FAMLNWS 2024-15
Family Law Newsletters
April 15, 2024

— Franks & Zalev - This Week in Family Law

Aaron Franks & Michael Zalev

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What is the Point in *Stare Decisis* if Our *Stare* is not *Decisis*???

Falsetto v. Falsetto, 2024 CarswellOnt 2444 (C.A.) — MacPherson, Miller and Paciocco JJ.A.

Issues: Ontario — Resulting Trust

Nothing — absolutely *nothing* — encourages litigation as much as uncertainty in the law.

We reported on *Falsetto* in the August 21, 2023 (2023-32) edition of *TWFL*. It is a case about taking different positions at law for different purposes, which should not be, and historically has not been, allowed.

By way of reminder, in 2011, Albert, who was married to Paula at the time, decided to purchase an investment property in Ottawa with his father, Luigi. Albert handled the negotiations and dealt with the bank.

The original plan was for Albert to take title to the property in his sole name. However, shortly before the scheduled closing date, Albert and Luigi's lawyer advised them that because Albert already owned the adjacent property in his sole name, by operation of the *Planning Act*, R.S.O. 1990, c. P.13, the two properties would merge if he took title to the new property in his name alone. As Albert didn't want the properties to merge, he tried to arrange to have Luigi added to title and the mortgage — he wasn't able to do so because the bank did not have enough time to approve Luigi for financing prior to the closing. As a result, Albert arranged to add Paula's name to title and the mortgage instead.

Albert and Luigi paid the down payment equally without contribution from Paula. And, after the sale closed, Paula did not make any contributions whatsoever towards the mortgage or other expenses associated with the property. All rental income was paid to Luigi and Albert.

Years later, Albert and Paula separated, and (of course) a dispute arose over whether Paula was holding her interest in the property in trust for Luigi.

Luigi argued that this was a clear case of a purchase money resulting trust, which as the Supreme Court of Canada explained in *Nishi v. Rascal Trucking Ltd.*, 2013 CarswellBC 1716 (S.C.C.), "arises when a person advances funds to contribute to the purchase price of property, but does not take legal title to that property." In those circumstances, "the law presumes that the parties intended for the person who advanced the funds to hold a beneficial interest in the property in proportion to that person's contribution."

Furthermore, while prior to 2013 there was a serious question in law about whether the presumption of advancement should apply where, as in this case, a parent makes a gratuitous transfer to a child, in *Pecore v. Pecore* (2007), 37 R.F.L. (6th) 237 (S.C.C.), the Supreme Court of Canada definitively determined that the presumption of advancement *does not apply* when dealing with transfers between parents and independent adult child:

> [36] . . . 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* [v. *McLear Estate* (2000), 33 E.T.R. (2d) 272 (Ont. S.C.J.)], 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.** [emphasis added]

What could be more clear than that?

Paula argued that the transfer to her was not gratuitous because she had paid consideration by pledging her credit. More interesting for our purposes, however, Paula also argued that since her name was put on title to avoid merger under the *Planning Act*, and as the only way merger could have been avoided was to give her both legal *and* beneficial title, Luigi must have intended to gift a beneficial interest in the property to her.

As noted in our original Newsletter piece, the Ontario Court of Appeal dealt with a very similar situation in *Holtby v. Draper* (2017), 3 R.F.L. (8th) 367 (Ont. C.A.) at paras. 68-69, leave to appeal refused 2018 CarswellOnt 19674 (S.C.C.), where the Court of Appeal found that an intention to avoid merger under the *Planning Act* is evidence that the transferor intended to gift beneficial ownership to the transferee. In fact, Paula argued that *Holtby v. Draper* offered a complete answer to Luigi's argument that he was the beneficial owner of the property. And that was a very good argument. How could the plan to avoid merger under the *Planning Act* peacefully — or legally — co-exist with a resulting trust in favour of Luigi? Surely Luigi and Albert could not have it both ways — they could not, for *Planning Act* purposes assert that Paula was a beneficial owner; but for family law purposes assert a resulting trust in Luigi's favour. To allow them to do so would run contrary to a long line of authorities that one cannot take one position for corporate, tax, trust, or other legal purpose — such as the *Planning Act* — and then try to take a different position for family law purposes. To do so is generally determined to be an abuse of process. See, for example: *Black v. Black* (1988), 18 R.F.L. (3d) 303 (Ont. H.C.); *Doucette v. Hache* (2010), 88 R.F.L. (6th) 115 (N.S. S.C.); *Wu v. Sun* (2010), 91 R.F.L. (6th) 24 (B.C. C.A.); *Rosenthal v. Rosenthal* (1986), 3 R.F.L. (3d) 126 (Ont. H.C.); *Battye v. Battye* (1989), 22 R.F.L. (3d) 427 (Ont. H.C.); *Dalgleish v. Dalgleish*, 2003 CarswellOnt 2758 (S.C.J.); *Fehr v. Fehr* (2003), 40 R.F.L. (5th) 71 (Man. C.A.); *Dillon v. Dillon* (2015), 65 R.F.L. (7th) 385 (Man. Q.B.); *Hu v. Li*, 2016 CarswellBC 3201 (S.C.); *Horch v. Horch* (2017), 1 R.F.L. (8th) 1 (Man. C.A.); *Schroeder v. Schroeder* (2002), 23 R.F.L. (5th) 361 (Man. C.A.); *Este v. Esteghamat-Ardakani* (2018), 12 R.F.L. (8th) 120 (B.C. C.A.).

