Manitoba Law Reform Commission

CREATING EFFICIENCIES IN THE LAW:

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

Final Report

September 2019

Manitoba Law Reform Commission

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The views expressed in this report 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.

EXECUTIVE SUMMARY/RÉSUMÉ

Most retirement and pension plans allow the plan participant to decide who should be entitled to their assets when they die. In Manitoba, *The Beneficiary Designation Act (Retirement, Savings and Other Plans)* ("*The Beneficiary Designation Act*")[1] provides for the creation of beneficiary designations under insurance and pension benefits legislation. This report considers reforms to improve the efficiency and clarity of *The Beneficiary Designation Act.*

In April 2018, the Commission released a consultation report entitled *The Beneficiary Designation Act (Retirement, Savings and Other Plans)*[2] to solicit feedback on possible areas of reform. The Commission received comments from legal practitioners who provided their comments on the provisional recommendations and issues for discussion contained in the report. The comments related not only to the reform issues identified in the consultation report, but also pointed to other possible deficiencies in the current law.

This report addresses the need for reform in three main areas: (1) the continuation of beneficiary designations where plans are renewed, replaced, or converted; (2) making, changing or revoking beneficiary designations; and (3) the effect of marriage, divorce and common-law relationships. The report also considers other areas of reform, namely irrevocable beneficiary designations, multiple beneficiaries, trusteeship, prescribing plans, beneficiary pre-deceasing a plan participant; and plan benefits and claims from creditors.

The Commission makes eight recommendations to amend and update *The Beneficiary Designation Act* to improve the legislation and help Manitobans carry out their intentions when it comes to making beneficiary designations. Perhaps one of the most significant issues addressed in the report is whether there is a gap in the law such that a beneficiary designation will not automatically roll over in certain circumstances, such as when an insurance policy or investment plan is replaced or converted. In such circumstances, the renewed, converted or transferred plan, including the beneficiary designation, ceases to exist, and the participant must make a fresh beneficiary designation. Requiring the participant to make a fresh beneficiary in such situations can prove particularly problematic when the participant has become mentally incompetent and is unable to make a continuing designation. To mend this gap, the Commission recommends amendments to *The Mental Health Act*, *The Vulnerable Persons Living with a Mental Disability Act*, and *The Powers of Attorney Act* that would expressly allow a substitute decision maker to redesignate a beneficiary to which *The Beneficiary Designation Act* applies.

[1] SM 1992, c 31; CCSM c B30.
[2] Manitoba Law Reform Commission, *The Beneficiary Designation Act (Retirement, Savings and Other Plans)* Consultation Report (April 2018). The consultation report is available online: <http://www.manitobalawreform.ca/pubs/pdf/additional/consultation_report_apr2018.pdf>.

This report is part of a series of Commission reports entitled *Creating Efficiencies in the Law*. This series focuses on provincial legislation that might be made more efficient with relatively straightforward and minor adjustments.

RÉSUMÉ

La plupart des régimes de retraite ou de pension permettent au participant de décider qui devrait avoir droit à ses éléments d'actif à son décès. Au Manitoba, la Loi sur la désignation de bénéficiaires (régimes de retraite, d'épargne et autres) [la « Loi sur la désignation de bénéficiaires »][3] prévoit la création de désignations de bénéficiaires aux termes de la législation en matière de prestations d'assurance et de pension. Le rapport envisage des réformes visant à améliorer l'efficacité et la clarté de la Loi sur la désignation de bénéficiaires.

La Commission a décidé d'envisager une réforme de la Loi après avoir pris connaissance de certaines lacunes possibles du droit actuel. En avril 2018, elle a publié un document de consultation intitulé *The Beneficiary Designation Act (Retirement, Savings and Other Plans)* (Loi sur la désignation de bénéficiaires (régimes de retraite, d'épargne et autres)) afin de solliciter des commentaires sur les domaines de réforme possibles. Des juristes ont communiqué à la Commission des commentaires sur les recommandations provisoires et les questions à débattre. Au cours du processus de consultation, la Commission a reçu des commentaires pratiques d'experts et de juristes œuvrant dans ce domaine. Ces commentaires ont contribué à guider le rapport.

