CITATION: Sawdon Estate, 2012 ONSC 4042
COURT FILE NO.: CV-09-4404-00ES
DATE: 20120723

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	
Wayne Robert Sawdon, in his capacity of Trustee of the Estate of Arthur O. Sawdon, deceased, and Wayne Robert Sawdon in his own right, and Stephen Peter Sawdon	Stephen Sawdon, self-represented L. Silver and C. Pendrith for Wayne Sawdon, Trustee of the Estate of Arthur O. Sawdon, deceased
Applicants	
- and -	
Watch Tower Bible and Tract Society of Canada	D. Gnam and S. Deschenes, for the respondent, Watch Tower and Bible Tract Society of Canada
Respondent	
- and -	
Public Guardian and Trustee, in its capacity as litigation guardian for James Arthur Sawdon, an incapable person	Y. Tse Kim for the Public Guardian and Trustee
	HEARD: June 18, 19, and 20, 2012

REASONS FOR JUDGMENT

Ricchetti J.

THE TRIAL OF AN ISSUE

[1] This matter proceeded as a trial of a discrete issue in the Passing of Accounts by Wayne Sawdon, the Trustee of the Estate of Arthur O. Sawdon.

[2] The only issue to be determined in this trial was whether monies in certain joint bank accounts, with a right of survivorship, held by Arthur Sawdon and one or more of his children at the date of his death form part of Arthur Sawdon's estate.

THE JOINT BANK ACCOUNTS

[3] The following seven bank accounts were jointly held, with a right of survivorship, by Arthur Sawdon, Wayne Sawdon and Stephen Sawdon on the date of Arthur Sawdon's death:

i. CIBC Acct. No. XXXXXXXXX
ii. CIBC Acct. No. XXXXXXXXX
iii. CIBC Acct. No. XXXXXXXXX
iv. Royal Bank Acct. No. XXXXXXXX
v. Royal Bank Acct. No. XXXXXXXX
vi. TD Canada Trust Acct. No. XXXXXXXX
vii. TD Canada Trust Acct. No. XXXXXXXX
(as more particularly described in the trial record)
("Joint Bank Accounts")

[4] The total amount in the Joint Bank Accounts on Arthur Sawdon's death was approximately $1,075,872.83.

[5] There is no dispute that the Joint Bank Accounts were jointly held with a right of survivorship. It is admitted Wayne Sawdon was a joint account holder in all of the Joint Bank Accounts. It is also admitted that Stephen Sawdon was a third joint holder on at least five of the Joint Bank Accounts. The only dispute is whether Stephen Sawdon was also a joint account holder on all seven of the Joint Bank Accounts (i.e. on two of the seven Joint Bank Accounts).

[6] On the evidence before me, I am satisfied that both Wayne and Stephen Sawdon were joint bank account holders, along with Arthur Sawdon, on all the Joint Bank Accounts.

THE WITNESSES

[7] The following witnesses testified at the hearing:

(a) Wayne Sawdon;
(b) Stephen Sawdon;
(c) Gladys Fisher (an accounts administrator with CIBC); and
(d) Daniel Pole (the lawyer for Arthur Sawdon).

THE FACTS

[8] Arthur Sawdon was married to Hilda Sawdon (jointly referred to as "the Sawdons").

[9] The Sawdons had 5 children, Wayne, Stephen, Brian, James and Carolyn. James has certain disabilities requiring the appointment of the Public Guardian and Trustee ("PGT") in this proceeding.

[10] The Watch Tower Bible and Tract Society of Canada ("Watch Tower") is a charity and the corporate entity which acts as the legal arm of the religious community of Jehovah's Witnesses in Canada.

[11] Mr. Pole became the Sawdons' lawyer in the early 1990's.

[12] In 1993 the Sawdons formed a company, Sawdon Holdings Inc. ("Sawdon Holdings"), in the Cayman Islands to hold their investment monies and avoid Canadian tax. Mr. Pole established Sawdon Holdings for the Sawdons. This was accomplished using a Trust Administrator, the CIBC, in the Cayman Islands. Initially, the two beneficial shareholders of Sawdon Holdings were Arthur and Hilda Sawdon, with a right of survivorship as between them.

[13] In 1994, the Sawdons arranged for Mr. Pole to transfer 5% of Sawdon Holdings to each of their 5 children. As a result, the Sawdons continued to jointly hold beneficially 75% of the shares of Sawdon Holdings while their children held 25%.

[14] The Sawdons' loaned money to Stephen Sawdon to buy a home. The loan was secured by a mortgage. The mortgage expressly provided that the mortgagees, Arthur and Hilda Sawdon, held the mortgage jointly with a right of survivorship. ("Stephen Sawdon Mortgage")

[15] The Sawdons also loaned money to Wayne Sawdon to buy a home. The loan was secured by a mortgage. The mortgage expressly provided that the mortgagees, Arthur and Hilda Sawdon, held the mortgage jointly with a right of survivorship. ("Wayne Sawdon Mortgage")

[16] The Sawdons held all, but one, of their bank accounts jointly with a right of survivorship.

[17] As a result of his own personal financial dealings throughout his life and prior to his death, Arthur Sawdon was familiar with and had a number of assets held "jointly" with a "right of survivorship". Further, Arthur Sawdon understood and appreciated that, joint assets with a right of survivorship, meant the assets would, upon the death of one joint owner, become the property of the other joint owner without the asset going to the deceased's estate or the need to probate the deceased's estate.

[18] Hilda Sawdon died on May 17, 2004.

[19] Arthur Sawdon was personally involved and observed the application of a transfer of joint assets with a right of survivorship when his wife, Hilda, died.

