CITATION: *Audi v. Breckon*, 2022 ONSC 2443
COURT FILE NO.: 17-73654 and 19-81361ES
DATE: 2022/05/05

ONTARIO

SUPERIOR COURT OF JUSTICE

IN THE MATTER OF THE ESTATE OF DOULGAS GILES BRECKON, deceased

BETWEEN:	
LIA AUDI Applicant	Miriam Vale Peters, for the Applicant
– and –	
MARK BRECKON, in his personal capacity and in his capacities as Estate Trustee of the Estate of Douglas Giles Breckon and Attorney for Property of Douglas Giles Breckon Respondent	Joseph W.L. Griffiths, for the Respondent
	HEARD: May 3-5, 28, 2021 and June 30, 2021.

REASONS FOR JUDGMENT

JUSTICE MARC R. LABROSSE

Overview

[1] Mark Breckon and Curt Breckon were the attorneys for property, attorneys for personal care, and named estate trustees for their parents, Douglas Giles Breckon and Marion Lorine Breckon.

[2] Curt lived in Florida and was not actively acting as an attorney for his parents. Marion Breckon died first on March 28, 2011 and left everything to Douglas Breckon.

[3] Curt died before his father and, as such, Mark was left to be the sole attorney for property as of August 16, 2012 and the sole estate trustee of the Estate of Douglas Giles Breckon (the "Estate").

[4] Curt received over $220,000 of his parents' funds prior to their deaths. Mark co-mingled his parents' funds with his own and used his parents' bank accounts as his own. Curt was aware that Mark was spending his parents' money but trusted that he would never spend more than his share of their eventual estates.

[5] The determination of who received how much and what may still be owing to Curt's estate is challenging as a result of the passage of time, Curt's lack of involvement prior to his death, and Mark's poor record keeping. There are two periods in question. From January 2009 to the date of Curt's death on October 16, 2012 is known as the "First Period." From October 17, 2012 to the date of Douglas' death on March 2, 2014 is known as the "Second Period."

[6] The Applicant, Lia Audi, is Curt's daughter and sole beneficiary to Curt's estate.

[7] Each party has approached this litigation in different ways. Douglas and Marion had two Bank of Montreal accounts bearing account nos. xxxx-833 ("833") and xxxx-295 ("295"). The Applicant has done an extensive review of the two bank accounts and determined what she deems to be legitimate and illegitimate expenses. She has also credited Mark for known deposits and refused to credit unsubstantiated deposits. She seeks payment of $396,821, which is what she deems to be the balance owing from her share of the Estate.

[8] The Respondent has provided a more limited accounting of the bank account activity and has focussed on his parents' assets. The Respondent contends that his parents' assets do not justify that so much of their money was improperly spent. His position is that the Applicant has not made out a case warranting any further payments to her.

[9] There are two previous court decisions which impact how this court must approach this accounting. In my decision dated May 17, 2019, I decided that Mark did not need to provide a passing of accounts for the First Period but that he needed to do so for the Second Period. However, I ordered certain disclosures from the First Period and indicated that the Applicant was

not precluded from challenging certain improper transactions during the First Period which had the effect of reducing the value of the Estate.

[10] On February 6, 2020, Justice Laliberté determined as part of a summary judgment motion that Mark was liable for breaching his fiduciary duty to his father over a period commencing in July 2009 but could not determine the relevant amounts associated with that breach. That was left to the trial judge.

[11] In the end, I agree with the Applicant's approach given that the law requires an attorney and estate trustee to account for their use of funds. By co-mingling funds for so many years, Mark has made it difficult to determine with exactitude what amount should be left in the Estate for division between Lia and Mark. The Applicant's accounting is the proper way to approach how the funds of the Deceased were used, but this applies only to the Second Period. The Respondent has been able to demonstrate that Marion and Douglas' assets and the income earned over the years do not warrant a finding that a large amount of money is missing or not accounted for. Also, I am satisfied on a balance of probabilities that Mark should receive the benefit of most of the deposits during the co-mingling period. Finally, I have concluded that Mark is liable to the Estate for certain improper transactions during the First Period that had the effect of reducing the value of the Estate.

[12] The result is that at the time of Douglas Breckon's death, the Estate should have had a remaining value of $507,344 to be shared. As such, Lia and Mark should have shared that amount equally, subject to normal estate administration issues. Any shortfall shall be a debt owing from Mark to Lia.

