SUPREME COURT OF NOVA SCOTIA
Citation: *Fitzgerald Estate v. Fitzgerald*, 2021 NSSC 355

Date: 20211208
Docket: Syd. No. 499924
Registry: Sydney

Between:

Estate of Michael Joseph Fitzgerald, as represented by his Executor, Michael Thomas Fitzgerald

Applicant

v.

Maureen Fitzgerald

Respondent

LIBRARY HEADING

Judge:	The Honourable Justice Patrick J. Murray
Heard:	June 29, 30, 2021, in Sydney, Nova Scotia
Written Decision:	December 8, 2021
Subject:	Tax-Free Savings Accounts; presumption of resulting trust
Facts:	The testator named his daughter as beneficiary of a Tax-Free Saving Account. In his will, he left the residue of the estate to his eight children in equal shares. The Estate took the position that the funds in the TFSA were part of the Estate.
Issue:	Are the funds in the TFSA subject to a presumption of resulting trust in favour of the Estate? If so, was the presumption rebutted on the evidence?
Result:	The Estate's application was dismissed. The court held that the presumption of resulting trust did not apply to funds held in TFSAs. 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. Further, applying the presumption would be contrary to the right to receive proceeds from accounts upon the death of the holder under section 9 of the *Beneficiaries Designation Act.* Applying the presumption would frustrate the legislative intention to simplify the transfer of funds to the beneficiary. As such, the TFSA amount belonged to the designated beneficiary, and did not form part of the Estate.

Caselaw Considered:

Pecore v. ***Pecore***, 2007 SCC 17; ***Calmusky v Calmusky***, 2020 ONSC 1506; ***Brousseau v. Mulrooney Estate***, 2016 NSSC 352; ***Dreger (Litigation Guardian of) v. Dreger***, [1994] 10 W.W.R. 293; ***Neufeld v Neufeld Estate***, 2004 BCSC 25; ***Nelson v Little Estate***, 2005 SKCA 120; ***Morrison v. Morrison***, 2015 ABQB 769; ***McConomy-Wood v. McConomy***, [2009] OJ No 741; ***Mak Estate v. Mak***, 2021 ONSC 4415; *Beneficiaries Designation Act*, R.S.N.S. 1989, c. 36; **Feeney**, *Canadian Law of Wills*, vol. 2.

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Counsel:	Peter Rumscheidt for the Applicant, Mr. Fitzgerald Alan Stanwick for the Respondent, Ms. Fitzgerald

By the Court:

Introduction

[1] This is an application filed in Probate Court in respect of the Estate of Michael Joseph Fitzgerald (Mr. Fitzgerald), as represented by his son, Michael Thomas Fitzgerald, (Michael) as Executor.

[2] At issue is a Tax Free Saving Account (TFSA) held by the late Mr. Fitzgerald at the Cape Breton Credit Union (Credit Union) formerly, Steel Center Credit Union.

[3] The Applicant Estate claims these funds are rightly those of the Estate, by way of resulting trust.

[4] The Respondent, Maureen Fitzgerald, of Sydney, and daughter of Mr. Fitzgerald, claims that her father designated this account to be hers upon his death.

Family Background

[5] Michael Joseph Fitzgerald was born on October [..], 1923. He died on December 16, 2019, at age 96. His wife, Florence Pauline Fitzgerald, was born on July [..], 1918, and died on May 14, 2011 at age 92. Mr. and Mrs. Fitzgerald had eight (8) children:

a. Kevin Fitzgerald, born […], 1947, currently residing in Toronto, Ontario;

b. Mary Louise Hunter, born […], 1951, currently residing in London, Ontario;

c. Kathleen Pronko, born […], 1954, currently residing in Dartmouth, Nova Scotia;

d. Theresa Shaw, born […], 1956, currently residing in Calgary Alberta;

e. Maureen “Reenie” Fitzgerald, born […], 1959, currently residing in Sydney, N.S.;

f. Terry Fitzgerald, born […], 1963, currently residing in Halifax, Nova Scotia;

g. Elaine Fitzgerald Muise, born […], 1963, currently residing in Dartmouth, N.S;

h. Michael Thomas Fitzgerald born […], 1949 and residing in Dartmouth, Nova Scotia.

Grounds for the Application

[6] The Applicant seeks an Order declaring Maureen Fitzgerald is in possession of, and has converted, assets belonging to the Estate, and directing the payment of those assets to the Applicant in his capacity as personal representative of the Estate. The Applicant relies on the following grounds in support of this Application:

a. Michael Joseph Fitzgerald, died on December 16, 2019.

b. A true copy of the Last Will and Testament of Michael Joseph Fitzgerald (aka Michael J. Fitzgerald), dated September 28, 2018.

c. At the time of his death, Mr. Fitzgerald had bank accounts, including a Tax-Free Savings Account, which were held jointly or designated to his daughter, Maureen Fitzgerald.

d. It is the position of the Estate that the balances of the accounts which, at the time of his death, were held jointly with or designated to Maureen, belong to the Estate, based on the doctrine of "Resulting Trust".

e. Maureen has turned over the balances of the accounts held with her father jointly to the Estate.

f. The remaining issue involves the proper distribution of the TFSA account.

Notice of Objection

[7] The Respondent has filed a Notice of Objection to the Application containing the following grounds:

1. The deceased, Michael Joseph Fitzgerald, made the voluntary decision to designate me as the beneficiary of his TFSA.

2. The deceased, Michael Joseph Fitzgerald, designated me as beneficiary of his TFSA because he intended that I receive the monies in the TFSA upon his death.

3. I rely upon the provision of the *Beneficiaries Designation Act*.

[8] Ms. Fitzgerald seeks a declaration that she is the owner of the TFSA funds by virtue of the beneficiary designation.

[9] Numerous affidavits have been filed and certain of these witnesses were made available for cross-examination.

Background

[10] Mr. and Mrs. Fitzgerald raised their family in the Ashby area of Sydney, Nova Scotia. They lived all of their lives in Sydney. Maureen Fitzgerald has lived in Sydney all of her life. Most of the children moved away from Cape Breton after high school.

