Beneficiary Designation By Way of Court Order Does Not Always Mean Payment

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Often when looking to secure a support payor's obligation to a recipient spouse after the death of the payor, it is asked of the payor to name the recipient as irrevocable beneficiary of the payor's assets until his/her obligation no longer exists. While in theory this seems straight forward and the intention of the parties is clear cut, the effect of pension legislation (either the *Pension Benefits Act for Ontario* regulated pension or the *Pension Benefits and Standards Act* for federally governed pension) often yields different results than what the parties expected.

This article will not deal with the issue of life insurance, but with a more seldom used form of security, being that of LIF (Life Income Fund) generated from pension funds.

Let us suppose a case whereby the support payor was elderly and did not have or qualify for life insurance. Furthermore, the payor has had a history of non-compliance with a valid separation agreement to pay support and has not paid arrears in 20 years. The recipient is not aware of any assets held by the payor as they have been separated for many years now. At trial, it was discovered that the payor did in fact hold assets with a financial institution, but the nature of such assets were not disclosed. The support recipient would instinctively be looking for any way to secure such arrears obligation owed and would seek relief naming the recipient as designated beneficiary of such newly disclosed assets to ensure payment would eventually be made upon the death of the payor.

While this sounds reasonable and practical, often, despite the Honourable Court wanting to ensure the recipient obtains the monies owed to him/her by way of support arrears and therefore grants the order requested, there is competing legislation providing for the assets to be dispersed to another individual upon death of the payor without the consent of all parties involved. As a result of this potentially costly dilemma through no fault of anyone involved, further litigation is needed to determine which legislation or provision takes priority.

One glaring example of where competing legislation can affect a family law proceeding can be seen when a pre-retirement benefit of the payor's pension is payable upon death of the payor and the former spouse has been named as beneficiary of this benefit by way of family court order to secure his/her arrears claim. The *Pension Benefits Act* enumerates at section 48(6) that the benefit is automatically paid to the current spouse despite a clear beneficiary designation being made naming another individual. However, under the *Family Law Act* and the *Succession Law Reform Act*, an Honourable Court can make a dependant relief support order or an order for security of support thereby creating the competing claims! Where do the parties go from here?

I believe that the first step as family law practitioners in this instance would be to obtain full disclosure as to the nature of the assets held with the financial institution prior to seeking security for support utilizing such assets. For instance, is the asset a pension, RIF, LIF, insurance policy? Once the nature of the asset is divulged, one can better understand what statutory provisions apply to the case at hand. If the asset is a life insurance policy, it can be differentiated from a pure pension asset and certain wording in a family law court order can alleviate any competing obligations.

If it is determined that the *Pension Benefits Act* applies the issue becomes much more complex. Any family law court order made must include very clear wording stating that the rights of the designated beneficiary shall supersede any rights the current spouse (if any) has to the pension upon death. While it is not specifically clear in the law how best to approach this argument or if this wording alone is enough to overcome the competing legislation, one can always use this as a starting point. Additionally, I would suggest making submissions to the Honourable Court referencing the pre-amble of the *Family Law Act* as well as Rule 2(4) of the *Family Law Rules* whereby pointing out the fundamental principles of the legislation and the objectives of the law. Furthermore, it can be also submitted to the Honourable Court that nowhere is it indicated that the *Pension Benefits Act* over-rides the *Family Law Act.*

If you find yourself in a dilemma whereby an order was already made naming the support recipient as beneficiary of the payor's assets, and the financial institution holding such assets will not prefer this court ordered designation over the current spouses rights under the *Pension Benefits Act*, in addition to the arguments regarding the he fundamental principles of the Family Law Act and the non-indication of priority between the *Pension Benefits Act* and the *Family Law Act,* one can attempt to argue that the recipient meets the definition of 'dependent' under the *Succession Law Reform Act* and that no proper financial provisions were left for the recipient in the payor's will.

The difficulty with this additional argument regarding a dependent relief claim is that often the payor has no other assets besides his/her LIF or other assets which at first glance appear to be governed by the *Pension Benefits Act* which do not form part of the deceased estate. As a result, in order to be able to access such asset for support purposes, an argument will likely have to be made that the asset can be 'clawed back' into the estate in accordance with the enumerated list outlined in section 72 of the *Succession Law Reform Act*. While the trend has been that pensions assets and LIFS do not fall under any enumerated scenarios found in section 72 of the Act, A recent decision entitled *Cotnam v. Rousseau*, 2018 ONSC 216 has opened up the possibility for judicial discretion to be used in order to allow pre-retirement benefits of a pension to be 'clawed back' and form part of the deceased's estate for support purposes. At paragraphs 34 to 36, the Honourable Justice De Sa stated the following:

> *While I acknowledge the Respondent's position has support in the jurisprudence, I disagree with this interpretation of the interaction between section 48 of the PBA and section 72 of the SLRA. While subsection 48(6) clearly creates a statutory priority between a "spouse" and other designated beneficiaries with respect to pre-retirement death benefits, I do not agree that this spousal priority shelters pre-retirement death benefits paid to a spouse from the "claw back" provisions of the SLRA. If Parliament intended such an exception to apply to the pre-retirement death benefit, they would have been explicit in this regard.*
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> *On the contrary, the provisions of the SLRA specifically contemplate a balancing of the assets between spouses and other dependants (see section 62 of the SLRA).1 To ignore the pre-retirement death benefit altogether would not only be arbitrary, but it may unduly skew the "balancing" envisioned under section 62 of the SLRA. The purposes of the SLRA could easily be thwarted altogether if the Respondent's interpretation were accepted. In many instances, the pre-retirement death benefit may be the only asset available to the deceased at the time of death.*
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> *On this point, consider a situation where the deceased recently married, and has two dependent children from a previous marriage. The primary asset upon death is the pre-retirement death benefit with a value of five million dollars. The estate itself has no other meaningful assets. If the Respondent's position were correct, the judge in determining an "equitable" distribution would not be entitled to apportion that five million dollar pension towards the dependent children. The absurdity of this result seems evident. Even without section 72(g) of the SLRA, the dependent children would likely have a claim to a portion of these funds based on pure equitable principles (constructive trust).2*

I must remind readers that while the issue is still not clearly outlined and symmetrical in the relevant legislation, the idea that the recipient/dependent spouse cannot touch a payor/deceased's pension seems to be changing.

This is a very complex issue combining aspects of family and pension law. It is very possible that there are other arguments to be made to obtain such assets upon the payor's death such as that the LIF is truly a life insurance policy and not a pension assets, and there are many other things to consider before seeking security for support by way of beneficiary designation such as whether or not the current spouse will be left destitute if the policy is paid to the designated beneficiary. Therefore, please do not take the examples outlined in this article as being exhaustive, and more importantly, always remember that just by being named as beneficiary by

way of agreement or court order does not always guarantee payment will be made to the desired individual.