CITATION: Calmusky v. Calmusky, 2020 ONSC 1506
COURT FILE NO.: 57107/16 (St. Catharines)
DATE: 20200316

ONTARIO

SUPERIOR COURT OF JUSTICE

IN THE MATTER OF THE ESTATE OF HENRY CALMUSKY, deceased	
BETWEEN:	
RANDY ZENOVI CALMUSKY, IN HIS CAPACITY AS EXECUTOR OF THE ESTATE OF HENRY CALMUSKY Applicant	*Sarah J. Draper*, for the Applicant
– and –	
GARY WILLIAM CALMUSKY, GARY WILLIAM CALMUSKY, IN HIS CAPACITY AS EXECUTOR OF THE ESTATE OF HENRY CALMUSKY, KYLE PATRICK CALMUSKY, NORMAN NAZWASKI, THE TORONTO-DOMINION BANK also known as TD CANADA TRUST, THE BANK OF MONTREAL, and THE ROYAL BANK OF CANADA Respondents	*Kristi J. Collins*, for the Respondents, Gary William Calmusky and Gary William Calmusky in his capacity as Executor of the Estate of Henry Calmusky *R. David House*, for the Respondent, Kyle Patrick Calmusky
	HEARD: January 20 and 21, 2020

R. A. LOCOCO J.

REASONS FOR JUDGMENT

I. Introduction

[1] Randy Calmusky brings an application to determine entitlement relating to certain assets following the death of his father, Henry Calmusky. The assets in dispute consist principally of funds held in (i) bank accounts that were in the joint names of the deceased and Gary Calmusky, Randy's twin brother, and (ii) a Registered Income Fund (RIF) in Henry's name, under which Gary was the designated beneficiary.

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[2] Randy submits that Gary holds the proceeds of the joint bank accounts and the RIF in trust for Henry's estate. Gary disagrees. Gary says he is entitled to the jointly-held funds by survivorship and the RIF as designated beneficiary, reflecting Henry's intention that Gary have the benefit of those funds upon his death.

[3] Gary also contests Randy's claim that Gary is liable to the estate for amounts relating to his use of estate assets since Henry's death, including occupation rent and reimbursement of certain amounts arising from Gary's occupation of Henry's solely-owned residence and Gary's use of Henry's motor vehicle. The estate's ownership of the residence and vehicle is not in dispute. The vehicle was later sold to a third party. Gary purchased the residence from Henry's estate shortly before the application hearing.

[4] The issues to be determined are therefore as follows:

1. Jointly-owned bank accounts: Do the jointly-owned bank accounts belong to the estate, or do they belong to Gary by survivorship?

2. RIF funds: Do the RIF funds belong to the estate, or do they belong to Gary as designated beneficiary?

3. Occupation rent/other amounts: Is Gary liable to the estate for occupation rent and/or other amounts related to his use of estate assets?

[5] For the reasons set out below, I have concluded that (i) the proceeds of the jointly-owned bank accounts and the RIF belong to Henry's estate, (ii) Gary is not liable to Henry's estate for occupation rent, and (iii) Gary's liability to Henry's estate related to his use of estate assets is limited to $2,308.12.

[6] In the balance of these Reasons, I will first set out further information about the parties and events involved in this application. I will then address in turn the issues outlined above.

II. Factual background

A. Henry's assets

[7] Henry Calmusky died February 1, 2016, at the age of 94. He was predeceased by his wife Mary Calmusky in 2014 and his son Daniel Calmusky in 2005. Henry has two surviving children, his twin sons, Randy Calmusky and Gary Calmusky. Prior to Henry's death, he resided in his solely-owned residence in Thorold. Henry had previously owned that property jointly with his late wife Mary.

[8] At the time of Henry's death, Gary resided with Henry at the Thorold residence. Gary moved into the residence in September 2013, for financial reasons and in order to assist with Mary's care prior to her death the following year. Randy resides in Alberta, as he has since the 1980s.

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[9] Prior to Mary's death in August 2014, Henry and Mary held bank accounts in their joint names. Henry managed those accounts himself, often attending personally at the bank branches to do his banking. It is common ground that Henry became beneficially entitled to the funds in the jointly-held accounts by way of survivorship on Mary's death. Henry was also the beneficiary of Mary's RIF. As discussed further below, shortly after Mary's death, Henry made Gary the joint holder with Henry of his bank accounts and designated Gary as beneficiary under Henry's RIF.

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[10] Henry's assets at the time of his death included the following:

a. Joint bank accounts: Banks accounts in the joint names of Henry and Gary, with right of survivorship, as follows:

   i. $28,728.16 in a savings account with the Bank of Montreal (BMO); and

   ii. $251,233.47 in a savings account and $4,626.62 in a chequing account with TD Canada Trust (TD);

b. RIF: $40,814.58 in a RIF with TD in Henry's name, of which Gary was the designated beneficiary;

c. Real property: The Calmusky family home in Thorold, which Henry solely owned; and

d. Vehicle: A 2011 Chevrolet Cruze, which Henry solely owned.

[11] Following Henry's death, BMO and TD paid out the proceeds of the joint bank accounts and the RIF to Gary. The remaining proceeds of those accounts are frozen pursuant to a consent order dated April 6, 2017, pending the outcome of this application.

B. Henry's 2014 will and bank account changes

[12] Upon Henry's death in 2016, he left a will dated August 6, 2014, executed two days after Mary's death. Under that will, Randy and Gary are named as co-executors. The residual beneficiaries named in the will are Henry's nephew, Norman Nazwaski (one of two children of Henry's late sister) and Henry's grandson, Kyle Calmusky (one of Randy's three children).

[13] Under a prior will (made in 1989), Henry named Mary as the residual beneficiary and Daniel, Randy and Gary as alternate residual beneficiaries. Henry revised his will after Daniel's death in 2005, substituting Randy and Gary as the alternate residual beneficiaries.

[14] The validity of Henry's 2014 will is not in dispute. However, there is disagreement between the parties about the circumstances surrounding the making of that will as well as Henry's intention when he revised his banking arrangements a short time later.

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[15] Gary says that Randy suggested the changes to Henry's will in order to protect the estate's assets from exposure to the creditors of Randy's failed business. According to Gary, the intention was that Kyle Calmusky and Norman Nazwaski were to act as "placeholders" for Randy and Gary (respectively) with respect to their residual beneficial interests in the estate. Norman supports Gary's position. In April 2017, Norman assigned his interest in Henry's estate to Gary. Gary also says that when Henry made Gary the joint holder of his bank accounts and named RIF beneficiary a few days later, Henry intended Gary to have the benefit of the funds in the bank accounts and the RIF upon Henry's death, given (among other things) the financial losses Gary and his mother suffered investing in Randy's business and Henry's prior balanced treatment of his sons from a financial perspective.

