THE PRESUMPTION OF ADVANCEMENT RETREATS, REBUTTAL EVIDENCE EXPANDS, AND ESTATE LITIGATION LAWYERS REJOICE

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When is a joint bank account a clever and simple estate planning technique to avoid probate fees and when is it just a way of allowing a child to assist in the day to day administration of his or her parent's finances? For years, law school examinations in Wills and Estates explored this question involving the rather banal situation in which a decedent held a joint bank account or investment with a son or daughter and that asset did not feature in the Will. Students were expected to recognize the potential of the jointly held property as a 'Will substitute' and find their way through the morass of the counter-presumptions of resulting trust and advancement. The nice thing about this scenario, for examiners at any rate, was that it forced students to pay attention to the principles underlying doctrine while recognizing the chaos of conflicting precedent, and to offer advice to the fictional parties in a principled but pragmatic manner. Creating such a balanced solution was no mean feat of course, and any student coming close would receive an 'A' grade from a pleased examiner. Law teachers everywhere are now disappointed that the Supreme Court of Canada has chosen to clarify the situation, at least to some extent. Happily, a number of issues remain alive such that old examination questions need only be adapted rather than tossed out altogether. For estates lawyers and planners, the Supreme Court's latest foray into the world of succession law is quite important. After all, the Supreme Court of Canada turns its attention to this area of law quite infrequently. In the last fifteen years, the court has dealt with approximately forty-five applications for Leave to Appeal in succession law matters but has only rendered four judgments — one on the law of dependants' relief,[1] one on undue influence,[2] and

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1. *Tataryn v. Tataryn Estate* (1994), 116 D.L.R. (4th) 193, [1994] 2 S.C.R. 807, 3 E.T.R. (2d) 229.
2. *Vout v. Hay* (1995), 125 D.L.R. (4th) 431, [1995] 2 S.C.R. 876, 7 E.T.R. (2d) 209.

now, two judgements on the testamentary treatment of jointly held assets. The court took a decidedly pragmatic approach to the problems associated with joint accounts in the two newest cases, ostensibly seeking to create greater certainty in the law. The solution to the issues set out by our highest court makes some very good points but is perhaps less emphatic on points of principle than practicality. Regardless, practitioners would do well to understand these developments and follow their evolution closely. In the meantime, law teachers will content themselves with grading the judgments as a solid 'B' — well written, dealing well with some of the relevant authorities and some of the practical issues, but paying scant attention to the evolution and core values underlying the presumptions of advancement and resulting trust, and casting many of the most difficult questions to the great bottomless legal pit known as 'the wisdom of the trial judge based on the individual facts of a specific case'.

1. The Context

The two most recent cases that the Supreme Court of Canada dealt with were variations on a single theme — a parent opens a joint bank account and/or purchases capital assets which are then taken in joint ownership with his or her child. All funds deposited into the account or paid for the asset are those of the parent exclusively; the child adds nothing of value. The parent then has the bad manners to die leaving a Will which fails to account for the asset in question. Is the beneficial entitlement to the asset to be treated as following the common law rules associated with joint ownership (legal title falling to the surviving joint tenant) perhaps with the presumption of advancement pled in aid of that proposition? Conversely, does the beneficial entitlement to the asset return to the now-deceased parent and fall into the residue of his or her estate through the application of the presumption of resulting trust? Of course the child on the account with the decedent sees it one way, the surviving spouse or children not on the account see it another, and eventually a nice judge sees it in court. The net result is that the only people to benefit in any real sense are the lawyers acting for the parties. Not a happy state of affairs as anyone, other than perhaps the lawyers and their own children, would admit.

In *Pecore v. Pecore*,[3] a father placed his assets into a joint bank account with one of his three children (Paula). His other children were more financially secure than this child, and indeed one of the others

3. (2007), 279 D.L.R. (4th) 513, 32 E.T.R. (3d) 1, 224 O.A.C. 330 (S.C.C.).

was estranged from the father. The father acted, at least in part, based on the advice of a financial advisor who told him that probate fees would not be charged on jointly held assets as they would operate outside the Will after his death. The father regarded the assets as his own during his lifetime, even representing himself as the 'real owner' to the Canada Revenue Agency in respect of tax liability (attempting to stave off liability for capital gains tax if the CRA chose to view the transaction as a present disposition of these capital assets to Paula). Paula had access to the account but only with notice to her father. At his death, a dispute arose between Paula and her quadriplegic ex-partner Michael, who was named as a residuary legatee in the father's Will. Were the assets part of the estate or were the assets owned in law and equity by Paula?

