Hamilton Law Association

20th Annual Estates & Trusts Seminar

February 24, 2022

Calmusky v. Calmusky: an Update

Karen Watters*
de VRIES LITIGATION LLP
Toronto and Oakville Offices

Tel: 416-640-2754
Fax: 416-640-2753

Email: kwatters@devrieslitigation.com
Website: devrieslitigation.com

Follow: allaboutestates.ca and devrieslitigation.com/blog

When the decision in *Calmusky v. Calmusky*[1] was released, it caused a bit of a stir. Here we are though, almost two years later and the world has been righted. Somewhat. Things have progressed in a way that some professionals predicted – we now have more than one decision of the Superior Court of Justice in Ontario which has not followed *Calmusky* with respect to beneficiary designations. Regrettably, we do not have any legislative amendments providing certainty in a post-*Calmusky* era despite requests from various stakeholders and what seemed to be an opportune time for the legislature to do just that. This paper will review what has come to pass since *Calmusky*.

Review of *Calmusky*

Let's review the facts in *Calmusky.* A father passed away and his two sons began litigating over who owned certain assets. One of those assets was a RIF of which only one son was the designated beneficiary. The son who was designated as beneficiary of the RIF argued that it was an asset which fell outside of the Estate. The other son argued that the RIF was subject to a resulting trust. There were other issues in the case such as the treatment of a joint bank account and the claim of occupation rent owed to the Estate by one of the beneficiaries. However, the court's treatment of those issues was not controversial.

The court found that the RIF was subject to a resulting trust and, in so doing, shifted the onus to the designated beneficiary to establish that the RIF was intended as a gift. Perhaps unsurprisingly the son who was the designated beneficiary could not provide sufficient evidence to satisfy the court that his father intended that he receive the RIF. The beneficiary forms were standard and lacking detail to support a conclusion of the deceased's intention. The evidence of the bank teller regarding conversations with the deceased was tenuous.

---

* Special thank you to Tyler Lin, associate at de VRIES LITIGATION LLP, for conducting the research for this paper.

[1] *Calmusky v. Calmusky*, 2020 ONSC 1506 (CanLII) ("***Calmusky***").

When the court applied the presumption of resulting trust to the RIF (following *Pecore v. Pecore*[2]), it was seen as a departure from the established treatment of assets subject to a beneficiary designation. The decision was surprising to many professionals including those in the legal profession, financial planning and insurance.

Declining to follow

(i) *Mak (Estate) v. Mak*

The decision in *Mak (Estate) v. Mak*[3] was released on June 18, 2021. There were a number of issues before the hearing judge, one being the ownership of a RRIF subject to a beneficiary designation, just like in *Calmusky*.

The Mak family which was a close-knit family of two parents and four sons. Between 1970 and 1990, various members of the Mak family immigrated to Canada from Hong Kong. In 1988 the first of two rental properties ("**Fundy Bay**") was purchased by one son, Kenny Mak ("**Kenny**") and another son, Steve Mak ("**Steve**"). Title was placed in the names of Kenny, Steve and their mother. The second rental property ("**Montezuma Trail**") was purchased in 1989 by the parents. The parents also purchased the family residence ("**Morrison Crescent**") around this time.

In 1994, the parents executed their wills providing that the property of each spouse was to be left to the survivor and, if the spouse pre-deceased, the estate of the surviving spouse would be split equally among the four sons. On the same day in 1998, title to Fundy Bay was transferred to Kenny and Steve and title to Montezuma Trail was transferred to Kenny.

The father passed away in 2002. In the years following his death, the following events occurred:

---

[2] *Pecore v. Pecore*, 2007 SCC 17 (CanLII) ("***Pecore***").
[3] *Mak (Estate) v. Mak,* 2021 ONSC 4415 (CanLII) ("***Mak Estate***").

