

## Joint Accounts ~ Supreme Court of Canada



**By Brian Madigan LL.B.**

The Supreme Court of Canada recently decided that the law of resulting trusts is the law of the land.

Two cases dealing with similar fact situations were considered by the Court. The two cases were *Pecore v. Pecore* and *Madsen Estate v. Saylor* both released by the Court in May 2007.

In both cases, an elderly father established a joint bank account with an adult daughter. In *Pecore*, the daughter was permitted to retain the proceeds for her own personal use, but in *Madsen*, the daughter was obligated to share the proceeds with other estate beneficiaries as set forth in the deceased's Will.

So, the legal issue in both cases was the same; were the proceeds of the joint bank account:

- 1) transferred to the surviving joint tenant (by right of survivorship), or
- 2) transferred to the residue of the estate, either to be distributed in accordance with the Will, or by the laws of intestate succession.

The Supreme Court of Canada decided that the presumption of resulting trust remains the general rule for gratuitous transfers. In the case of a gratuitous transfer, the principle of the **presumption of resulting trust** requires the recipient to demonstrate that the transfer was indeed intended as a gift.

The donee or recipient must establish the necessary intention on the part of the transferor. The burden of proof lies with the recipient. So, it doesn't matter whether the recipient is the plaintiff or the defendant in a lawsuit. They still must prove to the Court, and convince the Judge on the balance of probabilities that the transfer was really a gift. If successful, then the rules of survivorship apply, if not, the proceeds fall into general residue.

The Court also considered the principle of the **presumption of advancement**. Here, the law presumes that in the case of the transfer of assets to a beneficiary, that the beneficiary was just given their share (whatever it may be) a little early. These two legal principles are obviously in conflict.

The Court determined that the principle of advancement should be restricted to transfers from a parent to a minor child. In this case, it would be obvious that a gift was intended. There would be no reciprocal obligations of the part of the minor child.

So, how do you figure out what was intended? The Supreme Court of Canada directed lower Courts to:

- 1) consider the parent/child *relationship*,
- 2) view the *bank documents* establishing the account,
- 3) consider the *control* and use of the funds in the account,
- 4) determine the factors related to the granting of any *power of attorney*,
- 5) consider the *tax treatment* of the joint accounts.

While this list is not necessarily exhaustive, these are all important factors.

This case has serious implications for estate planning consultants and for realtors looking to sell property which has been inherited by right of survivorship.

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