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Supreme Court rules on joint name transfer issue

It's not uncommon for an elderly parent to transfer real estate or other assets into joint names with his or her adult children. When this happens, does the law presume that the transfer is a gift, or does the child merely hold the asset in trust for the parent?

Those were the questions which arose in the case of Pecore v. Pecore, which was decided by the Supreme Court of Canada last year.

In 1993, Edwin Hughes was advised that his $1 million estate could save significant probate fees on his death if he transferred ownership into the joint names of himself and his daughter Paula Pecore.

After most of the estate was transferred, Hughes was told that this type of transfer could trigger a significant capital gain on the profit on Paula's "half" of the assets.

Since that was not his intention, he wrote letters to the financial institutions holding the assets stating that the ownership change was for probate purposes only (to avoid the 1.5 per cent probate fees), and was not to be interpreted as a gift to Paula during his lifetime.

Shortly before he died, Hughes signed a will dividing his estate equally between Paula and her husband Michael Pecore. When Hughes died, Paula redeemed all of the investments, which she was entitled to do because they were registered jointly with her father.

Two years later, in the midst of divorce proceedings, Michael discovered he was entitled to half of his father-in-law's estate and sued Paula for his share.

Two long-standing common law doctrines come into conflict in situations like this where a parent transfers assets to an adult child.

The first is known as a "presumption of advancement," where the court rules that the recipient receives the asset as an outright gift.

The second is referred to as a "resulting trust," which is when the court will presume that the recipient does not receive anything, but merely holds the asset in trust for the giver.

In the Pecore case, the trial court ruled that the father had made an outright gift of all his assets to his daughter, and the "presumption of advancement" (or gift) rule applied with the result that Paula's husband got nothing.

The Ontario Court of Appeal agreed with the result at trial, but for different reasons.

Michael Pecore's appeal to the Supreme Court of Canada was heard by all nine judges in December 2006, and its decision was released in May of 2007.

The Supreme Court held that the trial judge got the right result for the wrong reason. It decided that the presumption of gift (or advancement) no longer applies to transfers of assets to independent adult children.

Instead, the courts will now presume that the adult child is holding the property in trust for the aging parent to facilitate the free and efficient management of that parent's affairs. In cases like these, it is always open to the recipient child to produce evidence to counter the presumption that the assets are to be held in trust.

In the Pecore case, the Supreme Court decided the evidence clearly demonstrated the intention on the part of the father that the transfers were gifts to go to Paula alone when he died despite the 50-50 division in the will.

Under the Pecore ruling, which now binds every court in the country, assets including real estate transferred to independent adult children are presumed to be held in trust by the child for the parent unless the child can prove that the parent intended a gift.

If the recipient child is under 18, however, transfers to him or her are presumed to be gifts.

The Pecore case holds an important lesson for parents elderly or not, who transfer assets or joint ownership of assets to their children.

The Supreme Court has now ruled that in cases like these, where the transfer could be subject to challenge at a later stage, the parent's intention should be clearly documented to indicate whether or not it was a gift.

In the absence of evidence to the contrary, courts will presume that transfers to independent adult children are not gifts.

Ownership remains with the parent and the assets are therefore subject to probate and distribution under a will.

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Pecore v. Pecore, 2007 SCC 17 (CanLII)

Date: 2007-05-03

Docket: 31202

Parallel citations: [2007] 1 S.C.R. 795 (2007), 279 D.L.R. (4th) 513 (2007), 37 R.F.L. (6th) 237 (2007), 224 O.A.C. 330
URL: http://www.canlii.org/en/ca/scc/doc/2007/2007scc17/2007scc17.html

Related decisions

- **Superior Court of Justice**

  Pecore v. Pecore, 2004 CanLII 5047 (ON S.C.)

Noteup

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SUPREME COURT OF CANADA

CITATION: Pecore *v.* Pecore, [2007] 1 S.C.R. 795, 2007 SCC 17	**DATE:** 20070503 **DOCKET:** 31202

BETWEEN:

Michael Pecore

Appellant

and

Paula Pecore and Shawn Pecore

Respondents

CORAM: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.

REASONS FOR JUDGMENT: (paras. 1 to 76)	Rothstein J. (McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish and Charron JJ. concurring)
CONCURRING REASONS: (paras. 77 to 107)	Abella J.

Pecore *v.* Pecore, [2007] 1 S.C.R. 795, 2007 SCC 17

Michael Pecore *Appellant*

v.

Paula Pecore and Shawn Pecore *Respondents*

Indexed as: Pecore *v.* Pecore

Neutral citation: 2007 SCC 17.

File No.: 31202.

2006: December 6; 2007: May 3.

Present: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.

on appeal from the court of appeal for ontario

Wills and estates Joint bank and investment accounts with right of survivorship Presumptions of resulting trust and advancement Father gratuitously placing assets in joint accounts with daughter Whether assets in joint accounts to be included in father s estate upon his death Whether presumption of resulting trust rebutted Whether presumption of advancement applicable Standard of proof applicable to rebut presumptions.

Wills and estates Joint bank and investment accounts with right of survivorship Presumptions of resulting trust and advancement Father gratuitously placing assets in joint accounts with daughter Evidence to be considered in ascertaining transferor s intention Whether evidence of intention that arises subsequent to transfer should be excluded.

Wills and estates Joint bank and investment accounts with right of survivorship Nature of survivorship in context of joint accounts.

Gifts Gratuitous transfer from parent to child Presumption of advancement Whether presumption applies between mother and child Whether presumption applies only to transfers made between parent and minor child.

An ageing father gratuitously placed the bulk of his assets in joint accounts with his daughter P, who was the closest to him of his three adult children. Unlike her siblings, who were financially secure, P worked at various lowlpaying jobs and took care of her quadriplegic husband, M. P s father helped P and her family financially, including buying them a van, making improvements to their home, and assisting her son while he was attending university. P s father alone deposited funds into the joint accounts. He continued to use and control the accounts, and declared and paid all the taxes on the income made from the assets in the accounts. In his will, P s father left specific bequests to P, M and her children but did not mention the accounts. The residue of the estate was to be divided equally between P and M. Upon the father s death, P redeemed the balance in the joint accounts on the basis of a right of survivorship. P and M later divorced, and a dispute over the accounts arose during their matrimonial property proceedings. M claimed that P held the balance in the accounts in trust for the benefit of her father s estate and, consequently, the assets formed part of the residue and should be distributed according to the will. The trial judge held that P s father intended to make a gift of the beneficial interest in the accounts upon his death to P alone, concluding that the evidence failed to rebut the presumption of advancement. The Court of Appeal dismissed M s appeal, but found that it was not necessary to rely on the presumption of advancement because the presumption is only relevant in the absence of evidence of actual intention or where the evidence is evenly balanced.

Held: The appeal should be dismissed.

Per McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish, Charron and Rothstein JJ.: The long-standing common law presumptions of advancement and resulting trust continue to play a role in disputes over gratuitous transfers. These presumptions provide a guide for courts where evidence as to the transferor s intent in making the transfer is unavailable or unpersuasive. They also provide a measure of certainty and predictability for individuals who put property in joint accounts or make other gratuitous transfers. The presumption of resulting trust is the general rule for gratuitous transfers and the onus is placed on the transferee to demonstrate that a gift was intended. However, depending on the nature of the relationship between the transferor and transferee, the presumption of advancement may apply and it will fall on the party challenging the transfer to rebut the presumption of a gift. The civil standard of proof is applicable to rebut the presumptions. The applicable presumption will only determine the result where there is insufficient evidence to rebut it on a balance of probabilities. [23-24] [27] [43-44]

In the context of a transfer to a child, the presumption of advancement, which applies equally to fathers and mothers, is limited in its application to gratuitous transfers made by parents to minor children. Given that a principal justification for the presumption of advancement is parental obligation to support dependent children, the presumption does not apply in respect of independent adult children. Moreover, since 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 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. The presumption of advancement is also not applicable 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. While dependency will not be a basis on which to apply the presumption, evidence as to the degree of dependency of an adult transferee child on the transferor parent may provide strong evidence to rebut the presumption of a resulting trust. [33] [36] [40-41]

With joint accounts, the rights of survivorship, both legal and equitable, vest when the account is opened. The gift of those rights is therefore *inter vivos* in nature. Since the nature of a joint account is that the balance will fluctuate over time, the gift in these circumstances is the transferee s survivorship interest in the account balance at the time of the transferor s death. The presumption of a resulting trust means in that context that it will fall to the surviving joint account holder to prove that the transferor intended to gift the right of survivorship to whatever assets are left in the account to the survivor. [48] [50] [53]

