

Joint Bank Account Trusts and the Protection of Older Adults from Financial Abuse: Exploring Equity's Preference for Beneficiary-Direction Over Beneficiary-Protection

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The equitable doctrine of resulting trusts plays a significant role in defining and allocating the rights and responsibilities of adult children and older adult parents who are co-holders of joint bank accounts. Where equity deems the adult child to be a resulting trustee for their parent, it also imposes a rule that the adult child must follow the directions of the older adult, that is, a beneficiary-direction rule. This rule suffices to hold to account a financially abusive adult child co-holder, but it appears to preclude a beneficiary-protection power, that is, a power of an honest adult child co-holder to take protective action, against the wishes of the older adult, to safeguard the parent from financial abuse by others. This article explores, from a Canadian perspective, but with comparative aspects, the preference of equity for a beneficiary-direction rule over a beneficiary-protection power in the context of joint bank account resulting trusts. While it is contended that it is possible for equity to recognize a beneficiary-protection power, by analogizing such resulting trusts to express trusts, it is ultimately concluded that the preference for the beneficiary-direction rule is reasonable. That conclusion is reached on the basis of considerations of precedent and policy that give rise to a number of interconnected barriers to this analogy. However, since it can be anticipated that a need for protective action might arise, it is argued that equity should respect an express grant of protective power. This, in turn, has implications for lawyers and other advisors on financial affairs and related legal matters.

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I. Introduction

In Canada, as in the comparable common law jurisdictions of England and Wales, and Australia, it is increasingly being recognized that older adults are vulnerable to financial abuse by people with whom they are closely involved in their day-to-day lives, including their adult children.¹ One means of financial abuse can occur when an older adult is influenced by an adult child to draw on her savings for expenses that are partially or entirely to the benefit of the adult child, rather than the older adult. Just such a situation was at issue in the relatively recent Canadian case of *Bakken Estate v Bakken*.² A dispute arose between an adult son, who was suspected of selfishly influencing his elderly mother, and his adult

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1. See e.g. Senate of Canada, Special Senate Committee on Aging, *Canada's Aging Population: Seizing the Opportunity* (April 2009) at 24-26 (Chair: Sharon Carstairs); UK, House of Commons, Health Committee, *Elder Abuse: Second Report of Session 2003-04*, vol 1 (March 2004) at 23-25 (Chair: David Hinchliffe); Government of South Australia, Department for Health and Ageing, *Strategy to Safeguard the Rights of Older South Australians 2014-2021*, (May 2014) at 15.
 2. 2014 BCSC 1540 [*Bakken Estate*].

sister who, as co-holder of the joint bank account from which money was being withdrawn by her mother, made a preventative withdrawal of the funds remaining in the account. The daughter's motive was to protect her mother's assets. So motivated, the daughter's action may appear, at least at first blush, to be a morally understandable and appropriate exercise of her capacity to protect her mother's interests. Indeed, it might even be thought that the daughter was not merely morally entitled, but morally obliged, to act. However, on the present state of the law, which in this area is heavily dependent on equity, a strong argument could be made that the daughter acted wrongfully, would be required to immediately reverse the withdrawal and would be liable for any damage or loss associated with her wrong. Although ultimately resolved in favour of the daughter on other grounds, the *Bakken Estate* case illustrates a difficult issue that can arise for adult children who are co-holders of joint bank accounts with their older adult parents — namely, whether the adult child is entitled to act protectively against the immediate wishes of the older adult. The objective of this article is to explore and assess the legal framework applicable to this issue, with a focus on the role played by the rules and principles of equity.

Equitable rules and principles, particularly in the area of resulting trusts, are intimately involved in the definition and allocation of rights and responsibilities between joint bank account holders, at least where one of the co-holders is the source of all of the original funds in the account. Typically, if the older adult intended that the funds would only be used for her benefit during her life, then the funds will be subject to a resulting trust in favour of the older adult and the co-holding adult child will only be permitted to deal with the funds for the older adult's benefit. This general arrangement of rights and responsibilities is adequate to address another means of financial abuse of older adults, namely, when the co-holding adult child independently and without permission expends money from the joint account for her own benefit. Selfish expenditure of this kind is a clear violation of the responsibilities of a resulting trustee. The numerous cases and decisions attesting to that violation rest on the basic rule that resulting trustees may only act with the knowledge and consent, or direction, of the older adult beneficiary

— what will herein be called the “beneficiary-direction” rule. In contrast, there appears to be no Canadian or comparative cases or decisions on the issue of whether and to what extent the rules and principles relating to resulting trusts might allow or, even, require a resulting trustee to proactively protect the older adult from the selfish influence of others — what will herein be called a “beneficiary-protection” power (which, if not merely allowed but required, would be a duty). At the same time though, the doctrine articulated on the basis of the beneficiary-direction rule in the cases dealing with selfish resulting trustees appears to leave no room for protective action. Moreover, where relevant equitable rules and principles have been applied in similar contexts, such as ostensibly protective action by adult children holding powers of attorney, those children have been held to have acted wrongfully.

This article considers the apparent preference of equity for a beneficiary-direction rule over a beneficiary-protection power in the context of adult children who are co-holders of joint bank accounts with their older adult parents. Ultimately, it is argued that this preference is reasonable in the sense that there are good reasons of precedent and policy for equity not to automatically or presumptively provide resulting trustees with discretion to act protectively. At the same time though, since it can be anticipated that a need for protective action might arise, and that a power to act protectively might be useful, the door should remain open to the possibility that equity would respect an express grant of protective power. The article proceeds in three parts. In Part II, it provides an overview of the approach of equity, via the doctrine of resulting trusts, to the situation where older adults enter joint bank account relationships with an adult child, including how the doctrine of resulting trusts identifies and allocates any beneficial interest. Part III then situates the doctrine of resulting trusts in relation to other relevant areas of equitable doctrine, especially on trustee and fiduciary obligations, and contextualizes the issue of the rights and responsibilities of resulting trustees. This includes an explanation of the beneficiary-direction rule and of the possibility of recognizing a beneficiary-protection power via an analogizing of the position of a resulting trustee to that of an express trustee. Part IV then identifies and assesses four barriers to that analogy,

namely: (i) the paramountcy of the resulting trust approach and the beneficiary-direction rule in cases addressing joint bank accounts; (ii) the mixed treatment of, and concerns raised over, claims to a beneficiary-protection power in non-trust fiduciary contexts; (iii) the consistency between the judicial preference for the beneficiary-direction rule and the balancing of the interests of older adults in related statutory regimes and law reform initiatives; and, finally, (iv) the likelihood that older adults may somewhat consciously prefer to avoid an express trust approach to joint bank accounts. Since the consideration of these barriers leads to a finding that the preference for a beneficiary-direction rule is reasonable, Part V provides a brief discussion of the possibility of leaving the door open to equitable recognition for express grants of protective power, including mention of the implications for lawyers and others providing advice to older adults on their financial affairs. As it proceeds, the analysis conducted in this article offers a modest comparative dimension in that it gives some attention to case law and other relevant material from England and Wales, and Australia.

II. Older Adult Joint Bank Accounts and Resulting Trusts

Canadian and comparative case law provide numerous illustrations of older adults creating joint bank accounts with one or more of their adult children.³ Often this occurs in the context of the older adult considering issues of capacity or convenience in managing her financial affairs as she ages, as well as issues of estate planning. In a typical scenario, an

3. From Canada, see *e.g.* *Ast v Mikolas*, 2010 BCSC 127; *Miller v Miller*, 2011 ONSC 7239 [Miller]; *Coulston v Dixon*, 2014 ONSC 6134; *Gollan v Burnett*, 2014 BCSC 2424; *Sawdon Estate v Sawdon*, 2014 ONCA 101 [Sawdon]; *Mroz v Mroz*, 2015 ONCA 171. From the UK, see *e.g.* *Aroso v Coutts & Co.*, [2001] EWHC 443 (Comm); *Re Northall (Deceased)*, [2010] EWHC 1448 (Ch) [Northall]; *Drakeford v Cotton*, [2012] EWHC 1414 (Ch) [Drakeford]; *Mathews v Revenue and Customs Commissioners*, [2012] UKUT 658 (TCC). From Australia (and New Zealand), see *e.g.* *Russell v Scott* (1936), 55 CLR 440 (HCA); *Oliver v Davison* (24 August 1983), NSW BC8311926 (SC)(QL) [Oliver]; *Re Brownlee*, [1990] 3 NZLR 243 (HC); *Logan v Gardiner*, [2006] NSWSC 1069 [Logan].

older adult creates a new joint bank account with an adult child and is the sole contributor of funds to the account. The older adult intends to retain control over the funds for the remainder of her life, but also wants an adult child to have the power to assist with financial transactions, as needed. In terms of empowering the assistance of the adult child, creation of a joint bank account makes this possible because, at common law, a joint bank account is a recognized form of joint tenancy, with each co-holder entitled to an undivided share of the funds in the account and associated individual and independent rights of deposit and withdrawal. However, at common law, there is no recognition of the primacy of the older adult's interests; it is equity that provides that recognition, through the doctrine of resulting trusts.

