

IN THE COURT OF APPEAL OF MANITOBA

Coram: Chief Justice Marianne Rivoalen
Madam Justice Jennifer A. Pfuetzner
Madam Justice Anne M. E. Turner

BETWEEN:

	)	<i>A. F. Hacault and</i>
	)	<i>E. A. Lawlor Forsyth</i>
<i>GARRY MERKE</i>	)	<i>for the Appellant</i>
)	
(Applicant) Respondent	)	<i>G. A. Cudney and</i>
	)	<i>C. R. Williamson</i>
	)	<i>for the Respondent</i>
- and -)	
	)	<i>Appeal under rr 37.3, 38</i>
	)	<i>of the MB, Court of Appeal</i>
<i>RYAN MERKE as Executor of The</i>	)	<i>Rules (Civil)</i>
<i>Estate of HILDEGARDE ADELAIDE</i>)	
<i>MERKE, Deceased</i>	)	<i>Joint written submissions filed:</i>
	)	<i>November 29, 2023</i>
(Respondent) Appellant)	
	)	<i>Judgment delivered:</i>
	)	<i>December 29, 2023</i>

RIVOALEN CJM (for the Court):

[1] This appeal of the motion judge's finding that the respondent was in contempt of an order of the Court and its award of solicitor and client costs proceeded in writing, without an oral hearing, pursuant to r 37.3 of the MB, *Court of Appeal Rules*, Man Reg 555/88R [the *Rules*], and with the consent of the parties.

[2] On January 11, 2023, the motion judge directed the respondent to produce and bring before the Court of King's Bench any paper or document made or signed by his late mother, Hildegard Adelaide Merke, and purporting to be testamentary in nature. The respondent was to do so within 15 days of being served with the order.

[3] The respondent failed to comply with the order, a warrant issued for his arrest, he spent one night in custody and, after a brief hearing, the motion judge found him to be in contempt. In addition, the motion judge ordered that the respondent pay solicitor and client costs to the applicant in the amount of \$2,800.

[4] The respondent's grounds of appeal include that the motion judge breached the rules of fundamental justice at the contempt hearing by refusing the respondent's request to retain counsel, by interrupting the respondent's provision of relevant evidence and by generally failing to give him a fair opportunity to be heard and to respond to the allegations against him.

[5] The applicant consents to the reversal of the motion judge's finding of contempt and the award of solicitor and client costs. He requests that we allow the appeal without costs in accordance with r 38 of the *Rules*.

[6] We have read the notice of appeal, the written consent of the applicant and the transcript of the proceedings held on May 17, 2023. We are of the view that paragraphs 4.1 and 4.2 of the order pronounced on May 17, 2023, should be set aside. All other terms of the order remain unchanged.

[7] There shall be no order as to costs.

Rivoalen CJM

Pfuetzner JA

Turner JA