



**HULL & HULL'S
ESTATE, TRUST AND CAPACITY LAW
BREAKFAST SERIES**

**"5 CASES EVERY ESTATES
LAWYER SHOULD KNOW
ABOUT"**

FRIDAY, SEPTEMBER 22, 2000



HULL & HULL
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“5 Cases Every Estates Lawyer Should Know About”

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**JOINT OWNERSHIP ON DEATH --
JOINT ACCOUNTS AND JOINT ASSETS IN ESTATE AND CAPACITY
LITIGATION**

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The question of the ownership on death of joint accounts and joint assets is an issue that is often considered in the context of various types of estate litigation.

As is sometimes the case, for planning reasons and probate fee avoidance, individuals may arrange their financial affairs through joint accounts with their husband, wife, spouse or child, so that upon either death, the funds automatically pass to the surviving individual by right of survivorship.

In circumstances where a joint bank account or joint GICs or term deposits are set up by the deceased prior to his or her death, the ownership of the assets on death is often difficult to determine. Furthermore, the information relating to that asset is usually not itemized in any manner in the accounts by the executors and is information that is sometimes not even within the knowledge of the executors as it can be seen as a “private matter” between the deceased and the individual with a right of survivorship.

Onus and Evidentiary Considerations

In matters involving a fiduciary, the question of gifts received by the fiduciary are often raised. An inter vivos gift is a gratuitous transfer of property from its owner to another person with the intention that the transfer has an immediate effect and the title of the property passes to the donee. There are two major components to this process (a) the transfer is gratuitous, and (b) there is an intention to pass title to the donee.

The onus is on the donee to provide that there is an intention on the part of the donor to transfer the beneficial ownership as well as the legal title.

The onus of proof is on the defendant to prove a valid gift inter vivos.

The presumption arising upon a voluntary transfer of property is that of a resulting trust to the donor, and the burden is on those asserting a beneficial transfer to establish that fact.

The presumption of a resulting trust can only be met by providing the same convincing and unimpeachable evidence that is required for an inter vivos gift.

Where undue influence is alleged, consideration must be given to whether there was potential for domination given the nature of the relationship between the parties. The test embraces those relationships which equity already recognized as giving rise to the presumption, such as a solicitor and client relationship, parent and child, guardian and ward, as well as other relationships of dependency which defy easy categorization.'

If the evidence is clear that the donor was in a relationship of dependency to the donee from the time that he granted the donee a Power of

Attorney, then theirs is not a relationship of equals. While there may or may not be sufficient evidence to make a finding on the mental capacity of the donor at any point in time, clearly if she was in a weakened condition, both mentally and physically, throughout the period of time the gifting is alleged to have occurred, then any gifts by the donor are subject to review.

As to the issue of the presumption of undue influence, an inter vivos disposition of property may give rise to the presumption of undue influence in cases of gifts inter vivos to persons standing in a fiduciary relationship or some other relationship whereby the donee was in a position to overbear the donor, such persons must show that she did not influence the donor in making the gift.²

In such a case, there is a presumption of undue influence³ and the onus on a beneficiary who attempts to discharge the presumption of undue influence is a heavy one even when the sale is done so at fair market value. The onus on the fiduciary is much heavier when the transaction is a gift.⁴

When an executor or beneficiary acquires property of an estate without an order of the court, or fails to rebut the presumption of undue

¹ McTaggart v. Bolfo (1975), 64 D.L.R. (3rd) 441 at p. 458, 10 O.R. (2nd) 733 (H.C.J.).

² J. MacKenzie, Feeney's Canadian Law of Wills, Fourth Edition (Toronto: Butterworths, 2000) at 3.6.

³ Goodman Estate v. Geffen (1991), 42 E.T.R. 97 (S.C.C.), pp. 114-115.

⁴ Re Taerk, (1957) O.R. 482 (C.A.), Goodman Estate v. Geffen (1991), 42 E.T.R. 97 (S.C.C.), pp. 114-115.

influence, the other party is entitled to a rescission or, when that is not possible, damages.⁵

In circumstances where there is a challenge to an inter vivos gift which does not involve an attorney or beneficiary, the onus is on the recipient of the gift to provide convincing and unimpeachable evidence that the donor intended to make the gift.⁶

In *Johnston v. Johnston*⁷ the Ontario Court of Appeal dealt with the question of onus and inter vivos gifts. The Court of Appeal held that the onus is on the recipient (plaintiff) to show that the transaction was a gift, and that must be established by proving a clear and unmistakable intention on the part of the donor to make a gift of money to the plaintiff.

In weighing the conflicting evidence, the preponderance must be such as to leave no reasonable room for doubt as to the donor's intentions. If it falls short of going that far, then the contention of a gift may fail.

In Halsbury's Law of England⁸ it stated:

A gift alleged to have been made by a deceased person cannot, as a general rule, be established without some corroboration...there is no hard and fast

⁵ *Treadwell v. Martin* (1976), 67 D.L.R. (3d) 493 (N.B.A.D.), *Cheese v. Thomas*, [1984] 1 All E.R. 135 (C.A.).

⁶ *Dell'Aquila Estate v. Mellof*, [1996] 6 W.W.R. 445 p. 454 (Sask.O.B.), *Johnston v. Johnston* (1913), 12 D.L.R. 537 p. 539 (Ont. C.A.).

⁷ See note 8 above.

