



NOVA SCOTIA  
BARRISTERS' SOCIETY

## MEMORANDUM TO COUNCIL

**From:** Lawrence Rubin and the Professional Standards (Wills, Powers of Attorney and Personal Directives) Committee

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**Date:** November 26, 2021

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**Subject:** Professional Standards (Wills, Powers of Attorney and Personal Directives) Standard – Beneficiary Designations<sup>1</sup>

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**For:**        **Approval**                    **Introduction X**                    **Information**

DATE	Council	Introduction
November 26, 2021		
	Council	Approval

### Rationale:

The Committee is of the opinion that beneficiary designations can be an effective way to pass assets on death, similar to a Will. However, beneficiary designations operate differently than Wills in certain situations and can create unintended results if not understood by the client doing an estate plan. It is important that the lawyer ensure the client understands the effect of beneficiary designations whether made inside the will or outside the will as well as designations made after the will is executed.

An equity lens was applied when drafting and reviewing this proposed standard. That said, concurrent with the introduction of this proposed standard for Member comment, the Committee has submitted it for review in accordance with the Society's Equity Lens Application in Policy Development guideline.

### Exhibit:

Proposed Standard – beneficiary Designations

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<sup>1</sup> No number is attached to this standard at this time. This is the third standard the Committee has presented to Council for introduction. As of the date of this memorandum, the Committee has not discussed a numbering scheme or the order of the initial standards that are set out in its Workplan.

EXISTING STANDARD	PROPOSED STANDARD	RATIONALE
N/A	<p style="text-align: center;"><b>Designation of Beneficiary Standard</b></p> <p>Standard</p> <p>When taking instructions for an estate plan and drafting estate planning documents, a lawyer must make inquiries of the client’s existing beneficiary designations including life insurance designations in the client’s estate plan and must confirm the client’s understanding of same before drafting the will.<sup>1</sup></p> <p>When advising a client about their estate plan the lawyer must inquire whether it is the client’s intention to make a gift to the beneficiary when designating a beneficiary inside or outside the Will, and to document that intention.<sup>2</sup></p> <p>When drafting a change or confirmation of beneficiary designation by Will, the lawyer must advise the client of the effect of revocation or confirmation of such current policy, plan or account using the Will as the revocation or confirmation document.<sup>3</sup></p> <p>When taking instructions for an estate plan, the lawyer must advise of the effect of future changes to beneficiary designations the client may make outside the Will in such policy, plan or account after the Will is executed.<sup>4</sup></p> <p>Footnotes</p> <p><sup>1</sup> <i>Calmusky v Calmusky</i> 2020 ONSC 1506; <i>Mak (Estate) v Mak</i>, 2021 ONSC 4415; <i>Moore v Sweet</i>, 2018 SCC 52; <i>Blasi v Di Ielsi</i>, [2013] QJ no 7293; Jason M. Chin, Archie Rabinowitz and Aoife Quinn, “The Presumption of Resulting Trust and Beneficiary Designations”, <i>Alberta Law Review</i>, &lt;<a href="http://albertalawreview.com/index.php/ALR/article/view/460">http://albertalawreview.com/index.php/ALR/article/view/460</a>&gt;</p>	<p>Beneficiary designations can be an effective way to pass assets on death, similar to a Will. However, Beneficiary Designations operate differently than Wills in certain situations and can create unintended results if not understood by the client doing an estate plan. It is important that the lawyer ensure the client understands the effect of beneficiary designations whether made inside the will or outside the will as well as designations made after the will is executed.</p>

<sup>2</sup> *Ibid*; *Conner v Bruketa Estate*, 2010 ABQB 517.

<sup>3</sup> *Moore v Sweet*, *ibid*.

<sup>4</sup> *Insurance Act*, RSNS 1989, c 231, s 87(3); *Beneficiaries Designation Act*, RSNS 1989, c 36; *Moore v Sweet*, *ibid*.

