PECORE'S TROUBLES

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1. Introduction

In May 2007 the Supreme Court of Canada ("S.C.C.") released its decision in *Pecore v. Pecore* ("*Pecore*"),[1] bringing about dramatic changes to the rules regarding presumptions of advancement and resulting trust which were immediately appreciated by members of the bar. What also created a stir were Rothstein J.'s comments on gifting the right of survivorship, which were confusing and unclear. Nonetheless, the majority of S.C.C. seems to hold that one can gift a right of survivorship in an account without gifting joint beneficial ownership. As this paper will argue, that is both problematic and, if true, a revolution in the law of personal property.

2. The *Pecore* decision

The facts of the case are not complicated. An ageing father gratuitously established joint accounts with his daughter Paula for his mutual funds, bank account and income trust assets. Paula was one of his adult children. Paula's father alone deposited funds into the joint accounts. Upon his death, a balance remained in the accounts. It was not disputed that Paula took legal ownership of the balance in the accounts through the right of survivorship. The issue was whether Paula took equitable (or beneficial) interest through survivorship as well.

After the joint accounts were established, Paula's father wrote letters to the financial institutions purporting to deal with the tax implications of creating the joint accounts. In these letters he stated that he was "the 100% owner of the assets and the funds are not being gifted to Paula". Paula's father continued to use and control the accounts after they were transferred into joint names. He declared all the income, and paid all the taxes on the income, earned on the assets in the accounts. Paula made some withdrawals but was required to notify her father before doing so. The father's estate paid tax on the basis of a deemed disposition of the accounts immediately before his death.

Both Paula and her husband, Michael, were beneficiaries under the

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1. (2007), 279 D.L.R. (4th) 513, [2007] 1 S.C.R. 795, 32 E.T.R. (3d) 1.

father's will. The dispute over the accounts arose during divorce proceedings between Paula and Michael. Michael claimed that the property formed part of the estate of Paula's father and that Michael was, as a beneficiary of the estate, entitled to a portion of it. Paula claimed that she was the beneficial owner of the property prior to her father's death and, therefore, the assets did not form part of her father's estate and were hers as surviving joint tenant.

A preliminary issue, not directly relevant to the matters that this paper focuses on, was whether Paula received the beneficial interest due to the presumption of advancement. Historically, when property was gratuitously transferred from A to B, a presumption of resulting trust arose in A's favour. The onus was then on B to prove that A intended the transfer to be a gift. However, where the transferor and transferee were husband and wife or father and child, the presumption of advancement would apply and the onus would fall on A to prove that he or she did not intend a gift. The decision in *Pecore* makes two changes to these presumptions.

Firstly, the application of the presumption of advancement in favour of a child was previously only applicable to a gratuitous transfer from the child's father. Courts have been inconsistent in the application of the presumption of advancement where the gift was from a mother to a child. Because *Pecore* concerned a gift from father to child, it was not necessary to consider this particular issue in *Pecore*. However, Rothstein J. (writing for the majority) tackles the issue at para. 33 and finds:

> As women now have both the means as well as obligations to support their children, they are no less likely to intend to make gifts to their children than fathers. The presumption of advancement should thus apply equally to fathers and mothers.

Secondly, Rothstein J. looks at the application of the presumption of advancement to adult independent children and at para. 36 determines that the presumption should no longer apply in such circumstances:

> . . . given that a principal justification for the presumption of advancement is parental obligation to support their dependent children, it seems to me that the presumption should not apply in respect of independent adult children.

Although the strength of the presumption of advancement in favour of adult, independent children has been questioned before,[2]

2. *Cooper v. Cooper Estate* (1999), 27 E.T.R. (2d) 170, [1999] 11 W.W.R. 592, 181 Sask. R. 63, 88 A.C.W.S. (3d) 1117 (Sask. Q.B.), at para.19; *McLear v.*

the issue is put to rest in Rothstein J.'s decision in *Pecore*: transfers from parents to adult, independent children will be subject to a presumption of resulting trust.

Since Paula is an adult, independent child, Rothstein J. determines that the presumption of advancement does not apply to her and instead the presumption of resulting trust applies. Rothstein J. finds at para. 75 that the presumption of resulting trust is rebutted in this case, though he does not explicitly phrase it that way, concluding that Paula is entitled to the funds, not the estate. In coming to that conclusion, Rothstein J.'s findings on whether there was joint beneficial ownership are difficult to ascertain. It is therefore necessary to review Rothstein J.'s decision carefully. Rothstein J. begins the discussion of beneficial interest by observing:

> [45] In cases where the transferor's proven intention in opening the joint account was to gift withdrawal rights to the transferee during his or her lifetime (regardless of whether or not the transferee chose to exercise that right) and also to gift the balance of the account to the transferee alone on his or her death through survivorship, courts have had no difficulty finding that the presumption of a resulting trust has been rebutted and the transferee alone is entitled to the balance of the account on the transferor's death.

In para. 45, Rothstein J. seems to describe joint beneficial ownership: the transferee has rights now (a present gift), and at the time of death takes the whole interest as a result of survivorship. However, the next paragraphs, when contrasted with para. 45, suggest that there can be a transfer of a right of survivorship without joint beneficial ownership:

> [46] In certain cases, however, courts have found that the transferor gratuitously placed his or her assets into a joint account with the transferee with the intention of retaining exclusive control of the account until his or her death, at which time the transferee alone would take the balance through survivorship: see e.g. *Standing v. Bowring* (1885), 31 Ch. D. 282, at p. 287; *Edwards v. Bradley* , [1956] O.R. 225 (C.A.), at p. 234; *Yau Estate*, at para. 25.
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> [47] There may be a number of reasons why an individual would gratuitously transfer assets into a joint account having this intention. A typical reason is that the transferor wishes to have the assistance of the transferee with the management of his or her financial affairs, often because the transferor is ageing or disabled. At the same time, the

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McLear Estate (2000), 33 E.T.R. (2d) 272, 98 A.C.W.S. (3d) 243 (Ont. S.C.J.). See also Donovan W.M. Waters, Mark R. Gillen and Lionel D. Smith, eds., *Waters' Law of Trusts in Canada*, 3rd ed. (Toronto: Thomson Carswell, 2005), at p. 383.

> transferor may wish to avoid probate fees and/or make after-death disposition to the transferee less cumbersome and time consuming.

