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(Winnipeg Centre)
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COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

PETER KOZIEY,	)	DAVE G. HILL
	)	FAYE A. BRANDSON
applicant,	)	for the applicant
	)	
- and -	)	
	)	
KEVIN STEVEN KOZIEY,	)	PETER HALAMANDARIS
	)	CAITLIN DYCK
respondent.	)	for the respondent
	)	
	)	JUDGMENT DELIVERED:
	)	January 11, 2024

PERLMUTTER A.C.J.

INTRODUCTION

[1] The applicant Peter Koziey applies for a declaration that the interest of the respondent Kevin Steven Koziey[1] in property owned by Peter and Kevin as joint tenants is held in a resulting trust for Peter. It is Kevin's position that Peter intended to gift him his interest in the property and as such, denies that Peter is entitled to the relief he seeks.

[1] Given that the applicant, respondent and Phyllis Koziey all have the same surname, to avoid confusion, I refer to them by their first names. No disrespect is intended.

BACKGROUND

[2] Peter is Kevin's father and is married to Kevin's mother Phyllis Koziey. In 2004, Peter purchased the property at 395 Waterloo Street, in Winnipeg. On January 25, 2007, he transferred an interest in the Waterloo property to Kevin, as a result of which they became registered owners of the property as joint tenants. Peter deposed in his affidavit evidence that he transferred this interest to Kevin, without consideration, for the purposes of estate planning. He also deposed that it was always understood between Kevin and him that Kevin would receive no actual interest in the Waterloo property until it would pass to him through survivorship after Peter's death because his interest was held in trust for Peter during Peter's lifetime. Peter no longer wants to include Kevin in his estate planning with respect to the Waterloo property and wishes to remove Kevin's name from the title.

[3] Kevin admits that he did not pay any part of the purchase price of the property and when his name went on title he did not pay for half the value of the property. Rather, Kevin deposed in his affidavit that he had always been promised by Peter and Phyllis that he would be compensated for work he did in the family business which consists of Peter purchasing and renovating homes that are then rented. As such, it was agreed that Peter and Phyllis would purchase a house for him. As a result, in 2004, the Waterloo property was purchased, initially in Peter's name. Kevin deposed that in 2007, they had another discussion about transferring the Waterloo property into his name as it was always understood and agreed to be his house. Kevin was living there and maintaining it. Kevin

deposed that it was agreed the property would be transferred into his name as well as Peter's name.

[4] Both Peter and Phyllis dispute that they agreed to buy Kevin a house.

[5] In addition to the affidavit evidence filed by Peter, Phyllis, and Kevin, each of them was cross-examined on their affidavit evidence in open court.

[6] The parties agree that if there is a resulting trust in Peter's favour, there is to be a direction by the court that Kevin transfer his interest in the Waterloo property back to Peter. If there is no resulting trust, the parties agree that title to the Waterloo property will remain as it is.

PARTIES' POSITIONS

[7] Peter relies on the presumption that a gratuitous gift to an adult, independent child leads to a resulting trust. It is Peter's position that it was his intention to create a trust with respect to the Waterloo property, he intended to provide Kevin with an interest in the property as part of his estate planning, and he is entitled to restructure his affairs as he sees fit. Peter also asserts that any contributions that Kevin made to improve the Waterloo property do not disrupt the presumption of a resulting trust.

[8] It is Kevin's position that the presumption has been rebutted by evidence that the transfer was intended to be a gift and the restructuring of Peter's affairs cannot be done by retracting the gift of joint interest. In taking this position, Kevin asserts that Peter changed his position that the interest in the property was a gift based on a deterioration in Kevin's relationship with Peter and Phyllis.

PRELIMINARY ISSUE – ADMISSIBILITY OF PETER'S NOTES

[9] Kevin objects to the admission of copies of two handwritten notes attached as exhibit A to Peter's affidavit sworn November 8, 2022, and which are referenced at paragraph 4 of this affidavit. Peter deposed that on or about September 22, 2006, after a conversation with his accountant, he made these two notes. Among other words, these notes include the words "Held in Trust for Kevin". Kevin's objection is that these notes constitute prior consistent statements which are generally inadmissible because of their self-serving nature and "oath helping" qualities.

