RIGHTS AND LIMITATIONS ON AN ATTORNEY **UNDER A POWER OF ATTORNEY**

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Beneficiary Designations and Attorneys – Legislation and Legislative Reform

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OBA INSTITUTE
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<u>Beneficiary Designations and Attorneys – Legislation and Legislative Reform</u>

Generally speaking, an attorney under a power of attorney for property cannot make, change or continue a beneficiary designation. This paper focuses on that issue and discusses legislative reform undertaken in various jurisdictions to change the law on point.

<u>Summary of Current Legislation</u>

The Succession Law Reform Act

Beneficiary designations are covered by Part III of the *Succession Law Reform Act*, RSO 1990, c S.26 (the "*SLRA*"):

> **Definitions**
>
> **50** In this Part,
>
> "participant" means a person who is entitled to designate another person to receive a benefit payable under a plan on the participant's death; ("participant")
>
> "plan" means,
>
> (a) a pension, retirement, welfare or profit-sharing fund, trust, scheme, contract or arrangement or a fund, trust, scheme, contract or arrangement for other benefits for employees, former employees, directors, former directors, agents or former agents of an employer or their dependants or beneficiaries,
>
> (b) a fund, trust, scheme, contract or arrangement for the payment of a periodic sum for life or for a fixed or variable term, or
>
> (c) a fund, trust, scheme, contract or arrangement of a class that is prescribed for the purposes of this Part by a regulation made under section 53.1,
>
> and includes a retirement savings plan, a retirement income fund and a home ownership savings plan as defined in the *Income Tax Act* (Canada) and an Ontario home ownership savings plan under the *Ontario Home Ownership Savings Plan Act*. ("régime") R.S.O. 1990, c. S.26.

Designation of beneficiaries

51 (1) 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 him or her or signed on his or her behalf by another person in his or her presence and by his or her direction; or

(b) by will,

and may revoke the designation by either of those methods.

Idem

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

....

Exception

54 (2) This Part does not apply to a contract or to a designation of a beneficiary to which the *Insurance Act* applies.

Application to retirement income funds

54.1 (1) This Part applies to the designation of a beneficiary of a retirement income fund, whether the designation was made before or after the effective date, and even if the participant who made the designation died before the effective date.

The Insurance Act

Life insurance arrangements are dealt with separately under Part IV of the *Insurance Act*, RSO 1990, c I.8. Care has to be taken to ensure that the legislative regime under consideration is the regime governing the designation in question.

Beneficiary designations are dealt with in sections 190 to 196. Sections 190 to 192 are reproduced here:

Designation of beneficiary

190 (1) Subject to subsection (4), an insured may in a contract or by a declaration designate the insured, the insured's personal representative or

a beneficiary as one to whom or for whose benefit insurance money is to be payable.

Electronic declaration

(1.1) Despite anything to the contrary in the *Succession Law Reform Act*, a declaration under this section may be provided electronically. 2019, c. 7, Sched. 33, s. 6.

Same, Authority rule requirements

(1.2) An electronic declaration under this section must comply with such requirements as may be prescribed by the Authority rules. 2019, c. 7, Sched. 33, s. 6.

Change in designation

(2) Subject to section 191, the insured may from time to time alter or revoke the designation by a declaration.

Meaning of "heirs", etc.

(3) A designation in favour of the "heirs", "next of kin" or "estate" of the insured, or the use of words of like import in a designation, shall be deemed to be a designation of the personal representative of the insured.

Restriction on designations

(4) Subject to the Authority rules, an insurer may restrict or exclude in a contract the right of an insured to designate persons to whom or for whose benefit insurance money is to be payable.

Designation may apply to replacement contract

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

Same

(6) Where a contract of group insurance replacing another contract of group insurance provides that a designation referred to in subsection (5) shall be deemed to apply to the replacement contract,

(a) each certificate in respect of the replacement contract must indicate that the designation under the replaced contract has been carried forward and that the group life insured should review the existing designation to ensure it reflects the group life insured's current intentions; and

(b) as between the insurer under the replacement contract and a claimant under that contract, that insurer is liable to the claimant for any errors or omissions by the previous insurer in respect of the recording of the designation carried forward under the replacement contract.

Designation of beneficiary irrevocably
191 (1) An insured may in a contract, or by a declaration other than a declaration that is part of a will, filed with the insurer at its head or principal office in Canada during the lifetime of the person whose life is insured, designate a beneficiary irrevocably, and in that event the insured, while the beneficiary is living, may not alter or revoke the designation without the consent of the beneficiary and the insurance money is not subject to the control of the insured, is not subject to the claims of the insured's creditor and does not form part of the insured's estate.

