



**Ontario Legal Conference - Family, Estates and Real Estate Law  
Joint Tenancy and Trust Claims: Things to Watch out For**

**A Gift, Trust, or Joint Tenancy? Understanding the Presumptions of  
Advancement & Resulting Trust and Principles Associated with Joint Tenancy**

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# **A Gift, Trust, or Joint Tenancy? Understanding the Presumptions of Advancement & Resulting Trust and Principles Associated with Joint Tenancy<sup>1</sup>**

## **A. What Is a trust?**

At its core, a trust, is a relationship. A trust creates a series of obligations that are owed by one party, defined as a trustee, to manage the property of the settlor, for the ultimate benefit of a third party, defined as the beneficiary.<sup>2</sup>

A trustee will hold legal title to property in a trust for the benefit of the beneficiary.<sup>3</sup> This dynamic imposes a fiduciary relationship between the trustee and the beneficiary.<sup>4</sup> With such fiduciary powers, the trustee is expected to act in the best interests of the beneficiary, as well as with honesty and confidentiality.<sup>5</sup>

### Equity's Role in Trust Law

Originating in the English courts of chancery, the law of Equity ("**Equity**") was created alongside developing common law and statute law.<sup>6</sup> Equitable principles have, "humanized and contextualized" the law so as to address the needs posed by society.<sup>7</sup> However, Equity is not above or below the common law, rather, courts have given effect to both legal and equitable rights, particularly after its jurisdictional fusion in 1881.

The law of Equity plays a crucial role in the relationship between a trustee and a beneficiary by creating a distinction between beneficial and legal ownership.<sup>8</sup> The beneficial owner of property has been described as "[t]he real owner of property even though it is in the name of another."<sup>9</sup> Beneficial ownership is distinct from legal ownership

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<sup>1</sup> Prepared by Gabriella Banhara, Articling Student.

<sup>2</sup> Albert Oosterhoff et al., *Oosterhoff on Trusts*, 9th edition, (Thomson Reuters, 2019) at 17 [*Oosterhoff on Trusts*].

<sup>3</sup> *Oosterhoff on Trusts*, *supra* note 1 at 17.

<sup>4</sup> *Ibid.*, at 17.

<sup>5</sup> *Ibid.*, at 17.

<sup>6</sup> Leonard I. Rotman, *The "Fusion" of Law and Equity* at 503 [Rotman].

<sup>7</sup> Rotman, *supra* note 5 at 506.

<sup>8</sup> *Ibid.*, at 506.

<sup>9</sup> *Pecore v. Pecore*, 2007 SCC 17, [2007] 1 SCR 795 (CanLII), at para 21 [*Pecore*].

and it describes the person receiving the “economic benefit”.<sup>10</sup> The presumptions of advancement and resulting trust demonstrate some of the distinctions applicable in determining ownership.

## **B. What is an express trust?**

An express trust is created when a settlor expressly or explicitly provides for designated property to be held and dealt with by a trustee for the benefit of a beneficiary.<sup>11</sup> As set out in *Byers v. Foley*,<sup>12</sup> there are three conditions or ‘certainties’ that must be met to constitute an express trust:

1. The language of the settlor must be imperative;
2. The subject matter or trust property must be certain; and
3. The objects of the trust must be certain.

Intention is a key component of an express trust, and is aptly stated in *Allison v. Bent*,<sup>13</sup>:

[55] In *Byers*, the court also held that, for a trust to be valid, there must be a clear intention to create it. In the absence of a formal trust agreement, “the court must look at the surrounding circumstances and the evidence in determining what the parties intended, as to what was actually agreed and as to how the parties conducted themselves to determine whether there was ‘certainty of intention’.

## **C. What is the presumption of resulting trust?**

While intention is a key component of creating a valid express trust, there are separate categories of trusts that arise regardless of intention, such as that of resulting trust.<sup>14</sup>

The operational effect of a resulting trust is to reverse the transfer of property between one party to another.<sup>15</sup> Regardless of intention, at first instance, the presumption of resulting trust will apply to transfers between adult individuals for nominal or no

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<sup>10</sup> Thomson Reuters Practical Law, Glossary: Beneficial interest, accessed online: [https://uk.practicallaw.thomsonreuters.com/w-022-2768?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/w-022-2768?transitionType=Default&contextData=(sc.Default)&firstPage=true).

<sup>11</sup> *Oosterhoff on Trusts*, *supra* note 1 at 22.

<sup>12</sup> 1993 5506 (CanLII) (ON SC) [*Byers v. Foley*].

<sup>13</sup> 2021 ONSC 6723 at para 55 [*Allison*].

<sup>14</sup> *Allison*, *supra* note 12 at para 24.

<sup>15</sup> *Ibid.*, at para 24.

consideration.<sup>16</sup> The presumption assumes that the transferred property will revert back to the original title holder, and the individual who has received the transfer of property is simply holding the property for the individual who advanced the money for the sale.<sup>17</sup> Equity tends to demand that the transferee prove the intention behind the transfer due to its suspicions on gifts.<sup>18</sup>

The presumption of resulting trust is rebuttable, with the onus being on the individual receiving the transfer, otherwise known as the transferee, to disprove the presumption and demonstrate intention in accordance with established common law treatment.<sup>19</sup>

When the transferor of the subject property has deceased, and a dispute arises involving a third party, the importance of placing the onus on the transferee to rebut the presumption of resulting trust becomes clear since the transferee arguably would have been in a better position to bring evidence regarding the transfer.<sup>20</sup>

#### **D. Looking at Intention...A trust or a gift?**

The courts try to follow the intention of the settlor (who is usually deceased) when trying to dispose of all assets.<sup>21</sup> According to Professor Oosterhoff, “[p]eople make wills intending to dispose of all assets involved. Therefore, a construction that avoids failure is usually the best way to give effect to the settlor’s intention”.<sup>22</sup>

#### **E. Presumption of Advancement:**

Professor Waters defines the presumption of advancement as a gift during the transferor’s lifetime to a transferee who, by marriage or parent-child relationship, is financially dependent on the transferor.<sup>23</sup>

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<sup>16</sup> *Ibid.*, at para 25.

