

ESTATE LITIGATION: **A PRIMER**

TRUSTS AND ESTATES LAW / YOUNG LAWYERS DIVISION

Joint Assets & Resulting Trusts: A Recipe for Litigation?
Dealing with Joint Assets in the Estates Litigation Context
Pia Hundal, Eisen Law

Joint Assets & Resulting Trusts: A Recipe for Litigation?

Dealing with Joint Assets in the Estates Litigation Context

Pia Hundal, Eisen Law

A. Introduction

Many estate litigation matters concern disputes regarding the beneficial ownership of joint assets, after the death of a title holder.

In this paper, I set out the basic principles behind joint asset disputes in Ontario, as well as provide a review of the case law to date. Specifically, I address:

- Unravelling the presumption of advance & the presumption of resulting trust.
- Rebutting the presumptions.
- When the presumptions apply: assets gratuitously transferred to children versus assets transferred between spouses.
- Evidentiary considerations and joint accounts versus real property.

B. The Presumption of Advancement & the Presumption of Resulting Trust

Legal ownership

The doctrine of resulting trusts arises out of equity. Equity recognizes a distinction between legal ownership and beneficial ownership. *Legal ownership* or *legal title* refers to property held in the name of a person or persons.¹

Beneficial ownership

Beneficial ownership is actual ownership is “described as ‘[t]he real owner of property even though [the property] is in someone else’s name’”.²

¹ *Pecore v Pecore*, 2007 SCC 17, 2007 CarswellOnt 2752 [*Pecore*], (WL Can) at para 4, citing *Cask v Aumon* (1990), 69 DLR (4th) 567 (Ont HC) at 570.

² *Ibid.*

Resulting trusts

A resulting trust is a common law, equitable remedy in situations where legal title is in one person's name, but that person, "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" (meaning the person who gave value for the property).³ In this paper, I address the presumption of resulting trust that arises on the voluntary transfer of property from one related party to another, either absolutely or into joint names.⁴

Advancement

Advancement is a gift during the transferor's lifetime to a transferee, who is related by marriage or the parent-child relationship to the transferor. Historically, this principle was applied to wives who could not hold legal title, minor children or adult children (regardless of dependency) who "the father was under a mortal duty to *advance*" in the world.⁵

The Presumptions

The presumption of advancement and the presumption of result trust apply in various situations involving gratuitous transfers of property.

Justice Abella, wrote a concurring decision to Justice Rothstein's majority decision in *Pecore v Pecore* ["*Pecore*"]. Abella J. succinctly summarized the principles regarding these two presumptions:

"The presumptions of advancement and resulting trust are legal tools which assist in determining the transferor's intention at the time a gratuitous transfer is made. The tools are of particular significance when the transferor has died."

³ *Ibid* at para 20, citing DWM Waters, MR Gillen and LD Smith, eds, *Waters' Law of Trusts in Canada*, 3rd ed (Toronto: Thomson Carswell, 2005) [*Waters' Law of Trusts in Canada*] at 362.

⁴ The other scenario in which the presumption of resulting trust applies is upon the failure of an express trust, also known as an "automatic" resulting trust. In such cases, the property reverts to the settlor of the trust. See: MR Gillen and F Woodman, eds, *The Law of Trusts A Contextual Approach*, 2nd ed, (Toronto: Edmond Montgomery Publications Limited, 2008) [*The Law of Trusts*] at 483-484.

⁵ *Pecore*, *ibid*, para 21.

*“If the presumption of advancement applies, an individual who transfers property into another person’s name is presumed to have intended to make a gift to that person. The burden of proving that the transfer was not intended to be a gift, is on the challenger to the transfer. If the presumption of resulting trust applies, the transferor is presumed to have intended to retain the beneficial ownership. The burden of proving that a gift was intended, is on the recipient of the transfer.”*⁶

C. When do the Presumptions apply?

The presumption of advancement has been limited to gratuitous transfers from a mother or father to a minor child.⁷

The presumption of resulting trust applies to all other gratuitous transfers, including between spouses and from a parent to an adult child.⁸ The presumption also applies to gratuitous transfers from an grandparent to an adult grandchild.⁹

Pecore is the leading decision on this topic, although the subsequent case law has developed more nuances to Rothstein J.’s reasons as to when these presumptions respectively apply.

