Managing the Beneficiary Designations of Incapable Persons

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Submitted by: Ontario Bar Association – Trusts and Estates Section

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A Branch of the Canadian Bar Association

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Ontario's aging society increasingly requires a substitute decision-making regime that provides:

(a) A tailored approach with the flexibility to manage the variables that often arise in addressing the continuing needs of an incapable person; and

(b) clarity and certainty for financial and other institutions that manage Registered Retirement Savings Plans ("RRSPs"), Registered Retirement Income Funds ("RRIFs"), Tax Free Savings Accounts ("TFSAs"), and pension plans ("instruments").

The current regime falls short in respect of both these goals where a substitute decision-maker's ability to manage beneficiary designations is concerned. There is a lack of clarity in the legislation and the common law has not - and likely cannot - develop a sufficiently tailored approach.

The Ontario Bar Association (OBA) Trusts and Estates Section appreciates the opportunity to provide advice to government on ways to remedy this increasingly critical problem, clarify the legislation and ensure that Ontario's regime is in keeping with modern practices.

The OBA

Established in 1907, the OBA is the largest legal advocacy organization in Ontario, representing 18,000 lawyers, judges, law professors and law students. We advocate both in the interests of the profession and, as in this case, in the interests of the public.

The OBA's Trusts and Estates Section has over 800 members, including the leading practitioners in the field. Our members would count among their clients virtually every stakeholder with an interest in this issue, including incapable persons and their families, substitute decision-makers, and financial institutions.

The Issues

There are two over-arching problems with respect to beneficiary designations by substitute decision makers:

I – A lack of clarity and certainty - there is no meaningful guidance in the legislative scheme with respect to the authority to manage beneficiary designations. As a result, there are inconsistent policies from different financial institutions with respect to whether an attorney or guardian can make a valid beneficiary designation; and

II- The common law is insufficiently tailored to address variables - While the matter has not been completely settled by the courts, the weight of authority seems to take a restrictive approach that invalidates beneficiary designations made by attorneys and guardians. The courts have not addressed those exceptional circumstances where allowing such a designation is clearly necessary to protect the interests of the incapable person and presents no risk to his/her interests. We have outlined these circumstances below. Protecting the financial interests of incapable persons requires both appropriate restrictions *and* appropriate flexibility.

Lack of Clarity in the Legislative Provisions

The *Substitute Decisions Act*, 1992 ("SDA") sets out the regime that governs the management of the property and personal affairs of an incapable individual by a substitute decision-maker who was appointed by a capable grantor ("attorney") or by the court or pursuant to the provisions of the SDA ("guardian").

The provisions of the SDA specifically preclude an attorney and guardian from "making a will" on behalf of the incapable person. The relevant legislative provisions are as follows.

Subsection 7(2) of the SDA:

> "The continuing power of attorney may authorize the person named as attorney to do on the grantor's behalf anything in respect of property that the grantor could do if capable, except make a will."

Subsection 31(1) of the SDA reads as follows:

> "A guardian of property has power to do on the incapable person's behalf anything in respect of property that the person could do if capable, except make a will."

Subsection 1(1) of the SDA states that the term "will" has the same meaning as in the *Succession Law Reform Act* R.S.O. 1990, c. S.26 ("SLRA"). Subsection 1(1) of the SLRA provides the following definition for the term "will":

"will" includes,

> (a) a testament,

(b) a codicil,

(c) an appointment by will or by writing in the nature of a will in exercise of a power; and

(d) any other testamentary disposition.

It appears clear that the designation of a beneficiary of a life insurance policy and/or plan benefits such as RRSPs, RRIFs and pension plans does not constitute a "testament", a "codicil", or an "appointment by will…". However, neither the SDA nor the SLRA offers any guidance on whether the making or changing of a beneficiary designation is a "testamentary disposition". As a result, there continues to be uncertainty as to whether a beneficiary designation constitutes a "testamentary disposition" and is, as such, the making of a will - an activity which attorneys and guardians are prohibited from carrying out under the SDA.

Common Law not Sufficiently Tailored

Whether designating a beneficiary is caught by the definition of a will, and is therefore prohibited, has not been clearly determined by the courts. However, the weight of authority appears to suggest that a beneficiary designation made on behalf of an incapable person by an attorney or guardian constitutes a testamentary disposition (i.e. a will) and, as such, is contrary to the provisions of the SDA.

