Estate Litigation

Fall Term 2025

Notes No. 3

A. Unjust Enrichment

Unjust enrichment claims often feature in estate litigation, most typically raised in relation to benefits conferred on the deceased purportedly in exchange for an asset owned by the Estate or a share of the Estate. To make sense of the law on point, it is necessary to understand the developing jurisdiction in unjust enrichment (which is probably the most significant development in Canadian private law in the last 25 years).

Introduction

Unjust enrichment and *restitution* are concepts that often occur together and are often confused; indeed, at the level of theory, there is much that is contentious in the area of law, even taxonomy. In the past, substantive grounds for a remedy and the remedy itself have often been conflated, especially in respect of proprietary remedies in equity. We now try to draw distinctions.

- ***Unjust enrichment*** is not the same as restitution, but is a reason for making restitution or compensation; other reasons might be that there is an enforceable contract or the defendant has committed a wrong. In recent years, the terms has been elevated from a general characterization of uncertain scope to something much more coherent.

- ***Restitution*** is the response which consists in causing one person to give up to another an enrichment received at his expense (the property itself) or its value in money. We use the term to describe the remedies which have that common function. The most well known remedy is the imposition of a constructive trust. In a series of cases, the Supreme Court of Canada imposed constructive trust in varying contexts on the basis of equity, principles of conscience, and a rather loose use of the term "unjust enrichment;" *Murdoch v. Murdoch*, [1975] 1 S.C.R. 423 (S.C.C.); *Rathwell v Rathwell*, [1978] 2 SCR 436 (S.C.C.); *Pettkus v Becker*, [1980] 2 SCR 834 (S.C.C.). Now, while a constructive trust may be a proper response; it is not always appropriate; *Moore v. Sweet*, 2018 SCC 52 at paras. 89-95 (S.C.C.)

The Canadian Supreme Court has dealt with principles of unjust enrichment and restitution as such since ***Degleman v Guaranty Trust Co. of Canada*, [1954] SCR 725 (S.C.C.)** a case featuring a disappointed nephew who was promised a testamentary gift by an aged aunt in exchange for his services. The aunt didn't leave

the gift and the nephew sued on the oral contract. The Supreme Court of Canada held that the *quantum meruit* ("as much as one deserves") claim for the services rendered was valid notwithstanding that the oral promise was not enforceable given its obvious non-compliance with formalities.

Cartwright J. for the majority held:

> In my opinion when the *Statute of Frauds* was pleaded the express contract was thereby rendered unenforceable, but, the deceased having received the benefits of the full performance of the contract by the respondent, the law imposed upon her, and so on her estate, the obligation to pay the fair value of the services rendered to her.

Rand J held for the concurring minority:

> There remains the question of recovery for the services rendered on the basis of a *quantum meruit.* On the findings of both courts below the services were not given gratuitously but on the footing of a contractual relation: they were to be paid for. The statute in such a case does not touch the principle of restitution against what would otherwise be an unjust enrichment of the defendant at the expense of the plaintiff. This is exemplified in the simple case of part or full payment in money as the price under an oral contract; it would be inequitable to allow the promissor to keep both the land and the money and the other party to the bargain is entitled to recover what he has paid. Similarly is it in the case of services given.

Given that the contract was unenforceable, however, what is the ultimate rationale for liability in *Degleman*? It can't be the contract (as it was not in writing) and thus 'implied contract' or 'quasi contact' was rejected by both the majority and the concurring minority. Unjust enrichment (the retention of a benefit without valid reason) best rationalized liability in the Court's view. One instantly appreciates the potential for an elegant solution rather than some soft standard like conscience or fairness, but then it becomes necessary to develop how the standard is more intellectually coherent than the traditional devices by which equity achieves a more fair result in the circumstances.

The Independent Action in Unjust Enrichment

The law of unjust enrichment in Canada has moved on substantially since *Degleman v Guaranty Trust Co. of Canada*. There is no doubt that there now exists an independent action for unjust enrichment in Canada that is not parasitic on an established common law, equitable, or statutory cause of action. That is, the jurisdiction sits alongside common law and equity but is independent of each; it is not a wrong. Rather, it is a jurisdiction in its own right that rationalizes the imposition of a proprietary remedy (like a constructive trust) or a personal remedy (an order to pay money).