The equitable doctrine of resulting trusts is multi-faceted and applies to a variety of situations that can be quite different but, to over-simplify, have in common a voluntary transfer of property that is not intended to benefit the recipient.⁴ The general operation of the doctrine of resulting trusts can be illustrated in the context of the creation of a joint bank account co-held by an older adult and an adult child. Where, as is typical,

4. This is an over-simplification in two senses. First, there is a lively jurisprudential debate about whether the basis of resulting trusts is intention or restitution. For a comprehensive overview of the law of resulting trusts, which argues for a restitution-based approach, see Robert Chambers, *Resulting Trusts* (Oxford: Oxford University Press, 1997) [Chambers, *Resulting Trusts*]. For an encapsulation and view of the debate over the appropriate approach, see John Mee, "Presumed Resulting Trusts, Intention, and Declaration" (2014) 73:1 Cambridge Law Journal 86. Second, resulting trusts can arise in circumstances of error (for example, unintended shortcomings in the establishment of an express trust) or mistake (for example, a misplaced deposit into the wrong bank account), where the question of intention is more complicated or, perhaps, less fruitfully explored. Often, circumstances of error and mistake, among others, are said to give rise to "automatic resulting trusts", whereas circumstances such as those currently under discussion in relation to joint bank accounts are said to give rise to "presumed intention resulting trusts". For an overview of resulting trusts that is structured around this nomenclature, see Dennis Pavlich, *Trusts in Common-Law Canada* (Markham: LexisNexis, 2014).

the older adult contributes all of the funds to the joint account, equity presumes that the older adult did not intend to transfer the beneficial proprietary interest (or, in other words, the equitable interest) in the funds to the adult child.⁵ Or, to put it the other way around, equity presumes that the older adult intended to retain the benefit of the funds. The effect of the presumption of a resulting trust is two-fold. First, when the presumption arises, equity presumptively binds the legal rights obtained by the adult child upon the creation of the joint account with a trust relationship that distinguishes the beneficial or equitable interest in the funds and allocates that interest to (or, in historical language, “results” that interest back to) the older adult. Second, having imposed this presumptive allocation, equity then places the onus of proof on any party who may oppose that allocation, whether it is the co-holding adult child or a third party, to show that there was an intention to transfer the beneficial interest. Where such an intention is demonstrated, the presumption of resulting trust is rebutted and the recipient will usually be regarded as having received an immediate gift of the funds. The courts have identified a variety of factors that can be considered in attempting to prove the intention of the older adult, but before discussing those it is necessary to recognize two possibilities that may affect the resulting trust analysis. First, there is the possibility of the older adult establishing the joint account in circumstances that give rise to a contrary equitable presumption, namely, the presumption of advancement. Second, there is the possibility of the older adult having distinct intentions as to the benefit of the funds in the account during the older adult’s life and the benefit of the funds remaining in the account upon the older adult’s death.

5. Technically speaking, the proprietary rights exist not in any money itself, but in the chose in action that arises through the creation of a bank account and that defines the rights and obligations of the bank and the account holders in relation to each other.

In terms of the contrary equitable presumption of advancement, historically, it applied where the voluntary transferor, or donor, was the husband or father of the donee. In situations of that type, the donor was presumed to be intending to make an “advance” of anticipated future entitlements of a wife or child. In other words, equity presumed that a gift was intended. In the context of a joint bank account, this would mean that if the older adult created co-holding rights in his wife or his child, then the wife or child would be presumed to have received an immediate (*i.e. inter vivos*) gift of the beneficial interest in the funds. Consequently, in equity, any party seeking to contest that presumptive allocation of the beneficial interest would have the onus of proving that there was no intention to give or, in other words, that there was an intention to retain the beneficial interest. The current status of the presumption of advancement differs among common law jurisdictions. In Canada, since the decision in *Pecore v Pecore*,⁶ the presumption has been extended to apply equally to both husbands/fathers and wives/mothers, but, with respect to parent-to-child voluntary transfers, has been restricted to minor children. On the other hand, in some Canadian provinces, statutory intervention in relation to spousal division of property on breakdown of family relationship requires that the presumption of resulting trust be applied — and therefore that the presumption of advancement not apply — to all voluntary transfers of property between the spouses.⁷ However, some of these statutes also provide that, where spouses are co-holders of joint bank accounts, they will be presumed to be jointly entitled, subject to demonstration of a contrary intention.⁸ For England and Wales, the historical common law

6. 2007 SCC 17 [*Pecore* SCC].

7. *Family Law Act*, RSO 1990, c F.3, s 14 [*Family Law Act Ontario*]; *The Family Property Act*, SS 1997, c F-6.3, s 50(1) [*Family Property Act Saskatchewan*]; *Matrimonial Property Act*, RSNS 1989, c 275, s 21(1) [*Matrimonial Property Act Nova Scotia*].

8. *Family Law Act Ontario*, *ibid*, ss 14(a), 14(b); *Family Property Act Saskatchewan*, *supra* note 7, s 50(2)(a); *Matrimonial Property Act Nova Scotia*, *supra* note 7, s 21(1)(a); *The Family Property Act*, CCSM c F25, s 35(4); *Matrimonial Property Act*, RSA 2000, c M-8, s 36(2)(a).

position has remained unchanged,⁹ but the presumption of advancement has been statutorily abolished.¹⁰ In Australia, there has been no statutory intervention and no evolution in the common law position.¹¹ At any rate, in the illustrative joint bank account situation providing the present (and Canadian) context, the presumption of advancement would not apply because the co-holding child is an adult. Therefore, the presumption of resulting trust would apply.

Moving then to the second possibility, in any assessment of the older adult donor's intention in terms of giving or retaining a beneficial interest in the joint bank account funds, it is necessary to recognize the possibility of her having distinct intentions as to the benefit of the funds in the account during her life and to the benefit of the funds remaining in the account upon her death. Doctrinally, this possibility has been managed by allowing the older adult to have a distinct intention for the transfer of the right to survivorship that is an inherent element of a joint tenancy. By virtue of the right of survivorship, when either of the two co-holders of the joint account dies, the survivor is automatically vested with the sole interest in the remaining funds. Equitable doctrine has accepted that an

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9. The approach taken in *Pecore* SCC, *supra* note 6, does not appear to have been expressly rejected in any cases from England and Wales, but Glister has suggested that the traditional conception of the presumption of advancement is treated as so well entrenched in both England and Australia that it would be highly unlikely that any court in those jurisdictions would adopt the Canadian approach: see Jamie Glister, "Is There a Presumption of Advancement?" (2011) 33:1 Sydney Law Review 39 at 49 [Glister, "Presumption of Advancement"].
 10. *Equality Act 2010* (UK), c 15, s 199; for a critical appraisal of this intervention, see Jamie Glister, "Section 199 of the Equality Act 2010: How Not to Abolish the Presumption of Advancement" (2010) 73:5 Modern Law Review 807.
 11. For an overview of the status of the presumption of advancement in Australia and other Commonwealth jurisdictions, see Glister, "Presumption of Advancement", *supra* note 9 at 49. For discussion of the need to consider statutory intervention in Australia, in the context of voluntary transfers relating to land, see Susan Barkehall-Thomas, "Parent to Child Transfers: Gift or Resulting Trust?" (2010) 18:1 Australia Property Law Journal 75.

older adult may intend both to retain the benefit of funds in a joint bank account during her life and to have the right of survivorship operate, in favour of the co-holding adult child, on any funds remaining in the account upon her death. One reason for this dual-intention can be that the older adult wishes to avoid having the remaining funds transfer as part of her estate under her will. Depending upon the circumstances, it can be either more convenient (*e.g.* the rights of the surviving co-holder are already recognized by the financial institution) or less costly (*e.g.* lower probate fees) for property to transfer upon death by virtue of the right to survivorship, rather than via a testamentary disposition (*i.e.* her will). Although the doctrinal approach of allowing a distinct gift of an equitable interest in the right of survivorship is vulnerable to criticism as inconsistent with some of the basic rules and principles of property law in common law systems,¹² it is now well entrenched.¹³ The recognition of the possibility of distinct intentions for the beneficial interest in the jointly-held funds during life and after death must therefore be considered in any analysis of whether a presumption of resulting trust has been rebutted.

Having acknowledged the relevance of the possibilities of the presumption of advancement and of distinct intentions, I now return to the work of the courts in identifying a variety of factors that may be taken into account in discerning the intention of the older adult creating a joint bank account. Obviously enough, the primary factor is any verbal or documented expression of intention by the older adult at the time of establishing the joint account. In addition, and as held in *Pecore*, a variety of other factors are also eligible for consideration, specifically: acts and declarations subsequent to the creation of the account that indicate the intention at the time of establishing the account; contents of bank documents relating to the account; control and use of the account during the lifetime of the older adult; any grants of power of attorney; and, the tax treatment of the funds in the account. In examining evidence relating

12. See, *e.g.* Michael J Welters & Emma A McArthur, "Pecore's Troubles" (2010) 29:2 Estates, Trusts & Pensions Journal 139 at 149-60.

13. *Pecore* SCC, *supra* note 6 at para 50; *Drakeford*, *supra* note 3 at para 73; *Oliver*, *supra* note 3.

to any of these factors, the question is always what the intention of the older adult was at the time of the creation of the joint account. In joint bank account situations where the presumption of resulting trust is not rebutted, the beneficial interest in the legal proprietary rights that the co-holding adult child enjoys with respect to the account will remain with the older adult. In other words, the legal proprietary rights of the adult child will be bound by a resulting trust in favour of the older adult. To illustrate the application of the doctrine of resulting trusts in the context of joint bank accounts, as well as how consideration of the various factors can lead to different conclusions on the older adult's intentions, I will briefly review *Pecore* and *Bakken Estate*.

In *Pecore*, an older adult father created joint bank accounts with his adult daughter. Following the death of the father, a dispute arose between the daughter and her ex-spouse as to the balance of funds remaining in the joint bank accounts. Both the daughter and her ex-spouse were beneficiaries under the father's will, but the ex-spouse stood to gain if the balance in the accounts did not vest solely in the daughter, via the right of survivorship, but, rather, became part of the residue of the father's estate. The trial judge decided that the presumption of advancement applied and that, considering a number of the relevant factors, it had not been rebutted.¹⁴ The trial judge did not clearly distinguish beneficial entitlement to the funds in the accounts during the father's lifetime from the beneficial right to survivorship but, since the father was deceased, the decision that the daughter had been given the rights of survivorship was sufficient. On appeal, the trial judge's decision was upheld, although the appeal court took the approach that since the father's intention to make a gift of the rights of survivorship was sufficiently clear, there was no need to invoke the presumption of advancement.¹⁵ On further appeal to the Supreme Court,¹⁶ Justice Rothstein, on behalf of the majority, held that neither of the lower courts had taken the correct approach but that, in the end, they had reached the correct result. As a consequence of

14. *Pecore v Pecore* [2004] OTC 188 (Ont Ct J) at paras 28, 44.

