Submission on the appropriate defined value of "small estate" under the *Estates Act* and other areas of estates law reform

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Submitted by: Ontario Bar Association

ONTARIO BAR ASSOCIATION
A Branch of the Canadian Bar Association

L'ASSOCIATION DU BARREAU DE L'ONTARIO
Une division de l'Association du Barreau canadien

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Introduction

This submission is in response to the Office of the Attorney General's request for input regarding the appropriate defined value of "small estate" to be set in regulation under the *Estates Act*, and other areas of estates law reform outlined in your letter of August 6, 2020 (the "Consultation Letter"). The OBA is pleased to provide this member feedback further to the Town Hall with the Attorney General hosted by the OBA on August 6, 2020.

The OBA

Established in 1907, the OBA is the largest voluntary legal organization in Ontario, representing lawyers, judges, law professors and students from across the province, on the frontlines of our justice system and in no fewer than 40 different sectors. In addition to providing legal education for its members, the OBA assists government and other decision-makers with several legislative and policy initiatives each year with the goal of improving Ontario's justice system.

This submission has been developed by the OBA's Trusts and Estates Law and Elder Law sections. Collectively, our members regularly represent a broad range of clients in all areas of estates law, including estate planning, administration and litigation.

Appropriate Defined Value of "Small Estate"

As noted by the Law Commission of Ontario ("LCO") in its 2015 report on *Simplified Procedures for Small Estates*, there is no commonly agreed upon value for defining a small estate. Members of the bar continue to express differing views on an appropriate value. Further, the appropriate defined value for a small estate is dependent, in part, on the details of the proposed simplified process and what protections may be lost under that process. While the OBA maintains its position, as outlined in our submission to the LCO, that protections provided by either a Certificate of Appointment of Estate Trustee with a Will or a Certificate of Appointment of Estate Trustee without a Will themselves are not relatively less important for smaller estates, we recognize that proportionality may be a consideration for many Ontarians in accessing the process. However, it cannot be ignored that another significant barrier to accessing probate, particularly in higher volume jurisdictions, is

lengthy processing times. That said, generally $50,000 may be too low of a threshold to provide the intended goal of alleviating disproportionate costs to access the system.

Further, the OBA favours a system that would allow an executor to elect to proceed in the ordinary course, despite the estate falling within the definition of a small estate. Such flexibility would enable an executor to take advantage of the additional procedural protections of the more fulsome process, where the complexity of the estate warrants such an approach despite its modest value. This also recognizes that the complexity of the estate and the significance of the bequests to the beneficiaries do not necessarily correlate to the value of the estate, and in fact, the availability of enhanced protections in estate administration may be particularly important for beneficiaries of limited means.

Additional Areas of Estates Law Reform

The Consultation Letter invited comment on a number of diverse areas of reform, aimed at modernizing estates law, and streamlining and expediting the resolution of estates. We recognize that reform in these areas is still being explored, and would welcome the opportunity to speak to you further on these topics as a more thorough consultation is warranted in most cases. Given that, and the relatively short time frame to provide feedback, we are happy to provide the following high level commentary and look forward to continuing to work with you on these important issues.

Emergency Order re: Witnessing of Wills and Powers of Attorney

> *When should the emergency order that grants the ability to witness the making of a will or the execution of a power of attorney through audio-visual communication technology, and the ability to sign identical copies in counterpart, be lifted and no longer in effect?*
>
> *Should the ability to witness the making of a will or the execution of a power of attorney through audio-visual communication technology, and the ability to sign identical copies in counterpart, be made permanent?*

The OBA supports extending the terms of the emergency order which grant the ability to witness the making of a will or the execution of a power of attorney through audio-visual communication technology, and the ability to sign identical copies in counterpart (the "emergency order"). We also encourage further consultation on whether this should be made permanent.

