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Pecore v. Pecore: A Discussion 10 Years Later

By Kimberly A. Whaley

Introduction

In 2007 the Supreme Court of Canada released its decision in ***Pecore v. Pecore***,[1] ("Pecore") addressing the legal ramifications of gifts, gratuitous transfers of real property, joint accounts and other joint holdings as between a parent and an adult child. The majority of the Court, per Rothstein J., held that the presumptions of advancement and of resulting trust *"continue to have a role to play in disputes over gratuitous transfers,"*[2] although the presumption of advancement was in future to be limited to cases of transfers to minor children.[3]

10 years later, however, disputes over gratuitous transfers continue to be litigated at high rates before our courts. Proper planning around these transfers seems not to have taken hold. While *Pecore* may have clarified and confirmed some legal concepts, it has also given rise to some uncertainty.

The presumption of resulting trust altered the general rule that a plaintiff would bear in a civil case, such that the legal onus is on the transferee/giftee to rebut the presumption on a balance of probabilities. The presumption may apply where evidence of intention is missing, or falls short. The transferee must

[1] 2007 1 SCR 795 (*Pecore*), along with the companion decision *Madsen Estate v. Saylor* [2007] 1 S.C.R. 838, 2007 SCC 18
[2] *Pecore* at para.23
[3] *Pecore* at para.40

demonstrate that a gift was intended. Thus, the majority of the court said, the presumption will determine the result only where there is insufficient evidence to rebut it on a balance of probabilities.

Notwithstanding the existence of the presumptions, the Supreme Court of Canada (the "SCC") noted that the focus of the inquiry is still the *actual intention* of the transferor. The adult child must adduce evidence, on a balance of probabilities, that the parent intended the property to be transferred both legally and beneficially.

Following *Pecore,* Canadian courts have consistently held that transfers of property from a parent to an adult child for nominal consideration create the presumption of resulting trust. Although legal title may vest in an adult child, circumstances are often such that the parent retains the beneficial ownership. ***Madsen Estate v. Saylor,***[4] another SCC decision rendered at the same time as *Pecore,* has also been followed by the Ontario Superior Court of Justice (the "SCJ") in many decisions since.

This analysis will consider certain issues raised by *Pecore* involving the interplay of statute, common law, and evidence of

[4] 2007 SCC 18

intention by way of five identified and enumerated discussion points.

1. Evidence of Adequate Intention

In order for a gift to be valid, it is established that there must be donative intent. Intention is at the heart of a gift. Where there is a gratuitous transfer between a parent and an adult child, the presumption of resulting trust assumes there was no intent to gift. Equity presumes bargains and not gifts. Therefore, a person holding the asset is presumed to be holding it on resulting trust for the transferor. In other words, someone has received an asset at the expense of another person and the resulting trust causes the beneficial ownership of that asset to be returned to that other person.

It appears, however, that courts are uncertain about the role of intention in bringing about the resulting trust. The common belief is that parents do not intend to make gifts to (non-dependant) adult children – the intent is rather, that adult children will manage their assets or "facilitate the free and efficient management of that parent's affairs" as was noted by Rothstein J. in *Pecore*.[5]

[5] *Pecore* at para. 36

Justice Abella, however, opined that parents are still affectionate towards their adult children and a gift can still be intended since parents naturally care about their children both young and old.[6] So what role does personal affection play, if any, in the determination of a parent's intention?

In *Pecore*, Rothstein J. examined the evidence that a Court may consider when determining the intent of the transferor. The following is a non-exhaustive list of the type of evidence considered:

1. Evidence: Evidence of the deceased's intention at the time of the transfer, including, where admissible; and evidence subsequent to the transfer (as long as it is relevant to the intention of the transferor at the time of the transfer);
2. Bank documents: The clearer the wording in the bank documents evincing the deceased's intention, the more weight that evidence might attract;
3. Control and use of the funds in the account: The circumstances must be carefully reviewed and considered to determine the weight 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;

[6] *Pecore* at paras.100-103

4. Granting a Power of Attorney: The court should consider whether a power of attorney constitutes evidence, one way or another, of the deceased's intention; and
5. Tax treatment of joint accounts: This is another circumstance which might shed light on the deceased's intention since, for example, a transferor may have continued to pay taxes on the income earned in the joint account evincing intent to have the assets form part of their estate. 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.[7]

Who holds this evidence and where will it come from? Adult children are often present during the opening of any joint account and so too, they are often involved in the parent's financial affairs. As such, the adult children may be in a better position than the estate to find and present the evidence (unless adult children were not aware of the joint account.)[8] Consider also the role that financial institutions themselves play. Should they bear some responsibility in updating and clarifying their banking documents? Some decisions have relied heavily on investment advisor or bank teller testimony as well as the testimony of lawyers or notary

[7] *Pecore* at paras. 55-70
[8] See *Doucette v. McInnes* 2009 BCCA 393

publics involved in the gratuitous transfer.[9] What role do documents play? Is the best way to document intention through drafting and executing Deeds of Gift or Declarations of Intention?

A survey of appellate level case law citing *Pecore* and the applicability of the presumption of resulting trust to gratuitous transfers between parents and adult children answers some of these questions. In cases where the parent is still alive and a dispute arises over whether the transfer was a gift or a loan, or the property is being held on resulting trust, it is often a question of credibility of the witnesses that is determinative, especially since the parent is present, can testify, and is able to provide evidence as to intention at the time of the transfer.

In cases involving estates, where the transferor/giftor has died, the most persuasive evidence often comes from third party witnesses such as financial advisors, bank tellers, lawyers or notary publics involved in the transfer or opening of accounts.

