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Transferring property to children is fraught with issues

A mother and daughter came into my office last week to talk about ownership of the family home. The mother, who is in her 70s, did not want the children to get stuck with the 1-per-cent Ontario probate fees on her death.

She asked me to prepare a deed putting the property into joint names with her four adult children. That way the children would automatically become the owners of the house without the necessity of applying to court for probate now known as a court certificate of appointment of estate trustee.

I explained to her that although the children would save perhaps $4,000 in what amounts to an Ontario death tax, she might live to a ripe old age and in the meantime, registering the property in all five names could have unintended consequences.

I told her that during her lifetime:

- Her family home would be exposed to the creditors of her adult children if they got sued or filed for bankruptcy.
- If she needed to sell the house and one or more of the children refused, she might not have the necessary funds to pay for her retirement needs.
- If any of the children became involved in a matrimonial dispute, his or her share in the house could be the subject of bitter and expensive litigation for all parties.
- Any of her children could become tempted to pressure the mother to sell her house, against her will, so she could distribute the proceeds to the children while she was alive.

After some discussion, the mother changed her mind and decided to leave the ownership of the house in her name only.

The fact is that putting a family home or other assets into the name of the children during the lifetime of the parent can create unintended and unhappy consequences.

That's exactly what happened in the case of Pecore v. Pecore, heard by the Ontario Court of Appeal last year.

Edwin Hughes had been a miner in Timmins for most of his life. Before he died in 1998, he had amassed assets worth about $1.2 million. He had been advised that his estate could save significant probate fees on his death if he transferred ownership of those assets to himself and his daughter Paula Pecore.

As a result, in 1994 he started transferring most of his investments into joint ownership with Paula. Two years later, Hughes was advised that this type of transfer could trigger a capital gains tax on the profit on Paula's "half" of the assets.

Since that was not his intention, he wrote letters to the financial institutions holding his investments stating that he did not intend to trigger any capital gains, that the funds were not being gifted to Paula, and that the ownership change was being registered for probate purposes only.

Shortly before his death, Hughes signed a will dividing his estate equally between Paula and her husband Michael Pecore. When her father died, Paula redeemed the investments which became her property as a result of the joint names registration.

Two years later, Paula and Michael separated and Michael started divorce proceedings. When he discovered that he had been named beneficiary of half of his father-in-law's estate, he sued Paula for his share.

Both the trial court and the court of appeal ruled the father had made a gift of the investments to his daughter. They came to this conclusion even though the father had written the financial institutions stating that the transfers were not gifts, in order to ensure that he did not suffer tax consequences on the change of ownership.

The appeal court said that there was no evidence Hughes intended to evade taxes illegally. That, the court said, was a matter between the father's estate and the tax department, not a matter between his daughter and the estranged son-in-law. Michael was cut out of the estate.

Commenting on the Pecore decision in a recent edition of *Money & Family Law*, Toronto estates lawyer Barry Corbin wrote that when a parent is transferring assets to a child for estate purposes, the child should sign a declaration confirming that he or she is not acquiring real ownership but only paper title.

The flip side of this, however, is that in the event probate is necessary, the probate fees will be the same as if title had not been transferred.

Corbin also notes that the parent who intends to make an actual current gift of a share of property must suffer the tax consequences of the gift. Except for a principal residence that is exempt from capital gains tax, a parent-to-child gift is viewed by the tax people in Ottawa as a sale at fair market value with all the resulting tax consequences.

Finally, Corbin notes that Hughes was one of the many individuals who believe it is possible to avoid both current income taxes and future probate fees by transferring property into joint ownership with a child with the child having no rights in the property until the parent dies.

In that scenario, it is not possible to prevent the transferred property from falling into the individual's estate, as a matter of succession law.

For aging parents, the bottom line is that transferring ownership of property and investments into joint names with a child or children is fraught with complexities and tax issues. It's important to get professional advice from a lawyer or accountant before making any transfers of this kind.

CLARIFICATION: In last week's Title Page column, I reported that Ontario Superior Court Justice John Jenkins criticized the lawyer for Andrea Edwards-DeCoito for failing to protect his client by obtaining a closing date extension for her house purchase. As a result, the builder cancelled the deal and resold the property. Harvey J. Ash was the successful lawyer for Edwards-DeCoito at trial. He was not her real estate lawyer in the aborted transaction.

APPEAL DECISION

This document: 2005 CanLII 31576 (ON C.A.)
Citation: *Pecore v. Pecore*, 2005 CanLII 31576 (ON C.A.)
Date: *2005-09-08*
Docket: *C41774*

[ ] [ ]

DATE: 20050908

DOCKET: C41774

COURT OF APPEAL FOR ONTARIO
WEILER, ROSENBERG and LANG JJ.A.

BETWEEN:	)	
	)	
MICHAEL PECORE	)))	Andrew M. Robinson and Megan Mackay for the appellant
Plaintiff (Appellant)	))	
	)	
- and -	)	
	)	
PAULA PECORE and SHAWN PECORE, TAMMIE PECORE and DANA BOULANGER	)))	Bryan C. McPhadden for the respondents
	)	
Defendants (Respondents)	))	
	)	
	)	Heard: April 20, 2005

On appeal from the judgment of Justice Norman M. Karam of the Superior Court of Justice dated February 20, 2004.

LANG J.A.:

[1] This appeal arises from a dispute as to who became entitled to Edwin Hughes s investments upon his death. The dispute between Hughes s youngest daughter, Paula Pecore, and her husband, Michael Pecore, arose in the course of Michael s divorce proceeding against Paula, in which he also sought spousal support and a division of assets.

[2] Paula bases her claim on a right of survivorship arising from Hughes s transfer of his investments, which totalled $949,674.87, into joint ownership with Paula in the years before his death. Michael bases his claim on his position as one of the two joint residuary beneficiaries under Hughes s will; Paula was the other joint residuary beneficiary. Karam J. held in Paula s favour on two bases: first, on the basis of the presumption of advancement and, second, on the basis of Hughes s actual intention to benefit his daughter. Michael also appeals the decision to deny him costs of the litigation; he seeks those costs out of the estate.

[3] For the reasons that follow, I agree with the trial judge that Hughes intended to give Paula beneficial interest in his investments when he placed them in joint ownership. As a result, it is not necessary to rely on the presumption of advancement.

A. Overview

[4] Since this case deals with whether Hughes intended the investments to be a gift to Paula made during his lifetime, trial counsel raised the applicability of the presumptions of resulting trust and advancement.

[5] The presumption of resulting trust arises when an individual transfers an asset into joint ownership with another who has not contributed to the asset. In such a case, equity presumes that the individual transferring the asset intended to transfer legal but not beneficial title: The presumption of resulting trust arises because equity does not assume a gift when a gratuitous transfer of property has been made. Thus, equity places the burden of proof on the transferee to prove a gift that is, to provide evidence of an

intention contrary to the presumption that a trust was intended (Eileen E. Gillese, *The Law of Trusts*, (Concord: Irwin Law, 1997) at p. 97).

