Citation: Henderson Estate (Re), 2024 MBCA 95
Date: 20241128
Docket: AI23-30-10020

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Jennifer A. Pfuetzner
Madam Justice Lori T. Spivak
Mr. Justice David J. Kroft

B E T W E E N:

GEORGE (YOGI) MILLER HENDERSON	)	
	)	
(Applicant) Appellant	)	
	)	***I. B. Scarth***
- and -	)	*for the Appellant*
	)	
ALEX DANNY HENDERSON in his capacity as attorney for GEORGE MILLER HENDERSON, HELEN DELORES COUGHLIN in her capacity as attorney for GEORGE MILLER HENDERSON and HELEN DELORES COUGHLIN in her capacity as the named Executrix of the Estate of GEORGE MILLER HENDERSON	)	***J. Paterson***
	)	*for the Respondents*
	)	
	)	*Appeal heard:*
	)	***May 28, 2024***
	)	
	)	*Judgment delivered:*
	)	***November 28, 2024***
	)	
	)	
(Respondents) Respondents	)	

SPIVAK JA

[1] This appeal arises out of a dispute concerning the financial and testamentary affairs of George Miller Henderson (George), who died on December 4, 2017. The applicant (Yogi) is George's son. The respondent, Helen Delores Coughlin (Helen), is George's daughter, who is the sole executor of his estate and acted as an attorney under a power of attorney with

George's brother, the respondent, Alex Danny Henderson (Danny), prior to George's death (collectively, the respondents).

[2] There is no dispute regarding the disposition of George's estate. Rather, Yogi appeals the application judge's decision dismissing his application for an accounting in respect of Helen and Danny's management of George's finances and for the removal of Helen as executor. Yogi argues that the application judge made factual and legal errors in denying his request for an accounting, and in concluding that a codicil dated December 15, 2011 (the December 2011 codicil) that removed Yogi as a co-executor with Helen, was valid and that the circumstances did not justify Helen's removal. Yogi also contends that the application judge erred in awarding costs against him in the amount of $30,000.

[3] For the following reasons, I would dismiss this appeal.

Background

[4] George executed a Will on October 14, 1982. His wife, Lina Delores Henderson (Lina), executed a mirror Will that same day (the 1982 Wills). The distribution plan under the 1982 Wills was that, if there was no surviving spouse, the residue was to be divided equally amongst their three children or, if one of them died, their issue. The three children at the time were Yogi, Helen and Heather. George's 1982 Will named Lina as executor and Helen and Heather as alternate co-executors of his estate. Heather subsequently died in 2007. She is survived by three children, Kyle, Kelsey and Tory Cardinal.

[5] On January 11, 2010, George and Lina both signed a joint codicil to the 1982 Wills appointing Yogi as an alternate co-executor with Helen in light of Heather's death. The codicil was in Lina's handwriting and witnessed by one person (the handwritten codicil). On July 27, 2011, George and Lina met with a lawyer, Kelly Land (Mr. Land), and each executed a codicil to the 1982 Wills (the July 2011 codicils), having advised him that they wished to change the executors named therein as Heather had passed away. The July 2011 codicils contained drafting errors, as paragraph 1 referred to a wish to change beneficiaries under clause 4 of the 1982 Wills, and paragraph 2 referred to changing the executors to Yogi and Helen. Also on July 27, 2011, George executed a power of attorney that named Lina as his attorney and Helen and Doreen Martin as alternate attorneys (the 2011 POA). The 2011 POA gave Yogi the right to an accounting.

[6] On August 11, 2011, Lina drafted a handwritten document that she and George signed (the handwritten document). It stated:

> Whether I <Lina> or Dad <George> survive each other first, there will not be any removal or add on of any kind to the Original Will. Format remains the same.
>
> No future husbands, wives, partners, etc. to become part of the estate.
>
> We both Honour this in a mutual agreement.
>
> [emphasis in original]

[7] Lina passed away on November 14, 2011. Thereafter, on December 15, 2011, George advised Mr. Land that he wanted to remove Yogi as co-executor of his estate and substitute Danny as co-executor with Helen

since he was having difficulties with Yogi and did not believe he would work well with Helen. Mr. Land prepared the December 2011 codicil but it contained similar drafting errors to the July 2011 codicils, as it also referred to changing beneficiaries in paragraph 1 and then mentioned changing the executors to Danny and Helen in paragraph 2. Mr. Land had no concerns with respect to George's mental capacity at the time.

