**NOVA SCOTIA COURT OF APPEAL**
**Citation:** *MacCallum v. Langille Estate*, 2022 NSCA 15

**Date:** 20220215
**Docket:** CA 507586
**Registry:** Halifax

**Between:**

Claude Davison MacCallum

Appellant

v.

Ronald J. Creighton Lawyer for the Estate of Cora J. Langille and John Robert Langill the Executor of the Will

Respondents

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| **Judge:** | The Honourable Justice Carole A. Beaton |
| **Appeal Heard:** | February 1, 2022, in Halifax, Nova Scotia |
| **Legislation/Rules Considered:** | *Nova Scotia Civil Procedure Rule* 13.04 |
| **Cases Considered:** | *Farmer v. Livingstone* (1883), 8 S.C.R. 140; *Raymond v. Brauer*, 2015 NSCA 37; *Burton Canada Company v. Coady*, 2013 NSCA 95; *Tri-County Regional School Board v. 3021386 Nova Scotia Limited*, 2021 NSCA 4; *Shannex Inc. v. Dora Construction Ltd.*, 2016 NSCA 89; *Palmer v. The Queen*, [1980] 1 S.C.R. 759; *Daigle v. Mark's Work Wearhouse Ltd.*, 2022 NSCA 5 |
| **Subject:** | Application; Application for summary judgment; *Nova Scotia Civil Procedure Rules*; *Nova Scotia Civil Procedure Rule* 13.04; Motion; Motion to adduce fresh evidence; Standard of review; Summary judgment; Wills |

**Summary:** The language of a will bequeathed the residue of an estate to those of three people then living at the death of the testatrix. One of the three residual beneficiaries predeceased the Testatrix. The husband of that person made an application seeking the share that would have gone to his wife had she not predeceased the Testatrix. The Estate moved for summary judgment, which was granted. The husband appealed that decision and sought to adduce fresh evidence on appeal.

**Issues:** (1) Did the appellant meet the test to permit fresh evidence to be adduced?
(2) Did the judge err in granting summary judgment?

**Result:** (1) The appellant did not meet the test for the introduction of fresh evidence.
(2) The judge properly applied the test for summary judgment. The appellant's view of a moral obligation he believed his mother-in-law had to leave to him his late wife's share of the residual does not bind the Estate.

The motion to adduce fresh evidence and the appeal are both dismissed.

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and John Robert Langill the Executor of the Will

Respondents

| | |
|---|---|
| **Judges:** | Beveridge, Bourgeois and Beaton JJ.A. |
| **Appeal Heard:** | February 1, 2022, in Halifax, Nova Scotia |
| **Held:** | Fresh evidence motion dismissed and appeal dismissed with costs, per reasons for judgment of Beaton J.A.; Beveridge and Bourgeois JJ.A. concurring |
| **Counsel:** | Claude MacCallum, appellant in person<br>Sandra McCulloch, for the respondents |

**Reasons for judgment:**

[1] Even modern-day family disharmony can find instruction in much older statements about the distinction between what people might perceive as being "the right thing to do" versus what the law dictates : "…courts of law do not sit to redress moral wrongs, unless the moral is accompanied by a legal wrong, such as a court of law or equity can recognize" (*Farmer v. Livingstone* (1883), 8 S.C.R. 140 at para. 9).

[2] Mr. MacCallum maintains he is entitled to the share of his late mother-in-law's Estate that would have gone to his late wife, had she not predeceased her mother. He appeals the Probate Court decision granting summary judgment which effectively put an end to his claim. In his Notice of Appeal, Mr. MacCallum asserts as his grounds of appeal that "there were factors that caused doubt and not taken into consideration." In response to the appeal, the Estate supports the observation found in the decision that Mr. MacCallum's position is "… based in a novel theory of law around the operation of the wishes of a contingent beneficiary". Mr. MacCallum also seeks to introduce fresh evidence on appeal. For the reasons that follow, I would dismiss both Mr. MacCallum's motion to introduce fresh evidence and the appeal.

*Background*

[3] Mr. MacCallum's wife, the late Shirley MacCallum ("Shirley") was named as one of three residual beneficiaries under the Will of Cora Langille ("Cora") signed March 25, 2014. Clause 5(b) of that will instructed the Executor:

> To call in and convert into cash the remaining rest and residue of my Estate and to divide the net proceeds thereof equally among those then living of my daughter, SHIRLEY E. MACCALLUM, my grandson, DAVID MACCALLUM, and my niece, VALERIE SUIDGEEST.