<sup>17</sup> Robert Chambers, *Resulting Trusts in Canada*, 2000 38-2 Alberta Law Review at 383 [Chambers].

<sup>18</sup> Chambers, *supra* note 16 at 383.

<sup>19</sup> See *Andrade v. Andrade*, 2016 ONCA 368 (CanLII) [Andrade].

<sup>20</sup> *Andrade* at para 59.

<sup>21</sup> Oosterhoff on *Trusts*, *supra* note 1 at 565.

<sup>22</sup> *Ibid.*

<sup>23</sup> DWM Waters, MR Gillen and LD Smith, eds, *Waters’ Law of Trusts in Canada*, 3rd ed (Thomson Carswell, 2005) (“*Waters’ Law of Trusts in Canada*”) at 378 [Waters’ *Law of Trusts in Canada*].

The presumption of advancement applies in varied circumstances such as, where a parent (donor) transfers property to a minor child (donee), where it is assumed that the transfer was intended to be a gift hence will not result back to the transferor.<sup>24</sup> The distinction between the presumption of advancement and that of resulting trust, is dependent on the relationship between the transferor and the transferee.<sup>25</sup>

### Parent to child

Where a transferee is a minor child, or a spouse, a presumption of advancement will apply rather than resulting trust.<sup>26</sup>

### Spouse

As stated in *Galla v Galla*<sup>27</sup>, in Ontario, the presumption of advancement also applies to property jointly owned between spouses.<sup>28</sup> The presumption of advancement is also addressed in statute through section 14 of the *Family Law Act*.<sup>29</sup>

## **F. When does the Presumption of Resulting trust arise?**

Professor Waters describes two circumstances where the presumption of resulting trust arises:

- 1) Where an individual acquires rights gratuitously; and<sup>30</sup>
- 2) Where an express trust fails to fully dispose of a beneficial interest.<sup>31</sup>

### Gratuitous Transfer

This first circumstance where the presumption of resulting trust arises, involves the transfer of an apparent gift.<sup>32</sup> Equity describes these transfers as voluntary.<sup>33</sup> For a transfer to be categorized as voluntary, it does not require that the transfer be done

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<sup>24</sup> *Oosterhoff on Trusts* at 621.

<sup>25</sup> *Pecore*, *supra* note 8 at para 21.

<sup>26</sup> *Ibid.*

<sup>27</sup> 2015 ONSC 37 [Gala]

<sup>28</sup> *Oosterhoff on Trusts*, *supra* note 1 at 640.

<sup>29</sup> RSO 1990, c F.3 at s.13 [FLA].

<sup>30</sup> *Waters' Law of Trusts in Canada*, *supra* note 22 at 5th Ed. at 10.I B. — Categories of Resulting Trusts.

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*

“willingly”, rather, “the recipient does not give value for what he or she acquires”.<sup>34</sup> Such transfers also arise, “when a person purchases property and directs that title be taken in the name of another or others”.<sup>35</sup> Given that the law of Equity assumes bargains, not gifts,<sup>36</sup> it “must be presumed that the transferor did not intend to give the beneficial interest, but, rather intended to retain it.”<sup>37</sup>

### Failed express trust

The second circumstance where a resulting trust arises, occurs where an express trust fails.<sup>38</sup> An express trust may fail when a settlor has not disposed of the entire beneficial interest of the trust assets.<sup>39</sup> This, consequently, will cause the trustees to hold the remaining assets on resulting trust for the settlor otherwise, the trustees would be unduly enriched to the detriment of the settlor.<sup>40</sup>

Other instances where an express trust may fail include where the trust objects have not been adequately made out or where undue influence, duress and/or fraud have taken place.<sup>41</sup>

### Exceptions to a Failed Express Trust:

There are two exceptions that will prevent a resulting trust from arising: the first, occurs where the “trust fails for illegality”, which may occur if the trust has been settled for reasons that are against public policy;<sup>42</sup> the second exception, occurs where the settlor intends for the remaining property of the trust to be gifted to the settlor as a surplus.<sup>43</sup>

In *Reaney v Reaney*,<sup>44</sup> the court failed to recognize a voluntary transfer as rebutting the presumption of resulting trust due to the fraudulent nature of the transfer. In *Reaney*, an

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<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*

<sup>36</sup> *Pecore*, *supra* note 8 at para 24.

<sup>37</sup> *Oosterhoff on Trusts*, *supra* note 1 at 24.

<sup>38</sup> *Waters' Law of Trusts in Canada*, *supra* note 22 at 5<sup>th</sup> Ed. At 10.11— Exhaustion or Failure of Express Trust Objects.

<sup>39</sup> *Oosterhoff on Trusts*, *supra* note 1 at 562.

<sup>40</sup> *Ibid.*, at 564.

