SUPREME COURT OF NOVA SCOTIA
(In the Probate Court of Nova Scotia)
Citation: *Re Yelubandi Estate*, 2025 NSSC 312

Date: 20250926
Probate Court Docket: *Hfx*, No. 68621
Registry: Halifax

In the Estate of Murali Ramam Yelubandi, Deceased

Between:

Venkata Kumar Yelubandi

Appellant

Radhika Yelubandi Carlyon, Estate of Murali Ramam Yelubandi

Respondent

Decision

Judge:	The Honourable Justice Darlene Jamieson
Heard:	August 25, 2025, in Halifax, Nova Scotia
Counsel:	Mr. Peter Rumscheidt, for the Appellant Ms. Tanya Butler, for the Respondent

By the Court:

Overview

[1] This appeal concerns a decision of the Registrar of Probate, District of Halifax (the "Registrar"), to deny a consent motion for conversion of an application for proof in solemn form to an action. It is a somewhat unusual appeal in that both parties support the appeal and also seek guidance with respect to the proper process for Form 45 applications heard by a Supreme Court judge sitting in Probate Court.

[2] The Appellant, Venkata Kumar Yelubandi ("Mr. Yelubandi"), is the Applicant in the application for proof in solemn form that was filed with the Probate Court (Probate District of Halifax) on February 27, 2023. The Respondent in this appeal, Radhika Yelubandi Carlyon ("Ms. Carlyon"), is also the Respondent in the application for proof in solemn form. The Appellant has appealed a decision of the Registrar of Probate dated December 18, 2024, whereby the Registrar advised that "As there is no mechanism under the Probate Regulations for an Action, it is not possible to convert the matter as requested."

[3] On May 23, 2024, the parties sought to convert the proof in solemn form application to an action pursuant to Civil Procedure Rule 6, by way of a written motion before a judge of the Supreme Court presiding in general chambers. They included a letter of explanation and a consent order. They advised that the matter would require in excess of six days of hearing, and that *viva voce* evidence would be preferable, as the court would need to make credibility findings at the hearing of the matter. Multiple days of discovery examination had been scheduled.

[4] After discussion with the Registrar's office and the Prothonotary, motion documents were filed on December 5, 2024, seeking to have a motion heard at a special time chambers date of March 11, 2025. Ultimately, there was no motion in either general or special time chambers, as the above noted decision of the Registrar was relayed to the parties on December 18, 2024.

[5] After receipt of the Registrar's decision, counsel for the Respondent, Ms. Butler, immediately emailed the Registrar to clarify that the motion the Applicant had sought to file was an interlocutory step in an existing application in Probate Court and asked that the conversion motion be heard by a judge of the Probate Court. Mr. Rumscheidt, counsel for the Applicant, followed up with the Registrar on

January 16, 2025, asking if there had been a reconsideration. Later that same day the Registrar referred counsel to her earlier ruling of December 18, 2024.

[6] The Respondent supports the Appeal and the parties filed joint written submissions.

Background

[7] The uncontentious background facts provided jointly by the parties include the following. They are helpful for context.

[8] The testator, Murali Ramam Yelubandi ("Ms. Yelubandi") died on April 22, 2022. She was survived by her three children, including the two parties.

[9] Ms. Carlyon was named as executor under a Will signed by Ms. Yelubandi on February 14, 2017. Ms. Carlyon was issued a Grant of Probate for the 2017 Will from the Probate Court for Nova Scotia on August 29, 2022. The 2017 Will was prepared by Ms. Yelubandi's lawyer, Mr. Blair MacKinnon.

[10] After applying for probate, Ms. Carlyon learned that her brother, Mr. Yelubandi, had prepared a later Will for the Testator, which was executed with lawyer, Mr. Owen Bland, in the Testator's home on May 13, 2021.

[11] On February 27, 2023, Mr. Yelubandi filed a notice of application under the *Probate Act*, SNS 2000, c 31 (the "*Act*"), in the form (Form 45) prescribed by the *Regulations* (the *Probate Court Practice, Procedure and Forms Regulations*, NS Reg 119/2001), with the required affidavit (Form 46) for proof in solemn form of the 2017 Will. Mr. Yelubandi takes the position that the 2017 Will is invalid on the basis that it was the result of undue influence exercised over the Testator. He argues that the 2021 Will is valid and should be admitted to proof in solemn form.

[12] On April 20, 2023, Ms. Carlyon filed a notice of objection to application in the form prescribed by the *Regulations*.

