NOVA SCOTIA COURT OF APPEAL
Citation: *Withenshaw v. Withenshaw*, 2023 NSCA 59

Date: 20230824
Docket: CA 517083
Registry: Halifax

Between:

Gail Withenshaw

Appellant

v.

Gary Paul Withenshaw and George David Withenshaw

Respondents

-and-

Eugene Tan

Intervenor

Judge:	The Honourable Justice Peter M. S. Bryson
Appeal Heard:	May 17, 2023, in Halifax, Nova Scotia
Legislation Cited:	s. 5(1) of the *Powers of Attorney Act*; ss. 650(3) and 686(1)(a)(iii) of the *Criminal Code*; ss. 7 and 11(d) of the *Charter*;
Cases Cited:	*R. v. G.D.B.*, 2000 SCC 22; *Caladon (Town) v. Darzi Holdings Ltd.*, 2022 ONCA 455; *M.W. v. Nova Scotia (Community Services)*, 2014 NSCA 103; *Patient X v. College of Physicians and Surgeons*, 2015 NSCA 41; *Kedmi v. Korem*, 2012 NSCA 124; *OZ Merchandising Inc. v. Canadian Professional Soccer League Inc.*, 2021 ONCA 520; *Mediatube Corp. v. Bell Canada*, 2018 FCA 127; *Saskatchewan Valley Land Co. v. Willoughby* (1913), 24 W.L.R. 40; *D.B. v. J.M.J.*, 2010 NSSC 137; *Zimmerman v. McMichael Estate*, 2010 ONSC 2947; *Toller James Montague Cranston (Estate of)*, 2021 ONSC 1347;
Subject:	Powers of Attorney – Duty to Account - Restitution

Summary: Judge found appellant liable to account to estate of her mother for appellant's use of an enduring power of attorney during her mother's incompetency. Appellant alleged four errors (see issues).

Issues:

(1) Was there a miscarriage of justice owing to ineffectiveness of counsel?
(2) Did the judge err by beginning his accounting period prior to deceased's incompetency?
(3) Did judge err by drawing a negative inference in the absence of a full accounting?
(4) Did judge err regarding accounting for income of deceased?

Result: Appeal allowed in part. Judge erred in apparently "double counting" assets in investment accounts and RIFs as income from those accounts. Issue remitted to trial judge for assessment of potential double accounting. Grounds 1, 2 and 3 dismissed. Miscarriage of justice owing to ineffectiveness of counsel was not available ground of civil appeal. A duty to account was not the same as an evidentiary "negative inference". The judge did not err in the chosen accounting period.

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Judges:	Farrar, Bryson and Van den Eynden JJ.A.
Appeal Heard:	May 17, 2023, in Halifax, Nova Scotia
Held:	Appeal allowed in part, per reasons for judgment of Bryson J.A.; Farrar and Van den Eynden JJ.A. concurring
Counsel:	Dianna M. Rievaj, for the appellant Richard Norman, for the respondent William Mahody, K.C., for the intervenor

Reasons for judgment:

Introduction

[1] In June of 2006, Doris Withenshaw granted an Enduring Power of Attorney to her daughter, Gail Withenshaw, who acted as her mother's attorney until Doris Withenshaw died in 2014.

[2] After their mother's death, her sons made requests of their sister for information about their mother's remaining assets. They received no answers. In 2017, they applied in the Probate Court to require Gail Withenshaw to pass her accounts as Executrix of their mother's estate. Justice Timothy Gabriel later described the information provided by Gail Withenshaw in the probate application as "… scant, and completely lacking in any supporting documents such as invoices or bank account statements" (2022 NSSC 21, at ¶15).

[3] The respondents then brought proceedings in the Supreme Court seeking an accounting of their mother's assets from Gail Withenshaw while exercising the Power of Attorney. They asked that she make restitution for assets improperly taken or used.

[4] There were difficulties about the evidence. The respondents made motions to produce documents which Gail Withenshaw opposed. Justice Gabriel had to deal with a challenging record, and ironically, had to largely rely on materials produced by the respondents or obtained by their efforts at disclosure. In the end, he ordered Gail Withenshaw to account to her mother's estate for $337,287.18, with costs of $30,742.10 (2022 NSSC 21 and 2022 NSSC 158).

[5] Gail Withenshaw appeals, fundamentally alleging that there has been a miscarriage of justice owing to the ineffectiveness of her trial counsel. She seeks to adduce fresh evidence on this ground. She adds that the judge erred in fact and law:

1. by basing the "pool of funds" to be accounted for on amounts that pre-dated the time of Doris Withenshaw's incompetence;
2. in failing to identify and/or consider relevant material facts and critical evidence; and
3. by incorrectly applying a negative inference "in the absence of a full accounting".