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.*

<sup>44</sup> 1990 CanLII 8062 ONSC [*Reaney*].

unmarried couple jointly purchased property. However, the couple chose to name Carol (the “**Plaintiff**”) solely on title to shield the property from Reaney’s creditors. Carol (the “**Defendant**”) was aware that her name was solely on title to protect the property from her partner’s debts, and thus participated voluntarily in this illegal act.<sup>45</sup>

Initially, it was contended there was a resulting trust, given that the Plaintiff had contributed equally to purchase the property and thus no consideration was exchanged.<sup>46</sup> However, due to the Plaintiff’s participation in the illegality of the agreement, the court determined that the Plaintiff was “unable to rely on the transfer to rebut the presumption of resulting trust.”<sup>47</sup> To understand this finding, the court cited with approval, the decision in *Maysels v. Maysels*,<sup>48</sup> which discusses the implications of an “illegal transaction to defeat the presumption of a resulting trust” as follows:<sup>49</sup>

I am quite clear that the husband (Plaintiff) cannot have it both ways. So he is on the horns of a dilemma. He cannot say that the house is his own and, at one and the same time, say that it is his wife’s. As against his wife, he wants to say that it belongs to him. As against his creditors, that it belongs to her. That simply will not do. Either it was conveyed to her for her own use absolutely; or it was conveyed to her as trustee for her husband. It must be one or other. The presumption is that it was conveyed to her for her own use; and he does not rebut that presumption by saying that he only did it to defeat his creditors. I think that it belongs to her.<sup>50</sup>

Courts in Canada have demonstrated confusion on this subject.<sup>51</sup> However, as Professor Oosterhoff states, “the rationale of the illegality doctrine is that it would be contrary to public interest to enforce a claim if to do so would be harmful to the integrity of the legal system.”<sup>52</sup>

### **G. *Pecore v. Pecore***

In the seminal case of *Pecore*, the Supreme Court of Canada (“**SCC**”) addressed various inconsistencies regarding the presumptions of resulting trust and advancement.

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<sup>45</sup> *Reaney*, *supra* note 45 at para 31.

<sup>46</sup> *Ibid.*, at para 42.

<sup>47</sup> *Ibid.*, at para 42.

<sup>48</sup> 1974 CanLII 831 ONCA, [*Maysels*], citing *Tinker v. Tinker*, [1969] EWCA Civ J1203-6.

<sup>49</sup> *Maysels*, *supra* note 49.

<sup>50</sup> *Ibid.*

<sup>51</sup> *Oosterhoff on Trusts*, *supra* note 1 at 651.

<sup>52</sup> *Ibid.*, at 664.

In *Pecore*, a father gratuitously deposited his “mutual funds, bank account and income trusts” into a joint account that amounted to nearly \$1,000,000 at the time of his death. The father was told by his accountant to create a joint account with his daughter (the “**Respondent**”) to lessen his probate fees. The Respondent worked various low paying jobs while taking care of her quadriplegic husband. Additionally, the Respondent was reliant on her father for financial support. As per the advice of his accountant, the Respondent wrote letters to his financial institutions stating he owned 100% of the funds in the joint account, and they were not gifted to the Respondent. This was done to ensure capital gains were not triggered on the disposition of the funds. The Respondent was only able to withdraw funds from the joint account with permission from her father. Additionally, her father exercised control over the funds after they were put into the joint account and paid taxes on the income that was created from the shares.

The funds were not addressed in the father’s will, although the respondent’s husband (the “**Appellant**”) was listed as a beneficiary. Before the father passed away, he mentioned to his family that he would always take care of the Respondent, while the system would take care of the Appellant. The Respondent and the Appellant divorced soon after. The Appellant claimed that the funds in the joint account formed part of her father’s estate, while the Respondent argued that due to the presumption of advancement, the funds were gifted to her.

The Respondent was able to provide sufficient evidence to demonstrate that the Respondent’s father intended to gift the funds in the joint account. The Court stated that the Respondent was entitled to the funds based on resulting trust. The Court stated that the presumption of advancement was not applicable given the Respondent was an adult, rather than a minor. The main findings resulting from *Pecore* were as follows:

#### Gratuitous Transfers Between Parent and Child

The Court concluded that the presumption of advancement still applies in modern times to apparent gifts between parents and minor children. Additionally, the

decision reinforced that the presumption of resulting trust will apply to apparent gifts between parents and adult children.<sup>53</sup>

### Married Spouses

In *Pecore*, the Court held that the presumption of advancement applies to *inter vivos* gifts made to a transferee who, by *marriage* or parent-child relationship, is financially dependent on the transferor.<sup>54</sup>

### Dependent children

The Court in *Pecore* clarified that the presumption of advancement does not apply to transfers between parents and dependent adult children. The justification for this exclusion is due to the difficulty it would create in determining what classifies as a dependent, “for the purpose of applying the presumption” of advancement<sup>55</sup>.

*Pecore* additionally set out the various types of evidence that a court may consider when assessing the “actual” intention of the transferor, as follows:<sup>56</sup>

#### **1. Evidence Subsequent to the Transfer**

The Court confirmed that evidence arising after the transfer may be used to demonstrate the relevant intention of the transferor at the time of the transfer and should be assessed for its reliability to determine whether the evidence “is self-serving,” or, reflective of a change in intention.”<sup>57</sup>

#### **2. Bank documents**

Bank documents which are intended to be relied on as evidence must be detailed enough to demonstrate that the transferor intended to provide beneficial title, rather than just the transfer of legal title.<sup>58</sup>

#### **3. Control and use of the funds in the account**

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<sup>53</sup> *Pecore*, *supra* note 8 at para 40.

