

Joint Accounts

Hull on Estate and Succession Planning Podcast #60

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Suzana Popovic-Montag: Hi, and welcome to Hull on Estate and Succession Planning. You are listening to Episode #60 of our podcast on Tuesday, May 15th, 2007.

Welcome to Hull on Estate and Succession Planning, a series of podcasts hosted by Ian Hull and Suzana Popovic-Montag, that will provide information and insights into estate planning in Canada, from the offices of Hull Estate Mediation in Toronto, Ontario, Canada. Here are Ian and Suzana.

Ian Hull: Hi Suzana.

Suzana Popovic-Montag: Hi there, Ian.

Ian Hull: Well before we launch into our discussion today, I thought we might spend a couple of minutes on a case that there will be lots of discussion, certainly in the Estate's Bar and the Estate Planning Bar for some time, and that was the recent *Supreme Court of Canada* decision called *Pecore*. And it was, there's a series of cases that were heard and it was released, I think, last Thursday. So it's fresh off the press and worth, I think, making some comment on this podcast.

Suzana Popovic-Montag: And certainly from our perspective Ian, I mean very few estates cases tend to make it to the Supreme Court of Canada, and this case, in fact, had a nine member panel which is even more rare.

Ian Hull: That's right.

Ian Hull: Well they were busy and the opening statement of one of the sets of reasons that came out identified the issue and that was that they said that many, many Canadians use the joint account as an important planning tool. And as a result, the Supreme Court of Canada, all nine members of the court in this case, were prepared to hear about a series of cases that talked about what the legal impact of a joint account was and how it would play out in both estate situations and Will planning circumstances.

Suzana Popovic-Montag: And I think the starting point, Ian, when you talk about joint accounts, is the presumption of resulting trust. And that presumption provides that when you put money into these kinds of situations, where one of the persons is primarily funding the account and the other person is just there on title and hasn't made any valid contribution or contribution at all, in those kinds of situations, there's a presumption that the account or the monies held in trust for the person who actually put the money into it.

Ian Hull: So we've got a situation, or a typical situation, where you've got say an elderly parent and one child of many, say three, in a family, has been helping out the parent. An

account, they go to the bank and the parent says, look I'm just tired of having to have you drive me to the bank every time there's a bill to be paid, why don't we set up a joint account? Many of us have seen that situation and the banks, for their efforts, don't have to get too involved at that point, other than the fact that they hand a fancy card that you sign and that the joint account is to allow for essentially two signatures. That signature card became very important in a couple of cases before they got to the Supreme Court of Canada because the courts were sort of struggling with whether that moment in time was all that important to people. Whether or not when they came to the banks, they really read those documents and understood what they meant. Most of which, though, at the time, those documents say that the account goes to the survivor of the two. So whoever the last person standing gets to keep the money from the bank's standpoint. Then the Supreme Court of Canada said, well let's look beyond that and see what happens in joint accounts and what is really the intention. And the buzz started at the Court of Appeal in Ontario when Justice Lang said that, you know, it is so very important that we just get to the core of the intention of what the parties were doing when they set up the account.

Suzana Popovic-Montag: And Ian, typically, how do we see these kinds of issues arise, like why does suddenly intention matter?

Ian Hull: Well, it's a good question. I'm not sure, the Supreme Court of Canada sort of half-heartedly said it didn't matter, and this Court of Appeal of course went there because they said it mattered so much. And intention really is, I think, the natural intuitive response to when you set up a joint account and that is, what do people think and understand, what was their expectation, was that money on death to go to that particular account holder, that, say in our example, the child who may survive, or was the money to go to that person's estate, the parent's estate?

Suzana Popovic-Montag: And I think the key there is the fact that because these accounts are set up as convenience accounts or convenient arrangements, if at the end of the day as you said, the last person standing suddenly gets the account, so that child who was on with the parent gets the account, then the other children who are in a family would be deprived of that particular asset. And I think it's in those kinds of situations that people start saying, you know what, this is not what Mom or Dad intended when they set up this account.