Cases Where Transferor Still Alive

In ***Bergen v. Bergen***,[10] parents transferred to their son a one-third interest in a property they had purchased. After a falling out occurred, the parents severed the joint tenancy and commenced

[9] See *Van De Keer Estate Re*, 2012 MBCA 109, *Lorintt v. Boda* 2014 BCCA 354, *Foley (Re)* 2015 ONCA 382, *Laski v. Laski* 2016 ONCA 337, *Doucette v. McInnes* 2009 BCCA 393, *Fuller v. Harper* 2010 BCCA 421.
[10] 2013 BCCA 492

a claim seeking an order to sell the property and a declaration that the son held his 1/3 interest in resulting trust. The son argued that his parents bought the house for him to live in and that it was a gift. While the father had unfortunately died shortly before the trial, the mother was able to provide evidence as to her intention. The mother testified that she intended that the son would *eventually* inherit the property and that this would ensure that the property by-passed probate.

The Court of Appeal however noted that “the record does not disclose whether the plaintiffs were advised that they would have to transfer an undivided beneficial interest in the property” to the son in order to bypass probate fees on death. The mother testified that they had retained a lawyer to carry out the transfer but that the lawyer had not explained “what that would mean”. The Court determined that the mother’s testimony was clear that she and her husband did not intend to “give up control” of the property during their lives. But they also wanted to avoid probate fees. They thought both objectives could be achieved. The Appeal Court found that the trial judge did not make an error in determining that the parents did not intend to make an immediate gift of a beneficial interest in the property to their son. The mother’s testimony and the son’s testimony were in direct conflict. The trial judge had the benefit of seeing the parties cross-

examined and made clear credibility findings in favour of the mother.

In ***Beaverstock v. Beaverstock,***[11] the transferor was still alive but the transferee (her adult son) had died. The son's wife testified that the money was a gift. The mother testified that it was a loan. The British Columbia Court of Appeal determined that the trial judge "failed to begin his analysis with the presumption of resulting trust" and made no finding of fact as to the actual intention of the mother (in fact it was not even considered). The mother testified that it was her intention at the time to loan the money to her son. The son's wife provided no evidence to rebut the presumption of resulting trust. The Court of Appeal held that it was a loan.

The Court determined that post-transfer conduct of the parent supported the finding of a gift in the case of ***Simcoff v. Simcoff***.[12] In this case, a mother had transferred title of a property into the name of herself and her son as joint tenants. The mother collected all rent on the property and assumed maintenance and upkeep *until* she moved out of the property. Her son then received all the rent and assumed maintenance of the property. After a falling out between the mother and son, the mother sought

[11] 2011 BCCA 413
[12] 2009 MBCA 80

a declaration that she was the sole owner of the property and her only intention for placing both names on title was for income tax purposes. She testified that she had no intention of gifting the property. The son testified that his mother had told him that the property was a gift and that when she died he would automatically receive full title. The application judge considered all of the evidence including the testimony and cross-examination of the mother (the mother was unable to recall significant portions of her history in relation to the property and gave contradictory answers);[13] documents attached to the son's affidavit including written memos by the mother showing her intention to gift; and that there was no evidence the mother actually benefited through income tax. The Court of Appeal held that the application judge made no error in concluding that at the time of the transfer the mother intended to gift a one-half undivided interest to her son.

In ***Andrade v. Andrade***[14] the mother died before trial but was able to give evidence as to her intention in an affidavit and on cross-examination before her death. She had purchased a house through a loan and mortgage, but put the property and mortgage into the names of her adult children. The mother rented out the house and collected the rent. The adult children, while living in the house, would give their mother money from jobs that they held.

[13] *Simcoff v. Simcoff* 2008 MBQB 213 at para. 13
[14] 2016 ONCA 368

The mother would use this money and rent money to pay the mortgage. One of the adult children died and his wife sought to recover his interest in the house. The mother claimed that she was the beneficial owner of the house. The trial judge concluded that the son was both the legal and beneficial owner of the house. The Court of Appeal disagreed and found that evidence of the mother's intention was not lacking, the trial judge just failed to direct himself to the question of the mother's intention. Instead the trial judge had looked at the intention of the adult children, which was incorrect. The testimony from the children and the mother before she died was that she had "borrowed" her children's names for title and for the mortgage because she could not qualify and they could. It was always the mother's intention that the children held the house in trust for her. The decision in this case did not turn on the application of a presumption, as evidence of the mother's intention was not lacking.

Cases Where the Transferor is Deceased

In ***Comeau v. Gregoire***[15], released shortly after *Pecore*, both the Court at first instance and the Nova Scotia Court of Appeal determined that a deceased mother had gifted the beneficial interest in a joint bank account to her adult daughter. The evidence rebutted the presumption of resulting trust. The trial

[15] 2007 NSCA 73

judge had heard evidence from several witnesses (including siblings not involved in the litigation and a financial services representative) that the mother and daughter were very close and that the mother intended a gift. Other evidence of intention relied on by the Courts included that the bank employee had explained the right of survivorship, the annual statement was sent to the mother only, and she paid tax on the income.[16]

