TAB 11

Insurance Trusts and Probate After The *Carlisle* and *Taylor* Cases

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INSURANCE TRUSTS AND PROBATE AFTER THE *CARLISLE* AND *TAYLOR* CASES*

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It is a common planning technique to have life insurance proceeds paid to a trustee, effectively creating what is known as a "life insurance trust". This type of structure is typically used where the insured[1] (owner) wants or needs to assert some control over the holding and/or distribution of the proceeds, such as where the proceeds are ultimately intended to go to minors or spendthrifts, or where he or she wants to defer the decision regarding distribution of the proceeds until a later time. A properly drafted insurance trust will have clear and distinct trust terms and trustee powers. It is not uncommon for the trust terms to mirror the terms of other trusts set out in the insured's Last Will and Testament (the "Will trusts"), and for the insurance trustee to be the same person as that person acting as estate trustee for the deceased insured.

With proper planning, an insurance trust will be treated as testamentary for tax purposes[2], but will be a separate trust from the Will trusts. The insurance proceeds in this case will be paid directly to the insurance trustee, and will fall outside of the deceased's estate[3]. The proceeds are paid to the insurance trustee as a result of a designation or declaration, whether in the insurance contract or in the insured's Will or other instrument[4], and indeed, it is very common for a declaration of this sort to be made in the Will of the insured.

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[1] Defined in s. 171(1) of the Insurance Act, R.S.O. 1990, c. I.8 (the "IA") as
"(i) in the case of group insurance, means, in the provisions of this Part relating to the designation of beneficiaries and the rights and status of beneficiaries, the group life insured, and
(ii) in all other cases, means the person who makes a contract with an insurer"

[2] CRA has confirmed its administrative position to treat these trusts as testamentary in Technical Interpretation 9238555 (Feb 4th, 1993); and Technical Interpretation 9605575 (Dec. 17, 1996).

[3] S. 196(1) of the IA.

[4] S. 190 of the IA describes beneficiary designations. The terms "beneficiary", "contract", "declaration", "instrument", and "will" are all defined at s. 171 of the IA.

The recent Saskatchewan cases of *Re Carlisle Estate*[5] and *Sun Life Assurance Co. of Canada v. Taylor* [6] have caused many practitioners to rethink how and where they make these designations, and whether specific wording is required in order the ensure that the life insurance proceeds paid to the trust, particularly as a result of a designation made by way of Will declaration, are excluded from the estate of the deceased insured and from probate. There has been much debate (across the country) as to whether these cases have application outside of Saskatchewan.

Although this is a subject about which reasonable people can differ, in my view it affords us, if nothing else, an opportunity to review the Insurance Act and underlying principles which allow us to create such trusts, and to ensure that we are drafting our designation provisions in accordance with these principles. Further, the implications of such review extends beyond what we traditionally consider to be life insurance and also includes related insurance products such as segregated funds and annuities, which also constitute life insurance within the meaning of provincial insurance legislation. Insurance legislation across the common law provinces is substantively the same, with very few minor differences, and caselaw reviewing legislation in one province can usually provide insight to practitioners even if not in the province where the case was decided. In this case, it is worth noting that the relevant provisions in the *Insurance Act (Saskatchewan)* are identical to those in the *Insurance Act (Ontario)*.

The Cases

The Carlisle case examined whether a declaration made in a will, purporting to create a separate insurance trust, had the effect of excluding the insurance proceeds from probate under the *Administration of Estates Act (Saskatchewan)*[7]. The judge in this case held that

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[5] 2007 SKQB 425 (Canlii) ("Carlisle").
[6] 2008 SKQB 403 (Canlii) ("Taylor")
[7] S.S. 1998, c. A-4.1.

the proceeds formed part of the deceased's estate and were therefore subject to probate fees.