Garland v Consumers Gas Co., 2004 S.C.C. 25 (S.C.C.) is now the leading case. It has taken unjust enrichment away from general statements of principle or legal fictions, to a model of law that is capable of coherent development.

This was a class action against a utility company for charging late payment penalties at a rate contrary to the *Criminal Code* notwithstanding that the penalties were authorized by the Ontario Energy Board. The action for unjust enrichment was successful and the defendant was ordered to repay the amounts received. At issue in *Garland v Consumers Gas Co.* was less the presence of benefit and deprivation (which was clear) and more the nature and method of analysis of the juristic reason that might justify retention.

Iacobucci J. held:

> 43 **It should be recalled that the test for unjust enrichment is relatively new to Canadian jurisprudence. It requires flexibility for courts to expand the categories of juristic reasons as circumstances require and to deny recovery where to allow it would be inequitable**… But, at the same time, **there must also be guidelines** that offer trial judges and others some indication of what the boundaries of the cause of action are. The goal is to avoid guidelines that are so general and subjective that uniformity becomes unattainable.
>
> 44 … **the proper approach to the juristic reason analysis is in two parts. First, the plaintiff must show that no juristic reason from an established category exists to deny recovery**… The established categories that can constitute juristic reasons include a contract (*Pettkus*, *supra*), a disposition of law (*Pettkus*, *supra*), a donative intent (*Peter*, *supra*), and other valid common law, equitable or statutory obligations (*Peter*, *supra*). **If there is no juristic reason from an established category, then the plaintiff has made out a *prima facie* case under the juristic reason component of the analysis.**
>
> 45 **The *prima facie* case is rebuttable, however, where the defendant can show that there is another reason to deny recovery.** As a result, there is a de facto burden of proof placed on the defendant to show the reason why the enrichment should be retained. This stage of the analysis thus provides for a category of residual defence in which courts can look to all of the circumstances of the transaction in order to determine whether there is another reason to deny recovery.
>
> 46 **As part of the defendant's attempt to rebut, courts should have regard to two factors: the reasonable expectations of the parties and**
>
> **public policy considerations.** It may be that when these factors are

> considered, the court will find that a new category of juristic reason is established. In other cases, a consideration of these factors will suggest that there was a juristic reason in the particular circumstance of a case but which does not give rise to a new category of juristic reason that should be applied in other factual circumstances. In a third group of cases, a consideration of these factors will yield a determination that there was no juristic reason for the enrichment. In the latter cases, recovery should be allowed. The point here is that this area is an evolving one and that further cases will add additional refinements and developments.

This is both a significant and a substantial development in the Canadian law of unjust enrichment, and the action as an autonomous non-parasitic claim is now undeniable.

If we proceed from the understanding that what a court will not countenance is a view of '*unjust* enrichment' as an idiosyncratic weighing of the equities of an individual case on subjective criteria ('palm-tree justice' to use the familiar phrase), then *Garland v Consumer's Gas Co.* identifies a principle that is both pragmatic (existing categories that would not interfere with the defendant's retention of the benefit are preserved despite their own inherent frailties) and dynamic (new categories can be created, but on a principled basis). The interim state – 'there was a juristic reason in the particular circumstance of a case but which does not give rise to a new category' – does pose a concern but also clarifies the still developing normative core of the action. That is, unjust enrichment is bound up with a treatment of subjective expectations that are objectively reasonable and where no public policy bars recovery.

Based on *Garland v Consumers Gas Co.,* we can now say with confidence:

> **A remedy based upon unjust enrichment may be ordered where there is**
>
> **(a) a benefit to or enrichment of one party, and**
>
> **(b) a corresponding detriment to or deprivation suffered by the other party, and**
>
> **(c) the absence of any juristic reason for the benefit or enrichment to be retained.**
>
> **The 'juristic reason' involves consideration of:**
>
> **(i) traditional categories that would allow the benefit to be retained; and,**
>
> **(ii) fact-specific reasons and new categories of general application that would allow the benefit to be retained**

tested on both the reasonable expectations of the parties and public policy considerations.

