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

IN THE MATTER OF: The Estate of Alvin Wesley Flett, deceased

AND IN THE MATTER OF: An Application under the Court of King's Bench Rules, Man. Reg. 553/88, Rule 14.05(2)(c)(i)

B E T W E E N:

EVELYN JOSEPHINE ANNETTE GRAHAM, AS EXECUTRIX OF THE ESTATE OF ALVIN WESLEY FLETT, applicant,	)	Aidan Prenovault for the applicant
- and -	)	Samantha S.T. Wong for the respondent
KENNETH WESLEY OSCAR FLETT, respondent.	)	Judgment Delivered: September 26, 2025

MONNIN J.

I. INTRODUCTION

[1] This is an application brought by Evelyn Josephine Annette Graham ("Evelyn") seeking advice and directions pursuant to Court of King's Bench Rule 14.05(2)(c)(i), regarding the Last Will and Testament ("Will") of her father, Alvin Wesley Flett ("Alvin").

The respondent, Kenneth Wesley Oscar Flett ("Kenneth") is the executor of Alvin's estate. Kenneth and Evelyn are siblings.[1]

[2] At its core, Evelyn's application is premised on the argument that the provision in the Will referenced as clause 3(i) is not a valid testamentary disposition. As set out in more detail below, I do not accept Evelyn's submission. Accordingly, her application is dismissed.

II. OVERVIEW AND CONTEXT

[3] On June 10, 2020, Alvin signed the Will, which names Kenneth as executor and sole trustee. On that same date, Alvin executed a General Power of Attorney, appointing Kenneth as his Attorney. Alvin passed away on June 17, 2022.

[4] On September 7, 2022, Kenneth sought and obtained Probate of the Will. Included in the Grant of Probate was Form 74B which describes immovable property, namely 1327 Manitoba Avenue, Winnipeg, Manitoba ("Property"). The Property was Alvin's home at the time of his passing, and it is at the heart of this dispute. Evelyn takes the position that the Property should never have formed part of the Estate, on the basis that she owned it in Joint Tenancy with Alvin. Conversely, Kenneth takes the position that the Property formed part of the Estate. He states that Alvin never intended the Property to be held in Joint Tenancy with Evelyn.

[5] On or about June 27, 2022, Kenneth caused a Caveat to be filed on the Property. On or about September 29, 2022, Evelyn filed a Request for Survivorship on the Title of the Property. It is unclear whether the Caveat was removed, however, there is no dispute

[1] To avoid any confusion, I will refer to all parties by their first names. No disrespect is intended.

that the Property was sold on October 4, 2024, to an arm's length third party purchaser. The transfer of title of the Property was completed on or about October 15, 2025, in exchange for $80,000. The net proceeds of sale after all of the accounts and real estate commissions were paid amounted to $75,120.82. Those funds are currently being held in a trust account pending the conclusion of this matter.

[6] Evelyn's position is that the net proceeds of the sale are to be transferred or paid to her without any adjustments. Conversely, Kenneth takes the position that, *inter alia*, the proceeds of sale, without any adjustments, form part of the Estate.

The Will

[7] The validity of the Will has not been challenged. Rather, there is a dispute regarding clause 3(i) as it relates to the Property and entitlement to the proceeds of the sale.

[8] Clause 3(i) reads as follows:

> 3(i) The property located at 1327 Manitoba Avenue, Winnipeg, Manitoba R2X 0K8 is to be paid or transferred to my said son, **KENNETH WESLEY OSCAR FLETT**, on the condition that my said son, **KENNETH WESLEY OSCAR FLETT**, will care and provide for the home in the event any of my grandchildren need a home in Manitoba. In the event my said son, **KENNETH WESLEY OSCAR FLETT**, predeceases me or survives me but dies within a period of fifteen (15) days following my death, I then direct that the rest and residue of my estate is to be paid or transferred to my grandsons, **CORY JAMES LOUISE MENEGHIN** and **CODY JOSEPH MENEGHIN** on the condition that my said grandsons, **CORY JAMES LOUISE MENEGHIN** and **CODY JOSEPH MENEGHIN**, will care and provide for the home in the event any of my grandchildren need a home in Manitoba.

Brief Procedural History

[9] This matter was first on the Uncontested List on March 5, 2025. At that time, a contested hearing date was set for April 30, 2025. Kenneth did not have legal counsel

on March 5, 2025, and he was directed by the court to retain legal counsel in advance of April 30, 2025.

