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— Franks & Zalev - This Week in Family Law

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Resulting Trusts: The Onus is On Us

MacIntyre v. Winter (2021), 59 R.F.L. (8th) 253 (Ont. C.A.) — Tulloch, Nordheimer and Jamal JJ.A.

Ah. The presumption of resulting trust. So what is a "presumption" anyway? The concept is certainly frequently misstated or misunderstood. A presumption is not evidence. Rather, a presumption is a rule of evidence that allocates the evidentiary and persuasive burden, and the presumption holds if the burden is not met. It is sort of like the "tie goes to the runner" rule in baseball. Therefore, *absent sufficient evidence to rebut the presumption*, the presumption of resulting trust requires that a transfer of funds or property to a third party, or the purchase of property in the name of another, be found to be a trust relationship and not a gift.

In *MacIntyre*, Mr. Winter ("Alex") appealed from the trial judge's determination that there should be an equal division of the net proceeds of the sale of the jointly owned home.

Mr. MacIntyre ("Ron") and Alex began a relationship in 1994. They separated in February 2017. They never married and had no children.

Ron was not doing well. He was 57 and had been in the care of a psychiatrist since 2009. He stopped working in 2010 due to mental health issues. Alex had also been in the care of a psychiatrist since 2009. He also worked as a staff psychiatrist at an Ottawa area hospital and had private patients.

The parties moved to Ottawa shortly after the relationship began. At first, they lived in Ron's apartment. They then considered buying a home, and Alex's mother provided $100,000 towards the purchase.

In January 1999, the parties purchased their first home together. They took title as joint tenants, and there was a joint mortgage secured against the property. The parties agreed that Ron would be responsible for the mortgage payments and that Alex would be responsible for all of the other home expenses. Alex paid the deposit of $5,000 and the $99,081.92 down payment.

Six years later, the parties purchased a new, larger home together in Arnprior. Again, a joint mortgage and line of credit were secured against the property. The purchase was financed through the mortgage, the proceeds of sale of the first home, and additional funds from Alex.

In September 2016, Alex told Ron that he wanted to separate. The separation did not happen immediately, but the relationship was over by early 2017.

The Arnprior home was appraised at $1,400,000. Alex claimed that he should receive the first $480,248.82 of the net proceeds of the sale based on his initial contributions of $105,000 for the first home, his additional contributions of $515,000 for the second home, and dividing the balance equally (he had already been reimbursed for $140,000). He argued that the "presumption against gifts" applied to the down payment, and that his intent was always that the down payment would be returned to him if the property was ever sold.

Ron claimed 50% of the net proceeds of sale.

The trial judge ordered an equal division of the proceeds of sale. He found there never was an intention that Alex was to be repaid the deposit and down payment. Rather, the trial judge found that Alex intended to gift the deposit and down payment to Ron as part of their financial arrangements for the purchase and use of the homes.

Enter the Ontario Court of Appeal, the presumption of resulting trust, and the importance of the onus.

While Alex raised several issues on appeal, his main submission was that the trial judge had erred in finding that Alex gifted the down payments.

As we all know, the leading decision on the dichotomy between gift and resulting trust is *Pecore v. Pecore* (2007), 37 R.F.L. (6th) 237 (S.C.C.). In that decision, Justice Rothstein confirmed that *two* presumptions — the presumption of a resulting trust and the presumption of advancement — remain important considerations in disputes over gratuitous transfers. Quite simply, Justice Rothstein said that 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" (at para. 23).

The presumption of advancement did not apply in this case, and neither party suggested it did. The presumption of advancement arises in gratuitous transfers between parents and minor children. Rather, here, it was the presumption of resulting trust that was in play.

In *Pecore*, Justice Rothstein explained the presumption of resulting trust as follows (at para. 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. . . . **This is so because equity presumes bargains, not gifts**. [emphasis added]

While the trial judge referred to *Pecore*, and correctly mentioned the burden of proof, according to the Court of Appeal, he did not actually apply the presumption of resulting trust in his reasoning. The trial judge had focussed on credibility, when credibility was not the central concern.