[6] However, there is an exception to the presumption of resulting trust; namely, the presumption of advancement, which presumes a gift in the case of gratuitous transfers between certain individuals. Professor Gillese (as she then was) noted that the identity of the parties is highly relevant : where a gratuitous transfer of property occurs between a father and child [i]nstead of raising the presumption of resulting trust, the law presumed a gift (page 103).

[7] Thus, if the presumption of resulting trust applies, it will be presumed that Hughes intended Paula to hold the investments in trust for him and Paula will have the burden of establishing to the contrary. On the other hand, if the presumption of advancement applies, the burden lies on Michael to establish that Hughes did not intend to gift both the legal and the beneficial ownership of the investments to Paula.

[8] The appellant questions whether the presumption of advancement remains relevant in today s society, particularly with respect to transfers to independent adult children. If the presumption does remain relevant, the appellant questions its application on the facts of this case, where there was a transfer of significant assets by a father to a preferred daughter to the apparent exclusion of a favoured son-in-law.

[9] Since both presumptions can be rebutted by evidence of actual intention, in my view, the presumptions become relevant only if, after considering all the evidence and the circumstances surrounding the transfer, a court is unable to draw a conclusion about the transferor s actual intention. Only in such a case, would a court resort to the presumptions to determine the issue. In a case such as this, which involves joint ownership of assets, resort to the presumption will rarely, if ever, be necessary.

[10] I intend to address the evidence of Hughes s actual intentions before discussing why it is unnecessary to resort to any presumptions about those intentions.

B. Facts

[11] As a result of a car accident, Michael suffered from quadriplegia, for which he was awarded compensation. That compensation included a $250,000 lump sum award and a modest disability annuity. After receiving that award, Michael hired Paula as his caregiver. Within a short time, Michael and Paula married and Michael adopted Paula s two children, Shawn and Tammie. Because their income was limited to Michael s annuity and Paula s part-time employment income, the couple encroached on Michael s lump sum to allow Paula to assume her primary role as caregiver for Michael, the children, and the home. Over the approximate twenty years of their marriage, Paula and Michael lived modestly.

[12] In contrast, Hughes, a retired miner, lived comfortably. He capably and successfully managed his own investments, with advice from his financial adviser and his accountant, and accumulated about $950,000 in investments. As a result, he was in a financial position to help Paula and her family. His help included paying for improvements to the Pecore home and buying vehicles for Paula and Michael as well as for Shawn. He also paid Shawn s student loans and later retained Shawn to give him financial advice.

[13] Hughes concentrated his financial help on Paula and her family even though Paula was only one of his three daughters. His other two daughters, Deborah and Lesley, both had pensions, were employed and had partners who were employed so that Hughes was not concerned about their financial welfare. In contrast to her sisters, Paula had minimal income-earning skills; had devoted many years to Michael s care; was experiencing some health problems, and had no financial security. Hughes explicitly expressed both his concern for Paula s financial welfare and his intention to take care of her financially.

[14] In the early to mid-1990s, after Hughes s second wife was admitted into long-term care with Alzheimer s disease and Hughes knew that she was unlikely to survive him, Hughes took specific steps to plan for Paula s financial security. First, he designated Paula as the beneficiary of both his Registered Retirement Savings Plan and of his life insurance, which had a combined value of $277,167.68. Those designations are not challenged. Second, he opened a mutual fund account in joint ownership with Paula.

[15] Third, as part of his plan, over time and on different occasions, Hughes transferred investments that he had held jointly with his ill wife first into his name and then into joint ownership with Paula. About two years before he died, Hughes transferred the bulk of his investments into joint ownership with Paula. His planning for Paula s financial security had accelerated after he suffered an aneurysm and was diagnosed with cancer.

[16] Hughes learned that transferring his investments to his daughter (as opposed to his spouse) could trigger a deemed disposition, which would result in capital gains consequences. To avoid those consequences, he wrote the financial institutions telling them not to adjust the cost bases for the investments because he retained 100% ownership. He explained that the joint ownership with Paula was for probate purposes only.

[17] After completing the transfer of all his investments, Hughes rewrote his will to name Paula as sole executrix; remove his other two daughters as beneficiaries; leave specific bequests of items, and name Paula and Michael as his residuary beneficiaries. When he executed his will, Hughes specifically told his lawyer that his investments would devolve to Paula outside his estate.

[18] As Hughes s health deteriorated, he moved in with Paula and Michael. A few months later, and all within a five-month span, Hughes s wife died, Michael moved into a long-term care facility because Paula could no longer care for him, and Hughes died. After this, Paula redeemed the joint investments.

[19] Two years later, after Paula and Michael s marriage permanently broke down, Michael moved out of the nursing home into a new home with his fianc e. Michael started divorce proceedings against Paula in which he claimed spousal support and a division of assets. During discoveries in that proceeding, Michael claimed that he first learned that he was a residuary beneficiary under the Hughes will and amended his petition to seek a declaration that the investments formed part of the residue of the Hughes estate.

C. The Trial Decision

[20] The trial judge first turned to the presumptions. He held that the presumption of resulting trust did not apply; rather, the presumption of advancement applied so that Hughes was presumed to have given Paula the investments as gifts. He concluded that Michael had not rebutted that presumption.

[21] In determining that the presumption of advancement applied and not the presumption of resulting trust, the trial judge considered the closeness of the father-daughter relationship as attested to by several witnesses and concluded that he cannot envisage a stronger set of circumstances to justify applying the presumption of advancement.

[22] As the presumption of advancement was held to apply, the burden was on Michael to rebut that presumption. In deciding that Michael had failed to meet that burden, the trial judge reviewed Michael s evidence about the close relationship he had with his father-in-law; Michael s evidence that his father-in-law told him he intended to leave him $350,000; Hughes s letters to the financial institutions indicating that the transfers were for probate purposes only; Hughes s continued management of the funds post-transfer; and the contents of Hughes s last will. While the trial judge accepted that Michael and Hughes had a close friendship, he rejected Michael s evidence that his father-in-law said he intended Michael to have $350,000. Further, he concluded that the disclaimer letters, Hughes s ongoing management of the fund, and his bequest to Tammie were not inconsistent with Hughes s intention to give his investments to Paula. On this basis, the trial judge said:

I am satisfied that the evidence fails to rebut the presumption of advancement from the deceased to his daughter, and that this action in that respect must fail. In fact, I have no reservation in going farther and concluding that the evidence clearly demonstrates the intention on the part of Edwin Hughes to transfer the beneficial ownership of those assets held in joint ownership to [Paula].

[23] Michael argues that the trial judge erred in two respects. First, he argues that Paula was not entitled to the benefit of the presumption because such a presumption is only available to a dependent minor child and not to an independent adult child or, alternatively, that Michael was equally entitled to the presumption as Hughes s favoured son-in-law. Second, he argues that the trial judge ignored evidence that rebutted any presumption of gift. I deal first with the issue of actual intention.

