NOVA SCOTIA COURT OF APPEAL
Citation: *MacCallum v. Langille Estate*, 2023 NSCA 45

Date: 20230621
Docket: CA 519635
Registry: Halifax

Between:

Claude Davison MacCallum

Appellant

v.

John Robert Langill, Executor of the Estate of the Late Cora J. Langille

Respondent

Judge:	Bourgeois, J.A.
Motion Heard:	June 15, 2023, in Halifax, Nova Scotia in Chambers
Held:	Motion to extend time to file Appeal Book dismissed. Appeal dismissed with costs.
Counsel:	Claude MacCallum, appellant in person John Langill, respondent in person Kelly Webb, on behalf of Sandra McCulloch, Proctor of the Estate

Decision:

[1] Claude MacCallum brought an appeal seeking to challenge four orders issued by Justice Jeffrey R. Hunt, sitting as a judge of the Court of Probate for Nova Scotia. At a motion for date and directions, Mr. MacCallum was directed to have the appeal book in this matter filed by May 30, 2023. He did not meet this requirement.

[2] The respondent, Mr. Langill, did not consent to the appeal book being filed out-of-time. As a result, Mr. MacCallum made a chambers motion seeking to extend the time for filing of the appeal book. I heard the motion on June 15, 2023 and reserved my decision.

[3] For the reasons to follow, I decline to grant Mr. MacCallum's motion and dismiss the appeal.

Background

[4] Mr. MacCallum, a resident of Weyburn, Saskatchewan, has been seeking the assistance of the courts of Nova Scotia to address concerns he has regarding the Estate of Cora J. Langille. Mr. MacCallum was the son-in-law of Mrs. Langille, who passed in 2020. Mr. John Langill, the deceased's brother, was named as Executor in her Will, and has been appointed Personal Representative of her Estate.

[5] Before addressing the decisions now under appeal, it will provide helpful context to set out the nature of an earlier appeal Mr. MacCallum unsuccessfully brought to this Court. The nature of that dispute was set out by Justice Beaton in *MacCallum v. Langille Estate*, 2022 NSCA 15 as follows:

> [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).

[6] This Court concluded Mr. MacCallum's appeal was without merit. Justice Beaton explained:

> [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.
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> [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.
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> [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.
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> [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.

[7] Upon dismissal of the appeal in February 2022, Mr. MacCallum was ordered by this Court to pay costs to the Estate in the amount of $3,000. He acknowledges those costs, nor the ones ordered by the court below on the summary judgment motion, have been paid.

[8] I turn now to the matters that form the basis for Mr. MacCallum's present appeal. On December 14, 2021, Mr. MacCallum filed an application in the Court of Probate seeking an order for "Investigate the sale of wood lot". On January 18, 2022, Mr. MacCallum filed another application seeking an order for "removal of the Executor".

[9] In response, the respondent made motions seeking an order requiring Mr. MacCallum to pay security for costs in relation to each application. The motions were heard together and were granted. Two orders were issued July 18,

2022, one in relation to each application, both of which directed Mr. MacCallum to pay security for costs to the Court in the amount of $5,000. Security was to be paid within 45 days from the issuance of the orders. The orders further directed that each application was stayed until such time as the security had been paid. Mr. MacCallum acknowledges he did not pay the security for costs in either application.

[10] The respondent made further motions requesting the two applications be dismissed due to the security not being paid as ordered. The motions were heard together on November 1, 2022, and granted.

[11] Mr. MacCallum filed a Notice of Appeal with this Court on December 7, 2022, in which he challenges the orders granting security for costs and the dismissal of his applications. On March 15, 2023, Justice Bryson held a motion for date and directions, and directed Mr. MacCallum to file the appeal book by May 30, 2023. In correspondence to the parties dated March 16, 2023, the filing dates relating to the appeal were set out, including the deadline for the appeal book. That letter stated in bold lettering "Failure to meet above-noted filing dates may result in this appeal being dismissed by the presiding judge".

Analysis

[12] In considering Mr. MacCallum's motion, I am guided by the *Civil Procedure Rules*.

[13] Unless Mr. MacCallum is granted permission to file his appeal book beyond the filing deadline, his appeal cannot be "perfected". This language arises in *Civil Procedure Rule* 40.43 which provides:

> **90.43 Appellant failing to perfect appeal**
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> **(1)** In this Rule 90.43 a "perfected appeal" means one in which the appellant has complied with the Rules as to each of the following:
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> (a) the form and service of the notice of appeal;
> (b) applying for a date and directions in conformity with Rule 90.25;
> (c) filing the certificate of readiness in conformity with Rule 90.26;
> (d) the ordering of copies of the transcript of evidence, in compliance with Rule 90.29;

> (e) **filing and delivery of the appeal book** and of the appellant's factum.
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> (Emphasis added)

[14] Rule 90.37 permits a judge in chambers to order a time limit be extended, and Mr. MacCallum asks that I do so in relation to the deadline for filing his appeal book.