[6] The respondents, Gary Paul Withenshaw and George David Withenshaw, are brothers of Gail Withenshaw and resist the appeal.

[7] Gail Withenshaw's lawyer for the accounting, Eugene Tan has intervened with respect to the allegations of ineffective counsel against him.

Factual Overview

[8] As earlier described, in June of 2006, Doris Withenshaw granted an Enduring Power of Attorney to Gail Withenshaw. At common law, powers of attorney are a form of agency which expire on the death or incompetency of the grantor of the power, because that person can no longer ratify, as principal, the acts of her attorney. By contrast, an enduring power of attorney is a creature of statute, which permits the attorney to act during the incompetency of the grantor of the power.

[9] By 2006, Doris Withenshaw was legally blind and suffering from Alzheimer's Disease which was progressive. Although none of the parties questioned her capacity to execute the Enduring Power of Attorney. Justice Gabriel found that Doris Withenshaw's mental and physical condition continued to decline until her death in 2014.

[10] Doris Withenshaw executed her Last Will and Testament on May 6, 2010. Gail Withenshaw was appointed Executrix. Doris Withenshaw's estate was equally divided among her three children. The 2010 Will displaced an earlier Will executed in 2004 which left 60 percent of Doris Withenshaw's estate to be divided equally between her children and 40 percent to charity. Doris Withenshaw's capacity to execute a will in 2010 has not been challenged.

[11] Doris Withenshaw died on November 1, 2014.

[12] In April 2018, Gary and George Withenshaw applied for an accounting. It turned out that the amount left in the estate by March of 2018 was $85,310.78, largely comprised of life insurance proceeds.

[13] As the matter unfolded before Justice Gabriel, two substantive hearings were held. The first was to establish whether Doris Withenshaw was legally incapacitated at any time during Gail Withenshaw's tenure as her attorney and, if so, when. And second, whether there was "cause" within the meaning of s. 5(1) of

the *Powers of Attorney Act*, R.S.N.S. 1989, c. 352, requiring Gail Withenshaw to account.

[14] In the first decision – not appealed – Justice Gabriel found that by May 1, 2007 at the latest, Doris Withenshaw lacked capacity to make financial decisions. He went on to find that cause had been established entitling the respondents to an accounting. He applied s. 5(1)(a) of the *Act* as it then was:

> 5(1) Where a donor of an enduring power of attorney becomes legally incapacitated a judge of the Trial Division of the Supreme Court may for cause, on application, require the attorney to have accounts passed for any transaction involving the exercise of the power during the incapacity of the donor
>
> [Emphasis of the judge.]

[15] The judge concluded that Gail Withenshaw had to account for her transactions involving the exercise of the Power of Attorney during Doris Withenshaw's incapacity from May 1, 2007 to the date of her death on November 1, 2014 (2020 NSSC 208, at ¶128).

[16] The accounting hearing was held on September 21, 2021. Gail Withenshaw's accounting was tardy and deficient. The judge was clearly frustrated with the late and incomplete disclosure by Gail Withenshaw prior to and at the accounting hearing. Ironically, the inadequacy of disclosure was exacerbated by the decision of the respondents not to cross-examine Gail Withenshaw.

[17] The judge was satisfied that Gail Withenshaw had not accounted for all the assets with which she dealt during the course of her mother's incapacity. He calculated the unaccounted for assets based on an initial "pool" of $412,769.15. He added her income during her remaining years and then subtracted established or estimated expenses and taxes during the accounting period. The unaccounted for total was $279,039.32. He found Gail Withenshaw must repay that amount to the estate, plus interest of $57,807.86, and ordered costs of $30,742.10 (2022 NSSC 158, at ¶27 and 45).

[18] Gail Withenshaw appealed the accounting and costs decisions.

Miscarriage of Justice Owing to Ineffective Assistance of Counsel

[19] To support this ground of appeal, Gail Withenshaw sought to adduce fresh evidence to overcome the shortcomings of her evidence at the accounting hearing. Gail Withenshaw maintains that her fresh evidence is material to the outcome and

was not before Justice Gabriel owing to the alleged incompetence of Mr. Tan and his predecessors.

[20] Ms. Withenshaw claims the fresh evidence would assist in establishing an opening balance as of May 1, 2007, more precisely establish "new income" from 2007-14, better identify expenses just prior to and during that period and some of the failings of her trial counsel.

[21] Mr. Tan filed a rebuttal affidavit. Both he and the respondent Withenshaw brothers resist admission of the proposed fresh evidence.