D. Analysis

1. The Evidence of Actual Intention

[24] Hughes s intention to gift the investments to Paula was confirmed by his only other daughter who testified at trial. Thus, this is not a case where the transfer is challenged by a sibling, but instead it is challenged by a son-in-law, a person who, in any event, does not traditionally benefit from the presumption of advancement.

[25] Before Hughes made Michael a joint residuary beneficiary of his will, Hughes signed documents with various financial institutions transferring his investments into joint ownership with Paula. It may be, in modern times, that such documents support an intention to make a gift of both legal and beneficial title, particularly where the documents specifically acknowledge a right of survivorship and are executed by both joint owners cognizant of the implications of the legal effect of the documents. However, while in this case at least some documents specifically confirmed that Paula was to have a survivorship interest, not all the relevant records were available at trial. In any event, the trial judge was entitled to consider all the circumstances surrounding the transfers.

[26] When determining actual intention, the court should consider such documents and other factors including the quantum of the transfer and its timing; the statements and conduct of the transferor referable to the transfer; the state of the relationship between the transferor and the transferee; any pattern of conduct on the part of the transferor relevant to the issue; the exclusion of any obvious recipient from the transfer; whether the transfer was improvident; and any other circumstance relevant to the transferor s actual intention.

[27] In considering the circumstances of the transfer in this case, the trial judge found the evidence to be more than ample to support Hughes s actual intention to give the investments to Paula at the time of transfer.

[28] As I have indicated, the transfers totalled $949,647.87 and comprised the bulk of Hughes s estate. Hughes effected the transfers over several years and after he had named Paula as the sole beneficiary of his RRSP and insurance policy. Only after he transferred the investments did Hughes amend his will to name Michael as a residuary beneficiary. That change to his will was made when Hughes knew that the investments were excluded from his estate and his only remaining assets were personal property and a few thousand dollars kept in his safe.

[29] Proximate to the transfer, Hughes made statements and took actions consistent with an intention to give Paula beneficial ownership in the investments. Hughes was familiar with the concepts of joint ownership as evidenced by his earlier acquisition of investments he had held in joint ownership with his wife. In transferring his investments to joint ownership with Paula, Hughes sought and took legal, investment, and accounting advice including advice that such transfers would reduce probate taxes and would facilitate his after-death dispositions. When Hughes subsequently changed his will, he specifically told his lawyer that he had already transferred his investments into joint ownership with Paula and that they would devolve outside his estate. Hughes also knew that Paula withdrew money from the funds for her own personal use. His statements and conduct surrounding the transfer support an actual intention to give Paula a beneficial interest in the investments.

[30] The transfers were consistent with the state of Hughes s relationship with Paula and his pattern of conduct towards her. He was close to Paula. During his lifetime he assisted her financially, visited her regularly, and lived with her and her family during the months before his death. Hughes expressed concern for Paula s financial welfare after his death. While Paula s sisters were excluded from the gifts, there were reasons for that exclusion including their financial self-sufficiency.

[31] In contrast, it is not surprising that Michael received none of the investments. According to four witnesses, while Hughes repeatedly expressed concern for Paula indicating that he intended to take care of her, he also said that the system would look after Michael. Michael s exclusion from the investments apparently did not surprise even Michael who did not raise any question about the issue until three years after Hughes s death. It follows that the state of Hughes s relationship with Michael was not such that Michael expected to receive an interest in the investments.

[32] This evidence accepted by the trial judge was clearly capable of supporting the trial judge s finding that Hughes actually intended to give Paula a beneficial interest. As well as accepting the evidence that Hughes intended to give Paula the investments, the trial judge rejected Michael s evidence to the contrary saying:

> The plaintiff testified that Mr. Hughes told him shortly after having attended at [his lawyer s] office to give instructions for his will, that he intended to leave him about $350,000.00, because he was indebted to him for originally referring him to [his first financial adviser]. I find this evidence very difficult to accept, since it was apparently only because of the examination for discovery that the plaintiff s status as a residual legatee was discovered. ... It is somewhat remarkable that the plaintiff is now able to recall that conversation for the purposes of this trial, but was unable to remember it or did not think it significant until informed of the contents of the will, after the discovery of his wife. Furthermore, it is highly unlikely that Mr. Hughes would have failed to indicate his intention to [his lawyer] that he intended the plaintiff to receive about $350,000.00 from his estate after his death. Accordingly, I reject the Plaintiff s evidence on this issue. Furthermore, I find his evidence on this very important issue so incredible that I must reject any of his evidence that is inconsistent with the evidence of any other witness (para. 41).

[33] The improbability of Michael s evidence about Hughes s intention is confirmed by Hughes s familiarity with the concept of joint ownership as an estate planning tool. Hughes knew that, as a result of these transfers, Paula would become an owner of the investments, just as the joint investments Hughes earlier held with his wife devolved to Hughes as her survivor. Hughes knew that on his death, the joint investments would similarly devolve to Paula, his survivor.

[34] The use of joint ownership as a tool of estate planning is to be contrasted with its use as a tool of convenience to permit a child to manage funds or to pay bills for an aged or infirm parent. That Hughes appreciated the distinction between a tool of estate planning and a tool of convenience is evident from the fact that Hughes s also gave Paula his power of attorney. That power of attorney gave Paula the authority needed to pay bills and give instructions with respect to the investments. With that power of attorney, joint ownership of the investments was unnecessary unless Hughes intended something more: to ensure the investments were given to Paula and to avoid probate fees, both entirely legitimate purposes.

[35] While Michael argues that the trial judge ignored or gave too little weight to certain evidence, the weight to be afforded a particular piece of evidence is a matter within a trial judge's discretion. An exercise of discretion is not to be overturned simply because an appellate court might have reached a different conclusion. Rather, an exercise of discretion is reviewed with deference and can only be reversed if there has been a wrongful exercise of discretion such as when a relevant consideration is ignored or given insufficient weight: See *Reza v. Canada*, , [1994] 2 S.C.R. 394 at 404-05; *Friends of Oldman River Society of Canada (Minister of Transport)*, , [1992] 1 S.C.R. 3 at 76-77; and *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561 at 588.

[36] As I explain below, I have concluded that that exacting standard of review is not met in this case. Michael argues that the trial judge gave insufficient weight to three pieces of evidence: first, Hughes s letters to the financial institutions; second, Hughes s continued control over the investments and; third, Hughes s bequest of a car to Tammie, a bequest which could only have been satisfied had their been money in the estate with which to buy a car.

(i) *The Letters*

[37] When Hughes learned that transferring assets into joint ownership with his daughter would trigger capital gains consequences, on Shawn s advice, he signed letters prepared by Shawn directed to the financial institutions. Those letters said that the transfers were made for probate purposes and, accordingly, no changes should be made to the adjusted cost base of the investments because, he said: I am the 100% owner of the assets and the funds are not being gifted to Paula. Consistent with these letters, before his death, Hughes paid income tax on the monies earned by the investments, income tax that was at a higher rate than would have been the case had that income been attributed to Paula.

