STANDARD LIFE

Group Savings & Retirement

Legislation matters

The Standard Life newsletter on legislation and governance

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1 Things you have always wanted to know but have never dared to ask on… beneficiary designations if you invest in an insurance product

Revocable or irrevocable? What does it mean?

Any beneficiary designation (in any written document other than a will) may be revocable or irrevocable.

If the beneficiary designation is ***revocable***, this means that the designation may be changed by the member, at any time, without the consent of the designated beneficiary.

If the beneficiary designation is ***irrevocable***, this means that the designation may be changed by the member, at any time, but only if the designated beneficiary agrees in writing to such a beneficiary change. This also means that the member is not allowed to make certain transactions, such as withdrawals, unless the designated beneficiary has agreed in writing to such transaction.

Is it true that if I designate my spouse as my beneficiary that the designation would be irrevocable?

Not necessarily. It depends on the applicable provincial legislation, as follows:

– ***All provinces except Quebec***

Any beneficiary designation made on or after July 1, 1962 is deemed revocable, unless the designation is expressly stipulated as irrevocable by a member.

– ***Quebec***

Any beneficiary designation made on or after October 20, 1976 is deemed revocable, unless:

- The designation is expressly stipulated by the member as irrevocable; or
- The legally married or civil union spouse of the member is designated as the beneficiary without any express stipulation that it is revocable. In such event, the designation is deemed irrevocable.

If the designated beneficiary is the member's common law spouse, the designation is deemed revocable, unless it is clearly stipulated as irrevocable.

Can a beneficiary be designated in a will?

Yes, a beneficiary can be designated in a will. In fact, any beneficiary designation in a will is revocable, and any designation or revocation subsequent to the date of signing the will takes precedence over such designation in the will.

However, a ***legacy*** must not be confused with a beneficiary designation made in a will because the consequences of a ***legacy*** are different from those of a beneficiary designation. In the case of a ***legacy***, the death benefit is paid directly to the estate before being paid to the legatee. As a result, the death benefit is part of the deceased's estate and can be seized by his or her creditors. For example, if the will states:

"I bequeath my RRSP to Jennifer," or "I bequeath all my property to Jennifer," this constitutes a ***legacy***.

In the case of a ***beneficiary designation***, the death benefit is paid directly to the designated beneficiary. As a result, the death benefit is not part of the deceased's estate and cannot be seized by his or her creditors. The will should then state:

"I designate Jennifer as the beneficiary of my RRSP." This constitutes a ***beneficiary designation***.

Are there any circumstances where beneficiary designations lapse?

Beneficiary designations lapse under the following circumstances:

- The designated beneficiary dies before the member.
- The court declares the beneficiary designation revocable or lapsed when granting separation or divorce (not applicable in Quebec).
- Upon divorce or dissolution of a civil union (only applicable in Quebec).

As a result, under these circumstances, the member may designate another person as a beneficiary regardless of whether the designation of the beneficiary was revocable or irrevocable.

Important note: Spousal priority in registered pension plans

The notion of "spousal priority" applies when a member of a pension plan dies and he/she had an eligible spouse.

"Spousal Priority" means that the person who qualifies as a spouse under the applicable pension legislation is automatically entitled to all or part of the member's benefits payable under the pension plan in the event of the death of the member before or after his retirement date. This rule applies even though another person may be designated as the beneficiary.

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Another decision from the Ontario Court of Appeal related to the payment of plan expenses

On May 20, 2008, in Burke v. Hudson's Bay Company, the Ontario Court of Appeal addressed, among other things, the issue of whether or not plan expenses were allowed to be paid from the pension fund.

Facts

In 1987, the Bay sold the assets of its Northern Stores Division to a retail company that became the North West Company.

At the time of sale, the pension plan sponsored by the Bay, a contributory defined benefit pension plan, had an actuarial surplus of approximately $94 million.

A pension plan agreement had also been signed by the Bay, whereby it agreed to transfer cash assets equal to the pension liabilities of the transferred employees, but not the actuarial surplus.

Years later, the transferred employees filed a claim where they argued that they were entitled to a pro rata share of the surplus and to an amount equal to their share of plan expenses that had been paid from the pension fund from 1982 to 1986. Prior to 1982, the Bay paid all expenses related to both the administration of the plan and management of the fund.

