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— Franks & Zalev - This Week in Family Law

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Contents

This Just *Can't* Be Right . . . Or Maybe It Is? No Wait . . . Let's Think About This . . .

Calmusky v. Calmusky, 2020 CarswellOnt 6539 (S.C.J.) - Lococo J.

This is not technically a family law case, but it should certainly be of interest to family lawyers and family law courts.

It used to be that a presumptive resulting trust was a presumptive resulting trust, and a beneficiary designation was a beneficiary designation. While applying the presumption of resulting trust to joint bank accounts and gratuitous transfers has been quite common (especially since *Pecore v. Pecore* (2007), 37 R.F.L. (6th) 237 (S.C.C.)), the thought of applying the presumption of resulting trust to a beneficiary designation - such as for life insurance or an RRSP - seemed foreign to most. After all, a beneficiary designation is a form of testamentary disposition that speaks to the future, not the present.

But this is precisely what happened in *Calmusky*, where Justice Lococo called into question the notion that named beneficiaries of such assets are strictly entitled to them, and suggested that such beneficiaries may, in fact, hold resulting proceeds on trust for the benefit of the deceased's estate. And that is exactly what Justice Lococo did in *Calmusky* with respect to the named beneficiary of a Registered Retirement Income Fund.

When it was first released, *Calmusky* came under significant fire from both the estates and family law bars. However, the application of the presumption of resulting trust to beneficiary designations is not without precedent. It has been done numerous times before. And while *Calmusky* may now require more careful estate planning (and likely a revisiting of current wills, estate plans, and beneficiary designations), our knee-jerk reaction that *Calmusky* "must be wrong" has succumbed to sober second thought. It *could* still be wrong. But it *may* be right. And we will have to wait for the Supreme Court of Canada (or the weight of appellate authority) to clear things up - but it is not as "out there" as it may have first appeared.

When Henry Calmusky died, his adult sons, Gary and Randy, could not agree about the disposition of certain assets, including bank accounts held jointly by Henry and Gary, and an RRIF in Henry's name that named Gary as the sole beneficiary.

Although Henry had signed a will in 2014, neither Gary nor Randy was a named beneficiary under the will. The will also did not make any reference to the disputed bank accounts and RRIF.

Gary had been living with Henry for several years. Randy had been living in Alberta since the 1980s. A week after Henry signed his will, Henry and Gary went to a local BMO branch and opened a joint chequing account with the right of survivorship. Shortly after that, Henry and Gary went to Henry's TD branch, and added Gary as a joint account holder to Henry's TD accounts with the right of survivorship (by way of a "tick box"). Henry then signed a form designating Gary as the sole beneficiary of his RRIF.

Upon Henry's death, Gary claimed that the bank accounts were his by right of survivorship, and that the RRIF was his by virtue of the beneficiary designation. Randy claimed that the bank accounts and the RRIF were held by Gary on resulting trust (along with the accompanying presumption) for Henry's estate.

This was the situation presented to Justice Lococo.

Justice Lococo started with the (rebuttable) presumption of resulting trust as set out by the Supreme Court of Canada in *Pecore*. In *Pecore* (in the similar circumstance of a parent adding an adult child as a joint owner of a bank account), the Supreme Court found that a gratuitous transfer from parent to adult child will raise the presumption that the adult child holds the funds in trust for the benefit of the transferor (or the transferor's estate).

In contrast, a presumption of advancement arises for transfers from a parent to a *minor* child. In *most* provinces, a presumption of resulting trust also arises between spouses. It is important to remember that a presumption of resulting trust is not a substantive rule of law; not every gratuitous transfer leads to a finding of resulting trust. Rather, a presumption is a rule of evidence that deals with who bears the evidentiary onus.

Therefore, if a presumption of resulting trust applies, the effect of the presumption is to place the evidentiary burden on the *transferee* to prove, on a balance of probabilities, that the transfer was intended to be a gift (thereby defeating the presumption of resulting trust). It is not necessary to rely on the presumption where there is actual evidence of intention; the presumptions provide a guide for courts where evidence as to intention is unavailable or unpersuasive: *Wu v. Sun* (2010), 91 R.F.L. (6th) 24 (B.C. C.A.); *F. (V.J.) v. W. (S.K.)* (2016), 77 R.F.L. (7th) 1 (B.C. C.A.); *Donaldson v. Braybrook*, 2020 CarswellOnt 1118 (C.A.); *Namdarpour v. Vahman* (2019), 23 R.F.L. (8th) 259 (B.C. C.A.).

