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Wealth Matters

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Inside

Watch for Miller Thomson's Budget Update on Tuesday, January 27th!

Beneficiary Designation Potpourri

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Connie joined Miller Thomson's Calgary office in 2008, bringing with her a wealth of experience in the trusts and estates area. Prior to joining Miller Thomson, Connie practiced for several years with a major financial institution in Calgary.

In the estate planning process, including the preparation of a Will, it is important to review existing beneficiary designations to ensure that the resulting dispositions fit with the overall estate planning objectives. Beneficiary designations can be used for such assets as Registered Retirement Savings Plans (RRSPs), Registered Retirement Income Funds (RRIFs), life insurance policies and some life insurance products such as annuities and segregated funds. Below are certain issues relating to beneficiary designations that should be considered.

1. Why is it Important to Consider Beneficiary Designations in an Estate Plan?

a. Funds that are paid to a designated beneficiary rather than to the "estate" generally do not form part of the estate assets upon which probate fees are calculated. The amount of the fee varies by province. Ontario and BC have the highest probate fees while Alberta's fee is capped at $400 and Québec has only a nominal fee. However, with respect to life insurance designations made in a Will, recent cases from Saskatchewan have created some uncertainty. This is discussed further below.

b. With the use of a designated beneficiary, the funds can be paid to the beneficiary in a timely manner. Minimal documentation is generally required before the financial institution or insurance company makes the payment to the beneficiary. This means that no grant of probate from the court is necessary to collect on these funds.

c. Beneficiary designations can be made as part of the account opening or insurance application process, or by a subsequent declaration. The most recent valid declaration is the one that will be effective. From a planning perspective, it is important to note whether a designation has been made to ensure that it is not subsequently unintentionally revoked. Also, if a beneficiary designation has been made by way of a subsequent declaration in a Will, notice of the change should be provided to the appropriate financial institution or insurance company so that they do not pay out the proceeds to the wrong beneficiary.

2. Wills and Life Insurance Trusts

The 2007 Saskatchewan case of *Re Carlisle Estate* creates some uncertainty with respect to the probate consequences of using a Will to make an insurance declaration. The Court found that an insurance trust created within a Will (even if it is a separate designation expressly stating that it is not intending the proceeds to form part of the estate) can only be exempt from the application of probate fees in limited circumstances.

Saskatchewan's *Administration of Estates Act* includes a provision that specifically excludes "insurance payable to a named beneficiary" from the assets of a deceased when calculating the value of the deceased's estate. In *Carlisle*, the Court found that the provision in the Will did not designate a "named beneficiary" and, notwithstanding that the provision was a valid declaration under *The Saskatchewan Insurance Act*, the insurance was to be included in the estate for the purpose of calculating the probate fee. The test applied was whether the assets pass to the beneficiaries outside of the Will and without reference to it (not an estate asset), or whether they pass to the beneficiaries through the executors by the terms of the Will (an estate asset). Specifically, the Court stated that the Trustee of the insurance trust must be someone other than the Executor of the estate and the distributive clauses of the insurance trust should not make reference to those found elsewhere in the Will. This case will not be appealed due to the relatively small amount of probate fees at issue.

The more recent 2008 case of *Sun Life Assurance Company of Canada v. Taylor* provides some clarification as to what is required to create a valid life insurance declaration in a Will such that the proceeds will not form part of the estate. The deceased had prepared a holographic will which contained provisions specifying the various insurance policies that he owned, naming his children as the beneficiaries of those policies and naming his wife as the "administrator" of those funds for the benefit of the children until they reached age 21. The Court found that the deceased had included a "named beneficiary" in this case and as such the insurance proceeds were not subject to probate fees. The *Carlisle* case was distinguished on the basis that in that case the provisions at issue directed the insurance proceeds to be "paid or payable" to the insured's executor and as such, did not pass to a named beneficiary. The Court adverted to the estate planning consequences as follows:

> *the challenge faced by drafters who include insurance declarations in wills and/or name the executors of a will as insurance trustee is to ensure their intent is clear. Without such clarity, it is open to a Court to find the insured's personal representative is designated to receive the insurance proceeds as opposed to a 'named benefici*ary'.