[10] On April 30, 2025, the parties appeared before me. At that time Kenneth appeared on his own, submitting that he had not been able to retain legal counsel and therefore required an adjournment. In the circumstances, the matter was adjourned to June 12, 2025. However, Kenneth was advised that the matter would have to proceed on that date whether he had retained legal counsel or not. I awarded some costs and disbursements in the cause in favour of Evelyn considering the adjournment. Kenneth retained legal counsel and materials were filed prior to the June 12, 2025, contested hearing.

III. THE ISSUES

[11] Evelyn is seeking the following advice and directions:

a) Is clause 3(i) of the Will a valid testamentary disposition despite the Joint Tenancy of the Property?

b) Are Kenneth, Cory or Cody entitled to inherit the Property, or any value related to the Property According to the Will?

c) Was the Caveat filed by Kenneth was valid? If the Caveat was not valid, should costs be awarded against Kenneth?

IV. SUMMARY OF THE EVIDENCE

[12] The evidence before me on this application consists of three affidavits. Evelyn provided two affidavits, the first sworn December 11, 2024, and the second affirmed June 12, 2025. Kenneth provided one affidavit affirmed June 3, 2025. There were no

cross-examinations on any of the affidavits. I also note that prior to proceeding with the contested hearing on June 12, 2025, neither party expressed any concern with doing so and neither party sought an adjournment.

[13] The evidentiary findings that follow are based on the evidence that I determined to be relevant, reliable and admissible. Conversely, I have not included the portions of the evidence filed by the parties that were irrelevant, of doubtful reliability, or both. I will first review the evidence provided by Evelyn and I will then review the evidence provided by Kenneth.

Evelyn's Evidence

[14] Evelyn attests that there is no dispute regarding the status of the Joint Tenancy of the Property. Alvin transferred the Property into Joint Tenancy with her, on or about July 5, 2016, and it was never severed (see Evelyn's affidavit affirmed June 12, 2025 at para. 2). By virtue of this fact, Evelyn became the sole owner of the Property after Alvin's passing. Therefore, clause 3(i) of the Will is not a valid testamentary disposition and, in the circumstances, Evelyn is entitled to the proceeds of sale without any adjustments.

[15] Evelyn further attests to having no knowledge of Kenneth ever having any ownership right in the Property or any knowledge of Alvin making any mention of Kenneth having any such ownership right. After Alvin's passing, without her permission or consent, Kenneth usurped her Joint Tenancy rights, filed the Caveat, and took control of the Property. When doing so, Kenneth failed to insure the Property or otherwise look after it. Kenneth allowed the Property to go to waste and permitted a series of house fires. In further support of her position, Evelyn provided a Status of Title indicating that

the Property was registered in Joint Tenancy with herself and Alvin. She also provided a copy of the Request for Survivorship on Title of the Property.

Kenneth's Evidence

[16] Kenneth's evidence paints a far different picture. He acknowledges that the Property was transferred into Joint Tenancy with Evelyn on or about July 5, 2016. However, he disagrees with the suggestion that there is no dispute regarding Alvin's intentions. Kenneth attests that Evelyn was added to the title of the Property shortly after Alvin had heart surgery. Evelyn and her now husband picked Alvin up from the hospital and drove him to a law office to have her added to the title. This was done on the basis that it would allow her to assist Alvin post surgery. Kenneth attests that Alvin did not want to do so, but felt pressured.

[17] In or around 2018, Alvin broke his hip. Kenneth moved in with him to help take care of him, where he assisted Alvin in all daily and financial care until his passing. During this time, Alvin expressed his intention to sever the Joint Tenancy or have Evelyn removed from the title, but she would not assist or cooperate. Kenneth provides some examples in his affidavit in support:

a) In or around April 7, 2020, Alvin and Evelyn had an argument regarding having her removed from the title. At that time, Alvin had her write and sign a handwritten document which read: "Take my name of (sic) the land of my father's house". While Kenneth was not present for this argument, Alvin provided him with the document and instructed him as his Attorney to bring it to his lawyer. Kenneth brought the document which was received

and stamped by Alvin's lawyer. A copy of this document was included in Kenneth's affidavit. The signature on the April 7, 2020, document is the same or similar to those found on Evelyn's affidavits. (See para. 14 j.)

b) In or around March 29, 2021, Alvin prepared and an executed a Notice of Intention to Sever Joint Tenancy. He had Kenneth take a picture of him while preparing and executing the document. Kenneth states that after Alvin completed the Notice of Intention to Sever Joint Tenancy, his health began to rapidly fail leaving him bed-ridden and extremely ill until his passing on June 17, 2022. A copy of this document and the picture was also included in Kenneth's affidavit. (See paras. 14 p. and r.)

c) The Will and the Power of Attorney were prepared and signed by Alvin after Evelyn's refusal to cooperate with her removal from the title. In particular, the new Will deliberately includes clause 3(i) dealing with the Property and excluded Evelyn. (See para. 14 m.)

