Wills, Powers Of Attorney, And Personal Directives Standards

Preface

Lawyers are entrusted with the responsibility of assisting clients to plan for death and incapacity with skill, wisdom, and a commitment to excellence. These standards, like those established for other practice areas, serve as guiding principles to assist lawyers in the exercise of their professional judgment.

Navigating the legal landscape in Nova Scotia presents lawyers with two undeniable certainties: death and taxes. However, today a third certainty emerges – the absence of a 'simple will.' Lawyers need to be knowledgeable about the complexities in planning for a client's death, including the tax implications embedded within clients' estate plans and also any arrangements clients have entered into in the often ill-considered quest for probate avoidance.

Crafting wills in Nova Scotia is no longer a mere documentation process; it is a strategic consideration of tax implications and potential pitfalls associated with will substitutes and probate alternatives. Lawyers must be well-versed in guiding

their clients through this nuanced journey, offering informed counsel and ensuring that the estate plan for each client is both comprehensive and resilient.

Moreover, true preparedness encompasses the foresight to navigate potential challenges related to mental incapacity. Lawyers are now integral architects of holistic estate plans and should guide clients through planning for possible incapacity.

Constituted in 2019, the formal mandate of the Professional Standards (Wills, Powers of Attorney and Personal Directives) Committee as approved by Council of the Nova Scotia Barristers' Society is as follows:

The Professional Standards (Wills, Powers of Attorney and Personal Directives) Committee supports Council in the governance of the Society by developing professional standards for the practice of wills, powers of attorney and personal directives (collectively referred to as "Wills"). Included, though in the Committee's discretion, is the development of standards in the related practice areas of estates and trusts.

These Standards and their featured resources are intended to be an articulation of the existing statutory and regulatory obligations for lawyers and to provide some guidance with respect to "how" a Standard might be met, taking into account the variances in practice around the province. Each proposed new Standard is first introduced to Council by the Professional Standards (Wills, Powers of Attorney and Personal Directives) Committee and then communicated to the membership for review and consultation. After that process is complete, it is brought back to Council for approval and finally made fully available to lawyers through this website.

- Planning for Assets in Multiple Jurisdictions
- Capacity
- Executing Estate Planning Documents
- Beneficiary Designations
- Income Tax
- Revocation of Wills

- Will Substitutes (Other Documents and Arrangements) and Expressing Intention in the Estate Plan
- Issues That Arise on Second and Subsequent Relationships

Glossary of Terms Used in Estate Planning

Standards

- Family Law Standards
- Real Estate Standards
- Law Office Management Standards
- Criminal Law Standards
- Wills, Powers of Attorney, and Personal Directives Standards

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Planning For Assets In Multiple Jurisdictions

Standard

A lawyer must consider whether a client would benefit in having multiple wills[1] or powers of attorney to deal with assets in other jurisdictions. The Nova Scotia will or power of attorney may or may not be effective outside the province[2].

If the lawyer does not practise law in the other jurisdiction[3], the lawyer should consult with or refer the client to another lawyer licensed to practise in the other jurisdiction[4], and collaborate with that other lawyer to accomplish the client's objectives.

Footnotes

1. The validity of separate wills to deal with assets in different jurisdictions has been recognised by the courts. *In the Goods of Astor*, [1876] P.D. 150 (England and New York); *Douglas-Menzies v. Umphelby*, [1908] AC 224 (J.C.P.C.) (Scotland and New South Wales).

The rationale for multi-jurisdictional separate wills was set out *In re Berkner Estate*, 2017 BCSC 619:

In a world in which individuals frequently maintain assets in different jurisdictions, the convenience of using multiple wills has long been recognized. The testator simply prepares an original will for each jurisdiction in which he or she has assets. The principal advantage is that each will can be submitted to the proper court or put into effect without any dependence on the other will(s). Where there are assets in several jurisdictions, there is no need to limit oneself to two wills. But in each case, care should be taken to ensure that the will satisfies the formalities of execution of the relevant jurisdiction. Likewise, it is necessary to ensure that one will does not accidentally deal with assets that are also dealt with under another will and thereby create a situation of conflict, presumably resulting in the provisions of the later-dated will having priority with respect to the disposition of such assets.

Great care must be exercised to ensure that one of several wills does not revoke the other: See Revocation Standard.

The practice of multiple wills to deal with different assets in the same jurisdiction is permitted in some Provinces: *Granovsky Estate v. Ontario*, 1998 CanLII 14913 (ONSC); *Kaptyn v Kaptyn*, 2010 ONSC 4293; in *Berkner (Estate)*, 2017 BCSC 619. The two documents are variously referred to as dual wills, primary and secondary will, probate will and non-probate will, as well as multiple wills.

The better view is that dual wills or multiple wills (to deal with separate classes of assets within Nova Scotia and to avoid probate) will not be effective. *Probate Act*, SNS 2000, c 31, s. 87(2) applies the probate tax “on all the assets of the deceased person that pass by a *will or wills* or that are transferred or will be transferred to *a trust under a will or wills*, whether or not the trust is described in the will as being separate from the estate or that pass upon intestacy”. Regulation 41(1) defines the “value of the estate” to be the gross value of the personal property of the deceased and the net value of the real estate [less mortgages and encumbrances] “that passes by a will or wills”. The Inventory includes a sworn Affidavit to the effect that it is “a true statement of all the assets of the deceased at the date of death”. The one permitted exclusion is real estate situate outside Nova Scotia.

2. Generally, the legal requirements for valid execution of a will are similar in all common law jurisdictions but some of them mandate specific forms of affidavits or certificates to prove due execution of the will in common form. Some jurisdictions (for example, Florida) may impose residence requirements for executors. Substantive law and drafting techniques may differ in regard to particular assets. Quebec is a civil law jurisdiction and wills are often executed in notarial form and the original remains in the custody of the notary. Louisiana is also a civil law jurisdiction.

There is far less uniformity in the legal requirements for valid execution of an enduring power of attorney. For example, two witnesses are required in Ontario, and the witnesses may not include the attorney's spouse or common law partner, the grantor's spouse or common law partner, a child of the grantor, or a person less than 18 years old. Florida also requires two witnesses. When the donor of a power of attorney is resident in Quebec and becomes incapable, the power of attorney does not become effective without a court order (homologation).

3. *Central Trust Co. v. Rafuse*, 1986 CanLII 29 (SCC), [1986] 2 SCR 147, 31 DLR (4th) 481, at [58], per Le Dain, J.:

"A solicitor is required to bring reasonable care, skill and knowledge to the performance of the professional service which he has undertaken ... The requisite standard of care has been variously referred to as that of the reasonably competent solicitor, the ordinary competent solicitor and the ordinary prudent solicitor."

4. See NSBS, *Code of Professional Conduct*, Halifax: Nova Scotia Barristers' Society, 2012, Commentary [6] to rule 3.1-2: Competence.

Additional Resources

Lindsay Ann Histrop, *Multiple Wills – Their Use and Drafting Issues*. The author highlights some of the complex drafting issues, including: (i) clear and unambiguous definition of the assets governed by each of several wills – together the multiple wills should dispose of the client's entire worldwide estate; (ii) choice of executors – if the same, are they legally capable of acting in all jurisdictions, or if different – how will their powers and duties be coordinated?; (iii) payment of debts and taxes – particularly if the wills have different beneficiaries, how will they be

paid and from which asset pools?; (iv) if the assets governed by one of the wills are not sufficient to pay the debts and taxes applicable in that jurisdiction, or the legacies set out in that will, can these be paid from the assets governed by the other will?; (v) careful wording for revocation clauses in each of the multiple wills, to ensure that none of them is inadvertently revoked: see Revocation Standard; (vi) careful consideration of residue clauses in the multiple wills – will the remaining assets in one jurisdiction be transferred back to the executors in the jurisdiction of domicile for final distribution or directly distributed by the foreign executors?

