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— Franks & Zalev - This Week in Family Law

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Contents

An "interest" that is not an "Interest"

Kent v. Kent, 2020 CarswellOnt 8320 (C.A.) - Gillese, Brown, and Jamal, JJ.A.

Kent deals with the interplay of *Pecore v. Pecore* (2007), 37 R.F.L. (6th) 237 (S.C.C.) and the protections provided to a "matrimonial home." In *Pecore*, the Supreme Court of Canada found there to be a rebuttable presumption that an adult child beneficiary of a gratuitous transfer holds the property on resulting trust for the parent. However, what if the subject of the gratuitous transfer was a property that was then used as a matrimonial home by the adult child and his/her spouse for a lengthy period of time? Does such use rebut the presumption of resulting trust? Let's find out.

Marian Graham had one child, Janice. Janice married Gordon, and they had two children: Elissa and Graham. So far, just a regular family.

Gordon was the appellant; Elissa, Graham, and Marian's estate were the respondents.

In the early 1980's, Marian bought a property and began living there.

In September 1996, Marian, the sole owner of the property, transferred title to herself and Janice as joint tenants (the "1996 Transfer"), for nominal consideration. Janice was an adult at that time.

At the time of the 1996 Transfer, Marian had a will dated July 24, 1978 (the "1978 Will"). Under the terms of the 1978 Will: Janice was the beneficiary; if Janice predeceased Marian, Janice's issue alive at Marian's death were the beneficiaries; and, if Janice predeceased Marian and had no issue alive at the time of Marian's death, Gordon was the beneficiary.

Marian continued to live alone on the property until 2008, when Janice, Gordon, and their two children moved to the property with Marian.

Janice died on July 22, 2014. Gordon was the beneficiary of her estate. After Janice died, Gordon continued to live with Marian on the property.

When Marian moved to a long-term care home in the summer of 2015, Gordon continued to reside on the property. Marian paid all of the costs and expenses of the property until she died in 2016 - even after she moved into long-term care. Neither Janice nor Gordon ever paid any rent while living at the property.

On July 14, 2015, Marian made a new will (the "2015 Will"). The 2015 Will named Elissa and Graham as the Executors and Trustees. Clause 4(b) of the 2015 Will read as follows:

> 4. **I GIVE, DEVISE AND BEQUEATH** all my property of every nature and kind and wheresoever situate, . . . to my said Trustee[s] upon the following trusts, namely:
>
> > (b) To transfer any home or condominium I may die possessed of to my son-in-law [**Gordon**], and my grandchildren, [**Graham**] and [**Elissa**].

On July 30, 2015, Marian registered a transfer of the property to herself, Elissa, Graham, and Gordon as joint tenants (the "2015 Transfer").

Marian died in 2016.

Questions then arose as to the ownership of the property. In March 2018, Gordon brought an application for a declaration that he owned a 2/3 share of the property. The respondents claimed that Gordon, Elissa and Graham were each entitled to a 1/3 share of the property.

Gordon's claim to 2/3 of the property was anchored in two specific provisions of the *Family Law Act*:

> **Matrimonial Home**
>
> 18 (1) Every property in which a person has an interest and that is . . . ordinarily occupied by the person and his or her spouse as their family residence is their matrimonial home.
>
> **Joint tenancy in matrimonial home**
>
> 26 (1) If a spouse dies owning an interest in a matrimonial home as a joint tenant with a third person and not with the other spouse, the joint tenancy shall be deemed to have been severed immediately before the time of death.

Gordon's argument was as follows: He argued that when he and Janice moved in with Marian, the property became their matrimonial home and that it was their matrimonial home at the time of Janice's death. Based on s. 26(1) of the *Family Law Act*, he argued that the joint tenancy was deemed to have been severed immediately before Janice's death with the result that, as the beneficiary under Janice's Will, he became a one-half owner of the property with Marian as tenants-in-common. After Marian's death, based on her 2015 Will, Gordon became entitled to an additional 1/3 share of Marian's 1/2 interest in the property. Therefore, Gordon claimed that he was entitled to a 2/3 interest in the property and that Elissa and Graham were each entitled to 1/6.

