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New Loss Carry-Back for Post-Mortem Declines in RRSPs and RRIFs

*Barry S. Corbin**

If it passes, the 2009 federal budget will provide some tax relief from a long-standing -- and, for individuals, blatantly unfair – aspect of the *Income Tax Act* as it pertains to the tax treatment of registered retirement savings plans (RRSPs) and registered retirement income funds (RRIFs) on the death of the plan/fund annuitant. In the absence of an applicable rollover provision, the fair market value of the property comprising a RRSP or RRIF at the time of the annuitant's death must be included in his or her income for the year of death. In effect, the *Income Tax Act* treats the annuitant as if he or she had closed the RRSP or RRIF immediately before death. However, if the RRSP or RRIF decreases in value by the time the property is distributed to the person(s) entitled to receive it, there is no tax relief available to the estate. A simple example will illustrate.

Suppose Max has a $500,000 equity-based RRSP at the time of his death in the late summer of 2008. Suppose further that the economic meltdown during the fall of that year has reduced the value of that RRSP to $300,000 by the time it is distributed to his adult daughter, Minnie, in early 2009. Under the current tax rules, there is no provision that would allow Max's personal representative to take into account the post-mortem drop in RRSP value when calculating Max's income for 2008. One might consider this to be a case of taxing "phantom" income.

This contrasts sharply with the tax relief that is available for income taxes arising on account of another of the taxing statute's fictional transactions triggered by the death of a taxpayer. Absent an applicable rollover, the taxing statute treats a taxpayer as if he or she had disposed of all of his or her capital property immediately before death at its fair market value determined as at that time. (The estate of the deceased taxpayer is deemed to have acquired that same property at that same fair market value.) Where the deceased taxpayer's personal representative realizes a capital loss on the disposition of capital property (not necessarily the same capital property that gave rise to the fictional capital gain) in its first taxation year, that capital loss can be carried back to offset the capital gains arising in the year of death.

The federal budget proposes to allow the deceased annuitant's personal representative to claim a deduction in the terminal return equal to the amount of any drop in the value of the RRSP or RRIF between the date of the annuitant's death and the date of distribution to the person(s) beneficially entitled to the plan or fund property. Returning to the example, Max's personal representative would be able to reduce the income inclusion in his 2008 tax return by $200,000.

The Notice of Ways and Means Motion that was included in the budget papers contains two important timing qualifications on the availability of this tax relief:

1. The final distribution from the RRSP or RRIF must take place after 2008.

2. Unless the Minister of National Revenue exercises the discretion to allow it, the deduction will not be available unless that final distribution is made by the end of the first year following the year of the annuitant's death.

One might have expected that the new rule would be made effective for all deaths occurring after 2008. Instead, what is key is that the final RRSP or RRIF distribution occur after 2008. Evidently, there is an element of retrospectivity in this new rule, since the estate of a taxpayer who died in 2008 can benefit from this new carry-back. All that must happen is that the final RRSP or RRIF distribution occur before the end of 2009. In fact, with the benefit of the exercise of Ministerial discretion, the carry-back can be made available in the case of a longer time span between the date of the annuitant's death and the final distribution.

Presumably, the exercise of that Ministerial discretion will require a demonstration that the delay of the final RRSP or RRIF distribution beyond the end of the year following the year in which the annuitant died was reasonable in the particular circumstances. The most obvious situation where the Minister might be persuaded to exercise discretion would be a case where a dispute over the entitlement to the RRSP or RRIF distribution delayed that distribution beyond the end of the period referred to in the Notice of Ways and Means Motion. For example, a party might allege that the annuitant's beneficiary designation for the RRSP or RRIF should be set aside on the basis that it was procured by undue influence or that it was signed at a time when the annuitant lacked the necessary mental capacity. Given the nature of litigation, it is not difficult to imagine a scenario where the resolution of the dispute, whether by judicial determination or by settlement, would not occur until some time after the end of the year following the year of the annuitant's death.

What would happen in the case of a dependant's relief claim under Part V of Ontario's *Succession Law Reform Act*? Returning to the example set out earlier, suppose that Minnie collected the RRSP proceeds in 2009 and that Max's personal representative filed the terminal return, claiming the $200,000 deduction. What if Max's other teenage daughter, Midi, alleges that her father failed to make adequate provision for her? Despite the fact that the RRSP does not form part of Max's estate, section 72 of the *SLRA* makes it available as part of Max's "notional estate" to satisfy Midi's claim. Suppose that the litigation is settled in 2010 and that Minnie turns over the RRSP money to Midi in satisfaction of her claim. Would it be open to the Minister to claim that the final distribution from the RRSP took place too late for the deduction to be claimed?

Still on the subject of disputes, it is evident that there may be room to expand the pie in cases where there has been a significant post-mortem drop in the value of a deceased annuitant's RRSP or RRIF (perhaps during a period of protracted litigation). A timely distribution of the RRSP or RRIF – perhaps even on an interim basis -- could make available a deduction to be carried back to the deceased's terminal return, thereby generating a tax refund that could be allocated between or among the disputing parties.

There may yet be amendments made to this proposal between now and the time it is introduced as legislation in the House of Commons and ultimately enacted. However, if the concept remains substantially unchanged, it will be a welcome change to the tax rules.

** Barry S. Corbin, Corbin Estates Law.*

Guardianship Applications – Judicial Comments about Evidence to Support Making a Finding of Incapacity

Conway J. and Brown J.

Judges on the Estates List are hearing an increasing number of applications for the appointment of a guardian of property and/or person under the *Substitute Decisions Act, 1992* ("SDA"). To grant such an appointment a judge must make a finding of incapacity: SDA s. 25(1), s. 58(1). The definition of incapacity is contained in SDA, s. 6 (for property) and 45 (for personal care).

Judges hearing applications for guardianships carefully and critically review the evidence of incapacity submitted by the applicant. A finding of incapacity is a serious one, with significant legal and financial consequences. An evidentiary foundation for this finding must exist before any order can be made, even if the parties proceed on a consent or unopposed basis. In order to make a determination of incapacity a judge must assess the adequacy of the evidence of capacity, consider the availability of less restrictive alternatives to the appointment of a guardian, and take into account the interests of the person alleged to lack capacity.

The most cogent evidence regarding capacity, of course, consists of up-to-date medical evidence from qualified medical professionals or capacity assessments from qualified assessors. If the evidence from medical practitioners will not take the form of an affidavit, their reports must meet the requirements of section 52(2) of the *Evidence Act*.

Evidence of relatives, neighbours and others who have observed the person may also be adduced, but a court will assess whether such evidence provides a partial or fulsome picture of the respondent as at the time of the hearing. As well, the *SDA* contains enhanced evidentiary requirements for summary applications which are conducted without a hearing.

All types of evidence must be satisfactory in substance, not just in form. It is critical that a medical or assessment report contains details about the background of the practitioner/assessor, the relationship of that person to the patient, the types of tests or examinations conducted, the number of times the patient was seen and most importantly, the basis for the conclusion of incapacity. All evidence should be current.

In order to avoid repeated attendances on a guardianship application, and the associated expenses and delays, when preparing application materials counsel should consider carefully the evidence that will be required to demonstrate the lack of availability of less restrictive alternatives to the appointment of a guardian and to establish a lack of capacity on the part of the respondent.

Re Henderson Estate; Re Zagaglia Estate, [2008] CanLII 69136 (Ont. S.C.): Dispensing with the Filing of Administration Bonds

*Susan J. Stamm**

Justice Brown released this endorsement on December 16, 2008.

The endorsement sets out what materials ought to be filed when a proposed estate trustee is seeking to be appointed without posting an administration bond.

Justice Brown reviewed section 35 of the *Estates Act*, R.S.O. c. E.21, which provides the statutory requirement for posting a bond:

35 Except where otherwise provided by law, every person to whom a grant of administration, including administration with the will annexed, is committed shall give a bond to the judge of the court by which the grant is made, to enure for the benefit of the Accountant of the Superior Court of Justice, with a surety or sureties as may be required by the judge, conditioned for the due collecting, getting in, administering and accounting for the property of the deceased, and the bond shall be in the form prescribed by the rules of court, and in cases not provided for by the rules, the bond shall be in such form as the judge by special order may direct.

Justice Brown noted that the statutory requirement of bonding frequently arises in the following situations: in an intestacy; where a will does not name a trustee; for successor trustees; and for foreign trustees.