[20] At the time of Hilda Sawdon's death, all assets, except one bank account, were held jointly by Arthur and Hilda Sawdon with the right of survivorship. Hilda Sawdon had one bank account solely in her name. ("Hilda's Bank Account")

[21] Upon Hilda Sawdon's death, the following assets transferred to Arthur Sawdon by operation of law, without the assets becoming a part of Hilda Sawdon's estate and without the necessity of probating Hilda Sawdon's estate:

- The 75% beneficial interest which the Sawdons had in Sawdon Holdings;
- The Stephen Sawdon Mortgage;
- The Wayne Sawdon Mortgage;
- The joint bank accounts held by the Sawdons; and
- Their home which was jointly owned.

[22] After some difficulty and frustration, Arthur Sawdon was able to persuade the bank, holding Hilda's Bank Account, to transfer the monies to him directly. Arthur Sawdon was able to present the bank a copy of Hilda Sawdon's Will showing that he was the sole beneficiary. Arthur Sawdon was unhappy with the delay and having to prove his entitlement to the monies in Hilda's Bank Account. This emphasized to Arthur Sawdon, in a very practical way, the manner in which joint bank accounts with a right of survivorship, operated upon the death of a joint

account holder as opposed to a bank account held solely in the deceased's name.

[23] In 2004, Arthur Sawdon decided to update his Will. Arthur Sawdon asked Mr. Pole to prepare a new Will. At a meeting with Arthur Sawdon, Arthur Sawdon told Mr. Pole he was thinking about transferring his bank accounts into joint bank accounts with his sons, Wayne and Stephen Sawdon. Mr. Pole advised Arthur Sawdon that, if he transferred his bank accounts into joint accounts with Wayne and Stephen and Arthur Sawdon did not want the monies in the bank account to go to the other joint bank account holders on his death, he would need a Declaration of Trust to "rebut the joint tenancy – joint survivorship." As a result, Arthur Sawdon clearly understood that, if and when he transferred the bank accounts into joint bank accounts with Wayne and Stephen, with a right of survivorship and without a Declaration of Trust, – the monies in his Joint Bank Accounts would belong or be accessible to Wayne and Stephen Sawdon immediately upon his death. Mr. Pole gave the following evidence at his cross-examination:

> Q. To your knowledge, right. And so – and- and – and I thought you said that the Declaration of Trust was required because otherwise when Art died, the Right of Survivorship would prevail and the money would go to the person with whom he had the joint account with.
>
> A. That's correct.

Q. Right. And you – and—and you made it clear to Art that the Declaration of Trust was required for that reason.

A. It was to rebut the joint tenancy – joint survivorship.

Q. Right. And so Art—so—so, to the best of your knowledge, Arthur Sawdon knew that if he didn't put a Declaration of Trust into place before he died, when he died, the money in the joint account would go to who he was holding the joint account with pursuant to the right of survivorship.

A. That was my legal advice to him, yes.

Q. You told him that and he – he was competent at the time?

A. Yes.

Q He understood that and never completed a Declaration of Trust.

A. He didn't, that's correct and I've explained why.

...

Q. Did you get in – did you discuss with Mr. Sawdon and let's start with 2004. That if he didn't want the money to go to the survivor of the joint account. He could take steps while he was alive to transfer the money into a sole account. He could eliminate the joint account completely.

A. That's right. And I don't have knowledge of whether or not a joint account was ever set up or – or any money put in a joint –

[24] Understanding this, Arthur Sawdon nevertheless proceeded to transfer his bank accounts into the Joint Bank Accounts with a right of survivorship to himself, Wayne and Stephen Sawdon. Arthur Sawdon never:

a) told Mr. Pole he had transferred his bank accounts into the Joint Bank Accounts;

b) told Mr. Pole he had any joint bank accounts prior to his death;

c) instructed Mr. Pole to prepare a Declaration of Trust for Wayne or Stephen Sawdon; and

d) asked nor had his sons execute a Declaration of Trust.

[25] The process of transferring Arthur Sawdon's bank accounts into the Joint Bank Accounts with a right of survivorship to himself, Wayne and Stephen Sawdon started in 2004.

[26] In June 2004, Arthur Sawdon transferred one of his CIBC bank accounts into a joint account with a right of survivorship to himself, Wayne and Stephen Sawdon. Ms. Gladys Fisher was the CIBC account representative Arthur Sawdon dealt with. She explained to Arthur Sawdon the option of opening a joint account with or without a right of survivorship and the differences between the two types of bank accounts. Ms. Fisher also explained to Arthur Sawdon the risks associated with joint accounts such as the ability of Wayne and Stephen Sawdon to withdraw the monies while he was alive, and potential risks of seizure by Wayne or Stephen Sawdon's creditors should they become bankrupt or get divorced. Arthur Sawdon understood Ms. Fisher's explanation that opening a joint account with a right of survivorship would result, upon his death, a transfer of all monies in the bank account to the surviving joint bank account holders,

Wayne and Stephen Sawdon. Understanding this, Arthur Sawdon explained to Ms. Fisher that he wanted his children to have the money on his death without having to go through probate. Arthur Sawdon did not want to have the account frozen upon his death. Arthur Sawdon did not want his children to have the same problems he had with Hilda Sawdon's bank account when she died. Arthur Sawdon told Ms. Fisher that, upon his death, Wayne and Stephen Sawdon "knew what to do with the money." Understanding the above, Arthur Sawdon proceeded with the transfer of this bank account to a joint bank account with a right of survivorship for himself, Wayne and Stephen Sawdon.

[27] On July 9, 2004 Arthur Sawdon executed a new will ("2004 Will"). The 2004 Will provided that Arthur Sawdon's estate was to be divided into 5 parts, with one part for each of his children or their issue. If one of Arthur Sawdon's children died without issue that the particular child's share would go to the Watch Tower.

