Manitoba Law Reform Commission

THE BENEFICIARY DESIGNATION ACT (RETIREMENT, SAVINGS AND OTHER PLANS)

Report for Consultation

April 2018

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The Manitoba Law Reform Commission was established by *The Law Reform Commission Act* in 1970 and began functioning in 1971.

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REPORT FOR CONSULTATION

The Manitoba Law Reform Commission ("MLRC") encourages you to provide your thoughts, comments and suggestions concerning this aspect of Manitoba's law. Please refer to the provisional recommendations identified in this Report, and any other matters you think should be addressed.

Comments on this Report for Consultation should reach the MLRC by **June 8, 2018**.

Please submit your comments in writing by email, fax or regular mail to:

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The MLRC assumes that written comments are not confidential. You may submit anonymous written comments, or you may identify yourself but request that your comments be treated confidentially. If you do not comment anonymously, or request confidentiality, the MLRC may quote from or refer to your comments in its Final Report.

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ACKNOWLEDGMENTS

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The Commission is grateful to those who have provided their time and assistance to this project to date and who will be properly acknowledged in the Commission's Final Report.

The views expressed in this Report for Consultation are those of the Manitoba Law Reform Commission and do not necessarily represent the views of those individuals who have so generously assisted the Commission in this project.

CHAPTER 1: INTRODUCTION

Pension plans, insurance proceeds, and other retirement savings vehicles play an important role in the savings strategies of Canadians. As individuals pay into these plans over the years, issues arise such as: what happens when the plan owner dies? Where does the money go?

In Manitoba, the treatment of the proceeds of these financial products upon the death of the owner is regulated by *The Insurance Act*[1], *The Pension Benefits Act*[2] and *The Beneficiary Designation Act (Retirement, Savings and Other Plans)* (hereinafter *"The Beneficiary Designation Act"*)[3]. The latter provides for designation of beneficiaries to occur without the formalities required under *The Wills Act*[4].

Recently, a gap in *The Beneficiary Designation Act* came to the attention of the Commission respecting beneficiary designations when plans are renewed, replaced or converted. In these situations, a new plan is created and the old plan ceases to exist. Plan beneficiary designations do not automatically roll over and a fresh beneficiary designation must be made or, upon the death of the owner of the plan, the proceeds are payable to the plan owner's estate. A further look at the legislation and comparison with the legislation of other jurisdictions highlighted several other potential deficiencies in Manitoba's legislative scheme.

This Consultation Report considers possible amendments to improve the legislation and procedure related to beneficiary designations in Manitoba. Given the popularity of pension plans, registered savings plans, and other retirement savings vehicles in the marketplace today, it is important to ensure that the legislative scheme in place provides appropriate and adequate guidance to plan owners, designated beneficiaries and the legal profession.

Chapter 2 of this Consultation Report provides a historical review of the creation and revision of beneficiary designation legislation in Canada and Manitoba. Chapter 3 discusses potential areas of reform, specifically in the areas of: continuation of designations when plans are renewed, replaced, or converted; the ability to make, change or revoke a beneficiary designation; the effect of the statute on the termination of domestic relationships and other potential areas.

While the Commission makes several provisional recommendations in this Consultation report, it is largely seeking input from the public and the legal community on each of the areas outlined in this document.

[1] CCSM c I40.
[2] CCSM c P32.
[3] CCSM c B30 [*The Beneficiary Designations Act*].
[4] CCSM c W150.

CHAPTER 2- BACKGROUND

In 1935, the Supreme Court of Canada considered the issue of whether a beneficiary designation made without the formalities of a will was valid in *Mac Innes v. Mac Innes*.[5] The Court held that a beneficiary designation in a company-sponsored employee savings fund was invalid because it was "testamentary" in nature and not executed in accordance with the *Wills Act of Ontario.* The decision prompted the Association of Superintendents of Insurance of Canada (the "Association") to call for the enactment of legislation to supersede the decision in *Mac Innes* and bring the law in line with that regarding beneficiary designations in insurance policies[6] and retirement savings plans.

Eventually, in 1954, the government of Ontario added s. 62 to its *Law of Property Act*[7] to enable a participant in a non-insurance pension plan to name a beneficiary to receive a death benefit in the same way an insured person can name a beneficiary in a life insurance contract. In 1956, the Association suggested to the Conference of Commissioners on Uniformity of Legislation (the "Conference") that it consider adopting uniform legislation for enactment by provincial legislatures.[8] The matter was referred to the Manitoba Law Reform Commission, who reported the following year with draft legislation largely based on s. 62 of the *Law of Property Act* of Ontario. In 1957, the Conference adopted the draft legislation proposed by the Manitoba Commissioners.[9] Coincidently, the federal government changed the *Income Tax Act* by creating registered retirement savings plans (RRSPs), providing for individuals not in an employment relationship, as well as individuals participating in an employment plan, to create their own retirement savings plan.[10] In 1959, Manitoba added ss. 44 and 45 to *The Law of Property Act*, based largely on the Conference legislation of 1957.[11]

At its 1973, 1974, and 1975 Annual Meetings, the Conference, now called the Uniform Law Conference of Canada (ULCC), revisited its 1957 uniform legislation due to concerns expressed by the Trust Companies Association of Canada that the 1957 uniform legislation did not include non-employment registered retirement savings plans.[12] In 1975, the ULCC adopted a revision of its 1957 uniform legislation in the form of a discrete draft Retirement Plan Beneficiaries Act (the

[5] [1935] SCR 200.
[6] D. Norwood and J.P. Weir, *Norwood on Life Insurance Law in Canada* (Carswell, Toronto) 3d ed., 2002, pp. 291-92.
[7] SO 1954, c 12.
[8] Proceedings of the 38th Annual Meeting, 1956, pp. 24-25.
[9] Proceedings of the 39th Annual Meeting, 1957, pp. 27-28 and 145-49, called the "Rutherford Uniform provision" for G.S. Rutherford, then Legislative Counsel of Manitoba and the Manitoba commissioner to the Conference, who composed the report and draft legislation.
[10] *An Act to Amend the Income Tax Act*, SC 1957, c 29, s 17.
[11] SM 1959, c 33, amended by SM 1970, c L90, changing only the numeration of s 44 and 45 to s 43 and s 44.
[12] Proceedings of the 55th, 56th, and 57th Annual Meetings, 1973, 1974, and 1975, p 30, pp 30 and 125, and pp 30 and 164, respectively.

("ULCC Uniform Act"). The new draft legislation brought in non-employee plans, spelled out the exceptions to the rule that a plan should not be permitted to override the relevant Act, clarified the effects of designations made both in and outside of a will, and articulated the effect of revocations of such designations.

In 1976, Manitoba adopted verbatim the language contained in the ULCC Uniform Act, repealing s. 43 (originally s. 44) of *The Law of Property Act*[13]. In 1992, following the publication of a report of the Manitoba Law Reform Commission on the topic[14], Manitoba enacted *The Retirement Plan Beneficiaries Act.*[15] This new Act defined a "participant" as "a person who is entitled to designate another person to receive a benefit payable under a plan on the participant's death"[16] and added to the definition of "plan" sub-section (c) "a retirement savings plan or retirement income fund as defined in the *Income Tax Act* (Canada)".[17] In 2009, the title of the Act was changed to *The Beneficiary Designation Act (Retirement, Savings and Other Plans)*[18] and tax free savings accounts were added to the definition of "plan".[19]

The current version of *The Beneficiary Designation Act* reads in full as follows:

THE BENEFICIARY DESIGNATION ACT (RETIREMENT, SAVINGS AND OTHER PLANS)

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Manitoba, enacts as follows:

Definitions

1 In this Act,

"designation" means a designation, whether made before or after this Act comes into force, by a participant of another person to receive a benefit that is payable under a plan on the death of the participant;

"participant" means a person who is entitled to designate another person to receive a benefit payable under a plan on the participant's death;

"plan" means

(a) a pension, retirement, welfare or profit-sharing fund, trust, scheme, contract or arrangement for the benefit of employees or former employees, or agents or former agents of an employer, or the dependants or beneficiaries of any of the foregoing,

[13] SM 1976, c 27.
[14] Manitoba Law Reform Commission, Report #73 "Statutory Designations and *The Retirement Plan Beneficiaries Act*" (October 1990).
[15] SM 1992, c 31.
[16] Ibid, s 1.
[17] Ibid.
[18] CCSM, c B30.
[19] SM 2009, c 26, s 79.

(b) a fund, trust, scheme, contract or arrangement for the payment of an annuity for life or for a fixed or variable term, or

(c) a TFSA (tax-free savings account), retirement savings plan or retirement income fund as defined in the *Income Tax Act* (Canada),

created before or after this Act comes into force;

"will" has the same meaning as in *The Wills Act*.

Designation and revocation by participant

2 A participant may designate a person to receive a benefit payable under a plan on the participant's death

(a) by an instrument signed by the participant;

(b) by an instrument signed by another on the participant's behalf, in the participant's presence and on the participant's direction; or

(c) by will;

and, subject to section 12, may revoke the designation by any of those methods.

Designation by will

3 A designation in a will is effective only if it relates expressly to a plan, either generally or specifically.

Revocation by will

4 Subject to section 12, a revocation in a will of a designation made by instrument is effective to revoke the designation only if the revocation relates expressly to the designation, either generally or specifically.

Later designation prevails

5 Notwithstanding *The Wills Act* but subject to section 12, a later designation revokes an earlier designation, to the extent of any inconsistency.

Revocation of a will

6 The revocation of a will is effective to revoke a designation contained in the will.

Invalid wills

7 A designation or the revocation of 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 will.

Invalid wills

8 A designation contained in an instrument that purports to be but is not a valid will is revoked by an event that would have the effect of revoking the instrument if it had been a valid will.