After considering both parties' arguments, Justice Ryan Bell agreed with Paula. Since Luigi's intention at the time of the purchase (which is the only time that matters when determining intention with respect to a resulting trust — see *Nishi* at para. 30 and *Pecore* at para. 59), was to avoid merger under the *Planning Act*, the only logical conclusion that could be drawn was that Luigi had intended to give Paula both legal and beneficial title to the property:

> [33] I reject this submission. **On the whole of the evidence, I find that Luigi and Albert's intentions were one and the same: to avoid merger under the *Planning Act* with a neighbouring property owned by Albert.** Luigi and Albert discussed the purchase of 415 Lisgar together. Luigi was aware of the *Planning Act* issue, having received advice from [the real estate lawyer], through Albert, that a second party was needed on title to avoid merger with an adjoining property. Albert's evidence is that he discussed adding Paula to title with Luigi and they agreed that they were "stuck" and "had no choice because there wasn't enough time to get [Luigi] approved." The bank's internal notes confirm that Paula was added to title to deal with the merger issue.

. . . . .

> [38] In this case, **I find that Luigi intended to pass beneficial ownership in 415 Lisgar to Paula in order to avoid a legal consequence under the *Planning Act*. Accordingly, no purchase money resulting trust arose in Luigi's favour.** [emphasis added]

The intention to prevent merger of title was completely *inconsistent* with a resulting trust and was *consistent* with a gift. If Luigi intended to pass beneficial ownership to Paula to avoid *legal consequences* under the *Planning Act*, how could a resulting trust arise? As a result, Justice Ryan Bell dismissed Luigi's claim for a beneficial interest in the property.

Luigi appealed — and he was successful, but over a rather blunt and powerful dissent from Justice MacPherson with which we respectfully agree.

First, the majority.

The majority agreed that Justice Ryan Bell correctly set out the general legal principles applicable to the dispute: the *Pecore* rebuttable presumption of resulting trust for most categories of relationships, including the one involved here.

Paula argued that having a third party take title to avoid merger under the *Planning Act* was basically a bar to relying on the presumption of resulting trust. But this proposition was dismissed by the majority as "unsupported by the case law" and as being "inconsistent with general principles." According to the majority, where a resulting trust is presumed, the onus is on a party seeking to rebut that presumption to establish that the purchaser intended to make a gift: *Lattimer v. Lattimer*, 1978 CarswellOnt 509 (H.C.) at p. 378 (H.C.). And, according to the majority:

> [18] . . . [t]his is not a matter of constructive or deemed intention, but of establishing actual intention, requiring a case-by-case evaluation of the evidence to ascertain the gratuitous transferor's actual intention on the balance of probabilities: *Schwartz v. Schwartz*, 2012 ONCA 239, 349 D.L.R. (4th) 326, at paras. 42-43. The intention to avoid merger does not necessarily entail the intention to make a gift.

Finding "several problems" with Justice Ryan Bell's analysis and chain of reasoning, the majority thought it was "obvious" that the presumption of resulting trust would apply because Luigi paid half the down payment. Respectfully, we do not find it so obvious.

First, the majority suggested that the "characterization" of Luigi's intention in the court below was "incomplete":

> [21] . . . What is left inexplicably in shadow is that Luigi's purpose in participating in the transaction was to purchase 415 Lisgar as an investment property — to become its co-owner in a joint business venture with Albert. Luigi always intended to — and did — earn income from the property.

