



**IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR**

Citation: *Franklin Estate (Re)*, 2026 NLCA 30

Date: August 20, 2026

Docket Number: 202601H0004

BETWEEN:

GEMMA FRANKLIN

APPELLANT

AND:

NINA FRANKLIN IN HER CAPACITY AS
ESTATE TRUSTEE FOR THE ESTATE OF
JOHN LESLIE STEPHEN FRANKLIN (DECEASED)

RESPONDENT

Coram: D.M. Boone C.J.N.L., W.H. Goodridge and G.L.C. Noel JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador,
General Division, 201901E18571
(2026 NLSC 7)

Appeal Heard: June 8, 2026

Judgment Rendered: August 20, 2026

Reasons for Judgment by: G.L.C. Noel J.A.

Concurred in by: D.M. Boone C.J.N.L. and W.H. Goodridge J.A.

Counsel for the Appellant: Melissa M. Saunders and J. Michael Collins

Counsel for the Respondent: Chineze Nwokedi

CASES CITED: *Franklin Estate (Re)*, 2026 NLSC 7; *Franklin v. Franklin*, 2026 NLSC 19; *Sinnott v. Sinnott Estate*, 2015 NLCA 41; *Zindler v. The Salvation Army et al.*, 2015 MBCA 33; *Mawhinney v. Scobie*, 2019 ABCA 76, leave to appeal to SCC refused, 38609 (8 August 2019); *Kent v. McKay*, 1982 CanLII 788 (BCSC); *McKay v. Howlett et al*, 2003 BCCA 555; *Scott v. Scott*, 2022 NLCA 61, leave to appeal to SCC refused, 40584 (11 January 2024); *Dicks v. Scott*, 2010 NLCA 35, leave to appeal to SCC refused, 33809 (23 December 2010); *Adams v. Adams*, [1892] 1 Ch. 369, 66 L.T. 98; *Re Williams*, [1912] 1 Ch. 399, 106 L.T. 584; *Oleynik v. Memorial University of Newfoundland*, 2024 NLCA 44, leave to appeal to SCC refused, 41632 (5 June 2025); *Cabana v. Wells*, 2024 NLCA 4; *R. v. Sullivan*, 2022 SCC 19, [2022] 1 S.C.R. 460.

STATUTES CONSIDERED: *Judicature Act*, RSNL 1990, c. J-4, section 123.

ARTICLES CONSIDERED: Peter G Lawson, “The Rule Against ‘In Terrorem’ Conditions: What Is It? Where Did It Come From? Do We Really Need It?” (2005) 25 Est Tr & Pensions J 71.

OTHER: Bryan A Garner, ed, *Black’s Law Dictionary*, 9th ed (St. Paul, MN: Thomson Reuters, 2009).

G.L.C. Noel J.A.:

OVERVIEW

[1] This appeal concerns whether a no-contest clause in a Will is triggered when a beneficiary brings an application to remove the personal representative of the Estate, and if so, the legal test that governs an application to enforce the clause.

[2] The no-contest clause in this case provides that any beneficiary who commences litigation in connection with any provision of the Will, other than for judicial interpretation or directions during administration, forfeits their entitlement.

[3] John Leslie Stephen Franklin died on August 6, 2019. Under his Will, he named his three children – Nina Franklin, Gemma Franklin and Sophie Harn – as his beneficiaries. He appointed one of his children, Nina, as the Executrix.

[4] On August 15, 2024, Gemma filed an application in the Supreme Court seeking an order removing Nina as the Executrix (the “Removal Application”). Gemma based her application on the alleged failure of the Executrix to administer the Estate, failure to adequately account to the beneficiaries, and non-compliance with a prior court order for an interim accounting. On November 27, 2024, Nina filed an application to enforce the no-contest clause (the “No-Contest Application”). The applications were heard by different judges.

[5] In the Removal Application, which is not the subject of this appeal, a judge dismissed Gemma’s application to have the Executrix removed.

