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THE TAX & ESTATE PLANNING GROUP

TAX TOPICS

Limitations on Creditor Protection and Life Insurance

One of the attractive features of life insurance policies is the element of creditor protection. (See the Tax Topic entitled Creditor Protection and Life Insurance). In recent years however, this protection has been challenged on many fronts. The good news is that creditor protection still exists in certain circumstances. However, careful review of the limitations on this protection should be considered. This Tax Topic will discuss how life insurance creditor protection has been interpreted in recent years.

Creditor Protection on Bankruptcy

The status of creditor protection for life insurance and annuity products was uncertain where the insured had made an assignment in bankruptcy, until the Supreme Court of Canada's decision in Ramogtra. (Royal Bank of Canada v. North American Life Assurance Company and Balvir Singh Ramgotra, (1996), 1 S.C.R. 325). Prior to that time, a series of cases starting with Klassan, (Klassan (Trustee of) v. Great West Life Assurance Co. (1990), 1 C.B.R., (3d) 263 (Sask. Q.B.) decision brought into question the effect of creditor protection afforded by provincial legislation where a "settlement" was found to exist under the Bankruptcy and Insolvency Act (BIA).

When an individual becomes insolvent, the rights of the bankrupt and his/her creditors are governed by the BIA. The BIA includes a specific provision that exempts from the control of the trustee in bankruptcy, property that is granted creditor protection under provincial law. Where there is a family beneficiary designation or an irrevocable beneficiary designation in place, or funds are locked in and protected under provincial legislation, the trustee in bankruptcy cannot force the surrender of a life insurance or annuity contract in order to satisfy the claims of the bankrupt's creditors.

The issue of "settlement" in the trustee arose in Ramgotra. A settlement includes a designation of a beneficiary in an insurance contract, to the extent that the designation is gratuitous or made for merely nominal consideration. Section 91(2) of the BIA declares that "settlements" made within one to five years prior to bankruptcy are void against a trustee in bankruptcy, if the interest of the settlor does not pass upon settlement.

In Ramgotra, the trustee in bankruptcy applied for a declaration that the transfer of the RRSP funds into the RRIF, was void relying on the provisions found in s. 91(2) of the BIA. The transfer occurred in June of 1990 and in February of 1992 Dr. Ramgotra made an assignment in bankruptcy. The court determined that the RRIF issued by the insurer was an annuity and a life insurance contract. The court held that a transfer of RRSP funds from a non-protected contract to a creditor protected life insurance RRSP (or RRIF) is not a settlement as defined by the legislation. The court came to this conclusion on the basis that a person cannot settle property upon him or herself and must involve a transfer of the property to be held for the enjoyment of another person.

The court distinguished between s. 91 and s. 67(1)(b) of the BIA. These sections were applied at different stages of the bankruptcy and were not to be considered pre-conditions of one another. The court found that the designation of the policyholder's spouse as a beneficiary was a settlement within five years prior to bankruptcy, and was void as against the trustee under s. 91(2). Therefore, the court invalidated the family beneficiary designation made within 5 years before the bankruptcy at least as against the trustee in bankruptcy. Notwithstanding this finding, the court then considered the provision contained within s. 67(1)(b) of the BIA. While the asset passed into the possession of the trustee at the time of the bankruptcy, the asset was deemed exempt under provincial law, thus barring the trustee from dividing the asset among creditors. The trustee was then obligated to return the asset to the bankrupt prior to the application for discharge.

The Ramgotra decision therefore has upheld creditor protection provided under provincial legislation to life insurance annuities where bankruptcy has occurred. The trustee in bankruptcy cannot force the surrender of a creditor protected life insurance or annuity contract in order to satisfy the claims of the bankrupt's creditors. However, each set of circumstances may present a different scenario that may or may not enjoy this same protection. Advisors should at least be familiar with the findings of the court, to determine if there is an issue that needs to be addressed by a legal advisor.

