Wills & Estates
Winter Term 2022

Lecture Notes – No. 4

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.)

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.184, 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.

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. . . . [R]estitution of benefits received from third parties may well provide a basis for recovery. 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, p.188

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.**
> …
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> 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.
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> 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.