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COMMENT

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CLARITY OF INTENTIONS WILL REDUCE UNCERTAINTY

The 2007 decision by the Supreme Court of Canada (SCC) in *Pecore v. Pecore* addressed the issue of a resulting trust in the context of a transfer of assets into joint title with adult children.

The issue of a resulting trust arises when there is a transfer of property without consideration. In general terms, when there is a gratuitous transfer of assets to an independent adult child, there is a presumption under common law that the child holds the assets in trust. Subsequent to the transfer, the assets still belong to the transferor, form part of the transferor's estate and are subject to the terms of the transferor's will. In such situations, the adult child who holds joint title is acting as trustee for the assets. In addition, the assets held in the resulting trust are subject to claims by creditors of the transferor's estate and are subject to probate fees (if any).

The SCC concluded that the presumption of a resulting trust can be rebutted through an assessment of the circumstances surrounding the transfer. Using a balance of probabilities approach, an assessment is made as to whether the transferor intended to transfer the assets without the presumption of a trust. In simple terms, the presumption can be overridden if the parent declares that the transfer was intended as an outright gift. Without such an obvious declaration, a circumstantial assessment would be required.

A significant outcome of the Pecore case was the SCC's analysis and conclusion with respect to the issue of joint tenancy and the right of survivorship. The SCC concluded that "rights of survivorship, both legal and equitable, vest when the joint account is opened and the gift of those rights is therefore *inter vivos* in nature."

Beneficiary designations, whether in a RRIF, RRSP or life insurance policy, are common place; yet, like transfers of property, the intended outcome of making that designation is not without some potential risk, depending on the circumstances. An October 2015 decision of the Court of Queen's Bench of Alberta in the Morrison Estate case considered the issue of whether a RRIF beneficiary designation could be considered a resulting trust.

A beneficiary designation on a life insurance policy, RRIF or RRSP directs the funds to the named beneficiary. The question in the Morrison case was whether the named beneficiary received the funds as an outright gift, or in trust for the policy owner's estate.

The primary facts of the case are as follows:

- Mr. Morrison signed his will on March 25, 2002, leaving everything to his spouse. In the event his spouse predeceased him, his estate was divided equally amongst his four children, with the exception of $11,000 that was to be deducted from one child's share. The $11,000 was to be divided equally amongst his grandchildren.
- Mr. Morrison survived his spouse, who passed away on June 19, 2002. This meant that his children and grandchildren, as subsequent beneficiaries, became entitled to his estate.
- Mr. Morrison named one of his sons, Douglas, as beneficiary of his RRIF shortly after his wife's passing. Douglas was also named as co-executor of his father's estate.
- Mr. Morrison sold his home shortly before his death and gave $25,000 to each of his four children from the proceeds.
- Mr. Morrison passed away on November 10, 2011.

Upon Mr. Morrison's passing, his son, Cameron, applied to the court seeking to declare the RRIF proceeds distributed to Douglas, as the named beneficiary, to have been received by him in-trust for the estate. Cameron's application relied on the Pecore case citing that there was no consideration paid for being designated as a beneficiary, making it a resulting trust.

Justice Graesser, the presiding judge, was charged with deciding whether the issues addressed in the Pecore case were equally applicable to the issue of beneficiary designations. In his analysis, the judge considered such issues as:

- What was on Mr. Morrison's mind when he named one child as beneficiary of his RRIF, when he could have named all four children or the estate as beneficiary?
- Mr. Morrison's relationship with Douglas, at the time he named him as beneficiary, relative to his relationship with the other children at that same time.
- The broader issue of beneficiary designations including the significant number of beneficiary designations across products such as life insurance, RRSPs and RRIFs, and the amount of doubt that could arise if every beneficiary designation were to be treated as a resulting trust.
- There was very little law on the subject or prior jurisprudence that could be used in assessing Mr. Morrison's situation.

