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ARTICLE: Recent Decisions Add Pieces to the Puzzle of Joint Ownership

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The recent decision of the Ontario Court of Appeal in *Mroz v. Mroz*[1] expands on the principles elucidated in *Sawdon Estate,*[2] and adds to the body of jurisprudence dealing with evidence of a testator's intentions. Kay Mroz was a widow who had a daughter, Helen, two grandchildren (Adrianna and Martin) from a son who died several years earlier, and a nephew, Richard, who had a wife and three children and who was an integral part of Kay's family.

In 2004, Kay executed a Will. At the same time, she signed a Direction to transfer her home, her only significant asset, into joint ownership with Helen. Although that real estate would have passed to Helen upon Kay's death by the right of survivorship, Kay's Will nonetheless included the following provision:

> "I bequeath my share of the property … to my daughter, Helen Mroz, provided that she pay within one (1) year of the date of my death the following legacies:
>
> (i) The sum of seventy thousand dollars ($70,000.00) to Adrianna Mroz …;

1 (2015), 125 O.R. (3d) 105, 2015 ONCA 171
2 *Sawdon Estate* v. *Watch Tower Bible and Tract Society of Canada* (2014), 119 O.R. (3d) 81, 2014 ONCA 101

(ii) The sum of seventy thousand dollars ($70,000.00) to Martin Mroz ….

These legacies shall constitute a first charge on my property in favour of Adrianna Mroz and Martin Mroz, until the legacies are paid."

Kay's Will also provided for $10,000 legacies to be paid to each of the five members of Richard's family.

Kay died in 2005 leaving an Estate with a value (exclusive of the real property) of approximately $3,200. Upon Kay's death, Helen sold the property and realized approximately $476,000. Helen treated these funds as her own on the basis that the property passed to her by the right of survivorship. She did not pay any of the legacies referenced in the Will.

The trial judge found that Kay possessed the requisite capacity and was not misled or subject to undue influence at the relevant times. The evidence supported the view that Kay was a "strong, intelligent woman" who managed her own finances and was "financially astute".

In the trial decision, the judge referred to the seminal Supreme Court of Canada decision in *Pecore*[3] and held that Helen had rebutted the presumption of a resulting trust. As such, on Kay's death, Helen became the sole owner of the house by right of survivorship. The house did not form part of the Estate. However, the trial judge also held that "[i]t is beyond dispute that Helen knew her mother wanted the legacies paid and knew the deadline for payment". The judge noted that Kay's Will provided for the two $70,000 legacies to form a first charge on the property. Her Honour concluded that the Will made Helen a joint tenant subject to the condition that Helen pay each of Adrianna and Martin a legacy of $70,000 within a year of Kay's death. This, the judge found, created a trust obligation on Helen which she breached. Helen was ordered to pay these two legacies, with interest.

On appeal, the court agreed with the trial judge's conclusion that Helen had breached her trust obligations, and upheld the order requiring Helen to pay the two $70,000 legacies to Adrianna and Martin. However, the Court of Appeal reached this conclusion for different reasons.

The Court of Appeal found that Helen had failed to rebut the presumption of a resulting trust. The Court noted that Kay, being financially astute, would have known that her house was the only asset available to fund the legacies in her Will. As such, the appellate court agreed with the lower court's finding that Kay's intention was that Helen should have full title to the house upon Kay's death and that the legacies be paid from the proceeds of sale of that property. However the Court of Appeal concluded that "once the trial judge found that the sale of the [p]roperty after Kay's death was to be the source of the funds for bequests under the 2004 Will", the trial judge could not find that the presumption of resulting trust had been rebutted. Parenthetically, it is interesting to note that there was ample evidence that Kay understood the fact and consequence of transferring her property into joint tenancy with Helen.

Referring to *Pecore*, the Court of Appeal explained that an *inter vivos* gift of joint tenancy in property includes a right of survivorship and vests immediately, with nothing more to be done to complete the

3 *Pecore* v. *Pecore*, [2007] 1 S.C.R. 795.

gift of beneficial title. But given the trial judge's finding that Kay intended that Helen sell the property after Kay's death to fund the legacies, this was not an *inter vivos* gift, but rather a testamentary disposition.

The Court of Appeal distinguished this case from the situation in *Sawdon Estate*. In that case, a father transferred certain bank accounts into joint ownership with two of his five children. The father made it clear to his children, and his children did not dispute, that the funds remaining in the bank accounts at the father's death were to be distributed equally among all five children. The father's Will did not make reference to the bank accounts. Although the court in that case held that the presumption of a resulting trust had been rebutted, the court concluded that the father's actual intent in transferring the accounts into joint ownership was to impose an immediate trust obligation on the two children who were joint account holders to hold the accounts and distribute the contents equally among all five children upon the father's death. The court reasoned that the father had created an *inter vivos* trust, although execution of the trust would only occur on the father's death. As such, the father's intention at the time of the transfer into joint ownership, in the *Sawdon Estate* case, was entirely different from Kay's intention in the *Mroz* case.

