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STATUTORY DESIGNATIONS

AND

THE RETIREMENT PLAN BENEFICIARIES ACT

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CHAPTER 1

INTRODUCTION

Individuals investing their funds are often invited by the financial institution accepting the monies to complete a "Designation of Beneficiary" form. The purpose of this form is to permit the individual to name the person who should receive the funds in the event of his or her death. Such forms are commonly offered and completed for insurance policies, pension plans, Registered Retirement Savings Plans (RRSPs), Registered Retirement Income Funds (RRIFs)[1], and sometimes even guaranteed investment certificates. It is assumed by members of the public that those designations will effectively transfer those assets on their death and that a formal will is therefore unnecessary in respect of those assets.

However, concern was expressed by the Manitoba Section of the Trust Companies Association about the effectiveness of these designations in the case of RRSPs and RRIFs. As a result, the Manitoba Law Reform Commission was requested by the Minister of Justice and Attorney General to investigate this issue.

The Commission concluded that the concern expressed is well-founded. Because of deficiencies in *The Retirement Plan Beneficiaries Act*,[2] a Manitoba statute, these "Designation of Beneficiary" forms may be of no legal effect at all in certain circumstances. RRSPs and RRIFs are the investments most at risk. In light of the very large amounts of money invested in these tax-assisted plans,[3] the consequences of so many invalid designations are very significant.

We therefore issued a Discussion Paper which examined the legal basis for these designations of beneficiaries and explained why some of them are valid (those for insurance policies and pension plans) and why others are probably invalid (those for RRSPs, RRIFs and guaranteed investment certificates). It asked why statutory designations are permitted to take the place of wills in some circumstances and whether there is still a need for them. Assuming that the need still exists, the Discussion Paper then asked which assets are appropriately dealt with by such instruments. Should the list be broadened to include RRSPs and RRIFs? What about other types of assets? Finally, the Discussion Paper looked at some other possible improvements to *The Retirement Plan Beneficiaries Act.*

The Discussion Paper was distributed to groups and individuals who we felt would be interested in the issue; a list of recipients can be found in Appendix B. We also published a summary of the Discussion Paper in *Headnotes and Footnotes*, the newsletter of the Manitoba

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[1]"An RRIF is an arrangement entered into between the annuitant of the RRSP and a 'carrier' who must generally have the same qualifications as a person eligible to be a trustee or other administrator of an RRSP. The assets in the RRSP are transferred to the carrier and in return the carrier undertakes to provide to the former annuitant, or his spouse if he should die before the termination of the RRIF, amounts payable annually or more frequently.": M.C. Cullity and C.A. Brown, *Taxation and Estate Planning* (2nd ed. 1984) 564.

[2]*The Retirement Plan Beneficiaries Act*, C.C.S.M. c. R138. The Act is reproduced in Appendix A to this Report.

[3]For example, during the 1987 taxation year alone, 3,483,650 taxpayers claimed deductions for RRSPs totalling $9,024,445,000; $329,903,000 was claimed in Manitoba by 136,570 taxpayers: Revenue Canada, Taxation, *1989 Taxation Statistics* (1989) Table 5. At the end of 1989, the amount invested in RRSPs (excluding RRSPs in the general funds of life insurers) totalled $74,572,439,000: Statistics Canada, *Financial Institutions* (publication 61-006, July, 1990) 158-159.

Bar Association (the Manitoba Branch of the Canadian Bar Association). In addition, our Executive Director attended a meeting of the Manitoba Section of the Trust Companies Association to discuss the issues raised in the Discussion Paper. We were gratified to receive a number of very well considered submissions which greatly assisted us in arriving at the recommendations contained in this Report. A list of those who responded to our Discussion Paper is also set out in Appendix B.

In the balance of this Report, we shall review the issues raised in the Discussion Paper, discuss some of the responses where appropriate, and set out our proposed recommendations. In Chapter 2, we set out the present state of the law relating to statutory designations, discuss why they are sometimes permitted to take the place of wills, and consider for which assets statutory designations should be available (with particular reference to RRSPs and RRIFs). Chapter 3 addresses a number of miscellaneous issues. The recommendations contained in this Report are then summarized in Chapter 4.

CHAPTER 2

THE ROLE OF STATUTORY DESIGNATIONS

A. WILLS VERSUS DESIGNATIONS

Any document or instrument which is testamentary in character is governed by *The Wills Act*[1] and is valid only if it complies with the terms of that Act. This is so whatever the document or instrument may be called. As stated in the classic case of *Cock* v. *Cooke*,

> . . . whatever may be the form of a duly executed instrument, if the person executing it intends that it shall not take effect until after his death, and it is dependent upon his death for its vigour and effect, it is testamentary.[2]

Compliance with *The Wills Act* requires that certain formalities be followed in the preparation and execution of the will or other testamentary document. These formalities include the following:

- it must be in writing;
- it must be signed by its maker (the testator) at its end;
- the testator must sign in the presence of two or more witnesses present at the same time;
- two or more of the witnesses must attest and subscribe the will in the presence of the testator.

Alternatively, the document will be valid as a testamentary disposition if it is wholly in the person's handwriting and signed at its end by the person. No witnesses are required for such a holograph will.

If these formalities are not complied with, the will may still be saved and given effect to by section 23 of *The Wills Act*. This provision, which is based on an earlier recommendation of the Manitoba Law Reform Commission,[3] allows a court to overlook a failure to comply with the strict formalities of *The Wills Act* and give effect to the document if the court is satisfied that the document embodies the testamentary intention of the deceased. In Canada, only Manitoba and Saskatchewan have such a saving provision.

The law appears to be settled in Canada that the designation of a beneficiary is a testamentary disposition.[4] This is so because such designations fall squarely within the test set out in *Cock* v. *Cooke*.

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[1]*The Wills Act*, C.C.S.M. c. W150.

[2]*Cock* v. *Cooke* (1866), L.R. 1 P.& D. 241 at 243.

[3]Manitoba Law Reform Commission, *The Wills Act and the Doctrine of Substantial Compliance* (Report #43, 1980).

[4]*MacInnes* v. *MacInnes*, [1935] S.C.R. 200.

> Nominations are testamentary in nature. They take effect only on the death of the nominator, they may be revoked by the nominator, and the nominator remains free to deal with the property in question during his lifetime. If the nominee predeceases the nominator, the nomination lapses. "The nominator," said Farwell L.J., "is in the position of a testator and the nominee of a 'legatee.'"[5]

This means that, in the absence of a statutory provision to the contrary, any designation of a beneficiary for insurance policies, pension plans, RRSPs and the like will be valid only if it complies with the formalities required by *The Wills Act* (unless, of course, it can be saved by section 23). Since such designations almost never have two witnesses and are virtually never entirely in the handwriting of the maker (they are done on pre-printed forms), they would, almost without exception, be invalid.

Three Manitoba statutes correct this invalidity and give effect to specified beneficiary designations despite their non-compliance with the requirements of *The Wills Act*. Because these designations are validated by statute, they are sometimes known as statutory designations (or nominations).[6] *The Insurance Act* provides that an insured under a life insurance policy[7] or under an accident and sickness insurance policy[8] may designate a beneficiary to receive the insurance money. The declaration may be contained in the insurance contract, a separate document or in a will. Furthermore, the Act provides that, where a beneficiary is designated, the insurance money does not form part of the estate of the insured and is not subject to the claims of the creditors of the insured.[9] *The Pension Benefits Act* also permits the designation of beneficiaries under pension plans;[10] it also provides that monies payable under a pension plan are exempt from execution, seizure or attachment.[11]

The third Manitoba statute is *The Retirement Plan Beneficiaries Act*. The Act permits the designation of beneficiaries under a plan.[12] Plan is defined as meaning:

> (a) a pension, retirement, welfare or profit-sharing fund, trust, scheme, contract, or arrangement for the benefit of employees, former employees, agents, or former agents of an employer or their dependants or beneficiaries, or
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> (b) a fund, trust, scheme, contract, or arrangement for the payment of an annuity for life or for a fixed or variable term, . . .[13]

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[5]W.J. Chappenden, "Non Statutory Nominations", [1972] J. Bus. L. 20 at 20. The author is quoting from *Griffiths* v. *Eccles Provident, Industrial, Co-operative Society, Ltd.*, [1911] 2 K.B. 275 at 284 (C.A.).