[11] Mr. Fitzgerald had a TFSA with the Credit Union. Mr. Fitzgerald designated his wife as the beneficiary under the TFSA.

[12] Ms. Fitzgerald passed away on May 14, 2011.

[13] On March 1, 2012, Mr. Fitzgerald attended at the Credit Union and executed documentation designating his daughter, Maureen Fitzgerald, as the beneficiary of his TFSA. The documentation was completed and signed in the presence of Lynn MacKinnon, a financial advisor at the Credit Union.

[14] Mr. Fitzgerald again attended at the Credit Union on April 13, 2012, and executed documentation designating Maureen Fitzgerald as beneficiary under the TFSA, in the presence of Cathy Delaney, a manager at the Credit Union.

[15] It is unknown why Mr. Fitzgerald did this a second time.

[16] Mr. Fitzgerald had a new Will prepared after his wife Flora passed away on May 14, 2011. That Will was executed in the office of his solicitor Christopher Conohan. For the sake of clarity, Mr. Fitzgerald executed Wills on May 9, 2012, and September 28, 2018.

[17] Mr. Fitzgerald left a Will naming his son, Michael Fitzgerald, Jr., as Executor. Mr. Fitzgerald devised the residue of his estate to his eight (8) children, in equal shares.

[18] Mr. Fitzgerald passed away on December 16, 2019.

[19] Michael Fitzgerald filed an Application for a Grant of Probate. The Grant was issued to Michael as Executor on May 11, 2020. The Estate has filed this Application seeking a declaration that the TFSA forms part of the Estate of Michael Joseph Fitzgerald.

Issue

[20] Are the funds in the TFSA subject to a presumption of resulting trust in favour of the Estate, and, if so, will the evidence rebut the presumption such that Ms. Fitzgerald should be the recipient of the funds rather than the estate?

Analysis

[21] The Applicant relies heavily upon the Supreme Court of Canada decision in ***Pecore*** v. ***Pecore***, 2007 SCC 17, and on ***Calmusky v. Calmusky***, 2020 ONSC 1506.

[22] The Applicant submits, based on these authorities, that the doctrine of resulting trust applies to gratuitous transfers of assets, and there is no principled reason why it should not apply to a designation of beneficiary under a TFSA account. The Applicant says this was a gratuitous transfer of the funds to Maureen Fitzgerald without consideration.

[23] ***Pecore*** is the leading authority on resulting trusts in the context of transfers between parents and their adult children. Rothstein, J, for the majority confirmed the presumption of resulting trust is the general rule for gratuitous transfers:

> 24 The presumption of resulting trust is a rebuttable presumption of law and general rule that applies to gratuitous transfers. When a transfer is challenged, the presumption allocates the legal burden of proof. Thus, where a transfer is made for no consideration, the onus is placed on the transferee to demonstrate that a gift was intended... This is so because equity presumes bargains, not gifts.

[24] The Court held that the presumption of resulting trust applies to gratuitous transfers between parents and their adult independent children. The presumption may be rebutted on a balance of probabilities. If the transferee fails to establish that the transfer was a gift, it is presumed that "the adult child is holding the property in trust for the ageing parent to facilitate the free and efficient management of that parent's affairs" (paras. 36-42).

[25] Section 9 of the *Beneficiaries Designation Act*, R.S.N.S. 1989, c. 36, is relevant, as it addresses the effect of beneficiary designations for TFSAs.

[26] The Respondent, Ms. Fitzgerald, submits that there is no resulting trust in these circumstances and that the *Beneficiaries Designation Act* applies to these circumstances. If Mr. Fitzgerald had wanted to leave the funds in the TFSA account to his estate, he could have revoked the designation in the six years between designating Maureen and executing his most recent Will in September, 2018. Alternatively, he could have done nothing following the death of his wife, Flora, whom he had previously designated as beneficiary of his TFSA account at the Credit Union. There was even a third option available to Mr. Fitzgerald: he could have placed a clause in his Will to specify that any funds for which he had previously designated a beneficiary, would instead would be payable to his Estate.

[27] The application of the presumption to designated beneficiaries of TFSAs has not been addressed by Nova Scotia Courts.[1]

Caselaw - Nova Scotia and other Provinces.

[28] In Nova Scotia, the presumption of resulting trust has been discussed in the context of designated beneficiaries of an RRIF. In ***Brousseau v. Mulrooney Estate***, 2016 NSSC 352, McDougall, J. states:

> I am further satisfied that payment of the proceeds from the RRIF were intended to be for Elizabeth 'Betty' Browne's personal use and enjoyment and any suggestion that a resulting trust has been created is rebutted.

[29] This issue has received more extensive treatment in other provinces.

[30] The presumption has been held to apply in British Columbia and Manitoba. Lines of authority in both provinces stem from the Manitoba Court of Appeal decision ***Dreger (Litigation Guardian of) v. Dreger***, [1994] 10 W.W.R. 293. ***Dreger*** was followed in ***Neufeld v. Neufeld Estate***, 2004 BCSC 25.

[31] In ***Nelson v. Little Estate***, 2005 SKCA 120, Sherstobitoff, J.A. for the Court declined to apply the presumption of resulting trust to beneficiary designations, stating:

> Simple lack of consideration would not avoid the designation of a beneficiary of the RRIF and, accordingly, the presumption of resulting trust would not apply.

[32] In Alberta, the law appears to be unsettled. In ***Morrison v. Morrison***, 2015 ABQB 769, Graesser, J. equivocated on whether the presumption of resulting trust applied to designated beneficiaries in the context of RRIF's. Graesser, J. expressed his personal view that ***Pecore*** should not apply because "it would create untold uncertainties in what are likely hundreds of thousands if not millions of beneficiary designations in Canada" (para. 53). Graesser, J. took the view that beneficiary designations are closer to testamentary designations, which do not attract the presumption, than *inter vivos* gifts. Both beneficiary designations under RRSP's, RRIF's, and insurance policies, and designations under a Will do not take effect until the owner dies, and the owner is free to change beneficiaries during their lifetime (paras. 44 - 47).

