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

Judges:	MacDonald, C.J.N.S., Roscoe and Fichaud, JJ.A.
Appeal Heard:	November 17, 2006, in Halifax, Nova Scotia
Held:	Appeal is allowed per reasons for judgment of Roscoe, J.A.; MacDonald, C.J.N.S. and Fichaud, J.A. concurring.
Counsel:	John T. Shanks and Heather Goodfellow, for the appellant Alain J. Begin, for the respondent Sherri Dale Hanes A. Lawrence Graham, Q.C. for the Public Trustee, Administrator of the Respondent Estate of Daniel Staples

Reasons for judgment:

[1] The issue on this appeal is whether DNA testing should be ordered when there is a dispute about whether a person is a lawful heir of an intestate. Rhoda Jean Miller alleges that Sherri Dale Hanes is not the daughter of the deceased Daniel Staples and applied to the Supreme Court, pursuant to **Civil Procedure Rule** 22.01, for an order requiring Ms. Hanes to submit a sample for DNA testing. The application was dismissed by Justice J. E. Scanlan by decision reported as 2006 NSSC 183; [2006] N.S.J. No. 244. Ms. Miller appeals.

Background:

[2] Several affidavits were filed by the parties, incorporating an abundance of hearsay, innuendo, opinion and irrelevancy, but there was no cross-examination or oral testimony, so where there was a dispute of fact, there has not been any proper resolution of it.

[3] The following facts are not in dispute: Daniel Robert Staples died without a will on September 19, 2003. He was not married at the time of his death. In the 1950's Mr. Staples married Marilyn Doris Allen, who is the mother of both Ms. Miller and Ms. Hanes. Ms. Miller was born in 1960, when Mr. Staples and Ms. Allen were living together. Ms. Hanes was born in 1966. Ms. Allen and Mr. Staples separated, reconciled briefly, and separated permanently at some point around the time of Ms. Hanes' birth. (The timing and extent of the reconciliation is in dispute.) Mr. Staples and Ms. Allen divorced in the 1980's. Ms. Allen re-married and later moved with her new husband, Mr. MacLean, and her children to British Columbia. Ms. Miller was raised with the surname Staples and Ms. Hanes used the name MacLean. Mr. Staples remained in Truro, Nova Scotia and did not remarry. Ms. Hanes moved to Truro after high school and became friends with Mr. Staples. He assisted her financially and designated Ms. Hanes as the beneficiary of a $25,000 life insurance policy. His estate is valued at just under $700,000.

[4] Most of the other relevant facts are in dispute. Ms. Miller alleges that Ms. Hanes' father is James Holmes with whom her mother had a brief relationship while separated from Mr. Staples. Ms. Hanes acknowledges the separation and the relationship with Mr. Holmes, but says that Mr. Staples and their mother reconciled for a period of time prior to her birth.

[5] The evidence in support of the fact that Ms. Hanes is not the biological daughter of Mr. Staples includes the affidavits of Mr. Staples' brother, Leander, and Ms. Allen's sister, Jean Simms-Mills. Their affidavits, filed by the appellant, expressed the view that during the pregnancy with Sherri, and after she was born, Ms. Allen acknowledged that Mr. Holmes was the father and that Mr. Staples told them he was not Sherri's father. As well, both swore that near the time of Mr. Staples' death, when they and Ms. Hanes were visiting him in the hospital, Ms. Hanes stated that she wished she was Mr. Staples' daughter, but she knew she was not. They also say that Mr. Staples stated on several occasions that Rhoda was his only child. As well, Ms. Miller and Ms. Simms-Mills assert that when she was a child, Ms. Miller was taken by her mother and grandmother for access visits with Mr. Staples, but Ms. Hanes was never included in the visits.