The majority was of the view that there was "overwhelming evidence" that Luigi did not intend to make a gift to Paula and that affirmed the presumption of resulting trust (including a history of Albert and Luigi investing together and Luigi advancing 50% of the purchase price).

But what of the specific intention to avoid operation of the *Planning Act*? Here the majority suggested that Luigi's intention with respect to the method of purchase was "another matter":

> [23] **Luigi's intention with respect to the mode of purchase is another matter**. He intended to purchase 415 Lisgar and — on his evidence — **he intended to do so in a manner that did not trigger adverse *Planning Act* consequences**. At first, he intended to accomplish this by registering himself on title as co-owner. When that option became impossible — due to financing considerations — he and Albert instead decided that Paula would take title to a 50 percent interest, subject to a trust in favour of Luigi.
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> [24] The application judge rejected Luigi's evidence that he advanced the funds so as to obtain a beneficial interest in the property. But why? Because, she reasoned, this plan of action could not achieve the end that Luigi sought, an end

> **she mischaracterized as avoiding the operation of the *Planning Act*.** Here, for his actual end — of purchasing the property as co-owner for investment purposes — the application judge substituted the means he chose to achieve that end. [emphasis added]

Very respectfully (and we mean it) — this is hard to understand. It is right there in black and white: "*he intended to do so in a manner that did not trigger adverse Planning Act consequences*." And the only way to not trigger adverse *Planning Act* consequences was either (1) to intend that Paula be the beneficial owner; or (2) to intend to be offside and not comply with the *Planning Act*.

Even though *Holtby v. Draper* (2017), 3 R.F.L. (8th) 367 (Ont. C.A.) would appear to be conclusive on the matter, the majority held that was not the case.

In *Holtby v. Draper*, Mr. Holtby co-owned a parcel of land with his first wife. They were registered as joint tenants. Mr. Holtby owned an adjacent property registered solely in his name. After the dissolution of his first marriage, he married Ms. Draper. His first wife's half-interest in the matrimonial home was transferred to Ms. Draper and they were registered as joint tenants (to avoid the *Planning Act*). On separation, Mr. Holtby argued that Ms. Draper held her share of the property on resulting trust for Mr. Holtby. But the court disagreed, concluding that, in all the circumstances, Mr. Holtby's intention was that Ms. Draper hold title as joint tenant and not subject to a resulting trust. Among the reasons for this conclusion was, "[t]o achieve the intended goal under the *Planning Act*, it was necessary for the beneficial ownership of [the adjoining lot] to be different from the beneficial ownership of the farm property": *Holtby*, at para. 69. While that seems rather conclusive to us, the majority in *Falsetto* was of the view that, in *Holtby*, achieving the *Planning Act* goal was *not* decisive in determining the transferor's intention, but rather just one factor (consistent with the presumption of joint ownership), for consideration.

Although strikingly similar, the majority found *Holtby* to be "materially different":

> [27] This case is materially different than *Holtby*, but **the ultimate question is the same: what was the transferor's intent at the time of the conveyance?** Did Luigi intend to retain a beneficial interest in 415 Lisgar, as we are to presume, or did he intend to give Paula a gift? **The application judge held that Luigi intended to give Paula a gift because he wanted to avoid merger and, on the application judge's reading of the law, avoiding merger required that he give her beneficial ownership in order to achieve that end**. But on Luigi's evidence: (1) the end he was trying to achieve was to purchase 415 Lisgar as an investment property; (2) in so doing he wanted to avoid merging the title with 274 Nepean; and (3) **he thought he could achieve this through having Paula take legal title while he retained the beneficial interest. The application judge rejected his evidence on the basis that because the plan could not have worked it therefore could not have been intended**.
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> [28] The application judge found that her conclusion was bolstered by various decisions of this court which addressed the effect of conveyances of property undertaken to avoid creditors or the imposition of probate fees. She concluded that "a party cannot achieve one result for the purpose of avoiding a legal consequence prescribed by statute — in this case the *Planning Act* — and achieve the opposite result for other purposes." This, of course, is a factor for consideration in determining what the transferor's intention was. **But on the evidence, Luigi's intention in avoiding the consequences of the *Planning Act* — whether it was effective or not — was fully aligned with his intention in retaining beneficial title. The application judge's conclusion does not follow.**
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> [29] In sum, the application judge erred in making the presumed operation of the *Planning Act* determinative of the question of whether Luigi intended to make a gift of the purchase money or retain a beneficial interest in the property. [**emphasis** added]

As a result, the majority allowed the appeal and granted a declaration that Luigi is the beneficial owner of 50% of the property.

