FAMLNWS 2025-06

Family Law Newsletters
February 17, 2025

— Franks & Zalev - This Week in Family Law

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Contents

Giving the Gift of . . . Litigation?

Jackson v. Rosenberg, 2024 CarswellOnt 18865 (C.A.) — van Rensburg, Zarnett and George JJ.A.

Issues: Ontario — Gifting a Right of Survivorship

While *Jackson* is not strictly a family law case, it is a decision that ***must*** be read carefully by family law practitioners across the country.

This case turns on the issues of gifts, joint tenancies, and the right of survivorship — and gifts of the right of survivorship.

As we all know, joint tenancy is a form of joint property ownership in contrast to tenancy in common. Not only is joint tenancy marked by the "four unities" (*Hansen Estate v. Hansen* (2012), 9 R.F.L. (7th) 251 (Ont. C.A.)), but a specific attribute of joint tenancy is the right of survivorship: upon the death of one joint tenant, that tenant's interest passes to the surviving joint tenant(s). However, this is not the *only* attribute to a joint tenancy. While both tenants are alive, they each enjoy an undivided interest in the entire property, the right to possession, a statutory right to compel partition or sale, and the right to unilaterally sever the joint tenancy, converting it to a tenancy in common.

The Respondent, Mr. Jackson, had been in a long-standing committed romantic relationship with Ms. Rosenberg's uncle, Mr. Taube. Neither of them had much in the way of family and they executed mirror Wills in 2005, with the entirety of their estates to go to the other and both of them naming Ms. Rosenberg as alternate beneficiary.

When Mr. Taube died in 2010, his estate passed to Mr. Jackson in its entirety. After Mr. Taube's death, Mr. Jackson purchased a new home in Port Hope. He alone paid for the property and all of the costs associated with its upkeep.

In his estate planning, Mr. Jackson wanted to leave the Port Hope home to Ms. Rosenberg on his death. While his existing Will would have accomplished this, he became concerned about probate fees. To that end, Mr. Jackson instructed a real estate lawyer to make Ms. Rosenberg a joint tenant of the Port Hope home in 2012.

The transfer to Ms. Rosenberg was gratuitous. The direction to the real estate lawyer confirmed that the transfer had been a gift and that no consideration had passed between Mr. Jackson and Ms. Rosenberg. Mr. Jackson's evidence was that he had not understood the implications of making Ms. Rosenberg a joint tenant during his lifetime. It was his evidence that he had solely intended for her to receive title upon his death — nothing more.

Around August 2020, Ms. Rosenberg and her spouse visited Mr. Jackson. While Ms. Rosenberg was out of the home, her spouse told Mr. Jackson that they intended to renovate the Port Hope home and sell it. They would use the proceeds to buy a new property where Mr. Jackson could live with them.

Mr. Jackson was — to put it mildly — neither amused nor a fan of this idea. He was worried that he would be forced from his home. He became determined to regain full ownership of his home. Consequently, on September 22, 2020, he asked a real estate lawyer to sever the joint tenancy and convert it to a tenancy in common. He did this, according to the application judge, so that Ms. Rosenberg would not get the entire home if he died before he managed to regain ownership.

Mr. Jackson then transferred his interest to himself as a tenant in common to sever the joint tenancy.

And off to court they went . . .

The question, as described by the application judge, was whether Mr. Jackson's transfer of his home from himself as sole owner to himself and Ms. Rosenberg as joint tenants, for no consideration, created a resulting trust in Mr. Jackson's favour, or was intended as an outright gift to Ms. Rosenberg? A question for the ages . . . and for all family lawyers.

Mr. Jackson argued that the presumption of resulting trust applied and could not be rebutted for the 2012 transfer. He testified that he had never intended for Ms. Rosenberg to have any rights to the Port Hope home until his death and that the lawyer that had prepared the transfer had never told him about its implications. He also argued that the 2020 transfer terminated any rights of survivorship.

Ms. Rosenberg argued that she was a beneficial owner of the home. She claimed that Mr. Jackson had made an unconditional gift to her in the 2012 transfer, making her a joint owner both legally and beneficially. She also maintained that the 2020 transfer was ineffective because a "gift cannot be revoked." She further argued that there had been an agreement among herself, her uncle and Mr. Jackson. Under the alleged agreement, Mr. Jackson promised to leave all his assets to her in exchange for her uncle not leaving her anything in his Will.