Section 36 of the *Estates Act* provides exemptions:

36(1) It is not necessary for the Government of Ontario or any ministry thereof or any Provincial commission or board created under any Act of the Legislature to give any security for the due performance of its duty as executor, administrator, trustee, committee, or in any other office to which it may be appointed by order of the court or under any Act.

36(2) A bond shall not be required where the administration on an intestacy is granted to the surviving spouse of the deceased and where,

(a) the net value of the estate as computed for the purposes of section 45 of the *Succession Law Reform Act* does not exceed the preferential share prescribed under subsection 45 (6) of that Act;[1] and

(b) there is filed with the application for administration an affidavit setting forth the debts of the estate. R.S.O. 1990, c. E.21, s. 36 (2); 1997, c. 23, s. 8 (1).

Justice Brown also noted that trust companies do not need to file bonds.

Section 37(1) provides that a bond should be double the amount of the property of the deceased, as sworn by the trustee.

Section 37(2) permits a judge to "at any time under special circumstances reduce the amount or dispense with the bond".

Rule 74.11(2) permits a person with a contingent or vested interest in an estate to move for an order that a trustee file a bond.

Justice Brown noted that the *Estates Act* does not set out what factors ought to be taken into account when dispensing with the filing of a bond.

He noted that in materials prepared for judges by Justice Haley in 2005, her Honour stated that a bond is usually dispensed with if:

(a) all beneficiaries are *sui juris* and consent; and
(b) all debts have been paid; or all debts are listed and the judge is satisfied that creditors are protected.

Accordingly, Justice Brown prepared a list of what should appear in a formal affidavit (i.e., not loose documentation) presented in support of a request to dispense with the filing of a bond:

(1) The identity of all beneficiaries of the estate;
(2) The identity of any beneficiary who is minor or incapable;
(3) The value of the interest of the minor or incapable beneficiary;
(4) Signed consents of *sui juris* beneficiaries (if consents cannot be obtained, an explanation as to how the interests are otherwise to be protected);
(5) The last occupation of the deceased;
(6) Evidence as to whether debts have been paid, including support obligations and orders;
(7) Evidence as to whether the deceased operated a business when he died and a description of those debts and whether they can be claimed against the estate;
(8) If all debts have not been paid, evidence of the value of the assets of the estate and particulars of each debt (amount and name of creditor) and an explanation as to the arrangements made to pay the debts or provide security to protect the creditors.

A draft order should be included, but should not form part of the affidavit. It should read "THIS COURT ORDERS that the posting of an administration bond by the Estate Trustee is dispensed with."

In the Henderson Estate application before him, Justice Brown did not grant the request, finding that a statement in an affidavit that read, "All debts of the estate will be fully paid and satisfied out of the estate assets" was insufficient evidence.

In the Zagaglia Estate, Justice Brown found that the statement "To the best of my knowledge and belief all creditors have been determined and there are sufficient assets to pay all claims against the estate" was also insufficient.

Accordingly, when counsel are seeking orders dispensing with the filing of administration bonds, full particulars are required detailing how beneficiaries and creditors are otherwise protected.

This case comment represents the opinion of the author and does not represent or embody the official position of The Children's Lawyer or the Ministry of the Attorney General.

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[1] The preferential share is currently $200,000.00.

Republicans' Worst Fears Realized; Socialism and Healthcare to Follow?

*Ed Esposto**

Deadbeat does not usually comment on US court decisions. While there may be cases in the US that are relevant or of interest to Ontario practitioners, the editors of *Deadbeat* are not qualified to give advice on US law (please hold your comments regarding our expertise in Ontario law). Nonetheless, we at *Deadbeat* thought the following case deserved some attention.

The decision is in the Matter of the Estate of H. Kenneth Ranftle, File No. 4585-2008 (N.Y.L.J., Feb. 3, 2009). Apparently contradicting some other earlier Surrogate Court rulings (upon which we are not qualified to comment, of course) the US court effectively recognized the Canadian same-sex marriage of a deceased male and his surviving husband.

Mr. Leiby, 65, and Mr. Ranftle, 54, were residents of New York state. They were married in Montreal on June 7, 2008. Mr. Ranftle died November 1, 2008. Manhattan Surrogate Court Judge Kristin Booth Glen ruled that J. Craig Leiby was "the surviving spouse and sole distributee [i.e., heir]" of H. Kenneth Ranftle. The judge said that the marriage is to be recognized in New York if it was valid in Montreal and not specifically prohibited by New York state law or by "natural law" (such as on the grounds of polygamy and incest).

The case was a procedural decision which had a substantive effect. The court was required to determine the identity of the deceased "distributees" for purposes of notice and service. This, in turn, apparently required an examination of the persons that would be entitled to the estate under intestate succession. Here, due to the court's recognition of his marriage, Ranftle's will was able to go through probate quickly without any need to involve his surviving brothers in the proceeding.

It should be noted that Governor David Paterson instructed New York state agencies to recognize same-sex marriages that were valid where performed, through an Executive Directive dated May 14, 2008. It is not evident that a contrary Executive Directive would have changed the ruling in this case.

This decision appears to have the effect of ensuring that if a person dies in the State of New York after having married in a jurisdiction that permits same-sex marriage, the surviving husband or wife will have all the rights that flow under New York State laws. Obviously, one should seek the advice of US counsel to confirm that our understanding of this case is correct.

The legal consequences for those of us advising clients who may move to the US or who may have family members in the US are interesting. The scope of the advice to and planning for our clients should necessarily expand to take this decision into consideration in appropriate cases.

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Case Comment: *Camarata v. Morgan,* Ontario Court of Appeal, Docket: C48879, Heard: January 6, 2009, Doherty, Weiler and MacFarland JJ.A.

*Ed Esposto**

This case was an appeal from the order of Justice B. Allen of the Superior Court of Justice dated May 6, 2008. The appeal required the Court of Appeal to decide whether the limitation period to bring an action by an estate for damages for injuries to the deceased, arising from a motor vehicle accident, runs from the date of the motor vehicle accident or from the date of his death.

The Facts:

On February 12, 2004, Manuel Camarata was struck and seriously injured by a fire truck operated by the respondent. He died on June 1, 2004. The estate representatives issued their statement of claim on March 16, 2006, more than two years after the date of the accident, but within two years from the date of his death.

Lower Court Decision:

The motions judge dismissed the estate's action pursuant to Rule 20.04(2)(a) as statute-barred and granted summary judgment. The estate appealed.

Basis of Appeal:

The basic limitations period pursuant to s. 4 of the *Limitations Act, 2002,* S.O. 2002, c. 24, is two years from the date the claim was discovered. On this substantive point, the appellant conceded that the claim had not been brought within the specified time period. Hence, the appeal was based upon certain novel claims arising from other statutes.

The appellant estate trustee relied on the provisions of s. 38(1) of the *Trustee Act,* R.S.O. 1990, c. T23, and s. 267.5 (5) of the *Insurance Act,* R.S.O. 1990, c. 1.8, in support of his argument that the applicable limitation period was two years from the date of death of the deceased, rather than two years from the date of the accident.

In addition, there were claims by the dependants of the deceased under s. 61 of the *Family Law Act,* R.S.O. 1990, c. F.3. whereby a cause of action exists in favour of relatives of "a person [who] is injured or killed by the fault or neglect of another under circumstances where the person is entitled to recover damages."

Trustee Act:

Subsection 38(1) of the *Trustee Act* provides in part that "the executor or administrator of any deceased person may maintain an action for all torts or injuries ... in the same manner and with the same rights and remedies as the deceased would, if living, have been entitled to do". Subsection 38(3) provides that "an action under this section shall not be brought after the expiration of two years from the death of the deceased."

In the court's words, section 38 of the *Trustee Act* "modifies the harsh effect of the common law in respect of claims of a deceased person by allowing the deceased's representatives to maintain an action 'in the same manner and with the same rights' as the deceased would have had, had he not died".

But in a critical finding, the court held that the incident giving rise to the cause of action was the motor vehicle accident, not the deceased's death. Section 38 does not create a new cause of action. Instead, it allows the deceased's representative to prosecute an existing cause of action and establishes the conditions under which an existing viable cause of action can be pursued after the deceased's death.

Section 38(3) does create a limitation period that operates in addition to any limitation period that would have applied had the deceased been able to carry on with the action. But the court pointed out that section 38(3) cannot extend the limitation period that would have been applicable had the deceased not died and been able to carry on with his action. Hence, the argument in respect of the *Trustee Act* could not succeed.