In his analysis, the judge pondered the concept of *inter vivos* and testamentary transactions, noting that while beneficiary 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.*
>
> *Beneficiary designations are unlike joint ownership of bank accounts or investment accounts, which confer a present property interest. Beneficiary designations do not.*
>
> *Beneficiary designations are essentially powers of appointment conferred on the owner by the terms of the contract."*

Based on the balance of probabilities with respect to Mr. Morrison's intentions when making the beneficiary designation, Justice Graesser found that there was sufficient evidence to conclude Mr. Morrison's beneficiary designation was a gift to Douglas as a favoured child. In making his final decision, Justice Graesser considered only the facts and not the issue of a resulting trust.

There was, however, the issue of the estate's tax liability arising from the RRIF. While a beneficiary designation can direct how the RRIF proceeds are distributed, the tax liability remains that of the deceased's estate. On this issue, the judge further decided that the income tax liability in the estate, created by the RRIF, should be borne by Douglas, the named beneficiary. The judge felt that if the estate was responsible for funding the income tax that arose from the RRIF, it would confer an unintended benefit on Douglas at the expense of the estate. In reaching this conclusion, Justice Graesser considered Mr. Morrison's probable intentions. He reasoned that Mr. Morrison did not likely understand the taxation of the RRIF upon his passing and probably would not want the tax cost to be borne by all of the children and grandchildren.

A beneficiary designation is a common strategy for dealing with a testator's assets. In his concluding remarks, Justice Graesser opined that "It is likely that the law in this area will be uncertain for some time. The 'definitive' case may be many years away from being finally decided, and legislatures may never choose to weigh in on these issues." He concludes with the recommendation that to enhance clarity, consideration should be given to documenting the policy owner's intention when making a beneficiary designation – was a gift intended?

A NEW YEAR AND NEW FEDERAL INCOME TAX RATES

The much-anticipated change to personal income tax rates was announced by the federal government on December 7, 2015, to take effect January 1, 2016. The result is a new 33% top-level federal income tax bracket along with a decrease for those whose taxable income surpasses the $45,282 mark.

What does it mean?

The net effect is an overall decrease to the total federal income tax paid by those with taxable income between $45,282 and $216,975, because everyone in this group will benefit from the 1.5% decrease applied to the second tax bracket (which was 23% and is now 21.5%).

However, individuals who earn more than $216,975 will pay more overall tax. This group will benefit from the 1.5% decrease to the tax rate applied in the second bracket but will also be subject to an increase of 4% (rate increase from 29% to 33%) on all taxable income over $200,000. The higher taxes in the top tax bracket exceed the tax savings in the second bracket when income reaches $216,975.

How many people are affected by the new top tax rate?

The most recent data available from Statistics Canada is based on 2012 income tax returns. While there is not a clear break point at the new $200,000 taxable income threshold, some interpretation of the statistics provides an interesting overview:

- The total number of individuals with taxable income between $200,000 and $250,000 is estimated at 231,000 taxpayers or 1.3% of total taxable returns filed. This number was estimated using a simple 50% of the total number of returns in the taxable income group of $150,000 to $249,000.
- Individuals with taxable income over $250,000 totalled about 225,000 taxpayers out of a total of 17,700,000 taxable returns filed, or 1.3%.
- Collectively, about 2.6% of total taxpayers will pay tax at the new 33% top tax bracket.

The federal tax brackets for 2016 are depicted in the chart below.

	Federal Tax Brackets for 2016	Tax Rate
1	up to $45,282	15.0%
2	$45,283 to $90,563	20.5%
3	$90,564 to $140,388	26.0%
4	$140,389 to $200,000	29.0%
5	$200,001 and over	33.0%

The tax brackets are applied to the marginal income in each respective bracket as shown in the following two examples.

Individual A– taxable income $85,000

- 15% on the first $45,282 = $6,792
- Plus 20.5% on the income between $45,283 and $85,000 = $8,142

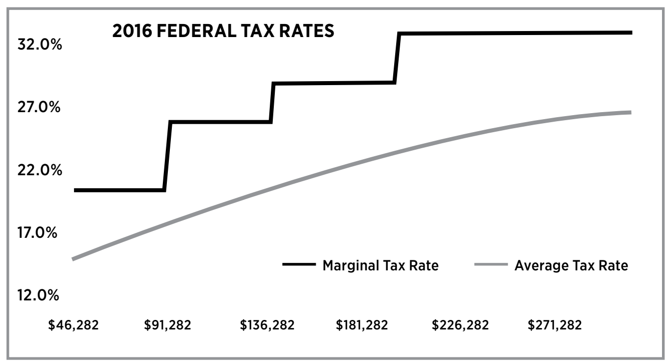
Equals TOTAL FEDERAL INCOME TAX PAID = $14,934 ($6,792 + $8,142)

