Trusts & Estates Proposals

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ONTARIO BAR ASSOCIATION
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L'ASSOCIATION DU BARREAU DE L'ONTARIO
Une division de l'Association du Barreau canadien

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Ontario Bar Association

Established in 1907, the OBA is the largest and most diverse volunteer lawyer association in Ontario, with close to 16,000 members, practicing in every area of law in every region of the province. Each year, through the work of our 40 practice sections, the OBA provides advice to assist legislators and other key decision-makers in the interests of both the profession and the public and we deliver over 325 in-person and online professional development programs to an audience of over 20,000 lawyers, judges, students, and professors.

This submission was prepared and reviewed by members of the OBA's Trusts & Estates Law section. Members of this section include barristers and solicitors in public and private practice in large, medium, and small firms, and in-house counsel across every region in Ontario. These members bring extensive expertise across all facets of estate and trust law. Their experience spans estate planning and administration, complex litigation involving will challenges and dependant support claims, and navigating multi-jurisdictional issues. They are well-versed in emerging areas such as digital assets and incapacity planning and regularly advise clients on fiduciary obligations under Ontario statutes including the *Succession Law Reform Act*, *Estates Act*, and *Trustee Act*.

Comments & Recommendations

Repealing of Section 5 of the *Estates Act, R.S.O. 1990, c. E.21*

In Ontario, the law currently imposes a restriction on the appointment of non-resident estate trustees in cases of intestacy under Section 5 of the *Estates Act*. This means that when an individual dies without leaving a valid will, only residents of Ontario can be appointed as estate trustees. The intention behind this restriction was historically to ensure accountability and make enforcement easier against trustees who reside within the province. However, in today's interconnected world, this requirement often creates significant challenges for families.

These residency restrictions can lead to unnecessary complexity, delays, and increased costs, particularly in situations where all of the intestate individual's closest relatives live outside Ontario. Families may be forced to appoint a local trustee who is unfamiliar with the deceased's wishes or to engage a trust company, which can be expensive and impersonal. In contrast, other Canadian provinces, such as British Columbia, do not impose residency requirements for estate representatives. Instead, they rely on safeguards like requiring non-resident trustees to post a bond, which provides financial security for beneficiaries and creditors while allowing greater flexibility in choosing an appropriate trustee.

The Ontario approach is increasingly out of step with modern realities. Global mobility means that many families are dispersed across provinces and countries, and technological advancements have made communication and oversight far easier than in the past. Maintaining a strict residency requirement may unintentionally exclude legitimate candidates, such as close family members living abroad, while doing little to enhance estate protection. This creates an unnecessary barrier for families already dealing with the emotional and administrative burden of an intestate death.

To address these issues, Section 5 of the *Estates Act* should be repealed and replaced with a requirement for non-resident trustees to post a bond. This reform would strike an appropriate balance between protecting intestate estates from potential misconduct and providing access to trustworthy executor candidates who happen to reside outside Ontario.

A bond requirement offers a practical safeguard by ensuring that trustees have a financial obligation to act responsibly, while also aligning Ontario's practices with those of other jurisdictions. This change would reduce administrative burdens, lower costs, and allow families to appoint individuals who are best suited to manage the estate, regardless of where they live.

Enacting the *Uniform Access to Digital Assets by Fiduciaries Act*

Overview

We recommend that Ontario enact the Uniform Law Conference of Canada's *Uniform Access to Digital Assets by Fiduciaries Act* ("***UADAFA***") to address the growing gap between traditional fiduciary authority and the realities of digital property. Estate trustees, attorneys for property, and guardians increasingly encounter email accounts, cloud-stored documents, social-media profiles, online banking platforms, loyalty programs, and cryptocurrency wallets. These assets are often essential to administering an estate or managing the property of an incapable person.

