SUPREME COURT OF NOVA SCOTIA
Citation: *Cunningham v. Cunningham*, 2026 NSSC 81

Date: 20260316
Docket: SBW No. 535337
Registry: Bridgewater

Between:

Janice Anne Cunningham and Edythe Frances Woodworth

Applicants

v.

Janice Rose Cunningham

Respondent

Decision

Judge:	The Honourable Justice John Bodurtha
Heard:	September 19, 2025, in Bridgewater, Nova Scotia
Written Decision:	March 16, 2026
Counsel:	Kathryn Dumke, KC, for the Applicants Andrew Fraser, for the Respondent

By the Court:

Introduction

[1] This is an application in court where the Applicants, Janice Anne Cunningham and Edythe Frances Woodworth, are applying for an order declaring that PIDS 60342177, 60339868, and 60342193 currently held by the Respondent, Janice Rose Cunningham, are owned by the Applicants and were not gifted to the Respondent.

Facts

[2] For the purposes of this decision, I shall refer to the parties by their first names at times. I mean no disrespect but have chosen this method to avoid confusion between the parties.

[3] On April 17, 2003, the Applicant, Edythe Frances Woodworth ("Edythe"), transferred the land that she owned at that time at New Cumberland Road, in Pleasantville, Lunenburg County, Nova Scotia, which was specifically identified as PIDS 60342177, 60339868, and 60342193 (the "Property") into the joint names of the two Applicants, Edythe and Janice Anne Cunningham ("Anne") for the purposes of estate planning. Edythe is Anne's mother.

[4] Edythe had been doing estate planning for the family for years to avoid probate fees and to make a fair distribution of her assets.

[5] In the Spring of 2023, the Applicants wished to transfer 15 acres of the Property to Anne's son, Stephen Cunningham ("Stephen") for the purposes of estate planning. The Applicants intended that the Property would be passed down to Stephen and Janice Rose Cunningham ("Rose") after they died but they wanted to provide Stephen now with 15 acres. Stephen would build a home there, harvest the land, and be of assistance to the Applicants as they aged. The Applicants and Stephen would benefit from those activities. To facilitate this plan, the Applicants had to survey, subdivide, and migrate the Property to the new Land Registration system.

[6] To accomplish this plan, the Property would be conveyed to Rose, Anne's daughter. She would be responsible for the survey and migration, and then Rose would reconvey the remainder of the Property back to the Applicants. The

Applicants asked Rose to assist with the plan. They believed Rose had the necessary knowledge to complete these steps because she had worked in real estate for a lengthy period.

[7] On May 12, 2023, Rose sent a text to Stephen advising that everyone had agreed to just put Rose on the deed. She advised that she called a surveyor who was going to get back to her next week to get the survey started.

[8] On May 16, 2023, the Applicants, Glenn Cunningham, and Rose signed a quit claim deed conveying the Property to Rose. Rose hired a lawyer to prepare the deed. There was no evidence in relation to any consideration being paid or provided to the Applicants for the Property. Anne and Rose had not spoken in person in 2023 up until the May 16, 2023 meeting to sign the documents.

[9] On May 16, 2023, Berrigan Surveys responded to Rose. She forwarded the text message to Stephen advising that the costs would be about $5,000. Stephen asked her to get started on it right away. Rose responded that it would take her some time to save up money to get the survey done.

[10] On June 9, 2023, Rose sent another text message to Stephen forwarding a subdivision email from Berrigan Surveys. Stephen asked Rose to speak to Anne about getting it done and for Rose to get on the wait list with the surveyor.

[11] On July 13, 2023, Rose emailed Brandon Crouse of Crouse Surveys Ltd. to get on the wait list for a survey.

[12] There is no written agreement describing what the Applicants said was to take place in relation to their estate plan.

[13] On September 13, 2023, Anne registered a Statutory Declaration with the Property advising that Rose had done nothing to complete the survey, subdivision, migration, and conveyance, and has refused to reconvey the remaining Property back to the Applicants. The purpose of the Statutory Declaration was to put any person on notice that the Applicants are the beneficial owners of the Property.

Issue

[14] Was the conveyance of the Property identified by PIDS 60342177, 60339868, and 60342193 for a specific purpose constituting a conveyance in trust or whether it was a gift to Rose?

Analysis

[15] This case turns on the credibility and reliability of the witnesses' testimony. Assessments of credibility and reliability are difficult because I can accept some, all, or none of a witness's testimony. Warner, J. described this in *Novak Estate, Re*, 2008 NSSC 283:

> There is no principle of law that requires a trier of fact to believe or disbelieve a witness's testimony in its entirety. On the contrary, a trier may believe none, part or all of a witness's evidence, and may attach different weight to different parts of a witness's evidence. (See *R. v. D.R.*, [1966] 2 S.C.R. 291 at ¶ 93 and *R. v. J.H. supra*).