It is unlikely that the creation of a satisfactory regime can be left to the common law. The court's ability to decide the narrow, "yes or no" question of whether a beneficiary designation falls under the definition of a will does not allow necessary exceptions to be addressed. A general prohibition against making or changing beneficiary designations may be necessary in order to protect incapable persons and ensure their prior wishes are fulfilled. However, there are necessary exceptions to such a prohibition. In order to protect the interests and reflect the wishes of an incapable person, substitute decision-makers must be able to name a beneficiary in certain circumstances. These are more fully outlined below.

Circumstances in which Attorneys and Guardians must Manage Beneficiary Designations

There is no question that the interests of incapable persons need to be protected by the SDA. Preventing an attorney or guardian from making a will on behalf of an incapable person appears necessary to prevent abuses. However, an absolute prohibition of an attorney or guardian from making a beneficiary designation on behalf of an incapable person can be problematic in certain

circumstances because this rule effectively prevents actions that would fulfill the intention of the incapable person.

These include:

(a) the attorney or guardian of the incapable person is continuing with a divorce proceeding commenced by the person prior to becoming incapable. While divorce will revoke the gifts in favour of a spouse in a will, it may not revoke a beneficiary designation on an insurance policy or in respect of registered plan benefits. The general releases and waivers usually contained in a separation agreement may not result in the change of an already existing beneficiary designation.[1] As a result, the former spouse will continue to benefit simply as a result of the individual's resulting incapacity and the inability of the attorney or guardian to change or revoke the beneficiary designation. It is not suggested that an attorney or guardian simply have the power unilaterally to select a replacement beneficiary for the previously named spouse. Rather, it is suggested that the legislation provide for the ability of the attorney or guardian to get direction from the court on the issue so that a change can be made in the appropriate circumstances;

(b) the transfer of an RRSP, RRIF or TFSA to another financial institution may be necessary to protect the investments and financial interests of the incapable person. Unless a beneficiary can be designated on the new plan, the proceeds may fall into the incapable person's estate, and, as a result, the proceeds may benefit persons whom the incapable person did not intend, thereby defeating his or her estate plan (and any tax planning undertaken with respect to the same) and increasing the potential for litigation. It is not suggested that in such a situation, the attorney or guardian be allowed to choose a new beneficiary. Rather, it is suggested only that the attorney or guardian be able to designate the same beneficiary on the new plan. The current regime does not allow for this, at least not clearly; and

(c) in the context of RRSPs, if the incapable person attains age 71, the RRSP proceeds will need to be transferred to a RRIF or permitted annuity. It would be consistent with the incapable person's wishes to designate the same beneficiary. Without the power to do so, on the death of the incapable person, the proceeds from the RRIF/annuity may be paid to persons that the individual did not intend, thereby defeating his or her estate plan (and

[1] It will not always be possible to adjust support provisions or the division of other property to correct for the fact that the former spouse will continue to benefit from the RRSP, pension etc. due to the incapable person's inability to change the designation.

any tax planning undertaken with respect to the same) and increasing the potential for litigation.[2]

In each of these cases, the solutions suggested raise little or no risk of abuse.

Amendments Suggested

In order to provide the necessary clarity and flexibility, it is suggested that amendments be made to the SDA and related legislation to allow an attorney or a guardian, to make, change or revoke a beneficiary designation in a limited number of circumstances. The incremental approach taken below is designed to protect the incapable person's interests while presenting no appreciable risk of abuse.