There has been one exception found to the limited application of the presumption of advancement since *Pecore*. The exception is that the presumption of advancement analysis and evidentiary burden will apply in cases where – on marriage breakdown – there is a claim by one spouse to funds that were inherited by the other and placed into a jointly held account.¹⁰

⁶ *Ibid* at paras 80-81.

⁷ *Pecore*, *supra* note 1 at paras 38-40.

⁸ *Ibid* at paras 98-106: It is worth noting that in her concurring decision, Abella J. found that the presumption of advancement ought to apply to gratuitous transfers from parents to adult children on the basis of natural love and affection: “*The origin and persistence of the presumption of advancement in gratuitous transfers to children cannot, therefore, be attributed only to the financial dependency of children on their father or on the father’s obligation to support his children. Natural affection also underlay the presumption that a parent who made a gratuitous transfer to a child of any age, intended to make a gift.*”

⁹ *Falagario v Falagario*, 2016 ONSC 648 [*Falagario*], (CanLII) at para 71.

¹⁰ See for example: *Kosterewa v Kosterewa*, [2008] QDFL 5332, 2008 CarswellOnt 5995 (SCJ) [*Kosterewa*]; and *Gall v Galla*, 2015 ONSC 37, 2015 CarswellOnt 12.

Gratuitous Transfers between Spouses

Historically, wives were afforded the benefit of the presumption of advancement for gratuitous transfers from their husbands. This changed with the introduction of reforms to the matrimonial property legislation in Canada¹¹, beginning with Ontario in 1975.¹²

In Ontario, the *Family Law Act*¹³ sets out the regime for the division of property between spouses on the breakdown of a marriage (including death) and accordingly, the presumption of advancement is of no effect.¹⁴ The rationale in the jurisprudence that an unjust enrichment or other equitable claim will “in the vast majority of cases” be “fully addressed the operation of the equalization provisions under the *Family Law Act*.”¹⁵

The *Family Law Act* provisions relating to property division on marriage breakdown does not extend to common law spouses. However, common law spouses do not get the benefit of the presumption of advancement for gratuitous transfers.¹⁶

Gratuitous Transfers from Parents to Children

In *Pecore*, Rothstein J. stated that the presumptions continue to play a role in resolving disputes around gratuitous transfers. He found that presumption of resulting trust is the general rule for gratuitous transfers from a parent to an adult child and that the presumption of advancement applies to gratuitous transfers to a minor child.¹⁷

It is worth noting that with respect to adult children, Rothstein J. rejected the notion that dependant, adult children should have the benefit of the presumption of advancement and accordingly, the presumption of resulting trust applies to all adult children.¹⁸

¹¹ *Waters*, *supra* note 3 at 379: Waters et al suggest that the presumption of advancement is still of some effect in British Columbia, Manitoba and Alberta, but has “weakened” in its scope. This paper is limited to Ontario law.

¹² *Waters*, *supra* note 3 at 379.

¹³ *Family Law Act*, RSO 1990, c F-3, Part I.

¹⁴ *Waters*, *supra* note 3. See also: *Rathwell v Rathwell*, [1978] 2 SCR 436, 83 DLR (3d) 289 at 304.

¹⁵ *McNamee v McNamee*, 2011 ONCA 533, 2011 CarswellOnt 7168 [McNamee], (WL Can) at para 66.

See also: *Martin v Sansome*, 2014 ONCA 14; *Korman v Korman*, 2015 ONCA 578; and

Murray v Bortolon, 2016 ONSC 5164.

¹⁶ *Veitch (Trustee of) v Rankin*, [1997] OJ No 4642, 41 OTC 14, 1997 CarswellOnt 4361 (CJ (Gen Div)) [Veitch], WL Can at para 33.

¹⁷ *Pecore*, *supra* note 1 at paras 38-40.

¹⁸ *Ibid* at para 40.

