Case Comment

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Re: The resulting clarity: designated plan assets 'result' back to the Estate…maybe.
Case comment on *Re Morrison Estate,* 2015 ABQB 769, 2015 CarswellAlta 2249

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I. KEY FACTS IN THE *RE MORRISON ESTATE* CASE

As we prepare for 2016, there is little doubt that this is one of the important estate decisions of 2015. But first, some context: What was this case about? Then, What is the impact? What should you tell your clients? (spoiler: it may *significantly* alter you advice about accounting to beneficiaries)

On December 8, 2015, Mr. Justice Graesser of the Alberta Court of Queen's Bench released his ruling in this interesting estate case. The case is about the disputed ownership of a Registered Retirement Income Fund (RRIF). The question boiled down to these issues: Is the RRIF an asset that flows into the Estate (to be divided amongst the Estate's residuary beneficiaries)? Or, do the RRIF funds go to the person named by the Deceased, pre-death, as a beneficiary on the designation/declaration form?

The essential facts are not complicated, and are as perennial as grass in estate litigation matters. The Deceased, John Morrison, died in November of 2011, leaving four surviving children at his death: Robert, Douglas, Cameron, and Heather. In his March, 2002 professionally prepared Will, John named his children, Douglas and Heather, as alternate joint Personal Representatives (Executors) in the even his wife pre-deceased him. His wife predeceased him in June of 2002, mere months after the Will.

Mr. Morrison apparently had a history of *inter vivos* gifts. The case report highlights an $11,000 loan to his son, Robert, which the Will declared an advance on Robert's distributive share. And, just before his death Mr. Morrison's home was sold and an *inter vivos* distribution of some of the net sale proceeds amongst his four children ($25,000 apiece) was effected. That distribution became a fulcrum for some of the unusual aspects of this decision.

While Douglas and Heather (Personal Representatives) undertook their work, they learned that Mr. Morrison had designated Douglas as his beneficiary on a RRIF. In July of 2002 (about a month after his wife's death and 4 months after he made his Will), Mr. Morrison signed a designation form listing Douglas as his beneficiary to en employment-related RRIF valued at $72,683 at his death. Largely because of his *inter vivos* generosity in this modest estate, the RRIF was the largest remaining asset Mr. Morrison owned at the moment of his death after payment of about $30,000 in taxes on the other liquid assets (made up of $77,000, apart from the RRIF, in bank accounts and insurance proceeds to the Estate).

The tax payment issue was a tangential feature of the case that appears to have concerned the Court. In effect, the Estate paid all the taxes, and Douglas received the RRIF proceeds intact. The other Estate beneficiaries (and the Court) were unhappy about that. However, I suggest that this is not all that relevant to the key question of ownership, despite the paragraphs the Court devotes to the tax payment.

So, what does the Court do with the RRIF?

II. RESULTING CLARITY (TRUST) FOR DESIGNATABLE ASSETS

Douglas' sibling, Cameron, challenged the RRIF designation on two fronts:

- No fair 'bargain': Douglas gave no consideration to Mr. Morrison for the RRIF money.

- No intent: Douglas did not prove that Mr. Morrison *intended* to "gift" the RRIF to Douglas entirely, to the exclusion of the other children/Estate beneficiaries (Cameron argues that the Will and the distribution of the house proceeds in 2011 both show intent for equal distribution amongst all four children, rather than favouring Douglas).

The Court considered these questions in the context of the well-understood principles from the Supreme Court of Canada's *Pecore* case (2007 SCC 17, 2007 CarswellOnt 2753, 32 ETR (3d) 1).

Some background on *Pecore*: when an adult independent child receives a benefit in such circumstances, the benefit is deemed by operation of law automatically to "result back" to the benefactor *ab initio* into a "resulting trust" (i.e. the transaction is reversed through the Delorian time machine known as "equity," back to the moment immediately before it arose, and the 'resulting trustee' must fully account for the trust *corpus*).