Le rapport traite la nécessité d'une réforme touchant trois aspects principaux : (1) le maintien de la désignation de bénéficiaires en cas de renouvellement, de remplacement ou de conversion du régime, (2) le processus des désignations de bénéficiaires, leur modification et leur révocation, et (3) les effets du mariage, du divorce et de l'union de fait. Le rapport examine également d'autres domaines de réforme, notamment la désignation de bénéficiaires irrévocable, les bénéficiaires multiples, la tutelle, la prescription de régimes, le cas où un bénéficiaire décède avant le participant au régime, ainsi que les prestations du régime et les réclamations des créanciers.

La Commission présente huit recommandations de modification et de mise à jour de la Loi sur la désignation de bénéficiaires afin d'améliorer la législation et d'aider les Manitobaines et les Manitobains à assurer l'exécution de leurs intentions en matière de désignation de bénéficiaires. Une des questions les plus importantes que traite le rapport pourrait être celle de savoir si le droit comporte une lacune telle que la désignation de bénéficiaires ne serait pas maintenue automatiquement dans certaines situations, comme le remplacement ou la conversion d'une police d'assurance ou d'un régime de placement. Dans une telle situation, le régime renouvelé, converti ou transféré, y compris la désignation de bénéficiaires, cesse d'exister et le participant doit faire

[3] L.M. 1992, c. 31; C.P.L.M., c. B30.

une nouvelle désignation. Or, l'obligation de faire une nouvelle désignation imposée au participant dans une telle situation peut se révéler particulièrement problématique s'il a été frappé d'incapacité mentale et n'est plus en mesure de le faire. Pour combler cette lacune, la Commission recommande d'apporter à la Loi sur la santé mentale, à la Loi sur les personnes vulnérables ayant une déficience mentale et à la Loi sur les procurations des modifications qui autoriseraient expressément un subrogé à désigner de nouveau un bénéficiaire visé par la Loi sur la désignation de bénéficiaires.

Le rapport fait partie d'une série de rapports de la Commission intitulée *Creating Efficiencies in the Law* (rendre les lois plus efficaces). Cette série porte sur les lois provinciales qui seraient plus efficaces si on leur apportait des ajustements relativement simples et mineurs.

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 participant dies? Where does the money go?

In Manitoba, the treatment of the proceeds of these financial products upon the death of the participant is regulated by *The Insurance Act*,[4] *The Pension Benefits Act*[5] and *The Beneficiary Designation Act (Retirement, Savings and Other Plans)* ("*The Beneficiary Designation Act*").[6] *The Beneficiary Designation Act* provides for designation of beneficiaries to occur without the formalities required under *The Wills Act.*[7]

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 participants, designated beneficiaries and the legal profession. As part of its series on *Creating Efficiencies in the Law*, the Commission has chosen to study certain aspects of *The Beneficiary Designation Act* that may be in need of reform. This topic first came to the Commission's attention when a legal practitioner pointed out a potential deficiency in the law related to the renewal, replacement or conversion of beneficiary designations. It appears that there is a gap in the law in these situations, such that a new plan is created and the old plan ceases to exist. In other words, plan beneficiary designations do not automatically roll over and a fresh beneficiary designation must be made or, upon the death of the participant of the plan, the proceeds are payable to the plan participant's estate. A further look at the legislation and comparison with the legislation of other jurisdictions highlighted two other potential deficiencies in Manitoba's legislative scheme: whether various substitute decision makers should be empowered to make, change, or revoke a beneficiary designation with court approval; and the effect of marriage, divorce and common-law relationships on beneficiary designations.

The Commission has previously studied the topic of beneficiary designations. In 1990, the Commission published a report entitled *Statutory Designations and The Retirement Plan Beneficiaries Act* ("1990 Report").[8] While the legislation has gone through minor amendments from time to time since the 1990 Report, the Commission determined that reform is required to update and modernize certain aspects of the Act.