<sup>54</sup> *Ibid.*, at para 21.

<sup>55</sup> *Ibid.*, at para 40.

<sup>56</sup> *Ibid.*, at para 55.

<sup>57</sup> *Ibid.*, at para 56.

<sup>58</sup> *Ibid.*, at para 60.

The decision also highlights that the use of funds should not be ruled out in determining the transferor's intention, yet it should not be determinative.<sup>59</sup> Various factors may impact the transferor's decision for allowing control over funds. An example, the dynamics of the relationship between transferee and transferor may be given weight. Such a relationship may indicate that the child of the transferor manages the transferor's bank accounts. However, that does not mean that the transferor intends the child to retain the funds after death.<sup>60</sup>

#### **4. Granting power of power of attorney**

The court has discretion to consider whether the granting of a power of attorney ("POA") is a factor in determining intent.<sup>61</sup> Again, such evidence should not be determinative. A transferor may grant a POA and create a joint account to permit assistance with their finances, "solely for convenience,"-rather than intending to dispose of the beneficial interest in the funds.<sup>62</sup>

#### **5. Tax treatment of joint accounts**

With respect to the transferor's tax treatment of funds in a joint account, it is in the court's discretion to determine the weight such evidence will be given in determining intent.<sup>63</sup>

### **H. Rebutting the Presumption of Resulting Trust**

In *Sawdon Estate v. Sawdon*,<sup>64</sup> the Ontario Court of Appeal held that the presumption of resulting trust "can be rebutted by evidence of the transferor's contrary intention on a balance of probabilities".<sup>65</sup> As stated by Oosterhoff, the presumption of resulting trust can be rebutted "by evidence that a transaction was a loan, sale, or in satisfaction of a debt,

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<sup>59</sup> *Ibid.*, at para 61.

<sup>60</sup> *Ibid.*

<sup>61</sup> *Ibid.*, at para 67.

<sup>62</sup> *Ibid.*

<sup>63</sup> *Ibid.*, at para 69.

<sup>64</sup> 2014 ONCA 101 [*Sawdon*].

<sup>65</sup> *Ibid.*, at para 57.

because it shows that the recipient was supposed to receive beneficial ownership, but not as a gift” as stated by Professor Oosterhoff.<sup>66</sup> In *Pecore*, the court found:

[24] 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.

In a gratuitous transfer, if it is established that the transferor intended to make a gift, the presumption of resulting trust is rebutted. In *Dixon v. Spencer*,<sup>67</sup> citing *Foley (Re)*,<sup>68</sup> the court set out three elements that must be met to establish a valid gift:

- (1) An intention to make a gift on the part of the donor;
- (2) An acceptance of the gift by the donee; and
- (3) A sufficient act of delivery or transfer of the property to complete the transaction.

In *Dixon*,<sup>69</sup> Ms. Dixon (the “**Deceased**”) was predeceased by her husband and had four children, who were all beneficiaries under the Deceased’s will. One of her children, Helen (the “**Applicant**”) contended that a Bond of the Deceased (the “**Aviva Bond**”), worth \$123, 558.64, formed a part of the Deceased’s estate. The remainder of the Deceased’s three children (the “**Respondents**”) were of the view that the Aviva Bond was a gift by the Deceased.

The Aviva Bond was transferred to Ms. Spencer (“**Respondent S**”) and Ms. Prudhomme (“**Respondent P**”), years prior to the Deceased’s death, given they were the named surviving policyholders. The Deceased confirmed that the “Aviva Bond was being assigned “[b]y way of a gift, in consideration of natural love and affection”.<sup>70</sup> Additionally, a separate gift had been made out to Respondent S, in the amount of \$55,000 by the Deceased, as a thank you for taking care of the Deceased. This gift was placed in a bank account by the Deceased called the “Lloyd account”, which the Deceased added

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<sup>66</sup> Oosterhoff on Trusts, *supra* note 1 at page 647.

<sup>67</sup> 2023 ONSC 202 (CanLII) at para 29 [*Dixon*].

<sup>68</sup> 1993 NS SC 3400 at para 28 [*Foley*].

<sup>69</sup> *Dixon*, *supra* note 65 at para 1.

<sup>70</sup> *Ibid.*, at para 6.

Respondent S and P as joint account holders to.<sup>71</sup> The funds in the Lloyd account were payments from the Aviva Bond. None of the beneficiaries disputed this second gift.

The court ruled that the Aviva Bond did not form a part of the estate. The court also found that the evidence provided by the Respondents indicated that the Aviva Bond was a gift.

The court established that the Deceased intended to gift the funds from the Aviva Bond to the Respondents for several reasons. First, the Applicant witnessed the Deceased's execution of the Deed of Assignment, indicating that the transfer to the Respondents was a gift. Next, the funds of the Aviva Bond were deposited into the Lloyd account, which Respondent S and P had access to during the deceased's life. The court found that control over an asset is a determination of the transferor's intention. Finally, the courts reviewed corroborating evidence from Ms. Amos ("**Respondent A**"), who was another child of the Deceased. Her evidence supported the assertion that Respondent S and the Deceased had a very close relationship, and the gift to Respondent S had been made out to her due to her support of the deceased when her health was declining.<sup>72</sup>

In another decision, that of *Falsetto v. Falsetto*,<sup>73</sup> the presumption of resulting trust was rebutted by providing sufficient evidence that a father intended to make a gift to his son, Sam (the "**Respondent**"). Salvatore (the "**Appellant**") owned a successful business that bought and developed rental properties. Despite the Respondent and the Appellant's tumultuous relationship, the Appellant transferred several properties and cash to assist the Respondent in his contracting business. The transfers encompassed a value of over \$10 million. Prior to each transfer, the Respondent testified that he verified with the Appellant that such transfers were gifts from the Appellant. Decades later, the Appellant sued the Respondent on the basis that such transfers of money and property were only made to the Respondent so they could be held in trust for the Appellant.