The types of evidence that should be considered in ascertaining a transferor s intent will depend on the facts of each case. The evidence considered by a court may include the wording used in bank documents, the control and use of the funds in the account, the granting of a power of attorney, the tax treatment of the joint account, and evidence subsequent to the transfer if such evidence is relevant to the transferor s intention at the time of the transfer. The weight to be placed on a particular piece of evidence in determining intent should be left to the discretion of the trial judge. [55] [59-62] [69]

In this case, the trial judge erred in applying the presumption of advancement. P, although financially insecure, was not a minor child. The presumption of a resulting trust should therefore have been applied. Nonetheless, this error does not affect the disposition of the appeal because the trial judge found that the evidence clearly demonstrated the intention on the part of the father that the balance left in the joint accounts was to go to P alone on his death through survivorship. This strong finding regarding the father s actual intention shows that the trial judge s conclusion would have been the same even if he had applied the presumption of a resulting trust. [75]

Per Abella J.: The trial judge properly applied the correct legal presumption to the facts of the case. Historically, the presumption of advancement has been applied to gratuitous transfers to children, regardless of the child s age, and there is no reason now to limit its application to non-adult children. The argument that a principal justification for the presumption was the parental obligation to support dependent children unduly narrows and contradicts the historical rationale for the presumption. Parental affection, no less than parental obligation, has always grounded the presumption of advancement. Furthermore, the intention to have an adult child manage a parent s financial affairs during his or her lifetime is hardly inconsistent with the intention to make a gift of money in a joint account to that child. Parents generally want to benefit their children out of love and affection. If children assist them with their affairs, this cannot logically be a reason for displacing the assumption that parents desire to benefit them. It is equally plausible that an elderly parent who gratuitously enters into a joint bank account with an adult child on whom he or she depends for assistance intends to make a gift in gratitude for this assistance. If the intention is merely to have assistance in financial management, a power of attorney would suffice, as would a bank account without survivorship rights. Accordingly, since the presumption of advancement emerged no less from affection than from dependency, and since parental affection flows from the inherent nature of the relationship not of the dependency, the presumption of advancement should logically apply to all gratuitous transfers from parents to their children, regardless of the age or dependency of the child or the parent. The natural affection parents are presumed to have for their adult children when both were younger should not be deemed to atrophy with age. [79] [89] [100] [102] [107]

In any event, bank account documents which, as in this case, specifically confirm a survivorship interest should be deemed to reflect an intention that what has been signed is sincerely meant. There is no justification for ignoring the presumptive relevance of clear language in banking documents in determining the transferor s intention. [104]

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By Rothstein J.

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APPEAL from a judgment of the Ontario Court of Appeal (Weiler, Rosenberg and Lang JJ.A.) 2005 CanLII 31576 (ON C.A.), (2005), 19 E.T.R. (3d) 162, 17 R.F.L. (6th) 261, 202 O.A.C. 158, [2005] O.J. No. 3712 (QL), affirming a decision of Karam J. 2004 CanLII 5047 (ON S.C.), (2004), 7 E.T.R. (3d) 113, 48 R.F.L. (5th) 89, [2004] O.J. No. 695 (QL). Appeal dismissed.

Andrew M. Robinson and *Megan L. Mackey*, for the appellant.

Bryan C. McPhadden and *Fabrice Gouriou*, for the respondents.

The judgment of McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish, Charron and Rothstein JJ. was delivered by

ROTHSTEIN J.

I. Introduction

1 This appeal involves questions about joint bank and investment accounts where only one of the account holders deposits funds into the account. These types of joint accounts are used by many Canadians for a variety of purposes, including estate-planning and financial management. Given their widespread use, the law relating to how these accounts are to be treated by courts after the death of one of the account holders is a matter appropriate for this Court to address.

2 Depending on the terms of the agreement between the bank and the two joint account holders, each may have the legal right to withdraw any or all funds from the accounts at any time and each may have a right of survivorship. If only one of the joint account holders is paying into the account and he or she dies first, it raises questions about whether he or she intended to have the funds in the joint account go to the other joint account holder alone or to have those funds distributed according to his or her will. How to answer this question is the subject of this appeal.

3 In the present case, an ageing father gratuitously placed his mutual funds, bank account and income trusts in joint accounts with his daughter, who was one of his adult children. The father alone deposited funds into the accounts. Upon his death, a balance remained in the accounts.

4 It is not disputed that the daughter took legal ownership of the balance in the accounts through the right of survivorship. Equity, however, recognizes a distinction between legal and beneficial ownership. The beneficial owner of property has been described as the real owner of property even though it is in someone else s name : *Csak v. Aumon* reflex, (1990), 69 D.L.R. (4th) 567 (Ont. H.C.J.), at p. 570. The question is whether the father intended to make a gift of the beneficial interest in the accounts upon his death to his daughter alone or whether he intended that his daughter hold the assets in the accounts in trust for the benefit of his estate to be distributed according to his will.

5 While the focus in any dispute over a gratuitous transfer is the actual intention of the transferor at the time of the transfer, intention is often difficult to ascertain, especially where the transferor is deceased. Common law rules have developed to guide a court s inquiry. This appeal raises the following issues:

1. Do the presumptions of resulting trust and advancement continue to apply in modern times?
2. If so, on what standard will the presumptions be rebutted?
3. How should courts treat survivorship in the context of a joint account?
4. What evidence may courts consider in determining the intent of a transferor?

6 In this case, the trial judge found that the father actually intended a gift and held that his daughter may retain the assets in the accounts. The Court of Appeal dismissed the appeal of the daughter s ex-husband.

7 I conclude that there is no basis to overturn this result. The appeal should be dismissed.

II. Facts

8 The dispute is between Paula Pecore and her ex-husband Michael Pecore regarding who is entitled to the assets held in joint accounts between Paula and her father upon her father s death. The assets in the joint accounts in dispute totalled almost $1,000,000 at the time Paula s father died in 1998.

9 Paula has two siblings but of the three, she was the closest to their father. In fact, her father was estranged from one of her sisters until shortly before his death in 1998. Unlike her siblings who were financially secure, Paula worked at various low-paying jobs and took care of her quadriplegic husband Michael. Her father helped her and her family financially by, for example, buying them a van, making improvements to their home, and assisting her son while he was attending university.

10 In 1993, Paula s father was told by a financial advisor that by placing his assets in joint ownership, he could avoid the payment of probate fees and taxes and generally make after-death disposition less expensive and less cumbersome ((2004), 7 E.T.R. (3d) 113, at para. 7). In February of 1994, he began transferring some of his assets which were mainly either in bank accounts or in mutual funds to himself and to Paula jointly, with a right of survivorship (*ibid*., at para. 6). In 1996, Paula s father was advised by his accountant that for tax purposes, transfers to his daughter (as opposed to a spouse) could trigger a capital gain, with the result that tax on the gain would be due as of the year of disposition. As a result, Paula s father wrote letters to the financial institutions purporting to deal with the tax implications. In these letters he stated that he was the 100% owner of the assets and the funds are not being gifted to Paula (*ibid*., at para. 10).

11 Paula s father continued to use and control the accounts after they were transferred into joint names. He declared and paid all the taxes on the income made from the assets in the accounts. Paula made some withdrawals but was required to notify her father before doing so. According to her, this was because her father wanted to ensure there were sufficient funds available for her to withdraw.

12 In early 1998, Paula s father drafted what was to be his last will. By this time, he had already transferred the bulk of his assets into the joint accounts with Paula. For the first time, he named Michael in his will. The will left specific bequests to Paula, Michael and her children (whom Michael had adopted), but did not mention the accounts. The residue of the estate was to be divided equally between Paula and Michael.

13 The lawyer who drafted the will testified that he asked Paula s father about such things as registered retirement savings plans, R.R.I.F.s, registered pension plans, life insurance, and in each case satisfied [him]self that they were not items which would pass as the result of a will and so that they needn t be included in the will (*ibid.*, at para. 37). There was no discussion about the joint investment and bank accounts.

14 In 1998, Paula s father moved into Paula and Michael s house. In 1997 and 1998, the father had expressed to others, including one of Paula s sisters, that he was going to take care of Paula after his death, but said the system would take care of Michael.

15 Paula s father died in December 1998. His estate paid tax on the basis of a deemed disposition of the accounts to Paula immediately before his death.