The respondents argued that each of Gordon, Elissa and Graham were entitled to a 1/3 interest in the property. They argued that Marian transferred title to the property to herself and Janice as joint tenants in 1996 for estate planning purposes. Thus, they argued, the 1996 Transfer raised the presumption of a resulting trust; Janice did not have a beneficial interest in the property; s. 26(1) of the *Family Law Act* did not apply; and Marian's 2015 Will operated to give each of Gordon, Elissa, and Graham a one-third share of the property.

The application judge, Justice Bale, agreed that if there was a resulting trust, then s. 26(1) of the *Family Law Act* did not apply. He then relied on *Pecore* to conclude that the 1996 Transfer from Marian to Marian and Janice, as joint tenants, raised the presumption of resulting trust. The primary issue, therefore, became whether Gordon had rebutted the presumption of resulting trust. The evidence required to rebut the presumption is evidence of the transferor's contrary intention, *at the time of the transfer*, on a balance of probabilities: *Pecore*, at para. 43. However, evidence of events *subsequent* to the transfer could be admitted, if it was relevant to the testator's intention at the time of the transfer: *Pecore*, at para. 59.

As both the transferor (Marian) and the transferee (Janice) were dead, there was no contemporaneous evidence of Marian's intention in making the 1996 Transfer: the dead tell no tales - and do not offer evidence. Gordon had also admitted that he had nothing to do with the 1996 Transfer and only learned about it afterward.

Therefore, with no evidence capable of rebutting the presumption, the presumption of resulting trust stood.

Justice Bale also found it important that the provisions in Marian's 2015 Will and the 2015 Transfer suggested that Marian believed she was the sole owner of the property.

Accordingly, Justice Bale dismissed Gordon's application. Gordon appealed.

THE ISSUES

On appeal, Gordon made three submissions:

1. As Janice was Marian's only child, and as Marian was a widow, the 1996 Transfer was a completed gift to Janice.

2. If the 1996 Transfer did raise the presumption of resulting trust, the 1978 Will in which Marian designated Janice as her residuary beneficiary rebutted that presumption.

3. Because Marian allowed Janice - an owner of the property by joint tenancy - and her husband to live on the property, beginning in 2008, Marian created a "matrimonial home circumstance" governed by s. 26(1) of the *Family Law Act*, thereby removing any consideration of resulting trust.

Was the 1996 Transfer a Gift?

The problem with this argument, found the Court of Appeal, was that it required the Court to apply the law of *inter vivos* gifts, which was not possible in the face of *Pecore*. This is important because, to the extent there was any lingering doubt, the Court of Appeal confirmed that the dictates of *Pecore* were meant to apply to gratuitous transfers of real property (from parent to adult child with capacity) as well as to bank accounts. The fact that Janice was Marian's only child and Marian was a widow did not change the applicability of *Pecore*. This principle is now beyond question: *Bergen v. Bergen*, 2013 CarswellBC 3473 (C.A.); *Schimelfenig v. Schimelfenig* (2014), 49 R.F.L. (7th) 1 (Sask. C.A.); *Kavanagh v. Lajoie* (2014), 43 R.F.L. (7th) 13 (Ont. C.A.); *Malkov v. Stovichek-Malkov*, 2017 CarswellOnt 17978 (S.C.J.), aff'd (2018), 15 R.F.L. (8th) 255 (Ont. C.A.).

Therefore, the 1996 Transfer was not the gift of an interest in the property to Janice. Janice held the property on resulting trust for Marian.

Was the Presumption of Resulting Trust Rebutted by the 1978 Will?

While hindsight, as they say, is 20/20, this seems to have been a very difficult argument. Gordon argued that Marian's 1978 Will naming Janice her trustee and residuary beneficiary was evidence that rebutted the presumption of resulting trust.

