<u>Wills & Estates</u>
Winter Term 2018

Lecture Notes – No. 3

<u>JOINT TENANCIES AND BANK ACCOUNTS</u>

The property interest in any bank account is not in the funds paid in directly by the depositor but rather is a *chose in action* in the form of a contractual debt owed by the bank to the account holders. Upon deposit, the bank takes title to the money and the account holder takes title to the *chose in action* that is the debt owed by the bank.

Joint tenancies, like a joint bank account, operate subject to the doctrine of survivorship; upon the death of the penultimate tenant, the surviving tenant takes absolutely. During the time that the joint tenancy is in effect, each joint tenant is said to hold *per my et per tout* ('by every part or parcel and by the whole'), holding nothing but holding everything as it were. That is, each joint tenant is equally seised of an interest in the entirety of the property but without distinct title. This means that the legal interests vest when title is transferred into the names of the joint tenants but the exact quality of the entitlement remains somewhat murky.

Pecore v Pecore
2007 SCC 17 (S.C.C.); cb, p.160, n.21, 186

A father placed his assets into a joint bank account with one of his three children (Paula). His other children were more financially secure than this child, and indeed one of the others was estranged from the father. The father acted, at least in part, based on the advice of a financial advisor who told him that probate fees would not be charged on jointly-held assets as they would operate outside the Will after his death. The father regarded the assets as his own during his lifetime, even representing himself as the 'real owner' to the Canada Revenue Agency in respect of tax liability (attempting to stave off liability for capital gains tax if the CRA chose to view the transaction as a present disposition of these capital assets to Paula). Paula had access to the account but only with notice to her father. At his death, a dispute arose between Paula and her quadriplegic ex-partner Michael, who was named as a residuary legatee in the father's Will. Were the assets part of the estate or were the assets owned in law and equity by Paula?

In **Madsen Estate v Saylor, 2007 SCC 18** the mother and father had mirror Wills providing for a gift over to the survivor, and if there was no surviving spouse then the remaining estate was to be divided equally between the two classes of children and grandchildren. The mother died first and her assets passed to the father. The father later opened a joint bank account and a joint investment account with one of his three daughters (Patricia). The father declared and paid the taxes on the income. He controlled the account during his lifetime which was only used for his benefit. Eventually the father died, Patricia claimed the assets as her own, and her siblings naturally disagreed and brought an action against her in her role as executor of the father's estate. Were the assets part of the estate or were the assets owned in law and equity by Patricia?

The issue of the operation of the presumption of advancement was of course central to both *Pecore* and *Saylor*; and the question was really one that asked whether the presumption ought to operate in present social circumstances - *does it aid in determining what the transferor probably intended?* Rothstein J, for the majority in *Pecore v Pecore*, held it is not helpful where the child in not a minor:

> … given that a principal justification for the presumption of advancement is parental obligation to support their dependent children, it seems to me that the presumption should not apply in respect of independent adult children… [moreover] parental support obligations under provincial and federal statutes normally end when the child is no longer considered by law to be a minor… Indeed, not only do child support obligations end when a child is no longer dependent, but often the reverse is true: an obligation may be imposed on independent adult children to support their parents in accordance with need and ability to pay… [further] it is common nowadays for ageing parents to transfer their assets into joint accounts with their adult children in order to have that child assist them in managing their financial affairs. There should therefore be a rebuttable presumption that the adult child is holding the property in trust for the ageing parent to facilitate the free and efficient management of that parent's affairs.

LIFE INSURANCE

Life insurance forms a part of most people's estate plan; indeed, for people of modest means, it may be the primary device to provide for family members after death. The issues surrounding insurance become complex at times. The deceased may have a former spouse, current spouse, children to whom he or she owes obligations from one or both or other relationships (with or without disabilities), etc. The contract of insurance itself is a complex arrangement, it may be a policy for a term of years or have a fixed premium for the life of the insured. The policy may be just on the life of the deceased, or the deceased and another (a 'multiple life' policy covering the deceased and his or her spouse for example).

One aspect of insurance that is important is in respect of the designation of the beneficiaries. Insurance statutes commonly allow for an irrevocable designation which prevents creditors accessing the funds when the deceased dies; that is, the proceeds form no part of the estate. One must check the terms of the *Insurance Act*, RSO 1990, c.I.8 carefully. Thus, for example, the deceased cannot be the single beneficiary of the policy but can be one of the designated beneficiaries; see the Insurance Act, s.171; *Tennant v Tennant* (2003), 62 OR (3d) 185 (CA).

