The Voice of the Legal Profession

OBA Submission re: Schedules 8 and 9 of Bill 245, *Accelerating Access to Justice Act, 2021*

Submitted to: Standing Committee on the Legislative Assembly

Submitted by: Ontario Bar Association

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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

The Ontario Bar Association (OBA) appreciates the opportunity to provide this submission in respect of Schedules 8 and 9 of Bill 245, *Accelerating Access to Justice Act, 2021* (the "Bill").

The Ontario Bar Association

Established in 1907, the OBA is the largest volunteer lawyer association in Ontario, with over 16,000 members who practice on the frontlines of the justice system and who provide services to people and businesses in virtually every area of law in every part of the province.

Each year, through the work of our 40 practice sections, the OBA provides advice to assist legislators and other key decision-makers in the interests of both the profession and the public, and delivers over 325 in-person and online professional development programs to an audience of over 12,000 lawyers, judges, students and professors.

This submission has been developed primarily by the OBA's Trusts and Estates Law section. Our members regularly represent a broad range of clients in all areas of estates law, including estate planning, administration and litigation. We have also consulted with the OBA's Family Law and Elder Law sections.

Background

Schedules 8 and 9 of the Bill propose various changes to the *Substitute Decisions Act, 1992* (*SDA*) and the *Succession Law Reform Act* (*SLRA*) to effect the following changes:

1. To incorporate the terms of an emergency order passed in April 2020 into the *SDA* and *SLRA* to permanently allow for remote witnessing of wills and powers of attorney;

2. To remove the automatic revocation of a will upon marriage;

3. To extend provisions which revoke bequests, appointments and entitlements on intestacy to a former spouse (where the parties are divorced) to also apply where the spouses are separated in certain circumstances; and

4. To grant authority to the court to validate an improperly executed will.

The OBA provided a submission to the Office of the Attorney General in respect of these issues in August 2020 (the "OBA August Submission")[1]. We are pleased to see the government moving forward with these important reforms in the area of estates law.

Revocation of Bequests, Appointment and Entitlements to Separated Spouses

The proposed amendments to section 17 of the *SLRA* (found in section 4(2) of Schedule 9) and the new proposed section 43.1 of the SLRA (found in section 6 of Schedule 9) extend provisions which revoke bequests, appointments and entitlements on intestacy to a former spouse (where the parties are divorced) to also apply where the spouses are separated in certain circumstances. One such circumstance, as referenced above, is where the spouses "lived separated and apart for three years as a result of the breakdown of their marriage".

The proposed transition provision for these amendments provides that the spouses must also have begun to live separate and apart on or after the date the provisions come into force in the case of sections 17(4)(a)(i) and 43.1(2)(a)(i). These transition provisions will result in two entirely different applications of the law and results depending on whether the spouses separated before or after the coming into force date, regardless of when one of the spouses dies and how long the spouses have been separated at the time of one spouse's death. This unfair result ought to be avoided.

[1] OBA Submission on the appropriate defined value of "small estate" under the *Estates Act* and other areas of estates law reform (August 31, 2020). Available at https://www.oba.org/CMSPages/GetFile.aspx?guid=64f0684f-a588-4903-b11c-4f4e811e9e21

We propose that the new provisions ought to apply to parties who have been living separate and apart for a period of three years from the date the provisions come into force, regardless of whether they separated before, on or after that date.

Remote Witnessing of Wills and Powers of Attorney

The emergency order permitting remote witnessing of wills and powers of attorney provided an important option for Ontarians to execute their wills and powers of attorney during the pandemic. While execution in this manner can be cumbersome, it enables the execution of wills and powers of attorney in certain circumstances where execution may not otherwise be possible without significant health and safety risks.

The OBA supports permitting remote witnessing of wills and powers of attorney on a permanent basis. These legislative changes will need to be supported by changes to the *Rules of Civil Procedure* and the forms prescribed thereunder, and we would welcome an opportunity to provide feedback and suggestions on these necessary regulatory changes.

