Citation: Berry v Berry, 2026 MBCA 90
Date: 20261112
Docket: AI26-30-10347

IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Christopher J. Mainella
Madam Justice Jennifer A. Pfuetzner
Madam Justice Anne M. E. Turner

***B E T W E E N**:*

	)	***K. G. Mandzuik, K.C.***
PAUL SEAN BERRY	)	*for the Appellant*
	)	
(Applicant) Appellant	)	***P. R. Kathler***,
	)	***C. A. M. Tokar*** *and*
- and -	)	***E. M. Chrusch***
	)	*for the Respondents*
ARTHUR EDWARD PETER BERRY and MARY ANN BERRY	)	
	)	*Appeal heard:*
	)	***October 5, 2026***
(Respondents) Respondents	)	
	)	*Judgment delivered:*
	)	***November 12, 2026***

On appeal from *Berry v Berry et al.*, 2025 MBKB 32 [*Berry*]

PFUETZNER JA

Introduction

[1] This appeal and cross appeal arise out of a dispute over a family farm near Fisher Branch, Manitoba (the property).

[2] The judge dismissed the applicant's (the son) request for an order directing the sale of the property because he found that the son did not have currently exercisable rights in the property and, alternatively, came to the Court with unclean hands. The judge made other findings regarding

beneficial ownership of the property. The son appeals the dismissal of his application and the respondents (the parents) cross appeal other aspects of the order.

[3] For the reasons that follow, I would allow the appeal and dismiss the cross appeal.

Background

[4] On November 13, 2008, the parents transferred the title of the property to themselves and the son as joint tenants (the transfer). Prior to the transfer, on October 27, 2008, the parents signed a deed of gift, drafted by their lawyer, setting out their intention to make a gift of the property to the son (the deed of gift). A copy of the deed of gift is attached to these reasons as an Appendix. No co-ownership agreement was entered into by the parties, and the son and the parents continued to farm the property together.

[5] In 2023, there was a serious breakdown in the relationship between the parents and the son. The parents took steps to sever the joint tenancy (the severance), with the result that the registered title to the property now reflects each of them having an undivided one-third interest in the property as tenants in common. At about the same time, the son brought an application for an order directing the sale of the property and for an order that the sale proceeds be divided unequally so that he would receive more than half (the application).

Proceedings in the Court of King's Bench

[6] The judge dismissed the application and made several findings regarding beneficial ownership of the property. He found, based on the deed

of gift and the affidavit evidence of the parents, that the parents had the "intention to gift a right of survivorship, but no intention to gift any exercisable rights in connection with the property during [their] lifetime[s]" (*Berry* at para 73). As a result, the judge concluded that beneficial ownership of the farm was one-third vested in each parent and a one-third survivorship interest held by the son. In other words, the son's one-third interest would only fully vest in him if he survives both of the parents, and he holds the interest in trust for them during their lifetimes. The judge found that the son did not fully rebut the presumption of resulting trust that arose when the parents made the transfer.

[7] Ultimately, the judge dismissed the application for two reasons. First, he found that the son did not have standing to obtain an order directing the sale of the property as he "has no exercisable rights in connection to the [property] prior to the deaths of the [p]arents" (*Berry* at para 80). Alternatively, he found that the son did "not come before [the Court] with clean hands, given the uncontradicted evidence that he drained the accounts of the farming operation, sold farm assets and confiscated farm equipment belonging to the parents" (*Berry* at para 81). This Court was advised by counsel at the hearing of the appeal that the dispute over the farming operation, assets and equipment (the farming operation dispute) is the subject of separate legal proceedings.

