

**CITATION:** Schutz Estate (Re), 2023 ONSC 3959  
**COURT FILE NO.:** CV-19-8675  
**DATE:** 2023-07-04

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:** )  
)  
IN THE MATTER OF THE ESTATE OF )  
Gerd C. Schutz aka Gerhard Schutz, )  
deceased )  
)  
**BETWEEN:** )  
)  
Rosemarie Roggenbuck as Estate Trustee ) Marc A. Huneault / Devan J. Munch, for the  
for the Estate of Gerd C. Schutz aka ) Applicant  
Gerhard Schutz, deceased )  
Applicant )  
)  
**AND:** )  
)  
Angela Schutz, Ralph Schutz, Corey Schutz, ) Réjean Parisé, for the Respondent Angela  
Jennifer Schutz, Samantha Hannan and ) Schutz and Ralph Schutz  
Daclan Hannan ) Corey Schutz, Jennifer Schutz, Samantha  
Respondents ) Hannan and Daclan Hannan, not appearing  
)  
)  
) **HEARD:** May 29 and 30, 2023, in person

2023 ONSC 3959 (CanLII)

**DECISION ON APPLICATION**

**R.D. GORDON, J.**

**Overview**

[1] Gerd Schutz died on June 15, 2013. He is survived by his wife Rosemarie Roggenbuck, and his two children Angela and Ralph.

[2] A few years prior to his death, Mr. Schutz executed a will in which he appointed his wife as executrix and left her 80% of the residue of his estate. The remaining 20% was to be divided equally between Ralph and Angela.

[3] The will was not contested. Rosemarie was granted a certificate of appointment of estate trustee with a will on November 28, 2013.

[4] In 2014 Rosemarie provided Angela and Ralph with a brief accounting of the Estate. It indicated total assets of \$384,750.06, monies disbursed of \$25,763.58, and a balance for distribution of \$358,986.48.

[5] Ralph and Angela were surprised at the size of the estate. They expected it to be much more. They knew Mr. Schutz had, within three months of his death, sold real estate for about \$600,000. They also believed he had a significant investment account. They could not understand what had become of his money.

[6] There followed a somewhat confused and time-consuming legal battle that led to an order requiring Rosemarie to pass accounts. That is what was before me – a contested passing of estate accounts. At issue is whether Rosemarie has fully accounted for all assets held by Mr. Schutz at the date of his death. In particular, the respondents take the position that the accounting is inadequate because it does not address or account for: (1) A policy of life insurance paid to Mr. Schutz's corporation following his death; (2) The proceeds of a RRIF held by Mr. Schutz at the date of his death; (3) The proceeds of sale of two properties approximately three months prior to Mr. Schutz's death; (4) Mr. Schutz's interest in real property in the name of Rosemarie located in Niagara-on-the-Lake; and (5) Legal fees paid by the estate on account of this litigation of \$21,074. In addition, the respondents dispute the trustee compensation claimed by Rosemarie and are of the view that capital receipts reveal assets far in excess of that which is proposed for distribution.

[7] The applicant raises preliminary issues of whether the respondents have standing to assert all of these claims within the context of a passing of accounts, and whether their claims related to property held by Rosemarie have been brought outside the applicable limitation period.

### **Preliminary Issues**

#### *The Issue of Standing*

[8] The applicant makes three arguments asserting that the respondents have no standing to bring their claims and the court no jurisdiction to grant them relief.

[9] First, it is argued that the respondents' objections to the accounts pertain to actions taken by Mr. Schutz prior to his death. They cite *Munro v. Thomas* 2021 ONSC 3320 as authority for the proposition that there is no requirement under the Rules for an executor to account for assets falling outside the estate and that were passed during his life for tax planning, estate planning, or other purposes.

[10] However, the context of that case must be considered. It was an application by a beneficiary for an order that the estate trustee provide full banking records for the deceased for some six years prior to her death, full and complete medical records for the deceased, an affidavit explaining all gifts made by the deceased during her lifetime, and that the estate trustee submit to examination and cross-examination under oath. The court held that the estate trustee had administered and accounted for the estate in a full and complete manner and that the demands being made by the applicant fell outside of the estate trustee's accounting obligations given that the allegations made by the applicant were unsupported by the evidence.