In the view of the Court of Appeal, the trial judge failed to address the main point of the presumption — *the intention of the transferor*. It is not the intention of both parties that is relevant. It is the intention of the transferor that governs. This was further clarified in *Kerr v. Baranow* (2011), 93 R.F.L. (6th) 1 (S.C.C.).

Therefore, the onus was solidly on Ron to rebut the presumption of resulting trust — that it was Alex's intention, at the time of the transfer, to gift the funds. That the trial judge did not commence his analysis with these principles in mind was an error of law.

To support his conclusion that Alex intended to gift the monies to Ron, the Court of Appeal found that the trial judge had essentially considered six factors:

- the length of time the parties lived together;
- their agreement on who would be responsible for which expenses associated with the home;
- the lack of a document evidencing Ron's obligation to repay the monies advanced by Alex;

• their decision to register the home as joint tenants and that the home would go to the surviving partner if either of them predeceased the other;

• the absence of any reference to repayment in Ron's will; and

• their decision to deposit the sale proceeds of the first home in a joint bank account.

However, of these six factors, three had nothing to do with Alex's intention at the only relevant time — *the time of the transfer* of funds: the length of time the two had been living together; the agreement on who would be responsible for which expenses associated with the ongoing ownership of the home; and the absence of any reference to repayment in Ron's will.

Although conflicting in some areas, the evidence of both parties showed that the home was put in joint tenancy to ensure that, if either Alex or Ron predeceased the other, the home would go to the surviving partner. There is nothing inherently incredible in the position that Alex would, on the one hand, not require Ron to repay the down payment and deposit if Alex died, but that he would insist upon repayment on separation. The Court of Appeal has a point here. It is no giant leap to suggest that a party might want one thing upon separation and another on death when the parties are still cohabiting. In fact, that is done in marriage contracts all the time.

The problem here, as correctly found by the Court of Appeal, was that the trial judge did not recognize that a gift of the right of survivorship can be separated from a gift of the full beneficial interest. It was possible to accept both Alex's assertion that his intent at the time of the purchase of the home was to receive back the funds he deposited if the house was ever sold, and, at the same time, to accept that Alex intended Ron to have survivorship benefits if he predeceased Ron while they were still happily together.

Therefore, and to be very clear, according to the Ontario Court of Appeal, a gift of the right of survivorship alone is not sufficient to rebut the presumption of a resulting trust that operates during the parties' joint lives. See also *Hynes v. Snook*, 2021 CarswellNfld 161 (C.A.); *Bergen v. Bergen* (2013), 39 R.F.L. (7th) 28 (B.C. C.A.); *Schimelfenig v. Schimelfenig* (2014), 49 R.F.L. (7th) 1 (Sask. C.A.).

To successfully assert an immediate gift of a beneficial ownership, Ron had to rebut the presumption of resulting trust by bringing evidence to support that claim: *Bergen v. Bergen* (2013), 39 R.F.L. (7th) 28 (B.C. C.A.). He had not done so, and the trial judge had erred in ignoring that requirement.

The Court of Appeal also noted that the fact that the proceeds of the sale of the first home were first paid into the parties' joint bank account did not support a finding of intention to gift at the time of the original transfer. That conclusion ignored the fact that the parties were in the process of buying a new home, and the purchase of that new home was being financed, in part, by the proceeds of sale from the first home. This is similar in concept to tracing cases where funds do not lose their excluded character simply by being placed in a joint account for a short period of time: *Barrett v. Barrett* (2014), 44 R.F.L. (7th) 159 (Ont. S.C.J.); *Henderson v. Casson* (2014), 42 R.F.L. (7th) 357 (Ont. S.C.J.); *Paddock v. Paddock* (2008), 78 R.F.L. (6th) 54 (Ont. S.C.J.), aff'd (2009), 78 R.F.L. (6th) 69 (Ont. C.A.); *Klinck v. Klinck* (2008), 58 R.F.L. (6th) 135 (Alta. Q.B.); *Cortina v. Cortina* (2015), 69 R.F.L. (7th) 299 (Ont. C.A.).

It is also worth noting that in this case, a resulting trust was "traced" through a first home and into a second home, six years later.