[6]Statutory designations are a form of "will substitute". These are instruments or mechanisms which permit the transfer of assets on death without a will. Other will substitutes include joint bank accounts, land held in joint tenancy, gifts *mortis causa* (gifts of personal property made in apprehension of imminent death and with the intent that it take effect only upon death) and self-declaration of trust or transfer where the trustee/transferor retains the power to revoke the disposition or to encroach on the capital. See Manitoba Law Reform Commission, *An Examination of The Dower Act* (Report #60, 1984) 135 - 143.

[7]*The Insurance Act*, C.C.S.M. c. I40, s. 167(1).

[8]*The Insurance Act*, C.C.S.M. c. I40, s. 224(1).

[9]*The Insurance Act*, C.C.S.M. c. I40, ss. 173(1) and 228(1).

[10]*The Pension Benefits Act*, C.C.S.M. c. P32, s. 17(2).

[11]*The Pension Benefits Act*, C.C.S.M. c. P32, s. 31(1).

[12]*The Retirement Plan Beneficiaries Act*, C.C.S.M. c.R138, s. 2.

[13]*The Retirement Plan Beneficiaries Act*, C.C.S.M. c. R138, s. 1.

This statute is based upon a Uniform Act proposed by the Uniform Law Conference of Canada.[14] Acts similar in form or substance have been adopted by most other Canadian jurisdictions.[15]

By virtue of these three statutes, it is clear that in Manitoba a designation of a beneficiary under an insurance policy, a pension plan, a profit-sharing plan or an annuity is valid and need not comply with the formalities under *The Wills Act*. The designation may be contained within a will or it may form a separate document. The courts have indicated - rightly, we believe - that a designation of a beneficiary under a guaranteed investment certificate is not valid;[16] that asset may be disposed of at death by a will only. Since they are not specifically mentioned in the definition of "plan", the same clarity does not exist for RRSPs or RRIFs, plans for which designations are in widespread use.

At the time of the publication of our Discussion Paper, only one case had interpreted *The Retirement Plan Beneficiaries Act* in the context of RRSPs. In *Daniel* v. *Daniel*,[17] at issue was whether an RRSP with a designated beneficiary formed part of the estate of its owner; the case did not indicate the type of asset in which the funds in the RRSP were invested (though one may infer that the funds were not invested in an annuity or other insurance product). Hirschfield J. held that the RRSP did fall within the definition of plan under *The Retirement Plan Beneficiaries Act* and that the designation was therefore effective in transferring the monies outside of the estate to the person so designated. Unfortunately, Hirschfield J. gave only one reason for this conclusion. His judgment appears to be founded on the fact that an RRSP ". . . is capable of being converted to an annuity at the appropriate time."[18] In the Discussion Paper, we suggested that this reason is unconvincing. In order for a plan to qualify under *The Retirement Plan Beneficiaries Act*, it must not simply be capable of conversion into an annuity; it must *be* an annuity. Any fund of money (such as a bank account, a guaranteed investment certificate or even cash on hand) or indeed any non-cash asset (such as a car or a piece of land) can be used to purchase or can be converted into an annuity if the owner so wishes. This surely does not mean that such assets can be disposed of on death by a simple designation of beneficiary. Furthermore, it is significant that *The Retirement Plan Beneficiaries Act* of Manitoba does not mention RRSPs or RRIFs, while the corresponding Acts in eight other jurisdictions have been amended to include specifically one or both of them.

Following the publication of our Discussion Paper, a further judgment of the Manitoba Court of Queen's Bench considered these issues. In *Waugh Estate* v. *Waugh*,[19] Wright J. stated that he did not agree with the decision in *Daniel* v. *Daniel*; instead, he quoted the analysis set out in the previous paragraph (which also appeared in the Discussion Paper) and said that he found it to be "convincing". Accordingly, we are fortified in the conclusion contained in the Discussion Paper that the validity of beneficiary designations under RRSPs and RRIFs not invested in

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[14]"Uniform Retirement Plan Beneficiaries Act", [1975] *Proceedings of the Fifty-Seventh Annual Meeting of the Uniform Law Conference of Canada* 178.

[15]*Law and Equity Act*, R.S.B.C. 1979, c. 224 as am., ss. 43, 46, 46.1 and 46.2; *Trustee Act*, R.S.A. 1980, c. T-10, s. 47; *The Queen's Bench Act*, R.S.S. 1978, c. Q-1 as am., s. 45, Rules 21-26; *Succession Law Reform Act*, R.S.O. 1980, c. 488, Part III; *Retirement Plan Beneficiaries Act*, S.N.B. 1982, c. R-10.21; *Beneficiaries Designation Act*, R.S.N.S. 1967, c. 21 as am., *An Act Respecting the Designation of Beneficiaries under Benefit Plans*, R.S.P.E.I. 1974, c. D-8; *The Income Tax Savings Plans Act*, S.N. 1974, No. 36 as am.; *Retirement Plan Beneficiaries Act*, R.S.Y. 1986, c. 153; *Retirement Plan Beneficiaries Act*, S.N.W.T. 1978-1st Sess., c.6.

Although Quebec is a civil law jurisdiction, the position there is also essentially that a gift effective upon death must be made by will in the absence of a specific provision to the contrary: C. art. 758, 778. An example of a contrary provision may be found in *An Act Respecting Supplemental Pension Plans*, R.S.Q. 1977, c. R-17.

[16]*Kologinski* v. *Kologinski Estate* (1988), 54 Man. R. (2d) 120 (Q.B.).

[17]*Daniel* v. *Daniel* (1986), 41 Man. R. (2d) 66 (Q.B.).

[18]*Id.*, at 71.

[19]*Waugh Estate* v. *Waugh*, (1990), 63 Man. R. (2d) 155 (Q.B.).

insurance products is uncertain at best. In our view, it is probable that, in Manitoba, such designations are not valid under *The Retirement Plan Beneficiaries Act*.[20]

B. WHY PERMIT DESIGNATIONS?

Before determining whether *The Retirement Plan Beneficiaries Act* should be expanded to encompass designations of beneficiaries under RRSPs, RRIFs and perhaps other schemes or assets, we posed a more fundamental question. Should designations not complying with the formalities of *The Wills Act* be permitted at all?

1. Reasons for Abolishing Statutory Designations

In our Discussion Paper, we identified the following arguments for ceasing to authorize statutory designations:

1) Designations are inconsistent with the purpose of the formalities of *The Wills Act*: It is argued that statutory designations are unwarranted exceptions to the rule that testamentary documents are valid only if they comply with the formalities set out in *The Wills Act*. If we accept the requirement of formalities on making a will, shouldn't these requirements be uniformly applied? However, this begs the question whether these formalities are themselves necessary. This Commission has previously considered this issue.[21] At that time, it recognized that some of the reasons put forward in support of these formalities were flawed. For example, the formalities do a poor job of serving the so-called protective function; ". . . the formalities are inadequate to protect a testator from determined crooks."[22] However, the Commission concluded that the formalities ". . . serve valid purposes in probate law and that reduction or elimination of the formalities is not an advisable solution."[23] It felt that the formalities ensured "[r]eliable and permanent evidence of intention, genuineness and clarity of terms. . . ."[24] It also felt that the formalities create the appropriate impression on the testator of finality and solemnity and that they assist in making the probate of wills more uniform and routine. If one accepts the validity of these formalities, it may be thought that they should not be dispensed with except in the most extreme circumstances.

On the other hand, it might be noted that most of the ends achieved by these formalities are also achieved by the less formal designations. Designations of beneficiaries forming part of standardized documents are reliable and permanent evidence of intention, are clear and are uniform. They do however tend to lack the same air of finality and solemnity which generally attends the execution of a will.