Chapter 2 of this 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

[4] RSM 1987, c I40.
[5] RSM 1987, c P32.
[6] SM 1992, c 31; CCSM c B30 [*The Beneficiary Designation Act*].
[7] RSM 1988, c W150.
[8] Manitoba Law Reform Commission, Final Report #73: *Statutory Designations and The Retirement Plan Beneficiaries Act* (1990) [1990 Report].

converted; the ability to make, change or revoke a beneficiary designation; the effect on plans of the termination of domestic relationships and other potential areas. Chapter 4 summarizes the recommendations from the preceding chapters.

CHAPTER 2- BACKGROUND

Beneficiary designations were not recognized as valid under the law in Canada until the 1950s. Prior to the enactment of legislation allowing for beneficiary designations made without the formalities of a will, the common law did not recognize such designations as valid. In 1935, the Supreme Court of Canada heard an appeal from the Ontario Court of Appeal on the question as to whether a beneficiary designation made without the formalities of a will in a company-sponsored employee savings fund was valid.[9] The Court held that a beneficiary designation was invalid because it was "testamentary" in nature and not executed in accordance with the *Wills Act* of Ontario.*[10]* The decision prompted the Association of Superintendents of Insurance of Canada (Association) to call for the enactment of legislation to supersede the decision in *MacInnes* and bring the law in line with that regarding beneficiary designations in insurance policies and retirement savings plans.[11]

Eventually, in 1954, the government of Ontario added s. 62 to its *Law of Property Act*[12] 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 in Canada ("Conference") that it consider adopting uniform legislation for enactment by provincial legislatures.[13] The matter was referred to the Manitoba Commissioners, 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.[14] Coincidentally, 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.[15] In 1959, Manitoba added ss. 44 and 45 to *The Law of Property Act*, based largely on the Conference legislation of 1957.[16]

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

[9] *MacInnes v. MacInnes*, [1935] SCR 200; 1934 CanLII 16 (SCC).
[10] *Ibid* at 211.
[11] D. Norwood and J.P. Weir, *Norwood on Life Insurance Law in Canada* (Carswell, Toronto) 3d ed., 2002, pp. 291-92.
[12] SO 1954, c 12.
[13] Conference of Commissioners on Uniformity of Legislation in Canada, Proceedings of the 38th Annual Meeting, 1956 at 24-25.
[14] Conference of Commissioners on Uniformity of Legislation in Canada, Proceedings of the 39th Annual Meeting, 1957 at 27-28 & 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.
[15] *An Act to Amend the Income Tax Act*, SC 1957, c 29, s 17.
[16] 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.

non-employment registered retirement savings plans.[17] In 1975, the ULCC adopted a revision of its 1957 uniform legislation in the form of a discrete *Retirement Plan Beneficiaries Act* ("*ULCC Uniform Act*").[18] 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.*[19] In 1992, following the publication of a report of the Manitoba Law Reform Commission on the topic,[20] Manitoba enacted *The Retirement Plan Beneficiaries Act.*[21] 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"[22] 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)".[23]

In 2009, the title of the Act was changed to *The Beneficiary Designation Act (Retirement, Savings and Other Plans)*[24] and tax free savings accounts were added to the definition of "plan".[25]

The Beneficiary Designation Act can be found in its entirety at Appendix A.

[17] 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.
[18] Uniform Law Conference of Canada, *Retirement Plan Beneficiaries Act* (1975) [*ULCC Uniform Act*], available online: https://www.ulcc.ca/en/component/content/article/526-josetta-1-en-gb/uniform-actsa/retirement-plan-beneficiaries-act/636-retirement-plan-beneficiaries-act-1975.
[19] SM 1976, c 27.
[20] 1990 Report, *supra* note 8.
[21] SM 1992, c 31.
[22] *Ibid*, s 1.
[23] *Ibid*.
[24] CCSM, c B30.
[25] SM 2009, c 26, s 79.

