Citation: Simmons v Sinclair, 2026 MBCA 74
Date: 20260831
Docket: AI25-30-10290

IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Marc M. Monnin
Mr. Justice James G. Edmond
Madam Justice Anne M. E. Turner

B E T W E E N:

	)	***R. C. Roy** and*
	)	***D. Wiebe***
	)	*for the Appellant*
LLOYD JOSEPH SIMMONS	)	
	)	***L. K. Troup***
(Applicant) Appellant	)	*for the Respondent*
	)	*P. M. Sinclair*
	)	
- and -	)	***K. A. Burwash** and*
	)	***W. Y. Tan***
	)	*for the Respondent*
PETER MICHAEL SINCLAIR and	)	*W. Guo*
WEIBIN GUO	)	
	)	*Appeal heard:*
(Respondents) Respondents	)	***May 5, 2026***
	)	
	)	*Judgment delivered:*
	)	***August 31, 2026***

On appeal from *Re Simmons Estate; Simmons v Sinclair et al*, 2025 MBKB 45 [the *decision*]

EDMOND JA

Introduction

[1] This appeal addresses the approach to be applied on a motion to produce relevant documents in estate litigation where the parties agreed on a process and filed a consent order.

[2] Lloyd John Simmons (the deceased) passed away on January 21, 2023. Two days before his death, on January 19, 2023, the deceased contacted his lawyer, the respondent, Peter Michael Sinclair (Sinclair), and gave instructions to draft a new last will and testament (the 2023 will). The 2023 will was prepared by Sinclair in the deceased's hospital room and then executed before two witnesses, an unrelated third party and the deceased's treating physician, Dr. Liumei Liu (Dr. Liu).

[3] On May 25, 2023, the son of the deceased (the applicant) filed a notice of application (the application) seeking an order pronouncing the 2023 will invalid on numerous grounds, including that the deceased lacked testamentary capacity, there were suspicious circumstances surrounding the preparation and execution of the will, the deceased lacked knowledge and approval of the contents of the 2023 will, and undue influence was exerted by the respondent, Weibin Guo (Guo). The applicant also sought records and documents within the power, possession and control of the respondents and relevant non-parties.

[4] On August 18, 2023, the parties agreed to a consent order (the consent order), which was granted by a different motion judge than the motion judge whose decision is under appeal (the motion judge). The consent order provides, among other things, that "[t]he parties shall produce for inspection all relevant records and documents in their power, possession or control under *King's Bench Rule* 30, and shall be examined for discovery pursuant to *Kings Bench Rule* 31, as if this application were an action."

[5] On December 16, 2024, the applicant challenged the document disclosure provided by the respondents and filed a notice of motion (the

motion) seeking, among other relief, a further and better affidavit of documents from Guo and production of certain documents alleged to be relevant to the issues raised in the application.

[6] The motion judge dismissed the motion seeking the relevant documents primarily on the basis that the applicant had not established proof of some "minimal evidentiary threshold" that would entitle him to production of the documents being sought. The motion judge referenced a number of cases from Ontario that stand for the proposition that an interested person in estate litigation must meet some minimal evidentiary threshold before a court will accede to a request that the testamentary instrument be proven in solemn form, including *Neuberger Estate v York*, 2016 ONCA 191 [*Neuberger*]; *Seepa v Seepa*, 2017 ONSC 5368 [*Seepa*]; *McBeath v Wright*, 2021 ONSC 4494; and *Johnson v Johnson*, 2022 ONCA 682 [*Johnson*], (see also Manitoba decisions *Re Peter Estate; Wickstead v Martens et al*, 2024 MBKB 94 [*Peter Estate*]; and *Re Clifford Estate; Clifford v Barrow et al*, 2025 MBKB 80 [*Clifford Estate*]).

