Indexed as:

Madsen Estate v. Saylor

Patricia Ann Brooks, Estate Trustee, Appellant;
v.
Mary Elizabeth Saylor and William Anthony Madsen,
Respondents.

[2007] 1 S.C.R. 838

[2007] S.C.J. No. 18

2007 SCC 18

File No.: 31262.

Supreme Court of Canada

Heard: December 7, 2006;
Judgment: May 3, 2007.

Present: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.

(44 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Catchwords:

Wills and estates -- Joint bank and investment accounts with right of survivorship -- Presumptions of resulting trust and advancement -- Father gratuitously placing assets in joint accounts with daughter -- Whether assets held in joint accounts to be included in father's estate upon his death -- Whether presumption of resulting trust rebutted -- Whether presumption of advancement applicable.

Appeals -- Supreme Court of Canada -- Evidence -- Assessment -- Whether Supreme Court should

consider evidence ignored by trial judge and make final determination rather than sending case back to trial.

Summary:

P, an adult daughter, was made a joint account holder by her father following the death of her mother. The accounts had a right of survivorship. P's father also executed a power of attorney in her favour and she remained the named alternate executor under his will, which was never changed after her mother's death. P's father retained control of the bank accounts and the funds were used solely for his benefit during his life. He also declared and paid all taxes on income made from the accounts. There was conflicting evidence from P and her siblings as to their relationships with their father, P claiming to be the preferred child. Under her [page839] father's will, P and her two siblings were to share one half of her father's estate. Following the father's death litigation was commenced by P's siblings against P as executor because she did not include the accounts in the distribution of the estate. Applying a presumption of resulting trust, the trial judge found that there was no evidence to support P's position that her father intended to gift the joint accounts to her and held that they should be included in the father's estate. The Court of Appeal affirmed the decision. The majority concluded that the trial judge was incorrect in applying the law of resulting trust and should have applied the presumption of advancement, but added that she was not required to consider either presumption because the intention of the father at the time of the transfer was demonstrated on the evidence.

Held (Abella J. dissenting): The appeal should be dismissed.

Per McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish, Charron and Rothstein JJ.: A presumption of a resulting trust applies to the gratuitous transfer of assets by P's father into the joint accounts. The presumption of advancement has no application because P was not a minor child of her father. P therefore had the burden of rebutting the presumption of a resulting trust by showing that her father intended to gift the assets in the accounts to her on the balance of probabilities. The trial judge incorrectly found that there was no evidence to suggest that P's father intended for her alone to have the assets in the joint accounts. The financial institution documents and P's evidence that she and her father acknowledged that they understood at the time that the right of survivorship meant that on the death of one of the joint account holders the other would become the sole owner, did constitute some evidence that was relevant to the father's intention. In the circumstances of this appeal, it is both feasible on a practical level and within the interests of justice for this Court to take into consideration the evidence not considered by the trial judge and make a final determination rather than sending the case back to trial. The financial institution documents and P's testimony in relation to them do not satisfy P's burden of proof on the balance of probabilities. Little weight can be accorded to that evidence because of the lack of clarity in the bank documents and because of the trial judge's finding that P's testimony was evasive and conflicting. The conclusion that the presumption of resulting trust was not rebutted is consistent with the trial judge's finding, based on the evidence she did consider, that the [page840] father had not intended to make P a gift of the

account proceeds. [para. 17] [para. 20] [para. 22] [para. 24] [paras. 27-29]

Per Abella J. (dissenting): The presumption of advancement should be applied in this case and a new trial ordered. This presumption should continue to apply to all gratuitous transfers from parents to their children, and not be restricted to transfers to non-adult children. The fact that the trial judge ignored or drew contrary inferences from certain factors which could be considered reflective of an intention to make a gift, illustrates how her error in applying the presumption of resulting trust may have influenced her findings of fact and credibility. The key finding made by the trial judge, a finding which reflects the erroneous assignment of the burden of proof to P, was that there is no evidence to support P's position that her father intended to gift the contents of his joint accounts to her. [para. 33] [para. 42]

Cases Cited

By Rothstein J.

Referred to: *Pecore v. Pecore*, [2007] 1 S.C.R. 795, 2007 SCC 17; *Hollis v. Dow Corning Corp.*, [1995] 4 S.C.R. 634; *Prudential Trust Co. v. Forseth*, [1960] S.C.R. 210.

By Abella J. (dissenting)

Pecore v. Pecore, [2007] 1 S.C.R. 795, 2007 SCC 17, aff'g (2005), 19 E.T.R. (3d) 162, aff'g (2004) 7 E.T.R. (3d) 113.