- In 2006, Montezuma Trail was sold. The proceeds of that sale ($247,000.00), were paid into a joint account with Kenny and the mother. The account was designated as joint with right of survivorship;
- $10,000.00 from the proceeds of sale of Montezuma Trail were paid to each of the four sons and the remainder was directed to a GIC;
- By 2007, Kenny was listed as the sole beneficiary of the mother's RRIF;
- In 2008, Fundy Bay was sold. The proceeds were divided into one-third shares and paid to each of Kenny, Steve and their mother;
- In 2011, Kenny was added as the attorney for property for his mother's account which held her securities;
- In 2012, the mother was diagnosed with dementia;
- In 2013, a joint account was opened with Kenny and his mother listed as owners (the "**2013 Joint Account**");
- In 2013, the funds in the mother's securities account was transferred to the 2013 Joint Account;
- In 2014, funds were transferred from the 2013 Joint Account to an account in Kenny's name alone. From Kenny's account, it was transferred to a joint account in Kenny's and Steve's name in 2014 ("**Kenny and Steve's Account**");
- In 2015, the mother passed away; and
- Funds from Kenny and Steve's Account were transferred to an account in Kenny's name alone.

The court found that the presumption of a resulting trust does not apply to a beneficiary designation for the mother's RRIF. The court reached the opposite conclusion from *Calmusky* for three reasons.

First, the law of resulting trust as set out in *Pecore* occurs in the context of *inter vivos* gifts. *Pecore* and its cannon of cases are about gratuitous transfers which occurred while the transferor-parent was alive.[4] Therefore, the presumption should not be applied in situations of estate planning, such as planning by use of beneficial designation, where the transfer of the asset can only occur after the transferor's death.

Second, referring to Demtre Vasilounis' contribution to AllAboutEstates.ca[5], the court noted that the operation of financial vehicles such as a life insurance policy or RRIF does not depend on intention in order to operate. Section 53 of the Succession Law Reform Act ("**SLRA**") provides that an institution administering the "plan" must pay it out in accordance with the beneficial designation. There is no additional requirement on assessing the transferor's intention, as there is when applying the resulting trust doctrine.[6]

Third, the presumption of resulting trust with respect to adult children evolved from the formerly recognized presumption of advancement (a presumption that a parent that arranges for joint ownership of an asset with an adult child is "advancing" part of that child's inheritance to them). The point of a beneficiary designation, however, is to specifically state what is to occur with an asset upon death.

In *Mak Estate*, the court found that the presumption of resulting trust did not apply to the RRIF. The onus, therefore, rested with the three brothers to establish on a balance of probabilities that their mother had intended to benefit her estate, not Kenny. The brothers were unable to do so. The beneficiary designation stood and Kenny retained the funds.

---

[4] *Mak Estate,* at para 44.
[5] Vasilounis, Demetre, "A Presumptive Peril: The Law of Beneficiary Designations is Now in Flux", AllAboutEstates.ca, July 17, 2020.
[6] *Mak Estate*, at para 44.

(ii) *Munro v. Thomas*

Almost two months before the decision in *Mak Estate,* the court considered the case of *Munro v. Thomas*[7]. The dispute was between one of the deceased's daughters, Barbara Munro ("**Barbara**") and the Estate Trustee, who was the deceased's son-in-law. While the litigation focused primarily on estate accounting by the Estate Trustee, the court was asked to consider the *inter vivos* transfers of certain assets from the deceased to her children, as well as the beneficiary designation on the deceased's Tax Free Savings Account ("**TFSA**").

The testatrix died in 2019 and was survived by two daughters and two sons, as well as grandchildren. In 2004, the testatrix executed a will naming her son-in-law (Thomas) as estate trustee. She divided the residue of her estate among her children but not in equal shares. Her grandchildren also received 10% of the residue. In 2011, the testatrix transferred a cottage property to one son and one daughter and in 2013 she sold her house. It is unclear when the beneficiary designation was made but the court found that there was insufficient evidence to support the allegation that there were issues of capacity prior to the testatrix's death.

The court distinguished *Munro* from *Calmusky* citing the latter as a case regarding the issue of joint assets and property held jointly with right of survivorship between a testator and adult child.[8] In *Munro*, none of the assets disposed of outside of the Estate were held jointly by right of survivorship with the testatrix. Rather, the testatrix designated beneficiaries of her TFSA prior to her death, to take effect after her death. With respect to the TFSA, the court concluded that it passed directly outside of the Estate to the named beneficiaries and that the Estate Trustee was correct in treating the TFSA as such. The court did not apply the presumption of resulting trust to the TFSA and there is no discussion in *Munro* as to whether the presumption should or should not apply.