Paragraph 46 is confusing. It suggests that a right of survivorship, rather than present ownership, is gifted and cites cases in support. Gordon MacRae[3] points out that the cases cited by Rothstein J. in para. 46 do not actually stand for the proposition he puts forward. In *Standing v. Bowring*,[4] the court found that A had made a complete gift to B and therefore A could not compel B to return the property; in other words, there was joint beneficial ownership. In *Edwards v. Bradley*,[5] B had a right to the funds, notwithstanding that B did not exercise those rights, and therefore B had joint beneficial ownership with A. In *Yau (Trustees of) v. Yau Estate*,[6] the presumption of advancement applied so that B held the account together with A both legally and beneficially as a joint tenant. Paragraph 47 of *Pecore* accurately describes the motivation, but does not advance our understanding. In para. 48, Rothstein J. confirms the lack of present ownership by saying that there is no joint beneficial ownership before the death of A:

> [48] Courts have understandably struggled with whether they are permitted to give effect to the transferor's intention in this situation. One of the difficulties in these circumstances is that the beneficial interest of the transferee appears to arise only on the death of the transferor. This has led some judges to conclude that the gift of survivorship is testamentary in nature and must fail as a result of not being in proper testamentary form: see e.g. *Hill v. Hill* (1904), 8 O.L.R. 710 (H.C.), at p. 711; *Larondeau v. Laurendeau*, [1954] O.W.N. 722 (H.C.); Hodgins J.A.'s dissent in *Re Reid* (1921), 64 D.L.R. 598 (Ont. S.C., App. Div.). For the reasons that follow, however, I am of the view that the rights of survivorship, both legal and equitable, vest when the joint account is opened and the gift of those rights is therefore *inter vivos* in nature. This has also been the conclusion of the weight of judicial opinion in recent times: see e.g. *Mordo v. Nitting*, [2006] B.C.J. No. 3081 (QL), 2006 BCSC 1761, at paras. 233-38; *Shaw v. MacKenzie Estate* (1994), 4 E.T.R. (2d) 306 (N.S.S.C.), at para. 49; and *Reber v. Reber* (1988), 48 D.L.R. (4th) 376 (B.C.S.C.); see also *Waters' Law of Trusts*, at p. 406.

This statement by Rothstein J. is quite difficult to understand: he

3. G. MacRae, "Current Issues Impacting Trusts" (Paper presented at Trusts: the Thorny Issues, Pacific Business & Law Institute, May 2008) [unpublished].
4. (1885), 31 Ch. D. 282.
5. (1956), 2 D.L.R. (2d) 382, [1956] O.W.N. 151, [1956] O.R. 225 (C.A.), revd 9 D.L.R. (2d) 673.
6. (1999), 29 E.T.R. (2d) 204 *sub nom. Cho Ki Yau (trustees of) v. Yau Estate*, 91 A.C.W.S. (3d) 887 (Ont. S.C.J.).

begins with pointing out that it is *beneficial interest* which may arise only on death but then concludes that the gift of a *survivorship interest* was not testamentary but arose *inter vivos*. Rothstein J. does not appear to come to a conclusion as to whether the beneficial interest has in fact been transferred on death. As for the authorities that are cited, not one of them supports the conclusion that the survivorship interest may be gifted *inter vivos* while the beneficial interest is retained by the donor. In *Reber v. Reber*,[7] the court found an immediate beneficial interest. In *Mordo v. Nitting*,[8] the court found a clear intention to make a present gift of the accounts. The court referenced the right of survivorship, but only in the context of that following from the joint interest. In *Shaw v. MacKenzie Estate*,[9] the court again found that there was a joint beneficial interest from the start, and that declining use of the funds during the grantor's life did not affect the validity of the gift. In the context of these decisions, Rothstein J. seems to be saying that there is joint beneficial ownership from the beginning, carrying with it a right of survivorship. On this reading, there would be no conflict with *Hill v. Hill*[10] since the intention in that case was to have the gift perfected on death. Rothstein J.'s rejection of that line of cases implies a different reading, and something other than joint beneficial ownership from the start. The language of "right of survivorship" is peculiar.

Rothstein J. next cites the *Reid* case:

> [49] An early case that addressed the issue of the nature of survivorship is *Re Reid* in which Ferguson J.A. of the Ontario Court of Appeal found that the gift of a joint interest was a "complete and perfect *inter vivos* gift" from the moment that the joint account was opened even though the transferor in that case retained exclusive control over the account during his lifetime. *I agree with this interpretation*. [Emphasis added.]

The reference to *Reid* is interesting, since Ferguson J.A. explained his decision in *Reid* as follows:[11]

> In this state of facts, it seems to me that there was, at the time of and by virtue of the deposit, a complete and perfect gift of a joint title or interest in the money which, by operation of law as well as by expressed intention and agreement, carried with it a right to title by survivorship –

7. (1988), 48 D.L.R. (4th) 376, 8 A.C.W.S. (3d) 446 (B.C.S.C.).
8. (2006), 153 A.C.W.S. (3d) 750, 2006 BCSC 1761, at para. 235.
9. (1994), 4 E.T.R. (2d) 306, 131 N.S.R. (2d) 118, 47 A.C.W.S. (3d) 1320 (N.S.S.C.), at para. 49.
10. (1904), 8 O.L.R. 710 (H.C.).
11. *Reid (Re)* (1921), 64 D.L.R. 598, 50 O.L.R. 595 (Ont. S.C., App. Div.), at pp. 608, 609.

> to my way of thinking, the title of the defendant and the gift as a gift was complete when and as soon as the deposit was made; from that time on the donee's joint title was complete and perfect.
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> But the donee admitted that he promised the donor that he would not, during the life of the donor, exercise his right to draw against the account, and agreed that the donee only might draw and use the fund during that period, and it is argued that the effect of such a promise and agreement was to leave the dominion and control of the fund in the donor, so that he had power to and might revoke the gift; that therefore the gift was not in any sense a complete and perfect one.
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> I cannot bring myself to such a view. To my mind, the gift was complete and perfect, and the promise and agreement deposed to should, according to the true intent and meaning of the parties, be viewed as a collateral agreement whereby the donor was not given a right of revocation, but a right and power to defeat in whole or in part the purpose of the gift. The gift of the joint interest was, I think, intended to be effective from the moment of the deposit, so as to carry with it the legal right to title by survivorship; that the promise and agreement in reference to drawing were not intended to, and did not, prevent the vesting of a title to the joint interest, as to which there was, I think, a complete and perfect gift *inter vivos*. I cannot see how the evidence may be read so as to deprive the donee of a joint title from the date of the deposit, or to conclude from the evidence that it was the intention that the donee should have no title in or to the moneys until the death of the donor – and thus require the gift to be evidenced as a testamentary gift, or the subject of the gift to be freed from dominion and control, as, it is urged, is necessary to a good *donatio mortis causâ*. If there was a present gift of a joint interest, is seems clear that it was neither a testamentary gift nor a *donatio mortis causâ*, because it is an essential of both that no title vests until the death of the donor: White & Tudor's L.C. 8th ed., p. 425. The title in right of survivorship was an incident of the joint ownership, an accretion to a title already vested – the donee's absolute title to the fund arose by operation of law, and not, I think, by reason of two separate gifts, *i.e.*, first, a gift of the joint interest, and, second, a gift of a complete and absolute ownership effective only and on and after the death of the donor.

In Ferguson J.A.'s view, there was a complete gift at the time of creating the joint account. Ferguson J.A. struggled with the exclusive control issue. He suggests it is a collateral agreement or grant of a right. Perhaps another way to view it is that the donee agreed in a moral sense that the donor could drain the account, but not in a legal sense. Either way, Ferguson J.A. clearly was of the view that the joint beneficial ownership arose at the start, and the right of survival was merely incidental to that.

