Trusts, Trustees, Trusteeships III

Use of Trusts as Will Substitutes

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There are numerous mechanisms by which a Canadian resident may transfer property on death outside of a will, each with advantages and limitations. This paper describes some of the most popular will substitutes used in Canada, with a particular focus on trusts and joint tenancy. Reasons for making use of the various will substitutes, as well reasons for restricting their use, are examined.

In particular, in addition to reducing the probate fees that might otherwise be payable in a will-planned estate, each of the will substitutes discussed below has a specific purpose and is useful in its own right, independent of probate planning. Many of the reasons for making use of will substitutes are entirely inoffensive in that they do not adversely affect the rights of third parties. Examples include maintaining confidentiality as to the value and terms of the distribution of an estate (trusts), providing security with respect to the financial well-being of loved ones (life insurance) and saving for retirement (registered retirement savings plans and registered retirement income funds). On the other hand, some limitations on the use of will substitutes are necessary as many of these same will substitute vehicles provide ancillary benefits (or primary benefits, depending on the intentions of those involved) which may negatively affect the rights of third parties such as creditors, disgruntled spouses and dependants. As we will see below, both objective and subjective factors may be considered when determining whether a particular will substitute structure should stand in the face of a challenge by a third party.

A NOTE ON PROBATE PLANNING IN CANADA

In line with the principle established in the oft-cited *Duke of Westminster* decision,[1] Courts in Ontario have stated that engaging in estate planning with a view to avoiding or reducing probate fees is both legitimate and prudent.[2] Unfortunately, the Courts in other provinces have been less planner-friendly.[3] It is in this conflicting environment that we examine the imposition of probate fees in Canada.

Where an individual uses a will in his or her estate planning, probate will generally be required in a particular province if the will encompasses assets such as bank accounts, brokerage accounts, and personally held real estate located in the province. Probate fees vary by province and territory from nil for notarial wills in Quebec to 1.5% of the value of the estate in Ontario. No federal probate fees are levied. Multiple probate proceedings are generally required where real property is owned in multiple Canadian jurisdictions.

Planning to avoid provincial probate fees generally involves will substitutes, including *inter vivos* trusts, joint ownership of assets and registered retirement savings plans, registered

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[1] *Inland Revenue Commissioners* v. *Westminster (Duke)*, [1936] AC 1 (HL).

[2] See for example the decision in *Granovsky Estate* v. *Ontario* (1998), 156 D.L.R. (4th) 557.

[3] See for example *Pollock* v. *Manitoba*, 9 E.T.R. (3d) 270, which distinguishes the *Granovsky* decision, and *Re: Carlisle Estate* (2007) S.K. Q.B. 435 in which a separate insurance designation in a will was held to make the insurance proceeds subject to probate fees.

retirement income funds, life insurance policies and pension plans, all of which may devolve directly to a named beneficiary.

One form of probate planning which does not involve will substitutes is the execution of dual wills. This form of will planning involves splitting an estate into two, with the "primary estate" containing assets that require probate for their transfer (this estate will be governed by the "primary will") and the "secondary estate" containing assets that do not require probate (this estate will be governed by the "secondary will"). In jurisdictions in which this planning has been accepted (namely, Ontario), only the primary will is admitted to probate and the probate fees are calculated on the value of the primary estate alone. This planning is particularly useful for clients with shares or debt in private companies, as such interests can be excluded from the primary estate and from the application of probate fees without hindering the transmission of the assets to the beneficiaries. Of course, a great deal of care must be taken in the drafting and execution of primary and secondary wills; dual wills quickly become complex and care must be taken that the secondary will does not revoke the primary one. If the wills have different beneficiaries then the drafting must take into account which assets will bear what extent of taxes and other debts.

There is no available data indicating whether the use of will substitutes is reduced in jurisdictions that recognize dual wills.

WILL SUBSTITUTE VEHICLES

Trusts

Inter vivos trusts are common in Canadian estate planning and are frequently used for traditional family trusts and trusts for special needs individuals. *Inter vivos* trusts have a number of tax and non-tax advantages over wills. As noted above, non-income tax advantages of establishing an *inter vivos* trust include potential probate savings and confidentiality as to the terms and assets of the trust. Further, *inter vivos* trusts provide continuity in the management of assets before and after death. As will be discussed below, *inter vivos* trusts also offer some protection against the claims of creditors, spouses and dependants (see the discussion under Claw Back Regimes).

Common income tax reasons for establishing an *inter vivos* trust include income-splitting with spouses and/or children, benefiting from reduced provincial tax rates if there is jurisdiction shopping, and avoiding a deemed disposition on death. With standard *inter vivos* trusts, however, there will be a deemed disposition at the time property is transferred into the trust and every 21 years thereafter. As well, income and gains earned and retained in *inter vivos* trusts are taxed at the highest marginal rates, whereas testamentary trusts benefit from the graduated tax rates of an individual.

In 2001, a number of special *inter vivos* trusts were introduced in the *Income Tax Act* (Canada) (the "Tax Act"),[4] which offer the additional tax benefit of a rollover on the transfer of assets to the trusts. As well, certain of these trusts are not immediately subject to the 21-year deemed disposition rule that applies to standard *inter vivos* trusts. There are, however, tax disadvantages

[4] RSC 1985, c. 1 (5th Supp.), as amended.

of using the special trusts instead of standard *inter vivos trusts*.[5] These special trusts have become known as alter-ego trusts,[6] joint partner trusts,[7] self-benefit trusts[8] and qualifying disposition trusts.[9] Each is discussed below.

Alter-ego and Joint Partner Trusts

Alter ego trusts are probably the best known of the new trusts.[10] An alter ego trust is a trust created by a resident of Canada who is at least 65 year of age where the terms of the trust provide that:

- the individual who creates the trust is entitled to all of the income of the trust that arises prior to the individual's death; and

- no other person may receive or obtain the use of any of the income or capital of the trust prior to the death of the creator of the trust.

Much like alter ego trusts, joint partner trusts are trusts created by a Canadian resident who is at least 65 years of age where the terms of the trust provide that:

- the individual who creates the joint partner trust and his or her spouse or common-law partner are the only people entitled to receive the income of the trust that arises prior to the death of the survivor of them; and

- no one but the trust creator and his or her spouse or common-law partner may receive or obtain the use of any of the income or capital of the trust prior to the death of the survivor of them.

