BENEFICIARY DESIGNATIONS AND EMPLOYEE PLANS: SOME ISSUES TO THINK ABOUT

Melanie A Yach
Aird & Berlis LLP

What is a Beneficiary Designation and How is it Made?

A beneficiary designation is the method of effecting the transfer of property on the death of the grantor. They can be made in respect of some, but not all, of a grantor's property. To the extent property transfers pursuant to a beneficiary designation, it transfers to the designated beneficiary outside the deceased grantor's estate. It is not governed by the provisions of the deceased's will or the intestacy laws, to the extent the deceased does not have a will. At present, beneficiary designations can be made in Ontario in respect of life insurance proceeds, death benefits relating to certain employee plans including pension and pension death benefits and certain other registered plans (e.g. registered retirement savings plans, registered tax free savings accounts, home ownership savings plans, etc.).

The making of beneficiary designations in respect of plans is governed by statutory law. As it relates to the making of beneficiary designations in respect of employee plans in Ontario, the relevant statutes are the *Succession Law Reform Act*, R.S.O. 1990, Chapter S.26 (the "*SLRA*"), the *Pension Benefits Act*, R.S.O. 1990, Chapter P.8 (the "*PBA*") and the *Family Law Act*, R.S.O. 1990, C. F.3 (the "*Family Law Act*").

Part III of the *SLRA* sets out the statutory framework relating to the designation of beneficiaries in respect of benefits payable under a "plan" on a participant's death (see Schedule "A" for excerpt of relevant provisions). "Plan" is broadly defined under the *SLRA* to include "a pension, retirement, welfare or profit-sharing fund, trust, scheme, contract or arrangement or a

fund, trust, scheme, contract or arrangement for other benefits for employees, former employees, directors, former directors, agents or former agents of an employer or their dependants or beneficiaries". It expressly excludes life insurance policies which are governed by the provisions of the *Insurance Act*, R.S.O. 1990, c. I (the "*Insurance Act*").

A designation can be made by a simple instrument in writing or by will. A designation in a will is effective only if it relates expressly to a plan, either generally or specifically. As a general statement, any written document containing a beneficiary designation constitutes an "instrument" (e.g. separation agreements, holograph wills, written instructions to counsel qualify as instruments). Where a designation is made by will, the effective date of the designation is the date the will is executed, despite the fact that a will legally speaks from the date of death.

A beneficiary designation made in accordance with the *SLRA* can be revoked as long as the participant has legal capacity to do so. A designation can be revoked by instrument in writing or by will. A designation does not necessarily need to be expressly revoked as the *SLRA* provides that a later designation will revoke an earlier designation to the extent of any inconsistency.

There is no requirement in the *SLRA* that a beneficiary designation, whether made by simple instrument or by will, must be filed with the administrator of the plan in question. Accordingly, there is a risk that a plan administrator may not have notice of the last valid beneficiary designation. Section 53(a) of the *SLRA* addresses the risk and provides that a plan administrator is discharged on paying the benefit to the person designated under the latest designation made in accordance with the terms of the plan, provided the administrator does not have notice of any subsequent designation or revocation. It should be noted that if the plan does

not require that the plan administrator be advised of changes in beneficiary designations (so as to create a presumption that the designation the administrator has notice of is valid) the statutory discharge may arguably not apply.

The *PBA* overlays Part III of the *SLRA* and provides certain special entitlements to spouses of pension plan members irrespective of any beneficiary designation made in accordance with the *SLRA* (see Schedule "B" for excerpt of relevant provisions). Section 44(1) provides a participant's spouse with an automatic entitlement to a survivor pension where the participant and the spouse were living together in a spousal relationship on the date the first instalment of the member's pension is due. Section 48(1) and (2) of the *PBA* provide the surviving spouse with the choice of taking a spousal survivor pension or a lump sum payment if the participant's death occurs before his or her pension benefits become payable. The Act further provides that the surviving spouse can waive his or her entitlement to the survivor pension benefit.

As for beneficiary designations, section 48 of the *PBA* provides that a participant may designate a beneficiary to receive a pre-retirement death benefit or survivor pension in circumstances where the member dies after retiring. However, a designation is only effective if, at the date the member dies, the member did not have "spouse", the member had a "spouse" but was living separate and apart from him or her, or the member had a "spouse" but the spouse had validly waived his or her entitlement to the spousal death benefit. The formalities relating to the designation of a non-spouse beneficiary are governed by the provisions of the *SLRA.*

The provisions of the *Family Law Act* relating to the equalization of net family property should be noted as they can impact upon the validity of spousal and non-spousal beneficiary designations of plan benefits. While the PBA generally prohibits the assignment of plan benefits

there is an exception in respect of orders or domestic contracts under Part 1 of the *Family Law Act*. That said, the *PBA* limits assignments pursuant to an order or domestic contract under Parts 1 or 4 of the *Family Law Act* to not more than 50 percent of the plan member's pension benefits accrued during the spousal relationship and limits execution, seizure or attachment in respect of a support order to a maximum of one-half of the money payable under the plan.

Challenges Frequently Faced by Plan Administrators

A common problem faced by plan administrators on the death of a plan member relates to claims by competing beneficiaries. For example, two spouses might assert claims to a survivor pension or a death benefit or an estate trustee might challenge the validity of a designation made by instrument in the face of a will which purports to change that designation. As the cases discussed below highlight, plan administrators should take care in dealing with such claims or run the risk of legal liability and/or costs.

(a) Who is the Proper "Spouse"? – *Carrigan v. Quinn*

The fact that a "spouse" has a priority entitlement to certain death benefits under the *PBA* can frequently give rise to competing claims, as Justice Nolan's recent decision in *Carrigan v. Quinn* [2011] O.J. No 559 (OntSCJ) demonstrates.

The grantor/employee in that case, Mr. Carrigan, died unexpectedly in June 2008. At the time of his death, Mr. Carrigan had a wife, from whom he was separated, and a common law spouse, Ms Quinn. He died testate, leaving a Last Will and Testament which appointed Mrs. Carrigan as the executrix and sole beneficiary of the estate. Mr. and Mrs. Carrigan also owned two properties in joint tenancy and title to both passed to Mrs. Carrigan by right of survivorship

on Mr. Carrigan's death, including a condominium in which Mr. Carrigan and Ms Quinn were living in at the time of his death.

Unbeknownst to both women, Mr. Carrigan had significant debts as at the date of his death which his estate was responsible for paying. He also had a pension with his employer which paid death benefits although it is not clear from Justice Nolan's decision how large the death benefits associated with the pension plan were. At some point during the course of his employment and presumably before he separated from Mrs. Carrigan, Mr. Carrigan had designated Mrs. Carrigan and his two daughters as the beneficiaries of those benefits.