[4] Shirley had been estranged from her mother for several years, but sent a note to her mother some two months before Cora prepared the Will. Knowing that due to her terminal illness she was unlikely to survive Cora, in her note Shirley made a request:

> Since you will probably outlive me, I am requesting as one of my last wishes that my share no matter how much be [left] to my Husband Claude.

> […]
>
> It is not secret now that I do not have a lot of time. Claude said he would fulfil[l] any of my wishes regardless whether he agreed or not with them. I am asking you to do the same. Dad I know would. So I will leave it up to you to make sure this one of my final wishes is fulfilled.

Shirley passed away on May 18, 2014, approximately two months after Cora executed the Will.

[5] Cora died in August 2020 and a Grant of Probate was issued to her Executor Mr. Langill in September 2020. Later that month, Mr. MacCallum filed in the Probate Court ("the court") a Notice of Application seeking to contest Cora's Will. In November 2020, the Estate filed a Notice of Objection to his application. In March 2021 the Estate filed a motion for summary judgment pursuant to *Nova Scotia Civil Procedure Rule* 13.04. In that motion the Estate also asserted Mr. MacCallum lacked standing to advance his application, as he did not fit the definition of an "interested person" set out in the *Probate Court Practice, Procedure and Forms Regulations*, N.S. Reg. 119/2001.

[6] The court considered the Estate's motion for summary judgment before adjudicating Mr. MacCallum's claim on its merits. The Honourable Justice Jeffrey Hunt of the Supreme Court of Nova Scotia ("the judge") heard the contested motion for summary judgment in June 2021. His decision, forming the basis of this appeal, is reported as *MacCallum v. Langille (Estate of)*, 2021 NSSC 229.

[7] The judge granted the Estate's motion for summary judgment and ordered Mr. MacCallum to pay $2,000 costs in favour of the Estate. The decision foreclosed any need for the judge to consider the question of Mr. MacCallum's standing to contest the Will. A motion for summary judgment is an interlocutory step in a proceeding. A successful motion—one that results in the matter being dismissed—generates an order that is treated as final (*Raymond v. Brauer*, 2015 NSCA 37 at para. 18). Therefore, the judge's decision on the summary judgment motion, given it was final in its effect, meant the litigation started by Mr. MacCallum was at an end (subject to his right of appeal).

*Fresh evidence motion*

[8] Mr. MacCallum sought the introduction of fresh evidence on appeal. That evidence consists of a series of documents relating to two new applications he has

very recently filed in the Probate Court at Truro, naming as respondents the same parties who are the respondents in this appeal.

[9] Putting aside the procedural difficulty presented by the very late filing of Mr. MacCallum's motion to admit fresh evidence, the motion cannot succeed on its merits. Guidance is provided by the often cited test for fresh evidence set out in *Palmer v. The Queen*, [1980] 1 S.C.R. 759, most recently discussed by this Court in *Daigle v. Mark's Work Wearhouse Ltd.*, 2022 NSCA 5:

> [27] *Civil Procedure Rule* 90.47(1) permits this Court to admit fresh evidence where there are "special grounds". As explained by Fichaud, J.A. in *Armoyan v. Armoyan*, 2013 NSCA 99:
>
> > [131] Rule 90.47(1) permits the Court of Appeal to admit fresh evidence on "special grounds". The test for "special grounds" stems from *Palmer v. The Queen*, [1980] 1 S.C.R. 759, at p. 775. Under *Palmer*, the admission is governed by: (1) whether there was due diligence in the effort to adduce the evidence at trial, (2) relevance of the fresh evidence, (3) credibility of the fresh evidence, and (4) whether the fresh evidence could reasonably have affected the result. Further, the fresh evidence must be in admissible form. *Nova Scotia (Community Services) v. T.G.* 2012 NSCA 43, paras 77-79, leave to appeal denied [2012] S.C.C.A. 237, and authorities there cited. *McIntyre v. Nova Scotia (Community Services),* 2012 NSCA 106, para 30.

