NOVA SCOTIA COURT OF APPEAL
Citation: *Troop v. Troop Estate*, 2023 NSCA 83

Date: 20231128
Docket: CA 518786
Registry: Halifax

Between:

Troop

Appellant

v.

Todd Troop as Personal Representative of the Estate of Stephen Longmire Troop

Respondent

Judge:	The Honourable Justice Peter M. S. Bryson
Appeal Heard:	November 21, 2023, in Halifax, Nova Scotia
Subject:	Wills – Property in joint tenancy – Devise – Non-perfected gifts – Trusts.
Cases Cited:	*Das Estate (Re)*, 2012 NSSC 441; *Milroy v. Lord*, [1862] EWHC Ch J78, 4 De G.F. & J. 264; *Bliss v. Aetna Life Insurance Co.* (1886), 19 N.S.R. 363; *Carson v. Wilson* (1960), 26 D.L.R. (2d) 307 (Ont. CA).
Legislation Cited:	*Wills Act*, R.S.N.S. 1989, c. 505, s. 24.
Authors Cited:	Pollack, Sir Frederick, and Frederic Maitland. *The History of English Law*, 2nd ed, Vol. II (Cambridge: Cambridge University Press, 1968).
Summary:	The late Stephen Troop recited in his Will that his son, Troy Troop, would receive, by "right of survivorship" real property "that is in our joint names when I die". His Will recited a similar arrangement with his son, Todd Troop, respecting a different property. Stephen Troop never conveyed anything to Troy Troop. He died eight months later. The executor applied for directions. The judge found an intention that the property be gifted to

	Troy Troop, but no gift in the Will. Troy Troop appealed, alleging error by the judge in failing to apply s. 24 of the *Wills Act* and common law principles to find a transfer to Troy Troop.
Issues:	(1) Did s. 24 of the *Wills Act* operate to gift the property to Troy Troop? (2) Did common law principles apply to allow the property to be gifted to Troy Troop?
Result:	Appeal dismissed. Section 24 of the *Wills Act* operated to prevent a lapse in a devise. The Will contained no devise of property to Troy Troop. It referred to an *inter vivos* transfer of property. Nor did common law principles assist. No transfer occurred. No trust was created. Courts cannot perfect an imperfect gift to a volunteer.

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Todd Troop as Personal Representative of the Estate of Stephen Longmire Troop

Respondent

Judges:	Wood C.J.N.S.; Bryson and Bourgeois JJ.A.
Appeal Heard:	November 21, 2023, in Halifax, Nova Scotia
Held:	Appeal dismissed, per reasons for judgment of Bryson J.A.; Wood C.J.N.S. and Bourgeois J.A. concurring;
Counsel:	Richard Bureau and Ryan Christen, for the appellant Douglas Lutz, for the respondent

Reasons for judgment:

[1] Stephen Longmire Troop owned many properties in Kings County in the Annapolis Valley. He wanted to divide his property amongst his four children. His wife, Sharon Troop, had predeceased him.

[2] Mr. Troop signed his Will on August 7, 2018 while in the Intensive Care Unit at the Valley Regional Hospital. He died on May 15, 2019. Probate was granted on June 25, 2019 to his son and Executor, Todd Troop.

[3] Clauses 4 and 5 of the Will refer to two of Mr. Troop's children and two of his properties:

> 4. JOINT PROPERTY WITH TODD. I confirm that TODD shall be, by right of survivorship, the sole beneficial owner of the property located at 1259 English Mountain Road, PID 55435697, that is in our names as joint tenants when I die without any resulting trust for my estate.
>
> 5. JOINT PROPERTY WITH TROY. I confirm that TROY shall be, by right of survivorship, the sole beneficial owner of the property, located at Aylesford Road, Lake George, PID 55337786, that is in our names as joint tenants when I die without any resulting trust for my estate.

[4] The property described in cl. 4 of his Will was held by Mr. Troop with his son Todd, as joint tenants. Unfortunately, the Lake George property referred to in cl. 5 was in Mr. Stephen Troop's name alone. He had not conveyed it to himself and his son Troy, jointly as cl. 5 suggests, so Troy could not acquire it by "right of survivorship", which a joint tenancy would have allowed.

[5] As Executor, Todd Troop applied to court for an interpretation of cl. 5 of the Will. Troy Troop asserted that cl. 5 conveyed the Lake George property to him.

[6] Justice Jamie Campbell heard the application. He was satisfied that:

> The will was drafted clearly on the assumption or the understanding that the deed would be drafted granting the property to Troy Troop before Stephen Longmire Troop died.

[7] But Justice Campbell declined to order transfer of the Lake George property to Troy Troop:

> The Court however cannot presume to require a conveyance of property by Mr. Troop's representatives based on the presumed intent outside the will. The Court is obliged to interpret the will based on surrounding circumstances but cannot force something to happen that's outside the will.
>
> Any conveyance in this case, must be found on an interpretation of the will itself and the surrounding circumstances.

[8] Even though he found Mr. Stephen Troop's intention was that Troy would have the Lake George property, Justice Campbell could do nothing because cl. 5 did not transfer or purport to transfer the property to Troy Troop.

