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Calmusky v. Calmusky, 2020 ONSC 1506 – Beneficiary designations in a Possible State of Uncertainty

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Calmusky v. Calmusky[1] is a recent Ontario Court decision that creates uncertainty for beneficiary designations filed with financial institutions. The key takeaway from this decision is that when we help Clients with their beneficiary designations, we will need to document Clients' intentions with clear and detailed notes.

The Facts

Henry Calmusky was the father of twin brothers, Gary and Randy. Henry passed away at the age of 94 and left various assets, including three bank accounts and a registered retirement income fund (RRIF). This case arose from a dispute between the brothers about these assets. Henry did not make any reference to these assets in his will.

The bank accounts in issue were:

- a savings account of $28,728.16 with the Bank of Montreal (BMO) and
- a savings and a chequing account containing $251,233.47 and $4,626.62, respectively with TD Canada Trust (TD).

Henry and Gary jointly owned the bank accounts with a right of survivorship.

The other asset was a $40,814.58 RRIF with TD. The RRIF was in Henry's name and Henry named Gary as the sole beneficiary by signing a beneficiary designation form with TD.

[1] 2020 ONSC 1506.

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The Presumption of Resulting Trust and the Presumption of Advancement

The Presumption of Resulting Trust

Before discussing the Court's findings in *Calmusky*, it is first useful to explain the legal concepts that relate to this case. The first concept is the presumption of resulting trust. This is a legal principle which states that a gratuitous transfer of property from a parent to an adult child means that the child holds the property in trust for the parent's estate. A common scenario is where a parent and adult child jointly own a bank account with a right of survivorship. The law of resulting trust presumes that the parent intended that the balance in the account would be distributed according to the parent's will on his/her death. The parent set up the joint account with the child to assist the parent with paying bills, for example. But, the balance in the account can go to the child as the survivor if the child can successfully show that the parent intended to gift the funds to him/her. In several cases, however, when the parent passes away, another family member (usually a sibling) may challenge the right of survivorship and argue that the funds go to the estate for distribution to the beneficiaries under the parent's will. In other words, the joint accounts would be subject to a resulting trust in favour of the parent's estate.

An example of this situation is in the leading Supreme Court of Canada (SCC) case of *Pecore v. Pecore*[2] (*Pecore*). In this case, a father jointly owned bank and investment accounts with his daughter. These accounts were not mentioned in the father's will. After her father's death, the daughter redeemed the balance of the joint accounts on the basis of a right of survivorship. The daughter's ex-husband challenged the right of survivorship. He argued that the daughter held the balance in the accounts in trust for the benefit of her father's estate. Therefore, the assets formed part of the estate and should be distributed according to the will under which the daughter and her ex-husband were equal beneficiaries.

The SCC held that presumption of resulting trust is still relevant today (and is now often referred to as the *Pecore* principle). The SCC stated, however, that the resulting trust presumption is rebuttable. This means that if another person (in most cases, another family member), brings a legal action challenging the gift, the adult child bears the burden of proving that the parent

[2] 2007 SCC 17 (CanLII). The companion case to *Pecore* is *Madsen Estate v. Saylor*, 2007 SCC 18 (CanLII) (*Madsen Estate*).

intended to gift the property to the child. If a court determines that there is insufficient evidence to rebut the presumption, the, child will be required to return the property to the parent or the parent's estate.

The SCC stated that the types of evidence a court should consider in ascertaining a parent's intent will depend on the facts of each case. The Court gave some examples: wording used in bank documents, the control and use of the funds in the account, the granting of a power of attorney, the tax treatment of the joint account, and evidence subsequent to the transfer if such evidence is relevant to the parent's intention at the time of the transfer. The SCC also ruled that the trial judge would have to decide how much weight to place on a particular piece of evidence in determining the parent's intent.

In *Pecore*, the SCC accepted the trial judge's findings that the father's intention was to pass the balance left in the joint accounts to his daughter on his death through survivorship. The daughter was therefore successful in rebutting the presumption of resulting trust and the funds did not form part of her father's estate to be shared with the beneficiaries under her father's will.