The British Columbia Court of Appeal overturned a trial judge's finding in ***Doucette v. McInnes***[17] that certain term deposits were held on resulting trust for a mother's estate. The Court of Appeal observed that while the evidence was "spotty," there was *uncontested* evidence that the Mother intended the term 'deposits' to be gifts. The trial judge had failed to properly incorporate the uncontested facts into his analysis. A bank teller had testified that although the term deposits were in joint names, only the mother's address was on the account. The mother had insisted on complete control. Also, the mother had surreptitiously obtained the signatures of her children on the banking documents. The children had no idea that they were joint owners of the term deposits, which the Court of Appeal found to be an important factor in determining that a gift was made noting that: "This is a

[16] 2007 NSCA 73 at paras. 12-13
[17] 2009 BCCA 393

factor which ought to have permeated the entire issue of the intention of Mrs. Doucette, but did not."[18]

The Court determined in ***Breau v. The Estate of Ernest St. Ornge et al***[19] that when the deceased added a "friend" who was 32 years his junior as a joint holder on his bank account he did so only for assistance with his banking and that no gift was made. The evidence showed that the deceased had required help with his finances (reviewing bills and writing cheques) and his daughter had previously been a joint account holder for that purpose. Although the friend was also an attorney under a Power of Attorney, the New Brunswick Court of Appeal did not find this to be "determinative of the issue of intention".[20]

In ***Fuller v. Harper,***[21] it appears that the evidence of a notary public and a clause in a Will was considered evidence significant enough to rebut the presumption of resulting trust. Five months before he died, the deceased had transferred a one-half interest in a vacant lot to his long-time friend. An estranged son of the deceased argued that the friend held the lot on resulting trust for his father's estate. The notary public testified that the deceased "clearly intended" the property be registered in joint tenancy; the

[18] *Doucette v. McInnes*, 2009 BCCA 393 at para. 58
[19] 2009 NBCA 36
[20] 2009 NBCA 36 at para. 47
[21] 2010 BCCA 421

deceased advised his friend that he was adamant that he did not want his son to receive any share of his estate; he put a clause in his Will explaining why he was disinheriting his son; and the notary public testified that the deceased wanted to gift the land outright but it was the notary that convinced him to put it in joint tenancy.

The testimony of a drafting solicitor was considered as evidence of intention in ***Van de Keere Estate, Re***[22]. A father had made multiple transfers of various sums of money to one of his daughters, totalling $408,000.00 (over 90% of his assets) over four years before his death, unknown to his other children. The lawyer who drafted his Will testified however that it was the deceased's intention to benefit his children equally. The only evidence that the transfers were gifts came from the daughter and her husband and the Court at first instance noted that their evidence was to be "carefully scrutinized".[23] The other siblings all testified that their father was a "careful man when it came to his money". No explanation was provided as to why the deceased would "strip himself of almost all of his assets". Gifting over 90% of his estate was inconsistent with the behaviour of the deceased that showed his intention to treat his children equally, including

[22] 2012 MBCA 109
[23] 2012 MBQB 33 at para. 30

evidence of earlier gifts and the contents of his Will. The decision was upheld on appeal.

In the case of ***Sawdon Estate v. Sawdon,***[24] the deceased had several bank accounts at various financial institutions that were jointly held with a right of survivorship with two of his five children. Despite understanding the "right of survivorship" of joint accounts, the father also advised his sons to divide the money in the joint account equally among their siblings on his death. The sons agreed. The father also executed a Will, where a charity would receive shares in his corporation and the residue of his estate. The charity argued the joint accounts formed part of the estate.

The trial judge relied on three pieces of evidence in finding that the deceased knew full well how the right of survivorship would operate on his death and concluded that the presumption of resulting trust had been rebutted:

> 1) The deceased already had firsthand experience and understood how joint accounts and the right of survivorship operated;
>
> 2) His lawyer advised the deceased that if he did not want the funds to go directly to the joint holders he would need a

[24] 2012 ONSC 4042, upheld 2014 ONCA 101

declaration of trust and he never instructed his lawyer to prepare one; and

3) A bank employee testified that she explained to the deceased the option of opening a joint account with or without a right of survivorship and the differences between the two types.

The trial judge also considered the testimony from the sons, the clear wording in the bank documents, the control and use of the funds, the tax treatment of the funds, the terms of the power of attorney he had granted to one of his sons, and the fact that there was no evidence of any reservation of interest by the deceased.

On appeal, Justice Gillese (with Justices Hoy and Strathy agreeing) upheld the trial judge's conclusion that the evidence rebutted the presumption of resulting trust. However, Justice Gillese found that from the time the accounts were opened, the children were entitled to the *beneficial right of survivorship* rather than a *beneficial entitlement to the contents* of the bank accounts.

In ***Mroz v. Mroz,***[25] a mother transferred title of her house (her only significant asset) into the names of herself and her daughter as joint tenants. At the same time she executed a Will in which she referred to the family home and made bequests to a number

[25] 2015 ONCA 171

of family members. Some of the bequests (two $70,000.00 bequests to two of her children) were charged against the family home. The trial judge had found that the daughter had rebutted the presumption of resulting trust and that the house was a gift to her; however, the trial judge also found that the daughter was liable to pay the $70,000.00 bequests from the sale of the house. The Ontario Court of Appeal found that the trial judge erred in principle since (post Pecore) once the trial judge found that the sale of the house was to be the source of funds for the bequest under the Will, she could not find that the presumption of resulting trust was rebutted and that the daughter was gifted the house.

