

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Holly C. Beard
Madam Justice Diana M. Cameron
Madam Justice Lori T. Spivak

IN THE MATTER OF: The Estate of Larry William Clifford, deceased

BETWEEN:

	) <i>W. S. Gange</i>
	) <i>for the Appellant</i>
	)
<i>WILLIAM SCOTT CLIFFORD</i>	) <i>N. D. M. Hamilton and</i>
	) <i>E. Bell</i>
(Applicant) Appellant	) <i>for the Respondents</i>
	) <i>W. Barrow and R. Turnbull</i>
- and -	) <i>as the Executors and</i>
	) <i>Administrators Pending</i>
<i>WARREN BARROW, WARREN BARROW</i>	) <i>Litigation of the Estate of</i>
<i>as the Executor of the ESTATE OF LARRY</i>	) <i>Larry William Clifford, and</i>
<i>WILLIAM CLIFFORD, deceased, WARREN</i>	) <i>W. Barrow and S. Clifford</i>
<i>BARROW as the Attorney under the Power of</i>	) <i>as the Attorneys under the</i>
<i>Attorney of LARRY WILLIAM CLIFFORD,</i>	) <i>Power of Attorney of the</i>
<i>RYAN TURNBULL, RYAN TURNBULL as</i>	) <i>Estate of Larry William</i>
<i>the Executor of the ESTATE OF LARRY</i>	) <i>Clifford</i>
<i>WILLIAM CLIFFORD, deceased, SHERRI</i>	)
<i>LYNN CLIFFORD, SHERRI LYNN</i>	) <i>K. G. Mandzuik, K.C. and</i>
<i>CLIFFORD as the Attorney under the Power</i>	) <i>D. Dubois</i>
<i>of Attorney of LARRY WILLIAM CLIFFORD,</i>	) <i>for the Respondents</i>
<i>BRADLEY CONRAD CLIFFORD, COLE</i>	) <i>W. Barrow, R. Turnbull,</i>
<i>JOSEPH TYSON LEBLANC, MYRNA</i>	) <i>S. Clifford, B. Clifford,</i>
<i>BARROW, RHONDA THEREAULT and</i>	) <i>C. LeBlanc, M. Barrow,</i>
<i>JAMES THEREAULT</i>	) <i>R. Thereault and J. Thereault</i>
	) <i>as Beneficiaries of the</i>
(Respondents) Respondents	) <i>Estate of Larry William</i>
	) <i>Clifford</i>
- and -	)

***DON TARRANT, JASON BEYETTE
operating as JAYLO FARMS and ALIX
HARPELLE CLIFFORD***

(Respondents)

) ***J. Taylor***
) *for the minor beneficiary*
)
) ***No appearance***
) *for D. Tarrant, J. Beyette*
) *operating as Jaylo Farms*
) *and A. H. Clifford*
)
) *Appeal heard and*
) *Decision pronounced:*
) ***September 15, 2026***
)
) *Written reasons:*
) ***October 7, 2026***

On appeal from *Re Clifford Estate; Clifford v Barrow et al*, 2025 MBKB 80 [the decision]

CAMERON JA (for the Court):

Introduction and Issues

[1] The applicant, who is the son of and beneficiary of the estate of Larry William Clifford (the deceased), has appealed the order of the motion judge (who was also the case management judge) (the judge) dismissing his application to have the deceased’s March 5, 2020 will (the 2020 will) proved in solemn form and declared invalid (the application).

[2] The respondent beneficiaries filed a motion (the threshold motion), which the judge granted, challenging the application on the basis that the applicant was not entitled to have the 2020 will proved in solemn form because the application did not meet the test in *Neuberger Estate v York*, 2016 ONCA 191 [*Neuberger*]. That test requires that “an interested person [in estate litigation] must meet some minimal evidentiary threshold before a court

will accede to a request that a testamentary instrument be proved [in solemn form]” (*ibid* at para 88) (the threshold test).

