

# Bill 245: Modernizing Wills and Power of Attorney Legislation for the 21<sup>st</sup> Century

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July 20, 2021



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## Today's Agenda

1. Virtual signing permanently a valid execution method
2. Courts given new substantial compliance authority to validate wills and other testamentary documents
3. New rules regarding wills of separated spouses
4. New rules regarding effect of formal marriage on validity of previously signed wills
5. Consultation paper on the legal authority to make decisions regarding deceased persons

# Virtual Signing

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April 7, 2020

- The government of Ontario passes Ontario Regulation 129/20 under subsection 7.0.2(4) of the *Emergency Management and Civil Protection Act*
- The regulation allows for signatures of wills executed under the *Succession Law Reform Act* (“SLRA”) and powers of attorney executed under *Substitute Decisions Act, 1992* (“SDA”) to be witnessed using “audio-video communication technology” and in counterpart

# Virtual Signing

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April 19, 2021

- Bill 245 given Royal Assent
  - Schedule 8 adds section 3.1 to the *SDA*
  - Schedule 9 amends section 4 of the *SLRA*
- Both of these changes authorize virtual signing under Ontario Regulation 129/20 permanently valid



# Virtual Signing

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April 19, 2021

- Requirements for signature using audio-visual communication technology:
  - At least one person who acts as a witness is a licensee within the meaning of the *Law Society Act* at the time
  - 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)
  - The prescribed requirements, if any under the specific legislation, are met
- Documents may be completed in counterpart by signing complete and identical copies



# Virtual Signing

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## Looking Ahead

- In person witnessing continues to be the preferred method of execution for wills and powers of attorney
- Issues include:
  - Challenges as to validity based on capacity
  - Challenges as to validity due to possible undue influence (who is in the room with the testator but not on camera?)
  - What if the documents signed by the testator and the witnesses are not identical
  - Acceptance of virtual and counterpart signed documents in other jurisdictions may be problematic



# Court-Ordered Validity

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Superior Court may validate imperfect testamentary documents

- The *SLRA* historically deemed documents not properly drafted or executed to be invalid
- As of January 1, 2022, Bill 245 adds section 21.1 to the *SLRA* allowing the Superior Court of Justice to deem a document not properly drafted or executed to be valid, if satisfied that the document properly sets out the testamentary intentions of the deceased
- How far the courts will go remains to be seen
- Electronically signed documents are not capable of being validated under section 21.1

# Separated Spouses

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Effect of Separation on Succession will be Aligned to Divorce

- Section 17 of the *SLRA* provides that, in general, a will is not revoked by presumption of intention
- Subsection 17(2) provides an exception to the rule where spouses are divorced,
  - 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
  - a will is treated as though the former spouse has predeceased the testator
- As of January 1, 2022, Bill 245 adds subsections 17(3)-17(5) to the *SLRA* which treats separated spouses as if they were divorced



# Separated Spouses

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What is considered “separated” for the purposes of the SLRA?

- New subsection 17(4) of the *SLRA* sets out the criteria for determining whether spouses will be considered separated at the time of the testator’s death
- There are two criteria and both criteria must be present for the spouses to be considered separated
- Criteria # 1: Before the testator’s death,
  - 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,
  - they entered into an agreement that is a valid separation agreement under Part IV of the *Family Law Act*,

# Separated Spouses

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What is considered “separated” for the purposes of the SLRA?

- 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
  - 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
- **Criteria # 2:** At the time of the testator’s death, the spouses were living separate and apart as a result of the breakdown of their marriage
  - The question of fact as to whether or not the separation requirement is met will no doubt lead to increased litigation

# Separated Spouses

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## Separation to have the Effect of Divorce on Succession Entitlement

- Prior to Bill 245, if a spouse died intestate (i.e. without a will), legally married but separated spouses could claim entitlement to the statutory intestate entitlement under section 45 of the *SLRA* or to an equalization payment on death under section 5 of the *Family Law Act* (“*FLA*”)
- As of January 1, 2022, Bill 245 adds section 43.1 to the *SLRA* and subsection 6(21) of the *FLA* which removes these succession entitlements for legally married spouses who are separated at the time of the first spouse’s death



# Marriage and Existing Wills

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Existing wills no longer revoked by marriage

- Prior to Bill 245, marriage of a testator would revoke an existing will under section 16 of the *SLRA*, except in the following circumstances:
  - There is a declaration that the will is made in contemplation of marriage,
  - The spouse of the testator elects in writing within one year of the testator's death to take their interest under the will, or
  - 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



# Marriage and Existing Wills

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Existing wills no longer revoked by marriage

- As of January 1, 2022, Bill 245 repeals section 16, 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



# Legal Authority to Make Decisions Regarding Deceased Persons

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## Priority of Persons

- The Ministry of Government and Consumer Services published a consultation paper in June, 2021 seeking feedback on proposed changes to the *Funeral, Burial and Cremation Services Act, 2002* (the “FBCSA”)
- Among the topics was a discussion on adding priority of persons with regards to legal authority of the final disposition of a deceased’s remains

# Legal Authority to Make Decisions Regarding Deceased Persons

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## Current Requirements

- The *FBCSA* requires a contract be made to provide bereavement supplies and services
- As a matter of common law, the executor(s) named in the will is responsible for directing and authorizing disposition of remains, but the deceased's wishes for disposition as set out in the will are not binding
- Where there is no will, there is no one with authority
- There is currently no priority of persons establishing authority to control final disposition. This has led to many difficult situations



# Legal Authority to Make Decisions Regarding Decedents

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## Proposed Changes

- Establish a clear hierarchy of priority of persons with the right to control final disposition of remains, including situations in which no one with a relationship to the deceased is available or willing to provide disposition instructions
- Require bereavement suppliers to obtain proper identification and written authorization from person with legal authority to control final disposition
- Written disposition instructions by the deceased (i.e. in their will) should be considered binding on the person with legal authority for final disposition





**Questions?**



# Contact Us

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