Relevant Facts

[13] The Last Will and Testament of Douglas Breckon is dated July 6, 1971. The residue of his estate was to pass to Marion Breckon if she survived him, failing which it was to be divided equally between his sons, Curt Breckon and Mark Breckon.

[14] Curt lived in Florida and Mark lived in Deep River, Ontario as did Douglas and Marion.

[15] On November 9, 2006, both Douglas and Marion executed Continuing Powers of Attorney for Property appointing Curt Breckon and Mark Breckon as their attorneys "jointly and severally".

With Curt living in Florida, it does not appear that he formally acted under the authority of either power of attorney.

[16] Marion and Douglas were both living in a long-term care facility by August 17, 2010. Marion died on March 28, 2011, and Douglas died on March 2, 2014.

[17] Starting in at least 2009, Mark Breckon began using his parents' money as his own. The evidence shows that since 2009, the two accounts, 833 and 295, did not have significant amounts in them that would have justified the level of spending shown in the Applicant's lists of expenditures.

[18] Mark made significant withdrawals from his parents' accounts and paid personal expenses from those accounts. He also used some of the funds to pay his parents' expenses. He co-mingled his own funds into his parents' accounts and deposited significant amounts of his own funds into his parents' accounts. Essentially, his parents' accounts became his own.

[19] Curt also benefited from his parents' funds before their deaths. In November 2009, he received $57,000 of his parents' money from the cashing of Canada Savings Bonds and mutual funds. In September 2011, he received half the proceeds from the sale of his parents' home in the amount of $165,709.52.

[20] Curt died on October 16, 2012, and Lia was appointed as "Personal Representative" of Curt's estate by the 13th Judicial Circuit Court of the State of Florida. Lia was also the sole beneficiary of Curt's estate.

[21] When Douglas died, Mark did not fulfill his duty as executor and did not properly notify Lia of her status as a beneficiary. Mark was or should have been aware of Lia's status and took no steps to provide Lia with a copy of Douglas' will. Conversely, Lia did not take adequate steps to inquire as to her status as a beneficiary of the Estate. This has contributed significantly to the challenges of getting a clear picture of Mark's spending from the two accounts.

[22] On or about March 8, 2017, Lia contacted a solicitor in Deep River who had Douglas' will, and she finally received a copy. These proceedings were commenced on August 15, 2017 and

then converted to an action on November 28, 2017. There is no dispute that the Applicant and the Respondent are equal beneficiaries to the Estate.

[23] In April 2017, Mark communicated that the value of the Estate was $964,000, which included $332,000 for the house and a large amount of cash. He indicated a balance owing to Lia of $186,000. That amount has changed over the years, and in September 2018, he indicated that the value of the Estate was $346,508.97. However, this was limited to investments and bank accounts and did not include the house as it had been sold prior to his father's death and half of the proceeds were distributed to Curt. Mark testified that once he retained counsel and was able to obtain relevant documents, he realized that the value of the Estate was much less and the same would apply to Lia's share. A significant correction to the estimated value of the Estate was made when Mark was informed that $240,000 in insurance proceeds did not form part of the Estate. As claimed by Mark in the Passing of Accounts, there was $348,295.60 available for distribution at the end of the Second Period.

The Proceedings

[24] This matter has been before the courts on various occasions. Initially, there were Orders Giving Directions and then an Order for the Estate to pass its accounts.

[25] On January 31, 2019, the parties appeared before this court when Lia sought an order for Mark to pass his accounts as Attorney for Property for Douglas Giles Breckon from July 2009 to March 2014. At that time, among other things, I made the following orders:

i. That Mark Breckon should pass his accounts as Attorney for Property from October 17, 2012 to March 2, 2014, but that the Applicant was not precluded from seeking reimbursement for improper transactions prior to October 17, 2012.

ii. That Mark Breckon identify, substantiate, corroborate, and validate all deposits he claims were made into the bank accounts of the Deceased from his own sources between January 1, 2010 and March 2, 2014.

iii. That Mark Breckon provide tracing for a number of investments specifically listed.

