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TAB 7

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Implications of the *Ashton* Case & Beneficiary Designations

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Implications of the *Ashton* Case & Beneficiary Designations

By Charles B. Wagner and Brendan Donovan

The purpose of this paper is to revisit the issue of beneficiary designations in the aftermath of *Ashton Estate* v. *South Muskoka Memorial Hospital Foundation* (the "*Ashton* case").[1] The paper is intended for lawyers who draft wills, practice family law or are involved in estate litigation.

The *Ashton* case was decided in 2008 and has received criticism from some academics and practitioners. Leanne Kaufman, vice-president, professional practice group, RBC Wealth Management, estate & trust services, Toronto STEP Member, went so far as to write:

> "While it may be possible to distinguish *Ashton* on its facts, or academically dismiss it as an anomaly, its mere existence creates sufficient ambiguity in the current law for corrective action to be necessary […] A legislative amendment to abrogate the effect of the judgment seems to be in order."[2]

Despite such criticism, the Legislature has not stepped in to "abrogate the effect of" the *Ashton* case. In addition, there is no Court of Appeal decision overruling the *Ashton* case. So those lawyers who draft wills or who litigate over beneficiary designations ignore the *Ashton* case at their peril. But, that's the middle of the story. Let's start at the beginning.

What is a beneficiary designation?

Imagine the testator is a person wearing a pair of pants with two pockets. In his right pocket are those assets in his estate that he will bequeath to beneficiaries named in his last will and testament. In his left pocket are those assets that will pass outside of his estate to beneficiaries named in a beneficiary designation, which need not be in a will.[3] The types of assets that commonly pass by way of beneficiary designation are:

- life insurance proceeds;
- death benefits relating to certain employee plans, including pension and pension death benefits;
- registered retirement savings plans (RRSPs);
- registered retirement income funds (RRIFs);
- registered tax free savings accounts (TFSAs);
- home ownership savings plans; and
- certain bank accounts.

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[1] 2008 CarswellOnt 2592 (S.C.).

[2] See L. Kaufman, "Revocation of beneficiary designations revisited" STEP Inside (June, 2010) Vol. 9, No. 2, p. 11. Available on line at http://www.step.ca/pdf/stepInside/si2010.6.1.June.pdf

[3] How that happens in the context of the requirement that a will complies with the formalities of execution is another topic for another paper.

For a more expansive explanation of beneficiary designations, readers should consult Melanie Yach's article, "Beneficiary designations and employee plans: some issues to think about."[4]

Changing the beneficiary designation

We invite the readers to familiarize themselves with several statutes relevant to changes of beneficiary designations, including the *Succession Law Reform Act*, R.S.O. 1990, c. S.26 (the "SLRA"), the *Pension Benefits Act*, R.S.O. 1990, c. P.8 (the "PBA"), the *Family Law Act*, R.S.O. 1990, c. F.3 (the "FLA") and the *Insurance Act*, R.S.O. 1990, c. I.8 (the "*Insurance Act*"). For the purposes of this paper, the authors have focused on the SLRA and the *Insurance Act*. There are a number of sections that bear consideration.

Section	Comment
Section 50 of the SLRA defines "plans" as follows: **50**. In this Part, "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 <u>includes a retirement savings plan, a retirement income fund and a home ownership savings plan</u> as defined in the *Income Tax Act* (Canada) and an Ontario home ownership savings plan under the *Ontario Home Ownership Savings Plan Act*.	Note that, pursuant to O. Reg. 54/94, section 2, <u>TFSAs are "prescribed plans" for the purposes of Part III of the SLRA</u>. This allows a planholder to designate a beneficiary of his or her TFSA. Insurance policies are not governed by the SLRA, but rather by the *Insurance Act*. See discussion below.
Section 51 of the SLRA specifies two methods for designating the beneficiaries of a plan:	Some argue that there is uncertainty surrounding whether the "designation"

[4] M. Yach, "Beneficiary designations and employee plans: some issues to think about" (available online at: http://www.airdberlis.com/Templates/Articles/articleFiles/704/Beneficiary%20Designations.pdf).