15. *Pecore v Pecore* [2005] 202 OAC 169 (Ont CA) at para 46.

16. *Pecore* SCC, *supra* note 6 at para 75, Abella J dissenting in part (on the revision of the presumption of advancement).

reworking the Canadian approach to the presumption of advancement, as mentioned above, Rothstein J held that it was instead the presumption of resulting trust that applied. Moving to a consideration of intention, the following evidence pointed in favour of an intention of the father not to retain an interest in the rights of survivorship: the father and daughter had a close relationship; the daughter relied upon the father for financial assistance; the father was concerned to provide for his daughter after his death; and, in his dealings with his lawyer in relation to his will, the father had treated ownership of the joint accounts as not passing via his estate. Evidence that the father alone had controlled and used the funds in the account during his life and had paid all relevant taxes was treated as indicating that the father intended to retain his beneficial interest in the funds in the accounts during his life, but also as not inconsistent with an intention to give the rights to survivorship. More potentially contra-indicating was evidence that the father had written letters to financial institutions declaring that the joint accounts were not a gift to his daughter, but these were ultimately dismissed from relevance on the basis that they merely evinced an intention to avoid triggering an immediate liability to capital gains tax (which, again, was not inconsistent with intending to give the rights of survivorship). Ultimately then, Rothstein J found that there was ample justification for the trial judge's finding that the father had intended to make a gift of the rights of survivorship and so, even though the analysis needed to be framed in terms of the presumption of resulting trust, rather than the presumption of advancement, the result would be the same and so the appeal could be dismissed.

As such, *Pecore* established the currently prevailing Canadian approach to application of the doctrine of resulting trusts to the situation where an older adult enters a joint bank account relationship with an adult child. This approach was followed in *Bakken Estate*, but led to a different outcome.¹⁷ In *Bakken Estate*, the British Columbia Supreme Court decided that the presumption of resulting trust that arose upon the creation of the joint account between the older adult mother and her adult daughter was rebutted both with respect to the beneficial interest

17. *Bakken Estate*, *supra* note 2.

in the funds during the mother's life and with respect to the balance remaining upon the mother's death. As mentioned earlier, the need to decide upon the allocation of proprietary rights in this case arose in the context of a dispute between the co-holding adult daughter and an adult male sibling. The adult brother was living with the mother, and helping her to manage the family business, when suspicions arose that he was improperly influencing his mother to make withdrawals from the joint account for his own benefit. In response, the co-holding daughter made a preventative withdrawal of the remaining funds in the account. Her brother, on the mother's behalf, sought legal advice on the possibility of contesting his sister's right to make such a withdrawal and the action was commenced a few months later. Less than two months after the commencement of the litigation, a medical assessment concluded that the mother lacked the mental competence to capably manage her own financial affairs and this led to the Office of the Public Guardian and Trustee ("PGT") becoming involved to act as Committee for the mother. Before or despite the PGT assuming this role, and less than two weeks after she was assessed as incapable, the mother purported to transfer her most significant real property interest — the land upon which she lived and operated the family business — into a joint tenancy with her son. As the litigation process was unfolding, the PGT investigated the management of the mother's financial affairs and informed the lawyer for the son and mother that it would not commence its own proceedings relating to the withdrawal from the joint bank account but, rather, was contemplating doing so in relation to the transfer of the real property interest. That is to say, the PGT was more concerned about the actions of the son than of his sister. The mother died nine months after the litigation was commenced. The son, who was the executor of her estate and a co-beneficiary with all of his siblings, continued the litigation on behalf of the estate. At this point the dispute had developed a similar complexion to the dispute in *Pecore* in that the determination of the issue of whether a resulting trust existed in relation to the joint bank account would determine whether the co-holding daughter, or the estate, was the rightful owner of the withdrawn amount and the balance in the account.

In finding that the presumption of resulting trust had been rebutted,

the trial judge in *Bakken Estate* noted evidence that all of the adult children, except the impugned brother, agreed that the purpose of the creation of the joint account was to give the co-holding daughter a gift of an inheritance of \$100,000 that the mother had recently received from her deceased sister. This was justified on the basis that, over the years, the mother had given substantially less financial assistance to that daughter than to her other children. The judge found that the terms on which the bank account was established were effective to grant full and equal rights to the joint holders. There was incomplete evidence on the use of the funds in the joint account, as only two uses were mentioned but they do not account for the full amount of the funds. First, soon after opening the account, the mother unilaterally transferred the full \$100,000 into a separate investment holding, seemingly in her name only. The capital initially grew but, when it then declined to approximately \$90,000, the co-holding daughter assisted the mother in terminating the investment and re-depositing that amount into the joint account. The second use of the account mentioned in evidence was the daughter's preventative withdrawal of \$69,970, which was the balance in the joint account at that time. There was no evidence to account for the approximately \$20,000 difference, although it would seem that this money may have been that which was expended by the mother under her son's influence. Despite this lack of evidential clarity, the trial judge found that the co-holding daughter had not otherwise drawn on the joint account. Although this finding, combined with the mother's earlier unilateral withdrawal, potentially indicated that neither regarded the co-holding daughter as the beneficial owner of the funds, the judge held that these facts were not conclusive and nor was either fact necessarily inconsistent with an intention to make an immediate gift of the originally deposited funds. On the other hand, the judge noted that the daughter had declared the interest earned on the invested funds, which was consistent with a gift. On the basis of this accumulation of circumstances, the trial judge in *Bakken Estate* held that the presumption of resulting trust had been rebutted both with respect to the funds in the joint account during the mother's life and with respect to the balance of funds upon her death. Consequently, as the sole beneficial owner of the funds, the co-holding daughter was entitled

to make the withdrawal, regardless of her preventative intentions. Since she had been given the funds in the joint account when it was created, she was entitled to deal with the funds as she saw fit. In the context of the case, and especially with regards to the undue influence apparently being wielded by the son over his mother, the finding that the funds had been given to the daughter upon creation of the joint account seems morally appropriate because it effectively denied the son a share of the funds and relieved the daughter of any liability to her mother's estate. The legal appropriateness of the decision is perhaps more questionable though, because the facts seem to point as much, if not more, in the direction of both the mother and the daughter intending that the mother retain the benefit of the funds during her life, rather than in the direction of the mother immediately relinquishing that benefit to her daughter. But if the court had held that the presumption of resulting trust had not been rebutted in relation to the funds during the mother's life, then it would have had to grapple with the apparent preference of equitable doctrine for a beneficiary-direction rule over a beneficiary-protection power. Consideration of that preference raises the more general issue — that did not fall to be addressed in either *Pecore* or *Bakken Estate* — of the rights and responsibilities of a resulting trustee. This article now moves to that territory, which requires a consideration of the broader context of relevant equitable doctrines and statutory regimes.

III. Equitable Doctrine on the Rights and Responsibilities of Trustees and Fiduciaries: The Possibility of a Beneficiary-Protection Power

In order to identify and explain the rights and responsibilities of resulting trustees it is necessary to situate resulting trust doctrine with respect to other areas of equitable doctrine applicable to trustees and fiduciaries more generally. This part thus begins with an overview of equitable doctrine on trustee and fiduciary obligations and then proceeds to explain the extent to which different types of trustees are subject to a beneficiary-direction rule or, instead, enjoy a zone of autonomy from the wishes of their beneficiaries. This leads to an introduction of the possibility of recognizing a beneficiary-protection power via an analogizing of the

position of a resulting trustee to that of an express trustee who enjoys some autonomy.

The legal roles of trustees and fiduciaries are creatures of equity. These roles, and the rights and responsibilities that go along with them, are both distinct and inter-connected. At the outset of providing an overview of the relevant components of equitable doctrine applicable to trustees and fiduciaries though, and especially in the context of a consideration of resulting trustees, it is important to bear in mind the following conclusion reached by Chambers in the course of what remains one of the few academic inquiries into the role of the resulting trustee:

[j]ust as there is no uniform set of obligations applicable to all fiduciaries, there is no one set for all trustees or even all resulting trustees. The principle of resulting trust applies in such a wide variety of situations that it is impossible to deduce, solely from the classification of resulting trust, that any particular set of fiduciary obligations applies.¹⁸

According to Chambers then, not only are the rights and responsibilities of resulting trustees variable and context-dependent, but also, this reflects the fact that, within the general doctrinal frameworks that structure the roles of trustees and fiduciaries, there is significant potential for variability at the more specific level of particular trustees and fiduciaries.