The court dismissed the appeal, deeming the transfers of property as gifts from the Appellant to the Respondent. The court relied on the factors set out in *Pecore*,<sup>74</sup> where

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<sup>71</sup> *Ibid.*, at para 7.

<sup>72</sup> *Ibid.*, at para 44.

<sup>73</sup> 2023 ONCA 469 [*Falsetto*].

<sup>74</sup> *Pecore*, *supra* note 8.

the Supreme Court held that when a parent gratuitously transfers property to their adult child, the law presumes that the child holds the property on resulting trust for the parent.”<sup>75</sup> To rebut such a presumption, the adult child must demonstrate “clear, convincing, and cogent evidence that”:

- 1) The parent intended to make a gift of the property to the child;
- 2) The child accepted the gift; and
- 3) A sufficient act of delivery or transfer of the property occurred to complete the transaction.<sup>76</sup>

The court based its conclusion on the evidence provided by the Respondent, including the testimony of eight witnesses. All witnesses testified that such transfers of property were intended to be gifts by the Appellant to the Respondent. This included the Appellant’s lawyer as a witness who was able to demonstrate that he was instructed by the Appellant to transfer the properties into the Respondent’s name, fulfilling the first requirement. The second requirement was fulfilled since the Respondent demonstrated that the property titles had been transferred into his name. Lastly, the Respondent was able to demonstrate “overwhelming evidence” that he had accepted the transferred property and money.<sup>77</sup> The Respondent was ultimately able to rebut the presumption of resulting trust by demonstrating that the Appellant had intended to gift the property.

### **I. Rebutting the Presumption of Advancement**

The presumption of advancement may be rebutted by a transferee if they are able to provide evidence that the transfer was not intended to be a gift.<sup>78</sup> The onus falls on the “party challenging the transfer to rebut the presumption of a gift”.<sup>79</sup> The court commented that “only slight evidence” is required to rebut the presumption on a balance of probabilities.<sup>80</sup>

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<sup>75</sup> *Falsetto*, *supra* note 71 at para 27.

<sup>76</sup> *Ibid.*

<sup>77</sup> *Ibid.*, at para 30.

<sup>78</sup> *Oosterhoff on Trusts*, *supra* note 1 at 646.

<sup>79</sup> *Pecore*, *supra* note 8 at 27.

<sup>80</sup> *Pecore*, *supra* note 8 at 42.

The courts make a distinction between a negative and a positive intention.<sup>81</sup> Oosterhoff, citing *Brown v Brown*, stating that in order to rebut a presumption, a parent does not need to demonstrate “a positive intention not to give”, rather, the absence of an intention to give, will suffice to rebut the presumption of advancement.<sup>82</sup> This absence of intention includes, “simply fail(ing) to address their minds to the issue” which rebuts the “interference that they did in fact intend to make a gift.”<sup>83</sup> In *Brown*, the court also commented that, “If parents had to prove that they formed the intention not to give, the presumption of advancement would not be rebutted by proof that they were unaware of the transaction or lacked the capacity to make a gift.”<sup>84</sup>

## **E. Jointly Owned Property and Rights of Survivorship**

### **Joint tenancy**

Joint ownership of property with a right of survivorship, often seen in joint tenancy arrangements, creates an enormity of unnecessary litigation.

The decision in *Properties v. Northmore*,<sup>85</sup> confirms that a joint tenancy, in essence, exists where all tenants share equal ownership in the property. What distinguishes joint tenancy from other forms of ownership is the right of survivorship.<sup>86</sup> Upon the death of a tenant in a joint tenancy arrangement, the rights of survivorship allow the Deceased tenant’s interest to pass to the surviving tenant.<sup>87</sup> Therefore, the interest in the property owned by the Deceased tenant does not form part of their estate. Rather, upon the death of the Deceased tenant, the Deceased’s share of title immediately vests in the surviving tenant.

Joint tenancy is curiously, yet, commonly, viewed as advantageous because it reduces the value of the Deceased’s estate, which allows the Deceased to pay lower probate fees.<sup>88</sup>

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<sup>81</sup> Oosterhoff on Trusts, *supra* note 1 at 647.

<sup>82</sup> *Ibid.*, at 646.

<sup>83</sup> *Ibid.*

<sup>84</sup> *Ibid.*, at 647.

<sup>85</sup> 2018 CanLII 153456 (ON LTB) [*Properties v. Northmore*].

<sup>86</sup> *Properties v. Northmore*, *supra* note 83 at para 19.

<sup>87</sup> *Ibid.*, at para 20.

<sup>88</sup> *Pecore*, *supra* note 8 at para 47.