CHAPTER 3- 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 Beneficiary Designation 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 renewal, replacement or conversion of plans governed by the Act. For instance, pursuant to the *Income Tax Act (Canada)*, when a plan participant reaches the age of 72, a 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 renewed, converted or transferred plan, including a beneficiary designation, ceases to exist.[26] If the plan participant wishes to continue the same designation, the plan participant 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.[27]

The state of *The Beneficiary Designation Act* is of particular concern to a plan participant who has made a beneficiary designation and becomes mentally incompetent. Clearly, such a participant 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*[28] 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.[29]

To create certainty, as recommended by the 2006 Report of the British Columbia Law Institute (BCLI),[30] British Columbia has amended its *Power of Attorney Act*[31] and its *Wills, Estates and Succession Act*[32] to empower various substitute decision makers to make continuing beneficiary designations. The Alberta Law Reform Institute (ALRI) has recommended the enactment of

[26] *Bramley v Bramley Estate* (2003) 3 ETR (3d) 191 (BCSC).
[27] *Supra* note 4, ss 154(2)(e), 167(5) and (6), 209(2)(e), 224(5) and (6), respectively.
[28] CCSM c M110, ss 61 and 71.
[29] See Alberta Law Reform Institute, *Beneficiary Designations by Substitute Decision Makers*, Final Report No. 104 (2014) at paras. 22-25, 41-49 [Alberta Report]. Available online: https://www.alri.ualberta.ca/docs/FR104.pdf; British Columbia Law 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].
[30] BC Report, *ibid* at 25.
[31] RSB 1996, c 370, s 20(5)(b).
[32] SBC 2009, c 13, s 90(1).

similar legislation.[33] We think that Manitoba also should do so. If implemented, these amendments would avoid potential unfairness that may result when a participant is mentally incompetent and their plan is renewed, replaced, or converted.

Recommendation 1

The Mental Health Act, *The Vulnerable Persons Living with a Mental Disability Act*, and *The Powers of Attorney Act* should be amended to expressly provide for a substitute decision maker for property, 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.

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, a substitute decision maker for property, and an attorney empowered to make such a designation pursuant to *The Mental Health Act, The Vulnerable Persons Living with a Mental Disability Act,* and *The Powers of Attorney Act"*.

B. Making, Changing and Revoking Beneficiary Designations

Another issue considered by the Commission is whether various substitute decision makers should be empowered to make, change, or revoke a beneficiary designation with court approval. This is similar to the issue of will making; currently, by common-law, substitute decision makers do not have the authority[34] and courts do not have the jurisdiction[35] to make or alter wills.

Uniquely, as recommended by the BC Report,[36] the *Power of Attorney Act*[37] and the *Wills, Estates and Succession Act*[38] of British Columbia provide an attorney with the power to make, alter or

[33] Alberta Report, *supra* note 29 at 26.
[34] C Harvey & D MacPherson, *Agency and Partnership Law Primer* (Thomson Reuters, Toronto, 5th ed, 2016) at 18, note 50.
[35] GB Robertson, *Mental Disability and the Law in Canada* (Toronto, Carswell, 2d ed., 1994), at 95-98.
[36] BC Report, *supra* note 29 at 82.
[37] *Supra* note 31, s 20 (5)(a).
[38] *Supra* note 32, s 85(3).

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):

> **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, ALRI decided against recommending the enactment of similar legislation,[39] in line with its earlier decision not to recommend statutory judicial will-making jurisdiction for persons lacking testamentary mental capacity.[40]

The feedback received by the Commission on this issue is supportive of statutorily empowering various substitute decision makers to make, change, or revoke a beneficiary designation with court approval, if a similar empowerment is made to *The Wills Act* and *The Insurance Act*. The Commission is currently studying possible reforms to *The Wills Act*, and the upcoming report will deal with empowering the Court of Queen's Bench to make, alter, or revoke a will. Thus, it is premature to make a recommendation respecting *The Beneficiary Designation Act*.

[39] *Supra* note 29, para 66.
[40] Alberta Law Reform Institute, *The Creation of Wills*, Report No 96, 2009 at 40.

C. Marriage, Divorce and Common-Law Relationships

Another issue considered by the Commission is whether a beneficiary designation ought to be statutorily revoked by a marriage or commencement of a common-law relationship and by a divorce or termination 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
> (c) the will fulfills obligations of the testator to a former spouse or common-law partner under a separation agreement or court order.

