

Case Commentaries: *Pecore* and *Saylor*

*Archie J. Rabinowitz, B.A., L.L.B.**

Pecore v. Pecore (2007) SCC 17

Overview of Case

In *Pecore*¹ and its companion case, *Madsen Estate v. Saylor*², the Supreme Court establishes rules and limitations regarding the treatment of gratuitous transfers of assets from a parent to their child. In particular, the Court addresses two conflicting presumptions which historically operated in such cases. The first, *the presumption of resulting trust*, which applies to most transfers of property without consideration, presumes that the transferor's intention is to transfer legal title only to the transferee. This means that when the transferor dies, the transferred assets constitute part of the transferor's estate, and will be passed on to the beneficiaries of their will. If the recipient wishes to assert ownership of the assets after the transferor's death, they bear the burden of proving that the transferor intended them to have survivorship rights and a beneficial interest in the property.

The *presumption of advancement* presumes the opposite, starting from the position that such transfers represent gifts and that full beneficial and legal title passes to the transferee. Historically, this presumption only operated in the case of transfers from a husband to his wife or a father to his child. Where the presumption of advancement operates, the court will start from the position that the assets have been gifted in full, and are not part of the transferor's estate.

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¹ *Pecore v. Pecore* (2007) SCC 17.

² *Madsen Estate v. Saylor* (2007) SCC 18.

The burden of proof will be on the beneficiaries of the transferor's will to show that the transferor never meant the transfer to commute to a gift on death.

In *Pecore*, the testator transferred a considerable portion of his assets into a joint bank account which he shared with his daughter. He also gave her power of attorney over his affairs. Evidence showed that the testator's daughter depended on his financial support. During his lifetime the testator maintained control of the accounts, and paid all taxes and fees on them. His daughter could make withdrawals, but had to notify him beforehand. There was some evidence that the testator opened the account as a means of avoiding probate fees and taxes after his death. In the course of drafting his will, the testator's lawyer specifically asked about assets such as those held in the joint accounts, and was satisfied that the testator did not intend those items to pass as a result of the will. When the testator died, his will named both his daughter and her husband as beneficiaries of the residue of his estate. The daughter and her husband later divorced, and the husband challenged her failure to include the assets held in the joint account in the contents of the estate. She said that her father meant her to have the contents of the account, while her ex-husband maintained that they should have been included in the estate, in which case he would have received half of their value as a residual beneficiary.

The Court held that the contents of the joint accounts represented an inter-vivos transfer to the daughter which included a right of survivorship. The daughter met the evidentiary burden, successfully rebutting the presumption of resulting trust. The Court considered a number of factors, including statements made by the testator to his lawyer and family prior to his death, his failure to include the accounts in his will, and banking documents granting right of survivorship to his daughter. The Court also considered the daughter's financial dependence upon the testator. They concluded that the evidence indicated that the testator was concerned about his

daughter's financial well-being, and intended that she keep the contents of the accounts on his death.

Grounds for Decision

Rothstein J., writing for the majority, stated that the presumption of advancement is strictly limited to transfers by a mother or father to a minor child. The presumption of resulting trust operates in all other transfers without consideration. When gratuitous transfers are made from a parent to a grown, independent child, the primary justification for the presumption of advancement, parental obligation to support dependant children, does not apply. The Court asserted that, with people enjoying greater longevity, transfers by parents to an independent child are often made in order for child to help the parents to manage their affairs. It follows that the transfer of assets into a joint account may be motivated, not by the desire to gift money the child, but rather by other, more pragmatic concerns. More surprisingly, the Court also asserted that the presumption of advancement does not apply to adult dependant children, because to hold otherwise would mean that the courts would have to determine in each case whether a child was dependant. However, evidence of an adult child's dependence may be introduced in order to rebut the presumption of resulting trust.

The Court sought to clarify the law regarding several types of evidence of intention that may be introduced in order to rebut either of the presumptions. Specifically, the court stated that:

1. **Evidence of the transferor's intention obtained subsequent to the transfer** should not automatically be excluded if it is relevant to the intentions of the transferor at the time of the transfer.
2. **Bank Documents**, especially where they are clear and detailed, may provide strong evidence of intention.
3. **The existence of a joint account with survivorship rights** will not necessarily be sufficient to rebut the presumption of resulting trust - something more may be required in the way of evidence of the transferor's intention to gift the right of survivorship.
4. **Control and use of the funds** during the lifetime of the transferor are of limited utility in determining the transferor's intention.
5. **Granting a power of attorney** may be evidence of an intention to gift where right of survivorship is also granted, especially when there is evidence that the transferor understood the difference between the two. This is because the goal of having one's child assist in the management of one's affairs can be accomplished through the granting of a power of attorney alone, rendering the joint accounts unnecessary if the only goal was to have the child help in arranging the parents affairs.

The trial judge erred in applying the presumption of advancement, as the transferee, though financially dependant, was not a minor. The daughter was able to rebut the presumption of resulting trust through the evidence introduced at trial. Evidence showed that the daughter relied on her father's financial assistance, and the father had expressed a wish to provide for her after his death. Statements made by the transferor to his lawyer indicated that he thought that the

accounts would not form part of the estate. These statements were deemed to be important indicators of intention, even though they were made subsequent to the transfer. The father's efforts to avoid taxes by saying that the transfers were not gifts were held not to be inconsistent with an intention to make a gift to his daughter.