Grounds of Appeal and Cross Appeal

[8] The son appeals, arguing that the judge made material errors of fact and principle. He asserts that the issue of the presumption of resulting trust was not before the Court and the process was therefore unfair. He merely

sought an order directing the sale of the property and the parents' only request for relief was to expunge parts of his supporting affidavit—there was no cross-application for a declaration of a resulting trust. Moreover, he submits that the presumption of resulting trust does not arise because the deed of gift provides conclusive evidence of the parents' actual intention. He says that he had a prima facie right to an order for partition or sale under section 19(1) of *The Law of Property Act*, CCSM c L90 [the *LPA*], which provides, in part, that "[a]ll joint tenants, tenants in common . . . and all persons interested in . . . any land in Manitoba, may be compelled to make or suffer partition or sale of the land or any part thereof." Finally, he argues that he did not come to the Court with unclean hands since the farming operation dispute is unrelated to the application and is, in any event, the subject of separate legal proceedings. The parents' position is that the judge correctly applied the relevant law, made reasonable findings of fact that were supported by the evidence and soundly articulated two bases upon which the application must fail. In particular, they submit that the presumption of resulting trust was before the judge by virtue of the application and need not have been pleaded by the parents.

[9] The parents have filed a cross appeal seeking to have the son's name removed from the title to the property. They assert that the judge erred in finding that the son holds a one-third interest in the property as a tenant in common on a resulting trust, as well as having a one-third right of survivorship. They argue that a tenancy in common with a right of survivorship does not exist at law—and the son agrees. However, the son's response to the cross appeal is that, to the extent that the judge found that the

parents made an irrevocable gift of a right of survivorship to him, the parents were not able to sever the joint tenancy and thereby extinguish the gift.

Analysis: The Appeal

The Process Was Fair

[10] The first issue raised by the son is whether the presumption of resulting trust was properly before the judge on the application. At the hearing of the appeal, this Court was advised that the judge raised the issue with counsel in the days prior to hearing the application and asked that counsel be prepared to address the decision of the Ontario Court of Appeal in *Jackson v Rosenberg*, 2024 ONCA 875 [*Jackson* 2024], which the judge ultimately purported to apply.

[11] The son objects to the process chosen by the judge. He asserts that the presumption of resulting trust only comes into play "[w]here a gratuitous transfer is being challenged" (*Pecore v Pecore*, 2007 SCC 17 at para 55 [*Pecore*]; see also *Kerr v Baranow*, 2011 SCC 10 at para 18). Here, the application was framed as a request for an order directing the sale of the property and the parents' response was not to challenge the transfer on the basis that it was not intended to be an outright gift, but to file an affidavit responding to the sale order sought by the son. The parents also filed an affidavit from each of their two daughters regarding events relevant to the breakdown of the family relationship in 2023 and the farming operation dispute (the daughters' affidavits).

[12] In the circumstances of the present case, in my view, the process chosen by the judge was fair. The judge merely raised an issue (the

presumption of resulting trust) that was a component of, or "rooted in", the relief sought by the son (*R v Mian*, 2014 SCC 54 at para 33). In order to establish the right to an order directing a sale, the judge had to be satisfied that the son had a beneficial interest in the property. I agree with the son that the evidence he filed in support of the application was not prepared in contemplation of rebutting the presumption of resulting trust and that, if he had anticipated a challenge to the transfer, he would have provided additional evidence. However, the judge alerted the parties to the issue in advance of the hearing and provided them with relevant jurisprudence. The parties were given the opportunity to respond to the judge's concerns. In the circumstances, I am not persuaded that the process here was unfair.

The Transfer Was a Gift

[13] The judge began his analysis regarding the beneficial ownership of the property by setting out the applicable legal principles from *Pecore* and subsequent jurisprudence. In *Pecore*, Rothstein J explained the nature of a gratuitous transfer resulting trust as follows: "A resulting trust arises when title to property is in one party's name, but that party, because he or she . . . gave no value for the property, is under an obligation to return it to the original title owner" (at para 20). Justice Rothstein further wrote that (*Pecore* at para 24):

> The presumption of resulting trust is a rebuttable presumption of law and general rule that applies to gratuitous transfers. When a transfer is challenged, the presumption allocates the legal burden of proof. Thus, where a transfer is made for no consideration, the onus is placed on the transferee to demonstrate that a gift was intended[.]

