

CITATION: *BARAN et al v. CRANSTON et al*, 2019 ONSC 3127

COURT FILE NO: 17-35222ES

DATE: 22/05/19

SUPERIOR COURT OF JUSTICE - ONTARIO

IN THE ESTATE OF TOLLER JAMES MONTAGUE CRANSTON (also known as Toller Montague James Cranston, James Cranston Toller Montague and Toller Cranston Montague), deceased.

BETWEEN: Phillippa Baran in her capacity as Trustee of the Estate of Toller James Montague Cranston and Hugh Goldie Cranston and Guy Cranston

BEFORE: Master Fortier

COUNSEL: Miriam Vale Peters for the Respondents, moving party
Douglas D. Buchmayer for the Applicant, responding party

HEARD: January 30, 2019

REASONS FOR DECISION

1. This motion is brought in the context of a contested passing of accounts. It is a motion for directions by the Respondents Hugh Goldie Cranston (“Goldie Cranston”) and Guy Francis Cranston (“Guy Cranston”). They seek an order appointing Travis Webb as Estate Trustee During Litigation (“ETDL”) over the Estate of Toller James Montague Cranston (“the Estate”) and removing the Applicant Phillippa Baran (“Ms. Baran”) as Trustee of the Estate.

Background and Position of the Parties

2. The deceased, Toller Cranston, was a renowned Canadian figure skater and artist. He died on January 23, 2015, in Mexico where he resided for some 23 years. The deceased died without leaving a will. His three siblings, Ms. Baran, Goldie Cranston and Guy Cranston

were declared the sole heirs of the Estate by the Second Civil Court in San Miguel de Allende, Guanajuato, Mexico in August 2015.

3. Ms. Baran is the Estate Trustee. She was first appointed “Executor” of the estate by the court in Mexico in September 2015. A Certificate of Appointment of Foreign Estate Trustee’s Nominee as Estate Trustee without a Will (“Certificate of Appointment”) was then issued by the Superior Court of Justice in Ottawa on December 8, 2016.
4. The assets of the Estate were situated both in Canada and in Mexico and included approximately 20,000 pieces of original artwork, chattels, bank accounts and properties. The original value of the Estate was approximately \$6,258,520.
5. According to Ms. Baran, the remaining estate assets consist of \$429,958 in cash and approximately \$1,577,371 in original art work. The deceased’s original artwork is on consignment to Artworld Fine Art (“Art World”), Art Evolution Gallery and Lounge (“Art Evolution”), and Koyman Galleries. A significant portion is also stored in Art Evolution’s warehouse.
6. Initially the parties worked together cooperatively to administer the affairs of the Estate. After Toller Cranston’s death, the three siblings travelled to Mexico to organize the Estate. In addition to selling the real estate, some artwork and other chattels, a number of paintings and other items were divided between them.
7. Subsequently, Goldie and Guy Cranston became concerned about Ms. Baran’s administration of the Estate. In summary, it is their position that Ms. Baran has mismanaged the Estate and they are concerned about the disposition of the remaining Estate assets.
8. Particularly troubling to Guy and Goldie Cranston is Ms. Baran’s position with respect to the disposition of the balance of the original artwork in the Estate. It is the “unrealized artwork” that is a major focus of dispute and one of the reasons why Goldie and Guy Cranston are requesting that an ETDL be appointed at this time.

9. As noted above, there remains a tranche of the deceased's original artwork either for sale in Canadian art galleries or in storage. Guy and Goldie Cranston have repeatedly asked that their share of this artwork be distributed to them in specie and not sold. Ms. Baran has refused their request and continues to sell the artwork through the galleries. Moreover, the moving parties have not been able to obtain an accounting of what pieces of art are for sale, have been sold or are stored.
10. Of particular concern to the moving parties is the evidence that Art Evolution is in financial difficulty and the Trustee has neither inquired about Art Evolution's financial situation nor made any effort to retrieve the artwork in the gallery's possession. Furthermore, Art Evolution does not regularly remit sales proceeds to the Estate and Ms. Baran confirmed that she does not know when the Estate would receive payment after an Art Evolution sale. Also troubling to the moving parties is that Gowling, the law firm representing Ms. Baran as Trustee, also represents Art Evolution. The moving parties argue that this affects the administration of the estate because the interests of the Estate and the interests of Art Evolution appear to be in conflict. According to Guy and Goldie Cranston, that loyalty runs contrary to Ms. Baran's duties as Estate Trustee.
11. It is the moving parties' evidence that neither Guy nor Goldie Cranston require the Estate to sell their respective shares of the artwork because Guy Cranston owns and operates an art Gallery in Lunenburg, Nova Scotia. They argue that art galleries typically take a 50% fee on sales and as such, Ms. Baran's insistence on selling the pieces through the galleries results in an unnecessary loss to the moving parties and is not in their best interests.
12. Another area of dispute between the parties is the future rights to the artwork. It would appear from the evidence that Ms. Baran has had discussions with Donna Child, the principal of Art World, related to the marketing and licensing opportunities that the artwork could yield once the passing of accounts is concluded. The discussions included the creation of a coffee table book and other merchandizing items, such as scarves, umbrellas, etc. Neither Guy nor Goldie Cranston have been consulted or informed of Ms. Baran's plans. The moving parties further argue that Ms. Baran is unduly focused on Toller

Cranston's legacy and she is making decisions regarding the artwork that they have not been part of and do not agree with.