Section	Comment
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.	and "plan" referred to in 51(1) are testamentary.[5] For the purposes of this paper, the authors take note of the case law that concludes that beneficiary designations are testamentary.[6] This is relevant to our discussion below of whether revocation by statute under section 16 of the SLRA (revocation by marriage) could be applicable to a "plan." In the *Annotated Ontario Estates Statutes*, Brian Schnurr writes that there is case law to support the view that a general designation such as "any RRSP owned by me at my death" is sufficient.[7] Mr. Schnurr cites an article by Barry Corbin where it is suggested that there must be a specific reference to a plan or a generic reference to plans, such as "all my RRSPs."[8]
Section 52 of the SLRA then specifies additional requirements for revoking beneficiary designations: *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*	The words "relates expressly" and "either generally or specifically" in section 52(1) suggest that a new beneficiary designation under a will must contain sufficient particulars of a "plan" to make it identifiable. That seems to be the plain reading of the text of the statute and, for many years, was the received wisdom on the subject.

[5] For a concise summary of this issue, see J. MacKenzie, ed., *Feeney's Canadian Law of Wills*, 4th Ed. (LexisNexis Canada Inc., 2000) at §1.78 - 1.81. The author makes the point that the gift goes directly to the beneficiary because of the statutory exemption, notwithstanding that it is testamentary. One of the uncertainties stems from the formalities of execution of testamentary documents under section 4 of the SLRA. If these plans are testamentary, why would they not be required to comply with the formalities of execution? In §1.81, J. MacKenzie writes: "Although there are some decisions that indicate that designations or nominations are not testamentary, the weight of authority is that they are testamentary. The decision of the Supreme Court of Canada in *MacInnes* is still definitive. Thus, these designations must be executed in accordance with the requirements of the wills legislation unless exempted by other statutory provisions."

[6] Such as *Re MacInnes*, [1935] S.C.R. 200 and *Gagnon* v. *Sussey*, 1994 CanLII 1276 (C.A.).

[7] B. Schnurr, *Annotated Ontario Estates Statutes*, 2d Ed. (Thomson Canada Ltd., 2003), Vol. 2, Succession Law Reform Act, R.S.O. 1990, c. S.26, section 51.

[8] B. Corbin, "Designating beneficiaries" (1988-1989) 9 *E.T.J.* 199.

Section	Comment
(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.	Section 52(4) is often overlooked. Just because a will may be set aside does not necessarily set aside the new beneficiary designation made in the will.

Of interest is the fact that life insurance policies are not governed by the SLRA, but rather by the *Insurance Act*.

Section	Comment
Section 190 of the *Insurance Act* specifies the method for designating or changing the beneficiary of an insurance policy: *Designation of beneficiary* **190.** (1) Subject to subsection (4), an insured may in a contract or by a declaration designate the insured, the insured's personal representative or a beneficiary as one to whom or for whose benefit insurance money is to be payable. 2012, c. 8, Sched. 23, s. 22 (1). *Change in designation* (2) Subject to section 191, the insured may from time to time alter or revoke the designation by a declaration. R.S.O. 1990, c. I.8, s. 190 (2).	

Section	Comment
Section 171(1) of the *Insurance Act* defines "declaration" as follows: "declaration", except in sections 207 to 210, means an instrument signed by the insured, (a) with respect to which an endorsement is made on the policy, (b) that identifies the contract, or (c) that describes the insurance or insurance fund or a part thereof, in which the insured, (d) designates, or alters or revokes the designation of, the insured, the insured's personal representative or a beneficiary as one to whom or for whose benefit insurance money is to be payable, or (e) makes, alters or revokes an appointment under subsection 193 (1) or a nomination referred to in section 199	The "declaration" need not have any formality. It must be in writing and signed by the insured.[9] Despite subparagraphs (b) and (c), it is unclear how much specificity is needed. In *Littlechild Estate* v. *Littlechild*, the will used the phrase: *"*… all moneys that I may have at the date of my death in any registered retirement savings plan …" Despite the fact that the will made no reference to an insurance policy or to a policy number either generally or specifically, the court held that this was a valid declaration because the RRSP was an insurance policy. Earlier case law held that a declaration must be more specific.[10]

Have in mind that the designation under a will in not ineffective by reason only of the will becoming invalid.[11] Conversely, if the will is revoked either by a new will or operation of law, the designation is also revoked.[12]

Now that we have briefly reviewed the text of the SLRA and the *Insurance Act*, let us revisit how the *Ashton* case changed the *status quo*.

