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BENEFICIARY DESIGNATIONS:

RRSPs, RRIFs AND SECTION 47 OF THE TRUSTEE ACT

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ACKNOWLEDGEMENTS

This project was originally suggested to the Institute by Cheryl James, who at the time was Chairperson of the Calgary Wills and Trusts Section, Alberta Branch of the Canadian Bar Association. Ms. James drew our attention to doubts that had arisen regarding the validity of RRSP and RRIF designations. This uncertainty impacts on the expectations of persons who have signed designations.

Mr. Richard Bowes is the counsel who had carriage of this project. The written report clearly sets out the policy issues, reviews the Uniform Act from which the Alberta provisions are derived and documents in detail the necessary background information.

We have had the benefit of thoughtful comments from a number of persons who reviewed an earlier issues paper that was circulated to interested individuals and organizations. We list those who provided written comments in Appendix B.

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CITATIONS, ABBREVIATIONS AND DEFINED TERMS

STATUTE CITATIONS

The following acts, which are mentioned frequently in this report, are referred to only by name when mentioned in the report. The full citation for less-frequently mentioned acts is given in the body of the report.

Alberta

Insurance Act, R.S.A. 1980, c. I-5

Trustee Act, R.S.A. 1980, c. T-10

Wills Act, R.S.A. 1980, c. W-11

Manitoba

Retirement Plan Beneficiaries Act, S.M. 1992, c. R138.

Retirement Plan Beneficiaries Act, R.S.M. 1987, c. R138

Federal

Income Tax Act, S.C. 1970-71-72, c. 63, as am.

ABBREVIATIONS AND DEFINED TERMS

ABBREVIATION OR DEFINED TERM	STANDS FOR:
future income plan	any of a number of different types of financial schemes designed to provide a future income for participants in the schemes
instrument designation	a testamentary beneficiary designation contained in an instrument that is not a will
issuer	an organization that invites individuals to invest in future income plans through that organization
owner	the person who is intended to receive the income contemplated by a future income plan
proceeds	benefits payable on the death of a participant in a plan to the participant's estate or a designated beneficiary
RPP	registered pension plan
RRIF	registered retirement income fund
RRSP	registered retirement savings plan
ULCC	Uniform Law Conference of Canada
will designation	a beneficiary designation contained in a will

SUMMARY

Section 47 of the *Trustee Act* allows a participant in a "plan" to designate a beneficiary of a benefit payable upon the participant's death by means of an instrument that does not comply with the formalities required by the *Wills Act*. Although it has been widely assumed that RRSPs and RRIFs are covered by the wording of section 47, this assumption has recently been questioned from several quarters.

This report examines whether instrument designations of RRSP or RRIF benefits are or ought to be allowed by section 47 of the *Trustee Act*. Chapter 1 describes the scope and history of this project. Chapter 2 looks at the existing law. It concludes that section 47 probably applies to RRSPs, even though its definition of "plan" does not mention them by name. However, it concludes that the status of RRIFs as a type of "plan" within the meaning of section 47 is more doubtful.

Chapter 3 examines the issue whether section 47 ought to apply to RRSPs and RRIFs. It advances two arguments for allowing instrument designations which do not comply with *Wills Act* formalities. First, instrument designations help prevent intestacy with respect to RRSP and RRIF assets. Because these designations are simple to execute and are usually completed when applying for a RRSP or RRIF, they are more likely to ensure that the proceeds are distributed in accordance with the owner's expressed wishes instead of through a default legislative formula. The second argument draws upon the fact that for many years instrument designations have been widely presumed to be effective and have been relied upon by thousands of people. Such widespread reliance is considered to be a good reason for retaining instrument designations and confirming their applicability to RRSPs and RRIFs. Several arguments against allowing instrument designations are considered. We conclude that while instrument designations have their drawbacks, they do not undermine the case for allowing instrument designations of RRSP and RRIF proceeds.

Our first recommendation is that RRSP and RRIF owners be able to designate a beneficiary by means of unattested instruments, as provided by section 47 of the *Trustee Act*. We then recommend that any doubt as to whether section 47 covers RRSPs and RRIFs be removed; section 47 should be amended to make it absolutely clear that it applies to RRSPs and RRIFs. Third, because a great many people have completed designations based on the assumption that they will be effective, we recommend that the amended wording apply to all designations, regardless of whether they were made before or after the date the amendment comes into force. The pre-amendment

section would continue to apply only in cases where using the amended wording would alter the results of a final judgment or impose liability on someone who has received or paid out RRSP or RRIF proceeds before the amendment comes into force.

Changes to the *Income Tax Act* (Canada) may result in new financial products being given tax relief and therefore offered to individuals. In order for section 47 to be kept as current as possible in the future, we recommend that the amended legislation authorize regulations designating new types of savings arrangements as "plans" for the purposes of section 47.

Finally, we recommend that issuers of plans covered by section 47 be required to provide plan owners with periodic reminders of subsisting beneficiary designations. This is intended primarily to alleviate the problem of forgotten designations, which is particularly troubling in a province where instrument designations are not automatically revoked by marriage or divorce. We recommend that the amended act authorize the making of regulations requiring issuers to provide annual reminders of subsisting beneficiary designations to plan owners.

CHAPTER 1
INTRODUCTION

A. PROJECT HISTORY

(1) CONCERNS ABOUT THE COVERAGE OF SECTION 47 OF THE *TRUSTEE ACT*

Section 47 of the *Trustee Act* allows a participant in a "plan" to designate a beneficiary of benefits payable upon the participant's death.[1] Section 47(2) allows a designation to be made by either of two methods:

(a) by an instrument signed by [the participant] or signed on his behalf by another person in his presence and by his direction, or

(b) by will.

Since the designation takes effect only upon the participant's death and can be revoked any time before then, it is a testamentary disposition. The significance of this categorization is that, generally speaking, the Wills Act makes a testamentary disposition ineffective unless it is contained in a valid will. Section 47 creates an exception to this rule by authorizing a participant to designate a beneficiary of plan proceeds in an "instrument" that is not signed with the formalities required for a valid will. Throughout this report we use the term "instrument designation" to refer to a testamentary beneficiary designation contained in an instrument that is not a will.

All common law provinces and the two territories have beneficiary designation legislation similar to section 47 of the *Trustee Act*.[2] In all of these jurisdictions the legislation applies to designations of benefits payable under a "plan". The definition of "plan", which is similar but, as will be seen, not identical in all jurisdictions, describes a number of different types of financial schemes that are designed to provide a future income for participants in the schemes.[3] For convenience, throughout this report we use the term "future income plan" as a generic label for such schemes, and the term "owner" to

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1 Henceforth, we use the term "proceeds" to denote benefits payable on the death of a participant in a plan to the participant's estate or a designated beneficiary.

2 See Appendix D.

3 One departure from this is that several jurisdictions define "plan" so as to include home ownership savings plans, which are designed to help save for the purchase of a home rather than to provide a future income.

denote the person who is intended to receive the income contemplated by a future income plan.

In most jurisdictions the definition of "plan" refers to registered retirement savings plans ("RRSP"s) and registered retirement income funds ("RRIF"s) by name, but the definition in Alberta's section 47 does not. Nevertheless, it seems to have been widely assumed that section 47 permits instrument designations of RRSP and RRIF proceeds. Thus, over the years since section 47 was enacted in 1976, "issuers"[4] of RRSPs and RRIFs have routinely invited people purchasing RRSPs or RRIFs to designate beneficiaries by instrument. This invitation has frequently been accepted, and when the maker of the designation has died issuers have customarily paid out in accordance with the designation.

However, in recent years doubts have been expressed about whether the wording of section 47 is apt to cover RRSPs and RRIFs.[5] Similar concerns were expressed about Manitoba's pre-1992 *Retirement Plan Beneficiaries Act*,[6] which led the Manitoba Law Reform Commission to recommend that the definition of "plan" in that act be amended to refer specifically to RRSPs and RRIFs.[7] This recommendation, along with several others, was implemented by the 1992 *Retirement Plan Beneficiaries Act*. In the meantime, doubts about the coverage of section 47 of Alberta's *Trustee Act* have been reinforced by two unreported decisions of the Alberta Court of Queen's Bench. The first case, *Asselstine v. McKeen*,[8] held that a RRIF did not come within section 47's definition of "plan", so an instrument designation of RRIF proceeds was invalid. The second case, *Kochut v. Kochut*[9] arrived at the same result regarding a RRSP. Both

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4 The term "issuer" is another label that we use for ease of reference. We use it to refer to any organization that invites individuals to invest in future income plans through that organization.

5 P. Renaud, "Registered Retirement Savings Plans: Designations of Beneficiaries" in *Canadian Bar Association Alberta Branch Midwinter Meeting* (Edmonton: CBA, 1989) 290 at 290-93; B. Corbin, "Designation of Beneficiaries: Addendum" (1989) 9 E. & T. J. 349; C. Fien, "Waugh Estate v. Waugh: More about the Nature of RRSPs" (1990) 10 E. & T. J. 37; J. Carstairs, "Beneficiary Designations" (Edmonton: LESA, 1990) in 23rd Annual Banff Refresher Course: Wills & Estates 152 at 169-71.

6 R.S.M. 1987, c. R138; repealed and replaced by *The Retirement Plan Beneficiaries Act*, S.M. 1992, c. R138. Henceforth, we refer to the old and new Manitoba acts as the "pre-1992" and "1992" *Retirement Plan Beneficiaries Act*, respectively.

7 Manitoba Law Reform Commission, *Statutory Designations and the Retirement Plan Beneficiaries Act* (Winnipeg: MLRC, 1990) [hereinafter "Manitoba Report"].

8 (November 19, 1991), Edmonton 9103 17969.

9 (July 28, 1992), Edmonton 9103 15123.

decisions were made by a judge sitting in chambers, and no written reasons were issued in either case.[10]

The uncertainty regarding the status in Alberta of RRSP and RRIF designations was brought to the Institute's attention in the spring, and again in the fall, of 1992 by Ms. Cheryl James, who at the time of her first communication was chairperson of the Canadian Bar Association's South Alberta Wills and Estates section. Ms. James wrote that "it is a practice followed by most financial institutions in the Province and most individuals assume that if they designate the beneficiary of the plan on the form supplied by the financial institution that the designation is effective." The Institute decided in the fall of 1992 to undertake a project focusing on the issue whether instrument designations of RRSP and RRIF proceeds are, or should be, authorized by section 47 of the *Trustee Act.*

(2) ISSUES PAPER

After deciding to undertake this project, our first step was to prepare and circulate an issues paper entitled *RRSP and RRIF Beneficiary Designations*,[11] which set out our tentative recommendations on several issues. The first issue discussed in the Issues Paper is whether or not instrument designations of RRSP and RRIF proceeds be permitted. The Issues Paper's tentative recommendation on this point was:

> TR1 It should be possible to designate beneficiaries of RRSPs and RRIFs by instruments that do not comply with the *Wills Act*.[12]

If instrument designations should be permitted, the second issue is whether the existing wording of section 47 achieves this result, or whether an amendment is required. We thought that there was enough doubt on the point, especially regarding RRIFs, to justify the following tentative recommendation:

> TR2 Section 47 should be amended to refer specifically to RRSPs and RRIFs.[13]

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10 The formal order in *McKeen* does incorporate a brief summary of the judge's reasons.

11 Unpublished, December 1992 [hereinafter "Issues Paper"].

12 *Id.* at 5. For ease of reference, we refer to the tentative recommendations as TR1, TR2 and so forth, although they were not numbered in the Issues Paper.

13 *Id.* at 7.

The Issues Paper then considered a pair of ancillary issues that would arise if section 47 is amended. The first is whether the amended wording of section 47 should apply to designations that had been made before the amendment came into force and, in particular, to designations made by people who had died before the amendment came into force. Our tentative recommendation on this point was:

TR3 The amended wording of section 47 should apply to all designations whenever made, regardless of whether the person making the designation is alive at the time the amendment comes into force.[14]

The second ancillary issue is how to keep section 47 up to date with possible developments in the *Income Tax Act* (Canada), which gave birth to both RRSPs and RRIFs and may well give birth to new types of future income plans in the future. We tentatively recommended:

TR4 Provision should be made for extending the coverage of section 47 through executive action.

To save both time and money, we decided not to print the Issues Paper and distribute it to everyone on the Institute's general mailing list. Instead, we sent copies of the Issues Paper to people and organizations whom we expected to have a particular interest in or knowledge of the matters under consideration. Initially, we sent the Issues Paper to organizations representing RRSP and RRIF issuers, the chairpersons of the North Alberta and South Alberta Wills and Estates sections of the Canadian Bar Association, the presidents of local bar associations across the province, and a number of individuals who we thought would be especially interested in the subject. In the case of the Wills and Estates sections and local bar associations, the chairperson or president was asked to bring the Issues Paper to the attention of section or association members. An unexpected but welcome development was that the Issues Paper came to the attention of the news media and was mentioned in several newspaper articles. This publicity led to a number of requests for copies of the Issues Paper from lawyers and other interested individuals. Ultimately, we received helpful comments from a number of individuals and organizations with an interest in the subject.

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14 *Id.* at 7.

(3) Responses to the Issues Paper

Appendix B lists the persons, firms and organizations who responded in writing to the Issues Paper. The responses to the four tentative recommendations are summarized below. Some of the specific points raised by the commentators are mentioned later in this report.

TR1 One commentator was very strongly opposed to the proposition that RRSP and RRIF owners should be able to designate beneficiaries by an instrument other than a will. The rest of the commentators expressed support for this proposition.

TR2 All commentators who supported recommendation TR1 supported the tentative recommendation that section 47 be amended to refer specifically to RRSPs and RRIFs.

TR3 All commentators who supported recommendations TR1 and TR2 favoured an amendment that would apply to instrument designations regardless of whether they were made before or after the amendment comes into force, and regardless of whether the participant was still alive at that time. However, a couple of the commentators qualified their support for a fully retrospective amendment. One of these commentators was concerned that the amendment should not upset court decisions or settlements based on such decisions. Another commentator supported retrospective operation for RRSP beneficiary designations but expressed no opinion on retrospective operation for RRIF designations.

TR4 All commentators who expressed an opinion on this recommendation supported the concept of amendment by executive action.

In the Issues Paper we stated that it was our understanding "that it has long been the assumption of financial institutions, lawyers, estate administrators and members of the public that section 47 applies to [RRSPs] and [RRIFs], and that their practices have reflected this assumption." We also referred to this assumption as being "nearly universal". One commentator thought that we were wrong to suggest this assumption was widespread amongst the groups mentioned. He pointed out that RRSP and RRIF issuers' beneficiary designation forms often contain cautionary phrases such as "where permitted by law" and "subject to applicable Provincial estate legislation". He argued that this showed that issuers, lawyers, estate administrators and persons who signed such designations all must be aware that the designations might be invalid. Moreover, the existence of several articles questioning the validity of RRSP designations in Alberta[15] indicated that the possible invalidity of RRSP and RRIF beneficiary designations was widely known within the legal profession.

Indeed, a significant number of lawyers and issuers do appear to have had longstanding concerns about the validity of RRSP and RRIF instrument designations. Nevertheless, most comments on the Issues Paper reinforced our initial impression that it has been widely assumed that instrument designations of RRSP and RRIF proceeds are valid in Alberta.

B. SCOPE OF PROJECT

As mentioned above, this project arose out of concerns about whether section 47 of the *Trustee Act* authorizes instrument designations of RRSP and RRIF proceeds. This boils down to whether the definition of "plan" in section 47(1)(c) includes RRSPs and RRIFs. Most of the discussion and all but one of the five recommendations in this report are directly concerned with whether section 47 applies, or ought to apply, to RRSPs and RRIFs. There are issues relating to RRSP and RRIFs about which this report does not make any recommendations. Some of these issues are important enough that we describe what they are and indicate why we do not make any recommendations about them in this report. We will do so in a moment, after first describing the specific issues about which this report does make recommendations.

