Toronto Lawyers ASSOCIATION TLA

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Via email: Amanda.Iarusso@ontario.ca

Dear Ms. Iarusso,

RE: JUSTICE SECTOR CONSULTATION ON ESTATES LAW

Summary

The below comments are provided in response to the August 5, 2020 email of The Honourable Doug Downey requesting comment on potential areas of reform in respect of Ontario's estates laws, for your consideration.

Generally, we are of the view that there is considerable room for reasonable and measured, yet progressive, updates to the law relating to the areas where input has been requested. We are particularly supportive of any potential reform that may serve to increase access to justice without significantly increasing risk of abuse, as well as those that create certainty in respect of rights of beneficiaries upon death.

1. Defining a Value for "Small Estates"

Issue: *The amendments to the Estates Act include the authority to establish a regulation to prescribe a small estates value. The amendments pertaining to small estates will come in to force on proclamation at a later date. This approach was taken to allow the Civil Rules Committee an opportunity to review the changes and consider any amendments to the Rules of Civil Procedure and forms that may be required and, to allow for consultation with the estates bar on the value of small estates*.

We are writing to invite you to provide us with your written input on the appropriate defined value of "small estate" to be set out in regulation.

As you know, the Law Commission of Ontario's (LCO) report on Simplified Procedures for Small Estates, published in 2015, recommended that "small estate" be defined as estates "valued up to $50,000". We understand that this number was chosen so as to exclude most real property transactions in Ontario.

In Spring 2019, the Ministry of Finance's amendments to the Estate Administration Tax Act, 1998 were passed to provide a tax exemption for estates valued under $50,000. This exemption aligns with the LCO's 2015 recommendations and took effect on January 1, 2020.

Given the passage of time, we are interested in understanding what members of the estates bar would consider to be an appropriate value for small estates. Is the $50,000 limit still appropriate or should another value be chosen to better reflect the world in 2020? Would any procedural difficulties arise if the two amounts do not align?

Proposal: The value of a "small estate" for the purposes of the Estates Act and the Estate Administration Tax Act should be greater than $50,000.00. We recommend a value of $100,000.00 and that the amounts be consistent throughout the legislation.

Comments: Last year's amendments to the *Estate Administration Tax Act* have lessened the burden in respect of estates valued at less than $50,000.00, where funeral costs, legal fees, and other estate-related expenses can, in many circumstances, consume the majority of estate assets, such that a very limited benefit (if any) is available for the beneficiaries of an estate.

When calculating the value of an estate for the purposes of applying for a Certificate of Appointment of Estate Trustee, only the amount of any encumbrances in respect of real estate are deducted from the estate value. An estate valued at $50,000.00 or more may nevertheless be subject to liabilities, such that it is insolvent or of very limited net value.

Enabling a simplified procedure to administer an estate of limited value and to lessen any fees incurred in obtaining the authority to administer such an estate would be particularly beneficial to individuals who cannot afford the assistance of a lawyer and should be expanded. In our view, assigning different values to a small estate under the *Estates Act* and the *Estate Administration Tax Act* could lead to unnecessary complications and the figures should be consistent in any event.

2. Virtual Witnessing and Execution in Counterpart of Wills and Powers of Attorney

Issues: *When 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, should be lifted and no longer in effect; or whether 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, should be made permanent.*

Proposal: We agree that the terms of the emergency order as they relate to the witnessing of wills and powers of attorney through the use of audio-visual communication technology and the ability to execute and witness such documents in counterpart should be made permanent. Furthermore, there may be room for the expansion of such measures to permit for the virtual execution of testamentary documents.

Comments: The emergency orders granted during COVID-19 have enhanced the ability of estate planning lawyers to assist clients, regardless of their location and health status, in creating and

amending estate plans without exposure to potential transmission of the virus. We have seen this practice used effectively and responsibly by the Estates Bar.

