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Docket: CI 16-01-05565
(Winnipeg Centre)
Indexed as: Robertson v. Harding
Cited as: 2017 MBQB 142

COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:

GLENN WILLIAM ROBERTSON,	)	Counsel:
	)	
applicant,	)	William C. Kushneryk, Q.C.
	)	and Colburne Poapst
- and -	)	for the applicant
	)	
GORDON BRUCE HARDING,	)	Wayne M. Onchulenko
	)	for the respondent
respondent.	)	
	)	JUDGMENT DELIVERED:
	)	July 26, 2017

McCAWLEY J.

[1] The applicant seeks an order requiring the respondent to provide the court with an accounting for funds which the applicant says were withdrawn from the bank accounts of the applicant's father, William Robertson, while the respondent was acting as William Robertson's attorney during the period January 2010 to May 2016.

[2] The applicant also seeks an order from the court that the respondent pay William Robertson all funds for which he has failed to account and for an order of costs.

[3] The underlying facts and applicable law were not in dispute and accordingly these reasons for decision will be brief.

[4] On June 29, 2005, William Robertson executed a power of attorney in favour of his wife. He named his stepson, the respondent, as the alternate attorney. Mr. Robertson's wife died on May 3, 2009, and from that date until May 18, 2006, the respondent acted pursuant to the power of attorney which was then terminated.

[5] The within application is not brought by William Robertson, but by his eldest son, Glenn William Robertson. Originally it was alleged that $160,000 was unaccounted for, but that figure was revised to $145,000. Although an accounting from the respondent was verbally requested it has never been provided.

[6] The essential issue in this case is whether this court should follow the line of decisions (*Ranville v. Campbell*, 2011 MBQB 315; *Penniston v. Vandekerckhove et al.* (25 September 2015), Winnipeg PR 14-01-99419 (MBQB); and *The Estate of Rudi Terhoch*, 2013 MBQB 181, 295 Man.R. (2d) 142) (*sub nom Zatser v. Boroditsky*)) to the effect that, in the face of an enduring power of attorney, s. 24(1) of *The Powers of Attorney Act*, C.C.S.M., c. P97, is only applicable where there is evidence of mental incompetency or, alternatively, whether the court should exercise its broad powers to order an accounting.

[7] Paragraph 26.01 of the power of attorney by William Robertson provides:

> I declare that the authority in this general power of attorney given to my attorney above named is to remain in full force and effect, notwithstanding any future or periodic mental infirmity or incompetency on my part, until expressly revoked by me.

[8] Paragraph 26.02 of the power of attorney names William Robertson's stepdaughter, Sheila Anne Howardson, as a person entitled to demand an accounting at any time.

[9] The evidence before the court, on its face, is troubling. It appears that the respondent was the joint owner of William Robertson's Scotiabank accounts and that for some reason it was determined that the money from the Scotiabank accounts should be gradually withdrawn and deposited in an account at the Royal Bank of Canada. The manner in which this appears to have been accomplished was that the respondent would drive Mr. Robertson to the Scotiabank where he would withdraw several thousand dollars at a time. The respondent would then take him to the Royal Bank where Mr. Robertson would remain in the car while the respondent deposited only some of the withdrawn monies into a Royal Bank account without the knowledge of Mr. Robertson. The applicant says that, of the approximately $193,000 withdrawn in this manner, about $145,000 remains unaccounted for.

[10] In the face of these suspicious circumstances, which seem to fly in the face of any reasonable interpretation of the fiduciary duties owed by an attorney to a donor, it is tempting to attempt to justify the kind of court intervention sought by the applicant. However, and without dealing with some of the

collateral issues raised (for example whether William Robertson had notice, and whether the applicant has standing), it is well established that evidence of mental incompetence on the part of a donor is a prerequisite to a third party applying for an accounting. The obvious underlying principle is that the donor can request and obtain an accounting while he or she is competent to do so. There is no evidence before this court that the donor is mentally incompetent.

[11] Accordingly, the application is dismissed. Costs may be spoken to if counsel are unable to agree.

McCawley J.