Submission on the impact of the *Calmusky* decision for estate planning in Ontario, and proposed legislative amendments to remedy same

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Submitted to: Attorney General of Ontario and Minister of Finance

Submitted by: Ontario Bar Association

ONTARIO BAR ASSOCIATION
A Branch of the Canadian Bar Association

L'ASSOCIATION DU BARREAU DE L'ONTARIO
Une division de l'Association du Barreau canadien

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Introduction

This submission outlines the concerns of the bar regarding the impact of the recent Superior Court of Justice decision in *Calmusky v. Calmusky*[1] for the estate plans of Ontarians, and proposes legislative amendments to remedy this issue.

The OBA

Established in 1907, the OBA is the largest voluntary legal organization in Ontario, representing lawyers, judges, law professors and students from across the province, on the frontlines of our justice system and in no fewer than 40 different sectors. In addition to providing legal education for its members, the OBA assists government and other decision-makers with several legislative and policy initiatives each year with the goal of improving Ontario's justice system.

This submission has been developed primarily by the OBA's Trusts and Estates Law section. Our members regularly represent a broad range of clients in all areas of estates law, including estate planning, administration and litigation. We have also consulted with the OBA's Insurance Law, Family Law, Elder Law, and Pension and Benefits Law sections.

Impact of the *Calmusky* Decision for Estate Planning in Ontario

The recent *Calmusky* decision held that the presumption of resulting trust applied to a beneficiary designation made in respect of a Registered Income Fund ("RIF"). As such, the named beneficiary was presumed to be holding the RIF in trust for the deceased's estate, and held the onus of rebutting that presumption.

It is our position that the Court's interpretation on this issue is contrary to the law as understood by legal practitioners and others in the estate planning community. The decision has not been appealed by the parties, which is unsurprising given the modest sum at issue.

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[1] *Calmusky v. Calmusky*, 2020 ONSC 1506

It is generally accepted by estate planning lawyers, along with those practicing in the insurance and pension law areas, that a beneficiary designation is a designation of both legal and beneficial interests, unless a contrary intention is expressed. Provincial legislation, including the *Succession Law Reform Act*, the *Insurance Act*, and the *Pension Benefits Act*, specifically provide for the designation of a beneficiary of funds, plans and insurance money, with a primary objective of enabling the transfer of the benefit without a will and without the need to flow through the estate.

The effects of the *Calmusky* decision are broad and far reaching. Among other things, the *Calmusky* decision:

1. Creates uncertainty for those Ontarians who have made beneficiary designations based on an understanding that the effect of the beneficiary designation is that the named beneficiary will receive the proceeds of the plan or policy outright;

2. May potentially defeat the testamentary intentions of many Ontarians who have already made their beneficiary designations and are unable, by reason of lack of capacity or opportunity, to make new ones;

3. Increases the potential for litigation where the named beneficiaries of plans, funds, and insurance policies are not the same residual beneficiaries of the estate;

4. Creates the potential for a significant increase in LAW PRO claims for lawyers who have been advising their clients that the named beneficiaries under funds, plans, and insurance moneys will receive the proceeds of such policies as beneficiaries thereof;

5. Creates uncertainty in cohabitation agreements, separation agreements, and divorce settlements that use beneficiary designations as a means of securing support payments; and

6. May require financial advisors, insurance brokers, and accountants to provide their clients with what constitutes legal advice when such designations are being made.

Additionally, beneficiary designations can now be made online without the presence of any type of advisor to ensure that the individual making the designation understands that naming a person as a beneficiary does not necessary mean that that person will be the ultimate recipient of the proceeds.

Further, we disagree with the assertion of the trial judge that "*it makes sense from a policy perspective that the evidentiary burden be on the transferee or designated RIF beneficiary, since the transferee/RIF beneficiary "is better placed to bring evidence of the circumstances of the transfer""*, quoting the Supreme Court of Canada's decision in *Pecore v. Pecore*[2]. Imposing the onus on the named beneficiary to rebut the presumption of resulting trust imposes an unfair hurdle on that individual. A beneficiary designation does not require the consent of the named beneficiary, and can, in most cases, be changed at any time by the plan or policy holder prior to their death. It is very common for a named beneficiary to be completely removed from the designation process and have no knowledge of the designator's intention. This is distinct from an *inter vivos* transfer of a right of survivorship in a joint account, as was the case in *Pecore*. In that circumstance, the recipient would necessarily be involved in the transfer and be better placed to bring evidence of the circumstances of the transfer.

Proposed Legislative Amendments

In light of the uncertainty and problematic circumstances stemming from the *Calmusky* decision, the OBA recommends amendments to the *Succession Law Reform Act* and *Insurance Act* to clarify that the presumption of resulting trust does not apply in respect of a beneficiary designation under these Acts and the *Pension Benefits Act*. As beneficiary designations under the *Pension Benefits Act* are subject to the *Succession Law Reform Act*, an amendment to the *Pension Benefits Act* itself is not required.

It is important that any legislative amendment intended to rectify the result from the *Calmusky* decision does not have other unintended consequences. For this reason, our proposed amendments are narrow and only seek to respond to the *Calmusky* decision.

The amendments ought to have retroactive effect to ensure that the *Calmusky* decision does not disturb the generally accepted understanding of the law and legal advice that was provided in respect thereof prior to this decision.

[2] *Pecore v. Pecore*, [2007] 1 S.C.R. 795

Amendment to the *Succession Law Reform Act*

The OBA proposes the addition of the following subsection to section 51 of the *Succession Law Reform Act*:

> 51(3) When a designation is made under a plan, there is no presumption of resulting trust in favour of the participant's estate of the benefit payable under the plan on the participant's death.

Amendment to the *Insurance Act*

The OBA proposes the addition of the following subsection to section 190 of the *Insurance Act*:

> 190(3.1) When a designation is made by contract or declaration under subsection 190(1) there is no presumption of resulting trust in favour of the insured's estate of the insurance money payable under the contract.

Conclusion

Thank you for considering this submission. We would welcome an opportunity to discuss this matter further with you, and would be pleased to answer any questions you may have.