

Trusts – Law 463
Fall Term 2026

LECTURE NOTES NO. 10

VII. RESULTING TRUST

B. THE CONCEPT APPLIED

(a) Resulting Trusts And Failure of an Express Trust

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.

**Re Barrett
(1914), 6 OWN 267**

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. However, was there an implied disposition?

The will contained a clause which read:

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

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

Per Meredith CJO:

It is very probable that if the testator had contemplated when he made his will that so large a sum as \$17,200 would be at his credit in his bank at the time of his decease he would have made a different provision as to the disposition of it from that contained in para. 26, but that, in my opinion, affords no reason for putting a construction on the language of the testator different from that which would be placed upon it if the fund amounted to no more than \$500. **My learned**

brother's view was that the legatee is not entitled to the fund absolutely, but that a trust is created, and that all money not needed for the purpose which the testator mentioned 'belongs to the estate as a resulting trust.' I am with respect unable to agree with this view and am of opinion that the clear words of gift to the daughter are not cut down or controlled by the statement of the testator as to purpose or object of the gift.

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

Moffit v. Moffit
[1954] 2 D.L.R. 841 (BCSC)

The deceased died leaving a Will, and had ostensibly settled an inter vivos trust. The question was whether certain land fell into the estate of the deceased or were dealt with through the trust. Wilson J. explained:

3 The document which I am thus called upon to interpret contains many unusual and interesting features.

4 The property dealt with falls into three groups: (a) Lands owned jointly by the settlor and the trustee; (b) Lands owned by the settlor; (c) Lands owned by the trustee.

5 The scheme of the deed, baldly, is this:

6 (1) That the trustee will, during the lifetime of the settlor and her husband, or the survivor of them, pay to them the net income from the trust property;

7 (2) That if the trustee dies while the settlor and her husband, or either of them, is still alive, the trustee's wife (called the substitute trustee) will pay to the settlor and her husband or the survivor of them the income from the properties listed under heading (b) above and one-half of the income from the properties listed under heading (a) above;

8 (3) No provision is made for the disposition of corpus or income after the death of the settlor and her husband.

9 The neat point I am asked to decide is this: Whether or not, since the trusts do not exhaust the estate given the trustee, there is

a resulting trust in favour of the executors as successors in title of Margaret Moffit, deceased, or whether, on the other hand, there is a gift to the trustee of the remainder.

Wilson J. then identified an old rule on point:

10 All cases dealing with this subject refer to the rule stated by Lord Eldon, L.C., in *King v. Denison* (1813) 1 Ves & B 260, at 270, 35 ER 102:

'If I give to A. and his heirs all my real estate, charged with my debts, that is a devise to him for a particular purpose, but not for that purpose only. If the devise is upon trust to pay my debts, that is a devise for a particular purpose, and nothing more; and the effect of those two modes admits just this difference. The former is a devise of an estate of inheritance for the purpose of giving the devisee the beneficial interest, subject to a particular purpose; the latter is a devise for a particular purpose; with no intention to give him any beneficial interest.'

After considering cases which provided glosses on the rule, Wilson J. then discerned the intention of the settlor from a reading of the Will and Deed together and held:

22 The rest of the trust deed is, as counsel for the defendants concedes, consistent with either interpretation. But **the passages I have cited satisfy me that the settlor intended to benefit the trustee, not merely ex gratia, as a son, but because she was receiving a valuable consideration, to wit, the income during her lifetime of his own properties and the unrewarded services of himself and his wife as managers, during the lifetime of herself and her husband, and for the benefit of herself and her husband, of the income from the properties. Hence I say there is no resulting trust. And in saying so, I repeat these words, already cited, of Bowen, L.J. in *Croome v. Croome*: "Those words do convey to me the impression, and an impression which is more than a mere guess, on which I am willing to act, and on which I seriously do act, in dealing with the property of others."**

Thus both a Deed and a Trust can be interpreted to allow for the court to give effect to an intention to dispose of an interest without a provision guiding the disposition of an unaccounted for interest.

(b) The Resulting Trust as a Family Law Device

In *Rathwell v Rathwell*, [1978] 2 S.C.R. 436 *S.C.C.), the Supreme Court of Canada used the resulting trust as a device to give effect to the “common intention” of the parties, a cohabiting couple who had separated, to depart from division of their property upon principles of financial contribution alone. It was a landmark decision and one that was part of a commonwealth trend modernizing family law in respect of the division of matrimonial and cohabitational property. This has now been rejected in favour of an approach rooted in unjust enrichment.