[28] Over the next few years, Arthur Sawdon proceeded to transfer his bank accounts at the Royal Bank and the TD Canada Trust into joint accounts with a right of survivorship to himself, Wayne and Stephen Sawdon. As with the CIBC bank account, Arthur Sawdon understood the legal consequences of establishing the Joint Bank Accounts with Wayne and Stephen Sawdon.

[29] The only inference to be drawn from Arthur Sawdon's actions after receiving the advice from Mr. Pole and his proceeding to transfer the bank accounts into the Joint Bank Accounts is that Arthur Sawdon intended and did not want the monies in the Joint Bank Accounts to go into his estate but rather to go to his two sons, to be used as he directed.

[30] However, upon his death, the monies in the Joint Bank Accounts were not to be for Wayne and Stephen Sawdon's sole benefit. Arthur Sawdon explained to Wayne and Stephen Sawdon that, upon his death and their entitlement to the monies in the Joint Bank Accounts, Wayne and Stephen Sawdon were to divide the monies equally amongst their siblings.

[31] Wayne and Stephen Sawdon agree and committed to their father that the monies in the Joint Bank Accounts, when they became entitled to those monies upon Arthur Sawdon's death, were not to be their monies personally, but rather, were to be for the benefit of the five siblings equally. Wayne Sawdon described the arrangement as follows:

> I was to utilize the funds later….on his death.
> ...
> These accounts were not gifts to him personally….they were gifts to me officially that I would do the right thing, that I would distribute them according to the way my father wanted me to.
> ...

> On his death, …. it meant I owned it (the monies) to do what my father wanted me to do with it. But I didn't own it, I understood that I owned it, I had control of it, I was in a position of power which I knew what to do with the power.

[32] It is important to note that placing all the siblings names in the Joint Bank Accounts would have been, not only time consuming as requiring all signatures, but James Sawdon's medical condition was also an issue. Arthur Sawdon took the more practical approach, transferring the bank accounts into joint bank accounts with two of his children he trusted (Wayne and Stephen) and having them agree that the monies were to be divided amongst his five children equally.

[33] Wayne Sawdon told Mr. Pole that, if needed, he was prepared to sign a document that Wayne Sawdon would hold the monies in the Joint Bank Accounts in trust for all the siblings. This is consistent with the trust obligation undertaken by Wayne and Stephen Sawdon that, upon Arthur Sawdon's death and their entitlement or access to the monies in the Joint Bank Accounts, the monies in the Joint Bank Accounts were to be distributed to all the siblings equally.

[34] Arthur Sawdon continued to manage his financial affairs for several years. Arthur Sawdon remained generally in good health and was mentally competent. It is clear that Arthur Sawdon did not need help, from his children or otherwise, during his life to manage his property including the monies in the Joint Bank Accounts. He did this entirely on his own. Further, if he had become

incapable of managing his property, Arthur Sawdon had already executed a Power of Attorney over his property naming Wayne Sawdon as his attorney.

[35] In 2006, Arthur Sawdon decided he wanted to update his Will. He contacted Mr. Pole on July 4, 2006. The notes which memorialize this communication state:

> ... divide among 5 children – equal parts
>
> -share to surviving issue
>
> -Residue to Watch Tower

[36] These notes suggest an intention to make a distribution consistent with the 2004 Will.

[37] Arthur Sawdon went to Mr. Pole's office on July 5, 2006. The notes of that meeting included a list of Arthur Sawdon's assets (not estate assets as suggested by Mr. Pole) which include references to bank accounts (not joint bank accounts). Mr. Poles' notes also include:

> -Now want: -Forgive largest mortgage
>
> -Give all other children same amount
> -Wayne
> -Stephen
> -Carolyn
> -Wayne for Jim
> -Brian Sawdon
>
> -Remaining for Kingdom Hall} World Tower Fund

> -25% Cayman belongs to kids
>
> -75% to Art
>
> I will arrange to attend in Cayman and transfer Hilda's shares to Art, arrange joint deed if appropriate, before going down.

[38] I reject Mr. Pole's evidence that Arthur Sawdon expressed an intention to him that the monies in the Joint Bank Accounts would form part of Arthur Sawdon's estate. There were no such express words used by Arthur Sawdon. Mr. Pole admitted he did not know the bank accounts which Arthur Sawdon told him about were jointly held with his sons on July 5, 2006. Mr. Pole did not even ask Arthur Sawdon whether the bank accounts disclosed on July 5, 2006 were joint. Mr. Pole did not find out the bank accounts were joint accounts until after Arthur Sawdon's death. As a result, Mr. Pole couldn't possibly know Arthur Sawdon's intention was with respect to the monies in the Joint Bank Accounts. Mr. Pole's conclusion is simply an assumption by him as a result of Arthur Sawdon disclosing he had bank accounts. Mr. Pole's assumption was wrong as evidenced by what Arthur Sawdon did two weeks later.

[39] On the same day on July 5, 2006, Mr. Pole prepared and Arthur Sawdon executed:

- a new will ("July 2006 Will"); and

- a Transfer and Assignment purporting to transfer his 75% interest in Sawdon Holdings to the Watch Tower subject to a life interest in favour of Arthur Sawdon ("Transfer and Assignment").

[40] The July 2006 Will provided:

- Wayne Sawdon was the Executor and Trustee;
- There was a hotchpot clause for the Sawdon children up the greater amount owing under the Stephen Sawdon Mortgage or the Wayne Sawdon Mortgage or $100,000;
- The share of any child who died without issue would go to Watch Tower; and
- The residue would go to the Watch Tower.