[13] Ms. Carlyon denies that the Testator was unduly influenced to sign the 2017 Will and further denies the validity of the 2021 Will on the grounds that the Testator did not have knowledge and approval of its contents, did not have the requisite testamentary capacity, and was unduly influenced to sign it.

[14] Administration of the estate has been paused while the application for proof in solemn form is addressed by the court.

The Parties' Joint Position

[15] The parties say that while there is no mechanism in the *Regulations* for an action, Rule 6.02(1) does not say that only applications in Supreme Court can be converted to actions. They submit that when Rule 6.02(1) refers to the conversion of an application, the word "application" should be interpreted to include a Form 45 application initiated in Probate Court. They say this court, sitting as the Probate Court, has the authority to convert the application.

[16] In the alternative, they submit that an application in court is not the type of proceeding provided for under the *Act* or its *Regulations*. They point out that there was no such thing as an application in court in 2000 when the *Act* was passed by the Legislature. The use of the word "application" in the *Act* and *Regulations* pre-dates the 2009 *Civil Procedure Rules* by nine years. Rather, the legislation provides for applications for proof in solemn form, which are not limited as to length of hearing by the *Act* or *Regulations*. Direct *viva voce* evidence has historically been led in applications for proof in solemn form, where appropriate.

[17] The parties say this matter is not appropriate to proceed as an application in court for a number of reasons. Ten days will be required for hearing this proof in solemn form matter. At present, 14 witnesses are anticipated to provide evidence at the hearing. The court will have to assess credibility. Expert opinion evidence will be tendered and an interpreter may be required for some witnesses whose first language is not English. Discovery examination took place of party and non-party witnesses over a period of six days. The parties say this application for proof in solemn form should not be subjected to the procedural limitations of an application in court.

Issues

[18] The issues for determination in this appeal are as follows:

I. Can the Form 45 Application be converted to an action under Civil Procedure Rule 6.02(1)?

II. In the alternative, should the Form 45 Application be permitted to proceed as an application in Probate Court without imposing the restrictions for an application in court under Civil Procedure Rule 5?

The Law and Analysis

[19] This appeal is brought pursuant to s. 93 of the *Probate Act*, which states:

> Powers of court on appeal
>
> 93 (1) Any party aggrieved by an order or decision of the registrar, other than a grant, may in the prescribed manner, appeal from the order or decision of the registrar to the judge.
>
> (2) On an appeal taken pursuant to subsection (1),
>
> (a) the judge may hear such appeal and, where the judge thinks fit, any of the parties thereto may adduce the same evidence as that given before the registrar and, so that the judge may hear the same evidence and any further or other evidence, any further or other evidence and the judge may confirm, vary or set aside the order or decision appealed from, and may make any decree, order or decision which the registrar should have made;
>
> (b) the judge may rescind, set aside, vary or affirm the order or decision appealed from or make any decision or order the registrar could have made;
>
> (c) costs of the appeal are in the discretion of the court.

[20] An appeal under s. 93 of the *Act* is a hearing *de novo*. The issue is decided afresh. (See *Hopgood v. Hopgood (Estate)*, 2018 NSSC 100, at paras. 53-54, and *Cooper v. Moncel Estate*, 2012 NSSC 195, at para. 6.)

The Probate Court in Nova Scotia

[21] The Court of Probate in Nova Scotia was established prior to the *Constitution Act*, 1867 (UK), 30 & 31 Vict, c. 3, reprinted in RSC 1985, Appendix II, No 5. In 1842, Nova Scotia legislation (*An Act relating to the Courts of Probate, and to the Settlement and Distribution of the Estates of Deceased Persons*, S.N.S. 1842, c. 22) established probate courts in every county of the province. Section 96 of the *Constitution Act*, 1867, *supra*, recognizes that these courts were already in existence, and states:

> Appointment of Judges
>
> 96 The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.
>
> [Emphasis added]

[22] The current *Probate Act*, at s. 4(2), appoints each judge of the Supreme Court as a judge of every Court of Probate. Section 3 states that each probate district has a Court of Probate, being the justice centre area established by the *Judicature Act*. The special status in Nova Scotia of the Courts of Probate was discussed by our Court of Appeal in *Saulnier v. Klyn Estate*, [1988] NSJ No 164, 86 NSR (2d) 29:

> [2] The Court of Probate is a special court under the Probate Act. Section 96 of the *British North America Act*, 1867, gave the federal government power to appoint "the Judges of the Superior, District and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick." The Court of Probate in each district of Nova Scotia consists of the judge of Probate and the registrar; both have extensive judicial powers and both are appointed by the province by or under the *Probate Act*. The court is thus separate from the County Court though its judge in each district is, by [then] s. 1(b) of the *Probate Act*, the County Court judge of that district.
>
> [Emphasis added]

