NOVA SCOTIA
BARRISTERS' SOCIETY

MEMORANDUM TO COUNCIL

From: Professional Standards (Wills, Powers of Attorney and Personal Directives) Committee

Date: April 28, 2023

Subject: Professional Standards (Wills, Powers of Attorney and Personal Directives) Standard – Assessing Intention in the Estate Plan – Other Documents and Arrangements Expressing Intention[1]

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

DATE April 28, 2023	Council	Introduction
	Council	Approval

Recommendation/Motion:

This is the introduction to Council of a proposed new standard of the Professional Standards (Wills, Powers of Attorney and Personal Directives) Committee – Assessing Intention in the Estate Plan – Other Documents & Arrangements Expressing Intention. The proposed standard will be circulated to the membership for comments.

Rationale / Executive Summary:

Many have arrangements outside wills and powers of attorney that express their intentions for particular assets. The Committee is of the opinion that lawyers must be aware of, and consider, the pros and cons of the various documents and arrangements used to express intention as to estates, both during life and at death.

An equity lens was applied throughout the drafting process. Concurrent with this memo, the draft has been sent to the equity committees for comment.

Exhibit:

Draft Standard – Assessing Intention in the Estate Plan – Other Documents & Arrangements Expressing Intention

[1] No number is attached to this standard at this time. 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	ASSSESSING INTENTION IN THE ESTATE PLAN – OTHER DOCUMENTS & ARRANGEMENTS EXPRESSING INTENTION A lawyer must inquire about what other arrangements and documents regarding a client's property may be in place beyond a will and power of attorney. A lawyer must consider whether: • a client is benefitting, or would benefit, from documents in addition to a will or power of attorney or from other arrangements to express their intentions regarding their estates; • any documents a client has expressing intention regarding their estate, in addition to their will and power of attorney, validly and effectively express their intention regarding their property; and • any arrangements, verbal or otherwise, a client has regarding their property effectively honour their intentions regarding that property. A lawyer must advise the client how to effect their intentions regarding the succession of their property. A lawyer must refer the client to other professional advisors, if the lawyer cannot speak knowledgeably to these alternative documents and arrangements, particularly their tax consequences. Those other professional advisors may include, but are not limited to, one or more of counsel, chartered professional accountants, investment advisors, insurance professionals, and gift planners. _____ **PRACTICE NOTES** Documents and arrangements, in writing or verbal, which express intention specific to a client's estate that are not a will are sometimes referred to as "will substitutes".	The Committee is of the opinion that lawyers must be aware of and consider the pros and cons of the various documents and arrangements used to express intention as to their estates both during life and at death.

	These documents and arrangements include, but are not limited to:
	
	• Corporations
	• Memoranda
	• Resulting trusts
	• Advancement
	• Joint tenants with right of survivorship
	• *Donatio Mortis Causa* ("deathbed gifts")
	• Beneficiary designations – refer to standard on **Beneficiary Designations**
	• *Inter vivos* transfers and gifts
	• *Inter vivos* trusts including:
	  • Alter Ego Trusts
	  • Joint Partner Trusts
	  • Self-benefit Trusts
	  • Bare Trusts
	  • Spouse Trusts
	  • Charitable purpose trusts
	  • Life insurance and registered asset trusts
	  • Under-40 Trusts
	• Real property agreements, including options agreements
	• Marriage contracts, separation and divorce agreements
	• Mutual Wills Agreements
	• Other documents under seal (i.e. , deeds of gift with no consideration)
	
	<u>General note</u>
	In determining the effectiveness of other documents, consider whether the use of seals is required.
	
	<u>Presumption of Resulting Trust</u>
	Where property is held jointly between a parent and adult child and the adult child did not provide consideration for the transfer, the presumption of resulting trust applies.[1] The presumption of resulting trust assumes that the property held jointly between parent and child was not intended to be a gift to the child on the parent's death and is merely held in trust by the child to be devised in accordance with the parent's will or the laws of intestacy. This is the general rule across Canada and the onus is placed on the transferee to demonstrate that a gift was intended.	

