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Issues Relating to the Joint Ownership of Property

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Introduction

In 2007 the Supreme Court of Canada released their decision in *Pecore* v. *Pecore*[1]. Although the principles which *Pecore* reaffirms are not new, the case clarified the law surrounding joint-ownership of property, and brought to the forefront of the minds of many in the legal community the issues surrounding joint-ownership. The courts have now had several years to consider the implications of *Pecore* as it relates to the joint-ownership of property, and have released decisions both for and against the presumption of resulting trust relating to it. This paper aims to explore the principles of joint-property ownership as discussed in *Pecore*, the impact that *Pecore* has had on the decisions which have followed it, and addresses some of the issues that still surround joint-ownership of property.

Pecore

In *Pecore*, the deceased placed the bulk of his assets into a joint account with one of his three daughters. The daughter did not make any contribution to this account. During his lifetime, the deceased used and controlled the account, and paid taxes on the income earned on the money in the account. The claim in *Pecore* was made by the daughter's husband, from whom the daughter was divorced. The daughter's husband, who was a beneficiary under the deceased's Will, claimed that the daughter held the joint accounts in trust for the deceased's estate. Ultimately, it was found that the funds on deposit in the accounts were gifted to the daughter, and did not form part of the deceased's estate.

In *Pecore*, the Supreme Court of Canada reaffirmed and modernized the role and applicability of the presumption of resulting trust and the presumption of advancement.

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[1] 2007 SCC 17

The presumptions of advancement and resulting trust are legal tools which assist in determining the transferor's intention at the time a gratuitous transfer is made, particularly when the transferor has died. A resulting trust arises when title to property is in one party's name, but that party, because s/he is a fiduciary or gave no value for the property, is under an obligation to return it to the original title owner. If the presumption of resulting trust applies, the transferor is presumed to have intended to retain the beneficial ownership of the property at issue. The burden of proving that a gift *was* intended is on the recipient of the gift. The presumption of advancement evolved as a limited exception to the presumption of resulting trust, generally arising in cases of gratuitous transfers in parent-child and spousal relationships. If the presumption of advancement applies, an individual who transfers property into another person's name is presumed to have intended to make a gift to that person. The burden of proving that the transfer was not intended to be a gift, is on the challenger to the transfer.

As stated by the Supreme Court of Canada, these presumptions provide a guide for courts in resolving disputes over gratuitous transfers of assets where evidence as to the transferor's intent in making the transfer is unavailable or unpersuasive. The presumptions are rebuttable, and the standard is the civil standard of proof on a balance of probabilities (not the criminal standard of beyond a reasonable doubt).

The presumptions can be rebutted by evidence showing the transferor's actual intention. This evidence of intention might consist of the wording of the documents, the use of the property, the tax treatment of the property, and evidence of actual intention, such as discussions that the deceased had with the parties, or with other advisors. The wording of a deceased joint owner's Will shall also be relevant. Notwithstanding the existence of the presumptions, the Supreme Court of Canada noted that the focus of the inquiry is still the

actual intention of the transferor. The utility of the presumptions is due to the fact that the intention of the transferor is usually so difficult to ascertain.

Accordingly, based on *Pecore* and other applicable case law, joint assets, on death of one of the joint owners, will be distributed either: (1) directly to the deceased joint owner's estate; or (2) directly to the surviving joint owner. If there is a dispute regarding distribution, the courts will look to evidence regarding the intentions of the joint owners, particularly the deceased joint owner, to decide the matter. *Pecore* held that the presumption of advancement applies to transfers of property by parents into joint ownership with their minor children. It will not apply to transfers by parents to their adult children, whether or not the children are independent or dependant (the court held that defining dependency with any degree of certainty was too difficult).

Historically the presumption of advancement applied when a man transferred property jointly into the names of himself and his wife, or himself and his child.[2] If you held property in either of these situations, this alone would be enough to rebut the presumption of resulting trust and allow the property to pass to you by way of survivorship. As has already been shown, *Pecore* did away with the presumption of advancement with respect to property held jointly between a parent and adult child, regardless of dependency (it still applies for minors).