Another recent decision of the Court of Appeal also deals with the problem of assets which are transferred into joint ownership but subject to a different disposition under the terms of a Will. The decision in *Foley v. McIntyre*,[4] addresses many issues, but this discussion will focus on certain Canada Savings Bonds which were owned by the deceased, Edward Foley.

In 1990, Mr. Foley prepared and signed a Will which contained the following specific bequest:

> "To transfer and deliver to my daughter, Dorothy Eileen McIntyre, all Canada Savings Bonds registered in my name only at the time of my death, together with all unpaid and accrued interest owing thereon."

The Will further divides the residue of Mr. Foley's Estate equally between his daughter, Dorothy, and his son, Donald, who are his only children.

In 1996, Mr. Foley opened a joint investment account with his children, as joint tenants. The evidence at trial established that Mr. Foley understood the nature of joint ownership and the right of survivorship and established the joint account with the intention of avoiding probate fees. Mr. Foley later deposited his Canada Savings Bonds into the joint account. He was the only one to make deposits to or withdrawals from the joint account, and both Dorothy and Donald testified that they were not aware that the Canada Savings Bonds had been placed in that account.

Mr. Foley died in 1998 and his Estate redeemed the bonds and distributed the proceeds of approximately $275,000 to Dorothy. Donald argued that the gift of the bonds adeemed when they were deposited into the joint account on the basis that they were no longer "registered in [Mr. Foley's] name only" at the time of his death. While Donald acknowledged that a presumption of a resulting trust applied to this gratuitous gift, he argued that by opening the joint account his father intended whatever property

4 (2015), 125 O.R. 3(d) 721, 2015 ONCA 382.

was in the account at the date of his death to pass by right of survivorship.

The trial judge noted that Mr. Foley established the joint account as a way to avoid probate costs. She held that Mr. Foley retained the beneficial interest in the contents of the account and did not intend to make an *inter vivos* gift of those assets. As such, Dorothy and Donald held the joint account on a resulting trust for their father's Estate. Having not rebutted the presumption of a resulting trust, the assets in the joint account, including the Canada Savings Bonds, formed part of Mr. Foley's Estate. This finding, together with the fact that the bonds remained registered in Mr. Foley's name (despite having been deposited into the joint account), led the Court of Appeal to decide that the bonds would pass to Dorothy pursuant to the terms of the Will.

These cases, and many other cases involving joint tenancy disputes, turn on their facts. As such, the evidence advanced by the litigants takes on particular significance. It is often challenging to adduce evidence of a deceased person's intentions and courts regularly struggle with the task of interpreting the deceased's conduct and its underlying meaning. The difficulty inherent in this exercise was highlighted in the recent Superior Court decision in *Swiderski v. Walsh*.[5] In that case, a daughter successfully rebutted the presumption of a resulting trust in relation to certain bank accounts which she held jointly with her mother. Following her mother's death, her brother challenged the operation of the right of survivorship. The mother's Will provided for an equal distribution of the residue of her Estate between her son and daughter. In coming to its conclusion, the Court considered that the mother had opened a RIF account naming the daughter as beneficiary, and concluded that this was evidence of the mother's intention to treat her children unevenly. There is no indication that the Court considered that having conferred that benefit on the daughter, the mother might want the balance of her Estate to be divided equally between her children.

Similarly, the Court considered that the mother had provided a generous wedding gift to her son, without any equivalent gift to her daughter. The Court found that this was further evidence of the mother's intention to treat her children unevenly. It does not appear, though, that the court considered the alternate interpretation that, having been historically generous to her son it was unlikely that the mother would effectively disinherit him by allowing the bulk of her Estate to pass to her daughter through the joint bank accounts.[6]

The decisions discussed above add significantly to the body of jurisprudence which distinguish between *inter vivos* and testamentary gifts and provide guidance in applying the presumption of resulting trust to joint tenancy with right of survivorship disputes. These decisions also shed additional light on how courts assess evidence which is proffered to support or rebut the presumption of resulting trust, although as with any exercise where evidence is weighed on a case by case basis, these decisions may lead to more confusion than clarity.

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5 2015 ONSC 3443.

6 For additional discussion of the different possible interpretations of the evidence in this case, see A. Casey, *The Joint Bank Accounts Conundrum*, All About Estates, August 10, 2015, http://www.allaboutestates.ca/estate-planning/joint-accounts-conundrum/

Letters, announcements, opinions, comments from members

If you have an article or an idea that would be of interest to other members of STEP, please send them to paul.keul@scpllp.com for inclusion in our next edition of the STEP Toronto Connection.

STEP continues to grow and a number of new members have recently been added to the Toronto branch. We extend a hearty welcome to all of the new members, and look forward to seeing you at upcoming programs and events. The process for the Experienced Practitioner route to membership has recently been changed, to ensure we maintain the high quality of our membership. If you know anyone who would be a good candidate for STEP membership, and who has the requisite experience to qualify under the Experienced Practitioner route, please direct them to the STEP Canada website.

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