If the evidence of donative intent is not sufficient to rebut the presumption of resulting trust, the transferee will hold the property for the benefit of the deceased's estate, and it would then be distributed in accordance with the deceased's will or the applicable intestacy rules. This would then cause the value of the asset(s) in question to be subject to probate fees, etc. This is a key point, and it is actually the point that made us doubt our original knee-jerk reaction to this case. For the same reason a parent might choose to hold a bank account or other assets with an adult child - to avoid probate fees - a parent might choose to designate a beneficiary for an asset or account for which such a designation is possible, with the actual intention that the asset be equally shared among those entitled to the residue of the estate. Alternatively, the beneficiary designation may have been made to ensure the assets did not become available to creditors of the estate.

The problem with this analysis, however, is that it ignores what would have been the *clear* intention of the deceased to avoid probate fees (or estate creditors) with the beneficiary designation on the assets in question. That is, the finding of resulting trust ignores what seems to have been a *clear* intention to avoid probate fees (and/or creditors), and supplants it with a presumption of resulting trust - which forces the assets to fall into the estate and be subject to probate fees and creditor claims.

Furthermore, Justice Lococo does not deal with the decision of *Amherst Crane Rentals Ltd. v. Perring*, 2004 CarswellOnt 2471 (C.A.), where the Ontario Court of Appeal specifically held that an RRSP does not devolve to the estate on the death of the account holder - but to the designated beneficiary. However, in *Amherst Crane*, the Court did not deal with the issue of resulting trust.

Gary argued that the forms he and Henry signed at the bank along with evidence of the discussion at the bank evidenced Henry's intention to make Gary the owner of the bank accounts by survivorship. Justice Lococo disagreed, finding that the bank documents were equivocal at best, and certainly not sufficient to prove a gift so as to defeat the presumption of resulting trust with respect to the bank accounts.

Gary was also not able to defeat the presumption with any other evidence as suggested by the Supreme Court of Canada in *Pecore*: the control and use of the funds in the account (at paras. 62-66), the granting of a power of attorney (at paras. 67-68), and the tax treatment of the joint accounts (at paras. 69-70).

With respect to the RRIF, no Ontario court had previously *explicitly* applied a presumption of resulting trust to an asset subject to a beneficiary designation. In *McConomy-Wood v. McConomy*, 2009 CarswellOnt 914 (S.C.J.), Justice Herold suggested it might be a possibility, but he did not have to decide the issue as he found there was "not the slightest doubt" that the beneficiary of the RRIF was meant to hold it in trust for the estate. However, this certainly was not a "first" in Canada.

A resulting trust analysis was applied to such assets in *Dreger (Litigation Guardian of) v. Dreger*, 1994 CarswellMan 89 (C.A.) (with respect to RRSP and life insurance beneficiary designations), which was then followed and/or cited favourably in other provinces: *Neufeld v. Neufeld Estate*, 2004 CarswellBC 29 (S.C.); *Rainsford v. Gregoire*, 2008 CarswellBC 511 (S.C. [In Chambers]); *Williams v. Williams Estate*, 2018 CarswellBC 1076 (S.C.); and *Morrison v. Morrison*, 2015 CarswellAlta 2249 (Q.B.). Only in Saskatchewan has the Court of Appeal opined as to a clear distinction between bank accounts (where the presumption of resulting trust applies) and beneficiary designations (where it does not).

Justice Lococo was unable to find any 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 RRIF beneficiary designation:

> [56] . . . While the matters to be decided in *Pecore* arose from the deceased father's placing his funds into joint accounts with his daughter, the principles set out in that case clearly apply more generally to other gratuitous transfers of property interests: see *Pecore*, at paras. 20-23. **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**. In both cases, the transfer of interest is gratuitous, as would be necessary for the presumption of resulting trust to apply. Gary was not the source of funds for either type of account. In both cases, the same evidentiary challenge arises - the difficulty in determining the deceased transferor's intention at the time he transferred legal (as opposed to beneficial) entitlement to the funds, whether the transfer is effective immediately (the joint accounts) or on the transferor's death (the RIF): see *Pecore*, at para. 5. In these circumstances, **it makes sense from a policy perspective that the evidentiary burden be on the transferee or designated RIF beneficiary, since the transferee/RIF beneficiary "is better placed to bring evidence of the circumstances of the transfer": *Pecore*, at para. 26. On that basis, I agree with the trial judge's *obiter* comments in *McConomy* that the principles in *Pecore* should apply to the RIF designation as well**. [emphasis added]

And that is what he did. Therefore, Gary again bore the burden of rebutting the presumption. As he was unable to do so, it was held that he was holding the RRIF in trust for Henry's estate.