[26] The lead up to this mini trial was determined by the motion for summary judgment heard by Justice Laliberté. In his endorsement dated February 6, 2020, Justice Laliberté decided those matters that he could decide on the evidentiary record and made the following findings:

i. That Mark Breckon breached his fiduciary duties in his capacity as Attorney for Property of the Deceased.

ii. That Mark Breckon was liable to the Applicant in an amount to be determined following the hearing of *viva voce* evidence.

iii. That the court could not come to a fair and just determination as to the amount payable by the Respondent.

iv. That the issue to be decided would revolve around the Respondent's ability to counter the accounting provided by the Applicant which claimed an amount of $358,460.77.

[27] Following the endorsement of Justice Laliberté, the parties agreed to have the matter proceed as a two-day mini trial before this court. The affidavits and the cross-examinations filed in the motion and application records became the evidentiary record for the mini trial. Each party had the right to serve affidavits for witnesses to be called. Each party had three hours in chief to provide their evidence and they would be cross-examined for two hours. For witnesses who were not parties, their affidavits would be their evidence in chief and there would be limited cross-examination.

Position of the Parties

The Applicant

[28] Lia has advanced her position in a similar manner as she did at the motion for summary judgment. Her figures were similar with the exception of the funds payable from Marion's life insurance in the amount of $34,081.65, given that she has already received her share for this asset as part of the interim distribution. Also, the amount of Mark's expenditures from the Deceased's accounts was reduced by $57,000 to account for the amount received by Curt in 2009. At trial, the total amount claimed was $396,821.

[29] Lia calculated this amount by taking all the expenses from the two bank accounts and attributing what she views as reasonable expenditures. She then took all the deposits made in the

accounts and credited those deposits that are clearly identified as being from Mark's funds. She has removed any deposits that cannot clearly be identified as being from Mark's sources. She has also added back certain investments that were not properly deposited into Douglas' accounts.

The Respondent

[30] The Respondent approaches the accounting a different way. He states that the First Period should not be considered because both Mark and Curt were Attorneys for Property and had the same obligations. As Curt did not see fit to inquire on how Mark was managing the funds, it should not be for this court to do so.

[31] The Respondent relies on my previous endorsement which did not require a passing of accounts for the First Period and states that this period has already been adjudicated on, subject to improper transactions. Mark claims that Lia has failed to show improper transactions that impacted the eventual value of the Estate.

[32] As for the Second Period, Mark has provided his accounting of the figures and particularly the significant deposits made to the accounts. Mark states that the focus should be on the assets and income sources for both Marion and Douglas. Mark relies on a hand-written accounting by Curt in 2008 as the starting point for determining what Marion and Douglas had in assets. Those assets can be followed in the tax returns from year to year until they were liquidated. Clearly, the assets and income cannot justify the level of expenditures from Douglas' accounts. As such, the money had to have come from Mark. In the end, their assets and income do not warrant a finding that significant funds are missing or owing to the Applicant.

The Law

[33] The parties did not rely on a significant amount of case law at this stage of the proceedings. The finding of a breach of fiduciary duty was made by Justice Laliberté and he directed that the methodology was to be based on the analysis provided by the Applicant. The focus was to be on the Respondent's ability or inability to provide cogent and reasonable justification for disbursements, income, and assets.

[34] In arriving at his conclusion that Mark Breckon breached his fiduciary duties as an Attorney for Property, Justice Laliberté relied on the following authorities which are still instructive in deciding this matter:

a. Section 32(1) of the *Substitute Decisions Act, 1992*,[1] states that a guardian of property is a fiduciary whose powers and duties shall be exercised and performed diligently, with honesty and integrity and in good faith, for the incapable person's benefit.

b. Section 32(6) of the *Substitute Decisions Act, 1992*, states that a guardian shall, in accordance with the regulations, keep accounts of all transactions involving the property.

c. A guardian of property has a fiduciary obligation to carry out his or her obligations with honesty and due care and attention. The core of these obligations includes the duty to be in a position at all times to prove the legitimacy of disbursements made on behalf of the estate.[2]

d. When estate money is mixed with private money, the onus is on the fiduciary to distinguish the estate funds and pay the estate funds back first and make good any loss to the estate. If the fiduciary cannot distinguish or separate the funds, all of the property will be considered the property of the Estate.[3]

e. If a trustee has mixed his/her own funds with the funds being held for another, all of the property must be taken to be the other's property until the trustee is able to prove what part of it is his/her own.[4]