Because of the error, the Court of Appeal had to determine whether the daughter rebutted the presumption of resulting trust. The evidence at trial included testimony from the daughter of the deceased's grandchildren, as well as the solicitor who drafted the deceased's Will. The solicitor had no recollection of his meetings with the deceased and had to rely on his handwritten notes. His notes indicated "if she dies house goes to daughter". He had also made note of the $70,000 in bequests. He had recommended that the house be held as tenants in common, however, the mother wanted it to be held in joint tenancy. He was clear that he would have discussed the meaning of putting property into joint tenancy and his notes reflected this and he would not have had her sign

the documents if he felt she did not understand the import of what she was doing.[26]

Further, “every witness at [the] trial confirmed that [the mother] was a strong, intelligent woman who knew her own mind and that she wanted to provide for her daughter after her passing.” Also, every witness, including the daughter, acknowledged that the mother wanted to use the proceeds of the sale of the house to make the bequests. Based on the evidence and factual findings of the trial judge, the Court of Appeal concluded that the daughter did not rebut the presumption of resulting trust. If the presumption had been rebutted, then the transfer of the property was an *inter vivos* gift and the daughter became the sole owner upon the mother’s death. In that case, the property would not have formed part of the estate and the daughter would not have to pay the bequests. This finding would be inconsistent with the trial judge’s finding that it was the mother’s actual intention at the time of the transfer to provide for the daughter ***and*** make the bequests. Therefore the property was held on resulting trust for the estate.

The key evidence in ***Lorintt v. Boda***[27] was once again, the testimony of a lawyer, which was supported by affidavits from the son. The deceased had requested that the lawyer transfer his

[26] *Mroz v. Mroz* 2014 ONSC 1030 at paras. 40-41
[27] 2014 BCCA 354, leave to appeal dismissed 2015 CanLII 10577 (SCC)

house to his son. After a discussion, the lawyer convinced the father to transfer title into joint names of both father and son. After the father died, the executor claimed that the son was holding title in resulting trust. The lawyer testified that the father intended a gift: he had explained the options to the father and the concept of joint tenancy and that the father spoke and understood English (although the father's first language was Hungarian). The executor had attempted to show evidence of the father's intention through affidavits but neither the trial, nor, the appellate court found them useful. Specifically, the affidavits dealt with the father's later inconsistent comments on his intention (not his intention at the time of transfer) and medical diagnoses for the father that were also not made at the time of the transfer.

A financial advisor provided the key evidence in ***Foley (Re)***[28] regarding monetary transfers to a daughter that the Court determined were gifts. The financial advisor testified that she met with the father alone with respect to a joint account with his daughter, the father was looking for a way to avoid probate costs, and the father wanted the daughter to receive the funds since his son had received the farm. The deceased was the only person to deposit and withdraw from the joint account. Also there was corroborative evidence by way of written instructions provided to

[28] 2015 ONCA 382

the financial advisor. The Court also took into account the fact that the daughter was also the father's attorney under a power of attorney as well as expert evidence regarding the father's capacity.

A mother had transferred her residence and property into joint names with her daughter in the case of ***Cowper-Smith v. Morgan***.[29] The property, along with certain investments, was held in trust, through a document titled "Declaration of Trust," in which the mother was the named beneficiary and the daughter was the bare trustee. Upon the mother's death, the daughter was entitled to both assets "absolutely". The effect of these transactions was to render the mother's estate devoid of any significant assets. The trial judge concluded that the Declaration of Trust was the result of undue influence and did not reflect the mother's intention; therefore, it was not evidence of her intention. Instead, the trial judge placed greater weight on a Will that the mother made, in which the mother intended that her assets be divided equally as between her children. There was also evidence that the mother paid taxes on the income from the investments and that the daughter did not take funds without her mother's approval. The son had also testified that the mother had told him everything

[29] 2016 BCCA 200

would be divided equally. The presumption of resulting trust was not rebutted. The British Columbia Court of Appeal agreed.[30]

In ***Laski v. Laski***[31] the "bulk of the evidence" was produced by the daughter that the funds held in a joint bank account with her father were gifts. Her brother argued that she held the funds on resulting trust for her father's estate. Evidence supporting the father's intention of a gift included testimony from the lawyer who drafted the father's Will in which there was a clause specifying that any assets held jointly with his daughter were hers alone on his death. The lawyer testified that the father had told her that he suspected his son would challenge entitlement to the joint accounts so she suggested putting the clause in the Will. The father also told the lawyer the reason why he did not want to specify details about the joint accounts in his Will was because his son would make his life "a living hell" if the son knew the extent of assets that would fall outside of the estate. The lawyer's testimony was also supported by her contemporaneous notes.

Further testimony from the father's investment advisor supported the finding that the father intended to gift the funds in the joint accounts to the daughter. The father had told the advisor that he

[30] The Court of Appeal overturned a part of the trial judge's decision with respect to a proprietary estoppel claim that the son made with respect to the daughter's 1/3 interest in the residence. Leave to appeal this portion of the decision to the Supreme Court of Canada was granted , while a cross-appeal by the daughter was dismissed, 2016 CanLII 82913 (SCC).
[31] 2016 ONCA 337

felt he was dying and he wanted to make sure his daughter was taken care of. The advisor understood that the assets were for the daughter's benefit only. The deceased had told the advisor that his son was "bullying" him and asking for money that the deceased did not want to give. The father wanted to protect his daughter. The Court found that the son's evidence was "bald and self-serving" and determined that there was "overwhelming" evidence that the father intended to gift the funds to his daughter.

