



NOVA SCOTIA  
BARRISTERS' SOCIETY

## MEMORANDUM TO COUNCIL

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

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**Date:** April 28, 2023

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**Subject:** Professional Standards (Wills, Powers of Attorney and Personal Directives) Standard – Issues That Arise On Second and Subsequent Relationships <sup>1</sup>

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**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 – Issues That Arise On Second and Subsequent Relationships - by the Professional Standards (Wills, Powers of Attorney and Personal Directives) Committee. The proposed standard will be circulated to the membership for comments.

### Rationale / Executive Summary:

Many will and estate clients have prior relationships which may involve dependents. Moreover, current relationships may involve dependents and step-dependents. The Committee is of the opinion lawyers should inquire about all of a client's relationships, past and present, and advise of any issues when doing estate planning.

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 – Issues That Arise On Second and Subsequent Relationships

<sup>1</sup> 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	<p><b>ISSUES THAT ARISE ON SECOND AND SUBSEQUENT RELATIONSHIPS STANDARD</b></p> <p>When taking instructions, a lawyer must inquire about a client’s relationship status. In addition to asking whether the client is currently married or in a common-law relationship or registered domestic partnership, the lawyer must also determine whether the client has any former or concurrent spouses.<sup>1</sup></p> <p>If the client has entered a subsequent or concurrent relationship, the lawyer must consider the potential impact of the relationship on the client’s intended planning. This, in turn, requires the lawyer to consider the client’s other dependants.<sup>2</sup> In particular, the lawyer must seek to identify any ways in which other dependants might be disadvantaged by the client’s intended planning (whether intentionally or inadvertently).</p> <p>The lawyer must then advise the client of any such concerns, taking care to document both the lawyer’s advice to the client and the client’s subsequent instructions.</p> <p><b>FOOTNOTES</b></p> <p>1. The term “spouse” has been defined as follows, for the purposes of various legislation, with certain notable differences and distinctions:</p> <p><b>Matrimonial Property Act, RSNS 1989, c 275</b>  “Spouse” means either of a man and woman who  (i) are married to each other,  (ii) are married to each other by a marriage that is voidable and has not been annulled by a declaration of nullity, or  (iii) have gone through a form of marriage with each other, in good faith, that is void and are cohabiting or have cohabited within the preceding year, and for the purposes of an application under this Act includes a widow or widower.</p> <p><b>Personal Directives Act, SNS 2008, c 8</b></p>	<p>The Committee is of the opinion lawyers should inquire about all of a client’s relationships, past and present, and advise of any issues when doing estate planning.</p>

	<p>"spouse" means, with respect to any person, a person who is cohabiting with that person in a conjugal relationship as married spouse, registered domestic partner or common-law partner;</p> <p><b>Human Organ and Tissue Donation Act, SNS 2019, c 6</b> "spouse" of an individual means</p> <ul style="list-style-type: none"><li>(i) another individual who is cohabiting with that individual in a conjugal relationship as a married spouse,</li><li>(ii) a registered domestic partner of the individual, or</li><li>(iii) an individual who is cohabiting with the individual in a conjugal relationship for a period of at least one year as common-law partners;</li></ul> <p><b>Adult Capacity and Decision Making Act, SNS 2017, c 4</b> "spouse" means either of two individuals who</p> <ul style="list-style-type: none"><li>(i) are married to each other and not living separate and apart, within the meaning of the Divorce Act (Canada), from each other,</li><li>(ii) are married to each other by a marriage that is voidable and has not been annulled by a declaration of nullity,</li><li>(iii) have entered into a form of marriage with each other that is void, if either or both of them believed that the marriage was valid when entering into it,</li><li>(iv) are domestic partners within the meaning of Section 52 of the Vital Statistics Act, or</li><li>(v) not being married to each other, have cohabited in a conjugal relationship with each other continuously for at least two years;</li></ul> <p><b>Pension Benefits Act, SNS 2011, c 41</b> "spouse" means either of two persons who</p> <ul style="list-style-type: none"><li>(i) are married to each other,</li><li>(ii) are married to each other by a marriage that is voidable and has not been annulled by a declaration of nullity,</li><li>(iii) have gone through a form of marriage with each other, in good faith, that is void and are cohabiting or, where they have ceased to cohabit, have cohabited within the twelve-month period immediately preceding the date of entitlement,</li><li>(iv) are domestic partners within the meaning of Section 52 of the Vital Statistics Act, or</li><li>(v) not being married to each other, are cohabiting in a conjugal relationship with each other, and have done so continuously for at least</li></ul> <p>(A) three years, if either of them is married, or</p>	
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(B) one year, if neither of them is married;

