



Simplified Procedures for Small Estates in Ontario

Submitted to: The Law Commission of Ontario

Submitted by: The Ontario Bar Association,
Trusts & Estates Section



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Introduction

The Ontario Bar Association (“OBA”) appreciates the opportunity to comment on issues raised in the Law Commission of Ontario (“LCO”) consultation paper on “Simplified Procedures for Small Estates in Ontario” (the “Consultation Paper”).

The OBA

Established in 1907, the OBA is the largest voluntary legal association in Ontario and represents some 16,000 lawyers, judges, law professors and law students. The OBA advocates in the interests of the public, the profession, and the administration of justice. This submission was prepared by the OBA Trusts & Estates Law Section. With over 700 members, the Section includes the leading experts in the field, who would count among their clients every stakeholder in the administration of estates, including testators, beneficiaries, estate trustees, and financial institutions.

Comments

As noted in the Consultation Paper, many sources have recognized the probate system as providing an important legal framework for regulating the orderly disposition of wealth after death. Key functions of probate include recognizing the validity of a will, authorizing persons responsible for administering the estate, and providing protections to the estate’s beneficiaries and creditors against poor administration or fraud.

Through the project on simplified procedures for small estates, the LCO seeks to determine whether there is a need in Ontario to recommend a simplified probate process for small estates and, if so, what that process should look like. The Consultation Paper provides an overview of the current state of Ontario law, perceived challenges, small estate procedures in other jurisdictions, and some possible options for reform. Among other things, the LCO indicates it is particularly interested in determining whether legal assistance is considered necessary to the probate process.

The OBA is pleased to provide the following comments addressing some of the underlying themes in the Consultation Paper.

The Role of Lawyers in Probate Protections

Lawyers are professionals who can offer clients expertise in a full range of estate related services, including estate planning, estate administration, and estate litigation.



The Consultation Paper refers to anecdotal evidence that Ontarians typically hire a lawyer to prepare and file the application materials to obtain probate. The OBA notes that when considering challenges in the administration of small estates, it is important to distinguish between costs incurred for the estate to satisfy the substantive probate requirements and costs incurred for the estate to benefit from the service of a lawyer having the expertise and experience to navigate the probate process.

In addition to the estate administration tax in Ontario, probate application costs for estates largely depend on the complexity of the estate, including factors such as whether or not there is a will, the number and location of beneficiaries, whether there are minor or incapable beneficiaries, the likelihood of a family dispute, the types of assets and whether or not there are creditors to be paid.

In short, where the estate is relatively straightforward and uncontentious, the requirements for obtaining probate will be easier to satisfy, and costs for probate will be low. Conversely, where the estate is complicated and there are challenges satisfying the probate requirements, the costs will be higher, for example when there are concerns about the validity of the will or difficulty locating beneficiaries. Whether the estate is straightforward or complicated, lawyers can provide the expertise and experience for the estate to obtain probate as quickly and cost effectively as possible.

As discussed below, the OBA favours an approach to simplifying estate administration by seeking to identify and eliminate ineffective probate requirements. This reduces costs of estate administration without jeopardizing valuable protections or the important role that lawyers have in the process.

On a related note, the consultation paper suggests that some jurisdictions have sought to reduce protections afforded by probate and simultaneously design small estate processes to be carried out without legal assistance. The OBA does not recommend reducing effective probate protections based on the size of the estate, but notes that if the LCO recommends doing so, the resort to expert assistance from a lawyer is all the more important for ensuring proper administration of the estate.

The Importance of Probate Protections in Small Estates

The Consultation Paper seeks to determine if, when, and how it might be appropriate to compromise procedural protections associated with the existing court probate process for the administration of small estates. The OBA makes a couple of observations with respect to this objective.

First, while probate costs that are not proportional to estate value will have a larger impact on smaller estates, the LCO should not conclude that probate protections themselves are relatively less important for smaller estates. It is not unreasonable to believe that a person who dies with modest assets may have beneficiaries in similar financial circumstances, for whom even relatively small bequests are highly significant. For a beneficiary with limited means, a bequest of \$30,000 may determine the person's ability to attend university or make a down payment on a house.



Second, while beneficiaries will naturally want to minimize probate costs in order to maximize the benefit received, jeopardizing the ability for the estate to be properly distributed to the intended beneficiaries undermines a basic probate objective and is therefore unhelpful even where the amounts in question are relative low. To the extent that probate requirements are effective, probate costs are higher for complex applications because they affect the ability of intended beneficiaries to receive the benefits to which they are entitled. The availability of protections in estate administration is especially important for beneficiaries of limited means who may have challenges pursuing remedies through litigation. If the estate has assets of significance to distribute, the LCO should be reluctant to conclude that effective probate requirements should be relaxed or eliminated.

Collectively these considerations militate against diminishing protections based on the size of the estate alone, at least in estates where there are assets of significance to distribute.

The Importance of Effective Probate Protections

Since probate protections may be fundamental to small estates, the OBA favours an approach to simplifying estate administration by seeking to identify and eliminate steps that do not provide effective protections, whether alongside or apart from assessing estates based on their complexity.

As an example recognized in the Consultation Paper, the OBA has been an advocate for modernizing trustee bonding requirements, because the current requirements create a regulatory burden beyond what is necessary to achieve the policy objective of protecting beneficiaries. Specifically, the OBA has recommended eliminating the general bonding requirement that currently applies to all estate trustees not named in a will or in an intestacy, and codifying more practical exceptions to the bonding requirement for estate trustees who are not resident in Ontario.

This is an example of the need to identify and eliminate existing probate requirements that do not provide valuable protection and thereby add unnecessary expense and delay to estate administration.

Conclusion

Whether an estate is straightforward or complicated to administer, lawyers can provide the expertise and experience to help obtain probate as quickly and cost effectively as possible. To reduce costs and delay in estate administration, the OBA supports identifying and eliminating ineffective probate requirements rather than reducing protections based on the size of the estate. This approach is in keeping with the stated objective of proportionality in the Ontario Rules of Civil Procedure, allowing for a more efficient administration of estates where the risks probate seeks to protect against are minimal.