In *Saylor v. Madsen Estate*,[4] the mother and father had mirror Wills providing for a gift over to the survivor, and if there was no surviving spouse then the remaining estate was to be divided equally between the two classes of children and grandchildren. The mother died first and her assets passed to the father. The father later opened a joint bank account and a joint investment account with one of his three daughters (Patricia). The father declared and paid the taxes on the income. He controlled the account during his lifetime which was only used for his benefit. Eventually the father died, Patricia claimed the assets as her own, and her siblings naturally disagreed and brought an action against her in her role as executor of the father's estate. Were the assets part of the estate or were the assets owned in law and equity by Patricia?

The resolution of these two cases require three issues to be resolved:

(i) Whether the originating transactions setting up joint ownership of the assets were testamentary in nature such that each must comply with the formalities provisions of the succession law regime — in the cases in question, the Ontario *Succession Law Reform Act*[5] — to be effective;

(ii) Whether the presumption of resulting trust operates to regard such gratuitous transfers as setting up a trust obligation in favour of the estate;

(iii) Whether the presumption of resulting trust is rebutted either by evidence or the presumption of advancement on the facts such that the gratuitous transfer can be properly seen as a gift.

4. (2007), 279 D.L.R. (4th) 547, 32 E.T.R. (3d) 61, 224 O.A.C. 382 *sub nom. Saylor v. Brooks* (S.C.C.).
5. R.S.O. 1990, c. S.26.

2. The Quasi-Testamentary Character of a Jointly Held Asset

With the greatest of apologies, to make sense of the points at issue it is necessary to return to the very heart of legal darkness, first-year Property Law.

As all lawyers are well aware, 'property' is a legal and not a physical phenomenon. Property describes the rights and obligations that owners of property (proprietors) have as against the world of non-proprietors in relation to the thing in question. In common law systems, one way of owning property is to own it alone (sole ownership), another is to own with others in equal shares (ownership in common), and yet a third is 'joint ownership'. Joint owners, or properly 'joint tenants', hold nothing independently but everything together; that is, each joint tenant is equally seized of an interest in the entirety of the property but without distinct title to any particular share. Such an arrangement arises due to the presence of the 'four unities' of possession, interest, title, and time of commencement.[6] Most significantly, joint tenancies operate upon the principle of 'survivorship' and are not subject to disposition in a Will — upon the death of a joint tenant, the property passes to surviving tenants automatically with the last survivor taking sole ownership of the thing in law. A joint bank account is a prime example of such a joint tenancy; here the debt of the bank to the account holders representing the value of the account is owned, title is re-arranged as the joint owners die, and eventually the last survivor takes sole title to the property.

What then of the application of the succession statute – surely one would say that a legal device that operates as a means of transferring assets after the death of the penultimate tenant should have to comply with the formalities requirements of the *Succession Law Reform Act* for all the same reasons (mainly protection against fraud) that require conventional Wills to comply with the statute. To paraphrase the Supreme Court of Canada on point, such transactions do not have to comply with the succession law regime, and the reason for that is because we say so, but if the legislature wishes to change things then it can.

Indeed *Pecore v. Pecore* provides the authoritative answer to this question in some greater detail — a transaction creating joint ownership of a certain asset (say a joint bank account) may be one

6. See generally A.H. Oosterhoff and W.B. Rayner, *Anger and Honsberger: Law of Real Property*, 2nd ed. (Aurora: Canada Law Book, 1985), §1501. Note that the position is altered by statute in relation to land in Ontario; *Conveyancing and Law of Property Act*, R.S.O. 1990, c. C.34, s. 13(1).

that is testamentary *in operation* but is not a testamentary *per se*. Rather, when the joint bank account is opened and money is paid in by just one joint tenant, the other(s) receive a valid *inter vivos* gift of a form of common law title to that asset. However, because the money can be withdrawn or additional funds can be added to the amount of the initial deposit, the ultimate share taken by the last survivor is not quantifiable until it passes to him or her through survivorship. Thus, Rothstein J. held for the majority:[7]

> The gift in these circumstances is the transferee's survivorship interest in the account balance – whatever it may be – at the time of the transferor's death, not to any particular amount.

