



Amendments to Estate Law Beneficiary Designations

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Submitted by: Ontario Bar Association

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ONTARIO
BAR ASSOCIATION
A Branch of the
Canadian Bar Association

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Une division de l'Association
du Barreau canadien



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Introduction

The Ontario Bar Association (“**OBA**”) makes the following short submission on proposed changes to the *Succession Law Reform Act* (the “**SLRA**”), the *Substitute Decisions Act* (the “**SDA**”), and the *Insurance Act*, regarding a proposal to allow substitute decision-makers to make a beneficiary designation in an instrument that is renewing, replacing, converting or transferring a similar instrument, provided that the beneficiary remains the same.

These amendments are welcome as they would provide much needed clarity with respect to the abilities of attorneys and guardians to manage “plans” (as such term is defined in the *SLRA*) with respect to incapable persons. These could be helpful in a variety of scenarios with respect to preserving the testamentary intent of the incapable person:

- When an incapable person’s RRSP converts to a RRIF upon them attaining the age of 71 years, the clarification that the beneficiary of the RRSP will also be the beneficiary of the RRIF.
- Where an attorney/guardian is not satisfied with a financial institution’s management of a plan, the ability to transfer the plan to a different financial institution while maintaining the same beneficiary designation for the plan.
- Where a separation, divorce or marriage has occurred, an attorney/guardian could apply to the court to permit the making, alteration or revocation of a designation to accommodate this change in family circumstances.

Ontario Bar Association

Established in 1907, the OBA is the largest and most diverse volunteer lawyer association in Ontario, with close to 16,000 members, practicing in every area of law in every region of the province. Each year, through the work of our 40 practice sections, the OBA provides advice to assist legislators and other key decision-makers in the interests of both the profession and the public and we deliver over 325 in-person and online professional development programs to an audience of over 20,000 lawyers, judges, students, and professors.



This submission was prepared by members of the OBA's Trusts & Estates and Pensions & Benefits law sections. Members of these sections include barristers and solicitors in public and private practice in large, medium, and small firms, and in-house counsel across every region in Ontario with significant experience in estate planning and litigation involving substitute decision makers and beneficiary designation issues.

Comments & Recommendations

We propose the following amendments to the *SLRA*, the *SDA*, and the *Insurance Act* to permit substitute decision-makers to make a beneficiary designation in certain circumstances. We conclude with pension law specific considerations to support the proposed amendments. Our proposals incorporate some of the Regulatory Registry's commentary while adding additional language we view as necessary for the proposal.

Proposed Amendments to the *SLRA*:

We propose the following amendments and additions to the *SLRA*:

51.1(1) Notwithstanding the reference to a will in subsection 7(2), paragraph 8(1)(c) and subsection 31(1) of the *Substitute Decisions Act, 1992*, an attorney for property or a guardian of property of a participant appointed in accordance with that act may:

(a) if:

(i) the participant, while capable, has designated a person to receive a benefit payable under a plan on the participant's death; and

(ii) the attorney or guardian, or the person administering the plan, has determined that the plan is to be converted, renewed, replaced or transferred to another person to administer the plan;

make a designation, by instrument other than a Will signed by the attorney or guardian, in order to permit the person to receive the same benefit payable under the plan that results from the conversion, renewal, replacement or transfer, provided that such designation by the participant was the most recent designation made by the participant regarding such plan;



(b) make, alter, or revoke a beneficiary designation, if the court authorizes the designation, alteration or revocation.

51.1(2) On an application to the court pursuant to paragraph 51.1(1)(b), the court shall consider whether the proposed designation, alteration or revocation of a beneficiary is in the best interests of the participant and the participant's estate.

51.1(3) Where a designation is made in accordance with subsection 51.1(1), it is deemed to have been made by the participant.

Proposed Amendments to the *SDA*

We further recommend complementary amendments to the *SDA*:

7(2) Subject to section 51.1 of the *Succession Law Reform Act*, the continuing power of attorney may authorize the person named as attorney to do on the grantor's behalf anything in respect of property that the grantor could do if capable, except make a will.

31(1) Subject to section 51.1 of the *Succession Law Reform Act*, a guardian of property has power to do on the incapable person's behalf anything in respect of property that the person could do if capable, except make a will.

Finally, we recommend an amendment to the *Insurance Act* as follows:

Proposed Amendments to the *Insurance Act*

Like the amendment to the *SLRA*, we recommend adding a new subsection to section 192 of *Part V* of the *Insurance Act*, *RSO 1990, c 1.8*, to allow a guardian or attorney to make an amendment to an existing beneficiary designation for life insurance. An Attorney may need to make decisions about insurance products for a grantor. The following are some potential scenarios we considered:

- A term policy that needs to be renewed due to an ongoing financial obligation of the grantor (terms of a separation agreement or a contract dispute);
- A financial management decision where the Attorney finds a less expensive policy is available for equal or greater benefit to replace an existing policy; or
- A term policy may need to be converted to permanent for financial or tax planning reasons that will benefit the grantor.



192(2.1) An attorney for property or a guardian of property of an insured appointed in accordance with the *Substitute Decisions Act, 1992* may:

(a) if:

(i) the insured, while capable, has designated the insured, the insured's personal representative or a beneficiary as one to whom or for whose benefit insurance money is to be payable; and

(ii) the attorney or guardian, or the insurer, has determined that the plan is to be converted, renewed, replaced or transferred to another insurer;

make a designation, by instrument other than a Will signed by the attorney or guardian, in order to permit the insured, the insured's personal representative or a beneficiary, as the case may be, to receive the same insurance money payable under the policy that results from the conversion, renewal, replacement or transfer, provided that such designation by the insured was the most recent designation made by the insured regarding such policy; and

(b) make, alter, or revoke a beneficiary designation, if the court authorizes the designation, alteration or revocation.

192(2.2) On an application to the court pursuant to paragraph 192(2.1)(b), the court shall consider whether the proposed designation, alteration or revocation of beneficiary is in the best interests of the insured and the insured's estate.

192(2.3) Where a designation is made in accordance with subsection 192(2.1), it is deemed to have been made by the participant.

Pensions & Benefits Considerations

Any proposed amendments to the *SLRA* should contemplate that different plans may offer different benefits and have different priority schemes which could impact who the member designates as their beneficiary, and as such, it may not be appropriate in all cases to presume that a member would want to maintain their beneficiary designation under the exporting plan. The implications of the proposal on scenarios in the pension sector, such as assets transfers, plan mergers, as well individual benefit transfer scenarios (e.g., CVs, reciprocal transfers, etc.), should be carefully considered. Additionally, the proposal should



consider various issues that may arise around disclosure of the designation, including who has the onus of providing such notice, and issues around how this would intersect with the ability of a member to name or revoke a beneficiary under a will. It would also be helpful to clarify that the discharge for administrators under section 53(a) of the *SLRA* would continue to apply in circumstances where a substitute decision maker fails to provide notice/maintain the beneficiary designation on behalf of the incapable member.

The OBA would be pleased to discuss this further and answer any questions that you may have.