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**Family Law Newsletters**
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# — Franks & Zalev - This Week in Family Law

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## Occam's Razor and Resulting Trusts

***Afatmirni v. Sharifi*, 2024 CarswellOnt 9069 (S.C.J.) — Finlayson J.**

**Issues:** Ontario — Resulting Trust

What party gets the benefit of a presumption when a party is trying to claim that a property they own legally is being held in trust for a third party? This important case discusses that question (obviously, or we would not have asked).

The parties had a short relationship and marriage: they were married in January of 2021 and separated in September or October of 2022. There were no children. The primary issue was how the court ought to deal with a condominium that was in the wife's name, but which she claimed she was holding in trust for her mother. The parties agreed to a focused hearing on this issue, and this is the decision.

The wife's mother, Roya Souzankari ("Roya"), entered into an Agreement of Purchase and Sale for a mixed-use commercial and residential condominium in Richmond Hill on January 26, 2014 for $727,734.92. On August 11, 2015, and June 1, 2018, Roya, the wife and the builder signed amendments to the Agreement of Purchase and Sale. The wife became the intended purchaser and was credited with the deposits that Roya had already made. Roya continued to make deposits *after* the wife became the intended purchaser. The deposits totalled $139,364.00.

On March 21, 2019, the purchase of the condominium property closed, and the wife took title. A mortgage was taken with the wife as the sole mortgagor, in the amount of $557,456.00. The wife also paid $46,722.19, but the source of these funds was not clear.

In May of 2022, the condominium was sold for $915,000.00. The net proceeds of sale of $341,833.06 were paid to the wife. Those funds were deposited into the wife's bank account, and then on June 3, 2022, the funds were transferred to *Roya's* real estate lawyer to fund the purchase of a cottage property which was purchased in the joint names of Roya and her partner.

On separation, the husband argued that the condominium property and cottage were both the wife's property. The wife and Roya, predictably, claimed that the condominium and cottage were solely Roya's property and that the wife only took title to the condominium in her name because Roya could not get a mortgage.

The trial proceeded solely on the basis of resulting trust and, specifically, on "purchase money resulting trust."

In his reasons, Justice Finlayson helpfully provides a thorough description of the law of resulting trusts, purchase money resulting trusts, and the doctrine of advancement. In summary:

• A rebuttable presumption of resulting trust arises where one party gratuitously transfers property to another party: *Kerr v. Baranow* (2011), 93 R.F.L. (6th) 1 (S.C.C.) ("*Baranow*");

• Resulting trusts can arise between both married and unmarried partners: *Baranow*;

• Resulting trusts can arise as between a parent and their adult child: *Pecore v. Pecore* (2007), 37 R.F.L. (6th) 237 (S.C.C.) ("*Pecore*");

• There is no presumption of advancement between spouses or between parents and adult children: *Pecore*;

• A purchase money resulting trust arises when one person provides the funds to purchase a property, but does not take legal title to that property. The law presumes that the parties intended for the person advancing the funds to hold a beneficial interest in the property in proportion to their contribution: *Rascal Trucking Ltd. v. Nishi*, 2013 CarswellBC 1716 (S.C.C.) ("*Rascal Trucking*"); and

• Purchase money resulting trusts have been applied to transactions between parents and their adult children: *Bradshaw v. Hougassian*, 2024 CarswellOnt 7808 (Ont. C.A.) ("*Hougassian*").

Justice Finlayson then considered the interesting question of who bore the presumption in this case.

The husband argued that the wife, as the transferee and legal title-holder of the condominium, bore the onus of showing that she did *not* own the condominium. The wife, on the other hand, argued that as the husband was the one arguing *against* the presumption of resulting trust, it was his onus to demonstrate that it did not apply.

. . . an interesting conundrum.

In paras. 22 to 25 of *Pecore*, the Supreme Court of Canada provided guidance regarding the question of onus, which Justice Finlayson summarized as follows:

(a) A rebuttable presumption of law is a legal assumption that a court will make if there is insufficient evidence adduced to displace the presumption. The presumption shifts the burden of persuasion to the opposing party who must rebut the presumption;

(b) The presumption provides a guide for courts in resolving disputes over transfers where evidence as to the transferor's intent at the time of making the transfer is unavailable or unpersuasive;

(c) 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; and

(d) The presumption of resulting trust, therefore, alters the general rule 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 by proving donative intent.

Justice Finlayson determined that the onus of rebutting the presumption of resulting trust lay with the person *opposing* the presumption. While the husband, therefore, had the onus, the court would still consider objective indicators that would go to whether or not a transfer was a gift or a loan [see *Barber v. Magee*, 2015 CarswellOnt 19620 (S.C.J.), aff'd, 2017 CarswellOnt 9971 (C.A.) ("*Barber*")]. However, Justice Finlayson did caution parties who might be intent to depend solely on the presumption by quoting *Pecore*:

[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.

Justice Finlayson considered this situation to be similar to the case before him. Both parties had called evidence. There was objective criteria the court could consider — and there were documents over which the wife and Roya had control that were not produced. All of this would factor into the court's analysis.