[6] All of the evidence supporting the allegation that Ms. Hanes is Mr. Staples' child is contained in Ms. Hanes' affidavit. She says that her mother told her that she and Mr. Staples had sexual relations during the time when she was conceived. She says that her birth certificate lists her last name as Staples, but she does not attach a copy or indicate whether it states the name of her father. Ms. Hanes states that she was treated by Mr. Staples as his daughter and provides numerous examples of his generosity and hospitality towards her. As well, she maintains that Mr. Staples told her and others that she and Rhoda were both his daughters and they would be treated equally.

[7] After Mr. Staples' death Ms. Hanes claimed to be his biological daughter and sought a one-half share of his estate. Ms. Miller commenced an action against the Estate, Ms. Allen and Ms. Hanes seeking a declaration that she is the sole heir and beneficiary of Mr. Staples and an order requiring Ms. Hanes and Ms. Allen to provide a DNA sample for the purpose of determining whether Ms. Hanes and Ms. Miller have the same biological father.

[8] Ms. Hanes filed a defence, refusing to submit a DNA sample because there is no requirement to do so, claiming that she is Mr. Staples' biological daughter, relying on the presumption of legitimacy and seeking a declaration that she is Mr. Staples' daughter.

[9] Ms. Miller brought an application in Supreme Court seeking an order compelling Ms. Hanes and Ms. Allen to submit a sample for DNA testing to determine Ms. Hanes' paternity pursuant to **Rule** 22, the relevant parts of which state:

> 22.01. (1) Where the physical or mental condition of a party is in issue, the court may, at any time on the application of an opposing party or on its own motion, order the party to submit to a physical or mental examination by a qualified medical practitioner.
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> ...
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> 22.02. (2) Where a person to be examined consents in writing or the court so orders, the examining medical practitioner may examine hospital records and x-rays previously made or taken, have analyses made of samples of blood and body fluids and have any other tests recognized by medical science made including without restricting the generality of the foregoing, x-rays, electrocardiographs and electro-encephalographs.

[10] Although Ms. Allen, the mother, was named as a defendant in the action, she did not file a defence or file an affidavit in support of either of her daughters or respond to the appeal. The Public Trustee as the Administrator of the Estate of Daniel Staples did not take a position on the application or on the appeal.

[11] Mr. Leander Staples, the brother of the deceased has agreed to provide a sample to assist in the DNA profiling. Counsel for Ms. Miller and Ms. Hanes agree that DNA testing would be determinative of the issue of paternity.

[12] Justice Scanlan dismissed the application for the DNA testing. He concluded that paternity is not a medical or physical condition and that there should be no automatic right to DNA testing of potential heirs-at-law. His reasoning is demonstrated in the following passage:

> [15] To apply the principles of **Bauman** [**Bauman v. Kovacs**, [1986] B.C.J. No. 2188 (C.A.)] as urged here by the Plaintiff would suggest that any heir at law could be challenged pursuant to **Rule 22** and required to undergo DNA testing before being entitled to a share of an estate. Paternity is not a physical or mental condition and **Rule 22** cannot be used as a stepping stone to allow heirs-at-law to automatically require of their siblings that they undergo DNA testing.

[16] There are many family dynamics which suggest such an automatic scientific analysis should not be a part of our laws of inheritance. In this case it would appear the deceased may well have considered Ms. Hanes to be his daughter and treated her as such. The fact she was born during the marriage brings into play the presumption of legitimacy. The deceased could be presumed to have been aware of this presumption and would not have been required to do anything more to ensure the person he treated as his daughter would be entitled to a share of his estate upon an intestacy. **Rule 22** should not now be used to defeat what the deceased may have understood the situation to be in terms of his heirs at law.

[17] It may well be that science has progressed beyond the laws of intestacy in Nova Scotia. If the legislators intend that all potential heirs at law line up and get DNA testing before inheriting a share of a father's estate upon an intestacy then they should clearly state that intention. I am not satisfied the law as it now stands requires DNA testing upon request. If the law were such then many families where children have been raised in every sense of the word as a son or daughter of a father would be torn asunder after the death of a father.

