

## NON-INSURANCE BENEFICIARY DESIGNATIONS

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*Retirement plans contain provisions which entitle a member to designate a beneficiary if the member should die before the plan starts to provide the anticipated stream of retirement income. All of the common law provinces and territories have statutory provisions designed to facilitate the use of these designations. This article argues that it is not clear that these statutes remove the important jurisprudential differences which may exist between designations under different plans within the same jurisdiction, or insulate designations from all or some of the more general law of the jurisdiction which would be expected to apply to them apart from these statutes. In particular, the article considers what types of designations would, at common law, be considered testamentary in nature, and discusses how far, despite the legislation, it may still be necessary, either generally or in specific cases, to deal with that question. Finally, it explores some problem areas where the persons entitled to receive the benefits may differ depending upon the manner in which the courts resolve some of these problems.*

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*Les régimes de retraite contiennent des dispositions qui permettent à leurs membres de désigner un bénéficiaire s'ils meurent avant que le régime ne commence à payer le revenu anticipé de la retraite. Provinces de "common law" et territoires ont tous dans leur législation des dispositions ayant pour but de faciliter l'emploi de ce genre de désignation. La thèse de l'auteur de cet article est qu'il n'est pas évident que ces dispositions statutaires effacent les différences jurisprudentielles importantes qui pourraient exister entre les désignations des régimes divers dans une même juridiction ou qu'elles isolent ces désignations de l'ensemble ou de certaines parties du droit plus général de ladite juridiction, droit qui devrait s'appliquer à ces désignations si les dispositions législatives spéciales n'existaient pas. L'auteur se demande en particulier quels genres de désignations on pourrait considérer comme étant de nature testamentaire en "common law" et analyse jusqu'à quel point il peut encore être nécessaire, malgré la législation, de s'occuper de cette question, soit généralement, soit dans des cas particuliers. L'auteur termine en examinant certains problèmes: quand, les décisions des tribunaux différant dans certains cas, les ayants droit diffèrent.*

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### Introduction

In the past few years, a number of Canadian articles and comments have discussed aspects of those mysterious juridical creatures, beneficiary designations, particularly with respect to their operation in connection with Registered Retirement Saving Plans (RRSPs).<sup>1</sup> Problems arising from the application of statutory provisions in the various jurisdictions have been extensively discussed, with respect both to designations of beneficiaries of life insurance policies, and designations of beneficiaries under various retirement and similar plans not issued by life insurers. In adding to this literature, this article will consider only those designations which fall outside the beneficiary designation provisions of the various insurance acts, a distinction made in all of the Canadian common law jurisdictions in their respective statutory provisions dealing with beneficiary designations.

Notwithstanding this fairly extensive literature, the essential nature of non-insurance beneficiary designations still seems elusive. The literature, both in Canada and elsewhere in the Commonwealth, seems to assume a homogeneity with respect to the nature of these designations. This is an assumption which I am no longer able to make. I believe that the jurisprudential differences which I submit exist between beneficiary designations under different types of plans might have very practical consequences. This article will first examine the difference which concerns me, that between those designations which, at least at common law, are testamentary in nature, and those which are not. It will then discuss whether the statutory provisions as to beneficiary designations in the various jurisdictions make an examination of this issue irrelevant, and conclude with a discussion of some areas where, if the courts do not decide that the question is irrelevant, the resolution of that issue may make a difference as to who is entitled to the plan funds.

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<sup>1</sup> B.S. Corbin, Comment (1988-89), 9 E. & T.J. 265; B.S. Corbin, Designating Beneficiaries (1988-89), 9 E. & T.J., at pp. 199, 349; C.M. Fien, *Waugh Estate v. Waugh*: More about the Nature of RRSPs (1990-91), 10 E. & T.J. 37; D.S. McReynolds, Sheltering RRSP Assets from Creditors on Death (1982-84), 6 E. & T.Q. 106; Law Reform Commission of British Columbia, Report No. 52, Report on the Making and Revocation of Wills (1981); Law Reform Commission of British Columbia, Report No. 70, Report on Statutory Succession Rights (1983); Manitoba Law Reform Commission, Report No. 73, Statutory Designations Under the Retirement Plan Beneficiaries Act (1990), reprinted (1991), 11 E. & T.J. 64. See also "Correspondence" in (1988-89), 9 E. & T.J., at pp. 357 *et seq.*, and (1990), 10 E. & T.J., at pp. 85 *et seq.*, and 160 *et seq.* The subject is also discussed in other Commonwealth jurisdictions. See W.J. Chappenden, Non-Statutory Nominations, [1972] J. Bus. L. 20; G. Kodilinye, Pension Scheme Nominations and the Wills Acts, [1990] Conv. 458; W.F. Nunan, The Application of the Wills Acts to Nominations of Beneficiaries under Superannuation or Pension Schemes and Insurance Policies (1966), 40 Aust. L.J. 13, and "Correspondence", *ibid.*, at pp. 248, 438; A. Samuels, Nominations in Favour of a Nominee to Take Effect at Death (1967), 31 Conv. & P.L. 85.

### I. *Beneficiary Designations at Common Law*

Nominations, or designations, of beneficiaries are usually found where the person executing the designation form has some contractual relationship with another, be it an employer, as in the case of an employee pension plan, or a trust company, a bank, or similar institution, as in the case of an RRSP, from which flows the entitlement to make the designation. The relationship may grow beyond the merely contractual in an individual case, but it will usually have its roots there.<sup>2</sup>

Starting with the contractual position alone, a provision that a third party to the bargain will receive some benefit, commencing with the death of one of the parties to the contract, creates no right enforceable by that third party down to the death of that contracting party, and none thereafter, due to the privity rule.<sup>3</sup> This does not make the provision for the third party valueless, for the other contracting party may perform the obligation to supply that benefit.<sup>4</sup> If he or she does so, the estate of the deceased contracting party is not entitled to interfere unilaterally, and demand that the benefit be paid to the estate, just as, prior to the death of the deceased, he or she could not have done so unless a power to so vary the contractual terms was reserved to that party.<sup>5</sup> On contracting, one party receives the benefit of a *chose in action*, that is, the right, commencing with his or her death, to performance in favour of the third party by the other contracting party. Such performance simply discharges the pre-existing obligation.

This basic position is unaffected by the existence of a term which gives to one contracting party a power to amend the contractual terms. Thus, if the contract so provides, the expectations of third party beneficiaries to the contract may be amended or destroyed by unilateral act of one contracting party. So long as the position of the persons concerned rests solely upon contract, any revocation or replacement of a designation is simply an exercise of contractual power to change the terms. If, after the death, the new nominee receives the benefit, it will be because the other contracting party is performing an obligation created

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<sup>2</sup> In theory, the "plan" could be settled as a gift from the settlor, eliminating the role of contract.

<sup>3</sup> It is possible that one of the contracting parties will hold the contractual *chose in action* in trust for the third party, thus giving to that third party a trust beneficiary's ability to enforce the right. See the discussion in *Beswick v. Beswick*, [1968] A.C. 58, [1967] 2 All E.R. 1197 (H.L.).

<sup>4</sup> In some cases, the obligation in favour of the third party may be specifically enforceable at the instance of the other contracting party, or his or her estate. See *Beswick v. Beswick*, *ibid.*

<sup>5</sup> See the discussion in *Re Schebsman*, [1944] Ch. 83 (C.A.).

*inter vivos*. The death establishes the time at which performance is to commence, and the last effective designation settles the final form of the contractual obligation to be performed.<sup>6</sup>

However, apart from the retirement plans based upon life insurance policies, or perhaps, non-trusteed deposit plans currently offered by banks, which seem to establish only a debtor-creditor relationship,<sup>7</sup> the position of the interested parties usually does not rest solely upon contract. The contract will require the establishment of a trust, the terms of which will be those bargained for in the contract. At common law, an effective beneficiary designation will now not only change the terms of the contract, but will alter, either immediately or at a future time, the beneficial interests in the trust *corpus* from those which would have existed but for that designation. The designation must achieve this latter result either by functioning as an exercise of a power of appointment over some interest in the *corpus*, or as an assignment or transfer of some interest of the nominator in the *corpus*. These two possibilities are not identical. "Power of appointment", in this context, is used as a technical term and is "distinct from the dominion that a man has over his own property".<sup>8</sup> Powers, in this technical usage, affect proprietary interests other than those already belonging to the donee. If a designation transfers to the nominee the very property interest under the trust which belonged to the planholder, or some part of that interest, it is not operating as an exercise of a power of appointment, but as an assignment.

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<sup>6</sup> However, there is a critical difference between the situation described in the text, where the obligation resting upon the other contracting party, immediately before the death of the "nominator", is to perform in favour of a third party, and a situation where, immediately before such death, the obligation is to perform in favour of the "nominator", and will only purport to be transformed into an obligation, in identical terms, in favour of the third party, upon the "nominator's" death. The death benefit payable to a third party beneficiary in a life insurance policy is a common example of the former situation. A change in the contractual term which identifies the payee is an exercise of a contractual power to amend the contract terms, not a testamentary act. A designation of a person to whom an existing debt, for example, a bank account, is to be payable on the creditor's death, if it is then outstanding, is an example of the latter situation, and would be testamentary in nature. See the section, "When are Common Law Beneficiary Designations Testamentary?", *infra*.

<sup>7</sup> See McReynolds, *loc. cit.*, footnote 1, at p. 111. In *Guttman v. Toronto Dominion Bank*, [1984] 5 W.W.R. 529, (1984), 28 Man. R. (2d) 147 (*sub nom. Re Shibov*) (Man. C.A.), affirming, [1984] 2 W.W.R. 443, (1983), 27 Man. R. (2d) 186 (Man. Q.B.), the courts treated a bank RRSP as a "trust". The reports do not describe the nature of the arrangement, but such internal clues as there are suggest a deposit account. However, see *Bateman v. Toronto Dominion Bank* (1991), 86 D.L.R. (4th) 354 (B.C.S.C.), where the court held against the existence of a trust.

<sup>8</sup> Halsbury's Laws of England (4th ed.), Vol. 36, p. 531, para. 801.

## II. *When Are Common Law Beneficiary Designations Testamentary?*

Under what circumstances is the act of designating a beneficiary to take upon the death of the planholder a testamentary act? That it may in some cases be testamentary, and thus required either to comply with formality requirements for wills, or to comply with some special statute permitting a lesser degree of formality for designations of beneficiaries in certain circumstances, is demonstrated by cases such as *Re MacInnes*,<sup>9</sup> which held a purported designation of beneficiary to be testamentary, and void for want of formality.

A well-known explanation of a testamentary act is that it is one which depends upon death "for its vigour and effect".<sup>10</sup> It is here that we must start in determining whether an instrument designating a beneficiary under some form of plan is testamentary in nature, whether the designation is authorized by a statute, or operates, if at all, only at common law. With respect, some of the cases involving designations add to the difficulty of analyzing the problem by starting at the wrong end. They tend to look for characteristics of the designation which resemble those of a testamentary act, and finding some, reason that the designation *is* testamentary in substance, and therefore, that the nominee had no interest in the *corpus* prior to the death of the nominator. For example, in *Re Barnes*,<sup>11</sup> Farwell J. described a statutory nomination as being "in its nature testamentary". He reached that conclusion because:<sup>12</sup>

... it is a nomination which has no effect at all until the death of the nominator who is left completely free during his lifetime to deal with his share irrespective of it. The nominee would have no right to complain of, nor could he take any steps to prevent, the nominator dealing with his interest during his lifetime. The nomination has no operation and is not intended to have any operation until the death of the nominator. Whether or not it then operates depends upon whether or not the nominator has during his lifetime either revoked it or used the money which he purported to nominate for his own purposes, by withdrawing it from the society or in some other way.

The factors referred to are equivocal. The object of a power of appointment who is granted a present beneficial interest by an exercise of the power "cannot take any steps to prevent" the donee properly exercising a power

<sup>9</sup> [1935] S.C.R. 200, [1935] 1 D.L.R. 401. See also *Re Shirley* (1965), 49 D.L.R. (2d) 474 (Sask. Q.B.). In *Baird v. Baird*, [1990] 2 A.C. 548, at p. 561, [1990] 2 All E.R. 300, at p. 308 (P.C.), Lord Oliver said, "[I]t would . . . be putting it too high to say that there is a universally negative answer to the question whether the provisions of the Wills Act 1837 apply to nominations made under such schemes. The question must depend in each case on the provisions of the individual scheme."

<sup>10</sup> *Cock v. Cooke* (1871), L.R. 1 P. & D. 241, at p. 243 (P.D.); *Anderson v. Patton*, [1948] 2 D.L.R. 202, [1948] 1 W.W.R. 461 (Alta. App. Div.).

<sup>11</sup> [1940] Ch. 267, at p. 273 (Ch.D.).

<sup>12</sup> *Ibid.*

of revocation over that interest, if such power was reserved, any more than a beneficiary under a will can prevent a bequest being revoked. The same is true of a beneficiary of a trust which has received a present transfer of property upon trusts which permit the settlor to revoke. It is true that, in order to deal with the interest awarded to the nominee by the designation, if a present interest *was* created in the nominee, the nominator would first have to take the formal step of revoking, in order to reacquire that interest, which a testator would not have to do. However, the practical power of disposition over the property subject to the designation which the nominator has during her or his lifetime may be substantially the same, whether a present, but revocable, interest is created in the nominee by the designation, or whether no interest at all will be created until the death of the nominator.

Consideration of the Judicial Committee's decision in *Baird v. Baird*,<sup>13</sup> and the earlier decision of Megarry J. in *re Danish Bacon Ltd. Staff Pension Fund Trusts*<sup>14</sup> leads me to submit that, in the case of beneficiary designations not contained within a "will", in the ordinary sense of that word, the most useful clue to the location of the elusive line between the testamentary and the non-testamentary will be found in a comparison of the interest which the nominee will receive upon the death of the nominator, assuming the validity of the designation, with the interest held by the nominator immediately before death. If the two interests are the same, the act of designation is testamentary in nature. If they differ, then, by whatever means the designation is effecting its intended goal, whether simply by creating a third party contractual benefit,<sup>15</sup> or by creating a present interest under an *inter vivos* trust in the nominee, the designation is non-testamentary. Unfortunately, given the complexity of many plan documents, the result of this comparison may not spring immediately to the eye, as *Baird v. Baird*<sup>16</sup> demonstrates.

In *Baird v. Baird*,<sup>17</sup> the Judicial Committee examined the common law position of the designation involved, as there was apparently no statutory provision in the jurisdiction for making a designation of beneficiary for pension-type plans. The plan in question was a benefit plan set up under a trust deed for employees of Texaco Trinidad Inc. The plan provided that, if the employee died while still in service, or within ten years after commencing retirement, certain payments would be made. These payments would be made to the person nominated in the prescribed manner, or, in default of a valid nomination, to the widow, or, if none, to the estate.

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<sup>13</sup> *Supra*, footnote 9.

<sup>14</sup> [1971] 1 W.L.R. 248, [1971] 1 All E.R. 486 (Ch. D.).

<sup>15</sup> As in *Re Schebsman*, *supra*, footnote 5. This is not a nomination case.

<sup>16</sup> *Supra*, footnote 9.

