



# Significant Estates Law Changes are Coming for All Ontarians: An Overview of Bill 245 & Rule Changes for Small Estates

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## Bill 245

On February 16, 2021, the Government of Ontario introduced the *Accelerating Access to Justice Act, 2021*, or Bill 245 ("Bill 245") that received Royal Assent on April 19, 2021. Bill 245 introduces significant changes to various aspects of estates and substitute decision-making law in Ontario, particularly to the *Succession Law Reform Act*, R.S.O. 1990, c. S.26 ("*SRLA*"). The legislation aims to continue building on changes already implemented as a response to the COVID-19 pandemic, and to make estate planning and estate administration more accessible, affordable, and efficient for Ontarians.

Key among these changes are permanently implementing the option to sign wills and powers of attorney virtually and in counterpart, changing the amount a parent can accept on behalf of a minor child without guardianship, marriage no longer revoking a will, treating separated spouses similar to divorced spouses for the purposes of estate distribution, and introducing court-validated compliance for testamentary documents.

## Signing Wills and Powers of Attorney Virtually and in Counterpart

The virtual counterpart execution provisions were initially introduced as a temporary measure to allow people to execute wills and powers of attorney while respecting social distancing guidelines during the COVID-19 pandemic. Bill 245 seeks to revise the *SLRA* and the *Substitute Decisions Act, 1992*, S.O. 1992, c. 30 (governing the executions of powers of attorney) to make permanent the provisions to execute wills and powers of attorney made on or after April 7, 2020, in counterpart through audio-visual communication technology. Similar to the provisions introduced under emergency orders, witnesses to wills and powers of attorney can be present by means of audio-visual communication technology defined as "any electronic method of communication in which participants are able to see, hear and communicate with one another in real time." Specifically, at least one of the witnesses must be a Law Society of Ontario licensee, meaning a lawyer or a paralegal.

In addition, the witnesses and the testator/grantor must contemporaneously sign complete, identical copies of the will or powers of attorney in counterpart, which counterparts together constitute the validly executed document(s). Notably, there can be minor, non-substantive differences in format or layout between the copies executed by the testator/grantor and the witnesses.

The provisions come into force on May 20, 2021 and will allow Ontarians to more easily and safely

access legal services when preparing their wills and powers of attorney.

## **Increasing the Monetary Amount a Parent Can Receive on Behalf of a Minor**

Bill 245 revises the section in the *Children's Law Reform Act*, R.S.O. 1990, c. C.12 ("CLRA") setting out the quantum of money payable and the value of personal property, including an inheritance, a parent or a person with lawful custody of the minor can receive on the minor's behalf without requiring a court order for guardianship of the minor's property. Specifically, the revision sets out that the prescribed amount is set out by regulation, and applies to money payable under a judgment, court order, or on an intestacy.

Previously, the amount a parent or person with lawful custody could receive was set at \$10,000.00. Ontario Regulation 120/21 provides that the new prescribed amount is \$35,000.00. This change will result in some parents or persons having lawful custody to receive a larger sum on behalf of the minor and avoid costly guardianship court proceedings.

## **Marriage No Longer Revokes a Will**

Bill 245 repeals the sections in the *SLRA* that provide that a will is revoked by marriage of the testator. Amongst others, this is a welcome change to address situations of predatory marriages on vulnerable individuals.

## **Relationship Breakdowns: Treating Separated Spouses Like Divorced Spouses**

The current *SLRA* provides that where a marriage ends as a result of divorce or is declared a nullity, subject to a contrary intention in the will, a former spouse of the testator is deemed to have predeceased the testator. This means that the appointment of the former spouse as estate trustee and any gifts to the former spouse are revoked. Currently, this provision does not apply to separated spouses.

Bill 245 addresses this gap by ensuring that a spouse separated at the testator's death does not benefit under the testator's will. Spouses are considered to be separated if the following conditions or circumstances apply:

*before the testator's death:*

1. they lived separate and apart for three years as a result of the breakdown of their marriage;
2. they entered into an agreement that is a valid separation agreement under Part IV of the *Family Law Act*, R.S.O. 1990, c. F.3;
3. a court made an order with respect to their rights and obligations in the settlement of their affairs arising from the breakdown of their marriage; or
4. a family arbitration award was made under the *Arbitration Act, 1991*, S.O. 1991, c. 17 with respect to their rights and obligations in the settlement of their affairs arising from the breakdown of their marriage;

and at the time of the testator's death, they were living separate and apart as a result of the breakdown of their marriage.