The Ontario Court of Appeal decision in *Hansen v. Hansen Estate*,<sup>89</sup> clarified the law with respect to the severance of joint tenancies. In particular, the court clarified the third of the “three rules” where a joint tenancy will be severed:

1. A joint tenancy can be severed by a unilateral act affecting title, such as selling or encumbering the interest;
2. Parties may explicitly agree to sever the joint title; and
3. Any course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common.<sup>90</sup>

The court expanded the third rule, stating that joint tenancy will be severed by something less than an explicit act of severance. The Court held that this rule operates in equity.<sup>91</sup> It is meant to prevent the title passing by way of survivorship when to do so would cause an injustice. This rule does not require a specific act or any explicit agreement. What the party asserting severance must prove is that the co-owners have all acted as though their respective shares in the property were no longer an indivisible, unified whole.<sup>92</sup>

#### Three Potential Ownership Interests Amongst Joint Tenants

In *Petrick (Trustee) v. Petrick*,<sup>93</sup> the Supreme Court of British Columbia was asked to determine whether a transfer of property was considered fraudulent. To do so, the court had to establish whether Mr. Petrick (**the “Defendant”**) had a beneficial interest in the property that the Defendant shared with his mother as joint tenants. If the court found that the Defendant did not have a beneficial interest in the property, it would revert to the Defendant’s mother due to the presumption of resulting trust. The court’s analysis provided three potential ownership interests that may arise amongst joint tenants:<sup>94</sup>

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<sup>89</sup> 2012 ONCA 112 [*Hansen Estate*].

<sup>90</sup> *Ibid.* at para. 34.

<sup>91</sup> *Ibid.* at para. 35.

<sup>92</sup> *Ibid.*, at para. 39.

<sup>93</sup> 2019 BCSC 1319 [*Petrick*].

<sup>94</sup> *Petrick*, *supra* note 91 at para 40.

- a) **A true joint tenancy**, in which the joint tenants are each owner of the whole. Each enjoys the full benefit of property ownership, and the ultimate survivor will enjoy the whole title for him or herself.
- b) **A resulting trust**, wherein only one joint tenant has any beneficial interest in the property and the other joint tenant, usually a gratuitous transferee, holds title in trust for the other and has no beneficial interest in the property.
- c) A scenario which is sometimes referred to as a **“gift of the right of survivorship,”** wherein a joint tenant is gratuitously placed on title and has no beneficial entitlement to the property during the lifetime of the donor, but if the donee survives the donor, the donee, will receive the entire property by rights of survivorship.

In *Petrick*, the court found that the bankrupt Defendant had beneficial title in the property because of the value he had given to it over several years. This included assisting in the property’s mortgage payments, as well as being a registered as comortgagor. This demonstrated that the Defendant was a true joint tenant, and the presumption of resulting trust did not apply, preventing the property from reverting to the Defendant’s mother.<sup>95</sup>

Additionally, the Defendant testified that he transferred the property to his mother when he began to face financial trouble.<sup>96</sup> It was clear to the Court that the Defendant was attempting to prove that he fell into the third type of joint tenancy being the “gift of the right of survivorship”. This would mean that the Defendant did not give any value to the property, and therefore, a beneficial interest had not been established. Such ownership would mean creditors would not be able to seize the property.

#### *Jackson v. Rosenberg*

In *Jackson v. Rosenberg*,<sup>97</sup> Mr. Jackson (**the “Applicant”**) purchased a new home after the death of his partner. He gratuitously transferred joint title to his niece (**the “Respondent”**) of his deceased partner for the purpose of having the property pass to

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<sup>95</sup> *Ibid.*, at para 67.

<sup>96</sup> *Ibid.*, at para 57.

<sup>97</sup> 2023 ONSC 4403 [*Jackson*].

her to avoid probate fees. The transferor later grew worried he would be forced out of his home and subsequently severed the joint tenancy, creating a tenancy in common.<sup>98</sup>

The Respondent's position was that the Applicant transferred the property as a gift to her as a joint tenant. Meanwhile, the Applicant maintained that it was not a gift, and that he intended to transfer the property to the Respondent to avoid probate fees, while retaining full beneficial interest in the Property until he died. Therefore, the Applicant's position was that the Respondent was holding the Port Hope Property on resulting trust for the Applicant. The Applicant also stated that he did not understand the implications of joint tenancy from his lawyer when such a transfer was made.<sup>99</sup>

The court addresses the following in its decision:<sup>100</sup>

1. "Partially" rebutting the presumption of resulting trust;
2. Severance of a joint tenancy;
3. The gift of the right of survivorship as not revocable; and
4. Survivorship not having to contain any value.

The court stated that the Respondent "partially" rebutted the presumption of resulting trust.<sup>101</sup> Although the Applicant did not intend for the Respondent to have beneficial interest of the property during his lifetime, he intended to gift her the beneficial interest in the property upon his death through the rights of survivorship.

The court stated that the gift of a right of survivorship in real property is an *inter vivos* and immediate gift that cannot be retracted by the donor.<sup>102</sup> In *Jackson*, the court held, "the fact that Mr. Jackson later regretted gifting the right of survivorship to Ms. Rosenberg does not alter his intention at the time of the transfer."<sup>103</sup> The court interestingly found that notwithstanding the gift of a right of survivorship cannot be revoked, it's value can fluctuate, and the donee is "only ever entitled to what was left of the donor's interest in the property on the donor's death."<sup>104</sup> The value that is left in the gift may be "whatever is

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<sup>98</sup> *Jackson*, *supra* note 95 at para 29.

<sup>99</sup> *Ibid.*, at para 54.

<sup>100</sup> *Ibid.*, at para 97.