For both alter ego and joint partner trusts, there is no deemed disposition when assets are transferred into the trust unless an election is made otherwise. Instead, gains are recognized on actual dispositions and there is a deemed disposition of all assets in the trust, for alter ego trusts, on the death of the creator of the trust and for joint partner trusts, on the death of last to die of the creator of the trust and his or her spouse or common-law partner. The 21-year deemed disposition rule does not immediately apply to an alter ego trust or a joint partner trust; the clock begins to run after the deemed disposition on the death of the creator (alter ego trusts) or on the death of the last to die of the creator and his or her spouse or common-law partner (joint partners trusts).[11]

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[5] For a more complete discussion of the tax disadvantages of the new inter vivos trusts, please see Catherine Brown, "Alter Ego, Joint Conjugal, and Self-Benefit Trusts Revisited: Some Troubling Tax Issues and a Search for Better Alternatives" in "Personal Tax Planning," (2005), vol. 53, no. 1 *Canadian Tax Journal*, 224-244 [*Brown Paper*].

[6] Defined in subsection 248(1) of the Tax Act.

[7] Defined in subsection 248(1) of the Tax Act.

[8] Subparagraph 73(1.02)(b)(ii) of the Tax Act.

[9] Section 107.4 of the Tax Act.

[10] *Brown Paper, supra* note 5 at 226.

[11] Mary Anne Bueschkens, "Trusts: Practical Issues, Uses, and Pitfalls," *Report of Proceedings of Fifty-Eighth Tax Conference*, 2006 Tax Conference (Toronto: Canadian Tax Foundation, 2007), 34:1-29 [*Bueschkens Paper*].

Alter ego trusts are particularly well-suited for asset management in cases of personal incapacity.[12] As well, assets in alter ego trusts are not subject to probate and enjoy some protection from claims of creditors and spousal and dependant relief claims. Disadvantages of alter ego trusts include the fact that testamentary graduated tax rates, tax-deferred rollovers of trust assets to a spouse and rollovers of certain property to children are all not available on the death of the creator.

While there are similar limitations on rollovers of certain property from joint partner trusts to children, under a joint partner trust both spouses may benefit under the trust during their lifetimes. One disadvantage of establishing joint partner trusts as compared to spousal trusts created on the death of the settlor is that joint partner trusts, being *inter vivos* trusts, do not benefit from graduated tax rates, whereas testamentary trusts do.[13]

An alter ego trust or a joint partner trust can, in appropriate circumstances, eliminate the need for a will and can be used as a probate planning tool. By their terms, such trusts may direct that a gift over to a contingent beneficiary be made following the death of the creator (in an alter ego trust), or the death of the last to die of the creator and his or her spouse or common-law partner (in a joint partner trust). As discussed above, where the trust is a true *inter vivos* trust, the assets that are the subject of the trust will not form part of the deceased's estate for probate purposes. Further, in certain provinces – most notably British Columbia, where the *Wills Variation Act*[14] can add a level of uncertainty in testamentary planning – these trusts may be a useful alternative to a will to ensure that the testator's wishes are fulfilled.[15]

The use of an alter ego or joint partner trust may also expedite the transfer of assets to the next generation of beneficiaries following the death of the spouses, since the probate process (including dealing with the estate registrar) will be avoided. The use of such trusts will also avoid the necessity of multiple probate proceedings where real property is owned in multiple jurisdictions (since legal title to the property will already rest with the trustees, the death of the settlor of the trust will not result in a requirement to probate a will in order to deal with the trust property).

Self Benefit Trusts

A "self-benefit" trust is similar to an alter ego trust, except that the creator of the trust has not yet attained the age of 65. Under this type of trust, a tax-deferred rollover is permitted on the transfer of capital property to the trust provided that, immediately after the transfer, no person other than the settlor may hold a right under the trust, and provided that the following conditions are met:

- the terms of the trust are such that, during the settlor's lifetime, only the settlor is entitled to receive or use the income or capital of the trust arising before his or her death;

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[12] *Brown Paper, supra* note 5 at 227, citing *Stone (Public Trustee of)* v. *Stone Estate* (1994), 4 ETR (2d) 165 (Alta. QB); varied (1997), 54 Alta. LR (3d) 598 (CA); and *Stone* v. *Stone* (2001), 39 ETR (2d) 292 (Ont. CA) [*Stone (Ontario)*].

[13] *Brown Paper, supra* note 5 at 243.

[14] RSBC 1996, c. 490, as amended.

[15] *Bueschkens Paper*, *supra* note 11 at 34:21.

- the transfer of the property does not result in a change in the beneficial ownership of the property (only a change in legal title to the property); and
- after the transfer, no person other than the settlor has an absolute or contingent right to any of the trust property,

Provided that the above conditions are satisfied, an individual, regardless of age, can transfer property to a self-benefit trust on a tax-deferred basis.

Self-benefit trusts may have been introduced to meet the need for "politicians' blind trusts," which are established for the purposes of compliance with federal and provincial conflict-of-interest guidelines.[16] However, these trusts may have other uses.

As with an alter ego and joint partner trusts, the 21-year deemed disposition rule will not apply during the lifetime of the settlor. However, the fact that beneficial ownership of property transferred to these trusts remains with the settlor results in a denial of certain benefits associated with other trust structures. For example, the property of the self-benefit trust will form part of the settlor's estate on his or her death. For this reason probate fees can only be avoided in special circumstances, such as where the trust terms provide that, during the lifetime of the settlor, he or she is the sole income and capital beneficiary of the trust, but on the death of the settlor the capital interest is to be transferred under a general power of appointment exercisable by a person named in the settlor's will.[17] The usefulness of a self-benefit trust as a will substitute is thus limited.

Qualifying Disposition Trusts

A qualifying disposition trust is similar to a self-benefit trust in that an individual who is under the age of 65 may make use of such structures and there is no change in beneficial ownership on the transfer of property to the trust. One distinction is that property transferred to a qualifying disposition trust must be non-capital property. In addition to numerous technical provisions which determine whether a disposition to the trust is a "qualifying disposition" under the Tax Act the following conditions must be met:

- the transfer of property to the trust results in a change in legal title only and beneficial ownership remains with the settlor;
- the disposition is not by a person resident in Canada to a non-resident trust; and
- immediately after the transfer no person other than the settlor holds an absolute or contingent interest of any kind in the trust.

Qualifying disposition trusts permit the tax deferred roll-over of properties such as resource properties and land inventories to a trust for the benefit of the transferring individual. As with the other types of special trusts noted, above the 21-year deemed disposition rule will not begin to apply until the date of the settlor's death. As well, the trust assets will be subject to a deemed

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[16] *Brown Paper, supra* note 5 at 230.

[17] *Brown Paper, supra* note 5 at 233.

disposition on the settlor's death. As with the self-benefit trust, a qualifying disposition trust appears to allow for the avoidance of probate only where a general power of appointment is provided in the terms of the trust and is exercisable under the settlor's will by which capital beneficiaries may be appointed. Like the self-benefit trust, the use of qualifying disposition trusts as will substitutes are somewhat limited.