When attempts to negotiate a settlement as between Mrs. Carrigan and Ms Quinn failed shortly after Mr. Carrigan's death, Ms Quinn commenced an application for dependant's support pursuant to Part V of the *SLRA*. A trial was ultimately conducted and the following issues, among others, were addressed by the Court:

- Is there a "spouse" entitled to claim the pension death benefit in accordance with section 48 of the *PBA?*
- Are the provisions of section 48 of the *PBA* subject to any remedies, either equitable, by way of resulting trust or constructive trust, or pursuant to *the Family Law Act*, if favour of Mrs. Carrigan?
- Does the beneficiary designation in favour of Mrs. Carrigan and her daughters have any effect on Ms Quinn's entitlement pursuant to section 48?

On the first issue, Justice Nolan noted that the *PBA* defines "spouse" in section 1 to mean either of two persons who are married to each other or are not married to each other but living together in a conjugal relationship continuously for a period of not less than three (3) years or in a relationship of some permanence, if they are the natural or adoptive parents of a child. The definition, taken on its own, applied to both Mrs. Carrigan and Ms Quinn. However, Justice

Nolan noted that section 48(3) provides that section 48(1) does not apply where the member and his spouse are living separate and apart on the date of his death, as was the case with Mrs. Carrigan. It followed that only one person met the requirement of both sections 1 and 48 of the *PBA*, Ms Quinn.

Having concluded that Ms Quinn was entitled to the pension benefits pursuant to sections 1 and 48 of the *PBA*, Justice Nolan then turned to the issue of whether or not the benefits were subject to any equitable or other claims Mrs. Carrigan might be in a position to make. On this issue, Justice Nolan held the express provisions of section 48 provide a complete code for the distribution of death benefits and displace the common law. Mrs. Carrigan could not, in effect, seek to use equitable remedies to get around a definite result dictated by the legislature. On that point, Justice Nolan relied upon the Supreme Court of Canada's decision in *Buschau v. Rogers Communications*[1] where it stated "it is clear from this explicit legislation that Parliament intended its provisions to displace common law rules, including equitable remedies and principles".

Justice Nolan pointed out that the nub of the problem lay in the fact that Mrs. Carrigan had failed during her husband's lifetime to exercise her right to an equalization of net family property pursuant to the *Family Law Act*. While she may have been entitled to exercise certain rights vis a vis the pension during Mr. Carrigan's lifetime, she had no such entitlement after his death.

On the third issue relating to the effect (if any) of the designation made in favour of Mr. Carrigan's two daughters, Justice Nolan held that the designation was only relevant if and to the extent Mr. Carrigan had no spouse as at the date of his death. Had Mr. Carrigan been separated

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1 [2006] 1 S.C.R. 973

from Ms Quinn as at the date of his death, the designation would have been effective. He was not and Ms Quinn was entitled to the whole of the death benefit.

(b) When is a Purported Revocation Valid?

The fact that the *SLRA* provides that a beneficiary designation can be made by instrument or by will and can be revoked by either method can lead to competing claims as the following cases demonstrate. Of particular interest is the extent to which the Court will impose the equitable remedy of constructive trust to address perceived inequities arising from the strict application of the applicable legislation.

(i) Gagnon v. Sussey

One of the earliest cases of note on the issue of the revocation of beneficiary designations relating to employee plans, is the decision of Justice Lally in *Gagnon v. Sussey*[2]. While the case involved the application of federal pension legislation and did not consider the possible remedy of constructive trust as later related cases did, it nonetheless serves as a starting point for a review of the relevant case law.

The deceased in that case, Jean Gagnon, was employed by the Federal Public Service at the time of his death and a contributor to a pension fund established pursuant to the *Public Service Superannuation Act.* Approximately eight years before his death, Mr. Gagnon designated the respondent, Ronald Sussey, as the sole beneficiary of the death benefits payable pursuant to Part II of the Act. He had no spouse or children. Mr. Gagnon made the designation pursuant to the regulations prescribed under the Act. Six days before his death, Mr. Gagnon

[2] [1992] O.J. No. 296, 45 E.T.R. 309 (Ont.Ct.(Gen.Div.))

made a Last Will and Testament wherein he revoked all previous testamentary dispositions and designated his father and mother as the beneficiaries of "all pension, annuity and superannuation benefits" payable as a result of his death.

The question to be decided on the application was who was entitled to the Part I and II benefits. Mr. Sussey argued that the designation in favour of Mr. Gagnon's parents in the will was not effective as the only way a beneficiary in respect of the Part II benefits could be named or substituted was in accordance with section 26 of the *Supplementary Death Benefit Regulations.* That section provides, *inter alia*, that the naming of a beneficiary or the substitution or cancellation of a named beneficiary must be in a form prescribed by the Minister, dated and witnessed and forwarded to the Minster. The applicants, Mr. Gagnon's parents, among other things, argued that section 26 was *ulta vires* because it enacted a mandatory scheme wherein the only way participants could name or substitute beneficiaries was by executing a form prescribed by the Minister and sent to the Minister prior to the participant's death. It was an "unduly restrictive attempt to regulate property and civil rights" and thus *ultra vires* the Federal Government.

Justice Lally held that the scheme prescribed by section 26 of the regulations was not *ultra vires* in that it "only marginally" encroached upon Provincial powers and there was a "functional relationship" to justify the provision. Further, it was sensible to have a requirement that a specific form be used and that the form only be effective when received by the Minister prior to death in order to facilitate the orderly process of claims.

On the issue of whether section 26 of the regulations related only to the naming and substitution of beneficiaries of Part II benefits and did not affect Mr. Gagnon's common law

right to revoke a beneficiary designation in respect of his Part I benefits, Justice Lally first noted that section 27 of the *Public Service Superannuation Act* states that the Part I benefits go to the beneficiary designated under Part II. On the issue of revocation, he indicated that he was prepared to hold that Mr. Gagnon could revoke a previous designation made by instrument by will. However, he noted that section 52(1) of the *SLRA* states that to be valid, a revocation contained in the will must "expressly relate to the designation, either generally or specifically". Insofar as the revocation language in the will did not expressly reference the Part I and II benefit it was ineffective to revoke the designation made in favour of Mr. Sussey. In any event, the purported designation of Mr. Gagnon's parents as the beneficiaries of his pension and superannuation benefits was ineffective as it did not comply with section 26 of the regulations.

(ii) Roberts v. Martindale

The 1998 decision of the British Columbia Court of Appeal in *Roberts v. Martindale* [1998] B.C.J. No 1509[3] is the next significant case of note insofar as it involved a consideration of whether the remedy of constructive trust can be used to assert a claim against death benefits proceeds payable to a designated beneficiary. The case involved death benefits payable under a life insurance policy, but reflects a reasoning cited with approval in later pension benefit cases.

The defendant in that case, John Martindale, was the ex-husband of the deceased, Joan Martindale. The plaintiff was Joan's sister. Joan had, during the course of her marriage, completed an employer form wherein she had designated John as the beneficiary of her group life insurance policy. She was later diagnosed with breast cancer and thereafter the couple separated. The separation and divorce was acrimonious involving allegations that John

[3] 162 D.L.R. (4th) 475, 21 E.T.R. (2d) 259

Martindale had been adulterous. The couple eventually entered into a separation agreement containing a general mutual release of property. The separation agreement did not specifically mention the group life insurance policy.

