

A Legal Anachronism: the Presumption *of* Advancement



What to do in an estate where you discover that the deceased, during life, made an apparently gratuitous transfer of valuable property to another person?

This fact pattern is the bread and butter of estate litigators.

Many contentious estate files involve such circumstances. Often these transfers are only discovered after death. Usually there is no supporting documentation to explain the reasons for the transfer.

For example, a parent puts a home or a bank account into joint names with one of his or her children. Did the parent intend to give the property to the child as an outright gift? Did the parent intend that the child hold the property in trust for the benefit of the parent? Did the parent intend the child to share the property with his or her siblings?

Brief Review of the Presumptions

To assist in determining the thorny question of intention, the common law has developed two different presumptions of law. Depending on the kinship relationship between the parties, one of following presumptions will apply.

This presumption of advancement, however, has been called into question many times over the last 30 years.

- **The presumption of advancement (gift)** This presumes the property was an outright gift to the person who received it. This presumption applies when the transfer is from parent to child or from husband to wife.
- **The presumption of resulting trust** This presumes the recipient of the property holds it in trust for the transferor. Thus the transferor remains the beneficial owner of the property. This presumption applies generally whenever there is no presumption of advancement, i.e., in any transfer not from parent to child or from husband to wife.

Historically, the presumption of advancement has been a powerful tool. It has been especially helpful to widows or wives wishing to establish absolute ownership of property previously transferred to them by their husbands. In

this situation and others, the presumption of advancement has helped defeat legal challenges to the ownership of the property.

This presumption of advancement, however, has been called into question many times over the last 30 years. Several learned authors have called for the restricted use of this doctrine and a few judges have restricted it somewhat. The basic law, however, remains unchanged. At present, the common law continues to require Courts to apply the presumption of advancement in the case of parental or husband-to-wife transfers.

As may be apparent from the title, the theory of this paper is that the presumption of advancement is an anachronism no longer sensible nor required. It should be abolished in favour of the presumption of a resulting trust. In other words, a transferee should be required to prove the property was *actually* a gift and not simply transferred in trust.

The Presumption of Resulting Trusts

Equity presumes a bargain is an oft-quoted maxim of equity. This refers to the equitable presumption that a transferor would *not* deliberately give property away. Thus, when property is transferred for little or no consideration, equity presumes a trust, i.e., it presumes the transferee holds

the property in trust for the transferor. The transferee or recipient of the property bears the onus of proving otherwise. In other words, he or she must prove the property was actually intended to be a gift.

The seminal case establishing the presumption of resulting trust is *Dyer v. Dyer* (1778) 2 Cox Eq. 92. In this case, the Courts ruled that where one party transfers property to another, without receiving valuable consideration in return, equity presumes that the transferor intended the recipient to hold the property *in trust*.

In other words, equity presumes that the transferor did not intend the transferee to take both legal and beneficial title to the subject property. The transferee is presumed to hold legal title to the property while the transferor continues to hold the equitable title. (*Law of Trusts in Canada*, second edition, Donovan Waters)

In determining the transferor's intention in transferring the property, all the circumstances must be considered. The only relevant question to be determined, however, is the intention of the parties *at the time of the transfer*. (*Law of Trusts in Canada*, second edition, Waters)

The Presumption of Advancement

In certain family situations, the presumption of a resulting trust created unacceptable results. This was especially so in cases involving transfers between parent and child or husband and wife. Historically, therefore, the presumption of advancement (gift) was developed. The Courts applied this presumption in circumstances where a transfer was made by a husband to a wife or by a father to a child. The underlying rationale was the commonly existing financial dependency of the wife or child on the husband or father.

More recently, this presumption has been extended to include transfers from mothers to children. See *Niem v. Ko*, (2003) 4 E.T.R.(3d) 279 (B.C.S.C.), where Justice Goepel found the presumption of advancement to apply between mothers and their children. In doing so he declined to follow the dated authority of *Edwards v. Bradley* (1957) S.C.R. 599. See also *Dreger v. Dreger* (1994) 10 W.W.R. 293 (Man. C.A.).

The presumption of advancement may be extended to include transfers between others who are *not* related by blood. This will only occur, however, where the evidence establishes a relationship tantamount to a close familial relationship akin to a parent-child relationship. *Wilson v. Boltezar*, unreported April 5, 1989. Vancouver Registry C873747 (B.C.S.C.)