History and Disposition:

APPEAL from a judgment of the Ontario Court of Appeal (Doherty, Feldman and LaForme JJ.A.) (2005), 20 E.T.R. (3d) 171, 261 D.L.R. (4th) 597, 203 O.A.C. 295, [2005] O.J. No. 4662 (QL), affirming a decision of Van Melle J. (2004), 13 E.T.R. (3d) 44, [2004] O.J. No. 5179 (QL). Appeal dismissed, Abella J. dissenting.

Counsel:

Joel Skapinker and *Jagjit S. Bhathal*, for the appellant.

Lorne S. Silver, *Robert B. Cohen* and *Margaret Hoy*, for the respondents.

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The judgment of McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish, Charron and Rothstein JJ. was delivered by

ROTHSTEIN J.:--

I. Introduction

1 This appeal, like its companion case, *Pecore v. Pecore*, [2007] 1 S.C.R. 795, 2007 SCC 17 (released concurrently), involves questions about joint bank and investment accounts. As discussed more fully in *Pecore*, joint accounts are used by many Canadians for a variety of purposes, including estate planning and financial management.

2 While the focus in any dispute over a gratuitous transfer is the actual intention of the transferor at the time of the transfer, intention is often difficult to ascertain, especially in cases where the transferor is deceased. The common law has developed certain rebuttable presumptions of law over many years to guide a court's inquiry.

3 In this case, the trial judge found that there was no evidence to support Patricia's position that her father intended to gift the joint accounts to her and held that the joint bank account and joint investments be included in the transferor's estate. The Court of Appeal dismissed the appeal.

4 I conclude that there is no basis to overturn this result. The appeal should be dismissed.

II. Facts

5 The dispute in this appeal is between Patricia Brooks, who was made a joint account holder by her father, and her two siblings. The trial judge found that the joint accounts in dispute totalled $185,000.

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6 The father and mother prepared their wills in 1982. In the event there was no surviving spouse, the estate was to be divided into two halves. One half was to be divided equally between Patricia and her two siblings. The other half was to be divided equally between their eight grandchildren. This will was never changed.

7 At that time, Patricia was named alternate executor and was also named an alternate power of attorney. She claimed that her mother had told her she had passed various "tests" that showed she was the most responsible child; it was for this reason that her parents gave her these powers.

8 Patricia's mother died in 1986. In 1991, the father made Patricia a joint signatory on his bank

accounts, which provided for a right of survivorship. He also executed a new power of attorney in her favour. In September of 1997, the joint accounts were closed and the funds deposited into another bank account and an investment account, which again was a joint account with Patricia and had a right of survivorship.

9 The father retained control of the bank accounts and the funds were used solely for his benefit during his life. He also declared and paid all taxes on income made from the accounts.

10 In 1994, Patricia's brother (and later his wife) moved in with the father. In 1997, the father moved in with Patricia due to his declining health and Patricia provided him care. In 1998, he moved into a nursing home.

11 There was conflicting evidence from Patricia and her siblings as to their relationships with their father. Patricia claimed to be the preferred child and that her father's relationship with her siblings was strained. Her siblings claimed to have a good relationship with their father.

12 In late 1998, Patricia's father died. The litigation was commenced by her siblings against her as [page843] executor because she did not include the accounts in the distribution of the estate.

III. Judicial History

A. *Ontario Superior Court of Justice* (2004), 13 E.T.R. (3d) 44

13 Van Melle J. found that there was no evidence to support Brooks' position that her father intended to gift the contents of the joint accounts to her. As a result, she ordered that the joint bank account and joint investments be included in the estate and ordered Patricia to pay to the estate a sum of $185,000. With respect to the general issue of the status of the law of the presumptions of advancement and resulting trust, Van Melle J. stated at para. 24 she thought that it was "time for the presumption of advancement from father to child to be abandoned in favour of the presumption of resulting trust in all but the most limited cases".

B. *Ontario Court of Appeal* (2005), 261 D.L.R. (4th) 597

14 LaForme J.A., in writing for the majority, reviewed the relevant presumptions of resulting trust and advancement. He determined that the trial judge was incorrect in applying the law of resulting trust and should have applied a presumption of advancement; however, he added that the trial judge was not required to consider either presumption because here the intention of the father at the time of transfer was demonstrated on the evidence. He found that regardless of whether the trial judge applied a presumption of advancement or resulting trust, it was evident from her detailed reasons that she carefully weighed all of the evidence before arriving at the conclusion that at the time of transfer the joint bank account and joint investments were not intended as gifts but rather were intended to be included as part of the estate. He concluded that there was no basis upon which the court should interfere with the trial judge's factual findings and conclusions.