[3] The judge issued the *decision* on June 19, 2025. In addition to granting the threshold motion and dismissing the application, the judge granted the respondent beneficiaries’ motion for security for costs. He also granted an application by the respondents, Warren Barrow and Ryan Turnbull, the administrators pending litigation, requiring the applicant to vacate the deceased’s lands and premises (the vacancy motion). The applicant did not appeal the orders in the latter two motions.

[4] All three of the above motions (the three motions), together with the application, were heard together and the judge addressed each of them in the *decision*.

[5] The applicant raised three issues on appeal. The first two related to a late change in counsel representing the applicant (new counsel), who went on record as applicant’s counsel on April 10, 2025. The applicant asserted that the judge erred in denying new counsel’s request to reamend his notice of application, if necessary, as well as a request to file further affidavit evidence, if necessary. The third alleged error was that the judge erred in his application of the threshold test.

[6] At the appeal hearing, we dismissed the appeal with brief reasons to follow. These are those reasons.

Background

[7] The applicant is the son of the deceased and a beneficiary of his estate. The main point of contention in this case arises from the fact that the deceased had made two wills. The first was dated February 21, 2019 (the 2019 will). Pursuant to the 2019 will, the applicant was to receive (1) the remainder of the deceased's spouse's life interest in the home quarter; (2) remaining farmlands not specifically bequeathed to named beneficiaries (the remaining farmlands), tools, equipment, shares and shareholder loans of the deceased's farming corporation; and (3) one half of the residue of the deceased's estate. The applicant's sister, who is the daughter of the deceased (the daughter), was to receive the other half of the residue of the estate.

[8] The 2020 will significantly reduced the applicant's entitlement. Pursuant to the 2020 will, the remainder of the deceased's spouse's life estate was to be divided between the applicant and the daughter. No specific provision was made for the remaining farmlands, tools, equipment, shares and shareholder loans of the deceased's farming corporation. While the residue of the estate continued to be divided equally between the applicant and the daughter, the applicant's share was to be held in trust for his benefit during his lifetime, with any remainder to be divided unequally between the applicant's son (twenty per cent) and the daughter (eighty per cent).

The Request to Reamend the Applicant's Application and the Request to File Further Affidavit Evidence (Both If Necessary)

[9] A brief review of the history of the proceedings provides context for the judge's decision. The deceased died on November 26, 2024. The applicant filed the application on December 18, 2024. As noted by the judge,

the applicant advanced multiple claims, but the focus was the validity of the 2020 will, and the applicant's claims that it was invalid because the deceased did not have testamentary capacity and he was subjected to undue influence.

[10] In January 2025, the application was amended to include an allegation that the signature on the 2020 will was not that of the deceased. This claim was abandoned by new counsel (see the *decision* at para 56).

[11] In February 2025, at the first case management conference, the judge made a number of orders denying several of the applicant's requests.

[12] In March 2025, at the second case management conference, the judge set filing deadlines for the three motions and set April 23, 2025 for oral argument.

[13] As noted earlier, new counsel went on record as representing the applicant on April 10, 2025, after the hearing date was set.

[14] On April 23, 2025, the date of the scheduled hearing (the April hearing), new counsel appeared via video, confirmed that he had just been retained by the applicant and indicated that he required time to prepare. He sought an adjournment of three months, which was opposed by all of the respondents. The notice of motion he filed sought leave to reamend the application, if necessary, and to file further affidavit evidence, if necessary.

[15] Although the judge refused to adjourn the April hearing for three months, he did agree to an adjournment until May 23, 2025 (the May hearing), with the consent of the respondents. However, he dismissed the motion to reamend the application, if necessary, as well as the request to file further

affidavit evidence, if necessary. In his case conference memorandum relating to the April hearing, the judge noted that the respondents argued that the applicant had already filed four affidavits in the proceedings, that the reamendment of the application would amount to a “do over” and that the combination of further affidavit evidence and a reamended application would effectively result in a fresh proceeding. Aside from providing these remarks, he gave no reasons in his case conference memorandum for dismissing these motions. In the *decision*, the judge stated that he dismissed the applicant’s motions to reamend the application and file further affidavit evidence, as it would have been unfair for the applicant to file further affidavit evidence that opposing counsel could not respond to in a timely way.

