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Barristers and Solicitors

### **Documenting Wishes Regarding Gifts to Adult Children**

An estate plan often consists of gifts under a will, in addition to those passing outside of the estate, including jointly-held assets or policies for which a beneficiary can be designated. While there may be good reason not to directly address these assets under the will due to potential exposure to additional estate administration tax, documenting the related intentions when retained to assist in preparing estate planning documents may nevertheless be important to give them effect.

The recent decision of *Calmusky v Calmusky*, 2020 ONSC 1506, refers to the expansion of the Supreme Court of Canada's reasoning in *Pecore v Pecore*, 2007 SCC 17, to the context of assets for which a beneficiary designation is in place.

Under *Pecore*, assets transferred into joint ownership with an adult child for no consideration are subject to a presumption of resulting trust. In *Calmusky*, the Court found that a presumption of resulting trust applied in respect of not only bank accounts jointly held with an adult child, but also in respect of a RIF for which the adult child had been identified as the designated beneficiary. The decision also refers to the scope of the presumption of resulting trust as extending to all gratuitous transfers to an adult child.

Section 13 of Ontario's *Evidence Act*, RSO 1990, c E.23, requires corroboration of an interested party's evidence with respect to a claim by or against an estate. *Calmusky* clarified that corroboration is still required in the face of a presumption of resulting trust (at para 33):

... [T]he task of any party who after the transferor's death seeks to challenge or uphold an *inter vivos* transfer is complicated by s. 13 of the *Evidence Act*, R.S.O. 1990, c. E.23. Section 13 provides that in estate litigation, "an opposite or interested party shall not obtain a verdict, judgment or decision on his or her own evidence in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence."

Uncorroborated evidence of the recipient of the gift or the party who would benefit from the imposition of a resulting trust as to the deceased's intentions is typically insufficient. As a result, in *Calmusky* and related matters, the records and/or testimony of estate planning lawyers and financial advisors who assist the deceased in creating or updating an estate plan may be key evidence as to the deceased's intentions. In the absence of clear, independent evidence, the presumption of resulting trust, the scope of which appears to have been expanded by the *Calmusky* decision, is likely to apply.

As part of the estate planning process, drafting solicitors may want to consider taking the time to discuss any assets passing outside of an estate to adult children and document the testator's related intentions to prevent scenarios where the beneficial ownership of such assets is determined by presumptions of law or evidentiary rules rather than the client's actual wishes.