**Insurance Act, RSNS 1989, c 231**

"spouse" means either of a man or woman who are married to each other;

**Income Tax Act, RSC 1985, c 1**

"cohabiting spouse or common-law partner" of an individual at any time means the person who at that time is the individual spouse or common law partner and who is not at that time living separate and apart from the individual and, for the purpose of this definition, a person shall not be considered to be living separate and apart from an individual at any time unless they were living separate and apart at that time, because of a breakdown of their marriage or common law partnership, for a period of at least 90 days it includes that time;

**Fatal Injuries Act, RSNS 1989, c 163**

"spouse" means either of a man or woman who are married to each other;

**Parenting and Support Act, RSNS 1989, c 160**

(In force since before 2001, most recently amended in 2022 – definition was updated from antiquated terms in 2017)

"spouse" means either of two persons who

- (i) are married to each other,
- (ii) are married to each other by a marriage that is voidable and has not been annulled by a declaration of nullity,
- (iii) have entered into a form of marriage with each other that is void, if either or both of them believed that the marriage was valid when entering into it,
- (iv) are domestic partners or are former domestic partners within the meaning of Section 52 of the Vital Statistics Act,
- (v) not being married to each other, cohabited in a conjugal relationship with each other continuously for at least two years, or
- (vi) not being married to each other, cohabited in a conjugal relationship with each other and have a child together.

**Hospitals Act, RSNS 1989, c 208**

	<p>“spouse” means, with respect to any person, a person who is cohabiting with that person in a conjugal relationship as married spouse, registered domestic partner or common-law partner;</p> <p><b>Employment Support and Income Assistance Regulations, NS Reg 195/2019</b> (In force since 2019, amended in 2021 – definition has remained the same)</p> <p>“spouse” means, with respect to any individual, an individual who is cohabiting with that individual in a conjugal relationship as married spouse, registered domestic partner or common-law partner;</p> <p>In addition, the term “common-law partner” has also been defined variously:</p> <p><b>Personal Directives Act, SNS 2008, c 8</b> "common-law partner" of an individual means another individual who has cohabited with the individual in a conjugal relationship for a period of at least one year;</p> <p><b>Insurance Act, RSNS 1989, c 231</b> “common-law partner” of an individual means another individual who has cohabited with the individual in a conjugal relationship for a period of at least one year, neither of them being a spouse;</p> <p><b>Income Tax Act, RSC 1985, c 1</b> “common-law partner”, with respect to a taxpayer at any time, means a person who cohabits at that time in a conjugal relationship with the taxpayer and (a) has so cohabited through the 12-month period that ends at that time, or (b) would be the parent of a child of whom the taxpayer is apparent, if this act were read without reference to paragraphs 252(1)(c) and (e) and subparagraph 252(2)(a)(iii), and, for the purpose of this definition, where at any time the taxpayer and the person cohabit in a conjugal relationship, they are, at any time after that time, deemed to be cohabiting in a conjugal relationship unless they were living separate and apart at the particular time for a period of at least 90 days that includes the particular time because of a breakdown of their conjugal relationship;</p> <p><b>Fatal Injuries Act, RSNS 1989, c 163</b></p>	
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"common-law partner" of an individual means another individual who has cohabited with the individual in a conjugal relationship for a period of at least one year immediately preceding the death of the individual;

2. The client's dependants may include:

a. Dependants within the meaning of Section 2 of the *Testators' Family Maintenance Act*. R.S., c. 465, s. 1., namely the widow or widower or the child of a testator;

b. Dependent children or dependent parents within the meaning of Section 2 of the *Parenting and Support Act*. 2015, c. 44;

c. Any other people to whom the client owes spousal support or child support obligations, including former spouses;

d. Common-law partners, who may have certain equitable claims against the client's estate on death; and

e. Children in respect of whom the client stands, or has stood, *in loco parentis*.