Approved by Council on January 27, 2023

Standards

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- Revocation of Wills

Capacity

Standard

A lawyer must assess the capacity of the client when the client gives instructions and when the client executes a Will, Power of Attorney or Personal Directive.[1]

Footnote

1. Nova Scotia Barristers' Society, Code of Professional Conduct, Halifax: Nova Scotia Barristers' Society, 2012, rule 3.2-9 "Clients with Diminished Capacity" identifies the two critical factors in determining whether a client has the capacity to instruct: whether they can understand the information needed to make a decision, and whether they can appreciate the consequences of that decision.

Clients with Diminished Capacity – Practice Notes These are guiding principles to assist with meeting the Standard taken from our Code of Professional Conduct

When a client's ability to make decisions is impaired because of minority or mental disability, or for some other reason, the lawyer must, as far as reasonably possible, maintain a normal lawyer and client relationship.

Lawyer and client relationship presupposes that the client has the requisite mental ability to make decisions about his or her legal affairs and to give the lawyer instructions. A client's ability to make decisions depends on such factors as age, intelligence, experience and mental and physical health and on the advice, guidance and support of others. A client's ability to make decisions may change, for better or worse, over time. A client may be mentally capable of making some decisions but not others. The key is whether the client has the ability to understand the information relative to the decision that has to be made and is able to appreciate the reasonably foreseeable consequences of the decision or lack of decision. Accordingly, when a client is, or comes to be, under a disability that impairs his or her ability to make decisions, the lawyer will have to assess whether the impairment is minor or whether it prevents the client from giving instructions or entering into binding legal relationships.

A lawyer who believes a person to be incapable of giving instructions should decline to act. However, if a lawyer reasonably believes that the person has no other agent or representative and a failure to act could result in imminent and irreparable harm, the lawyer may take action on behalf of the person lacking capacity only to the extent necessary to protect the person until a legal representative can be appointed. A lawyer undertaking to so act has the same duties under these rules to the person lacking capacity as the lawyer would with any client.

If a client's incapacity is discovered or arises after the solicitor-client relationship is established, the lawyer may need to take steps to have a lawfully authorized representative, such as a litigation guardian, appointed or to obtain the assistance of the Office of the Public Trustee to protect the interests of the client. Whether that should be done depends on all relevant circumstances, including the importance and urgency of any matter requiring instruction. In any event, the lawyer has an ethical obligation to ensure that the client's interests are not abandoned. Until the appointment of a legal representative occurs, the lawyer should act to preserve and protect the client's interests.

In some circumstances when there is a legal representative, the lawyer may disagree with the legal representative's assessment of what is in the best interests of the client under a disability. So long as there is no lack of good faith or authority, the judgment of the legal representative should prevail. If a lawyer becomes

aware of conduct or intended conduct of the legal representative that is clearly in bad faith or outside that person's authority, and contrary to the best interests of the client with diminished capacity, the lawyer may act to protect those interests. This may require reporting the misconduct to a person or institution such as a family member or the Public Trustee.

When a lawyer takes protective action on behalf of a person or client lacking in capacity, the authority to disclose necessary confidential information may be implied in some circumstances: See NSBS, *Code of Professional Conduct*, Halifax: Nova Scotia Barristers' Society, 2012, under rule 3.3-1 (Confidentiality) for a discussion of the relevant factors. If the court or other counsel becomes involved, the lawyer should inform them of the nature of the lawyer's relationship with the person lacking capacity.

Commentary

Decisional capacity includes at least four components:

1. understanding information relevant to the decision;
2. appreciating the information (applying the information to one's own situation);
3. using the information in reasoning; and
4. expressing a consistent choice

To make a will:

- ability to understand the nature and effect of making a will;
- ability to understand the extent of the property in question; and
- ability to understand the claims of persons who would normally expect to benefit under a will of the testator

To make a Power of Attorney:

- ability to understand the consequences of making a Power of Attorney;
- ability to understand the extent of the decisions to be made or that may be necessary in the future; and

- ability to appreciate the consequences of allowing another individual to make your decisions

To make a Personal Directive

- ability to understand the consequences of appointing someone to make your medical and personal decisions when you are no longer capable to do so; and
- type of Decision to be made – make one's own decision about accepting services, where they will reside, medical treatment (consent to treatment)

Applicable Legislation

Adult Capacity and Decision-making Act, SNS 2017, c.4, s.31.

Adult Protection Act, RSNS 1989, c. 2

Hospitals Act, RSNS 1989, c. 208

Involuntary Psychiatric Treatment Act, SNS 2005, c. 42

Personal Directives Act, SNS 2008, c. 8, s. 1.

Powers of Attorney Act, RSNS 1989, c. 352, s. 1.

Probate Act, SNS 2000, c. 31, amended 2001, c. 5, ss. 12 – 33, 2002, c. 5, s. 47; 2004, c. 3, s.31; 2007, c.9, s. 35; 2007, c.50; 2009, c.5, s. 26; 2001, c. 8, s. 20; 2013, c. 3, s. 13

Public Trustee Act, RSNS 1989, c. 379

Trustee Act, RSNS 1989, c. 479

Wills Act, RSNS 1989, c. 505, s. 1.

Case Law

The following is a list of some (this is not an extensive list) relevant Nova Scotia cases & SCC Decisions

Decision	Brief Description	Significance

Banks v. Goodfellow, [1870] 5 QB 549	The English High Court laid out the benchmark test for assessing testamentary capacity. To this day, it has stood the test of time. Subsequent cases have served to focus and clarify aspects of it. The recent decision of the Ontario Superior Court of Justice in *Kay v Kay Sr.* is such a case.	Recently there is consideration for reviewing this *Gold Standard,* see for example: Himel, S, Hull, I M, et al. “Time To Update The Test For Testamentary Capacity” (2017) CanLIIDocs 133; 95-1. Canadian Bar Review
Devlin Estate (Re), 2021 NSSC 151; *Devlin Estate (Re)*, *2022 NSCA 33*	The case Challenges the validity of a holograph will.	The court provides a helpful review of the law regarding testamentary capacity; what constitutes **suspicious circumstances** and how do they affect proof of the mental capacity of the testator The Judge found to have correctly identified and applied the principles relating to testamentary capacity. The Judge committed no error and the conclusions the Judge reached were available to her on the evidence.
Taraschi-Carr v. Gulati, 2021 NSSC 56 (*Still before the Courts)*		*10 (1) The Court may order a **capacity** assessment of an adult if (a) the adult’s **capacity** to make decisions is at issue in a proceeding under the Act;* CPR 21.02 discretionary
Vout v. Hay, 1995 CanLII 105 (SCC), [1995] 2 SCR 876	The leading case from the **Supreme Court** of **Canada**	The propounder of the will has the **burden of establishing** that the testator had a disposing mind and memory as essentials of **testamentary capacity**.
Kay v. *Kay Sr.*, 2019 ONSC 3166	The court provides a helpful review of the law regarding testamentary capacity, as set out in *Banks v*	It emphasizes that testamentary capacity is to be **determined based on the facts and**

	Goodfellow, specifically the weight that is to be given to the drafting lawyer's assessment and a posthumous testamentary capacity assessment.	**circumstances of each case.** The drafting lawyer's assessment plays a major role in assessing capacity. A posthumous testamentary capacity assessment may also be given considerable weight if it is conducted around the time the deceased's capacity was in question and if the assessor's review of the deceased's life around the time, they signed the will.
Nieuwland v. Yorke Estate, 2011 NSSC 19	The applicant asserted that her mother lacked the necessary testamentary capacity to create a valid will at the time that the document was executed.	**Diminished capacity** does not mean there is a *lack of capacity* and the courts should strive to give effect to the intentions of testators.
Beairsto v. *Stirling*, 2007 NSSC 350	At paragraph 25 reference is made to **post operative confusion**	This is not atypical, particularly in elderly people, and not indicative of permanent **diminished capacity**.
McInnis v. *McGuire,* 2014 NSSC 437	Code of professional Conduct 3.2-9 discussed	When a client's **ability to make decisions is impaired** because of minority or mental disability, or for some other reason, the lawyer must, as far as reasonably possible, maintain a normal lawyer and client relationship.
Kerfont v. Fraser, 2010 NSSC 293	The burden of proving testamentary capacity is on the party propounding the will.	If the plaintiffs can satisfy the Court that there is evidence of **suspicious circumstances**, surrounding the execution the burden of proving testamentary capacity reverts to the propounders of the will.