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[20]One of our respondents, a Winnipeg lawyer, argued that RRSP designations are not in fact testamentary in nature, but are revocable trusts. If this were so, *The Wills Act* and *The Retirement Plan Beneficiaries Act* would both be irrelevant to the issue and designations would be governed by the law of trusts (and would therefore generally be valid). Although we agree that this position is supportable (the distinction between a revocable trust and a testamentary disposition can be very fine), and one author has made a similar argument (D.S. McReynolds, "Sheltering RRSP Assets from Creditors on Death (1983), 6 E. & T.Q. 106), we do not believe that the case law supports it. For example, *Waugh Estate* v. *Waugh*, *supra*, clearly accepts that an RRSP designation is testamentary. The same conclusion is reached in *Canadian Imperial Bank of Commerce* v. *Besharah* (1989), 58 D.L.R. (4th) 705 (Ont. H.C.) and Ewaschuk J. specifically holds that "[t]he R.R.S.P. was not an *inter vivos* trust in which the wife as beneficiary had a vested interest at the creation of the trust." (at 708). Most significantly, the argument seems inconsistent with *MacInnes* v. *McInnes*, *supra* n. 4.

[21]*Supra* n. 3.

[22]*Supra* n. 3, at 15.

[23]*Supra* n. 3, at 17.

[24]*Supra* n. 3, at 15.

2) **Designations are easily forgotten:** Several authors have pointed out that designations of beneficiaries, once made, tend never to be reviewed again by their makers.

> A statutory nomination once made tends to be forgotten. The risk of this occurring is a major disadvantage because the nomination will not be revoked or varied by any subsequent will or codicil [unless the revocation relates expressly to the designation, either generally or specifically].[25]

A will is automatically revoked by the subsequent marriage of its maker; divorce revokes gifts in a will to the ex-spouse. However, a statutory designation made outside of a will is unaffected by marriage or divorce. A forgotten designation can easily result in assets going to an individual whom the deceased in his changed circumstances would not have wanted to benefit. Similarly, individuals whom the deceased would have wanted to benefit may be excluded. For example, in *Re Hart and Public Trustee*,[26] a father designated his daughter as the beneficiary of an insurance policy; he subsequently had another child but neglected to change the designation. After his death, his widow sought to have both daughters named as beneficiaries, arguing that her husband had never intended to favour one child over another. However, the court held that it lacked the power to grant her request. In two other cases, an individual failed to change the designation on an insurance policy upon his divorce and subsequent remarriage; as a result, his ex-wife received the proceeds of the policy instead of his widow.[27]

3) **Designations create uncertainty for financial institutions:** A statutory designation can be revoked by express words in a will or by a later designation. How then can the holder of funds subject to a designation be certain that it may properly pay those funds to the beneficiary named in the designation on file? It may be able to check the probated will for a revocation, but how does it ascertain whether the deceased ever executed a later designation? *The Pension Benefits Act* partially answers this question. It provides that the payer's liability is discharged upon payment to the person named in the designation.[28] It also provides that designations may be altered or revoked only in the manner set forth in the pension plan.[29] No similar provisions are contained in *The Retirement Plan Beneficiaries Act.*

4) **Designations are unnecessary in light of s. 23 of *The Wills Act*:** Statutory designations give effect to gifts to beneficiaries which would not otherwise be valid because of a failure to comply with the formalities of *The Wills Act.* Yet, is there still a need for such a relieving law when *The Wills Act* itself now permits such relief? Section 23 of the Act permits a court to give effect to a document or any writing on a document which embodies the testamentary intentions of the deceased, even if that document or writing does not comply with the formal requirements of the Act. The early indications are that this provision - found only in Manitoba and Saskatchewan - will be construed liberally.[30] This may mean that designations not complying with *The Wills Act* will be valid nonetheless, even without *The Insurance Act, The Pension Benefits Act* or *The Retirement Plan Beneficiaries Act.* Of course, it may be argued that such designations should be expressly authorized by statute, rather than being left to the vagaries of a relieving provision of general application.

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[25]J.B. Clark, *Parry & Clark on the Law of Succession* (8th ed., 1983) 16. See also A.R. Mellows, *The Law of Succession* (4th ed., 1983).

[26]*Re Hart and Public Trustee* (1981), 24 Man. R. (2d) 206 (Q.B.).

[27]*Eaton Life Assurance Co.* v. *LeNéal* (1988), 54 Man. R. (2d) 40 (Q.B.); *McLean* v. *Guillet* (1978), 22 O.R. (2d) 175 (Dist. Ct.).

[28]*The Pension Benefits Act*, C.C.S.M. c. P32, s. 17(2).

[29]*The Pension Benefits Act*, C.C.S.M. c. P32, s. 17(3).

[30]*Re Pouliot*, [1984] 5 W.W.R. 765 (Man. Q.B.).

2. Reasons for Retaining Statutory Designations

We also identified the following arguments in support of statutory designations:

1) Designations are useful for the poor and the unsophisticated: Statutory designations originated as a means by which poor unsophisticated people, who could not afford the services of a lawyer to prepare a will or who did not realize the importance of a will, could dispose of their small estates.[31] As one author has pointed out, "[t]he effect of these provisions is thus to permit a limited number of informal wills . . . ."[32] Until recently, the maximum amount which could be the subject of designation in the United Kingdom ranged from £100 to £500.[33]

However, the continued validity of this rather paternalistic argument is open to question. In an era of greater education and sophistication, where abundantly available lawyers will prepare wills at comparatively little cost, it may be argued that ersatz wills are no longer required for poor people or small assets. More significantly, it should be pointed out that the assets for which statutory designations are used or proposed for use today (insurance policies, RRSPs) are often very large assets indeed. In the United Kingdom, the maximum amount which may be the subject of designation is now £5,000.[34] In Manitoba, there is no monetary limit. Is it appropriate that such major assets (often the deceased's largest assets) should be subject to informal procedures while other, often smaller assets, require the full formality of *The Wills Act*?

As one commentator noted,

> To say that will substitutes are 'convenient and inexpensive' implies that wills themselves are inconvenient and expensive, but is this true? Unlike the medieval requirement of delivery, the necessity of a writing, signature and witnesses does not seem to be a great burden, even for a poor man. The utility of some of the formalities prescribed for wills may be questionable, but they are not onerous. Probably most people resort to will substitutes in order to avoid hiring a lawyer to draft a will, and to avoid the delay and expense of administration. However, one *can* draft a valid will without going to a lawyer; in fact, wills drawn without counsel are not uncommon. The expense of administration may be an undue burden, particularly on small estates, but many statutes exempt small estates from administration. However, these statutes typically have low dollar limits, whereas there are no dollar limits on transmission by will substitutes, and sometimes large amounts pass in this form. Thus the 'poor man's will' is not in fact confined to the poor.[35]

2) Designations allow probate fees to be saved: Assets which are subject to a valid designation do not form part of the estate of the deceased. Accordingly, no probate fees are payable on the value of those assets. It is therefore argued that statutory designations have the advantage of reducing the burden of probate fees on estates.

If this advantage accrued primarily to poorer people, it might provide a persuasive argument in favour of statutory designations. However, the advantage accrues not in accordance with income or size of estate, but in accordance with type of asset in the estate. The holder of a million dollar insurance policy is benefited, while the holder of a savings account (large or small) is not. Surely, if the reduction of the burden of probate fees is the objective, then the appropriate response would be to lower the amount of those fees, provide exemptions for small estates, or

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[31]J.B. Clark, *supra* n. 25, at 115; A.R. Mellows, *supra* n. 25, at 314-315. See also *Eccles Provident Industrial Co-operative Society, Ltd.* v. *Griffiths*, [1912] A.C. 483 at 490 (H.L.).

[32]J.B. Clark, *supra* n. 25, at 115.

[33]*E.g. Friendly Societies Act 1974*, c. 46, s. 66 (U.K.); *Industrial and Provident Societies Act 1965*, c. 12, s. 23 (U.K.); *National Savings Bank Act 1971*, c. 29, s. 9 (U.K.).

[34]*Administration of Estates (Small Payments) (Increase of Limit) Order 1984*, S.I. 1984/539, art. 2 made under the *Administration of Estates (Small Payments) Act 1965*, c.32, s. 6(1) (U.K.).

[35]W.M. McGovern Jr., "The Payable on Death Account and Other Will Substitutes" (1972), 67 Nw. U.L. Rev. 7 at 11-12.

abolish them. The elimination of probate fees for certain assets only seems an illogical justification for statutory designations.