Ontario has no statutory framework governing fiduciary access to digital assets. Existing legislation, including the *Succession Law Reform Act*, *Substitute Decisions Act, 1992*, and *PIPEDA*, do not provide the authority fiduciaries need, and technology companies frequently refuse access based on restrictive terms of service or foreign privacy laws. This can delay or even prevent the proper administration of estates and guardianships, leaving important financial, legal, and personal matters unresolved.

UADAFA provides a clear and privacy-respecting structure that balances three goals:

1. Ensuring fiduciaries can perform their legal duties;
2. Protecting the privacy and intentions of the account holder; and
3. Giving technology custodians certainty about when disclosure is permitted.

Uniformity is especially important because most digital service providers operate across borders. A consistent national approach makes compliance more straightforward and increases the likelihood that custodians will recognize and honour fiduciary requests. Saskatchewan, Yukon, New Brunswick, and Prince Edward Island have already adopted *UADAFA* with minimal modification, demonstrating that the model is workable and adaptable.

Given the centrality of digital assets in modern life and the practical difficulties currently faced by fiduciaries, *UADAFA* offers Ontario a timely, tested, and balanced solution.

Introduction and Purpose

The Ontario Bar Association Trusts and Estates Section recommends that the Ontario Ministry of the Attorney General ("**MAG**") works to enact *UADAFA* (potentially with targeted amendments to address any specific policy considerations). Ontario's current legislative framework does not provide clear authority for fiduciaries (e.g. executors, trustees, attorneys for property) to access custodial digital assets (e.g. assets facilitated by a third party such as email and social media accounts) after death or upon incapacity, nor does it require custodians to cooperate with validly appointed Ontario fiduciaries.

The attached paper, *The Case for Fiduciary Access to Digital Assets Legislation in Ontario* (Demetre Vasilounis, STEP National Conference, June 2024), offers a comprehensive review of this issue, including legal analysis, comparative law, and case studies. While that paper is

attached for reference, this submission distills its key points into a concise policy proposal for MAG's consideration[1].

The Problem in Ontario

Digital assets are increasingly integral to modern estates. They may hold significant monetary value (e.g., Bitcoin, domain names, online businesses), critical informational value (e.g. email and social media accounts) and/or irreplaceable sentimental value (e.g., family photographs, personal writings).

Ontario has no legislation that explicitly:

- confirms fiduciaries' rights to access these assets; or
- compels custodians to grant access to fiduciaries.

In practice, fiduciaries often face lengthy, costly, and sometimes fruitless processes to obtain access. This is especially the case where custodians demand a court order from their own jurisdiction (e.g. California) before releasing information.

Why Ontario Should Enact *UADAFA*

UADAFA has been enacted in Saskatchewan, Prince Edward Island, New Brunswick, and Yukon, and endorsed by the Alberta Law Reform Institute.

UADAFA is the product of the Uniform Law Conference of Canada ("**ULCC**"), a century-old interprovincial law reform body composed of representatives from all Canadian jurisdictions. ULCC develops uniform statutes in areas where consistent provincial and territorial law is desirable. Its drafting committees typically include practicing lawyers, academics, and government counsel, and its work is closely reviewed and debated by all jurisdictions before adoption. *UADAFA*, completed in 2016, was specifically modelled to fit

[1] **See attached:** ***The Case for Fiduciary Access to Digital Assets Legislation in Ontario***

within Canada's estate, privacy, and property law frameworks, while drawing on lessons from the U.S. *Revised Uniform Fiduciary Access to Digital Assets Act* ("***RUFADAA***").

Its pedigree ensures that the legislation has been through a robust, consultative, and nationally-vetted drafting process, giving it legitimacy and making it an ideal candidate for adoption in Ontario.

