

IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Christopher J. Mainella
Madam Justice Karen I. Simonsen
Mr. Justice James G. Edmond

BETWEEN:

<i>WALTER GLEN SCHROF</i>	)	<i>J. I. Jardine</i>
	)	<i>for the Appellant</i>
)	
<i>(Applicant) Appellant</i>	)	<i>F. J. Trippier and</i>
	)	<i>P. L. West</i>
<i>- and -</i>	)	<i>for the Respondents</i>
)	
<i>MERVIN FRED SCHROF and CALVIN</i>	)	<i>Appeal heard and</i>
<i>PAUL SCHROF</i>	)	<i>Decision pronounced:</i>
	)	<i>May 7, 2025</i>
<i>(Respondents) Respondents</i>)	
	)	<i>Written reasons:</i>
	)	<i>May 22, 2025</i>

MAINELLA JA (for the Court):

Introduction

[1] The parties are three brothers engaged in litigation over their late mother's (the mother) estate. After hearing the applicant's appeal, we allowed it in part with reasons to follow. These are those reasons.

Background

[2] The applicant sought revocation of the grant of probate to the mother's estate and a declaration that three codicils (made in 2009 to 2010) to

the mother's 2001 will be declared invalid due to a lack of testamentary capacity and/or undue influence. The applicant also sought a declaration as to entitlement to eighty acres of farmland (the eighty acres) and various personal property, including \$40,000 in guaranteed investment certificates (GICs) in an investment account at the Royal Bank of Canada (the RBC GICs).

[3] The judge dismissed the challenge to the grant of probate and the three codicils but ordered a trial with *viva voce* evidence as to the issue of entitlement to the eighty acres and various personal property (see *Schrof v Schrof*, 2017 MBQB 51). That judgment was not appealed.

[4] After the trial of that issue, the judge rejected the applicant's claim that he and the mother had a binding contract for him to acquire the eighty acres upon her death before the two became estranged. The judge also did not accept the alternative argument of the applicant being entitled to the eighty acres based on proprietary estoppel. The judge found that the mother authorized the applicant to farm the eighty acres, to which she held title, on the basis of a yearly rental agreement that was cancelled by her in 2010. When the mother died in 2011 (at age eighty-eight), the eighty acres formed part of her estate to be distributed pursuant to her will and codicils to the respondents with the applicant being totally disinherited because of the codicils.

[5] The RBC GICs were opened in the names of the applicant and the mother in 2007. The mother funded joint GIC accounts in her name and in the names of each of her three sons. In 2009, the mother reinvested the money from the RBC GICs into her name only as, by that time, she was estranged from the applicant. While the trial of the issue was ordered only in relation to the RBC GICs, there was an agreement to decide entitlements to GICs at other

financial institutions where the same pattern occurred—the mother deposited her monies at the financial institution and took out a GIC in the names of her and the applicant but, at the time of renewal of the GIC, she transferred the monies to other accounts on which the applicant was not an account holder. The applicant claims that the GIC monies in dispute are \$214,398, plus interest, with part owed by the mother’s estate and part owed by the respondents (the GICs).

[6] The judge found that there was insufficient evidence that there was an “irrevocable intention” to make an *inter vivos* gift in relation to the monies at the time the mother established the GICs in the joint names of her and the applicant. The judge said, at best, the evidence established that the mother made an *inter vivos* gift to the applicant by the right of survivorship for the purpose of estate planning.

[7] The issue of entitlement of the applicant to other personal property was either settled, is the subject of outstanding litigation or was not appealed.

[8] The applicant appealed the judgment dismissing his entitlement claims to the eighty acres and the GICs, as well as the award of party and party costs of \$156,042.42, inclusive of disbursements, under Tariffs A (Class 3) and B of the MB, *King’s Bench Rules*, Man Reg 553/88 [the *KB Rules*].

Discussion

[9] In her 2001 will, the mother transferred the family farm by giving equal shares of the land to each of her three sons (eighty acres each).

[10] Prior to 2007, the parties farmed the family farm collectively with the mother paying the expenses and receiving a share of the profits. As she grew older, the mother decided to decrease her involvement in the farming business in favour of her three sons. One of her motivations was to ensure her income was not too high to result in a claw back of her old age security pension.

[11] Counsel for the applicant confirmed at the hearing of the appeal that there is no claim that the mother made an *inter vivos* gift of the eighty acres to the applicant. The dispute here is restricted to contract and proprietary estoppel.