The Presumption of Advancement

In *Pecore*, the SCC also addressed the "presumption of advancement". This is a legal principle which states that the gratuitous transfer of property to a spouse or minor child is intended as a gift. Thus, any person who brings a legal action challenging a gift made to a spouse or minor child bears the burden of proving that the gift was not intended. The SCC clarified that the presumption of advancement does not apply to an adult child, but that the presumption of resulting trust applies to an adult child.

The Dispute in *Calmusky*

In *Calmusky*, when Henry died, Gary received the bank accounts worth $284,588.25 as well as the RRIF worth $40,814.58. Randy sued his brother Gary, arguing that the bank accounts did not go to Gary by right of survivorship, but instead went to Henry's estate for distribution to the beneficiaries under Henry's will. As well, Randy argued that the RRIF also went to Henry's estate -

despite the designation which named Gary as beneficiary. Randy's position was that the presumption of resulting trust (as affirmed in *Pecore*) applied to the bank accounts and the RRIF.

The Issues in *Calmusky*

The main issues in this case were as follows:

- Did the jointly-owned bank accounts belong to the estate, or to Gary by right of survivorship?
- Did the RRIF funds belong to the estate, or to Gary as designated beneficiary?

The Court's Decision

Jointly-Owned Bank Accounts

In his argument rebutting the resulting trust presumption, Gary asserted the following:

- The forms at the bank were clear.
- Their father made a clear choice to select survivorship.
- The bank employees explained the documents to the father and what would happen to the jointly-held funds upon his death.

The Court concluded that Gary had not satisfied the burden of proving that his father intended to gift Gary with the remaining funds in the joint accounts. The Court reasoned that the bank documents were of a "bare bones" nature, and did not assist in determining Henry's intention. The Court also found that the testimony of the bank personnel was insufficient to support the conclusion that Henry intended to give the funds to Gary. Therefore, the jointly-held funds formed part of Henry's estate.

The RRIF

With respect to the RRIF, Gary argued that there is no binding authority in Ontario that extends the *Pecore* principle to RRIF designations. In siding with Randy, the Court stated that there is "no

principled basis for applying the presumption of resulting trust to the gratuitous transfer of bank accounts into joint names but not applying the same presumption to the RIF beneficiary designation" and 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'". Thus, the Court held that the RRIF funds also formed part of Henry's estate.

The Application of the Presumption of Resulting Trust in Other Provinces

Courts in other provinces have also considered the presumption of resulting trust, and how it applies to designations in favour of adult beneficiaries. A Saskatchewan court ruled that the presumption of resulting trust does not apply to beneficiary designations. Cases in Manitoba, British Columbia and Ontario have taken a different and more problematic approach. An Alberta case has recognized the problem of applying the *Pecore* principle to beneficiary designations, but the Court felt obliged to follow previous case law, which applied the principle. Below is a brief summary of these decisions by province.

Saskatchewan

In *Nelson v. Little Estate*[3] (*Nelson*), a mother left joint accounts and a RRIF to her only son. After the mother's death, the son's two sisters brought an action against their brother claiming that the joint accounts and the RRIF formed part of their mother's estate. The Court held that the presumption of resulting trust applied to funds in joint bank accounts, and ruled that the funds went to the mother's estate. But the Court, without explanation, held that the presumption of resulting trust did not apply to a beneficiary designation under the deceased's RRIF.

Manitoba

In *Dreger (Litigation Guardian of) v. Dreger,*[4] (*Dreger*), the legal guardians of a three year old daughter of the deceased mother challenged the beneficiary designations. The mother had

[3] 2005 SKCA 120 (CanLII).
[4] 1994 CanLII 16643 (MB CA).

named her adult son as beneficiary under her RRSP annuity contract and life insurance polices. The Court appeared to be very sympathetic to the minor daughter, and applied the presumption of resulting trust. The Court concluded that the adult son held the proceeds of those contracts for the benefit of the mother's estate.[5] *Dreger* is a decision that predated *Pecore* and has been cited and/or followed in other court decisions including *Calmusky*, *Neufeld v. Neufeld*,[6] (*Neufeld*), *Morrison Estate (Re)*,[7] and *Rainsford v. Gregoire*[8] (*Rainsford)*.

