

## Part 5 – Benefit Plans

- The intent of Part 5 is to harmonize the treatment of non-insurance products with insurance products;
- However, these provisions are intended to complement – not replace – *Insurance Act* provisions.

### SECTION 84

- Section 84 establishes that Part 5 applies regardless of the provisions in a benefit plan. (i.e., this legislation trumps the terms of the benefit plan).
- Section 84 ensures that designations involving registered retirement savings plans that are administered by insurance companies are governed by the *Insurance Act*.
  - This would likely be the case even without section 84; as the *Insurance Act* applies specifically to insurance products, where these provisions apply to beneficiary designations more generally.
  - Section 84 is simply included for clarity.
- While this legislation provides general rules, if it is inconsistent with other legislation (either B.C. or Federal) then that legislation applies.

### Division 1 – Designation Requirements

- Division 1 of Part 5 sets out the requirements for making a valid beneficiary designation. These requirements are not as stringent as those for making a valid will.
- Default rules for designating several beneficiaries, as well as provisions giving a person the ability to make an irrevocable designation are also included in this division.

### SECTION 85

- Section 85 sets out the mechanics of designating a beneficiary.
- This section has been significantly amended by section 29 of the [Wills, Estates and Succession Amendment Act, 2011](#) to clarify the section.
- Subsection (1) provides a participant with the authority to designate another person as a designated beneficiary and gives the right to alter or revoke the designation (unless it is made irrevocable in accordance with section 87).
- Subsection (2) specifies the requirements for making an effective designation.
  - Paragraph (a) sets a lower standard for making a designation than for making a will. While the designation must be in writing, and must be signed, there are no witnessing requirements

- Paragraph (b) permits a designation to be made or changed in a will, but requires that the designation relate expressly to a benefit plan.
- Subsection (3) allows a representative with powers over a person's financial affairs to make, change or revoke a designation if permitted to do so by the court.
  - Currently the authority of a designated person to make such changes is in doubt. This change clarifies the law while providing some protection by requiring the court to authorize the change.

## SECTION 86

- Section 86 is based on section 52 (2) of the *Insurance Act* (now [section 63 \(2\)](#)). It provides a default rule that will apply when a participant designates two or more beneficiaries as being entitled to take the benefit.
  - Having a default rule will reduce the need for people to resort to the court to decide what happens.
  - This rule also harmonizes the law in relation to insurance designations and retirement plan beneficiary designations on this point.
- The default rule will not apply if the participant expressly provides in the designation that the beneficiaries are to take in shares that are not equal, or if the participant designates two or more beneficiaries who are to take as alternatives to one another.

## SECTION 87

- Section 87 changes the law to allow a person to make the designation of a beneficiary (e.g., a Registered Retirement Savings Plan) irrevocable, without the beneficiary's consent.
- The section is modelled on section 49 of the *Insurance Act* (now [section 60](#)), as irrevocable designations are already possible under insurance contracts.
- NOTE: While this section applies to benefit plans generally, it will not apply to benefit plans that are governed by pension legislation, as the legislation governing pensions has specific requirements which will supersede this general rule.
- There are two reasons for this change:
  1. This provision simply adds another tool to aid in estate planning.
    - Irrevocable designations will most likely be used in connection with separation agreements, as interests in benefit plans often constitute family assets.
  2. Enacting this provision harmonizes the treatment of retirement plan designations with designations under insurance policies.
    - There is really no principled reason why similar products offered by insurance companies should allow irrevocable designations while other benefit plans do not.

## **SECTION 88**

- Section 88 is related to section 87. It describes the effect of making a beneficiary designation irrevocable.
- Subsection (1) clarifies that once a beneficiary designation is made irrevocable the participant may not alter or revoke the designation without the consent of the beneficiary.
- Subsection (2) clarifies that if a beneficiary designation is made irrevocable, then it is not subject to the control of the participant and does not form part of the participant's estate; therefore, a participant's creditors have no claim on the benefit.

## ***Division 2 – Other Benefit Plan Provisions***

- Division 2 of Part 5 addresses other issues surrounding the making of benefit plan designations and payment of a benefit.

## **SECTION 89**

- Section 89 ensures that, in the event of a conflict between the legislation and a plan, Part 5 will prevail over the terms of a plan, unless payments under the plan have commenced.
- While the general intent is to give flexibility to plan participants, allowing a participant to change a designation after payments have begun is considered to be unfair to the plan provider – who may have calculated benefits based on the characteristics (age, health, etc.) of the original beneficiary.