The Pension Benefits Act

The definition of a "plan" under the SLRA covers a pension. The *Pension Benefits Act* R.S.O. 1990, Chapter P8 (the "PBA") allows for the designation of various benefits but not to the mechanics of designation. That changed in 2018 when the PBA was amended to provide for electronic designations:

Electronic designation of beneficiaries
30.1.1 (1) Despite anything to the contrary in the *Succession Law Reform Act*, an administrator may permit members, former members and retired members to designate beneficiaries electronically for the purposes of any provision in this Act permitting the designation of a beneficiary.

Same

(2) The administrator shall comply with any prescribed requirements respecting the electronic designation of beneficiaries.

That change was proposed by Bill 57, and triggered a submission from the OBA to the Minister of Finance dated December 3, 2018. The submission pointed out that the change relating to pensions would leave some beneficiary designations to be made in electronic format, but

leave others, governed under the *SLRA*, subject to the more traditional regime where a written and signed document would be required. It would be particularly confusing where the ability to convert a pension into a product like a LIRA would change the rules before and after. A change was made to the *Insurance Act.* It was amended in 2019 with the addition of subsection 190(1.1) allowing for electronic designations on the same terms as the *PBA*. No change was made to the *SLRA* to allow electronic designations.

Other Statutory Regimes

Federal pensions legislation will govern beneficiary designations under pensions falling under federal constitutional sway. Other legislation may apply to other forms of designations. This paper is not intended to be comprehensive in covering the waterfront of all possible forms of designations available to residents of Ontario. An interesting conflict of laws issues will also present in practice. A person entering into a contract of insurance while resident in another province, such as Quebec, may move to Ontario and have the power to make beneficiary designations that will be governed by extra-provincial rules under extra-provincial legislative regimes. This is an area where the waters run deep.

Legislative Reform

Beneficiary designations have been the subject of scrutiny and legislative reform for the last two decades.

The Power to Continue Beneficiary Designations Confirming Same Beneficiaries

The continuation of beneficiary designations has been an issue of concern where a plan or financial product has to continue in a transformed or replacement product. An RRSP is the go-to example. When a plan participant attains the age of 72 the *Income Tax Act* (Canada) provides that the product must be converted into a RRIF. The resulting RRIF is a replacement product. A replacement product also arises when an account is transferred from one financial institution to another. Attorneys for property frequently transfer assets to a different financial institution. There is law to suggest that the converted, replaced, or renewed plan ceases to

exist and any existing beneficiary designation may cease to operate, a point dealt with in *Bramley v. Bramley Estate* (2003), 2003 CarswellBC 445, 2003 BCSC 313, [2003] B.C.J. No. 457, 3 E.T.R. (3rd) 191 (BCSC). The deceased in *Bramley* started with a RRSP that designated one of his three children as sole beneficiary. Over the years that followed the RRSP was converted by the deceased (no attorney was involved) into a RRIF but no new beneficiary designation was ever made. If the proceeds of the RRIF fell into his estate, three children would share in them equally. If the designation made earlier survived the conversions and lived on as operative in the RRIF, then the one son would receive it. The court concluded (at paragraph 13): "In my view, a new instrument was indeed created when the RRIF was created, and the designation of beneficiary in the RRSP did not automatically rollover or transfer into a designation of beneficiary for the RRIF." The situation would have been different if the deceased plan holder had signed a new beneficiary designation continuing the old one but he did not.

If no valid beneficiary designation is in place, the default is generally "estate," which might be exactly what the deceased wanted to avoid at the time he or she directed her mind to make the designation sometime earlier.

Can the substitute decision-maker make a fresh designation to confirm an old one? The common law is uncertain on point. The answer may turn, in part if not whole, on whether the beneficiary designation is testamentary or not.