Non-revival of designation

9 The revocation of a designation does not revive an earlier designation.

Revoked designation in will

10 The republication of a will by codicil does not revive a designation contained in the will where the designation has been revoked, unless the codicil so provides.

Effective date of designation or revocation by will

11 Notwithstanding *The Wills Act*, a designation or the revocation thereof contained in a will is effective from the time of the execution or signing of the will.

Irrevocable designation

12 A participant may make a designation by instrument irrevocable by so providing in the instrument and by filing the instrument at the head office or principal office in Canada of the administrator of the plan to which the designation relates.

Notice of effect of marriage and divorce

13 Any form furnished to a participant by the administrator of a plan for use in making a designation, and any report on the status of a plan furnished to a participant by the administrator of the plan, shall contain the following statement:

CAUTION: Your designation of a beneficiary by means of a designation form will not be revoked or changed automatically by any future marriage or divorce. Should you wish to change your beneficiary in the event of a future marriage or divorce, you will have to do so by means of a new designation.

Enforcement of designation

14 A person to whom a benefit is payable under a plan pursuant to a designation may enforce payment of the benefit against the administrator of the plan, but the administrator may set up any defence against the person that it could have set up against the participant who made the designation.

Discharge to plan administrator

15 Payment by the administrator of a plan of the benefits under the plan in accordance with a designation is, in the absence of actual notice of a subsequent designation or a subsequent revocation of the designation, a full discharge to the administrator of its obligations under the designation.

Conflict between Act and plan

16 Where this Act is inconsistent with a plan, this Act applies, unless the inconsistency relates to a designation made or proposed to be made after the making of a benefit payment where the benefit payment would have been different if the designation had been made before the benefit payment, in which case the plan applies.

Insurance Act

17 This Act does not apply to a contract or to the designation of a beneficiary to which *The Insurance Act* applies.

CHAPTER 3- POSSIBLE AREAS FOR REFORM

The Commission has considered the current law in Manitoba and elsewhere in Canada as it relates to beneficiary designations. In the Commission's view, there are a number of areas where the Act may not adequately address the current realities.

A. The Continuation of Beneficiary Designations when Plans are Renewed, Replaced or Converted

There is a gap in *The Beneficiary Designation Act* respecting the replacement or conversion of plans governed by the Act. For instance, pursuant to the *Income Tax Act (Canada)*, when a plan owner reaches the age of 72, a Registered Retirement Savings Plan (RRSP) must be converted to a Registered Retirement Income Fund (RRIF) or, when a plan is transferred to another institution, a new plan or contract is created. The converted or transferred plan, including a beneficiary designation, ceases to exist.[20] If the plan owner wishes to continue the same designation, he or she must make a fresh beneficiary designation. In other words, plan beneficiary designations do not roll over with the renewal, replacement, or conversion of a plan. By comparison, under *The Insurance Act*, in connection with group life and group accident and sickness policies, a roll over is provided.[21]

The state of *The Beneficiary Designation Act* is of particular concern to a plan owner who has made a beneficiary designation and becomes mentally incompetent. Clearly, such an owner cannot make a continuing beneficiary designation. The law is uncertain regarding the authority of a substitute decision maker (i.e. a committee appointed pursuant to *The Mental Health Act*[22] or an attorney pursuant to an enduring power of attorney or to a springing power of attorney triggered by the mental incompetence of the donor) to do so. The uncertainty of the law results from the ongoing debate on the testamentary or contractual character of plan beneficiary designations.[23]

To create certainty, as recommended by the 2006 Report of the British Columbia Law Reform Institute (BCLRI),[24] British Columbia has amended its *Power of Attorney Act*[25] and its *Wills, Estates and Succession Act*[26] to empower attorneys and other substitute decision makers to make

[20] *Bramley v. Bramley Estate* (2003) 3 ETR (3d) 191 (BCSC).
[21] *Supra* note 1, ss 154(2)(e), 167(5) and (6), 209(2)(e), 224(5) and (6), respectively; see Appendix A.
[22] CCSM c M110, ss 61 and 71.
[23] See Alberta Law Reform Institute, *Beneficiary Designations by Substitute Decision Makers*, Final Report No. 104 (2014) at paras. 22-25, 41-49. Available online: https://www.alri.ualberta.ca/docs/FR104.pdf [Alberta Report]; British Columbia Law Reform Institute, *Wills, Estates and Succession: A Modern Legal Framework*, Final Report No. 45(2006) at 71-73. Available at: http://www.bcli.org/sites/default/files/Wills_Estates_and_Succession_Report.pdf [BC Report].
[24] *Ibid* at 82.
[25] RSB 1996, c 370, s 20(5)(b).
[26] SBC 2009, c 13, s 90(1).

continuing beneficiary designations. The Alberta Law Reform Institute (ALRI) has recommended the enactment of similar legislation.[27] We think that Manitoba should also do so.

Provisional Recommendation #1

The Mental Health Act and *The Powers of Attorney Act* should be amended to expressly provide for a committee or an attorney, pursuant to an enduring power of attorney or a springing power of attorney triggered by the donor becoming mentally incompetent, to re-designate a beneficiary in a plan that renews, replaces, or converts a prior plan that designated that beneficiary in a plan as defined by and to which *The Beneficiary Designation Act* applies.

Provisional Recommendation #2

The definition of "participant" in *The Beneficiary Designation Act* should be amended by adding "and, except when the context otherwise requires, includes a committee or attorney empowered to make such a designation pursuant to *The Mental Health Act* and *The Powers of Attorney Act*.

B. Making, Changing and Revoking Beneficiary Designations

Another issue for consideration is whether substitute decision makers ought to be empowered to make, change, or revoke a beneficiary designation with court approval. Such an empowerment and process would create an exception to the law that substitute decision-makers do not have the authority[28] and courts do not have the jurisdiction[29] to make or alter wills.

Uniquely, as recommended by the 2006 Report of the BCLRI[30], the *Power of Attorney Act*[31] and the *Wills, Estates and Succession Act*[32] of British Columbia provide an attorney with the power to make, alter or revoke a beneficiary designation where the court authorizes the change and where the designation is not made in a will.

British Columbia's *Power of Attorney Act* provides at s. 20(5)(a):

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[27] Alberta Report, *supra* note 23, at 26.
[28] C. Harvey and D. MacPherson, *Agency and Partnership Law Primer* (Thomson Reuters, Toronto, 5th ed, 2016), p 18 at note 50.
[29] G.B. Robertson, *Mental Disability and the Law in Canada* (Toronto, Carswell, 2d ed., 1994), at 95-98.
[30] BC Report, *supra* note 23, at 82.
[31] *Supra* note 25, s 20 (5)(a).
[32] *Supra* note 26, s 85(3).

20(5) An attorney may, in an instrument other than a will,

(a) change a beneficiary designation made by the adult, if the court authorizes the change, or

(b) create a new beneficiary designation, if the designation is made in

(i) an instrument that is renewing, replacing or converting a similar instrument made by the adult, while capable, and the newly designated beneficiary is the same beneficiary that was designated in the similar instrument, or

(ii) a new instrument that is not renewing, replacing or converting a similar instrument made by the adult, while capable, and the newly designated beneficiary is the adult's estate.

British Columbia's *Wills, Estates and Succession Act* provides that:

Designated beneficiaries

[…]

[85](3) A person granted power over an adult's financial affairs under

(a) Part 2 of the *Power of Attorney Act*, or

(b) the *Patients Property Act*

may make, alter or revoke a designation under this section only if expressly authorized to do so by the court and the designation is not made in a will.

In contrast, in considering this matter in its 2014 Report, the ALRI decided against recommending that Alberta establish a similar statutory judicial will-making jurisdiction for persons lacking testamentary mental capacity.[33] This was despite the ALRI's acknowledgment that such an empowerment of substitute decision makers would be beneficial, for the reasons cited earlier, in certain instances. The Report states the following:

> [64] Alberta courts do not have jurisdiction to make statutory wills for persons without testamentary capacity. As summarized by the Alberta Law Reform Institute [in *The Creation of Wills*, Report No. 96, 2009, pp. 36-37]:
>
> > [T]here are some major philosophical hurdles militating against allowing a court to simply come in and rearrange a person's testamentary affairs when the subject is personally incapable of doing it. Canadian legislation largely respects the view that will-making is a sacrosanct personal act that should not ever be delegated to another.
>
> [65] The Institute [in *The Creation of Wills*, Report No. 96, 2009] did not recommend changes to the legislation to allow courts to engage in substitute will-making. Among the arguments against statutory wills were: the subjective nature of creating a will for another person, the existence and

[33] Alberta Report, *supra* note 23 at 28.

> nature of evidence in contested cases, the increase in litigation which could act as a drain on estates, the risk of misuse and abuse, and the fact that there did not seem to be any pressing need for court made wills or significant reform movement in Canada advocating this major legal change.
>
> [66] For similar reasons, it does not seem advisable to let courts exercise testamentary power under the guise of authorizing an attorney or trustee to name, change or revoke a beneficiary on behalf of an incapable person. That assets transferred through beneficiary designations are often as important, if not more so, than those assets passed by wills bolsters this reasoning. To avoid discrepancy, it is preferable to deal with court authorisation in a manner which is consistent with the *Wills and Succession Act* where the policy is clear.[34]

At this juncture, the Commission has not come to even a tentative conclusion on the question of whether substitute decision makers ought to be empowered to make, change, or revoke a beneficiary designation with court approval. Instead, the Commission prefers to await feedback from readers of this Consultation Report.

Issue for Discussion #1:

Should substitute decision makers be empowered to make, change or revoke a beneficiary designation with court approval?