His Honour correctly noted that the goal of the analysis was to determine the intention of the transferor (in this case Roya) *at the time the funds were advanced* (see *Rascal Trucking*; see also *Hougassian*). This is because the "common intention resulting trust" went the way of the Dodo as a result of *Baranow*.

The evidence of the transferor's intention ought to be contemporaneous "or nearly so" (*Pecore* at para. 56). To determine the transferor's intention, courts have considered: the relationship between the transferor and the transferee, their conduct, the wording of the transaction documentation, how the property transferred was controlled and used, what bank documents say, who made subsequent payments and any tax treatment pertaining to the transaction: *Pecore* at paras. 56-70; *Barber* at paras. 42-43; *S. (J.) v. S. (D.B.)* (2016), 79 R.F.L. (7th) 409 (Ont. S.C.J.) at para. 74; *O.K. v. M.H.*, 2024 CarswellOnt 3683 (S.C.J.) at paras. 89-108.

In determining intention, the court may take into account evidence that arises *after* the transfer, but only *to the extent that it is relevant to the transferor's intention at the time of the transfer itself*. The reliability of subsequent evidence and the weight to attach to it must be assessed "guarding against evidence that is self-serving or that tends to reflect a change in intention" (see *Pecore* at paras. 56, 59; and *Hougassian* at paras. 11-12).

Justice Finlayson then weighed each of the different arguments made by the parties in terms of Roya's intention at the time the funds were transferred to the wife:

> • It was not disputed that Roya had paid about $140,000 in deposits for the condominium property.
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> • The wife and Roya argued that the wife had only taken title for mortgage financing purposes. They claimed that they had been advised by the mortgage broker to do so. However, the wife did not call the mortgage broker as a witness. And the mortgage application that the wife filled out directly contradicted her sworn financial statements. The wife tried to blame the mortgage broker for any discrepancies — but as she did not call the broker, these arguments carried little weight. Therefore, the court put little weight on the wife's evidence that Roya needed her daughter's help to get a mortgage.
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> • The wife called the realtor for the transaction, who testified that she understood that the condominium was being purchased by Roya and that Roya would be running her hair salon business out of the property. This evidence was considered important and influential by Justice Finlayson.
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> • The husband argued that the wife had used the property as a residence and for her own hairdressing business, demonstrating that she was the sole owner. She had also dealt with minor maintenance issues. The wife acknowledged that she had lived in the condominium "rent free" for one year and that she had done some work there. However, Roya had worked from the property extensively throughout the time it was owned by the wife. The wife had dealt with some maintenance issues, but they were minor in nature. As Justice Finlayson stated, " . . . just because the wife dealt with the air conditioner, does not make the wife the sole owner or exclude Roya as an owner." His Honour determined that this argument was "not particularly dispositive".
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> • The husband argued that the wife had paid the condominium's carrying costs and liabilities, demonstrating that she was the sole owner. The wife acknowledged that the payments for the condominium came from her account, but she claimed that Roya would give her cash to cover the expenses. This was done, according to the wife, because the bank had told her that as the titled owner the payments had to come to her account. The wife failed to call the person at the bank who told her this as a witness. There were no tracing documents showing the payments coming from Roya.

 

Roya and the wife had also refused to produce Roya's bank statements. Given the state of the wife's evidence, the court determined that all of the payments were coming from the wife's bank account and thus the simplest, and only, thing it could do was attribute all of the payments to the wife. Enter Occam's Razor: if you have two competing ideas to explain the same phenomenon, you should prefer the simpler one.

• The wife claimed the condominium property as her principal residence upon its sale, thereby shielding the gain from being taxed as a capital gain. The husband argued that this was definitive proof that she was the sole owner. The husband argued that she could not take one position for tax purposes — claim to be the sole owner; and then claim otherwise for family law purposes. The wife and Roya failed to provide a definitive explanation as to what had occurred, attempting to blame an accountant — whom (you guessed it) the wife had not called as a witness.

The court determined that there were a number of plausible explanations as to what had occurred. Maybe Roya had not intended to retain beneficial ownership, which is why the wife had reported the sale to the CRA. On the other hand, maybe Roya had chosen to put title in the wife's name while retaining beneficial ownership in order to avoid future tax liabilities. Justice Finlayson determined that the claims made in tax filings were a *relevant* but *not determinative* factor — see *Falsetto v. Falsetto* (2024), 99 R.F.L. (8th) 276 (Ont. C.A.) and *Andrade v. Andrade*, 2016 CarswellOnt 7727 (C.A.) ("*Andrade*"). There was no requirement that the wife have "clean hands" to assert that Roya was the beneficial owner of the property. The case would not be decided on the basis of the wife's tax filings. (In our view, this really should be dispositive as we have discussed in previous editions of *TWFL*, including the April 15, 2024 (2024-15) and August 21, 2023 (2023-32) editions of *TWFL*. What could be more determinative of intention as of the time of transfer than the representations actually made to tax, or other, authorities. It is odd that an email between parties suggesting gift would be dispositive, but an official position with CRA would not?)