Assessment of Decision

The *Pecore* decision resolves at least one controversy in the law of trusts in Canada; it is now settled that where assets are transferred without consideration the presumption of resulting trust will operate in all but very limited cases. Only transfers from a parent to a minor child will give rise to a presumption of advancement. The court also clarified the traditional role of these presumptions in determining whether a transfer of beneficial interest has occurred. The Court of Appeal had declared that resort was to be had to such presumptions only after the evidence of intention had been examined and found wanting. This represents a reversal of usual order of events where a presumption is in operation. In *Pecore*, the Supreme Court righted this topsy-turvy analysis, and affirmed that a presumption exists as a starting point, which may be rebutted by evidence.

It is not clear what sort of evidence of intention should be in place in cases where a parent does not want to relinquish control over a joint asset while they are alive, but wishes the child to gain full ownership when they die. The Court has given trial judges great leeway in assessing evidence, which leaves open the question of what evidence might be considered conclusive. In most cases, it will fall to the surviving joint account holder to prove that the transferor intended to gift a beneficial interest in the assets. It is open to the judge to assign varying weights to evidence, and none of the factors to be considered are necessarily determinative of intention. For

those seeking legal certainty, these decisions provide little comfort. In *Saylor*, The Court held that the proven intention to grant survivorship rights to an account would represent a complete inter-vivos gift, but went on to hold that banking documents designating accounts as having survivorship rights were insufficient evidence of intention. Clearly something more is required, and it may be that in order to achieve certainty in such cases, banking institutions and lawyers will need to adjust the wording of joint-account agreements to include a specific reference to the transfer of beneficial interest upon the death of the transferor, or a form of deed or gift may be required.

This element of uncertainty becomes even more apparent when one compares the conclusions reached by the court in *Pecore* and its sister decision, *Saylor*³. Abella, J., dissenting in both cases, pointed out that the two fact sets are very similar. In both cases a parent transferred assets into a joint account with a child and gave the same child power of attorney. In both cases the accounts provided for right of survivorship. Abella argues that a presumption of advancement ought to follow any gratuitous transfers from a parent to their child, based on the natural affection that a parent can be supposed to feel for their child. Abella points out, correctly, that a parent's wish to have their child manage their affairs during their lifetime is not inconsistent with the wish to make a gift on death. However, given that the challengers in many of these cases will also be children of the testator as well, it may be argued that the parental affection argument militates equally for the presumption of resulting trust.

The case also leaves wide open the question of how the courts will decide cases which involve transfers of funds to dependant children. Although Rothstein J. states that the presumption of advancement should not apply to dependant children, since that would mean that

³ Summarized below.

judges would be put in the impossible position of determining which children were dependant and which were not, he also asserts that evidence of dependence and the degree of such dependence may be strong factors in establishing an intention to transfer beneficial ownership. It seems that, where evidence of dependence is introduced in such cases, the courts will have to engage in the very determinations that Rothstein J. sought to avoid.

Madsen Estate v. Saylor

Overview of Case

A father made his daughter a joint signatory to his bank accounts, which provided a right of survivorship. He also granted her power of attorney. The father retained control of the accounts and his daughter did not use the funds during his lifetime. On the father's death, his other children commenced litigation against the daughter when she did not include the accounts in the estate, of which she was sole executrix.

The Court upheld the trial judge's finding that the transferee had not met her evidentiary burden sufficiently to rebut the presumption of resulting trust. As result, the accounts in dispute formed part of the transferor's estate upon his death, to be divided equally among the beneficiaries of his will.

Grounds for Decision

Rothstein J., writing for the majority, held that, although the trial judge erred in determining that there was no evidence to support an intention to transfer beneficial interest in the disputed accounts, her conclusion was correct. The Court held that the financial documents, i.e. account agreement, indicating that the father had chosen to include a right of survivorship in

the account agreements, along with the transferee's testimony as to her father's wishes, constituted evidence which the trial judge ought to have considered. Rather than sending the case back for a retrial, the Court asserted jurisdiction to consider the evidence, but determined that it was not sufficiently persuasive to change the outcome of the case.

The Court found the wording of the banking documents establishing the account agreements to be insufficiently clear, and for this reason accorded them little weight in determining whether the transferor had intended to transfer beneficial ownership. The court accepted the findings of the trial judge that the transferee's testimony was not candid and at times conflicting. The transferee's lack of candour, combined with her failure to obey the judges instructions in court and her removal of estate files without authorization, led the court to the conclusion that her testimony could not be relied upon.

The Court concluded that even after having included and reviewed the evidence of the bank documents and the transferee's testimony there was insufficient evidence to rebut the presumption of resulting trust.

Assessment of Decision

In some respects the *Saylor* decision seems to represent an affirmation of the principles set out in *Pecore*. Certainly the two cases work together to provide a definitive statement of the law as concerns the presumption of advancement, which is now applicable only to transfers from a parent to a minor child. However, *Saylor* adds no clues as to what sort of evidence may be sufficient to rebut this presumption. Legal certainty is unlikely to be achieved while courts still enjoy significant discretion in assigning weight to evidence.

The different conclusions reached in *Pecore* and *Saylor* turned, at least in part, on the credibility of oral evidence regarding the intentions of the transferor. In *Pecore*, testimony provided by the transferors lawyer was deemed to be disinterested and credible, whereas the trial judge in *Saylor* found the testimony of the transferee to be “evasive and conflicting”.