Deferred Annuities

Deferred annuities have found the same favour with the court. A trilogy of cases at the B.C. Court of Appeal, the cases of Re Sykes, Robson and A.R. Thompson, In the matter of the Bankruptcy of Russell Boyd Sykes v. Smythe McMahon Inc., Trustee in Bankruptcy for the Estate of Russell Boyd, the "Bankrupt" and Russell Boyd Sykes and Shirly Anne Sykes, Edison Robson and Daniel Robson v. Seaboard Life Insurance Company and Royal Life Insurance Company Limited, A.R. Thomson Ltd. v. Dennis Stock and Coast Seal Co. Ltd. and Cameron Waddall, 156 D.L.R. (4th) 105, (sub nom. Sykes (Bankrupt), Re) 103 B.C. A. 81, (sub nom. Sykes (Bankrupt, Re), 169 W.A.C. 2 C.B.R. (4th) 79, 1 C.C.I. (3d) 1, 48 B.C.L.R. (3d) 169, [1998] 8 W.W.R. 120, C.C.P.C. 219 (B.C.C.A.) overturned earlier lower court decisions determining that segregated fund and deferred annuity RRSPs were not entitled to the creditor protection afforded to life insurance contracts. The contracts in question contained language which would allow the policyholder to "annuitize" their contract at maturity or any time prior to that. So unlike the Ramgotra case, the contract was not yet in the pay-out mode.

The court in its reasoning considered in addition to s. 147(2) of the B.C. Insurance Act, which set out the rules relating to creditor protection where a family beneficiary is named, (see the Tax Topic Creditor Protection and Life Insurance) that the amending legislation had expanded the definition of "life insurance" to include annuities. The court determined that the purpose of the amending bill must be a legislative intent to extend the protection afforded to beneficiaries and dependants with respect to life insurance to annuities issued by an insurer. These cases determined that RRSP funds in the form of deferred annuity including segregated fund contracts issued by a life insurer, are eligible for creditor protection except in the case of a fraudulent conveyance.

Other provinces have confirmed that the purpose of the amendments to the definition is to protect retirement savings in the form of annuities (whether they are deferred life annuities or segregated fund annuities) from seizure by creditors, in the same manner as life insurance. We can find comfort in these decisions at least to the extent that the court has provided a dialogue on the issue and judicial confirmation that creditor protection continues to exist for these types of products.

In Quebec however, recent cases have brought about discussion as to whether annuity products are subject to the claims of creditors. The most recent case of Banque de Nouvelle-Ecosse C. Guy Thibault (27 Sept. 1999), Laval 540-05-004404-96 (C.S.Q.) considers an annuity contract issued by a securities dealer (Scotia McLeod) in the form of a self-directed RRSP (SDRRSP). Under the provisions of the contract, partial or total withdrawals could be made from the SDRRSP. The court determined that because these types of withdrawals could be made from the SDRRSP, the contract did not constitute an annuity under the provisions of the Quebec Civil Code. As a result, trustees in bankruptcy have begun to question annuity contracts.

Fraudulent Conveyances

Provincial legislation dealing with fraudulent conveyance, provides another argument for creditors when seeking to satisfy an outstanding debt. While Re Sykes, would have succeeded in providing protection regardless of the provisions of the BIA, it failed under the B.C. Fraudulent Conveyances Act. Certainly, the decision in Ramgotra, opened the door for challenges under fraudulent conveyance.

Life insurance should not be purchased for the sole purpose of defeating creditors. This issue should be discussed in advance to ensure that this is not the case. If the intent to place the insurance is for this purpose, then it may be seen as a fraudulent conveyance. While there may be fewer claims by trustees in bankruptcy under the BIA in the future, the downside is that there may be more claims under fraudulent conveyances legislation.

Generally, provincial legislation will allow the creditor to set aside transactions where the intent of the transaction is to avoid the claims of creditors. However, the onus in these cases is on the creditor to illustrate that there is an intention to delay, hinder or defraud creditors. The court will also consider whether consideration has flowed from the transferee to transferor and whether the consideration is adequate to illustrate the transaction was made in good faith and not for fraudulent purposes. If a creditor is successful in demonstrating a fraudulent intent, the exemption under the BIA will not be available and no protection will exist.

Great caution therefore needs to be exercised when dealing with this issue. It should be noted that the more knowledgeable the consumer of life insurance is on this point, the more likely creditor protection will not be available. As well, in this instance the policy is more apt to be seized placing the insurer in a difficult position. Life insurance advisors should not encourage the purchase of insurance "to provide" creditor protection where it appears that the purchaser could have fraudulent intent or where it is apparent that the purchaser is in financial difficulty. This is often a difficult determination to make. Legal advice may be in order before the insurance is purchased. If there is any doubt, a recommendation to seek legal advice may be made. An advisor may provide information to a client about creditor protection but the limits of that protection should also be discussed.