[7] Unlike the circumstances addressed in the Ontario decisions, in this case, the parties agreed on a process to proceed with hearing the application. As I will explain, the fact that the parties agreed to the process and filed the consent order is a complete answer to the issues raised on this appeal. A consent order is a binding order of the court and, since none of the parties sought to set aside or vary the order, it is an order of the court with the same force and effect as a judgment once it is signed by the court.

[8] For the reasons that follow, I would allow the appeal in part and return the motion to a different motion court judge for a new hearing.

Background

[9] The applicant is the only child of the deceased and resides with his family in Alberta. On November 24, 1994, the deceased executed a last will and testament (the 1994 will). The applicant was the sole beneficiary in the 1994 will.

[10] In November 2018, the deceased met Guo, who arrived in Canada from China in September 2018. The deceased and Guo began cohabitating in May 2019.

[11] Guo and the deceased separated between July 2020 and April 2021. In December 2021, the deceased had eye surgery on his right eye and he did not have sight in his left eye due to a retinal detachment. As a result of the surgery on his right eye, the deceased was virtually blind and required full-time care. Guo moved in with the deceased and provided care for him. In her affidavit, Guo described living together with the deceased in an intimate relationship from that time until he passed away on January 21, 2023.

[12] Between June and October 2022, the deceased was diagnosed with lung and laryngeal cancer that required chemotherapy treatments commencing in November 2022. He was hospitalized on January 16, 2023.

[13] On January 19, 2023, the deceased asked Guo to provide him with Sinclair's telephone number. She provided the phone number and the deceased called Sinclair and asked him to attend at the hospital as he wished to make changes to the 1994 will. Sinclair had known the deceased for more than fifty years.

[14] It is undisputed that Sinclair attended at the deceased's hospital room and received instructions to prepare the 2023 will directly from the deceased in the presence of Guo. The 2023 will was handwritten by Sinclair paragraph by paragraph and read back to the deceased after each paragraph was written. Although Guo was present at the time the instructions were received by Sinclair, her evidence was that she did not participate in the discussions and was there to provide comfort to the deceased. The 2023 will was witnessed by an unrelated third party and Dr. Liu.

[15] On February 24, 2023, an affidavit of execution of the 2023 will was sworn by Dr. Liu. Paragraph 2 of the affidavit states in part: "in my opinion, the testator was of sound mind, memory and understanding at the time of execution of the [2023 will]."

[16] The 2023 will named Sinclair as the executor. Guo was bequeathed a life estate interest in the deceased's residence located at 40 MacBell Road (the residence), his motor vehicle, all furniture in the residence, all funds held by the deceased at the Steinbach Credit Union, and the deceased's CPP pension and RRSPs. The life estate interest in the residence was to continue unless the residence was sold for $3.5 million or more, at which time the life estate interest would terminate and the sale proceeds were to be divided equally between the applicant and Guo. The 2023 will bequeathed the applicant all funds held at the Bank of Montreal and Nesbitt Burns and certain funds held in trust by Thompson Dorfman Sweatman LLP (TDS) subject to any claims by the Canada Revenue Agency, as well as the proceeds of certain life insurance policies. The applicant was named as the residual beneficiary of the estate.

[17] At the time the 2023 will was executed, the deceased was suffering from cancer, had problems with his eyesight and was virtually blind in December 2021. According to the applicant, since December 2022, the deceased had been slurring his words and not speaking clearly. In the two weeks before he passed away, the deceased told the applicant he was not getting much sleep and he could barely swallow food. The day after the 2023 will was executed, the applicant arrived in Winnipeg and observed that the deceased was not himself and had difficulty speaking and making eye contact.

[18] The deceased took great pride in his dogs and had travelled to dog shows. The applicant alleges that his dogs showed signs of abuse and neglect shortly after the deceased passed away, which the applicant submitted raised concerns about the deceased's well-being and capacity.

[19] On May 25, 2023, the applicant filed the application seeking an order pronouncing the 2023 will invalid on numerous grounds as outlined in paragraph 3 herein. The applicant also sought records and documents within the power, possession and control of the respondents and relevant non-parties.