[38] Although these letters clearly could raise a question about Hughes s intention, the trial judge was satisfied on the evidence that Hughes still intended to gift the investments to Paula. Further, there was no evidence that Hughes, who had made the transfers with Paula s knowledge and consent, ever advised her of this communication or any other limitation or condition on the gifts.

[39] There was no evidence that Hughes intended to commit any illegal act by signing the letters prepared by his financial adviser. Indeed, the only evidence was that Hughes intended to defer capital gains taxes, which he was told he could legally do. There was no evidence that he intended to evade taxes. Indeed, after his death, Paula paid $180,000 to satisfy Hughes s tax liability. In these circumstances, to the extent the matter is relevant in a challenge to the transfer by the son-in-law, the trial judge was entitled to conclude that these letters were not inconsistent with an intention to give a joint interest in those assets to his daughter . Any improper attempt by Hughes to defer taxes is a matter between his estate and the tax department. It is not a matter that bears on Michael s claim against Paula.

(ii) *Control over the investments*

[40] After the transfers, Hughes and Paula agreed that Hughes would continue to manage the investments. Although Paula and Hughes agreed that Hughes would be the primary consumer of the money during his lifetime, Paula withdrew some money for her personal use before her father died. These agreements and understandings as to the control and use of the investments in the circumstances of this case are not surprising. While 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 Hughes s actual intention.

[41] Michael also argued that Hughes s continued control over the investments suggested that the transfers were, in substance, testamentary dispositions. Testamentary dispositions require compliance with the formalities for wills. See for example: *Purchase v. Pike Estate* (1991), 42 E.T.R. 75 (Nfld. S.C.) at p. 85. However, it has been accepted in recent years that a gift given in the transferor s lifetime by means of joint ownership is a gift given at the time it is placed into joint ownership and not a testamentary disposition. After the transfer into joint ownership, both Hughes and Paula held legal title to the funds. On the death of Hughes, his interest as joint owner was simply extinguished. See *Cho Ki Yau Trust, supra* at para. 28; Donovan W.M. Waters, Q.C., *Waters Law of Trusts in Canada,* 3rd ed. (Toronto: Thomson Carswell, 2005) at p. 401; A.H. Oosterhoff and E.E. Gillese, *Text, Commentary and Cases on Trusts*, 5th ed. (Scarborough: Carswell, 1998) at p. 373.

[42] In the result, Michael cannot succeed on this basis.

(iii) *Bequest to Tammie*

[43] In his last will, Hughes expressly stated, subject to Paula s discretion, that a car should be bought from the residue of his estate for Paula s daughter Tammie. Michael argues that this bequest shows that Hughes intended the investments to form part of his residue because, if they did not, there would not have been sufficient funds to satisfy the bequest.

[44] I agree with the trial judge s rejection of this argument. The bequest gave Paula sole discretion to decide whether Tammie received a car. Hughes knew that if Paula determined that Tammie should receive a car, and if the residue was insufficient for its stated purpose, Paula had sufficient funds from the investments to buy Tammie a car. Thus, it was unnecessary for Hughes to leave money in his estate for this purpose. The discretionary bequest to Tammie did not amount to evidence supporting an intention on Hughes s part that the investments would form part of the residue.

[45] Accordingly, on the evidence at trial, the trial judge was entitled to conclude that Hughes intended to gift his investments to his daughter. He made the transfers in writing, on separate occasions over several years, fully cognizant of the implications of joint title, and with the explicit intention of benefiting his daughter. As the trial judge said, the evidence clearly demonstrated Mr. Hughes s actual intention.

2. The Presumptions

[46] In this case, presumed intention was irrelevant. Presumed intention, which is presumed from the nature of the transaction, is only relevant when evidence of actual intention is evenly balanced, or when there is no evidence of actual intention. Hence there was ample evidence of actual intent and it was unnecessary for the trial judge to resort to the presumptions.

E. Disposition

[47] For the reasons given above, I would dismiss this appeal.

F. Costs

[48] The trial judge denied Michael costs out of the estate or from Paula. He did so because, on the issues raised in the divorce proceeding, success was divided; because the respondents made an offer to settle that exceeded the result; and because the judge found Michael s conduct to be less than candid. Although there appears to have been candour issues on the part of both Michael and Paula, I am satisfied, in the circumstances of this case, that the trial judge properly exercised his discretion in denying costs to both parties. I see no reason to interfere with that disposition.

[49] Accordingly, the appeal is dismissed. We have received and considered the parties written submissions on costs of the appeal. Those costs are awarded to the successful respondent, Paula Pecore, fixed in the amount of $17,000 inclusive of GST and disbursements.

Released:

Since Michael and Paula Pecore share the same surname, for ease of reference I refer to them by their first names.

The evidentiary value of such documents signed with financial institutions when setting up joint accounts was questioned in *Mailman Estate (Re)*, [1941] S.C.R. 368. The evidentiary value of such institutional documents is under consideration by this court in another case, *Saylor v. Brooks,* C41921 and C42850, reserved June 30, 2005, which is currently under reserve. See also *Cho Ki Yau Trust (Trustees of) v. Yau Estate* (1999) 29 E.T.R. (2d) 204 at p. 218 that, *prima facie,* a transfer of personalty to two or more persons creates joint ownership.

TRIAL DECISION:

This document: 2004 CanLII 5047 (ON S.C.)
Citation: *Pecore v. Pecore*, 2004 CanLII 5047 (ON S.C.)
Parallel citations: (2004), 48 R.F.L. (5th) 89
Date: *2004-02-20*
Docket: *F900-01*

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ONTARIO

B E T W E E N:	)	
	)	
MICHAEL PECORE	)	A. M. Robinson, for the Plaintiff

	)	
	)	
Plaintiff	)	
	)	
- and -	)	
	)	
	)	
PAULA PECORE and SHAWN PECORE, TAMMIE PECORE and DANA BOULANGER	)	Don C. Wallace, for the Defendants
	)	
Defendants	)	
	)	
	)	**HEARD:** December 2nd, to December 5th, 2003

Norman M. Karam, S.C.J.

1. This is an application brought by the plaintiff Michael Pecore seeking spousal support and an unequal distribution of matrimonial property from the defendant Paula Pecore, his former spouse. In addition he claims a share in the estate of his deceased father-in-law, Edwin Hughes, who died on December 16, 1998, of which his former spouse is the sole executrix, an accounting of the assets received by her to date and other associated claims for relief.

2. The plaintiff was badly injured in a motor vehicle accident in 1976 at age 26, which rendered him a quadriplegic. In 1980, he married the defendant Paula Pecore, three years his senior, whom he had originally hired to provide nursing care for him. He subsequently adopted the two children from her first marriage, the defendants Shawn and Tammie Pecore, who were 12 and 10 at the time and who assumed his surname.