Amounts Available to the Owner

Where a life insurance policy or an annuity contract is surrendered by the owner for its cash value, creditor protection will not be provided. As well, it was previously thought that there was no statutory protection for payments received under a life insurance or annuity contract by the life insured or annuitant while living. Although the contract itself may not have been subject to seizure and surrender, payments from the policy were thought to be available to the claims of creditors. This however was changed by the decision in Whalley v. Harris Steel, August 15, 1997, Toronto C19766 (Ont. C.A.). The court held that such payments are payments of insurance monies and are therefore creditor protected, even when paid to a life insured or annuitant. Similar reasoning was applied in Christianson, (1996), 39 Alta. L.R. (3d) 101 C.A. This trend appears to have reversed the previous thinking on this issue.

Family Beneficiaries

The legislative intent to provide creditor protection to life insurance has been to shield family members who are beneficiaries from creditor claims against the owner of the policy. The exemption exists where there has been a designation of a spouse, child, grandchild or parent of a person whose life is insured. In Ontario, recent amendments to the Insurance Act will also include common law and same-sex couples.

Previous challenges on this issue were brought under the provisions of the Charter of Rights in the Province of Alberta. In Re Gruending, (1999) 170 D.L.R. (4^{th}) 541 (Alta. Q.B.), the court found the Alberta Insurance Act did not protect such assets in the hands of persons in marriage-like relationships. The court found the legislation to be unconstitutional because it discriminated between married spouses and common law spouses. The court has the option of reading into the legislation an intended meaning or striking down the provisions found to be unconstitutional within the legislation. The court in this instance would not read into the legislation the definition of common law spouses because such action should only occur in the clearest situations with the greatest judicial restraint. Instead the court decided to strike down the provision, effective February 19, 2000. In response, the Alberta government gave Royal Assent to Bill 44 on December 9, 1999. Bill 44 defines spouse to include common law spouses of the opposite sex. The definition does not include same-sex couples as in Ontario. British Columbia has also made amendments to several pieces of legislation to expand the definition of spouse to include common law and same-sex partners. The B.C. Insurance Act was however not included. Quebec has also not amended its insurance legislation despite amendments in other pieces of legislation. In Nova Scotia, Bill 75, received Royal Assent on November 30, 2000. The definition of spouse is expanded to include same-sex or opposite sex partners under the definition of common law partner. The Nova Scotia Insurance Act includes this expanded definition.

Dependant Relief Claims – Support

When the owner's estate is designated as beneficiary of a life insurance policy, it will not be eligible for creditor protection. Where there is an appropriate designation under a policy or through provisions in a will by a separate testamentary trust, then the proceeds will not flow through the estate and will enjoy creditor protection. Despite this arrangement, family dependants may sue for insurance money that has not yet passed into the hands of a beneficiary.

Support obligations arise out of a "need" by a dependant and the grounds for seeking support exist in various legislation. The obligation for payment of support comes into existence by way of court order or agreement. Generally, a dependant means a person whom another has an obligation to support. A dependant may include a child or a spouse. Common law spouses and same-sex couples may also be included under the definition of a spouse, depending upon the provisions in provincial legislation. For instance, in Ontario a "spouse" includes persons in a same-sex relationship or a man and woman who are not married to each other and who have cohabited continuously for a period of three years or who have been in a relationship of some permanence, if they are the natural or adoptive parents of a child. Common law spouses and same-sex couples in Ontario can therefore be considered a dependant eligible to seek spousal support. Such obligations will continue to exist until a triggering event occurs. A triggering event may be defined in the separation agreement, by court order or through legislation.

