THE PERILS OF JOINT OWNERSHIP AND BENEFICIARY DESIGNATIONS

(The road to court is paved with good intentions -- and poor execution)

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1. Estate planning is basically two things:

   (a) simplifying the administration of the deceased's affairs for survivors, and
   (b) maximizing inheritance for one's dependants or heirs.

Maximizing inheritance may be further subdivided into 3 main strategies:

   (a) minimizing costs;
   (b) avoiding creditors; and
   (c) increasing assets and investment returns.

2. Beneficiary designations on life insurance and registered assets) and jointly owned property can assist with these goals in several ways, including:

   (a) avoiding exposure to creditors,
   (b) simplifying the administration of the estate, and
   (c) minimizing costs.

However, like most areas of the law, there are traps for the unwary.

20 things you need to know

3. Direct to Beneficiaries: Amounts designated to a beneficiary pass directly to the beneficiary and do not pass through the estate. This is due to the wording in s. 157 of *The Saskatchewan Insurance Act* (in the case of life insurance) and s. 73 of *The Queen's Bench Act, 1998* (in the case of registered plans) and s. 67 of *The Pension Benefits Act, 1992*[1] (pensions). As a result of these sections the personal representative of the deceased owner does not have the right to enforce payment of the proceeds of a fund where there is a designated beneficiary. These sections are similar in to s. 53 of the *Succession Law Reform Act*, R.S.O. 1990 considered in *Amherst Crane Rentals Ltd. v. Perring*[2]; See also *Clark Estate v. Clark*[3], *Kerslake v. Gray*,[4] *Baltzan Estate v. Royal Bank*.[5]

4. Exposure to Creditors: Generally amounts designated in favour of a beneficiary are out of the reach of a creditor of the estate. In the case of life insurance, s. 158 of *The Saskatchewan Insurance Act* specifically provides that such proceeds are free from the claims of creditors. Although there is no corresponding legislation stating the same for registered plans, in *Amherst, supra.* the Ontario Court of Appeal found that the effect of s. 53 of the *Succession Law Reform Act*, R.S.O. 1990 was that such proceeds were out of reach of creditors of the estate. The court in *Amherst*, *supra* specifically declined to follow the Manitoba Court of Appeal's decision in *Clark*

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1 Some Saskatchewan pensions are covered by special statutes and federal government pensions are governed by the *Public Service Superannuation Act*.

2 (2004), 241 D.L.R. (4th) 176 (Ont. C.A.)(Leave to appeal to S.C.C. refused)

3 (1997), [1997] 3 W.W.R. 62 (Man C. A.)

4 [1957] S.C.R. 516 (S.C.C.)

5 [1990] 3 W.W.R. 374, 82 Sask. R. 280, (Surr. Ct.)

Estate, supra which found that a creditor could follow the proceeds of a RRSP which had been paid to a designated beneficiary. Since there are specific legislative exemptions in Saskatchewan for pensions, life insurance and registered plans, designating a beneficiary will avoid the plan holder's creditors in death as well as life. However, where the funds are paid to an estate, such amounts will be subject to the claims of creditors of the estate.

5. Testamentary Disposition: It is likely that beneficiary designations are a testamentary disposition. In the Supreme Court of Canada decision in *MacInnes v. MacInnes*[6], any instrument, the court referred to a statement from *Cock v. Cooke*[7]:

> It is undoubted law that whatever may be the form of a duly executed instrument, if the person executing it intends that it shall not take effect until after his death, and it is dependent upon his death for its vigour and effect, it is testamentary.

In some earlier cases, the courts held that since beneficiary designations were a testamentary disposition they were subject to the same formalities of execution as wills. However, in *Re Buckmeyer Estate*,[8] the court held that very little formality was required for a designation under a life insurance policy, and that an email was sufficient to change the designation as a result of *The Electronic Information and Documents Act, 2000*.

As discussed elsewhere, several cases have considered whether funds designated directly in favour of a beneficiary are part of the estate and available to creditors of the estate. Due to legislation, such cases do not appear to depend on whether a beneficiary designation is a testamentary disposition.