McGrath v. Joy, 2020 ONSC 7454	Case involves suicide notes alleged to be a holograph will	Discusses *Vout v. Hay*, 1995 CanLii 105 SCC, Sopenka J. speaking for the court, outlined the **evidentiary burden** when suspicious circumstances exist; The burden with respect to **testamentary capacity will be affected as well if the circumstances reflect on the mental capacity of the testator to make a will**
Vernon v. Sutcliffe, 2014 NSSC 376	*Application to remove the lawful attorneys was dismissed. Conduct of attorney pre-dating incapacity of donor is reviewable under s.5 (c) of the Powers of Attorney Act.*	*It is preferable but not always necessary for a court to have expert opinion evidence to establish a state of "legal incapacity". To remove an attorney under the Powers of Attorney Act, the court must gauge the attorney's duty towards the donor according to the attorney's abilities and remove the attorney only upon a finding of misfeasance or compelling evidence of misconduct or neglect, as stated by LeBlanc, J. in Isnor Estate, Re,* 2001 CanLII 25721 (NS SC).

For more general information please visit the following additional resources articles & commentary

"*Assessing Capacity in Canada: Cross-Provincial Examination of Capacity Legislation*", Kimberly A. Whaley, Whaley Estate Litigation Partners (2019) https://seniorsfirstbc.ca/

"A Lawyer's Duties and Obligations Where Capacity, Undue Influence, and Vulnerability are at Issue In A Retainer", Kimberly A. Whaley, Step Canada 2018 National Conference, Toronto

Estate Litigation, Brian A. Schnurr, loose-leaf, 2nd ed. (Toronto: Carswell, 1994) (2016, revision 8), ch. 2.1(c).

"Powers of Attorney: Moving Towards Best Practices in Canada", Laura Watts and Kevin Zakreski, (Paper delivered at the Canadian Bar Association Canadian Legal Conference, St. John's, 13-15 August 2006)

Public Trustee's Office services webpage

Legal Information Society of Nova Scotia's website: Power of Attorney

Law Reform Commission / "Final Report" regarding the Powers of Attorney Act (April 2015).

Law Society of Upper Canada: Determining Competency – Mental Health

Nova Scotia Barristers' Society, Code of Professional Conduct, Halifax: Nova Scotia Barristers' Society, 2012, rule 3.2-9 "Clients with Diminished Capacity"

Time To Update The Test For Testamentary Capacity, Himel, S, Hull, I M, et al., (2017) CanLIIDocs 133; 95-1. Canadian Bar Review

Approved by Council on November 25, 2022.

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Executing Estate Planning Documents

Wills/Codicils

When attending to the execution of a will/codicil a lawyer must ensure:

- The client has capacity, is free of undue influence, and has reviewed, understood, and approved the document (see Capacity Standard);[1]
- The will/codicil is signed by the client at the end of the document;[2]
- The client (or another individual at the client's direction and in the presence of the client) signs in the presence of two witnesses who are both present at the time of signing;[3]
- The witnesses attest and subscribe the will/codicil also in the presence of the client;[4]
- The witnesses are not a beneficiary named in the document or the spouse of a beneficiary named in the document.[5]

In circumstances where the lawyer cannot be personally present at the time of execution of the document, the lawyer must provide the client with written

instructions on how to properly execute the document and take steps to review the executed document to ensure compliance with the formal requirements.[6]

Power of Attorney

When attending to the execution of a power of attorney a lawyer must ensure:

- The client is capable of understanding and appreciating the nature and effects of granting a power of attorney;[7]
- The power of attorney is signed by the client and dated;[8]
- The client (or another individual at the client's direction and in the presence of the client) signs in the presence of two witnesses who are both present at the time of signing;[9]
- The witnesses are of the age of majority and are not the attorney or the spouse, registered domestic partner, common-law partner or a child of the attorney.[10]

Personal Directive

When attending to the execution of a personal directive a lawyer must ensure:

- The client has capacity to sign a personal directive;[11]
- The personal directive is signed by the client and dated;[12]
- The client (or another individual at the client's direction and in the presence of the client) signs in the presence of at least one witness who is present at the time of signing;[13]
- The witness is someone other than the named delegate, the spouse of the delegate, the person who signed on behalf of the client, or the spouse of the person who signed on behalf of the client.[14]

Footnotes

1. *Vout v. Hay*, 1995 CanLII 105 (SCC), [1995] 2 SCR 876
2. *Wills Act* –s. 6(1)(a)
3. *Wills Act* – s.6(1)(b)
4. *Wills Act* – s.6(1)(c)
5. *Wills Act* – s.12
6. *Whittingham v. Crease & Company*, 1978 CanLII 1930 (BCSC); *Ross v. Caunters*,

[1979] 3 All E.R. 580
7. *Powers of Attorney Act* – s. 2A(2)
8. *Powers of Attorney Act* – s. 3(1)(i) and (ii)
9. *Powers of Attorney Act* – s.3(1)(d)
10. *Powers of Attorney Act* – s.3(1)(d)
11. *Personal Directives Act* – s. 3(1)
12. *Personal Directives Act* – s. 3(2)
13. *Personal Directives Act* – s.3(2)
14. *Personal Directives Act* – s.3(3)
15. *Wills Act*, s.6(2)
16. *Wills Act*, s.8A

Practice Notes

These are guiding principles to assist with meeting the Standard.

When attending to the execution of documents a lawyer should:

1. Ensure the document is dated and each page is initialed by the witnesses and the client unless the client has limitations which would render this difficult.

2. Ensure any handwritten alterations that may have been made at the time of signing are initialed by the client and the witnesses.

3. Ensure the document is on letter sized paper as per the Civil Procedure Rules and the pages are numbered.

4. Meet with the client alone.

5. Ensure the document reflects the client's wishes and instructions.

6. If the client is not signing on their own, the attestation clause should state that it is done in the client's presence and at the client's request and also, if the client is unable to read, that the will was read to the client and that the client appeared to understand it.

Example for a Will:
*SIGNED by the Testator, *, who is blind, as his Last Will and Testament, after the Will had first been read over to the Testator in our presence and it appeared to be*

understood and approved by him, in the presence of us, both present at the same time, who at his request, in his presence and in the presence of each other have hereunto subscribed our names as witnesses.

7. Ensure the subscribing witnesses complete an Affidavit of Execution at the time of signing a will.

8. It is recommended that lawyers make and retain detailed notes pertaining to the circumstances of execution of documents.

9. Following the execution of these documents a lawyer should advise the client to review their documents on a regular basis and caution against making alterations that do not meet the above formal requirements.

Nova Scotia does recognize holograph wills and directs that a will is valid if it is wholly in the testator's own handwriting and signed by the testator. Further, where a court is satisfied that a writing embodies the testamentary intentions of the deceased, it can order that the writing is valid and effective as a will even though it may not meet all of the formal requirements set out above.

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Beneficiary Designations

Standard

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.[1]

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.[2]

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.[3]

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.[4]

Footnotes

1. *Fitzgerald Estate* v. *Fitzgerald*, 2021 NSCC 355, *Calmusky v Calmusky,* 2020 ONSC 1506; *Mulrooney Estate (Re)*, 2016 NSSC 352; *Dreger (Litigation Guardian of) v. Dreger*, 1994 CanLII 16643 (MBCA); *Neufeld* v *Neufeld*, 2004 BCSC 25; *Nelson v Little Estate*, 2005 SKCA 120; *Morrison Estate (Re)*, 2015 ABQB 769; *McConomy-Wood v. McConomy*, 2009 CanLII 7174 (ONSC); *Mak (Estate) v Mak*, 2021 ONSC 4415; *Moore v Sweet*, 2018 SCC 52; *Di Ielsi c. Blasi*, 2013 QCCS 3063 (CanLII); Jason M. Chin, Archie Rabinowitz and Aoife Quinn, "The Presumption of Resulting Trust and Beneficiary Designations", *Alberta Law Review.*

2. *Ibid; Conner v Bruketa Estate*, 2010 ABQB 517.

