Does the “presumption of resulting trust” apply to beneficiary designations?

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Since the decisions of the Supreme Court of Canada in *Pecore v. Pecore*, 2007 SCC 17 and *Madsen Estate v. Saylor*, 2007 SCC 18, the “presumption of resulting trust” has taken a leading place in estate litigation in Canada. It is common for persons interested in an estate to make claims that assets jointly owned by the Deceased and a third person (often an adult child) actually belong to the estate, and do not pass by right of survivorship to the other co-owner. The presumption of resulting trust is rebuttable, and the court will consider whether the Deceased actually intended to make a gift of the property (or the right of survivorship) to the third party.

Such claims are most prominent in British Columbia since assets passing outside the estate by right of survivorship are not subject to wills variation claims. Claimants often combine a *Pecore* claim with a wills variation claim in order to increase the size of the estate subject to the dispute.

Assets such as Registered Retirement Savings Plans (RRSP) and Tax-Free Savings Accounts (TFSA) also pass outside the Deceased’s estate if a beneficiary has been designated. This point is codified in section 95 of the *Wills, Estates and Succession Act* (WESA). As such, these assets would not be subject to a wills variation claim.

There remains some confusion in the case law, particularly in British Columbia, as to whether the principles from *Pecore* apply to beneficiary designations. In short, does the presumption of resulting trust apply?

Current law in British Columbia

The Supreme Court of British Columbia has answered this question in the affirmative. This line of authority dates back to *Neufeld v. Neufeld*, 2004 BCSC 25 in which the Court followed the Manitoba Court of Appeal decision in *Dreger (Litigation Guardian of) v. Dreger*, [1994] 10 W.W.R. 293, which in turn relied upon earlier U.K. authorities dealing with insurance policies. The Court in *Neufeld* held that the deceased had designated her brother as a beneficiary of her Registered Retirement Income Fund (RRIF) for the purpose of reducing probate fees and taxes, and not as a gift, and the proceeds were therefore held upon a resulting trust for the estate.

Such an approach has been consistently followed by the Court: *Re Stade Estate,* 2017 BCSC 2354; *Williams v. Williams Estate*, 2018 BCSC 711. In the recent case of *Simard v. Simard Estate*, 2021 BCSC 1836, the *Pecore* analysis was again applied to RRIFs and a TFSA with designated beneficiaries. The Court noted that there was "no dispute" that the presumption of resulting trust applied.

Conflicting decisions from Outside B.C.

While the B.C. Supreme Court followed *Dreger* in finding that the presumption of resulting trust applies to beneficiary designations, courts in other Canadian jurisdictions have taken a contrary approach. The Saskatchewan Court of Appeal, in a short discussion in *Nelson v. Little Estate*, 2005 SKCA 120, held that the presumption of resulting trust would generally not apply to beneficiary designations. In the facts of that case, however, the Court held that the actual intention of the Deceased was that RRIF funds be held in trust.

A justice of the Alberta Court of Queen's Bench in *Re Morrison Estate,* 2015 ABQB 769 expressed significant concerns about the *Dreger* decision, and the potential impacts on the investment and brokerage industry if the presumption of resulting trust applied to beneficiary designations. Justice Graesser noted that cases like *Dreger* predate the Supreme Court of Canada decision in *Pecore*, and the enactment of new legislation in Alberta with specific provisions on beneficiary designations. Despite the obvious view of the Court that *Dreger* is no longer good law, the Court chose not to make a clear ruling to that effect, and instead decided the case on other grounds. Justice Graesser placed significant weight on the importance of *stare decisis* and feared that he would be disturbing settled law. Another justice of the Alberta court, however, was more decisive. In *Roberts v. Roberts*, 2021 ABQB 945, Madam Justice Kubik explicitly rejected the *Dreger* line of cases. The designation of beneficiaries under Alberta's *Wills and Succession Act* is testamentary in nature and the presumption of resulting trust does not apply. The Court held that the designation of a beneficiary is distinguishable from *inter vivos* transfers as the beneficiary has no rights during the owner's lifetime, and the designation can be revoked at any time.