C. Marriage, Divorce and Common-Law Relationships

Another issue contemplated by the Commission is whether a beneficiary designation ought to be statutorily revoked by a marriage or commencement of a common-law relationship. Section 17 of *The Wills Act* provides:

> **Revocation by marriage**
> **17** A will is revoked by the marriage of the testator except where
> (a) there is a declaration in the will that it is made in contemplation of the marriage; or
> (a.1) there is a declaration in the will that it is made in contemplation of the testator's common-law relationship with the person the testator subsequently marries; or
> (b) the will is made in exercise of a power of appointment of real or personal property which would not, in default of the appointment, pass to the heir, executor, or administrator of the testator or to the persons entitled to the estate of the testator if the testator died intestate; or

[34] *Ibid.*

(c) the will fulfills obligations of the testator to a former spouse or common-law partner under a separation agreement or court order.

Currently, section 13 of *The Beneficiary Designation Act* provides:

> **Notice of effect of marriage and divorce**
> **13** Any form furnished to a participant by the administrator of a plan for use in making a designation, and any report on the status of a plan furnished to a participant by the administrator of the plan, shall contain the following statement:
>
> CAUTION: Your designation of a beneficiary by means of a designation form will not be revoked or changed automatically by any future marriage or divorce. Should you wish to change your beneficiary in the event of a future marriage or divorce, you will have to do so by means of a new designation.

The wording of section 13 is the result of Recommendation 6 of the Commission's 1990 Report #73.[35]

Marriage or commencement of a common law relationship on beneficiary designations pursuant to *The Beneficiary Designation Act* does not have the effect of revoking the designation. Additionally, Section 13 of *The Beneficiary Designation Act* does not speak to the end of a common-law relationship as do subsections 18(2), 18(3) and 18(4) of *The Wills Act:*

> **Effect of divorce**
> **18(2)** Where in a will
> (a) a devise or bequest of a beneficial interest in property is made to a spouse of the testator;
> or
> (b) the spouse of the testator is appointed executor or trustee; or
> (c) a general or special power of appointment is conferred upon a spouse of the testator; and after the making of the will and before the death of the testator, the testator's marriage to that spouse is terminated by a decree absolute of divorce or is found to be void or declared a nullity by a court in a proceeding to which the testator is a party, then, unless a contrary intention appears in the will, the devise, bequest, appointment or power is revoked and the will shall be construed as if the spouse had predeceased the testator.
>
> **Definition of "spouse"**
> **18(3)** In subsection (2) "spouse" includes the person purported or thought by the testator to be the spouse of the testator.
>
> **Effect of termination of common-law relationship**
> **18(4)** Where in a will
> (a) a devise or bequest of a beneficial interest in property is made to the common-law partner of the testator;

[35] *Supra* note 14 at 16; see Appendix B.

(b) the common-law partner of the testator is appointed executor or trustee; or
(c) a general or special power of appointment is conferred on a common-law partner of the testator;
and after making the will and before the death of the testator, the testator's common-law relationship with his or her common-law partner is terminated
(d) where the common-law relationship was registered under section 13.1 of *The Vital Statistics Act*, by registration of the dissolution of the common-law relationship under section 13.2 of *The Vital Statistics Act*; or
(e) where the common-law relationship was not registered under section 13.1 of *The Vital Statistics Act*, by virtue of having lived separate and apart for a period of at least three years;
then, unless a contrary intention appears in the will, the devise, bequest, appointment or power is revoked and the will shall be construed as if the common-law partner predeceased the testator.

Subsections 18(2), (3) and (4) of *The Wills Act* have the effect of establishing that the termination or voiding of a marriage or common law relationship revokes provisions made to a spouse or common-law partner by will unless there is an express intention otherwise.

In the ALRI's 2014 Report[36], the Alberta commissioners recommended that the *Insurance Act* and section 25 of the *Wills and Succession Act*[37] of that province should be amended to provide that, subject to the contrary intention expressed in a plan or by a plan participant, the legal end of a marriage or a common-law relationship has the effect of revoking any beneficiary designation in favour of the former spouse or common law partner.[38] This recommendation, however, has not been implemented and no other comparable Canadian legislation so provides.

In its 1990 Report, the Manitoba Commission considered and rejected such a recommendation, opting to recommend what comprises section 13 of *The Beneficiary Designation Act*, set out above, instead.

In its 2003 Report titled "Wills and Succession Legislation"[39], the Manitoba Commission again considered the effect of divorce on provisions made to a spouse in a will as provided for in s.18 of *The Wills Act.* The Commission observed that section 18(2) does not provide that divorce revokes a retirement plan or insurance beneficiary designation contained in a will. It also identified that, while section 169(3) of *The Insurance Act* provides that the revocation of a will by law or otherwise revokes a beneficiary designation contained in the will, the effect of section 18(2) is simply to revoke the specific devise or bequest, not to revoke the will in its entirety.[40] Therefore, section 169(3) of *The Insurance Act* does not apply to the divorce or breakdown of a common law relationship.

[36] Alberta Report, *supra* note 23; see Appendix C.
[37] Section 25 is comparable to *The Wills Act of Manitoba*, s 18 (2) and (4); see Appendix D.
[38] Alberta Report, *supra* note 23 at paras. 68-74.
[39] Manitoba Law Reform Commission, *Wills and Succession Legislation,* Report No. 108 (2003); see Appendix E.
[40] *Ibid,* 29.

In its 2003 Report, the Manitoba Commission recommended that the *The Wills Act* be amended to treat retirement plan and insurance beneficiary designations in favour of a spouse in the same manner as other devises or bequests. To date, no changes have been implemented.

The Commission seeks input on whether the Commission ought to follow the lead of the Alberta Law Reform Institute and recommend that a section be added to *The Beneficiary Designation Act* comparable to sections 17, 18(2) and (4) of *The Wills Act.* The Commission also seeks input on whether retirement plan and insurance beneficiary designations in wills ought to be treated the same as devises or bequests upon divorce as initially recommended by the Commission in its 2003 Report.

Issues for Discussion #2:

1. Should section 13 of *The Beneficiary Designation Act* remain in its present state?
2. Should section 13 remain as is, but "commencement or termination of a common-law relationship" be added?
3. Should section 13 be repealed and replaced by sections akin to s. 17 of *The Wills Act* regarding the effect of marriage and commencement of a common-law relationship and like ss. 17, 18(2),(3) and (4) regarding divorce and the termination of a common-law relationship?
4. Should section 169(3) of *The Insurance Act* also be repealed and replaced by sections akin to ss. 17, 18(2),(3) and (4) of *The Wills Act*?
5. If the answer to questions 2 is *yes*, should a section akin to s. 13 be added to *The Insurance Act* requiring a "Caution" respecting the termination effect of marriage, divorce, and the commencement or termination of a common-law relationship?

D. Other Areas for Potential Reform

The legislation of British Columbia[41], Alberta[42], and Prince Edward Island[43] contains provisions that may be either superior to those in *The Beneficiary Designation Act* or that are not contained in Manitoba's legislation at all.

[41] *Wills and Succession Act*, supra, note 26.
[42] *Wills and Succession Act*, SA 2010, c W-12.2.
[43] *Designation of Beneficiaries Under Benefit Plans Act*, RSPEI 1988, c D-12.

(i) Irrevocable Beneficiary Designations

While a typical beneficiary designation may be altered or revoked prior to the death of the deceased, an irrevocable plan designation cannot be revoked or changed without the consent of the named beneficiary. While creating a beneficiary designation that limits a plan owner's ability to revoke or change his or her own plan designation may seem unnecessary and heavy-handed, as described in the 2003 British Columbia report, irrevocable designations serve as important security instruments in separation agreements and spousal and child maintenance orders.[44] In its report, the BCLRI quoted from the Court of Appeal in *Law v. Tretiak*[45]:

> [i]nterests in plans often constitute family assets, and on the breakdown of a marriage it may be a term of the separation agreement that one spouse appoint the other as a beneficiary. If that designation could be made irrevocable except with the consent of the spouse named in the designation, it could not be revoked in breach of the separation agreement.[46]

Section 12 of the Manitoba Act directs how a plan participant may make a beneficiary designation irrevocable.

> **Irrevocable designation**
> **12** A participant may make a designation by instrument irrevocable by so providing in the instrument and by filing the instrument at the head office or principal office in Canada of the administrator of the plan to which the designation relates.

This section contrasts with the equivalent provisions in British Columbia's *Wills, Estates and Succession Act.* Sections 87 and 88 of British Columbia's Act provide:

> **Irrevocable designations**
> **87** (1) A participant may make an irrevocable designation.
> (2) An irrevocable designation has effect as an irrevocable designation only if, during the lifetime of the participant, it is filed with an office in Canada specified for that purpose by the benefit plan administrator.
> (3) If a person
> (a) makes an irrevocable designation by will, or
> (b) makes an irrevocable designation that is not filed in accordance with subsection (2),
> the designation takes effect as a revocable designation.
>
> **Effect of irrevocable designation**
> **88** (1) While a designated beneficiary of an irrevocable designation is living, the participant may not alter or revoke the designation without the consent of the designated beneficiary.

[44] BC Report *supra* note 23 at xix-xx.
[45] (1993), 80 BCLR (2d) 1 (CA) cited in BC Report *supra* note 23 at 10..
[46] Ibid at 9.

(2) A benefit that is the subject of an irrevocable designation
(a) is not subject to the control of the participant or the participant's creditors, and
(b) does not form part of the participant's estate.