[18] Kenneth attests that this, *inter alia*, demonstrates that Evelyn had knowledge of Alvin's intention to remove her as a joint tenant and that she deliberately did not include this information in her sworn materials.

Upkeep and Damage to the Property

[19] Kenneth attests that from the time that Evelyn was added to the title until Alvin's passing, Evelyn did not reside at the Property, and she did not contribute to or make any payments for maintenance or otherwise. Within three days of Alvin's passing, Evelyn told Kenneth that she was now the sole owner of the Property. She then proceeded to give

him 24 hours to remove his personal effects and had the locks changed. Within a couple of months thereafter, Evelyn's daughter subsequently moved into the Property as a rent paying tenant.

[20] Kenneth disputes the suggestion that he was responsible for the value of the Property being diminished as he was kicked out and was no longer living there. Rather, it was Evelyn who had her daughter living in the Property as a rent paying tenant when the fire(s) occurred. While he resided at the Property with Alvin, Kenneth paid for such things as maintenance, property taxes and insurance. However, after he was kicked out by Evelyn, he stopped doing so. The first time Kenneth became aware that the Property was no longer insured was in or around 2023, when Evelyn contacted him following a fire at the Property asking about the insurance policy. If Evelyn genuinely believed that she was the owner of the Property, she should have paid the insurance.

[21] As executor of Alvin's estate, Kenneth filed for Probate and he included the Property in the inventory, as he believed that it was an asset that should be included in the Estate. In that connection, given the dispute with Evelyn, he caused the Caveat to be filed.

V. THE LAW

Interpretation of a Testamentary Document

[22] Before considering the specific wording of clause 3(i) of the Will, it is necessary to briefly review the principles applicable to the interpretation of a testamentary document.

[23] When the court is asked to provide advice and direction regarding the provisions of a will, it must be primarily concerned with ascertaining the intention of the testator.

Where the provisions of the will and the testator's intentions are clear, the court must give effect to the will. (See ***Nicol v. Nicol Estate***, 2021 MBQB 50 (CanLII) at para. 15; ***Tod v. Tod Estate***, 2001 MBQB 291 (CanLII) at para. 8, and ***Tapper v. Sair-Segev***, 2003 MBQB 243 (CanLII) at para. 9)

[24] Further, when interpreting a clause of a will, the court must first consider the meaning of the entire clause as written. In doing so, the court must also conduct a contextual analysis by considering the meaning of a clause in the context of the will as a whole and give effect to the will. It is from reading the clause in the context of the whole will that the testator's intention is to be determined. (See ***Nicol***, at para. 16, and ***Hearn Estate v. Hearn***, 1984 (CanLII) 3769 (MB QB), (1984), 29 Man. R. (2d) 302 at para. 8)

Resulting Trust

[25] Perhaps the only point of agreement is that the parties agree that ***Pecore v. Pecore***, 2007 SCC 17, [2007] 1 S.C.R. 795 (QL), is the starting point to address the main issue raised in this matter. It is therefore equally necessary to review the principles that flow from ***Pecore***, and which need to be applied when addressing the presumption of a resulting trust. In the decision of ***Bowes v. Estate of Bowes***, 2022 MBQB 47 (CanLII), at paras. 5-7, Bock J., provides a helpful overview of the key considerations:

> [5] … ***Pecore*** addressed and clarified the long-standing common law presumptions of advancement and resulting trust. Rothstein J., for the majority, wrote where, as here, a parent makes a gratuitous transfer to an adult child by means of a joint account, there is "a rebuttable presumption that the adult child is holding the property in trust for the ageing parent to facilitate the free and efficient management of the parent's affairs" (para. 36). But, **he acknowledged, there may be situations where a parent intended to make a gift to their adult child, and it is open to the adult child to bring forward evidence to support such a claim and rebut the presumption (para. 41)**.
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> [Emphasis Added]

