

COURT OF KING'S BENCH OF MANITOBA

IN THE MATTER OF: The Estate of Lloyd John Simmons, deceased.

B E T W E E N:

LLOYD JOSPEH SIMMONS,)	
	)	<u>Kelby R. Loeppky</u>
applicant,	)	for the plaintiff
)	
- and -	)	<u>Lynda K. Troup</u>
	)	for the respondent
	)	Peter Michael Sinclair
)	
PETER MICHAEL SINCLAIR and WEIBIN GUO,	)	<u>Karen A. Burwash</u>
	)	<u>Wan Yen Tan</u>
respondents.	)	for the respondent
	)	Weibin Guo
)	
	)	<u>Penny L. Piper</u>
	)	for Canada Revenue Agency
	)	(on a watching brief)
)	
	)	<u>Judgment Delivered:</u>
	)	April 3, 2025

HUBERDEAU J.

A. INTRODUCTION AND BACKGROUND

[1] Lloyd Joseph Simmons (the "Applicant") is the only child of the deceased, Lloyd John Simmons ("Lloyd").

[2] Lloyd executed his Will on November 24, 1994, naming the Applicant as the sole beneficiary (the "1994 Will").

[3] The Applicant has resided in Alberta since at least 2013. During this time, he stated having in-person visits with Lloyd in May 2019, a two-day visit in November 2021, and another visit on January 20 and 21, 2023. He further stated that he would speak with Lloyd regularly either over the phone or video chat.

[4] In November 2018, Lloyd met Weibin Guo ("Guo"), who had just arrived in Canada in September 2018. They began cohabitating together in May 2019.

[5] Guo stated that the parties separated between July 2020 to April 2021, but resumed their cohabitation in December 2021, which continued until Lloyd's death.

[6] Between June and October 2022, Lloyd was diagnosed with lung and laryngeal cancer which required chemotherapy treatment commencing in November 2022. He was hospitalized on January 16, 2023.

[7] While at the hospital and in the presence of his lawyer, Peter Michael Sinclair ("Michael"), his treating physician Dr. Liu, and Guo, Lloyd provided instructions and executed a new Will on January 19, 2023 (the "2023 Will").

[8] The 2023 Will stated that Guo was to receive Lloyd's RRSPs, CPP, funds held with the Steinbach Credit Union and a life estate to Lloyd's residence located at 40 MacBell Road ("MacBell"), which consists of a residential dwelling located on a 1.83-acre site and 5.07 acres of surplus land. The life estate was to continue unless MacBell was sold for \$3.5 million, at which time the sale proceeds were to be divided

equally between Guo and the Applicant. The Applicant was to receive the balance of Lloyd's estate.

[9] Lloyd passed away on January 21, 2023.

[10] The Applicant filed his Notice of Application on May 25, 2023, challenging the 2023 Will, alleging there to be suspicious circumstances surrounding its preparation, a lack of testamentary capacity, undue influence and a lack of knowledge and approval.

[11] On August 18, 2023, the parties (i.e. the Applicant, Guo and Michael) signed a consent order (the "Consent Order") which:

- i. appointed Michael as the administrator pending litigation;
- ii. required Michael's law firm to produce the content of their legal files relating to the preparation and execution of any of Lloyd's wills;
- iii. waived any solicitor and client privilege with respect to the preparation and execution of the 2023 Will and authorized Michael and his law firm to discuss their knowledge of the 2023 Will;
- iv. waived any claim of privilege, including solicitor/client privilege or confidentiality relating to the instructions for, making of, or execution of any of Lloyd's testamentary, personal, financial, property, real estate or corporate documents; and
- v. required the parties to produce for inspection all relevant records and documents under their control under the Court of King's Bench Rules 30 and 31.