British Columbia

In *Neufeld*, the Court applied the presumption of resulting trust to a RRIF and joint bank accounts. Before her death, the deceased had left her RRIF proceeds to one of her two brothers. She also owned joint bank accounts with that same brother. Her second brother successfully challenged the beneficiary designations, and the Court found that both assets belonged to the estate.

Similarly, in *Stade Estate (Re)*[9] the Court found that three adult beneficiary sons of their deceased mother's RRIF and other joint accounts had not rebutted the presumption of resulting trust. Therefore, the sons held the RRIF proceeds and the joint accounts in trust for the estate. In *Williams v. Williams Estate*,[10] a son challenged his deceased father's gifts to his brother. The assets in dispute included various joint accounts and two RRIFs. The Court found that the joint accounts belonged to the estate. The Court also found that one of the RRIFs belonged to the estate, but the second RRIF went to the son who was the named beneficiary because he was able to rebut the presumption of resulting trust.

The *Rainsford* decision differs from *Neufeld* and *Williams*. While the Court considered the presumption of resulting trust and the deceased's intention, the Court found that the beneficiary

[5] It is uncertain as to why the Court did not apply dependent relief legislation instead of the presumption of resulting trust to find in favor of the minor child.
[6] 2004 BCSC 25 (CanLII).
[7] 2015 ABQB 769 (CanLII). For a thorough review of this issue, see Aoife Quinn, Jason M Chin and Archie Rabinowitz, The Presumption of Resulting Trust and Beneficiary Designations: What's Intention Got to Do with It?, 2016 54-1 *Alberta Law Review* 41, 2016 CanLIIDocs 29.
[8] 2008 BCSC 310 (CanLII).
[9] 2017 BCSC 2354 (CanLII).
[10] 2018 BCSC 711 (CanLII).

designation under the life insurance policy must succeed. The Court stated, "In sum, the general rule regarding the necessity for a written designation of beneficiary under a life insurance policy must prevail". The Court in *Rainsford* recognized that the presumption of resulting trust should not apply to life insurance policy beneficiary designations. However, like the Saskatchewan Court in *Nelson*, the Court in Rainsford did not explain why the presumption of resulting trust did not apply to the life insurance policy designation.

Ontario

In *McConomy-Wood v. McConomy*,[11] the mother of three children named her daughter, Lisa as the beneficiary of her RRIF. After the mother's death, Lisa's two siblings argued that Lisa held the RRIF proceeds in trust for the three of them. The Court agreed, stating that there was ample evidence that the mother wished for her three children to be treated equally. The Court also stated that there was no need to rely on the presumptions of resulting trust and advancement, and that Lisa simply held the RRIF proceeds in trust for the estate. However, the Court noted that if a presumption did apply, he would follow *Pecore* and refrain from applying the presumption of advancement in the case of an adult child (that is, Lisa).

Alberta

In *Morrison Estate (Re)*, the Court considered the issue of whether the *Pecore* principle applied to a RRIF. A father named one his adult sons as the sole beneficiary under his RRIF. After the father's death, the other son challenged the designation arguing that under the presumption of resulting trust, the RRIF should go to the estate.

The Court made some insightful comments on the *Pecore* principle and beneficiary designations. The Court was concerned that applying the principle could have significant impact on millions of RRSPs, RRIFs and life insurance policies with designated beneficiaries. The Court also opined that financial investments with beneficiary designations should be treated differently from jointly owned bank accounts, investment accounts and property.

While the judge in *Re Morrison Estate* was hesitant to apply the *Pecore* principle to the RRIF designation, he felt compelled to follow previous case law which did so. In any event, the Court

[11] 2009 CanLII 7174 (ON SC).

concluded that, on a balance of probabilities, the father intended to gift the RRIF to the designated beneficiary.

The Court also predicted that if *Pecore* applied to beneficiary designations, there would be a flood of litigation by disappointed siblings against designated beneficiaries. The Court suggested that this could be avoided by variations to beneficiary designation forms, and by documentation of intent by the donor.

Summary of Resulting Trust Court Decisions

Below is a summary of the cases discussed in this article dealing with the presumption of resulting trust and/or the *Pecore* principle.