Enacting *UADAFA* in Ontario would:

- **Promote Uniformity and Harmonization**: While the introduction of *UADAFA* in Ontario may not necessarily guarantee that every custodian will cooperate with fiduciaries, Ontario's alignment with other Canadian jurisdictions increases the likelihood that custodians will recognize such fiduciary requests, reducing the need for Ontarians to be involved with costly and time-consuming foreign proceedings. Given that Ontario is the most populous province in Canada, its enactment of *UADAFA* could send a strong message to custodians that their approaches to this needs to change.
- **Assist Fiduciaries With Doing Their Jobs Efficiently**: Fiduciaries must be able to promptly locate and secure assets—both traditional and digital—to prevent loss and meet legal duties. In particular, Ontario courts are weighed down with all sorts of proceedings related to estate and capacity issues. *UADAFA* may allow fiduciaries to address issues related to digital assets without having to revert to the courts for recourse or to otherwise spend unnecessary time, money and energy on this issue.
- **Serve the Public Interest**: *UADAFA* would reduce unnecessary burdens on grieving and struggling Ontario families. Having the proper procedures for dealing with digital assets codified in a statute would also promote fair, predictable outcomes for disputes in this area.

UADAFA* vs. *RUFADAA

MAG has expressed interest in enacting *UADAFA* "Subject only to a designated person(s) for that digital asset". For instance, if a person designates an individual for a particular account, that should trump the trustee of the will.

While the approach described above is present in the U.S. *RUFADAA*, the Canadian *UADAFA* takes a different approach. Under *UADAFA*'s "last-in-time" approach, **the most recent**

lawful expression of intent governs. This is the case whether it is a designation in an online tool, or a dispositive clause in a will.

While the U.S. *RUFADAA* uses a three-tiered system giving priority to online tools, *UADAFA*'s presumed-consent model is more flexible, which is critical for facilitating Ontarians' ability to indicate their last wishes with respect to digital assets. It is arguable that *UADAFA* is more favourable to individuals and fiduciaries, whereas *RUFADAA* is more favourable to custodians; the "last-in-time" system is evidence of that.

In addition, *UADAFA* was drafted by ULCC with Canadian privacy law and estate law in mind and has already gained traction domestically. Adopting it would keep Ontario in step with the Canadian legislative trend, rather than importing a U.S.-focused framework. We believe it is important to achieve consistency across jurisdictions as this will better compel custodians to cooperate with Canadian fiduciaries.

Privacy Considerations

It is important to consider that *UADAFA* provides "presumed consent" (i.e. even where the individual has not expressed their intent regarding digital assets, fiduciaries still have a right to access the digital assets). This speaks to the flexibility necessary to ensure proper estate or incapacity administration.

UADAFA balances access rights with privacy issues by:

- limiting access to duly appointed fiduciaries;
- preserving the accountholder's right to opt out; and
- imposing existing fiduciary duties to act in good faith and in beneficiaries' best interests.

Legislative clarity is especially important given the overlap between digital assets, particularly regarding what "property" is for the purposes of the *Succession Law Reform Act* and "personal information" is for the purposes of the *Personal Information Protection and*

Electronic Documents Act. Without it, custodians often refuse access on privacy grounds, leaving fiduciaries without a clear path forward.

Recommendation

In summary, Ontario should enact *UADAFA* in substantially the same form as other Canadian jurisdictions. If there is a desire to examine and modify any of the provisions in *UADAFA*, we would be happy to discuss that as we believe that ultimately enacting the legislation in some form is a priority. This would bring Ontario in line with other provinces, encourage custodian cooperation, ensure fiduciaries can fulfil their duties effectively, and most importantly remove barriers for Ontarians faced with the already challenging issues surrounding death and incapacity.

Tariff C Reform on Passing of Accounts

Tariff C of the *Ontario Rules of Civil Procedure* sets the costs for lawyers' services in an uncontested passing of accounts. The cost is based on the estate's receipts, ranging from $2,500 for estates under $300,000 to $7,500 for estates over $3,000,000.

Currently, where an estate trustee or a person with a financial interest in the estate seeks costs greater than the amount allowed in Tariff C, he or she may serve and file a request for increased costs, and a hearing shall take place.

The last increase to the Tariff C costs occurred in July 2012. Given that this was over 14 years ago, we believe it is time to update these costs. The Consumer Price Index (CPI) has increased by 35.27% from 2012 to date. Tariff C amounts should, at minimum, be adjusted accordingly. Also, consideration should be given to implementing an automatic inflation adjustment until a different cost model can be adopted.