	The presumption may be rebutted by proof on a balance of probabilities. An example: where a sum of money given by the testator to his daughter was not referenced in his will, but the will did explicitly reference forgiveness of his daughter's loans, the will was determined to be a strong piece of evidence in rebutting the presumption of resulting trust.[2] <u>Presumption of Advancement</u> The presumption of advancement, often referred to as the "equitable doctrine of advancement" or the "presumption against double portions", is a form of ademption. The presumption provides that if, after making a provision in a will for a child, a testator makes a substantial and similar *inter vivos* gift, then the *inter vivos* gift would be considered an advance of a part or the whole of the gift to the child in the testator's will (*Pierce Estate (Re)* , 2003 NSSC 110). A principal justification for the presumption of advancement is that parents have an obligation to support dependent children (*Pecore*, at para. 36).[3] Historically, the presumption of advancement has also applied to a husband transferring property to his wife (*Hyman*). However, the *Matrimonial Property Act*, RSNS 1989, c 75, s 21, abolishes the presumption of advancement in Nova Scotia for spouses and instead a presumption of resulting trust shall apply unless property is held by the spouses as joint tenants. The *Pecore* decision confirmed that the presumption also does not apply to adult children, even if they are dependent on the testator, as parents owe no obligation to adult independent children, and it would be impossible to provide a test for what makes someone "dependent" for the purposes of applying a presumption of advancement (*Pecore* at paras. 34-40). As a result, the presumption now only applies to minor children (*Pecore* at para 40). <u>Evidence for Intent of Gift</u> Where the giftor is deceased, material corroboratory evidence is required under Section 45 of the *Nova Scotia Evidence Act* to support a claim of gift and rebut the presumption of resulting trust. The threshold is proof on a balance of probabilities.[4] Evidence given to support a claim of gift should be unequivocable as to the intent of the gift. If the evidence could support an explanation other than that the deceased intended the property as a gift, such as a goal of probate avoidance, the evidence is not sufficient to rebut the presumption.[5] Failure to address an asset in the will does not provide evidence one way or the other.[6] <u>*Donatio Mortis Causa*</u> In order to be a valid *donatio mortis causa* or "deathbed gift", the person alleging the gift must demonstrate an intent to make a gift by the deceased and show that either the intention was carried	

	into effect by a transfer, or that there was an attempt to carry out a transfer, during the deceased's lifetime.[7] <u>Revocation of Beneficiary Designations</u> A general revocation clause in a will does not revoke a prior beneficiary designation unless the language indicates clear intent to do so. For example, where a clause in a will generally revoked designations under any Registered Retirement Savings Plans and/or Registered Retirement Income Plan but did not specifically mention his RRIF, the Nova Scotia Supreme Court upheld the prior beneficiary designation of the Registered Retirement Income Fund ("RRIF").[9] Based on the recent decision of *Fitzgerald* , Nova Scotia law does not consider a beneficiary designation to be a gratuitous transfer that gives rise to a resulting trust. That is not necessarily the case in certain other jurisdictions. Some recent cases, in Ontario and British Columbia in particular, have found that the presumption of resulting trust that arises in gratuitous transfers of property also applies to beneficiary designations under RRSP annuity contracts, life insurance policies, and RRIF designations.[8] However, other cases outside of Nova Scotia have also reaffirmed that beneficiary designations are not subject to the presumption as the presumption only applies to *inter vivos* gifts, not testamentary designations. In British Columbia, in *Chung v Chung*, 2022 BCSC 1396, the court found that the application of the presumption of resulting trust clearly applied to gratuitous transfers of property and bank accounts, but it was unsettled whether it also applied to beneficiary designations. The Ontario government has been asked by a number of organizations to legislate to confirm that the presumption does not apply to beneficiary designations in the aftermath of the *Calmusky* decision. <u>*Inter Vivos* Trusts</u> Lawyers should be aware that the tax reporting rules are constantly evolving with respect to trusts. Lawyers must be familiar with the tax legislation and interpretations in place, and their implications, at the time of drafting. Lawyers should be mindful of tax legislation changes as well as changes to interpretation bulletins that may affect their clients. Bare trusts in particular are something the drafting lawyer should consider carefully. A bare trust is a common strategy used for probate avoidance with real property, investment, and bank accounts, frequently between parents and adult children. Prior to 2023, these did not require tax reporting, but that rule is currently forecast to change for any trusts in place on December 31, 2023, expressly including bare trusts.	

Joint Tenants with Right of Survivorship

In Nova Scotia, property devised to two or more persons is a tenancy in common unless expressly declared to be a joint tenancy.[10]

Note that "joint tenants with right of survivorship" is not only a manner of tenure, but also is frequently considered an expression of intention.