Rothstein J. continues in para. 49:

> . . . I also find MacKay J.A.'s reasons in *Edwards v. Bradley* (C.A.), at p. 234, to be persuasive:
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>> The legal right to take the balance in the account if A predeceases him being vested in B on the opening of the account, it cannot be the subject of a testamentary disposition. If A's intention was that B should also have the beneficial interest, B already has the legal title and there is nothing further to be done to complete the gift of the beneficial interest. If A's intention was that B should not take the beneficial interest, it belongs to A or his estate and he is not attempting to dispose of it by means of the joint account. In either event B has the legal title and the only question that can arise on A's death is whether B is entitled to keep any money that may be in the account on A's death or whether he holds it as a trustee under a resulting trust for A's estate.
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> *Edwards v. Bradley* was appealed to the Supreme Court of Canada but the issue of survivorship was not addressed.

It is tempting to read the above quote from *Edwards v. Bradley*[12] as implying that there is no beneficial interest before death. MacKay J.A.'s decision in *Edwards v. Bradley* might have been confusing since he quoted the trial judge's finding that it was clearly the intention of the mother that the daughter should have what remained in the account at the mother's death, but, taken in context, that refers to the intention to make an immediate gift carrying with it a right of survivorship, not to a gift on death. Earlier, MacKay J.A. had approvingly quoted Ferguson J.A.'s views that survivorship follows from joint ownership by operation of law and that survivorship is not a separate gift effective only on death.[13] Moreover, in the first paragraph of Laidlaw J.A.'s concurring decision in *Edwards v. Bradley*, he stated there was no evidence that the donee should have no title until death (by title he meant beneficial rights, since the donee of course had legal title by being named on the joint account), and held that:[14]

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12. *Supra*, footnote 5. The Supreme Court of Canada held that the presumption of resulting trust applied on the basis that, on the evidence, no present benefit to the daughter was intended and so the daughter held the funds on trust.
13. *Edwards v. Bradley*, *supra*, footnote 5, at para. 20. What could also be confusing is MacKay J.A.'s reference to the presumption of advancement not applying: ". . . so that even if the presumption of a gift did not apply in this case" (at p. 394). However, while the presumption might not apply, it does not mean it was not a gift — just that it is not presumed to be a gift and must be proven.

> The evidence and circumstances existing at the time the joint bank account was opened disclose a good and sufficient reason for the intention of the appellant's mother to vest in the appellant an immediate right, title and interest in and to the moneys in the account.
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> . . . . .
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> . . . I am satisfied from the evidence that she intended to make a complete and perfect gift *inter vivos* to her daughter of a joint interest in and to the moneys deposited in the joint bank account.

Edwards v. Bradley should have led Rothstein J. to conclude either that Paula had a beneficial interest from the start, or that the beneficial interest passed to the estate, not that there could be a third alternative that a right of survivorship is gifted without there being joint beneficial interest from the start.

Rothstein J. then cites decisions in other jurisdictions:[15]

> [51] Treating survivorship in these circumstances as an *inter vivos* gift of a joint interest has found favour in other jurisdictions, including the United Kingdom and Australia: see *Russell v. Scott* (1936), 55 C.L.R. 440, at p. 455; *Young v. Sealey*, [1949] 1 All E.R. 92 (Ch. Div.), at pp. 107-8; (in *obiter*) *Aroso v. Coutts*, [2002] 1 All E.R. (Comm) 241, [2001] EWHC Ch 443, at paras. 29 and 36.

The opening words of para. 51, by referring to an *inter vivos* gift of a joint interest, suggest, again, equitable joint tenancy from the beginning. Based on the foregoing, it seems reasonable to forgive the use of the phrase "gift of survivorship" and interpret Rothstein J.'s decision to mean that there was joint beneficial ownership at the creation of the joint accounts (notwithstanding the father's proclamations to the contrary). However, by citing those cases, Rothstein J. seems to mean that a right of survivorship can be gifted separately from an immediate, joint beneficial interest. Interestingly, the Australian case of *Russell v. Scott* actually achieved the result by adopting a trust analysis. As for the U.K. case *Young v. Sealey*, Romer J. states:[16]

> The plaintiffs [*i.e.*, the estate] invite me to follow *Owens v. Green* and the Canadian cases [*e.g.*, *Reid*; *Hill v. Hill*] which are in line with it. I confess that the reasoning of those cases appeals to me, and if there had been no English authority relevant to the question, I should have felt inclined to apply that reasoning notwithstanding that, by so doing, I

14. *Edwards v. Bradley*, *supra*, footnote 5, at paras. 3 and 4.
15. See MacRae, *op. cit.*, footnote 3, for an analysis of the decisions cited in para. 51. In *Russell v. Scott*, the majority decisions held that right of survivorship had been effected by means of an *inter vivos* trust.
16. [1949] 1 All E.R. 92 (Ch. D.), at p. 108.

> should have defeated Miss Jarman's expressed intentions. I find it difficult to regard Miss Jarman's deposit account transactions as voluntary settlements by her in the defendant's favour coupled with a power of revocation. I find it equally difficult to regard them as operating as immediately effective gifts of anything, seeing that, as between Miss Jarman and the defendant, the defendant was to have no power of withdrawal so long as Miss Jarman was living, while she retained the entire beneficial title to the funds. Further, it is impossible to regard the transactions as *donationes mortis causa*. There only remains the view, therefore, that the gifts were intended to be postponed until Miss Jarman's death and to operate then so as to pass for the first time to the defendant a beneficial right to assets of Miss Jarman as then ascertained. In my judgment, however, it would not be right for me to defeat the defendant by applying this course of reasoning.

The judge rejects the notion that there was an immediate gift, but also rejects the proposition that it fails as a testamentary gift (which would have meant defeat for the defendant), suggesting that one takes by survivorship. On the other hand, refusing to apply "this course of reasoning" follows immediately upon the "only remaining view" that the gifts were postponed, which seems to be counter to gifting a right of survivorship. Romer J. (1) rejects all the alternatives that he lists, (2) notes that "there is no reported case, so far as I know, in which the point now raised was presented to the court", but (3) still finds that the defendant had the beneficial interest rather than the estate, so the basis for the result (the defendant being entitled to the funds) is not really clear. Arguably, the case supports the result in *Pecore* as being one of a gift of a right of survivorship without concurrently giving joint beneficial interest. More simply, the judge seems to conclude that since in other cases of this sort the joint title holder had the beneficial interest at the end of the day, notwithstanding that the particular legal issue had not apparently been raised before, the defendant in *Young v. Sealey* did too.[17] Interestingly, in the other U.K. case, *Aroso v. Coutts & Co.*,[18]

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17. In *Aroso v. Coutts & Co.*, [2002] 1 All E.R. (Comm) 241, [2001] EWHC Ch. 443, Collins J. summarizes the reasoning in *Young v. Sealey* as follows at para. 30:

    > But he decided that, because the objection had not been taken in the many cases in which joint accounts had been involved, he would hold the gift valid (as it had been by the Ontario Appellate Division in *Re Reid* 50 Ont LR 595) and leave the question of principle to the Court of Appeal. He was not referred to the decision in *Russell v. Scott*, and recently in *Lynch v. Burke and Allied Irish Banks plc* [1996] 1 ILRM 114 the Irish Supreme Court has overruled the decision in *Owens v. Greene*, the reasoning of which appealed to Romer J.