⁸ (4th) Vol. 20, p. 15.

rule that the alleged donee must be disbelieved if uncorroborated. It must be examined with scrupulous care, even with suspicion, but if it brings conviction to the tribunal which has to try the case, that conviction will be acted on.

In addition, it should be noted that the *Ontario Evidence Act* makes it clear that corroborative evidence is required when dealing with actions by or against the heirs of an estate.⁹ Section 13 of the *Ontario Evidence Act* provides as follows:

13. In an action by or against the heirs, next of kin, executors, administrators or assigns of a deceased person, 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.

Ownership of Joint Accounts and Joint Assets

Generally, the governing statement of law with respect to the ownership of money deposited in a joint account, when the money is deposited by one of the account holders only, is as set out by the Supreme Court of Canada in *Niles v. Lake*¹⁰.

The law is well settled, I think, that when a person transfers his own money into his own name jointly with that of another person, except in cases with which we are not concerned, then there is, prima facie, a

⁹ See the recent Ontario Court of Appeal decision *Burns v. Mellon* (2000), 48 O.R. (3rd) 641 (Ont. C.A.), see also Brian A. Schnurr "Estate Litigation – Requirement of Corroboration" 5 E.T.Q. 42.

¹⁰ [1947] 2 D.L.R. 248 p.254, *Taschereau* }. (S.C.C.).

resulting trust for the transferor. This presumption, of course, is a presumption of law which is rebuttable by oral or written evidence or under circumstances tending to show there was, in fact, an intention of giving beneficially to the transferee.

At page 258, Taschereau J. went on to state:

The words "shall be joint property of the undersigned" or "right of survivorship" and "all monies in the account to be joint property of the undersigned" are indeed apt words to convey a legal title to the fund, but not to convey the whole fund beneficially. Something more than mere transfer is required to destroy the presumption of a resulting trust and intimation of such an intent must appear on the document itself, or as a result of evidence which reveals the intention to benefit the transferee.

At page 260, Taschereau J. also stated:

The presumption arising upon such a voluntary transfer of property into another title or legal power, without more, is that of a resulting trust to the donor, and the burden is on those asserting a beneficial transfer to establish that fact.

As such, the onus is on the recipient of the inter vivos gift to rebut the presumption of a resulting trust and, where the person is deceased, the presumption can only be met by providing the same convincing and unimpeachable corroborative evidence.

The recent decision of Justice Cullity in Cho Ki Yau Trust v. Yau Estate¹¹ is an excellent illustration of how the courts have dealt with whole question of ownership of inter vivos gifts and joint accounts.

¹¹ (1999) 29 E.T.R. (2d) 204 (Ont.Sup.Ct.) 204.

In the Cho Ki Yau Trust v. Yau Estate, the first wife of the deceased and their adopted son held a term deposit jointly (without express right of survivorship). Upon the death of the first wife, the husband directed the bank to transfer the funds into his personal account. The adopted son claimed that the mother had intended the funds to go to him upon her death and the adopted son brought an action against the father's administrator and sought summary judgment.

The court considered issues such as the ownership of the joint account in light of the lack of an express right of survivorship in the language of the bank's joint account agreement. Furthermore, the court looked at the question of the presumption of advancement as between parent and child and given the relationships of the parties, the whole question of rebutting the presumption of resulting trusts was considered by the court.

Finally, the court also made some comments with respect to the whole issue of conversion of assets¹².

As to the question of the ownership and right of survivorship of the assets in the joint account, the court considered a reasonably unique circumstance in this case as the language of the bank's joint account agreement

¹² In this decision, there is also an interesting discussion of the appropriate circumstances whereby summary judgment may be granted in an estate proceeding. In this case, summary judgment was granted and Justice Cullity reviews the law in respect of summary judgment in some detail. This issue is not the subject of this paper and as such if one is interested in reviewing this aspect of the decision one should refer to pages 207-212.

was not determinative as the agreement determined the rights and obligations vis-à-vis the bank only.¹³

Justice Cullity made it clear that in circumstances such as this, the question of whether the adopted son obtains a beneficial right to the funds on deposit depends upon the intention of his mother and that, for this purpose, the terms of the document provided by the bank for their signatures are of secondary importance. The court made it clear that those documents really just determine the rights and obligations in respect of the bank.¹⁴

Cullity J. went on to emphasize that depending upon the evidence of the depositor's intention and on the operation of the equitable presumptions of a resulting trust and advancement where such evidence is lacking, the beneficial ownership of joint accounts to which only one of the account holders has contributed may vary significantly irrespective of the terms of the documents provided by the bank.¹⁵

In essence, where the evidence is that the original deposit of the funds is made by one of the individual joint account holders, in the absence to the contrary, it must be presumed that the sole depositor was the beneficial owner of the funds. This circumstance where the one individual deposits most, if not all of the funds into the account and the other joint holder is there solely for

¹³ Cho Ki Yau Trust v. Yau Estate at p. 213.

¹⁴ IBID at p. 213. See also Niles v. Lake [1947] S.C.R. 291 (S.C.C.) at pp. 307-309 per Rand J.; Mailman, Re, [1941] S.C.R. 368 (S.C.C.) at pp. 377-378 per Crocket J.; Taylor Estate v. Taylor (1995), 9 E.T.R. (2d) 15 (B.C.S.C.)

¹⁵ IBID, at p. 213.

the convenience and benefit of the depositor, is of course common in many family situations.