In light of *Calmusky*, prior to designating a beneficiary of accounts and/or prior to changing beneficiary designations, it may be prudent for clients to consult with counsel to ensure their actual intentions are known. For example, a letter of intention may now be a good general planning document to evidence intention.

Time for the Government to Provide Some Support in Determining Support?

Locke v. Goulding, 2021 CarswellNfld 19 (S.C.) - Knickle J.

The parties had twin daughters who were born in 1995. One of the twins - B - was seriously disabled, and required full-time 24-hour-a-day care.

After the twins were born, the mother sued the medical professionals who were allegedly responsible for causing B's disability, and secured a settlement for B of more than $2,000,000 (of that amount, $1,250,000 was placed in a trust to help pay for B's expenses for the rest of her life).

In 2020, the father applied to terminate his child support obligations for both children on the basis that they were both over the age of majority. The mother agreed that child support should end for the second child, but argued that B (at 25 or 26 years old) was still entitled to child support as a result of her disabilities.

Although the father admitted that B was incapable of making independent decisions or being employed, he argued that the funds that were available to her from the settlement made her capable of withdrawing from parental charge and obtaining the necessities of life.

In the alternative, the father argued that even if B was still entitled to child support, she did not need child support from him as her expenses could all be met from the settlement funds. He also argued that he lacked the ability to pay child support for B.

Pursuant to s. 2(1)(b) of the *Divorce Act*, a person who is over the age of majority can still qualify as a "child of the marriage" for child support purposes if s/he "is unable, by reason of illness, disability, or other cause" to: (a) withdraw from parental charge; ***or*** (b) obtain the necessaries of life.

Justice Knickle accepted that the father was likely correct that B's settlement was sufficient to provide her with the necessaries of life. However, she nevertheless found, quite correctly in our view, that B was still a "child of the marriage" for support purposes, because the evidence was clear that she was severely disabled and would never be able to withdraw from parental charge and live independently:

> [29] Considering the definition of child under the *Divorce Act*, the reasoning in [the B.C. Court of Appeal's decision in *Briard v. Briard*, 2010 CarswellBC 3225 (C.A.)], and considering the circumstances of [B], of which are not in dispute, I conclude that by reason of her illness and disability, [B] is not "capable of withdrawing" from her parent's care. Because of her disabilities, [B] will never live independently, and cannot *choose* to so do. This satisfies me that she is still a child of the marriage.
>
> [30] That the funds available to [B] by way of the settlement might assist her in being able to obtain the necessaries of life does not mean despite her disabilities she is necessarily no longer a child of the marriage. In my view, the availability of these funds is more properly considered in determining what the appropriate level of child support should be, if any.

[For a further discussion of the principles that apply when determining whether a person over the age of majority qualifies as a "child of the marriage" due to illness and/or disability, see Justice Chappel's thorough discussion of this topic in *Weber v. Weber* (2020), 45 R.F.L. (8th) 196 (Ont. S.C.J.) at paras. 56-68.]

Having found that B was still a "child of the marriage" for support purposes, Justice Knickle then had to determine whether to apply the *Guideline* approach in s. 3(2)(a) (i.e. table support plus a proportionate share of the child's s. 7 expenses), or whether the *Guideline* approach was "inappropriate" such that child support should be determined pursuant to s. 3(2)(b), which requires the court to consider "the condition, means, needs and other circumstances of the child and the financial ability of each spouse to contribute to the support of the child."

Before the Ontario Court of Appeal decided *Senos v. Karcz* (2014), 45 R.F.L. (7th) 97 (Ont. C.A.), there was significant debate in the caselaw about whether and when the *Guideline* approach should apply when dealing with child support for an ill or disabled adult who has his or her own source of income or savings. In *Senos*, however, the Court of Appeal made it clear that a disabled adult who has his or her own financial resources - in that case almost $10,000 a year from the Ontario Disability Support Plan - will almost always be "sufficient to displace the 'one-size-fits-most' approach in s. 3(2)(a) of the *Guidelines* in favour of the 'tailor made' approach in s. 3(2)(b)."

Given the substantial funds that had been set aside from the personal injury settlement to pay for B's expenses, Justice Knickle had no difficulty finding that the *Guideline* approach in s. 3(2)(a) of the *Guidelines* was inappropriate in this case. As a result, she concluded that child support for B had to be determined using the "tailor made" approach set out in s. 3(2)(b) by considering B's condition, means, needs, and other circumstances (and the ability of each parent to contribute to those needs).

The mother did not file a budget or other clear evidence to show how or why the significant funds that B had received from the personal injury settlement were insufficient to meet B's expenses going forward.