[35] The common law requires corroborating evidence to rebut the presumptions. The corroborating evidence can be direct or circumstantial, and it can consist of a single piece of evidence or several pieces considered cumulatively.[5]

---

[1] S.O. 1992, c. 30.
[2] *Aragona v. Aragona*, 2012 ONCA 639, 80 E.T.R. (3d) 167, at para. 21.
[3] *Villa v. Villa*, 2013 ONSC 2202, 89 E.T.R. (3d) 49, at para. 20.
[4] *Zimmerman v. McMichael Estate*, 2010 ONSC 2947, 57 E.T.R. (3d) 101, at para. 89.
[5] *Burns Estate v. Mellon* (2000), 48 O.R. (3d) 641 (C.A.), at para. 29.

[36] The Applicant states that credibility is at the heart of this trial. In *Landry v. Pratt & Whitney Canada*,[6] Justice Yanosik provided a useful analysis of credibility at paras. 15-16. The following principles are instructive:

a. A trier of fact is entitled to believe all, some, or none of a witness' evidence and to weigh the evidential value of that evidence;

b. Credibility concerns, generally, the assessment and weighing of the testimony of a witness;

c. Testimony that is not plausible or reasonable in itself may be rejected on that basis alone;

d. There are no set rules to follow when making credibility assessments, but it often falls on good common sense;

e. Discrepancies on relevant matters must be looked at very carefully in assessing credibility.

Analysis

Methodology

[37] The direction provided by Justice Laliberté in his summary judgment decision was to address the methodology presented by the Applicant at the motion for summary judgment. Specifically, Mark was to counter the accounting provided by the Applicant in arriving at the amount of $358,460.77.

[38] In my May 2019 endorsement, I did not require Mark to pass his accounts for the First Period, but I did leave open the possibility for Lia to claim that funds were owing to Curt's share of the Estate during the First Period. In that endorsement, I did express concerns about the delays and the challenges in providing an accurate picture of the parents' expenses after so many years. This was in part due to the fact that Curt did not get involved while he was still living.

---

[6] 1996 CanLII 10409 (A.B. Q.B.).

[39] During the First Period and as early as 2010, it is obvious that Mark was using significant amounts of money from Douglas' (his parents') accounts. At the same time, he also deposited significant amounts into those accounts. It is relevant that during the First Period, while living in Florida, Curt did not see fit to inquire as to how the Deceased's bank accounts were being managed or used by Mark, and he willfully benefited from over $222,000 of his parents' money during the First Period. Of note, Lia testified that Curt was aware that Mark was spending frivolously, but that Curt did not believe Mark would spend more than his share.

[40] The evidence in this proceeding provides the court with each party's summary of the expenditures from different points in 2009 to August 2012. One of the main accounts of the Deceased, account 833, only has statements starting in July/August 2009. However, when it comes to deposits, the period initially ordered was from January 2010 to March 4, 2014. The Respondent did provide two deposits from 2009 in his rough accounting. However, this leaves the court with the concern that it may not have a full picture of what transpired during the First Period.

[41] I continue to be of the view that a full accounting during the First Period was not warranted. Both Mark and Curt took significant funds from their parents' accounts, and they were complicit in each other's breach of obligations to their parents. It would have been unfair to require Mark to go back to 2009 and provide the level of accuracy required in a passing of accounts. Having come to this conclusion, it would be unfair to now require Mark to answer the detailed expenditures set out by Lia in her accounting during the First Period or to rule against him on every transaction that he cannot specifically recall. I maintain my view from my previous endorsement that the analysis of the First Period should be limited to improper transactions which had the effect of reducing the value of the Estate.

[42] This leads me to conclude that the methodology provided by the Applicant is the appropriate format to follow but that this process should only apply to the Second Period. I also deem this to be a fair result given that the passage of time has prevented all banking records from being obtained, despite the fact that the delay lies mostly at the feet of the Respondent. The parties have been able to do a full review of the bank accounts during the Second Period and as such, the court is able to better assess how the expenditures and deposits should be attributed.