In ***Franklin v. Cooper,***[32] a daughter testified that the lawyer explained the concept of joint tenancy to a mother when she transferred title of her home to herself and her daughter as joint tenants. The lawyer, however, was *not* called as a witness and the lawyer's file was destroyed. Another daughter testified that the mother put title into joint tenancy because she was afraid of being defrauded into transferring her home to a third party (she had watched a T.V. show about this). The mother had offered to put title into joint names with this daughter first, but she declined. The mother had also told all three children that they would split the profits from the house equally. There was insufficient evidence to establish intention of a gift as the Court placed little weight on the testimony of the daughter who held the title in joint tenancy.

[32] 2016 BCCA 447

In ***Thorsteinson Estate v. Olson,***[33] the deceased transferred her property into the name of herself and a man whom she had helped raise and treated like a son ("William"). During her life she had commenced an action requesting that the transfer be set aside, arguing William was holding the land in trust for her. After she died, her estate trustee continued the action on behalf of her estate. The deceased had signed a "Deed of Gift" at the time of transfer and expressed the intent to gift the land. She had contacted and instructed a lawyer on her own volition to prepare the Deed and transfer. The lawyer testified, he had retained his contemporaneous notes, and was able to clearly recall the conversation. The lawyer had informed her of the significance and effect of joint tenancy on death. The deceased had understood this as well as any tax implications. She was motivated to avoid or reduce probate fees (after seeing what happened to William's father's estate). The lawyer was "unshaken" in cross-examination about attending to have the Deed signed and that the deceased understood what she was signing, although he admitted that he had no discussion with the deceased about what would happen if she had a falling out with William.

The Court at first instance also referenced case law in Saskatchewan which consistently found that the resulting trust

[33] 2016 SKCA 134

principle was inapplicable in circumstances involving a transfer of title to land under *The Land Titles Act, 2000*. The Court concluded that based on statutory provisions and established jurisprudence, "it can be stated with confidence that the doctrine of resulting trust is inapplicable where the impugned transfer of land has been registered in Saskatchewan's land titles system".[34] However, the Court went on to determine that even if this was not accurate, William was able to rebut the presumption of resulting trust. In addition to the testimony of the lawyer and William, she had also made him an attorney under a POA. He had broad powers to deal with her financial affairs and she placed great trust in him. There were relatively few facts supporting the position that she did not intend a gift, and most occurred post-transaction. She changed her mind, but by then it was too late. The gift was made. The Court of Appeal found the trial judge did not err when determining that it was a gift, but declined to consider whether resulting trust was applicable to the land titles system in Saskatchewan.[35]

An elderly mother held joint title in real property with one of her two adult daughters in ***Zeligs v. Janes***.[36] The mother had also made the same daughter an attorney under a power of attorney. Prior to the mother's death, the daughter granted mortgages

[34] *Thorsteinson v. Olson* 2014 SKQB 237 at para.103
[35] 2016 SKCA 134 at para.32
[36] 2015 BCSC 7, upheld 2016 BCCA 280

against the property and then sold the property using the sale proceeds to pay off the mortgages and deposited the remaining funds in a joint bank account she held with her mother. Shortly thereafter, the daughter withdrew the remaining funds from the account to buy a property for her and her husband. After the death of their mother, the other daughter argued that the interest in the property was held on resulting trust for the mother's estate. The trial judge found that the main piece of evidence with respect to the mother's intention was a handwritten note saying that she wanted her daughter to be a full owner of the property when she died. While the note was considered hearsay, the Court still referred to it on the basis of necessity, and concluded that it was a reliable and significant piece of evidence about the mother's intention to give the daughter joint ownership while alive and full ownership when she died. The presumption of resulting trust was rebutted. Nevertheless, the daughter had severed the joint tenancy and extinguished the right of survivorship when she transferred the sale proceeds to herself and her husband. The mother's estate was entitled to a one-half interest in the sale proceeds, which the daughter held on resulting trust for the estate. Notably, the decision was upheld on appeal to the British Columbia Court of Appeal.

In ***McKendry v. McKendry,***[37] the deceased also had a change of heart with respect to property she transferred into joint tenancy with her son, although in this case she had originally intended that it be held in trust, and later wanted it to be a gift. At the time of the transfer it was "clear" that the son held the property in trust as the mother asked a lawyer to prepare a trust declaration reflecting this intention (even though the son never signed it as requested). Later when the mother changed her mind, the Court of Appeal found that the mother's intentions were "manifest and unambiguous" in her intention to gift the property. She consulted a new lawyer, who drafted a two-page document whereby the mother "unambiguously renounced" her beneficial interest in the right of survivorship. The mother's Will also had a clause which stated that the property registered in joint tenancy was gifted to the son subject to registered mortgages. The trial judge found that an executed deed of gift under seal was required to perfect the gift to the son of the right of survivorship to the property. The Court of Appeal however disagreed and instead found that nothing more would have been gained had the mother executed a deed of gift under seal. No further act of delivery was required because of the existing joint tenancy.

[37] 2017 BCCA 48

In this review, and in consideration of a selection of decisions post Pecore, it is apparent that evidence from third parties is preferred in determining the intention of the giftor/transferor, such as from lawyers, financial advisors, bank tellers or notary publics. Witnesses can be cross-examined and judges may assess credibility as opposed to documentary evidence. However, strong documentary evidence such as a Deed of Gift, or, a Declaration of Trust may also be clear evidence of actual intention.

2. Applicability to Wills & Testamentary Transfers

Most will agree that *Pecore* and the presumption of resulting trust are inapplicable to Wills and testamentary transfers. Testamentary dispositions should not be considered gratuitous gifts to adult children so as to result in a presumption of a resulting trust.