The state of the law prior to the *Ashton* case

Prior to the *Ashton* case, the law seemed to be that a general revocation clause in a will would not revoke prior beneficiary designations because such broadly worded clauses do not relate expressly to the designation, either generally or specifically.[13] Paragraphs 28 and 29 of the Ontario Court of Appeal decision in *Laczova Estate* v. *Madonna House* ("*Laczova*"*)* was the leading authority and stood for the following proposition:

[9] *Kilitzoglou* v. *Cure Estate*, 2014 CarswellOnt 1809 (S.C.).
[10] *Jones, Re*, [1933] O.J. No. 67, (Ont. H.C.); and *Conway* v. *Conway Estate*, [2006] O.J. No. 234 (S.C.).
[11] See section 192 of the *Insurance Act*.
[12] See section 192(3) of the *Insurance Act*.
[13] *Laczova Estate* v. *Madonna House* (2001), 2001 CarswellOnt 4438 (*sub nom*. *Laczova Estate, Re*) (C.A.); see also *Bottcher Estate, Re*, 1990 CarswellBC 162 (S.C.).

"The appellant's alternative submission: s. 52(1)

28 Ms. Carnevale's alternative argument was founded on s. 52(1) of the SLRA. It provides:

> 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.

In her submission, the scheme of the will impliedly revoked the original designations of the deceased's family members to receive the benefits payable under the RSPs.

29 A careful reading of s. 52(1) is sufficient to dispose of this alternative argument. Whereas s. 51(2) requires that a designation by will must relate "expressly to a plan, either generally or specifically", s. 52(1) requires that a revocation in a will must relate "expressly to the designation, either generally or specifically". <u>But, as Ms. Carnevale acknowledged, nowhere in the deceased's will is there any expression that relates to either of the previous designations in favour of her family members. By its very language, s. 52(1) renders a revocation in a will that fails to relate expressly to the designation made by instrument ineffective to accomplish that purpose. That language is fatal to Ms. Carnevale's alternative argument.</u>" (emphasis added)

The *Ashton* case

The decision in the *Ashton* case is only eight paragraphs in length. The chronology is important to our understanding of the result.

In 1987, upon reaching the age of 69, the testator transferred his RRSPs into RRIFs. He then rolled the RRIFs into a single RRIF with TD Evergreen Investment Services – Account #817-5007-T, then executed a beneficiary designation the following year in favour of his eight children.

In 2001, the testator executed a will containing a general clause revoking "all wills and testamentary dispositions of every nature or kind whatsoever made." In his 2001 will, the testator left 95% of the residue of his estate to his eight children in <u>unequal shares</u> and specifically appointed each of them beneficiaries of "any pension plan benefits or RRSP" he might own.

When the testator died in 2007, he did not own any pension plan benefits or RRSP, just his RRIF worth $370,000. Given that the 2001 will contemplated an unequal division of assets, there were some of his children who would benefit more if the beneficiary designation was revoked by the 2001 will.

In the *Ashton* case, the court made two decisions of note:

a. the beneficiary designation was testamentary; and
b. the general revocation clause in the will complied with section 52(1), meaning that it related "expressly to the designations, either generally or specifically" to the designation.

As a result, the beneficiary designation was revoked.

Is the *Ashton* case good law?

The *Ashton* case has yet to be judicially considered. Laura M. Tyrrell and Anne E.P. Armstrong wrote the following in an *Issues in Focus* contribution entitled "The effect of revocation clauses on beneficiary designations":