The facts in this case were fairly straightforward. The deceased, Joyce Carlisle, held two insurance policies on her life. When she first acquired these policies, she designated her son, Shawn Carlisle, as beneficiary of both policies. The deceased subsequently executed a Will, and appointed her son Shawn as estate trustee, with her daughter Richelle as alternate. Clause 6 of the Will dealt with life insurance proceeds, stating:

> *"...I hereby declare that the proceeds of all policies of insurance on my life owned by me at the time of my death shall be payable and paid to the person who shall from time to time be acting as my Trustee, but such proceeds shall be paid to my Trustee in his capacity as insurance trustee, and not in his capacity as Trustee of my estate assets, and the proceeds shall be held by my insurance trustee, in trust, in the same shares and upon the same trusts, terms and conditions as if such proceeds had formed part of the residue of my estate. It is my express intention that such insurance proceeds not pass through my will or estate, and this paragraph shall be a declaration within the meaning of the Saskatchewan Insurance Act, any successor or replacement legislation thereto and any similar legislation in for in any other applicable jurisdiction. Subject to the foregoing, my insurance trustee shall have the same powers, rights, protections, obligations and duties in connection with the administration of the insurance fund or funds as he had as a Trustee of my estate assets for the administration of the residue of my estate."*

The residue of the deceased's estate was left to her four children (the youngest of whom was 20 at the time of Joyce's death), with a trust imposed over any beneficiary's shares to age 21 and discretionary powers to pay out for education, maintenance, etc. The issue before the court was whether the declaration effectively excluded the insurance proceeds (plus proceeds from a third policy, to be described below) from the estate for the purposes of calculating the probate levy.

The *Administration of Estates* Regulations[8] provide that insurance proceeds payable to a "named beneficiary" are not to be included in the calculation of the value of a deceased's

[8] R.R.S. c. A-4.1 Reg. 1.

estate when determining the probate levy payable, whereas life insurance proceeds payable to the estate are. The question before the Court was whether the Declaration in the will was effective in creating a 'named' beneficiary for this purpose. The court relied significantly on the decision in *Re Brown Estate*[9] case, which similarly looked not at whether the beneficiary designation was a valid one for the purposes of the Saskatchewan insurance legislation, but whether there was a 'named' beneficiary for probate purposes. In that case, there was a Will declaration which directed payment of proceeds of a group life insurance policy to the estate trustees, to fall into a separate trust and distributed in specified percentages to named individuals. There were no trust terms created, as the declaration appeared to contemplate an outright distribution to the named persons. Further, the declaration did not expressly distinguish the capacity in which the trustee was to receive the proceeds (i.e. as insurance trustee and not as estate trustee), nor did it expressly state the intention to have the proceeds pass outside of the will, all of which Mrs. Carlisle's will clearly did.

The court in *Carlisle* decided that the applicable test should be whether the assets pass to the beneficiaries outside of the will "*and without reference to it*", or to the beneficiaries through the executors "*by the terms of the Will*". (Emphasis added). The Court stated:

> *"[I]n spite of the fact that the testatrix expressly stated in the will that her intent was that the death benefits would not pass through her will or estate, she has, by the appointment of her executor and trustee as the person to whom the insurance proceeds were to be paid, and by declaring that the proceeds were to be dealt as if they formed part of the residue of the estate, passed the proceeds through her executors to the beneficiaries under the will. ..."*
>
> The Court went on to state that
>
> *"...the essence of the "named beneficiary" exemption under s. 8(3)(b) of The Administration of Estates Regulations...is that the insurance proceeds are payable to persons other than the executors. If they are payable to the executors,*

[9] [1992] S.J. No. 535, [1993] 2 W.W.R. 513

no exemption from probate fees can be claimed. In my view, the concurrent appointment of the executor as "insurance trustee" does not negate the fact that he is in that position because he is the executor of the deceased's estate. It is because he is first and foremost the executor of the deceased's will that he is also encumbered with the responsibility of administering the insurance funds."