Ian Hull: Absolutely, and really in the series of decisions that came out of the Supreme Court of Canada, as you say, they struggled with this. And I think the big difference between the Ontario Court of Appeal approach and then the Supreme Court of Canada's approach was that the Supreme Court of Canada embraced the legal concepts as opposed to the Ontario Court of Appeal, which sort of said that, let's get to the heart of it, let's look for evidence as to what was actually going on. And you describe that legal concept and, without getting overly burdened by it, the Supreme Court of Canada said as a starting point resulting trust matters, the concept of presumptions matter. And not that the Ontario Court of Appeal said otherwise, but the Ontario Court of Appeal sort of said look, let's go to those legal concepts only after we've exhausted the intention evidence, after we have looked under every rock to determine what that person really intended that

money to go to. And I think it's a really helpful decision. I think it settles the law a little bit because what now, as lawyers, we're able to say to our clients is, is that there's at least a hurdle. It used to be just a bump in the road, it was a speed bump of a legal hurdle before, and now it is a full hurdle, you know, and you have to leap over it to get to the intention inquiry.

Suzana Popovic-Montag: And I think just another thing and again, without getting overly legal or technical about the decision, there's also a further presumption Ian, and that's the presumption of advancement. And the courts rely on these kinds of presumptions in situations where money is given from a parent to a child, in which case there is a presumption that it was meant to be a gift and that there wouldn't necessarily be a trust arrangement that had been established as a result. And *Pecore* specifically speaks to this presumption and clarifies for practitioners anyways how that presumption matters, when the child is not necessarily a minor, but an independent adult child as well.

Ian Hull: So I think *Pecore* can be summarized and the series of cases can be summarized sort of on this basis, that if you go with your child and you set up a joint account, and your adult child and you do this so that the Rogers bill and the hydro bill and so on can get paid, and you die, as is the typical order of life. And the remaining person left is the younger child, the courts say this, they say that it is presumed that that money was intended to go to the estate, not to the child. And, now you can rebut that presumption, you can put evidence before the court saying no, no, no, this is one of those special cases. But I think it's a really helpful case, because it's a starting point to say okay, and it's intuitively what we would expect, that when you set up one of these accounts, most of the money is yours, if not all of it, as an adult setting this account up. And most of the time, you don't expect that one child to exclusively enjoy the benefit for the others. And so the Supreme Court of Canada says, that's fine, we'll allow you to keep doing these joint accounts but we're going to presume that money is to go to your estate unless you deem otherwise. And so that's important to again come back to the intention evidence, like what was intended, let's make it clear. And if we want to do something other than that, we have to make sure it's clear.

Suzana Popovic-Montag: And that just leads you to considering, you know, the need to document these kinds of situations, to document your intention, to create something in writing that'll maybe, for the first step anyways, to morally persuade your children in terms of your intention, and then secondly, possibly to persuade a court at the end of the day.

Ian Hull: And the other aspect of the decision which was fairly clear was that if you set up one of these joint accounts with a minor child, so an individual goes to the bank and sets up a joint account with their fourteen year old daughter, thinking they've got many years to live and they want to avoid probate fees in the future or something like that. If you set it up with a minor child, the Supreme Court of Canada said clearly then that's a gift, you have gifted it to that minor child, and if you set up a joint account with a dependent child, the Supreme Court says that's a gift. Now that's a little different, we've got a dependent child who could be over the age of eighteen, so a situation where say,

you've got a healthy forty-five year old or forty-eight year old parent and they've got a child who is in their early twenties, just can't get off his feet, having some trouble getting sort of into the stream of life, living at home, living on Mom and Dad, on Mom's money entirely, and this joint account gets set up. Should that untimely death happen to the adult and that child is seen and deemed by the court as a dependent, then that money will be seen to be as a gift. So there are some twists, there's sort of three twists of what came out of the court, one is if you set it up as an adult, you're deemed to and you've just set it up with your healthy, active and non-dependent child, you're deemed to have given that money to your global estate as opposed to that individual child. The second is, it's a gift if you set up that account with a minor. And the third is, if you set up that account with a dependent, it's a gift. So those are the sort of clear messages that came out of that decision. Now every case is different, everyone has different facts, and that's why the courts talk about rebutting presumptions. There's no hard and fast rules, all they've done is try to set a map that you can follow now as opposed to before, which wasn't necessarily bad, but it was a less clear approach.

Suzana Popovic-Montag: And I think, just in terms of wrapping up the whole discussion on this decision, I think it also brings clarity to us as practitioners in terms of probate applications, when you actually apply to administer an estate and whether or not these assets form part of an estate. Because I know that there's been a debate certainly in the profession as to whether or not you should pay probate on joint accounts and ultimately it always came down to intention and so having a little bit of guidance now from our highest court here in Canada will certainly help people in making those determinations.

Ian Hull: Well that was an interesting case, and as I say, I think it's going to keep a buzz in the estate planning world for some time. Thanks very much, Suzana.

Suzana Popovic-Montag: Thanks to you, Ian.

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