Many practitioners report that Tariff C amounts are significantly out of step with the actual cost of performing the work required to complete an uncontested passing of accounts. Even routine files often demand more time, expertise, and administrative effort than the current

Tariff contemplates. Updating Tariff C to reflect the real cost of legal services would improve fairness and predictability for both estate trustees and beneficiaries.

Further, higher and more accurate Tariff amounts may encourage beneficiaries to accept informal accountings in cases where informal processes are appropriate. This, in turn, could reduce the number of formal passing-of-accounts applications brought before the court, easing administrative burdens and promoting more efficient use of judicial resources.

Two estates and trusts firms that do a high volume of passings of accounts work were asked to advise on the percentage of passings of accounts files included a request for costs above Tariff C. The result for 2025 was approximately 60%.

The Perpetuities Act, RSO 1990, c. P.9

Background and Purpose of the Rule

The *Perpetuities Act* codifies in Ontario the common law rule against perpetuities, a doctrine developed in 17th-century England. The rule was originally intended to prevent settlors or testators from exerting control over property long after death through contingent or successive interests. By placing a temporal limit on when property must vest (when a beneficiary must be legally entitled to the property), the rule sought to prevent indefinite restrictions on the alienation and productive use of property – a concern often described as avoiding the "dead hand" of control.

At its core, the rule was designed to promote economic efficiency, facilitate property transfer, and ensure that wealth remained accessible and useful to living generations.

Current Framework in Ontario

The rule against perpetuities continues to operate as part of the common law of Ontario, except to the extent that it is expressly altered by the *Perpetuities Act*. The *Perpetuities Act*

preserves the common law rule against perpetuities but modifies the application of the rule in some key respects.

At common law, a contingent interest is void from the outset if there is any possibility that it might not vest within the perpetuity period – typically a life in being at the time of the disposition, plus twenty-one years. The most notable feature of the *Perpetuities Act* is the introduction of a statutory "wait and see" approach, under which a gift in a trust is not automatically invalid merely because it *might* vest too late, after the expiry of the perpetuity period. Instead, the trust is allowed to operate unless the gift *actually* fails to vest within the perpetuity period.

While the statute mitigates the harshness of the traditional common law rule, the underlying common law doctrine remains in force. The result is a hybrid regime: the common law governs where the *Perpetuities Act* is silent, and the *Perpetuities Act* prevails where it expressly modifies the rule's operation.

Challenges and Rationale for Review

Despite the *Perpetuities Act*'s more tempered approach to the common law rule, there is increasing recognition that the rule against perpetuities may no longer serve a meaningful purpose in modern estate and property law. Specific challenges include:

Complexity and Uncertainty: The rule remains technical and difficult to apply, increasing drafting complexity and legal costs. Even experienced practitioners often encounter confusion around its application.

Limited Practical Utility: In contemporary practice, the 21-year deemed disposition rule under the Canadian *Income Tax Act* already operates to limit indefinite control of trusts by settlors and testators. Additionally, the availability of mechanisms to vary or terminate trusts—including under the *Variation of Trusts Act*—provides a more flexible and responsive approach to evolving family and economic circumstances, reducing the need for rigid temporal restrictions.

Inconsistent Enforcement and Redundancy: The rule's continued presence can create traps for the unwary without delivering significant policy benefits. In many cases, planning professionals simply avoid triggering it—undermining its legitimacy and purpose.

Modern Trends in Reform: The rule has been abolished or significantly reformed in various jurisdictions, including several U.S. states, Ireland, South Australia, and Canadian provinces such as Nova Scotia, Manitoba, and Saskatchewan. These reforms have not resulted in negative outcomes, suggesting that repeal or modernization is both feasible and prudent.

In light of these factors, a statutory review of the *Perpetuities Act* is appropriate to evaluate whether the rule remains necessary, or whether it should be repealed or amended to respond more effectively to current legal and economic realities.