See also: LIANS Standard # \_\_\_ - Taking Instructions for Competent Will Drafting.

## **PRACTICE NOTES**

### **1 Intake Questionnaires**

An intake questionnaire may assist the lawyer in determining the client's relationship status and relationship history. The use of such a questionnaire may also help the lawyer to identify topics for discussion, and even spot planning issues, well in advance of the initial client meeting.

### **2 Further Planning Considerations**

Second and subsequent relationships introduce an added element of complexity to estate planning. When advising clients who have entered into such relationships, and particularly

those with children from a prior relationship, the competent solicitor will be mindful of the following considerations.

*a. Independent Legal Advice*

The lawyer cannot presume that the objectives of both spouses are identical, or even aligned, simply because they are in a relationship together. At the same time, a joint retainer may limit the lawyer's ability to ascertain the true objectives of one or both spouses.

There can be no secrets in a joint retainer. If one spouse discloses information to the lawyer, the lawyer must share that information with the other spouse.

This can be problematic in the context of a second or subsequent relationship, especially where one or both spouses have children from a prior relationship. For example, one spouse may wish to limit the ultimate entitlements of the other spouse's children but may feel uncomfortable discussing their intentions in the presence of the other spouse.

The lawyer should query whether it is realistic, or even possible, to meet the lawyer's duties of loyalty and candour before accepting a joint retainer.

When accepting a joint retainer, the lawyer should document the terms of the retainer by having both spouses sign a joint retainer letter or similar acknowledgement in writing. Among other things, the joint retainer document should confirm:

- that the lawyer or the lawyer's firm cannot keep and has not kept confidential from either client any information received by either spouse;
- that there has been and will continue to be full disclosure among the lawyer and both spouses throughout the course of the estate planning engagement; and
- that, if either spouse should in the future contact the lawyer or the lawyer's firm in connection with any matter that would require the lawyer or the lawyer's firm to act contrary to the interests of the other spouse, then the firm could not accept such retainer without the express authorization of both spouses.

In addition, the lawyer should not hesitate to refer one or both spouses to independent counsel at any point during the estate planning engagement, to the extent that a conflict of interest or any other need for independent legal advice may arise.

See *Code of Professional Conduct*, 3.4-5 and 3.4-6 re: Joint Retainers.

*b. Existing Support Obligations*

The client may owe support obligations to a former spouse, children of a prior relationship, or both. The lawyer should determine whether any such obligations exist and advise the client of the need to make adequate provision for all such dependants. In particular, the lawyer should inquire about, and consider the implications of, any Divorce Order, separation agreement or other similar legal documents to which the client is party.

To the extent that a client may disregard the lawyer's advice with respect to any such obligations, the lawyer should document the client's instructions thoroughly. In addition, it may be advisable for the lawyer to obtain a written acknowledgement, signed by the client and confirming the client's decision to disregard the lawyer's advice.

*c. Common-law Partners*

Presently, common-law partners do not enjoy the same legal rights and standing as married couples or registered domestic partners.

For example, the *Testators' Family Maintenance Act*, R.S.N.S. 1989, c. 465, does not include surviving common-law partners among the "dependants" it entitles to receive "adequate provision" from a deceased person's estate. (See *LeBlanc v. Cushing Estate*, 2019 NSSC 360.)

Similarly, the *Intestate Succession Act*, R.S.N.S. 1989, c. 236, excludes common-law partners from inheriting from an intestacy. (See *Jackson Estate v. Young*, 2020 NSSC 5.)

The Newfoundland and Labrador Supreme Court has stated that, unlike married couples, common-law partners do not enjoy the presumption of advancement. Therefore, at least in that province, gratuitous transfers of property from one spouse to the other are subject to a presumption of resulting trust. (See *Nicholas v. Edgecombe Estate*, 2018 NSLC 176.)

It is therefore essential for partners in common-law relationships to document their intentions to benefit each other. They may also consider whether to register as a registered domestic partnership, in order to obtain many of the same legal rights as married partners.



*d. Multiple Concurrent Spouses*

Some clients may have more than one spouse at the same time. For instance, a client may remain married to a first spouse long after entering into a common-law relationship with a second partner. In such circumstances, both spouses may have claims against the client's estate.