Despite the significance of Chambers' conclusion, which will be brought back into play later in this section, the main elements of the general doctrinal frameworks applicable to trustees and fiduciaries can be outlined. To begin with, all trustees are fiduciaries, but trustees are not the only type of fiduciaries. What typically distinguishes trustees from other types of fiduciaries — such as lawyers, real estate agents, holders of powers of attorney and doctors — is that they hold property and manage it in the interests of their beneficiaries.¹⁹ At a general level, the fundamental responsibility of a fiduciary is the duty of loyalty, which entails acting selflessly, without conflict of interest and only in the best interests of

18. Chambers, *Resulting Trusts*, *supra* note 4 at 200.

19. It should be acknowledged that other types of fiduciaries can have trustee responsibilities if the need to hold or manage property arises. For instance, when lawyers need to handle money or other assets for their clients, they are required to use trust accounts.

the beneficiary. Moreover, breaches of this fundamental responsibility are subject to strict liability in the sense that, for instance, where a fiduciary acts in circumstances of conflict of interest, he or she will have committed a wrong even if the action was taken honestly, in good faith and with reasonable care. As fiduciaries, all types of trustees are similarly bound. As such, trustees are an example of the so-called *per se* or category-based types of fiduciaries. People who occupy certain categories of roles, such as trustees or guardians or agents, are automatically deemed by equity to be acting in a fiduciary capacity and so are subject to fiduciary obligations. The unifying characteristic of these roles is an express or implied undertaking or understanding that the person occupying the role has the capacity to unilaterally affect substantial interests of the other person and must only act in that other person's best interest. This type of fiduciary can be contrasted with *ad hoc* or fact-based types of fiduciaries whose classification as fiduciaries arises from application of general principles to the particular circumstances that existed at the time the person took on the role in question. To simplify, the general principles require an inquiry into the existence of circumstances reflecting the unifying characteristic of categorical fiduciaries.²⁰

For their part, the primary responsibility of trustees is to properly administer and dispose of trust property. The scope and nature of this responsibility will vary according to whether the situation involves an express trust, a resulting trust, or a constructive trust. In terms of express trusts, that is, those trusts that are intentionally created, there are three dimensions to the primary responsibility of express trustees. First, express trustees are bound by the terms of their trust, as specified by the creator of the trust. The terms of express trusts can vary widely and impose more or less constraint on the ways in which the trust property must be administered and disposed of. A key issue is the amount of discretion allowed to the trustee in making decisions about administration and

20. This summary reflects the approach of the Supreme Court of Canada as relatively recently stated in *Galambos v Perez*, 2009 SCC 48. See also *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24.

disposal.²¹ A second dimension of the primary responsibility of express trustees is that, to the extent they have any discretion, they must exercise it honestly, in good faith and in accordance with the requisite standard of care. Importantly though, to the extent that an express trustee is directed by the terms of the trust to act in certain ways, without an allowance for discretion, a showing of honesty, good faith and reasonable care will generally be no defense.²² In other words, express trustees are strictly liable for breaches of non-discretionary trust duties. The third dimension to the primary responsibility of express trustees is that they must fulfill it in accordance with the dictates of the fundamental fiduciary duty of loyalty.

One consequence of the primacy of the terms of the express trust is that, generally speaking, express trustees are meant to act independently of the beneficiaries in the sense that they are not generally regarded as under the control of their beneficiaries. Express trustees are accountable to their beneficiaries, but not subject to direction by those beneficiaries. In turn, where the terms of an express trust diverge from the wishes of beneficiaries, tensions can arise between trustees and their beneficiaries. Likewise, to the extent that an express trustee may be granted discretion, tension can arise where the express trustee and a beneficiary diverge in their opinion of what is in the best interests of a beneficiary in relation to exercise of the discretion. For that matter, a similar tension can arise for any other fiduciary.

It is at this point though that the more specific rights and responsibilities of different types of trustees need to be attuned to the

21. Trust law draws a fundamental distinction between fixed and discretionary trusts. In a fixed trust, the trustee has no discretion as to identifying the beneficiaries of the trust or as to identifying the amounts or shares of trust property that each shall receive. A discretionary trust arises where discretion of either type is allowed to the trustee. See *e.g.* Albert H Oosterhoff et al, *Oosterhoff on Trusts: Text, Commentary and Materials*, 7d (Toronto: Carswell, 2009) at 20.

22. It should be noted that there is a limited statutory right to be excused of liability for actions by trustees that, although technically breaches of the terms of the trust, are taken honestly, in good faith and with reasonable care: *Trustee Act*, RSO 1990, c T.23, s 35.

nature and circumstances of their trusts. The principle of the primacy of the terms of the trust is most applicable in the context of express trusts, where the terms are deliberately and explicitly articulated. By extension, trustees of express trusts are also understood to enjoy a meaningful degree of autonomy in relation to the wishes of the beneficiaries of express trusts, at least to the extent that the terms of the trust do not provide to the contrary. In other words, unless arising expressly or by necessary implication from the terms of an express trust, an express trustee is not subject to a “beneficiary-direction rule”. In contrast, and at the other end of the spectrum, trustees in constructive trust situations, which generally arise through wrongful conduct, rather than deliberate creation, typically have no right to act independently and are essentially awaiting directions from the victim of their wrongful conduct, who will be the beneficial owner, as to when and to whom to transfer the property. In the middle of this spectrum are trustees of resulting trusts, which, as discussed in Part II, arise from a combination of intention and circumstances that, in theory, are distinguishable from those giving rise to express trusts. The degree of autonomy available to a resulting trustee will vary in accordance with variation in the intention and circumstances from which the resulting trust arises.²³ For his part, Chambers analyzes a number of factors potentially relevant to defining the obligations of resulting trustees and argues for adherence to the following general markers.²⁴ To begin with, he argues that where a resulting trust arises from circumstances associated with the failure of an express trust, the resulting trustee should be subject to the same duties as would have applied to the express trustee, had the express trust not failed. Consequently, whether the resulting trustee in this situation was subject to the beneficiary-direction rule would depend

23. It should be noted that, in Penner’s view, all resulting trustees (in presumed intention situations) should be treated as bare trustees but with the proviso that as soon as any intention beyond allocation of beneficial ownership is alleged or identified, the situation should be approached as one of informal express trust, rather than resulting trust: see Jamie E Penner, *The Law Of Trusts*, 6d (Oxford: Oxford University Press, 2008) at 106.

24. Chambers, *Resulting Trusts*, *supra* note 4 at 219.

upon the intended terms of the failed express trust. Next, but at the other end of the spectrum, where a resulting trust arises in circumstances where the resulting trustee is an innocent recipient of the property bound by the trust, the only duty of the resulting trustee ought to be to convey the property at the beneficiary's request. In other words, the beneficiary-direction rule should apply. Finally, and more generally, Chambers argues that although knowledge of the circumstances giving rise to a resulting trust should not be a prerequisite to the recognition of the existence of the resulting trust, liability for breach of fiduciary obligations associated with the resulting trust should not arise until the resulting trustee has such knowledge. Putting all of this together, and bearing in mind the context of the present discussion of older adult joint bank accounts, it would appear possible to contend that where a resulting trustee has assumed that role voluntarily, and with knowledge of the circumstances giving rise to the resulting trust, including an appreciation of the intention behind those circumstances, then the nature and content of her rights and responsibilities ought to be understood more in accordance with the approach taken to those of an express trustee than to those of a constructive trustee or an innocent or unknowing resulting trustee. For present purposes, the key distinction between the two ends of this spectrum is the extent to which the resulting trustee should be subject to the beneficiary-direction rule. Constructive trustees and innocent or unknowing resulting trustees are essentially required to act as directed by the beneficiary. In other words, the fundamental obligation to act in the best interests of the beneficiary collapses into an obligation to act according to the wishes of the beneficiary. In contrast, express trustees are primarily required to act as directed by the terms of the trust and not generally meant to act at the direction of the beneficiaries, except as required by those terms. Further, to the extent that the terms of an express trust allow an express trustee to exercise discretion, he or she is legally understood as enjoying what might be called a "zone of autonomy" in relation to the wishes of the beneficiary, albeit a zone that is always to be navigated only in accordance with an assessment of the best interests of the beneficiary (and with honesty, good faith and reasonable care). Most significantly for present purposes, this legal understanding enables

an express trustee, in determining how to exercise his or her discretion, to independently consider whether the wishes of the beneficiaries align with their best interests and to act against those wishes where the trustee deems it appropriate to do so.

In the context of the present inquiry, this legal understanding that an express trustee may refuse to follow the wishes of the beneficiaries in order to protect the best interests of those beneficiaries amounts to a legal recognition that the express trustee has a beneficiary-protection power. Confirmation of the legal recognition of this power can be found in, for instance, the longstanding precedent in *Tempest v Lord Camoys*²⁵ (“*Tempest*”), where the English Court of Appeal strongly affirmed the zone of autonomy for express trustees in the context of a dispute over a decision that can be regarded as protectively-motivated. In *Tempest*, the two express trustees had to make a decision about what land to purchase with certain trust funds. While the terms of the trust required that the funds be used for a land purchase, the trustees had to exercise their discretion as to what land to purchase. The adult beneficiaries of the trust requested that the trustees use the funds to purchase a property that had historic significance for the Tempest family. To do so, the trust would have had to take out a mortgage on the property to complete the purchase, but the power to mortgage was a power enjoyed by the trustees. In assessing, as they were duty-bound to do, whether the purchase would

25. (1882), 21 Ch D 571 (CA (Eng)); another foundational case on the zone of autonomy enjoyed by express trustees in discretionary matters is *Gisborne v Gisborne* (1877), 2 App Cas 300 (HL); for what remains an insightful analysis of the trajectory of judicial decision-making since those cases, see Maurice Cullity, “Judicial Control of Trustees’ Discretion” (1975) 25:2 University of Toronto Law Journal 99. Cullity’s analysis convincingly argues that courts have subsequently established that their power to intervene on grounds of *mala fides* in the exercise of discretion extends far beyond instances of fraud and now includes, for example, instances of consideration being given to irrelevant or extraneous factors — but that expansion does not contradict the legitimacy of trustees’ consideration of protective action. Cullity’s analysis has more recently been judicially approved in *Fox v Fox Estate* (1996), 28 OR (3d) 496 (CA), per Galligan J.

be in the best interests of the beneficiaries, one trustee was of the view that the purchase and mortgage was appropriate, while the other was not — seemingly due to a concern that it would be imprudent for the trust to burden its property with a mortgage. When the beneficiaries sought an order from a court to compel the transaction, both the trial and appeal courts refused the order. For its part, the Court of Appeal firmly stated the legal position that, where trustees have discretion, and properly exercise it, the courts should not intervene. As such, the decision in *Tempest* confirmed that trustees exercising discretionary powers enjoy a zone of autonomy from the wishes of their beneficiaries and are, in a nutshell, entitled to protect the beneficiaries from themselves.²⁶

By analogy, it might be contended, a voluntary and knowing resulting trustee should also be regarded as enjoying a similarly structured zone of autonomy in relation to the wishes of the beneficiary of the resulting trust, subject to evidence of a contrary intention — that is, an intention for beneficiary-direction — existing when the circumstances of the resulting trust arose. By extension, to the extent that protective action might be justifiable by reference to the best interests of the beneficiary, it might then be argued that such a resulting trustee ought to be regarded as holding a beneficiary-protection power or, even, duty.