Richardson Estate v. Mew
2009 ONCA 403 (Ont. C.A.); cb, p.174, note 4

Here a man died leaving an ex-wife (and their children) and a second wife (and their children). He died in a long-term care facility as he developed Alzheimer's Disease and required institutional care in his final years. The second wife managed his affairs using a Power of Attorney provided for that purpose. A question arose in respect of a life insurance policy payable to the first wife. It had been taken out originally when the deceased was married to his first wife and then made subject of a condition in the separation agreement between them that the first wife remain as beneficiary for a year (the end of his child care obligations). He told his second wife that he would designate her as the beneficiary at the end of the commitment under the separation agreement but never did so. Some few years later, the deceased became incapable of managing his affairs due to Alzheimer's Disease. The costs of his care exhausted his retirement savings and the second wife assumed the costs of his care including paying the premiums due on the life insurance policy. It wasn't entirely clear in the report of the judgement whether it was established as a matter of fact that the second wife did actually pay premiums with her own money and the suggestion was that if she did, the sum was relatively modest. In any case, the action was brought in unjust enrichment claiming a constructive trust over the policy.

The Court of Appeal held that while the first wife may have been enriched, there was no corresponding deprivation and a juristic reason that allowed her to retain – the contract of insurance. That is, the plaintiff might have a theoretical claim against the Estate for the premiums that she paid; 'theoretical' because she inherited the Estate. As against the designated beneficiary (the first wife), there was no claim in unjust enrichment as the contract of insurance constituted a good juristic reason for her to retain the insurance proceeds. The separation agreement may have contained a standard clause release or renouncing all claims against the other's estate, but it is well recognized that the quality of title to insurance proceeds is unaffected where the policy continues to designate the former spouse as beneficiary upon death.

As an aside, there is an interesting point that arises and that was addressed, in *obiter dicta*, by Gillese JA as to the ability of the plaintiff to change the designation in view of her fiduciary obligation to her incapable husband:

> 49 As a fiduciary, Ms. Ferguson was obliged to act only for the benefit of Mr. Richardson, putting her own interests aside: see *Ermineskin Indian Band & Nation v. Canada*, 2009 SCC 9 (S.C.C.), at para. 125. In *Egli (Committee of) v. Egli* (2004), 28 B.C.L.R. (4th) 375 (B.C. S.C.), aff'd (2005), 262 D.L.R. (4th) 208 (B.C. C.A.), Garson J. described the prohibition against using a power for the attorney's profit, benefit or advantage at para. 82 in the following way:
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> It is the attorney's duty to use the power only for the benefit of the donor and not for the attorney's own profit, benefit or advantage. The attorney can only use the power for his or her own benefit when it is done with the full knowledge and consent of the donor. I am not aware of any authority that detracts from this principle in circumstances where the benefit is conferred on family members. [Citations omitted.]
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> 50 I do not understand Ms. Ferguson to suggest that she was entitled to change the beneficiary designation, cancel the Policy or cease paying the premiums during the time that Mr. Richardson was still capable of managing his property. To the extent that she makes such an argument, I would reject it. Given that there is no evidence that Mr. Richardson instructed her to do any of those things, if she had so acted, she would have been in breach of her duty to carry out the donor's instructions. Furthermore, changing the beneficiary designation to herself would have contravened the prohibition

against using the Power for her own benefit, as Mr. Richardson had not expressly consented to such a change.

51 After Mr. Richardson became incapable, as has been noted, Ms. Ferguson owed him an even higher duty of loyalty when exercising the Power. As a fiduciary in a role rising to that of a trustee, she was bound to use the Power only for Mr. Richardson's benefit and any exercise of the Power had to be done with honesty, integrity and in good faith. There is nothing in the record to suggest that a change in the beneficiary designation, cancellation of the Policy or a cessation of the premium payments would have been for Mr. Richardson's benefit.

PENSIONS AND BENEFICIARY DESIGNATIONS

The Succession Law Reform Act provides a scheme in Part III respecting pension funds and plans. They are not available to creditors of the deceased normally (unless designated to the Estate), except may be brought back into the Estate for the purposes of family provision.