Joan Martindale executed a Last Will and Testament after her divorce wherein she named her sister as the sole estate trustee and beneficiary of her estate. There is no specific mention of the group life insurance policy in the will. Following Joan's death, it was discovered she had not changed the beneficiary designation on her group life insurance to designate her sister. This came as a surprise to Joan's sister and to other third parties as she had made a number of statements suggesting that she believed she had, in fact, changed the beneficiary designation. The insurance company paid the proceeds of the group life policy to John in accordance with the beneficiary designation on file. Joan's sister, in her capacity as executrix of the estate, commenced an application against John seeking recovery of the life insurance proceeds.

Justice Quijano, who presided over the initial trial, held that John held the insurance proceeds on resulting trust for Joan's sister based on Joan's mistaken belief that she had changed the beneficiary designation prior to her death. John was ordered to pay the insurance proceeds over to Joan's sister. John appealed the trial judge's decision.

The Court of Appeal dismissed John's appeal, reaching the same ultimate conclusion as the trial judge, albeit on different grounds. It held unanimously that it would be "against good conscience" for John to keep the group life insurance proceeds because he had, by the separation agreement, surrendered any right he might have to Joan's property. In asserting a claim to the insurance proceeds, John acted in breach of the separation agreement. His breach of the agreement was sufficient to call into aid the doctrine of remedial constructive trust.

(iii) Hemmerling Estate v. Hemmerling

In the later decision of Justice Nash in *Hemmerling Estate v. Hemmerling*[4], the Alberta Queen's Bench addressed the issue of whether a constructive trust could be asserted over the proceeds of a registered retirement savings plan ("RRSP"). In that case, the ex-wife of the deceased, Mr. Hemmerling, claimed an entitlement to his RRSP following his death pursuant to a designation he had made during the course of their marriage. She did so in the face of an express release of her entitlement to any RRSP in the couple's separation agreement. Mrs. Hemmerling's three sons, the executors and beneficiaries of Mr. Hemmerling's estate, brought an application seeking recovery of the RRSPs paid to her on the basis that their mother was in breach of the separation agreement and/or held the RRSP proceeds on remedial constructive trust because she had received consideration for relinquishing her rights to the RRSP.

Justice Nash noted at the outset that not all separation agreements terminate the financial bonds or extinguish all property bonds between separating parties. In some cases, they can provide for the long term care of a spouse or continuing co-ownership of property. However, in the case of the Hemmerlings, the separation agreement clearly stated that it was intended to resolve all property matters between the couple. Mrs. Hemmerling received a payment of cash in lieu of a spousal transfer from Mr. Hemmerling's RRSP and having done so was in breach of the separation agreement in refusing to sign a renunciation of her interest in the monies. Justice Nash went on to hold that even if she was not in breach of the separation agreement, Mrs. Hemmerling held the monies on constructive trust for her ex-husband's estate.

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4 [2000] A.J. No 1328, 36 E.T.R. (2d) 286

(iv) Laczova Estate v. Madonna House

In 2001, the Ontario Court of Appeal had occasion in *Laczova Estate v. Madonna House*[5] to consider the revocation and designation provisions contained in the *SLRA.* The deceased in that case, Olga Laczova, had purchased RRSPs from two banks. She designated four members of her family as the beneficiaries of the RRSPs. Shortly before she died, Olga prepared and signed a holograph will wherein she listed her assets on the first page. The list made reference to the RRSPs. However, the will did not contain a specific gift of the RRSPs, rather contained a lengthy list of legatees. Following Olga's death, her estate trustee took the position that the holograph will had the effect of revoking the earlier designations in respect of the RRSPs made in favour of her four family members and applied to the Court for directions.

Justice Sheppard held on the application in the first instance that the beneficiary designations made in respect of the two plans remained in full force and effect and were not revoked by the holograph will. The estate trustee appealed.

Justice Catzman, writing for the Court, dismissed the estate trustee's appeal and the argument that Olga's intention was clear and should prevail "notwithstanding any statutory strictures". In rejecting the estate trustee's argument, his Honour wrote:

> "The laudable objective of discerning and implementing the deceased's intention cannot be achieved by ignoring the language of the statute."

Justice Catzman further noted that Part III of the *SLRA*, and in particular section 52(1), provides that a revocation by a will is effective to revoke a designation made by instrument only if the revocation relates expressly to the designation, either generally or specifically. There was no

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5 [2001] O.J. No 4992, 207 D.L.R. (4th) 341, 152 O.A.C. 351

specific revocation of the previous beneficiary designations made in favour of the four family members. Moreover, there was no specific bequest of the RRSP. Accordingly, there had not been an effective revocation of the initial beneficiary designations in favour of the four family members.

(v) Teamsters and Participating Employers of Ontario Pension Plan v. Hay

A case of particular interest, if only because the pension administrator in question participated in the court proceedings, is the 2003 decision of Justice Hockin in *Teamsters and Participating Employers of Ontario Pension Plan v. Hay*[6]. The pension administrator in that case brought a court application for direction as to whether the ex-wife of a deceased plan member or his common law spouse was entitled to the survivor benefits payable pursuant to his death.

The plan member, Donald Linthwaite, married Daphne Linthwaite in 1946. After almost forty years of marriage, the couple separated and entered into a separation agreement which obligated Mr. Linthwaite at the time of his retirement to designate Mrs. Linthwaite as the beneficiary of the survivor benefits payable under his pension plan. A copy of the separation agreement was sent to the plan administrator. Thereafter, Mr. Linthwaite retired and was paid a retirement pension benefit. At the time of his retirement and in accordance with the provisions of the separation agreement, Mr. Linthwaite designated Mrs. Linthwaite as his "spouse" and payment thereafter under the plan was accomplished by way of a joint annuity.

Four years after he executed the separation agreement, Mr. Linthwaite entered into a common law relationship with Ruth Hay which lasted until the date of his death. A few weeks

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6 65 O.R. (3d) 744, [2003] O.J. No 2575 (Ont.S.C.J.)

before he died, Mr. Linthwaite executed a Last Will and Testament which contained the following provision:

> "To transfer any benefits to my Teamsters and Motor Transport Industrial Relationship Bureau of Ontario Pension Plan to my friend, Ruth Hay, to be hers absolutely."

Following Mr. Linthwaite's death, the pension administrator commenced payments to Mrs. Linthwaite in accordance the beneficiary designation. However, it suspended the payments a few months later when Ruth Hay asserted a claim to the same benefit pursuant to the Last Will and Testament.