In considering whether Ms. Rosenberg had rebutted the presumption of resulting trust, the application judge set out that he not only had to determine whether Mr. Jackson had *intended* to make a gift but also the *nature* of the gift, if any. After looking at all of the evidence, the application judge determined that Mr. Jackson had, indeed, intended to gift *something* to Ms. Rosenberg — he had intended to gift her the right of survivorship in the Port Hope property *but nothing more*. The gift was, therefore, whatever equity was in the property when he died. There was no intention to gift Ms. Rosenberg any beneficial interest in the property before his death.

The application judge found that while the gift of the right of survivorship took effect immediately, and although a perfected, unconditional gift cannot be revoked, that did not prevent Mr. Jackson from severing the joint tenancy and thereby eliminating the right of survivorship.

The application judge relied on the cases of *Simcoff v. Simcoff*, 2009 CarswellMan 357 (C.A.) and *Bergen v. Bergen* (2013), 39 R.F.L. (7th) 28 (B.C. C.A.) as support for this proposition.

The result was that the 2020 transfer severed the joint tenancy, making both Mr. Jackson and Ms. Rosenberg tenants in common, each with a 50% interest in the property. However, the presumption of resulting trust applied, such that Ms. Rosenberg held her 50% interest on resulting trust for Mr. Jackson. However, according to the application judge, while the severing of the joint tenancy eliminated Ms. Rosenberg's right of survivorship to Mr. Jackon's 50% share, he could not revoke the right of survivorship with respect to Ms. Rosenberg's 50% share — as he had intended to gift the right of survivorship to her in 2012 and he could not revoke that perfected gift.

Ms. Rosenberg appealed.

She maintained that Mr. Jackson had intended to convey both legal and beneficial title to her as a joint owner in accordance with the "mutual wills agreement." She also argued that the application judge should not have put any weight on Mr. Jackson's stated intent to avoid probate fees, because she became subject to "more onerous capital gains taxes by being placed on title as a joint owner."

The Court of Appeal rejected these arguments. The application judge's findings were entitled to deference, and there was no palpable and overriding error identified by Ms. Rosenberg: *Housen v. Nikolaisen*, 2002 CarswellSask 178 (S.C.C.) at paras. 10 and 19. There was ample evidence to support the application judge's factual findings about intention at the time of transfer.

Ms. Rosenberg had also failed to establish the existence of the "mutual wills agreement." She had acknowledged during the appeal that there was no binding contract as to how Mr. Jackson would dispose of his property upon his death.

There was also no evidence that capital gains tax exposure to Ms. Rosenberg was ever considered by Mr. Jackson; and in determining whether a gift was intended, it is only the intention of the transferor at the time that matters: *Andrade v. Andrade*, 2016 CarswellOnt 7727 (C.A.) at para. 63.

The Court of Appeal upheld the application judge's finding that Mr. Jackson had only ever intended to gift the right of survivorship to Ms. Rosenberg. And as the transfer had been gratuitous it engaged the presumption of resulting trust: *Pecore v. Pecore* (2007), 37 R.F.L. (6th) 237 (S.C.C.) at para. 20. The transferee, Ms. Rosenberg, was presumed to be holding her interest in the property in trust for Mr. Jackson, the transferor, who was presumed to be the beneficial or "real" owner of the interest unless there was clear evidence to rebut this presumption.

The only way Ms. Rosenberg could rebut the presumption of resulting trust was to demonstrate that Mr. Jackson intended to give her a gift. The Ontario Court of Appeal determined that a transferor could transfer property with the intention to only gift the associated property rights upon the death. In *Pecore*, for example, the Supreme Court recognized that a person could gratuitously place assets into a joint account with the intention of retaining exclusive control of the account until his or her death, at which time the transferee would take the balance through survivorship. The result was an *inter vivos* gift of the right of survivorship.