There are, however, four main barriers to this analogizing of the position of the voluntary and knowing resulting trustee of an older adult joint bank account to the position of an express trustee. In the following part of this article, I will first identify these barriers and then discuss each in turn.

26. Another example of the legal legitimacy of express trustees acting protectively is the validation available to a trustee who seeks the assistance of a court to vary the terms of a trust in order to further the best interest of the beneficiaries by, for instance, postponing a disposition of property to a beneficiary to a time when the beneficiary ought to be adequately equipped to manage the property appropriately: see *NS (Re)*, 2007 NSSC 288.

IV. Barriers to a Beneficiary-Protection Power

The contention that, in relation to a potential power of beneficiary-protection, the position of the voluntary and knowing resulting trustee of an older adult joint bank account can be analogized to the position of an express trustee faces the following four barriers. First, to the extent that existing case law from Canada, as well as England and Wales, and Australia, addresses the situation of voluntary and knowing resulting trustees of joint bank accounts, it all suggests that the beneficiary-direction rule is paramount. Although this case law has only considered situations of allegations of selfish, rather than protective, conduct by the resulting trustees, it would seem to be strongly implied that there is no scope for recognition of a beneficiary-protection power. A second barrier, which reinforces the first, are concerns raised in Canadian precedents dealing with instances of beneficiary-protection action taken by non-trustee fiduciaries with responsibilities for older adults, specifically, adult children with powers of attorney. To some extent, those concerns have revolved around issues of conflict of interest that would be applicable to the situation of joint bank account resulting trusts. In addition though, the concerns have been informed by judicial perceptions of the underlying interests at stake for older adults, and how they should be balanced, in part as reflected in statutory regimes applicable to assistive and substitute decision-making. Those interests, and the fact they are defined, prioritized and balanced in ways that can be regarded as running counter to a beneficiary-protection power, then represent a third barrier to analogizing the position of voluntary and knowing resulting trustees to that of express trustees. The fourth barrier to the analogy is that in the resulting trust situation, the relevant beneficiary is also and always the same person whose actions and intention drove the creation of the resulting trust. This can be contrasted with express trust situations, where the creator of the trust, if a beneficiary at all, will often be but one of numerous beneficiaries. Generally speaking, it might be argued, the creator of an express trust, even if he or she will also be a beneficiary, is likely to be more aware of the significance of his or her actions, in terms of giving over control to the trustee, than would the creator of a resulting trust. Indeed, that awareness may explain why an older adult

would create a joint bank account instead of creating an express trust. In turn, the potential for that awareness may need to inform the approach equity takes to the rights and responsibilities of resulting trustees. I will now discuss each of these barriers in more depth.

A. Barrier #1: The Paramountcy of the Beneficiary-Direction Rule

This section provides a review of two relevant and representative lines of reasoning emanating from cases in Canada, England and Wales, and Australia dealing with rights and responsibilities of resulting trustees in the context of older adult joint bank accounts.

One line of reasoning addresses situations where adult child co-holders of joint bank accounts are accused of financially abusing the older adult by using the funds for their own benefit. Claims against these adult children are usually based on breach of trust and breach of fiduciary obligations. Generally speaking, where wrongful conduct is found, the wrong is said to consist in a departure from the rule that resulting trustees of joint bank accounts can only act as directed by the older adult — that is, a violation of the beneficiary-direction rule. Where an adult child resulting trustee acts so as to benefit him or herself, either without direction from the older adult or contrary to directions, then both a breach of trust and a breach of fiduciary duty has occurred.

An example of the application of the beneficiary-direction rule in England and Wales is provided by *Re Northall (Deceased)*,²⁷ where an aging mother deposited the proceeds of a sale of her home into a joint bank account created with one of her adult sons. The son made a number of withdrawals from the account during the lifetime of his mother and withdrew the balance for his own benefit following her death. A dispute arose over whether the balance in the account ought to have formed part of the mother's estate and this led to questions being raised about the propriety of the other withdrawals made during the mother's life that did not appear to be for the mother's benefit. Applying the presumption of resulting trust, the court held that it had not been rebutted, either

27. *Northall*, *supra* note 3.

with respect to the beneficial interest in the funds during the mother's lifetime, nor with respect to the right to survivorship. Then applying the beneficiary-direction rule, and finding that the mother had not requested or consented to the co-holding son's withdrawals, the court ordered him to account for those withdrawals and the balance.

To similar effect is the Canadian decision in *Miller v Miller*,²⁸ where a recently separated older woman deposited the proceeds of a significant disbursement from a trust in her favour into a joint bank account she created with one of her adult daughters. The daughter made numerous large withdrawals from the joint account for her own benefit. Although the daughter even went so far as to have her mother removed from the daughter's home, where she was then living, to a psychiatric ward, the mother eventually received assistance from her estranged husband and brought an action to recover her funds. Applying the presumption of resulting trust, the court held that it had not been rebutted in relation to the beneficial interest in the funds in the joint account during the mother's lifetime (but did not need to address the beneficial interest in the right to survivorship). The court then ordered the daughter to account for the withdrawn funds on two bases that were regarded as distinct. One basis was conversion, which was founded on breach of the beneficiary-direction rule. As reasoned by the court, when a resulting trustee in the position of the daughter makes withdrawals without the knowledge or permission of the older adult beneficiary then she has converted the funds to her own use. The alternative basis was breach of fiduciary duty. The relevance of fiduciary obligations was not based on the daughter's status as a resulting trustee but, rather, was built on reasoning that applied the principles for determining whether an *ad hoc* or fact-based fiduciary relationship had been brought into existence. Finding that the daughter had knowingly undertaken a fiduciary position with respect to her mother, the court had no trouble finding that her self-interested withdrawals violated her fiduciary obligation to act only in the best interests of her beneficiary.

As illustrated by both *Re Northall* and *Miller*, the beneficiary-direction rule is entirely adequate for bringing to account a resulting trustee who

28. *Miller*, *supra* note 3.

acts in a self-interested way. But the beneficiary-direction rule would also preclude a resulting trustee from acting in a protective manner against the wishes or without the knowledge of the beneficiary. In other words, the beneficiary-direction rule appears to eliminate any zone of autonomy for a resulting trustee to assess and safeguard the best interests of the beneficiary. In that sense then, this line of reasoning erects a first barrier to analogizing a resulting trustee to an express trustee in relation to a zone of autonomy and a beneficiary-protection power. However, I have noted the fiduciary basis of liability in *Miller* because it may open an alternative pathway to a protective responsibility. Similarly, and perhaps more feasibly than the *Miller* alternative, there is another line of reasoning emanating from other cases dealing with older adult joint bank accounts that raises the possibility of regarding the circumstances as ultimately giving rise to an express trust, rather than a resulting trust. I will now discuss illustrative examples of this line of reasoning.

The reasoning in these other cases essentially proceeds on the basis that presumptions of either resulting trust or advancement can be rebutted by an intention to create an express trust, although that result has so far only been reached in relation to the right to survivorship in joint bank accounts. An example of this is provided by the Australian case of *Logan v Gardiner*²⁹ (“*Logan*”), in which an older adult mother was the sole depositor to a joint account opened with her adult daughter. At the same time, the mother attached a note to her will that provided instructions on the distribution of the funds in the joint account. Following the mother’s death, the co-holding daughter, who was also administrator of her estate, set about distributing the funds in accordance with the instructions, although only with respect to herself and her immediate family. While acknowledging the entitlements of other family members, the daughter assumed for herself a degree of discretion in distributions to them that was held to be inconsistent with the terms of the mother’s note. In the course of litigation brought by those other family members for misadministration of the estate, the court found that the mother had intended to create a secret trust over the right to survivorship relating to

29. *Logan*, *supra* note 3.

the joint account. Although the reasoning is not entirely straightforward, it appears that this intention was treated as rebutting the presumption of advancement (it was the presumption of advancement that applied, rather than the presumption of resulting trust, because, as discussed earlier, in Australia, the presumption of advancement continues to operate in favour of adult children as well as minor children). All parties appeared to accept that there was no intention on the part of the mother to give up control or use of the funds during her lifetime. Having found that a secret trust had been created, the court faulted the co-holding daughter for assuming too great a discretion to herself as the trustee, in contradiction of the terms of the secret trust. She was thus ordered to distribute the funds in accordance with the mother's intentions.

