

**NOVA SCOTIA COURT OF APPEAL**

**Citation:** *Withenshaw v. Withenshaw*, 2022 NSCA 62

**Date:** 20221019

**Docket:** CA 517083

**Registry:** Halifax

**Between:**

Gail Withenshaw

Appellant

v.

Gary Paul Withenshaw and George David Withenshaw

Respondents

**Judge:** Wood, C.J.N.S.

**Motion Heard:** October 13, 2022, in Halifax, Nova Scotia in Chambers

**Written Decision:** October 19, 2022

**Held:** Motion dismissed

**Counsel:** Dianna M. Rievaj, for the appellant  
Richard W. Norman, for the respondents

## Decision:

[1] The parties are siblings and have been engaged in litigation concerning the estate and assets of their late mother. This appeal involves issues related to the conduct of the appellant during the time she acted as attorney under a power of attorney granted by her late mother. The decision under appeal was issued by Justice D. Timothy Gabriel of the Nova Scotia Supreme Court on June 9, 2022 (2022 NSSC 158).

[2] The decision of Justice Gabriel resulted in an order being issued on August 8, 2022 requiring the appellant to make the following payments within 30 calendar days:

1. The sum of \$337,287.18 to the Prothonotary of the Supreme Court of Nova Scotia to be held pending completion of the Probate Court proceedings concerning the estate of the late Doris Withenshaw.
2. The sum of \$30,742.10 to the respondents representing costs and disbursements.

[3] The appellant filed a Notice of Appeal from Justice Gabriel's decision on August 12, 2022. On September 6, 2022, she filed a Notice of Motion for Date and Directions which will be heard on November 9, 2022. Presumably, at that time a date for the appeal hearing will be set.

[4] The appellant did not pay the amounts required pursuant to the August 8, 2022 order nor did she make a motion for a stay pending appeal. On October 4, 2022, the respondents filed a Notice of Motion seeking an order requiring the appellant to post security for costs which was heard on October 13, 2022.

[5] A motion for security for costs is governed by *Civil Procedure Rule 90.42* which provides:

- (1) A judge of the Court of Appeal may, on motion of a party to an appeal, at any time order security for the costs of the appeal to be given as the judge considers just.
- (2) A judge of the Court of Appeal may, on motion of a party to an appeal, dismiss or allow the appeal if an appellant or a respondent fails to give security for costs when ordered.

[6] An order to require an appellant to post security for costs is discretionary. The test applied by the Court places the onus on an applicant to establish “special circumstances” in order for the discretion to be exercised in their favour. Beveridge, JA described the approach to be taken in *Sable Mary Seismic Inc. v. Geophysical Services Inc.*, 2011 NSCA 40:

[6] There are a variety of scenarios that may constitute “special circumstances”. There is no need to list them. All bear on the issue of the degree of risk that if the appellant is unsuccessful the respondent will be unable to collect his costs on the appeal. In *Williams Lake Conservation Co. v. Kimberley-Lloyd Development Ltd.*, 2005 NSCA 44, Fichaud J.A. emphasized, merely a risk, without more, that an appellant may be unable to afford a costs award is insufficient to constitute “special circumstances”. He wrote:

[11] Generally, a risk, without more, that the appellant may be unable to afford a costs award is insufficient to establish “special circumstances.” It is usually necessary that there be evidence that, in the past, “the appellant has acted in an insolvent manner toward the respondent” which gives the respondent an objective basis to be concerned about his recovery of prospective appeal costs. The example which most often has appeared and supported an order for security is a past and continuing failure by the appellant to pay a costs award or to satisfy a money judgment: *Frost v. Herman*, at ¶ 9-10; *MacDonnell v. Campbell*, 2001 NSCA 123, at ¶ 4-5; *Leddicote*, at ¶ 15-16; *White* at ¶ 4-7; *Monette v. Jordan* (1997), 163 N.S.R. (2d) 75, at ¶ 7; *Smith v. Heron*, at ¶ 15-17; *Jessome v. Walsh* at ¶ 16-19.

See also *Branch Tree Nursery & Landscaping Ltd. v. J & P Reid Developments Ltd.*, 2006 NSCA 131.

