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**Beneficiary Designations at Risk**

*A recent Ontario court decision could upend estate planning*

*This is a special guest article authored by Kevin Wark, Tax Advisor to the Conference of Advanced Life Underwriters (“CALU”).*

In the recent Ontario court decision of *Calmusky v. Calmusky*,<sup>1</sup> the Judge decided that funds payable to a named beneficiary under a registered retirement income fund (“RRIF”) were held in a resulting trust for the estate of the deceased planholder. This decision could have disturbing implications for the estate plans of many residents in Ontario. The position taken by the Judge in *Calmusky* follows similar decisions in several other provinces, demonstrating this is a pan-Canadian issue for advisors and their clients.

This article will briefly review the common law principles governing the gratuitous transfers of property, the Supreme Court of Canada (“SCC”) decision in *Pecore v. Pecore*,<sup>2</sup> and how this decision has been applied in *Calmusky* and other recent court decisions to override transfers pursuant to beneficiary designations. This article will also discuss steps that can be taken to ensure that a beneficiary designation in favour of adult children (and other adult beneficiaries) will be respected by the Courts.

**Presumption of Advancement vs. Resulting Trust**

In common law provinces and territories there is a legal presumption that the gratuitous transfer of property to a spouse or minor child is intended as a gift. This is known as the “presumption of advancement”. Thus, any person who brings a legal action challenging a gift made to a spouse or a minor child bears the burden of proving that the gift was not intended “on the balance of probabilities”.

On the other hand, a gratuitous transfer of property to a non-family member is governed by the presumption of resulting trust. Thus, where there is a legal challenge to the transfer of property in these circumstances,<sup>3</sup> it is presumed that such transfer is not intended as a gift. If the court determines that there is insufficient evidence to rebut the presumption, the transferee will be required to return the property to the donor or the donor’s estate.

<sup>1</sup> 2020 ONSC 1506.

<sup>2</sup> [2007] 1 S.C.R. 795. Hereinafter, “*Pecore*”.

<sup>3</sup> Which most often occurs upon the mental incompetency or death of the transferor.



## The Pecore Decision

In *Pecore* the SCC considered a situation where a parent added an adult child as a joint owner of a bank account. The adult child asserted that the transfer into joint ownership was intended as a gift while other estate beneficiaries claimed that the joint account should be held by the adult child in trust for the estate. The main question was whether the presumption of advancement or resulting trust should apply in deciding this issue. The SCC held that gifts to adult children should be governed by the presumption of resulting trust, and therefore the adult child bore the onus of proving the transfer of the funds in the bank account was intended as a gift.

The SCC also spoke to the nature of the evidence that must be provided to the Court to rebut the presumption of a resulting trust. A court cannot only consider evidence of the donor's intention at the time of the gift but may also consider the donor's actions subsequent to the transfer to determine his or her intent. A court may also look to the documentation relating to the transfer, who controlled the use of the property after the transfer, and the tax treatment of the property subsequent to the transfer. In *Pecore* the SCC specifically focused on the nature of the banking documents, and determined such documents only governed the rights and obligation as between the account holders and the bank, and not ownership rights between the donor and transferee.

## The Calmusky Decision

In *Calmusky*, Randy Calmusky brought an action against his brother, Gary Calmusky, disputing Gary's entitlement to the proceeds of a joint bank account held with their deceased father (Henry), as well as entitlement to the funds held in the deceased's RRIF under which Gary was designated as beneficiary. Randy's position was that the presumption of resulting trust applied to those funds and therefore Gary held them in trust for the beneficiaries of Henry's estate.

With respect to the joint bank account, Gary accepted that the presumption of resulting trust applied, and that he bore the onus of proving the transfer was intended as a gift. He therefore provided evidence which he felt clearly demonstrated that his father intended him to have the funds in the bank account upon his father's death. However, after reviewing all the facts, the Judge was not satisfied that Henry intended to gift the funds in the bank account to Gary on his death. As a result, Gary was required to return the funds in the bank account for distribution as per the deceased's will.

