NOVA SCOTIA COURT OF APPEAL
Citation: *Kinley Estate v. Kinley*, 2021 NSCA 85

Date: 20211124
Docket: CA 509388
Registry: Halifax

Between:

Paula K. Howatt and J. Edward Kinley, as Personal Representatives of the Estate of Grace E. Kinley

Applicants

v.

Peter J. Kinley and Shona Kinley MacKeen

Respondents

Judge:	Bourgeois J.A.
Motion Heard:	November 24, 2021, in Halifax, Nova Scotia in Chambers
Written Release:	December 14, 2021
Held:	Motion dismissed
Counsel:	Paula K. Howatt and J. Edward Kinley, on their own J. Walter Thompson, Q.C., for the respondents

Decision:

[1] The parties are siblings. They have been engaged in litigation relating to the Estate of their late mother. There appears to be a high degree of animosity amongst the four, with differing views as to who is responsible for what appears to be a sad state of affairs within the family. The answer to that question is immaterial to the motion before me.

[2] The applicants are the personal representatives of the Estate. They have appealed a decision of Justice Ann E. Smith, sitting as a Justice in the Court of Probate for Nova Scotia. Justice Smith's decision was in response to an appeal brought by the respondents of a Registrar of Probate's decision permitting an indefinite extension of time for the passing of accounts in relation to the administration of the Estate. She found the Registrar had erred in granting an indefinite extension and ordered the personal representatives "forthwith obtain a date certain to provide an accounting of their administration of the Estate". Justice Smith also ordered the personal representatives be personally responsible for costs arising from the matter before her.

[3] The applicants filed a Notice of Appeal on October 1, 2021. On October 20, 2021, the applicants filed a Notice of Motion seeking a stay and permission to "exclude part of the transcript for the Appeal Book". On the same day, the applicants filed a Motion for Date and Directions.

[4] The motion relating to the stay and contents of the Appeal Book was heard on November 24, 2021. Both applicants were present during the motion; however, Paula K. Howatt advanced the bulk of the representations. Although she is acting on her own behalf, Ms. Howatt has been a practicing lawyer in Nova Scotia for some time. Edward Kinley was given the opportunity to add to her submissions. He indicated he was in agreement with the points raised by Ms. Howatt. J. Walter Thompson, Q.C. appeared and made submissions on behalf of the respondents. The motion for date and directions was adjourned to December 15, 2021.

[5] At the end of submissions, I advised the parties the motion was dismissed with written reasons to follow. These are my reasons.

Position of the parties

[6] The relief sought by the applicants expanded in the course of the hearing from that contained in their Notice of Motion. The written motion before the Court is confined to a request that "the Cost award be stayed" and that "permission to exclude part of the transcript for the Appeal Book" be granted. The affidavit filed by Ms. Howatt in support of the motion addresses those two matters, as does the written submissions.

[7] However, in oral argument, the applicants expand their request to include that I: stay Justice Smith's direction regarding the disclosure of documents; summarily strike down other aspects of her order; and give the Registrar of Probate directions regarding an upcoming hearing in January, specifically in relation to holdback of Estate funds.

[8] The respondents submit this Court should only consider the relief sought in the Notice of Motion filed by the applicants; that is, a stay of the order of costs and permission to abridge the Appeal Book. It is argued the other requests advanced by the applicants have not been properly placed before the Court.

[9] With respect to the issues properly for determination, the respondents submit the applicants have not established a stay of the cost award was warranted, nor have they justified derogating from the contents of an appeal book as set out in *Civil Procedure Rule* 90.30.

Analysis

Request for a stay

[10] It is helpful to begin with the general legal principles that govern the matters raised in the motion before me. The principles governing a stay were recently set out by Justice Beveridge in *Fraser v. Limbo Cove Resources Inc.*, 2021 NSCA 41:

> [16] There are virtually legions of decisions that have set out and applied the well-known criteria a judge must consider when an appellant requests a stay of execution, either absolutely or on conditions, pursuant to the equitable power to do so under the *Judicature Act*, R.S.N.S. 1989, c. 240 and the *Nova Scotia Civil Procedure Rules*. They all refer to and apply the leading cases of *Purdy v. Fulton Insurance Agencies Ltd.* (1990), 100 N.S.R. (2d) 341 and/or *R.J.R.-MacDonald v. Canada (Attorney General)*, [1994] 1 S.C.R. 311.
>
> [17] The power to grant such relief is based on equitable principles and is discretionary. The only legislative guidance comes from s. 45(e) of [the] *Judicature Act* and *Rule* 90.41(2). Section 45(e) envisages the power to stay might

> be exercised "so far as necessary for the purposes of justice" and for the Court to make such order "as may be just".
>
> [18] *Rule* 90.41(1) directs that the filing of a Notice of Appeal does not operate as a stay of execution or enforcement of the judgment appealed from. However, *Rule* 90.41(2) provides:
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> > (2) A judge of the Court of Appeal on application of a party to an appeal may, pending disposition of the appeal, order stayed the execution and enforcement of any judgment appealed from or grant such other relief against such a judgment or order, on such terms as may be just.
>
> [19] Hallett J.A. canvassed the historic and emerging caselaw on this equitable power in *Purdy v. Fulton Insurance Agencies Ltd.* and arrived at his seminal exposition of a two-part test. To satisfy the primary test, an appellant must convince the Court on a balance of probabilities: the grounds of appeal raise at least one arguable ground of appeal; the appellant will suffer irreparable harm should the stay not be granted—assuming the appeal is ultimately successful; and, the appellant will suffer greater harm if the stay is not granted.
>
> [20] The appellant may also obtain a stay pending an appeal, even if it cannot meet all of the criteria for the primary test, if there are exceptional circumstances that nonetheless make it fit and just to grant a stay. This is known as the secondary test.

