<u>**Trusts Equity**</u>
Fall Term 2018

Lecture Notes – No. 9

A. RESULTING TRUST: THE CONCEPT

In comparison to express trusts that arise exclusively upon the intention of the settlor, *resulting trusts* and *constructive trusts* ‘arise by operation of law’. They are not private trusts but rather legal responses to some precipitating event or state of affairs; they are *reactive*, although there may not necessarily be any form of wrongdoing involved.

Resulting trusts are not disassociated from intention altogether – we may look to the intention of the settlor in dispossessing himself or herself although that intention may be presumed, rebuttably or irrebuttably.

Constructive trusts are much different and are imposed without reference to the parties’ intentions; indeed, they are imposed against the wishes of the settlor (now trustee).

According to the orthodox classification there are two main categories of resulting trust based upon either the *presumed intent* of the settlor (which may be rebutted, for example in the case of a gratuitous transfer that is properly a gift) or that arise *automatically* in response to certain types of events (e.g. where an express trust fails because not all proprietary interests are accounted for in the settlement, or, where the trust is voided for illegality).

In **Re Vandervell's Trusts (No. 2) [1974] Ch. 269**, Megarry J described the orthodox view of the two types of resulting trusts:

> (a) **The first class of case is where the transfer to B is not made on any trust ... there is a rebuttable presumption that B holds on resulting trust for A.** The question is not one of the automatic consequences of a dispositive failure by A, but one of presumption: the property has been carried to B, and **from the absence of consideration and any presumption of advancement B is presumed not only to hold the entire interest on trust, but also to hold the beneficial interest for A absolutely.** The presumption thus establishes both that B is to take on trust and also what that trust is. **Such resulting trusts may be called "presumed resulting trusts".**
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> (b) The second class of case is where the **transfer to B is made on trusts which leave some or all of the beneficial interest undisposed of. Here B automatically holds on resulting trust for A to the extent that the beneficial interest has not been carried to him or others.** The resulting trust here does not depend on any intentions or presumptions, but is the automatic consequence of A's failure to dispose of what is vested in him. Since ex hypothesi the transfer is on trust, the resulting trust does not establish the trust but merely carries back to A the beneficial interest that has not been disposed of. **Such resulting trusts may be called "automatic resulting trusts".**

Megarry J. was reversed in the Court of Appeal on a formalities point, but no doubt was cast on this analysis, which had long been thought to be definitive.

Lord Browne-Wilkinson’s later classification in ***Westdeutsche v Islington BC* [1996] 2 All ER 961** is similar, but not identical, to Megarry J.'s:

> (A) where A makes a voluntary payment to B or pays (wholly or in part) for the purchase of property which is vested either in B alone or in the joint names of A and B, there is a presumption that A did not intend to make a gift to B: the money or property is held on trust for A (if he is the sole provider of the money) or in the case of a joint purchase by A and B in shares proportionate to their contributions. It is important to stress that this is only a presumption, which presumption is easily rebutted either by the counter-presumption of advancement or by direct evidence of A's intention to make an outright transfer: see Underhill and Hayton, *Laws of Trusts and Trustees,* 15th ed., pp. 317 et seq.; *Vandervell v IRC* [1967] 2 AC 291, 312 et seq.; *In re Vandervell's Trusts (No. 2)* [1974] Ch. 269, [1974] 3 All ER 205, at page 288 et seq. of the former report.
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> (B) Where A transfers property to B on express trusts, but the trusts declared do not exhaust the whole beneficial interest: ibid. and *Quistclose Investments Ltd. v Rolls Razor Ltd (In Liquidation)* [1970] AC 567, [1968] 3 All ER 651. Both types of resulting trust are traditionally regarded as examples of trusts giving effect to the common intention of the parties. A resulting trust is not imposed by law against the intentions of the trustee (as is a constructive trust) but gives effect to his presumed intention.
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> Megarry J in *In re Vandervell's Trusts (No.2)* suggests that a resulting trust of type (B) does not depend on intention but operates automatically. I am not convinced that this is right. If the settlor has expressly, or by necessary implication, abandoned any beneficial interest in the trust property, there is in my view no resulting trust: the undisposed-of equitable interest vests in the Crown as bona vacantia: see *In re West Sussex Constabulary's Widows, Children and Benevolent 1930) Fund Trusts* [1971] Ch. 1, [1970] 1 All ER 544.

