LEGAL BUSINESS REPORT | ALPERT LAW FIRM
THE TAX LAW PROFESSIONALS
1 St. Clair Ave. East, Suite 900 Toronto, Canada M4T 2V7 Tel: 416-923-0809 Fax: 416-923-1549 www.alpertlawfirm.ca

JOINT TENANCY CONSIDERATIONS IN ESTATE PLANNING

This issue of the Legal Business Report provides current information to the clients of Alpert Law Firm regarding the use of joint tenancy ownership as an estate planning technique. Alpert Law Firm is experienced in providing legal services to its clients in tax and estate planning matters, tax dispute resolution, tax litigation, corporate-commercial transactions and estate administration.

A. ESTATE ADMINISTRATION TAX IN ONTARIO

When a will is probated in Ontario, pursuant to the *Estate Administration Tax Act,* a tax or "probate fee" is levied on the value of any assets that are subject to the will. These "probate fees" are imposed in addition to any income tax arising pursuant to the *Income Tax Act* (the "Act") and any other applicable taxes. Any assets that flow through a probated will are taxed at $5 per $1,000 on the first $50,000 worth of assets and $15 per $1,000 thereafter. As an example, a probated estate worth $10 million would be liable to remit approximately $150,000 of Estate Administration Tax.

B. JOINT TENANCY OWNERSHIP

1. In common law jurisdictions in Canada, joint tenancy is a form of co-ownership with a right of survivorship. When a joint tenant dies, the interest of the deceased passes automatically and immediately to any surviving joint tenants by operation of law, enlarging those interests. Where there are only two joint tenants, upon the death of one, complete title will vest in the lone survivor. Property held in joint tenancy need not go through probate until the death of the last remaining joint tenant.

2. Adding another individual (usually a family member) to title as a joint tenant is a popular strategy to minimize probate fees. The right of survivorship allows probate fees to be deferred until the death of the last joint tenant, and the process of changing title is relatively straightforward and inexpensive.

3. When implemented properly, holding property in joint tenancy can reduce Estate Administration Tax, particularly in the case where the joint tenants are spouses. However, there are some drawbacks associated with transferring title into joint tenancy, and in some cases the use of other estate planning techniques may be more appropriate.

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C. JOINT TENANCY CONSIDERATIONS

There are both tax and non-tax considerations when changing the ownership of a property into joint tenancy ownership.

I. TAX CONSIDERATIONS

1. When adding another individual to the title of a property as a joint tenant, it is important to determine whether legal or beneficial ownership (or both) has been transferred as a result, since this affects the tax treatment of the transaction. Beneficial ownership generally exists where a person has a right to use and benefit from a property and also has some responsibility to maintain the property. Legal ownership, in contrast, exists simply when title is held in a person's name.

2. According to the Canada Revenue Agency (the "CRA") whether a person has beneficial ownership is a determination of fact based on certain indicia, including whether the person has (i) the right to possession, (ii) the right to collect rents, (iii) the right to call for mortgaging of the property, (iv) the right to transfer title by sale or by will, (v) the obligation to repair, (vi) the obligation to pay property taxes and (vii) other relevant rights and obligations. Not all factors need to be present to ground a finding of beneficial ownership. A written agreement specifying a type of ownership will not in and of itself be determinative, although coupled with the presence or absence of certain of the above-mentioned indicia, it may form a portion of the evidence that indicates beneficial ownership.

3. The CRA has indicated that a change in legal ownership without a change in beneficial ownership may not have the effect of reducing probate fees; since the beneficial interest remains with the original title-holder, the value of the beneficial interest will have to be added to the value of the estate upon probate. On the other hand, a change in beneficial ownership resulting from a transfer of property may reduce the liability for probate fees, but may also accelerate the payment of capital gains tax arising from a disposition of one-half of the property by the original title-holder.

4. Generally, a non-arm's length transfer of the beneficial ownership of a property will trigger immediate tax consequences since it is deemed to take place at fair market value pursuant to the provisions of section 69 of the Act. It is the CRA's position that a change in beneficial ownership will cause a disposition of one-half of the property by the original title-holder, with a resulting capital gain (or loss), unless there is a tax-free

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transfer to a spouse or a spousal trust or alternatively through the application of the corporate roll-over rules.