Overview of the Act and Regulations

[23] As the Court of Appeal stated, the power of the Probate Court is broad. Section 8 of the *Act* states:

> Power of courts
>
> 8 (1) Each court may
>
> (a) issue grants;
>
> (b) revoke or cancel grants;
>
> (c) effect and carry out the judicial administration of the estates of deceased persons through their personal representatives, and hear and determine all questions, matters and things in relation thereto necessary for such administration;
>
> (d) order any person who has been named as an executor of a will to appear and probate or renounce executorship of the will;
>
> (e) order any person who witnessed a will to prove the will;
>
> (f) order a person to comply with this Act;
>
> (g) appoint guardians and take the accounts of guardians under the *Guardianship Act*.

> (2) Nothing in this Act deprives the Supreme Court of jurisdiction in the matters referred to in subsection (1).
>
> [Emphasis added]

[24] The application before this court is for proof in solemn form. Counsel agree that the issues concern testamentary capacity and undue influence. This court has jurisdiction over the hearing of proof of a will in solemn form. Section 97 of the *Act* states:

> Jurisdiction to hear and determine
>
> 97 (1) The following matters shall be heard and disposed of by a judge of the Supreme Court:
>
> (a) an application for the approval, pursuant to Section 50, of a sale;
>
> (b) an application for the approval, pursuant to Section 52, of the lease or mortgaging of real property;
>
> (c) an application for an order, pursuant to Section 53, requiring that real property be conveyed or vesting real property;
>
> (d) an application for an order pursuant to Section 55.
>
> (2) The following matters shall be heard and disposed of by the judge of the court, or, where all interested persons and the registrar agree in writing, by the registrar:
>
> (a) the hearing of proof of a will in solemn form;
>
> (b) an application to have a personal representative removed.
>
> (3) All other applications and other matters before the court shall be heard and disposed of by the registrar and, subject to subsection (1), the registrar may make any order that the judge may make. 2000, c. 31, s. 97.
>
> [Emphasis added]

[25] Section 31 authorizes an "application" for proof in solemn form:

> Proof in solemn form
>
> 31 (1) A court may hear a will proved in solemn form and determine the validity of the will where an application asking the court to do so is made by a person interested in the estate of the testator either before

> or after a grant is made with respect to the will but not after the expiration of six months from the grant.
>
> (2) Notwithstanding subsection (1), the court may, upon application, where it considers it just, hear a will proved in solemn form at any time after the expiration of six months from the grant and before an order is issued pursuant to Section 72 as to any portion of the estate remaining undistributed at the date of the application.
>
> [Emphasis added]

[26] Section 98 grants a "person interested in the estate" procedural rights in an application:

> Right to appear
>
> 98 At the hearing of any application pursuant to this Act any person interested in the estate may appear at the hearing either personally or by counsel and may adduce evidence, cross-examine any witness called by any other party, reexamine any witness and make submissions and arguments.
>
> [Emphasis added]

[27] The *Act* further provides at s. 106(1)(a) that the Governor in Council may make rules of court for the purpose of carrying the *Act* into effect and specifically includes the following:

> (i) regulating the sittings of courts,
>
> (ii) regulating the practice and procedure in courts, including the manner in which applications are made and evidence is taken and facts and documents are proved,
>
> …
>
> [Emphasis added]

[28] The *Regulations* address procedures on applications for proof in solemn form at s. 71. The application is commenced by filing a notice of application (Form 45) and an affidavit (Form 46) "setting out the reasons for questioning the validity of the will and describing the names, ages and places of residence of the beneficiaries and persons entitled to share in the distribution of the estate by reason of the *Intestate Succession Act*" (s. 71(1)). Service must be provided to "[a]ll persons known to have an interest in upholding or disputing the validity of the will", and those people have the right to be joined as parties (s. 71(3)), and the applicant must advertise the notice of application in the Royal Gazette (s. 71(4)). If a grant of probate has already been issued, the personal representative's powers are curtailed (ss. 71(5)-(6)). If the

application is not contested, "the court may make an order based on the documents filed without requiring anything more" (s. 71(9)). Anyone contesting the application is required to file a notice of objection (s. 71(12)). Notably, the regulations say nothing about the procedure for hearing the application.