[16] I will address the salient parts of the evidence that I believe in addition to the facts already stated that result in my decision.

[17] Anne testified that the Property was not intended to be a gift to Rose. Stephen was to get his parcel now and then Rose and Stephen would get the remainder of the Property when Anne and her mother were dead. Rose agreed to the conveyance and to reconvey the Property to the Applicants.

[18] Anne was cross-examined on her affidavit about text messages from her cell phone. She recognized part of the text messages as being sent by her but not other parts. I found this response not credible because the text messages came from her phone and she recognized part of the text chain but not other parts. She provided no explanation as to why she did not recall the texts messages. There was no evidence that her phone had been hacked or tampered with by another individual. I found the rest of her testimony regarding the Applicants' intention about the Property consistent, clear, and unshaken on cross-examination.

[19] Anne was next cross-examined on another text message dated March 6, 2023, where she said, "Land is going in your name that was planned from the start but u just won't talk" and a birthday card she sent to Rose, whose birthday was March 8 saying, "We are doing the land up this is yours and behind Molars." When it was suggested to her that the Property was to go to Rose alone, Anne's response was

consistent. The Property was going to be divided up between Rose and Stephen after the Applicants had passed away; however, Stephen was to get his 15 acres now. This response never changed. She testified that she did not add Stephen's name to the text, but the Property was not just Rose's alone, it was hers and Stephen's. That was the plan.

[20] When cross-examined about the reference on the birthday card about "No one will ever take it from you" she responded that meant Bob, her current partner, was not going to take the Property. Anne wanted to reassure Rose that the Property would be hers after Anne passed. Anne testified that it was always the Applicants' intention that the land would go to both Stephen and Rose, but not while the Applicants were alive.

[21] Similarly, Anne was questioned about her handwriting on the envelope that "… the land is going into your name." (Exhibit 3, Tab M). She responded in the same way. She wanted the Property for Stephen and Rose and wanted Rose to know that she was not going to be left out. Stephen was to get his 15 acres now and after the Applicants passed, Rose and Stephen would get the remainder of the Property.

[22] Anne was consistent and credible in her responses regarding what was to happen with the Property. The land was being conveyed to Rose so that she could subdivide, migrate, and then reconvey the land to the Applicants. The conveyance to Rose was being done to permit Stephen to receive 15 acres now and then upon the Applicants' passing the remainder of the Property would go to Stephen and Rose. She never wavered from this response, and I accept her evidence regarding what was to occur with the Property.

[23] In addition, on cross-examination Stephen corroborated Anne's evidence regarding what was to occur with the Property. He was asked if he heard something from Rose regarding the signing of the quit claim deed on May 16, 2023. He responded:

> A. So she said that it was easier, supposed to be easier for her to go to the lawyer with my mom, my grandmother, my aunt, my father and everyone else who is involved to sign over all the land completely into her name and then she was gonna meet with the lawyer, with me to sign over the...the 15 acres at the time to me and then go meet with another lawyer again to sign with my grandmother, my aunts, my mother and my father and sign everything back over to them.

[24] When Rose was questioned about whether she heard Stephen's testimony about the conveyance of the Property she answered:

> A. I heard his testimony, yes.
>
> Q. He said that you told him that you were getting the land to subdivide off a piece and get—and convey it to him and then convey the property back to your mother and grandmother.
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> A. …Don't recall exactly what it was, but it's something similar to that…

[25] There was no denial regarding Rose getting the Property to subdivide off a piece, convey it to Stephen, and then reconvey the remaining Property back to the Applicants. Rose did not dispute Stephen's version of events.

[26] In *Pecore v. Pecore*, 2007 SCC 17, the Supreme Court of Canada reviewed the presumptions of resulting trust and advancement. Justice Rothstein speaking for the majority stated:

> 20 A resulting trust arises when title to property is in one party's name, but that party, because he or she is a fiduciary or gave no value for the property, is under an obligation to return it to the original title owner: see D.W.M. Waters, M.R. Gillen and L.D. Smith, eds., *Waters' Law of Trusts in Canada* (3rd ed. 2005), at p. 362. While the trustee almost always has the legal title, in exceptional circumstances it is also possible that the trustee has equitable title: see *Waters' Law of Trusts*, at p. 365, noting the case of *Carter v. Carter* (1969), 70 W.W.R. 237 (B.C. S.C.).
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> 21 Advancement is a gift during the transferor's lifetime to a transferee who, by marriage or parent-child relationship, is financially dependent on the transferor: see *Waters' Law of Trusts*, at p. 378. In the context of the parent-child relationship, the term has also been used because "the father was under a moral duty to advance his children in the world": A.H. Oosterhoff et al., *Oosterhoff on Trusts: Text, Commentary and Materials* (6th ed. 2004), at p. 573 (emphasis added).