In common law Canada the presumption of advancement as it relates to spouses has largely disappeared[3]. In 1975, Ontario introduced legislation that abolished the

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[2] Donovan W.M. Waters, ed., *Waters' Law of Trusts in Canada*, 3rd ed., (Toronto: Thomson Carswell, 2005) at 378.

[3] Donovan W.M. Waters, ed., *Waters' Law of Trusts in Canada*, 3rd ed., (Toronto: Thomson Carswell, 2005) at 379.

presumption. Currently, section 14 of the *Family Law Act* states that the rule of law applying a presumption of a resulting trust shall be applied in questions of the ownership of property between spouses, as if they were not married, except that, (a) the fact that property is held in the name of spouses as joint tenants is proof, in the absence of evidence to the contrary, that the spouses are intended to own the property as joint tenants; and (b) money on deposit in the name of both spouses shall be deemed to be in the name of the spouses as joint tenants for the purposes of clause.

Impact

How Pecore Has Been Applied

In the four years or so that have passed since *Pecore* was decided, the courts have had the chance to consider the case on several occasions and in various contexts. In decisions ranging from disputes involving family law, estates law, to even the seizure of property as a result of a crime[4], parties have argued both for and against the presumption of resulting trust using the framework as laid out by *Pecore*. Throughout all of these diverging fact patterns, however, one thing has held true. No matter the facts of the case before the court, the court will always look to what the intention of the transferor was at the time the transfer was made. Change of hearts after the fact, and trying to argue for or against a resulting trust only after things have gone wrong, will usually result in an unfavourable court ruling. If ever there was a practice tip it is this: if you are assisting a client in transferring property into joint-ownership, make sure to accurately record the intentions of the transferor at the time the transfer is made to determine if they intend the transfer to be a gift.

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[4] See *R. v. Sodhi*, 2011 ONCJ 301, in which a mother unsuccessfully tried to argue that a house that was seized from her son for its connection to a marijuana grow-operation was rightfully hers by way of resulting trust.

In *Simcoff v. Simcoff*[5] the Manitoba Court of Appeal had to consider a case in which a mother transferred title to a property to herself and her son as joint-tenants. Subsequent to transferring title, the mother and the son had a falling out, and the mother filed an Application with the Court seeking a declaration that she was the sole owner of the property by way of resulting trust. The Court concluded that even though the mother was now arguing that she never intended her son to have the right of survivorship, on the evidence presented, it appeared that when the mother transferred the property to her son as a joint-tenant she intended for him to have the right of survivorship. In coming to this conclusion, it relied heavily on the fact that the mother understood the meaning of registering the property in joint-names at the time she transferred the property.

Simcoff does an excellent job at demonstrating that what is most relevant in the eyes of the court is the intention of the transferor at the time that the transfer was made. Here the transferor herself was saying that she never intended the property as a gift. Despite this, the Court looked to the evidence available around the time the transfer was made and concluded that she intended to gift the property to her son.

A large number of the cases that have been decided post-*Pecore* have been family law disputes. In *Harrington v. Harrington*[6] the court had to deal with a situation in which, during the marriage, the husband's father granted a power of attorney in favour of his son, and had placed his bank account jointly in the names of himself and his son. The husband and wife subsequently separated, and the wife sought to include the bank account in the husband's net-family-property. At the time of separation, the bank account had $640,000 in it, $500,000 of which was the original deposit, and $140,000 of which was income/growth. At

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[5] 2009 MBCA 80

[6] 2009 CarswellOnt 159 (ONCA)

trial, the Court ruled that the presumption of resulting trust applied, and the bank account was not available for equalization. On Appeal however, it was held that while the original $500,000 reverted back to the father by way of resulting trust, on the evidence it appeared that the father intended the $140,000 in growth to be his son's, and as such was available to form party of the husband's property.

As can be imagined, a large number of cases decided post-*Pecore* have been estate matters in which a parent has placed an asset into joint-ownership with a non-dependant child, and following the death of the parent a dispute arose over whether the property reverted to the estate.

