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Assante Financial Management Ltd.

Spring is the time of new beginnings. We open the windows and let the fresh air back into our homes, we clean up our yards and dust out the cupboards.
Spring is also a great time to revisit your estate plan. When did you last review your will? Does it still reflect your current wishes? Is your current life insurance coverage appropriate?
If you would like to review, update or create your estate plan, please do not hesitate to get in touch.

CLARITY OF INTENTIONS WILL REDUCE UNCERTAINTY

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The 2007 decision by the Supreme Court of Canada (SCC) in *Pecore v. Pecore* addressed the issue of a resulting trust in the context of a transfer of assets into joint title with adult children.

Upcoming Events:

Business Owners Luncheon – Tuesday, May 10th, 2016

Client Education Event – Wednesday, April 27th, 2016
LONG TERM CARE

The issue of a resulting trust arises when there is a transfer of property without consideration. In general terms, when there is a gratuitous transfer of assets to an independent adult child, there is a presumption under common law that the child holds the assets in trust. Subsequent to the transfer, the assets still belong to the transferor, form part of the transferor's estate and are subject to the terms of the transferor's will. In such situations, the adult child who holds joint title is acting as trustee for the assets. In addition, the assets held in the resulting trust are subject to claims by creditors of the transferor's estate and are subject to probate fees (if any).

The SCC concluded that the presumption of a resulting trust can be rebutted through an assessment of the circumstances surrounding the transfer. Using a balance of probabilities approach, an assessment is made as to whether the transferor intended to transfer the assets without the presumption of a trust. In simple terms, the presumption can be overridden if the parent declares that the transfer was intended as an outright gift. Without such an obvious declaration, a circumstantial assessment would be required.

A significant outcome of the Pecore case was the SCC's analysis and conclusion with respect to the issue of joint tenancy and the right of survivorship. The SCC concluded that "rights of survivorship, both legal and equitable, vest when the joint account is opened and the gift of those rights is therefore *inter vivos* in nature."

Beneficiary designations, whether in a RRIF, RRSP or life insurance policy, are common place; yet, like transfers of property, the intended outcome of making that designation is not without some potential risk, depending on the circumstances. An October 2015 decision of the Court of Queen's Bench of Alberta in the Morrison Estate case considered the issue of whether a RRIF beneficiary designation could be considered a resulting trust.

A beneficiary designation on a life insurance policy, RRIF or RRSP directs the funds to the named beneficiary. The question in the Morrison case was whether the named beneficiary received the funds as an outright gift, or in trust for the policy owner's estate.

The primary facts of the case are as follows:

• Mr. Morrison signed his will on March 25, 2002, leaving everything to his spouse. In the event his spouse predeceased him, his estate was divided equally amongst his four children, with the exception of $11,000 that was to be deducted from one child's share. The $11,000 was to be divided equally amongst his grandchildren.

• Mr. Morrison survived his spouse, who passed away on June 19, 2002. This meant that his children and grandchildren, as subsequent beneficiaries, became entitled to his estate.

• Mr. Morrison named one of his sons, Douglas, as beneficiary of his RRIF shortly after his wife's passing. Douglas was also named as co-executor of his father's estate.

• Mr. Morrison sold his home shortly before his death and gave $25,000 to each of his four children from the proceeds.

• Mr. Morrison passed away on November 10, 2011.

Upon Mr. Morrison's passing, his son, Cameron, applied to the court seeking to declare the RRIF proceeds distributed to Douglas, as the named beneficiary, to have been received by him in-trust for the estate. Cameron's application relied on the Pecore case citing that there was no consideration paid for being designated as a beneficiary, making it a resulting trust. Justice Graesser, the presiding judge, was charged with deciding whether the issues addressed in the Pecore case were equally applicable to the issue of beneficiary designations. In his analysis, the judge considered such issues as:

• What was on Mr. Morrison's mind when he named one child as beneficiary of his RRIF, when he could have named all four children or the estate as beneficiary?

• Mr. Morrison's relationship with Douglas, at the time he named him as beneficiary, relative to his relationship with the other children at that same time.

• The broader issue of beneficiary designations including the significant number of beneficiary designations across products such as life insurance, RRSPs and RRIFs, and the amount of doubt that could arise if every beneficiary designation were to be treated as a resulting trust.