<sup>17</sup> *Ibid.*

Nominations, and revocations and alterations of nominations, were subject to the consent of the management committee for the plan.

The payment which would be made in the case of death while in employment was comprised of two years' basic income, plus the member's contributions with interest, plus any amount which may have been transferred to the member's credit from a previous non-contributory plan. In the case of death within ten years after retirement, the pension would continue for the balance of the ten year period, and in addition, a lump sum of three months' basic salary would be paid. Members who left the Company prior to retirement were entitled only to a deferred pension, as earned up to the time of leaving. In case of death before this deferred pension could be enjoyed, the member's estate received the return of the contributions made, with interest. Neither the pension itself nor any of the other benefits provided were assignable.

In 1965, the employee, Mr. Baird, nominated his brother to receive the "death-in service" benefits, should they become payable. The nomination was accepted by the Company. In 1970, Mr. Baird married the appellant. In 1972, while still employed by the Company, he died, having taken no steps to revoke or alter that nomination. The widow, as administratrix, and the brother, as nominee, each sought payment of the sum due according to the terms of the plan. The widow argued that the nomination was in essence a will, and was void for failure to comply with the formal requirements for testamentary documents established by the local legislation. Her claim was founded upon the assertion that the nomination was a revocable disposition which took effect only upon the death of Mr. Baird.

The Judicial Committee rejected the argument. It agreed that it is "axiomatic that an essential characteristic of a will is that, during the lifetime of the testator, it is a mere declaration of his present intention, and may be freely revoked or altered".<sup>18</sup> However, "[i]t does not follow that every document intended to operate on death and containing a power of revocation is necessarily testamentary in character".<sup>19</sup> For one thing, the nomination here was not "freely" revocable, for it could be altered or revoked only with the consent of the plan management. This factor alone was very influential in leading the Judicial Committee to deny that the nomination was a testamentary act. But a case turning only upon such a restriction would have little general interest in the Canadian context. So, leaving this factor out of account, what instruction does the case have for us?

In reaching its conclusion, the Judicial Committee considered and approved the reasoning of Megarry J. in the *Danish Bacon*<sup>20</sup> case, where

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<sup>18</sup> *Ibid.*, at pp. 557 (A.C.), 305 (All E.R.).

<sup>19</sup> *Ibid.*

<sup>20</sup> *Supra*, footnote 14. For a criticism of Megarry J.'s reasoning, see Chappenden, *loc. cit.*, footnote 1.

a non-statutory nomination was also held not to be testamentary. The rules which governed the trust fund established under the pension plan in that case provided that an employee who left employment before qualifying for a pension under the plan, or who died before so qualifying, would be entitled (or the employee's estate would be entitled) to a return of contributions with interest. An employee might nominate a beneficiary to receive money which would otherwise be payable to the personal representative, and might subsequently cancel any appointment so made and simultaneously appoint a new nominee.

Megarry J. said: "I do not, however, think that a nomination under the trust deed and rules in the present case requires execution as a will. It seems to me that such a nomination operates by force of the provisions of those rules, and not as a testamentary disposition by the deceased."<sup>21</sup> His reasoning is made clearer by an earlier passage, quoted by Lord Oliver in *Baird v. Baird*,<sup>22</sup> although Megarry J. was not here dealing with the testamentary argument:<sup>23</sup>

What I am concerned with is a transaction whereby the deceased dealt with something which ex hypothesi could never be his. He was not disposing of his pension, nor of his right to the contributions and interest if he left the company's service. He was dealing merely with a state of affairs that would arise if he died while in the company's pensionable service, or after he had left it without becoming entitled to a pension. If he did this, then the contributions and interest would, by force of the rules, go either to his nominee, if he had made a valid nomination, or to his personal representatives, if he had not. If he made a nomination, it was revocable at any time before his death.

The Judicial Committee, in *Baird v. Baird*,<sup>24</sup> developed a similar point concerning the respective positions of the member and nominee in the plan which was before it. Apart from his pension and retirement benefits, the member's rights were "of a very limited order".<sup>25</sup> He could defeat any interest of his nominee or widow or estate by quitting his employment, but he himself would only become entitled to a deferred pension in that event. There was no provision by which living members or former members could remove their contributions nor those of the company, nor could they deal with their interests under the plan by assignment during their lifetimes. This position was contrasted with that of the member of the profit sharing plan which was before the Supreme Court of Canada in *Re MacInnes*,<sup>26</sup> a case with which the Board agreed. In the Canadian case, the members could withdraw and obtain their own contributions, with interest, at any time,

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<sup>21</sup> *Ibid.*, at pp. 256 (W.L.R.), 494 (All E.R.).

<sup>22</sup> *Supra*, footnote 9, at pp. 559 (A.C.), 306-307 (All E.R.).

<sup>23</sup> *Supra*, footnote 14, at pp. 255 (W.L.R.), 493 (All E.R.).

<sup>24</sup> *Supra*, footnote 9.

<sup>25</sup> *Ibid.*, at pp. 556 (A.C.), 304 (All E.R.).

<sup>26</sup> *Supra*, footnote 9.



and after ten years' membership, could also obtain the amount credited to their interest out of the company's contributions. Members could freely assign their rights under the plan, and indeed, the member in question in that case had on one occasion assigned his share as loan security.

If we apply the test suggested above for determining the dividing line between the testamentary and the non-testamentary, we will, in each of the cases mentioned, come to the same result as that to which the respective courts arrived. In the *Danish Bacon*<sup>27</sup> case, the nominee's entitlement, arising if the planholder died in service, was to payment of a sum equal to the planholder's contributions, plus interest. What the planholder or nominator held, immediately before death, was a right to receive a future pension to be provided by the trustees, and only a contingent right to receive the return of contributions during his own lifetime, the contingency being his leaving employment before reaching retirement.<sup>28</sup> What the nominee would receive was not something the nominator either had, or had a right to obtain from the plan trustees, during his lifetime, and while in pensionable service. Therefore, the creation of entitlement in the nominee by the nomination was not testamentary in nature.<sup>29</sup> In *Baird v. Baird*,<sup>30</sup> if the planholder died in service, the nominee would receive a payment calculated on the basis of a return of contributions, plus interest, plus a lump sum. During his or her lifetime, a planholder could never have any entitlement to any such amount, even by leaving employment. What the nominee would receive was not something that passed from the nominator on the latter's death, and again, therefore, the nomination was not testamentary in nature. On the other hand, what the nominee in *Re MacInnes*<sup>31</sup> purported to be entitled to receive, on the death of the nominator, was payment of the exact sum which, up to the moment of death, the nominator was entitled to demand from the plan trustees, or to assign to others, as he wished, without first satisfying some condition such as leaving service with the company, and without first revoking any existing nomination of a beneficiary. The nominator's proportionate equitable interest in the fund held by the plan trustees immediately before his death was exactly what the designation

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<sup>27</sup> *Supra*, footnote 14.

<sup>28</sup> A contributor who must leave employment to obtain a return of contributions, either those of the contributor or those of the employer, necessarily surrenders her or his interest in the *chose in action* held immediately before leaving, that is, the right to the stipulated pension on retirement. At the same time, the contingent entitlement of the nominee to receive some payment on the employee's death in service is automatically defeated. Although, while employment continues, both the nominator and the nominee have contingent rights to the return of contributions, the right of each is subject to a different contingency, and the two interests are therefore different.

<sup>29</sup> See *contra*, Chippenden, *loc. cit.*, footnote 1.

<sup>30</sup> *Supra*, footnote 9.

<sup>31</sup> *Ibid.*

purported to transmit to the nominee. As that transmission was only to take effect on death, it was testamentary.

It follows that, for the purpose of determining whether a designation, not itself contained in a will, is a testamentary act, it does not matter whether the designation is operating upon an interest created under a trust, as was the case in *Re MacInnes*<sup>32</sup> or *Baird v. Baird*,<sup>33</sup> or upon a purely contractual *chose in action*, for example, a debt, which may be the case under some bank RRSPs. If, on the death of the planholder, the nominee receives the identical beneficial interest, or the benefit of the same contractual right, as the planholder held immediately before death, the conveyance of title effectuated by the designation is testamentary.<sup>34</sup> Under a trust, in such case, the nominee will be taking by means of a transfer of the planholder's interest, carried out on death by the designation, not under the exercise of a power of appointment over a beneficial interest previously held by some person other than the planholder. In the case of a purely contractual debt, the designation will function as an assignment, operative upon death, of the pre-existing indebtedness to the planholder. It will not be operating as the exercise of a power to vary the terms of the contract, thereby creating an entirely different *chose in action*, in favour of a third party, from any which previously existed.

What results flow when we attempt to apply the above theoretical analysis to a particular plan? In the case of retirement plans set up by companies for employees, we will probably find that the act of designating a beneficiary to take the "death before retirement" benefits provided by the plan is not testamentary,<sup>35</sup> unless the designation is incorporated in a will. It is beyond the scope of this article to enter upon a detailed examination of the legislation controlling the form of employee pension plans in the various Canadian jurisdictions, let alone purport to scrutinize individual plans. However, let us assume that the terms imposed by the legislation in Ontario<sup>36</sup> are not atypical with respect to the plan terms which are employed in other jurisdictions. Under that legislation, the interest which a plan member or former member is entitled to award to a beneficiary

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<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*

<sup>34</sup> The transfer of interest need not be immediate and direct. Testamentary transmissions of title ordinarily go first to the personal representative, and may be defeated in whole or in part at that stage if needed for due administration.

<sup>35</sup> This proposition may not apply to voluntary additional contributions under plans. These are often held under a different set of trusts from those governing the funds held under the principal plan. The control of the contributor over these additional funds is often similar to the control over the funds held in RRSPs. At common law, at least, a designation with respect to all funds in the plan may operate as a non-testamentary act with respect to the funds payable out of the principal plan, and an act testamentary in nature with respect to the payment out of the voluntary contributions.

<sup>36</sup> Pension Benefits Act, R.S.O. 1990, c. P.8.

by a designation, in the case of death before commencement of the pension, that is, the commuted value of a deferred pension,<sup>37</sup> is not an interest which the member is entitled to receive during his or her lifetime, whether before or after termination of membership in the plan. The employee who terminates her or his plan membership prior to receiving his pension is entitled, with only minor exceptions,<sup>38</sup> to a deferred annuity which is non-commutable,<sup>39</sup> unless the years of continuous service or attainment of prescribed age are insufficient to qualify for this benefit.<sup>40</sup> In addition, the employee cannot deal with his or her interest in the plan by assigning or pledging any money payable under the plan.<sup>41</sup> That money is also exempt from execution, seizure or attachment.<sup>42</sup>

The differences between the rights enjoyed by the plan member during life, and those enjoyable by the beneficiary under a designation, after the member's death, in an employee plan in Ontario, seem closely akin to the differences which led the Judicial Committee, in *Baird v. Baird*,<sup>43</sup> to characterize the designation in that case as a non-testamentary, revocable exercise of a power of appointment. Lord Oliver described the position under the plan before the Board thus:<sup>44</sup>

Essentially, a pension scheme of the type with which this appeal is concerned is no different from any other inter vivos declaration of trust . . . containing provisions for the destination of the trust fund after the death of the principal beneficiary. By becoming a party to the scheme, each employee constitutes himself both a beneficiary and (quoad his contributions to the trust fund from which the benefits are payable) a settlor. He retains no proprietary interest in his contributions but receives instead such rights, including the right to appoint interests in the fund to take effect on the occurrence of specified contingencies, as the trusts of the fund confer upon him.

Similarly, I submit that a designation of beneficiary under a trustee plan which comes under the Ontario Pension Benefits Act<sup>45</sup> takes effect

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<sup>37</sup> *Ibid.*, s. 48(6). No designation is effective if the member is survived by a "spouse" with whom the member or former member is living at the date of death. If there is a "spouse" with whom the member or former member was living, the statute requires that the "spouse" take the interest. In that case, the "spouse" may take either the commuted value of the deferred pension or an immediate or a deferred pension. If there is no "spouse" with whom the member or former member was living at death, and no designation, the commuted value of the deferred pension is payable to the member's personal representative. See ss. 48(1), 48(2), 48(6) and 48(7).

<sup>38</sup> *Ibid.*, s. 50, which permits commutation where the pension which would be payable at normal retirement date is very small, or, if a pre-1988 plan so provides, permits commutation of up to 25% of the commuted value of the deferred pension.

<sup>39</sup> *Ibid.*, s. 67.

<sup>40</sup> In such case, the employee would be entitled to a return of contributions with interest; *ibid.*, s. 63.

<sup>41</sup> *Ibid.*, s. 65.

<sup>42</sup> *Ibid.*, s. 66.

<sup>43</sup> *Supra*, footnote 9.

<sup>44</sup> *Ibid.*, at pp. 556-557 (A.C.), 305 (All E.R.).

<sup>45</sup> *Supra*, footnote 36.

as an exercise of a power of appointment created by the statute,<sup>46</sup> and usually by the plan itself. The effect of the *inter vivos* exercise of this power must be to create in the nominee an immediate contingent, but revocable,<sup>47</sup> beneficial interest in the *corpus* held by the plan trustee. The rights of a "spouse" who is alive at the employee's death and who is not living separate and apart from the employee, and of the personal representative of the employee, arising by force of the Ontario legislation, may be similarly characterized,<sup>48</sup> except that they are not "revocable" in the usual sense of that word. The "spouse" may lose the preemptive right granted by the legislation by ceasing to come within the requirements of the statute,<sup>49</sup> and the personal representative's interest may be defeated by the existence, at the employee's death, of either a qualified "spouse" or a nominee under a valid designation.

On the other hand, I submit that the nomination of a beneficiary under the RRSP plans with which most persons are familiar, those offered by banks and trust companies, is an act testamentary in nature. There are opinions to the contrary, at least with respect to those plans which create trusts.<sup>50</sup> These commentators suggest that the interest of the planholder under such plans is a life estate in the corpus, the nominee under the beneficiary designation holding an equitable remainder which is revocable, and subject to appointment to another person by the exercise of a fresh nomination, and which becomes an interest in possession upon the nominator's death.

If this life estate-remainder position is the correct one, what terms within the plan documentation bring it about? The only provisions in any plan documents I have seen which I could imagine anyone relying upon to found a conclusion that the plan contemplated settlement of all contributions upon the member for life, with a revocable remainder to some person other than the member, are the provisions for beneficiary designation which may be

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<sup>46</sup> *Ibid.*, s. 48(6). As to the position of additional voluntary contributions into such a plan, see *supra*, footnote 35.

<sup>47</sup> The Ontario Pension Benefits Act, *supra*, footnote 36, which establishes the limitations upon the power of beneficiary designation in the case of employee plans in that province, says nothing about revocation, or indeed, about any of the requirements for a designation. This is left to Part III of the Succession Law Reform Act, R.S.O. 1990, c. S. 26, ss. 50-56, which, *inter alia*, provides for revocation (ss. 51, 52). The nominee's interest would also necessarily be "revoked" if the employee were to acquire a "spouse" who remained alive at the employee's death, or were to resume cohabitation with a previously existing "spouse" who remained alive at that date. See the Pension Benefits Act, *supra*, s. 48.

