Joint tenancy and making gifts of the right of survivorship

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Since the *Pecore* decision, there has been much debate amongst practitioners and academic commentators about the doctrinal soundness of a "gift of the right of survivorship". The underlying transaction would involve a gratuitous transfer of property by A into a joint tenancy with B, but A retains full beneficial ownership of property during their lifetime. An immediate *inter vivos* gift of solely the "right of survivorship", however, seems inconsistent with basic principles about joint tenancies such as the requirement for the "four unities". Further, it is now clear that the transferor may effectively nullify the gift through *inter vivos* transactions. For instance, if A transfers a bank account to B, with the intention of only making a gift of the right of survivorship, and then drains the bank account prior to death, the value of the gift for B is nil. Likewise, transferring real property into joint tenancy, but severing the joint tenancy prior to death, will extinguish the right of survivorship: *Bergen v. Bergen*, 2013 BCCA 492; *Zeligs Estate v. Janes*, 2016 BCCA 280. The ability of the transferor A to effectively revoke the gift to B seems contrary to the irrevocable nature of gifts at law.

This point was raised, in *obiter,* in the recent case of *Mong Alter Ego Trust No. 1 v. Yip*, 2022 BCSC 1327(5 August 2022, Watchuk J.). The underlying claim was made by the trustee of an alter ego trust settled by Hilda Mong in 2009. Mrs. Mong had become the sole beneficial owner of assets upon the death of her husband Jeffrey in 2007. Some of these assets – including a property in the Langara neighborhood of Vancouver and an investment account – were owned jointly with Mrs. Mong's daughter Jennifer. The trustee of the Trust sought a declaration that these assets (now worth $7.2 million) formed part of the Trust. Jennifer claimed that the assets had been gifted to her and therefore devolved to her by right of survivorship.

The Court held that Mrs. Mong was the sole beneficial owner of these assets following her husband's death. The evidence in the case rebutted the presumption of resulting trust. Watchuk J. noted that it is easier for persons to understand the concept of a "gift" rather than a resulting trust, and courts should look for evidence of any rational purpose for the transfer other than a gift. Watchuk J. found that many arguments made by Jennifer to support a gift were illogical, internally inconsistent, or contradicted with the evidence of credible witnesses.

Upon the advice of her lawyers, Mrs. Mong settled the Trust in 2009. She ultimately took steps to transfer the assets that were jointly owned with Jennifer to the Trust,

despite the refusal of Jennifer to sign a declaration that she held such assets as bare trustee for her mother. Given the finding that Mrs. Mong was the sole beneficial owner of the disputed assets, the transfer of the assets to the trustee of the Trust was effective, and the assets formed part of the Trust property.

The *Mong* decision contains a useful discussion of the principles relating to resulting trust claims, and also serves as a reminder of the benefits of alter ego trusts in estate planning. It also illustrates that litigation may succeed or fail based on the quality of the evidence, including the evidence of the solicitor involved in the planning.

One of the most interesting aspects of the case relates to this issue of *inter vivos* gifts of the right of survivorship. The discussion begins at paragraph 91. Justice Watchuk notes that there is a confusion in the jurisprudence. A gift of the right of survivorship relating to a joint bank account may be an "empty gift" if the account was drained prior to the transferor's death. The Court notes that it is difficult to reconcile this point with the principle that a gift cannot be revoked. Such comments were made in *obiter*, however,given the Court's ultimate finding that Mrs. Mong was the sole beneficial owner of the assets and did not intend any gift to Jennifer.

A more thorough discussion of the issue is found in the recent case of *Kennedy v. Smith*, 2022 BCSC 1622 (14 September 2022, Francis J.). In the underlying claim, the plaintiff sought a declaration that she was the "spouse" of the defendant Smith, and sought a division of family property. Smith denied that they were spouses, and sought a declaration that he was the sole beneficial owner of a house in Langley that had been registered in the names of himself and Kennedy as joint tenants. The Langley property had been sold prior to trial.

The trial before Madam Justice Francis was unusual, as the plaintiff Kennedy represented herself and attended the trial sporadically. The Court held that the parties were never in a spousal relationship. Francis J. also found that Smith contributed all of the funds towards the purchase of the Langley property, and that Kennedy gave no "value" towards the purchase (within the meaning of *Bajwa v. Pannu*, 2007 BCCA 260). Kennedy had little income or assets, and "pledging her credit" by being a co-mortgagee was unnecessary. Her poor financial situation was actually a detriment to obtaining a mortgage. Francis J. accepted the evidence of Smith that he added Kennedy as a co-owner in joint tenancy because he intended to leave the property to her (considering her a close friend) and this would avoid the need for a will.

The circumstances of the transfer led to a consideration of what type of "joint tenancy" arose. Madam Justice Francis referred to her own decision in *Re Petrick*, 2019 BCSC 1319, which contained an extremely useful distillation of the possible scenarios that arise after a gratuitous transfer: (1) a "true" joint tenancy in which the co-owners A and B each hold legal and beneficial title from the outset; (2) a resulting trust whereby B holds legal title only, and beneficial title belongs to A or A's estate; and (3) a gift of the right of survivorship whereby A has full beneficial ownership during his or her lifetime, but beneficial ownership accretes to B upon A's death. In regards to the Langley property, Francis J. held that the third category applies: Smith intended a gift of the right of survivorship to Kennedy.

Madam Justice Francis referred to ongoing commentary about the "conceptual difficulties" with this type of gift. Nevertheless, such a gift was clearly allowed by the

B.C. Court of Appeal in *Herbach v. Herbach Estate*, 2019 BCCA 370, and would be followed here.

The next question was the value of the survivorship interest for Kennedy in this case. Cases like *Herbach* make clear that certain *inter vivos* dealings by the transferor A can result in the right of survivorship disappearing, and a gift of nil value for the transferee B. A gift of the right of survivorship for B depends upon the "ultimate gamble" of B first surviving A, but then B only receives what is left of the property, if anything, after the gamble is won. A joint bank account could have been drained, or a joint tenancy to real property severed. In this case, the Langley property had been sold prior to trial. Francis J. concluded that nothing remains of the gift of the right of survivorship to Kennedy, as the sale of the property was the equivalent of Smith draining a joint bank account during his lifetime. The gift had no value.

Madam Justice Francis makes clear that Smith was not entitled to revoke the gift of the right of survivorship in the property since, at law, a perfected gift cannot be revoked. The value of a gift of the right of survivorship, however, was contingent on "a specific series of events occurring" and, in the circumstances of the events occurring in this case, the gift to Kennedy had no value.

The decision in *Kennedy v. Smith* is a clear illustration of how the "gift of the right of survivorship" works. Such a gift can effectively be revoked by the transferor through *inter vivos* dealings such as severing a joint tenancy. It was clear that Smith intended to sever the joint tenancy when the Langley property was sold. However, cases like *Zeligs Estate v. Janes* make clear that the sale of jointly-held property, by itself, does not sever a joint tenancy. Further actions must be taken to demonstrate the intention to sever. In another factual scenario, could the "gift of the right of survivorship" be traced to assets purchased with funds from a joint bank account, or from the sale proceeds of a jointly-owned house? For instance, if Smith was incapable and the Langley property was sold by his committee or attorney, there seems to be no principled reason to deny Kennedy the right to the proceeds remaining upon Smith's death. The courts will need to develop this law in future cases.

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