

**NOVA SCOTIA COURT OF APPEAL**  
**Citation:** *Berg v. Fox Estate*, 2024 NSCA 20

**Date:** 20240221  
**Docket:** CA 523972  
**Registry:** Halifax

**Between:**

Judith Berg and Sherry Lake

Appellants

v.

Bank of Nova Scotia Trust Company  
in its capacity as the Personal Representative of the  
Estate of Shirley Fox

Respondent

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**Judge:** The Honourable Justice Cindy A. Bourgeois

**Appeal Heard:** January 11, 2024, in Halifax, Nova Scotia

**Statutes Considered:** *Testators' Family Maintenance Act*, R.S.N.S. 1989, c. 465;  
*Probate Act*, S.N.S. 2000, c. 31.

**Cases Considered:** *Caterpillar Inc. v. Secunda Marine Services Ltd.*, 2010 NSCA 105; *R. v. Palmer*, [1980] 1 S.C.R. 759.

**Subject:** Adjournment of motions; Standing; Effect of prior release

**Summary:** Mrs. Shirley Fox died on October 21, 2020. Her Last Will and Testament, executed in November 2019, appointed The Bank of

Nova Scotia Trust Company (“Scotiitrust”) as her personal representative.

A grant of probate was issued by the Court of Probate on February 1, 2021, to Scotiitrust.

In December 2022, Mrs. Fox’s daughter, Judith Berg, and a family friend, Sherry Lake, brought an application contesting the probated Will and seeking removal of the personal representative. In response, Scotiitrust brought a motion to have the application dismissed on a number of grounds, notably that Ms. Berg had previously released all interest in the Estate, and Ms. Lake had no standing.

The motion was heard on April 14, 2023. A judge of the Court of Probate found Ms. Berg had released all claims against the Estate and was thus precluded from bringing the filed application. She further determined Ms. Lake lacked standing. As a result of these determinations, the motion was granted, the application dismissed, and an order issued April 17, 2023.

Ms. Berg and Ms. Lake filed a Notice of Appeal seeking to challenge the April 17, 2023, order. They further sought to introduce fresh evidence in support of their assertions of error.

**Issues:**

1. Did the motion judge err in declining to grant an adjournment as requested by Ms. Berg and Ms. Lake?
2. Did the motion judge err in concluding Ms. Berg had released her interest in the Estate and was therefore barred from advancing the application?
3. Did the motion judge err in concluding Ms. Lake had no standing to bring the application?

**Result:**

The motion to introduce fresh evidence is denied. The motion judge properly exercised her discretion in declining to grant an adjournment.

The motion judge did not err in concluding Ms. Berg was barred from advancing the application because of the existence of a prior release.

The motion judge did not err in concluding Ms. Lake lacked standing to bring the application.

The appeal is dismissed, and the appellants are ordered to pay Scotiabank costs, inclusive of disbursements, in the amount of \$3,000.00. These costs are payable forthwith, on a joint and several basis.

*This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 8 pages.*

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Respondent

**Judges:** Bourgeois, Scanlan and Van den Eynden JJ.A.

**Appeal Heard:** January 11, 2024, in Halifax, Nova Scotia

**Held:** Appeal dismissed with costs, per reasons for judgment of Bourgeois J.A.; Scanlan and Van den Eynden JJ.A. concurring

**Counsel:** Sherry Lake on her own behalf and on behalf of Judith Berg, appellants  
Tipper McEwan and Lauren Agnew, Articled Clerk, for the respondent

## **Reasons for judgment:**

[1] Mrs. Shirley Fox died on October 21, 2020. Her Last Will and Testament, executed in November 2019, appointed The Bank of Nova Scotia Trust Company (“Scotiastrust”) as her personal representative.

[2] A grant of probate was issued by the Court of Probate on February 1, 2021 to Scotiastrust.