Currently, s. 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 s. 13 is the result of Recommendation 6 of the Commission's 1990 Report.[41]

Marriage or the commencement of a common-law relationship does not have the effect of revoking a designation made pursuant to *The Beneficiary Designation Act*. Additionally, s. 13 of *The Beneficiary Designation Act* does not speak to the commencement or ending of a common-law relationship as do ss. 17(a.1), above, and 18(4) of *The Wills Act:*

> **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;

[41] *Supra* note 8 at 16; see Appendix B.

> 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.

The Alberta Report recommends that Alberta's *Insurance Act* and *Wills and Succession Act* 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.[42] The Alberta Report pointed out the problem with the current law:

> 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 participant 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.[43]

This recommendation, however, has not been implemented and no other comparable Canadian legislation so provides.

In its 1990 Report, the Commission considered and rejected a recommendation similar to the Alberta Report, opting to recommend what comprises s.13 of *The Beneficiary Designation Act*, as set out above. However, the 1990 Report noted the concern that the different effects of marriage and divorce on wills as opposed to plan and insurance designations may be confusing, which is why the Commission recommended a caution be included.[44] It further noted that "[i]f, at some future time *The Insurance Act* and *The Pension Benefits Act* are changed to accord with *The Wills*

[42] S*upra* note 29 at para 68 *et seq*; The relevant excerpt can be found at Appendix C.
[43] *Ibid* at para 69. See Appendix C for the full excerpt.
[44] 1990 Report, *supra* note 8, Recommendation 6.

Act, *The Retirement Plan Beneficiaries Act* could then be similarly changed and the above notice would no longer be necessary."[45]

In its 2003 report on *Wills and Succession Legislation* ("Report 108"),[46] the Commission considered the effect of divorce on provisions made to a spouse in a will as provided in s. 18 of *The Wills Act.* The Commission observed that s. 18(2) does not provide that divorce revokes a retirement plan or insurance beneficiary designation contained in a will. It also observed that, while s. 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 s. 18(2) is simply to revoke the specific devise or bequest, not to revoke the will in its entirety.[47] Therefore, s. 169(3) of *The Insurance Act* does not apply to the divorce or termination of a common-law relationship.

In Report 108, the Commission recommended that *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.[48] To date, no changes have been implemented.

In its April 2018 consultation report, the Commission considered three options to address the effect of marriage and divorce on beneficiary designations: (1) amend *The Beneficiary Designation Act* so that provisions regarding marriage and divorce are consistent with *The Wills Act*; (2) leave *The Beneficiary Designation Act* as is, so that it is inconsistent with *The Wills Act* but continues to be consistent with *The Insurance Act*; or (3) change all statutes authorizing beneficiary designations so that the effect of marriage and divorce is consistent with *The Wills Act*. In addition to these options, the consultation report also asked whether common-law relationships should be included.

The Commissioners received a wide-range of feedback on this issue. Some respondents thought that there would be merit in including provisions akin to ss. 17 and 18 of *The Wills Act* while others responded that s. 13 should be left as is. The Commissioners considered the feedback, and, while inclined to support the third option cited above, the Commission has decided not to make a recommendation at this time. The Commission is currently studying reforms to *The Wills Act*, and, part of the review includes consideration of ss. 17 and 18 of *The Wills Act*. Therefore, it is premature to make a determination on this point. This issue will be explored as part of *The Wills Act* final report.

[45] *Ibid.*
[46] Manitoba Law Reform Commission, *Wills and Succession Legislation* Final Report 108 (2003) [Report 108].
[47] *Ibid* at 29. The relevant excerpt can be found at Appendix D.
[48] *Ibid*.

D. Other Areas for Potential Reform

This section discusses the legislation of British Columbia,[49] Alberta,[50] and Prince Edward Island,[51] which all contain provisions that differ from *The Beneficiary Designation Act*, and considers whether similar provisions should be adopted in Manitoba.