3. As the result of an action arising from the motor vehicle accident, he received a lump sum payment of $250,000 in 1979, as well as a disability annuity that he was still receiving by the date of trial. Some of the funds were used to make mortgage payments on a home in North Bay, Ontario that the plaintiff had purchased at the end of 1978. He had the home fitted with various conveniences designed for wheel-chair use and other alterations that permitted him to live more comfortably with his disability. Eventually, the residence was transferred into joint ownership with Paula in 1983. The money was also used to purchase a van that was fitted with a lift for his wheel chair. The funds were eventually used up, since the plaintiff was unemployable because of his disability and the defendant worked sporadically at part-time low-paying jobs, because of her care-giving responsibilities. She was a part-time school crossing-guard, did housekeeping and worked as a waitress for McDonald s Restaurant, for example. Prior to their separation, once the plaintiff was hospitalized in the fall of 1998, the only income that they received was the plaintiff s annuity, a Canada Pension disability pension, social assistance and any money that Paula could earn at the various jobs that she held.

4. During his marriage to Paula, the plaintiff developed a good relationship with his father-in-law, a retired miner, who resided in Timmins, Ontario for almost all of his life. Mr. Hughes had been re-married in the late 1970 s to his second wife, Dora Kenesky-Hughes. The evidence disclosed that he was very close to his daughter Paula and visited her, the plaintiff and their two children every two weeks or so, for two or three days, at North Bay. On those occasions he also visited his wife s sister, Anne Kenesky, while she was a chronic patient in a psychiatric hospital there. He spent almost every Christmas there as well. He had another daughter, Deborah Nenonen, who also lived in Timmins. She was neither a party to this action nor did she testify, and her relationship with her father was largely undefined by the evidence. He was estranged from his only other child, Leslie Graham, because of his re-marriage, until shortly before he died. When he faced serious health problems in 1997, she re-kindled their relationship. After that they visited together regularly until his death. The defendants called her as a witness.

5. The evidence disclosed that Mr. Hughes was apparently very careful with his money and as a result was able to accumulate a substantial estate over the years. The plaintiff, who was involved in the early 1980s in investing the remainder of the judgment or settlement that he had received, introduced his father-in-law to his financial advisor, Ted Thompson. Eventually, as the result of the management of his money, by the time that he died in 1999, Mr. Hughes had accumulated assets worth approximately 1.2 million dollars. These assets, which consisted of a life insurance policy and a Registered Retirement Income Fund (RRIF) left directly to Paula as the named beneficiary, in the combined amount of $277,167.68, are not at issue in these proceedings. There were mutual funds, bank accounts and income trusts held in joint tenancy with Paula that she received as the surviving joint owner, in the amount of $949,674.87, which are in issue. There were other assets, including undesignated cash in the amount of $4,548.85, undesignated items of personal property that have not been accounted for. Finally, there are items of personal property designated by specific bequest, within his last will, to the plaintiff and Paula jointly, that the plaintiff has not received.

6. Beginning in February of 1994, after his wife Dora had become seriously ill with Alzheimer s disease and was permanently institutionalized, Mr. Hughes began to transfer most of his assets, which were, for the most part, held either in bank accounts or in mutual funds, to himself and to Paula jointly, with a right of survivorship. The transfer of assets into joint ownership continued until shortly before his death. The evidence disclosed that he became very proficient in investing and dealing with money. He not only looked after his own investments but with the illnesses of his wife and sister-in-law he dealt with their assets as well.

7. Mr. Thompson testified that he and Mr. Hughes had a discussion in 1993, after the problems surfaced concerning the health of his wife, during which they discussed joint tenancy. Mr.Thompson testified that he advised Mr. Hughes that by placing his assets in joint ownership with Paula, with a right of survivorship, he could avoid the payment of probate fees and taxes and generally make after-death disposition less expensive and less cumbersome.

8. On July 16, 1993, according to Mr. Thompson, Mr. Hughes had already designated Paula as the sole beneficiary of money held in a R.R.I.F., in order to avoid probate and any consequent fees and taxes. He did the same thing for his life insurance policy. It is evident that where he could not designate a named beneficiary in that fashion, he transferred the particular asset to he and Paula jointly, with a right of survivorship. Once Dora was hospitalized in January of 1994, shortly thereafter, on February 21 of that year, he opened an account in the names of himself and Paula as joint owners.

9. It is apparent that, after a meeting with John Wipprecht, a chartered accountant, probably in the fall of 1996, Mr. Hughes became concerned that such transfers to Paula might be considered deemed dispositions by Revenue Canada, thereby triggering the immediate payment of capital gains taxes. Mr. Wipprecht testified that he told Mr. Hughes and Shawn that while transfers between himself and and his wife Dora were not taxable, being between spouses, transfers to his daghter Paula were taxable. At this point, there had already been transfers of his assets to himself and Paula jointly. He was advised that there could be capital gains taxes payable under those circumstances.

10. Subsequently therefore, as a result of that advice, and with the help of his grandson Shawn, by profession a financial advisor, he had letters sent to the various funds and banks, at which he had accounts that he held jointly with Paula, advising each that the change in ownership had been done for probate purposes only. By way of example, a letter to Canadian International Mutual Funds, dated October 13, 1996, stated: I am adding my daughter Paula Pecore as a joint tenant for probate purposes I have contacted my accountants at K.P.M.G for advice. K.P.M.G. has indicated that the ACB will remain at the original cost base since I am the 100% owner of the assets and the funds are not being gifted to Paula. Another letter dated January 17,1997 to the same organization, presumably relating to assets previously owned by he and his wife, stated: Please transfer all shares to the open account of Edwin Hughes and Paula Pecore for estate planning purposes. Since this is a transfer among spouses and Paula Pecore is merely there for probate purposes, the adjusted cost base of the funds should not change.

11. At his death he left a will dated January 16, 1998, which aside from various specific bequests left to the plaintiff, Paula and others, named the plaintiff and Paula as residual legatees and Paula as the sole executrix. In her capacity as sole executrix, she has elected not to probate the will. In fact, she apparently also failed to advise the plaintiff of his entitlement under the will as a legatee, a matter in dispute, but of little consequence, other than to reflect upon the rancour between the parties in this action.

12. After almost twenty years of living together, in November of 1998, as a result of various medical difficulties, Michael Pecore was institutionalized in a long-term care facility. Apparently, as a result of a joint decision made by various health professionals in consultation with his wife Paula, it was determined that she could no longer provide the level of care that he required. He testified that this decision was made against his will, although it is difficult to understand how he could be moved from his own home without his consent. At some point in and around this time, the parties appear to have separated for good, although Paula visited him in the facility and brought him home occasionally. In the spring of the same year, Edwin Hughes moved into their home with the plaintiff and his daughter, and remained there until his death.

13. The plaintiff stayed in the long-term care facility until 2001, when with the help of his present wife, who was employed there at the time, he moved out, to take up residence in her home, where he has remained. In November of 2002 he was divorced from Paula and re-married.

14. The plaintiff claims a 50% share of the deceased s estate, including the assets left to Paula in joint tenancy, as a residual legatee

under the will dated January 16, 1998. There is no dispute between the parties that he is a residual legatee along with Paula under that will, that the deceased was competent when he made the will and that the will in question is the last legal will of the deceased. There was a codicil made August 10, 1998 dealing with unrelated matters, but confirming the validity of the will of January 16, 1998.

