Death Changes Everything: The Interplay Between Death, Bankruptcy and Debt

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When underwriting loans, lenders should consider not only the assets that the borrower has available but also the assets that would be available in the event that the borrower dies. *Re Cameron Estate*[1] is an example of how creditors may be out of luck in the event of the borrower's death.

Cameron Estate involved the deaths of two doctors. Both doctors had matrimonial homes that were jointly owned with their wives. Doctor 1 obtained a $70,000 operating line of credit with the bank. The security that the bank had against Doctor 1 was a General Security Agreement. Doctor 2 had a $75,000 demand overdraft facility with the bank. The bank took security against doctor 2 in the form of a General Assignment of Book Debts. When doctor 1 died, all his payments with the bank were current. He owed approximately $56,000 to the bank. Similarly, Doctor 2 was also not in default with the bank when he died. Doctor 2 owed approximately $70,000 to the bank. In both cases, there were insufficient assets in the doctors' estates to pay the bank. The main asset of each estate was the matrimonial home, which passed to the wives outside of the doctors' estates due to the right of survivorship as a joint tenant.

The bank applied for and obtained orders for bankruptcy against each of the doctors' estates. Under s. 96 of the *Bankruptcy and Insolvency Act*[2], a trustee in bankruptcy has the ability to apply to set aside transfers of property that have been made by the bankrupt before the bankruptcy for less than fair market value. This section prohibits a bankrupt from making pre-bankruptcy attempts to defeat the claims of his creditors. The Trustee in each case refused to take proceedings against the wives to have the transfer of the matrimonial home set aside on this basis. The bank then obtained a court order allowing it to make the applications.

The bank argued that the transfers of the matrimonial homes to the wives in each case should be set aside because there was no payment by the wives for the transfer that occurred. As such, the doctors' half of the value of the matrimonial home should be declared an asset of their estates. The bank also argued that court should order that the wives held the doctors' half of the matrimonial home in trust for their estates.

Although these were very creative arguments advanced by the bank, the court rejected both. In order for s. 96 of the *BIA* to apply, the bank must show that there was a "transfer" at undervalue that occurred within one year of the bankruptcy. The court examined whether the wives' becoming sole owners of the matrimonial homes due to survivorship constituted a "transfer" within the meaning of the *BIA*. One of the fundamental features of joint tenancy is the right of survivorship – the surviving joint tenant automatically becomes the owner of the whole property upon the death of the other owner.

The court held that on the death of one joint tenant, the deceased does not "dispose" or "part with" his asset. Rather, his interest in the jointly held asset is extinguished, which leaves nothing for the deceased to "transfer." The court noted that quite often parties intentionally hold assets jointly because they know that upon death the property will not form part of the deceased's estate. As the automatic vesting of the matrimonial homes to the wives by their right of survivorship was not a "transfer" under the *BIA*, the bank's motion failed.

The court also went on to consider whether the automatic vesting was made at "undervalue," which was the other element that the bank would have had to prove. In the court's opinion, the right of survivorship was acquired when the doctors and their wives acquired the property. The doctors and their wives provided equal consideration for such right — each party had a risk of predeceasing the other and having nothing. Marriage is considered an economic partnership and each of the wives acquired a right to the sole ownership of the property at the time the matrimonial homes were acquired with their equal, joint efforts. The court concluded that the wives had already provided

adequate consideration for the right of survivorship.

Finally, the court also refused to find that the wives held the doctors' share of the matrimonial home in trust for the bank. Because the court had found that there was adequate consideration provided by the wives and the widows owned the whole of the matrimonial homes prior to the bankruptcies, the estates were not deprived of anything. The right of survivorship under joint tenancy also provided a juristic reason for a trust not to be implied in this instance.

The lesson to be learned is to ensure that the proper security is taken at the time the loan is granted. The bank in *Cameron Estate* obtained security from each of the doctors for their loans, but as it turned out, it took the wrong type of security. Mortgage security against the matrimonial homes would have protected the bank in this instance. In Alberta, it is possible for a joint tenant to mortgage only his interest in real property. Upon the death of the borrower, the surviving joint tenant would then take the property subject to the mortgage. It is therefore important for lenders to carefully consider the assets that the borrower has, not only during the life of the borrowerm, but also after his death.

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1 2011 CarswellOnt 12323 (Ont. S.C.J.) ("*Cameron Estate*")

2 R.S.C.1985, c. B-3 (the "*BIA*")