3. *Moore v Sweet*, *ibid*.

4. *Insurance Act*, RSNS 1989, c 231, s 87(3); *Beneficiaries Designation Act*, RSNS 1989, c 36; *Moore v Sweet, ibid*. Irrevocable beneficiaries are permitted under the *Insurance Act*.

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 *Fitzgerald Estate* v. *Fitzgerald*, 2021 NSSC 355, *Mak (Estate) v Mak*, 2021 ONSC 4415 and *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 *Di Ielsi c. Blasi*, 2013 QCCS 3063 (CanLII).
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 Assur. Co.*, 1988 CanLII 2980 (BCSC) and *Barry v. Bezanson*, 1995 CanLII 4251 (NSCA).
13. It is good practice, when designating a beneficiary by Will, to 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.
14. It is good practice to review Separation Agreements which may obligate a testator to maintain certain beneficiary designations.

Additional Resources

- Jason M. Chin, Archie Rabinowitz and Aoife Quinn, "The Presumption of Resulting Trust and Beneficiary Designations", *Alberta Law Review*.
- Report by Alberta Law Reform Institute, "Beneficiary Designation by Substitute Decision Makers". This report contains a discussion about beneficiary designations in general.

Applicable Legislation

- *Beneficiaries Designation Act*, RSNS 1989, c 36
- *Income Tax Act*, RSC 1985, c 1 (5th Supp)

- *Insurance Act*, RSNS 1989, c 231
- *Wills Act*, RSNS 1989, c 505

Approved by Council on November 25, 2022.

Standards

- Capacity
- Executing Estate Planning Documents
- Beneficiary Designations
- Planning for Assets in Multiple Jurisdictions
- Will Substitutes (Other Documents and Arrangements) and Expressing Intention in the Estate Plan
- Issues That Arise on Second and Subsequent Relationships
- Income Tax
- Revocation of Wills

Income Tax

Standard

A lawyer must be knowledgeable about basic concepts of income taxation affecting the individual taxpayer.[1]

When advising a client on estate planning[2], a lawyer should ensure that the client is aware of and understands the income tax consequences of death and of transferring particular assets, whether by will or beneficiary designation or *inter vivos* sale or gift, including conveyance of the fee simple title or conveyance of an interest in joint tenancy or tenancy-in-common.[3]

If the client's assets are complex[4] or if the client's personal situation is complicated[5] or if the client or a proposed personal representative is a non-resident of Canada[6] or if the client or an intended beneficiary are U.S. citizens[7] or if the client has foreign assets[8], and the potential income tax issues or the foreign legal system are outside the lawyer's experience and knowledge, a lawyer may decide to consult with or refer the client to another lawyer or accountant[9] with relevant experience and knowledge.

Footnotes

1. “A solicitor is required to bring reasonable care, skill and knowledge to the performance of the professional service which he has undertaken … The requisite standard of care has been variously referred to as that of the reasonably competent solicitor, the ordinary competent solicitor and the ordinary prudent solicitor.”

“A solicitor is not required to know all the law applicable to the performance of a particular legal service, in the sense that he must carry it around with him as part of his “working knowledge”, without the need of further research, but he must have a sufficient knowledge of the fundamental issues or principles of law applicable to the particular work he has undertaken to enable him to perceive the need to ascertain the law on relevant points.” per LeDain, J. in *Central & Eastern Trust Company v. Rafuse*, 1986 CanLII 29 (SCC), [1986] 2 SCR 147, 31 DLR (4th) 481, at [58] and [59].

2. “ … the solicitor does not discharge his duty by simply taking down and giving legal expression to the words of the client …” per Boyd, C. in *Murphy v. Lamphier*, (1914), 31 OLR 287.

3. Income tax liabilities can be triggered by sales to non arm’s-length persons at less than fair market value or by gifts, including deemed dispositions as a result of the death of the taxpayer: *Income Tax Act*, RSC 1985, c 1 (5th Supp).

Where a taxpayer has disposed of property to a person with whom the taxpayer was not dealing at arm’s length for no proceeds or for proceeds less than the fair market value or to any person by way of gift, the taxpayer is deemed to have received proceeds of disposition equal to the fair market value: s. 69 (1) (b).

The deceased taxpayer is deemed to have received proceeds of disposition equal to the fair market value of all property immediately prior to death: s. 70(5). This can result in inclusion of the entire value of certain registered assets (such as retirement savings plans and retirement income funds) or one half of deemed capital gains on unregistered capital assets (such as real estate (other than the principal residence) or marketable securities) as taxable income in the deceased taxpayer’s final T1 individual tax return.

4. For example, there are complex rules relating to corporate assets and trust assets. Both corporations and trustees are separate taxpayers. There are specialized deferrals or exemptions relating to farming (including forestry) and fishing property and qualified small business corporations.

5. If the taxpayer has a spouse, it is possible to transfer assets on a tax deferred basis to that spouse or to a spouse trust: s. 73(1) and (1.01). Likewise, gifts on death to the surviving spouse or a testamentary spouse trust may occur on a tax deferred basis: s. 70(6). A spouse and a common law partner are entitled to the same income tax treatment under the Act. Note that "common law partner is defined in s. 248 as follows: "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 throughout the 12-month period that ends at that time, or

(b) would be the parent of a child of whom the taxpayer is a parent, 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 particular 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.

Note that this definition does not determine the rights of a common law partner under provincial laws governing division of property on separation or divorce and succession on death.

6. If the transferor is a non-resident of Canada, the Act imposes joint liability for income tax on capital gains on both the vendor and purchaser of Canadian real estate. The purchaser is entitled to request the vendor to obtain a clearance certificate under s. 116 of the Act and to require a 25% holdback until the certificate is delivered. See Real Estate Standard 3.10. A trust resides for the purposes of the Act where its real business is carried on, which is where the central management and control of the trust actually takes place. The residence of the trust is not always that of the trustee. It will be so where the trustee carries out the central

management and control of the trust where the trustee is resident: *Fundy Settlement v. Canada*, 2012 SCC 14 (CanLII), [2012] 1 SCR 520.

7. United States citizens are taxed on their worldwide income even though they may be resident in Canada for Canadian income tax purposes. The Canada-U.S. Tax Treaty may alleviate double taxation in appropriate circumstances. A U.S. citizen resident in Canada is required to file income tax returns in both countries. Likewise, the personal representative of a U.S. citizen resident in Canada will have to file a U.S. income tax return for the year of death, a U.S. estate tax return, and a Canadian income tax return for the year of death.

8. If the Canadian resident client owns assets in a foreign jurisdiction (or even another Province in Canada), legal documents prepared in Nova Scotia may not be valid to achieve the client's estate planning goals. In particular, if real estate is owned by a deceased client outside Nova Scotia, the law of the foreign jurisdiction or Province will govern. It likely will be necessary to initiate probate proceedings both in Nova Scotia (if the deceased is ordinarily resident within the Province) and also in the other jurisdiction. See Wills Drafting Standard (N.B. – this is a reference to what will be a future standard).

9. See NSBS, *Code of Professional Conduct*, Halifax: Nova Scotia Barristers' Society, 2012, Commentary [6] to rule 3.1-2: Competence:

A lawyer must recognize a task for which the lawyer lacks competence and the disservice that would be done to the client by undertaking that task. If consulted about such a task, the lawyer should:

1. decline to act;
2. obtain the client's instructions to retain, consult or collaborate with a lawyer who is competent for that task; or
3. obtain the client's consent for the lawyer to become competent without undue delay, risk or expense to the client.

Additional Resources

Income Tax Act, RSC 1985, c 1 (5th Supp)

Canada Revenue Agency: https://www.canada.ca/en/revenue-agency/services/tax/individuals/life-events/

Canada Revenue Agency: https://www.canada.ca/en/revenue-agency/services/tax/international-non-residents-tax

Approved by Council on September 24, 2021.

