

IN THE COURT OF PROBATE

Citation: *Skanes v Skanes Estate*, 2023 NSSC 20

Date: 20230118

Docket: KEN No.507807

Probate No. 13193

Registry: Kentville

Between:

Mark Randall Skanes

Applicant

and

Paul Gordon Skanes, Personal Representative of the Estate
Of Mildred Jean Skanes

Respondent

Judge: The Honourable Justice Gail L. Gatchalian

Heard: January 13, 2023, in Kentville, Nova Scotia

Oral Decision: January 13, 2023

Counsel: Jonathan Hooper, for Mark Skanes
Dillon Trider, for Paul Gordon Skanes

By the Court:

Introduction

[1] This is a motion for contempt brought by the Applicant, Mark Skanes, against his brother, Paul Gordon Skanes.

[2] Paul is the former Personal Representative of the Estate of Mildred Jean Skanes. Ms. Skanes was the mother of Mark and Paul.

[3] Mark filed an Application under the *Probate Act*, S.N.S. 2000, S.N.S, to remove Paul as the Personal Representative. In an Interim Order dated April 22, 2022, I required Paul to file a detailed accounting of his administration of the Estate, and set a deadline for doing so.

[4] Paul did not file the accounting as required by my Order. The hearing of the Application reconvened, and in an Order dated July 21, 2022, I removed Paul as the Personal Representative.

[5] In the motion for contempt, Mark alleges that Paul has failed to comply with the April 22, 2022 Order, compelling him to provide all bank account statements and tax records for the administration of the Estate to the Court and to Mark, on or before June 10, 2022.

[6] The hearing of the contempt motion was adjourned once for Paul to retain legal counsel. It was adjourned a second time when Paul retained legal counsel shortly before the hearing.

[7] At today's hearing, both parties were represented by counsel. Paul was cross-examined on his affidavit.

[8] Mark seeks a finding of contempt, as well as solicitor-client costs, a fine and a deadline by which Paul must comply with the order, and a fine for each day that Paul fails to comply with the deadline.

[9] Paul says that the hearing of liability should be bifurcated from penalty. Paul acknowledges that there are sufficient facts to ground a finding of contempt. However, he asks the Court to exercise its discretion not to make such a finding at this time, given the evidence that Paul has taken steps to bring himself into compliance with the order, and Paul's evidence that he intends to comply with the order. Legal counsel for Paul asks that he be given an additional three months to comply.

[10] I agree with Paul's position that the issues of liability and penalty should be bifurcated. This is the practice in this Court: see *Betts v. Bezanson-Gallant*, 2022 NSSC 114 at paras.5-6. I will therefore only be dealing with liability at this stage.

[11] In order to determine whether I should enter a finding of contempt, or whether I should exercise my discretion not to enter such a finding at this time, I will consider:

1. the purpose of a contempt finding,
2. the elements of civil contempt, and
3. the circumstances in which the Court may exercise its discretion not to enter a finding of contempt despite the elements having been proved beyond a reasonable doubt.

The Purpose of a Contempt Finding

[12] Contempt of court rests on the power of the court to uphold its dignity and process. The rule of law is directly dependent on the ability of the courts to enforce their process and maintain their dignity and respect. See *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901 at p.931, cited in *Carey v. Laiken*, 2015 SCC 17 at para.30.

[13] The purpose of a civil contempt proceeding, where there is no element of public defiance, as contrasted with criminal contempt, is primarily coercive rather than punitive: *Carey v. Laiken, supra*, at para.31.

Elements of Civil Contempt

[14] Civil contempt has three elements which must be established by the applicant beyond a reasonable doubt:

1. The order alleged to have been breached must state clearly and unequivocally what should and should not be done.
2. The party alleged to have breached the order must have had actual knowledge of it.
3. The party allegedly in breach must have intentionally done the act that the order prohibits or intentionally failed to do the act that the order compels.

Carey v. Laiken, supra at paras.32-35

[15] As stated, there is no dispute between the parties that the three elements of civil contempt have been proved beyond a reasonable doubt in this case.