In Ontario, obligations to support a child exist under the Family Law Act, R.S.O. 1990, c. F3. and the Succession Law Reform Act, R.S.O. c. S. 26, as long as the child is a dependant. If child support obligations exist under a Divorce Judgment then pursuant to the Divorce Act, R.S.C. 1997. C.1. support obligations will continue until the child is no longer a child of the marriage as defined by the Divorce Act. A child of the marriage is defined as a child of two spouses or former spouses who, at the material time is under the age of sixteen years or is sixteen years or over but is unable by reason of illness, disability or other causes to provide for themselves. Generally, the support obligations found in a court order or in an agreement contemplate support continuing through post-secondary education while the child is enrolled in a full time program of education. In Ontario, the Family Law Act sets out continuing support obligations while the child is enrolled in a full time program of education. If adequate provisions have not been made for the support of the dependants of the deceased, the court may order adequate provisions be made out of the estate and can alter the distribution of the estate regardless of the beneficiary designation. Dependant relief claims have been successful in the province of Ontario under the provisions of the Succession Law Reform Act. In the case of Harrison, Harrison (Litigation Guardian of) v. State Farm Mutual Automobile Insurance Co.,[1996] O.J. No. 4499, there existed at the time of death, arrears of child support. Under a court order, the deceased payer was to purchase a life insurance policy to address the need of child support in the event of his death. Instead a life insurance policy named the deceased's common law spouse as beneficiary and not the children. The Succession Law Reform Act was determined to be special legislation overriding the provisions of the Insurance Act, which would otherwise provide such protection from creditors. The court determined that the Succession Law Reform Act was an exception to the Insurance Act and the proceeds should be available to satisfy the dependant relief claim regardless of the rights of the named beneficiary.

It should also be noted that with the inception of the Federal Child Support Guidelines in May of 1997, more of these challenges may arise. The Federal Child Support Guidelines determine the quantum of child support to be paid in each province. The guidelines are determined by considering the income of the payor. Many court orders and separation agreements now require that adequate insurance exist, to cover the support obligation on death. However, where an order or agreement is silent on this issue, a claim may be brought for relief based on the Guideline amounts which illustrate the amount of support that should be paid.

If there exists a question as to who should receive the proceeds of the life insurance policy at the time of death, the life insurer if still in possession of funds (which is rare) will usually pay the proceeds into court. The court will then make an appropriate determination as to the rights of the dependant and shall then order the payout of the proceeds to those named parties in the court order.

Marriage Breakdown -Property claims

Life insurance may also fall under attack in a marriage breakdown situation. Many provincial acts (with the exception of Quebec) provide for a scheme of equalization of property between spouses. In Ontario, an equalization payment will be made where the net family property (NFP) of one spouse exceeds the NFP of the other spouse. The equalization is equal to one-half of the difference between the two spouses' NFP's. The cash value of a life insurance policy owned by a spouse is property that forms part of the net family property calculation. In Ontario, each spouse must indicate particulars regarding any life insurance policy and its cash value so that it may be included in the calculation.

Part I of the Ontario provincial legislation, provides for exclusions to the net family property calculation. Excluded property includes proceeds or a right to proceeds of a policy of life insurance as defined by the Insurance Act where the spouse would receive a death benefit payable on a death of a life insured. In Ontario, the proceeds from such policy would fall under the category on the Net Family Property Statement as an inheritance and would not be included in the calculation of the NFP. The only exception would be where the spouse has taken the proceeds and comingled the funds to purchase a matrimonial home. In such a case, the proceeds would not be protected and would fall under the division of the value of the matrimonial home.

A court may order that a life insurance policy on the life of the spouse be disposed of leaving the cash surrender value to be divided between the spouses or the ownership to be transferred to a spouse. Generally, pensions, RRSPs and annuities also fall under matrimonial property in most provincial acts and are therefore subject to equalization. There has been a great deal of litigation on this point and the cases are quite clear that these types of assets are all subject to attack by a former spouse.

Recent case law in British Columbia has gone a step further to say, that where there is a question of whether a support obligation can be met, then property shall be used to replace what would have been paid by way of support. In Kordysz v. Kordysz,[1999], B.C.S.C., No. 360 unreported spousal support was sought after a six year marriage. Both parties were in their 60's. The court determined that where a sufficient asset base exists, then the economic independence of the spouse is best achieved through an appropriate division of property rather than an order requiring the payment of spousal support under the Divorce Act. The court came to this conclusion on the basis that there was an uncertainty whether the support would be paid, especially given the advanced age of the parties. The outcome of this case means that all property may be under attack and subject to a claim, if support obligations cannot be met by other means. The Supreme Court of Canada has also decided that support obligations can be extended, if a sick or disabled spouse is in need of support. (See Bracklow v. Bracklow, [1999] S.C.C., No. 26178).