[16] Rules 38.05.1(1) and 38.05.1(2) of the MB, *King’s Bench Rules*, Man Reg 553/88 [the *KB Rules*], provide the authority for the court to amend a notice of application. They state:

When amendments may be made

38.05.1(1) The applicant may amend a notice of application

- (a) on filing the written consent of all parties and, if a person is to be added as a party, with the written consent of that person;
- (b) at any time on requisition to correct clerical errors; or
- (c) with leave of the court.

Moment d’apporter des modifications

38.05.1(1) Le requérant peut modifier un avis de requête :

- a) en déposant le consentement écrit de toutes les parties et, le cas échéant, celui de la personne qui doit être jointe ou substituée comme partie;
- b) en tout temps sur demande, afin de corriger des erreurs d’écriture;

c) avec l'autorisation du tribunal.

When court may grant leave

38.05.1(2) The court may grant leave on motion at any stage of an application to amend a notice of application on such terms as are just, unless prejudice would result that could not be compensated by costs or an adjournment.

Pouvoir du tribunal

38.05.1(2) À moins qu'il n'en résulte un préjudice qui ne saurait être réparé par les dépens ou par un ajournement, le tribunal peut, à la suite d'une motion présentée à une étape d'une requête, accorder l'autorisation de modifier un avis de requête à des conditions qu'il estime justes.

[17] The applicant refers to *Hapko v Boel*, 2024 MBCA 110 at paras 40-42 [*Hapko*], in arguing that the judge was required to provide reasons evidencing and explaining his application of each of the requirements of rule 38.05.1(2) of the *KB Rules* and that he erred by failing to do so.

[18] *Hapko* is a decision of a single judge of this Court granting leave to appeal. It does not appear to have been argued by the parties before the judge in the present case, and the appeal in *Hapko* was discontinued before the issues raised in it were considered by this Court. Nonetheless, the overriding issue of prejudice identified in that case and in rule 38.05.1(2) of the *KB Rules* was addressed by the parties before the judge.

[19] The decisions dismissing the motions for reamendment and further affidavit evidence were made in the context of case management. They are discretionary decisions subject to appellate review on the standard of deference absent a legal error, a palpable and overriding error of fact, or a failure to exercise his discretion judicially, which includes acting arbitrarily

or being so clearly wrong as to amount to an injustice (see “*Iglesia Ni Cristo*” *Church of Christ v Canadian Broadcasting Corporation*, 2026 MBCA 45 at para 4).

[20] In this case, it would have been impossible for the judge to fully consider the factors in rules 38.05.1(1) and 38.05.1(2) of the *KB Rules*, given that the nature of the reamendment to the application was not specified, or even determined to be necessary, by the applicant.

[21] The applicant was successful in obtaining an adjournment of the April hearing to accommodate new counsel. Prior to the May hearing, new counsel cross-examined four of the respondent beneficiaries’ affiants. While recognizing that it would be rare, had the applicant or his new counsel identified any compelling reasons for a specific reamendment or further material evidence, the applicant could have made a further motion to the judge in the ensuing time frame, but he did not do so.

[22] Although it would have been preferable for the judge to have given reasons for dismissing the motion to reamend the application and file further affidavit evidence, the judge was being asked to grant an unspecified amendment and allow further affidavit evidence, only if necessary. Considering the nature of the arguments and the prejudice identified by the respondents, we are not convinced that the judge made a reviewable error.

The Threshold Motion

[23] As earlier stated, the *Neuberger* case stands for the proposition that an applicant in estate litigation must meet some minimal evidentiary threshold

before a court will grant a request for a testamentary instrument to be proved in solemn form.

[24] The threshold test is the law in Ontario (see *Johnson v Johnson*, 2022 ONCA 682 at paras 7-8). It has been expanded to apply to other aspects of estate litigation, such as documentary discovery (see *ibid* at para 16; *Seepa v Seepa*, 2017 ONSC 5368 at paras 2-4).