The authority of the attorney to continue the prior beneficiary designation was squarely dealt with in a British Columbia decision, *Desharnais v. Toronto Dominion Bank*, 2001 CarswellBC 2908, 2001 BCSC 1695, 42 E.T.R. (2d) 192 (B.S.S.C.) (appealed and partially reversed on other grounds at 2002 CarswellBC 2904, 2002 BCCA 640, 3 E.T.R. (3d) 221, 9 B.C.L.R. (4th) 236 (B.C.C.A.)). The authority of an attorney was at issue in *Desharnais*. The grantor of the power of attorney had lost capacity. The attorney was his spouse, and his RRSP had been designated to her. It started out as her wealth if he died. She moved his RRSP from one financial institution to another. In signing the papers for the new RRSP the beneficiary designation was left blank. This left the funds falling into the estate, rather than to her. By

moving the RRSP she lost the advantage of the beneficiary designation. She successfully sued the financial institutions in negligence, taking the position that someone should have told her she was stripping her own inheritance away. The British Columbia Supreme court had the opportunity to express a view, in *obiter*, on the attorney's authority in the circumstances, concluding that the attorney had the power to sign a document continuing a testamentary beneficiary designation but not the power to sign documents that changing a testamentary beneficiary designation:

> 40 In the circumstances before me, I find the reasoning of the LESA report persuasive. There is an absence of statutory authority. The changing of the designated beneficiary is testamentary in nature. The process by which Ms. Desharnais accomplished the change was not in accordance with the ***Wills Act***. Only Mr. Hawthorne had testamentary capacity. The change was invalid. The purported transfer of the RSP was not in accordance with the law. Ms. Desharnais was not acting legally.
>
> 41 A valid transfer of the RSP would have required the continuation of the designation of Ms. Desharnais as beneficiary. That action would have been authorized by the power of attorney. It would not have been testamentary in nature.

Regardless of whether the position taken was correct at law, the reasoning of the case was immediately criticized. Valorie Pawson stated in a case comment on *Desharnais* found at (2003) 22 Est. & Tr. J. 298 at 308: "The issues around the authority of an attorney and the nature of beneficiary designations remain as murky now as they were before this case came to the courts. In fact, it could be argued that even more uncertainty exists in this area of the law and estate planning."

If a beneficiary designation is testamentary, then a time-honoured legal prohibition would seemingly apply: an attorney cannot make a will or testamentary disposition for an incapacitated ward (that prohibition is discussed at greater length below). If making the beneficiary designation is not testamentary but *inter vivos* then making a beneficiary designation that continues a beneficiary designation might be legally possible.

That latter conclusion can be argued based on *Banton v. Banton* (1998), 164 D.L.R. (4th) 176, 1998 CarswellOnt 3423, and (additional reasons) 164 D.L.R. (4th), 1998 CarswellOnt 4688 (Ont. Gen. Div.). Well reasoned comments in that case by Cullity J. support the conclusion that an attorney has the authority to put an *inter vivos* trust in place effectively emptying the will-maker's estate on the condition that the same heirs inherit (among other conditions). In other words, an *inter vivos* instrument can be signed by an attorney notwithstanding the fact it has the effect of directing wealth at death, provided the beneficiaries inheriting the wealth remain unchanged. The attorney can sign *inter vivos* routing documents so long as the destination remains unchanged. Cullity J. commented:

> 156 The power of attorney given to George Jr. and Victor contained the standard provision set out in Form 1 under the *Powers of Attorney Act*. Under this provision the donor authorized the attorney, or attorneys, "to do on my behalf anything that I can lawfully do by an attorney". It is not unknown for individuals to settle irrevocable *inter vivos* trusts through attorneys under a power conferred upon them either generally or for the purpose. I do not doubt that the provision in Form 1 is wide enough for this purpose. In consequence, the question is not whether the terms of the power held by George Jr. and Victor were broad enough to authorize the creation of a trust. Rather, the issue is whether the trust should be set aside on the ground that, in so exercising the power, they were in breach of their fiduciary responsibilities.

The trust established in that case was held to be invalid. The specific terms of the trust put barriers in place that deprive the ward of beneficial access and rights to the trust property. The decision leaves open the idea that an inter vivos trust, properly structured, can be validly constituted by attorneys provided, inter alia, the testamentary destinations of the ward's estate plan are preserved.

None of the above is to suggest that the law on point is well-settled or clear. Thus the call for law reform.

This issue has been taken up by law reform commissions in three provinces to date:

- The Alberta Law Reform Institute (the “ALRI”), in *Beneficiary Designations by Substitute Decision Makers*, Final Report No 104 (2014) [available online at their website https://www.alri.ualberta.ca].

- The British Columbia Law Institute (the “BCLI”), in *Wills, Estates and Succession: A Modern Legal Framework*, Final Report No 45 (2006) [online at http://www.bcli.org].