To similar effect is the appeal decision in the Canadian case of *Sawdon Estate v Sawdon*,³⁰ in which a father converted a number of bank accounts into joint accounts with two of his sons. Following the death of the father, a dispute arose over whether the balances of the various accounts ought to form part of the residue of his estate, which residue had been left to a religious organization. The trial court found that the co-holding sons had been instructed by their father that the balances in the various accounts were to be distributed equally among his five children, including themselves. According to the trial court, in agreeing to this arrangement, the two co-holding sons became either express trustees of the right to survivorship or recipients of a conditional gift of the right to survivorship. At the same time though, the trial court found that the presumption of resulting trust had been rebutted in relation to the money in the various accounts during the father's lifetime. In the words of the trial court, this meant that the father had made immediate *inter vivos* gifts of the funds (a result that was akin to the decision reached in *Bakken Estate*). On appeal, the somewhat contradictory nature of these holdings was corrected. Partially overruling the trial court, the appeal court held that the presumption of resulting trust had not been rebutted in relation to the control and use of the beneficial interest in the funds during the lifetime of the father. As for the arrangement with respect to

30. *Sawdon*, *supra* note 3.

the right of survivorship, the appeal court held that it was best understood as creating an express trust, with the two co-holdings sons as trustees and all of the children as beneficiaries. In other words, the intention to create an express trust displaced the presumption of resulting trust in relation to the right of survivorship.

The significance of the line of reasoning in cases such as *Logan* and *Sawdon* lies in the position that a presumption of resulting trust, or of advancement, can be rebutted, or displaced, by an intention to create an express trust. This is significant because it raises the possibility of finding that an express trust was created not only in relation to a right of survivorship in an older adult joint bank account, as in those two cases, but also in relation to the funds in the account during the older adult's lifetime. After all, the intention of the older adult plays no less pivotal a role in the resulting trust analysis of the allocation of either type of beneficial interest. If it were possible to regard the adult child as (or, at least, as analogous to) an express trustee of the funds then, in turn, it could be argued that the adult child, as an express trustee, enjoys a presumptive zone of autonomy that includes a beneficiary-protection power. In this way, the barrier posed by the application of the beneficiary-direction rule to resulting trustees could be sidestepped. And yet the possibility that an adult child might be regarded as (or analogous to) an express trustee of the funds in an older adult joint bank account during the older adult's lifetime does not appear to have been raised in any cases — although, as noted above, it was suggested in *Miller* that the adult child might somehow be regarded as a stand-alone fiduciary.

Why might courts or counsel be overlooking or avoiding this express trust possibility? One reason might be that the framework of resulting trusts, and more particularly the constraints of the beneficiary-direction rule that it imposes, are perceived as more appropriate to the situation, for the very reason that they preclude the zone of autonomy that might be presumptively enjoyed by an express trustee or *ad hoc* fiduciary. A source of reinforcement for any such perception, and the second barrier to be addressed, is the concerns raised in Canadian cases dealing with adult child holders of powers of attorney who purport to act to protect the interest of their older adult beneficiaries but without the parents'

knowledge or consent.

B. Barrier #2: The Mixed Treatment of, and Concerns Raised About, Beneficiary-Protection Powers

Precedent is scarce on the issue of the validity of a beneficiary-protection power for non-trustee fiduciaries. The little that exists is mixed on the issue and raises some potentially significant concerns that would require attention if resulting trustees were analogized to express trustees.³¹ Two Canadian cases that represent the mixed treatment and also illustrate relevant concerns will be discussed in this section. The first case, *Banton v Banton*,³² is receptive to a beneficiary-protection power where a beneficiary lacks competence to manage their own property, but raises concerns about conflict of interest. The second, *McMullen v Webber*³³ (“*McMullen*”), is negative and raises concerns about properly respecting the autonomy of older adults.

Banton involved an elderly and twice-widowed father who was

31. A search of case law databases covering Canada, England and Wales, and Australia identified only two Canadian cases discussed in this section as addressing what could be regarded claims to a beneficiary-protection power by non-trustee fiduciaries. A further Canadian case is *Fareed v Wood*, [2005] OTC 526 (Ont Ct J)(in which a lawyer was held to have violated his fiduciary duties as both solicitor to, and holder of power of attorney for, an older adult when he accepted responsibility for managing some of her financial affairs but then failed to properly account for or explain a depletion of her assets) [*Fareed*]. Although it was the older adult herself who had transferred away her assets, the lawyer was present at meetings between the older adult and the person to whom she made the transfers but when, following her death, he was asked by beneficiaries under her will to account for the assets, he refused to provide an explanation. While *Fareed* would therefore appear to be imposing a beneficiary-protection duty on a non-trustee fiduciary, this seems to have been based upon a judicial approach that treated the lawyer, in the circumstances (which also included indications that the older adult had lost capacity to manage her property), as a *de facto* express trustee and essentially faulted him for failing to adequately account for a depletion of trust assets.

32. (1998), 164 DLR (4th) 176 (Ont Ct J (Gen Div)) [*Banton*].

33. 2006 BCSC 1656 [*McMullen*].

subjected to the undue influence of a much younger woman who was an employee in the nursing home where he resided. Under her influence, and as his mental capacity deteriorated, the father married the woman and altered his will and powers of attorney in her favour. The factual history was substantial and convoluted and by the time of the litigation gave rise to myriad complicated legal issues. This included a need to define and apply the different legal test for determining mental capacity to marry, testamentary capacity, capacity to manage property and capacity to grant powers of attorney for property and for personal care. For present purposes, the key event was the joint decision by the father's two sons, acting on the authority of the continuing power of attorney that they jointly held, to protectively transfer some of their father's assets into an irrevocable trust for his benefit during his lifetime, with remainder to be shared equally between themselves and their siblings. One of the grounds upon which the validity of this express trust was contested was that the assets that it protected had been improperly distributed to the father, by the sons, as trustees of an earlier express trust established by the father. Under that earlier express trust, the father and his then wife had a life interest, with remainder to be shared equally between the sons and their siblings. The trial judge, Justice Cullity (who is a recognized expert in the trusts field), held that the sons had improperly distributed the capital of that express trust to the father. Consequently, the sons had no power to establish a new trust, even though in similar terms, with what remained of that same capital. Nevertheless, Cullity J went on to consider the further and alternative allegation that the new trust was also an invalid exercise of the continuing power of attorney and this is the allegation that is of most immediate relevance.

In the course of considering this allegation, Cullity J discussed the nature of the rights and responsibilities of holders of a continuing power of attorney, as well as the legitimacy of protective action. Two key points emerge from the discussion. First, Cullity J took the position that a *general* power of attorney — that is, one that applies while the donor/beneficiary is mentally competent — essentially establishes an agency

relationship in which the beneficiary-direction rule is paramount.³⁴ In contrast, according to Cullity J, where there is a *continuing* power of attorney, and the beneficiary has thus been found to lack capacity to manage property, “[t]he status of such an attorney is much closer to that of a trustee than an agent of the donor”.³⁵ In the eyes of the court, the significance of this shift lay in the extent and degree of the fiduciary duties owed to the donor: “[a]s an agent, such an attorney owes fiduciary duties to the donor but these are pale in comparison with those of an attorney holding a continuing power when the donor has lost capacity to manage property”.³⁶ The second key point made by Cullity J was that the holder of a continuing power of attorney does have the power to establish an express trust on behalf of the donor and is not precluded from doing so for protective reasons. However, given the heightened fiduciary duties, akin to those of trustees, the court will closely scrutinize the attorney’s actions and, in particular, will be concerned both with any appearance of conflict of interest or self-benefit and also with any measures that curtail the donor’s rights to a greater extent than necessary. In the course of elaborating this point, Cullity J observed as follows:

I do not share the view that there is an inviolable rule that it is improper for attorneys under a continuing power [of attorney] to take title to the donor’s assets either by themselves or jointly with the donor. This must depend upon whether it is reasonable in the particular circumstances to do so to protect or advance the interests, or otherwise benefit, the donor. It is conceivable that circumstances in which this would be reasonable may arise, although I think the burden of demonstrating that this is so should be on the attorneys if the propriety or reasonableness of their conduct is challenged. The authorities that condemn such acts of attorneys where the donor has capacity to manage property are not in point.³⁷

Ultimately, although Cullity J expressed the view that the sons had acted at all times in good faith, with selfless motivations, and with valid concerns, he held that the sons had gone too far in three respects: in creating remainder interests in themselves and their siblings; in the extent to which the establishment of the trust would nullify the legal capacities

34. *Banton*, *supra* note 32 at para 150.

35. *Ibid.*

36. *Ibid.*

37. *Ibid* at para 157.

that the father was still deemed mentally capable of exercising; and, in the potential detrimental impact on the statutory rights of the father's new spouse upon his death. A more reasonable approach, according to Cullity J, would have been to vest the remainder in the father's estate.

The decision in *Banton* therefore has mixed implications for the possibility of validating a beneficiary-protection power for resulting trustees by analogizing them to express trustees. On the one hand, *Banton* offers some legal legitimacy to the basic idea that a beneficiary-protection power can be integrated into the rights and responsibilities of those fiduciaries who are regarded as akin to express trustees. On the other hand though, in drawing a distinction between the rights and responsibilities attaching to holders of general and continuing powers of attorney, with the former being framed more as agents, *Banton* reinforces the idea that it is more appropriate for resulting trustees, whose beneficiaries are typically mentally competent, to be subject to a beneficiary-direction rule. In addition, in drawing attention to the issue of conflict of interest and self-benefit, the decision in *Banton* raises an issue that could be expected to often arise for adult child resulting trustees of joint bank accounts because it is they who will typically stand to ultimately benefit from a preservation of the joint bank account funds, either as beneficiaries of the right of survivorship or as heirs to the estate. To the extent that an appearance of a conflict of interest might be an inevitable aspect of the adult child resulting trustee's situation, a preference for the beneficiary-direction rule may be more appropriate.