[6] In the No-Contest Application, which is the subject of this appeal, a judge (the “Applications Judge”) allowed Nina’s application to enforce the clause. The Applications Judge found that the Removal Application violated the no-contest clause and disentitled Gemma from her inheritance. The benefits that might have gone to Gemma, the Applications Judge held, fall into the residue of the Estate to be distributed according to the Will. He ordered Gemma to pay Column 3 costs to the Estate (*Franklin Estate (Re)*, 2026 NLSC 7, the “Decision”, at para. 50).

[7] For the reasons that follow, I would set aside the Decision and remit the matter to the Supreme Court for a rehearing in accordance with the directions in these reasons. The costs order in the Decision is set aside, and there is no order as to costs on this appeal.

BACKGROUND

[8] John Franklin included the following clause in his Will (the “No-Contest Clause”):

If any person who may be entitled to any benefit under my Will or the spouse of that person, commences any litigation in connection with any of the provisions of my Will, other than for the necessary judicial interpretation or for the direction of the court in the course of administration, all benefits to which that person would have been entitled shall cease and I revoke all such benefits. I direct that these benefits so revoked shall fall into and form part of the residue of my estate to be distributed as if the person had predeceased me and left no issue surviving me.

[9] The Will bequeathed to Gemma real property at 170 Water Street, St. John's, Newfoundland and Labrador, and one-third of the residue of the Estate. Although Letters of Probate were issued on October 17, 2019, Gemma still has not received the property bequeathed to her, or any other distribution from her father's Estate.

[10] The procedural history helps to inform the Court's reasons. As noted above, Gemma filed the Removal Application on August 15, 2024. A judge of the Supreme Court heard that application on September 12 and 29, 2025.

[11] Nina filed the No-Contest Application on November 27, 2024. The Applications Judge heard the application on December 17, 2025.

[12] On January 16, 2026, the judge who heard the Removal Application filed an Endorsement dismissing the application with reasons to follow.

[13] On January 23, 2026, the Applications Judge filed his Decision on the No-Contest Application.

[14] On January 26, 2026, Gemma filed a Notice of Appeal in this Court appealing the Endorsement in relation to the Removal Application.

[15] On March 4, 2026, the judge filed his reasons for dismissing the Removal Application (*Franklin v. Franklin*, 2026 NLSC 19, the "Removal Decision").

[16] Gemma filed a Request with this Court to defer the appeal of the Removal Decision until the subject appeal is decided.

[17] At the appeal hearing, the Panel invited submissions from the parties on whether the two appeals should be heard together, or separately. Counsel for Nina submitted that the appeals should be heard together, while counsel for Gemma submitted that they should be heard separately, since her appeal of the Decision was perfected and should proceed without delay. The Panel decided that the appeal would proceed separately and heard the parties' submissions on the merits of the appeal.

ISSUES

[18] The issues for determination are:

1. What is the standard of review that governs the appeal?
2. Did the Removal Application trigger the No-Contest Clause?
3. If so, did the Applications Judge err in enforcing the No-Contest Clause?
4. What is the appropriate remedy and order for costs?

ANALYSIS

ISSUE 1: Standard of Review

Position of the Parties

[19] The parties disagree on the standard of review that applies.

[20] Gemma submits that the standard of review is correctness because the Applications Judge based his determination on the language of the Will alone, and the errors alleged involve pure and extricable questions of law.

[21] Nina submits that the Decision reflects the application of legal principles to a specific factual matrix. She argues that the Applications Judge's conclusions attract deference, and that the applicable standard of review is palpable and overriding error.

Governing Authorities

[22] The interpretation of a Will involving an extricable point of law is reviewable on a correctness standard. Where there are findings of fact underpinning the application of the law (i.e., mixed fact and law), those determinations are reviewable on the standard of palpable and overriding error (*Sinnott v. Sinnott Estate*, 2015 NLCA 41, at para. 13; *Zindler v. The Salvation Army et al.*, 2015 MBCA 33, at paras. 8-10; *Mawhinney v. Scobie*, 2019 ABCA 76, leave to appeal to SCC refused, 38609 (8 August 2019), at paras. 20, 68-71).

Correctness is the Standard of Review in this Case

[23] The Applications Judge based his conclusion on the language of the Will. In interpreting the Will, he made no factual findings pertaining to extrinsic circumstances. Consequently, whether the Removal Application triggered the No-Contest Clause, and if so, the legal test that applies to the enforcement of the No-Contest Clause, are extricable questions of law reviewable on the correctness standard.