<sup>48</sup> The "appointment", in these latter cases, need not be made by the employee. It is mandated by the statute; see ss. 48(1), 48(2), 48(7), *ibid.*

<sup>49</sup> *Ibid.*, s. 48(1).

<sup>50</sup> McReynolds, *loc. cit.*, footnote 1, at p. 110; Fien, *loc. cit.*, *ibid.*

found in the plan, the plan's provisions for disposal of the fund if the member dies before the fund is converted into an annuity or RRIF without designating a beneficiary, and provisions restricting the alienation of the funds in the plan. I submit that neither individually nor cumulatively do terms of this nature suggest, let alone compel, such a result.

The provisions for beneficiary designation say nothing as to the nature of the interests over which the designation purports to operate, or as to the nature of the operation itself. As seen above, a designation could be a testamentary disposition of the member's absolute interest, or an *inter vivos* exercise of a power over a remainder interest.

The provisions in default of designation, which will usually provide for payment to the estate, may be simply an otiose description of the result which would flow from the general law, apart from that provision, under a plan where any designation would be testamentary in nature. If one argues that the provision is not otiose, but that the document is creating a life estate in the planholder, with a remainder to the planholder's personal representatives, one is immediately faced with those cases which construe a gift to a person for life, with remainder to that person's personal representatives, as an immediate gift to that person absolutely.<sup>51</sup> Presumably, the same result will flow where there is a purported settlement upon the settlor for life, with a remainder to the settlor's estate. The settlor would simply possess the absolute beneficial interest.

The provision which restricts alienability of the plan funds<sup>52</sup> is more troublesome in this context. The provision certainly purports to reduce the planholder's ordinary power over property, a restraint which would not be borne by the nominated beneficiary should the property be paid out to that beneficiary upon the planholder's death before maturity. The existence of a provision against alienation in the plan at issue in *Baird v. Baird*<sup>53</sup> was given weight by the Judicial Committee in arriving at its conclusion that the nomination there was not a testamentary act, although exactly how this ingredient was worked in was not spelled out. Nevertheless, I submit that the existence of a restraint upon the alienation of a property interest owned by a person immediately before death does not make the transfer of that interest upon death a non-testamentary act. Suppose Jane

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<sup>51</sup> *Webb v. Sadler* (1873), L.R. 8 Ch. App. 419 (C.A.), at p. 427, per Lord Selborne L.C., at p. 429, per James L.J.; *Re Brooks, Public Trustee v. White*, [1928] Ch. 214 (C.A.), at p. 222, per Lawrence L.J.; *Kerr v. Smith* (1894), 27 O.R. 409.

<sup>52</sup> This provision is required, as a condition precedent for registration, in plans in which the planholder makes payment into the plan by deposit with a branch in Canada of a "person" who is, or is eligible to become, a member of the Canadian Payments Association, or certain credit unions; Income Tax Act, R.S.C. 1952, c. 148, as amended, ss. 146(2)(c.3), 146(1)(j)(ii).

<sup>53</sup> *Supra*, footnote 9, at pp. 555, 557, 561 (A.C.), 304, 305, 308 (All E.R.).

owns the fee in some property, subject to a condition subsequent giving to the grantor a right of re-entry upon alienation,<sup>54</sup> and purports to transfer it to Susan, the transfer of title to take effect only upon the death of Jane. Can it be doubted that the transfer is a testamentary act, and must comply with the appropriate formalities? Surely it will remain testamentary even though the condition is personal to Jane, so that Susan would take her interest free of the restraint.

There is also the problem of overcoming the necessary consequences of holding that the planholder owns only a life estate in the *corpus*. If so, capital funds could neither be withdrawn by the planholder before maturity of the plan, nor applied to purchase of an annuity or RRIF for the planholder, without first revoking, at least *pro tanto* in the former case, the nominee's interest in the capital, and reclaiming it for the planholder.<sup>55</sup> Unless the mere act of withdrawal of money for either of these purposes automatically, and without more, accomplishes this, it would seem to follow that a planholder must first perform some act to reclaim the capital interest, before dealing with it. As this does not appear to have been a requirement in the past, this line of thought suggests that all those RRSP-derived annuities which have been purchased from plans in which a beneficiary designation was extant at the time the plan matured were wrongfully purchased with the designated beneficiary's money. The mind boggles! The hard way to avoid this absurd result is to argue that, by necessary implication, the plan document must be read as if it had explicitly provided that any withdrawal of the moneys by the planholder should have the effect of revoking the nominee's capital interest and reconveying the capital interest in those funds to the planholder. This strains the law as to inferral of terms into documents about as far as could be conceived. The easy way is to deny that the planholder ever created a remainder interest in the nominee, to set up the problem in the first place. This returns me to where I started. The act of designating a beneficiary for these typical non-insurance RRSP plans is testamentary in nature. Such acts fall within the ambit of *Re MacInnes*,<sup>56</sup> and not that of *Baird v. Baird*.<sup>57</sup>

### III. Beneficiary Designations Under Statute

In Canada's common law provinces and territories, beneficiary designation has not been left to the common law. There are statutory provisions which apply to nomination of beneficiaries under employee benefit and retirement

<sup>54</sup> For purposes of the argument, I assume here that the restraint is valid.

<sup>55</sup> See *Eccles Provident Industrial Co-Operative Society, Limited v. Griffiths*, [1912] A.C. 483 (H.L.), at p. 492, per Lord Atkinson, and at p. 495, per Lord Shaw.

<sup>56</sup> *Supra*, footnote 9.

<sup>57</sup> *Ibid.*

plans, and under individual retirement plans such as RRSPs.<sup>58</sup> There is a general family similarity among these provisions, although there are important differences in detail. Either explicitly or implicitly, the plan trustee or administrator is discharged upon payment of the benefit to the nominee, and the nominee is entitled to sue the plan trustee or administrator to recover the benefit, subject to any defence which the defendant might have set up against the plan member or his or her estate.

These provisions have old roots. In the United Kingdom, they were employed to enable persons who were members of various self-help societies to make small dispositions of a testamentary nature without requiring them, or their estates, to incur the expense of preparing or probating a will. They were also used, particularly in connection with life insurance contracts, to overcome the rule that third party beneficiaries of a contract cannot sue upon it. This technique is still employed under the statutes based upon the Uniform Life Insurance Act.<sup>59</sup>

The form of the general scheme is most apt and necessary in its application to the contractual problem. As a scheme applying to plans where *inter vivos* designations are not testamentary in their nature, and which operate through trusts, it adds little to the common law position. Such plans do not require statutory assistance to permit designation of beneficiaries, or to enable the designated beneficiary to enforce payment. The beneficial interest created by the designation, or exercise of a power of appointment, could have been enforced by the nominee beneficiary in the same manner as any other beneficial interest under a trust.

As a scheme applying to plans where acts of designation would be testamentary in nature, it does a bit more. Without resort to the legislation, the planholder could always make a will, in the usual sense of the term, and specifically bequeath the payout. In such case, the payout would pass through the hands of the personal representative, who alone could discharge

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<sup>58</sup> Alberta, R.S.A. 1980, c. T-10, s. 47; British Columbia, R.S.B.C. 1979, c. 224, as supplemented and amended by S.B.C. 1981, c. 10, s. 29, S.B.C. 1984, c. 25, s. 19, and S.B.C. 1984, c. 26, s. 11, ss. 43, 46, 46.1, 46.2, all repealed and re-enacted as s. 46, S.B.C. 1990, c. 34, s. 9 (not proclaimed in force as of time of writing); Manitoba, R.S.M. 1987, c. R138; New Brunswick, S.N.B. 1982, c. R.10.21; Newfoundland, R.S.N. 1990, c.I-2; Northwest Territories, R.S.N.W.T. 1988, C. r-6; Nova Scotia, R.S.N.S. 1989, C.36; Ontario, R.S.O. 1990, c. S.26, ss. 50-54; Prince Edward Island, R.S.P.E.I. 1988, c. D-9; Saskatchewan, R.S.S. 1978, c. Q.1, as amended by ss. 1978, c. 41, s.a. and ss. 1988-89, c. 18, s. 3, ss. 45(21)-45(26); Yukon, R.S.Y. 1986, c. 153. As to whether the Alberta and Manitoba statutes, *ibid.*, in their present form, actually do apply to payouts from plans, see Corbin, *loc. cit.*, footnote 1, at p. 349; Manitoba Law Reform Commission, *op. cit.*, footnote 1, pp. 1, 5 (pp. 65, 69, E. & T.J.); *Waugh Estate v. Waugh* (1990), 63 Man. R. (2d) 155, at p. 158 (Man. Q.B.). For a sketch of the history of designation provisions in Canada, see Pension Trusts and Plans (Appointment of Beneficiaries), in Proceedings of the Fifty-Seventh Annual Meeting of the Uniform Law Conference of Canada (1975), p. 164.

<sup>59</sup> See, for example, Insurance Act, R.S.O. 1990, c. I.8, ss. 190-196.

the plan administrator. The beneficiary's means of enforcement would be by action against the personal representative for payment of a legacy. The designation legislation reduces the formality requirements where the designation is not incorporated within an ordinary will, and it appears, on its face, to give the nominee a direct action against the plan administrator, cutting out the personal representative.<sup>60</sup>

The use of such an all-purpose format to validate beneficiary designations of a testamentary nature, which would otherwise run afoul of *Re MacInnes*,<sup>61</sup> raises questions whose answers, I submit, are not obvious. In their application to such designations, do the relevant statutory provisions constitute a closed system, a code complete in itself? Or, should they be regarded as carving out an exception from the more general law, statutory and judge-made, governing wills, an exception permitting a lesser amount of formality, and intended to permit the designation to co-exist with more formal testamentary documents? In the latter case, one would expect the provisions of the more general law to apply to the statutory designations, where there is no inconsistency between the two sets of provisions.

*Re MacInnes*<sup>62</sup> shows that, were it not for the statutory provisions for "designations", the formal requirements regarding execution imposed by the general wills legislation would apply to acts of designation testamentary in nature. It seems reasonable to expect that other provisions in the general law, affecting, for example, capacity, revocation and avoidance of lapse<sup>63</sup> would also apply. Insofar as legislatures enacted these "designation" provisions to save informal testamentary designations under retirement and similar plans from the fate of that in *Re MacInnes*,<sup>64</sup> did they intend to go further in insulating such designations from other provisions which they have considered it proper to apply to testamentary dispositions generally? I submit that neither the particular statutes governing designations nor the

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<sup>60</sup> However, the decision in *Canadian Imperial Bank of Commerce v. Besharah* (1989), 58 D.L.R. (4th) 705, 68 O.R. (2d) 443 (Ont. H.C.), holds that, despite the existence of a valid beneficiary designation at the planholder's death, the funds payable under the plan on death devolved upon the planholder's personal representative, to be paid out to the beneficiary as a specific legacy, but subject to the claims of creditors. See also *Waugh Estate v. Waugh*, *supra*, footnote 58. This makes the difference between the means available to beneficiaries under designations which are testamentary in nature to enforce their rights, and those available to beneficiaries under ordinary wills, uncertain. The Ontario court relied upon the provision in the Estates Administration Act, R.S.O. 1990, c. E.22, s. 2(1), vesting all of the real and personal property, not subject to a right of survivorship, of a deceased person in that person's personal representatives. Insofar as personal property is concerned, this is the position at common law.

<sup>61</sup> *Supra*, footnote 9.

<sup>62</sup> *Ibid.*

<sup>63</sup> For example, in *Re Barnes*, *supra*, footnote 11, a statutory designation held to be testamentary in nature lapsed because the nominee predeceased the nominator.

<sup>64</sup> *Supra*, footnote 9.



general statutes governing "wills" in the usual sense of that term offer an obvious answer to this question.

Most of the statutes which create these designation schemes<sup>65</sup> distinguish between designations in "wills", and other written designations. There can be no doubt that a "will", as referred to in these designation statutes, means a testamentary document which meets the formal requirements of the jurisdiction's general wills legislation. The purpose of the distinction, where it appears in the "designation" statutes, seems to be to allow a plan member to use his or her "will", in the ordinary understanding of that term, to designate a plan beneficiary, at least if this mode of designation is permitted by the plan.<sup>66</sup> The legislatures which make this distinction also wish to protect designations made in "wills" from the risk of failure for want of compliance with the more rigorous formality requirements for ordinary wills. They validate such designations, so long as they meet the formality requirements of the "designation" legislation and, if the designation is also required to comply with plan requirements, with those requirements. These legislatures also wish to permit designations not contained in ordinary "wills" to co-exist with the member's ordinary will, so that the member's actions in making, altering or revoking one of these documents will not *inadvertently* affect the other. Achievement of these objects requires provisions which control the interaction of the two types of designation documents. Legislatures which do not distinguish between designations within "wills" and those separate from wills seem content to leave these problems, and indeed, the question whether a designation may be made in an ordinary "will" at all, entirely to those who draft the plan.

Acceptance of these policy goals does not force us to conclude that legislatures intended to make these dispositive kinds of acts a completely self-contained island. When we turn to the detail of the various statutes, we can find conflicting signals of the legislative intent. For example, the

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<sup>65</sup> *Supra*, footnote 58. Newfoundland and Saskatchewan legislation does not make this distinction.

<sup>66</sup> The Alberta (s. 47(12)), British Columbia (s. 46(14), as enacted by S.B.C. 1990, c. 34, s. 9, not proclaimed in force as at the time of writing), Manitoba (s. 12), New Brunswick (s. 5), Northwest Territories (s. 12), Ontario (s. 54) and Yukon (s. 12) designation legislation permits the planholder to embody the designation in a "will", in the usual sense of that term, whether or not the terms of the plan permit this. The designation legislation in the other Canadian jurisdictions does not contain these "override" provisions. Legislation in these other jurisdictions applies to designations made "in accordance with the terms" of a plan, and Newfoundland (s. 4), and Saskatchewan (s. 23(3) and s. 26(3)), reinforce this with a provision that designations may be made "only in the manner set forth in the . . . plan". For full citations, see *supra*, footnote 58. However, the "override" provision in the Manitoba statute (*ibid.*) does not appear to apply to plans governed by the Pension Benefits Act, R.S.M. 1987, c. P.32. S. 17(3) of that Act permits alteration or revocation of a designation made under the plan, "but only in the manner set forth in the plan". By s. 3 of that Act, in the event of conflict between any provision of the Pension Benefits Act and any other act, the Pension Benefits Act prevails.

provinces which, in their designation statutes, distinguish between designations in "wills" and those in other instruments, provide that designations within "wills", are revoked by the revocation of the "will".<sup>67</sup> One may argue that, by referring only to designations in a "will", these statutes suggest that the legislatures did not intend that the general provisions governing revocation of "wills", particularly those providing for revocation by subsequent marriage, should apply to designations made by documents other than "wills", and by a further step in reasoning, that none of the general provisions were intended to apply to such designations. On the other hand, the same group of statutes all contain provisions excluding the operation of the general wills legislation, or particular parts of it, with respect to certain specific provisions.<sup>68</sup> This might be taken to suggest that these legislatures considered that the provisions of the general law governing testamentary dispositions would apply to those designations which were testamentary in nature, if not blocked in the specific instances.<sup>69</sup>

Turning to the general wills legislation, these statutes will usually define a "will" as including testaments, codicils, appointments by writing in the nature of a will in exercise of a power, and *any other testamentary*

<sup>67</sup> Alberta, s. 47(6); British Columbia, ss. 46(2), 46.1(2), 46.2(2), all incorporating R.S.B.C. 1979, c. 200, s. 143(3), as amended and renumbered 46(2)(6) by S.B.C. 1990, c. 34, s. 9 (not yet proclaimed at time of writing); Manitoba, s. 6; New Brunswick, s. 3(3); Northwest Territories, s. 7; Nova Scotia, s. 8; Ontario, s. 52(3); Prince Edward Island, s. 7; Yukon, s. 6. For full citations, see *supra*, footnote 58.