[16] Randy disputes Gary's position. Randy agrees that given his precarious financial situation, he proposed to Henry that someone else be made a beneficiary under the will instead of Randy, suggesting his son Kyle. However, Randy denies that Kyle was a "placeholder" for Randy and denies any knowledge or discussion of Norman's being a placeholder for Gary. Kyle supports Randy's position. Randy also disputes that Henry intended to benefit Gary personally when he made Gary a joint bank account holder and the designated RIF beneficiary. Among other things, Randy notes that Gary made no financial contribution to those accounts and did not have access to them prior to Henry's death.

[17] By way of background, there is no dispute that historically, Henry and Mary were financially generous with their children on a balanced basis. In his affidavit evidence, Gary refers to several occasions over the years where his parents provided financial gifts and loans to their children, including occasions when the parents provided unsolicited funds to one son that corresponded to funds already provided to another son. Gary also relies on the terms of Henry's previous wills as indicating his intention to benefit his sons financially in a balanced manner.

[18] It is also common ground that between 2006 and 2011, both Gary and his mother, along with other outside investors, invested significant sums of money in Randy's business in Alberta. While some of those funds were later returned to Gary and Mary with interest, they both incurred significant losses after Randy's company went into bankruptcy in 2013. According to Gary, he lost about $135,000 and his mother lost about $200,000. Gary and Mary made claims for those amounts to the bankruptcy trustee. In March 2014, they were notified that their claims were disallowed. They were also ordered to repay interest they received on their investments plus costs.[1] According to Gary, the losses that

[1] Under a Settlement Agreement dated August 17, 2015 with the Receiver-Manager for Randy's insolvent company, Theresa Calmusky (Randy's wife) agreed to pay $150,000 in full satisfaction of all claims against Theresa, Gary and Mary. Gary signed the agreement on his own behalf and as executor of Mary's estate. The Receiver provided releases in favour of the Calmuskys, to be held in trust and not be used until Theresa satisfied her payment obligation. The agreement requires Theresa to (i) grant a collateral second mortgage against real property she owned as security for the settlement payment, (ii) list the property for sale, and (iii) use the proceeds to satisfy her payment

Mary and Gary suffered were of significant concern to Mary and Henry before Mary's death and continued to be of concern to Henry after Mary's death in August 2014.

[19] On August 6, 2014, two days after Mary's death, Henry attended at a lawyer's office to give instructions for a new will. Randy arranged the meeting at Henry's request. Randy and Gary both accompanied Henry to the meeting. Henry signed the new will that day.

[20] As previously noted, the will names Randy and Gary as co-executors. Kyle Calmusky and Norman Nazwaski are named as residual beneficiaries in equal shares. There is no indication in the will that Kyle or Norman held their residual interest for the benefit of someone else. The will makes no reference to Henry's bank accounts, RIF or any other specific asset. Consistent with the lawyer's meeting notes, the lawyer did not ask about Henry's assets, and there was no discussion about his bank accounts or the RIF.

[21] Randy says that two days later on August 8, 2014, he had a discussion with Henry about his assets to prepare Randy for his role as co-executor. Gary was not present and was not aware of that meeting. According to Randy, Henry showed his bank statements to Randy. Attached to Randy's affidavit is a brief handwritten note that Randy says he made at that meeting, dated that day. As set out in his note, Randy says the bank statements indicated approximately $236,000 in TD bank accounts, $31,000 in (Mary's) RIF and $6,000 with BMO. According to Randy, there was no discussion about the bank accounts being jointly held. Randy travelled back to his home in Alberta the next day.

[22] On August 11, 2014, Henry, accompanied by Gary, went to Henry's BMO branch, where they met with the Assistant Bank Manager for approximately an hour. The bank official was familiar with Henry from previous visits. Henry gave instructions to open a joint chequing account with Gary, in place of Henry's previous joint account with Mary. The account opening slip that Henry and Gary signed indicates that the account is "joint with right of survivorship". The following day, they returned to the BMO branch to open a new joint savings account.

[23] On August 20, 2014, Henry and Gary went to Henry's TD branch and met with the branch's Manager of Financial Service for half an hour to an hour. That bank employee was new to the branch and did not recall having met Henry before. Henry gave instructions to add Gary's name as joint holder for the bank accounts in place of Mary. On the account opening slip, alongside the word "Survivorship:", the box next to "Yes" is checked. At the same meeting, Henry signed a "Designation of Beneficiary" for the RIF, naming Gary as 100 percent beneficiary.

[24] There is no dispute that Randy did not know that Gary was a joint holder of the bank accounts or the designated RIF beneficiary until sometime after Henry's death.

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obligation. Gary says that he has yet to receive the release in his favour and accordingly remains exposed to the Receiver until Theresa fulfils her payment obligation.

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[25] With that background, I will now address in turn the issues to be determined, as listed previously.

III. Jointly-owned bank accounts

[26] Do the jointly-owned bank accounts belong to the estate, or do they belong to Gary by right of survivorship?

A. Legal Principles

[27] It is common ground between the parties that the legal principles set out by the Supreme Court of Canada in *Pecore v. Pecore*, 2007 SCC 17, [2007] 1 S.C.R. 795, and *Madsen Estate v. Saylor*, 2007 SCC 18, [2007] 1 S.C.R. 838, apply to the analysis in this case relating to the joint bank accounts. In *Pecore*, at para. 36, and *Madsen*, at para. 17, the Supreme Court confirms that where there is a gratuitous transfer of assets from a parent to an adult child (including a transfer of the parent's funds into a joint account with the adult child), there is a presumption of resulting trust, that is, a presumption that the transferee holds the assets as trustee for the transferor. In doing so, the court settled the question raised in previous decisions of whether the applicable presumption in these circumstances was the presumption of advancement (gift) or the presumption of resulting trust.

[28] Since the correct presumption is resulting trust, a transferee claiming beneficial ownership of the property (in this case Gary) has the onus of showing, on a balance of probabilities,[2] that the transferor (Henry) intended the transfer to be a gift to the transferee. As well, in *Pecore*, at paras. 45-53, the Supreme Court indicates that it would also be open to the trial court to find, after weighing the evidence, that the transferor intended to retain exclusive control of the jointly-held funds until his or her death, at which time the transferee would be beneficially entitled to the remaining funds by survivorship. At para. 47, the court observes that there may be a number of reasons why the transferor would transfer the funds with that intention, including (i) to obtain the assistance of the transferee with management of funds during the transferor's lifetime, and (ii) to avoid probate fees upon the transferor's death.

[29] In *Pecore*, at para. 55, the court also indicates that after determining the correct presumption (in this case resulting trust), the trial judge must weigh the evidence relating to the actual intention of the transferor in order to determine whether the presumption has been rebutted. At para. 56, the court notes the traditional rule that evidence adduced to show the intention of the transferor at the time of the transfer ought to be contemporaneous (or nearly so) to the transaction. The court then adds the caveat that evidence of the transferor's intention that arises subsequent to a transfer should not automatically be excluded, but the trial judge "must assess the reliability of this evidence

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[2] See *Pecore*, at pp. 42-43, where the Supreme Court considered and decided that balance of probabilities is applicable standard of proof.

and determine what weight it should be given, guarding against evidence that is self-serving or that tends to reflect a change in intention": *Pecore*, at para. 59.

