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Wills, Trusts & Estates

Resulting trusts can cause more estate problems than they solve

By **Stephanie Battista**

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(April 20, 2021, 8:34 AM EDT) -- When clients decide to leave money to their children on their death, they generally want to do so in the simplest and easiest way. Anything that gets the inheritance into their children's hands as quickly as possible, and with the smallest tax hit, is almost always the preferable way.

Unfortunately, the probate process in Ontario doesn't always allow for this. It can take several months to probate a will in Ontario, and with an Estate Administration Tax rate of roughly 1.5 per cent, a portion of the inheritance may be gone before the child even receives his or her share.

So, it's unsurprising that clients are often on the lookout for "simple" solutions, including adding a child directly to title of their assets while they are alive. However, on this quest for simplicity and efficiency, the legal consequences of some of these shortcuts are often overlooked.

Efforts to transfer large assets, like a house, into the hands of adult children to avoid paying tax or allow for immediate payouts, may be deemed to be a "resulting trust" with certain strings attached.

Take the case study of Rosie, for example. Rosie learned that so-called "resulting trusts" are far from rosy.

Rosie has three adult children, Al, Beth and Carl. After hearing horror stories from friends, Rosie thought it was finally time for her to get her affairs in order to ensure that her children would receive the benefits of the wealth she worked so hard to accumulate over her lifetime and that they aren't left with any headaches or unanticipated delays in getting their inheritance and any tax could be minimized.

Rosie attended a planning seminar for some guidance and was shocked to learn that to probate her will after her death, the process could take *at least* six months in Toronto, and that her estate would have to pay a significant tax on all her assets, one of the highest rates in Canada. Rosie was worried that the value of her house, her only significant asset in her estate, would be eroded by this Estate Administration Tax leaving less for her children. She was also worried that her children wouldn't have immediate access to their inheritance.

Following the advice of a friend, she thought the best solution was to put one of her children's names on title to her home as joint tenant with right of survivorship: this way, she thought she could avoid paying probate tax as the house would pass by right of survivorship to the child on her death, and the child could then sell the house and share the proceeds with his or her siblings.

Her eldest son, Al, lives in Toronto with her and visits every Sunday for dinner. He also takes her to all her appointments and talks to her on the phone every day. Al happens to be the most financially responsible of the children, and Rosie thinks he is the best choice to put on title with her.

Rosie also thought she may as well name Al as the sole beneficiary of a registered plan and a nominal life insurance policy as further assurance that she could avoid probate. This way Al would also have immediate access to money to pay for her funeral expenses and help get the estate settled.

Rosie thought she was all set.

Although the Supreme Court of Canada's decision in *Pecore v. Pecore* 2007 SCC 17 is often written about and litigated, many are still surprised to know that when an asset is put into joint names with an adult child for no consideration, there is the presumption that the property is not a gift to the child but rather that the child is holding the property in trust for the estate of the parent.

Although Rosie's house was now owned jointly with Al, the probate tax she was trying to avoid on her death may still be payable since the house is considered to be beneficially owned by Rosie and her asset.

But probate taxes may not be the only issue at play. Rosie never told her children about her wishes or her planning strategies. What if, say, Al thinks or later claims that Rosie transferred title of the house to him as an additional gift? After all, he was the only one who cared for mom while Beth and Carl moved as far away as they could from Rosie. Rosie always told Al he was the favourite — maybe mom did want him to have the house?

The presumption of a resulting trust can be rebutted, with the onus being on the transferee adult child to show that the transfer was intended to be a gift. The threshold is high, and Al would need concrete evidence that this transfer was intended to be a gift to him by Rosie, evidence which would go above and beyond the Sunday dinners. Even if he is not able to prove the transfer was a gift, the additional legal costs, time and potential family discord in trying to settle this was clearly not what Rosie would have wanted.

What about Rosie's RRIF and life insurance policy? It has been thought that the presumption does not extend to assets where there is a designated beneficiary by virtue of the contract, in which case Al isn't under any obligation to actually share the proceeds with his siblings or use the funds to help pay for the funeral, as Rosie wanted. Rosie will have to hope that Al is as financially responsible and trustworthy as she thinks, and that he doesn't decide to use this money to potentially fund his pursuit of the house.

However, just last year the Ontario court found that the presumption of a resulting trust as applied in *Pecore* did in fact apply to a registered account designated to an adult beneficiary (*Calumsky Estate v. Calumsky* 2020 ONSC 1506). Although this case has not been appealed at this time, the Ontario Bar Association has proposed amendments to legislation that would explicitly state that there would be no presumption of resulting trust for these designations made under the *Succession Law Reform Act* or the *Insurance Act*. Whether this decision will be upheld or these legislative amendments are approved, the fact remains that when it comes to leaving assets to your adult children, there are certain risks and unintended legal consequences that must be considered.

Quick and easy is not always the way, and sometimes what may seem like the easiest solution at the time can actually cause the most problems later on.

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