August 31, 2020

VIA EMAIL: attorneygeneral@ontario.ca

The Honourable Doug Downey, M.P.P.
Attorney General of Ontario
Ministry of the Attorney General
McMurtry-Scott Building
720 Bay Street, 11th floor
Toronto, Ontario M7A 2S9

Dear Attorney General:

RE: Justice Sector Consultation on Estates Law

The Advocates' Society (the "Society"), established in 1963, is a not-for-profit association of more than 6,000 members throughout Canada, including approximately 5,000 in Ontario. The mandate of the Society includes, among other things, making submissions to governments and others on matters that affect access to justice, the administration of justice, and the practice of law by advocates.

The Society is in receipt of the Ministry's letter dated August 5, 2020. We sincerely appreciate the opportunity to consult with the government on how best to modernize estates law and streamline the administration of estates in Ontario. The Society convened members of its Estates Litigation Practice Group to discuss the appropriate value of "small estates" and the further suggestions for reform outlined in your letter. The Society's feedback on these proposals is outlined below.

Small Estates

Every family in Ontario will encounter a death in their family at some point. For many, this will be their first experience interacting with the justice system. The Spring 2019 amendments to the *Estates Administration Tax Act, 1998*, S.O. 1998, c. 34, Sch., to exempt estates valued under $50,000 from taxation was an important step in balancing accessibility and procedural protections for such estates, which increased access to justice and simplified the administration of justice. Streamlining the process and minimizing the requirement for Ontarians to interact with the courts unnecessarily also improves access to justice.

However, it is imperative that the value assigned to a "small estate" be able to achieve the goals that prompted the amendments: avoiding the disproportionate cost and undue burden of probating some small estates and instead allowing them to proceed through a simplified court process.

The Society believes that there would be a wide range of opinions among its membership as to what would qualify as a "small estate", which may vary depending on whether the advocate is located in a rural or urban area. Agreement may exist that many estates in the $50,000 to $100,000 range share the characteristic of having simple assets to distribute and that the cost of probate can operate as an undue burden with respect to these estates. Raising the threshold to $100,000 would allow smaller estates to

obtain probate without the accompanying, and often prohibitive, tax and administrative obligations. A simplified procedure would have the added benefit of reducing delays as well as easing the overall burden on the courts. The Society believes that defining a "small estate" as having a value of $100,000 or less would address these concerns.

There is a valid concern to ensure robust probate safeguards where there may be real property transactions. However, this does not necessarily need to be tied to the value of the estate and can be accomplished by way of an exemption in the legislation to the estate qualifying as a small estate if the estate has real property.

Virtual Execution of Wills and Powers of Attorney

A will is presumed to be valid when the formalities of execution are met. The validity of a will is tremendously important because a will is *in rem*; it has effect as against the world. The statutory formalities surrounding the due execution of a will serve four important interrelated functions: 1) evidentiary function, 2) cautionary function, 3) protective function, and 4) organizational. The requirement that wills be executed before two witnesses is meant to provide evidence that the will is authentic and reliable. This requirement also lends to the solemnity of the occasion and it functions as a caution that the act of executing a will ought not to be done lightly. The practice in which the testator and the witnesses initial each page also safeguards against any inadvertent or nefarious substitution of pages. Lastly, the coordination involved in the due execution of a will is meant to enhance organized document preparation and record keeping.

The ability to witness the execution of a will, virtually, is absolutely necessary during the present circumstances where in-person executions may result in serious health consequences. Once the COVID-19 pandemic is resolved, along with the health risks of in-person executions, there may be little benefit to virtual executions when weighed against the functional purposes of the formalities. The mechanism prescribed in the emergency order should remain in place until such time as vulnerable clients can safely be physically close to the licensees and the witnesses to the documents.

Whether this mechanism should be made permanent involves balancing the risks the technology raises with accessibility to estate planning. The risks include the potential to diminish the ability of the lawyer to assess capacity or be on guard for suspicious circumstances and undue influence on the day of signing. In addition to assessing capacity and being alert to issues of undue influence, there is also a risk that an incorrect version of the will or power of attorney is signed inadvertently. There are also general security concerns when clients and lawyers are using Wi-Fi networks and a fear that contact with a client by video can be less reliable than in-person contact. As well, for many clients, there may be privacy issues that come into play with meetings that take place on less secure video-conferencing platforms.

The advantages include access to estate planning in situations of urgency, and for those for whom getting to see a lawyer is difficult due to their physical ability or their location in rural or remote areas.

These factors need to be considered when deciding if virtual execution can continue to be employed after the pandemic for signing of wills and powers of attorney.

Intersection of the *Succession Law Reform Act* with Matrimonial Status

Any change to the provisions of the *Succession Law Reform Act*, R.S.O. 1990, c. S.26, that makes laws clearer to the public and makes it easier to ascertain a testator's true intentions with regard to their estate plan is encouraged as this will result in less litigation.

Anecdotally, it appears it may not be widely known that marriage, except in certain limited circumstances, results in the revocation of a will. It is unlikely that many individuals consult with a lawyer before they get married to be made aware of this law. The automatic revocation of the will can create unintentional hardships. In particular, these hardships may arise in scenarios of predatory marriage when on an intestacy the preferred share of the estate will be directed to the new spouse. Further, beneficiary designations are not revoked by marriage. Consistent rules around major life events are always preferred.

The timeframe between a separation and divorce is replete with danger that the testator's true wishes are not reflected in the strict application of the law. If an individual does not have a lawyer at the time of separation, they may not be properly advised to change their will and powers of attorney, with devastating results for families.

A move to allow for the revocation of a bequest to a former spouse after separation for a prescribed length of time, by court order, or where the parties have demonstrated an intention to permanently finalize the dissolution of the marriage would provide greater certainty and prevent unnecessary lawsuits.

Rectifying an Improperly Prepared Will

The issue of changes to the legislation to allow for rectification of an improperly prepared will is a very significant issue with many implications. The members of the Society convened to respond to this consultation felt that a wider consultation of the Society's members would be required in order to properly respond. Debate on these important issues would be welcomed by the Society given the widespread ramifications.

Limiting Degrees of Consanguinity

There was debate amongst the members of the Society who were convened to respond to this consultation on whether limiting degrees of consanguinity would provide a defined group and clarity which would theoretically reduce litigation, or whether requiring more distant relatives to obtain a court order or relief from forfeiture under the *Escheats Act, 2015*, S.O. 2015, c. 38, Sch. 4, would require additional court appearances that may not be necessary and move the law in a direction that creates more complexity rather than promoting access to justice. The members of the Society were unable to reach a consensus on a recommendation.

Preferential Share

A great number of Ontarians have not created a will, thereby opting out of the opportunity to direct where their assets will go upon their death. Losing a spouse should not leave one financially destitute solely for the reason that their spouse lacked a will. The policy objectives behind the preferential share

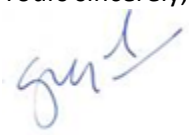
are to distribute the intestate's assets similarly to what they would have chosen if they had made a will and also to ensure that a spouse can remain in the matrimonial home.

As the value of the preferred share was set many years ago, revisiting whether this amount remains adequate in 2020 is important. In the context of the present housing market, income patterns and net worth increases, $200,000 appears low and it should be raised.

Consideration of tying the preferential share to inflation could eliminate the need for periodic amendments and the stated amount becoming inadequate in future economic contexts.

Thank you for considering the Society's submissions on the important issue of how to modernize estates law in Ontario. I would be pleased to answer any questions you may have.

Yours sincerely,



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