Estate Planning: Underestimating the significance of an account's name

"Dear friend. Would you act as my liquidator?" This kind of request is becoming quite common as our entourage progresses in life. For some, this question gives them chills, like during a violent thunderclap, but for others it is synonymous with trust and appreciation.

Far from being a Greek tragedy, acting for others is a rewarding experience that can strengthen our relationships, provided we act with caution and diligence from the start. One of the most important tasks of any administrator of the property of others is to prepare an inventory that reflects reality. As such, the legal qualification of assets under management can sometimes be a challenge for those who find themselves catapulted into this new environment.

Let's examine the specific case of Arianna, a citizen of Gatineau and knitting enthusiast. She has a 10year-old son, Theo, with a disability whose symptoms are mainly related to serious deficiencies in his sense of direction. Arianna wants to protect him financially so that he can pursue his studies and settle down in life. Arianna opens two bank accounts, her "nest eggs", one in a financial institution located in Gatineau and the other in Ottawa. She deposits $10,000 in each of the accounts, money which is then invested. Both accounts bear the following name: "Arianna in trust for Theo".

Unfortunately, Arianna dies in a car accident a few years later. Homer, the estate liquidator, regrets not having paid attention during his law course and does not know what to do with these accounts. He assumes they are the property of Arianna, but Theo, now of age, is hounding him to get money from "his accounts" to pay for bullfighting lessons, in addition to demanding that Homer report on his management. Who is right?

In my practice, I often see accounts with titles bearing the term "in trust". This expression can be confusing and is inherited from common law. Are we in the presence of a trust as defined by the law? Was there a transfer of ownership when creating such an account? These issues have been brought before the courts on a number of occasions and the answer depends on the circumstances and on which side of the provincial border, we find ourselves.

Civil law and the "in trust" account

In Québec, as in Ontario, only a mentally fit adult can transfer property in trust. The Civil Code of Québec (CCQ) provides that three fundamental elements must exist in order to set up a personal trust:

- the transfer of property from the property of the settlor to the trust patrimony he/she creates.
- the appropriation of property transferred for a specific purpose.

- the acceptance by the trustee to administer the trust. In addition, in order to comply with the requirements of the Civil Code, the settlor of the trust must appoint an independent trustee who is neither a settlor nor a beneficiary of the trust (section 1275 CCQ). It is the independent trustee who can normally open a bank account.

Québec courts are very reluctant to find that a trust was actually constituted in the absence of a real and indisputable transfer of ownership. Very little importance is given to the name of the bank account, which in itself cannot encompass the vital conditions of the trust. Considering that interpretation is what the law is all about, it is important to know that just because a word is used does not mean that it reflects the intent with which it was written.

In the case of Mathieu vs. Tardif (J.E. 97-1067 C.Q.), an account opened by a mother entitled “for her children” was considered insufficient to demonstrate the intention of a trust donation to them. According to the court decision, the absence of an independent trustee is another argument to dispel the existence of a trust regarding the sums held in the bank account. The courts came to similar conclusions when the expression “in trust” was found on a stock certificate or cheque unless related agreement indicated otherwise.

In the matter at hand, Theo’s chances of obtaining money from the Gatineau account are very slim. In Québec, when a person plans to give property to a minor child, the most appropriate and least ambiguous wording would be the use of the term “ex-officio” or “in his capacity as”. In our example, if Arianna’s desire is to give Theo $10,000, it is better to deposit this sum in an account identified, “Arianna in her capacity as tutor to the property of Theo”.

When Theo reaches the age of majority, he will then have the legal capacity to manage this sum himself. On the other hand, if Arianna wants to maintain ownership of the accounts, we suggest not including Theo’s name in the wording.

Common Law and the “in trust” account

Ontario’s common law differs somewhat on this point of law. Indeed, a person can create a personal trust by unilateral declaration. The key element will be the person’s intent and proof of it.

In some cases, creating a trust can be as simple as stating the three constituent certainties of a common law trust in front of witnesses, that is:

- I want to create a trust (certainty of intent).
- with my bank account # XYZ at National Bank (certainty of property transferred).
- and hold it henceforth for the benefit of my son Theo (certainty of the object).

Ontario courts generally place greater emphasis on the wording of the account, which assumes that the settlor intends to create a trust. In our example, Theo would have strong arguments for obtaining the money from the Ottawa account.

The rule set out in Saunders vs. Vautier, which applies to most common law jurisdictions, also provides that if the beneficiaries have the legal capacity and hold all rights in the fiduciary property, they may terminate the trust. This principle is applicable regardless of whether it contravenes the document creating the trust and therefore the Will of the grantor.

Is it worth the risk?

At both the federal and provincial levels, the rules for distributing income among related persons must always be kept in mind. For example, following the payment of a $500 dividend on shares held in the Ottawa “in trust” account prior to Arianna’s death, Theo included this income in his tax return. The tax authorities will reallocate this income to Arianna. Therefore, it is her, and not Theo, who will have to pay the tax on this dividend. Indeed, since the capital deposited in the account comes from Arianna’s gift, allocation rules are applicable. The only income splitting still allowed for minors, through the transfer of property directly or by trust, is with respect to capital gains and losses that will not be reallocated to the donor.

In the tangled web of today’s business world, clear intentions that are expressed with simplicity, and preferably written down are more likely to promote good relationships!

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