    Aroso v. Coutts is an important case from the bank's perspective.
18. *Supra*.

Collins J. noted in *obiter* that "I would have followed the reasoning in *Russell v. Scott* [by which the survivor took in accordance with the terms of a trust] and <u>reached the same result</u> as *Young v. Sealey*" [emphasis added].

Rothstein J.'s comments at para. 70 on the relevance of how the transferor treated the joint account for tax purposes also support the notion that a right of survivorship can be divorced from an immediate, joint beneficial interest:

> [70] . . . Where, in setting up a joint account, the transferor intends to transfer full legal and equitable title to the assets in the account immediately and the value of the assets reflects a capital gain, taxes on capital gains may become payable in the year the joint account is set up. However, *where the transferor's intention is to gift the right of survivorship to the transferee but retain beneficial ownership of the assets during his or her lifetime, there would appear to be no disposition at the moment of the setting up of the joint account*: see s. 73 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.). That said, the issue of the proper treatment of capital gains in the setting up of joint accounts was not argued in this appeal. I can say no more than these are matters for determination between the Canada Revenue Agency and taxpayers in specific cases.

Given the reference to gift of right of survivorship, it seems from this passage that Rothstein J. rejects an interpretation that the transferee acquires beneficial ownership when the joint account is created, precluding joint beneficial ownership between Paula and her father. Thus it is not clear what has happened when Rothstein J. holds:

> [73] . . . All of this evidence is consistent with Paula's father having gifted away the right of survivorship when the joint accounts were opened, and thus is relevant to his intention at the time of the transfer.
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> [74] There is of course the issue of Paula's father writing to financial institutions saying that the transfers were not gifts to Paula. Consistent with these letters, Paula's father continued to control the funds in the accounts and paid income tax on the earnings of the investments before his death. The trial judge found that Paula's father's intention when he wrote the letters was "simply to avoid triggering an immediate deemed disposition of the assets in question, and therefore avoid capital gains taxes" (para. 39). I agree with the trial judge that this is not inconsistent with an intention that the balance [page 826] remaining in the accounts would belong to Paula on his death.

Was Rothstein J. merely holding that how the ownership relationship was treated for tax purposes does not determine the

actual legal relationship? Or does Rothstein J. actually mean that there can be a gift of the right of survivorship without joint beneficial ownership? It is difficult to understand the purport of the decision, but there are a number of possibilities that must be explored.

3. Possibility #1: The Gift of The Right of Survivorship

To consider this principle properly, it is necessary to describe joint tenancy and the right of survivorship (at least as understood before *Pecore*).

For there to be joint tenancy there must be four unities: of title, of interest, of possession, and of time. Unity of interest requires that the interest of each tenant is the same in extent, nature and duration.[19] If one tenant has a greater interest than another, then there is no unity of interest and there is only a tenancy in common.

In *Speck v. Speck*,[20] the registrar of land titles refused to register the applicants as the owners of land as joint tenants with one applicant having an undivided 71/100 interest and the other having an undivided 29/100 interest. The court upheld the registrar's refusal to register on the grounds that there was no "unity of interest".

While *Speck v. Speck* involved realty, there does not appear to be any Canadian case law suggesting that realty and personalty should be treated differently for this purpose.[21] Old English case law seems to confirm that they are treated the same.[22] *Halsbury's Laws of England*[23] cites Blackstone's Commentaries (14th ed.) for the proposition that concurrent ownership of personalty resembles that of realty and that joint ownership of personalty is characterized by the same four unities. This is confirmed in *Zdrilic Estate v. Princess Beatrix (The)*:[24]

> There may be joint ownership of any kind of personal property in the same manner as there may be a joint tenancy of real property (See Joshua Williams, *supra*, at p. 518) and the four unities of possession, interest, title and time apply equally to joint tenancy of real estate or joint ownership of chattels.

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19. *Halsbury's Laws of England*, 4th ed., vol. 35 (London: Butterworths, 1980), at para. 193 ("*Halsbury's*").
20. (1983), 51 B.C.L.R. 143 (S.C.).
21. A.J. McLean, "Severance of Joint Tenancies" (1979) 57 Can. Bar Rev. 1 at p. 28; see *Murdoch v. Barry* (1975), 64 D.L.R. (3d) 222, 10 O.R. (2d) 626 (H.C.J.), at pp. 228-229.
22. *Partriche v. Powlet* (1740), 2 Atk. 54, 26 E.R. 430.
23. *Halsbury's Laws of England*, *op. cit*., footnote 19, vol. 35, at paras. 1243 and 1244.
24. [1982] F.C.J. No. 306 (QL) (T.D.).

Just as any act that destroys one of the four unities of joint tenancy must bring the joint tenancy to an end,[25] so must the lack of one of the unities fail to bring into existence a joint tenancy, as in *Speck v. Speck*.[26] As a result, generally, an attempt to create a joint tenancy whereby only one tenant has the economic (*i.e.*, beneficial) interests is doomed to fail.

As for the right of survivorship, the B.C. Supreme Court in *Foort v. Chapman*,[27] quoting from the 3rd edition of Megarry and Wade found:[28]

> "A gift of lands to two or more persons in joint tenancy is such a gift as imparts to them, with respect to all other persons than themselves, the properties of one single owner." Although as between themselves joint tenants have separate rights, as against everyone else they are in the position of a single owner. The intimate nature of joint tenancy is shown by its two principal features, the right of survivorship and the "four unities."
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> 1. *The right of survivorship*. This is, above all others, the distinguishing feature of a joint tenancy. On the death of one joint tenant, his interest in the land passes to the other joint tenants by the right of survivorship (*jus accrescendi*), and this process continues until there is but one survivor, who then holds the land as sole owner. This right of survivorship takes precedence over any disposition made by a joint tenant's will: *jus accrescendi praefertur ultimae voluntati*. The same principle applies if a joint tenant dies intestate; a joint tenancy cannot pass under a will or intestacy. For this reason, among others, joint tenants were said to be seised "*per my et per tout*," "*my*" apparently meaning "not in the least": each joint tenant holds nothing by himself and yet holds the whole together with his fellows. Or again, a joint tenant may become entitled to nothing or to all, according to whether or not he is the last survivor. Where it was doubtful who had survived, as where joint tenants perished in a common disaster, their respective heirs held in joint tenancy, so that there was no survivorship; but today statute usually resolves the question who is deemed to be the survivor.