These provisions come into force on January 1, 2022.

## **Separated Spouses No Longer Entitled to Benefit on an Intestacy**

Where a married person dies without a will, the surviving married spouse is entitled to some, or all, of the deceased person's estate. The provision applies even when spouses are separated, but not divorced. Effective January 1, 2022, Bill 245 aims to address this often unintended effect by ensuring that separated spouses, as defined above, do not inherit the estate of a former spouse who died without a will.

Spouses inhering on an intestacy were previously entitled to the preferential share, that was set at \$200,000.00 since 1995. If the estate was greater than \$200,000.00, the spouse was entitled to the first \$200,000.00, and to split the remainder above the preferential share equally with the remaining beneficiaries on an intestacy (if any). Under Ontario Regulation 54/95, the preferential share for a surviving spouse has increased to \$350,000.00 for the estates of persons who die on or after March 1, 2021.

## **Introducing Court-Ordered Validity of Testamentary Documents**

Bill 245 introduces a new provision under the *SLRA* that allows for the court to validate a document that sets out the testamentary intentions of the deceased or intentions to revoke, revive, or amend a will, but that was not properly created or signed under the *SLRA*. By application made to the court, the court may order that the document is a valid testamentary document if it sets out the testamentary intentions of the deceased, or an intention of the deceased to revoke, alter, or revive a will. Importantly, such testamentary document cannot be an electronic will.

The court-ordered validity provision comes into force on January 1, 2022.

## **Changes for Small Estates**

In addition to Bill 245, the Government of Ontario introduced changes to the *Estates Act*, R.S.O. 1990, c. E.21 ("*Estates Act*") in the *Smarter and Stronger Justice Act, 2020*, S.O. 2020, c. 11 ("*Stronger and Smarter Justice Act, 2020*") to make it easier, faster, and more affordable for individuals to administer small estates.

The simplified rules for small estates, effective as of April 1, 2021, include changes to the *Rules of Civil Procedure* (R.R.O. 1990, Reg. 194) ("*Rules of Civil Procedure*") set out in O. Reg. 111/21 creating new provisions related to the probate process for small estates. Previous to these changes, the probate procedure was the same for all estates regardless of the size.

The changes include:

### **Increasing the Value of a "Small Estate"**

As of April 1, 2021, a "small estate" in Ontario is one that does not exceed \$150,000.00 in value. Importantly, the new small estate value will not affect estate administration tax, which will continue to apply to the portion of the estate exceeding \$50,000.00.

## Removal of Bond Requirement

Previously, the *Estates Act* set out a number of circumstances when the filing of a bond was required, often resulting in delay and increased costs. The new rules provide that the requirement to post a bond for a small estate is removed, except where a beneficiary is a minor or is deemed incapable.

## The Simplified Small Estates Probate Process

Rule 74.1 of the *Rules of Civil Procedure* allows estate trustees to apply for a Small Estate Certificate both when there was a will and even if there was no valid will. This certificate has the same effect as a Certificate of Appointment of Estate Trustee, except that the authority of an estate trustee pursuant to the Small Estate Certificate is limited to the estate assets listed in the application.

The applicant for a Small Estate Certificate must provide a copy of their court application along with copies of the will and codicil(s), if any, to all persons entitled to share in the distribution of the estate. Notably, the applicant can provide a copy of the documents by e-mail, as well as by regular mail or courier. The applicant must then wait 30 days before filing the application with the court located in the jurisdiction where the deceased person last resided.

If the applicant discovers additional assets after the court issues a Small Estate Certificate, but that do not exceed the \$150,000.00 small estate threshold, the applicant can file an Application to Amend Small Estate Certificate, and the court will issue an Amended Small Estate Certificate.

If the applicant discovers additional assets after the court issues a Small Estate Certificate that exceed the \$150,000.00 threshold, the applicant can proceed with a regular application for a Certificate of Appointment of Estate Trustee under Rule 74 of the *Rules of Civil Procedure*.

Various aspects of Ontario estates law merit a revisiting due to the rapidly evolving times and demographics. The changes set out in Bill 245, the *Estates Act*, and the *Stronger and Smarter Justice Act, 2020* are welcome and needed for Ontarians navigating the law related to preparing for incapacity, finalizing their testamentary wishes, and administering the estates of loved ones.