[12] On December 16, 2024, the Applicant filed the motion before me seeking the following:

- i. the production of:
 - a. Lloyd's medical and financial records for the period of January 21, 2018 to January 21, 2023 ("Medical and Financial Documents");
 - b. Lloyd's legal files with Thompson Dorfman Sweatman LLP ("TDS") relating to Guo, or alternatively confirmation as to whether these files exist (the "Legal Files");
 - c. all documents, which include e-mails, social media messages and posts (including native files) relating to or with Lloyd; Lloyd's account passwords; documents as to living arrangements, financial arrangements, property, gifts related to/between/provided or taken from Lloyd in the possession of Guo related to her relationship with Lloyd ("Guo's Documentation");
 - d. Lloyd's cellphone ("Cellphone"); and
 - e. a further affidavit of documents from Guo.

(collectively "the Production Records")

- ii. that Guo vacate MacBell, and that she reimburse Lloyd's estate for expenses it paid relating to MacBell; and
- iii. that he be entitled to a retroactive reimbursement of legal fees of \$60,000.00 and a further interim advance of \$40,000.00 from Lloyd's estate.

[13] The Applicant, Guo and Michael each provided their own affidavit(s), but none of the parties were cross-examined on same.

[14] The following agreements were reached at the hearing:

- i. the Applicant's request to produce the Cellphone would be adjourned without date until it was determined whether it contained any data and whether that data could be extracted given the Cellphone was damaged; and
- ii. Guo would not oppose Michael's decision to pay a retroactive reimbursement of the Applicant's legal fees of \$60,000.00.

[15] A representative from the Canada Revenue Agency ("CRA") attended the hearing on a watching brief given that it is alleged that Lloyd's estate is indebted to the CRA for an undetermined sum.

B. ISSUES

[16] The issues can be framed as follows:

- i. Has the Applicant established proof of some "minimal evidentiary threshold" which would entitle him to the Production Records?
- ii. If not, is the Applicant still entitled to the Production Records based on the terms of the Consent Order?
- iii. Has the Applicant established that Guo should be required to vacate MacBell and that she also be required to reimburse Lloyd's estate for all expenses paid by it relating to MacBell?
- iv. Is the Applicant entitled to an interim advance from Lloyd's estate?

C. THE LAW ON PRODUCTION IN ESTATE LITIGATION, THE POSITION OF THE PARTIES, MY ANALYSIS AND FINDINGS

The Law

[17] The issue of production in estate litigation has, and continues to be, extensively litigated in Ontario. The leading cases include, ***Neuberger v. York***, 2016 ONCA 191, and ***Seepa v. Seepa***, 2017 ONSC 5368.

[18] In ***Neuberger***, at paras. 88 and 89, the court held that an interested person must meet some minimal evidentiary threshold before a court will accede to a request that a testamentary instrument be proven in solemn form. To meet the evidentiary threshold, the person seeking to challenge a will must adduce, or point to, some evidence which, if accepted, would call into question the validity of the testamentary instrument that is being propounded.

[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."

[20] In **McBeath v. Wright**, 2021 ONSC 4494, at paras. 14 and 15, the court found that bare allegations and mere suspicions are not enough to meet the minimal evidentiary threshold. There must be an air of reality to the allegations.

[21] The Ontario Court of Appeal had an opportunity to clarify the state of the law in **Johnson v. Johnson**, 2022 ONCA 682, where it confirmed that the correct analytical approach to apply in circumstances of estate production is derived from **Neuberger**, with the clarifications in **Seepa**.

[22] The issue of estate litigation production orders in Manitoba was recently addressed in **Re Peter Estate; Wickstead v. Martens et al.**, 2024 MBKB 94, where Rempel J. relying on **Seepa** 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. He further found that although the evidentiary threshold is a low one, it must rise to a level higher than mere suspicion of a challenger when all of the available evidence is considered as a whole (see paras. 37 and 38).

