COURT OF APPEAL FOR ONTARIO

CITATION: Aragona v. Aragona, 2012 ONCA 639
DATE: 20120926
DOCKET: C55324

Cronk, Epstein and Pepall JJ.A.

BETWEEN

Robert Aragona

Applicant (Respondent)

and

Beniamino Aragona, guardian of property for Maria Emilia Aragona,
and the Public Guardian and Trustee

Respondents (Appellant)

John W. Bruggeman, for the appellant

J.Greg Murdoch and Cynthia Davis, for the respondent

Heard: September 6, 2012

On appeal from the judgment of Justice Gray of the Superior Court of Justice, dated March 5, 2012.

**Epstein J.A.:**

[1] The appellant and respondent are brothers. On August 3, 1999 the appellant was appointed the guardian of property for their mother, Maria Aragona. Ms. Aragona, who suffered from Alzheimer's disease, died on March 6, 2010.

[2] The appellant appeals from the March 5, 2012 judgment in which the application judge dismissed his application to pass accounts and awarded other

relief, the effect of which amounted to a strong rebuke of the appellant's conduct as guardian.

[3] With the exception of one variation to take into account a possible benefit accruing to Ms. Aragona's estate, I am in full agreement with the application judge's reasoning and conclusions. I would therefore allow the appeal, in part.

**Background**

[4] On May 1, 2001, pursuant to an order of the Superior Court, the appellant passed his first set of accounts. On July 20, 2004, he was again ordered to pass accounts – this time within 30 days of that date and every three years thereafter. His failure to comply with the July 2004 order resulted in yet another order, dated June 8, 2010, requiring him to pass accounts. On December 14, 2010, this court dismissed the appellant's appeal from that order. The application to pass accounts, the first since May of 2001, finally came before the application judge on January 9, 2012.

[5] The application judge's findings relating to the finances concerning Ms. Aragona's property, during the appellant's guardianship, can be summarized as follows.

[6] As of May 21, 2001 the capital in the estate, held in an investment account, amounted to $152,055.71 and the liabilities totalled $8,521.45. The estate revenue from 2001 until her death was $195,776.41, an amount only $11,000

short of meeting Ms. Aragona's expenses during that period. In September 2003 the investment account was closed and a money order in the amount of $117,881.95 was given to the appellant. He deposited the money order into another investment account approximately a year later. Between May 31, 2001 and March 31, 2010, the appellant withdrew $122,534.40 from the investment account. As of March 31, 2010, this account held $46,562.91.

[7] After hearing the contested passing of accounts and rejecting the appellant's efforts to tender additional evidence as part of his written submissions, the application judge released reasons in which he identified certain misconduct in the appellant's management of his mother's property.

[8] This central finding of misconduct gave rise to the following terms of the decision that the appellant challenges on appeal.

[9] On the basis of the application judge's finding that the appellant transferred, without convincing explanation, a significant sum of money from his mother's investment account to his own account, the appellant was ordered to reimburse these monies through a payment of $132,628.

[10] On the basis of the application judge's conclusion that the appellant had incurred unjustified legal expenses in the management of his mother's property, the application judge ordered the appellant to reimburse the estate for certain

legal costs paid by the estate and not use estate funds to pay other outstanding accounts.

[11] Finally, citing *Zimmerman v. McMichael Estate*, 2010 ONSC 2947, 103 O.R. (3d) 25 (S.C.J.), the application judge ordered that the appellant was disentitled to compensation for his work as a guardian and that he personally pay the costs of the application itself.

**Issues**

[12] The appellant submits that the application judge erred:

> (1) in including in his calculation of the money the appellant was ordered to repay the estate, the amount of $18,615.38 in legal costs;
>
> (2) in ordering that outstanding legal accounts not be paid by the estate;
>
> (3) in not adequately explaining his decision to require the appellant to repay $132,628 to the estate and his decision that outstanding legal accounts not be paid by the estate; and
>
> (4) in depriving him of compensation as guardian of his mother's property.

**Analysis**

**(1) Requiring the appellant to repay $18,615.38 to the estate**

[13] Of the $28,154 in legal fees the appellant claimed were expended on behalf of the estate, the respondent challenged the amount of $18,615.38. The

application judge found in the respondent's favour on this issue and added this amount to the amount he ultimately ordered the appellant to repay the estate.