Family Law Act:

The claims brought by the dependants of the deceased under s. 61 of the *Family Law Act,* R.S.O. 1990, c. F.3 also failed for similar reasons. In the court's view:

> "Claims under s. 61 of the *Family Law Act* are derivative. The limitation period governing the principal action, that is the claim brought by the trustee, also governs the claims made under s. 61".

The section contemplates claims triggered by the injury or death of a person. The court ruled that "while the death of the injured party will have consequences for the kind of damages claimed, death does not create a new cause of action. The cause of action under s. 61 arose in the circumstances of this case when the deceased suffered his injuries." In this case, it was the automobile accident that caused the injuries (and subsequent death). Hence the limitation period runs from that date.

The Insurance Act:

Section 267.5(5) provides that

> Despite any other Act … the owner of an automobile, the occupants of an automobile and any person present at the incident are not liable in an action in Ontario for damages for non-pecuniary loss, including damages for non-pecuniary loss under clause 61 (2) (e) of the Family Law Act, from bodily injury or death arising directly or indirectly from the use or operation of the automobile, unless as a result of the use or operation of the automobile the injured person has died or has sustained,
>
> (a) permanent serious disfigurement; or
> (b) permanent serious impairment of an important physical, mental or psychological function.

The appellant's argument based on s. 267.5(5) was that the death of the injured party creates a new cause of action and therefore it logically follows that in respect of that cause of action, the limitation period begins from the death. The court, however, found that the injuries suffered by the deceased during the accident gave rise to a cause of action under s. 267.5 (5). His subsequent death merely changed the nature of the damages claim, but did not give rise to a new cause of action.

Conclusion:

Barristers are, once again, reminded of the strictness of the *Limitations Act* and the need to advise clients accordingly. In this case, the creative claims under other statutes did not provide the appellants with the relief they hoped for, given their initial failure under the *Limitations Act* itself.

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Where there's a Will, there's a Way … To Revoke a Designation, but How? A Review of *Ashton Estate*

*Ryan Kirshenblatt**

Executive Summary

The 2008 decision of *Ashton Estate* raised important questions relating to the relationship between beneficiary designations and their revocation by Will under the *Succession Law Reform Act*. This article examines those questions through a review of the *Ashton Estate* decision against the backdrop of the relevant legislation and jurisprudence, both from inside and outside Ontario, including a discussion of the gap opened by the Ontario Court of Appeal's decision in *Laczova Estate*.

Introduction

In the spring of 2008, a rather short decision concerning rights under a Will emerged from the Barrie docket. *Ashton Estate v. South Muskoka Memorial Hospital Foundation*[1] addressed – rather succinctly in only eight paragraphs – very important issues relating to beneficiary designations.

The General Situation

Testator has an RRSP. Testator then signs a beneficiary designation leaving the RRSP to one or more beneficiaries. Testator turns 71 and converts the RRSP into a RRIF. Testator then makes a Will that begins with "I hereby revoke all Wills and testamentary dispositions of every nature or kind whatsoever made by me." In his Will, testator leaves the residue of his estate in a distribution scheme that differs from the beneficiary designation. Testator dies thereafter.

Someone interested in this estate comes into your office and asks the important question: "Who gets the RRIF?"

"Hmm," you pause to review what you consider to be a rather settled issue and advise your client. "Since there was no revocation in the Will of the beneficiary designation, whoever is listed on the RRSP/RRIF designation gets it. Part III of the *Succession Law Reform Act* covers this issue."

Not so fast, counsel.

A Synopsis of *Ashton Estate*

In 1987, Mr. Ashton (the testator) turned 69 years old and transferred his RRSPs into two RRIFs. In 1997, he merged these two RRIFs into one RRIF with TD Evergreen under Account No. 817-5007-T. In 1998, he executed a beneficiary designation for his "Mutual Fund RSP – Account No. 817-5007-T in favour of his eight children. In 2001, the testator executed his Will which conveyed 95% of the residue of his estate to his eight children – in unequal shares – and specifically appointed each of them beneficiaries of any "pension plan benefits or registered retirement savings plan" that he may own. The Will contained a standard revocation clause that revoked "all Wills and testamentary dispositions of every nature or kind whatsoever made by [the testator]." Six years later, in 2006, Mr. Ashton died and the RRIF was valued at approximately $370,000.00.

McIsaac, J. held that the RRIF passed through the estate and *not* via the designation. His reasons, which I will elaborate on and analyze below, were that the revocation clause in the Will was a valid revocation because the beneficiary designation was a "testamentary disposition" under Part III of the *SLRA* and that the appointment of his children as beneficiaries of "any pension plan benefits or Registered Retirement Savings Plan" that the deceased owned was a valid designation by Will because the RRIF was a derivative of the RRSP, concluding that the testator "must have had in mind his RRIFs when he appointed his eight children beneficiaries of [same]."

Analysis of the Issues

1. Did the beneficiary designation, although it said "Mutual Fund RSP, Account No. 817-5007-T", constitute a valid designation under s. 51 of the *SLRA*?

McIsaac, J. held that the beneficiary designation was valid under s. 51 of the *SLRA* because the designation (by instrument) was saved by the reference to the RRIF account number. Keep in mind that a designation *by instrument* has no formal requirements for validity under the *SLRA* so long as it is signed. This differs from a designation *by will*, which I address later.

2. Did the revocation clause in the Will constitute a valid revocation of the beneficiary designation in compliance with s. 52 of the *SLRA?*

According to McIsaac, J., the short answer was yes, because the designation was a "testamentary disposition." This is *very important.* This holding may break a Pandora's box wide open for drafting solicitors who may now need to reconsider the standard language in a standard revocation clause at the beginning of a will. This is because the *Ashton Estate* holding, I submit, stands for the proposition that a standard revocation clause which revokes "all testamentary dispositions" will have the effect of *revoking a beneficiary designation in the process* if upheld. When you were taught during articling to not slavishly adhere to forms, this is why.

This holding, the authority it relied on and the reasoning process that applied it, needs elaboration. McIsaac, J. correctly considered the Court of Appeal decision in *Laczova Estate v. Madonna House*[2] to arrive at his conclusion but, with the greatest of respect to His Honour, may have erred in his application of it. Furthermore, this application becomes more interesting when it is considered in light of the *Succession Law Reform Act* and other case law relevant to not only this issue, but also the issue of the nature of beneficiary designations generally.

In *Desharnais v. Toronto Dominion Bank*,[3] the court held that a change in a beneficiary designation is testamentary in nature. Therefore, it is an act that *cannot* be carried out under the authority of a continuing power of attorney.

This holding, while not expressly referred to or considered in *Ashton Estate*, may help explain why McIsaac, J. considered the beneficiary designation to be covered by the revocation clause in the deceased's will as a "testamentary disposition."

However, McIsaac, J. relied on *Laczova Estate* as part of his reasoning. *Laczova Estate* provided a detailed explanation of the designation and revocation requirements by instrument or by will as stated in Part III of the *SLRA*. However, the facts in *Laczova Estate* differ from the facts in *Ashton Estate* in a material respect. The handwritten Will in *Laczova Estate* contained *no revocation clause whatsoever*. On the contrary, Mr. Ashton's Will *did* contain such a clause.

Laczova Estate held that the prerequisites for a valid designation by will were not met because although the deceased's Will may have made express reference to RRSPs, the Will nonetheless contained no designation. Section 51 of the *SLRA* requires (1) a designation; that (2) relates expressly to a plan, either generally or specifically.[4]

Furthermore, *Laczova Estate* dealt with two arguments by the appellant, who sought to draw RRSPs into the Estate for the benefit of multiple charitable causes. The first argument was the theory of "implied designation"[5] because the appellant conceded that the Will made no *express* designation. This argument was rejected by Catzman J.A., writing for the Court of Appeal, finding that a designation *must* relate *expressly*. The Legislature left no room for implication.

The second argument was the theory of "implicit revocation."[6] This argument was rejected as well. However, s. 52 of the *SLRA* requires that a revocation relate *expressly* to the *designation*, either generally or specifically.[7] Of course, there was neither a revocation clause in Ms. Laczova's Will nor a designation[8] to be revoked in the first place.