Why? Well, because we've always regarded it as such,[8] others regard it as such,[9] and it is eminently practical to do so. In other words, while the nature of the property is in fact one that is testamentary in operation, we do not regard it as such to allow the long-standing use of joint accounts as Will substitutes as a means of avoiding probate fees. As the Supreme Court of Canada held further, "[s]hould the avoidance of probate fees be of concern to the legislature, it is open to it to enact legislation to deal with the matter".[10] While a seemingly technical point, this is an important clarification of doctrine and removes, an admittedly small, ambiguity from Canadian estates law.

3. Is there a *Prima Facie* Resulting Trust in Such Circumstances?

Simply, yes.

Where the parent pays in all the money into the joint bank account and later dies, and the child takes sole title to the money in the account through the doctrine of survivorship, then that child is a *prima facie* trustee for the estate unless a gift is either proven or presumed.

Again, we must return to basics for a brief moment.

A 'presumption of resulting trust' is an equitable device which regards a gratuitous transfer (that is, a transfer from A to B absent valuable consideration) as giving rise to an obligation to return the

7. *Pecore*, *supra*, footnote 3, at para. 50.
8. *Reid (Re)* (1921), 64 D.L.R. 598, 50 O.L.R. 595 (C.A.), at p. 608; *Edwards v. Bradley*, [1956] O.R. 225 (C.A.), at p. 234, revised on other points [1957] S.C.R. 599, 9 D.L.R. (2d) 673.
9. *Russell v. Scott* (1936), 55 C.L.R. 440 (Aust. H.C.), at p. 455; *Young v. Sealey*, [1949] 1 All E.R. 92 (Eng. Ch. Div.), at pp. 107-108; *Aroso v. Coutts*, [2001] EWHC Ch. 443, at paras. 29, 36.
10. *Pecore*, *supra*, footnote 3, at para. 54.

property to the transferor, and, absent return, the transferee is treated as a trustee. The rationale is essentially one that is rooted in unjust enrichment. The transfer of title discloses no juristically valid explanation as to why beneficial entitlement should follow; absent such a juristically valid explanation, the transferee would be unjustly enriched. Hence the trust obligation as a default response to a gratuitous transfer. How does one rebut the presumption? By determining the intention of the transferor to give the asset to the transferee as a gift, either by evidence of intention (explicit or implicit, judged on the normal civil standard)[11] or through a counter-presumption of a gift (the 'presumption of advancement').

Perhaps the most important aspect of *Pecore v. Pecore* and *Saylor v. Madsen Estate* is to set out the circumstances by which the presumption of resulting may be rebutted by evidence. That clarification, if that be the right word in truth, merely allows almost any evidence to be offered on point. Indeed, by liberalizing the law on point and allowing for inferences to be taken from circumstances in new ways, litigation will now be focussed not on what might be presumed from the nature of the relationship of the parties but the circumstances of the transfer. In this regard, one might expect litigation to increase (particularly in circumstances where no lawyer or other professional adviser was available to document the transferor's intentions) rather than the opposite as was intended in the judgments.

In *Pecore v. Pecore*, the decedent had opened a joint bank account with his daughter five years before his death based, at least partially, on advice that this form of Will substitute would lessen probate fees payable on his estate. The account was opened pursuant to a contract with the bank setting out the operation of the account based, in part, on the doctrine of survivorship. He continued to transfer property into the account but represented himself as the 'true owner' to the CRA for the purposes of capital gains tax liability. He wrote letters to this effect to the bank. He controlled the account. He took all decisions in relation to it but allowed the daughter to withdraw from the account provided she told him first. He made statements to his lawyer in respect of his estate plan, but did not specifically address the matter of the jointly held assets.

