

The Complexities Surrounding Joint Ownership in Canada

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Joint Ownership in Canada

Overview

- Joint ownership, joint tenancy, joint accounts, and the presumption of resulting trust
- Joint assets as vehicles for abuse
- Remedies that can be used in the face of abuse
- Recent court treatment and divergence across Canada

JOINT OWNERSHIP

Joint Tenancy

Joint Accounts

Joint Tenancy

- Form of co-ownership of real property
- Commonly used in estate planning and between spouses, or parents and children concerning real property
- Central characteristic: the right of survivorship → when one tenant dies, their interest in the property is extinguished and passes to survivor



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Joint Accounts



Often a joint account is created between an older parent and their adult child for the purpose of assisting the parent in managing finances



Can be an effective and convenient estate planning tool



Comes with many unintended consequences

Legal and Beneficial Ownership

- Where it concerns the ownership of property, there are two types of ownership:
 1. Legal; and
 2. Beneficial
- Joint ownership is appealing because of its convenience and benefits:
- Ability to manage property without the consent of the other owner
 - Probate (N.B. Jurisdictionally relevant) taxes on jointly owned property are only payable on the death of the final joint owner
 - Jointly owned assets can pass without being probated (jurisdictionally specific)

Joint Assets as Vehicles for Abuse

- A growing number of individuals transferring assets into joint ownership may be vulnerable
- Approx. 7.6M Canadians over the age of 65
- Approx. 26% of Canadians over the age of 15 had one or more disabilities impacting their daily activities
- Within these populations, an estimated 1 in 10 older adults experience abuse or neglect
 - This figure could be much higher as abuse/neglect is under or unreported

Presumption of Resulting Trust

- Traces its origins back to 15th century England
- Presumption arises in two scenarios:
 1. Where an individual acquires rights gratuitously; and
 2. Where an express trust fails to fully dispose of a beneficial interest.
- In *Pecore*, the Supreme Court of Canada confirmed that the law presumes that the recipient of a gratuitous property transfer holds that property on resulting trust for the donor



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Pecore - 17 years later

- *Pecore* established rules and limitation surrounding the treatment of gratuitous transfers of assets from parents to adult children and addressed the type of evidence that can be used to demonstrate intention
- 17 years later, courts are still looking closely at the intention of the transferor at the time the transfer was made
- There is still, however, uncertainty regarding the role of intention in determining the existence of a resulting trust
- Post-*Pecore* we have also seen a noticeable increase in decisions which look closely at the role capacity and undue influence play in determining intention



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Adult Children and Joint Assets

- Favourable treatment of one or some children over others can lead to litigation, especially once relationships become strained
- *Simard v. Simard*, [2021 BCSC 1836](#) provides an example:
 - Daughter named sole beneficiary to mom's accounts
 - Three other children were estranged from mom, and brought a claim that her accounts were held on resulting trust – drawn out litigation ensued
 - RRIF's determined to be gifts, but remaining accounts determined to be held for the estate on resulting trust
- Interestingly, *Simard* does not place weight on the quality of the relationship in the determination of resulting trust

The Gift of Right of Survivorship

Pecore established the gift of right of survivorship:

- A joint tenancy is gratuitously placed on title with no beneficial interest in the property during the lifetime of the donor, but if the donee survives the donor, the donee will receive the entire property by right of survivorship

Ontario's Approach & Diverging Treatment

- Severing Joint Tenancy
- Gift of the Right of Survivorship in *Jackson v. Rosenberg*
- Ontario's approach to Undue Influence in challenging a Power of Attorney

Severing a Joint Tenancy

- Joint tenancy can be converted into a tenancy in common unilaterally by any joint tenant
- Severance requires clear, unequivocal action (ie., Registering the severance on title to the property)
- *Hansen v. Hansen*, [2012 ONCA 112](#) criteria



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Diverging Approaches to Severing Joint Tenancy

- In Manitoba and B.C., a joint tenant is free to sever a joint tenancy
- However, in Saskatchewan and Alberta:
 - Once the right of survivorship is gifted, the transferor cannot sever the joint tenancy
 - *Pohl v. Midtal*, [2017 ABQB 711](#), aff'd 2018 ABCA 403;
Thorsteinson Estate v. Olson, [2016 SKCA 134](#)

Jackson v. Rosenberg 2023 ONSC 4403

- Applicant intended to gift the right of survivorship, but did not intend to gift the property during his lifetime and intended to retain control of the property throughout his life
- Held: presumption of resulting trust was partially rebutted

Jackson v. Rosenberg 2023 ONSC 4403

- In support of finding, the decision in *Jackson* referenced BC's approach pursuant to *McKendry v. McKendry*, [2017 BCCA 48](#):
 - An *inter vivos* transfer of the right of survivorship is properly characterized as a gift, even though there is the possibility that the severance of the joint tenancy could rob this gift of any value

Jackson v. Rosenberg 2023 ONSC 4403



Prior to *Jackson*, the Ontario Court of Appeal had yet to weigh in on survivorship in the face of a severance post-*Pecore*