5. Where an elderly parent grants a child joint ownership title of a property, this may result in a change of the beneficial ownership of one-half of the property, and any accrued capital gains, capital losses, recapture or terminal losses on one-half of the property will be crystallized at that time. As a result, the parent could become liable to pay tax on any gains or income arising in that taxation year.

6. In the event that a beneficial interest in a property is transferred to another person for no consideration, such a transfer is generally exempt from Ontario Land Transfer Tax; however, where the real estate property is encumbered by a mortgage then Ontario Land Transfer Tax will be eligible based on the outstanding amount of the mortgage at that time (refer to Ontario Tax Bulletin LTT10-2000).

II. NON TAX CONSIDERATIONS

1. Where a person is added to the title as a joint tenant, the first owner will lose some control over the property. The second owner will be entitled to any income and any future proceeds of disposition in proportion to his or her interest in the property. The property cannot be sold or mortgaged without the agreement of the new joint owner. The property will also become subject to any claims made by the new owner's creditors or family law claimants. In addition, if the second owner unexpectedly predeceases the first owner, the title to the property will revert back to the first owner thereby thwarting the intended purpose of having transferred the property into joint tenancy.

2. The following types of unilateral actions taken by either joint tenant will change the form of ownership from a joint tenancy to a tenancy in common: (i) selling or mortgaging either tenant's interest in the property; or (ii) executing a document which indicates a desire to sever the joint tenancy. Although a tenancy in common is still a form of co-ownership, it does not confer a right of survivorship so that upon the death of one tenant-in-common, that owner's interest in the property will be inherited by the heirs of the deceased's estate, rather than passing by survivorship to the other joint tenant.

3. Placing assets into joint tenancy free of consideration may create family disputes. When an individual gratuitously grants another person joint title to property and then passes away, it may be difficult to determine whether the transferor intended to make a gift to the second joint tenant or merely to place the property into the name of the

second joint tenant for ease of administration. For example, an adult child may have been added to a joint bank account simply to help an ailing parent manage finances with no intention that remaining funds be left solely to that child. Where a transferor places assets into joint tenancy with one child or beneficiary, and where other beneficiaries would have inherited the property if it had passed by will rather than by right of survivorship, the stage for estate litigation is set.

D. PROBATE PLANNING TECHNIQUES

1. Multiple Wills

The use of multiple wills can reduce probate fees by reducing the value of assets that pass through the estate. All assets which may be distributed only after obtaining probate are dealt with under a primary will. Other assets which may be distributed without probate are dealt with in a secondary will. If it is unclear whether or not an asset will require probate, it can be put into a will on its own so that it can be probated if necessary without affecting other assets. Upon the testator's death, only the primary will needs to be submitted to the Court, and probate fees are calculated based only upon the value of the assets passing to the Estate Trustee under the primary will.

2. Alter-Ego and Joint Partner Trusts

Living trusts provide another alternative method to avoid probate fees. A living trust, such as an alter-ego trust or a joint partner trust, allows a transferor to transfer assets to the trust on a tax-deferred basis. Property held by the trust need not go through probate. After the death of the transferor or the transferor's spouse (as the case may be) the beneficiaries named in the trust will be able to receive the income and capital of the trust without the necessity of obtaining probate.

E. RECENT CASE LAW

1. In two recent cases the Supreme Court of Canada clarified the analysis required to determine whether an individual named as a joint tenant has beneficial ownership or merely legal ownership. Case law regarding this issue relies on two legal presumptions, the presumption of resulting trust and the presumption of advancement.

2. A resulting trust arises when a party holds title to property but has received it without giving consideration for it or has received the title to the property as a fiduciary. The presumption of resulting trust operates so that where a gratuitous transfer occurs, the property is presumed to belong to the transferor, and the person who has received the property is under an obligation to return that property to the original title-holder. This presumption operates so that where a testator transfers property during his lifetime to a beneficiary, upon the testator's death, the property is presumed to belong to the testator and thus falls into the testator's estate. This presumption can be rebutted by sufficient evidence to the contrary.

3. The presumption of advancement is an exception to the presumption of a resulting trust. It stipulates that where a gratuitous transfer is made by a parent to a minor child, it should be presumed that a gift to the minor child was intended.

4. The Court emphasized that cases involving these presumptions must be decided primarily according to the specific facts of each case.