<sup>68</sup> Alberta, ss. 47(5), 47(10); British Columbia, ss. 46(2), 46.1(2), 46.2(2), each of which incorporates by reference s. 143(2) of the Insurance Act, R.S.B.C. 1979, c. 200, and ss. 46(5) and 46(11), as enacted by S.B.C. 1990, c. 34, s. 9 (not proclaimed in force at time of writing); Manitoba, ss. 5, 10; New Brunswick, ss. 3(2), 3(7); Northwest Territories, s. 6; Nova Scotia, s. 6; Ontario, ss. 52(2), 52(7); Prince Edward Island, s. 5; Yukon, ss. 5, 10. For full citations, see *supra*, footnote 58.

<sup>69</sup> S. 52(7) of the Ontario legislation (see *supra*, footnote 58), providing that a designation or revocation of a designation contained in a will is effective from the time the will is signed, states that it operates "despite section 22". The latter is the common section in wills legislation providing that, except where a contrary intention appears, a will speaks and takes effect as if made immediately before the testator's death, with respect to the property of the testator. The Act also provides, by s. 52(2), that a later designation revokes an earlier designation to the extent of any inconsistency. Presumably, the reference, in s. 52(7), to s. 22 was inserted to forestall an argument that, where the testator died leaving a will containing a designation, and also leaving an inconsistent later designation not contained in a will, the designation in the will would be treated as taking effect immediately before the death, thus revoking the non-will designation.

In the same statute, s. 52(2), *ibid.*, is itself stated to operate "notwithstanding section 15". The latter section sets out the means by which wills or parts of wills may be revoked. The only means of revocation by any kind of writing provided for are by wills or written instruments "made in accordance with the provisions of this Part", that is, either in holograph form or the usual "English" form with two witnesses. The "notwithstanding" clause in s. 52(2) presumably was added to prevent a possible holding that a later designation, not executed in the manner required for "wills" in the ordinary sense, could not revoke a designation which was contained in such a will.

*disposition*.<sup>70</sup> On its face, this definition applies to those statutory designations which are, at common law, testamentary in nature. If so, it should invoke all of the provisions of the more general statute except those necessarily displaced by the specific provisions of the "designation" statutes.<sup>71</sup> From a policy perspective, it is difficult to imagine why the legislatures should want to insulate designations of a testamentary nature from the general provisions that they have made to govern testamentary dispositions, beyond those exceptions which they have specifically provided. For example, if it is good policy to presume that a testator who has not said otherwise would prefer that, if a gift has been made to her or his child in an ordinary "will", and that child has predeceased the testator, that child's issue should take in preference to the testator's next of kin or residuary beneficiaries, why should not the same presumption apply when the gift is made by a simple signed designation, testamentary in nature, under a plan?

An argument in the other direction is that the "designation" statutes contemplate a high degree of reliance upon the internal provisions of individual plans to determine whether, and how, designations may be made, particularly in those provinces which do not have provisions in their "designation" statutes which "override" plan restrictions.<sup>72</sup> They also provide an apparently more direct means by which a beneficiary may enforce the gift made by the designation. Also, where the designation is testamentary

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<sup>70</sup> Alberta, R.S.A. 1980, c. W-11, s. 1; British Columbia, R.S.B.C. 1979, c. 434, s. 1; Manitoba, R.S.M. 1988, c. W.150, s. 1; New Brunswick, R.S.N.B. 1973, c. W-9, s. 1; Northwest Territories, R.S.N.W.T. 1988, c. W-5, s. 1; Nova Scotia, R.S.N.S. 1989, c. 505, s. 2; Ontario, R.S.O. 1990, c. S.26, s. 1(1); Prince Edward Island, R.S.P.E.I. 1988, c. P-21, s. 1; Saskatchewan, R.S.S. 1978, c. W-14, s. 2, as amended by S.S. 1989-90, c. 66, s. 3; Yukon, R.S.Y. 1986, c. 179, s. 1. The Newfoundland statute, R.S.N. 1990, c. W-10, does not contain a definition section.

<sup>71</sup> This argument is somewhat more difficult to make in Ontario, as the "designation" provisions are found in the statute which governs wills generally, that is, the Succession Law Reform Act, *supra*, footnote 47. Under Part III of that Act, a "designation" may be made by a signed instrument or by a "will" (s. 51). "Will", in this part of the Act, must be referring only to a testamentary document executed in accordance with the requirements of the general sections (ss. 4-7), requiring that a "will" (other than a "soldier's" or "mariner's" will), be executed in the presence of two witnesses, or that it be in holograph form. If the Act's general definition of a "will" were to apply to those designations, testamentary in nature, made by an instrument simply signed by the plan participant, the legislature's purpose in distinguishing between the two forms would be completely defeated. If one then turns to general provisions of the statute other than those within Part III, say, the "anti-lapse" provision (s. 31), and attempts to argue that it may apply to a simple signed designation of a testamentary nature, one must then acknowledge that the defined term, "will", would require a narrower meaning for the purposes of Part III than it bears in the remainder of the Act. While one would not lightly hold that the meaning of a term changes throughout a statute, as the context changes, it may be necessary to so conclude to give effect to the perceived legislative intention. See *Pajelle Investments Ltd. v. Herbold*, [1976] 2 S.C.R. 520, at p. 526, (1975), 62 D.L.R. (3d) 749, at p. 754. In that case, however, the term in question was not defined in the statute.

<sup>72</sup> *Supra*, footnote 66.

in nature, they seem to require the plan administrator or trustee to look to the beneficiary, rather than to the plan member's personal representatives, for a discharge of its obligations to pay out the funds which can no longer be used to purchase a retirement income.<sup>73</sup> These factors may be taken to suggest a closed statutory system, in which the nomination of the designated beneficiary is neither *inter vivos* nor testamentary, in our usual sense of these terms, but rather, is *sui generis*, governed only by its own internal law as established by the individual plan and the statute which deals with designations, whether the act of designation would or would not otherwise be testamentary.

I am not convinced by the argument that the "designation" statutes set up a "closed" jurisprudence from which all of the general law governing testamentary dispositions is assumed to be excluded, unless specifically imported by the plan or the statute. This argument reads a very extensive set of goals into what appears to be a simple technique to overcome problems created by the contractual privity rule and by cases similar to *Re MacInnes*.<sup>74</sup> It is true that a closed, *sui generis* system has the attraction that we are not forced to treat legislatures as intending differing bodies of law to apply to designations of beneficiaries of retirement plans, depending upon the result of a possibly difficult analysis of the individual plans in question, when they set up their apparently simple and inexpensive system. However, adoption of such a position forces us to depart from a classification long recognized and employed by both common and statute law, that is, one which divides transfers of property into either *inter vivos* or testamentary acts, with each class having its own legal characteristics and consequences.

#### IV. *Some Instances Where It May Matter Whether the Designation is Testamentary in Nature*

In the great majority of cases, there will be no need to examine the plan to determine whether we are dealing with a testamentary or a non-testamentary act, or one which is *sui generis*. It will not matter. However, situations must arise from time to time in which the applicability or non-applicability of the general law applying to testamentary dispositions might make a difference as to who is entitled to the property over which a designation may operate. In discussing the following areas where I see problems, the discussion assumes that we have concluded that the "designation" statutes do not create a "closed", *sui generis* system, from which all general testamentary law is excluded unless specifically imported. In each area, we still must decide whether the "designation" statute is excluding some specific portion of the more general law by being inconsistent with it and, if not, how the outcome might be affected.

<sup>73</sup> But see *supra*, footnote 60.

<sup>74</sup> *Supra*, footnote 9.

### A. *Capacity and Undue Influence*

The issue of sufficiency of age at the time of executing the designation will probably not arise often, where we are dealing with retirement plans, but a person might join an employer's plan or open an RRSP, and make beneficiary designations, while still below the minimum age stipulated by the general wills statute for executing a "will". A designation under a plan which is not testamentary would not be invalidated by the general "wills" statute simply because the member is under that age. However, the designation under the RRSP would be at risk for non-compliance with the statutory age requirement, whatever the actual level of capacity at the time of execution might be established to have been.

If we assume that the courts of our jurisdiction will apply general wills legislation and common law where it is not necessarily excluded by the "designation" legislation, how strong is the argument for exclusion of the minimum age requirement?

I can think of two arguments in favour of non-applicability of this particular requirement to designations testamentary in nature. The first is that the "designation" statutes provide that the plan member may designate a beneficiary, and if this is done in the manner provided in the plan and/or the statute, the nominee may sue to recover the death benefit. None of these statutes requires any minimum age, and I have yet to see a plan document that does so. A minor who becomes a plan member and executes the appropriate designation documents thus comes squarely within the terms of the plan and the "designation" statute.

The second argument flows from the provision, common to all of the jurisdictions which distinguish between designations in "wills" and those in other instruments, that 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.<sup>75</sup> Suppose a minor put a designation into what purported to be an ordinary will. That document would be invalid as a will for want of age, but the saving provision in the "designation" statute might apply to it. If it does, the effect, presumably, would be that the minor's capacity to designate would be judged on the basis of the actual capacity established by the evidence. If sufficient, the designation in the "will" would be effective. As there is no apparent reason why a legislature would want to save a minor's designation in a "will" from automatic failure for minority, and not similarly save designations which are testamentary in nature but not included in a "will", one may

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<sup>75</sup> Alberta, s. 47(7); British Columbia, ss. 46(2), 46.1(2), 46.2(2) (all incorporating by reference s. 143(1) of the Insurance Act), and s. 46(7) as enacted by S.B.C. 1990, c. 34, s. 9 (not proclaimed in force at time of writing); Manitoba, s. 8; New Brunswick, s. 3(4); Northwest Territories, s. 8; Nova Scotia, s. 7; Ontario, s. 52(4); Prince Edward Island, s. 6; Yukon, s. 8. For full citations, see *supra*, footnote 58.

argue that the terms of these designation statutes suggest an intention to exclude the general minimum age requirement from invalidating *any* designation testamentary in nature.

A counter-argument is that the "saving" provisions in the "designation" statutes could not have been intended to validate *any* purported testamentary act of an incapable person, and the age requirement of the general statute is a legislated parameter of testamentary capacity. To me, the argument either way is not obviously correct.

The choice of the appropriate law to apply to capacity and undue influence issues may also differ, depending upon whether the designation is characterized as testamentary. If testamentary, the test for will-making capacity established in *Banks v. Goodfellow*<sup>76</sup> should apply. If non-testamentary, the standard for *inter vivos* transactions might be applicable.<sup>77</sup> However, in *Re Rogers*,<sup>78</sup> the British Columbia Court of Appeal held that, as the act of designation looks to the interests of the possible beneficiaries of the death benefit, rather than to the interest of the designator, the testamentary standard for capacity should apply even to a designation that was not testamentary in nature. In fact, there will probably be very few cases where the issue is so delicately balanced that the difference between the two standards, if there is a real difference, will matter.

However, there may be more close cases where a possible difference in the location of the onus of proof of capacity, or of incapacity, may make a difference. The rule with respect to testamentary instruments, the so-called "First Rule" in *Barry v. Butlin*,<sup>79</sup> is that the onus of proving that the instrument propounded as a will is in fact the last will of a free and capable testator always lies upon the party propounding that instrument. With *inter vivos*

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<sup>76</sup> (1870), L.R. 5 Q.B. 549.

<sup>77</sup> As to the difference, if any, see *Birkin v. Wing* (1890), 63 L.T. 80 (Ch. D.), and *Re Rogers* (1963), 39 D.L.R. (2d) 141 (B.C.C.A.). In the latter case, Wilson J.A., in the course of the majority judgment, said, at p. 148: "I think the real difference between the two classes of cases is this, that the contractor is required to be capable of appreciating his own interest whereas the testator is required to be capable of appreciating the interests of other persons, those interests consisting of their claims to his bounty." That case involved a purported change of preferred beneficiaries under a life insurance policy. The court held that, under the statute as it then stood (R.S.B.C. 1960, c. 197, s. 147), upon the designation of a preferred beneficiary, the named beneficiary became a *cestui que trust*, the insured thereafter having a special power of appointment limited to the class of preferred beneficiaries, the power including a right to revoke previous appointments. The act of designating a preferred beneficiary, whether the designation was the original nomination or a succeeding one, would therefore not be testamentary in nature.

<sup>78</sup> *Supra*, footnote 77. This case was followed in *Stewart v. Nash* (1988), 65 O.R. (2d) 218, 30 E.T.R. 85 (Ont. H.C.). See also *Tamblyn v. Leach; Public Trustee of Manitoba v. Leach* (1981), 10 E.T.R. 178 (Man. Q.B.), where the court applied the testamentary doctrine of suspicious circumstances to a designation made pursuant to the Public Service Superannuation Act, R.S.C. 1970, c. P.36.

<sup>79</sup> (1870), 2 Moo. P.C. 480, 12 E.R. 1089.

instruments, the rule is that the person attacking an instrument on the grounds of incapacity carries the burden of establishing the incapacity.<sup>80</sup> In *Re Rogers*,<sup>81</sup> where the court had applied the testamentary *standard* for capacity to a non-testamentary designation, it refused to apply the testamentary rule as to onus of proof to such a designation.<sup>82</sup>

Where the issue is undue influence, the difference between the testamentary and the *inter vivos* rules may also be important in a close case. If the designation is non-testamentary, and the *inter vivos* rule applies, the party attacking the designation may have the advantage of the equitable presumption that, if it is established that the person benefitting from a transaction "occupies such a position in relation to his or her supposed benefactor as to give the recipient a dominating influence over the latter",<sup>83</sup> that benefit is presumed to have been obtained by undue influence. To uphold the transaction, the recipient must satisfy the court that it was the result of a free and independent exercise of the will of the person conferring the benefit. In some cases, the relationship between the parties to the transaction will be such that the party seeking to attack the transaction will have the additional benefit of a preliminary presumption, namely that the person benefitting does possess that "dominating influence". A well-known example of this special relationship is that between a trustee and a beneficiary of the trust. However, with a testamentary gift, the onus of proving that the gift was obtained by the exercise of undue influence always lies upon the person alleging that fact.<sup>84</sup>

Neither the "designation" statutes nor the general wills statutes give any help on the issue of onus of proof in contests over capacity or undue influence. The question will turn in part upon the courts' views of the general question as to whether the legislature in a particular jurisdiction intended a "closed" jurisprudence for all designations. This approach then requires the court to pick one or the other of the competing rules, for use within that closed system.<sup>85</sup> If the jurisdiction is not held to have a "closed" system for beneficiary designations, an analysis of the particular act of designation,

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<sup>80</sup> *Re Rogers*, *supra*, footnote 77, at p. 148.

