**NOVA SCOTIA COURT OF APPEAL**
**Citation:** Miller v. Staples Estate, 2006 NSCA 140

**Date:** 20061228
**Docket:** CA 267854
**Registry:** Halifax

**Between:**

Rhoda Jean Miller

Appellant

v.

Estate of Daniel Staples, Sherri Dale Hanes, and Marilyn Doris Allen

Respondents

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**Judge:** The Honourable Justice Roscoe

**Appeal Heard:** November 17, 2006

**Subject:** **Civil Procedure Rule** 22, medical examination, DNA testing, **Intestate Succession Act**

**Summary:** An elderly unmarried man died without a will. The woman he had been married to many years before had two daughters. The older daughter was born while he and his wife lived together. The younger one was born after their separation. Both claimed to be entitled to share in his estate. The older daughter claimed that the younger one was not his biological daughter and sought to have her and their mother compelled to provide a sample for DNA testing pursuant to **Rule** 22. The chambers judge dismissed the application.

**Issues:** Did the chambers judge err in interpretation of **Rule** 22? Was there an error in principle or patent injustice?

**Result:** Appeal allowed on the basis of an error in legal principle and patent injustice. The order of the chambers judge denied the plaintiff the opportunity to have a just, speedy and inexpensive determination of the proceeding, was based on a misapplication of **Rule** 22, an error in principle and a misapprehension of the evidence. Before using **Rule**

22 to order DNA testing in a contested estate, the court should be satisfied that there is a clear factual foundation or some plausible evidence supporting the proposition that the person is, or is not, as the case may be, a lawful lineal descendant. In this case there was sufficient foundation to order the test.