What was the problem with this argument? In *Pecore*, the Supreme Court of Canada was clear that evidence of the transferor's intention *at the time of the transfer* must be either "contemporaneous, or nearly so" to the transaction; or evidence of intention arising subsequent to the transfer but which is relevant to intention at the time of the transfer (paras. 55-59).

As the 1978 Will was made almost two decades before the 1996 Transfer, it was hard to argue that it spoke to Marian's intention two decades later. While the 1978 Will could have provided context for the 1996 Transfer - context is not intention.

See also: *Mroz (Litigation guardian of) v. Mroz*, 2015 CarswellOnt 3585 (C.A.); *Sawdon Estate v. Watch Tower Bible and Tract Society of Canada* (2014), 39 R.F.L. (7th) 6 (Ont. C.A.); *Foley v. McIntyre*, 2015 CarswellOnt 7680 (C.A.); *McKendry v. McKendry*, 2017 CarswellBC 190 (C.A.).

Was the Property a Matrimonial Home?

Gordon's final argument was that, in allowing him, Janice, and their children to live at the property together with her, beginning in 2008, Marian made the property their matrimonial home and thereby removed any consideration of resulting trust.

Section 18(1) of the *Family Law Act* defines "matrimonial home":

> Every property in which a person has an interest and that is . . . ordinarily occupied by the person and his or her spouse as their family residence is their matrimonial home.

There was no dispute that, beginning in 2008, Janice and Gordon occupied the property as their family residence. Therefore, the only question was whether either Janice or Gordon had "an interest" in the property within the meaning of s. 18(1).

So, did Janice have an "interest" in the property within the meaning of s. 18(1)? According to Justice Gillese, speaking for a unanimous bench, the answer was "no". As Janice was, in fact, a joint owner, however, that answer requires some explanation.

Janice became a joint tenant of the property with Marian as a result of the 1996 Transfer. However, as noted above, the 1996 Transfer raised the presumption of resulting trust, which presumption was not rebutted. Therefore, as a result of the 1996 Transfer, Janice was on title to the property *as a trustee* for Marian's beneficial interest. Then, as the Court of Appeal noted in *Spencer v. Riesberry* (2012), 17 R.F.L. (7th) 94 (Ont. C.A.) (at para. 45), the duties and powers of a trustee are not an "interest" in the property within the meaning of s. 18(1) of the *Family Law Act* because those powers and duties are held in the fiduciary role of a trustee - not in a personal capacity. Therefore, the 1996 Transfer did not give Janice an "interest" in the property.

Nor did Gordon have an "interest" in the property through s. 26(1) of the *Family Law Act*. Again, that section states:

> If a spouse dies owning an interest in a matrimonial home as a joint tenant with a third person and not with the other spouse, the joint tenancy shall be deemed to have been severed immediately before the time of death.

While, when Janice died, she was on title to the property as a joint tenant with Marian, a third person, Janice was on title in the capacity of a trustee - she did not have an interest in the property within the meaning of s. 18(1). Therefore, when Janice died, she did not own an "interest" in a matrimonial home as a joint tenant with Marian, a third person.

As a result, the appeal was dismissed.

The finding that being on title to a property (that would otherwise qualify as a matrimonial home) as a trustee, does not give rise to an "interest" in the property within the meaning of s. 18(1) is an important one with potentially far-reaching implications. This decision takes the principles of *Spencer v. Riesberry* one step further such that a matrimonial home may not be a "matrimonial home" within the meaning of the *Family Law Act*. And when one considers the special treatment afforded to a "matrimonial home" in the *Family Law Act* - rights of possession, restrictions of alienation, gift/tracing issues, claims for exclusive possession, etc. - one realizes how significant such implications may be.

The Latest Dance Craze: The Arbitration Award Enforcement Two-Step

Zonruiter v. Matthews (2020), 39 R.F.L. (8th) 384 (B.C. S.C.) - Marchand J.