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15 Feldman J.A., in dissent, disagreed with the approach and conclusion reached by LaForme J.A. She held that the trial judge had erred in law by concluding that (1) the presumption of advancement from father to child must be abandoned in favour of the presumption of resulting trust in all but limited cases; (2) that the presumption of resulting trust applied in this case; and (3) that the onus was on Patricia to prove that her father intended to gift the joint investments to her. She therefore held that the appeal should be allowed, the order of the trial judge set aside and a new trial ordered.

IV. Analysis

16 How the rebuttable presumptions of a resulting trust and advancement operate and guide a court's analysis is discussed in the *Pecore* decision.

17 In the present case, a presumption of a resulting trust applies to the gratuitous transfer of assets by Patricia's father into the joint accounts with Patricia. The presumption of advancement has no application because Patricia was not a minor child of her father. Patricia therefore had the burden of rebutting the presumption of a resulting trust by showing that her father intended to gift the assets in the accounts to her on the balance of probabilities.

18 Van Melle J. found that there was no evidence to support Patricia's position that her father intended to gift the contents of his joint accounts to her -- there was no documentation to that effect, there was no clear statement to anyone and the father's conduct *vis-à-vis* the joint accounts while he was alive did not support this contention. Indeed, she also did not believe much of Patricia's evidence, finding that she was "evasive and gave conflicting evidence" and that she "purposely misrepresented events" (para. 51). Van Melle J. found that the father had sole control of the assets in the accounts during his lifetime and he declared and paid all income tax on the income generated from the joint [page845] accounts and investments. She concluded that the joint account agreement was not determinative of the father's intention. She could not find evidence of an intention to benefit Patricia financially over the other children.

19 As discussed in *Pecore*, at paras. 62-66, the fact that a transferor maintains sole control over or use of funds in a joint account will not be determinative of whether a transferee is entitled to the balance in the account upon the transferor's death. Whether or not a transferor continues to pay tax on the income of the joint accounts is also not determinative.

20 However, I am unable to agree with the trial judge that there was no evidence to suggest that Patricia's father intended for her alone to have the assets in the joint accounts. On the relevant financial institution documents, the father elected to have the joint accounts carry a right of survivorship. Patricia testified that both she and her father acknowledged that they understood at the

time that this meant that on the death of one of the joint account holders, the other would become the sole owner.

21 As discussed in *Pecore*, at para. 61, banking documents may, in modern times, be detailed enough that they provide strong evidence of the intention of the transferor regarding how the balance in the accounts should be treated on his or her death. The clearer the evidence in the documents, the more weight that evidence should carry.

22 Therefore, the financial institution documents and Patricia's evidence about them did constitute some evidence that was relevant to the father's intention. The question now is whether this matter should be remitted to the trial judge to redetermine the result taking account of the evidence that she ignored in her initial decision or whether it is [page846] appropriate for this Court to substitute its decision for that of the trial judge.

23 Patricia's father died in 1998. This matter has been outstanding for over eight years. The amount in dispute is some $185,000. To remit the matter to the trial judge in these circumstances would involve more costs, more time and potentially further appeals. Having regard to the fact that this case has been to trial (a trial which lasted approximately 15 days), has been to appeal and now has been further appealed to this Court, it is difficult to see how any of the litigants will benefit if the matter is remitted for yet another trial.

24 It is well established that where the circumstances warrant, appellate courts have the jurisdiction to make a fresh assessment of the evidence on the record: *Hollis v. Dow Corning Corp.*, [1995] 4 S.C.R. 634, at para. 33; *Prudential Trust Co. v. Forseth*, [1960] S.C.R. 210, at pp. 216-17. Having regard to the circumstances of the present appeal, I think it is both feasible on a practical level and within the interests of justice for this Court to consider the evidence not considered by the trial judge and make a final determination rather than sending the case back to trial.

25 Beyond the fact that both accounts were designated as carrying the right of survivorship, the banking documents do not contain any express reference to beneficial entitlement to the assets in the accounts. The Toronto-Dominion Account Agreement provided:

> If the account *has a right of survivorship* then if any one or more of us dies any moneys standing to the credit of the account are to be subject to withdrawal by the survivor or, if more than one, by any one or more of the survivors; [Emphasis in original.]

