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Dealing with Designations

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Upon resolving to implement an estate plan to ensure that testamentary intentions are carried out, most people immediately consider the provisions to be contained within their will. While a will is still of central importance to any comprehensive estate plan, it is only one method, amongst many, that must be considered with respect to the transfer of wealth. Some assets, such as life insurance policies and registered plans, may be transferred by designating beneficiaries of those policies or plans. While individuals often rely upon the advice of lawyers to draft their wills, they less often rely upon legal advice when it comes to designating beneficiaries or using those designations in conjunction with their will to carry out their testamentary intentions (or to ensure that their testamentary intentions are not defeated).

The Nature of Beneficiary Designations

Designating a beneficiary of an insurance policy or of a registered plan (for example, a Tax Free Savings Account or a Registered Retirement Savings Plan) can have a number of benefits over including those assets in an estate. In particular:

1. As the proceeds of the insurance policy or registered plan are not estate assets, estate administration tax can be avoided;
2. Because payment is remitted directly to the beneficiaries by the policyholders or planholders, payments may be processed much faster. The delays associated with applying for a Certificate of Appointment of Estate Trustee generally do not impact payments of these types of assets to designated beneficiaries (although a Death Certificate may often be required);
3. While probated wills become a matter of public record, direct payment to a beneficiary under an insurance policy or registered plan may remain private; and
4. As these benefits pass outside of the estate, they are generally insulated from the claims of creditors of the deceased.[1]

While beneficiary designations have been called "odd creatures" by the courts, on occasion,[2] it seems that the weight of authority in Ontario is in favour of viewing beneficiary designations as testamentary dispositions. Courts have held that, because a beneficiary designation takes effect on death, it should require the level of capacity necessary at law for the making of a will, rather than the lower standard needed for the making of an *inter vivos* gift.[3]

This issue becomes highly significant when considering the authority of an attorney for property or guardian of property to designate, amend, or revoke a beneficiary designation on behalf of an incapable person who can no longer do it for themselves.

Making and Revoking Beneficiary Designations

Designating a beneficiary of an insurance policy may be made in the insurance contract or by declaration, including a declaration in a will.[4] They may be subsequently altered or revoked by declaration as well.[5]

Similarly, beneficiary designations for a registered plan (as defined under Part III of the *SLRA*[6]) may be made or revoked by an instrument or in a will.[7]

As a result, careful consideration should be given to the drafting of revocation clauses in a will. As beneficiary designations are considered testamentary dispositions, a testator must be careful to ensure that beneficiary designations are not included under the umbrella language intended to revoke prior wills.

Marriage will also revoke a will and any designation of beneficiaries within that will.[8] It should be noted that revocation of a designation does not revive an earlier designation.[9]

However, a designation or revocation in a will may remain valid even if the will is determined to be invalid.[10] This stems from the requirement that the designation of a beneficiary by declaration may be made by instrument signed by him or her, but need not be witnessed (and thus need not comply with the stricter requirements of a will).[11]

Designation of beneficiaries in a will function differently than gifts under a will in a number of material ways. Most importantly, it should be noted that the designation of beneficiaries under a will only refers to those insurance policies or registered plans in existence at the date that the will was signed. As a result, even if a will designates a spouse as the beneficiary of "all registered plans", such provision will not apply to a new RRSP opened after the date of the will or to a RRIF created after the date of the will. If these new RRSP's or RRIF's do not have a designated beneficiary in the contract itself, they will become payable to the estate and, more importantly, may defeat the deceased's testamentary plan.

Beneficiary Designations and Incapacity

The *Substitute Decisions Act, 1992* (the "*SDA*") provides that an attorney for property may be authorized to "do on

the grantor's behalf anything in respect of property that the grantor could do if capable, except make a will".[12] The authority of a guardian of property is similar in scope.[13] The definition of "will" in the *SDA* gives it the same meaning as under the corresponding definition under the *SLRA*.[14] The *SLRA* defines a "will" to include "(a) a testament, (b) a codicil, (c) an appointment by will or by writing in the nature of a will in exercise of a power, and (d) *any other testamentary disposition"*.[15]
To the extent that the courts have characterized beneficiary designations as testamentary dispositions, they remain outside the scope of authority of an attorney or guardian for property acting for an incapable person in Ontario.