> [6] **The court's analysis should begin from the presumption of a resulting trust, but should continue with a weighing of all the evidence adduced by the parties in order to ascertain, on a balance of probabilities, the transferor's actual intention (*Pecore*, at para. 44)**. The Burden is on the transferee to prove the transferor's intention to make a gift (para. 53). Traditionally, courts have considered evidence contemporaneous to the transaction in question, or nearly so (para. 56). That said, depending on the facts of the case other evidence, such as banking documents, may be relevant in ascertaining intent (para. 55).
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> [Emphasis Added]

> [7] In ***Madsen Estate v. Saylor***, 2007 SCC 18, [2007] 1 S.C.R. 838, a companion case to ***Pecore***, Rothstein J. again emphasized that the "focus in any dispute over a gratuitous transfer is the actual intention of the transferor at the time of the transfer" (***Madsen***, at para. 2). The presumption of rebuttable trust serves as a guide to the court's inquiry into the question of intention, but it is not determinative. **Any evidence relevant to the question of the transferor's intention ought to be carefully considered**.
>
> [Emphasis Added]

[26] In situations where the transferor is deceased, the presumption of resulting trust has an additional justification. It functions as a guide for the court, as it allocates the burden of proof in disputes over transfers where evidence as to a transferor's intent is unavailable or less clear. The starting point for the court is to apply the applicable presumption and weigh all the evidence to ascertain, on a balance of probabilities, the transferor's actual intent. (See ***Berry v. Berry et al.***, 2025 MBKB 32 (CanLII), at para. 49, ***Kerr v. Baranow***, 2011 SCC 10, at para. 18 and ***Pecore***, at para. 59)

Rebutting the Presumption

[27] The presumption of a resulting trust can be rebutted. It falls upon the transferee, or the recipient of the property or gift, to prove, on a balance of probabilities, that a gift was intended by the transferor or donor rather than a resulting trust. This is done by the recipient providing clear and convincing evidence that the gift was intended. (See

Pecore at paras. 24 and 44; ***Nishi v. Rascal Trucking Ltd***., 2013 SCC 33, at para. 30 and ***Berry*** at paras. 45, 51-53)

Legal Versus Beneficial Ownership

[28] As discussed in more detail below, this matter also calls upon the court to consider the interplay between legal ownership in the context of the land registry office and beneficial ownership in the face of the presumption of a resulting trust. On this point, in ***Berry***, Rempel J., at paras. 43, 47-49, provided the following:

> [43] The practical effect of a finding of fact that a resulting trust exists is explained succinctly in ***Jackson v. Rosenberg***, 2024 ONCA 875, where the Ontario Court of Appeal confirms, at para. 42:
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> > [42] A gratuitous transfer engages the presumption or resulting trust, under which the transferee is obliged to return the interest transferred to the original title holder: *Pecore v. Pecore*, (*citation omitted*), at para. 20. In other words, although a gratuitous transfer of a joint interest gives legal ownership of that interest to the transferee, it is presumed to be held in trust for the transferor who remains the beneficial or "real" owner of the interest: *Pecore*, at paras. 3-4, citing *Csak v. Aumon* (1990), 1990 CanLII 8070 (ON SC), 69 D.L.R. (4th) 567 (Ont. H.C.), at p. 570.
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> . . . . .
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> [47] ***Hyczkewycz*** clearly states that in Manitoba, the legal owners of land listed on a title at the land registry office cannot conclusively claim beneficial ownership of land in the face of a successful claim of a resulting trust. Legal ownership and beneficial ownership are two separate questions, and it is a question for the finder of fact to determine if a resulting trust has arisen "*outside the land titles registrations system*" (at para. 117). ***Hyczkewycz*** then continues at the same paragraph to state that ownership of land recorded at the land titles registry does not address the key question of whether a resulting trust has arisen. That key question is answered by the evidence as to what the intention of the transferor or donor was at the time the transfer was made.
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> [48] The decision in ***Hyczkewycz*** then continues, at paras. 118-119:
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> > [118] … The beneficiary is not directly challenging the certificate of the title to the land itself; rather her or she is challenging the person whom her or she asserts is his or her trustee. The result of the challenge may lead a court to require that the trustee transfer the land to the beneficiary, but that is simply a possible remedy that is available in the *in personam* claim is successful.