13. Finally, the moving parties submit that they are alarmed by the evidence that the Trustee has reimbursed herself the sum of \$528,228 from the Estate to date and they have concerns about the \$315,774 spent by the Trustee in legal fees on behalf of the Estate.
14. Goldie and Guy Cranston submit that Ms. Baran should be relieved of her duties as Estate Trustee for the course of this litigation in order to prevent further depletion of the Estate and irreparable harm to the beneficiaries if the artwork is liquidated in the present manner.
15. The moving parties argue that an ETDL ought to be appointed to preserve the assets of the Estate and to distribute the artwork among the beneficiaries. In that regard, Travis Webb, a lawyer at Soloway Wright with experience in the administration of estates, has consented to act as an ETDL. His qualifications are not in issue and I am satisfied that Mr. Webb is qualified to act as an ETDL.
16. The Estate Trustee opposes the appointment of an ETDL arguing that it is neither appropriate nor warranted.
17. The Trustee submits that the moving parties are employing unnecessary procedural tactics against her to purposefully disrupt the passing of accounts and to prevent her from being able to properly respond to the allegations being made against her in the passing of accounts.
18. Counsel for the Trustee argues that this is not the first time that the moving parties have opposed Ms. Baran's appointment as Estate Trustee. Goldie and Guy Cranston initially opposed Ms. Baran's application for a Certificate of Appointment. They eventually withdrew their objections and the appointment proceeded. Approximately three months later, Goldie Cranston commenced an application seeking to remove Ms. Baran as Estate Trustee and to compel a passing of accounts. The application was adjourned sine die

because independent of the application of Goldie Cranston, the Trustee herself commenced an application to pass her accounts for the administration of the Estate in July 2017.

19. The Trustee admits that she is opposed to the distribution of the artwork in specie and will not make any decision with respect to any unrealized artwork until the passing of accounts is complete. As she stated on the cross-examination on her affidavit on August 21, 2018:

1237. Q.: Okay. So in this letter you acknowledge that the statement is being made that Guy and Goldie want an immediate distribution of the art work.

A.: Yes.

1238. Q.: They don't want the galleries to continue selling them. You understand that?

A.: I do

1239. Q.: What has happened since that letter? Has art work been sold?

A.: I'm sure it has, yes. As long as I'm the administrator with authority I continue to act in what I believe are the best interests of the estate, and because my brothers want immediate distribution of the paintings, I will maintain, as I have said in writing and I've said again today, until the estate is ready to be closed I don't think it's appropriate to do that and I'm going to do that. I'll oppose it. That's the last residue of this estate. Only the paintings and what's in the bank account. And I feel the estate needs those resources to settle its affairs before anything else is done.

20. Ms. Baran does not dispute that she continues to sell the artwork over the objection of the moving parties. It is her position that she is entitled to do so as the Estate Trustee and argues a beneficiary does not have a legal right to demand the distribution in kind of estate assets.

21. The Trustee argues that the moving parties raise numerous issues before the court on this application but have not provided any evidence that the Trustee has been uncooperative or unwilling to participate in the passing of accounts. The trustee has produced a detailed reply to various notices of objection of the moving parties and states that she has provided

full disclosure of the documentation in her possession. Moreover, the passing of accounts is the appropriate process that will afford the Trustee the opportunity to provide responses to all inquiries in the normal course.

22. Ms. Baran argues that significant distributions in kind of the artwork have already been made to the heirs. There is no urgency warranting an immediate distribution in kind of the remaining artwork, which in effect may expose such artwork to “fire sale” pricing. The final determination of these issues should be left to the passing of accounts hearing, where the concerns of the moving parties may be properly addressed.
23. Counsel for Ms. Baran argues that the appointment of a neutral third party to ensure the transparent and orderly administration of the estate is not necessary in the circumstances of this case. According to Ms. Baran the administration of this estate is essentially complete with the exception of the remaining artwork. Her position is that heirs of an estate have no entitlement at law to the assets of the estate but rather only to the net proceeds of distribution upon the administration of the estate as a whole.

