

ONTARIO

SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

BETWEEN:)
)
Phillippa Baran) *Douglas D. Buchmayer, Joel Reinhardt for*
) the Appellant
Appellant)
)
– and –)
)
Guy Francis Cranston and Hugh Goldie)
Cranston) *Miriam Vale Peters, Sara-Louise Drury for*
) the Respondents
Respondents)
) **HEARD at Ottawa:** January 22, 2020

REASONS FOR DECISION

PARFETT J.

[1] This matter is an appeal from a decision and order of the Master. The Appellant, Phillippa Baran, is seeking to set aside the decision and order of the Master appointing an Estate Trustee During Litigation (ETDL).

Background

[2] On January 23, 2015, a Canadian icon, Toller Cranston died in Mexico. He left no will. He had an extensive collection of art work and other assets. His sister, Phillippa Baran and his two brothers, Guy and Goldie Cranston are his heirs.

[3] Ms. Baran was appointed the administrator of Cranston’s Mexican estate by a Mexican court on September 3, 2015. This appointment was made on consent of the three beneficiaries.

[4] On December 8, 2016, Ms. Baran’s appointment as administrator of Cranston’s estate was confirmed in Ontario. This order was also on consent.

[5] However, a rift developed between the siblings over Ms. Baran's administration of the estate and on March 23, 2017, Goldie Cranston sought to have Ms. Baran removed as administrator. This motion was adjourned *sine die* but is expected to be heard on April 21, 2020 at the same time as the passing of accounts.

[6] On January 30, 2019, the Respondents on this appeal brought a motion to appoint an Estate Trustee During Litigation. The key issue that had arisen between the parties involved the distribution of the remaining art work. Ms. Baran was selling the art work with a view to distributing the residue of the estate as money and the brothers wanted to receive some of the residue of the estate in the form of paintings.

[7] The Master released her decision on May 22, 2019 and an order was subsequently issued by the court. The form and content of the order had been agreed upon by the parties.

[8] There was a preliminary issue concerning whether the decision of the Master was interlocutory or final in nature. That issue was resolved on November 13, 2019 and this appeal proceeded on the basis that the decision was interlocutory.

Issues

[9] There are two issues on this appeal. First, whether the decision of the Master should be set aside and second, whether the order that was issued exceeded the Master's jurisdiction.

Legal Principles

[10] In *Housen v. Nikolaisen*,¹ the Supreme Court of Canada set out the standards of review on an appeal. Where the issue is a pure question of law, the court stated,

The basic rule with respect to the review of a trial judge's findings is that an appellate court is free to replace the opinion of the trial judge with its own. Thus, the standard of review on a question of law is that of correctness.²

[11] The standard of review for findings of fact 'is that such findings are not to be reversed unless it can be established that the trial judge made a "palpable and overriding error".'³

[12] These principles are straightforward. Where the applicable standard becomes more complicated is where the issue is one of mixed fact and law. As the court in *Housen* noted, where the matter involves the application of a legal standard to a set of facts, the question is one

¹ [2002] 2 S.C.R. 235.

² At para. 7.

³ At para. 10, citing *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802 at p. 808.

of mixed fact and law.⁴ The reviewing court dealing with a question of mixed fact and law must determine which standard of review to apply. The court in *Housen* stated,

Matters of mixed fact and law lie along a spectrum. Where, for instance, an error with respect to a finding of negligence can be attributed to the application of an incorrect standard, a failure to consider a required element of a legal test, or similar error in principle, such an error can be characterized as an error of law, subject to a standard of correctness.⁵

[13] However, the court goes on to say,

In our view, it is settled law that the determination of whether or not the standard of care [in a negligence case] was met by the defendant involves the application of a legal standard to a set of facts, a question of mixed fact and law. This question is subject to a standard of palpable and overriding error unless it is clear that the trial judge made some extricable error in principle with respect to the characterization of the standard or its application.⁶

[14] The *Housen* case dealt with appeals from trial judges. However, the case law is clear that the same standards of review are to be applied to the decisions of Masters.⁷

[15] The Appellant argued that the errors in the present case are both errors in law and errors of mixed fact and law. The Appellant contended that the Master erred in law in that she exceeded her jurisdiction by removing the Appellant as administrator. The Appellant pointed to s. 37 of the *Trustee Act*⁸, which indicates that the removal of an administrator can only be done by a judge.

[16] The Respondents agree that s. 37 of the *Trustee Act* does not authorize a Master to remove a trustee. However, they argue that the Master did not remove Ms. Baran as the administrator; she merely appointed an ETDL.