> [119] In conclusion, in my view, the presumption of resulting trust continues to apply in Manitoba in disputes between registered title holders and those claiming a gratuitous transfer resulting trust and, once it is applied, it then falls upon the registered title holder to rebut the presumption. This was the conclusion of the trial judge (see para 144), and, in my view, he was correct in so concluding. Thus, I would dismiss this ground of appeal.

VI. DISCUSSION AND DISPOSITION

I. Is clause 3(i) of the Will a valid testamentary disposition despite the Joint Tenancy of the Property?

[29] I find that clause 3(i) is neither ambiguous nor unclear. Alvin's objective intentions can easily be ascertained on a plain reading of the clause, and the Will as a whole. It is clearly contemplated that the Property is to be paid or transferred to Kenneth. It is also clearly contemplated that if Kenneth is deceased or does not survive Alvin for 15 days, the rest and residue would transfer to Cory and Cody.

[30] However, the main thrust of Evelyn's argument is not that clause 3(i) is ambiguous or unclear, rather that it is not valid because the Property was held in Joint Tenancy. This question stands to be resolved by ***Pecore***.

Resulting Trust

[31] Evelyn's position on how ***Pecore*** ought to be applied can be found at paragraph 13 of her brief, where it is submitted that since Alvin is unable to explain himself, the court "must presume that the Deceased created a resulting trust transferring the Property to himself and Evelyn in joint Tenancy." This was also submitted during oral argument at the contested hearing. I disagree.

Rebutting the Presumption

[32] Rather, what ***Pecore*** provides is that when there is a gratuitous transfer of property, a presumption of resulting trust arises in favour of the transferor, unless clear and convincing evidence suggests otherwise. Here, the legal burden lies with Evelyn providing clear and convincing evidence of Alvin's intention to gift the Property to her. This is done by weighing all the properly adduced evidence by the parties to determine, on a balance of probabilities, Alvin's true intentions. In such cases where the transferor is deceased, it is the transferee who is best placed to bring evidence about the circumstances of the transfer. (See ***Pecore***, at para. 26)

Alvin's Intentions

[33] Other than providing a copy of the Title of the Property, Evelyn provided virtually no evidence whatsoever regarding the circumstances that led to Alvin transferring the Property to her on July 5, 2016, or to support any suggestion that it was intended as gift.

[34] Evelyn broadly attests that there is no dispute regarding the status of the Joint Tenancy. However, at no point did she raise or address the numerous examples provided by Kenneth in his affidavit regarding Alvin's declared intention and his attempts to have her removed from the title and severing the Property. Evelyn made no mention in either of her affidavits of the allegation that she had an argument with Alvin or of the handwritten and signed note dated April 7, 2020, which directed that her name be removed from the title. She also made no attempts to challenge or contradict this either by cross-examination, expunging, or in affidavit reply. The same applies to Kenneth's

evidence with respect to the Notice of Intention to Sever Joint Tenancy prepared by Alvin and the picture of him signing it.

[35] Evelyn also relies on Request for Survivorship in support of her position. This document was caused to be filed on or about September 29, 2022, after Alvin's passing on June 17, 2022. Simply put, it does truly little, if anything, to address Alvin's intentions of gifting the Property to Evelyn.

[36] I find it necessary to address Evelyn's argument that without her permission or consent, Kenneth usurped her Joint Tenancy rights by taking control of the Property after Alvin's passing. She also argued that Kenneth then failed to insure the Property and proceeded to allow it to go to waste, suffer fire damage, and lose value. I agree with Kenneth that if Evelyn genuinely believed she was the owner of the Property, it makes sense that she should and would have insured it. In addition, I highlight Kenneth's evidence that within three days of Alvin's passing, Evelyn proceeded to have the locks changed and gave him 24 hours to remove his personal effects and a brief time thereafter, Evelyn's daughter moved into the Property as a paying tenant. Again, Evelyn made no attempts to challenge, expunge, or contradict this evidence.

[37] As well, Evelyn has made no attempts to challenge, expunge, or contradict Kenneth's evidence that since approximately 2018, he moved into the Property to help take care of Alvin and assisted in daily and financial assistance until his passing. Nor have there been any attempts to challenge, expunge or contradict Kenneth's evidence that from the time that the Property was transferred until Alvin's passing, Evelyn did not

reside at the Property, and she did not contribute to and make any payments for maintenance or otherwise.

