Choosing One Of Your Adult Children As Your RRSP/RRIF/TFSA Beneficiary? Think-And Act-Carefully

It’s an increasingly common story.

A widow has several children, all of them adults. She makes a will that leaves her assets to all her children equally.

The widow, however, decides to leave her registered retirement savings plan (RRSP) with just one of her children. Perhaps this one child has special financial needs or was closest to mom.

You might expect this one child to receive the RRSP funds after mom’s death but what happens after mom dies is a little more complicated. Depending on the province, there is a risk that the RRSP funds will not pass to the one child, as anticipated:

- According to the courts of **British Columbia**, the child holds onto the RRSP funds in trust for mom’s estate, unless the child can prove that mom had intended that the RRSP funds were a gift to the child alone.

  If the child here can prove that mom had intended a gift, the RRSP funds are the child’s.

  If the child here cannot prove that mom had intended a gift – maybe because mom never gave a reason for her RRSP arrangements – then the child would have to follow mom’s will and split the RRSP proceeds equally with the other siblings.

- According to the courts of **Alberta, Saskatchewan**, and **Nova Scotia**, the child receives the RRSP funds outright after mom’s death, unless others (e.g. the other children) can prove that mom had intended that the child hold the RRSP funds in trust for mom’s estate or that the child had unduly influenced mom.
- The courts of **Ontario** have conflicting judgments on this point. An Ontario lower court judge in 2020 followed BC’s approach. The next year, a different Ontario lower court judge declined to follow BC’s approach, opting instead to follow the approach of Alberta, Saskatchewan, and Nova Scotia. Until a higher court weighs in and breaks the tie, the lower courts in Ontario are free to follow either approach.

How did we get here?

The different approaches of Canadian courts have their roots in a landmark Supreme Court of Canada decision from 2007.

In *Pecore v. Pecore*, 2007 SCC 17, an aging father added one of his adult children, his daughter, as a joint owner on his bank account. At issue was whether the daughter was entitled to the funds in the account outright after her father's death or whether she held the funds in trust for her father's estate, where it would be distributed in accordance with her father's will.

Before Pecore, any property that a parent freely transferred to an adult child was presumed to pass to the child, for that child alone to use and enjoy. The burden of proof then fell to others (e.g. the other children) to prove that the parent did not intend to make a gift of the property to the child but rather that the child held the property in a "resulting trust" for the parent's estate when the parent later dies. A resulting trust is a type of trust that the law imposes as a matter of fairness.

In *Pecore*, the Supreme Court of Canada set a new rule. The Court held that, when a parent freely transfers property to an adult child while the parent is still alive, the law presumes that the child holds onto the property in a resulting trust for that parent's estate when that parent later dies. To rebut this presumption, the child must prove that the parent intended a gift at the time of the transfer

In reversing the burden of proof, the Court was responding to changes in Canadian society that were happening at the time.

Canadians were living longer, and aging parents were often adding an adult child as a co-owner on the parents' bank accounts or property, to the exclusion of the parents' other children, for administrative ease and convenience, rather than for succession purposes. After that parent dies, the adult child holding the asset is often in a better position than their disinherited siblings to give evidence about the deceased parent's intention at the time the transfer was made.

Because there was evidence in Pecore that the father had intended to make a gift to his daughter when he added her on the joint account, the presumption that the daughter held the funds in the joint account in resulting trust for her father's estate was successfully rebutted.

The mess we're in…

Since *Pecore* was decided, courts across Canada have grappled over whether the *Pecore* principle (that property freely transferred to adult children is presumed to be held in resulting trust) should apply to designated beneficiaries of registered plans, with uneven results.

In 2021 alone, the courts of Ontario, Alberta, Nova Scotia, and British Columbia made contradictory rulings on this questioni .

Why the differences? It comes down to what courts think of this question: When an aging parent designates an adult child as the beneficiary on a RRSP/RRIF/TFSA, is the act similar to transferring property to the child during the parent's lifetime, or is the act similar to leaving property to the child in the parent's will?

If designating a child as a beneficiary is similar to transferring property to the child during the parent's lifetime, the *Pecore* principle and the presumption of resulting trust apply. The child holds the plan's funds in trust for the parent's

estate unless the child can prove that the parent intended a gift.

However, if designating a child as beneficiary is similar to leaving property to a child in the parent's will, then the presumption of resulting trust does not apply. The child will receive the plan's funds, unless the others can prove that the parent intended that the child hold the funds in trust for the parent's estate or that the child had unduly influenced the parent.

In this author's view, there are better arguments in favour of the second interpretation. Designating an adult child as a RRIF/RRSP/TFSA beneficiary is more like leaving property to that child in a will: the adult child does not have access to the plan's funds until the owner's death; in fact, the owner making the designation could always revoke the designation up to the point when they die.

What should you do?

Regardless of what this author might think, Canadians have to deal with the state of the law as it is today.

Until a higher court weighs in to give more clarity, what should Canadians do? Here are a few thoughts:

- **Aging parents everywhere should be careful when designating one of their adult children as the beneficiary on their registered plans.** In BC and possibly Ontario, the child will have to prove that the parent had intended to gift the plan's funds to them. In other provinces, the child receives the plan's funds but may still have to rebut claims of undue influence or resulting trust brought by others.
- **An aging parent's intention at the time of the designation matters and should be properly documented.** In a BC decision (Simard), a signed bank form designating a beneficiary was sufficient proof of a parent's intention to gift the plan's funds; however, not all bank forms are the same. A Deed of Gift is generally the gold standard for showing an intention to make a gift.
- **Canadians should consider designating their plan beneficiaries through a will**, if their province allows beneficiary designations in wills.
- **Talk to a lawyer.** The burden of proof matters. At trial, it means that one party is more likely to win than the other. Registered plans matter, too. In 2020, Canadians on average held around $112,000 in RRSP accounts. Investing some money in good legal advice and planning today can avoid surprises later on and prevent the value of your estate from being be eroded in costly and drawn-out litigation.

Source: Miller Thomson

Written By: Stephen Hsia