[7] However, the demonstration of special circumstances does not equate to an automatic order of security for costs. It is a necessary condition that must be satisfied, but the court maintains a discretion not to make such an order, if the order would prevent a good faith appellant who is truly without resources from being able to prosecute an arguable appeal. This has sometimes been expressed as a need to be cautious before granting such an order lest a party be effectively denied their right to appeal merely as a result of impecuniosity (*2301072 Nova Scotia Ltd. v. Lienaux*, 2007 NSCA 28, at para. 6; *Smith v. Michelin North America (Canada) Inc.*, 2008 NSCA 52).

[7] The parties filed affidavits which established the following:

- The appellant has not paid the amounts ordered by Justice Gabriel.

- The appellant is the registered owner of two lots in Wilmot, Annapolis County with a total area of 5.63 acres and an aggregate assessed value of \$122,200. Her home is on one of the lots.
- The respondents recorded a judgment for the cost component of Justice Gabriel's order against the appellant's properties on September 16, 2022. There are no other recorded encumbrances.
- The appellant is in receipt of pension income.

[8] The respondents argue the failure of the appellant to pay the money required by the order is sufficient evidence of her acting in an insolvent fashion to establish the necessary "special circumstances" to support granting an order for security for costs. They say this triggers an obligation on the part of the appellant to provide full financial disclosure. If she were able to establish impecuniosity it might justify refusing to order security provided I was satisfied the grounds of appeal were arguable.

[9] The appellant argues that mere non-compliance with the order is not sufficient to establish insolvent behaviour. The cost award has been secured by registration of the judgment against her property and there is no significant risk this amount would not be recovered should her appeal be unsuccessful. She says before the Court should order an appellant to pay the amount of a potential cost award in advance, the respondents must show that diligent attempts had been made at collection without success.

[10] In my view, the fact the underlying judgment has not been satisfied is not, by itself, sufficient to establish "special circumstances" justifying requiring security for costs. Without attempting to articulate all of the circumstances which might justify such an order, it is clear that something more is needed than what is found in this case. As an illustration, I would note the situation in *Sable Mary Seismic Inc.* which Justice Beveridge described this way:

[16] In total, GSI is now owed approximately \$2.7 million. There is no need to recite all of the various efforts by GSI to try to collect. Execution orders were issued in February 2010. The sheriff has been able to collect and remit to GSI only \$518.91. SMSI is no longer active in business. It holds no real property in Nova Scotia, but has substantial amounts said to be due to it from associated companies. Matthew Kimball no longer has any real property registered in his name in Nova Scotia. He did have an interest in a property, but on October 29,

2002 conveyed it to his wife. Attempts to examine Matthew Kimball in aid of execution have been unsuccessful as he resides in Thailand.

[11] Given the discretionary nature of the remedies sought, I think it is also relevant to consider the appellant's steps to advance the appeal in a timely fashion. She filed her Notice of Appeal three days after the order was issued and has set down a motion for date and directions for November 9<sup>th</sup>. According to her Certificate of Readiness, she anticipates being able to file the Appeal Book by November 11<sup>th</sup>.

[12] Attempts to delay and frustrate the appeal process that border on an abuse of process can constitute "special circumstances" and support an order requiring posting of security for costs. An example of this is *Marshall v. Robbins*, 2020 NSCA 7. As with *Sable Mary Seismic Inc.*, the situation presented by the evidence in this case is very different and much less compelling.

[13] I accept the evidence of the respondents that they believe there is a significant risk they will not recover their costs if successful. This subjective belief is based upon the lengthy and difficult dispute among the siblings concerning their mother's estate. As the authorities indicate, a motion seeking security for costs requires an objective assessment of the risk that a successful respondent may be unable to collect their costs.

[14] In this case, the limited evidence before me shows the appellant owns unencumbered land (which includes her residence) against which the costs judgment has been registered. She is also in receipt of some undetermined pension income. The record shows the appeal is being prosecuted expeditiously, and a hearing is likely within the next few months.

[15] On the evidence before me, the respondents have not established a sufficient objective risk they will not be able to recover appeal costs if they are successful on the appeal. There are no special circumstances.

[16] The respondents' motion for security for costs is dismissed. I fix costs of the motion at \$750 to be paid by the respondents to the appellant in any event of the cause.