It is uncertain what application these cases may have in other jurisdictions since it appears that that the decisions were based upon the specific wording in the Saskatchewan legislation. However, it would be prudent for lawyers drafting Wills which include insurance trusts to keep these cases in mind, especially in those provinces where the avoidance of probate fees is of greater concern.

3. Who Pays the Tax?

The general rule is that when the owner (annuitant) of an RRSP passes away, the value of the account is included in the deceased's income and is subject to tax. If a spouse, common-law partner or financially dependant child all of whom ("qualified beneficiaries") is entitled to receive the proceeds of the account, elections are available for the value of the account to the qualified beneficiary to be included in his or her own income thereby reducing the tax liability to the deceased's estate. Subsequently, a deferral of the tax liability could occur if the qualified beneficiary elects to roll the assets into his or her own RRSP (full deferral until funds are withdrawn) or purchase an annuity with the funds received (tax liability is spread over the term of the annuity). These elections are available whether the qualified beneficiary is specifically designated as a beneficiary of the RRSP under the plan or if the qualified beneficiary is entitled to a share of the deceased's estate of which the RRSP forms a part.

However, if the named beneficiary to the RRSP proceeds is not a qualified beneficiary, that beneficiary will receive the full proceeds of the account. The proceeds will be reported as income of the deceased account owner and the estate of the deceased will be primarily liable for the income tax. The following example demonstrates how such a beneficiary designation can create an issue with respect to the beneficiaries of the estate. Assume an account owner designates an adult son as the beneficiary of his RRSP and leaves the residue of the estate to an adult daughter in his Will. When the account owner passes away, the son will receive the full value of the RRSP and the resulting income tax owing will be paid out of the residue of the estate thereby decreasing the share that the daughter receives. This may or may not be the result that the deceased intended.

4. Designating a Minor Beneficiary

When the desire is to designate a beneficiary who has not yet reached the age of majority, care should be taken to ensure that a trustee is named to manage the funds for such a beneficiary and that specific directions are included for the trustee to follow. For example, directions can be provided that the funds are not to be distributed until the beneficiary reaches a certain age and/or that funds can only be used for certain purposes to benefit the beneficiary. Without the designation of a trustee for a minor beneficiary, the provincial Public Trustee's office would manage the funds or a person might have to apply to the court to be appointed as the trustee for such beneficiary. Without specific trust provisions, if a minor beneficiary is involved, he or she will be entitled to receive the full amount upon attaining the age of majority. If the form for designating the beneficiaries for the RRSP, RRIF or insurance policy does not have enough space or even contemplate the appointment of a trustee or setting out specific terms, the designation can be made in a Will or in a separate trust document.

5. Moving a Registered Plan from One Institution to Another or Making Changes to It

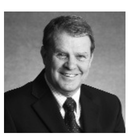
When an individual who owns an RRSP transfers those funds to a RRIF, any beneficiary designation that has been made with respect to the RRSP does not automatically transfer over to the RRIF. Accordingly, the individual needs to ensure that a new beneficiary designation is made in such circumstances.

When an attorney acting under a Power of Attorney is responsible for the transfer of an RRSP to another RRSP or to a RRIF, the rules are different. In the case of *Desharnais v. Toronto Dominion Bank* (2002) BCCA 640, an attorney transferred funds from a beneficiary-designated RRSP to another financial institution. No beneficiary designation was made with respect to the new RRSP account. By default, this generally acts as a designation that the proceeds form part of the "estate". The Court determined that this "change" in designation was a testamentary disposition that an attorney does not have the authority to undertake. The Court therefore concluded that the attorney must continue the designation from the old account to the new for the transfer to be valid.

From a planning standpoint, it may be beneficial to have this requirement specifically stated in the Power of Attorney document when it is drafted to bring this issue to the attention of the attorney and to make the institution aware that the attorney is acting within his or her authority if such a transfer must occur.