The Court of Appeal therefore held that the beneficiary designations contained in the instruments were valid and disposed of the issue. The decision was a clarification of the *different* requirements between designation and revocation of designation by *instrument* on the one hand, and designation and revocation of designation by *will*, on the other. The former method requires no special requirements other than a signature. The latter method does have special requirements, which should be committed to memory like an estate litigation mantra:

> "*The Designation by Will must relate expressly to the Plan.*
> *The Revocation by Will must relate expressly to the Designation.*"

So, how does this mantra, and the *SLRA* provisions it paraphrases, affect the reasoning in *Ashton Estate*?

While *Laczova Estate* dealt with the situation where there was no revocation clause and held that any implied designation/revocation was immaterial and ineffective, the Court of Appeal did not go so far as to decide what would happen if there *was* a revocation clause, general or otherwise. Given the language of ss. 51 and 52 of the *SLRA*, if the revocation clause related expressly to the designation, then that would be sufficient to put an asset originally left to a designated beneficiary into the estate instead.

However, in *Ashton Estate*, the decision did not delve deeply into the purported revocation clause, but concluded that the general revocation clause was effective to revoke the beneficiary designation on the deceased's RRIF. If we were to apply *Laczova Estate* to the facts of *Ashton Estate*, there appears a small gap. Factually, *Laczova Estate* did not contemplate the effect of a general revocation clause. McIsaac, J. seems to have come to the conclusion that there was no impediment to finding that a general revocation clause that encompassed *all* testamentary dispositions naturally included *any* testamentary disposition, including the RRIF designation. Since *Desharnais* held beneficiary designations to be testamentary dispositions, it is possible that McIsaac, J. viewed the conceptual fit between designations and testamentary dispositions as permitting a finding that there should be a linguistic, interpretive and legal fit as well between the terms of the Will and the concepts they supposedly addressed.

As I originally submitted above, the view taken by McIsaac, J. is a novel one. Although *Laczova Estate* sheds light on why the *Ashton Estate* decision may be flawed on the grounds of the Court of Appeal's discussion of Part III of the *SLRA*, the factual gap left open by the case results in *Laczova Estate* not being enough, on its own, to render the *Aston Estate* decision markedly inconsistent with previous authority. Although failure to

comply with ss. 51 and 52 *SLRA* in *Laczova Estate* was fatal to the appellant's case, all the Court of Appeal decided was what *did not* measure up to s. 52's requirements. I suggest that the Court of Appeal did leave open what *could*.

Let us hold the general revocation clause in *Ashton Estate* against the requirements of s. 52 of the *SLRA*. Does this revocation expressly relate to the designation either generally or specifically? In a roundabout way, it does. The designation was, according to *Desharnais*, a testamentary disposition and the revocation clause spoke of all testamentary dispositions. On the other hand, maybe the revocation does not. The general revocation clause in Hugh Ashton's Will related only to the *disposition* and not the *designation*. The word "designation" appears nowhere in the revocation clause and the *SLRA* requires that the revocation relate *expressly* to *the* designation, not *a* designation. So, at the low end, we have indeterminacy. While indeterminacy does much to keep us lawyers gainfully employed, it may come as small consolation to the solicitor retained to prepare a Will in the face of it.

From a practical standpoint, this may be cause for concern. Must it be all or nothing for a drafting solicitor? According to *Ashton Estate*, a drafting solicitor may find himself or herself in the unenviable position of having either to risk revoking all designations to any number of beneficiaries who could then turn around and sue, or must ascertain exactly which designations are to be revoked and which are to remain in force. What if the testator does not recall which investments he has with which institutions, and which investments have a designated beneficiary? Must litigation ensue?

Unfortunately, practical consequences alone may not be enough to cause concern about the questions raised by the *Ashton Estate* decision. A "business of lawyering" concern is an insufficient ground to critique a decision, at least academically. However, there is authority, which calls into question the holding in *Ashton Estate* that a general revocation in a Will is enough to revoke a beneficiary designation.

One case is *Re Bottcher Estate*.[9] In this case, Maria Bottcher made a designation of her RRSP in favour of her son, John, in 1980. Ms. Bottcher's Will contained a general revocation clause that read "*I HEREBY REVOKE all my former Wills and Testamentary dispositions heretofore made by me AND I DECLARE this to be my last Will and Testament*." Thus the same issue as in *Ashton Estate* was considered in *Bottcher Estate*. In fact, Anderson J. specifically referred to s. 52 of the *SLRA* and determined that the general revocation clause in Maria Bottcher's Will, if held against the *SLRA*, would *not* revoke the designation under the plan "as no general or specific reference was made to the designation."[10] In reaching this conclusion, Anderson J. relied on *Hurzin v. Great West Life Assurance Company.*[11] In *Hurzin*, the general revocation clause was ineffective because (in that case) the insurance contract was not identified or described in the revocation clause. Applying *Hurzin* to *Bottcher*, Anderson J. held at paragraph 27 that "the general revocation clause in a will does not revoke a prior beneficiary designation validly made outside a Will unless the language of such a clause evidences a clear intention to do so." There was previous case law that arguably supported this proposition.[12] As a result, the original beneficiary designation was upheld and the RRSP did not fall into the estate.

Therefore, when s. 52 *SLRA* is interpreted in light of *Bottcher*, the reasoning in *Ashton Estate* can be called into question. Absent *Bottcher*, *Laczova Estate* on its own is not a firm precedent in support of a finding that the general revocation clause in Mr. Ashton's Will could not revoke the beneficiary designation. This is notwithstanding McIsaac J.'s interpretation that *Laczova Estate* was authority for the effect of the general revocation clause – even though a general revocation clause did not arise on the facts of *Laczova Estate*.

Perhaps there may be another avenue to follow in considering *Ashton Estate*. Perhaps it could be reconciled with the jurisprudence. However, to uphold this case in light of what I have written and maintained throughout this article would assume that McIsaac J. impliedly held that initially, the revocation clause could

not revoke the disposition. But, after considering how the beneficiaries were given unequal residual shares of the estate, in McIsaac J's view, that was the cogent evidence required under *Bottcher Estate* to rebut the presumption that a general revocation clause is ineffective to revoke a beneficiary designation outside a Will. However, such an implied holding would still conflict with Anderson J.'s statement that "On the basis of Ontario law, the general revocation in the deceased's will would not revoke the designation under the plan as no general or specific reference was made to the designation." This may likely be due in part to the older authorities being from a time where there were no statutory requirements for revocation of designations by Will.

Therefore, the combination of *Bottcher Estate*, *Laczova Estate* and s. 52 of the *SLRA* demonstrate that *Ashton Estate*'s holding, which is that the general revocation clause revoked the beneficiary designation, is questionable. This is because the revocation clause made no general or specific reference to the designation itself as required by s. 52 of the *SLRA* as discussed in *Bottcher Estate* and later in *Laczova Estate*. No implicit designation or revocation is allowed, which seems intuitive when one considers the strong evidentiary burden to establish that a general revocation clause was intended to revoke a designation.

3. Did the Will convey the proceeds of Mr. Ashton's RRIF to his eight children in unequal shares?

The questionable reasoning behind the issue of the general revocation clause may have had a spillover effect on the final issue dealt with in *Ashton Estate*. Since McIsaac J. held that the revocation clause revoked the RRIF designation, His Honour consequently held that the RRIF thus became part of Mr. Ashton's estate to be distributed under the residue clause in unequal shares. However, Mr. Ashton's Will made no express mention at all of any RRIF. The residue clause, after enumerating the percentage shares of each beneficiary, specifically appointed the beneficiaries of any "pension plan benefits or Registered Retirement Savings Plans" that he owned.

McIsaac, J. held that the RRIF was covered by the residue clause because the RRIF was a "derivative" of Mr. Ashton's RRSPs on the *Income Tax Act*'s requirement that the RRSP be converted into an RRIF. In so finding, McIsaac J. distinguished the facts of this case from the facts of *Re Konanz*[13] where the Court would not include "term deposits" in a bequest of "all my bonds and debentures." That was because the testator, on the evidence, was well aware that a term deposit is a bank account and therefore entirely different from a bond or debenture. There was no "direct link" between a term deposit and "bonds and debentures" which McIsaac, J. found existed between an RRSP and a RRIF.