3) **Designations assist in estate planning:** It is argued that statutory designations play an important part in estate planning and, in particular, in the reduction of income tax payable upon the death of a taxpayer. For example, upon death, a taxpayer is deemed to have disposed of all assets and tax may therefore become payable on the resulting deemed capital gains. However, where those assets are left to the taxpayer's spouse, the tax that would otherwise have become payable is deferred until the death of that spouse; statutory designations provide a means by which those assets may be left to the taxpayer's spouse. However, this tax advantage does not generally depend upon the spouse receiving the assets by way of statutory designation; the same deferral is available if the assets devolve upon the spouse by will. In the case of RRSPs which pass by way of will rather than designation, it is necessary to file an election in order to achieve the same effect;[36] however, this does not seem to be an onerous requirement.

4) **Designations protect assets from creditors:** A further justification propounded for statutory designations is that they keep assets out of the hands of creditors, a further boon to estate planning. This is only partially true. Insurance monies which are subject to a statutory designation are indeed free from the claims of creditors upon the death of the insured and are exempt from execution or seizure during the life of the insured where the designation is in favour of a spouse, child, grandchild or parent.[37] However, there is no similar provision for statutory designations made under *The Retirement Plan Beneficiaries Act*. Even though the monies do not form part of the estate of the deceased,

> . . . that does not mean that the settlor's creditors could not, nor should not be able to look to those assets for satisfaction of their claims when the settlor's estate is otherwise incapable of paying them.[38]

As noted in the *Waugh* case, ". . . the deceased's property vests firstly in the personal representative, at least in relation to personal property . . . "; the ". . . power to designate outside a will does not in itself remove the designated assets from the scope of the estate."[39]

Thus, although an individual may designate a beneficiary under *The Retirement Plan Beneficiaries Act*, in the absence of a statutory provision stating that an asset devolves directly to the designated beneficiary, it devolves on the deceased's estate and can be transmitted to the beneficiary ". . . only after the creditors have been satisfied."[40]

Even if statutory designations did shield monies from creditors, this would only beg the question. If certain assets are to be shielded from creditors, why only those which are subject to a statutory designation? And why should only certain assets be shielded in that manner?

5) **Designations are widespread and popular:** Perhaps the most persuasive reason for preserving statutory designations is that they are very widespread and popular. They are a

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[36]*Income Tax Act*, S.C. 1970-71-72, c. 63, Part I as am., s. 146 (8.91).

[37]*The Insurance Act*, C.C.S.M. c. I40, ss. 173 and 228.

[38]D.S. McReynolds, *supra* n. 20, at 113.

[39]*Supra* n. 19, at 160.

[40]*Canadian Imperial Bank of Commerce* v. *Besharah*, *supra* n. 20, at 709. A possible argument to the contrary might be found in *Kerslake* v. *Gray*, [1957] S.C.R. 516. There, it was held that designated insurance proceeds did not form part of the estate for the purposes of *The Dependants' Relief Act*, R.S.O. 1950, c. 101. This was because ". . . a dependant is entitled to look only to the estate which the personal representatives of the estate are entitled to administer" (at 519). Although this might suggest that creditors are similarly restricted, the majority judgment, taken as a whole, probably cannot be extended beyond the particular facts and statutory provisions before the court.

common, accepted part of commerce throughout Canada and figure in countless transactions. For example, life insurance policies seem unimaginable without a designation of beneficiary. Even if no other good reason could be found for them, it may be that the abolition of statutory designations would simply cause an unacceptable degree of financial dislocation.

C. THE RESPONSES

In questioning the very existence of statutory designations, we fully expected to provoke rebuttals extolling their virtues. We were not disappointed. The vast majority of our respondents urged the preservation of statutory designations. The arguments generally were that designations permit cash to be paid out quickly to beneficiaries in a time of need, that many people do not make wills, that the protection of assets from creditors is an important estate planning tool and that designations are popular. Our suggestion that designations are easily forgotten was also disputed by several representatives of the insurance and pension industries; in their view, existing mandatory reporting requirements to policy and plan holders are an adequate periodic reminder. Only one respondent, the Manitoba Council on Aging, felt that statutory designations, other than those allowed under *the Insurance Act*, should be abolished. In their view:

> . . . the formalities of executing a will are viewed as offering some protection to individuals (in that the majority will have acted with legal advice) and the solemnity attendant upon execution reinforces to individuals the significance of decisions reflected in a will.
>
> The Council is of the view that given the availability of legal assistance and the relative insignificance of the cost of making a will, that statutory designations are in general, of little use.[41]

D. CONCLUSION

A reconsideration of the merits of statutory designations poses a difficult dilemma between the purity of principle and the compromise of pragmatism. Were a legal system being built from scratch, it seems to us unlikely that there would be room for two such divergent methods of passing property to the next generation. The essence of wills is their formality and the protection that this is thought to afford; the essence of designations is their informality and the convenience which they afford. However, law reform does not take place in a vacuum and we recognize that statutory designations are an entrenched fact of life; any change to their status would result in unacceptable social and financial dislocation. Statutory designations should continue to be available for the assets for which they are presently being used (primarily insurance policies and pension plans).

For the same reason, statutory designations should be available for RRSPs and RRIFs. The interests of uniformity of legislation and of commercial practice across Canada would be served; every common law province but Manitoba and Alberta expressly permits the designation of beneficiaries for RRSPs. Furthermore, making RRSPs capable of designation would eliminate an apparent inequity between different financial institutions which issue RRSPs. Plans issued by insurance companies are generally capable of designation[42]; those issued by trust companies and

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[41]Written submission by Manitoba Council on Aging to the Manitoba Law Reform Commission, February 19, 1990.

[42]It should be noted that not all plans issued by insurance companies will be capable of designation. Only those plans which meet the definition of insurance in *The Insurance Act* will be designatable. Plans which do not meet that definition (such as a plan holding a guaranteed investment certificate or a similar instrument), even though issued by an insurance company, will not be capable of designation and will not have the benefit of the other provisions of *The Insurance Act* (such as protection from creditors).

banks probably are not. Furthermore, these instruments are effectively substitutes for pension plans; permitting designations would result in a further consistency.[43] We recommend:

RECOMMENDATION 1

That statutory designations should be available for Registered Retirement Savings Plans and Registered Retirement Income Funds.

In order to allow the law to adapt to new retirement-oriented plans which may come into being in the future, we also recommend:

RECOMMENDATION 2

That the legislation governing statutory designations provide that the Lieutenant Governor in Council may, by regulation, add additional assets to the list of those for which statutory designations may lawfully be made.

Thus, the legislation would not fall behind the times. Governments would have the flexibility to include new types of financial plans or assets as they are devised in the future without the necessity of belatedly bringing an amendment to the Legislature. However, we believe that that power should only be used to extend the use of statutory designations to new plans which might arise in the future which are analogous to insurance or pensions. Great care must be taken not to erode the role of wills.[44]

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[43]We recognize that, in curing one inconsistency, we may be creating another. A registered retirement savings plan is not really an asset. It is a relationship between an individual and a financial institution. The plan is a means by which specific assets are held. A law permitting the designation of beneficiaries for RRSPs might cure the inequity between insurance companies and other financial institutions, but create a more fundamental inequity between identical assets held inside and outside of an RRSP. For example, a savings account or guaranteed investment certificate held within an RRSP would be capable of designation; the same account or certificate held outside of an RRSP would not.

[44]For example, we noted earlier that, in the United Kingdom, certain types of savings accounts may be the subject of a designation of beneficiary to a maximum of £5,000. We would not support such an extension.

CHAPTER 3

OTHER ISSUES RESPECTING STATUTORY DESIGNATIONS

In our Discussion Paper, we examined several additional issues respecting statutory designations. In particular, we drew upon suggestions which were made by the Law Reform Commission of British Columbia for improvements to the Uniform Retirement Plan Beneficiaries Act upon which *The Retirement Plan Beneficiaries Act* of Manitoba is based.[1]

A. DEFINITION OF PARTICIPANT

The Retirement Plan Beneficiaries Act applies only to a "participant", who is defined as "a person who is entitled to designate another person to receive a benefit payable under a plan on the participant's death".[2] It has been suggested that this may mean that a beneficiary may be designated only where the plan itself confers that right. The Law Reform Commission of British Columbia felt that this was not in keeping with the purpose of the Act and recommended that the Act should apply "whether or not the plan gives the participant a right to designate anyone".[3]

However, it was pointed out to us that there is no legal requirement that a plan provide a mechanism for the designation of a beneficiary outside of a will and that such a requirement might prove difficult or impractical for some plan administrators. It was also suggested that the special circumstances of a given plan might make the designation of a beneficiary undesirable.[4] In deference to these concerns, we have decided not to recommend any change to the definition of participant.