- The Manitoba Law Reform Commission (the “Manitoba LRC”), in *Creating Efficiencies in the Law: The Beneficiary Designations Act (Retirement, Savings and Other Plans)* [online at www.manitobalawreform.ca].

British Columbia has amended section 20 of its *Power of Attorney Act*, RSB 1996, c. 370:

> **20**(5) An attorney may, in an instrument other than a will,
>
> ….
>
> (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.

Also amended was section 90 of its *Wills, Estates and Succession Act* SBC 2009, c 13 to allow substitute decision-makers to make continuing beneficiary designations.

> **Maintaining previous designations**
>
> **90** (1) Subject to subsection (2), a new designation of the same designated beneficiary may be made, other than by will, by a representative of the participant, including by one of the following:

> (a) a person granted power over financial affairs under the *Patients Property Act*;
>
> (b) an attorney acting under an enduring power of attorney as described in Part 2 of the *Power of Attorney Act*;
>
> (c) a representative acting under a representation agreement made under section 7 (1) (b) of the *Representation Agreement Act*;
>
> (d) a person appointed under section 51 (2) of the *Indian Act* (Canada) or the Minister of Aboriginal Affairs and Northern Development.

> (2) Subsection (1) operates only if the designation renews, replaces or converts a similar instrument made by the participant while capable.

Will-making is specifically excluded. The power only functions if the same beneficiaries are maintained.

The change appears to be good housekeeping. The ALRI and the Manitoba LRC have recommended the same changes in Alberta and Manitoba.

This appears to be a live issue in Ontario, and a similar change might be contemplated here.

Section 50 of the *SLRA*, set out in full earlier, sets out a definition of "participant" as "*a person who is entitled to designate another person to receive a benefit payable under a plan on the participant's death*." The use of that language clearly takes us to the debate on whether a beneficiary designation is a testamentary instrument or an *inter vivos* one. If testamentary, then the conventional legal wisdom is that an attorney or other substitute decision-maker cannot validly make it. That debate is taken up in other papers submitted as part of this program.

The legal position might be slightly more nuanced in Ontario under the *Insurance Act*.

Subsection 190(5) provides that a replacement group insurance plan comes into effect preserving any beneficiary designations made under the precursor plan. That is in concert

with similar provisions in other provinces but does not address the issue here for contracts of insurance outside of group life insurance arrangements.

Subsection 190(1) of the *Insurance Act*, reproduced earlier, makes it clear that it is the "insured" who has the power to make a beneficiary designation of life insurance proceeds at death. The definition of "insured" in subsection 171(1) is of no help. Subsection 191(1) provides the same power to the insured but does so when the policy is being designated irrevocably. The difference between the two types of designation is highly germane here. Consider a revocable beneficiary designation first. Debate might be possible on whether a revocable beneficiary designation is testamentary, and therefore outside of the power of an attorney to make, or whether it is *inter vivos* and within the powers of an attorney. The best view has traditionally been that such designations are squarely testamentary in nature. Consider next an irrevocable beneficiary designation of life insurance proceeds. It depends on death for its vigour, true, but cannot be freely changed by the owner of the plan. That being the case, it is extremely difficult to argue that it is testamentary under the traditional definitions on point commencing with *Cock v. Cooke* (1865-69), L.R. 1 P. & D. 241 (Eng. Ct of Prob. and Div.), finding its way authoritatively into Canada in *MacInnes v. MacInnes,* [1935] S.C.R. 200, (sub nom. Re MacInnes Estate), [1935] 1 D.L.R. 401 (SCC).

That leads to the counter-intuitive conclusion that an attorney for property has the power to continue an irrevocable beneficiary designation (assuming attorney has any necessary consent from the beneficiary) but not a revocable one. This has to be quickly qualified by stating that it might be limited to the power to make a new beneficiary designation continuing the *same named beneficiary* as the destination of the proceeds at death. To change the destination of the proceeds, even with the consent of the irrevocable designated beneficiary, may still run afoul of the objection that a gift, whether testamentary or *inter vivos*, is a highly personalized decision and, as a result, is always outside of the power of attorney for property.

We are left with the conclusion that the call for reform answered in British Columbia, Alberta and Manitoba stands open to be made in Ontario.

The Power to Make Beneficiary Designations Redirecting Wealth

If a beneficiary designation is testamentary in nature then it appears to fall into and be captured by the general prohibition that an attorney for property cannot make a will for the incapacitated ward who appointed them.