Justice Hockin noted at the outset that the pension plan in question was subject to the Federal *Pension Benefits Standards Act*, R.S.C. 1985, c. 32 (2nd Suppl) and that section 31 of that Act imported "any provisions of any provincial law relating to the payment of benefits or the designation of beneficiaries under pension plans"

Ruth Hay had argued that she was Mr. Linthwaite's "spouse" at the time the pension payments commenced and as such was the only one eligible to receive the survivor's benefit in accordance with the legislation. Justice Hockin did not agree finding that the effect of the separation agreement was to transfer the pension benefit beyond her reach. In that regard, his Honour noted that section 25(4) of the *Pension Benefits Standards Act* and provisions in the plan itself contemplated a plan member could assign all of part of the pension benefit to their spouse effective as of divorce or separation and in the event of such an assignment the spouse is deemed for the purposes of the Act to have been a member of the pension plan. Moreover, a subsequent spouse of the plan member is not entitled to any pension benefit in respect of the assigned portion. The fact that Ruth Hay became Mr. Linthwaite's common law spouse did not displace Mrs. Linthwaite's clear entitlement to the survivor's benefit unless his Last Will and Testament

revoked that designation. There was no express revocation of the beneficiary designation in the will either generally or specifically.

> "A revocation, to be effective, must be precise and evidence a clear intention to revoke the designation."

Justice Hockin also noted that to the extent Mr. Linthwaite purported to change the beneficiary designation in respect of the pension survivor benefits to designate Ruth Hay it was an actionable breach of the separation agreement. Mrs. Linthwaite gave consideration for her designation as a beneficiary insofar as she gave up a claim to support at the time the couple separated. Whatever Ruth Hay might have received pursuant to the will would have been payable to Mrs. Linthwaite by way of constructive trust or damages.

(vi) Conway v. Conway Estate

The role of equitable remedies in recovering pension benefit death benefits was squarely considered by Justice Weekes of the Ontario Superior Court in the 2006 decision of *Conway v. Conway Estate*[7].

The deceased in that case, Brian Conway, worked for Hydro One and during the course of his employment and while married designated his wife, Deborah Conway, as the beneficiary of his group life insurance policy and pension survivor benefits. The Conways later separated and entered into negotiations which, among other things, involved a valuation of Mr. Conway's pension with Hydro One. The value of the pension was expressly factored into the equalization payment Mr. Conway paid to his wife. The separation agreement signed by the couple

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7 [2006] O.J. No 234. [2006] O.T.C. 44, 25 R.F.L. (6th) 106 (Ont.S.C.J.)

contained a general release of any claims but did not specifically reference the group life insurance policy or the pension plan.

Mr. Conway did not change the beneficiary designations he made in respect of his group life insurance policy or pension benefits before he died in 2005. Following his death, Mrs. Conway brought an application for a declaration that she was entitled to both the proceeds of the group life insurance and the pension survivor benefits. The estate trustee of Mr. Conway's estate opposed the application.

Justice Weekes held that having regard to the fact that the separation agreement did not specifically reference the group life insurance policy and there was no persuasive evidence that Mr. Conway intended to change the designation, that Mrs. Conway was entitled to receive the group life insurance proceeds. Justice Weekes reached a different conclusion with respect to the pension benefits, however. He took note of the provisions of the *SLRA* which contemplate that a beneficiary designation can be revoked by instrument (e.g. a separation agreement) and held that in order to validly revoke a beneficiary designation there must be specific reference to the plan in question. His conclusion in this regard was not the end of the matter, however. The estate trustee of Mr. Conway's estate contended that it would be appropriate to impose a constructive trust over the pension benefits to prevent Mrs. Conway from being unjustly enriched. Justice Weekes noted that Mr. Conway had made an equalization payment to his wife which took into account the value of the pension. It could be inferred that Mr. Conway would not have done so had he intended her to receive the benefit of it. If Mrs. Conway were to receive the survivor benefits she would be enriched and the estate would suffer a corresponding deprivation. Further there was no juristic reason for Mrs. Conway to receive the benefits in the circumstances.

Accordingly, it was appropriate to impose a constructive trust in respect of the benefits payable under the pension plan.

(vii) Ferguson v. Mew

The Ontario Court of Appeal had occasion to consider the issue of revocation of a beneficiary designation and the availability of the constructive trust remedy in the May 2009 decision of *Richardson (Estate Trustee of) v. Mew et al.*[8].

The litigation arose following the death of Michael Richardson, the ex-husband of Stephanie Mew. The claim was asserted by Michael's second wife, Anne Ferguson and related to certain life insurance Michael held as at the date of his death. Michael and Ms Mew had separated and divorced in the early 1990's following a 26 year marriage. Michael married Ms Ferguson shortly after his divorce and the couple went on to have three children. In March 1994, Ms Mew and Michael entered into a comprehensive divorce settlement agreement which, among other things, required Michael to designate her as the named beneficiary of a $100,000 life insurance policy until February 28, 1995. In 1999, Michael was diagnosed with Alzheimer's disease. He died seven years later. In the final few years of his life, Michael was incapable of managing his property and Ms Ferguson acted as his attorney for property. In that capacity, she paid the premiums on the life insurance policy in question. In fact, Ms Ferguson paid the premium herself in 2007 as by that point Michael's financial resources had been depleted and on the mistaken assumption that she was the designated beneficiary of the policy.

It was only after Michael's death in 2006 that Ms Ferguson, the estate trustee and primary beneficiary of his estate, discovered that Ms Mew was the designated beneficiary of the

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[8] 96 O.R. (3d) 65 (O.N.C.A.) affirming [2008] O.J. No. 4892 (S.C.J.).

$100,000 life insurance policy. Having understood that she was the designated beneficiary of all of Michael's life insurance, Ms Ferguson brought a motion within the context of the administration of her husband's estate seeking a declaration that Ms Mew held the life insurance proceeds on constructive trust for Michael's estate. Ms Ferguson framed her claim as one based in principles of unjust enrichment. In support of her motion, Ms Ferguson pointed out that: (1) had she known Michael's ex-wife was the named beneficiary of the life insurance policy she would have used her power of attorney to either change the designation, stop paying the premiums, or to cancel the policy; (2) Ms Mew had relinquished all rights and claims to Michael's assets pursuant to the release provision contained in the separation agreement; and (3) she had made the final premium payment out of her own funds.

Justice Strathy, who heard the matter in the first instance, dismissed the motion holding that Ms Ferguson had failed to satisfy the three part, unjust enrichment test. More specifically, she had failed to prove that she suffered a "corresponding deprivation" as a result of the proceeds being paid to Ms Mew. His Honour also dismissed Ms Ferguson's argument that she could have exercised the power of attorney she held over Michael's property to change the beneficiary designation[9].

Ms Mew appealed Justice Strathy's decision arguing that he had misapplied the doctrine of unjust enrichment. She specifically argued that His Honour had erred in failing to find that she had suffered a "corresponding deprivation" and in finding there was a juristic reason for the entitlement.

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[9] In that regard, Strathy J. held that changing the beneficiary designation was akin to a testamentary disposition and would have constituted a breach of Anne's fiduciary duty to Michael.

The Court of Appeal dismissed Ms Ferguson's appeal and upheld the motion judge's decision. Justice Gillese, writing for the Court, held that the general release contained in the separation agreement did not extend to the specific policy which had benefitted Ms Mew. On the issue of the separation agreement, Her Honour noted that the agreement contemplated that a variation proceeding was to take place prior to the February 28, 1995 date to determine Ms Mew's benefits and that the proceeding had never taken place.