[25] Aside from the application of the threshold test by the judge in this case, that test has also been applied by the Manitoba Court of King's Bench in *Re Peter Estate; Wickstead v Martens et al*, 2024 MBKB 94 and *Re Simmons Estate; Simmons v Sinclair et al*, 2025 MBKB 45 (overturned for other reasons in *Simmons v Sinclair*, 2026 MBCA 74 [*Simmons* 2026]).

[26] At the May hearing, the parties did not dispute the application of the threshold test, and the hearing proceeded on that basis without any analysis of its applicability (see the *decision* at para 57).

[27] Shortly before this appeal hearing, this Court released its reasons in *Simmons* 2026. In that case, Edmond JA was considering the issue of document disclosure in an estate dispute. He referred to *Neuberger* and subsequent case law applying the threshold test (see *Simmons* 2026 at paras 44-51). He acknowledged that there was a question as to the applicability of the *Neuberger* approach in Manitoba, and he noted the academic commentary cautioning courts on the application of the threshold test. In the end, he found that it was unnecessary to determine the applicability of that test in the case before him, given that the parties had an earlier binding consent order regarding disclosure (see *Simmons* 2026 at paras 55-60). He

thus left for another day the determination of whether the *Neuberger* approach should be adopted in Manitoba (see *Simmons* 2026 at para 60).

[28] Given the recency of *Simmons* 2026, this Court alerted the parties to the decision with the direction that, if they wished to argue the issue, a motion would be required seeking leave to amend the grounds of appeal.

[29] The applicant responded, stating that he was not seeking leave to amend the grounds of appeal and that he was prepared to proceed with the arguments as framed, consenting to the application of the threshold test.

[30] Thus, this Court agreed to decide the appeal based on the parties' agreement, without determining whether the threshold test is applicable in Manitoba.

Application of the Threshold Test

Hearsay

[31] The applicant first argued that the judge erred by impermissibly relying on hearsay evidence in determining whether the threshold test had been met. This issue was not before the judge and was first argued on appeal.

[32] We agree with the position of all of the parties that the judge mistakenly relied on a comment by the deceased's spouse, made in a separate proceeding. The comment related to the living situation of the spouse and the deceased at a certain point in time. However, in our view, the judge's reliance on the comment was harmless in the circumstances of this case, and the living situation was proved through other admissible evidence.

[33] Regarding the applicant's contention that the judge relied on inadmissible hearsay from decisions of the parole board relating to the applicant, comments from the daughter about the applicant's interactions with others, and other assertions, a review of the judge's reasons demonstrates that he did not rely on this evidence in determining the threshold issue. Rather, this evidence was filed in support of the vacancy motion. The order of the judge granting that motion has not been appealed.

[34] It should also be noted that hearsay evidence is permitted in an affidavit filed for use in a motion, if it complies with rule 39.01(4), and in an application, if it complies with rule 39.01(5) of the *KB Rules*. In addition to not raising the issue of some evidence being inadmissible hearsay at the May hearing, the applicant did not challenge it on the basis that it did not comply with these provisions.

Suspicious Circumstances

[35] The applicant submitted that he presented evidence of suspicious circumstances surrounding the making of the 2020 will and that the judge erred by conflating the evidentiary burden articulated in the threshold test with the persuasive legal burden.

[36] As explained by Pfuetzner JA in *Drewniak v Smith*, 2024 MBCA 86 at paras 28-32 [*Drewniak*]:

Vout v Hay, 1995 CanLII 105 (SCC) [*Vout*] is the leading Canadian case on the burdens of proof in contested Wills matters and its statement of the law is consistent with the law's historical origins in the probate courts. The propounder of a Will has the persuasive legal burden to prove due execution, knowledge and approval and testamentary capacity. In a common form

proceeding, this persuasive legal burden is typically discharged by the propounder of the Will filing affidavit evidence that the Will was read over by the testator who appeared to understand it and the Will was executed with the requisite legal formalities. Upon establishing these facts, capacity and knowledge and approval are presumed (see *Vout* at para 26). I will refer to this rebuttable presumption as the *evidentiary presumption arising from due execution*.