<sup>101</sup> *Ibid.*, at para 122.

<sup>102</sup> *Ibid.*, at para 76.

<sup>103</sup> *Ibid.*, at para 55.

<sup>104</sup> *Ibid.*, at para 74.

left at the time of the transferor's death". The court stated the Applicant was free to sell the property if he decided to do so.<sup>105</sup>

[62] Simply, and conceptually, the fact that a "complete gift" may have been given and that this gift included a right of survivorship does not, *prima facie*, prevent a donor from dealing with the retained joint interest while alive. The right of survivorship is only to what is left. Accordingly, if one joint owner drains a bank account (in the case of personal property) or severs a joint tenancy (in the case of real property), there is nothing in the right of survivorship itself that somehow prevents this.<sup>106</sup>

In *Jackson*, the Applicant was able to sever the joint tenancy by transferring the property to himself, which is permitted through Section 41 of the *Conveyancing and Law of Property Act*.<sup>107</sup> The court stated:

[82] A joint tenancy can be severed by transferring an interest jointly held with another from oneself to oneself. The property is then considered to be held as tenants in common with the former co-tenant. The joint tenancy is considered effectively destroyed.<sup>108</sup>

The decision of *Jackson* is currently under appeal, with a hearing scheduled for April 2024. This is a matter to watch out for.

### *Kennedy v. Smith*

In *Kennedy v Smith*,<sup>109</sup> the court was able to determine whether a non-purchasing joint tenant was entitled to the sale proceeds of the home. In this case, the purchaser (**the "Applicant"**) of a home never consulted the co-purchaser (**"the Defendant"**) before purchasing the home. The Applicant transferred title into joint tenants with the Defendant solely for the purpose of rights of survivorship. The court established that the Applicant and the Defendant were not romantic or sexual partners, nor spouses as defined by the FLA.<sup>110</sup> Rather, the Applicant placed the Defendant on title because they were close

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<sup>105</sup> *Ibid.*, at para 76.

<sup>106</sup> *Ibid.*, at para 62.

<sup>107</sup> R.S.O. 1990, c. C.34 at s. 41.

<sup>108</sup> *Ibid.*, at para 82.

<sup>109</sup> 2022 BCSC 1622 [*Kennedy*].

<sup>110</sup> *Ibid.*, at para 45.

friends. The court heard evidence that the Applicant did not contribute any funds towards the purchase of the home, made no payments on the mortgage, paid some ongoing utility costs, but never contributed financially to the capital cost of the purchase of the home.<sup>111</sup>

The court ultimately held that where a property is purchased by one party, yet, title is held jointly by two parties, there is a presumption that the party providing the purchase funds intended to retain the entire beneficial interest, including the right of survivorship, unless there is evidence to the contrary.<sup>112</sup>

The court in *Kennedy* notably also stated that:

[86] One consequence of a transfer of legal title into joint tenancy is that an immediate, *inter vivos* gift is made of the right of survivorship in property, with the donor of the gift retaining all remaining right and interest in the property during their lifetime: *Herbach v. Herbach Estate*, 2019 BCCA 370 at para. 39. These are the circumstances that have arisen in this case. Mr. Smith did not create a true joint tenancy when he gratuitously placed Ms. Kennedy on title as a joint tenant. He made an immediate *inter vivos* gift of the right of survivorship.<sup>113</sup>

### Creditor Rights and Joint Tenancy

In *Senthillmohan v. Senthillmohan*,<sup>114</sup> the court addressed the rights of a creditor to seize the property of a non-debtor in a joint tenancy. Sockalingam Senthillmohan, (the “husband”) and Subhathini Senthillmohan, (the “wife”) separated but owned a matrimonial home together in joint tenancy. In January 2020, the wife began an application for the division of the party’s assets, and a sale of the matrimonial home. In January 2021, the court granted the sale of the home and ordered that the sale proceeds be held in trust until the parties decided how to divide such funds. In September 2021, a third-party creditor, 2401242 Ontario Inc. (the “**Creditor**”) placed a writ on the matrimonial home, after a default judgement had been placed against the husband.<sup>115</sup>

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<sup>111</sup> *Ibid.*, at para 33.

<sup>112</sup> *Ibid.*, at para 78.

<sup>113</sup> *Ibid.*, at para 86.

<sup>114</sup> 2023 ONCA 280 [*Senthillmohan*].

<sup>115</sup> *Senthillmohan*, *supra* note 112 at para 2.

In November 2021, the wife brought a motion to sever the joint tenancy in the matrimonial home, requesting the release of 50% of the matrimonial home's proceeds. The creditor appealed, on the basis that the default judgement was ordered when both the husband and the wife were joint tenants. The creditor contended this entitled them to the wife's share of the sale proceeds.