[29] Similarly s. 64 of the *Regulations*, under Part 1V - Contentious Matters, provides for a Form 45 Notice of Application and Form 46 affidavit to be filed to bring any contentious matter before the court:

> Application respecting contentious matter
>
> 64 (1) An application may be made to a court under this Part respecting any contentious matter.
>
> (2) For the purposes of this Part, a "respondent" includes but is not limited to any person interested in an estate.
>
> (3) A person interested in an estate may commence an application under this Part by filing with a court and serving on the respondents
>
> (a) a notice of application in Form 45; and
>
> (b) an affidavit in Form 46 containing a list of persons interested in the estate and swearing to the facts on which the application is based.
>
> (4) If a personal representative is not joined as an applicant in an application under this Part, the personal representative shall be shown as a respondent in documents filed with the court.
>
> [Emphasis added]

[30] Each of Form 45 and Form 46 reference s. 64. The content of Form 45 simply refers to the type of relief sought, whereas the Form 46 affidavit sets out the facts required to establish the remedy sought. The two together can be said to be the pleading, so to speak, to bring the application for proof in solemn form.

[31] The Regulations define "application" and "hearing" as follows:

> 2 (c) "application" means an application for a hearing or other proceeding pursuant to these regulations;
>
> …
>
> (j) "hearing" means the hearing of an application pursuant to these regulations;

[32] The Regulations with respect to contentious probate matters clearly contemplate oral evidence at the hearing. They state that the registrar can receive evidence at a hearing by affidavit or orally and can direct a hearing of the issues and the procedure to be followed:

> Procedure and powers at hearing
>
> 67 Without limiting the powers of the court, the registrar, on hearing an application under this Part,
>
> (a) may receive evidence by affidavit or orally;
>
> (b) dispose of issues arising out of the application;
>
> (c) direct a hearing of issues arising out of the application and the procedure to be followed at the hearing;
>
> …
>
> [Emphasis added]

Further, the Probate Court can issue subpoenas for the attendance of witnesses to give evidence (s. 23).

[33] Of course, this court sitting in probate has no less power to control its procedure on a probate application than a registrar has. Section 100 of the *Act* specifically states that "[a] judge or a registrar may, in hearing and disposing of an application pursuant to this Act, exercise the powers and functions of the court."

[34] As set out above, there is no specific procedure in the *Act* or *Regulations* governing how an "application" is to be heard, other than that it can be by way of affidavit or orally. Section 67 is clear that the court disposes of any issues arising out of the application and directs the procedure to be followed at a hearing.

[35] With respect to any guidance as to how this court approaches its responsibility to "dispose" of issues and to "direct" the procedure to be followed, the *Act* incorporates the *Civil Procedure Rules* within its ambit. Section 102 of the *Act* provides that "[w]here no provision is made in this Act or in the Probate Rules with respect to practice or evidence and in so far as this Act or the Probate Rules do not extend, the *Civil Procedure Rules* apply." The *Regulations*, at s. 3, add that where a practice or procedure is not provided for in the *Rules*, a court may make any decision it considers necessary or appropriate in the circumstances:

> Nova Scotia Civil Procedure Rules

> 3 (1) Where any practice or procedure respecting probate is not provided for by these regulations or the Act, the Civil Procedure Rules apply.
>
> (2) Where any practice or procedure respecting probate is not provided for by these regulations or the Civil Procedure Rules, a court may make any order or decision concerning it that it considers necessary or appropriate in the circumstances...
>
> [Emphasis added]

Proof in Solemn Form Procedure prior to 2000

[36] Prior to the introduction of the current *Probate Act* in 2000, the procedures for proof in solemn form were governed by s. 36 of the *Probate Act*, RSNS 1989, c. 359. The "executor or person desiring administration" was permitted to "take out a citation to have a will proved in solemn form of law and its validity determined" (s. 36(2)(a)), failing which "any heir, devisee, legatee, next of kin or other person interested in the estate" could apply to the court for a citation requiring the executor or person to show cause why they should not take out the citation. If cause was not shown, the court could order the executor to take out a citation for proof in solemn form (s. 36(2)(b)). The section referred to the originating document variously as a citation (ss. 36(2)(a)-(b) and (d)-(f)) and as a "petition" (ss. 36(2)(c) and (g)). However, the formal designation given to the proceeding was of little consequence. Once all filing and notice prerequisites had been established, s. 36(2)(h) stated:

> the court shall hear the alleged will proved in solemn form of law, and decide in regard to the validity of the same, according to the evidence and the usual practice of the court of probate.

[37] This language was substantively identical to that of the predecessor provision, s. 35(2)(h) of the *Probate Act*, RSNS 1967, c. 238, which can be traced at least as far back as the consolidated *Probate Act* of 1897: SNS 1897, c. 2, s. 23.