Consultation Strategy and Objectives

Engaging with relevant stakeholders will be essential to ensure that any proposed reform is informed, balanced, and grounded in both legal theory and practical experience. The objectives of the consultation process should be to:

- Assess how the *Perpetuities Act* is currently understood and applied in practice;
- Evaluate the rule's ongoing relevance and any continuing policy justifications;
- Identify potential legal and planning consequences of reform or repeal;
- Review alternative mechanisms that address similar concerns, such as variation statutes, tax policy, or fiduciary duties; and
- Consider comparative legislative approaches from other Canadian and international jurisdictions.

Proposed stakeholders to consult include:

- Trusts and estates practitioners, particularly those with experience in complex trust and will drafting;

- Academic experts in property and trust law, with an interest in legal history and reform;
- STEP Canada, as a leading national voice in trust and estate planning;
- The Ontario Bar Association, including the Trusts & Estates and Real Property Sections;
- Tax professionals, where relevant, to assess the interplay between the rule and the *Income Tax Act*.

This consultation will help determine whether the *Perpetuities Act* continues to serve a valid legal function or whether it should be repealed or replaced with a more modern framework reflecting contemporary legal practice.

Statutory Review of the *Accumulations Act, RSO 1990, c. A.5*

Purpose

The *Accumulations Act* reflects Ontario's adoption of the common law rule against accumulations, a doctrine with origins in 18th-century English trust law. The purpose of the rule was to restrict trustees from accumulating (reinvesting) income in trusts over extended periods of time. It was developed in response to concerns that property could be tied up indefinitely, for generations, rather than distributing it, depriving beneficiaries of access to income and reducing the productive use of assets. Like the rule against perpetuities, the rule against accumulations reflects a historical policy interest in limiting long-term control over property by settlors of testators for indefinite periods of time (i.e. from beyond the grave).

Current Framework in Ontario

The *Accumulations Act* limits the periods during which income from property can be accumulated under the terms of a will or trust. These accumulation periods are narrowly defined and include:

- The life of the grantor;
- A term of 21 years from the date of making an *inter vivos* disposition (a disposition during life);
- The duration of the minority of any person living or conceived but not born at the date of making an *inter vivos* disposition;
- Twenty-one years from the death of the grantor, settlor or testator;
- The duration of the minority or respective minorities of any person or persons living or conceived but not born at the death of the grantor, settlor or testator; or
- The duration of the minority or respective minorities of any person or persons who, under the instrument directing the accumulations, would, for the time being, if of full age, be entitled to the income directed to be accumulated.

If a direction to accumulate income in a trust exceeds a permitted period, that direction is invalid to the extent of the excess. In such cases, the income is instead distributed as though no accumulation had been directed.

The *Accumulations Act* includes specific exemptions. For example, it does not apply to trusts created for charitable purposes or to pension trusts. These exclusions reflect a recognition that, in some contexts, accumulation of income may serve a public or long-term financial interest.

Challenges and Rationale for Review

The policy objectives behind the *Accumulations Act* may be less compelling today than when the rule was first introduced. Several jurisdictions, including England (in respect of personal trusts), have repealed their accumulation rules altogether, and several Canadian provinces have followed suit. This has prompted renewed discussion about whether Ontario's restrictions remain necessary or effective.

Specific concerns include:

- **Redundancy with Other Legal Tools**: Modern fiduciary duties, tax legislation (including the 21-year deemed disposition rule), and trust variation statutes already

impose natural limits on long-term accumulation in most tax and estate planning contexts.

- **Administrative and Interpretive Burden**: The rule's rigid application and narrow exceptions can create unnecessary complexity, especially when minor drafting errors may result in unintended invalidation of clauses in trusts.
- **Reform Trends Elsewhere**: The rule against accumulations has been repealed or significantly relaxed in several jurisdictions, including England, Manitoba, and Saskatchewan. These developments reflect a broader trend toward simplifying trust law and modernizing estate planning frameworks.