The Position of the Parties

[23] The Applicant submitted that he has met the low evidentiary threshold demonstrating issues of lack of testamentary capacity, knowledge and approval and undue influence based on the following evidentiary foundation:

- i. Guo obtained and provided Michael's phone number to Lloyd the day the 2023 Will was executed;
- ii. Guo remained in the hospital room with Michael and Lloyd the entire time the 2023 Will was discussed and executed;
- iii. the 2023 Will was a significant departure from the 1994 Will;
- iv. Lloyd was virtually blind at the time the 2023 Will was executed and had difficulty making eye contact;
- v. Lloyd was slurring his words, it was difficult to understand him, and he was acting oddly at least one month before the 2023 Will was executed, in that between November and December 2022 he began growing a beard, which was unusual for him;
- vi. Lloyd was isolated and dependent on Guo for his emotional and physical needs at the material time;
- vii. Lloyd's dogs, which he normally took great care and pride of, showed signs of abuse and neglect at the time of his death;
- viii. Guo had used Lloyd's debit card while Lloyd was in the hospital on January 18, 2023, totalling \$815.54;
- ix. Lloyd's estate was complex;
- x. Lloyd's direction to end the life estate if MacBell was sold for \$3.5 million is incompatible with the recent market value appraisal of \$1.55 million and his December 30, 2022, opposition to his neighbour's request to sub-divide his property; and

- xi. the 2023 Will does not comply with the formalities of the Court of King's Bench Rules and ***The Wills Act***, C.C.S.M. c. W150, (the pages are neither initialled nor are the alterations).

[24] The Applicant further submitted that unlike in ***Re Peter Estate*** and ***Seepa***, he is not an excluded relative running up the costs for the estate and other beneficiaries, given he, as the residual beneficiary, will be paying all costs for all production.

[25] Guo submitted that the Applicant has not met the low evidentiary threshold referred to in ***Neuberger***, ***Seepa*** and ***Re Peter Estate***, in that she has answered and/or rebutted the evidence adduced or pointed to by the Applicant.

[26] Michael joins Guo on this point indicating that he too, has answered and/or rebutted the evidence adduced or pointed to by the Applicant requiring production of his Legal Files.

My Analysis and Findings

[27] Having considered the evidence and submissions of counsel, I agree that Guo has answered and/or rebutted much of what the Applicant 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. This included the following:

- i. although Guo provided Lloyd with Michael's telephone number, she did so at his direction;
- ii. Lloyd was the one who called Michael asking him to attend the hospital so that he could provide instructions;

- iii. Michael was known to Lloyd for some time (i.e. 50 years);
- iv. although Guo was present in the hospital room, she neither said nor did anything during the time that Lloyd provided instructions or when he signed the 2023 Will other than to assist with clearing fluids from Lloyd's mouth using a suction tube, nor was she ever asked to leave Michael's room;
- v. although the 2023 Will did depart from the 1994 Will:
 - a. it is consistent with the information contained in an alleged text message between Guo and Lloyd on March 27, 2021 (see exhibit F of Guo's affidavit); and
 - b. the Applicant still received a sizable portion of the estate, including proceeds of a life insurance policy and being named as the residual beneficiary.
- vi. although Lloyd did have eye surgery in December 2021, he recovered enough to travel by himself to Prague in July 2022 for a dog show;
- vii. even if Lloyd did have issues with his eyesight at the time the 2023 Will was prepared and executed (which Guo denies), Michael read out the terms of the 2023 Will to Lloyd to which he indicated he understood prior to having him execute it;
- viii. Lloyd's difficulty in speaking or caring for his dogs were directly related to the physical limitations caused by his lung and laryngeal cancer diagnosis and chemotherapy treatment;