Finally, the trial judge had found it was not credible that Alex would invest the amount of money into a property and not secure the repayment with a document in writing. On this point, the Court of Appeal said as follows:

> [38] Our courts are strewn with cases where people in a relationship wound up in litigation because they did not take a commercial approach to their domestic arrangements from the outset. This is just another of those cases. While it may be regrettable, it does not change the fact that it is a very frequent reality. Although the absence of contemporaneous documentation is a relevant consideration (see *Chao v. Chao*, 2017 ONCA 701, at para. 54), **the absence of such documentation by itself is not necessarily sufficient to conclude that a gift was intended**. The most that the evidence

> establishes, even taken entirely from Ron's point of view, is that the issue was simply not discussed — an understandable result in a domestic relationship. **It is precisely in such situations, where the evidence is insufficient, that the presumption of a resulting trust "determine[s] the result"**: *Pecore*, at paras. 22, 44. The trial judge erred by losing sight of this principle. [emphasis added]

This point bears repeating as it comes up regularly: the absence of loan documentation is not, alone, sufficient to conclude that a gift was intended.

In order to establish a gift, *Ron* had to prove a gift on the balance of probabilities. He would have had to show (1) an intention to make a gift; (2) an acceptance of the gift; and (3) a sufficient act of delivery or transfer of the property to complete the transaction: *McNamee v. McNamee* (2011), 4 R.F.L. (7th) 13 (Ont. C.A.) at para. 24.

In the absence of clear, convincing, and cogent evidence that a gift was intended, Ron, who bore the burden of rebutting the presumption of resulting trust, could not succeed.

Ignore the onus at your peril.

Appeal allowed.

Anyone Who Says I Control My Parents' Company Clearly Doesn't Know My Mother

Henderson v. Henderson (2021), 58 R.F.L. (8th) 203 (N.B. Q.B.) — d'Entremont J.

Pursuant to s. 18(1) of the *Child Support Guidelines* (the "*Guidelines*"), where a spouse is a shareholder, director, or officer of a corporation, a court has discretion to add all of or part of the company's corporate pretax income to that spouse's income for support purposes.

The principles that apply when deciding whether to attribute corporate pretax income for support purposes are well-established, and have already been discussed a number of times in this *Newsletter*. For example, as Philip Epstein discussed in his comment on *Reid v. Faubert*, 2019 CarswellNS 352 (C.A.) in the July 8, 2019, (2019-27) edition of *TWFL*, when deciding whether to attribute corporate pretax income under s. 18(1), the court should consider a "wide range of factors", including:

> 1) The pretax income of the corporation;
>
> 2) The nature of the business involved (Is it capital intensive or service-oriented? Is it subject to seasonal fluctuations or economic cycles?);
>
> 3) The corporate share structure, including any obligation imposed by shareholders' agreements;
>
> 4) The financial position and general operations of the company (What are the company's operating requirements, its inventory, accounts receivable and accounts payable? Are there bank covenants which may affect payment out of funds? Is there a necessity to upgrade equipment, etc.?); and
>
> 5) Is the company a well-established one or merely in its start-up phase?

However, most of the cases that have dealt with the attribution of corporate pretax income have dealt with situations where a spouse clearly had control over the corporation. But where it is not so clear, how should the court go about determining whether a spouse actually has control over a corporation for the purposes of s. 18(1)? That is the question that Justice d'Entremont had to consider in *Henderson*.

The husband and wife were married for 12 years and had three children together. Shortly before they separated, the husband's parents gave each of them shares in Ravenwood Holsteins Ltd. ("Ravenwood"), which owned and operated the husband's family's dairy farm.

At the time of the gift, the husband received 5.4% of the voting shares in the company, and the wife received 3.6%. The remaining 91% of the voting shares were held by the husband's parents, and the plan had been that the husband and wife would purchase the rest of the shares in the company from the husband's parents over a period of time. However, before the plan could be implemented, the husband and the wife separated.

Although the husband did not have *de jure* control over Ravenwood, the wife nevertheless argued that, for the purposes of determining interim support, 100% of the company's pretax corporate income, which was in excess of $400,000 a year, should be attributed to the husband. And, based on that attributed income, argued the wife, the husband should be required to pay her more than $13,000 a month in interim spousal support.