Turning to the RRIF funds, the Judge first addressed the question of whether the principles set out in the *Pecore* decision applied to property transfers via a beneficiary designation. The Judge took note of the Ontario Court decision in *McConmy-Wood v. McConmy*<sup>4</sup> which involved a dispute relating to the entitlement of the deceased's adult daughter to proceeds of the deceased's RRIF under a beneficiary designation. The Court held that the RRIF proceeds were intended to be held in trust by the daughter for the beneficiaries of the deceased's estate. The Court also found "there is no presumption of advancement, and any presumption of resulting trust is overwhelmingly rebutted by the evidence."<sup>5</sup>

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<sup>4</sup> (2009) 46 E.T.R (3d) 259 (S.C.).

<sup>5</sup> *Ibid* at paragraph 58.



The Judge also reviewed the Manitoba Court of Appeal decision in *Dreger v. Dreger*,<sup>6</sup> which was decided before the SCC decision in *Pecore*. In *Dreger* the Court held that the adult beneficiary under the mother's RRSP annuity contract and life insurance policies held the proceeds of those contracts for the benefit of the mother's estate under a resulting trust. The Court of Appeal specifically addressed the law of presumptions governing the gratuitous transfer of property to an adult child, and held that the presumption of advancement should apply.<sup>7</sup> The Court of Appeal then determined that the evidence supported the view that the mother intended that her son hold the disputed funds for the benefit of her estate, thus rebutting the presumption of advancement.

Gary argued that despite this case law, the *Pecore* decision should not apply to funds received under a RRIF beneficiary designation. The Judge disagreed, citing there is "no principled basis for applying the presumption of resulting trust to the gratuitous transfer of bank accounts into joint names but not apply the same presumption to the RRIF beneficiary designation."<sup>8</sup> The Judge also noted that "it makes sense from a policy perspective that the evidentiary burden be on the transferee or designated RIF beneficiary, since the transferee/RIF beneficiary is better placed to bring evidence of the circumstances of the transfer".<sup>9</sup> In applying the presumption of resulting trust to the transfer of the RRIF proceeds, the Judge once again concluded that Gary did not satisfy the onus of establishing his father intended him to have beneficial ownership of the RRIF proceeds upon his death.

It does not appear that the *Calmusky* decision will be appealed. Therefore, the transfer by an Ontario resident of property via a beneficiary designation to an adult child (or any other adult beneficiary) may be subject to the presumption of resulting trust. As a result, if there is a challenge to a beneficiary designation upon the death of the planholder/policyholder, the designated beneficiary bears the burden of proving that a gift was intended. Failure to satisfy the burden of proof will result in the plan/policy proceeds falling back into the deceased's estate.

Given this court decision, it can be anticipated that there will be increased challenges to beneficiary designations given the evidentiary burden falls on the designated beneficiary. This will not only result in legal fees for all participants in the court challenge, but if the beneficiary does not meet the burden of proof, the registered funds and/or insurance proceeds will become part of the deceased's estate and be subject to the probate delays and related fees and administrative costs.

### What is the status of designation beneficiaries in other provinces?

The application of the *Pecore* decision to designations in favour of adult beneficiaries under registered plans and life insurance policies has also been considered by the Courts in Saskatchewan, Manitoba,<sup>10</sup>

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<sup>6</sup> (1994), Man. R (2d) 39 (C.A).

<sup>7</sup> Presumably the presumption of resulting trust would have been found to apply if this legal action was being decided after the *Pecore* decision.

<sup>8</sup> Supra note 1 at paragraph 56.

<sup>9</sup> Supra note 1. The quoted words are from *Pecore* at paragraph 26.

<sup>10</sup> Supra note 6. Please see discussion of the *Dreger* decision above.



British Columbia and Alberta. All but Saskatchewan appear to have accepted that the presumption of resulting trust will apply. A brief overview of the applicable decisions is provided below.