[18] This is not a case of a person who was a total stranger appearing after the death of an individual saying I am the long lost child of the deceased. This is a case of a person who in every way was treated by a father as a daughter, now being asked to submit to DNA testing. The court has, as part of the inherent jurisdiction of the court, discretion to order DNA testing. That discretion should be exercised sparingly.

[19] In this case had Mr. Staples believed Ms. Hanes was not his daughter, as he had represented repeatedly she was, he may well have taken other steps to make provision for Ms. Hanes by way of a Will. Certainly Mr. Staples was representing to his business advisor that Ms. Hanes was his daughter. He was astute enough to amass an estate worth just under $700,000.00 so one should not underestimate his intellect.

[20] As I had noted above the court has inherent jurisdiction to order DNA testing. The decision as to whether such testing should be ordered will depend on the circumstances of each case. For example in situations where, a complete stranger, upon the death of a person, comes forward alleging they are a child of the deceased person the court may see fit to order DNA testing. I do not suggest this is the only case where testing would be ordered. I am satisfied however the discretion to order DNA testing should be exercised very sparingly in the absence of legislative direction to do otherwise.

Issues:

[13] The issues raised in the notice of appeal may be conveniently restated as:

(1) the standard of review of the decision of the chambers judge;

(2) the interpretation of **Rule** 22.01

(3) whether the dismissal of the application for DNA testing was based on a wrong principle of law or caused a patent injustice?

1. Standard of Review:

[14] The deferential standard which this court traditionally uses in discretionary interlocutory matters applies here. This court will not interfere unless wrong principles of law have been applied or a patent injustice would result. See: **Exco Corporation Limited v. Nova Scotia Savings & Loan et al** (1983), 59 N.S.R. (2d) 331(C.A.); **Minkoff v. Poole** (1991), 101 N.S.R. (2d) 143 (C.A.).

2. **Rule** 22.01:

[15] Before dealing with the interpretation of the **Rule**, it is helpful to put the application in context, by briefly reviewing the legislation under which the Estate of Daniel Staples will devolve: the **Intestate Succession Act**, R.S.N.S. 1989 c. 236, as amended. Since he died without a will, the **Act** provides in section 4(7):

> 4 (7) If an intestate dies leaving issue, the intestate's estate shall be distributed, subject to the right of the surviving spouse, if any, *per stirpes* among the issue.

[16] Daniel Staples had no surviving spouse, so his entire estate should be divided among his issue, defined in s. 2, as:

> 2 (b) "issue" includes all lawful lineal descendants of the ancestor;

[17] In the lawsuit commenced by the appellant the main question to be determined is whether Sherri Hanes is a lawful lineal descendant of Daniel Staples, in other words, is she, in fact, his biological daughter. Whether Daniel Staples treated her as a child or stood in loco parentis to her is not in issue.

[18] **Rule** 22.01 must be interpreted in light of **Rule** 1.03:

> The object of these Rules is to secure the just, speedy and inexpensive determination of every proceeding.

[19] This court has only dealt with **Rule** 22.01 once, in **Grant v. Foster,** [1992] N.S.J. No. 102 (Q.L.); 111 N.S.R. (2d) 178 where the issue was whether the **Rule** permitted the defendant to have the plaintiff examined by an expert of his own choice. Jones, J.A. for the court said:

> [5] We think it is clear from the cases quoted by the appellant's counsel that a litigant has a prima facie right to have a party examined by a medical expert of his own choosing. See **Hall v. Avon Health Authority**, [1981] 1 All E.R. 516 which follows the decision in **Starr v. National Coal Board**, [1977] 1 All E.R. 243.