"Pour-over" Trust Trap

Any time *inter vivos* trusts are used in estate planning, extra care must be taken in drafting the wills of the parties involved with the trusts, as negative tax consequences can easily arise. The problem known as the "pour-over trust trap" occurs where a testator, by his or her will, instructs his or her executors to add properties or funds to an existing *inter vivos* trust. This is a common feature of U.S. estate planning providing for confidentiality and a single residuary beneficiary designation in the will. This situation is problematic since the testator is attempting to effect the distribution of assets on his or her death by way of an *inter vivos* trust document and not by a will, where the *inter vivos* trust will not have been executed in accordance with the formalities required for a will.

The state of the law relating to "pour-over" provisions can be summarized as follows:

(i) a pour-over provision in a will into a trust which did not exist at the time the will was signed is not valid;

(ii) a pour-over provision in a will into a trust which is amendable by the testator after the date of the execution of the Will is invalid but only to the extent that amendments are actually made which affect the pour over provision;

(iii) a pour-over provision in a will into a trust which is amendable by a third party after the date of the execution of the will should be valid and fully effective so long as the amendments are not made under the control of the testator.[18]

Trusts considered amendable include those in which there is a power to add beneficiaries, a power to delete beneficiaries or a power of appointment.

Given the above, it is generally inadvisable to include provisions in a will whereby assets will "pour-over" from an estate into a pre-existing *inter vivos* trust, and this is especially so where the testator is a trustee of the trust.

Joint Tenancy

Placing assets such as residential premises, bank accounts, brokerage accounts and shares of private companies into joint tenancy may be viewed as a form of will substitute, since assets so held generally pass to the surviving joint tenant on death, as opposed to devolving to the estate of the deceased. Joint tenancy may be considered attractive for a variety of reasons, including assistance with a transferor's financial affairs during his or her lifetime, avoidance of probate fees until the death of the surviving joint tenant, protection from creditors, ease of administration

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[18] Janine A.S. Thomas, "The Proper Construction of a Trust," *1998 British Columbia Tax Conference*, (Vancouver: Canadian Tax Foundation, 1998), 11:1-44.

of an individual's estate upon death, and/or the provision of an *inter vivos* gift. The normal income tax rules regarding dispositions and attribution must be considered in restructuring ownership; for example, changing an asset to joint tenancy may trigger future income attribution to the transferor and an immediate disposition at fair market value of one-half of the asset transferred.

Joint tenancy is to be distinguished from tenancy in common, another prevalent form of co-ownership in Canada. Whereas in joint tenancy, each joint tenant has an equal holding or undivided interest in the whole of the property,[19] in a tenancy in common, the parties each may hold a different percentage of the title and possess the entire property in aggregate.

After an overview of the legal presumptions that arise in the context of joint ownership, the discussion below focuses on the recent Supreme Court of Canada decisions in *Pecore*[20] and *Saylor*,[21] both of which deal with joint bank accounts between an elderly parent and an adult child.

Presumptions Applicable to Gratuitous Transfers

Ownership of property can be divided into legal and equitable (or beneficial) title. Where an individual transfers property gratuitously to another and it is not clear whether he or she intended to transfer both legal and equitable title, courts in common law jurisdictions rely on two contrasting presumptions: the presumption of resulting trust and the presumption of advancement.

According to Waters, "a resulting trust arises when title to property is in one party's name, but that party, because he or she is a fiduciary or gave no value for the property, is under an obligation to return it to the original title owner."[22] Put another way, the presumption of resulting trust stipulates that where property is purchased or owned by one person but title is placed in the name of another, the purchaser or owner is considered to be the beneficial owner and the person having title is considered to be holding the property in trust for the purchaser or owner.[23]

Where a gratuitous transfer is made in circumstances where the presumption of resulting trust applies, the onus is on the recipient to rebut the presumption and to demonstrate that a gift was intended. The recipient thus bears the legal burden of establishing the nature of the transferor's intentions.

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[19] Known as "unity of interest." Unity of interest is one of four unities required to create a valid joint tenancy, with the other three being (i) unity of title (the holdings of each joint tenant must arise from the same act or instrument); (ii) unity of time (the interests of the joint tenants must arise at the same time); and (iii) unity of possession (the joint tenants must jointly possess the entire property). See Bruce Ziff, *Principles of Property Law*, 4th ed. (Toronto: Thomson Canada Limited, 2006) at 312-313 [*Ziff Paper*].

[20] *Pecore* v. *Pecore*, [2007] 1 S.C.R. 795.

[21] *Saylor* v. *Madsen Estate*, [2007] 1 S.C.R. 838.

[22] D.W.M. Waters et al., eds., *Waters' Law of Trusts in Canada*, 3rd ed. (Toronto: Carswell, 2005), at 362 [Waters].

[23] Jeanie DeMarco, "Is the Presumption of Advancement Nearing Extinction?". *The Lawyers Weekly, September 19, 2003* [*DeMarco Paper*].

Where the presumption of advancement applies, gratuitous transfers will be presumed to result in gifts, wherein the recipient takes both a legal and beneficial interest in the property transferred to joint tenancy. Traditionally, the presumption of advancement operated in situations where gifts were made from fathers to their children, because "the father was under a moral duty to advance his children in the world."[24]

Prior to the Supreme Court of Canada decisions in *Pecore* and *Saylor*, a line of case law and commentary had developed which suggested that the presumption of advancement was no longer relevant in contemporary society. The presumption of advancement was viewed as particularly out of step with reality in respect of transfers made between spouses and between parents and their adult children. The statement by Heeney J. in the 2000 decision of *McLear* is often cited in this regard:

> Given these social conditions, it seems to me that it is dangerous to presume that the elderly parent is making a gift each time he or she puts the name of the assisting child on an asset. The presumption that accords with this social reality is that the child is holding the property in trust for the aging parent, to facilitate the free and efficient management of that parent's affairs. The presumption that accords with this social reality is, in other words, the presumption of resulting trust. [25]

As well, commentators noted the fact that the presumption of advancement in respect of husbands and wives had been abolished in Ontario beginning with the passage of the *Family Law Reform Act* of 1975, since it was no longer assumed that wives were dependent on their husbands for support.[26] The abolition of the presumption of advancement between spouses is currently embodied in section 14 of the *Family Law Act* ("FLA"),[27] which states:

> 14. The rule of law applying a presumption of a resulting trust shall be applied in questions of the ownership of property between spouses, as if they were not married, except that,
>
> (a) the fact that property is held in the name of spouses as joint tenants is proof, in the absence of evidence to the contrary, that the spouses are intended to own the property as joint tenants; and
>
> (b) money on deposit in the name of both spouses shall be deemed to be in the name of the spouses as joint tenants for the purposes of clause (a).