As to whether or not Ms Ferguson had made a case for unjust enrichment, the Court of Appeal agreed that Ms Mew had enjoyed an enrichment but was not persuaded Ms Ferguson had suffered a "corresponding deprivation". It also held that the beneficiary designation made in favour of Ms Mew was a "juristic reason" for her enrichment. While acknowledging Ms Ferguson paid one of the final insurance premiums, Gillese, J.A. questioned whether or not a single payment over the 17 year term of the policy would warrant the imposition of a constructive trust.

Justice Strathy and the Court of Appeal distinguished *Roberts v. Martindale* on its facts. Whereas the deceased in *Roberts v. Martindale* had demonstrated a clear intention to change the beneficiary designation in favour of her sister and, in fact, believed she had done so, there was no evidence that Michael had any intention to designate anyone other than his first wife. As Justice Gillese noted, the best evidence of Michal's intention was the fact that he took no steps to change the beneficiary designation after his obligation to maintain the policy ended.

(viii) Conner v. Bruketa Estate

In 2010, Justice Clark of the Alberta Queen's Bench had another occasion in *Conner v. Bruketa Estate*[10] to consider the issue of the extent to which a deceased plan member's intentions impact upon the revocation of an existing beneficiary designation.

In that case, Shirley Conner, the estate trustee and sole beneficiary of the estate of John Bruketa, brought two applications for directions with respect to Mr. Bruketa's Last Will and Testament. Among other things, she sought a declaration that she was the designated beneficiary of Mr. Bruketa's life insurance policy and pension plan benefits or, in the alternative, an Order directing that the will be interpreted to provide that she received the life insurance proceeds and pension benefits.

Prior to his death and during the course of his employment, Mr. Bruketa had completed beneficiary designation forms with his employer wherein he designated his father, whom failing his mother, as the beneficiary of both his pension benefits and his group life insurance policy. Sometime after he completed the beneficiary designation, Mr. Bruketa gave handwritten instructions to his lawyer which expressly stated that "all pension plans, benefits and any life insurance will go to Shirley Conner as the designated beneficiary". Ms. Conner was a close friend. Mr. Bruketa did not sign the handwritten instructions but his lawyer made note of his name on the top of the document. The lawyer proceeded to prepare a will which made no reference to either the life insurance policy or the pension benefits. Her evidence was that she had mistakenly assumed that Mr. Bruketa had already made a separate beneficiary designation.

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[10] [2010] A.J. No 909, 63 E.T.R. (3d) 296, [2011] 3 W.W.R. 557 (Alta.Q.B.)

She further testified that she did not explain to Mr. Bruketa that there should be a specific clause in the will relating to the group life insurance and the pension plan.

The plan administrator was unclear on Mr. Bruketa's death who was entitled to receive the life insurance proceeds and the pension benefits and it paid the monies into Court. On the return of her applications, Ms Conner argued that the evidence was clear that Mr. Bruketa had intended that she receive the life insurance proceeds and the pension benefits on his death and that the Court should strive to give effect to his wishes. Ms Conner further argued, in the alternative, that the handwritten will instructions satisfied the statutory requirement for an instrument or declaration designating a pension of life insurance beneficiary.

Justice Clark agreed that the evidence was clear that Mr. Bruketa had intended that Ms Conner receive the pension plan benefits and life insurance proceeds on his death. It was an "exceptional case" where Mr. Bruketa's handwriting will instructions and the surrounding circumstances dictated that the Court strive to give effect to his wishes. Justice Clark went on to note that the *Trustee Act*, R.S.A. 2000, c. T-8, governs pension plan designations in the Province of Alberta and contains a provision similar to section 52 of the *SLRA* in that it contemplates that a beneficiary designation can be made by an instrument signed by the participant or signed on the participant's behalf. His Honour was prepared to accept that the handwritten instructions on which the lawyer wrote Mr. Bruketa's name satisfied the requirements of the *Trustee Act.* Justice Clark further held that the handwritten instructions satisfied the requirements of the *Insurance Act*, R.S.A. 2000, c. T-8 despite the fact that Mr. Bruketa had not "signed" the document. In that regard, he noted that case law interpreting the Alberta *Insurance Act* set a low threshold for the making of a beneficiary designation.

(f) ***Tower Estate v. Tower Estate***

The use of the constructive trust remedy in the context of pension plan death benefits was considered by the New Brunswick Queen's Bench in the recent, 2010 decision of *Tower Estate v. Tower Estate*[11]. In that case, the three sons of the deceased plan member, Cedric Tower, brought an action seeking a declaration that their father's estate was entitled to supplementary death benefits and superannuation public service pension benefits payable on Mr. Tower's death. The defendant in the proceeding was their mother, Mr. Tower's ex-wife.

Mr. and Mrs. Tower (who later remarried and was known as Mrs. Grant) had married in the early 1960s. Mr. Tower was employed by Correctional Services Canada and acquired entitlements pursuant to the *Superannuation Act*, R.S.C. 1985, C-P-36. During the course of the marriage, Mr. Tower appointed Mrs. Grant as the beneficiary of death benefits payable pursuant to the *Superannuation Act*. The couple separated in 1992 and divorced in 1995. The separation agreement signed by Mr. Tower and Mrs. Grant purported to settle all outstanding issues between them. The agreement made no mention of the pension benefits and Mr. Tower died without having revoked the beneficiary designations made during the course of the marriage. He died intestate and his sons were the heirs of his estate pursuant to the intestacy laws of New Brunswick.

Mrs. Grant maintained in responding to the application that she was the rightful owner of the supplementary death benefits and the Superannuation Public Service pension benefits. Applying the reasoning in *Gagnon v. Sussey*, Justice Savoie held that section 26 of the Regulations prescribed under the Federal *Superannuation Act* is part of a complete code and a

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[11] [2010] N.B.J. No 395, 366 N.B.R. (2d) 363

system which precludes reliance upon the common law right of revocation by will unless the testamentary revocation complied with the regulatory requirements (i.e. had to be evidenced in writing in the form set out in the regulations, dated, signed and witnessed and forwarded to the Minister).

Mr. Tower's sons had pleaded that the pension benefits their mother received were subject to a constructive trust to the benefit of the estate. They cited both *Hemmerling Estate v Hemmerling* and *Roberts v. Martindale* as authority for their position. Justice Savoie held that both cases could be distinguished insofar as there was no evidence that Mr. Tower had not intended his ex-wife to receive the pension benefits. Moreover, the estate trustees had not made the case for unjust enrichment as there was a juristic reason, in the form of the beneficiary designation, for the enrichment Mr. Tower's ex-wife received. In his conclusion, Justice Savoie noted that Mr. Tower may have intentionally left his ex-wife as the beneficiary or it may have been the result of neglect or inadvertence. In either case, Mrs. Grant was entitled to receive the death benefits.

Best Practices When Faced with a Dispute over Death Benefits

As the decision in *Teamsters and Participating Employers of Ontario Pension Plan v. Hay* illustrates, plan administrators can expose a plan to unnecessary risk and/or incur unnecessary costs if they fail to respond to appropriately to the claims of competing beneficiaries.