[12] It is a common ground between the parties that each of them had an oral agreement with the mother in relation to an eighty-acre parcel of the family farm that the mother owned. The issue for this Court on appellate review is whether the judge erred in determining that the nature of the contract that was formed in relation to the applicant was a lease to allow farming of the eighty acres in exchange for rent, as opposed to an agreement for the applicant to acquire the land upon the mother's death (see *Matic v Waldner*, 2016 MBCA 60 at paras 55-64 [*Matic*]).

[13] What is in dispute, in terms of contract law, is the essential terms of the contract in relation to the eighty acres between the applicant and the mother. This question of contractual interpretation of a non-standard form contract is a question of mixed fact and law reviewable on a standard of palpable and overriding error, absent an extricable legal principle (see *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53 at paras 50-55; *King v*

Operating Engineers Training Institute of Manitoba Inc, 2011 MBCA 80 at para 29).

[14] Palpable and overriding errors are errors having the qualities of being obvious in a judge's reasons and determinative of the outcome of the case (see *Albo v The Winnipeg Free Press*, 2020 MBCA 50 at para 19 [*Albo*]). The standard is satisfied where a factual determination that affected the result is “‘clearly wrong’, ‘unreasonable’ and ‘not reasonably supported by the evidence’” (*HL v Canada (Attorney General)*, 2005 SCC 25 at para 110).

[15] We are persuaded that the judge approached the dispute before him by correctly considering the factual matrix, “other than the subjective intention of the parties, through the lens of an objective reasonable bystander” to determine the nature of the agreement reached in relation to the eighty acres and its essential terms (*Matic* at para 71).

[16] We are not persuaded that the judge made a palpable and overriding error. Counsel for the applicant took us at length through different parts of the record and said that the judge came to the wrong conclusion on the evidence. We disagree. It is important to highlight that the role of this Court is not to retry the case and substitute our view of the evidence for that of the judge if his findings are reasonably supported by the record, which is the case here (see *Housen v Nikolaisen*, 2002 SCC 33 at para 3).

[17] The judge carefully examined the whole of the evidence as to how the family farm was operated over many years and the intention of the mother and the applicant as to how the mother wished to organize the farm while she was alive and after her death. It strikes us that, while the applicant expected to inherit the eighty acres, as did his brothers, in relation to the parcels of land

they were farming, there was no restriction in law on the mother changing her mind as to her testamentary bequests. The judge's finding that the mother merely "entered into a rental agreement with each of her three sons" is reasonably supported by the record.

[18] Leaving aside the respondents' submission that the arrangement proposed by the applicant is unknown in law, the idea that the mother would, in 2006 to 2007, duplicate by contract what she had already done by her 2001 will in relation to the eighty acres makes little sense for reasons of estate planning. There is a lack of commercial efficacy to the applicant's claim of the contract between him and the mother (see *Albo* at para 20). No good reason arises on the record for such an unusual contract in relation to the disposition of land—particularly in oral form—without the benefit of legal advice when it is a clear aspect of the factual matrix that the mother was quite comfortable using lawyers to organize her affairs—particularly as to estate planning. In contrast, the judge's finding about the nature of the contract being merely a verbal lease as to the use of the eighty acres for farming while the mother was alive is entirely reasonable given the factual matrix.

[19] It is also noteworthy that the judge expressed a concern that there was "no mechanism" in the contract proposed by the applicant as to how the eighty acres would be transferred to the applicant if the land was passed to the applicant outside of the mother's estate. We agree such a term would need to be reasonably certain to give binding effect to such an agreement (see *Matic* at para 71; see also *Homestead Properties (Canada) Ltd v Sekhri*, 2007 MBCA 61 at para 27).

[20] We would also not interfere with the judge's summary dismissal of the alternative claim for the eighty acres based on proprietary estoppel. Such a determination is largely a question of mixed fact and law and, therefore, subject to a standard of review of palpable and overriding error absent a readily extricable legal principle (see *Cowper-Smith v Morgan*, 2017 SCC 61 at para 30 [*Cowper-Smith*]).