The distinction between the traditional classification and this new one is in respect of the role of intention in giving rise to a resulting trust. Thus, whereas the orthodox classification would not use intention at all in certain circumstances (the ‘automatic’ resulting trust that arises where all beneficial interests are not completely disposed of in a transaction for example), Lord Browne-Wilkinson’s formulation looks to intention to rationalise the trust (all trusts are presumed resulting trusts).

The most recent decision of the Supreme Court of Canada, **Kerr v. Baranow 2011 SCC 10,** which we will consider in its own context, is disappointing in that the Court chose not to comment on the current state of thinking on nature of the resulting trust in Canada.

Hodgson v Marks
[1971] Ch 892 (CA)

Here the widow Hodgson transferred her house to her lodger who sold it to Marks (and who mortgaged it in favour of a third party financial institution). The dynamics between the parties are readily apparent from the trial judge's description of the lodger: he 'was a very ingratiating person, tall, smart, pleasant, self-assured, 50 years of age, apparently dignified by greying hair and giving the impression to one of the defendants' witnesses of a retired colonel.' The widow thought that her nephew would put the lodger out on her death and so she intended to, in essence, leave him a life interest - but of doing so, she merely transferred title and assumed a trust limiting the lodger's interest was effective (which it wasn't, for lack of formalities). At trial, the judge allowed an oral trust to be proved. On appeal, it was held that a resulting trust arose. The further transfer to the innocent party Marks was ineffective as the lodger had no beneficial interest to sell (*nemo dat quod non habet*, 'no one can give what he does not have').

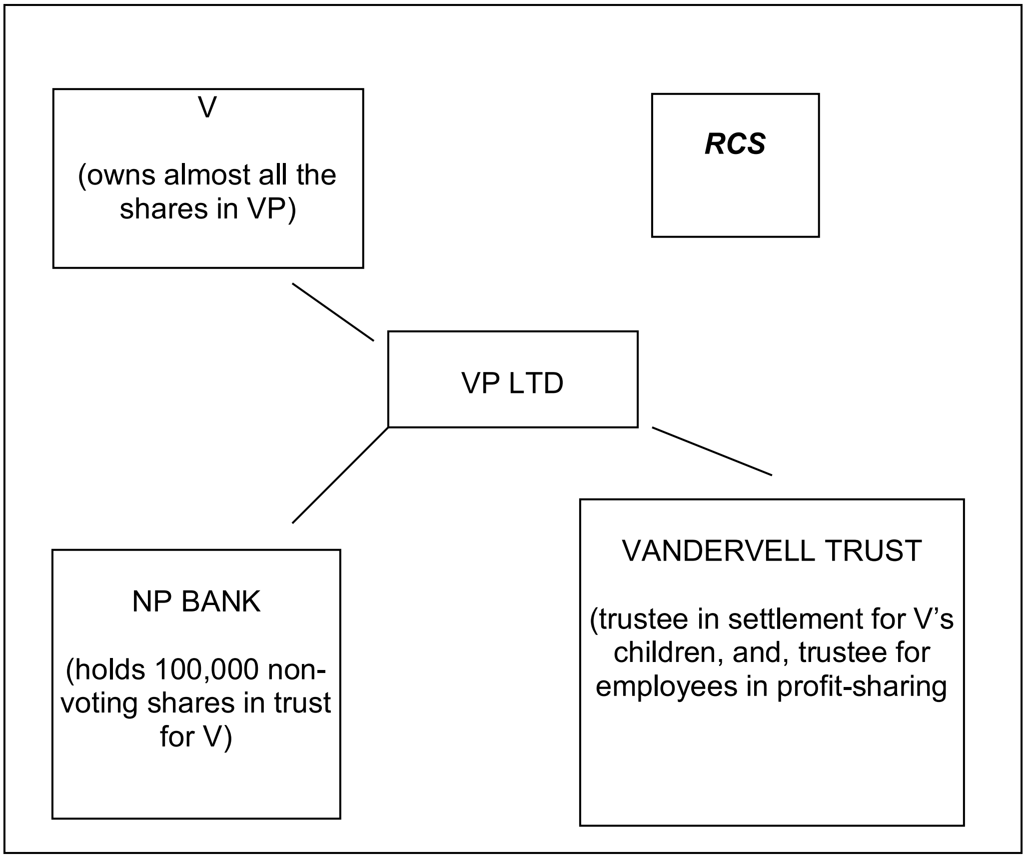
The judgement seems wrong. The widow *did* intend to benefit the lodger (but not to the extent he claimed) and *did* intend for title to vest in him. The trust is really more consistent with a constructive than a resulting trust: that is, the lodger acted deceitfully.