- ix. Lloyd's decision to grow a beard in November 2022 (which Guo agreed was out of character for him), was to support the "Movember" cancer fundraiser and not indicative of cognitive decline;
- x. although she used Lloyd's debit card while he was in the hospital, it was only to purchase items they needed, including approximately nine bags of dog food at Costco totalling \$641.97 to maintain his large dog kennel operation;
- xi. Lloyd understood the complexities of his personal affairs and finances in that he was able to answer the concern raised by Michael the day following the execution of the 2023 Will respecting his gifting of the life insurance policy to the Applicant;
- xii. Lloyd's instructions to end the life estate should MacBell be sold for \$3.5 million is rational based on the following:
 - a. Lloyd having told Guo (prior to his death) that a neighbouring vacant lot, less than half the land area of MacBell, had sold for between \$600,000.00 to \$700,000.00; and
 - b. the value of MacBell would significantly increase if it were ever to be subdivided and rezoned.
- xiii. Lloyd's treating physician, who was also the person who witnessed the 2023 Will swore an Affidavit of Execution of Will, stating that he believed Lloyd was of sound mind, memory and understanding (see Request for Probate document no. 2 in the court registry).

[28] I am also satisfied that Michael (through his affidavit) has answered or rebutted aspects of what the Applicant adduced or pointed to support his claim(s). This included Michael having no personal recall or time record of having attended MacBell in May 2019, or at any time for the purposes described by the Applicant. On this point I also note that the Applicant also failed to identify any basis as to why he believed the document he alleged seeing at the May 2019 meeting (which both Guo and Michael deny ever occurring) had anything to do with Guo relinquishing her rights to Lloyd's property.

[29] For all these reasons, I am not satisfied that the Applicant has met the low evidentiary threshold set out in ***Neuberger, Seepa*** and ***Re Peter Estate***. As such, this branch of relief contained in the Applicant's motion is dismissed.

D. THE LAW ON CONSENT ORDERS, PRODUCTION OF DOCUMENTS, RELEVANCY, THE POSITION OF THE PARTIES, MY ANALYSIS AND FINDINGS

The Law

[30] Courts are cautious about setting aside consent orders given parties are expected to be held to their agreement. In Manitoba, consent orders can only be amended or set aside according to the narrow circumstances set out in Court of King's Bench Rule 59.06 (see ***Santoro v. Shpak***, 2024 MBCA 63, at paras. 45 and 46).

[31] The key provisions of the Consent Order include the following:

6. The solicitor and client privilege of the deceased relating to the preparation and execution of the alleged Last Will and Testament of the Deceased dated January 19, 2023 (the "Will") is hereby waived and Peter Michael Sinclair and/or Thompson Dorfman Sweatman LLP, as the case may be, are hereby authorised to discuss their knowledge of the preparation and execution of the Will and matters material to the litigation hereof with respective

legal counsel of the parties, including any examination for discovery of Peter Michael Sinclair.

7. Any claim in respect of the Deceased 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 Deceased's testamentary or personal documentation, financial documentation, or documentation relating to property, real estate, or a corporation of the Deceased, inclusive of any privacy regulations and legislation which may prohibit the obtaining of such information, including personal and health information in respect of the Deceased and documentation in respect of the Deceased 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.

8. The parties shall produce for inspection all relevant records and documents in the power, possession or control under King's Bench Rule 30, and shall be examined for discovery pursuant to King's Bench Rule 31, as if the application were an action.

[32] The Court of King's Bench Rule 30, with respect to discovery of documents, expressly applies to actions, which are defined as a civil proceeding, other than an application, that is commenced by a statement of claim, counterclaim, crossclaim, third party claim or a petition ("pleadings").

[33] What documents may or may not be relevant under Rule 30 are determined by the alleged facts detailed in the pleadings and any subsequent pleadings filed by the responding parties (*Re Peter Estate*, at para. 7). The onus is on each party to produce those documents in their possession which may be relevant (*Llewellyn v. Hughes*, 2008 MBCA 136, at para. 7).

