Wills & Estates
Winter Term 2019

Lecture Notes – No. 3

THE NATURE OF A WILL

Succession Law Reform Act:

Definitions

1. (1) In this Act,

"will" includes,
(a) a testament,
(b) a codicil,
an appointment by will or by writing in the nature of a will in exercise of a power, and any other testamentary disposition.

Power to dispose of property by will

2. A person may by will devise, bequeath or dispose of all property (whether acquired before or after making his or her will) to which at the time of his or her death he or she is entitled either at law or in equity, including,

(a) estates for another's life, whether there is or is not a special occupant and whether they are corporeal or incorporeal hereditaments;
(b) contingent, executory or other future interests in property, whether the testator is or is not ascertained as the person or one of the persons in whom those interests may respectively become vested, and whether he or she is entitled to them under the instrument by which they were respectively created or under a disposition of them by deed or will; and
(c) rights of entry, whether for conditions broken or otherwise.

- A Will is a formal declaration that is created by the testator or testatrix during his or her lifetime. The Will represents the intention of the testator or testatrix to dispose of property upon death.

- A Will is by its nature both ***revocable*** and ***ambulatory*** - that is the testator or testatrix can change his or her mind and revoke the Will in whole or in part, and, the Will can speak to property that has yet to be acquired by the testator or testatrix or a presently-held asset whose value fluctuates.

- The Will can do much more than just pass on property. It can also represent a devolution of certain other powers or rights that were enjoyed by the deceased during his or her lifetime, such as a *power of appointment* (that is, the right to give away another's property to a third party).

As a fundamental proposition, only a Will that represents *the deliberate or fixed and final expression of intention of the deceased* to dispose of his or her property is valid. It must be in a form that complies with the statute. There is no 'substantial compliance' allowance.

Bennett v Gray
[1958] SCR 392 (S.C.C.); cb, p.304

Here the testatrix had a Will naming her husband as the beneficiary of a life tenancy in her Estate and a gift-over of the Estate in set shares to her children. The husband died before the testatrix. She became unhappy with the Will and wrote a letter to her solicitor. In the letter she wrote (in part):

> Dear Mr. Dysart
>
> When I was in your offis about a month ago I Promised to let you know how I would like my will to be made out. I have no Ida at all about such matters so Ill leave all that to you, but I do know its Important to have such matters settled before its to late. I will try to outline the way I would like to leave the little I have. the two boys are provided for and do not expect any thing from me. to Dixie her real name is Margaret Dorothea Beautrick Gray Bennett Wife of Charls Paul Bennett the sum of thirty thousand dollars. (30,000) my house if I own a house at the time of my death Also all my furniture and my Car Also my Clothing and fur Coats.--to my daughter Jacquline Dinnia Gray wife of Victor Fregeau the sum of ten thousand dollars (10,000). and to my Grand daughter, Joyce Gray, I leave five thousand dollars. and I also want to leave to my dearly Beloved Grand daughter Judith Ann Bennett fifteen thousand dollars and my summer home on Coney Island in Kenora Ont and also the furniture in the cottage my watch or any Jewelery and my diamond rings--To the Reverend A.X. MacAulay one thousand dollars to have holey Masses offered to God for the repose of my soul.
>
> Dear Mr. Dysard I will be in Winnipeg in a few days I will call you. Thanks for your trouble and for all your kindness to us.

The testatrix did go to see her lawyer some weeks later but could not decide who to appoint as her executor. Still later they met and there were some additional instructions given about one gift. She died three years later, still not having made a new Will.

Per Fauteux J:

> Whether the letter of September 27, 1952, contains *per se* **a deliberate or fixed and final expression of intention** must be determined by the phrases immediately preceding and following the intermediate part of the letter where the wishes of Mrs. Gray are expressed; for, read as a whole, the letter has one single subject-matter, indicated as follows by Mrs. Gray: "I Promised to let you know how I would like my will to be made out."
>
> In the opening and closing phrases of the letter, Mrs. Gray conveys to Mr. Dysart sentiments of unreserved trust, reliance and dependence. Born, as admittedly shown by extrinsic evidence, out of an intimate relationship of many

years between Mr. Dysart, on the one hand, and Mr. and Mrs. Gray and their children, on the other, these sentiments were those accompanying the mind of Mrs. Gray when, after expressing them, she wrote: "I will try to outline the way I would like to leave the little I have." And having done so, she closed the letter by informing Mr. Dysart that she would be in Winnipeg in a few days and that she would call him.