• There was very little law on the subject or prior jurisprudence that could be used in assessing Mr. Morrison's situation.

In his analysis, the judge pondered the concept of *inter vivos* and testamentary transactions, noting that while beneficiary designations

> *"have been treated as* inter vivos *transactions and not testamentary transactions, they are certainly much closer to testamentary transactions than to* inter vivos *gifts such as transferring bank accounts, investment accounts or property into joint names. Such transactions cannot be unilaterally undone, unlike beneficiary designations.*
>
> *Beneficiary designations are unlike joint ownership of bank accounts or investment accounts, which confer a present property interest. Beneficiary designations do not. Beneficiary designations are essentially powers of appointment conferred on the owner by the terms of the contract."*

Based on the balance of probabilities with respect to Mr. Morrison's intentions when making the beneficiary designation, Justice Graesser found that there was sufficient evidence to conclude Mr. Morrison's beneficiary designation was a gift to Douglas as a favoured child. In making his final decision, Justice Graesser considered only the facts and not the issue of a resulting trust.

There was, however, the issue of the estate's tax liability arising from the RRIF. While a beneficiary designation can direct how the RRIF proceeds are distributed, the tax liability remains that of the deceased's estate. On this issue, the judge further decided that the income tax liability in the estate, created by the RRIF, should be borne by Douglas, the named beneficiary. The judge felt that if the estate was responsible for funding the income tax that arose from the RRIF, it would confer an unintended benefit on Douglas at the expense of the estate. In reaching this conclusion, Justice Graesser considered Mr. Morrison's probable intentions. He reasoned that Mr. Morrison did not likely understand the taxation of the RRIF upon his passing and probably would not want the tax cost to be borne by all of the children and grandchildren.

A beneficiary designation is a common strategy for dealing with a testator's assets. In his concluding remarks, Justice Graesser opined that "It is likely that the law in this area will be uncertain for some time. The 'definitive' case may be many years away from being finally decided, and legislatures may never choose to weigh in on these issues." He concludes with the recommendation that to enhance clarity, consideration should be given to documenting the policy owner's intention when making a beneficiary designation – was a gift intended?

This article was written by Deborah Kraft and Jim Kraft and was published in the 292-2015 issue of COMMENT. Posted with permission from the Financial Advisors Association of Canada (Advocis) and The Institute for Advanced Financial Education.

There are significant changes occuring on January 1st, 2017 that will impact insurance products. This does not affect any insurance that is in place **before** December 31st, 2016. It would be important for us to review your insurance needs in the next few months to determine if you should consider any action. Please call our office to schedule an appointment if you are not already scheduled to meet in the next month or so.

HOLIDAYS & BUSINESS TRAVEL

Office Closed:

- Victoria Day – May 23rd
- Canada Day - July 1st, 2016
- Civic Holiday - August 1st, 2016

David Out of Office:

- Vacation – May 17th – June 12th
- Alberta Client Meetings – June 23rd – 25th
- BC Client Meetings / Educational Development June 27th – 29th.
- Vacation July 27th – September 4th

Juana Out of Office:

- Alberta Client Meetings – June 23rd – 25th
- BC Client Meetings / Educational Development June 27th – June 29th
- Vacation – July 4th – 8th & July 25th – 29th

7 Things, you never want your kids to hear you say!

1 – Who needs a budget?
2 – Don't worry we can just put it on the Credit Card
3 – The neighbors got this "insert gadget name here", we must need one too!
4 – We deserve the best things we shouldn't have to actually work for them
5 – We are going to have to work forever, so we don't need a financial plan
6 – We can't afford it right now, but it is such a good sale, let's buy it anyway!
7 – We can get it, if you don't tell Mom/Dad

The best way your children will learn great financial skills is by teaching them. Be a mentor!
Have a budget, only spend what you can afford to spend, buy what you need, not what you want, have a financial plan completed, and don't keep financial secrets!
Teach your children, smart financial skills!

If you want to create, update or review your financial plan, call our office to book your next appointment.

Both David and Juana are always happy to meet with new people and provide a second opinion on their current financial strategies.

Do you know someone we can help? Have them give us a call!

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