The parties were married and had a 5-year-old child together. They lived in Alberta during the marriage, but after they separated, the mother and child moved to British Columbia, and the father eventually followed.

Before the parties moved to B.C., they signed a Mediation/Arbitration Agreement in Alberta that was governed by the Alberta *Arbitration Act*, R.S.A. 2000, c. A-43 (the "Med/Arb Agreement"). The Med/Arb Agreement provided that all of the issues arising out of the breakdown of their marriage would be determined by a named mediator/arbitrator in Alberta.

During the mediation/arbitration process, the mediator/arbitrator made an Award that required the father to pay the mother just over $12,000 in costs, but the father did not pay the award. Further litigation ensued in B.C. after the parties moved there. During the course of the B.C. litigation, the mother asked that she be able to enforce the Alberta costs Award against the father as though it was a judgment or Order of the B.C. Court.

In British Columbia, s. 29 of the *Arbitration Act*, R.S.B.C., c. 55 (the "*Arbitration Act*") provides that an Arbitration Award can be enforced in the same manner as a judgment or court order, and that leave of the court is not required if the Award relates to a "family law dispute", which is defined as "a dispute respecting a matter to which [the *Family Law Act*, S.B.C. 2011, c. 25] relates".

The statutory definition of "family law dispute", argued the mother, was broad enough to cover the Alberta costs Award and, as such, it should be enforceable as a B.C. judgment or order under s. 29 of the *Arbitration Act*.

Justice Marchand disagreed. Based on both the wording of the *Arbitration Act* and policy concerns, Justice Marchand concluded that the Alberta costs Award could ***not*** be enforced as though it was a B.C. judgment or court order:

> [21] As noted by [the mother], "family law dispute" is defined very broadly in the BC *FLA*. To be specific, it is defined to mean "a dispute respecting a matter to which this Act relates". **On [the mother's] interpretation, the BC *FLA* would apply to family disputes arising anywhere in the world relating to parenting issues, property division, child support, spousal support, children's property and protection from family violence, including those arising in non-reciprocating jurisdictions**.
>
> [22] In my respectful view, **such a broad interpretation [of "family law dispute"] presents a host of concerns, including that the courts in British Columbia could be used to enforce awards made in foreign jurisdictions which have regressive laws and/or do not abide by the rule of law**.
>
> [23] **I do not consider it necessary or appropriate to try to define the full scope of the term "family law dispute"** in the BC *FLA* in the context of the parties' dispute regarding the costs of their Alberta arbitration process. **It is sufficient for me to simply find that the parties' dispute over those costs is a dispute respecting a matter related to the laws of Alberta, not British Columbia**. As a result, [the mother] may not rely on s. 29 of the *BC Arbitration Act* or Rule 10-5 to enforce the Alberta arbitration costs awards.
>
> [24] **My interpretation is buttressed by differences in the language used in arbitration legislation across the country**. In particular, I note that the arbitration legislation in provinces such as Alberta and Ontario includes terms that expressly permit the enforcement of arbitration awards made "elsewhere in Canada". Though not applicable to family law disputes, a similar provision will be included in new arbitration legislation in British Columbia that has received Royal Assent but has not been brought into force. ***If the legislative assembly wished to provide a similar avenue for the enforcement in British Columbia of family law arbitration awards made "elsewhere in Canada", the legislation would surely expressly reflect that***. [emphasis added]

That being said, Justice Marchand also noted that there was a fairly simple solution to this problem - the mother could have the costs Award made into an Order of the Alberta Court of Queen's Bench, and then enforce that Order in B.C. pursuant to the *Court Order Enforcement Act*, R.S.B.C. 1996, c. 78:

> [25] Fortunately, the broad interpretation advanced by [the mother] is unnecessary - because there is already a fairly straightforward process in place for [the mother] enforce her costs awards.
>
> [26] The arbitration agreement contemplates the parties filing consent orders with respect to any awards made by the arbitrator, including, in my view, the arbitrator's costs awards. If [the father] does not cooperate with respect to the filing of a consent order regarding the costs awards, the arbitration agreement and s. 49 of the *Alberta Arbitration Act* enable [the mother] to apply to enforce the costs awards.