[22] At the appeal, we allowed cross-examination of Ms. Withenshaw and Mr. Tan. But the fresh evidence should not be admitted because miscarriage of justice is not an available ground of appeal for Ms. Withenshaw.

Miscarriage not available ground of appeal

[23] Miscarriage of justice caused by ineffectiveness of counsel can be a ground of appeal in the criminal context because s. 686(1)(a)(iii) of the *Criminal Code* allows appeals from conviction where there has been a "miscarriage of justice". In *R. v. G.D.B.*, 2000 SCC 22, at ¶27, the Supreme Court of Canada explained that the right to effective representation of counsel is a principle of fundamental justice flowing from s. 650(3) of the *Criminal Code* and ss. 7 and 11(d) of the *Charter*, as well as the common law. Effective representation of counsel is part of the right to make full answer and defence and to have a fair trial. No such public interest foundation is usually available in a civil case involving a private dispute between private litigants (*Caladon (Town) v. Darzi Holdings Ltd.*, 2022 ONCA 455, at ¶47).

[24] Ineffectiveness of counsel may be a ground of appeal in the rarest of civil cases where an important public interest is engaged: *M.W. v. Nova Scotia (Community Services)*, 2014 NSCA 103 at ¶41; *Patient X v. College of Physicians and Surgeons*, 2015 NSCA 41, at ¶41; *Kedmi v. Korem*, 2012 NSCA 124, at ¶8; and *OZ Merchandising Inc. v. Canadian Professional Soccer League Inc.*, 2021 ONCA 520, at ¶44. Exceptionally, ineffectiveness of counsel causing a miscarriage of justice has been recognized as a potential ground of appeal involving vulnerable persons such as children or persons with a disability (*M.W.*, at ¶41).

[25] Ms. Withenshaw says she is a vulnerable person with past addiction and mental health issues. There is little evidence of Ms. Withenshaw's psychological

health. More importantly, the vulnerability contemplated by the cases cited would not extend to people able to freely exercise such powers as enjoyed by Ms. Withenshaw in this case.

[26] All parties rely upon *Mediatube Corp. v. Bell Canada*, 2018 FCA 127, where Justice Stratas elaborates on why a miscarriage of justice is almost never available to a civil litigant:

> [38] In many civil cases, the right to liberty of the litigants is not at stake. Charter rights and statutory rights, which support the existence of the ground in criminal cases, are often not present in civil cases. See *Hallatt* at para. 21.
>
> [39] ***The interest of litigants in civil cases is often financial. Thus, "other remedies [are] in place that a losing litigant may invoke to recover the loss claimed at trial if ineffective assistance can be established"*** such as an "action against the counsel whose conduct he impugns": *D.W. v. White* (2004), 2004 CanLII 22543 (ON CA), 189 O.A.C. 256 at para. 51 (C.A.); see also *Hallatt* at para. 21 and *Mallet v. Alberta*, 2002 ABCA 297, [2003] 8 W.W.R. 271 at paras. 60-61.
>
> [40] Further, ***when the ground of ineffective assistance is raised in civil appeals, it is something between a party and its trial lawyer, not the opposing party***. Here, "the rights of others," namely the opposing parties, "are inevitably and inextricably involved": *Dominion Readers' Service Ltd. v. Brant* (1982), 1982 CanLII 1771 (ON CA), 140 D.L.R. (3d) 283 at p. 291, 41 O.R. (2d) 1 at pp. 9 (C.A.). They are caught up in a mess not of their own making and they want to see off the mess and receive the benefit of the judgment they have won. And it must be remembered that ***"the Court must keep in mind…that it is primarily concerned with the rights of litigants and not with the conduct of solicitors***": *Simpson v. Sask. Govt. Ins. Office* (1967), 1967 CanLII 436 (SK CA), 61 W.W.R. 741 at pp. 750, 65 D.L.R. (2d) 324 at p. 332 (Sask. C.A.). This differs somewhat from criminal cases where the Crown, among other things, must consider the public interest and the administration of justice, be alert to miscarriages of justice, and act as a minister of justice: *Boucher v. The Queen*, 1954 CanLII 3 (SCC), [1955] S.C.R. 16, 110 C.C.C. 263.
>
> [Emphasis added.]

[27] Gail Withenshaw argues that the "extraordinary circumstances" of *Saskatchewan Valley Land Co. v. Willoughby* (1913), 24 W.L.R. 40 (SKSC) apply in this case. *Willoughby* found a judgment should be set aside for fraud perpetrated on the part of Willoughby and the solicitor for the plaintiff company in earlier proceedings. But as Justice Stratas explains in *Mediatube* (¶44), *Willoughby* involved perpetration of a fraud that goes to the integrity of the trial and impugns the judgment thereby obtained.