[11] In the present instance, the applicants acknowledge they do not meet the primary test for a stay. However, they submit I should exercise my discretion and grant a stay in accordance with the secondary test. Success on the second ground is rare and requires exceptional circumstances (*Fraser* at para. 34).

[12] The applicants say the COVID-19 pandemic gives rise to exceptional circumstances. Although the Court can take judicial notice of the broad-ranging impacts of the pandemic, it is unclear from the materials before me how its presence or effects demonstrate it is in the interest of justice that the cost order under appeal be stayed. The applicants, other than making an assertion that exceptional circumstances exist, have provided no evidence to establish that staying the cost order is in the interest of justice. I am not prepared to stay the cost order.

[13] Further, I am not prepared to grant the applicants' request that Justice Smith's order relating to disclosure be stayed. First, this request was not part of the Notice of Motion. It was not addressed in the affidavit of Ms. Howatt filed in support of the motion, nor was it mentioned in the applicants' written submissions. Second, even if I were inclined to exercise my discretion to consider a late request

for relief, there is nothing in the materials before me to satisfy either the primary or secondary test for a stay.

Request regarding contents of the Appeal Book

[14] The required contents of an appeal book are set out in *Rule* 90.30(2). The contents of an appeal book may be abridged upon agreement of the parties (*Rule* 90.30(4)), or if a judge permits (*Rule* 90.30(5)). The evidence establishes that the applicants sought the respondents' agreement to exclude materials from the Appeal Book in this matter. The respondents did not agree to have materials excluded, and as such, the applicants now seek permission to abridge the Appeal Book.

[15] The applicants want to exclude the court transcript arising from the proceeding below. From Ms. Howatt's oral submissions, I understand this request would include several short appearances before Justice Smith, an appearance before Justice Jamieson, in addition to the actual hearing. Other than asserting it would be cost and time effective to not be required to provide a transcript, the applicants do not advance any other reason why this Court should not have the entirety of the record.

[16] In his written submissions, counsel for the respondents argues:

> The Appellants do not say what is to be included or excluded from the appeal book. The Respondents, however, say that the transcripts of all conferences and correspondence with the Court must be included in the appeal book. The parties held five conferences with the Court. They are spoken of in the Appellants' written submission on their motions. That alone demonstrates their relevance to the issues on appeal. Each of the conferences has a context of emails and briefs, all of which were before the Court. The decision under appeal makes reference to some of this correspondence in paragraphs 24-31. The correspondence too must be included if the Court of Appeal is to have a full understanding.

[17] On appeal, this Court is asked to assess whether a trial judge or other decision-maker made an error justifying appellate intervention. To undertake that task, *Rule* 90.30(2) contemplates this Court be provided with the entirety of the record upon which the impugned decision was made. There may be times, however, where the nature of the decision, the nature of the grounds of appeal or some other circumstance would permit the Court to undertake its responsibility without a full record.

[18] The circumstances where an appeal book can be abridged are variable, but a party seeking to limit the materials normally provided on appeal should be prepared to demonstrate why the documents to be omitted are not required. In this case, I am not satisfied the transcripts from the court appearances below ought to be omitted.

[19] Given the grounds of appeal and the submissions made in support of the motion for a stay, it would appear the transcripts are likely relevant. As noted by the respondents, the applicants themselves have made reference in their submissions to the very hearings and appearances that they wish to have excluded from the Appeal Book. In my view, this is a strong indicator that those court appearances are relevant to the issues advanced on appeal and the potential arguments to be advanced by the parties.

[20] For this Court to properly assess the errors allegedly made by Justice Smith, the Appeal Book should, as contemplated by the *Nova Scotia Civil Procedure Rules*, contain the materials she had before her in rendering judgment. The Appeal Book filed by the applicants must comply with Rule 90.30(2).

Additional relief

[21] In the course of the hearing, the applicants asked that I strike offending portions of Justice Smith's order. The applicants assert if I were prepared to do so, the appeal would no longer be necessary, and they would file a Notice of Discontinuance.

[22] In making such a request, the applicants clearly do not appreciate the role of a chambers judge is limited. In effect, they asked me to determine the outcome of their appeal. That is the role of a panel of the Court, not a judge in chambers.

[23] Further, I was asked to give directions to the Registrar of Probate in relation to a proceeding scheduled for January 2022 and, in particular, relating to a requested holdback of estate assets. Again, the advancement of such a request demonstrates a fundamental misunderstanding of the parameters in which a single judge of this Court functions.

Conclusion

[24] The motion is dismissed. The applicants shall personally pay costs in the amount of $500.00 to the respondents forthwith.