In [Kerr v. Baranow](#), 2011 SCC 10 (S.C.C.); **cb, p.614** 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:

[13] The resulting trust jurisprudence in domestic property cases developed into what has been called “a purely Canadian invention”, the “common intention” resulting trust: A. H. Oosterhoff, et al., *Oosterhoff on Trusts: Text, Commentary and Materials* (7th ed. 2009), at p. 642. While this vehicle has largely been eclipsed by the law of unjust enrichment since the decision of the Court in *Pettkus v. Becker*, 1980 CanLII 22 (SCC), [1980] 2 S.C.R. 834, claims based on the “common intention” resulting trust continue to be advanced. In the *Kerr* appeal, for example, the trial judge justified the imposition of a resulting trust, in part, on the basis that the parties had a common intention that Mr. Baranow would hold title to the property by way of a resulting trust for Ms. Kerr. The Court of Appeal, while reversing the trial judge’s finding of fact on this point, implicitly accepted the ongoing vitality of the common intention resulting trust.

[14] However promising this common intention resulting trust approach looked at the beginning, doctrinal and practical problems soon became apparent and have been the subject of comment by the Court and scholars: see, e.g., *Pettkus*, at pp. 842-43; *Oosterhoff*, at pp. 641-47; D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters’ Law of Trusts in Canada* (3rd ed. 2005) (“*Waters*”), at pp. 430-35; J. Mee, *The Property Rights of Cohabitees: An Analysis of Equity’s Response in Five Common Law Jurisdictions* (1999), at pp. 39-43; T. G. Youdan, “Resulting and Constructive Trusts”, in *Special Lectures of the Law Society of Upper Canada 1993 — Family Law: Roles, Fairness and Equality* (1994), 169, at pp. 172-74.

...

[21] That brings me to the “common intention” resulting trust. It figured prominently in the majority judgment in *Murdoch v. Murdoch*, 1973 CanLII 193 (SCC), [1975] 1 S.C.R. 423. Quoting from Lord Diplock’s speech in *Gissing v. Gissing*, [1970] 2 All E.R. 780 (H.L.), at pp. 789 and 793, Martland J. held for the majority that, absent a financial contribution to the acquisition of the contested property, a resulting trust could only arise “where the court is satisfied by the words or conduct of the parties that it was their common intention that the beneficial interest was not to belong solely to the spouse in whom the legal estate was vested but was to be shared between them in some proportion or other”: *Murdoch*, at p. 438.

[22] This approach was repeated and followed by a majority of the Court three years later in *Rathwell*, at pp. 451-53, although the Court also unanimously found there had been a direct financial contribution by the claimant. In *Rathwell*, there is, as well, some blurring of the notions of contribution and common intention; there are references to the fact that a presumption of resulting trust is sometimes explained by saying that the fact of contribution evidences the common intention to share ownership: see p. 452, per Dickson J. (as he then was); p. 474, per Ritchie J. This blurring is also evident in the reasons of the Court of Appeal in *Kerr*, where the court said, at para. 42, that “[a] resulting trust is an equitable doctrine that, by operation of law, imposes a trust on a party who holds legal title to property that was gratuitously transferred to that party by another and where there is evidence of a common intention that the property was to be shared by both parties” (emphasis added).

[23] The Court’s development of the common intention resulting trust ended with *Pettkus*, in which Dickson J. (as he then was) noted the “many difficulties, chronicled in the cases and in the legal literature” as well as the “artificiality of the common intention approach” to resulting trusts: at pp. 842-43. He also clearly rejected the notion that the requisite common intention could be attributed to the parties where such an intention was negated by the evidence: p. 847. The import of *Pettkus* was that the law of unjust enrichment, coupled with the remedial constructive trust, became the more flexible and appropriate lens through which to view property and financial disputes in domestic situations. As Ms. Kerr stated in her factum, the “approach enunciated in *Pettkus v. Becker* has become the dominant legal paradigm for the resolution of property disputes between common law spouses” (para. 100).

[24] This, in my view, is as it should be, and the time has come to say that the common intention resulting trust has no further role to play in the resolution of domestic cases. I say this for four reasons.

