**NOVA SCOTIA COURT OF APPEAL**
**Citation:** *Baker Estate v. Baker*, 2018 NSCA 80

**Date:** 20181016
**Docket:** CA 475405
**Registry:** Halifax

**Between:**

Kerry Haley, Lila Haley, and Annette Collicutt,
Executors and Trustees of the Last Will and Testament of
the late Rebecca J. Baker

Appellants

v.

Jennifer Helene Baker and Jacques David Alexandre Baker

Respondents

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|---|---|
| **Judges:** | Farrar, Oland and Hamilton, JJ.A. |
| **Appeal Heard:** | October 1, 2018, in Halifax, Nova Scotia |
| **Held:** | Leave to appeal granted; appeal dismissed with costs to the respondents in the amount of $2,000 inclusive of disbursements per reasons of Farrar, J.A.; Oland, J.A. and Hamilton, J.A. concurring; |
| **Counsel:** | John A Keith, Q.C., Richard Norman and Tanya Butler, for the appellants<br>Timothy Matthews, Q.C. and Lauren Harper (Articled Clerk), for the respondents |

**Reasons for judgment:**

## Background

[1] Rebecca Jean Baker died on February 10, 2017. Ms. Baker had two children, Jennifer Baker and Jacques David Baker, the respondents on this appeal.

[2] On November 17, 2016, Ms. Baker executed a new will. The appellants, Kerry Haley, Lila Haley and Annette Collicutt, were appointed as executors of the estate of Ms. Baker as well as the trustees of a testamentary trust for Jennifer Baker. The Will also created a Henson trust for Jacques Baker, with Catherine Watson Coles of the law firm McInnes Cooper as the Trustee. A Henson trust is typically set up to protect the assets of a disabled person. Aside from a grandchild who was bequested $10,000, Jennifer Baker and Jacques Baker are the only other beneficiaries under the Will.

[3] The Bakers commenced a motion in the fall of 2017 for proof in solemn form of the Will. In addition, claims were filed in the Supreme Court of Nova Scotia under the *Testators' Family Maintenance Act*, R.S.N.S. 1989, c. 465 and the *Variation of Trusts Act*, R.S.N.S. 1989, c. 486, contesting the terms of the Will.

[4] On September 27, 2017, the Bakers filed a separate motion to remove the appellants as executors of Ms. Baker's estate and to appoint a replacement executor and trustee. The removal motion was scheduled to be heard by Justice Mona Lynch on November 23, 2017.

[5] By the time the parties appeared before Justice Lynch on November 23, 2017, it was agreed that the motion to remove the executors would be adjourned. What remained was a motion for directions and a motion by the Bakers to appoint an interim administrator pending the determination of the motion to remove the executors.

[6] After hearing argument from the parties, Justice Lynch granted the Bakers' motion and appointed Royal Trust Company of Canada to act as interim administrator pending a hearing on the merits. An order to that effect was issued on December 2, 2017.

[7] At the motion for directions, among other things, the date of March 9, 2018, was set to hear the removal motion.

[8] On February 23, 2018, the executors filed their own motion seeking to have the estate pay their legal fees in defending the removal motion.

[9] The parties were back before Justice Lynch on March 9, 2018. By this time it was apparent the motion to remove the executors would not be proceeding on that day. Instead, the parties used March 9, 2018, to argue the executors' motion to have their legal costs paid out of the estate.

[10] After hearing argument, the motions judge rendered an oral decision dismissing the executors' motion. The issue of costs was left open until the matter was decided on the merits. An order to this effect was issued on April 3, 2018.

[11] Also, on March 9, 2018, the Bakers and the executors, by Consent Order, agreed that Royal Trust would continue as interim administrator until the removal motion was decided.

[12] By Notice of Appeal dated April 17, 2018, the executors sought leave to appeal from the order and decision dismissing the motion to pay their legal fees. For the reasons that follow, I would grant leave to appeal but dismiss the appeal with costs to the respondents in the amount of $2,000, inclusive of disbursements.

**Issues**

(a) Should leave to appeal be granted?