[34] To be relevant, evidence must increase or decrease the probability of the truth of the facts in issue. Relevance is about the tendency of the evidence to support inferences. To be relevant, an item of evidence does not have to firmly establish the

truth or falsity of a fact in issue. The evidence must simply tend to increase or diminish the probability of the existence of the fact in issue (***CIBC v. Deloitte & Touche***, 2013 ONSC 917, at para. 68).

[35] Evidence is relevant if, as a matter of common sense and human experience, it makes the existence of a fact in issue more or less likely. Relevance is assessed by reference to the material issues in a particular case and in the context of the entirety of the evidence and the positions of the parties (***CIBC***, at para. 69).

[36] A document is relevant for the purpose of a party's discovery obligations if it is logically connected to and tending to prove or disprove a matter in issue as defined by the pleadings (***Sky Solar (Canada) Ltd. v Economical Mutual Insurance Company***, 2015 ONSC 4714, at para. 25).

Position of the Parties

[37] The Applicant submitted that the none of the narrow circumstances of the Court of King's Bench Rule 59.06 apply, and that the parties cannot now suggest that privilege prevents the production requested given privilege has been waived. The Applicant referred to ***Barbieri v. White***, 2024 BCCA 225 (see paras. 23, 25 and 54), to support his position that an estate representative can expressly waive privilege in a consent order.

[38] The Applicant further submitted that his production request is not overbroad and that the documents are relevant for the following reasons:

- i. Medical and Financial Documents

- a. the medical documents would describe the progression of Lloyd's cancer and any mental decline; and
 - b. the financial documents would identify any improper withdrawals or transfers given Guo's explanation as to the use of Lloyd's bank account is not supported by the banking records in his possession.
- ii. Legal Files
 - a. Michael and/or TDS may have one or more files pertaining to Lloyd and/or Guo given a meeting he had witnessed between Michael, Lloyd and Guo in May 2019 at MacBell and a letter from TDS he had seen shortly after Lloyd's death. He believed the letter was an immigration sponsorship letter referencing Guo that was similar to the other two other times Lloyd had sponsored women to come to Canada.
- iii. Guo's Documentation
 - a. Guo has disclosed very few documents, all of which are favourable to her position, and some of which whose authenticity cannot be verified.

[39] Guo submitted the following:

- i. the Consent Order does not impose an unqualified obligation on her to produce documentation regardless of their relevance; and
- ii. the Applicant's requested document production is overly broad, disproportionate and constitutes a fishing expedition.

[40] Michael submitted as follows:

- i. both he and TDS have complied with the terms of paras. 5 and 6 of the Consent Order;
- ii. the balance of the Consent Order does not impose an unqualified obligation on him or TDS to produce the Legal Files or disclose the existence of files regardless of their relevance; and
- iii. given the instructions received from the Law Society of Manitoba (who were served with the application and motion material, but did not attend the hearing) even if the documents were relevant, he is unable to produce any further information, or the files sought by the Applicant because of solicitor-client privilege.

My Analysis and Findings

[41] Despite the litigation having commenced by way of an application, the parties have agreed that the Court of King's Bench Rule 30, shall apply¹. This means that I am to determine the issue of relevance and production based on what is contained in the application. Given applications generally contain limited factual detail, I find I must also rely of the affidavits provided by the parties.

[42] Considering this background, I find my Rule 30 analysis will mirror that set out in ***Neuberger, Seepa*** and ***Re Peter Estate*** namely, whether the Applicant, through the

¹ see para. 8 of the Consent Order

application and his affidavits has established a *prima facie* case supporting production, which has not been answered or rebutted by Guo and Michael.

[43] Having adopted this approach and given my analysis and findings set out at paras. 27 to 29, the Applicant's Rule 30 production request must fail.

E. THE LAW RELATING TO THE OBLIGATIONS OF A LIFE TENANT, THE POSITION OF THE PARTIES, MY ANALYSIS AND FINDINGS

The Law

[44] A person determined to have a life interest in a property has an obligation to pay insurance, taxes, utility charges and reasonable maintenance and repair costs to ensure that the property is maintained and kept in a state of reasonable repair, taking into account its state of repair at the time of the testator's death (see ***Kachur Estate***, 2017 ABQB 786, at paras. 105 and 107).