A settled test for determining whether a disposition is testamentary is set out in the 1866 case of ***Cock v. Cooke***:

> It is undoubted law that whatever may be the form of a duly executed instrument, if the person executing it intends that it shall not take effect until after his death, and it is dependent on his death for its vigour and effect, it is testamentary.[38]

[38] *Cock v. Cooke* (1866), LR 1 P&D 241 at 243 (Eng)

In the case of ***Norman Estate v. Watch Tower***,[39] the trial judge also observed that cases where documents are held to be testamentary often include the following factual elements: no consideration passes, the document has no immediate effect, the document is revocable, and the position of the donor and the donee does not immediately change.[40]

Testamentary gifts are fully revocable by the giftor during his or her lifetime based on a simple change of mind, without the requirement for permission from some other person, and take effect only at death. The testamentary transfer must meet legislative requirements as well. Provincial statutes contain varying levels of formal requirements for testamentary dispositions.

Testamentary gifts cannot be challenged by the presumption of resulting trust because it is presumed that the donor intended to give a gift. The testator would not intend for the beneficiary to hold the gift.[41] The presumption of resulting trust is not intended to operate in every case involving gratuitous transfers (or apparent gifts). It only arises where evidence of intention is *missing*. The recipient bears the onus of proving that a gift was intended. With

[39] 2014 BCCA 277
[40] 2014 BCCA 277 at para. 20
[41] Archie Rabinowitz, Jason M. Chin and Aoife Quinn called "The Presumption of Resulting Trust and Beneficiary Designations: What's Intention Got to Do with It" in the Alberta Law Review (2016) 54:1 ("Rabinowitz") at 54.

a testamentary disposition, intention is not missing since it is clearly documented in the testamentary document.

Therefore, testamentary gifts should not be challenged by the presumption of resulting trust because it is presumed that the donor intended to give a gift by the very nature that it is a testamentary transfer and dependent upon the person's death.

3. Beneficiary Designations as Gratuitous Transfers

Relatedly, some have questioned whether *Pecore* and the presumption of resulting trust will apply to beneficiary designations as gratuitous transfers. The answer is not straightforward.

An *inter vivos* gift is one that is intended to take effect during the lifetime of the donor. It consists of a voluntary transfer of property to another with the full intention that the property will not be returned. To establish a gift, one must show intention to donate, sufficient delivery of the gift and acceptance (***McNamee v. McNamee).***[42] As equity presumes bargains and not gifts, the presumption of resulting trust presumes that the transferor intended to retain the beneficial ownership of the property.

Differing from *inter vivos* gifts, are beneficiary designations and testamentary gifts which arguably share many similarities: they do

[42] 2011 ONCA 533 at para. 24

not take effect until the death of the owner of the plan; they can be changed by the donor during life; and, they do not confer a present proprietary interest in the beneficiary.[43]

In a recent paper for the Alberta Law Review, *The Presumption of Resulting Trust and Beneficiary Designations: What's Intention Got to Do with It?,*[44] authored by Archie Rabinowitz, Jason M. Chin, and Aoife Quinn (the "Authors"), the Authors analyze the doctrine of resulting trust through leading cases and empirical evidence evaluating the intentions of Canadian investors. The authors concluded that applying the presumption of resulting trust to beneficiary designations betrays both the theory and purpose of the presumption and contend that it "runs counter to the intentions of most Canadians and creates uncertainties in millions of beneficiary designations".[45] It seems to thwart the intentions of registered account holders.

The Authors also note an inconsistency in how the courts in the provinces interpret the application of presumption of resulting trust to beneficiary designations: England,[46] Manitoba,[47] British

[43] Archie Rabinowitz, Jason M. Chin and Aoife Quinn called "The Presumption of Resulting Trust and Beneficiary Designations: What's Intention Got to Do with It" in the Alberta Law Review (2016) 54:1 ("Rabinowitz") at 54.
[44] Ibid.
[45] Rabinowitz at 54
[46] See *In Re A policy No. 6402 of the Scottish Equitable Life Assurance Society* (1901), [1902] 1 Ch 282
[47] See *Dreger (Litigation Guardian of) v. Dreger* [1994] 10 WWR 293

Columbia and Ontario[48] all apply the presumption to beneficiary designations. Only one province, Saskatchewan, takes the position that it does not apply to beneficiary designations.[49]

In the Alberta case of ***Morrison Estate (Re)***,[50] Justice Graesser felt bound by precedent in Manitoba and England, holding that the presumption of resulting trust applies to beneficiary designations. The court did not need to apply the presumption because it was able to find evidence of intention. The judge framed the legal issue on whether the son had proven on the balance of probabilities that his father intended to gift him the RRIF. The evidence that it was a gift: the close relationship between the father and son at the time of designation; the assistance rendered to the father after the mother died; the close temporal connection between the making of the Will appointing the son and daughter as joint alternate executors; and, the signing of the beneficiary designation in favour of the son only.

As noted, if the father really wanted to give his RRIF to his children in equal shares he could have refused to make a designation. Instead, he made a positive choice to change this default position to his son only.

[48] See *McConomy-Wood v. McConomy* (2009) 46 ETR (3d) 259 (ONSC)
[49] *Nelson et al. v. Little Estate* 2005 SKCA 120
[50] 2015 ABQB 769

So are beneficiary designations distinguishable? The very act of designating a beneficiary on its face, establishes an intention to transfer a beneficial interest. This is inconsistent with establishing a trust in one's own favour.[51] Further, unlike joint bank accounts, adults do not designate beneficiaries to manage their funds in an RRSP or insurance policy while simultaneously retaining a beneficial interest. That's simply not how designations work.