### **Saskatchewan**

In *Nelson v. Little Estate*,<sup>11</sup> the Saskatchewan Court of Appeal held that the presumption of resulting trust does not apply to beneficiary designations. In the Nelson case, the deceased transferred a bank account into the joint names of herself and one of her sons, James. She also designated that son as beneficiary under her RRIF. Other family members challenged the transfers and the evidence supported the view that the deceased did not intend a gift to James.

The Court held that the presumption of resulting trust applied to the funds in the joint bank account. But the Court, without explanation, expressly held that the presumption of resulting trust did not apply to a beneficiary designation under the deceased's RRIF.

### **British Columbia**

In *Neufeld v. Neufeld Estate*,<sup>12</sup> the British Columbia Superior Court followed the Manitoba Court of Appeal decision in *Dreger*<sup>13</sup> and found that the presumption of resulting trust applied to proceeds received by an adult beneficiary under the deceased's RRIF.

### **Alberta**

In *Morrison Estate (Re)*,<sup>14</sup> the court had to determine if the presumption of resulting trust should be applied to the designation of an adult beneficiary under the deceased's registered plans and life insurance policies. The Judge struggled with this issue, concerned that applying this presumption could impact millions of RRSPs, RRIFs and life insurance policies that have designated beneficiaries. The Judge also expressed the view that a distinction could be drawn between transferring bank accounts into joint ownership with an adult child and making a beneficiary designation in favor of an adult child.

However, based on the decided case law, the Judge was hesitant to hold that the presumption of resulting trust did not apply in Alberta to beneficiary designations by a parent in favor of an adult child. Ultimately, the Judge determined that he did not need to apply either presumption, because the evidence proved on a balance of probabilities that Mr. Morrison intended to gift the RRIF to the designated beneficiary. However, the fact that the Court considered evidence of the deceased's intention and the finding that there was sufficient evidence that a gift of the RRIF was intended seems to indicate that the presumption of resulting trust was applied in this case. As a result, this decision has

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<sup>11</sup> *Nelson v. Little Estate*, 2005 SKCA 120.

<sup>12</sup> *Neufeld v. Neufeld Estate*, 2004 BCSC 25.

<sup>13</sup> Supra note 6.

<sup>14</sup> 2015 ABQB 769



been interpreted to mean that the presumption of resulting trust does apply to designations in favour of adult beneficiaries.

### Where do we go from here?

Advocis and CALU are strongly of the view that the act of designating a beneficiary (whether it be a minor child, spouse, adult or other person) pursuant to provincial legislation should be distinguished from naming a joint owner of a bank account or investment contract. The statutory rules governing beneficiary designations expressly set out the legal rights of a designated beneficiary under a registered plan or life insurance policy.<sup>15</sup>

As well, it is generally accepted by the planning community that the naming of a beneficiary is a clear indication of the plan holder's intent that the named beneficiary should receive the proceeds of the plan. Finding otherwise could result in placing the estate plans of a large number of people at risk, as well as increasing estate administration and legal fees to the detriment of all estate beneficiaries. We therefore plan to advocate for changes that would ensure that the presumption of resulting trust does not apply where an appropriate beneficiary designation has been made.

In the meantime, professional advisors can play an important role by ensuring that their clients' intentions to make a gift when designating a beneficiary are properly documented. This will ensure that the designated beneficiary can meet the evidentiary burden of proof that a gift was intended.

Clients should also be encouraged to share their estate plans with family members, to ensure they are aware of the client's intentions in respect of the distribution of assets, registered funds and insurance proceeds. In addition, where there is a beneficiary designation of registered assets in favour of an adult child, the associated tax liability to the client's estate should be explained and properly contemplated as part of the estate plan. Otherwise, the Courts might feel it is equitable to draw back at least a portion of the registered assets into the estate to both pay these taxes, as well as make distributions to other estate beneficiaries.

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If you have questions or comments about this Regulatory Bulletin, or to connect with Advocis Legal and Regulatory Affairs, please contact us at:

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<sup>15</sup> Subject to other provincial rules such as family law and dependent relief legislation.