[14] The ultimate goal is to determine the transferor's actual intention. As a result, the evidence required to rebut the presumption is "evidence of the transferor's contrary intention on the balance of probabilities" (*Pecore* at para 43).

[15] After considering the evidence—which consisted only of the son's affidavit in support of the application, the parents' responding affidavit and the daughters' affidavits—the judge found that the parents intended "to limit the gift to the [s]on of a future right after their joint deaths rather than a gift with immediate effect" (*Berry* at para 65). The judge stated that "[t]he deed of gift does not fully rebut the presumption of a resulting trust as the [s]on contends, as it does not address the clearly stated intention of the [p]arents to fully control the [property] and live there until their joint deaths" (*Berry* at para 65). The judge found that the parents "were instead only gifting a right of survivorship following their deaths" (*Berry* at para 63). The judge concluded that the presumption of resulting trust had not been fully rebutted and that "[t]he evidence overwhelmingly supports a finding that the [p]arents intended to leave a gift to the [s]on only after they were both deceased and until that time the [s]on was only holding an interest as a joint tenant in the [property] in trust for them" (*Berry* at para 70).

[16] With respect, the conclusion that the presumption of resulting trust was not fully rebutted on this evidentiary record was the result of palpable and overriding error. In my respectful view, the judge failed to give effect to the clear and unequivocal language in the deed of gift that an immediate gift was intended. He did so by relying on statements in the parents' affidavit, sworn more than sixteen years later, as to what their intention was in 2008 that he found "dramatically undermine[d] the argument" that they intended a gift

(*Berry* at para 62). However, those statements are, in fact, not inconsistent with the intention to make an immediate gift of an undivided interest as a joint tenant in 2008. Moreover, while "evidence of intention that arises subsequent to a transfer should not automatically be excluded" (*Pecore* at para 59), the judge failed to critically assess the evidence for both relevance and reliability in light of the potential for the evidence to be self-serving or reflect a change in intention (see *Pecore* at para 59).

[17] In their affidavit, the parents state that, in 2008 when they "added [the son's] name as a joint tenant", the son knew that it was their intention "to continue farming until [their] retirement and to live on the [p]roperty until [their] death." They confirmed that the transfer was not made "pursuant to any agreement" and appended to their affidavit a copy of the deed of gift that the judge noted was "drafted by their lawyer" (*Berry* at para 21). The parents also swore that they "were under the understanding that other individuals could be added to title . . . at a later date" and that "[i]t was always [their] intention to eventually add [their] daughters . . . to title of the [p]roperty so that all of [their] children would be left with equal interest in the land upon [their] death."

[18] There is nothing in these statements that significantly contradicts or undermines the best evidence of the parents' intention in 2008—the deed of gift—that they intended themselves and the son to own the property as legal and beneficial joint tenants.

[19] The nature of a joint tenancy is that all the joint tenants share an identical interest in the land and are each "entitled to undivided seisin or possession of the whole of the property and none holds any part separately to

the exclusion of the others" (A.W. La Forest, *Anger & Honsberger: Law of Real Property*, 3rd ed (Thomson Reuters, 2025) (updated December 2025, release 2) at vol 1, s 14:2).

[20] Accordingly, the parents' intention to farm the property and live on it until their deaths is consistent with their rights as joint tenants with the son. The judge described the parents as having a stated intention to *fully control* the property. While this language does not appear in their affidavit, the judge's inference in respect of their intention is, in any event, consistent with the right of each joint tenant to be simultaneously in possession of the whole of the property. Finally, the parents' somewhat vague statement that they always intended to eventually add their daughters to title is not inconsistent with an intention in 2008 to gift an interest in the property to the son. Adding additional joint tenants was always legally possible but would have required a new conveyance of title by the son and the parents to themselves and the daughters as joint tenants. That never occurred.