<sup>81</sup> *Ibid.*

<sup>82</sup> *Ibid.*, at p. 148. The court characterized the testamentary rule as "arbitrary".

<sup>83</sup> *McKay v. Clow*, [1941] S.C.R. 643, at p. 664, [1941] 4 D.L.R. 273, at p. 290. The issue of undue influence in *inter vivos* transactions was recently reviewed in *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353, (1991), 81 D.L.R. (4th) 211. In *Brydon v. Hawkins*, [1949] 3 D.L.R. 252, [1949] O.R. 393 (Ont. H.C.), the equitable presumptions which may be raised in *inter vivos* transactions were applied to an attack upon a beneficiary designation under life insurance policies.

<sup>84</sup> See, generally, T.G. Feeney, *The Canadian Law of Wills, Volume 1: Probate* (3d ed., 1987), pp. 42 *et seq.*

<sup>85</sup> I hope that I am not overbold in assuming that the courts will not invent still a third rule for "designations".

to determine whether it is testamentary, will be required. The choice of the applicable rule should follow from the result of that analysis.

### B. Revocation

The general wills statutes of the common law jurisdictions in Canada provide for the intentional revocation of a will by an act of damage to the document, and for the automatic revocation of a will by the subsequent marriage of the testator.<sup>86</sup> Some also provide for the revocation, by a subsequent divorce or declaration of nullity, of gifts by will to a spouse.<sup>87</sup> None of these means of revocation is referred to in any of the "designation" statutes as a method of revoking a designation, although some of these statutes expressly provide for the revocation of designations contained within "wills" by circumstances which revoke the will itself.<sup>88</sup> Are we justified in concluding, from this omission, that beneficiary designations which are, at common law, testamentary in nature, but are not contained within wills, cannot be revoked by these means? Two law reform commissions in Canada have so concluded, at least with respect to revocation by subsequent marriage,<sup>89</sup> and this seems to be the usual assumption among lawyers with whom I have spoken on the subject. I believe that this assumption is correct in some of our jurisdictions, but I am doubtful as to its validity in others.

The policy permitting revocation by physical act is, I assume, to recognize that, for most people, the natural way to cancel a document is to destroy it, and to avoid continually frustrating the intentions of persons who will take this course, whatever legislation may say. The policy behind revocation of a will by subsequent marriage is the economic protection of the new spouse, and any new family. That which underlies the "divorce" provisions is, presumably, a desire to give effect to that which most forgetful divorced testators would have wished to do if they had remembered that they had a will extant. These policies are as applicable to wealth passing out of a retirement plan through a designation that is testamentary in nature as they are to that passing out of the testator's estate by the testator's ordinary will. Of course, that fact is far from conclusive of the issue as to whether these events which revoke ordinary wills, or parts of them, revoke

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<sup>86</sup> Alberta, ss. 16, 17; British Columbia, ss. 14, 15; New Brunswick, ss. 15, 16; Manitoba, ss. 16, 17; Newfoundland, ss. 9, 11; Northwest Territories, s. 11; Nova Scotia, ss. 17, 19; Ontario, ss. 15, 16; Prince Edward Island, s. 68; Saskatchewan, ss. 15, 17; Yukon, s. 10. For full citations, see *supra*, footnote 70.

<sup>87</sup> British Columbia, s. 16; Manitoba, s. 18(2); Ontario, s. 17(2); Prince Edward Island, s. 69; Saskatchewan, s. 16, as amended by S.S. 1980-81, c. 97, s. 3. For full citations, see *supra*, footnote 70.

<sup>88</sup> *Supra*, footnote 67.

<sup>89</sup> Law Reform Commission of British Columbia, Report No. 70, *loc. cit.*, footnote 1, pp. 136 *et seq.*; Manitoba Law Reform Commission, Report No. 73, *loc. cit.*, footnote 1, at pp. 7, 14 *et seq.* (pp. 72, 82 *et seq.* (E. & T.J.)).



designations, not themselves contained within wills, which are testamentary in nature.

The differences between the "designation" statutes in the various provinces and territories become particularly important in considering the possible answers to this question. For purposes of discussion, I divide these statutes into two groups. There is the "restricted" group, where participants may only revoke designations "in the manner set forth in the plan".<sup>90</sup> There is also the group which I call the "override" jurisdictions, characterized, for present purposes, by two provisions: (1) the plan participant may revoke a designation by the means stipulated in the statute for making of a designation; (2) with certain exceptions, where the statute is inconsistent with the plan terms, the statute applies.<sup>91</sup>

Where the nature of the plan is such that an act of designation, not contained within a "will", is an *inter vivos* exercise of a power of appointment, the general wills law cannot apply. Common law allows the document creating a power of appointment to specify the formalities for its exercise, and, to be effective, the manner of exercise must comply with the stipulated methods. Similarly, if a power to revoke an appointment and make a new appointment (designation) is reserved, the manner of exercise of such power must comply with the requirements.<sup>92</sup> Therefore, those designation statutes of the "restricted" group are following the common law, insofar as they are applying to non-will designations under this type of plan. The designation statutes of the "override" type differ in respect of non-will designations under this type of plan only in that they permit the making or revocation of a designation in a manner other than as specified in the document creating the power to appoint, or designate. However, I submit that any extension of permitted method must be limited to the manner of designation or revocation specified in the "designation" statutes. With both these groups of statutes, then, the means of making and revoking a designation which

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<sup>90</sup> British Columbia, ss. 43(3), 46(3), 46.1(3), 46.2(3); Newfoundland, s. 4; Nova Scotia, s. 5; Prince Edward Island, s. 4; Saskatchewan, ss. 45(21)(3), 45(23)(3), 45(26)(3). However, Nova Scotia (s. 8) and Prince Edward Island (s. 7), qualify this with respect to designations contained within a will, which are revoked by circumstances which revoke the will. For full citations, see *supra*, footnote 58. Manitoba must be added to this group with respect to plans governed by the Pension Benefits Act. See *supra*, footnote 66. In the case of the British Columbia sections, except for s. 43(3), the statute does not expressly confine the manner of revocation to that set out in the plan and the statute, so the proposition in the text is based only upon inference in these cases. The 1990 amendment, *supra*, footnote 58, will shift the British Columbia statute into the "override" group when proclaimed.

<sup>91</sup> Alberta, ss. 47(2), 47(12); Manitoba, ss. 2, 12; New Brunswick, ss. 2(1), 5; Northwest Territories, ss. 3, 12; Ontario, ss. 51(1), 54; Yukon, ss. 2, 12. For full citations, see *supra*, footnote 58. Manitoba must be removed from this group with respect to plans governed by the Pension Benefits Act; see *supra*, footnote 66. British Columbia will join this group when the 1990 amendment, *supra*, footnote 58, is proclaimed: see ss. 46(2), 46(14).

<sup>92</sup> See Sir George Farwell, *A Concise Treatise on Powers* (3d ed., 1916), pp. 147 *et seq.*

is in reality an *inter vivos* exercise of a power of appointment are confined to those means stipulated in the plan document, supplemented, in the case of the "override" group of statutes, by the means stipulated in the relevant statute.

However, if such a plan permits a designation to be made by will, or, in the "override" jurisdictions, whether or not it does, and a designation is so made, the legal position changes, at least at common law. The exercise by will of a power of appointment is a testamentary act, and indeed, one which comes within the definition of a "will" in the wills legislation of all of the Canadian common law jurisdictions except Newfoundland.<sup>93</sup> At common law, therefore, all acts which revoke a will may revoke an exercise by will of a power of appointment.<sup>94</sup> In the "override" jurisdictions, this is also provided for, with respect to designations, by statute,<sup>95</sup> and this is also true of Nova Scotia and Prince Edward Island.<sup>96</sup> The situation in this regard is less clear in Manitoba, with respect to plans covered by the Pension Benefits Act,<sup>97</sup> and in Newfoundland and Saskatchewan, all of which simply provide that designations may be made or revoked only in the manner set forth in the plan.

Suppose that such a plan, governed by Manitoba, Newfoundland or Saskatchewan law, permits a beneficiary designation to be made by will, but continues on to provide that a designation, however made, may be revoked only by a written instrument filed with the plan administrator. A plan member does make a will which includes a beneficiary designation. The member subsequently tears up that will with the intention of revoking it. The will is thereby revoked. Suppose also that there is no further act

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<sup>93</sup> "The difference between an appointment by will and one by deed must be borne in mind. The latter is an act complete in itself, and the thing appointed vests from the execution of the instrument making the appointment; whereas in the former case the death of the appointor is necessary to make the act complete and to make the subject of the power pass", Farwell, *ibid.*, p. 268. The general wills legislation in each of the Canadian common law jurisdictions, except Newfoundland, defines a "will" as, *inter alia*, "an appointment by will or by writing in the nature of a will in the exercise of a power"; see *supra*, footnote 70.

<sup>94</sup> There is a possible exception to this proposition where the act of revocation is the subsequent marriage of the testator. Wills exercising a power of appointment are not always revoked by a subsequent marriage, insofar as they exercise the power. See Alberta, s. 17(b); British Columbia, s. 15(b); Manitoba, s. 17(b); New Brunswick, s. 16(b); Newfoundland, s. 9; Northwest Territories, s. 11(3)(b); Nova Scotia, s. 17(c); Ontario, s. 16(c); Prince Edward Island, s. 68(2); Saskatchewan, s. 15(b); Yukon, s. 10(3)(b). For full citations, see *supra*, footnote 70.

<sup>95</sup> Alberta, s. 47(6); British Columbia, s. 46(2)(6), as enacted by S.B.C. 1990, c. 34, s. 9 (not proclaimed in force at time of writing); Manitoba, s. 6; New Brunswick, s. 3(3); Northwest Territories, s. 7; Ontario, s. 52(3); Yukon, s. 6. For full citations, see *supra*, footnote 58.

<sup>96</sup> *Supra*, footnote 67.

<sup>97</sup> *Supra*, footnote 66.

of designation with respect to that plan before the member dies. Is the designation in the revoked will still effective because the revocation was not effected by a written instrument? If one looks only at the wording of the "designation" statutes of these provinces, the answer appears to be "yes". The revocation is not effected in the manner set forth in the plan. However, at common law, there is no effective designation in favour of the beneficiary. The designation, or exercise of the power, being itself a testamentary act, never had "vigour and effect". The instrument containing it was revoked before the death of the plan member made it operative. Will courts hold that the provisions of the "designation" legislation of these provinces makes a designation contained in a will effective, even though the will which contains it is revoked, where the manner of revocation of the will does not conform to the plan terms with respect to revocation of a designation?

Where the plan is one to which the analysis in *Re MacInnes*<sup>98</sup> would apply, any designation thereunder, whether or not contained within a will, is, at common law, an act testamentary in nature. As that case itself shows, under the general law, no term of the plan itself can validate any manner of designation that does not conform to the general wills law. I submit that it is reasonable to extrapolate from this statement that, under the general law, no term of such a plan can either enlarge or restrict the modes of revocation of testamentary instruments provided for by the general wills law. If there is to be any enlargement or restriction, in the case of designations under such a plan, these must be authorized by statute.

With this type of plan, a statute of the "restricted" group is delegating to the creator of the plan the code of formalities with respect to the making and revoking of designations not included within a will.<sup>99</sup> The plan terms must be complied with, as the member making such a designation is opting into the plan's code, given legal effect by the designation statute. With this group of statutes, then, a designation under a plan of this type, not contained in a will, would not be revoked by any mode or circumstance not provided for by the plan terms. Where the designation is permitted to be, and is made within a will, the analysis, in any given case, should be the same as it would be for a plan of the type to which the reasoning in *Baird v. Baird*<sup>100</sup> would apply.

When the statutes in the "override" group are applied to designations, not contained within a "will", under plans to which the analysis in

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<sup>98</sup> *Supra*, footnote 9.

<sup>99</sup> This proposition requires qualification in the case of those jurisdictions which require that designations under some types of plans conform not only with the plan requirements, but also with the statute's requirements, to be effective. See British Columbia, ss. 43, 46, 46.1, 46.2, prior to the 1990 amendment (not proclaimed at time of writing); Nova Scotia, s. 3; Prince Edward Island, s. 2. For full citations, see *supra*, footnote 58.

<sup>100</sup> *Supra*, footnote 9.

*Re MacInnes*<sup>101</sup> applies, the question whether a designation may be revoked in any manner by which an ordinary will might be revoked becomes, in my submission, difficult to answer, if one has not already concluded that the "designation" statutes create a "closed" system, excluding all of the general wills law.

The most direct path to a conclusion that the statutes of the "override" group do not permit revocation of designations, testamentary in nature, and not contained within wills, by any means not expressly provided for in the particular plan, or in the "designation" statute, is to argue that those statutes are intended to do no more than add the means of making and revoking a designation expressed therein to the scheme implemented by the statutes in the "restricted" group, and set out the means of interaction between designations within "wills", and other designations. In other words, designations not contained within "wills" would be subject to the same analysis, in the case of the "override" group, as in the case of the "restricted" group of statutes. Thus, they could only be made or revoked in the manner set forth in the plan document, subject to the qualification that such designations could always be made or revoked in the manner specified in the statute, whether or not the plan stipulated these means.

This argument is at least consistent with the records of the evolution of these statutes. The "designation" statutes in the "restricted" group seem based upon the 1957 Uniform Act,<sup>102</sup> although there are individual variations. The statutes in the "override" group are based upon the 1975 Uniform Act,<sup>103</sup> also with variations. The 1957 Uniform Act is said to have resulted from representations made on behalf of the life insurance industry<sup>104</sup> for a uniform statute similar to Section 60 of Ontario's Conveyancing and Law of Property Act, added in 1954.<sup>105</sup> The 1975 Uniform Act appears to have had its genesis in a desire to expand the 1957 version to cover RRSPs, in addition to employer plans.<sup>106</sup> In the reports of the proceedings of the Uniformity Commissioners, there is no hint that they considered that there might be any relevant jurisprudential differences between designations under different types of retirement plans. As far as the record of proceedings shows, the main concern, with each of the Uniform Acts, appears to have been whether a member should be permitted to designate by will even if the plan did not so provide. Reading the 1975 Proceedings, it is difficult to

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<sup>101</sup> *Ibid.*

<sup>102</sup> See the Conference of Commissioners on Uniformity of Legislation in Canada, 1957 Proceedings, p. 150.

<sup>103</sup> Uniform Law Conference of Canada, 1975 Proceedings, *op. cit.*, footnote 58, p. 178.

<sup>104</sup> *Op. cit.*, footnote 102, pp. 145 *et seq.*

<sup>105</sup> S.O. 1954, c. 12, s. 1. See R.S.O. 1970, c. 85, s. 63.

<sup>106</sup> Uniform Law Conference of Canada, 1975 Proceedings, *op. cit.*, footnote 58, pp. 164 *et seq.*

see any concerns among the Commissioners other than the extension of the scope of the statute beyond employers' plans, the ability to make designations by will in all cases, and the working out of the interaction between designations in wills and other designations. I suspect that the Commissioners believed that that is all they had done, and that, accordingly, the terms of the plan would continue to be the sole code as to the means of making and revoking designations, except for the provisions as to the manner of designating and revoking which they had specified in the Uniform Act and which, with qualifications, would be effective regardless of the plan terms.

