



Show me the Money! Navigating Unique Issues with Seniors and their Financial Institutions

Kimberly Whaley,
Whaley Estate Litigation
and
Suzanne Michaud,
Royal Bank of Canada

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Overview (course description)

- The landscape is shifting for clients and their financial service providers. Both during incapacity and after death, it can be unclear to lawyers, estate trustees, co-account holders and beneficiaries what rights and obligations exist under the pre-existing account and plan documentation of the financial institutions. Practitioners must have a thorough understanding of the common, yet avoidable problems encountered by representatives who interact with banks, mutual fund companies and investment dealers on behalf of elderly clients.
- In this webinar, our expert faculty will provide you with practical guidance on the hard questions while giving you the tools and knowledge you need to work effectively with financial institutions in a variety of different scenarios.

The comments and opinions expressed are ours and are provided for information only. They do not constitute legal advice.

Topics

- Voluntary Commitment on Powers of Attorney and Joint Accounts binding Canada's banks (SM – 5 min)
- Understanding the contractual rights and duties and the impact of differing regulatory regimes governing documentation requirements (SM – 20 min)
- How to manage jurisdictional issues in respect of powers of attorney documents (SM – 10 min)
- Joint accounts versus estate plans: recent decisions on the presumption of resulting trust (KW – 15 min)
- Working with banks to implement remedies: service requirements, preservation orders, tracing orders (KW – 20 min)
- Questions? (5 min)



Section 1

Voluntary Commitment

Voluntary Commitment on Powers of Attorney and Joint Accounts

- Made by Canada retail banks to Canadian government
- Banks implemented the provisions of Commitment related to disclosure of the required information about Powers of Attorney and Joint Deposit Accounts on their websites by September 1, 2014 and in the branches by December 31, 2014; and the staff training provisions by March 31, 2015
- Regulated by Financial Consumer Agency of Canada
- Generic information to improve financial literacy:
 - Canadian Bankers Association
 - Canadian government
 - Banks themselves

Content of Voluntary Commitment

Banks will:

- not require their own forms of POA
- offer general info on POAs and joint accounts
- set out bank's minimum requirements to operate account under POA
- unless suspected financial abuse, will inform attorney/client of any additional review needed
- provide information on dispute resolution process
- train front line staff dealing with POAs and joint accounts



Section 2

Contractual Rights & Regulatory Regimes

Contractual/Regulatory – Legal Entities

*Who are you/your client dealing with? >>
engage the correct legal entities!*

- Banks and broker-dealers (FIs) >> separate legal entities, governed under different laws and regulatory regimes
- Privacy laws preclude sharing of information unless with client consent (perhaps found in account agreement) or under compulsion of law
- Letters of direction to FI or Court Order
 - detailed, inclusive
 - delivered/served to right entity/business

Contractual/Regulatory - Analysis

Adapt your approach to the legal entity

- *Bank Act* (Canada) has provisions not available to provincially regulated broker-dealers (s. 437):
- May receive deposits and make payments, whether or not the person is qualified by law to enter into contracts
- Not required to see to due execution of trust - reliance on terms of contract – important point for joint accounts

Where, how and with whom does your client transact?

- on-line
- by phone
- different branches or deep relationship at one branch

Contractual/Regulatory – Know Your FI

Adapt your approach to the legal entity

Broker – dealer under provincial securities regulation:

- Requirement to “Know Your Client”
- Means more information required about objectives, risk tolerance, more advice may be offered
- Often more one to one relationship with advisor who may have knowledge/concerns
- Compliance departments may be involved

Contractual/Regulatory – What Assets?

Different regulatory requirements for:

- Bank accounts/ GICs
- Investment accounts
- Insurance products/segregated funds
- Possible limitations on liquidation

What is Ownership now? sole, joint, corporate, trust

What consequences will there be from the proposed transaction?

For example: Triggering of gains, withholding tax, deferred sales charges, exposure to creditors, defeat of estate plan

Contractual/Regulatory – What Documents?

What documents govern and what do they say?

- Are product documents relevant – can transaction be refused?
- Are there other FI standard forms (such as limited POA), giving access to accounts in place?
- “Limited” generally means either to one described account and/or limited activities such as banking only
- Trading authority a limited type of power of attorney for investment accounts
- Additional limited forms may not needed if the client has prepared a general enduring power of attorney and simple situation but depends on client
- Personal versus corporate

Contractual/Regulatory - Processing

- Do not expect review of non-standard POA and transaction to be processed the same day
- Need for representatives to be identified
- Do It Yourself documents usually attract additional scrutiny as do transactions not for client's apparent best interest which come to attention of FI staff
- Estate planning transactions can be problematic – creation of joint accounts, trusts, large gifts
 - By POA
 - Capacity in question
- Gifting powers in POA document not tested in courts yet
- Financial abuse common, generally by family members

Contractual/Regulatory – Suspected Financial Abuse

What might FI do if financial abuse suspected?