[30] The Supreme Court then goes on to discuss particular types of evidence that courts have considered to determine the transferor's intention, including bank documents that set up a joint account (*Pecore*, at paras. 60-61), the control and use of the funds in the account (at paras. 62-66), the granting of a power of attorney (at paras. 67-68), and the tax treatment of the joint accounts (at paras. 69-70).

[31] With respect to bank documents that set up a joint account, the Supreme Court (at para. 60) refers to previous cases where courts held that bank documents relating to a joint account "are an agreement between the account holders and the bank about legal title; they are not evidence of an agreement between the account holders as to beneficial title". At para. 61, the Supreme Court then goes on to indicate that courts should not be automatically barred from considering bank documents to assist in determining the transferor's intention regarding beneficial interest, stating as follows:

> While I agree that bank documents do not necessarily set out equitable interests in joint accounts, banking documents in modern times may be detailed enough that they provide strong evidence of the intentions of the transferor regarding how the balance in the account should be treated on his or her death …. Therefore, if there is anything in the bank documents that specifically suggests the transferor's intent regarding the beneficial interest in the account, I do not think that courts should be barred from considering it. Indeed, the clearer the evidence in the bank documents in question, the more weight that evidence should carry. [Citation omitted.]

[32] In *Pecore*, at para. 5, the Supreme Court also recognizes that there are evidentiary challenges when a transfer of funds into joint names is disputed by a third party after the transferor's death. At para. 26, the court indicates that there is additional justification for placing the burden of proof on the transferee in these circumstances, since the transferee is better placed than the disputing party to bring evidence about the circumstances of the transfer.

[33] In fact, the task of any party who after the transferor's death seeks to challenge or uphold an *inter vivos* transfer is complicated by s. 13 of the *Evidence Act*, R.S.O. 1990, c. E.23. Section 13 provides that in estate litigation, "an opposite or interested party shall not obtain a verdict, judgment or decision on his or her own evidence in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence." In *Burns Estate v. Mellon* (2000), 48 O.R. (3d) 641 (C.A.), at para. 29, the Ontario Court of Appeal interpreted this provision as follows:

> The corroboration required by s. 13 must be evidence independent of the evidence of [the party whose evidence requires corroboration], which shows that her evidence on a material issue is true. The corroborating evidence can be either direct or circumstantial. It can consist of a single

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> piece of evidence or several pieces considered cumulatively. [Footnote omitted]

B. Position of the parties

[34] Gary submits that he is beneficially entitled to the funds remaining in the joint bank accounts upon Henry's death. Consistent with *Pecore* and *Madsen*, Gary accepts that he is presumed to hold those funds in trust for Henry's estate. He also concedes that he did not contribute to or personally use the funds in the joint bank accounts during Henry's lifetime. However, Gary submits that on a balance of probabilities, the evidence supports his position that at the time Henry made Gary a joint account holder, Henry intended that Gary have the benefit of those funds by survivorship upon Henry's death.

[35] In support of that position, Gary relies on the following (among other things):

a. Bank documents that Henry signed relating to the joint accounts, which indicate Henry's choice that the accounts go to Gary by survivorship on Henry's death;

b. The testimony of the bank employees who met with Henry at that time and explained the bank documents to him, including what would happen to the jointly-held funds upon Henry's death;

c. The circumstances leading to and the terms of Henry's 2014 will, made a short time before the banking arrangements were changed, including Gary's own evidence (supported by Norman) with respect to the "placeholder" arrangements under which Kyle and Norman became residual beneficiaries as placeholders for Randy and Gary, respectively, to shield estate assets from the creditors of Randy's failed business; and

d. Henry's justifiable concern about the financial losses that Mary and Gary suffered investing in Randy's business that crystallized earlier in 2014, viewed in the context of Henry's prior balanced treatment of his sons from a financial perspective.

[36] Randy disputes Gary's position. According to Randy (with Kyle's support), Gary holds the proceeds of the joint bank accounts in trust for Henry's estate. In Randy's submission, Gary has not met his burden of establishing Henry's intention to transfer beneficial ownership of the jointly-held funds to Gary, either during Henry's lifetime or by survivorship upon Henry's death.

[37] In support of that position, Randy relies on the following (among other things):

a. There is no dispute that Gary did not contribute any funds to the joint accounts – the funds were entirely derived from Henry;

b. There is no evidence the Gary had any control over or access to the joint accounts for his own purposes during Henry's lifetime – Henry used the funds in the accounts for his own continuing expenses after Mary's death and declared as income in his tax returns the full amount of interest earned;

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c. The banking documents establish legal rights and between the bank and the account holders – they do not by their terms establish beneficial ownership of the funds as between the joint account holders;

d. The evidence of the bank employees is inconclusive and does not establish Gary's beneficial ownership of the jointly-held funds upon Henry's death;

e. There was no discussion of jointly-held bank accounts either in the meeting with the lawyer who prepared Henry's 2014 will or in Randy's subsequent meeting with Henry to prepare Randy for his role as co-executor. Both of those meetings occurred a matter of days before Henry's changes to his bank accounts, raising doubt that Henry intended that the funds in those accounts fall outside of his estate; and

f. There is no evidence that any concern Henry may have had about financial losses that Gary and Mary suffered investing in Randy's failed business motivated Henry to provide Gary with beneficial ownership of the joint accounts upon Henry's death in order to treat Gary and Randy in a balanced manner financially. Randy denies being a party to any "placeholder" arrangement and (supported by Kyle) denies that Kyle holds his interest as residual beneficiary for Randy's benefit.

C. Analysis and conclusion

[38] For the reasons below, I have concluded that Gary has not satisfied the onus of establishing that Henry intended that Gary have the benefit of the remaining jointly-held funds by survivorship upon Henry's death. I therefore find that the funds form part of Henry's estate.

[39] I will first address certain of Randy's arguments that I did not find of material assistance in making that determination. In support of his position, Randy relied on the fact that Gary did not contribute any funds to the joint accounts and did not have control over or access to the funds in the joint accounts during Henry's lifetime. In my view, neither of those facts materially assists in determining the matter in issue, that is, whether Henry intended that Gary have the benefit of the jointly-held funds by survivorship upon Henry's death.

[40] The fact that Gary did not contribute any funds to the joint accounts supports the conclusion that the transfer into the joint names of Henry and Gary was gratuitous. As a result, it is clear that the applicable presumption is one of resulting trust, since the transfer must be gratuitous for that presumption to apply. However, I do not consider the gratuitous nature of the transfer (in itself) to assist materially in determining Henry's actual intention relating to the beneficial ownership of the joint-held funds upon Henry's death.

