

## Joint Accounts

### Hull on Estates Podcast #59

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David Smith: Hello and welcome to Hull on Estates. You're listening to Episode #59 of our podcast on Tuesday May 15<sup>th</sup>, 2007.

*Welcome to Hull on Estates, a series of podcasts for the Canadian legal community dealing with issues and insights surrounding estate planning in Canada. Hosted by the lawyers of Hull & Hull, the podcast will touch on some key considerations when planning estates and Wills. Now, here are today's hosts.*

Jason Allan: Well good afternoon, David.

David Smith: Good afternoon, Jason.

Jason Allan: So today we'll be talking about the topic of jointly held accounts.

David Smith: That's right Jason. And more particularly is, it's commonly known a joint account passes to the survivor when the other joint owner dies and what we're concerned with is the question that often arises in an estate litigation practice which is, when the joint owner dies, does the surviving joint owner have entitlement to that account or does it revert back to the estate? And I understand that was recently dealt with in two very recent decisions of the Supreme Court of Canada.

Jason Allan: Yes, that's right. There's been a lot of conflict in the case law over the topic of whether the common-law presumption should apply in the circumstances of jointly held accounts. And the presumptions are, well they have been historically, that a transfer between a parent to a child was presumed to be a gift unless there was evidence to rebut that presumption. And transfers between strangers were presumed to be on a resulting trust. So if there was a transfer between one person to another who was outside the context of the family, you would presume that was for a business purpose and if not, that it was not a gift, that it was going to revert back to the transferor's estate.

David Smith: So Jason, what are the names of the two cases that were just recently considered, for the benefit of the listeners?

Jason Allan: The two cases are *Pecore and Pecore*, and *Madsen Estate and Saylor*.

David Smith: Alright, and for the benefit of the listeners, I understand that we'll have a link to those cases available for anyone listening to the podcast. What was the big picture here? Who were the joint owners on these accounts?

Jason Allan: Well in both cases David, the accounts were jointly held between a father and one of his children. In the case of *Pecore*, the father, near the end of his life, named

his daughter as a joint account holder of some of his bank and investment accounts. He later went on to leave a Will that said that his residue of his estate was to be divided equally between his daughter and his daughter's husband. Now, of course, after this person's death, the testator's death, the daughter and her husband divorced and the question arose as to whether the funds that the daughter acquired from the father should be included in the estate and thus distributed to the husband, or whether the daughter acquired them outright.

David Smith: What did the court hold?

Jason Allan: Well David, the court found that the money that the surviving daughter acquired should result back into the estate, but the court then went on to find that there was enough evidence available to show that the father actually intended for the daughter to acquire the accounts outright after her death.

David Smith: Now Jason, I'm familiar with the Court of Appeal's decision, that is the lower court and I understood that the Court of Appeal basically said, you look at the evidence first, see on a balance of probabilities which way it looks like the money goes, and if you can't from the evidence glean the answer, then you look to the presumptions. Does the Supreme Court of Canada effectively affirm what was said by the Court of Appeal?

Jason Allan: Well in a way the result was ultimately the same, but the starting approach is different, which is that the person who has received the gift almost has, well does have the burden of proving to the court that, that was intended to be a gift. So there's a reverse onus that's applied on the, on the person who's trying to uphold the transfer.

David Smith: Alright, but the test is still balance of probabilities, isn't it?

Jason Allan: That is the case.

David Smith: Now I guess the interesting issue as well, as I understand it, is that the court has given some valuable pronouncement on the difference between joint accounts held with minor children by a parent, and joint accounts held between parents and adult children. What's that difference?

Jason Allan: Well the court looked at the historical purpose of applying these presumptions, whether they were to be a gift, whether they were to result back into the estate. And the court found that the historical purpose for approaching the transfer as a gift, was that there was an assumption that the parent would support his or her child. Now in the modern context, where children often help their parents with the banking in their old age and their accounts are therefore held jointly, the courts thought that the presumption should not apply. So for adult children, it'll be presumed that it is for utility and sort of for the purpose to help the parent with the banking. But in the case of minor children, the court will still apply the presumption on the basis, on the assumption that the transfer was to provide support essentially for that minor child.

