

Gratuitous Transfers of Assets from Parent to Child

Pecore v Pecore [2007], 279 D.L.R. (4th) 513 and *Madsen Estate v Saylor* [2007], 279 D.L.R. (4th) 547

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Introduction

The Supreme Court of Canada in *Pecore v Pecore*¹ and its companion decision, *Madsen Estate v Saylor*², established rules and limitations regarding the treatment of gratuitous transfers of assets from a parent to a child. In these cases, the Court examined two historically conflicting presumptions; namely, the presumption of resulting trust and the presumption of advancement. The presumption of resulting trust applies to most transfers of property without consideration and presumes that the transferor's intention is to transfer legal title only to the transferee. The presumption of advancement presumes the reverse, starting from the position that such transfers represent gifts and that full beneficial and legal title passes to the transferee.

The presumption of resulting trust can be further explained by stating that when a transferor dies, the transferred assets become a part of the transferor's estate, and will be passed on to the beneficiaries in their will. In this situation, if after the death of the transferor the recipient wishes to assert ownership of the assets they will bear the onus of proving that the transferor intended them to have the survivorship rights along with a beneficial interest in the property. The presumption of advancement presumes the opposite and the Court will start from a position that the assets have been gifted in full, and are not part of the transferor's estate. In this situation the burden of

proof will be on those who wish to show that the transferor never meant the transfer to commute a gift on death.

Overview of the *Pecore v Pecore* Case

In *Pecore*, the testator transferred a substantial portion of his assets into a joint bank account that he shared with his daughter. Additionally, the father also gave his daughter power of attorney over his property. It was shown through evidence that the daughter depended on her father for financial support. During his lifetime the testator had capacity to maintain control of his accounts, taxes and fees, and if his daughter wanted to make withdrawals she would need his prior approval to do so. There was also some evidence that the testator opened the account as a means of avoiding probate fees and taxes after his death. While drafting his will, the testator's lawyer specifically inquired about the assets such as those held in joint accounts, and was satisfied that the testator did not intend for those items to pass as a result of the will. In his will the testator named his daughter and her husband as beneficiaries of his estate. After the death of her father, the daughter divorced, and the husband decided to challenge his wife's failure to include the assets held in the joint account in the assets of the estate. She said that her father intended her to have the contents of the account, while her ex-husband believed that they

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1. *Pecore v Pecore* [2007], 279 D.L.R. (4th) 513 [Pecore].

2. *Madsen Estate v Saylor* [2007], 279 D.L.R. (4th) 547 [Saylor].

should have been included in the estate. The ex-husband's argument would entitle him to receive half of the value of the joint account 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. In this case, the daughter was able to meet the evidentiary burden successfully rebutting the presumption of resulting trust. In coming to the decision the Court relied upon a number of factors, including statements 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 a right of survivorship to his daughter. Additionally, the Court considered the daughter's financial dependance on the testator and came to the conclusion that the evidence showed that the testator was concerned about his daughter's well-being and fully intended that the contents of the account be for her use on his death.

Grounds for decision

Rothstein, J., in writing for the majority stated that presumption of advancement is limited to transfers by a mother or father to a minor child. Additionally, the Court stated that the presumption of resulting trust operates in all other transfers without consideration. In a situation where a gratuitous transfer has been made from a parent to a grown, independent child, the primary rationale for the presumption of advancement (namely, the parental obligation to support a dependant) does not apply. The Court recognized that it is common practice for transfers from parents to an independent child to be for the primary purpose of helping parents to manage their affairs. The Court also stated that the transfer of assets into a joint account may be motivated by pragmatic concerns, not only by the desire to gift money to a child. It was also noted that the presumption of advancement does not apply to adult dependant children, but evidence may be presented to rebut the presumption of resulting trust.

The Court took steps to clarify the law regarding the 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 make a gift.
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 a 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, whereas a joint account is unnecessary if the only goal was to have the child help in arranging the parent's affairs.

The trial judge erred in applying the presumption of advancement, as the transferee, though financially dependent, was not a minor. The evidence presented at trial showed that the daughter relied on her father's financial assistance and that the father did intend to provide for her on his death. Thus, the daughter was successfully able to rebut the presumption of resulting trust. Statements made by the testator to his lawyer after the transfer showed that he had no intention for the accounts to be a part of his estate. These statements were held to be significant by the Court even though they were made after the transfer was complete.