[33] Despite his concerns, Graesser, J. stated, at paragraph 66:

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[1] See *Wilkinson Estate v Wilkinson Estate* 2019 NSSC 52, at para 55: Arnold J "decline[d] to comment whether the principles in *Pecore* apply to TFSAs" because the applicant withdrew that part of her claim.

> I am mindful of *stare decisis* and am loathe on the facts of this case to reject what appears to be settled law in England through *Scottish Equitable Life* and the Manitoba Court of Appeal in *Dreger* and *Northern Trust.*[2]

[34] Graesser J. ultimately decided the issue "without resort to presumption", by placing the onus on the designated beneficiary to prove on a balance of probabilities whether his father intended to give him the RRIF funds (paras. 67-68).

[35] In Ontario, ***McConomy-Wood v. McConomy***, [2009] OJ No 741, and ***Calmusky v. Calmusky***, 2020 ONSC 1506, applied the presumption of resulting trust to designated beneficiaries. ***Calmusky*** was strongly criticized for eroding the certainty around beneficiary designations of countless RIF's, RRSP's, TFSA's, and pensions. Lococo, J. did not address the presumption within the context of s. 51(1) of the *Succession Law Reform Act*, which requires an institution administering a plan to pay it out to the designated beneficiary upon death of the owner.

[36] In ***Mak Estate v. Mak***, 2021 ONSC 4415, the same court declined to follow ***Calmusky*** in the context of a beneficiary designation on an RRIF. The reasons noted that ***Calmusky*** was grounded on an "*obiter* comment" in ***McConomy-Wood***, and ***Dreger*** pre-dated ***Pecore*** (paras. 42-43). McKelvey, J. went on to state:

> **44** In my view, however, there is good reason to doubt the conclusion that the doctrine of resulting trust applies to a beneficiary designation. First, the presumption in *Pecore* applies to *inter vivos* gifts. This was a significant factor for the Court of Appeal in *Seguin*, and similarly is a significant difference in the context of a resulting trust. Further, the decision of this Court in *Calmusky* has been the subject of some critical comment. As noted by Demetre Vasilounis in an article entitled "A Presumptive Peril: The Law of Beneficiary Designations is Now in Flux", the decision in *Calmusky* is, "ruffling some feathers among banks, financial advisors and estate planning lawyers in Ontario". ***In his article, the author comments that there is usually no need to determine "intent" behind this designation, as this kind of beneficiary designation is supported by legislation*** including in Part III of the *Succession Law Reform Act* (the "*SLRA*"). Subsection 51(1) of the *SLRA* states that an individual may designate a beneficiary of a "plan" (including a RIF, pursuant to subsection 54.1(1) of the *SLRA*.)
>
> **46** It is also important that the presumption of resulting trust with respect to adult children evolved from the formerly recognized presumption of advancement, a sometimes erroneous assumption for a parent that arranges for joint ownership of an asset with their adult child is merely "advancing" the asset to such adult child as such adult child will eventually be entitled to such asset upon such parent's

[2] *Morrison* at para 66.

> death. ***The whole point of a beneficiary designation, however, is to specifically state what is to happen to an asset upon death.*** **[Emphasis added.]**

The Presumption and Legislative Intent

[37] Section 9 of the *Beneficiaries Designation Act* reads:

> Savings plan
>
> 9 (1) In this Section,
>
> (a) "plan holder" means a person who has entered into a savings plan;
>
> (b) "savings plan" means a retirement savings plan, a retirement income fund, a tax-free savings account or a home ownership savings plan as each is defined in the *Income Tax Act (Canada)*.
>
> (2) Where, in accordance with the terms of a savings plan, a plan holder has designated a person or persons to receive a benefit payable under the savings plan in the event of the plan holder's death,
>
> (a) the person administering the savings plan is discharged upon paying the benefit to the designated person or persons;
>
> (b) the designated person or persons may, upon the death of the plan holder, enforce payment of the benefit, but the person administering the savings plan is entitled to set up any defence that could have been set up against the plan holder or the plan holder's personal representatives. [*emphasis added*]

[38] The *Act* states that designated beneficiaries of TFSAs and other plans are to receive the proceeds upon the death of the account holder. This interpretation reflects the Legislature's intent, evidenced in the debates for the Bill No. 196, amending the *Act* to include TFSAs:

> Michel Samson, MLA for Cape Breton-Richmond: So the purpose of this bill, after hearing this in the budget, is to make sure that upon someone's passing, if they held any money in these tax-free savings accounts, they can identify a beneficiary and that beneficiary will receive that money tax-free, outside, as well, of any probate of the estate which will take place.[3]
>
> Hon. Cecil Clarke, Minister of Justice: We want to ensure that those who have money in a tax-free savings account can pass the money along to their loved ones without penalty when they pass away, and today we are seeking to amend the legislation to allow that to happen. We're now including the new tax-free savings account within the definitions of savings plan in the Beneficiaries Designation Act. That means designated beneficiaries can receive tax-free savings accounts

[3] Nova Scotia, Legislative Assembly, *Debates and Proceedings (Hansard)*, 60th Gen Ass, 2nd Sess, 08-47 (13 November 2008) at p 5346 (Michel Samson).

> outside of a will in the same way that beneficiaries can receive the proceeds of an RRSP. This will allow an easier transfer of funds at a difficult time in life.[4]

[39] The only authority in Nova Scotia besides ***Brousseau*** citing s. 9 of the *Act* is ***Bruhm v. Feindel***, [1999] N.S.J. No. 57. Wright, J. stated at paragraph 51 that the designated beneficiary of the RRSP directly receives the proceeds of the account, without applying the presumption of resulting trust:

> I have reached the same conclusion in respect of the deceased's R.R.S.P.'s in which the appellant was named as the designated beneficiary. As such, she could enforce payment of the benefits upon the death of her husband as plan holder by virtue of s.9 of the *Beneficiaries Designation Act*, R.S.N.S. (1989), c.36. These R.R.S.P.'s did not pass through the hands of the executors nor were they otherwise administered by them.