[10] Peter's counsel submits that these notes are the best evidence to address the pertinent question of Peter's intention in transferring an interest in the Waterloo property to Kevin. Peter argues that these notes are admissible based on s. 58(1) of ***The Manitoba Evidence Act***, C.C.S.M. c. E150, which provides as follows:

> **58(1)** In any legal proceedings where direct oral evidence as to a fact would be admissible, any statement made by a person in a document and tending to establish that fact is, on production of the original document, admissible as evidence of that fact,
>
> (a) if the maker of the statement either
>
> (i) had personal knowledge of the matters dealt with by the statement; or
>
> (ii) where the document in question is, or forms part of, a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of those matters; and
>
> (b) subject to subsection (2), if the maker of the statement is called as a witness in the proceedings.

[11] If not admitted under s. 58(1) of the ***Act***, it is Peter's position that the notes are admissible to rebut the allegation of recent fabrication.

[12] I find that the notes are not admissible under s. 58(1) of the ***Act*** because the "original[s]" of these documents have not been produced as expressly and clearly required by s. 58(1). Only copies are included as exhibits to Peter's affidavit.

[13] An exception to the general exclusionary rule regarding prior consistent statements is where it has been suggested that a witness recently fabricated portions of their evidence. "Admission on the basis of this exception does not require that an allegation of recent fabrication be expressly made – it is sufficient that the circumstances of the case reveal that the 'apparent position of the opposing party is that there has been a prior contrivance'". (***R. v. Stirling***, 2008 SCC 10, para. 5)

[14] Kevin's counsel argues that there is no evidence aside from the notes themselves which proves the notes were written when they purport to have been written and as such, it cannot be said that they were made prior to when any motive to fabricate arose. As I said, Peter has sworn in his affidavit that he made the notes on or about September 22, 2006. Kevin's argument is to question the truth of when these notes were made. Peter was not cross-examined on his affidavit evidence about when they were made. For the purpose of the question of admissibility, I accept Peter's evidence about when these notes were made.

[15] In Kevin's affidavit evidence and through his counsel's cross-examination on the affidavits of Peter and Phyllis, Kevin asserts that Peter's transfer of the interest in the Waterloo property to him was intended by Peter to be a gift. This assertion suggests that

Peter's evidence that he intended that the interest in the property be held by Kevin in trust was recently contrived and in my view is sufficient to trigger the exception to the general exclusionary rule. Accordingly, the notes will remain admitted as evidence only to rebut the allegation of recent fabrication.

LAW OF RESULTING TRUST

[16] In ***Hyczkewycz v. Hupe***, 2019 MBCA 74, Beard J.A. discussed when a resulting trust arises and the presumption of a resulting trust by reference to the explanation provided by Rothstein J. in ***Pecore v. Pecore***, [2007] 1 S.C.R. 795. A summary of the principles applicable to the present case is as follows (paras. 112-113, 117, 119, 122-123):

- 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.
- 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.
- The presumption of resulting trust therefore alters the general practice that a plaintiff (who would be the party challenging the transfer in these cases) bears the legal burden in a civil case. Rather, the onus is on the transferee to rebut the presumption of a resulting trust.

- The evidence required to rebut the presumption is evidence of the transferor's contrary intention on the balance of probabilities.
- The trial judge will commence his or her inquiry with the applicable presumption and will weigh all of the evidence in an attempt to ascertain, on a balance of probabilities, the transferor's actual intention. The presumption will only determine the result where there is insufficient evidence to rebut it on a balance of probabilities.
- In asking whether a resulting trust has arisen, the question is: what was the intention of the transferor or donor? The presumption simply helps to answer this question; it does not purport to conclusively decide who is the title holder of the property.

