



1882-2007

**Business Bulletin, January 2008**

**When is a Gift not a Gift?**

**by Malte von Anrep, Q.C.**

We have all heard of the case of the mother who transfers her bank account into the name of herself and her daughter, Jane, so that both she and Jane have the ability to draw cheques or withdraw money from that account. The bank has the mother and her daughter Jane sign documents which have the effect of setting up a joint account with “right of survivorship”. What that means is that on the death of one of them, the survivor becomes the sole owner of the money in the account.

This is a common way for older people, in poor health, to set up a system for one of their children, in this case, daughter Jane, to deposit their cheques and have their bills paid.

When the mother passed away, daughter Jane said to her brothers and sisters, “The money in the bank account is mine; that is the way mother set it up and it is the result she intended.”

Jane’s siblings say “Wait a minute, that was set up in that fashion so that you could help mother look after her financial affairs when she could no longer get around because of her health. The rest of the money in the bank account should go back into mother’s estate and be divided evenly amongst the rest of us, just as instructed in the Will which states “divide the rest of my estate in equal shares, amongst all of my children alive at my death.”

Who is right? The Supreme Court of Canada has ruled that there is a presumption that Jane was holding the money left in the bank accounts as trustee for her mother’s estate and, accordingly, it gets split equally amongst all of the children. Jane may rebut that presumption and keep all of the money in the account if she can produce evidence that her mother’s intention was to make a gift to Jane of the money left in the account at her death. Jane cannot simply rely on what her mother said to her when the account was set up. A statement of a deceased person is not accepted as evidence in court unless there is independent evidence to corroborate that statement. If the mother made the statement “I want you, Jane, to have whatever money is left in that account on my death” in the presence of another person who can come to court and confirm that statement, or better still, if the mother signed a document confirming her intention to make a gift to Jane, the money will belong to Jane as she has successfully refuted the presumption.

The legal presumption described above is not applicable if the recipient of the gift is a spouse or a dependent child. In that case there is a presumption that a gift was intended.

So when is a gift not a gift? Usually when the person making the gift has not left clear evidence, preferably in the form of a signed statement, that he or she intended the recipient to have ownership of the asset as a gift.

*The foregoing is provided to you for information purposes only. We caution you to obtain legal advice specific to your situation in all circumstances.*

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