(i) Irrevocable Beneficiary Designations

A typical beneficiary designation may be altered or revoked prior to the death of a mentally competent plan participant; an irrevocable plan designation cannot be revoked or changed without the consent of the named beneficiary or beneficiaries. While creating a beneficiary designation that limits a plan participant's ability to revoke or change a beneficiary designation may seem unnecessary and heavy-handed, as described in the BC Report, irrevocable designations serve as important security instruments in separation agreements and spousal and child maintenance orders.[52] In its report, BCLI quoted from the British Columbia Court of Appeal in *Law v. Tretiak*:

> …[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[53]

Section 12 of the Manitoba's 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

[49] *Wills, Estates and Succession Act*, *supra*, note 32.
[50] *Wills and Succession Act*, SA 2010, c W-12.2.
[51] *Designation of Beneficiaries Under Benefit Plans Act*, RSPEI 1988, c D-12.
[52] S*upra* note 29 at xix-xx.
[53] *Supra* note 29 at 10 (1993), 80 BCLR (2d) 1, 9 (CA).

(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.

(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 s. 12 of the Manitoba Act, s. 87(3) of 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 is contained in a will, will be the creation of a revocable designation and not a failure of the designation altogether. In contrast, the Manitoba Act is silent on the effect of a failed attempt to establish an irrevocable designation. Additionally, s. 88 of the British Columbia Act provides that an irrevocable designation may be altered or revoked where the designated beneficiary consents to the change and provides that the benefit of the irrevocable designation is not subject to the control of the participant's creditors, and does not form part of the participant's estate, potentially significant provisions.

Recommendation 3:

Section 12 of *The Beneficiary Designation Act* should be amended, drawing on ss. 87 and 88(1) of the *Wills and Succession Act* of British Columbia, to provide that:

(i) an unsuccessful attempt to make an irrevocable beneficiary designation creates a revocable beneficiary designation, and

(ii) an irrevocable beneficiary designation can be changed with the consent of the irrevocably designated beneficiary or beneficiaries.

(ii) Multiple Beneficiaries

The Commission considered whether to recommend the addition of a provision to *The Beneficiaries Designation Act* respecting multiple designated beneficiaries.

British Columbia's *Wills, Estates and Succession Act* 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.

Similarly *The Insurance Act of Manitoba* provides:

> **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.

The Beneficiaries Designation Act of Manitoba contains no sections comparable to s. 86 of the *Wills and Succession Act* of British Columbia. The majority of the feedback on this issue was in favour of amending the Act to provide guidance where multiple beneficiaries are named in a plan. In the Commission's view, amending the Act to add a provision respecting multiple beneficiaries will help to clarify the law and confirm the common law rule.

Recommendation 4:

The Beneficiary Designation Act should be amended to add a section like s. 86 of the *Wills and Succession Act* of British Columbia regarding multiple beneficiaries.

(iii) Trusteeship

Next, the Commission has considered whether the Act should provide for the appointment of trustees for beneficiaries under a plan. 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.

Respondents to the Consultation Report were in favour of such a section to be added to the Manitoba Act. One respondent noted that "[p]rovision to appoint a Trustee would assist in estate planning. The plan owner would be able to designate a trusted person of their choosing."

Recommendation 5:

The Beneficiary Designation Act should be amended to provide for the appointment of trustees for beneficiaries under plans as provided in s. 92 of the British Columbia *Wills, Estates, and Succession Act.*

(iv) Prescribing Plans

Alberta's *Wills and Succession Act*[54] provides that funds, trusts, schemes, contracts or arrangements may be prescribed by regulation as 'plans' for the purpose of the governing Act.

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[55], New Brunswick[56], Prince Edward Island[57], Yukon[58], and Nunavut[59] contain a section comparable to s. 71(19) of the *Wills and Succession Act* of Alberta. Manitoba's Act contains no such provision. The Commission received feedback that supported the addition of a provision similar to s. 71(19) of Alberta's *Wills and Succession Act*. Accordingly, the Commission recommends that a similar provision be added to Manitoba's Act.