(1) Issues Addressed

(a) Coverage of section 47

The first four of the five recommendations in this report correspond closely to the four tentative recommendations in the Issues Paper. These recommendations are all directly related to the coverage of section 47. The first issue considered is whether, as a matter of policy, the law ought to permit instrument designation of RRSP and RRIF benefits. We answer this question affirmatively. The next issue is whether section 47 should be amended to refer to RRSPs and RRIFs by name. Again, our response is affirmative. The third issue is concerned with the extent, if any, to which the amendment to section 47 should apply to pre-existing beneficiary designations. Our answer is that, subject to certain qualifications, the amended wording of section 47 should apply to all beneficiary designations, including those executed by RRSP and RRIF owners who have died before the amendment comes into force. Our fourth recommendation is concerned with the problem of keeping section 47

15 See articles cited in note 5.

up to date with developments in the marketplace and with the *Income Tax Act;* we recommend that provision be made for modifying the coverage of section 47 by regulation.

(b) Periodic reminders of beneficiary designations

Our fifth recommendation was not foreshadowed by the Issues Paper but reflects comments we received on the Issues Paper. This recommendation is that issuers should be encouraged — and required, if necessary — to give future income plan owners periodic reminders of the identity of designated beneficiaries. The purpose of this recommendation is to address a concern expressed by several commentators that people can easily forget that they have made beneficiary designations that no longer reflect their actual intentions regarding the disposition of plan proceeds.

(2) ISSUES ABOUT WHICH WE DO NOT MAKE RECOMMENDATIONS

(a) Designations to which *Insurance Act* applies

Section 47(15) of the *Trustee Act* states that the section does not apply to "a contract or to a designation of a beneficiary to which the *Insurance Act* applies". Section 240.1 of the *Insurance Act* makes it clear that annuities issued by insurance companies (whether held in a RRSP or not) are to be treated as life insurance for the purposes of Part 6 of that act:

> For the purpose of [Part 6], an undertaking entered into by an insurer to provide an annuity, or what would be an annuity except that the periodic payments may be unequal in amount, shall be deemed to be and always to have been life insurance whether the annuity is for
>
> (a) a term certain,
>
> (b) a term dependent either solely or partly on a human life, or
>
> (c) a term dependent solely or partly on the happening of an event not related to a human life.[16]

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[16] A commentator on the Issues Paper drew our attention to the history of this provision. It was added to the Alberta *Insurance Act* and the corresponding acts of other provinces after it was held in two Manitoba cases that an annuity issued by an insurance company was **not** a contract of life insurance: *Re Scott and Manufacturers Life Insurance Co.* (1973), 41 D.L.R. (3d) 296 (Man. Q.B.); *Re Beck*, [1976] 2 W.W.R. 665 (Man. Q.B.). Prior to these (continued...)

Section 259(1) of the *Insurance Act* provides that "[a]n insured may in a contract or by a declaration designate his personal representative or a beneficiary to receive insurance money." The term "declaration" is defined in section 240:

> In this Part,
>
> . . .
>
> (e) "declaration" means an instrument signed by the insured
>
> (i) with respect to which an endorsement is made on the policy,
>
> (ii) that identifies the contract, or
>
> (iii) that describes the insurance or insurance fund or a part thereof,
>
> in which he designates or alters or revokes the designation of his personal representative or a beneficiary as one to whom or for whose benefit insurance money is to be payable.

The upshot of all this is that a beneficiary designation regarding an annuity issued by an insurance company is authorized and governed by Part 6 of the *Insurance Act*, whether or not it is a RRSP or RRIF. Such designations are beyond the scope of this report.

(b) Revocation of designations by operation of law

In Alberta a will is automatically revoked if the person who makes it subsequently marries, unless the will is expressed to have been made in contemplation of marriage.[17] This automatic revocation of the will seems to be based on the assumption that marriage represents such a significant change in a person's life that a will made prior to marriage will probably not continue to reflect the person's actual intentions regarding the disposition of his or her property on death. A further assumption seems to be that a distribution in

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[16](...continued)
cases, insurers apparently treated their annuity products as life insurance, and accepted and acted on designations under each province's equivalent of section 259 of the *Insurance Act*. After these cases were decided, the insurance industry persuaded the provinces to add the equivalent of section 240.1 to their respective acts, thus putting the validity of such designations beyond doubt.

[17] *Wills Act*, s. 17. Other provinces' acts contain a similar provision regarding divorce: a gift in a will to a spouse is automatically revoked upon divorce.

accordance with the intestate succession laws is likely to come closer to giving effect to such a person's actual intentions than would the old will.

Unlike the *Wills Act*, section 47 of the *Trustee Act* does not provide for automatic revocation of instrument designations upon the marriage of the person who made the designation. This could easily lead to a designation in favour of someone other than a RRSP owner's new spouse remaining in force because the RRSP owner has forgotten about the designation. In fact, one of the cases referred to earlier, *Kochut v. Kochut*,[18] arose out of just such a set of circumstances. The deceased had designated his father as the beneficiary of an RRSP when he was single, and had not changed the designation after he married. His widow claimed that the deceased's failure to change the beneficiary designation was an oversight rather than a deliberate decision to leave his father as the designated beneficiary. This seems to be a plausible account of what actually happened, and might well have influenced the court's conclusion that the designation was invalid in the first place.

If the beneficiary designation that gave rise to *Kochut* had been made in a will instead of an instrument, the will, and hence the designation, would have been revoked by the testator's subsequent marriage. The different result, depending on whether the designation is in an instrument or a will, is difficult to justify on policy grounds.[19] It is certainly arguable that a beneficiary designation under section 47 should be revoked automatically in the same circumstances that a will would be revoked by operation of law. However, we intend to review the whole area of automatic revocation of testamentary dispositions in our succession law project, so we defer further examination of the automatic revocation issue until that time. It should be mentioned, though, that implementation of our recommendation regarding annual reminders of beneficiary designations should reduce the chance that plan participants will forget to change beneficiary designations that no longer reflect their actual wishes.

(c) Is effective revocation too difficult?

One of the commentators on the Issues Paper argued that, in practice, it is too difficult to revoke beneficiary designations that have been made by instrument. Section 47(4) of the *Trustee Act* provides that an instrument

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18 *Supra*, note 9. This summary of the facts is based on the affidavit filed on behalf of the applicant, the deceased's widow.

19 It is worth noting, however, that beneficiary designations under the *Insurance Act* are not revoked by marriage (or divorce), either. So section 47's approach is at least consistent with that of the *Insurance Act*.

designation can be revoked by a will "only if the revocation refers to the plan either generally or specifically". A standard revocation clause such as, "I revoke all former wills and codicils" would not revoke an instrument designation, because the words of revocation do not refer to the plan either generally or specifically. What are required, presumably, are words that make it clear that the will is intended to revoke a particular designation or to revoke all designations that the testator may have made with respect to any plan. It will not be difficult for a lawyer to draft a clause to this effect, but a person making a will without the assistance of a lawyer could hardly be expected to anticipate the need for such a clause. The same commentator observed that even where a will revokes an earlier instrument designation, it may be difficult to ensure that the revocation is effective in practice.

Suppose that the will of a RRSP owner who has just died revokes a previous beneficiary designation in favour of B1. The original designation was made in the RRSP application and is on file with the issuer.[20] The will, which has not been filed with the issuer, directs that the proceeds are to be paid to B2. Legally, the designation in favour of B1 is revoked and replaced by the designation in favour of B2. But suppose that as soon as the owner dies B1 applies to the issuer for payment of the RRSP proceeds. After checking its records and confirming that B1 is the designated beneficiary, the issuer pays the proceeds to B1. Since the designation in favour of B1 was revoked, B1 is not entitled to keep the proceeds. But if B1 has already disposed of the proceeds when the deceased's personal representative discovers what has happened, the estate's cause of action against B1 may be of little or no practical value. Worse yet, so far as B2 is concerned, the issuer is insulated from liability by section 47(13) of the *Trustee Act*:

> When a plan requires or permits a designation or revocation thereof to be filed with a specified person or body and any benefit is paid under the plan to a beneficiary on the basis of the latest designation so filed, the payment shall be deemed to be validly made, as against the person required by the plan to make the payment, notwithstanding that
>
> (a) a later designation or revocation of a designation is filed under the plan after the payment was made, or

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20 We assume here that the beneficiary designation was valid in the first place.

(b) the person or body is notified, after the payment was made, of an event that had the effect of revoking a designation so filed.[21]

Thus, although in theory it is not terribly difficult to revoke an instrument designation by a will, to make sure that the revocation will be effective as against the issuer it is necessary to file the will with the issuer.

The statutory protection afforded to the issuer who acts on the basis of the latest designation filed with it reflects a difficult policy choice. Whenever legislation deals with the disposition of deceased persons' property there will be some tension between the goal of ensuring that the property ultimately ends up in the hands of the persons who are legally entitled to it and the goal of distributing the property expeditiously and at the least possible cost. The more legal safeguards that are put in place to ensure that the deceased's property ultimately ends up in the right hands, the less expeditious and the more expensive the process of distributing the property is likely to become. Obviously, a provision such as section 47(13) assigns considerable weight to the goal of having an expeditious, inexpensive procedure for distributing property that is the subject of a beneficiary designation. The commentator on the Issues Paper who thought that section 47 should not apply to RRSPs and RRIFs felt that section 47 puts too little emphasis on the goal of ensuring that the proceeds end up in the right hands.

The argument that section 47(13) of the *Trustee Act* overemphasizes the expeditiousness of the procedure for dealing with designated proceeds at the expense of ensuring that the proceeds end up in the right hands cannot be rejected out of hand. We note, however, that, except for the Northwest Territories, every Canadian jurisdiction with legislation permitting instrument designations has a provision similar to section 47(13).[22] Of course, the pervasiveness of this provision in Canadian designation legislation does not prove its merit. On the other hand, it seems reasonable to infer that if this type of provision was likely to cause serious problems, they would have shown up by now in the reported cases. But so far as we are aware, there is not a single reported case in Canada where a provision such as section 47(13) appears to

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21 Section 47(14) provides that the filing with the issuer of an authenticated copy of a will that makes or revokes a designation satisfies any filing requirement under the plan, but our example assumes that the will was not filed with the issuer.

22 This was noted in the Manitoba Report, *supra* note 7 at 12-13. At the time, Manitoba's pre-1992 *Retirement Plan Beneficiaries Act* did not contain a provision similar to section 47(13) of the *Trustee Act*. The Manitoba Commission recommended that it should. This recommendation was implemented in section 15 of the 1992 *Retirement Plan Beneficiaries Act*.

have resulted in the proceeds of a RRSP, RRIF or other future income plan ending up in the wrong hands.

In any event, one virtue of section 47(13)'s approach is that it is fairly uniform across the country.[23] It is desirable to retain as much uniformity as possible in this area. If section 47(13) does not strike exactly the right balance between an expeditious, low-cost procedure and a procedure that ensures that proceeds ultimately end up in the right hands, it does not appear to be too far off the mark. Certainly, it does not appear to us to be so far off the mark that Alberta should depart from the approach that is followed by almost every other jurisdiction. If the appropriateness of the policy choice implicit in section 47(13) is to be re-examined, we think this is a task that should be undertaken by an interjurisdictional body such as the Uniform Law Conference of Canada ("ULCC").

(d) Exigibility of RRSPs and RRIFs

One of the major issues regarding future income plans, particularly RRSPs, is whether judgment creditors should be able to seize, garnish or otherwise get at the property held under such a plan while its owner is still alive. At the moment, pensions and "life insurance RRSPs" are relatively safe from creditors but RRSPs issued by institutions other than life insurance companies are more vulnerable. In our report on creditors' remedies we suggested that the government establish a consistent policy regarding the exigibility of all future income plans, including RRSPs.[24] We understand that the Alberta government is, in fact, examining this issue in conjunction with its review of our creditors' remedies report. Thus, we do not consider this issue here. It should be noted that there is no necessary connection between the issue whether or not property held in such plans should be exigible and the issue whether or not owners should be able to make an instrument designation of the plan proceeds.

(e) RRSP and RRIF benefits and claims against the deceased's estate

Various persons are likely to have claims against a deceased person's estate. These claims may have a variety of sources: the deceased's will, a contract debt, intestate succession legislation, family relief legislation and so

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23 It is also consistent with the approach taken by the *Insurance Act* regarding payment of insurance money: *Insurance Act*, s. 276(1).

24 Alberta Law Reform Institute, Report No. 61, *Enforcement of Money Judgments* (Edmonton: ALRI, 1991) at 302.

on. The common denominator is that they are all claims against the deceased's estate, so claimants must look for satisfaction to property that is part of the estate. Herein lie the roots of an interesting question about future income plan proceeds that are the subject of a beneficiary designation. Do such proceeds flow through the deceased's estate on their way to the designated beneficiary, making them subject to claims against the estate, or are they immune from such claims? Different views have been expressed about this by courts and commentators. One view is that the designated proceeds do not form part of the estate and are, therefore, not subject to claims against the estate.[25] Another view is that although designated proceeds are not part of the deceased's estate, they are subject to claims of creditors of the estate.[26] A third distinct view is that the designated proceeds comprise part of the deceased's estate and are, therefore, available to satisfy claims against the estate.[27]

The answer to the question whether designated proceeds are subject to claims against the deceased's estate is uncertain. It is uncertain mainly because the legislation sends out mixed signals. On the one hand, section 47 of the *Trustee Act* (and similar legislation in other provinces) does not say that designated proceeds are not part of the deceased's estate and are not subject to claims against the estate. By way of contrast, section 265(1) of the *Insurance Act* provides:

> When a beneficiary is designated, the insurance money, from the time of the happening of the event on which the insurance money becomes payable, is not part of the estate of the insured and is not subject to the claims of the creditors of the insured.

On the other hand, section 47(11) of the *Trustee Act* could be taken to suggest that designated proceeds do not fall into the deceased's estate:

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25 *Daniel v. Daniel* (1986), 41 Man. R. (2d) 66 (Q.B.). In this case it was held that designated proceeds were not part of the deceased's estate for the purposes of a family relief application. See also C. Wright (Note), "Inter Vivos Transactions with Testamentary Effect—Will or Trust—Nomination of Beneficiary of Profit Sharing Plan" (1935), 13 Can. B. Rev. 324, where it is argued that instrument designations could be regarded as creating an immediate, albeit revocable, trust in favour of the designated beneficiary.

26 D. McReynolds, "Sheltering RRSP Assets from Creditors on Death" (1982-84), 6 E. & T.Q. 106, at 111-15. This view is accepted in the Manitoba Report, *supra*, note 7 at 8.

27 *Canadian Imperial Bank of Commerce v. Besharah* (1989), 68 O.R. (2d) 443 (H.C.J.); *Waugh Estate v. Waugh* (1990), 61 Man. R. (2d) 155 (Q.B.). Both cases involved claims by creditors of the deceased. However, if one accepts their central premise that designated proceeds flow through the estate on the way to the designated beneficiary, it would seem to follow that the proceeds should also be subject to family relief claims.

> After the death of a participant who has made a designation that is in effect at the time of his death, the person designated may enforce payment of the benefit payable to him under the plan, but the person against whom the payment is sought to be enforced may set up any defence that he could have set up against the participant or his personal representative.

The beneficiary's right to enforce payment directly against the issuer is arguably inconsistent with the proceeds being part of the estate. Generally, the deceased's legal representative is the only person entitled to deal with estate property or, more specifically, to enforce rights that the estate may have against a third person.[28] One of the reasons for this rule is that the legal representative is responsible for ensuring that the estate is properly distributed, and is liable for failure to do so. Given that the legal representative has this responsibility and potential liability, it would be unusual to give someone else (the designated beneficiary) control over property that is meant to be part of the estate. Still, it might be argued that section 47(11) is simply a "machinery" provision that creates an exception to the rule regarding the legal representative's exclusive power to deal with estate property, rather than implying that the proceeds are not part of the estate.[29]

Should proceeds that are the subject of a valid beneficiary designation be subject to family relief claims or claims by creditors of the deceased plan owner? We do not try to answer this question in this report, because it raises different and broader policy issues than are raised by the question whether instrument designations of RRSP and RRIF proceeds should be allowed. In attempting to answer the latter question, the primary issue is whether instrument designations are likely to be reliable indicators of a plan owner's intentions regarding the disposition of plan proceeds on his or her death. On the other hand, where the question is whether designated plan proceeds should be subject to family relief or creditors' claims, the policy problem is to decide how to assign priority between competing claims to the same property. We intend to consider whether designated plan proceeds should be subject to family relief claims as part of our succession law project. As for creditors' claims against designated plan proceeds upon the plan owner's death, this is

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[28] See *Administration of Estates Act*, R.S.A. 1980, c. A-1, s. 32.