[38] The caselaw illustrates that before 2000, proof in solemn form was usually by trial. In *Re Brownhill Estate* (1986), 72 NSR (2d) 181, [1986] NSJ No 513 (Prob Ct), O'Hearn Co Ct J expressly described a proof in solemn form proceeding as a "trial" (para. 8). The decision proceeded in the form of a conventional trial judgment, with a review of witnesses' testimony and weighing of oral and documentary evidence. Judge O'Hearn did not mention the *Probate Act* (1967). Other examples of proof in solemn form trials are evident from the decisions of Davison, J. in *Re Little Estate* (1998), 169 NSR (2d) 113, and Hall, J. in *Re Murphy Estate* (1998), 170 NSR (2d) 1.

Proof in Solemn Form Procedure after the Probate Act of 2000

[39] When the current *Act* came into effect in 2000 there was no such thing as an "application in court". The *Civil Procedure Rules* (1972) (the "Old Rules") included applications which were either interlocutory applications or originating applications (Old Rule 37). Evidence on an application was by way of affidavit, agreed statement of facts or, with leave of the court, in person. The Old Rules did not limit the number of days of hearing.

[40] Proof in solemn form applications under the 2000 *Act* retained their flexible procedures despite the reference to "application" in the legislation. In *Re Ramsay Estate*, 2004 NSSC 140, Wright J. conducted an application for proof in solemn form. As with the pre-2000 decisions described above, it appears that the hearing was conducted by way of oral evidence, with references to testimony by multiple witnesses, and no mention of affidavits. As in the older decisions, Wright J. saw no need to expressly address the procedure governing the application. Various other cases also appear to have been heard in trial fashion. For example, in each of *Keddy Estate (Re)*, 2002 CarswellNS 451, at paras. 28-44, 51-52 (affirmed at 2003 NSCA 55); *Morash Estate (Re)*, 2002 NSSC 244, at paras. 20-28; and *Brown v Thomas Estate*, 2008 NSSC 89, at paras. 29 and 39, the court refers to witness testimony and makes no mention of affidavits.

The Advent of Proof in Solemn Form Applications Treated as Applications in Court

[41] On January 1, 2009, the current *Civil Procedure Rules* came into effect. Rule 5 contained procedures for applications in court whereby appropriate contested matters requiring evidence could proceed by way of affidavit evidence and cross examination. At the motion for directions the presiding judge could permit a witness to testify rather than swear an affidavit. Rule 5 described an application in court as a flexible and speedy alternative to an action.

[42] The caselaw illustrates that after the 2009 Rules came into effect, the proof in solemn form application hearings remained flexible. Most commonly, they proceeded with only affidavit evidence or as a hybrid with some affidavit evidence and some *viva voce* evidence. Trial like hearings with all *viva voce* evidence appear to have taken place as well. (See *Casavechia Estate, Re*, 2014 NSSC 73 upheld 2015 NSCA 56 (N.S. C.A.); *Kenny v. Kenny Estate*, 2016 NSSC 214; *Villeneuve v. MacPherson Estate*, 2019 NSSC 88, and *Chambers v. Pace*, 2024 NSSC 304, as examples of hearings by affidavit and cross-examination; *Fennell v. Crookshank Estate*, 2010 NSSC 442, and *Wright v. Wright*, 2013 NSSC 288, as examples of what

appears, from the decisions, to be *viva voce* evidence only; and *Willis Estate, Re*, 2009 NSSC 231, *Fawson Estate, Re*, 2012 NSSC 55, *Baird Estate, Re*, 2014 NSSC 266, *Wittenberg v. Wittenberg Estate*, 2014 NSSC 301, affirmed at 2015 NSCA 79, *Foster v. Kenney Estate*, 2022 NSSC 29, *Mersey v Mersey Estate*, 2023 NSSC 421, *Hill Estate*, 2024 NSSC 374, and *Kuhn v. Townsend*, 2025 NSSC 220, as examples of hybrid hearings.)

[43] Moir, J. also reviewed the history of hearing procedure in proceedings for proof in solemn form in *Re Devlin Estate*, 2020 NSSC 77. He focused on the timeframe both before and after the 2000 *Probate Act* came into effect. Before the introduction of the *Probate Act* (2000), he said, "proof in solemn form was usually by trial" (para. 51). Since the new legislation was introduced, he went on to say, "some contested wills have been proved by affidavit and cross-examination", while "[s]ome have been determined by trial" and others by a "hybrid" approach where "[d]irect evidence was introduced by affidavit of some witnesses and testimony of others" (paras. 48-50).