[17] In ***Pecore***, Rothstein J. also discussed the admissibility of evidence of the intention of the transferor subsequent to the transfer, which includes the following (paras. 56, 58-59):

> Whether evidence subsequent to a transfer is admissible has often been a question of whether it complies with the Viscount Simonds' rule in *Shephard v. Cartwright*, [1955] A.C. 431 (H.L.), at p. 445, citing *Snell's Principles of Equity* (24th ed. 1954), at p. 153:
>
> > The acts and declarations of the parties before or at the time of the purchase, [or of the transfer] or so immediately after it as to constitute a part of the transaction, are admissible in evidence either for or against the party who did the act or made the declaration.... But subsequent declarations are admissible as evidence only against the party who made them....
>
> …
>
> The rule has also lost much of its force in England. In *Lavelle v. Lavelle*, [2004] EWCA Civ 223, at para. 19, Lord Phillips, M.R., had this to say about *Shephard v. Cartwright* and certain other authorities relied on by the appellant in that case:
>
> > It seems to me that it is not satisfactory to apply rigid rules of law to the evidence that is admissible to rebut the presumption of advancement. Plainly,

> self-serving statements or conduct of a transferor, who may long after the transaction be regretting earlier generosity, carry little or no weight.
> [Emphasis in original.]

> Similarly, I am of the view that the evidence of intention that arises subsequent to a transfer should not automatically be excluded if it does not comply with the *Shephard v. Cartright* rule. Such evidence, however, must be relevant to the intention of the transferor at the time of the transfer: *Taylor v. Wallbridge* (1879), 2 S.C.R. 616. The trial judge must assess the reliability of this evidence and determine what weight it should be given, guarding against evidence that is self-serving or that tends to reflect a change in intention.

ANALYSIS

[18] To begin, Peter's evidence that it was always understood that the interest in the Waterloo property would pass to Kevin through survivorship necessarily means Peter transferred the beneficial ownership to him. Peter's argument that there is a resulting trust is based on his maintaining beneficial ownership. The two positions are a contradiction in terms. (see also, ***Pecore***, para. 48; ***Fuller v. Fuller Estate***, 2010 BCCA 421, paras. 52-53; ***Stubbings v. Stubbings***, 2018 SKQB 8, paras. 15, 23-24, 28; and ***Simcoff v. Simcoff***, 2009 MBCA 80) If Peter's intention was to maintain beneficial ownership of the property during his lifetime and give the property to Kevin upon his death, Peter could have done so by his will.

[19] Nevertheless, assuming Peter can advance both positions, I now consider the question of resulting trust.

[20] In light of the gratuitous transfer of an interest in the Waterloo property from Peter to Kevin, such that they became joint tenants, there is presumed to be a resulting trust. The onus is on Kevin to demonstrate with evidence on a balance of probabilities that Peter intended to gift the interest in the property to him and rebut the presumption of a

resulting trust. The relevant time to determine Peter's intention is when he transferred the property into joint names with Kevin, on about January 25, 2007.

[21] Commencing with the presumption of a resulting trust and weighing all of the evidence, on a balance of probabilities, I find that Peter's actual intention was to gift a half-interest in the Waterloo property to Kevin. As such, I find that the presumption of a resulting trust is rebutted. I make this finding for the following reasons.

[22] First, declarations by or on behalf of Peter demonstrate that he intended to gift Kevin the interest in the property and these declarations contradict Peter's assertion that his intention was that Kevin's interest in the property was held in trust for Peter during Peter's lifetime. These include the following:

- In a letter dated August 9, 2022, from counsel for Peter and Phyllis to Kevin, their counsel advised Kevin that $200,000 given by Peter and $100,000 given by Phyllis to Kevin (which provided him with cash to close a transaction regarding Kevin's purchase of a house on Chrypko Drive) "related to [Peter and Phyllis] buying out your one-half share of 395 Waterloo". In my view, the declaration that Peter and Phyllis were "buying out" Kevin's "one-half share" demonstrates that Peter believed Kevin was the beneficial owner of this half share.
- In email communications, from Peter and Phyllis to Kevin, several times, they referred to the Waterloo property as "yours" or "your property". For example, an email of May 29, 2019 (at which time Kevin was living at the Waterloo property), from Peter and Phyllis, alerting Kevin about a house for sale, states "Really like this house & property, can move in when you get rid of yours???". Another email

of September 4, 2019, from Peter and Phyllis to Kevin, states "Hey Kev., you should look at 882 Borebank… perhaps buy this and get out from yours, keep yours for rent…" On April 5, 2021, after Kevin's offer to purchase the house on Chrypko Drive was accepted, an email from Peter and Phyllis to Kevin with reference to the Waterloo property states "… look after your property the way you do, but, your choice Kev, You could try a rental for a while!!". In my view, the references to the property as Kevin's, along with Kevin's option to "get rid" of or keep it to rent are all evidence which support that Peter and Phyllis considered Kevin to be a beneficial owner of the property, i.e. that Peter had gifted the half interest to him.