[9] Troy Troop appealed. He describes the issues in his factum this way:

> Issue #1: The learned trial judge erred by failing to correctly interpret and apply the *Wills Act* and jurisprudence with respect to the determination that the Will could not be found to include the gift of real property to Troy Troop (Ground of Appeal 1 and 4).
>
> Issue #2: The learned trial judge erred in considering the common law principles with respect to the determination that the Will could not be found to include the gift of real property to Troy Troop despite ascertaining that the Testator intended to gift the real property to Troy Troop (Grounds of Appeal 2 and 3).

Issue 1: *Wills Act*

[10] Troy Troop says the judge erred in not applying s. 24 of the *Wills Act*, R.S.N.S. 1989, c. 505, to gift the Lake George property to him. Section 24 of the *Wills Act* provides:

> **Failed devise as part of residuary devise**
>
> 24 Unless a contrary intention appears by the will such real property or interest therein as is comprised or intended to be comprised ***in any devise*** in such will contained which fails or becomes void by reason of the death of the devisee in the lifetime of the testator, or by reason of the devise being contrary to law or otherwise incapable of taking effect, shall be included in the residuary devise, if any, contained in such will. (emphasis added)

[11] With respect, s. 24 of the *Wills Act* has no application to this case. That section refers to a "devise". A devise is a testamentary act, distinct from granting or conveying typically associated with an *inter vivos* transfer by deed.

[12] "Devise" is a very old term in our law. It goes back at least to Glanvill in the 12th century. It always meant a property transferred on death. By the 16th century, it had crystallized into the transfer of real estate. In modern usage it is distinct from a bequest which refers to personal property.[1]

[13] The method of transfer chosen by the testator in this case was an *inter vivos* transfer by deed, not a devise. Troy Troop argues Justice Campbell found the "gift" in the Will "had lapsed". The judge made no such finding because the Will makes no gift of the Lake George property to Troy Troop. So there was no gift that could "lapse". Nor could "reviewing the entirety" of the Will change the plain meaning of the words in cl. 5.

[14] The resulting trust language in cl. 5 adds nothing to the analysis. It was there to make clear that Troy Troop would enjoy the beneficial interest in Lake George, when deeded to him. That never happened.

[15] Respectfully, s. 24 of the *Wills Act* has no application to cl. 5 of Mr. Troop's Will. Troy could only have a right of survivorship under a joint tenancy if that tenancy had been created by deed. That did not happen on August 2, 2018, nor did it happen in the following eight months prior to Mr. Stephen Troop's death.

Issue 2: Common Law Principles

[16] Troy Troop's arguments that a will must be interpreted in conjunction with all the surrounding circumstances does not assist. In this context, surrounding circumstances relates to interpretation of a gift in the Will—not a gift to be implemented by a deed that was never signed.

[17] Troy Troop also argues there is a principle of interpreting wills against intestacy. If there are two possible interpretations of a will, the court will prefer the one that validates a gift rather than one triggering an intestacy. Leaving aside the question of whether the failure of cl. 5 in this case creates an intestacy, the interpretative principle relates to disposition or attempted disposition of gifts by will. It does not extend to *inter vivos* transfers by deed as was contemplated in this case.

[1] Pollack, Sir Frederick, and Frederic Maitland. *The History of English Law*, 2nd ed, Vol. II (Cambridge: Cambridge University Press, 1968).

[18] Finally, Troy Troop argues in his factum the judge could have found a trust for him created by the Will, such that the Lake George property was being held by Stephen Troop in trust pending his death.

[19] Troy Troop cites *Das Estate (Re)*, 2012 NSSC 441, as authority that a trust could be imposed in the circumstances of this case. That case is of no help. Mr. Das' will failed to dispose of a large portion of his estate. The court found there was an intestacy that could not be avoided. No trust was imposed.

[20] Courts cannot impose a trust in order to perfect an imperfect gift:[2]

> […] I take the law of this Court to be well settled, that, in order to render a voluntary settlement valid and effectual, ***the settler must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him. He may of course do this by actually transferring the property*** to the persons for whom he intends to provide, and the provision will then be effectual, and ***it will be equally effectual if he transfers the property to a trustee*** for the purposes of the settlement, ***or declares that he himself holds it in trust for those purposes***; and if the property be personal, the trust may, as I apprehend, be declared either in writing or by parol; but, in order to render the settlement binding, one or other of these modes must, as I understand the law of this Court, be resorted to, for ***there is no equity in this Court to perfect an imperfect gift***. The cases I think go further to this extent, that if the settlement is intended to be effectuated by one of the modes to which I have referred, the Court will not give effect to it by applying another of those modes. ***If it is intended to take effect by transfer, the Court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust***. These are the principles by which, as I conceive, this case must be tried. (emphasis added)

[21] *Milroy v. Lord* has been applied in Nova Scotia (*Bliss v. Aetna Life Insurance Co.* (1886), 19 N.S.R. 363 at ¶7), and more recently in *Carson v. Wilson* (1960), 26 D.L.R. (2d) 307 (Ont. CA).

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[2] *Milroy v. Lord*, [1862] EWHC Ch J78, 4 De G.F. & J. 264.

Conclusion

[22] In the result, the appeal should be dismissed, but in view of the very unfortunate effect on Mr. Troy Troop, which could have been avoided if the deed contemplated had actually been signed, there should be no costs.

Bryson J.A.

Concurred in:

Wood C.J.N.S.

Bourgeois J.A.