Almost as an aside, the Court also found that a third policy, acquired after the execution of the Will and payable directly to Shawn Carlisle, should be included in Mrs. Carlisle's estate for probate purposes. The court found that the Will declaration created a trust, which was sufficient to include any insurance proceeds on the life of Joyce Carlisle received by Shawn, whether in his capacity as trustee, or in his capacity as beneficiary, and whether from a policy acquired prior or subsequent to the execution of the Will. This last point is clearly at odds with our understanding of provincial insurance legislation, as it somehow implies that a specific beneficiary designation in a contract is nullified by a broadly worded beneficiary designation (contained in the Will) executed *prior* to the acquisition of the policy in question. Notwithstanding the wording of the Will declaration (referring to "all policies of insurance on my life owned by me at the time of my death"), legislation provides that a declaration in a Will has no effect on a subsequent beneficiary designation, wherever contained[10].

The *Carlisle* case left many estate practitioners reviewing the technicalities of drafting insurance trust declarations, particularly where the executors and insurance trustees are one and the same. Can any declaration be effective where the insurance trustees are the same parties as the estate trustees? Should the declaration be removed from the Will? Do we need to use wording different than "my residual beneficiaries?...

The recent case of *Sun Life Assurance Co. of Canada v. Taylor* (also out of Saskatchewan) has clarified the court's approach and alleviated some, but not all, of these

[10] Subsection 154(4) of the *Insurance Act (Saskatchewan)* R.R.S. 1978, c. S-26

drafting concerns. The facts of that case are rather simple. John Parbst and Laurene (Laurie) were married in 1987 and they had two children, Matthew and Breanna. John and Laurie separated in 2004. In November of 2001, John purchased a $100,000 life insurance policy and designated his business partner, James Taylor, as the revocable beneficiary.

On January 7, 2007, John drafted a will in his own handwriting. In this will, John appointed Laurie as his executor, and went on to deal with the proceeds of his insurance policy. He identified the life insurance policy by way of policy number and carrier, and stated that his two children were to be equal beneficiaries under the policy with Laurie to act as "administrator", holding the funds until the children attained the age of 21. On February 2, 2007, John was killed in a car accident, and both Laurie (on the children's behalf) and James Taylor claimed entitlement to the proceeds.

The court firstly dismissed the claim made by James Taylor. The court confirmed that a holograph will could contain a valid beneficiary designation, and in this case, it found that the new beneficiary designation effectively revoked the original designation made in favour of James Taylor.

The court then went on to consider whether appointing the same person as both executor and insurance trustee resulted in the inclusion of the insurance proceeds as an asset of the estate for probate purposes. The court specifically considered the *Carlisle* decision, and concluded that insurance proceeds should only be treated as an asset of the estate in those circumstances where the designation was made to the estate trustee. Where the designation is made in favour of a named beneficiary, with a trustee appointed to hold on the beneficiary's behalf, the insured's intentions are clear and the proceeds do not form part of the deceased's estate. This clarity of intention exists even though the insurance trustee and executor are one and the same. The court stated:

> "An individual may act in more than one capacity. One may wear the hat of an

executor of a will and also be designated as trustee of an insurance policy. Nothing in any legislation prohibits this. The role played with respect to each of those positions is very different as are the legal responsibilities which attach thereto. It only stands to reason that often an individual will appoint the same person as executor of his will and trustee of his insurance policies as generally there are only a few people an individual trusts to carry out their wishes".

There was much debate after the *Carlisle* case was reported as to whether it was cause for concern for Ontario drafters, and how to draft in light of it. *Taylor* at least clarified that an insurance trustee could be the same person as an estate trustee. It clarified that probate will not be payable where there is a clear intention to pay the insurance proceeds to the named beneficiaries, even through the use of an insurance trust, but I would argue that even in light of the *Taylor* decision, we in Ontario are still left with some unanswered questions related to the drafting of these trusts so as to avoid probate:

1. What is a "named beneficiary" under the *Estate Administration Tax Act (Ontario)* [11] ("EATA")? Is it the same as a "Beneficiary" for Insurance Act purposes?
2. Can a trustee be a "Beneficiary" for the purposes of the Insurance Act?
3. How do we draft insurance trust declarations so as to generate creditor protection and create separate taxpayers while avoiding probate?