Applicant's Accounting

[43] Lia's calculations consider all expenditures and attribute certain disbursements related to the parents. Her approach was reasonable given the information she had, and I accept that she did her best to attribute expenses to Marion and Douglas' ongoing needs. After the sale of the house, the expenses attributable to the parents decrease as they were both in long-term care. However, I have determined that the detailed accounting provided by the Applicant will not be used by the court during the First Period for the same reasons that I did not require a passing of accounts during the First Period. In addition, there are problems with the availability of banking records during the First Period and there are missing banking records for approximately 12 months during the First Period. All parties have had a role in the missing evidence. It is a reality of arriving at a just result in this case that the court is limited by the available evidence. This has been caused by Mark's poor record keeping and delay in providing the will, Curt's failure to get involved in the management of his parents' affairs and Lia's failure to promptly inquire on her status as a beneficiary.

[44] Lia's approach becomes more relevant for the Second Period and is consistent with the case law that establishes that in cases of co-mingling, unidentified disbursements are assumed to belong to the attorney. In cross-examination, Lia admitted to certain duplications that mostly applied to overlap between the First Period and the Second Period. She provided revised calculations as part of her closing argument.

[45] When considering what Mark calls his "rough accounting" provided at Exhibit "W" of his affidavit dated September 11, 2018, that document only reflects expenses that Mark accepts as his own but does not explain the numerous expenses that he attributes to his parents' expenses. Specifically, he excludes the use of the Canadian Tire credit card that was used in part by caregivers, one of which was Mark's daughter. I do not accept that those expenses should have been excluded by Mark but those relate mostly to the First Period. However, they do not rise to the level of improper transactions. During the Second Period, such expenses were incurred while Mark was the only attorney. It was then solely his responsibility to properly track and identify these disbursements incurred on behalf of Douglas during the entire Second Period. Mark's accounting at Exhibit "W" fails to properly account for all expenditures.

[46] Turning my focus to the Second Period, Lia did admit to some duplication, and she made adjustments to her figures following her cross-examination. The amount of the expenditures decreased by close to $70,000. When considering the full amount of the expenditures that Lia attributes solely to Mark during the Second Period, I am of the view that her calculation represents the best available evidence and is the proper methodology to follow. In cross-examination, a number of corrections were addressed and agreed to by Lia. While these do not amount to large amounts, they are indicative of the challenges of trying to wade through years of bank records and do what Mark should have done. There would always be a margin of error. Also, I agree with Mark that Lia may have been overly restrictive in what she accepted as expenses incurred on behalf of Marion and Douglas, particularly before the home was sold but this would only relate mainly to the First Period. Otherwise, Lia's accounting of expenditures over the Second Period should be followed.

[47] On my review of the accounting by both parties over the Second Period, I accept that Lia has provided a more accurate analysis of Mark's expenditures and that she has made adjustments during the trial to account for errors or duplication. I accept her figure of $626,996 as opposed to Mark's total of $593,915, as Mark did not include all expenditures from the accounts. Her analysis is more complete in respect to Mark's expenditures.

[48] Finally, if the analysis of expenditures only applies to the Second Period, the analysis must exclude the amounts received by Curt during the First Period.

Deposits

[49] If I am wrong on the exclusion of the First Period from the specific accounting, I should provide my analysis of the deposits. It remains relevant for the Second Period but to a much lesser extent.

[50] I have considered the evidence of both parties when considering the source of the deposits. This analysis must begin with the 2008 hand-written worksheet which summarized the parents' assets. Lia does not disagree that this document represents a starting point to assess Marion and Douglas's investments, but she maintains that it is hearsay and that no weight should be placed on it. Mark maintains that the document has some limited value as it corroborates the investments as

shown in the tax returns. I agree with Mark. However, both parties agree that it is not a document that can allow the court to determine the value of assets in 2008 or 2009.

[51] As a consequence of considering the 2008 document and the tax returns, I accept Mark's evidence that no further investments were acquired for or by their parents after 2008. This has not been significantly challenged by the Applicant.

[52] Also, in argument, the Applicant confirmed that there was no claim being made for missing income.

[53] When considered together, the 2008 handwritten note by Curt, the banking records showing deposits, and the tax returns allow me to conclude on a balance of probabilities that there are no other hidden assets or sources of income which should otherwise have been part of the Estate. Those documents provide circumstantial evidence that the investments, sources of income, and bank accounts attributable to Marion and Douglas have been included. Furthermore, there is no evidence of other bank accounts, investments, or sources of income that have not been included.