16 Paula and Michael later divorced. The dispute over the accounts arose during their matrimonial property proceedings.

III. Judicial History

A. *Ontario Superior Court of Justice* (2004), 7 E.T.R. (3d) 113

17 The trial judge looked at the operation of the presumption of a resulting trust and the presumption of advancement and found that the latter applied given Paula s relationship with her father. Karam J. concluded that the evidence failed to rebut the presumption of advancement and held that the money in the joint accounts therefore belonged to Paula. He found that the evidence clearly indicated that Paula s father intended to gift the beneficial ownership of those assets held in joint ownership to her while he continued to manage and control them on a day-to-day basis before his death.

B. *Ontario Court of Appeal* (2005), 19 E.T.R. (3d) 162

18 The Court of Appeal agreed with the trial judge that there was ample evidence to show that Paula s father intended to give Paula beneficial interest in his investments when he placed them in joint ownership. As a result, Lang J.A. found that it was not necessary to rely on the presumption of advancement, saying that a presumption is only relevant when evidence of actual intention is evenly balanced or when there is no evidence of actual intention.

IV. Analysis

A. *Do the Presumptions of Resulting Trust and Advancement Continue to Apply in Modern Times?*

19 A discussion of the treatment of joint accounts after the death of the transferor must begin with a consideration of the common law approach to ascertaining the intent of the deceased person.

20 A resulting trust arises when title to property is in one party s name, but that party, because he or she is a fiduciary or gave no value for the property, is under an obligation to return it to the original title owner: see D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters Law of Trusts in Canada* (3rd ed. 2005), at p. 362. While the trustee almost always has the legal title, in exceptional circumstances it is also possible that the trustee has equitable title: see *Waters Law of Trusts*, at p. 365, noting the case of *Carter v. Carter* (1969), 70 W.W.R. 237 (B.C.S.C.).

21 Advancement is a gift during the transferor s lifetime to a transferee who, by marriage or parent-child relationship, is financially dependent on the transferor: see *Waters Law of Trusts*, at p. 378. In the context of the parent-child relationship, the term has also been used because the father was under a moral duty to advance his children in the world : A. H. Oosterhoff et al., *Oosterhoff on Trusts: Text, Commentary and Materials* (6th ed. 2004), at p. 575 (emphasis added).

22 In certain circumstances which are discussed below, there will be a presumption of resulting trust or presumption of advancement. Each are rebuttable presumptions of law: see e.g. *Re Mailman Estate*, [1941] S.C.R. 368, at p. 374; *Niles v. Lake*, 1947 CanLII 5 (S.C.C.), [1947] S.C.R. 291; *Rathwell v. Rathwell*, 1978 CanLII 3 (S.C.C.), [1978] 2 S.C.R. 436, at p. 451; J. Sopinka, S. N. Lederman and A. W. Bryant, *The Law of Evidence in Canada* (2nd ed. 1999), at p. 115. A rebuttable presumption of law is a legal assumption that a court will make if insufficient evidence is adduced to displace the presumption. The presumption shifts the burden of persuasion to the opposing party who must rebut the presumption: see Sopinka et al., at pp. 105-6.

23 For the reasons discussed below, I think the long-standing common law presumptions continue to have a role to play in disputes over gratuitous transfers. The presumptions provide a guide for courts in resolving disputes over transfers where evidence as to the transferor s intent in making the transfer is unavailable or unpersuasive. This may be especially true when the transferor is deceased and thus is unable to tell the court his or her intention in effecting the transfer. In addition, as noted by Feldman J.A. in the Ontario Court of Appeal in *Saylor v. Madsen Estate* 2005 CanLII 39857 (ON C.A.), (2005), 261 D.L.R. (4th) 597, the advantage of maintaining the presumption of advancement and the presumption of a resulting trust is that they provide a measure of certainty and predictability for individuals who put property in joint accounts or make other gratuitous transfers.

1. The Presumption of Resulting Trust

24 The presumption of resulting trust is a rebuttable presumption of law and general rule that applies to gratuitous transfers. When a transfer is challenged, the presumption allocates the legal burden of proof. Thus, where a transfer is made for no consideration, the onus is placed on the transferee to demonstrate that a gift was intended: see *Waters Law of Trusts*, at p. 375, and E. E. Gillese and M. Milczynski, *The Law of Trusts* (2nd ed. 2005), at p. 110. This is so because equity presumes bargains, not gifts.

25 The presumption of resulting trust therefore alters the general practice that a plaintiff (who would be the party challenging the transfer in these cases) bears the legal burden in a civil case. Rather, the onus is on the transferee to rebut the presumption of a resulting trust.

26 In cases where the transferor is deceased and the dispute is between the transferee and a third party, the presumption of resulting trust has an additional justification. In such cases, it is the transferee who is better placed to bring evidence about the circumstances of the transfer.

2. The Presumption of Advancement

27 The presumption of resulting trust is the general rule for gratuitous transfers. However, depending on the nature of the relationship between the transferor and transferee, the presumption of a resulting trust will not arise and there will be a presumption of advancement instead: see *Waters Law of Trusts*, at p. 378. If the presumption of advancement applies, it will fall on the party challenging the transfer to rebut the presumption of a gift.

28 Historically, the presumption of advancement has been applied in two situations. The first is where the transferor is a husband and the transferee is his wife: *Hyman v. Hyman*, [1934] 4 D.L.R. 532 (S.C.C.), at p. 538. The second is where the transferor is a father and the transferee is his child, which is at issue in this appeal.

29 One of the earliest documented cases where a judge applied the presumption of advancement is the 17th century decision in *Grey (Lord) v. Grey (Lady)* (1677), Rep. Temp. Finch 338, 23 E.R. 185:

> . . . the Law will never imply a *Trust*, because the natural Consideration of Blood, and the Obligation which lies on the Father in Conscience to provide for his Son, are predominant, and must overrule all manner of Implications. [Underlining added; p. 187.]

30 As stated in *Grey*, the traditional rationale behind the presumption of advancement between father and child is that a father has an obligation to provide for his sons. See also *Oosterhoff on Trusts*, at p. 575. The presumption also rests on the assumption that parents so commonly intend to make gifts to their children that the law should presume as much: *ibid*., at pp. 581 and 598.

31 While historically the relationship between father and child gave rise to the presumption of advancement, courts in Canada have been divided as to whether the relationship between mother and child does as well. Some have concluded that it does not: see e.g. *Lattimer v. Lattimer* (1978), 18 O.R. (2d) 375 (H.C.J.), relying on Cartwright J. s concurring judgment in *Edwards v. Bradley*, 1957 CanLII 17 (S.C.C.), [1957] S.C.R. 599. Others have found that it does: see e.g. *Rupar v. Rupar* (1964), 49 W.W.R. 226 (B.C.S.C.); *Dagle v. Dagle Estate* (1990), 38 E.T.R. 164 (P.E.I.S.C., App. Div.); *Re Wilson* (1999), 27 E.T.R. (2d) 97 (Ont. Ct. (Gen. Div.)). In concluding that the presumption applies to mothers and children in *Re Wilson*, Fedak J., at para. 50, took into consideration the natural affection between a mother and child, legislative changes requiring mothers to support their children, the economic independence of women and the equality provisions of the Charter .

32 The question of whether the presumption applies between mother and child is not raised in these appeals, as the transfers in question occurred between a father and daughter, but I shall deal with it briefly. Unlike when the presumption of advancement was first developed, women today have their own financial resources. They also have a statutory obligation to financially support their children in the same way that fathers do. Section 26.1(2) of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), for instance, refers to the principle that spouses have a joint financial obligation to maintain the children , and s. 31(1) of the *Family Law Act*, R.S.O. 1990, c. F.3, provides that [e]very parent has an obligation to provide support for his or her unmarried child who is a minor or is enrolled in a full time program of education, to the extent that the parent is capable of doing so. Oosterhoff et al. have also commented on this issue in *Oosterhoff on Trusts*, saying at p. 575, Mothers and fathers are now under equal duties to care for their children and are equally likely to intend to make gifts to them. . . . In Canada, it is now accepted that mothers and fathers should be treated equally.

33 I agree. As women now have both the means as well as obligations to support their children, they are no less likely to intend to make gifts to their children than fathers. The presumption of advancement should thus apply equally to fathers and mothers.

