September 16, 2020

Mr. David Wai
Assistant Deputy Minister
Financial Services Policy, Ministry of Finance
Government of Ontario
Frost Building N, 4th Floor
95 Grosvenor St
Toronto, ON M7A 1Z1

Via email - David.Wai@ontario.ca

Re: Impact of Calmusky Decision on Estate Planning

Dear Mr. Wai:

On behalf of Advocis, The Financial Advisors Association of Canada, and CALU, the Conference for Advanced Life Underwriting, we are writing to outline our concerns about the potential impact of the recent Ontario court decision in *Calmusky v. Calmusky* on the estate plans of many Ontarians. We hope you will share our concerns and the Ontario government will consider, on an expedited basis, legislative changes to the Ontario Insurance Act and Succession Law Reform Act to resolve these concerns. In this letter we will provide details relating to the *Calmusky* decision (and similar decisions in other provinces), how the application of the presumption of resulting trust to beneficiary designations will adversely impact the estate plans of Ontarians and recommended legislative changes.

About Advocis

Advocis is the association of choice for financial advisors and planners. With more than 13,000 members across the country, Advocis is the definitive voice of the profession, advocating for professionalism and consumer protection. Professional financial advisors and planners are critical to the ongoing success of the economy, helping consumers to make sound financial decisions that ultimately lead to greater financial stability and independence both for the consumer and the country. No one spends more time with consumers than advisors and planners, educating them about financial matters and helping them to reach their financial goals. Advocis works with decision-makers and the public, stressing the value of financial advice and striving for an environment in which all Canadians have access to the advice they need.

About CALU

CALU is the only national professional organization dedicated to advanced planning issues related to life underwriting, tax planning and wealth management. CALU's 650 industry leading members include insurance and financial advisors as well as accounting, tax, legal and actuarial experts. We advocate in support of fair and competitive public policies to grow and preserve the financial well-being of Canadian families and businesses.

Background

In the recent Ontario decision in Calmusky v. Calmusky,[1] the Court applied the presumption of resulting trust to a RRIF designation made in favour of an adult beneficiary.[2] Based on the reasons for this decision and similar Court decisions in other jurisdictions, it appears that the presumption of resulting trust would similarly be applied to insurance designations made under the Ontario Insurance Act.[3] We believe such an outcome would be detrimental to the estate planning needs of Ontarians.

Presumption of Advancement vs. Resulting Trust

In common law provinces there is a legal presumption that the gratuitous transfer of property to a spouse or minor child is intended as a gift. This is known as the "presumption of advancement". Thus, any person who brings a legal action challenging a gift made to a spouse or a minor child bears the burden of proving that the gift was not intended "on the balance of probabilities".

On the other hand, a gratuitous transfer of property to a non-family member is governed by the presumption of resulting trust. Thus, where there is a legal challenge to a gift of property to a non-family member,[4] it is presumed that such transfer is not intended as a gift and the transferee merely holds the property in trust for the benefit of the donor or donor's estate. If the court determines that there is insufficient evidence to rebut the presumption, the transferee will be required to return the property to the donor or the donor's estate.

The Pecore Decision – Gifts to Adult Children

In *Pecore*[5] the Supreme Court of Canada ("SCC") considered a situation where a parent added an adult child as a joint owner of a bank account. The adult child asserted that the transfer into joint ownership was intended as a gift while other estate beneficiaries claimed that the joint account should be held by the adult child in trust for the estate. The main question was whether the presumption of advancement or resulting trust should apply in deciding this issue. The SCC held that gifts to adult children should be governed by the presumption of resulting

[1] 2020 ONSC 1506. Herein referred to as the "Calmusky decision". We understand this decision has not been appealed.
[2] Such designations are expressly permitted and are governed by Part III of the Succession Law Reform Act, R.S.O. 1990, c. S-26..
[3] Sections 190-198 of the Insurance Act R.S.O. 1990, c I-8.
[4] Which most often occurs upon the mental incompetency or death of the transferor.
[5] *Pecore v. Pecore*, 2007 SCC 17.

trust, and therefore the adult child bore the onus of proving the transfer of the funds in the bank account was intended as a gift.