[25] First, as the abundant scholarly criticism demonstrates, the common intention resulting trust is doctrinally unsound. It is inconsistent with the underlying principles of resulting trust law. Where the issue of intention is relevant to the finding of resulting trust, it is the intention of the grantor or contributor alone that counts. As Professor Waters puts it, “In imposing a resulting trust upon the recipient, Equity is never concerned with [common] intention” (Waters’, at p. 431). The underlying principles of resulting trust law also make it hard to accommodate situations in which the contribution made by the claimant was not in the form of property or closely linked to its acquisition. The 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: Waters’, at p. 432. It follows that a resulting trust based solely on intention without a transfer of property is, as Oosterhoff puts it, a doctrinal impossibility: “. . . a resulting trust can arise only when one person has transferred assets to, or purchased assets for, another person and did not intend to make a gift of the property”: p. 642. The final doctrinal problem is that the relevant time for ascertaining intention is the time of acquisition of the property. As a result, it is hard to see how a resulting trust can arise from contributions made over time to the improvement of an existing asset, or contributions in kind over time for its maintenance. As Oosterhoff succinctly puts it at p. 652, a resulting trust is inappropriate in these circumstances because its imposition, in effect, forces one party to give up beneficial ownership which he or she enjoyed before the improvement or maintenance occurred.

[26] There are problems beyond these doctrinal issues. A second difficulty with the common intention resulting trust is that the notion of common intention may be highly artificial, particularly in domestic cases. The search for common intention may easily become “a mere vehicle or formula” for giving a share of an asset, divorced from any realistic assessment of the actual intention of the parties. Dickson J. in *Pettkus* noted the artificiality

and undue malleability of the common intention approach: at pp. 843-44.

[27] Third, the “common intention” resulting trust in Canada evolved from a misreading of some imprecise language in early authorities from the House of Lords. While much has been written on this topic, it is sufficient for my purposes to note, as did Dickson J. in *Pettkus*, at p. 842, that the principles upon which the common intention resulting trust jurisprudence developed are found in the House of Lords decisions in *Pettitt v. Pettitt*, [1970] A.C. 777, and *Gissing*. However, no clear majority opinion emerged in those cases and four of the five Law Lords in *Gissing* spoke of “resulting, implied or constructive trusts” without distinction. The passages that have been most influential in Canada on this point, those authored by Lord Diplock, in fact relate to constructive rather than resulting trusts: see, e.g., *Waters*, at pp. 430-35; *Oosterhoff*, at pp. 642-43. I find persuasive Professor *Waters*’ comments, specifically approved by Dickson J. in *Pettkus*, that where the search for common intention becomes simply a vehicle for reaching what the court perceives to be a just result, “[i]t is in fact a constructive trust approach masquerading as a resulting trust approach”: *D. Waters, Comment* (1975), 53 *Can. Bar Rev.* 366, at p. 368.

[28] Finally, as the development of the law since *Pettkus* has shown, 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.

[29] I would hold that the resulting trust arising solely from the common intention of the parties, as described by the Court in *Murdoch and Rathwell*, no longer has a useful role to play in resolving property and financial disputes in domestic cases. I emphasize that I am speaking here only of the common intention resulting trust. I am not addressing other aspects of the law relating to resulting trusts, nor am I suggesting that a resulting trust that would otherwise validly arise is defeated by the existence in fact of common intention.

(c) “Purchase Money” Resulting Trusts

As we considered in respect of gratuitous transfers, equity doesn't concern itself as much with legal title as with beneficial interests and thereafter uses the resulting trust to force the title-holder to hold on trust for the transferor unless there is a good reason not to interfere with the beneficial interest following the legal interest – e.g. through proof of donative intention.

It is not unusual in commercial and even domestic arrangements for the purchaser of property to use another's money to complete the transaction; the title may be put in the purchaser's name, the name of the person who supplied the money, a third party with an interest in the money, a third party stranger, or some or all of them in joint tenancy or tenancy in common. Obviously the parties can structure arrangements to suit their interests and preferences.

Thus, A advances money to B to purchase property in B's name. A would normally be considered the beneficiary of a resulting trust for the gratuitous transfer of the money to B which could be followed into the property (even if the property is land; **Neazor v Hoyle (1962), 32 DLR 92 (2d) 131 (Alta SC App Div)**).