With great respect to His Honour, the circumstances of *Ashton Estate* bore similarity to the circumstances in *Re Konanz* and accordingly His Honour may have erred when he considered a RRIF to be a derivative of an RRSP and therefore constituting the same asset to be treated the same way in the Will. Consider the case of *Bramley v. Bramley Estate,*[14] where Morrison J. held that under the *Law and Equity Act*, which established beneficiary designations for RRSPs and RRIFs, the two assets were separate and distinct as creatures of statute. Therefore, when the RRSP ceased to exist, its corresponding beneficiary designation ceased to exist as well and a new one was required to designate the RRIF. Of course, the validity of the distinction between an RRSP and a RRIF would be a strong determinant of whether the term "Registered Retirement Savings Plan" in Mr. Ashton's Will could be properly interpreted to mean "Registered Retirement Income Fund."[15]

Summary

Ashton Estate is an important case to consider because of its impact on the law as it relates to revocation of beneficiary designations by will. Part III of the *Succession Law Reform Act* governs this type of testamentary transaction but the case law in Ontario, particularly *Laczova Estate*, left a gap in the jurisprudential and

statutory framework which, I have argued through this article, may have been filled in a novel way by the *Ashton Estate* decision. The consequences of the decision may fall heavily on estate planners and drafting solicitors who may have to revisit how even the most simple Will may need to be redrafted so as to avoid any potential lawsuits from designated beneficiaries who lose the benefits they were otherwise entitled to on account of a standard general revocation clause. An even greater risk may lie on the shoulders of drafting solicitors who have *already* drafted wills with a general revocation clause in circumstances just like this, and it may be advisable to canvass their clients to clarify and confirm any intended revocations and to incorporate any rectified inconsistencies into a revised will.

Some case law may appear helpful if (and likely when) the issue of general revocation clauses appears before the courts again. However, some of the useful authority is not binding in Ontario at the moment (because it is from another jurisdiction) and we may have to wait for the Court of Appeal to confront the situation directly in order to further delineate the relationship between general revocation clauses and the requirements for revocation by will under the *Succession Law Reform Act*.

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[1] 40 E.T.R. (3d) 153.
[2] *Laczova Estate v. Madonna House*, [2001] O.J. No. 4992 (Ont. C.A.).
[3] 42 E.T.R. (2d), 2001 BCSC 1695.
[4] *Succession Law Reform Act,* s. 51.
[5] *Laczova Estate*, *supra* n. 3 at para. 20.
[6] *Id.*, at para. 28.
[7] *SLRA s. 52.*
[8] This point was conceded by the Appellant. *See supra n. 3* at para. 29.
[9] 47 B.C.L.R. (2d) 359, 39 E.T.R. 19 (1990).
[10] *Id.,* at para. 22.
[11] 23 B.C.L.R. (2d) 252, 29 E.T.R. 51 (1988).
[12] *Cf McCarthy v. Fawcett*, [1941] 1 D.L.R. 648, *Royal Trust Co. v. Shimmin*, [1932] 3 W.W.R. 447, affirmed [1933] 3 D.L.R. 718. Those cases suggest that clear intention that a general revocation clause revokes a designation is required. However, there may remain an issue whether the presumption is that a revocation clause does revoke absent cogent evidence, but the *Bottcher* decision itself seems to suggest that the presumption is actually that the revocation clause will *not* revoke a designation unless there is clear evidence that the general revocation clause was intended to do so.
[13] 88 D.L.R. (3d) 82 (1978).
[14] 3 E.T.R. (3d) 191 (B.C.S.C.) (2003).
[15] *Cf. Re Carson* [1937] O.W.N. 679 (Ont. H.C.), where "bonds" could mean shares of stock, but only in the circumstances where the testator owned no bonds and an intestacy would be avoided by such an interpretation. On the other hand, in *Ashton Estate*, the testator owned no RRSP's at all, but an intestacy would still not occur even if the term of "Registered Retirement Savings Plan" was held not to include a RRIF.

Canadian Conference on Elder Law

*Jan Goddard**

"Aging Citizens, Evolving Practices", the fourth Canadian Conference on Elder Law, was held in Vancouver on November 13–15, 2008. This year's conference was jointly hosted with the International Guardianship Network and as such, the theme of the conference was guardianship law, nationally and internationally.

With this focus on guardianship, the conference provided sessions on the Hague Convention on the International Protection of Adults, alternatives to guardianship, guardianship challenges and guardianship monitoring. It is clear that many countries around the world are struggling with the issues of capacity, substitute decision making and guardianship. There appears to be mounting concerns everywhere about the effectiveness of guardianship systems and how best to monitor guardians. Regular readers of *Deadbeat* will know that the Executive of the Ontario Bar Association, Trusts and Estates Section is sufficiently concerned about these issues here in Ontario to have struck a capacity law working group to discuss them.

As illustrated by the presentations of the conference participants, there are many models for guardianship and substitute decision making. In Ontario, we see the issues of capacity, substitute decision making and guardianship through the framework of the *Substitute Decisions Act, 1992*. There are other, interesting and challenging ways of looking at these issues. Some of the more notable ways in which systems outside of Ontario differ from ours include: less focus on capacity (Sweden), greater monitoring of guardians on an ongoing basis (some jurisdictions in the United States), mandatory representation of the person alleged to be incapable (this is quite common, and in fact the opportunity to be represented is one of the requirements for enforceability under the Hague Convention), and guardianship orders that are limited as to time and scope (Australia). These different points of view may be of interest to us in Ontario, as we evaluate how well our own legislation addresses the needs of persons with diminished capacity.

The conference banquet featured Moses Znaimer as guest speaker. Mr. Znaimer is now the President of the Canadian Association of Retired Persons (CARP), an organization he is trying to rebrand through his invention of the term "Zoomer" to describe older Canadians. Mr. Znaimer's presentation focused on the enormous clout that Zoomers should have in the marketplace and the political arena. His presentation was followed by a very lively question period, in which he was put to the task of responding to suggestions that his interests are purely commercial.

Once again, a sizeable contingent of Ontario lawyers attended and presented at the conference. Thanks to a grant from the Law Foundation of Ontario for the purpose of providing Ontarians with an opportunity to travel to and attend the conference, and take back what they learned to others, participation at the conference by Ontarians was greater than ever.

For more information about the Canadian Conference on Elder Law, and the publications of its host, The Canadian Centre for Elder Law, see the Centre's website at www.bcli.org/ccel.

** Jan Goddard, Jan Goddard & Associates.*

Brown Bag Lunch Summary

*Bianca La Neve, Diane Vieira and Suzana Popovic-Montag**

Our Brown Bag Lunches continue to be held on the third Tuesday of each month. Since our last report, we have had three more … and we set out a summary of each of them below.

The first was held on **November 18, 2008.**

We began this meeting by discussing whether or not estate trustees can and should proceed with the sale of estate assets, such as real estate and vehicles, before probate. It was generally agreed that with respect to vehicles, probate is not required. However, with real property, some participants were of the view that it should not be listed before obtaining probate. Others opined that this could be done, so long as the listing agreement specified that any sale was conditional on a grant of probate.

We then discussed debts payable to a deceased's estate and whether acknowledgments of debts included an acknowledgment of interest owed. It was generally agreed that the interest obligation should attach to the primary debt obligation and was included in any acknowledgment. Participants were encouraged to review the relevant statutes and case law in respect of this issue. We also discussed debts owed by beneficiaries. It was generally agreed that a right of set-off exists and an estate trustee may withhold an amount owing from a bequest owed to that beneficiary.

A participant asked whether solicitors retained on behalf of an estate trustee, who is also a spouse of a deceased person, should advise the estate trustee/spouse of the right to elect for equalization under the *Family Law Act*. Participants seemed to agree that estate solicitors should advise the estate trustee/spouse to seek independent legal advice with respect to any rights they may have as spouses under the *Family Law Act*. Participants disagreed on whether an estate can be distributed before the six-month anniversary of a deceased's passing if a spouse elects forthwith to take their entitlement pursuant to the terms of the Will.

We then discussed the payment of RSPs to spouses (as designated beneficiaries) and the attendant tax consequences to spouses and to the estate. We discussed various planning techniques to allocate the tax payable, including designating an estate as an RSP beneficiary and providing the spouse with a legacy.

We ended our lunch with an interesting discussion about *Ashton Estate v. South Muskoka Memorial Hospital Foundation*, a recent case which held that the standard general revocation clause in a Will revoking all prior testamentary documents equally applies to revoke RSP/RIF designations made prior to the Will. It will be interesting to see how this case is judicially considered.

Our next Brown Bag Lunch was held on **December 16, 2008**.