[41] The July 2006 Will was re-executed to correct a typographical error in October 2006. There were no changes of any significance to the Will.

[42] Prior to execution of the Transfer and Assignment or the July 2006 Will (both of which were financially beneficial to the Watch Tower), Mr. Pole did not disclose to Arthur Sawdon he was an elder with the Jehovah's Witnesses or had acted as the Watch Tower's counsel in the past.

[43] Several weeks later, on July 19, 2006, Arthur Sawdon returned to the CIBC bank and transferred the two remaining CIBC bank accounts into joint bank accounts with a right of survivorship for himself, Wayne and Stephen Sawdon. It

is important to note that this was done AFTER Arthur Sawdon had executed the July 2006 Will. One of the accounts transferred at this time was a bank account which held approximately 60% of the total monies in Arthur Sawdon's bank accounts. It is inconceivable that Arthur Sawdon intended his Joint Bank Accounts to go into his estate (as Mr. Pole testified) when Arthur Sawdon proceeded, within two weeks after signing the July 2006 Will, transferred the bulk of the monies in his bank accounts into one of the Joint Bank Accounts knowing and having been told previously by Mr. Pole that the effect of doing so would result in the monies NOT going to his estate. Arthur Sawdon clearly knew and intended that the monies in these newly transferred joint bank accounts (like his other joint bank accounts) would not go into his estate, would not be subject to probate and could (and would) be accessed by his sons after his death.

[44] By transferring the last two CIBC bank accounts, Arthur Sawdon ensured that all his bank accounts were Joint Bank Accounts notwithstanding the provisions in the July 2006 Will.

[45] Wayne Sawdon or his siblings (the other shareholders in Sawdon Holdings) were not told or were aware that Arthur Sawdon had executed the Transfer and Assignment. Mr. Pole travelled to the Cayman Islands in October 2006. The Trust Administrator refused to recognize or accept the Transfer and

Assignment. On his return, Mr. Pole told Arthur Sawdon that it did not matter the Trust Administrator had not accepted the Transfer and Assignment as Mr. Pole “reassured" Arthur Sawdon that the Watch Tower was the residual beneficiary under his July 2006 Will and would receive the shares in Sawdon Holdings in that manner.

[46] Arthur Sawdon died on March 27, 2007.

[47] Up until his death, Arthur Sawdon was the sole person depositing or withdrawing funds from the Joint Bank Accounts (except for mortgage payments made by Wayne and Stephen into one of the Joint Bank Accounts).

[48] Notwithstanding, the Trust Administrator’s refusal to accept the Transfer and Assignment in October 2006; having told Arthur Sawdon that Watch Tower would receive the shares in Sawdon Holdings as residual beneficiary under the July 2006 Will; and without authority from the executor of Arthur Sawdon or the beneficial shareholders of Sawdon Holding, Mr. Pole:

a) wrote to Wayne Sawdon on April 2, 2007 and said “As it stands now, the Watch Tower is the majority shareholder [of Sawdon Holdings] and I am waiting to see if they have any instructions for me.”;

b) wrote to the Trust Administrator on April 11, 2007 requesting that "you immediately amend your records to note that the interest formerly seized by Mr. Sawdon is now held by" the Watch Tower;

c) wrote to Wayne Sawdon on May 7, 2007 that the "majority shares were transferred *inter vivos* by Arthur Sawdon."; and

d) wrote to the Trust Administrator on May 8, 2007 "instructing" them to record the Watch Tower as the 75% shareholder of Sawdon Holdings. Mr. Pole concluded:

> I must warn you that if the CIBC fails to perform the transfer of shares as necessary, I will advise the transferee Watch Tower Society of your refusal. In such case I anticipate that I may be instructed as corporate secretary to commence a legal proceeding to compel the CIBC to act with the legal costs and damages that may be appropriate.

THE CREDIBILITY OF THE WITNESSES

[49] I accept the evidence of Wayne Sawdon and Gladys Fisher as credible and reliable. The evidence of these witnesses was direct and clear. Ms. Fisher's evidence was unbiased. Both witnesses had no hesitation answering questions fully and completely. Their evidence was consistent with the documents, the agreed facts and other evidence.

[50] With respect to the evidence of Stephen Sawdon, while I found most of his evidence to be reliable, some answers were biased. Fortunately for the Applicants, the significant portions of his evidence are consistent with the evidence of Wayne Sawdon and the documentation signed by Arthur Sawdon.

[51] With respect to the evidence of Mr. Pole, I reject it entirely. There are a number of reasons I have concluded his evidence is neither credible nor reliable:

(a) Mr. Pole is a lawyer. I find it surprising and questionable that Mr. Pole would not disclose a conflict or even a potential conflict that he was an "elder" or "lay minister" with the Jehovah's Witness church and had acted for the Jehovah's Witness church prior to the preparation of the 2004 Will or the July 2006 Will or the Transfer and Assignment. Mr. Pole's reason for not doing so – because he wasn't wearing his Jehovah's Witness "hat" at the time – is simply not a good answer. Arthur Sawdon and the other shareholders of Sawdon Holdings were entitled to know all of Mr. Pole's "hats" when Mr. Pole provided advice or prepared documents for Arthur Sawdon;

(b) Mr. Pole's answers in cross-examination by the Estate Trustee's counsel were combative and he took every opportunity, whether or not relevant or appropriate to the question asked, to give answers favourable to Watch Tower;