Evidence on the Application

Michael Fitzgerald

[40] In his affidavit, Michael noted that his father was an independent man, and that was important to him, along with his community involvement.

[41] Through Michael, his counsel introduced a number of Exhibits (1-8), including the Designation of Beneficiary in question (#1) and the Guaranteed Investment Certificate (GIC), which Michael held with his father as Joint Tenants (36). This was in the amount of $75,000, and placed in both names on October 26, 2017, for a period of one year.

[42] Exhibit 8 shows this GIC having been placed in Michael's name as holder of it on December 2, 2019. Michael, Sr., passed away on December 16, 2019, two weeks later.

[43] At the outset it was acknowledged by the Applicant that paragraph 22 of his affidavit was in error, in that it states that he was designated beneficiary of his father's GIC investment, for which he received a cheque for $80,000, which he deposited in a chequing account in his name, holding same in trust to distribute equally among his siblings.

[44] With respect to his father, Michael referred to him as the "Chief". He stated the Chief "was very aware of what was happening with his money". He also

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[4] Nova Scotia, Legislative Assembly, *Debates and Proceedings (Hansard),* 60th Gen Ass, 2nd Sess, 08-50 (18 November 2008) at p 5717 (Hon Cecil Clarke).

confirmed that his father "looked after his own finances until he moved" to Taigh Na Mara, a seniors care home for Canadian Veterans.

[45] Michael's affidavit also addresses his father's "Estate Planning" and steps taken by him with his father, to attend various lawyer's offices, mentioning that Mr. Chris Conohan updated his father's Power of Attorney and Executor in his Will.

[46] In particular, paragraphs 14 -18 of Michael's affidavit are relevant to these issues. There is some hearsay in the affidavit and I ruled that certain portions were not admissible.

[47] The affidavit further details visits to the Credit Union, including a meeting with Lynn MacKinnon, who he said, treated his father with dignity and respect as a credit Union member. The Chief always had his reasons for gong to the Credit Union, Michael said.

[48] In these paragraphs, Michael attempted to convey to the Court what he believed were his father's intentions, and that as Executor, Michael would be able to distribute the assets "equally among his eight children", whom were all named in the Will (para. 18).

[49] Although Michael's affidavit contained errors, and hearsay, I found he gave his evidence in a candid and straightforward manner. He noted that his father was "not okay with my sister Reenie" (i.e. the Respondent), referring to changes his father made in the Power of Attorney and Will.

[50] With respect to the GIC monies, which he held jointly with his father, Michael said it would be "divided equally among my siblings", which he said "was the Chief's intention for the money". It goes without saying that the disposition of the TFSA is a decision for the Court.

[51] In cross-examination Michael acknowledged his father's designation of Maureen as the primary beneficiary of the TFSA on April 13, 2012, and agreed that it had not been changed since then.

[52] The Applicant submits that Michael's evidence is corroborated by that of Chris Conohan, and should be accepted by this Court. In addition, there is the affidavit of Elaine Muise, who filed an affidavit to similar effect supporting the Applicant. I will return to this evidence.

[53] In cross-examination, Michael was also asked about Maureen still being named as alternate Executor on the 2018 Will. He acknowledged that also had not been changed since 2013, although he said if he had died while his father was alive, his father probably would have changed it. Michael cannot speak for his father.

[54] Michael Fitzgerald was asked about the phrase "entire estate". He acknowledged the Will does not say what that consisted of, nor did it mention a savings or investment accounts. In cross-examination Michael stood firm that "entire estate" means everything his father had at the time of his death. Arguably, at least, he no longer had the TFSA funds "on or after his death."

[55] He further acknowledged, that Exhibit #8 placing the GIC in his name alone predated his father's passing. He testified the Credit Union called him to come in to switch it over into his name on December 2, 2019. Michael signed his name at the bottom and, as mentioned previously, takes the position this is part of the Estate. No further explanation of the date is available.

Maureen Fitzgerald

[56] Maureen Fitzgerald provided an affidavit, filed on December 21, 2020, and entered at the hearing as Exhibit #6.

[57] The majority of the affidavit describes her close relationship with her father and mother over the many years that she resided here as the only child in Sydney.

[58] Maureen refers to the many celebrations she organized such as birthday parties, St. Patrick's Day celebrations, and her father's involvement with the Irish Society as President and founding member in Sydney. This included her father's 95th birthday party. Generally, she would invite her siblings to these events. Like many families, there were at times strained relationships. She further testified, she would be aware when others were visiting her parents or having separate celebrations, that did not necessarily include her. For the most part, however, she was the driving force, according to her family when it came to her parents, which included personal care and finances.

[59] In her affidavit, Maureen discussed her father's finances and her involvement with them. She stated she had been Power of Attorney, but found it overwhelming, with her other responsibilities. Her brother, Michael, became Power of Attorney.

[60] She stated that every time a withdrawal had to be made from the joint account they would either go into the Credit Union together, or ask the Credit Union to give it to Maureen, while he waited in the car.

[61] All monies withdrawn were used for her father's benefit, she said. She took no funds for her personal use (paras. 138-139).

[62] At paras. 140 - 146 Maureen discussed her father's passing:

> 140. After my father passed away, my brother, Michael, as executor of my father's estate, demanded that I send the monies from the joint bank account to the estate.
>
> 141. After receiving this demand, I consulted with legal counsel.
>
> 142. Based upon the legal advice I received; I sent the monies in the joint bank account to the estate.
>
> 143. I agree that the monies in the joint bank account should be part of dad's estate because I do verily believe he did not intend me to keep the money.
>
> 144. I do verily believe that my dad named me as beneficiary of his Tax-Free Savings Account ("TFSA") because he intended that I receive the monies in the TFSA when he passed away.
>
> 145. I was there and helped mom and dad in every way I could.
>
> 146. My parents depended on me and I depended on them, I was blessed.

[63] Maureen's testimony appeared very honest and credible. She attempted to explain her reasons for making the claim to the TFSA monies.