The court determined the creditors were not entitled to the wife's share of the sale proceeds and stated that:

[9] In our view, the appellant's position fundamentally misunderstands the law of creditors' remedies against jointly-held property where only one of the owners guaranteed the debt. Having so concluded, it is not necessary to consider the appellants' arguments about the date of severance.<sup>116</sup>

The court went on to discuss Section 10(6) of the *Execution Act*, which states that a writ "binds the land against which it is issued". When s.10(6) is read in conjunction with s.9, as well as considering rights of survivorship, the writ "can effect only a seizure of the debtor's exigible interest in land held in joint tenancy".<sup>117</sup>

## **J. Joint accounts**

The use of joint accounts and shared investment accounts between an adult child and an ageing parent is often seen in modern society, but it also comprises of an unlimited source of contentious litigation.<sup>118</sup> Often, joint account planning is simply designed so an adult child can assist in managing their parents' financial matters. In *McLear v. McLear Estate*,<sup>119</sup> the court characterized these situations as the "present social conditions"<sup>120</sup> between elderly parents and their adult children, yet criticized reasons for the creation of joint accounts which can irrationally include minimizing probate fees and simplifying estate transfers. Joint accounts simply cause unnecessary confusion respecting the intent of the parent in both living and deceased circumstances. The question becomes whether the parent's intent, was for their funds to result back to them solely to form a part of their estate after death, or was the intent of the parent to gift the adult child the account by

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<sup>116</sup> *Ibid.*, at para 15.

<sup>117</sup> *Ibid.*

<sup>118</sup> *Pecore*, *supra* note 8 at para 34.

<sup>119</sup> (2000), 33 E.T.R. (2d) 272 (Ont. S.C.J.) [*McLear*].

<sup>120</sup> *Pecore*, *supra* note 8 at para 34.

rights of survivorship.<sup>121</sup> *Pecore*, citing Dickson J. in *McLear*, provides an interesting analysis on the court's rationale for treating joint transfers on resulting trust principles, and a rationale for why the presumption of advancement is not applied:<sup>122</sup>

[411] 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.<sup>123</sup>

In *Laski v Laski*,<sup>124</sup> a recent Ontario Court of Appeal decision, a father (the “**Deceased**”) held bank accounts jointly with one of his daughters (the “**Responding Party**”), excluding his two other children. After the Deceased passed away, his son (the “**Moving Party**”) claimed the funds in the joint account. The Moving Party contended that the funds in the joint account between the Deceased and the Responding party were held by the estate of the Deceased on resulting trust. The Responding party was able to provide the court with “overwhelming” evidence indicating that the Deceased intended to gift her the money in the joint accounts, for her sole use. Evidence included the following:

1. A clause in the Deceased's will stating that the any assets jointly held with the moving party would be gifted to her upon his death;<sup>125</sup>
2. The Deceased's lawyers and investment advisors provided some evidence that the Deceased wanted to ensure his daughter was taken care of after his death;<sup>126</sup> and
3. Proof that the Deceased understood how joint accounts and rights of survivorship worked.<sup>127</sup>

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<sup>121</sup> *Ibid.*, at para 45.

<sup>122</sup> *Ibid.*

<sup>123</sup> *Ibid.*, at para 34.

<sup>124</sup> 2016 ONCA 337 [*Laski*].

<sup>125</sup> *Laski*, *supra* note 122 at para 13.

<sup>126</sup> *Ibid.*, at para 14.

<sup>127</sup> *Ibid.*, at para 15.

*Laski* demonstrated that the Responding Party, who was the transferee, was able to successfully rebut the presumption of resulting trust by submitting sufficient evidence to the court of the Deceased's intention.

A recent decision which demonstrates a transferee's failure to rebut the presumption of resulting trust can be considered in *Renwick Estate and Miller v. Stanberry*.<sup>128</sup>

In this decision, the Deceased's daughter, Betty (the "**Applicant**") and her stepsister (the "**Respondent**") were both named as co-executors of their mothers' estate. A Certificate of Appointment was granted in, 2019, after the death of the Deceased on September 3, 2018. The issuance of the Certificate of Appointment was neither contested by the Applicant, nor the Respondent. At the Deceased's death, she held seven joint accounts with the Applicant, totaling \$128,241.41. Most of these accounts were set up jointly in 2015.

Each joint account contained a signature card that had been initialed by the Deceased and the Applicant. The Applicant contended this demonstrated the Deceased's approval in creating joint accounts with rights of survivorship. Additionally, a financial services agreement had been registered with each account having been in existence since 2011, and, updated in 2016. The agreement explained the terms and conditions of creating joint accounts.

The court found that neither, the financial services agreement, nor the signature cards sufficiently demonstrated the Deceased's intention to leave the funds to the Applicant, rather than the estate:

[11] There is no direct evidence in the record as to what was specifically discussed between TD Bank and the Deceased regarding: (a) the meaning and effect of the signature card; (b) the terms regarding joint accounts in the financial services agreement; (c) the differences between a joint account with or without survivorship; and (d) the Deceased's specific intention in checking off the survivorship option on the

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<sup>128</sup> 2023 ONSC 5970 [*Renwick*].

signature cards (for example, whether the intention in doing so may only have been an attempt to avoid probate fees).<sup>129</sup>

### **Concluding Comments**

Despite the allure, attempts to bypass probate through joint tenancy and the rights of survivorship often represent a dangerous way for individuals to prevent assets from falling into the estate of the deceased.

Such transfers often create unwanted litigation since the intentions of the deceased are often unclear or unknown to the beneficiaries of the estate. When such claims arise, the transferee is held to the burdensome task of rebutting the presumption of resulting trust by demonstrating that the transferor intended to transfer a gift.

As is often the case, clear evidence of intention appears to be provided mostly by third party witnesses such as drafting solicitors and financial advisors. In these circumstances, solicitors are often reminded of their duties and should adapt best practices such as keeping clear and contemporaneous notes of any discussion regarding such transfers, especially where the transferor is an older adult, and the transferee is an adult child. Obtaining testimony from relevant financial institutions is also critical at early stages so as to preserve any evidence of intention.

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<sup>129</sup> *Ibid.*, at para 11.