This issue has also been clarified in Ontario. The Superior Court of Justice had first held, in *Calmusky v. Calmusky*, 2020 ONSC 1506, that the presumption of a resulting trust was applicable to beneficiary designations under a RIF. Justice Lococo reasoned that there was no principled basis for finding that the presumption of a resulting trust would apply to the gratuitous transfer of a bank account into joint names but not to a "gratuitous" beneficiary designation. This decision was widely criticized, and effectively reversed in the June 2021 decision of *Mak Estate v. Mak*, 2021 ONSC 4415. Justice McKelvey held that cases involving *inter vivos* gifts, such as *Pecore*, were distinguishable from those concerning beneficiary designations where the entire purpose of the designation is to specifically state what is to happen to an asset upon death.

The most comprehensive review of these issues can be found in the Nova Scotia case of *Fitzgerald Estate v. Fitzgerald*, 2021 NSSC 355, released in December 2021, involving a beneficiary designation for a TFSA. Justice Murray of the Nova Scotia Supreme Court thoroughly canvassed the case law and ultimately concurred with cases like *Mak Estate* that the presumption of resulting trust has no application. He held that applying the presumption in this context "often frustrates the intention of the transferor,

creates transactional uncertainty, and poses evidentiary challenges for the transferee". It would be contrary to legislative intent concerning beneficiary designations to apply the presumption of resulting trust. The Court (at paras. 103-107) listed other factors for this conclusion, including that a beneficiary designation is a contract that binds the institution where the funds are held.

Chung v. Chung , 2022 BCSC 1396

The issue of beneficiary designations was more recently raised in *Chung v. Chung*, 2022 BCSC 1396 (15 August 2022, Majawa J.), an important decision concerning procedure under s. 151 of the WESA. The plaintiffs sought leave to bring an action on behalf of their father's estate against their brother Ken to recover various assets, which they asserted were held by Ken upon a resulting trust. Such assets included real property that was held jointly by Ken and his father, as well as registered accounts in which Ken was the designated beneficiary. One criterion of the test for granting leave under s. 151 is whether there is an "arguable case". Justice Majawa held that, whereas the application of the presumption of resulting trust to the gratuitous transfers of real property and bank accounts to Ken was clear, the law in Canada is unsettled as to whether beneficiary designations are caught by presumption. He referred explicitly to cases like *Fitzgerald Estate* and *Mak Estate.* However, Majawa J. also noted that the B.C. Court of Appeal has not considered the issue, and cases like *Neufeld* and *Simard* support the application of the presumption. He commented (like Graesser J. in *Morrison Estate*) that the enactment of new legislation relating to beneficiary designations – s. 95 of the WESA – may have changed the legal terrain, but the plaintiffs need only prove at this stage that they have an "arguable case", which is a low threshold to meet. The plaintiffs were granted leave under s. 151 to bring the claim against Ken, including a claim relating to the registered accounts.

Conclusions

The B.C. Supreme Court will need to revisit the correctness of the *Neufeld* line of authorities. The policy reasons cited by the courts in *Fitzgerald Estate* and *Mak Estate* are compelling and should be followed. In contrast, the approach in *Neufeld* creates confusion and runs counter to not only the intentions of the Deceased, but also the Legislature in enacting s. 95 of the WESA. There is no need to resort to a "presumption" to determine the intention of the Deceased; the entire purpose of making a beneficiary designation is to state clearly the Deceased's intention.

There may be a reluctance of a B.C. Supreme Court judge to depart from authorities like *Neufeld* due to the importance of *stare decisis,* and fears of unsettling the law. However, the test from *Hansard Spruce Mills* allows for a principled departure from prior decisions of the same court. The relevant principles of *Hansard Spruce Mills* were summarized by one of the authors in an article published in *The Advocate* in 2004 (Scott Kerwin, "*Stare Decisis* in the B.C. Supreme Court: Revisiting *Hansard Spruce Mills*" (2004), 62 *Advocate* 541) which was recently applied by the Supreme Court of Canada in *R. v. Sullivan,* 2022 SCC 19. The article refers to the principle of a prior authority being "undermined" by subsequent cases or by changes in legislation. There is a strong argument that the enactment of the WESA, with specific provisions about beneficiary designations, has undermined the authority of *Neufeld* and allows the Court to follow

cases like *Fitzgerald Estate.* The conflicting case law from other Canadian courts on this issue may also allow a B.C. Supreme Court judge to invoke *Hansard Spruce Mills.*

Until this issue has been clarified, estate planners in B.C. will need to treat beneficiary designations in the same manner as transferring property into joint names. It is prudent to document the “intention” of the donor, and make clear that a testamentary gift is intended, just as would be done when establishing a joint bank account.

Par

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