IN THE COURT OF APPEAL OF MANITOBA

B E T W E E N :

VICTORIA CATHERINE PRESTON	)	
in her capacity as power of attorney for	)	
LOVEY WACHNIAK of the City of Winnipeg	)	
	)	
(Applicant) Respondent	)	
	)	
- and -	)	***T. Wachniak***
	)	*on his own behalf*
TERRY WACHNIAK	)	*(via teleconference)*
	)	
(Respondent) Appellant	)	
	)	***K. Brownell***
(by original action)	)	*for the Respondents*
	)	*(via teleconference)*
A N D B E T W E E N :	)	
	)	
VICTORIA CATHERINE PRESTON and	)	*Chambers motion heard:*
MICHAEL ELIAS LAPKA in their capacity	)	***August 6, 2020***
as executors of THE ESTATE OF LOVEY WACHNIAK	)	
	)	
	)	*Decision pronounced:*
(Applicants) Respondents	)	***August 12, 2020***
	)	
- and -	)	
	)	
TERRY WACHNIAK	)	
	)	
(Respondent) Appellant	)	
	)	
(by order dated June 30, 2020)	)	

COVID-19 NOTICE: As a result of the COVID-19 pandemic and pursuant to r 37.2 of the Manitoba*, Court of Appeal Rules*, Man Reg 555/88R, all motions are heard remotely by teleconferencing until further notice.

MARC M. MONNIN JA

[1] This is a motion brought by Terry Wachniak (the respondent) seeking an extension of time to file a factum in proceedings he commenced with respect to an order granted by McCarthy J (the application judge) on December 16, 2019 (the first order).

[2] The respondent and his sister, Victoria Preston (the applicant) are the children of Lovey Wachniak (the mother) who died on March 6, 2020. In October 2019, the applicant, in her capacity as a power of attorney for their late mother, applied for a writ of possession for a house owned by her mother where the respondent resided. At that time, her mother was a resident of a personal care home, where she had been placed by the applicant over the objections of her son, the respondent, who was of the view that his mother was capable of residing at home with him and wished to do so. The power of attorney under which the applicant acted was a springing power of attorney which took effect when their mother was no longer able to take care of her affairs.

[3] On the hearing of the application, the respondent took the position that there was no medical evidence justifying the use of the power of attorney and that the writ of possession should be denied as the best interests of their mother were for her to be allowed to return to her home under the care and supervision of her son. The applicant took the position that vacant possession of the house was required in order to sell it to obtain funds to pay for the care and ongoing needs of their mother in the personal care home.

[4] The application judge concluded that there was medical evidence sufficient to warrant the springing of the power of attorney and that the facts

justified the granting of a writ of possession. However, she stayed the effect of the writ of possession for 90 days to allow the respondent to obtain alternate accommodation.

[5] The respondent filed a notice of appeal on February 25, 2020, seeking to set the first order aside on the ground, amongst others, that the application judge erred in concluding that the power of attorney was in effect.

[6] On March 10, 2020, four days after the mother passed away, a writ of possession was issued by the Court of Queen's Bench for the home.

[7] On March 16, 2020, the respondent moved before Dewar J who held that the writ of possession should be set aside given that, upon the mother's death, the power of attorney ceased to have effect. He stayed the first order until further order of the Court.

[8] The mother died leaving a will by which her assets were divided equally between her children. She named the applicant and Michael Lapka, her brother, as alternate executors in the will. They applied for probate which was granted to them on April 21, 2020.

[9] On May 6, 2020, the executors applied under r 11 of the Manitoba, *Court of Queen's Bench Rules*, Man Reg 553/88, for the action commenced by the applicant under her power of attorney to be continued under the authority of the executors. That matter proceeded before McCarthy J on June 30, 2020, together with a motion by the respondent for a stay of the first order as it related to the writ of possession pending a decision of the Court of Appeal.

[10] By an order dated June 30, 2020 (the second order), McCarthy J granted the r 11 application and allowed the proceedings to continue with the executors as the applicants and lifted the stay imposed by Dewar J, allowing for the issuance of a new writ of possession. However, she granted a 30-day stay before the writ of possession could be issued.

[11] On July 22, 2020, the respondent applied for a stay of the second order before McKelvey J in the Court of Queen's Bench who dismissed the application on the basis that she had no jurisdiction. A writ of possession issued on July 31, 2020, but, as of the time of the hearing before me on August 6, 2020, it had not been acted upon.

[12] As to the Court of Appeal proceedings, a letter was sent to the respondent by the Registrar on June 11, 2020, advising him that, since the factum and appeal book had not been filed within the time limits set out in the Court's rules, the appeal would be deemed to be abandoned within 30 days unless he brought a motion to extend the time. He did so and it is what I have to decide.

[13] I understand that the respondent attempted to file a notice of appeal with respect to the second order but the document did not comply with the rules and was rejected. No attempt was made in this Court to stay the effect of the second order other than a request to me in the last few minutes of the hearing of the motion.