The trial judge concluded that the transferred employees were entitled to a pro rata share of the surplus because failure to transfer a portion of the surplus constituted a breach of trust. On the other hand, the trial judge concluded that the Bay was entitled as a matter of contract to deduct plan expenses from the pension fund.

The Bay appealed the trial judge's decision on the surplus issue, and the transferred employees appealed the trial judge's decision regarding the payment of plan expenses.

Payment of Plan Expenses

The Ontario Court of Appeal maintained the trial judge's decision by referring to the Kerry decision (for more information on the Kerry decision, please refer to the April 2008 issue of *Legislation matters*).

The Court emphasized the principle that "As the court noted in Kerry, there is no legislation in Ontario that governs the payment of pension plan expenses. Therefore, in order to determine how pension plan expenses are to be paid, the court must begin by reviewing the pension plan documentation. Review of the pension plan documentation in Kerry—as in the present case—involved a consideration of both the governing Plan text and trust agreement."

After reviewing historical plan documentation—i.e. the plan text and trust agreement—from plan inception (1961) to 1986, the Court concluded that the Bay was entitled to deduct plan expenses from the pension fund. The Court indicated again that silence from the plan and the trust agreement does not create a legal obligation on the employer to pay plan expenses.

Surplus Issue

Again, the Court indicated that the rights and obligations of the parties to a pension plan must be determined in accordance with the plan documentation.

After reviewing the plan text and the trust agreement, the Court overturned the trial judge's decision and concluded that the transferred employees were not entitled to a pro rata share of the actuarial surplus. In other words, transferred employees are not automatically entitled to a portion of the surplus in the case of a sale, unless the historical plan documentation or the purchase and sale agreement requires such a transfer of the surplus, which was not the case here.

It is important to note that the Ontario Court of Appeal's decision is based on specific provisions of the Bay pension plan text and trust agreement and therefore, you should review your historical plan documentation before applying this decision to your situation.

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Broader protection from creditors for RRSPs and RRIFs and the prioritization of regular contributions for pension plans

New measures that will offer broader protection to RRSPs and RRIFs and will prioritize regular contributions for pension plans came into force on July 7, 2008 through Bill C-12.

Bill C-12 amends the *Bankruptcy and Insolvency Act* and the *Companies' Creditors Arrangements Act*, and it is the result of a long legislative saga with an adoption process that started in 2005.

RRSP/RRIF

Bill C-12 introduces creditor protection to all RRSPs and RRIFs in the event of bankruptcy regardless of how these plans are funded and irrespective of the person's province of residence. However, in general, creditors can still seize any amounts contributed during the 12 months preceding bankruptcy.

In the context of RRSPs or RRIFs that are underwritten by life insurance companies, this adds a new level of creditor protection that did not exist prior to Bill C-12 for members who had not designated a "preferred beneficiary." If a member had designated a "preferred beneficiary," then the entire RRSP or RRIF, including the contributions paid in the 12 months prior to bankruptcy, was creditor-proof (exempt from seizure) and this continues to apply even after the introduction of Bill C-12.

For the purpose of this publication, "preferred beneficiary" includes:

- the legal spouse of the member (including the civil union spouse in Quebec); or
- the member's parents/grandparents; or
- the member's children/grandchildren; or
- any other person the member has designated as an irrevocable beneficiary.

Note: Deferred Profit Sharing Plans (DPSPs) are also subject to the new creditor protection rules governing RRSPs and RRIFs, including the last 12 months of contributions preceding the bankruptcy, which may be seized by creditors.

Pension Plans

Regular pension plan contributions by employees and their employers that are continuous at the time of the bankruptcy of the employer sponsoring the pension plan now have priority over secured creditors.

This is a significant change given that claims involving pension funds were always deemed an unsecured debt, therefore, not a privileged debt in cases of bankruptcy.

It is important to note that this priority status does not apply to unfunded actuarial liabilities.

On the other hand, the court can only approve a proposal, arrangement or compromise if:

- It is provided that these contributions will be paid to the pension plan; and
- The court is satisfied that the company can and will make the payments as required.

You can contact us

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