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Jointly-Owned Real Property and Bankrupt Estates

by Stuart Clark

Re Cameron Estate

Is jointly-owned real property which otherwise would appear to pass to the surviving joint-owner by right of survivorship available to satisfy the debts of the deceased joint-owner should their estate later be found to be bankrupt or insolvent?

In *Re Cameron Estate*ⁱ, the Ontario Superior Court of Justice was asked to consider whether a matrimonial home which passed to the surviving spouse by right of survivorship could be clawed back into a bankrupt estate to satisfy the debts of the deceased spouse. In this case, subsequent to the deceased spouse's death, it was discovered that there were insufficient assets in the estate to pay all liabilities, and the estate was pushed into bankruptcy.

The most significant asset which the deceased owned during his lifetime was his matrimonial home, which he owned as joint-tenants with his wife. At the time of his death, the deceased owed approximately \$56,000.00 to a bank in association with a line of credit. As there were now insufficient assets in the estate to pay this debt in full, the bank took the position that the matrimonial home passing to the surviving spouse by right of survivorship was a "transfer undervalue" in accordance with section 96 of the *Bankruptcy and Insolvency Act*ⁱⁱ, such that the matrimonial home should be available to be clawed back into the bankrupt estate to pay for the deceased's debts.

In rejecting the bank's argument, Madam Justice Mesbur looked to the law surrounding joint-tenancy, providing the following commentary:

"When one joint tenant dies, its interest in the property is extinguished, and the rights of the remaining joint tenant or tenants are correspondingly enlarged. The enlarged interest immediately vests in the remaining joint tenant or tenants. As the court put in White, Re, at paragraph 8, 'The characteristic of an estate in joint tenancy is that the joint tenants have the same interests ... and upon the death of one of the joint tenants the entire estate remains in the survivor in whom the whole estate immediately vests.'"ⁱⁱⁱ

"I therefore cannot see that the automatic vesting by right of survivorship is a 'transfer' as contemplated by section 96 of the BIA ..."^{iv}

As summarized by Madam Justice Mesbur, there is no "transfer" when a property is transferred on joint-tenancy by right of survivorship, but rather the deceased joint-owner's interest in the property is "extinguished", with the effect of the surviving joint-owner now owning the whole. As there is no "transfer", there could be no "transfer undervalue", and thus section 96 of the *Bankruptcy and Insolvency Act* could not be invoked to claw the matrimonial home back into the estate.

As an alternative argument, the bank took the position that the matrimonial home was now held on a constructive trust by the surviving spouse for the benefit of the estate. In reviewing the jurisprudence, Madam Justice Mesbur noted that constructive trusts are imposed to prevent unjust enrichment, and that to impose a constructive trust the court must find that there has been an enrichment,

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a corresponding deprivation, and the absence of any juristic reason for the enrichment.^v In rejecting that a constructive trust should be found to apply, Madam Justice Mesbur provided the following commentary:

“... I am not persuaded the automatic vesting of title in a survivor enriches the survivor and deprives the estate. I say this because the parties each acquired their inchoate rights of survivorship at the time the property was acquired, not at the date of death. It was part of what each had from the beginning. There was mutual consideration passing between the spouses in the sense that each acquired the chance of acquiring the whole by way of survivorship, and each risked the fact that he or she might predecease the other, and thus lose his or her right to the whole ...”^{vi}

“... even if there were enrichment and deprivation, I echo the words of Herold J. in Harrison Estate v. Harrison in which he said that even if automatic vesting of title by operation of law ‘enriches the survivor and deprives the estate, it surely cannot be said that there is no juristic reason for it.’ He identified the juristic reason as what the law dealing with joint tenancy requires. I agree with his statement that ‘[i]t would lead to a preposterous and unfortunate result if every transfer by operation of law which occurs on the death of a joint tenant could set up a claim for a remedial constructive trust.’ If the law itself provides for the right of survivorship, then surely that is the juristic reason for it.”^{vii}

Re Cameron Estate is authority for the proposition that, absent extraordinary circumstances, jointly-held real property which passes to a surviving joint-owner by right of survivorship is not available to satisfy the debts of the deceased joint-owner should their estate later be pushed into bankruptcy. Presuming that the debt itself is not registered against the property, the property passes to the surviving joint-owner upon death free and clear of the deceased joint-owner’s debts.

Resulting Trust

Although the issue is not addressed in *Re Cameron Estate*, the question remains whether a creditor in a similar situation could have taken the position that

the property was held by the surviving spouse on a resulting trust for the benefit of the deceased spouse’s estate. While section 14 of the *Family Law Act*^{viii} provides that there is a presumption that property that is held jointly between married spouses passes to the surviving spouse by right of survivorship, it is a rebuttable presumption. If there is evidence which shows that it was the deceased spouse’s intention that the property not pass by right of survivorship, the presumption can be rebutted, and the court may conclude that the property is held by the surviving spouse on a resulting trust for the benefit of the deceased spouse’s estate. When the joint-owners are not married spouses, the rebuttable presumption from *Pecore v. Pecore*^{ix} that the jointly-held asset is held on a resulting trust for the benefit of the estate could similarly apply.

ⁱ *Re Cameron Estate*, 2011 ONSC 6471

ⁱⁱ *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended

ⁱⁱⁱ *Re Cameron Estate*, 2011 ONSC 6471, at para. 25

^{iv} *Re Cameron Estate*, 2011 ONSC 6471, at para. 35

^v *Re Cameron Estate*, 2011 ONSC 6471, at para. 44

^{vi} *Re Cameron Estate*, 2011 ONSC 6471, at para. 47

^{vii} *Re Cameron Estate*, 2011 ONSC 6471, at para. 49

^{viii} *Family Law Act*, R.S.O. 1990, c. F.3, as amended

^{ix} *Pecore v. Pecore*, 2007 SCC 17



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