[10] The materials Mr. MacCallum seeks to have admitted are of no relevance. They relate to new applications in another court and have no bearing on the outcome of this appeal. Indeed, Mr. MacCallum acknowledged during oral argument that his real intention in making the fresh evidence motion was simply to draw the Court's attention to the existence of these new matters.

[11] The motion for fresh evidence cannot meet the *Palmer*, *supra* criteria for relevance nor potential impact on the outcome of the appeal. For these reasons, I would dismiss the fresh evidence motion.

*The issue on appeal*

[12] Mr. MacCallum's written materials filed in support of the appeal do not precisely identify what he says constituted the error by the judge in granting summary judgment. The Estate takes the position the judge's decision is supported by the application of the evidence before him to the governing law. In addition, Mr. MacCallum has not identified any standard of review to be applied by this

Court. The standard of review is critical—it guides our task because an appeal is not simply a re-hearing of the matter, nor an opportunity to have a panel of judges take a "fresh" second look at the case, in the hope of securing a different result. This Court's function on an appeal of this nature is limited to assessing whether, based on the record of the case, there was any error and, if so, the appropriate remedy.

[13] The focus of Mr. MacCallum's position is the moralistic, not legal, question of what should be deemed "fair" under the circumstances. He maintains Cora had an obligation borne out of decency to abide by Shirley's letter, and therefore he should receive Shirley's share of Cora's residual Estate. Mr. MacCallum says the Court's focus should be, and the judge's should have been, on what is a "just" outcome regardless of "where the law lies".

[14] Mr. MacCallum appears to disagree with the judge's treatment of the evidence and seems to imply the judge erred either by ignoring certain evidence or suggested possibilities, or in accepting other evidence. I would characterize Mr. MacCallum's various arguments as a broad assertion the judge made findings and drew conclusions based on an improper assessment of or a failure to consider the evidence. Of significance, as it goes to the heart of this Court's function, is that Mr. MacCallum does not suggest the judge made any error in his identification or application of the test for summary judgment. As he did before the judge, in this Court Mr. MacCallum focuses on the issues raised by his own application rather than on responding to the question before the Court.

[15] The sole question before the Court is whether the judge erred in concluding it was appropriate to grant the Estate's motion for summary judgment. The standard of review in relation to that question was set out in *Burton Canada Company v. Coady*, 2013 NSCA 95 (at para. 19): "… We will not intervene unless wrong principles of law were applied, or insofar as the judge was exercising a discretion, a patent injustice would result." (See also *Tri-County Regional School Board v. 3021386 Nova Scotia Limited*, 2021 NSCA 4 at para. 16.)

*Analysis*

[16] The purpose of summary judgment was described in *Burton Canada Company*, *supra*, as:

> [22] … "Summary" is intended to mean quick and effective and less costly and time consuming than a trial. The purpose of summary judgment is to put an end to

> claims or defences that have no real prospect of success. Such cases are seen by an experienced judge as being doomed to fail. These matters are weeded out to free the system for other cases that deserve to be heard on their merits. That is the objective. Lawyers and judges should apply the Rules to ensure that such an outcome is achieved.

[17] The judge was required to weigh the evidence put before him to determine whether the Estate had met its burden to establish the granting of summary judgment was justified. The mechanics of assessing a summary judgment motion are set out in *Rule* 13.04:

> **13.04 Summary judgment on evidence in an action**
>
> **(1)** A judge who is satisfied on both of the following must grant summary judgment on a claim or a defence in an action:
>
> (a) there is no genuine issue of material fact, whether on its own or mixed with a question of law, for trial of the claim or defence;
>
> (b) the claim or defence does not require determination of a question of law, whether on its own or mixed with a question of fact, or the claim or defence requires determination only of a question of law and the judge exercises the discretion provided in this Rule 13.04 to determine the question.
>
> **(2)** When the absence of a genuine issue of material fact for trial and the absence of a question of law requiring determination are established, summary judgment must be granted without distinction between a claim and a defence and without further inquiry into chances of success.
>
> **(3)** The judge may grant judgment, dismiss the proceeding, allow a claim, dismiss a claim, or dismiss a defence.
>
> **(4)** On a motion for summary judgment on evidence, the pleadings serve only to indicate the issues, and the subjects of a genuine issue of material fact and a question of law depend on the evidence presented.
>
> **(5)** A party who wishes to contest the motion must provide evidence in favour of the party's claim or defence by affidavit filed by the contesting party, affidavit filed by another party, cross-examination, or other means permitted by a judge.
>
> **(6)** A judge who hears a motion for summary judgment on evidence has discretion to do either of the following:
>
> (a) determine a question of law, if there is no genuine issue of material fact for trial;
>
> (b) adjourn the hearing of the motion for any just purpose including to permit necessary disclosure, production, discovery, presentation of expert evidence, or collection of other evidence.