[3] In December, 2022, Mrs. Fox’s daughter, Judith Berg, and a family friend, Sherry Lake, brought an application contesting the probated Will and seeking removal of the personal representative. In response, Scotiastrust brought a motion to have the application dismissed on a number of grounds, notably that Ms. Berg had previously released all interest in the Estate, and Ms. Lake had no standing.

[4] The motion was heard on April 14, 2023. Justice Gail L. Gatchalian, sitting as a judge of the Court of Probate, found Ms. Berg had released all claims against the Estate and was thus precluded from bringing the filed application. She further determined Ms. Lake lacked standing. As a result of these determinations, the motion was granted, the application dismissed, and an order issued April 17, 2023.

[5] Ms. Berg and Ms. Lake filed a Notice of Appeal seeking to challenge the April 17, 2023 order. They further sought to introduce fresh evidence in support of their assertions of error. In advance of the appeal hearing, Ms. Berg filed a written authorization with the Court indicating her consent for Ms. Lake to make submissions on her behalf. Ms. Berg attended the appeal hearing by telephone and confirmed her directions in that regard.

[6] After hearing from Ms. Lake on behalf of herself and Ms. Berg, the panel advised it was unanimously of the view the appeal ought to be dismissed, with reasons to follow. My reasons follow.

## **Background**

[7] It is evident from Ms. Lake’s written and oral submissions, she is operating under a fundamental misunderstanding regarding the role of this Court. Notwithstanding the Notice of Appeal being in relation to the above-noted April 17, 2023 order, Ms. Lake’s focus was almost entirely on matters which are irrelevant to the order she and Ms. Berg seek to challenge.

[8] This Court's task is to assess whether the order under appeal demonstrates legal error, and not to assess whether the appellants' unrelated multitude of complaints regarding the personal representative, bank personnel, court staff and counsel have merit.

[9] To place my analysis in context, some factual background will be of assistance. I note:

- In her probated Will, Ms. Fox bequeathed \$10,000 to Ms. Berg. She further made specific monetary bequests to five charities, and similarly left the residue of her Estate to charity. Ms. Lake was not named in the probated Will. The probated Will contained a clause specifically revoking all earlier Wills and testamentary dispositions;
- On October 26, 2021, Ms. Berg, represented by legal counsel, filed a Notice of Action and Statement of Claim in the Supreme Court of Nova Scotia, in which she sought to advance a claim under the *Testators' Family Maintenance Act*, R.S.N.S. 1989, c. 465 ("TFMA") against Scotiatrust as personal representative of the Estate of Shirley Fox;
- Settlement discussions ensued between Ms. Berg's lawyer and Scotiatrust's legal counsel. An agreement was purportedly reached, following which, Ms. Berg refused to sign documentation setting out the settlement;
- Scotiatrust brought a motion in the Supreme Court of Nova Scotia for enforcement of the settlement and dismissal of the action. The motion was heard on December 14, 2022. By order issued December 15, 2022, the motion judge found Ms. Berg had settled the action, she had released all further interest and claims against the personal representative and her mother's Estate. That order was not appealed;
- Shortly following Mrs. Fox's death, the personal representative and Ms. Lake discussed what arrangements would be made for the deceased's dog. The personal representative advised Ms. Lake she could have the dog. Subsequently, Ms. Lake filed a creditor's claim

in the Court of Probate, seeking financial compensation from the Estate for the support of the dog;

- Scotiatrust brought a motion in the Court of Probate seeking to have Ms. Lake's creditor claim dismissed. The motion was heard on December 14, 2022, and dismissed by order issued the following day. That order was not appealed;
- On December 7, 2022, Ms. Berg and Ms. Lake filed an application contesting the probated Will and seeking removal of the personal representative. As noted earlier, Scotiatrust then made a motion seeking dismissal of the application;
- A motion for date and directions was held on March 1, 2023. At that time, the hearing of Scotiatrust's motion was scheduled for April 14, 2023; and
- Ms. Lake retained counsel three days before the hearing. Ms. Berg retained the same counsel the morning of the hearing. Counsel sought an adjournment of the motion hearing, which was opposed by Scotiatrust. The motion judge declined to grant the adjournment, and the hearing proceeded as scheduled.