In *Anger and Honsberger Law of Real Property*,[29] the right of survivorship is described as follows:

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25. *E.g.*, *Walker v. Dubord* (1992), 92 D.L.R. (4th) 257, 45 E.T.R. 209, 67 B.C.L.R. (2d) 302 (C.A.).
26. A.J. Oakley, *Megarry's Manual Of The Law Of Real Property*, 8th ed. (London: Sweet Maxwell , 2002), at p. 425.
27. (1973), 37 D.L.R. (3d) 730, [1973] 4 W.W.R. 461 (B.C.S.C.).
28. *Foort v. Chapman*, *supra*, at p. 738 (quoting Megarry and Wade, *The Law of Real Property*, 3rd ed. (1966)).

> The most important incident of joint tenancy is the right of survivorship . . . the right of surviving joint tenants to have their undivided interests progressively increased by the deaths of the other joint tenants, although the survivors continue as joint tenants, the last survivor taking the entirety. This feature of a joint tenancy is the natural consequence of the other incidents of complete unity of title, interest and possession, the interests of joint tenants not only being equal but being one and the same, their combined interests forming one estate.

In *Edwards v. Bradley*, Laidlaw J.A. states in his concurring decision that "[t]he title to the joint interest and to the moneys vested in the appellant at that moment, and carried with it, as an incident of the joint ownership, the legal right to title by survivorship."[30] In the same case, MacKay J.A. cites Ferguson J.A. in Reid:[31]

> The title in right of survivorship was an incident of the joint ownership, an accretion to a title already vested – the donee's absolute title to the fund arose by operation of law, and not, I think, by reason of two separate gifts . . .

Based on the foregoing, the idea of gifting the right of survivorship is surprising. Where co-owners hold property as joint tenants, each joint tenant already has the right of survivorship; there is nothing left for one joint tenant to give to the other. Where co-owners hold property as tenants in common, or solely, there is no right of survivorship in existence, so there is none that can be given. Thus, the terminology used by Rothstein J. of gifting a right of survivorship is inconsistent with how joint ownership was previously understood. That does not necessarily mean that the *result* in *Pecore* is wrong. Assuming that the terminology is misleading but the result is correct (as is suggested by the antecedents cited by Rothstein J. and by McRae at p. 10) and has now been confirmed by the S.C.C. in its decision in *Pecore*, what is the correct legal way to describe what has happened? As will be shown below, there are several possibilities, none of which gives a satisfactory result.

Returning briefly to the notion of gifting a right of survivorship apart from creating joint beneficial interests, it is interesting to note that, in the first 60 written decisions that cite *Pecore*, none relied on the gift of a right of survivorship in reaching its result. Many cases citing *Pecore* deal with the simpler question of gift versus loan, but for those that address whether there is a resulting trust or a gift, there is no

29. Anne Warner La Forest, *Anger and Honsberger Law of Real Property*, 2nd ed. (Aurora: Canada Law Book, 1985), at p. 793.
30. *Edwards v. Bradley*, *supra*, footnote 5, at para. 1 (p. 383).
31. *Edwards v. Bradley*, *supra*, footnote 5, at para. 20 (p. 391).

apparent argument as to the third possibility that there was a gift of the right of survivorship even though the defendant in each case would have had an interest in arguing it.[32] However, in the recent case of *Doucette v. Doucette* ("*Doucette*"),[33] the B.C. Court of Appeal did find that the deceased mother gifted the right of survivorship to her children when she opened GICs in their names without their knowledge. Doucette illustrates the analytical problems created by *Pecore*. Unlike in *Pecore*, the children in Doucette did not know that their mother held GICs in joint names with each of them, but as in *Pecore* they did not make personal use of the funds during their mother's life. At paras. 62 and 65, Ryan J.A. wrote (with Lowry J.A. concurring and Neilson J.A. dissenting):

> [62] . . . In my view however, her belief that she could "switch them around" can also be understood as evidence that Mrs. Doucette wished to gift certain of her children with money on her death but also wished to maintain control of her finances while she was alive in the sense that she retained the power to change her mind as to whom she wished to gift the right of survivorship.
>
> . . . . .
>
> [65] For these reasons, then, I am of the view that the trial judge erred in finding that the GICs in the name of Joslin Clarke, Louie Doucette and Diane McInnes were the subject of a resulting trust in favour of the

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32. See, for example, *McLean v. Saint John* (2009), 46 E.T.R. (3d) 280, 879 A.P.R. 319 *sub nom. Noble Estate (Re)*, 2009 NLTD 16 (Nfld. & Lab. S.C.T.D.); *Schweizer-Moyen v. Schweizer* (2009), 179 A.C.W.S. (3d) 873, 2009 ABQB 412; *Finlayson Estate (Re)* (2008), 40 E.T.R. (3d) 106, 167 A.C.W.S. (3d) 228, 2008 NSSC 120; *MacDonald v. Myra* (2009), 893 A.P.R. 354, 281 N.S.R. (2d) 354, 209 NSSM 33 (Sm. Cl. Ct.); *Videchak v. Giarratano* (2009), 49 E.T.R. (3d) 120, 178 A.C.W.S. (3d) 290 (Ont. S.C.J.); *Mennonite Trust Ltd. v. Good* (2007), 37 E.T.R. (3d) 133, [2008] 6 W.W.R. 187, 2007 SKQB 351; *Fuller v. Fuller Estate* (2008), 41 E.T.R. (3d) 225, 168 A.C.W.S. (3d) 898, 2008 BCSC 702; *Dhillon v. Dhillon* (2009), 177 A.C.W.S. (3d) 522, 2009 BCSC 608; *Kallinis v. Kallinis* (2008), 43 E.T.R. (3d) 281, 170 A.C.W.S. (3d) 881 (Ont. S.C.J.); *Harrington v. Harrington* (2009), 63 R.F.L. (6th) 264, 2009 ONCA 39, 174 A.C.W.S. (3d) 224; *Archer v. St. John* (2008), 37 E.T.R. (3d) 101, 84 Alta. L.R. (4th) 249, 439 A.R. 260 (Q.B.), supp. reasons 39 E.T.R. (3d) 138, 88 Alta. L.R. (4th) 152, 439 A.R. 275 (Q.B.); *Marshall v. Cole* (2008), 863 A.P.R. 30, 281 Nfld. & P.E.I.R. 30, 2008 NLTD 187 (Nfld. & Lab. S.C.T.D.); *St. Onge Estate v. Breau* (2008), 38 E.T.R. (3d) 275, 841 A.P.R. 346, 328 N.B.R. (2d) 346 (Q.B.), affd 48 E.T.R. (3d) 162, 889 A.P.R. 101, 345 N.B.R. (2d) 101 (C.A.). It is possible that right of survivorship was in fact argued in one or more of the foregoing, but if so it was not dealt with in the resulting judgment.
33. (2009), 311 D.L.R. (4th) 410, 50 E.T.R. (3d) 163, 2009 BCCA 393.

> estate. I would accede to this ground of appeal and order that the funds be returned to the children in whose names the GICs were held.