[8] On January 2, 2013, on George's instruction, Mr. Land prepared another power of attorney, which George executed, that named Danny as primary attorney, Helen as the alternate and George's sister, Joyce Brooks, as the person entitled to an accounting. On March 27, 2013, the January 2013 power of attorney was amended to name Helen as co-attorney rather than an alternate. I will refer to these two powers of attorney collectively as the 2013 POA.

[9] Following Lina's passing in 2011, George continued to live independently in their family home on Roseberry Street (the Roseberry home). In 2012, George began receiving home-care assistance and, over the course of 2013, he began to display some physical limitations and forgetfulness. In August 2013, following input from George's medical team, Danny and Helen moved George to an assisted-living facility. According to Danny, he thereafter began managing George's finances as one of his attorneys and coordinated the sale of the Roseberry home.

[10] In 2015, Yogi requested an accounting from Danny, which was declined. Following George's death in December 2017, given Yogi's challenge to his appointment as co-executor, Danny renounced his executor role and Helen submitted a request for probate in August 2020 as sole

executor. As well, in May 2021, Danny provided Yogi with an accounting dating back to January 2014 in respect of his management as George's attorney.

[11] Unsatisfied with the adequacy of the accounting and the appointment of Helen as executor, Yogi brought his application for a more detailed and comprehensive accounting from 2011 and for Helen's removal.

The Application Judge's Decision

[12] The application judge dismissed Yogi's application for an accounting, finding that he did not have the right to demand one under the 2013 POA and declining a discretionary accounting pursuant to *The Powers of Attorney Act*, CCSM c P97, s 24 [the *Act*]. The application judge found that George was mentally competent in 2011 and 2013. He further determined that Yogi had not presented any compelling evidence giving rise to serious concerns about Helen and Danny's financial management. He also considered that it was neither proportional nor fair to grant the accounting request given the insufficient proof of wrongdoing, the work that an accounting would involve and the gross value of the estate, which was less than $500,000.

[13] As for the request that Helen be removed as executor, the application judge rejected Yogi's claim that the December 2011 codicil was invalid because of the drafting errors. In his view, these mistakes admitted to by Mr. Land "overwhelmingly [pointed] to the clear intention of [George] to remove Yogi as an executor in the December 2011 codicil and not to change the distribution scheme in the Will." Given the validity of the December 2011 codicil, the application judge indicated that he did not have to delve into the validity of the handwritten codicil, stating that "[t]he law does not permit

someone to prepare a holograph will or codicil on behalf of someone else." The application judge went on to consider whether it was appropriate nonetheless to remove Helen as executor because of the intensity of the conflict with Yogi. He declined to do so, noting the high cost of a third-party administrator for a relatively small estate and that the estate was not particularly complex.

[14] The application judge awarded costs of $49,081.33 to Helen and Danny to be paid from the estate. Of this amount, the sum of $30,000 was awarded against Yogi consisting of tariff costs of $12,500 and additional costs of $17,500. The remaining solicitor and client costs were to be divided equally between Helen ($9,540.67) and Heather's three children ($3,180.22 each). The application judge admitted the 1982 Will and the December 2011 codicil to probate.

Issues on Appeal

[15] Yogi essentially raises three issues on appeal:

1. Did the application judge err in refusing Yogi's request for an accounting from 2011?

2. Did the application judge err in failing to remove Helen as executor of George's estate?

3. Did the application judge err in awarding $30,000 in costs against Yogi?

Analysis and Decision

Did the Application Judge Err in Refusing Yogi's Request for an Accounting From 2011?

The Relevant Legislation and Standard of Review

[16] The standard of care for an attorney is set out in section 19(2) of the *Act*. It requires that an attorney acting without compensation "exercise the judgment and care that a person of prudence, discretion and intelligence would exercise in the conduct of his or her own affairs."

[17] As for the right to an accounting, section 22(1)(a) of the *Act* provides that only the person named as a recipient of an accounting by the donor may make such a demand. However, pursuant to sections 24(1)(e) and 24(2) of the *Act*, an accounting may be ordered upon application by the nearest relative or, with the approval of the court, an interested party.

[18] Since Yogi was not entitled to demand an accounting under the 2013 POA, he sought a discretionary order requiring Danny and Helen to pass their accounts under section 24(1)(e) of the *Act*.