The Alberta Law Reform Institute summarized the position of attorneys for property in the context of will making (as opposed to making beneficiary designations) in *The Creation of Wills* Final Report 96 (2009) [https://www.alri.ualberta.ca], at paragraph 58:

> The law in Canada also seems clear that a substitute decision-maker cannot exercise the testamentary power of a person under their care by making, altering or revoking that person's will. A testator's power to make a will cannot be transferred or delegated at common law. Like getting married or serving a prison sentence, will-making is classified as a personal act that can only be performed by the principal, not by an agent. In addition, the fiduciary nature of the relationship between a principal and their agent, attorney or trustee restricts a substitute decision-maker from disposing of the principal's property without clear and specific authority to do so; therefore, this principle similarly restricts substituted will-making. Although many Canadian statutes confer on substitute decision-makers very broadly-stated general powers to deal with the property and affairs of the persons under their care, it is extremely doubtful that the power to make a will would thereby be included.

It is of interest that it is the *personal nature* of making a will that is identified by the ALRI as the policy point in play to justify the attorney's inability to make a will. That policy point has more prominence in English commentary and case law (see for example *Clauss v. Pir*, [1987] 2 All E.R. 752 (Eng. Ch.D)) than it does in Canada. Other personal acts can be added to the list: directorship, child rearing, and swearing an affidavit. None can be delegated by signing a power of attorney for property. Canadian commentators and courts generally state the prohibition against will-making by attorneys without regard to the underlying judicial policy. That is of interest because the point made about wills can be made about the making of major *inter vivos* gifts. Like the making of a will, the decision to make a major gift is intensely

personal. A hard and fast rule limiting attorneys in one sphere should limit attorneys in the other. The same policy point justifies the same rule. Yet Canadian lawyers seem willing to endorse the conclusion that a clause can legitimately appear in a power of attorney for property document that authorizes the making of gifts but no clause can legitimately be added that authorizes the making of a will. Lawyers engaged in estate planning files might be too quick to assume that the power to gift can be created by a clause in the power of attorney for property that purports to authorize the attorney to make gifts (for grist for the mill out of England see "Traps for the Unwary – Lasting Powers of Attorney" (2013), Angahard Palin, P.C.B 2013, 6, 310-313).

Regardless of the rationale, it appears to be safe legal ground that an attorney for property cannot make a last will and testament to operate at the death of the donor of the power. If a beneficiary designation is testamentary, it should fall under the same rule. Any effort by the attorney to redirect wealth at death through the use of a beneficiary designation should be as unsuccessful as would be the effort to do so by will.

At least one court in Canada has been crystal clear in stating that a substitute decision-maker cannot redirect wealth by beneficiary designation, *M. (K.M.) v. M. (M.G.),* 2002 CarswellAlta 1406, 2002 ABQB 1003, 10 Alta. L.R. (4th) 275, 328 A.R. 371, 43 C.C.L.I. (3d) 101 (Alta. Q.B.). The Court stated: "A trustee of a dependent adult who acts pursuant to authority granted under … the *Dependent Adults Act*, R.S.A. 2000, c. D-11 as amended ("the DAA") does not have authority to alter the beneficiary under a policy of life insurance owned by that dependent adult" [at para. 2].

The ALRI report also goes on to point out that the statutes in place at the time in the Northwest Territories, Nunavut, Ontario, Saskatchewan and Quebec expressly provided that a substitute decision-maker could not make, change or revoke a will [citing the *Guardianship and Trusteeship Act*, S.N.W.T. 1994, c. 29, s. 36(3); *Substitute Decisions Act*, S.O. 1992, c. 30, s. 31(1); *Adult Guardianship and Co-decision-making Act*, S.S. 2000, c. A-5.3, and s. 43; *Quebec Civil Code*, art. 711]. Wills legislation across Canada typically includes a definition of "will" that extends to include codicils and any other testamentary instrument in place at death.