What if the situation was not truly a gratuitous transfer, but it was A and B's common intention that A should be treated as having a beneficial interest in the property notwithstanding not having any part of the title to the property? A purchase money resulting trust can arise - **a ‘purchase money’ resulting trust means that A can claim an interest through a resulting trust where he or she supplied the purchase money ‘in the character as a purchaser’ meaning that there was a common intention between the A and B such that A would retain the beneficial interest in the purchase money and can claim a proprietary interest in the property.** How can the A's claim be defeated? Simply by showing that he or she intended to benefit B or another and was content to have a debt owed to him or her by B (or not at all).

Nishi v. Rascal Trucking Ltd.
2013 SCC 33 (S.C.C.); cb, p.622

The *dramtis personae* for this particular comedy of errors are:

Hans Heringa: a civil engineer and owner of **Rascal Trucking Ltd.**

Cidalia Plavetic: a realtor and owner of **Kismet Enterprises Ltd.**

Edward Nishi: common law partner of Plavetic.

The City of Nanaimo: A place in British Columbia which is evidently the 'Bathtub Racing Capital of the World' in addition to being responsible for the ubiquitous 'Nanaimo bar'.

CIBC: The people who own the ATM machines distributed around campus.

Heringa and Plavetic were business partners who at one time had a romantic relationship. Kismet owned two acres of land in Nanaimo where Nishi and Plavetic lived. Heringa proposed a topsoil processing venture on the land; Plavetic agreed. Rascal leased the land from Kismet and commenced operations. The residents nearby complained that the business constituted a nuisance. The City of Nanaimo passed a by-law disallowing such businesses at the location and ordered that the topsoil on site be removed; nothing was done. The City removed the topsoil and added tax arrears to Kismet's account for \$110,679.74. Rascal admitted liability for the charge to Kismet based on an indemnity clause in their contract. Rascal didn't pay the tax owing but sued the City instead for damages including its liability to pay the tax. Kismet defaulted on the mortgage on the property and CIBC foreclosed. The bank paid the tax arrears and offered the property for sale. Nishi bought the land for \$237,500 (which was the fair market value plus the costs of the taxes). Heringa agreed to put \$85,000 of Rascal's money towards the purchase and assume \$25,000 of the mortgage (that is, paying the equivalent of the taxes). Nishi and Plavetic then made improvements with a view to selling the property as a development. Rascal claimed an interest in the land.

At trial, it was found as a fact that there was no agreement between Nishi and Heringa or Rascal to grant Rascal an interest in the land (although that was what Rascal wanted). Indeed the trial judge found that '[Nishi and Plavetic] would not have spent that money if Mr. Heringa was to have had an interest in the land;' 2010 BCSC 649, para. 20. The trial judge held that the money was advanced by Rascal as it was liable to pay the taxes and Heringa promised that he would do so – Dley J. held, 'The contribution toward the purchase price by Rascal was simply to put Ms. Plavetic, Kismet, and Mr. Nishi in the same position as if the nuisance and its accompanying charges had not been caused by the plaintiff;' 2010 BCSC 649, para. 55.

In the BCCA, the Court held that the trial judge wrongfully considered Nishi's intention rather than Rascal's intention. That is, Rascal provided money gratuitously and thus a resulting trust arose. The presumption was not rebutted by Nishi given that the trial judge did not make clear findings of fact that a gift was intended.

The appeal was allowed in the Supreme Court of Canada. Per Rothstein J.:

[21] The purchase money resulting trust is a species of gratuitous transfer resulting trust, where a person advances

a contribution to the purchase price of property without taking legal title. Gratuitous transfer resulting trusts presumptively arise any time a person voluntarily transfers property to another unrelated person or purchases property in another person's name: D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters' Law of Trusts in Canada* (4th ed. 2012), at p. 397.

[22] As Cromwell J. noted in *Kerr v. Baranow*, 2011 SCC 10 (CanLII), 2011 SCC 10, [2011] 1 S.C.R. 269, at para. 12, it has been "settled law since at least 1788 in England (and likely long before) that the trust of a legal estate, whether in the names of the purchaser or others, 'results' to the person who advances the purchase money". Despite this recent endorsement of the purchase money resulting trust, Mr. Nishi argues that it should be abandoned in favour of the doctrine of unjust enrichment. The purchase money resulting trust provides certainty and predictability. Mr. Nishi has not advanced arguments that would support overruling the Court's jurisprudence in this area.

...