[14] I have given a fairly lengthy summary of the proceedings to date so that the reasons for my decision can be properly understood.

[15] A request to extend the time for the filing of a factum and appeal book is not an unusual request, but it must still meet certain criteria, which are set out in decisions of this Court, such as *Bohemier v Bohemier*, 2001 MBCA 161; and *Campbell v Campbell*, 2011 MBCA 23. They are that:

- there be a continuous intention to appeal from a time within the period when the appeal should have been commenced;

- there is a reasonable explanation for the delay; and

- there are arguable grounds of appeal.

[16] Although not articulated in these criteria, but nevertheless a consideration for this Court on requests such as these, is whether there is still a purpose for the appeal. In other words, is it still relevant or has it become moot? Moot means that the underlying matter which the order dealt with is no longer at issue between the parties.

[17] The respondent's position before me on his motion was that the appeal of the first order should continue because the writ of possession was issued on an improper basis, namely, under a power of attorney which should not have been used. Furthermore, he argues that his mother's rights under the *Canadian Charter of Rights and Freedoms* (which ones he did not articulate precisely) remained to be considered and would form the basis of the argument before this Court. When I raised with him considerations which now apply as a result of the transference of the proceedings to the estate, whose right to possession stems from the will and the executors' obligation to administer the estate properly, he was unable to articulate the legal basis upon which he claims to have the legal right to remain in the premises over the

executors. He questioned the appropriateness of the executors' decision to seek possession, but could not point to a legal basis as to why he should remain in possession.

[18] Applying the criteria to the facts before me, I do not dispute that the respondent would appear to have satisfied the first two. There was a clear intention to appeal within the time period. As to the reason for the delay, the respondent relies upon the effects of the COVID-19 pandemic. While the evidence of his inability to obtain legal advice in the interim is not very weighty, it is sufficient to meet the criteria.

[19] However, when it comes to the issue of a fairly arguable ground, I do not find that he has satisfied that requirement. His argument that there was no evidence upon which the application judge could have concluded that his mother was unable to care for herself and attend to her financial matters is not supported by the material before me. There was evidence, although not a specific report, that medical personnel were of the view that their mother was incapable of managing her affairs which was sufficient for the application judge to reach the conclusion that she did. The respondent provided no evidence to the contrary at the hearing and the application judge's conclusion that the power of attorney was validly in effect has little chance of being overturned.

[20] Therefore, the conclusion that a writ of possession was needed in order to sell the house and provide funds for their mother's care was reasonable in the circumstances and was an exercise of discretion which could only be overturned if the application judge proceeded on a misdirection or was so clearly wrong as to amount to an injustice (see *Perth Services Ltd v Quinton*

et al, 2009 MBCA 81). The respondent has raised no arguable grounds which would allow a panel of this Court to come to that conclusion.

[21] Just as important is the fact that the effect of the first order is, by all appearances, spent. It no longer has relevance to the outcome of these proceedings in that McCarthy J reviewed the matter of the issuance of the writ of possession afresh on June 30, 2020, when she exercised her discretion to issue a new writ of possession. While the terms of her order made reference to a lifting of the stay, the decision had to be based on the granting of the request under r 11 adding a new dimension to the reason for the writ. That dimension was of course the grant of probate and the appointment of executors who were entitled to seek possession. The respondent has provided no legal basis upon which he can argue that he should retain possession as opposed to the executors.

[22] It is important for me to recognise the direction we were given by the Supreme Court of Canada in *Hryniak v Mauldin*, 2014 SCC 7, that proportionality should play a role in rendering our decisions. Allowing this appeal of an essentially spent order to continue when another order has superseded it (and that order is not under appeal) would seem to be an exercise in futility and a waste of court resources and litigant's funds.

[23] For these reasons, I would dismiss the request to extend the time to file the appeal material and dismiss the motion.

[24] At the end of the hearing, the respondent asked to be granted a stay to consult counsel to deal with further arguments as to why he would have a legal right to remain on the premises notwithstanding the request of the executors for possession. There is no appeal of the second order, nor is there

any material to request a stay by reason of a pending appeal of that order. The material before me discloses that the second order was signed on July 16, 2020, and most of the appeal material could have been filed any time after that date. As well, it is not necessary to obtain a transcript of the proceedings, as alleged by the respondent in argument, only that a notice of request of a transcript be filed, along with the notice of appeal. I am not satisfied that the respondent has taken reasonable steps to attempt to file a notice of appeal with respect to the second order which would make granting a stay appropriate in the circumstances.

[25] A stay would only be granted under terms similar to those governing the granting of an injunction as set out in the *RJR - MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 test and includes a requirement that there be a serious question to be argued on appeal (see *Child and Family Services of Western Manitoba v KB*, 2006 MBCA 48). The respondent has not provided a legal basis as to why his claim to possession of the property is superior to that of the estate.

[26] For these reasons, I would also dismiss the request for a stay.

[27] Costs to the estate are set at $500, inclusive of disbursements, which may be set off against the respondent's share of the estate.

"Monnin JA"