(b) Did the motions judge err in failing to award interim costs to the executors?

## Leave to Appeal

[13] The test for leave to appeal is set out in *Homburg v. Stichting Autoriteit Financiële Markten*, 2016 NSCA 38:

> [18] … The test for leave to appeal is well-known. It requires an appellant to raise an "arguable issue". An arguable issue must do more than simply identify a matter of pure academic interest. It must be an issue that actually arises on the facts and merits this Court's attention. It must be "an issue that could result in the appeal being allowed". [citations omitted]

[14] I am satisfied that the appellants, in their Notice of Appeal and factum, have raised arguable issues. I would grant leave. It is not necessary to address the issue further.

Appeal – Standard of Review

[15] The motions judge's decision was an interlocutory discretionary order. We will only interfere with the discretionary order if wrong principles of law were applied or the decision is so clearly wrong as to amount to a patent injustice (See for example, *Maritime Travel Inc. v. Go Travel Direct.Com Inc.*, 2007 NSCA 11, ¶3. Both parties agree this is the standard of review.

**Analysis**

[16] The appellants argue the motions judge proceeded on a wrong principle of law when she said the executors had already been removed. This, they say, tainted her consideration of their motion. In arguing the judge proceeded on an erroneous legal principle, the executors refer to her decision in their factum:

> 35. The learned motion judge said at para. 2 of her decision (referring to her December 20, 2017 order appointing Royal Trust):
>
> > So the decision was made that the executors were removed until the matter of whether they should be permanently removed could be decided.
>
> At para 3, she said:
>
> > I understand that the executors are normally indemnified when they are acting under their duty. Here they're at the present time not the executors.
>
> At para. 5, she said:
>
> > …they are litigants at this point in the matter and not acting in their capacity as executors.
>
> 36. In effect, this learned motion judge determined that because she had already removed the executors (as a term of an adjournment), they had no existing interest in the litigation and, therefore, their need for a continuing role was now diminished. Respectfully, this is wrong at law and would create a very problematic precedent.
>
> [Emphasis added]

[17] In order to address this aspect of the executors' argument some further context is necessary.

[18] In the executors' pre-hearing brief filed on February 23, 2018, they broke the legal costs issue down into two separate and distinct categories. The first, indemnification costs, was titled in the pre-hearing brief as follows:

**(A) Executors Entitlement to Indemnification from the Estate for Reasonably Incurred Legal Costs.**

[19] They proceeded to argue the basis upon which the executors would be entitled to indemnification for reasonably incurred legal costs. Then they set out a separate category of costs which they identified as:

**(B) Interim Costs.**

[20] The distinction between the two categories of costs was the subject of discussion between counsel for the executors and the motions judge at the hearing:

> **THE COURT**: Okay. You've got – you're – you're [conflating] two things. Okay. You're asking for two things and that's the – that's where I'm getting – losing you. Okay. One is indemnification as they go along. The other is interim costs.
>
> **MR. KEITH**: I – I – I – I – and I – and I maybe misunderstanding the point My Lady. I probably am but I – I see them as the same because indemnification as they go along in our mind is equivalent to interim costs. When we asked for…
>
> **THE COURT**: Well I've never seen an interim costs order say, "Come back and we'll pay it as it goes along." It's a – it's a lump sum.
>
> **MR. KEITH**: We were – we – we were seeing it My Lady as interim – legal fees. Costs for legal fees on the basis that…
>
> **THE COURT**: Well I've – I've never seen an order like that. I mean it – it's a – something that's normally done in matrimonial matters when they're – got one spouse that is – has all of the resources and the other spouse doesn't to fight it but it's – I mean they come forward and they ask for interim costs and there is an award made of interim costs in a specific amount.
>
> **MR. KEITH**: M-hm.
>
> **THE COURT**: So your – your two issues are in – are different to me. One of them you were asking I thought as for their fees to be paid as they go along because you're – they're entitled to that based on them – the – the fact that they were the named Executors.
>
> **MR. KEITH**: Yeah.
>
> **THE COURT**: The other is interim costs and the costs that you have in the cases that you have in – in relation to interim costs are you know the three prongs as to what has to be proven.
>
> **MR. KEITH**: That's right, My Lady.