The conclusion may be the same in Ontario regardless of whether the beneficiary designation is a testamentary or *inter vivos* instrument. There are two reasons for that. First is the argument, made earlier, that the same prohibition applicable to wills should be applicable to beneficiary designations. Second is the decision in *Richardson Estate v. Mew,* 2009 CarswellOnt 2576, 2009 ONCA 403, 310 D.L.R. (4th) 21, 64 R.F.L. (6th) 126, 73 C.C.L.I. (4th) 257, 96 O.R. (3d) 65 (Ont. C.A.) in which the Ontario Court of Appeal commented as follows:

> 50 I do not understand Ms. Ferguson to suggest that she was entitled to change the beneficiary designation, cancel the Policy or cease paying the premiums during the time that Mr. Richardson was still capable of managing his property. To the extent that she makes such an argument, I would reject it. Given that there is no evidence that Mr. Richardson instructed her to do any of those things, if she had so acted, she would have been in breach of her duty to carry out the donor's instructions. Furthermore, changing the beneficiary designation to herself would have contravened the prohibition against using the Power for her own benefit, as Mr. Richardson had not expressly consented to such a change.
>
> 51 After Mr. Richardson became incapable, as has been noted, Ms. Ferguson owed him an even higher duty of loyalty when exercising the Power. As a fiduciary in a role rising to that of a trustee, she was bound to use the Power only for Mr. Richardson's benefit and any exercise of the Power had to be done with honesty, integrity and in good faith. There is nothing in the record to suggest that a change in the beneficiary designation, cancellation of the Policy or a cessation of the premium payments would have been for Mr. Richardson's benefit.

Those comments were *obiter*. The core thought is that actions that cannot be justified as advancing the best interests of the incapacitated ward are not validly taken by the attorney even if they operate with a neutral impact on the ward.

This has been an active area for law reform.

Various jurisdictions have enacted legislation allowing for judicially made statutory wills where the potential will-maker does not have the capacity to do so on their own. England

led the charge with the *Mental Capacity Act 2005* (U.K.) 2005, c. 9, s 18(i). Australia and New Zealand followed with similar legislation. New Brunswick was the first and, at this point, only Canadian jurisdiction to follow suit in its *Infirm Persons Act* RSNB 1973 1973, c. I-8, s. 3(4).

The approach judges follow in England in writing a statutory will was set out in *Re D.(J.)*[1972] 1 Ch.237:

> (1) the patient should be assumed to have a brief lucid interval at the time the will was made;
>
> (2) during that lucid interval it should be assumed that the patient has full knowledge of the past and realizes that as soon as the will is executed he will lapse back into his pre-existing mental state;
>
> (3) the actual patient must be considered, with all his antipathies and affections that he had while in full capacity, and not a hypothetical patient;
>
> (4) the patient must be assumed to be acting reasonably and to have been advised by a competent solicitor; and
>
> (5) in normal cases, he is to be envisaged as taking a broad brush to the claims on his bounty rather than an accountant's pen.

The judicial power to make a statutory will might be usefully invoked where a person without the capacity to make a will has weak links to the family that might inherit on intestacy but strong links to other persons, family or otherwise, who are clearly close to them. The person might cohabit long term with another friend. That friend might have gifted them money and supported them. Another common situation that might justify a statutory will is where the person standing to inherit steals from or abuses the person. Judges have been willing to be creative in some situations. A statutory will was used to thwart a predatory marriage in *Re Davey*, [1981] 1 W.L.R. 164 (Ct. of Protection). An elderly woman suffering from diminishing capacity was in the process of dying. A young male nurse seized the opportunity to marry her. The marriage revoked her will which had left her property to her family. On an intestacy, the woman's estate would pass to the predatory nurse who married her in what appeared to be a bid to take advantage of her imminent death. The Official Solicitor successfully applied

for a statutory will in the same terms as the revoked will. The application was made quickly, without notice to the predatory husband. The woman died just a few days later.

Leaving aside wills, law reform commissions have been considering changes that allow for judicial power to amend not just wills but also beneficiary designations. It makes sense. The judicial power to make statutory wills makes no sense unless concurrent and parallel changes are made to the power to make beneficiary designations that will dove-tail with the estate plan embodied in any statutory will that is made.

The BCLI recommended reform in British Columbia that allows for judicially made beneficiary designations, but has no legislation in play allowing for judicially made statutory wills. The change appears in paragraph (a) to subsection 20(5) of the *Power of Attorney Act*:

> **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

A similar change was made to British Columbia's *Wills, Estates and Succession Act* providing 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.

This leaves British Columbia in an interesting position where they appear to allow judicially made beneficiary designations but not judicially made wills.

The Alberta Law Reform Institute recommended against this form of judicial power to make wills or beneficiary designations. The Manitoba Law Reform Commission is considered the power to make judicial beneficiary designations and then tabled it to be dealt with in a later report dealing with the possible introduction of statutory wills.

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This paper is intended for the purposes of providing information only and is to be used only for the purposes of guidance. This paper is not intended to be relied upon as the giving of legal advice and does not purport to be exhaustive.

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