[20] The applicant submits that the 2023 will does not comply with the formalities of *The Wills Act*, CCSM c W150 [the *Act*] and the MB, *King's Bench Rules*, Man Reg 553/88 [the *KB Rules*]. For example, the applicant submits that each page of the 2023 will is not identified by the signatures or initials of the subscribing witnesses and that the alterations do not have the signatures or initials of the witnesses near the alterations (see the *KB Rules*, rr 74.02(7), 74.02(11); the *Act*, s 19).

[21] On August 18, 2023, the parties agreed to the consent order. The consent order waives certain privilege pertaining to the deceased's

testamentary, legal, personal, financial and medical documentation. The consent order appoints Sinclair as the administrator pending litigation of the estate and contains the following orders relevant to the motion:

> [TDS] shall produce the entire contents of legal files relating to the preparation and execution of any will of the [d]eceased.
>
> The solicitor and client privilege of the [d]eceased relating to the preparation and execution of the alleged Last Will and Testament of the [d]eceased dated January 19, 2023 (the [2023 will]) is hereby waived and [Sinclair] and/or [TDS], as the case may be, are hereby authorized to discuss their knowledge of the preparation and execution of the [2023 will] and matters material to the litigation hereof with respective legal counsel of the parties, including at any examination for discovery of [Sinclair].
>
> Any claim in respect of the [d]eceased of lawyer/client privilege, financial advisor/client privilege, or any other professional privilege, including medical privilege, or the duty of confidentiality relating to the instructions for, making of, or execution of, any of the [d]eceased's testamentary or personal documentation, financial documentation, or documentation relating to property, real estate, or a corporation of the [d]eceased, inclusive of any privacy regulations and legislation which may prohibit the obtaining of such information, including personal and health information in respect of the [d]eceased and documentation in respect of the [d]eceased governed by *The Personal Information Protection and Electronic Documents Act*, and *The Personal Health Information Act,* shall be and hereby is waived by this order.
>
> The parties shall produce for inspection all relevant records and documents in their power, possession or control under [the *KB Rules*, r 30], and shall be examined for discovery pursuant to [the *KB Rules*, r 31], as if this application were an action.
>
> This application shall proceed to a pre-trial conference.

[22] The parties exchanged affidavits of documents, and counsel for the applicant requested certain medical and financial records, as well as legal

files. Sinclair responded, advising that TDS did not have the medical records and suggesting that counsel for the applicant obtain a subpoena for same. Certain financial records were provided. As to the legal files requested, Sinclair advised that no notes were taken regarding the preparation of the 2023 will as he was drafting the 2023 will based on instructions provided. As to other files held by TDS, Sinclair advised that he reached out to the Law Society of Manitoba for direction and was advised that the consent order was not broad enough in scope to release the files requested and a further order should be sought that would allow Guo to respond.

[23] The applicant filed the motion seeking detailed document disclosure from the respondents and third parties, including medical, legal and financial records, and a further and better affidavit of documents from Guo, including relevant documents exchanged between the deceased and Guo relating to the deceased and her association with him. He also sought an order requiring Guo to vacate the residence and pay certain expenses to the estate for her occupation of the residence, as well as an order granting the applicant an interim advance from the estate.

[24] Affidavits were filed by the applicant, a legal assistant employed with the law firm representing the applicant, Guo and Sinclair. The affidavits contain contradictory evidence regarding the issues raised in the application. The parties chose not to cross-examine on the affidavits and, therefore, the motion judge did not have the benefit of transcripts of cross-examinations to assist with reviewing the evidence and making certain findings on the evidence.

The Motion Judge's Decision

[25] In the decision, the motion judge dealt with four issues. The first two issues are relevant to this appeal. At the hearing of this appeal, counsel for the applicant withdrew the issue of whether Guo was required to reimburse the estate for expenses incurred respecting the residence.