34 Next, does the presumption of advancement apply between parents and adult independent children? A number of courts have concluded that it should not. In reaching that conclusion, Heeney J. in *McLear v. McLear Estate* (2000), 33 E.T.R. (2d) 272 (Ont. S.C.J.), at paras. 40-41, focussed largely on the modern practice of elderly parents adding their adult children as joint account holders so that the children can provide assistance with the management of their parents financial affairs:

> Just as Dickson J. considered present social conditions in concluding that the presumption of advancement between husbands and wives had lost all relevance, a consideration of the present social conditions of an elderly parent presents an equally compelling case for doing away with the presumption of advancement between parent and adult child. We are living in an increasingly complex world. People are living longer, and it is commonplace that an ageing parent requires assistance in managing his or her daily affairs. This is particularly so given the complexities involved in managing investments to provide retirement income, paying income tax on those investments, and so on. Almost invariably, the duty of assisting the ageing parent falls to the child who is closest in geographic proximity. In such cases, Powers of Attorney are routinely given. Names are put on bank accounts and other assets, so that the child can freely manage the assets of the parent.
>
> Given these social conditions, it seems to me that it is dangerous to presume that the elderly parent is making a gift each time he or she puts the name of the assisting child on an asset. The presumption that accords with this social reality is that the child is holding the property in trust for the ageing parent, to facilitate the free and efficient management of that parent s affairs. The presumption that accords with this social reality is, in other words, the presumption of resulting trust.

35 Heeney J. also noted that the fact that the child was independent and living away from home featured very strongly in Kerwin C.J. s reasons for finding that no presumption of advancement arose in *Edwards v. Bradley*. A similar conclusion was reached by Klebuc J., as he was then, in *Cooper v. Cooper Estate* (1999), 27 E.T.R. (2d) 170 (Sask. Q.B.), at para. 19: I have serious doubts as to whether presumption of advancement continues to apply with any degree of persuasiveness in Saskatchewan in circumstances where an older parent has transferred property to an independent adult child who is married and lives apart from his parent. Waters et al., too in *Waters Law of Trusts*, at p. 395, said: It may well be that, reflecting the financial dependency that it probably does, contemporary opinion would accord [the presumption of advancement] little weight as between a father and an independent, adult child.

36 I am inclined to agree. First, 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. As Heeney J. noted in *McLear*, at para. 36, parental support obligations under provincial and federal statutes normally end when the child is no longer considered by law to be a minor: see e.g. *Family Law Act*, s. 31. 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: see e.g. *Family Law Act*, s. 32. Second, I agree with Heeney J. that 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.

37 Some commentators and courts have argued that while an adult, independent child is no longer financially dependent, the presumption of advancement should apply on the basis of parental affection for their children: see e.g. *Madsen Estate*, at para. 21; *Dagle*; *Christmas Estate v. Tuck* (1995), 10 E.T.R. (2d) 47 (Ont. Ct. (Gen. Div.)); and *Cho Ki Yau Trust (Trustees of) v. Yau Estate* (1999), 29 E.T.R. (2d) 204 (Ont. S.C.J.). I do not agree that affection is a basis upon which to apply the presumption of advancement to the transfer. Indeed, the factor of affection applies in other relationships as well, such as between siblings, yet the presumption of advancement would not apply in those circumstances. However, I see no reason why courts cannot consider evidence relating to the quality of the relationship between the transferor and transferee in order to determine whether the presumption of a resulting trust has been rebutted.

38 The remaining question is whether the presumption of advancement should apply in the case of adult dependent children. In the present case the trial judge, at paras. 26-28, found that Paula, despite being a married adult with her own family, was nevertheless dependent on her father and justified applying the presumption of advancement on that basis.

39 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.

40 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 regard to gratuitous transfers from parent to child should be preserved but be limited in application to transfers by mothers and fathers to minor children.

41 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. In addition, while dependency will not be a basis on which to apply the presumption of advancement, evidence as to the degree of dependency of an adult transferee child on the transferor parent may provide strong evidence to rebut the presumption of a resulting trust.

B. *On What Standard Will the Presumptions Be Rebutted?*

42 There has been some debate amongst courts and commentators over what amount of evidence is required to rebut a presumption. With regard to the presumption of resulting trust, some cases appear to suggest that the criminal standard, or at least a standard higher than the civil standard, is applicable: see e.g. *Bayley v. Trusts and Guarantee Co.*, [1931] 1 D.L.R. 500 (Ont. S.C., App. Div.), at p. 505; *Johnstone v. Johnstone* (1913), 12 D.L.R. 537 (Ont. S.C., App. Div.), at p. 539. As for the presumption of advancement, some cases seem to suggest that only slight evidence will be required to rebut the presumptions: see e.g. *Pettitt v. Pettitt*, [1970] A.C. 777 (H.L.), at p. 814; *McGrath v. Wallis*, [1995] 2 F.L.R. 114 (Eng. C.A.), at pp. 115 and 122; *Dreger (Litigation Guardian of) v. Dreger* (1994), 5 E.T.R. (2d) 250 (Man. C.A.), at para. 31.

43 The weight of recent authority, however, suggests that the civil standard, the balance of probabilities, is applicable to rebut the presumptions: *Burns Estate v. Mellon* 2000 CanLII 5739 (ON C.A.), (2000), 48 O.R. (3d) 641 (C.A.), at paras. 5-21; *Lohia v. Lohia*, [2001] EWCA Civ 1691 (BAILII), at paras. 19-21; *Dagle*, at p. 210; *Re Wilson*, at para. 52. See also Sopinka et al., at p. 116. This is also my view. I see no reason to depart from the normal civil standard of proof. The evidence required to rebut both presumptions, therefore, is evidence of the transferor s contrary intention on the balance of probabilities.

44 As in other civil cases, regardless of the legal burden, both sides to the dispute will normally bring evidence to support their position. The trial judge will commence his or her inquiry with the applicable presumption and will weigh all of the evidence in an attempt to ascertain, on a balance of probabilities, the transferor s actual intention. Thus, as discussed by Sopinka et al. in *The Law of Evidence in Canada*, at p. 116, the presumption will only determine the result where there is insufficient evidence to rebut it on a balance of probabilities.

C. *How Should Courts Treat Survivorship in the Context of a Joint Account?*

45 In cases where the transferor s proven intention in opening the joint account was to gift withdrawal rights to the transferee during his or her lifetime (regardless of whether or not the transferee chose to exercise that right) and also to gift the balance of the account to the transferee alone on his or her death through survivorship, courts have had no difficulty finding that the presumption of a resulting trust has been rebutted and the transferee alone is entitled to the balance of the account on the transferor s death.

46 In certain cases, however, courts have found that the transferor gratuitously placed his or her assets into a joint account with the transferee with the intention of retaining exclusive control of the account until his or her death, at which time the transferee alone would take the balance through survivorship: see e.g. *Standing v. Bowring* (1885), 31 Ch. D. 282, at p. 287; *Edwards v. Bradley*, [1956] O.R. 225 (C.A.), at p. 234; *Yau Estate*, at para. 25.

47 There may be a number of reasons why an individual would gratuitously transfer assets into a joint account having this intention. A typical reason is that the transferor wishes to have the assistance of the transferee with the management of his or her financial affairs, often because the transferor is ageing or disabled. At the same time, the transferor may wish to avoid probate fees and/or make after-death disposition to the transferee less cumbersome and time consuming.

48 Courts have understandably struggled with whether they are permitted to give effect to the transferor s intention in this situation. One of the difficulties in these circumstances is that the beneficial interest of the transferee appears to arise only on the death of the transferor. This has led some judges to conclude that the gift of survivorship is testamentary in nature and must fail as a result of not being in proper testamentary form: see e.g. *Hill v. Hill* (1904), 8 O.L.R. 710 (H.C.), at p. 711; *Larondeau v. Laurendeau*, [1954] O.W.N. 722 (H.C.); Hodgins J.A. s dissent in *Re Reid* (1921), 64 D.L.R. 598 (Ont. S.C., App. Div.). For the reasons that follow, however, I am of the view that the rights of

survivorship, both legal and equitable, vest when the joint account is opened and the gift of those rights is therefore *inter vivos* in nature. This has also been the conclusion of the weight of judicial opinion in recent times: see e.g. *Mordo v. Nitting*, 2006 BCSC 1761 (CanLII), [2006] B.C.J. No. 3081 (QL), 2006 BCSC 1761, at paras. 233-38; *Shaw v. MacKenzie Estate* (1994), 4 E.T.R. (2d) 306 (N.S.S.C.), at para. 49; and *Reber v. Reber* reflex, (1988), 48 D.L.R. (4th) 376 (B.C.S.C.); see also *Waters Law of Trusts*, at p. 406.