#### Additional Resources

- Jason M. Chin, Archie Rabinowitz and Aoife Quinn, “The Presumption of Resulting Trust and Beneficiary Designations”, *Alberta Law Review*, <<http://albertalawreview.com/index.php/ALR/article/view/460>>.
- Report by Alberta Law Reform Institute, “Beneficiary Designation by Substitute Decision Makers”, <<https://www.alri.ualberta.ca/wp-content/uploads/2020/05/FR104.pdf>>. This report contains a discussion about beneficiary designations in general.

#### Practice Notes

These are guiding principles to assist with meeting the Standard.

When drafting estate planning documents, the lawyer should:

1. Advise the client that assets may pass both outside the will and inside the will and assist the client to identify such assets.
2. Request the client to confirm the existing beneficiary designations before drafting the Will. It is advisable to have the client confirm the existing beneficiary designations and any updates made prior to the execution of the will so that the designations are aligned. It is good practice to confirm the status of the beneficiary designations in the final report to the client

as well as communicating that future changes in beneficiary designations may affect the estate plan in a significant way.

3. Encourage client to align the will and beneficiary designations.
4. Request the client to confirm he or she is the owner of the plan or policy or account and has the authority to designate a beneficiary. Note some pension plans define who the beneficiary is and cannot be changed even by separation agreement. See *Tower v Estabrooks* 2012 NBCA 27 and *Snell v McGregor*, 2014 SKQB 108.
5. Advise the client to confirm whether it is their intention to make a gift or not, when using beneficiary designations. The presumption of resulting trust may apply to beneficiary designations in certain cases unless intention to make a gift is stated or clear. See *Calmusky v Calmusky* 2020 ONSC 1506. See <https://hullandhull.com/tag/beneficiary-designation/> and <https://www.allaboutestates.ca/presumptive-peril-law-beneficiary-designations-now-flux/> for case analysis.
6. Advise the client regarding the income tax implications of designating beneficiaries on certain registered plans. Note that when an Registered Retirement Savings Plan (RRSP) or Registered Retirement Income Fund (RRIF) is paid out to the designated beneficiary after death, the income tax due (from the inclusion of that income in the T1 Terminal Tax Return) is not withheld from the RRSP or RRIF at source and is payable from the estate assets, if sufficient. The tax liability initially rests with the estate, but the beneficiary can still be liable to pay the tax if the estate assets are not sufficient. Refer to Income Tax Standard for more information.
7. Advise the client that a right of survivorship will apply only to the beneficiaries named on the plan who are alive at the time of the client's passing.
8. Advise the client not to name minor beneficiaries without including a Trustee and advise of the option to set up a trust in the Will for the minor beneficiaries.

9. Advise the client that a future beneficiary designation made on a plan, policy or account after execution of the Will takes precedence over a properly drafted beneficiary designation in the Will.
10. Consider using a hotchpot provision to bring designated beneficiary benefits into the accounting of the share of a beneficiary in a Will. This permits the testator to equalize all beneficiaries both inside and outside the Will when a beneficiary predeceases the testator and the alternate beneficiary in the will does not receive the benefit of the assets passing by beneficiary designation. The hotchpot clause can equalize the share of the deceased beneficiary to allow the share to pass to an alternate beneficiary.
11. Use appropriate language when creating a beneficiary designation with the Will and advise the client to provide a copy of the Will to the institution holding the asset as notification of the revocation. Preferably have institution acknowledge beneficiary designation change. See *Blasi v Di Ielsi*, [2013] QJ no 7293.
12. Be cautious when drafting the general revocation clause, not to inadvertently revoke beneficiary designations which are intended to remain. See *Hurzin v Great West Life Assurance* (1988), ETR (BCSC) and *Turner Estate v Bezanson*, (1995) 8 ETR (2d) 169 (NSCAA).
13. It is good practice, when designating a beneficiary by Will, place the beneficiary designation within the body of the will before the general vesting of assets into the name of the Personal Representative to provide clarity that the policy, plan or account does not vest in the Personal Representative, but passes outside the will.