Indefeasibility of Title

[38] Evelyn submitted that a resulting trust in favour of Alvin or the Estate, is negated by subsection 59(1) of ***The Real Property Act***, C.C.S.M. c. R30 ("***RPA***"), which reads as follows:

Conclusive evidence – title paramount (indefeasible) **59(1)** Every certificate of title or registered instrument, as long as it remains in force and is not cancelled or discharged, is conclusive evidence at law and in equity, as against the Crown and all persons, that the owner is indefeasibly entitled to the land or the interest specified in the title or instrument.	**Preuve concluante** **59(1)** Tant qu'ils demeurent en vigueur et n'ont pas été annulés ou fait l'objet d'une mainlevée, le certificat de titre et l'instrument enregistré font preuve d'une façon concluante, en common law et en équité, que le propriétaire a droit au bien-fonds ou à l'intérêt qui y est précisé; ce droit est opposable à la Couronne et à toute autre personne.

[39] Evelyn argued that the Status of Title and the Request for Survivorship provided conclusive and definitive evidence that Evelyn is indefeasibly entitled to the Property, and by extension the proceeds of sale. I disagree.

[40] This argument fails to consider the fact that our Court of Appeal has held that various *in personam* equitable interests, including trusts related to land, can supersede the principle of indefeasibility and can be enforced against a trustee who is the registered owner on the title to the land despite the provisions of the ***RPA***. The presumption of a resulting trust continues to apply in Manitoba as it relates to disputes between registered title holders and those claiming a gratuitous transfer. It then falls upon the registered

title holder to rebut the presumption of a resulting trust, which Evelyn failed to do. Therefore, this argument must also fail. (See ***Hyczkewycz v. Hupe***, 2019 MBCA 74 (CanLII), at paras. 81-82, 101, 103 and 119)

The Transfer was not Gratuitous

[41] While not contained in the Notice of Application or in Evelyn's brief, at the contested hearing it was submitted that the transfer of the Property was not gratuitous on the basis that the Status of Title refers to consideration in the amount of $1 being provided. I disagree. This argument ignores the reasons in the decision of ***Simcoff v. Simcoff***, 2009 MBCA 80 (CanLII), at para. 35, where our Court of Appeal held that:

> 35 The presumption of resulting trust is the general rule for gratuitous transfers. Despite this transfer of land referring to consideration of "$1.00 and other good and valuable consideration," the applications judge, correctly in my view, treated this as a gratuitous transfer. The document required a consideration to be stated, together with an acknowledgement of receipt, in order for the form to be registrable. … In *Glenelg Homestead Ltd. V. Wile et al.*, 2003 NSSC 155, 216 N.S.R. (2d) 180, aff'd 2005 NSCA 4, 230 N.S.R. (2d) 289, the trial court held (at para. 26):
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> > Payment of a nominal sum of $1.00, in the absence of the transferee assuming some onerous obligation, does not alter a transaction from a gift to a conveyance for valuable consideration. Courts recognize a distinction between "nominal consideration" and "valuable consideration." ….

(Also see ***Glenelg Homestead Ltd. v. Wile et al.***, 2003 NSSC 155, at paras. 26-28)

[42] In addition to the foregoing, I find that Evelyn has provided no evidence whatsoever to suggest that in addition to paying the nominal sum of $1, she assumed any onerous obligation. Indeed, there is nothing in the evidence to support Evelyn's position.

[43] Overall, I find that Kenneth has adduced substantial and credible evidence that Alvin did not intend to make a gift of the Property with right of survivorship in favour of

Evelyn. It bears repeating that Evelyn made no effort to challenge Kenneth's evidence through cross-examination, expunging, or contradicting the evidence contained in his affidavit. His evidence was essentially unchallenged and uncontradicted.

[44] I am satisfied that Evelyn has failed to discharge her onus to rebut the presumption of a resulting trust by proving that Alvin intended to gift her the Property, including a right of survivorship.

II. Are Kenneth, Cory or Cody entitled to inherit the Property, or any value related to the Property According to the Will?

[45] Court of King's Bench Rule 14.05(2)(c)(i) is broadly worded. It allows the court to provide opinion, advice, or direction regarding a person's rights in relation to the administration of an estate and in relation to the interpretation of a will. As noted above, I have determined that clause 3(i) is clear and unambiguous and there exists a resulting trust in favour or Alvin or the Estate, which Evelyn has failed to rebut. The Property should have been transferred to Kenneth in accordance with the Will. That is no longer possible, given that the Property has been sold to an arm's length third party.