[29] McReynolds, *supra*, note 26 makes such an argument. Unfortunately, neither of the two cases that conclude that designated proceeds form part of the deceased's estate — *Besharah* and *Waugh*, both *supra*, note 27 — accounts for or even mentions the Ontario or Manitoba equivalent of section 47(11): *Succession Law Reform Act* R.S.O. 1990, c. S26, s. 53(b); pre-1992 *Retirement Plan Beneficiaries Act*, s. 11. The reasoning of these cases would be more convincing if it had accounted for this provision.

related to the issue whether future income plan assets should be exigible while the owner is still alive. As mentioned above, the government is currently reviewing the latter issue; it would be inappropriate to make any recommendations on the former issue until the outcome of that review is known.

(f) Liability for income tax

Several commentators who agreed that RRSP and RRIF proceeds should be capable of being disposed of by designation were, nevertheless, concerned about responsibility for the payment of income tax on the proceeds, as between the estate and a designated beneficiary. There is no problem where the deceased's spouse, or a dependent child or grandchild of a deceased who had no spouse, is the designated beneficiary, because the amount paid to the spouse or dependant is regarded as income of the spouse or dependant.[30] But if the proceeds are payable to someone else, the amount of the "benefit" paid to that person is treated as taxable income of the deceased.[31] This means that the estate will be liable for the tax payable on the RRSP or RRIF proceeds paid to the designated beneficiary. As might be expected, the *Income Tax Act* protects Revenue Canada's position by making the person who receives the benefit jointly liable with the estate for payment of the relevant tax.[32] However, the issuer who pays proceeds to a designated beneficiary is not required to withhold part of the proceeds to meet the potential tax liability. As between the estate and the beneficiary, it seems to be the former that is primarily responsible for paying the tax. Thus, if Revenue Canada seeks payment of the tax from the estate instead of the beneficiary, the estate probably has no claim over against the designated beneficiary.

It is important to keep in mind that the estate is primarily responsible for payment of the tax liability whether the beneficiary is designated by instrument or by will. This is a consequence of the general law of estates, under which debts of the deceased are paid first out of residue. Unless the testator has expressed a contrary intention, specific legacies are charged with payment of estate debts only to the extent that the residue is insufficient to pay the deceased's debts. Moreover, this general rule of construction applies even if the deceased gives someone a specific item of personal property that has a

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30 *Income Tax Act*, ss 146(1)(h), 146(8.8), (8.9). By taking appropriate steps, the spouse or dependant can continue to defer tax on the proceeds.

31 *Income Tax Act*, s. 146(8.8).

32 *Income Tax Act*, s. 160.2.

liability attached to it.[33] For example, suppose that a will directs that a particular car owned by the deceased be given to B. There is a balance outstanding on a loan the deceased took out to buy the car. Unless the deceased has expressed a contrary intention, the personal representative must pay off the loan out of the residue of the estate and transfer the car to the beneficiary free of the encumbrance. This is analogous to the situation where the estate incurs a tax liability as a result of RRSP or RRIF proceeds being transferred to a designated beneficiary other than a spouse or dependant.

It is not difficult to imagine situations in which the "estate pays the debt" rule will have precisely the opposite result of what the deceased RRSP or RRIF owner probably intended. Indeed, it seems a reasonable to speculate that most RRSP or RRIF owners who direct that the proceeds are to go to a person other than their spouse or dependant would expect that person to be primarily responsible for payment of any related tax obligation. However, this problem is not confined to RRSP or RRIF proceeds or to instrument designations; it arises out of the general law regarding the payment of estate debts. Therefore, we do not think it would be appropriate to make any recommendations regarding the tax liability issue in isolation from the more general issue of who should be primarily liable for payment of debts that attach to personal property that is the subject of a specific gift. This larger issue is outside the scope of this report, but we intend to examine it in our succession law project.

C. RRSPS AND RRIFS IN CANADA

In this section we provide a very brief sketch of the history and current role of RRSPs and RRIFs in Canada. Our purpose here is merely to highlight certain aspects of RRSP and RRIF development that provide useful background to our discussion of the beneficiary designation issue.

Prior to 1957 Canadian taxpayers who were fortunate enough to belong to employment pension plans had a significant tax advantage over taxpayers who did not. An amount of up to $1500 deducted from an employee's remuneration by the employer as the former's contribution to a registered pension plan ("RPP") could be deducted in computing the employee's taxable income for the

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33 This presumption is reversed for devises of real property that are subject to a mortgage: *Wills Act*, s. 37. But the common law rule was the same for realty and personalty: the estate was liable to pay a debt secured by the subject matter of a specific gift: T. Feeney, *The Canadian Law of Wills*, 3rd ed. (Toronto: Butterworths, 1987) vol. 2 at 179.

year.[34] Another advantage was that the earnings of the plan itself were not taxable.[35] Of course, payment of tax was merely postponed, since the taxpayer would have to pay tax on the pension income when it eventually began to flow. Nevertheless, this deferral of tax was a real and substantial benefit.

The *Income Tax Act* did not allow other taxpayers a similarly advantageous method of saving for retirement. A taxpayer could, of course, make investments or purchase an annuity contract to provide a retirement income. However, unlike a RPP participant, the taxpayer would be making investments or purchasing an annuity with after-tax dollars. Obviously, this would make it more difficult for another taxpayer to achieve the same retirement income as the RPP participant.

Parliament created the RRSP in 1957 to provide taxpayers who were not fortunate enough to belong to an employment pension plan with a similar method of deferring tax while saving for retirement.[36] The RRSP provisions were (and are) complex, but the basic idea was reasonably simple. An RRSP was to be a retirement savings mechanism that would approximate the effect of a pension plan. Under an employment pension plan, contributions are made during participants' working years in the expectation that they will receive a steady stream of income from the plan after they retire. Similarly, the original RRSP provisions contemplated that participants would make contributions to the plan during their income producing years in order to receive a steady stream of income — an annuity — from the issuer in their later years. Subject to a maximum annual limit, the taxpayer's contributions would be deducted in computing taxable income, and the annuity payments would be treated as income of the taxpayer in the year they were received. In keeping with the pension analogy, the original RRSP legislation required that the amount accumulated in the RRSP be used to purchase an annuity no later than the end of the year in which the taxpayer reached the age of 71. Failure to do so could result in an unpleasantly large tax bill.

The *Income Tax Act*'s RRSP provisions have been amended many times since they were first introduced. However, the only change that we need mention here is the introduction in 1978 of the RRIF concept. The purpose of introducing the RRIF concept into the *Income Tax Act* was to give RRSP holders

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34 *Income Tax Act*, R.S.C. 1952, c. 148, s. 11(1)(i), as am. S.C. 1953-54, c. 57, s. 2(5) and S.C. 1956, c. 39, s. 3(3). This provision originated in the *Income War Tax Act*, S.C. 1917 c. 28, s. 3(7), as am. S.C. 1919, c. 55, s. 2.

35 *Income Tax Act*, R.S.C. 1952, c. 148, s. 62(1)(q), as am. S.C. 1956, c. 39 s. 14(1).

36 *Income Tax Act*, R.S.C. 1952, c. 148, s. 79B as am. 1957, c. 29, s. 17.

who were approaching 71 an alternative to converting the RRSP into an annuity. The alternative is to transfer the RRSP assets into a RRIF instead of purchasing an annuity. The assets that can be held in a RRIF are similar to those that can be held in a RRSP, so taxpayers can continue to pursue the same investment strategy under a RRIF that they have pursued under their RRSPs. But while a RRSP is intended to provide a facility for accumulating assets, a RRIF is intended to be a vehicle for gradually converting those assets into income. The *Income Tax Act* requires that a minimum proportion of the total value of a RRIF be paid out to the taxpayer (as taxable income) in each year.[37]

Both the number of people contributing to RRSPs and the amount contributed have grown steadily over the years. In 1968, eleven years after the RRSP was introduced, about 2% of all tax filers, about 172,000 individuals, made contributions totalling $143 million to RRSPs. In 1987 the corresponding figures were 20% of tax filers, 3.5 million individuals, and $9.0 billion in contributions.[38] In 1991 4.6 million taxpayers contributed about $14.6 billion, an average of a just over $3,000 each.[39] Clearly, RRSPs have become a very significant savings and investment vehicle in terms of both the number of people who contribute to them, the amounts contributed, and the amount of wealth held in them.

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[37] This is discussed in more detail in Chapter 2.

[38] H. Frenken, "RRSPs: Tax-Assisted Retirement Savings" in *Perspectives on Labour and Income* (Ottawa: Statistics Canada, Winter 1990) 9 at 10.

[39] H. Frenken, "Note on RRSP Contributions and Payouts" in *Perspectives on Labour and Income* (Ottawa: Statistics Canada, Spring 1993) 49 at 49. This article does not provide the percentage of all tax filers who made contributions.

CHAPTER 2
THE EXISTING LAW OF DESIGNATIONS

A. DEVELOPMENT OF THE CURRENT LEGISLATION

(1) DISPOSING OF PROPERTY ON DEATH: THE GENERAL RULE

A voluntary disposition of property that is intended to take effect upon the death of the person making it is said to be "testamentary". Testamentary dispositions are governed by many special rules, one of which is that they are ineffective unless they are in a valid will. Except for a few special types of wills, a will is valid only if it is signed by the testator in the presence of at least two witnesses, who must both "subscribe" (sign) the will in the presence of the testator.[40] There are several exceptions to the requirement that a will be witnessed; the most important is that a "holograph will" — a will that is written out entirely in the testator's handwriting and signed by the testator — need not be witnessed.[41]

Sometimes a voluntary disposition of property that looks very much like a testamentary disposition is characterized by the courts as something else, such as an immediate, albeit revocable, trust. Where a disposition is so characterized, it is not regarded as testamentary, and so need not meet the requirements of the *Wills Act*. It has been argued that instrument designations could be treated as creating a revocable trust that confers an immediate, albeit fragile, interest on the designated beneficiary.[42] However, this argument has not found much favour with Canadian courts. Courts that have considered the sort of designations with which we are concerned have generally assumed that

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40 *Wills Act*, s. 5. This glosses over some of the more arcane requirements of section 5.

41 *Wills Act*, s. 7.

42 Wright, *supra*, note 25, *passim*; McReynolds, *supra*, note 26 at 109-11. McReynolds' argument is confined to situations in which there is a trust relationship between the plan issuer and the plan owner. Wright, on the other hand, points out that the subject matter of the revocable trust might well be a chose in action. That is, even if the relationship between the plan owner and the issuer is that of creditor and debtor, rather than *cestui que trust* and trustee, there could still be a trust relationship between the owner and the designated beneficiary. The owner could be considered to be the trustee of the debt, and the designated beneficiary could be considered to have a present, albeit revocable, interest in the debt. This issue is discussed in detail in a very recent article: R. Scane, "Non-Insurance Beneficiary Designations" (1993), 72 Can. B. Rev. 178 at 182-91. Professor Scane concludes (at 189-91) that beneficiary designations for RRSPs offered by banks and trust companies are probably testamentary dispositions.

the designations are testamentary dispositions.[43] Thus, such designations will be effective only if they are made in valid wills or are made under legislation that authorizes instrument designations. We briefly consider the history of such legislation in the next section.

(2) EVOLUTION OF DESIGNATION LEGISLATION IN CANADA

(a) Life insurance

It has long been possible for a person purchasing a policy of insurance on his or her own life to designate a beneficiary of the policy either by an instrument in writing or by will. Statutory provisions regarding designations of beneficiaries go back to the last century in some provinces. In Alberta, section 6(3) of *The Life Insurance Beneficiaries Act*[44] of 1916 provided:

> The assured may designate the beneficiary by any mode of "declaration" as defined in this Act and may, whether the insurance money has or has not been already appointed or apportioned, from time to time, except as against a beneficiary for value and subject to the provisions of the Act as to preferred beneficiaries, by declaration, appoint or apportion the same, or alter or revoke the benefits, or add or substitute new beneficiaries, or divert the insurance money wholly or in part of himself or his estate.

It is worth noting, because it contrasts with the approach the courts have taken regarding future income plan designations, that the ability of an insured to designate a beneficiary was not originally a creature of statute. Canadian courts in the nineteenth century appear to have followed American authorities in holding that beneficiary designations of insurance proceeds were valid quite apart from any statutory authorization. Indeed, the accepted view seems to have been that such designations were not only valid, but were generally irrevocable except with the consent of the designated beneficiary.[45]

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43 The leading case, *MacInnes v. MacInnes*, [1935] S.C.R. 200, is discussed later in this chapter.

44 S.A. 1916, c. 25.

45 A turn of the century monograph, F. Hodgins, *Life Insurance Contracts in Canada* (Toronto: Canada Law Book, 1902) at 52, put the position thus:

> Regard must now be had to the rights of the person on whom a voluntary benefit has been conferred which are often more important than those of any other party to the contract.

(continued...)

Thus, the main original function of a provision such as section 6(3) may have been to reverse the presumption that designations were irrevocable.

(b) Employment plans and the 1957 Uniform Act

Mr. J. C. MacInnes, a participant in a deferred profit sharing plan set up by his employer, died in 1933. He had designated his wife, who was not the residuary beneficiary under his will, as the beneficiary of benefits payable under the plan upon his death. The designation was revocable but had not been revoked. A succession of judges up to and including an unanimous Supreme Court of Canada had no apparent hesitation in concluding that the designation was testamentary: an attempt to make a disposition of property that would take effect only upon the death of the donor. The Supreme Court reached this conclusion without any apparent consideration of whether the designation created a revocable *inter vivos* trust in favour of the designated beneficiary, even though it was urged to do so by counsel.[46] Having reached this conclusion, the courts had no difficulty in holding that the designation was of no effect, since it clearly did not meet the requirements of Ontario's *Wills Act*.[47]

Whatever the merits of *MacInnes* as an exercise in technical legal reasoning, it seems to have been regarded as a step backwards in terms of policy.[48] After about 20 years, provincial legislatures began to take steps to reverse the effect of *MacInnes*. In 1954 Ontario added to its *Conveyancing and*

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[45](...continued)

> It has been pointed out that a life insurance policy is something more than a mere contract between two persons for the benefit of a third. As is said in *Dolen v. Metropolitan Life Insurance Co.* (1894), 26 O.R. 67, the insured cannot by any act of his deprive the beneficiaries (in that case ordinary beneficiaries) of the interests vested in them so soon as the policy is issued, and their right to call upon the company for payment. As to preferred beneficiaries, this is fortified by the provision that the designation of a beneficiary of that class creates a trust in his favour.

See also Wright, *supra*, note 25 at 328-29. The English courts, in contrast, seem to have applied a narrow contractual analysis. The designated beneficiary was not a party to the insurance contract, so the doctrine of privity of contract prevented the beneficiary from enforcing the contract: *Cleaver* v. *Mutual Reserve Fund Life Association*, [1892] 1 Q.B. 147 at 152.

[46] Wright, *id.* at 327-28.

[47] *MacInnes v. MacInnes, supra*, note 43.

[48] See Wright, *supra*, note 25 at 326-27.

Law of Property Act[49] a section designed to validate instrument designations of benefits payable upon the death of participants in plans such as the one considered in *MacInnes*. The new section applied to "plans", which were defined thus:

> "plan" means an employee pension, retirement, welfare or profit-sharing fund or plan.[50]

The two main thrusts of the new section were to affirm the validity of designations made by employees in accordance with the terms of a plan, and to make the designations enforceable by the beneficiary.

Shortly after Ontario enacted section 62 of the *Conveyancing and Law of Property Act*, the insurance industry suggested to the Association of Superintendents of Insurance of the Provinces of Canada that all provinces should enact legislation similar to Ontario's.[51] The Superintendents referred the matter to the ULCC (which at the time was called the Conference of Commissioners on Uniformity of Legislation in Canada). In 1957 the ULCC adopted a uniform act ("1957 Uniform Act") based on the 1954 Ontario legislation. The 1957 Uniform Act's definition of "plan" reads as follows:

> "plan" means a pension, retirement, welfare, or profit-sharing fund, scheme, or arrangement, for the benefit of employees, former employees, agents, and former agents of an employer, or any of them.

