Trusts & Equity
Fall Term 2022

Lecture Notes – No. 8

INFORMAL PUBLIC APPEALS

Based on the ULCC *Uniform Informal Public Appeals Act (2012)*, Saskatchewan has enacted *The Informal Public Appeals Act*, S.S. 2014, I-9.0001. Essentially the court is provided with a jurisdiction to settle the funds collected into a suitable trust. It is a very useful statute.

The following case is not required reading:

Re Humboldt Broncos Memorial Fund Inc.
2018 SKQB 592

This was the first case considering the new statute.

N.G. Gabrielson J.*:*

> 1 It is a rare occasion that from great tragedy comes great generosity. Such was the genesis of the money raised by the Humboldt Broncos Memorial Fund Inc. [HBMFI].
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> 2 The fund was created to remember and honour the 29 persons who, in April of 2018, were involved in a horrific bus crash on a highway between Tisdale and Nipawin, Saskatchewan. Sixteen persons lost their lives and 13 survived with various injuries that will affect them for the rest of their lives.
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> 3 Sylvie Kellington, a Humboldt resident, started a GoFundMe Campaign for the players and their families. In the 12 days that followed, there was raised a total of $15,172,948.00 from donors around the world. The generosity of persons wanting to help in this time of tragedy was truly amazing.
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> 4 The money raised by the GoFundMe Campaign led to the creation of a non-profit corporation in June, the HBMFI, to distribute the funds to those on the bus at the time of the crash.
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> 5 An application was made to the court by the HBMFI. I was appointed by the Chief Justice of our court to supervise the fund.
>
> 6 Fortunately, we had an Act in Saskatchewan, *The Informal Public Appeals Act*, SS 2014 c I-9.0001 [*IPAA*], a new statute which was enacted in 2015 based upon legislation developed by the Uniform Law Conference of Canada. Saskatchewan, for some reason, was the only province in Canada to enact the legislation. In any event, through good government management or good fortune, this *Act* laid out the framework by which the monies raised by the GoFundMe Campaign could be dealt with.

7 The HBMFI was approved as trustee of the fund. Darrin Duell, Robert Eichorst, Dalyn Graf, Kevin Garinger, Randolph Maclean, Kathleen Keen and Jay Fitzsimmons were its first directors. The HBMFI obtained legal advice and counsel from MLT Aikins were appointed and who I am told acted on a *pro bono* basis.

8 HBMFI applied to the court for directions in August of 2018. At that time, an interim distribution of $50,000.00 was made to each of the individuals who were on the bus. As well, an Advisory Committee consisting of five prominent, experienced and respected individuals from Saskatchewan, Alberta and Manitoba was approved. The five were The Honourable Dennis Ball of Regina, a retired justice of the Court of Queen's Bench, Kevin Cameron of Lethbridge, Alberta, Mark Chipman of Winnipeg, Manitoba, Hayley Wickenheiser of Calgary, Alberta and Dr. Peter Spafford of Saskatoon, Saskatchewan. Information Resource Persons were tasked with providing the Advisory Committee with personal information concerning the 29 individuals on the bus, their spouses, families or next of kin. The Information Resource Persons were Sandra Boswell of Saskatoon, John Gabrysh of Tisdale and Penny Lee of Humboldt.

9 The Advisory Committee filed its recommendation to the HBMFI November 10, 2018. In a 17-page report the Advisory Committee recommended that the funds held by the Humboldt Broncos Memorial Fund Inc. be allocated as follows:

(a) in addition to the initial payment of $50,000.00 made to each of the families of the 16 persons who died in the accident, to pay the sum of $475,000.00 to each such family for a total of $525,000.00.

(b) in addition to the initial payment of $50,000.00 made to each of the 13 surviving claimants, to pay the sum of $425,000.00 to each claimant; and

(c) to distribute any remaining funds in trust to the 13 surviving claimants in equal shares, share and share alike.

10 HBMFI accepted the recommendation of the Advisory Committee and applied to the court for approval of a final order under the *IPAA*.

11 I have decided to accept the recommendation of the Committee. The Committee went through in detail the options they faced and made thoughtful recommendations. They took into account the fact that the survivors of the crash may have available to them insurance under *The Automobile Accident Insurance Act*, RSS 1978, c A-35, *The Workers' Compensation Act*, *2013*, SS 2013, c W-17.11, Hockey Canada, the Western Hockey League and other insurance sources. They took into account the wishes of the survivors that they all benefit equally no matter what their medical condition so as to not create any rift between them by the allocation of funds. Finally, they explained their reasons for the slight difference in the allocation as to those who died in the crash and those who survived as follows:

> [57] Finally, we have considered the logic and fairness of our recommendations by asking two simple questions. First, would any of the 13 survivors and their families trade places with any of the other 16 members in return for any amount of money? Of course, they would not. Second, would any of the 16 families who have lost a loved one forego any amount of money

> if they could have their sons, daughters or partners back? Of course they would, in a heartbeat.
>
> 12 The simplicity and the reasonableness of the recommendation appeals to me and I adopt the reasons for the distribution recommended.
>
> 13 I therefore approve the draft order as to the final distribution and the other matters covered by it.