British Columbia Protects RRSPs, RRIFs, and DPSP Assets From Creditors

Kenneth Burnett



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On November 27, 2008 the British Columbia legislature gave a third reading to Bill No. 45 - 2008 - the "*Economic Incentive and Stabilization Statutes Amendment Act*". Part 2 of that Bill, dealing with "asset protection", amended the *Court Order Enforcement Act* to provide exemption from enforcement by creditors against assets in a RRSP, RRIF and DPSP by adding a new section 71.3. The *Court Order Enforcement Act* (BC) regulates how unsecured creditors can enforce judgments against debtors. Part Two of the Bill received Royal Assent on November 27, 2008.

Effect of Amendment - Property of Plan Exempt from Creditor's Claim

The effect of the new section 71.3 is that, subject to certain exceptions, all property in a RRSP, DPSP or an RRIF, as they are defined in the *Income Tax Act* ("Registered Plan"), is exempt from any enforcement process by a creditor.

Exception to Protection of Plan Property Against Creditors

There are some exceptions to the exemption of property of a Registered Plan from enforcement by creditors, as follows:

(a) property contributed to a Registered Plan after or within 12 months before the date on which the debt being enforced became due;

(b) property that has been or is being paid out of a Registered Plan, except for the transfers described below;

(c) an enforcement process which arises out of a maintenance order as defined under the *Family Maintenance Enforcement Act*; and

(d) an enforcement process initiated against a Registered Plan prior to November 1, 2008.

Exemption Treatment for Transfers between Plans and Payments on Death of a Planholder

Section 71.3 (4) provides that transfers of property from a Registered Plan of a planholder to:

(a) another Registered Plan of a planholder; or

(b) after the death of a planholder, to the planholder's spouse or common law partner (defined under Section 248 of the *Income Tax Act*) who is entitled under the terms of the Registered Plan to receive that property on the planholder's death,

do not constitute "property paid out of a Registered Plan" and such transfers are therefore exempt from an enforcement process by creditors. Accordingly, on the death of a planholder, it will be possible to transfer the property of the Registered Plan to the spouse of that planholder who is the beneficiary.

Insurance Act Exemption

These new exemptions are in addition to the existing exemptions that the *Insurance Act* (BC) provides for the protection of the assets of Registered Plans which are "segregated funds" and which are considered to be "insurance policies".

Effect of Change under *Bankruptcy Act*

The effect of this change (in British Columbia) is that property of a Registered Plan is not considered "property of the bankrupt" under the *Bankruptcy and Insolvency Act* and therefore not available to the creditors of the planholder. Subsection 67(1) of the *Bankruptcy and Insolvency Act* provides that the property of a bankrupt divisible among his creditors shall not include "any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides".

Beware the Duty to Account for Assisting an Elderly Parent!

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It is not uncommon to act under a Power of Attorney for Property in order to assist an elderly but mentally competent parent.

Is that family member obliged to account to the beneficiaries of the parent's estate?

Although section 38 of Ontario's *Substitute Decisions Act* does not require the attorney to keep accounts where the grantor is capable of managing property, the attorney is well advised to maintain detailed records for his or her own protection. A beneficiary of the estate may demand a full accounting. In exercising its discretion under section 42 of the *Substitute Decisions Act*, an Ontario court will consider the extent of the attorney's involvement in the grantor's financial affairs, and whether the applicant has raised a significant concern in respect of the management of the grantor's affairs to warrant an accounting.

In the 2008 case of, *McAllister Estate v. Hudgin*, the deceased's son brought an application to have the deceased's daughter formally account for her activities under the Power of Attorney in her favour. The daughter had received all invoices and executed all of the financial transactions so as to give effect to her mother's instructions. The Court therefore considered the daughter to have been in full control of her mother's affairs though the mother had been capable of managing her property.

There appeared to be a $100,000.00 discrepancy in the assets that should have existed on death. While the Court did not order a full formal accounting on the application, it held that the son, as a beneficiary, had the right to copies of the financial records relating to his sister's role as attorney. The son was also entitled to seek further directions, which could include an Order for a formal Passing of Accounts.