Assessment of decisions

Since *Pecore* it is now settled that where assets are transferred without consideration, the presumption of resulting trust will only be applicable in limited cases. It is only transfers from a parent to a minor child that will give rise to the presumption of advancement. The Court clarified the issue of the traditional role of these presumptions and affirmed that a presumption exists as a starting point, which may be rebutted by evidence. The issue needed to be examined since the Court of Appeal declared that resort was to be had to such presumptions only after the evidence of intention had been examined and found wanting.

It is still not completely clear what evidence of intention is sufficient where a parent does not want to surrender control over joint assets while they are alive, but wishes the child to gain full ownership when they die. The Court has given great flexibility in assessing the evidence, but in most cases the onus will fall on the surviving joint account holder to prove that the transferor intended to gift a beneficial interest in the assets. In all cases 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. Hence, for those that are looking for legal certainty on the issue these decisions provide little satisfaction.

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. Obviously, there is something more that is required to prove intention and it may be that in order to achieve certainty, banks 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. Another option for banks and lawyers may be to provide a form of deed of gift.

The level of uncertainty becomes even more confusing when a comparison is done between the

conclusions reached in *Pecore* and its sister decision, *Saylor* which is summarized below. Abella, J. dissented in both cases and stated that the facts in both cases were quite similar. In both cases, a parent transferred assets into a joint account with a child and gave the same child power of attorney. As well, in both cases the account provided for a right of survivorship. Abella, J. stated that a parent's wish to have their child manage their affairs during their lifetime is not at all inconsistent with the wish to make a gift on death. She further stated that the presumption of advancement ought to follow any gratuitous transfers from a parent to their child, based on the natural affection that a parent presumably has for their child. Unfortunately, given that often the challengers in cases like these may also be children of the testator, it may be argued that the parental affection argument militates equally for the presumption of resulting trust.

The case also leaves open the question of how the courts will decide cases which involve transfers of funds to dependant children. Rothstein, J. stated that the presumption of advancement should not apply to dependant children, because it would place the judges in an impossible position to determine which children are dependant. Nevertheless, he also asserted that evidence of dependance and the degree of such dependance may be strong factors in establishing an intention to transfer beneficial ownership. Thus, it seems that, where evidence of dependance is introduced in such cases, the courts will have to engage in the very determination that Rothstein J. wanted to steer clear of.

Overview of the *Madsen Estate v Saylor* Case

A father made his daughter a joint signatory to the accounts, which provided a right of survivorship. The father maintained control of the accounts in his lifetime and the daughter did not use the funds while he was alive. Additionally, he granted her a power of attorney. On the death of her father, 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 SCC upheld the trial judge's finding that the transferee had not sufficiently met her evidentiary burden to rebut the presumption of resulting trust. Thus, the accounts in dispute formed part of the transferee's estate upon death and were to be divided equally among the beneficiaries to his will.

Grounds for decision

Rothstein, J., again wrote the decision for the majority in this case and held that although the trial judge erred in determining that there was no evidence to support an intention to transfer a beneficial interest in the disputed accounts, her conclusion was correct. The Court concluded that the trial judge ignored evidence that should have been considered. This evidence consisted of financial documents, i.e. an account agreement, as well as the fact that the father had chosen to include a right of survivorship in the account agreements and the transferee's testimony as to her father's wishes. Rather than sending the case back for retrial, the Court asserted its jurisdiction to consider the evidence, but determined that it was not sufficiently persuasive to change the outcome of the case.

In interpreting the wording of the banking documents, the Court found them to be written insufficiently clear and for that reason gave them little weight in determining the intention for the transfer. The Court thus accepted the finding of the trial judge that the transferee's testimony was not candid and at times conflicting. The transferee's lack of candour,

along with her failure to obey previous court orders to produce estate files removed without authorization, led the Court to the conclusion that her testimony could not be relied upon.

The conclusion of the Court after reviewing the evidence of the bank documents and the transferee's testimony, was that there was not enough evidence to successfully rebut the presumption of resulting trust.

Conclusion

It can be seen through analysing both cases that *Saylor* stands to reaffirm the principles set out in *Pecore*. These cases compliment each other and together provide a definitive statement of the law concerning the presumption of advancement, which is now only applicable to transfers from a parent to a minor child. Unfortunately, *Saylor* does not add anything to the issue of what sort of evidence is sufficient enough to rebut the presumption. As courts retain a wide discretion in assigning weight to evidence, legal certainty on this issue will remain elusive.

It is important to note that the difference in conclusions in *Pecore* and *Saylor*, is due in part to the credibility of the oral evidence regarding intentions of the transferor. In *Pecore*, testimony provided by the transferor's 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'.