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CORPORATE — ESTATE ALERT

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Common Misconceptions about Joint Accounts and Joint Ownership

Elderly parents will often put their money into bank accounts held jointly with their adult children, or transfer real property into a joint tenancy with one or more of their adult children. Sometimes, this is done for expediency so that an adult child can help manage the asset. In other cases, this is a planning technique used to avoid estate administration tax when the parent dies.

Whatever the motivation behind the transfer, there is a persistent misconception that the asset passes to the surviving child when the parent dies and does not form part of the parent's estate. In fact, there is a legal presumption that such assets belong to the deceased parent's estate. The adult child bears the burden to rebut the presumption and to prove the parent intended to gift the asset to the adult child.

The *Pecore* Framework

In *Pecore v. Pecore*[1], the Supreme Court of Canada set out a framework of analysis for gratuitous transfers to adult children. First, a presumption of resulting trust applies to gratuitous transfers of property from a parent to an adult child. Second, a trial judge must start his or her inquiry with this presumption and then weigh all evidence to determine, on a balance of probabilities, the testator's actual intention at the time of the transfer.

Justice Rothstein, writing for the majority in *Pecore*, set out factors the court may consider when determining the testator's intention. In *Mroz v. Mroz*[2], discussed below, the Court of Appeal added to this list of factors. The factors include, but are not limited to:

- evidence of the transferor's intention subsequent to the transfer;
- the wording of banking or financial institution documents;
- control and use of the funds in the accounts;
- the terms of any power of attorney granted to the transferee;
- the tax treatment of the accounts; and
- evidence of the transferor's conduct after the transfer, to the extent it is relevant to the transferor's intention at the time of the transfer.

[1] *Pecore v. Pecore,* 2007 SCC 17
[2] *Mroz v. Mroz,* 2015 ONCA 171 at para.73

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The Recent Court of Appeal Trio

In a trio of recent decisions[3], the Court of Appeal for Ontario reaffirmed the principles established in *Pecore*. These cases illustrate some of the factors the court will consider.

Sawdon Estate v. Sawdon dealt with an aging father who put bank accounts into joint names with two of his five children. He told the two children that when he died, the funds in the account should be distributed equally among all of his children. A residuary beneficiary argued the accounts formed part of the estate. The trial judge held that the presumption had been rebutted. This was upheld on appeal, although on slightly different grounds. The Court of Appeal found there was compelling evidence before the trial judge that when the two children became the legal owners of the bank accounts, they did so on the understanding they were to distribute the remaining funds equally among all five children after their father died. As a result, the Court held that the deceased made an immediate *inter vivos* gift of the beneficial right of survivorship to his children, and that the accounts did not form part of the estate. In that case, there was compelling evidence about the testator's intention.

In *Mroz v. Mroz*, an elderly mother transferred title of the family home (her only significant asset) to herself and her daughter as joint tenants. At the same time, she executed a will which included bequests to her two grandchildren that were to be paid from the proceeds of sale of the house. The daughter failed to pay the bequests and the grandchildren challenged the transfer. The trial judge held that the presumption was rebutted, but that the deceased intended the grandchildren's bequests be paid from the proceeds of sale of the house. The Court of Appeal reversed the decision on the basis that these two conclusions were inconsistent. It was clear from the deceased's will that she did not intend her daughter to be the sole beneficial owner of the house. The Court held that the presumption was not rebutted and the house formed part of the estate.

Finally, in *Foley v. McIntyre*, the Court of first instance dismissed an action to set aside three *inter vivos* monetary transfers and a testamentary bequest of Canada Savings Bonds made by the deceased to his daughter. The Court of Appeal upheld the decision and agreed with the trial judge's conclusions that:

(a) the deceased had capacity at the time of the transfers;

(b) the daughter rebutted the presumption of resulting trust with clear evidence that the deceased intended the funds to be a gift; and

(c) the deceased was not unduly influenced.

With respect to the Canada Savings Bonds, the Court of Appeal held that the presumption of resulting trust was not rebutted, and the bonds formed part of the deceased's estate by way of resulting trust. As a result, the bonds passed to the daughter pursuant to a specific bequest in the deceased's will.

Take Away Considerations

These cases remind us that the *Pecore* framework is alive and well. Adult children should not assume, or treat, assets held jointly as their own in the absence of clear evidence that the deceased intended to gift the asset to the adult child. Similarly, parents who wish to gift assets to adult children through joint ownership should carefully document their intention and should review their testamentary documents to make sure they do not contain anything that could call their intention into question and lead to litigation.

[3] *Sawdon Estate v. Sawdon*, 2014 ONCA 101; *Mroz v. Mroz*, 2015 ONCA 171; *Foley v McIntyre*, 2015 ONCA 382

ESTATES, TRUSTS AND CHARITIES

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