15. The first issue, to be determined, is whether those assets that the deceased held jointly with Paula, with a right of survivorship, properly form part of the estate and therefore devolve under the terms of the will, instead of directly to her, as the surviving joint tenant. In addition, there is a claim for the specific bequests left to him by the deceased in his will. These consist of: a) My china cabinet and contents; b) My coin and stamp collection; and c) All articles of personal and household use or ornament belonging to me at my death. Shawn Pecore claims to have received the coin and stamp collections as a gift from his grandfather, shortly before his death.

16. The position taken by the plaintiff, is that based on the evidence of the deceased s intention and upon the equitable presumption of resulting trust, all of the assets, other than those specifically bequested to Paula must devolve under the terms of the will. The deceased was the beneficial owner of the assets held jointly with his daughter Paula, to which only he contributed, and upon which only he paid income tax. In that respect, it is argued that the only purpose in transferring the assets in question into joint ownership was to avoid the payment of probate and lawyers fees upon his death and to make any disposition after death less cumbersome.

17. The position taken by the defendants is that the deceased intended to make a gift of those assets held jointly with his daughter, with whom he was very close, and about whose future, in light of her impecuniosity, he was concerned. He employed the use of joint ownership with the right of survivorship to make the transfer easier and less expensive. According to several witnesses, he had voiced concern on numerous occasions about Paula s financial plight, as she got older. Aside from the defendants themselves, both his daughter Leslie and her husband Gary Graham, a friend Tom Laffin and, a friend of Paula s, Sandra Baskey testified that he had frequently indicated that he intended to take care of Paula, but that the system would look after the plaintiff. It is argued therefore that the evidence, together with the presumption of advancement to his daughter, dispels the plaintiff s argument.

18. In situations such as the present when the transferor, without consideration, voluntarily transfers property to himself and another, a presumption of resulting trust arises, which may be rebutted. In *Niles* v. *Lake*, [1947] S.C.R. 291, [1947] 2 D.L.R. 248 at 254-55 it was stated:

> 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 to give beneficially to the transferee.

19. However the presumption of resulting trust may be displaced by a presumption of advancement, where, as in this case, the transferee is the child of the donor. If applicable, the presumption then, is that the transferor intended to make a gift and the onus of disproving the presumption rests upon the person wishing to challenge the transfer by establishing upon a balance of probabilities that he had no such intention. The presumption of resulting trust will not arise where the recipient is the child or wife of the person who voluntarily transferred the property. In these cases, the presumption of resulting trust is displaced and there is a presumption that the donor intended to make a gift shifting the burden to the person challenging the transfer to prove that there was no such intent. See *Cole* v. *Cole*, [1943] 3 W.W.R. 532 at 551 (B.C.C.A.) aff d [1944] 2 D.L.R. 798 and *Lindenblatt* v. *Lindenblatt* (1975), 4 O.R. (2d) 534.

20. Pettit, at page163 of his text, expresses the law as recognizing that the special relationship will be treated as *prima facie* evidence that the person who paid the purchase money or transferred the property intended to make a gift to the person into whose name the property was transferred. See Philip Pettit, *Equity and the Law of Trusts*, 8th ed. (London: Butterworths, 1997); and also *Dagle* v. *Dagle Estate*, , (1990) 70 D.L.R. (4th) 201, leave to S.C.C. refused [1991] 1 S.C.R. viii.

21. Counsel for the plaintiff referred me to the decision of the Supreme Court of Canada in *Rathwell* v. *Rathwell*, [1978] 2 S.C.R. 436, (1978) 83 D.L.R. (3d) 289 at 304 in which Dickson, J. (as he was then) described the presumption of advancement as ceasing to any longer embody any credible inference of intention.

22. However, in light of the circumstances of this particular case, I adopt Cullity J. s comments in *Cho Ki Yau Trust (Trustees of)* v. *Yau Estate,* [1999] O.J. No. 3818, 29 E.T.R. (2d) 204 at 216 in which the Court distinguished the *Rathwell* decision:

> I believe it would be a mistake to extrapolate the treatment of the equitable presumptions in *Rathwell* out of their matrimonial property context to other situations including those involving the acquisition, or transfer, of property between strangers and between parents and their children. The trend of the authorities since *Rathwell* is consistent with this view.

23. Waters reached a similar conclusion, that while there is some question as to the significance of the presumption of advancement in a matrimonial situation it appears that the presumption has been left untouched as for children (D.W.M. Waters, *Law of Trusts in Canada*, 2d ed., (Toronto: Carswell, 1984) at 314-15).

24. The first issue to be determined therefore is whether there exists a presumption of advancement in this case between Edwin

Hughes and his daughter Paula. In determining whether there does in fact exist a presumption of advancement in particular circumstances, the Court in *Dredger* v. *Dredger*, □ , [1994] 10 W.W.R. 293, 5 E.T.R. (2d) 250 (Man. C.A.) had this to say, at paragraph 31: The strength of the presumption whether it be a presumption of advancement or a presumption of resulting trust, will vary greatly from case to case. Since the presumption of advancement is based upon a parental obligation, its force will alter depending upon the circumstances of the child. And later the Court stated: The presumption does no more than provide a starting point to determine upon whom the burden of rebutting a presumption falls.

25. For that purpose, it is necessary to examine the relationship between them, particularly since at the relevant time Paula was an adult, married, with her own family. The evidence of the various witnesses who knew them, saw them interact and who gave evidence on this issue, and indeed there was no evidence to the contrary, was that their relationship was very strong. Certainly, of his three children, she was the closest and most trusted. There was little evidence of his relationship with his daughter Deborah since she was not a party to this proceeding, and did not appear to dispute or support Paula s entitlement. He was estranged from his daughter Leslie throughout his marriage to Dora and it was only during the last 2 years of his life that they reconciled. She appeared as a witness for the defendants and her testimony regarding Paula s relationship to her father, echoed by various other witnesses, was that it was very strong and that he made statements indicating a concern about Paula s welfare after his death. This evidence was not objected to, and although it is hearsay evidence, I use it only as an indication of his state of mind during the relevant times.

26. Over the years, as earlier indicated, Mr. Hughes visited regularly and often with Paula and her family, including the plaintiff, from his home in Timmins, after she moved to North Bay. He selected her to be his sole executrix and granted her the power of attorney over his estate after his wife became ill. He chose to move in with her and the plaintiff in the last year of his life, shortly before the plaintiff was institutionalized, and after he became ill and sold his own home. As the years passed, he also relied on her son, his grandson Shawn, to advise him and to help him with his investments. It is apparent from the evidence that he did not require Shawn s assistance to manage his affairs but chose to do so. He was quite capable of doing it himself. Shawn attended the meeting with his accountants described by Mr. Wipprecht, Shawn communicated with the various banks and funds as a result of that meeting, and it was Shawn and Paula who went with him to have his last will prepared.