The law flowing from *Morrison* (and arguably *Pecore*) seems to thwart the intention of those making beneficiary designations. One solution suggested in the referenced paper included, "Courts may wish to define beneficiary designations as testamentary dispositions, thus removing them from the resulting trust regime and placing them in the Wills framework".[52] However, there will be issues if they do not meet statutory guidelines for testamentary dispositions. Another option is legislative reform.[53] Eventually, it will "likely fall to banks to apprise their customers of the law and provide them an opportunity and the appropriate paperwork to establish their intent that their beneficiary should indeed benefit".[54]

[51] Rabinowitz at 56
[52] Rabinowitz at 62
[53] Rabinowitz at 64
[54] Rabinowitz at 66

4. Capacity, Undue Influence and Suspicious Circumstances

What role does potential undue influence and lack of capacity play in determining the intention of the transferor and whether the presumption of resulting trust exists or is rebutted?

One historical case determined that a resulting trust can arise even when the transferor lacks the mental capacity to understand the nature of the transfer (*Goodfellow v. Robertson* (1871), 18 Gr 572 (Ont Ct Ch)).

Some of the cases discussed at **1.Evidence of Adequate Intention** also addressed the transferor's capacity or susceptibility to undue influence.

In ***Breau v. Ernest St. Onge et als,***[55] the trial judge found that the deceased had lacked the requisite capacity to gift certain personal items (tools), but, did not address the deceased's capacity to gift the beneficial interest in a joint bank account. A lawyer had also declined to prepare a Will for the deceased,

[55] 2009 NBCA 36

finding that the deceased lacked testamentary capacity. The Court of Appeal noted that:

> Curiously, the trial judge did not find that Mr. St. Onge lacked the requisite capacity to intend a gift with respect to the funds in the joint bank account. Since the joint account was established at around the same time as the purported gifts of personal property, one would have thought that the finding of incapacity would apply equally to the establishment of the joint account.[56]

However, the Court went on to examine the presumption of resulting trust argument, "for the sake of completeness".[57] The Court concluded that the presumption of resulting trust was not rebutted

In ***Foley v. Mcintyre***,[58] the son brought an action seeking to set aside three money transfers and a bequest of Canada Savings Bonds that his father made to his sister, arguing, in addition to the application of the presumption of resulting trust, that the father was subjected to undue influence and lacked sufficient decisional capacity to make the gifts and bequest. The trial judge *started* with an analysis of whether the deceased had capacity to make the gifts and whether he was unduly influenced by his daughter to do so. The evidence included medical records, testimony from medical experts, testimony from bank employees, the son and the

[56] 2009 NBCA 36 at para. 37
[57] 2009 NBCA 36 at para. 37
[58] 2015 ONCA 382

daughter. The trial judge concluded that the evidence showed that the father had the requisite capacity to gift and that the presumption of undue influence was rebutted respecting the money transfers. The trial judge then went on to determine that the presumption of resulting trust had been rebutted.

The court addressed the possibility of undue influence (but not capacity) in the case of ***Cowper-Smith v. Morgan***. As noted above, in this case a mother had transferred her residence and property into joint names with her daughter. The property, along with certain investments, was held in trust through a document titled, "Declaration of Trust" in which the mother was the named beneficiary and the daughter was the bare trustee. Upon the mother's death, the daughter was entitled to both assets "absolutely". The effect of these transactions was to render the mother's estate devoid of any significant assets. The trial judge concluded that the Declaration of Trust was the result of undue influence (and the independent legal advice the mother received was insufficient to rebut the presumption of undue influence). It did not reflect the mother's intention; therefore, it was not *evidence* of her intention. It followed therefore that the presumption of resulting trust was not rebutted.[59]

[59] 2016 BCCA 200 at para. 62

The trial judge in ***Lorintt v. Boda***, also determined that the presumption of resulting trust had been rebutted regarding a gratuitous transfer of property into joint names between father and son and that the presumption of undue influence did not apply. In the event that it did apply, the evidence was considered sufficient to rebut it. Both the trial judge and the appellate court looked to the father's intention in year 2000 when the transfer was completed and it considered whether a presumption of resulting trust applied through the lens of assessing whether the father had the capacity to gift.

The executor attempted to introduce the deceased's father's evidence concerning the transaction through two of his own affidavits which attached sworn affidavits of the father from 2006 in support of a petition the father brought to have his son removed as his committee. A doctor also provided an affidavit in support of the executor concerning an examination he conducted of the father in 2006 to determine his testamentary capacity.

The trial judge gave no weight to the affidavits filed on behalf of the executor, noting:

> In my view, the inconsistent diagnoses and the inconsistent comments made at different times about what occurred in the past make this evidence at best equivocal and

> ambiguous and of little use to either side in this argument or to me. It is simply not clear whether these reflections of what the father actually believed was his intention some years earlier, or whether they are the result of some element of mental incompetence or dementia.[60]

After finding that the father intended a gift in 2000 of the property and that the right of survivorship vested when the gift was made, the trial judge went on to examine the question of undue influence. The court, initially finding that the presumption of undue influence did not arise in this situation, went on to find that even if it did arise, it was rebutted by the evidence of the lawyer. Moreover, there was no evidence at the relevant time that the deceased suffered from dementia or mental incapacity (which did not begin to appear until 2004). The appellate court also did not find the later evidence of the father to be reliable, noting that: "the fact that the father may have possessed testamentary capacity in 2006 did not make his 2006 affidavits concerning events that took place in year 2000 reliable".[61] The appeal was dismissed.