We began by discussing a beneficiary's right to view or receive a complete copy of a Will. It was generally agreed among the solicitors present that they usually provide a complete copy of a Will only to residuary beneficiaries, while beneficiaries receiving a specific bequest receive a redacted copy outlining the bequest. For those individuals seeking a complete copy of a Will (whether or not named as a residuary beneficiary), section 9 of the *Estates Act* can be used to compel an estate trustee to produce and file with the Court a copy of all testamentary documents in their possession.

We then discussed the recent proposed amendments to the *Family Law Act* that seek to redress certain inequities in the allocation of assets among spouses. For example, spouses choosing to elect to equalize

property after the death of their spouse will now have to include for valuation purposes, property jointly owned. Some participants raised particular issues with respect to some of the proposed amendments, such as the need to clarify whether the reference to joint assets will include all joint real and personal property. Another issue raised was the apparent lack of an express transition rule to govern the application of the new proposed provisions.

We then continued our discussion regarding RSP designations in Wills and the allocation of the tax liability between the estate and the beneficiary, particularly in the context of the designation of spouses. Participants appeared divided on whether the tax liability fell to the designated spouse or the estate in the first instance. We also discussed the different tax rules governing RSP beneficiary designations for spouses and children, as well as the practice of making designations conditional on a beneficiary bearing the tax burden. It was noted that any RSPs or insurance plans purchased by a testator subsequent to the making of their Will shall not be governed by any beneficiary designations contained in said Will. Although a Will speaks from death, a beneficiary designation speaks from the date it is made and can only cover those RSPs or insurance plans (as the case may be) in existence at the time.

A participant raised an issue concerning possible conflicts of interest when professional estate trustees retain their own firms to do work on behalf of an estate. It was noted that some Wills contain clauses that specifically permit professional estate trustees to retain their own firms to do work for an estate. When disputes arise concerning accounts rendered for such work, estate trustees have the option of assessing said accounts.

Another participant raised an interesting scenario in which named estate trustees wanted to accept their appointment as executors only, and renounce their appointment in the Will as trustees. It was generally agreed that an executor accepts property in trust for the entire estate, making them a trustee in the first instance, and thus precluding a separation of powers.

Our last Brown Bag Lunch was held on **January 20, 2009**.

Due to the televised inauguration of the newly-elected American President, Barack Obama, the turnout was smaller than usual, but we did have a lively discussion on some important issues.

One participant raised an interesting question with respect to an article she read that suggested proposed section 60.011 of the *Income Tax Act* provides for parents of disabled children who purchase a special form of annuity to include a tax-free rollover in their Wills to pass RSP or RIF funds to their disabled children. The general consensus from the group was that this was proposed legislation and had not yet been enacted. Participants then suggested different ways in which trusts could be set up for disabled beneficiaries, including the use of a Henson trust and the use of multiple trusts.

We then had an interesting discussion on whether a trustee has an obligation to inform beneficiaries of the *Saunders v. Vautier* rule. Some participants thought you could not inform beneficiaries as to do so would frustrate the testator's intentions and would result in setting aside the trust, while others thought beneficiaries should be advised to seek independent legal advice.

We also continued our discussion from our previous Brown Bag Lunch regarding RSP designations in Wills and the allocation of the tax liability between the estate and a spouse. The experience of some participants has been that a spouse, especially in a second marriage, may take the position that the RSP was gifted directly and they do not need to file a joint election. The tax liability may then fall to the estate. We discussed different ways of drafting designations conditional on a beneficiary bearing the tax burden.

We then discussed a number of drafting issues with respect to Wills. One participant raised the issue of drafting percentages instead of fixed amounts. Often a testator prefers percentages, but this can result in a number of problems for an executor. Beneficiaries, including charities, will make expensive inquiries as to the value of the estate to ensure that they are receiving an accurate percentage of the estate. There is also the problem of fluctuating value of assets, and the testator may end up giving more or less than they intended. The general consensus was to advise clients to include fixed amounts whenever possible.

We ended our session with a discussion on compensation for Attorneys pursuant to a Power of Attorney for Property. As many questions were raised, including if compensation was awarded for simply taking over assets and if compensation was awarded on an annual basis, we promised to revisit this issue in the upcoming Brown Bag Lunch.

We look forward to seeing you at our next Brown Bag Lunch.

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Case Comment: *Lipson v. Canada*, Supreme Court of Canada, 2009 SCC 1, Date: January 8, 2009, Docket: 32041

*Ed Esposto**

In Canada, whether by judicial accident or Ministerial design, we may be approaching tax fatigue when it comes to tax policy and administration. The *Income Tax Act,* Canada (the "Act") is becoming ever more incomprehensible to citizens. Tax policy is becoming ever more convoluted. And now, the General Anti Avoidance Rule ("GAAR") in the Act is slowly but irreversibly sucking all the oxygen out of the fight against uncertainty in tax policy and enforcement.

Initially even those who view the *Income Tax Act* as little more than codified theft could understand the rationale for a measure such as the GAAR. The idea that one clever (or wealthy) taxpayer could pay less than his or her fair share by twisting the interpretation of a provision to the point of strangulation seemed unfair at best. Letting some taxpayers avoid tax by employing fanciful planning merely increased the burden on the others.

Unfortunately, as the recent Supreme Court of Canada decision in *Lipson v. Canada* illustrates, the GAAR has become the very thing it was designed to prevent. In the past, revenue authorities attempted to hold up the clear wording of the statute against the whimsical interpretations asserted by the taxpayer. The taxpayer would try to create ambiguities that did not exist in the hope of having an unsettled result where the tie goes to the taxpayer. The game was all about finding a "filing position". Revenue authorities were the defenders of the rule of law, as written in the statute, while the taxpayer stretched the meaning of the statutory provisions to encompass the result he or she desired.

Now the GAAR has turned all of this on its head. Now we have the Minister arguing in court that even though each section of the act relied upon by the taxpayer was operating exactly as drafted and intended, the result is not one that should be allowed. The *Lipson* decision may come to mark the era when taxpayers can no longer merely rely on the provisions of the statute as written, but rather must also attempt to predict the possible future counterfactual administrative assertions.

Much has been written and will be written about the *Lipson* decision by those well versed in the minutiae of tax law. A paragraph by paragraph review of the court's decision will not be attempted here. My focus is on why this decision is a depressing harbinger of the future of tax planning and administration.

The facts of the *Lipson* case are actually quite simple (for a tax case). The taxpayer Earl Lipson and his wife Jordanna Lipson entered into an agreement of purchase and sale for a home. They (or their counsel) designed a clever arrangement whereby they could finance the purchase of the home and deduct the interest, something ostensibly prohibited under the Act.

Mr. Lipson owned the shares of a private family company. Mrs. Lipson borrowed $562,500 from a bank to finance the purchase of some of those shares from her husband. She paid the borrowed money directly to Mr. Lipson who, in turn, transferred the shares to her. The next day the purchase of the house closed. Mr. and Mrs. Lipson obtained a mortgage from the bank for $562,500. That same day, they used the mortgage loan funds to replace the share loan in its entirety.

By virtue of the attribution rules in the Act, Mr. Lipson was required to include in his income any taxable dividends received by Mrs. Lipson on those shares which she now owned. In addition, Mr. Lipson was able to use parts of section 20 of the Act to deduct the interest paid on the loan (now secured by mortgage on the new home). This was the intended benefit of this arrangement.

The taxpayers did not try to assert that this plan was anything other than a desire to achieve a good tax result. It was a plan, a sequence of events, designed to get interest deductibility and dividend income in the hands of the same taxpayer, all the while using borrowed money to purchase a home. Quite simply, it was a clever plan, but not an outrageous one. It did not rely on any alleged ambiguity in sections of the Act; it did not try to torture the construction of any sections of the Act into admitting that which is untenable. In fact, the plan relied for its efficacy upon the proper application of all relevant sections of the Act, exactly as drafted.

It is a principle of law that taxpayers can organize their affairs to achieve the best tax result for themselves, so long as they do not step over the line. But where is the line?

The Minister of National Revenue, while essentially admitting that all of the provisions of the Act at issue were operating exactly as designed, applied the GAAR to disentitle Mr. Lipson from claiming the interest deduction. While the sections were operating as designed, the result of this series of transactions was alleged to be an abuse or misuse of the Act.

The reasons for judgement are somewhat lengthy, so I will of necessity selectively review the Court's reasoning. The majority judgment was by LeBel, Fish, Abella and Charron JJ. For those interested in a point by point critique of the majority decision, one only need read the dissenting reasons of Binnie and Deschamps JJ.