To decide whether to attribute all or part of Ravenwood's pretax income to the husband, Justice d'Entremont first had to decide whether the husband actually had "control" over the company. While the husband's parents had *legal* control over the company, legal control was not the only relevant consideration. As Justice Dufour noted in *Guenther v. Guenther* (2016), 82 R.F.L. (7th) 311 (Sask. Q.B.), which was cited with approval by the Saskatchewan Court of Appeal in *Potzus v. Potzus* (2017), 91 R.F.L. (7th) 290 (Sask. C.A.):

> [19] . . . **The overriding consideration is whether the payor is in a position to influence the amounts paid out by the company**. Referencing the ability to influence how pre-tax income is used rather than whether there is a legal right to dictate how it is used recognizes that relationships between shareholders based on ties of family or friendship in closely held corporations can, and often do, affect corporate financial decision-making. [emphasis added]

[For further discussion of *Guenther v. Guenther* and *Potzus v. Potzus*, see the December 5, 2016, (2016-48) and June 19, 2017, (2017-24) editions of *TWFL*]

To help guide the analysis in these types of cases, Justice d'Entremont provided a very helpful list of factors for courts to consider when determining who actually has control over a company for the purposes of s. 18(1) of the *Guidelines*:

> a) Who decides when dividends are declared and when the corporate funds are dispensed?
>
> b) How has control been exercised in the past in the real sense?
>
> c) Who exercises complete control of finances, policies and business practices of the corporation?
>
> d) Who is the *de facto* shareholder and controlling mind of the business?
>
> e) Who can influence in a very direct way the shareholders who would otherwise have the ability to elect the board of directors?
>
> f) Who is in a position to influence the amounts paid out by the corporation and to influence how the pretax income is used?

On the facts of this case, Justice d'Entremont declined to attribute any of Ravenwood's pretax income to the husband because, in addition to not having *de jure* (legal) control of the company, the evidence on the motion was inadequate to establish that he had *de facto* control either:

> [53] . . . There is no evidence that at the end of a fiscal year sums are attributed to [the husband] by the corporation to finance his lifestyle. There is no proof that he can control the pre-tax income of the corporation and disburse the funds as he pleases. There is no pattern of deriving benefits from the corporation by [the husband] other than the dividends he receives, the use of a company truck and the ability to live in the farmhouse owned by the corporation. In the past, [the husband's] lifestyle cannot be described as extravagant. Lately, he has not travelled extensively, and he does not drive fancy motor vehicles. Rather, he carries a significant amount of debt following the separation.

. . . . .

> [74] . . . There is no evidence that [the husband] was the *de facto* majority shareholder and controlling mind of the business. There is no evidence that he had the clear right and ability to effect significant change in the directorship of the corporation or to influence the shareholders who have the ability to elect the board of directors. I am not convinced that [the husband] was the one who ultimately declared dividends. Taking a holistic approach at the facts in this case, I am of the view that the paternal grandparents are the individuals who had control of the corporation.

Thus, instead of ordering the husband to pay the wife the more than $13,000 a month in interim support she had requested, Justice d'Entremont ordered him to pay interim support of only $800 a month based on the income and relatively minor personal benefits (e.g. use of a truck) that he was actually receiving from Ravenwood.

While the wife will be able to renew her request to attribute Ravenwood's pretax income to the husband at trial, clearly she will need to come up with much better evidence than she produced for this motion.

So I Filed for Bankruptcy 20 Years Ago; Is That Going to Be a Problem???

Stec v. Blair, 2021 CarswellOnt 13099 (S.C.J.) — Fowler Byrne J.

Bankruptcy continues to present all sorts of vexing problems for family law lawyers across Canada. At least bankruptcy is federal jurisdiction so we can all suffer together.

Stec v. Blair provides yet another example of the potential problems that can arise if bankruptcy issues are not dealt with in a timely manner.

The parties were common law spouses, and had a child together (the mother also had a child from a previous relationship).