Given these considerations, a statutory review is warranted to determine whether the *Accumulations Act* continues to serve a meaningful policy function or whether it should be repealed or modernized to reflect current legal and economic realities.

Consultation Strategy

A targeted consultation process will ensure that any proposed reforms are grounded in practical experience and reflect the needs of Ontario's legal and planning communities.

- Understand how the *Accumulations Act* is applied or avoided in practice;
- Identify whether existing legal tools already address the concerns the *Accumulations Act* was intended to prevent;
- Evaluate whether the *Accumulations Act* causes unintended consequences in modern trust drafting and administration; and
- Review reforms undertaken in other Canadian jurisdictions and common law countries.

Proposed stakeholders to consult include:

- Trusts and estates practitioners, including drafters and litigators;
- Academic experts in trust law and estate planning;

- STEP Canada and its Ontario chapters;
- The Ontario Bar Association's Trusts & Estates Section; and
- Tax professionals familiar with the interaction between trust accumulation and tax law.

This consultation will help determine whether Ontario's *Accumulations Act* remains necessary or whether repeal or reform is warranted in light of contemporary trust practice.

Amendment of the Funeral, Burial and Cremation Services Act to Provide Greater Clarity to Funeral Homes

There are many cemetery and funeral professionals pushing for greater clarity on who may instruct them regarding the remains of a deceased individual. Currently, the *Funeral, Burial and Cremation Services Act* ("***FBCSA***") is silent on who may instruct them. In contrast, section 5 of the *Cremation, Interment, and Funeral Services Act* (BC legislation) provides a hierarchy of individuals who may provide such instructions.

A similar *FBCSA* amendment would give clarity to funeral homes on who may instruct them. The legislation would include a priority list of individuals that would mirror the BC legislation. As mentioned, the top of that list is the estate trustee named in a will—there should be some legislative commentary that protects funeral homes from relying on certain documents that appear to be a valid will as practically they will not be able to receive probate within a timeframe that is appropriate for disposing of the deceased's remains.

The OBA Estates & Trusts Section has advocated for legislation that would include a priority list of individuals that would mirror the BC legislation.

We are pleased to see that on December 9, 2025, *Bill 46, the Protect Ontario by Cutting Red Tape Act, 2025*, received Royal Assent. The OBA Estates & Trusts Section is interested in weighing-in on the proposed regulations to a) ensure that the estate trustee (executor)

named in the will is at the top of the list of priority of persons; and b) ensure that funeral homes are permitted to rely on certain documents that appear to be a valid will, as practically, they will not be able to receive probate within a timeframe that is appropriate for disposing of the deceased's remains.

Burial and Estate Administration for Youth in Care

Ontario could benefit from updating its legislation to address challenges like the death of a child who is subject to an extended Children's Aid Society ("**CAS**") care order. Assuming the child has no will, the child's next-of-kin are given the priority right to administer the child's estate and make funeral arrangements. However, it is often the case that the child's next of kin are difficult to locate, unwilling to step up, or fight between themselves. This can result in the child's body remaining unclaimed for long periods of time. It also presents a challenge to the care organizations or caregivers who may be holding onto the child's funds; unless or until someone steps into the role of estate trustee, it is unclear whether they can pay out the funds or use them to pay for burial/cremation.

As such, we would propose that the *Child, Youth and Family Services Act, 2017* be amended to permit those who are caring for a child who dies (be it the CAS, a foster family, or other type of guardian) to (i) make burial/cremation arrangements; and (ii) utilize any funds owned by the youth to pay for the burial/cremation.

***Estate Administration Tax Act* and Real Estate Co-Ops**

Estate Administration Tax ("**EAT**") is payable by an estate based on the "value of the estate" (*Estate Administration Tax Act ("**EATA**"), 1998*, s. 2(2)-2(6.1)), which in turn is defined as the value of "[…] all property that belonged to the deceased person at the time of his or her death less the actual value of any encumbrance on real property that is included in the property of the deceased person" (*EATA*, s. 1(1), emphasis added).

