

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-17-100574-170

DATE: January 15, 2018

IN THE PRESENCE OF: THE HONOURABLE PETER KALICHMAN, J.S.C.

SISTINA GAETANO

Plaintiff

vs

MARIA VINCENZA GAETANO

Defendant

and

MICHELE GAETANO

Impleaded Party

TRANSCRIPTS OF ORAL JUDGMENT RENDERED ON JANUARY 10, 2018¹
(Safeguard Order)

1. Overview

[1] The Court is seized of a request for the issuance of a safeguard order in regards to the Estate of the Late Elpidio Gaetano (the "Estate").

¹ The judgment was rendered off the bench ("séance tenante"). The Court has reviewed the transcript and made certain modifications to enhance its presentation, facilitate its comprehension and, in keeping with the Court of Appeal's decision in *Kellog's Company of Canada v. PG du Québec*, (1978) C.A. 258, 259-260, provided additional grounds to explain certain of its conclusions.

[2] Because he was predeceased by his wife, Mr. Gaetano's entire Estate was left in equal shares to his three children: the Plaintiff Sistina, the Defendant Maria Vincenza and the Impleaded Party, Michele.²

[3] The Defendant is the liquidator of the Estate.

[4] Even though Mr. Gaetano died in April of 2015, his Estate is not yet settled. The Defendant has thus far produced a first inventory of assets on October 19, 2015³, an updated inventory on October 11, 2016⁴ and a notarized updated inventory on May 30, 2017⁵.

[5] Mr. Gaetano was in the insurance brokerage business. The most valuable component of the Estate is his professional corporation, Elpidio Gaetano Courtier d'Assurances Inc. (the "Corporation").

[6] The Plaintiff is suing the Defendant in her capacity as liquidator of the Estate. Her chief complaints are that the Estate is taking an extremely long time to settle, that the net value of the Estate has decreased significantly since the first inventory without a proper explanation having been provided and, finally, that Defendant is not providing her with all the information to which she is entitled. On the merits, Plaintiff seeks "a firm timeline and schedule for the final steps of the liquidation".

[7] The Defendant and the Impleaded party have communicated their grounds of oral defence. In essence, they plead that the Defendant has fulfilled her obligations as liquidator, including the filing of tax returns, and that the reason the Estate has not as yet been settled is due to the delays in receiving the clearance certificates and notices of assessment, both of which are beyond her control.

[8] By way of safeguard order, Plaintiff seeks:

- a. An advance of a portion of her share of the Estate; and
- b. The communication of certain documents pertaining to the Estate.

[9] The Court must decide if either of these requests should be granted.

2. The position of the parties

[10] As far as the information requests are concerned, Plaintiff seeks the deed of sale pursuant to which certain assets of the Corporation were sold (the "Deed of Sale") as well as the financial statements of the Corporation (the "Financial Statements").

² Exhibit P-1.

³ Exhibit P-2.

⁴ Exhibit P-3.

⁵ Exhibit P-4.

[11] Defendant contests the request and maintains that the Plaintiff has been provided with all the documentation and information to which she is entitled. Furthermore, she argues that the Corporation's documents are private. Finally, she claims that Plaintiff does not meet the test for the issuance of a safeguard order.

[12] Plaintiff's request for an advance is tied to her state of health. Plaintiff has been undergoing dialysis treatments since experiencing kidney failure in September 2014. As a result of her weakened condition, Plaintiff has developed a variety of other health-related problems.

[13] Plaintiff's poor health has placed great financial demands on her and her family. The advance against her inheritance will help them cope with those increased demands and allow her to be able to properly address her medical problems.

[14] Since the Estate is clearly solvent, she argues that the \$100,000 distribution will create no risk for the Estate or for the Defendant.

[15] The Defendant acknowledges that as liquidator she has the discretion to make an advance to the Plaintiff. However, she maintains that it is entirely within her discretion to wait until the Estate is fully settled before making any distribution to the heirs in order to ensure that she is not personally liable for any tax shortfall. Furthermore, she has submitted a list of information requests to Defendant concerning her health and her financial situation and insists on obtaining answers before taking a definitive position on the request for an advance.⁶ Finally, she argues that Plaintiff does not meet the criteria for the issuance of a safeguard order.