Interestingly, while section 14 of the FLA purports to eliminate the presumption of advancement between husbands and wives, if property is owned jointly the spouses will be considered joint tenants. Thus, in the case of a joint bank account, the proceeds will pass by right of survivorship to the remaining spouse. This achieves the same result as if the presumption of advancement was applicable.

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[24] A.H. Oosterhoff et al., *Oosterhoff on Trusts: Text, Commentary and Materials*, 6th ed. (Toronto: Carswell, 2004), at 575 [*Oosterhoff Paper*].

[25] *McLear* v. *McLear Estate* [2000] O.J. No. 2570 (S.C.J.) at para. 41.

[26] *DeMarco Paper*, *supra* note 23.

[27] R.S.O. 1990, c. F.3.

Pecore and Saylor

The 2007 Supreme Court of Canada decisions in *Pecore* and *Saylor* have significant consequences for transfers of property from parents to their adult children. The main issue in both cases was the manner in which the proceeds of a joint account were to be dealt with on the death of the joint owner who contributed all of the property. In both *Pecore* and in *Saylor*, the elderly father had gratuitously opened an account jointly with his adult daughter with a right of survivorship. The issues before the Court in both cases were as follows:

(a) Do the presumptions of resulting trust and advancement continue to apply in modern society?

(b) If so, on what standard will the presumptions be rebutted?

(c) How should courts treat survivorship in the context of a joint account?

(d) What evidence may courts consider in determining the intent of a transferor?

In *Pecore*, the Court ruled in favour of the adult daughter, who was allowed to keep the proceeds of the joint account; in *Saylor*, the adult daughter was required to divide the proceeds of the joint account in accordance with the Will of her deceased father. Opposite conclusions were reached in these cases based on the Court's analysis of the factual circumstances surrounding the joint accounts in each case.

The Presumptions Post-Pecore and Saylor

The Court found that the well-established presumptions of resulting trust and advancement continue to have a role in disputes over gratuitous transfers. Specifically, the Court confirmed that the presumption of resulting trust will generally apply such that the onus will usually be on the transferee to rebut the presumption of resulting trust and demonstrate that the transfer was intended to be a gift. The Court ruled that the presumption of advancement will apply only when the gratuitous gift is made in the context of certain dependency-based relationships, such as that between a parent and a minor child. Where such a relationship exists, the onus will be on the person challenging the gift to rebut the presumption of advancement.

Standard on which the Presumptions will be Rebutted

On the second issue, the Court held, in keeping with a long line of authorities, that the standard on which the presumptions may be rebutted is the standard of proof used for civil cases (a balance of probabilities).[28]

The Gift of Survivorship

Of great interest to the tax community were certain of the Court's findings in *Pecore* regarding the right of survivorship. In particular, the Court appears (at paragraph 70) to suggest that the right of survivorship may be separated from the interest in the joint account during the

[28] See e.g.: *Dagle* v. *Dagle Estate* (1990), 70 D.L.R. (4th) 201 (P.E.I.S.C., App. Div.); *Re Wilson* (1999), 27 E.T.R. (2d) 97 (Ont. Ct. (Gen. Div.)); *Burns Estate* v. *Mellon* (2000), 48 O.R. (3d) 641 (C.A.).

transferor's lifetime, such that a parent may gift the right of survivorship to a child while maintaining beneficial ownership of the account during his or her lifetime:

> Where, in setting up a joint account, the transferor intends to transfer full legal and equitable title to the assets in the account immediately and the value of the assets reflects a capital gain, taxes on capital gains may become payable in the year the joint account is set up. However, where the transferor's intention is to gift the right of survivorship to the transferee but retain beneficial ownership of the assets during his or her lifetime, there would appear to be no disposition at the moment of the setting up of the joint account.

On this analysis, where the intention is to gift only the right of survivorship, there may be no disposition of the account for tax purposes at the time of the transfer. Further, the decision implies that a joint account may not form part of an estate for probate purposes, even where the intention is for the account to be divided among the beneficiaries under the Will.[29]

The Court noted that, as the issue of the proper treatment of capital gains in the setting up of joint accounts was not argued by the parties, such matters remained to be resolved by the Canada Revenue Agency and taxpayers in specific cases.

The possibility of an immediate gift of the right of survivorship without an attendant disposition of beneficial ownership for tax purposes represents a novel line of reasoning in the context of joint ownership in Canada and may be inconsistent with current tax policy.

The Evidence to be Considered in Ascertaining Intention

Critical to the Court's analysis in *Pecore* and *Saylor* was the evidence regarding the deceased's intention. The Court sets forth the following factors to be taken into consideration:

- bank documents, especially if a transfer of beneficial ownership is clearly stated;
- control and use of the funds in the account, having regard to the dynamics of the relationship and prior experience with the management of financial affairs;
- tax treatment of the income from the assets in the account; specifically whether the transferor continues to pay taxes on the income earned in the accounts; and
- the granting of a power of attorney, especially where the transferor appreciates the distinction between granting a power of attorney as opposed to gifting the right of survivorship.

The Court also relaxed the traditional rule associated with evidence arising subsequent to the transfer by stating that such evidence may be relevant, but that its reliability and weight should be assessed by the trial judge on a case by case basis.

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[29] See also Pamela L. Cross, Using Joint Accounts in Estate Planning, 2007 Ontario Tax Conference (Toronto: Canadian Tax Foundation) (not yet published).

The Court's Conclusions

Despite the Court's rulings with respect to the presumption of resulting trust, the Court nonetheless concluded in *Pecore* that the father intended to gift the right of survivorship in the accounts to his daughter at the time the accounts were set up. In so doing, the Court relied on the deceased's close relationship with his daughter, his concern for providing for her on his death and the fact that he had not mentioned the joint accounts to the lawyer who drafted his will (presumably because he was of the view that the accounts would be dealt with outside of his estate). In the *Saylor* case, the opposite conclusion was reached, as the daughter's evidence was found to be insufficient to rebut the presumption of resulting trust.

Based on the *Pecore* and *Saylor* decisions, where clients wish to transfer assets into joint ownership with children or others, it is critical for an advisor to ascertain the intention of the transferor and to take steps to document that intention in order to appropriately protect and preserve the wishes of the transferor.

