trust could be authorized. But I do not read the will as authorizing that all or even a substantial portion of the capital of the one-quarter share set aside for Jordan and Sarah could be used for that purpose. In other words, none of this context detracts from the conclusion that Elizabeth intended her grandchildren to enjoy the lion’s share of her estate. In my view, the use of the word “necessary” – which imposes a high standard for the justification of payments – supports this view of Elizabeth’s intention. It seems to me that the payments made to Niel were not faithful to this intention and that they were therefore not reasonable.

4.3.3 The trustees’ inquiries

4.3.3.1 Necessity and Niel's standard of living

[84] In 2020, Niel and Mr. Cameron filed affidavits and were cross-examined. Niel testified that his financial circumstances were poor after his separation from Jodie. Mr. Cameron's 2020 affidavit does not explain how he concluded that either of the two payments made to Niel were necessary to maintain Niel's standard of living. He says that those payments were approved on the advice of counsel. The advice, of course, has not been disclosed. Mr. Cameron also says in his 2020 affidavit that the third request made by Niel was not approved because he determined that it was not necessary to maintain Niel's standard of living.

[85] On cross-examination in 2020, when asked on what he was basing his determinations about Niel's standard of living, Mr. Cameron said that he relied on the language of the will which gave him "absolute discretion in making these decisions." He said that he did not have a "definitive definition" of "standard of living" and, importantly, he said repeatedly that he knew very little about Niel's actual standard of living and had made no inquiries about it.

[86] In 2024, Niel and Mr. Cameron swore new affidavits and Tom swore an affidavit for the first time in these proceedings. In his 2024 affidavit, Mr. Cameron said that his evidence on cross-examination was incorrect insofar as he had said that he knew little about Niel's standard of living. He said that he had testified in this way because he was concerned that he might inadvertently waive solicitor-client privilege by doing so as he had discussed Niel's standard of living with Mr. Grant. He also asserted in 2024 that he asked Mr. Grant for advice about the definition of "standard of living" and that he followed the advice he received. Mr. Cameron then continues in his 2024 affidavit to set out the basis for his knowledge of Niel's financial circumstances.

[87] I give Mr. Cameron's second affidavit no weight. The transcript of his cross-examination reveals no ambiguity or hesitation whatsoever as to his lack of knowledge of Niel's circumstances. Mr. Cameron unequivocally stated at that time – not once, but repeatedly – that he knew little or nothing of Niel's standard of living. He did not mention advice from Mr. Grant in this respect or with respect to the definition of "standard of living", did not make a claim of privilege, did not ask for a break so he could get advice, did not suggest that he had information that he could not or was

not sure that he could share. He simply answered the questions without qualification. I add that Mr. Cameron is not unsophisticated. He is a financial advisor of long experience. If his 2024 affidavit is true, then Mr. Cameron was not being truthful under cross-examination. If he was being truthful under cross-examination, his affidavit is false. Either way his evidence is entitled to no weight on these points.

[88] Tom's 2024 affidavit says that he and Mr. Cameron relied on Mr. Grant's privileged advice. He also says that he was fully aware of Niel's standard of living at all stages of Niel's life. Like Mr. Cameron, Tom relied on what he understood to be the trustees' "absolute discretion" to approve payments to Niel. He says that he and Mr. Cameron did in fact consider whether the payments were necessary to maintain Niel's standard of living. His affidavit is not supported by any attached corroborating documentation in this respect and is supported by nothing else other than the small collection of communications which were provided in response to undertakings given.

[89] While the parties dispute the extent and causes of Niel's financial hardship following his separation from Jodie, I am satisfied that there was some financial pressure on Niel as there often is in circumstances of family breakdown. It may be that this situation might have justified some encroachment on the trust, consistent with the will as I have interpreted it, and subject to what I have said about the need to act with an even hand that respects the interests of Jordan and Sarah.

[90] However, the evidence does not satisfy me that the payments requested by Niel were in fact necessary, or that inquiries were made respecting necessity – especially not by Mr. Cameron – or that Tom and Mr. Cameron made inquiries into the extent to which it was necessary to encroach on the trust to maintain Neil's standard of living. For example, there is no evidence that they considered whether something less than the full amounts being requested by Niel might have been sufficient. This should not have been an all or nothing proposition.

[91] Insofar as both Tom and Mr. Cameron expressly take the position that their discretion was absolute, it seems that their view was that very little if any inquiry was required. It is difficult to be certain, though, given that they both rely on undisclosed legal advice as evidence of their faithfulness to the directives of the will. And insofar as they relied on that advice, it is difficult to

know how they assessed whether payments were necessary to maintain Niel's standard of living because the legal advice has not been disclosed.