Justice Cullity goes on to note that cases in which beneficial joint ownership has been found to exist from the inception from the account have most commonly involved accounts in the names of spouses to which each has contributed or, at least, from which each has made withdrawals for his or her own purposes.¹⁶

As noted above, the intention of the depositor and the documentation is of secondary importance.

In considering the question of ownership, looking at the intentions of the depositor and, on a secondary basis looking at the banking documentation, one must then turn to the question of whether or not a presumption of advancement exists and whether or not there is evidence that is capable of rebutting it.

Typically in circumstances of joint accounts the account is either set up jointly in the name of the depositor and his or her spouse or jointly in the name of the depositor and his or her child.

¹⁶ IBID. at pp. 213-214.

As between spouses, the presumption of advancement has been preserved by virtue of s. 14 of the *Family Law Act*¹⁷ which provides as follows:

14. Presumptions –

The rule of law applying a presumption of a resulting trust shall be applied in questions of the ownership of property between husband and wife, as if they were not married except that,

- (a) the fact that property is held in the name of spouses as joint tenants is proof, in the absence of evidence to the contrary, that the spouses are intended to own the property as joint tenants; and
- (b) money on deposit in the name of both spouses shall be deemed to be in the name of the spouses as joint tenants for the purposes of clause (a).

As between parent and child, the whole question of the presumption of advancement is more complex. Historically, the presumption of advancement was not regarded as applicable to transfers between a mother and her child while the father was alive and supporting the child.¹⁸

In Cho Ki Yau Trust v. Yau Estate¹⁹ Justice Cullity carefully reviews the authorities in support of the concept that the presumption of advancement does not apply between mother and child while their father is alive. In so doing, Cullity J. provides a comprehensive comparison as between the authorities which

¹⁷ R.S.O. 1990, c.F.3.

¹⁸ Cho Ki Yau Trust v. Yau Estate at p. 214.

support the concept of the presumption of advancement in these circumstances and the authorities which reject the presumption of advancement. He goes on to repeat the fact that there is a present statutory endorsement of the presumption of advancement in s. 14 of the *Family Law Act* and clearly states that in the context of other situations including those involving the acquisition, or transfer, of property between strangers and between parents and their children, the presumption of advancement continues to be endorsed by the courts.²⁰

While Justice Cullity struggled with the authorities that denied the existence of a presumption of advancement when a mother transfers property gratuitously to her child,²¹ he eventually finds that in the circumstances, the deposit of the funds by the depositor mother gave rise to a presumption of advancement in favour of the son.²²

Cullity J. determined that the more recent authorities in respect of the application of a presumption of resulting trust should prevail and relied on

¹⁹ At pp. 214-219.

²⁰ Cho Ki Yau Trust v. Yau Estate at p. 216. See also Albert v. Albert (1982), 13 E.T.R. 149 (Alta.Q.B.); Cohen v. Cohen (1985), 60 A.R. 234 (Alta.Q.B.); Tucker Estate v. Gillis (1986), 22 E.T.R. 73 (N.B.Q.B.); Boulos v. Boulos (1986), 24 E.T.R. 56 (Nfld.T.D.); Dreger (Litigation Guardian of) v. Dreger (1994), 5 E.T.R. (2d) 250 (Man.C.A.); Wilson, Re. (1999), 27 E.T.R. (2d) 97 (Ont.Gen.Div.).

²¹ See Cartwright J. in Edwards v. Bradley, [1957] S.C.R. 599 (S.C.C.) and Lattimer v. Lattimer (1978), 1 E.T.R. 274 (Ont.H.C.).

²² It should be noted that Cullity J. made it clear that while no authority was cited to him that applied to the presumption of advancement in favour of an adopted child, even independently of the provisions of ss. 1(2) of the *Childrens Law Reform Act*, R.S.O. 1990 c.C.12, which provides: (1)(2) exception for adopted children – where an adoption order has been made, s.158 or 159 of the *Child and Family Services Act* applies and the child is the child of the adopting parents as if they were the natural parents and ss. 158(2) of the *Child and Family Services Act*, R.S.O. 1990, c.C.11, a distinction cannot properly be drawn in Ontario, at the present time, between voluntary transfers to adopted and other, children.

the decision of *Re: Wilson*²³ and accepted the court's analysis and conclusion which stated:

Taking into consideration the natural affection between a mother and child, legislative changes requiring mothers to support their children, the economic independence of women and the equality provision of the Charter, I conclude that the presumption of advancement, rather than the presumption of resulting trust, should apply to the transfer of assets from [the mother] to her [son].

Accordingly, the court in *Cho Ki Yau Trust v. Yau Estate* found that the deposits for a mother intended to retain the sole use and benefit of the funds in the account during her lifetime and notwithstanding, her adopted son became a co-owner of the account at its inception and as a consequence, the plaintiff father had no right to appropriate any of the funds for his own benefit without the adopted son's authority.

CONCLUSION

In summary, the question of the surviving ownership of a joint account and the role which joint assets play is a difficult one. In terms of the ownership interests of the surviving individual, the court will look carefully at the intention and conduct of the parties.

²³ (1999), 27 E.T.R. (2d) 97 (Ont.Gen.Div.)

Costs in Estate Litigation – Re Marshall Estate

Ian Hull, Hull & Hull

The recent Ontario Court decision of *Re Marshall Estate*¹ has highlighted the growing trend in the courts in respect of the question of the payment of costs in estate litigation.²

In *Re Marshall Estate* Sutherland J. dealt with the issue of costs in an estate action that came on for trial for six days.