***Pecore v Pecore*, 2007 SCC 17**

1. In this Supreme Court of Canada case, the testator had placed the majority of his assets into joint accounts with his adult daughter prior to his death. The accounts, which the testator retained control over, had a right of survivorship. The testator's will did not mention the accounts, but left specific bequests for his daughter, her husband and their children. The residue of the estate was directed to be divided between the testator's daughter and her husband.

2. After the testator's death, the daughter and her husband divorced. The husband claimed that the amounts in the joint accounts should form part of the residue of the estate, which he was entitled to share in, rather than passing to the daughter alone through the right of survivorship.

3. The Supreme Court determined that both the presumption of resulting trust and the presumption of advancement remain applicable in certain situations, since they provide guidance to the courts when trying to determine a deceased testator's intentions and predictability to testators attempting to plan their affairs. Both presumptions must be rebutted on a balance of probabilities. The Court stated that the onus to rebut the presumption of resulting trust is on the potential recipient of the property. The Court further decided that the presumption of advancement, which can be used to rebut the presumption of resulting trust, is only applicable to minor children. However, the Court

remarked that although dependency of an adult child on a testator parent is not a sufficient basis to result in a presumption of advancement, such dependency may be used as evidence to rebut the presumption of resulting trust.

4. The Supreme Court overturned the traditional rule of evidence that barred evidence subsequent to the time of the transfer from being adduced to show the intention of the testator. The Court held that evidence of a testator's intention that arises subsequent to a transfer should not be automatically excluded if it is relevant to the intention of the testator at the time of the transfer. However, the trier of fact will assess the reliability of any subsequent evidence and determine the appropriate weight it should be given.

5. In this case, the daughter, as the potential recipient of the property, had the onus to rebut the presumption of resulting trust. Because she was not a minor she could not rely on the presumption of advancement to do this. However, the trial judge had determined that there was enough evidence to show that the testator had intended to make a gift of these accounts to his daughter alone. Therefore the Supreme Court relied on the trial judge's findings of fact, coupled with the correct application of the presumptions, to determine that the assets in the joint accounts had passed to the daughter through a right of survivorship and did not form part of the residue of the testator's estate.

***Madsen Estate v Saylor*, 2007 SCC 18**

1. The facts of this Supreme Court of Canada case were very similar to the *Pecore* case, above. The testator made one daughter a joint signatory on several bank and investment accounts which had a right of survivorship. At all times he maintained control of the accounts and paid taxes on income earned from the assets in the accounts. After the testator's death, the daughter administered the estate, but did not include the amounts in the joint accounts in the estate. Her two siblings commenced litigation against her to have the amounts included in the estate.

2. The Supreme Court determined that the presumption of resulting trust was relevant to these facts. The Court would therefore presume that the accounts remained the property of the testator and passed to the testator's estate unless evidence to the contrary was proved on a balance of probabilities. The presumption of advancement was not applicable because the daughter was not a minor child, and so the court would not presume that the accounts were intended as a gift from parent to child.

3. The Supreme Court found that, unlike in the *Pecore* case, there was not enough evidence that the testator intended the joint accounts to pass by right of survivorship rather than through his estate. Although the banking documents mentioned a right of survivorship, they did not indicate a clear intention on the part of the testator to make a gift of the funds in the accounts to the testator's daughter. None of the evidence on record indicated that the testator favoured the daughter who held joint title to the accounts over his other children. The Court held that this daughter merely had legal ownership, but not beneficial ownership of these accounts. The Court ordered the daughter to repay the money from these accounts into the estate to be distributed accordingly.

***Harrington v Harrington*, 2009 ONCA 39**

1. In this Ontario Court of Appeal case, the Court dealt with the amount of an equalization payment due from a husband to his wife on the breakdown of their 13-year marriage. During the marriage, the husband managed his father's financial affairs under a power of attorney until his father's death, which occurred shortly after the husband and wife had separated. As a result of the father's death, the husband and his sister became the beneficiaries of their father's estate.

2. During the marriage, the husband transferred approximately $500,000 out of a joint account that he had with his father and invested the funds aggressively in accounts in his own name. By the date of separation, the money had grown to $640,000. The husband testified that it was his understanding that he could use the interest earned from his father's money as his own but not the principal, and that the $500,000 principal amount was not "owned" by him within the meaning of subsection 4(2) of the *Family Law Act.* The wife took the position that the husband's father's funds had become the husband's property because of the manner in which he had managed the funds.