The primary reason for this result (or 'default rule') is rooted in fairness and consistency. The sole contributor to an asset is, in equity, its beneficial owner (when a recipient of bare title gave nothing for it). That is both the presumption and result. To rebut it, the *recipient* must positively prove that, notwithstanding the lack of value given by them, the person establishing the asset *intended* (in actual fact) to make a "gift" of the asset to the recipient; only then may its property pass beneficially to the recipient.

In *Re Morrison*, Mr. Justice Graesser reviewed the law of resulting trust, both predating and post-dating *Pecore*. The Court sketched out the two alternatives, and the stakes of the result.

Douglas cited a pre-*Pecore* case, *Nelson v. Little Estate*, 2005 SKCA 120 (mere lack of consideration does not void an otherwise-valid beneficiary designation on a designatable plan, and resulting trust should not apply at all to such assets in Alberta). Cameron, on the other hand, relied on pre-*Pecore* law holding that beneficiary designations on life insurance policies (as in *Dreger v. Dreger*, [1994] 10 WWR 293 (MBCA)) and annuity payments (as in *Neufeld v. Neufeld*, 2004 BCSC 25) are subject to the resulting trust doctrine.

The Court, for its part, noted the impact of its decision affects "the investment and brokerage industry," and also RRSPs, RRIFs, and life insurance policies "that have designated beneficiaries instead of the proceeds going to the owner's estate." In fact, Justice Graesser finds that "there has always been the potential issue of a resulting trust being imposed in the event of a gratuitous and unexplained beneficiary designation." So why all the fuss?

Justice Graesser finds that it is *Pecore* that has broadened the risk. Before *Pecore*, adult children benefitting from such a document would be subject to the presumption of advancement (i.e. presumed intent to gift). Since *Pecore*, any *non-spousal* designation/declaration will be presumed to result to the Deceased's estate, unless rebutted by *proof* of the Deceased's intent to make a "gift" of that designation/declaration. The level of proof a recipient must establish in an estate litigation matter is, of course, held to the the "corroboration" standard of s. 11 of the Alberta *Evidence Act* (for an excellent discussion of meeting the necessary standard to prove a gift, as compared to the Court's inherent duty to protect the Deceased/Estate's interests, see: *Burns Estate v. Mellon*, 2000 CanLII 5739, 2000 CarswellOnt 1990 (ONCA)).

Post-*Pecore* there is little law on the subject.

So, what will an Alberta court *do* with designatable / declarable assets (life insurance, RRSPs, RRIFs, TFSAs, etc) in the post-*Pecore* world of estate law?

In *Re Morrison Estate,* the Court in effect finds that a RRIF designation, like other designatable assets, can be subject to the resulting trust doctrine. The definition of "plan" under the *Wills and Succession Act* (s. 71) sets the bounds of the *Morrison* decision. That provision defines a very broad array of assets or "plans" over which the testator holds power to appoint a beneficiary.

Mr. Justice Graesser confirms that similar treatment should apply to all such "plans," and that there is "no sound policy reason why beneficiary designations under RRSPs, RRIFs and insurance policies should not be treated in a similar fashion to beneficiary designations under a will. None of these 'gifts' takes effect until the death of the owner of the plan or policy." There is no special reason why designations are *inter vivos,* as opposed to testamentary, dispositions. Even despite the fact that they are closer to the latter insofar as they confer no *inter vivos* property interest (*cf.* joint accounts or joint dispositions, for instance), in the Court's view plan designations may be subject to a presumed resulting trust.

In *obiter*, the Court ponders the rationale for why holograph Wills ("a few handwritten notes on the back of a cigarette package signed by the testator" as the example) are treated in law as a valid testament, if plan designations (witnessed by someone) are not treated the same way. While interesting, this comparison is, in my respectful view, inapt and overlooks the policy roots of holograph Wills and their inherent reliability.[1]

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[1] For a more elegant review of these "roots" of holograph Wills, much closer to my own, see this interesting story: http://globalnews.ca/news/926746/dying-sk-farmers-will-goes-down-in-history/

Although the *Re Morrison Estate* decision notes that this may be "one of the unintended consequences of *Pecore v. Pecore*" — and Mr. Justice Graesser is expressly (repeatedly) reluctant to apply *Pecore* and would have preferred to follow the *Nelson v. Little Estate* case above — his decision ultimately follows *Pecore* and finds that all designations of designatable plans are subject to the presumption that their base assets "result" to the plan owner on death, absent rebuttal of that presumption by corroborated proof established by the recipient to show the owner's intent to create a "gift" of the asset.