Beyond the context of the COVID-19 pandemic, allowing latitude in the manner in which testamentary documents are executed and witnessed remains beneficial. Especially in more remote areas of Canada, allowing for the execution and witnessing of wills without the necessity of being in the same physical location as a lawyer and witnesses may assist in increasing access to justice. Provided that proper technology is used, which allows for verification of due execution by the testator and signature of witnesses that is otherwise compliant with the formal requirements for a valid will, virtually witnessed wills and wills executed in counterpart can function to improve access to justice and access to affordable and timely assistance in the preparation of a valid will.

The emergency orders do not permit electronic execution and witnessing of wills. "Wet signatures" are still required on physical documents for a will or power of attorney to be valid. In our view, new technology – for example, services available through Syngrafii (syngrafii.com) – is capable of confirming that an electronic will has been properly executed and safeguarding against any potential susceptibility to fraud. The option of virtual or electronic signatures may complement the relaxed formal requirements for the execution and witnessing of wills and powers of attorney and make it easier for residents of Ontario to make a valid will. Such a change in the legislation is also consistent with trends being seen in other parts of the world such as the United States, where the Uniform Law Commission introduced a *Uniform Electronic Wills Act* in 2019 as a model for states in enacting legislation to permit the use of electronic wills.

3. Automatic Revocation of a Will Upon Marriage

Issue: *Whether section 16 of the Succession Law Reform Act (SLRA), which provides that a will is revoked upon marriage, should be repealed.*

Proposal: We agree that subsection 15(a) and section 16 of the *Succession Law Reform Act* should be repealed, following the models of Alberta and British Columbia.

Comments: The fact that marriage automatically revokes a will in many Canadian provinces is both antiquated and inconsistent with the relatively low standard for capacity to marry in comparison with that of testamentary capacity. Furthermore, many Canadians do not understand that this is a legal consequence of marriage. Within the context of our aging population, older adults with diminished capacity may be targeted for marriage in an effort to gain an interest in their estates and updating legislation to protect vulnerable Canadians is necessary. The result is often the complete upheaval of an estate plan in a manner that is neither intended nor understood.

Such an update to the legislation would not otherwise deprive married spouses of the rights that they may have as a surviving spouse. Furthermore, those who marry and who possess testamentary capacity could nevertheless update an estate plan to benefit such individuals as he or she may please.

4. Revocation of Gifts to Separated Spouses

Issue: *Whether section 17 of the SLRA, which revokes a bequest to a former spouse upon divorce, should 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.*

Proposal: We agree that section 17 of the *Succession Law Reform Act* should be expanded to revoke gifts made under a will to spouses separated from the deceased for a period of two years or more or where a Court order or agreement intended to permanently finalize the dissolution of the marriage is in place.

Comments: Many Canadians choose to separate from spouses without ever obtaining a formal divorce due to the costs of formal separation and divorce proceedings through the family courts.

We frequently encounter situations where the rights of a separated spouse upon death are unclear. Often, the terms of a Court order or separation agreement are at odds with the terms of a will that was left by the deceased and last updated prior to separation. Clarifying that separated spouses are not entitled to a distribution from an estate after separation terms have been finalized (or the spouses have otherwise had sufficient opportunity and have declined to do so) would be of assistance to many families.

5. Substantial Compliance

Issue: *Whether the court should be granted greater latitude in validating or rectifying an improperly prepared will.*

Proposal: We agree that the Court should be granted discretion to order a will valid or to rectify a will in the face of procedural or technical irregularities.

Comments: Ontario is one of the few remaining strict compliance jurisdictions in Canada with respect to the issue of compliance with formal requirements for a will.

The result is that some documents that are clearly intended to be testamentary and which demonstrate the deceased's clear wishes are ineffective, even where the distribution under a prior will or on intestacy is known to be inconsistent with the deceased's wishes expressed in writing while capable.

The *Succession Law Reform Act* could be updated to provide judges with the ability to exercise discretion to admit documents that may not meet all formal requirements set out at section 4 and subsection 7(1) of the Act in unique circumstances.

6. Intestate Heirs and the Escheats Act

Issue: *Whether estates administration should 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.*

Proposal: We do not agree that the rights of remote relatives on intestacy should be compromised in favour of forfeiture under the Escheats Act.