## **SECTION 90**

- Section 90 grants a person authorized to manage a person's financial affairs the limited authority to sign, on behalf of the participant, a new designation that is identical in substance to the participant's previous designation.
  - The authority conferred by this section does not extend to making a designation that is different from the previous designation or that in any way alters the previous designation.
- The authority granted by this section supersedes legal formalities that prevent the representative from making what is essentially an administrative change, for example:
  - A person has a Registered Retirement Savings Plan (RRSP). They become incapacitated and their spouse becomes their guardian, with control over their finances. When the person reaches 71 they are required to collapse their RRSP. The spouse wants to convert the RRSP into a Registered Investment Fund (RIF).
  - Or an incapacitated person has an RRSP and the spouse wants to move the RRSP from one financial institution to another.

- In both cases, as long as the beneficiary of the benefit plan stays the same, then there should be no concern that the guardian has changed the location of the benefit plan or has converted the plan from an RRSP into a RIF, which is likely beneficial from a tax consequence.

## SECTION 91

- Section 91 is based on section 52 (2) of the *Insurance Act* (now [section 63 \(2\)](#)). It specifies what happens if a specified beneficiary dies before the participant in a benefit plan and provides a hierarchy of alternative beneficiaries, concluding with the participant's estate.
- The prescribed hierarchy will most likely correspond to the deceased's wishes.
- Moreover, it is merely a default hierarchy and can be displaced by the plan holder specifically describing the order in which alternative beneficiaries are to take.

## SECTION 92

- Section 92 is modelled on section 51 of the *Insurance Act* (now [section 62](#)). It permits a participant to appoint a trustee for a beneficiary under a plan.
  - This will harmonize the law of retirement plan designations with insurance designations.
  - This change also provides greater flexibility in estate planning.
    - Currently, the *Law and Equity Act* is silent on the possibility of appointing a trustee for a beneficiary. As a result, it is difficult to convince plan administrators to accept a beneficiary designation that appoints a trustee. This can frustrate some estate planning strategies.
- Subsection (2) provides protection to plan administrators by discharging them from any further liability when they make a payment under the plan to a trustee.

## SECTION 93

- This section provides the necessary statutory authority to allow a beneficiary (or a trustee of the beneficiary, if one has been appointed) to take action to enforce an entitlement to the benefit.
- A statutory rule is necessary; otherwise the common-law rule 'privity of contract' would operate to prevent a beneficiary from taking action to enforce payment of the benefit under the plan.
  - The principle of privity of contract is commonly summarized using a quote from the English Case [Tweedle v. Atkinson \[1861\] EWHC QB J57](#)  
". . . no stranger to the consideration can take advantage of a contract, although made for his benefit."

- A retirement plan beneficiary designation is a classic example of a type of contract made between two persons for the benefit of a third party, who is a “stranger to the consideration.” Person A, the plan participant who makes contributions, enters into a contract with Institution B, the financial institution that administers the plan, to pay the proceeds of the plan to person C upon person A’s death. Clearly there is no contractual connection between B and C; nonetheless, the payment of the benefits should be enforced.

## SECTION 94

- Section 94 provides protection for plan administrators who transfer a benefit in accordance with the plan to a beneficiary of record.
- This section is necessary because sections 85 and 97, allow a person to change a beneficiary designation in their will. This means that a plan administrator may have a beneficiary designation in their records that has been superseded by a designation made in a later will.
- There are two reasons to protect plan administrators in this manner:
  1. Allowing plan administrators to rely on their records achieves a reasonable balance between protecting the interests of the true beneficiary and administrative convenience on the part of a plan administrator.
  2. This provision is also of practical assistance to beneficiaries, who might be kept waiting if plan administrators believed that they could not rely on their records, and instead had to make further inquiries to determine if the person in their records was the true beneficiary.

## SECTION 95

- Section 95 is based on section 54 (1) of the *Insurance Act* (now [Section 65](#)). It clarifies that a benefit payable under a plan on the death of a participant is not part of the participant’s estate and not subject to the claims of the participant’s creditors. There are the following exceptions to this protection:
  - the deceased’s estate is the designated beneficiary; or
  - the benefit falls into the deceased’s estate, as there is no designated beneficiary or the designated beneficiary predeceases the plan participant.
- There are two reasons for section 95:
  1. It resolves uncertainty in this area of the law,
    - It is likely that a benefit paid directly to a beneficiary is safe from creditors now. However, there have been no authoritative court cases on this point; thus, without statutory authority uncertainty remains.
  2. The clarification promotes uniformity between benefit plans (Registered Retirement Savings Plans) and insurance products.