[21] The difficulty here is that there is almost no evidence that the applicant did anything or refrained from doing anything to his own detriment based on any representation made to him by the mother in relation to the eighty acres (see *ibid* at para 15). The applicant had farmed the family farm, including the eighty acres, with his brothers for decades until discord between them arose sometime in 2006 to 2007. The applicant's estrangement with the mother was complete by 2010 when she sent him a letter, via her lawyer, notifying him that he had no right to farm the eighty acres anymore. We also see nothing particularly unfair or unjust here that cries out for an extraordinary equitable remedy. The applicant received the exclusive right to receive any profits from farming the eighty acres by this arrangement with the mother in exchange for paying the costs of the operation, as well as a fee to the mother. There is no evidence of material hardship to the applicant.

[22] One of the consequences of the judge's finding as to the nature of the contract is that the applicant's claim for rent for farming the eighty acres after 2010 by one of the respondents was unnecessary to decide. We agree.

[23] In terms of the GICs, it was recognized in *Pecore v Pecore*, 2007 SCC 17 [*Pecore*] that often, as a function of estate planning, a transferor gratuitously places "assets into a joint account with the transferee with the

intention of retaining exclusive control of the account until his or her death, at which time the transferee alone would take the balance through survivorship” (at para 46, see also paras 36, 47-52, 63-66). In law, such an arrangement amounts to an *inter vivos* gift of the right of survivorship even though the transferor has the right to deplete the account. The gift is of whatever remains in the account at the time of the transferor’s death (see *Jackson v Rosenberg*, 2024 ONCA 875 at paras 44-47).

[24] In our respectful view, some of the judge’s language in relation to his *Pecore* analysis was imprecise given the positions of the parties regarding the relevance of the evidence as to the rebutting of the presumption of a resulting trust, but the fact that the judge may have erred is not determinative. An appellate court cannot intervene simply because a “judge has done a poor job in expressing himself or herself” (*R v Ramos*, 2020 MBCA 111 at para 50 [*Ramos*], aff’d 2021 SCC 15). As was explained in *R v GF*, 2021 SCC 20, “[w]here ambiguities in a trial judge’s reasons are open to multiple interpretations, those that are consistent with the presumption of correct application must be preferred over those that suggest error” (at para 79).

[25] In our view, the reasons of the judge are sufficiently clear that he made a finding that the true nature of the gifts at the time the mother opened the various GICs in her name and that of the applicant was limited to a right of survivorship only. This means that the applicant was entitled to the balance of the GICs at the time of the mother’s death but the mother also had the right, in light of *Pecore*, to move the funds in the GICs elsewhere before her death, which she decided to do.

[26] In such a scenario, the gift of the right of survivorship does not “prevent a donor from dealing with the retained joint interest while alive” even to the point of draining an account to zero (*Simcoff v Simcoff*, 2009 MBCA 80 at para 64; see also *Bergen v Bergen*, 2013 BCCA 492 at paras 37-39).

[27] This case can be distinguished from what occurred in *Doucette v McInnes*, 2009 BCCA 393, where the judge did not make a positive finding about a donor’s intention in opening GICs in joint names; he simply decided that the evidence to rebut the presumption of a resulting trust was “unpersuasive” (at para 57).

[28] Here, in contrast, any commentary about rebutting the presumption of a resulting trust by the judge was *obiter* because he made a clear finding that the mother’s intention was, for the purpose of organizing her affairs, to gift the applicant only a right of a survivorship. That finding is reasonably supported by the record. While there is some evidence to support the claim of the applicant—for example, he paid the income tax on the RBC GICs while the mother was alive—there was conflicting evidence as to the mother’s intention. In particular, the applicant testified that the mother told him that he would “only” have the right to “touch” the GICs when she died. The inference arising from that evidence supports the conclusion the judge reached.

[29] In summary, we are not persuaded that the judge made a palpable and overriding error by deciding the mother’s intention was to gift to the applicant only a right of survivorship in relation to the GICs.

[30] The next issue relates to a settlement of part of the estate litigation involving the GICs that the mother deposited into her name and that of the applicant and respondents but did not alter that arrangement before she died.

The applicant claims that this part of the case was settled but that he was not properly paid pre-judgment interest. The judge refused to decide this issue as it was outside the scope of the trial of an issue he ordered. We are not convinced that there is any reason to interfere with this discretionary decision. If a settlement needs to be enforced, the proper procedure is to do so in accordance with the process set out in rule 49 of the *KB Rules*.