Summary of Cases on the Resulting Trust (*Pecore*) Principle

Decision	Asset(s)	Transferor	Transferee*/ Beneficiary	Party Challenging	Resulting Trust Applied?	Resulting Trust Rebutted?	Who Received Asset
Pecore v. Pecore, 2007 SCC 17 (CanLII)	Joint bank account & Investment Accounts	Father	Daughter	Daughter's Ex-husband	Yes	Yes	Funds when to daughter by right of survivorship
Madsen Estate v. Saylor, 2007 SCC 18 (CanLII)	Joint bank account & Investment Accounts	Father	Daughter	Siblings	Yes	No	Estate
Nelson v. Little Estate, 2005 SKCA 120 (CanLII)	Joint bank accounts & RRIF	Mother	Son	Siblings	Yes	No	Estate
Dreger (Litigation Guardian of) v. Dreger, 1994 CanLII 16643 (MB CA)	RRSP and life insurance policies	Mother	Son	Guardian of minor daughter	Yes	No	Estate
Neufeld v. Neufeld Estate, 2004 BCSC 25 (CanLII)	RRIF	Sister	Brother	Sibling	Yes	No	Estate
Stade Estate (Re), 2017 BCSC 2354 (CanLII)	Joint accounts & RRIF	Mother	3 sons	Siblings	Yes	No	Estate
Williams v. Williams Estate, 2018 BCSC 711 (CanLII)	Joint accounts	Father	Son	Sibling	Yes	No	Estate
	RRIF 1	Father	Son	Sibling	Yes	No	Estate
	RRIF 2	Father	Son	Sibling	Yes	Yes	Son
Rainsford v. Gregoire, 2008 BCSC 310 (CanLII)	Life insurance policy	Father	Daughter	Sibling	Intention discussed but not applied to facts. The Court found that the life insurance policy designation must prevail.		Daughter
Morrison Estate (Re), 2015 ABQB 769 (CanLII)	RRIF	Father	Son	Sibling	Yes	Yes	Son
McConomy-Wood v. McConomy, 2009 CanLII 7174 (ON SC)	RRIF	Mother	Daughter	Siblings	The Court did not rely on presumptions and simply found the RRIF belonged to the estate		Estate
Calmusky v. Calmusky, 2020 ONSC 1506	Joint bank accounts & RRIF	Father	Son	Twin brother	Yew	No	Estate
*Transferee is an adult.							

We can see from this summary that the SCC cases in *Pecore* and *Madsen Estate* applied the presumption of resulting trust originally only to joint bank accounts and investment accounts.

Other provincial decisions extended this principle to RRIFs. In less than thirty percent of the cases were the beneficiaries able to rebut the presumption.

Courts have also discussed the resulting trust presumption to life insurance policy designations. In *Dreger*, based on very sympathetic facts, the Court found that there was a resulting trust in favour of a minor child and that the life insurance designation in favour of the adult child should not succeed. But in *Rainsford*, the Court found that the beneficiary designation under the life insurance policy must prevail.

As we can see, there is an inconsistency in the decisions and a concerning trend that the presumption of resulting trust/*Pecore* principle will apply to beneficiary designations. Changes to relevant provincial legislation is greatly needed. The Financial Advisors Association of Canada and the Conference for Advanced Life Underwriting have made a submission to the Ontario Ministry of Finance to make an amendment to the *Insurance Act (Ontario)*[12] and the *Succession Law Reform Act (Ontario)*[13] to clarify that the presumption of resulting trust does not apply to beneficiary designations.[14] The Canadian Life and Health Insurance Association has also written a letter in support of this submission.[15]

The Ontario Bar Association (OBA) has also made a submission to the Attorney General of Ontario and the Ontario Minister of Finance where the OBA proposed amendments to the SLRA and the *Insurance Act*.[16] The OBA proposed the addition of the following subsection to section 51 of the SLRA:

> 51(3) When a designation is made under a plan, there is no presumption of resulting trust in favour of the participant's estate of the benefit payable under the plan on the participant's death.