[26] The first two issues were framed by the motion judge as follows:

> (1) Has the applicant established proof of some "minimal evidentiary threshold" that would entitle him to the production records?
>
> (2) If not, is the applicant still entitled to the production records based on the terms of the consent order?

[27] As to issue one, the motion judge referred to the Ontario cases mentioned above and followed the approach adopted in *Peter Estate*, where Rempel J held that "a request for production in estate litigation matters must be able to bear some minimal degree of scrutiny before a judge requires an estate and all beneficiaries to endure highly intrusive and costly disclosure obligations" (the *decision* at para 22).

[28] The motion judge found "that Guo ha[d] answered and/or rebutted much of what the [a]pplicant adduced or pointed to in support of his claim(s) of a lack of testamentary capacity, knowledge and approval, undue influence and the presence of suspicious circumstances" (*ibid* at para 27).

[29] The motion judge also found that Sinclair "(through his affidavit) ha[d] answered or rebutted aspects of what the [a]pplicant adduced or pointed

to support his claim(s)" (*ibid* at para 28). As a result, the motion judge concluded he was not satisfied the applicant had met the low evidentiary threshold set out in *Neuberger*, *Seepa* and *Peter Estate*, justifying the disclosure obligations. Therefore, the applicant's motion was dismissed.

[30] As to issue two, the motion judge correctly identified that courts must be cautious about setting aside consent orders. He referenced rule 59.06 of the *KB Rules* and a leading authority interpreting rule 59.06, *Santoro v Shpak*, 2024 MBCA 63 at paras 45-46. The motion judge identified the definition of relevance in a proceeding and stated that he was required to determine the issue of relevance and production based on what was contained in the application and the affidavits provided by the parties. He concluded (the *decision* at paras 42-43):

> I find my Rule 30 analysis will mirror that set out in ***Neuberger***, ***Seepa*** and [***Peter Estate***] namely, whether the [a]pplicant, through the application and his affidavits has established a *prima facie* case supporting production, which has not been answered or rebutted by Guo and [Sinclair].
>
> Having adopted this approach and given my analysis and findings set out at paras. 27 to 29, the [a]pplicant's Rule 30 production request must fail.

Preliminary Issue, Grounds of Appeal and Standard of Review

[31] A preliminary issue was advanced by the parties. The applicant did not file a motion seeking leave to appeal pursuant to section 25.2(1) of *The Court of Appeal Act*, CCSM c C240 [the *CA Act*]. The law is clear—barring exceptional cases as prescribed in section 25.2(2), if an order under appeal is

interlocutory, not final, a motion must be filed seeking leave (see *Kinnarath v People's Party of Canada*, 2024 MBCA 2 at paras 19-20 [*Kinnarath*]).

[32] Although the applicant advanced a number of grounds of appeal, the primary arguments focused on whether the motion judge erred in failing to give paramount or any consideration to the consent order that required the parties to produce for inspection all relevant records in their power, possession or control under rule 30 of the *KB Rules*, and whether the motion judge erred in law by conflating the law in *Neuberger*, *Seepa* and *Peter Estate* with the legal test under rule 30.

[33] A motion judge's decision to grant or refuse an order for the production of documents is an exercise of judicial discretion. As stated in *Llewellyn v Hughes*, 2008 MBCA 136 [*Llewellyn*]: "An appellate court should intervene only if there has been a misdirection of the law, a significant misapprehension of the evidence, or if the decision is so clearly wrong as to amount to an injustice (at para 6).