Under the emergency order, two practices developed for the execution of wills and powers of attorney using remote witnessing:

1. While on a video call with all parties, the testator/grantor and the witnesses signed the document in counterparts, which together constituted the will or power of attorney. This practice is hereinafter referred to as the "counterparts method"; or

2. While on a video call with all parties, the testator/grantor signed the document. The document was then delivered to the first witness. On a second video call with all parties, the first witness (and second witness, if present at the same physical place) signed the document. If the second witness was not present at the same physical place, the document was then delivered to the second witness and a third video call was held with all parties for signature by the second witness. If in close proximity, this process could be completed on the same day or even within a few hours. If the parties were located further apart, the process could take a number of days to complete. This practice is hereinafter referred to as the "circulation method".

Both practices have their benefits and challenges. There is no consensus on the preferred approach amongst the bar; however, members of the bar have successfully used both methods to provide valuable services to their clients in challenging circumstances. Other members of the bar continued to execute wills and powers of attorney in the ordinary course, meeting clients in outdoor spaces or witnessing documents through windows.

The inclusion of the requirement in section 1(2) of both Schedule 8 and Schedule 9 that the signatures of the testator or grantor and the witnesses be "contemporaneous" appears to preclude the circulation method where the signatures are made on a series of video calls. Given that the use of counterparts is permissive and not mandatory, it would appear that the circulation method would still be permitted but only where the signatures are made in very short order, for example where the parties are in separate physical spaces in close proximity and the document can be delivered from one to another in a matter of minutes while all parties remain on the same video call.

We note that the word "contemporaneous" can be defined as "at the same time" or "in the same period of time". To avoid any uncertainty or ambiguity about the extent to which the circulation method continues to be available, we propose replacing the word "contemporaneous" with the phrase "at the same time".

If the circulation method is to be precluded entirely, we propose the following amendment to the provisions pertaining to counterpart signing in Schedule 8 (with a corresponding amendment to Schedule 9) to reflect that execution in counterparts is *required*:

> Counterpart signing
>
> (3) For the purposes of clause (2) (b), the signatures required by this Act ~~may~~ shall, subject to any prescribed requirements, be made by signing complete, identical copies of the power of attorney in counterpart, which shall together constitute the power of attorney.

Finally, we would encourage the government to consider making regulations to assist in streamlining the counterparts method, to address *inter alia* the voluminous nature of wills and

powers of attorneys executed in this manner. The OBA would be pleased to provide feedback and advice in respect of such regulations.

Potential for Increased Litigation

Despite our general support for the amendments proposed in Schedules 8 and 9 of the Bill, we must acknowledge that there is some concern about a possible increase in litigation in certain areas, as referenced in the OBA August Submission. Specifically, increased litigation may arise in respect of the following:

1. We recognize that the repeal of section 16 of the *SLRA* (revocation of a will upon marriage) addresses a very real concern about predatory marriages. That said, if a will is not automatically revoked on marriage, the onus will fall to a married spouse who is not adequately provided for in a will prepared before the marriage to bring a claim for dependant's relief or to make an election for equalization under s. 6 of the *Family Law Act*.

2. In respect of the new proposed ss. 17(4)(a)(i) and 43.1(2)(a)(i), the determination as to whether the spouses have been living "separate and apart for three years as a result of the breakdown of their marriage" requires a determination of the spouses' date of separation. As we know from the family law field, the date of separation can be difficult to ascertain in certain circumstances. Disputes over the date of separation are not uncommon and are very fact specific, making it particularly challenging for an estate trustee to make this determination. This may be exacerbated in a situation where an entitlement under a will is dependent on it.

Our members will continue to monitor any issues that may arise and look forward to continuing to work with the government on the implementation of these provisions.

Conclusion

The OBA appreciates this opportunity to provide this submission to the Standing Committee on the Legislative Assembly in respect of Schedules 8 and 9 of Bill 245, *Accelerating Access to Justice Act, 2021*.