[12] R.S.O. 1990, CHAPTER I.8 (the *Insurance Act*).
[13] R.S.O. 1990, CHAPTER S.26 (the *SLRA*).
[14] Advocis and CALU Letter, "Impact of Calmusky Decision on Estate Planning," September 16, 2020.
[15] CLHIA Letter, October 13, 2020.
[16] Ontario Bar Association to Attorney General of Ontario and Minister of Finance, "Submission on the impact of the *Calmusky* decision for estate planning in Ontario, and proposed legislative amendments to remedy same," November 17, 2020.

The OBA also proposed the addition of the following subsection to section190 of the *Insurance Act*:

> 190(3.1) When a designation is made by contract or declaration under subsection 190(1) there is no presumption of resulting trust in favour of the insured's estate of the insurance money payable under the contract.

The OBA also asserted that these amendments ought to have retroactive effect. This would help to ensure that the *Calmusky* decision does not disturb the generally accepted understanding of the law and legal advice that was provided prior to the decision.

Implications of *Calmusky*

The *Calmusky* decision is part of a line of cases that has created uncertainty over how a beneficiary designation may be interpreted if another person (another family member in most cases) challenges the designation. While *Calmusky* dealt with the beneficiary designation on a RRIF, the decision could affect beneficiary designations on insurance policies, as well. Therefore, this decision could potentially affect many of our Clients' beneficiary designations.

It is unfortunate that the Court in *Calmusky* did not refer to the relevant Ontario legislation governing beneficiary designations. For example, the SLRA states that an individual may designate a beneficiary of a plan,[17] and mandates that an institution administering the plan must pay it out in accordance with the beneficiary designations upon the plan-owner's death.[18] In *Sun Life v. The Estate of Juanita* Nelson,[19] the Court set out the test for a valid a beneficiary designation: it must be in writing, and identify the policy and who is to benefit.

Also, the *Insurance Act* states that where a beneficiary is designated and the insurance money becomes payable, the money does not form part of the policy owner's estate.[20] In both the

[17] Subsection 51(1) of the *SLRA*.
[18] Section 53 of the *SLRA*.
[19] 2017 ONSC 4987.
[20] Subsection 196(1) of the *Insurance Act*.

Insurance Act and the *SLRA*, determining the policy owner's intention is not a requirement before paying out the funds under a beneficiary designation. A beneficiary designation, however, can be challenged on other grounds other then the *Pecore* principle. For example, insurance money can be clawed back from a beneficiary to satisfy a support claim brought by a dependent against the estate of the insured.[21]

It will be interesting to see if a future court decision will consider this legislation, and confirm that the *Pecore* principle and the presumption of resulting trust are not meant to apply to valid beneficiary designations. As well, as discussed above, hopefully legislative amendments to the *Insurance Act* and *SLRA* will make clear that these principles do not apply to life insurance policies.

The *Calmusky* decision may not only frustrate a policyholder's intent to have the named beneficiary receive the proceeds of the plan, but may also jeopardize the policyholder's estate plan. This is because the proceeds will be deemed to form part of his or her estate and the proceeds may be subject to probate fees (properly known in Ontario as the Estate Administration Tax). The policyholder's family members may also have to incur legal costs in defending any action challenging the beneficiary designation.

It is commonly recognized among the estate planning community that beneficiary designations are a tool which allow Clients to retain some flexibility and control over their estate plans even after a will is drafted. For the sake of certainty and predictability of Clients' estate plans, beneficiary designations must prevail. Applying the presumption of resulting trust to beneficiary designations runs counter to the intentions of most Canadians and creates uncertainties in millions of beneficiary designations.

[21] Section 58 and paragraph 72(1)(f)) of the SLRA.

Key Takeaway

Calmusky is part of a troublesome trend expanding the *Pecore* principle to beneficiary designations. This principle undercuts people's rights to dispose of their property as they wish. Provincial legislation needs to clarify that the presumption of resulting trust does not apply to beneficiary designations. *In* the interim, we as professional advisors can play an important role by ensuring that Clients' intentions to make a gift when designating a beneficiary are properly documented. Keeping clear and detailed notes is essential. We should also encourage Clients to share their estate plans with family members. As the Court wisely articulated in *Morrison Estate (Re)*,[22] "Certainty is far better than entering the world of secret trusts."

[22] Supra note 6.