[19] In *Robertson v Harding*, 2018 MBCA 67 [*Robertson*], this Court considered the Court's authority to order an accounting pursuant to section 24(1)(e) of the *Act*. The decision to order an accounting is discretionary and requires careful consideration of all of the circumstances (see *Robertson* at para 42). Mental incompetence is not a requirement for an order under this section (see *ibid* at para 40) and "an accounting should not be ordered in the absence of compelling evidence giving rise to serious concerns"

(*ibid* at para 42). A donor's privacy rights should be respected (see *ibid* at para 44). Circumstances that the Court should consider include (*ibid* at para 46):

> a) the donor's health and vulnerability and whether there is evidence that the donor has been physically or mentally abused;
>
> b) the extent of the attorney's involvement in the donor's financial affairs;
>
> c) whether the applicant has raised a significant concern in respect of the management of the donor's affairs; and
>
> d) whether there are or may be limitations of actions concerns.
>
> [citations omitted]

[20] As the application judge's denial of an accounting was a discretionary decision, it is reviewable on a deferential standard. It will only be set aside if there is material error as to the law or the facts, or if the decision is so clearly wrong as to be unjust (see *Re Parkinson Estate*, 2024 MBCA 52 at para 77 [*Parkinson*]).

Yogi's Position

[21] Yogi submits that the application judge erred in failing to order an accounting by determining that George was mentally competent in 2011 and had the necessary mental capacity to give instructions in 2013, in finding that there were no serious concerns sufficient to justify an accounting, and by considering that the principle of proportionality and fairness did not justify such an order. I will deal with each of these arguments in turn.

George's Mental Capacity

[22] Yogi contends that George was suffering from incapacity since around the time of Lina's death in November 2011 and would not have had the mental capacity to understand the nature and effect of the 2013 POA. He asserts that the application judge erred by finding that George was mentally competent at the time of the December 2011 codicil and the 2013 POA. Yogi does not directly challenge the validity of the 2013 POA as, in light of George's death, he concedes it is "a moot point." Rather, Yogi argues that, given George's incapacity since November 2011, an accounting should have been ordered from that time.

[23] In *Drewniak v Smith*, 2024 MBCA 86 [*Drewniak*], a decision just released, this Court explained the nature of the capacity required to grant a power of attorney and how the legal framework developed for proving a Will has been extended to apply to powers of attorney. The common law rule that an adult is presumed to have mental capacity includes the granting of a power of attorney (see *ibid* at para 17; see also *Lewis v Lewis*, 2019 ONCA 690 at para 3). Section 10(3) of the *Act* sets out the capacity required to grant an enduring power of attorney and provides that "[a]n enduring power of attorney is void if at the time of its execution the donor is mentally incapable of understanding the nature and effect of the document." A donor must understand that the document will allow the attorney to manage their finances, give various powers, continue after incapacity and become irrevocable upon incompetence. Also of note, the capacity to execute a power of attorney is generally considered to be lower than that necessary to execute a Will (see *Drewniak* at para 40; *Dubois v Wilcosh*, 2007 MBQB 20 at paras 16-17). I will say more about the applicability of the doctrine of suspicious

circumstances to powers of attorney shortly when I specifically address Yogi's position that the application judge erred in law in this regard.

[24] For the sake of completeness, I add that, for testamentary capacity to exist, as noted in *Re Chrustie*, 2015 MBQB 25 at para 35 [*Chrustie*],

> a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties.

See also *Slobodianik v Podlasiewicz*, 2003 MBCA 74 at para 27; *Banks v Goodfellow* (1869-1870), 5 QB 549 at 565, [1870] UKLawRpKQB 74 (CommonLII) (QB UK).

[25] The application judge's determination of George's mental capacity is a question of mixed fact and law and is entitled to deference absent palpable and overriding error.

[26] I am not persuaded that any such error occurred.

[27] The application judge assessed the evidence related to George's mental capacity from the time he executed the December 2011 codicil until the execution of the 2013 POA. He considered that, as of 2011, George was living independently in the Roseberry home and driving his own vehicle. As he was entitled to do, he placed considerable weight on the observations of Mr. Land, an independent party and solicitor who had no concerns about George's mental capacity at the time of the December 2011 codicil. Mr. Land noted that George was managing well and provided a coherent explanation as

to the changes he was requesting. Similarly, the application judge had before him Mr. Land's memo regarding his interactions with George in March 2013. In that memo, Mr. Land stated that he had no issues in regard to George's competency: he knew what he owned, he knew who the beneficiaries were and he understood the powers he was giving Danny to manage his affairs if he could not do it himself. The application judge also had before him evidence that George was still living at the Roseberry home and managing his finances at that time.

[28] Yogi argues that Mr. Land's evidence is speculative and highlights that his notes regarding the 2013 POA were not contemporaneous but created in October 2013. He also points to the fact that, by January 2014, Danny acknowledged he was managing George's financial affairs. However, it is not this Court's role to re-weigh or reassess the evidence. It was open to the application judge to assess George's mental capacity as he did based on the evidentiary record before him. As I have already stated, he made no palpable and overriding error in doing so.