The emergency order provided an important option for Ontarians to execute their wills and powers of attorney during the pandemic. While execution in this manner could be cumbersome and challenging, resulting in many lawyers using it as a last resort, it did enable the execution of wills and powers of attorney in certain circumstances where execution may not have otherwise been possible or where execution in the normal course would have been associated with significant health and safety risks.

While the rates of community transmission are currently low, and more clients and lawyers are comfortable with in-person, socially-distanced meetings, this is not universally true. Some lawyers and clients fall within a higher risk category or are otherwise not able or not comfortable participating in an in-person meeting. As we move into the Fall and Winter months, outdoor signings, an approach that has commonly been employed by lawyers throughout the pandemic, will become more difficult. Additionally, we know that experts are anticipating potential new outbreaks, as has been seen in other jurisdictions. Accordingly, the OBA recommends the continuation of the provisions of the emergency order while the pandemic persists.

There is interest amongst the bar in making the ability to witness the execution of wills and powers of attorney through audio-visual communication technology, and the ability to execute in counterpart, permanent; however, this should be done as part of a larger suite of changes to address some of the issues our members have encountered with the current provisions. These include:

- In counterpart execution, the requirement that all of the "complete, identical copies" of the will or power of attorney together constitute the will or power of attorney (as opposed to one copy of the document with multiple signing pages) means that the documents are large and often unmanageable. For example, if a client executes two wills, and each is 30 pages, and they are signed in three counterparts, there are now two 90-page documents.

- The current prescribed form of Affidavit of Execution for wills does not clarify if witnesses were present for the execution of the will physically or by audio-visual communication technology, or a combination of both. There is no clear or consistent rule, practice direction, or other guidance applicable throughout the Province setting out what an affidavit of execution should include for wills that are witnessed using audio-visual communication technology or executed in counterpart.

- More generally, Rule 74 of the *Rules of Civil Procedure* (and related prescribed forms) have not been updated to clearly set out the requirements for obtaining a Certificate of Appointment in respect of wills that have been witnessed using audio-visual communication technology or executed in counterpart.

- Some third parties who have dealings with attorneys acting under a power of attorney, such as financial institutions, have expressed concern over their ability to determine whether, on the face of the document, it complies with the formal requirements, since the *Substitute Decisions Act, 1992* (*SDA*) does not require an affidavit of execution or similar document.

- The provisions of the emergency order do not meet the needs of certain populations who do not have access to audio-visual communication technology. A discussion on permanent reforms should consider solutions for these populations as well.

The OBA would welcome an opportunity to provide further submissions concerning possible solutions to the issues set out above, in the event the Ministry elects to proceed with permanent changes to the legislation permitting witnessing by audio-visual communication technology, and the ability to execute in counterpart.

Finally, in the event that the provisions of the emergency order are to be terminated and not made permanent, the OBA recommends amendments to the *Succession Law Reform Act* (*SLRA*) and the *SDA* to expressly grandfather wills and powers of attorney that were executed under the authority of the emergency order. It is likely that section 37 of the *SLRA* and section 85 of the *SDA* could be relied upon to render wills and powers of attorney executed under the authority of the emergency order valid even if the emergency order is terminated. However, an express provision in both statutes is recommended to avoid any uncertainty or ambiguity. Such uncertainty could result in unnecessary will challenges being brought by disappointed individuals.

Repeal of Section 16 of the *Succession Law Reform Act*

> *Should section 16 of the Succession Law Reform Act (SLRA), which provides that a will is revoked upon marriage, be repealed?*

While not expressly outlined in the Consultation Letter, we understand that the rationale behind this proposed change may be to address concerns around predatory marriages.

Section 16 of the *SLRA* undoubtedly becomes problematic in the case of predatory marriages. Given the inconsistency between the legal threshold for capacity to marry and testamentary capacity, an individual may well be able to enter into a valid marriage, resulting in revocation of their will by operation of section 16, and yet be unable to create a new will given a lack a testamentary capacity. Such a situation may result in defeating the individual's testamentary intention, and a disinheritance for intended beneficiaries.