[64] Being a joint account holder on the two accounts made it easier and more convenient to provide care to her father by being able to withdraw money to pay bills. She became a joint account holder when the two accounts were opened in 2012.

[65] She testified that all of the funds in those accounts were her father's. The only time she took money out, Maureen said, was when her father asked.

[66] She explained she knew that the account was "joint with survivorship", understanding this to mean that it was "joint but the money is not mine, it belongs to the estate, I don't own it", or words to that effect.

[67] On cross-examination, Maureen stated she knew of the earlier Will, and understood that the residue of her father's estate would be divided between her and her seven brothers and sisters.

[68] She was also asked if she knew her brother was Executor under the 2018 Will. She said she did, but was not sure when she found out. She did not know she herself was also an executor. She testified she did not wish to be and had asked her father to appoint Michael.

[69] In cross-examination Maureen was further asked about the two Wills, and when she became aware of being Executrix. She said she knew she was executor of the earlier Will, but told her father all those years, that she did not want to be executor, and asked him to appoint Michael. Her evidence here was a bit confusing, but she did confirm that her father told her she had been appointed "in 2013".

[70] She was also asked about Exhibit #1, and a meeting she had with Lynn MacKinnon after her father's passing, regarding the TFSA. It was suggested she informed Ms. MacKinnon that, the TFSA "goes with the Will". This was in response to Ms. MacKinnon handing her a cheque. After being questioned at some length she said she did not understand at the time that this was what the cheque was for. She thought Ms. MacKinnon was handing her a cheque for the monies in the two joint accounts, not the TFSA. She was referred to the third bullet in her March 29, 2020, email:

> In February Lynn from the Credit Union phoned and asked if I would meet with her. At that time Lynn told me I ws the beneficiary of the TFSA. I told her that goes in the Will. Lynn said no a TFSA works outside of a Will. She also asked me about closing the accounts. I closed one that day so we wouldn't have to pay taxes on the interest. The other I wanted to keep open because of automatic withdrawals may still come out, she agreed.
>
> I opened an estate account and put the savings in that account under my name. The other account was closed as planned March 19 and put in the estate account. I told Michael all of this in February after my meeting with Lynn, I wanted to tell everyone – he said no and wait.

[71] She was challenged on that evidence, as the email states that Ms. MacKinnon told her she was the beneficiary of the TFSA. In the email, it says next, "I told her that goes with the Will".

[72] The Estate says Maureen's testimony was vague on this point and that she attempted to "back away" from what she said in the email.

[73] However, it is important to review her entire evidence on this point for context. A transcript is as follows:

> Q: Okay. Alright so if I go to your document, March 29, 2020 and I'm looking at the third bullet point?
>
> A: Right.
>
> Q: And I'll just read from it, in February Lynn from the Credit Union phoned and asked if I would meet with her. At that time Lynn told me I was the beneficiary of the TFSA, I told her that goes in the Will. Lynn said no a TFSA works outside of the Will.
>
> A: Uh huh.
>
> Q: So you've read that.
>
> A: Yes.
>
> Q: So I will suggest to you that you had a discussion with Ms. Fitzgerald that was specific about the TFSA, correct?
>
> A: Yes after, yes.
>
> Q: And your answer to her when she told you, you were the beneficiary, you said no, that money goes in the Will?
>
> A: I did, because she passed me a cheque and then told me after, like it was… she said no this is a TFSA you're sole beneficiary.
>
> Q: Okay, so when she handed…
>
> A: She didn't say it was a TFSA when she was handing me the cheque.
>
> Q: I see. But it came, did it come as a surprise to you, you were getting this money from the TFSA?
>
> A: Yes.
>
> Q: Okay and do I understand when you received that, or I guess I'll back up first, sorry, do you remember how much cheque was that you got from Ms. MacKinnon?
>
> A: $53,200, I don't know exactly.
>
> Q: Okay and what did you do with that cheque?
>
> A: I put in a separate account, my own account.
>
> Q: Okay. And did I hear you right, did you get a different cheque a second cheque from Ms. MacKinnon that day for the money in the joint accounts?

A: No we got, we discussed I had to change the accounts. I didn't get a sec… I got the one cheque.

Q: I see. And My Lord maybe just to close the loop, in light of these discussions I'm not going to look to have that document entered as an exhibit.

Court: Okay thank you.

PR: So the money that was in the joint accounts, was that something you reviewed with Ms. MacKinnon that day when you went to see her.

A: Yes she asked me, I had to change the accounts because they were still in my and dads name and she wanted me like had to take dads name off it, so then they just went in, she wanted them to just both go in my name, but I said no one of them I wanted to keep the way it was in case more bills came for dad right….

Q: Okay.

A: …to pay bills, she wanted both so after that then they both went into my name after about another month or so I can't exactly remember when but…

Q: So was a new account opened in your name alone eventually?

A: I, no there were two separate but just in my name.

Q: So your father's name came off the accounts.

A: Yes, yes in a month.

Q: But were two new accounts open or is it just a matter of your dad's name came off it.

A: His name came off it.

Q: Okay.

A: Came off it.

Q: Okay so as a result of which the accounts were in your name alone?

A: I see.

[74] Notably, Ms. Fitzgerald stated she was "surprised" to learn she had been named beneficiary, which would be consistent with her evidence that Lynn MacKinnon did not mention that the cheque was for the TFSA monies, when she handed her the cheque.

[75] Maureen earlier mentioned a conversation she had with her parents at the Credit Union. This involved the TFSA and what would happen if her mother passed away. This is a hearsay statement that would favour Maureen. It is subject to section 45 of the *Evidence Act* and I must be wary of the potential for frailty in that evidence. The answer was given on cross-examination.

[76] Both parties gave evidence of interactions with their parents.

[77] The Estate submits there has been corroboration of a number of witnesses, such as to satisfy the corroboration requirement, and this should be given due weight.