Justice Graesser re-anchors his analysis firmly in equity, following the *Dreger v. Dreger* case from the Manitoba Court of Appeal (which in turn followed *In re A Policy No. 6402 of the Scottish Equitable Life Assurance Society*, [1902] 1 Ch. D. 282). As that line of authority establishes, designatable assets are, at least *prima facie,* viewed in the recipient's hands as "a purchase by one in the name of another with no other circumstances proved."

So, how did the Court apply this law?

The Court reviewed, and largely dismissed, the affidavit evidence from Douglas that summarised the history of Mr. Morrison's apparent favouritism shown to Douglas, as opposed to Cameron (and the reasons why Cameron was essentially less deserving of the gift and Douglas more so). This evidence was not relevant or helpful to the question of rebutting the resulting trust presumption by showing Mr. Morrison's *intent* to *gift* the RRIF. It also overlooked why Mr. Morrison would favour Douglas over the other children, whom he treated equally in the Estate but not in the RRIF.

What *was* relevant were the following facts:

- The designation form. It was witnessed when signed in July of 2002. However, no evidence was presented about either the witness or the circumstances of signing the document. It was part of a transfer of funds from a then-existing investment certificate and somehow was related to Mrs. Morrison's estate administration. Under "remarks," it stated: "Estate settlement, death cert already on file." Douglas' testimony is that it was owned by Mrs. Morrison (Mom) and inherited by Mr. Morrison (Dad) when Mrs. Morrison died.

- The RRIF was a significant portion of the Estate assets. But-for the RRIF, there also would have been little tax payable by the Estate (and the Estate was taxed, by deemed disposition, for the RRIF's value despite its beneficiary receiving the funds outside the Estate, which resulted in a shortfall in the residuary beneficiaries' interests — this fact appears to have troubled Justice Graesser, who called this circumstance "manifestly unfair" (foreshadowing the result).

- There was "no evidence here as to why Mr. Morrison did what he did." The Court presumed, absent evidence, that Mr. Morrison was aware of and intended his decision. The Court noted that "beneficiary designations should be made with full knowledge of the benefits and detriments as to the consequences of making a designation or not making a designation" (this will be explored below, with recommendations).

- The available evidence did permit Justice Graesser to conclude that Mr. Morrison intended Douglas to inherit the RRIF proceeds (to avoid the application of a resulting trust). It was expressly "a very thin finding," at "50.01%" in favour of Douglas. The following evidence was salient to show a "gift" was intended:

- The evidence was somewhat conflicting. Mr. Morrison did treat all his children equally in his Will. The RRIF is the "aberration," and it came as a surprise to all, including Douglas.

- Douglas was closest to his father.

- The fact of making a designation at all was, itself, (apparently) some evidence of intent to favour Douglas in the context of this estate plan (equal division amongst the residuary beneficiaries).

- If Mr. Morrison *had* intended it to go to his Estate, he knew who to designate: Douglas *and* Heather. They were already selected by him as his Personal Representatives under his Will that he made a few months prior.

- Justice Graesser distills the key facts down to the following factors that gravitate to proving a "gift" was intended:

    1) Douglas and his father had a close relationship at the time of the designation.
    2) Douglas helped his father out after his mother's death.
    3) The designation was made close to the time Mr. Morrison made the Will naming Douglas and Heather his Personal Representatives (see above).

The treatment Mr. Justice Graesser applies to the Estate taxes is a surprising aspect of this decision. The Court found itself compelled to even out the tax consequences of Douglas inheriting the RRIF asset although the Estate beneficiaries (the four children equally) paid the taxes arising from it.