[21] To summarize, the parents' affidavit supports that their intention in 2008 was accurately reflected by the documents that they executed at that time; a deed of gift in favour of the son and the transfer, which created a joint tenancy amongst the parents and the son. In my view, the judge made a palpable and overriding error in concluding that the presumption of resulting trust was not rebutted on this record as the evidence cannot reasonably support his conclusion (see *H.L. v Canada (Attorney General)*, 2005 SCC 25 at para 110).

The Joint Tenancy Was Severable

[22] The son argues that, on the facts of the present case, the parents should be treated as having effectively created an unseverable joint tenancy. I would not accede to this argument. The judge relied on *Jackson* 2024 for the principle that, "[a]lthough a transfer of a right of survivorship through joint tenancy can be properly characterized as a gift, a gratuitous transferor retains the right to sever the joint tenancy" (*Berry* at para 58). This Court has previously considered and rejected the contention that the gift of an interest in real property as a joint tenant "somehow creates an irrevocable right of survivorship" (*Simcoff v Simcoff*, 2009 MBCA 80 at para 57 [*Simcoff*]), noting that, "at common law, it is the *prima facie* right of a joint tenant while alive to take action to effect a severance of a joint tenancy into a tenancy in common" (*Simcoff* at para 61). I pause to note that the question of whether joint tenants can enter into a binding agreement not to sever a joint tenancy, the breach of which entitles the other party to seek damages or an equitable remedy, is not before this Court and I would not comment on it further.

[23] To conclude, the parents made a gift in 2008 to the son of an undivided interest in the property as a joint tenant. Because of the severance, legal (and beneficial) title now stands in the names of the parents and the son, each as to an undivided one-third interest as tenants in common.

[24] As a result of my conclusion on this issue, I will revisit the judge's finding that the son was not entitled to an order directing the sale of the property. Before I do, I will offer some brief comments on two other aspects of the judge's reasons.

Obiter Comments

[25] First, both parties submit, and I agree, that the judge erred when he purported to rely on *Jackson* 2024 to find that the severance only affected a two-thirds interest in the property. The judge concluded that the son "lost his right of survivorship with respect to the [p]arents' two-thirds share" but that "the gift of survivorship with respect to the [s]on's one-third share" could not be revoked (*Berry* at para 76).

[26] The Ontario Court of Appeal in *Jackson* 2024 explicitly overturned the application judge in that case who had come to a similar conclusion (see also *Jackson v Rosenberg*, 2025 ONCA 48 at paras 1-5). In *Jackson* 2024, the Court noted that both parties agreed that "a right of survivorship could not exist under a tenancy in common" (at para 68). In my view, this is also a correct statement of the law as it stands in Manitoba.

[27] The second point upon which I will comment is the judge's statement that "[t]he law recognizes that a gift of a right of survivorship after death can exist independently and in the absence of a beneficial right of ownership during the donor's lifetime" (*Berry* at para 73). He correctly observed that this proposition is supported by *Jackson* 2024.

[28] Whether the incident of survivorship inherent in a joint tenancy of real property can, at law, be divested as a separate gift is an issue that was not fully argued by the parties and is not necessary to resolve in order to dispose of this appeal. I would leave for another day the question of whether the reasoning in *Jackson* 2024 should be adopted in Manitoba.

The Son Is Entitled to an Order Directing a Sale

[29] As I have explained, the judge erred in finding that the son did not have standing to seek an order directing the sale of the property and that he did not have currently exercisable rights with respect to the property. I will now consider the judge's alternative finding that the son did not come before the Court with clean hands.

[30] The jurisprudence regarding the right of a co-owner, whether a joint tenant or a tenant in common, to seek an order for partition or sale under the *LPA* is settled. Citing *Siwak v Siwak*, 2019 MBCA 60, the judge observed that the *LPA* gives a co-owner "a *prima facie* right to apply for an order of partition and [*sic*] sale" (*Berry* at para 80).