[24] The Applications Judge, in paragraphs 13 through 24, outlined the background to the application and included a table describing the relevant history. Although the Applications Judge discussed the issue of the enforcement of the No-Contest Clause against this background (Decision, at para. 24), he made no factual findings pertaining to the Removal Application and based his determination solely on the wording of the Will.

[25] The Applications Judge interpreted “litigation in connection with any of the provisions of my Will” in the context of the wording of the No-Contest Clause and other provisions of the Will. He concluded that it was “self-evident” that the Removal Application was litigation in connection with a provision of the Will (Decision, at para. 35). The Applications Judge pointed to the extent of trust and authority that the Testator granted to Nina (Decision, at paras. 36-37). He stated the Removal Application was “more than a desultory act”, concluding that it went “to the root of the Estate and to the trust that John Franklin demonstrated in Nina Franklin when he named her as Executrix” (Decision, at para. 38).

[26] The Decision noted that:

[17] John Franklin left little doubt about the breadth of the discretion that Nina Franklin had in administering his Estate. That is evident throughout the many ancillary powers he conferred on her – to deal with young or incapacitated beneficiaries; to lease or dispose of property in the estate; to make investments; to institute and defend legal proceedings on behalf of the estate; to value, allocate and distribute estate assets in specie; to file income tax elections for the estate; to borrow money for the estate; to carry on businesses associated with the estate; and to act on environmental matters associated with the estate.

[18] To remove any doubt about the scope of Nina Franklin’s discretion, he added Clause 10, under the heading “Discretion of Trustee”:

No action shall lie against my Trustee to compel my Trustee to exercise my Trustee's discretion on any matter upon which I have herein directed that discretion may be exercised by my Trustee, nor shall any action lie against my Trustee in respect of any claim that any person may have against my Trustee by the reasonable exercise of that discretion.

[27] The Applications Judge did not interpret the Will “in the context of the surrounding circumstances” or make any factual findings regarding the Removal Application, which would require this Court to apply the standard of palpable and overriding error to the interpretation of the Will (*Sinnott*, at paras. 26-27; *Zindler*, at para. 10).

[28] The Applications Judge's determination was a conclusion of law without reliance on the factual matrix, therefore reviewable on a standard of correctness. Further, whether the Applications Judge applied the proper legal test to enforce the No-Contest Clause is a question of law mandating correctness review.

ISSUE 2: Did the Removal Application trigger the No-Contest Clause?

Governing Principles

[29] A clause appointing a personal representative to administer one's estate is a core provision of a Will.

[30] No-contest clauses affirm the principle of testamentary autonomy and are enforceable where they preserve judicial oversight and do not preclude applications for directions or interpretation during administration (*Mawhinney*, at para. 27; *Kent v. McKay*, 1982 CanLII 788 (BCSC), at para. 9). Such provisions serve legitimate objectives by discouraging wasteful adversarial disputes, while maintaining access to the court for necessary supervision.

[31] The No-Contest Clause here sets out the consequences for failure to meet the condition of the testamentary conditional gift. It expressly provides that any revoked benefit “shall fall into and form part of the residue of my Estate to be distributed as directed in this Will.” As such, the English law that developed around the non-enforcement of “*in terrorem*” clauses has no applicability here. An “*in terrorem*” clause – meaning “in fear” or “as a warning” – is one where the condition is a threat without any consequences. In contrast, a clause that has consequences is not a mere threat or *in terrorem* (*Mawhinney*, at para. 22; *Kent*, at para. 14).

Position of the Parties

[32] Gemma argues that the Removal Application dealt with Estate administration and did not challenge the Will or any of its dispositive provisions.

[33] Nina argues that the No-Contest Clause strikes the appropriate balance by permitting applications for interpretation and directions, while deterring adversarial litigation. She argues that the Applications Judge correctly concluded the No-Contest Clause was triggered, as it did not fall within the clause's exceptions.

The Removal Application Triggered the No-Contest Clause

[34] The No-Contest Clause does not stifle legitimate court oversight; it penalizes only elective adversarial litigation, which the Testator expressly sought to deter. The Removal Application did not fall within the No-Contest Clause's two exceptions.