As noted above, the British Columbia Court of Appeal and Ontario Court of Appeal upheld similar gifts in the cases of *Bergen v. Bergen* (2013), 39 R.F.L. (7th) 28 (B.C. C.A.) and *MacIntyre v. Winter* (2021), 59 R.F.L. (8th) 253 (Ont. C.A.).

The Court of Appeal upheld the application judge's decision in regard to the gift. The finding regarding Mr. Jackson's intention flowed from the evidence and had ample support. There was no error.

The Court of Appeal then went on to consider the interesting question of whether, despite the gift of the right of survivorship, Mr. Jackson retained the right to unilaterally sever the joint tenancy. While a perfected unconditional gift cannot be revoked, a joint tenant *always* has a right to sever — even if it would extinguish a right of survivorship. The Court of Appeal upheld the application judge's decision for three reasons:

> [53] **First**, it is inherent in a joint tenancy that each joint tenant has the unilateral right to sever it at anytime, thereby ending the right of survivorship. In *Hansen Estate*, at para. 32, Winkler C.J.O. cited the classic statement from the English case of *Williams v. Hensman* concerning the three ways in which severance could occur to end the right of survivorship. One of them is that "[e]ach [joint tenant] is at liberty to dispose of his own interest in such manner as to sever it from the joint fund — losing . . . at the same time, his own right of survivorship". At para. 34 of *Hansen Estate*, this mode of severance was described as "unilaterally acting on one's own share, such as selling or encumbering it". [Footnotes omitted]
>
> [54] I see no basis, in applying this statement, to distinguish between joint tenancies created for consideration and those created gratuitously. Were an owner of land to sell an interest and create a joint tenancy with the purchaser, what was sold would include a right of survivorship (as well as a current beneficial interest in the property). Similarly, if two people acquire property, each contributing financially to the acquisition, and place it in joint tenancy, each would have a right of survivorship and a current beneficial interest. Yet absent an agreement between them preventing severance, the original

owner in the first example would be free to unilaterally sever the joint tenancy (as would the purchaser), ending both of their rights of survivorship, and each joint tenant in the second example would have a right to sever and end all rights of survivorship. It is difficult to see why a gifted right of survivorship would prevent the donor joint tenant from exercising a right to sever when the same right, transferred or acquired for consideration, would not.

[55] **Second**, the right of survivorship is entirely contingent on there being no severance. That is the very nature of the right. In the classic statement adopted in *Hansen Estate*, at para. 32, it was described as follows: "The right of each joint-tenant is a right by survivorship only in the event of no severance having taken place of the share which is claimed under [it]" (emphasis added). To adopt the view that a gifted right of survivorship precludes severance is to change the nature of the right.

[56] **Third**, there is the nature of the gift itself. As the court held in *Pecore*, at para. 50, **the gift of the right of survivorship is only of what remains when the transferor dies**; this meant in *Pecore* that the transferor was free in the meantime to dissipate the jointly held bank account. In other words, the gift of the right of survivorship does not, on its own, prevent dealings by the donor that could denude the right of any value.10 In *Simcoff*, and cases that have followed it, courts have applied this reasoning to land, observing that a gift of the right of survivorship does not prevent the donor from dealing with the retained joint interest — for example by exercising the right to sever — in a way that puts an end to the right of survivorship: *Simcoff*, at para. 64; see also *Bergen*, at paras. 40-41; *McKendry v. McKendry*, 2017 BCCA 48, 93 B.C.L.R. (5th) 215, at paras. 27-30; and *Herbach v. Herbach Estate*, 2019 BCCA 370, 28 B.C.L.R. (6th) 360, at para. 37 where the court observed that an *inter vivos* transfer of a right of survivorship is properly characterized as a gift "even though there was a possibility that severance of the joint tenancy could rob the gift of any value". [emphasis added]

Finally, the Court of Appeal distinguished this case from *Thorsteinson Estate v. Olson*, 2016 CarswellSask 676 (C.A.). In *Thorsteinson Estate*, the Saskatchewan Court of Appeal held that after gifting a joint tenancy, a donor could sever the joint tenancy. However, as noted by the Ontario Court of Appeal, there are material differences between the land titles legislation in each province. Unlike in Ontario, Saskatchewan's *Land Titles Act*, *2000*, S.S. 2000, c. L-5.1 specifically prevents a joint tenant from unilaterally effecting a transfer to sever a joint tenancy. In Saskatchewan, a joint tenancy can only be terminated by written agreement of the joint tenants or by court order.