D. Joint Property with the Right of Survivorship

In cases where the transferee can establish a gift where they obtain the property by the right of survivorship, the question of what is actually gifted can arise. Both *Pecore* and *Sawdon Estate* are instructive in these situations.

With respect to joint bank accounts, Rothstein J. in *Pecore* found:

“There may be a number of reasons why an individual would gratuitously transfer assets into a joint account having this intention. A typical reason is that the transferor wishes to have the assistance of the transferee with the management of his or her financial affairs, often because the transferor is ageing or disabled. At the same time, the transferor may wish to avoid probate fees and/or make after-death disposition to the transferee less cumbersome and time consuming.

“Courts have understandably struggled with whether they are permitted to give effect to the transferor’s intention in this situation. One of the difficulties in these circumstances is that the beneficial interest of the transferee appears to arise only on the death of the transferor. ...I am of the view that the rights of survivorship, both legal and equitable, vest when the joint account is opened and the gift of those rights is therefore inter vivos in nature.”¹⁹

Gillese J.A. applied Rothstein J’s approach in *Sawdon Estate*. In that case, the deceased transferred his accounts into joint names with two of his five children and expressly told the two children that they were to share what was left in the accounts on his death with their siblings in equal shares. He subsequently drafted a will giving legacies to the five children and leaving the balance of his estate to the Watch Tower Bible and Tract Society of Canada [“Watch Tower”].²⁰

¹⁹ *Ibid* at paras

²⁰ *Sawdon Estate v Watch Tower and Tract Society of Canada*, 2014 ONCA 101, 119 OR (3d) 81, 2014 CarswellOnt 1274 [*Sawdon Estate*], (WL Can) at paras 2, 6-12

After the father died, the issue was whether the funds in the account belong to:

- a. The two adult children who had title to the accounts by right of survivorship;
- b. The deceased's estate by virtue of a resulting trust in favour of the estate; or
- c. The deceased's five children in equal shares.²¹

Gillese J.A. found that at the time of the transfer of the accounts into joint names, *legal* title immediately vested in the deceased and his two sons equally. However, the deceased created a trust. When the two sons became legal owners of the joint accounts on the death of their father, they became the only two legal title owners of the accounts, but they held the accounts in trust for themselves and their siblings in equal shares:

"In legal terms, when the Bank Accounts were opened Arthur made an immediate inter vivos gift of the beneficial right of survivorship to the Children. Thus, from the time that the Bank Accounts were opened, those holding the legal title to the Bank Accounts held the beneficial right of survivorship in trust for the Children in equal shares".²²

E. Rebutting the presumptions

Presumption of Advancement

Both presumptions are rebuttable. The presumption of advancement may be rebutted by evidence that the transfer was not a gift. The burden is on the transferor to show – on a balance of probabilities - that the transfer was not a gift.

Presumption of Resulting Trust

The presumption of resulting trust places the onus on the recipient or transferee to prove – on a balance of probabilities - that a gift was intended by the transferor.²³ In estates litigation, this can be particularly challenging because the transferor is dead.²⁴

²¹ *Ibid.*

²² *Ibid* at para 67.

²³ *Sawdon Estate*, *supra* note 20 at paras 57-58.

²⁴ Usually a barrier to provide evidence.

The presumption of resulting trust applies where a transferor is presumed to have intended to retain the beneficial ownership of the transferred property. The burden of proving that a *gift* was intended falls on the transferee/recipient of the property transferred.²⁵

In order to rebut the presumption of resulting trust, the transferee must prove that the transferor intended to make a gift. A gift is defined as the voluntary transfer of property to another without consideration.²⁶

F. Evidentiary Considerations

Both presumptions are equitable remedies and equity presumes bargains, not gifts.²⁷

In *Kosterewa v Kosterewa*, the court found that the husband rebutted the presumption of advancement claimed by the wife over funds inherited by husband. The funds were placed in a joint account that was dormant (other than accruing interest) and not used by the husband for the couple's joint benefit.²⁸ The court found that the husband had rebutted the presumption of advancement and showed that the husband intended that the money he inherited from his mother's estate was to be his alone and none of it was meant to be a gift to his wife. The other facts that the husband used to support his position was that he claimed the interest income on his tax returns and that to divide that income between the husband and wife would have saved money for the couple in taxes. Also, funds the husband had received previously were deposited in existing, active joint accounts and used for family debts and vacations. Thus, the fact of the funds being in a joint account was not a barrier to the husband rebutting the presumption of advancement, given his use of the funds.²⁹

²⁵ *Pecore*, *supra* note 1 at para 81.