14 I would like to commend counsel for their work in coming to this final order. I also appreciate the comments of Ms. Gellrich who spoke to an equal distribution of funds to everyone but I have decided to follow the recommendations of the Advisory Committee for the reasons stated. I also commend the members, directors and officers of the HBMFI, the members of the Advisory Committee, the Information Resource Persons, Sylvie Kellington, who started the GoFundMe Campaign, and the persons in the global community who made contributions to the Campaign. I would finally recognize the 29 persons who were on the bus, as well as their family and friends. Everyone has proven that together we can face adversity and move forward if we remain "Humboldt Strong".

CY-PRÈS

Like all doctrines of a certain vintage, the development of cy-près in equity has some interesting moments. One particular case is a favourite of mine, and serves to prove two principles directly relevant to the law of charities.

In 1717, Sir George Downing made a Will which set up a complex settlement including a wish to give land and make an endowment gift of £100,000 to create a college in the name of the Downing family. Sir George died in 1749 and, after a number of other relatives had the good manners to die, the estate then passed to Sir Jacob Downing. Sir Jacob died in 1764. Although technically only having an income interest in the estate, Sir Jacob willed his interest to his widow, Lady Margaret Downing. There began almost 40 years of court cases regarding the disposition of the estate. Along the way, the matter involved consideration of the cy-près doctrine as there was insufficient funds in the estate to found the college which Sir George had desired to establish. In ***Attorney- General v Lady Downing*** **(1769), Amb 571**, Wilmot CJ considered the matter and set out what he perceived to the primary reason why equity had the power to restructure failed settlements such as the one before the court. A resettlement scheme was necessary not for the benefit of the public, but to aid in the expiation of late donor's sins - 'the merits of the charity ought not to be lost to the testator.' Eventually the litigation was resolved and Downing College, Cambridge was established in 1800. Instead of the new college beginning with the Downing estates and a £100,000 initial endowment, Downing College began with a capital legacy of a £9,780.18s. 6d.

The first lesson one can take from the case is that charitable giving is a considered a benefit to all, even the donor.

The second lesson is that primary beneficiaries of any trust, even a charitable one, are always the lawyers.

(A) CY-PRÈS: THE CONCEPT

Gifts are often made to charities during the lives of donors, and quite often such gifts are made through a will to take effect on the testator's death. However, circumstances may have changed during the period from when the donor decided to make the gift and the time that the gift was to take place. The designated charity may have ceased to exist. The purpose of the charity might have been accomplished already, or the functions taken over by the government rendering it without any role. The original purpose might now not fit contemporary morals or public policy, or might even be contrary to law. Even if the gift did take place, the same considerations may intervene at a later stage. In all these cases, the law has developed doctrines to allow courts to rescue the funds and re- apply them for new charitable purposes.

The term cy-près is itself a source of some confusion. It is traditionally translated as 'near-to' and thought to derive from an Anglo-Norman corruption of the Middle French terms *si-pres ('as* near') or *ici-pres* (near here). One contemporary definition reads:

If property is given on trust to be applied for a particular charitable purpose, and it is or becomes impossible or impracticable or illegal to carry out the particular purpose, and is the settlor manifested a paramount intention to devote the property to charitable purposes, the trust will not fail but the court will direct the application of the property to some charitable purpose which falls within the paramount charitable intention of the settlor.

However defined, cy-près is a rather simple concept: **a court of suitable jurisdiction has the power to keep in existence gifts made for charitable purposes so that the public might continue to benefit into the future where the original terms of the gift are impossible or impracticable or unlawful to be carried out.** In other words, the gift was one given for charitable purposes and should remain dedicated to charitable purposes – it should not be diverted to other uses.

While the rationale for the court's power may have been one which had ecclesiastical overtones in earlier times, it is now decidedly secular. The gift is saved to benefit the public, and the court here acts consistent with one of equity's long-standing maxims – *Charity is Always Favoured by Equity.*

At the same time, one must take care not to regard the power of the court for more than it is - **the doctrine fills a preservative function only, and cy-près is not available merely to structure the settlement in some better way;** *Re Baker* (1984), 47 O.R. (2d) 415 (Ont HCJ).; *Weninger Estate v Canadian Diabetes Association* (1993), 2 E.T.R. (2d) 24 (Ont Gen Div).