<u>Analysis and Decision</u>

Leave to Appeal

[34] In *Kinnarath* at paras 12-13, Mainella JA addressed the purpose of section 25.2(1) of the *CA Act* and the focus of the Court in assessing whether an order is interlocutory or final as follows:

> The purpose of provisions such as section 25.2(1) of the *CA Act* is to cull certain types of appeals to avoid "needless expense and delay" (*Grant v Saskatchewan Government Insurance*, 2003 SKCA 17 at para 5). The provision gives legislative force to the general common law rule against hearing appeals of an

> interlocutory matter, absent a plain case of error (see *Mardynalka v Kurian Const Ltd*, 1986 CanLII 4787 at 510 (MBCA)).
>
> Section 25.2(1) of the *CA Act* focuses attention on whether the order appealed from finally determines substantive rights in dispute in the claim that is the subject of the litigation, as opposed to resolving a collateral matter to the merits of the dispute (see *College of Registered Nurses of Manitoba v Hancock*, 2023 MBCA 70 at para 75). The latter scenario falls within that legislative provision, while the former situation falls outside the confines of section 25.2(1). As Feldman JA explained in *1476335 Ontario Inc v Frezza*, 2021 ONCA 822: "A final order disposes of the litigation, or finally disposes of part of the litigation [citation omitted]. An interlocutory order disposes of the issue raised, most often a procedural issue, but the litigation proceeds" (at para 7).

[35] The applicant submits the order under appeal is final rather than interlocutory. Therefore, leave to appeal is not required.

[36] This Court adopted the main principles to be considered when assessing whether an order is interlocutory in *Nguyen v Winnipeg (City of)*, 2022 MBCA 33 at para 15, quoting *Paulpillai Estate v Yusuf*, 2020 ONCA 655 at para 16 as follows:

> 1. An appeal lies from the court's order, not from the reasons given for making the order [citations omitted].
>
> 2. An interlocutory order "does not determine the real matter in dispute between the parties — the very subject matter of the litigation — or any substantive right(.) Even though the order determines the question raised by the motion, it is interlocutory if these substantive matters remain undecided" [citations omitted].
>
> 3. In determining whether an order is final or interlocutory, "one must examine the terms of the order, the motion judge's reasons for the order, the nature of the proceedings giving rise to the order, and other contextual factors that may inform the nature of the order" [citation omitted].

> 4. The question of access to appellate review "must be decided on the basis of the legal nature of the order and not on a case by case basis depending on the application of the order to the facts of a particular case" [citations omitted]. In other words, the characterization of the order depends upon its legal nature, not its practical effect [citations omitted].

[37] The applicant argues that, even though the decision did not finally dispose of the issues raised in the application, the order deprived the applicant of a substantive right—in this case, the production of documents relevant to the issues to be determined at the trial, which documents could be determinative of the action (see *Fram Elgin Mills 90 Inc v Romandale Farms Ltd*, 2016 ONCA 404 at para 29).

[38] The respondents submit the order addresses preliminary procedural issues relating to production of documents and discretionary decisions made by the administrator pending the resolution of the estate litigation. As a result, the respondents submit the order is interlocutory and the applicant was required to seek leave. As leave was not sought, the respondents submit the appeal must be dismissed.

[39] As stated earlier, the motion was seeking production of documents and interim orders respecting Guo's remaining at the residence, not paying occupation rent and seeking an interim payment.

[40] In my view, the interim orders permitting Guo to remain at the residence and not pay occupation rent and the decision respecting interim advances are clearly interlocutory orders that do not address the issues raised in the application summarized in paragraph 3 herein. Therefore, leave to appeal was required to appeal those interim orders.

[41] Generally, I would agree with the respondents that an order relating to the production of relevant documents in an action and the extent of that production are typically interlocutory in nature. A disclosure order does not finally determine the substantive issues for trial (see e.g. *Nygard v Canadian Broadcasting Corporation*, 2026 MBCA 36 at para 12; *Elegant Façade Inc v Broccolini Construction (Toronto) Inc*, 2021 ONSC 6951 at para 18; *Wachsberg v Wachsberg*, 2018 ONCA 508 at paras 6-7).