Comments: Under the current intestacy provisions, it is possible for remote next-of-kin to ultimately inherit a deceased family member's estate, regardless of the proximity of their relation and any intention that the intestate may have had to benefit the relative. In theory, this can create a "windfall" situation where the unsuspecting beneficiary receives a significant distribution from the estate of an individual who they may not have even known. In other circumstances, it can be difficult (or impossible) to ascertain the proper intestate beneficiaries.

That being said, to require a beneficiary to obtain a Court order to preserve the entitlements that she or he would currently have as intestate beneficiary could create an access to justice issue, whereby some intestate beneficiaries may be deprived of their interest in an estate simply because they are not familiar with the steps that they must take to preserve their entitlements as next-of-kin and cannot afford to obtain the assistance of a lawyer to navigate the process. As the law currently stands, some residents of Ontario choose not to make a will on the basis of a rough understanding that their closest living family will benefit upon their deaths.

In our view, there may be other methods to increase funds payable to the provincial and/or federal governments from estates that could better target estates of larger sizes (for example, changes to the ability to use multiple will planning strategies to minimize Estate Administration Taxes) rather than those where there is no will or immediate surviving family. We would be pleased to comment on this further upon request.

7. Preferential Share for Spouses

Issue: *Whether the preferential share for spouses under the SLRA, which is currently set at $200,000 and has not been updated since 1995, should be changed.*

Proposals: We agree that an increase to the amount of the preferential share for spouses on intestacy to reflect inflation since 1995 would be appropriate. Furthermore, we see potential for the intestacy provisions of the *Succession Law Reform Act* to be expanded to provide common-law spouses with rights upon intestacy.

Comments: Adjusted for inflation, $200,000.00 in 1995 is roughly equivalent to $330,000.00 to $350,000.00 in 2020. Accordingly, we agree that it would be appropriate to increase the amount of a married spouse's preferential share under the regulations under the *Succession Law Reform Act*.

Part II of the *Succession Law Reform Act* provides a benefit on intestacy to a married spouse, children, parents, siblings, and even remote relatives, without consideration of the rights of a common-law spouse. This treatment is somewhat inconsistent with the terms of the *Estates Act,* which, on intestacy, provide that a married or common-law spouse may (in priority to next-of-kin) seek appointment as estate trustee (subsection 29(1)(a)). It is also inconsistent with the ability of a spouse or partner to consent to treatment on behalf of a person who is incapable under subsection 20(1)(4) of the *Health Care Consent Act*.

In British Columbia, the definition of spouse provided under section 2 of the *Wills, Estates and Succession Act* includes persons who have lived together in a marriage-like relationship for two years or more, and married and common-law spouses are not otherwise distinguished in the legislation's intestacy provisions.

Many individuals in common-law relationships are under the mistaken belief that there is no critical difference between legal marriage and living as common-law spouses. With common-law spousal relationships an increasingly common living arrangement, where financial dependency of one spouse upon the other often ensues, many common-law spouses are required to seek the Court's assistance in securing an interest in their predeceasing spouse's estate on intestacy.

While Part V of the *Succession Law Reform Act* can be applied to provide an appropriate remedy, the surviving spouse may incur legal fees in the tens or hundreds of thousands of dollars just to obtain necessary relief during a period of grief and financial instability. The state of the law as it affects common-law spouses is a significant access to justice issue.

In the absence of a formal marriage, it would be appropriate to confer upon common-law spouses at least some of the benefits received by surviving married spouses, which would (as a married spouse's interest) remain subject to the rights of surviving children of the intestate.

While such reform would be a significant departure from the current disregard of the rights of common-law spouses, residents of Ontario would retain testamentary autonomy and have the option to create a will directing the distribution of property as they please (subject to the rights of any dependants, as is currently the case).

8. Other Proposed Areas of Reform

Below, we briefly address several issues in respect of which input has not been requested:

Enhancing Fiduciary Access to Digital Assets

Issue: The rights of estate trustees, attorneys for property, and other fiduciaries to obtain access to and administer digital assets is inconsistently recognized.