The SCC also spoke to the nature of the evidence that must be provided to the Court to rebut the presumption of a resulting trust. A court cannot only consider evidence of the donor's intention at the time of the gift but may also consider the donor's actions subsequent to the transfer to determine his or her intent. A court may also look to the documentation relating to the transfer, who controlled the use of the property after the transfer, and the tax treatment of the property subsequent to the transfer. In *Pecore* the SCC specifically focused on the nature of the banking documents, and determined such documents only governed the rights and obligations as between the account holders and the bank, and not ownership rights between the donor and transferee.

The *Calmusky* Decision

In *Calmusky*, Randy Calmusky brought an action against his brother, Gary Calmusky, disputing Gary's entitlement to the proceeds of a joint bank account Gary held with their deceased father (Henry), as well as entitlement to the funds held in the deceased's registered retirement income fund (RRIF) under which Gary was designated as beneficiary. Randy's position was that the presumption of resulting trust applied to the funds in the bank account as well as the RRIF proceeds, and therefore Gary held them in trust for the beneficiaries of Henry's estate.

With respect to the joint bank account, Gary accepted that the presumption of resulting trust applied, and that he bore the onus of proving the transfer was intended as a gift. He therefore provided evidence which he felt clearly demonstrated that his father intended him to have the funds in the bank account upon his father's death. However, after reviewing all the facts, the Judge was not satisfied that Henry intended to gift the funds in the bank account to Gary on his death. As a result, Gary was required to return the funds in the bank account to the estate for distribution as per the terms of the deceased's will.

Turning to the RRIF funds, the Judge first addressed the question of whether the principles set out in the *Pecore* decision applied to property transfers via a beneficiary designation. The Judge took note of the Ontario Court decision in *McConmy-Wood* v. *McConmy*[6] which involved a dispute relating to the entitlement of the deceased's adult daughter to proceeds of the deceased's RRIF under a beneficiary designation. The Court held that the RRIF proceeds were intended to be held in trust by the daughter for the beneficiaries of the deceased's estate. The Court also found "there is no presumption of advancement, and any presumption of resulting trust is overwhelmingly rebutted by the evidence."[7]

[6] (2009) 46 E.T.R (3d) 259 (S.C.).
[7] *Ibid* at paragraph 58.

The Judge also reviewed the Manitoba Court of Appeal decision in *Dreger* v. *Dreger,*[8] which was decided before the SCC decision in *Pecore*. In *Dreger* the Court held that the adult beneficiary under the mother's RRSP annuity contract and life insurance policies held the proceeds of those contracts for the benefit of the mother's estate under a resulting trust. The Court of Appeal specifically addressed the law of presumptions governing the gratuitous transfer of property to an adult child, and held that the presumption of advancement should apply.[9] The Court of Appeal then determined that the evidence supported the view that the mother intended that her son hold the disputed funds for the benefit of her estate, thus rebutting the presumption of advancement. The Judge in *Calmusky* assumed that if *Dreger* had been decided after *Pecore*, the Court in *Dreger* would have held that the presumption of resulting trust also applied to life insurance designations.

Gary argued that despite this case law, the *Pecore* decision should not apply to funds received under a RRIF beneficiary designation. The Judge disagreed, citing there is "no principled basis for applying the presumption of resulting trust to the gratuitous transfer of bank accounts into joint names but not apply the same presumption to the RRIF beneficiary designation."[10] The Judge also noted that "it makes sense from a policy perspective that the evidentiary burden be on the transferee or designated RIF beneficiary, since the transferee/RIF beneficiary is better placed to bring evidence of the circumstances of the transfer".[11] In applying the presumption of resulting trust to the transfer of the RRIF proceeds, the Judge once again concluded that Gary did not satisfy the onus of establishing his father had intended him to have beneficial ownership of the RRIF proceeds upon his death.