Finally, in ***Zeligs v. Janes***, when the mother made a gratuitous transfer of her property into joint tenancy with one of her daughters, she had made a handwritten note saying that they are

[60] *Lorintt v. Boda*, Vancouver Dockett, S086460 para. 34
[61] 2014 BCCA 354 at para. 83

joint owners until her death and then her daughter will become "full owner". Her other daughter, the plaintiff in a claim to have the transfer set aside, argued that there were "suspicious circumstances" surrounding the note and that it should be given little weight in the Court's analysis of the mother's intention. The plaintiff did not argue that the note was not written by the mother but that the mother had misspelled her own name. Both the trial judge and the Court of Appeal found that the presumption of resulting trust and the "suspicious circumstances" were rebutted.

5. Legal Characterization of an *Inter Vivos* Transfer of Rights of Survivorship

Although the appellate courts have confirmed that where there is a gratuitous inter-vivos transfer, or, property passing between two parties that indeed, the presumption of resulting trust applies yet, beyond this presumption their appears to be the possibility of another option.

The cases of *Pecore* v. *Pecore*,[62] *Sawdon Estate v. Sawdon*,[63] *Mroz* (Litigation guardian of) *v. Mroz*[64], have identified four potential options concerning the status of funds in a joint bank account held between a parent and an adult child:

[62] *Pecore* v. *Pecore*, 2007 SCC 17 (CanLII)
[63] *Sawdon Estate v. Sawdon,* 2014 ONCA 101 (CanLII)
[64] *MROZ v MROZ*, 2015 ONCA 171 (CanLII)

> (1) The funds in the accounts result back to the estate as a consequence of the death of the parent by way of a resulting trust;
> (2) The funds were placed into a joint account by the transferor parent with the transferee adult child with the intention that the adult parent retain exclusive control of the account until her death and thereby gift the right of survivorship to the adult child;
> (3) An outright gift was made to the adult child when the joint account was created; and
> (4) An express trust was created when the adult parent created a joint account.

The act of transferring an asset into joint tenancy with the intention that the co-owner becomes a bare trustee during life and then takes full legal and beneficial ownership at the death of the original transferor is now generally characterized as an "*inter vivos* gift of survivorship rights".[65]

In the recent case of ***McKendry v. McKendry,*** the British Columbia Court of Appeal confirmed the following:

> [29] So long as the requirements of a binding gift are met, the owner of property may, during his or her lifetime, make an immediate gift of a joint tenancy, including the right of survivorship. This is so regardless of whether the donee of the gift is to hold it for the benefit of the donor while he or

[65] John E.S. Poyser, *Capacity and Undue Influence* (Toronto: Thomson Reuters Canada Limited, 2014) at p.389

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** (*Simcoff v. Simcoff*, 2009 MBCA 80 at para. 64; *Bergen v. Bergen*, 2013 BCCA 492 at para. 37; *Pecore* at paras. 45-53).

. . .……

[36] 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. In *Bergen*, Newbury J.A. explained why:

> [42] … Consistent with this, the authors of Waters [Donovan W.M. Waters, Mark R. Gillen, & Lionel D. Smith*, Waters' Law of Trusts in Canada*, 4th ed. (Toronto: Carswell, 2012)] in the most recent edition (post-Pecore) state:
>
> If A supplies the purchase money and conveyance is taken in the joint names of A and B, B during the joint lives will hold his interest for A, B will also hold his right of survivorship − again by way of resulting trust for A's estate, because that right is merely one aspect of B's interest. In other words, the starting point is that B holds all of his interest on resulting trust for A, or A's estate. However, evidence may show that, while A intended B to hold his interest for A during the joint lives, it was also A's intention that, should he (A) predecease, B should take the benefit of the property. The

> presumption of resulting trust would then be partially rebutted, in relation to the situation that has arisen, so that B would not hold his interest (now a sole interest and not a joint tenancy) on resulting trust. He would hold it for his own benefit. [At 405; emphasis added.]

Ultimately, in *McKendry,* the presumption of resulting trust was not required to determine the outcome of the case as the mother's intentions were "manifest and unambiguous". The only real question was the legal effect. When the mother unambiguously renounced her beneficial interest in the right of survivorship in her son's favour should he survive her, "she clearly intended to make an immediate *inter vivos* gift of that incident of the joint tenancy to [her son] ". The gift was whatever remained when the mother died. The mother had done everything she could to convey beneficial interest to her son. The immediate *inter vivos* gift was complete and binding.[66]

McKendry dealt with real property. However, in *Sawdon*, joint accounts were addressed. The Ontario Court of Appeal in *Sawdon* stated:

> 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

[66] *McKendry v. McKendry* 2017 BCCA 48 at para. 43

> 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.[67]

So what then is the legal characterization of an *inter vivos* transfer of rights of survivorship? It appears to be simply a trust. But could it be another legal creature?

CONCLUDING COMMENTS

Ten years on, *Pecore* may well have produced more questions than answers. The key take away however, appears to include that the presumption of resulting trust applies to *inter vivos* gifts, does not apply to testamentary dispositions, and likely applies to beneficiary designations despite strong argument against this position. Furthermore, in estate cases, clear evidence of intention appears to be provided mostly by third party witnesses such as drafting solicitors and financial advisors. This is a good reminder to solicitors to keep clear, contemporaneous notes of any discussion regarding such transfers, especially if the transferor is an older adult and the transferee an adult child. Obtaining testimony from relevant financial institutions is also critical early on so as to preserve evidence of intention.

[67] *Sawdon* at para. 67