If a person seeks to attack a Will on the basis that the testator did not in fact execute the Will, lacked capacity or lacked knowledge and approval of the Will's contents, that person has the evidential burden to point to some evidence that, if accepted, would establish those facts (see *Otis* at para 49; *Vout* at para 27). One way that this evidential burden can be satisfied is by pointing to suspicious circumstances surrounding the origins of the Will.

If the attacker is successful in discharging their evidential burden, the propounder can no longer rely on the evidentiary presumption arising from due execution to satisfy their persuasive legal burden. The propounder must lead sufficient evidence to prove due execution, capacity and knowledge and approval, as the case may be, on a balance of probabilities.

Traditionally, once an attacker has discharged their evidential burden the propounder of the Will would seek to prove it in solemn form . . .

The distinction between the routine nature of proof in common form and the contentious nature of proof in solemn form continues to this day, although that nomenclature is not always used.

[emphasis in original; underlining added]

[37] Thus, if the evidentiary burden is satisfied, the propounder of a will is obligated to prove its validity in solemn form (see *Drewniak* at paras 31-32).

[38] In this case, there is no issue that the judge correctly articulated both the law, as set out above, and the threshold test. The judge's subsequent assessment of the evidence and factual findings are owed appellate deference, absent an error in principle (see *Giann v Giannopoulos* 2024 ONCA 928 at para 17). As noted earlier, absent an error of law or fact, the exercise of discretion can only be challenged on the basis that it was arbitrary or so clearly wrong as to amount to an injustice (see para 19 herein).

[39] The applicant argued that the judge made palpable and overriding errors in his application of the threshold test.

[40] In applying the threshold issue, the judge considered the evidence presented by the applicant and what the judge termed the applicant's "working theory" (the *decision* at paras 67-68). This included the fact that the time at issue was the short period of the fifty-four weeks between the signing of the 2019 will on February 21, 2019, which the applicant argued was valid, and the signing of the 2020 will on March 5, 2020 (the relevant time), which he alleged was invalid.

[41] The judge found no evidence of a lack of capacity, pointing out that, while the applicant mentioned that the deceased had treatment for several physical problems (the *decision* at para 77):

[The applicant] never mention[ed] that the [d]eceased was in any way cognitively impaired or somehow limited in his ability to work on the farm. None of the medical conditions mentioned by [the applicant] logically point to a lack of mental capacity or limited cognitive function on the part of the [d]eceased.

[42] The judge noted that the applicant, himself, relied on the capacity of the deceased during the same period that he also argued it was lacking. The judge also noted the applicant's assertion that he and the deceased came to an agreement, and the two of them actively worked the deceased's farm together after the relevant time.

[43] Regarding capacity and undue influence by the daughter, the judge stated that, among other things, the daughter had been estranged from the deceased and had not communicated with him from 2015 until his stroke in 2021, including at the time he executed both the 2019 will and the 2020 will, and that nothing had happened between the execution of those two wills that would have indicated either a lack of capacity or undue influence.

[44] In addition, the judge stated that the same lawyer, with whom the deceased had a long-standing personal and professional relationship, drafted and executed both the 2019 will and the 2020 will. Furthermore, the judge considered and rejected other circumstances that the applicant claimed constituted suspicious circumstances. After considering and providing reasons for rejecting the alleged suspicious circumstances, the judge stated that "[t]he law does not provide that inconsistency between two wills alone constitutes a suspicious circumstance" (the *decision* at para 92).

[45] In our view, the applicant has not demonstrated an error in principle, a palpable and overriding error in the judge's assessment of the facts or application of the threshold test, or that the decision was arbitrary or so clearly wrong as to amount to an injustice.

[46] In the result, we dismissed the appeal, with one set of tariff costs to the respondent beneficiaries, one set to the respondent estate administrators and one set to the minor beneficiary.

Cameron JA

Beard JA

Spivak JA