It is not an aid to resolving problems with the gift, it is an aid to preventing failure of charitable gifts. In other words, expediency is not enough to allow the court to invoke its powers under the cy-près doctrine; *Re St George's Hospital* (1859), 27 Beav 107; *Re Baker* (1984), 47 O.R. (2d) 415 (Ont HC).

The *cy-près* doctrine is within the general equitable jurisdiction of the court to supervise trusts. Thus, whether the application has been made by the Public Guardian and Trustee or another trustee under the Trustee Act RSO 1990, s.60(1) or by any two people under the Charities Accounting Act RSO 1990, s.10(1) or by any other procedure contemplated by the Rules of Civil Procedure, a court of superior jurisdiction may exercise its equitable jurisdiction and invoke the cy-près doctrine where circumstances so permit.

Sidney and North Saanich Memorial Park Society v. British Columbia (Attorney General) 2016 BCSC 589 (B.C.S.C.); cb, p.454

A trust of land was settled in 1922. The land was used as a recreational facility, a memorial, and, over the years, was subject of both expropriations and additions through purchase by the trustees. The machinery of the trust was outdated and the trustees sought an order allowing them to be freed from certain restrictions respecting use of the land and its exploitation while preserving the general nature of the use of land and preservation of a cenotaph. The application was allowed, but it's importance to us is in respect of the nature of the court's jurisdiction.

per Dardi J.:

c. Proposed Amendments to the Trust Deed

Legal Framework

Charitable Purpose Trusts

[45] A charitable trust is an instrument for furthering the dedication of property to charity. It will not fail for uncertainty if its objects are purposes and not persons. The charitable purpose stands in the place of what ordinarily would be a beneficiary. It is, however, essential that the purposes be exclusively charitable. Charitable purposes are generally perceived as enduring to the benefit of the public and, accordingly, the law recognizes that this type of trust may operate in perpetuity: Waters at 664; Rowland at para. 55.

[46] It has long been settled that the court has the inherent jurisdiction to supervise the establishment and administration of charitable purpose trusts. The court's inherent jurisdiction was historically exercised in the courts of equity in England. This equitable jurisdiction was assumed by and vests in the courts of British Columbia: Kenney v. Loewen, [1999] B.C.J. No. 363 at para. 19.

Cy-près Jurisdiction

[**47] Cy-près is a significant doctrine in the law of charities. It determines what happens when property that has been dedicated to charitable purposes cannot be applied in the manner intended by the donor**: Haley & McMurtry, Equity and Trusts, 3d ed (London: Sweet & Maxwell, 2011) at 261. **Where the purposes or objects of a charitable trust have become impossible or impracticable to achieve, the court, relying on its inherent jurisdiction, may intervene and alter the purposes of the trust, and in doing so, depart from the stated intention of the settlor. The courts may implement modernized or modified objects that are "as near as possible"** (cy-près) to the original purposes: Toronto Aged Men's and Women's Homes v. Loyal True Blue and Orange Home, 2003 CanLII 32923 (ON SC), [2003] O.J. No. 5381, 68 O.R. (3d) 777 at para. 50 (S.C.J.) [Stillman].

[48] A cy-près order "must depart from the intentions of the [settlor] only to the extent required to remove the problem that has caused the future administration of the Trust to become impracticable." It is also imperative that the relative efficiency of the proposed amendments be considered: Stillman at para. 28.

[49] The threshold requirement for invoking the cy-près doctrine is a finding that carrying out the existing trust terms is either impossible or impracticable. In the absence of such a determination, the court must refuse to exercise its cy-près scheme-making jurisdiction. Despite the narrow ambit of the doctrine, courts have, at times, interpreted impossibility and impracticability broadly: Waters at 683. "Impracticability" is not to be construed as "absolutely impracticable": In re Dominion Students' Hall Trust, [1947] Ch. 183 at 186.

[50] Earlier lines of authority endorsed the notion that cy-près orders should be restricted to cases where there has been a failure of the purposes or objects of a charitable trust as distinct from the malfunction of the directions from the settlor for implementing those objects.

[**51] However, the modern Canadian jurisprudence, as articulated by Mr. Justice Cullity in Stillman at paras. 31-33 and subsequently applied by the court in Fenton Estate, 2014 BCSC 39, establishes that the doctrine extends beyond remedying the failure of objects. It goes further and empowers the court, without amending the purposes, to introduce or adjust administrative trust machinery to accommodate contemporary conditions, so that the charitable purposes can be sustained. The rationale is found in the judicial recognition that the charitable objects should not be frustrated by the trust's administrative provisions.**

[52] Stillman is instructive of the point. There, the will-maker directed the trustees to invest the residue of the estate and to pay out the annual net income to certain charities. There was no power in the will for the trustees to encroach on the capital. The trust was registered as a private foundation under the Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.). At that time, the applicable disbursement quota for a charitable trust was 4.5% of the average fair market value of its investment property. In the years from 1997 to 2002, the trust had been unable to meet the quota, as the annual income had been in the range of only 3.4% to 4.1%.