B. PROTECTION FOR ADMINISTRATORS OF PLANS

Designations of beneficiaries may be filed with the administrator of the relevant plan. However, there is no requirement that this be done; in fact, where the designation is contained in a will, it would be unusual that it be filed with the administrator. Even where a designation is filed, it can be changed by a subsequent document without any notice to the administrator. As a result, uncertainty may arise when the owner of a plan dies. How does the administrator know that it has the most recent designation of beneficiary and that it is paying the monies to the correct person?

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[1]Law Reform Commission of British Columbia, *Report on The Making and Revocation of Wills* (Report #52, 1981); Law Reform Commission of British Columbia, *Report on Statutory Succession Rights* (Report #70, 1983).

[2]*The Retirement Plan Beneficiaries Act*, C.C.S.M. c. R138, s. 1.

[3]Law Reform Commission of British Columbia, *Report on The Making and Revocation of Wills* (Report #52, 1981) 88.

[4]Written submission by Investors Syndicate Limited to the Manitoba Law Reform Commission, January 18, 1990; written submission by the Canadian Life and Health Insurance Association Inc. to the Manitoba Law Reform Commission, January 19, 1990.

The legislation of every Canadian jurisdiction but Manitoba and the Northwest Territories addresses this problem by discharging the administrator of the plan from liability, generally where it pays the monies to the person designated in accordance with the plan; in other words, the legislation seems to permit the rules of the plan to determine when a designation will bind the administrator. For example, the Ontario legislation provides as follows:

> 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 . . . not in accordance with the terms of the plan; . . .[5]

The Law Reform Commission of British Columbia proposed a somewhat more restrictive solution which was consistent with their approach concerning insurance policies; it recommended that "[a]dministrators of a plan should be discharged upon transferring the benefit contemplated by the plan to the beneficiary of record prior to receipt at any of their offices in Canada of a notice of a change of beneficiary".[6]

Almost all of our respondents agreed that it is essential that the administrators of plans, acting in good faith, should be accorded a measure of protection. We agree and, in the interests of uniformity, would follow the Ontario model. We recommend:

RECOMMENDATION 3

That, where a participant in a plan has designated a person to receive a benefit under the plan on the death of the participant, 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 not in accordance with the terms of the plan.

Of course, the protection afforded to plan administrators does not affect the ability of the true beneficiary to seek the recovery of the monies payable under the insurance or the plan from the mistaken payee.

C. REPUBLICATION

The Law Reform Commission of British Columbia raised an interesting issue respecting the effect of a codicil to a will. Consider the following facts. An individual makes a will in which a beneficiary is designated in respect of a plan. Subsequently, the individual designates a *different beneficiary on a form supplied by the administrator of the plan. The effect is that the* designation in the will is revoked and superseded by the later designation.[7] *Suppose that the* individual then makes a codicil to his or her will for the purpose of, say, changing the executor. Such a codicil is generally considered to have the effect of "republishing" the entire original will (with the specified change). As a result, this doctrine of republication may have the unintended effect of reviving the original designation in the will.

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[5]*Succession Law Reform Act*, R.S.O. 1980, c.488, s. 53(a).

[6]*Supra* n. 3, at 88.

[7]*The Retirement Plan Beneficiaries Act*, C.C.S.M. c. R138, s. 5.

In fact, as the Law Reform Commission of British Columbia notes, this interpretation has not been accepted by the courts. In *Royal Trust Co.* v. *Shimmin*,[8] Macdonald J. held that the true intention of the individual must be ascertained:

> I do not think that the mere republication of the original will has the effect contended for, nor that the codicil so intended. If the testator had the intention now submitted he could have so expressed himself.[9]

Nonetheless, the Law Reform Commission of British Columbia considered it advisable that the alternative interpretation be dealt with legislatively by adopting the test propounded by Macdonald J. It recommended that the Act "should expressly provide that the republication of a will by codicil is not effective to revive a revoked designation in a will unless the codicil expressly so provides."[10]

It may well be, as one of our respondents argued, that a codicil cannot have the effect of republishing the original designation in our scenario because a will or part of a will which has been revoked cannot be republished. Nonetheless, out of an abundance of caution, we recommend:

RECOMMENDATION 4

That a codicil should not, by virtue of the fact that it republishes a will, have the effect of reviving a designation contained in that will which designation was subsequently revoked, unless the codicil expressly indicates an intention that it have that effect.

D. IRREVOCABLE DESIGNATION

It is possible under *The Insurance Act* to designate a beneficiary irrevocably.[11] The Law Reform Commission of British Columbia was of the view that such a provision would be desirable for plans in general. It might, for example, be useful in the division of assets in a separation agreement.[12] We agree and recommend:

RECOMMENDATION 5

That The Retirement Plan Beneficiaries Act should contain provisions permitting a designation of beneficiary which would be irrevocable except with the consent of the named beneficiary.

E. EFFECT OF MARRIAGE AND DIVORCE

In our Discussion Paper, we noted that an inconsistency exists between *The Retirement Plan Beneficiaries Act* and *The Wills Act* in their treatment of the effect of marriage and divorce

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[8]*Royal Trust Co.* v. *Shimmin*, [1932] 3 W.W.R. 447 (B.C.S.C.), aff'd [1933] 3 D.L.R. 718 (B.C.C.A.).

[9]*Supra* n. 8, at 450 (B.C.S.C.).

[10]*Supra* n. 3, at 88.

[11]*The Insurance Act*, C.C.S.M. c. I40, s. 168.

[12]*Supra* n. 3, at 90-91.

on designations and wills. The same inconsistency exists between the other statutes permitting designations (*The Insurance Act* and *The Pension Benefits Act*) and *The Wills Act*.

Generally speaking, where an individual marries, any will made prior to that marriage is revoked.[13] As a result, any designation of beneficiary of an insurance policy or a plan which may have been contained in the will will also be automatically revoked by operation of law.[14] The purpose of such a revocation is, of course, to ensure that an individual who is marrying will consider his or her new responsibilities and make a new will (and, presumably, new designations); if he or she does not make a new will, the revocation, in concert with other statutes, ensures that the spouse and any dependent children are the beneficiaries of the estate. However, a designation which is made outside of a will under *The Retirement Plan Beneficiaries Act* (or under *The Insurance Act* or *The Pension Benefits Act*) is not similarly revoked upon marriage.

Under *The Wills Act*, divorce does not have the effect of revoking a will. However, it does have the effect of revoking any gift to the divorced spouse contained in that will.[15] Designations made under statutes (including *The Retirement Plan Beneficiaries Act*) are unaffected by divorce.

The Law Reform Commission of British Columbia identified two main reasons why statutory designations should also be revoked by operation of law on the marriage of an individual. First, such designations remove the affected asset from the estate of the deceased. As a result, they are not available to a surviving spouse who did not receive at least one-half of the deceased's estate (as they would be under *The Dower Act*), nor are they available to a dependant who did not receive an adequate bequest under the will (as they would be under *The Dependants Relief Act* or the former *Testators Family Maintenance Act*).[16] Secondly, as noted earlier in this Discussion Paper, there is a very real tendency for statutory designations, once made, to be forgotten by the maker. This may often result in individuals simply forgetting to change a beneficiary designation to their spouse. The courts have no jurisdiction to correct such oversights, however obvious they may be.

Two arguments have been put forward for the proposition that a bequest or designation should be revoked upon divorce. First, it is presumed that such a revocation would be in accordance with the wishes of the affected individuals. Secondly, it is assumed that appropriate provision for an accounting and division of assets will have been made by agreement, under *The Marital Property Act*,[17] or in the divorce. Such a division will have taken insurance policies, pension plans and the like into account. Therefore, unless any designations in favour of the divorced spouse are revoked, it is possible that that spouse will be over-benefited if he or she also receives such assets.