[11] That is quite different from what is before me. In this case Rosemarie has provided little, if any, explanation for the whereabouts of the \$600,000 received by Mr. Schutz and his company just three months before his death. Furthermore, although she has explained why Mr. Schutz transferred significant funds to her to purchase property in Niagara-on-the-Lake, she has a personal interest in the issue and a consequent inability to offer an objective, unbiased view of the transactions. She is essentially in a conflict of interest relative to this issue.

[12] Section 49(2) of the *Estates Act* R.S.O. 1990, c. E.21, provides that the judge on passing of accounts of an executor has jurisdiction to enter into and make full inquiry and accounting of the property that the deceased was possessed of or *entitled to*. Subsection 3 gives me power to inquire into any complaint or claim of misconduct, neglect, or default on the part of the executor occasioning loss to the estate and on proof of such a claim to order the executor to pay such sum by way of damages to the estate as is considered proper.

[13] Rosemarie's accounts provide a statement of assets at the date of death. Angela and Ralph dispute those accounts because certain defined assets to which he was entitled appear to be unaccounted for either by neglect or default. In my view, this is precisely what a passing of accounts is meant to resolve.

[14] Second, the applicant disputes the respondents' right to advance several of their claims because they are not specified in the Notice of Objection.

[15] Rule 74(12) provides that 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.

[16] On a fair reading of the respondents' Notice of Objection, the only issues raised are the legal costs paid from the estate in dealing with the dispute and the failure of Rosemarie to account for funds paid to her by the deceased and to which the estate may claim a resulting trust. The remaining claims cannot be raised unless I order otherwise.

[17] I have been provided no caselaw on the circumstances in which courts have allowed claims to be raised outside of the Notice of Objection.

[18] Estate accounts are often lengthy and detailed documents including hundreds, if not thousands of entries. The rules require an objector to file a notice of objection in form 74.45 specifying each objection in separate and consecutively numbered paragraphs. This is required so that the trustee knows what specifically is at issue and can frame an appropriate reply to the objections. The accounts, the notice of objections to accounts, the reply to notice of objection of accounts, and any responses to the reply, comprise the documents that frame and delineate what is in dispute. These documents allow the parties and the court to know what is at issue and to properly prepare to address those issues. They are the foundation upon which the hearing is conducted.

[19] If knowing what is at issue and having an opportunity to properly prepare to address those issues is what drives the contested passing of accounts process, then it is appropriate to allow an objector to raise an objection at a hearing on a passing of accounts that was not raised in a notice

of objection to accounts when: (1) the objection has been made to the trustee in circumstances indicating the objector's intention to raise it at the hearing; and (2) adequate notice of the objection has been provided to allow the trustee to prepare to address it at the hearing.

[20] To properly consider the issue in the context of this specific case, it is necessary to understand some of the background to this litigation. Ralph and Angela began action CV-19-8237 seeking various relief including a finding that the monies advanced by Mr. Schutz to Rosemarie and used in the purchase of the home in Niagara-on-the-Lake be subject to a resulting trust and become an estate asset. By order dated June 7, 2019 in that action, Justice Poupore required that Rosemarie apply to pass accounts for the estate on or before August 30, 2019. In accordance with that order, the current application was commenced, and Ralph and Angela filed their Notice of Objection.

[21] At the first scheduled hearing to pass the accounts it was determined that the matter was not ready to proceed. In an endorsement dated November 24, 2020 Justice Cornell indicated that the "sole question that remains is whether there are assets that have not been accounted for." He ordered the objectors to deliver an affidavit that sets out the assets they assert properly form part of the estate by December 20, 2020. He ordered Rosemarie to provide a responding affidavit by January 22, 2021. He ordered cross-examination on affidavits by February 19, 2021. He ordered the objectors to file a proper notice of objection following completion of the cross-examinations and that the passing of accounts be scheduled for a full day hearing with *viva voce* evidence.

[22] In compliance with Justice Cornell's order, Angela and Ralph filed an affidavit taking issue with Rosemarie's failure to account for (1) the proceeds of sale of the two pieces of real estate totaling \$600,000; (2) the \$500,000 paid to Rosemarie by Mr. Schutz while he was alive; and (3) "other assets that were in the form of investments that she failed to disclose". Rosemarie delivered a responding affidavit addressing these issues.