Recommendation 6:

A provision like s. 71(19) of the Alberta *Wills and Succession Act* should be added to *The Beneficiary Designation Act.*

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

(v) Beneficiary Pre-Deceasing Plan Participant

The Commission 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 added to British Columbia's *Wills, Estates, and Succession Act* when it replaced the previous *Wills Act* and was recommended by BCLRI in its BC Report.[60] BCLI recommended the addition of s. 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(1) 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
>
> (c) if there is no surviving beneficiary, to the insured or the insured's personal representative.

All respondents agree on the addition to *The Beneficiary Designation Act* of a section like s. 171(1) of *The Insurance Act.* Accordingly, the Commission recommends that Manitoba's Act be amended to address situations where a designated beneficiary predeceases a plan participant.

[60] *Supra* note 29 at 184.

Recommendation 7:

A section should be added to *The Beneficiary Designation Act* to harmonize the effect of a designated beneficiary predeceasing a plan participant with s. 171(1) of *The Insurance Act*, substituting "estate" for "personal representative" in subsection (c).

(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 the benefit of plans designated under the Act are not subject to the claims of creditors. This would involve the addition of provisions comparable to s. 95 of the *Wills and Succession Act* of British Columbia and ss. 9 and 10 of the *Designation of Beneficiaries Under Benefit Plans Act*[61] 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, ss. 9 and 10(1) of Prince Edward Island's legislation provide:

> **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.
>
> **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.

The Commission's 1990 Report recommended that Manitoba's legislation be amended to include provisions similar to those set out above:

> **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

[61] RSPEI 1988, c D-9.

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.[62] 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.[63]

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:

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.

The recommendations were never implemented.

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[62] *Canadian Imperial Bank of Commerce* v. *Besharah* (1989), 58 DLR (4th) 705 (Ont. HC); *Waugh Estate* v. *Waugh* (1990), 63 Man. R (2d) 155 (QB).

[63] DS McReynolds, "Sheltering RRSP Assets from Creditors on Death" (1983), 6 E & T Q 106 at 115.

There has been a spate of Manitoba cases dealing with this matter. In *Waugh Estate* v. *Waugh*[64] Justice Wright held that RRSP proceeds are an asset of the deceased plan participant's estate, expressly disagreeing with the same Court's decision in *Daniel* v. *Daniel.*[65] In *King* v. *King,*[66] without referring to either *Daniel* or *Waugh Estate*, Justice Kennedy decided that such plan proceeds are not an asset of the deceased plan participant's estate, but rather are payable directly to the designated beneficiary. In *Pozniak Estate* v. *Pozniak*[67] the Court of Appeal agreed with *Waugh Estate*. Relevant to the issue at that time was s. 11 of *The Retirement Plan Beneficiaries Act*[68] :

> **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, s. 11 was slightly revised and became the current s. 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.

Additionally, in 1992, current s. 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,*[69] the Court of Queen's Bench considered funeral expenses of $7,014.83 paid by the deceased's executor out of his own pocket, only $3,381.08 of which he recovered from the deceased's $3,381.08 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 Small Claims Court for

[64] (1990) 63 Man R (2d) 155 (QB).
[65] (1986) 41 Man R (2d) 66 (QB).
[66] (1990) 68 Man R (2d) 253 (QB).
[67] (1993) 88 Man R (2d) 36 (CA).
[68] *Supra*, note 11.
[69] 27 February 1995, Brandon Centre 95.02.270CI (QB).

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 ss. 14 and 15 of the 1992 re-enactment, noting that:

> [t]he 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.[70]

The Court of Appeal affirmed the Court of Queen's Bench decision, sub nom *Clarke Estate* v. *Clarke*[71], 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 participant's estate whose claims cannot be met by the estate.[72]

In its Report 108 the Commission recommended that there be added to *The Dependents Relief Act* anti-avoidance provisions like those contained in the comparable legislation of Ontario, Prince Edward Island, the Northwest Territories, Nunavut, and Yukon, and specifically s. 72 of the *Succession Law Reform Act* of Ontario, which includes in s. 71(1)(g) "any amount payable under a designation of beneficiary under Part III", Part III being the Part of the *Act* comparable to *The Beneficiary Designation Act* of Manitoba. The recommendation has not been implemented. The Commission thinks that not only should a section like s. 72 be added to *The Dependents Relief Act*, but also the gist of s. 72(1)(g) should be included in *The Plan Beneficiary Designation Act*. The Commission notes that *The Family Property Act* includes plan proceeds in its definition of `family assets`, as extended by s. 1(2)(d).