The following are some suggested best practices:

1. The plan administrator should make reasonable inquiries to determine if there might be more than one beneficiary designation. The nature and extent of the inquiries to be made will depend upon the applicable legislation and the terms of the plan itself (e.g. which might set out a procedure for providing notice to the administrator of any changes in beneficiary designations).

2. In circumstances where the provisions of section 44 of the *PBA* apply, the plan administrator should make reasonable inquiries to determine if there is a "spouse" or might be more than one "spouse". Once again, the nature and extent of the inquiries to be made will depend upon the applicable legislation and the terms of the plan itself (e.g. which might set out a procedure for providing notice to the administrator of any changes in beneficiary designations).

3. The plan administrator should provide reasonable notice to interested parties of the proposed payout of pension benefits where there is reason to believe that there are competing beneficiary claims.

4. The plan administrator should consider holding the pension benefits in trust while the competing beneficiaries attempt to negotiate a settlement of their dispute. It should consider whether the monies need to be invested depending upon how long it appears it might hold the monies in trust.

5. The plan administrator should consider insisting that any settlement between competing beneficiaries is approved by the Court recognizing that the process of securing court approval can be costly and time consuming.

6. In circumstances where no Court order is to be obtained, the plan administrator should consider insisting upon a written release signed after the parties have secured independent legal advice.

7. Where the benefits at issue are significant, the plan administrator should consider paying the monies into Court on notice to the interested beneficiaries recognizing that cost of paying the monies into Court may be a cost the plan administrator must bear.

SCHEDULE A

Succession Law Reform Act
R.S.O. 1990, CHAPTER S.26

PART III
DESIGNATION OF BENEFICIARIES OF INTEREST IN FUNDS OR PLANS

Definitions, Part III

50. In this Part,

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

"plan" means,

(a) a pension, retirement, welfare or profit-sharing fund, trust, scheme, contract or arrangement or a fund, trust, scheme, contract or arrangement for other benefits for employees, former employees, directors, former directors, agents or former agents of an employer or their dependants or beneficiaries,

(b) a fund, trust, scheme, contract or arrangement for the payment of a periodic sum for life or for a fixed or variable term, or

(c) a fund, trust, scheme, contract or arrangement of a class that is prescribed for the purposes of this Part by a regulation made under section 53.1,

and includes a retirement savings plan, a retirement income fund 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*. ("régime") R.S.O. 1990, c. S.26, s. 50; 1994, c. 27, s. 63 (4).

Designation of beneficiaries

51.(1) 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 her or signed on his or her behalf by another person in his or her presence and by his or her direction; or

(b) by will,

and may revoke the designation by either of those methods.

Idem

(2) A designation in a will is effective only if it relates expressly to a plan, either generally or specifically. R.S.O. 1990, c. S.26, s. 51.

Revocation and validity of designation

Revocation of designation

52.(1) A revocation in a will is effective to revoke a designation made by instrument only if the revocation relates expressly to the designation, either generally or specifically.

Idem

(2) Despite section 15, a later designation revokes an earlier designation, to the extent of any inconsistency.

Idem

(3) Revocation of a will revokes a designation in the will.

Where will invalid

(4) 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.

Idem

(5) 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.

Earlier designations not revived

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

Effective date

(7) Despite section 22, a designation or revocation in a will is effective from the time when the will is signed. R.S.O. 1990, c. S.26, s. 52.

Payment and enforcement

53. Where a participant in a plan has designated a person to receive a benefit under the plan on the death of the participant,

(a) the person administering the plan is discharged on paying the benefit to the person designated under the latest designation made in accordance with the terms of the plan, in the absence of actual notice of a subsequent designation or revocation made under section 51 but not in accordance with the terms of the plan; and

(b) the person designated may enforce payment of the benefit payable to him under the plan but the person administering the plan may set up any defence that he could have set up against the participant or his or her personal representative. R.S.O. 1990, c. S.26, s. 53.

Regulations, Part III

53.1 The Lieutenant Governor in Council may make regulations prescribing classes of funds, trusts, schemes, contracts or arrangements for the purposes of this Part. 1994, c. 27, s. 63 (5).

Application of Part to plan

54.(1) Where this Part is inconsistent with a plan, this Part applies, unless the inconsistency relates to a designation made or proposed to be made after the making of a benefit payment where the benefit payment would have been different if the designation had been made before the benefit payment, in which case the plan applies.

Exception

(2) This Part does not apply to a contract or to a designation of a beneficiary to which the *Insurance Act* applies. R.S.O. 1990, c. S.26, s. 54.

Application to retirement income funds

54.1(1) This Part applies to the designation of a beneficiary of a retirement income fund, whether the designation was made before or after the effective date, and even if the participant who made the designation died before the effective date.

Exception

(2) Despite subsection (1), this Part as it read immediately before the effective date continues to apply in a particular case if applying the Part as it read after the effective date would,

(a) change the result in a proceeding in which a judgment or final order was made before the effective date, even if the judgment or order is subject to appeal; or

(b) make a person liable to repay or account for retirement income fund proceeds received or paid by the person before the effective date.

Definition

(3) In this section,

"effective date" means the date on which the *Statute Law Amendment Act (Government Management and Services), 1994* received Royal Assent. 1994, c. 27, s. 63 (5).

SCHEDULE "B"

Pension Benefits Act
R.S.O. 1990, CHAPTER P.8

Joint and survivor pension benefits

44. (1) Every pension paid under a pension plan to a former member who has a spouse on the date that the payment of the first instalment of the pension is due shall be a joint and survivor pension. R.S.O. 1990, c. P.8, s. 44 (1); 1999, c. 6, s. 53 (5); 2005, c. 5, s. 56 (9).

Note: On a day to be named by proclamation of the Lieutenant Governor, subsection (1) is amended by striking out "to a former member" and substituting "to a retired member". See: 2010, c. 9, ss. 30 (1), 80 (2).

Commuted value

(2) The commuted value of a joint and survivor pension under subsection (1) shall not be less than the commuted value of the pension that would be payable under the pension plan to the former member. R.S.O. 1990, c. P.8, s. 44 (2).

Note: On a day to be named by proclamation of the Lieutenant Governor, subsection (2) is amended by striking out "to the former member" at the end and substituting "to the retired member". See: 2010, c. 9, ss. 30 (2), 80 (2).

Amount of survivor benefit

(3) The amount of the pension payable to the survivor of the former member and the spouse of the former member shall not be less than 60 per cent of the pension paid to the former member during the joint lives of the former member and his or her spouse. R.S.O. 1990, c. P.8, s. 44 (3); 1999, c. 6, s. 53 (6); 2005, c. 5, s. 56 (10).

Note: On a day to be named by proclamation of the Lieutenant Governor, subsection (3) is repealed and the following substituted:

Amount of survivor benefit

(3) Upon the death of the retired member, the pension payable to his or her surviving spouse shall not be less than 60 per cent of the pension paid to the retired member during their joint lives. 2010, c. 9, s. 30 (3).

See: 2010, c. 9, ss. 30 (3), 80 (2).