[20] In **Noseworthy v. Murphy,** [1999] N.S.J. No. 79 (S.C.) Justice Goodfellow set out a list of helpful principles respecting the **Rule** when considering whether the defendant is entitled to more than one medical examination:

> 6. PRINCIPLES
>
> 10 A person’s medical background is entitled to a high degree of privacy and confidentiality. Professionally, a patient's medical condition and records are privileged. With some rare statutory exceptions i.e. s. 3 of the **Children and Family Services Act** requires reporting any information, whether or not it is confidential or privileged, that indicates a child is in need of protective services.
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> 11 **Civil Procedure Rule** 22.01 allows an invasion of the privacy of a person that is intrusive. Any such invasion must be clearly justified.
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> 12 The principles to be considered include:
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> 1. The onus is upon the party applying for the independent medical examination to satisfy the court, on a balance of probabilities, that such a request is reasonable, and that the proposed examiner is properly qualified.
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> 2. The entitlement of a party to personal privacy physical and psychological integrity must not be breached lightly and only when the court is satisfied such is necessary to secure the just determination of the issues before the court.

3. A claimant should not be accorded an unfair evidentiary advantage that can arise by permitting that person to have his/her medical and psychological condition examined, assessed and advanced without providing the opposing party, against whom relief and damages are sought, a reasonable opportunity to respond fully.

4. The party who advances a claim for damages, alleging that they flow from the negligent act of another party, removes the entitlement of privacy, to the extent that the claims advanced relate to the medical conditions being advanced or should be disclosed as relevant to the relief sought in damages.

5. The court, in order to meet the object of the **Civil Procedure Rules**, **CPR** 1.03 has repeatedly indicated that the **Rules** are to receive a liberal interpretation. **Civil Procedure Rules** are our tools and not our masters.

6. In **MacInnis v. Maritime Beverages Ltd.** [1989] N.S.J. No. 280, June 9, 1989, Kelly, J. granted an order that the plaintiff be tested by a psychologist, who specialized in rehabilitation counseling of the head injured. The Rule authorizes examinations only by a "qualified medical practitioner" and the court was satisfied there was a real requirement for this type of testing, to enable qualified medical practitioners to give an opinion and **CPR Rule** 22 was liberally interpreted, taking into consideration the expanding field of medical diagnosis and treatment.

7. The **Interpretation Act** provides some general guidance, although it does not specifically apply to rules of court. The **Act** provides that words expressed in the singular, include the plural and vice versa.

[21] The only Nova Scotia decision, other than the one under appeal, dealing with an application for a DNA test is **Glace Bay Community Hospital v. Nova Scotia Nurses' Union,** [1992] N.S.J. No. 308, where Glube, C.J.T.D., as she then was, held that an arbitration board lacked jurisdiction to compel the grievor to provide a sample of her blood for DNA testing to help determine the identity of the person who had stolen drugs from a hospital. In *obiter*, she said:

> I accept the position of the majority in **Peck** [**Peck v. Glendinning** (1985), 9 C.P.C. (2d) 132 (B.C.C.A.)] and find that there is no authority for the court to order the taking of a blood sample under the provision of **C.P.R.** 22.01.

[22] In British Columbia the courts have ordered DNA testing in numerous paternity cases pursuant to their **Rule** 30(1) which, in similar language to our **Rule**, 22.01 provides:

> (1) Where the physical or mental condition of a person is in issue in a proceeding, the court may order that the person submit to examination by a medical practitioner or other qualified person, and if the court makes an order, it may make
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> (a) an order respecting any expenses connected with the examination, and
>
> (b) an order that the result of the examination be put in writing and that copies be made available to interested parties.