[41] In a similar vein, the fact that Gary did not have control over or access to the jointly-held funds during Henry's lifetime supports the conclusion that Henry did not intend to provide a gift of those funds that was effective while Henry was alive. However, Gary is not alleging that Henry had that intention. Gary says that Henry intended that Gary have

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the benefit of the balance of the jointly-held funds upon Henry's death. As indicated in *Pecore*, at paras. 45-53, it would be open to the court to find on the evidence that the transferor intended to retain exclusive control of the jointly-held funds until the transferor's death, at which time the transferee would take the balance by survivorship.

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[42] As well, I do not consider the fact that the bank accounts were not specifically addressed in Henry's 2014 will (or discussed during the meeting when the will was prepared or Randy's subsequent private meeting with Henry) as being of any particular assistance in determining Henry's intention relating to jointly-held accounts. Whether it was Henry's intention that Gary take the joint-held funds by survivorship for his own use or to deal with as estate assets, it was not necessary for Henry's will to address the funds in those bank accounts. The difficulty is that Henry did not make his intentions clear, which he could have done in his will or by some other means. However, I do not agree that the failure to address those funds in his will indicates a clear intention one way or the other as to whether the funds should be treated as estate assets or Gary's personal funds.

[43] That being said, I am not satisfied that the evidence, taken as a whole, supports Gary's position that at the time the bank accounts were placed in their joint names, Henry intended that Gary have the benefit of the remaining jointly-held funds upon Henry's death. In his affidavit, Gary deposes that Henry told Gary that he had that intention. However, that evidence, standing alone, cannot support a finding in Gary's favour. By reason of s. 13 of the *Evidence Act*, Gary's evidence must be "corroborated by some other material evidence".

[44] As corroborating evidence, Gary relies on the signature cards and other bank documents relating to the account changes, as well as the evidence of the bank employees who were present when the changes were made. From a timing perspective, that evidence would accord with the traditional rule (referred to in *Pecore*, at para. 56) that evidence as to the transferor's intention ought to be contemporaneous (or nearly so) to the transaction. As well, as indicated in *Pecore*, at paras. 60-61, bank documents to set up a joint account "may be detailed enough to provide strong evidence" of the transferor's intention relating to beneficial ownership. However, in this case, I do not consider the wording of the bank documents to provide any material assistance in determining whether Henry intended to transfer beneficial ownership of the remaining funds to Gary on Henry's death (as opposed to transferring legal ownership for the purpose of dealing with the funds for the benefit of the estate beneficiaries).

[45] In this case, the bank documents for the TD accounts consisted of signature cards signed by Henry and Gary, which included as a line item the word "Survivorship:", followed by three boxes labeled "Yes", "No" and "Not applicable". For each account, the "Yes" box had a check in it. Similarly, the bank documents for the BMO account consisted of a brief printed agreement signed by Henry and Gary, which included a box headed "Form of Co-ownership", under which the words "JOINT WITH RIGHT OF SURVIORSHIP" were typed in. In neither case is any further explanation provided in the bank documents themselves. Given the bare bones nature of the documents, I do not see how they assist in determining Henry's intention with respect to beneficial ownership.

[46] I also considered the transcripts of the examinations of the bank representatives who met with Henry and Gary at the time that the bank accounts were put into the joint names of Henry and Gary. In that regard, I note that the BMO representative, who was well acquainted with Henry from previous dealings, had a clear memory of the meetings, whereas the TD representative, to a significant extent, was relying on what she "would have said" to an elderly transferor in those circumstances. Nevertheless, I am satisfied that the explanations they gave to Henry were sufficient to ensure that Henry understood that Gary would receive the RIF funds upon Henry's death. However, I agree with Randy that the explanation the bank employees provided, together with the contents of the bank documents, were not sufficient to support the conclusion that Henry intended Gary to have beneficial ownership of those funds for his own use, as opposed to the right to deal with the funds for the benefit of the estate beneficiaries.

[47] In reaching the conclusions I have, I also considered Gary's position that I should draw the inference that Henry intended that Gary have the proceeds of the joint accounts in order to treat Gary and Randy in a balanced way financially, given Henry's past balanced treatment of his sons and the significant sums that Gary and Mary lost investing in Randy's bankrupt business. However, I agree with Randy that as indicated in *Pecore*, at para. 56, I should be cautious about drawing such an inference to the extent that it is dependent on matters separated in time from the transfer (beyond being "contemporaneous or nearly so").

[48] The fact remains that there is no convincing evidence of what Henry intended when he made Gary a joint account holder to support Gary's evidence of what Henry told him. In that regard, it is not clear how the so-called "placeholder" arrangements would be of any material assistance in determining Henry's intention about beneficial ownership of the jointly-held funds. Among other things, if the purpose of those arrangements was to protect Henry's estate from the creditors of Randy's failed business, it is not apparent how placing Gary's residual interest in Norman's name would further that purpose, given particularly that Norman formally transferred his residual interest to Gary in fairly short order. In any case, there is little or no reliable independent evidence to support Gary's position that Kyle was intended to be a placeholder for Randy as a residual beneficiary under the will. Both Kyle and Randy deny that was the case (although the testimony of each of them alone would not be sufficient without corroboration). Norman deposed that he never had any discussion with either Kyle or Henry about any arrangements between Kyle and Randy. According to Norman, the information he had about the placeholder arrangements between Kyle and Randy came from his discussions with Gary and Randy, but Norman could not remember whether he discussed that subject with them together, or whether it was in separate conversations. In all the circumstances, the weight of the evidence does not support the conclusion that Kyle holds his interest in Henry's estate as a placeholder for Randy.

[49] Accordingly, I have concluded that Gary has not satisfied his onus of establishing that Henry intended that Gary have the benefit of balance of the jointly-held funds by survivorship upon Henry's death. I therefore find that the jointly-held funds form part of Henry's estate.

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IV. RIF funds

[50] Do the RIF funds belong to the estate, or do they belong to Gary as designated beneficiary?

[51] Randy (with Kyle's support) says that Gary holds the RIF proceeds in trust for Henry's estate. According to Randy, the legal analysis in *Pecore* and *Madsen* relating to jointly-held bank accounts is equally applicable to Gary's beneficiary designation under the RIF. Gary had the burden of establishing that Henry intended that Gary take the RIF funds for his personal use, rather than holding them in trust for Henry's estate. Randy says that Gary did not meet that burden. As well, Randy submits that regardless of whether the presumption of resulting trust applies in this case, the weight of the evidence does not support a finding that Henry intended that Gary take the RIF funds for his personal use.