[23] There seems to have been some difficulty having Rosemarie attend for cross-examination with the result that Ralph and Angela brought a motion to compel her attendance. Heard coincident with that motion was a motion by Rosemarie to strike the statement of claim Ralph and Angela had issued. By order dated June 7, 2021 Justice Boucher ordered the statement of claim struck as an abuse of process but without prejudice to Ralph and Angela's "right to litigate their property or trust claim" within the passing of accounts application. He ordered Rosemarie to attend for cross-examination.

[24] Rosemarie was subsequently cross-examined. She was questioned concerning the two pieces of real estate that had been sold, the monies she received to buy property in Niagara-on-the-Lake, a registered retirement income fund (RRIF) that she received as the designated beneficiary and a life insurance policy that was payable to Mr. Schutz's corporation following his death.

[25] There was no new notice of objection filed as ordered by Justice Cornell. The application to pass accounts was scheduled and came before me.

[26] The resulting trust claim was identified as an issue in the notice of objection and is properly raised.

[27] The issues relating to the proceeds of the sale of the real properties was not in the notice of objection but was contained in Angela's affidavit. It was the subject of questioning. It was an issue known to the Applicant and for which she had ample time to prepare. It is properly raised at the hearing.

[28] The issue regarding the use of estate funds to pay the costs of this application was raised in the notice of objection and is properly before me.

[29] The remaining issues were not in the notice of objection and did not appear in Angela's affidavit. Although questions were asked and undertakings delivered with respect to them, there was no notice to Rosemarie that they would be issues raised at hearing. She was given no opportunity to gather evidence to address the issues. It would be unfair to allow these objections to stand in these circumstances.

[30] Third, the applicant cites *Wall v. Shaw* 2018 ONCA 929 for the proposition that a notice of objection does not commence a proceeding. The argument follows that if no proceeding has been commenced, there is no basis for me to make a finding of resulting trust or grant relief to the respondents. In my view, the decision in *Wall v. Shaw* is somewhat narrower than proposed by the applicant. The court in that case found that a notice of objection does not commence a proceeding *within the meaning of section 4 of the Limitations Act*. Section 49(3) of the *Estates Act*, as noted above, provides me the authority to determine if an executor has been guilty of misconduct, neglect, or default occasioning financial loss to the estate. In my view, this provides me with the power to determine if the estate had a valid claim to assets that were not pursued by Rosemarie due to misconduct, neglect or default. If I were to so find it provides authority for me to order the payment of damages to the estate.

#### *The Limitations Issue*

[31] Rosemarie takes the position that the claim for a resulting trust is statute barred as it was brought more than two years after Angela and Ralph had knowledge of the facts in support of it. Ralph and Angela are of the view that their claim is a remedial resulting trust claim in property owned by Rosemarie and therefor falls within s. 4 of the *Real Property Limitations Act* which affords them the ten-year limitation period. They rely on *McConnell v. Huxtable* 2014 ONCA 86 in support of their position.

[32] I prefer to rely on *Wall v. Shaw* to resolve this issue. There the court of appeal determined that the filing of a r. 74.18(7) notice of objection to accounts in response to an application to pass accounts initiated by an estate trustee is not captured by s. 4 of the *Limitations Act*. Ralph and Angela are not making a claim. They are objecting to the manner in which the estate has been administered. If successful they realize no immediate benefit. Rather, the court can only order payment of damages to the estate thereby ultimately increasing the amount eventually payable to them.

## The Sale of Real Estate

[33] Mr. Schutz had for many years operated a successful landscaping business and retail garden centre through his company Gerd C. Schutz Landscaping and Construction Limited. The garden centre was located at 1753 Seymour Street in North Bay, as was his residence. Title was held jointly between he and Rosemarie. This property sold on April 2, 2013 and the net proceeds of sale were \$403,978.02. By way of signed direction from Rosemarie, the entirety of these funds were paid to Mr. Schutz following the sale.

[34] Abutting the Seymour Street property was a property on Progress Court. This was vacant property used to store various items related to the landscaping business. This property was owned by the corporation and was also sold on April 2, 2013. The net proceeds of sale were approximately \$186,800 and were paid to the corporation following closing.

[35] Rosemarie's evidence was that she had no personal information of what became of the funds from these two transactions except to say that she did not receive any of them. She has not produced the banking or investment account records from April 1, 2013 to the date of Mr. Schutz's death, which would likely clarify the issue considerably. She has basically relied upon the accountant Mr. Kendall to ensure that all of the money went to the correct place.