B. Did a Resulting Trust Arise for the Benefit of Rascal?

[29] Rascal's contribution to the purchase of the property was made without consideration and Rascal and Mr. Nishi are not related. Therefore, the legal presumption of resulting trust applies: *Pecore* at paras. 24 and 27. This is because in such circumstances equity presumes bargains rather than gifts: *Pecore*, at para. 24. In the context of a purchase money resulting trust, the presumption is that the person who advanced purchase money intended to assume the beneficial interest in the property in proportion to his or her contribution to the purchase price: see *Waters' Law of Trusts in Canada*, atp. 401.

[30] However, the presumption of resulting trust can be rebutted if the recipient of the property proves, on a balance of probabilities, that the person who advanced the funds intended a gift: *Pecore*, at paras. 24 and 44. The relevant intention is the intention of the person who advanced the funds at the time of the contribution to the purchase price: *Pecore*, at para. 59. Therefore, for Mr. Nishi to rebut the presumption in this case, he must prove that Rascal intended to make a gift at the time that

Rascal made a contribution to the purchase price, in May 2001.

[31] In my view, the trial judge was correct to conclude that the presumption was rebutted in this case. In his May 28, 2001 fax, Mr. Heringa indicated that the contribution to the purchase price and his intention to pay \$25,000 of the mortgage was made “without any conditions or requirements, and these instructions are irrevocable” (A.R., at p. 117). As will be discussed below, a contribution to the purchase price without any intention to impose conditions or requirements is a legal gift. While Mr. Heringa argued that there was either an agreement to transfer a portion of the land to him or an intention for him to hold a beneficial interest, the trial judge preferred the evidence of Mr. Nishi (para. 40).

[32] The Court of Appeal held that the trial judge’s findings (1) that there was no issue of a gift and (2) that Mr. Heringa’s intention to obtain an interest in the property was obvious, meant that the presumption of resulting trust had not been rebutted. In my view, the Court of Appeal erred in the inferences it drew from the trial judge’s reasons on these two key issues.

...

[33] Reviewing the trial judge’s reasons in their full context confirms that he understood that Rascal’s intention at the time of the advance was to make a legal gift — i.e. to contribute to the purchase price without taking a beneficial interest in the property. As the trial judge found, Rascal’s contribution to the purchase price was motivated by recognition of the costs that it had imposed on Kismet, the company owned by Ms. Plavetic, his friend. As I will explain, this intention, to make good on Rascal’s obligations to Kismet by way of a payment to Mr. Nishi, is not inconsistent with a finding of a legal gift. Moreover, as was clear from the May 28, 2001 fax, Rascal’s stated intention was to make the advance without any conditions such as obtaining a beneficial interest in any portion of the land.

[34] The trial judge’s comment that there was “no issue of a gift” was made in the context of reviewing Mr. Nishi and Ms. Plavetic’s perspective on the purpose of the payment:

In this case, there is no issue of a gift. Neither Mr. Nishi nor Ms. Plavetic considered the plaintiff's contribution to be a gift. [para. 42]

Mr. Nishi and Ms. Plavetic did not see the payment as a gift, because as the trial judge went on to describe, Rascal acknowledged its responsibility for a debt to Kismet related to the tax arrears arising from Rascal's topsoil operation. However, it made no sense for Rascal to make that payment directly to Kismet since Kismet was subject to other liabilities and was essentially defunct. If Rascal had made the payment to Kismet, it would not have assisted Mr. Heringa's friends to obtain title to the property. Making the contribution to the purchase price, therefore, enabled Rascal to live up to its moral commitment in a way that practically benefited Mr. Heringa's friends. It also left open the possibility that in the future they might agree to a second mortgage or a transfer of a portion of the property to Rascal.

[35] Indeed, Mr. Heringa's instructions to his staff on payment of his contribution towards the mortgage on the property refer to the amount of the tax arrears (\$110,679.74) down to the penny. The necessary implication is that Mr. Heringa viewed the payments as connected with that moral obligation. If Mr. Heringa's intention at that time was for Rascal to take a beneficial interest in the property, the moral obligation would not have been fulfilled since Rascal would have used the payment to obtain a corresponding interest in the land and not to make good on its moral obligation. In other words, for these parties, one payment cannot be used both to discharge the moral obligation and to obtain a beneficial interest in the land. The two intentions are incompatible.

(d) Gratuitous Transfers

The Presumption Of Advancement (see also cb, pp. 609-610)

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.); cb, p.642

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 is 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 facie 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.