This definition allows traditional mortgage debt to be deducted from an estate's gross value in determining EAT, and it works with most forms of real property ownership. However, the definition does not address situations where the deceased's interest in real estate is held through a real estate co-op structure.

Real estate co-ops are an alternative form of home ownership where title to real estate – usually a multi-unit building – is held by a corporation, The corporation issues shares with usage rights for individual units, and homeowners acquire rights to their units by purchasing the relevant shares. As with any other real estate purchase, a co-op homeowner often must take out a substantial loan to finance the purchase of their shares. But because the homeowner is not on title in Land Titles, security is not given by registering a charge on title, but rather by pledging the homeowner's co-op shares.

This results in a mismatch with the *EATA*. While most homeowners can deduct their secured home-purchase or line-of-credit loans, co-op homeowners have no corresponding deduction for their loans because these loans cannot be registered as encumbrances on real property. There is no principled reason for this difference in treatment. The *EATA* should therefore be amended to reflect the type of security provided in co-op financing – namely debt secured by a pledge of co-op shares – and add the deduction of this type of debt.

Proposed amendment language

s. 1(1): "value of the estate" means the value which is required to be disclosed under section 32 of the *Estates Act* (or a predecessor thereof) of all the property that belonged to the deceased person at the time of his or her death less the actual value of:

(a) any encumbrance on real property that is included in the property of the deceased person, or

(b) any debt secured by a pledge of, or lien against, a share or shares of the capital stock of a co-operative housing corporation acquired for the sole purpose of acquiring the right to inhabit a housing unit owned by the corporation that is or are included in the property of the deceased person.)

Rules 74.08 and 74.09 of the *Rules of Civil Procedure* and Apostilles of Foreign Grants

Rules 74.05.1, 74.08, and 74.09 of the *Rules of Civil Procedure* ("*RCP*") all deal with limited appointments of estate trustees in Ontario following the appointment of an estate trustee in a foreign jurisdiction. The procedures differ depending on whether the foreign jurisdiction is another Canadian province, a Commonwealth country, or elsewhere, and for the latter, on whether or not there is a Will. However, in each case the *RCP* require that the application be accompanied by at least one copy of the foreign grant document "under the seal of the court that granted it".

The issue is that foreign jurisdictions have their own procedures, which can make it impossible to satisfy this requirement. For example, in some foreign jurisdictions a grant of probate is not issued by a court at all and may instead be issued by a registrar. In others, the court will provide only original digitally signed documents and refuse to provide a sealed hard copy.

Rules 74.05.1, 74.08, and 74.09 should be amended to reflect the need for greater procedural flexibility when dealing with foreign jurisdictions, by focusing on ensuring the authenticity of the foreign grant rather than on any particular form.

Proposed amendments

1. Canada is now a signatory to the Apostille Convention, a treaty providing 125 signatory countries with a system for mutually accepted authentication of public documents using a certificate called an "Apostille". Rules 74.05.1, 74.08, and 74.09 could all be amended to allow filing an Apostille of the foreign document (where the foreign jurisdiction is also a signatory country or is a province or state of a signatory country) as an alternative to a copy under the seal of the court that granted it. This will not be an absolute fix as not all countries are parties to the Apostille Convention, but by providing a second option that uses a known shared procedure, it will make many estate administrations where multiple jurisdictions are involved a lot easier.

2. Recognizing that the *RCP* cannot account for every jurisdictional difference, Rules

74.05.1, 74.08, and 74.09 could all be amended to provide the court with authority to direct alternative materials for filing in support of such applications, such that an application could be filed (a) with a copy of the foreign grant under the seal of the court that granted it, *or* (b) with an Apostille of the foreign grant, *or* (c) with such other material as the court directs. This would provide the necessary flexibility so the Ontario court could adapt what is required from a foreign jurisdiction based on what it is possible to get from that foreign jurisdiction (currently, the *RCP* give the court jurisdiction to direct additional material for filing, but only in addition to the required copies under seal, not *in lieu* of such copies.)