[29] Yogi also submits that the application judge erred in law in concluding that the doctrine of suspicious circumstances did not apply to the determination of capacity to grant a power of attorney. The doctrine of suspicious circumstances arose in the context of the specific requirements for proof of a Will. It is fully explained in *Drewniak*. For the purposes of this decision, suffice it to say that "[t]he propounder of a Will has the persuasive legal burden to prove due execution, knowledge and approval and testamentary capacity" (*ibid* at para 28). This is typically discharged by evidence that the Will was read over and understood by the testator and executed with the requisite legal formalities. When this is established,

capacity, knowledge and approval are presumed. Where a person attacking the validity of a Will meets the evidential burden of pointing to suspicious circumstances, the propounder can no longer rely on the presumption arising from due execution to meet their persuasive legal burden and must lead sufficient evidence to prove due execution, capacity and knowledge and approval on a balance of probabilities (see *Drewniak* at paras 28-30; *McLeod Estate v Cole*, 2022 MBCA 73 at paras 12-20).

[30] In addressing Yogi's claim that George's lack of mental capacity entitled him to an accounting from 2011, the application judge stated that the doctrine of suspicious circumstances only applies when a person is making a Will, thereby concluding that it was inapplicable to powers of attorney. As confirmed in *Drewniak*, this is incorrect. In *Drewniak*, it noted with approval that, in Manitoba, the legal framework developed for proving a Will has extended to powers of attorney (see para 37; see also *Young v Paillé*, 2012 MBQB 3 at paras 33-34). Like challenges to the validity of Wills, if the person attacking the validity of a power of attorney is able to point to evidence of suspicious circumstances regarding the capacity of the donor to grant the power of attorney, the evidentiary presumption arising from due execution is spent and the party seeking to uphold the power of attorney would be required to lead evidence sufficient to prove capacity on a balance of probabilities (see *Drewniak* at para 39). All that said, the application judge's erroneous statement of the law had no impact on his decision. It is apparent that he found no suspicious circumstances relevant to George's capacity to execute the 2013 POA and he made no error in this finding. So, while it may have been an error to conclude that the doctrine of suspicious circumstances did not apply to

powers of attorney, this error was not overriding as it did not affect the outcome.

[31] Finally, relevant to this issue, Yogi argues that the application judge erroneously assumed that he conceded that George had mental capacity to execute the December 2011 codicil and the 2013 POA and improperly relied on this concession in exercising his discretion. To begin with, the application judge understood that George's mental state was in issue in this application and he undertook his own assessment of the relevant evidence and had no concerns. His comments to the effect that Yogi did not challenge George's mental capacity to execute the December 2011 codicil and 2013 POA have to be understood in the context of Yogi's argument before him. As I earlier noted, Yogi did not directly challenge the validity of the 2013 POA. Further, as I will explain shortly, Yogi did not directly assert that George lacked capacity to execute the December 2011 codicil. Rather, Yogi argued that evidence of George's incapacity from 2011 supported his request for an accounting that reached back that far.

Whether Danny and Helen Breached Their Duties as Attorneys for George

[32] Yogi contends that the application judge erred in concluding that none of the alleged breaches of duty attributed to Helen and Danny raised serious concerns sufficient to justify an accounting pursuant to section 24 of the *Act*. He argues that Helen and Danny breached their duties as attorneys by failing to act in George's best interests in selling the Roseberry home, purchasing unauthorized gifts and emptying the Roseberry home of personal possessions without an inventory.

[33] The application judge properly recognized that the standard of care for persons acting as attorneys is as set out in section 19(2) of the *Act*, as previously referenced. He acknowledged the principles set out in *Robertson* that governed the exercise of his discretion as to whether to order an accounting under section 24(1)(e) of the *Act*.

[34] The application judge considered the allegations advanced by Yogi with reference to the evidence. He was satisfied that the sale of the Roseberry home was based on medical advice that George could no longer safely live alone and needed to reside in an assisted-living facility. He further found that there was no evidence to suggest that there was a failure to obtain the best possible price from a willing buyer on the open market.

[35] As for the allegations of improper gifting, Yogi references a gift of $125 given as a token of appreciation to an individual who assisted in caring for George, and points to the absence of any gifting clause in the 2013 POA. I see no error in the application judge's characterization of this gift as a trivial complaint that does not amount to a breach of the standard of care supporting an accounting.

[36] Similarly, the application judge was entitled to conclude, on the record, that Yogi's complaint as to the distribution of George's household effects had no merit since the items had no monetary value and Yogi was offered a chance to claim any of them.