Standards

- Capacity
- Executing Estate Planning Documents
- Beneficiary Designations
- Planning for Assets in Multiple Jurisdictions
- Will Substitutes (Other Documents and Arrangements) and Expressing Intention in the Estate Plan
- Issues That Arise on Second and Subsequent Relationships
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- Revocation of Wills

Revocation Of Wills

Standard

When preparing a will a lawyer must consider the scope of the revocation clause.[1] In particular, a lawyer should request copies of existing wills and other testamentary instruments and ensure the revocation clause cannot be interpreted to apply beyond the scope for which it is intended[2] or if there are multiple wills operating concurrently, that one does not revoke the other.[3]

Footnotes

1. "A solicitor is required to bring reasonable care, skill and knowledge to the performance of the professional service which he has undertaken ... The requisite standard of care has been variously referred to as that of the reasonably competent solicitor, the ordinary competent solicitor and the ordinary prudent solicitor." per LeDain, J. in *Central & Eastern Trust Company v. Rafuse*, 1986 CanLII 29 (SCC), [1986] 2 SCR 147, 31 DLR (4th) 481, at [58].

Feeney's Canadian Law of Wills, 4th Edition at section 10.58 –"If the will has been drawn by a lawyer, the court will assume that the technical terms are used in their correct, technical, legal sense, unless it clearly appears that they were intended to bear some other meaning."

2. *Mulrooney Estate (Re)*, 2016 NSSC 352 – Justice McDougall considered whether the wording in a will signed subsequent to a beneficiary designation was sufficient to revoke the specific designation and found it did not. See also, *Ashton Estate v. South Muskoka Hospital Foundation*, 2008 O.J. No. 1805 – a clause revoking "all wills and testamentary dispositions of every nature or kind whatsoever" was found to revoke a beneficiary designation on a registered retirement income fund.

3. *Robinson Estate v. Robinson, [*2010] O.J. No.2771 – Testator executed a will in Spain indicating said will would deal with her European property and her Canadian will would deal with her Canadian property. Testator subsequently amended Canadian will including standard revocation clause. The drafting solicitor had no knowledge of Spanish will. Court upheld revocation clause had effect of revoking all prior wills. See also Multiple Wills Standard (N.B. – this is a reference to what will be a future standard).

Additional Resources

Section 19 of the *Wills Act*, RSNS 1989, c 505 sets out conditions for revocation of a will, in particular s.19(c) execution of a new will.

Approved by Council on September 24, 2021.

Standards

- Capacity
- Executing Estate Planning Documents
- Beneficiary Designations

Will Substitutes (Other Documents And Arrangements) And Expressing Intention In The Estate Plan

Standard

A lawyer must inquire about what other documents and arrangements regarding a client's property may be in place beyond a will and power of attorney.

A lawyer must advise the client how to effect their intentions regarding the succession of their property, and the consequences of doing so (including equitable considerations).

A lawyer must consider whether:

- a client is using, 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 is relying on to express intention regarding their estate, in addition to their will and power of attorney, do validly and effectively

express their intention regarding their property;

- any arrangements, verbal or otherwise, a client has regarding their property effectively honour their intentions regarding that property;
- the client is aware of the tax implications for their property and estate related to any will substitutes; and
- the client is aware of, and has been advised about, equitable considerations including, but not limited to, gender, religion, disability, race, colour, and sexual orientation, in the preparation of other documents and arrangements affecting the distribution 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

The purpose of this standard is to draw attention to the myriad "will substitutes" that are possible and require consideration by the lawyer in assessing the client's intention with respect to their overall estate plan. Will substitutes are documents and arrangements, in writing or verbal, which express intention specific to a client's estate that are not a will.

These documents and arrangements include, but are not limited to:

- Verbal agreements
- Corporations
- Memoranda
- Resulting trusts
- Advancement
- Joint tenants with right of survivorship
- *Donatio Mortis Causa* ("deathbed gifts")
- Beneficiary designations – refer to standard on **Beneficiary Designations**

- Registered disability savings plans ("RDSPs")
- *Inter vivos* transfers and gifts
- *Inter vivos* trusts including:
  - Alter Ego Trusts
  - Joint Partner Trusts
  - Self-benefit Trusts
  - Bare Trusts
  - Spousal 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)

General note

In determining the effectiveness of other documents, consider whether the use of seals is required.

Equitable Considerations

Lawyers should always consider, and provide guidance on, equitable considerations when advising clients on their estate plan, including will substitutes. Lawyers are encouraged to inquire into, and discuss with clients, arrangements that may appear to be inequitable.

Equitable considerations include, but are not limited to:

- Possible inequities in relationships between men and women, and particularly concerns surrounding oppression;

- Assessing how clients interpret the meaning of certain terms, including spouse and child
- Potential claims under the *Testators' Family Maintenance Act* ("TFMA"), particularly understanding the reasons for and consequences of a child or spouse being disinherited or benefitted disproportionately;
- Planning for beneficiaries with disabilities (including considerations of claims under the TFMA and impact on government support)
- The cultural impacts that may arise from one's personally-held religious beliefs, including the consequences if an intended bequest fails for legislative (*i.e.*, TFMA) or cultural reasons (*i.e.*, Sharia law); and,
- Implications arising from the application of the *Indian Act*.

Lawyers should be mindful of using alternative or culturally sensitive language when working with clients to properly assess, and assist with the expression of, their intentions for their estate plan. In particular, they should frame questions regarding gifts in a culturally sensitive manner.

Lawyers should remind client of evidentiary legal requirements and review with the client acceptable material corroborative evidence.

Verbal Agreements

Lawyers should inquire as to whether the client has made any verbal agreements or expressed intentions that other individuals, particularly family members, may be relying on or believe to fully address the client's intention regarding a particular asset. The lawyer should assist the client in documenting those intentions so as to effectively express that intention.

Presumption of Resulting Trust

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].

Presumption of Advancement

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 275, 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).

Evidence for Intent of Gift

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].

Donatio Mortis Causa

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].

Revocation of Beneficiary Designations

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.

Registered Disability Savings Plans

Lawyers should consider the client's intentions regarding planning for any beneficiaries who are disabled. This may include an RDSP set up during the beneficiary's lifetime. The lawyer should consider whether the RDSP is the entirety, or part, of the estate plan. The lawyer should also be familiar with, amongst other options, Henson trusts and Qualifed Disability Trusts, and how these may work with, or in lieu of, an RDSP. The lawyer should be aware of the income tax implications of planning for disabled beneficiaries as well as the impact of the client's planning on the beneficiary's other support sources, including government benefits.

Inter Vivos Trusts

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 in flux; the lawyer is advised to check the rules in place at the time of drafting documents and before moving assets into a bare trust arrangement.

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.

With a cultural competency lens, the lawyer should consider whether it is appropriate to draft a customized property division agreement that aligns with a client's cultural or religious norms, especially in communities where property is traditionally divided among family members in a specific manner. The lawyer

should still advise clients of any legal obligations for dependents and related to distribution.

Land Titles Initiative Clarification Act

Lawyers should be attuned to any current claims by their clients or inheritance of claimed Land Title parcels.

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*

Wills
45 (1) Nothing in this Act shall be construed to prevent or prohibit an Indian from devising or bequeathing his property by will.

Form of will
(2) The Minister may accept as a will any written instrument signed by an Indian in which he indicates his wishes or intention with respect to the disposition of his property on his death.

Probate
(3) No will executed by an Indian is of any legal force or effect as a disposition of property until the Minister has approved the will or a court has granted probate thereof pursuant to this Act.

