Date: 19991123
Docket: CA 156820

# NOVA SCOTIA COURT OF APPEAL

[Cite as: Demone v. Saunders, 1999 NSCA 145]

**Freeman, Roscoe and Cromwell, JJ.A.**

**IN THE ESTATE OF DOROTHY BELLE CROUSE**

**BETWEEN:**

| | | |
|---|---|---|
| LORAN DEMONE and MERILYN HENDRY | ) | Rubin Dexter for the Applicants |
| Applicants | ) | |
| **- and -** | ) | |
| EDMUND R. SAUNDERS | ) | Appellant appeared in person |
| Appellant | ) | |
| | ) | Application Heard: November 23, 1999 |
| | ) | Decision Delivered: November 23, 1999 |

**THE COURT:** The application is granted with costs as per oral reasons for decision of Roscoe, J.A.; Freeman and Cromwell, JJ.A., concurring.

The reasons for decision of the Court were delivered orally by:

**ROSCOE, J.A.:**

[1] This is an application to quash an appeal from a decision of Justice Hiram Carver in a matter brought pursuant to s. 31 of the **Probate Act**, R.S.N.S. 1989, c. 359. Section 31 of the **Probate Act** states:

> **Executor wasting estate**
>
> 31 (1) The court of probate, upon the summary application of anyone interested in the estate, if it is proved to the satisfaction of the court that an executor is wasting the estate, may order the executor to give security for the performance of his duty.
>
> **Removal of executor**
>
> (2) If it is proved to the satisfaction of the court that he has not obeyed such order, or if in any case it is proved that an executor is residing beyond the jurisdiction of the court, and is neglecting to settle or administer the estate, or if it is proved that an executor has failed to comply with an order to pay into a chartered bank any money of an estate remaining in his hands made under this Act, the court may remove such executor from his office and appoint another person in his place, who shall have the powers and perform the duties of an administrator with the will annexed.
>
> . . .

[2] The background of the matter is set out in a decision of Pugsley, J.A. in **Crouse Estate v. Saunders**, dated May 31, 1999, [1999] N.S.J. No. 184, and it is not necessary to repeat it. An application for leave to appeal to the Supreme Court of Canada was dismissed with costs: [1999] S.C.C.A. No. 317. In that decision, this Court upheld an earlier decision by Carver, J. to require the Executor of the Estate of Dorothy Belle Crouse, Edmund Saunders, to either pay $130,000 to the Estate or post a bond in the amount of $250,000 with sureties, on or before March 25, 1999. The Court concurred with Justice Carver's conclusion that Mr. Saunders had converted substantial funds belonging to the Estate to his own use, which constituted a flagrant breach of fiduciary duties. In addition,

Mr. Saunders was directed to file with the Registrar of Probate sworn financial statements before June 7, 1999.

[3] On June 10, 1999 Justice Carver heard and granted a petition of Merilyn Hendry, one of the beneficiaries of the Estate, to remove Mr. Saunders as the Executor and appointing Loran DeMone as Administrator of the Estate with the will annexed. Mr. Saunders, as of that date, had not complied with the earlier order to either pay the missing funds to the Estate or post security.

[4] On June 17, 1999, Mr. Saunders filed a notice of appeal from the June 10, 1999 decision of Carver, J. setting out the following grounds of appeal:

> (1) THAT the learned Justice, Hiram J. Carver, erred in law and was clearly wrong in failing to correctly interpret and apply the Law with respect to the legal rights and responsibilities of a sole Executor named in the Last Will and Testament of the Executrix, containing no restrictions on the power and authority of such Executor to invest, control or otherwise administer the assets in the Estate.
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> (2) THAT the learned Justice, Hiram J. Carver, erred in law and was clearly wrong in failing to find that under the law of Probate an Executor duly appointed as sole Executor has the same power and authority over the assets in the estate as would the Testatrix, if living, and could not be found to be "wasting the estate" within the meaning of Section 31(1) of the Probate Act unless and until, in this particular case, the Executor had committed a criminal offence of theft, by a Criminal Court of competent jurisdiction.
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> (3) THAT the learned Justice, Hiram J. Carver, not having made any finding that the Executor had "wasted the estate" under the provisions of Section 31(1) of the Probate Act and no proceedings having been taken under the provisions of Section 70(4) of the Probate for the Executor to show cause why he was not proceeding to close the estate, he was without jurisdiction to Order removal of an Executor properly named by an Executrix in her Last Will and Testament.
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> (4) THAT the learned Justice, Hiram J. Carver, erred in law and was clearly wrong in failing to correctly interpret and apply the legal rights of a Testatrix to name any person she desires as Executor in her Last Will and Testament for the purposes of administering her estate on her death and in failing to find that such person so named, should not be removed except in case of not being able to satisfy the Court under the provisions of Section 70(4) of the Probate Act as to why he was not

> proceeding to close or that he was, or had wasted the estate, which in this particular case would require a conviction of a Criminal Offence by a Criminal Court.

[5] On June 30, 1999 counsel for Mr. DeMone and Ms. Hendry appeared before Justice Flinn in Chambers to have the application to quash the appeal set down. The order setting today as the hearing date also required any party, other than the applicants, wishing to be heard to file written submissions on or before October 22, 1999. The applicants submissions were filed on October 8, 1999. Although the order was served on Mr. Saunders, no written submissions were filed by him. Mr. Saunders did appear at the hearing of the application and submitted that the Court of Appeal should deal with the issues raised by his notice of appeal.

[6] The application is made pursuant to **Civil Procedure Rule** 62.18 which provides:

> **62.18** (1) Any party to an appeal may apply in accordance with rule 62.30 to the Court at any time before or at the hearing of the appeal for an order quashing the notice of appeal or dismissing the appeal on the ground that no appeal lies to the Court or that the appeal is frivolous, vexatious or without merit or that the appellant has unduly delayed preparation and perfection of the appeal.

[7] The applicants submit both that the appeal is frivolous, vexatious and without merit, and that there has been undue delay in perfection of the appeal.

[8] In **Perry v. Perry** [1987] N.S.J. No. 305 (C.A.), the test on applications pursuant to **Rule** 62.18 was determined to be similar to applications to strike pleadings pursuant to **Rule** 14.25 and as set out in **Currie v. Dargie** (1984), 62 N.S.R. (2d) 416 (C.A.). That is, where the appeal is “absolutely unsustainable”, the notice of appeal will be quashed.

[9] After a careful review of the history of this matter, the notice of appeal, and the

written and oral submissions, we have concluded that the applicants have met that test. We are of the unanimous opinion that there is no merit whatsoever in the appeal and it is on its face absolutely unsustainable. The grounds of appeal advanced substantially duplicate those in the previous appeal which were found, after a full hearing, to be without a "modicum of merit" and also "an abuse of the appeal process" (see para. 35, per Pugsley, J.A.). The appellant's argument appears to be that as Executor, he was entitled to use the Estate's funds for his own personal use, and that he cannot be removed as Executor unless he is first convicted of theft. The appellant has not complied with any of the previous orders made by Carver J. or of this Court in this matter and he should not be permitted to use the appeal process to further delay the administration of the Estate.

[10] The application is granted with costs against the appellant on a solicitor/client basis which we fix in the amount of $2,000.00 including disbursements.

Roscoe, J.A.

Concurred in:

Freeman, J.A.

Cromwell, J.A.