27. It is also apparent from the evidence that the plaintiff and Paula barely eked out an existence for themselves through social assistance and the disability pension that the plaintiff received. She held only various menial and part-time jobs over the years. One can understand her father s concern for her well being, described by the various witnesses to whom I have earlier referred. The evidence indicated that he assisted her and the plaintiff financially by helping them to pay for the second van in 1993. He also provided assistance to Shawn when he was attending university. The plaintiff testified that his father-in-law had the windows in their house replaced, bought them a washer and dryer, had their driveway re-done with lockstone, had the walls in a walkway supported and covered in, and one must expect provided other assistance because of the disparity in their financial positions. Paula was dependant upon her father and there is little question that he felt a responsibility for Paula and her family and helped them often. Many of the witnesses, including the plaintiff, indicated that he often expressed concern for Paula s future lack of financial security, as she got older, comparing her to her sisters who had regular jobs with pensions.

28. In light of the relationship between Paula and her father, I cannot envisage a stronger set of circumstances to justify applying the presumption of advancement.

29. The presumption of advancement can be rebutted. That is, the evidentiary presumption can be rebutted by evidence that is written or parol, direct or circumstantial.

30. The standard of evidence required by the person attacking the transfer of what is presumed to be an advance is to prove within a reasonable probability that there was no gift. Where the legal and beneficial rights in the property are indicated in writing it would take very clear, cogent and convincing evidence of intention to cut down the interest of apparent, expressed intent (*Ingersoll* v. *Nettleton*, [1956] O.W.N. 738 at 741).

31. In that latter respect, there is of course the fact that the transfers into joint ownership occurred often and over a period of several years before he died. They were of course in writing and effected only with the formality associated with the transfer of investments required by financial institutions. It is very difficult to believe that he was not familiar with the legal implications of such a transfer in the event of his death. William Brunton who prepared his final will and codicil thought that he did. This is particularly so when one considers that over the same time period he had to deal with the assets of his wife and her sister, during their sickness and death.

32. In attempting to determine his intention in transferring assets into joint tenancy, it is necessary to examine his dealings with his estate over the years leading up to his death. In that respect, after his wife became infirm, he named only Paula as the sole beneficiary of his insurance policy and of his registered retirement savings plan. He also named her as his sole executrix, and as the only holder of his power of attorney. It is significant that he did not include any of his other children or the plaintiff in the exercise of those responsibilities except to name her son Shawn, as her alternate. I am satisfied that this was the result of the strong relationship that he shared with Paula, who clearly was the person, other than his wife, that he was closest to and most concerned about.

33. A number of his earlier wills were introduced as exhibits. The first of these wills is dated May 17, 1988, about ten years before his death and apparently while his wife was still in good health. This will was made in Timmins, Ontario, where he was residing at the time. He named Dora as his executrix and Paula as the spare executrix. Although his wife was his residual legatee, his daughters Paula and Debra were named as the residual legatees in the event that his wife were to predecease him. There was no mention made of the plaintiff.

34. Subsequently, he made a new will, dated February 28, 1994, also at the City of Timmins, where he continued to reside. At this point in time, his wife had apparently begun to suffer from Alzheimer s disease. He appointed his daughter Paula as the sole executrix of this will and his grandson Shawn, as his spare executor. He named his two daughters Paula and Debra as the residual legatees. Again there was no reference made in this document to the plaintiff.

35. His next will was made May 5, 1994. He once again appointed his daughter Paula as the sole executrix to the will and his grandson Shawn as the spare executor. He made a number of specific bequests to various members of his family including Paula, her children and another grandson. He left the residue of his estate to his daughters, Paula and Debra. Again, he made no mention of the plaintiff.

36. His final will was made in North Bay on January 16, 1998, after he had completed transferring the bulk of his assets to Paula in joint tenancy. Once again Paula was named as his sole executrix, Shawn as his spare executor and there were a number of specific bequests to grandchildren. For the first time, the plaintiff, together with Paula, was named as a legatee of certain specific bequests, to which I have already referred. In addition, the plaintiff, along with Paula, was named as a residual legatee.

37. Finally, the deceased had a codicil prepared at North Bay, on August 10, 1998, where he was living by that time, providing specific registered education plans for certain of his grandchildren. The codicil also confirmed the contents of his will of January 16, 1998. Mr. Brunton, who prepared both of those documents, testified that Mr. Hughes made no specific reference to the assets held in joint tenancy but appeared to be fully aware of the effects of that designation and of the extent of his assets. He advised Mr. Brunton that he had designated his daughter as his beneficiary in certain cases and had transferred certain assets into joint tenancy. Mr. Brunton testified: I asked him about such things as registered retirement savings plans, R.R.I.F.s, registered pension plans, life insurance, and in each case satisfied myself that they were not items which would pass as the result of a will and so that they needn t be included in the will. There was no discussion about investments or bank accounts forming part of the residue nor was there any indication of an intention to leave the plaintiff any interest in the various investments held in joint ownership with Paula.

38. It was argued that the deceased also had a very close relationship with the plaintiff, and that therefore this relationship explains why the plaintiff was designated as a residual legatee in the will of January 16, 1998. I find no evidence to support such a conclusion. It is apparent that the two were good friends. Paula stated in her discovery that her father treated the plaintiff as a son. This would not be unusual considering that the plaintiff was his favourite daughter s husband. There was no evidence of anything occurring between he and the plaintiff of consequence to change the attitude that prevailed throughout his earlier wills. The fact that he spent the last year of his life living at their home is hardly significant from the plaintiff s perspective, since he did so 7 or 8 months after making the will, and the plaintiff moved out shortly after he had moved in. It is far more significant that he moved in with his favourite child.

39. There of course is the matter of the letters to the various banks and funds disclaiming the transfer of beneficial ownership. There is little question from the testimony of several of the witnesses who gave evidence in this Court that Mr. Hughes watched his investments very carefully. In fact, it is apparent from the evidence that he was pre-occupied with the management and control of his assets. I do not find his disclaimers inconsistent with an intention to give a joint interest in those assets to his daughter. From his perspective, if he were able to do so, he would attempt whatever was necessary to avoid paying capital gains taxes. In that respect, it appears obvious that his intention in sending out the letters, was simply to avoid triggering an immediate deemed disposition of the assets in question, and therefore avoid capital gains taxes which would then have reduced the total value of his estate.

40. It is apparent that Mr. Hughes did not include reference to the plaintiff in any capacity, in any of his earlier wills, or in other documents of significance. Similarly, over the years, while he involved both Paula and Shawn very much in his affairs and relied upon Shawn for financial advice, he made no effort to rely upon or involve the plaintiff. If the history of his estate planning and the management of the affairs of his wife and sister-in-law are to have any significance, then I must assume that he included the plaintiff as a residual legatee without intending to leave him any substantial amount of his estate. In fact, the plaintiff, who testified that he only found out about the contents of the will at the examination for discovery of Paula in the Family Law part of this action, obviously did not expect to be included, because he waited for 3 years after Mr. Hughes death to raise the issue.