## Issues

[10] In their Notice of Appeal filed May 24, 2023, Ms. Berg and Ms. Lake set out 22 grounds of appeal, the majority of which are statements of purported facts irrelevant to the determinations made by the motion judge on April 14, 2023, and subsequently incorporated in the April 17<sup>th</sup> order. Similarly, their factum identifies 16 issues for determination, most of which asks this Court to address matters not properly before it.

[11] In my view, the questions this Court should address arising from the April 17, 2023 order are as follows:

1. Did the motion judge err in declining to grant an adjournment as requested by Ms. Berg and Ms. Lake?

2. Did the motion judge err in concluding Ms. Berg had released her interest in the Estate and was therefore barred from advancing the application?
3. Did the motion judge err in concluding Ms. Lake had no standing to bring the application?

### **Fresh Evidence Motion**

[12] The appellants brought a motion for the introduction of fresh evidence. They filed two affidavits, with exhibits, which were jointly sworn. The purported evidence included documentation regarding the professional backgrounds of the lawyers involved (Mr. McEwan and the Estate Proctor – Mr. Comeau), documentation pertaining to the *TFMA* action, a number of previous Wills of Mrs. Fox, copies of court dockets and an assortment of other materials.

[13] The test for the admission of fresh evidence on appeal is well-known. An appellant seeking to have this Court consider evidence that was not before the judge of first instance must meet the requirements of the *Palmer* test<sup>1</sup>. It is as follows:

1. The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in criminal cases as in civil cases;
2. The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial;
3. The evidence must be credible in the sense that it is reasonably capable of belief; and

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<sup>1</sup> *Palmer v. The Queen*, [1980] 1 S.C.R. 759.



4. It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

[14] In addition to the above, the evidence adduced must be in admissible form.

[15] I would decline to admit any of the evidence proposed by the appellants. I will not go through the materials in detail. None of it is relevant to the issues the motion judge was required to decide, nor would any of it have impacted on her conclusion Ms. Berg was barred from bringing the application and Ms. Lake lacked standing to do so. The only document of potential relevance was an earlier Will which had been revoked by virtue of Mrs. Fox's probated Will. That previous Will also did not name Ms. Lake as a beneficiary.

### **Analysis**

*Did the motion judge err in declining to grant an adjournment as requested by Ms. Berg and Ms. Lake?*

[16] As noted above, the date for hearing the motion was assigned on March 1, 2023. The record shows that the day before the hearing, April 13<sup>th</sup>, counsel emailed the court and advised he had been retained by Ms. Lake two days earlier, and he would be seeking an adjournment.

[17] At the outset of the hearing, counsel advised he had also been retained by Ms. Berg that morning, and repeated his request for an adjournment. Scotiatrust opposed the adjournment.

[18] The motion judge requested the parties speak to several factors that she determined were relevant to whether she would grant the adjournment or not: 1) the prejudice to Ms. Berg and Ms. Lake if the adjournment was denied; 2) the complexity of the motion should it proceed; 3) the prejudice to the Estate and beneficiaries should the adjournment be granted; 4) whether prejudice to the Estate and beneficiaries caused by an adjournment could be compensated by the imposition of costs or other terms; and 5) whether there was evidence Ms. Berg

and Ms. Lake had made honest and diligent efforts to retain and instruct counsel or whether they did so for the purpose of delay.

[19] After hearing from the parties, the motion judge considered all of the above factors and determined it was not in the interests of justice to grant the adjournment.

