BLOG

Deceased's Estate granted new trial in $30 million transfer of funds to personal support worker (Waters Estate v. Henry)

Litigation & Dispute Resolution | Private Client Services | Trusts

16 November 2026

As the average age of Canada's population continues to increase, lawyers are being engaged more often than before to advise vulnerable elderly seniors and their family members about elder abuse and to help estate trustees forensically examine suspicious financial transactions that may have occurred prior to a person's death. Elderly persons who are isolated and face significant health issues, and possibly dementia, are particularly vulnerable to having their accumulated wealth and assets misappropriated by unscrupulous relatives, friends and care providers.

Although misappropriation is tantamount to criminal fraud, matters involving misappropriation from an elderly victim typically wind up in civil court where much time and expense is consumed to assess whether a defendant has committed a breach of fiduciary duty or trust under a power of attorney or as an estate trustee, whether a plaintiff is entitled to a resulting trust over assets acquired by an unscrupulous defendant or whether transfers of money and/or property to a defendant were gifts. These issues are complex and sometimes difficult to resolve. However, the law does not and should not make it easy for a defendant to strip any vulnerable person of their wealth.

In *Waters Estate v. Henry*, 2026 ONCA 704, the Court of Appeal for Ontario rendered an important decision for the estates bar and for those advocating for the protection of aged seniors against elder abuse.

In this case, an elderly wealthy man, WRW, who suffered multiple health issues, transferred more than $30 million over a period of ten years to a personal support worker, GH, whom he had initially hired to provide care for his chronically ill wife. GH was in desperate financial circumstances and going through marital issues at the time she was hired. WRW paid GH a generous wage of $60,000 per year and, shortly after she was hired, provided her with significant loans to pay off debts and to buy a new car.

GH was middle aged but decades younger than WRW. WRW was in poor health and vulnerable but did not lack capacity.

During the course of GH's employment, WRW continued to transfer more money to her, which she used to purchase and renovate real estate, support her family, buy jewelry and show horses for her daughter and fund luxurious vacations. When WRW died, his estate trustees discovered for the first time that most of his previous wealth had ended up in GH's hands and that his invalid wife of 53 years, who needed 24-hour care, was essentially left destitute.

Accordingly, the Estate was required to sue GH to get back the money and obtain an interest in the properties that she had bought with it.

While the trial judge found that some of the money WRW had given to GH were loans, rather than gifts, and that WRW retained a beneficial interest in a horse farm property GH had purchased, GH escaped a more significant judgment debt on the grounds that WRW had gifted the bulk of his wealth to her. The trial judge concluded that based on GH's testimony, which was uncorroborated by anyone, WRW and GH had become involved in a clandestine intimate relationship over the course of her employment and that this explained the significant transfer of wealth to her.

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The Estate appealed the trial judge's decision and won.

At issue on the Estate's appeal were the following:

1. Did the trial judge improperly reverse the burden of proof by requiring the Estate to prove that the transfers (393 in total) were not gifts?

2. Did the trial judge err in ruling that a majority of handwritten notes made by WRW to record transfers were inadmissible?
- Did the trial judge misapply section 13 of the *Evidence Act* by finding that the alleged intimate relationship could corroborate GH's evidence about the transfers?

- Did the trial judge err in finding that the Estate's non-property and some property claims were statute-barred? and
- Did GH breach a fiduciary duty to WRW?

Presumption of resulting trust

The law presumes bargains, not gifts. Accordingly, gratuitous transfers of assets, without consideration, give rise to a rebuttable presumption of resulting trust. This places the onus on the recipient of a transfer to prove on a balance of probabilities that the transfer was a gift.

The trial judge had rejected the claim that WRW retained any interest in the bulk of the transfers due to a lack of documentation, finding that most of the transfers did not represent an investment in the properties purchased by GH. The only transfers which the court accepted as an investment were those made in connection with the purchase of a horse riding stable and with renovations to this property.

The Court of Appeal found that while the trial judge stated the law on resulting trust correctly, he misapplied it. The Court found that the trial judge reversed the onus by focusing on whether the Estate had been able to prove that WRW intended to retain an interest in the monies transferred to GH and the properties that she purchased with those funds. However, the onus rested on GH to prove that WRW had relinquished a beneficial interest in the transfers and properties. As found by the trial judge, GH had no recollection of any discussions with WRW about his intentions.

The Court was also concerned that the trial judge analyzed a small selection of the transfers and jumped to the conclusion that since those transfers were gifts, all of the other transfers, with a limited exception, had to be gifts. Even though the Court accepted that the trial judge was not required to analyze each transfer separately, more evidence needed to be considered. Some of that evidence was contained in WRW's handwritten notes, which the trial judge found were inadmissible hearsay. Those notes, on their face, appeared to document WRW's financial investments in properties and his shareholder interests.

Handwritten notes should not have been excluded

Although several handwritten notes existed, the trial judge only admitted one of them. The trial judge ruled that, apart from that one note, the others did not qualify for admission under the principled exception to the hearsay rule. Even though there was obvious necessity, the trial judge found that they did not meet the test for procedural or substantive reliability.

The Court agreed with the Estate's argument that the bulk of notes were potentially admissible, finding that the trial judge had applied the hearsay analysis to the wrong evidence.