In *N.(J.C.) v. H.(R.J.)*[7], a father transferred his bank accounts and title to his home into joint-ownership between himself and his son eight years prior to his death. In determining if the presumption of resulting trust could be rebutted, the Court looked to whether the Deceased understood the nature of joint-property ownership at the time the transfer was made. It found that as the notary had explained to the Deceased the nature of joint-property ownership, and that his son would eventually get the asset, that the presumption of resulting trust had been rebutted, and the house was the son's by right of survivorship.

In *Doucette v. Doucette Estate*[8], the Court found that the presumption of resulting trust applied to the assets in question. In this case, the Court had to determine if joint-investment accounts that were held jointly between a mother and several of her children were gifts and passed by right of survivorship, or if they reverted back to the estate by way of resulting trust. In coming to its decision, the evidence presented by the children was not persuasive.

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[7] 2007 BCSC 820

[8] 2007 BCSC 1021

The Court found that as none of the children had contributed to the joint-account, that the income derived from the account was solely for the benefit of the mother, that the income tax on the joint-accounts was paid solely by the mother, and that none of the children were aware of the joint-accounts until after their mother's death, that the presumption of resulting trust could not be rebutted. As such, the joint-accounts reverted back to the estate.

Issues Surrounding Joint-Ownership of Property

Joint Ownership Between Attorneys and Grantors of Powers of Attorney for Property

Despite the breadth of an attorney's power under the *Substitute Decisions Act*,[9] it is subject to significant qualification. As a fiduciary, the attorney will be held to the standard of care detailed therein[10], and has certain common law duties (in addition to any duties particularized in the power of attorney document), including to exercise reasonable care, not to make a profit for him/herself and not to act contrary to the interests of the grantor[11].

An attorney is not to dispose of specific property that he/she knows is subject to a testamentary gift in the incapable person's Will, unless it is necessary to do so to otherwise comply with the attorney's duties.[12] Given that this restriction refers to "know", there is room for debate about whether or not the attorney took appropriate steps to "know" by reviewing the Will or obtain information about its contents.[13] While the *SDA* requires the attorney to

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[9] For example: to complete transactions (Section 34), to make expenditures (Subsection 37(3)), to receive annual compensation (Section 40) and to apply to the court for directions (Subsection 42(2)).

[10] Subsections 32(7) or 32(8) of the *SDA*.

[11] *Canadian Estate Planning Guide* (CCH Canadian Limited, 1995) at 9008.

[12] Section 31.1 of the *SDA*.

[13] Clare A. Sullivan, "Living with the Substitute Decisions Act, 1992: Some Practical Guidance", *Canadian Bar Association - Ontario*, June 2,.2000 (Toronto: Canadian Bar Association, 2000) at page 22.

make "reasonable efforts" to determine whether the incapable person has a Will and, if so, to determine what its provisions are[14], this does not close the door on possible disputes over whether the attorney took sufficient steps in this regard.

The accountability provisions of the *SDA* have not been fully tested, leaving uncertainty regarding the parameters of an attorney's functioning. That said, the decisions being made appear to reveal the courts' leaning towards a strict construction of the scope of an attorney's authority to act. Comingling assets and placing assets into joint ownership with the donor should obviously be avoided, and this is conduct that the courts do not appear to be tolerating.

For example, in *Volchuk v. Kotsis*[15], the Court disallowed a series of purported gifts (cheques and money transfers) effected by an attorney, noting, in addition, that attorneys were precluded from relying solely on their own evidence by section 13 of the *Ontario Evidence Act* (which provides that evidence must be corroborated by other material evidence).

Further, in *Biamonte Estate v. Ward Estate*[16], a property owned by three deceased persons as tenants in common, and ultimately conveyed by an administrator of one of these estates to benefit her son, was found to be an improper exercise of the power of attorney. The trial judge commented that the transaction "reeks of fraud" and that it should be set aside.

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[14] Section 33.1 of the *SDA*.

[15] 2007 CanLII 28527 (ON S.C.)

[16] 1999 CarswellOnt 4211.

In addition, in *McMullen v. McMullen*[17], an elderly widower commenced an application against two of his three daughters, who held his power of attorney. The daughters transferred a 99% interest in the father's condominium property to their husbands to preserve their father's asset (the daughters alleged that their father's investments had been depleted due to a new female acquaintance). The Court declared the condominium transfer null and void. While the daughters acted in what they considered to be in their father's best interests, there was nevertheless no evidence to show that the father was incapable of managing his financial affairs. The daughters had therefore breached their duties as attorneys by acting contrary to their father's intentions.

