ENDORSEMENT

The Applicants are 4 of 5 surviving children of Jose Lima Silva, who died with out a Will on June 24, 2015. The Respondent is the brother of the Applicants, and was appointed Estate Trustee Without a Will by Certificate of Appointment dated December 9, 2015.

The Applicants apply for an order removing the Respondent as Estate Trustee and requiring him to pass his accounts, and for related relief.

The Application was issued July 8, 2016. The supporting Affidavit of the Applicant Maria Luisa Silva stated that the Respondent had been unresponsive and hostile to requests for information about the estate and for an accounting.

The Respondent delivered an Affidavit sworn August 11, 2016, in which he set out the assets of the estate, which he said included a $500.00 deposit his father and mother had paid on December 17, 1996 to become members of a committee who acted on behalf of tenants in a trailer park where they resided. He stated that following his father's death, the deposit was returned to him in cash. He added, in response to the Applicants' assertion that a deposit of $5,000.00 with camping site for trailer was unaccounted for: "I also have no knowledge of where or how the amount of $5,000.00 for this asset was calculated or arrived at in paragraph 9 of the Applicant's Affidavit."

The Respondent denies knowledge of $70,000.00 the Applicants believed their father held on deposit in a bank before his death, and states that the only bank accounts that his father held were one with the TD Bank that contained $302.24 and one with Scotiabank that contained $82.76.

The Applicant Maria Luisa Silva has tendered a further Affidavit sworn November 25, 2016 which attaches an email from Marlyn Addai, President of the Board of Directors of Cedar Grove Residence Community Corporation, which confirms that the Corporation issued a cheque to the Respondent on December 18, 2015 in the amount of $5,500.00 that the Respondent did not disclose in his Affidavit and denied knowledge of on cross-examination.

The Respondent's non-disclosure and misrepresentation of the assets of the estate, in combination with the facts that he declared the value of the estate to be $117,000.00 in his Application for the Certificate of Appointment on August 25, 2015 and now declares it to be $36,029.46, and that he paid himself $32,544.00 from the Estate bank account, supports an inference of fraud and justifies his removal as Trustee and an Order requiring him to pass his accounts. It also justifies an injunction prohibiting him from disposing of or encumbering any further assets of the estate. There is, additionally, ample basis for a request that the police undertake a criminal investigation of the Respondent's conduct.

There are five requirements for a Mareva Injunction:

1. The Plaintiff/Applicants must make full and frank disclosure of all material in their knowledge. I find that they have done so. They identified in their initial Affidavit precisely the concerns they had regarding the:

   (a) Deposit from the Committee.

   (b) The $70,000.00 bank account of their father which has not been accounted for.

   (c) The discrepancy between the value escribed to the estate in the Application for Probate, namely $117,000.00 and the value ascribed to it by the Respondent four months later, namely $36,000.00.

   (d) The fact that the Respondent first stated that he would be charging 5% for his time and then distributing the balance among the parties and later stating that there would be no residue to distribute.

   (e) The lavish spending by the Respondent on a car, vacation, etc. while he and his family were unemployed.

2. The Plaintiff/Applicants must give particulars of the claim against the Defendants/Respondent stating the grounds of the claim and the amounts. They have done so with the particulars stated above. If they have not advanced the points that could be made against them by the Respondent, it must be observed that the Respondent himself has not been able to advance any reasonable explanation for the facts alleged against him. When he was cross-examined on the $5,500.00 deposit, he denied knowledge of it, and has offered no explanation of the cheque and receipt supporting the allegation that he lied in his Affidavit and on his cross-examination.

3. The Plaintiff/Applicants must give grounds for believing that the Defendant/Respondent has assets in the jurisdiction. They have given evidence of his home and of the Estate's assets.

4. The Plaintiff/Applicants must give grounds for believing that there is a real risk of assets being removed or disposed of or otherwise dealt with so that the Plaintiff/Applicants will be unable to satisfy a judgment awarded to them. The diminishing Estate, even on the Respondent's own evidence, satisfies this requirement.