RESULTING TRUST AS A RESPONSE TO THE FAILURE OF EXPRESS TRUSTS

Where an express trust fails there is an *automatic resulting trust*. We presume that the settlor intended the subject-matter to return to him or her rather than being retained. Later we will consider whether the better explanation is one predicated on unjust enrichment with a judicially constituted trust merely being the remedial vehicle.

Vandervell v. IRC
[1966] Ch 261

Vandervell wished to make a gift to the Royal College of Surgeons in order to endow a Chair of Pharmacology. They needed about £150,000. He was equitable owner of a substantial number of shares in Vandervell Products Ltd, a private limited liability company which he controlled (which made, among other things, Vanwall racing cars). The legal interest in Vandervell's shares was held by a bank as nominee. In order to endow the Chair, he arranged with the bank orally (presumably to avoid tax on dispositions) to transfer both legal and equitable interests in these shares to the Royal College of Surgeons (RCS), giving a trustee company (Vandervell Trustees Ltd., which he controlled) an option to re-purchase them for £5,000 (well under the value of the shares). This enabled the RCS to receive dividends of some £266,000 (£157,000 net after tax), but since, as a charity, RCS was not liable to pay income tax, it hoped to claim the tax back. Because of the option to re-purchase, Vandervell did not irrevocably relinquish control of Vandervell Products. Vandervell Trustees Ltd had the legal interest in the option. But where was the equitable interest? If it remained in Vandervell himself, he would be liable to surtax, on the basis of s. 415 of the Income Tax Act 1952.



Plan:

1. V to transfer VP's shares (legal and equitable interests) to RCS, but VP to have an option to repurchase for £5000.

2. VP to declare dividends sufficient to endow the chair. RPC hoped to be not liable for tax on this amount; received some £266,000 gross, £157,000 after tax.

3. RCS to grant the option, which would be exercised after dividends paid.

Timeline:

1958: Arrangement for the donation executed: NP told to transfer the shares, RPC executed deed of option to VT. However, option did not say who VT would hold the shares for (V?).

1958-1961: Dividends paid by VP.

1961: IR assess V to sur-tax on the dividends paid to RCS on the basis that he did not completely divest himself absolutely of the shares.

House of Lords, [1967] 2 A.C. 291:

Issue: Whether the transfer of the shares to RCS was effective notwithstanding that it was not in writing.

3:2 for IR.

The HL accepted the argument of the IR; that is, as there was no beneficiary stipulated in the option, VT would hold on resulting trust for V rather than the children who were Bs of the VT. Thus, V had failed to divest himself completely.