### *The Progress Court Sale Proceeds*

[36] With respect to the corporation, we know that Mr. Schutz effectively ceased his operations at the end of 2012. We know this because Ralph testified that he took over the business under a new business registration in January of 2013. From the corporate financial statements for the year end January 31, 2013 there are a few notable entries: (1) The current assets of the corporation were \$5,095; (2) There was due to the corporation from Mr. Schutz the sum of \$71,180; (3) There were liabilities totaling \$156,051.

[37] We know, from Mr. Kendall's letter dated October 10, 2013 (tab 12(a) of the application record), that as of Mr. Schutz's death on June 15, 2013, the value of his interest in the corporation was \$120,000 along with a shareholder loan due to him of \$50,000. It is safe to assume that Mr. Schutz's interest was valued after the payment of all liabilities aside from the loan due to himself. The sum of \$120,000 was subsequently paid to the estate on account of Mr. Schutz's interest in it. The \$50,000 has been stated as unrealizable – meaning there is no money and no assets in the corporation available to satisfy the debt.

[38] We know from the 2013 Financial Statements that the current assets were \$5,095. I will assume those assets were realized. We know that the corporation received \$68,697 on September 27, 2013 which I am satisfied represents the proceeds of the Manulife Life Insurance policy (see exhibits 19 and 20). We know the corporation would have received \$186,800 from the sale of Progress Court. And we know that Mr. Schutz paid into the company \$121,780, because his shareholder account went from \$71,180 owed *by* him to \$50,000 owed *to* him. In all, the corporation would have realized \$382,372 between January 31, 2013 and the date of his death.

[39] In that same time frame the corporation would have had to pay its debts of \$156,051 and pay the estate the sum of \$120,000 for a total of \$276,051.

[40] If the corporation realized \$382,372 but paid out only \$275,051 there is \$107,321 unaccounted for.

#### *The Seymour Street Sale Proceeds*

[41] The net proceeds of sale from the Seymour Street property were approximately \$404,000 the entirety of which was paid to Mr. Schutz. The question is: What became of these funds? Again, much would have been explained by providing the bank and investment account balances for Mr. Schutz from the period April 2 through June 15, 2013. In their absence, I am left to make reasonable inferences from the exhibits entered at trial.

[42] I have examined Mr. Schutz's income tax returns for the years 2008 through 2012. In 2008, 2009 and 2010 there is modest dividend income from various investment funds. In neither 2011 nor 2012 is there dividend income from any source other than his own company. The inference I draw is that Mr. Schutz had few if any investments at the end of 2012.

[43] We know that he when he died, he had an investment account with Dominion Securities that contained shares with an adjusted cost base of about \$202,600 (see his 2013 income tax return at 8(f) of the Application Record) and a cash balance of \$1,217. We know that he paid into his corporation the sum of \$121,180 (as noted above). We also know that his personal account had a balance of just over \$9,000 on his death. It is fair to infer that all these amounts originated from the proceeds of the Seymour Street property. There is no other reasonable explanation. The total is \$350,780.00. The difference between this amount and the \$404,000 received, namely \$53,220, is unaccounted for.

#### **The Resulting Trust Claim**

[44] A resulting trust may arise when there has been a gratuitous transfer of property from one person to another. Gratuitous means that the transferee has provided no consideration for the transfer. In such a situation the actual intention of the transferor is the governing consideration. [See *Pecore v. Pecore*, [2007] SCC 17]. The analysis requires three steps: (1) Was there a transfer of property? (2) Was it gratuitous? (3) What was the intention of the transferor?

#### *Was There a Transfer of Property?*

[45] Rosemarie agrees that Mr. Schutz made the following transfers to her prior to his death: (1) On November 15, 2009 the sum of \$200,000; (2) On February 15, 2010 the sum of \$150,000; and on February 15, 2011 the sum of \$150,000. Clearly there was a transfer of property.

#### *Was the Transfer of Property Gratuitous?*

[46] The Notice of Objection filed by Ralph and Angela sets out the basis upon which this issue is raised:

9. Prior to his death, Mr. Schutz had provided the sums of money of an estimated \$750,000.00 to the Applicant, Rosemarie Roggenbuck, for purposes of either:

- i) resolution of all equalization and property issues under the *Family Law Act*, due to a separation;
- ii) or alternatively, to invest in the purchase of an asset for their benefit and located in the Niagara-on-the-Lake area in which all the funds or lands are directly attributable to Mr. Schutz.