[45] Necessary or major repairs preventing a property from becoming completely valueless is the responsibility of the remainderman and not the person determined to have a life interest in the property (see ***Kachur***, at para. 108, and ***Re Buhr Estate***, 1993 CanLII 14976 (MB KB), 90 Man. R. (2d) 118, at paras. 16 and 17).

Position of the Parties

[46] The Applicant submitted that the house inspection report shows that Guo is not performing the ongoing maintenance to the property, including not dealing with vegetation growth, failing to clean the gutters, and failing to deal with mould and pests or rodents in the house.

[47] Guo submitted that many of the issues raised in the house inspection report are problems that existed prior to Lloyd's death, suggesting that they are major and not her responsibility.

[48] Michael submitted that as administrator pending litigation, he has permitted Guo to remain at MacBell given the following:

- i. the 2023 Will grants her a life interest, which would entitle her to live there, unless the 2023 Will is set aside;
- ii. if not for Guo the estate would be required to engage a third party, at a cost to the estate, to monitor and otherwise provide upkeep to the property;
- iii. Guo has agreed to pay all costs relating to MacBell, other than property taxes, property insurance and capital repairs which to date have totalled \$18,962.00 ("Estate Expenses"); and
- iv. the estate has reserved the right to seek reimbursement from Guo for some of the Estate Expenses should the 2023 Will be proven valid.

[49] Michael further submitted that MacBell is a remote and secluded property which requires upkeep and maintenance.

My Analysis and Findings

[50] Having considered the evidence and submissions of counsel, I see no reason to interfere with Michael's decision to allow Guo to reside in MacBell at this time, subject to her paying all costs, other than the Estate Expenses, given the following:

- i. the life estate in MacBell has yet to vest with Guo;

- ii. the estate has reserved the right to seek reimbursement from Guo for some of the Estate Expenses should the 2023 Will be proven valid;
- iii. if Guo were not residing in MacBell, the estate would have to retain a third party to monitor the property at a cost to the estate;
- iv. the vegetation growth, gutter, pest or rodent issues (as noted in the home inspection report) do not rise to the level of Guo letting the property go to waste; and
- v. the foundation, mould, fencing, plumbing, electrical, vegetation issues (as noted in the home inspection report) likely existed prior to Lloyd's passing and appear to be major and/or capital expenditures which are not normally the responsibility of a tenant or life tenant.

[51] For all these reasons, this branch of relief sought by the Applicant is dismissed.

F. INTERIM ADVANCE, THE POSITION OF THE PARTIES, MY ANALYSIS AND FINDINGS

Position of the Parties

[52] The Applicant submits that he has depleted his savings and incurred debt to pay to have this matter litigated. As such, he is requesting that he be provided an interim advance for the purpose of continuing with his claim. He further submits that any advance out of the estate would only impact his interest as the residual beneficiary.

[53] Guo submits that given Michael's comments relating to significant outstanding liabilities owing to CRA, she is not prepared to consent to the Applicant receiving any interim advances at this point.

[54] Michael submits that he is not, at this time, prepared to provide the Applicant an interim advance of \$40,000.00 given the extent of tax liabilities (known and unknown) owing to CRA.

My Analysis and Findings

[55] Having considered the evidence and submissions of counsel, I see no reason to interfere with Michael's decision not to make an interim advance of \$40,000.00 to the Applicant given the complexities surrounding Lloyd's estate and until such time as the exact quantum of all liabilities, including the amounts owing to CRA (which appear to be significant), have been established.

[56] For all these reasons, this branch of relief sought by the Applicant is dismissed.

[57] The parties can speak to costs if they cannot agree.

J.