(c) Some of Mr. Pole's answers made little sense. For example, Mr. Pole's evidence as to knowing Arthur Sawdon's intention regarding the Joint Bank Accounts after his death make no sense when Mr. Pole didn't know the joint nature of the bank accounts until after Arthur Sawdon's death. Daniel Pole's evidence was inconsistent with his earlier evidence that he had told Arthur Sawdon, if he set up joint accounts without a Declaration of Trust, the monies would go to the joint account holders on his death. Even more inconsistent was that two weeks after Arthur Sawdon signed the July 2006 Will, Arthur Sawdon opened up two new joint accounts with his sons with a right

of survivorship. Notwithstanding, Mr. Pole was adamant that it was Arthur Sawdon's intention that the monies in the Joint Bank Accounts were to go to the estate;

(d) Mr. Pole's actions subsequent to the death of Arthur Sawdon are demonstrative of a appearance of bias in favour of the Watch Tower:

i. Mr. Pole advised Arthur Sawdon that the Transfer and Assignment had not been accepted by the Trust Administrator and that the Watch Tower would receive the shares as the residual beneficiary under the July 2006 Will. The Transfer and Assignment apparently was a moot issue. However, upon Arthur Sawdon's death, Mr. Pole's actions in his attempts and threatens to get an immediate transfer of the shares of Sawdon Holdings to the Watch Tower, not as a residual beneficiary but as an *inter vivos* gift, gives the appearance of bias in favour of the Watch Tower. Mr. Pole's explanation that he did this to avoid estate fees was not a credible explanation;

ii. Despite instructions by Wayne Sawdon, the executor under Arthur Sawdon's July 2006 Will, not to advise the Watch Tower about the Watch Tower's potential entitlement under the Will, Mr. Pole nevertheless communicated the information to the Watch Tower; and

iii. Mr. Pole's attempts to get the Trust Administrator to immediately effect the Transfer and Assignment from Arthur Sawdon to Watch Tower, without authorization from potentially interested parties, are also evidence of apparent bias in favour of the Watch Tower. I reject Mr. Pole's explanations as to his authority to pursue the transfer to the Watch Tower as his explanations are wrong in law and appear to be an effort to justify taking his actions:

- Authority under the *Charities Accounting Act*. R.S.O. 1990, c.C.10, as amended - There was no legal obligation on Mr. Pole, under the *Charities Accounting Act,* to advise the Trust Administrator as no property intended for a charity vested in him;

- Authority under the Power of Attorney - The Power of Attorney, given by Arthur Sawdon, even if relevant, had expired upon the death of Arthur Sawdon; and

- As solicitor for or director of Sawdon Holdings - Mr. Pole had not received any instructions from Sawdon Holdings or its board of directors or its officers to demand the transfer to the Watch Tower. There is no reason that Mr. Pole would have written the letter without the prior knowledge of Wayne Sawdon, the only other director of Sawdon Holdings, a beneficial shareholder of Sawdon Holdings and an officer of Sawdon Holdings. Further, there no reason that Mr. Pole would have made the demands without the prior knowledge and approval of Wayne Sawdon, the executor under the July 2006 Will, a beneficiary under the July 2006 Will and someone who might object to the transfer of the shares to the Watch Tower.

THE LAW

[52] The legal concepts relating to joint bank accounts was succinctly set out in Water's *Law of Trusts in Canada* (3ed) at pages 401 and 404:

> A bank account gives rise to a chose in action against the bank. The banker is a debtor of the account holder, and the limit of the banker's obligation is the balance standing to the credit of the account at the time of the account holder's demand for payment. A joint account comes into

> being when an account at a bank is opened in the names of two or more persons. When the account is in joint names, both account holders are entitled to demand payment from the bank, and the agreement signed by both of them when the account is opened enables the bank to discharge its obligation by paying either account holder. The rights of the account holders against the bank stem from their joint legal title to the chose in action, and the demand upon the banker which it permits.(page 401)
>
> The legal effect of this action, as commonly understood, is that, while the bank and the account holders stand respectively in the position of debtor and creditor, each of the account holders has a legal title to the moneys in the account. (page 401)
>
> …
> The opening of a joint account gives each account holder a legal interest in the moneys credited to the account at any one time, and the right of survivorship arises by operation of law as part of the legal concept of joint tenancy. But whether the survivor may take the balance depends upon whether the deceased intended to make such a gift of his share. (page 404)

[53] The most recent pronouncement on a survivors entitlement to the monies in joint bank accounts is the Supreme Court's decision in *Pecore v. Pecore*, 2007 SCC 17. The court stated:

> ...
> 2. Depending on the terms of the agreement between the bank and the two joint account holders, each may have the legal right to withdraw any or all funds from the accounts at any time and each may have a right of survivorship. If only one of the joint account holders is paying into the account and he or she dies first, it raises questions about whether he or she intended to have the funds in the joint account go to the other joint account holder alone or to have those funds distributed according to his or her will. How to answer this question is the subject of this appeal.
>
> 3. In the present case, an ageing father gratuitously placed his mutual funds, bank account and income trusts in joint accounts with his daughter, who was one of his adult children. The father alone deposited funds into the accounts. Upon his death, a balance remained in the accounts.

4. It is not disputed that the daughter took legal ownership of the balance in the accounts through the right of survivorship. Equity, however, recognizes a distinction between legal and beneficial ownership. The beneficial owner of property has been described as "the real owner of property even though it is in someone else's name": *Csak v. Aumon*, (1990), 69 D.L.R. (4th) 567 (Ont. H.C.J.), at p. 570. The question is whether the father intended to make a gift of the beneficial interest in the accounts upon his death to his daughter alone or whether he intended that his daughter hold the assets in the accounts in trust for the benefit of his estate to be distributed according to his will.

...

