

2022: Important Changes To Wills And Power Of Attorney Legislation

Tax

22 February 2022

Introduction

Significant changes have recently been made to the *Succession Law Reform Act* ("SLRA") and *Substitute Decisions Act, 1992* ("SDA"). Estates lawyers and clients looking for estate planning advice should be aware of these changes before finalizing any estate plan.

1. Virtual Signing

As a safety measure due to the COVID-19 pandemic, the government of Ontario passed Ontario Regulation 129/20 under subsection 7.0.2(4) of the *Emergency Management and Civil Protection Act*. The regulation allowed for signatures of wills executed under the SLRA and powers of attorney ("POAs") executed under the SDA to be witnessed using "audio-video communication technology" and in counterpart.

The validity of virtual signing for wills and POAs is now permanent through updates to the SLRA and the SDA. The following requirements must be met for a signature using audio-video communication technology to be valid:

1. At least one person who acts as a witness is a licensee within the meaning of the *Law Society Act* at the time (i.e. a lawyer or paralegal);
2. The signatures and subscription required under the specific legislation are contemporaneous (meaning circulation of the same document for witness signatures at different times are no longer acceptable); and
3. The prescribed requirements, if any under the specific legislation, are met[1]

Wills and POAs can validly be completed in counterpart, so long as each party is signing complete and identical copies of the document. Wet-ink signatures are still required for wills and POAs – electronic signatures (for example, through the use of software such as DocuSign or Syngafi) are not valid.

While virtual signing is now here to stay, in-person witnessing continues to be the preferred method of execution for wills and POAs, where possible. Several issues can arise where virtual signing is used:

1. Challenges as to validity based on capacity;
2. Challenges as to validity due to possible undue influence (who is in the room with the testator but not on camera?);
3. What if the documents signed by the testator and the witnesses are not identical; and
4. Acceptance of virtual and counterpart signed documents in other jurisdictions may be problematic.

Clients should speak with their lawyer to discuss their options for executing wills and POAs.

2. Substantial Compliance with Formal Validity Requirements

Historically, the SLRA has deemed documents that were not properly drafted or executed to be invalid. The SLRA now provides that, if the Superior Court of Justice is satisfied that a document that was not properly executed or made (i.e. drafted) sets out the testamentary intentions of a deceased, the Court may, on application, order that the document is as valid and fully effective as if it had been properly executed or made..[2] However, the Court's new power does not apply to electronically signed documents[3]

It remains unclear how far the courts will or can extend this power. Other jurisdictions already have similar substantial compliance legislation. Accordingly, case law from those jurisdictions will likely become relevant in Ontario when this is brought before the court.

3. Separated Spouses

The SLRA provides that, in general, a will is not revoked by presumption of intention,[4] with the exception of where spouses are divorced:

1. A devise or bequest and an appointment as executor or trustee and powers of appointment in favour of a spouse are revoked upon divorce;**and**
2. A will is treated as though the former spouse has predeceased the testator. [5]
3. The SLRA now treats separated spouses as if they were divorced in certain circumstances. There are two criteria that must be met in order to determine that spouses were considered separated at the time of the testator's death:
4. Before the testator's death,
5. the spouses lived separate and apart as a result of the breakdown of their marriage for a period of three years, if the period immediately preceded the death
6. they entered into an agreement that is a valid separation agreement under Part IV of the *Family Law Act* ("FLA"),
7. a court made an order with respect to the spouses' rights and obligations in the settlement of their affairs arising from the breakdown of their marriage, or
8. a family arbitration award was made under the *Arbitration Act, 1991* with respect to the spouse's rights and obligations in the settlement of their affairs arising from the breakdown of their marriage; **and**
9. At the time of the testator's death, the spouses were living separate and apart as a result of the breakdown of their marriage.[6]

Further, if a spouse died intestate (i.e. without a will), legally married but separated spouses could historically claim entitlement to the statutory intestate entitlement under the SLRA [7] or to an equalization payment on death under the FLA. [8] The SLRA and FLA have now removed these succession entitlements for legally married spouses who are separated at the time of the first spouse's death. [9]

Notably, these changes do not affect common-law spouses, as the word "spouse" in the SLRA and FLA only refers to legally married spouses.[10]

As with the other new changes, there are foreseeable issues that can arise. What is the threshold to be considered legally separated (e.g. three year test, separation agreement)? What if the living spouse claims that the spouses had reconciled prior to the testator's death? Does this new rule apply retroactively to spouses separated for three years but prior to January 1, 2022?

The question of fact as to whether or not the separation requirement is met will no doubt lead to increased litigation.

4. Formal Marriage and Validity of Existing Wills

Historically under the SLRA, the marriage of a testator would revoke an existing will, except in the following circumstances:

1. There is a declaration that the will is made in contemplation of marriage;
2. The spouse of the testator elects in writing within one year of the testator's death to take their interest under the will;**or**
3. The will is made in exercise of power of appointment if property which would not in default of the appointment pass to the heir, executor or administrator of the testator or to the persons entitled to the estate of the testator if he or she died intestate.[11]

This section of the SLRA has now been repealed, allowing for the continued operation of an existing will upon the marriage of a testator. This means it is even more important for couples entering into formal marriage to review and update their existing wills.

Conclusion

These are major changes to the landscape of estate planning. It is more important than ever to seek proper advice. Please contact a member of Gardiner Roberts LLP's Tax and Estates Planning Group at the link below should you have any questions about the above information.

<https://grllp.com/tax>

[1] *Succession Law Reform Act*, R.S.O. 1990, c. S.26 at ss. 4(3) [SLRA] and *Substitute Decisions Act*, 1992, S.O. 1992, c. 30 at ss. 3.1(2) [SDA].

[2] SLRA at s. 21.1.

[3] SLRA at ss. 21.1(2) and *Electronic Commerce Act*, 2000, S.O. 2000, c. 17 at ss. 31(1).



[4] *SLRA* at s. 17.

[5] *SLRA* at ss. 17(2).

[6] *SLRA* at ss. 17(4).

[7] *SLRA* at s. 45.

[8] *Family Law Act*, R.S.O. 1990, c. F.3 at s. 5 [*FLA*].

[9] *SLRA* at s. 43.1 and *FLA* at ss. 6(21).

[10] *SLRA* at s. 1(1) "spouse" and *FLA* at 1(1) "spouse".

[11] *SLRA* at s. 16.

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