Case law has therefore blended issues of property division and spousal support obligations together, creating a larger playing field for a former spouse to make a claim. When dealing with this issue, the first question to determine is whether a domestic contract exists. If so, it undoubtedly will address property division upon marriage breakdown. However, even where a contract exists, a former spouse may challenge the validity of the contract and in doing so make a claim for property that was thought to be protected by the contract. All property including life insurance, RRSPs and annuities may therefore be subject to a claim by a former spouse.

Common Law Spouses - Property Claims

Similar to marriage contracts, cohabitation agreements may exist between the parties that deal with a whole regime of issues including property division upon separation. While many provincial acts do not speak to same-sex couples or common law spouses' rights when dealing with property issues, provisions for support may exist. Even though legislation may be silent on the issue of property, there is case law to allow for property division where a constructive trust has been found. For instance, an argument favouring a constructive trust may arise where the court determines there has been unjust enrichment on the part of one party as a result of the labours of the other. In Bigelow v. Bigelow,(1995), 15 R.F.L. (4th) 12, the Divisional Court allowed the appeal of Mrs. Bigelow and found that her contribution by way of household and childcare duties benefited the husband by permitting him to pursue his career. The court found that she had suffered a corresponding deprivation as her services were provided without compensation. The court determined that a monetary award may not be satisfied and ordered a fifty percent division of the husband's pension and severance benefits.

Testamentary Trusts

The right of a beneficiary to receive money from an estate, may be subject to the claims of that beneficiary's creditors. A separate testamentary trust created in a will may be one way of protecting beneficiaries from their own creditors. A testamentary trust within a will must clearly create a separate trust in such a way that insurance proceeds will not flow through the estate. One way to achieve this outcome is by way of a discretionary trust. In a discretionary arrangement, the trustee has control of the trust and the pay outs made from the trust. The trustee can refrain from making payments to the beneficiary until such time as the beneficiary is no longer subject to claims of creditors or make payment to the beneficiary in such a manner that the creditor will not gain the benefit of the distribution.

While a testamentary trust can be an effective vehicle to ensure life insurance proceeds are creditor protected, the will must be structured in such a manner to ensure that the proceeds flow outside of the estate. Otherwise, the protection that the testator hoped in drafting the will to create such a trust will fail and the proceeds will be subject to creditor's claims

Inter Vivos Trust

The question of whether creditor protection exists in an inter vivos trust scenario depends upon the relationship of the beneficiary to the life insured rather than the relationship of the trustee to the life insured. If the beneficiary falls within the protected class, then insurance money is protected from creditors. This is regardless of the fact, that the policy may be payable to a trustee. As long as the benefits are payable in trust for a beneficiary, in the protected class, then creditor protection will exist.

Annuities Offered by Non-Life Companies

At one time, only life insurance companies enjoyed creditor protection for life insurance contracts and annuity contracts. Provinces such as Prince Edward Island, New Brunswick and British Columbia have amended pension legislation to allow banks and trust companies to extend such protection to similar products provided by them. Saskatchewan, Manitoba and Ontario offer case law on the issue. The law in this area is in a state of flux. Case law seems to indicate that RRSP's are available if the claims of general creditors of the deceased's estate cannot be met by the estate itself because of insufficient assets. However, this leaves a number of issues open. For instance, what happens when there are two or more creditors of the estate? How is priority determined between creditors? British Columbia, Prince Edward Island & Saskatchewan appear to favour total creditor protection for RRSP's payable to a named beneficiary. Manitoba and Ontario qualify it. Generally, the state of law across the common law provinces is at this point somewhat uncertain. As a result, creditor protection may not be afforded to products offered by non-life companies.

Two Ontario decisions, National Trust Company v. Lorenzetti, (1983) 41 O.R. (2d) 772 (Ont. S.C.) as well as Re Morgan Trust Company v. Dellelce,[1985], 2 C.T.C., 370, indicate that in- force- annuities issued by trust companies are not granted creditor protection under the provincial insurance acts and accordingly could be seized by the creditors of the owner. If the owner of such an annuity designated someone other than his estate as beneficiary, any death benefit payable under that policy would flow outside of the estate to the beneficiary. However, if the estate had insufficient assets to satisfy the claims of the deceased's creditors, they could claim against the death benefit paid to a beneficiary. Therefore, even if the death benefit under an annuity (except in Quebec) offered by a non-life company passed directly to the beneficiary, they may not be exempt from a claim made by creditors of the owner.