Application of subss. (1-3)

(4) Subsections (1) to (3) do not apply,

(a) in respect of a pension benefit if payment of the pension has commenced before the 1st day of January, 1988; or

(b) in respect of a former member who is living separate and apart from his or her spouse on the date that payment of the first instalment of the pension is due. R.S.O. 1990, c. P.8, s. 44 (4); 1999, c. 6, s. 53 (7); 2005, c. 5, s. 56 (11).

Note: On a day to be named by proclamation of the Lieutenant Governor, clause (b) is amended by striking out "a former member" and substituting "a retired member". See: 2010, c. 9, ss. 30 (4), 80 (2).

Deferred life annuity

(5) Where,

(a) prior to the 1st day of January, 1988, a deferred life annuity has been purchased from an insurance company for a person entitled to a deferred pension under the *Pension Benefits Act*, being chapter 373 of the Revised Statutes of Ontario, 1980;

(b) payments have not commenced under the annuity on the 1st day of January, 1988; and

(c) the recipient of the payments has a spouse on the date payments commence,

the annuity shall be paid as a joint and survivor pension in accordance with the requirements of this section and the insurance company shall make payments accordingly. R.S.O. 1990, c. P.8, s. 44 (5); 1999, c. 6, s. 53 (8); 2005, c. 5, s. 56 (12).

Application of ss. 45, 46

(6) For the purposes of subsection (5), the insurance company shall be deemed to be the administrator under sections 45 and 46. R.S.O. 1990, c. P.8, s. 44 (6).

Note: On a day to be named by proclamation of the Lieutenant Governor, section 44 is amended by adding the following subsections:

Lump sum payment, small amounts

(7) A pension plan may provide for payment, upon the death of a retired member, of the commuted value of the joint and survivor benefit to a person who is entitled to the joint and survivor benefit if, at the date of death,

(a) the annual benefit payable is not more than 4 per cent of the Year's Maximum Pensionable Earnings; or

(b) the commuted value of the benefit is less than 20 per cent of the Year's Maximum Pensionable Earnings. 2010, c. 9, s. 30 (5).

Right to transfer lump sum

(8) The person to whom the payment under subsection (7) is to be made may require the administrator to pay the commuted value into a registered retirement savings arrangement and the person may exercise this entitlement by delivering a direction to the administrator within the prescribed period. 2010, c. 9, s. 30 (5).

Same

(9) Section 50.1 applies with respect to the payment into the registered retirement savings arrangement. 2010, c. 9, s. 30 (5).

See: 2010, c. 9, ss. 30 (5), 80 (2).

Information for payment

45.(1) Before commencing payment of a pension or pension benefit, the administrator of a pension plan shall require the person entitled to the payment to provide to the administrator the information needed to calculate and pay the pension or pension benefit.

Person to provide information

(2) The person entitled to the payment shall provide the information to the administrator.

Discharge of administrator

(3) In the absence of actual notice to the contrary, the administrator is discharged on paying the pension or pension benefit in accordance with the information provided by the person in accordance with subsection (2) or, if the person does not provide the information, in accordance with the latest information in the records of the administrator. R.S.O. 1990, c. P.8, s. 45.

Pre-retirement death benefit

48. (1) If a member or former member of a pension plan who is entitled under the pension plan to a deferred pension described in section 37 (entitlement to deferred pension) dies before commencement of payment of the deferred pension, the person who is the spouse of the member or former member on the date of death is entitled,

Note: On a day to be named by proclamation of the Lieutenant Governor, subsection (1) is amended by striking out the portion before clause (a) and substituting the following:

Pre-retirement death benefit

(1) If a member who is entitled under the pension plan to a deferred pension described in section 37 dies before payment of the first instalment is due, or if a former member or retired member dies before payment of the first instalment of his or her deferred pension or pension is due, the person who is his or her spouse on the date of death is entitled,

See: 2010, c. 9, ss. 33 (1), 80 (2).

(a) to receive a lump sum payment equal to the commuted value of the deferred pension; or

Note: On a day to be named by proclamation of the Lieutenant Governor, clause (a) is repealed and the following substituted:

(a) to receive a lump sum payment equal to the commuted value of the deferred pension;

See: 2010, c. 9, ss. 33 (2), 80 (2).

(b) to an immediate or deferred pension the commuted value of which is at least equal to the commuted value of the deferred pension. R.S.O. 1990, c. P.8, s. 48 (1); 1999, c. 6, s. 53 (10); 2005, c. 5, s. 56 (14).

Note: On a day to be named by proclamation of the Lieutenant Governor, clause (b) is repealed and the following substituted:

(b) to require the administrator to pay an amount equal to the commuted value of the deferred pension into a registered retirement savings arrangement; or

(c) to receive an immediate or deferred pension, the commuted value of which is at least equal to the commuted value of the deferred pension.

See: 2010, c. 9, ss. 33 (2), 80 (2).

Idem

(2) If a member of a pension plan continues in employment after the normal retirement date under the pension plan and dies before commencement of payment of pension benefits referred to in section 37, the person who is the spouse of the member or former member on the date of death is entitled,

(a) to receive a lump sum payment equal to the commuted value of the pension benefit; or

(b) to an immediate or deferred pension the commuted value of which is at least equal to the commuted value of the pension benefit. R.S.O. 1990, c. P.8, s. 48 (2); 1999, c. 6, s. 53 (11); 2005, c. 5, s. 56 (15).

Note: On a day to be named by proclamation of the Lieutenant Governor, subsection (2) is repealed and the following substituted:

Same

(2) If a member of a pension plan continues in employment after the normal retirement date under the pension plan and dies before payment of pension benefits referred to in section 37 begins, the person who is the spouse of the member on the date of death is entitled,

(a) to receive a lump sum payment equal to the commuted value of the pension benefits;

(b) to require the administrator to pay an amount equal to the commuted value of the pension benefits into a registered retirement savings arrangement; or

(c) to receive an immediate or deferred pension, the commuted value of which is at least equal to the commuted value of the pension benefits. 2010, c. 9, s. 33 (3).

See: 2010, c. 9, ss. 33 (3), 80 (2).

Application of subss. (1, 2)

(3) Subsections (1) and (2) do not apply where the member or former member and his or her spouse are living separate and apart on the date of the death of the member or former member. R.S.O. 1990, c. P.8, s. 48 (3); 1999, c. 6, s. 53 (12); 2005, c. 5, s. 56 (16).

Note: On a day to be named by proclamation of the Lieutenant Governor, subsection (3) is repealed and the following substituted:

Application of subss. (1, 2)

(3) Subsections (1) and (2) do not apply where the member, former member or retired member and his or her spouse are living separate and apart on the date of death. 2010, c. 9, s. 33 (4).

See: 2010, c. 9, ss. 33 (4), 80 (2).

Direction

(4) A spouse may exercise his or her entitlement under subsection (1) or (2) by delivering a direction to the administrator within the prescribed period and, if the spouse does not do so, the spouse is deemed to have elected to receive an immediate pension. 2010, c. 9, s. 33 (5).