Ultimately, to Justice Finlayson, the two most important factors were Roya's down payment and the wife's contributions to the condominium's carrying costs. While the parties attempted to frame the case as an all or nothing decision — either Roya owned 100% of the property or she owned none of fit — Justice Finlayson was not convinced. Instead, he determined that the "reality of the situation" indicated that Roya and the wife were *both* beneficial owners of the condominium property.

Justice Finlayson noted that the Ontario Court of Appeal, in *Andrade*, considered subsequent mortgage payments as contributions to the original purchase. When analyzed this way, *both* Roya and the wife contributed significant portions to the purchase of the condominium property — Roya made her contribution "up front" while the wife borrowed funds from the bank and paid it back over time. Justice Finlayson concluded that the payments against the mortgage were not, when framed in this way, in truth, subsequent payments: see *Chechui v. Nieman* (2017), 96 R.F.L. (7th) 1 (Ont. C.A.).

However, we note that the law on this is not quite settled. In *Hamilton v. Hamilton*, 1996 CarswellOnt 2421 (C.A.), the Ontario Court of Appeal determined the "Rule" in *Hamilton v. Hamilton*: that the only contribution to the property that mattered was contributions to the initial purchase of the property. See also *Dale v. Salvo*, 2005 CarswellOnt 3172 (S.C.J.); *Steele v. Doucet* (2019), 22 R.F.L. (8th) 471 (Ont. S.C.J.); *Fekete v. Begovic* (2008), 51 R.F.L. (6th) 424 (Ont. S.C.J.); *Kiriakou v. Pentzos*, 2020 CarswellOnt 525 (S.C.J.); *Schwartz v. Schwartz*, 2012 CarswellOnt 4362 (C.A.); and *Korman v. Korman* (2015), 63 R.F.L. (7th) 1 (Ont. C.A.). This "Rule" was then somewhat relaxed in *Chechui v. Nieman* (2016), 78 R.F.L. (7th) 272 (Ont. S.C.J.), rev'd, (2017), 30 E.T.R. (4th) 1 (Ont. C.A.), where the Court of Appeal agreed that the presumption of resulting trust is not limited to contributions to the initial purchase of property, but could also apply, for example, to proximate lump sum payments of debt. The "Rule" was similarly relaxed in *Andrade* where the Ontario Court of Appeal determined that a resulting trust can arise where a party contributes directly to the purchase price *or* the mortgage. So, while the "Rule" in *Hamilton* may not be dead, it has certainly been punched in the face a few times.

In our view, allowing subsequent contributions to count toward an argument of resulting trust runs afoul of the rule in *Rascal* that intention is to be determined at the time of initial purchase. But we digress . . .

After taking into account all of the evidence, and the serious concerns he had regarding the wife and Roya's credibility, Justice Finlayson determined that the wife had a 36% interest in the condominium property. This was determined based on the deposits

 

paid by Roya and the amount paid toward the mortgage by the wife during the time she was sole title holder to the condominium property.

The wife adduced no proper evidence as to the value of the condominium property on the date of marriage. While she had obtained an appraisal, it was incomplete. The appraisal valued only the residential portion of the condominium property and not the commercial portion. And as the wife did not call the appraiser to testify, no explanation could be obtained. The husband stated that the court should just use the wife's appraisal, but Justice Finlayson declined to do so, as it would have been a "fiction" and would have resulted in little to no equity in the property on the date of marriage — something which would not have been fair to the wife. Justice Finlayson was also critical of the husband for failing to obtain a better appraisal of his own.

Justice Finlayson did the following:

> [140] Therefore, I have decided instead, to adjust the property's value in a linear way from the time of its purchase, forward to the date of marriage, by using the purchase and sale prices. While I appreciate that this approach may not be completely accurate, as the market did not necessarily increase in a straight line, I find it is close enough. If the parties are dissatisfied with this approach, then they need to take responsibility for the fact that they did not put better evidence before the Court on this point.

Justice Finlayson set out the value of the wife's 36% interest on the date of marriage and the date of separation. When all was said and done, it added $17,877.61 to the wife's Net Family Property, thereby impacting the equalization payment by only $8,938.00.

While it was *obiter*, Justice Finlayson also stated that if he was wrong and Roya was the beneficial owner of the entire condominium property, then the wife would have had a claim based on unjust enrichment based on her contributions to the condominium property. This would have introduced "other problems" as the wife had not made a claim against her mother.

Justice Finlayson set out that while the husband could not advance a trust claim against Roya, based on the Ontario Court of Appeal decision of *Karatzoglou v. Commisso* (2023), 95 R.F.L. (8th) 264 (Ont. C.A.), the wife's failure to pursue a claim based on unjust enrichment could be raised in an unequal division argument. However, for those of you that read our discussion of *Karatzoglou* in the June 26, 2023 (2023-25) edition of *TWFL*, you may recall our view that while the husband may not have been able to claim against Roya, he could claim against the wife for omitting an asset from her Net Family Property.

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