[14] With respect to this issue, the appellant's primary submission is that he did not receive a fair hearing. The transcript reveals, he says, that counsel for the respondent made it clear at the outset of the hearing of the application that his client did not take issue with any disbursements the appellant claimed he had made on behalf of the estate. Mr. Bruggeman, counsel for the appellant, submits that his client's case was presented on the basis of that representation. The appellant was, therefore, taken by surprise when the respondent's written submissions included argument in which these disbursements were challenged. Mr. Bruggeman attempted to respond by including in his written submissions argument referencing material already in the record and additional documentation that had not been put before the application judge that related to these disbursements. The application judge refused to accept the new evidence.

[15] I do not agree with the appellant's contention that, in these circumstances, he was treated unfairly.

[16] From the outset the respondent signalled to the appellant his particular concern about the disbursements in question. On August 2, 2011, the respondent served a Notice of Objection identifying missing documents and concerns relating to the Statement of Accounts the appellant had delivered. On

October 25, 2011, the respondent served an Amended Notice of Objection and a Demand for Particulars setting out additional concerns about the decrease in the capital of the investment account and the lack of documentary support for disbursements the appellant claimed to have made.

[17] At the opening of the hearing of the application, an exchange took place between counsel and the application judge about what was in issue. Counsel for the respondent indicated that his client was not challenging disbursements. In the course of this exchange counsel agreed with the application judge's expression of the understanding that disbursements were not in issue "at this time". It was against this background that the hearing proceeded.

[18] During cross-examination the appellant was questioned about a number of disbursements allegedly paid by the appellant on behalf of the estate, over a number of years. Significantly, Mr. Bruggeman neither objected to these questions nor dealt with the issue during re-examination.

[19] Given the history of the appellant's failure to fulfill his obligations as guardian of his mother's property and the respondent's having put the appellant on notice about his concern about certain disbursements, (as evidenced by the Notices of Objection and the Demand for Particulars), the cross-examination of the appellant should, in my view, have caused counsel for the appellant to be concerned about whether the issue of the respondent's challenge to the claimed

disbursements had, in fact, been taken off the table. If appellant's counsel firmly held the view that it was not in issue, he most certainly would have objected to the questioning. As indicated, he did not.

[20] Moreover, when the appellant was clearly made aware, through the respondent's written submissions, that these legal expenses were in issue, at least from the respondent's perspective, the appellant was still unwilling or unable to support the challenged disbursements despite being given the opportunity on two subsequent occasions to do so. The application judge reviewed the appellant's submissions on this issue and the documentation upon which he relied and was not prepared to accept the new evidence. That said, based on his review, he concluded that the evidence was of no assistance - "the new material simply disclose[d] what was apparent already". This is relevant to the fairness argument the appellant is advancing. Finally, during oral argument before this court, the appellant still could not provide an explanation in support of the challenged disbursements despite being given an opportunity to do so.

[21] The appellant's fairness argument should be considered in the light of his statutory obligations. Pursuant to the *Substitute Decisions Act, 1992*, S.O. *1992*, c. 30, a guardian of property has a fiduciary obligation to carry out his or her obligations with honesty and due care and attention. The core of these obligations includes the duty to be in a position at all times to prove the legitimacy of disbursements made on behalf of the estate: Widdifield on

Executors and Trustees, 6th ed. (Scarborough, ON: Thomson Carswell, 2002) at p. 13-1. The history of the appellant's conduct demonstrates that he managed his mother's property in blatant disregard of his obligations as guardian.

[22] In the light of the appellant's obligations as guardian and this history, I am not persuaded that he was treated unfairly with respect to the disbursements issue. The appellant had ample opportunity on the passing of his accounts to justify the expenditures allegedly made on behalf of the estate. He failed to do so. Indeed, there is no indication that the appellant, even now, has access to any material that would have had an impact on the application judge's decision in this respect. In fact, in his reasons, the application judge gratuitously indicated that he may have disallowed the entire amount of claimed legal expenses, totalling $28,154, had the respondent challenged them.

[23] I would therefore not give effect to this argument.

### (2) The order that the estate would not be responsible to pay unpaid legal accounts

[24] The legal fees ordered not to be paid by the estate relate to lawsuits the appellant initiated against his brothers, on behalf of the estate. In these proceedings, the appellant claimed that his brothers, in their management of their father's estate, failed properly to account for assets under their management, the income from which was directed, through their father's will, to the benefit of Ms. Aragona, during her lifetime.