26 The CIBC Wood Gundy Account Agreement provided:

> The following provisions shall apply upon the death of any Applicant: (i) the survivor(s) will promptly notify you of such death; (ii) the survivor(s) will provide you [page847] with a certified copy of the death certificate ...; (iii) the estate of the deceased shall continue to be liable for any amounts owing ...; and

(iv) the survivor(s) shall continue to have the same rights as described in paragraph 12(c) [providing for the operation of the accounts by the survivor].

27 Having regard to the lack of clarity in the documents on this critical point, I would accord them little weight insofar as the issue of beneficial entitlement to the assets in the accounts is concerned.

28 As to Patricia's testimony, the trial judge found that she "was evasive and gave conflicting evidence" and that "she purposely misrepresented events" (para. 51). The trial judge observed that contrary to instructions given to her not to discuss her testimony while under cross-examination, she contravened that admonition. The trial judge also noted that Patricia removed estate files from the estate's solicitor without authorization and failed to return them despite requests to do so. For these reasons, little weight can be accorded to Patricia's evidence as to what her father understood at the time the joint accounts were opened about beneficial title to the assets in the accounts on his death.

29 Thus, even having regard to the financial institution documents and Patricia's testimony in relation to them, such evidence is insufficient to rebut the presumption of resulting trust. This conclusion is consistent with the trial judge's conclusion based on the evidence she did consider.

30 Patricia also argued that the closing balances of the joint accounts at the death of the father was $167,675.09. The respondents maintained that the factual finding by the trial judge that the amount was $185,000 should be upheld. The trial judge heard evidence on the matter and in her judgment ordered Patricia to pay $185,000. I see no reason to disturb that result.

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31 Patricia also argued that this Court should find that the respondents are indebted to the estate in the sum of $35,900 and $26,360 respectively. According to Patricia, her father insisted that she have the respondents sign promissory notes to evidence their indebtedness to him. The trial judge considered the matter and found that collection of the notes is statute barred and that even if it were not, she was not satisfied that Patricia had successfully established that the promissory notes were outstanding and were meant to be repaid to the estate. Again, I see no palpable and overriding error in the trial judge's finding of fact which would merit disturbing the result.

V. Disposition

32 I would dismiss this appeal, with costs to the respondents payable by Ms. Brooks and not out of the estate.

The following are the reasons delivered by

33 ABELLA J. (dissenting):-- My views on the scope of the presumption of advancement are discussed in the *Pecore* decision ([2007] 1 S.C.R. 795, 2007 SCC 17), released concurrently. Like the majority, I would apply the presumption of advancement to all gratuitous transfers from parents to their children regardless of the parent's gender. Unlike the majority, I would not restrict its application to transfers to non-adult children. In *Pecore*, the difference in our legal approaches did not lead me to a different result. In this appeal, it does. I would allow the appeal and order a new trial.

34 Both the majority and dissent in the Court of Appeal agreed that in applying the presumption of resulting trust, the trial judge erred, improperly placing the onus on the daughter, Patricia Ann Brooks, to prove that her father, Niels Madsen, intended to make a gift to her of the funds held jointly in her and her father's name: (2005), 261 D.L.R. (4th) 597.

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35 When Mr. Madsen's wife died, all funds in their joint bank accounts accrued to him by virtue of his right of survivorship. On May 3, 1991, he transferred the funds in these accounts to a joint account in his and his daughter's name. The bank documents, as in the case of those with his wife, provided for a right of survivorship. These were the accounts that were transferred into the joint account with Ms. Brooks on September 9, 1997.

36 There was conflicting evidence at trial about the relationship between the father and his three children. Ms. Brooks' evidence was that the reason her father decided to make a gift of the joint accounts to her was that by the spring of 1991, she had been widowed and was ill with complications from cancer. According to her, her father wanted to provide her and her children with financial security.

37 Her evidence was vigorously disputed by her brother and sister. Their evidence was that they had a very good relationship with their father and that Mr. Madsen treated all of his children equally. They pointed out, by way of example, that at Christmas in 1996, two years before he died, their father gave each of his children a gift of $1,000.

38 Feldman J.A., in dissent in the Ontario Court of Appeal, observed at para. 86 that, like *Pecore*, this case is a situation where there is "no issue of undue influence or overbearance, but strictly a voluntary and intentional transfer into a joint account". Yet, as she noted, several factors relied on by the trial judge and the Court of Appeal in *Pecore* ((2004), 7 E.T.R. (3d) 113 and (2005), 19 E.T.R. (3d) 162) to *confirm* the father's intention to make a gift of funds in joint bank accounts to his adult daughter were either disregarded by the trial judge in this case or used as evidence of a contrary intention.