Insofar as *Banton* associates holders of general powers of attorney with a beneficiary-direction rule, and by implication also associates resulting trustees with that rule, it is reinforced by the decision in the second illustrative case. The litigation in *McMullen* revolved around the actions of the two daughters who jointly held, with their brother, power of attorney in relation to their older adult father. The power of attorney, which enabled the attorneys to do on the father's behalf anything that he could lawfully do by an attorney, required that any two of the three co-holders could act together under it and was granted in accordance with

the *Power of Attorney Act*.³⁸ The father executed the power of attorney just a few months before the death of his wife, following which he relied upon his family for emotional support and financial advice. One of the daughters was particularly active in assisting her father with organizing his financial affairs and assessing his financial needs. Over the ensuing months the father's children became concerned that he was depressed, acting erratically and being financially exploited by a new romantic partner whom he had met on a vacation he took following his wife's death. Eventually, the daughters utilized the power of attorney to transfer 99% of the value of the father's last remaining significant asset — his condominium — to their spouses. This was despite the fact that, on two occasions during the period of rising concerns among his children, the father's mental capacity had been professionally assessed and found sufficient to continue managing his own financial affairs. The daughters' purported motivation was to protect the property for the longer-term benefit of the father, although they did not inform him of the transaction for fear of upsetting him. Nevertheless, when the father eventually discovered the transaction he immediately called for a reversal and began litigation to set it aside, arguing that the daughters had improperly exercised their powers of attorney.

The court accepted that the daughters were genuinely motivated by a concern for the best interests of their father and also accepted that there was evidence that the father's behavior had changed significantly. Indeed, the court also accepted that there was evidence that the father may have been a victim of financial exploitation. However, since there was no evidence that the father had become incapable of managing his financial affairs and, in fact, given that there was evidence to the opposite effect, it was held that the daughters had violated a duty to provide the father with an accounting of his finances, and had also violated a beneficiary-direction rule, both of which bound them as fiduciary obligations associated with their role as attorneys.

For present purposes, the failure to account need not be addressed. The more immediately relevant aspect of *McMullen* is the application

38. RSBC 1996, c 370.

of the beneficiary-direction rule in this non-trustee context. There is little reasoning in the case as to why the beneficiary-direction rule ought to apply. The decision quotes a Canadian lower court precedent which states that the holder of a power of attorney is a fiduciary and that, as such, the attorney has a duty to account, to exercise reasonable care and to “not act contrary to the interests of the donor”.³⁹ That precedent would not appear to be decisive though, since acting protectively is not necessarily acting contrary to best interests. The decision goes on to advert to a common statutory rule that renders invalid any transfer by an attorney, to him or herself, of property belonging to the beneficiary, unless expressly authorized or ratified by the beneficiary. But that rule is also not decisive because the transaction at issue in *McMullen* was not quite of that type. The pivotal component of the reasoning thus becomes the judge’s subsequent statement that “the fiduciary relationship created the duty to act only in accordance with the donor’s intentions”⁴⁰ and that, regardless of the protective motivation, in acting without the father’s knowledge or consent, this duty had been breached. In other words, the key argument is that acting in accordance with the donor-beneficiaries intent can only be achieved if acting with his knowledge and consent — which amounts to an application of the beneficiary-direction rule.

Despite the shortcomings in this chain of reasoning as to the applicability of the beneficiary-direction rule to holders of powers of attorney, it must be acknowledged that it is consistent with the legal position that is basically taken for granted in *Banton* (and, for that matter, in treatises on trusts law).⁴¹ Rather than, as in *Banton*, analogizing the position of the joint-attorney daughters to the position of agents though, the judge in *McMullen* found reinforcement in the nature and limits of related statutory regimes and the ways in which those regimes express and balance relevant interests. This brings me to the third barrier standing in the way of recognition of a beneficiary-protection power for

39. *McMullen*, *supra* note 33 at para 52, quoting from *Andreasen v Daniels-Ferrie*, 2001 BCSC 1503 at para 27, per Quijano J.

40. *McMullen*, *supra* note 33 at para 57.

41. See discussion in Waters et al, *Waters’ Law of Trusts in Canada*, 3d (Toronto: Thomson Carswell, 2005) at 53.

resulting trustees.

C. **Barrier #3: The Interests of Older Adults and the Balances Struck in Statutory Regimes**

The typical parameters of Canadian statutory regimes dealing with the related issues of assisted and substitute decision-making are illustrated in the statutory framework discussed by the judge in *McMullen*. The judge adverted to this framework in addressing the argument, made on behalf of the daughters, that since the daughters' spouses were holding their newly acquired interests in the father's condominium in trust for the father, they ought to be allowed to continue to do so unless and until the father could prove that he was competent to manage his financial affairs in his own best interests and, most importantly, free from manipulation and exploitation. On behalf of the father, it was countered that this was reversing the onus of proof in relation to capacity, contrary to the presumption of capability contained in the *Adult Guardianship Act*.⁴² Moreover, accepting the daughters' argument would also improperly circumvent the provisions of the *Patients Property Act* that establishes the process for applications for substitute decision-making power on the basis of mental incapacity.⁴³ On these issues the court essentially sided with the father. In doing so, the court first invoked a basic legal principle that "[t]he law does not require individuals to make decisions in their own best interests".⁴⁴ In fact, the court noted, this guiding principle was reflected in one of the statutory principles formulated to guide administration and interpretation under the *Adult Guardianship Act*: "all adults are entitled to live in the manner they wish and to accept or refuse support, assistance or protection as long as they do not harm others and they are capable of making decisions about those matters".⁴⁵ Against the backdrop of this

42. RSBC 1996, c 6, s 3(1) [*Adult Guardianship Act*]. A similar presumption is found, for example, in section 2(1) of the *Substitute Decisions Act*, SO 1992, c 30 [*Substitute Decisions Act*].

43. RSBC 1996, c 34, ss. 2-3. A similar process is prescribed, for example, in the *Substitute Decisions Act*, *supra* note 42, ss 16(1), 16(2).

44. *McMullen*, *supra* note 33 at para 67.

45. *Adult Guardianship Act*, *supra* note 42, s 2(a).

statutory framework, the judge refused to take up the invitation, from the daughters' counsel, to "fill the gap" into which the circumstances of the case purportedly fell. That gap was the lack of legal power to take protective action in relation to a person, such as the father, who had not crossed a legal threshold of incapacity to manage his own affairs but who appeared to be emotionally and psychologically vulnerable to exploitation and to acting uncharacteristically and unwisely. In refusing to fill this gap, the judge expressed "considerable empathy" for the father's family and acknowledged the dilemma that they faced, however, she stated:

[t]he issues involved in filling the gap in the law are complex and controversial. Principles of personal autonomy conflict with principles of protection for vulnerable individuals. Legislation dealing with incompetent persons ... provide blunt instruments to address problems of incapacity. There are few tools which address the issue of exploitation of vulnerable individuals ... Given this complex arena, it is not for this Court to fill the legislative gap, particularly given the evidence in this case.⁴⁶

...

Removing an individual's autonomy is extremely significant. Mr. McMullen is entitled to live his life as he wishes unless and until he is found to be incompetent to manage his own affairs.⁴⁷

The interests identified by the judge in these passages, and the position taken on how to weigh and balance them, are broadly reflective of the current approaches taken by older adult advocacy organizations and authoritative law reform bodies.⁴⁸ For instance, in 2012 the Law Commission of Ontario ("LCO") concluded a multi-year study to formulate *A Framework for the Law as it Affects Older Adults* and that framework is built upon a recognition of the following fundamental principles for promoting substantive equality for older adults: respecting

46. *McMullen*, *supra* note 33 at para 72.

47. *Ibid* at para 76.

48. See *e.g.* UK, Law Commission, *Adult Social Care Report*, Law Com No 326 (London: The Stationary Office, 2011) at para 4.26; Ireland, The Law Reform Commission, *Consultation Paper on Law and the Elderly* (LRC CP 23)(Dublin: The Law Reform Commission, 2003) at 158-59; Australia, Cth, Seniors' Rights Victoria, *Submission to the Australian Law Reform Commission: Equality, Capacity and Disability in Commonwealth Law* by Lauren Adamson, Melanie Perkins & Faith Hawthorne (Melbourne: June 2014) at 3.

dignity and worth; fostering independence and autonomy; promoting participation and inclusion; recognizing the importance of security; responding to diversity and individuality; and, understanding membership in the broader community.⁴⁹ In elaborating upon these principles, the LCO noted not only that they are interdependent but also that there may be tensions between them. Although the report does not specifically address the issue of beneficiary-protection, in the course of discussing the principles, the LCO seems to favour an approach that reflects the position taken in *McMullen*. This is evident in the general endorsement given to a submission by the Advocacy Center for the Elderly, a longstanding and highly respected specialty legal clinic in Toronto, and the inclusion of the following quotation from them in the report:

[the principle of security should address] possible vulnerabilities of older adults, whether short-term or long-term, without discounting the principles of dignity, independence and participation. The LCO is discouraged from recommending a framework based on the notion of vulnerability and a perception that older adults lack capacity and need protection.⁵⁰

Ultimately then, when it comes to considering the interests of older adults that are at stake in assessing the merits of equitable recognition of a beneficiary-protection power, the position adopted by the judge in *McMullen* appears not only generally consistent with relevant statutory frameworks but also generally consistent with the approach preferred by a representative leading older adult advocacy organization and a recently concluded representative law reform initiative. That position involves a prioritizing of dignity, autonomy and independence over protection. A key reason for that prioritization is a deep-seated concern over the

49. Law Commission of Ontario, *A Framework for the Law as it Affects Older Adults: Advancing Substantive Equality for Older Persons through Law, Policy and Practice*, final report (Toronto: April 2012) at 86 [Law Commission of Ontario, *Advancing Substantive Equality*].