In *Saylor v. Madsen Estate*, the decedent first opened a joint bank account with his daughter seven years before his death; the account was subsequently closed but successor accounts and investment certificates were substituted and were all similarly jointly held. All

11. *Pecore*, *supra*, footnote 3, at paras. 42-44.

were made pursuant to contracts setting out the survivorship principle. The decedent also gave the daughter a power of attorney. He paid all taxes and controlled the account. The daughter maintained that there were statements made by the father prior to his death that established a gift, but she was disbelieved at trial.

All of this evidence was considered in the Supreme Court of Canada to make out the intention of the transferor at the time that the accounts were opened and the monies paid in. In *Pecore*, the presumed resulting trust was rebutted and a gift was proved. In *Saylor*, the presumed resulting trust was not rebutted and the daughter held on trust for the estate. What is important here is the range of evidence that can be considered and the wide nature of the inquiry into intention that the Supreme Court contemplates. Unkind critics might even say that the spectre of 'palm-tree justice' — equity's description of legal Hell — looms ever larger as a result of these judgments.

(a) the documents setting up the account.

Notwithstanding earlier precedent that the banking documents merely described the rights between the account holder(s) and the bank,[12] these documents may be used to infer the intent to gift the contents of the account on death. In *Pecore v. Pecore*, Rothstein J. held for the majority:[13]

> While I agree that bank documents do not necessarily set out equitable interests in joint accounts, banking documents in modern times may be detailed enough that they provide strong evidence of the intentions of the transferor regarding how the balance in the account should be treated on his or her death: see B. Ziff, *Principles of Property Law* (4th ed. 2006), at p. 332. Therefore, if there is anything in the bank documents that specifically suggests the transferor's intent regarding the beneficial interest in the account, I do not think that courts should be barred from considering it. Indeed, the clearer the evidence in the bank documents in question, the more weight that evidence should carry.

In *Pecore* itself the banking documents did not feature predominantly. In *Saylor* the survivorship clause in the banking contract 'lacked clarity' and was considered, but accorded little weight in the analysis.[14] Notwithstanding the use of the evidence in

12. *Mailman Estate (Re)*, [1941] S.C.R. 368, [1941] 3 D.L.R. 449; *Niles v. Lake*, [1947] S.C.R. 291, [1947] 2 D.L.R. 248; *Edwards v. Bradley*, [1957] S.C.R. 599.
13. *Pecore*, *supra*, footnote 3, at para. 61.
14. *Saylor*, *supra*, footnote 4, at paras. 26-27.

these cases, the law on this point has shifted substantially and the documents themselves should be carefully scrutinized, together with the transferor's sophistication and the pre-transaction advice to him or her by third parties, as a basis for inferring intent.

(b) the use and control of the account during the decedent's lifetime.

As the majority in *Pecore* acknowledge, the fact that the decedent retained control of the account and did such acts as assuming responsibility for tax liability could be seen as either consistent with retaining beneficial ownership or preserving the value of the asset as a gift to pass on death.[15] Again, this is evidence that may be considered by the trial court and must be weighed as to persuasiveness of a particular proposition in the context of the facts of an individual case. While it may be of 'marginal assistance'[16] given that it may be consistent with contrasting inferences, it certainly provides nice fodder for the litigation-minded.

(c) tax treatment and assumption of liability for tax.

Again, the attitude of the transferor is of relevance in determining the intention of the transferor to retain or donate beneficial title and can cut either way; it is relevant but not determinative evidence whose weight must be determined through the exercise of the trial judge's discretion.[17] Surprisingly, the fact that this gives rise to a tax problem in respect of actual liability for tax when the transferee's interest vests did not seem unduly troublesome to the majority of the court in *Pecore v. Pecore*. Rothstein J. held:[18]

> As for the matter of taxes on capital gains, it was submitted to this Court that for public policy reasons, transferors should not be permitted to transfer beneficial title while asserting to the tax authorities that such title has not been passed in order to defer or avoid the payment of taxes . . . In principle, I agree. 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

15. *Pecore*, *supra*, footnote 3, at para. 62.
16. *Pecore*, *supra*, footnote 3, at para. 63.
17. *Pecore*, *supra*, footnote 3, at para. 69.
18. *Pecore*, *supra*, footnote 3, at para. 70.