[35] The No-Contest Clause specifically provided for "the direction of the court in the course of administration". Rather than seeking the removal of the Executrix, Gemma could have applied for directions regarding the Executrix's administration of the Estate.

[36] Earlier in the proceedings, Gemma had in fact applied for an accounting. The Supreme Court on May 4, 2022, ordered Nina to file an accounting (Decision, at para. 21).

[37] Gemma's position was that her Removal Application was regarding Estate administration and not a challenge to the Will. The Applications Judge described this position as "insincere and unpersuasive" and concluded that the Removal Application "challenges the Will fundamentally" (Decision, at para. 39).

[38] The Removal Application was not for directions in Estate administration. It was a challenge to the Testator's express intention to appoint Nina as the Executrix. The Applications Judge made no error in his determination that the Removal Application triggered the No-Contest Clause.

ISSUE 3: Did the Applications Judge err in enforcing the No-Contest Clause?

The Law

[39] A no-contest clause cannot insulate a personal representative of an Estate from removal for misconduct. Once appointed, a personal representative owes duties to the beneficiaries, and the court is the protector of the beneficiaries (*Scott v. Scott*, 2022 NLCA 61, leave to appeal to SCC refused, 40584 (11 January 2024), at para. 17).

[40] However, the removal of the Executrix challenges the Testator's choice of fiduciary, and it "is not something which is done lightly" (*Dicks v. Scott*, 2010 NLCA 35, leave to appeal to SCC refused, 33809 (23 December 2010), at para. 39). There must be good reason to interfere with a testator's choice.

[41] Section 123 of the *Judicature Act*, RSNL 1990, c. J-4, provides authority for the removal of an executor:

Upon the application of a person interested in the estate of a deceased person, the court may, by order, remove an executor or administrator upon the same grounds that the court may remove a trustee, and may appoint some other person to act in the place of the executor or administrator so removed.

[42] A superior court also has inherent jurisdiction to remove the personal representative of an estate (*McKay v. Howlett et al*, 2003 BCCA 555, at para. 17).

[43] As I will explain, the law is unsettled as to the legal test to be applied once the No-Contest Clause has been triggered. There is a need for this Court to provide clarity on the legal test required to give effect to a no-contest clause.

Position of the Parties

[44] Gemma submits that there is a long-established principle that a no-contest clause can disinherit a beneficiary for challenging the Will or one of its provisions, but not for taking steps in good faith to enforce their legal rights under the Will.

[45] Nina submits that Gemma's position would require that the Court introduce a good faith exception not found in the language of the Will. Nina argues that the No-

Contest Clause defines the circumstances in which recourse to the court is permitted, and that the Removal Application did not fall within those exceptions.

Review of the Jurisprudence and the Requisite Legal Test

[46] The common law has long recognized that no-contest clauses are enforceable by the court to disinherit a beneficiary in circumstances where the court finds the proceeding brought by the beneficiary to be frivolous and vexatious.

[47] In *Adams v. Adams*, [1892] 1 Ch. 369, 66 L.T. 98, the testator left his son with an annuity to be paid out of a farm, and his daughter, who was also a trustee, was given title to the farm. The Will had a no intermeddling or interference clause that stated if the son “should in any way intermeddle with or interfere in, or attempt to intermeddle with or interfere in, the management of the testator’s real and personal estate ... the said annuity should immediately cease” (*Adams*, at 237).

[48] The son sought an injunction to restrain the trustees from occupying the property. It was not proven that there was any danger of the property not being sufficient to pay the annuity. The son’s action was dismissed by the lower court as frivolous and vexatious and the court determined that the annuity ceased pursuant to the no intermeddling or interference clause.

[49] The Court of Appeal dismissed the son’s appeal and upheld the lower court decision as it “was in accordance with the authorities and with good sense” (*Adams*, at 237). In doing so, the court recognized that a no-contest clause did not prevent beneficiaries from bringing proceedings to vindicate their rights under the Will.

[50] The Court of Appeal stated, “if the [son] had had reason to complain of the trustees and had come to the Court to vindicate his rights, that would not be such an interference with the testator’s property as would produce a forfeiture, but that where there was no probable cause for the action that was an attempt to intermeddle with or interfere in the management of the testator’s estate within the proviso” (*Adams*, at 237).