[20] The decision to grant or deny an adjournment is a discretionary decision. As such, this Court will not interfere unless a clear error is shown. In *Caterpillar Inc. v. Secunda Marine Services Ltd.*, 2010 NSCA 105, the Court said:

[5] This court applies a deferential standard to a trial judge's decision whether to grant or deny an adjournment. In *Abbott v. Sharpe*, 2007 NSCA 6, ¶ 74, Justice Saunders for the court said:

A trial judge's right to supervise and control the trial includes a wide discretion to grant or refuse adjournments. The exercise of that discretion is owed considerable deference on appeal unless it can be shown that the judge erred in principle or that the judge did not exercise his or her discretion judicially. *Webber v. Canada Permanent Trust Co.* (1976), 18 N.S.R. (2d) 631 (N.S.C.A.), and *Moore v. Economical Mutual Insurance Co.* [1999] N.S.J. No. 250 (N.S.C.A.).

In *Moore*, cited in the passage from *Abbott*, Justice Cromwell said:

33 The decision to grant or refuse an adjournment is within the discretion of the presiding judge. It is a discretion which the judge is particularly well placed to exercise. An appellate court should not substitute its judgment for that of the presiding judge but should limit its review to determining whether the judge applied a wrong principle or the decision gave rise to an injustice.

[21] The appellants have not demonstrated the motion judge applied an incorrect principle of law. Nor am I satisfied the denial of an adjournment in the circumstances of this case gave rise to an injustice. I would dismiss this ground of appeal.

*Did the motion judge err in concluding Ms. Berg had released her interest in the Estate and was therefore barred from advancing the application?*

[22] By virtue of the December 14, 2022 order, Ms. Berg was found to have reached a settlement in relation to the *TFMA* claim and her entitlement as a beneficiary of her mother's Estate. She was deemed to have entered into two releases which had been negotiated by counsel. Those releases were attached to the order issued on December 15, 2022.

[23] That order was not appealed, and accordingly, the motion judge was fully entitled to treat it as binding, because it was. In her reasons, the motion judge set out a number of the provisions contained in the release, including the following:

1. I am Judith Berg of Boyle, Province of Alberta.
2. I have received a satisfactory accounting of and full payment in satisfaction of all sums of money and benefits accrued to me from the personal representative of this Estate.
3. I release the Bank of Nova Scotia Trust Company, the personal representative of this Estate and their heirs, successors, personal representatives and assigns from all claims and demands by me against the property of the Estate and against the personal representative for the administration and management and distribution of the Estate.

[24] The effect of that earlier order, and the releases, meant Ms. Berg was legally precluded from bringing any further proceeding against the Estate or Scotiatrust as the personal representative. This served as an absolute bar to the application, and the motion judge did not err in so concluding.

[25] I would dismiss this ground of appeal.

*Did the motion judge err in concluding Ms. Lake had no standing to bring the application?*

[26] Ms. Lake was not named as a beneficiary in Mrs. Fox's Will. She was not a person who would inherit on an intestacy. She was not a dependant of Mrs. Fox. By virtue of the decision rendered on December 14, 2022, she was found not to be a creditor of the Estate.

[27] Ms. Lake had argued she was a beneficiary under the Will, and therefore had standing, because an email between representatives of Scotia Wealth and Scotiatrust had referenced "the dog is to be bequeathed to Sherry or Ms. Lake".

The motion judge rejected that argument, and rightly so. The Will did not contain any such provision, and an email between third parties cannot serve to inject a gift into it that the testator did not specify.

[28] Ultimately, Ms. Lake did not fall into any of the categories of a “person interested in an Estate” under the regulations of the *Probate Act*, S.N.S. 2000, c. 31. The appellants have failed to convince me the motion judge’s reasons demonstrate an error.

[29] I would dismiss this ground of appeal.

### **Disposition**

[30] This appeal was entirely without merit. It was based, at least in part, on the appellants’ misunderstandings of the law.

[31] Scotiatrust has, in responding to the appeal, expended funds which Mrs. Fox intended to benefit the charities identified in her Will.

[32] The appeal is dismissed, and the appellants are ordered to pay Scotiatrust costs, inclusive of disbursements, in the amount of \$3,000.00. These costs are payable forthwith, on a joint and several basis.

Bourgeois J.A.

Concurred in:

Scanlan J.A.

Van den Eynden J.A.