Analysis and Disposition

24. Pursuant to r. 75.06(3)(f) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, the court, on an application for directions, may order that an estate trustee during litigation (ETDL) be appointed and file security as the court directs.
25. According to the jurisprudence, the purpose of an ETDL is to ensure that the playing field is level. The court has comprehensive and inherent powers with respect to the supervision of an estate, including the appointment of an ETDL. The cases set out the following principles:
 - a) The court has broad and inherent powers to supervise the management of estates and to control its own processes and may draw upon its inherent jurisdiction

where appropriate to protect parties so that justice can be done in the proceeding (see *Mayer v. Rubin* 2017 ONSC 3498, 30 E.T.R. (4th) 239, at para. 26).

- b) The inherent jurisdiction of the court includes appointing an officer of the court to preserve and protect the assets of an estate which may be at risk during litigation (*Mayer* at para. 28).
- c) The court must ensure that there is a level playing field and that the assets of the estate be immunized from the tactics employed by litigating parties. Neither side should be able to use their control over the estate to benefit themselves or to prejudice the other beneficiaries. (*Mayer* at para. 36, *Class v Smith*, 2018 ONSC 623, 38 E.T.R. (4th) 326, at para. 40).
- d) The assets of the estate ought to be administered to the maximum advantage of the beneficiaries. A trustee who is in an adversarial position towards a co-trustee or a beneficiary should not normally be left in charge of trust property; “simple prudence” calls for the temporary replacement of a trustee who is in such a position. (*Mayer* at para. 36; *Class* at para. 40).
- e) The appointment of an ETDL is not an extraordinary measure and the court should refuse the appointment only in the clearest of cases. The appointment of an ETDL will be favored by the court in the majority of cases of conflict between the trustee and beneficiaries unless the administration of the estate is particularly simple or straightforward. (*McColl v. McColl et al*, 2013 ONSC 5816, 93 E.T.R. (3d) 116 at para. 26; *Mayer* at para. 35; *Class* at para. 41.)

26. In addition to the above, McEwen J. in *Kalman v. Pick*, 2014 ONSC 2362, at para. 5(ii) indicated that, in his view, the appointment of an ETDL would most likely result in savings to the estate and to the parties where significant legal fees have been generated as a result of acrimony between the parties.

27. In my view, the only issue requiring resolution on this motion is whether to appoint an ETDL at this time and not whether the beneficiaries have a right to seek distribution in kind of the artwork. The distribution question is not a simple one: there is no will and therefore no direction from the Testator as to what he wanted done with the assets. It may be that in such circumstances the Estate Trustee would be well advised to consider the wishes of the beneficiaries. In any event, it appears from the conduct of the Trustee that she has already decided the question and she continues to sell the artwork through the galleries over the objection of the beneficiaries.
28. The administration of this Estate is neither simple nor straightforward and has become highly adversarial. Goldie and Guy Cranston argue that Ms. Baran's handling of the artwork is more focused on her vision of Toller Cranston's legacy than administering the Estate in the interests of the beneficiaries. In my view, their concern may be justified. Ms. Baran appears to have a personal interest in the outcome in conflict with the other beneficiaries.
29. Ms. Baran's argument that the concerns of the moving parties will be addressed at the passing of accounts misses the point and underscores the conflict between the Trustee and the beneficiaries. The artwork may be disposed of by the time the accounts are passed and the interests of the moving parties thereby defeated.
30. In fairness to Ms. Baran, there is evidence that she has worked very hard since Toller Cranston's death to deal with the significant assets and debts of the estate. It has been a difficult task. However, the parties appear to have reached an impasse.
31. In my opinion, Ms. Baran's handling of the remaining artwork in either selling the artwork over the objections of the moving parties or in making plans with regards to the future rights of the artwork without informing or consulting Guy or Goldie Cranston is unreasonable and runs contrary to her obligations as an estate trustee to act only in the interests of the beneficiaries. In my view Ms. Baran is in a position of conflict in this litigation.


32. As held by the court in *Mayer*, neither side should be able to use their control over the estate to benefit themselves or to prejudice the other (at para. 36). The court must ensure that there is a level playing field and a trustee who is in an adversarial position towards a beneficiary should not be left in charge of trust property. Of added concern are the mounting legal costs in this matter. In my view, based on the evidence before me, the appointment of an ETDL to ensure the transparent, neutral and orderly administration of the Estate is necessary. The moving parties' motion is therefore granted.

Order

33. Travis Webb, lawyer with the law firm Soloway Wright, is appointed the Estate Trustee During Litigation of the estate of Toller James Montague Cranston to act without the posting of an Administration Bond. He shall immediately file his Consent with the court and take immediate control of all assets of the Estate. Ms. Baran shall fully co-operate in the hand-over of the Estate assets and all records.
34. I direct that Mr. Webb investigate and develop a plan for the distribution and/or liquidation of the remaining artwork, based on consultation with all three beneficiaries. Counsel may request a case conference before me to discuss these issues, if that is deemed to be helpful.

Costs

35. If the parties cannot otherwise agree on costs, they shall send written submissions to me within 30 days of the date of this Order. Submissions shall be no longer than 3 pages in length.


Master Fortier