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**** HIGHLIGHTS ****

- * A Justice of the Alberta Court of Queen's Bench has upheld the transfer of a joint interest in a family farm, with right of survivorship, to one of 5 adult children. The transfer was without consideration. The Court concluded that the child had rebutted the presumption of resulting trust, and that when the transfer was signed the intention was that the quarter section would be transferred as part of an overall estate plan, with the intent that it would be a gift which was made to ensure the family farm remained intact for the next generation. The legal principles and the burden of proof with respect to rebutting the presumption of resulting trust are discussed in the context of farm land. [Editor's Note: The practice of transferring lands into the joint names of parents and children is relatively common. A signed Declaration of Intent to make a gift might avoid litigation and family disputes.]. (Midtdal v. Pohl, [CALN/2015-009](#), [\[2014\] A.J. No. 1173](#), Alberta Court of Queen's Bench)

**** NEW CASE LAW ****

Midtdal v. Pohl; [CALN/2015-009](#), Full text: [\[2014\] A.J. No. 1173](#); [2014 ABQB 646](#), Alberta Court of Queen's Bench, M.T. Moreau J., October 22, 2014.

Resulting Trusts -- Transfer of Family Farms to the Joint Names of Parents and Children
-- Evidence Relevant to Rebutting the Presumption of Resulting Trust for Farm Land.

James Gordon Midtdal ("Gordon") and Vivian Midtdal ("Vivian") brought an action to set aside a transfer of a joint interest in a quarter section of land to Vivian's daughter, Melva Pohl ("Melva").

Gordon and Vivian were married in May, 1974, two years after the death of Vivian's first husband.

Vivian had 5 children by her first marriage, the eldest of whom was Melva.

At the time of marriage, Gordon owned 6 quarter sections of land he had purchased from his father.

Gordon transferred a joint interest in all the quarters Vivian, including the "Home Quarter".

One of the 6 quarter sections was sold, leaving 5 quarter sections of land.

Melva and her husband Dennis Pohl ("Dennis") were the only members of Vivian's family who took up full time farming.

Melva and Vivian were very close.

In 2002, Gordon, Vivian, Dennis and Melva took a number of farm related estate planning courses. They eventually retained the services of a farm planning consultant and prepared an estate plan. The estate plan was never implemented. It provided for the sale of all 5 quarters to Melva and Dennis.

In early 2004, Gordon, Vivian, Dennis and Melva met to discuss the purchase of all 5 quarter sections by Melva and Dennis. Vivian's son Bryce was present at this meeting. He opposed the sale of all 5 quarters but did not oppose the sale of 3 quarters to Melva and Dennis.

In May of 2004, Gordon and Vivian instructed a Wetaskiwin lawyer to prepare documents to sell 3 of the 5 quarter sections to Melva and Dennis at a price of \$100,000.00 per quarter. The price was substantially less than market value at the time. Melva and Dennis signed two promissory notes to pay for the land: - one promissory note in favour of Gordon in the sum of \$200,000.00, and one promissory note in favour of Vivian in the sum of \$100,000.00.

Eight days later, on June 4, 2004, Gordon and Vivian executed transfers of land transferring a joint interest of the Home Quarter to Melva, and a joint interest of another quarter to Bryce. The transfers were prepared by the same lawyer. At the time of these transfers, the Home Quarter had an estimated value of \$377,000.00, and the quarter section transferred jointly to Bryce had an estimated value of \$190,000.00.

On June 4, 2004, Vivian also made a Will giving her entire estate to Gordon. The Will provided that in the event Gordon predeceased her, her estate would be divided among her other children, Randy, Charline and Donald in equal shares. There was evidence that Gordon made a similar Will, however the Will was not produced.

On August 2, 2007, Vivian executed an Enduring Power of Attorney appointing Gordon as her attorney and Melva as her alternate attorney. Her health was very poor at the time. She was developing Alzheimer's.

There was a falling out between Gordon and Melva. Gordon commenced this action in his name and on Vivian's behalf, relying on this Power of Attorney.

Decision: Moreau, J. dismissed Gordon's action.

Moreau, J. considered a number of issues including the following:

1. The Presumption of Resulting Trust and the Presumption of Advancement:

Moreau, J. concluded that the presumption of resulting trust applied and that Melva had to rebut the presumption by proving a gift of the quarter section was intended. Moreau, J. commented at para. 73 to 75 as follows:

[73] Based on the principles set out in *Pecore v Pecore*, [2007 SCC 17](#) (CanLII), a presumption of resulting trust applies to a gratuitous transfer of property. As noted in *Waters' Law of Trusts in Canada*, 4th ed (Toronto: Carswell, 2012) at 394, a resulting trust arises whenever legal or equitable title to property is in one party's name, but that party is under an obligation to return it to the original title owner, or to the person who paid the purchase money for it. This obligation may arise in situations where the property holder did not give any value for the property he or she acquired. As *Waters* noted, at page 395, equity assumes bargains, not gifts.

[74] The presumption of advancement does not apply in this case as Melva was an independent child at the time of the transfer. Rothstein J. for the majority of the Court in *Pecore*, referred, at para 34, to the modern practice of elderly parents adding their adult children as joint account holders so that the children can assist with the management of their parent's financial affairs. In those circumstances, it is dangerous to presume that the elderly parent is making a gift each time he or she puts the name of the existing child on an asset:

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

McLear v. McLear Estate (2000), reflex, [33 ETR \(2d\) 272](#) (Ont SCJ) at paras 40-41 as cited in *Pecore* at para 34.

[75] As I found that there was no consideration given by Melva for the transfer to her of the joint interest of the Home Quarter, Melva therefore bears the onus of rebutting the presumption of a resulting trust. The standard of proof is the civil standard of balance of probabilities: *Pecore*, at para 43...

2. Whether Melva Had Rebutted the Presumption of Resulting Trust?

Moreau, J. observed [at para. 102] [relying on the judgment of Rothstein, J. in *Pecore* at para. 37], that although the presumption of advancement does not apply to adult children, there is no reason why Courts cannot consider evidence relating to the quality of the

relationship between parents and children to determine whether the presumption of a resulting trust has been rebutted.

The fact that there was a close relationship between Gordon, Vivian and Melva at the time of the transfer was a material factor.

In addition, although the Estate Plan was abandoned, Gordon's intent that the farm would be kept intact for the next generation was consistent with a gift of a joint interest in the Home Quarter to Melva.

Moreau, J. also concluded [at para. 112] that it was Gordon and Vivian's intention to continue to reside on the Home Quarter until they were ready to move elsewhere and that during this period they would continue to operate the farm, receive the revenue from the oil leases and continue to pay the taxes for the property. The fact that they did so was not inconsistent with the intention that the farm would vest in Melva on their death. The fact that the transfer was signed on the same day that Wills were signed confirmed the intention to make a gift of the Home Quarter, as part of an overall estate plan [para. 113 and 114].

Moreau, J. observed, at para. 107 [relying on Rothstein, J. in *Pecore* at para. 46 to 49] that the gift of survivorship is not testamentary in nature but *inter vivos*. It vests when the transfer is made.

Moreau, J. concluded, at para. 118:

[118] In all of the circumstances, I conclude that Melva has rebutted the presumption of a resulting trust. Gordon and Vivian's transfer of a joint interest in the Home Quarter to Melva constituted an irrevocable *inter vivos* gift and the right of survivorship vested when the gift was made: *Fuller v Fuller Estate* 2010 BCCA 421 (CanLII) at para. 53.

** CREDITS **

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