[25] The application judge held that these proceedings were ill-advised given the financial stability of Ms. Aragona's estate and therefore that the estate should not be responsible for the legal costs associated with these proceedings.

[26] However, the appellant submits that the application judge erred in failing to take into account the possibility that the estate could actually benefit from the proceedings. He points to an award of costs in the amount of $25,000 in favour of the estate arising out of a motion for contempt brought in one of the proceedings. While these costs have not yet been paid to the estate, there is nothing in the record to support the conclusion that all, or at least part, will not be collected. It would be unfair, argues the appellant, for the estate to receive a benefit from the contempt motion, without having to incur any of the associated costs.

[27] I find merit in this argument. And counsel for the respondent, quite fairly, advised the court that he does as well. However, his submission is that if and when any part of the award is collected, the parties should look to the trustee of Ms. Aragona's estate to determine what, if any, responsibility the estate should have for the legal fees incurred by the appellant in respect of the contempt motion that led to the award.

[28] The difficulty with this suggestion lies in the wording of the specific terms of the judgment under appeal. Paragraph 4 orders that “[a]ny outstanding legal accounts directed to the estate of Maria Emilia Aragona shall not be paid by the estate”. Left unchanged, this provision would preclude the trustee from authorizing the payment of legal costs from the estate.

[29] I am of the view that this issue can be resolved in a manner designed to be fair to those whose interests are affected and also cost-effective, having regard to the amounts potentially in issue. With these objectives in mind, I would order that if the estate collects the total amount of $25,000 pursuant to this award, that it reimburse the appellant in the amount of $7,500 for legal fees he can demonstrate he paid and that led to this award.

**(3) The Sufficiency of Reasons**

[30] I do not find merit in the appellant’s argument that the application judge’s reasons relating to his decision to order him to repay $132,628.33 to the estate and that the estate not be responsible for the legal fees associated with the $25,000 costs award, are inadequate.

[31] As put by Doherty J.A. in *Law Society of Upper Canada v. Neinstein* (2010), 317 D.L.R. (4th) 419, when the adequacy of the reasons is raised as a ground of appeal the court’s focus is on whether the reasons explain what was decided and why that decision was made.

[32] Shortcomings notwithstanding, I am of the view that the application judge's reasons are adequate. The findings of fact that the application judge was required to make were supported by the record and those based on the application judge's unfavourable assessment of the appellant's credibility are entitled to deference. And, the application of these facts to the controlling legal principles leading to the conclusions reached is explained.

[33] Ultimately, the test is whether the reasons permit reasonable appellate review. In my view, they do. I would therefore not give effect to this ground of appeal.

**(4) Compensation and Costs**

[34] The application judge's reliance on *Zimmerman* was well-placed given his strongly-worded conclusion at para. 34 that "the conduct of (the appellant) has been shocking. He has literally helped himself to many thousands of dollars from his mother's estate, at a time when his mother had Alzheimer's and was unable to look after her own affairs. (The appellant) treated the money in the estate as if it was his own."

[35] The application judge's assessment of the appellant's failure to keep proper accounts and of his indifference to his fiduciary obligations, finds ample support in the record. It follows that depriving him of compensation for his guardianship was clearly within the application judge's discretion: *Zimmerman* at para. 34.

[36] I would also reject this ground of appeal.

**Disposition**

[37] Accordingly, for the reasons given, I would allow the appeal in part by varying paragraph four of the judgment to read as follows:

> 4. Any outstanding legal accounts directed to the estate of Maria Emilia Aragona shall not be paid by the estate save and except that, to the extent that the estate collects all of the $25,000 costs awarded in its favour under paragraph eight of the Order of Somers J., dated January 5, 2006, in action no. 01-0373/03, the estate shall pay the total amount of $7,500, inclusive of disbursements and all applicable taxes, on account of those legal fees incurred by Beniamino Aragona in respect of the underlying motion that led to the award.

[38] In all other respects, I would dismiss the appeal.

[39] The respondent is entitled to his costs of the appeal paid by the appellant, personally. As agreed, these costs are fixed in the amount of $10,600, inclusive of disbursements and all applicable taxes.

Released:

"SEP 26 2012"

"GE"

"Gloria J. Epstein J.A."

"I agree E.A. Cronk J.A."

"I agree Sarah Pepall J.A."