[53] Mr. Justice Cullity found the administrative terms of the trust had become impossible, or at least impracticable, in the circumstances. The "impracticability" arose out of the entitlement of the Minister of Customs and Revenue to revoke the charitable registration, giving rise to liability for a revocation tax and subsequent taxation on its realized capital gains. Those statutory consequences were sufficiently serious that the court concluded that it was no longer practicable to administer the testamentary trust in accordance with the provisions of the will that limited the trustee's power to limit distributions to "income only".

[54] Mr. Justice Cullity's distillation of the animating principles, at para. 33 of Stillman, is instructive:

Where the directions of the donor have become impracticable, as here, I do not think it matters whether they are to be characterized as relating to the purposes of the Trust or merely to the mode by which they are to be achieved. The jurisdiction to substitute other directions will exist in either case and in each case the court will fashion a scheme that will as nearly as possible reflect the intentions of the donor.

[55] I prefer and adopt the contemporary judicial approach. The administrative terms of a trust support the advancement and achievement of the charitable purposes. If, as a result of the existing administrative terms, impracticability in achieving those charitable purposes has arisen, it is open to the court to invoke its cy-près jurisdiction to amend the administrative terms in order to formulate a scheme that facilitates the continued administration of the charitable purpose trust.

Administrative Scheme-Making

[56] The jurisprudence establishes that, even absent a finding of impracticability or impossibility, the court retains the inherent jurisdiction for administrative scheme-making with respect to charitable trusts. An administrative scheme addresses the inadequacy of the administrative terms of a trust to achieve its charitable objects: Waters at 807-08. Pursuant to this jurisdiction, the court has the power to supply administrative terms or to alter the administrative machinery of a charitable trust when necessary for the effective operation of the trust. The court directs a scheme in order to secure a more complete attainment of the charitable purposes. This is in keeping with a long-standing recognition by the courts that the dedication of property to charity through a trust involves special rules. The jurisdiction to regulate the administration of charitable trusts should be exercised sparingly.

[57] Historically, the courts in England have relied on their inherent jurisdiction to supply administrative terms when the trust instrument is silent, or to vary administrative terms including trustee powers, such as the investment power, when those terms have become obsolete: In re Royal Society's Charitable Trusts, [1956] Ch. 87.

[58] The doctrine has received a somewhat uneven reception in Canada.

[59] Killam Estate (Re) (1999), 185 N.S.R. (2d) 201 [Re Killam], a decision of Chief Justice Kennedy of the Nova Scotia Supreme Court, involved a charitable endowment trust that permitted distribution of income only for charitable purposes. There was no suggestion that it had become impracticable to achieve the testator's purposes and the issue of the applicability of the court's cy-près jurisdiction is not addressed in the reasons. However, the court approved an amendment pursuant to its administrative scheme-making jurisdiction, permitting the trustees to implement a total return investment and distribution policy. A total return investment policy is one that seeks to achieve the best return in terms of income and capital gains without distinguishing between them.

[60] At paras. 81-83, the court in Re Killam reasoned:

> [81] Having concluded that both the method of investment and the distribution level sought to be maintained by the applicants are reasonable and prudent, I conclude that this Court should use its inherent jurisdiction to approve and enable "the agreement" to be accomplished.
>
> [82] Although the result will be contrary to the expressed, unequivocal direction of Mrs. Killam to distribute "income only", I am influenced by the cases cited, such as: re J.W. Laing Trust, [1984] 1 Ch. 143, re Dominion Students' Hall Trust, [1947] 1 Ch. 183 and re Lysaght, decd. Hill and Another v. The Royal College of Surgeons and Others, [1966] 1 Ch. 191 in which the courts have varied trusts and thereby contradicted the original intentions of the makers when they determined that the alterations were in the best interests of the beneficiaries and for the better administration of the trust.
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> [83] I am convinced that the variations accomplished by "the agreement" are in accord with the "spirit of the gift".
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> …
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> [75] Dr. Waters summarized the nature of the conflict in the jurisprudence regarding the contours of this administrative scheme-making jurisdiction: Waters at 810:
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> While these courts agree that a scheme can be approved that would introduce "total return", the limits of administrative scheme-making in the light of the English Chancery precedents are differently conceived. With the move from a prescribed perpetual income distribution to the percentage trust one court sees a perpetuation of the testator's intent in a discerned continuity between "income" and "capital", while another sees the issue as an invasion of capital contrary to expressed intent.
>
> [76] I conclude that I have inherent jurisdiction for administrative scheme-making for charitable trusts. In cases where it cannot be said that the requirements to achieve the purposes of a charitable trust have become sufficiently impracticable or impossible so as to engage the cy-près doctrine, the courts may nonetheless, pursuant to this administrative scheme-making jurisdiction, vary the administrative terms of a trust for the furtherance of charitable purposes. As this case does not involve an endowment trust, it is not necessary to resolve the conflict in the Canadian authorities I have described.