[37] After careful scrutiny, the application judge found that none of the alleged breaches of duty attributed to Helen and Danny by Yogi were significant or raised serious concerns. As no palpable and overriding error has been demonstrated, his findings are entitled to deference.

The Application Judge's Consideration of the Principle of Proportionality

[38] Yogi argues that the application judge erred by determining that the principle of proportionality did not justify an accounting given that the gross value of the estate was less than $500,000. In my view, the application judge did not err in his consideration of this principle. The jurisprudence has recognized the importance of drawing on the policy concerns and the cultural change promulgated by the Supreme Court of Canada in *Hryniak v Mauldin*, 2014 SCC 7, "in estate cases that are at risk of depletion by needless and expensive litigation" (*Johnson v Johnson*, 2022 ONCA 682 at para 18). Courts are required to "be mindful of the goals of the civil justice system . . . to achieve fair and just outcomes through processes that are efficient, affordable, and especially proportional in light of the facts and circumstances of each case" (*Seepa v Seepa*, 2017 ONSC 5368 at para 49).

[39] Here, the application judge's consideration of the principle of proportionality was informed by his factual findings, to which deference is owed absent palpable and overriding error. Prior to noting the value of the estate, he understandably stated, "in considering the [principle] of proportionality and fairness, there [was] simply insufficient proof of wrongdoing that could justify the kind of expense that a reference to an Associate Judge going back to a date over ten years ago would entail." Moreover, as he also noted, this was particularly so in the context of a voluntary accounting from January 2014 having already been provided.

[40] Overall, there is no basis to interfere with the application judge's denial of Yogi's request for an accounting from 2011. As discussed above,

the evidentiary record supported his findings. Furthermore, and fundamentally important to the application judge, was that Danny only began managing George's finances in August 2013 and Danny and Helen voluntarily provided Yogi with an accounting dating back to January 2014. There are no errors in principle that underlie the exercise of the application judge's discretion and his decision is not so clearly wrong as to be unjust.

Did the Application Judge Err in Failing to Remove Helen as Executor?

Rectification and the Validity of the December 2011 Codicil

Rectification—The Legal Principles

[41] It is the Court's duty to give effect if it can to the wishes of a testator (see *Chrustie* at para 58). Rectification is primarily concerned with ensuring that all of the words used in a Will were known and approved by the testator.

[42] As explained in James MacKenzie, *Feeney's Canadian Law of Wills*, 4th ed (Toronto: LexisNexis, 2000) (loose-leaf updated 2020, release 88-8), c 3 at s 3.28:

> The application for rectification is usually based on the ground that, by some slip of the draftsperson's pen or by clerical error, the wrong words were inserted in the will; the mistake may be latent in the letters of instruction or other documents. Yet, when the mistake is that of a draftsperson who inserts words that do not conform with the instructions he or she received, then, provided it can be demonstrated that the testator did not approve of those words, the court will receive evidence of the instructions (and the mistake) and *the offending words may be struck out*.
>
> [emphasis added]

[43] As alluded to in MacKenzie, on an application for rectification, a probate court can admit extrinsic evidence, including direct evidence of a testator's intention, in determining whether the document truly reflects the Will of the testator (see also *Ali Estate (Re)*, 2011 BCSC 537 at para 24 [*Ali Estate*]). On a rectification application, a probate court has the power to delete the words from a Will that were mistakenly included. The rectified Will is then admitted to probate.

Standard of Review

[44] The standard of review applicable to a rectification decision depends on the issue. The identification of the applicable legal principles is reviewed for correctness. Findings of fact are reviewed on the standard of palpable and overriding error. A finding that a Will should be rectified is a discretionary decision subject to a deferential standard of review.

Yogi's Position

[45] Yogi asserts that the application judge made palpable and overriding errors in determining that the December 2011 codicil was valid and reflected George's clear testamentary intentions. He argues that, given the evidence of George's incapacity in 2011, the handwritten codicil and handwritten document, and the substantive drafting errors in the December 2011 codicil, it should not have been rectified and admitted into probate. Yogi submits that, as the December 2011 codicil was a nullity, the handwritten codicil properly reflects George's intentions and should be admitted to probate pursuant to the Court's power to dispense with the formal requirements for execution of testamentary documents under *The Wills Act*, CCSM c W150, s 23.

