DAUNAIS McKAY + HARMS
BARRISTERS + SOLICITORS

Patricia L Daunais, Q.C.
March 2021

The Thunderbolt Decision in Calmusky

Give me a vision when I got none
And the thunderbolts in each hand of my own
For I'm comin' back to level
Everythin' they taught us wrong
Onto transmigration*

Dub the Frequencies of Love by Gogol-Bordello

Ever so often in the staid and respectable land of legal precedent and common law a case is handed down that turns settled law on its head. Frequently it's a charter challenge, but sometimes it's just taking the law as we know it and extending it to everyday situations. *Calmusky* v. *Calmusky,* 2020 ONSC 1506 is such a decision.

This case from central Canada extends the as law of *Pecore v. Pecore*, 2007 SCC 17 from estates dealing with joint bank accounts to designated assets, in this case, a Registered Income Fund (RIF).

There has been a great deal of controversy regarding this extension and calls for legislative intervention in Ontario. I am at a loss as to why.

For example, it is now settled law thanks to the SCC decision in *Moore v. Sweet,* 2018 SCC 52 that when a deceased person assigns insurance policy proceeds to his spouse, but previously had promised them to an ex-spouse, the proceeds will not go to the spouse, despite the designation to the spouse, but instead the proceeds would be awarded to the ex-spouse on the basis of unjust enrichment.

In *Pecore* an aging father gratuitously placed over a period of years his mutual funds, bank accounts and an income trust in a joint account with his daughter. The court applied the presumption of resulting trust and placed the burden of proof on the daughter to demonstrate a gift. The court held that the presumption of advancement, that is, the legal principle that a transfer of assets was presumed to be a gift, no longer applied to adult children.

Why should RIFs, pension plans, life insurance policies and other assets, be any different?

In *Calmusky* the bank accounts were held to revert to the father's estate, as the son could not show evidence of a donative or gifting intent on behalf of the father. And then came the

thunderbolt: the court determined that the rule in *Pecore* applied to the RIF. The learned Justice stated:

"*I see no principled basis for applying the presumption of resulting trust to the gratuitous transfer of bank accounts into joint names but not applying the same presumption to the RIF beneficiary designation ".*

There has been much legal comment that beneficiaries of RIFs, pension plans, life insurance policies etc. are no longer protected. That financial planners can no longer use them in estate planning or that affidavits of execution will now have to be attached. Respectfully I submit this is not the case. In fact, the ruling in *Calmusky* does the opposite in many respects. It helps to stop the fraudulent designation of beneficiaries by elderly and frail individuals, who are pressured or persuaded by usually a child to designate them and only them. In most cases designated assets will still pass to be the named beneficiaries. However, beneficiaries who have been ousted from their fair share by a scheming sibling, child, caregiver, relative or friend will now have an opportunity to set aside the designation. Now a party who has been wronged or who believes they have been wronged can have their day in court. A possible remedy now exists where one previously did not.

The *Calmusky* decision was never appealed, and to date it has only been referred to in one case - not on the issue of designated beneficiaries but that of occupation rent (Estate of Charles v. Charles, 2020 ONSC 1506).

Patricia L. Daunais, Q.C.

.