Again, we take issue with this. Not only does *Holtby* seem to be a decision on all fours with *Falsetto*, but it cannot be that *illegal* intention constitutes *legitimate* intention. Ignorance of the law is no excuse. This is not really any different than a cause of action being statute-barred because the plaintiff knew the facts but did not appreciate the legal significance of those facts:

Nicholas v. McCarthy Tétrault, 2008 CarswellOnt 6320 (S.C.J.), aff'd (2009), 68 R.F.L. (6th) 293 (Ont. S.C.J.), leave to appeal to S.C.C. ref'd [2009] S.C.C.A.; *Isailovic v. Vojvodic*, 2011 CarswellOnt 11704 (S.C.J.); *Boyce v. Toronto Police Services Board*, 2011 CarswellOnt 4 (S.C.J.); *Webster v. Almore Trading & Manufacturing Co.*, 2010 CarswellOnt 5595 (Ont. S.C.J.); *Coveley v. Thorsteinssons LLP*, 2018 CarswellOnt 13229 (S.C.J.).

Justice MacPherson wrote a short, blunt dissent. In his view, Justice Ryan Bell had written "exemplary" reasons and reached the correct result. As noted by Justice MacPherson, there were four crucial factual points that ground Justice Ryan Bell's analysis and conclusion:

> [34] First, the **sole reason** for putting the respondent Paula Falsetto on title to the property at 415 Lisgar St. in Ottawa was **to avoid a merger** of title of it and the adjoining property at 274 Nepean St.
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> [35] Second, after [Paula] was placed on title in 2011, **she remained the co-owner with her husband for more than ten years**. **Neither her husband (now ex-husband) Albert nor her father in-law Luigi took any steps to change the formal ownership** of the Lisgar property.
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> [36] Third, for at least eight of those years Luigi's tax returns reflected no ownership interest in 415 Lisgar.
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> [37] Fourth, there was **never any suggestion that Paula's co-ownership of 415 Lisgar would be held by her for Luigi. There were no trust documents. There were never any discussions between Albert and Paula, or Luigi and Paula, about a trust**. [**emphasis** added]

Against this backdrop, according to Justice MacPherson, the trial judge engaged in the following "impeccable" reasoning:

> [38] . . . On the whole of the evidence, I find that **Luigi and Albert's intentions were one and the same: to avoid merger under the *Planning Act*** with a neighbouring property owned by Albert.
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> . . . . .
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> Albert's evidence is that he discussed adding Paula to title with Luigi and **they agreed that they were "stuck" and "had no choice because there wasn't time enough to get [Luigi] approved**." **The bank's internal notes confirm that Paula was added to title to deal with the merger issue.**
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> Luigi's position, maintained throughout his cross-examination, that he never intended Paula to be a "real" owner of 415 Lisgar, belies this evidence and the *Planning Act* goal.
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> . . . . .
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> . . . Paula and Albert have remained on title together for more than 10 years and Luigi's tax returns for a number of years reflected no ownership interest in 415 Lisgar. Both of these facts are consistent with an intention by Luigi at the time of purchase to pass the beneficial interest to Paula.
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> . . . . .
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> The court's decisions in *Zacher v. Zacher*, and *Styres v. Martin* support the conclusion that a party cannot achieve one result for the purpose of avoiding a legal consequence prescribed by statute — in this case, the Planning Act — and achieve an opposite result for other purposes.
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> . . . . .
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> In this case, I find that Luigi intended to pass beneficial ownership in 415 Lisgar to Paula in order to avoid a legal consequence under the *Planning Act*. Accordingly, no purchase money resulting trust arose in Luigi's favour. [**emphasis** added]

For good measure, Justice MacPherson also referred to *Holtby* as the leading case on the issue.

According to Justice MacPherson, the simple fact that governed the appeal was that for 10 years, Albert and Luigi initiated, accepted, and did not challenge Paula's crystal clear beneficial ownership, together with her husband, of the property. Luigi's subsequent attempt to claim half ownership of a property that was never registered in his name and for which he reported nothing to the tax authorities for almost a decade was unfair, and Justice Ryan Bell saw it for what it was.

Justice MacPherson would have dismissed the appeal.

As we mentioned above, absolutely nothing encourages litigation as much as uncertainty in the law — so it is a bit disappointing that, given the chance to clarify the law, the Court of Appeal was unable to do so. As a result, we now leave this to you to figure out. *Holtby*? *Falsetto*? Discuss amongst yourselves.

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