There Is No Basis for Intervening With the Application Judge's Determination of the Validity of the December 2011 Codicil

[46] As for George's mental capacity and the issue of rectification, counsel for Yogi fairly acknowledged that, in terms of capacity, the threshold is lower for a testator executing a codicil changing executors as opposed to changing beneficiaries. In fact, Yogi does not submit that the evidence proves that George lacked the capacity to execute the December 2011 codicil. Instead, he argues that the evidence of some incapacity and limited understanding on George's part militates against the rectification of this codicil and suggests it did not represent his clear intention. However, I have already indicated that I see no reviewable error in the application judge's finding that George was clearly mentally competent at the time of the execution of the December 2011 codicil. Yogi is essentially asking this Court to re-weigh the evidence and reach a different conclusion about George's level of understanding, which is not its role.

[47] Yogi further argues that the application judge erred in relying on Mr. Land's testimony that it was George's intention to change executors at the time of the execution of the December 2011 codicil, as Mr. Land failed to bring to George's attention the prior handwritten codicil that appointed Yogi as co-executor and the handwritten document wherein George and Lina agreed that there would be no removal or additions to their original Wills. Yogi does not assert that the handwritten document was a binding mutual Wills agreement, but argues that the handwritten document and the handwritten codicil reflect George and Lina's continued testamentary intention to include their children, i.e., Helen and Yogi, as executors of their estate.

[48] In my view, this is another invitation for this Court to reassess the evidence and come to a different determination than the application judge. In determining which of the documents submitted for probate were George's valid testamentary documents, the application judge was exercising the Court's probate jurisdiction. The application judge properly acknowledged that "[a] will or codicil should not be invalidated by an error in its drafting, so long as the intentions of the testator are clear. It is inappropriate to defeat a testator's intention due to a mistake by the drafting solicitor." Mindful of the applicable law, he also quoted the excerpt from MacKenzie concerning rectification that I earlier cited. He noted that the December 2011 codicil, which references a change in the designation of beneficiaries in paragraph 1, appoints Danny and Helen as executors, but then ratifies the 1982 Will in paragraph 3. He considered Mr. Land's testimony that paragraph 1 was in error and that George's instructions were to change executors and not beneficiaries. A purposive reading of the application judge's endorsement shows that he found that the word beneficiaries and the reference to deleting paragraph 4 were included by Mr. Land in error and without George's knowledge and approval in paragraph 1 of both George's July 2011 codicil and December 2011 codicil and should be deleted. In essence, he found that George had intended to change his designation of executors and to delete paragraph 2 of the 1982 Will.

[49] According to Mr. Land, George specifically explained the rationale for replacing Yogi and his notes record that George had concerns about Yogi's behaviour after Lina's death and his ability to work with Helen. The application judge applied the correct law to the facts and determined that the evidence overwhelmingly supported the conclusion that George intended to

remove Yogi as an executor in the December 2011 codicil. I see no palpable and overriding error in his application of the test for rectification of a Will to the evidence.

[50] Lastly, Yogi argues that the application judge erred in law when he indicated he did not have to deal with the handwritten codicil and that "[t]he law does not permit someone to prepare a holograph will or codicil on behalf of someone else." Yogi points out that, although the handwritten codicil does not conform with the requirements of a holograph Will pursuant to section 6 of *The Wills Act*, or a duly executed Will under section 4 of *The Wills Act*, it can be saved by the Court's dispensation power pursuant to section 23. The application judge's statement that a holograph Will or codicil, as defined in *The Wills Act*, has to be in the testator's own handwriting is correct though, admittedly, he did not consider whether that document could have been admitted to probate pursuant to section 23 of *The Wills Act*. Nonetheless, this is of no consequence as it was unnecessary for him to consider whether to exercise his discretion to dispense with the formal requirements and to admit the handwritten codicil to probate given his determination that the later December 2011 codicil was valid.

[51] The application judge's conclusion that the December 2011 codicil was valid and should be admitted to probate does not warrant appellate intervention.

[52] That said, this does not end the matter. The application judge should have rectified and admitted the July 2011 codicil for probate in addition to the 1982 Will and the December 2011 codicil as part of the Court of King's Bench responsibility (stemming from its function as the probate court) regarding

validly executed testamentary documents (see *Drewniak* at para 23). The December 2011 codicil does not revoke the July 2011 codicil. Even though the July 2011 codicil, which appointed Yogi as co-executor, is superseded by the December 2011 codicil, which removed him, the July 2011 codicil is nonetheless a proper testamentary document. It is a document of testamentary intention by a person with testamentary capacity that was validly executed in accordance with the formalities required under *The Wills Act*. Moreover, the application judge should have noted the words of the July 2011 codicil and the December 2011 codicil that were to be deleted upon their admission to probate.

Notwithstanding the Validity of the December 2011 Codicil, Did the Application Judge Err by Failing to Remove Helen as Executor of the Estate?