[31] However, he also noted that "there are circumstances where a judge can exercise discretion to refuse a request for such an order" (*Berry* at para 80). Such circumstances include where "the application itself is vexatious or if the effect of the order would be oppressive . . . mere hardship or inconvenience . . . is insufficient" (*Berry* at para 80). In addition, because the relief is equitable in nature, the order can be denied "if the applicant does not come to court with clean hands" (*Berry* at para 80). The judge instructed himself that "the conduct required to refuse an order for partition or sale must be fairly egregious" and that "most cases tend to favour the prima facie right of the applicant to partition and [*sic*] sale unless unusual circumstances exist" (*Berry* at para 80; see also *Simcoff* at paras 50-51).

[32] In applying those principles in the present case, the judge found that the son had unclean hands "given the *uncontradicted* evidence that he drained the accounts of the farming operation, sold farm assets and confiscated farm

equipment belonging to the parents" (*Berry* at para 81) [emphasis added]. A review of the record shows that the judge relied on the parents' affidavit in making these factual findings. However, with respect, it is not reasonable to characterize the parents' evidence as uncontradicted.

[33] The son's affidavit filed in support of the application asserted that the farm business operated "at or near a loss" because the parents "used the farm revenue to pay all of their personal expenses". The son also gave evidence that he removed farm equipment to a place of safekeeping as his father "stated that he would be liquidating the farm assets without [the son's] consent" and that his father began to sabotage the farm equipment. The son's affidavit attached photographs of what he attested was damage intentionally inflicted by the father to various pieces of farm machinery. The son also stated that both he and his wife obtained protection orders against the parents at the urging of the RCMP who had become involved in the parties' dispute.

[34] In their affidavit filed in response to the application, the parents say that the son never had the authority to run the farm independently and deny the son's allegations regarding their actions of sabotage but agree with him "that many pieces of [their] farm equipment had been removed from the [p]roperty and taken to the quarter section of land across the street owned by [the son]." In that respect, their evidence is aligned. However, in the broader context of the starkly different allegations in their competing evidence, one cannot say that the parents' evidence is uncontradicted.

[35] Moreover, the judge acknowledged the conflicting evidence when he stated: "Even if the [s]on's allegations as to misconduct of the [p]arents are true, *which still has to be decided*, it cannot mean that he can deprive them of

their assets without notice or compensation. I would refuse the request for partition and [*sic*] sale on this basis" (*Berry* at para 81) [emphasis added].

[36] In my view, it was a palpable and overriding error to deny the application in exclusive reliance on the parents' version of events regarding the farming operation dispute that was contested, unresolved and was the subject of other legal proceedings. The fact that the son did not file a further affidavit to counter the parents' evidence does not leave their allegations uncontradicted. There was no cross-examination on the affidavits or other basis to allow the judge to make credibility findings on this record and to prefer the evidence of the parents over that of the son in the manner that he did. Indeed, the level of personal conflict and animosity evidenced in the competing affidavits supports the conclusion that continued co-ownership of the property by the parties is untenable.

[37] There is, however, a more fundamental issue with the judge's application in the present case of the equitable maxim that those who seek equity must come before the Court with clean hands. Even if the parents' version of events regarding the farming operation dispute was uncontested, the nature and subject of the son's misconduct would not be sufficient to deny him the relief sought. This is because his alleged improper behaviour is unrelated to the manner in which he acquired an ownership interest in the property—and it is that interest that forms the basis of his claim.

[38] In *BMO Nesbitt Burns Inc. v Wellington West Capital Inc.*, 2005 CanLII 30303, 77 OR (3d) 161 (Lexis) (ONCA) [*BMO*], Laskin JA observed that "the clean hands principle is applicable only where the plaintiff's impugned conduct is directly related to the transaction it has sued on" (at

para 27). Similarly, in *Bolianatz Estate v Simon*, 2006 SKCA 16 at para 119, Cameron JA (in dissent but not on this point) wrote:

> Thus, a court exercising equitable jurisdiction may, on application of the doctrine of clean hands, refuse to grant relief to a plaintiff in respect of a transaction tainted by fraud or other unconscionable conduct by the plaintiff if there exists such an "immediate and necessary relation" between the relief sought and the conduct in question as to make it unjust to grant the relief.