- Meet with client
- Ask for evidence supporting capacity/incapacity
- Review of executed forms/documents
- Investigate past transactions
- Ask for further information about this transaction
- Contact attorney if not the suspected abuser
- Contact next of kin (if not suspected abuser) under new amendment to privacy law

Contractual/Regulatory – Suspected Financial Abuse (2)

What might FI do after this review?

- Refuse transaction
- Restrain account other than needed expenses for client
- Require Order or other way for certainty
- Required reporting of suspected financial abuse where client resident of long term care or retirement home
- Possible involvement of PGT or police



Section 3

Jurisdictional Issues

Jurisdictional Issues - Non-resident Representatives

- Attorney, guardian of property, trustee, estate trustee
- If investment account, Canadian investment advisors are prevented from taking instructions from US residents under SEC regulations
- Solutions mostly unpalatable – i.e. resignation, hold or liquidate
- Much better to anticipate in document rather than have to deal with issue after incapacity or death of client
- Anti money laundering identification requirements are strict, which can be an issue for non-residents as well

Jurisdictional Issues – Foreign Documents

Foreign power of attorney for use in Ontario

- Often needs a foreign legal opinion attesting to legal validity and effectiveness since CDN FI cannot validate it
- Will cause delays and likely added expense
- May not be accepted at all
- Again concerns about identification of attorneys for AML

Foreign estate documents also problematic

- Section 460 of *Bank Act* offers some protection to banks but nothing similar for broker dealers

Jurisdictional Issues - Delegation

- Attorneys and estate trustees act
 - personally
 - generally may not delegate their powers/ discretions, subject to certain exceptions
- Problem arises when attorneys and estate trustees want to do a wholesale delegation to someone else or have become incapable and their own attorney wishes to act for the original owner
- Can be problematic re discretionary managed investment accounts where sub/delegation of investment power needed
- Again, inserting the appropriate delegation & subdelegation clauses in the power of attorney or Will is very helpful to avoid these issues

Jurisdictional Issues – Other Applicable Legislation?

For instance re Locked In Registered Plans

- Governed under relevant pension benefits legislation
- Spouses have rights to pension and death benefits and must consent to unlocking of benefits
- Spousal rights trump designated beneficiary, unless waiver is possible under relevant pension law
- Attorney generally is not acting in best interest of spouse to sign a waiver of these rights

Income Tax Act

- Often settlements and orders do not take into account the income tax consequences; such as for joint accounts and for registered plans ion dispute

SECTION 4

Joint Accounts

Joint Accounts & doctrine of resulting trust

Pecore v. Pecore, 2007 SCC 17

Sawdon Estate, 2012 ONSC 4042

Sawdon Estate v. Sawdon, 2014 ONCA 101

POA for Property

Power of Attorney for Property document

Legislated formal validity requirements

Legislated duties and obligations

Access to *all* property, but *no* ownership

Death = authority of POA ends

Joint Accounts

Signature cards

No validity requirements

No duties or obligations (just contracts with bank)

Access to *only* that account, with ownership

Death = right of survivorship (maybe resulting trust)

SECTION 5

Remedies

Remedies – an overview of this section

- Freezing Orders (in general)
 - Mareva Injunctions (in particular)
- Preservation Orders
- Tracing Orders:
 - How to trace
 - Joint Accounts
 - Mixed Funds
- Implementing these remedies: the Bank's Perspective

Freezing Orders

- *1711811 Ontario Ltd. V. Buckley Insurance Brokers Ltd.*, 2014 ONCA 125
 - interim injunctive relief is pre-trial relief, typically for a brief, specified period of time
 - interim injunction is also pre-trial relief, generally for a longer duration than an interim injunction
 - interlocutory injunctions are imposed in ongoing cases
 - permanent injunctions are granted after a final adjudication of rights

Freezing Orders

- *Courts of Justice Act*, RSO 1990 c C.43

101. (1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.

Mareva Injunction

- *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR 311 at para 48:
 1. Is there a serious issue to be tried?
 2. Would the moving party otherwise suffer irreparable harm?
and
 3. Does the balance of convenience favour granting the injunction?