The 1957 Uniform Act was implemented by Alberta in 1958 by adding a section to *The Trustee Act*.[52] Its definition of "plan" was identical to that of the 1957 Uniform Act.

(c) Other plans and the 1975 Uniform Act

The 1957 Uniform Act applied only to future income plans established for the benefit of present or former employees or agents of an employer, which we refer to as "employee plans". This relatively narrow scope shows that the

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49 R.S.O 1950, c. 68, s. 62, as am. S.O. 1954, c. 12, s. 1.

50 *Id.* s. 62(1)(c).

51 This paragraph is based on *Proceedings of the Thirty-Ninth Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada* (Calgary: ULCC, 1957) Appendix T, at 145 [hereinafter "1957 Proceedings"].

52 R.S.A. 1955, c. 346, s. 57, as am. S.A. 1958, c. 89, s. 3.

drafters of the 1957 Uniform Act, like the drafters of the 1954 Ontario act upon which it was based, were focusing on the sort of plan that the Supreme Court had considered in *MacInnes.* Coincidentally enough, 1957 was also the year in which the *Income Tax Act* introduced the RRSP as a tax-assisted retirement savings vehicle for taxpayers who did not have the good fortune to belong to an employment-related plan. Most RRSPs clearly would not fall within the 1957 Uniform Act's definition of "plan".[53]

The question of the validity of RRSP instrument designations did not seem to attract much attention until the early seventies.[54] At that time the Trust Companies Association of Canada requested individual provinces to consider amending their beneficiary designation legislation applicable to employee plans so that it would apply to all RRSPs. Several provinces responded quite promptly to this request. In 1973 Ontario added a section to the *Conveyancing and Law of Property Act* that was very similar to the 1954 provision applicable to employee plans but allowed designations in respect of benefits payable under retirement savings plans.[55] These were defined as follows in section 64(1)(c):

> "retirement savings plan" means an arrangement that is defined to be a retirement savings plan by the *Income Tax Act* (Canada) for the purpose of that Act.

British Columbia passed similar legislation in the same year.[56] The new section applied to "registered plans", which were defined as follows:

> "registered plan" means a retirement savings plan that
>
> (i) was created before, or is created after, this section comes into force; and
>
> (ii) is registered pursuant to the *Income Tax Act* (Canada).

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53 Employers sometimes arrange group RRSPs for their employees, and these might come within the 1957 Uniform Act's definition. But such employer-arranged RRSPs are the exception rather than the rule.

54 This paragraph is based on *Proceedings of the Fifty-Seventh Annual Meeting of the Uniform Law Conference of Canada* (Halifax: ULCC, 1975) Appendix O, at 165 [hereinafter "1975 Proceedings"].

55 *Conveyancing and Law of Property Act*, R.S.O. 1970, c. 85, s. 64 as am. S.O. 1973, c. 132.

56 *Laws Declaratory Act*, R.S.B.C. 1960, c. 213, s. 41, as am. S.B.C. 1973, c. 84, s. 9. This is now s. 42 of the *Law and Equity Act*, R.S.B.C. 1979, c. 224.

Other provinces soon enacted similar legislation,[57] and beneficiary designations once again found their way onto the ULCC's agenda. The British Columbia commissioners were asked to prepare a report. Their report,[58] which was considered at the 1975 ULCC Conference, recommended that the 1957 Uniform Act be revised in various ways, most of which are not of immediate concern to us. For present purposes, the interesting part of the report is its discussion of what retirement savings plans should be covered by the revised uniform act. The discussion, in the form of a question and answer, is reproduced below.

> *QUESTION 2.*
>
> Should the Act as it applies to retirement savings plans be restricted to those plans which are registered under the Income Tax Act of Canada?
>
> *Comment*
>
> The B.C. Enactment [s. 41 of the *Laws Declaratory Act*] for registered retirement savings plans is limited to plans registered under the Income Tax Act of Canada. The reason for the restriction may well have been that the Trust Companies Association did not request any wider applicability.
>
> *Recommendation*
>
> The Act should apply to all plans which create annuities which are not covered by the Insurance Acts, whether or not they are retirement savings plans under the Income Tax Act, (they are likely to be) and particularly, whether or not they are registered under the Income Tax Act (they may well not be so registered because of the limitations that Act imposes on investments in order to attain registration).[59]

The question posed and answered by the British Columbia Commissioners makes it clear that they had no doubt that the revised uniform act should apply to RRSPs. The only question — which they answered affirmatively — was whether the act should apply as well to plans that were not RRSPs. Thus, it appears that the lack of a specific reference to RRSPs in the British Columbia

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57 See, for example, *An Act Respecting the Designation of Beneficiaries Under Benefit Plans*, S.P.E.I. 1974, c. 68 ; *An Act to Amend The Queen's Bench Act*, S.S. 1974-75, c. 37.

58 1975 Proceedings, *supra*, note 54, Appendix O.

59 1975 Proceedings, *supra*, note 54 at 168.

Commissioners' draft simply reflects a decision to build a measure of flexibility into the definition of "plan".

The British Columbia Commissioners' draft act was adopted by the ULCC in 1975 ("1975 Uniform Act"). Like its predecessor, the 1975 Uniform Act's definition of "plan" covered employee plans but added a separate clause covering other types of future income plans:

> "plan" means
>
> (a) [employee-plans], and
>
> (b) a fund, trust, scheme, contract or arrangement for the payment of an annuity for life or for a fixed or variable term, created either before or after the coming into force of this Act.

The 1975 Uniform Act has since been adopted, with varying degrees of faithfulness to the original text, in most of the common law provinces. It was adopted by Alberta in 1976 by the enactment of what is now section 47 of the *Trustee Act*.[60]

(d) Other legislation affecting designations

It should be emphasized that the ability to designate a beneficiary under section 47 of the *Trustee Act* may be qualified by other relevant legislation, notably, the *Employment Pension Plans Act*.[61] The latter gives an employment pension plan member's spouse certain rights in the pension. In particular, the spouse of a member who dies before the pension becomes payable is entitled to receive the pension or, in certain circumstances, its commuted value.[62] If a member has a spouse when the pension payments commence, the pension must be a joint pension payable to the survivor for life.[63] In certain circumstances and subject to certain conditions, a member who terminates his or her membership in a pension plan may elect to transfer the commuted

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60 *Attorney General Statutes Amendment Act*, S.A. 1976, c. 57, s. 7.

61 S.A. 1986, c. E-10.05. One of the commentators on the Issues Paper, *supra*, note 11, brought our attention to the significance of this act.

62 Section 31(1). The "commuted" value of a pension is essentially the estimated present value of the future stream of payments anticipated under the pension.

63 Section 32. The spouse can waive his or her rights under this section: see s. 32(4).

value of the pension to a RRSP.[64] However, the regulations require that the RRSP in question provide the same sort of benefits to the member's spouse that he or she would have had under the pension plan.[65] Thus, the right to designate a beneficiary provided by section 47 of the *Trustee Act*, whether by will or by instrument, could be subject to the rights of a spouse under the *Employment Pension Plans Act*.

B. DOES SECTION 47 APPLY TO RRSPS OR RRIFS?

In this rather long section we consider whether section 47 as it is currently worded applies to RRSPs and RRIFs. We first briefly discuss the handful of judicial decisions that have considered this point. We then indulge in a fairly detailed look at the wording of section 47's definition of "plan", for which purpose it is necessary to look also at several provisions of the *Income Tax Act*.

(1) JUDICIAL DECISIONS

Daniel v. *Daniel*[66] is the first case we know of that considered the coverage of a provision equivalent to section 47: in this case Manitoba's pre-1992 *Retirement Plan Beneficiaries Act*. As noted earlier, the ultimate issue in *Daniel* was whether designated RRSP proceeds should be considered to be part of the deceased's estate for the purposes of an application under family relief legislation. In concluding that they should not, the court decided that a RRSP was a "plan" within the meaning of the act. In answer to the argument that the RRSP in question was not a contract for the payment of an annuity, the judge responded that the RRSP could be converted to an annuity at the appropriate time.[67] The Manitoba Law Reform Commission later criticized this reasoning:

> In order for a plan to qualify under the *Retirement Plan Beneficiaries Act*, it must not simply be capable of conversion into an annuity; it must be an annuity. Any fund of money (such as a bank account, a guaranteed investment certificate or even cash on hand) or indeed any non-cash asset (such as a car or a piece of land) can be used to purchase or can be converted into an annuity if the owner so wishes. This surely does not mean that

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[64] Section 30.

[65] Section 62(1)(d); A.R. 364/86, s. 30.

[66] *Supra*, note 25.

[67] *Id.* at 71.

> such assets can be disposed of on death by a simple designation of beneficiary.[68]

We will return to this point when we examine the precise wording of section 47 of the *Trustee Act.*

The next case to consider the definition of "plan" was *Kologinski* v. *Kologinski Estate,*[69] which concerned a guaranteed investment certificate of which the deceased had designated his nephew the beneficiary by an instrument that did not comply with the *Wills Act.* The nephew, obviously in desperation, argued that the designation came within Manitoba's equivalent of section 47. No attempt was made to argue that the guaranteed investment certificate was an annuity, which it obviously was not. Instead, the nephew argued that he had been an employee of his uncle and the designation could therefore be regarded as a designation of benefits under an employee plan. This ingenious argument failed to impress the judge, who held that the designation was invalid.

As already mentioned, the issue in *Waugh Estate* v. *Waugh,*[70] was whether proceeds of two RRSPs that had been designated in a will were subject to claims of creditors against the estate. The two RRSPs were described as follows:

> The National Trust Plan contains provision for conversion to an annuity at a certain point in time, but [no] such conversion had occurred by the date of death. The Manulife Plan appears to be an actual annuity to which the deceased was committed, with payments commencing at a future date in accordance with a prescribed choice of plan.[71]

As mentioned in Chapter 1, the court held that the RRSP proceeds were subject to claims of creditors even if the pre-1992 *Retirement Plan Beneficiaries Act* applied to them.[72] But although both counsel had assumed that the act

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68 Manitoba Report, *supra,* note 7 at 5.

69 (1988), 54 Man. R. (2d) 120 (Q.B.).

70 *Supra,* note 27.

71 *Id.* at 157.

72 As pointed out by Fien, *supra,* note 5 at 43-45, it is not clear why the case did not proceed on the basis that the designation regarding the Manulife plan was governed by Manitoba's *Insurance Act* R.S.M. 1987, c. I40, rather than the pre-1992

(continued...)

applied to the RRSPs, the judge suggested that the National Trust RRSP was probably not a "plan", because it was not actually a contract for an annuity.[73] In making this suggestion, the judge quoted with approval the Manitoba Commission's criticism of the reasoning in *Daniel.*

Asselstine v. McKeen[74] was the first Alberta case to consider section 47's definition of "plan". The deceased had designated his wife as the beneficiary of a RRIF worth about $85,000 and, in a holograph will, had directed that an annuity be purchased for his wife "using $80,000 taken from some of the lower paying accounts that I have with Investors Syndicate", the RRIF issuer.[75] The residue of the estate was left to the deceased's children from a previous marriage. In addition to the RRIF, the deceased had other investments and accounts totalling over $250,000 with Investors Group. When the deceased died Investors Group paid the RRIF proceeds to the wife. An issue then arose as to whether the administrators of the deceased's estate were required to purchase an annuity for the wife. The Court held that the administrators were not required to do so. Two reasons were given for this conclusion.[76] The first was that section 47 of the *Trustee Act* does not apply to RRIFs generally or to this RRIF in particular, so the designation was invalid. The second reason was that, even if the designation was valid, the direction in the will to set up an annuity was simply a confirmation of the designation, rather than an additional gift. In either event, having received the proceeds of the RRIF, the wife had already received at least as much as she was entitled to receive by the combined effect of the designation and the will.

The final case is *Kochut* v. *Kochut,*[77] another decision of the Alberta Court of Queen's Bench. While single, the deceased had signed an instrument designation naming his father the beneficiary of a RRSP. He later married the applicant but did not change the beneficiary designation. The uncontested

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[72](...continued)
Retirement Plan Beneficiaries Act. As noted earlier, annuity contracts issued by insurance companies are defined as life insurance and designations of life insurance proceeds are governed by the *Insurance Act.* The *Insurance Act* makes it clear that the amount payable to a designated beneficiary is not part of the deceased's estate.

[73] *Supra,* note 27 at 158.

[74] *Supra,* note 8.

[75] Actually, the issuer of the RRIFs and the other accounts appears to have been a related company, Investors Group, but nothing seems to turn on this distinction.

[76] The reasons appear in the formal order.

[77] *Supra,* note 9. It is perhaps worth mentioning that the order in this case was given from the bench on an unopposed application in chambers.

evidence was that this was due to inadvertence on his part. As pointed out earlier, if the designation was valid to begin with, it was not revoked by the deceased's subsequent marriage. However, it was held that the RRSP was not a "plan" within the meaning of section 47, so the designation was ineffective and the RRSP proceeds formed part of the deceased's residuary estate.

(2) Analysis of the Section 47 Definition of Plan

(a) Was section 47 intended to cover RRSPs and RRIFs?

When courts must interpret an enactment whose meaning is not as clear as it might have been, they often try to discover the purpose of the enactment as an aid to its interpretation. Historically, this process of discovering an enactment's purpose has been made more challenging than it might otherwise be by various self-imposed rules that have prevented courts from considering a lot of background information that might well reveal the precise purpose of the enactment. Lately, these restrictive rules have been relaxed considerably. In any event, there is nothing to prevent us from looking at all relevant information in order to determine the actual purpose of section 47, even if some of this information could not be looked at by a court.

We have already described the process that led to the ULCC's adoption of the 1975 Uniform Act. Clearly, the ULCC intended the 1975 Uniform Act to apply to RRSPs, which were not specifically referred to in the definition of "plan" because of a concern that doing so would unduly restrict the scope of the act.[78] As already noted, Alberta adopted the 1975 Uniform Act in 1976. In moving second reading of the relevant bill, the Attorney General made the following statement about its purpose:

> The next [section of the bill] is an amendment to The Trustee Act, which will allow the holder of a registered retirement savings plan to designate a beneficiary by simple execution of an appropriate form, just as is done with life insurance and for employee benefit plans.[79]

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[78] See text at note 59, *supra*.

[79] Alberta Hansard 1976 at 1393 (No. 50). One of the self-imposed rules that makes it more difficult than it need be for courts to determine the purpose of an enactment is that it is not permissible to refer to Hansard as an extrinsic interpretive aid. This rule has recently been reconsidered in a pair of Alberta Court of Appeal cases. In *Tschritter v. Children's Guardian for Alberta*, [1989] 4 W.W.R. 175, 57 D.L.R. (4th) 579, Heatherington, J.A., in a concurring opinion, questioned the continuing usefulness of the rule. In *Neill v. Calgary Remand Centre*, [1991] 2 W.W.R. 352 at 356-57, the court held that statements of a statute's purpose are admissible in certain circumstances. Kerans, J.A. wrote:

(continued...)

It is, therefore, clear that both the 1975 Uniform Act and section 47 of the *Trustee Act* were intended to apply to RRSPs. Of course, it cannot be said that the 1975 Uniform Act or section 47 was specifically intended to apply to RRIFs, since RRIFs were not invented until 1978. On the other hand, RRIFs are closely related to RRSPs, and it is worth recalling that the 1975 Uniform Act's definition of "plan" was intended to have a certain measure of flexibility.[80]

It is all very well to say that section 47 was intended to apply to RRSPs, that RRIFs are closely related to RRSPs and that all this should be borne in mind in interpreting the definition of "plan" in section 47. The fact remains that a court interpreting section 47 must consider the actual words of the enactment. It may be, as some of the cases and authorities seem to suggest, that the wording of the definition of "plan" simply fails to achieve its intended purpose. However, to decide whether this has happened, it is necessary to look not only at the wording of section 47, but also at the provisions of the *Income Tax Act* that deal with RRSPs and RRIFs.