The notes had not been proffered for the truth of their contents, but for a general proposition that WRW had advanced monies to GH for a purpose other than a gift. The Estate argued that if WRW intended his transfers to be gifts, there was no reason to make detailed notes. In essence, the position of the Estate was that by making the detailed notes, WRW impliedly asserted his interest in the transfers. Accordingly, the issue was the reliability of the implied assertion.

The Court explained that hearsay typically consisted of spoken words, but could also consist of conduct, which either could be assertive conduct or non-assertive conduct. The Court said that assertive conduct included expressive acts such as nodding or shaking one's head and that non-assertive conduct described conduct from which a trier of fact was asked to infer an actor's belief.

With respect to implied assertions, the Court noted that the doctrine was undeveloped in the case law.

Furthermore, the Court stated that the notes could have been admissible for a non-hearsay purpose, which did not need a hearsay analysis at all. The Court explained:

Triers of fact are often called upon to draw inferences from non-assertive conduct. Those inferences may relate to the belief or statement of the declarant. However, the law does not consider all such inferences to be implied assertions. More commonly, the cases do not see this reasoning as engaging the hearsay rule,

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but rather, as an example of inferential reasoning from original circumstantial evidence.

The pathways in the hearsay and non-hearsay context are analytically distinct.

While the foregoing will need to be assessed at a new trial, the Court concluded that for the purposes of the appeal, the trial judge had simply erred in his conclusion on threshold reliability because, in the circumstances, WRW was making the notes for himself. Therefore, there was no risk that they were being made to deceive anybody.

The Court also found that the trial judge's *obiter* ruling that even if the bulk of the notes were admissible they should be given little weight was erroneous because he had not considered the implied assertion that the notes might be taken to mean.

Lastly, the Court concluded that it was difficult to reconcile the trial judge's treatment of the bulk of the notes to the one note he had admitted into evidence.

Section 13 of the Evidence Act

Under section 13 of the *Evidence Act*, GH was required to corroborate her evidence that the transfers were gifts. The section states:

In an action by or against the heirs, next of kin, *executors*, administrators or assigns *of a deceased person, an opposite* or interested *party shall not obtain a* verdict, *judgment or decision on his or her own evidence in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence.* (Emphasis added)

Corroboration requires independent evidence that the evidence of the opposite party is true.

However, the trial judge relied heavily, as corroboration, on the alleged intimate relationship, for which, there was little evidence beyond GH's own assertion.

Although WRW had been prescribed Cialis and a doctor's note suggested that he wanted to treat erectile dysfunction, the Court said that standing alone the note and prescription could not rebut the presumption of resulting trust or support GH's claim that WRW intended every transfer to be a gift, particularly given that he made large transfers to her within a week of her starting employment and GH's "undisputed lack of credibility on other important issues." The trial judge had found that GH "had a significant motive to misrepresent, overstate, and fabricate evidence."

Limitation periods

Both the 2-year and 10-year limitation periods, found respectively in the *Limitations Act, 2002* and *Real Property Limitations Act*, applied to the transfers.

With respect to monetary transfers that were not used to buy property, the trial judge found that those transfers stopped by December 2019 and thus were statute-barred because the action was not commenced until April 29, 2022.

With respect to certain real property, the trial judge found that the Estate's claim for purchases made prior to April 29, 2012 was statute-barred because WRW knew or ought reasonably to have known about a claim in them before this date.

However, the Court of Appeal found that in a claim for resulting trust, the limitation period might start on the date of transfer or acquisition, or it might not. Since a new trial was necessary on the issue of a resulting trust, the issue of what WRW knew or ought to have known about GH's treatment of the funds would need to be reconsidered.

Breach of fiduciary duty

The trial judge found that GH was not a fiduciary to WRW and thus had not breached any corresponding duties with respect to the properties. This conclusion was based on the judge's findings that the transfers were gifts rather than investments.

Since the Court was setting aside the trial judge's conclusion that WRW gifted the majority of the transfers to GH, the conclusion that GH was not a fiduciary also needed to be set aside.

Cross-appeal dismissed

The Court also dismissed a cross-appeal which, among other things, challenged a ruling that money belonging to WRW's wife, which WRW transferred to GH, was not a gift and was recoverable even though the wife was not a plaintiff.

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The Court found that despite the wife not being a party, it did not follow that GH was entitled to keep her money or that the Estate had no standing to pursue the claim for the wrongful transfer of funds by WRW to GH.

Representation by Gardiner Roberts LLP

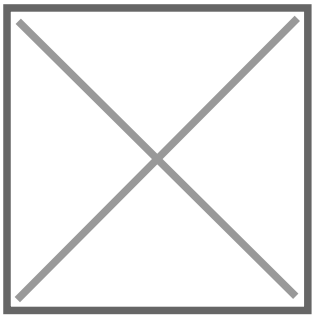
The Estate was represented on the appeal by Gavin J. Tighe, K.C. Mr. Tighe is a senior partner at Gardiner Roberts LLP and is a certified specialist in litigation. He is also co-chair of the firm’s Dispute Resolution Group.

Mr. Tighe was assisted throughout by Karen Bernofsky, a senior associate in the firm’s Dispute Resolution Group.

In addition, Stephen Thiele, a partner and the firm’s Director of Legal Research, assisted in all aspects of the preparation of the Notice of Appeal, the legal research and the preparation of the factums filed in support of the appeal and in the defence of the cross-appeal. He was assisted by Isabel Yoo, a junior associate and research lawyer at the firm.

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