[47] Ralph and Angela first allege that Mr. Schutz and Rosemarie separated in 2008 and that the money was paid to resolve Rosemarie's property entitlement. If they are correct, the transfer cannot be termed gratuitous. It was a payment in satisfaction of her entitlement to the funds. There was consideration in the sense that at least to the extent of the payment, she would not be able to assert a property claim against Mr. Schutz.

[48] If Ralph and Angela are incorrect and they were not separated, the transfer is between married spouses and the presumption of advancement would apply, meaning there is a rebuttable presumption that Mr. Schutz intended the transfers to be gifts to Rosemarie. The onus would be on Ralph and Angela to rebut that presumption by evidence that establishes Mr. Schutz's contrary intention on the balance of probabilities. No such evidence has been led.

[49] Accordingly, I need not resolve the issue of whether or not Rosemarie and Mr. Schutz were separated. In neither event do Ralph and Angela succeed with their argument.

### **Legal Expenses**

[50] The Statement of Accounts indicates two payments on account of legal fees to Weaver, Simmons totaling \$21,074. These were on account of services rendered in defending the claims/objections raised by Angela and Ralph.

[51] The obligation of an estate trustee is to provide a full accounting if requested. The expense involved in providing that accounting is properly an estate expense and appropriate claim is made in the Notice of Passing of Accounts with respect to the legal fees associated with it.

[52] However, when accounts are contested what is at issue is the estate trustee's conduct. Although there may be circumstances in which it is appropriate that an estate trustee defend their conduct from the coffers of the estate, I would think it unusual that the estate would reimburse or pay a trustee's expenses in situations where a trustee is found to have acted improperly.

[53] Accordingly, expenses incurred by estate trustees to defend actions taken by them as estate trustees should be borne personally pending the outcome of the litigation. The funds ought to be returned to the estate.

### **Conclusion**

[54] Years of litigation could have been avoided by the estate trustee simply obtaining and providing the banking and investment records for the deceased and his corporation for the period beginning six months prior to his death to the date of his death. Those documents would have very likely provided crucial information of where all of the money from the sale of the two North Bay

properties went. Without those records, the court was left trying to piece together what happened from various financial statements and income tax records. On the balance of probabilities, the evidence indicates that there are corporate assets amounting to \$107,321 that are unaccounted for, \$53,220 of personal assets of the deceased that are unaccounted for, and \$21,074 of legal fees paid on behalf of Rosemarie that should be refunded to the estate. In all there is \$181,615 that, but for the neglect or default of the estate trustee, would have accrued to the estate. In the circumstances it is appropriate that she be ordered to pay such sum to the estate by way of damages.

[55] Of course, the eventual entitlement of Angela and Ralph would be just 20% of that amount or \$36,323, so I encourage the parties and counsel to take reasonable steps to incorporate this award into the final disbursement of the estate.

### **Other**

[56] Although I have dealt with all of the issues properly contested before me, I will add that my review of the accounts does not reveal any other assets that are unaccounted for. I am satisfied that aside from the amounts I have determined to be missing as noted above, the statement of original assets reflects an accurate picture of the assets of the deceased at his date of death. That the statement of capital receipts shows a greater amount is simply a function of accounting entries to reflect an appropriate movement of funds between the estate and the corporation.

### **Costs**

[57] Although Ralph and Angela have had a measure of success on this matter, it is far less than they sought and the net amount into their pockets is modest. Counsel would do well to consider this when discussing the issue of costs. In the event agreement cannot be reached written submissions on costs may be made to me within 45 days, restricted to four pages each along with attachments.

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The Honourable Mr. Justice R.D. Gordon

**Released:** July 4, 2023

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**BETWEEN:**

IN THE MATTER OF THE ESTATE OF Gerd C.  
Schutz aka Gerhard Schutz, deceased

**BETWEEN:**

Rosemarie Roggenbuck as Estate Trustee for the Estate  
of Gerd C. Schutz aka Gerhard Schutz, deceased  
Applicant

**AND:**

Angela Schutz, Ralph Schutz, Corey Schutz, Jennifer  
Schutz, Samantha Hannan and Daclan Hannan  
Respondents

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**DECISION ON APPLICATION**

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R.D. Gordon, J.

**Released:** July 4, 2023