(b) Section 47, the *Income Tax Act* and RRSPs

Since the 1975 Uniform Act was intended to apply to RRSPs, its drafters obviously thought that the following part of the definition of "plan" would catch RRSPs:

> a fund, trust, scheme, contract or arrangement for the payment of an annuity for life or for a fixed or variable term.

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[79](...continued)

> I refer only to a ministerial statement on introduction of a Bill. I need not, therefore, challenge totally the first reason for the rule, which is that interpretive statements by an individual member reflect only that member's view and are irrelevant. The statement is not just the view of one member, it is a statement of policy by the government that introduced the Bill . . . Nor do I here challenge the second reason for the exclusionary rule, which is that Hansard searches would add time and expense to preparation of argument with little useful result. I rely here only on the exception to the rule . . . that one should be able to cite Hansard when the reference would "almost certainly settle the matter immediately one way or the other." [citation omitted].

The Attorney General's statement regarding s. 47 might well fall within this category.

80 The text surrounding note 59 refers to the external evidence for this conclusion. Internal evidence that section 47's drafter intended the definition of "plan" to be fairly flexible can be found in the use of the phrase "fund, trust, scheme, contract or arrangement" in section 47's definition of plan. A drafter who had wanted to keep section 47 within very narrow bounds probably would not have used open-ended words like "scheme" and "arrangement" in the definition.

What the drafters were attempting to accomplish with this definition becomes apparent when one examines the definition of "retirement savings plan" in section 146(1)(j) of the *Income Tax Act*, as it stood in 1975. The *Income Tax Act*'s definition had two distinct branches:

> "retirement savings plan" means
>
> (i) a contract between an individual and a person [authorized to carry on an annuities business] under which [for appropriate consideration] that person agrees to pay to the individual, commencing at maturity, an annuity for life, or
>
> (ii) an arrangement under which payment is made by an individual
>
> (A) in trust to a [trust company] of any periodic or other amount as a contribution under the trust, or
>
> (B) to [an approved corporation authorized to issue investment contracts] of any periodic or other amount as a contribution under any such contract . . .
>
> to be used, invested or otherwise applied by that [trust company or corporation] for the purpose of providing to the individual, commencing at maturity, an annuity for life.

In essence, clause (i) of the *Income Tax Act* definition described a contract between the issuer and the owner under which the former agreed to pay the latter an annuity for life, while clause (ii) described an arrangement in which money would be paid by the owner to the issuer to be invested, with the object of being used to provide an annuity "at maturity." In either event the taxpayer would ultimately end up with "an annuity for life." In referring to a "fund, trust, scheme, contract or arrangement for the payment of an annuity for life", the drafters of the 1975 Uniform Act were clearly attempting to track the *Income Tax Act* definition of "retirement savings plan". Unfortunately, while the Uniform Act's definition tracked the first branch of the *Income Tax Act* definition, it is debatable whether it tracked the second. While an arrangement contemplated by clause (ii) of the *Income Tax Act* definition must be designed to provide the owner with an annuity at maturity, this is not necessarily equivalent to its being "a fund, trust, scheme, contract or arrangement for the payment of an annuity", as required by the Uniform Act's definition.

Manitoba, was one of the first provinces to adopt the 1975 Uniform Act, and did so with a minimum of tinkering.[81] The definition of "plan" in Manitoba's pre-1992 *Retirement Plan Beneficiaries Act* was essentially identical to the 1975 Uniform Act's definition. As such, it suffered from the same tracking problem mentioned in the preceding paragraph: it did not clearly apply to the type of RRSP contemplated by clause (ii) of the *Income Tax Act*'s definition of "retirement savings plan". This problem was glossed over in *Daniel*,[82] but was highlighted in the Manitoba Report[83] and came home to roost in *Waugh*.[84]

Manitoba appears to have been the only province that adopted the definition of "plan" in the 1975 Uniform Act" without any modification. Most other provinces took a similar approach to that of Ontario in its 1977 *Succession Law Reform Act*.[85] As mentioned above, Ontario had amended its *Conveyancing and Law of Property Act* in 1973 to allow RRSP beneficiary designations. When the beneficiary designation provisions were moved to the *Succession Law Reform Act*, the drafters combined the 1975 Uniform Act's definition of "plan" with the RRSP-specific definition from the previous Ontario act, resulting in the following hybrid provision:

> "plan" means,
>
> (a) [employee-plans] or
>
> (b) a fund, trust, scheme, contract, or arrangement for the payment of a periodic sum for a fixed or variable term,
>
> and includes a retirement savings plan and a home ownership savings plan as defined in the *Income Tax Act* (Canada) and an Ontario home ownership savings plan under the *Ontario Home Ownership Savings Plan Act*.[86]

Except for the substitution of "periodic sum" for "annuity", the part up to the end of clause (b) is based on the 1975 Uniform Act, but everything after clause (b) follows the approach of the *Conveyancing and Law of Property Act*. This

[81] S.M. 1976, c. 27, s. 1.

[82] *Supra*, note 25.

[83] See text at note 68, *supra*,.

[84] *Supra*,, note 27.

[85] S.O. 1977, c. 40, now R.S.O. 1990, c. S.26.

[86] R.S.O. 1990, c. S.26, s. 50.

drafting technique has been followed in most other jurisdictions that have adopted the 1975 Uniform Act.

The Alberta drafters also tinkered with the Uniform Act's definition of "plan" but took a different approach than was taken in Ontario and other jurisdictions. The definition of "plan" set out in section 47(1)(c) of the *Trustee Act* reads as follows:

> "plan" means
>
> (i) [employee plans] or
>
> (ii) a fund, trust, scheme, contract or arrangement for the payment of an annuity for life or for a fixed or variable term **or under which money is paid for the purpose of providing, upon the happening of a specified event, for the purchase of, or the payment of, an annuity for life or for a fixed or variable term,**
>
> created before or after the commencement of this section.[87]

The drafters of section 47 obviously were worried about the fit between the definition of "plan" in the 1975 Uniform Act and the definition of "retirement savings plan" in the *Income Tax Act*. Instead of adding a phrase such as "and includes a retirement savings plan as defined by the *Income Tax Act*", their solution was to try to ensure that the definition of "plan" would include any arrangement that would meet either branch of the contemporary definition of "retirement savings plan" in section 146(1)(j) of the *Income Tax Act*. In particular, the bolded part of clause (ii) of the definition of "plan" corresponds closely to the second branch of the definition of "retirement savings plan" in the *Income Tax Act*: an arrangement under which payments are made to the issuer "to be used, invested or otherwise applied . . . for the purpose of providing to the individual, commencing at maturity, an annuity for life."

As noted in Chapter 1, the RRIF was introduced by the *Income Tax Act* in 1978 in order to give RRSP owners an alternative to receiving a straightforward annuity when their RRSPs matured. In the next section, we will consider whether a RRIF might be treated as a special kind of annuity. However, if one assumes that a RRIF is not an annuity, the question arises whether or not a RRSP whose property may be transferred to a RRIF instead of being used to purchase an annuity still falls within section 47's definition of "plan".

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87 [Emphasis added.] The present wording is identical to the 1976 wording.

The definition of "retirement savings plan" in section 146(1) of the *Income Tax Act* was modified by the same amendment that added section 146.3 dealing with RRIFs. The definition now refers to a "retirement income", instead of to an "annuity for life". The relevant definitions now read:

> (i.1) "retirement income" means
>
> > (i) an **annuity** commencing at maturity . . . payable to [the annuitant for his life or for the joint lives of the annuitant and his spouse, and to the survivor of them for life] or
> >
> > (ii) an **annuity** commencing at maturity, payable to the annuitant [for a term of years whose length is determined by a specified formula]
> >
> > . . .
> >
> > [or any combination of (i) and (ii)];
>
> (j) "retirement savings plan" means
>
> > (i) a contract between an individual and a person [authorized to carry on an annuities business] under which, [for appropriate consideration], a **retirement income** commencing at maturity is to be provided for the individual, or
> >
> > (ii) an arrangement under which payment is made by an individual or his spouse
> >
> > > (A) in trust to [a trust company] . . .
> > >
> > > (B) [to a corporation licensed to issue investment contracts] . . . or
> > >
> > > (C) as a deposit with [a deposit-taking institution such as a bank or credit union]
> >
> > to be used, invested or otherwise applied by [the trust company, corporation or deposit-taking institution] for the purpose of providing for the individual, commencing at maturity, a **retirement income**.

In fact, so far as our problem is concerned, the changes to the definition of "retirement savings plan" are merely cosmetic. The definition now refers to a retirement income rather than to an annuity, but "retirement income" is itself defined as a type of annuity: either for life (or joint lives) or for a term of years. It is especially important to note that the definition of "retirement income" does **not** include a **retirement income fund**, unless the latter can be regarded as a form of annuity.[88] Thus, it still seems that the only arrangement that satisfies the *Income Tax Act*'s definition of "retirement savings plan" is:

1. a contract under which the issuer is to provide the participant with an annuity at maturity [146(1)(j)(i)]; or

2. an arrangement under which the plan issuer uses, invests or applies the participant's contributions for the purpose of providing the participant with an annuity at maturity [146(1)(j)(ii)].

Thus, any contract or arrangement that comes within one of the branches of the *Income Tax Act*'s definition of "retirement savings plan" still seems to come within one of the branches of the definition of "plan" in section 47(1)(c)(ii) of the *Trustee Act*.

If someone invests in the second type of RRSP contemplated by section 146 of the *Income Tax Act*, it is by no means certain that the property in the RRSP will eventually be converted into an annuity. There is, for example, no requirement in section 146 that the plan prohibit the owner from prematurely terminating the RRSP. Usually, the only thing preventing RRSP owners from collapsing their RRSPs before maturity is the adverse tax consequences of doing so. But section 146(16) provides a tax-friendly means of transferring property from a RRSP into, amongst other things, a RRIF:

> Notwithstanding any other provision in this section, a registered retirement savings plan may at any time be revised or amended to provide for the payment or transfer before the maturity of the plan, on behalf of the annuitant under the plan (in this subsection referred to as the "transferor"), of any property thereunder by the issuer thereof

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88 One of the commentators on the Issues Paper made the following argument:

> In order to obtain registration of a retirement savings plan, it must be applied by the depository for the "purpose of providing for the individual, commencing at maturity, a retirement income" (s. 146(j)). "Retirement Income" includes a RRIF. A RRIF is not an annuity. Therefore a plan might not be one "under which money is paid for the purpose of providing, upon the happening of a specified event, for the purchase of, or the payment of, an annuity . . .".

The reply to this argument is that **if** a RRIF is not an annuity, it does not fall within the definition of "retirement income" in section 146(1)(i.1) of the *Income Tax Act*. So "retirement income" would **not** include a RRIF.

> (a) to a registered pension plan for the benefit of the transferor or to a registered retirement savings plan or **registered retirement income fund** under which the transferor is the annuitant
>
> . . .

Assuming that a RRIF is not an annuity, does the fact that property held in a RRSP may eventually be transferred to a RRIF mean that the RRSP does not satisfy section 47's definition of "plan"? Looking back at the second branch of section 47(1)(c)(ii), it requires an arrangement under which money is paid for the purpose of providing for the purchase of, or the payment of, an annuity "upon the happening of a specified event". It does not say that the specified event must be certain to occur or that the arrangement must be so structured that the participant is precluded from deciding later on to receive the value of the RRSP otherwise than through an annuity. So the fact that the property in an RRSP might eventually be transferred to a RRIF instead of being used to purchase an annuity is not inconsistent with the proposition that the RRSP comes within the second branch of the definition of "plan". Indeed, if the possibility that property in an RRSP will eventually be transferred to a RRIF takes the RRSP outside the definition of "plan" in section 47, it would also appear to take the RRSP outside the definition of "retirement savings plan" in section 146 of the *Income Tax Act*: an odd result, to say the least.

Our view is that section 47 of the *Trustee Act* probably applies to RRSPs, notwithstanding that its definition of "plan" does not mention them by name. The historical record clearly shows that the definition of "plan" was intended to cover RRSPs, a consideration that should be borne in mind in resolving any ambiguities in the definition. Section 47's drafters intended to make it clear that the section applied to RRSPs. Instead of referring to RRSPs by name, however, they tried to track the *Income Tax Act*'s definition of "retirement savings plan".[89] The *Income Tax Act*'s definition has changed somewhat since section 47 was enacted, but the latter still tracks the former quite closely. Therefore, any savings plan that satisfies the *Income Tax Act*'s definition of "retirement savings plan" should also satisfy section 47's definition of "plan".

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89 One might well ask why section 47's drafters did not use precisely the same language used in section 146 of the *Income Tax Act*. The answer is probably that section 146's definition of "retirement savings plan" is so complex and uses so many terms that are defined elsewhere in the *Income Tax Act* that it was impractical to use the precise language of section 146 in defining "plan" in section 47 of the *Trustee Act*.

(c) Section 47, the *Income Tax Act* and RRIFs

The definition of "retirement income fund" found in *Income Tax Act* section 146.3(1)(f) reads:

> "retirement income fund" means an arrangement between a carrier and an annuitant under which, in consideration for the transfer to the carrier of property (including money), the carrier undertakes to pay to the annuitant and, where the annuitant so elects, to his spouse after his death,
>
> (i) in each year, commencing not later than the first calendar year after the year in which the arrangement is entered into, one or more amounts the aggregate of which is not less than the minimum amount under the arrangement for a year . . .
>
> (ii) at the end of the year in which the last payment under the arrangement is, in accordance with the terms and conditions of the arrangement, required to be made, an amount equal to the value of the property, if any, held in connection with the arrangement at that time.

The term "minimum amount" is defined in section 146.3(1)(b.1) and section 7308 of the Income Tax Regulations.[90] For our purposes, it suffices to observe that the minimum amount for a year is the value of the property held in the fund at the beginning of the year multiplied by a fraction that depends on the "annuitant's" (or the annuitants spouse's) age at the beginning of the year. The net result of these definitions is that the arrangement in question must provide for minimum payments in each year, but there is otherwise no limitation on the amount that can be paid to the annuitant in any given year.

A RRIF clearly does not come within the second branch of section 47(1)(c)(ii)'s definition of "plan". Unlike RRSPs, RRIFs are not intended by the *Income Tax Act* to be a mechanism for accumulating assets for the purpose of building up a fund to be used in the future to purchase an annuity. A RRIF is itself the source of an income stream that commences more or less as soon as

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90 Bill C92, which received Royal Assent on June 10, 1993, changes the method of calculating the minimum amount that must be paid to the taxpayer in each year. Previously, the formula set out in s. 146.3(1)(b.1) of the *Income Tax Act* and the definition of "retirement income fund" in s. 146.3(1)(f) ensured that the value of the assets held in a RRIF would decrease rapidly as the "annuitant" approached the age of 90, and would be nil after the annuitant reached 90. The new formula allows the RRIF's assets to be drawn down more slowly, and does not require the RRIF to be wound up when the annuitant reaches 90: *Income Tax Act*, s. 146.3(1)(b.1), as substituted by Bill C92, s. 84(2), and Income Tax Regulations, **draft** s. 7308 as set out in H. Stikeman, ed., *Canada Tax Service* (Scarborough: Carswell, 1993) Vol. 14 at 1502.

the fund is set up. Thus, a RRIF must come within the first branch of section 47's definition — an arrangement[91] for the payment of an annuity — or it is not a "plan" for the purposes of section 47. Is a RRIF an arrangement for the payment of an annuity?

The very feature of a RRIF that makes it attractive — its flexibility — might take it outside the traditional conception of an annuity. The traditional definition of a contractual annuity would seem to involve the following elements, where A is the person receiving the annuity and B is the person paying it:[92]

- for appropriate consideration, B agrees to pay A a specified sum at regular intervals[93] either for a defined period of time or until the occurrence of some event, such as A's death;

- B is under a personal obligation to pay the sums called for at the intervals specified; and

- A's retains no right in the money (or other property) paid to B as consideration for B's promise to pay the annuity: A has only a contractual entitlement to receive the specified stream of payments.

