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Schedule 9 - Succession Law Reform Act

1. This is an opportune moment to abandon the hoary term of “testator” – which, by the way, has driven many a will drafter, unnecessarily, to use the term “testatrix” when the will-maker is a woman. Mr. Google tells me that “testator” has its roots in the 14th century. Is it not well past time, not only to modernize the statutory language but at the same time to join the steady trend towards the use of “gender-neutral” language in the laws of Ontario? (See, for example, Schedule 11 to the Bill.) Ontario should adopt the term “will-maker”, which is what British Columbia legislators did when enacting that province’s *Wills, Estates and Succession Act* a dozen years ago. (In that statute, “will-maker” means “a person who makes a will”.)

2. In the rush to enable remote witnessing of a will by the emergency order made on April 7, 2020, there was an unfortunate omission. Clause 15(d) of the *Succession Law Reform Act* enables the revocation of a will by burning, tearing or otherwise destroying it, whether such actions be taken by the will-maker personally or “by some person *in his or her presence* and by his or her direction with the intention of revoking it.” (my emphasis). Why not expand the scope of proposed subsection 4(3) that allows for remote witnessing of a will through appropriate “audio-video communication technology” to apply to remote destruction of a will by the will-maker’s agent? Imagine a scenario where the will-maker’s will is stored at home while the will-maker is confined in a hospital or other facility where visitors are not permitted. Assuming the will-maker has access to appropriate audio-visual communication technology, it should be possible for the will-maker to direct someone remotely to physically destroy the will. (It is likely that proposed new subsection 21.1(1) could be invoked to have a court validate the revocation of a will, where the act of revocation does not comply with the statutory requirements. But why should the time and expense of a court application be necessary?)

3. Signing of wills in counterpart was enabled under an emergency order made in on April 7, 2020. While it may have been helpful to have this facility while in the depths of the COVID-19 pandemic, it is unnecessary to make it a permanent fixture of the law, particularly now that we are in the early stages of a vaccine rollout for all Ontarians, with the result that there will be little reason to be concerned, going forward, that anyone will be prevented from making a will if signing in counterpart is discontinued. (There were likely relatively few wills signed in counterpart during the past 11 months. Indeed, such has been the antipathy of estates lawyers towards having wills signed in counterpart that many of them have expressed an intention, wherever possible and as soon as possible, to arrange for each client who signed a will in counterpart to re-sign his or her will using a single document.) Embedding in the statute the ability to make the signing of wills in counterpart -- apart from being unnecessary, as I have suggested here -- can be expected, over time, to give rise to court disputes arising out of unusual facts. In this regard, I am appending a copy of an article I wrote for *Money & Family Law*, a legal newsletter published by Thomson Reuters, entitled "Signing Wills in 'Counterparts' – A Counterpoint". Simply put, this is a solution in search of a problem.

There are also practical issues that will arise with wills signed in counterpart. Ever since the making of the emergency order that enabled wills to be signed in counterpart, differences of opinion have been expressed by estates practitioners as to what one must submit to the court in applying for a certificate of appointment of estate trustee with a will (formerly, "letters probate"). Does one submit each one of the signed counterparts in its entirety? Or does one do what is frequently done in commercial agreements which expressly provide for signature

by the parties in counterpart; namely, submit a document comprised of one completely signed counterpart, together with only the signature page of each other counterpart? In my view, the language of proposed subsection 4(4) – that is, the identical copies of the will signed in counterpart “which together shall constitute the will” -- makes it clear that one cannot take the shortcut used in a commercial context. (An ancillary question also arises; namely, to the back of which page or pages does one affix the exhibit stamp, whether as an exhibit to the affidavit of execution or as an exhibit to the application for a certificate of appointment of estate trustee with a will?) Consider a 20-page will signed in three counterparts. Ignoring the relatively new e-filing option, it means that the court will have to issue a 62-page certificate of appointment of estate trustee with a will, affixing the court seal to every page. An even bigger nightmare would be entailed for the estates lawyer who has to make multiple notarial copies of that certificate of appointment of estate trustee with a will, affixing a notarial seal to every single page of each notarial copy. No wonder many lawyers are keen to have wills signed by a client in counterpart replaced with single-document versions.