Life Insurance

Life insurance is a popular means of providing a financial cushion to surviving family members, and often forms a key part of estate tax planning. Where the beneficiary under a life insurance policy is the policy-holder's estate, proceeds may be used to pay funeral and testamentary expenses and to create liquidity to satisfy estate liabilities such as taxes, estate equalization, dependant support, estate creation and the funding of charitable bequests.[30] For business purposes, life insurance proceeds often provide a means of funding survivorship obligations under a shareholders agreement and can also be used for key-person and business loan protection. In all of these situations, the existence of a life insurance policy ensures that funds will be available to fulfill particular needs at a specific time when liquidity is needed.[31]

Where a particular beneficiary is named under a life insurance policy, the insurance proceeds do not form part of the deceased's estate, are not governed by the deceased's will (if any), and pass directly to the named beneficiary on the death of the policy-holder (however, see the discussion of the deeming rule in subsection 72(1) of the *Succession Law Reform Act* (the "SLRA"), below).[32] In these circumstances, the proceeds of life insurance are not subject to probate. In the case of an estate with substantial debts, a life insurance policy with a named beneficiary may allow for a distribution to loved ones, even in the face of a bankrupt estate.

Springing Trusts

Individuals may also consider establishing one or more life insurance trusts also called springing trusts. A springing trust is an insurance trust that is created outside of a will by either a stand

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[30] Charles Chaho, "Death and Taxes in the United States: A Canadian's Guide to Navigating US Estate Taxation" in "Personal Tax Planning," (2006), vol. 54, no. 1 *Canadian Tax Journal*, 262-286.

[31] Joel Cuperfain, "Leveraged Life Insurance," *Report of Proceedings of Fifty-Sixth Tax Conference*, 2004 Tax Conference (Toronto: Canadian Tax Foundation, 2005), 10:1-28.

[32] R.S.O. 1990, c. S.26.

alone trust deed or as part of an insurance policy beneficiary designation.[33] Ontario's *Insurance Act* [34] sets out the structural needs of an insurance policy, including the ownership and transfer of policies, the legalities of choosing a beneficiary and the appointment of trustees to receive proceeds on behalf of beneficiaries. Since it is not created by a will, a springing trust is not exempt from the 21-year deemed disposition rule in the *Income Tax Act* [35]. As discussed below, the trust will be deemed to begin upon the life insured's passing. When using an insurance policy beneficiary designation form to name a trustee, it is best to attach an appendix that lists the powers, rights and terms of the trustee. Without this list a bare trust is created, leaving the trustee with no guidance or limitations.

One advantage of creating a trust for life insurance proceeds is it does not form part of the probatable estate, and so no probate fees are paid on the proceeds. Consequently, the proceeds are also protected from creditors of the estate. It is uncertain whether the policy itself is protected from creditors during the lifetime of the policy owner. The *Insurance Act* does provide this protection for certain familial designations [36] however it does not state whether it protects trusts or trustee designations as well. As well, if it is the policy holder's intention to distribute the proceeds of the life insurance policy to minor children, interposing a life insurance trust to receive the proceeds should avoid the intervention of the office of the provincial public guardian and trustee.[37]

A second benefit is the CRA will consider a springing trust to be a testamentary trust provided 1) the trust arises as a consequence of the death of an individual and is created by that individual and 2) no one contributes to the trust other than an individual upon death. If it meets these requirements the trust is subject to federal and provincial tax at the appropriate graduated marginal rate. This is in contrast to standard *inter vivos* trusts which are taxed at the highest marginal rate.

One of the main concerns of setting up a springing trust is the uncertainty over how variations in the life insurance policy will affect its tax treatment. For example, when a policy is jointly owned on two lives, it has two separate owners who act together to designate a beneficiary and create a trust. Because there may be two creators of the trust, it is unclear whether this type of trust will be considered testamentary. Similar issues arise with co-owned policies, where co-owners have separate identifiable interests which could be paid out independently.

There is also some doubt in how to treat irrevocable designations of trustees. With an irrevocable designation, the policy owner loses the right to change or alter the designation without the consent of the trustee. However, since the trust is not settled until the life insurance proceeds are transferred into the trust, it is uncertain as to where the powers of the trustee to act for beneficiaries would stem from while the owner is still alive. The conflict lies in the fact that if

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[33] For a more complete discussion of insurance trusts, please see Robin Goodman, "Combining Trusts and Life Insurance in Estate Planning: Tricks and Traps" in "Personal Tax Planning" (2008), vol.56, no.1 *Canadian Tax Journal*, 188-213.

[34] R.S.O. 1990, c. I.8, as amended.

[35] R.S.C. 1985 (5th Supp.), c .1, s. 104(4)(a).

[36] *Supra* note 19, s. 196(2).

[37] Todd M. Rosenberg, CA., LL.B., "Inter-Vivos Trusts," *2004 Prairie Provinces Tax Conference*, (Toronto: Canadian Tax Foundation, 2004), 15:1-45, at 15:41 to 15:43.

the trustee does have powers during the life of the owner, then the trust should be considered an *inter vivos* trust, however if the trustee does not have any powers until the trust is settled then no one has control over the trust during the owner's lifetime.

One structural problem that should be avoided is when couples separate and fail to assign policies to their former spouses. If policies are not assigned, this can lead to the owner of the policy not being the insured person thus creating an *inter vivos* trust upon the death of the insured. It is best to deal with this issue at the time the separation agreement is signed to avoid any future confusion.

Registered Retirement Savings Plans and Registered Retirement Income Funds

Registered retirement savings plans ("RRSPs") and registered retirement income funds ("RRIFs") are government-endorsed tax-deferred savings vehicles. As such, RRSPs and RRIFs are widely used retirement and estate planning tools.

Contributions to an RRSP are generally deductible from the taxpayer's income up to the RRSP deduction limit for the year. Within that limit, RRSPs allow for deferral by effectively permitting tax-free growth of investments in the RRSP until withdrawal. Contributions to an RRSP are not permitted after the year in which the taxpayer reaches the age of 71, at which point funds in the RRSP must be withdrawn (a taxable event) or transferred to an annuity or an RRIF (a non-taxable event). If transferred to an RRIF, a minimum amount must be withdrawn every year. Funds received from an RRSP or RRIF are fully taxable when received. While RRSPs and RRIFs are useful tools, the contribution limits are generally too low to allow higher income earners to maintain a level of income sufficient to meet their lifestyle needs through retirement.

Care should be taken when designating a beneficiary under an RRSP or RRIF, since the full value of the RRSP or RRIF will pass to the beneficiary on the death of the taxpayer, while the taxes payable on the amount transferred will be borne by the taxpayer's estate. Such taxes will often be substantial and may deplete the estate of the taxpayer, which can be problematic where the residual beneficiaries under the will and the designated beneficiary under the RRSP or RRIF are different.

