

August 24th, 2020

Office of the Attorney General
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Re: Estate Law Consultation

Ref: M-2020-8852

The Society of Trust and Estate Practitioners (Canada) (“STEP Canada”) has reviewed the Ontario Attorney General’s Consultation (the “Consultation”), regarding certain estates law and administration issues. STEP Canada has consulted with its Ontario members and the chairs of each of the local branches and chapters have met to discuss the responses and provide STEP Canada’s submission on the Consultation.

STEP Canada is part of STEP Worldwide, the leading international organization for trust and estate professionals. STEP’s mandate is to provide a forum for discussion and to advance practitioners’ knowledge of tax, accounting, administrative, statute and case law through regular branch seminars, symposia, and an annual national conference. STEP Canada also makes representations of a technical nature to government, policy makers and related professional bodies, with the goal of promoting better understanding of trusts and estates and improving related law and policy. There are approximately 20,000 members worldwide and over 3,000 members in Canada, operating as professionals in the trust, legal, accounting, financial planning and insurance industries. Many of the members of STEP Canada and STEP Worldwide are engaged in advising their clients on matters relating to the ownership, including beneficial ownership, of companies.

Given the brief amount of time provided for the Consultation, we have not been able to do as much research and consultation as we would prefer. Accordingly, we have kept our comments brief and limited them to where there is either a general consensus or there are strong views on the part of the membership. We commend to you the good work done by provincial bar associations and law reform commissions, which deal with most if not all of these topics.

A. Responses to Specific Consultation Questions

1. Is the \$50,000 limit [for small estates] 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?

The general consensus on this point is that it is preferable, but not required, that the amounts align should a small estates process be implemented. What is most important is that there is a Certificate of some sort upon which a third party can rely, similar to the Certificate of Appointment of Estate Trustee.

There is a strong view that there are two main factors leading Ontarians to seek to avoid the probate process and thereby putting themselves at risk to financial abuse and reducing the amount of Estate Administration Tax received by the province:

First, the process itself, while not unduly onerous in terms of preparing an Application, is significantly more time consuming than appropriate. The processing times (including before COVID-19) are significant, and lead to delays in estate administration and risks to assets while the Estate Trustee is not permitted to deal with them.

Second, the rates are high. This is mitigated for smaller estates as noted in the Consultation. The general consensus is that compliance with the probate process would be significantly improved with lower rates. However, it is noted that if the processing times were improved compliance would likely improve with the current estate administration tax rates.

2. 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.

Unless the Province is implementing these changes permanently (see the response below on this point), the emergency order should be maintained. So long as the pandemic continues such that high risk individuals should not meet in person, the benefits of those changes outweigh the risk. It should be noted that the groups most concerned with estate planning matters (i.e. older Ontarians and Ontarians with health issues) mirror those who are at a high risk due to COVID-19.

3. 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.

The consultations with STEP Canada members in Ontario did not find a consensus on this point. The following risks were highlighted:

- With video signings, lawyers cannot be certain as to who is in the room;
- It is far more difficult over video to determine whether the client understands and has the capacity to understand the actions they are taking;
- Not all clients have access to technology or technical skills necessary; and
- In light of the above circumstances, vulnerable individuals will be more reliant on family and friends in making arrangements to sign documents, increasing the risk of financial abuse.

It is likely that documents witnessed through video will be much more open to challenge due to the issues noted above.

Should the Province decide to proceed with making these changes permanent, STEP Canada recommends that consideration be given to what circumstances are appropriate. In addition to requiring that a witness be a lawyer, consider whether there should be a limited number of circumstances in which it would be appropriate to use witnessing through these means.

It may be more appropriate to expand substantial compliance in execution requirements (see below) rather than making these changes permanent.

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

The consultations with STEP Canada members in Ontario did not find a consensus on this point. Some members were of the view that change is unnecessary as the section permits the spouse to elect to retain the Will.

However, there is significant concern that the section allows for vulnerable individuals to be taken advantage of financially and that is not necessary due to the application of other provisions in the SLRA and Family Law Act.

The capacity required to marry is much lower than that required to make a Will. This is desirable from a public policy perspective to permit persons with diminished capacity to enjoy the benefits of marriage. However, in cases of diminished capacity for those people who have made a prior Will (as may be the case with the growing elderly population), the ability to marry results in the automatic revocation of the Will. This may not be desirable and it may lead to increased abuse by those seeking financial gain (predatory marriage).

In cases where a Will is not updated on marriage, the rights of spouses are already protected under the Family Law Act and dependent's relief provisions in the SLRA. Providing a further windfall arising as a result of an intestacy triggered by marriage may not be appropriate.

5. Whether section 17 of the SLRA, which revokes a bequest to a former spouse upon divorce [and revokes their appointment as estate trustee], 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.

The general consensus on this point is that such a change should be made. As noted in respect of the question above, it may be useful to expand the provision to beneficiary designations under the SLRA and Insurance Act for consistency. In addition, consider whether a similar provision should be included in respect of Continuing Powers of Attorney under the Substitute Decisions Act.

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

We received significant submissions on this point. The general consensus is that substantial compliance as exists in other provinces should be adopted in Ontario. In order to best reflect the testamentary intentions of Ontarians, substantial compliance would allow the Court to remedy formal errors made when drafting or executing a Will.

7. 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.

The consultations with STEP Canada members in Ontario did not find a consensus on this point. Should the Province proceed with making these changes, it may be worthwhile to consider clarifying what reasonable efforts must be taken to find a beneficiary and to provide a simplified avenue, such as payment into Court or to the Public Guardian and Trustee, for executors to relieve themselves of liability where beneficiaries cannot be found.

8. 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.

The general consensus is that the amount should be increased and that consideration should be made to allow for annual increases tied to inflation or a periodic review of the amount.

It was noted that in some provinces the preferential share may differ depending on whether the issue of the deceased are also the issue of the spouse. Where that is the case, a larger preferential share may be appropriate, as that best reflects the wishes of most individuals.

B. Additional Issue Raised.

9. Beneficiary Designations by Substitute Decision-Makers

Our members have noted that Attorneys for Property or Guardians for Property should be able to make beneficiary designations on RRSPs and RRIFs where an existing plan is being transferred or converted. Currently, this is not permitted, leading to the undesirable result that a beneficiary designation is revoked when the plan is transferred or converted, which does not reflect the intentions of the testator.

This is a change that has been made in Alberta, British Columbia, New Brunswick, and, in respect of Guardians, Nova Scotia.

Several members of STEP Canada participated in discussions concerning our submissions and contributed to its preparation. The members were:



Paul W. Taylor of Borden Ladner Gervais LLP, Ottawa, Chair of STEP Ottawa

Elaine Blades of RBC Wealth Management Royal Trust, Toronto, Chair of STEP Toronto

Justin Hoffman of Davis Martindale LLP, London, Chair of STEP Southwestern Ontario

We would be pleased to discuss our comments with you at your convenience.

Yours very truly,

	
Pamela Cross Chair, STEP Canada Borden Ladner Gervais LLP	Timothy Matthews Chair, STEP Canada Trust and Estate Technical Committee Stewart McKelvey