[Emphasis added]

[21] The motions judge saw the issues she had to address in her decision as two-fold: first, if the executors were acting in their capacity as executors, they were entitled to indemnity for their legal costs associated with administering the estate. The second issue was whether they were entitled to interim costs, that is, costs which had not been incurred but which would be incurred in the litigation involving their removal as executors.

[22] It is with this contextual background that the judge's decision must be read. It explains why the motions judge was of the view the executors were not entitled to indemnification costs at this stage of the proceeding. In her decision she says:

> [5] But I cannot say that it should be taken out of the normal course, and they will be entitled to their costs and indemnification if they are successful but they are litigants at this point in the matter and not acting in their capacity as executors.
>
> [6] So I find that to determine whether or not they are going to be indemnified at this stage is premature and it has to be decided at the end of the motion. I can't say that they are entitled to indemnification without hearing the motion and certainly as Mr. Matthews conceded, if they are successful, they are entitled to indemnification.

[Emphasis added]

[23] In this part of her decision, the motions judge is addressing the arguments which the executors made in their brief that they were entitled to be indemnified for reasonable legal fees incurred in the administration of the estate. The executors were, in essence, arguing they would be administering the estate by defending the motion to remove them as executors. The motions judge disagreed. She decided it would be premature for her to award indemnification costs for the removal motion, because the motion had not yet been heard and it could not be determined what amount, if any, would be an appropriate costs award.

[24] She did not make a determination that the executors had been removed but rather, decided they were no longer administering the estate and were, therefore, not entitled to indemnification costs. In doing so, she did not err.

[25] Having made the decision the executors were not entitled to indemnification costs, the motions judge then addressed the executors' argument with respect to interim costs, setting out the test she had to apply in determining this issue:

> [8] The test [as] set out by both parties is impecuniosity, a *prima facie* case, and I agree that the affidavits from the named executors show that they are impecunious. The *prima facie* case as Mr. Keith has said, is that the will is

> presumed to be valid. The problem that I'm having is with the third part, the money to fund them has to come from the estate, and I understand that the beneficiaries are being funded by the estate, but as Mr. Matthews indicated the money in the estate is for them. And they have made that decision to use it in this fashion.
>
> [Emphasis added]

[26] The test referred to by the motions judge comes from *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, a case cited to her by both parties. It held:

> 36 There are several conditions that the case law identifies as relevant to the exercise of this power, all of which must be present for an interim costs order to be granted. The party seeking the order must be impecunious to the extent that, without such an order, that party would be deprived of the opportunity to proceed with the case. The claimant must establish a prima facie case of sufficient merit to warrant pursuit. And there must be special circumstances sufficient to satisfy the court that the case is within the narrow class of cases where this extraordinary exercise of its powers is appropriate.
>
> [Emphasis added]

[27] The executors say that the motions judge failed to properly apply the *Okanagan* test. They argue the judge's refusal to grant them interim costs was contingent on whether she considered there was a public interest at stake in this case. They refer to the following from the written release version of her oral decision:

> [9] … The Supreme Court of Canada case which the test comes from with Okanagan Band talks about public interest litigation. Very exceptional cases – public interest litigation – ought to be narrowly construed … In the Supreme Court of Canada case they spoke of public importance of the litigation continuing, and I'm not seeing that there is a big public interest in making sure this case proceeds.
>
> [10] I'm not finding that the interests of justice require that the named litigants receive indemnification. I don't find it's a case that can be said to be in the public interest or of public importance as the other cases that have been provided. …

[28] The executors say these passages show that the motions judge focused on the public interest and failed to properly consider whether special circumstances existed such that she should exercise her discretion.

[29] With respect, I disagree. Again, context is important.