I am unable to dismiss the view I formed that, read as a whole and according to its ordinary and natural sense, this letter amounts to nothing more than what is a preliminary to a will. While Mrs. Gray indicated to Mr. Dysart the legacies she then contemplated her will to contain, it is clear, in my view, that she did not want that letter to operate as a will. Indeed, by her letter, she is committing to future consultation with Mr. Dysart both the finality of her decisions, if not of her deliberations, and that of the form in which they should eventually be expressed in a regular will, the preparation of which is entrusted to Mr. Dysart himself. If this interpretation properly attends the document, the letter has not per se, and cannot acquire without more, a testamentary nature, and the proposition stated in *Godman v. Godman…* "that a document which is in terms an instruction for a more formal document may be admitted to probate if it is clear that it contains a record of the deliberate and final expression of the testator's wishes with regard to his property", as well as the proposition stated in *Milnes v. Foden* [(1890), 15 P.D. 105 at 107.], that "It is not necessary that the testator should intend to perform or be aware that he has performed a testamentary act", are of no application in the present case.

What took place from the date of the letter, September 27, 1952, to the day of the death of Mrs. Gray, April 5, 1956, affords no evidence either that her letter contained a deliberate or fixed and final expression of intention or that it acquired such a testamentary character by subsequent and sufficient manifestation of intention on her part. Indeed the evidence shows that Mrs. Gray failed to pursue what she indicated in her letter she contemplated doing subject to consultation with Mr. Dysart, though there were, during this lengthy period of time, the fullest opportunities and facilities to do so, and that the most reasonable explanation for this failure is the abandonment of her original intention. No decision was ever reached as to the choice of an executor; nor was even the disposal of the residue of the estate ever considered; nor did she, at any time, decide to instruct Mr. Dysart to proceed with the preparation of the will, notwithstanding that both were perfectly aware that the formal will, executed by Mrs. Gary at the same time as that of her husband on January 6, 1949, was still in existence.

[Please note that the *dicta* in this case does not stand for the proposition that a note to a solicitor cannot be a valid Will – the test ultimately is whether the instrument sets out the final and fixed intention of the testator which is intended to have effect at death; e.g. Re Kavanagh's Will, 1998 CanLII 18096 (NLCA).]

<u>"WILL-SUBSTITUTES"</u>

Advantages of a Will-substitute rather than a Will?

- Estate administration taxes arising on death may be avoided;
- The asset can be shielded from creditors as it passes 'outside the Estate' – but perhaps not if dependants are inadequately provided for (in which case it may be brought back into the Estate through a judicial order);
- no need for probate and legal fees associated with probate;
- fewer transactions costs;
- minimize opportunities for litigation by disappointed beneficiaries.

Advantages of a Will?

- Income and other taxes arising on death may be minimized through appropriate planning with greater certainty;
- Allows for highly creative plans that suit a person's needs;
- Allows for a comprehensive plan in one document;
- Covers issues beyond transmission of wealth.

One should note that the tax regime has changed with respect to the rigor that the provincial government approaches the collection of Estate Administration Tax.

In the past, there was no real audit in respect of the value of personal property. The **Better Tomorrow for Ontario Act (Budget Measures), 2011** amended the legislation to enhance the compliance regime. The Ontario Minister of Revenue is provided with significant audit and verification functions as a result of this change, as well as assessment, objection and appeal mechanisms, similar to those contained in Canada's Income Tax Act. As a result, it is anticipated that there will be much more pressure to verify the value of the assets disclosed in the application for a Certificate. This will likely result in a higher tax payable unless one has engaged in planning to minimize this tax.

The enhanced audit and verification functions will include (among other things) the right to assess and reassess an estate in respect of its tax liability within four years of the tax being payable, a requirement that the Estate Trustee provide all reasonable assistance and answer all questions in respect of an audit being conducted, provide any 'prescribed' information as is requested and a requirement that third parties give the Minister access to their premises and/or permit the Minister to examine their assets and records. The Minister may also assess or reassess an estate in respect of its Estate Administration Tax liability outside the four-year limitation period if any person made a misrepresentation attributable to neglect, carelessness or wilful default, or committed fraud in supplying (or omitting to disclose) information regarding an estate to the Minister.