[54] I pause at this point to emphasize that I am still left with questions surrounding the ongoing income as declared in the tax returns and the funds left in the bank accounts. While I accept that the income for some years was inflated by the realization on some investments, I still have a doubt on the level of spending. Mark's manner of accounting has not answered all the court's questions. However, on a balance of probabilities, I am left to conclude that all assets and sources of income have been included.

[55] Turning back to the deposits and those challenged by the Applicant, I consider the list of unsubstantiated deposits listed by the Applicant as part of Tabs "M" and "N" of her Closing Submissions.

[56] With respect to Tab "M" (A140), I accept that Mark's ScotiaLine Line of Credit statements demonstrate that in 2012, the line of credit increased by approximately $125,000. On a balance of probabilities, I conclude that the amounts attributable to line of credit deposits relate to funds that belonged to Mark and as such he should receive a full credit of $112,700 against his expenditures. I understand that the absence of proper bank statements is due to Mark's failure to obtain them in a timely fashion. I also accept that there are not clearly identified bank account numbers to allow

for a direct link to be established from Mark's line of credit and that it may have been helpful to have Mark's tax returns as part of the analysis. However, on the evidence before me, those deposits are accepted as being from Mark's sources.

[57] Similarly, when considering Tab "N" of the Closing Submissions (A142), I accept that the amounts deposited to the Deceased's bank accounts should be credited against Mark's expenses as no other plausible source can be identified for these amounts. However, the amount of $101,759.43 should be reduced by three improperly claimed deposits. Item 5 is a claimed deposit of $12,000 that the Respondent accepted was never made to either of the accounts. Item 7 is a claimed deposit of $25,000 that the Respondent could not demonstrate was ever an actual deposit into either account. Item 11 was a deposit of $10,000 that was made and then immediately withdrawn. Consequently, the amount of $54,759.43 should be credited against Mark's expenditures during the First Period. However, neither Tab "M" nor Tab "N" applies to the Second Period.

[58] As for the disputed deposits during the Second Period, these are limited to three deposits totalling $2,164. As a result of my conclusion that there are no missing investments or sources of income, I am satisfied that those deposits should also be credited as against Mark's expenditures. Consequently, I accept Mark's figure for his deposits during the Second Period in the amount of $364,183.

Improper Transactions

Cash Payments to Curt

[59] While I accept that Mark has remained consistent in his evidence that he arranged for three cash payments of $25,000, $25,000, and $23,000 to be delivered to unknown persons at some point, this does not add to his credibility or reliability on this point. Mark initially claimed in his September 11, 2018 affidavit that the money was withdrawn in "small increments over a period of weeks". At trial, he claimed that money was delivered to unknown persons at some point between 2009 and 2012. He also stated that each cash payment was several months apart.

[60] However, when looking at the cash withdrawals in Lia's accounting, it shows a total amount of withdrawals during the First Period of $77,227.41 from account 833 and $43,409.21

from account 295. Mark claimed that significant amounts of cash were paid out to the caregivers, Ester and Mark's daughter Chela.

[61] In his first affidavit, Mark refers to taking "out money in small increments over a period of weeks so that I could accumulate cash to send down to him in Tampa." During his testimony, Mark first said that the withdrawals were "less than $5,000." He then agreed that the withdrawals were "less than $2,000."

[62] Mark was evasive when asked about the timing of the cash payments. In effect, he could not answer the important questions about when he took out these large cash withdrawals to build up to the $25,000 of cash.

[63] While Mark states in his first affidavit that both he and Curt worked cooperatively between 2008 and 2012, the only evidence of this is found in the two transfers of funds being $57,000 in 2009 and $165,000 in 2011. Otherwise, there are no letters, no notes, and no emails that would suggest that Curt had any knowledge of what Mark was doing. The only evidence came from Lia in one of her affidavits which indicated that Curt was aware that Mark was spending frivolously but that he assumed Mark would never spend more than his share.

[64] In his evidence at trial, Mark said the following:

a. He was unable to provide a summary list of cash withdrawals.

b. He avoided answering with any precision the questions seeking to find out over what period the withdrawals were made. His evidence only referred to "weeks".

c. He paid Ester $1,260 every two weeks. He started putting money aside for Curt in July 2009 and the first $25,000 would have been paid to Curt by July 2010. It would have been in less than one year.

d. Ester left on February 28, 2010, meaning that Ester would have worked at roughly $2,500 per month for 8 months from July 2009 to July 2010 and thus would have been paid $20,160 in that period.