[18] At the hearing, the judge had before him the evidence and written arguments filed by the parties. Ronald Creighton, lawyer and Proctor of the Estate, who had prepared Cora's 2014 Will, was cross-examined by Mr. MacCallum. Each party provided oral argument following the close of evidence. As to the evidence of Mr. MacCallum the judge noted:

> [23] The MacCallum affidavits contain a focus on a letter written by Shirley MacCallum to her mother where she asks her mother to give Claude, if Shirley died, any share of the Estate which would have been destined for Shirley, had she survived her mother.
>
> [24] Mr. MacCallum's submissions are largely focused on this letter and his argument that justice and fairness demand that as a 30 year son in law he ought to be entitled to any share of the Estate which might have been directed to Shirley, had she lived.

[19] Concerning the evidence of Mr. Creighton the judge described:

> [26] His evidence sets out in some detail the discussions with Ms. Langille respecting the drawing of the Will and her wishes for the disposition of her Estate.
>
> [27] Included in his evidence are portions directly relevant to the question of Cora Langille's intentions with respect to her daughter, the import of her surviving her mother, and her intentions with respect to her son in law, Mr. MacCallum.
>
> […]
>
> [30] Her instructions were that she did intend to favour her daughter, but only if she outlived Ms. Langille. She provided specific instructions that she did not wish to gift any portion of her Estate to her son in law, Mr. MacCallum. She did make specific and generous provision for her grandson David, the child of Shirley and Claude.
>
> [31] Based on the evidence supplied by Mr. Creighton, there is nothing in the instructions or the language of the Will which evidence ambiguity, confusion or uncertainty.

[20] The judge explained he was considering first the motion for summary judgment because the outcome of his analysis could potentially render moot the question of Mr. MacCallum's standing to challenge the Will. The judge identified his intention to consider *Rule* 13.04 using the framework for analysis set out by this Court in a series of decisions:

> [34] The Nova Scotia Court of Appeal has provided much direction with respect to the operation of our summary judgement rule. In *Shannex Inc. v. Dora*

*Construction Ltd.*, 2016 NSCA 89, Justice Fichaud set out a series of sequential questions to be asked when considering Rule 13.04:

> [34] I interpret the amended Rule 13.04 to pose five sequential questions:
>
> • **First Question**: Does the challenged pleading disclose a "genuine issue of material fact", either pure or mixed with a question of law? [Rules 13.04(1), (2) and (4)]
>
> If Yes, it should not be determined by summary judgment. It should either be considered for conversion to an application under Rules 13.08(1)(b) and 6 as discussed below [paras. 37-42] or go to trial.
>
> The analysis of this question follows *Burton*'s first step.
>
> A "material fact" is one that would affect the result. A dispute about an incidental fact - i.e. one that would not affect the outcome - will not derail a summary judgment motion: *2420188 Nova Scotia Ltd. v. Hiltz*, 2011 NSCA 74, para. 27, adopted by Burton, para. 41, and see also para. 87 (#8).
>
> The moving party has the onus to show by evidence there is no genuine issue of material fact. But the judge's assessment is based on all the evidence from any source. If the pleadings dispute the material facts, and the evidence on the motion fails to negate the existence of a genuine issue of material fact, then the onus bites and the judge answers the first question Yes. [Rules 13.04(4) and (5)]
>
> *Burton*, paras. 85-86, said that, if the responding party reasonably requires time to marshal his evidence, the judge should adjourn the motion for summary judgment. Summary judgment isn't an ambush. Neither is the adjournment permission to procrastinate. The amended Rule 13.04(6)(b) allows the judge to balance these factors.
>
> • **Second Question**: If the answer to #1 is No, then: Does the challenged pleading require the determination of a question of law, either pure, or mixed with a question of fact?
>
> If the answers to #1 and #2 are both No, summary judgment "must" issue: Rules 13.04(1) and (2). This would be a nuisance claim with no genuine issue of any kind – whether material fact, law, or mixed fact and law.
>
> • **Third Question**: If the answers to #1 and #2 are No and Yes respectively, leaving only an issue of law, then the judge "may" grant or deny summary judgment: Rule 13.04(3). Governing that

