Date:19990618
C.A. No. 154851

NOVA SCOTIA COURT OF APPEAL

Cite as Saunders v. Crouse Estate, 1999 NSCA 10

BETWEEN:

EDMUND SAUNDERS Appellant/ Applicant	)	Appellant/applicant in person
- and -	)	Rubin Dexter for the residuary beneficiary Merilyn Hendry
THE ESTATE OF DOROTHY BELLE CROUSE Respondent	)	for the respondent
	)	Application heard: June 17, 1999
	)	Decision delivered: June 18, 1999

BEFORE THE HONOURABLE JUSTICE FLINN IN CHAMBERS

FLINN J.A.: (**in Chambers**)

[1] This is an application to stay the execution of an order issued by this Court on May 31st, 1999, pending the hearing of an application for leave to appeal the decision of this Court to the Supreme Court of Canada. Following the hearing of this application, I rendered an oral decision dismissing the application, and I indicated to the parties that I would supplement my oral decision with brief written reasons. These are those reasons.

[2] The facts are set out fully in the decision of this Court dated May 31st, 1999. However, for the purpose of this application, the relevant facts are as follows.

[3] The applicant was the executor of the respondent estate. Following a hearing in the Court of Probate, on the petition of the residuary beneficiary of the estate, who was concerned that the estate was being depleted under the applicant's direction, Justice Carver decided that the applicant had converted funds of the estate to his own use. He ordered the applicant to pay into the estate the sum of $130,000.00, and failing that, to provide a $250,000.00 bond with two sureties. The order also provided that if these conditions were not met by March 25th, 1999, there would be a further hearing to determine whether or not the applicant should be removed as executor of the estate.

[4] Pursuant to the provisions of s. 134(2) of the **Probate Act**, R.S.N.S. 1989, c. 359, the applicant filed a bond, in the penal sum of $240.00, which stayed proceedings until the applicant's appeal of Justice Carver's order, to this Court, was determined. As

a result, Justice Carver adjourned the further hearing of the matter from March 25th, 1999 to June 10th, 1999.

[5] On May 31st, 1999, this Court heard the applicant's appeal from Justice Carver's order. Following the hearing of the appeal, Justice Pugsley, on behalf of the Court, delivered an oral judgment dismissing the appeal.

[6] In dismissing the applicant's appeal from Justice Carver's order, Justice Pugsley referred to the applicant's actions as "a flagrant breach of fiduciary obligations owed by him as executor of the estate"; and, "a serious dereliction of duties which we would class as unconscionable". This Court concluded: "The grounds of appeal are without merit, indeed, without any modicum of merit. We are of the view that the appeal was brought for the sole purpose of delaying the legatees from pursuing their legitimate rights. As such, this proceeding is an abuse of the appeal process."

[7] This Court ordered the applicant to pay solicitor and client costs to the two beneficiaries who appeared on the appeal.

[8] This Court also ordered the applicant to file:

> On or before 12 noon on Monday, June 7th with the Registrar of Probate in Bridgewater, Nova Scotia, a sworn statement of his assets and liabilities as of June 7th, 1999, and further file a sworn list of all transactions of assets disposed of directly or indirectly by him since September 13, 1997.

[9] I was advised during the hearing of this application that the applicant

complied with the first part of this Court's direction, by filing a sworn statement of his assets and liabilities as of Monday, June 7th, 1999. However, the other required filing has not been made.

[10] I was also advised that a further hearing was held before Justice Carver on June 10th, 1999. Since the applicant had not paid the required monies ($130,000.00) or the required bond ($250,000.00)into Court, Justice Carver issued an order dated June 14, 1999, by which the applicant was removed as executor of the respondent estate; and, Loran DeMone was appointed administrator of the estate with Will annexed.

[11] The applicant has filed with the Supreme Court of Canada an application for leave to appeal this Court's decision and order of May 31st, 1999, and seeks a stay of this Court's order pending the hearing of the appeal. The stay would also apply to his obligation (which is still outstanding) to pay the required monies ($130,000.00) or the required bond ($250,000.00) into Court.

[12] Section 65.1 of the **Supreme Court Act**, R.S.C. 1985, c. S-26 (as amended) provides:

> 65.1(1) The Court, the court appealed from, or a judge of either of those courts may, on the request of the party who has served and filed a notice of application for leave to appeal, order that proceedings be stayed with respect to the judgment from which leave to appeal is being sought, on the terms deemed appropriate.

[13] The matters to be taken into consideration on such an application are, essentially, the same as those established for applications for a stay of execution on

appeals to this Court. (See **Turf Masters Landscaping v. T.A.G. Developments Ltd. and Dartmouth (City)** (1995), 144 N.S.R. (2d) 326 (Freeman, J.A. in Chambers)). Is there a serious issue to be tried? The threshold is low in assessing that consideration. If there is a serious issue to be tried, it must be determined whether the applicant would suffer irreparable harm if the stay was refused. Thirdly, there is the so-called balance of convenience test. If the applicant fails to meet those tests, he may still be entitled to a stay if exceptional circumstances make it fit and just that a stay be granted.

[14] I have reviewed the material which the applicant has filed in support of his application. I have also heard the submissions of the applicant and of counsel for the residuary beneficiary under the Will. In my opinion, this application is entirely without merit.

[15] During the hearing I asked the applicant to explain to me the basis upon which he was seeking leave to appeal this Court's decision to the Supreme Court of Canada. The applicant, a former solicitor, acknowledged that he should not have used these monies for his own, or his family's, purposes; and that he has to pay those monies back to the estate. He claims, however, that, as the executor of the estate, he has complete control over the estate and can do anything with the assets of the estate that the testatrix could have done. He further submitted that, while he should not have used the estate monies as he did, that he did nothing legally wrong, unless he has been found to have committed a criminal offence, and he has not been found guilty of any

criminal offence. There is no theft, he submits, because he placed his own promissory note, in the estate file, to cover the funds he used. Because there is no criminal offence here, he claims, Justice Carver had no jurisdiction to make the order.

[16] It is rather frightening that the applicant, a former solicitor, appears to have no conception of the fiduciary obligations of an executor to an estate.

[17] In my opinion the application for leave to appeal to the Supreme Court of Canada has no merit. Notwithstanding the low threshold which is employed in assessing merit on an application such as this, this application for leave to appeal does not reach that threshold. It is a further abuse of the appeal process, as this Court found his appeal to have been. Even if there was merit to the application, the applicant has provided me with nothing upon which I could determine:

(i) that he would suffer irreparable harm if the stay is not granted; or

(ii) that the balance of convenience favours him as opposed to the beneficiaries of the estate.

[18] There are, certainly, no exceptional circumstances here in the applicant's favour.

[19] The application is, therefore, dismissed. Because this application has no merit, and yet the residuary beneficiary of the estate was required to retain counsel to appear and speak to the matter, I am ordering that the applicant pay to the residuary

beneficiary Merilyn Hendry, forthwith, her costs of this application which I fix at $750.00.

Flinn, J.A.