There are two troubling aspects of the decision in *Doucette*. First, the reasons in *Doucette* reveal no consideration of the underlying principle of gifting a right of survivorship. It may have been that whether or not one can gift a right of survivorship was not argued. The lack of careful consideration of the concept of gifting a right of survivorship is particularly troubling since its application was not necessary to achieve the result. Instead, existing trust concepts, whereby the income and capital were for the mother's benefit during her life and for one of her children's benefit afterwards, would have been adequate. Since the concept of gifting a right of survivorship was not analyzed by the court and was unnecessary to obtain the result, *Doucette* should not be taken as further support for the ability to gift a right of survivorship without concurrently creating immediate joint beneficial ownership.

Second, and this probably flows from the lack of critical analysis in *Doucette* as to whether rights of survivorship can be dealt with independently, it leaves a curious gap in ownership of the joint account. If there was no resulting trust, as found by the court in para. 65, then presumably the children obtained the beneficial interest immediately and there was no need for a gift of a right of survivorship. If the children did not obtain a beneficial interest until their mother's death, but in the meantime they did not hold the beneficial interest in trust for their mother, on what basis did they (unknowingly) hold the beneficial interest? What were their rights? What were their obligations?

Property is held in one of three ways: as owner (*i.e.*, for one's own benefit), on trust, or on bailment. In the case of a joint account, the joint holders have a receivable from a bank, which is a property right. Each joint holder is either entitled to beneficially use that right as he or she pleases, or holds that property right subject to certain fiduciary obligations towards the donor holder — in other words, holds that property right on trust. In *Doucette*, the children did not know of the GICs until their mother's death, but that does not avoid this legal quandary: if the donee holder is subject to obligations with respect to those specific funds, it must be pursuant to a trust relationship. The problem is that the court held in *Pecore* that there was no resulting trust and apparently no beneficial interest (until death). Even if in *Pecore* Paula had entered into a separate contract with her father regarding use of the accounts, this ownership issue would not have been resolved.

If *Pecore* has revolutionized the law of property in Canada, such that a survivorship interest in personal property can now be gifted notwithstanding no beneficial interest in the meantime, does this new property interest extend to real property? The issue with trying to extend planning regarding gifts of right of survivorship is that, even if drafted as a gift of a survivorship interest, it may be seen as the creation of a life estate. In other words, the legal substance of the gift might be a life estate regardless of the use of language describing it as a grant of a right of survivorship. The tax consequences of this would be unwelcome: under s. 43.1 of the *Income Tax Act* of Canada ("*ITA*"),[34] a gift of a life estate results in a disposition of the life estate at fair market value at the time the right of survivorship is purportedly granted.

4. Possibility #2: Gift of remainder interest

A second possibility is that the father has gifted the remainder interest in the property to his daughter, and thereby retained a life interest. However, this is problematic for several reasons (including the tax consequences, as referred to above).

First, the courts have historically held that there can be no estates in personal property. There is an important distinction between real property and personal property. Real property, being crucial historically for feudal hierarchies and obligations, can only be absolutely owned by the Crown while all others enjoy land only as tenants of the Crown.[35] A tenant's interest in land under the tenure system is called an estate and a lesser estate can be carved out of a greater estate.[36] For example, a life estate out of a fee simple or fee tail, and so a number of different persons could hold estate in the same land at the same time. Accordingly, realty can be subject to successive interests. Personalty is different. Under the common law, personalty is the subject of absolute ownership. Absolute ownership means there is no tenure, and without tenure, ownership cannot be split into successive interests. By way explanation, *Halsbury's* [37] and *Vaines*[38] cite *Blackstone's Commentaries* which notes that the law, being founded upon feudalism, did not often condescend to regulate the ownership of personal property. As stated in *Halsbury's*:[39]

34. R.S.C. 1985, c. 1 (5th Supp.).
35. See *Halsbury's Laws of England*, *op. cit*., footnote 19, vol. 35, at para. 1227; and E.L.G. Tyler and N.E. Palmer, *Crossley Vaines on Personal Property*, 5th ed. (London: LexisNexis Butterworths, 1973), at p. 40 ("*Vaines*").
36. See Tyler and Palmer, *ibid*., at p. 45.
37. *Halsbury's Laws of England*, *op. cit*., footnote 19.
38. Tyler and Palmer, *op. cit*., footnote 35, at p. 3.

> Thus, if a lessee or the owner of a chattel attempted to assign or bequeath the property to one person for life with a remainder to another, the remainder was void, and the first-mentioned person took absolutely.

Accordingly, it is not possible to grant a life estate in personalty. Bank accounts, as choses in action, or securities, are personalty, even if intangible, and thus cannot be the subject of a life estate. Allowing a gift of the right of survivorship seems to mean the gifting of a remainder interest, a principle that requires that the law recognize estates in personal property. Since the law has historically rejected successive interests (or estates) for personal property, this interpretation of the *Pecore* decision would mean a revolution in the law of property in Canada.

There is, however, a way to mimic estates in personalty. As noted by Vaines, "limited interests may now exist in personalty by way of trust in a manner essentially the same as in the case of realty".[40] Vaines also notes the modern doctrine of executory interests created by will, though such interests may be due to a trust as well (the underlying theory on this point is not clear).[41] According to Vaines, a number of successive interests in personalty can be created using the trust form, including a life interest.[42] Thus, by using a trust, it is possible to create for personalty something approaching a life estate. However, Rothstein J. held that Paula was not holding title to the accounts in trust.

Even assuming that successive interests can now be created in personalty, the second difficulty in the remainder interest interpretation is that there is some question as to whether a life interest can be *retained* (there is no question that it can be granted to someone else such that the grantor retains the reversionary interest, which the grantor can also gift). According to Megarry and Wade[43] and Anger & Honsberger,[44] a *profit a prendre* may be created *by a grant or by reservation*. Unfortunately, a "reservation" appears to be colloquial and not an accurate description of the legal events. Under common law, a "reservation" operates as a grant to the purchaser and a re-grant by the purchaser to the vendor,[45] although the legal documents can express the transaction as a reservation.[46] According

39. *Halsbury's Laws of England*, *op. cit.*, footnote 19, at para. 1229.
40. Tyler and Palmer, *op. cit.*, footnote 35, at p. 6.
41. Tyler and Palmer, *op. cit.*, footnote 35, at pp. 16, 42; see also *Halsbury's Laws of England*, *op. cit.*, footnote 19, at para. 1230.
42. Tyler and Palmer, *op. cit.*, footnote 35, at p. 30.
43. Oakley, *op.cit.*, footnote 26, at pp. 856-859.
44. La Forest, *op. cit.*, footnote 29, at p. 975.
45. *Mason v. Clarke*, [1955] A.C. 778, [1955] 2 W.L.R. 853 (H.L.).

to A.J. Oakley,[47] a lesser estate must be carved out of the greater estate. Since a lesser estate can only be created out of a greater estate, it follows that only the person with the larger interest can grant the life estate. The rationale for the grant and re-grant is obscure,[48] and beyond the scope of this paper.