[51] The Court of Appeal also recognized that the inclusion of a no-contest clause is consistent with a testator’s desire to avoid frivolous and vexatious litigation. The court held that: “The bringing of a frivolous and vexatious action was precisely one of the things contemplated by the testator. He had given the bulk of his property to

his daughter, and he thought that his son might be troublesome, and that was why he inserted this proviso in his will” (*Adams*, at 237).

[52] *Re Williams*, [1912] 1 Ch. 399, 106 L.T. 584 involved a no-contest clause that did not attempt to forfeit a beneficiary’s share altogether. Instead, the no-contest clause held that the costs of any action would be deducted from the beneficiary’s gift. The court refused to enforce this clause, holding that the no-contest clause could not oust the jurisdiction of the court to deal with costs of the proceedings.

[53] The court did not rest judgment on that ground alone. The court held the no-contest clause did not apply to an action for administration by the beneficiaries against the estate’s personal representative and trustee “on the footing of willful default”, citing *Adams* for the proposition “that such a clause does not apply where there is *probabilis causa litigandi*” (*Re Williams*, at 403). *Probabilis causa litigandi* means “a probable cause of action” (Bryan A Garner, ed, *Black’s Law Dictionary*, 9th ed (St. Paul, MN: Thomson Reuters, 2009), at 1321).

[54] Gemma submits that the court in *Re Williams* refused to enforce the no-contest clause, “where the action was taken in good faith and on probable grounds” (Appellant’s Factum, at para. 20).

[55] The phrase “good faith” is not used by the court in *Re Williams*. The language of “good faith and for ‘probable cause’” comes out of United States authorities, such as those cited by the article of Peter G Lawson, “The Rule Against ‘In Terrorem’ Conditions: What Is It? Where Did It Come From? Do We Really Need It?” (2005) 25 Est Tr & Pensions J 71, at 81-84, discussed in *Mawhinney* at paragraphs 22-28. Lawson writes, at 80-81, that:

The rule adopted in most, if not all, American jurisdictions accepts, as its starting point, the enforceability of conditions which provide for the forfeiture of a legacy in the event that the legatee contests the will. This approach is justified on the twin grounds of effectuating testamentary intention and avoiding vexatious litigation. The presence or absence of a gift over has generally been viewed as irrelevant. ...

At the same time, an exception to this assumption of enforceability has been recognized. Where, in contesting the will, the beneficiary acts in good faith and for "probable cause" the condition providing for forfeiture will not be enforced.

(Footnotes removed).

[56] In *Mawhinney*, the Alberta Court of Appeal split regarding whether raising suspicious circumstances that could require proof in solemn form could trigger a no-contest clause. The Court of Appeal, at paragraph 52, issued a declaration that if Ms. Mawhinney were to apply to request the personal representatives to obtain formal proof of the Will, that would trigger the Will's no-contest clause. The majority chose to give effect to enforcement of the no-contest clause on a strict merits-based determination, i.e., Ms. Mawhinney's interest under the Will would be forfeited if her challenge failed.

[57] In dissent, O'Ferrall J.A. would have found that a beneficiary with concerns about a Will's validity can raise suspicious circumstances without triggering a no-contest clause, at paragraph 76:

What right could be more fundamental than the right to be satisfied that the testamentary instrument in question is indeed the last will and testament of the deceased. If because of a lack of testamentary capacity the document is not valid, then there is no operative no-contest clause.

[58] The present case does not concern a challenge to testamentary capacity. This Court expresses no opinion on the operation of no-contest clauses in the context of challenges to the validity of a Will with regards to testamentary capacity or other suspicious circumstances.

The Applications Judge Failed to Apply the Requisite Test

[59] Considering the jurisprudence and guiding principles, the Applications Judge was required to assess whether the Removal Application was frivolous and vexatious. The Applications Judge erred in enforcing the No-Contest Clause without making factual findings and applying the requisite test.