## ***Division 3 – Designated Beneficiaries in a Will***

- Designating a beneficiary of a benefit plan in a will results in certain questions.
  - There are different requirements for designating a beneficiary as opposed to making a valid will; so, if a will is invalid, how does this impact a beneficiary designation made in that will.
  - Actions taken to repeal or revive a will could be considered to impact beneficiary designations made in the will; so, if a will is revived, how does this impact a beneficiary designation made in that will.
- Division 3 of Part 5 sets out rules intended to prevent issues from arising from the ability to designate beneficiaries in a will.

### **SECTION 96**

- Section 96 sets out the mechanics of designating a beneficiary and deals with some consequences of allowing designations in a will.
- This section resolves potential conflicts between designations in a will that are not expressly revoked by a later designation in a signed instrument.
- The language of section 96 also furthers the uniform treatment of insurance beneficiary designations and retirement plan designations.

### **SECTION 97**

- Section 97 accomplishes the following objectives:
  - It guards against the possibility of accidental or mistaken revocations.
  - It resolves any conflicts that may exist when a later designation is made in the absence of an express revocation of an earlier one.
  - It clarifies the effect of revocation of a will on a designation in that will.
  - It ensures that revocation of a designation does not revive an earlier designation.
- The provisions in section 97 provide clear and explicit rules for retirement plan beneficiary designations.
  - Subsection (1) guards against the possibility of accidental or mistaken revocations by virtue of the rule that a later will revokes an earlier one.
  - Subsection (2) resolves any conflicts that may exist when a later designation is made in the absence of an express revocation of an earlier one.
    - Subsection (2) must be cross referenced to [section 37](#), which sets out the formalities that apply to the making of a will.

### **SECTION 98**

- Section 98 sets out several special rules that govern the relationship between beneficiary designations contained in a will and the general law of making a will.

- A designation (or revocation of a designation) can be found valid even if the document in which the designation is found is not valid as a will.
- The key to section 89 is the rules for a valid beneficiary designation set out in [section 85](#).
  - The requirements for a beneficiary designation to be valid under section 85 are less stringent than the requirements for a document to be valid as a will (for example, no witnesses are required).
  - Section 98 ensures that as long as a designation complies with the requirements of section 85 the designation will be valid.
- Subsection (2) provides for the revocation of a designation contained in the defective will referred to in subsection (1).
- The rules set out in section 98 are necessary to ensure that the intentions of will-makers are not defeated.
  - Because a designation does not require the same formalities as a will it is not necessary for a purported will to be valid for the designation to be valid.
    - Just because the designation appears in a document that was intended to be a will does not mean that the designation should have to meet higher requirements for validity than section 85 requires.
- This section is also consistent with the broader policy goals of permitting participants to designate beneficiaries in instruments that do not meet the formalities required of a valid will (see section 85 (2)) and aligning the designation of non-insurance beneficiaries with designations under the *Insurance Act*.

## SECTION 99

- Section 99 guards against the inadvertent revival of a revoked beneficiary designation contained in a will upon the execution of a codicil that revives that will.
  - This is done by codifying the test in [Royal Trust Co. v. Shimmin \(1932\) 46 B.C.R. 273](#).
- This special rule is necessary to ensure that the intentions of will-makers are not defeated through inadvertence.

### **Background - Royal Trust Co. v. Shimmin (1932) 46 B.C.R. 273**

- A codicil is a document that explains, modifies or revokes a will (or part of a will). In most cases a codicil will provide for the republication of the original will. The problem that this may pose for a beneficiary designation is illustrated by the fact pattern in *Royal Trust Co. v. Shimmin*.
  - In this case a person made a will that contained a beneficiary designation.
  - At a later time they revoked the designation and made a new designation in a signed instrument.

- Then, still later, the person executed a codicil that made changes to the will unrelated to the designation and which had the effect of republishing the will.
  - An argument could be made that republication of the will revives the first designation that was contained in that will, even though the codicil had nothing to say about the designation.
- In *Shimmin*, Macdonald J. concluded that the proper test was one that gave effect to the will-maker's intention.

*There is no doubt that a codicil to a will operates as a revival of the will, as if the will-maker had made a new will at the time. While the will was republished by the codicil and thus for many purposes the date of the original will was, as it were, shifted to the date of the codicil, still the republication did not necessarily make it operate for all purposes "as if it had originally been made at the date of the republishing instrument; a contrary intention may be shewn.*

*The rule is subject to the limitation that the intention of the will-maker is not to be defeated thereby:"*

## **SECTION 100**

- Section 100 modifies the rule that a will is to be interpreted as having been drafted just before death. Section 100 provides that a beneficiary designation contained in a will is effective from the date that the will is signed.
  - This rule is necessary to ensure that the intentions of will-makers are not defeated.
  - Designations are, by their nature more specific than gifts under a will, therefore, different rules must apply to them.