39 In *Pecore*, the trial judge, applying the presumption of advancement, used the following

factors as confirmation of an intention to make a gift:

[page850]

- the father had personal knowledge that the consequence of having a joint account was that the daughter would have a right of survivorship in the funds; and
- the joint bank accounts were not needed as a tool of convenience to assist the father since the daughter already had a power of attorney.

40 In addition, the father's control of the bank accounts during his lifetime was found by the Court of Appeal in *Pecore* not to be inconsistent with his intention to make a gift of the funds. In this case, Mr. Madsen's control was held to be evidence of an intention *not* to make a gift of the funds.

41 These inconsistencies were cogently amplified by Feldman J.A. as follows:

> In *Pecore*, the father put significant funds into joint accounts with one of his three adult children, Paula, because she was the most financially in need. In his will, the father named Paula and her dependant husband as residuary beneficiaries. After the father's death, the husband separated from Paula, learned that he was a residuary beneficiary under his ex-father-in-law's will, and, in the course of his divorce proceedings against Paula, challenged her right of survivorship to the jointly-held funds, because the effect of the right of survivorship was that those funds did not form part of the estate.
>
> In the context of examining the facts that might speak to the father's intention at the time he transferred his investments into joint ownership, the court first noted that the father was familiar with joint ownership as an estate planning tool because he and his wife had held their investments jointly and they had devolved to him as the survivor. The court concluded that the father therefore knew that on his death, his joint investments would devolve to Paula as his survivor.
>
> In this case, there was evidence that the father had also held his investments in joint tenancy with his wife, and they devolved to him on her death. Following his wife's death, he opened a joint account with his daughter, [Ms. Brooks]. A court could therefore conclude that he knew that when he died,

> his joint investments would [page851] devolve to [Ms. Brooks] as his survivor. However, neither the trial judge nor my colleague chose to take this factor into account.
>
> A second factor considered by the court in *Pecore* was that the father gave Paula his power of attorney. The court took that as evidence that he was not using the joint account with Paula as a tool of convenience to give her signing access on the account. She would have that with the power of attorney. Rather, it showed that the father intended something more.
>
> Similarly, in this case, the father also gave [Ms. Brooks] his power of attorney. [Ms. Brooks] was also the executrix of his estate and looked after him physically at the end of his life. Again, neither the trial judge nor my colleague viewed the giving of the power of attorney as a factor that suggested that the joint account was not set up merely as a tool of convenience for mutual access to funds.
>
> A third factor considered by the court in *Pecore* involved the significance of the father maintaining control over the investments during his life. In *Pecore*, Paula and her father had agreed that he would manage the investments and pay the taxes on them. This court held that "[w]hile control can be consistent with an intention to retain ownership, it is also not inconsistent in this case with an intention to gift the assets. Hence, this factor was not determinative of [the father's] actual intention" (para. 40). In contrast, in this case, one of the main factors my colleague relies on to show that the father did not intend to create a beneficial joint tenancy is that he remained in control of his finances and that he paid the taxes on the interest on the funds. [paras. 68-73]

42 The fact that the trial judge ignored or drew contrary inferences from certain factors considered by the Court of Appeal in *Pecore* to be reflective of an intention to make a gift, illustrates how her error in applying the presumption of resulting trust may have influenced her findings of fact and credibility. The key finding made by the trial judge in this case, a finding which reflects the erroneous assignment of the burden of proof to Ms. Brooks, was that "[t]here is no evidence to support Patricia Brooks' [page852] position that [her father] intended to gift the contents of his joint accounts to her", emphasizing the lack of "documentation to this effect" and the lack of a "clear and unequivocal statement in this regard to anyone" ((2004), 13 E.T.R. (3d) 44, at para. 58).

43 In the final analysis, I share the views of Feldman J.A. who observed:

> As demonstrated, the factors a court may take into account in its attempt to

> determine the transferor's intention at the time of transfer will be given different weight. This will depend on how the trial judge views the whole of the evidence, including the credibility of the witnesses, and the trial judge's view of the evidence may be affected by the onus of proof he or she applies. Since the trial judge in this case applied the incorrect onus of proof and relied on evidence that occurred years after the joint account was established, I am of the view that this court ought not to rely on her assessment of the evidence in order to determine the actual intention of the father when he put his funds into joint accounts with the appellant, nor should it determine the weight to be given to the factors that speak to the father's intent at the time he established the joint account. Instead, in order to fairly decide this case, it seems to me that a new trial must be ordered. [para. 74]

44 I would therefore allow the appeal and order a new trial.

Solicitors:

Solicitors for the appellant: Skapinker & Shapiro, Toronto.

Solicitors for the respondents: Cassels, Brock & Blackwell, Toronto.