Please see below for a discussion of new legislation dealing with creditor protection for RRSPs and RRIFs.

Registered Pension Plans

Registered pension plans ("RPPs") are attractive to employees as such plans provide an opportunity for employer-sponsored retirement savings. RPPs are those pension plans which have been accepted for registration in accordance with the Tax Act. Heavily regulated, RPPs are subject to the requirements of the common law, pension standards legislation and certain rules in the Tax Act.

There are numerous types of RPPs, including money purchase plans, defined benefit plans, combination plans, multi-employer plans, specified multi-employer plans, simplified pension plans, designated plans and flexible pension plans. As well, there are various types of benefits that can be provided under an RPP, including lifetime retirement benefits, lump sum payments,

survivor benefits, bridging benefits, guaranteed period benefits, benefits on marriage breakdown and indexing. Both an employer and an employee may contribute to an RPP for the employee.

While an RPP retains its registered status under the Tax Act, contributions by an employer or an employee to the RPP (within the annual statutory limit) may generally be deducted from the income of the employer or employee, as the case may be. As well, interest and gains earned in the RPP are not subject to tax until paid out to and received by the RPP member.

An additional attraction of establishing an RPP is creditor proofing. Under provincial and federal legislation, registered pension plans are generally exempt from creditor claims against the employer and the individual member. As the member usually has no ability to demand a lump-sum payment under the plan, creditors cannot force the immediate collapse of the plan. Further, if other parties (such as a spouse) have claims under the plan, the plan's protection from creditors is strengthened.[38]

As with life insurance and RRSPs and RRIFs, where an individual is designated to benefit under the RPP on the death of the plan member, the funds in the RPP will pass outside of the will (subject to the discussion below of subsection 72(1) of the SLRA) and will avoid probate fees.

CLAWBACK REGIMES

In appropriate circumstances, spouses, common-law partners and children and other dependants may be eligible to receive benefits under the estate of a deceased which were intentionally not left to those individuals by the deceased. These circumstances include situations where there is a demonstrated need on the part of the dependant which was ignored or underestimated in the estate planning of the deceased. In these circumstances, the wishes of the deceased will often be disregarded in favour of the needs or rights of the spouse, common-law partner or dependant, as the case may be. The relevant legislation is that of the province. The applicable Ontario statutes include the SLRA and the FLA.

Third-party creditors may also be successful in claims against an estate where the deceased dies with debts outstanding. Generally speaking, where an individual transfers property out of his or her name while insolvent or shortly before declaring bankruptcy, such transfers may be deemed invalid, with the transferred property remaining available to creditors. The federal *Bankruptcy and Insolvency Act* ("BIA"),[39] as well as provincial statutes such as Ontario's *Fraudulent Conveyances Act* (the "FCA")[40] and the SLRA are relevant to the determination of when transfers to will substitutes will be disregarded in favour of creditors.

The discussion below highlights a selection of topical issues on the subject of creditor-proofing in the context of will substitutes.

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[38] Anne E. Montgomery, "Executive Retirement Arrangements: Innovations and Issues," *Report of Proceedings of Fifty-Fifth Tax Conference*, 2003 Tax Conference (Toronto: Canadian Tax Foundation, 2004), 16:1-20 at p.16:19.

[39] R.S.C. 1985, c. B-3.

[40] R.S.O. 1990, c. F.29.

Claims by Spouses

Under provincial legislation in Canada, spouses are generally entitled to an equalization of net family property upon marriage breakdown or the death of a spouse. In Ontario, a spouse may either take his or her entitlement under the will of the deceased spouse or elect to receive the equalization payment to which he or she is entitled under the FLA.[41]

While Ontario's FLA does not explicitly prohibit the alienation of assets during marriage, where property is transferred to an *inter vivos* trust, the transfer may be subject to judicial scrutiny if the surviving spouse brings an action claiming that the transfer was made to defeat his or her right to an equalization payment. Ontario jurisprudence has held that a spouse has the same rights as a third party creditor in challenging a transfer of assets to an alter ego trust by his or her spouse or former spouse as a fraudulent conveyance pursuant to the FCA.[42] The FCA holds that a conveyance "made with intent to defeat, hinder, delay or defraud creditors or others of their just and lawful actions … are void as against such person and their assigns."[43] Thus, where an individual has transferred assets to an *inter vivos* trust for the purpose of reducing his or her net family property (in an attempt to defeat or hinder the claim to equalization by his or her spouse under the FLA), a court may set aside such transfer as void under the FCA.

Specifically, the Ontario Court of Appeal has stated the following with respect to the use of the FCA in the family law context:

- spouses each own their separate property throughout the marriage; however, upon an event that triggers a valuation date (such as a death of one of the spouses), a spouse is entitled to an equalization of net family property;
- under the FLA, a debtor-creditor relationship is created between spouses only as of the valuation date;
- for a spouse to qualify as a creditor under the FCA, the spouse must have had an existing claim against the transferring spouse at the time the transfers were made (for example, a claim regarding an "improvident depletion" under subsection 5(3) of the FLA);
- the FLA does not specifically exclude the FCA as a means of determining the net family property of each spouse on the valuation date; and
- an individual cannot, by virtue of deliberate non-disclosure of the transfer of assets, prevent his or her spouse from establishing himself or herself as a creditor.[44]

In the context of claims by spouses then, the intentions of the individual in transferring assets to a will substitute will be relevant to the determination of whether such transfers will be set aside.

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[41] See sections 5 and 6 of Ontario's FLA.

[42] *Stone (Ontario), supra* note 12.

[43] FCA s. 2.

[44] *Stone (Ontario)*, supra note 12.

Dependants' Relief Claims

The major thrust of dependants' relief legislation, including Ontario's SLRA and British Columbia's *Wills Variation Act* ("WVA"),[45] is that if a person dies without having made adequate provision for the proper maintenance and support of his or her dependants, a judge has the discretion to override the terms of any will, or in the absence of a will, the provisions of any legislation dealing with intestacy. Under the SLRA, a dependant is defined as a spouse, parent, child or sibling "to whom the deceased was providing support or was under a legal obligation to provide support immediately before his or her death."[46]

An important limitation on some dependants' relief legislation is that a judge can generally only order an award to be made out of the estate of the deceased person as that estate exists at the time of death. Thus, to the extent the individual had divested his or her estate of property prior to death, the legislation is rendered ineffective.[47]

Ontario

Ontario's SLRA has addressed this limitation by deeming to be included in the estate of a deceased certain assets that would ordinarily not form part of the estate. Subsection 72(1) of the SLRA states:

> **72. Value of certain transactions deemed part of estate** – (1) Subject to section 71, for the purpose of this Part, the capital value of the following transactions effected by a deceased before his or her death, whether benefiting his or her dependant or any other person, shall be included as testamentary dispositions as of the date of the death of the deceased and shall be deemed to be part of his or her net estate for purposes of ascertaining the value of his or her estate, and being available to be charged for payment by an order under clause 63(2)(f),
>
> (a) gifts *mortis causa*;
>
> (b) money deposited, together with interest thereon, in an account in the name of the deceased in trust for another or others with any bank, savings office, credit union or trust corporation, and remaining on deposit at the date of the death of the deceased;
>
> (c) money deposited, together with interest thereon, in an account in the name of the deceased and another person or persons and payable on death under the terms of the deposit or by operation of law to the survivor or survivors of those persons with any bank, savings office, credit union or trust corporation, and remaining on deposit at the date of the death of the deceased;
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> (d) any disposition of property made by a deceased whereby property is held at the date of his or her death by the deceased and another as joint tenants;

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[45] R.S.B.C. 1996, c. 490.

[46] SLRA s. 57.

[47] John H. Askin, "Family Trusts: The Ultimate Estate Planning Vehicle", *1994 Prairie Provinces Tax Conference*, (Toronto: Canadian Tax Foundation, 1994), 20:1-18 at 20:9.

> (e) any disposition of property made by the deceased in trust or otherwise, to the extent that the deceased at the date of his or her death retained, either alone or in conjunction with another person or persons by the express provisions of the disposing instrument, a power to revoke such disposition, or a power to consume, invoke or dispose of the principal thereof, but the provisions of this clause do not affect the right of any income beneficiary to the income accrued and undistributed at the date of the death of the deceased;
>
> (f) any amount payable under a policy of insurance effected on the life of the deceased and owned by him or her;
>
> (f.1) any amount payable on the death of the deceased under a policy of group insurance; and
>
> (g) any amount payable under a designation of beneficiary under Part III.

Section 71 of the SLRA deals with contractual devises or bequests satisfied by gifts in a Will and would not constitute a will substitute. Paragraph 63(2)(f) of the SLRA deals with payments satisfying orders for support of dependants.

Thus, pursuant to subsection 72(1) of the SLRA, elements of an individual's estate planning involving will substitutes may be undone at death, at least with respect to dependants' relief claims. Specifically, *inter vivos* gifts made in contemplation of the donor's imminent death, funds transferred to joint bank accounts or bank accounts held in trust for others, assets transferred to revocable *inter vivos* trusts and life insurance proceeds are all brought back into an individual's estate for the purposes of determining the assets that may be accessed in satisfying successful dependants' relief claims. It should be noted, however, that subsection 72(1) of the SLRA is a deeming rule which is limited to dependants' relief claims, and which does not operate to unwind an individual's estate planning for other purposes, such as probate fee reduction and protection from claims by other creditors.

British Columbia

British Columbia's WVA provides a regime for dependants of a deceased to claim support from the estate of the deceased where the provisions for support of such dependant in the deceased's will are inadequate. The WVA is unique among dependant relief legislation in Canada in that a dependant in British Columbia does not need to have been financially dependant on the deceased in order to succeed in a claim.[48] Section 2 of the WVA states the following:

> **Maintenance from estate**
>
> 2. Despite any law or statute to the contrary, if a testator dies leaving a will that does not, in the court's opinion, make adequate provision for the proper maintenance and support of the testator's spouse or children, the court may, in its discretion, in an action by or on behalf of the spouse or children, order that the provision that it thinks adequate, just and equitable in the circumstances be made out of the testator's estate for the spouse or children.

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[48] M. Elena Hoffstein, Alter Ego Trusts/Joint Partner Trusts - Tips, Traps & Planning, *2004 Ontario Tax Conference*, (Toronto: Canadian Tax Foundation, 2004), 12A:1-47 at 12A:11.

In a significant case, the British Columbia Supreme Court recently approved the use of an alter ego trust as a means of avoiding a challenge to a will by an adult child.[49] In that case, the adult son of the deceased challenged the will under the WVA and argued that an alter ego trust set up by the testatrix was a device by the testatrix to defeat his anticipated WVA claim. The testatrix and her late husband had been quite generous to their son (who had assets of his own valued at seven to eight million dollars) during his lifetime. Prior to the testatrix's death, their relationship was distant and strained. The Court upheld the validity of the trust, stating:

> … *Inter vivos* trusts, including alter ego trusts, are standard estate planning tools. As noted in Waters at 593 - 594, trusts are often used to avoid probate fees and achieve other legitimate estate planning objectives.
>
> The issue of arranging one's affairs to avoid possible claims under the WVA in circumstances such as these was decided many years ago by this court in *Hossay* v. *Newman* … Mr. Justice MacKenzie (as he then was) held that the claim of an independent adult child under the WVA on moral grounds is not a claim by "creditors or others" under the *Fraudulent Conveyance Act*[50]... Despite the passage of eighteen years since Hossay, the legislature has not seen fit to pass legislation or amend existing legislation to prevent the avoidance of claims under the WVA.

Based on this recent decision, it appears that an adult independent child making a claim under the WVA in British Columbia cannot attack *inter vivos* transfers (including transfers to alter ego trusts) as fraudulent conveyances. It remains to be seen whether other provinces will follow the British Columbia courts in upholding transfers to trusts and other will substitutes in the face of dependants' relief applications.

Failures to Amend Beneficiary Designations

Under Canadian law, while marriage revokes a previously made will, separation has no impact on it. Accordingly, individuals who are separated but not yet divorced are often advised to make new wills to ensure that their testamentary wishes will be carried out. Sometimes overlooked however, are changes to designations of beneficiaries for life insurance, RRSPs, RRIFs, RPPs and other plans in respect of which beneficiary designations outside a will have been made. In most provinces, neither separation nor divorce will result in a revocation of a beneficiary designation (though this may depend on whether the designation is contained in a will or in a separate document).[51]

Where a separated or divorced person does not change the beneficiary designation prior to his or her death, entitlement of the designated beneficiary to the relevant asset may depend on the scope of the release, if any, given by the designated beneficiary in a separation agreement, if there is one. In the absence of a separation agreement with a sufficiently broad release, the

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[49] *Mordo* v. *Nitting*, 2006 B.C.S.C. 1761.

[50] R.S.B.C. 1996, c. 163.