In the middle of the highly contested trial about a host of parenting and financial issues, including the mother's claim against the father for unjust enrichment/joint family venture, it came out that the mother was an undischarged bankrupt.

It is unclear from the decision whether counsel and/or the Court knew about her bankruptcy status prior to trial. But in any event, it turned out that the mother had made an assignment in bankruptcy in 2000 (no, that is not a typo) and, for reasons that are not explained in the decision, had inexplicably never obtained a discharge, or taken the necessary steps to deal with the fact that she was an undischarged bankrupt prior to trial.

But whatever the reason for the mother's lack of diligence, there was no dispute that, as a result of s. 71 of the *Bankruptcy and Insolvency Act*, she technically had no authority to pursue her property claims against the husband. Those claims, along with all of the mother's other non-exempt assets, still belonged to her trustee. Oops.

To avoid having to stop the trial, which involved serious questions about the best interests of the parties' child, Justice Fowler Byrne gave the mother leave to continue with her property claim against the father, but only "on the stipulation that any judgment would not be released until which time [the mother] received an absolute discharge."

After the evidence was complete, the trial was adjourned to allow the mother to deal with the bankruptcy issues. Fortunately for the mother, she was able to reach an agreement with her trustee whereby her property claim was re-assigned to her in exchange for an immediate payment of $5,000, and an agreement that she would pay her remaining creditors in full if she succeeded on her claims against the father. As a result of this agreement with her trustee, the mother was finally able to obtain a discharge.

As for the issue of whether the mother's claim against the father for unjust enrichment/joint family venture was a nullity, Justice Fowler Byrne concluded that the mother's failure to deal with the bankruptcy issues in advance was merely an irregularity that could be cured given that:

1. The trustee, who had every right to pursue the mother's property claims on behalf of her creditors, had already re-assigned the claim to her.

2. As the mother's claims for support against the father were not impacted by her bankruptcy, Justice Fowler Byrne found that "it would be improper to declare this application a nullity when valid claims remain before the court." See *Walek v. Guardian Storage Inc.*, 2010 CarswellBC 654 (B.C. S.C.), where Justice Fenlon determined that an action commenced by an undischarged bankrupt is not a nullity where the action sets out other claims that are not nullities, and that this type of defect is capable of being cured at the court's discretion, by a court order allowing amendments, *nunc pro tunc*.

3. As a general principle, Justice Fowler Byrne determined that courts should be reluctant "to allow a defendant to defeat a claim on purely technical grounds." See *Daemore v. Von Windheim* (2011), 98 R.F.L. (6th) 497 (B.C. S.C.), where Justice Verhoeven expressed the view that "the failure of the bankrupt to obtain re-assignment . . . prior to commencing the action is merely an irregularity, capable of being remedied by a subsequent re-assignment by the trustee or by court order".

4. It would have been contrary to the primary objective of the *Family Law Rules* to delay the matter further by requiring the parties to amend the proceeding to give the trustee carriage of the mother's property claim, particularly since the father "has not been prejudiced as the claim could have been advanced in any event."

To this we would add that, pursuant to s. 187(9) of the *BIA*, "[n]o proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that court." Given the absence of any possible prejudice to the father, and the potential benefits to the mother's creditors as a result of her agreement with her trustee, allowing the mother to proceed with her property claim would not have caused "substantial injustice" to anyone.

As a result, Justice Fowler Byrne granted the mother leave to proceed with her property claim against the father *nunc pro tunc*, and "subject to any rights she assigned to her former Trustee in Bankruptcy[.]"

Justice Fowler Byrne then went on to decide the mother's property claim on the merits. After considering the evidence, she found that the mother had established her claim against the father for unjust enrichment/joint family venture, and ordered the father to pay her a monetary award of $141,750 (this was based on 50% of the net value of the family home that was legally owned solely by the father, but that both parties had contributed to during their relationship).

This was a very fortunate result for the mother (and her creditors). The *BIA* is complicated and technical, and it will not always be possible to fix bankruptcy related issues after the fact. So if you have a case where you know the client has previously gone bankrupt, you need to ensure you deal with the situation as quickly and early as possible.

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