[27] Justice Rothstein went on to discuss how the presumptions of resulting trust or of advancement are rebuttable:

> 22 In certain circumstances which are discussed below, there will be a presumption of resulting trust or presumption of advancement. Each are rebuttable presumptions of law: see e.g. *Mailman, Re*, [1941] S.C.R. 368 (S.C.C.), at p. 374; *Niles v. Lake*, [1947] S.C.R. 291 (S.C.C.); *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436 (S.C.C.), at p. 451; J. Sopinka, S.N. Lederman and A.W. Bryant, *The Law of Evidence in Canada* (2nd ed. 1999), at p. 115. A rebuttable presumption of law is a legal assumption that a court will make if insufficient evidence is adduced to displace the presumption. The presumption shifts the burden of persuasion to the opposing party who must rebut the presumption: see Sopinka et al., at pp. 105-6.

> 23 For the reasons discussed below, I think the long-standing common law presumptions continue to have a role to play in disputes over gratuitous transfers. The presumptions provide a guide for courts in resolving disputes over transfers where evidence as to the transferor's intent in making the transfer is unavailable or unpersuasive. This may be especially true when the transferor is deceased and thus is unable to tell the court his or her intention in effecting the transfer. In addition, as noted by Feldman J.A. in the Ontario Court of Appeal in *Saylor v. Madsen Estate* (2005), 261 D.L.R. (4th) 597 (Ont. C.A.), the advantage of maintaining the presumption of advancement and the presumption of a resulting trust is that they provide a measure of certainty and predictability for individuals who put property in joint accounts or make other gratuitous transfers.

[28] He later went on to discuss the question of whether the presumption of advancement should apply between a parent and an independent adult child:

> 34 Next, does the presumption of advancement apply between parents and adult independent children? A number of courts have concluded that it should not. In reaching that conclusion, Heeney J. in *McLear v. McLear Estate* (2000), 33 E.T.R. (2d) 272 (Ont. S.C.J.), at paras. 40-41, focussed largely on the modern practice of elderly parents adding their adult children as joint account holders so that the children can provide assistance with the management of their parents' financial affairs:
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> > Just as Dickson J. considered "present social conditions" in concluding that the presumption of advancement between husbands and wives had lost all relevance, a consideration of the present social conditions of an elderly parent presents an equally compelling case for doing away with the presumption of advancement between parent and adult child. We are living in an increasingly complex world. People are living longer, and it is commonplace that an ageing parent requires assistance in managing his or her daily affairs. This is particularly so given the complexities involved in managing investments to provide retirement income, paying income tax on those investments, and so on. Almost invariably, the duty of assisting the ageing parent falls to the child who is closest in geographic proximity. In such cases, Powers of Attorney are routinely given. Names are "put on" bank accounts and other assets, so that the child can freely manage the assets of the parent.
> >
> > Given these social conditions, it seems to me that it is dangerous to presume that the elderly parent is making a gift each time he or she puts the name of the assisting child on an asset. The presumption that accords with this social reality is that the child is holding the property in trust for the ageing parent, to facilitate the free and efficient management of that parent's affairs. The presumption that accords with this social reality is, in other words, the presumption of resulting trust.

35 Heeney J. also noted that the fact that the child was independent and living away from home featured very strongly in Kerwin C.J.'s reasons for finding that no presumption of advancement arose in *Edwards v. Bradley*. A similar conclusion was reached by Klebuc J., as he was then, in *Cooper v. Cooper Estate* (1999), 27 E.T.R. (2d) 170 (Sask. Q.B.), at para. 19: "I have serious doubts as to whether presumption of advancement continues to apply with any degree of persuasiveness in Saskatchewan in circumstances where an older parent has transferred property to an independent adult child who is married and lives apart from his parent." Waters et al., too in *Waters' Law of Trusts*, at p. 395, said: "It may well be that, reflecting the financial dependency that it probably does, contemporary opinion would accord [the presumption of advancement] little weight as between a father and an independent, adult child."

36 I am inclined to agree. First, given that a principal justification for the presumption of advancement is parental obligation to support their dependent children, it seems to me that the presumption should not apply in respect of independent adult children. As Heeney J. noted in *McLear*, at para. 36, parental support obligations under provincial and federal statutes normally end when the child is no longer considered by law to be a minor: see e.g. *Family Law Act*, s. 31. Indeed, not only do child support obligations end when a child is no longer dependent, but often the reverse is true: an obligation may be imposed on independent adult children to support their parents in accordance with need and ability to pay: see e.g. *Family Law Act*, s. 32. Second, I agree with Heeney J. that it is common nowadays for ageing parents to transfer their assets into joint accounts with their adult children in order to have that child assist them in managing their financial affairs. There should therefore be 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 that parent's affairs.