[44] After reviewing the substantive requirements of proof in solemn form as set out in *Vout v. Hay*, [1995] 2 SCR 876 (paras. 52-56), Moir, J. concluded that a contested application for proof in solemn form has to be treated as an application in court:

> [57] In my assessment, the *Probate Act* of 2000 and the *Probate Court Practice, Procedures and Forms Regulations* of 2001 do not loosen the procedural rights of next-of-kin and they do not water down the substantive requirements on a proof in solemn form. Nothing in the language of the statute or the regulations changes the substantive requirements set by the Supreme Court in *Vout...*
>
> [58] The legislation does make changes to the procedure for hearing a proof in solemn form, but without diminishing the procedural rights of parties.
>
> [59] Instead of the ancient hearing in the ecclesiastical courts or the later trial of an action as described by Mr. Macaskie, the present legislation calls for an application. This evokes Rule 6.01 of Rule 6 – Choosing Between Action and Application. However, a judge can convert the application and order a trial under Rule 6.03.
>
> [60] Rule 5 – Application makes it clear that the practice of referring a contested application for proof in solemn form to chambers is wrong. Both the history of proof in solemn form and the substantive requirements needing proof by the proponent of the will show that the application is inconsistent with Rules 5.01(3), 5.05(1), and 5.05(2). No language in the statute or the regulations suggests otherwise.

> [61] A contested application for proof in solemn form has to be treated as an application in court. It should be directed and set for hearing only on the quality of information demanded for a motion for directions under Rule 5.13.
>
> [Emphasis added]

[45] While Moir, J. said a Form 45 proof in solemn form application has to be treated as an application in court, he did not say that the flexibility with which the courts addressed Form 45 proof in solemn form applications was misplaced, nor that utilizing the application in court Rule prevented the type of hybrid hearings that had previously taken place in probate matters. What he said was that looking at the existing *Rules*, a Form 45 application fit better under the Application in Court Rule than under the Application in Chambers Rule. He explained that applications in chambers matters were intended to be of short duration, either one half-day scheduled as special time chambers or, when in general chambers, less than 30 minutes (Rules 5.01(3), 5.05(1) or 5.05(2)). He also noted that the need for proof of the will was inconsistent with a chambers application. He further said the application should be treated as an application in court and "set for hearing only on the quality of the information demanded for a motion for directions..". Moir, J. specifically referenced Rule 6, stating that a judge could convert the application and order a trial.

[46] Similarly, Keith, J.'s recent decision in *Rees v Roseveare Estate*, 2025 NSSC 232, assumes that Form 45 applications are treated as applications in court. For example, paragraph 10 of the decision states:

> When parties engage in the application in court process, they implicitly agree that the matter will be ready for hearing in less than two years and that the number of days needed to hear the matter will stay within the limits established in the Rules.
>
> …

[47] As Moir, J. did in *Re Devlin Estate, supra*, this court, in various other decisions, has regularly applied the *Civil Procedure Rules* to probate matters, where the procedure under the *Act* and *Regulations* was lacking in detail or no procedure existed. For example, in *Clarke v. Estate of Hamish MacGillivray*, 2024 NSSC 406, the court applied Rule 5.21(3) in an adjournment motion, as the matter had been "commenced as a Notice of Application in the Probate Court". In *Deagle v. Deagle Estate*, 2019 NSSC 70, the court applied Rule 77 with respect to costs (see also *Keddy v. Keddy Estate*, 2016 NSSC 194) . In *Graves v. Graves Estate*, 2022 NSSC 231, this court applied Rule 2.03(1)(c) to extend time for filing an election under the *Wills Act*. In *MacCallum v. Langille (Estate of)*, 2021 NSSC 229, because there was no mechanism in the *Act* or *Regulations* to address unmeritorious claims, the court

applied summary judgment Rule 13.04 to a probate matter where the will was being contested. These decisions all point to s. 102, Regulation 3 or both as authority for importing procedures from the *Civil Procedure Rules* into probate practice.

[48] In my view, this is exactly what was intended by the Legislature in enacting s. 102 of the *Act* and Regulation 3. Where the *Act* and *Regulations* do not address a practice or procedure, this court is to apply the *Rules* and if there is no Rule that covers the issue in question, the court is to do what is necessary or appropriate in the circumstances.