[30] Paragraph 36 from the *Okanagan* case, cited above, sets out the factors a court is to consider in exercising its general discretion to award interim costs. However, *Okanagan* sets out a separate test where there is a public interest component to the case (as there was in *Okanagan*):

> [40] With these considerations in mind, I would identify the criteria that must be present to justify an award of interim costs in this kind of case as follows:
>
> 1. The party seeking interim costs genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial – in short, the litigation would be unable to proceed if the order were not made.
> 2. The claim to be adjudicated is *prima facie* meritorious; that is, the claim is at least of sufficient merit that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means.
> 3. The issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases.
>
> [Emphasis added]

[31] As can be seen, the third part of the general discretion test is modified. It is not necessary to show special circumstances but rather, interim costs can also be awarded if there is a public interest at stake.

[32] The motions judge's decision was rendered shortly after hearing final argument by the parties. In ¶8 and the first part of ¶9 she references the three prong test from *Okanagan* which applies to cases other than public interest cases. For ease of reference, I will reproduce the excerpts from her decision where she discussed *Okanagan*. I will also reproduce the portion of ¶9 from her decision which is not cited by the executors in their factum:

> [8] The test [as] set out by both parties is impecuniosity, a *prima facie* case, and I agree that the affidavits from the named executors show that they are impecunious. The *prima facie* case as Mr. Keith has said, is that the will is presumed to be valid. The problem that I'm having is with the third part, the money to fund them has to come from the estate, and I understand that the beneficiaries are being funded by the estate, but as Mr. Matthews indicated the

> money in the estate is for them. And they have made that decision to use it in this fashion.
>
> [9] In all of the cases that were provided, it's potential beneficiaries that have their costs paid on an interim basis. It's people that are making claim whether under the *Testator Family Maintenance Act* or similar legislation, they proved that they have a *prima facie* case that can't be made without having the interim costs but, there is nothing like this, where the executors are applying to fight their removal and to be indemnified. The *Waese* case refers to the general discretion at paragraph 27 and says that it's not limited to matrimonial cases but they indicated exercise is limited to very exceptional cases and ought to be narrowly applied. The Supreme Court of Canada case which the test comes from with the Okanagan Band talks about public interest litigation. Very exceptional cases – public interest litigation – ought to be narrowly construed. All of the case law seems to say that it is kind of the matrimonial cases or the equivalent like the *Testators' Family Maintenance Act.* In the Supreme Court of Canada case they spoke of public importance of the litigation continuing, and I'm not seeing that there is a big public interest in making sure that this case proceeds.
>
> [Emphasis added]

[33] She found that the first two parts of the test had been satisfied by the executors – they were impecunious and had a *prima facie* case. But she had concerns with the third prong of the *Okanagan* test – the part of the test which required her to consider whether there were special circumstances in this case that brought it within the narrow class of cases where the extraordinary exercise of the court's jurisdiction in granting an interim award of costs was appropriate.

[34] The cases she references in the first part of ¶9 are all decisions that do not involve public interest litigation.

[35] The motions judge considered there could be special circumstances that warrant the granting of costs even in the absence of a public interest component. This is evident from her reference to *Waese v. Bojman*, [2002] O.J. No. 5220. *Waese*, like this case, was one where interim costs were sought to be paid out of the estate. The following is the paragraph from *Waese* referenced by the motions judge in ¶9:

> 27 In the notice of motion, the request for an order for an interim payment of costs was made against all the defendants but, on the basis of the evidence before the court on this motion, if such an order is to be made, the source of the funds must be the estate. The discretion of the court to make such an order pursuant to section 131 of the *Courts of Justice Act* was not in dispute at the hearing and counsel were also in agreement with respect to the principles that should govern

> an exercise of the discretion. A convenient statement can be found in the reasons of Aitken J. in *Roberts v. Aasen*, [1999] O.J. No. 1969 (S.C.J.):
>
> > "I adopt the following statement of the law from *Organ v. Barnett* (1992), 11 O.R. (3d) 210 at 215 (Gen. Div.):
> >
> > > ... the court does have a general jurisdiction to award interim costs in a proceeding, and ... such a jurisdiction is not limited exclusively to matrimonial cases. In my view, however, such an exercise of jurisdiction is limited to very exceptional cases and ought to be narrowly applied, especially when the court is being asked to essentially predetermine an issue, in addition to being asked to provide funding for anticipated legal costs to the end of the trial.
> >
> > The question to be asked is whether [the defendant] can establish that she has a case of sufficient merit to warrant its being presented to the court, and secondly whether she is genuinely in financial circumstances which but for an order for interim costs for disbursements would preclude her from pursuing the claim."
>
> [Emphasis added]