Accordingly, although a beneficiary designation may be a testamentary disposition it appears very little turns on that distinction.

6. Resulting Trusts: A presumption of a resulting trust arises when one person has gratuitously transferred his property into another party's name, that party, either because he is a fiduciary or gave no value for the property, is under an obligation to return the property to the transferor or the person who gave value for it: *Cooper v. Cooper Estate*[9] This presumption is rebuttable, but the onus is on the transferee to prove a gift. Jointly owned property and funds received by a beneficiary as a result of a designation may be subject to principle of resulting trust: *Nelson v. Little Estate*[10] See also: *Neufeld v. Neufeld Estate*,[11] *In re A Policy of the Scottish Equitable Life Assurance Society*[12].

7. Presumption of Advancement: In certain circumstances, where there is a transfer between related individuals, the law presumes that the transfer is a gift. The interplay of this rebuttable presumption and the presumption of resulting trusts was canvassed by the Supreme Court of Canada in *Pecore v. Pecore*[13] and *Madsen Estate v. Saylor*.[14] In those cases, the court

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6 (1934), [1935] S.C.R. 200 (S.C.C.)

7 (1866) L.R. 1 Pro. & Div. 241 at 243.

8 2008 SKQB 141

9 [1999] 11 W.W.R. 592, 181 Sask. R. 63 (Q.B.)

10 2005 SKCA 120

11 2004 BCSC 25

12 [1902] 1 Ch. 282

13 2007 SCC 17

held that there is no longer any presumption of advancement between a parent and adult child. Accordingly, where an adult child receives a fund as a result of being designated as beneficiary, he or she will not be able to rely on the presumption of advancement to rebut the presumption of resulting trust.

8. Making a Designation in a Will: Under the combined operation of paragraphs 133 (e) and (i) and section 152 of *The Saskatchewan Insurance Act*, a beneficiary designation can be changed in a will. If a designation of beneficiary is done in a will, there is a high probability that the proceeds will be considered to form part of the estate, and will therefore be available to creditors and be subject to probate tax: *Re Carlisle Estate*,[15] and *Re Brown Estate*.[16] However, a beneficiary designation need not be made in a will.

9. The Effect of a General Clause in Will: Where there is a conflict between the wording of the will and the beneficiary designated on the policy/registered plan, which will prevail? Many wills have language to the effect:

> I HEREBY REVOKE all my former Wills and Testamentary dispositions heretofore made by me

In *Bottcher Estate*[17] and in *Hurzin v. Great West Life Assur. Co.*[18] it was held that a general revocation clause in a will did not revoke a designation of beneficiary. However in *Ashton Estate v. South Muskoka Memorial Hospital Foundation*,[19] the opposite result was reached. The safest course is thus to remove "all testamentary dispositions" from the revocation clause.

10. Effective Date: Under section 154(2) of *The Saskatchewan Insurance Act*, beneficiary designations speak from date of signature, not date of death (even if contained in a will).

11. Trusts for Minors: Because of limitations of standard forms provided by life insurance companies and due to the rule in *Saunders v. Vautier*[20] where a beneficiary designation appointing a trustee for a minor is done on the life insurance company's standard form, the funds will be available to the minor at age 18. It is possible to structure a more complex trust for the minor in the will or in a stand alone document, just not on the standard life insurance form.

12. Testamentary Trusts: Where the funds of an life insurance policy are designated in favour of beneficiaries in trust, CRA's view is that the trust will be a testamentary trust under the *Income Tax Act*.[21] However, if the insured establishes a trust during his/her lifetime with a nominal settlement and leaves the trust dormant until the insurance proceeds become payable, the trust will not qualify as a testamentary trust.[22] While a life insurance trust created by a designation would be a testamentary trust under the *Income Tax Act*, because it would not

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14 2007 SCC 18

15 2007 SKQB 435

16 (1992), 106 Sask.R. 88 (Q.B.)