Contracts

Mutual will agreements, marital or pre-marital agreements, separation agreements, and divorce agreements (the "agreements") contract between parties how particular assets are to be distributed, including upon death. These agreements may supersede any changes to beneficiary designations or to the will. For example, where a couple agrees on divorce that they will maintain each other as designated beneficiaries to an account, and one subsequently changes their beneficiary designation, the courts may enforce the agreement through constructive trust on the death of the party.[11] If an agreement purports to be "signed, sealed, and delivered", the lawyer should make all efforts to ensure that the document is actually sealed, or it may not be enforceable.[12]

APPLICABLE LEGISLATION

Below is a non-exhaustive list of legislation that has bearing on your clients' intentions. Note that for some legislation, there are multiple jurisdictions to consider (for example, both Nova Scotia and federal, or municipal and provincial/federal).

- *Code of Professional Conduct*
- *Legal Profession Act*
- Regulations to the *Legal Profession Act*
- *Beneficiaries Designation Act*

Will

	6 Where a designation is contained in a will, the designation, notwithstanding Section 23 of the Wills Act , has effect from the time of its execution. R.S., c. 36, s. 6. Invalid will 7 A designation contained in an instrument purporting to be a will is not invalid by reason only of the fact that the instrument is invalid as a testamentary instrument, and it may be revoked or altered by any subsequent designation. R.S., c. 36, s. 7. Revoked will 8 Where a designation is contained in a will and subsequently the will is revoked by operation of law or otherwise, the designation is thereby revoked. R.S., c. 36, s. 8. • *Insurance Act* Designation of beneficiary 192 (1) An insured may, in a contract or by a declaration, designate himself, his personal representative or a beneficiary to receive insurance money. (2) Subject to Section 193, the insured may alter or revoke the designation by a declaration. (3) A designation in favour of "heirs", "next of kin", or "estate", or the use of words of like import in a designation, shall be deemed to be a designation of a personal representative. R.S., c. 231, s. 192. Irrevocable designation 193 (1) An insured may, in a contract or by a declaration, other than a declaration that is part of a will, filed with the insurer at its head or principal office in Canada during the lifetime of the person whose life is insured, designate a beneficiary irrevocably and in that event the insured, while the beneficiary is living, may not alter or revoke the designation without the consent of the beneficiary and the insurance money is not subject to the control of the insured or of his creditors and does not form part of his estate.	

		(2) Where the insured purports to designate a beneficiary irrevocably in a will or in a declaration that is not filed as provided in subsection (1), the designation has the same effect as if the insured had not purported to make it irrevocable. (3) No insurer shall issue a policy containing an irrevocable designation of a beneficiary or accept for filing a declaration containing an irrevocable designation of a beneficiary unless there are attached to the policy or to the declaration statements signed by (a) the insured in the following form: I understand that the effect of my designating a beneficiary irrevocably is that, under the provisions of the Insurance Act, while the beneficiary is living, I may not alter or revoke the designation without the consent of the beneficiary and I may not assign, exercise rights under or in respect of, surrender or otherwise deal with the contract without the consent of the beneficiary; and (b) an agent of the insurer in the following form: I certify that I have fully explained to the insured the nature and effect of making an irrevocable designation of beneficiary and such explanation was given to the insured not in the presence of the beneficiary and that the insured indicated that he was aware of the irrevocable nature of the designation so made by him. R.S., c. 231, s. 193. Designation in will 194(1) A designation in an instrument purporting to be a will is not ineffective by reason only of the fact that the instrument is invalid as a will or that the designation is invalid as a bequest under the will. (2) Notwithstanding the Wills Act , a designation in a will is of no effect against a designation made later than the making of the will.	

		(3) Where a designation is contained in a will, if subsequently the will is revoked by operation of law or otherwise, the designation is thereby revoked. (4) Where a designation is contained in an instrument that purports to be a will, if subsequently the instrument if valid as a will would be revoked by operation of law or otherwise, the designation is thereby revoked. R.S., c. 231, s. 194. Trustee for beneficiary 195 (1) An insured may, in a contract or by a declaration, appoint a trustee for a beneficiary and may alter or revoke the appointment by a declaration. (2) A payment made by an insurer to the trustee discharges the insurer to the extent of the payment. R.S., c. 231, s. 195. Beneficiary predeceasing life insured 196 (1) Where a beneficiary predeceases the person whose life is insured, and no disposition of the share of the deceased beneficiary in the insurance money is provided in the contract or by a declaration, the share is payable to (a) the surviving beneficiary; (b) if there is more than one surviving beneficiary, the surviving beneficiaries in equal shares; or (c) if there is no surviving beneficiary, the insured or his personal representative. (2) Where two or more beneficiaries are designated otherwise than alternatively, but no division of the insurance money is made, the insurance money is payable to them in equal shares. R.S., c. 231, s. 196. Right to enforce contract 197 A beneficiary may enforce for his own benefit, and a trustee appointed pursuant to Section 195 may enforce as trustee, the payment of insurance money made payable to	

him in the contract or by a declaration and in accordance with the provisions thereof, but the insurer may set up any defence that it could have set up against the insured or his personal representative. R.S., c. 231, s. 197.

