

COURT OF APPEAL FOR ONTARIO

CITATION: Doherty v. Doherty, 2023 ONCA 763

DATE: 20231114

DOCKET: COA-23-CV-0447

Lauwers, Hourigan and Coroza JJ.A.

BETWEEN

Kathleen Florence Doherty in her personal capacity and capacity as
Estate Trustee of Molly Marie Doherty

Applicant (Respondent)

and

Terrence Raymond Doherty also known as Terrance Raymond Doherty also
known as Terence Raymond Doherty in his personal capacity and capacity as
Attorney for Property for Molly Marie Doherty*, Sylvia Joan Kurkowski Doherty
also known as Sylvia Joan Doherty*, and Liam Alexander Doherty

Respondents (Appellants*)

Terence Raymond Doherty and Sylvia Joan Doherty, acting in person

Kimberly Gale and Palak Mahajan, for the respondent

Heard and released orally: November 10, 2023

On appeal from the judgment of Justice Bernadette Dietrich of the Superior Court
of Justice, dated March 20, 2023.

REASONS FOR DECISION

[1] This appeal arises in the context of estate litigation, but it is focused on a
narrow procedural point regarding service of a notice of application.

[2] In October 2019, Molly Doherty died, leaving her daughter, the respondent Kathleen Doherty, and her son, the appellant Terrence Doherty. The appellant Sylvia Doherty is married to Terrence,¹ and Liam Doherty is their son.

[3] In March 2021, Kathleen, who is Molly's Estate Trustee, brought an application against Terrence, Sylvia and Liam for directions, seeking an accounting of funds that Terrence transferred out of Molly's bank accounts and the issuance of a certificate of pending litigation on property owned by the appellants.

[4] On the initial return of the application, Kathleen was represented by counsel and Liam appeared on his own behalf. Nobody appeared for Terrence or Sylvia. On the consent of the parties present, the application judge ordered Terrence, who was Molly's power of attorney for property, to prepare an account and tracing of Molly's assets prior to her death. The order also authorized Kathleen to compel production of various financial records and permitted Kathleen to register a caution against certain property owned by the appellants (the "March Order").

[5] In October 2021, the application judge held another hearing. Kathleen's counsel attended, as did Liam in person. Counsel appeared for Terrence and Sylvia. They sought to set aside the March Order under Rule 38.11, on the basis that they were not properly served with the notice of application. The application judge accepted that they were on a sailing trip at the time of purported service, in

¹ First names are used in this RFD for clarity purposes.

international waters, without access to email or telephone. However, she noted that they obtained notice of the proceeding in April yet took no steps to respond to the original process, except to move to set aside the March Order. The application judge declined to set aside the March Order but varied the deadlines to give Terrence more time for compliance (the “October Order”).

[6] The parties appeared on several motions before the Superior Court over the next year. These motions related primarily to efforts to have Terrence comply with his obligations under the March Order as modified by the October Order. Eventually, the application was heard on the merits. In it, Kathleen accused the appellants of stealing money from Molly’s accounts, prior to her death. In response, the appellants conceded that approximately \$330,000 had been transferred to accounts that were directly or indirectly controlled by them. However, they claimed that these transfers were the result of a series of gifts made by Molly.

[7] The application judge found that there was insufficient evidence that Molly intended to make gifts and that there was no evidence that Molly had the power and control over the transfer of money required to qualify as a valid *inter vivos* gift at law. Thus, she found that there was both unjust enrichment and a breach of fiduciary duty. The application judge granted judgment for an accounting and ordered Terrence and Sylvia to transfer approximately \$330,000 back to Molly’s estate. That judgment is the subject of the present appeal.

[8] Instead of engaging with the merits of the application judge's decision, the appellants have focused their appeal on the issue of the service of the notice of application. This position is without merit. As noted, in October the appellants sought to set aside the March Order and were unsuccessful. Their remedy was to seek leave to appeal the October Order in the Divisional Court. They chose not to do so. Thus, their appeal is an impermissible collateral attack on the October Order. Moreover, they fully participated in the proceedings below and were not prejudiced in any manner by the initial service of the notice of application.

[9] The appeal is dismissed. The appellants shall pay the respondent her costs of the appeal, which we fix in the all-inclusive sum of \$24,000.

"P. Lauwers J.A."
"C.W. Hourigan J.A."
"S. Coroza J.A."