[78] For example, the Estate says, Michael's evidence that his father wanted him added to the joint accounts is supported by Chris Conohan in paragraph 20 of his affidavit. In addition, the evidence of Elaine Muise in her affidavit at paragraph 12, about going for coffee with her **father** in the summer of 2018 and him saying, " I have a hundred and don't have enough money if I were to live to be 100". Elaine says she told him the family wanted him to be happy and did not want his money. He replied, she said, "Well whatever is left, I want it shared among all of yas." This is clearly hearsay on a critical point.

[79] Again, the Estate submits this was fully corroborated in the Will made soon after. I have taken this submission into account in my overall assessment of the evidence. What can be readily observed is the confusion that arises when intention and resulting trust presumptions are at issue. The potential for frailties in regard to self-serving evidence clearly exists.

[80] For example, in Mr. Conohan's evidence he clearly states his impression that his client, Mr. Fitzgerald, wanted his estate divided evenly among his eight children. With due respect, this still begs the question.

[81] Mr. Conohan's notes of his meeting, contained in Tab A of his affidavit (Exhibit #18), contain a reference to "tax free (income tax) - $50,000". The obvious question is why would they, if this asset was not meant for the Estate. Mr. Conohan did not have instructions recorded that the TFSA was to be treated separately, but also testified he did not ask about specific assets being designated. He did explain to Mr. Fitzgerald what it meant to have a designated beneficiary of a particular asset.

[82] Mr. Conohan was right to point out he is an objective witness, taking no sides and giving factual evidence. In the concluding paragraph of his affidavit he states:

> 21. THAT I cannot be sure that Mr. Fitzgerald specifically turned his mind to any beneficiary designation or not regarding his Credit Union accounts. However, his intention to divide his estate equally was clear to me. He simply did not articulate

> anything to me which I can say demonstrated a firm intention to include or exclude any bank accounts.

[83] Mr. Conohan's evidence is that Mr. Fitzgerald did not articulate anything, one way or the other, to show a firm intention to "include or exclude any bank accounts".

[84] Cathy Delaney's evidence is of obvious relevance. She too was a neutral witness, in the sense that she did not have an interest in the outcome.

[85] Ms. Delaney very clearly and credibly testified that she explained to Mr. Fitzgerald what it was he was signing. He came prepared, she said. In her affidavit, she stated:

> 6. On April 13, 2021 I met alone with Mr. Fitzgerald, as is my practice;
>
> 7. I was informed by Mr. Fitzgerald and I do verily believe that he wanted to designate his daughter, Maureen Fitzgerald as beneficiary of his TFSA;
>
> 8. Mr. Fitzgerald had Maureen Fitzgerald's address and Social Insurance Number to update the account information;
>
> 9. I explained to Mr. Fitzgerald that by signing the Designation of Beneficiary that all sums falling due under this contract on or after his death, would be paid to Maureen Fitzgerald, his beneficiary;
>
> 10. I felt that Mr. Fitzgerald was comfortable in signing the Designation of Beneficiary;
>
> 11. If I felt that Mr. Fitzgerald was not comfortable with signing the Designation of Beneficiary, I would have suggested that he come back to the credit union when he felt comfortable with his decision;
>
> 12. I witnessed Mr. Fitzgerald's signature authorizing the Designation of Beneficiary of his TFSA to his daughter, Maureen Fitzgerald;

[86] Ms. Delaney's evidence was unaffected in cross-examination. She agreed with the Estate's counsel that she did not have a specific recollection of the meeting, but she also said, "… I just didn't say here sign this form. We would have talked about the, what he was signing". This is consistent with her affidavit. He knew her well at the time, and specifically asked for "the MacPhee girl". She knew him and his family well.

[87] I will return to the evidence of both Mr. Conohan and Ms. Delaney.

[88] Outside the family, there is the affidavit of Ms. Judy Marshall, which speaks to the "unwavering commitment" of Maureen to her parents, and confirmed the various birthday and St. Patrick's day celebrations involving "Mr. Irish", which Maureen held. She stated Maureen even took up his role within the Irish Society and made him comfortable at Taigh Na Mara.

Decision

[89] The Estate advances a compelling argument that there would be little left to divide without the TFSA and the GIC, despite Mr. Fitzgerald's intent indicated in the Will to divide his estate. This goes to the Will of 2018, the wording of which says "entire Estate" to be "divided in eight (8) equal shares to my children, namely, …".

[90] The Estate submits therefore, that the rational inference is that Mr. Fitzgerald meant his entire estate.

[91] The law is clear that a Court must be very cautious in interpreting the general scope of the Will and the general intent of the testator. In **Feeney**, *Canadian Law of Wills*, vol. 2, the author states:

> Of course, the construction of the will cannot be based on mere conjecture or belief, the construction adopted by the court must be such that the words of the will and the reasoning therefrom persuade the court that it is the right construction.
>
> Inferences that can be drawn from the scope or scheme of the will are limited however. It has been said that a general intention cannot be carried out when the actual words of the will are inappropriate to do so. As was pointed out in *Inderwick v. Tatchell*, the court cannot simply guess at what the testator would have said if a particular matter, one which did not occur to him at all had been present in his mind; he cannot be supposed to have intended to make a certain provision. Where it can do so without straining the language, the court will attempt to reconcile conflicting provisions so as to make the whole will consistent with the apparent general intention of the testator.

[92] While I have not specifically referred to or detailed every affidavit filed in this application, I have reviewed and considered them in reaching my decision. Within the family, there are competing views.

[93] In ***Calmusky*** the court made a distinction between being satisfied on the evidence that the transferor understood it would be transferred to the person designated, and being satisfied that the evidence supported the conclusion that the

transferor intended the person designated to have beneficial ownership of the funds (para. 46).

[94] These distinctions and burdens are less relevant if the presumption of resulting trust does not apply. A key reason for applying that presumption is as stated in ***Pecore*** and ***Calmusky*** is that the transferee is in a better position to discharge that burden.

[95] In the present case, I do not believe that Maureen is in a better position to meet any such burden. While she had much more interaction with her father, she admitted to being surprised about being named as beneficiary. In fact, the Applicant has argued her position that her father intended to benefit her, was taken, "in hindsight".