Proposal: Adoption of some or all of the provisions of the *Uniform Access to Digital Assets by Fiduciaries Act* would clarify the rights of estate trustees and other fiduciaries to access and administer digital assets.

Comments: Service providers may or may not recognize the authority of fiduciaries, such as estate trustees or attorneys for property, to access and administer digital assets. The assistance of the Court and/or preparation of planning documents that specifically grant authority may be required in order to obtain access, notwithstanding the broad authority of fiduciaries under the *Estate Administration Act* and the *Substitute Decisions Act, 1992*. The cost of going to Court to access electronic records that may be of sentimental and/or financial value can be prohibitive, but digital assets are quickly becoming a class of asset in need of administration during incapacity and/or death.

The Uniform Law Conference of Canada introduced the *Uniform Access to Digital Assets by Fiduciaries Act* in 2016 and it has yet to be implemented by Ontario. Saskatchewan (in Bill 176) appears to be one of the first provinces to take steps to adopt the ULCC's recommendations.

Powers of Attorney and Guardianship

Issue: Without a Continuing Power of Attorney for Property, significant cost and time may be necessary to obtain the appointment of a guardian of property pursuant to the *Substitute Decisions Act, 1992*.

Proposal: The *Substitute Decisions Act, 1992* could be updated to introduce a statutory scheme for decision-making with respect to property that mirrors the *Health Care Consent Act*.

Comments: While the *Health Care Consent Act* sets up a regime and order of priority for substitute decision-making in respect of decisions relating to medical treatment, there is no corresponding legislation that relates to the management of property. While this may provide the opportunity for misuse of the authority to make decisions involving property, appointing a different individual as attorney for property under a Continuing Power of Attorney document would remain an option, and decision-making would remain subject to scrutiny, decision-makers being fiduciaries accountable for the management of the incapable's property.

Low-income residents of Ontario simply cannot afford guardianship applications, creating an access to justice issue. The incapable person's financial matters, including simple matters like regularly monthly expenses, may remain in limbo for months to the incapable’s detriment, even if family members can afford a guardianship application.

End-of-Life Decision Making by Attorneys for Personal Care

Issue: The end of the prohibition against physician-assisted death following the Supreme Court of Canada's landmark decision in *Carter v Canada* has given rise to new issues relating to the accessibility of medical assistance in dying ("**MAID**").

Proposals: Clarification is required as to the role of substitute decision-makers, if any, in respect of MAID. Clarity on the issue of potential liability of attorneys for personal care who rely upon "no heroic measures" clauses appearing within Powers of Attorney for Personal Care would also be beneficial.

Comments: Many Canadians (and some very publically) have been lobbying for increased access to MAID. The current criteria are somewhat restrictive and do not allow consent to MAID to be provided by a substitute decision-maker, notwithstanding the very broad authority conferred by the *Substitute Decisions Act, 1992*, the *Health Care Consent Act*, and the terms of Powers of Attorney for Personal Care.

It remains somewhat unclear whether a substitute decision-maker may have the ability to consent to MAID on behalf of an incapable person and, if not, why this is the case. The result is that some Canadians choose to obtain MAID at an earlier stage of disease to ensure that they can die with dignity. In particular, there is a subtle distinction between the exercise of authority under a Power

of Attorney for Personal Care that shares the grantor's wish that no heroic measures be exercised to unnecessarily prolong life in the case of an irremediable disease and the decision by an attorney for personal care on the grantor's behalf to access MAID.

It should be considered whether there may be an appropriate mechanism to allow an individual to delegate decision-making to an attorney for personal care to increase availability to MAID or to provide advanced consent that can be subsequently confirmed by a substitute decision-maker.

Conclusion

We would be pleased to report further and/or discuss any of the foregoing issues. We thank you in advance for your consideration.

Yours very truly,

Brett Harrison
President
Toronto Lawyers Association

cc: Suzana Popovic-Montag, TLA Director, Managing Partner, Hull & Hull LLP
Ian Hull, Co-Founder, Hull & Hull LLP