

JOINT PROPERTY: DON'T LET YOUR PLANS GO UP IN SMOKE

INTRODUCTION

Jointly held property is becoming an increasingly common way for individuals to arrange their assets prior to death. There are many reasons why an individual may want to own property jointly with another person. The nature of our assets has changed over the years, as have the procedures for banking and asset transfer. The convenience of having another person designated as an account holder could be very helpful in assisting someone in dealing with banking issues.

While many may place assets jointly for convenience or probate tax avoidance, the legal implications of such an arrangement are not always obvious. Beneficiaries may not end up receiving what they believe they are owed, leading to disputes. As a result, litigation on this topic is increasing. This paper will outline the legal effect of joint ownership of property, as well as the risks faced by joint owners of property after the death of other joint owners.

LEGAL EFFECT OF JOINT PROPERTY

Owning assets jointly with another person or persons does not mean that they will be legally entitled to those assets upon your death. If you hold property jointly with someone other than your spouse or minor child, there will be a presumption of a resulting trust, and the other joint holder will need to adduce evidence to show that you intended them to be the beneficial owner of the funds.

The leading case in this area is *Pecore v. Pecore*, 2007 SCC 18, which Rothstein J. wrote for the majority of the Court. Abella J. dissented as to reasoning, but not to result. Rothstein J. took the opportunity to clarify the interplay between resulting trusts and the presumption of advancement.

In *Pecore*, an elderly father placed the bulk of his assets into joint accounts with his daughter. The father retained control of the accounts and made all deposits. The mother was not expected to live much longer. The father declared and paid all taxes on the income from the accounts, and in fact told Canada Revenue Agency that the accounts were not a gift to his daughter, so as not to trigger a deemed disposition to the daughter. The daughter's evidence and the evidence of the father's lawyer was that there was always an intention to gift the accounts to the daughter. Upon her father's death, the daughter claimed the accounts through the right of survivorship. Upon her divorce, the daughter's husband claimed that she held the accounts in trust for her father's estate, and that they should be distributed according to her father's will, of which he was a beneficiary.

The lower courts found that the presumption of advancement applied, and that the daughter was entitled to the funds as the deceased's "dependent" child. Rothstein J. disagreed with this reasoning, and proceeded to clarify the modern status of the presumption of advancement.

Rothstein J. confirmed that while the daughter gained legal ownership of the accounts through the right of survivorship, equity recognizes that beneficial ownership and legal ownership can diverge. The beneficial owner is the “real” owner, despite the fact that the assets may be in someone else’s name.¹

The dispute is whether a gift for no consideration gives rise to a resulting trust, or to presumption of advancement.

Resulting Trust

A resulting trust arises when a person holds legal title to property, but received the property as a fiduciary or for no value, and is under an obligation to return it.² This presumption is a rebuttable presumption of law, and is the general rule that applies to gratuitous transfers.

When a transfer is challenged, the onus is placed on the transferee to demonstrate that the transferor intended to give a gift. As noted by Rothstein J.: “This is so because equity presumes bargains, not gifts.”³

Presumption of Advancement

As noted above, the presumption of resulting trust is the general rule for gratuitous transfers. However, the relationship between transferee and transferor may negate this presumption. Historically, the presumption of advancement applied when there was a gift made during a transferor’s lifetime to a transferee who, by marriage or parent-child relationship, is financially dependent on the transferor.⁴

The presumption of advancement was historically applied in two cases. The first is between husband and wife, which presumption still applies.⁵ If funds or property are in joint names, there will be a presumption that the spouses hold the beneficial interest. If a party challenges a transfer between husband and wife, the onus is on that party to rebut the presumption of a gift.

The second historical application of the presumption of advancement was between a father and child. Rothstein J. assessed the law in Canada and noted that, while not in issue in the instant case, the presumption should also apply between a mother and child, given modern women’s access to funds and statutory obligations to support their children.⁶

Following a comprehensive review of the law, Rothstein J. determined that the presumption of advancement would no longer apply between parents and independent adult children. The principal historical justification for the presumption was parental obligation, which Rothstein J. believed should no longer apply to independent adult children, given it was

