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VOLUME 27, NUMBER 2, JUNE 2021

Bill 245 – Significant Changes Coming to Ontario's *Succession Law Reform Act*

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Bill 245, also known as the *Accelerating Access to Justice Act, 2021*, was introduced earlier this year by the office of the Attorney General of Ontario in an effort to modernize what had become in some ways an outdated system, and to introduce meaningful changes that better reflect life in Ontario in the 2020s and the way that most of us organize our affairs. Schedule 9 to Bill 245 provides for significant updates to the *Succession Law Reform Act*, RSO 1990, c S. 26 (the "SLRA"), most of which come into effect in 2022.

Remote Will Execution in Counterpart Made Permanent

The SLRA and the *Substitute Decisions Act, 1992*, SO 1992, c 30 (the "SDA") both speak to the requirement that planning documents be signed in "the presence of" two witnesses. This has historically required witnesses to be in the physical presence of the testator/grantor and one another, and for all three individuals to sign the same original copy of the document.

Abiding by in-person witnessing requirements under the SLRA and SDA became a challenge in light of the safety issues posed by the COVID-19 pandemic. This led to emergency Orders in Council that allowed solicitors to assist clients in the remote execution of wills and powers of attorney through the use of audiovisual communication technology and the execution and witnessing of documents in counterpart, with two or more identical copies of the will or power of attorney together comprising the complete original document.

The provisions permitting the remote execution and witnessing of planning documents in counterpart have now been made permanent through updates to the SLRA and the SDA. As was the case under the emergency Orders, one of the witnesses must be a licensee of the Law Society of Ontario.

Unlike the other amendments under Schedule 9 to Bill 245, the update to section 4 of the SLRA is already effective and is deemed to have come into force on April 7, 2020. Notably, while the circulation of the same copy of a will or power of attorney was previously permitted, the SLRA now speaks only to the opportunity to virtually execute and witness such documents at the same time in counterpart.

The permanence of virtual witnessing provisions for wills has the potential to increase access to justice, while preserving necessary safeguards in the will execution process.

Ontario Will No Longer Be a Strict Compliance Jurisdiction

Ontario has been one of the few remaining strict compliance jurisdictions in Canada. If a will is not entirely compliant with the formal requirements set out under the SLRA, it is not a valid will. As a result, some documents clearly intended by the deceased to function as a will have failed to be effective.

Under a new section 21.1 of the SLRA, courts will have the authority to declare a will to be valid notwithstanding non-compliance with certain requirements under the Act. This change will apply only to the estates of persons who die after January 1, 2022. While these developments may not yet be in effect, they may nevertheless impact the validity of wills that are being made now.

In the past, we have seen technicalities prevent what was clearly intended to be a will from functioning as one from a legal perspective. However, the new section 21.1 will provide the courts with a mechanism to allow the intentions of individuals who may not be aware of the formal requirements for a valid will to be honoured.

Wills Will No Longer Be Revoked by Marriage

Subsection 15(a) of the SLRA states that a will is revoked by marriage, subject to section 16. Pursuant to section 16 of the Act, marriage has the

effect of revoking a will, except in limited circumstances, including where the will is made in contemplation of marriage.

Many individuals are unaware that marriage automatically revokes a will, including in circumstances where the person marries while no longer possessing testamentary capacity and unable to make a new will after marriage. This can lead to disputes regarding the validity of a marriage and other claims by beneficiaries under a will made prior to marriage following death. Sections 15(a) and 16 of the SLRA may also leave individuals, especially older individuals, vulnerable to predatory marriages.

On January 1, 2022, sections 15(a) and 16 of the SLRA are being repealed, thereby eliminating the automatic revocation of wills as a consequence of marriage.

Schedule 9 to Bill 245 is, in part, aimed at protecting vulnerable elders against predatory marriages. These changes will prevent the automatic revocation of wills when this may not be what is intended by the testator, without restricting his or her ability to make a new will after marriage if the individual retains capacity to do so.

Divorced and Separated Spouses To Be Treated More Consistently

Subsection 17(2) of the SLRA sets out that, unless a contrary intention appears in the will, where a marriage is terminated by divorce or declared a nullity, a devise or bequest to a former spouse, an appointment of a former spouse as estate trustee, and the conferring of a general or special power of appointment on a former spouse, are revoked, and the will is construed as if the former spouse had predeceased the testator. This provision does not currently apply to separated spouses.

Many couples never obtain a formal divorce and/or take steps to update their wills following separation. After death, surviving separated spouses often benefit in a manner that the deceased may not have intended and their estate plan may be inconsistent with conflicting legal and/or moral support obligations at the time of death.

Upcoming amendments to the SLRA address the gap in treatment between divorced spouses and separated spouses. New subsection 17(3) will mirror subsection 17(2) to restrict the estate-related rights of separated spouses. A spouse will be considered "separated" from the testator for the purposes of the SLRA where:

- the couple have lived separate and apart for three years as a result of a breakdown of the marriage; or
- their rights on the breakdown of the marriage have been addressed by way of a separation agreement, court order, or family arbitration award; and
- at the time of the testator's death, they were living separate and apart as a result of marriage breakdown (to avoid application to circumstances of reconciliation).

Similarly, a new section 43.1 of the SLRA will eliminate a separated spouse's entitlements on intestacy to mirror the treatment of divorced spouses on intestacy.

These amendments will come into force on January 1, 2022. The updated rights of separated spouses can be expected, in most cases, to result in a more appropriate treatment of separated spouses who do not take the step of obtaining a formal divorce but no longer wish to benefit one another after death.

Conclusion

There is significant potential for the amendments introduced under Schedule 9 to Bill 245 to facilitate access to justice and to assist Ontario families in addressing the death of a loved one. We welcome these progressive developments and commend the Attorney General's office for taking these significant steps in the modernization of our estates legislation.

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