Justice Knickle recognized it was likely that all (or at least the vast majority) of B's expenses going forward would be met by the personal injury settlement. Nevertheless, she ordered the father to pay his proportionate share of B's expenses that were not covered by the settlement if/when they arose, "so that any shortfall in funds does not fall solely on the shoulders of [the mother]." She also ordered the parties to exchange financial disclosure annually so that they could determine their respective proportionate shares of B's expenses.

Respectfully, we have serious concerns about ordering parties to share a disabled adult's unknown future expenses, if and when they arise. This type of order creates the potential for endless conflict about whether one party is actually obligated to contribute to a specific expense, particularly in situations where, as in this case, the parties have already been litigating with each other for many years.

The order will also require the parties to have to exchange financial disclosure literally for the rest of their lives (assuming that B outlives them). That is certainly not ideal. At *some point*, given the significant resources in trust for B, one would think that the obligation on the parents to contribute will come to an end, even in the case of a disabled child. See, for example, *King v. Sutherland*, 2004 CarswellOnt 3497 (S.C.J.); *Hill v. Davis* (2006), 31 R.F.L. (6th) 326 (N.S. S.C.); *B. (J.R.) v. B. (C.F.)* (1999), 48 R.F.L. (4th) 263 (Alta. Q.B.); *Carpenter v. March* (2012), 23 R.F.L. (7th) 211 (N.L. T.D.); *Matheson v. Matheson* (2003), 48 R.F.L. (5th) 283 (Ont. S.C.J.); *Curry v. Curry*, 2008 CarswellBC 1737 (S.C. [In Chambers]); *McSweeney v. Baird*, 2015 CarswellNS 706 (S.C.). For the contrary view (that support for a disabled adult child may never end) see: *Carpenter v. March* (2012), 23 R.F.L. (7th) 211 (N.L. T.D.); *Coates v. Watson* (2018), 14 R.F.L. (8th) 460 (Ont. C.J.).

We understand that Justice Knickle made the order she did to ensure that the mother would be able to meet B's expenses going forward. However, since the mother bore the onus of proving that B needed child support from the father, and as she failed to meet that onus (by not preparing a budget), we suspect it would have been better to dismiss her claim subject to the caveat that she could always come back later if B's circumstances or needs changed (or, alternatively, to order the mother to put forward proper evidence about B's actual need for support over and above what was available to her from the settlement, and give the father a further opportunity to respond).

The time really has come to consider amending the *Guidelines* to provide a clear framework for dealing with child support for disabled adults. Deciding how child support for a disabled adult should work involves difficult policy questions that the federal and provincial legislatures are far better suited to address than the courts. Furthermore, separated parents of disabled children already have enough on their plates without also having to decipher the common law principles that govern their support obligations, or face the significant uncertainty of outcome that currently exists when litigating these issues.

Deference to the Case Management Judge? Not.

Lloyd-Martinez v. Martinez, 2021 CarswellAlta 75 (C.A.) - Antonio J.A.

In *Martinez*, by order dated October 19, 2020, a Case Management judge increased the father's parenting time from seven supervised visits per month to alternating full weeks without supervision. The mother appealed and sought a stay of the order below.

The parties were married from 2008 to 2017. Their relationship involved very significant conflict since separation.

An Emergency Protection Order was issued on May 2, 2017, one condition of which was that the father have no contact with the mother or the children. By Consent Interim Contact Order (May 29, 2017), the father was allowed 2-1/2 hours of supervised visits every eight days.

Notably, the case was placed into case management in June 2018. That is, at the time of the decision being appealed, the matter had been in case management for 2-1/2 years.

On February 20, 2019, the Case Management judge increased the father's supervised access to five visits of four hours every 30 days.

On October 22, 2019, the Case Management judge increased the father's supervised access to seven days out of every 30 days, with additions for holidays and other special events.

On October 19, 2020, the parties appeared in chambers before the Case Management judge again. Upon reading the parties' affidavits and hearing argument, the Case Management judge decided that it would be in the children's best interests to maximize their contact with both parents. The Case Management judge was satisfied that both parties were adequate parents. The father was doing all he could to strengthen his bond with his children. He had taken anger management courses, high-conflict parenting courses, and some counselling. The Case Management judge rejected several of the mother's allegations of bad parenting by the father, and found the mother had taken steps to alienate the children from the father. The Case Management judge ordered that parenting be shared on a week-on/week-off basis without supervision and that the children continue to attend counselling.

