FEDERATION OF ONTARIO LAW ASSOCIATIONS
FÉDÉRATION DES ASSOCIATIONS DU BARREAU DE L'ONTARIO

"The Voice of the Practising Lawyer in Ontario"

FOLA Submissions

Regarding the Request for Input on Estates Law Reform to Modernize Estates Law and Streamline and Expedite Resolution of Estates

Submitted to:	Director of Policy and Legal Affairs Amanda Iarusso Amanda.iarusso@ontario.ca
Submitted on:	27 August 2020
Submitted by:	John Krawchenko 1st Vice Chair jok@krawchenkolaw.com

Corporate Mailing Address
731 9th Street West, Owen Sound, ON N4K 3P5
Phone: (519) 270-4283

www.fola.ca
@ont_law_assoc

INTRODUCTION

The Federation of Ontario Law Associations (FOLA) appreciates the opportunity to provide submissions in response to your request for input on **Estates Law Reform to Modernize Estates Law and Streamline and Expedite Resolution of Estates**.

FOLA is an organization that represents all 46 local law associations across Ontario. Together with our associate member, The Toronto Lawyers Association, FOLA represents approximately 12,000 lawyers, most of whom are in private practice in firms across the province.

In response to your invitation, FOLA sought input from its member associations to provide feedback and submissions relative to this important subject.

RESPONSE

In the context of the Law Commission of Ontario's (LCO) report on *Simplified Procedures for Small Estates*, published in 2015 and pursuant to amendments to the *Estates Act* found in the *Smarter and Stronger Justice Act, 2020,* you have posed 8 questions to which we respond as follows:

(1) **Is the $50,000.00 limit suggested by the LCO for small estates still appropriate or should another value be chosen to better reflect the world in 2020? Based upon the current tax exemption of $50,000.00 under the *Estates Administration Tax Act, 1998* would any procedural difficulties arise if these two amounts do not align?**

In its final report the LCO stated that "the definition of small estate should target those estates for which cost is likely to be an obstacle to accessing the current system"[1]. Many values were considered but the LCO elected to use the $50,000.00 limit acknowledging that it could be varied over time by way of regulations.

Views on what constituted an appropriate value for "small estates" in 2020 were divided in the responses received from our members. The suggested quantum and rationale for making the suggestions were very similar to those identified in the original LCO reports from 5 years ago.

[1] Part III Section B Law Commission of Ontario Report – Simplified Procedures for Small Estates-Final Report

Given the fact that the current tax exemption of $50,000.00 under the *Estates Administration Tax Act, 1998,* corresponds to the suggested value for small estates, FOLA submits that (notwithstanding the passage of time since the LCO report was released), $50,000.00 is still an appropriate defined value for small estates. FOLA further submits that the defined limit for small estates, should always be aligned with the tax exemption. Any contemplated increase to the defined limit for a small estate, should see a corresponding increase in the tax exemption. In maintaining the two amounts as equal values, it is submitted that this would provide clarity and certainty to applicants and would encourage parties to administer smaller estates, who may otherwise avoid the process.

With regards to procedural difficulties arising if the small estates value and tax exemption did not align, our respondents indicated that they believed that this could occur. FOLA agrees with this view. The LCO recommendations number 7 alluded to the added complexity to the administration of a small estate in the context of newly/after discovered assets which would require a refiling of the application (on one occasion only) and the potential requirement to use the regular stream. If not aligned, in addition to these additional steps, the filing parties would then be required to calculate tax and make determinations if they are properly due, find the funds and make the remittance. This could be avoided and simplified by maintaining the correlation of the tax exemption and the defined small estate.

(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**

The majority of respondents were in support of allowing for remote execution of wills and powers of attorney to continue, for so long as the risk of Covid 19 infection existed and social distancing measures were in place. FOLA submits that notwithstanding the termination of the emergency order, that the allowance for remote execution should continue until the end of the pandemic in order to provide access to justice for those vulnerable Ontarian's unable to attend law offices in person as a result of the threat of contracting the virus.

(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**

Our respondents were equally divided on this issue. One half believed that the remote execution regime should end when the pandemic ends, while others perceived it to be an enhancement and modernization to the traditional methods employed. FOLA supports the

continued use of remote witnessing and execution of wills and powers of attorney but only in exceptional circumstances, such as in remote communities or in the case of an inability to access the testator/testatrix or donor due to hospitalization, isolation or quarantine.

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

The majority of respondents did not support this proposition, stating that it was a necessary protection to new spouses and dependants. The ability to make a will in contemplation of marriage was viewed as an appropriate safeguard to avoid a lapse in a testamentary planning. FOLA agrees with the majority view, that section 16 of the SLRA should not be repealed.

(5) **Whether section 17 of the *Succession Law Reform Act* (SLRA), which revokes a bequest to a former spouse upon divorce, 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 majority of respondents supported this proposition. FOLA submits that it would be desirable to amend section 17 of the SLRA (subject to any written agreement or court order relating to the parties) to provide for a deemed revocation of a bequest to a separated spouse who have been living separate and apart with no reasonable prospect of reconciliation for a period of 10 years or longer; this lengthy period being evidence of the parties intentions to be free of obligations to each other, in life and in death. FOLA further submits that their must also be with procedural safeguard put in place in the way of a reverse onus on a surviving spouse to show that the revocation ought not to be applied in their circumstance.

(6) **Whether to court should be granted greater latitude in validating or rectifying an improperly prepared will**

All respondents supported this proposal. FOLA submits that this is appropriate and would potentially assist in avoiding subsequent estate litigation.

(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 majority of respondents were opposed to this proposition. The argument advanced in support of maintaining the status quo was that typically in an intestacy, one does not have to move too far down the list of consanguinity to find an heir in law and that these are rare circumstances to begin with. The suggested alternative of distant relatives being required to seek court orders to prove entitlement would fly in the face of the stated objective of simplifying processes and potentially creating a barrier to the access to justice. FOLA does not support this proposition.

(8) **Whether the preferential share for spouses under the SLRA, which is currently set at $200,000.00 and has not been updated since 1995, should be changed**

The majority of respondents were in favour of this proposition. FOLA submits that the preferential share set out in section 45 of the SLRA should be adjusted to reflect a current value of the original $200,000.00 set in 1995. FOLA further submits that any changes to this section must be made in concert with changes to section 17 of the SLRA (discussed in question 5 above) and section 1, definitions of spouse. The reasoning behind this is that long term separated spouses should see equal treatment in both testate and intestate scenarios.

CONCLUSION

The Federation of Ontario Law Associations appreciates the opportunity to make these submissions regarding Estates **Law Reform to Modernize Estates Law and Streamline and Expedite Resolution of Estates**.

John Krawchenko
1st Vice Chair