Estate Administration Tax rate:

$5 for each $1,000, or part thereof, of the first $50,000 of the value of the Estate, and $15 for each $1,000, or part thereof, of the value of the estate exceeding $50,000.

GIFTS

Where large *inter vivos* gifts are made, three sorts of concerns arise: capacity to make a gift; compliance with common law doctrine to allow the transfer to be regarded as valid as a matter of law; and, whether the donor was "unduly influenced" by the donee or another. The last point is particularly significant where the donee provides care to the donor.

Jansen v. Niels Estate
2017 ONCA 312 (Ont. C.A.)

This appeal concerned an *inter vivos* conveyance by the testator of her home into joint tenancy with her son, daughter-in-law, and herself. The conveyance was challenged after the testator's death by one child on various bases. The judgment on appeal considered whether the joint tenancy had been severed and whether the conveyance was a proper gift. The former ground was dismissed at trial and appeal for want of evidence. The latter ground was dismissed on the basis that there was a good gift notwithstanding that words of gift were not used. In a *per curiam* judgment, the Court held on the latter point:

> [40] The application judge applied the proper test for a gift, as set out in McNamee and summarized in *Foley* [*Foley v. McIntyre*, 2015 ONCA 382 (Ont. C.A.)] at para. 25: **"To establish a gift, one must show intention to donate, sufficient delivery of the gift, and acceptance of the gift".**
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> **[41] As the application judge noted, it was not necessary for Theadora to state that she was gifting the property. Her intention to gift the property was evident from her instructions to her solicitor and his assistant and the executed documents, all of which supported this finding.** This included:
>
> - her advice to her solicitor that she would take title alone and add Richard to the deed later;
> - the codicil to her will, making it clear that the home would not form part of her estate;
> - her request that the joint tenancy between herself and Richard be created on his return to Canada;
> - the absence of any request to revert the title to tenancy in common; and
> - her call to Carol Harding seeking assurance that her home would pass to Richard and Ingrid on her death.
>
> [42] Furthermore, the application judge found that Theadora received legal advice from a lawyer who knew her well; that she understood the consequences of joint tenancy as opposed to tenancy in common; and that she was mentally engaged and cognitive until her death.

[43] The application judge did not wrongly rely on evidence of notes documenting Theadora's visit to her lawyer's office in September 2004 and a phone call made to the office in November, 2004, in determining her intention concerning the gift. The application judge's reasons, and in particular para. 148, do not reflect acceptance of the notes on Theadora's visit as evidence of intention. Rather, the notes were part of the narrative explaining the steps that led to title being in the names of Theadora and Richard and the contents of the codicil. This would also help explain why the appellant took no objection at trial to the admission of the notes.

…

Was Theadora Subject to Undue Influence?

[45] Marjolein submits that the application judge erred by, in effect, requiring her to establish undue influence rather than simply demonstrate that the relationship of the parties gave rise to a potential for undue influence.

[46] There is no merit to this submission.

[47] The application judge applied the law as set out in *Foley*, in which this court noted, at para. 28, that the presumption of undue influence applies "[w]here the potential for domination inheres in the relationship between the transferor and transferee", citing *Goodman Estate v. Geffen*, 1991 CanLII 69 (SCC), [1991] 2 S.C.R. 353, at p. 378. Where the presumption applies, the transferee must establish that a gift was the result of the full, free, and informed thought of the transferor. Evidence that the transferor received qualified and independent advice can be used to rebut the presumption, although it is not required in every case. But corroborating evidence is required in order to rebut the presumption, whether direct or circumstantial in nature.

[48] The application judge applied the presumption that undue influence was exerted, but based on his factual findings concluded, at para. 184, that "the potential for domination and therefore undue influence is completely rebutted." The application judge emphasized the independence of Theadora. He found that her advanced age was not a trigger for domination. This was not a case in which a totally new estate plan had been entered by a person facing a terminal illness. Theadora was pursuing an intention to gift the property that she developed in 2004 and never wavered from. She was cognitively engaged and unfettered by persuasion.

[49] Although the application judge said that Marjolein provided no evidence of undue influence, when his decision is read as a whole, it is clear that he did not reverse the burden of proof and require Marjolein to prove undue influence. On the contrary, the application judge acknowledged the operability of the presumption but found that it was rebutted. As the application judge put it, at para. 179: "Nothing in the evidence causes me any concern that the direction and eventual registration of the tri joint tenancy deed, was done with anything less than the full acquiescence, acceptance and complete concurrence of Mrs. Niels."