17 1990 CanLII 710 (BC SC)

18 1988 CanLII 2980 (BC SC)

19 2008 CanLII 21421 (ON SC)

20 (1841), EWHC Ch J82

21 Technical interpretations 9605575 and 9625975; CRA responses 2008-0278801C6 and 2008-0270421C6,

22 Technical interpretation 9625975.

constitute a trust created by a taxpayer's will, it would not be considered a testamentary spousal trust.

13. Divorce/Separation: Although s. 19 of *The Wills Act* makes gifts to a former spouse invalid in certain cases, there are no equivalent provisions for beneficiary designations in life insurance contacts or registered plans. Prudent practice dictates that you should at a minimum ask the client who the designated beneficiary is, ask them to double check, or preferably, bring a copy of their last form/statement showing the beneficiary.

14. Fraudulent Conveyances: Disappointed spouses may be able to attack a transfer of property into joint names with a child (or someone else) as a fraudulent conveyance designed to defeat their family property claim. See *Stone v. Stone*,[23] and *Mawdsley v. Meshen*.[24]

15. Support obligations: Occasionally, parents who have separated or divorced will agree that one or both of them should maintain a life insurance policy in favour of children or the other party. However, a beneficiary has no right to be notified by the insurance company of changes of beneficiary, defaults in payment or changes in ownership. Even where a beneficiary is designated irrevocably, the party who is intended to receive the benefit has little way of monitoring or enforcing default. Where it is contemplated that one or both parties will maintain a life insurance policy with the other or the children designated as beneficiary, the preferable way to structure such arrangements is to have the party receiving the benefit of the policy being the owner, the life insured being the other spouse, and then the owner can name whomever as beneficiary. If the intent is to have the life insured also responsible for premium payments, the owner can easily monitor and more easily enforce the obligation, since premium notices and default notices come to the owner.

16. The Dependants' Relief Act: Under *The Dependants' Relief Act, 1996*, a dependant can assert a claim for maintenance against a deceased's estate. Because "estate" is defined to mean "all the property of which a deceased had power to dispose by will", it is suggested that "estate" includes registered plans and life insurance contracts owned by the deceased, except where there has been a irrevocable designation of beneficiary or where a designation was done for fair consideration. Furthermore, since s. 7 permits the court to direct that specified property be transferred or assigned to the dependant and since the court may direct such order to persons other than the executors or administrators of an estate and may also grant a vesting order, it is submitted that the court could direct a beneficiary of a policy to pay the proceeds to a dependant.

17. Avoiding Probate: Because a life insurance policy or a registered plan with a beneficiary designation passes directly to the beneficiary, such assets will not trigger probate. Similarly, as a general rule, jointly owned assets will not trigger probate. However, if the assts are subject to a bare trust or resulting trust, although they may not trigger probate, the value of the assets belonged to the deceased and are subject to probate tax, if probate is triggered by another asset.

18. Part I or II of the Schedule of Assets? If proceeds of a registered plan or jointly owned property are subject to a bare trust or resulting trust in favour of the deceased, the value of the proceeds belonged to the deceased and must be listed in Part I. If there was a designated beneficiary of the policy, registered plan or a joint owner and the value belongs absolutely to the

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[23] 2001 CanLII 24110 (ON CA)

[24] 2012 BCCA 91 (CanLII)

designated beneficiary or joint owner, then the value passes outside he estate and may be listed in Part II if probate is required.

19. Tax on RRSPs and RRIFs: Where a registered plan has a designated beneficiary, the financial institution will pay the entire proceeds of the plan to the beneficiary, without withholding any tax. The estate is liable to pay the deceased's taxes which include the income tax on the collapse of the RRSP/RRIF at death. While designated beneficiaries are not in general liable for the debts or expenses of the estate, under s. 160.2 and s. 160.21 of the *Income Tax Act*, a beneficiary of a registered plan is jointly and severally liable to Canada Revenue Agency for the tax on the proceeds of the plan.