[96] Do the TFSA funds belong to the Estate, or do they belong to Maureen Fitzgerald as the designated beneficiary? The caselaw indicates that all of the circumstances must be weighed and considered in making this decision (see ***Pecore***).

[97] After reviewing the affidavit of Ms. Delaney and listening to her evidence on cross-examination, I have no doubt that Ms. Delaney would have explained to Mr. Fitzgerald, whom she knew well, exactly what he was doing by signing the beneficiary designation form. In her evidence she stated:

> To me he was there to nominate a new beneficiary. … I would have talked to him about what it meant, that his daughter would be the beneficiary of that asset.

[98] The evidence is very clear, that of all the children, Maureen is the one who ended up caring for her mother and father, and in fact, dedicated her life to doing so.

[99] I find on the evidence that this was most likely "not lost" on Mr. Fitzgerald. He had been told several times what it meant for him to sign the beneficiary designation form, not only by senior financial advisors but his own counsel, Mr. Conohan.

[100] In ***Pecore***, the Supreme Court of Canada said this about resulting trusts:

> 5. While the **focus in any dispute over a gratuitous transfer is the actual intention of the transferor at the time of the transfer**, intention is often difficult to ascertain, especially where the transferor is deceased. Common law rules have developed to guide a court's inquiry.
>
> 20. A resulting trust arises when title to property is in one party's name, but that party, because he or she is a fiduciary or gave no value for the property, is under

> an obligation to return it to the original title owner... While the trustee almost always has the legal title, in exceptional circumstances it is also possible that the trustee has equitable title…
>
> 23. For the reasons discussed below, I think the long-standing common law presumptions continue to have a role to play in disputes over gratuitous transfers. The presumptions provide a guide for courts in resolving disputes over transfers **where evidence as to the transferor's intent in making the transfer is unavailable or unpersuasive.** This may be especially true when the transferor is deceased and thus is unable to tell the court his or her intention in effecting the transfer. In addition, as noted by Feldman J.A. in the Ontario Court of Appeal in *Saylor v. Madsen Estate* (2005), 261 D.L.R. (4th) 597, the advantage of maintaining the presumption of advancement and the presumption of a resulting trust is that they provide a measure of certainty and predictability for individuals who put property in joint accounts or make other gratuitous transfers.
>
> 26. In cases where the transferor is deceased and the dispute is between the transferee and a third party, the presumption of resulting trust has an additional justification. In such cases, **it is the transferee who is better placed to bring evidence about the circumstances of the transfer. [Emphasis added]**

[101] While I concur that the focus is the actual intention of the transferor, I do not concur that evidence of that intention is unavailable or difficult to ascertain in these circumstances. It is all of the circumstances that must be considered.

[102] In ***Calmusky***, the Court said:

> 56. 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.

[103] With respect, I see things differently. There are several reasons why the same reasoning should not apply to TFSAs (as opposed to a joint account), starting with the fact that a TFSA is not held jointly, nor is it transferred *inter vivos* during the transferor's lifetime. Instead, it is transferred upon his or her death.

[104] Beyond the fact that the "transfer" may be gratuitous, there are significant and distinct differences between joint bank accounts and a beneficiary designation, be it a RIF or a TFSA. There is no immediate transfer of asset into joint names. In a designation the asset remains in owner's name, not in both names as was the case in ***Pecore***.

[105] It is also a contract that binds the institution where the funds are held. The legislation not only requires the funds to be paid to the person designated but also

entitles that person to receive the funds. The word “contract” appears nowhere in the ***Pecore*** decision.

[106] In addition, unlike a joint account, there is no access to the funds by the person designated. The owner continues have sole authority to use the funds during their lifetime, as was the case before the designation was granted.

[107] Significantly there is no fiduciary aspect to a TFSA designation. In ***Pecore***, the court clearly stated that the rationale for applying the presumption of resulting trust is that the beneficiary is a fiduciary. That is simply not the case with a designation, unless the beneficiary is identified as a trustee. That is also not the case here.

[108] I concur with the reasoning applied in ***Morrison***, where the Court ruled that subject to specific wording, a TFSA designation was more akin to a Testamentary instrument:

> 44. Like designations of beneficiaries under insurance policies, there is a benefit to the owner of an RRSP or RRIF to be able to designate a beneficiary rather than have the plan go to his or her estate. That may be tax roll-over provisions relating to spousal beneficiaries and there may be an element of creditor-proofing if there is designated beneficiary rather than having the plan go to the owner's estate.
>
> 45. I can frankly think of no sound policy reason why beneficiary designations under RRSPs, RRIFs and insurance policies should not be treated in a similar fashion to beneficiary designations under a will. None of these "gifts" take effect until the death of the owner of the plan or policy. With the exception of irrevocable beneficiaries under some life insurance policies, the owner is free to change beneficiaries during his or her lifetime, so long as he or she is of sound mind.
>
> 46. I recognize the historical concerns surrounding the formalities required of testamentary dispositions. The intent of formality was undoubtedly to attempt to add a level of assurance that the donor intended the consequences of his actions and was in fact the author of the testamentary disposition.
>
> 47. While such designations have been treated as inter vivos transactions and not testamentary transactions, they are certainly much closer to testamentary transactions than to inter vivos gifts such as transferring bank accounts, investment accounts or property into joint names. Such transactions cannot be unilaterally undone, unlike beneficiary designations. I note that RRSP beneficiary designations appear to be "testamentary dispositions" in Ontario as a result of Ontario's *Succession Law Reform Act*, RSO 1990, c S.26 (see *Amherst Crane Rentals Ltd. v. Perring* [2004 CarswellOnt 2471 (Ont. C.A.)], 2004 CanLII 18104).