3. The Ontario Superior Court of Justice rejected the wife's argument and held that the manner in which the husband handled the funds did not alter their nature. In so holding, the Court effectively held that the presumption of resulting trust had not been rebutted. Accordingly, the Ontario Superior Court of Justice concluded that both the capital amount of $500,000 and the appreciated amount of approximately $140,000 must be excluded from the husband's net family property because they were held in trust at the time the parties had separated.

4. The wife appealed to the Ontario Court of Appeal, which partially allowed her appeal. The Ontario Court of Appeal held that the appreciated amount of $140,000, representing the increase in the amount of the funds, should be included in the calculation of the husband's net family property. The Ontario Court of Appeal followed the general rule established by the Supreme Court of Canada in *Pecore v. Pecore* that there is a presumption that an adult child holds funds in a joint account with his parent on a resulting trust, but that this presumption may be rebutted if the evidence establishes that the parent's intent was to make an outright gift to the adult child.

5. The Ontario Court of Appeal held that although it was never the father's intention to allow the husband to access the principal amount of $500,000, the same cannot be said of the income stream from the principal amount. The Ontario Court of Appeal based its conclusion on the fact that (i) the husband generated all of the increase in the investment accounts in his name only; (ii) while ordinarily the income or growth on trust funds would also be held in trust for the beneficiary, the evidence established that the husband was allowed to use the income for himself; and (iii) the husband declared the income as his own on his personal income tax return.

***Doucette v McInnes*, 2009 BCCA 393**

1. This British Columbia Court of Appeal case illustrates how evidence of a testator's intent will be interpreted differently when adult children of a testator do not know that property has been transferred to them before the testator's death. In this case, at the time of her death, the testator jointly held a number of guaranteed investment certificates ("GICs") with each of three of her children. However, the testator's children did not know that they were joint-holders of these GICs. The trial judge held that the presumption that these GICs were held under resulting trusts had not been rebutted on a balance of probabilities and so the GICs became part of the testator's estate, not the property of the children with whom they were jointly-held. This holding was appealed.

2. The trial judge gave five reasons for finding that the testator had not intended the GICs to be a gift to her children: (1) the testator's children did not contribute to the GICs, the testator received all income from them and paid all applicable taxes; (2) the testator's children were not aware of their joint-holdings; (3) when meeting with her lawyer to discuss her instructions for drawing up her will, the testator told her lawyer a value of her estate that included the value of the GICs; (4) it was likely a mistake that the testator invested in irredeemable GICs because she had always invested in redeemable GICs and her actions indicated that she believed the GICs were

redeemable; and (5) the banking documents, which included a right of survivorship, should be given little weight because they did not address beneficial ownership in the GICs.

3. The Court of Appeal overturned the trial judge's holding, and held that the testator had intended each GIC to be a gift to the child with which it was jointly-held. The Court of Appeal held that there was an unstated premise in the *Pecore* case that the adult child who jointly-held an asset with the testator had, at the very least, knowledge of being a joint-owner. Therefore, the Court of Appeal held that the fact that this was not the case should have permeated the entire analysis of determining the testator's intention, but it had not in the trial decision.

4. When the Court of Appeal considered the evidence relevant to the testator's intention, it found: (1) the chronology of events was key because (a) the testator purchased the joint GICs after she had executed a will that disinherited two of the children named on the GICs and (b) after the testator had reconciled with one of her children, she tried to rearrange the GICs to put some additional funds jointly in the name of that child but could not because they were irredeemable; (2) since the children did not know about the GICs, the fact that they did not contribute to them or pay taxes on them was neutral evidence; (3) evidence that the testator thought the GICs were redeemable could indicate that she wanted to make a gift of the GICs to her children upon her death but maintain control of her finances while alive, including rearranging to whom the GICs would be gifted; (4) since only the testator knew of the GICs, the banking documents were good evidence of the testator's intention because she is assumed to have read and understood them before signing them and they included a clause that on the death of a joint-owner, the surviving owner was entitled to the funds; and (5) the fact that the testator tried to redeem one of the GICs so that some of its funds could be put in a jointly-owned GIC under her name and another child for the express purpose of giving that child funds was direct evidence that the testator intended the GICs to be gifts to her children.

5. The Court of Appeal found that the evidence, when viewed in light of the fact that the testator's children had no knowledge of the joint-ownership of the GICs, was a strong indication that the testator fully-understood and intended that on her death the beneficial interest would fall to the child jointly-holding the GIC.