49 An early case that addressed the issue of the nature of survivorship is *Re Reid* in which Ferguson J.A. of the Ontario Court of Appeal found that the gift of a joint interest was a complete and perfect gift *inter vivos* (p. 608) from the moment that the joint account was opened even though the transferor in that case retained exclusive control over the account during his lifetime. I agree with this interpretation. I also find MacKay J.A. s reasons in *Edwards v. Bradley* (C.A.), at p. 234, to be persuasive:

> The legal right to take the balance in the account if A predeceases him being vested in B on the opening of the account, it cannot be the subject of a testamentary disposition. If A s intention was that B should also have the beneficial interest, B already has the legal title and there is nothing further to be done to complete the gift of the beneficial interest. If A s intention was that B should not take the beneficial interest, it belongs to A or his estate and he is not attempting to dispose of it by means of the joint account. In either event B has the legal title and the only question that can arise on A s death is whether B is entitled to keep any money that may be in the account on A s death or whether he holds it as a trustee under a resulting trust for A s estate. [Emphasis added.]

Edwards v. Bradley was appealed to the Supreme Court of Canada but the issue of survivorship was not addressed.

50 Some judges have found that a gift of survivorship cannot be a complete and perfect *inter vivos* gift because of the ability of the transferor to drain a joint account prior to his or her death: see e.g. Hodgins J.A. s dissent in *Re Reid*. Like the Ontario Court of Appeal in *Re Reid*, at p. 608, and *Edwards v. Bradley*, at p. 234, I would reject this view. The nature of a joint account is that the balance will fluctuate over time. The gift in these circumstances is the transferee s survivorship interest in the account balance whatever it may be at the time of the transferor s death, not to any particular amount.

51 Treating survivorship in these circumstances as an *inter vivos* gift of a joint interest has found favour in other jurisdictions, including Australia and the United Kingdom: see *Russell v. Scott* (1936), 55 C.L.R. 440, at p. 455; *Young v. Sealey*, [1949] 1 All E.R. 92 (Ch. Div.), at pp. 107-8; (in *obiter*) *Aroso v. Coutts*, [2002] 1 All E.R. (Comm) 241, [2001] EWHC Ch 443, at paras. 29 and 36.

52 While not entirely analogous, the American notion of the Totten trust (sometimes referred to as the Bank account trust) is now recognized as valid in most states in the United States; an individual places money in a bank account with the instruction that upon his or her death, whatever is in that bank account will pass to a named beneficiary: see *Restatement (Third) of Trusts* (2003), at para. 26 of Part 2, Chapter 5. The Totten trust is so named for the leading case establishing its validity: see *Matter of Totten*, 179 N.Y. 112 (1904). While a Totten trust does not deal with joint accounts as such, it recognizes the practicality of the depositor having control of an account during his or her lifetime but allowing the depositor s named beneficiary of that account to claim the funds remaining in the account upon the death of the depositor without the disposition being treated as testamentary: see e.g. *Matter of Berson*, 566 N.Y.S.2d 74 (App. Div. 1991); *Matter of Halpern*, 303 N.Y. 33 (1951).

53 Of course, the presumption of a resulting trust means that it will fall to the surviving joint account holder to prove that the transferor intended to gift the right of survivorship to whatever assets are left in the account to the survivor. Otherwise, the assets will be treated as part of the transferor s estate to be distributed according to the transferor s will.

54 Should the avoidance of probate fees be of concern to the legislature, it is open to it to enact legislation to deal with the matter.

D. *What Evidence May a Court Consider in Determining Intent of the Transferor?*

55 Where a gratuitous transfer is being challenged, the trial judge must begin his or her inquiry by determining the proper presumption to apply and then weigh all the evidence relating to the actual intention of the transferor to determine whether the presumption has been rebutted. It is not my intention to list all of the types of evidence that a trial judge can or should consider in ascertaining intent. This will depend on the facts of each case. However, I will discuss particular types of evidence at issue in this appeal and its companion case that have been the subject of divergent approaches by courts.

1. Evidence Subsequent to the Transfer

56 The traditional rule is that evidence adduced to show the intention of the transferor at the time of the transfer ought to be contemporaneous, or nearly so , to the transaction: see *Clemens v. Clemens Estate*, 1956 CanLII 3 (S.C.C.), [1956] S.C.R. 286, at p. 294, citing *Jeans v. Cooke* (1857), 24 Beav. 513, 53 E.R. 456. Whether evidence subsequent to a transfer is admissible has often been a question of whether it complies with the Viscount Simonds rule in *Shephard v. Cartwright*, [1955] A.C. 431 (H.L.), at p. 445, citing *Snell s Principles of Equity* (24th ed. 1954), at p. 153:

> The acts and declarations of the parties before or at the time of the purchase, [or of the transfer] or so immediately after it as to constitute a part of the transaction, are admissible in evidence either for or against the party who did the act or made the declaration . . . . But subsequent declarations are admissible as evidence only against the party who made them . . . .

The reason that subsequent acts and declarations have been viewed with mistrust by courts is because a transferor could have changed his or her mind subsequent to the transfer and because donors are not allowed to retract gifts. As noted by Huband J.A. in *Dreger*, at para. 33: Self-serving statements after the event are too easily fabricated in order to

bring about a desired result.

57 Some courts, however, have departed from the restrictive and somewhat abstruse rule in *Shephard v. Cartwright.* In *Neazor v. Hoyle* (1962), 32 D.L.R. (2d) 131 (Alta. S.C., App. Div.), for example, a brother transferred land to his sister eight years before he died and the trial judge considered the conduct of the parties during the years after the transfer to see whether they treated the land as belonging beneficially to the brother or the sister.

58 The rule has also lost much of its force in England. In *Lavelle v. Lavelle*, [2004] EWCA Civ 223 (BAILII), at para. 19, Lord Phillips, M.R., had this to say about *Shephard v. Cartwright* and certain other authorities relied on by the appellant in that case:

> It seems to me that it is not satisfactory to apply rigid rules of law to the evidence that is admissible to rebut the presumption of advancement. Plainly, self-serving statements or conduct of a transferor, who may long after the transaction be regretting earlier generosity, carry little or no weight. [Emphasis added.]

59 Similarly, I am of the view that the evidence of intention that arises subsequent to a transfer should not automatically be excluded if it does not comply with the *Shephard v. Cartright* rule. Such evidence, however, must be relevant to the intention of the transferor at the time of the transfer: *Taylor v. Wallbridge* (1879), 2 S.C.R. 616. The trial judge must assess the reliability of this evidence and determine what weight it should be given, guarding against evidence that is self-serving or that tends to reflect a change in intention.

2. Bank Documents

60 In the past, this Court has held that bank documents that set up a joint account are an agreement between the account holders and the bank about legal title; they are not evidence of an agreement between the account holders as to beneficial title: see *Niles* and *Re Mailman*.

61 While I agree that bank documents do not necessarily set out equitable interests in joint accounts, banking documents in modern times may be detailed enough that they provide strong evidence of the intentions of the transferor regarding how the balance in the account should be treated on his or her death: see B. Ziff, *Principles of Property Law* (4th ed. 2006), at p. 332. Therefore, if there is anything in the bank documents that specifically suggests the transferor s intent regarding the beneficial interest in the account, I do not think that courts should be barred from considering it. Indeed, the clearer the evidence in the bank documents in question, the more weight that evidence should carry.

3. Control and Use of the Funds in the Account

62 There is some inconsistency in the caselaw as to whether a court should consider evidence as to the control of joint accounts following the transfer in ascertaining the intent of the transferor with respect to the beneficial interest in the joint account. In the present case, for example, Paula s father continued to manage the investments and to pay the taxes after establishing the joint accounts. The Court of Appeal, at para. 40, held that this factor was not determinative of Paula s father s intentions: [w]hile control can be consistent with an intention to retain ownership, it is also not inconsistent in this case with an intention to gift the assets. In contrast, in *Madsen Estate*, at para. 34, one of the main factors the Court of Appeal relied on to show that the father did not intend to create a beneficial joint tenancy was that he remained in control of the accounts, and that he paid the taxes on the interest earned on the funds in the accounts.

63 I am of the view that control and use of the funds, like the wording of the bank documents, should not be ruled out in the ascertainment of the transferor s intention. For example, the transferor s retention of his or her exclusive beneficial interest in the account in his or her lifetime may support the finding of a resulting trust, unless other evidence proves that he or she intended to gift the right of survivorship to the transferee. However, evidence of use and control may be of marginal assistance only and, without more, will not be determinative for three reasons.

