

Shakespeare portrait leads to dispute over estate trustee

Litigation | Litigation & Dispute Resolution | Trustee Act

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The appointment of an estate trustee in a will is a decision that courts will generally respect absent clear evidence that the removal of the trustee is necessary in the circumstances. Sometimes the beneficiaries or potential beneficiaries of a will may believe that the appointed estate trustee is not properly qualified or is otherwise mishandling the administration of the estate. An application to replace the estate trustee may be brought, but there is a high evidentiary bar to be met before the court will order the estate trustee's removal.

An application to replace an estate trustee in *Meuse v. Taylor*, 2022 ONSC 1436 (CanLII), arose from a dispute around the authentication, evaluation, and sale of the "Sanders Portrait," which purports to be a painting of William Shakespeare made during his lifetime. In 2016, the portrait was appraised at USD \$50,000,000, based on the premise that a buyer would agree that it does in fact depict Shakespeare. Conversely, if the portrait is merely a 400-year-old painting, it would be worth only a fraction of that amount.

The portrait was the primary asset of a testator who died in 2020. She obtained the portrait a year earlier under her late husband's will.

The testator's husband had acquired the portrait from his mother, whose own mother had brought it to Canada from England in the late 19th century. The portrait's provenance has been traced to the husband's great-great grandfather, who mentioned it in an inventory of possessions in 1844, and then back to one of Shakespeare's neighbours in the late 16th or early 17th century.

In their wills executed in 2015, the testator and her husband had named the husband's cousin as their estate trustee to be followed by their long-time accountant as the second alternate trustee. In September 2020, the accountant formally replaced the cousin as the estate trustee.

The key issue in the management of the estate was obtaining the maximum price for the Shakespeare portrait. Since the portrait's value depended on whether it could be authenticated, efforts to do so had been ongoing for many years before the death of the testator's husband and continued thereafter.

Many parties claimed to have a stake in the sale of the portrait and the eventual proceeds of sale. Several individuals claimed that they loaned money to the testator's husband, or were otherwise entitled to compensation for work they did for him, which would be repayable on the sale of the portrait. A law firm that provided legal services in connection with the portrait claimed to be owed over \$1,000,000 and had obtained a court order preventing its sale without their consent.

Five months after accepting his appointment as the estate trustee, the accountant was forced to respond to an application to remove him from his role. The applicant sought to have himself appointed in the accountant's place.

Simply put, the applicant alleged that the accountant lacked the expertise and competence to obtain a fair market value for the portrait. He alleged that the accountant had not acted diligently in the performance of his duties as estate trustee and that he had otherwise mishandled the estate administration while attempting to sell the portrait at a below-market price.

Under section 5 of the *Trustee Act*, a court may order the appointment of a new trustee in substitution for or in addition to an existing trustee. The court also has an inherent power to remove a trustee where circumstances require it: *Gonder v. Gonder Estate*, 2010 ONCA 172, at para. 26.

However, the court will assume that the testator's choice of trustee should be respected. The main consideration is the welfare of the beneficiaries. Generally, the estate trustee's acts or omissions must be of such a nature as to "endanger the administration of the trust": *Johnston v. Lanka*, 2010 ONSC 4124, 103 O.R. (3d) 258,

at para. 15.

One of the allegations levied against the accountant was that he had attempted to influence the testator's late husband to change his will to remove the charities as beneficiaries. The attempt to change the will was unsuccessful only because the husband was assessed as lacking capacity to change his will. The court rejected these allegations outright as there was no evidence that the accountant had done so.

As to the main issue, the authentication and sale of the Shakespeare portrait, the applicant argued that because the accountant had no specialized knowledge of Elizabethan art or the sale of such art, he could not make reasonable or informed decisions concerning the sale of the portrait. The applicant claimed that he would be better suited to deal with the estate because of his past involvement in efforts to authenticate and sell the portrait as a one-of-a-kind historical artifact.

This argument, however, was based on a fundamental misapprehension about the role of an estate trustee. An estate trustee is not required to have expertise about an estate's assets or any particular experience or training in administering estate assets. The court noted that an application to replace an estate trustee "is not a beauty contest between the parties." Rather, the issue is whether the estate trustee appointed by the testator's will is shown to have been endangering the estate.

Furthermore, the application judge reasoned that it was unlikely that there was any single person alive who was capable of handling all the facets of the authentication and sale of the portrait without calling on outside experts. Neither the accountant nor the applicant were experts in Elizabethan art, and neither had formal education or training as an art historian or evaluator.

The applicant had not produced any expert report or any other evidence showing that the accountant's approach was misguided or that there was another, better way of selling the portrait. The accountant had not pre-determined the value of the portrait and the court concluded that the evidence fell far short of establishing that the estate trustee was delinquent in performing his duties or that he had endangered the estate's administration.

To the contrary, given his short tenure in the role and the potential size of the estate, he had accomplished a good deal. He might have accomplished even more but for the necessity of defending the application to remove him.

The application to replace the estate trustee was therefore dismissed. The application judge determined that an award of substantial indemnity costs of \$40,000 was merited because the applicant had alleged that the accountant had attempted to mislead the testator's late husband, through false representations, to get him to change his will, and by refusing to take steps to prevent the estate from being defrauded. There was no substance to any of these allegations.

The decision shows that litigants should exercise caution when making such grave accusations, without any foundation, as they will face a higher cost award from the court if their claims are dismissed.

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