[49] The *Regulations* do not address specific hearing procedures for proof in solemn form applications, nor do the 2009 *Civil Procedure Rules* contain any relevant "practice or procedure respecting probate...". Given the lack of direction in the *Act*, the *Regulations*, and the *Civil Procedure Rules*, the practice and procedure before the court in hearing an application for proof in solemn form falls into the situation contemplated by s. 3(2) of the *Regulations*, whereby "a court may make any order or decision concerning it that it considers necessary or appropriate in the circumstances." Because there was no specific Civil Procedure Rule dealing with statutory applications, such as proof in solemn form applications, judges naturally relied on the existing *Civil Procedure Rules*.

[50] Since the 2009 *Rules* came into effect, applications under Form 45 for contentious matters, have often been treated as applications in court, although I understand this practice is not consistent across all probate courts in the province. The reason for treating them as such is simple; an application in court was really the only available option for this type of contentious probate application under the 2009 *Rules*. Utilizing Rule 5 was appropriate in the circumstances of there being no specific Rule to address contentious probate applications. While it was a bit like fitting a square peg into a round hole, the discretion within Regulation 3 to do what is necessary or appropriate in the circumstances remained and meant proof in solemn form hearings retained their flexibility and often included both affidavit and *viva voce* evidence post 2009, as noted above.

[51] The Probate Court in Halifax has treated applications for proof in solemn form and other contested estate matters as applications in court. For example, such Form 45 applications proceed to a motion for directions before a judge, prior to hearing dates being set. This process is instrumental to organizing the hearing of proof in solemn form and other contentious probate matters. There is, in keeping with the

application in court, a presumption that the evidence at the hearing will be by affidavit.

The Procedure Followed in this Matter

[52] In the present matter, the Form 45 application followed the usual procedure in Halifax of proceeding to a motion for directions. On May 9, 2023, the motion for directions took place before Hoskins, J. The outcome followed the typical directions for applications in court existing at that time, where filing deadlines and hearing dates were set. Despite applications in court allowing only four days of hearing, Hoskins, J. applied the usual flexibility and six hearing days were set. Clearly, the court felt this was appropriate in the circumstances, as Regulation 3 allows.

[53] When it became apparent this matter was more complex than originally thought, a further motion for directions was held on December 21, 2023, before Brothers, J. where new deadlines were set for affidavits, expert reports, discovery examinations, and briefs, and new hearing dates were assigned. Again, with the exception of six days being assigned, the matter had all the hallmarks of an application in court, proceeding by affidavit, etc. On May 23, 2024, the parties wrote to this court advising that they wished to convert the matter to an action as, due to the need for credibility findings at the hearing, they were of the view *viva voce* evidence was necessary. As set out above, this ultimately led to the Registrar's decision of December 18, 2024.

[54] The Registrar's comment that there is no mechanism under the *Regulations* for an Action is accurate. However, it does not follow from this that a probate matter that had been treated as an application in court cannot be converted to an action to allow for *viva voce* evidence.

[55] I am of the view that where this court has utilized the application in court procedures of Rule 5 to manage a Form 45 proof in solemn form application, it is only appropriate that the parties are entitled to the benefit of all of the applicable procedures set out in the Rule. There is nothing in the *Act* or *Regulations* that would preclude this. The parties had available to them Rule 5.13(2)(c), requiring the judge hearing the motion for directions to determine "whether the information shows that the application may need to be converted to an action under Rule 6..." They could have requested a further motion for directions to address the issue. In addition, Rule 5.13(4) provides that a judge who hears a motion for directions or another motion concerning the course of an application, and who becomes satisfied that it is obvious

the proceeding should be converted to an action may convert the proceeding on the judge's own motion:[1]

> **5.13** (4) A judge hearing a motion for directions, or another motion concerning the course of an application, and who is satisfied on the materials filed in the application that it is obvious the application should be converted to an action may, on the judge's own motion without a further hearing, make an order under Rule 6.03 (1) of Rule 6-Choosing Between Action and Application.
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> [Emphasis added]

[56] What the parties did here was seek to bring a motion under Rule 6 for conversion of the application in court to an action. Rule 6 specifically addresses situations where the parties seek to convert an application in court to an action. The parties interlocutory conversion motion was appropriate in the circumstances and should have been heard by the court. Moir, J. in *Re Devlin Estate, supra*, was also of the view that Rule 6 conversion was available in proof in solemn form applications (para. 59).