Unlike section 12 in Manitoba's legislation, the British Columbia Act expressly provides that the effect of an unsuccessful attempt to establish an irrevocable designation, either because the instrument was not properly filed or where it was contained in a will, will be the creation of a revocable designation and not a failure of the designation altogether. In contrast, Manitoba's legislation is silent on the effect of a failed attempt to establish an irrevocable designation. Additionally, s. 88 of British Columbia's Act provides that an irrevocable designation may be altered or revoked where the designated beneficiary consents to the change. This section also provides that the subject of the irrevocable designation is not subject to the control of the participant's creditors, a potentially significant provision.

Issue for Discussion #3:

Can s. 12 of the Manitoba Act be improved by drawing on ss. 87 and 88 of the *Wills and Succession Act* of British Columbia?

(ii) Multiple Beneficiaries

The Commission is considering whether to recommend the addition of provisions to *The Beneficiaries Designation Act* relating to multiple designated beneficiaries.

British Columbia's *Wills, Estates and Succession Act* offers guidance when multiple beneficiaries are designated under a plan. Sections 86 provides:

Several designated beneficiaries
86 If 2 or more designated beneficiaries are designated other than alternatively, but no division is made of the benefit payable under the benefit plan on the participant's death, the benefit is payable to the designated beneficiaries in equal shares.

The Beneficiaries Designation Act of Manitoba contains no sections comparable to sections 86 of the *Wills and Succession Act* of British Columbia.

Issue for Discussion #4:

The Commission seeks input on whether to recommend that the Manitoba Act be amended to provide guidance where multiple beneficiaries are designated.

(iii) Trusteeship

Additionally, the Commission seeks input on whether Manitoba's legislation ought to provide for appointment of trustees for beneficiaries.

The *Wills, Estates, and Succession Act* of British Columbia provides the following:

> **Trustee for designated beneficiary**
> **92** (1) A participant may, in the same manner as a designation, appoint or alter or revoke the appointment of a trustee for a designated beneficiary.
> (2) A payment made by a benefit plan to the trustee for a designated beneficiary discharges the benefit plan administrator to the extent of the payment.

Issue for Discussion #5:

Should *The Beneficiary Designation Act* provide for the appointment of trustees for beneficiaries under plans?

(iv) Prescribed Plans

Alberta's *Wills and Succession Act*[47] provides that certain funds, trusts, schemes, contracts or arrangements may be prescribed by regulation as 'plans' for the purpose of the governing Act.

Sub-section 71(19) provides:

> **Designation of person to receive a benefit under a plan**
> **71** (19) The Lieutenant Governor in Council may make regulations prescribing funds, trusts, schemes, contracts and arrangements as plans for the purposes of this section.

The legislation of Ontario[48], New Brunswick[49], Prince Edward Island[50], Yukon[51], and Nunavut[52] contain a section comparable to section 71(19) of the *Wills and Succession Act* of Alberta.

[47] *Supra* note 42.
[48] *The Succession Law Reform Act*, RSO 1990, c S 26, s 53.1.
[49] *Retirement Plan Beneficiaries Act,* SNB 2012, c 144, s 12(1).
[50] *Designation of Beneficiaries Under Benefit Plans Act,* RSPEI 1988, c D-9 s 11.
[51] *Retirement Plan Beneficiaries Act,* RSY 2002, c197, s14.
[52] *Beneficiaries Designation Act (Retirement, Savings and Other Plans,* RSNWT 1988, c R-6, s 13(1).

Issue for Discussion #6:

Should a provision like ss. 71(19) of Alberta's legislation be added to *The Beneficiary Designation Act* of Manitoba?

(v) Beneficiary Pre-Deceasing Plan Owner

The Commission has also considered whether *The Beneficiary Designation Act* is deficient in failing to consider what occurs in situations where a designated beneficiary predeceases a plan participant.

The *Wills and Succession Act* of British Columbia contains a unique section:

> **Designated beneficiary dying before participant**
>
> **91** If a designated beneficiary dies before the participant, and no disposition of the share of the deceased designated beneficiary is provided for in the designation, the share is payable
> (a) to the surviving designated beneficiary,
> (b) if there is more than one surviving designated beneficiary, to the surviving designated beneficiaries in equal shares, or
> (c) if there is no surviving designated beneficiary, to the participant's personal representative.

Section 91 was incorporated into British Columbia's *Wills, Estates, and Succession Act* when it replaced the previous *Wills Act* and was recommended by the BCLRI in its 2006 Report.[53] The BCLRI recommended the addition of section 91 which harmonizes British Columbia's plans legislation with a section in British Columbia's *Insurance Act* of the same effect.

Section 63 of British Columbia's *Insurance Act* governs situations where a beneficiary pre-deceases a life insured and is comparable to s. 171 of *The Insurance Act* of Manitoba:

> **Beneficiary dying before life insured**
>
> 171(1) When a beneficiary dies before the person whose life is insured, and no disposition of the deceased beneficiary's share in the insurance money is provided in the contract or by a declaration, the share is payable
> (a) to the surviving beneficiary;
> (b) if there is more than one surviving beneficiary, to the surviving beneficiaries, in equal shares; or

[53] BC Report, *supra* note 17 at 184.

(c) if there is no surviving beneficiary, to the insured or the insured's personal representative.

Several beneficiaries

171(2) If 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.

Disclaimer by beneficiary

171(3) A beneficiary may disclaim the beneficiary's right to insurance money by filing a notice in writing with the insurer at its head or principal office in Canada.

Disclaimer is irrevocable

171(4) A notice of disclaimer filed under subsection (3) is irrevocable.

Payment of insurance money when beneficiary disclaims or is disentitled

171(5) Subsection (1) applies in the case of a disclaiming beneficiary or of a beneficiary determined by a court to be disentitled to insurance money as if the disclaiming or disentitled beneficiary died before the person whose life is insured.[54]

Issue for Discussion #7:

Should the Commission recommend that Manitoba follow British Columbia's lead and harmonize the effect of a designated beneficiary predeceasing a plan owner with section 171(1) of *The Insurance Act?*

If the Commission did recommend that *The Beneficiary Designation Act* be amended to include a section comparable to section 91 of British Columbia's *Wills, Estates, and Succession Act*, a second issue is whether it ought to go further and include a subsection like subsection 25.2 of *The Wills Act* of Manitoba. Subsection 25.2 of *The Wills Act* provides:

When issue predecease testator

25.2 Except when a contrary intention appears by the will, where a person dies in the lifetime of a testator, either before or after the testator makes the will, and that person

(a) is a child or other issue or a brother or sister of the testator to whom, either as an individual or as a member of a class, is devised or bequeathed an estate or interest in real or personal property not determinable at or before the death of the child or other issue or the brother or sister, as the case may be; and

[54] *Insurance Act, supra* note 2.

(b) leaves issue any of whom is living at the time of the death of the testator;

the devise or bequest does not lapse, but takes effect as if it had been made directly to the persons among whom, and in the shares in which, the estate of that person would have been divisible if that person had died intestate without leaving a spouse or common-law partner and without debts immediately after the death of the testator.[55]

Issue for Discussion #8:

If the Commission recommends the Act be amended to harmonize the effect of a designated beneficiary predeceasing a plan owner with s. 171(1) of *The Insurance Act*, should it also include a subsection like ss. 25.2 of *The Wills Act*?

(vi) Plan Benefits and Claims from Creditors

An issue of considerable importance is whether *The Beneficiary Designation Act* ought to be amended to provide that plans designated under the Act are not subject to the claims of creditors. This would involve the addition or provisions comparable to section 95 of the *Wills and Succession Act* of British Columbia and sections 9 and 10 of the *Designation of Beneficiaries Under Benefit Plans Act*[56] of Prince Edward Island.

British Columbia's *Wills, Estates, and Succession Act* provides:

> **Benefit not part of estate**
> **95** A benefit payable to a designated beneficiary or to a trustee appointed under section 92 under a benefit plan on the death of a participant does not form part of the participant's estate and is not subject to the claims of the participant's creditors.

Similarly, sections 9 and 10 of Prince Edward Island's legislation states[57]:

> **Plan money not part of estate and free from creditors**
>
> **9** Where a beneficiary is designated, any benefit payable to the beneficiary is not, from the time of the happening of the event upon which it becomes payable, part of the estate of the participant, and is not subject to the claims of the creditors of the participant.

[55] *Wills Act*, *supra* note 2.
[56] RSPEI 1988, c D-9.
[57] *Ibid.*

Plan exempt from execution

10 (1) Where a designation in favour of a spouse, child, grandchild or parent of a participant is in effect, the assets of the plan and the rights and interests of the participant therein and in the plan are exempt from execution or seizure.

(2) Subsection (1) does not apply to
(a) a tax-free savings account; or
(b) any other plan that is prescribed as being exempt from the application of subsection (1).

The Commission's 1990 Report #73 recommended that Manitoba's legislation be amended to include provisions similar to those set out above.[58] These recommendations were never implemented.

There has been a spate of Manitoba cases dealing with this matter. In *Waugh Estate* v. *Waugh*[59] Justice Wright held that Registered Savings Plan proceeds are an asset of the deceased plan owner's estate, expressly disagreeing with the same court's decision in *Daniel* v. *Daniel*[60]. In *King* v. *King*[61], without referring to either *Daniel* or *Waugh Estate*, Justice Kennedy decided that such plan proceeds are not an asset of the deceased plan owner's estate, but rather are payable directly to the designated beneficiary. In *Pozniak Estate* v. *Pozniak*[62] the Court of Appeal agreed with the court in *Waugh Estate*. Relevant to the issue at that time was section 11 of *The Retirement Plan Beneficiaries Act*[63] :

Enforcement of Designation
11 After the death of a participant who has made a designation that is in effect at the time of his death, the person designated may enforce payment of the benefit payable to him under the plan, but the person against whom the payment is sought to be enforced may set up any defence that he could have set up against the participant or his personal representative.