[46] Given the nature of the application and the surrounding circumstances of this matter, the Estate is entitled to the proceeds of sale without any adjustments. In turn, pursuant to the Will and considering the surrounding circumstances, Kenneth is entitled to the proceeds of sale in accordance with the Will. What that final amount will ultimately be is subject to what needs to be paid out of the Estate in terms of administration. The decision of ***Hyczkewycz***, at para. 102, lends support to proceeding in this manner:

> [102] Thus, where a beneficiary seeks to enforce a resulting trust relating to land *in personam* against the trustee, her or she is asking a court to declare that a trust exists in relation to the land. If a court makes that finding, then the usual remedy is to direct the trustee to transfer title to the land to the beneficiary, although this

> can generally occur only if the land remains registered in the trustee's name. **If the trustee has already transferred the land to a third party, the trustee could no longer be directed to transfer title to the beneficiary, although the beneficiary could still proceed *in personam* against the trustee. Whether a court would give the beneficiary a monetary remedy would depend on the surrounding circumstances.** …
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> [Emphasis Added]

[47] Regarding Cory and Cody's entitlements, given that Kenneth was alive at the time of Alvin's passing and survived him by 15 days as stipulated by the Will, I am not required to decide. Any entitlement that they may have is set out in the Will.

III. Was the Caveat filed by Kenneth was valid? If the Caveat was not valid, should costs be awarded against Kenneth?

[48] Evelyn argued that Kenneth filed an invalid Caveat and therefore costs should be awarded against him. I disagree.

[49] Beneficiaries of a trust relating to land can take steps to protect their beneficial interests by filing caveats. (See ***Hyczkewycz***, at para. 81) Kenneth's evidence is that he caused the Caveat to be filed in his capacity as executor, as he believed the Property ought to have been included in the Estate inventory. In any event, the filing of the Caveat did not prohibit Evelyn from selling the Property. I therefore find that the Caveat and reasons why it was filed were valid. It was not clear to the parties during the contested hearing if the Caveat had been removed. To the extent that it remains on title, it should be removed as soon as reasonably practicable.

Kenneth's Requests for Advice and Direction

[50] At the hearing Kenneth also sought advice and direction from the court. Namely, Kenneth asked, *inter alia*, that the court:

a) order that Evelyn is responsible for the diminution in value of the Property which was assessed by the City of Winnipeg in the amount of $130,000 and is therefore liable for the difference between that value and the sale price;

b) order that Evelyn owes the Estate for the legal fees and real estate commissions paid for the sale of the Property, which were paid from the proceeds of sale;

c) order that Evelyn must pay to the Estate the amount she received in rent from her daughter who was a tenant in the Property after Alvin's passing; and,

d) order that Evelyn provide to Kenneth some World War II rifles which he claims belonged to Alvin and which she has in her possession.

[51] I am not prepared to make those orders. First, I note that Kenneth did not file a Notice of Application in support of the relief that he is now seeking. In any event, there is insufficient evidence to support the relief that Kenneth sought at the contested hearing.

[52] Specifically, while the Property was assessed by the City of Winnipeg in the amount of $130,000, until a property is sold, the true value is not known. Finding that the Property was worth $130,000 rather than the amount for which it sold would be speculative. As noted, there is insufficient evidence regarding the alleged rents received from Evelyn's daughter. As it relates to the World War II rifles, there is no mention of them in the Probate or the Will. As for the legal fees and real estate commissions for the sale of the Property, these would necessarily need to be paid in any event.

VII. CONCLUSION AND ORDERS

[53] My order is as follows:

a) Clause 3(i) of the Will is a valid testamentary disposition;

b) The Property was and remained subject of a resulting trust in favour of Alvin or his Estate and that Evelyn held the Property as Trustee for Alvin or his Estate;

c) Evelyn has failed to adduce sufficient evidence to rebut the presumption of a resulting trust and to establish that the transfer of the Property to her was intended as a gift;

d) In the circumstances, the Estate is entitled to the sale of proceeds, without any adjustments, and those proceeds are to be dispersed in accordance with the Will;

e) The Caveat and the reasons why it was filed were valid;

f) I am not prepared to grant the various relief sought by Kenneth; and,

g) The parties are at liberty to apply for any further advice and directions necessary to give effect to this Order.

[54] If the parties are unable to agree, costs may be spoken to.

_____ J.