This case serves as a caution to children and others acting under a power of attorney to keep proper books and records of their dealings with the grantor's property - whether the grantor is capable or incapable.

Proposed Changes to Dependants Relief Under the *Wills Variation Act* of British Columbia Rejected

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In 2003, the British Columbia Law Institute initiated the Succession Law Reform Project (the "Project") in order to study and modernize the statutory and common law with respect to the law of succession in the province. The result of this Project was the publication in June 2006 of a final report entitled, "Wills, Estates, and Succession: A Modern Legal Framework" (the "Report"). The Report included the draft *Wills, Estates and Succession Act* (the "Proposed Act"), a consolidation of British Columbia's current *Wills Act, Wills and Estates Variation Act* (the "WVA"), *Estate Administration Act*, and *Probate Recognition Act*. There were a number of significant proposed changes relating to the matter of dependants' relief currently dealt with under the WVA.

Eligibility for Dependants' Relief

It was proposed that there be a fundamental change to the current WVA structure of having no restriction on the eligibility of a child over the age of majority to claim relief. Such reform would have brought British Columbia in line with all other Canadian jurisdictions by restricting eligible adult non-spousal claimants to those unable to be self-supporting due to illness, physical or mental incapacity, or other special circumstances. Also eligible would be those dependants temporarily unable to be self-supporting after attaining age of majority due to full-time enrolment in an educational or vocational training program.

It was also proposed that stepchildren be eligible to claim dependants' relief if they were supported by the deceased for at least one year prior to the deceased's death and remained minors at the time of death.

Nature of Relief

The nature of relief granted for "adequate provision" to a child, whether a minor or adult, was to correspond to the degree of the child's inability to be self-supporting. A non-exhaustive list of eight factors was proposed for a court to consider in deciding the amount and duration of relief payments. Two concepts which previously formed the basis for claims by adult children, namely "moral obligation" and "fair share", were not to be considered by a court. The court was to be limited to ordering "adequate provision" awards by way of a periodic payment or annuity, rather than a share of the estate, although such a maintenance payment could be made by a lump sum payment.

Waiver

Under the WVA, one cannot waive the entitlement to protection afforded by the WVA. It was proposed that an eligible claimant could irrevocably waive the right to claim dependants' relief under legislation. This change was to reflect the notion that spouses ought to have flexibility in the planning of their financial affairs, as has been reflected by the general trend towards the enforcement of freely negotiated agreements between spouses.

Anti-Avoidance Provisions

Under the WVA, non-probate assets, such as insurance policies and retirement savings plans, do not form part of the estate and can be used by a testator to shelter other assets, thereby protecting certain assets from a potential claim. Provisions similar in operation to the *Fraudulent Conveyances Act* were proposed which would make voidable any transaction of the deceased that conferred a benefit on a third party and that was done with the intent to defeat the rights of an eligible claimant. As with fraudulent conveyance legislation, transactions entered into by the third party in good faith, for valuable consideration, and without notice or knowledge of the deceased's purpose at the time of the transaction would not be voidable.

Intestacy

In contrast to the WVA which currently is not applicable on intestacy, it was proposed that the provisions in the Act would extend to intestacies.

Pending Legislation Rejects Proposals

On April 16, 2008, the British Columbia government introduced Bill 28 - *Wills, Estates and Succession Act*. While it did not pass on first reading, it may well be enacted in due course. If the proposals had been introduced and passed, it would have been welcome news for beneficiaries under wills who would no longer have to fear potential claims of adult independent children. However, Bill 28 does not include any of these proposals. The law is essentially unchanged by Bill 28 except to the extent that there is an additional requirement that the Writ of Summons must be served on the executor no later than 30 days after the 6 month limitation period has expired.