The action related to a challenge to the validity of a Will and the Will was challenged by a great-nephew of the deceased.

Under the Will that was challenged, the residue and the bulk of the estate was left to a niece of the deceased and the niece was appointed Executrix.

The great-nephew challenged the validity of the Will and alleged undue influence and fraud.

¹ (1998) 22 E.T.R. (2nd) 255 (Ont.Ct.Gen.Div.).

² See *Fox v. Fox Estate* (1994) 5 E.T.R. (2d) 174 (Ont. Gen. Div.), (1996) 10 E.T.R. (2d) 229 (Ont. C.A.), Application for Leave to Appeal to the Supreme Court of Canada submitted September 13, 1996 and refused January, 1997, Brian Schnurr, "Estate Litigation - Who Pays the Costs?", [1991] 11 E.T.J. 52. Theodore

The allegations of fraud were withdrawn on the first day of trial.

The result of the court was that the validity of the Will was upheld and the allegations of undue influence were found to have had no foundation in evidence and were entirely unsupported.³

In view of the weak case presented by the party challenging the validity of the Will, the court made a finding that the challenger should not receive his costs and that costs of the Executrix should be paid by the challenger.

In *Re Marshall*, the court reviewed the law relating to the issue of costs in will challenges.

The traditional approach with respect to costs when challenging a Will is that in some circumstances, the costs of all parties are payable out of the assets of the estate on a solicitor and client basis.

The *Re Marshall Estate* decision is clearly not one which the court felt should fall within the more traditional approach.

B. Rotenberg "Case Comment: *Re Marshall Estate*" (1998) 22 E.T.R. (2nd) 267, Hull, 1 "Costs in Estate Litigation" (1997) 18 E.T.R. (2d) 218.

In *Re Marshall Estate*, there was some question as to the standing of the objector and there were numerous comments by the court in respect of the approach taken by the objector throughout the proceedings. For example, the court described the objector as conducting himself in a reckless manner and that his allegations in respect of fraud were totally unsubstantiated.⁴

In finding that the objector had proceeded with the litigation in an improper and unjustified manner, the court found that the traditional approach to the question of costs should not be used. Sutherland J. stated⁵:

"It is not that the caveator lost the case; it is that on none of the issues was there, after September, 1995 reasonable grounds for persisting with the litigation, having regard to the knowledge of, and means of knowledge, readily available to, the caveator."

³ *Re Marshall, supra* at p. 257.

⁴ *Supra* at p. 258.

⁵ *Supra* Note 20 at p. 264.

HULL AND HULL BREAKFAST SEMINAR
FRIDAY SEPTEMBER 22, 2000
RODNEY HULL Q.C.

PROBLEM: Drafting conditions of entitlement in a will.

SOLUTION: Ensure that all contingencies are provide for in the event that any or all of the conditions take effect. Take special care when double conditions are included.

CASE: Off Estate; Docket 15464 Toronto Estates Court Office.
Judgment; Haley J. Reversed on appeal, Ontario Court of Appeal.

STATUTARY PROVISION: Section 23, Succession Law Reform Act:

“Except where a contrary intention appears by the will, property or an interest therein that is comprised or intended to be comprised in a devise or bequest that fails or becomes void by reason of,

- (a) the death of the devisee or donee in the life of the testator; or
- (b) the devise or bequest being disclaimed or being contrary to law or otherwise incapable of taking effect, is included in the residuary devise or bequest, if any contained in the will.”

DISPOSITIVE PROVISIONS:

“I devise my property known as 38 Burton Road to the use of my wife Doris during her life, subject to payment of expenses. Upon her death to my sister Margaret provided she survives the survivor of myself and my wife.

Residue to my sister Margaret for her own use, provided she survives me.

If my sister does not survive me, I give devise and bequeath my estate to be invested until the expiration of twenty-one years from the death of the last survivor of the children of my niece Pauline, born in my lifetime with income to them equally with power to encroach on capital. After twenty-one years capital equally among children of niece Pauline born during my lifetime.”

FACTS: Testator died 1965, sister died in 1986 and wife died 1997. The sister of the deceased was five years older than the wife of the deceased.

INTERPRETATION PROBLEM: Who gets the house in the circumstances that have transpired.

JUDICIAL FINDINGS: Haley J. held that a contrary intention was expressed by the terms of the will. The Court of Appeal reversed that decision and held no contrary intention was contained in the will.

CONCERN: No matter which tribunal is right or wrong, by reason of the drafting of the will, no provision is made for a disposition of the house in the events that have transpired.

As the facts that in fact transpired could reasonably have been contemplated by the draftsman to occur, and as no provision as to entitlement in those circumstances was provided for by the draftsman, it was necessary to have the matter brought before the courts for such determination.

This would not have been necessary had the draftsman provided for the contingency which not only occurred but could reasonably have been foreseen to occur and the court costs which I expect might well exceed \$100,000 could have been avoided.

CONCERN: Liability of draftsman.

Indexed as:
Curley v. MacDonald

Between
Shelley Curley, Bradley MacDonald and Sandra Blanck, and
Sharon Elaine Gunn MacDonald, Scotia Bank and Montreal Trust

[2000] O.J. No. 3116
Court File No. 522/00

Ontario Superior Court of Justice
Durno J.