The Family Law Context: Claims by Unmarried Spouses

***Kerr v. Baranow*, 2011 SCC 10 (S.C.C.)**, is the leading case.

In this case, the action for unjust enrichment was further developed for use in the family law context and specifically to deal with the entitlements of cohabiting partners. A new doctrine was created; a "joint family venture".

Cromwell J. held:

> [84] It is not the purpose of the law of unjust enrichment to replicate for unmarried partners the legislative presumption that married partners are engaged in a joint family venture. However, there is no reason in principle why remedies for unjust enrichment should fail to reflect that reality in the lives and relationships of unmarried partners.
>
> [85] I conclude, therefore, **that the common law of unjust enrichment should recognize and respond to the reality that there are unmarried domestic arrangements that are partnerships; the remedy in such cases should address the disproportionate retention of assets acquired through joint efforts with another person. This sort of sharing, of course, should not be presumed, nor will it be presumed that wealth acquired by mutual effort will be shared equally. Cohabitation does not, in itself, under the common law of unjust enrichment, entitle one party to a share of the other's property or any other relief. However, where wealth is accumulated as a result of joint effort, as evidenced by the nature of the parties' relationship and their dealings with each other, the law of unjust enrichment should reflect that reality.** Thus, as appropriate, the law can address the unjust enrichment of one partner (or is or her estate) who leaves the relationship with a disproportionate share of accumulated assets.

Furthermore, Cromwell J. held that the law shall not look to artificial constructions of doctrine unsuited to this context. Thus, the Court has explicitly held that the law of resulting trusts shall no more play a role in this area – '[t]he point of the resulting trust is that the claimant is asking for his or her own property back, or for the recognition of his or her proportionate interest in the asset which the other has acquired with that property. This thinking extends artificially to claims that are based on contributions that are not clearly associated with the acquisition of an interest in property; in such cases there is not, in any meaningful sense, a "resulting" back of the transferred property.' Rather what is required is an approach that is principled and speaks to the realities of the context:

> **... the principles of unjust enrichment, coupled with the possible remedy of a constructive trust, provide a much less artificial, more comprehensive and more principled basis to address the wide variety of circumstances that lead to claims arising out of domestic partnerships. There is no need for any artificial inquiry into common intent. Claims for compensation as well as for property interests may be addressed. Contributions of all kinds and made at all times may be justly considered. The equities of the particular case are considered transparently and according to principle, rather than masquerading behind often artificial attempts to find common intent to support what the court thinks for unstated reasons is a just result.**

Kerr v Baranow identifies a new doctrine, the 'joint family venture'. One would think that it would be relevant at this point of the analysis if a new juristic reason of general application has been established. However, it is precisely the case that it is not as there is no presumption that a cohabitational relationship should give rise to a presumption of sharing wealth. However, the same considerations that are relevant as to whether there is a 'joint family venture' are relevant to making out whether there were reasonable expectations of the parties to share acquired and accumulated wealth. Thus, this is a fact-specific exercise based on the circumstances of the individuals and policy arguments respecting the fairness of wealth sharing in those circumstances. Where there was no actual expectation of sharing, the defendant has a good defence to the claim unless the court (presumably) interferes to imply such an expectation as a matter of policy.

In identifying whether such a venture exists, one looks to certain factors:

> [89] **In undertaking this analysis, it may be helpful to consider the evidence under four main headings: mutual effort, economic integration, actual intent and priority of the family. There is, of course, overlap among factors that may be relevant under these headings and there is no closed list of relevant factors.** What follows is not a checklist of conditions for finding (or not finding) that the parties were engaged in a joint family venture. These headings, and the factors grouped under them, simply provide a useful way to approach a global analysis of the evidence and some examples of the relevant factors that may be taken into account in deciding whether or not the parties were engaged in a joint family venture. The absence of the factors I have set out, and many other relevant considerations, may well negate that conclusion.

