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Beneficiary Designation Challenges and the Resulting Trust Presumption

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The issue of whether the resulting trust presumption applies to beneficiary designations is controversial. In *Calmusky v. Calmusky*,[1] the court concluded that a registered retirement income fund (RRIF) went to the plan owner's estate for distribution under his will and not to the named beneficiary under the resulting trust presumption.[2] Since *Calmusky*, three new court decisions have been released on this issue. These decisions are *Mak (Estate) v. Mak*,[3] *Fitzgerald v. Fitzgerald Estate*,[4] and *Simard v. Simard Estate*.[5]

In *Mak* and *Fitzgerald*, the courts reached a different result than the court in *Calmusky*. In *Mak*, the court concluded that a RRIF beneficiary designation prevails over the resulting trust presumption. Similarly in *Fitzgerald*, the court found that the resulting trust presumption did not apply to a tax-free savings account (TFSA). However, in *Simard*, the court took a divided approach.

While *Mak* and *Fitzgerald* are helpful, uncertainty about beneficiary designations remains. *Simard* demonstrates that documenting Clients' intentions with clear and detailed notes is essential.

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[1] 2020 ONSC 1506. (*Calmusky*)

[2] For a discussion of the resulting trust presumption and the *Calmusky* decision, please see: Sanjana Bhatia, "*Calmusky v. Calmusky*, 2020 ONSC 1506 – Beneficiary Designations in a Possible State of Uncertainty," December 2020, Insurance Tax Solutions, Sun Life Advisor Site.

[3] 2021 ONSC 4415. (*Mak*)

[4] 2021 NSSC 355. (*Fitzgerald*)

[5] 2021 BCSC 1836. (*Simard*)

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***Mak* and RRIFs**

Tai-Kiu Mak (Tai-Kiu) had four sons: Raymond, Eddie, Steve and Kenny. On her death, Tai-Kiu left various assets including a RRIF in which she named Kenny as the sole beneficiary. Raymond, Eddie and Steve brought a court action against Kenny after they discovered that Tai-Kiu had left a significant part of her estate to him. As in *Calmusky*, the brothers argued that Tai-Kiu's RRIF (and the rest of her assets) belonged to her estate under the resulting trust presumption.

The court concluded that the RRIF beneficiary designation in favour of Kenny must prevail, and that the resulting trust presumption did not apply. It stated that there is good reason to doubt the conclusion that the resulting trust presumption applies to a beneficiary designation. The resulting trust presumption is meant to apply to gifts made during a parent's lifetime, not to assets transferred *after* the parent's death (as they do with beneficiary designations).

The court also noted that *Calmusky* has been "ruffling some feathers among banks and financial advisors and estate planning lawyers in Ontario," presumably because "there is usually no need to determine 'intent' behind a [beneficiary] designation."[6] For example, Ontario's *Succession Law Reform Act* (SLRA)[7], expressly permits for the naming of designated beneficiary on "a plan" (which include RRIFs, TFSAs, registered retirement savings plans, locked-in retirement accounts, and deferred profit sharing plans). The SLRA also states that an institution administering the plan must pay it out under the beneficiary designation on the plan owner's death.[8]

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[6] See, however, *Knowles v. Leblanc*, 2021 BCSC 482, in which the court examined the life insured's intention concerning a life insurance beneficiary designation. In *Ray-Ellis v. Goodtrack et al.*, 2021 ONSC 3102, in concluding that a photocopy of a later beneficiary designation was valid, the court considered the plan owner's intention behind a LIRA beneficiary designation.

[7] Section 51(1).

[8] Section 53.

Fitzgerald and TFSAs

In *Fitzgerald*,[9] a father named his daughter, Maureen as the beneficiary of his TFSA. When the father passed away, the father's son (Michael) challenged the designation. Michael argued that the resulting trust presumption applied to the TFSA and, therefore, the TSFA goes to the estate.[10]

The court followed the reasoning in *Mak* and differed with the court in *Calmusky*. The court articulated several reasons why the reasoning in *Calmusky* on joint accounts should not apply to TFSAs:

- A TFSA is not held jointly.
- A TFSA is not transferred during a transferor's lifetime, but is transferred at death.
- The beneficiary designation is a contract that binds the institution where the funds are held, with legislation that not only requires the funds to be paid to the person designated but also entitles that person to receive the funds.
- There is no access to the funds by the designated beneficiary prior to death.
- The designated beneficiary is not a fiduciary.
- A beneficiary designation is akin to a testamentary document, that is a will.

The court also concluded that the resulting trust presumption did not apply to a TFSA account for the following reasons:

- the resulting trust presumption often frustrates the transferor's intention, creates transactional uncertainty, and poses evidentiary challenges for the transferee,
- applying the resulting trust presumption would be contrary to the right to receive proceeds from accounts upon the holder's death under section 9 of the *Beneficiaries Designation Act*,[11] and
- to impose the resulting trust presumption would frustrate the legislative intention to simplify the transfer of funds to the beneficiary.

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[9] Supra note 4.
[10] Maureen was also named as the sole beneficiary on her father's joint account. However, she agreed that the joint account goes to the estate.
[11] RSNS 1989, c. 36.

Therefore, the court ruled that the TFSA belonged to Maureen as the named beneficiary, and did not form part of the estate under the resulting trust presumption.

Simard and Documenting Clients' Intentions

While *Mak* and *Fitzgerald* are comforting decisions, greater certainty is needed around beneficiary designations. A solution would be for the provinces to amend their relevant legislation to clarify that the resulting trust presumption does not apply to beneficiary designations. Several bodies have made proposals to the Ontario Ministry of Finance recommending the addition of sections to Ontario's *Succession Law Reform Act* and *Insurance Act* to clarify that the resulting trust presumption does not apply to beneficiary designations.[12]

It's important to continue to document Clients' intentions when they designate a beneficiary. As stated above, in *Simard*, the court took a divided approach. For registered accounts where the plan owner's intent to gift the accounts to her daughter were documented in the investment advisor's notes, the court found that the resulting trust presumption did not apply. However, for registered accounts where advisors' notes were not on file and there were only account statements identifying the daughter as beneficiary, the court found that this was insufficient in rebutting the resulting trust presumption. In other words, account statements simply naming the daughter as beneficiary did not suffice. *Simard* further demonstrates that maintaining clear and detailed notes is essential.

[12] These bodies include the Conference for Advanced Life Underwriting, the Canadian Life and Health Insurance Association, Advocis, the Society of Trust and Estate Practitioners, and the Ontario Bar Association. At the time of writing, the author is not aware if organizations in other provinces have made representations or proposals to amend their legislation. If Ontario is successful, it is quite possible that the other provinces will follow suit.

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Clients can also prepare a letter of intent, including their reasons for choosing a particular beneficiary, their reasons for excluding other family members, their lack of intention to create a resulting trust, and their desire that the proceeds are to pass to the named beneficiary outside of the estate. Clients can also be encouraged to share their estate plans with family members. As the court articulated in *Morrison Estate (Re)*,[13] "[c]ertainty is far better than entering the world of secret trusts."

[13] 2015 ABQB 769.