August 11, 2000.
(17 paras.)

Counsel:

D.A. Grace, for the applicants.
R.H. Thomson, for the respondent, Sharon Elaine Gunn MacDonald.

¶ 1 **DURNO J.** (endorsement):— At the time of his death John Douglas MacDonald held an RRSP with his three children by his first marriage, the Applicants, named as beneficiaries; three life insurance policies upon which loans had been taken with the same beneficiaries and a will naming the Respondent, his second wife, as Estate Trustee, directing her, inter alia, to pay income taxes and debts due in respect of the estate. The issues for determination are:

- i) is the tax payable on the RRSP to be paid by the estate or the beneficiaries?
- ii) are the loans on the insurance policies to be repaid by the estate as an estate debt?

¶ 2 The Respondent is also the residual beneficiary of the estate which has assets of \$102,091.62 comprised of a house, car, bank account (\$1591.62) and personal property. The estate does not have sufficient cash to pay the taxes on the RRSP (\$25,000 to \$26,000 on the \$104,132. value) or repay the insurance loans (\$10,444.76).

¶ 3 The actions against the banks have been dismissed on consent without costs upon the banks paying the RRSP funds into court.

¶ 4 There is no dispute the Respondent is entitled to the "locked-in" portion of the RRSP, approximately 25%, in accordance with s. 48 of the Pension Benefit Act which takes precedence over any other beneficiary designation.

¶ 5 While affidavit evidence was filed on the appeal with regards to Mr. MacDonald's intentions, there was no application for the opinion, advice or direction regarding the will. Counsel did not pursue any argument based on the intentions or equitable arguments included in the written submissions filed.

The non Case law Foundations of Counsels' Arguments

¶ 6 On behalf of the Applicants, Mr. Grace relies primarily upon the following in support of his submission the Estate Trustee is required pursuant to the will and by law to pay the taxes and loans out of the estate:

- a) the wording of the will:

3(b) - To pay out of and charge to the capital of my general estate my just debts, funeral and testamentary expenses and all estate inheritance and succession duties or taxes whether imposed by or pursuant to the law of this or any other jurisdiction whatsoever that may be payable in connection with any property passing (or deemed so to pass by any governing law) on my death or in connection with any insurance on my life or any gift or benefit given or conferred by either during my lifetime or by survivorship or by this my Will or any Codicil thereto and whether such duties or taxes be payable in respect of estate or interest which fall into possession at my death or at any subsequent time; and I hereby authorize my Trustee to commute or prepay any such taxes or duties. ... (emphasis added after "to pay")

b) Income Tax Act

s. 146(8.8) Effect of death where person other than spouse becomes entitled.

Where the annuitant under a registered retirement savings plan (other than a plan that had matured before June 30, 1978) dies after June 29, 1978, the annuitant shall be deemed to have received, immediately before the annuitant's death, an amount as a benefit out of or under a registered retirement savings plan equal to the amount by which

- a) the fair market value of all the property of the plan at the time of death exceeds
- b) where the annuitant died after the maturity of the plan, the fair market value at the time of the death of the portion of the property described in paragraph (a) that, as a consequence of the death, becomes receivable by a person who was the annuitant's spouse immediately before the death, or would become so receivable should that person survive throughout all guaranteed terms contained in the plan.

s. 150(3) Every trustee in bankruptcy, assignee, liquidator, curator, receiver, trustee or committee and every agent or other person administering, managing, winding up, controlling or otherwise dealing with the property, business, estate or income of a person who has not filed a return for a taxation year as required by this section shall file a return in prescribed form of that person's income for that year.

s. 159 Person acting for another

(1) For the purposes of the Act, where a person is a legal representative of a taxpayer at any time,

(a) the legal representative is jointly and severally liable with the taxpayer

(2) Certificate before distribution. Every legal representative (other than a trustee in bankruptcy) of a taxpayer shall, before distributing to one or more persons any property in the possession or control of the legal representative acting in that capacity, obtain a certificate from the Minister, by applying for one in prescribed form, certifying that all amounts

(a) for which the taxpayer is or can reasonably be expected to become liable under this Act at or before the time the distribution is made, and

(b) for the payment of which the legal representative is or can reasonably be expected to become liable in that capacity

... have been paid or that the security for payment thereof has been accepted by the Minister.

- (3) Personal liability. Where a legal representative (other than a trustee in bankruptcy) of a taxpayer distributes to one or more persons property in the possession or control of the legal representative, acting in that capacity, without obtaining a certificate ... the legal representative is personally liable for the payment of those amounts ...

¶ 7 On behalf of the Respondent, Mr. Thomson relies primarily upon the following in support of his position neither the RRSP taxes nor the loans are to be paid out of the estate.

a) Income Tax Act

s. 153(1) Withholding - Every person paying at any time in a taxation year

(j) a payment out or under a registered retirement savings plan ...

shall deduct or withhold therefrom such amount as is determined in accordance with prescribed rules and shall, at such time as is prescribed, remit that amount to the Receiver General on account of the payee's tax for the year (emphasis added)

s. 160.2 Joint and several liability in respect of amounts received out of or under RRSP

(1) Where

(a) an amount is received out of or under a registered retirement savings plan by a taxpayer other than an annuitant (within the meaning assigned by subsection 146(1)) under the plan, and