Mareva Injunction

Part 1 of the RJR test:

“Serious issue to be tried” = neither vexatious nor frivolous

But see, for example, *Down Estate v. Racz-Down*, 2009 CarswellOnt 8128 (SC) at paras. 65-66, where the “strong prima facie case” is applied instead of the three-part test.

Mareva Injunction

Part 2 of the RJR test

irreparable harm

Mareva Injunction

Part 3 of the RJR test

does the balance of convenience favour
granting the injunction?

Preservation Orders

Rule 45.01 = physical property (land, physical evidence...)

Rule 45.02 = \$

Rule 45.02

- *Sadie Moranis Realty Corp v. 1667038*, 2012 ONCA 475 applies *News Canada Marketing Inc. v. TD Evergreen*, [2000] O.J. No. 3705 (Ont. S.C.J.), at para. 1:
 - a) the plaintiff claims a right to a specific fund;
 - b) there is a serious issue to be tried regarding the plaintiff's claim to that fund;
 - c) the balance of the convenience favours granting the relief sought by the plaintiff.

Rule 45.02

“There is a subtle but important difference between an amount that may be owing to the plaintiff and a right of the plaintiff to a fund”

Sadie Moranis Realty Corp v. 1667038, 2012 ONCA 475
citing *Assante Financial Management Ltd. v. Dixon* (2004), 8
C.P.C. (6th) 57 (Ont. S.C.J.), at para. 28

Rule 45.02

- *Taribo Holdings Ltd v Storage Access Technologies Inc*, 2002 CarswellOnt 3811 (SC), at para 2:

The effect of *Rule 45* is to give the court authority to make such orders as may be necessary in the circumstances to preserve a particular piece of property where there are disputes that are directed specifically at that piece of property.

Preservation Orders: Notice Requirements

"Extraordinary urgency" that justifies moving for an injunction without notice arises where "the delay necessary to give notice might entail serious and irreparable injury to the plaintiff"

Corbett J. in *Robert Half Canada Inc. v. Jeewan et al*, [2004] O.J. No. 2903, 71 O.R. (3d) 650, at paras. 30 to 40

Preservation Orders: Notice Requirements

“As the jurisprudence of this Court consistently has held, proceeding with an application (or a motion) on an ex parte basis is an extraordinary way of proceeding and only should occur (i) where there is good reason to believe that the responding party, if given notice, will act to frustrate the process of justice before the motion can be decided or (ii) where there is simply not the time and/or means to provide notice.”

D.M. Brown J. in *Re Sprott Resource Lending Corp.*, [2013] ONSC 4350

Preservation Orders: Other Considerations

- Full and frank disclosure?
- *Arduino Ignani v. Franco Ignani and Teresa Marroccoli*, 2009 CanLii 54768
- Will it frustrate the administration of the estate?
- Will it interfere with the management of the older adult's property?
- Are ex-parte motions appropriate in estate litigation?

Preservation Orders: Sample Cases

- *Jordan v. Jordan*, 2013 ONSC 6948
- *Carfagnini v. White Estate*, 2014 ONSC 3574
- *Down Estate v. Down*, 2009 CarswellOnt 8128 (SC)

Tracing Orders

- Not a remedy – a right
- Technically a process rather than a claim or remedy

Tracing Orders

- Tracing vs. Following
- *Foskett v. McKeown*, [2000] 3 All ER 97 (House of Lords)

Following is the process of following the same asset as it moves from hand to hand. Tracing is the process of identifying a new asset as the substitute for the old. Where one asset is exchanged for another, a claimant can elect whether to follow the original asset into the hands of the new owner or to trace its value into the new asset in the hands of the same owner. In practice his choice is often dictated by the circumstances.

Tracing Orders

- Tracing vs. Following
- *Foskett v. McKeown*, [2000] 3 All ER 97 (House of Lords)

A beneficiary of a trust is entitled to a continuing beneficial interest not merely in the trust property but in its traceable proceeds also, and his interest binds every one who takes the property or its traceable proceeds except a bona fide purchaser for value without notice. In the present case the plaintiffs' beneficial interest plainly bound Mr. Murphy, a trustee who wrongfully mixed the trust money with his own and whose every dealing with the money (including the payment of the premiums) was in breach of trust. It similarly binds his successors, the trustees of the children's settlement, who claim no beneficial interest of their own, and Mr. Murphy's children, who are volunteers. They gave no value for what they received and derive their interest from Mr. Murphy by way of gift.