While no new ground is broken, the judgment provides comfort that intention to gift remains a question of fact that can be inferred from the evidence and that a caregiver is not precluded from receiving a gift from a frail and vulnerable older adult. The possibility of exploitation may itself raise a presumption of undue influence which was rebutted on the evidence.

Morreale v. Romanino
2017 ONCA 359 (Ont. C.A.)

Here the presumption of undue influence respecting a gift from an elderly parent to a child was also at issue. The asset was the proceeds of sale of the deceased's home which were then used to purchase another home with title being taken by the deceased's daughter and son-in-law. The deceased was ill with cancer and the daughter and her husband lived with the deceased and provide care services. The deceased did not receive independent legal advice. Gillese J.A. helpfully reviewed the law on point:

> **1. The Presumption of Undue Influence Did not Arise**
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> [19] At para. 73 of her reasons, the trial judge stated:
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> > I find that in these circumstances, and despite the "special" relationship that existed, it is not possible to find any specific act of coercion or domination that would lead to a presumption of undue influence.
>
> [20] The appellant points to this sentence and submits that it demonstrates an error in law on the part of the trial judge because there is no need for a finding of a "specific act of coercion or domination" in order for the presumption to arise.
>
> [21] I agree. **In this regard it is important to distinguish between the presumption of undue influence and actual undue influence. In this case, the trial judge was addressing the question of whether the presumption of undue influence arose, not whether there had been undue influence exerted by the respondent over her parents. There is no need for a finding of a specific act of coercion or dominion in order for the presumption to arise. Whether a person's free will was overborne by an act of coercion or fraud is a question of actual undue influence: *Keljanovic Estate v. Sanseverino* (2000), 2000 CanLII 5711 (ON CA), 186 D.L.R. (4th) 481 (Ont. C.A.), at para. 61.**
>
> **[22] In the case of voluntary gifts, whether the presumption of undue influence arises begins with an examination of the relationship between the parties and the first question to be addressed, in all cases, "is whether the potential for domination inheres in the nature of the relationship itself": Geffen, at p. 378. This test embraces those relationships that equity has already recognized as giving rise to the presumption, including parent and child: Geffen, at p. 378.**
>
> **[23] However, while the test embraces relationships that have been recognized as giving rise to the presumption, it is not enough to simply show that such a relationship exists. Even for such relationships, the**

presumption does not arise unless it has been established that there is the potential for one person to dominate the will of another. The test requires the trial judge to consider the whole of the relationship between the parties to see if there is the potential for domination, rather than looking for a specific act of coercion or domination.

[24] Despite the impugned statement, in light of the trial judge's findings, I would not interfere with the trial judge's determination that the presumption did not arise in this case. Far from the respondent having the potential to dominate the will of her parents, the trial judge saw Mr. Ruccia as the dominant party in the financial transactions between the Ruccias and the respondent.

[25] The trial judge was very aware of the family dynamic. She recognized that the respondent lived with her parents all of her life and that, as the Ruccias aged, they became more and more dependent on the respondent and, eventually, her husband as well. However, the trial judge found that Mr. Ruccia told the appellant that she would receive less from their estate than would her sister and that he wanted to ensure that her husband would get no money from his estate. And, importantly, the trial judge found that Mr. Ruccia was a strong-willed individual who made all the financial decisions as between him and his wife and that he was so meticulous in respect of his personal financial affairs that he required the respondent to provide him with receipts for all bank transactions that she performed on his behalf.

[26] Given that Mr. Ruccia's mental capacity was not in issue and in light of the trial judge's findings as to the strength of his will in all things, including those financial, the trial judge made no error in concluding that the presumption of undue influence did not arise in this case.

[Emphasis added.]

Thus while a relationship between an adult child providing care to an elderly parent may in some cases give rise to a presumption of undue influence, there is no categorical necessity to presume undue influence where the evidence is to the contrary. Here the evidence would have rebutted the presumption if it did operate but the refusal to regard it applying categorically operates as a break on frivolous litigation.

JOINT TENANCIES AND BANK ACCOUNTS

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:
>
> 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.]
>
> 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.