¹ *Pecore, supra*, at para 4

² *Pecore, supra*, at para 20

³ *Pecore, supra*, at para 24

⁴ *Pecore, supra*, at para 21

⁵ *Hyman v. Hyman*, [1934] 4 D.L.R. 532 (S.C.C.), *Pecore, supra*, at para 28

⁶ *Pecore, supra*, at paras 31 & 32

becoming common practice for aging parents to transfer assets jointly for the sake of convenience.⁷

I am therefore of the opinion that the rebuttable presumption of advancement with regard to gratuitous transfers from parent to child should be preserved but limited in application to transfers by mothers and fathers to minor children.⁸

As a result, there is now a rebuttable presumption of resulting trust with respect to transfers from parents to adult children .⁹

Affection between parent and child, or the degree of dependency of a child on a parent, is no longer a basis for applying the presumption of advancement, although Rothstein J. does note that it could be evidence to rebut the presumption of a resulting trust.¹⁰

Rothstein J. found that the presumption of advancement did not apply in *Pecore*. He went on to consider whether the evidence was sufficient to rebut a presumption of resulting trust. He found that Paula was entitled to the funds as she had amply rebutted the presumption of a resulting trust. She and her father were very close, he made statements to his lawyer about providing for her, and despite his statements regarding the taxes, there was intent to gift the accounts to her.

Resulting Trust: Inter vivos gift, or failed testamentary disposition?

As the presumption of advancement was not applicable to the daughter in *Pecore*, it fell to her to rebut the presumption of resulting trust. An issue which Rothstein J. then examined is that as the beneficial interest of the transferee appears only to arise on the death of the testator, the implication is that it is a testamentary gift and fails due to the fact that it is not in the proper testamentary form.¹¹

Rothstein J. disagreed with the assertion that the gift would be testamentary, and found that the rights of survivorship, both legal and equitable, vest when the joint account is opened. As a result, the gift is *inter vivos*.¹² This remains true despite the fact that the gift is not necessarily certain – as the transferor could empty the bank account, there may be no funds at the transferor’s death. Rothstein J. rejected this as being relevant, noting that the nature of a bank account is that it would fluctuate over time. He states:

The gift in these circumstances is the transferee’s survivorship interest in the account balance – whatever it may be – at the time of the transferor’s death, not to any particular amount.¹³

⁷ *Pecore, supra*, at para 36

⁸ *Pecore, supra*, at para 40

⁹ *Pecore, supra*, at para 36

¹⁰ *Pecore, supra*, at paras 37 & 41

¹¹ *Pecore, supra*, at para 48

¹² *Pecore, supra*, at para 48

¹³ *Pecore, supra*, at para 50

Survivorship as an *inter vivos* gift is supported by case law in the United Kingdom and Australia. The United States has a similar, although not entirely analogous, concept. A “Totten Trust” can arise when an individual places money in an account with the instruction that upon his or her death it passes to a named beneficiary. While not a joint account, it is a method which recognizes the convenience of survivorship without requiring adherence to testamentary forms.¹⁴

EVIDENCE TO REBUT RESULTING TRUST

Evidentiary Standard

The necessary standard to rebut the presumption of either advancement or resulting trust is well-established. Although early caselaw implied a standard closer to the criminal, or at least moderately higher than the civil, recent authority indicates that the balance of probabilities is the appropriate standard. Rothstein J. agreed, stating:

This is also my view. I see no reason to depart from the normal civil standard of proof. The evidence required to rebut both presumptions, therefore, is evidence of the transferor’s contrary intention on the balance of probabilities.¹⁵

The evidence required to rebut a presumption of resulting trust will vary heavily from case to case. While the traditional rule is that evidence should be contemporaneous¹⁶, Rothstein J. found in *Pecore* that subsequent acts and declarations could be relevant, and should not be automatically excluded.¹⁷ However, a judge must ensure that the evidence is reliable and relevant to intention at the time of the transfer. The trier of fact must also guard against self-serving evidence, which could often come in to play in these circumstances.¹⁸

Types of Evidence

In *Pecore*, Rothstein considered whether evidence that a transferee intended to gift assets in order to avoid probate tax was relevant. While noting that the courts may have concern with obvious attempts to avoid probate tax, he states: “Should the avoidance of probate fees be of concern to the legislature, it is open to it to enact legislation to deal with the matter.”¹⁹ He did not create a policy rationale for excluding this type of evidence.