(b) that amount or part thereof would, but for paragraph (a) of the definition "benefit" in subsection 146(1), be received by the taxpayer as a benefit (within the meaning assigned by that definition),

the taxpayer and the last annuitant under the plan are jointly and severally liable to pay a part of the annuitant's tax under this Part for the year of the annuitant's death equal to that proportion of the amount by which the annuitant's tax for the year is greater than it would have been if it were not for the operation of subsection 146(8.8) that the total of all amounts each of which is an amount determined under paragraph (b) in respect of the taxpayer is of the amount included in computing the annuitant's income by virtue of the annuitant under any other provision of this Act. (emphasis added)

(4) Rules applicable. Where a taxpayer and an annuitant have, by virtue of subsection (1) or (2), become jointly and severally liable in respect of part or all of a liability of the annuitant under this Act, the following rules apply:

(a) a payment by the taxpayer on account of the taxpayer's liability shall to the extent thereof discharge the joint liability; but

(b) a payment by the annuitant on account of the annuitant's liability only discharges the taxpayer's liability to the extent that the payment operates to reduce the annuitant's liability to an amount less than the amount in respect of which the taxpayer was, by subsection (1) or (2), as the case may be made jointly and severally liable.

Analysis

RRSP

¶ 8 Does the primary responsibility for tax payment rest with the estate or the beneficiaries? Section 160.2 of the Income Tax Act does not refer to either having the primary responsibilities. I am unable to find in any section referred to, support for the Respondent's submission the primary liability rests with the beneficiaries. A review of the various sections and authorities presented has persuaded me the primary responsibility rests on the estate when it has sufficient assets to pay the taxes.

¶ 9 Two facts distinguish this case from those relied upon in support of the position of the Estate Trustee, the RRSP is not an asset of the estate and the estate has assets with which to pay the tax liability. *Clark Estate v. Clark*, [1997] M.J. No. 19. (Man. C.A.) is distinguishable since that estate was insolvent. Logically in that situation the RRSP should be subject to attachment by creditors of the deceased's estate. *Re McClintock* (1977), 12 O.R. (2d) 741, (Ontario High Court of Justice), relied upon by the Respondent, is another case dealing with an estate with insufficient assets to pay all legacies in full and does not support the position that the beneficiaries of the RRSP are responsible for the taxes. *McClintock* dealt with executors deducting taxes or duties before paying money or giving property to beneficiaries. Since the RRSP is not an asset of the estate, the Estate Trustee does not "pay" the funds to the beneficiaries.

¶ 10 I agree with the conclusions reached in *Slater v. Klassen*, [2000] M.J. No. 49 (Man. Q.B.) that liability is fixed "squarely on the estate by virtue of s. 146(8.8)" and by Kurisko J. in *Bobyck v. Bobyck* 13 O.R. (3d) 559 (Ontario Gen. Div.) that the section requires the estate to pay the taxes due. Pursuant to that section the funds are deemed payments to Mr. MacDonald immediately before his death and liable to tax. Pursuant to the will and the Income Tax Act the Estate Trustee is responsible for filing a return and paying taxes due, s. 150(3) and 159. The taxes are to be paid out of the estate where sufficient assets exist in the estate.

¶ 11 I am not persuaded by the Respondent that s. 146(8.8) is simply a method of calculating taxes due. The section specifies the funds are deemed a benefit to the annuitant immediately before his death which triggers tax liability on his estate and provides the primary responsibility for tax payments. Only if the estate cannot pay the taxes or "is in default of paying the taxes otherwise due" does s. 160.2(1) apply. *Estate Administration, Anne E.P. Armstrong*, p. 5-24. While this issue was conceded and not analyzed in *Slater*, I agree with the conclusion the section (s. 160.2(1)) is a collection mechanism where the value of the estate is less than the tax liability. One of the parties must have the primary responsibility and that is the estate by virtue of s. 146(8.8).

¶ 12 Section 153(1) requires a person making a payment out of an RRSP to withhold taxes and remit the funds on account of the payee's tax for the year. By s. 146(8.8) the payment is deemed to be made by the bank to Mr. MacDonald, the payee, immediately before his death. In *Slater*, at para. 9 Schulman J. concluded "the payee referred to in s. 153 is the person deemed to have been the recipient of the funds under s. 146(8.8), and that by virtue of section 146(8.8) and 153, income tax is payable by the annuitant ... and his estate." I agree.

¶ 13 This conclusion is consistent with the following excerpt from *The Solicitor's Guide to Estate Practice in Ontario*, Margaret E. Rintoul at p. 199:

Unless there are very specific provisions in the will covering the matter, the tax payable on the Registered Retirement Savings Plan in the year of death must be paid by the estate as a whole, even though the named beneficiary is entitled to receive the full value of the plan as of the date of death with no resulting tax consequences to the designated individual alone in the absence of special provisions.

The Insurance Loans

¶ 14 The three loans and interest were to be deducted from the value of each policy. There was no agreement they had to be repaid by a fixed date. The insurance and loans contracts were entered into separate from the will's provisions. In *Re Farrow Estate*, [1942] O.R. 396 Hogg J. held an insured who had not agreed to repay the loan was under no personal liability. I agree with the conclusion in *Farrow*. There is no obligation on the estate to repay a loan Mr. MacDonald was not required to repay. On the date of death the amounts payable pursuant to the policies were the values less the loans and interest. It is that figure to which the beneficiaries are entitled.