David Smith: Right, and Jason, that ties into the whole concept of fiduciary duty doesn't it? I mean if, if I'm holding a joint account with one of my parents, and I've got some siblings and my parents' Will provides that the estate is to be divided equally among all of us, the court is probably going to assume that whatever I take as a surviving joint owner is impressed with a trust for the estate. And the reason for that is going to be that the court will look at the testamentary intent, will look at the nature of the relationship between me and my parents, which would be a fiduciary relationship, and would look, I think, in large part, at avoiding a situation in which a fiduciary is benefiting from a fiduciary position, which is what the court is saying the relationship is, when an adult child jointly holds an account with a parent, isn't it?

Jason Allan: Well, David to quote from the decision, "it is common nowadays for aging parents to transfer their assets into joint accounts with their adult children in order to have that child assist them in the managing of their financial affairs. There should therefore be a rebuttal assumption that the adult child is holding the property in trust for the aging parent to facilitate the free and efficient management of that parent's affairs."

David Smith: Right, and so I would interpret that to suggest that there's a duty owing by the child to the parent, isn't there?

Jason Allan: I would think so, yes.

David Smith: Now Jason, you and I briefly talked about the situation where you might have an adult child who nonetheless is the intended recipient of the joint account by right of survivorship. How does that adult child rebut the presumption of resulting trust?

Jason Allan: Well David, first of all the, the standards for rebutting the presumption is obviously the civil standard of a balance of probabilities. And the surviving child will have to show essentially that the parent intended for that child to acquire the assets by right to survivorship. And the evidence that they can point to includes banking documents, particularly if there's anything specific in the banking documents that would indicate that the parent knew that survivorship was an effect of holding accounts jointly and acknowledged that, somehow in the banking documents. The court will consider who controlled and used the funds during the parent's lifetime. In a way it's unequivocal because the parent may be using the funds and still intend to gift the funds to the child, nonetheless. So the courts will really consider a variety of circumstances. Some other factors may include whether there's a Power of Attorney that names the child who is the joint account holder. If that's the case, if there is a Power of Attorney naming that child, the courts will think, or maybe the evidence would suggest in that case that it wasn't necessary for the accounts to be held jointly for the purposes of assisting with banking, that maybe indeed the parent intended for there to be a transfer of funds to the surviving child after all. And finally, the courts would consider the tax treatment of the joint account, who paid the taxes during the parent's life?

David Smith: Jason, I've also often thought that the Will itself can be a rather interesting document, and I think a relevant document. To my mind, if the joint account holder is an executor under the Will, I think the court will generally look at that and see that as some kind of evidence suggesting that the intention was not for the recipient of the joint account to benefit from the account. I think again that ties into the fiduciary argument. The other point that's interesting with a Will is how it treats everybody else. And, of course, if it's simply an estate planning tool and if the recipient of the joint account by right of survivorship is the only beneficiary under the Will, of course it's rather a moot point, isn't it?

Jason Allan: Yes, and it's interesting you bring up the comment about the lawyer, because of course, in the *Pecore* decision, there was a great deal of weight put on the evidence of the lawyer who drafted the Will for the deceased. The lawyer testified that the deceased knew that those assets would not fall under his estate and be addressed in his Will, so the court put a great deal of weight on that evidence.

David Smith: Maybe Jason, just to sort of wrap things up, I thought in closing we could just touch on something that isn't dealt with in the cases, because the cases you've referred to deal with joint accounts between parents and children. Of course, this differs from joint accounts between spouses, and in Ontario, pursuant to the *Family Law Act*, there's a presumption of advancement that still effectively applies on joint accounts between spouses. And that's a whole different situation, and one which hopefully the court might similarly provide some clarification on at some point. Is there anything else in closing we want to touch on that comes out of these cases that's of guidance to the profession?

Jason Allan: Well David, I think the big message coming out of these cases is really that the evidence of intention is always paramount. If you can show what the testator's intentions were or what the deceased's intention were, that's critical. And in these cases, evidence of how the deceased person intended to dispose of the accounts will really carry a great deal of weight, regardless of whether there is a presumption of advancement or presumption of resulting trust.

David Smith: The last word on this is that presumptions exist to assist the court only if there's not enough evidence put forth. And if you're the lawyer acting for one of the parties, you've got to do your job to gather together absolutely anything that could be relevant to the question of intention.

Jason Allan: That's right, David.

David Smith: Thank you, Jason.

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