If someone purchases a RRIF containing a typical mix of assets, such as mutual fund units, government bonds and GICs and elects to receive the minimum annual payment, this arrangement has several features that take it outside the traditional conception of an annuity. The amount received by the RRIF owner is almost certain to vary from year to year, depending on the value of the assets held in the fund at the beginning of each year. Moreover, the RRIF owner's rights are at least in part a claim against assets held on his or her

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91 The definition says "fund, trust, scheme, contract or arrangement" for the payment of an annuity. We will simply refer to an "arrangement" since that term seems broad enough to include anything covered by the other terms.

92 See *O'Connor v. Minister of National Revenue*, [1943] 4 D.L.R. 160 at 173 (Ex. Ct.). This case contains a very extensive discussion of the meaning of the term "annuity" as used in a tax statute. That the periodic payments under an annuity are necessarily equal seems to be regarded as self-evident and beyond argument.

93 A very strict interpretation might require that the payments be made annually, as suggested by the term itself. However, a modern court would probably be satisfied by any schedule of regular payments, regardless of the interval between payments. In any event, section 47(1)(a)'s definition of "annuity" makes it clear that the payments need not be annual:

> "annuity" includes an amount payable on a periodic basis, whether payable at intervals longer or shorter than a year.

behalf by the issuer, rather than an *in personam* claim against the issuer. The latter point is particularly difficult to reconcile with the traditional conception of an annuity. For a court to hold that a RRIF is a type of annuity, thus bringing it within section 47's definition of "plan", the court would have to adopt an expansive view of what constitutes an annuity. Consequently, we think the status of RRIFs as a type of "plan", within the meaning of section 47 of the *Trustee Act*, is uncertain at best.

CHAPTER 3
ISSUES AND RECOMMENDATIONS

A. SHOULD RRSP AND RRIF INSTRUMENT DESIGNATIONS BE PERMITTED?

(1) THE ISSUE

The most unusual aspect of section 47 is that it permits what are essentially testamentary dispositions of certain types of property to be made by instruments other than a valid will. We have described the history of section 47 and similar legislation in this and other provinces in some detail. However, we have not yet considered whether it is or is not a good idea for legislation to allow future income plan proceeds — in particular, RRSP and RRIF proceeds — to be disposed of on death through instruments that are not valid as wills. If the general rule is that testamentary dispositions must be made in documents executed in accordance with the formalities of the *Wills Act*, what is the justification for excluding RRSPs, RRIFs or similar future income plans from this requirement? Before considering this question, we should be clear as to exactly what formalities are required for a will that are not required for an instrument designation.

Section 5 of the *Wills Act* sets out the formalities required for the creation of a an ordinary, formal will:

> Subject to section 6 [privileged wills] and 7 [holograph wills], a will is not valid unless
>
> (a) it is signed at the end or foot thereof by the testator or by some other person in his presence and by his direction,
>
> (b) the testator makes or acknowledges the signature in the presence of 2 or more attesting witnesses present at the same time, and
>
> (c) 2 or more of the attesting witnesses subscribe the will in the presence of the testator.

We will refer to clause (a) as a "signing requirement" and clauses (b) and (c) together as an "attestation requirement". Section 7 of the *Wills Act* provides a method of creating a valid will without attestation through a so-called "holograph will":

> A testator may make a valid will wholly by his own handwriting and signature, without formality, and without the presence, attestation or signature of a witness.

The holograph will retains the signing requirement of section 5 and substitutes a requirement that the will be wholly in the testator's handwriting for the attestation requirement. Section 47 of the *Trustee Act* retains the signing requirement but has neither the attestation requirement of a formal will nor the handwriting requirement of a holograph will.

(2) ARGUMENTS FOR ALLOWING DESIGNATIONS

In this section we set out two arguments for allowing instrument designations. The first argument, labelled "preventing intestacy" is the more ambitious of the two. It is an argument that could be made if instrument designations were not presently allowed, and one was considering whether they should be allowed in the future. The second, less ambitious, argument — really, a group of related arguments — is labelled "beneficiary designations are widespread and popular". It is based on the proposition that instrument designations of future income plan proceeds are already allowed or assumed to be allowed. It then argues that, regardless of whether there would be a strong case for creating this facility if it did not already exist, there is no compelling reason to abandon it when it already exists.

(a) Arguments we do not make

The Manitoba Report examined five possible arguments for retaining statutory designations.[94] The only one it found persuasive was the "widespread and popular" argument described in section (c), below. The four arguments the Manitoba Commission found unpersuasive were labelled:

1. Designations are useful for the poor and the unsophisticated;

2. Designations allow probate fees to be saved;

3. Designations assist in estate planning;

4. Designations protect assets from creditors.

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94 *Supra*, note 7 at 8-11. The issue posed by the Manitoba Commission was whether instrument designations regarding any plan — including life insurance policies, pension benefits, and so forth — should be retained.

The "poor and unsophisticated" argument is that designations provide a means for poor, unsophisticated people who cannot afford a lawyer or who do not appreciate the importance of a will to dispose of their small estates.[95] It was rightly pointed out in reply to this argument that lawyer-prepared wills are not particularly expensive. In any event, assets that are typically the subject of statutory designations are likely to have a very substantial value, and the person making the designation is not especially likely to be either poor or unsophisticated. We would point out, however, that the first argument we make below for allowing instrument designations — that they prevent intestacy as to the proceeds of future income plans — is not the same thing as the "poor and unsophisticated" argument. The argument we make below does not depend on the proposition that future income plan owners who fail to make a will are likely to be either poor or unsophisticated.

We agree with the Manitoba Commission that the other three arguments mentioned above are not particularly persuasive. They all suffer from similar frailties. Their main problem is that they claim benefits that are questionable on policy grounds, or that could be obtained without allowing instrument designations. For instance, consider the "estate planning" argument. It is true that where a deceased has designated his or her spouse as the beneficiary of a RRSP or RRIF, the tax deferral benefits of the RRSP or RRIF can be maintained. However, it does not matter to Revenue Canada whether the designation is made in an instrument or in a will. Indeed, even if the RRSP or RRIF owner dies intestate leaving a spouse, it will generally be possible to take advantage of the tax deferral options. So the tax advantages of being able to make instrument designations are minimal, if they exist at all. Similarly, if there are sound policy reasons for protecting future income plans from a person's creditors, the legislature could achieve this policy without allowing instrument designations of plan proceeds.

(b) Preventing intestacy

Jones, Black and Smith are all recently deceased RRSP owners. Jones made a will that designates a beneficiary of the proceeds and that reflects the sage advice given by the lawyer who drafted the will. Black never executed a will but did execute an instrument designation. Smith, who lived in a jurisdiction that does not permit instrument designations, never executed a will. The proceeds of Jones' RRSP are distributed in accordance with the will, Black's in accordance with the instrument designation, and Smith's in accordance with the intestate succession legislation. Few would deny — we certainly would not — that Jones acted wisely in executing a will and in getting the advice of a

[95] *Id.* at 8.

lawyer before doing so. It is reasonable to suggest that Jones' will designation of RRSP proceeds was likely based on a more complete appreciation of the consequences of the designation than was Black's instrument designation. But what about the comparison between Black and Smith? The proceeds of Black's RRSP will at least be paid out in accordance with Black's expressed intentions, while Smith's end up being distributed in accordance with a legislated formula.

Suppose that Black had lived in the same jurisdiction as Smith, one in which instrument designations of RRSP proceeds were not permitted. It is possible that Black, knowing that the only way to designate a beneficiary of RRSP proceeds is to make a will, would have done so. However, it is more likely that Black would simply have joined Smith as another person who dies without having executed a will, leaving the RRSP proceeds to be distributed under the intestate succession legislation.

Whatever else may be said about instrument designations, they are certainly convenient to execute. Often, they are just another blank to be filled in on the application for a RRSP. Granted, it is not all that difficult or expensive to make a will, either, but it does take more effort to make a will than it takes to execute an instrument designation. Moreover, going to a lawyer to make a will is something that many people find easy to keep putting off: many people who die intestate have probably been intending to execute a will for years. In any event, because of inertia, procrastination, an exaggerated impression of how difficult or expensive it is to make a will, or whatever, many future income plan owners in a jurisdiction that did not allow instrument designations would die without having made a will. Because instrument designations are so convenient to execute, it seems probable that a significant proportion of these people would have executed an instrument designation if they had been given the opportunity to do so. Thus, allowing instrument designations will result in the proceeds of future income plans more frequently being paid out in accordance with their owners' express wishes instead of in accordance with a default legislative formula. This seems to provide a good argument for allowing instrument designations of future income plan proceeds.

An opponent of instrument designations might concede that they make it easier for future income plan owners to state their intentions regarding the destination of plan proceeds but not concede that this convenience is desirable. It might be argued that the ease of making an instrument designation and the fact that it is executed without legal advice increases the probability that the designation will be made without proper consideration of all the factors that should be carefully considered in deciding how to dispose of one's estate.

Thus, the instrument designation might very well not reflect what the plan owner would have done if he or she had received the advice and given the matter the same degree of consideration that is typically associated with making a will. If instrument designations were not possible, the entire estate, including RRSP and RRIF proceeds, of persons who failed to make a will would be distributed in accordance with the *Intestate Succession Act*. Admittedly, this act's formula for distributing an intestate's estate is not perfect and will not necessarily result in the distribution that the deceased would have directed if he or she had made a valid will. However, it is at least designed to distribute the estate amongst those people who are generally assumed to have the most plausible claim to the deceased's bounty. Moreover, unlike many a hastily made instrument designation, a distribution under the *Intestate Succession Act* takes into account the entire estate of the deceased. Thus, it is wrong to assume that acting upon an instrument designation is more likely to effectuate a deceased's actual intentions than would distributing his or her entire estate in accordance with the *Intestate Succession Act*.

In our view, the argument that distributing plan proceeds under intestate succession laws is more likely to achieve an appropriate result than is acting upon an instrument designation is overly pessimistic about the average person's ability to appreciate the consequences of making an instrument designation. Undoubtedly, if instrument designations are allowed, there will be occasions where persons make designations that they probably would not have made if they had received legal advice about, and given more consideration to, the consequences of the designation. There probably will be cases where distribution of the deceased's entire estate — including the designated proceeds — in accordance with the intestate succession laws would produce a better result than is produced by acting on the instrument designation. Such cases, however, would surely be the exception rather than the rule. Most people who execute instrument designations will appreciate the main consequence of doing so, which is that the proceeds will go to the designated beneficiary. It is paternalistic to suppose that distributing the plan proceeds under intestate succession laws is more likely to achieve an appropriate result than is acting on an instrument designation.

(c) Instrument designations are popular

The preceding serves as an argument for introducing a facility for making instrument designations where that facility does not presently exist. However, the fact of the matter is that we have for quite a few years had legislation on the books allowing instrument designations for various kinds of future income plans. To very briefly summarize what we have already said in Chapter 2 at some length:

- For many years Albertans have been able to designate beneficiaries of life insurance benefits by instrument. In this context, life insurance includes annuity contracts issued by life insurance companies, which may be RRSPs.

- Since 1958, Albertans have been able to make instrument designations regarding employee plans.

- In 1976 the Alberta legislature enacted legislation that was intended to allow instrument designations of RRSP proceeds. Many of Albertans have made beneficiary designations over the years, presumably on the assumption that the designations would be effective. Although it is debateable whether the Alberta legislation allows instrument designations regarding RRIFs, many Albertans have made such designations, again, presumably, on the assumption that such designation are effective.

The facility, real or assumed, for making instrument designations seems to be very popular. The fact that this facility has existed — or has been widely believed to exist — for years, and has been utilized and relied upon by many thousands of people, is reason in itself to retain and confirm it, unless there are compelling reasons for doing otherwise.[96]

(3) Arguments Against Allowing Designations

(a) Instrument designations lack safeguards

The argument that allowing instrument designations helps avoid intestacy could apply to any kind of property, not just future income plans. If avoiding intestacy is of paramount importance, why not allow a person to make instrument designations for any type of property: a car, a house, the contents of a bank account or whatever? Indeed, why have an attestation requirement at all? The answer is that the attestation requirement serves a purpose. And if it serves a purpose in the context of a testamentary disposition of a car, a house or a bank account, it must serve the same purpose for a testamentary disposition of future income plan proceeds. Obviously, this purpose will not be served if the attestation requirement is dispensed with to allow instrument designations of future income plan proceeds.

In order to evaluate this argument it is necessary to consider what purposes the *Wills Act* formalities generally, and the attestation requirement specifically, serve. This question has attracted a fair amount of attention over

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96 A similar argument was made in the Manitoba Report, *supra,* note 7 at 9-10.

the years.[97] The following labels have been given to functions that the formalities might serve: (1) cautionary (or ritual), (2) evidentiary, (3) protective and (4) channelling. These functions are explained briefly below.

The cautionary (or ritual) function.[98] The various formalities involved in the execution of a will should make it clear to testators that they are performing an action that determines the destination of their property upon death. Thus, when a properly executed document that purports to be a will comes before a court of probate, the court should be able to assume that its maker intended the instrument to be a will. The requirement that the will be in writing and that it be signed by the testator provides part of the ritualistic atmosphere. However, the attestation requirement, not being something that the average person runs into on a daily basis, is especially likely to leave testators in no doubt as to the significance of what they are doing: "[i]t is difficult to complete the ceremony and remain ignorant that one is making a will".[99] To the extent that there is less ceremony involved in executing an unattested instrument designation while completing a RRSP application at a financial institution's office than is involved in executing a will in a lawyer's office, the instrument designation probably does not fulfil the cautionary function as thoroughly as does a formal will.[100] On the other hand, it seems unlikely that many future income plan owners who execute an instrument that purports to be a beneficiary designation will fail to appreciate that they are designating the person who is to receive the plan proceeds upon their death.

The evidentiary function.[101] The various formalities associated with executing a will make it easier than it otherwise might be for a court of probate to determine what a deceased's final testamentary intentions were. The requirements that a will be in writing and that it be signed by the testator play an obvious role here. The writing requirement ensures that there will be a more or less permanent record of the testator's testamentary intentions as of the time of execution of the document, and the requirement that it be signed by the testator provides a means, albeit not foolproof, of verifying the

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97 See e.g., A. Gulliver and C. Tilson, "Classification of Gratuitous Transfers" (1941) 51 Yale L. J. 1 at 3-13; J. Langbein, "Substantial Compliance with the Wills Act" (1975) 88 Harvard L. R. 489 at 491-98; Law Reform Commission of British Columbia, *Report on The Making and Revocation of Wills* (Vancouver: LRBC, 1981) at 24-25 [hereinafter "B.C. Report"].

98 Gulliver and Tilson, *supra,* note 97 at 5-6; Langbein, *supra,* note 97 at 494-96.

99 Langbein, *id.* at 495.

100 Langbein, *id.* at 508-09.

101 Gulliver and Tilson, *supra,* note 97 at 6-9; Langbein, *id.* at 492-93.

authenticity of the document at a later date. The attestation requirement can also play a significant role in establishing the authenticity of a document that purports to be a deceased person's will. Obviously, the evidentiary benefits of attestation are foregone where instrument designations are allowed. However, it has been pointed out that the circumstances surrounding the execution of an instrument designation of future income plan proceeds provide an adequate substitute for attestation:

> Once again, what legitimates this will substitute [instrument designation of insurance proceeds] is that, although it functions as a will, its own forms adequately serve the purposes of the Wills Act. The insured signs a written purchase application in which he also designates his beneficiary, and he makes at least one, usually dozens, of payments to the insurer. Business practice serves the channelling policy, generally effecting the transfer entirely out of court. Writing, signature and payment serve the evidentiary and cautionary policies, but at the lowered cautionary level already remarked for tentative and revocable trusts.[102]

The fact that most instrument designations are made when someone signs up for a future income plan on a form that is retained by the issuer serves the same verification purpose served by the attestation requirement. If the beneficiary designation was forged, so was the application to join the plan. And if the application was forged, who was making the contributions required by the plan?[103]

The channelling function.[104] The requirement to comply with specified formalities in order to make a will is said to perform a channelling function that provides benefits for both testators and the court system. The requirement that wills meet certain formalities usually relieves courts of the burden of

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102 Langbein, *id.* at 509.