> [27] Once the parties have filed a consent order or [the mother] has obtained judgment on the costs awards in Alberta, [the mother] can follow the usual procedure for registering and enforcing a judgment from Alberta under Part 2 of the *Court Order Enforcement Act*, R.S.B.C. 1996, c. 78 [COEA].

The Need for "Enduring Community Vigilence"

CAS v. E.R. and M.B.B., 2020 CarswellOnt 9478 (S.C.J.) - Pazaratz, J.

In this interesting case, Justice Pazaratz reminds us that, while resolution is always encouraged, the court has the ultimate responsibility to ensure that resolutions with respect to children are safe and appropriate.

This was an "over-the-counter" motion brought by the Children's Aid Society of Hamilton ("CAS") seeking to terminate a final order (dated January 20, 2020) in relation to a 29-month-old boy. The order being requested was pursuant to final minutes of settlement signed by CAS and both parents in June 2020. However, in the circumstances of the case, Justice Pazaratz was not prepared to make the requested order - at least not at this time - and not on the materials filed.

In early 2018, a doctor reported that the child - then seven weeks old - had suffered an unexplained and very concerning head injury, bruising on his abdomen, and other unexplained injuries. As a result of the injuries, the child had been hospitalized for a good period of time. The injuries were serious enough that permanent disability was a medical concern.

The parents were the only people who had cared for the child at the material time. And they were not able to provide any plausible explanation.

The parents wanted a second opinion. The second opinion supported the concerns of acute physical abuse, and further noted that the further assessment identified that the child suffered acquired traumatic head injuries on at least two occasions prior to presentation.

The parents rejected the second opinion as well.

CAS claimed that it verified that the child suffered significant physical harm while in the parents' care and that one of the parents caused the injuries - but it could not make a determination as to which parent was the perpetrator. Similarly, no criminal charges were laid because the police could not establish that either parent had an "exclusive opportunity".

After his release from hospital, the child was cared for by his maternal grandparents for almost two years. He did well in their care, and his condition improved.

The parents' access was initially supervised. Even though the parents (and the extended family) did not accept the medical opinions, they all complied with the terms of supervision imposed by the court.

In the late summer or fall of 2019, the parents began having unsupervised access. No concerns were noted as access expanded.

The child remained in the maternal grandmother's care until January 20, 2020.

Then, pursuant to the aforementioned January 20, 2020, Supervision Order, the child was placed in the care of the parents for a period of five months, under CAS supervision.

On June 17, 2020, CAS brought a Status Review Application seeking to terminate the Supervision Order.

The Court accepted that, since January 2020, the child had been well cared for by the parents. And the child was improving, achieving developmental milestones. Until the COVID-19 pandemic, CAS maintained regular home visits, and since mid-March CAS had been monitoring through videoconference calls.

So, the Court was met with a dilemma common to "unexplained injury" cases:

a. CAS was of the view that, when he was seven weeks old, the child suffered horrific inflicted injuries at a time when only two people - the mother and the father - were caring for the child.

b. Although the parents disputed the findings of two child abuse experts, they offered no alternative, credible explanation.

c. The inability to conclusively establish *who* injured this child did not change the fact that *somebody* injured the child.

Had the basis for the initial apprehension and protection finding not been so extremely troubling, Justice Pazaratz noted that he would have had little hesitation granting the requested Order. However:

> . . . horrific unexplained injury cases require enduring community vigilance. Anything less would be an abdication of our responsibility to protect a young, vulnerable child who has already been severely abused.

That is, while the parents were to be commended for their progress - the Court had lingering concerns such that it was premature to grant the order being requested. And, as a result, his Honour dismissed the motion. While it is arguably a dangerous motto to live by, and while it can sometimes work an injustice, in cases of unexplained injury, it is often better safe than sorry.

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