In short, it appears that a life interest can be granted but not retained, so even if the result in *Pecore* could be framed as a gift of a remainder interest, the transferor must have transferred the entire interest in the accounts to the transferee and the transferee must have then granted the transferor a life interest. That would have problematic tax consequences for the father since he would have disposed of his entire interest in the accounts and therefore should have paid tax accordingly.[49]

5. Possibility #3: Trust

Another possibility is that Paula took joint beneficial interest in the accounts as trustee, the terms of the trust being that, during the father's lifetime, he was solely entitled to the income and capital, but after his death Paula was solely entitled to the remaining funds. This is essentially the analysis in *Russell v. Scott* case cited in para. 51 of *Pecore*. As Dixon and Evatt JJ. stated in that case:[50]

> Doubtless a trustee he was during her lifetime, but the resulting trust upon which he held did not extend further than the donor intended; it did

46. *Wickham v. Hawker* (1840), 7 M. & W. 63.
47. Oakley, *op.cit*., footnote 26, at p. 33.
48. See, *e.g*., *Doe d. Douglas v. Lock* (1835), 2 Ad. & E. 705, at p. 743.
49. With respect to real property, it appears to have been taken for granted that a person can simply reserve a life interest while giving away the remainder interest, perhaps because the grant and regrant can be expressed in legal documents as simply a reservation yet be effective, making the actual legal events irrelevant to everyone except tax lawyers. The retention of the life interest and granting of the remainder interest was used for tax planning purposes because the value of the remainder interest granted was presumably low. As result, Parliament enacted s. 43.1 of the *Income Tax Act* which deems the person to have disposed of the life estate at that time and reacquired the life estate. Given the question as to whether a life estate can even be retained, as opposed to granted, s. 43.1 may simply re-establish the tax consequences that flowed from the proper common law analysis. Section 43.1 by its terms only applies to life estates in real property, which is not surprising since historically the common law did not allow successive interests in personalty.
50. *Russell v. Scott* (1936), 55 C.L.R. 440 (Aus. H.C.), at p. 455. McTiernan J. said: "His legal interest was saddled with that particular trust during her lifetime. But that trust did not exhaust the interest taken by him . . . The legal interest which accrued to him by survivorship was not saddled with a resulting trust in favour of the representative of the deceased's estate".

> not exhaust the entire beneficial interest in every contingency. In the contingency of his surviving the donor and of the account then containing money, his legal interest was allowed to take effect unfettered by a trust [in favour of the estate].

The problem with this option is that the court finds that no trust was created. If a trust analysis is what Rothstein J. intended, it is puzzling that he referred to a right of survivorship rather than to beneficial interests, and did not refer to any trust terms.

If there was a trust relationship in *Pecore*, the trust did not qualify as an *alter ego* or joint partner trust resulting in a taxable disposition of the property at the time the father made the accounts joint. This outcome would be inconsistent with Rothstein J.'s *obiter* approval of tax treatment to the contrary, namely that there was no disposition until death. However, given that other interpretations are so problematic and revolutionary, this analysis remains preferable, since it is not revolutionary and fits within already well understood property concepts, and Rothstein J.'s comments on the appropriate tax treatment should be ignored except to the extent that such factual tax treatment should be only one factor to consider in determining the deceased's intent.

Even if the traditional concept of resulting trust could not accommodate multiple beneficiaries, this analysis is evolutionary rather than revolutionary as other interpretations would be.

6. Possibility #4: The right of survivorship for joint legal title also applies to beneficial title

Another possibility is that because Paula had joint legal title on the accounts, her right of survivorship applied not only to joint legal title, but extended to the beneficial interest as well. This is inconsistent with the division of legal and beneficial interest and is contrary to the requirement that there be unity of interest for there to be joint ownership, but is one way to interpret the decision. It is doubtful, on careful consideration, that this interpretation is really any different from allowing remainder interests since the beneficial interest passes to the donee on the death of whom would otherwise be called the life tenant.

7. Possibility #5: Testamentary gift

Although a survivorship interest is an incident of joint ownership and thus requires joint legal title and joint beneficial ownership as

discussed above, Rothstein J. finds that a survivorship interest may be gifted while at the same time beneficial ownership is retained:

> [70] . . . Where, in setting up a joint account, the transferor intends to transfer full legal and equitable title to the assets in the account immediately and the value of the assets reflects a capital gain, taxes on capital gains may become payable in the year the joint account is set up. However, where the transferor's intention is to gift the right of survivorship to the transferee *but retain beneficial ownership* of the assets during his or her lifetime, there would appear to be no disposition at the moment of the setting up of the joint account . . . [Emphasis added.]

Since we have already critiqued the concept of gifting a right of survivorship separately from granting a joint beneficial interest at the time the account is opened, an alternative interpretation of the decision is that, by reference to right of survivorship, Rothstein J. meant that there was a gift that completes on becoming the survivor (*i.e.*, it completes on death of the donor). Rothstein J.'s *obiter* approval of the tax treatment of the account on the father's death[51] confirms that *something* is transferred at death: the estate paid tax on a deemed disposition at death. The only plausible explanation, outside of the revolutionary interpretation that one can gift a right of survivorship without concurrently creating immediate joint beneficial ownership, is that the beneficial interest is transferred on death. The problem with this interpretation is that a gift made on death is a "testamentary gift" and must meet certain statutory requirements in order to be valid (in British Columbia the statutory requirements for a valid testamentary gift are found in the *Wills Act*[52]). Indeed, this was the interpretation adopted in *Hill v. Hill*[53] and in *Larondeau v. Laurendeau*,[54] but Rothstein J. explicitly rejected it at para. 48 of *Pecore*.

8. Possibility #6: *Donatio mortis causa*

An exception to the rule that testamentary gifts must meet the form requirements of the statute governing testamentary gifts (in B.C. the *Wills Act*), are gifts made *donatio mortis causa*. A *donatio mortis causa* is a gift made *inter vivos* with the intention that the gift should take

51. Referencing tax treatment is directly relevant to determining intention of the donor, but Rothstein J. seems to have gone further and tentatively approved the tax treatment itself.
52. R.S.B.C. 1996, c. 489.
53. (1904), 8 O.L.R. 710 (Ont. H.C.).
54. [1954] 4 D.L.R. 293, [1954] O.W.N. 722 (H.C.).

effect only on death. Once death occurs, the gift takes effect retrospectively and is effective from the date the gift was initially made. Similar to a gift in a will, a *donatio mortis causa* may be revoked at any time up until death. In many ways, the gift in *Pecore* appears to fit the parameters of a *donatio mortis causa*: a gift made *inter vivos*, revocable until death and completed retrospectively on death so that the form requirements of the B.C. *Wills Act* are avoided. For a *donatio mortis causa* to be effective, there are three requirements:[55]

1. the intention to give the gift immediately, subject only to the condition that absolute title will vest only on the death of the giver;
2. delivery of the gift; and
3. the gift must have been made in contemplation of death.

