Citation: Fraser v Mayers-Konyk, 2024 MBCA 9
Date: 20240115
Docket: AI23-30-09941

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Holly C. Beard
Mr. Justice Marc M. Monnin
Madam Justice Jennifer A. Pfuetzner

B E T W E E N :

	)	***D. J. Nelko*** *and*
GLENN FRASER	)	***E. M. Rempel***
	)	*for the Appellant*
(Applicant) Appellant	)	
	)	***S. D. Brown*** *and*
- and -	)	***D. A. G. Beynon***
	)	*for the Respondent*
MONECA TERESA MAYERS-KONYK, Executrix of THE ESTATE OF WALTER KONYK, deceased, and the said MONECA TERESA MAYERS-KONYK	)	*Appeal heard and decision pronounced:* ***January 15, 2024***
	)	
(Respondent) Respondent	)	*Written reasons:* ***January 29, 2024***

On appeal from *Estate of Walter Konyk*, 2022 MBKB 192 [*Konyk*]

PFUETZNER JA (for the Court):

[1] The applicant, Glenn Fraser (Fraser), appealed the dismissal of his application for a trial of issues regarding the validity of a will. He also appealed the application judge's award against him of solicitor and client costs for a portion of the proceedings.

[2] At the hearing of the appeal, we dismissed the appeal with brief reasons to follow. These are those reasons.

Background

[3] Fraser is a second cousin of Walter Konyk (the deceased), who died on February 14, 2018. The respondent, Moneca Teresa Mayers-Konyk (Mayers-Konyk), was married to the deceased for just over 20 years and was named as the sole executor and beneficiary of his will made in 2017 (the 2017 Will). In the event that Mayers-Konyk failed to survive the deceased, the 2017 Will provided for an alternate executor and contingent beneficiaries. Mayers-Konyk filed a Request for Probate of the 2017 Will with the Court two days after the deceased died. The Grant of Probate issued on March 2, 2018.

[4] Two prior wills of the deceased, made in 2002 and 2006, named Fraser as the executor and left the estate in a spousal trust for Mayers-Konyk with the residue divided on her death between Fraser and his sister. Fraser and his sister are not included in the list of contingent beneficiaries in the 2017 Will. Fraser claims that he was not aware of the existence of the 2017 Will until a few weeks after the deceased's death.

[5] Fraser brought an application under rr 14.05(1) and 75 of the *Court of King's Bench Rules*, Man Reg 553/88, seeking various reliefs—including an order under former r 75.03(1)(b) revoking the Grant of Probate and a declaration that there were suspicious circumstances surrounding the execution of the 2017 Will. The application also sought an order directing a trial of certain issues regarding the validity of the 2017 Will, including testamentary capacity, undue influence, knowledge and approval, and mistake.

[6] After the exchange of extensive affidavits and the cross-examination of various witnesses—including the deceased's physicians, accountant, investment advisor and the drafting solicitor—the application was heard by the application judge.

[7] Relying on r 38.09 and the test enunciated by this Court in *Janz v Janz*, 2016 MBCA 39 [*Janz*], and *Garwood v Garwood Estate*, 2007 MBCA 160, the application judge determined that there were no substantial disputes of fact before her and that a trial was not necessary. The application judge found that all available evidence had been produced and that, after taking a hard look at the evidence, Fraser's allegations were not made out. She concluded that "[t]he evidence falls far short of establishing that suspicious circumstances surrounded the making of the [2017 Will]" (*Konyk* at para 134). In addition, she wrote that "the allegation of undue influence on [Mayers-Konyk]'s part is wholly unsupported" (*ibid* at para 136). The application judge dismissed the application and awarded costs in favour of Mayers-Konyk.

[8] A hearing was held to determine the quantum of costs. In his written submissions on costs, Fraser conceded that Mayers-Konyk was entitled to an award of costs against him personally and that case law supported an award of elevated costs "for the later stages of the proceeding but only to a limited degree."

[9] After hearing argument, the application judge ordered elevated costs at double the tariff "from the point of preparing the response affidavits until the end of cross-examinations." She ordered solicitor and client costs against Fraser "from the close of cross-examination until the end of the proceedings."

Issues

[10] Fraser raised the following issues:

1. Did the application judge err in finding that certain hearsay evidence did not meet the reliability criterion for admission under the principled approach?

2. Did the application judge err in exercising her discretion under r 38.09 in finding that there were no substantial disputes of fact regarding the allegations of suspicious circumstances and undue influence that required a trial?

3. Did the application judge err in ordering costs against him on a solicitor and client basis?

Analysis

Exclusion of Hearsay

[11] Fraser submits that the application judge erred in her treatment of the hearsay evidence, which consisted of statements made to him by the deceased that he wished to introduce for the truth of their contents.