When *The Retirement Plan Beneficiaries Act* was re-enacted in 1992, section 11 was slightly revised and became the current section 14:

Enforcement of designation
14 A person to whom a benefit is payable under a plan pursuant to a designation may enforce payment of the benefit against the administrator of the plan, but the administrator may set up any defence against the person that it could have set up against the participant who made the designation.

[58] *Ibid* at 17; See Recommendations 7 and 8 at Appendix F
[59] (1990) 63 Man R (2d) 155 (QB).
[60] (1986) 41 Man R (2d) 66 (QB).
[61] (1990) 68 Man R (2d) 253 (QB).
[62] (1993) 88 Man R (2d) 36 (CA).
[63] Supra, note 9.

Additionally, in 1992, current section 15 was added:

> **Discharge to plan administrator**
> **15** Payment by the administrator of a plan of the benefits under the plan in accordance with a designation is, in the absence of actual notice of a subsequent designation or a subsequent revocation of the designation, a full discharge to the administrator of its obligations under the designation.

In *Copet* v. *Clark* [64], the Court of Queen's Bench considered funeral expenses of $7014.83 paid by the deceased's executor out of his own pocket, only $3381.08 of which he recovered from the deceased's $3381.08 estate. This left the estate insolvent. The deceased had an RSP, the proceeds of which were paid directly to the deceased's children, whom she had designated to be the beneficiaries. The executor successfully sued the deceased's widower in the Small Claims Court for the balance of the funeral expenses on the basis of the ultimate legal responsibility of a surviving spouse for the funeral costs of a deceased spouse. The widower appealed to the Court of Queen's Bench. The widower's submission, based upon *Pozniak Estate*, was that the deceased's estate was not insolvent because her RSP proceeds should have been paid to her estate, not the designated beneficiaries. Justice Mykle upheld the Small Claims Court decision. He disagreed with the widower and distinguished *Pozniak Estate* on the basis of sections 14 and 15 of the 1992 re-enactment. He said:

> The legislative scheme now permits a designated beneficiary to enforce payment directly to that beneficiary, upon which payment the administrator of the plan is discharged of its obligations. It is clear that the intent of the present legislation is that such funds do not form part of the deceased's estate.

The Court of Appeal affirmed the Court of Queen's Bench decision, sub nom *Clarke Estate* v. *Clarke*[65], but added in an *obiter dictum* that, since Recommendations 7 and 8 of the Commission's Report #73, 1990, were not implemented, although plan proceeds payable to a designated beneficiary or to designated beneficiaries are not an "asset" of the estate, plan proceeds paid to a designated beneficiary or beneficiaries are not immune from the claims of creditors of the deceased plan owner's estate whose claims cannot be met by the estate.[66]

At this time, the Commission is not making a recommendation on whether Recommendations 7 and 8 of its Report #73, 1990 should be implemented.

[64] 27 February 1995, Brandon Centre 95.02.270CI (QB).
[65] (1997) 115 Man. R. (2d) 48 (CA).
[66] *Ibid*, paras 25-33; see Appendix G.

Issue for Discussion #9:

Given the Court of Appeal's *obiter dictum* in *Clarke Estate*, should the Commission reiterate recommendations 7 and 8 from its Report #73? If so, should the section refer not only to "creditors", but also to other claimants, such as those pursuant to *The Marital Property Act* and *The Dependants Relief Act*?

E. A Final Matter- Treatment of Designations under *The Pension Benefits Act* where Member Has a Spouse or Common-Law Partner

The Commission received an email from a lawyer who drew a situation to the attention of the Commission where the owner or participant in a plan under *The Beneficiary Designation Act* is married or in a common-law relationship at the time of the owner/participant's death. The lawyer noted that various provisions of the Act,[67] and indeed, the Act as a whole, operates on the principle that the person designated as the beneficiary remains the beneficiary unless or until the designation is revoked. Despite this, the statutes which govern various types of plans, as defined in section 1 of the Act, and the statutes which govern the disposition of property generally, may contain different rules with respect to who is entitled to property when someone dies, notwithstanding the beneficiary designation made by the plan owner/participant. As an example, sections 21(26) and 23(1) of *The Pension Benefits Act* provide:

> **21(26)** If a member of a pension plan dies before his or her pension commences, the plan must
>
> (a) subject to subsection (26.2), provide a pension under the plan to the member's spouse or common-law partner, unless
>
> i. at the time of death the member was living separate and apart from the spouse or common-law partner by reason of a breakdown of their relationship, or
>
> ii. the spouse or common-law partner has waived his or her entitlement to the pension in accordance with subsection (26.3) and the waiver has not been revoked under subsection (26.4); or
>
> (b) if there is no spouse or common-law partner entitled to a pension under clause (a), pay an amount to
>
> i. the member's designated beneficiary, other than the member's spouse or common-law partner, or
>
> ii. the member's estate, if there is no such designated beneficiary.
>
> **23(1)** Every pension plan must provide that the pension payable to a member who, when the pension commences, has a spouse or common-law partner must be a joint pension payable

[67] *Supra* note 3, ss. 2, 5, 13 and 16, for example.

(a) to the member during his or her lifetime; and
(b) after the member dies, to the spouse or common-law partner for his or her lifetime if he or she survives the member;
unless
(c) immediately before the pension commences, the member is living separate and apart from the spouse or common-law partner by reason of a breakdown of their relationship; or
(d) the spouse or common-law partner has waived his or her entitlement to the joint pension in accordance with subsection (4), and the waiver has not been revoked under subsection (5).

Accordingly, regardless of who may have been designated as a beneficiary by the owner/participant in a pension plan, *The Pension Benefits Act* provides that the spouse or common-law partner is entitled to receive survivor's benefits, unless the relationship had broken down at the time of the member's death or the spouse or common-law partner has expressly waived his or her pension entitlement.

The lawyer suggested that there may be other statutes in Manitoba, such as *The Family Property Act*, *The Insurance Act*, and *The Intestate Succession Act*, which provide different rules regarding the entitlement of spouses or common-law partners to benefits of plans or policies upon the death of the members, owners or participants of such plans or policies, which may trump any beneficiary designation made pursuant to the Act. He suggested that the Commission may wish to investigate whether or not there is a way, from a practical perspective, to make people aware of the legal ramifications associated with their beneficiary designations.

This matter came to the lawyer's attention as a result of a case he was retained on in which the adult children of a widower were designated as the beneficiaries of the widower's pension. Following his death, the widower's common-law partner made a claim to the pension. She produced evidence to prove that she had been in a common-law relationship with the deceased plan member prior to his retirement and until the time of his death. The pension administrator found that, since the deceased plan member had been in a common-law relationship prior to his death, as per the terms of *The Pension Benefits Act*, the common-law spouse was entitled to his pension benefits. The children had always understood that their father had wanted them to be the beneficiaries of his pension when he died. It is possible that he intended that his children receive the benefit failing to understand the impact *The Pension Benefits Act* provisions would have on his children's claim.

One option may be to treat this matter in the same way as the effect of marriage under section 13 of *The Beneficiary Designation Act*, which would require any designation form or report on the status of a plan furnished to a plan participant to contain an appropriate caution. The Commission is seeking input on this matter.

Issue for Discussion #10:

Should changes be made to *The Pension Benefits Act* requiring designation forms and status reports contain a caution similar to that required by s. 13 of *The Beneficiary Designation Act*?

CHAPTER 4 - LIST OF PROVISIONAL RECOMMENDATIONS & ISSUES FOR DISCUSSION

Provisional Recommendations:

Provisional Recommendation #1: *The Mental Health Act* and *The Powers of Attorney Act* should be amended to provide expressly for a committee or an attorney, pursuant to an enduring power of attorney or a springing power of attorney triggered by the donor becoming mentally incompetent, to re-designate a beneficiary in a plan that renews, replaces, or converts a prior plan that designated that beneficiary in a plan as defined by and to which *The Beneficiary Designation Act (Retirement, Savings and Other Plans)* applies (p. 7).

Provisional Recommendation #2: The definition of "participant" in *The Beneficiary Designation Act (Retirement, Savings and Other Plans)* should be amended by adding "and, except when the context otherwise requires, includes a committee or attorney empowered to make such a designation pursuant to *The Mental Health Act* and *The Powers of Attorney Act*" (p. 7).