In summary, based on the *Calmusky* decision[12], the transfer of property by an Ontario resident via a beneficiary designation to an adult child (or any other adult beneficiary) will be subject to the presumption of resulting trust. As a result, assuming there is a challenge to a beneficiary designation upon the death of the planholder/policyholder, the designated beneficiary will bear the burden of proving that a gift was intended. Failure to satisfy the burden of proof will result in the plan/policy proceeds falling back into the deceased's estate.

We would note that in addition to the *Dreger* decision in Manitoba, courts in British Columbia[13] and Alberta[14] have effectively applied the presumption of resulting trust to beneficiary designations. However, this presumption of resulting trust does not appear to have application to beneficiary designations in Saskatchewan.[15]

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[8] (1994), Man. R (2d) 39 (C.A).

[9] Presumably the presumption of resulting trust would have been found to apply if this legal action was being decided after the *Pecore d*ecision.

[10] Supra note 1 at paragraph 56.

[11] Supra note 1. The quoted words are from *Pecore* at paragraph 26.

[12] We understand the Calmusky decision is not being appealed.

[13] *Neufeld v. Neufeld Estate*, 2004 BCSC 25. The *Neufeld* application of the presumption of resulting trust to insurance and registered plan designations was followed by the Courts in *Rainsford v. Gregoire*, 2008 BCSC 310; *Stade Estate (Re*), 2017 BCSC 2354; and *Williams v. Williams Estate*, 2018 BCSC 711.

[14] *Morrison Estate (Re),* 2015 ABQB 769.

[15] *Nelson v. Little Estate,* 2005 SKCA 120.

Recommended Approach

Advocis and CALU are of the view that the act of designating a beneficiary (whether it be a minor child, spouse, adult or another person) pursuant to provincial legislation should be distinguished from naming a joint owner under a bank account or investment contract. The statutory rules governing beneficiary designations expressly set out the legal rights of a designated beneficiary under a registered plan or life insurance policy and are already subject to certain restrictions prescribed by provincial legislation.[16]

As well, it is generally accepted within the estate planning community that the naming of a beneficiary is a clear indication of the plan holder's intent that the named beneficiary should receive the proceeds of the plan. Finding otherwise will result in increased estate litigation and the estate plans of a large number of people being at risk. In turn, this would lead to increased estate administration costs and legal fees to the detriment of all estate beneficiaries.

We are further of the view that there is no sound public policy for placing the burden of proof on the beneficiary to demonstrate that the gift was intended. Satisfying the evidentiary burden may be more challenging for the beneficiary than it would appear at first glance. For example, it is often the case that a testator will make a beneficiary designation without formally advising the intended beneficiary or beneficiaries, since such gifts, like bequests in a will, only take effect upon death and can be modified before that time.[17]

A concern that has been raised in several court decisions relates to the tax treatment of registered funds where the designation is in favour of an adult person. In these circumstances the proceeds of the registered plan will be paid to the designated beneficiaries free of tax, with the tax liability relating to the registered plan falling upon the estate. This is perceived as creating an additional benefit to the designated beneficiary and may be considered unfair to other estate beneficiaries in the absence of a clear intention that this was intended by the testator/plan holder.[18] We recognize this is a valid concern but believe it can be addressed in other ways.

We are therefore recommending that the Ontario government amend relevant provincial legislation to provide that, subject to limited exceptions, the presumption of resulting trust should not apply to beneficiaries designated under the applicable Ontario legislation. This would provide greater certainty to testators, beneficiaries and their advisors, help avoid costly litigation, and protect the existing estate plans of a significant number of Ontarians.

[16] For example, spousal claims under the Ontario Family Law Act and the dependents relief under section 72 of the Ontario Succession Law Reform Act.

[17] With the possible exception of an irrevocable life insurance beneficiary designation.

[18] However, it should be noted that the beneficiary is jointly and severally liable for the payment of such taxes under section 160 of the ITA.

We look forward to working with you and the Attorney General's office in the development of legislative solutions which appropriately address the concerns noted in this letter. Should you have any questions, please do not hesitate to contact the undersigned, or James Ryu, Senior Director of Legal and Regulatory Affairs, Advocis at jryu@advocis.ca

Sincerely,

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