[17] The Appellant also argued that the Master did not properly apply the test for determining whether an ETDL is necessary.

⁴ At para. 26.

⁵ At para. 36.

⁶ Ibid.

⁷ *Zeitoun v. Economical Insurance Group*, [2008] O.J. No. 1771 (Div. Ct.) at para. 26.

⁸ R.S.O. 1990, c. T.23.

[18] The authority for the appointment of an ETDL is found in s. 28 of the *Estates Act*.⁹ That section states,

Pending an action touching the validity of the will of a deceased person, or for obtaining, recalling or revoking any probate or *grant of administration*, the *Superior court of Justice has the jurisdiction to grant administration in the case of intestacy and may appoint an administrator of the property of the deceased person, and the administrator so appointed has all the rights and powers of a general administrator, other than the right of distributing the residue of the property*, and every such administrator is subject to the immediate control and direction of the court, and the court may direct that such administrator shall receive out of the property of the deceased such reasonable remuneration as the court considers proper. [Emphasis added]

[19] Rule 75.06(3)(f) of the *Rules of Civil Procedure*¹⁰ expressly authorizes the court to appoint an ETDL.

[20] As noted earlier, the matter involves an intestacy. Consequently, the validity of a will is not in issue. However, this section applies to the situation of intestacy and as the Appellant's counsel noted, there are other reasons than a challenge to the validity of a will for appointing an ETDL. For example, in *McColl v. McColl*, the validity of the will was not in issue. However, there was a dispute between the trustee and a beneficiary. The court appointed an ETDL based on the conflict and the trustee's lack of experience in managing a business.¹¹

[21] In *Mayer v. Rubin*,¹² the court stated that an ETDL may be required where 'the parties' duties as fiduciaries [are] inconsistent with their ongoing litigation interests. They often cannot be loyal and selfless to each other while they are adverse in interest in litigation.'

[22] The court went on to note that in deciding whether to appoint an estate trustee during litigation, the court will consider the balance of convenience. It also commented that the reasons for appointing an ETDL can extend beyond a dispute over the validity of the will to include the need to protect the estate from the trustees' animosity.¹³

[23] Finally, the court in the *Mayer* case stated,

⁹ R.S.O. 1990, c. E.21

¹⁰ R.R.O. 1990, Reg. 194.

¹¹ 2013 ONSC 5816,

¹² 2017 ONSC 3498.

¹³ At para. 34, citing *Gefen v. Gaertner*, 2019 ONCA 233.

It is in the interests of all beneficiaries that the assets of the estate be immunized from the tactics employed by litigating parties. The court must protect the level playing field. Neither side should be able to use their control over the estate to benefit themselves or to prejudice the other. It is a simple inference that 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 an adversarial position with a co-trustee or beneficiary.¹⁴

[24] The decision whether to appoint an ETDL is discretionary.¹⁵ Some of the factors to be considered in determining whether the discretion to appoint an ETDL should be exercised include,

- Whether a trustee may be a witness in the litigation;
- Potential for conflict of interest;
- Conflict between the interests of the trustees and/or beneficiaries;
- Hostility between the trustees and/or beneficiaries;
- Lack of communication between the parties; and
- Evidence of settlement discussions that exclude some of the parties.¹⁶

[25] The Appellant contends that in the present case, the order issued by the Master requires the ETDL to do things that an ETDL is not permitted to do. Specifically, the order purports to authorize the ETDL to distribute the residue of the estate. Section 28 of the *Estates Act* prohibits an ETDL from distributing the residue of the estate.

[26] As the Appellant noted, ETDLs are usually directed by the court to keep the estate in a holding pattern until the issue at dispute has been resolved. However, section 28 does not otherwise limit the powers of the ETDL, subject to the direction and control exercised by the court.

Analysis

[27] The Master made the following findings with respect to the issue of whether an ETDL should be appointed in this case:

In my view, the only issue requiring resolution on this motion is whether to appoint an ETDL at this time...¹⁷

¹⁴ At para. 36.

¹⁵ *Ward v. Popov*, Decision of Strathy, J. released March 5, 2009 (SCJ) at para. 14.

¹⁶ At paras. 18-24.

The administration of this Estate is neither simple nor straightforward and has become highly adversarial...¹⁸

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.¹⁹

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.²⁰

In my opinion, Ms. Baran's handling of the remaining artwork in either selling 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.²¹

[28] The Master also considered the following legal principles in making her final determination:

- 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;
- 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;
- 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;
- 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

¹⁷ Reasons for decision at para. 27.