What is noteworthy is that the court split 4 to 3, with the dissent divided between one judgement of two and one single. This split is itself part of the lesson of this case. We always prefer clear and unambiguous reasons from the bench. We always prefer unanimous judgements (if we agree with the result, that is). But in the GAAR realm this split decision is even more problematic for the taxpayer.

The GAAR is uncertain by its very design. Unlike other provisions of the Act, the GAAR does not pronounce that "if you do X, the result will be Y". Instead it says that "If you do X, the result will be Y, unless the Minister assets the result to be Z". This kind of uncertainly is usually something that courts agree must be strictly limited or avoided in tax legislation. Taxpayers are entitled to know the law and plan their affairs accordingly.

There are attempts in the drafting of the provision and in its interpretation in cases thus far to give it certainty, with a gloss of a mathematical or analytical framework. The Minister and the courts like to repeat maxims from prior GAAR cases which suggest a methodical approach:

> A two-part inquiry must be followed to determine whether a transaction results in a misuse and an abuse for the purposes of s. 245(4) of the Act. First, a court must conduct a unified textual, contextual and purposive analysis of the provisions giving rise to the tax benefit in order to determine their essential object, spirit and purpose. It is important to identify which provision is associated with each tax benefit. … Second, a court must determine whether the avoidance transaction frustrates the object, spirit or purpose of the relevant provisions.

So, applying that methodical and analytical framework, four of the most knowledgeable jurists in the land said "bad tax plan", two said "good tax plan" and one essentially said "I'm answering a different question". Charming.

Why is this case so troubling for taxpayers? Because both of the opposing counsel and the bench essentially were in agreement that each of the provisions of the Act relied upon by the taxpayers operated in this case exactly as drafted. Where they disagreed was whether that was acceptable. The majority agreed with the Minister that it was not acceptable for the taxpayer to use different sections of the Act in combination to achieve a desired result. So taxpayers (and counsel advising taxpayers) are faced with the following problem: they may be applying section XXX of the Act correctly and they may be applying section YYY of the Act correctly, but by using XXX and YYY together, they are abusing and misusing the Act and frustrating the object spirit or purpose of the relevant provisions. Well, which sections of the Act cannot be used in tandem? Any sections? What about combining subsections of the same section together? Is it abusive only if one of the sections used is an attribution section? Does any attribution section, used in conjunction with other sections, produce a GAAR result?

Should the revenue authorities be able to successfully apply the GAAR when all of the individual sections are used correctly? The Lipson plan failed because the Court put the series of acts together and saw the matrix of sections together as abusing the Act. It would certainly have been possible for the court to hold, as did the minority, that individually each section operated correctly and it is not an abuse or misuse of any of the sections to simply put them together to achieve the desired result.

The strength of the Minister's position was, I think, the fact that the attribution rules in section 74 were used in a way that gave a beneficial tax result. The Minister successfully argued that by combining the sections dealing with interest deductibility and the sections dealing with attribution, the taxpayer was achieving an abusive result. The Minister was able to persuade the court that it is an abuse to allow the attribution rules to be used in this way. It was a compelling argument to say that the attribution rules were designed to prevent taxpayers from transferring assets between spouses and achieving a beneficial tax result.

The problem, however, is that the attribution rules do not say that it is impermissible to have a positive tax result after a transfer of assets between spouses. Instead, the rules merely *prescribe the consequences* of transfers between spouses. In the Lipson case, the taxpayers understood those consequences and in fact wanted them to govern. If Parliament wanted the attribution rules to specify that no positive tax result is possible after a transfer of assets between spouses, it could have done so. Instead, it merely dictated the tax results of such a transfer.

The Minister successfully argued that while each of the provisions of the Act relied upon by the taxpayer operated as designed, the series of transactions resulted in abuse or misuse. But the dissenting judgement of Binnie J. and Deschamps J. effectively and simply dismissed this contention:

> [54] At the same time, of course, the GAAR must be given a meaningful role. That role is circumscribed by the requirement in s. 245(4) of the Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.), that the transaction[s] not only be shown to be "avoidance transaction[s]", i.e. transactions structured primarily to obtain a tax benefit, but in addition that the Minister demonstrate that the tax benefit results from a misuse/abuse of the provisions of the Act relied upon to produce it.
> (*emphasis added*)
> …

> [68] Of course, in the GAAR analysis, the entire series of transactions must ultimately be taken into consideration to determine whether the tax benefit results from an abuse of the provisions relied upon. (*emphasis added*)

The dissent was saying that you can look at the series, but only to determine if the particular sections were abused. In my view, the Minister did not make a persuasive case for the proposition that any of the particular sections were abused, only that the result seemed "wrong". Deducting the interest is permitted in one section of the Act. Attributing the income is required by another section of the Act. Doing both together as part of a series is abusive?

Again in paragraph 65 of the dissent:

> The outcome was not so much an abuse "of the specific provisions" as it was a fulfilment of them. The Minister's argument paints with too broad a brush. *Canada Trustco*[1] requires him to identify the misuse and abuse of an "object, spirit or purpose" that is "anchored in a textual, contextual and purposive interpretation of the specific provisions that are relied upon for the tax benefit".... (*emphasis in original*)

And in a final smackdown of the majority in paragraph 80 of the dissent:

> In an effort to identify the "object, spirit or purpose" of s. 74.1(1) abused by the appellant's plan, my colleague LeBel J. states, as mentioned, that "the attribution rules in ss. 74.1 to 74.5 are anti-avoidance provisions whose purpose is to prevent spouses (and other related persons) from reducing tax by taking advantage of their non-arm's length status when transferring property between themselves" (para. 32). In my respectful view, what LeBel J. believes s. 74.1(1) is designed to *prevent* is actually a reasonable statement of what s. 74.1(1) seeks to *permit*. *(emphasis in original)*

Taxpayers should be up in arms that the Minister is able to use the GAAR in this way. This is not a case where the sections of the Act were used in a way that produces a result that is clearly unsupportable. With all due respect to planning of an era gone by, this is not a "Red Cross Trust"[2] type of plan where the sections of the Act were used "correctly", but in a way that requires the willing suspension of disbelief in order for the plan to be upheld. The GAAR should have been perfectly applicable to the vacuous Red Cross Trust type of planning. But not in the *Lipson* case.

Cleverness without abuse should not be prohibited.

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[1] *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601.
[2] A "Red Cross Trust" is a situation where an offshore trust is settled by a Canadian with only a named charity as a beneficiary. The trust would include a power to add beneficiaries, often at the discretion of some combination of the trustee and a protector. The Canadian settlor would settle millions of dollars into such a trust and, on the advice of counsel, assert that the trust was for pure philanthropic purposes. No income of the trust was to be taxable in Canada. This requires the acceptance of the proposition that the taxpayer intended such beneficence and had no intention of adding his or her family members as beneficiaries in the future.

Split Infinitive

*Sean Lawler**

Bryan Garner says, *"an infinitive…is the tenseless form of a verb preceded by 'to', such as 'to dismiss' or 'to modify'"*.[1] The infinitive is 'split' when the writer places one or more words between 'to' and the verb.[2]

From the sources I reviewed,[3] it seems that:

(a) there is no principled reason for the rule prohibiting split infinitives;[4]

(b) inexplicably, there is a long history of English teachers telling students that split infinitive are always bad; and

(c) split infinitives are perfectly acceptable, so long as they are used properly.

Split infinitives can make a sentence awkward. The *American Heritage Dictionary of the English Language* says that the split infinitive in: "*We are seeking a plan to gradually, systematically, and economically relieve the burden*" is clumsy and slows the reader's understanding of the sentence.[5]

Sometimes, split infinitives create ambiguities. See, for instance, the sentence: *"The legislation would make it a Federal crime to physically block access to clinics, damage their property or injure or intimidate patients and staff"*.[6] Does 'physically' modify only 'block', or does it also modify 'damage'; 'injure'; and 'intimidate'?

On the other hand, trying to avoid a split infinitive can ruin a sentence. For instance, the sentence, *"she decided to gradually get rid of the teddy bears she had collected"* cannot easily be changed to eliminate the split infinitive:

(a) *"she decided gradually to get rid of the teddy bears she had collected"*, suggests that it took her a while to decide to get rid of the teddy bears;

(b) *"she decided to get rid of the teddy bears she had collected gradually"*, suggests that the collection process was slow;

(c) *"she decided to get gradually rid of the teddy bears she had collected"*, sounds awkward; and

(d) *"she decided to get rid gradually of the teddy bears she had collected"*, also sounds awkward.[7]

Garner and Strunk say that knowing when to use a split infinitive is a matter of having a 'good ear'. There really is no solution, other than to carefully review your writing and decide whether, in a particular phrase, it makes sense to use the split infinitive.