It is noteworthy that both the presumption of resulting trust and the presumption of advancement may be rebutted.

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Specific Examples of the Presumption of Advancement

Husband to Wife

In matrimonial law this presumption has been abolished in most provinces in the last 25 years.

In British Columbia matrimonial law, the presumption continues to apply, however, only in the most restrictive of situations. It has *never* applied in transfers from wife to husband.

Jackman v. Jackman (1959) S.C.R. 702

Here the Supreme Court considered a situation where a husband had purchased a property with his money and registered it in his wife's name. At the time of purchase, the possibility of separation was envisaged by both parties. Indeed the parties had separated on previous occasions. The Court ruled the wife to be the absolute owner of the property. They found the evidence, rather than rebutting the presumption of advancement, tended to support an intention to benefit the wife.

Common Law Spouses

McDonald v. Eckert, 2004 B.C.S.C. 323

Here the Courts ruled the presumption of advancement does *not* apply to a common law spouse.

Huscroft v. Bodor (2004) 5 E.T.R. 170 (B.C.S.C.)

Here the Courts declined to follow two cited cases previously recognizing a presumption of advancement in a common law relationship.

Parent to Child

This is unquestionably the most common fact pattern giving rise to a presumption of advancement. Consider the following examples.

Wiens v. Wiens (1991) 31 R.F.L. (3d) 265 (B.C.S.C.)

Here the Courts dealt with a common fact pattern—where parents advance money to facilitate the purchase or the improvement of their child's matrimonial home. The Courts held that in the absence of a promissory note or other document evidencing a loan, the Courts must assume the money was a gift. This case was followed in *Speidel v. Kositzka*, (2003) 49 E.T.R. (2d) 280 (B.C.S.C.).

Locke v. Locke 2000 BCSC 1300

In this case the husband's parents had advanced the husband \$30,000 to purchase the matrimonial home. After the separation, the parents' action for repayment of the loan was dismissed. The parents had advanced the same amount for the same purpose to their other son, the husband's brother. The Courts held that the funds were a gift or advancement to the husband and not a loan.

Castellan v. Muncey Estate (2003) E.T.R. (3d) 41 (B.C.S.C.)

The testatrix prepared a Will in 1991 in which the defendant daughter was designated trustee and beneficiary and the plaintiff daughter was designated as alternate trustee and co-beneficiary. The testatrix carefully documented reasons for excluding other children. The testatrix sold her home three months later and transferred most of proceeds to the defendant daughter and her husband. The recipient daughter claimed the testatrix said something like, "It's yours."

The trustee and her daughter claimed the testatrix subsequently made statements about the co-beneficiary daughter having received enough money already. The trustee and her daughter also opined that testatrix took exception to the co-beneficiary and her husband being

alcoholics and her husband having sexually assaulted children. The co-beneficiary daughter had never been made aware of the transfer and the trustee tried to conceal it for as long as possible. The co-beneficiary brought action for a declaration that the proceeds were transferred in trust for estate and succeeded in a summary trial against the trustee.

The trial judge hearing the summary trial held that equity presumes a resulting trust where there is a gratuitous transfer. While the presumption of advancement may arise where the transferee is a close relative who can reasonably expect an advance on his or her inheritance, an examination of all the circumstances of the transfer is crucial.

The reasonable inference was that the transfer was not intended as a gift. The testatrix was sophisticated and would not be expected to gift almost the entire value of her estate within three months of having prepared a Will stipulating an equal division. The presumption of a resulting trust had not been displaced.

The BC Court of Appeal ordered a new trial, (2004) 5 E.T.R.(3d) 165, on the basis that the case was not one suitable for summary trial but was one where there should have been a hearing on oral evidence in circumstances that would have lent themselves to vigorous cross-examination and an opportunity to assess the demeanour of the witnesses.

Joint Bank Account

Joint bank accounts with right of survivorship are a frequent source of estate litigation. Sometimes parents indeed intend to gift their monies to a child as surviving joint tenant. Nevertheless, there are other reasons that often motivate such a banking arrangement, such as banking convenience and avoidance of probate fees. All too often, parents naively assume the surviving joint tenant will share the proceeds with his or her siblings. In any event, the true intention in setting up a joint account is rarely clear.