3. Analysis

[16] The criteria for the issuance of a safeguard order are well-known and are common ground between the parties. Plaintiff must establish urgency, apparent right, irreparable harm and, to the extent that her right is not clear, that the balance of inconvenience favours the issuance of such an order.

a. The request for documents

[17] The Plaintiff's request for documents is based on Art. 1354 C.c.Q, which reads as follows:

1354. An administrator shall at all times allow the beneficiary to examine the books and vouchers relating to the administration.

[18] Plaintiff claims that both the Deed of Sale and the Financial Statements are essentially vouchers (in French, *pièces justificatives*).

⁶ Exhibit D-1.

[19] With respect to the Deed of Sale, she refers the Court to Exhibits P-2, P-3 and P-4, and argues that the Estate's accounting includes the proceeds from the sale of the Corporation's assets for which the Deed of Sale is clearly a supporting document. In particular, she points out that in the updated inventory of October 11, 2016⁷, the Defendant refers to the sale of certain assets of the Corporation having taken place on October 11, 2016 for a sale price of \$810,687.50.

[20] With respect to the Financial Statements, in addition to Exhibits P-2, P-3 and P-4, the Plaintiff refers the Court to a letter sent to her attorney by Mr. Steve Harrar of Nexia Freedman, accountants hired by the Defendant, which purports to answer questions that had been put to the Defendant⁸. In his letter, Mr. Harrar explains the impact of the sale of the Corporation's assets on the fair market value of the Corporation's shares. He specifically refers to the Financial Statements in providing his explanation.

[21] The purpose of Art. 1354 C.c.Q., is to ensure that the beneficiaries have access to meaningful information relating to the financial aspects of the administration of the Estate. There is no doubt that the Deed of Sale and the Financial Statements are important in establishing the value of the Corporation which is the largest single asset of the Estate. Furthermore, these documents clearly support the calculations and the assessments that the Defendant has made.

[22] The Court has no hesitation in concluding that the Deed of Sale and the Financial Statements are documents that are contemplated by Art 1354 C.c.Q. and that the Plaintiff is entitled to have access to them.

[23] The Court concludes that Plaintiff is entitled to these documents and need not have brought a demand for safeguard order to obtain them.

[24] In *Lacopo c. Ragonese*⁹, an heir brought a request for safeguard order seeking access to the books and records of the Estate. The liquidator contested on the basis that there was no urgency and that the balance of inconvenience did not favour the issuance of an order. Justice Fournier acknowledged that the party seeking a safeguard was required to meet the criteria for the issuance of a provisional interlocutory injunction. However, after noting that Art. 1354 C.c.Q. provides for beneficiaries to be able to access the books and supporting documents of the estate at any time and recognizing the importance of such a control mechanism to allow interested parties to act rapidly, he granted the order on the basis of Art. 46 C.C.P. (now Art. 49), without dealing with either urgency or balance of inconvenience.

[25] In the Court's view, the same situation exists here. The Legislator does not provide for a specific solution or remedy in the event that a liquidator refuses to provide

⁷ Exhibit P-3.

⁸ Exhibit P-6.

⁹ 2011 QCCS 4571.

documents that fall within the scope of Art. 1354 C.c.Q. The Court can therefore use its power under Art. 49 CCQ to make such an order.

b. Request for an advance

Apparent right

[26] Defendant submits that Plaintiff has no right to an advance since Art. 807 C.c.Q. gives the liquidator the discretion to issue an advance but not the obligation to do so.

[27] Art. 807 C.c.Q. reads as follows:

807. Where the succession is manifestly solvent, the liquidator, after ascertaining that all the creditors and legatees by particular title can be paid, may pay advances to the creditors of support and to the heirs and legatees by particular title of sums of money. The advances are imputed to the shares of those who receive them.

