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Estate Planning Updates

July 2007

Recent Cases

An overview of recent developments regarding the court's treatment of property held jointly by parents and children, and the duty to adequately provide for married spouses, former married spouses, common-law spouses, and other dependants on death.

Holding Property With Children Can Be Risky

The Supreme Court of Canada's decisions in *Pecore v. Pecore*[1] and *Madsen Estate v. Saylor*[2], released on May 3, 2007, stand as a stark reminder that parents should never add a child's name onto bank accounts or other property without proper legal advice, as few other issues cause as much conflict in the administration of estates.

In *Pecore,* the Supreme Court acknowledged that there are legitimate reasons why parents transfer property into joint names with children, including assistance with financial management, simplification of estate administration, and avoidance of probate fees payable on death. Property held jointly passes "by right of survivorship", meaning that ownership of the property passes to the surviving joint owners automatically on the death of any joint owner. Therefore, whenever property owned by a parent is transferred into joint names with one of his or her children, it raises questions about whether the parent intended to have the property go to the child/joint owner alone, or intended to have such property distributed according to his or her Will. This uncertainty can result in expensive and hurtful conflicts, especially since the Will often divides the parent's estate amongst all of his or her children equally, the now-deceased parent has failed to make his or her intentions with respect to the jointly-owned property clear while living, and the child/joint owner believes the property is intended to be theirs alone.

Justice Rothstein's judgment in *Pecore,* delivered on behalf of eight out of nine of the Supreme Court Justices, made a definitive statement as to how courts must deal with such cases. It is now the law in Canada that whenever a parent gratuitously transfers property into joint names with an adult child, the court will presume that the property so transferred is not intended to pass to such child on the death of the parent, but is intended to form part of the deceased parent's estate to be distributed in accordance with his or her Will. If the child/joint owner asserts that the jointly held property was intended to pass to them alone on the death of the parent, the onus is on the child to prove that this was the parent's intention on a balance of probabilities.

While *Pecore* clarifies how courts must deal with such cases in the future, the decisions in both *Pecore* and *Madsen Estate* reveal that disputes regarding bank accounts will remain expensive to litigate and difficult to decide, as the parent is not around to clarify their intention, and there is usually little evidence of intention left behind. Both cases demonstrate that the evidence usually available in such cases, namely, who controlled the accounts, how the property was used, who paid the taxes, and the language of the bank documents, do little to illuminate the intention of the deceased parent. Of the two cases, *Madsen Estate* is the better example

of the risks, as it was a scenario which remains all too common. Here one of three children was added to an investment account likely for convenience, the child/joint owner asserted that the parent intended the remaining $185,000.00 to be all theirs, the Will divided the estate amongst the children and grandchildren, the other children contended the account was to be divided the same way as the estate under the Will, the deceased parent failed to make their intentions clear, and the result was eight years of expensive and emotional litigation.

Some good news arising from the *Pecore* decision is that even though assets held jointly are presumed to be distributed as part of one's estate, the value of such assets will continue to be excluded from the estate in applications for probate, and will not be subject to the estate administration tax… for now. It is always open to the Ontario Government to introduce legislation which will cause such assets to be included for probate and taxed.

If anything is to be learned from the *Pecore* and *Madsen Estate* decisions it is this: holding property jointly with one's children remains a risky proposition without proper legal advice and without making one's intentions with respect to such property completely clear. If a parent decides to hold property jointly with a child, they must document their intention with respect to this property, either in their Will, or in a separate document kept with their Will or other personal papers.

The Estate Plan Must Provide for Dependants

The general rule in Ontario is that individuals are free to dispose of their estate by a valid Will in any manner they wish upon their death. The two major exceptions to this general rule are the rights of married spouses under the *Family Law Act*[3], and the rights of dependants to adequate support out of the estate under Part V of the Succession *Law Reform Act*[4].

Historically the law has required that married spouses are, at a minimum, entitled to each others' estates to the extent of their entitlement in a divorce. Where a spouse who dies with a Will has not provided at least this amount to the surviving spouse, the survivor may elect under section 6 of the *Family Law Act* to take the share of the deceased spouse's estate they would be entitled to in a divorce. With respect to the claims of dependants, recent decisions such as the Ontario Court of Appeal's in *Cummings v. Cummings*[5] and the Superior Court of Justice's in *Perilli v. Foley Estate*[6] have clarified how the entitlement of a dependant is determined.

Whenever a deceased has not adequately provided for the proper support of any of his or her dependants, and such dependant(s) apply for support from the estate, the court may order that the amount which it considers adequate for the support of such dependant(s) be paid out of the estate. In order to be a dependant, one must be a member of a specific class, namely, a spouse (including common-law) or former married spouse, parent, child, or brother or sister of the deceased, to whom the deceased was providing support, or was legally obligated to provide support, immediately before his or her death.

Where the court determines that an applicant is a dependant of the deceased, the court must next

determine what adequate support for the applicant would be. The court is given a long list of factors to consider. These address the needs of the applicant, the nature of the applicant's relationship with the deceased, and the contributions and support provided by the applicant to the deceased. In *Cummings v. Cummings* the Ontario Court of Appeal confirmed that the determination of adequate support is not limited to a needs-based economic analysis, and that moral considerations are relevant to the exercise. Therefore, when applying the statutory factors to determine what adequate support is in any given case, the court must consider:

> (a) what legal obligations would have been imposed on the deceased had the question of provision arisen during his or her lifetime; and,
>
> (b) what moral obligations arise between the deceased and his or her dependants as a result of society's expectations of what a judicious person would do in the circumstances.

In *Perilli v. Foley Estate* the court helpfully summarized the process to determine a dependant's entitlement. The court must first identify all of the dependants who may have a claim on the estate. Then, the court must tentatively value the claims of those dependants by considering the factors set out in the legislation and the legal and moral obligations of the estate to the dependants. Thereafter, the court must identify those non-dependant persons who may have a legal or moral claim to a share of the estate. Lastly, the court must attempt to balance the competing claims to the estate by taking into account the size of the estate, the strength of the claims, and the intentions of the deceased in order to arrive at a judicious distribution of the estate. This exercise may involve the prioritization of the competing claims.

In considering the freedom to dispose of one's estate by Will and the rights of spouses and dependants, three practical conclusions come to mind:

1. Individuals must provide adequately for married spouses, and they must provide adequately for former married spouses and common-law spouses to the extent such spouses are dependants.

2. Individuals remain free to exclude other potential beneficiaries such as adult children and more distant relatives provided they are not dependants under the *Succession Law Reform Act*.

3. In considering dependants such as beneficiaries with disabilities, it is not enough to provide only for their ongoing bare needs, but for what society expects a judicious person would do in the circumstances. This might require providing a greater share of the estate to a dependant adult child with a disability, both because he or she needs more, and because the moral duty to provide for him or her is greater.

1 2007 SCC 17
2 2007 SCC 18
3 R.S.O. 1990, c. F.3
4 R.S.O. 1990, c. S.26
5 (2004), 69 O.R. (3d) 397
6 2006 CarswellOnt 719, 24 R.F.L. (6th) 99, 23 E.T.R. (3d) 245

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Pallett Valo LLP Wills, Estates & Trusts Group

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