[51] Barry S. Corbin and Andrew J. Freedman, CA, "Tax and Estate Planning and Family Law Considerations," *Report of Proceedings of Fifty-Third Tax Conference*, 2001 Tax Conference (Toronto: Canadian Tax Foundation, 2002), 24:1-48.

courts have held that, because the deceased spouse could have changed the beneficiary designation with the stroke of a pen (or the click of a mouse) and failed to do so, the surviving spouse is entitled to the money.[52]

For example, Ontario courts have held that a separated spouse was entitled, as the designated beneficiary, to the proceeds of the deceased's RRSP and life insurance policy, even though she had signed a separation agreement in which she released all of her entitlement to her late husband's estate.[53] The Court stated that the boilerplate clauses in the separation agreement were not sufficient to revoke the wife's designated beneficiary status under the RRSP and life insurance plan, and that on the facts there was insufficient evidence that the deceased had intended to revoke that designation. Clear evidence that the deceased intended to revoke a beneficiary designation is thus required where the revocation is not made prior to death.[54]

Attacks by Third Party Creditors

Third party creditors may seek to obtain access to assets that have been transferred to will substitutes in a variety of ways. Taking the example of assets transferred to an *inter vivos* family trust, creditors may challenge the transfer of assets to the trust under bankruptcy or fraudulent conveyance legislation; they may challenge the validity of the family trust itself; or they may try to obtain some control over the decisions and powers exercised by the trustees (particularly where there is only a discretionary interest in a trust).[55]

A common remedy used by creditors to gain access to assets that have been transferred to a trust is to apply to set aside the transfer as being a fraudulent conveyance. Under the FCA, if the sole reason for establishing a trust is to protect the trust assets from creditors, then the transfer of those assets to the trust will clearly contravene the FCA and be void. However, even where creditor protection is not the sole reason for the transfer and, for example, estate and tax planning considerations were also motivating factors, a court may still find that an estate planning purpose is not inconsistent with an intention to defeat creditors (i.e. the settlor wishes to protect assets from creditors so that they are available for family members in the future). Some points to note about fraudulent conveyances are as follows:[56]

- the fact that property is settled on a trust is not a defence to a claim that the conveyance was fraudulent;
- property which is exempt from seizure, such as funds held by a life insurance company under an RRSP, cannot be attacked under the fraudulent conveyance legislation;
- the intention requirement to satisfy the test under the legislation is the intention to protect the debtor's property from attack by a creditor;

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[52] *Ibid*.

[53] See *Gaudio Estate* v. *Gaudio* [2005] W.D.F.L. 2616, 16 R.F.L. (6th) 72.

[54] See also Wayne Tunney, "Estate Plan After Separation" (2005) vol. 13, no. 12 Canadian Tax Highlights, 7-8.

[55] Lisa Heddema, "Family Trusts - An Update," *1998 British Columbia Tax Conference*, (Vancouver: Canadian Tax Foundation, 1998), 3:1-31.

[56] *Ibid*.

- if the debtor was insolvent at the time of the transfer of property, a strong presumption of a fraudulent intent arise; and

- creditors who have standing to challenge a transfer include both creditors existing at the time of the transfer and subsequent creditors.

Determinations as to whether a particular transfer constitutes a fraudulent conveyance are made after a review of all relevant facts, including the intentions of the transferor.

Changes to the Bankruptcy and Insolvency Act Regarding RRSPs and RRIFs

In certain provinces, RRSPs and RRIFs with named beneficiaries, like life insurance policies, are viewed as passing outside of the estate on death such that the funds therein are not susceptible to the claims of creditors. For example, the Ontario Court of Appeal has held that RRSPs do not form part of the estate, but instead devolve directly to the designated beneficiary and that a creditor has no recourse to repayment from the RRSP proceeds in the designated beneficiary's hands when the estate cannot pay its debts.[57] Most provinces have similar legislation stating that RRSPs and RRIFs will not form part of an estate and will not be subject to attack by a creditor where they are placed with an insurer and there is a designated beneficiary other than the estate.[58] Thus, in a case dealing with the *Saskatchewan Insurance Act* (the "SIA"),[59] the Supreme Court of Canada held that, pursuant to the terms of the SIA, the exempt status of the taxpayer's RRIF as a life insurance policy with a designated beneficiary was an absolute bar to any claim by creditors.[60]

The BIA, a federal statute, contains a provision that protects from seizure any property that is otherwise exempt from seizure under provincial legislation. This is viewed as problematic in the context of RRSPs and RRIFs, since the different provinces offer varying degrees of creditor protection for such plans.

Provisions to address this were contained in *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditor Arrangement Act and to make consequential amendments to other Act* [61] which was proclaimed into force effective July 7, 2008. Included was an amendment to s.67(1)(b) of the BIA which exempts RRSPs and RRIFs from seizure in bankruptcy. This provision received final iteration in Bill C-12,[62] which came into force on December 14, 2007.

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[57] *Amherst Crane Rentals Ltd.* v. *Perring* [2004] 5 C.T.C. 5, leave to appeal refused.

[58] The Insurance Acts of all provinces except Quebec permit such beneficiary designations; in Quebec, the designation must be made in the testator's will (See Canada Revenue Agency, "2007 T4RSP and T4RIF Guide," T4079(E), Rev. 07, Chapter 4, "Death of an Annuitant Under an RRSP or RRIF").

[59] R.S.S. 1978, c. S-26.

[60] *Royal Bank of Canada* v. *North American Life Assurance Company and Balvir Singh Ramgotra*, [1996], 1 SCR. 325.

[61] S.C. 2005, c. 47.

[62] *An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005*, S.C. 2007, c. 36, s. 32.

S. 67(1)(b.3) of the BIA exempts funds contributed to RRSPs, RRIFs or any other prescribed plan from the pool of assets available to a trustee for distribution. Changes to the BIA *General Rules* included a deferred profit sharing plan as a prescribed plan.[63] The amendment maintains any existing provincial exemptions. The new federal creditor protection is narrower than the existing protection under some provinces' laws (not the case for Ontario), as the federal rules do not offer protection for funds transferred to registered plans within the 12 months prior to the declaration of bankruptcy. Thus, while the creditor protection offered for RRSPs and RRIFs as between the various Canadian provinces is not identical, the amendments go some distance in levelling the playing field between the provinces. As this protection is only provided federally in insolvent situations and does not protect all contributions to an RRSP, other methods of creditor-proofing will continue to maintain popularity.

CONCLUSION

The existing broad range of Canadian will substitutes continues to expand. Each provides its own unique benefits, whether it be ease of transfer, some degree of creditor protection, confidentiality or probate fee planning. However, as has been illustrated, the benefits of will substitutes are sometimes impacted by higher rates of tax, confusion as to entitlement, inapplicability of relieving provisions, or by the complexity of the specialized substitute.

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[63] *Bankruptcy and Insolvency General Rules*, S.O.R./2008-223, s.1.