[36] The motions judge uses the same wording from the case referenced in *Waese* in saying the "exercise of discretion is limited to very exceptional cases and ought to be narrowly applied". She simply did not consider this to be one of those very exceptional cases where she should exercise her discretion.

[37] It is also interesting that her oral decision, as transcribed in the Appeal Book, ¶9 is actually transcribed as four paragraphs as opposed to one:

> In all of the cases that were provided is potential beneficiaries that are – have – that have their costs paid on an interim basis. It's people that are making claim whether under the testator's *Family Maintenance Act* or a similar legislation. They proved that they have a *prima facie* case that can't be made without having the interim costs and – but there's nothing like this where the Executors are applying to have – to fight to be – their removal and to be indemnified.
>
> It – the *Weiss* (sp) case – I'm probably not pronouncing that right but I believe it was the – Tab 16 in the – the brief from the named Executors. That case refers to the general discretion at Paragraph 27 and says that it's not limited to matrimonial cases but they indicate that it should be exercised as limited to very exceptional cases and ought to be narrowly applied.
>
> The Supreme Court of Canada case which the – the test comes from with the Okanagan Band talks about public interest litigation and so very exceptional

> cases, public interest litigation, ought to be narrowly construed. All of the caselaw seems to say that it's the kind of matrimonial cases or the equivalent like the *Testators' Family Maintenance Act*.
>
> The – in the Supreme Court of Canada case they spoke of the public importance of the litigation continuing and I'm not seeing that there is a – a – as – a big public interest in this case in this making sure that this case proceeds.

[38] When the paragraphs are broken down, as they are in the transcript, the motions judge's thought process becomes clear. When she is referring to the *Okanagan* case in the latter part of ¶9 the motions judge is considering whether the issues raised in this case transcend the interests of the particular parties, are of public importance and have not been resolved in previous cases (*Okanagan*, ¶40). She found they did not satisfy the requirements.

[39] I do not see her analysis as conflating public interest and special circumstances such that the motions judge was saying the only time you can have special circumstances is when there is a public interest, as argued by the executors. But rather, she was addressing special circumstances and public interest separately to determine whether one or the other might justify an award of interim costs. She found there were neither special circumstances nor a public interest component which would warrant such an award.

[40] The motions judge had a difficult task to perform. What she had to consider was set out appropriately and succinctly by counsel for the executors:

> **MS. BUTLER**:I – I think, My Lady, with respect you're – you're in an unenviable position of having to decide it one way or the other anyway. If they don't get their interim costs Rebecca Baker's Will is going to fail if – if they're just not going to be able to raise the capital to continue the defence. If – if you do get them – give them their interim costs and it turns out that they've had their hand in the cookie jar since day one and there's a cost order against them and there's no way to – to – for the Estate to recover on that then it may be that – that - that is equally prejudging. I think what is certain from right…
>
> **THE COURT**: And see then that's – the problem is is that's why we do costs at the end.
>
> [Emphasis added]

[41] The choice the motions judge had to make was whether this was a case where special circumstances existed such that she should grant interim costs and have the executors' legal fees funded out of the estate. She found there were not.

[42] Absent legal error or a potential injustice, neither of which is present here, it is not for us to review the same evidence and arguments of counsel made before the motions judge and come to a different conclusion.

Costs

[43] The parties agree the appropriate award of costs on appeal should be $2,000 inclusive of disbursements. The respondents shall have their costs in the amount of $2,000, inclusive of disbursements.

**Conclusion**

[44] I would grant leave to appeal, and dismiss the appeal with costs to the respondents of $2,000 inclusive of disbursements.

Farrar, J.A.

Concurred in:

Oland, J.A.

Hamilton, J.A.