The effect which marriage and divorce should have on designations under *The Retirement Plan Beneficiaries Act* poses a thorny problem. Although we are attracted by the reasoning set out above, we find ourselves faced with a choice of inconsistencies. We may:

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[13]A will is not revoked by the marriage of the testator where there is a declaration in the will that it is made in contemplation of the marriage or where the will is made in exercise of a power of appointment of property which would not otherwise pass to the testator's heirs: *The Wills Act*, C.C.S.M. c. W150, s. 17.

[14]*The Wills Act*, C.C.S.M. c. W150, s. 17; *The Retirement Plan Beneficiaries Act*, C.C.S.M. c. R138, c. 6; *The Insurance Act*, C.C.S.M. c. I40, ss. 169(3) and 224(4).

[15]*The Wills Act*, C.C.S.M. c. W150, s. 18(2).

[16]Concern over this possibility was also expressed by the Commission in its Reports on these two statutes: Manitoba Law Reform Commission, *Report on an Examination of The Dower Act* (1984, Report #60) 135-143; Manitoba Law Reform Commission, *Report on The Testators Family Maintenance Act* (1985, Report #63) 108-110.

[17]Insurance policies, annuities and pension and superannuation plans are all family assets under *The Marital Property Act*, C.C.S.M. c. M45, s. 1(2) and therefore shareable upon application.

(a) change *The Retirement Plan Beneficiaries Act* so that it will accord with *The Wills Act*. However, it would then be out of line with *The Insurance Act* and *The Pension Benefits Act*;

(b) make no change to *The Retirement Plan Beneficiaries Act*. The result is that that Act remains inconsistent with *The Wills Act*, but is still in line with the other statutes authorizing the designation of beneficiaries;

(c) change all three statutes authorizing the designation of beneficiaries, so that they are made to be consistent with *The Wills Act*.

At first blush, the latter option would appear to be the obvious answer. However, we think that it would be inappropriate to recommend changes to *The Insurance Act* and *The Pension Benefits Act* when we had not previously indicated that that was in our contemplation. This is doubly so in light of the fact that both of these Acts are under the on-going supervision of specialized provincial and national bodies; changes in insurance law should be made under the aegis of the Canadian Council of Insurance Regulators.

Each of the other two options contains the seeds of potential injustices. Changing *The Retirement Plan Beneficiaries Act* so that designations are revoked on marriage may work unfairly on persons who are remarrying and who have children from a previous marriage; if they have previously designated those children as their beneficiaries and do not realize that they must redesignate them after remarriage, their wishes will be thwarted. Leaving *The Retirement Plan Beneficiaries Act* in its present form may be similarly unfair on divorce; a divorcing spouse who believes that the divorce will revoke a designation to the ex-spouse, as it revokes gifts in a will to that ex-spouse, will not realize that a new designation is required. On balance, we believe that it is best to leave the present situation unchanged, so that there is at least consistency among the three statutes permitting designations. However, because of our concern that the differing effects of marriage and divorce on wills and designations may confuse the public, we believe that it is essential that this fact be brought to their attention. We therefore recommend:

RECOMMENDATION 6

That every form which permits the designation of a beneficiary and which is provided by an administrator of a plan governed by The Retirement Plan Beneficiaries Act and every report on the status of a plan from a plan administrator to a participant shall contain the following statement:

> ***Note: Your designation of a beneficiary will not be affected and will remain in force if you marry or divorce in the future. If you ever wish to designate a different beneficiary, you must do so in a will or must complete a new designation form.***

If, at some future time *The Insurance Act* and *The Pension Benefits Act* are changed to accord with *The Wills Act*, *The Retirement Plan Beneficiaries Act* could then be similarly changed and the above notice would no longer be necessary.

F. EFFECT ON CREDITORS

We previously noted that, by virtue of the terms of *The Insurance Act*, insurance monie which are subject to a statutory designation are free of the claims of creditors and that no simila provision exists for designations made under *The Retirement Plan Beneficiaries Act*. We noted authorities indicating that monies passing pursuant to designations under that Act were

nonetheless available to the claims of the deceased's creditors.[18] Is this appropriate? Should certain assets subject to a designation be free from the claims of creditors while others are not, or is the existence of a designation essentially irrelevant? The competing interests are well stated in the following comment made in the context of RRSPs:

> It may very well be the public policy . . . that all RRSPs should be given the same protection from creditors. Employee pension benefits are exempt from execution, seizure or attachment, and, as RRSPs were intended to give privately employed individuals the same benefits as members of registered pension plans then, arguably, all RRSPs should receive the same protection from creditors. Conversely, it is a long-standing principle of equity that creditors should be preferred to volunteers and, if RRSPs are viewed as a method by which an individual may save for retirement and that individual dies before he or she has a chance to enjoy that retirement, it does not seem unfair that those RRSP funds should, as a last resort, be available to satisfy the deceased's creditors.[19]

We recognize that sometimes RRSPs are not in fact used as pension supplements or substitutes. On occasion, they are used as a form of savings vehicle and are terminated well in advance of retirement; for example, some people use them to save for a down-payment on a home. Indeed, a change to the law which would shield from creditors assets which are subject to designation under *The Retirement Plan Beneficiaries Act* might on occasion give rise to attempts to evade creditors. However, we think that this risk is relatively small, particularly in light of the contribution limits on RRSPs.

On balance, we believe that assets which are subject to designation under *the Retirement Plan Beneficiaries Act* should be protected from creditors. As the Act's title indicates, these assets are being held primarily in retirement plans. Employee pension benefits which are governed by *The Pension Benefits Act* are protected from creditors; other plans, such as RRSPs, which are also pension supplements or substitutes should be treated in the same way. We recommend:

RECOMMENDATION 7

That, where a beneficiary is designated, any benefit payable to him or her is not, from the time of the happening of the event upon which it becomes payable, part of the estate of the participant, and is not subject to the claims of the creditors of the participant.

RECOMMENDATION 8

That, while a designation in favour of a spouse, child, grandchild or parent of a participant is in effect, the assets of the plan and the rights and interests of the participant therein and in the plan are exempt from execution or seizure.[20]

G. EFFECTING THE RECOMMENDATIONS

The recommendations which are contained in this Report would result in a number of significant changes to *The Retirement Plan Beneficiaries Act.* Unless great care is taken, they could have the effect of opening up estates which have already been distributed in whole or in

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[18]*Canadian Imperial Bank of Commerce* v. *Besharah* (1989), 58 D.L.R. (4th) 705 (Ont. H.C.); *Waugh Estate* v. *Waugh* (1990), 63 Man. R. (2d) 155 (Q.B.).

[19]D.S. McReynolds, "Sheltering RRSP Assets from Creditors on Death" (1983), 6 E. & T. Q. 106 at 115.

[20]Mrs. McGonigal abstained from these recommendations and did not participate in discussion of the issue, due to a possible perception of conflict of interest.

part. Clearly, that would be an inappropriate and unintended result. Accordingly, we recommend:

RECOMMENDATION 9

That the Recommendations contained in this Report apply only in cases of death occurring on or after the day on which legislation giving effect to them comes into force.

In order to illustrate the Recommendations contained in this Report, we have included an annotated Draft Retirement Plan Beneficiaries Act in Appendix C. Its purpose is to show how our Recommendations might be given effect; however, it should be noted that we do not have specialist training in legislative drafting.

Finally, we note that some of the changes proposed in this Report for *The Retirement Plan Beneficiaries Act* might also be appropriate for inclusion in *The Insurance Act* and *The Pension Benefits Act*. However, that is beyond the scope of this Report and we make no comment on it.