…

40 As compelling as some cases might be, I am reluctant to apply the presumption of advancement to gratuitous transfers to "dependent" adult children because it would be impossible to list the wide variety of the circumstances that make someone "dependent" for the purpose of applying the presumption. Courts would have to determine on a case-by-case basis whether or not a particular individual is "dependent", creating uncertainty and unpredictability in almost every instance. I am therefore of the opinion that the rebuttable presumption of advancement with regards to gratuitous transfers from parent to child should be preserved but be limited in application to transfers by mothers and fathers to minor children.

41 There will of course be situations where a transfer between a parent and an adult child was intended to be a gift. It is open to the party claiming that the transfer is a gift to rebut the presumption of resulting trust by bringing evidence to support his or her claim. In addition, while dependency will not be a basis on which to apply the presumption of advancement, evidence as to the degree of dependency of an

> adult transferee child on the transferor parent may provide strong evidence to rebut the presumption of a resulting trust.

[29] There is no evidence before the Court that Rose is a "dependent" person. I find that the Respondent has failed to rebut the presumption of advancement. I also find she has failed to rebut the presumption of resulting trust. I am not persuaded that the transfer of the Property was a gift based on the evidence.

[30] In *Pecore*, the court spoke about transferors changing their mind and looking to retract the gift:

> 56 The traditional rule is that evidence adduced to show the intention of the transferor at the time of the transfer "ought to be contemporaneous, or nearly so," to the transaction: see *Clemens v. Clemens Estate*, [1956] S.C.R. 286 (S.C.C.), at p. 294, citing *Jeans v. Cooke* (1857), 24 Beav. 513, 53 E.R. 456 (Eng. Ch.). 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* (1954), [1955] A.C. 431 (U.K. H.L.), at p. 445, citing *Snell's Principles of Equity* (24th ed. 1954), at p. 153:
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> > 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....
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> The reason that subsequent acts and declarations have been viewed with mistrust by courts is because a transferor could have changed his or her mind subsequent to the transfer and because donors are not allowed to retract gifts. As noted by Huband J.A. in *Dreger*, at para. 33: "Self-serving statements after the event are too easily fabricated in order to bring about a desired result."

[31] The actions of Anne and Stephen support the Applicants' intention for the Property. The actions of Rose are consistent with someone who knew the Applicants' intention. For instance, in addition to Rose not denying Stephen's version of events about what was to occur with the Property, what also supports the Applicants' version of events is Rose attempting to lineup surveyors to subdivide the Property to enable her to provide Stephen with 15 acres.

[32] Rose sent a text to Stephen on May 12, 2023, prior to the May 16, 2023 signing of the quit claim deed. In the text she advised Stephen that she contacted a surveyor. If the Property was going to her alone and she did not know the Applicants' intentions as Rose testified, I do not understand why she would be advising Stephen that she had contacted a surveyor prior to the May 16, 2023 signing

of the deed, unless she knew of the Applicants' plan for the Property in advance of the signing.

[33] After the signing of the quit claim deed, Rose continued to speak with Stephen through text messages about Berrigan Surveys on May 16, 2023, and June 9, 2023.

[34] On July 13, 2023, Rose contacted another surveying company, Crouse Surveys Ltd.

[35] The actions of Rose prior to and post conveyance of the Property support Anne and Stephen's version of what the Applicants' intention was for the Property.

Conclusion

[36] After reviewing all the evidence, the purpose of the conveyance was to have Rose hold the land, subdivide the piece required, then convey the subdivided piece to Stephen, and finally reconvey the remainder to the Applicants.

[37] The Applicants wanted the assistance of Rose to facilitate their estate planning intention. They believed Rose had an expertise in completing what they wanted to do because she worked in real estate.

[38] Following *Pecore*, I find that the conveyance to Rose, an adult independent child, without consideration gives rise to the presumption of a resulting trust. Rose has failed to rebut the presumption. Therefore, a resulting trust was created with the express intention of the parties that Rose conduct the wishes of the Applicants regarding Stephen and the remainder of the Property be reconveyed to the Applicants. There is no evidence to support a presumption of advancement in favour of Rose.

[39] I order the Respondent to reconvey the Property described in the deed between the parties dated May 16, 2023 to the Applicants. If a conveyance cannot be obtained, I alternatively order a revesting of the title in the Property described in the deed to the Applicants.

[40] The Applicants are entitled to their costs. If the parties are unable to reach an agreement on costs, I will receive written submissions from the Applicants within 30 days of the date of this decision with the Respondent filing their submissions within 45 days of the date of this decision.

[41] I would ask the parties to address in their submissions the Applicants' request for costs in the amount of $2,500 in any event of the cause for the adjournment motion.

[42] I would ask counsel for the Applicants to prepare the order.

Bodurtha, J.