

## This Week In News

### ◆ Toronto Synagogues Receive Federal Funding for Security

In response to, and as a preemptive measure against hate crime, a Forest Hill synagogue and community centre have received government funding for additional security measures.

They are among 17 religious institutions to receive funding as part of a pilot program from Public Safety Canada.

### ◆ Harper Condemns Israeli Apartheid Week

Prime Minister Stephen Harper denounced the annual Israeli Apartheid Week held last month by university students in 11 major Canadian cities, it was reported.

"We must be relentless, relentless and uncompromising in exposing this anti-Semitism for what it is," the prime minister told partakers at a Toronto Canadian Jewish Political Affairs Committee conference.

### ◆ Toronto-Area Basement Fire

On Tuesday morning, four people were transported to hospital — two adults, a 22-month-old boy and a three-month-old girl — according to Toronto Fire officials.

The fire broke out around 8:15 a.m. at 2031 Eglinton Ave. W., just east of Caledonia Rd, and it is thought that hoarding may have been a factor in the fire. The home did not have working fire alarms.

### ◆ GM Expanding in Urban Canada

General Motors of Canada Ltd. is trying to infiltrate Canada's major urban centres, including possibly opening a new dealership in downtown Toronto, the CBC reported.

Winning over customers in major Canadian cities has become a priority for the company, as it tries to rebuild after restructuring.

### ◆ Ontario Teachers Earned \$13.3 Billion in 2010

According to The Ontario Teachers' Pension Plan, teachers earned a 14.3 per cent return last year.

But, according to CTV, it faces "serious funding challenges," including a \$17.2-billion preliminary funding deficit due to longer retirement periods and low real interest rates. The fund currently pays out \$1.8 billion more each year than it receives.

## A Trustee Is Not Entitled To Use Trust Property For His Own Benefit

Justice Strathy of the Superior Court of Justice ordered that Mr. Zimmerman repay nearly \$500,000 in compensation he took as an attorney for property. The judge also ordered that he personally pay the legal costs of the other side amounting to \$284,362.19. What happened?

Let me first introduce you to Robert and Signe McMichael. During their lives they collected Canadian art from artists like Tom Thomson and the Group of Seven members. In 1964 they donated their art collection to the province of Ontario and by 1981 the Collection had grown to include more than 2,000 artworks. This Collection is truly a Canadian national treasure.

In 2001 Robert and Signe McMichael made mirror wills. Both husband and wife left everything to each other. Signe's will (like her husband's) said that if her spouse predeceased her, then when she died, Signe's assets would be donated to the Collection. Mr. McMichael died in 2003 and his assets were inherited by his wife.

After her husband's death, Mrs. McMichael signed a power of attorney appointing Mr. Zimmerman as her sole attorney for property. In early 2004 Mr. Zimmerman's lawyers prepared a trust document appointing Mr. Zimmerman as the trustee. Mr. Zimmerman then transferred virtually all of Mrs. McMichael's assets including the art collection into the trust so that there was virtually nothing left in her estate.

Under this new trust, Mr. Zimmerman had sole and unfettered discretion to decide which art related organization would receive Signe's assets years after her death. Effectively, the new trust rendered the will meaningless. Instead of inheriting everything immediately after Signe's death, the Collection would get nothing. If the new trust went unchallenged it was totally up to Mr. Zimmerman to decide whether the Collection would receive any of Signe's assets.

When Mrs. McMichael died in 2007 her niece and husband, the executors under the will, commenced a legal proceeding. They asked the court to declare that the Power of Attorney and the Trust were void on the ground that Signe lacked capacity. They also wanted Mr. Zimmerman to pass his accounts in a separate proceeding.

The only issue before Justice Strathy was Mr. Zimmerman's passing of accounts. To pass his accounts Mr. Zimmerman had to show what assets of Signe's he received and how the money under his control was spent. As an attorney for property it was Mr. Zimmerman's statutory and com-

mon law duty to keep proper accounting records and proof/vouchers to demonstrate that the money spent was for the benefit of Mrs. McMichael. This duty is imposed on trustees because it is a basic fundamental principle of trust law that Mr. Zimmerman, as a trustee, was not entitled use the trust property for his own personal benefit. If Mr. Zimmerman did use Signe's assets for his own personal benefit or if he could not account or explain to the court how he spent the money then he would be liable to return it.

When Mr. Zimmerman tried to pass his accounts the fireworks started.

Whatever accounting that was provided was incomplete. Mr. Zimmerman could not or would not provide proper explanations about how he spent the money. The court found that Mr. Zimmerman breached his fiduciary duties and failed to exercise his powers and duties diligently, with honesty and integrity and in good faith, for the incapable person's benefit. Mr. Zimmerman did not comply with his obligation to keep proper accounts and was not in a position to prove that he administered the trust prudently and honestly. He did not have the accounts ready and was not able to give full information when required.

Mr. Zimmerman infuriated the court because he failed to respond to appropriate objections to his accounts. The judge drew an adverse inference that by failing to respond properly to the questions raised by the Collection and the estate trustees Mr. Zimmerman was guilty of taking the money for himself and would be required to reimburse the estate for those disbursements and expenses.

This short review of the case law should not be taken as legal advice. Based on my experience in dealing with these cases, they often turn on the specific facts. If you have a legal question relating to something similar, you are best advised to seek out competent legal counsel to determine your best course of action.

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## What happens when a spouse removes the child from the home without the other spouse's consent?

By: Avy Jordan Ben-zvi

In these types of cases the courts are generally reluctant to favour the parent who unilaterally removed the child from the home and deprived the other parent of access unless there are strong reasons for their actions, for example abuse. In *LiSanti v. LiSanti*, 1990 CarswellOnt 219 the courts stated the fact that one parent, without just cause, leaves home with the child should not entitle that parent to establish a status quo in order to defeat the other's custody rights. Specifically, when the fleeing parent made no efforts to reach an agreement about custody with the other parent and did not bring an application for interim custody prior to the abrupt departure. This was similar to a custody case that I recently dealt with. The mother unilaterally removed the child without the father's consent. The father immediately called my office and retained my services. We wrote to the mother asking for immediate access. The mother only allowed access once every two weeks for a two hour period and it was circumscribed by her requirement that it would be at her home with her grandparents supervising the visits. The court stated that the access arrangement that was offered by the mother amounted to "no access". As a result the court ordered im-

mediate access to the child for every Tuesday, Thursday, Saturday and Sunday. The court also stated that the father may take the child to his own home or wherever he wishes during access times. If this happens to you it is strongly advised to contact a lawyer immediately.

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*Avy Ben-zvi is the CEO of Ben-zvi Barrister & Solicitor Professional Corporation. His legal area of practice and expertise involves civil law, including collection matters, family law, and personal injury cases. This article is in no way offering any kind of legal advice. If you are seeking any kind of legal advice or opinions, please seek an attorney. Avy Ben-zvi may be reached at avy@ben-zvi.ca*