CHAPTER 4

SUMMARY OF RECOMMENDATIONS

The following is a summary of the recommendations contained in this Report:

1. That statutory designations should be available for Registered Retirement Savings Plans and Registered Retirement Income Funds. (p. 11)

2. That the legislation governing statutory designations provide that the Lieutenant Governor in Council may, by regulation, add additional assets to the list of those for which statutory designations may lawfully be made. (p. 11)

3. That, where a participant in a plan has designated a person to receive a benefit under the plan on the death of the participant, 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 not in accordance with the terms of the plan. (p. 13)

4. That a codicil should not, by virtue of the fact that it republishes a will, have the effect of reviving a designation contained in that will which designation was subsequently revoked, unless the codicil expressly indicates an intention that it have that effect. (p. 14)

5. That *The Retirement Plan Beneficiaries Act* should contain provisions permitting a designation of beneficiary which would be irrevocable except with the consent of the named beneficiary. (p. 14)

6. That every form which permits the designation of a beneficiary and which is provided by an administrator of a plan governed by The Retirement Plan Beneficiaries Act and every report on the status of a plan from a plan administrator to a participant shall contain the following statement:

   > *Note: Your designation of a beneficiary will not be affected and will remain in force if you marry or divorce in the future. If you ever wish to designate a different beneficiary, you must do so in a will or must complete a new designation form.* (p. 16)

7. That, where a beneficiary is designated, any benefit payable to him or her is not, from the time of the happening of the event upon which it becomes payable, part of the estate of the participant, and is not subject to the claims of the creditors of the participant. (p. 17)

8. That, while a designation in favour of a spouse, child, grandchild or parent of a participant is in effect, the assets of the plan and the rights and interests of the participant therein and in the plan are exempt from execution or seizure. (p. 17)

9. That the Recommendations contained in this Report apply only in cases of death occurring on or after the day on which legislation giving effect to them comes into force. (p. 18)

This is a report pursuant to section 15(2) of *The Law Reform Commission Act*, C.C.S.M. c. L95, signed this 23rd day of October, 1990.

Clifford H.C. Edwards, President

John C. Irvine, Commissioner

Gerald O. Jewers, Commissioner

Eleanor R. Dawson, Commissioner

Pearl K. McGonigal, Commissioner

CHAPTER R138

THE RETIREMENT PLAN BENEFICIARIES ACT

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Manitoba, enacts as follows:

Definitions.

1 In this Act,

"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 for the benefit of employees, former employees, agents, or former agents of an employer or their dependants or beneficiaries, or

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

created before or after the commencement of this Act; ("régime")

"will" has the same meaning as in The Wills Act. ("testament")

CHAPITRE R138

LOI SUR LES BÉNÉFICIAIRES DES RÉGIMES DE PENSION DE RETRAITE

SA MAJESTÉ, sur l'avis et du consentement de l'Assemblée législative du Manitoba, édicte :

Définitions

1 Les définitions qui suivent s'appliquent à la présente loi.

"participant" La personne qui a le droit d'en désigner une autre pour recevoir à son décès une prestation payable au titre d'un régime. ("participant")

"régime" Selon le cas :

a) Un fonds, une fiducie, un programme, un contrat ou une entente de rentes, de pension, de retraite, de prévoyance ou de participation aux bénéfices, au profit des employés ou anciens employés, des mandataires ou anciens mandataires d'un employeur, ou des personnes à charge ou bénéficiaires de ces derniers;

(b) un fonds, une fiducie, un programme, un contrat ou une entente pour le paiement d'une rente viagère ou couvrant une période fixe ou variable,

créés avant ou après l'entrée en vigueur de la présente loi. ("plan")

"testament" Testament au sens de la Loi sur les testaments. ("will")

Designation and revocation by participant.

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

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

(b) by will;

and may revoke the designation by either of those methods.

Designation by will.

3 A designation in a will is effective only if it relates expressly to a plan, either generally or specifically.

Revocation by will.

4 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.

Later designation.

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

Revocation of a will.

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

Invalid wills.

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

Invalid wills.

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

Non-revival of designation.

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

Désignation de bénéficiaires

2 Le participant peut désigner une personne pour recevoir à son décès une prestation payable au titre d'un régime :

a) soit par un document revêtu de sa signature ou signé en son nom, en sa présence et sur son ordre par une autre personne;

b) soit par testament.

Il peut révoquer la désignation par l'une ou l'autre de ces méthodes.

Désignation par testament

3 Une désignation contenue dans un testament n'est valide que si elle fait expressément référence au régime, d'une façon générale ou spécifique.

Révocation par testament

4 La révocation faite dans un testament d'une désignation faite au moyen d'un autre document n'est valide que si elle se rapporte expressément à la désignation, d'une façon générale ou spécifique.

Préséance de la désignation la plus récente

5 Par dérogation à la Loi sur les testaments, une désignation révoque toute désignation antérieure, dans la mesure où il y a incompatibilité.

Révocation d'un testament

6 La révocation d'un testament a pour effet de révoquer les désignations qu'il renferme.

Testament invalide

7 Une désignation ou une révocation contenue dans un document censé être un testament n'est pas nulle du seul fait que ce document ne constitue pas un testament valide.

Révocation

8 Une désignation contenue dans un document censé être un testament, mais qui ne constitue pas en fait un testament valide, est révoquée lorsqu'il se produit un événement qui aurait pour effet de révoquer le document si ce dernier avait été un testament valide.

Désignation non remise en vigueur

9 La révocation d'une désignation ne rétablit pas une désignation antérieure.

Date of designation or revocation by will.
10 Notwithstanding The Wills Act, a designation or revocation in a will is effective from the time when the will is signed.

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

Conflicts between Act and plans.
12 Where this Act is inconsistent with a plan, this Act 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.

Insurance Act.
13 This Act does not apply to a contract or to a designation of a beneficiary to which The Insurance Act applies.

Date d'entrée en vigueur
10 Par dérogation à la Loi sur les testaments, une désignation prend effet à compter de la date de la signature du testament.

Paiement
11 Après le décès d'un participant qui a fait une désignation, laquelle est en vigueur au moment du décès, la personne désignée peut faire exécuter le paiement de la prestation qui lui est due au titre du régime, mais celui contre lequel le paiement fait l'objet d'une exécution peut présenter toute défense qu'il eût été en droit d'opposer au participant ou à son représentant légal.

Incompatibilité
12 Lorsqu'il y a incompatibilité entre un régime et la présente loi, cette dernière s'applique, sauf les cas où l'incompatibilité se rapporte à une désignation faite après le versement d'une prestation, si ce versement avait été différent dans l'éventualité où il aurait été précédé par la désignation, auxquels cas le régime s'applique.

Cas où la loi ne s'applique pas
13 La présente loi ne s'applique pas aux contrats ni aux désignations de bénéficiaires visés par la Loi sur les assurances.

The Queen's Printer
for the Province of Manitoba

L'Imprimeur de
la Reine du Manitoba

APPENDIX B

PERSONS WHO RECEIVED A COPY OF THE COMMISSION'S DISCUSSION PAPER

Investment Dealers Association, Manitoba District Council

Canadian Association of Retired Persons

Association of Canadian Pension Management

Canadian Association of Pension Supervisory Authorities

Canadian Pension Conference, Manitoba Regional Council

National Pensioners and Senior Citizens Federation

Pension Investment Association of Canada

Consumers' Association of Canada (Manitoba Branch)

Winnipeg Society of Financial Analysts

Canadian Association of Financial Planners

Canadian Institute of Credit and Financial Management (Winnipeg Chapter)

Canadian Institute of Financial Planning

Canadian Bankers Association

Co-operative Credit Society of Manitoba Ltd.

Credit Union Central of Manitoba

Fédération des caisses populaires du Manitoba Inc.

Investment Dealers Association of Canada

Investment Funds Institute of Canada

Association of Canadian Insurers

Canadian Council of Insurance Regulators

Canadian Life and Health Insurance Association Inc.

Insurance Brokers Association of Manitoba Inc.

Insurance Institute of Manitoba

Manitoba Society of Seniors, Inc.