In *Niles v. Lake*, [1947] S.C.R. 291, para. 18, Taschereau, J., said as follows:

The law is well settled, I think, that when a person transfers his own money into his own name jointly with that of another person, except in cases with which we are not concerned, then there is *prima facie*, a resulting trust for the transferor. This presumption, of course, is a presumption of law which is rebuttable by oral or written evidence or other circumstances tending to show there was in fact an intention of giving beneficially to the transferee.

Joint bank accounts with right of survivorship are a frequent source of estate litigation.

Continuing at paragraph 33:

The words “shall be the joint property of the undersigned” or “right of survivorship” and “all monies in the account to be joint property of the undersigned” are indeed apt words to convey a legal title to the fund, but not to convey the whole fund beneficially. Something more than a mere transfer is required to destroy the presumption of a resulting trust and an intimation of such an intent must appear in the document itself, or as a result of evidence which reveals the intention to benefit the transferee.

Clarke v. Hambly (2002) B.C.J. 1672, succinctly summarizes the law relating to bank accounts. Kirkpatrick J. at paragraph 10 states:

The Courts in *MacInnis Estate v. MacDonald* (1994), 138 N.S.R. (2d) 321 (N.S.S.C.), considered the issue of whether money deposited in joint accounts by a father in favour of himself and his daughter was an absolute gift to the daughter or held under a resulting trust for the benefit of the father's estate. MacAdam J. extensively reviewed the law pertaining to the operation and effect of jointly held bank accounts in the context of a transfer involving a parent and child. The principles of law reviewed in that decision and others may be

summarized as follows.

- (a) The general rule with regard to joint bank accounts is that on the death of one customer, the survivor is not entitled, as against the estate of the deceased customer, to hold the funds as her own property, if the funds were provided entirely by the deceased customer, unless there is a presumption of gift or an intention, on the part of the deceased customer, that the survivor shall have the right to retain the funds as her own: *Re Fenton Estate* (1977) 26 N.S.R. (2d) 662 at 673.
- (b) The question, in the absence of fraud or undue influence, is the intention of the donor creating the joint account. The “ordinary rule” is that where the funds are provided entirely by the deceased, the funds revert to the donor upon a resulting trust: *Edwards v. Bradley*, [1957] S.C.R. 599.
- (c) The “ordinary rule” may be modified when the transfer involves a parent and child, in which case the presumption of advancement may arise: *Shephard v. Cartwright*, [1955] A.C. 431 at 445.
- (d) The presumption of advancement may be rebutted, but should not give way to slight circumstances: *Shephard v. Cartwright*.
- (e) Because advancement is a question of intention, facts antecedent or contemporaneous with the transaction may be put in evidence to rebut the presumption or to support it: W. J. Mowbray, BA, *Lewin on Trusts*, 16[th] ed. (London: Sweet & Maxwell, 1964) at 135.
- (f) The subsequent acts and declarations of the parties cannot be used to support their positions but may be used against them: *Shephard v. Cartwright*.

Rebutting the Presumptions

As noted above, the presumption of advancement may be rebutted, in which case the Courts will find a resulting trust.

In *Re Harvey*, 66W.W.R. 254, the Courts held in the case of a purchase by the husband of property in his wife's name that the husband, in order to rebut the presumption, was required to present clear, distinct, and precise evidence of a trust.

Pasko v. Pasko, 44 E.T.R. (2d) 266 is a recent example of a case where the test in *Re Harvey* was applied.

Shephard v. Cartwright (1954) 3 All E.R. 649 (U.K.H.L.) is a leading case dealing with rebutting the presumption. In this case, Viscount Simonds stated as follows.

The presumption of advancement, like the presumption of resulting trust, may be rebutted by declarations made by the parent at or before the date of purchase or by the surrounding circumstances. If there is evidence that shows that the intention was to benefit a child, then, of course, the presumption of advancement has not been rebutted but rather has been affirmed.

In *Farrell Estate v. Turner Estate*, 2002 BCSC 165, the Courts reviewed the law. They held that in determining whether a gift was intended, the Courts must consider all the circumstances to determine *the intention at the time the transfer was made*. The evidence required to displace the presumption of a resulting trust may be less in cases where the relationship between the parties is close.

In *Dreger v. Dreger* (1994) 10 W.W.R. 293, the Courts held that the presumption of advancement also applies to transfers of property from mother to child. The Courts said that since the presumption is based on the obligation to provide support, its force will vary depending upon the child's circumstances. In this case, the financially successful son was designated as beneficiary of two insurance policies and RRSP contracts.