These types of decisions should serve as a caution to lawyers to fully explore the circumstances of a case when being asked to effect a transfer of real estate involving an attorney for property.

Avoidance of Probate Fees

One of the leading reasons that a client may wish to place assets in joint-ownership is the avoidance of probate fees. With respect to which assets you must pay probate fees on, the *Estate Administration Tax Act, 1998* defines the "value of the estate" as "...all the property that belonged to the deceased person at the time of his or her death..."[18] As joint-property vests in the co-owner of the property immediately before the time of death of their co-owner, the asset cannot be said to belong to the deceased person at the time of their death.

The issue of avoiding probate fees through the transferring of property by way of joint-ownership was raised in *Pecore*. The Supreme Court of Canada states:

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[17] [2006] B.C.J. No 2900.

[18] S.O. 1998, c. 34, Sched., s. 1

> "Should the avoidance of probate fees be of concern to the legislature, it is open to it to enact legislation to deal with the matter."[19]

The Supreme Court of Canada gives the clear implication that as it currently stands, placing assets in joint-ownership is a legitimate way to avoid probate fees, and unless the legislature changes the legislation as it relates to the subject this tax-avoidance measure will continue to be permitted.

But what if following the death of a person who placed property in joint-ownership with an individual in order to avoid probate fees, the property reverts back into the estate by way of resulting trust? Would the tax advantage of avoiding probate fees be undone with the property reverting back to the estate?

Although it has not seem to have been tested by the courts, the answer to this problem may come in the form of a secondary will. Creating a secondary will to avoid probate fees is a tool often used by estate planning lawyers. By placing a clause in the secondary will stating that any assets that revert back to the estate by way of resulting trust are to be distributed according to the terms of the secondary will, you may avoid probate fees, even should it be determined that assets that were intended to be passed by way of joint-ownership revert back to the estate by way of resulting trust.

In *Pecore* the Supreme Court of Canada states:

> "[Unless the presumption is rebutted] the assets will be treated as part of the transferor's estate to be distributed according to the transferor's will. "[20]

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[19] *Supra* note 1 at para. 54

[20] *Supra* note 1 at para. 53.

If there is a direction in a secondary will (which is not being probated) that all assets that revert back to the estate by way of resulting trust are to be distributed according to the provisions of that will, it would logically follow that by placing this clause in the secondary will you could shield these assets from probate. Although careful consideration should be given to the fact-specific circumstances and the property owned by the individual.

Is it worth it?

With the objective of avoiding probate fees and having assets pass outside of a person's will, many testator's may view joint-ownership of property as helpful. This, however, is not always the case. Some of the potential pitfalls of joint-ownership of property between a parent and child include, but are not limited to[21]:

a) The property cannot be sold or mortgaged without the child's consent;

b) The exposure of the property to claims against the child arising out of financial or martial problems;

c) The income tax consequences of a deemed disposition at fair market value;

d) If the property is the parent's principal residence, the loss of one-half of the principal residence exemption for the years following the transfer during which the child is not living in the property; and

e) The possible deemed severance of the property if it is being used by the child as his or her matrimonial home and the child predeceases the transferor.

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[21] Barry S. Corbin, "How Not to Avoid Probate Fees" (1996) 16 E. & T.J. 169 at 172.

These potential pitfalls should be raised with the client at the time they are deciding whether to place assets into joint-ownership, as they should turn their minds as to whether the potential to avoid probate fees is worth some of these risks.

Conclusion

With the Supreme Court of Canada's decision in *Pecore*, joint-ownership of property has again come to the forefront of the minds of many within the legal community. If used in the appropriate circumstance, joint-ownership of property can be an excellent tool to help avoid probate fees, and can allow for the easy transfer of an asset to an intended beneficiary following death.

No matter the circumstance, if a person is considering placing assets into joint-ownership, the intention of the transferor regarding if they want the right of survivorship to apply must be properly recorded. By doing this one thing, costly litigation may be avoided, and the true intentions of the deceased can be realized.