Our suggested amendments to the SDA are as follows:

Section 31 of the SDA be amended as follows:

> 31(1) Subject to subsection 2, a guardian of property has power to do on the incapable person's behalf anything in respect of property that the person could do if capable, except make, change or revoke a will. [3]
>
> (2) A guardian of property may make, change or revoke a beneficiary designation:
>
> > (a) where a plan (within the meaning of that term as set out in the Succession Law Reform Act) that is the subject of a beneficiary designation (the "former designation") is converted, renewed, transferred or replaced, a guardian has the power to designate beneficiaries identical to the former designation on the instrument that results from the conversion, renewal, transfer or replacement; or

[2] There is another situation where the proposed solution may be of benefit to the incapable person. If a person is a member of a group under a group insurance contract with an employer and the carrier changes, an existing insurance declaration would not apply to the replacement group insurance contract. In that situation, normally the employer would circulate a new insurance declaration to be completed by each member of the group. Very recent amendments have been made to the *Insurance Act* to address this situation. However, they have yet to be proclaimed in force and, even when they are proclaimed in force, it will be the decision of the new carrier as to whether it will respect insurance declarations made under the predecessor contract. Where, at the time the new insurance declaration is circulated by the employer, the member is incapable (although still a member of the group), it would be helpful if the attorney or guardian could make new insurance declaration on the incapable person's behalf.

[3] We are suggesting the addition of the words "change or revoke" to confirm the scope of the existing wording.

(b) by order of the Court, on the guardian's application for directions.

Subsection 7(2) of the SDA be amended as follows:

7(2.1) Subject to subsection 2.2, the continuing power of attorney may authorize a person named as attorney to do on the grantor's behalf anything in respect of property that the grantor could do if capable, except make, change or revoke a will.

(2.2) An attorney for property may make, change or revoke a beneficiary designation:

(a) where an instrument containing a plan (within the meaning of that term as set out in the Succession Law Reform Act) that is the subject of a beneficiary designation is converted, renewed, transferred or replaced, an attorney for property has the power to designate beneficiaries identical to the former designation on the instrument that results from the conversion, renewal, transfer or replacement; or

(b) with the approval of the Court, on the attorney's application for directions.

Consideration could be given to enumerating some grounds for the exercise of the court's discretion in subsections 31(2) and 7(2.2) above. Further consultation would be required.

As a result of these proposed amendments, it will likely be necessary to make corresponding legislative changes, including, without limitation, the following:

(a) amendments to the *Insurance Act* R.S.O. 1990, c. I.8 in order to ensure that there is no doubt as to the authority of attorneys and guardians to make qualifying declarations pursuant as to the provisions of that statute;

(b) adding a definition of "beneficiary designation" to the SDA in order to ensure that all manner of designations can be made by attorneys and guardians, and in particular designations with respect to those assets qualifying as "plans" pursuant to section 50 of the *Succession Law Reform Act* R.S.O. 1990, c. S.26 and its regulations (the "SLRA"); and

(c) amending the SDA and/or the SLRA to ensure that those provisions of Part III of the SLRA applicable to beneficiary designations (and in particular section 53 of the SLRA, which allows third parties to rely on such beneficiary designations) will apply to a designation made by an attorney or guardian pursuant to these new provisions of the SDA. For example, this could be accomplished by providing that any designation made by an attorney or guardian pursuant to the new provisions of the SDA will be deemed to be a designation made by the grantor or incapable person for the purposes of Part III of the SLRA.

Thank you for your consideration of this matter. We look forward to receiving your comments in due course. If we can provide you with any further information in relation to this matter, please do not hesitate to contact us.

Appendix I – Summary of Issues and Proposed Solutions

Issue	Solution	Section Amendments
Divorce – while gifts, etc. in a will are revoked automatically, beneficiary designations in RRSP'S, pension plans etc. may not. Former spouse continuing as beneficiary not likely but for incapacity.	Allow attorney or guardian to get a court order to change beneficiary where appropriate.	SDA, ss. 31(2)(b) and 7(2.2)(b)
RRSP proceeds required to be transferred to RRIF/annuity at age 71. New instruments result.	Allow attorney and guardian to name beneficiary on a new instrument as long as identical to former instrument.	SDA, ss. 31(1) and 7 (2.2) (b)
Prudent investment choices or other practicalities require investments to be transferred to another institution resulting in replacement instruments	Allow attorney and guardian to name beneficiary on a new instrument as long as on identical terms to former designation.	SDA, ss. 31(1) and 7 (2.2) (b)
Where attorney or guardian cannot name identical beneficiary in above circumstances (pre-deceased, etc.).	Allow attorney or guardian to get a court order to change beneficiary where appropriate.	SDA, ss. 31(2)(b) and 7(2.2)(b)

		Applicable Insurance Act amendments as well.