[39] In the present case, the underlying basis for the application was the son's receipt of an interest in the property by way of a gift in 2008—this is the "transaction . . . sued [upon]" (*BMO* at para 27). The parents do not allege that the transfer and the deed of gift were procured by the son through fraud or other unconscionable conduct. Nor is there any evidence that he acted in any way improperly in 2008 in connection to the gift. The disagreement in which the son is embroiled with the parents—over a farming operation conducted on the property—is not directly related to his acquisition of an interest in the property and cannot form the basis for the application of the clean hands doctrine.

[40] Having found that the judge's two bases for dismissing the application do not bar the relief sought, I would allow the appeal and direct the sale of the property. The matter should be remitted back to the Court of King's Bench to conduct the sale of the property in accordance with the *LPA* and the *King's Bench Rules*, MR 553/88.

[41] The son is entitled to costs of the appeal and costs of the application.

The Cross Appeal

[42] In light of my conclusions regarding the appeal, specifically that the judge erred in finding that the son does not have a beneficial interest in the property, the cross appeal is moot and I would dismiss it with costs.

Pfuetzner JA

I agree: Mainella JA

I agree: Turner JA

APPENDIX

DEED OF GIFT

WE, the undersigned, ARTHUR EDWARD PETER BERRY and MARY ANN BERRY, of the Postal District of Fisher Branch in Manitoba, do hereby convey by way of gift to our dear son, PAUL SEAN BERRY, the following parcels of realty, namely:

TITLE NO. 1720264: NW 1/4 21-23-2 WPM
INCLUDING FISHER-RIVER ROAD PLAN 524 WLTO (PP DIV) (NOW CLOSED) EXC ALL MINES AND MINERALS TOGETHER WITH THE RIGHT TO ENTER LOCATE PROSPECT MINE FOR AND REMOVE.MINERALS AND ALL OTHER ESTATES RIGHTS AND INTERESTS RESERVED TO THE CROWN UNDER THE CROWN LANDS ACT

TITLE NO. 1720265: NE 1/4 21-23-2 WPM
EXC FISHER RIVER ROAD PLAN 524 WLTO (PP DIV)
SUBJECT TO THE RESERVATIONS AND PROVISOES CONTAINED IN THE GRANT FROM THE CROWN

TITLE NO. 1720268: . NE 1/4 33-23-2 WPM
SUBJECT TO THE RESERVATIONS AND PROVISOES CONTAINED IN THE CROWN LANDS ACT

We do hereby declare our intent that the gift reflected by this Deed is intended to be in favor of our above-named son exclusively, as is any income derived therefrom, capital gains thereon, or other accretions thereto, and is therefore not intended to be a shareable asset of his within the context of the Family Property Act of Manitoba, and amendments thereto and any similar legislation that may be in effect and in force or enacted in any other applicable jurisdiction. The gift reflected by this Deed is made in consideration of natural love and affection.

IN WITNESS WHEREOF, I have executed this instrument at Fisher Branch, Manitoba, this 27th day of October, 2008.

[signature omitted]
WITNESS

[signature omitted]
ARTHUR EDWARD PETER BERRY

[signature omitted]
WITNESS

[signature omitted]
MARY ANN BERRY

ACCEPTANCE

I, PAUL SEAN BERRY, the donee named in the foregoing Deed of Gift, do hereby accept that gift upon the foregoing terms.

Dated at Fisher Branch, Manitoba, this 27th day of October, 2008.

[signature omitted]
WITNESS

[signature omitted]
PAUL SEAN BERRY