Amherst Crane Rentals Ltd. v. Perring
(2004), 11 E.T.R. (3d) 112 (Ont CA); cb. p178

Per Feldman JA:

2 **The facts of the case are quite typical. The appellant is a creditor of the deceased. The respondent is the widow of the deceased and the designated beneficiary of two RRSP funds. She received the proceeds of the two funds from the two plan administrators. Because the estate of the deceased was unable to pay all of its debts and declared bankruptcy, the creditor sought to obtain payment of the outstanding debt owed by the estate from the beneficiary out of the proceeds of the RRSPs.**

…

33 I agree with Cameron J. that **there is neither a legal principle nor statutory authority that requires that the creditors have any claim on the proceeds of an RRSP that devolve directly to a designated beneficiary. I also agree that the equities do not necessarily favour the claims of creditors over those of beneficiaries of RRSP.** The beneficiaries are often spouses, and therefore, not volunteers in the traditional sense, but partners in life, who have provided support to their spouses with the expectation that they will be supported after the death of their spouses. Finally, there are several potential procedural difficulties if creditors are permitted to pursue beneficiaries directly for the proceeds of the RRSPs in their hands.

34 I am also satisfied that in order to give full effect to s. 53 as an exemption from the rule that an RRSP designation is a testamentary disposition, and following Kerslake, it would be anomalous to hold that RRSP

> proceeds that have devolved to the designated beneficiary remain subject to the claims of the creditors of the deceased.
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> 35 I therefore conclude that the effect of s. 53 is to except RRSP proceeds in the hands of a designated beneficiary from the claims of creditors of a deceased RRSP owner's estate.

CONTRACTS: PROMISES TO LEAVE THE CLAIMANT A GIFT IN A WILL

A common enough situation arises: a person promises to leave another a gift in his or her Will in exchange for something (personal care, marriage, some favour, etc). Conceptually there is merely a straight-forward case. If the contract is broken, the plaintiff can sue the Estate in damages. The difficulty, of course, is that Estate may not be able to pay either at all or completely given that there may be other creditors. In the past, cases arose where there was insufficient protection for spouses or dependants (*Synge*, below), on equitable doctrines (part performance, estoppel), or the principle of restitution (*Degleman*, below).

Synge v Synge
[1894] 1 QB 466; cb, 117

The most familiar of all estate litigation: 2nd wife v children of first marriage. The husband induced the 2nd wife to marry him by promising her that she would inherit the house and land as a life tenant after he died. She married him in reliance. He then conveyed the property to his daughters from his first marriage. The second wife sued and was successful in damages. Kay LJ held that the claim might have been made against the daughter but the plaintiff sought only damages from the husband:

> **Sir R. Synge had all his lifetime to perform this contract; but, in order to perform it, he must in his lifetime make a disposition in favour of Lady Synge. If he died without having done so, he would have broken his contract. The breach would be omitting in his lifetime to make such a disposition. True, it would only take effect at his death; but the breach must take place in his lifetime, and as by the conveyance to his daughters he put it absolutely out of his power to perform this contract. Lady Synge, according to well-known decisions… had a right to treat that conveyance as an absolute breach of contract, and to sue at once for damages; and as this Court has both legal and equitable jurisdiction, we are of opinion that such relief should be granted.**
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> We have not before us the materials for assessing such damages. The amount must depend on the value of the possible life estate which Lady Synge would be entitled to if she survived her husband. Their comparative ages would, of course, be a chief factor in such a calculation. There must be an inquiry as to the proper amount of damages.

Part Performance

Certain types of agreements must be in writing to be enforceable under the *Statute of Frauds*, RSO 1990, c. S.19.

The doctrine of part performance is an equitable doctrine that was used to deal with claims based, inter alia, on ineffective transactions. In *Steadman v. Steadman*, [1976] A.C. 536, 558 Lord Simon said:

> [This doctrine] was evoked when, almost from the moment of passing of the Statute of Frauds, it was appreciated that it was being used for a variant of unconscionable dealing, which the statute itself was designed to remedy. A party to an oral contract for the disposition of an interest in land could, despite performance of the reciprocal terms by the other party, by virtue of the statute disclaim liability for his own performance on the ground that the contract had not been in writing. Common Law was helpless. But Equity, with its purpose of vindicating good faith and with its remedies of injunction and specific performance, could deal with the situation. The Statute of Frauds did not make such contracts void but merely unenforceable; and, if the statute was to be relied on as a defence, it had to be specifically pleaded. **Where, therefore, a party to a contract unenforceable under the Statute of Frauds stood by while the other party acted to his detriment in performance of his own contractual obligations, the first party would be precluded by the Court of Chancery from claiming exoneration, on the ground that the contract was unenforceable, from performance of his reciprocal obligations; and the court would, if required, decree specific performance of the contract. Equity would not, as it was put, allow the Statute of Frauds "to be used as an engine of fraud." This became known as the doctrine of part performance — the "part" performance being that of the party who had, to the knowledge of the other party, acted to his own detriment in carrying out irremediably his own obligations (or some significant part of them) under the otherwise unenforceable contract.**

[Approved in *Hill v. Nova Scotia (Attorney General)* [1997] 1 S.C.R. 69. For a recent case applying the doctrine see *Frisgo Development Inc. v. Brower*, 2009 ABQB 463].

Quantum Meruit, Proprietary Estoppel, and Unjust Enrichment

In most cases in which the claim is brought against the Estate based on the acts of the deceased, the approach today would be through the action for unjust enrichment.

In ***Degleman v Guaranty Trust Co. of Canada*, [1954] S.C.R. 725 [cb, 122],** a disappointed nephew was promised a testamentary gift by an aged aunt in exchange for his services. The aunt didn't leave the gift and the nephew sued on the promise. The Supreme Court of Canada held that the claim for the services rendered was valid notwithstanding that the oral promise was not enforceable given its obvious non-compliance with formalities. Cartwright J for the majority held:

> In my opinion when the Statute of Frauds was pleaded the express contract was thereby rendered unenforceable, but, the deceased having received the benefits of the full performance of the contract by the respondent, the law

> imposed upon her, and so on her estate, the obligation to pay the fair value of the services rendered to her.

Rand J held for the concurring minority:

> There remains the question of recovery for the services rendered on the basis of a *quantum meruit.* On the findings of both courts below the services were not given gratuitously but on the footing of a contractual relation: they were to be paid for. The statute in such a case does not touch the principle of restitution against what would otherwise be an unjust enrichment of the defendant at the expense of the plaintiff. This is exemplified in the simple case of part or full payment in money as the price under an oral contract; it would be inequitable to allow the promissor to keep both the land and the money and the other party to the bargain is entitled to recover what he has paid. Similarly is it in the case of services given.

Given that there was no contract between the aunt and the nephew, what is the ultimate rationale for liability in *Degleman*? It can't be the contract alleged to have existed; both the majority and the concurring minority rejected a contractual basis for relief. Rather than contract, then, it was the principle of unjust enrichment (the retention of a benefit without valid reason) that best rationalized liability in the Court's view.

The law of unjust enrichment in Canada has moved on substantially since *Degleman v Guaranty Trust Co. of Canada*. There is no doubt that there exists an independent action for unjust enrichment in Canada that is not parasitic on an established common law, equitable, or statutory cause of action. That such established law is brought into unjust enrichment as 'juristic reasons' to disallow an otherwise unjust retention of a benefit is not to limit the action for unjust enrichment to those categories. Pragmatically, this ensures that well settled doctrine remains valid but allows for more coherent development. Thus, rather than talking of an 'action for *quantum meruit*' in respect of the services at issue in *Degleman*, we now more usefully speak of remedies properly arising as a response to a valid contract (on which damages may be calculated on a *quantum meruit* basis) or remedies arising on a successful action in unjust enrichment (which might be remedied with a money award to the same ends). We no longer have to rely on *quantum meruit* as an indistinct concept that describes the variety of factors that might support the remedy outside conventional contract, whether in law or equity or otherwise. Rather, we ventilate the inquiry through the law of unjust enrichment which provides for a more structured approach. Thus, at the very least, we can now say with confidence:

> A remedy based upon unjust enrichment may be ordered where there is
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> (a) a benefit to or enrichment of one party, and
> (b) a corresponding detriment to or deprivation suffered by the other party, and
> (c) the absence of any juristic reason for the benefit or enrichment to be retained.
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> The 'juristic reason' involves consideration of (i) traditional categories that would allow the benefit to be retained and (ii) fact-specific reasons and new categories of general application that would allow the benefit to be retained

tested on both the reasonable expectations of the parties and public policy considerations.