> "There has since been extensive discourse regarding the court's ruling in *Ashton*, *supra*, and its application of *Laczova*, *supra*, that warrants brief mentioning herein. One commentator (Leanne Kaufman) noted as follows:
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> > 'In the single sentence of reasons on this topic, Judge McIsaac relies on paragraph 9 of the decision in *Laczova* for support of his finding that the revocation clause in the will cancelled the 1998 designation. That paragraph in *Laczova* noted that the holograph will in that case contained no revocation clause at all. The *Ashton* decision appears to seize upon this distinguishing factor as authority for the proposition that any revocation in the will should be sufficient to satisfy section 52(1) of the SLRA. However, reliance on paragraph 9 alone seems to ignore the Court of Appeal's conclusions on section 52(1) generally at paragraph 29 of the *Laczova* judgment: "… s. 52(1) requires that a revocation in a will must relate 'expressly to the designation, either generally or specifically' … By its very language, s. 52(1) renders a revocation in a will that fails to relate expressly to the designation made by instrument ineffective to accomplish that purpose." […] The general revocation language in the *Ashton* will had no express reference to the 1998 or any beneficiary designation, and therefore, could arguably have also been 'fatal' to the proposition that the 2001 will revoked the 1998 designation. Nevertheless, the result is a judicial interpretation of section 52(1) that enables estate trustees to challenge the validity of designations that have otherwise been considered valid beneficiary designations."[14]
>
> "A further commentator noted:
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> > '[*Ashton, supra*] recently came on the radar screen in an Ontario Bar Association trusts and estates sectional publication — affectionately referred to as Deadbeat — as a case that lawyers should take note of because of its implications for drafting revocation clauses in a will … The author of the Deadbeat article raised issues as to how this case could be reconciled with the legal mantra: "that a designation by will must relate expressly to the plan; while a revocation by will must relate expressly to the designation." In *Ashton*, there was no reference to the actual designation. The judge in the *Ashton* decision appears to have concluded that a general revocation clause relates to all testamentary dispositions, which

[14] L. Kaufman, "Revocation of beneficiary designations revisited" STEP Inside (June, 2010) Vol. 9, No. 2, p. 11. Available on line at http://www.step.ca/pdf/stepInside/si2010.6.1.June.pdf.

include beneficiary designations. The Deadbeat article provides an alert to lawyers of the larger ramifications this case may have on using such standard revocation clauses in a will. While lawyers will need to sort out this drafting issue, advisors need to be mindful of the very important role to be played in terms of ensuring that clients are aware of all designations in existence and conveying that information to their lawyer for the purposes of drafting clauses in a will.'[15]

> "At present, *Ashton*, *supra*, remains 'good law', and therefore must be considered as a precedent decision regarding will revocation clauses containing language to the effect of 'I revoke all former wills & testamentary dispositions', in the context of s. 52(1) of the SLRA."[16]

Lawyers often rely on the excellent work and material published by the authors Ms. Tyrrell and Ms. Armstrong, but the authors believe that it is premature to say that the *Ashton* case is "good law." The arguments raised by Ms. Kaufman and others make sense and, until the Court of Appeal speaks to the issue, at best *Ashton* is persuasive authority. But what does that mean for the lawyer, accountant or planner who drafts wills, negotiates separation agreements or litigates beneficiary designations?

How should the *Ashton* case affect your dealing with beneficiary designations?

Estate Planners/Solicitors

With respect to RRSPs, RRIFs, pension plans and TFSAs, the authors suggest that it would be a mistake to rely on the general revocation clause in a testamentary document to revoke previous designations and plans. After all, notwithstanding the decision in the *Ashton* case, given the current ambiguity in the law, it would be prudent to provide clarity about the designations and plans being dealt with. It is ambiguity and uncertainty that spawns litigation; and this is already an area of sufficient complexity. In one case, an RRSP was deemed by the court to be an insurance policy based on the life of the insured. As a result,the *Insurance Act*, not the SLRA, applied.[17] Thus, the best practice when dealing with changes to beneficiary designations for any plan is to obtain a comprehensive list and particulars of all plans/policies, then to expressly identify those plans and designations the testator wishes to make or revoke. It also makes sense

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[15] Referring to an anonymous post on the Manulife website entitled "Can a beneficiary designation be revoked in a will?" (February, 2009): https://repsourcepublic.manulife.com/wps/portal/Repsource/SalesResources/Insurance/TaxEstatePlanning/NewNoteworthy/as%20a%20matter%20of%20law/ins_tepg_aamolrevokedwill/!ut/p/z0/xZA_T8MwEMW_ipeMyKYqhTUqIlAlCwwNXqJTeklN3XNiX5vy7TGhQyTUrh3f_fnduye1LKUmOJoW2DgCG_WnXlSr-2L-mmYqVy-5Ummevj9kz0s1mz_KDyS5kvr6UKSYr77XqdS1I8YTy9JjF9zB1xgM41glrpAS9avFuRAVWAzC43k2UYbCwQPVmCiGkwDaCAwMcaezQGSoTRThMDbIMQ7O8_Y7URAEiD0woxeuERaGkVUxdm0FsHfW49HtcDMYO_4988WyaKXugLd3hhony_8MWV5mXI_lbXHhSAP9hBrVDQKMp6cr0cQkrD9L3S5bP4WmCLhOfwAEKSeA/ .