Where the joint family venture is present, the appropriate remedy becomes a proportionate share of the asset in the hands of the defendant:

> [81] In such cases, the basis of the unjust enrichment is the retention of an inappropriately disproportionate amount of wealth by one party when the parties have been engaged in a joint family venture and there is a

> clear link between the claimant's contributions to the joint venture and the accumulation of wealth. Irrespective of the status of legal title to particular assets, the parties in those circumstances are realistically viewed as "creating wealth in a common enterprise that will assist in sustaining their relationship, their well-being and their family life" (McCamus, at p. 366). The wealth created during the period of cohabitation will be treated as the fruit of their domestic and financial relationship, though not necessarily by the parties in equal measure. Since the spouses are domestic and financial partners, there is no need for "duelling quantum meruits". In such cases, the unjust enrichment is understood to arise because the party who leaves the relationship with a disproportionate share of the wealth is denying to the claimant a reasonable share of the wealth accumulated in the course of the relationship through their joint efforts. The monetary award for unjust enrichment should be assessed by determining the proportionate contribution of the claimant to the accumulation of the wealth.

Claims on this basis arise *inter vivos* in family law proper, but also in the testamentary context.

Unjust Enrichment and Proprietary Claims Against Assets

***Moore v. Sweet*, 2018 SCC 52 (S.C.C.)** is a useful case that illustrates how unjust enrichment may feature in the testamentary context with reference to claims against assets that may pass outside an Estate, specifically insurance proceeds. In ***Richardson Estate v. Mew*, 2009 ONCA 403 (Ont. C.A.)**, a man died leaving an ex-wife (and their children) and a second wife (and their children). He died in a long-term care facility as he developed Alzheimer's Disease and required institutional care in his final years. The second wife managed his affairs using a Continuing Power of Attorney for Property management. A question arose in respect of a life insurance policy payable to the first wife. It had been taken out originally when the deceased was married to his first wife and then made subject of a condition in the separation agreement between them that the first wife remain as beneficiary for a year (the end of his child care obligations). He told his second wife that he would designate her as the beneficiary at the end of the commitment under the separation agreement but never did so. Some few years later, the deceased became incapable of managing his affairs due to Alzheimer's Disease. The costs of his care exhausted his retirement savings and the second wife assumed the costs of his care including paying the premiums due on the life insurance policy. It wasn't entirely clear in the report of the judgement whether it was established as a matter of fact that the second wife did actually pay premiums with her own money and the suggestion was that if she did, the sum was relatively modest. In any case, the action was brought in unjust enrichment claiming a constructive trust over the policy.

The Court of Appeal held that while the first wife may have been enriched, there was no corresponding deprivation and a juristic reason that allowed her to retain – the contract of insurance. That is, the plaintiff might have a theoretical claim against the

Estate for the premiums that she paid; ‘theoretical’ because she inherited the Estate. As against the designated beneficiary (the first wife), there was no claim in unjust enrichment as the contract of insurance constituted a good juristic reason for her to retain the insurance proceeds. The separation agreement may have contained a standard clause release or renouncing all claims against the other’s estate, but it is well recognized that the quality of title to insurance proceeds is unaffected where the policy continues to designate the former spouse as beneficiary upon death.

Richardson Estate v. Mew must now be read in the context of *Moore v. Sweet*. Here a man made an oral agreement with his ex-wife; if she maintained the policy of insurance that he owned on his own life, she would be entitled to the proceeds of the insurance policy at his death. The ex-wife held up her end of the bargain and paid the premiums for 7 years. The man did not; he designated his second wife irrevocably. Côté J. for the majority held that an action in unjust enrichment should be successful:

> [46] Taking a straightforward economic approach to the enrichment and corresponding deprivation elements of the unjust enrichment framework, I am of the view that Michelle stands deprived of the right to receive the entirety of the policy proceeds (for a value of $250,000) and that the necessary correspondence exists between this deprivation and Risa’s gain. With respect to the extent of Michelle’s deprivation, my view is that the quantification of her loss should not be limited to her out-of-pocket expenditures — that is, the $7,000 she paid in premiums between 2000 and 2013. Pursuant to her contractual obligation, she made those payments over the course of 13 years in exchange for the right to receive the policy proceeds from the Insurance Company upon Lawrence’s death. In breach of his contractual obligation, however, Lawrence instead transferred that right to Risa. Had Lawrence held up his end of the bargain with Michelle, rather than designating Risa irrevocably, the right to payment of the policy proceeds would have accrued to Michelle. At the end of the day, therefore, what Michelle lost is not only the amount she paid in premiums. She stands deprived of the very thing for which she paid — that is, the right to claim the
> $250,000 in proceeds.
>
> [47] To be clear, therefore, Michelle’s entitlement under the Oral Agreement is what makes it such that she was deprived of the full value of the insurance payout. In other cases where the plaintiff has some general belief that the insured ought to have named him or her as the designated beneficiary, but otherwise has no legal or equitable right to be treated as the proper recipient