[53] Yogi contends that, regardless of the validity of the December 2011 codicil, Helen should be removed as executor given the conflict between them. According to Yogi, this is not a workable relationship and there will always be suspicion cast upon Helen.

[54] The application judge addressed whether, given Danny's renunciation, it was appropriate for Helen to remain as executor. He indicated that he gave serious thought to removing Helen because of the intensity of her conflict with Yogi. He explained why he declined to do so, noting the relatively small estate, which was not particularly complex to administer as all the assets had been converted to cash.

[55] There is no dispute that deference is owed to the application judge's decision to decline to remove Helen as an executor.

[56] Pursuant to *The Trustee Act*, CCSM c T160, s 9(1), the Court may order the appointment of a new trustee where a personal representative is guilty of misconduct or refuses or is unfit to act. However, a court will not lightly remove an executor chosen by a testator except in the most compelling and clear cases (see *Bereskin Estate, Re*, 2014 MBCA 15 [*Bereskin*]). As noted in *Bereskin*, "an executor may be removed where the executor is in a conflict of interest, where the executor fails to put the interests of the trust and the beneficiaries first in his thinking, and ahead of any other interest, or where the attitude and conduct of the executor is 'purely obstructive'" (at para 13). So, too, even where there is no misconduct, an executor can be removed where the proper administration of the estate has become impossible or improbable (see *Bartel Estate, Re*, 2006 MBCA 139 at paras 22-24).

[57] The application judge did not find any misconduct on the part of Helen that necessitated her removal—he rejected any claim by Yogi in this regard. He was alive to the acrimony between the parties, but ultimately concluded that Helen's removal was not warranted in all the circumstances. It was certainly open to him to find that this was not one of the clearest of cases where the removal of an executor and interference with the testator's wishes should occur. The application judge made no reviewable error in so concluding.

Did the Application Judge Err in Awarding Costs of $30,000 Against Yogi?

[58] At the hearing before the application judge, Helen and Danny sought solicitor and client costs of $53,670.09, submitting that Yogi should be responsible for tariff costs in the amount of $14,120.06 with the balance of $39,550.03 payable from the estate. Yogi acknowledged that he should be

responsible for tariff costs, which he asserted were $11,400, but argued that Helen and Danny should only be entitled to a portion of the remaining solicitor and client costs from the estate given their conduct and delay in administering the estate and failing to communicate with Yogi.

[59] The application judge awarded to Helen and Danny the all-inclusive sum of $49,081.33 to be paid from the estate. In doing so, he denied the fees sought by Helen and Danny for Mr. Land in the amount of $4,240.81. He allocated the costs award as follows: the total sum of $30,000 was awarded against Yogi, being tariff costs of $12,500 and additional costs of $17,500. He ordered that the remaining solicitor and client costs were to be divided evenly between Helen ($9,540.67) and Heather's three children ($3,180.22 each).

[60] Yogi argues that the application judge erred by awarding the respondents substantial reimbursement from the estate and that the additional award of $17,500 against him was not reasonable or justified. Yogi stresses that his intention in bringing this application was bona fide and reasonable for the purposes of moving the administration of the estate forward.

[61] In *Parkinson*, this Court recently summarized the governing principles concerning costs in estate litigation. The modern approach to costs in estate litigation mirrors other forms of civil litigation. Unless there is a recognized public policy consideration that warrants the estate litigation, the normal civil litigation rules generally apply and costs typically follow the result (see *ibid* at para 99; see also *McAuley v Genaille*, 2017 MBCA 69 at para 83). This general rule as to costs in estate litigation interacts with the principle regarding indemnification of a trustee. Therefore, an executor

"acting within the scope of their duties is entitled to indemnification from the estate for all reasonable costs incurred in executing their duties, including reasonable legal fees on a solicitor and client basis" (*Parkinson* at para 100, quoting *Weiss Estate v Weiss*, 2022 MBQB 55 at para 3). As well, where a court awards costs on a partial indemnity basis against an unsuccessful party, it may be appropriate to order that the balance of the executor's reasonable costs be paid from the estate by way of "a blended costs order" (*Parkinson* at para 101, quoting *Sawdon Estate v Watch Tower Bible and Tract Society of Canada*, 2014 ONCA 101 at para 95).

[62] An award of costs is a discretionary decision that is entitled to deference. Appellate intervention is only justified if the judge made an error in principle or if the costs award is plainly wrong (see *Parkinson* at para 108; *Hamilton v Open Window Bakery Ltd*, 2004 SCC 9 at para 27).