20 A resulting trust arises when title to property is in one party's name, but that party, because he or she is a fiduciary or gave no value for the property, is under an obligation to return it to the original title owner: see D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters' Law of Trusts in Canada* (3rd ed. 2005), at p. 362. While the trustee almost always has the legal title, in exceptional circumstances it is also possible that the trustee has equitable title: see *Waters' Law of Trusts*, at p. 365, noting the case of *Carter v. Carter* reflex, (1969), 70 W.W.R. 237 (B.C.S.C.).

...

24. The presumption of resulting trust is a rebuttable presumption of law and general rule that applies to gratuitous transfers. When a transfer is challenged, the presumption allocates the legal burden of proof. Thus, where a transfer is made for no consideration, the onus is placed on the transferee to demonstrate that a gift was intended: see *Waters' Law of Trusts*, at p. 375, and E. E. Gillese and M. Milczynski, *The Law of Trusts* (2nd ed. 2005), at p. 110. This is so because equity presumes bargains, not gifts.

25. The presumption of resulting trust therefore alters the general practice that a plaintiff (who would be the party challenging the transfer in these cases) bears the legal burden in a civil case. Rather, the onus is on the transferee to rebut the presumption of a resulting trust.

...

40. 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 regard to gratuitous transfers from parent to child should be preserved but be limited in application to transfers by mothers and fathers to minor children.

41. 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 that the transfer is a gift to rebut the presumption of resulting trust by bringing evidence to support his or her claim. In addition, while dependency will not be a basis on which to apply the presumption of advancement, evidence as to the degree of dependency of an adult transferee child on the transferor parent may provide strong evidence to rebut the presumption of a resulting trust.

43 The weight of recent authority, however, suggests that the civil standard, the balance of probabilities, is applicable to rebut the presumptions: *Burns Estate v. Mellon* 2000 CanLII 5739 (ON CA), (2000), 48 O.R. (3d) 641 (C.A.), at paras. 5-21; *Lohia v. Lohia*, [2001] EWCA Civ 1691 (BAILII), at paras. 19-21; *Dagle*, at p. 210; *Re Wilson*, at para. 52. See also Sopinka et al., at p. 116. This is also my view. I see no reason to depart from the normal civil standard of proof. The evidence required to rebut both presumptions, therefore, is evidence of the transferor's contrary intention on the balance of probabilities.

44 As in other civil cases, regardless of the legal burden, both sides to the dispute will normally bring evidence to support their position. The trial judge will commence his or her inquiry with the applicable presumption and will weigh all of the evidence in an attempt to ascertain, on a balance of probabilities, the transferor's actual intention. Thus, as discussed by Sopinka et al. in *The Law of Evidence in Canada*, at p. 116, the presumption will only determine the result where there is insufficient evidence to rebut it on a balance of probabilities.

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.

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.

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

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 BCSC 1761 (CanLII), [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 CanLII 3357 (BC SC), (1988), 48 D.L.R. (4th) 376 (B.C.S.C.); see also *Waters' Law of Trusts*, at p. 406.

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 gift *inter vivos*" (p. 608) 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. I also find MacKay J.A.'s reasons in *Edwards v. Bradley* (C.A.), at p. 234, to be persuasive:

> 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. [Emphasis added.]
>
> *Edwards v. Bradley* was appealed to the Supreme Court of Canada but the issue of survivorship was not addressed.
> ...
>
> 51. Treating survivorship in these circumstances as an inter vivos gift of a joint interest has found favour in other jurisdictions, including Australia and the United Kingdom: 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.
>
> 53. Of course, the presumption of a resulting trust means that it will fall to the surviving joint account holder to prove that the transferor intended to gift the right of survivorship to whatever assets are left in the account to the survivor. Otherwise, the assets will be treated as part of the transferor's estate to be distributed according to the transferor's will.

[54] The Supreme Court in *Pecore* reviewed several of the relevant factors which might assist a court in determining the intention of the deceased at the time of the transfer of the joint interest in the bank accounts:

(a) Evidence of the deceased's intention, including, where admissible, evidence subsequent to the transfer;

(b) Bank documents - the clearer the wording in the bank documents as to the deceased's intention, the more weight that evidence might attract;

(c) Control and use of the funds in the account – the circumstances must be carefully reviewed and considered to determine the weight to be given to this factor. However, the Supreme Court in *Pecore* recognized that a transferor may wish to avoid probate fees and/or make after death disposition less cumbersome and time consuming. See *Pecore* para. 47;

(d) Granting a Power of Attorney – the court should consider whether a granted power of attorney is some evidence, one way or another, of the deceased's intention; and

(e) Tax Treatment of Joint Accounts – this is another circumstance which might shed light on the deceased's intention.

THE ISSUES

[55] The issue to be decided are:

1. Whether the Applicants have rebutted the presumption of a resulting trust with respect to the Joint Bank Accounts; and

2. Whether there was a valid *inter vivos* gift of the joint interest in the Joint Bank Accounts.

ANALYSIS

ISSUE #1 - Have the Applicants rebutted the presumption of a resulting trust with respect to the Joint Bank Accounts?

[56] The transfers of Arthur Sawdon's bank accounts into Joint Bank Accounts from 2004 to 2006 were done gratuitously to his adult children, Wayne and Stephen Sawdon. Therefore, there is presumption of a resulting trust. The presumption may be rebutted by Arthur Sawdon's children, if they can establish, on the balance of probabilities, that Arthur Sawdon intended to and did make an *inter vivos* gift of the interest in the Joint Bank Accounts.

[57] There is no issue that Arthur Sawdon intended to make an immediate transfer of the legal interest in the Joint Bank Accounts when the accounts were established. This occurred when Arthur Sawdon and his sons signed the necessary bank documentation for each of the Joint Bank Accounts.