¶ 15 The will does not assist the Applicants. It provides "the Trustee is to pay debts ... that may be payable ... on my death ... in conjunction with any insurance on my life." The loans were not payable on the death of Mr. MacDonald in that there was no requirement they be repaid.

Conclusions

¶ 16 The estate is responsible for paying the taxes due as a result of the RRSP but is not responsible for repayment of the insurance loans.

¶ 17 Counsel may make brief written submissions as to costs by August 31, 2000.

DURNO J.

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Hedley Estate v. Grant

Janet Wade, Estate Trustee of the Estate of Mabel Hedley, Deceased, Applicant and Gloria Grant, Mary Tannahill, Will Tannahill, MacGregor Tannahill, Norma Richardson, Michael Richardson, Colm Richardson, David Bell, Timothy Bell, Sarah Margaret Bell, Adam Bell, Peter Bell, Andrew Bell, David Scott Bell, Gloria Bell, Daniel Bell, Sarah Aileen Bell, Heather Bell, Faith Bell, and Julianne Wade, Respondents

Citation: 1998 CarswellOnt 4876
Court: Ontario Court of Justice (General Division)
Judge: Hoilett J.
Heard: November 6, 1998
Judgment: November 23, 1998
Year: 1998
Docket: Toronto 01-4165/97
Counsel: *Mr. John S.H. Carriere, for the Applicant.*
Ms. Dianne Caldwell, for the Minor Respondents.

Subject:

Estates and Trusts

Estates — Legacies and devises — Payment of legacies — Infant beneficiaries — General.

Cases considered by Hoilett, J.:

Fox v. Fox Estate (1996), 10 E.T.R. (2d) 229, 28 O.R. (3d) 496, (sub nom. *Fox v. Fox*) 88 O.A.C. 201 (Ont. C.A.) — referred to

Fox v. Fox Estate (1996), 207 N.R. 80 (note), (sub nom. *Fox v. Fox*) 97 O.A.C. 320 (note) (S.C.C.) — referred to

Hunter Estate v. Holton (1992), 7 O.R. (3d) 372, 46 E.T.R. 178 (Ont. Gen. Div.) — considered

APPLICATION by estate trustee for directions in respect of exercise of discretion given by will.

Hoilett, J.:

1 This is an application brought on behalf of Janet Wade, the Estate Trustee of the Estate of Mabel Headley, in which the court's "opinion, advice or direction" is sought in respect of the following question:

Having regard to the provisions of the Will as a whole, and the language of paragraphs 6(i), 6(iv), 7, and 8(f) and 8(g), is it a proper exercise of the discretion given to the Estate Trustee in paragraph 8 of the said Will, to pay the entire shares (consisting of mostly capital) which

would otherwise be held in trust (pursuant to paragraph 8(f) for certain members of the issue of Thelma Richardson and Bernice Bell, two of the residuary beneficiaries (both of whom predeceased the Testatrix), which members are presently infants, to the parent of such members, on behalf of such members, pursuant to paragraph 8(g) of the Will?

2 The paragraphs referenced in the above question are, for ease of reference, reproduced following:

6. I Direct my Trustees to divide the residue of my estate into five equal shares in order to give effect to the following:

- i) To pay one such equal share to the said Thelma Richardson;
- ii) ...
- iii) ...
- iv) To pay one such equal share to the said Bernice Bell;
- v) ...

7. I FURTHER DIRECT that if any of the above named Thelma Richardson, Gloria Grant, Janet Wade, Bernice Bell or Mary Tannahill should predecease me leaving issue, then her share in my estate shall go to her issue, and in the event they should leave no issue then her share in my estate shall go back into my estate, to increase the shares of the survivors.

8. I GIVE to my Trustees to be exercised at any time and from time to time in the administration of my estate and any share or portion thereof into which my estate is divided or divisible as they in their discretion deem advisable, full power and authority:

.....

- (f) Subject to any specific provisions in my Will or any Codicil thereto, to hold the share of any person who becomes entitled to a share of or to receive any portion of the income or capital of my estate while under the age of eighteen (18) years and to keep such share invested and to use so much of the income and capital thereof for the benefit of such person until he or she attains the age of eighteen (18) years as they consider advisable.
- g) To make any payment of income or capital on behalf of any person under the age of eighteen (18) years to a parent or guardian of such person or to any person to whom my Trustees deem it advisable to make such payment and the receipt of such parent, guardian or other person shall be a sufficient discharge to my Trustees.

(See Exhibit A to the Affidavit of Janet Wade, sworn in support)

3 The undisputed facts in this application are set out in paragraphs 1 to 4 of Factum filed on behalf of the Estate Trustee. In the interest of fidelity the text of those paragraphs are hereafter reproduced:

1. The testatrix died on February 15, 1997, testate, appointing Janet Wade as her (substitute) Estate Trustee. This Court issued a Certificate of Appointment of Estate Trustee With a Will, dated October 20, 1997, to the applicant, JANET WADE.

2. Paragraph 6 of the deceased's Last Will divides the residue into 5 equal shares, amongst 5

separate individual beneficiaries. Two of said beneficiaries (Thelma Richardson and Bernice Bell) predeceased the deceased, both leaving issue, in which case their shares are given to their respective issue, pursuant to paragraph 7 of the Will.

3. Thelma Richardson's entitled issue are her daughter Norma Richardson and Norma's infant sons Michael and Colm (born March 18, 1996), each being entitled to $\frac{1}{3}$ of the said $\frac{1}{5}$ share of the residue.