[92] One is left to wonder, then, what advice – if any – they received about whether it could ever be “necessary” to encroach on the trust to help Niel satisfy his spousal and child support obligations. The amount of support owing is based on the means of the parties to family litigation, and those means are determined largely by a person's assets and income,¹² the very things which also determine one's “standard of living.” In other words, the law already takes into account the payor's economic standard of living when determining levels of support based on assets and income. As the respondent submits, in these circumstances, insofar as the payments to Niel were intended to pay for spousal and child support, it is difficult to see how they could never be said to be “necessary to maintain Niel's standard of living.”¹³

[93] In any case, the applicants have refused to waive privilege over the advice they received yet rely on it as evidence of their fidelity to Elizabeth's intentions. It is the applicants who made the advice a live issue in this case and, having done so, it seems to me that the respondent was entitled to get to the bottom of that advice: *Regina v. Campbell*, [1999] 1 S.C.R. 565, at para. 73. In the absence of disclosure of Mr. Grant's advice, I give the claim that his advice was followed no weight in assessing either the good faith of the trustees or the reasonableness of the decisions to allow payments to Niel: *Campbell*, at paras. 67 – 73.

[94] To the very limited extent that the record does provide a window onto the advice of Mr. Grant, it reveals advice that had nothing to do with how to assess the necessity of making payments to maintain Niel's standard of living. As I have already described, that advice came in connection with Niel's third request for funds, which was refused. At that time, although he referred to the necessity requirement in the will, Mr. Grant counselled only that the trustees apply to pass the accounts given that Jordan and Sarah might object.

¹² See, for example, the FCSG and s. 33 of the *Family Law Act*, R.S.O. 1990, c. F-3.

¹³ Moreover, in Niel's case, the calculation of his support obligations – based on his assets and income – did not take into account his access to the trust set aside for his daughters. If it had, his obligations to Jodie would have been greater.

[95] As it turns out, the third payment was not necessary, even though both trustees had opined that it was (albeit tentatively in Mr. Cameron’s case), and even though Mr. Grant said that he thought the court would endorse that view. The third payment had been requested by Niel so that he could purchase a home. Even without the payment, however, he was able to purchase a home shortly thereafter.

[96] In my view, the evidence does not establish that the trustees engaged in any satisfactory consideration of whether the payments requested by Niel were necessary to maintain his standard of living. I am fortified in that view by the fact that the trustees had minimal information respecting the justifications for the requests which Niel made for payments, and I turn to that issue now.

4.3.3.2 The justification for the first payment

[97] There is very little evidence that the trustees made “all necessary inquiries” before approving payments to Niel: *Walters*, at para. 65.

[98] In his original affidavit, Mr. Cameron says that Niel provided to Mr. Grant evidence of his need for \$50,000 to “pay off an existing line of credit arising as a consequence of the financial pressures imposed on Niel following his divorce from Jodie in 2013.” But Mr. Cameron neither requested nor maintained copies of whatever documentary evidence was given to Mr. Grant and there is no evidence of what that documentation might have been. On cross-examination, Mr. Cameron had no recollection of what documentation he saw, if any, and said that he was told that Niel had a \$50,000 line of credit. There may also have been a document to that effect, but he could not “specifically recall.” He did not request any additional financial documents prior to authorizing the \$50,000 payment to Niel. Mr. Cameron said that at some point he spoke to Niel about the line of credit and from that conversation he “got the general sense that [Niel’s] \$50,000 line of credit was a debt he was not going to be able to diminish.” There is no evidence of any other inquiry about how the debt was amassed, what means Niel had to maintain or retire it, or how doing so was affecting Niel’s standard of living. Mr. Cameron’s 2024 affidavit adds little to this body of evidence, apart from his assertion that he relied on Mr. Grant’s advice about whether he needed to request documentation from Niel or maintain records and that he relied on the advice, although privilege is asserted over it.

[99] Niel's original affidavit does not say what, if any, evidence he provided to the other trustees or to Mr. Grant to support his request for \$50,000, but he does attach to his affidavit bank statements showing that he used the payment he received to retire a debt of \$49,711.79 on his line of credit. Neither does Niel's 2024 affidavit say what he told Tom and Mr. Cameron about the reasons for his need for \$50,000, but both affidavits set out that causes of his indebtedness (which causes included spousal support, child support and s. 7 payments). Under cross-examination, Niel said that he simply told the trustees that he had "maxed out" his line of credit. He did not tell them how that had come to pass, and they did not ask. He was not asked to put his request in writing.

[100] In his 2024 affidavit, Tom says that he knew of Niel's expenses (including spousal and child support) and his line of credit from discussions with Niel and other family members, and of Niel's effort to save for the purchase of a home, but does not describe any inquiries for confirmation of what he was told in this regard, nor does he attach any supporting documentation to his affidavit. Tom's affidavit also reports that he and Mr. Cameron met with Mr. Grant and relied on his advice but asserts that that advice is protected by privilege. Tom says that he and Mr. Cameron trusted that what Neil was saying to them about his line of credit was true, and that they did not request documentation from him. Tom adds that Niel has since provided evidence of the state of his line of credit, which confirms that what he told Tom and Mr. Cameron was true.