The Basic Operation of the Doctrine

In general terms, there are three stages of the process: qualification of the gift, failure of the gift, and resettlement of the gift via a judicial cy-près scheme. To be more precise:

1. *There must be a gift for a charitable purpose.* The cy-près doctrine cannot convert an invalid private purpose trust into a valid charitable trust. The original objects of the gift must fall within the traditional definitions of charity or any statute that deems such objects to be charitable.

2. *There must be a 'cy-près occasion'.* There must be an event that the court recognizes as sufficient for it to invoke its jurisdiction and resettle the gift. There are two main categories:

i. The charitable purpose designated is *impossible* to carry out;
ii. It is *impracticable* to carry out the charitable purpose.

3. In some cases, the donor must have had a 'general charitable intent' when making the gift to allow the court to act. Where the cy-près occasion prevents the gift vesting in the charity at all ('initial failure'), it must be shown that the donor had a 'general' or 'paramount' charitable intention' in making the gift. Where the gift fails *after* the gift has vested ('subsequent failure'), a general charitable intention need not be shown.

4. The new objects should be close to the failed objects of the gift. The terms of the resettlement – the new charitable purposes substituted by the court – should be as near as possible to the original purposes of the trust so as to respect the will of the testator; see *Bloorview Childrens Hospital Foundation v. Bloorview MacMillan Centre* (2001) 8 C.P.C. (5th) 329 (Ont Sup Ct).

(B) 'CY-PRÈS OCCASIONS'

A word of caution: One should note that care is required as not all situations that would appear to be failures are really failures at all. Sometimes, a careful inquiry will reveal that a charity thought to be no longer in existence has just hidden itself under a different name or that a defect in the trust instrument can be cured to reveal the identity of the donee as was intended by the donor.

For example, where a charity is consolidated with other charities with similar purposes, it may be that the charity has not ceased to exist at all but that it remains in existence – only the 'machinery of the institution' has changed; *Re Faraker* [1912] 2 Ch 488. The matter is not always quite so simple in practice though. In one case, amalgamation was held to be a cy-près occasion; see *Avalon Consolidated School Board v. United Church* (1984), 47 Nfld. & P.E.I.R. 261 (Nfld CA). In such a case, the change was not sufficient to constitute failure. It might be that the charity is mis-named rather than never having existed – this is not properly cy-près but more a matter of discerning the true intent of the donor; *Re Buchanan* (1995), 11 ETR (2d) 8 (BCSC).

Traditionally, a court of equity would have jurisdiction to invoke its jurisdiction where there was a sufficient 'cy-près occasion'. Usually this meant that the gift was *impossible* to perfect (for example, the donee had ceased to exist or the money left was insufficient for the purpose) or the gift was *impracticable* (for example, the a scholarship with discriminatory provisions unacceptable to the donee).

(i) Impossibility

It would be impossible to define with precision those occasions in which it would be impossible for the gift to be made. A few of examples will suffice:

- ***Re Spence's Will Trusts,* [1979] Ch. 483; cb, p.465:** The testatrix gave a gift for the benefit of residents at a retirement home that existed when the Will was executed but had ceased to exist when she died; there was a specific charitable intention so the gift failed.
- *AG v London Corporation* (1790), 3 Bro CC 171: A religious trust to propagate 'the Christian religion amongst the infidels of Virginia' was impossible as the Court determined that there were no infidels in Virginia.

- *Re Rymer* [1895] 1 Ch 19: A specific seminary was left a gift, but the seminary did not exist anymore (although it once had). The gift failed, as the testator had a specific and not a general charitable intent, there was a resulting trust.
- *Re Harwood* [1936] Ch 285: This was a gift to the "Peace Society" in Belfast. The charity never existed but there was a general charitable intent so that the gift could be applied cy-près.
- *Re McSweeney* (1982), 41 NBR (2d) 419 (NBQB): The Will contained a residuary bequest for the establishment and maintenance of a home for aged men and women. After the distribution there was approximately $176,000 in the estate. The executor felt that the money was not sufficient to establish a home for the aged, but it was held that the gift was not impossible to carry out in view of financing options open to the donee.
- *Johnston Estate v. Ganaraska Woods Retreat Centre* [2002] O.J. No. 1079 (Ont Sup Ct): Testator left gifts to two schools for retarded children which were no longer in existence; gifts resettled on cy-près for similar purposes.