***Simcoff v Simcoff*, 2009 MBCA 80**

1. This Manitoba Court of Appeal case deals with the results of a transfer of title of a house from the sole name of the transferor to the names of both the transferor and her son. The application arose during the life of the transferor when her relationship with her son had deteriorated and she wanted to transfer the property back into her name alone. The Court of Appeal held that the transfer of one-half of the property to her son was a gift. Consequently, she could not unilaterally revoke the transfer.

2. The trial judge started his analysis with the presumption that the transferor intended a resulting trust, since it was a gratuitous transfer from parent to adult child. The transfer was found to be gratuitous even though the nominal amount of $1.00 was listed on the transfer of land as the consideration received in respect of the transfer, since it is required by law that an amount of consideration be stated on the transfer of land. The trial judge found that there was sufficient evidence to rebut the presumption of a resulting trust and found that the transferor had intended the transfer of one-half of the property be a gift to her son. Therefore, the mother and the son were each an owner of one-half of the property.

3. The Court of Appeal upheld the finding the transfer of one-half of the property was intended to be a gift. The evidence in support of this finding included: (1) the transferor claimed the transfer was done purely for income tax purposes but there was no evidence of any income tax benefit resulting from the transfer; (2) the transferor admitted that at the time of the transfer she knew what it meant for property to be put in joint names; (3) the conduct of the testator following the transfer supported a finding that she intended the property to ultimately devolve into the sole name of her son upon her death; and (4) the son was never cross-examined on his affidavit, which laid out evidence that supported his position that the transfer was intended as a gift.

***Mroz v Mroz*, 2015 ONCA 171**

1. This Ontario Court of Appeal decision indicates that even if the presumption of resulting trust is rebutted, property transferred as a gift may have to be dealt with by the transferee in accordance with a will. The testator transferred her house into the joint names of herself and her daughter. The testator's will stated the she left her share in the house to her daughter provided that within one year of the testator's death the daughter paid $70,000 to each her niece and nephew. Following the testator's death, the daughter sold the house but never made the payments to her niece and nephew.

2. The trial judge found that the testator had intended the transfer of the house into joint tenancy to be a gift (2014 ONSC 1030). The evidence that rebutted the presumption of a resulting trust included that the testator wanted to avoid probate fees and her lawyer's notes indicated that she wanted the house to ultimately go to her daughter.

3. The evidence given at trial by the testator's lawyer also indicated that the transfer was initially to make the testator and her daughter tenants in common but the testator requested they be joint tenants instead. Also, the testator's lawyer gave evidence that the testator instructed him to make the transfer of the house conditional upon the daughter paying $70,000 to each her niece and nephew.

4. The trial judge found that the testator had intended the transfer to be a gift but that the gift of the testator's half of the property was not entirely for the daughter's personal use. This gift was encumbered by the requirement that the daughter make the specified payments in the testator's will. Therefore, a trust was imposed over the property and the daughter's failure to make the payments to her niece and nephew was a breach of trust.

5. At trial, it was argued that the transfer and the conditions in the will created a "conundrum" because a joint tenancy includes a right of survivorship. Therefore, since the transfer was a gift, the daughter automatically became sole owner of house upon the death of her mother. The trial judge held that the joint tenancy and the conditional transfer in the will did not create a "conundrum" but was the result of poor drafting. The trial judge held that it was beyond dispute that the daughter had to make the payments to her niece and nephew out of the proceeds of the sale of the house.

6. The Court of Appeal dismissed the appeal brought by the testator's daughter. The testator's daughter argued that the trial judge erred in finding that the property was subject to a trust in favour of her niece and nephew in respect of the bequests to them under the will. Although the Court of Appeal upheld the finding that the testator's daughter was obliged to pay her niece and nephew the amount of their bequests under the will, the Court of Appeal arrived at this conclusion through different reasons than the trial judge.

7. The Court of Appeal held that the trial judge was correct in applying the presumption of resulting trust but that the trial judge erred in finding that the presumption had been rebutted. The Court of Appeal held that once the trial judge had found that the sale of the property after the testator's death was to the be the source of the funds for the bequests to the niece and nephew, the trial judge could not find that

the presumption that the property was held by the daughter on resulting trust had been rebutted.