[23] One such case, referred to by Justice Scanlan, is **Bauman v. Kovacs**, [1986] B.C.J. No. 2188 (C.A.) where the issue was the paternity of a 17 year old whose mother was seeking child support from her former husband. Taggart, J.A. for the court, distinguished the **Peck** case that Glube, C.J.T.D. relied on in the **Glace Bay Hospital** decision, saying:

> In my opinion the composition of a person's blood is a physical condition of a person, and the requirements of the rule that the order that a person submit to examination must be in relation to a physical or mental condition is met in this case.
>
> I distinguish the decision in **Peck v. Glendinning** on the ground that a palm print is not a physical condition. We were referred to the definitions of "condition" in the Shorter Oxford dictionary under the second general heading. The fifth definition is "a characteristic or attribute". In my opinion the blood composition of a person is, in that sense, within the definition of "condition".
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> I turn now to the second aspect of the principal issue, namely, whether the blood composition is in issue in a maintenance proceeding.
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> There are a number of issues in such a proceeding. The issue should not be given an encompassing definition that limits it to only one issue in any proceeding. A true examination should be made of what are the disputed points of fact and law and those should be regarded as points that are in issue in the proceeding. There may be many of them in a case. The paternity of Barbara June is a broad general issue in this case, but there are subsidiary issues, the resolution

> of which goes to determining the broad issue of paternity, and that in turn goes to determining the even broader issue of whether maintenance should be awarded. Each of the subdivisions of the points in dispute are properly regarded as issues, if they are genuinely in contention and relevant to the outcome of the dispute as a whole. In my opinion, therefore, the tests for the application of **Rule** 30(1) are met in this case.
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> The rule imposes a discretion on the chambers judge once the conditions are met. He must decide whether the order should be made for the examination. He decided in this case to exercise his discretion by making the order. He considered the long delay. He considered the unavailability of evidence by reason of the long delay and the handicap to Mr. Kovacs through that unavailability, or possible unavailability of evidence. He may well also have considered, and we have certainly been told about, evidence with respect to consorting with other men on the part of Mrs. Roe around the time of conception; and we have had pointed out to us the inconsistencies in her evidence, both internally in these proceedings, and also by comparison with the original divorce proceedings and the petition against Mr. Bauman. I think those matters are properly relevant to the exercise of the discretion. <u>But, in my opinion, the fact that a blood test of a tissue type can be so helpful would make it a rare case where evidence of that type should be excluded. The tissue typing blood test can demonstrate with complete accuracy that a man is not the father of a child, and it can form the basis of an opinion that a man is the father of a child with varying degrees of statistical certainty, from in the neighbourhood of 50% up to very close to 100%.</u> I feel confident that judges, in assessing evidence of that kind of blood test, will assess the evidence for what it is worth and consider it in association with the other evidence.
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> [emphasis added]

[24] Many other cases where DNA samples were ordered in the context of a child support application were cited by appellant's counsel, for example, **M.C. v. L.A.C. ,** [1990] B.C.J. No. 134 (B.C.C.A.) (Q.L.). As well, British Columbia courts have ordered DNA testing in other interesting cases where an adult sought a declaration of paternity just to know for sure who her father was (**Schuh v. Schulzer,** [1998] B.C.J. No. 2563 (S.C.) (Q.L.)), and in a case where a man wanted to know for estate planning purposes if an 18 year old was actually his child (**I.M. v. K.M.,** [2003] B.C.J. No. 1007 (S.C.) (Q.L.)). In the latter case, Neilson, J. said:

> 16 In ordering blood tests under **Rule** 30(1) to provide a basis for a declaration of paternity, the courts have recognized that DNA profiling will provide highly relevant evidence of biological parentage, and that the interests of

> justice will generally best be served by obtaining such evidence so that the truth may be ascertained: **J.S.D. v. W.L.V.**, [1995] B.C.J. No. 653 (C.A.) at para. 26.

[25] In Nova Scotia the authority to order a blood test to determine paternity of a child of unmarried parents is found in s. 27(1) of the **Maintenance and Custody Act**, R.S.N.S. 1989 c. 160, as amended. See: **H.R.C. v. S.M.H.,** [2003] N.S.J. No. 393; 2003 NSFC 18.