103 Admittedly, nothing in section 47 or similar provisions actually requires that the instrument designation be completed in the issuer's office or made on the application form. So far as section 47 is concerned, the plan owner could sign a beneficiary designation form in respect of an existing future income plan and mail it to the issuer. In theory, this could give someone an opportunity to forge the plan owner's signature on a beneficiary designation. In practice, however, we suspect that for their own protection issuers will adopt measures to ensure that they only act upon genuine designations. Moreover, our recommendation regarding annual reminders of beneficiary designations, although primarily intended to deal with a different problem, should bring any unauthorized designation to the owner's attention.

104 Langbein, *supra,* note 97 at 493-94.

deciding such issues as whether a particular document was meant to be a will. And from testators' perspective, the provision of a relatively simple set of formalities that are relatively easy to comply with means that they will know precisely what they have to do in order to create a valid testamentary disposition. As pointed out by Langbein in the passage set out above, the channelling function of the *Wills Act* formalities is adequately served by the forms associated with an instrument designation.

The protective function.[105] A person who signs a document that purports to be a will might do so under duress or undue influence, or at a time when he or she is not really capable of making rational judgments about the disposition of his or her estate. Of course, any of these circumstances would make the purported disposition void, but how is a court of probate to determine long after the fact whether any of these circumstances existed when the will was executed? This is where the requirement of two disinterested witnesses is sometimes said to serve a protective function. The requirement that the execution of the will be attested by two disinterested witnesses is said to make it more difficult for someone to procure the execution of a will through fraud, duress or undue influence, or by someone who is not mentally competent to make a will. The theory is that the witnesses will be able to observe the circumstances under which the will is signed, the mental condition of the testator and so forth. This should help both to deter attempts to procure the execution of a will through inappropriate means and to expose such attempts when they do occur.

The supposed protective function of the attestation requirement has been exposed to trenchant criticism.[106] It has been pointed out that the attestation requirement provides no real protection against fraud, undue influence, lack of testamentary capacity and associated evils. Certainly, judging by the number of cases in which it is alleged that wills have been executed by persons who were not mentally competent to do so or as a result of fraud or undue influence, it is apparent that the attestation requirement fails miserably as a deterrent. Moreover, when the matter does come before a court, the attestation requirement does not seem to be either a necessary or particularly useful means of detecting fraud or some other circumstance that would invalidate the will. Thus, we discount the supposed protective function of the attestation requirement.

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105 Gulliver and Tilson, *supra,* note 97 at 9-13; Langbein, *id.* at 496-97.

106 Gulliver and Tilson, *id;* Langbein, *id.*

In considering whether it is dangerous to forego the attestation requirement for designations pertaining to future income plans, past experience is relevant. Over the years Canadians must have made literally millions of instrument designations regarding insurance policies and future income plans.[107] If the lack of an attestation requirement was going to create a problem, one would have expected the problem to have shown up by now. There has been litigation — not an inordinate amount — involving the circumstances in which instrument designations have made: whether, for example, the maker was mentally competent or subject to undue influence.[108] We have not encountered a single reported case in which it appears that the outcome would have been different if there had been an attestation requirement, nor have we come across any statement by a judge that would indicate a concern that the lack of an attestation requirement affected the outcome in any way. This fortifies us in concluding that any useful purpose that might be served by the attestation requirement in the context of a will is adequately served by the special circumstances surrounding an instrument designation of future income plan proceeds.

(b) Designations are often forgotten

While it is not impossible for someone to forget that he or she made a formal will, it is probably more likely to happen in the case of an instrument designation.[109] Signing up for a RRSP and filling in the beneficiary designation is unlikely to be as memorable an event as is the execution of a formal will. Not only is one more likely to forget about an old designation than an old will, the consequences of forgetting about the former could be more serious than the consequences of forgetting about the latter. An old will can be revoked by the simple statement, "I revoke all former wills and codicils" in a new will. Since this statement is usually part of the "boilerplate" of formal wills, executing a new will tends to take care of the problem of previously executed, but forgotten, wills. But a revocation clause in a will revokes an instrument designation "only if the revocation refers to the plan either

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[107] We do not have direct evidence of the actual numbers of designations that have been executed. But given that several million Canadians contribute to RRSPs each year, it does not seem unreasonable to conclude that millions of designations have been executed over the years.

[108] In determining whether a deceased who has made an instrument designation was mentally competent to do so or whether the deceased was subject to undue influence, the courts apply the tests appropriate to testamentary dispositions, rather than those appropriate to *inter vivos* dispositions: see e.g. *Stewart v. Nash* (1988), 65 O.R. (2d) 218 (H.C.); *Fontana v. Fontana* (1987), 28 C.C.L.I. 232 (B.C.S.C.). For a more detailed discussion see Scane, *supra,* note 42 at 198-201.

[109] This point is discussed in the Manitoba Report, *supra,* note 7 at 7.

generally or specifically."[110] Moreover, as mentioned in Chapter 1, a designation, unlike a will, is not automatically revoked by the subsequent marriage of the deceased.

We agree that the "forgotten designation" can create real problems in a significant number of cases. We note, however, that the problems arise mainly from the peculiar "staying power" that the legislation gives to an instrument designation, rather than the fact that the designation is unattested. We are not particularly concerned with the requirement that a revocation in a will must refer to a plan either generally or specifically; if a person goes to a lawyer to execute a will, the lawyer should be able to ensure that the will contains the appropriate wording to revoke any previous designations, whether the testator actually remembers them or not. As for the matter of revocation by operation of law, that is something that we intend to address soon in another report. In the meantime, our recommendation regarding annual reminders should help address the problems that may be created by forgotten designations.

(4) INSTITUTE'S RECOMMENDATION

We believe that allowing instrument designations of future income plan proceeds will more frequently result in the proceeds going to the person whom the plan owner intended to receive them than would a legislative policy requiring that all such designations be made in a will. We believe that the particular circumstances surrounding the execution of an instrument designation regarding a future income plan provide built-in safeguards that are a reasonable substitute for the attestation requirement that is associated with the execution of wills. Therefore, we think there would be a good argument for introducing a facility for designating future income plan beneficiaries by instrument if such a facility did not already exist.

If there would be a good case for introducing an instrument designation facility when one did not already exist, there is an even better case for maintaining a facility that does exist, or that has been widely assumed to exist. Alberta legislation clearly allows instrument designations in respect of insurance policy proceeds and of many kinds of future income plans. In 1975 the Alberta Legislature enacted section 47 of the *Trustee Act*, with the intention that it would allow instrument designations for RRSPs. Although the legislation was not specifically intended to cover RRIFs — they did not exist at the time — they are so similar to RRSPs that it is difficult to think of any reason for allowing designations of RRSP benefits that would not also apply to RRIFs. Although doubts have been expressed about whether the wording

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110 *Trustee Act*, s. 47(4).

section 47 actually captures RRSPs or RRIFs, there is no doubt that many Albertans have made instrument designations of RRSP and RRIF proceeds and have assumed that these designations will be effective. This provides an additional reason for confirming that instrument designations of RRSP and RRIF benefits are permitted by section 47 of the *Trustee Act*.

RECOMMENDATION 1

RRSP and RRIF owners should be able to designate a beneficiary by means of unattested instruments, as provided by section 47 of the *Trustee Act*.

B. SHOULD THE DEFINITION OF "PLAN" BE AMENDED?

If RRSP and RRIF owners should be able to make instrument designations, the next question is whether an amendment to section 47 is required in order to achieve this objective. This depends upon whether the existing definition of "plan" is apt to cover RRSPs and RRIFs. It should be clear by now that our view on this is as follows.

1. Any arrangement that would satisfy the definition of "retirement savings plan" under the *Income Tax Act* should also satisfy the definition of "plan" in section 47, because the latter tracks the former.

2. Since it is difficult to fit a typical RRIF within the classical conception of an annuity, we believe that a court could only hold that a RRIF comes within section 47's definition of "plan" by adopting a very broad definition of the term "annuity", as it appears in section 47.

Notwithstanding that we think section 47's definition of "plan" probably covers RRSPs, we believe the issue should be put beyond doubt by amending the definition to include a specific reference to RRSPs. Given the very doubtful status of RRIF designations under the present definition of "plan", the need for an amendment that would specifically refer to RRIFs is self-evident, if it is accepted that instrument designations regarding RRIFs should be allowed.

RECOMMENDATION 2

Section 47 should be amended so as to make it absolutely clear that it applies to RRSPs and RRIFs.

C. DESIGNATIONS TO WHICH THE AMENDED WORDING SHOULD APPLY

(1) THE ISSUE AND OPTIONS

Suppose that an amendment along the lines we have recommended was enacted and came into force on a certain date ("D"). A question that would surely arise, and that would have to be addressed by the amending legislation, is whether the amended version of the definition would apply only to designations made after D, or whether it would apply to designations made before D. In the latter case, the next question is whether it would apply to designations made by people who had died before D. Finally, if the amended wording was made to apply to designations made by people who had died before D, consideration would have to be given to whether there should be any exceptions to this general rule. Each of the options described below appears to us to be a plausible approach to the issue under consideration.

Option 1

The amended wording would apply only to RRSP or RRIF beneficiary designations made on or after D. This would mean that the validity of designations made prior to D would be determined under the existing wording of section 47.

Option 2

The amended wording would apply to RRSP or RRIF beneficiary designations of persons who are alive on D, regardless of whether the designation is made before or after D. The old wording would apply to designations made by people who have died before D.

Option 3A

The amended wording would apply to all RRSP or RRIF beneficiary designations, including designations made by people who have died before D.

Option 3B

This option is the same as Option 3A, except that the amended wording would not apply in certain cases where actions had been taken in reliance upon the pre-amendment wording of the definition of "plan".

The choice of option would make no difference for RRSP or RRIF owners (or their estates) who have not made an instrument designation before D, nor would it make a difference in the case of deceased RRSP or RRIF owners who had designated by instrument the same person who would have received the proceeds under their will or under the *Intestate Succession Act*. The choice would make a difference for RRSP or RRIF owners who are alive on D and who have made an instrument designation. It would also make a difference where RRSP or RRIF owners who had died before D had designated a beneficiary other than the person or persons who would receive the proceeds under their will or under the *Intestate Succession Act*.

(2) The Options Compared

(a) Option 1 versus Option 2

Option 1 would make the amended wording of the definition applicable only to designations made after D, while Option 2 would make the amended definition applicable to designations made before D unless the person who made the designation had died before then. Option 1 has the advantage that it avoids the slightest hint of retroactivity. Apart from that, however, we cannot see that it has any advantages over Option 2. Option 1 would do nothing to clarify the status of thousands of designations that have already been made by people who are still alive on D. Presumably, the great majority of these persons still intend that the proceeds of their RRSP or RRIF will go to the named beneficiary. If the amendment did not apply to these designations, their makers would have to go to the trouble of signing new beneficiary designations in order to secure the protection of the amended wording. We see no purpose that would be served by requiring them to do so. Moreover, many persons who had already made instrument designations would probably not realize that their designations might be invalid, and would never get round to signing a new designation. All in all, we think Option 2 is clearly superior to Option 1.

(b) Option 2 versus Option 3

The difference between Option 2 and Option 3 is that the latter would make the amended wording applicable to designations made by RRSP or RRIF owners who have died before D. The choice between the two options is important only in the case of RRSP or RRIF owners who have died before D and who have designated a beneficiary who is not the same person or persons who would take under their will or under the *Intestate Succession Act*. There are precedents for each option. The Manitoba Commission recommended Option 2:

> The recommendations which are contained in this Report would result in a number of significant changes to [the pre-1992 *Retirement Plan Beneficiaries Act*]. Unless great care is taken, they could have the effect of opening up estates which have already been distributed in whole or in part. Clearly, that would be an inappropriate and unintended result.[111]

This recommendation was implemented by section 18(1) the 1992 *Retirement Plan Beneficiaries Act*:

> This Act applies in the case of any death occurring on or after but not before the date the Act comes into force.

Section 18(2) provides that the pre-1992 act continues to apply in the case of deaths occurring before the effective date of the 1992 act. On the other hand, in 1973 when British Columbia added what is now section 46 of the *Law and Equity Act*, it left no doubt that the section was retroactive:

> This section is retroactive and shall be deemed to have been in force on, from and after January 1, 1971.[112]

A more recent example of this approach in a very similar context is section 140.1 of our own *Insurance Act*, which makes it clear that annuity contracts issued by life insurance companies are treated as life insurance.[113] The relevant part of the section reads "an annuity . . . shall be deemed to be and always to have been life insurance".

Option 2 would not affect any distribution of RRSP or RRIF proceeds that has been made before D. Thus, a previous distribution of RRSP or RRIF proceeds made on the assumption that a beneficiary designation was **invalid** would not be affected by the amendment. This would avoid the possibility of the amendment upsetting such a distribution. On the other hand, if the amended wording does not apply to designations made by RRSP and RRIF owners who have died before D, the status of many such designations would be left up in the air. Moreover, making the amended wording applicable to designations of deceased RRSP and RRIF owners is the approach most likely to

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111 Manitoba Report, *supra*, note 7 at 17-18. As indicated in the quoted passage, the Manitoba Report recommended changes to the Manitoba act beyond the change in the definition of "plan".

112 R.S.B.C. 1979, c. 224, s. 46(5).

113 The background to this section is discussed in note 16.

give effect to their intentions. After all, they presumably intended their designations to be effective and are in no position to re-execute them after D. For these reasons, we prefer Option 3A or 3B to Option 2.

(c) Option 3A versus Option 3B

It should be emphasized that there is likely to be very little practical difference between Options 3A and 3B. In either case, the amended wording would apply to most instrument designations made by deceased RRSP and RRIF owners. But the choice of options could make a difference in a few cases. Option 3A is essentially what we had proposed in the Issues Paper. Some commentators who agreed with the general thrust of that proposal were nevertheless concerned about its application in specific circumstances. Concern was expressed about how it would affect the following sorts of situations.

- The deceased RRSP or RRIF owner designated X as the beneficiary, but the issuer decided that the designation was invalid and paid the proceeds to the deceased's personal representative, who in turn paid the proceeds to Y, the residual beneficiary of the estate. This was all done without the agreement of X and without the protection of a court order.[114]

- The circumstances are the same as above, except that the proceeds of the RRSP or RRIF are distributed in accordance with a settlement agreement entered into by X and Y. One of the factors taken into account in the settlement negotiations was the distinct possibility that the instrument designation in favour of X was invalid.

- Again, the circumstances are the same, except that there have been court proceedings and the court has ruled that the RRSP or RRIF proceeds belong to Y because the designation in favour of X is invalid.

Actually, we do not think that a retroactive amendment would affect the result in the second or third situation, unless the judgment in the latter were still subject to appeal. A retroactive change to the definition of "plan" would not undo the effect of a settlement agreement between persons setting up adverse claims to the proceeds of a RRSP or RRIF. The rights of the parties to the agreement would be determined by the agreement. The retroactive amendment is unlikely to be regarded as an event that destroys the foundation

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114 We suspect that this situation is unlikely to arise. For its own protection, if the issuer suspected that the instrument designation was invalid, it would most likely pay the money into court or obtain the agreement of all concerned before paying the proceeds to anyone.

of the agreement. Similarly, if someone has obtained a final judgment based on the proposition that a RRSP or RRIF designation is invalid, and the judgment is not subject to appeal, the successful litigant's rights under the judgment are likely to be protected by the doctrine of *res judicata*. However, the doctrine of *res judicata* might not apply if the judgment in question was still subject to appeal, since the appeal court might feel obliged to apply the retroactively amended wording.[115] As a result of the concerns expressed about the approach that we describe here as Option 3A, we decided to consider Option 3B.