[63] At the costs hearing before the application judge, Yogi advanced similar arguments to those made before this Court. Namely, given the respondents' conduct, the delay in administering the estate, the failure to communicate and the bona fides of this application, a full reimbursement of the respondents' costs was inappropriate. The application judge considered, but rejected, Yogi's position. Aside from the adjustment to the tariff costs and denial of Mr. Land's costs, he saw no basis to otherwise reduce the costs award because of misconduct or because they were unreasonable. He further determined that a blended costs award was most appropriate in the circumstances and delineated how it should be shared amongst the beneficiaries of the estate. He concluded that Yogi should bear half of the costs award beyond tariff costs, which, with tariff costs, totalled $30,000.

[64] It was within the application judge's discretion to award costs in the manner he chose and Yogi has not demonstrated any error in principle in making that decision. Furthermore, the costs award is not plainly wrong. The application judge's award is consistent with the principles outlined in the case law that an unsuccessful party to litigation should generally pay costs and that executors are entitled to indemnification for their reasonable legal fees from the estate. Bearing in mind that an award of costs "is a quintessentially discretionary decision that will not be lightly interfered with on appeal" (*Parkinson* at para 108), I would not accede to this ground of appeal.

Conclusion

[65] For these reasons, I would dismiss the appeal with the additional order that the July 2011 codicil also be admitted to probate. Both the July 2011 codicil and the December 2011 codicil shall be noted to have the words "designation of beneficiaries" and "4" deleted from paragraph 1.

[66] I would grant the respondents costs of the appeal in the same blended fashion as awarded by the application judge. That is to say, the respondents are to be granted tariff costs against Yogi with their remaining reasonable solicitor and client costs to be paid out of the estate apportioned as follows: one half to Yogi, one-quarter to Helen and one-quarter to be borne by the three Cardinal beneficiaries. If the amount of reasonable solicitor and client costs cannot be agreed upon, then the parties are to contact the registrar for further direction.

Spivak JA

I agree: Kroft JA

PFUETZNER JA (concurring):

[67] I agree with the reasons of my colleague and her proposed disposition of this appeal. In particular, I agree that the application judge did not err in his approach to the doctrine of rectification other than the minor issue of not specifying in his order which terms were to be deleted from the July and December 2011 codicils.

[68] While not necessary in order to dispose of this appeal and not raised or addressed by counsel, I am compelled to make the following *obiter* comments on recent jurisprudence of the Ontario Court of Appeal dealing with the rectification and construction of Wills—in particular, *Ihnatowych Estate v Ihnatowych*, 2024 ONCA 142 [*Ihnatowych Estate*] and *Rondel v Robinson Estate*, 2011 ONCA 493 [*Robinson Estate*].

[69] The effect of the decision in *Robinson Estate* is that direct extrinsic evidence of a testator's intention is not admissible at the probate stage in order to determine if the testator had actual knowledge and approval of the words used in the testamentary documents. *Robinson Estate* limited the allowable evidence to what would be admissible on an application to construe a Will—historically, a distinct process undertaken in a separate court with different legal rules (*ibid* at paras 18-20, 26-27). The Court, in *Ihnatowych Estate*, applied *Robinson Estate* and also referred to the equitable doctrine of rectification as being applicable to Wills (*Ihnatowych Estate* at paras 25, 38).

[70] In my view, *Robinson Estate* and *Ihnatowych Estate* do not reflect the law in Manitoba and caution should be exercised in relying on this line of Ontario cases. Manitoba law has not diverged from the traditional position,

illustrated in cases such as *Ali Estate*, which carefully avoids conflation of the procedure and concepts applicable to two distinct processes: rectification of a Will by a probate court and interpretation of a Will by a court of construction (see Manitoba Law Reform Commission, *Wills and Succession Legislation*, Report 108 (Winnipeg: Publications Branch, 2003) at 47-51, online: <manitobalawreform.ca/pubs/pdf/fullreports/108-full_report.pdf> [the MLRC Report]; see also generally Albert H Oosterhoff, "The Discrete Functions of Courts of Probate and Construction" in *Law Society of Upper Canada 19th Annual Estates and Trusts Summit* (3 November 2016)).

[71] Moreover, the equitable doctrine of rectification developed in the Court of Chancery and described in *Canada (Attorney General) v Fairmont Hotels Inc*, 2016 SCC 56, is distinct from the probate doctrine of rectification which arose independently in the probate courts. The equitable doctrine does not apply to Wills (see Oosterhoff at 3-29).

[72] In order to alleviate the problems caused by the conflation of these concepts, as well as their inherent limitations, serious consideration should be given to the statutory reforms discussed in the MLRC Report at 51-56.

Pfuetzner JA