[12] Applying the test for the principled exception to the hearsay rule, the application judge found that the various pieces of hearsay evidence did not meet that test as they were, at best, of questionable reliability (see *Fawley v Moslenko,* 2017 MBCA 47 at para 94). In many cases, she found the proposed evidence to be either completely uncorroborated or demonstrably untrue in light of other evidence.

[13] In our view, the application judge made no error that would invite appellate intervention.

Rule 38.09 Ruling

[14] Fraser acknowledges that the application judge's decision under r 38.09 not to order a trial of issues is discretionary (see *Janz* at paras 26-27) and he concedes that the application judge referred to the correct legal test. However, he argues that she erred by making impermissible credibility findings and effectively treating the proceeding as a motion for summary judgment.

[15] Fraser asserts that four substantial disputes of fact should have been sent to a trial: whether Mayers-Konyk was interested in investing, whether the deceased was friends with the contingent beneficiaries, whether Fraser and the deceased had a close relationship, and whether the deceased and Mayers-Konyk had an unhappy marriage.

[16] The application judge carefully reviewed all of the evidence related to these issues and she did not find any substantial disputes of fact. In our view, she made no reversible error.

[17] Moreover, it strikes us that these alleged disputed facts are of little significance to Fraser's primary theory of the case—that Mayers-Konyk procured the 2017 Will by exercising undue influence over the deceased—in light of the overwhelming evidence to the contrary. As stated by the application judge: "There is not a shred of evidence that [Mayers-Konyk] had coerced [the deceased] to make these changes" (*Konyk* at para 89).

[18] We repeat what this Court said in *Eckert v Cork-Eckert*, 2018 MBCA 105 at para 3:

> Before disposing of an application by directing a trial or trial of a particular issue or issues [citation omitted] an application judge must be satisfied that a factual dispute necessary to decide the application is substantial and that the nature of the dispute, and the respective strength of the evidence each side puts forward, is such that the dispute cannot be fairly resolved with confidence without the formalities of a trial. . . .
>
> [emphasis added]

[19] As noted in *Janz*, the court must weigh and assess the evidence to a certain extent in order "[t]o give full meaning to the principle of proportionality" (at para 49) so that minor disputes of fact are not directed for trial.

[20] In our view, the application judge did not misdirect herself nor was her decision to dismiss the application so clearly wrong as to amount to an injustice.

Solicitor and Client Costs

[21] Fraser also appeals the award of solicitor and clients costs. He asserts that his application was advanced in good faith and was not frivolous and that he conducted the proceedings reasonably. Although he acknowledges that "[a] judge's decision on costs is discretionary and will rarely be disrupted by an appellate court", he argues that this is not one of the rare and exceptional cases warranting costs on a solicitor and client basis.

[22] However, the application judge concluded otherwise. She found that Fraser's request "to order a trial was unreasonable" given the "vast amount" of evidence that had been gathered. Moreover, she found that "some of what went on" at the hearing "was bordering on vexatious" and "worthy of disapproval." She also found that the allegations of undue influence against Mayers-Konyk "went beyond reasonable", were "without any factual underpinnings" and were "offensive."

[23] The application judge was also critical of Fraser's counsel for what she perceived to be his shifting position at the hearing of the application as to whether he was indeed seeking a trial. After having carefully reviewed the transcript, we do not endorse her view that Fraser's counsel clearly changed his position over the course of the hearing. Nor do we share the application judge's view that, even if he did so, it resulted in "an egregious misuse of court time."

[24] Having said that, there is certainly jurisprudence supporting an award of solicitor and client costs against a party making a wholly unsubstantiated allegation of undue influence (see *Weiss Estate v Weiss*, 2022 MBQB 55 at para 3; *Re West (Estate of)*, 2003 ABQB 205 at paras 21, 24-25; *Marshall Estate, Re*, 1998 CarswellOnt 337 at para 45, [1998] OJ No 258 (Ct J (GD)).

[25] As previously indicated, Fraser persisted with his claim of undue influence as the primary theory of his case—even at the hearing of the appeal. We agree with the application judge that an allegation of undue influence, while perhaps common-place in estate litigation, is a serious one and should not be maintained in the face of overwhelming evidence to the contrary. The

application judge made no palpable and overriding error in her finding regarding the overwhelming nature of the evidence.

[26] In all of the circumstances, we were not persuaded that the application judge made an error in principle or that the award of solicitor and client costs was plainly wrong (see *Hamilton v Open Window Bakery Ltd*, 2004 SCC 9 at para 27).

Conclusion

[27] For these reasons, we dismissed the appeal with costs.

Pfuetzner JA

Beard JA

Monnin JA