64 First, it may be that the dynamics of the relationship are such that the transferor makes the management decisions. He or she may be more experienced with the accounts. This does not negate the beneficial interest of the other account holder. Conversely, evidence that a transferee controlled the funds does not necessarily mean that the transferee took a beneficial interest. Ageing parents may set up accounts for the sole purpose of having their adult child manage their funds for their benefit.

65 Second, in cases involving an ageing parent and an adult child, it may be that the transferee, although entitled both legally and beneficially to withdraw funds, will refrain from accessing them in order to ensure there are sufficient funds to care for the parent for the remainder of the parent s life.

66 Finally, as previously discussed, the fact that a transferor controlled and used the funds during his or her life is not necessarily inconsistent with an intention at the time of the transfer that the transferee would acquire the balance of the account on the transferor s death through the gift of the right of survivorship.

4. Granting of Power of Attorney

67 Courts have also relied to varying degrees on the transferor s granting of a power of attorney to the transferee in determining intent. The Court of Appeal in *Madsen Estate*, at para. 72, noted that the transferor had granted the transferee power of attorney but did not view it as a factor that suggested that the joint account was not set up merely as a tool of convenience for mutual access to funds . The Court of Appeal in the present case, on the other hand, placed substantial weight on Paula s father having given her both joint ownership of the accounts and power of attorney in finding that he intended to gift the assets to her. Lang J.A. reasoned, at para. 34, that had Paula s father intended only for Paula to assist in the managing of the accounts, this could have been accomplished solely by giving her power of attorney: With that power of attorney, joint ownership of the investments was unnecessary unless [Paula s father] intended something more: to ensure the investments were given to Paula and to avoid probate fees, both entirely legitimate purposes. Lang J.A. also found, at para. 35, that the weight to be afforded a particular piece of evidence is a matter within a trial judge s discretion.

68 I share Lang J.A. s view that the trier of fact has the discretion to consider the granting of power of attorney when deciding the transferor s intention. This will be especially true when other evidence suggests that the transferor appreciated the distinction between granting that power and gifting the right of survivorship. Again however, this evidence will not be determinative and courts should use caution in relying upon it, because it is entirely plausible that the transferor granted power of attorney and placed his or her assets in a joint account but nevertheless intended that the balance of the account be distributed according to his or her will. For example, the transferor may have granted power of attorney in order to have assistance with other affairs beyond the account and may have made the transferee a joint account holder solely for added convenience.

5. Tax Treatment of Joint Accounts

69 Courts have relied to varying degrees on the transferor s tax treatment of the account in determining intent. In *Madsen Estate*, the trial judge relied in part on the fact that the transferor was the one who declared and paid income tax on the money in the joint accounts in finding that the transferor intended a resulting trust ((2004), 13 E.T.R. (3d) 44, at para. 29). In the present case, at para. 44, the trial judge noted that Paula s father continued to pay taxes on the income in joint accounts but nevertheless found that he intended to gift the joint accounts to her. I do not find either of these approaches inappropriate. The weight to be placed on tax-related evidence in determining a transferor s intent should be left to the discretion of the trial judge. However, whether or not a transferor continues to pay taxes on the income earned in the joint accounts during his or her lifetime should not be determinative of his or her intention in the absence of other evidence. For example, it may be that the transferor made the transfer for the sole purpose of obtaining assistance in the management of his or her finances and wished to have the assets form a part of his or her estate upon his or her death. Or, as discussed above, it is open to a transferor to gift the right of survivorship to the transferee when the joint accounts are opened, but to retain control over the use of the funds in the accounts (and therefore to continue to pay taxes on them) during his or her lifetime.

70 As for the matter of taxes on capital gains, it was submitted to this Court that for public policy reasons, transferors should not be permitted to transfer beneficial title while asserting to the tax authorities that such title has not been passed in order to defer or avoid the payment of taxes: appellant s factum, at p. 24. In principle, I agree. Where, in setting up a joint account, the transferor intends to transfer full legal and equitable title to the assets in the account immediately and the value of the assets reflects a capital gain, taxes on capital gains may become payable in the year the joint account is set up. However, where the transferor s intention is to gift the right of survivorship to the transferee but retain beneficial ownership of the assets during his or her lifetime, there would appear to be no disposition at the moment of the setting up of the joint account: see s. 73 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.). That said, the issue of the proper treatment of capital gains in the setting up of joint accounts was not argued in this appeal. I can say no more than these are matters for determination between the Canada Revenue Agency and taxpayers in specific cases.

E. *Should the Decision of the Trial Judge Be Overturned?*

71 The trial judge in the present case found that, at the time of the transfers, Paula and her father had a very close relationship and that Paula clearly was the person, other than his wife, that he was closest to and most concerned about (para. 32). Given this relationship and her financial hardships, her father preferred her over her siblings. Indeed, he was estranged from one of his daughters at the time the accounts were set up (para. 25). While he may have grown close to his son-in-law, the trial judge concluded they were simply good friends (para. 38). Moreover, his wife was seriously ill and not expected to outlive him.

72 Paula and her family relied on her father for financial assistance. While he maintained control of the accounts and used the funds for his benefit during his life, the trial judge found his concern lay with providing for Paula after his death. This is consistent with an intention to gift a right of survivorship when the accounts were set up.

73 The statements of Paula s father while drafting his last will are also an important indicator of intention. Although the statements were made in years subsequent to the transfer, the trial judge considered the lawyer s testimony about them reliable. The lawyer had nothing to gain from his testimony. This evidence indicates that Paula s father was of the view that the accounts had already been dealt with and understood these assets would not form part of the estate. I agree with the trial judge that if [the father s] intention was to have his jointly held assets devolve through the estate, they were of such magnitude that he would have at least discussed that matter with his solicitor, since they constituted a substantial proportion of what he owned (para. 43), particularly after the lawyer asked him about life insurance policies, RRIFs and other assets. All of this evidence is consistent with Paula s father having gifted away the right of survivorship when the joint accounts were opened, and thus is relevant to his intention at the time of the transfer.

74 There is of course the issue of Paula s father writing to financial institutions saying that the transfers were not gifts to Paula. Consistent with these letters, Paula s father continued to control the funds in the accounts and paid income tax on the earnings of the investments before his death. The trial judge found that Paula s father s intention when he wrote the letters was simply to avoid triggering an immediate deemed disposition of the assets in question, and therefore avoid capital gains taxes (para. 39). I agree with the trial judge that this is not inconsistent with an intention that the balance remaining in the accounts would belong to Paula on his death.

75 The trial judge erred in applying the presumption of advancement. Paula, although financially insecure, was not a minor child. Karam J. should therefore have applied the presumption of a resulting trust. Nonetheless, this error does not affect the ultimate disposition of the appeal because the trial judge found that the evidence clearly demonstrate[d] the intention on the part of the father that the balance left in the joint accounts he had with Paula were to go to Paula alone on his death through survivorship (para. 44). I am satisfied that this strong finding regarding the father s actual intention shows that the trial judge s conclusion would have been the same even if he had applied the presumption of a resulting trust.

V. Disposition

76 For the reasons above, I would dismiss this appeal, with costs. Michael Pecore asked this Court for costs throughout from Paula or the estate. As noted in the judgment of the Ontario Court of Appeal, at para. 48, the trial judge denied Michael costs out of the estate or from Paula. He did so because he found that on the issues raised in the divorce proceeding, success was divided, Paula made an offer to settle that exceeded the result, and Michael s conduct was less than candid . I see no reason to interfere with that disposition, or that costs should not follow the event in this Court.

The following are the reasons delivered by

77 ABELLA J. Tolstoy wrote at the beginning of *Anna Karenina*: Happy families are all alike, every unhappy family is unhappy in its own way. That unhappiness often finds its painful way into a courtroom.

78 This appeal involves a father who opened joint bank accounts with his daughter, signing documents that specifically confirmed that the daughter was to have a survivorship interest. The daughter s entitlement to the remaining funds in the accounts was challenged by her ex-husband. The trial judge, who was upheld in the Court of Appeal ((2005), 19 E.T.R. (3d) 162), applied the presumption of advancement and concluded that the father s intention was to make a gift of the money to his daughter ((2004), 7 E.T.R. (3d) 113). In the companion appeal, *Madsen Estate v. Saylor*, 2007 SCC 18 (CanLII), [2007] 1 S.C.R. 838, 2007 SCC 18, the daughter s entitlement to the funds was challenged by her siblings. The trial judge applied the presumption of resulting trust rather than the presumption of advancement, and concluded that the father had *not* intended to make a gift to his daughter ((2004), 13 E.T.R. (3d) 44). The issue in both appeals is which presumption applies and what the consequences of its application are.

