THE LAWYER'S DAILY

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Wills, Trusts & Estates

Beneficiary designations: Are they now safe?

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(December 9, 2022, 1:30 PM EST) -- It has been over a year since Justice Michael McKelvey of the Ontario Superior Court in the decision of *Mak (Estate) v. Mak*, 2021 ONSC 4415 potentially rescued the financial services industry and estate planners from years of litigation by stating clearly that, in his view, the doctrine of resulting trust should not apply to a beneficiary designations made on a financial instrument such as an RRSP or a TFSA.

Justice McKelvey criticized the 2020 decision of the same court in *Calmusky Estate v. Calmusky*, 2020 ONSC 1506 where Justice Richard Lococo had suggested that, in his view, there was no principled reason to differentiate between gratuitous transfers of bank accounts into joint names with right of survivorship from those transactions where beneficiary designations are put in place for financial instruments which would operate upon death.

Justice Lococo had held that both gratuitous transfers and the making of a beneficiary designation could attract the presumption of resulting trust and that the recipient should be required to provide evidence to rebut that presumption and prove that the intention of the donor was one of gift.

Justice McKelvey noted, however, that unlike transfers that take place during the lifetime of a donor, beneficiary designations are operable only on death, and furthermore, they are statutorily recognized as a legitimate estate planning tool. As such, he found that the doctrine of resulting trust would not apply to beneficiary designations.

Neither decision appears to have been further considered by the courts in Ontario since the release of *Mak*, but two recent decisions from British Columbia suggest that the question may be far from closed.

In the B.C. decision of *Chung v. Chung*, 2022 BCSC 1396, released in August 2022, the Supreme Court of British Columbia was considering an application made by the siblings of Ken Chung who had been made the joint tenant of a condominium unit and had been added as a joint account holder to a number of bank accounts with his parents at the same time as he was named as the designated beneficiary of his parents' registered investment accounts.

The court accepted that it was arguable that the presumption of resulting trust could arise with respect to all of these transactions including the designation of Chung as a designated beneficiary. The court was not impressed by the evidence that existed from the bank files and from the solicitor's files as to the donor's intention as it was not made clear in those notes whether the transfers and the designation were intended as gifts.

The court determined that a trial was necessary to resolve the question as to whether the presumption of resulting trust had been rebutted with respect to all the financial instruments and transactions which were in question.

Similarly, the B.C. Supreme Court in the decision of *Simard v. Hall Estate*, 2021 BCSC 1836

considered evidence with respect to a series of transactions wherein a parent had made transfers to a favoured child, adding that child as a joint holder of bank accounts and naming that child as a designated beneficiary with respect to other financial instruments.

In each instance, the court in *Simard* considered the evidence available with respect to the parents' intention as could be gleaned from the testimony of financial advisers, notes made at the time and the wording of financial documents which were executed.

The court was impressed with the reliability of the notetaking of the financial adviser who had set up the beneficiary designation and found that the language of the designation form was clear and detailed enough to provide evidence that the parent intended the child to receive the balance in that account when she died.

The court found that the presumption of resulting trust had been rebutted with respect to the beneficiary designation but did not make that same finding with respect to other transactions as the evidence was not compelling enough there to overcome the presumption of resulting trust.

These recent decisions should serve as a reminder to financial planners and estate planners to clearly document the intentions of the donor when setting up bank accounts with rights of survivorship and also when executing beneficiary designations.

The documentation used for both should be easy to understand and should prompt the donor to state their intention clearly so that records will be available in years to come if it is necessary to determine that intention in future years.

While the distinctions that the court made in *Mak* to note that beneficiary designations are different from gratuitous transfers as they are not immediately operable appears sound, one cannot be certain as to how future courts will interpret the question, and so continuing to properly document transactions when they occur is key.

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