[52] In support of his position that the principles in *Pecore* and *Madsen* apply to the RIF designation, Randy cites the decision of Herold J. of this court in *McConomy-Wood v. McConomy* (2009), 46 E.T.R. (3d) 259 (S.C.). In that case, the court (at para. 58) found on the evidence that there was not the "slightest doubt" that by designating her daughter as the beneficiary under her RIF, the now-deceased mother intended that her daughter held the RIF proceeds in trust for the beneficiaries of the mother's estate. Therefore, it was not necessary for the court to determine whether the principles in *Pecore* and *Madsen* relating to the presumption of resulting trust applied in that case. In *obiter dicta*, the trial judge goes on to state that if he had to decide the presumption issue, he would "agree with the current trend expressed by the Supreme Court of Canada in *Pecore*, against applying a presumption of advancement". He finds instead that "as in *Pecore*, that there is no presumption of advancement, and any presumption of resulting trust is overwhelmingly rebutted by the evidence": *McConomy*, at para. 58.

[53] As further support for his position, Randy also relies on the decision of the Manitoba Court of Appeal in *Dreger (Litigation guardian of) v. Dreger* (1994), Man. R. (2d) 39, [1994] 10 W.W.R. 293 (C.A.), a case decided before the Supreme Court's seminal decision in *Pecore*. In *Dreger*, the court holds that the adult beneficiary under his mother's RRSP annuity contracts and life insurance policies held the proceeds of those instruments for the benefit of his mother's estate under a resulting trust. In doing so, the court first reaches the threshold conclusion that the law relating to the presumptions that arise upon the gratuitous transfer of property apply to the mother's beneficiary designations under RRSP annuity contracts and life insurance policies: see *Dreger*, at paras. 24-27. The court decides that the correct presumption (pre-*Pecore*) is the presumption of advancement: *Dreger*, at paras. 28-30. Weighing the evidence, the court goes on to find that the mother's intention at the times she designated her son as beneficiary under the instruments was that upon her death, her son would take the proceeds for the benefit of her estate, thereby rebutting the presumption of advancement: *Dreger*, at para. 41.

[54] In Randy's submission, the Manitoba court's conclusion that the law relating to the presumptions that arise upon the gratuitous transfer of property applies to beneficiary

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designations under RRSP annuity contracts and life insurance policies applies by analogy to the beneficiary designation under Henry's RIF. Under *Pecore*, the applicable presumption is now the presumption of resulting trust, placing the onus on Gary to establish that Henry intended that Gary take the RIF funds for his personal use upon Henry's death. According to Randy, Gary has not met that onus.

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[55] In opposition to Randy's position, Gary submits that there is no binding authority in Ontario that expressly extends the principles in *Pecore* to RIF designations, noting as well that there are no reported cases citing *McConomy* to support that position. He also seeks to distinguish *McConomy* and *Dreger* on their facts. In *McConomy*, the mother's intention that the beneficiary to treat the RIF proceeds as estate funds was clear from the evidence. He also disputes that the application of *Pecore* to annuities and life insurance contracts in *Dreger* should be extended to the RIF beneficiary designation in this case.

[56] I disagree. While the matters to be decided in *Pecore* arose from the deceased father's placing his funds into joint accounts with his daughter, the principles set out in that case clearly apply more generally to other gratuitous transfers of property interests: see *Pecore*, at paras. 20-23. 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. Gary was not the source of funds for either type of account. In both cases, the same evidentiary challenge arises – the difficulty in determining the deceased transferor's intention at the time he transferred legal (as opposed to beneficial) entitlement to the funds, whether the transfer is effective immediately (the joint accounts) or on the transferor's death (the RIF): see *Pecore*, at para. 5. In these circumstances, it makes sense from a policy perspective that the evidentiary burden be on the transferee or designated RIF beneficiary, since the transferee/RIF beneficiary "is better placed to bring evidence of the circumstances of the transfer": *Pecore*, at para. 26. On that basis, I agree with the trial judge's *obiter* comments in *McConomy* that the principles in *Pecore* should apply to the RIF designation as well.

[57] I also agree with Randy's counsel that the reasoning of the Manitoba court in *Dreger*, while not binding on me, provides additional support for the conclusion that the law relating to the presumptions that arise upon the gratuitous transfer of property applies to the beneficiary designation under Henry's RIF. In particular, I see no reasonable basis for applying those principles to a beneficiary designation under an annuity contract or an insurance policy but not applying them to a RIF designation.

[58] Accordingly, I have concluded that my findings of fact and legal analysis with respect to Henry's intention when he placed the bank account into joint names with Gary also apply with respect to the RIF beneficiary designation. In that regard, Gary argued (among other things) that the contents of the RIF beneficiary designation together with the evidence of the TD bank representative provided cogent evidence of Henry's intention when he signed the designation. However, consistent with my findings relating to the joint accounts, I do not consider that evidence (in the context of all the evidence) to be

sufficient to establish that Henry intended that Gary have beneficial ownership of the RIF funds on Henry's death.

[59] Upon review of the RIF beneficiary designation (being about half a page in length), that document clearly provides TD with the authority to pay out the funds to the designated beneficiary upon the RIF owner's death unless TD is satisfied the designation has been validly revoked by a later-dated designation or a will. However, I do not consider the contents of the designation to be detailed enough to constitute reliable evidence of Henry's intention relating to beneficial ownership of the RIF funds. In reaching that conclusion, I also considered the transcript of the TD representative's examination relating to the explanation she provided to Henry when he signed the beneficiary designation. As I noted previously, the TD representative appeared to have only limited actual recollection of the meeting with Henry, whom she met for the first time that day. She relied to a significant extent on what she "would have said" to an elderly customer in those circumstances. While I am satisfied that the explanation she provided was sufficient to ensure that Henry understood Gary would receive the RIF funds upon Henry's death, I do not consider her explanation, together with the contents of the designation, to be sufficient to support the conclusion that Henry intended Gary to have beneficial ownership of those funds.

[60] Accordingly, I have concluded that Gary has not satisfied his onus of establishing that Henry intended that Gary have the beneficial ownership of the RIF funds upon Henry's death. I therefore find that the RIF funds form part of Henry's estate.

V. Occupation rent/other amounts

A. Introduction

[61] Is Gary liable to the estate for occupation rent and/or other amounts related to his use of estate assets?

[62] Randy (with Kyle's support) claims that Gary is liable to Henry's estate for a total of approximately $72,000 relating to Gary's use of estate assets since Henry's death (referred to in these Reasons as the "contested expenses"). The contested expenses (including a claim for occupation rent) arise from Gary's occupation of Henry's Thorold residence and Gary's use of Henry's motor vehicle.

[63] By way of background, Gary continued to reside in Henry's Thorold residence after Henry's death, as Gary had since September 2013. A consent order (dated April 6, 2017) permitted Gary to continue to reside at the Thorold residence, without prejudice to the estate's claim for occupation rent. That order also required Gary to pay all expenses associated with the property, including property taxes, insurance, utilities, and maintenance and lawn care expenses. Effective January 15, 2020, Gary purchased the Thorold residence from Henry's estate for $343,000 (including $3,000 allocated to contents).

