

## PRESUMPTION OF RESULTING TRUST CHECKLIST

- A **resulting trust** arises when title to property is held in the name of a party who gave no value for it. In such circumstances, that party is obliged to return the property to the original title owner unless he/she can establish it was given as a gift.
- In the case of a gratuitous transfer, a **rebuttable presumption of resulting trust** applies when the transfer is challenged. A Court must commence the inquiry with the presumption, weigh all of the evidence and attempt to ascertain the actual intention of the transferor. The presumption of resulting trust determines the result only where there is insufficient evidence to rebut the presumption on a balance of probabilities.<sup>1</sup>
- The presumption of resulting trust applies to gratuitous transfers between parents and adult children. The **presumption of advancement** is still applicable between parents and minor children.
- A gift is a gratuitous transfer made without consideration. The donor must have *intended* to make a gift, the subject matter of the gift must be delivered to the donee, and the donee must accept the gift.<sup>2</sup> Once a gift is given it cannot be retracted. The standard for proving a gift is the usual civil standard of a balance of probabilities. The **intention of the donor** at the time of the transfer is the governing consideration.

## JOINT TENANCY/JOINT ACCOUNTS & RIGHT OF SURVIVORSHIP

- **Joint Tenancy:** Is a form of concurrent property ownership. However, parties may hold legal title to property as joint tenants while beneficial ownership is held differently. For example, a mother and adult son may own real property as joint tenants in law while the mother alone owns the beneficial interest. In such circumstances the beneficial owner of property has been described as ‘the real owner of property even though it is in someone else’s name’.<sup>3</sup>
- **Right of Survivorship:** When a joint tenant dies, his/her interest in property is extinguished. The last surviving joint tenant takes full ownership of the property.
- **Gift of the Right of Survivorship:** So long as the requirements of a binding gift are met, the owner of property may, during his/her lifetime, make an immediate gift of a joint

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<sup>1</sup> *Pecore v. Pecore* 2007 SCC 17 at paras. 20, 22-25, 44; *Kerr v. Baranow*, 2011 SCC 10 at para.18

<sup>2</sup> *McNamee v. McNamee* 2011 ONCA 533 at para. 24

<sup>3</sup> *Pecore v. Pecore* 2007 SCC 17 at para. 4

tenancy including the right of survivorship. The donee of the gift may be holding it for the benefit of the donor while he/she is alive. When gifted *inter vivos*, the right of survivorship is a form of expectancy regarding the future. It is a right to what is left of the jointly-held interest, if anything, when the donor dies. Donor may gift the right of survivorship but continue to deal freely with property throughout his/her lifetime. When legal title to property is transferred gratuitously and a resulting trust arises, the right of survivorship is held on trust by the transferee unless otherwise established.

## EVIDENCE OF INTENTION

- The intention of a person who transfers property gratuitously to another is sometimes difficult to determine, particularly when the transferor is deceased. In *Pecore*, Justice Rothstein set out a non-exhaustive list of factors for a Court to examine:
  - **Evidence of the deceased's intention at the time of the transfer:** including, where admissible, evidence subsequent to the transfer (as long as it is relevant to the intention of the transferor at the time of the transfer);
  - **Bank documents:** The clearer the wording in the bank documents as to the deceased's intention, the more weight that evidence might attract;
  - **Control and use of the funds in the account:** The circumstances must be carefully reviewed and considered to determine the weight to be given to this factor since control can be consistent with an intention to retain ownership, yet it is also not inconsistent with an intention to gift the assets in certain circumstances;
  - **Granting a Power of Attorney:** The court should consider whether a power of attorney is evidence, one way or another, of the deceased's intention;
  - **Tax treatment of joint accounts:** This is another circumstance which might shed light on the deceased's intention as, for example, a transferor may have continued to pay taxes on the income earned in the joint account since they intended the assets to form part of their estate. However, once again the weight to be placed on tax-related evidence in determining a transferor's intent should be left to the discretion of the trial judge.<sup>4</sup>
- Several cases have also turned on the **testimony of drafting lawyers**,<sup>5</sup> **notary public**,<sup>6</sup> **financial and investment advisors**<sup>7</sup> and **bank tellers**<sup>8</sup> with respect to the deceased's intention at the time a transfer is made or the joint bank account is opened.

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<sup>4</sup> *Pecore* at paras. 55-70

<sup>5</sup> *Laski v. Laski* 2016 ONCA 337; *Van De Keere Estate Re* 2012 MBCA 109; *Lorintt v Boda* 2014 BCCA 354; *McKendry v. McKendry* 2017 BCCA 48

<sup>6</sup> *Fuller v. Harper* 2010 BCCA 421

## APPLICABILITY

- **Gratuitous Transfer of Assets or Title into Joint Property:** In *Pecore*, the Supreme Court of Canada confirmed that the presumption of resulting trust applies to gratuitous transfers of assets or joint property between parents and adult children. The presumption of advancement still exists, but *Pecore* eliminated it as between parents and adult children.
- **Testamentary Dispositions:** The presumption of resulting trust does not arise with respect to testamentary dispositions since there is clear evidence of intention in the Will or other testamentary document.
- **Beneficiary Designations:** There is conflicting law on whether the presumption of resulting trust applies to beneficiary designations under RRSPs, RRIF or insurance policies for example. Courts in England,<sup>9</sup> Manitoba,<sup>10</sup> British Columbia,<sup>11</sup> Ontario,<sup>12</sup> and Alberta<sup>13</sup> apply the presumption of resulting trust to beneficiary designations. Only one province, Saskatchewan takes the position that the presumption of resulting trust does not apply to beneficiary designations.<sup>14</sup>
- **Transfers of Land:** Some cases have questioned whether the presumption of resulting trust applies to gratuitous transfers of land,<sup>15</sup> although there are several cases and authority that support the view that it does.<sup>16</sup>

*This checklist is intended for the purposes of providing information and guidance only. This checklist is not intended to be relied upon as the giving of legal advice and does not purport to be exhaustive.*

Kimberly A. Whaley, Whaley Estate Litigation Partners

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<sup>7</sup> *Foley (Re)* 2015 ONCA 382; *Laski v. Laski* 2016 ONCA 337

<sup>8</sup> *Comeau v. Gregoire*, 2007 NSCA 73; *Doucette v. McInnes* 2009 BCCA 393

<sup>9</sup> *In Re A Policy No. 6402 of the Scottish Equitable Life Assurance Society*, (1901), [1902] 1 Ch 282

<sup>10</sup> *Dreger (Litigation Guardian of) v. Dreger* [1994] 10 WWR 293

<sup>11</sup> *Neufeld v. Neufeld Estate*, 2004 BCSC 25

<sup>12</sup> *McConomy-Wood v. McConomy* (2009), 46 ETR (3d) 259

<sup>13</sup> *Morrison Re.* 2015 ABQB 769

<sup>14</sup> *Nelson et al. v. Little Estate* 2005 SKCA 120

<sup>15</sup> *Thorsteinson Estate v. Olson* 2016 SKCA 134 at para. 17, citing *Thorsteinson Estate v. Olson* 2014 SKQB 237 at para. 103

<sup>16</sup> *Fuller v. Harper* 2010 BCCA 421