[65] My review of the cash withdrawals from July 2009 to July 2010 shows a total amount of approximately $27,900. It would have been impossible to set aside $25,000 in cash and pay Ester over $20,000 during this same period.

[66] In consideration of all the evidence on this subject, I reject Mark's claim that he ever sent $73,000 in Canadian currency to Curt. I do not accept that such amounts of cash would have been given to total strangers. Also, there is nothing to suggest that Curt received such large amounts of Canadian currency in the USA. There is no corroboration anywhere except in the fact that Mark has repeated the claim since the beginning. Mark's evidence simply lacked credibility in this area and it is rejected.

[67] Furthermore, the cash withdrawals of over $120,000 during the First Period cannot be explained by Mark's evidence on cash paid out. The math does not work for the cash withdrawals during the First Period and the only available conclusion is that Mark spent the $73,000 he says was given to Curt. I conclude that the $73,000 of cash withdrawals amounts to improper transactions which should be paid back to the Estate. Accordingly, Mark's claim that Curt's share should be increased by $73,000 is rejected.

Sale of Shares Deposited to Other Accounts

[68] There was no real dispute during the trial that Mark made certain deposits of shares to accounts that were not the two accounts, 833 and 295. The liquidation of CPR and Encana shares in 2012 resulted in $81,952.10 being deposited to an account owned by Mark and Chela. In 2013, the liquidation of Cenovous Energy Inc. and Teck Resources Ltd. shares resulted in $40,408.50 being deposited to the account owned by Mark and Chela.

[69] These deposits are clearly improper, and they qualify as inappropriate transactions as alluded to in my previous endorsement. As such, the amount of $122,360.60 should be paid back to the Estate. At trial, there was evidence that Mark may have paid the taxes on those amounts that should otherwise have been paid by the Estate. There should therefore be an adjustment if that is the case and only the net amount be paid back to the Estate. For the purposes of my calculations, I will maintain the $122,360.60 amount until it is corrected by the parties. I assume that the parties will be able to agree to the net amount but if not, I may be contacted to adjudicate on the issue.

Summary

[70] As set out above, I conclude that from the summary approved by Justice Laliberté at the summary judgment motion, the detailed accounting should only apply to the Second Period, subject to the amounts deemed to be improper transactions being paid back to the Estate.

[71] I provide the following calculations:

Ending Balance in the Estate:	$49,171
Mark's Withdrawals:	$626,996
Mark's Deposits:	$364,183
Repayment of Shares Liquidated:	$122,360
Repayment of Improper Cash Withdrawals:	$73,000
Remaining Value of Estate to be Shared:	$507,344
Lia's Share:	$253,672
Amount Received by Lia:	$24,585
Shortfall Owing by Mark to Lia:	$229,087

[72] As previously stated, the amount of $229,087 is subject to the determination of any tax paid by Mark on the sale of shares that should have otherwise been paid by the Estate at the time the shares were liquidated. Otherwise, there shall be judgment in favour of the Applicant in the amount of $229,087.

[73] The parties have advised that although there is a process associated with the Passing of Accounts application, the court's findings as set out above will likely resolve all outstanding issues. If this is not the case, the parties may seek an appointment with me to address outstanding matters.

Costs

[74] The parties are encouraged to resolve the issue of costs. If they are unable to do so, they may make written costs submissions no longer than three pages excluding all attachments. The

Applicant will provide her costs submissions within 20 days from the date of these Reasons for Judgment and the Respondent will have a right to respond within 20 days thereafter.

Justice Marc R. Labrosse

Released: May 05, 2022

CITATION: Audi v. Breckon, 2022 ONSC 2443
COURT FILE NO.: 17-73654 and 19-81361ES
DATE: 2022/05/05

ONTARIO

SUPERIOR COURT OF JUSTICE

IN THE MATTER OF THE ESTATE OF DOULGAS GILES BRECKON, deceased

B E T W E E N:

LIA AUDI

Applicant

– and –

MARK BRECKON, in his personal capacity and in his capacities as Estate Trustee of the Estate of Douglas Giles Breckon and Attorney for Property of Douglas Giles Breckon

Respondent

REASONS FOR JUDGMENT

Labrosse J.

Released: May 05, 2022