Planning Updates

Miller Thomson Private Client Group

Contributions to RDSPs for 2008 extended to March 2, 2009

Registered Disability Savings Plans were first introduced in the 2007 Federal Budget and the ensuing legislation came into force on December 1, 2008. RDSPs went on sale at at least one Canadian financial institution in early January 2009. Given the delay in the introduction of the plans, the government has extended the contribution date for 2008 to March 2, 2009. The 2009 contribution year begins March 3, 2009. This ensures that contributors will be eligible for the Canada Disability Savings Grants and Canada Disability Savings Bonds for 2008.

RDSPs are available to disabled individuals who (a) are eligible for the Disability Tax Credit, (b) have a Social Insurance Number, (c) are resident in Canada, and (d) are under 60. As of 2009, the individual or his or her "legal representative" will be able to open an RDSP account with financial institutions in Canada. The RDSP will allow the disabled individual, the parents or others to accumulate savings on a tax-deferred basis for the disabled individual (the beneficiary of the Plan). Federal government grants make these savings plans even more attractive.

Similar to a Registered Education Savings Plan, contributions to an RDSP are not tax-deductible, however the income that accrues on contributions will not be taxable while held in the RDSP. When funds are paid out of the RDSP to the disabled beneficiary, the investment income, the Grant and the Bond will be taxable to the beneficiary (presumably at a relatively low tax rate).

RDSP payments to the disabled beneficiary of the Plan must commence by the end of the year in which the disabled person turns 60 and will be limited to a maximum amount based on the value of the assets in the plan and the individual's life expectancy. Unlike with an RESP, contributors to an RDSP for a disabled beneficiary will not be entitled to a refund of contributions. Rather, on the death of the beneficiary or cessation of his or her disability, the funds (net of re-payment of the CDSG and CDSB) will be paid to the beneficiary or his or her estate.

The Canada Revenue Agency has published a guide to the RDSP which may be accessed at: http://www.cra-arc.gc.ca/E/pub/tg/rc4460/rc4460-draft-e.pdf

Ontario, British Columbia, Saskatchewan and Newfoundland have announced that RDSP assets and withdrawals will be fully exempt from the provincial disability pension program.

Additional Value Attributed to Shares with Voting Control

We recently noted that certain Canada Revenue Agency ("CRA") offices may be attributing a premium to the value of control shares in private companies which previously would have been viewed as having a fixed value. The tax consequences of such valuations could include unexpected gains at death in circumstances where an estate freeze has been carried out.

In a typical estate freeze, shares in a private company are exchanged for preferred shares which have voting control but which do not participate in future earnings and growth ("control, non-participating" shares). New common shares are issued on the exchange, and these new common shares are often transferred to the next generation of family members or held in a family trust. In the past, the aggregate value attributed to the control, non-participating preferred shares has been equal to the value of the company at the time of the freeze, with this value remaining fixed. If the company increases in value, it is the value of the new common shares that increases. Thus, historically, no value has been assigned to the voting control element of the preferred shares.

However, the Vancouver TSO is apparently now assessing a premium on the value of private company control, non-participating preference shares acquired on an estate freeze and held by a taxpayer at death. Attributing value to control shares is not unheard of in the US, however such assessments in Canada represent an unannounced change in policy by the CRA.

In the absence of a spousal rollover, on the death of a shareholder of control, non-participating preferred shares, such shares are deemed disposed of at fair market value the instant before death. If the CRA assesses a premium on the value of the shares due to their voting control, a gain will be triggered at death, resulting in a tax liability.

We are currently evaluating possible methods for minimizing the risk that a voting control premium may be assessed on freeze shares. Potential strategies include revising the share attributes of the preferred shares and holding such shares in trusts. We continue to monitor the CRA's position on this issue and will provide updates as required.

Case Comment: *Frye v. Sylvestre* - Does a Shareholders' Agreement Constrain Testamentary Freedom?

In the recent Ontario case of *Frye v. Sylvestre*, a shareholders' agreement provided that the shareholders of a family company could not transfer their shares without the consent of the Board of Directors. One sibling left his shares to another sibling by Will. The trial judge interpreted the share transfer restrictions in the shareholders' agreement and the company's letters patent broadly enough to apply to a transfer by testamentary disposition. He therefore found the gift of shares to be null and void.