²⁶ *McNamee*, *supra* note 15 at para 23.

²⁷ *Waters*, *supra* note 3 at 372; see also: *Falagario*, *supra* note 9 at paras 68-71.

²⁸ *Kosterewa*, *supra* note 10 (WL Can) at paras 23-24: The fact that the wife took out some of the money to pay for credit card debt, without her husband's knowledge – was not evidence that the funds were advanced to her in equal shares with her husband.

²⁹ *Ibid* at paras 26-28.

Evidence Rebutting the Presumption of Resulting Trust

For either resulting trusts or advancement, the presumptions may be rebutted by evidence of a contrary intention by the transferor, on a balance of probabilities.³⁰

In the case of the presumption of advancement, the transferor has the onus of proving that the transfer was not a gift in order to rebut the presumption. The presumption of resulting trust is rebutted by the transferee/recipient proving that the transferor intended a gift.

However, since *Pecore*, the law has been relatively straightforward for the presumption of advancement, which is limited to minor children and essentially automatically applied.

However, the presumption of resulting trust is applied where the recipient/transferee of the gratuitous transfer is unable to provide sufficient evidence to show that the transferor's *actual intention* – at the time of the transfer – was to make a gift of the property to the recipient/transferee.³¹

In order to establish a legally valid gift, the transferee must provide evidence to show:

1. an intention to make a gift on the part of the donor/transferor, without consideration or expectation of remuneration;
2. an acceptance of the gift by the donee/transferee; and
3. a sufficient act of delivery or transfer of the property to complete the transaction.³²

In *Sawdon Estate v Watch Tower Bible and Tract Society of Canada* [“*Sawdon Estate*”], Justice Gillese for the Ontario Court of Appeal provided a list of the types of evidence that the court may consider when determining the transferor's actual intention:

- Evidence of the transferor's intention subsequent to the transfer;
- The terms of any power of attorney granted to the transferee;
- The wording of the bank/financial institution documents; and
- Control and use of the funds in the accounts.³³

³⁰ *Pecore*, *supra* note 1 at paras 43-44; *Sawdon Estate*, *supra* note 20 at para 57.

³¹ *Ibid.*

³² *McNamee*, *supra* note 15 at para 24.

Both *Pecore* and *Sawdon Estate* related to the treatment of bank accounts transferred during a parent's lifetime into joint names with a child/children with the right of survivorship. Some considerations, including those above, include:

- Evidence that the transferee contributed to property in such a way to suggest that she expected an interest to vest in her eventually; and
- The use of the property.³⁴

For both joint accounts and jointly held real property, independent evidence of the Deceased's statements regarding his or her intentions has been found to be persuasive – for example statements made to the deceased's will drafting lawyer.³⁵

In addition, the tax treatment of the property will be relevant in both classes of evidence, such as whether capital gains were completed and paid, as well as the payment of any income tax.³⁶

Finally, the deceased's estate planning has found to be useful evidence in cases where an *inter vivos* transfer was made to equalize what each of the deceased's children received.³⁷

³³ *Sawdon*, *supra* note 20 at para 58, citing *Pecore*, *supra* note 1 at paras 58-70.

³⁴ *Falagario*, *supra* note 9 at paras 75-77.

³⁵ *Ibid* at paras 29, 58-67 and 76 and *Sawdon*, *supra* note 20 at paras 38-39.

³⁶ *McNamee*, *supra* note 15.

³⁷ *Latner Estate v Latner*, 2016 ONSC 364, 2016 CarswellOnt 3253, (WL Can) at para 50.