

Recent changes to wills, powers of attorney and succession law

The government has enacted four important changes regarding wills, powers of attorney (POAs) and to the administration of an estate with Bill 245 – *Accelerating Access to Justice Act, 2021* which received Royal Assent on **April 19, 2021**. (See amendments in Schedule 8 – *Substitute Decisions Act, 1992* and Schedule 9 – *Succession Law Reform Act*.) Some of these changes have a significant impact and change parties' rights and entitlements. Lawyers need to be aware of and advise their clients of these important changes.

1. Virtual signing of wills and powers of attorney (POA) made on or after **April 7, 2020**, provided one of the witnesses is a lawyer or paralegal, was made permanent and no longer under Emergency Orders during the pandemic.
 - One may sign traditionally in-person, or virtually using audio-visual communication technology using counterparts of the will or POA.
 - Specifically, the practice of circulating the original will or POA and seeing it executed in multiple virtual meetings was **not** continued after **April 21, 2021**. All signatures now have to be contemporaneous.
2. Section 16 was repealed on **January 1, 2022**. Marriages entered into after this effective date do not nullify an existing will.
3. Separated Spouses are treated more like Divorced Spouses: Separated spouses of a person who died on or after **January 1, 2022**, can be treated in certain circumstances as predeceasing the testator in the administration of that will. Section 17 will exclude separated spouses if:
 - they 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*,

- 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
- a family arbitration award was made under the *Arbitration Act, 1991* 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 person's death, they were living separate and apart as a result of the breakdown of their marriage.

A new section 43.1 is added to provide that the spousal entitlements – under Part II of the *Succession Law Reform Act* if a person dies intestate in respect of any or all property – will not apply if the person and the spouse are separated, as determined under the section (see above), at the time of the person's death. A complementary amendment is made to section 6 of the *Family Law Act*.

4. The Superior Court of Justice is given authority, on application, to make an order validating a will (not POA) that was not properly executed or made under the *Act*, if the Court is satisfied that the document or writing sets out the testamentary intentions of a deceased or an intention of a deceased to revoke, alter or revive a will of the deceased (new section 21.1). ■

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Practice tips:

- 💡 Advise clients of relevant changes, especially if you are dealing with an estate, or succession planning matters for a client or individuals who have separated.
- 💡 Consider any changes you should make to your practice, whether in will and POA drafting, family dispute discussions, or to previously drafted wills.
- 💡 Consider how you virtually sign wills. Counterparts are clearly recognized. Circulating the will or POA is not allowed.
- 💡 Do not relax any will signing protocol in view of the courts new authority to validate an improperly signed will! While the new changes move away from strict compliance to substantial compliance, it remains to be seen how the courts will exercise that authority based on the evidence available.
- 💡 With these changes to the law, consider writing former clients to invite them to review their current wills, POAs and estate plans.
- 💡 As always and especially when signing remotely, be alert to undue influence and capacity concerns and make notes to your file of how they were addressed.