[11] The *Estates Administration Tax Act, 1998,* S.O. 1998, c. 34, Schedule as amended

Life Insurance and the Estate Administration Tax Act

In order to understand how to draft around probate, it is necessary to review the basis upon which probate is levied upon life insurance in Ontario. Indeed, legislation[12] in Ontario creating the obligation to pay probate is different from probate legislation in Saskatchewan[13]. Our legislation requires that probate be paid on the total value of "all property that belonged to the deceased at the time of his or her death"[14]. Unlike Saskatchewan, our legislation does not expressly levy probate on insurance proceeds payable to one's estate.[15] Our only reference to life insurance is found in Form 74.4[16], which speaks not to what should be included, but rather to what should *not* be included in the deceased's estate, as follows: "Do not include in the total amount: Insurance payable to a named beneficiary or assigned for value".

Does that mean that life insurance should be subject to probate fees at all? One might argue no, and in fact, there is caselaw which provides that, even where life insurance proceeds are payable to an estate, rather than a named beneficiary, a life insurance company cannot force the Estate Trustee to produce a Certificate of Appointment of Estate Trustee. The court in *Rozon* v. *Transamerica Life Insurance Co of Canada*[17] noted that the requirement is to provide the insurer with sufficient proof of entitlement, which could be less than probate.

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[12] The *Estates Administration Tax Act, 1998*, ibid, and The *Estates Act*, R.S.O. 1990, c. E.21, as amended (the "EA")

[13] See, for instance, Ann Elise Alexander, *Deadbeat*, Volume 26, no. 3.

[14] S. 32(1) EA, and s. 1 of the EATA

[15] Although the EATA does not specify how insurance proceeds are to be treated, the generally recognized exclusion for proceeds payable to a named beneficiary has been long accepted (even prior to the introduction of the EATA), and was accepted in the case of *Granovsky Estate v. Ontario, 1998 CanLII 14913 (ON S.C.)*. There, Greer J. stated at paragraph 12:

> "Throughout the history of probate fees, certain assets have been excluded from probate. At the present time, assets which are registered in joint names and which pass by right of survivorship on the death of the first of the joint tenants to die are not included for probate, nor is real property not situate in Ontario at the death of the deceased, **nor is insurance nor RRSP holdings for which the deceased has named beneficiaries under the appropriate beneficiary designation forms completed during her or his lifetime**." (emphasis added)

[16] Form 74.4 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as amended; Application for Certificate of Appointment of Estate Trustee with a Will, in which an Estate Trustee verifies, under oath, the value of the assets of the estate.

[17] Unreported, November 30, 1999, Ont. C.A.

Even if it is accepted that the EATA is intended to include life insurance in its probate "web", there are many unanswered questions as to the value of the inclusion, as the EATA is not at all clear when it comes to life insurance. The EATA does not define a "named beneficiary". The Insurance Act defines a Beneficiary but not a "named beneficiary", which leaves open the question as to whether the Insurance Act definition is helpful in this regard. Nor does the EATA expressly speak to who must own the policy for its proceeds to be included.

For instance, the EATA appears to contemplate a policy on the life of the deceased, which is owned by the deceased. It does not, however, contemplate situations such as a jointly owned policy on the life of the deceased, or one payable on the first to die of the (now) deceased and the other owner. Should all the proceeds be considered when calculating probate payable, even where the deceased was only one of the owners?