4. The use of the word “contemporaneous” in proposed subsection 4(3) – to be clear, I mean the version of that subsection that is re-enacted by subsection 1(2) of the Bill -- is problematic. In normal usage, the word “contemporaneous” with reference to two distinct actions means actions which occur at the same time or nearly at the same time. Where the will-maker and a witness sign identical copies in counterpart using audio-visual technology, they can do so contemporaneously (although in some cases they may not). However, where there is only a single will, it has to travel from the will-maker (following signature) to the witnesses, and possibly from one witness to the other witness. In such cases, it is inappropriate to use the

word “contemporaneous” because the separate signings may take place over the span of several days, or perhaps weeks in some cases. (Admittedly, in some contexts – for example, with reference to social or historical events -- the word “contemporaneous” may describe two events or actions that encompass a longer span of time.) I would recommend replacing the word “contemporaneous” with the words “intended by all of them to be linked to execution of the same document” or else by adding a subsection that gives an expanded definition of the word “contemporaneous” in the same way that subsection 4(5) expands the meaning of “identical copies” of documents being signed in counterpart. This would surely eliminate legal disputes over the validity of a will where a day (at least) has elapsed between the will-maker’s signature and the signature of the later of the two witnesses to sign.

5. Currently, divorce precludes a surviving ex-spouse from taking any benefits from the estate of the deceased ex-spouse, either under a will that pre-dates the divorce or on an intestacy. In this regard, the Bill would make separation, under certain circumstances, equivalent in effect to a divorce. I will leave it to family law practitioners to provide more detailed commentary on the listed circumstances that will determine whether two spouses have separated prior to the death of one of them. However, I will make one observation that applies equally to proposed subsections 17(4) and 43.1(2). Each of those subsections requires that the spouses have been living separate and apart at the time of the death of one of them. In addition, at least one of three other conditions must have been satisfied. The first-listed condition is that the spouses “lived separate and apart for three years as a result of the breakdown of their marriage”. I would recommend that the language be clarified to say that there must have been no reconciliation between the spouses from the end of the three-year period of separation until

the date of the death of one of them. Otherwise, the following scenarios could arise with what are arguably undesirable outcomes:

After two years of marriage, A and B separate. At the end of a three-year separation, they reconcile and remain together for another 30 years, when B announces the marriage is over and walks out. A, shocked and distraught by the second separation, takes his own life a few days later. Shortly before the second separation, A had made a will leaving everything to B. The operation of proposed clause 17(4)(a) will mean that by virtue of the first separation, B inherits nothing under A's will.

Assume the same fact situation as above, except that A died without a will. If no next-of-kin of A can be found, then by virtue of the operation of proposed clause 43.1(2)(a), A's entire estate would escheat to the Crown.

Apart from these remarks, I will make one point regarding the language used in subsection 17(2). I would suggest this opportunity be taken to replace the word "construed" by the words "given effect". Construction of a will pertains to its meaning. It is inapt to refer to a will's being construed – on divorce or, under the Bill, on separation -- as if the ex-spouse or separated spouse, as the case may be, had predeceased the testator.

Schedule 8 – *Substitute Decisions Act, 1992*

My comments above respecting the use of the term “contemporaneously” in section 4 of my commentary on Schedule 9 are equally apt with respect to the same use of that word in proposed clause 3.1(2)(b) of the *Substitute Decisions Act, 1992*.

Of particular importance is the industry in which the payor participates.

Consider the example of a restaurant owner who is required to close its dine-in operations starting in mid-March. Clearly, a reduced level of income, or more likely losses, would be expected over the period of the closure; however, once restrictions are lifted, several scenarios may occur:

- The business could return to its normal course operating levels.
- More likely, diminished profits could persist over some period in the event that either (a) regulations mandate that restaurants may operate, but only at a reduced capacity; or (b) consumers prove less willing to return to their pre-pandemic way of life.
- The business could discontinue operations altogether in the face of mounting debts resulting in possible bankruptcy.