[101] While it appears that the evidence establishes that Niel had in fact "maxed out" his line of credit, (and that he used the money provided to him from the trust to pay it off), there is no satisfactory evidence that the trustees did anything to confirm this fact *before* they approved the payment of \$50,000, or that they made any inquiry into how it was that the line of credit had come to be in that state, or that they questioned why retiring it was "necessary", or that they considered whether it was sufficient to provide something less than \$50,000. The trustees simply relied on Niel's assertions that his expenses were high, that he was trying to save to purchase a house, and that he needed help to retire the debt he had amassed on his line of credit.

[102] In my view, the trustees did not make all necessary inquiries respecting the justification for the first payment to Niel before approving it.

4.3.3.3 The justification for the second payment

[103] Similarly, the evidence establishes that the trustees made inadequate inquiries respecting the justification for the second payment to Niel before it was approved.

[104] It will be recalled that Niel wrote to the trustees and to Mr. Grant on September 17, 2018, proposing to delay disclosure of the amount of funds being held because he hoped to make a lump sum payment to Jodie. At that time, Jodie's counsel was proposing a lump sum of about \$113,000 and that proposal was forwarded to the trustees. Niel's counteroffer, prepared a week later, was also sent to the trustees, and it proposed a lump sum payment of \$60,000 for spousal support and \$5,652 for child support for a total of \$65,562. Niel's email to the trustees asked that they consider a payment that would cover the lump sum (that had not yet been agreed upon) "and legal expenses." Ultimately, on October 1, 2018, the court ordered a lump sum payment of \$60,000 for spousal support, \$5,652 for child support, and \$10,000 for s. 7 expenses, or a total of \$75,652. It is not clear whether Tom and Mr. Cameron ever saw the final order of the court or that they were advised as to what had been agreed and ordered, although the payment to Niel was made after the date of the court order.

[105] A request for the amount of \$95,000 is not reflected in any document in the record. The documents show only that Niel was requesting help with making the lump sum payment, the amount of which had not yet been finalized, and with paying his legal fees in an unspecified amount.

[106] Mr. Cameron's first affidavit says that the payment of \$95,000 was intended to "pay off [Niel's] existing support obligations in a lump sum." He then adds that a portion of this payment was intended to cover Niel's legal expenses for which an account had not yet been rendered by his counsel at the time the payment was approved. Mr. Cameron deposes that he was satisfied that he had been provided a "genuine pre-estimate of the account and that any difference between such estimate and the actual account would be negligible." Mr. Cameron's affidavit does not say what the pre-estimate was, attaches no documents supporting these assertions, and makes no comment on what Niel's legal fees actually were in the end.

[107] Niel's first affidavit does not say what he told the trustees about the justification for his second request other than that he asked them to "provide me with the necessary assistance to close out any legal matters with Jodie." Then he would be able to start saving for a home. Niel says in his affidavit that he used the second payment to pay the lump sum ordered by the court (\$75,652), that he paid his legal fees of \$12,043.89, and that he paid off his Visa credit card bill of \$6,404.82.

[108] Under cross-examination, Mr. Cameron said he did not receive any information other than what was sent to him respecting the lump sum payment. He said that he did not remember what the estimate for Niel's legal fees was but did not dispute that it was more than the actual bill. He confirmed that the trustees had never asked for any money back from Niel.

[109] Tom's 2024 affidavit says that Niel provided copies of the settlement negotiations between counsel so that he knew what the lump sum payment was but does not attach any of those documents to his affidavit. None of the communications between counsel which are in the record provides the amount of the lump sum payment which was ordered by the court. Tom also says that Niel provided the trustees with "a genuine pre-estimate" of his legal fees. He does not say what this pre-estimate was, nor does he attach any document relating to the pre-estimate, nor does he explain how he determined that it was "genuine." Tom further swears that he regards the fact that there was a difference between the original estimate – whatever it was – and the actual legal fees incurred by Niel as "inconsequential." This is so because Niel used the money to "pay off debts, including legal expenses, which was entirely appropriate and was agreed to by me and [Mr. Cameron]."

[110] There is no evidence that the trustees were ever asked to approve the \$95,000 payment on the basis that it would be used in part to pay off Niel's Visa bill other than Niel's 2024 affidavit in which he asserts, well over four years after the first affidavits were filed and had been cross-examined upon. In the absence of any documentary corroboration for this claim, I give this evidence no weight. Similarly, Tom's 2024 assertion that he and Mr. Cameron "agreed" that paying off debts (other than the lump sum and legal fees) was appropriate is not supported by any documentary evidence or by the evidence of Mr. Cameron and comes too late in these proceedings to be credible.

