

Resulting Trusts – the same, but different

Case Comment:

Jackson v Rosenberg, 2024 ONCA 875,

Supplementary Reasons given at 2025 ONCA 48

Joshua Laplante
Cohen Highley LLP



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Principles

- Rebuttable presumption of resulting trust
 - *Pecore v Pecore*, 2007 SCC 17
 - With a gratuitous transfer of property from one adult to another, regardless of relationship, the transferee holds the property in trust for the transferor (or their estate)
 - Evidence of an intention to gift will rebut the presumption



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Principles

- Gifts
 - *McNamee v McNamee*, 2011 ONCA 533
 1. Donor intended gift without expectation of compensation or remuneration
 2. Donee must accept the gift
 3. Delivery or transfer of subject property
 - Intention of the transferor alone that counts: *Andrade v Andrade*, 2016 ONCA 368



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Principles

- “No takebacks” rule
 - *Abdollahpour v. Banifatemi*, 2015 ONCA 834
 - Once a gift is given, it cannot be revoked or undone



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Facts - Background

- Mr. Jackson owned a house purchased partly using his inheritance from his late long-time partner
- Mr. Jackson became close with his late partner's grand-niece, Ms. Rosenberg; no other family
- In 2012, Mr. Jackson added Ms. Rosenberg to title as a joint tenant for the purposes of avoiding probate
- Ms. Rosenberg never lived in the property nor contributed to it with money or labour



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Facts - Background

- Poor legal advice was given to Mr. Jackson upon transfer – no explanation as to gifts vs. trusts, no recommendation to document his intentions, nor a was advice given as to whether Mr. Jackson could later change his mind
- Mr. Jackson's intentions were to gift the property to Ms. Rosenberg *after* he died; rather than adding a gift in his will, he saw the title change as a way to circumvent probate



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Facts - Dispute

- Mr. Jackson suffered a surprise when, in 2020, he was advised by Ms. Rosenberg's husband that they intended to sell the property out from under him
- Mr. Jackson unilaterally severed the joint tenancy to protect a one-half interest in the property
- Mr. Jackson brought an Application seeking a declaration that Ms. Rosenberg was holding her half-interest in the property in trust for him



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Application findings

Jackson v. Rosenberg, 2023 ONSC 4403, Charney J.:

1. No intention to gift the property during Mr. Jackson's **lifetime**
2. Ms. Rosenberg was holding 50% of the property on resulting trust for Mr. Jackson
3. Mr. Jackson only intended to gift the right of survivorship to Ms. Rosenberg, not *inter vivos* property rights
4. Ms. Rosenberg maintained her right to survivorship of 50% interest despite the 2020 severance of the joint tenancy



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Appellate position (2024 ONCA 875)

1. Ms. Rosenberg argued that the application judge erred in finding the transfer was limited to a right of survivorship without immediate property rights; argued full beneficial rights were gifted to her
2. Argued that once gifted, the right of survivorship could not be taken away from her by severing the joint tenancy



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The Court of Appeal

- Significant deference given to the application judge on factual findings
- Perhaps most importantly: finding that Mr. Jackson only intended to gift property rights after his death
- No intention to gift *inter vivos* property rights



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The Court of Appeal

- Application judge's factual conclusion led to legal conclusion: Mr. Jackson gifted the right of survivorship; all other property rights held in trust for Mr. Jackson by Ms. Rosenberg
- Court of Appeal considered whether this form of gift was supported in law



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The Court of Appeal

45. In *Pecore*, Rothstein J. recognized that a person could gratuitously place assets into a joint account with the intention of retaining exclusive control of the account until his or her death, at which time the transferee would take the balance through survivorship. He held that courts can give effect to this intention. The result is an *inter vivos* gift of the right of survivorship, even though the transferor has retained the right to deplete the account. The gift is of whatever remains in the account at the time of the transferor's death



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The Court of Appeal

- Court of Appeal upholds application judge's finding that the effect of the 2012 transfer was limited to gifting the right of survivorship
- Even though legal title was held by both parties as joint tenants, Ms. Rosenberg held all benefits except for the right of survivorship in trust for Mr. Jackson



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The Court of Appeal

- Ms. Rosenberg argued that, since Mr. Jackson gifted the right of survivorship, he cannot then sever the joint tenancy, thereby revoking the gift
- Court of Appeal rejected this argument for three reasons



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The Court of Appeal

1. Inherent to joint tenancies is a unilateral right to sever at any time
2. Right of survivorship is entirely contingent upon no severance of the joint tenancy
3. Nature of survivorship is what remains when the transferor dies – he or she is free to do as they please before death



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The Court of Appeal

- Application judge erred that right of survivorship could continue in absence of joint tenancy:

67. Before the 2020 transfer, Ms. Rosenberg held her interest in the joint tenancy in trust for Mr. Jackson, and she had a right of survivorship. As the joint tenancy was severed in the 2020 transfer, what Ms. Rosenberg continued to hold was an interest in a tenancy in common in trust for Mr. Jackson. No right of survivorship could attach to or flow from that interest.



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The Court of Appeal

Supplementary Reasons (2025 ONCA 48)

- Invited parties to make submissions on changes to application judge's Judgment given error regarding a survivorship attaching to a tenancy in common
- Varied Judgment accordingly



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The Court of Appeal

- Success for Mr. Jackson:
 1. Ms. Rosenberg holds her 50% share in resulting trust for Mr. Jackson; resulting trust means the trustee must return the property at the demand of the donor
 2. Right of survivorship revoked with severance the joint tenancy



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Hypothetical

- What if the evidence as to Mr. Jackson's intentions in 2012 was unclear – or if Mr. Jackson had predeceased Ms. Rosenberg?



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Key Takeaways

1. Right of survivorship alone *can* be gifted, but is inherently attached to a joint tenancy by its nature



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Key Takeaways

2. Importance of sound legal advice at the time of the transfer into joint tenancy
 - a. Explanation of implications of gifts and trusts, risks, effects on current estate planning
 - b. Consider other issues (e.g., will avoiding Estate Administration Tax trigger a greater Capital Gains tax?)



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Key Takeaways

3. Documenting the intentions of the transferor at the time of the transfer:
 - a. If a gift – execute deed of gift
 - b. If a trust – execute a trust agreement



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Key Takeaways

4. Maintain sound practices
 - a. Independent legal advice for donee
 - b. Obtaining accountant advice
 - c. Consider capacity, undue influence



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Joshua Laplante
Cohen Highley LLP
jlaplante@cohenhighley.com
226-476-0892



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