Discretion

[16] The contempt power is discretionary and courts have consistently discouraged its routine use to obtain compliance with court orders. The contempt power should be used cautiously and with the greatest restraint: *Carey v. Laiken*,

supra at para.36. It should be used as a last resort: see *Ucore Rare Metals v. IBC Advanced Technologies Inc.*, 2020 NSSC 232 at para. 41.

[17] Judges have inherent discretion to decline to impose a contempt finding where the offending party has acted in good faith in taking reasonable steps to comply with the order and/or where it would work an injustice in the circumstances of the case: see *Carey v. Laiken, supra* at para.37. Where there have been substantial and proper measures taken by the alleged contemnor to comply, the contempt may be excused or the imposition of any sanction postponed to allow those measures to continue: see *TG Industries v. Williams*, 2001 NSCA 105 at para.37.

[18] It is within the judge's discretion, if persuaded that it is appropriate and in the interests of justice in all of the circumstances, to fashion an order whose object is to secure compliance with the order. Relevant considerations include the diligence of the alleged contemnor in attempting to comply with the order. See *TG Industries, supra* at para.38.

[19] In short, the court may decline to make a finding of contempt, or delay a decision on the motion for contempt, notwithstanding its finding that the three

elements of contempt have been proved beyond a reasonable doubt. See *York Condominium Corporation, No. 188 v. Chaudrey*, 2021 ONSC 7586 at para.21.

[20] Paul filed an affidavit. In it, he acknowledges that he did not comply with my April 11, 2022 order, but that he intends to comply with it. He acknowledges that he did not act quickly enough to retain counsel and begin the process of providing an accurate accounting of the Estate. He apologizes to the Court and to counsel for Mark.

[21] In Paul's affidavit, originally filed on December 21, 2022 (although not properly sworn until January 9, 2023), Paul says that, "[o]ver the past two weeks," in consultation with legal counsel, he has searched the boxes of account information at his company warehouse and found a number of bank statements that contain transactions pertaining to the Estate. He has identified gaps in the accounting that he needs to fill. He is developing a plan with counsel to fill in the gaps in documentation. He attaches some of the required documentation.

[22] During his cross-examination and re-examination, Paul confirmed that he has been in contact with banks to obtain necessary statements, that he has contacted some of the beneficiaries to obtain confirmation from them of amounts

received, he has provided up-to-date tax information to his legal counsel, and he has retained an accounting firm to assist him.

[23] There are still significant gaps in the accounting required to be filed by Paul pursuant to my April 11, 2022 order.

[24] Mark says that the efforts of Paul to comply are too little too late, and that monetary penalties are required to motivate Paul to comply.

[25] Counsel for Paul acknowledges that the Court cannot know whether Paul will in fact comply with the order, but that there is a light at the end of the tunnel, and counsel feels confident that he can assist Paul in complying with the order within three months.

[26] I am concerned about Paul's lengthy delay in complying with the Order. I am concerned that he took far too long to retain counsel and to take serious steps to comply with my Order. Nonetheless, he is now on the right track. I choose to accept that there is a light at the end of the tunnel.

[27] I conclude that it is in the interests of justice that I exercise my discretion to adjourn this contempt hearing to a date certain within approximately three months to allow Paul some further time to comply with my order, for the following reasons:

1. The purpose of a contempt order is primarily coercive, and, on the evidence, Paul now appears motivated to do what he needs to do to comply with my order.
2. The contempt power should be used cautiously and with the greatest restraint, and only as a last resort, and on the evidence, it may not be required if Paul truly is motivated to comply with my order.
3. Paul has now retained legal counsel and an accountant, providing the court with additional comfort that he will indeed comply with the order.
4. Counsel for Paul believes that, with his assistance, Paul will be able to file the accounting required by my order within three months, which is not an unreasonable delay given his late retention.

[28] We will set a continuation date today, as well as set deadlines for any supplementary affidavit evidence and written submissions. There will no doubt be cost consequences for Paul as a result of the contempt hearing and this adjournment, but those can be spoken to at the end of the proceeding.

Gatchalian, J.