> discretion is the principle in *Burton*'s second test: "Does the challenged pleading have a real chance of success?"
>
> Nothing in the amended Rule 13.04 changes *Burton*'s test. It is difficult to envisage any other principled standard for a summary judgment. To dismiss summarily, without a full merits analysis, a claim or defence that has a real chance of success at a later trial or application hearing, would be a patently unjust exercise of discretion.
>
> It is for the responding party to show a real chance of success. If the answer is No, then summary judgment issues to dismiss the ill-fated pleading.
>
> • **Fourth Question**: If the answer to #3 is Yes, leaving only an issue of law with a real chance of success, then, under Rule 13.04(6)(a): Should the judge exercise the "discretion" to finally determine the issue of law?
>
> If the judge does not exercise this discretion, then: (1) the judge dismisses the motion for summary judgment, and (2) the matter with a "real chance of success" goes onward either to a converted application under Rules 13.08(1)(b) and 6, as discussed below [paras. 37-42], or to trial. If the judge exercises the discretion, he or she determines the full merits of the legal issue once and for all. Then the judge's conclusion generates issue estoppel, subject to any appeal.
>
> This is not the case to catalogue the principles that will govern the judge's discretion under Rule 13.04(6)(a). Those principles will develop over time. Proportionality criteria, such as those discussed in *Hryniak v. Mauldin*, [2014] 1 S.C.R. 87, will play a role.
>
> A party who wishes the judge to exercise discretion under Rule 13.04(6)(a) should state that request, with notice to the other party. The judge who, on his or her own motion, intends to exercise the discretion under Rule 13.04(6)(a) should notify the parties that the point is under consideration. Then, after the hearing, the judge's decision should state whether and why the discretion was exercised. The reasons for this process are obvious: (1) fairness requires that both parties know the ground rules and whether the ruling will generate issue estoppel; (2) the judge's standard differs between summary mode ("real chance of success") and full-merits mode; (3) the judge's choice may affect the standard of review on appeal.

[35] In *Baypoint Holdings Ltd. v Royal Bank of Canada*, 2018 NSCA 17, the court synthesized the analysis required on a motion under Rule 13.04 and expressed it in this language:

> 1. Does the challenged pleading disclose a "genuine issue of material fact, either pure or mixed with a question of law"?
> 2. Does the challenged proceeding require the determination of a question of law, either pure, or mixed with a question of fact?
> 3. Does the challenged pleading have a real chance of success?
> 4. Did the judge exercise the "discretion" to fully determine the issue of law?
> 5. If the motion under Rule 13.04 is dismissed, should the action be converted to an application, and if not, what direction should govern the conduct of the action? (¶34-42)
>
> [36] Thus, in this case the Court must ask itself these questions in relation to the issues before the Court.
>
> [37] I have been assisted in the application of this test by the manner in which the Court of Appeal worked through the elements of the test in *HRM v. Annapolis Group Inc*, 2021 NSCA 3.

[21] Turning to the first question on the summary judgment motion—whether the pleadings disclose a genuine issue of material fact—the judge concluded the answer to that question was "no":

> [46] I have accepted for the purposes of this analysis that Mr. MacCallum will be able to prove the existence of this letter and that there was a genuine wish on the part of Shirley MacCallum that her mother would choose to favour Mr. MacCallum. The issue that remains however is whether this matters in law.
>
> [47] There was no evidence presented that was directed at challenging issues of execution of the document. Neither was there any actual evidence on issues of capacity or undue influence. There is no live dispute of material fact presented that would require determination. The claim appears to be based in a novel theory of law around the operation of the wishes of a contingent beneficiary.