8. The Court of Appeal went on to explain that a gift from parent to adult child includes the right of survivorship and is not testamentary but is *inter vivos*, so that it vests immediately at the time of transfer. However, the Court of Appeal noted that the findings of the trial judge were that the testator intended the daughter would sell the property after her death and use the proceeds to fulfill the bequests to her niece and nephew. According to the Court of Appeal, this finding made the disposition of the property testamentary in nature so that it was an error for the trial judge to find the transfer of the property was by way of gift and as a result that the presumption of trust had been rebutted. Therefore, the Court of Appeal found that the daughter held the property on resulting trust. Consequently, the property formed part of the testator's estate upon her death and the bequests to the niece and nephew were a first charge on the property.

***Sawdon Estate v Watch Tower Bible and Tract Society of Canada*, 2014 ONCA 101**

1. This decision of the Ontario Court of Appeal clarifies the approach for applying the presumption of resulting trust from *Pecore*. At the time of his death, the testator held several bank accounts, with a right of survivorship, in joint names with two of his five adult children. The testator had told the two children whose names were on the joint accounts that the funds in the accounts were to be equally distributed among all five of his children when he died. When the testator died, his residuary beneficiary, Watch Tower Bible and Tract Society of Canada ("Watch Tower"), claimed that the funds in the accounts formed part of the estate because it was presumed that they were held by the adult children on resulting trust and the evidence did not rebut that presumption.

2. At trial, the judge applied the test from *Pecore*. Since the accounts were transferred in the joint name of the testator and his adult children, the presumption of resulting trust applied. The trial judge found that this presumption had been rebutted on a balance of probabilities.

3. The trial judge found that the following evidence rebutted the presumption of resulting trust: (1) the testator transferred the accounts into joint names with a right of survivorship after receiving advice about the consequences of doing so; (2) the testator made an express decision on the banking documents to subject the accounts to a right of survivorship; (3) even though the funds in the accounts were solely used by the testator in his lifetime, he was told and he understood that the children named on the

accounts could use the funds; (4) putting the accounts into joint names with his children was not done to assist with managing his financial affairs because he had already given one of the children Power of Attorney for personal care and property before adding his name to the accounts; (5) the fact that the testator included all the interest income from the accounts on his tax returns during his lifetime was not surprising or determinative, since he was the only one who actually used the funds in the accounts; and (6) there was no expectation or intention of the testator that the funds in the accounts would form part of his estate.

4. The trial judge found that all five of the testator's children held an equal beneficial interest in the accounts because either: (1) the testator gifted the beneficial interest in the accounts to all five of his children and the two children named on the accounts were merely used to facilitate that transfer or (2) the testator had gifted the joint accounts to the two children named on them subject to an *inter vivos* trust that stipulated all five of the testator's children were to benefit from the funds equally. Watch Tower appealed the trial decision.

5. The Ontario Court of Appeal agreed with the overall result of the trial judge but it arrived at the conclusion that the testator's five children each had an equal beneficial interest in the accounts through a different analysis. The Court of Appeal held that the testator intended to gift legal title of the accounts to his two children when he added their names to the accounts. However, the Court held that the right of survivorship was held on trust by the two children named on the accounts for all five children in equal shares.

6. In clarifying the correct analysis, the Court of Appeal observed that the two alternate lines of reasoning used by the trial judge to arrive at the conclusion that all five children held a beneficial interest in the accounts were incompatible with one another; one cannot find that a gift of the right of survivorship has been made and, at the same time, find that the recipient holds it in trust for others.

7. The Court of Appeal remarked that some of the confusion may have been due to the fact that *Pecore* only addressed the possibilities of resulting trust and gift because the possibility of a trust did not arise on the facts of the case. Since the power of an owner to dispose of ownership rights by way of a trust is fundamental, the Court of Appeal held that *Pecore* could not be read as having taken away that right. Consequently, the presumption of resulting trust can be rebutted by evidence of a contrary intention of the testator, including the intention to transfer by way of gift or the intention to create a trust other than a resulting trust. Therefore, the decision clarifies that the ultimate goal of a court is to determine the testator's intention when making a

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transfer to an adult child but where that intention cannot be established from the evidence on a balance of probabilities, the presumption of resulting trust will prevail.

8. The Court of Appeal refused to entertain the Watch Tower's argument that the trust failed by virtue of being a secret trust because the issue was raised for the first time on appeal. However, the Court remarked that it thought the argument was doomed to fail.

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