> disposition at the moment of the setting up of the joint account . . . 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.

One expects the CRA to voice an opinion at some point.

(d) the decedent has granted a Power of Attorney to the transferee.

Again this is a relevant but not determinative fact that is to be weighed by the trial judge, and is itself equivocal. As Rothstein J. held in *Pecore v. Pecore*:

> [T]his evidence will not be determinative and courts should use caution in relying upon it, because it is entirely plausible that the transferor granted power of attorney and placed his or her assets in a joint account but nevertheless intended that the balance of the account be distributed according to his or her will. For example, the transferor may have granted power of attorney in order to have assistance with other affairs beyond the account and may have made the transferee a joint account holder solely for added convenience.[19]

Or, perhaps not.

(e) subsequent acts and statements.

If one were of the opinion that litigation may be more on the cards now given the nature of the evidence thought relevant, then that opinion can only be strengthened by the new rule that evidence of acts or statements of the transferor after the transfer — years after in fact as was the case in *Pecore v. Pecore* — are adducable on point with a *caveat* that is itself little more than an aspiration than a rule:

> . . . I am of the view that the evidence of intention that arises subsequent to a transfer should not automatically be excluded . . . Such evidence, however, must be relevant to the intention of the transferor at the time of the transfer the trial judge must assess the reliability of this evidence and determine what weight it should be given, guarding against evidence that is self-serving or that tends to reflect a change in intention.

The net result of all of this is to regard the transaction setting up the account and the paying-in of money as a quasi-testamentary one. If it were a Will made in compliance with the succession statute we might be able to presume intention absent suspicious circumstances or

19. *Pecore*, *supra*, footnote 3, at para. 68.

questions as to mental capacity or undue influence and the like, but within the context of the operation of a Will substitute like a joint bank account the court may be required to determine intention based on a wide array of evidence.

4. The Counter Presumption of Advancement

The presumption of resulting trust becomes a difficult issue when it meets its oppositional counterpart, the presumption of advancement. Here the equities are reversed, unless the presumption of advancement does not apply on its own terms and those terms have been narrowed so very much as a result of *Pecore v. Pecore*.

The presumption of advancement is of course one of equity's oldest doctrines and is so described even in the earliest cases,[20] holding in its original form that a gratuitous transfer between a man and his wife or natural child or one to whom he stands *in loco parentis* is presumed to be a gift; it allows the donee to "advance" or get-on in life. Now, as a result of *Pecore v. Pecore*, the presumption still operates but operates parent to minor child only. That it operates from a parent and not just a man is an expansion of the doctrine; that it operates to minor children only is a substantial restriction.

The issue of the operation of the presumption of advancement was of course central to both *Pecore* and *Saylor*; and the question was really one that asked whether the presumption ought be allowed to operate in present social circumstances. With respect, the discussion of the presumption of advancement in both the majority and minority judgments in *Pecore* was a disappointment.[21] Rather than seeing the evolution of the presumption as somewhat shrouded in the peculiarities of the development of equity, the majority judgment took a decidedly narrow view of both its development and justification in contemporary society. The minority did somewhat better. Regardless, the majority judgment in *Pecore v. Pecore* holds that the presumption of advancement is not helpful where the child in not a minor given the lack of a support obligation at law on the part of the parent. Rothstein J. wrote:[22]

20. *Dyer v. Dyer* (1788), 30 E.R. 42, 2 Cox 92; *Grey v. Grey* (1677), 2 Swans. 594, 1 Ch. Ca. 296, 22 E.R. 809 (H.C. of Ch.); *Elliott v. Elliott* (1677), 2 Ch. Ca. 231, 22 E.R. 922 (H.C. of Ch.); *The Venture*, [1908] P. 218 (C.A.).
21. I have treated the issue elsewhere and at the risk of having the phrase 'sour grapes' being hurled in my general direction I would suggest that the evolution of the presumption historically and its modern development is rather more multi-faceted than features in *Pecore v. Pecore*; see C.D. Freedman, "Reassessing Gratuitous Transfers by Parents to Adult Children" (2006), 25 E.T.P.J. 174.