The prohibition on an attorney or guardian making a will under the *SDA* is undoubtedly intended to protect the estate planning of incapable persons from being overridden, regardless of the motives of the attorney or guardian who would seek to change it. Unfortunately, in some circumstances, the inability of an attorney or guardian to change a beneficiary designation can preclude the attorney or guardian from protecting the incapable's original estate plan where beneficiaries change by operation of law and without any active steps taken by the incapable, the attorney, or the guardian.

Upon reaching age 71, the funds in a Registered Retirement Savings Plan ("RRSP") must be withdrawn, used to purchase an annuity, or transferred into a Registered Retirement Income Fund ("RRIF").[16] Like an RRSP, a RRIF can have its own designated beneficiary to whom the proceeds of the plan would be paid upon the death of the registrant. However, the designated beneficiary of the RRSP does not automatically become the designated beneficiary of the RRIF. The designation of a beneficiary of a RRIF must be made anew. If an individual has lost the capacity required to designate a new beneficiary before the age of 71, it is currently not open for an attorney or guardian for property to do so on behalf of the incapable person. The result may be that a RRIF, a substantial asset, does not go to the beneficiaries intended by the registrant while he or she was capable, but may instead fall into the residue of his or her estate. This may leave an intended beneficiary disinherited as a result of an unintended and unforeseen event. It will also have implications for estate administration tax, and may leave the funds vulnerable to claims by creditors. Further, it raises the likelihood of costly estate litigation.

The inability of an attorney or guardian to update a beneficiary designation can also prove frustrating where the individual had commenced divorce proceedings prior to his or her incapacity, which are now being continued by the attorney or guardian.[17] If designations had been made in favour of the former spouse, it will no longer be possible to revoke or change them.

Even common transactions can be limited by the inability of the attorney or guardian to make or amend designations, such as where the attorney or guardian simply wishes to switch financial institutions or insurers.[18] New beneficiary designation forms may be required to maintain the incapable person's original estate plan, however, nobody would have the authority to execute them.

Conclusions

While wills continue to be central estate planning documents, alternative means of transmitting wealth on death are as popular as ever. As beneficiary designations on life insurance policies and registered plans have different legal consequences that are brought about by changes in circumstances, they must be carefully monitored, not only as stand-alone documents, but in conjunction with an overall estate plan.

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1 *Insurance Act,* R.S.O. 1990, c. I.8, s. 196 [*Insurance Act*]. However, these funds may be subject to the clawback provisions of section 72(1) of the *Succession Law Reform Act,* R.S.O. 1990, c. S.26 as amended, such that they remain available to satisfy a dependant support claim brought against the estate.
2 See *Re Danish Bacon Co. Ltd. Staff Pension Fund Trusts* (1970), [1971] 1 W.L.R. 248 at 256.
3 *Stewart v. Nash* (1988), 30 E.T.R. 85, 33 C.C.L.I. 34, 65 O.R. (2d) 218, 10 A.C.W.S. (3d) 395, 1988 CarswellOnt 590 (Ont. H.C.J.); *Re Rogers* (1963), 42 W.W.R. 200, 39 D.L.R. (2d) 141, 1963 CarswellBC 51.
4 *Insurance Act*, ss. 190, 192.
5 *Ibid*., subs. 190(2).
6 *SLRA*, s. 50.
7 *Ibid*., s. 51.
8 *Ibid*., subs. 52(3).
9 *Ibid*., subs. 52(6).
10 *Ibid*., subs. 52(4).
11 *Insurance Act*, s. 171.
12 *Substitute Decisions Act, 1992*, S.O. 1992, c. 30, subs. 7(2) [*SDA*].
13 *Ibid*., subs. 31(1).
14 *Ibid*., subs. 1(1).
15 *SLRA*, subs. 1(1).
16 *Ibid*.
17 *Ibid*.
18 *Ibid*.

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Breakfast Series

Our next Breakfast Series will be held on Thursday, October 16, 2014. The Breakfast Series meeting is being held at the Ontario Bar Association, 2nd floor, 20 Toronto Street, Salons 2 & 3, Toronto, Ontario. Breakfast begins at 8:15 a.m. with the presentation to follow at 8:30 a.m. A fee of $300 (26.55 + $3.45 HST) is payable to Hull & Hull LLP up in registration by cheque, VISA or MasterCard. To register, please contact Sarah Koslicki at (416) 369-4770 or by email at skoslicki@hullandhull.com.