1961: VT exercises the option and purchased the shares. Funds drawn from the VT trust settlement.

1962-1964: Dividends of £769,580 paid on the shares to VT, for the benefit of V's grandchildren.

1965: V transfers all his legal and equitable rights under the shares and option to VT for the benefit of the children.

1967: V dies; no provision made for children.

IR assess V's estate with sur-tax payable on the payment of the dividends during 1962-1964, on the basis that V retained beneficial ownership until the 1965 trust settlement. The Executor of V's estate sues VT seeking the dividends.

[1974] 1 All ER 47 (Ch); appeal allowed, [1974] 3 All ER 205 (CA):

Issue: Whether the VT held on a resulting trust for V subject to an equitable lien of £5000.

At trial, held by Megarry J for the Executor.

On appeal, appeal allowed on the basis that the fact that VT paid for the shares with the settlement money that belonged to the beneficiaries, held dividends for the children, and paid tax were all indicative of a trust in favour of the children. The exercise of the option = the creation of the trust; as the option was personal property, the trust need not be in writing.

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What else to know? Solicitors who draft trusts improperly may be liable for the costs of the clean up due to their own negligence. At the very least, LawPro (the professional insurer) reports that a sizeable number of claims occur in drafting wills and trusts arising from (i) failure to know the law and (ii) failure to investigate the facts. Both factors come together in complex trust settlements.

PRESUMED RESULTING TRUSTS: TRUST OR GIFT?

Where S transfers property to T without intending T to take that property beneficially, and where there is no presumption of advancement, there arises a *presumed* resulting trust over that property in favour of S.

Re Barrett
(1914), 6 OWN 267

The will contained a clause which read:

> 'I hereby give to my daughter, Sarah Frances Barrett, whatever sum or sums of money may be to my credit in any bank or upon my person or in my domicile at the time of my decease *for the purpose of enabling my said daughter to meet the immediate current expenses in connection with housekeeping*.'

The sum left in the estate for distribution was over $17,000 (adjusting for inflation, that's about $400,000 in current dollars).

Per Meredith CJO:

> It is very probable that if the testator had contemplated when he made his will that so large a sum as $17,200 would be at his credit in his bank at the time of his decease he would have made a different provision as to the disposition of it from that contained in para. 26, but that, in my opinion, affords no reason for putting a construction on the language of the testator different from that which would be placed upon it if the fund amounted to no more than $500. **My learned brother's view was that the legatee is not entitled to the fund absolutely, but that a trust is created, and that all money not needed for the purpose which the testator mentioned 'belongs to the estate as a resulting trust.' I am with respect unable to agree with this view and am of opinion that the clear words of gift to the daughter are not cut down or controlled by the statement of the testator as to purpose or object of the gift.**

This was then an attempt to interpret the will in a manner that revealed a modest gift with a remainder that would fall into residue in the manner in which a resulting trust operates. It really isn't a use of resulting trust principles at all, but does illustrate the use of the intention of the settlor to guide the legal characterization of the beneficial rights in the money.

Moffit v Moffit
[1954] 2 D.L.R. 841 (B.C.S.C.)

Surplus property after performance of trust: A charitable trust excluded the resulting trust where voluntary contributions are pledged for a purpose; where the purposes is completed and funds remain, a resulting trust accrues in favour of S if that was the intention (see), else, perhaps, gift or *bona vacantia*.

The Presumption Of Advancement

The presumption of resulting trust becomes a difficult issue when it meets its oppositional counter-part, the presumption of advancement. Here the equities are reversed unless the presumption of advancement doesn't apply on its own terms or because it has been abolished by statute. In such cases, one presumes that transfer of the beneficial interest was the probable intention of the transferor.

The presumption of advancement in its original form held that a gratuitous transfer between a man and his wife or natural child or one to whom he stands *in loco parentis* is presumed to be a gift; it allows the donee to "advance" or get-on in life.