The problem with this argument is that in the course of recasting the Uniform Act in 1975, those express provisions in the 1957 Act which gave legal effect to designations, testamentary in nature, not contained within a will, which did not comply with the formal requirements of the general wills legislation, were not brought forward into the 1975 Uniform Act, or into the "override" statutes based upon it. In the statutes in the "restricted" group based upon the 1957 Uniform Act, the effect of *Re MacInnes*,<sup>107</sup> was overcome by the provision that, where a designation is made "in accordance with the terms of the plan", the nominee can enforce payment to himself or herself, and the plan administrator is, explicitly or implicitly, discharged upon making that payment. It is also that phrase in those statutes, applied to revocations, which leads to the conclusion that a designation, not contained in a will, may be revoked only in a manner authorized by the plan, and not by any other means of revocation of testamentary instruments which exists under the jurisdiction's general wills law.

None of the statutes in the "override" group contain such a direct validation of the forms of designation referred to in the plan, nor do they contain the explicit restriction of the manner of revocation to that set forth in the plan. One must look to sections designed for other purposes for any suggestion that the statutes may validate means of designation, other than those set out explicitly in the statutes themselves, which are authorized by the plan, or for any limit to the permissible means of revocation.

All of these "override" statutes contain a provision that, in the case of inconsistency between statute and plan, the statute prevails, "unless the inconsistency relates to a designation made or proposed to be made after the making of the 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".<sup>108</sup> The provision appears to have been inserted

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<sup>107</sup> *Supra*, footnote 9.

<sup>108</sup> Alberta, s. 47(12); British Columbia, s. 46(14) (as enacted by S.B.C. 1990, c. 34, s. 9, not proclaimed in force as of time of writing); Manitoba, s. 12; New Brunswick, s. 5; Northwest Territories, s. 12; Ontario, s. 54; Yukon, s. 12. For full citations, see *supra*, footnote 58.

by the Uniformity Commissioners to prevent a plan member changing the "beneficiary" of an annuity of the joint and survivor type, that is, the person to receive the annuity payments after the member's death, once the annuity payments had commenced, as the amount of an instalment would vary with the particulars of the other annuitant.<sup>109</sup> The latent assumption seems to have been that the "inconsistency" would arise where a plan required that a designation, by will or otherwise, be recorded with the plan issuer, but an unrecorded designation was made effective by the statute. The provision certainly envisages that plan terms controlling the manner of making designations which differ from the means of designating expressly set out in the statute will be effective, at least in this situation. The section would have to be read sufficiently broadly to encompass revocations as well, if the policy behind the section is to be protected. However, the narrow issue to which the section is directed, deducible from its wording, makes it difficult to expand this validation of any manner of designation provided in the plan, in all circumstances, as is the case with some of the statutes in the "restricted" group. It seems even more difficult to make this section bear the weight of imposing a general restriction of modes of revocation to those set out in the plan, supplemented only by those set out in the "designation" statute. I would have thought that it would take a much more explicit statutory provision than this to overcome the proposition, inherent in *Re MacInnes*,<sup>110</sup> that the terms of a plan cannot control the application of the general wills law to the making or revoking of a designation which is testamentary in nature.

A sub-group of the "override" statutes contains a further provision<sup>111</sup> which may be argued to validate means of making designations set out in the plan but not set out in the "designation" statute, and to restrict the manner of revocation to the means expressly set out in the plan or the statute. This provision discharges the plan administrator on paying out to the nominee "under the latest designation made in accordance with the terms of the plan", in the absence of actual notice of a designation or revocation made according to the manner stipulated in the "designation" statute but not in accordance with the terms of the plan. This suggests that the plan terms as to the manner of making a designation have effect even where they differ from the formalities specified in the statute. The provision also refers only to actual notice of a revocation effected in the manner specified in the statute as removing the protection from the plan administrator. It may be argued from this that the legislation intends that the

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<sup>109</sup> Uniform Law Conference of Canada, 1975 Proceedings, *op. cit.*, footnote 58, pp. 171-172.

<sup>110</sup> *Supra*, footnote 9.

<sup>111</sup> New Brunswick, s. 4(a); Ontario, s. 53(a); Yukon, s. 11(a). For full citations, see *supra*, footnote 58.

only means of revoking a designation are those specified in the plan or in the statute. Therefore, subsequent marriage, for example, would not revoke a designation not contained within a will.

The difficulty with this argument for restriction of the manner of revocation, based upon the above-mentioned provisions, is that these sections deal only with the discharge from liability of the plan administrator who pays out without notice of an event which would alter the identity of the persons entitled to receive the payment. The sections do not state that the ultimate rights of the beneficiaries are affected beyond the barring of their claims against the administrator. There is nothing which expressly prohibits the beneficiary who should have received the money from pursuing a restitutionary claim, analogous to that permitted in *Re Diplock*,<sup>112</sup> against the recipient of the payout. After giving the administrator the protection intended, there is no reason to suppose that the legislature also wished to protect persons who received money by mistake, at the expense of those who would have received the funds if the plan administrator had known of their entitlement. The protection provided to the plan administrator by these provisions is not enhanced by restricting the permissible modes of revocation to those set out in the statute or in the plan. Given the policy reasons underlying the other modes of revocation of testamentary documents provided by the general law, there is no apparent reason why these legislatures should want to affect the identity of the persons who could make these restitutionary claims, in the course of providing protection to the administrators. It is indeed curious that, if, say, subsequent marriage does revoke a designation, testamentary in nature, not contained in a will, actual notice of such event would not remove the protection granted by these provisions to a plan administrator who nevertheless paid out to the person named in the designation so revoked. However, if it is these provisions that are to be relied upon to establish the legislatures' intention that designations, testamentary in nature, and not contained within a will, may be revoked only in the manner set out in the plan or the "designation" statute, it is at least equally curious that such an oblique method was chosen to effect this result.

Turning to other possible internal evidence, within the "override" group of statutes, that the legislatures intended to restrict the manner of revocation of designations, testamentary in nature and not contained within wills, to the means set out explicitly in the plan or in the statutes, we see that, in general, these statutes state means by which a plan participant may make an effective designation, and then permit the participant to revoke a

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<sup>112</sup> [1948] Ch. 465, [1948] 2 All E.R. 318 (C.A.), affirmed, *sub nom.*, *Ministry of Health v. Simpson*, [1951] A.C. 251, [1950] 2 All E.R. 1137 (H.L.). See Corbin, *loc. cit.*, footnote 1, at p. 206.

designation in the same manner. Some also expressly provide for the revocation of designations contained within "wills" by circumstances which revoke the will itself.<sup>113</sup> An argument that these express provisions are intended to be exclusive immediately suggests itself. However, I submit that such a conclusion, while possible, is not inevitable on the wording of the various statutes.

First, the provisions of the "override" group of statutes dealing with the manner of revocation are phrased in permissive, not mandatory terms. Therefore, we are not driven by the wording of these statutes to exclude other acts and circumstances, not referred to in the "designation" statutes, which, under the general law, would revoke a will, from revoking designations, testamentary in nature, not contained within a "will".

Second, all of the "designation" statutes describe the means by which the *plan participant* may revoke. Where the alleged cause of revocation is a subsequent marriage, or divorce, or declaration of nullity, one may argue that it is not the plan member who is revoking. Rather, the law is carrying out that process as a collateral, and possibly unintended, consequence of an act of an entirely different nature performed by the member. The "designation" statutes may speak only to the means by which plan members who wish only to revoke an existing designation may do so. Unless the "designation" statute in question is held to create a "closed" system, from which the jurisdiction's general "wills" law is excluded, the general statutory provisions for revocation of wills, or gifts within wills, by operation of law, could apply to all designations which are testamentary in nature. These provisions of the "designation" statutes which set out the means by which the plan participant may revoke are not inconsistent with such a result. This argument, obviously, has no application to possible revocation by damage to the document containing the designation.

Those jurisdictions which distinguish between "wills" and other instruments in their "designation" legislation<sup>114</sup> afford another argument against revocation, by damage to the document or by subsequent marriage, of designations which are testamentary in nature, and are not contained within "wills". They all provide that a revocation of a "will" revokes a designation in that "will",<sup>115</sup> and most also provide that designations in invalid "wills" are revoked by an event which would have revoked the instrument if it had been a valid

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<sup>113</sup> *Supra*, footnote 61.

<sup>114</sup> Alberta, British Columbia, Manitoba, New Brunswick, Northwest Territories, Nova Scotia, Ontario, Prince Edward Island, Yukon. For full citations, see *supra*, footnote 58.

<sup>115</sup> *Supra*, footnote 67.



"will".<sup>116</sup> In these jurisdictions, therefore, a subsequent marriage revokes a designation contained in a "will" or, in most of these jurisdictions, a purported "will".<sup>117</sup> The fact that these statutes make explicit reference to the revocation of designations in "wills" by circumstances which would revoke the "will" itself may suggest that the legislature does not intend that designations made by instruments other than "wills" should be revoked by all of the means by which an ordinary will may be revoked. Rather, it may be argued, it is intended that designations not contained within "wills" may be revoked only by such means as are provided for in the plan, or, where the legislation overrides plan provisions, by an instrument executed in compliance with the statutory requirements for designations.

However, some of the force of this *inclusio unius, exclusio alterius* type of argument may be reduced by considering why these legislatures may have provided only for revocation of designations within "wills", and not for revocation of those, testamentary in nature, made by "other instruments", by all events which revoke an ordinary will. As mentioned previously, the "override" legislation, making the distinction between "wills" and other instruments, seeks to prevent the two types of documents by which designations may be made from inadvertently affecting each other. To settle the question as to whether a general revocation clause in a "will" would revoke a prior designation, testamentary in nature, in a non-"will" instrument, these statutes provide that revocation occurs only if the "will" refers either generally or specifically to that prior designation.<sup>118</sup> Such a provision,

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<sup>116</sup> Alberta, s. 47(8); Manitoba, s. 8; New Brunswick, s. 3(5); Northwest Territories, s. 9; Ontario, s. 52(5); Yukon, s. 8. For full citations, see *supra*, footnote 58.

<sup>117</sup> In the jurisdictions which provide for revocation by divorce or nullity of gifts by will to former spouses (see *supra*, footnote 87), such a gift would not be affected by the provision that "revocation of a will revokes a designation in the will" (see *supra*, footnote 67). Divorce or declaration of nullity does not revoke the will containing the gift, only the gift itself. However, if, for this purpose, a designation within a "will" would be characterized as a "bequest", a subsequent divorce or declaration of nullity would also revoke a designation to the former spouse contained within that will. In *Canadian Imperial Bank of Commerce v. Besharah*, *supra*, footnote 60, at pp. 709 (D.L.R.), 447 (O.R.), and in *Waugh Estate v. Waugh*, *supra*, footnote 58, at p. 160, a RRSP designation within a will was characterized as a specific legacy, although, in those cases, the courts were not considering the applicability to designations of the provisions for revocation of testamentary gifts by divorce or nullity. A "will", in the ordinary sense, may dispose only of a single asset, and may be combined with other properly executed documents to comprise a person's "last will". The general provisions which revoke gifts to spouses, within wills, by subsequent divorce or nullity would revoke such a gift in a "single asset" will, even though only a useless shell were to be left. Therefore, unless the relevant "designation" statute excludes all general wills law not specifically imported, or at least excludes all of the general provisions with respect to revocation, I submit that these provisions for revocation of testamentary gifts revoke designations, testamentary in nature, not contained within "wills".

<sup>118</sup> Alberta, s. 47(4); Manitoba, s. 4; New Brunswick, s. 3(1); Northwest Territories, s. 5; Ontario, s. 52(1); Yukon, s. 4. The statutes of British Columbia, Nova Scotia and Prince Edward Island, which also distinguish between "wills" and other written instruments, do not contain this provision. For full citations, see *supra*, footnote 58.

in turn, suggests a further question as to whether a subsequent "will" which revokes all prior testamentary instruments must refer in a similar manner to designations contained in prior "wills" if those designations are to be revoked. The answer given to this latter question by the jurisdictions which have addressed it expressly was "no". At least in those jurisdictions, any event which revokes a will revokes a designation within the "will".<sup>119</sup>

The singling out by these legislatures of designations in a "will" for revocation by circumstances which would revoke that will is a sensible one, to the extent that it is designed to address the questions suggested in the preceding paragraph. In considering the effect of a general revocation clause in a "will" upon a prior non-"will" designation which is testamentary in nature, it seems reasonable to assume that the ordinary person is unlikely to have in mind, when making that will, an existing designation form filed with an employer or with the organization administering an RRSP. Therefore, there is no revocation of the beneficiary designation unless the testator makes it clear that such was intended. On the other hand, it is also reasonable to assume that when a testator makes a subsequent will revoking all prior wills, that testator intends to nullify everything contained in a document that he or she considers to be a prior "will". Therefore, revocation of the will revokes a designation contained in it. To the extent that this is a rationale for the distinction, then the *inclusio unius, exclusio alterius* argument, based upon the specific reference to revocation of designations within wills, loses some of the strength it may have appeared to have. That distinction may well have had a more limited purpose.

However, the rationale proffered above for the distinction does not remove all of the strength of the *inclusio unius* argument. That rationale does not apply either to revocations by operation of law, or to revocation by physical destruction of the document, which are the possible means of revocation concerning us here. The problem of interpretation of legislative intention really arises because the legislation, in providing simply that revocation of a will revokes a designation in that will, sweeps together intentional revocatory acts performed by the testator, whether by subsequent testamentary document or by physical action upon the document, with an event, subsequent marriage, which revokes independently of any intention of the testator, and possibly contrary to it. Whether the legislatures which enacted legislation in this form contemplated, or intended, the possible inference that designations which are testamentary in nature but not made within "wills" would be immune from revocation by these means is, I submit, speculative. Such a conclusion defeats the policy underlying the provision for revocation by these means, found in the general wills law. The only countervailing policy that comes to my mind in support of such a conclusion is one of creating additional protection for plan administrators. Those persons

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<sup>119</sup> *Supra*, footnote 67.

administering the ordinary estate of a deceased person are more likely to know of a change in marital status after the date of a will than is the bank or trust company administering a person's RRSP likely to be aware of a similar change post-dating a designation filed with it. Restriction of means of revocation of designations, testamentary in nature, not contained within "wills", to those means explicitly referred to in the "designation" legislation no doubt, with some of the statutes of the "override" group, gives additional protection to plan administrators. However, this would be attained at the cost of removing the protection which the general wills legislation gives to the class of persons intended to benefit from its provisions for revocation of wills, or, in the case of divorce or nullity, gifts within wills.

Obviously, if we apply these other means of revocation to designations of a testamentary nature not contained in "wills", we have to ask why a legislature should be taken as intending, for example, that subsequent marriage or divorce might revoke a person's designation, not contained within a will, under a RRSP, where that designation is held to be testamentary in nature, and not one made in favour of the same nominee under that person's company pension plan, where the designation is interpreted as an *inter vivos* exercise of a power of appointment. An answer is that we would be drawing the line in the same place, and on the same principle, as we draw it in non-designation situations. For example, the difference between a gift by will to X, and an *inter vivos* settlement of a remainder interest in the same property upon X, following a life estate to the settlor, with power reserved to the settlor to encroach on capital, to revoke, and to reappoint the remainder interest as the settlor may choose, is not one which persons who are not lawyers or trust officers can easily appreciate. However, difficult as the distinction may be, it is fundamental.<sup>120</sup> If the testator subsequently marries, the testamentary gift will be revoked automatically, unless the testator has taken the required steps to prevent this. The *inter vivos* settlement of the remainder will stand, unless the settlor takes the required steps to revoke it.