Historically, bank documents that set up a joint account were seen as an agreement between the account holders and the bank about legal title – they were not evidence of an agreement regarding beneficial title.²⁰ These documents are not necessarily dispositive of

¹⁴ *Pecore, supra*, at paras 51 & 52

¹⁵ *Pecore, supra*, at para 43

¹⁶ *Clemens v. Clemens Estate*, [1956] S.C.R. 286, *Pecore* para 56

¹⁷ *Pecore, supra*, at para 59

¹⁸ *Pecore, supra*, at para 59

¹⁹ *Pecore, supra*, at para 54

²⁰ *Pecore, supra*, at para 60

beneficial interests, but may be detailed enough to provide strong evidence of the intentions of the transferor at the time of transfer. The courts should not be barred from considering these documents.²¹

There is inconsistency in the caselaw as to whether the court should consider evidence about the control of joint assets to establish intent of the testator. Control can be consistent with an intention to retain ownership, but also not inconsistent with an intention to gift the assets.²² On this point, Rothstein J. states:

I am of the view that control and use of the funds, like the wording of the bank documents, should not be ruled out in the ascertainment of the transferor's intention. For example, the transferor's retention of his or her exclusive beneficial interest in the account in his or her lifetime may support the finding of a resulting trust, unless other evidence proves that he or she intended to gift the right of survivorship to the transferee. However, evidence of use and control may be of marginal assistance only and, without more, will not be determinative for three reasons.²³

Rothstein's three reasons are 1) the transferor may make the management decisions, and be more experienced with the accounts;²⁴ 2) the transferee, although entitled to funds, may refrain from withdrawing them in order to ensure that the parent has sufficient funds to care for themselves for the remainder of their life;²⁵ and 3) control and use are not necessarily inconsistent with intention to gift the balance of the assets.²⁶

Granting a power of attorney can be seen as evidence that a gift was intended, as if the accounts were joint for convenience only, a power of attorney will usually suffice.²⁷ However, this will not be dispositive, but may serve to be additional evidence regarding intention.

The tax treatment of joint accounts is not necessarily dispositive of intention, but should be left to the discretion of the trial judge. The payment of taxes does not mean that the accounts were not intended to be gifts. In *Pecore*, it was submitted that for policy reasons, a transferor should not be able to transfer beneficial title while asserting to tax authorities that such title had not been passed. While Rothstein agreed in principle, he stated that these matters were for determination by the Canada Revenue Agency in each specific case.²⁸

²¹ *Pecore, supra*, at para 61

²² *Pecore v. Pecore*, (2005), 19 E.T.R. (3d) 162 at page 40

²³ *Pecore, supra*, at para 63

²⁴ *Pecore, supra*, at para 64

²⁵ *Pecore, supra*, at para 65

²⁶ *Pecore, supra*, at para 66

²⁷ *Pecore, supra*, at para 65

²⁸ *Pecore, supra*, at para 70

RISKS OF HOLDING JOINT PROPERTY

Once the legal effects of joint property are determined, what remains to be seen is whether there are any risks to the surviving joint property holders due to debts, creditors or other statutory mechanism.

Other risks include the more mundane, such as a situation where a parent and a child have placed the parent's home in joint ownership, to avoid probate. What if the child wants to move back into the home, but the parent does not want them to? They are now the legal co-owner of the property.

Creditors

Bankruptcy

Can holding property jointly with a bankrupt result in the loss of the non-bankrupt's portion of the asset?

Only the property of a bankrupt is subject to seizure by a trustee. Bankruptcy severs joint tenancy, and joint assets will only be affected to the extent of the bankrupt's portion.²⁹ The non-bankrupt may be forced to sell the asset, but will retain their portion of the asset.

Concerns for the surviving property holder can include loss of the asset, despite retaining half its value, inconvenience and valuation issues.

Debts

To what extent is jointly-held property available for seizure by creditors of a joint property holder?

Similarly to bankruptcy, only the property of the debtor is subject to seizure for unpaid debts. Nova Scotia Civil Procedure Rule 79.09 states that there is a presumption that a debtor is entitled to an equal share of a joint account, unless the other holder(s) prove otherwise:

79.09 (1) A judgment debtor who is a joint account holder, or to whom money is otherwise owed jointly with another person, is presumed to be entitled to an equal share of the joint account, or other joint obligation, unless an interested person proves otherwise.