5. The Plaintiff's/ Applicants' undertaking as to damages is, in my view, unnecessary given that the Estate itself is an asset in which the Applicants have a 4/5 interest and that, based on the application for probate, should be sufficient to satisfy liability for damages if the Applicants are mistaken.

Based on the foregoing, it is ordered that:

1. The Respondent is removed as Estate Trustee for the Estate of Jose Lima Silva and the Applicants, Maria Luisa Silva, and Mario Manuel Da Silva are appointed in his place. A Certificate of Appointment shall issue appointing Maria Luisa Silva, and Mario Manuel Da Silva as Co-Estate Trustees Without a Will.

2. The Respondent shall, by January 15, 2017, pass his accounts in the form required by the Rules of Civil Procedure and the Trustee Act.

3. The Respondent, including his servants, employees, agents, assigns and anyone acting on their behalf, or in conjunction with any of them, and anyone and all persons with notice of this Order are restrained from directly or indirectly, by any means whatever;

    (a) selling, removing, dissipating, alienating, transferring, assigning, encumbering, or similarly dealing with any assets of the Estate of Jose Lima Silva, wherever situate, and any assets into which those assets have been converted, including 6 Chetholme Place, Georgetown (PIN 25050-1710 (LT)) and any motor vehicle in his name or over which he has control purchased or otherwise acquired since June 24, 2015.

    (b) instructing, requesting, counselling, demanding or encouraging any other person to do so: and

    (c) facilitating, assisting in, aiding, abetting, or participating in any acts the effect of which is to do so.

4. Paragraph 3 applies to all of the Respondent's assets wherever situated, and whether or not they are in his own name and whether they are jointly owned. For the purposes of this Order, the Respondent's assets include any asset which he has the power, directly or indirectly, to dispose of or deal with as if it were his own. The respondent is to be regarded as having such power if a third party holds or controls the assets in accordance with his direct or indirect instructions.

5. The Respondent shall forthwith provide the Applicants' solicitors with an Affidavit or Statutory Declaration listing all of his assets, wherever situated, whether in his name or not, and whether jointly or solely owned, including such Affidavit or Statutory Declaration the value, location and details of all such assets.

6. Any financial institution or person ("Third Parties") receiving or having notice of this Order shall forthwith freeze and prevent the removal or transfer of monies, investments, accounts, and/or financial instruments including but not limited to GIC's and RRSP's wherever located, or assets of the Respondent held in any account or on credit on behalf of the Respondent with the Third Parties until further Order of this Court.

7. The Registrar of this Court shall issue a Certificate of Pending Litigation against the property at 6 Chetholme Place, Georgetown, Ontario, PIN 25050-1710 (LT).

8. Anyone served with or notified of this Order may apply to the Court at any time to vary or discharge this Order on four (4) days notice to the Applicants.

9. The Respondent shall pay the Applicants' costs of this Application and motion, fixed in the amount of $17,500.00, plus HST and $2,051.20 for disbursements, payable forthwith.

Reasons for costs:

The Respondent's time is 33.5 hours and Applicants' is 37.6 including clerk's time, which I find to be similar. The time spent in preparation for and attendance at cross-examinations, for example, was 9.5 hours by Applicants; 8.5 hours by the Respondent. The Applicants' counsel was called to the Bar in 1993, and his full indemnity hourly rate is $375.00. His partial indemnity rate based on the 2005 costs bulletin of the Rules Committee was $350.00 in 2005, and the current equivalent after adjusting for inflation, is $417.00/hour, which I would round up to $420.00. His substantial indemnity rate, which is more appropriate in cases of fraud and misconduct, is $630.00 ($420.00 x 1.5), full indemnity costs, normally appreciate in cases of intentional deception of the court is 10% higher or approximately $700.00/hour. In light of the circumstances, Mr. Gray's rate is conservative.

The costs claimed are proportional to the value of the estate and the issues involved and the Respondent should have reasonably expected costs of at least the amount claimed if unsuccessful.