[111] In summary, I draw the following conclusions. The trustees approved a \$95,000 payment to make the lump sum payment and to pay legal fees. They were not asked to make a payment so that Niel could retire other debts. It is not clear that the trustees knew what the lump sum payment was to be when they approved an encroachment for this purpose. It is clear, however, that they did not know what Niel's legal fees were to be. They never inquired as to what the actual fees were. In the end, Niel used the money to pay the lump sum (\$75,652), legal fees (\$12,043.89), and his Visa credit card bill (\$6,404.82), for a total of \$94,099.89. The use of roughly \$900 is then left unexplained. The money used for purposes other than the lump sum and legal fees (roughly \$7,300) was not a "negligible" or "inconsequential" amount, especially when viewed from the perspective of Jordan and Sarah, two young women then in their late teens and twenties. There appears to have been no discussion of whether something less than \$95,000 might have been sufficient for Niel's purposes, as was apparently the case.

[112] In my view, this payment was not properly justified. The payment was approved before the trustees knew how much money was "necessary", yet the trustees did not later confirm what in fact had been necessary. The payment was used for purposes other than that for which it had been requested. Clearly, the trustees did not satisfy themselves that this payment was "necessary." This was not reasonable.

4.3.4 Conclusion respecting reasonableness

[113] The burden of proof on an application to pass accounts is on the applicants: *Nicholson*, at para. 6. The standard of care and diligence required of trustees is "that of a person of ordinary prudence in managing their own affairs": *Nicholson*, at para. 8.

[114] In all these circumstances of this case – the failure to act with an even hand, the failure to consider that the will protected the interests of Jordan and Sarah, the approval of payments representing a substantial percentage of the capital of the trust, the failure to exercise due diligence, the reliance on undisclosed legal advice, the over-payment for legal fees, and the use of a portion of one of the payments for a purpose other than one for which it was requested – I am driven to the conclusions that the requests for the payments were not reasonable, that the payments themselves were not reasonable, that the applicants have failed to meet their burden to establish

reasonableness, and that the applicants did not exercise the ordinary prudence of a person managing their own affairs.

[115] On the whole, all three of the applicants appear to have regarded the trust as a pot of money from which Niel could draw with limited justification and with little regard for how much money would be left for Jordan and Sarah given how they interpreted the will, the lack of inquiry made about the requests, and the purposes for which encroachments were approved.

4.4 Remedy

[116] The powers available to me on an application to pass accounts are set out in s. 49 of the *Estates Act*, R.S.O. 1990, c. E.21. Section 49(3) provides as follows:

The judge, on passing any accounts under this section, has power to inquire into any complaint or claim by any person interested in the taking of the accounts of misconduct, neglect, or default on the part of the executor, administrator or trustee occasioning financial loss to the estate or trust fund, and the judge, on proof of such claim, may order the executor, administrator or trustee, to pay such sum by way of damages or otherwise as the judge considers proper and just to the estate or trust fund, but any order made under this subsection is subject to appeal.

[117] Jordan asks me to use the authority of s. 49 to order that the accounts not be approved, and that the amount of \$145,000 be returned to the trust by Niel or, in the alternative, to find that all three of the applicants are jointly and severally liable for the return of that amount to the trust.

[118] In my view, although Niel requested and received the payments, all three applicants are responsible for them. I order that they shall be jointly and severally responsible for the return to the trust the amount of \$145,000 with interest from the dates of the two payments.

5. Conclusion and costs

[119] For all these reasons, the application to pass accounts is dismissed and the applicants are jointly and severally ordered to repay to the trust \$145,000 as follows:

- (a) \$50,000 with interest from June 29, 2018; and

(b) \$95,000 with interest from October 11, 2018.

[120] If the parties are unable to agree on costs, the respondent may serve and file written costs submissions within 10 days of the release of these reasons directed to my attention by email to my judicial assistant at mona.goodwin@ontario.ca and Kitchener.SCJJA@ontario.ca. The applicants may serve and file responding costs submissions within 7 days thereafter. The respondent's reply, if any, shall be served and filed within 3 days thereafter.

I.R. Smith J.

Released: April 27, 2026

CITATION: Karrow v. Boghosian, 2026 ONSC 2425
COURT FILE NO.: CV-20-645-00ES
DATE: 2026/04/27

ONTARIO

SUPERIOR COURT OF JUSTICE

**IN THE MATTER OF THE ESTATE OF
ELIZABETH JOAN KARROW, DECEASED**

BETWEEN:

NIEL ALEXANDER KARROW, BRIAN D.
CAMERON AND THOMAS PAUL KARROW

Applicants

– and –

JORDAN BOGHOSIAN

Respondent

REASONS FOR JUDGMENT

I.R. Smith J.

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