4. Bernice Bell's entitled issue include her four children and their respective fourteen children. One of Bernice Bell's children (Peter Bell) has eight infant children, and another of Bernice Bell's children (Mary Tannahill) has one infant grandchild. Each of Bernice Bell's said issue is entitled to a $\frac{1}{18}$ th share of the said $\frac{1}{5}$ of the residue (including the nine said infant beneficiaries).

4 The following other circumstances are, in my opinion, germane to a determination of the issue upon which the court is asked to pass. Ms. Wade, in paragraphs 4 and 5 of her affidavit recites the entitlements of those whose interests she would like to have transferred to the hands of their parents. In paragraph 6 of her affidavit Ms. Wade relies on paragraph 8 of the will as the source of her discretion to distribute the legacies in the manner she proposes.

5 Paragraphs 7 and 10 of Ms. Wade's affidavit provide some illumination concerning her motive for the relief sought. Those two paragraphs are cited following:

.....

7. As Estate Trustee, I wish to exercise my discretion pursuant to sub-paragraph 8(g) to the Will, to pay the shares of Norma Richardson's two infant children, to Norma Richardson in trust for them; and to pay the shares of Peter Bell's eight infant children, to Peter Bell in trust for the said children; and to pay the share of Will Tannahill's infant child, to Will Tannahill in trust for his said child. I believe that Norma Richardson (my friend), Peter Bell (my brother), and Will Tannahill (my nephew) (all of whom I know well, and all of whom are in my opinion respectable and responsible persons) will apply the said shares for the benefit of their respective children, and that the said funds will be used by the said respective parent on behalf of her or his children or child, more easily and better than if I were to hold the said infants' shares in trust until each infant attains eighteen years of age.

.....

10. If my application for an Order authorizing such payments is refused, I would then wish to pay the said infants' shares to the Accountant of the Ontario Court on behalf of the said infants, and to be relieved from the trusts for said infants.

(See pp. 7-8 of Application Record)

6 Both counsel are agreed that they have found no cases directly on point, or, at least, not on all fours with the present application. Concerning the exercise of a trustee's discretion, however, they are both agreed that the law is correctly stated in the recent decision of the Ontario Court of Appeal in *Fox v. Fox Estate* (1996), 10 E.T.R. (2d) 229 (Ont. C.A.); leave for appeal from which was denied by the Supreme Court of Canada (1996), 207 N.R. 80 (note) (S.C.C.). The court at p. 234 of the *Fox Estate* case quoted with approval the judgement of Steele, J. in *Hunter Estate v.*

Holton (1992), 7 O.R. (3d) 372 (Ont. Gen. Div.) at p. 379:

Trustees must act in good faith and be fair as between beneficiaries in the exercise of their powers. There is no allegation of bad faith in the present case. A court should be reluctant to interfere with the exercise of the power of discretion by a trustee. I adopt the following criteria in *Re Hastings-Bass* ... at p. 41 Ch., p. 203 All E.R., as being applicable to the court's review of the exercise of such power:

To sum up the preceding observations, in our judgment, where by the terms of a trustee ... a trustee is given a discretion as to some matter under which he acts in good faith, the court should not interfere with his action notwithstanding that it does not have the full effect which he intended; *unless* (1) what he has achieved is unauthorised by the power conferred upon him, or (2) *it is clear that he would not have acted as he did (a) had he not taken into account considerations which he should not have taken into account, or (b) had he not failed to take into account considerations which he ought to have taken into account.* [Emphasis added].

7 The applicant's submission, at the risk of simplifying it, is that what the applicant proposes is no more than a bona fide exercise of the powers vested in her under the terms of the will. Counsel acting on behalf of the infant beneficiaries argues the contrary view.

8 The correct answer to the question posed depends, in my opinion, on a proper characterization of what the applicant proposes. Sub-clauses 8(f) and 8(g) must, in my view, be read together and, of course, together with all the other terms of the will. In particular, sub-clause 8(f) sets out the conditions under which the trustee must hold the respective shares and sub-clause 8(g) sets out the terms under which those shares may be disbursed.

9 A fair reading of the applicant's affidavit, makes it abundantly clear, in my view, that what the applicant wishes to accomplish, may be for very good reason, is to relieve herself of the trustee obligation imposed on her under the terms of the will. That relief, if achieved, is not merely an incident of her exercise of the powers, indeed, it is the very purpose of the applicant's intended exercise of the power.

10 The court was not furnished with a list of the respective ages of the 11 beneficiaries who stand to be affected were the question posed to be answered in the affirmative. What is common ground, however, is that the youngest is two years of age, more or less. My opinion that the question posed should be answered in the negative is fortified by the following circumstances. Given that there are 11 affected beneficiaries, the inference is inescapable that their individual circumstances are differentiated at least by virtue of age and gender, among others. It is reasonable to conclude, therefore, that any proper exercise of a discretion, mindful of the individual circumstances, would require some discrimination in the exercise of that discretion. An affirmative answer to the question raised would have the result of vesting with the court's imprimatur a purported "gross" exercise of a power amounting to the abandonment of a trust rather than the proper exercise of its powers. At best, we would have the case of a delegate delegating her authority, which is not authorized in law.

11 For all the foregoing reasons, the question put to the court is answered in the negative.

Application dismissed.