Analysis

79 Historically, the presumption of advancement has been applied to gratuitous transfers to children, regardless of the child s age. If we are to continue to retain the presumption of advancement for parent-child transfers, I see no reason, unlike Rothstein J., to limit its application to non-adult children. I agree with him, however, that the scope of the presumption should be expanded to include transfers from mothers as well as from fathers.

80 The presumptions of advancement and resulting trust are legal tools which assist in determining the transferor s intention at the time a gratuitous transfer is made. The tools are of particular significance when the transferor has died.

81 If the presumption of advancement applies, an individual who transfers property into another person s name is presumed to have intended to make a gift to that person. The burden of proving that the transfer was not intended to be a gift, is on the challenger to the transfer. If the presumption of resulting trust applies, the transferor is presumed to have intended to retain the beneficial ownership. The burden of proving that a gift *was* intended, is on the recipient of the transfer.

82 There is an ongoing academic and judicial debate about whether the presumptions, and particularly the presumption of resulting trust, ought to be removed entirely from the judicial tool box in assessing intention. E. E. Gillese and M. Milczynski offer the following criticism, echoed by others, in *The Law of Trusts* (2nd ed. 2005):

> . . . modern life has caused many to question the utility of the presumptions. When I voluntarily transfer title to property to another, is it more sensible to assume that I have made a gift or that I transferred title under the assumption that the transferee would hold title for me? Surely, it is more likely that, had I intended to create a trust, I would have taken steps to expressly create the trust and document it. It is more plausible to presume the opposite to that which equity presumed. If someone today gives away property, it is at least as likely that they intended a gift as that they intended to create some type of trust. And, if they did intend to create a trust, they should be held to the requirements that exist for express trusts and not be favoured by the presumption of a resulting trust. The fact that the presumption is out of step with modern thought explains the courts new approach to such cases, which is to look at all the evidence with an open mind and attempt to determine intention on that basis. If that were the end of the matter, we could say that the presumption of resulting trust had been eradicated. Unfortunately, the courts have not gone that far, and the presumption will operate where the evidence is unclear. [pp. 109-10]

83 Similarly, in *Nelson v. Nelson* (1995), 184 C.L.R. 538, the High Court of Australia dealt with a case involving a mother s purchase of a house which she then transferred into the names of her children. In his concurring reasons, McHugh J. made the following comments about the presumption of resulting trust:

> No doubt in earlier centuries, the practices and modes of thought of the property owning classes made it more probable than not that, when a person transferred property in such circumstances, the transferor did not intend the transferee to have the beneficial as well as the legal interest in the property. But times change. To my mind and, I think, to the minds of most people it seems much more likely that, in the absence of an express declaration or special circumstances, the transfer of property without consideration was intended as a gift to the transferee. . . .
>
> A presumption is a useful aid to decision making only when it accurately reflects the probability that a fact or state of affairs exists or has occurred. . . . If the presumptions do not reflect common experience today, they may defeat the expectations of those who are unaware of them. [Emphasis added; p. 602.]

84 McHugh J. s allusion to earlier centuries reflects the origins of the presumption of resulting trust. In the 15th century, it was not uncommon for landowners in England

to have title to their property held by other individuals on the understanding that it was being held for the use of the landowner and subject to his direction. This had the effect of separating legal and beneficial ownership. The purpose of the scheme was to avoid having to pay feudal taxes when land passed from a landowner to his heir.

85 It became so common for owners to transfer land to be held for their own use, that the courts began to *presume* that a transfer made without consideration, or gratuitously, was intended to be for the transferor s own use, giving rise to the presumption of resulting use. Because these nominal transfers caused a significant loss of revenue to the Crown, the *Statute of Uses, 1535* was enacted, which executed the use , reuniting legal and equitable title (R. Chambers, Resulting Trusts in Canada (2000), 38 *Alta. L. Rev.* 378; *Cho Ki Yau Trust (Trustees of) v. Yau Estate* (1999), 29 E.T.R. (2d) 204 (Ont. S.C.J.)).

86 The presumption of resulting trust is the vestigial doctrine that emerged from the evolutionary remains of the executed use. The presumption of advancement, on the other hand, evolved as a limited exception to the presumption of resulting trust, generally arising in two situations: when a gratuitous transfer was made by a father to his child; and when a gratuitous transfer was made by a husband to his wife.

87 The traditional presumption of advancement as between husband and wife has been largely abandoned, both judicially (*Pettitt v. Pettitt*, [1970] A.C. 777 (H.L.), and *Rathwell v. Rathwell*, 1978 CanLII 3 (S.C.C.), [1978] 2 S.C.R. 436) and legislatively (New Brunswick, *Marital Property Act*, S.N.B. 1980, c. M-1.1, s. 15(1); Prince Edward Island, *Family Law Act*, R.S.P.E.I. 1988, c. F-2.1, s. 14(1); Nova Scotia, *Matrimonial Property Act*, R.S.N.S. 1989, c. 275, s. 21(1); Newfoundland and Labrador, *Family Law Act*, R.S.N.L. 1990, c. F-2, s. 31(1); Ontario, *Family Law Act*, R.S.O. 1990, c. F.3, s. 14; Northwest Territories and Nunavut, *Family Law Act*, S.N.W.T. 1997, c. 18, s. 46(1); Saskatchewan, *The Family Property Act*, S.S. 1997, c. F-6.3, s. 50(1); Yukon, *Family Property and Support Act*, R.S.Y. 2002, c. 83, s. 7(2)).

88 But in the case of gratuitous transfers to children, the presumption appears to retain much of its original vigour (D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters Law of Trusts in Canada* (3rd ed. 2005), at p. 381). As noted by Cullity J. in *Yau Estate*, at para. 35:

> [I]t would be a mistake to extrapolate the treatment of the equitable presumptions in *Rathwell* out of their matrimonial property context to other situations including those involving the acquisition, or transfer, of property between strangers and between parents and their children.

89 Rothstein J. rejects parental affection as being a basis for the presumption, stating that a principal justification for the presumption of advancement in the case of gratuitous transfers to children was the parental obligation to support their dependent children (para. 36). With respect, this narrows and somewhat contradicts the historical rationale for the presumption. Parental affection, no less than parental obligation, has always grounded the presumption of advancement.

90 It is in fact the rationale of parental affection that was cited in *Waters Law of Trusts in Canada* as an explanation for the longevity of the presumption of advancement in transfers to children:

> The presumption of advancement between father and child has not been subjected to the same re-evaluation which in recent years has overtaken the presumption between husband and wife. . . . The factor of affection continues to exist, something which cannot be presumed in the relationship between strangers, and possibly for this reason the courts have seen no reason to challenge its modern significance. [Emphasis added; p. 395.]

91 In his article, Reassessing Gratuitous Transfers by Parents to Adult Children (2006), 25 *E.T.P.J.* 174, Professor Freedman acknowledges that while the original rationale of the advancement rule is somewhat difficult to pin down (p. 190), it did not arise only from the parental obligation to provide support for dependent children:

> Would that satisfaction of legal obligations was the explicit rationale of the presumption of advancement in the older cases; unfortunately, the authorities 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. While later cases have gone on to demonstrate the highly refined skills of both counsel and judges in distinguishing one case from another based on factual considerations in determining whether the presumption ought to apply in any given circumstance, I would suggest that no uniform principle can be found in the cases. The simple fact is that the extent of the obligation between the transferor and transferee was never the focus of the inquiry, only the probable intent of the transferor in seeking to retain the beneficial interest for himself in the context of a given relationship that on its face gave rise to reasonable expectations that such gifts might be forthcoming. [Emphasis added; pp. 190-91.]

92 Even at the elemental stage in the development of the doctrine, the court in *Grey (Lord) v. Grey (Lady)* (1677), 2 Swans. 594, 36 E.R. 742, identified natural affection as a rationale for the application of the presumption of advancement:

> For the natural consideration of blood and affection is so apparently predominant, that those acts which would imply a trust in a stranger, will not do so in a son; and, *ergo*, the father who would check and control the appearance of nature, ought to provide for himself by some instrument, or some clear proof of a declaration of trust, and not depend upon any implication of law . . . . [Emphasis added; p. 743.]

