

IN THE COURT OF APPEAL OF MANITOBA

Coram: Chief Justice Marianne Rivoalen
Mr. Justice Christopher J. Mainella
Madam Justice Jennifer A. Pfuetzner

BETWEEN:

GREGORY JOHN HENUSET

(Applicant/Respondent) Appellant

- and -

VIVIAN ALICE HENUSET

(Respondent/Applicant)

(by original action)

AND BETWEEN:

GREGORY JOHN HENUSET

(Applicant/Respondent) Appellant

- and -

***MICHELLE RENEE GERVIN and
STEPHEN BRENT HENUSET as Executors
of the Estate of VIVIAN ALICE HENUSET,
deceased***

(Respondents/Applicants) Respondents

(by order dated December 18, 2024)

J. Rock
for the Appellant

S. Nelko
for the Respondents

*Appeal heard and
Decision pronounced:
October 7, 2025*

*Written reasons:
October 17, 2025*

On appeal from *Henuset v Henuset*, 2024 MBKB 185 [*Henuset*]

PFUETZNER JA (for the Court):

[1] The appellant (Gregory) disputed the validity of a notice of intention to sever a joint tenancy (the notice) signed by his mother, Vivian Alice Henuset (Vivian).

[2] The application judge found that the notice was valid and dismissed Gregory's application. He appealed, arguing that the application judge made palpable and overriding errors in assessing the evidence of the lawyer who prepared the notice (the lawyer) and in finding that the notice was not procured by undue influence exercised over Vivian. Gregory does not assert that the application judge made any extricable errors of law.

[3] After hearing argument, we dismissed the appeal with reasons to follow. These are those reasons.

Background

[4] Prior to 2016, Vivian had made two Wills leaving a portion of her farmland (the farmland) to Gregory and providing him with an option to purchase the remaining portion from her estate. The residue of Vivian's estate was to be divided among her other five children in equal shares.

[5] In 2016, Vivian modified this plan by conveying the farmland to herself and Gregory as joint tenants with a right of survivorship (the land transfer). In 2017, she changed her Will to reflect that the farmland would not form part of her estate if Gregory survived her. The residue of her estate was again to be divided among her other five children in equal shares.

[6] By 2023, Vivian regretted this state of affairs. The farmland was more valuable than her other assets and she felt that the division of her estate would not be fair if Gregory received all of the farmland upon her death, while her other five children shared the remaining assets.

[7] With the help of her daughter, the respondent Michelle Gervin (Michelle), who lived near her and who regularly provided her with assistance, Vivian retained the lawyer to prepare and execute the notice together with a new Will. As a result of the notice and new Will, Gregory would receive half of the farmland (by virtue of his ownership of an undivided one-half interest as a tenant in common) and would be granted the option to purchase the other half interest from Vivian's estate. The residue of Vivian's estate was to be divided among her other five children in equal shares.

[8] Upon being served with the notice, Gregory retained counsel who filed a notice of application seeking to challenge the validity of the notice on the basis that Vivian lacked capacity to make the notice and/or that the notice was procured by Michelle exercising undue influence over Vivian.

[9] Affidavits were filed by Gregory, Vivian, Michelle, the lawyer and by a legal assistant in the office of Gregory's counsel. Michelle, Gregory and the lawyer were cross-examined on their affidavits.

[10] The application was heard on November 4, 2024 and judgment was delivered on December 13, 2024. On November 29, 2024, Vivian died. The proceedings were continued with Vivian's executors, Stephen Brent Henuset and Michelle, as respondents.

Application Judge's Reasons

[11] With the agreement of the parties, the application judge applied the law relating to testamentary capacity, knowledge and approval, and undue influence in determining the validity of the notice. He referred to the principles set out in *Vout v Hay*, 1995 CanLII 105 (SCC), *Drewniak v Smith*, 2024 MBCA 86 [*Drewniak*] and *McLeod Estate v Cole*, 2021 MBQB 24, aff'd 2022 MBCA 73, leave to appeal to SCC refused, 40457 (20 April 2023)—including the test for testamentary capacity described in *Banks v Goodfellow* (1869-1870), LR 5 QB 549, [1870] UKLawRpKQB 74 (CommonLII) (QBUK).

[12] The application judge found that Gregory had succeeded in identifying suspicious circumstances, as he had pointed “to some evidence which, if accepted, would establish that Vivian lacked capacity or lacked knowledge and approval of the notice’s contents” (*Henuset* at para 30) and that there was “evidence of circumstances tending to show undue influence” (*ibid* at para 34). He found that these circumstances included Vivian’s age at the time of the notice (ninety), as well as her vision and memory impairments; that Michelle was providing “day-to-day care” (*ibid* at para 32) for her; that the lawyer was new to Vivian and was brought to her home by Michelle; that Vivian’s behaviour indicated possible confusion and agitation; that “Vivian’s narrative of the circumstances surrounding the land transfer were inaccurate” (*ibid*); and that Michelle “had numerous discussions with Vivian about” the land transfer (*ibid* para 35).

[13] However, the application judge found that Vivian had led sufficient evidence to prove capacity and knowledge and approval of the notice on a

balance of probabilities (see *ibid* para 36). In finding that the notice was valid, the application judge relied on the evidence of Vivian and the lawyer, finding that the latter “took steps to assess Vivian’s capacity throughout the entirety of her retainer” (*ibid* at para 43). The lawyer met with Vivian alone in person twice and spoke with her on the phone three times regarding the notice and her new Will. The lawyer also read the notice to Vivian line by line to ensure that she understood it before signing. Similarly, the application judge found that Gregory failed to establish on a balance of probabilities that the notice was the product of undue influence by Michelle.

Analysis

[14] Gregory argues on the appeal that the application judge erred by “[g]iving inconsistent weight to the evidence” of the lawyer without clear reasons for doing so. He submits that the application judge should have cast a more critical eye on the reliability of the evidence of the lawyer in his assessment of whether Vivian had capacity as well as knowledge and approval of the notice.

[15] He also asserts that, if the application judge had not erred in finding that Vivian had sufficient “knowledge and capacity” to sign the notice, he “would most likely have arrived at a different conclusion with respect to undue influence.”

[16] None of these arguments are persuasive. They amount to a request that we re-weigh the evidence—which this Court will not do in the absence of palpable and overriding error (see *Housen v Nikolaisen*, 2002 SCC 33 at paras 3, 21-23).

[17] The application judge carefully reviewed all the evidence (including Vivian's unchallenged affidavit) relating to Vivian's capacity to make the notice, her knowledge and approval of the notice, and whether any undue influence had been applied to her. In our view, the application judge was entitled to weigh the evidence and make the findings that he did, all of which were amply supported by the record.

[18] A final comment. The question of whether the notice is truly testamentary in nature has not been raised as an issue and is, in the circumstances of this appeal, of no moment. Indeed, Gregory benefitted from the application judge's decision to proceed on the basis that Vivian bore the persuasive legal burden of proving the validity of the notice and that the law of suspicious circumstances (a probate doctrine) applied. Ultimately this was not enough to carry the day as the evidence demonstrated that Vivian had the requisite capacity as well as knowledge and approval of the contents of the notice.

[19] Similarly, the application judge gave Gregory the benefit of considering whether his conclusion would be any different applying the equitable doctrine of undue influence as an alternative to probate undue influence. Gregory was still unable to muster sufficient evidence to prove undue influence on a balance of probabilities (see *Drewniak* at para 58).

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

Pfuetzner JA

Rivoalen CJM

Mainella JA