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[64] There is no dispute that except for the contested expenses, Gary personally paid the expenses relating to the Thorold residence since Henry's death in February 2016 until his purchase of the Thorold residence in January 2020. Gary says that the amounts he paid for property-related expenses include the following:

a. $9,409.68 for property tax for the period commencing June 2016 ($1,071.43 remaining in dispute for the prior period since Henry's death); and

b. $2,107.22 for home insurance for the period commencing March 2017 ($904.92 remaining in dispute for the prior period).

[65] After Henry's death, Gary also continued to use Henry's 2011 Chevrolet Cruze until December 2016, when Gary acquired his own vehicle and Henry's vehicle was no longer insured to drive. In February 2018, the estate sold Henry's vehicle to a third party for $5,000.

[66] The most significant portion (by far) of the contested expenses relates to occupation rent for Gary's continued use of Henry's Thorold residence from Henry's death until Gary's purchase of the residence from Henry's estate, a period of almost four years. The appraisal evidence before me indicates that the fair market rent for the property for that period would total $66,600. As indicated further below, Gary disputes that he should pay any amount for occupation rent.

[67] The balance of the contested expenses (totaling $5,196.24) relating to Gary's occupation of the Thorold residence and his use of Henry's 2011 Chevrolet Cruze after Henry's death. Of that total, Gary agrees that he should repay the estate for expenses totalling $907.18, but disputes responsibility for the balance.

[68] The amount of the contested expenses that Gary agrees to repay (being $907.68) consists of (i) 626.00 for insurance on Henry's car after his death, and (ii) $216.68 as reimbursement for an Enbridge Gas billing credit for the period prior to Henry's death, and (iii) $65.00 as Gary's portion (accruing after Henry's death) of payments totalling $372.07 to Bell Canada for the Thorold residence.

[69] The balance of the contested expenses (being $4,288.56) consists of: (i) $1,875.00 for the decrease in value of Henry's vehicle between the date of Henry's death and the vehicle's sale in February 2018, (ii) $904.92 for home insurance prior to March 2017, (iii) $1,071.43 for property taxes prior to June 2016, (iv) $130.14 for the portion of the March 2016 Enbridge Gas bill for the Thorold residence that relates to the period after Henry's death the previous month, and (v) $307.07 for the balance of the Bell Canada February 2016 payments.

B. *Occupation rent – legal considerations*

[70] I will first address the legal considerations relating to occupation rent, which accounts for the most significant portion of the contested expenses. When someone occupies a property and by doing so excludes another interested party, occupation rent is an

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equitable remedy that is available to the court in appropriate circumstances to achieve fairness between the parties. That remedy has long been recognized by Ontario courts, as indicated by Karakatsanis J. (when she was a judge of this court) in *Dagarsho Holdings Ltd. v. Bluestone* (2004), 23 R.P.R. (4th) 80 (S.C.), aff'd (2005), 37 R.P.R. (4th) 53 (C.A.). That case involved a dispute between a mother and her son that arose when the mother's company terminated the son's retainer as a property manager. After his termination, the son continued to occupy a company-owned property without paying rent. Among other things, the company claimed occupation rent as damages for trespass and unjust enrichment. In that context, the trial judge (at para. 26) referred to the remedy of occupation rent in the following terms:

> Occupation rent is an equitable remedy. The often cited general principle of occupation rent is that "if a person is in occupation without a lease, although the relationship of landlord and tenant will not exist, the law will imply a contract for payment to the landlord or a reasonable amount for the use and occupation of his land": Young v. Bank of Nova Scotia (1915), 34 O.L.R. 176, 23 D.L.R. 854 (Ont. C.A.). The principle is based upon the presumption that the parties have agreed to reasonable compensation. That presumption can be rebutted by evidence that the parties intended that the occupation be without compensation. Occupation rent is also an appropriate measure of damages for trespass and unjust enrichment.

[71] In *Dagarsho*, the trial judge found the overholding occupant liable for trespass and unjust enrichment. In finding that unjust enrichment was established, the court applied the test (previously established in the commercial context), as follows: "Unjust enrichment is an equitable remedy. There must be enrichment, a corresponding deprivation, and the absence of a juristic reason for the enrichment": *Dagarsho*, at para. 15. The court ordered, among other things, that the occupant pay occupation rent as the measure of damages for trespass and unjust enrichment: *Dagarsho*, at para 95.

[72] In subsequent case law, the Supreme Court of Canada provides guidance with respect to unjust enrichment analysis, including the approach to considering the third element of the test, the absence of a juristic reason for the enrichment. The juristic reason analysis proceeds in two stages: *Moore v. Sweet*, 2018 SCC 52, [2018] 3 S.C.R. 303, at para. 56. The court must first look to the "established" categories of juristic reasons justifying the enrichment and corresponding deprivation. The established categories are the existence of a contract, a disposition of law, a donative intent, and other valid common law, equitable or statutory obligations: *Moore*, at para 57; *Kerr v. Baranow*, 2011 SCC 10, [2011] 1 S.C.R. 269, at para 41. If the court finds that any of these categories justify the disputed benefit, the analysis ends. However, if none of these established categories applies, then a *prima facie* case for unjust enrichment exists. At the second stage, the responding party can rebut this *prima facie* claim by establishing some residual reason to deny recovery: *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629, at para. 45. The responding party bears the burden of proof to rebut a *prima facie* finding of

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unjust enrichment. At this stage in the test, the court considers the parties' reasonable expectations and public policy: *Garland*, at para. 46.

[73] Occupation rent has also been awarded in estate litigation against persons who continue to occupy property when not entitled to do so after the deceased's death to the exclusion of the rightful beneficial owner. In determining whether to order the payment of occupation rent in these circumstances, courts in previous cases have applied the above three-part test for unjust enrichment: see *Bergmann v. Amis Estate*, 2010 ONSC 993, 54 E.T.R (3d) 49, at paras. 37-38; *Filippelli Estate v. Filippelli*, 2017 ONSC 4923, 33 E.T.R. (4th) 88, at para. 20.

[74] As well, occupation rent is sometimes awarded in family law cases where one party continues to occupy the family home to the exclusion of the other party after the breakdown of the parties' relationship. The case law generally recognizes the court's jurisdiction to award occupational rent in a matrimonial dispute "where it would be equitable and reasonable to do so", with some cases cautioning that awarding occupation rent should be limited to "exceptional cases": *Casey v. Casey*, 2013 SKCA 58, 417 Sask. R. 34, at paras. 42-48; see also *Charon v. Charon*, 2014 ONSC 496, at para. 8. In the family law context, rather than expressly using unjust enrichment analysis, the case law has generally emphasized the discretionary, case-specific nature of the occupation rent remedy, noting various factors relating to the conduct of the parties (among other things) that it would be appropriate to consider when determining whether to order its payment: see *Griffiths v. Zambusco* (2001), 54 O.R. (3d) 397 (C.A.), at paras. 49-50; *Higgins v. Higgins* (2001), 19 R.F.L. (5th) 300 (Ont. S.C.), at para. 53.