[109] In the present case, I am satisfied from the evidence that:

i) Mr. Fitzgerald's TFSA designation of beneficiary is a contract with the Credit Union whereby the Credit Union agreed to pay funds to the designated beneficiary, his daughter Maureen Fitzgerald, upon his death.

ii) Unlike a joint account the TFSA is not an *inter vivos* transfer to a person who will be the other joint account holder. Ms. Fitzgerald agreed to pay the funds in two joint accounts she held with her father to the Estate.

iii) Mr. Fitzgerald twice named his daughter as beneficiary of the TFSA account.

iv) Mr. Fitzgerald previously named his wife Flora as beneficiary of the TFSA in 2009. Following her passing in 2011 he decided to change the beneficiary on his TFSA. Mr. Fitzgerald also signed a new Will in May 2012 (Exhibit 18 Tab G) after completing the new designation(s) that included a clause (8) that any RRSP, RRIF, pension plans, or annuity purchases, or Insurance Policies on his life that did **not** designate his Estate as the beneficiary, were "with respect **only** to those plans, policies or annuities" designated as being payable to his Estate "upon or as a result" of his death.

v) The 2012 Will was revoked and in his subsequent Will in 2018 he directed that his "entire estate" be divided equally among his eight (8) children. This Last Will did not include a clause similar to his previous Will, overriding any previous RRSP, RRIF, and Insurance Designations. It must be noted that the 2012 Will did **not** refer to the TFSA account as one the "plans, policies, or annuities" for which the proceeds would be payable to his Estate at that time. Significantly, that "Will designation" specifically **declared** that the designation "shall be a designation within the meaning of the ***Beneficiary Designation Act of Nova Scotia.*****"**

vi) Turning to the wording of the "bank document", (cited in ***Pecore***) as one of the sources of evidence showing intention (paragraph 61); the designation Mr. Fitzgerald signed tells us specifically when the proceeds should be payable to the Estate. The TFSA designation in Exhibit 1, paragraph b, states: "If no beneficiary designated herein survives me or accepts this designation, the proceeds of this contract shall be paid to my estate".

vii) It is clear that then and only then would the proceeds of the TFSA be payable to the Estate. This is not a case where there is "no beneficiary designated that survives" the transferor, Mr. Fitzgerald or where there is "no beneficiary designated that accepts" the designation. On this basis I reject

> the Applicant's argument that the *Act* merely represents "form and not substance". **[Emphasis added]**

[110] Given that Mr. Fitzgerald designated his wife Flora as the beneficiary of his TFSA funds back in 2009, it is likely that he would have gotten advice at that time, about what it meant to sign the designation. He met with Ms. MacKinnon, who witnessed his signature then. The evidence of Cathy Delaney was that it did not matter who he was meeting with at the Credit Union, he would have been told the same thing. Mr. Michael Fitzgerald mentioned his father often met with Lynn MacKinnon.

[111] It is therefore, a reasonable inference that the effect of signing a designation of beneficiary was explained to him by the Credit Union, at least twice and probably three times, in addition to having it explained to him by Mr. Conohan in 2018 and having it in his Will dated May 9, 2012.

[112] Exhibit 1, paragraph c, states: "All sums falling due under this contract, on or after my death be paid to the Beneficiary(s) listed below". The primary beneficiary designated is Maureen Ann Fitzgerald, 59 Common Street. Relationship: Daughter. Social Insurance Number ---. The evidence of Cathy Delaney is that Mr. Fitzgerald had the information he needed with him on April 13, 2012 to make this designation.

[113] Mr. Conohan explained to Mr. Fitzgerald that he had the option of designating someone else, revoking it, or overriding such a designation in his Will. In cross-examination Mr. Conohan testified as follows:

> Q: I always mention… I always confirm that some assets operate outside an estate, correct?
>
> A: Yes and I had that discussion with Mike. And I explained to him that if you have a beneficiary designation and these occur in things like, the most common cases are life insurance policies or rrsp's, within the context of that sort of conversation, I usually also talk about in estate planning if you have real estate and you want to avoid the property being processed through probate that you can do a joint tenancy deed, but specifically these beneficiary designations were discussed and you know, I did not have any sense that he did not understand what I meant.
>
> …
>
> Q: Have you, in the course of your practice and you've indicated you've been practicing since 1998, have you ever had occasion to include a destination in the will designating that the proceeds from an rrsp, a rif or a tfsa would go to the rest and residue of an estate?

A: I've done that but only with specific language that would mirror what's required by the statute.

Q: That's right okay.

A: Yeah.

Q: And in this particular case, were you directed by Mr. Fitzgerald to, to include such a designation in his last will and testament?

A: No he did not indicate to me to do anything along those lines.
Q: Thank you.

[114] In the present case, the wording of the designation itself is clear, that it would only be transferred upon his death. There was no previous *inter vivos* transfer that would give rise to a resulting trust upon Mr. Fitzgerald's death, as was the case in ***Pecore***.

[115] In these circumstances, the intention could not be any clearer that giving the funds to Maureen when he did was exactly what Michael, Sr. intended, in accordance with the language of Clause C of Exhibit 1, which states:

> All sums falling due under this contract, on or after my death, be paid to the Beneficiary(s) listed below.

Conclusion

[116] In my view, the presumption of resulting trust should not be applied to TFSA accounts.

[117] First, Courts in other jurisdictions, notably Ontario, have found that applying the presumption in this context often frustrates the intention of the transferor, creates transactional uncertainty, and poses evidentiary challenges for the transferee.

[118] Second, applying the presumption is contrary to the Nova Scotia Legislature's intention to provide designated beneficiaries of TFSAs with the right to receive proceeds from accounts upon the death of the holder under s. 9 of the *Beneficiaries Designation Act.*

[119] Thirdly, to impose the presumption of resulting trust upon designated beneficiaries of TFSAs would frustrate the clear purpose of the Legislature: to simplify the transfer of monetary gifts from the transferor to his/her loved ones.

[120] There being no presumption of resulting trust, and the burden is on the Applicant to establish, on a balance of probabilities, that it is entitled to the Order sought. For all of the above reasons, I have concluded the Applicant has not met that burden.

[121] The appropriate disposition of the TFSA funds of the late Michael Joseph Fitzgerald held at the Credit Union is that they belong to Maureen Fitzgerald as his designated beneficiary.

[122] Accordingly, Maureen Fitzgerald is the beneficial owner of the funds in question.

Murray, J.