Discriminatory Provisions

Aside from the simple situation where the donee has ceased to exist, it might also be the case that carrying out the gift would contravene the law in some way. A simple illustration is gifts made with discriminatory provisions that limit the class of beneficiaries in a manner which would violate human rights or other equal access provisions. For example, in *Re Ramsden Estate* (1996), 139 DLR (4th) 746 (PEI SC), a gift to a university was made for scholarships to go to Protestant students only. Such a gift violated the provincial statute respecting universities and was thus impossible to carry out as stipulated by the settlor. In ***Canada Trust Co. v. Ontario Human Rights Commission*** **(1990), 74 OR (2d) 481 (Sup Ct); cb, p.476,** the Will provided for a scholarship fund to exclude 'all who are not Christians of the White Race, and who are not of British Nationality or of British Parentage, and all who owe allegiance to any Foreign Government, Prince, Pope or Potentate, or who recognize any such authority, temporal or spiritual' (amongst other restrictions). The Court struck out the provisions which ought not be enforced on policy terms and ordered a scheme accordingly.

(ii) Impracticability

Like impossibility, impracticability covers a wide field. Courts in the past have used this ground narrowly and broadly. In the narrow use, it is the circumstances of the case which dominate the analysis- for example, a gift to establish a church is impracticable where a similar church was already established in a small locale; *Re Schneckenburger* (1931) 40 OWN 210 (Ont SC). More broadly, courts sometimes can use this ground to determine the issue on public policy grounds, in effect allowing the gift to be saved from a condition which might otherwise cause it to fail; *Re Dominion Students' Hall Trust* [1947] Ch 183.

(C) INITIAL AND SUBSEQUENT FAILURE

An *initial failure* occurs where the property fails to vest in a donee; for example, where the charity ceases to exist before the testator/donee dies. The gift is then never effective. **For the court to invoke its jurisdiction, it must be satisfied that the donor wished to give to charity as a paramount intent (and secondarily to this charity)** rather than giving a gift to the institution specified and only that institution.

A *subsequent failure* takes place after the original gift has vested in the original donee; for example, the terms of the donee's existence are satisfied and the institution is wound up accordingly. In such cases, the money has already been used for charitable purposes and **the court will not require the showing of a general charitable intent – the presumption is that the gift, once dedicated to charity, is fully and forever dedicated to charity from the moment it vests.** If, however, the donor had provided conditions (a gift-over in such circumstances as caused the failure), it is of course the donor's intent which prevails absent any statutory authority to the contrary. One should note that the court will not entertain the cy-près application before the actual failure – so, for example, the fact that the institution still exists even though its future might be precarious makes the application premature.

Re Fitzpatrick **(1984), 4 DLR (4th) 644 (Man QB); cb, p.471** is an example of subsequent failure. The testatrix left the residue of her residue of her estate to her executors on the following terms:

> I DIRECT my Executors to hold the balance of the monies in my estate in a fund to be known as 'The Kathleen Fitzpatrick Fund', and to invest such monies in such investments as in its sole discretion shall be appropriate and from the principal and interest of such fund to pay for the musical education of any boy or boys who are under the care of St. Joseph's Vocational School of Winnipeg, and resident there, and who shall show musical talent, the selection of such boy or boys to be made by a committee consisting of the Rev. Sister Superior of St. Joseph's Vocational School, the President of the Manitoba Registered Music Teachers Association Incorporated, and the head of the music department of St. Mary's Academy, of Winnipeg.

The school was closed ten years after the death of the testatrix. No one had received benefit from the fund. The executors applied for an order for advice and directions concerning the legacy. Simonsen J held:

> The principles were expressed by the author Donovan Waters in an article [Case comment: *Re Hunter; Genn v. A.G.B.C.]* (1974), 52 Can. Bar Rev. 598, at pp. 598-99:
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> The law in this area is not easy, but it is fairly well laid down. Before the court can approve a cy-près scheme, it must be shown that the testator's charitable purpose was impossible to carry out or impracticable, and that he did not have only that particular charitable purpose in mind, but a general intent to give to charitable work of that kind. It is because the testator had this so- called general charitable intent that the court will assist his intention by seeing that the property is applied to some similar purpose. If he only wanted to further the particular named charitable purpose, but impossibility or impracticability has occurred, the court will not intervene, and the property in question will revert to his estate.
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> However, these rules only apply when the expressed charitable purpose is impossible or impractical on the instrument of gift taking effect, and in the case of a will, of course, this is the moment of the testator's death. It does not matter whether the charitable gift is to take place immediately or only after the completion of a prior interest. If there is a so-called initial impossibility or impracticability, the rules mentioned apply.
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> These rules do not apply when impossibility or impracticability occurs *after* the instrument of gift has taken effect. It does not matter whether the purpose is being carried out when the impossibility or impracticability subsequently occurs, or if either of those events occurs during the time of a prior interest, while the purpose or charity is awaiting the end of that

> interest. When impossibility or impracticability occurs after the instrument has taken effect, a so-called supervening impossibility or impracticability has occurred.
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> In these circumstances the court now looks to see whether the instrument of gift has given the property in question exclusively to the charitable purpose. That is to say, if there is a gift over of any kind, then there is no so-called exclusive dedication to the charitable purpose. However, if there is an exclusive dedication, and the purpose can no longer be carried out because of impossi bility or impracticability, the property is regarded as dedicated to charity, and passes to the Crown in right of the province as the ultimate protector of charity and charities. By long custom the Crown will now agree to the drawing up of a cy-près scheme for the approval of the court.
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> In the circumstances of supervening impossibility or impracticability no general charitable intent is required. This is because the purpose or charity was possible and practicable when the instrument of gift took effect, and whatever the scope of the donor's intent he has dedicated his property to charity. All that is required, as I have said, is an exclusive dedication.
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> ...
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> In the present case, St. Joseph's Vocational School was in existence at the time of the testatrix' death and there were potential candidates in existence at that time. In my view, that was the critical date because the objects of the charity were in existence at the time of death. It can therefore be said the charity vested in perpetuity for the stated charitable purpose. This was not a case of initial failure but rather of supervening impossibility. In the circumstances, it is not necessary to find a general charitable intent in the legacy to permit the ordering of a cy-près scheme.

'Paramount Charitable Intent'

This is really a matter of fact and impression; the court must determine whether the donor intended, primarily, to give to charity or whether she gave to *this* charity and *only* this charity. Thus, in *Re Taylor* (1888), 58 LT 538, Kay J said that:

> ... if upon the whole scope and intent of the will you discern the paramount intention of the testator was to benefit not a particular institution, but to effect a particular form of charity independently of any special institution or mode, then, although he may have indicated the mode in which he desires that to be carried out, you are to regard the paramount intention chiefly...
>
> [See Cartwright J (in dissent) in *Re Cox* [1953] 1 SCR 94]
>
> Because the issue is essentially one of fact, it is difficult to come up with precise guidelines as to whether such a paramount intention exists in any one case. It is usually a matter of inference from the scheme settled in the trust instrument rather than a matter of direct evidence, and the court must consider whether "the specific formulation of the purpose of the bequest is not exhaustive of the intention of the testator" - so, for example, a gift for the paying of a church debt where matching funds are made available is not indicative of a general charitable intent [Re *Harding* (1904), 4 O.W.R. 316 (Ont H.C.)], nor was a gift to a particular orphanage [Re *Allendorf,* [1963] 2 O.R. 68 (Ont H.C.)]. These were more

consistent with a specific charitable intent for the named institution and only the named institution.

VIII. RESULTING TRUST

A. 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; cb, p.556**, 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".**
>
> (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.

(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.

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; cb, p.594** 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); cb, p.557

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').