93 In *Yau Estate*, Cullity J. also observed that parental affection is a rationale for the presumption, leading Professor Freedman in his article to conclude:

> In other words, parental affection grounds the presumption and is the greatest indicator of the probable intent of the transferor. This is an attractive argument which I

suggest most would agree accords with common experience. [p. 196]

94 Because parental affection has historically been seen as a basis for the presumption of advancement, it was routinely applied to adult as well as to minor children. In *Sidmouth v. Sidmouth* (1840), 2 Beav. 447, 48 E.R. 1254, for example, the court applied it in the case of a gratuitous transfer to an adult son, explaining:

> As far as acts strictly contemporaneous appear, there does not appear to be anything to manifest an intention to make the son a trustee for the father. The circumstance that the son was adult does not appear to me to be material. It is said that no establishment was in contemplation, and that no necessity or occasion for advancing the son had occurred, but in the relation between parent and child, it does not appear to me that an observation of this kind can have any weight. The parent may judge for himself when it suits his own convenience, or when it will be best for his son, to secure him any benefit which he voluntarily thinks fit to bestow upon him, and it does not follow that because the reason for doing it is not known, there was no intention to advance at all. [Emphasis added; p. 1258.]

(See also *Scawin v. Scawin* (1841), 1 Y. & C.C.C. 65, 62 E.R. 792, and *Hepworth v. Hepworth* (1870), L.R. 11 Eq. 10.)

95 It is true, as was noted in *Oosterhoff on Trusts: Text, Commentary and Materials* (6th ed. 2004), at pp. 581-86, that some courts in the mid-90s began questioning whether the presumption of advancement should apply to transfers between parents and their adult children (see *Dreger (Litigation Guardian of) v. Dreger* (1994), 5 E.T.R. (2d) 250 (Man. C.A.); *Cooper v. Cooper Estate* (1999), 27 E.T.R. (2d) 170 (Sask. Q.B.), and *McLear v. McLear Estate* (2000), 33 E.T.R. (2d) 272 (Ont. S.C.J.)).

96 But in most cases, the presumption of advancement continues to be applied to gratuitous transfers from parents to their children, regardless of age. In *Madsen Estate v. Saylor*, for example, the companion appeal, the Ontario Court of Appeal found that the trial judge erred in applying the presumption of resulting trust, concluding that the presumption of advancement can still apply to transfers of property from a father to a child, including an independent adult child (2005 CanLII 39857 (ON C.A.), (2005), 261 D.L.R. (4th) 597, at para. 21).

97 And in this appeal, the Ontario Court of Appeal took no issue with the trial judge s application of the presumption of advancement to the transfer by the father, notwithstanding that the beneficiary of the transfer, his daughter, was an adult at the time. (See also *Young v. Young* (1958), 15 D.L.R. (2d) 138 (B.C.C.A.); *Oliver Estate v. Walker*, [1984] B.C.J. No. 460 (QL) (S.C.); *Dagle v. Dagle Estate* (1990), 38 E.T.R. 164 (P.E.I.S.C., App. Div.); *Christmas Estate v. Tuck* (1995), 10 E.T.R. (2d) 47 (Ont. Ct. (Gen. Div.)); *Reain v. Reain* reflex, (1995), 20 R.F.L. (4th) 30 (Ont. Ct. (Gen. Div.)); *Sodhi v. Sodhi*, 1998 CanLII 4386 (BC S.C.), [1998] 10 W.W.R. 673 (B.C.S.C.); *Re Wilson* (1999), 27 E.T.R. (2d) 97 (Ont. Ct. (Gen. Div.)); *Yau Estate*; *Kappler v. Beaudoin*, [2000] O.J. No. 3439 (QL) (S.C.J.); *Clarke v. Hambly* 2002 BCSC 1074 (CanLII), (2002), 46 E.T.R. (2d) 166, 2002 BCSC 1074; and *Plamondon v. Czaban* 2004 ABCA 161 (CanLII), (2004), 8 E.T.R. (3d) 135, 2004 ABCA 161.)

98 The origin and persistence of the presumption of advancement in gratuitous transfers to children cannot, therefore, be attributed only to the financial dependency of children on their father or on the father s obligation to support his children. Natural affection also underlay the presumption that a parent who made a gratuitous transfer to a child of any age, intended to make a gift.

99 Rothstein J. relied too on the argument made in *McLear*, at paras. 40-41, against applying the presumption of advancement to adult children, namely, that since people are living longer and there are more aging parents who will require assistance in the managing of their daily financial affairs, it is dangerous to presume that the elderly parent is making a gift each time he or she puts the name of the assisting child on an asset .

100 This, with respect, seems to me to be a flawed syllogism. The intention to have an adult child manage a parent s financial affairs during one s lifetime is hardly inconsistent with the intention to make a gift of money in a joint account to that child. Parents generally want to benefit their children out of love and affection. If children assist them with their affairs, this cannot logically be a reason for assuming that the desire to benefit them has been displaced. It is equally plausible that an elderly parent who gratuitously enters into a joint bank account with an adult child on whom he or she depends for assistance, intends to make a gift in gratitude for this assistance. In any event, if the intention is merely to have assistance in financial management, a power of attorney would suffice, as would a bank account without survivorship rights.

101 The fact that some parents may enter into joint bank accounts because of the undue influence of an adult child, is no reason to attribute the same impropriety to the majority of parent-child transfers. The operative paradigm should be based on the norm of mutual affection, rather than on the exceptional exploitation of that affection by an adult child.

102 I see no reason to claw back the common law in a way that disregards the lifetime tenacity of parental affection by now introducing a limitation on the presumption of advancement by restricting its application to minor children. Since the presumption of advancement emerged no less from affection than from dependency, and since parental affection flows from the inherent nature of the relationship, not of the dependency, the presumption of advancement should logically apply to all gratuitous transfers from parents to any of their children, regardless of the age or dependency of the child or the parent. The natural affection parents are presumed to have for their adult children when both were younger, should not be deemed to atrophy with age.

103 While, as Rothstein J. observes, affection arises in many relationships, familial or otherwise, it is not affection alone that had earned the presumption of advancement for transfers between father and child. It was the uniqueness of the parental relationship, not only in the legal obligations involved, but, more significantly, in the protective emotional ties flowing from the relationship. These ties are not attached only to the financial dependence of the child. Affection between siblings, other relatives, or even friends, can undoubtedly be used as an evidentiary basis for assessing a transferor s intentions, but the reason none of these other relationships has ever inspired a legal presumption is because, as a matter of common sense, none is as predictable of intention.

104 It seems to me that bank account documents which specifically confirm a survivorship interest, should be deemed to reflect an intention that what has been signed, is sincerely meant. I appreciate that in *Re Mailman Estate*, [1941] S.C.R. 368, *Niles v. Lake*, 1947 CanLII 5 (S.C.C.), [1947] S.C.R. 291, and *Edwards v. Bradley*, 1957 CanLII 17 (S.C.C.), [1957] S.C.R. 599, this Court said that the wording of bank documents was irrelevant in determining the intention behind joint bank accounts with respect to beneficial title. Fifty years later, however, I have difficulty seeing any continuing justification for ignoring the presumptive, albeit rebuttable, relevance of unambiguous language in banking documents in determining intention. I think it would come as a surprise to most Canadian parents to learn that in the creation of joint bank accounts with rights of survivorship, there is little evidentiary value in the clear language of what they have voluntarily signed.

105 It is significant to me that even though the presumption of advancement has generally been replaced in the spousal context by the presumption of resulting trust, it has nonetheless been conceptually retained in the case of spousal property which is jointly owned, such as joint bank accounts. Section 14(a) of the Ontario *Family Law Act*, for example, provides that the fact that property is held in the name of spouses as joint tenants is proof, in the absence of evidence to the contrary, that the spouses are intended to own the property as joint tenants . Section 14(b) further specifies that money on deposit in the name of both spouses shall be deemed to be in the name of the spouses as joint tenants for the purposes of clause (a) .

106 Equally, a presumed intention of joint ownership in the case of jointly held property should apply to parent-child relationships, and the appropriate mechanism for achieving this objective, absent legislative intervention, is the application of the presumption of advancement.

107 The trial judge, whose conclusion was upheld by the Court of Appeal, properly applied the correct legal presumption to the facts of the case. Like Rothstein J., therefore, I would dismiss the appeal.

Appeal dismissed with costs.

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