### C. Lapse

With the rather rare exception of a gift made in discharge of a "moral obligation",<sup>121</sup> a testamentary gift fails if the donee predeceases the testator. As it is common for RRSP plans to provide, in the plan documents, for payment to the plan member's personal representatives if the designated beneficiary dies before the plan member, and, as I am advised by lawyers who deal frequently with company pension plans, a similar provision is

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<sup>120</sup> Cf. Feeney, *op. cit.*, footnote 84, pp. 14-15, where the author suggests that Canadian courts might apply a "control" test in such circumstances to determine that an apparent *inter vivos* transaction was in fact testamentary.

<sup>121</sup> See the discussion of this exception in Feeney, *ibid.*, Vol. II: Construction, pp. 137 *et seq.*, and Jarman on Wills (8th ed., 1951), pp. 438-439.

common in such plans, the possible application of the common law doctrine of lapse to a designation may seem to be only of academic interest. The gift to the nominee who predeceases the member appears to fail by the terms of the documentation, without recourse to lapse doctrine, and there will be no need to enter upon the question of whether a designation under a particular plan is testamentary in nature. However, unless the "designation" statute of a particular jurisdiction is held to create a "closed" system, excluding all of the ordinary testamentary law, there still appear to be some questions to be resolved. In my submission, the proper answers to these questions, in nearly all<sup>122</sup> of the plans I have seen, and probably in most, fortunately leave the position exactly where it appears to be on a straightforward reading of the documents. However, I found the path to that conclusion to be anything but straight.

To start with a fundamental proposition, the doctrine of lapse is a rule of law, not a rule of construction.<sup>123</sup> Accordingly, a testator cannot prevent the operation of the doctrine, no matter how clearly the intent to do so is expressed.<sup>124</sup> The testator can only avoid the consequences of lapse by providing a substitutionary gift to another donee if the original gift lapses.

With a plan to which the analysis in *Baird v. Baird*<sup>125</sup> applies, a beneficiary designation thereunder, made in an instrument that is not itself a "will",<sup>126</sup> is non-testamentary, so lapse will not affect it. If such a gift

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<sup>122</sup> See *infra*, footnote 157.

<sup>123</sup> Jarman, *op. cit.*, footnote 121, p. 438, states: "The liability of a testamentary gift to failure, by reason of the decease of its object in the testator's lifetime, is a necessary consequence of the ambulatory nature of wills; which not taking effect until the death of the testator, can communicate no benefit to persons who previously die: in a like manner as a deed cannot operate in favour of those who are dead at the time of its execution."

<sup>124</sup> For example, *Re Ladd*, [1932] 2 Ch. 219 (Ch. D.).

<sup>125</sup> *Supra*, footnote 9.

<sup>126</sup> If the designation under such a plan is made within a will, the designation, which is the exercise of a power of appointment, becomes a testamentary act. See *supra*, footnote 93. Thus, lapse applies to the exercise of powers of appointment by wills. See Jarman, *op. cit.*, footnote 121, pp. 444 *et seq.* It has been held that the "anti-lapse" section (s. 33) of the Wills Act, 1837, does not apply where the object of a special power predeceases the appointor, but does apply where the power is general, Jarman, *ibid.*, pp. 842 *et seq.* and Farwell, *op. cit.*, footnote 92, p. 267. If the terms of the designation incorporate the plan document, and the terms of that document clearly take the payment to the planholder's estate, should the nominee predecease the planholder (see *infra*, the text accompanying footnotes 145-161), then the transformation of the designation into an act testamentary in nature does not matter. However, if the plan terms, when and if incorporated into the will, do not demonstrate a "contrary intent", and if the power to designate is a general power, as I submit is the usual situation, then the "anti-lapse" sections may apply in a proper case. This would lead to the unexpected result that distribution of the payment would differ, depending upon whether the member chose to make the designation by *inter vivos* instrument, or enclose it within an ordinary will. This result is not unique to designation situations. The same possibility exists in any case where a donee is given a general power to appoint by deed or will.

to the designated beneficiary fails because that beneficiary has predeceased the plan member, it will be because the plan's terms make the interest which may be appointed under a designation contingent upon the appointee surviving the member. Those terms will usually continue on to make a gift, in default of an effective appointment, to other persons, usually the personal representatives of the plan holder.<sup>127</sup>

In the case of a plan to which *Re MacInnes*<sup>128</sup> applies, where any beneficiary designation thereunder is an act testamentary in nature, a designation should be subject to lapse, quite apart from any term in the plan, unless there is something in the "designation" legislation to prevent this. None of the "designation" statutes in the Canadian common law jurisdictions deals with this topic expressly. In one English case,<sup>129</sup> a designation under a statute, the Industrial and Provident Societies Act, 1893, which was held to be testamentary in nature, lapsed due to the failure of the nominee to survive the nominator. Unless the applicable "designation" statute is held to create a "closed" system, the same result should occur in the case of our statutory designations which are testamentary in nature. Upon the lapse of the gift to the nominee, the amount payable under the plan would be distributed as an asset of the plan member's ordinary estate not specifically bequeathed. This is the result for which the terms of at least most of the plans provide anyway, quite apart from the lapse doctrine.

However, a problem arises if a beneficiary, designated in an instrument which is testamentary in nature, who has predeceased the plan participant, is a member of the class of persons named in the so-called "anti-lapse" section of the wills statute of the particular jurisdiction.<sup>130</sup> All of these statutes provide that, except where a contrary intention appears by the will, the gift "does not lapse", and then provide for the disposition of the property comprised in the gift. Notwithstanding the apparently clear words of the

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<sup>127</sup> In Ontario, in plans covered by the Pension Benefits Act, *supra*, footnote 36, the statute carries the payment to the personal representative of the member where the member or former member was not living with a "spouse" at death, and had not made a designation of beneficiary. See s. 48(7). I am assuming that the expression, "has not designated a beneficiary . . .", found in the subsection, means "has not designated a beneficiary who is capable of taking according to the terms of the plan".

<sup>128</sup> *Supra*, footnote 9.

<sup>129</sup> *Re Barnes*, *supra*, footnote 11.

<sup>130</sup> Alberta, s. 34; British Columbia, s. 29; Manitoba, s. 34 (as amended and renumbered to s. 25.2 by S.M. 1989-90, c. 44, s. 4); New Brunswick, s. 32; Newfoundland (as amended by S.N. 1971, c. 29, s. 3), ss. 18 and 19; Northwest Territories, s. 21; Nova Scotia, s. 31; Ontario, s. 31; Prince Edward Island, s. 85; Saskatchewan, s. 32; Yukon, s. 20. For full citations, see *supra*, footnote 70.

statutes, in most of the Canadian common law jurisdictions<sup>131</sup> the statute does allow the original gift to fail, but then makes a substitutionary gift directly to the persons among whom, and in the shares in which the original beneficiary's estate would have been divisible<sup>132</sup> if he or she had died intestate and without debts<sup>133</sup> immediately after the death of the testator.

Suppose Ms. X resides and is domiciled in Ontario. In addition to her ordinary estate, she owns an RRSP, and is a member of her employer's pension plan, to each of which she has been making full contributions for many years. She has no surviving parents, spouse or issue, but does have three siblings. With her brother and his family, she is on close terms. With her two sisters and their families, her social relationship is distant at best. She has never made a will, in the usual sense of this term. She has executed and filed with her employer, and with the trust company which administers her RRSP, designations of her brother as plan beneficiary. The brother predeceases X, but she never revises either designation. The brother leaves a spouse who survives X, but no surviving issue. As the gift is to X's brother, the necessary conditions for the operation of the Ontario "anti-lapse" section<sup>134</sup> are met. As far as X's ordinary estate is concerned, on X's death the two surviving sisters will take all, under Ontario's intestacy provisions.<sup>135</sup> If the designation under the employer's plan is assumed to be a non-testamentary act, and the plan contains the common provision making the rights of the designated beneficiary contingent upon surviving the plan member, the statute governing such plans, if not the plan itself, will require the payment to be made to Ms. X's personal representatives. Therefore, the sisters will also take the payout from this plan. But what about that sizable sum sitting in the RRSP?

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<sup>131</sup> The exception is Nova Scotia; see *ibid.* The Nova Scotia section avoids lapse by making the gift to the beneficiary who predeceased the testator take effect as if the death of the beneficiary had occurred immediately after the testator's death. The section is patterned after s. 33 of the English Wills Act, 1837. The Nova Scotia version makes the subject matter of the gift an asset of the estate of the original beneficiary.

<sup>132</sup> Some of the jurisdictions which allow a spouse a preferential share on intestacy impose the qualification that a spouse of the original beneficiary, who becomes entitled to receive a substitute gift by operation of the "anti-lapse" section, is not entitled to such preference in the distribution of that gift. Alberta, s. 35; Ontario, s. 31(d); Saskatchewan, s. 32. For full citations, see *supra*, footnote 70. See also Manitoba, Devolution of Estates Act, R.S.M. 1987, c. D.70, s. 14.

<sup>133</sup> In British Columbia and Manitoba, if the original beneficiary dies leaving issue who survive the testator, the distribution is made as if that beneficiary had died intestate without leaving a spouse and without debts. British Columbia, s. 29; Manitoba, s. 34 (as amended and renumbered s. 25.2 by S.M. 1989-90, c. 44). For full citations, see *supra*, footnote 70.

<sup>134</sup> *Supra*, footnote 130.

<sup>135</sup> R.S.O. 1990, c. S.26, ss. 44-49.

The obvious course is to look at the terms of the plan. We will probably find a term stating that, if the designated beneficiary predeceases the plan holder, the sum payable on the planholder's death is payable to the planholder's estate. It looks like the sisters again win, and the brother's surviving spouse again loses. Now assume that, at least apart from the effect of Ontario's "designation" legislation, the RRSP is one to which *Re MacInnes*<sup>136</sup> would apply, to make the designation in favour of the brother one which is testamentary in nature. If the Ontario "anti-lapse" section applies, the brother's surviving spouse, not the two sisters, would take the RRSP payout, as, in the absence of issue of the brother, she would be entitled to his entire estate on his death intestate.

Suppose the surviving spouse can persuade the court that the Ontario "designation" legislation does not exclude all general testamentary law not specifically imported. If she fails in this, of course, she has no case. The "anti-lapse" section is never potentially in play. If she succeeds, her argument will continue on to allege that, as a rule of law, lapse has operated to nullify the gift to her late spouse, the brother, quite apart from any terms of the plan. Although the naming of the brother was the only disposition within the designation, that disposition was a "bequest"<sup>137</sup> within the terms of the Ontario "anti-lapse" section.<sup>138</sup> That section would then create a statutory substitutionary gift directly to the brother's surviving spouse, *unless* "a contrary intention appears by the will".

There will probably be a "contrary intention" appearing *within the plan documentation*, through the ubiquitous provision that, on the predeceasing of the plan member by the designated beneficiary, the payment will be made to the plan member's estate. But, is this an intention which appears "*by the will*"?

The "will" would seem to be that document which is duly executed, as required by the relevant statute, for the purpose of transmitting the property to the beneficiary. Considerable differences exist between the designation forms supplied by issuers of RRSP plans. Some of the forms which I have seen are physically separate documents from other documents delivered to the planholder. In other cases, the designation form, while printed on the same piece of paper as the plan terms, or collated with pages containing these terms, is formatted as a separate document. In only a few of the sets of forms which I have seen are the terms which require the named beneficiary to survive the plan member, and which provide for a substitutionary gift if he or she does not do so, found literally within the designation document

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<sup>136</sup> *Supra*, footnote 9.

<sup>137</sup> See *Canadian Imperial Bank of Commerce v. Besharah*, *supra*, footnote 60, at pp. 709 (D.L.R.), 447 (O.R.); *Waugh Estate v. Waugh*, *supra*, footnote 58, at p. 160.

<sup>138</sup> *Supra*, footnote 130.

itself. Some Canadian cases<sup>139</sup> have held that, for the "contrary intention" to appear "by the will", as the phrase is used throughout wills statutes, it must appear within the "will" itself. Assuming that Professor Youdan<sup>140</sup> is correct in asserting that these cases err in so requiring, and that we are entitled to determine whether there is a "contrary intent" from all the evidence ordinarily admissible in construing a will, we are no further ahead. If the plan provisions for the substitutionary disposition to the plan member's estate are not actually a part of the "will" document, we cannot resort to them as extrinsic evidence to show the contrary intent, for such terms constitute direct evidence of the plan member's intention. As such, they are inadmissible, in the absence of an equivocation, or latent ambiguity, in the construction of a testamentary document. Therefore, we need some basis for bringing the plan terms which purport to create the substitutionary disposition to the plan member's estate into the designation document.

A possible method of overcoming this problem is to employ the probate doctrine of incorporation by reference, to transcribe notionally the plan terms, including the substitutionary provision in favour of the plan member's estate, into the "designation" document. This would demonstrate the "contrary intent" from the very words of that document, as extended by the incorporation. The plan terms are contained in a document which exists at the date of execution of the designation. The requirement of clear identification, in the "will", of the target document is probably met in the documents which I have seen, at least if the courts are prepared to be the slightest bit benign in their interpretation of this requirement.<sup>141</sup> The impediment to incorporation, if there is one, is illustrated by the following quotation:<sup>142</sup>

It is clear law that a document not existing in unalterable form at the date of the execution of the will cannot be incorporated into the will. The courts have stated that a testator cannot create for himself a power to dispose of his property by an instrument not executed as a will or codicil.

Invariably, these plan documents reserve to the plan issuer a power to amend the terms, if the amendment will not result in deregistration for tax purposes. Of course, use of this power by an issuer in order to amend the substitutionary disposition to the plan member's estate appears unlikely,

<sup>139</sup> *Re Hicknell* (1981), 128 D.L.R. (3d) 63, 34 O.R. (2d) 246 (Ont. H.C.); *Re Billard Estate* (1986), 22 E.T.R. 150 (Ont. H.C.); *Re Mackie* (1986), 54 O.R. (2d) 784 (Ont. H.C.).

<sup>140</sup> T.G. Youdan, *The Meaning of "Contrary Intention Appears by the Will"* (1986), 22 E.T.R. 151.

<sup>141</sup> For a discussion of the requirements, see Feeney, *op. cit.*, footnote 84, pp. 160 *et seq.* (Vol. I: Probate).

<sup>142</sup> H.A. Leal, *Testamentary Additions to Trusts*, Proceedings of the 49th Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada (1967), p. 207, at p. 208. See also M.M. Litman, *Pour-Over Wills: Their Relationship to the Doctrine of Incorporation by Reference* (1979), 4 E.T.R. 48, at pp. 52, 54.



to say the least, but the power exists. If the first sentence of the above quotation is literally true, an attempt to incorporate the plan terms to include the substitutionary gift to the estate of the deceased designated beneficiary, and therefore, to show a contrary intention appearing "by the will", appears to fail. However, in my submission, effective incorporation of the plan terms, thus demonstrating "by the will" the necessary "contrary intent", may take place.