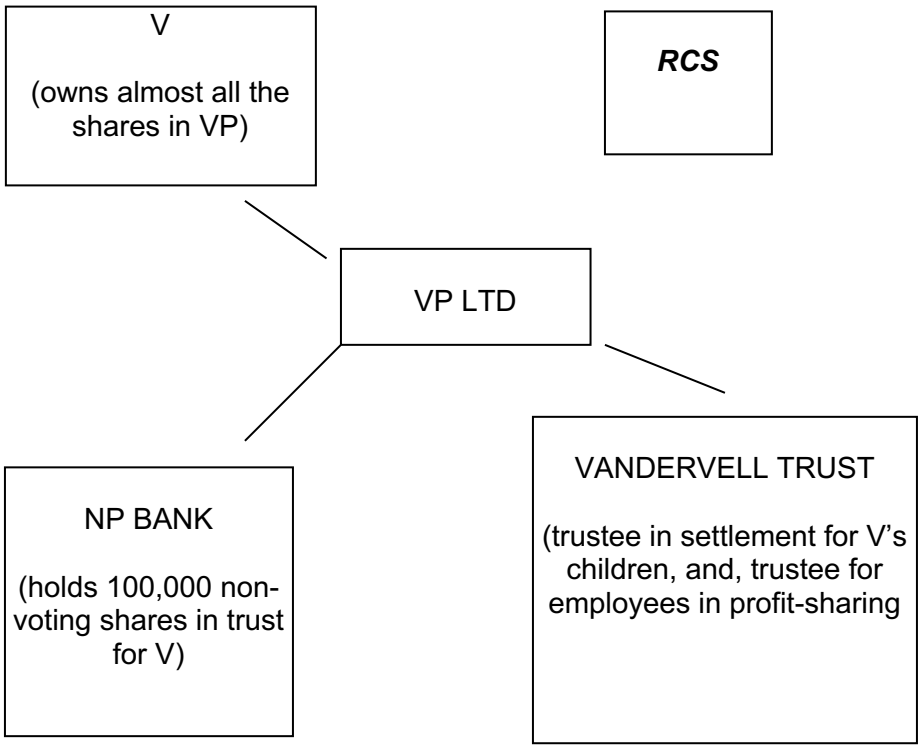
The judgement seems wrong. The widow *did* intend to benefit the lodger (but not to the extent he claimed) and *did* intend for title to vest in him. The trust is really more consistent with a constructive than a resulting trust: that is, the lodger acted deceitfully.

B. 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; cb, p.556

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.

~ ~ ~

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.

C. 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; cb, p.565

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.

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; cb, p.622

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.
>
> 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.
>
> 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.
>
> 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.

Kent v. Kent
2020 ONCA 390 (Ont. C.A.)

Grandmother purchased a home and transferred title to herself and her daughter as joint tenants. The daughter and her husband and children moved into the home with the grandmother a number of years later; some years later the grandmother died. The daughter died but her husband continued to reside with the grandmother. The grandmother re-registered the property in her own name and then as joint tenants with the husband and the two children. After the grandmother died, the husband asserted a 2/3 interest in the property arguing that the joint tenancy was severed based on a provision in the Family Law Act:

per Gillese J.A.:

Was the Property a Matrimonial Home?

[42] I do not accept Gordon's submission that in allowing him, Janice, and their children to live on the Property together with her, beginning in 2008, Marian made the Property their matrimonial home and thereby removed any consideration of resulting trust.

[43] Determining whether the Property was Janice and Gordon's matrimonial home begins with a consideration of s. 18 (1) of the FLA. It will be recalled that s. 18(1) provides that:

Every property in which a person has an interest and that is … ordinarily occupied by the person and his or her spouse as their family residence is their matrimonial home.

[44] Although the application judge made no express finding on the matter, it appears beyond dispute that Janice and Gordon occupied the Property as their family residence, beginning in 2008 when they, together with their children, moved onto the Property and began living there with Marian. Thus, in determining whether the Property was Janice and Gordon's matrimonial home, we must decide whether either Janice or Gordon had "an interest" in the Property within the meaning of s. 18(1).

[45] Did Janice have an interest in the Property within the meaning of s. 18(1) of the FLA? In my view, she did not.

[46] Janice became a joint tenant of the Property with Marian as a result of the 1996 Transfer. As I have explained, the 1996 Transfer raised the presumption of resulting trust and, on the findings of the application judge, the presumption was not rebutted. Thus, the 1996 Transfer had the effect of placing Janice on title to the Property in the capacity of a trustee. As this court stated at para. 45 of Spencer v. Riesberry, 2012 ONCA 418, it is self-evident that the duties and powers of a trustee are not an interest in the property within the meaning of s. 18(1) of the FLA because those powers and duties are held not in a personal capacity but in the fiduciary role of a trustee. Consequently, the 1996 Transfer did not give Janice an interest in the Property within the meaning of s. 18(1).

[47] Did Gordon have an interest in the Property within the meaning of s. 18(1) of the FLA? In my view, he did not. In reaching this conclusion, I reject Gordon's submission that s. 26(1) of the FLA gave him such an interest. Recall that s. 26(1) reads as follows:

If a spouse dies owning an interest in a matrimonial home as a joint tenant with a third person and not with the other spouse, the joint tenancy shall be deemed to have been severed immediately before the time of death.

[48] It is correct that when Janice died, she appeared on title to the Property as a joint tenant with Marian, a third person. However, as I have just explained, as Janice was on title to the Property in the capacity of a trustee, she did not have an interest in the Property within the meaning of s. 18(1) of the FLA. Thus, when Janice died, she did not own an interest in a matrimonial home as a joint tenant

with Marian, a third person. Consequently, s. 26(1) does not apply and Gordon cannot claim an interest in the Property pursuant to it.