Finally, the EATA does not adequately address what is intended to be included in the phrase "property owned at his or her death", when it comes to life insurance. What about the situation where the deceased owned a policy on the life and that of his spouse, with the account value paying out on the first (his) death, and the rest of the policy remaining intact until the death of the spouse? Presumably the account value payout would be subject to probate if no named beneficiary existed, but what of the rest of the policy that the deceased held; what, if any, value does that have for the purposes of calculating probate? What does the deceased "own at his or her death"?

For the most part, it is not conceptually difficult to determine what property an individual owns at death. Whether it is corporate stock, real estate or bank accounts, if an individual owned the property (other than as a joint tenant) immediately prior to death, then generally speaking, one assumes that that property was owned at the time of his or her death. Those assets are identifiable and quantifiable. Life insurance is a unique asset. Prior to the happening of the event triggering payout (the death of a life insured), a life insurance policy is a contract between a policyholder and an insurance carrier, obligating

the policyholder to pay premiums to the insurance carrier, and obligating the insurance carrier to pay proceeds to a designated person at the (future) triggering event. The triggering event may be the death of the policyholder or of a person other than the policyholder, and the person designated to receive the proceeds may be the policyholder, his or her estate, or it may be another party[18].

The policyholder maintains all rights to deal with the contract prior to the triggering event, subject to an irrevocable beneficiary designation[19] or an assignment of that policy. This means that the policyholder can alter or revoke the designation from time to time[20], and the person designated to receive the proceeds has no right to enforce that designation until the death of the life insured. At that time, the beneficiary has a right to enforce payment of the proceeds. This is a legislative right, as with no privity of contract between the beneficiary and the insurer, the beneficiary would otherwise have no recourse to the monies.

All of which begs the question: what is the "property" of the policyholder *at the time of* his or her death? Can the contract be considered "property" of the policyholder at the time of his or her death? At what moment does the contract cease to be a contract between the policyholder and the insured, and become an obligation to pay to the beneficiary. Is it the moment of death of the life insured, or the moment after death?

Certainly the Carlisle and Taylor cases imply that the proceeds of an insurance policy are the subject of the probate levy. In the Carlisle case, the court stated that: "the suggestion that the value of a life insurance policy should be based on its cash surrender value at the point in time immediately prior to death is, in my view, not reasonable. No one would suggest that the value of a winning lottery ticket is the price paid for the ticket. The value of an insurance policy is the amount paid to the beneficiary by the terms of the policy.

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[18] S. 190(1) of the IA permits an insured to designate the insured's personal representative or a beneficiary to receive insurance money.
[19] S. 191(1) of the IA
[20] S. 190(2) of the IA

When the proceeds are paid to the estate, the full amount is to be included..."[21]. Applying this reasoning to probate levied in Ontario, this would imply that the property owned at the time of his or her death is the insurance proceeds. In this author's humble opinion, the analysis may not be that simple.

A Named Beneficiary

If indeed life insurance proceeds are vulnerable to inclusion in the estate for probate purposes, how then do we ensure their exclusion? Form 74.4 tells us that we are not to include insurance payable to a Named Beneficiary, but does not define a Named Beneficiary. Can we assume that the IA definition of Beneficiary applies, or should we apply the common law meaning?

At common law, the term beneficiary refers to the person who is beneficially entitled; who gets the benefit of something, such as a trust beneficiary[22]. A person is beneficially entitled to something if he is the real or beneficial owner, even though it is in someone else's name as nominal owner, with legal title to the property. One is beneficially entitled where one is in a position, ultimately, to exercise the right of ownership over the property held, and where he could legally recover the property for his own benefit[23].

The Insurance Act, on the other hand, has an arguably different definition of "beneficiary". Section 171 of the Insurance Act defines a "beneficiary" to mean a "person, other than the insured or his personal representative, to whom or for whose benefit insurance money is made payable in a contract or by a declaration." Put differently, a beneficiary is any person other than the insured or his personal representative, for whose benefit insurance money is payable, where payment results from a contract designation or declaration; A beneficiary is also any person to whom

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[21] *Carlisle Estate*, par. 31
[22] *Almasi (Litigation Guardian) v. Almasi Estate*, [1999] 1 W.W.R.290 (Sask Q.B.)
[23] *Griffin v. Charles M. Stewart Inc.* (1986), 57 Nfld & P.E.I.R. 62 (PEITD)

insurance money is made payable, resulting from a contract designation or declaration. Next to no formality is required to make a beneficiary designation for insurance purposes. The designation must describe the insurance and identify the person who is to receive the benefit of certain insurance[24].