Both parties claimed that the application judge was wrong to conclude that the right of survivorship could continue to apply to a 50% interest in the property if a joint tenancy ceased to exist. In *Hansen Estate*, the court stated that the "critical distinction" between a joint tenancy and a tenancy in common is the right of survivorship. A tenant in common's interest falls to their estate in the event that they pass away, it does not become the property of their co-tenant.

The Court of Appeal agreed that this was an error. Before the 2020 transfer, Ms. Rosenberg held her interest in the joint tenancy in trust for Mr. Jackson and she had a right of survivorship. After the transfer, the joint tenancy was severed. As a result, Ms. Rosenberg continued to hold an interest in a tenancy in common, but in trust for Mr. Jackson. No right of survivorship could attach or flow from that interest. As a result, by severing the joint tenancy, Mr. Jackson would retain full title to the Port Hope property, and it would fall to his estate in its entirety upon his death.

The Court of Appeal invited the parties to make written submissions to address how the application judge's formal orders could be modified to address this error. The additional reasons that flowed from those submissions were released on January 21, 2025 (see 2025 CarswellOnt 600 (C.A.)). Ms. Rosenberg made the unwise decision to spend most of her written submissions in an effort to re-litigate the factual findings of the application judge (this would be her third attempt at that for those keeping score). She argued that she should be declared the 50% owner of the property and that Mr. Jackson could not sell or encumber the property without her consent.

Mr. Jackson argued that the order should be modified to make it clear that the Port Hope property was now his sole property, that Ms. Rosenberg held title to the property in trust for him, that he retained full control over the property and that it would fall to his estate upon his death. Technically, Mr. Jackson was cross-appealing, as he did not appeal the application judge's decision in the first place. The Court of Appeal determined that it was in the interest of justice to permit the changes as requested by

Mr. Jackson — there was no need for him to have to go through another round of litigation with an inevitable result given the findings by the Court of Appeal.

As a result, at least in Ontario and other provinces in which the presumption of resulting trust and the ability of a joint tenant to unilaterally sever a joint tenancy exist, there is now a clear separation of the fee simple from the right of survivorship and it is possible to gift only the right of survivorship. As a result, there are now several possibilities:

There can be an intention to gift the fee simple so as to create a full joint tenancy.

There can be no intention to gift such that the joint interest is held on resulting trust for the donor.

There can be a gift of only the right of survivorship so as to only allow the joint tenant to have what may be left at the time of the other joint tenant's death. But that gift can be "voided" by a unilateral severance.

There can be a conditional gift of the right of survivorship: *Malkov v. Stovichek-Malkov*, 2017 CarswellOnt 17978 (S.C.J.), aff'd (2018), 15 R.F.L. (8th) 255 (Ont. C.A.).

Any of the above gifts that reserve a right of revocation, are revocable: *Herbach v. Herbach Estate*, 2019 CarswellBC 3086 (C.A.) at paras. 35-36.

Mix-and-match at your leisure.

But Einstetin Said Time Is Flexible!?

Thomson v. Thomson (2024), 5 R.F.L. (9th) 257 (Alta. C.A.) — Watson, Pentelechuk and Antonio JJ.A.

Issues: Alberta — Time Limit for Bringing an Application for Leave to Appeal an Arbitration Award

Everyone is so used to the idea that, in litigation, time is "flexible." The Rules of Court in all jurisdictions (and many statutes) provide that the court can abbreviate or extend time limits. Therefore, it is easy to forget that — just sometimes — not adhering to timelines can result in serious consequences and serious prejudice.

The parties agreed to arbitrate certain issues relating to parenting, support, and responsibility for a debt to CRA. The parties signed an Arbitration Agreement. The Arbitration Agreement specified that the Arbitration Award would not be subject to appeal "save and except on questions of law, requiring leave of the court".