Richardson Estate v. Mew must now be read in the context of ***Moore v. Sweet*, 2018 SCC 52 (S.C.C.).** Here a man made an oral agreement with his ex-wife; if she maintained the policy of insurance that he owned on his own life, she would be entitled to the proceeds of the insurance policy at his death. The ex-wife held up her end of the bargain and paid the premiums for 13 years. The man did not; he designated his second wife irrevocably. Côté J. for the majority held that an action in unjust enrichment should be successful:

> [46] **Taking a straightforward economic approach to the enrichment and corresponding deprivation elements of the unjust enrichment**

framework, I am of the view that Michelle stands deprived of the right to receive the entirety of the policy proceeds (for a value of $250,000) and that the necessary correspondence exists between this deprivation and Risa's gain. With respect to the extent of Michelle's deprivation, my view is that the quantification of her loss should not be limited to her out-of-pocket expenditures — that is, the $7,000 she paid in premiums between 2000 and 2013. Pursuant to her contractual obligation, she made those payments over the course of 13 years in exchange for the right to receive the policy proceeds from the Insurance Company upon Lawrence's death. In breach of his contractual obligation, however, Lawrence instead transferred that right to Risa. Had Lawrence held up his end of the bargain with Michelle, rather than designating Risa irrevocably, the right to payment of the policy proceeds would have accrued to Michelle. **At the end of the day, therefore, what Michelle lost is not only the amount she paid in premiums. She stands deprived of the very thing for which she paid — that is, the right to claim the $250,000 in proceeds.**

[47] To be clear, therefore, Michelle's entitlement under the Oral Agreement is what makes it such that she was deprived of the full value of the insurance payout. In other cases where the plaintiff has some general belief that the insured ought to have named him or her as the designated beneficiary, but otherwise has no legal or equitable right to be treated as the proper recipient of the insurance money, it will likely be impossible to find either that the right to receive that insurance money was ever held by the plaintiff or that it would have accrued to him or her. In such cases, the properly designated beneficiary is not enriched at the expense of a plaintiff who had no claim to the insurance money in the first place — the result being that the plaintiff will not have suffered a corresponding deprivation to the full extent of the insurance proceeds (*Love v. Love*, 2013 SKCA 31, 359 D.L.R. (4th) 504, at para. 42).

…

[49] My view is that it is not useful, in the context of unjust enrichment, to distinguish between expectations based on a contractual obligation and expectations where there was a breach of an equitable duty (see my colleagues' reasons, at para. 104). Rather, a robust approach to the corresponding deprivation element focuses simply on what the plaintiff *actually* lost — that is, property that was in his or her possession or that would have accrued for his or her benefit — and on whether that loss corresponds to the defendant's enrichment, such that we can say that the latter was enriched *at the expense of* the former. As was observed by Professors Maddaugh and McCamus in The Law of Restitution, one source of difficulty in these kinds of disappointed beneficiary cases is

> a rigid application of the "corresponding deprivation" or "expense" element as if it requires that the benefit in the defendant's hands must have been transferred from, or constitute an out-of-pocket expense of, the plaintiff. . . . <u>[R]estitution of benefits received from third parties may well provide a basis for recovery</u>. In this particular context, the benefit received can, in any event, normally be described as having been received at the plaintiff's expense in the sense that, but for the mistaken failure to implement the arrangements in

question, the benefit would have been received by the plaintiff. [Emphasis added; p. 35-21.]

I agree. In this case, given the fact that Michelle held up her end of the bargain, kept the policy alive by paying the premiums, did not predecease Lawrence, and still did not get what she actually contracted for, it seems artificial to suggest that her loss was anything less than the right to receive the entirety of the insurance proceeds.

[50] From this perspective, it is equally clear that Risa's enrichment came at Michelle's expense. It is not only that Michelle's payment of the premiums made Risa's enrichment possible — something which the application judge found to be the case: "The change of designation, and [Risa's] later receipt of the proceeds of the Policy, would not have been possible but for [Michelle's] performance of her obligations under the agreement" (para. 48). What is more significant is that Risa's designation gave her the statutory right to receive the insurance proceeds, the necessary implication being that Michelle would have no such right *despite* the fact that she had a contractual entitlement, by virtue of the agreement with Lawrence, to remain named as beneficiary. Because Risa received the benefit that otherwise would have accrued to Michelle, the requisite correspondence exists: the former was enriched at the expense of the latter.

[Emphasis in original.]

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.

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.