> . . . 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 . . . [moreover] parental support obligations under provincial and federal statutes normally end when the child is no longer considered by law to be a minor . . . Indeed, not only do child support obligations end when a child is no longer dependent, but often the reverse is true: an obligation may be imposed on independent adult children to support their parents in accordance with need and ability to pay . . . [further] it is common nowadays for ageing parents to transfer their assets into joint accounts with their adult children in order to have that child assist them in managing their financial affairs. There should therefore be a rebuttable presumption that the adult child is holding the property in trust for the ageing parent to facilitate the free and efficient management of that parent's affairs.

Should the presumption apply, then, to dependant adult children based on the justification of a legal obligation of support owed to the adult child? No, held the majority of the court, certainty and pragmatism argue to the contrary. Rothstein J. held:[23]

> The question of whether the presumption applies to adult dependent children begs the question of what constitutes dependency for the purpose of applying the presumption. Dependency is a term susceptible to an enormous variety of circumstances. The extent or degree of dependency can be very wide ranging. While it may be rational to presume advancement as a result of dependency in some cases, in others it will not. For example, it is not difficult to accept that in some cases a parent would feel a moral, if not legal, obligation to provide for the quality of life for an adult disabled child. This might especially be the case where the disabled adult child is under the charge and care of the parent.
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> As compelling as some cases might be, I am reluctant to apply the presumption of advancement to gratuitous transfers to "dependent" adult children because it would be impossible to list the wide variety of the circumstances that make someone "dependent" for the purpose of applying the presumption. Courts would have to determine on a case-by-case basis whether or not a particular individual is "dependent", creating uncertainty and unpredictability in almost every instance. I am therefore of the opinion that the rebuttable presumption of advancement with regards to gratuitous transfers from parent to child should be preserved but be limited in application to transfers by mothers and fathers to minor children.
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> There will of course be situations where a transfer between a parent and an adult child was intended to be a gift. It is open to the party claiming

22. *Pecore*, *supra*, footnote 3, at para. 36.
23. *Pecore*, *supra*, footnote 3, at paras. 39-41.

that the transfer is a gift to rebut the presumption of resulting trust by bringing evidence to support his or her claim.

This is disappointing. It would have been better to end the availability of the presumption of advancement altogether as its partial-retention, partial-abolition seems somewhat arbitrary and certainly does not reflect its somewhat inelegant evolution. However, cutting it back in respect of adult and independent children is a development to be welcomed. It puts the onus where it should be, on the transferee who is best situated to prove a gift. In the case of dependant children, the logic set out in the majority judgment for withholding the availability of the presumption seems somewhat suspect (surely defining dependency for these purposes is not altogether that difficult, we certainly have little trouble with the point in dependants' relief cases), but one might expect that factual inferences taken from evidence setting up actual dependency between such an adult child and a parent may well allow a finding that a gift was intended.

5. Conclusion

Maintaining a balance between the twin institutional values of flexibility and certainty in crafting legal doctrine is not easy. However, given that the use of jointly held assets in estate planning is commonplace one would have expected a rather more refined response to the issues. The solution offered by the Supreme Court of Canada in respect of the testamentary effect of jointly held assets creates greater certainty in some respects, principally the non-application of the formalities requirements of the succession law statute and the confinement of the presumption of advancement to minor children. That the presumption of advancement was retained at all is a disappointment, but, if it is to remain within the succession law regime, its unavailability to adult dependant children seems odd. At the same time, certainty is weakened by an expanded inquiry into the decedent's intentions based on inspection of highly technical banking contracts and the post-transaction acts and statements of the transferor. Lawyers and other professionals wishing to advise their clients with a view to avoiding litigation would do well to anticipate challenges to the operation of joint accounts as Will substitutes through the presumption of resulting trust by creating an accompanying document that states the intention of the decedent which is compliant with the succession statute's formalities provisions to make it a near conclusive form of proof. Perversely, the clearest method would be to bring the assets into the Will, which would of course defeat the whole point of using a joint bank account as a Will substitute in the first place.