[28] It is easy to see that allegations of the type advanced by Ms. Withenshaw against her trial lawyer would result in many appeals degenerating into an unseemly contest between the disappointed litigant and their defensive lawyer – a contest in which neither a busy court nor a victorious respondent should have any interest. If Ms. Withenshaw has a claim to make against her former lawyers, the Court of Appeal is not the place to make it.

[29] This ground of appeal fails because it is unavailable to Gail Withenshaw.

Did the judge err in calculating the "pool of funds" as of January 1, 2006, versus the deemed date of incompetency, May 1, 2007?

[30] The simple answer is the judge did not do what is here alleged.

[31] Gail Withenshaw argues that the judge's beginning point was problematic for three reasons. First, it required her to account for a period of time when she may have had little or no knowledge of how funds were spent – i.e., prior to the granting of the Power of Attorney. Second, Gail Withenshaw was only ordered to produce an accounting from May 1, 2007. Third, she had no opportunity to present evidence for the January 1, 2006-May 1, 2007 period. She adds that her brothers could have compelled disclosure from the relevant financial companies. However, these submissions ignore three things.

[32] First, they ignore Ms. Withenshaw's failure to discharge her duty of providing a reliable "opening balance" number as of May 1, 2007. Second, they ignore Ms. Withenshaw's authority as attorney to obtain this information from the financial institutions concerned. Her brothers were not fiduciaries; they had no power themselves to obtain their mother's financial records; and unlike their sister, they had no duty to do so. Third, they ignore the pre-hearing disclosure orders of Justices Warner and Lynch which required Ms. Withenshaw to obtain financial and other records beginning from January 1, 2006.

[33] Throughout the accounting proceedings, there was great difficulty in obtaining financial information from Ms. Withenshaw.

[34] The respondents eventually made an interim application for financial disclosure before Justice Greg Warner. The respondents obtained a second disclosure order from Justice Mona Lynch. The orders required production of financial and other records beginning in January 1, 2006. As the respondents explain in their factum:

> 33. [...] The cause asserted by the Respondents was the unexplained dissipation of their mother's assets. They knew she had more than $300,000 in or around 2006. They knew her income more or less met her expenses. They knew she was confined to a nursing home with serious physical and mental health concerns for the last few years of her life. And they knew that her assets appeared to be depleted at the time of her death.
>
> 34. The records they sought were intended to establish and confirm the pool of assets that existed at the time the Appellant became attorney [...]

[35] Initially, the only information about the "pool of assets" was a spreadsheet from Investors Group showing an opening balance of $27,666.40 as of April 1, 2007. Owing to the paucity of disclosure, Justice Gabriel began his analysis with the $328,916.93 of investments in two investments accounts as of January 1, 2006. He then deducted Doris Withenshaw's living and other expenses from January 1, 2006 to May 1, 2007. He also included Doris Withenshaw's 2006 income and a portion of her 2007 income. In other words, in order to establish the firm foundation which Gail Withenshaw had failed to provide, Justice Gabriel began with assets known to exist at the beginning of 2006 and then made adjustments to those assets to establish a figure for the beginning accounting date of May 1, 2007.

[36] The judge made no error in doing the best he could with the evidence available to establish a starting point for a pool of funds as of May 1, 2007.

Did the judge err in applying a "negative inference" in the absence of a full accounting?

[37] Gail Withenshaw faults the judge for applying a principle he does not mention. The quoted phrase does not appear in Justice Gabriel's decision, although it is referred to in some of the parties' written submissions to him.

[38] Fundamentally, this submission misunderstands Gail Withenshaw's obligation as an attorney. Once the court determines – as here – that cause is established under s. 5(1)(a) of the *Act*, Gail Withenshaw had a positive legal duty to account. The burden was on her to identify those assets over which she exercised power, what she did with those assets, and what balance remained (see for example: *D.B. v. J.M.J.*, 2010 NSSC 137, at ¶14). Any failure of adequate explanation is a breach of her duty and typically requires reimbursement for the missing assets. No adverse inference is necessary.

[39] An adverse inference is a matter of evidence. It may be invoked to draw a factual conclusion in the absence of evidence from someone who could provide it.

Judges have a discretion about drawing an adverse inference. In this case, it coincides with Ms. Withenshaw's legal obligation to account – but it does not create that obligation. Judges have no discretion about enforcing the obligation to account.