The sweeping assertion, in the above quotation, that no alterable document may be incorporated, is at odds with a leading English case, *Re Edwards' Will Trusts*.<sup>143</sup> Where the "will" document identifies only an existing document as the document for incorporation, the fact that the target document may itself contain provisions permitting future amendment of its terms, even by the testator<sup>144</sup> will not prevent its incorporation.<sup>145</sup> Attempts to employ such provisions to dispose of property passing under the testamentary document into which they have been incorporated will be ineffective, at least if those terms permit amendment by the testator, but the words of the target document, effective or ineffective, will be notionally transcribed in the will. If Canadian courts follow this case, we will be able to bring into the designation the terms of the plan in question, if the actual designation form is found to identify it sufficiently as an existing document.

In *Re Edwards' Will Trusts*,<sup>146</sup> the settlor, in the *inter vivos* "target" settlement, reserved to himself a general power of appointment. In default of any appointment, he settled the beneficial interests upon his wife and children. On the same day, he made a will, giving the residue of his estate to the settlement trustees, to be held on the trusts of that settlement. The settlor subsequently exercised his power of appointment under the settlement, with respect to a large sum out of the *corpus*.<sup>147</sup> After the settlor's death, the validity of the appointment, and of any of the terms of the settlement, with respect to the property comprised in the testamentary estate, was questioned. The Court of Appeal treated the case as one of incorporation by reference.<sup>148</sup> The purported appointment pursuant to the reserved power

<sup>143</sup> [1948] Ch. 440, [1948] 1 All E.R. 821 (C.A.).

<sup>144</sup> As to situations where the future amending power is not exercisable by the testator, but only by some other person, see *infra*, footnote 155.

<sup>145</sup> *Supra*, footnote 143. See also *Re Schintz' Will Trusts*, [1951] 1 Ch. 870, [1951] 1 All E.R. 1095 (Ch. D.).

<sup>146</sup> *Ibid.*

<sup>147</sup> The sum appointed by the settlor's memorandum far exceeded the amount of the capital in the settlement at that time. The settlor was obviously anticipating the future inflow of funds from his estate, under the provisions of his will.

<sup>148</sup> See Litman, *loc. cit.*, footnote 142, where it is argued that courts should be more astute in distinguishing between incorporation by reference situations and those involving a "pour-over" of assets from a testamentary estate into the *corpus* of an existing *inter vivos* trust (*Re Edwards' Will Trusts*, *supra*, footnote 143, would appear to be one of the latter). See also Leal, *loc. cit.*, footnote 142. However, as the court, in *Edwards*, characterized the issue as one of incorporation, the case is an authority on that doctrine.

was ineffective, as far as any property passing from the testamentary estate was concerned,<sup>149</sup> because the testator would have been making a change in his existing testamentary dispositions in a manner other than that prescribed in the Wills Act. However, as the appointment was ineffective, the default of appointment clause, also incorporated, operated. That clause did not contain the flaw of being amendable. Accordingly, it became an effective part of the testator-settlor's will, and governed the disposition of the testamentary estate.

Similarly, in *Re Schintz' Will Trusts*,<sup>150</sup> an *inter vivos* settlement contained, in Clause 10, a power in the settlor to declare "new or other trusts" in favour of his wife, children or other relations, in place of the trusts originally declared therein. The court said that the effect of the judgments in *Re Edwards' Will Trusts*<sup>151</sup> "is that [the will clause which incorporated this settlement] will incorporate the whole of the settlement, but the offending clause in the settlement, Clause 10, will not have effect so far as the dispositions made by the will are concerned".<sup>152</sup> The original dispositions in the settlement accordingly stood, by incorporation, as an effective part of the will.

Applying these cases to designation situations, I submit that the substitutionary provision in favour of the plan member's estate, found in most plan terms, is equivalent to the default of appointment clause in *Re Edwards' Will Trusts*,<sup>153</sup> or the original dispositions, which were in fact such a clause, in *Re Schintz' Will Trusts*.<sup>154</sup> Suppose we concede the correctness of the most strict view of the bar against reservation of a power to make future alterations, that is, one which extends the bar to alterations by persons other than the testator.<sup>155</sup> Even then, at most, the common clause in the

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<sup>149</sup> It would have been effective over the small amount of property settled upon the trustees by *inter vivos* transaction, when the settlor constituted the trust.

<sup>150</sup> *Supra*, footnote 145.

<sup>151</sup> *Supra*, footnote 143.

<sup>152</sup> *Ibid.*, at pp. 877 (Ch.), 1099 (All E.R.).

<sup>153</sup> *Supra*, footnote 143.

<sup>154</sup> *Supra*, footnote 145.

<sup>155</sup> In such case, the testator is granting a power of appointment over part of the testamentary estate. This risks running afoul of the supposed rule that will-making power cannot be delegated. This "rule" seems to supply the grounds for the argument that documents granting an amending power to someone other than the testator cannot be incorporated into a will. See the discussion in Litman, *loc. cit.*, footnote 142. Since that annotation was written, *Re Nicholls* (1987), 34 D.L.R. (4th) 321, 57 O.R. (2d) 763 (C.A.), was decided. This case held that there is no objection to a testator granting a general power of appointment over the testamentary estate. The usual power of amendment reserved to plan issuers appears to be such a power, insofar as it could be used to alter beneficial interests. Even if it is not, *Re Nicholls, ibid.*, suggests to me that Ontario courts would not invalidate any power contained in a will, or the exercise of it, solely on the ground that there was a delegation of will-making power. If such delegation is no longer a vice, this reason for refusing incorporation of an identified document containing such a power is gone.

plan terms which, in theory, permits amendment of all terms, including that substitutionary provision, would be inoperative with respect to any disposition made by a designation document testamentary in nature. If *Re Edwards' Will Trusts*<sup>156</sup> is correct, and applies here, the original substitutionary provision in favour of the plan member's estate stands incorporated into that designation document, and effective. A "contrary intent" now "appears by the will", on the most strict reading of the latter phrase. Accordingly, the "anti-lapse" section will not apply.<sup>157</sup>

#### D. Intestacy

If a person dies leaving an effective beneficiary designation which is testamentary in nature, but no other "will", has that person died wholly intestate, or partially intestate? In most Canadian common law jurisdictions, that question need not be answered, as it will not affect the distribution of the deceased person's estate. However, the question is relevant in Ontario, and to a more limited extent, in Manitoba.

A number of Canadian common law jurisdictions provide a preferential share to a surviving spouse of a deceased who dies intestate, leaving issue surviving. Of those jurisdictions, only Manitoba<sup>158</sup> and Ontario<sup>159</sup> provide for a set-off against that preferential share of any amount the surviving spouse might have received under a will, in the case of a partial intestacy. In the other jurisdictions providing such a preference, the surviving spouse is entitled to it on the division of the intestate portion of the estate, and also to anything received as a testamentary gift.<sup>160</sup>

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<sup>156</sup> *Supra*, footnote 143.

<sup>157</sup> This conclusion assumes that the plan clearly provides for a disposition of the funds in a manner different to that for which the "anti-lapse" section provides, thereby demonstrating the "contrary intent". This is surely the case where the provision for disposition in the event that the designated beneficiary predeceases the plan member takes the payment to the "estate" or "personal representative" of the member. However, this is not a universal provision. One major RRSP issuer provides only that, if the planholder dies before the start of payment of a retirement income, a lump sum payment will be made "to the person or persons who have the legal right to receive this payment". Another provides only for "payment to the person legally entitled thereto". This economical phrasing appears designed to encompass persons, if any, who are designated as beneficiaries under the plan application and anyone else to whom the law might take such payment if no legally eligible designated beneficiary exists. *Quaere* whether incorporation of such provisions into a designation document which is testamentary in nature would demonstrate an intention that the applicable jurisdiction's "anti-lapse" section should not apply, should the deceased designated beneficiary be one of the class named in the section.

<sup>158</sup> S.M. 1989-90, c. 43, s. 2(4). Manitoba gives a preferential share only if the intestate is survived by issue, one or more of whom are not also issue of the surviving spouse, *ibid.*, s. 2(3).

<sup>159</sup> R.S.O. 1990, c. S.26, s. 45(3).

<sup>160</sup> The Alberta provision is typical. "So much of the estate of a person dying partially intestate as is not disposed of by his will shall be distributed as if he had died intestate and left no other estate", R.S.A. 1980, c. I-9, s. 12.

Suppose that a person in Ontario dies, survived by a spouse and issue. The deceased leaves an unmatured RRSP worth \$100,000, of which the spouse is the designated beneficiary, and net other assets of another \$100,000. The deceased leaves no "will", in the ordinary sense of the word. The RRSP is one to which *Re MacInnes*<sup>161</sup> applies, making the designation testamentary in nature at common law. I assume that, however the act of designation is characterized, letters of administration would issue to deal with the non-RRSP assets, as on a total intestacy, and that, subject to the implications of the Ontario decision in *Canadian Imperial Bank of Commerce v. Besharah*,<sup>162</sup> and the Manitoba decision in *Waugh Estate v. Waugh*,<sup>163</sup> the plan issuer would pay out directly to the designated surviving spouse, not to the administrator. However, this does not necessarily answer the question of how much the surviving spouse and issue each get out of the property in the administrator's hands.

If the designation is not a testamentary act for purposes of applying the intestacy distribution law, then the deceased has not died "testate as to some property".<sup>164</sup> Accordingly, the spouse will take \$75,000 and either one-third or one-half of the balance of the property in the administrator's hands,<sup>165</sup> in addition to the \$100,000 payout from the RRSP. If we *do* so treat the designation, the spouse will be "entitled under the will to property having a net value of more than \$75,000",<sup>166</sup> and there will be no preferential share out of the property in the administrator's hands. The spouse would still take the \$100,000 from the RRSP, but only the appropriate fraction of the assets in the administrator's hands.

If the retirement plan is governed by the reasoning in *Baird v. Baird*,<sup>167</sup> the surviving spouse, whether or not living apart from the plan member, unquestionably would be entitled to a preferential share out of the assets in the administrator's hands, in addition to the payout from the plan, as long as the designation was not itself contained in a "will". The making of a designation under such a plan, an exercise of a power of appointment, is a testamentary act if made by will.<sup>168</sup> Leaving aside for a moment the effect of the legislation governing employee pension plans, which will apply to most such plans, such a designation under the plan would therefore be a gift by will, under general wills law, and the deceased would die testate as to the property passing under the plan. It therefore seems that the amount

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<sup>161</sup> *Supra*, footnote 9.

<sup>162</sup> *Supra*, footnote 60.

<sup>163</sup> *Supra*, footnote 58.

<sup>164</sup> *Supra*, footnote 159.

<sup>165</sup> *Ibid.*, ss. 45 and 46.

<sup>166</sup> *Ibid.*, s. 45(3)(b).

<sup>167</sup> *Supra*, footnote 9.

<sup>168</sup> *Supra*, footnote 93.

passing out of the plan to the surviving spouse should be added to any other property passing to that spouse under the will, to calculate the total set-off against any claim for a preferential share of the property passing on the partial intestacy. Once more, a choice as to the vehicle by which the designation is made may affect the distribution of the plan member's wealth on death. Again, this possibility is not unique to designation situations. The possibility of triggering a set-off against a preferential share, in the case of a partial intestacy, where an appointment is made by will, but not when it is made by deed, is present in these jurisdictions in the case of any settlement which contains a power to appoint by deed or will.

The above argument as to designations within "wills" under employee pension plans may only be raised against a surviving spouse who is living separate and apart from the plan member on the member's death, for such a spouse is not entitled by statute to receive the payout from the plan.<sup>169</sup> Obviously, this situation will arise only where the deceased plan member has neither changed his or her will after the separation, nor filed a new designation. If the surviving spouse is not living separate and apart, then the respective statutes require the payout to that spouse.<sup>170</sup> Even if there is a designation in favour of the spouse extant as well, the payout seems to be occurring by reason of the statute, not the designation in the will. If this is correct, there is no testamentary gift to the spouse, the plan member has died totally intestate, and there can be no set-off against the preferential share.

### *Conclusion*

At the beginning of this article, I referred to my perception that, underlying the discussion of statutory beneficiary designations in our legal literature, there is an assumption that all of these designations, whether of benefits payable under life insurance policies, employer pension plans provided as part of an overall employment contract, or individual retirement planning arrangements such as RRSPs, belong to the same jurisprudential species,<sup>171</sup> just because they wear similar clothes. If that turns out to be a correct assumption, it is because the various statutes dealing with designations have created this state of affairs, for it is not true under the general common and statute law, apart from these special statutes. The decision of the Judicial Committee in *Baird v. Baird*,<sup>172</sup> set beside the Supreme Court of Canada's

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<sup>169</sup> Manitoba, *supra*, footnote 66, ss. 21(26), 31(2); Ontario, *supra*, footnote 36, s. 48(3).

<sup>170</sup> See *ibid.*, Manitoba, s. 21(25); Ontario, ss. 48(1), 48(2).

<sup>171</sup> This assumption is stated explicitly by the Manitoba Law Reform Commission, *op. cit.*, footnote 1, pp. 3-4 (pp. 67-68 E. & T.J.), which treats all beneficiary designations as testamentary in nature.

<sup>172</sup> *Supra*, footnote 9.

decision in *Re MacInnes*,<sup>173</sup> which it both agreed with and distinguished, makes this patent.

Once we accept that, at common law, within the same jurisdiction, a beneficiary designation under one plan might be a different legal animal from one operating under another plan, we must determine the effect of the applicable designation legislation. Was it intended to pull designations entirely out of their common law characters, into a new, *sui generis* grouping, governed only by its own internal code? Or, was it designed merely to facilitate the ordinary common law operation of designations by overcoming possible enforceability problems for beneficiaries, should privity doctrine be a problem, and possible validity problems arising out of failure to comply with formality requirements ordinarily imposed on testamentary acts?

My argument in this article is that, while some of the statutes give fairly clear answers to some of the problems raised, none clearly solve all of the issues, arising out of the possible interaction of the designation legislation with the more general law, which may confront those competing for the wealth at the disposal of a member of a plan on death. Where problems remain, there is often little internal evidence in the applicable legislation to compel any particular conclusion, and portions of what evidence does exist point in opposite directions. If, in any particular jurisdiction, we conclude that the applicable "designation" legislation does not create a "closed", *sui generis* jurisprudence, then the relevant statutes must be examined closely to see whether the more general law is excluded in particular aspects, and the particular plan must be examined to determine whether or not a designation made thereunder is testamentary in nature.

As I suggested earlier, most of the time none of these issues will matter, as the occasion for any problem will not arise. However, in cases where the destination of the funds would be affected by the way in which some of the questions posed here are answered by the courts, in default of clear answers being forthcoming from the legislatures, there is good fighting ground for both parties to a dispute. Given the importance to individuals of the wealth which may be transferred by these designations, the differences which exist among the documentation which creates individual plans, and the number of individuals who commit wealth to these plans without a shred of professional advice, this position is, to say the least, unfortunate.

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<sup>173</sup> *Ibid.*