This situation arose in CIBC v. Beshara, (1989), 68 O.R. (2d) 443 (Ont. H.C.J.) The court determined in that case, that notwithstanding that an RRSP was purchased from a trust company under which the annuitant designated his spouse as beneficiary, the proceeds passed through the estate and were therefore subject to the annuitants' creditors. Here the court went on to say that no statutory exemptions existed for RRSPs that would be similar to insurance plans.

Other case law has also dealt with whether a trust company can collapse an RRSP and pay the proceeds directly to Canada Customs and Revenue Agency (CCRA). In DeConinck v. Royal Trust Corporation of Canada, [1988] N.B.B.C.A. No., 1012, the annuitant sued the trust company for collapsing the proceeds without his consent. The court determined that a trustee relationship existed and not a debtor-creditor relationship. The court therefore concluded that a trustee who holds funds that are fully vested in a trust would not fall within the definition of a person liable to make a payment under s. 224(1) of the Income Tax Act. The annuitant was therefore successful in obtaining compensation for the payment made by the trust company to CCRA. This case may therefore afford trust companies some protection at least where a trustee relationship is established. However, it would appear that the court would not provide such p

Recent case law has again looked at this area. In Ontario two cases examined the issue. Curley v. MacDonald [2000] O.J. No. 3116 and Banting v. Saunders Estate [2000] O.J. No. 2817 questioned the reasoning in the Beshara case and instead followed the Manitoba Court of Appeal decision in Clarke Estate v. Clark, (1997), 15 E.T.R. (2d) 113. The decision in Clark concluded that RRSP funds payable to a named beneficiary did not form part of the estate. The Court further concluded that such funds were available to satisfy creditors of the estate, but only after other assets of the estate were exhausted.

Insurance company products continue to enjoy the greatest level of creditor protection through provincial legislation. While some provinces have amended their provincial legislation to extend creditor protection to annuity and RRSP products offered by trust companies and banks, there are still those that have not made such amendments. Accordingly then, in these provinces such protection is not provided to products issued by these institutions.

Claims by Canada Customs and Revenue Agency (CCRA)

CCRA has two avenues available for collection purposes. It may provide notice to a third party to require payment to the Minister, pursuant to s. 224(1) of the Income Tax Act, R.S.C. 1985, c. 1(5th supplement) where moneys are immediately payable and where moneys become payable generally within one year. This provides CCRA with a garnishment remedy. The second avenue arises under s. 225(1) of the Income Tax Act. It allows the Minster to give written notice to the debtor of the Minister's intention to seize property to collect on any balance owing by the taxpayer. The latter is a seizure remedy.

In the first instance, it was thought that CCRA could only exercise its garnishment power if provincial legislation did not prevent such remedy. In Sun Life Assurance Co. of Canada v. M.N.R., [1992], 2 C.T.C. 315 (Sask. Q.B.), however the Saskatchewan Queen's Bench determined that Revenue Canada (now CCRA) could garnish pension payments regardless of restrictions contained within the Pension Benefits Act. Sun Life argued that s. 224(1) of the Income Tax Act could not be employed by the Minister because of the provisions in s. 19 of the Pension Benefits Act. Under the Provincial Benefits Act, the legislation provided that pension payments were not attachable by garnishment The question really became one of

Federal Paramountcy. The court determined that the Federal Crown was not engaging in an act regulated by provincial legislation but rather, it was exercising its proper authority pursuant to s. 91 of the Constitution. The court determined the collection provisions fit within the scope of the federal legislation. The court also found that Sun Life was contractually liable to make payments to the tax debtor and therefore it was properly put on notice of the requirement to remit under s. 224(1) of the Income Tax Act. The court indicated that this was a special debtor-creditor relationship and Revenue Canada was a special kind of creditor. In coming to its conclusion that Revenue Canada was not an ordinary creditor, the court determined that the intention of the provincial legislation was not applicable to Revenue Canada. The court declared that Revenue Canada has the right to levy taxes and the right to collect them and therefore this remedy was found appropriate. This decision now indicates that CCRA has a special status as a creditor allowing it to garnish payouts under life insurance contracts that are owned by registered pension plans.