The Ontario Court of Appeal reversed the decision. It held that contractual obligations do not constrain a person's ability to bequeath property by means of a Will. Secondly, subsection 67(2) of the *Business Corporations Act* provides that a corporation shall treat the executor as a registered security holder. Legal title to the shares was transmitted by the Will to the estate trustees, who held them in trust for the beneficiary. The estate trustees are bound by the shareholders agreement and cannot distribute the shares out of the estate to the beneficiary without complying with the requirements of the shareholders’ agreement and the company’s letters patent. The inability to transfer the shares immediately does not, however, render the bequest void.

The case is currently under appeal to the Supreme Court of Canada.

WHAT'S HAPPENING AROUND MILLER THOMSON

Donald Carr, Q.C., Arthur Drache, Q.C., William Fowlis, Dragana Sanchez Glowicki, Robert Hayhoe, Susan Manwaring, Rosanne Rocchi, Martin Rochwerg, and **Joseph Yurkovich** have been selected to be included in the 2009 edition of The Best Lawyers in Canada in the specialty of Trusts and Estates. Congratulations!

Rosanne Rocchi spoke on November 13, 2008 on "Selected Legal Aspects of the New Philanthropy" at Mindpath's Doing Well by Doing Good Conference.

Dragana Sanchez Glowicki was appointed the Editor of the Canadian Bar Association (Alberta Branch) Law Matter publication.

Esmail Bharwani writes regularly for *Dollars & Sense*, having written recently on the following topics: "Consider All Factors Before Using a Joint Account", "Factors Courts Use to Determine the Intention of a Transfer", "Are Expenses Incurred on an Aborted Purchase Tax Deductible?" and "What You Need to Know about the Art of Valuation".

Kelly Charlebois spoke on Certificates of Pending Litigation at the Ontario Bar Association's "Deadbeat Dilemmas: How to Get Paid" on November 13, 2008.

On November 2nd, **Martin Rochwerg** presented on Canadian Legal Issues to the International Estate Planning Committee of the American College of Trust and Estate Counsel, in Savannah, Georgia. On October 21st, he chaired the session on Private Corporate Reorganizations, and introduced the keynote luncheon speaker, Ontario Minister of Finance Dwight Duncan, at the Ontario Tax Conference of the Canadian Tax Foundation, Mississauga. Martin also presented on 'Tax Rulings on Estate Planning' at the Senior Estates and Trusts Forum, held in Cambridge, Ontario, on October 3rd. He served on the steering committee for the conference.

Richard Fontaine presented on the "Importance of estate planning for a business owner" to Sun Life Financial, September 24 , 2008. He also spoke on "La Fiducie de Protection D'Actifs en droit Québécois," at a seminar organized by the Montréal chapter of STEP. Richard published an article in *le Journal Statège* on immigration trusts. He led a workshop given in Montreal November 4, 2008, entitled "Intervene abroad: a review of the Canadian rules having influence on the activities of Canadian charitable organizations", organized by the Canadian Counsel of International Co-operation. He has published a case study on planned giving which appeared in the Chronique Conseil d' un Héritage à Partager, in the review Bel Âge for the month of August 2008.

Rachel Blumenfeld spoke to a group of professional advisors on "New Developments in Philanthropy" at the Georgetown Hospital Foundation on November 12 and in Kingston at the AFP Southeastern Ontario Chapter's National Philanthropy Day Seminar on "Capacity to Gift: What the Gift Planner Should Know" on November 13. She will be speaking in Ottawa at a STEP seminar on planning for disabled beneficiaries on January 14.

On January 23 and 24, **Kenneth Burnett** and **Sandra Enticknap** are presenting at the Continuing Legal Education program "Death is Not the End - Difficult Matters in Pre-Grant and Administration of Estates."

Sandra Enticknap will be chairing the Federated Press conference in Vancouver entitled "Planning for the Wealthy Family" on February 25 and 26. She will be speaking on "The use of Trusts in Estate Planning" at the conference.

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