Tracing Orders: How to Trace

- Strict Approach: Transactional versus Causal

Tracing Orders: How to Trace

- “common sense approach”
- *Bennett v. Bennett*, 1997 CarswellOnt 4682 (Ont Gen Div)

Tracing Orders: How to Trace

- “It appears that some of the older, more technical tracing rules developed in the context of trust law are not applicable in the family law context where they would bring about an arbitrary or unfair result”
- *Ludmer v. Ludmer*, 2013 ONSC 784

Freezing / Tracing: Joint Accounts

- Section 14 of the *Family Law Act*, RSO 1990, c F.3:

The rule of law applying a presumption of a resulting trust shall be applied in questions of the ownership of property between spouses, as if they were not married, except that,

(a) the fact that property is held in the name of spouses as joint tenants is proof, in the absence of evidence to the contrary, that the spouses are intended to own the property as joint tenants; and

(b) money on deposit in the name of both spouses shall be deemed to be in the name of the spouses as joint tenants for the purposes of clause (a).

Freezing / Tracing: Joint Accounts

- Money on deposit in joint accounts is presumed to be property held as joint tenants: *Family Law Act*, R.S.O. 1990, c. F.3, s. 14. There appears to be nothing in the record that rebuts the inference that throughout their 20-year marriage, Joe and Pina intended these joint accounts to be used for the benefit of both and to have a right of survivorship. I see no unjust enrichment in Pina's having funds to which she was, during Joe's lifetime, fully entitled to access
- *Scalia v. Scalia*, 2015 ONCA 492

Freezing / Tracing: Joint Accounts

- Resulting trust presumption
- *Pecore v. Pecore*, 2007 SCC 17

Tracing: Mixed Funds

- *Boughner v. Greyhawk Equity Partners Limited Partnership (Millenium)*, 2012 ONSC 3185

Tracing: Mixed Funds

- **Rule in *Clayton's case*:** first in, first out – not without some criticism in estate litigation
- **Rule in *Re Hallett's case*:** Resolve any evidentiary burden against the wrongdoer, if the funds have been mixed as a result of wrongdoing

Tracing: Mixed Funds

- **Principle in *Re Oatway***: up to the beneficiaries to decide, after knowing all the facts, whether the trustee spent his own money or the trust money first
- **The Lowest Intermediate Balance Rule ("LIBR")**: where trust money has been mingled in a bank account and spent by a breaching trustee and new money originating from a different source is subsequently deposited into the mixed account, an injured beneficiary can only claim a proprietary interest over the lowest intermediate balance

Tracing: Dissipated Funds “Backwards Tracing” – future trends

- “The development of increasingly sophisticated and elaborate methods of money laundering, often involving a web of credits and debits between intermediaries, makes it particularly important that a court should not allow a camouflage of interconnected transactions to obscure its vision of their overall purpose and effect. If the court is satisfied that the various steps are part of a coordinated scheme, it should not matter that, either as a deliberate part of the choreography or possibly because of the incidents of the banking system, a debit appears in the bank account of an intermediary before a reciprocal credit entry.”
- *Federal Republic of Brazil and another v. Durant International Corporation and another* [2015] UKPC

Tracing: Mixed Funds

- *pari passu ex post facto*
- *Law Society of Upper Canada v. Toronto Dominion Bank* (1998), 42 O.R. (3d) 257 (C.A.)
- (but see *Ontario (Securities Commission) v. Greymac Credit Corp.* (1986), 55 O.R. (2d) 673 (C.A.))

Tracing: Mixed Funds

- Was the mixer an innocent contributor of his or her own funds?
 - **YES:** A is assumed to spend own money first. This is the case even if first withdrawal used to buy now successful investment
 - **NO:** Use *Re Oatway* (Beneficiary's choice). Then, the choice is between the LSUC and the *Greymac* approach (i.e., are we applying LIBR or not when we do pro rata sharing)

Banton v CIBC Trust Corp, 38 E.T.R. (2d) 167, 53 O.R. (3d) 567 (CA)

- Testator comingled a “Residence Trust” with his own funds
- dispute is to the entitlement to the remaining funds in the account, as between George Banton’s estate and the Residence Trust
- Cullity J held that the Residence trust was entitled to trace its \$205,342 and to secure its claim to that amount by an equitable lien
- Appellant argued the fund should be divided *pro rata* in accordance with the respective “contributions“
- The Court of Appeal upheld Justice Cullity’s decision

FI Perspective

- Who should you serve? See earlier notes re legal entities
- What information does the FI need?
 - Correct account/plan information helpful and creates uncertainty if inaccurate
 - General description also can be helpful if legal entity correct
- Who pays the FI's legal fees? May come out of account if in account documents or allowed by law

Questions?