[42] However, in this case, determining whether the order is final or interlocutory must be assessed based on the wording of the order, the facts of the case and the decision. In this case, the motion judge made certain findings on the evidence and concluded that the applicant had not met a minimal evidentiary threshold to justify the requested document production. The motion judge made findings that arguably dispose of the core of the estate litigation—whether the 2023 will is valid on the basis of testamentary capacity, knowledge and approval, undue influence, and/or suspicious circumstances.

[43] In my view, the motion judge made findings relating to the execution of the 2023 will and appears to have determined that the 2023 will need not be proven in solemn form, even though the consent order had established a process for hearing the application, which was to proceed as an action. The decision therefore determined substantive rights of the applicant granted by the consent order. To that extent, it is a final order and may be appealed as of right.

The Consent Order and Minimal Evidentiary Threshold

[44] The motion judge referenced one of the leading decisions in Ontario addressing estate litigation (see *Neuberger*). The question determined by the Ontario Court of Appeal in that case was whether the governing rule in Ontario gave an interested person an automatic right to have a will proven in solemn form. The applicant in that case challenged "the validity of the 2010 wills based on her father's alleged incapacity and susceptibility to undue influence at the time that he executed them. She also alleged suspicious circumstances" (*ibid* at para 39).

[45] The motion judge correctly identified the approach adopted by the Court of Appeal in *Neuberger* at paras 88-89 as follows:

> My second reason for rejecting the notion that, pre-probate, an interested person has a right to require proof in solemn form is this. In my view, an interested person must meet some minimal evidentiary threshold before a court will accede to a request that a testamentary instrument be proved. In the absence of some minimal evidentiary threshold, estates would necessarily be exposed to needless expense and litigation. In the case of small estates, this could conceivably deplete the estate. Furthermore, it would be unfair to require an estate trustee to defend a testamentary instrument simply because a disgruntled relative or other potential beneficiary makes a request for proof in solemn form.
>
> Based on the above analysis, in my view, an applicant or moving party under rule 75.06 must adduce, or point to, some evidence which, if accepted, would call into question the validity of the testamentary instrument that is being propounded. If the applicant or moving party fails in that regard or if the propounder of the testamentary instrument successfully answers the challenge, then the application or motion should be dismissed. If, on the other hand, the applicant or moving party adduces or points to evidence that calls into question the validity of the testamentary instrument

> which the propounder does not successfully answer, the court would generally order that the testamentary instrument be proved. In determining the manner in which the instrument be proved, the court would have recourse to the powers under rule 75.06(3).

[46] The motion judge also referenced the *Seepa* decision. The context in which Myers J gave his decision in *Seepa* is very significant. Justice Myers described the general circumstances in which disgruntled applicants in estate litigation allege undue influence. He also addressed the standard form orders for directions routinely granted on consent and asked this question: "Is it time for a culture shift?" (*ibid* at para 4). Justice Myers *declined to sign a consent order for directions*, stating *"there must be some evidentiary basis to meet an applicable legal test"* (*ibid* at para 5) [italics added].

[47] The motion judge referenced the "minimal evidentiary threshold" requirement articulated in *Neuberger* and *Seepa*, and stated as follows (the *decision* at para 19):

> In ***Seepa***, the court zeroed in on the "minimal evidentiary threshold" requirement from ***Neuberger***. At para. 35, Myers J. noted that at this preliminary stage, the issue is not whether an applicant has proven his or her case, but whether he or she ought to be given tools, such as documentary discovery, that are ordinarily available to a litigant before he or she is subjected to a requirement to put a best foot forward on the merits. At para. 38, Myers J. referred to the special responsibility the court owes to the testator who is not present to express their own wishes. At para. 39, he said that, in his view, the court ought to measure the evidence adduced by the applicant challenger against the evidence answered by the proponent of the will and assess what, if any, processes are required to resolve any conflicts that the court cannot fairly resolve on the record before it. At para. 40, Myers J. said, "it must be borne in mind that what is at issue is whether the court should exercise its discretion to require proof in solemn form."