[60] In fairness to the Applications Judge, he may have resiled from making factual findings because the Removal Application was heard and dismissed by another judge by way of an Endorsement with reasons to follow. Meanwhile, the judge in the Removal Application was assessing the evidence on the applicable legal test for removal of the Executrix. He did not consider the evidence from the perspective of the legal threshold of a frivolous and vexatious proceeding.

[61] Enforcing the No-Contest Clause in the absence of factual findings would prohibit a beneficiary in any circumstance from applying to remove the Executrix. That interpretation would be contrary to a court's judicial supervisory role in

overseeing the administration of estates. A balance must be struck between the Testator's expressed intention to prohibit "any litigation in connection with any of the provisions of my Will" and a court's supervisory role in the Estate's administration.

Frivolous and Vexatious Test

[62] The proper balance is to adopt a test that avoids frivolous and vexatious litigation. The frivolous and vexatious test does not prohibit beneficiaries from bringing legitimate proceedings to vindicate their rights to inheritance provided for in Wills.

[63] Furthermore, this approach to the requisite test is consistent with the Testator's direction and intention. He directed his Executrix to transfer and distribute his property and assets according to the terms of his Will. In giving directions, he limited the Executrix's discretion as to whom was entitled to what. It rationally follows that the Testator was not intending to insulate his personal representative from proceedings in connection with a beneficiary seeking timely receipt of her entitlement under the Will.

[64] The appropriate test for assessing the legitimacy of the Removal Application is that the evidence in support of the application, or lack of evidence, must demonstrate that the application was not merely unsuccessful, but also that it amounts to a frivolous and vexatious proceeding.

[65] This Court considered the meaning of a "frivolous and vexatious" proceeding in *Oleynik v. Memorial University of Newfoundland*, 2024 NLCA 44, leave to appeal to SCC refused, 41632 (5 June 2025), and *Cabana v. Wells*, 2024 NLCA 4. A proceeding that has no arguable merit is considered "frivolous". A proceeding that involves "illegitimate use of court resources" or is intended "to harass, threaten or embarrass a party" is "vexatious". There is no closed list of factors that may be relevant in the context of a case when assessing whether it is frivolous and vexatious (*Oleynik*, at para. 61; *Cabana*, at paras. 18-20). In some cases, the judge may be able to render a decision based solely on the pleadings. This is not such a case.

[66] Accordingly, no judicial determination has been made on whether the Removal Application constituted a frivolous and vexatious proceeding. The Applications Judge erred in enforcing the No-Contest Clause without determining whether the Removal Application met the frivolous and vexatious test.

ISSUE 4: What is the Appropriate Remedy and Order for Costs?

Remedy

[67] The preferable approach would have been to hear both the Removal Application and the No-Contest Application together. That did not occur. Therefore, what is the appropriate remedial order?

[68] I would order the No-Contest Application be remitted for a new hearing. The new hearing is to determine whether the evidence establishes that the Removal Application was a frivolous and vexatious proceeding. If the Removal Application was not frivolous and vexatious, then the No-Contest Clause cannot be enforced on the basis of that application.

[69] It will be for the judge hearing the application to decide the procedure and evidence to be considered, and whether the principle of “judicial comity” applies to the findings of fact made by the judge in the Removal Application, “unless there are compelling reasons that justify departing” from those findings (*R. v. Sullivan*, 2022 SCC 19, [2022] 1 S.C.R. 460, at para. 24).

Costs

[70] The Applications Judge ordered Gemma to pay Column 3 costs to the Estate (Decision, at paras. 47, 50). That costs order is set aside.

[71] Because this is an uncompleted matter and the law was unsettled on the legal test to be applied, there is no order as to costs on the appeal.

CONCLUSION

[72] Reviewing the Decision on a standard of correctness, I would uphold the Applications Judge’s conclusion that the Removal Application triggered the No-Contest Clause. However, since the Applications Judge failed to make factual findings and to apply the frivolous and vexatious test, I would remit the matter to the Supreme Court for a rehearing.

DISPOSTION

[73] The appeal is allowed and the matter remitted to the Supreme Court for a rehearing in accordance with these reasons. The costs order below is set aside, and there is no order as to costs on the appeal.

G.L.C. Noel J.A.

I concur: _____
D.M. Boone C.J.N.L.

I concur: _____
W.H. Goodridge J.A.