[26] There are very few reported Canadian cases where DNA testing has been ordered to determine paternity in an estate matter. One of interest is **Schubert v. Cahoon Estate,** [1994] B.C.J. No. 2752 (Q.L.), where Preston J. allowed an application to compel three parties to provide blood samples for DNA testing pursuant to B.C. **Rule** 30. The plaintiff believed he was the illegitimate son of the deceased and sought DNA testing of the deceased's brother and his two nephews who were the sole beneficiaries in the will. The judge stated:

> 14 R. 30 is part of a scheme of discovery process which is created by the Rules of Court. The affidavit evidence submitted in support of this application establishes that the analysis of blood samples taken from the defendants will provide cogent evidence for or against the contention advanced by the plaintiff that James Cahoon was his father. Once matters are put in issue in litigation before the courts the avenues for discovery provided by the Rules should be employed to ensure that all litigants obtain access to all relevant evidence and information in order to allow the litigation process to provide answers to the questions in issue between the parties.

[27] See also: **Cruickshank v. Cruikshank,** [1993] B.C.J. No. 650 .

[28] Given this jurisprudence, should **Rule** 22.01 be interpreted to allow the ordering of DNA testing when the entitlement of a claimant in an intestacy is the question before the court? I agree with the reasoning in **Bauman**, and **Schubert**, that the composition of a person's blood is a physical condition in issue in this type of case. In this action the ultimate issue is whether Ms. Hanes is entitled to a share of Daniel Staples' estate. That issue will be determined by the subsidiary issue of whether he is in fact her biological father, i.e. paternity is a subsidiary issue. The issue of paternity can be determined by her blood composition, which in turn makes it a significant point in issue in the case. Blood composition is a physical condition and it is in issue.

[29] With respect, I disagree with the chambers judge's formulation of the question which led to the finding that "paternity was not a physical condition". Furthermore, I do not accept the premise that allowing an application for a DNA test in this case would open the proverbial floodgates leading to the "automatic" request for blood tests in every probate matter. It appears that the learned chambers judge founded his decision on the floodgates concern as is evident from the portions of his decision quoted above. (¶ 11) It is not suggested that "any" heir could be challenged, that there will be "automatic" requisitions for all siblings to "line up" for blood tests, that orders will be granted "upon request" in every case, or that "complete strangers" could ask for testing to see if they might be an heir of an intestate.

[30] 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 the vast majority of intestacies and wills variation cases there is no dispute among the surviving widow, children or other potential heirs as to who are the legitimate claimants. The majority of cases where there is disputed paternity are sorted out when the obligation for child support is normally determined, shortly after the birth of a child whose fatherhood is not known or admitted.

[31] In this case, however, there was substantial evidence which questioned the paternity of Ms. Hanes as outlined above (¶ 5) contrasted with the glaring lack of information from the one person who likely has the best evidence: her mother.

[32] As noted in **Bauman**, **Schuh**, and **I.M v. K.M.**, *supra*, DNA profiling is such a highly reliable method of determining parentage that the interests of justice will generally best be served by obtaining the evidence so that the truth may be ascertained in an efficient and effective manner. The objects of the **Rules** as defined in **Rule** 1.03 would thereby be enhanced. In this case to require a trial to determine the right of Ms. Hanes to inherit without DNA evidence means the ultimate decision would be based on 40 year old hearsay, evidence of declarations against interest and the ancient presumption of legitimacy, instead of the near 100% accurate, advanced, science of genetics.

3. Was there an error in legal principle or a patent injustice?

[33] In **Minkoff v. Poole** Chipman, J.A., provided examples of circumstances when the court will override a discretionary order:

> [10] Under these headings of wrong principles of law and patent injustice an Appeal Court will override a discretionary order in a number of well-recognized situations. The simplest cases involve an obvious legal error. As well, there are cases where no weight or insufficient weight has been given to relevant circumstances, where all the facts are not brought to the attention of the judge or where the judge has misapprehended the facts. The importance and gravity of the matter and the consequences of the order, as where an interlocutory application results in the final disposition of a case, are always underlying considerations. The list is not exhaustive but it covers the most common instances of appellate court interference in discretionary matters. ...

