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

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In April 2021, Bill 245, also known as the *Accelerating Access to Justice Act, 2021*, received Royal Assent. Bill 245 was initially introduced in February of 2021 by the office of the Attorney General of Ontario in an effort to modernize what had become in some ways an outdated system, and to introduce meaningful changes that better reflect the realities of life in Ontario and the way that most residents organize their affairs in the 2020s. Schedule 9 to Bill 245 provides for significant updates to the *Succession Law Reform Act*, RSO 1990, c S. 26 (the "SLRA"), as briefly summarized below, 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 wills, powers of attorney, and codicils 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 and the execution of such documents in counterpart are being made permanent through updates to the SLRA and the SDA.

Section 4 of the SLRA now reads as follows:

4 (1) In this section, "audio-visual communication technology" means any electronic method of communication which allows participants to see, hear and communicate with one another in real time.

(2) Subject to subsection (3) and to sections 5 and 6, a will is not valid unless,

(a) at its end it is signed by the testator or by some other person in his or her presence and by his or her direction;

(b) the testator makes or acknowledges the signature in the presence of two or more attesting witnesses present at the same time; and

(c) two or more of the attesting witnesses subscribe the will in the presence of the testator.

(3) A requirement in clause (2) (b) or (c) that witnesses be in the presence of the testator or in one another's presence for the making or acknowledgment of a signature on a will or for the subscribing of a will may be satisfied through the use of audio-visual communication technology, if,

(a) at least one person who acts as a witness is a licensee within the meaning of the Law Society Act at the time;

(b) the making or acknowledgment of the signature and the subscribing of the will are contemporaneous; and

(c) the requirements specified by the regulations made under subsection (7), if any, are met.

(4) For the purposes of clause (3) (b), signatures and subscriptions required to be made under clause (2) (b) or (c) may, subject to any requirements specified by the regulations made under subsection (7), be made by signing or subscribing complete, identical copies of the will in counterpart, which shall together constitute the will.

(5) For the purposes of subsection (4), copies of a will are identical even if there are minor, non-substantive differences in format or layout between the copies.

The update to section 4 of the SLRA is already effective and is deemed to have come into force April 7, 2020. Notably, while the circulation of the same copy of a will or power of attorney was previously permitted, the SLRA speaks only to the opportunity to virtually execute and witness such documents in counterpart. As was the case under the emergency Orders, one of the witnesses must be a licensee of the Law Society of Ontario.

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. These amendments are expected to provide Ontarians improved access to legal assistance in their estate and incapacity planning, regardless of where in the province they may be located.

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.

Strict compliance prevents courts from validating documents that express a testamentary intention if they do not adhere to the execution requirements set out under the SLRA. In some cases, this results in intestacies that benefit individuals other than those that the deceased may have intended (and expressed a written intention) to benefit.

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, giving rise to a new set of considerations to keep in mind as these legislative amendments formally take effect next year.

Section 21.1 of the SLRA will read as follows:

21.1 (1) If the Superior Court of Justice is satisfied that a document or writing that was not properly executed or made under this Act sets out the testamentary intentions of a deceased or an intention of a deceased to revoke, alter or revive a will of the deceased, the Court may, on application, order that the document or writing is as valid and fully effective as the will of the deceased, or as the revocation, alteration or revival of the will of the deceased, as if it had been properly executed or made.

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

Section 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 or the testator's spouse elects to take under the will that is otherwise revoked by 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.

Sections 15(a) and 16 are being repealed, thereby eliminating the automatic revocation of wills as a consequence of marriage. These amendments come into force on January 1, 2022.

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 the requisite mental capacity to do so. A surviving married spouse may nevertheless be able to pursue relief under Part V of the SLRA and/or the *Family Law Act*, RSO 1990 c. F3, if not adequately provided for under the predeceasing spouse's estate plan.

Divorced and Separated Spouses to be Treated More Consistently

Section 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 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 include reference to separated spouses.

Many couples never obtain a formal divorce following separation and may not 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, with necessary modification. A new subsection 17(4) will describe a spouse as being "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).

New section 43.1 of the SLRA will also eliminate a separated spouse's entitlements on intestacy. Section 43.1 will read as follows:

43.1 (1) Any provision in this Part that provides for the entitlement of a person's spouse to any of the person's property does not apply with respect to the spouse if the spouses are separated at the time of the person's death, as determined under subsection (2).

- (2) A spouse is considered to be separated from the deceased person at the time of the person's death for the purposes of subsection (1), if,
- (a) before the person's death,
 - (i) they lived separate and apart as a result of the breakdown of their marriage for a period of three years, if the period immediately preceded the death,
 - (ii) they entered into an agreement that is a valid separation agreement under Part IV of the Family Law Act,
 - (iii) a court made an order with respect to their rights and obligations in the settlement of their affairs arising from the breakdown of their marriage, or
 - (iv) a family arbitration award was made under the Arbitration Act, 1991 with respect to their rights and obligations in the settlement of their affairs arising from the breakdown of their marriage; and
 - (b) at the time of the person's death, they were living separate and apart as a result of the breakdown of their marriage.

These amendments will not come into force until January 1, 2022.

The updated rights of separated spouses will, in most cases, result in a more appropriate treatment of separated spouses who do not take the step of obtaining a formal divorce.

Conclusion

There is significant potential of 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.