Jackson held that severance of the joint tenancy eliminated Ms. Rosenberg's right of survivorship in respect to Mr. Jackson's 50 percent share – but Mr. Jackson could not revoke the right of survivorship with respect to Ms. Rosenberg



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Jackson v. Rosenberg 2023 ONSC 4403



The Ontario Court of Appeal upheld the trial decision and dismissed Ms. Rosenberg's appeal, however, invited further submissions regarding the remaining share and resulting trust

Jackson v. Rosenberg, 2025 ONCA 48 granted an order vesting 100 % of the beneficial interest in the property to Mr. Jackson

Undue Influence – POA Challenges

- Uncertainty in the law concerning which approach to take in attacking a Power of Attorney
- In *Vanier v. Vanier*, [2017 ONCA 561](#), Ontario took the approach that the test to be applied is the wills doctrine of testamentary undue influence
- In *Drewniak v. Smith*, [2024 MBCA 86](#), Manitoba took the opposite approach: the test to be applied is the equitable approach to undue influence



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Remedies for Abuse

It is important for practitioners to be aware of the tools available to assist clients who have fallen victim to financial abuse

In many circumstances, the use of declaratory relief, the law of restitution, and doctrines in equity can be relied upon for an appropriate remedy

Law of Restitution

- A court can declare although an abuser may have “legal” title to property, the “beneficial” title belongs to the victim
- An abuser can be “unjustly enriched” where a benefit has been given to them, to the detriment of the older adult and there is no lawful reason for it to have happened
- Where unjust enrichment is established, the court can order the money be paid back to the older adult, or order that the property the abuser holds is being held “in trust” for the older adult



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The Application of Equitable Doctrines

In advancing a claim in equity, the party seeking equitable relief must first establish facts under which the law of equity applies. Some common forms of equitable relief include:

- Declaratory orders
- Relief against penalties
- Injunctions
- Specific performance
- Restitution
- Damages in equity
- Rescission; accounting; and rectification
- Financial compensation for breach of confidence

Relevant Equitable Doctrines

Undue influence

- Used to set aside certain *inter vivos* gifts/wealth transfers/transactions or planning and testamentary documents executed/procured through the exertion of influence on the mind of the donor

Unconscionability

- Used to set aside a contract that offends the conscience of a court of equity

Lack of Independent Legal Advice

- Used to assist where there are allegations of undue influence

Non-Est Factum

- Defence available to someone who has been misled into executing a deed/signing a document that is fundamentally different from that which they intended to execute or sign

The Importance of ILA

Practitioners must have a clear understanding of not only the importance of ILA but also, who their client is:

- *Gold v. Rosenberg*, [1997 CanLII 333 \(SCC\), \[1997\] 3 SCR 767](#): whether someone has received ILA is dependent on two concerns – whether they understand what is proposed to them and whether they are free to decide according to their own will
- *Cowper-Smith v. Morgan*, [2016 BCCA 200](#) identified considerations that are relevant to the assessment of legal advice provided to a donor (the “Coish” factors).



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Declaratory Relief

Judges have discretion to grant declaratory judgments (an equitable remedy)

Declaratory judgments may be appropriate where:

1. The court has jurisdiction to hear the issue;
2. The dispute is real and not theoretical;
3. The party raising the issue has a genuine interest in its resolution;
and
4. The responding party has an interest in opposing the declaration being sought

Caselaw – *Hugginson v. Hugginson*

Hugginson v. Hugginson, [2025 ONSC 1797](#)

- Determination of validity of a \$400k *inter vivos* gift
- The “gift” was never perfected, and the Deceased’s intention was never proven
- Court looked to law of gifts in *McNamee v. McNamee*, [2011 ONCA 533](#) – three elements that must be satisfied:
 - 1) Specific intention to make a gift; 2) delivery of the gift; 3) acceptance by the recipient

Caselaw – *Balkinsson v. Sandy*

Balkinsson v. Sandy, [2025 ONSC 856](#)

- Mother funded a Brampton property registered to her son but after a deterioration in the relationship, claimed property held on resulting trust
- Court looked at contemporaneous text messages from the mother as evidence of her intention to gift the property as an early inheritance
- Respondents held to have successfully rebutted the presumption of resulting trust and established the property was in fact a gift

Caselaw – *Doherty v. Doherty*

Doherty v. Doherty, [2023 ONCA 763](#)

- Over \$700K missing from older adult's joint account
- Son who acted under POA and transferred funds into a joint account he held with his wife and son
- Funds were used to renovate mom's home, then sold the house with the POA on title, below market value
- Capacity assessor evidence was persuasive in rebutting any intention to gift

Caselaw – *Re Hartin Estate*

Re Hartin Estate, [2024 ONSC 5754](#)

- An Attorney exercised undue influence over her mother – had her sign POA documents she downloaded off the internet without benefit of ILA
- Acting on POA, daughter had mail redirected and deposited mom's funds into a new joint account held with her
- Respondent unable to demonstrate that the Deceased had intended to gift her the right of survivorship to the assets left in the joint account at the time of her death



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QUESTIONS OR COMMENTS?

Thank you!