[28] The Court agrees with Defendant that according to Art. 807 C.c.Q., a liquidator has no duty to provide an advance. However, the Defendant's position is not simply that she is not prepared to exercise her discretion. The Defendant has requested extremely detailed and specific information and documentation pertaining to Plaintiff's health as well as to her financial situation and has indicated that she will take a position on the request for an advance within 15 days of receiving that information.¹⁰ It stands to reason, therefore, that Defendant is prepared to exercise her discretion to at least some degree, if the Plaintiff provides the requested information. If not, why ask for the information in the first place?

[29] In light of her position, the question is not whether the Defendant in her capacity as liquidator can be compelled to provide an advance but rather whether the conditions that she imposes on the exercise of that discretion are reasonable and, assuming they are, whether they have been met.

[30] In this regard, the Court finds Defendant's request for information surprising if not shocking. Defendant's 3 page request for information and documentation¹¹ includes such items as:

- Provide a copy of all medical bills relating to dialysis treatments undergone from 2014 to present, and proof of payment thereof;
- Provide, from 2014 to date, a copy of the bills, invoices and proof of payment for prescription medication, ancillary medication and supplies;

¹⁰ Exhibit D-1.

¹¹ Exhibit D-1.

- Provide details of any private insurance policy as well as any other insurance policy (life insurance, disability, unemployment, etc.) within the last 3 years;
- Provide a list of all claims made to private insurers since 2014, including prescription medications, medical supplies, medical procedures and all refunds and reimbursements relative thereto;
- Provide the personal income tax returns and notices of assessment for Plaintiff and her husband since 2012, including all tax slips issued by Plaintiff's former employer;
- Provide the amount of monthly contributions made into RRSPs and from whom and where such contributions were made;
- Provide a banking summary and all account statements for Plaintiff and her husband as well as all investment funds, GICs, TFSAs and mutual funds;
- Provide a deed of sale of Plaintiff's current home and the deed of mortgage; and
- Advise as to the monthly household expenses for heat, hydro, gas, insurance, food and clothing along with bills, invoices and proofs of payment justifying all such expenses since 2012.

[31] Defendant's request for information and documentation is excessive to say the least. Plaintiff is not claiming the reimbursement of her expenses. Her late father left money to her and her sisters and she seeks an advance on her portion due to her illness.

[32] Even if Plaintiff were claiming the reimbursement of her expenses, the lengths to which Defendant goes in seeking information and documentation would still be disproportionate to any legitimate objective the Defendant seeks. In the context of Plaintiff's request, there is simply no rational basis to insist on being provided with every invoice and proof of payment for all medical, financial and household expenses incurred over a period of several years, to cite but a few examples. The conditions that Defendant imposes for the issuance of an advance are not reasonable.

[33] By contrast, the evidence filed by Plaintiff supports her allegations to the effect that her condition is serious and her finances strained.

[34] In a letter dated February 9, 2017, Dr. David D. Bercovitch indicates that Plaintiff has chronic renal failure requiring dialysis 3 times per week for 4 hours. He adds that Plaintiff's dialysis cannot be altered or skipped.¹²

¹² Exhibit P-12.

[35] In a letter dated October 4, 2017, Dr. Han Yao indicates that in addition to renal failure, Plaintiff suffers from hypertension, edema, nausea, chronic fatigue due to renal failure, anemia, chronic electrolyte imbalances and occasional drops of blood pressure.¹³

[36] In regards to her financial situation, Plaintiff indicates that she has been on sick leave since August 2012 and that her husband's income is insufficient to meet all their needs. They have had to borrow money from family and friends to cover their basic expenses.

[37] In a letter dated September 22, 2017, Nadine Tadros, a clinical pharmacist, indicates that on two separate occasions over the past year, Plaintiff was unable to afford her prescribed medication on at least 2 occasions.¹⁴ Although it is not apparent that Ms. Tadros was directly aware of Plaintiff's financial situation, the mere fact that Plaintiff would risk not taking her medication is revealing of her situation.

