

Legal presumptions have merit, say rulings

Supreme Court clarifies joint account issues

BY HELEN BURNETT
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A pair of Supreme Court of Canada decisions may have helped clarify the law surrounding joint accounts, but lawyers in the estates area say account holders still need to make their own intentions clear.

In the companion decisions handed down May 3, the court addressed the question of how joint bank accounts are to be treated by the courts when one of the account holders passes away.

In *Pecore v. Pecore*, on appeal from the Ontario Court of Appeal, defendant Paula Pecore held joint accounts with her father. After his death, she redeemed the balance in the joint accounts on the basis of a right of survivorship.

When Pecore and her husband, Michael, the appellant, divorced and a dispute over the accounts arose during their matrimonial property proceedings, he claimed that the balance in the accounts formed part of the residue and should be distributed according to the will.

The trial judge held that the father intended to make a gift of the beneficial interest in the

accounts to his daughter alone, concluding that the evidence failed to rebut the presumption of advancement, or the presumption that it was a gift. The Supreme Court dismissed the appeal.

In the companion case *Madsen Estate v. Saylor*, also on appeal from the Ontario Court of Appeal, appellant Patricia Ann Brooks was a joint account holder with her father, while the father retained control of the bank accounts. Following the father's death, the appellant's siblings commenced litigation against her, as she did not include the accounts in the distribution of the estate.

The trial judge found that there was no evidence to support Brooks' position that her father intended to give the joint accounts to her as a gift and held that they should be included in the father's estate. The Court of Appeal affirmed the decision and the Supreme Court dismissed the appeal.

In her reasons in *Pecore*, Justice Rosalie Abella wrote: "The trial judge, who was upheld in the Court of Appeal . . . applied the presumption of advancement



Ian Hull says although the court says documentation of people's intentions is a must, there's still debate of what exactly proper documentation is.

and concluded that the father's intention was to make a gift of the money to his daughter. In the companion appeal, *Madsen Estate v. Saylor*, the daughter's entitlement to the funds was challenged by her siblings. The trial judge applied the presumption of resulting trust rather than the

presumption of advancement, and concluded that the father had not intended to make a gift to his daughter.

"The issue in both appeals is which presumption applies and what the consequences of its application are."

Ian Hull, of Hull and Hull LLP, which handles estate litigation, says the court has done a great service in bringing some certainty to the joint account situation.

"They've said that the legal presumptions have some real merit in the whole analysis.

"I like the idea that we're allowed to sort of rely on the existing presumptions, only because the courts and lawyers are most comfortable with that," he says.

Similarly, Lorne Silver, of Cassels Brock & Blackwell LLP, who represented the respondents in *Madsen Estate*, says this is an area of law that was not clear before these two decisions.

He adds that the most important point is that the Supreme Court has made it clear that if a parent puts an adult child on a joint bank account, if the parent intends to gift that money to the child or to the estate after the parent passes away, they should make that intention perfectly clear to avoid costly litigation.

"What the court has said is that in a situation where the parent transfers or puts the adult child on the bank account, the

presumption of resulting trust will apply, which means, unless the presumption is rebutted, the money in the joint account will go to the estate and not the individual at the time of death," says Silver.

Andrew Robinson, of Miller Thomson LLP, who represented the husband in *Pecore*, says the decision gives guidance as to the kind of evidence that should be relied upon by courts in determining a donor's intention.

Hull notes the decisions do not change the expectation that lawyers have to find out what the intention of their clients are when they establish joint accounts.

He adds, however, although the court says individuals must have documented their intentions well, there is a lot of debate as to what proper documentation is, which creates a bit of uncertainty.

"In all events, the word out to the people making the transfers is make sure that, whatever you do, there's a documentary record ensuring that your intention is clear, and that'll avoid these lengthy estate battles to determine what somebody who is deceased intended to do at the time that the transfer was made," says Silver.

"I think it's significant, especially to the trusts and estate bar that have been looking for more certainty in this area of law for a long time. It should reduce expensive, costly, and unpredictable litigation in this area of the law," he adds. **LI**