

TAX ALERT



TAX ALERT is a commentary on topics of current interest – usually topics relating to recent changes in tax law, new CRA administrative practices or current interpretations arising from tax cases. Professional advice should be obtained before acting on any of this information.

MAKING A NEW RRSP OR RRIF DESIGNATION IN YOUR WILL – BEWARE!

When an RRSP plan is first purchased, the owner must name a beneficiary in the plan. The beneficiary or beneficiaries will inherit the proceeds of the RRSP when the owner dies. Similarly, when a RRSP is converted to a RRIF, the same process will follow and a beneficiary must be specified in the RRIF. We will only refer to RRSPs below but the same rules apply to RRIFs.

Typically, the RRSP beneficiary named under the plan is not looked at for many years after a plan is taken out. Individuals simply continue on contributing to the plan but at some point the need for estate planning kicks in and the RRSP designation comes back into play. Usually this happens when individuals are thinking about revising their will at or near retirement. It is our experience that when the RRSP beneficiary is made under a new will, it almost always changes from the beneficiary set out under the original RRSP plan. Therein lies the problem.

CALL THE RRSP ISSUER

Most often, when a will is being re-done discussions come up about RRSP beneficiaries and between the lawyer and the client they will insert a RRSP designation in the will and leave it at that. Seldom if ever in our experience does anyone think to go back and compare the beneficiary designation under the plan with the one under the will. In fact, most wills do not even specifically mention that the original RRSP designation is revoked and the new one (under the will) takes its place. Also, there just does not seem to be any inclination for anyone to contact the RRSP issuer and inform them of the new beneficiary so the issuer is completely unaware of the change. My advice to clients who are drawing up a new will and designating a RRSP beneficiary in that will is to contact the plan holder and send them a copy of the new will or at least the wording of the designation clause in the will. The will should be very specific about the details of the original RRSP designation and its revocation.

DESIGNATION DISPUTES

In 2008 this issue came up in a court case where the original RRIF beneficiary (changed by a later will designation) was disputed in Ontario Superior Court in *Ashton Estate v South Muskoka Memorial Hospital Foundation*.

The facts are follows. In 1998, Mr. Ashton signed a beneficiary designation form for his RRIF in favour of his children. In 2001 he executed a will in which his eight children were entitled to 95% of his estate in unequal shares. The will included a general clause by which he revoked all wills and testamentary dispositions previously made. When Mr. Ashton died in 2007 there was a dispute as to whether the general revocation clause in his 2001 will constituted a valid revocation of his 1998 beneficiary designation in his RRIF as required pursuant to the Succession Law Reform Act (SLRA). The SLRA provides that *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.* The question was whether the general clause in the will was specific enough to cancel the original RRIF designation. The court decided that it was sufficient enough to meet the conditions of the SLRA but most lawyers are unhappy with the decision and uncertain about its application. The case seems to indicate that *any* revocation in a will should be sufficient to satisfy the SLRA but the legal fraternity is not so sure. The case seems to ignore the fact that the SLRA requires that the new designation must “*expressly*” refer to the original designation either generally or specifically but in the Ashton case that certainly does not seem to have been the case.

EXECUTORS DILEMMA

The decision puts executors and estate trustees in a difficult position where the wording in a will does not refer specially to the original plan designation and the cancellation of that designation. Undoubtedly, beneficiaries under the new will designation and under the original plan designation will take different views and at that point estate litigation is bound to happen. Also, issuers and administrators of the RRSP and RRIF plans will have a low comfort level about who is the actual beneficiary and probably be unwilling to discharge funds until the matter is settled.

NOTIFY THE ISSUER

In summary, individuals who are revising their wills and making RRSP and RRIF designations should carefully consider the fact that a carefully drafted clause should be put in the will to identify and cancel the original designation in RRSP and RRIF plans. It would be even better if a copy of the will is sent to the RRSP issuer for their records. We would do it by registered mail. It would be truly unfortunate if the RRSP issuer, when notified of the death of an individual, paid out the funds pursuant to the beneficiary in the original plan because the issuer was not aware that there was a later designation under a will. The horse would be clearly out of the barn.

Executors have enough issues to deal with in estate litigation that is more frequently happening these days and there seems little need to add this to the list. If you have revised your will lately and named an RRSP or RRIF beneficiary in it, best you look at it again to make sure it has been done correctly. Put a copy of your new will in the mail to the RRSP issuer and ask for confirmation that the issuer is satisfied that the will clause is acceptable in order to make the change in the plan beneficiary.

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