An example is *Slagboom Estate v. Kirby*,[56] where the deceased deposited money in the defendant's account on trust for him, with the intent that she receive the money on death. The court found that since the gift to the defendant was made in contemplation of death, the gift took effect on death.[57]

In *Pecore*, the first two requirements have arguably been met: the trial court found that the father intended the gift of the accounts to be immediate and the father could effectively "revoke" the gift by emptying the account prior to his death. By putting title to the account in joint names with Paula, the father effected delivery of the gift. However, it could not likely be argued that the father was contemplating his death at the time of the gift any more than to say he recognized that he would someday die and organized his affairs in acknowledgement of that certainty. Although the case law is inconsistent with regard to how imminent death must be, it seems unlikely that the circumstances in *Pecore* would satisfy the requirement.

Having already changed the law on the presumption of advancement, Rothstein J. could have proceeded to craft a new exception to the rules on testamentary gifts, or expand the *donatio mortis causa* exception. Because Rothstein J. dismissed the idea that the beneficial interest may have been the subject of a testamentary gift, the issue of whether this might have been a failed attempt at

55. See Waters, *op. cit.* footnote 2, at p. 222.
56. (1993), 48 E.T.R. 219, 37 A.C.W.S. (3d) 1134 (B.C.S.C.).
57. There appears to have been an alternative argument open to the defendant: that the deceased created a trust for the benefit of deceased during his life and then for the sole benefit of the defendant. This alternative argument was not explored.

donatio mortis causa is not explored but is perhaps preferable to the interpretation that allows of gifts of survivorship interests apart from gifts of joint interests.

9. Tax Considerations

The estate planning result is clear: the joint title holder receives the equitable interest on death and, since the funds do not pass according to a will, the funds will not be subject to probate fees. The income tax consequences of what happened are not so clear, though the deceased father's estate did file a tax return on the basis that he disposed of the accounts immediately before death. Was that the correct result?

There appears to be limited case law on how to treat income from jointly held property. In *Wertman v. M.N.R.*,[58] Thurlow J. held that income from jointly owned property belongs to the joint owners, for tax purposes, in equal shares. Thurlow J. stated that it might be different in civil law jurisdictions such as Quebec.

The Canada Revenue Agency ("CRA") has stated:[59]

> We understand you are considering the creation of a JTWROS arrangement to avoid probate fees. You plan no written agreement but there will be a legal and beneficial ownership change by forming a new account adding the son to an existing joint account currently under the father and mother. Since this transaction will be considered a disposition, a capital gain will result on the transfer to the son. In your example there are accrued gains of $120,000 and a current fair market value ("FMV") of $400,000. Each of the parents would be transferring 1/3 of their account to the son resulting in a capital gain of $20,000 each. On the death of one of the parents, 50% of that parent's interest in the property would flow to the remaining spouse tax free at the adjusted cost base ("ACB"), while the other 50% would flow to the son at FMV resulting in a capital gain of $20,000. When the remaining parent dies the balance of the property flows to the son and a capital gain of $60,000 on the remainder of the property is realized and taxed on that parent's tax return prior to death.

If in *Pecore* all that was granted was then a right of survivorship and there was no joint beneficial ownership, there was no disposition by the father to the daughter at the time that the accounts became joint. As already quoted above, Rothstein J. suggests in *obiter* that there is no disposition at the time the accounts are made joint. MacRae disagrees with Rothstein J.'s analysis and argues that the gifting of the right of survivorship must be a disposition, but with

58. [1964] C.T.C. 252, 64 D.T.C. 5158, [1965] 1 Ex.C.R. 629 (Can. Ex. Ct.).
59. CRA document no. 9907965.

nominal value at the time of the gift.[60] MacRae points out that there must be a deemed disposition of the accounts immediately before death, which is how the estate treated the matter when it filed the father's terminal return. Although it seems to matter little to the result, query whether the father had the disposition suggested by MacRae: certainly the daughter seems to have gained something, but did the father give something up?

On the other hand, if the correct analysis is that there was a trust created with multiple beneficiaries whose beneficial interest related simply to different periods of time (before and after the death of the settlor), the tax results are different. In the absence of qualification as an *alter ego* or joint partner trust, there would be a disposition at the time the trust is settled (*i.e.*, at the time that the accounts are made joint pursuant to the resulting trust terms). In *Pecore*, that would mean tax on the accrued gains at that time. If the trust analysis is correct, then *Pecore*-type planning should never involve the transfer of assets with accrued gains.[61]

If instead the correct interpretation is that there is a testamentary gift, pursuant to a new or expanded exception to the usual rules, then there is no disposition until death, and the grantor has a disposition of the fair market value of the joint account immediately before death pursuant to the usual *ITA* rules.

10. *Pecore*'s Legacy

Rothstein J. could have followed earlier cases and found, in a clear manner, that there was joint beneficial interest from when Paula was added to the accounts. Paula would have taken the remaining property and Michael, through the estate, would have still been deprived. The tax treatment could be treated simply as anomalous, and the estate lucky if the Minister of National Revenue did not challenge it. Unfortunately for Rothstein J., this would have conflicted with the father's express intention to retain beneficial ownership. If the father's proclamations are to be preferred, then the estate should have been entitled to the balances in the accounts, which would result in Paula's ex-husband receiving a portion of the funds. The muddle that is *Pecore* must be understood in this context.

The *Pecore* decision generates a great deal of uncertainty and raises

60. MacRae, *op. cit.*, footnote 3.
61. Except perhaps principal residences. However, keep in mind that the *Income Tax Act* actually requires a principal residence election to be filed in year of disposition for the exemption to apply, though the CRA administratively dispenses with that requirement.

some important questions that we are, sadly, unable to answer: has it heralded a radical change in how the common law views personal property? How far can the decision be taken: can it apply to any personal property where title can be registered, such as cars, horses, patents, or copyrights? Can it apply to personal property to which title cannot be registered, such as a book or a painting? What is the proper tax treatment? And, as raised by Pamela Cross in her 2007 Ontario Tax Conference paper, "How will the federal and provincial taxing authorities treat attempts to access this new form of ownership? What onus is on professional advisors to investigate and advise on existing and proposed joint account ownership? What is the impact on creditor claims against the transferor or the transferee?"[62]

A tempting alternative is to accept the result as correct but consider the references to gifting rights of survivorship to be anomalous or, notwithstanding the references to gifting rights of survivorship, apply a trust analysis.

We agree that it is tempting to simply accept *Pecore* and implement *Pecore*-type planning for joint ownership and gifts of rights of survivorship. However, given that the concept of gifting a right of survivorship is difficult, if not impossible, to reconcile with previously understood property law concepts, the prudent path may be to avoid implementing any planning that involves the gifting of a right of survivorship. We suspect that many practitioners or their clients will choose to risk implementing *Pecore*-type planning, in which case we suggest that, given the uncertainty of the legal and tax consequences, such planning not involve assets with accrued but unrealized gains.

62. Pamela L. Cross, "Joint Accounts — Ramifications of *Pecore* and *Brooks*", *2007 Ontario Tax Conference*, (Toronto: Canadian Tax Foundation, 2007), at pp. 12:1-14.