Similar to many provincial arbitration statutes, s. 44(1) of the *Arbitration Act*, R.S.A. 2000, c. A-43 (the "*Arbitration Act*"), states that "[i]f the arbitration agreement so provides, a party may appeal an award to the court on a question of law, on a question of fact or on a question of mixed law and fact." Section 44(2) then states that if the arbitration agreement does not provide that the parties may appeal an award on a question of law, "a party may, with the permission of the court, appeal an award to the court on a question of law."

The Husband was not happy with the arbitral award. He filed an application appealing the Award — but he did not at that time seek leave to appeal. When the Wife's lawyer pointed out that the Arbitration Agreement required leave to appeal on a question of law, the Husband amended his application to seek leave to appeal.

The Wife applied to strike the amended application as being filed outside the time limits set out in s. 46(1) of the *Arbitration Act*. Section 46(1) requires that an application for leave to appeal under s. 44(2) of the *Arbitration Act* be made within 30 days of the Award. The Husband argued that the application for leave to appeal was brought pursuant to the Arbitration Agreement, rather than under s. 44(2) of the *Arbitration Act*. The motion judge struck the amended application but ordered that the Husband could move to amend his application. The Husband then sought leave to amend his application, and the Wife asked that the application be dismissed as out of time.

The chambers judge concluded that the s. 46(1) time-limit for seeking leave to appeal did not apply, as it applied only to a leave application under s. 44(2) of the *Arbitration Act*, which only applied to arbitration agreements that were silent on a right of appeal. Here, the Arbitration Agreement expressly allowed for appeals on questions of law, with leave. Therefore, neither the legislation nor the Arbitration Agreement established a time period within which the application for leave to appeal had to be made — a gap existed.

The Wife appealed the order allowing the Husband to amend his application to seek leave to appeal the Award.

The Court of Appeal noted that any pleading may be amended, no matter how late, subject to four major exceptions:

> (a) Where the amendment would cause serious prejudice to the opposing party, not compensable in costs;
>
> (b) Where the amendment requested is hopeless;
>
> (c) Where the amendment seeks to add a new party or a new cause of action following the expiry of a limitation period; or
>
> (d) Where there is an element of bad faith associated with the failure to plead the amendment at first instance.

The Court of Appeal held that the 30-day period set out in s. 46(1)(b) of the *Arbitration Act* governed and that the amendment to the application seeking leave to appeal was brought out of time. The language used in the Arbitration Agreement did not provide a right of appeal on a question of law; rather, it simply acknowledged the existing statutory right provided in s. 44(2) of the *Arbitration Act*. The Court of Appeal noted that while parties can agree to broader rights of appeal, *they cannot agree to exclude the application of s. 44(2)*. Therefore, the Husband's application was for leave to appeal under s. 44(2) — and the 30-day time limit set out in s. 46(1)(b) applied. As the amendment seeking leave to appeal was proposed more than 30 days after the Arbitration Award, it was out of time. And the court has no jurisdiction under the *Arbitration Act* to extend the time limits thereunder.

Appeal allowed.

Although this may seem a harsh result, courts in British Columbia and Ontario also agree that a court does not have jurisdiction to extend times in the provincial arbitration acts: *Math4Me Learning Inc. v. 1099615 B.C. Ltd.*, 2024 CarswellBC 3268 (C.A.); *Allen v. Renouf*, 2019 CarswellAlta 1194 (C.A.); *Draper Farms (Keswick) v. 1758691 Ontario Inc.*, 2013 CarswellOnt 13513 (S.C.J.), aff'd 2014 CarswellOnt 4370 (C.A.); *Wong v. Wires Jolley LLP*, 2010 CarswellOnt 6817 (S.C.J.); *Desjardins v. Gillin* (2011), 14 R.F.L. (7th) 317 (Ont. S.C.J.); *Simcoe Condominium Corp. No. 78 v. Simcoe Condominium Corp. Nos. 50, 52, 53, 56, 59, 63 & 64*, 2006 CarswellOnt 909 (S.C.J.).

Absent express authority in the *Act*, a court does not have the jurisdiction to extend the time period for seeking leave to appeal an Award. The court does not have inherent jurisdiction to extend the time limits for an appeal that is based in statute without express authority in the statute.

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