R.S., c. I-6, s. 45

Minister may declare will void
46 (1) The Minister may declare the will of an Indian to be void in whole or in part if he is satisfied that

(a) the will was executed under duress or undue influence;

(b) the testator at the time of execution of the will lacked testamentary capacity;

(c) the terms of the will would impose hardship on persons for whom the testator had a responsibility to provide;

(d) the will purports to dispose of land in a reserve in a manner contrary to the interest of the band or contrary to this Act;

(e) the terms of the will are so vague, uncertain or capricious that proper administration and equitable distribution of the estate of the deceased would be difficult or impossible to carry out in accordance with this Act; or

(f) the terms of the will are against the public interest.

Where will declared void
(2) Where a will of an Indian is declared by the Minister or by a court to be wholly void, the person executing the will shall be deemed to have died intestate, and where the will is so declared to be void in part only, any bequest or devise affected thereby, unless a contrary intention appears in the will, shall be deemed to have lapsed.

R.S., c. I-6, s. 46

Note: Indigenous estates for those living in First Nations Communities are probated at Indigenous Services Canada (in Amherst).

- 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. *Brousseau* v *Mulrooney Estate,* [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.

Approved by Council on September 27, 2024.

Standards

- Capacity
- Executing Estate Planning Documents
- Beneficiary Designations
- Planning for Assets in Multiple Jurisdictions
- Will Substitutes (Other Documents and Arrangements) and Expressing Intention in the Estate Plan
- Issues That Arise on Second and Subsequent Relationships
- Income Tax
- Revocation of Wills

LAWYERS' INSURANCE ASSOCIATION OF NOVA SCOTIA

Issues That Arise On Second And Subsequent Relationships

Standard

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.[1]

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.[2] 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).

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.

Footnotes

1. The term “spouse” has been defined as follows, for the purposes of various

legislation, with certain notable differences and distinctions:

***Matrimonial Property Act*, RSNS 1989, c 275**

“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.

***Personal Directives Act*, SNS 2008, c 8**

“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;

***Human Organ and Tissue Donation Act*, SNS 2019, c 6**

“spouse” of an individual means

(i) another individual who is cohabiting with that individual in a conjugal relationship as a married spouse,

(ii) a registered domestic partner of the individual, or

(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;

***Adult Capacity and Decision Making Act*, SNS 2017, c 4**

“spouse” means either of two individuals who

(i) are married to each other and not living separate and apart, within the meaning of the *Divorce Act* (Canada), from 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 within the meaning of Section 52 of the *Vital Statistics Act*, or

(v) not being married to each other, have cohabited in a conjugal relationship with each other continuously for at least two years;

***Pension Benefits Act*, SNS 2011, c 41**

"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 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,

(iv) are domestic partners within the meaning of Section 52 of the *Vital Statistics Act*, or

(v) not being married to each other, are cohabiting in a conjugal relationship with each other, and have done so continuously for at least

(A) three years, if either of them is married, or

(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**

"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;

Employment Support and Income Assistance Regulations, NS Reg 195/2019

(In force since 2019, amended in 2021 – definition has remained the same)

"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;

In addition, the term "common-law partner" has also been defined variously:

***Personal Directives Act*, SNS 2008, c 8**

"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;

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

"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;

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

"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;

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

"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*, RSNS 1989, 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, SNS 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*.

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 *NSBS 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 NLSC 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 the same legal rights and standing as a married couple.

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*

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.

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.

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.

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.

To address these concerns, the lawyer may consider recommending one or more of the following planning tools:

- using a spousal trust;
- naming beneficiaries on life insurance policies;
- naming beneficiaries on registered investment accounts;
- making certain assets joint with other family members;
- making *inter vivos* gifts or transfers of property for consideration.

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.

f. *Domestic Contracts*

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,* 2021 BCSC 767, 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. An

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 may then dispose of it as they see fit. The lawyer should ensure that the client is fully aware of this possibility 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.)

l. *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*, RSNS 1989, c. 505, s. 1. and consider its potential impact on the client's planning.

Additional Resources

Christine Van Cauwenberghe, *Wealth Planning Strategies for Canadians*

Margaret O'Sullivan, *Trust and Estate Essentials: Achieving Success in Family Succession*

David Howlett, *Estate Matters in Atlantic Canada*

The Society of Trust and Estate Practitioners, *Meeting the Needs of Modern Families + Whaley, Hull, All About Estates?*

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Wills Standards Committee: Glossary of Terms Used in Estate Planning

1. **Abatement**: The reduction or decrease in the value of a legacy or devise due to insufficiency of assets in an estate to satisfy all bequests or devises.
2. **Ademption**: The failure of a specific gift in a will because the property is no longer owned by the testator at the time of death.
3. **Administration of Will**: The legal process of managing and distributing the assets and property of a deceased person according to the instructions laid out in their will. This process involves identifying and inventorying the assets, paying any debts and taxes owed by the estate, and distributing the remaining assets to the beneficiaries.
4. **Advancement**: The principle of advancement in the context of wills and inheritance law refers to a common law presumption that when a parent gives a substantial gift to a child during their lifetime, it is presumed to be an "advancement"—that is, an early portion of what the child would otherwise inherit from the parent's estate.
5. **Affidavit of Execution of Will or Codicil**: A sworn statement signed by witnesses to a will and/or Codicil, confirming that they witnessed the testator sign the will.
6. **Age of Majority**: The age at which a person is legally recognized as an adult and is granted the rights and responsibilities that come with adulthood, such as the ability to enter into contracts, vote, and make legal decisions without parental consent. The age of majority varies by jurisdiction but is age 19 in Nova Scotia.
7. **Agent**: A person or entity authorized to act on behalf of another, often in legal or financial matters.
8. **Alter Ego Trust**: A type of trust arrangement where an individual who is over age Sixty-Five (65) who transfers assets into a trust that they control and benefit from during their lifetime. Upon their death, the assets in the trust are typically distributed to named beneficiaries in the trust document or other testamentary document, eliminating the requirement of probate. Such trusts provide privacy, do not require probate and are complex trusts requiring advanced knowledge of estate planning.
9. **Apostille**: An **apostille** is an official certification that authenticates the origin of a public document for use in another country. It verifies that the document has been issued or certified by a recognized authority in its country of origin. Apostilles are issued under the framework of the **Hague Apostille Convention of 1961**, which simplifies the process of legalizing documents for international use among member countries.

10. **Attorney**: A person appointed in a power of attorney document to represent another person when they are not able to act on their own.
11. **Beneficiary**: A person or entity who is designated to receive benefits, such as assets, property, or funds, from a trust, will, insurance policy, retirement account, or other legal arrangement.
12. **Beneficiary Designation**: The act of specifying who will receive the benefits of a trust, will, insurance policy, retirement account, or other legal arrangement upon the death of the owner or creator of the arrangement.
13. **Bequest**: A gift of personal property by will.
14. **Capacity**: The legal ability of a person to understand and the effect of creating legal documents such as wills, powers of attorney, personal directives and trusts. The test for capacity to create each document varies with each document.
15. **Capital**: In financial terms, capital refers to the money or assets that are used to generate income or wealth. It can include cash, investments, equipment, property, and other tangible or intangible assets. The capital of a trust is the corpus or original deposit amount to the trust.
16. **Clearance Certificate**: A document issued by Canada Revenue Agency under s. 159(2) of the *Income Tax Act* certifying that all taxes owed by the deceased person have been paid or settled, typically required before the transfer of assets or property out of the estate of a deceased should occur.
17. **Codicil**: A document that modifies, revokes, or adds to the terms of an existing will
18. **Common Law Partner**: A person who is in a long-term, committed relationship with another person but is not legally married to them. Common law partners may have certain legal rights and obligations similar to those of married couples, depending on the jurisdiction. There are different definitions of the term in Provincial and Federal Laws. As of the year 2024, common law partners do not inherit under the *Intestate Succession Act* when their partner dies owning assets in their sole name. It is essential for individuals in common-law relationships to be aware of their legal rights and responsibilities under Nova Scotia's laws, especially in the event of separation or death.
19. **Competency**: The general ability of an individual to make informed logical and rational decisions, in legal matters.
20. **Contingent Beneficiary**: A person or entity designated to receive benefits only if certain conditions are met.
21. **Cy-près Doctrine**: The cy-près doctrine (from the French phrase *cy près comme possible*, meaning "as near as possible") is a legal principle used in trust and

charitable law to modify the terms of a trust, will, or charitable gift when the original intent of the donor or testator cannot be carried out. The doctrine allows courts to redirect the assets to a purpose that is as close as possible to the original intent.