C. *Position of the parties*

[75] Supported by Kyle, Randy submits that the elements of unjust enrichment are present in this case, entitling the estate to occupation rent for the period following Henry's death. Randy argues that Gary had the benefit of rent-free occupation for Henry's residence from February 2016 to January 2020. The estate suffered a corresponding deprivation, since it was deprived of market rent that it could have otherwise enjoyed for that period. Gary was not entitled to that estate asset under Henry's will, nor was there any other juristic reason for Gary's enrichment. In these circumstances, the estate is entitled to occupation rent equal to the market rent that could have been realized for that period, according to Randy.

[76] In addition, Randy argues that Henry should reimburse the estate for other amounts relating to Gary's use of the Thorold residence and Henry's vehicle after Henry's death, as outlined previously. The most significant of those amounts ($1,875) relates to the decrease in value of Henry's vehicle between the date of Henry's death and its sale in February 2018. Randy says that Gary bears responsibility for the estate's inability to sell the vehicle during that period because of his use of the car and failure to cooperate in its sale. The balance of the amounts remaining in dispute relates to expenses for the Thorold residence that the estate incurred before Gary began to pay the expenses himself.

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[77] Gary disputes the estate's entitlement to occupation rent, arguing that the elements of unjust enrichment have not been satisfied. Among other things, Gary argues that if he benefited from rent-free occupation of the Thorold residence, there was no corresponding deprivation, since the estate had the benefit of the property's increase in value between 2016 and 2020. Gary also argues that he had a juristic reason for remaining in the property, noting that it was his intention to acquire the house and the car from the estate in satisfaction of his 50 per cent residual share. In that regard, Gary says that since at least September 2016, he expressed his intention through counsel to purchase the residence and car from the estate, but his requests have been unreasonably refused or ignored.

[78] In the alternative, Gary argues that if he is found liable to pay occupation rent for the Thorold residence, calculation of the amount owing should not commence for a reasonable period after Henry's death, since there would have been some period of time after Henry's death (suggesting two months) before it would be reasonable to expect that the property would be sold or rented to a third party. Gary also argues that no amount should be owing for the period after March 2018, when Gary (through counsel) wrote to Kyle's counsel with an offer to purchase Kyle's 50 per cent ownership interest in the property for its then-current value ($290,000 for the entire interest in the property, according to Gary). As well, Gary argues that any amount he is required to pay for occupation rent should be offset by the amount of property-related expenses that he paid for the relevant periods, relying on *Fray v. Evans*, 2017 ONSC 1528, 137 O.R. (3d) 280, at paras. 46-47.

[79] Gary also contests being responsible for other expenses relating to his use of the Thorold residence or Henry's car after Henry's death, except for the amounts he has already agreed to repay (as noted above). He denies liability for the decrease in value of Henry's vehicle prior to its sale, noting the estate's lack of cooperation with his desire to purchase the car. He also contests responsibility for payment of other estate expenses, arguing such expenses would be covered by the estate in the normal course for a reasonable period following the deceased's death.

D. Analysis and conclusion

[80] Having considered the parities' submissions, I have concluded that Gary should not be responsible for any amount for occupation rent with respect to his use of the Thorold residence since Henry's death. I have also concluded that his liability to the estate for other amounts relating to his use of estate assets should be limited to $2,308.12, including $907.68 in expenses he has already agreed to reimburse the estate.

(a) Occupation rent

[81] By occupying Henry's residence after his death without paying rent, Gary enjoyed a financial benefit equal to at least the difference between (i) the market rent for the

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property and (ii) the property-related expenses Gary incurred before he purchased the residence from the estate.[3] The property-related expenses Gary paid included realty tax commencing in June 2016, as well as home insurance from March 2017. If Gary were a rent-paying tenant, the property owner (Henry's estate) in the normal course would have paid at least the property tax. Therefore, it is appropriate that the calculation of any benefit to Gary should be net of the amounts that estate would have otherwise paid as landlord: *Filippelli*, at para. 19; see also *Fray*, at paras. 46-47. On the evidence, it is clear that the market rent for the property far exceeded the property-related expenses Gary paid after Henry's death. I therefore find that Gary derived a financial benefit from his rent-free occupation of the Thorold residence. Accordingly, the first element of the unjust enrichment test has been satisfied.

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[82] Turning to the second element of the test, Randy says that because Gary continued to occupy the property rent-free, the estate suffered a deprivation corresponding to the benefit Gary enjoyed. Gary disagrees. As previously noted, he argues that in determining whether the estate suffered a corresponding deprivation, I should take into account the fact that the estate had the benefit of the property's increase in value in the four years after Henry's death until the estate's sale of the property to Gary in January 2020.

[83] On the evidence before me, it is clear that the estate in fact realized a significant financial benefit from its continued ownership of the Thorold residence for that period. The evidence establishing the estate's gain includes five realtor valuation letters and two later appraisals for the Thorold residence at various dates. The realtor valuations each consisted of a single-page, bare-bones "Opinion of Value" for the property, as follows: (i) $230,000 as of April 3, 2016 (two months after Henry's death); (ii) $269,900 as of October 1, 2016; (iii) $289,900 as of January 26, 2017; (iv) $339,900 as of May 27, 2017; and (v) $290,000 as of September 25, 2017 and March 1, 2018 (the latter opinion being from a different realtor). The two more recent appraisals were contained in more formal, detailed reports (from a real estate appraisal firm) entitled "Residential Appraisal Report", valuing the property as follows: (i) $310,000 as of November 1, 2018; and (ii) $340,000 as of Nov. 5, 2019. As previously indicated, Gary purchased the Thorold residence from the estate effective January 15, 2020, for $340,000. Previously, Gary (through his lawyer) had formally indicated his willingness to purchase the residence, first for an unspecified price (in September 2016), and later for the equivalent of $290,000 (relying on the latest of the bare-bones "opinions of value" referred to above).

[84] Although the earlier "opinions of value" may be considered less reliable that the appraisals (given the former's lack of detail and formality), I am satisfied that Henry's estate realized a substantial financial benefit (as much as $110,000 on a notional basis) from the sale of the Thorold residence in January 2020 as compared to the proceeds of sale that would have been available as of the date of Henry's death. Taking into account

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[3] I qualify that statement by the words "at least", since I agree with Gary that in any event, it would have been unreasonable to charge him rent for an appropriate period (suggesting two months) after Henry's death.

that gain (net of the property-related expenses), Gary argues the "corresponding deprivation" requirement of the test has not been satisfied.

[85] I disagree. As explained later in these Reasons, I agree with Gary that the estate's financial gain resulting from the timing of the property's sale is a relevant consideration in the unjust enrichment analysis. However, in my view, the estate's gain on the property's sale is not sufficiently connected to the rent-free benefit Gary enjoyed to be relevant in determining whether the estate suffered a "corresponding deprivation", as contemplated by the second element of the test.