[31] The judge's award of costs does raise some concerns despite the great deference that is normally owed absent an error in principle or the costs award is plainly wrong (see *Hamilton v Open Window Bakery Ltd*, 2004 SCC 9 at para 27).

[32] The judge received extensive submissions as to costs. The applicant requested that the award of costs be calculated in a different way than proposed by the respondents, in the amounts of \$45,293.89 or \$59,225.89, inclusive of disbursements.

[33] The judge provided no reasons and approved the bill of costs proposed by the respondents in accordance with Tariffs A (Class 3) and B of the *KB Rules*.

[34] Reasons for decision serve three purposes: (i) to explain the decision to the parties, (ii) to provide public accountability, and (iii) to permit effective appellate review (see *R v REM*, 2008 SCC 51 at para 11).

[35] A judge satisfies their duty to provide reasons where they provide "an intelligible pathway to the result reached given the context of the specific case" (*Ramos* at para 47). Even where "reasons are objectively inadequate",

the appellate court should not interfere with a decision where the basis for it is apparent from the record, even without being articulated (*ibid* at para 51).

[36] In our view, despite the absence of reasons, we are satisfied that we can perform effective appellate review with some of the judge's award of costs, as the basis for his decision is apparent from the record when the result he reached is read in the context of the submissions of counsel and the *KB Rules*.

[37] It was open to the judge to award costs on a Class 3 basis because the proceeding was commenced by an application (see the *KB Rules*, Tariff A, s 3(2)(b)). Taking a contextual and functional approach to the record, we are satisfied that, save and except for four areas of the award of costs, there is no basis to disturb the award of the judge as being based on an error in principle or being plainly wrong.

[38] Regrettably, for the following four areas of the award of costs, before any applicable taxes, we cannot perform meaningful and effective appellate review in the absence of reasons: (i) 17.5 days of examination (\$12,750), (ii) preparing applications and motions (\$12,750), (iii) preparation for trial of an action or application (\$38,150), and (iv) document production and reproduction (\$9,785.44). Given that these amounts, in total, constitute approximately fifty per cent of the costs awarded, in our respectful view, the judge's assessment must, in the interests of justice, be redone (see *FH v McDougall*, 2008 SCC 53 at para 97).

[39] Because the record does not allow this Court to reasonably resolve the applicant's objections to these four areas of the award of costs, if the parties cannot agree, we would refer these four costs issues only to an

associate judge to be decided afresh in accordance with the *KB Rules* (see *The Court of Appeal Act*, CCSM c C240, s 28; *Ultracuts v Magicuts*, 2024 MBCA 45 at para 20).

[40] One final comment must be made about the nature of the record that was provided on this appeal.

[41] The record for this unfortunate family dispute is tremendous. There are 1,232 pages of transcripts. The factums and case books filed by the parties total 387 pages. The applicant's appeal book is 1,135 pages. The respondent's appeal book is 1,492 pages. The appeal books are duplicative. Preparing for this appeal was a challenging puzzle.

[42] This is not a new problem in this Court. One cannot help but be reminded of the sage guidance provided long ago by Monnin CJA that appellate counsel have a duty to produce an appellate record that is not "prolix, redundant and unnecessary" (*Isbister v Isbister*, [1981] 5 WWR 443 at 446, 1981 CanLII 3410 (MBCA)).

[43] History teaches that one of the hallmarks of good appellate advocacy is zeroing in on key aspects of the law and the record. Such focused attention improves a litigant's chances of influencing the decision-making of the Court. We take this opportunity to encourage all counsel to prudently cull the appeal record to the absolute minimum and to liberally employ the use of condensed books in appearances in this Court (see Manitoba Court of Appeal, "Consolidated Practice Direction" (5 February 2024) at s 2(c)(xiv), online (pdf): manitobacourts.mb.ca/site/assets/files/1139/consolidated_practice_direction_amended_-_may_14_2025.pdf) to further focus attention to those documents, excerpts of transcripts or parts of leading authorities on

which the appeal truly turns. Once again, it must be said, an appeal is not a retrial.

Disposition

[44] In the result, the appeal was allowed in part as to the four costs issues set out in paragraph 38 herein, with reference to an associate judge for a fresh assessment of those four costs issues only in accordance with the *KB Rules*. The remainder of the applicant's appeal was dismissed. As the respondents were substantially successful on the appeal, they will have tariff costs in this Court.

Mainella JA

Simonsen JA

Edmond JA