Can a trustee be a beneficiary under the Insurance Act? The definition of beneficiary requires that the money be payable by contract or declaration to a person, and excludes no one other than the insured or his personal representative. A "Person" has been defined as including a corporation and the heirs, executors, administrators or other legal representatives of a person to whom the context can apply according to law[25]. Can Mr. X, as insured, designate his brother as beneficiary of the policy, with an agreement to hold the proceeds in trust for the benefit of Mr. X's children for a stated period of time? Is Mr. X's brother the beneficiary under the Insurance Act? This certainly seems to meet the IA definition of beneficiary, and arguably has all the requisite certainties necessary to impose a trust over those proceeds. Where Mr. X's brother might constitute a Beneficiary of the insurance proceeds under the IA, Mr. X's children are the beneficiaries of the trust holding those proceeds.

The Insurance Act permits the appointment of a trustee for a beneficiary, and states that: "The insured may in a contract or by declaration appoint a trustee for a beneficiary and may alter or revoke the appointment by declaration"[26]. This section has been pointed to in support of the position that a trustee cannot be a beneficiary. Perhaps the section should be read permissively rather than restrictively; that is, that an insured may also choose to appoint and change appointments of a trustee at any time, without it having the effect of changing the beneficiary designation. If both methods are acceptable mechanisms of designating a beneficiary and imposing a trust over the insurance proceeds for the purposes of the Insurance Act, then a trustee meets the definition of beneficiary for IA purposes.

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[24] D. Norwood and J.P. Weir, Norwood on Life Insurance Law, (Toronto: Carswell 2000) at 295
[25] S. 29 of the Interpretation Act, R.S.O. 1990, c. I-11 (repealed)
[26] S. 193(1) of the Insurance Act

Under these circumstances, is there any reason why the trustee cannot be the same person as that person acting as estate trustee for the deceased insured? Provided the designation is clear as to intention, there certainly does not seem to be a problem from the perspective of the Insurance Act. This is typical insurance and will planning, and often the person selected as estate trustee is the person most trusted to carry out the testator's wishes. This was acknowledged in the *Taylor* case.

If, in fact, a trustee can either be appointed or designated as beneficiary under the Insurance Act, does the same hold true then with respect to the EATA? Again, the EATA is silent as to the inclusion of insurance proceeds, but for Form 74.4. Like the Saskatchewan legislation applicable in the *Carlisle* and *Taylor* cases, this form refers to a "Named Beneficiary", without definition.

If a person can be designated beneficiary under the IA on the condition that the proceeds are ultimately held for others, then, at least according obiter from to the *Granovsky* case[27], that person should be a named beneficiary for probate purposes. If this is true, then it shouldn't matter whether the insurance trustee is the same person as the executor, provided the intention to designate a beneficiary is clear. We know from the *Taylor* case that a person can wear two hats, acting as both estate trustee and insurance trustee. How do we ensure clarity?

Some are suggesting that we ignore the whole thing and continue to draft as always; that is, with the insurance trustee the same person as the estate trustee. An alternative might be to consider establishing the insurance trust outside of the will, in a further attempt to exclude the insurance proceeds from probate in these circumstances. Perhaps another alternative would be to take advantage of *Granovsky*[28] type planning by including the insurance trust provisions in a second will which would not be submitted for probate.

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[27] *Supra* fn. 15
[28] *Supra* fn. 15.

From a practical perspective, however, it may be that it is easier and more certain to identify those persons with the intended beneficial interest in the proceeds, and then appoint trustees to receive the money and hold legal title to it.