[58] The only other issue is whether Arthur Sawdon intended to make an immediate transfer of his beneficial interest in the Joint Bank Accounts when the accounts were established.

[59] I am satisfied that Arthur Sawdon's children have established that Arthur Sawdon intended to and did make a gift of his beneficial interest in the Joint Bank Accounts when the accounts were opened and, equally important, Arthur Sawdon did not intend that the monies would be held in trust for him during his life or be included in his estate, upon his death.

[60] Let me review the evidence:

i) Direct Evidence of Intent

[61] The direct evidence clearly establishes that Arthur Sawdon intended to make an *inter vivos* gift of the interest in the Joint Bank Accounts when the Joint Bank Accounts were opened:

(a) Arthur Sawdon understood how joint assets with a right of survivorship would operate on his death based on his prior dealings with such assets, his first-hand experience with joint assets after Hilda Sawdon's death, the advice given to him by Mr. Pole in 2004 and the information on joint bank accounts given to him by Gladys Fisher in 2004 and 2006; and

(b) Arthur Sawdon decided to and did, before and after the July 2006 Will, transfer his bank accounts into the Joint Bank Accounts, with a right of survivorship knowing the consequences of doing so. Namely, Arthur Sawdon understood (and therefore must have intended) that the monies in those Joint Bank Accounts would not form a part of his estate on his death and that the monies in those Joint Bank Accounts would belong to Wayne and Stephen Sawdon. I will deal with the issue of the sibling's entitlement below.

ii) Bank Documents

[62] The bank documents clearly set out that the Joint Bank Accounts were subject to a right of survivorship. In fact, in some of the bank documents, a clear choice had to be made by Arthur Sawdon whether the account was to be subject to a right of survivorship. Arthur Sawdon expressly chose to make the joint account "with a right of survivorship."

iii) Control and Use of the Funds

[63] The monies in the Joint Bank Accounts were used solely by Arthur Sawdon. However, Arthur Sawdon was told and understood that Wayne and Stephen Sawdon could withdraw the funds if they wanted to and that the monies in the Joint Bank Accounts were subject to creditor risks, during his lifetime, in certain financial situations involving his sons.

iv) Granting of Power of Attorney

[64] Arthur Sawdon had granted a Power of Attorney for personal care and for property on May 8, 2004. This would have permitted Stephen Sawdon to manage Arthur Sawdon's monies (including bank accounts) should he become incapable of managing his affairs. As a result, arranging the Joint Bank Accounts was not done for the purpose of assisting Arthur Sawdon to manage his financial affairs.

v) Tax Treatment

[65] Arthur Sawdon included in is tax returns all interest income from the Joint Bank Accounts. This is not surprising or determinative since it was clear the monies were deposited by Arthur Sawdon during his lifetime.

vi) No evidence of any reservation of interest by Arthur Sawdon

[66] In the evidence before this Court, there is no evidence that Arthur Sawdon intended Wayne or Stephen Sawdon to hold the monies in the Joint Bank Account "in trust" for himself while he lived or for the benefit of his estate upon his death. The evidence is all to the contrary. Arthur Sawdon's intended to transfer or "gift" the legal and beneficial interest in the Joint Bank Accounts. As far as Arthur Sawdon intended, the "gift" was completed when the Joint Bank Accounts were opened. There was nothing further to be done by Arthur Sawdon. Arthur Sawdon had given his entire interest, legal and beneficial, when the Joint Accounts were opened. There was no expectation or intent by Arthur Sawdon that the monies would become a part of his estate on his death.

Conclusion

[67] I am satisfied that Arthur Sawdon intended to make an *inter vivos* gift of, the legal and beneficial interest when the Joint Bank Accounts were opened.

ISSUE #2 - Whether there was a valid *inter vivos* gift of the joint interest in the bank accounts?

[68] The Watch Tower submits that the gift fails because Arthur Sawdon did not gift to Wayne and Stephen Sawdon the beneficial interest in the Joint Bank Accounts.

[69] The Watch Tower's position is set out in paragraphs 35-38 of their factum:

> The gift of the right of survivorship can only be to the joint account holders, those with legal title to the account. As Justice Rothstein twice emphasizes, if the presumption is rebutted, "the transferee alone" takes the balance of the account on the transferor's death through survivorship. To be a gift, the done must take title absolutely. A gift is not a trust and a trust is not a gift.
>
> Wayne and Stephen contend it was their father's intention to gift the monies left in the joint account on his death to his five children equally. However the other three children are not joint account holders. If there was a gift, it was not of the right of survivorship. As the Supreme Court held in *Pecore*: "Otherwise, the assets will be treated as part of the transferor's estate to be distributed according to the transferor's will."
>
> If Arthur Sawdon intended to create an express trust, wherein on his death Wayne and Stephen Sawdon held the monies in the joint accounts in trust for themselves and their siblings in equal share, such a trust was a testamentary disposition. ….
>
> The Succession Law Reform Act defines "will" to include "any other testamentary disposition" and requires it to be in writing. No will or codicil exists documenting Arthur Sawdon's purported gift on his death of the balance in the joint accounts to his five children equally.

[70] I am not persuaded that Arthur Sawdon's gift of the interest in the Joint Bank Accounts fails.

[71] A particularly relevant portions of the Supreme Court's decision in *Pecore* is the following:

> The question is whether the father intended to make a gift of the beneficial interest in the accounts upon his death to his daughter alone or whether he intended that his daughter hold the assets in the accounts in trust for the benefit of his estate to be distributed according to his will. (para 20)

[72] As is stated above, Arthur Sawdon did not intend to reserve the beneficial interest in the Joint Bank Accounts when he established the accounts.

