

Publisher's Note

2018 — Release 9

Previous release was 2018-8

From Your Library:

<input type="checkbox"/>	_____
<input type="checkbox"/>	_____
<input type="checkbox"/>	_____
<input type="checkbox"/>	_____
<input type="checkbox"/>	_____

Widdifield

Executors and Trustees, 6th Edition

This seminal work of Canadian legal literature is reviewed and updated by a team of authors drawn from the front ranks of the profession from across Canada. In keeping with the original, the sixth edition of Widdifield on Executors and Trustees offers a comprehensive exposition of the law relating to the exercise of the duties and prerogatives of executors and trustees in Canadian estates and trusts law.

What's New in this Update:

This release contains amendments to the commentary in Chapter 6 (Investments Made By Trustees), Chapter 9 (Delegation to Agents), Chapter 10 (Breach of Trust and Its Consequences) and Chapter 18 (Words and Phrases). Highlights of this release, include:

Highlights

Breach of Trust — Co-mingling Trust Property — Allocation Among Innocent Contributors: The Alberta Court of Appeal stated in this case that the Last Intermediate Balance Rule (LIBR) is the general rule for allocating funds among innocent beneficiaries when there is a shortfall in a trust account or in an account that has been impressed with a constructive trust by operation of law. It went on to state that there are two exceptions: If the LIBR is unworkable or the beneficiaries expressly or impliedly intended another method of distribution: *Easy Loan Corp. v. Wiseman*, 2017 ABCA 58, 2017 CarswellAlta 185, [2017] 5 W.W.R. 419, [2017]

THOMSON REUTERS CANADA® Customer Relations

1-416-609-3800 (Toronto & International)

1-800-387-5164 (Toll Free Canada & U.S.)

Fax 1-416-298-5082 (Toronto)

Fax 1-877-750-9041 (Toll Free Canada Only)

Email CustomerSupport.LegalTaxCanada@TR.com

This publisher's note may be scanned electronically and photocopied for the purpose of circulating copies within your organization.

A.W.L.D. 1270, [2017] A.W.L.D. 1335, [2017] W.D.F.L. 1348, 275 A.C.W.S. (3d) 478, 412 D.L.R. (4th) 155, 45 C.B.R. (6th) 3, 45 Alta. L.R. (6th) 209.

Breach of Trust — Co-mingling Trust Property — Trust and Non-Trust Funds: In this case, the court stated that “[a]s this is a case of a mixed fund consisting of trust funds and non-trust funds, and as the balance in the operating account and the Monitor’s account did not fall below the amount claimed by CSI as trust funds, which can be traced into the operating account at first instance, the applicable principle is that set out in *Brookfield Bridge Lending Fund Inc. v. Vanquish Oil & Gas Corp.*, 2009 ABCA 99 (Alta. C.A.) at para 13: . . . if the trust funds are comingled with non-trust funds, the trustee is generally presumed to have honest intentions and to have spent the non-trust funds first: *Re Hallett’s Estate* (1879), 13 Ch D 699. Thus any remaining balance will be presumed to be trust funds.”: *Sanjel Corporation (Re)*, 2018 ABQB 157, 2018 CarswellAlta 516, [2018] A.W.L.D. 1457, 290 A.C.W.S. (3d) 243.

Breach of Trust — Innocent Breach of Trust — Improper Payments: An executor made payments to the niece of the deceased for “pre-death financial obligations” that he had been informed of by the deceased. The registrar’s finding that the payments were not proper distributions and that the executor was personally liable was upheld on appeal. The court found that, pursuant to s. 45 of the *Evidence Act*, the executor could not be excused from liability for payments under s. 64 of the *Trustee Act* without evidence corroborating his assertions that the deceased had given him instructions as he claimed: *Hopgood v. Hopgood (Estate)*, 2018 NSSC 100, 2018 CarswellNS 304, 293 A.C.W.S. (3d) 221, 36 E.T.R. (4th) 169.

Breach of Trust — Innocent Breach of Trust — Delay: Where an administration took almost 10 years and the co-executrices sought special costs against another executor, the court stated that there was nothing in the evidence that suggested that the actions of the executor were wilful or stemmed from malicious or fraudulent motives. Nor was there any suggestion that she was acting out of self-interest or to intentionally benefit herself or others at the expense of the estate. She had paid the estate all amounts alleged to have resulted from errors on her part, had paid the costs awarded or agreed to and had completely foregone any remuneration for administering the estate: *Crisafio Estate*, 2018 BCSC 305, 2018 CarswellBC 443 (B.C. S.C.).

Breach of Trust — Innocent Breach of Trust — Failure to Exercise Care, Skill, Diligence and Judgment of Prudent Investor: An executor failed to diversify estate’s stock portfolio, bought stocks on margin, made various risky investments resulting in significant investment losses, failed to pay debts of estate, and failed to establish education trust funds provided for in will. The court found that the executor had failed to exercise care, skill, diligence and judgment that prudent investor would exercise in making investments. It stated that the provisions of will authorizing estate trustee to make investments and shielding him from liability did not override duties under s. 27 of the *Trustee Act* to exercise care, skill, diligence and judgment that prudent investor would exercise in making investments, and to diversify

investments. The losses to estate were not result of fraud, embezzlement, misappropriation or defalcation, he was guilty of breach of trust, but not fraudulent breach of trust. His actions were not dishonest, just wrong-headed. He had an inflated view of his business prowess and was careless of risks involved and duties of estate trustee. Buying stocks on margin was unacceptable risk for estate trustee: *Groome Estate v. Groome*, 2016 ONSC 7850, 2016 CarswellOnt 19637, 276 A.C.W.S. (3d) 247.

Breach of Trust — Compensation and Penalties for Breach: An executor undertook renovations to the home of the deceased in an attempt to attract offers. The sole offer that the executor had received prior to renovations was \$370,000. The executor then invested \$22,494 into property with expectation of asking for \$395,000 but the executor sold the home to her daughter for \$385,000 before the renovations were complete and without testing the price of the renovated house on the open market. The court found that the executor was responsible for repaying to estate \$7,494 for the cost of the renovations that were not recovered from sale: *Horrasz Estate (Re)*, 2018 ABQB 428, 2018 CarswellAlta 1065, [2018] A.W.L.D. 2421, [2018] A.W.L.D. 2422, [2018] A.W.L.D. 2423, 293 A.C.W.S. (3d) 222.