[38] Finally, Plaintiff indicates that in order to be eligible for a kidney transplant, she will need to undergo a preliminary procedure that entails expenses she cannot currently afford.

[39] By indicating her willingness to advance funds under certain conditions, the Defendant can no longer in good faith argue that she has the discretion to simply deny the request for an advance regardless of those conditions. In this respect, the case at issue differs from this Court's decision in *Robichaud c. Boivin*¹⁵, which Defendant referred to in her pleading.

[40] Notwithstanding the discretionary nature of the liquidator's power to make advances, the Court concludes that under the circumstances, Plaintiff has an apparent right to obtain an advance against her inheritance. However, she does not necessarily have a right to the specific advance she seeks. The Court will return to this issue below.

Urgency

[41] While it is true that Plaintiff first made the request for an advance in March of 2017¹⁶, the evidence suggests that her family's financial situation has become increasingly precarious over time such that the situation is now urgent. Plaintiff and her husband have had to borrow money from friends and family to meet their financial obligations. Furthermore, there is evidence that over the past year Plaintiff has been unable to pay for all the drugs that have been prescribed to her.¹⁷

¹³ Exhibit P-13.

¹⁴ Exhibit P-14.

¹⁵ 2013 QCCS 5227.

¹⁶ Exhibit P-8.

¹⁷ Exhibit P-14.

[42] The Court is satisfied that Plaintiff's Demand for a safeguard order is urgent.

Irreparable Harm

[43] Notwithstanding Defendant's request for detailed information regarding Plaintiff's health and finances, the evidence before the Court clearly indicates that Plaintiff is suffering from serious health issues and that her financial resources are limited.

[44] The fact that without an advance Plaintiff may be unable to afford medication to treat her various illnesses or a procedure that may render her eligible for a kidney transplant, satisfies the Court that the criteria of irreparable harm has been met. In this regard it is important to remember that Plaintiff is not seeking damages but rather an advance of funds that were left to her.

Balance of Inconvenience

[45] Having concluded that Plaintiff has a clear right to an advance, it is not necessary to examine the balance of inconvenience. However, for the reasons that follow, the Court adds that even if Plaintiff's right was doubtful, the balance of inconvenience favours her.

[46] As outlined above, the potential harm to Plaintiff is clear. Without an advance on her inheritance she may be unable to afford certain medication or procedures that would be beneficial to her health.

[47] The only harm or inconvenience that may be caused to the Defendant if an advance is made to Plaintiff would be her potential personal liability for a tax shortfall.

[48] However, the Court is satisfied based on the available evidence that the Estate is manifestly solvent and that there is no reasonable basis to be concerned that the Estate will be unable to pay its eventual tax assessments as a result of having to make some form of advance to Plaintiff.

[49] The Defendant's most recent assessment of the net value of the Estate is \$766,109.01.¹⁸ This takes account of the anticipated tax assessments for 2016 and 2017 of \$12,847.24 as well as estimates of remaining professional fees. The Court also notes that the Estate paid taxes of \$38,917.93 in 2015.

[50] As Defendant herself points out in her Outline of Oral Defence, she has "surrounded herself with professionals in order to be advised on the appropriate manner with which to fulfill her obligation as liquidator". If there were a particular issue that would justify her concern about a potential tax shortfall, the Court assumes that this issue would have been brought to her attention and that she would have brought it to the Court's attention. No such issue has been raised. Unless Defendant and her

¹⁸ Exhibit P-4.

professionals have grossly miscalculated the net value of the Estate, there is no reasonable basis for her to be concerned about a tax shortfall.

[51] Lastly, the fact that Defendant has sought to obtain additional information and documentation from the Plaintiff regarding her medical and financial situation indicates that, subject to receiving that information, she is at least prepared to make a partial advance regardless of any potential tax shortfall.

[52] For all these reasons, the Court concludes that Plaintiff satisfies the requirements for the issuance of a safeguard order in regards to the payment of an advance against her inheritance.