See, for example, *Boughton v. Widner Estate*, 2021 BCSC 325, where the British Columbia Supreme Court affirmed the respective entitlements of both the deceased's wife and his common-law partner to share in the estate under that province's *Wills, Estates and Succession Act*. While a different result might obtain in Nova Scotia, the possibility of multiple concurrent spouses having multiple concurrent claims—including claims to equitable remedies such as unjust enrichment—remains.

*Mother 1 v. Solus Trust Company*, 2019 BCSC 200 (affirmed, 2021 BCCA 112; leave to appeal denied, 2022 Carswell BC 2084) offers some interesting commentary on the construction and evolution of "marriagelike" relationships. The deceased died without a will. He was the father of five children by five different women, none of whom he had married. One of the mothers asserted she was the deceased's "spouse" for the purposes of the *Wills, Estates and Succession Act* and therefore entitled to a "preferential share" plus half the estate. (In contrast to Nova Scotia, British Columbia recognizes couples as spouses if they have "lived with each other in a marriage-like relationship for at least 2 years".) The court then considered the criteria for a "marriage-like relationship". It found there was no "marriagelike relationship" in this case because the deceased chose to live a "playboy" lifestyle without committing to any relationship.

The Canada Revenue Agency has also confirmed that it is possible to have multiple concurrent spouses, each of whom are eligible to receive capital property on a tax-deferred basis under the rollover provisions of subsection 70(6) of the *Income Tax Act*, so long as all the conditions of subsection 70(6) are met: CRA technical interpretation 2014-0523091C6.

*e. Planning for Blended Families*

	<p>Couples who form blended families may choose to combine their financial affairs or keep them separate. They may also have an uneven number of children, or uneven expenses associated with their children’s care.</p> <p>Spouses may wish to provide for each other and then leave the assets they brought into the relationship to their own respective children. Alternatively, they may wish to benefit all of their children and stepchildren equally, or each of them to varying degrees.</p> <p>Spouses may also have inconsistent interests or objectives. In particular, one or both of them may be concerned that the survivor will fail to provide for any stepchildren in a subsequent will or other estate planning.</p> <p>Each spouse should be aware that the survivor could alter an existing will following the death of the first spouse. For instance, the survivor could remove the deceased spouse’s children as beneficiaries, thwarting the intentions of the deceased spouse. Consequently, one “branch” of the family may receive the couple’s entire combined estate. In such circumstances, the children of the first spouse to die may have little if any recourse to claim against their deceased stepparent’s estate.</p> <p>To address these concerns, the lawyer may consider recommending one or more of the following planning tools:</p> <ul style="list-style-type: none"><li>• using a spousal trust;</li><li>• naming beneficiaries on life insurance policies;</li><li>• naming beneficiaries on registered investment accounts;</li><li>• making certain assets joint with other family members;</li><li>• making <i>inter vivos</i> gifts or transfers of property for consideration.</li></ul> <p>When assessing the above options, the lawyer should consider that certain types of assets pass more efficiently to a surviving spouse or common-law partner than to children. For example, upon death, a RRSP RRIF will “roll over” to a spouse or common-law partner on a tax-deferred basis. With few exceptions, if these accounts are instead made payable to children or grandchildren, they will become taxable upon death.</p> <p>f. <i>Domestic Contracts</i></p>	
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In the context of a blended family, a domestic contract may be beneficial, helping both spouses to better define their respective rights, obligations and expectations.

Couples can modify at least some of their property rights by entering into a domestic contract. Such contracts may address, among other things, the rights that arise on the death of one or both spouses. Where a contract defines or limits a spouse's entitlements on death, it may be easier to provide for other beneficiaries, such as children from a prior relationship.

See also: LIANS Family Law Practice Standard #8 - Domestic Contracts.

*g. Dependant's Relief Claims*

The lawyer should consider the range of potential dependant's relief claims that a spouse or children may have against the client's estate pursuant to the *Testators' Family Maintenance Act* or any equitable doctrines, such as unjust enrichment.

The lawyer should take pains to advise the client of any such obligations, and particular care to document the client's reasons for disproportionately benefitting or depriving any one or more of the client's dependants (including independent adult children) vis-à-vis the others.

In particular, the lawyer should consider the possibility that a will benefiting a stepparent at the expense of the testator's children may incite claims by those children (who would have no future recourse against their stepparent's estate) if the stepparent survives the testator.