22. **Deemed Disposition**: A tax term referring to the fictional sale or transfer of assets upon certain events, such as death or emigration, for the purpose of calculating capital gains tax.
23. **Delegate**: The name of a person authorized to make personal care decisions for another under the *Personal Directives Act*.
24. **Direct Devise**: A specific bequest or transfer of property or assets to a named beneficiary in a will or trust.
25. **Donee**: The recipient of a gift, donation, or transfer of property or assets from a donor.
26. **Donor**: A person who gives or donates property, assets, or funds to another person or entity.
27. **Estate Freeze**: A tax planning strategy where the owner of a business or assets locks in the current value of their estate by transferring ownership to family members or a trust, typically in exchange for preferred shares or other instruments that maintain control while reducing future tax liabilities.
28. **Estate Planning**: The process of arranging for the management and distribution of one's assets and property during life and after death, typically with the goal of minimizing taxes, ensuring the well-being of beneficiaries, and achieving other financial and personal objectives.
29. **Even-Hand Rule**: In the context of estates refers to the principle that a trustee or executor of an estate must administer the estate impartially and fairly, without favouring one beneficiary over another unless explicitly directed by the terms of the trust or will. This rule requires the fiduciary to treat beneficiaries equally, balance competing interests, and avoid conflict of interest. For example, in a trust where one beneficiary is entitled to income and another is entitled to the principal on death of the income beneficiary, the trustee must manage the assets in a way that provides reasonable income without depleting the principal unfairly. This rule ensures the fiduciary upholds their duty of loyalty and prudence to all parties involved in the estate or trust.
30. **Executor/Executrix**: A person named in a will or appointed by a court to carry out the instructions contained in the will and administer the estate of a deceased person. The term "executrix" traditionally refers to a female executor, although the term "executor" is often used for both genders.

31. **Gift Over**: A "gift over" refers to a provision in a trust or will that specifies what should happen to the trust property if certain events occur (e.g., if a primary beneficiary dies or a condition is not met). Under the rule in *Saunders v. Vautier*, if the trust beneficiaries are absolutely entitled to the property and agree to terminate the trust, they can override the "gift over" provision. This is because their absolute beneficial ownership takes precedence over the settlor's directions.

32. **Grant of Administration**: A legal document issued by a court authorizing an individual or entity to administer the estate of a deceased person who did not leave a valid will (intestate).

33. **Grant of Administration with Will Annexed**: A legal document issued by a court authorizing an individual or entity to administer the estate of a deceased person who leaves a valid Will but there is no person named in the Will who is able to act as executor due to reasons such as death or incapacity.

34. **Grant of Probate**: A legal document issued by the Court of Probate certifying the validity of a deceased person's will and the authority of the executor named in the will to administer the estate according to its terms.

35. **Guardian**: A person legally responsible for the care and management of a minor person and their assets under the *Guardianship Act* of Nova Scotia. Also, a guardian was the name of a person appointed as a legal representative under the former *Incompetent Persons Act*. The *Adult Capacity and Decision-Making Act* states that a guardian is to be read and construed as including a reference to a representative appointed under that Act unless a contrary intention appears.

36. **Henson Trust**: A type of trust designed to provide financial support and care for a person with disabilities without jeopardizing their eligibility for government benefits, such as disability assistance.

37. **Holograph Will**: A will that is entirely handwritten and signed by the testator.

38. **Hotchpot**: A legal concept referring to the process of equalizing distributions among heirs or beneficiaries to ensure fairness, often applied in situations where certain beneficiaries have received advancements or gifts during the lifetime of the deceased.

39. **Joint Partner Trust**: A trust established by partners or spouses one of whom must be Sixty-Five (65) years of age to manage and distribute assets jointly owned by them, often used for estate planning purposes. Such trusts provide privacy, do not require probate and are complex trusts requiring advanced knowledge of estate planning.

40. **Joint Tenancy**: A form of property ownership where two or more individuals hold equal rights to the property, including the right of survivorship, which means that

if one owner dies, their share automatically passes to the surviving owner(s) outside of probate.

41. **Income**: In a financial context, income refers to money earned or received, typically through employment, investments, or other sources. Income of a trust is generated from the capital of the trust.
42. ***Inter Vivos* Trust**: A trust created during the lifetime of the settlor (the person establishing the trust) to manage and distribute assets to beneficiaries.
43. **Intestate**: The legal status of a person who dies without leaving a valid will or without disposing of all their property through a will.
44. **Inventory**: A detailed list of the assets and liabilities of an estate, typically prepared by the executor or administrator for probate or administration purposes.
45. **Issue**: In legal terms, issue refers to a person's lineal descendants, such as children, grandchildren, and further descendants.
46. **Lapse**: The failure of a gift in a will because the beneficiary predeceases the testator or fails to meet a condition.
47. **Last Will and Testament**: A legal document that specifies how a person's assets and property should be distributed after their death and may also appoint guardians for minor children and specify other wishes.
48. **Legacy**: A gift of personal property or a specific sum of money bequeathed to a beneficiary in a will.
49. **Life Insurance**: A contract between an individual and an insurance company where the insurer agrees to pay a specified sum of money to designated beneficiaries upon the insured person's death in exchange for premium payments.
50. **Life Insurance Trust**: A trust established *inter vivos* or in a Will (testamentary) to receive life insurance proceeds on death and to distribute them outside the estate according to the terms of the trust.
51. **Living Will** – see ***Personal Directive***.
52. **Maker**: The name of a person who makes a Personal Directive, in Nova Scotia under the *Personal Directives Act*.
53. **Marriage Contract**: A marriage contract, also known as a prenuptial agreement or prenup, is a legal document created by two individuals before or after they enter into marriage. This contract typically outlines the rights and responsibilities of each spouse regarding property, finances, and other assets in the event of divorce or death. The law governing spouses in Nova Scotia is the *Matrimonial Property Act*.

54. **Medical Assistance in Dying or "MAiD"**: A medical procedure in which a competent adult, suffering from a grievous and irremediable medical condition, voluntarily chooses to end their life with the assistance of a medical practitioner.

55. **Minor Beneficiary**: A person who is under the legal age of majority and designated to receive assets or benefits from a trust, will, or other legal arrangement.

56. **Mirror Will**: A pair of wills, typically made by spouses or partners, which leave identical or nearly identical assets to each other.

57. **Monitor**: A person appointed under the *Powers of Attorney Act* who is granted powers to visit and communicate with the donor at any reasonable time, request records from the attorney kept, demand an accounting from the attorney and apply for a Court order for more powers where there are concerns with the document or the actions of the Attorney.

58. **Multiple Wills**: A strategy used in estate planning where a person creates more than one will to deal with different types of assets or to minimize probate fees and taxes. This strategy is not available in Nova Scotia due to the language in the *Probate Act* that all assets of a person disposed of by Will must be taken into account when making an application for a grant of Probate or Administration.

59. **Mutual Will**: Wills made by two or more individuals, usually spouses or partners, which are intended to be legally binding and often mirror each other's terms.

60. **Notice to Creditors**: A legal notice informing creditors of a deceased person's death and providing them with an opportunity to make claims against the deceased's estate.

61. ***Per Capita***: A method of distributing an estate where each beneficiary receives an equal share, regardless of their relationship to the deceased, with the share of any deceased beneficiary being divided equally among the surviving beneficiaries.

62. **Personal Directive**: A legal document that outlines a person's wishes regarding their personal and medical care in the event they become incapable of making decisions for themselves.

63. **Personal Representative**: A person appointed to administer the estate of a deceased person, which may include an executor/executrix if there is a will or an administrator if there is no will.

64. ***Per Stirpes***: A method of distributing an estate where each branch or line of descendants receives an equal share, with the share of a deceased beneficiary being passed down to their own descendants.