The original rationale of the advancement rule is somewhat difficult to pin down – most continue to think that the basis is the satisfaction of the legal obligation of support between a man and his wife and children, especially in a time where they were economically dependent upon the man and he alone either held title to family property. One must remember that in early times in England a married woman held no property in her own name, and, the head of the family held title of the family estate to maintain the integrity of land-based wealth in a pre-industrial society. There were compelling social and economic interests in concentrating ownership of the property that was the larger family's wealth in one person's hands, and both the law of property in the common law courts and the application equity in Chancery reflected these dynamics. Would that satisfaction of legal obligations was the explicit rationale of the presumption of advancement in the older cases; unfortunately, the cases are inconsistent in approach and lead to little certainty in justifying doctrine. Indeed, this was decidedly an inquiry into gifting, not compelling support payments, and gratuitous transfers were recognised as advancements in a number of situations that are problematic for this elegant explanation of the equitable doctrine - for example, where the donee was of legal age and even independent of his father, or was already provided for, or was illegitimate, or where the *loco parentis* principle was liberally applied to a wider class of people that would not be the object of any enforceable legal obligation. No uniform principle can be found in the cases.

Pecore v Pecore
2007 SCC 17

A father placed his assets into a joint bank account with one of his three children (Paula). His other children were more financially secure than this child, and indeed one of the others was estranged from the father. The father acted, at least in part, based on the advice of a financial advisor who told him that probate fees would not be charged on jointly-held assets as they would operate outside the Will after his death. The father regarded the assets as his own during his lifetime, even representing himself as the 'real owner' to the Canada Revenue Agency in respect of tax liability (attempting to stave off liability for capital gains tax if the CRA chose to view the transaction as a present disposition of these capital assets to Paula). Paula had access to the account but only with notice to her father. At his death, a dispute arose between Paula and her quadriplegic ex-partner Michael, who was named as a residuary legatee in the father's Will. Were the assets part of the estate or were the assets owned in law and equity by Paula?

In **Madsen Estate v Saylor, 2007 SCC 18,** the mother and father had mirror Wills providing for a gift over to the survivor, and if there was no surviving spouse then the remaining estate was to be divided equally between the two classes of children and grandchildren. The mother died first and her assets passed to the father. The father later opened a joint bank account and a joint investment account with one of his three daughters (Patricia). The father declared and paid the taxes on the income. He controlled the account during his lifetime which was only used for his benefit. Eventually the father died, Patricia claimed the assets as her own, and her siblings naturally disagreed and brought an action against her in her role as executor of the father's estate. Were the assets part of the estate or were the assets owned in law and equity by Patricia?

The issue of the operation of the presumption of advancement was of course central to both *Pecore* and *Saylor*; and the question was really one that asked whether the presumption ought to operate in present social circumstances - *does it aid in determining what the transferor probably intended?* Rothstein J, for the majority in *Pecore v Pecore*, held it is not helpful where the child in not a minor:

> … given that a principal justification for the presumption of advancement is parental obligation to support their dependent children, it seems to me that the presumption should not apply in respect of independent adult children… [moreover] parental support obligations under provincial and federal statutes normally end when the child is no longer considered by law to be a minor… Indeed, not only do child support obligations end when a child is no longer dependent, but often the reverse is true: an obligation may be imposed on independent adult children to support their parents in accordance with need and ability to pay… [further] it is common nowadays for ageing parents to transfer their assets into joint accounts with their adult children in order to have that child assist them in managing their financial affairs. There should therefore be a rebuttable presumption that the adult child is holding the property in trust for the ageing parent to facilitate the free and efficient management of that parent's affairs.

Should the presumption apply, then, to dependant adult children based on the justification of a legal obligation of support owed to the adult child? No, held the majority of the Court, certainty and pragmatism argues to the contrary. Rothstein J held:

> The question of whether the presumption applies to adult dependent children begs the question of what constitutes dependency for the purpose of applying the presumption. Dependency is a term susceptible to an enormous variety of circumstances. The extent or degree of dependency can be very wide ranging. While it may be rational to presume advancement as a result of dependency in some cases, in others it will not.