[53] Over and above her arguments for the issuance of a safeguard order, Plaintiff has referred the Court to the decision of Justice Michel Pinsonnault, J.S.C. in *Michael Belcourt et Louise Belcourt c. Catherine Campeau et Peter Connelly* (Succession de feu David Belcourt)¹⁹ as further support for her position.

[54] In *Belcourt*, the Court was faced with a similar request for a safeguard order to compel a liquidator to advance funds to an heir. Justice Pinsonnault concluded that such a request need not be brought by means of a safeguard order. He held that the Court had the necessary powers under Article 49 C.c.P. to render an order in circumstances such as these where the law provides no solution.

[72] Le Tribunal ne partage pas non plus l'avis de l'avocate des demandeurs à l'effet que leur présente demande pour le versement d'acompte doit faire l'objet d'une ordonnance de sauvegarde proprement dit.

[73] Dans l'affaire *Fournier c. Giroux*, la juge Piché a accueilli une requête visant à obtenir une ordonnance obligeant les liquidateurs d'une succession à verser un acompte, et ce, sans procéder par l'entremise d'une ordonnance de sauvegarde.

[74] En vertu de l'article 807 C.c.Q., le but du versement d'un acompte sur un legs a précisément pour but d'avoir lieu avant la finalisation de la liquidation d'une succession lorsque les conditions sont présentes.

[75] Quoi qu'il en soit, les dispositions de l'article 49 NCPC confèrent au juge tous les pouvoirs nécessaires pour l'exercice de leur compétence, y compris le pouvoir de rendre les ordonnances appropriées pour pourvoir aux cas où la loi n'a pas prévu de solution. Cela n'implique pas que l'ordonnance appropriée soit nécessairement une ordonnance de sauvegarde.

[55] Even if this Court had come to the conclusion that a safeguard order was not an available remedy under the circumstances, it could still order that an advance be made by virtue of its power under Article 49 C.p.c., which reads as follows:

¹⁹ 2016 QCCS 385.

49. The courts and judges, both in first instance and in appeal, have all the powers necessary to exercise their jurisdiction.

They may, at any time and in all matters, even on their own initiative, grant injunctions or issue protection orders or orders to safeguard the parties' rights for the period and subject to the conditions they determine. As well, they may make such orders as are appropriate to deal with situations for which no solution is provided by law.

[56] Given the circumstances of this case, if there were no other solution in law, the Court is satisfied that the exercise of its discretion under Article 49 C.c.P. would be warranted. The Estate is clearly solvent and, based on the evidence reviewed above, an advance to Plaintiff will not change that situation. Furthermore, the Defendant has indicated her willingness to make an advance but has set conditions that the Court views as unreasonable. Finally, since the merits of the case concern primarily the speed at which the Estate is being settled, and not Plaintiff's entitlement to her inheritance, an order to advance funds will not decide an issue that is to be heard on the merits.

[57] The Court will now turn to the issue of the amount of that advance.

Amount of the advance

[58] The Court is mindful of the fact that the available financial information is not complete and that a substantial assessment, while not likely, remains possible.

[59] The Court is also mindful of the fact that even if the Defendant had exercised her discretion to issue an advance, it would not have been unreasonable for her to select a sum other than \$100,000.

[60] For these reasons, the Court will grant the request in part and will order the Defendant to advance the sum of \$75,000, which represents less than a third of Plaintiff's inheritance, based on the most recent estimate of the net value of the Estate.

FOR THESE REASONS, THE COURT:

GRANTS in part Plaintiff's Demand for a partial distribution and communication of documents;

ORDERS Defendant *es qualité* liquidator to the Estate of the Late Elpidio Gaetano to advance the sum of \$75,000 to Plaintiff against her eventual inheritance;

ORDERS Defendant *es qualité* liquidator to the Estate of the Late Elpidio Gaetano to communicate a copy of the deed of sale of October 11, 2016 of certain assets of Elpidio Gaetano Courtier d'Assurances Inc. as well as all financial statements of that corporation since 2015;

THE WHOLE, with legal costs.


PETER KALICHMAN, J.S.C.

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Date of hearing: January 4, 2018