65. **Power of Attorney**: A legal document that grants another person the authority to act on behalf of the person granting the power (the principal) in financial and legal matters.

66. **Presumption of Advancement**: The **presumption of advancement** is a legal concept that arises in estate planning and property law. It refers to the assumption that when a person transfers property or assets to a close family member (usually a spouse or child) without receiving anything in return, the transfer is considered a **gift** rather than a loan or trust. The presumption of advancement can be challenged in court. If evidence shows the transfer was intended as something other than a gift (e.g. a loan, a joint investment, or held in trust), the presumption may not apply. In estate planning, clear communication and documentation of intentions regarding asset transfers are essential to avoid reliance on legal presumptions and potential family conflicts.

67. **Primary and Secondary Will**: A strategy used in estate planning where a person creates two wills: a primary will dealing with assets that require probate and a secondary will dealing with assets that can be distributed without probate, aiming to minimize probate fees and taxes. This practice is not recommended in Nova Scotia. See ***Multiple Wills***.

68. **Probate of Will**: The legal process of proving the validity of a deceased person's will in court and formally appointing the executor named in the will to administer the estate.

69. ***Pro rata***: A Latin term meaning "in proportion" or "according to the rate." In the context of the division of an estate amongst beneficiaries, it refers to the allocation or division of the estate in proportion to the number of beneficiaries or shares of the estate.

70. **Public Trustee**: A government official or office responsible for managing the affairs of persons who are unable to manage their own affairs due to incapacity or other reasons, typically appointed as a guardian or trustee.

71. **Registered Disability Savings Plan (RDSP)**: A tax-deferred savings plan designed to help individuals with disabilities and their families save for long-term financial security, with contributions eligible for government grants and bonds.

72. **Registered Domestic Partner**: A person who is legally recognized as a partner or spouse in a committed relationship, typically granted certain rights and benefits similar to those of married couples under the *Vital Statistics Act*.

73. **Registered Education Savings Plan (RESP)**: A tax-deferred savings plan designed to help parents and others save for a child's post-secondary education, with contributions eligible for government grants and bonds.

74. **Registered Retirement Income Fund (RRIF)**: A tax-deferred retirement income fund that holds assets transferred from an RRSP and provides regular income payments to the annuitant, with minimum withdrawal requirements set by the government.

75. **Registered Retirement Savings Plan (RRSP)**: A tax-deferred retirement savings plan that allows individuals to contribute a portion of their income to investments, with contributions eligible for tax deductions and investment earnings tax-sheltered until withdrawal.

76. **Representative**: A person appointed as a decision-making representative under the *Adult Capacity and Decision-making Act* which replaced the former *Incompetent Persons Act*.

77. **Resident of Canada**: A person who meets the residency requirements set by the Canadian government, typically based on the number of days spent in Canada during a tax year.

78. **Residue**: The remaining assets and property of an estate after all debts, taxes, expenses, and specific bequests have been satisfied and distributed to beneficiaries.

79. **Resulting Trust**: A legal concept where property held by one person is presumed to be held for the benefit of another person, typically arising when there is a lack of evidence of a gift or intention to transfer ownership.

80. **Revocation**: The act of invalidating or canceling a legal document, such as a will or power of attorney, by the maker or testator.

81. **Right of Survivorship**: The legal right of a joint tenant to automatically inherit the share of a co-owner who dies, resulting in the surviving joint tenant(s) owning the entire property.

82. **Rollover Under the *Income Tax Act***: A tax-deferred transfer of assets from one registered account to another, such as from an RRSP to a RRIF, allowing the assets to continue growing tax-free until withdrawn voluntarily or on death of the annuitant.

83. **Royal Gazette Nova Scotia**: The official government publication in Nova Scotia, Canada, which publishes legal notices, including probate notices, government appointments, regulations, and other official announcements.

84. **Rule Against Perpetuities**: A legal rule that limits the duration of certain property interests, preventing them from lasting indefinitely beyond a specified period or the lives of certain individuals. The rule has been abolished in Nova Scotia.

85. **Rule in *Saunders v. Vautier***: The rule in *Saunders v. Vautier* (1841) is a fundamental principle in English trust law. It provides that: If all beneficiaries of a

trust are of full age (i.e. adults), have full legal capacity, and are absolutely entitled to the trust property, they can together demand the termination of the trust and direct the trustees to transfer the trust property to them, even if the trust terms specify a later date for distribution.

86. **Specific Bequest**: A gift of a specific asset or property item, such as a piece of jewelry or a car, to a named beneficiary in a will.

87. **Specific Devise**: A gift of specific real property, such as land or a house, to a named beneficiary in a will.

88. **Spousal Trust**: Under the *Income Tax Act* (Canada), a spousal trust (or common-law partner trust) is a type of trust designed to provide income or benefits to a surviving spouse or common-law partner, while deferring certain tax liabilities until their death. It is often used in estate planning to ensure that the surviving spouse is financially secure and to manage the eventual distribution of assets to other beneficiaries, such as children. The beneficiary must be the spouse or common-law partner of the settlor (the person establishing the trust). The trust must be created by the settlor either during their lifetime or through their will. The spouse or common-law partner must be the only person entitled to receive income or other benefits from the trust during their lifetime. When assets are transferred into a spousal trust, the transfer can occur on a tax-deferred basis, meaning no immediate capital gains tax is triggered. The trust allows the settlor to control the ultimate distribution of assets (e.g., to children or other beneficiaries) after the death of the surviving spouse or partner. The relevant provisions under the *Income Tax Act* are Section 70(6**)** and Subsection 104(4).

89. **T1 Terminal Return**: The final tax return filed for a deceased individual, covering the period from the beginning of the tax year to the date of death.

90. **T3 Trust Return**: A tax return filed for a tax return filed for a trust in Canada. Specifically, it is the tax return form used to report income, gains, losses, and deductions for trusts, as well as to calculate the tax liability of the trust for a given tax year.

91. **Tax-Free Savings Account (TFSA)**: A type of savings account available in Canada that allows individuals to earn tax-free investment income, with contributions made using after-tax dollars and withdrawals, including investment gains, tax-free.

92. **Tenancy in Common**: A form of property ownership where two or more individuals hold an undivided interest in the property, with each owner having the right to use and occupy the entire property, and upon death, their share passes to their heirs or beneficiaries rather than to the other owners.

93. **Testamentary Capacity**: The legal and mental capacity of a person to understand the nature and consequences of making a will, including

understanding the extent of their assets, the identity of their beneficiaries, and the implications of their decisions.

94. **Testamentary Trust**: A trust established through a person's will, which takes effect upon their death and governs the distribution and management of assets for the benefit of specified beneficiaries according to the terms outlined in the will.

95. **Testate**: The legal status of a person who dies leaving a valid will that disposes of their property and assets according to their wishes.

96. **Testator**: A person who makes or has made a will, outlining how their property and assets should be distributed after their death.

97. **Testatrix**: The female counterpart of a testator, referring to a female person who makes or has made a will.

98. **Trust**: A legal arrangement in which one party, known as the settlor or grantor, transfers assets or property to another party, known as the trustee, to hold and manage for the benefit of one or more beneficiaries, according to the terms specified in the trust document.

99. **Trustee**: A person or entity appointed to manage and administer a trust on behalf of the beneficiaries, including handling the trust's assets, making investment decisions, and distributing income or principal according to the trust's terms.

100. **Variation of Trust**: Under the *Variation of Trusts Act* of Nova Scotia, a "variation of trust" refers to a legal process where the terms of a trust are altered, modified, or terminated. This can occur when the beneficiaries and trustees seek changes to the trust's original terms to better align with current circumstances or achieve the trust's purpose more effectively. Key aspects include court approval if the proposed changes benefit persons who may not be able to consent on their own. This includes minors, individuals under legal disability, unborn beneficiaries, or contingent beneficiaries. It requires consent by beneficiaries who are capable of consenting to the proposed variation, provided it does not contravene the trust's fundamental purpose.