To the extent that insurance proceeds are, in fact, otherwise potentially subject to probate, this technique certainly seemed to satisfy the court (at least in Saskatchewan) that there was a clearly named beneficiary, and protected the proceeds from that levy. Although it would seemingly not have been an issue if the insurance trustee were a person different than the Estate Trustee, it may in fact be a more practical method of creating an insurance trust for other (non-probate) reasons as well.

Where a beneficiary is designated, the Insurance Act provides that "...the insurance money, from the time of the happening of the event upon which the insurance money becomes payable, is not part of the estate of the insured and is not subject to the claims of the creditors of the insured"[29]. These proceeds would arguably be protected regardless of the identity of the beneficiary. The Insurance Act goes on to provide additional creditor protection, however, where "...a designation in favour of a spouse, child, grandchild or parent of a person whose life is insured, or any of them, is in effect, the rights and interests of the insured in the insurance money and in the contract are exempt from execution or seizure"[30]. It is unclear whether a beneficiary designation in favour *of a trustee for the benefit of* a spouse, child, etc., provides the same protection. Perhaps this protection will be more readily available where the trustee is appointed to hold the proceeds for the beneficiary, who is clearly of the family class described.

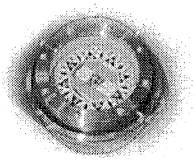
As well, problems can arise where an insured wishes to irrevocably designate an insurance trustee as beneficiary. The Insurance Act provides that an irrevocable designation[31] has the result of removing the insurance money from the control of the insured or the insured's creditors, and removes it from the insured's estate. Occasionally

[29] S. 196(1) of the IA
[30] S. 196(2) of the IA
[31] S. 191(1) of the IA

an insured will use this type of designation to attain creditor protection as against creditors during his or her lifetime, particularly where that protection can not be attained with a designation under s. 196(2) of the IA. Once designated this way, the insured may not alter or revoke the designation, and is limited in what he or she can do with the policy without the consent of the irrevocably designated beneficiary. If that beneficiary is an insurance trustee, there has always been concern that the trustee has no authority to act (to provide consent), until the trust is settled, which doesn't occur until the receipt of the insurance proceeds. In such cases, no one has the power to consent to any changes in respect of the policy. Perhaps designating the "underlying" beneficiaries and then appointing a trustee might help resolve this problem. Provided that the beneficiaries are of legal age and capacity to provide consent, it might be possible for them to do so even before the trust is settled. This might give an insured more flexibility in terms of creating a testamentary insurance trust and still using an irrevocable beneficiary designation to protect the policy.

If nothing else, the insured will have greater flexibility to appoint and change trustees without having to change beneficiaries. For instance, this might have value in circumstances where Mr. X designated his minor children as irrevocable beneficiaries, appointing Mrs. X as insurance trustee. Such is often the case in matrimonial and support settlements. When the children attain the age of majority, it might be possible for Mr. X to get their consent to the removal of Mrs. X as trustee, whereas it might otherwise have been technically and certainly practically impossible to obtain her consent directly as trustee/beneficiary.

Certainly insurance trusts remain alive and well. These cases were valuable to us if for no other reason that to give us an opportunity to think through the practicalities, as well as the legalities, of how we draft them.



Insurance Trusts and Beneficiary Designations after the Carlisle case

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Insurance Trusts: What they are

- Testamentary trusts receiving/holding insurance proceeds
- trusts created outside of will
- Typically in will
- Insurance trustee often estate trustee
- Arises from beneficiary designation
  - Proceeds don't form part of estate
  - Not subject to estate creditors
  - Free from probate
  - Carlisle – proceeds added to estate?