[15] I also note Rule 90.40 which states:

> **90.40 Setting aside or dismissing an appeal summarily**
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> **(1)** A judge of the Court of Appeal may set aside a notice of appeal if it fails to disclose any ground for an appeal.

[16] In *Shupe v. Beaver Enviro Depot*, 2021 NSCA 46, the legal principles governing a motion for an extension of time to file a Notice of Appeal were set out by Farrar, J.A. In my view, many of the same considerations are relevant in determining whether other mandated time limits should be extended. Justice Farrar noted:

> [14] Rule 90.37(12) gives a judge of this Court the authority to extend the time to file a Notice of Appeal:
>
> > 90.37 (12) A judge of the Court of Appeal hearing a motion, in addition to any other powers, may order any of the following:
> >
> > …
> >
> > (h) that any time prescribed by this Rule 90 be extended or abridged before or after the expiration thereof.
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> [15] In *Farrell v. Casavant*, 2010 NSCA 71, Beveridge, J.A., explained the test for granting an extension of time to appeal as, ultimately, a determination of whether it is in the interest of justice to grant the extension (¶17). In determining whether it is in the interest of justice, common factors to be considered are:
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> - the length of the delay;
> - the reason for the delay;
> - the presence or absence of prejudice;
> - the apparent strength or merit in the proposed appeal; and
> - the good faith intention of the appellant who exercises his or her right of appeal within the prescribed time period.

> [16] The relative weight to be given to any of these factors may vary from case to case (*Farrell*, ¶17).

[17] The ultimate question I must determine is whether it is in the interest of justice to grant an extension of time to permit Mr. MacCallum to file his late appeal book. In doing so, I will consider a number of the above factors.

[18] I note the appeal book arrived by Canada Post two days past the filing deadline. The length of the delay is minimal, and I accept Mr. MacCallum intended to meet the filing deadline. Both of these factors would weigh in favour of granting the extension of time sought.

[19] However, there are other considerations which I find more troubling:

- Although Mr. MacCallum purports to be appealing the four orders relating to the security of costs and ultimate dismissal of his applications, his Notice of Appeal does not set out any grounds of appeal in relation to them. Rather, he asserts the *Probate Act* permits a removal of an executor, and that he had provided proof the sale of the wood lot had been mishandled. During the hearing, I gave Mr. MacCallum the opportunity to explain how the motions judge erred in granting the security for costs orders or the dismissal orders that followed. Other than asserting that he shouldn't have to pay to have judges do their jobs, Mr. MacCallum offered no further basis on which to establish the orders were tainted by error; and

- Mr. MacCallum has been previously ordered to pay costs to the Estate both in this Court and in the Probate Court. He acknowledges he has not made payment towards any of the outstanding costs awarded. He indicates that he is not in a financial position to do so.

[20] Having reviewed the materials before me, I am satisfied the Notice of Appeal does not raise a ground of appeal relevant to any of the four orders being challenged. On the basis of Rule 90.40, the Notice of Appeal should be set aside and the appeal dismissed.

[21] Even if I was to interpret the Notice of Appeal generously in a search to find a ground relating to the security for costs orders and the following dismissals, there is simply no merit to the appeal. The granting of an order for security for costs is a

discretionary order. Justice Hunt had ample evidence before him that security for costs was appropriate in the circumstances. Further, dismissing the applications in light of Mr. MacCallum's failure to provide security was entirely warranted. This weighs against granting the extension of time.

[22] Additionally, I am satisfied that allowing the extension of time, and thus permitting the appeal to proceed would expose the respondent to further unnecessary expense. It is highly likely the respondent will be the successful party at the conclusion of the appeal and be awarded costs accordingly. However, it is also highly likely Mr. MacCallum will not abide by any such order for costs. This also weights against granting the motion.

[23] In terms of prejudice, there is no prejudice to Mr. MacCallum in being prevented from advancing a meritless appeal. However, allowing the appeal to continue would serve to diminish Estate funds on responding to a meritless appeal. This is a clear prejudice to the Estate and residual beneficiaries.

[24] As a final consideration, this Court should guard against wasting its time and resources on facilitating the advancement of meritless appeals, notably where an appellant has not followed previous orders. Permitting a meritless appeal to advance in these circumstances would be contrary to the object of the *Civil Procedure Rules* – the just, speedy and inexpensive determination of every proceeding.

Disposition

[25] For the above reasons, I am satisfied it is not in the interest of justice to grant the requested extension of time. The appeal is dismissed. Mr. MacCallum is hereby ordered to pay costs in the amount of $500 to the Estate.

Bourgeois, J.A.