[86] Because Gary continued to occupy the Thorold residence after Henry's death, the estate was denied the opportunity to rent the property to a third party. As a result, the estate suffered a deprivation corresponding to the market rent it would have received less the property-related expenses the estate would have paid as landlord. The benefit to the estate arising from the timing of the property's sale is irrelevant in making that determination. Therefore, the second element of the unjust enrichment test has been established.

[87] While I am satisfied that the first two elements of the unjust enrichment test have been satisfied, I have not reached the same conclusion with respect to the third element. On the evidence, I am not satisfied there was no juristic reason for Gary's occupation of Henry's residence. In any case, given in the discretionary nature of the occupation rent remedy, I am not satisfied in all the circumstances that justice would be served by awarding occupation rent in this case.

[88] At the time of Henry's death, he was living at the Thorold residence along with his father with the latter's consent. While he was apparently contributing to expenses to some extent before Henry's death, there was no evidence that he was paying anything close to the equivalent of market rent prior to Henry's death. Although Gary did not receive a specific bequest of the Thorold residence in Henry's will, it was clear from at least April 2017 (upon Norman's formal assignment of interest to Gary) that Gary had a 50 per cent residual interest in the estate. Through his lawyer, he formally expressed his interest in purchasing the property (and Henry's car) within months of Henry's death, his lawyer's September 2016 correspondence noting that it did not make sense in these circumstances for Gary to vacate the property in the interim. In the litigation that Randy commenced a short time later, Gary expressed his intention to acquire Henry's house and car in satisfaction of his residual interest. He remained in the house on a consent basis from at least April 2017 (albeit without prejudice to the estate's claim for occupation rent) while the acrimonious litigation proceeded over Henry's assets, of which the Thorold residence was only a part. Had Henry made his intentions clear relating to other aspects of his estate (his financial assets in particular), it is likely that protracted litigation could have been avoided, in which case occupation rent should not have been a matter of dispute.

[89] Taking the foregoing considerations into account, I do not consider it within the reasonable expectations of the parties that occupation rent would be paid in this case. Among other things, Gary manifested an early intention to purchase the residence. He was (in essence) entitled to a 50% interest in the property. There is no evidence the estate

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intended to rent the property. In all the circumstances, I am not satisfied that the third element of the unjust enrichment test has been established.

[90] In any case, given the discretionary nature of the occupation rent remedy, I am not satisfied that justice would be served by awarding occupation rent to the estate. As previously indicated, I consider it relevant that the estate realized a significant financial benefit when it was sold the Thorold residence to Gary some four years after Henry's death. Taking that benefit into account, it is apparent that the value of the estate was not detrimentally affected by Gary's rent-free occupation of the Thorold residence after Henry's death. In all the circumstances, I see no sufficient justification for invoking the equitable remedy of occupation rent in this case.

(b) Other expenses

[91] In a similar vein, I am not satisfied there is any sufficient basis for requiring Gary to pay the estate $1,875 for the decrease in value of Henry's vehicle between the date of Henry's death and the vehicle's sale in February 2018. As previously noted, after expressing interest in acquiring Henry's vehicle along with the Thorold residence, Gary stopped using Henry's vehicle and purchased his own vehicle in December 2016, the same month that Randy commenced this application. In all the circumstances, I am not satisfied that Gary should be responsible for any depreciation in value relating to the timing of the vehicle's sale.

[92] Turning now to the balance of the contested expenses, in general terms, I agree with Randy's position that Gary should bear the out-of-pocket expenses related to his continued use of estate assets after Henry's death, with one caveat. Consistent with Gary's alternative submissions, there should be some reasonable time after Henry's death during which the estate in the normal course would bear at least the expenses relating to the Thorold residence. In his alternate submissions, Gary suggests two months, that is until April 2016, which appears to me to be reasonable.

[93] On that basis, Gary will be required to pay $2,308.12 to the estate relating to his use of estate assets after Henry's death, consisting of (i) $907.68 that he has already agreed to reimburse the estate, as noted above (ii) $634.44 for property tax, and (iii) $766.00 for home insurance. The property tax amount was calculated (drawing on the methodology in Randy's April 2019 affidavit) by (i) multiplying the per diem amount for 2016 property taxes for the Thorold residence ($7.1434) by (ii) the number of days from April 1 to December 31 that year (275), and then (iii) subtracting the 2016 property tax payments that Gary made personally ($1,330). The home insurance amount is an approximation, allocating the amount previously identified as being in dispute for the 13 months from February 2016 to March 2017 ($904.92), with the estate being responsible for the first two months of that period and Gary the remaining 11 months. The balance of the contested expenses relates to the first two months after Henry's death and are therefore not included in the amount Gary is being required to reimburse.

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VI. Disposition

[94] Accordingly, judgment will issue as follows:

1. Gary Calmusky shall pay to the credit of the Estate of Henry Calmusky the proceeds of (i) bank accounts that Gary held jointly with Henry at time of Henry's death, and (ii) Henry's Registered Income Fund under which Gary is the designated beneficially.

2. The Toronto-Dominion Bank and the Bank of Montreal are directed to cooperate with Gary Calmusky to permit the release of the funds referred to in paragraph 1 to the Estate of Henry Calmusky.

3. Gary Calmusky shall pay $2,308.12 to the credit of the Estate of Henry Calmusky for reimbursement of expenses relating to his use of estate assets after Henry's death.

4. If not settled between the parties, costs shall be determined based on written submissions.

[95] If the parties cannot agree on costs, the parties may each serve and file brief written submissions (not to exceed three pages) together with a bill of costs within 30 days. The parties may each respond by brief written submissions within a further seven days. Such submissions are to be forwarded to the Trial Coordinator and to me at 59 Church Street, 4th Floor, St. Catharines ON L2R 7N8. If no submissions are received within the specified timeframe, the parties will be deemed to have settled costs.

The Honourable Mr. Justice R. A. Lococo

Released: March 16, 2020

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CITATION: Calmusky v. Calmusky, 2020 ONSC 1506
COURT FILE NO.: 57107/16 (St. Catharines)
DATE: 20200316

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

RANDY ZENOVI CALMUSKY, IN HIS CAPACITY AS EXECUTOR OF THE ESTATE OF HENRY CALMUSKY

Applicant

– and –

GARY WILLIAM CALMUSKY, GARY WILLIAM CALMUSKY, IN HIS CAPACITY AS EXECUTOR OF THE ESTATE OF HENRY CALMUSKY, KYLE PATRICK CALMUSKY, NORMAN NAZWASKI, THE TORONTO-DOMINION BANK also known as TD CANADA TRUST, THE BANK OF MONTREAL, and THE ROYAL BANK OF CANADA

Respondents

REASONS FOR JUDGMENT

R.A. LOCOCO J.

Released: March 16, 2020

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