Justice Antonio of the Alberta Court of Appeal first considered the test for a stay pending appeal: the applicant must establish that (i) there is a serious question to be tried (or, in other words, an arguable issue that is not frivolous and vexatious); (ii) there will be irreparable harm if the stay is not granted; and (iii) the balance of convenience favours a stay: *RJR-MacDonald Inc. v. Canada (Attorney General)*, 1994 CarswellQue 120F (S.C.C.) at paras. 83-85. Alternatively, even if the tripartite test is not met, the court may grant a stay where the interests of justice call for a stay: *Santoro v. Bank of Montreal*, 2018 CarswellAlta 1607 (C.A.) at para. 4.

Generally, where a request for a stay pending appeal involves children, most courts of appeal modify the test to reflect the paramount importance of the best interests of the children: *E. (H.) v. M. (M.)* (2015), 57 R.F.L. (7th) 12 (Ont. C.A.); *Reeves v. Reeves* (2010), 79 R.F.L. (6th) 255 (N.S. C.A. [In Chambers]); *Godin v. Godin* (2011), 2011 CarswellNS 88 (C.A. [In Chambers]); *MacPhail v. Karasek*, 2006 CarswellAlta 1406 (C.A. [In Chambers]); *B. (A.) v. D. (C.)*, 2004 CarswellNB 435 (C.A.); *B. (C.) v. C. (P.)*, 2003 CarswellAlta 1543 (C.A.); *Power v. Wiseman* (2012), 23 R.F.L. (7th) 282 (N.L. C.A.).

An arguable case will generally be made out where there is credible evidence that the best interests of the children have been significantly adversely impacted by the order, coupled with an arguable case that the challenged order is flawed in some significant manner: *A. (D.) v. K. (H.)*, 2014 CarswellAlta 1983 (C.A.) at para. 19. In addition, the best interests of the children will modify the irreparable harm and balance of convenience stages of the test. That is, the court must consider whether the children will suffer irreparable harm resulting from the granting or denial of the stay: *Noel v. Maj*, 2006 CarswellAlta 1658 (C.A. [In Chambers]) at para. 3.

The threshold for a "serious question" is low. The analysis does not require a detailed assessment of the merits of the case. Generally, courts recognize there is often a serious question to be tried when the best interests of the children are involved.

Here, the mother argued that the October 2020 Order radically changed the parenting arrangement without justification. First, she argued that a significant change in custody should not have been made on the basis of contradictory affidavits. Second, she argued that joint custody and shared parenting arrangements ought not to be ordered where the parents "are in substantial conflict with each other, and particularly where there has not yet been a trial and there is significant disagreement on the evidence."

As is often the case when dealing with a claimed stay of a parenting order, the mother was able to satisfy the Court there was an arguable issue.

In *Baker v. Hunter*, 2015 CarswellAlta 1803 (C.A.) at para. 11, the Alberta Court of Appeal summarized the approach to the second and third parts of the modified test for a stay pending appeal of a child-related issue as follows:

> The modified second and third parts of the test mandate a consideration of whether the children will suffer irreparable harm from the denial of a stay, and it is those interests that will ultimately determine the balance of convenience. These parts of the test must be considered holistically, as irreparable harm is intricately connected with the balance of convenience when children are involved. [citations omitted]

Irreparable harm to the best interests of a child is generally not found in mere disruption to the children's lives: *MacPhail* at paras. 6-8. As some basic level of disruption will be present in every case, simple disruption - moving children from one stable and appropriate environment to another - is generally not taken as evidence of irreparable harm: *Nova Scotia (Minister of Community Services) v. F. (B.)*, 2003 CarswellNS 612 (C.A. [In Chambers]). Children are resilient and adaptable: *Reeves v. Brand* (2018), 8 R.F.L. (8th) 1 (Ont. C.A.). Some cases go so far as to suggest that there must be potential danger to the child should a stay not be granted: *Wiegers v. Gray*, 2007 CarswellSask 123 (C.A. [In Chambers]); *Gerski v. Gerski*, 2006 CarswellSask 389 (C.A. [In Chambers]).

Here, the mother had always been the children's primary caregiver. Since 2017, the children had only seen their father at supervised visits of short duration. Therefore, a sudden change from seven supervised visits per month to 50/50 unsupervised parenting would be "destabilizing" for the children.

And while the father was alleging that the mother had intentionally alienated their son from him, any reconciliation had to be sensitively managed in the son's best interests.

As a result, Justice Antonio was of the view that a stay was required to prevent possible harm to the children.

This all seems quite logical save for one question: After case managing this high-conflict parenting case for *2-1/2 years*, should the Case Management judge not have been afforded more deference?

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