---

[7] *Munro v. Thomas*, 2021 ONSC 3320 (CanLII) ("***Munro***").
[8] *Munro,* at para 26.

(iii) *Fitzgerald Estate v. Fitzgerald*

Fitzgerald Estate v. Fitzgerald[9] was decided on December 8, 2021 by the Supreme Court of Nova Scotia. The issue was squarely whether the presumption of resulting trust applies to a TFSA with a beneficiary designation.

The testator died in 2019. He was predeceased by his wife and survived by eight children. In 2012, shortly after the death of his wife, the testator twice designated his daughter, Maureen Fitzgerald ("**Maureen**"), as beneficiary of his TFSA. In the testator's 2012 will (which was executed following the designation of Maureen as beneficiary), there was a clause which would override the beneficiary designation to Maureen and include the TFSA as an asset of the Estate. However, in 2018 the testator executed a new will which did not include the same or similar clause. Instead the testator left the residue of his "entire estate" to be divided equally among his eight children. Upon the testator's death, the Estate Trustee argued that the TFSA formed part of the Estate. Maureen objected.

The court considered *Calmusky* and respectfully disagreed to follow the reasoning therein, concluding that the presumption of resulting trust does not apply to TFSAs for three reasons:

First, to apply the presumption to such an account could frustrate the intention of the transferor, create transactional uncertainty, and create evidentiary challenges for the transferee. Second, applying the presumption would be contrary to the legislature's intention to provide designated beneficiaries of TFSAs with the right to receive proceeds from accounts upon the death of the account holder under the applicable Nova Scotia statute (s. 9 of the *Beneficiaries Designation Act*). Third, applying the presumption would frustrate the legislative intention to simplify the transfer of monetary gifts from the transferor to a loved one.[10]

---

[9] *Fitzgerald Estate v. Fitzgerald,* 2021 NSSC 355 (CanLII) ("***Fitzgerald Estate***").
[10] *Fitzgerald Estate*, at para 116.

Of note, the court in *Fitzgerald Estate*, agreed with the reasoning in *Morrison Estate (Re)*[11], a 2015 decision of the Alberta Queen's Bench, where the court found that a beneficiary designation on a TFSA is akin to a testamentary instrument and should be treated the same as a beneficiary designation under a will.

In declining to follow *Calmusky*, the court made the following observations as to why the presumption of resulting trust should not apply to a TFSA (as opposed to a joint account).

1. A TFSA is not held jointly, nor is it transferred *inter vivos* during the transferor's lifetime. It is transferred upon his or her death.
2. In a TFSA designation, the asset remains in the owner's name until death. There is no joint ownership of the asset.
3. A TFSA designation is a contract that binds the institution where the funds are held.
4. Unlike a joint account, there is no access to the funds by the person designated. The owner continues to have sole authority to sue the funds during their lifetime.
5. There is no fiduciary aspect to a TFSA designation, unless the beneficiary is identified as a trustee.[12]

The comments above are likely applicable to any beneficiary designation and are not limited to TFSAs, though the court restricted its finding to TFSAs. With respect to point #5, it remains to be seen if this comment will keep the door open to argue that the presumption of resulting trust applies if the designated beneficiary is also the Estate Trustee.

(iv) *Roberts v. Roberts*[13]

A decision of the Alberta Queen's Bench in 2021, the issue was, once again, the designation of a beneficiary on a TFSA. The court declined to follow *Calmusky* and did not apply the presumption of resulting trust.

---

[11] *Morrison Estate (Re),* 2015 ABQB 769 (CanLII) ("***Morrison***").
[12] *Fitzgerald Estate*, at paras 103-107.
[13] *Roberts v. Roberts,* 2021 ABQB 945 (CanLII) ("**Roberts**").

The testatrix died in 2018, survived by four children and a grandchild. In 2012, the testatrix executed a will naming her daughters (Peggy and Constance) as Estate Trustees and dividing her estate equally between her four surviving children and one grandchild. In 2014, the testatrix opened a TFSA and designated her daughter Peggy as sole beneficiary. The Estate brought an application for an order declaring that the funds in the TFSA form part of the Estate.