> For example, it is not difficult to accept that in some cases a parent would feel a moral, if not legal, obligation to provide for the quality of life for an adult disabled child. This might especially be the case where the disabled adult child is under the charge and care of the parent.
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> As compelling as some cases might be, I am reluctant to apply the presumption of advancement to gratuitous transfers to "dependent" adult children because it would be impossible to list the wide variety of the circumstances that make someone "dependent" for the purpose of applying the presumption. Courts would have to determine on a case-by-case basis whether or not a particular individual is "dependent", creating uncertainty and unpredictability in almost every instance. I am therefore of the opinion that the rebuttable presumption of advancement with regards to gratuitous transfers from parent to child should be preserved but be limited in application to transfers by mothers and fathers to minor children.
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> There will of course be situations where a transfer between a parent and an adult child was intended to be a gift. It is open to the party claiming that the transfer is a gift to rebut the presumption of resulting trust by bringing evidence to support his or her claim.

Rebutting the Presumption of Resulting Trust

Whatever view one takes of the nature of the intent presumed, it is clear that its rebuttal in the form of proof of donative intent on the normal civil standard (including satisfaction of corroboration requirements under the provincial *Evidence Act* RSO 1990, c.E.23, s.13 on the same standard) or a counter-presumption of donative intent ('the presumption of advancement') is well settled.

In *Attorney for Robertson v Hayton* (2003), 4 E.T.R. (3d) 115, para 31-32 (Ont. Sup. Ct. Lofchik J recently summed up the position nicely:

> The standard of proof for intention to donate is high. The donee must show that that transaction was a gift by proving a clear and unmistakable intention on the part of the donor to make a gift to the donee. In weighing the conflicting evidence it is not sufficient that the preponderance of evidence may turn the scale slightly in favour of the gift. **The preponderance must be such as to leave no reasonable room for doubt as to the donor's intention. It should be inconsistent with any other intention or purpose. If it falls short of going that far then the intention of gift fails.** *Johnstone v. Johnstone* (1913), 12 D.L.R. 537; *Kibsey Estate v. Studsky*, [1990] M.J. No. 112 (Man. C.A.) at 3; *Scott Estate v. Scott*, [2002] A.J. No. 459 (Q.B.) at para. 52 and 53; *Olson v. Olson*, [1996] O.J. No. 3964 (Gen. Div.) at paras 55-56.
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> When a person transfers his own money into his own name jointly, with that of another person, there is prima facia a resulting trust for the transferor. This is a presumption of law, which is rebuttable by oral or written evidence or other circumstances tending to show that there was in fact, an intention of giving beneficially to the transferee. **Something more than a mere transfer is required to destroy the presumption of a resulting trust and an intimation**

> **of such an intent must appear on the document itself, or as a result of evidence which reveals the intention to benefit the transferee. The burden is on the person asserting a beneficial transfer to establish such a fact**. *Co-operative Trust Co. of Canada v. Mellof*, [1996] S.J. No. 188 (Q.B.) paras 35-36; *McLear v. McLear Estate*, [2000] O.J. No. 2570 (Ont. Sup. Ct.)

Proof of donative intent is a matter of evidence; simply put, it is a question of fact that may be proved from the documentation setting up the conveyance, the circumstances surrounding the transaction, or the previous or contemporaneous conduct of the parties.

Foley v. McIntyre
2015 ONCA 382

This is a nice review of the application of the doctrine of resulting trust. After their father's death, a son disputed certain inter vivos transfers made by the father and a savings bond held in a joint account after his death that were subject to a disposition in a Will. Ultimately the appeal turned on the evidence and is the decision is thus quite useful as to the method of analysis and application of the rules to a simple fact pattern.