Issues for Discussion:

Issue for Discussion #1: Should substitute decision makers be empowered to make, change or revoke a beneficiary designation with court approval? (p. 9)

Issues for Discussion #2:

1. Should section 13 of *The Beneficiary Designation Act* remain in its present state?
2. Should section 13 remain as is, but "commencement or termination of a common-law relationship" be added?
3. Should section 13 be repealed and replaced by sections akin to s. 17 of *The Wills Act* regarding the effect of marriage and commencement of a common-law relationship and like ss. 17, 18(2),(3) and (4) regarding divorce and the termination of a common-law relationship?
4. Should section 169(3) of *The Insurance Act* also be repealed and replaced by sections akin to ss. 17, 18(2),(3) and (4) of *The Wills Act*?
5. If the answer to questions 2 is *yes*, should a section akin to s. 13 be added to *The Insurance Act* requiring a "Caution" respecting the termination effect of marriage, divorce, and the commencement or ending of a common-law relationship? (p. 12)

Issue for Discussion #3: Can s. 12 of the Manitoba Act be improved by drawing on ss. 87 and 88 of the *Wills and Succession Act* of British Columbia? (p. 14)

Issue for Discussion #4: The Commission seeks input on whether to recommend that the Manitoba Act be amended to provide guidance where multiple beneficiaries are designated. (p. 15)

Issue for Discussion #5: Should *The Beneficiary Designation Act* provide for the appointment of trustees for beneficiaries under plans?(p. 15)

Issue for Discussion #6: Should a provision like ss. 71(19) of Alberta's legislation be added to *The Beneficiary Designation Act* of Manitoba? (p. 16)

Issue for Discussion #7: Should the Commission recommend that Manitoba follow British Columbia's lead and harmonize the effect of a designated beneficiary predeceasing a plan owner with section 171(1) of *The Insurance Act?* (p. 17)

Issue for Discussion #8: If the Commission recommends the Act be amended to harmonize the effect of a designated beneficiary predeceasing a plan owner with s. 171(1) of *The Insurance Act*, should it also include a subsection like ss. 25.2 of *The Wills Act*? (p.18)

Issue for Discussion #9: Given the Court of Appeal *Clarke Estate obiter dictum*, should the Commission reiterate recommendations 7 and 8 from its Report #73? If so, should the section refer not only to "creditors", but also to other claimants, such as those pursuant to *The Marital Property Act* and *The Dependants Relief Act*? (p. 21)

Issue for Discussion #10: Should changes be made to *The Pension Benefits Act* requiring designation forms and status reports contain a caution similar to that required by s. 13 of *The Beneficiary Designation Act*? (p. 23)

APPENDIX A

The Insurance Act, CCSM c I40

Contents of group certificate

154(2) In the case of a contract of group insurance or creditor's group insurance, the insurer must issue, for delivery by the insured to each group life insured or debtor insured, a certificate or other document in which are set out the following: …

> (e) in the case of a contract of group insurance that replaces another contract of group insurance on some or all of the group life insureds under the replaced contract, whether a designation of a group life insured, a group life insured's personal representative or a beneficiary as a person to whom or for whose benefit insurance money is to be payable under the replaced contract applies to the replacing contract; …

Application of designation to replacement contract

167(5) A contract of group insurance replacing another contract of group insurance on some or all of the group life insured under the replaced contract may provide that a designation applicable to the replaced contract of a group life insured, a group life insured's personal representative or a beneficiary as a person to whom or for whose benefit insurance money is to be payable is deemed to apply to the replacing contract.

Insurer's obligation under replacement contract

167(6) If a contract of group insurance replacing another contract of group insurance provides that a designation referred to in subsection (5) is deemed to apply to the replacing contract,

(a) each certificate in respect of the replacing contract must indicate that the designation under the replaced contract has been carried forward and that the group life insured should review the existing designation to ensure it reflects the group life insured's current intentions; and
(b) as between the insurer under the replacing contract and a claimant under that contract, that insurer is liable to the claimant for any errors or omissions by the previous insurer in respect of the recording of the designation carried forward under the replacing contract.

Sections 209(2)(e) and 224(5) and (6) respecting group accident and sickness policies are identical to ss. 154(2)(e) and 167(5) and (6).

APPENDIX B

Statutory Designations and *The Retirement Plan Beneficiaries Act*,
Report #73, 1990, The Manitoba Law Reform Commission

E. EFFECT OF MARRIAGE AND DIVORCE

In our Discussion Paper, we noted that an inconsistency exists between *The Retirement Plan Beneficiaries Act* and *The Wills Act* in their treatment of the effect of marriage and divorce on designations and wills. The same inconsistency exists between the other statutes permitting designations (*The Insurance Act* and *The Pension Benefits Act*) and *The Wills Act*.

Generally speaking, where an individual marries, any will made prior to that marriage is revoked.[1] As a result, any designation of beneficiary of an insurance policy or a plan which may have been contained in the will will also be automatically revoked by operation of law.[2] The purpose of such a revocation is, of course, to ensure that an individual who is marrying will consider his or her new responsibilities and make a new will (and, presumably, new designations); if he or she does not make a new will, the revocation, in concert with other statutes, ensures that the spouse and any dependent children are the beneficiaries of the estate. However, a designation which is made outside of a will under *The Retirement Plan Beneficiaries Act* (or under *The Insurance Act* or *The Pension Benefits Act*) is not similarly revoked upon marriage.

Under *The Wills Act*, divorce does not have the effect of revoking a will. However, it does have the effect of revoking any gift to the divorced spouse contained in that will.[3] Designations made under statues (including *The Retirement Plan Beneficiaries Act*) are unaffected by divorce.

The Law Reform Commission of British Columbia identified two main reasons why statutory designations should also be revoked by operation of law on the marriage of an individual. First, such designations remove the affected asset from the estate of the deceased. As a result, they are not available to a surviving spouse who did not receive at least one-half of the deceased's estate (as they would be under *The Dower Act*), nor are they available to a dependant who did not receive an adequate bequest under the will (as they would be under *The Dependants Relief Act* or the former *Testators Family Maintenance Act*).[4] Secondly, as noted earlier in this Discussion Paper, there is a very real tendency for statutory designations, once made, to be forgotten by the maker.

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[1] A will is not revoked by the marriage of the testator where there is a declaration in the will that it is made in contemplation of the marriage or where the will is made in exercise of a power of appointment of property which would not otherwise pass to the testator's heirs: *The Wills Act*, C.C.S.M. c. W150, s. 17.

[2] *The Wills Act*, CCSM c W150, s 17 [Wills Act]; *The Retirement Plan Beneficiaries Act*, CCSM c R138, c 6; *The Insurance Act*, CCSM c I40 [Insurance Act], ss 169(3) & 224(4).

[3] *The Wills Act*, C.C.S.M. c. W150, s. 18(2).

[4] Concern over this possibility was also expressed by the Commission in its Reports on these two statutes: Manitoba Law Reform Commission, *Report on an Examination of The Dower Act* (1984, Report #60) 135-143; Manitoba Law Reform Commission, *Report on The Testators Family Maintenance Act* (1985, Report #63) 108-110.

This may often result in individuals simply forgetting to change a beneficiary designation to their spouse. The courts have no jurisdiction to correct such oversights, however obvious they may be.

Two arguments have been put forward for the proposition that a bequest or designation should be revoked upon divorce. First, it is presumed that such a revocation would be in accordance with the wishes of the affected individuals. Secondly, it is assumed that appropriate provision for an accounting and division of assets will have been made by agreement, under *The Marital Property Act*,[5] or in the divorce. Such a division will have taken insurance policies, pension plans and the like into account. Therefore, unless any designations in favour of the divorced spouse are revoked, it is possible that that spouse will be over-benefited if he or she also receives such assets.

The effect which marriage and divorce should have on designations under *The Retirement Plan Beneficiaries Act* poses a thorny problem. Although we are attracted by the reasoning set out above, we find ourselves faced with a choice of inconsistencies. We may:

(a) change *The Retirement Plan Beneficiaries Act* so that it will accord with *The Wills Act*. However, it would then be out of line with *The Insurance Act* and *The Pension Benefits Act*;
(b) make no change to *The Retirement Plan Beneficiaries Act*. The result is that that Act remains inconsistent with *The Wills Act*, but is still in line with the other statutes authorizing the designation of beneficiaries;
(c) change all three statutes authorizing the designation of beneficiaries, so that they are made to be consistent with *The Wills Act*.

At first blush, the latter option would appear to be the obvious answer. However, we think that it would be inappropriate to recommend changes to *The Insurance Act* and *The Pension Benefits Act* when we had not previously indicated that that was in our contemplation. This is doubly so in light of the fact that both of these Acts are under the on-going supervision of specialized provincial and national bodies; changes in insurance law should be made under the aegis of the Canadian Council of Insurance Regulators.

Each of the other two options contains the seeds of potential injustices. Changing *The Retirement Plan Beneficiaries Act* so that designations are revoked on marriage may work unfairly on persons who are remarrying and who have children from a previous marriage; if they have previously designated those children as their beneficiaries and do not realize that they must redesignate them after remarriage, their wishes will be thwarted. Leaving *The Retirement Plan Beneficiaries Act* in its present form may be similarly unfair on divorce; a divorcing spouse who believes that the divorce will revoke a designation to the ex-spouse, as it revokes gifts in a will to that ex-spouse, will not realize that a new designation is required. On balance, we believe that it is best to leave the present situation unchanged, so that there is at least consistency among the three statutes

[5] Insurance policies, annuities and pension and superannuation plans are all family assets *under The Marital Property Act*, C.C.S.M. c. M45, s. 1(2) and therefore shareable upon application.

permitting designations. However, because of our concern that the differing effects of marriage and divorce on wills and designations may confuse the public, we believe that it is essential that this fact be brought to their attention. We therefore recommend:

RECOMMENDATION 6

That every form which permits the designation of a beneficiary and which is provided by an administrator of a plan governed by The Retirement Plan Beneficiaries Act and every report on the status of a plan from a plan administrator to a participant shall contain the following statement:

> *Note: Your designation of a beneficiary will not be affected and will remain in force if you marry or divorce in the future. If you ever wish to designate a different beneficiary, you must do so in a will or must complete a new designation form.*

If, at some future time *The Insurance Act* and *The Pension Benefits Act* are changed to accord with *The Wills Act*, *The Retirement Plan Beneficiaries Act* could then be similarly changed and the above notice would no longer be necessary.

APPENDIX C

Beneficiary Designation By Substitute Decision Makers,
Report 104, 2014, Alberta Law Reform Institute

D. Should a Beneficiary Designation be Revoked When a Marriage or Adult Interdependent Relationship Ends?

[68] There will be instances where a former spouse or adult interdependent partner will continue to benefit as a result of the owner's inability to revoke that beneficiary designation. This result has been cited as ground for expanding attorneys' and trustees' powers in specified circumstances.[1] However, most "forgotten" beneficiary designations are only discovered after the death of the plan or policy owner when the money is paid to the designated beneficiary. At that point it is too late for an attorney or trustee to make the change even if they were authorised to do so.