[73] The Watch Tower takes too narrow a view of the gift as it suggests the gift was to the five children and was incomplete since only Wayne and Stephen Sawdon were named joint account holders.

[74] The Watch Tower's argument fails on any analysis. Either Arthur Sawdon intended that and transferred the beneficial interest in the Joint Bank Accounts to all of his children when the Joint Bank Accounts were established or he intended and transferred the beneficial interest in the Joint Bank Accounts to Wayne and Stephen Sawdon subject to a trust for all of his children. Either case is consistent with the facts in this case. In either case, the transfer, by way of gift, of the beneficial interest in the Joint Bank Accounts was valid at law.

i) Arthur Sawdon gifted the beneficial interest in the Joint Accounts to the Children

[75] One way to look at what Arthur Sawdon intended to and accomplished was a "gift" of the beneficial interest in the Joint Bank Accounts to his five children. Wayne and Stephen Sawdon were simply used by Arthur Sawdon to facilitate this transfer of the beneficial interest to Arthur Sawdon's children. Arthur Sawdon told Wayne and Stephen Sawdon, at the time the Joint Bank Accounts were established that the monies in the Joint Bank Accounts, on his death, belonged to all of his children equally and not just Wayne and Stephen Sawdon.

[76] The Watch Tower has not provided any authorities which suggest that the legal and beneficial ownership in the gift need to be to the same donee. It does not. There is no requirement that the legal and beneficial ownership in the joint interest in the Joint Bank Accounts need to be the same persons.

[77] Who are the beneficial owners of the Joint Bank Accounts? The bank's "paperwork" is not necessarily determinative of beneficial interest. The fact that the remaining children of Arthur Sawdon are not on the records of the Joint Bank Accounts does not mean they does not have a beneficial interest in the joint accounts. In *Bourque v. Landry*, (1936) 10 M.P.R. 108, the New Brunswick

Supreme Court made the following statement regarding the importance of the names on joint bank accounts at para. 5:

> In the consideration of cases of this kind, while the instrument containing the joint account agreement and direction to the bank no doubt establishes the title to the money in law it does not determine the rights of the parties in equity.

See also *Re Mailman Estate*, [1941] S.C.R. 368, *Niles v. Lake*, [1947] S.C.R. 291, and *Edwards v. Bradley*, [1957] S.C.R. 599.

[78] "In every case it is a question of intention to be gathered from the special facts and circumstances and the family relations or otherwise of the parties." See *User v. Banes*, (1921) CarswellNB 19 at para. 3.

[79] In this case, all the evidence supports a conclusion that all five children were intended to and had an equal beneficial interest in the Joint Bank Accounts upon Arthur Sawdon's death despite the fact that only Wayne and Stephen Sawdon's names were on the Joint Bank Accounts.

ii) Perfected Gift Subject to a Bare Trust

[80] Another way to approach what Arthur Sawdon did was that he made a "gift" of the legal and beneficial interest in the Joint Bank Accounts to Wayne and Stephen Sawdon subject to Wayne and Stephen Sawdon holding those monies,

upon receipt, in trust for their siblings. In other words, Wayne and Stephen Sawdon were bare trustees for their siblings when and if they received any monies from the Joint Bank Accounts.

[81] There is nothing improper or contrary to law with such an arrangement. The gift does not fail because the donee receives or holds the monies as a trustee for a third party. As set out in Water's Law of Trusts in Canada (3rd) at page 175, foot note 28:

> A gift is a donation, and a donation may be made by direct transfer to the done or to a trustee who is to hold for the donee.

See also *Walker, supra,* at para. 6.

[82] The valid *inter vivos* trust was established by Arthur Sawdon's clear language, the subject matter of the trust was certain (the joint interest in the Joint Bank Accounts) and the object of the trust was certain (to be divided amongst his children equally). All of the constituent elements for the creation of a trust are present.

[83] I am satisfied the evidence establishes there was a present intention by Arthur Sawdon to make the gift of the Joint Bank Accounts to Wayne and Stephen Sawdon subject to an *inter vivos* trust that the monies they received

from the Joint Bank Accounts were for the benefit of all of Arthur Sawdon's children equally.

Conclusion

[84] Regardless of whether, upon opening of the Joint Bank Accounts, the beneficial interest was transferred to all of Arthur Sawdon's children or to Wayne and Stephen Sawdon subject to a trust, there was no intention to reserve any beneficial interest by Arthur Sawdon.

[85] I conclude there was a valid *inter vivos* gift despite the fact the Joint Bank Accounts were only in the names of Wayne and Stephen Sawdon.

[86] The gift of the joint interest in the Joint Bank Accounts is not a testamentary disposition as the gift was intended to and was effective immediately upon opening of the joint bank accounts.

CONCLUSION

[87] The Joint Bank Accounts are not part of the Estate of Arthur Sawdon. There is no resulting trust in favour of the Estate with respect to the monies in the Joint Bank Accounts.

COSTS

[88] Either party seeking costs may file written submissions, with a maximum four pages in length with any attached Costs Outline and Authorities attached. Such submissions are to be filed within two weeks of the date these reasons are released.

[89] The responding party may file responding written submissions with the same length restrictions, within one week of the date of the Costs Submissions.

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Ricchetti J.

Released: July 23, 2012

CITATION: Sawdon Estate, 2012 ONSC 4042
COURT FILE NO.: CV-09-4404-00ES
DATE: 20120723

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

Sawdon Estate et al.

Applicants

- and –

Watch Tower Bible and Tract Society of Canada et al.

Respondents

-and-

Public Guardian and Trustee et al.

Respondent

REASONS FOR JUDGMENT

Ricchetti J.

Released: July 23, 2012