Trust Companies Association of Canada

Winnipeg Chamber of Commerce

Manitoba Chamber of Commerce

Civil Service Superannuation Board

Cooperative, Consumer and Corporate Affairs (Research and Planning Division)

Superintendent of Insurance, Province of Manitoba

Superintendent of Pensions, Province of Manitoba

Prof. Cameron Harvey, Faculty of Law, University of Manitoba

Legal Research Institute, Faculty of Law, University of Manitoba

Task Force on Superannuation and Group Insurance, Civil Service Commission

Pension Commission of Manitoba, Department of Labour

Manitoba Department of Justice

Business Law Subsection, Manitoba Bar Association

Insurance Law Subsection, Manitoba Bar Association

Wills and Trusts Subsection, Manitoba Bar Association

Mr. John Turnbull, Turnbull and Turnbull Consulting Actuaries

Mr. Douglas Jones, Investors Syndicate

Mr. Robert Goodwin, Simkin, Gallagher, Barristers & Solicitors

Mr. Russ Wookey, D'Arcy & Deacon, Barristers & Solicitors

Mr. Arthur Chapman, Taylor, McCaffrey, Chapman, Barristers & Solicitors

Ms Jane Evans, Aikins, MacAulay & Thorvaldson, Barristers & Solicitors

Mr. William Molloy, Thompson, Dorfman, Sweatman, Barristers & Solicitors

Mr. Don Cochrane, Habing & Company

Ms Theresa Johnson, Great West Life Assurance Company

Mr. Brian David, Prudential Assurance Company

Mr. Raymond Hall, Taylor, McCaffrey, Chapman, Barristers & Solicitors

Ms Linda Barker, Smordin, Soronow, Ludwig, Barristers & Solicitors

Mr. Fred W. Duval, McRoberts Law Offices

Ms Patricia G. Ritchie, Barrister & Solicitor

Mr. John Van der Krabben, Smith, Neufeld & Jodoin, Barristers & Solicitors

Mr. Myron J. Ogaranko, Barrister & Solicitor

Mr. Allan Macdonald, Macdonald, Murray, Barristers & Solicitors

Mr. M.L. Rosenberg, Simkin, Gallagher, Barristers & Solicitors

Mr. George Van den Bosch, Pitblado, Hoskin, Barristers & Solicitors

Mr. Bruce King, Pitblado, Hoskin, Barristers & Solicitors

Ms Laurie Allen, Cherniack & Allen, Barristers & Solicitors

Mr. Robert Fisher, Weinberg, Perlov, Stewart, Barristers & Solicitors

Mr. Warren Besel, Barrister & Solicitor

Mr. Sam Braker, Barrister & Solicitor

Mr. Sam Sheps, Barrister & Solicitor

Me. Denis Labossière, Teffaine, Labossière, Barristers & Solicitors

Mr. Paul Peters, Toronto Dominion Bank

Mr. Murray Smith

Mr. Norman Larsen, Crown Counsel (Legislation)

Ms Priscilla Healy, Pension Commission of Ontario

Mr. Bill Simms, Central Guaranty Trust

Mr. George Saunders, Royal Bank of Canada, Law Department

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Mr. Robert C. Dowsett, William M. Mercer Limited

Mr. P.F.E. Campbell, The Toronto-Dominion Bank

Mr. D.E. Jones, Investors Syndicate Limited

Mr. T. Douglas Kent, Canadian Life and Health Insurance Association Inc.

Mr. John Cumberford, Manitoba Pension Commission

Mr. David Phillips, Canadian Bankers' Association

Mr. John Wahl, Life Underwriters Association of Canada

Manitoba Council on Aging

APPENDIX C

DRAFT RETIREMENT PLAN BENEFICIARIES ACT AND COMMENTS

DRAFT RETIREMENT PLAN BENEFICIARIES ACT

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Manitoba, enacts as follows:

Definitions.
1 In this Act,

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

"plan" means

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

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

(c) a retirement savings plan or retirement income fund as defined in the Income Tax Act (Canada),

created before or after the commencement of this Act and such other fund, trust, scheme, contract or arrangement as the Lieutenant Governor in Council may prescribe by regulation;

"will" has the same meaning as in The Wills Act.

Designation and revocation by participant.
2 A participant may designate a person to receive a benefit payable under a plan on the participant's death

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

(b) by will;

COMMENTS

Unchanged from the present Act.

This definition has been expanded to permit the designation of beneficiaries under RRSPs and RRIFs (including those already in existence at the time of the enactment of the statute). It also permits future expansion of the definition, by means of regulation, to accommodate new plans which may come into existence in the future. (Recommendations 1 and 2)

Unchanged from the present Act.

Unchanged from the present Act, except for reference to new section 12 (irrevocable designations).

and, subject to section 12, may revoke the designation by either of those methods.

Designation by will.
3 A designation in a will is effective only if it relates expressly to a plan, either generally or specifically.

Unchanged from the present Act.

Revocation by will.
4 Subject to section 12, a revocation in a will is effective only if it relates expressly to a plan, either generally or specifically.

Unchanged from the present Act, except for reference to new section 12 (irrevocable designations).

Later designation.
5 Notwithstanding The Wills Act, but subject to section 12, a later designation revokes an earlier designation, to the extent of any inconsistency.

Unchanged from the present Act, except for reference to new section 12 (irrevocable designations).

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

Unchanged from the present Act.

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

Unchanged from the present Act.

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

Unchanged from the present Act.

Non-revival of designation.
9 Revocation of a designation does not revive an earlier designation.

Unchanged from the present Act.

Non-revival of designation in will.
10 The republication of a will by codicil does not revive a designation in the will which was subsequently revoked unless the codicil expressly so provides.

This section implements Recommendation 4 and addresses the possibility of a revoked designation in a will being inadvertently revived by a subsequent codicil to that will.

Date of designation or revocation by will.
11 Notwithstanding The Wills Act, but subject to section 12, a designation or revocation in a will is effective from the time when the will is signed.

Unchanged from the present Act, except for reference to new section 12 (irrevocable designations) (formerly s. 10).

Designation of beneficiary irrevocably.
12 A participant may irrevocably designate a person to receive a benefit payable under a plan on the participant's death by an instrument signed by him or signed on his behalf by another person in his presence and by his direction which is filed with the person

This section would permit a beneficiary to be designated irrevocably (Recommendation 5).

administering the plan at its head or principal office in Canada.

Notice of effect of marriage and divorce.
13 Every form which permits the designation of a beneficiary under a plan and which is provided by the person administering the plan and every report on the status of a plan from the person administering the plan to a participant shall contain the following statement:

> Note: Your designation of a beneficiary will not be affected and will remain in force if you marry or divorce in the future. If you ever wish to designate a different beneficiary, you must do so in a will or must complete a new designation form.

The purpose of this section is to ensure that the public's attention is drawn to the fact that the effect of marriage and divorce on plans governed by *The Retirement Plan Beneficiaries Act* is different from the effect which they have under *The Wills Act*. Under *The Retirement Plan Beneficiaries Act*, neither marriage nor divorce revokes a designation and we have not proposed any change to this (see our discussion of this issue at pages 14 to 16). This section gives effect to Recommendation 6.

Enforcement of designation.
14 Where a participant has designated a person to receive a benefit under a 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 2 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 personal representative.

This section provides protection to plan administrators who make payments in good faith on the basis of the most recent designation known to them. It is based on section 53 of Ontario's Act (Recommendation 3). Subsection (b) also incorporates section 11 of the present Act.

Plan money free from creditors.
15(1) Where a beneficiary is designated, any benefit payable to the beneficiary is not, from the time of the happening of the event upon which it becomes payable, part of the estate of the participant, and is not subject to the claims of the creditors of the participant.

This section protects plan monies from creditors. It is based on section 173 of The Insurance Act (Recommendations 7 and 8).

Plan exempt from seizure.
15(2) While a designation in favour of a spouse, child, grandchild or parent of a participant is in effect, the assets of the plan and the rights and interests of the participant therein and in the plan are exempt from execution or seizure.

Conflicts between Act and plans.
16 Where this Act is inconsistent with a plan, this Act 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

Unchanged from the present Act (formerly s. 12).

would have been different if the designation had been made before the benefit payment, in which case the plan applies.

Insurance Act.
17 This Act does not apply to a contract or to a designation of a beneficiary to which The Insurance Act applies.

Unchanged from the present Act (formerly s. 13).

Application of this Act.
18 This Act applies in cases of death occurring on or after the day this Act comes into force.

The changes contained in this Act would apply only to participants who die on or after the date they come into force (Recommendation 9).

Repeal.
19(1) Subject to subsection (2), The Retirement Plan Beneficiaries Act, R.S.M. 1987, c. R138, is repealed.

The former Retirement Plan Beneficiaries Act would be repealed.

Deaths before this Act comes into force.
19(2) The Retirement Plan Beneficiaries Act, R.S.M. 1987, c. R138, continues in force as if unrepealed in cases of death occurring before this Act comes into force.

Transitional provision.