[57] Accordingly, where an application for proof in solemn form is presumptively treated as an application in court pursuant to Rule 5 (as it was here), it is subject to the judge's power to convert it to a trial – including on the judge's own motion – pursuant to Rule 6. What does that mean from a procedural perspective? Is a notice of action and statement of claim then required for such a probate matter? Does this conversion take the matter out of the Probate Court and become a matter originating in the Supreme Court? I think not. What it simply demands is the same flexibility the court has demonstrated since the 2000 *Probate Act* came into effect. Treating a Form 45 application for proof in solemn form as an application in court does not remove a judge's discretion under Regulation 3 to do what is appropriate in the circumstances. If the motion to convert had proceeded before this court, the presiding judge could have simply done what was appropriate in the particular circumstances. For example, if the judge agreed it should be converted, it might mean a hearing with all *viva voce* evidence or a hybrid type of hearing, as the caselaw illustrates has been commonplace.

[58] What the parties here are seeking is that *viva voce* evidence be allowed in situations where the circumstances demand it. That is precisely what Regulation 3 contemplates – doing what is appropriate in the circumstances.

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[1] Rule 5 was amended after this appeal was filed. Some of the provisions and numbers have changed but the potential for conversion to an action remains.

[59] While, as I have said above, presumptively treating a Form 45 application as an application in court entitles the parties to utilize those portions of Rule 5 relating to conversion, including Rule 6, I am of the view that it should not be necessary to do so. Judges have the discretion under Regulation 3, where the *Civil Procedure Rules* do not provide for a practice or procedure, to do what is appropriate in the circumstances. Whether at a motion for directions in the present case, or thereafter, counsel should have been able to seek the direction of the court when it became apparent to them that the hearing needed to proceed with *viva voce* evidence.

[60] In short, while the appeal is allowed for the reasons set out above, I am of the view, given the content of the *Act* and *Regulations*, that even though there may be a presumption that the hearing will proceed as an application in court, by affidavit evidence, this subject can be pursued by counsel and the judge presiding at any motion for directions or at any other motion concerning the course of the application to ensure the hearing of the matter proceeds in a manner that is appropriate in the specific circumstances.

[61] This appeal was filed before the amendments to Rule 5 concerning applications in court were approved by the Supreme Court on June 27, 2025. The recent amendments reinforce the need for flexibility when dealing with contentious probate matters under Rule 5, such as applications for proof in solemn form. For example, application in court hearings are now limited to two days. However, Rule 5.01(4)(a) provides that matters such as contested estate matters can be set down at the further motion for directions for up to four days, at the presiding judge's discretion. I interpret "contested estate matters" to include contentious matters in the Probate Court. In addition, there is no longer any discovery examination in an application in court (5.01(5)), other than of uncooperative witnesses.

[62] Clearly, some contentious probate matters, including proof in solemn form applications, will continue to be well-suited to proceed solely by affidavit evidence as a true application in court, but many others will not. I suspect, as has been the case in the past, many hearings will be hybrid, with some evidence by affidavit and some *viva voce* evidence. Other matters may be more suited to a hearing with only *viva voce* evidence. The increasing number of self-represented litigants in probate matters also highlights the importance of the courts discretion in determining the most appropriate method for presenting the evidence at the hearing. When dealing with contentious probate matters, the flexibility set out in Regulation 3 for the court to make any order or decision relating to any practice or procedure that is necessary or appropriate in the circumstances must govern.

[63] With respect to the current matter, counsel estimate that ten hearing days are required. They say there are at least 14 witnesses, there have been six days of discovery, there are expert witnesses, there are significant credibility issues, and interpreters will be utilized for some of the witnesses' evidence. Counsel are of the view that *viva voce* evidence is required and I agree. Further, I see no reason to require the parties to bring a conversion motion before this court. I am of the view, on the evidence before me, that the requirements for conversion in Rule 6 have been met. As a result, I direct that counsel contact my office at their earliest opportunity to schedule a further motion for directions to discuss what the "conversion" should entail. This motion for directions will determine whether all evidence should be *viva voce* evidence and what other directions are needed before this matter is ready for hearing.

[64] While outside the parameters of this decision, I am of the view that a new, built-for-purpose, Civil Procedure Rule that addresses statutory applications should be considered. In my view, such a Rule could be applied in the context of applications under the *Act,* given that the *Act* and the *Regulations* expressly contemplate the application of the *Civil Procedure Rules* in probate proceedings. Obviously, this is a decision for all of the judges of the Supreme Court. In the meantime, the *Act* and *Regulations* continue to give judges broad discretion to determine the manner in which a hearing should proceed, to determine the number of hearing days necessary, and to determine whether discovery examination should be allowed, among other things.

Conclusion

[65] The appeal is allowed. The parties are entitled to convert the matter that had been treated as an application in court, to a proceeding that includes *viva voce* evidence. Further directions will be given at the yet-to-be-scheduled motion for directions.

Jamieson, J.