[34] Once it is determined, as I have done, that **Rule** 22.01 applies to the requested DNA test, the starting point for the exercise of judicial discretion is the principle I have noted above from **Bauman**, **Schuh** and **I.M. v K.M.**. The interests of justice are best served by disclosure of relevant information so that the court may ascertain the truth. This principle underlies the broad pre-trial disclosure prescribed by Nova Scotia's **Civil Procedure Rules**: **Upham v. You** (1986), 73 NSR (2d) 73 (CA) at ¶ 25-30; **Eastern Canadian Coal Gas Venture Ltd v. Cape Breton Development Corp.** (1995), 141 NSR (2d) 180 (CA) at ¶ 12-13, 23; **Dowling v. Securicor Canada Ltd.,** 2003 NSCA 69 at ¶ 8-12; **2502731 Nova Scotia Ltd v. Plazacorp Retail Properties Ltd.,** 2004 NSCA 123 at ¶ 13. The chambers judge's reasons do not consider this principle. The denial of the request, without consideration of this basic precept, is in my view an error of law.

[35] This is also a case where this court should interfere and reverse the order of the chambers judge because otherwise a patent injustice would result. In addition to being based on the misapplication of the **Rule**, the mistaken concern about floodgates, and a failure to consider the principle of disclosure, I am of the view that the judge erred by finding facts that were not supported by the evidence and by relying on irrelevant factors.

[36] As mentioned, there was no cross-examination on the affidavits. Therefore, there was no opportunity to make findings of credibility. So, where there was a conflict in the evidence the judge ought not to have made a finding of fact or drawn any conclusions based on inferences. It appears that he accepted as fact all of the

contents of Ms. Hanes' affidavit without regard to the abundance of evidence to the contrary. For example, in ¶ 6 of the decision, the judge wrote:

> 6 By unchallenged affidavit dated May 18, 2006, filed with this Court on the same date, Ms. Hanes states that her mother, Marilyn Allen, advised that she had been sexually intimate with the deceased during the time that Ms. Hanes had been conceived even though they were living separate and apart. She further attests that Ms. Allen and Mr. Staples had reconciled after the separation and lived together on Lyman Street in Truro.

[37] That evidence was explicitly contradicted in the affidavits of Mr. Leander Staples and Ms. Simms-Mills.

[38] Another example is his finding that in the obituary prepared by Ms. Miller, Ms. Hanes was identified as Mr. Staples' daughter. However, both Ms. Miller and her aunt Ms. Simms-Mills swore that Ms. Simms-Mills prepared the obituary and named Ms. Hanes as a daughter in order to help ease the tension that was building up between family members at that time. Who prepared the obituary and how and why Ms. Hanes was described in it are however not particularly relevant to the question of whether she is an heir at law.

[39] Another instance is the statement in ¶ 18 that Mr. Staples treated her "in every way" as a father would treat a daughter. Again, although not necessarily relevant, it fails to account for the unchallenged evidence that there was no contact between the two for the first 18 years of her life. Another example is the statement in ¶ 19 to the effect that had Mr. Staples believed that Ms. Hanes was not his daughter, as he repeatedly said she was, he may have taken other steps to provide for her. This completely ignores all the evidence to the contrary in the affidavits of Ms. Miller, her aunt and her uncle that Mr. Staples repeatedly indicated that Ms. Hanes was not his daughter.

[40] There is sufficient reason to allow the appeal 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.

[41] I would allow the appeal and grant the order compelling Ms. Hanes and Ms. Allen to provide a suitable bodily sample for the purposes of DNA testing. The costs of the appeal of both the appellant and Ms. Hanes shall be party and party costs and disbursements as taxed and payable by the Estate.

Roscoe, J.A.

Concurred in:

MacDonald, C.J.N.S.

Fichaud, J.A.