¹⁸ Reasons for decision at para. 28.

¹⁹ Reasons for decision at para. 29.

²⁰ Reasons for decision at para. 30.

²¹ Reasons for decision at para. 31.

prudence' calls for the temporary replacement of a trustee who is in such a position;

- 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 favoured 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.²²

[29] The Appellant argues that the Master erred by failing to appreciate that the removal of a trustee requires proof a significant wrongdoing or risk of wrongdoing. The Master's decision makes it clear that she understood that she was not permanently removing Ms. Baran as administrator, merely asking her to step-aside pending the motions to be heard in April 2020 in relation to the passing of accounts and removal of Ms. Baran as administrator.²³ Consequently, the Master did not have to address her mind to that factor.

[30] The legal principles as noted above are appropriate in a situation where the decision is whether to appoint at ETDL. I can find no error in the Master's application of these principles to her findings of fact.

[31] The second issue to be addressed involves the order issued by the Master.

[32] The Appellant argued that the order exceeds the Master's jurisdiction and effectively permanently removes Ms. Baran as administrator, replacing her with the ETDL and providing the ETDL with the authority to distribute the residue of the estate.

[33] The Respondent contended that any provisions of the order that fall outside the parameters of the Master's decision were negotiated with and agreed to by both parties and should not be disturbed. Moreover, to the extent that any provision of the order exceeds the jurisdiction of the Master, that provision can be excised from the order by this court.

[34] Appellant's counsel took issue with several provisions of the order. He was unable to provide the court with any explanation why he approved the form and content of an order with which he had so many concerns. That said, there are clearly problems with this order.

[35] The disputed provisions are the following:

2. This court orders that Travis Webb be and is hereby authorized to exercise those powers given by law to an administration, including such powers given to an

²² Reasons for decision at para. 25. Citations omitted.

²³ Reasons for decision at para. 14.

administrator under the *Estates Act*, R.S.O. 1990, c.21 as amended, and *final distribution of the assets of the Estate*;

3.(a) Surrender the Certificate of Appointment of Foreign Estate Trustee's Nominee as Estate Trustee Without a Will to the court; and

10. This court orders that in any event, *Travis Webb shall not be required to distribute the Artwork until such time as he in his sole discretion considers reasonable to do so* or by Order of the Court, and, in particular, until such time as he has determined whether there are any creditors of the Estate or claims against the Estate that require maintaining the Artwork as assets of the estate, he has investigated whether all income tax issues have been resolved and is satisfied that no income tax issues are outstanding, and he has received a Clearance Certificate from Canada Revenue Agency (or equivalent from any other applicable taxation authority).

[36] The parties agree that the ETDL does not have the authority to distribute the residue of the Estate.

[37] The order provides that Ms. Baran must surrender her Certificate of Appointment to the court. It does not indicate what should occur if ultimately, Ms. Baran is not removed as Trustee. Finally, paragraph 10 of the order provides the ETDL with the authority to distribute the artwork. This paragraph also potentially runs afoul of s. 28 of the *Estates Act*.²⁴

[38] The Respondents argue that any terms of the order that go beyond what was contemplated in the decision of the Master were agreed to by the parties. On the other hand, the Appellant contends that once the Master signed the order, it became her order and if there are aspects of the order that exceed her jurisdiction, the entire order has to be set aside.

[39] In my view, the order does contain provisions that are either unclear, exceed the Master's jurisdiction or go beyond the parameters of the Master's decision. However, that does not mean the parties get to set aside the entire decision and start over. Instead, the parties should either redraft the order themselves or, if they are unable to come to an agreement, they should return to the Master to set the terms of the order such that it reflects the Master's intentions and remains within her authority.

Conclusion

²⁴ See para. 25 of *McColl*.

[40] The appeal is dismissed. The order is to be amended by the parties to properly reflect the Master's decision and to ensure its terms do not exceed her jurisdiction or the parties are to arrange an appearance before the Master to set the terms of the order.

Costs

[41] The parties should attempt to resolve the issue of costs of this appeal themselves. However, if the parties cannot resolve the issue of costs, they can make written submissions in relation to this issue. The written submissions should be no more than two pages in length, with Bills of Costs and any Offers to Settle attached and should be provided within 30 days, with a right of reply within a further ten days.



Parfett J.

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DIVISIONAL COURT FILE NO.: DC-19-2500
DATE: 2020/02/10

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