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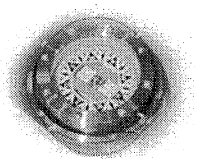
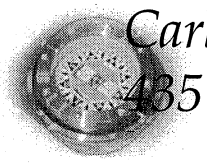


Carlisle Estate (Re), (2007) SKQB 435 (CanLII)

- Will contained Declaration
- All proceeds shall be payable to my trustees
  - In their capacity as insurance trustee and not as executor
  - To be held on same trusts and powers as if proceeds had formed part of my estate
  - It is my express intention that such proceeds shall not pass through my will or estate
- Has the Insured "Named" a beneficiary, or is the money to be paid to the executor to be distributed pursuant to will terms?

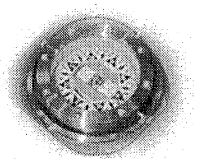


Carlisle Estate (Re), (2007) SKQB 435 (CanLII)

Test: do proceeds pass to beneficiaries outside the will AND WITHOUT REFERENCE TO IT?

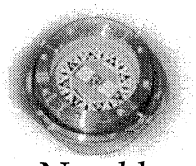
- Or do they pass through executors AND BY TERMS OF WILL
- Court ignored testatrix's express intentions to create trust outside will
- Court noted that this might be a valid beneficiary designation, but stated that "named beneficiary" (for probate purposes) are payable to persons other than the executors

- Much debate has ensued:
  - Can insurance t/ee and Estate T/ee be the same?



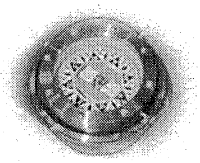
Sun Life v. Taylor 2008 carswellsask678

- Maybe provides some relief?
- Holograph Will: same person named as executor and as "administrator" of insurance proceeds
- "An individual may act in more than one capacity. One may wear the hat of an executor of a will and also be designated as trustee of an insurance policy. Nothing in any legislation prohibits this. The role played with respect to each of those positions is very different as are the legal responsibilities which attach thereto. It only stands to reason that often an individual will appoint the same person as executor of his will and trustee of his insurance policies as generally there are only a few people an individual trusts to carry out their wishes".
- Distinguished Carlisle because in that case no beneficiary designated and trust not a stand-alone trust



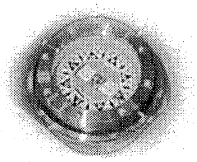
Where does that leave us?

- Need beneficiary to have separate trust (IA)
- Can Trustee be "beneficiary"?
- What makes a beneficiary?
  - Person other than insured or personal rep
  - To whom or for whose benefit
  - Statutory definition-Different than common law?
- What if trustee is executor?
  - Practical answer
- IA allows for "appointment "of trustee
- Can we do it either way?



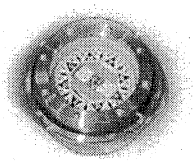
Where does that leave us?

- Does this matter for probate?
- What is captured?
  - Property of deceased at the time of his or her death
  - Policy or proceeds?
- Insurance is an anomaly
  - Contract between 2 parties to pay a third
  - When does contract change to right to receive proceeds?
  - Moment before death/moment after death
- Granovsky: states that proceeds are "probatable"



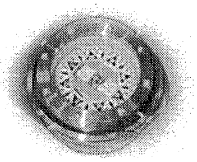
Where does that leave us?

- Is beneficiary (IA) the same as "named beneficiary" (EATA)?
  - Not defined in EATA
  - Some caselaw implies they are the same
- Can we have a named beneficiary where insurance trustee is also estate trustee?
  - Carlisle: never
  - Taylor: yes where named beneficiary not trustee
- Ontario?



Where does that leave us?

- Practical answer:
  - Remove declaration from will?
    - Dual will strategy
  - Don't appoint executor; or
- Make clear that proceeds are payable to trustee for benefit of (residual) beneficiaries
  - Make sure there is a trust
  - "Appoint" trustee to receive
  - Other practical benefits



Where does that leave us?

- Additional benefits
  - Beneficiaries can consent if irrevocable
  - May get additional creditor protection
  - May be able to remove and replace trustees before trust is settled