> of the insurance money, it will likely be impossible to find either that the right to receive that insurance money was ever held by the plaintiff or that it would have accrued to him or her. In such cases, the properly designated beneficiary is not enriched at the expense of a plaintiff who had no claim to the insurance money in the first place — the result being that the plaintiff will not have suffered a corresponding deprivation to the full extent of the insurance proceeds (*Love v. Love*, 2013 SKCA 31, 359 D.L.R. (4th) 504, at
> para. 42).

Thus the nature of the enrichment and deprivation were the same – the opportunity to receive the insurance proceeds – and no juristic reason justified the retention of the enrichment by the defendant.

Provision of Services

One of the most commonly occurring types of claims against Estate in unjust enrichment is in respect of provision of services, like in *Degleman v Guaranty Trust Co. of Canada*. A nice illustration is ***Tarantino v. Galvano* (2017), 2017 ONSC 3535 (Ont. S.C.J.)**, appeal dismissed on other grounds, 2019 ONCA 699 (Ont. C.A.).

Here the case involved a situation in which a daughter provided care and support to her parents for many years. Was she entitled to claim against the Estate? Kristjanson J. held:

> [120] A quantum meruit claim is "simply one of the established categories of unjust enrichment claims": *Kerr v. Baranow*, 2011 SCC 10, [2011] 1 S.C.R. 269, at para. 74. It is a claim that there has been unjust enrichment, and that the remedy should be a monetary remedy calculated on the basis of quantum meruit (fee-for-services) rather than a proprietary remedy (constructive trust over specific property)….
>
> …
>
> [123] A party can make a claim for quantum meruit compensation against the Estate of a deceased person for services rendered to the deceased person during their lifetime: *Deglman v. Guaranty Trust Co. of Canada*, 1954 CanLII 2 (SCC), [1954] S.C.R. 725. In *Deglman*, the claimant lived with his aunt for six months and claimed that she agreed to leave him her house in her will if he did various tasks for her, including driving her places and doing "odd jobs" and "errands". He provided various services to his aunt, but she died intestate. Any oral contract between the nephew and his aunt was unenforceable by virtue

of the Statute of Frauds, and the aunt's estate refused to give anything to the nephew. In awarding monetary compensation for the nephew's services, Justice Cartwright found, at para. 30:

> In my opinion when the Statute of Frauds was pleaded the express contract was thereby rendered unenforceable, but, the deceased having received the benefits of the full performance of the contract by the respondent, the law imposed upon her, and so on her estate, the obligation to pay the fair value of the services rendered to her.
>
> …
>
> [126] The quantum meruit claim is established. Rosa received excellent care for over four years in very challenging circumstances—that is the benefit conferred. Nellie was correspondingly deprived; she closed her businesses and worked full time for the benefit of her mother. Nellie was meeting Rosa's wish to be looked after in her home, not a nursing home. Nellie was no longer earning income, and was on call 24 hours a day until January, 2010 when Meth Garcia, the live-in caregiver arrived. Even then, Nellie remained available to provide care during the day, evenings, and weekends. Rosa avoided paying for this care during her lifetime. Finally, there is no juristic reason for the enrichment. Nellie believed she was keeping up her end of the bargain. However, this court has invalidated the contract. In the absence of the contract, the services must be acknowledged and paid for, to avoid an unjust enrichment.

Thus we see that the old action in equity for *quantum meruit* still exists, but exists within the framework of the law of unjust enrichment.

B. Resulting Trust Claims

A resulting trust is a trust arising by operation of law in respect of, inter alia, a gratuitous transfer. It obligates the transferee to hold on trust for the transferor by presumption, which presumption can be rebutted (that is, on proving that the beneficial interest in the property was intended to be transferred gratuitously).
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 (S.C.C.)

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.