* *Sean Lawler, Shibley Righton LLP.*

[1] Bryan A. Garner, *A Dictionary Of Modern American Usage*, (New York: Oxford University Press, 1998) ("ADMAU) at pg 616.
[2] The one everyone knows is: 'to boldly go'.
[3] *ADMAU*; David Foster Wallace, "Tense Present", *Harper's*, (April 2001) 39; William Strunk Jr., *The Elements of Style*, 4th ed. ((Boston: Allyn and Bacon, 2000); Patti Tasko, ed, *The Canadian Press Stylebook*, (Toronto: The Canadian Press, 2002); William Morris, ed, *The American Heritage Dictionary of the English Language* (New York: Houghton Mifflin, 1969) ("AHT") at pg 1247.

[4] Foster Wallace says, *"the injunction against split infinitives … is a consequence of the weird fact that English grammar is modeled on Latin even though Latin is a synthetic language and English is an analytic language…a synthetic language uses inflections to dictate syntax, whereas an analytic language uses word order. Latin, German and Russian are synthetic; English and Chinese, analytic. Latin infinitives consist of one word and are impossible to as it were split…"*
[5] *AHT* at pg 1247.
[6] *ADMAU* at page 617.
[7] R.L. Trask, *Mind The Gaffe,* (2001): Penguin Books) at pages 269-270, cited in http://en.wikipedia.org/wiki/Split_infinitive.

Book Review

Mrs. Astor Regrets: The Hidden Betrayals of a Family Beyond Reproach by Meryl Gordon

*Reviewed by Jan Goddard**

"But the case was always as much about family as it was about money." – Meryl Gordon, *Mrs. Astor Regrets.*

"All happy families are alike; each unhappy family is unhappy in its own way." – Leo Tolstoy, *Anna Karenina.*

This reviewer fully appreciates that she occupies not only a different lot and plan of subdivision, but a completely different cluster of stars within the firmament than Leo Tolstoy. Therefore, it is with considerable trepidation that I challenge Tolstoy's statement about unhappy families. Perhaps it is safest to qualify the challenge by saying it does not seem to readily apply to families whose unhappiness is manifest in a power of attorney or guardianship dispute.

Experience with such disputes teaches us that there are archetypal unhappy families, such as siblings in conflict or children of a first marriage who cannot get along with a parent's second spouse.

Perhaps the least obvious, but I suspect quite prevalent archetype, is the parent who doesn't quite love a child well enough and the child who tries to navigate their relationship and the world knowing this. Brooke Astor, the New York socialite and philanthropist, lived to the age of 105. Her only child, her son Anthony Marshall, had over 80 years to share the world with a popular and beloved mother who, it seems, could never quite love him well enough.

The case of the late Brooke Astor is the most high profile story of alleged power of attorney abuse, a guardianship fight and ongoing will contest that we have seen in recent time, eclipsing handily Ontario's sad circus involving the late Harold Ballard in the early 1990's. It would be so easy to write the story as being "all about the money", as many journalists would do. It is to Meryl Gordon's great credit that she tells a more nuanced story in her poignantly titled book.

From Gordon we learn that Tony Marshall was the child of his mother's first abusive marriage, and perhaps even conceived as the result of a marital rape. Brooke never seemed very comfortable with Tony, and he spent his youth in the care of nannies or his grandparents while Brooke focused on herself and a beloved second husband.

After the death of her second husband, Brooke married the difficult and very wealthy Vincent Astor. With this third and final marriage for Brooke, which lasted until Vincent's death five years later, Brooke acquired the pedigree of the surname Astor, financial security for life and control over the Vincent Astor Foundation.

The ability to give money away to good causes is a great power. It was with the Foundation that Brooke made her mark in high society and in the affections of New Yorkers of many backgrounds. Her 90th birthday celebration was a spectacular fundraiser for the Citizens Committee for New York City. By then, Brooke Astor had become a beloved New York institution.

But Brooke did not just belong to New York society. She was part of a family. There was Tony, of course, his twin sons Philip and Alec, and most significantly in the story as Gordon tells it, there was Tony's third wife, Charlene.

Charlene Marshall was a provocative addition to the family. She was the wife of Brooke's minister when she met Tony at a lunch hosted by Brooke in her summer home in Maine. Brooke was horrified that the pair had fallen in love as guests under her roof and by the break-up of both their marriages. Gordon portrays Charlene as a vivacious, intelligent and determined woman – all qualities that Brooke might have enjoyed or admired in another woman, but not in Charlene as her home-wrecking daughter-in-law.

With the arrival of Charlene, and Brooke's later descent into dementia, a story unfolds that is perhaps more gossip-worthy because of the prominent names of the players involved and the high property values, but is familiar to any estates or guardianship lawyer.

Brooke lived on and on – Tony himself was aging, and if she outlived him, Charlene would receive almost nothing. Brooke suddenly became far more generous to Tony than she had been in the past, both in the making of gifts and under the provisions of a series of new wills and codicils that she signed.

Brooke had wanted to give a cottage adjacent to her summer home to her grandson Philip, and Tony, who had been promised the whole property, had objected. Now the property was gifted to Tony, who regifted it to Charlene. A beloved Childe Hassam painting promised to the Metropolitan Museum of Art was sold, with Tony pocketing a handsome commission. The law firm that had served Brooke for decades was replaced by a dodgy lawyer with a checkered history.

All suspicious stuff for sure, but much of it only came to light after Philip Marshall commenced a guardianship proceeding, directly challenging his own father as attorney for Brooke and seeking to replace him with a bank. Philip stood to gain nothing financially; in fact, he probably lost whatever inheritance he might have received from his father by taking the action he did. Rather, Philip's motivation was to see his grandmother's money spent on her and to improve the situation of squalor in which he believed she was now living in her Park Avenue penthouse apartment.

For while there were millions at his disposal, Tony made the same mistakes as so many other attorneys and stopped spending his mother's money on his mother. And while in our more run-of-the-mill cases, the attorney won't pay for the private room in the nursing home and a new nightie, in Brooke's case, it was the butler, the chef, the chauffeur, the social secretary, the fresh flowers and the country home that got cut. Not only that, but Brooke's precious dachshunds were no longer being properly cared for, and were soiling the carpets and furniture in her neglected apartment.

"O reason not the need!" Lear tells Goneril and Regan, but four centuries later, attorneys still do not heed the Bard's lesson. Maybe Brooke didn't need a social secretary any more, but Philip was so troubled by the

diminution of her style of living, as decided upon by his father, that he publicly challenged him and triggered a chain of events that unfolded beyond his intentions.

Brooke Astor's eventual, court-appointed personal guardian was her close friend, Annette de la Renta. Annette ensured that she lived out her remaining days in her country home, with all her needs attended to under the supervision of her rehired butler. She basked in the attention and love of devoted employees, friends and select family members (Charlene was not permitted to visit). She died in 2007. A few months later, not only were her will and three codicils being challenged, but her son Tony had been charged criminally with grand larceny and conspiracy respecting the transfers of property during Brooke's lifetime and the alleged forgery of testamentary documents that deprived charitable organizations of long-promised bequests, to the benefit of Tony.

The case of Brooke Astor holds no legal precedential value in Ontario. One will never get to cite it in a factum and toss about the names Rockefeller, Kissinger and de la Renta while quoting it in submissions. Meryl Gordon's account is not a legal roller coaster ride either. The court proceedings are downplayed – no swashbuckling lawyers, high stakes motions or revelatory moments on the witness stand.

However, her account of this case provides valuable insight for any lawyer about to become embroiled in a family dispute about a person of diminished capacity. Rich or middle class, the dynamics of such a family lead to similar patterns of emotions and actions. Sometimes, it really is not all about the money. And when it is not, as Gordon demonstrates, the situation is in many ways far, far worse, and no court order can redress what has gone wrong in that family.

** Jan Goddard, Jan Goddard & Associates.*

Upcoming Programs

Income Tax Update 2009
March 24, 2009 – 12:00 p.m.

Dinner with the Estates List Judges
April 28, 2009 – 5:30 p.m.

Complimentary Event

Does Gender Matter?

March 5, 2009

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