[40] Ms. Withenshaw cites *Zimmerman v. McMichael Estate*, 2010 ONSC 2947, at ¶36 and 119, as an example of the court giving an attorney further time to fairly address an inadequate accounting. That was a discretionary decision without the parallel here of pre-trial disclosure orders and inadequate explanations for unaccounted funds.

[41] Ms. Withenshaw also relies upon *Toller James Montague Cranston (Estate of)*, 2021 ONSC 1347, at ¶56 and 60 which held that written receipts were not required for every expense. *Cranston* is really a standard of care case. Significantly, and unlike this case, the judge in *Cranston* accepted the Trustee's sworn evidence concerning gaps in the record of receipts.

Did the judge err by failing to consider material facts and evidence?

[42] Gail Withenshaw elaborates in her factum on this ground. She says the judge failed to give credit for a cheque representing a medical expense and misinterpreted income tax information.

[43] The questioned cheque was for $783.60 payable to Emergency Health Services. Credit should be given to Gail Withenshaw in this amount.

[44] Gail Withenshaw's more substantial submission relates to the judge's alleged misinterpretation of income tax information. She says that her mother's income over the years included pension income from a RIF. That "income" was not all new money because some of it would include a return of capital. Gail Withenshaw says that the judge relied on total income shown on Line 150 from her mother's tax returns, on her Notices of Assessment. This includes the value from Line 115 of the tax return, "other pension and superannuation". Gail Withenshaw submits that Line 115 captures any funds withdrawn in a given year from an RIF. (Again, ironically, this tax information was not provided by Ms. Withenshaw, but was exhibited to an affidavit of Gary Withenshaw.)

[45] In his decision, the judge totalled Doris Withenshaw's income from 2006-14 at $352,822. This sum was included in the funds for which Gail Withenshaw was required to account.

[46] Gail Withenshaw explains the "double counting" of some income this way. For example, she points out that in 2014, she had taxable income of $32,904.00, acknowledged by Canada Revenue Agency on Line 150 of her tax return, which includes Line 115 "other pension and superannuation". The $32,000.00 could not all be CPP or OAS income. She deposes in ¶24 of her January 25, 2021 affidavit:

> 24. Shortly before my mother passed away, she left approximately $27,000.00 in investments. I did cash that investment out with the intention of bringing her home to rest for her final days. When cashed, approximately $8,000.00 was withheld for taxes and I prepared to make my home appropriate for her. Unfortunately, she passed away before preparations were finished and the cheque remained dormant. After her passing, a cheque for $19,000.00 was returned and then placed in her estate, and $8,000.00 was returned by C.R.A. These amounts were reflected as income in her 2014 tax return.

[47] So, the approximately $27,000.00 looks like both an "investment" and "income". She could not be required to "account" twice for what may be the same money. Ms. Withenshaw argues that Line 115 of her mother's tax returns included RIF payments from the financial service companies holding her assets. There is earlier mention of a RIF payment from Sun Life in 2006 (Affidavit of Gary Withenshaw, sworn January 10, 2020, Exhibit L, p. 2). It is a reasonable inference that Doris Withenshaw's income – as shown on her tax returns from 2007 to 2014 – included return of investment capital, described as "other pension and superannuation". The result is "double accounting" for income really representing a return of capital.

[48] Gail Withenshaw has demonstrated that there is a clear and material error in the calculation of money for which she is responsible to account.

[49] It has to be emphasized that the judge was struggling to wade through information unsupported by complete affidavit evidence or explanation from Ms. Withenshaw or her trial counsel, partly as a result of the failure of Gail Withenshaw to provide documents and do a proper accounting in the first place. Nevertheless, this ground of appeal should succeed and a recalculation of the amount to be repaid should be done, based on a proper assessment of how much of Doris Withenshaw's income was actually "new money" in the hands of her attorney, Gail Withenshaw. We lack the information to make this calculation. The matter should be remitted to the trial judge to make that assessment.

Conclusion

[50] The appeal should be allowed in part and, in the absence of agreement between the parties, the matter of "new money" income decided by the Supreme Court. The amount for which Ms. Withenshaw would have to account could then be adjusted to accord with the court's findings.

Costs

[51] Ms. Withenshaw has been partly successful. I would order costs of $5,000.00, inclusive of disbursements to Ms. Withenshaw. I would not reverse trial costs awarded against Ms. Withenshaw because the necessity and prolixity of the proceedings before Justice Gabriel can be attributed to Ms. Withenshaw who resisted any effort to account, delayed matters, required the respondents to obtain disclosure and production orders, and unsuccessfully opposed determination of her mother's incompetency as of 2007, a matter heard below but not appealed.

Bryson J.A.

Concurred in:

Farrar J.A.

Van den Eynden J.A.