That said, section 16 protects married spouses, and by extension, the issue of the testator. A simple repeal of section 16 may not be the best solution, and could otherwise be problematic.

If the intention behind the reform is to address predatory marriages, potential alternative solutions may include:

- Legislating a higher standard for capacity to marry, given the numerous property implications of marriage; or
- Extending the exception for wills made "in contemplation of marriage" to permit a testator to express an intention that a will survive *any* future marriage and not only a specific upcoming marriage.

A more fulsome consultation is necessary to consider these and other potential solutions, and to better address any unintended consequences that may arise from repealing section 16.

Expansion of Section 17 of the *Succession Law Reform Act*

> *Should section 17 of the SLRA, which revokes a bequest to a former spouse upon divorce, be extended to spouses that have been separated from the deceased for two years or longer, or where a court order or agreement intended to permanently finalize the dissolution of the marriage is in place?*

The OBA is generally in support of the proposed expansion of section 17 of the *SLRA* to spouses where a court order or agreement intended to permanently finalize the dissolution of the marriage is in place, although a divorce order has not been issued.

Expanding section 17 to spouses that have been separated from the deceased for two years or longer is more problematic, and requires further consultation. In particular, this could lead to increased

litigation as disputes arise regarding the date of separation. Experience from the family law field reveals that the date of separation can be challenging to ascertain in certain circumstances, and is very fact specific. Disputes over the date of separation are not uncommon, and this may be exacerbated in a situation where an entitlement under a will is dependent on it. Consideration should be given to whether a Partial Separation Agreement, which sets out the date of separation, ought to be required before section 17 would apply.

Granting Greater Latitude to the Courts in Validating and Rectifying Improperly Prepared Wills

> *Should the court be granted greater latitude in validating or rectifying an improperly prepared will?*

The OBA supports granting greater latitude to the Courts to validate improperly prepared wills. Enabling the Courts to validate wills that fail to meet the procedural or formal requirements of the legislation provides a balanced and flexible system that can save an estate and beneficiaries from costly litigation.

There is less consensus amongst the bar on whether the Courts should be granted greater latitude to rectify improperly prepared wills. Further consultation is necessary to ensure the appropriate limitations and safeguards are in place. Consideration should be given to the various legislative approaches across the country and the caselaw that has developed thereunder to determine the most appropriate approach for Ontario.

Specifying Degree of Consanguinity for Heirs on Intestacy

> *Should estates administration be simplified by providing that only heirs to a specified degree of consanguinity are entitled to an estate on intestacy and requiring more distant relatives to obtain a court order or relief from forfeiture under the Escheats Act?*

The Consultation Letter does not outline the mischief this reform seeks to address. The most problematic result of the current system would be where an estate trustee has to incur time and expense in looking for remote beneficiaries. We do not understand this to be a significant issue that requires address. Additionally, there is relief available to an estate trustee under the *Trustee Act* where they can pay the funds into Court. That said, we would welcome an opportunity to discuss this further and to better understand the reasoning for the proposed reform.

Further consultation on this proposed reform should include whether the definition of "spouse" should be expanded to allow common law partners to be treated the same as married spouses for the purposes of determining inheritances when the deceased dies intestate.

Changing the Preferential Share for Spouses under the *Succession Law Reform Act*

> *Should the preferential share for spouses under the SLRA, which is currently set at $200,000 and has not been updated since 1995, be changed?*

Given the passage of time and increased cost of living since the preferential share was last set at $200,000 in 1995, the OBA supports an increase in the prescribed amount, and additionally, would support an annual indexing of the amount to ensure it remains in line with the current times.

Conclusion

We appreciate the opportunity to provide a submission on these important topics on behalf of our members. As noted earlier, we would welcome an opportunity to continue this discussion with you, to provide additional information and to answer any questions you may have.