41. The plaintiff testified that Mr. Hughes told him shortly after having attended at Mr. Brunton s office to give instructions for his will, that he intended to leave him about $350,000.00, because he was indebted to him for originally referring him to Mr. Thompson. I find this evidence very difficult to accept, since it was apparently only because of the examination for discovery that the plaintiff s status as a residual legatee was discovered. This was after he had already commenced this action under the *Family Law Act* for spousal support, and a division of matrimonial assets. It is somewhat remarkable that the plaintiff is now able to recall that conversation for the purposes of this trial, but was unable to remember it or did not think it significant until informed of the contents of the will, after the discovery of his wife. Furthermore, it is highly unlikely that Mr. Hughes would have failed to indicate his intention to Mr. Brunton that he intended the plaintiff to receive about $350,000.00 from his estate after his death. Accordingly, I reject the Plaintiff s evidence on this issue. Furthermore, I find his evidence on this very important issue so incredible that I must reject any of his evidence that is inconsistent with the evidence of any other witness.

42. Another aspect of Mr. Hughes final will that it is argued demonstrates that he must have assumed that his jointly-held assets would devolve through his will, is the bequest of an automobile to his granddaughter Tammie Pecore. Absent the jointly-held assets there was

insufficient money in the estate to satisfy this bequest. Specifically, he left his granddaughter a new automobile (the cost of same to be determined by my Trustees in their sole and absolute discretion) .for her own use absolutely. Although this certainly gives rise for concern, I am satisfied that he did so, knowing that Paula would have enough money of her own, to make up any deficiency that existed in the estate. Firstly, he left the purchase of the vehicle squarely within the absolute discretion of Paula, his executrix. Secondly, an independent witness Tommy Laffin corroborated Paula s testimony that the deceased was unhappy with his granddaughter s lifestyle, which would explain why he would frame the bequest the way that he did, leaving control of the purchase to Paula.

43. Including the plaintiff within his final will as a residual legatee, in my view, is entirely consistent with an intention to leave to him only those residual assets of a personal nature and without significant value. Mr. Brunton testified that wills almost always contain a residual beneficiary clause, simply to ensure that any unforeseen and less significant assets will be dealt with. He also stated that in his opinion Mr. Hughes appeared to be quite competent and fully understood the instructions that he provided at the time. I am of the view that if his intention was to have his jointly held assets devolve through the estate, they were of such magnitude that he would have at least discussed that matter with his solicitor, since they constituted a substantial proportion of what he owned.

44. I am satisfied that the evidence fails to rebut the presumption of advancement from the deceased to his daughter, and that this action in that respect must fail. In fact, I have no reservation in going farther and concluding that the evidence clearly demonstrates the intention on the part of Edwin Hughes to transfer the beneficial ownership of those assets held in joint ownership to her, although continuing to manage and control them on a day-to-day basis. There is no question that he did so, instead of waiting to make a bequest of those assets to her through his estate, in order to avoid the payment of taxes and expenses related to deemed dispositions and probate. Furthermore, with that intention in mind, it is understandable that Mr. Hughes would continue to receive the income from the investments and would pay the income taxes payable upon that income, aside from the fact that Paula was certainly in no financial position to contribute.

45. There is also the matter of the specific bequests made to the plaintiff and Paula. Both of the defendants Paula and her son Shawn testified that the deceased changed his mind prior to his death, after making his will, and gave the stamp and coin collections to Shawn, instead of to the plaintiff and Paula as provided in his will. There was no other evidence on this issue. In light of the behaviour of the two defendants in failing to disclose the special bequests contained in the will to the plaintiff, I have serious reservations about their credibility on this issue.

46. In addition, there was simply no evidence to corroborate the evidence of Shawn Pecore that his grandfather gave him his stamp and coin collections prior to his death, as required by s. 13 of the Ontario *Evidence Act*, . I therefore reject his claim to those items. Accordingly, since the deceased left the collections and other specific bequests to the plaintiff and Paula jointly, they are entitled to those items specifically bequested to them. Unfortunately no evidence as to their value or actual whereabouts was provided. If demanded, I am ordering the defendants Paula and Shawn Pecore to produce them forthwith. Failing their production or for any other reason, the plaintiff may bring this issue back before me, on four days notice. Similarly, should an accounting be necessary with respect to the undesignated cash in the estate, that issue as well may be made returnable on four days notice.

47. It now becomes necessary to deal with those issues brought under the *Family Law Act*.

48. The matrimonial home was sold pursuant to a Court order on May 15, 2002. The balance due on closing was $149,689.20. After payment of a loan of $8554.73 made from Paula to the plaintiff, he was paid $60,196.44, being one-half of the net proceeds. The balance of the proceeds, being Paula s share were subsequently ordered retained in trust subject to the monthly payment to her of $2,000.00 from August 1, 2002 until January 1, 2003 and the payment of legal fees of $25,000.00 to her legal counsel. This order was subsequently extended by order dated September 19, 2003. However no evidence was provided to indicate how much was paid out or what remains in trust at the time of trial. It appears clear that those funds belong to the defendant Paula Pecore.

49. While the plaintiff was institutionalized and after the matrimonial home was vacated, Paula disposed of some of the contents, retained some, claimed to put others in storage and delivered some of them to the plaintiff. There was no evidence as to the respective values of the contents or even their whereabouts. As a matter of practicality, I will therefore make no order in that regard.

50. The outstanding issue is the claim for spousal support by the plaintiff. I have carefully considered their respective financial statements. While it is clear that the plaintiff cannot earn an income because of his disability, it is also evident that Paula could do little more than maintain a small part-time job, which she has been doing for her son. I refer to this not only because of her age and fragile health but because of her lack of job-training. During their marriage it is apparent that in spite of their impecuniosity she was only able to hold down unskilled, poorly paid positions. She spent most of her time looking after the plaintiff, who required extensive personal care. However this was a fairly lengthy marriage, the plaintiff is in need and the defendant, because of her wealth, is able to pay.

51. Paula s investment income does not provide a realistic indication of the return that she should earn on the assets which she received after the death of her father. Some of the assets have been given to Shawn, some appear to be unaccounted for, and generally there appears to be an attempt to hide the income-generating potential of that money. In the absence of evidence to the contrary, I find that based on a value of capital remaining of approximately $700,000, she should earn an annual return of $35,000.00, if those assets are

properly invested. Under the circumstances, therefore, I will attribute annual income to her of $35,000.00. Based upon that amount, I am therefore going to order her to pay to the plaintiff $1,000.00 per month, for his support, beginning January 1, 2002, a reasonable period after the commencement of this action. There shall be no interest payable upon the back-dated support.

52. The matters earlier referred to, and the matter of costs may be brought back on four days notice.

Norman M. Karam
Superior Court of Justice

Released: February 20, 2004

COURT FILE NO.: F900-01

DATE: 2004/02/20

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

MICHAEL PECORE

Plaintiff

- **and**

PAULA PECORE and SHAWN PECORE, TAMMIE PECORE and DANA BOULANGER

Defendants

REASONS FOR JUDGMENT

The Honourable Mr. Justice Norman M. Karam

Released: February 20, 2004