20. Doctrine of Election: There is a general principle that a person cannot take a benefit under a will without confirming all its provisions.[25] Thus, where a testator intends to give property which he/she does not own in his/her will, while at the same time making a gift in his/her will to the owner of the property, the owner/beneficiary will have to elect to assert his/her property rights or to forego them in favour of the inheritance. The testator's intention must be clearly expressed and not merely in general terms.[26]

> Example: Father owns quarter section in joint names with 2 sons, A and B. Father leaves quarter section to A, and leaves the residue of his estate to his three children in equal shares. B will have to elect whether to assert his interest as a surviving joint owner, or whether to accept 1/3 of the residue.

21. Right of Survivorship: As a result of Justice Rothstein's comments in *Pecore*, *supra*, there appears to be the possibility that a property owner can transfer property into joint names with the effect that the transferee has no beneficial interest in the property during his/her lifetime, but receives beneficial ownership upon the death of the transferor.[27] However, despite his comments in paragraph 70, it is likely that CRA would take the view that where a right of survivorship to the beneficial title immediately vests, there is a disposition.

22. The Enforcement of Money Judgments Act: Under the new EMJA, a judgment creditor will be able to seize property owned by the judgment debtor jointly with an innocent third party.

Impact on Planning:

23. Check on Designations: While a solicitor may not have a duty to actually verify who the designated beneficiaries are on a policy or registered plan, it's a good idea to at least have the clients check who they have recorded as beneficiaries.

24. Recording Intention: With there being considerable uncertainty as to the effect of any designation of beneficiary or jointly owned property, the best practice is to ensure that the owner's intention is thoroughly canvassed and recorded at the time of the designation or transfer. Numerous courts have noted that self-serving evidence after a transfer made by a transferor/donor of property will be viewed with some skepticism. Although it may be too late to record the intention concurrent with the transfer, it's still worth doing as soon as circumstances permit. Recording the owner's intent may avoid:

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[25] *Oosterhoff on Wills and Succession*, 6th ed.

[26] *Granot v. Hersen Estate* (1999), 173 D.L.R. (4th) 227 (Ont. C.A.)

[27] see paragraphs 48-53 and 70.

(a) Exposure to Creditors: When property is put in joint names, it becomes susceptible to claims of the creditors of the transferee, even if the transferee has no beneficial interest. Similarly, with insurance policies and registered plans, if a competing relative can assert that the recipient of a fund is a resulting trustee, it is only a matter of time before a creditor of the estate successfully asserts the same thing. If the owner documented his/her intent at the time of the transfer, such as by a deed of gift, it will go a long way to convincing the creditor to withdraw.

(b) Litigation Between Beneficiaries: Although beneficiaries may not like the owner's expressly stated intention, if it is documented in writing, there is much less incentive to litigate.

25. Economics: Clients and their solicitors need to understand the economics of putting property in joint names:

(a) Time value of money: In the case of land, the owner will pay an immediate costs to transfer the land, in contrast to the possibility of paying probate costs decades later.

(b) Probate tax: As mentioned above, while having property in joint names may avoid probate being triggered, it may not remove the value of the property from the estate, and the client may end up paying both transfer costs and probate costs.

(c) Opportunity costs: If a client puts property in joint names, he/she may forego the option of using discretionary testamentary trusts for beneficiaries. The annual tax savings from such trusts can in many cases far exceed the one time probate costs.

(d) Unquantifiable costs: Putting property in joint names exposes the owner to the risks of the transferee's creditors and litigation costs.

(e) Capital Gains Tax: If the owner does not document his/her intention property, he/she may find that CRA is treating the transfer as a taxable disposition of capital property.

26. Keep it out of the will: Regardless of whether you view *Re Carlisle* as having been decided correctly, it is now too risky to include a change of beneficiary in a will (unless the client is prepared to have the funds subject to probate costs).

27. Follow Through: Sending a copy of designations to the financial institutions who hold the products immediately as this can identify errors in policy/account numbers while there is still an opportunity to correct them. It will also avoid having the company pay out funds to a different beneficiary as a result of an earlier but revoked designation.

28. Testamentary capacity: A solicitor should take similar precautions in assessing and recording evidence of testamentary capacity with joint ownership transfers and designations.