[48] Further, the motion judge referenced the more recent Ontario Court of Appeal decision of *Johnson*, where the Court of Appeal affirmed the analytical approach to estate litigation, following the approach in *Neuberger* and *Seepa*.

[49] Finally, the motion judge referenced the Manitoba decision in *Peter Estate*. In that case, Rempel J addressed a request for production of documents in estate litigation matters and referenced the minimal evidentiary threshold test. He agreed that Manitoba also needs a new organizing principle governing disclosure obligations for contested estate litigation (see *ibid* at para 10).

[50] Justice Rempel considered the evidentiary threshold that could trigger an order for disclosure in a contested estate and stated (*ibid* at para 38):

> Although the evidentiary threshold that could trigger an order for disclosure in a contested estate is indeed a low one, it must rise to a level higher than the mere suspicion of a challenger when all of the available evidence is considered as a whole (***Martin v. Martin***, 2018 ONSC 1840, at paras. 33-35 and 37). Although the ***Civil Rules of Procedure***, R.R.O. 1990, Reg. 194, in the Ontario Superior Court of Justice offer more guidance on the question of disclosure obligations in contested estates than our Rules, I am satisfied that the ***Seepa*** decision offers valuable guidance on the question of how to quantify or describe the evidentiary tipping point for disclosure orders in cases involving proof in solemn form. ***Seepa*** ties the tipping point to the principle of proportionality which is enshrined in the Rules here in Manitoba by Rule 1.04[.]

[51] In *Clifford Estate*, Rempel J applied the minimal evidentiary threshold approach in the context of an application filed, challenging the will executed by the deceased where one of the parties was seeking proof in solemn form of the will. The Court provided an extensive review of the issues

in dispute and concluded that the working theory advanced by the moving party was nothing more than guesswork and unsubstantiated speculation (see *ibid* at para 85). Justice Rempel applied the *Neuberger* approach, which he stated represented a paradigm shift from how estate litigation has historically been conducted and concluded as follows (*Clifford Estate* at paras 100-101):

> The traditional civil litigation model is not appropriate in estate litigation because it completely disregards the rights of a testator to reduce their estate plan to writing and to maintain a reasonable expectation of privacy and confidentiality in the solicitor client relationship. Disclosure obligations and the necessity of defending an action through to trial should not be triggered in estate ligation merely because bald or unsupported allegations against the validity of a testamentary document have been made.
>
> All of Scott's allegations bear so little weight they can be fully and effectively answered to by way of facts on the record before me. I am satisfied Scott has not met the minimum evidentiary threshold he is required to meet under the ***Neuberger*** approach.

[52] What is crucial to emphasize is that, in each of these cases, the applicant was moving to prove a testamentary instrument in solemn form or, alternatively, the Court had not granted an order regarding the manner in which the estate litigation would proceed when the Court applied the *Neuberger* approach.

[53] I agree that, depending on the matters in dispute, there may be sound reasons to adopt the *Neuberger* approach in Manitoba and to require that a moving party challenging a testamentary instrument be required to adduce, or point to, some evidence which, if accepted, would call into question the validity of the testamentary instrument that is being propounded—in other words, requiring a moving party to establish a minimal evidentiary threshold to permit an application to proceed to trial in estate litigation.

[54] There is academic commentary cautioning courts on the application of the minimal evidentiary threshold in estate litigation, alluding to situations where an applicant is prevented from advancing a legitimate inquiry into the validity of a will and limiting the courts' special duty owed to testators to ensure a will reflects a testator's true intent (see Suzana Popovic-Montag et al, "The Evidentiary Barrier to Justice: A Cautionary Commentary on the Minimum Evidentiary Threshold for a Will Challenge" (2025) 96 Estates & Trust Reports 4th 418).

[55] It is unnecessary to determine whether the *Neuberger* approach should be applied in Manitoba to decide this appeal. It is my view that such an approach does not apply in this case where the parties had an opportunity to review the application and the alleged issues to be determined and then agreed on a process to proceed with the issues raised in the application as an action and also agreed on the disclosure of relevant documents, examinations for discovery and proceeding to a pre-trial conference.