Exemption from execution and seizure
198 (1) Where a beneficiary is designated, 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.

(2) While a designation in favour of a spouse or common-law partner, 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. R.S., c. 231, s. 198; 2000, c. 29, s. 24

- *Municipal Government Act*

Requirements for subdivision approval

268 …
(2) Subdivision approval is not required for a subdivision
…
(j) resulting from a devise of land by will executed on or before January 1, 2000.

(3) In order to create a subdivision based on an exemption from the requirement for approval set out in any of the clauses in subsection (2), except clause (b), a document that

(a) specifies the intent to create the subdivision, the exemption on which the subdivision is based and the facts that entitle the subdivision to the exemption; and
(b) provides proof of the consent of the person entitled to create the subdivision,

must be registered or recorded in the registry. 1998, c. 18, s. 268; 2002, c. 10, s. 22; 2003, c. 9, s. 68; 2004, c. 7, s. 17; 2006, c. 40, s. 10; 2015, c. 24, s. 1; 2021, c. 7, s. 8.

- *Powers of Attorney Act*
- *Guardianship Act*
- *Adult Capacity and Decision-Making Act*
- *Matrimonial Property Act*
- *Vital Statistics Act*
- *Income Tax Act*
- *Land Registration Act*
- *Registry Act*
- *Real Property Act*

JOINT TENANCY AND TENANCY IN COMMON
Tenancy in common and joint tenancy
5 (1) Every estate granted or devised to two or more persons in their own right shall be a tenancy in common, unless expressly declared to be in joint tenancy but every estate vested in trustees or executors as such shall be held by them in joint tenancy.

(2) This Section shall apply as well to estates already created or vested as to estates hereafter to be granted or devised. R.S., c. 385, s. 5.

- *Indian Act*
- Pension legislation (federal and provincial)

- *Firearms Act*

  See also: https://www.rcmp-grc.gc.ca/en/firearms

  To inherit a firearm, the beneficiary must
  • be 18 years of age
  • hold a valid Possession and Acquisition Licence (PAL) with the correct privileges (i.e., non-restricted, restricted, prohibited)

Also consider legislation in other jurisdictions if client has assets outside of Nova Scotia, particularly matrimonial property legislation.

ADDITIONAL RESOURCES

Robert Spenceley, *The Estate Planner's Handbook* , 5th ed (Toronto: Wolters Kluwer Canada Limited, 2016).

Christine Van Cauwenberghe, *Wealth Planning Strategies for Canadians 2022* (Toronto; Thomson Reuters, 2021).

Caroline Rhéaume, *Strategic Use of Trusts in Tax and Estate Planning*, 3rd ed (Canada; Wolters Kluwer Canada Limited, 2018).

End Notes

1. *Pecore v Pecore*, [2007] SCJ No 17, 2007 SCC 17, 2007 CarswellOnt 2752 ("Pecore ").

2. *Burns Estate v Mellon*, 48 OR (3d) 641, [2000] OJ No 2130 ("*Burns Estate* "); *Self v Brignoli Estate* , [2012] NSJ No 135, 2012 NSSC 81.

3. *Pecore.*

4. *Burns Estate.*

5. *Bellegarde v Murdock*, [1977] NSJ No 11, 25 NSR (2d) 389 ("Bellegarde ").

	6. *Calmusky Estate v Calmusky*, [2020] OJ No 2078, 2020 ONSC 1506 ("*Calmusky Estate* "). 7. *Bellegarde*. 8. *Calmusky Estate*. 9. *Mulrooney Estate (Re)*, [2016] NSJ No 523, 2016 NSCC 352. 10. *Rafuse v Borne*, [1996] NSJ No 558, 157 NSR (2d) 118, 16 ETR (2d) 80, 68 ACWS (3d) 199. 11. *Moore v Sweet*, [2018] 3 SCR 303, 2018 SCC 52, [2018] 3 RCS 303, [2018] SCJ No 52, [2018] ACS no 52; *Madsen Estate v Saylor* , [2007] SCJ No 18, 2007 SCC 18*; Fralic v Drouin Estate* , [2014] NSJ No 491, 2014 NSSC 344, 350 NSR (2d) 372, 244 ACWS (3d) 384, 39 CCLI (5th) 314, 2014 CarswellNS 692. 12. *Friedmann Equity Developments Inc v Final Note Ltd*, [2000] SCJ No 37, 2000 SCC 34.	