[23] Second, aspects of Peter's evidence create reliability, bordering on credibility, concerns. Salient parts of Peter's affidavit evidence and evidence on cross-examination on his affidavits were contradictory and at times Peter was evasive in his testimony. Peter could not explain why his lawyer (in the letter referred to above) would tell Kevin that Peter and Phyllis had given him money to buy out his one-half share of the Waterloo property. If Kevin held his interest in trust for Peter, it would not be necessary for Peter to buy him out. It is of note that there is no mention of a trust in that letter.

[24] Further undermining the general reliability of the evidence of both Peter and Phyllis is their nonsensical evidence that they did not sign gift letters regarding the $300,000 that they gave to Kevin. The gift letters were needed by Cambrian Credit Union, which was providing Kevin with mortgages relating to the property he was purchasing. Peter testified that his signature on the gift letter was a "fraud". However, the unchallenged

opinion evidence of a certified questioned document examiner retained by Kevin was that the signature on the gift letter purporting to be Peter's signature is genuine.

[25] Both Peter and Phyllis also deny Kevin's evidence he attended their house on May 11, 2021, to have them sign the gift letters. However, Kevin's evidence that he attended their house that day to have them sign the gift letters is corroborated by the following text messages between Kevin and Phyllis that same day:

> From Kevin:
>
> > "Are you guys at home – need to call to chat to resolve one banking issue – should be easy so no worries
> > I'm on a client call now but will call you around 11:45am"
>
> From Phyllis:
>
> > "Hi kev. Am ready to go"
>
> From Kevin:
>
> > "Okie dokie
> > Just about to leave – I was on the phone with Cambrian until now"

[26] Another aspect that undermines the general reliability of Phyllis' evidence is her inexplicable initial reluctance during the cross-examination on her affidavit to acknowledge that she knew as early as 2017, that Kevin was looking for a different property. A related concern is that when questioned on cross-examination on her affidavit, several times Phyllis was combative in answering questions.

[27] Third, on cross-examination, Kevin was largely unchallenged on his affidavit evidence. Kevin deposed to the significant renovations and capital upgrades to the Waterloo property that he conducted along with the related costs he paid of about

$80,000 before moving in and of approximately $200,000 since 2004. I find Phyllis' denial on cross-examination on her affidavit that she knew anything about Kevin undertaking renovations to the Waterloo property to be unreliable as it was contradicted by several emails between Phyllis and Kevin which reference renovations by Kevin to the property. In my view, the fact that Kevin undertook this work and incurred these substantial costs substantiates that the transfer of an interest in the property was intended to be a gift as it is nonsensical in the circumstances that he would incur such costs if the property was not his.

[28] Finally, Peter's counsel submitted that the best evidence of this being a trust are the notes, which reference "Trust", as they were made on September 22, 2006 (relatively close in time to the transfer date). In my view, these notes do not substantiate that it was Peter's intention that the interest in the property transferred by him to Kevin was held in trust. The notes say "Held in Trust for Kevin". However, it is Peter's position that the property was to be held in trust for Peter. As such, if anything, the notes corroborate Kevin's evidence that it was always understood and agreed to be his house and when it was agreed that it would be transferred into his name as well as Peter's it was because Peter wanted to retain a measure of monetary control. In addition, for the reasons discussed above, there is significant evidence which is inconsistent with Peter's assertion that this was a situation of a trust in his favour. For these reasons, I give no weight to the notes.

CONCLUSION

[29] In conclusion, I find that Peter's actual intention was to gift a half-interest in the property to Kevin. As such, I find that the presumption of a resulting trust is rebutted and the property will remain owned by Peter and Kevin as joint tenants.

[30] Accordingly, the application is dismissed.

[31] If costs cannot be agreed upon, counsel may file written submissions.

_____ A.C.J.