Option 3B would have the same effect as Option 3A except in what would surely be a handful of cases: where RRSP or RRIF proceeds have been paid out without the protection of a court order or settlement agreement on the assumption that an instrument designation was invalid; or where a court order to the effect that such a designation is invalid is still subject to appeal. We think there is something to be said for Option 3A over Option 3B, in that the former gives full effect to the presumed intention of deceased persons who have made a beneficiary designation. That RRSP or RRIF proceeds have already been paid, on the assumption that an instrument designation is invalid, to the residuary beneficiaries under a will or to those entitled under intestate succession legislation, rather than to the designated beneficiary, does not change the fact that the deceased intended the proceeds to go to the designated beneficiary. This also applies where someone has obtained a judgment to the effect that a RRSP or RRIF designation is invalid, where the judgment is still subject to appeal. A fully retrospective amendment would allow the appeal court to give effect to the intentions of the person making the designation where the trial court might have felt unable to do so. On the other hand, in the first case the residual beneficiaries may well have changed their position in such a way that they would suffer real prejudice if forced to disgorge the proceeds. In the second case, it seems somewhat unfair to change the rules for a litigant who has already gone to the trouble and expense of obtaining a judgment, even if the judgment is still subject to appeal. Ultimately, we have concluded that Option 3B achieves the best balance between the competing considerations.

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115 But the appeal court might take the view that the amendment, although retroactive, was not intended to a apply to previously decided case, even if the trial decision was still subject to appeal: see *Hornby Island Trust Committee v. Stormwell* (1988), 53 D.L.R. (4th) 435 at 441-43 (B.C.C.A.); *Zadvorny v. Saskatchewan Government Insurance* (1985), 38 Sask. R. 59 at 62-63 (C.A.).

RECOMMENDATION 3

(a) Subject to paragraph (b), the amended wording of the definition of "plan" in section 47 should apply to designations made before or after the amendment comes into force, including designations made by people who have died before the amendment comes into force.

(b) The validity of a RRSP or RRIF designation should be determined in accordance with the pre-amendment wording of section 47 where application of the amended wording instead of the pre-amendment wording could

(i) alter the result in proceedings in which a judgment or final order had been granted before the amendment came into force, regardless of whether the judgment or order is subject to appeal; or

(ii) impose on a person liability to repay or account for RRSP or RRIF proceeds received or paid out by that person before the amendment came into force.

(c) The validity or enforceability of an agreement settling competing claims to RRSP or RRIF proceeds should not be affected by the amendment.

Recommendation 3(c) reflects what is perhaps an over-abundance of caution; as noted above, a retrospective change in the definition of "plan" should not in any event undo the effect of an antecedent agreement that settles competing claims to RRSP or RRIF proceeds.

D. KEEPING SECTION 47 UP TO DATE

Our view is that when it was originally enacted, section 47's wording was apt to cover the type of arrangement it was specifically intended to cover: RRSPs. Subsequent changes to the *Income Tax Act* introduced a new type of arrangement — the RRIF — that was not specifically contemplated by section 47's drafters. A specific reference to RRSPs in section 47's definition of "plan" would not have helped, because a RRSP is not the same thing as a RRIF. Provinces whose legislation originally referred to RRSPs have had to amend their legislation to include specific references to RRIFs. The moral of the story is that no matter what approach had been taken to drafting section 47's definition of "plan" in 1976, an amendment to the original wording probably would have been necessary to catch RRIFs when they came along in 1978.[116]

It is no secret that changes to the *Income Tax Act* are often the source of new kinds of financial products and changes to existing products. Whatever else might be said about it, the *Income Tax Act* cannot be accused of being too static: it seems to be in constant flux. This virtually guarantees that provincial legislation that attempts to tie in with the *Income Tax Act* will quickly fall behind changes to the latter unless there is a special mechanism for keeping the provincial legislation up to date. Given the constraints on legislative time, it seems that the only feasible mechanism for making section 47's coverage reasonably responsive to changes in the *Income Tax Act* is to rely on subordinate legislation. Thus, we believe the definition of "plan" in section 47 should be capable of being amended by regulation. Both the British Columbia Law Reform Commission and the Manitoba Law Reform Commission made a similar recommendation, and in 1992 New Brunswick added just such a provision to its designation legislation.[117]

RECOMMENDATION 4

The amended section 47 should authorize extension of the definition of "plan" to new types of future income plans or similar plans by regulation.

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116 The statement in the text is not literally true. An entirely different approach to the definition of "plan" could have made it flexible enough to catch something like a RRIF. A definition along the following lines would probably be broad enough to capture pension plans, RRSPs, RRIFs and other future income plans:

> "plan" means a contractual or statutory arrangement under which one or more contributions of money or other property are made by or on behalf of a participant in the arrangement for the purpose of providing the participant with an income commencing either immediately or in the future.

But a definition such as this might be considered too indeterminate.

117 *An Act to Amend the Retirement Plan Beneficiaries Act*, S.N.B. 1992, c. 16, ss 1, 2. The new definition of "plan" ends with the following clause:

> (c) a fund, trust, scheme, contract or arrangement prescribed by regulation to be a plan for the purposes of this Act.

E. PERIODIC REMINDERS OF BENEFICIARY DESIGNATIONS

We observed earlier that people are more likely to forget that they have made an instrument designation than to forget that they have made a will. The likelihood of designations being forgotten is especially troublesome given that instrument designations are not automatically revoked by marriage or by divorce.[118]

As noted in Chapter 1, we have decided to defer an examination of the issue of revocation of instrument designations by marriage or divorce until a later report in which we examine revocation of testamentary instruments generally. We note, however, that both the British Columbia and Manitoba Law Reform Commissions considered whether designations ought to be revoked by operation of law in the same circumstances that a gift in a will would be revoked. The British Columbia Commission recommended that designations should be revoked in the same circumstances that a will (or a gift to a particular person in a will) would be revoked.[119]

The Manitoba Commission took a more cautious approach.[120] It was clearly sympathetic to the approach taken in the British Columbia Report but did not make the same recommendation. The Manitoba Commission's main reason for not recommending automatic revocation of instrument designations was to maintain consistency between different Manitoba acts dealing with instrument designations: the *Retirement Plan Beneficiaries Act*, *The Pension Benefits Act* and *The Insurance Act*. The Manitoba Commission noted that designations under the latter two acts are not subject to revocation by operation of law, and did not feel that it was within its mandate to recommend changes to those acts. Therefore, a recommendation to make designations under the *Retirement Plan Beneficiaries Act* subject to revocation by operation of law would lead to inconsistent rules for designations under the three acts. Consequently, the Manitoba Commission decided not to make such a recommendation so long as the *Pension Benefits Act* and *The Insurance Act* did not provide for revocation of designations by operation of law. Instead, it made the following recommendation:

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118 In Alberta wills are revoked by the subsequent marriage of the testator. In most provinces — but not Alberta — a gift in a will to a spouse is automatically revoked upon divorce.

119 B.C. Report *supra*, note 97 at 136-43.

120 Manitoba Report, *supra*, note 7 at 14-16.

> That every form which permits the designation of a beneficiary and which is provided by an administrator of a plan governed by the *Retirement Plan Beneficiaries Act* and every report on the status of a plan from a plan administrator to a participant shall contain the following statement:
>
>> Note: Your designation of a beneficiary will not be affected and will remain in force if you marry or divorce in the future. If you ever wish to designate a different beneficiary, you must do so in a will or must complete a new designation form.

The Manitoba Commission does not appear to have been too sanguine about the usefulness of the proposed notice requirement. However, we believe that a requirement for issuers to send owners of future income plans covered by section 47 annual reminders of subsisting beneficiary designations would greatly diminish the problem of forgotten designations. We stress that the reminders would need to be given periodically: a notice given when someone makes the designation is as likely to be forgotten as the designation itself. An annual reminder that identifies the current beneficiary shown in the issuer's records and states that the designation may remain in effect notwithstanding changes in circumstances such as marriage or divorce is more likely to have the intended effect. We think it is important that the reminder notice identify the current beneficiary. Identification of the beneficiary shown in the issuer's records is more likely to bring home the need for action, if action is required, than is a statement that warns that any previous beneficiary designation remains in effect but does not identify the currently designated beneficiary. As for the length of time between reminders, we doubt that there is anything to be gained by providing reminders more frequently than annually. On the other hand, providing reminders annually should not be particularly onerous for issuers. The information itself is on file and could be included with other information that the issuer must in any event give to owners at least annually. For example, issuers must provide RRSP and RRIF owners with information required by the latter to complete their annual income tax returns. The annual reminder regarding the designated beneficiary could be provided at the same time.

We think the purpose that could be served by annual designation reminders is important enough to justify a legislative requirement in that regard. Therefore, we recommend that the amended section 47 authorize regulations that would require "plan" issuers to provide owners with annual reminders identifying the beneficiary shown on the issuer's records and indicating that the designation is not necessarily revoked by marriage or divorce.[121] For obvious reasons, we do not think that failure of an issuer to send a required notice should have any adverse effect on the validity of the designation in question.

RECOMMENDATION 5

(a) Issuers of plans covered by section 47 should be required to send plan owners an annual notice

(i) identifying the designated beneficiary as disclosed by the issuer's records, and

(ii) stating that the beneficiary designation may not be automatically revoked by the marriage or divorce of the owner.

(b) The amended section 47 should authorize regulations requiring plan issuers to provide the contemplated notices.

(c) An issuer's failure to send the notice should not invalidate the beneficiary designation in question.

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121 We say "not necessarily revoked" because we anticipate that issuers might give such notices in different provinces with different rules regarding revocation by operation of law.

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CHAIRMAN

DIRECTOR

September 1993

APPENDIX A

LIST OF RECOMMENDATIONS

RECOMMENDATION 1

RRSP and RRIF owners should be able to designate a beneficiary by means of unattested instruments, as provided by section 47 of the *Trustee Act*.

RECOMMENDATION 2

Section 47 should be amended so as to make it absolutely clear that it applies to RRSPs and RRIFs.

RECOMMENDATION 3

(a) Subject to paragraph (b), the amended wording of the definition of "plan" in section 47 should apply to designations made before or after the amendment comes into force, including designations made by people who have died before the amendment comes into force.

(b) The validity of a RRSP or RRIF designation should be determined in accordance with the pre-amendment wording of section 47 where application of the amended wording instead of the pre-amendment wording could

   (i) alter the result in proceedings in which a judgment or final order had been granted before the amendment came into force, regardless of whether the judgment or order is subject to appeal; or

   (ii) impose on a person liability to repay or account for RRSP or RRIF proceeds received or paid out by that person before the amendment came into force.

(c) The validity or enforceability of an agreement settling competing claims to RRSP or RRIF proceeds should not be affected by the amendment.

RECOMMENDATION 4

The amended section 47 should authorize extension of the definition of "plan" to new types of future income plans or similar plans by regulation.

RECOMMENDATION 5

(a) Issuers of plans covered by section 47 should be required to send plan owners an annual notice

(i) identifying the designated beneficiary as disclosed by the issuer's records, and

(ii) stating that the beneficiary designation may not be automatically revoked by the marriage or divorce of the owner.

(b) The amended section 47 should authorize regulations requiring plan issuers to provide the contemplated notices.

(c) An issuer's failure to send the notice should not invalidate the beneficiary designation in question.

APPENDIX B

PERSONS WHO PROVIDED WRITTEN COMMENTS ON ISSUES PAPER

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APPENDIX C

TRUSTEE ACT, SECTION 47

Pension plans and funds

47(1) In this section,

(a) "annuity" includes an amount payable on a periodic basis, whether payable at intervals longer or shorter than a year;

(b) "participant" means a person who is entitled to designate another person to receive a benefit payable under a plan on the participant's death;

(c) "plan" means

(i) a pension, retirement, welfare or profit-sharing fund, trust, scheme, contract or arrangement for the benefit of employees, former employees, agents or former agents of an employer or their dependants or beneficiaries, whether created by or pursuant to a statute or otherwise, or

(ii) a fund, trust, scheme, contract or arrangement for the payment of an annuity for life or for a fixed or variable term or under which money is paid for the purpose of providing, on the happening of a specified event, for the purchase of, or the payment of, an annuity for life or for a fixed or variable term, created before or after the commencement of this section;

(d) "will" has the same meaning as in the *Wills Act*.

(2) A participant may designate a person to receive a benefit payable under a plan on the participant's death

(a) by an instrument signed by him or signed on his behalf by another person in his presence and by his direction, or

(b) by will,

and may revoke the designation by either of those methods.

(3) A designation in a will is effective only if it refers to the plan either generally or specifically.

(4) A revocation in a will of a designation made by an instrument is effective to revoke the designation made by the instrument only if the revocation refers to the plan either generally or specifically.

(5) Notwithstanding the *Wills Act*, a later designation revokes an earlier designation, to the extent of any inconsistency.

(6) Revocation of a will is effective to revoke a designation in the will.

(7) A designation or revocation contained in an instrument purporting to be a will is not invalid by reason only of the fact that the instrument is invalid as a will.

(8) A designation in an instrument that purports to be but is not a valid will is revoked by an event that would have the effect of revoking the instrument if it had been a valid will.

(9) Revocation of a designation does not revive an earlier designation.

(10) Notwithstanding the *Wills Act*, a designation or revocation in a will is effective from the time when the will is signed.

(11) After the death of a participant who has made a designation that is in effect at the time of his death, the person designated may enforce payment of the benefit payable to him under the plan, but the person against whom the payment is sought to be enforced may set up any defence that he could have set up against the participant or his personal representative.

(12) If this section is inconsistent with a plan, this section applies unless

(a) the inconsistency relates to a designation made or proposed to be made after the making of a benefit payment, and

(b) the benefit payment so made would have been different if the designation had been made before the benefit payment was made,

in which case the plan applies.

(13) When a plan requires or permits a designation or revocation thereof to be filed with a specified person or body and any benefit is paid under the plan to a beneficiary on the basis of the latest designation so filed, the payment shall be deemed to be validly made, as against the person required by the plan to make the payment, notwithstanding that

(a) a later designation or revocation of a designation is filed under the plan after the payment was made, or

(b) the person or body is notified, after the payment was made, of an event that had the effect of revoking a designation so filed.

(14) When a plan requires or permits a designation or revocation thereof to be filed with a specified person or body, then, in the case of a designation or revocation made by a will, the filing of a copy of the will with that person or body, authenticated in the manner, if any, prescribed by the plan, is a sufficient compliance with the requirement under the plan.

(15) This section does not apply to a contract or to a designation of a beneficiary to which the *Insurance Act* applies.

(16) The Crown is bound by this section.

APPENDIX D

PROVINCIAL AND TERRITORIAL DESIGNATION LEGISLATION

JURISDICTION	CITATION	RRSP	RRIF	EXECUTIVE AMENDMENT
Alberta	*Trustee Act*, R.S.A. 1980, c. T-10, s. 47.	No	No	No
British Columbia	*Law and Equity Act*, R.S.B.C. 1979, c. 224, as am. S.B.C. 1981, c. 10, 1984, c. 25, s. 19, and S.B.C. 1984, c. 26, s. 11.	Yes	Yes	No
Manitoba	*The Retirement Plan Beneficiaries Act*, S.M. 1992, c. R138.	Yes	Yes	No
New Brunswick	*Retirement Plan Beneficiaries Act*, S.N.B. 1982, c. R-10.21, as am. S.N.B. 1992, c. 16.	Yes	Yes	Yes[122]
Newfoundland	*Income Tax Savings Plan Act*, R.S.N. 1990, c. I-2.	Yes	Yes	No
N.W.T.	*Retirement Plan Beneficiaries Act*, R.S.N.W.T. 1988, c. R-6.	No	No	No
Nova Scotia	*Beneficiaries Designation Act*, R.S.N.S. 1989, c. 36, s. 9.	Yes	Yes	No
Ontario	*Succession Law Reform Act*, R.S.O. 1990, c. S.26, ss 50-54.	Yes	No	No
Prince Edward Island	*Designation of Beneficiaries Under Benefit Plans Act*, R.S.P.E.I. 1988, c. D-9.	Yes	Yes	No
Saskatchewan	*Queen's Bench Act*, R.S.S. 1978, c. Q-1, s. 45(23)-(26), as am. R.S.S. 1978 (Supp.), c. 57, s. 2 and S.S. 1988-89, c. 18, s. 3(6).	Yes	Yes	No
Yukon Territory	*Retirement Plan Beneficiaries Act*, R.S.Y. 1986, c. 153.	Yes	No	No

122 For the list of approved plans, which up to now includes only RRSPs and RRIFs, see N.B. Reg. 92-95.