[56] It is perhaps trite to state that a consent order is a binding order of the court. There is authority for that obvious statement of the law. In *Shackleton v Shackleton*, 1999 BCCA 704 at para 12, the British Columbia Court of Appeal stated that a consent order is a formal expression of an agreement between the parties. Once a consent order has been agreed to between the parties, and filed and signed by the court, it becomes an order of the court (*Austin v Dunne*, 2021 NLCA 38 at para 15). By its nature, as an order of the court, consent orders are binding on the parties, having the same force and effect as a judgment (see *Rozinsky v Rozinsky*, 2013 ABCA 113 at para 6).

[57] Once the motion was filed, the primary issue to be determined by the motion judge was the extent of the disclosure of testamentary, legal, personal, financial and medical documentation relevant to determine the issues raised in the application.

[58] The appropriate time to challenge the application and seek to apply the *Neuberger* approach was after the application was filed, not after the consent order addressing the process was filed, reviewed by Rempel J and granted. Pursuant to the consent order, the parties agreed that they were required to produce for inspection all relevant records and documents in their power, possession or control under rule 30 of the *KB Rules* and to be examined for discovery pursuant to rule 31 as if the application was an action.

[59] The motion judge correctly referenced paragraph 7 of this Court's decision in *Llewellyn* to the effect that each party has the onus to produce those documents in their possession that may be relevant (see the *decision* at para 33). However, in my view, the motion judge misdirected himself on the law when he stated that the rule 30 analysis "will mirror that set out in ***Neuberger***, ***Seepa*** and [***Peter Estate***]" (the *decision* at para 42). Once the parties agreed and submitted a consent order and the motion judge signed the consent order, the parties must have been satisfied that the evidence presented established that the dispute required a trial. Otherwise, one would not expect them to agree on the process defined in the consent order.

[60] I leave for another day whether the *Neuberger* approach should be adopted in Manitoba. Even if the *Neuberger* approach should be adopted, the time to consider whether an applicant has raised a minimal evidentiary threshold is after a notice of application is filed challenging a testamentary

instrument. Once parties agree and file a consent order, the agreed process governs and the *Neuberger* approach does not apply.

[61] One final comment on the motion judge's decision. In this case, the motion judge purported to make final decisions relating to the execution of the 2023 will; appeared to have determined that the 2023 will need not be proven in solemn form; and concluded that the applicant had not met the low evidentiary threshold set out in *Neuberger*, *Seepa* and *Peter Estate*, thereby depriving the applicant of relevant documents even though the consent order established a process for discovery of documents. Judges dismissing this type of motion should be very circumspect when making statements about either law or facts that are or may be in dispute at trial. This is especially so where another judge will hear the legal issues and contested facts at the trial (see *Sterling Parkway Residences Inc v Gypsum Drywall Interiors Ltd*, 2024 MBCA 46 at para 69; *Hyczkewycz v Hupe*, 2016 MBCA 23 at para 5).

[62] In the result, I would allow the appeal on this issue. In light of this determination, it is unnecessary to consider the other issues raised by the applicant.

[63] Since the motion judge did not address the primary issue of what relevant documents should be produced pursuant to the consent order and the *KB Rules*, I would return that issue to the lower court for a new hearing. In this case, since the motion judge made certain findings that were final in nature, the new hearing should take place before a different judge.

Conclusion

[64] For the foregoing reasons, I would allow the appeal in part, and send the motion seeking production of documents relevant to determine the issues raised in the application (specifically, the orders sought in paras 1, 2, 3, 4 and 8 of the motion) back to the lower court for a new hearing before a different motion court judge. Tariff costs for the appeal are granted to the applicant.

Edmond JA

I agree: Monnin JA

I agree: Turner JA