[69] While a gift in a will to a spouse or adult interdependent partner is revoked when the relationship ends, a beneficiary designation will remain in effect even after the marriage or adult interdependent partnership has ended. The general releases and waivers usually contained in a separation agreement may not be specific enough to revoke a beneficiary designation in favour of a former spouse or adult interdependent partner. As a result, unless the plan or policy owner takes positive action to change the designation, the benefit or proceeds of that plan or policy will pass to the former spouse or adult interdependent partner. Allowing an attorney or trustee to change the designation would provide a partial remedy. However, as noted, very often the "forgotten" designations are not discovered in time.

[70] There does not appear to be any reason for treating beneficiary designations differently than gifts in a will when the marriage or adult interdependent partnership ends. The difference is additionally difficult to justify considering that beneficiary designations are often used as an alternative to a will. The issue of "forgotten" designations could easily be dealt with by adopting the same policy that applies for wills. Subject to a contrary intention, a beneficiary designation in favour of a former spouse or adult interdependent partner would automatically be revoked upon the ending of that relationship.[2]

[71] Sometimes more than one beneficiary may be designated in the same instrument. For example, the owner may designate their spouse and children under a life insurance policy either as co-beneficiaries or alternate beneficiaries. In that case, the end of the marriage should only revoke the designation of the spouse but should not alter the designation to the children. In line with the *Wills and Succession Act*, partial revocation of a beneficiary designation to a former

[1] *The Creation of Wills*, note 14 at 21-40.
[2] *Wills and Succession Act*, s. 25.

spouse or adult interdependent partner should be done in such a way so as not to affect the rights of other designated beneficiaries.

[72] Under the *Wills and Succession Act*, revoking a gift to a former spouse or adult interdependent partner is achieved by deeming that person to have predeceased the testator. This mechanism preserves the balance of the testator's estate plan expressed in the will. Deeming a former spouse or adult interdependent partner to have predeceased the owner of a plan or policy would similarly preserve the owner's estate plan and the rights of other beneficiaries who may be designated in the plan or policy.[3]

[73] The *Wills and Succession Act* also protects the gift to a former adult interdependent partner where the partner is married to the testator when the testator dies or is related to the testator by blood or adoption.[4]

[74] As with the *Wills and Succession Act*, revoking a beneficiary designation at the end of a marriage or adult interdependent partnership should only apply with respect to marriages or adult interdependent relationships that end after the recommended provision comes into force.

RECOMMENDATION 2

The *Insurance Act* and the *Wills and Succession Act* should provide that, subject to contrary intention of the plan or policy owner, the legal end of a marriage or adult interdependent relationship has the effect of revoking any beneficiary designation in favour of the former spouse or adult interdependent partner by deeming the former spouse or partner to have predeceased the owner on the same conditions and with the same exceptions as provided in section 25 of the *Wills and Succession Act*.

[3] See also *Insurance Act*, s. 664. This section provides for insurance money to be paid to surviving beneficiaries or the insured's personal representative if a beneficiary dies before the insured.

[4] For background on this provision see Alberta Law Reform Institute, *Wills and the Legal Effect of Changed Circumstances*, Final Report No. 98 (2010) at pp. 45-46.

APPENDIX D

The Wills Act, CCSM c W150

Effect of divorce

18(2) Where in a will

(a) a devise or bequest of a beneficial interest in property is made to the spouse of the testator; or

(b) the spouse of the testator is appointed executor or trustee; or

(c) a general or special power of appointment is conferred upon a spouse of the testator;

and after the making of the will and before the death of the testator, the testator's marriage to that spouse is terminated by a decree absolute of divorce or is found to be void or declared a nullity by a court in a proceeding to which the testator is a party, then, unless a contrary intention appears in the will, the devise, bequest, appointment or power is revoked and the will shall be construed as if the spouse had predeceased the testator.

Effect of termination of common-law relationship

18(4) Where in a will

(a) a devise or bequest of a beneficial interest in property is made to the common-law partner of the testator;

(b) the common-law partner of the testator is appointed executor or trustee; or

(c) a general or special power of appointment is conferred on a common-law partner of the testator;

and after making the will and before the death of the testator, the testator's common-law relationship with his or her common-law partner is terminated

(d) where the common-law relationship was registered under section 13.1 of *The Vital Statistics Act*, by registration of the dissolution of the common-law relationship under section 13.2 of *The Vital Statistics Act*; or

(e) where the common-law relationship was not registered under section 13.1 of *The Vital Statistics Act*, by virtue of having lived separate and apart for a period of at least three years;

then, unless a contrary intention appears in the will, the devise, bequest, appointment or power is revoked and the will shall be construed as if the common-law partner predeceased the testator.

APPENDIX E

Wills and Succession Legislation
Report #108, 2003, Manitoba Law Reform Commission

F. EFFECT OF DIVORCE

The revocatory effect of divorce on an existing will has been the subject of several law reform reports,[1] including the Commission's discussion of the topic in its report *Family Law -Part I: The Support Obligation*.[2] As a result of the recommendations contained in that Report, section 36.1 was enacted in 1977[3] which was replaced in 1980 by current subsection 18(2).[4]
Subsections 18(2) and 18(3) provide:

> **Effect of divorce**
> **18(2)** Where in a will
> (a) a devise or bequest of a beneficial interest in property is made to a spouse of the testator; or
> (b) the spouse of the testator is appointed executor or trustee; or
> (c) a general or special power of appointment is conferred upon a spouse of the testator;
> and after the making of the will and before the death of the testator, the testator's marriage to that spouse is terminated by a decree absolute of divorce or is found to be void or declared a nullity by a court in a proceeding to which the testator is a party, then, unless a contrary intention appears in the will, the devise, bequest, appointment or power is revoked and the will shall be construed as if the spouse had predeceased the testator.
>
> **Definition of "spouse"**
> **18(3)** In subsection (2) "spouse" includes the person purported or thought by the testator to be the spouse of the testator.

Though subsection 18(2) differs from the provision that was introduced in response to the Commission's recommendation in several respects, the most significant in this context is that, while the original provision only deemed a spouse to have predeceased the testator, subsection 18(2) goes further and revokes any devises, bequests, appointments, and powers.

In 1977, the Ontario Law Reform Commission reviewed five reform proposals, including the revocation of gifts to an ex-spouse, and deeming an ex-spouse to have predeceased the testator.[5] Although that Commission recommended only the latter proposal, both proposals were included in subsection 17(2) of *The Succession Law Reform Act, 1977*.[6] That subsection is essentially identical to current subsection 18(2) of the Manitoba Act.

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[1] For a list of reports, see, Alberta Law Reform Institute, *Effect of Divorce on Wills* (Report #72, 1994) v [ALRI].
[2] Manitoba Law Reform Commission, *Family Law – Part I: The Support Obligation* (Report #23, 1976) 106-108 [MLRC].
[3] *An Act to Amend Various Acts Relating to Marital Property,* S.M. 1977, c. 53, s. 7.
[4] *An Act to Amend The Wills Act and The Mental Health Act*, S.M. 1980, c. 7, s. 2.
[5] Ontario Law Reform Commission, *The Impact of Divorce on Existing Wills* (Report, 1977) [OLRC].

[6] Now *The Succession Law Reform Act*, R.S.O. 1990, c. S-26, s. 17(2).

Similarly, the Uniform Law Conference of Canada concluded that deeming a predeceasing is the better reform,[7] but its draft legislation revoked gifts to *and* deemed a predeceasing of the ex-spouse.

In its Report *Effect of Divorce on Wills*, the Alberta Law Reform Institute recommended a provision similar to Manitoba subsection 18(2), but which only deems predeceasing of the ex-spouse.[8] The Institute alluded to the possible confusion that may result from legislation that both revokes gifts to and deems a predeceasing of an ex-spouse.[9] Specifically, where the will provides for a gift to a spouse with a gift-over in the event that the spouse predeceases the testator, it is not clear whether only the initial gift is revoked by the legislation, or whether both it and the gift-over are revoked.

Subsection 18(2) is likewise potentially confusing. An obvious solution would be the repeal of the provision revoking all devises, bequests, appointment, and powers. Alternatively, the provision could be amended to read: "... the devise, bequest, appointment or power, *but not a gift-over*, is revoked and the will shall be construed as if the spouse had predeceased the testator" [emphasis added]. Of these two solutions, the Commission favours the former as the one that is more straightforward and more likely to resolve the problem.

RECOMMENDATION 19

The Act should provide that, after the making of a will by a testator and before his or her death, the marriage of the testator is terminated by a divorce judgment or the marriage is found to be void or declared a nullity by a court in a proceeding to which he or she is a party, then, unless a contrary intention appears in the will, the will shall be construed as if the spouse had predeceased the testator.

Subsection 18(2) gives rise to several other matters worthy of consideration. First, it does not deal with the (admittedly rare) situation where the will gives a life estate *pur autre vie* (one which terminates on the death of someone other than the beneficiary) with the spouse as the *cestui que vie* (person on whose death the life estate will terminate). The Law Reform Commission of British Columbia briefly considered and rejected the idea of including life estates *pur autre vie* as it considered that a testator might not want such a life estate to be defeated.[10] We take a different view, believing it more likely that, in such circumstances, a testator would wish to revoke the life estate and think it would be useful if the legislation addressed this issue.

RECOMMENDATION 20

The Act should stipulate that a life estate* pur autre vie *with a spouse as a* cestui que vie *will not survive the termination of a marriage, unless a contrary intention appears in the will.