*h. Executors, Trustees, Attorneys for Property and Personal Care Delegates*

It is important to consider family dynamics when appointing executors, trustees, attorneys for property and personal care delegates. This is especially true in the context of blended families when the interests of the family's "branches" diverge.

An independent third party, such as a corporate executor, may be an appropriate choice to act as executor, trustee or attorney (or one of several such appointees), as this may help to ensure the objectivity of these various decision-making processes.

*i. Polyamorous Relationships*

In *British Columbia Birth Registration No. 2018-XX-XX5815, 21*, the British Columbia Supreme Court recognized additional parents in polyamorous relationships. The petitioners, a man and two women, had been living together in a committed relationship for several years. The man and one of the women were the child's biological parents and were named on the child's birth registration. All three petitioned the court, seeking a declaration that the second mother was the child's third legal parent and that the child's birth registration should be amended accordingly. The court granted the petitioners' request, exercising its *parens patriae* jurisdiction, even though the *Family Law Act* of that province does not recognize this possibility.

*j. Joint Property*

A client may seek to make property joint with a spouse, most often with a view to avoiding probate. While the joint tenancy may allow the property to pass outside of probate on the first death, the survivor will then hold title to the property. The lawyer should ensure that the client is fully aware of this fact and the risks it may present. For example, the survivor could make a new will disinheriting children of the deceased spouse.

Alternatively, the client may seek to make property joint with one or more children, in order to ensure it passes directly to them. Unless the property is a principal residence or otherwise exempt from capital gains tax, this may result in a partial disposition for capital gains purposes. From that point onward, the client may also lose the principal residence exemption for any increase in the value of the property interest so transferred.

If the client makes assets joint with a child, it will be important to document the terms of each such transfer, as well as the client's intention and motivations. Otherwise, there may be a risk that the joint assets will become subject to claims by a child's spouse or creditors. There is a further risk that even a well-documented transfer may give rise to a dispute about the beneficial or "true" ownership of the property following the parent's death.

More generally, all such transfers should be informed by an assessment of the client's other assets, other intended beneficiaries, and broader estate planning objectives.

*k. Existing Beneficiary Designations*

Marriage does not revoke or otherwise alter any existing beneficiary designations made in respect of registered investments or life insurance policies. Likewise, although the terms of a separation agreement or divorce order may provide for the revocation of beneficiary designations, the client must still take the steps necessary to confirm the revocation or amendment of any existing beneficiary designations.

It is important to ensure that a former spouse does not become entitled to the proceeds of registered investment plans or life insurance policies simply because the deceased failed to update one or more of their existing beneficiary designations. In the case of a Registered Retirement Savings Plan (RRSP) or Registered Retirement Income Fund (RRIF), the result can be especially punitive, because the proceeds of such plans will be paid in full to the named beneficiary while being taxed in the deceased's terminal return (with the resulting tax liability being payable by the estate).

The lawyer should also document the client's intention when making new or updated beneficiary designations even if a presumption of resulting trust does not apply to such designations. (See *Fitzgerald v. Fitzgerald Estate*, 2021 NSSC 355, as well as the Ontario Superior Court's conflicting decisions in *Calmusky v. Calmusky*, 2020 ONSC 150 and *Mak (Estate) v. Mak*, 2021 ONSC 4415.)

#### *I. Family Business*

The succession of a family business may be further complicated if the founder has entered into a subsequent relationship. The competent lawyer should be attuned to the possibility of current or future tensions within the family. Where appropriate, the lawyer should consider whether to recommend a domestic contract with the new spouse or a shareholders' agreement with any children having an interest in the business.

#### *m. Revocation of Prior Wills*

The lawyer must be familiar with Section 17 of the *Wills Act*, R.S., c. 505, s. 1. and consider its potential impact on the client's planning.

### **ADDITIONAL RESOURCES**

Christine Van Cauwenberghe, *Wealth Planning Strategies for Canadians*

	<p>Margaret O'Sullivan, <i>Trust and Estate Essentials: Achieving Success in Family Succession</i></p> <p>David Howlett, <i>Estate Matters in Atlantic Canada</i></p> <p>The Society of Trust and Estate Practitioners, <i>Meeting the Needs of Modern Families</i></p>	
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