While recognising that there was no evidence of the testator's intent, the Court invoked equity to repair what it viewed as a "manifestly unfair" tax result, and found that Mr. Morrison "must have been under the impression or understanding that Douglas would bear any tax liability on the RRIF and no burden would fall on his Estate." The Court "inferred" that the testator would have intended Douglas' receipt of the RRIF funds to be conditional on payment of the taxes for those funds out of the RRIF.

The Court reviews section 39 of the *Wills and Succession Act* to possibly "rectify" this unfairness. It then reaches into the *Judicature Act* for its inherent equitable jurisdiction to do so.

As the Court itself notes, the former section 39 power, as applied to the *Re Morrison Estate* facts, appears quite dubious. Section 39 requires "clear and convincing evidence that the Will does not reflect the testator's intention" because of enumerate grounds, such as accidental slip, misunderstanding, or similar failings. As the Court noted, no such standard of evidence was available in *Re Morrison Estate*.

The *Judicature Act* has no similar restriction or evidentiary burden (only balance of probabilities). Justice Graesser applied section 8 of the *Judicature Act* to "fashion a remedy" to cause Douglas to reimburse the Estate for the taxes payable as a result of the RRIF, apparently because Douglas is otherwise "unjustly enriched" (although it appears that the Court did not consider whether the contractual power of appointment exercised by Mr. Morrison, or Mr. Morrison's apparent intent to "gift" as found by the Court earlier in the decision, were "juristic reasons" otherwise barring that finding).

And yet, while the decision may still be reviewed by a higher court, and despite Justice Graesser's comments that it is neither intended as a "definitive" decision nor to find that *Pecore* applies to designations for RRIFs and like assets, in practical effect it does firmly establish that designatable assets are subject to the Supreme Court's *Pecore* ruling and presumption of resulting trust in favour of the Estate.

It does appear that the tax aspect of the *Re Morrison Estate* decision, in particular, is not as well grounded in established principles and Justice Graesser recognises that it "may be viewed as extraordinary." Regardless, some key lessons are evident.

III. LESSONS LEARNED & RECOMMENDATIONS

What began as a fairly typical estate matter has become a useful comparator. I would suggest that the lessons from *Re Morrison Estate* can be distilled into at least the following comments:

- **Documenting Intent:** Estate litigation between the beneficiaries, after your client's death, may be avoided by properly documenting the testator's intent, at the relevant time. I suggest, for example, preparing documentation that accompanies and provides context for the typical designation/declaration forms for designatable assets such as life insurance, AD&D insurance, RRSPs, RRIFs, TFSAs, annuities, and similarly designatable accounts and plans.

- **Practice Tip:** It is also advised that you create careful notes and checklists for your file, to confirm the key aspects of testator intent, which will likely assist in resolving later potential litigation. Such notes may include specific elections between classes of beneficiary, rationales, tax consequences and decisions, and (where applicable or useful) specific quotes from the testator of her/his general intent and specific intent in relation to the relevant designatable assets.

- **Liability for Payment:** If you are advising a Personal Representative (Executor), or an institutional client, or professional trustee, it may be sound practice to recommend that no settlement or payment of funds under their control be made in circumstances of any potential or actual challenge to the ownership of *any* designatable assets, absent releases executed by all beneficiaries (which of course must be on a fully-informed basis, as to the assets and disposition). In short: they may otherwise end up 'paying twice', when the transaction is subsequently discovered by a concerned beneficiary.

- **Tax Intent:** If specific tax treatment is intended, such as payment of taxes accruing to the Estate as a result of ownership, at death, of a specific asset or asset class, such tax treatment (e.g. payment of the taxes by the specific beneficiary of such an asset) should be clearly documented in some fashion (whether in the testamentary instruments or collateral documents). That may avoid the surprising and unpredictable results a court of equity may apply, as it did in *Re Morrison Estate*.

- **Accounting Issue:** Because designatable assets are subject to a presumption that they result back to the Estate by resulting trust, it is wise to advise your Personal Representative clients that they have an obligation to account to the beneficiaries (both the specific designee and residuary beneficiaries) for such interests, even if contingently.