[16] L. Tyrrell and A. Armstrong, eds., "The effect of revocation clauses on beneficiary designations" Ontario – Estate Administration, *Issues in Focus* (November 3, 2013).

[17] *Littlechild Estate* v. *Littlechild*, 2011 CarswellOnt 15283 (Ont. S.C.J.)

to give notice to those in charge of the plan of the change in the designation. Perhaps the Court of Appeal or Legislature will clarify this area of the law at some point, but until that time, prudence suggests express identification of the plan and designation.

Although the *Ashton* case did not involve a policy of insurance, and insurance policies are governed by the *Insurance Act* rather than the SLRA, the authors suggest *Ashton* should still serve as a cautionary tale for planners and solicitors dealing with insurance policy designations. It would be prudent to ensure that any revocation in a testamentary document clearly identifies the insurance contract with sufficient detail to describes the insurance or insurance fund and beneficiary to whom or for whose benefit insurance money is to be payable.

Family Law Lawyers

In Ontario, when a person obtains a divorce and then dies, any bequest in the deceased's will to the former spouse is revoked.[18] Section 16 of the SLRA states that the will is to be read as though the former spouse had predeceased. Does that mean that lawyers representing clients in divorce proceedings do not need to worry about their clients' prior beneficiary designations? There might be a tendency to leave this issue to the estate planner or to the next lawyer, but that would be a mistake.

Does divorce automatically revoke a beneficiary designation? Let's review the *Richardson Estate* v. *Mew*[19] case, which addresses that very question. In *Richardson Estate* v. *Mew*, husband and wife signed a separation agreement providing that the wife would be irrevocably designated as the beneficiary under a specific life insurance policy. The separation agreement indicated that the policy of insurance was to expire on February 28, 1995. Instead, possibly through inadvertence, the policy remained in effect after February 28, 1995, and the designation of the wife as the beneficiary was never revoked. The husband remarried and had three children. The premiums were paid, in part by the new wife. The court based its decision, in large part, on whether or not the divorce judgment or separation agreement constituted a "declaration," as that term is defined in the *Insurance Act*, to change the beneficiary. Mr. Justice Strathy held that there was no declaration and therefore the first wife remained the designated beneficiary. The decision was upheld on appeal.

Interestingly, Mr. Justice Strathy agreed with the submission that a designation of a beneficiary under a life insurance policy was "akin to a testamentary disposition."[20] Query whether, if the designation really was a testamentary disposition, would the remarriage by the husband have invoked section 16 of the SLRA to automatically revoke it?

In the wake of cases like *Richardson Estate* v. *Mew* and the *Ashton* case, it may make sense for family lawyers to ask their clients to make a list of their insurance policies, pensions RRSPs, TFSAs, etc. and, in conjunction with the client's estate planner, revisit who is designated as a beneficiary under the respective plans.

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[18] See Section 17(2) of the SLRA. The exception to this rule is if the testamentary document expresses a contrary intention stating that the testator wants to benefit his or her former spouse.
[19] *Richardson Estate* v. *Mew*, 2009 ONCA 403.
[20] *Richardson Estate, Re* (2008), 93 OR (3d) 537 at para. 66.

Estate Litigators

Estate litigators should remember that the *Ashton* case is persuasive, not binding, authority for the proposition that a general revocation clause revokes all prior beneficiary designations. There is still sufficient ambiguity and disagreement over the reading of the SLRA and *Laczova* that one may argue over whether a general revocation clause in a will lacks the specificity necessary to revoke a designation under a plan. There is ammunition for both sides. The authors conclude that, as is so often the case with areas of legal ambiguity, there will certainly be more litigation surrounding this issue in the future.