The Courts held that since there was no evident reason why this son should be preferred over his siblings, the presumption of advancement could be displaced by the

slightest evidence of a contrary intention. The Courts also stated that while the evidence necessary to rebut the presumption ought to be nearly contemporaneous to the transaction, the rule was not invariable. In this case the Courts found the son to hold the monies in trust. To rule otherwise, it said, would defeat the entire scheme of the mother's Will.

Given these social conditions, it seems to me that it is dangerous to presume that the elderly parent is making a gift each time he or she puts the name of the assisting child on an asset.

Competing Legal Obligations or Presumptions

The presumption of advancement will usually easily be displaced by other legal obligations or presumptions, such as where the child is in a fiduciary relationship with the parent. For example, where the recipient of the transfer is in a fiduciary relationship and receives a gratuitous transfer of valuable property, then a presumption of undue influence will arise. In such a case, the transferee may rebut the presumption that the transfer was induced by undue influence.

This principle is set out in *Geffen v. Goodman Estate* (1991) 2 S.C.R. 353. See also *Farrell Estate v. Turner Estate* 2002 BCSC 165.

Judicial Rumbblings for Change

In *Rathwell v. Rathwell* (1978) 2 S.C.R. 436, at p. 304, Dickinson J. characterized the presumption of advancement as an anachronism, stating as follows: "In present conditions the old presumption of advancement has ceased to embody any credible inference of intention."

In *Wilson v. Munro* (1983) 13 E.T.R. 174, at paragraphs 24 and 25, McKenzie J. examined the state of the law stating:

Professor McClean, in his comment on *Pettkus v. Becker*, "Constructive and Resulting Trusts—Unjust Enrichment in a Common Law Relationship—

Pettkus v. Becker" (1982), 16 Univ. of British Columbia L. Rev. 155 at 160, notes that:

The modern trend appears to establish a presumption of resulting trust in the case of all voluntary transfers of title, including those from husband to wife... .

...The learned editors of *Snell's Principles of Equity*, 28th ed. (1982), at p. 183, concur with McClean:

...under modern conditions, with the reduction of the wife's economic dependence on her husband, the force of the presumption [of advancement] is much weakened, especially in relation to purchases of the matrimonial home in the names of both, and to purchases in which evidence of the circumstances of the transaction is still available.

Last, a refreshingly new approach was taken by Justice Heeney in the Ontario case of *McLear v. McLear Estate* (2000) 33 E.T.R. 272.

In *McLear*, a mother left the residue of her estate to be divided equally among her four children. Before her death, the mother had invested the bulk of her estate jointly with one daughter in Guaranteed Investment Certificates. After death this daughter claimed the monies were intended as a gift to her. The other siblings succeeded in their action claiming the monies were held in trust for the estate.

Justice Heeney held that since the presumption of advancement was historically found in relationships of dependency, then logically it should apply equally between mothers and fathers with respect to dependent children, *but should not apply to either parents where the recipients were independent adults*.

Justice Heeney stated:

Given these social conditions, it seems to me that it is dangerous to presume that the elderly parent is making a gift each time he or she puts the name of

the assisting child on an asset. The presumption that accords with this social reality is that the child is holding the property in trust for the ageing parent, to facilitate the free and efficient management of that parent's affairs. The presumption that accords with this social reality is, in other words, the presumption of resulting trust.

Justice Heeney observed that a parent's affection must be presumed to be equal to all children of that parent. Thus, he said, a resulting trust is the appropriate presumption because the law should assume that a parent does *not* wish to prefer one child over another.

Conclusion

The presumption of advancement has, in my opinion, outlived its usefulness. I am hopeful that other Courts will either ignore the presumption altogether as an anachronism or, alternatively, will highly restrict its application as was done in *McLear*. In my view, Justice Heeney, in his insightful comments, hit the nail on the head. There is no reason for the law to assume that a parent intends to benefit one child over the others or that a transfer was done for any reason other than to help manage the parent's affairs.

I strongly agree with the statement of Professor McLean to the effect that there should be a presumption of resulting trust in the case of all voluntary transfers of title. To avoid the finding of a resulting trust, the onus should be on the recipient of the property to establish the deceased intended to benefit him or her. ▲

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