Recommendation 8:

The Commission reiterates Recommendations 7 and 8 made in its 1990 Report 73, adding to Recommendation 7, "but is subject to claims made pursuant to *The Family Property Act* and *The Dependents Relief Act*."

[70] *Ibid*.
[71] (1997) 115 Man R (2d) 48 (CA).
[72] *Ibid*.

CHAPTER 4 - LIST OF RECOMMENDATIONS

Recommendation 1:

The Mental Health Act, The Vulnerable Persons Living with a Mental Disability Act, and *The Powers of Attorney Act* should be amended to expressly provide for a substitute decision maker for property, 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. (p. 6)

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, a substitute decision maker for property, and an attorney empowered to make such a designation pursuant to *The Mental Health Act, The Vulnerable Persons Living with a Mental Disability Act,* and *The Powers of Attorney Act"*. (p. 6)

Recommendation 3:

Section 12 of *The Beneficiary Designation Act* should be amended, drawing on ss. 87 and 88(1) of the *Wills and Succession Act* of British Columbia, to provide that:

(i) an unsuccessful attempt to make an irrevocable beneficiary designation creates a revocable beneficiary designation.

(ii) an irrevocable beneficiary designation can be changed with the consent of the irrevocably designated beneficiary or beneficiaries. (p. 12)

Recommendation 4:

The Beneficiary Designation Act should be amended to add a section like s. 86 of the *Wills and Succession Act* of British Columbia regarding multiple beneficiaries. (p. 13)

Recommendation 5:

The Beneficiary Designation Act should be amended to provide for the appointment of trustees for beneficiaries under plans as provided in s. 92(1) of the British Columbia *Wills, Estates, and Succession Act.* (p. 14)

Recommendation 6:

A provision like s. 71(19) of the Alberta *Wills and Succession Act* should be added to *The Beneficiary Designation Act*. (p. 14)

Recommendation 7:

A section should be added to *The Beneficiary Designation Act* to harmonize the effect of a designated beneficiary predeceasing a plan participant with section 171(1) of *The Insurance Act*, substituting "estate" for "personal representative" in subsection (c). (p. 16)

Recommendation 8:

The Commission reiterates Recommendations 7 and 8 made in its 1990 Report 73, adding to Recommendation 7, "but is subject to claims made pursuant to *The Family Property Act* and *The Dependents Relief Act*." (p. 19)

This is a report pursuant to section 15 of *The Law Reform Commission Act*, C.C.S.M. c. L95, signed this 21st day of June, 2019.

"Original Signed by"
Cameron Harvey, President

"Original Signed by"
Myrna Phillips, Commissioner

"Original Signed by"
Michelle Gallant, Commissioner

"Original Signed by"
Jacqueline Collins, Commissioner

`

"Original Signed by"
Sacha Paul, Commissioner

APPENDIX A

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,

(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.

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.

---

[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 participant'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 participant 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 participant 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 participant 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

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

former 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 participant of a plan or policy would similarly preserve the participant'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 participant, 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 participant 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

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

F. EFFECT OF DIVORCE

… 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*[82] contained a provision similar to subsection 18(2), but that provision was repealed many years ago.[83] Presently, the only potentially relevant provision in *The Insurance Act* on this point is subsection 169(3),[84] 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.***
>
> ***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.***[85]

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[82] *An Act to Amend the Insurance Act*, R.S.M. 1954, c. 126, s. 176.
[83] *An Act to Amend the Insurance Act*, S.M. 1960, c. 27, s. 3.
[84] *The Insurance Act*, C.C.S.M. c. I40.
[85] Mrs. McGonigal abstained from these recommendations and did not participate in discussion of the issue, due to a possible perception of conflict of interest.