Individual B– taxable income $225,000

- 15% on the first $45,282 = $6,792
- Plus 20.5% on the income between $45,283 and $90,563 = $9,282
- Plus 26% on taxable income between $90,564 and $140,388 = $12,954
- Plus 29% on taxable income between $140,389 and $200,000 = $17,287
- Plus 33% on taxable income between $200,001 and $225,000 = $8,250

Equals TOTAL FEDERAL INCOME TAX PAID = $54,566

The federal tax brackets are illustrated graphically in the chart below, which highlights the marginal and average tax rates for the taxable incomes shown.



A taxpayer will have both a marginal tax rate and an average tax rate. The marginal tax rate represents the amount of tax paid on the next dollar earned. The marginal tax rate is useful in analyzing options such as the amount of tax saved by contributing to an RRSP. The average tax rate represents the ratio of total taxes divided by total taxable income. Average tax rate is useful in estimating an individual's total tax liability given a certain amount of income.

When reviewing these tax changes, it is important to keep in mind these are federal income tax rates only. Additional income tax liability arises when the applicable provincial or territorial income tax is added.

GOVERNMENT PENSION PLANS: BENEFITS AND CONTRIBUTIONS FOR 2016

Contributions and benefits under government pension plans are adjusted periodically to reflect increases in the Consumer Price Index or the average Canadian wage. The new amounts, commencing January 1, 2016, are shown in the table below. Each benefit is subject to income tax when received, with the exception of the Guaranteed Income Supplement and the Allowance. All benefits shown are paid monthly unless otherwise indicated, and are the maximum amounts.

	CPP	QPP	OAS
CPP / QPP benefits (for new beneficiaries)			
Retirement pension (at age 65) Post-Retirement benefit (at age 65) Retirement Pension Supplement	$1,092.50 $27.31 n/a	$1,092.50 n/a $20.88	
Disability pension	$1,290.81	$1,290.78	
Disabled contributor's child benefit (each child)	*$237.69	*$75.46	
Survivor's*** pension			
• under age 65	**$593.62	**$881.09	
• age 65 or over	$655.50	$655.50	
Surviving child's benefit (each child)	*$237.69	*$237.69	
Death benefit (lump sum)	$2,500.00	$2,500.00	
Combined benefits			
• survivor's*** pension and disability (under age 65)	$1,290.81	n/a	
• survivor's*** pension and retirement (age 65 and over)	$1,092.50	$1,092.50	
Annual CPP contribution			
Self-employed (9.9%)	$5,088.60		
Employee (matched by employer) (4.95%)	$2,544.30		
Annual QPP contribution Self-employed (10.65%) Employee (matched by employer) (5.325%) **Old Age Security (OAS)**		 $5,474.10 $2,737.05	
January to March 2016			$570.52
Guaranteed Income Supplement (GIS)			
January to March 2016			
• spouse/common-law partner receives OAS or Allowance			$512.96
• single person (or spouse/common-law partner receives neither OAS nor Allowance)			$773.60
Allowance			
January to March 2016			
• age 60 to 64, and spouse/common-law partner receives OAS and GIS			$1,083.48
• age 60 to 64, survivor's*** Allowance			$1,213.00
Notes: * flat benefit amounts ** these amounts may vary depending on whether the survivor is under age 45, disabled, or with or without children ***a survivor is the spouse or common-law partner of a deceased individual			

Authors:

James W. Kraft, CPA, CA, MTAX, TEP, CFP, CLU, CH.F.C

Deborah Kraft, MTAX, LLM, TEP, CFP, CLU, CH.F.C.

Published by:

The Institute

390 Queens Quay West, Suite 209

Toronto, Ontario M5V 3A2

T: 416.444.5251 or 1.800.563.5822

F: 416.444.8031

www.iafe.ca • info@iafe.ca

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