While a higher court has not tested this decision, it is one in which close attention should be given. The outcome may be analogized and applied to provincial insurance legislation. If provincial pension legislation was not protected in this instance, then the same success may be achieved by creditors in relation to pay outs made under the Insurance Act.

In the Newfoundland Court of Appeal case of M.N.R. v. Anthony,(1995), 32 C.B.R. (3d) 109 (Nfld. C.A.), the court held that the retirement savings plan that a bankrupt dentist held with the Canadian Dental Association under an agreement defined as a "variable annuity contract" was a contract of insurance falling within the Insurance Act and was exempt from execution and seizure under that Act. The insurer held and invested the funds of participating members of the association and undertook to pay individual annuities to members of the plan who elected to receive by that mode all or part of his or her value in it. The Minister argued that a contracting insurer makes no undertaking to create an annuity until an election has been exercised by the participating member. On this basis, the Minister argued that it was not eligible to be protected under the definitions contained within the Insurance Act. In essence the Minister was attempting to obtain a garnishment remedy under s. 224 of the Income Tax Act. The court disagreed with this argument and indicated that the insurer's undertaking to provide an annuity fell within the ambit of the Act. The outcome of the case indicates that unless money is payable by operation of a contract or the policy owner requests the money, an argument to garnish should not succeed. Despite this outcome, CCRA continues to take the position that a requirement to pay attaches to the policy whether there are moneys payable or not and there is an obligation to collapse the policy.

Subsection 225(5) of the Income Tax Act, states provincial exemptions from seizure will apply. CCRA however challenged this exemption under the provisions of the Manitoba Insurance Act. In M.N.R. v. Ross, [1997] Fed. Ct. (T.D. No. 1538). The court allowed an order to continue allowing for the seizure of life insurance policies by the Minister of Revenue. The facts indicated that the taxpayer had flagrantly avoided making payment and this ultimately may have brought the court to its conclusion to allow for the seizure.

The taxpayer had three insurance policies described by the court as bank chequing accounts. Funds flowed in and out of the accounts frequently. The court concluded that the insurance policies were not exempt from seizure under the Income Tax Act regardless of the provisions contained within s. 173 of the Manitoba Insurance Act. The court followed the reasoning found in another Manitoba Court of Appeal decision, although that case had dealt with the issue of garnishment and not seizure.(See Red Development Corporation v. Triman Industries Ltd. [1991] 6 W.W.R. 481). Similar to Sun Life, the remarks of the Court of Appeal judge indicated that the purpose of the Income Tax Act was not only to levy tax but also to collect it. Collection and enforcement under the Income Tax Act is part of the subject matter of s. 91(3) of the Constitution Act and is not merely incidental to raising revenue. In Ross, the Federal Court went on to say that the collection provisions fit within the scope of the federal legislation and therefore the policies were not exempt or immune from seizure under provincial statutes. The court determined that unlike 67(1)(b) of the BIA, there is no provision in the Income Tax Act exempting property from seizure under provincial law. The decision in this case appears somewhat unusual and inconsistent in its finding with the provisions in the Income Tax Act. While this case seems to have provided CCRA with broad remedial powers, the facts of this case should be considered. Here the taxpayer debtor continually avoided making payment and garnishment had already been utilized by Revenue to obtain some funds in settlement of the debt. Perhaps, in a scenario where the taxpayer had not gone to such lengths to avoid payment, the court may not have granted such relief in the first instance. However, the case does confirm that CCRA may take such steps to obtain payment and that life insurance and annuity contracts will no longer be subject to the same sort of protection in relation to seizure that was once enjoyed.

Summary

While creditor protection continues to exist for life insurance contracts, there appears as of late to be some erosion of that protection. There continues to be many instances, however, where life insurance can provide protection. It is important to understand the restrictions of creditor protection to better determine where it may still exist as an additional feature. Creditor protection should not be the only reason for placing life insurance. It should, however, be viewed as an added feature of the product, if in the future creditor issues do arise.