It may be necessary to present multiple scenarios based on the various underlying assumptions for the court to consider. A range of possible outcomes might contribute to the resolution of the dispute, particularly when economic events occurring after the date of the income report had been contemplated in a particular scenario.

The documentation required to support the payor's current income will be case-specific. Monthly financial reporting with current income statements and balance sheets (along with prior year comparatives) will be critical.

It may not be as simple as following a linear trend of income, or pro-rating prior year results when arriving at a projection of a support payor's income. For example:

- The seasonality of the business may impact expectations: would the business' profits have been expected to be lower in the spring/summer months in any event?
- It may be that the business' income has been relatively unaffected to date, as the business has been working through a backlog of existing projects but may not have their ordinary pipeline of work once that backlog has been eliminated.

It will be important to consider the costs associated with a motion to change. If it is likely that the decline in the payor's income is not permanent, and/or the costs outweigh the reduction to a new level of support, it may not make financial sense to proceed.

The parties may have to suffer through a level of short-term pain if they expect that income levels will return to previous levels once the economy recovers. By the time their case is heard, their current income may be similar to their pre-COVID-19 income.

On the other hand, their income may have disappeared entirely — a realistic possibility for many.

We find ourselves living in unprecedented and uncertain times. Support payors/recipients, their lawyers and the Judges or arbitrators who hear their cases will require the appropriate financial analysis that accommodates the uncertainty in which we are all currently experiencing.

SIGNING WILLS IN "COUNTERPARTS" - A COUNTERPOINT

By Barry S. Corbin*

Readers of our newsletter will recall our April 2020 issue where we wrote about the problems of signing wills in the COVID-19 age of self-isolation.¹ Specifically, how do you comply with the statutory requirements that the testator sign in the presence of two witnesses and that each witness sign in the presence of the testator, if the testator cannot have two witnesses physically present for that purpose? In one of our footnotes to that article, we alluded to the April 7, 2020 emergency regulation made under Ontario's *Emergency Management and Civil Protection Act*,² declaring that remote witnessing with appropriate two-way, real time communication between the testator and the two witnesses satisfies the formal requirements in the *Succession Law Reform Act*³ for making a will. We pointed out that since there is only one will, this accommodation would still require the will signed by the testator to be delivered to the witnesses for their respective signatures, again with an Internet-based link established between the testator and the witnesses during that signing.

Evidently, someone has convinced the Attorney General that an additional accommodation was necessary so as to avoid the need for delivery of the will from the testator to each witness. On April 22, 2020, a further emergency regulation was made under the same statute, revoking the first one and replacing it with one that further enhanced the means of signing wills, continuing powers of attorney and powers of attorney for personal care. Specifically, from the date on which the regulation was made until Ontario's declaration of emergency has been rescinded, each of those documents may be signed in "counterparts". Here is the text of the two new subsections added by this regulation in relation to wills:

- (2) If a will is executed with the assistance of audio-visual communication technology as authorized by subsection (1), the signatures or subscriptions required by the *Succession Law Reform Act* may be made by signing or subscribing complete, identical copies of the will in counterpart, which shall together constitute the will.
- (3) For the purposes of subsection (2), copies of a will are identical even if there are minor, non-substantive differences in format or layout between the copies.

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¹ Barry Corbin, "Will-Signing in the Age of COVID-19" (2020), 35 M.F.L. 25.

² R.S.O. 1990, c. E.9.

³ R.S.O. 1990, c. S.26 ("SLRA").

We question why it was thought of such importance that the will not have to travel from one location to another to complete the signatures by the witnesses. We can think of three responses — and perhaps our readers (or, for that matter, the Attorney General) can suggest others. First, there is the risk that the will might not reach the witnesses in a timely manner — or, indeed, ever — necessitating having to start the process all over again. Second, between the time the testator signs and the time the last witness's signature is affixed to the will, the testator might lose the mental capability of being consciously present during the second Internet link — or die, for that matter. Third, there may be a question as to the date of the will if the testator signs on one day and the last witness signs on a later day.⁴

In our view, these rationales, whether considered separately or taken together, would not warrant the making of this new regulation. But since it is a *fait accompli*, let's consider a few ramifications of having two or three separate documents signed in counterparts⁵ constituting the will:

- T signs a will that is remotely witnessed by W1 and W2 (one of whom is a licensee under the *Law Society Act*),⁶ each of whom signs a counterpart of the will. After signing, T has misgivings about the dispositive scheme in the will and rips up his or her signed counterpart. T does not tell W1 and W2 and then dies. If all of the counterparts taken together constitute the will, the physical destruction of T's counterpart alone has no effect. Or does it?
- Same facts as in the previous bullet point, but T rips up his or her signed counterpart while "on camera" and tells W1 and W2 during the same Internet link to rip up their counterparts as well. They do so. Has T revoked the will? If T did not succeed in revoking the will by destroying his or her counterpart, directing W1 and W2 to destroy their respective counterparts during the internet link would not accomplish that result. Why? The regulation does not address paragraph 15(d) of the *SLRA* which allows a will to be revoked if it is destroyed by "the testator or by some person *in his or her presence* and by his or her direction with the intention of revoking it". [our emphasis]
- After T signs the will that is remotely witnessed by W1 and W2, each of whom signs in counterparts, W1 and W2 send their counterparts to T. When T dies, the executor finds the counterparts signed by each of W1 and W2 but can't find the counterpart signed by T. There is a rebuttable presumption that a testator destroyed the will if the physical will was last known to be in the testator's possession but can't be found at the time of death. If all the counterparts taken together constitute the will, does the presumption arise? Should it?
- Same facts as in the last bullet point, but T then decides to delete a cash bequest to a beneficiary, B, with whom there has been a falling out. Such alterations can be made without any formalities if the alteration renders the words "no longer apparent." T uses a laundry pen to obliterate the words comprising the cash bequest to B on T's counterpart but leaves the corresponding words in the other counterparts untouched. Has T succeeded in taking B out of the will?⁷

Then there are practical issues — or at least one that occurs to us. How do you make a notarial copy of a will signed in counterparts? Photocopying all but the signing page and then affixing copies of the separate signing pages from each counterpart will not do. Since all of the counterparts, taken together, constitute the will, that would not be a true copy of the original will shown to the notary. And it would certainly not be true where, as is normally the case, the testator and the two witnesses have initialed all of the pages of their respective counterparts. Let's see, a 20-page will means affixing one's notarial seal 61 times. What fun!

⁴ In our view, the date of the will is the date on which the testator signed it. (As an aside, the current form of the affidavit of execution does not recite the date on which the witnesses signed, but only the date on which the testator signed.) In any event, we cannot imagine that anything could turn on the date of the will where the testator and at least one of the witnesses affix their respective signatures on different days.

⁵ It strikes us as a rather odd context in which to use the word "counterparts". Traditionally, signing documents in counterparts is an arrangement that is frequently employed in a commercial context where there are multiple parties spread across geographic distances who are entering into some type of agreement. In the context of a will, there is only one "party". (Given the advent of electronic signatures and, more important, Ontario's enactment of its *Electronic Commerce Act, 2000*, S.O. 2000, c. 17, being able to sign an agreement in counterparts is arguably no longer as important as it may once have been. Of course, wills are expressly excluded from the scope of that statute.)

⁶ R.S.O. 1990, c. L.8.

⁷ The *SLRA* also allows for alterations to a previously made will where the signature of the testator and subscription of witnesses to that signature are made in the vicinity of the alteration or in conjunction with a memorandum written somewhere in the will that refers to the alteration. Let's change the facts in this example. Suppose that after the will has been signed in counterparts and while the Internet link continues, T advises W1 and W2 that the bequest to B is to be removed and, after showing them a line being drawn through the bequest on T's counterpart, instructs them to do likewise on their respective counterparts. Will this alteration be effective? On the one hand, there is nothing in the statute that requires W1 and W2 to be physically present for T's signature to the alteration. On the other hand, the new regulation allowing for a will to be signed in counterparts refers only to the execution of a will and not to an alteration to a will after the will has been made. Would the alteration be valid if, after T makes it and affixes a signature to the alteration, the original will is sent to W1 and W2 to sign the alteration?