The court found that beneficiary designations made in accordance with the applicable Alberta statute (s. 71 of the *Wills and Succession Act*) are testamentary in nature and the presumption of resulting trust does not apply to such designations. The court reached that conclusion for four reasons, as follows.

1. The *Wills and Succession Act* ("*WSA*") provides two equally valid methods of designating a beneficiary for various instruments – either by witness signature on the face of the instrument, or by Will. Had the testator chosen to designate Peggy as the TFSA beneficiary in her Will, no presumption of resulting trust would arise. As an executor with capacity and absent undue influence, she would have been presumed to intend the benefit. There is nothing in the statutory language of section 71 which suggests that designation on the face of the instrument does not have the same effect.
2. Beneficiary designations are distinguishable from *inter vivos* transfers notably because they do not give the beneficiary any rights during the owner's lifetime. The owner is free to revoke the designation at any time and the benefit itself passes on death of the owner. As a result, the designated beneficiary is not holding any interest in trust for the benefit of the transferor.
3. In a designation the beneficiary's interest is only enforceable after the death of the instrument holder.

4. The inclusion of beneficiary designations in the *WSA* lends support to the conclusion that it was the intention of the legislature to give testamentary effect to beneficiary designations made in either manner.[14]

Interestingly, the court found that if it was incorrect and the presumption of resulting trust applies to TFSAs with beneficiary designations, the court held that Peggy rebutted the presumption and was entitled to retain the TFSA. The court went further to analyze the testatrix's intentions and concluded that she intended for Peggy to keep the TFSA. The court's analysis of Peggy's successful (though not required) rebuttal of the presumption is as follows.

1. The beneficiary designation is direct objective evidence of the testatrix's intent. The language in the designation is clear and simple.
2. There was no evidence to suggest that the testatrix was not aware of the contents of her Will, lacked capacity or was unduly influenced.
3. The testatrix understood the nature and effect of the beneficiary designation, illustrated by a conversation she had with her daughter Constance. When Constance questioned her about the beneficiary designation and her understanding of its effect, the testatrix responded that she was not stupid and knew what she was doing.
4. Peggy provided financial assistance to the testatrix during her lifetime without seeking reimbursement and was appointed the testatrix's attorney under a power of attorney and as joint ET of the testatrix's estate. It is reasonable to infer that the testatrix intended the TFSA to go to Peggy to compensate her for funds disbursed on her behalf and for her assistance throughout her lifetime.

---

[14] *Roberts,* at para 50.

(v) *Simard v. Simard Estate*

The decision in *Simard v. Simard Estate*[15] is worth mentioning in that does not cite or refer to *Calmusky* whatsoever. The Supreme Court of British Columbia rendered its decision in September 2021 and considered the ownership of several assets, including joint bank accounts, title to land, and two RRIFs. The court examined the evidence through the application of *Pecore* and the presumption of resulting trust.

At the beginning of the decision, the court states that the presumption of resulting trust applies where a gratuitous transfer to a joint account is challenged, and that, in B.C. the courts have determined that the presumption applies to transfers of real property. Missing from the analysis is the same discussion about whether the presumption applies to assets subject to a beneficiary designation. This may be because in *Simard Estate*, the parties agreed that the presumption applied to all of the mother's accounts, including those where the mother designated her daughter, Julie, as the beneficiary (the Coast Capital RRIF and the BMO RRIF).[16]

Although the court did not undertake a discussion of beneficiary designations, it analyzed the evidence of the testatrix's intention, including the evidence of the financial advisor who spoke with the mother about the designated beneficiary forms. The court also reviewed the language of the beneficiary form in its review of the evidence. With respect to the mother's RRIF accounts with Pinnacle Wealth, the court found that the beneficiary forms were "detailed enough to provide further evidence that [the mother] intended Julie to receive the balance in both RRIFs when she died".[17] However, the same could not be said for the RRIFs with Coast Capital and BMO.[18] With respect to those RRIFs, the court concluded that the daughter did not