Calculation of benefit

(5) For the purposes of this section, the deferred pension or pension benefits to which a member is entitled if the member dies while employed shall be calculated as if the member's employment were terminated immediately before the member's death. R.S.O. 1990, c. P.8, s. 48 (5).

Designated beneficiary

(6) A member or former member of a pension plan may designate a beneficiary and the beneficiary is entitled to be paid an amount equal to the commuted value of the deferred pension mentioned in subsection (1) or (2) if,

(a) the member or former member does not have a spouse on the date of death; or

(b) the member or former member is living separate and apart from his or her spouse on that date. R.S.O. 1990, c. P.8, s. 48 (6); 1999, c. 6, s. 53 (14); 2005, c. 5, s. 56 (18).

Note: On a day to be named by proclamation of the Lieutenant Governor, subsection (6) is repealed and the following substituted:

Designated beneficiary

(6) A member, former member or retired member described in subsection (1) may designate a beneficiary and the beneficiary is entitled to be paid an amount equal to the commuted value of the deferred pension mentioned in subsection (1) or (2),

(a) iif the member, former member or retired member does not have a spouse on the date of death; or

(b) if the member, former member or retired member is living separate and apart from his or her spouse on the date of death. 2010, c. 9, s. 33 (6).

See: 2010, c. 9, ss. 33 (6), 80 (2).

Estate entitlement

(7) The personal representative of the member or former member is entitled to receive payment of the commuted value mentioned in subsection (1) or (2) as the property of the member or former member, if the member or former member has not designated a beneficiary under subsection (6) and,

(a) does not have a spouse on the date of the member or former member's death; or

(b) is living separate and apart from his or her spouse on that date. R.S.O. 1990, c. P.8, s. 48 (7); 1999, c. 6, s. 53 (15); 2005, c. 5, s. 56 (19).

Note: On a day to be named by proclamation of the Lieutenant Governor, subsection (7) is repealed and the following substituted:

Estate entitlement

(7) The personal representative of a member, former member or retired member described in subsection (1) is entitled to receive payment of the commuted value mentioned in subsection (1) or (2) as the property of the member, former member or retired member if he or she has not designated a beneficiary under subsection (6) and,

(a) does not have a spouse on the date of death; or

(b) is living separate and apart from his or her spouse on the date of death. 2010, c. 9, s. 33 (6).

See: 2010, c. 9, ss. 33 (6), 80 (2).

Dependent children

(8) If the pension plan provides for payment of pension benefits to or for a dependent child or dependent children of the member or former member upon the death of the member or former member, the commuted value of the payments may be deducted from the entitlement of a

beneficiary designated under subsection (6) or of a personal representative under subsection (7). R.S.O. 1990, c. P.8, s. 48 (8).

Note: On a day to be named by proclamation of the Lieutenant Governor, subsection (8) is repealed and the following substituted:

Dependent children

(8) If the pension plan provides for payment of pension benefits to or for a dependent child or dependent children of the member, former member or retired member upon his or her death, the commuted value of the payments may be deducted from the entitlement of a beneficiary designated under subsection (6) or of a personal representative under subsection (7). 2010, c. 9, s. 33 (6).

See: 2010, c. 9, ss. 33 (6), 80 (2).

Note: On a day to be named by proclamation of the Lieutenant Governor, section 48 is amended by adding the following subsections:

Additional entitlement

(8.1) A spouse who has an entitlement under subsection (1) or (2), a designated beneficiary who has an entitlement under subsection (6) or a personal representative who has an entitlement under subsection (7) is entitled to a lump sum payment from the pension fund equal to the amount of any contributions that the member or former member was required to make under the pension plan in respect of employment before January 1, 1987, plus interest credited to the contributions. 2010, c. 9, s. 33 (7).

Spouse's right to transfer additional entitlement

(8.2) A spouse entitled to a lump sum payment under subsection (8.1) may require the administrator to pay the lump sum into a registered retirement savings arrangement and may exercise this entitlement by delivering a direction to the administrator within the prescribed period. 2010, c. 9, s. 33 (7).

Payments into registered retirement savings arrangements

(8.3) Section 50.1 applies with respect to any payment into a registered retirement savings arrangement. 2010, c. 9, s. 33 (7).

Limitation on all payments

(8.4) The entitlements under this section are subject to the prescribed limitations in respect of the transfer of funds from pension funds. 2010, c. 9, s. 33 (7).

See: 2010, c. 9, ss. 33 (7), 80 (2).

Information

(9) It is the responsibility of the person entitled to the payment to provide to the administrator the information needed to make the payment. R.S.O. 1990, c. P.8, s. 48 (9).

Discharge of administrator

(10) In the absence of actual notice to the contrary, the administrator is discharged on making payment in accordance with the information provided by the person. R.S.O. 1990, c. P.8, s. 48 (10).

Offset

(11) A pension plan may provide for reduction of an amount to which a person is entitled under this section to offset any part of a prescribed additional benefit that is attributable to an amount paid by an employer, subject to the following:

1. The reduction shall be calculated in the prescribed manner.

2. The reduction shall not exceed the prescribed limits. R.S.O. 1990, c. P.8, s. 48 (11).

Discharge of entitlement

(12) Payment in accordance with this section replaces the entitlement of a member or former member in respect of a deferred pension mentioned in section 37. R.S.O. 1990, c. P.8, s. 48 (12).

Note: On a day to be named by proclamation of the Lieutenant Governor, subsection (12) is amended by striking out "of a member or former member" and substituting "of a member, former member or retired member". See: 2010, c. 9, ss. 33 (8), 80 (2).

Order or domestic contract

(13) An entitlement to a benefit under this section is subject to any right to or interest in the benefit set out in a domestic contract or an order referred to in section 51 (payment on marriage breakdown). R.S.O. 1990, c. P.8, s. 48 (13).

Note: On a day to be named by proclamation of the Lieutenant Governor, subsection (13) is repealed and the following substituted:

Restriction on entitlement

(13) An entitlement to a benefit under this section is subject to any right to or interest in the benefit set out in an order made under Part I (Family Property) of the Family Law Act, a family arbitration award or a domestic contract. 2009, c. 11, s. 44.

See: 2009, c. 11, ss. 44, 53 (2).

Waiver

(14) The spouse of a member or former member may waive the spouse's entitlement under subsection (1) or (2) by delivering a written waiver, in the form approved by the Superintendent, to the administrator of the pension plan. 1999, c. 15, s. 8; 2005, c. 5, s. 56 (20).

Cancellation of waiver

(14.1) A spouse who has delivered a waiver may cancel it by delivering a written and signed notice of cancellation to the administrator before the date of death of the member or former member. 1999, c. 15, s. 8; 2005, c. 5, s. 56 (21).

Effect of waiver

(14.2) If a waiver is in effect on the date of death of the member or former member, subsections (6) and (7) apply as if the member or former member does not have a spouse on the date of death. 1999, c. 15, s. 8; 2005, c. 5, s. 56 (22).

Definition

(15) In this section,

"personal representative" has the same meaning as in the *Estates Administration Act*. R.S.O. 1990, c. P.8, s. 48 (15).