50. *Ibid* at 95, citing Advocacy Centre for the Elderly, *Submission to the Law Commission of Ontario Concerning the Law as it Affects Older Adults* (July 2008) at 5.

debilitating effects on older adults of paternalistic treatment.⁵¹ Clearly enough, there is a very real danger that purportedly protective action may be motivated by or amount to paternalism and so it follows that there would be a general preference for a beneficiary-direction rule over a beneficiary-protection power. In turn, this approach would count against any move to analogize the position of a voluntary and knowing resulting trustee to the position of an express trustee. Similarly, it would also justify a refusal to explore the possibility of regarding an adult child co-holder of a joint bank account as an express trustee, rather than a resulting trustee, of the beneficial interest held by an older adult in the funds in the account during his or her lifetime. In each case, to the extent that a move towards an express trusteeship would potentially open the door to a beneficiary-protection power, a consideration of the underlying interests at stake for older adults, and in particular the risk of paternalism, would discourage that move.

This brings me to a discussion of a fourth and final barrier to analogizing the adult child resulting trustee to an express trustee, namely, the basic dis-analogy that might exist in the mind of the older adult. At the same time though, this discussion leads to an identification of what would appear to be the most appropriate means of managing the dilemma of beneficiary-protection.

D. Barrier #4: The Dis-Analogy of Resulting and Express Trusts

The key component of the dis-analogy between resulting and express trusts is the potential for an affirmative perception, in the mind of the older adult, that the arrangement of an express trust necessarily involves a degree of giving up of control over assets to the express trustee, whereas the arrangement from which the resulting trust arises does not. The existence of this affirmative perception may be attributable to the older adult's general or particular knowledge or experience, or to legal or other

51. The problem of paternalism is emphasized by the Law Commission of Ontario in its discussion of the key ways in which "ageism" can manifest: Law Commission of Ontario, *Advancing Substantive Equality*, *supra* note 49 at 77-78.

professional advice, or both. Regardless, even if it is unlikely that an older adult would be aware of the phenomenon of the resulting trust, and even if similarly unlikely to have ever considered whether he or she preferred a beneficiary-direction rule or a beneficiary-protection power, it may be quite likely that an older adult perceives an express trust as involving a potentially significant degree of empowerment and independence of a trustee that he or she wishes to avoid. Moreover, it may be quite likely that an older adult comprehends that to create a joint bank account, on the basis of an understanding that the funds in the account will only be used for the older adult's benefit during her lifetime, is not to create an express trust. To the extent that this is likely to be the state of an older adult's perception, or to the extent that it makes sense to presume that this is what the older adult perceives, there is a further reason to resist analogizing the position of the adult child resulting trustee to that of an express trustee.

Put another way, this argument could be that the intention that is being investigated in relation to the issue of whether the older adult intended to retain or give up a beneficial interest has a different specificity or robustness than the intention that needs to be demonstrated in relation to the issue of whether an express trust has been created. In keeping with this argument, the explanation for why intentions to create express trusts have only been found in relation to rights of survivorship in joint bank accounts may simply be that it has only been in relation to that aspect of the accounts that the relevant specificity or robustness of intention — what I will call a requisite difference of intentionality — has been found to exist.

Having arrived at the point where the explanation for the preference for the beneficiary-direction rule over a beneficiary-protection power might be reinforced by reference to a difference of intentionality, we also arrive at the point where the most appropriate means of managing the dilemma of beneficiary-protection might be appearing.

V. The Possibility of an Expressed Intention for Beneficiary-Protection Power

On the basis of the foregoing discussion it seems reasonable for equity to approach joint bank account resulting trustee situations by imposing a beneficiary-direction rule and refusing a beneficiary-protection power. At the same time though, and especially given the role of intention in the recognition of resulting trusts, those positions could be regarded as not precluding a recognition that an older adult and co-holding adult child could agree that a beneficiary-protection power will be granted. In other words, the door should be left open to equitable recognition for situations where an older adult expresses an intention that their co-holding adult child should hold a beneficiary-protection power. Arguably, this may involve a degree of intentionality that tips the situation from one of resulting trust to express trust but, since this tip would be based in an express intention, any such argument is really beside the point.

If equity were to take the approach of only recognizing a beneficiary-protection power on the basis of expressed intention, then there would still be a need to grapple with the task of establishing appropriate standards and tests for the valid exercise of such a power. This article does not seek to explore that territory, although attention can at least be drawn to the position expressed by Cullity J, as mentioned in the earlier discussion of *Banton*, that the onus for demonstrating the reasonableness of protective action might best be placed on the fiduciary — that is, in the context of joint bank account resulting trusts, the onus should be on the adult child resulting trustee.

One further point, in relation to implications for the professional responsibility of lawyers, should also be noted. To the extent that the door is still open to equity recognizing an expressed intention for a beneficiary-protection power, this may have significance for the lawyers and others who typically advise clients, either or both older adults and their adult children, on matters relating to joint bank accounts. Practically-speaking, the possibility that an older adult could expressly grant a beneficiary-protection power may be of more interest to their potential co-holding adult children. But since either party may have some interest in the possibility, and since it now seems entirely predictable that circumstances

may arise where there is perceived to be a need to act protectively towards the older adult, it could be argued that discussion of the possibility of expressly granting a beneficiary-protection power should be regarded as a new element of due diligence and, therefore, professional responsibility for lawyers (or other professionals or service providers) who find themselves in the position of advising either or both of the older adult and the adult child on the creation of a joint bank account.

VI. Conclusion

The rules and principles of equity play a significant role in defining and allocating the rights and responsibilities of adult children and older adult parents who are co-holders of joint bank accounts. In a typical situation, adult children are deemed by equity to be resulting trustees for their older adult parents in relation to the funds in the joint bank account, at least during the older adult's lifetime. A particular concern in these contexts is financial abuse of older adults. In situations where the adult child resulting trustee is financially abusing the older adult, without her knowledge or consent, equity applies a rule of beneficiary-direction to resulting trustees. The beneficiary-direction rule is adequate to hold an abusing resulting trustee to account, but in doing so it appears to rule out recognition of a resulting trustee having a beneficiary-protection power, — that is, a power to act against the wishes of the older adult in order to protect her from financial abuse by others. In contrast, equitable rules relating to express trusts can be understood to preserve a zone of autonomy for discretionary responsibilities of express trustees and, in turn, this zone enables a beneficiary-protection power, subject always to the terms of the trust and an assessment of the best interests of the beneficiary. Given that the definition and allocation of the rights and responsibilities of resulting trustees needs to take account of the context within which the resulting trust arises, it might be argued that a voluntary and knowing resulting trustee of a joint bank account could be analogized to an express trustee, at least in terms of enabling a beneficiary-protection power. However, considerations of both precedent and policy give rise to a number of interconnected barriers to this analogy, specifically: (i) the paramountcy of the resulting trust approach and the beneficiary-direction rule in cases

addressing joint bank accounts; (ii) the mixed treatment of claims to a beneficiary-protection power in non-trust fiduciary contexts, including concerns raised over both conflict of interest and appropriate respect for the autonomy of older adults; (iii) the consistency between the judicial preference for the beneficiary-direction rule and the way in which related statutory regimes and law reform initiatives balance the interests of older adults, especially the importance of avoiding paternalism; and, finally, (iv) the likelihood that older adults may somewhat consciously prefer to avoid an express trust approach to joint bank accounts. In assessing these barriers, the analysis conducted in this article draws the conclusion that they are based on a solid and coherent foundation of equitable rules and principles and policy considerations. Ultimately, these barriers construct a strong argument that resulting trustees should not be analogized to express trustees in the sense that equity should continue to prefer a beneficiary-direction rule over a beneficiary-protection power in relation to resulting trustees. At the same time though, since it can be anticipated that a need for protective action might arise, and that a power to act protectively might be useful, the door should remain open to the possibility that equity would respect an express grant of protective power.

This endorsement of equity's apparent preference for a beneficiary-direction rule over a beneficiary-protection power creates a difficult situation for adult children who are resulting trustees of joint bank accounts co-held with their older adult parents when they suspect that their parents are being financially manipulated and exploited. So long as the older adult parent retains mental capacity to manage her financial affairs, and so long as she expresses wishes to use the joint account in specified ways, the adult child who suspects that those wishes are symptoms of financial abuse is legally prohibited from taking preventative protective action by shifting the funds in the joint account out of the reach of the older adult. It can be anticipated that some adult children who face this difficult situation will nevertheless choose to take protective action because, practically-speaking, doing so may be effective in preventing the abuse and, in turn, the adult child may be willing to run the risk of negative legal consequences for such wrongful conduct. While it may be understandable that an adult child would opt for this risky route out of

the difficult situation, and while courts may be tempted to allow him or her to escape liability (after-all, “hard cases” are well-known to make “bad law”), it is important to realize that there are ways to avoid the difficult situation in the first place. One means of avoidance would be an express grant of a beneficiary-protection power to the resulting trustee. Another means would be to undertake the intentional creation of an express trust, rather than merely relying upon a presumed intention resulting trust. For either means to be available though, both the adult child and their older adult parent will need to be aware of the potential for a difficult situation to arise and the possibilities for managing or avoiding it. Ultimately, responsibility for establishing that awareness lies more in the realm of diligent legal/professional practice than equitable legal doctrine. The case law, such as *Bakken Estate*, provides numerous examples of legal and other professionals advising older adults about joint bank accounts in the context of broader discussions of capacity to manage financial affairs and estate planning. It would appear that the resulting trust approach to older adult joint bank accounts is often presented as an option of convenience. But with the problem of older adult financial abuse now clearly apparent, and with case law on the potential for a difficult situation to arise gradually accumulating, the best lesson for lawyers and other professionals to take from *Bakken Estate*, and other litigation of disputes over resulting trustees taking preventative protective action, may be the need to provide advice on the means for preventing resulting trustees from finding themselves in such difficult situations.