[22] The judge moved next to the second question identified in *Shannex*, *supra*—whether the pleadings required determination of a question of law. The judge correctly recognized Mr. MacCallum's claim of "a moral unfairness or injustice" did not constitute the basis of a question of law. He explained Mr. MacCallum's action would have had to contest the Will and "the application of some very well-established principles of law and interpretation", namely: whether Cora had the capacity to make a will, whether the Will was properly executed and whether Cora was unduly influenced in making the Will.

[23] The judge concluded there was no evidence to support the burden resting with Mr. MacCallum to upset the legal presumptions operating in favour of a valid will. In addition, he recognized Mr. MacCallum could not seek relief under the *Testators' Family Maintenance Act*, R.S.N.S. 1989, c. 465 as he could not meet the definition of a "dependant" under that *Act*. Although the judge did not definitively state as "no" his answer to the second question of his analysis, the only inference to be drawn from the language of his decision and the analysis provided is that "no" was his indeed his answer.

[24] Responding "no" to the first two questions meant the judge could have ended his analysis there, because he had determined there was no issue to be tried. He was not required to move to the third question in the *Shannex, supra* framework. Nonetheless, the judge chose to consider whether Mr. MacCallum's pleadings had a real chance of success. He described that question as being "the true heart of the Estate's challenge to Mr. MacCallum's claim", which is undoubtedly why he examined it, despite having already established the basis for allowing summary judgment in answering "no" to the first two questions. That additional step assisted the parties in understanding why, even had the judge answered the second question of the test with a "yes" rather than a "no", he would have nonetheless exercised his discretion under the third branch of the test to grant summary judgment.

[25] To answer the third question, the judge canvassed legal principles concerning interpretation of a will in the context of the evidence before him. He considered the unambiguous wording of the residual clause in Cora's Will—"to divide the net proceeds thereof equally **among those then living** of my daughter, Shirley … my grandson … and my niece …" (emphasis added). He was satisfied the language of the Will clearly and unequivocally communicated Cora's intent that the residue of her Estate be shared by all those of the three named people **still** alive at her death. He concluded:

> [67] Accordingly, the intention is clear, the operation of the clause is unambiguous, and the law is easily applicable. **There is no realistic possibility Mr. McCallum could succeed in challenging the execution, interpretation or effect of Ms. Langille's Will.**
>
> […]
>
> [70] This is clearly the case here as well. Mr. McCallum's position in this matter is unsustainable. **The fact that his spouse hoped her mother would choose to favour Mr. McCallum after her death is of no legal consequence.** Mr. MacCallum has framed it as a moral issue. Reasonable people could I

> suppose take differing positions on that. But in any event, it is not a position that has any prospect of success at law. The law requires that clearly unmeritorious claims be dealt with at the summary judgment stage. (emphasis added)

[26] The judge was correct that Mr. MacCallum's claim could never succeed in law. He was satisfied the language of Cora's Will expressed a clear intention to limit the residual beneficiaries to those of the three people who outlived her. The desire penned by Shirley about what she would like to see happen to her share was, with respect, only that; she did not outlive her mother, which was a legal requirement to receiving her share.

[27] Mr. MacCallum referenced the wording of the residual clause and the phrase "those then living" contained in it as being the Estate's "only defence". Again with respect, that is precisely the point—the language of the Will is clear and unmistakeable, even if the legal outcome clashes with Mr. MacCallum's view of what he believes to be the "right" outcome under all of the circumstances.

[28] Whether Cora ignored or did not consider as morally binding Shirley's desire is obviously distasteful to Mr. MacCallum, as demonstrated in his submissions. However, it is not a legal question and cannot form the basis of a successful appeal. Shirley did not receive anything she could pass on to Mr. MacCallum because she died before Cora, and Cora had no duty, recognized in law, to Mr. MacCallum.

[29] As discussed earlier, the role of this Court is limited. The record does not reveal, and I am not persuaded, there were any errors by the judge in reaching his decision. There is no basis upon which this Court could or should now intervene.

*Disposition*

[30] There is no basis upon which to admit the proposed fresh evidence. There is nothing in the record that could support any conclusion the judge erred in his treatment of the evidence, his application of the law, or his decision to grant summary judgment. I would dismiss the fresh evidence motion and the appeal.

[31] The Estate is entitled to costs in the amount of $3,000, payable forthwith.

Beaton J.A.

Concurred in:

Beveridge J.A.

Bourgeois J.A.