If an interested person can prove that the accounts belong wholly to the debtor, they could access the entire account. A joint account holder, or other joint property holder, should clearly document their entitlement to the assets to avoid claims that they belong entirely to

²⁹ <http://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br01407.html>

the debtor. There has been no caselaw to date where a joint account holder attempted to prove they were entitled to more than their proportion of a bank account under this rule.

Matrimonial Property Act

The interaction between matrimonial property and joint property is less clear. If spouses hold joint property, the presumption is that the surviving spouse holds beneficial title, and is not required to adduce evidence that the property was intended to be a gift.

However, what if a spouse holds property jointly with a third-party (for example, a parent or adult child) – upon the spouse’s death, can their surviving spouse claim an interest in the deceased spouse’s interest, or does survivorship mean that the surviving property holder can rebut the presumption of resulting trust and retain the property?

The *Matrimonial Property Act* states:

12 (1) Where

...

(d) one of the spouses has died,

either spouse is entitled to apply to the court to have the matrimonial assets divided in equal shares, notwithstanding the ownership of these assets, and the court may order such a division.

...

12 (4) Any right that the surviving spouse has to ownership or division of property under this Act is in addition to the rights that the surviving spouse has as a result of the death of the other spouse, whether these rights arise on intestacy or by will. R.S., c. 275, s. 12.

There are no cases which touch on this issue. Presumably the statute would override the common law, however there will be issues regarding ownership. Can an asset truly be said to be matrimonial property if the owner-spouse intended for it to be given to the third-party on their death? If it is not a matrimonial asset, it is not available for division.

Intestacy (and matrimonial property)

Under the *Intestate Succession Act*, R.S.N.S. 1989, c. 236:

4 (1) If an intestate dies leaving a surviving spouse and issue, the intestate's estate, where the net value does not exceed fifty thousand dollars, shall go to the surviving spouse.

(2) Where the net value of the estate exceeds fifty thousand dollars, the surviving spouse is entitled to fifty thousand dollars and has a charge upon the estate for that sum with accrued interest from the date of the death of the intestate.

(3) In this Section,

(a) "home" means a dwelling owned and occupied as the principal residence by the intestate at the date of death of the intestate and includes any land appurtenant thereto and all household goods and furnishings of the dwelling;

(b) the value of the home shall be the fair market value less any charges attaching thereto.

(4) Where the surviving spouse is entitled to fifty thousand dollars pursuant to subsection (2), the surviving spouse may elect to receive the home

(a) in lieu of the said fifty thousand dollars where the value of the home is in excess of fifty thousand dollars; or

(b) as part of the said fifty thousand dollars where the value of the home does not exceed fifty thousand dollars.

Similarly to the previous section, the same issue arises – if the “home” is owned jointly with a third party, their ability to claim survivorship rights may be compromised by the surviving spouse’s interest even though he or she is not on title.

Testators’ Family Maintenance Act

Under the *Testators’ Family Maintenance Act*, R.S.N.S. 1989, c. 465, a court can provide maintenance for a dependent out of an Estate:

3 (1) Where a testator dies without having made adequate provision in his will for the proper maintenance and support of a dependant, a judge, on application by or on behalf of the dependant, has power, in his discretion and taking into consideration all relevant circumstances of the case, to order that whatever provision the judge deems adequate be made out of the estate of the testator for the proper maintenance and support of the dependant.

If assets are held jointly, their legal status must be determined. If the assets are held in a resulting trust and are therefore part of the estate, they can be subject to a TFMA claim. If the presumption of resulting trust is rebutted, the assets would not form part of the testator’s estate, and could not form part of a TFMA award.

Common-Law Spouses / Registered Domestic Partners

The position of common law partners is somewhat more precarious than others. Unless they register as domestic partners, common-law spouses do not have all the rights that legally married spouses do. For example, common-law spouses are not able to access the benefits of the *Matrimonial Property Act*, the *Intestate Succession Act* or the *Testators' Family Maintenance Act*. Couples who are in common-law relationships must plan carefully to ensure that their loved ones are provided for on their death.

It is not entirely clear whether the presumption outlined in *Pecore*, namely that there is an assumption that spouses have the right of survivorship, would apply equally to common-law spouses.

CONCLUSION

The most critical point in estate planning where you can avoid litigation is at the drafting stage. Ensuring that your intentions regarding your joint property are clearly laid out can prevent litigation after your death.