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[7] Uniform Law Conference of Canada, "Wills: The Impact of Divorce on Existing Wills", *Proceedings of the Sixtieth Annual Meeting* (1978), at 35, and Appendix S, at 269-282. *The Uniform Wills Act* was originally adopted by the Conference of Commissioners on Uniformity of Legislation in Canada (as the ULCC was formerly called) in 1929 [ULCC].

[8] ALRI, *supra* n. 74.

[9] ALRI, *supra* n. 74, at 23.

[10] Law Reform Commission of British Columbia, *Statutory Succession Rights* (Report #70, 1983) 110 [BCLRC].

Second, subsection 18(2) does not deal with the more common life insurance and pension proceeds beneficiary designations made in wills. Regarding life insurance beneficiary designations, at one time *The Insurance Act*[11] contained a provision similar to subsection 18(2), but that provision was repealed many years ago.[12] Presently, the only potentially relevant provision in *The Insurance Act* on this point is subsection 169(3),[13] which provides:

> **Revocation**
> **169(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.

Subsection 18(2), however, does not revoke a will, meaning that subsection 169(3) of *The Insurance Act* is inapplicable, and an insurance proceeds designation does not otherwise appear to fall within clause 18(2)(a), and certainly not (b) or (c). Thus, a life insurance beneficiary designation contained in a will in favour of a spouse will, in fact, survive a divorce.

As for the impact of divorce on beneficiary designations made in a will with respect to pension proceeds, there is no relevant legislation whatsoever.

It seems to the Commission that the legislation is remiss in not addressing the consequences of divorce on these kinds of beneficiary designations made in wills, and further, that it would be appropriate to treat such designations in favour of a spouse in the same manner as other bequests on divorce.

RECOMMENDATION 21

The Act should treat beneficiary designations in favour of a spouse, whether designations of insurance proceeds or pension proceeds, in the same manner as other devises or bequests.

Subsection 18(2) also fails to provide for the possibility of divorced spouses subsequently remarrying each other. A precedent for such a provision exists in the United States, specifically in section 2-508 of the *Uniform Probate Code*, which states:

> ... If provisions are revoked solely by this section, they are revived by testator's remarriage to the former spouse ....

The Commission believes that a similar provision would be useful in preventing unnecessary disruption of testamentary preparations in the event of a reconciliation by divorced partners.

RECOMMENDATION 22

The provisions of the Act dealing with revocation of a will upon marriage should not apply in the event of a subsequent marriage to the former spouse.

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[11] *An Act to Amend the Insurance Act*, R.S.M. 1954, c. 126, s. 176.
[12] *An Act to Amend the Insurance Act*, S.M. 1960, c. 27, s. 3.
[13] *The Insurance Act*, C.C.S.M. c. I40.

Finally, subsection 18(2) refers to a "decree absolute" of divorce. As decrees *nisi* and absolute are no longer issued in Manitoba,[14] the legislation should be updated to refer simply to "a divorce".

RECOMMENDATION 23

References to "a decree absolute of divorce" should be replaced with a reference to "a divorce judgment".

[14] *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), s. 8.

APPENDIX F

Statutory Designations and the *Retirement Plan Beneficiaries Act*
Manitoba Law Reform Commission Report #73, 1990

F. EFFECT ON CREDITORS

We previously noted that, by virtue of the terms of *The Insurance Act*, insurance monies which are subject to a statutory designation are free of the claims of creditors and that no similar provision exists for designations made under *The Retirement Plan Beneficiaries Act.* We noted authorities indicating that monies passing pursuant to designations under that Act were nonetheless available to the claims of the deceased's creditors.[91] Is this appropriate? Should certain assets subject to a designation be free from the claims of creditors while others are not, or is the existence of a designation essentially irrelevant? The competing interests are well stated in the following comment made in the context of RRSPs:

> It may very well be the public policy [. . .] that all RRSPs should be given the same protection from creditors. Employee pension benefits are exempt from execution, seizure or attachment, and, as RRSPs were intended to give privately employed individuals the same benefits as members of registered pension plans then, arguably, all RRSPs should receive the same protection from creditors. Conversely, it is a long-standing principal of equity that creditors should be preferred to volunteers and, if RRSPs are viewed as a method by which an individual may save for retirement and that individual dies before he or she has a chance to enjoy that retirement, it does not seem unfair that those RRSP funds should, as a last resort, be available to satisfy the deceased's creditors.[92]

We recognize that sometimes RRSPs are not in fact used as pension supplements or substitutes. On occasion, they are used as a form of savings vehicle and are terminated well in advance of retirement; for example, some people use them to save for a down-payment on a home. Indeed, a change to the law which would shield from creditors assets which are subject to designation under *The Retirement Plan Beneficiaries Act* might on occasion give rise to attempts to evade creditors. However, we think that this risk is relatively small, particularly in light of the contribution limits on RRSPs.

On balance, we believe that assets which are subject to designation under *The Retirement Plan Beneficiaries Act* should be protected from creditors. As the Act's title indicates, these assets are being held primarily in retirement plans. Employee pension benefits which are governed by *The Pension Benefits Act* are protected from creditors; other plans, such as RRSPs, which are also pension supplements or substitutes should be treated in the same way. We recommend:

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[91] *Canadian Imperial Bank of Commerce* v. *Besharah* (1989), 58 D.L.R. (4th) 705 (Ont. H.C.); *Waugh Estate* v. *Waugh* (1990), 63 Man. R. (2d) 155 (Q.B.).
[92] D.S. McReynolds, "Sheltering RRSP Assets from Creditors on Death" (1983), 6 E. & T. Q. 106 at 115.

RECOMMENDATION 7

That where a beneficiary is designated, any benefit payable to him or her is not, from the time of the happening of the event upon which it becomes payable, part of the estate of the participant, and is not subject to the claims of the creditors of the participant.

RECOMMENDATION 8

That, while a designation in favour of a spouse, child, grandchild or parent of a participant is in effect, the assets of the plan and the rights and interests of the participant therein and in the plan are exempt from execution or seizure.[93]

[93] Mrs. McGonigal abstained from these recommendations and did not participate in discussion of the issue, due to a possible perception of conflict of interest.

APPENDIX G

Clarke Estate v. *Clarke*, (1997) 115 Man. R. (2d) 48 (CA).

[25] […] it does not necessarily follow that those moneys are immune from the claims of creditors of the estate. It will be observed that when the Act was amended the legislature did not include a provision comparable to s. 173(1) of the *Insurance Act*, R.S.M. 1987, c. I-40, which insulates the proceeds of an insurance policy from the claims of the deceased's creditors. Back in 1990, after the decision in *Waugh Estate* v. *Waugh et al*. (1990), 63 Man. R. (2d) 155 (Q.B.), that had been recommended by the Law Reform Commission and could easily have been enacted, but the legislature declined to do so. Section 173(1) specifies that the insurance money is not part of the estate and is not subject to the claims of creditors of the insured.

[26] There is a very real distinction to be made between life insurance and an RRSP contract or scheme. In the one a premium is paid by or on behalf of the insured in the expectation that when death occurs the insurer will make a payment out of its resources to the named beneficiary. The moneys never were the property of the insured. With an RRSP contract or scheme, the money is invested either by the "participant" in the contract or scheme, or on his behalf. The participant has an entitlement to those funds which can rightfully be regarded as his asset.

[27] It is therefore logical that when the participant dies leaving an insolvent estate, that asset should be subject to attachment by creditors of the deceased's estate.

[28] Since the assets are not in the hands of the executor and trustee, and the executor and trustee has no right or obligation to seek the funds, the creditor must lay claim to the funds, if he can, in the hands of the beneficiary. I do not mean to stray too far from the question presented to the court for determination, but I would observe that the claim of a creditor would seem to rank ahead of the claim of a beneficiary who has given no consideration.

[29] An analogy might be drawn between the position of the administrator of an RRSP under the *Retirement Plan Beneficiaries Act*, and an executor functioning under s. 41 of the *Trustee Act*, R.S.M. 1987, c. T-160. Under s. 41(1) an executor and trustee of an estate can make distribution of the estate to named beneficiaries after advertising for debts and allowing a reasonable time for unknown creditors to come forward. Like the administrator of an RRSP contract or scheme, the executor is protected from the claims of creditors who subsequently emerge. But the creditor is not prevented from claiming the funds from the recipient beneficiaries on the basis that the valid claim of a creditor takes precedence over the entitlement of a voluntary beneficiary.

[30] The case of *Diplock's Estate, Re*; *Diplock* v. *Wintle*, [1948] 1 Ch. 465, establishes that the claim of the creditor against the beneficiary will be sustained both under common law and equitable principles, either in personam, or if the funds remain traceable, in rem.

[31] In the present case, the addition of ss. 14 and 15 to the *Retirement Plan Beneficiaries Act* simply established the mechanism by which the administrator of the RRSP should pay out the moneys. Those provisions did not, however, make those moneys immune from the claims of creditors. Once in the hands of the named beneficiaries, I would hesitate to describe the funds as an "asset" of the estate. But however they may be described, they are subject to the claims of general creditors of the deceased's estate whose claims cannot be met by the estate itself.

[32] The claim of the designated beneficiary of an RRSP contract or scheme would seemingly be superior to that of other volunteers, such as specific legatees or residual legatees under the will. But I need not be definitive because that issue lies beyond the scope of the questions we are called upon to answer.

[33] While the questions presented to the court have now been answered, the answers do not change the disposition of the claim by the executor of the estate against the defendant. The defendant remains liable as a judgment debtor. But having paid that judgment, he is entitled to embark upon his own separate action as a creditor of the insolvent estate to claim a part of the funds in their reinvested form in the hands of the Public Trustee.