---

[15] *Simard v. Simard Estate*, 2021 BCSC 1836 (CanLII), ("***Simard Estate***").
[16] *Simard Estate,* at para 267.
[17] *Simard Estate,* at paras 262-265.
[18] *Simard Estate,* at paras 268-276.

successfully rebut the presumption of resulting trust and held those assets in trust for the Estate.[19]

While *Simard Estate* is a useful review of *Pecore*, it is not an analysis of *Calmusky*. It does, however, lead one to conclude that detailed beneficiary forms which include fulsome statements of the transferor's intention will help rebut the presumption of resulting trust, should the presumption apply.[20]

Submissions by Stakeholders: No Legislative Amendments

On November 17, 2020, the OBA proposed legislative amendments to provide certainty following the *Calmusky* decision. The "Submission on the impact of the *Calmusky* decision for estate planning in Ontario, and proposed legislative amendments to remedy same" was submitted to the Attorney General of Ontario and Minister of Finance.[21] About two months before the OBA Submission, there was a joint submission on behalf of Advocis and the Conference for Advanced Life Underwriting ("**CALU**"), addressed to the Assistant Deputy Minister, Financial Services Policy in the Ministry of Finance for Ontario. Advocis and CALU also called upon the legislature to provide certainty on assets subject to beneficiary designations.[22]

---

[19] *Simard Estate*, at paras 318-319.

[20] The beneficiary form which was "detailed enough" in *Simard Estate* included the following statement, found at para 262 of the decision.

> *I acknowledge any designation(s) made … are subject to the following:*
>
> *…*
>
> *Any designation made shall apply to this Plan only. …*
>
> *A. Designation of Beneficiary (For all plan types)*
>
> *In the event of my death, I hereby designate the following individual(s) … as my designated beneficiary(ies) entitled to receive my interest in this Plan if living at the time of my death. If my designated beneficiary(ies) predecease(s) me and no other beneficiary has been appointed, I understand the proceeds of my Plan will be paid to my Estate. I reserve the right to revoke this designation, in writing, at any time.*

[21] Submission on the impact of the *Calmusky* decision for estate planning in Ontario, and proposed legislative amendments to remedy same, Ontario Bar Association, oba.org, November 17, 2020.

[22] Impact of Calmusky Decision on Estate Planning, joint submission of Advocis, The Financial Advisors Association of Canada and CALU, advocis.ca, September 16, 2020.

Despite these submissions, and other less formal requests for legislative amendments, the legislature has not responded. As many are aware, Bill 245 received Royal Assent on April 19, 2021. The *Accelerating Access to Justice Act, 2021*[23], among other things, amended the SLRA in several ways including allowing remote will execution in counterpart and allowing substantial compliance for wills. It seemed like it was an opportune time for the legislature to consider the OBA submission and the joint submission of Advocis and CALU. However, no amendments in response to *Calmusky* were made to the SLRA through Bill 245.

Where do we go from here?

In Ontario we have conflicting decisions about the applicability of the presumption of resulting trust for assets subject to a beneficiary designation. There have been well-reasoned decisions declining to follow *Calmusky* but no legislative amendments providing certainty. Perhaps *Calmusky* is a good example of the rarity of quick-fixes in a common law system. At some point we may have the right case with the right set of facts in which a party appeals to the Court of Appeal on this issue. Perhaps then we will have a decision which rejects *Calmusky* and is binding on the lower courts in Ontario. Or, maybe, the legislature may still weigh in.

Until then, it continues to be wise for anyone on the planning end to ensure as much as possible that the intention of the transferor to gift the asset to the designated beneficiary is well documented. If a client assures her lawyer that a beneficiary designation has been made outside of the will then the lawyer could and perhaps should still have the conversation about the intention to gift the asset to the beneficiary and not have it form part of the Estate (and document said conversation in her file). It is possible that there will be limited conversations or no conversation with the transferor when she designates the beneficiary of her registered account. The only documentation may be a simple form prepared by the financial institution or plan administrator. The decision in *Simard Estate* suggests that those with the authority to

---

[23] *Accelerating Access to Justice Act, 2021*, SO 2021, c. 4 – Bill 245.

review and update beneficiary forms should consider doing so with a critical eye and with a view to providing more detail of the transferor's intention directly on the beneficiary form.