3. Finally, consideration should be given to how Rules 74.05.1 and 74.09 (and the relevant provisions of the *Estates Act* if necessary) could be amended to clarify the correct application and procedure where there is a grant of probate outside the Commonwealth <u>with</u> a Will but appointing an estate trustee who is not named in the Will (similar to administration with the Will annexed) or without appointing any estate trustee at all (some foreign jurisdictions do not require an estate trustee, typically because in such jurisdictions the beneficiaries stand in their place, so, unlike in Ontario, one often sees a foreign grant of probate without an estate trustee being appointed). These foreign grants do not fit into either existing model under Rules 74.05.1 or 74.09, and the costs to resolve these cases by an application for directions is too-often disproportionate to what are limited Ontario assets.

If section 5 of the *Estates Act* is repealed and replaced so that a non-resident estate trustee could be appointed without a Will (subject to bonding), we propose that a non-resident foreign-grant estate trustee should also be able to be appointed in an ancillary grant (subject to bonding), rather than having to appoint an Ontario-resident nominee (74.05.1).

In summary, Rules 74.05.1 and 74.09 could be combined under a single ancillary grant umbrella wherever there is a foreign grant in a non-Commonwealth country - regardless of whether it is with a Will or without a Will, or an estate trustee named in the Will or not named in the Will (i.e. it could cover foreign probate, foreign letters of administration without a Will, and foreign letters of administration with Will annexed). Combining everything into a single

ancillary grant would also accommodate more of the procedural differences among various jurisdictions.

First Home Savings Account

On April 1, 2023, the Government of Canada introduced the First Home Savings Account ("**FHSA**") (through the *Income Tax Act* ("***ITA***"). The FHSA has qualities similar to other types of plans under the *ITA*, including a Registered Retirement Savings Plan ("**RRSP**") and a Tax-Free Savings Account ("**TFSA**"). For Ontario purposes, RRSPs are considered "plans" under Part III of the *Succession Law Reform Act* ("***SLRA***"), and accordingly Ontarians can designate beneficiaries for them under their wills or in separate instruments. TFSAs are also considered "plans", but they were added to this definition pursuant to *O. Reg 54/95* to the *SLRA*, given that the definition of "plans" is geared more toward "retirement" plans.

We propose that FHSAs also be captured under the definition of plans given their similarities to RRSPs and FHSAs. We note that the definition of "plans" includes reference to "a home ownership savings plan as defined in the *ITA* (Canada) and an Ontario home ownership savings plan under the *Ontario Home Ownership Savings Plan Act*".

These plans also have similarities to FHSAs, but do not capture FHSAs. Therefore, it would be helpful from a clarity perspective and given how new FHSAs are to codify them as part of the *SLRA*, whether as an amendment to the definition of "plans" or as a separate regulation.

Rule 74.04 of the *Rules of Civil Procedure* and Forms 74A, 74B & 74B.1

In their current form, the notification requirements pursuant to Rule 74.04(2) create a misaligned situation whereby beneficiaries who receive a specific gift under a Will are only entitled to see the portion of the Will related to their gift but remain entitled to see the Form74A application in its entirety, which includes the value of the estate. Prior to January 21, 2022, beneficiaries were not entitled to a copy of Form 74A but rather only entitled to receive notice of the application.

For example, if the testator's caregiver receives a legacy of $5,000 under the testator's Will, the caregiver remains entitled to know that the value of the testator's estate is $10 million. The concerns arising from this situation are two-fold. First, the new presumptive right of legatees to see additional information about the value of the estate appears to be an unintended consequence of the changes to the forms rather than an intentional policy change. Although legatees could always obtain this information by doing a search for the probate documents filed with the court, this required effort that most legatees would not undertake. Second, information about the estate's value is irrelevant to beneficiaries receiving specific gifts under a Will. These beneficiaries should therefore not be entitled to such sensitive information as of right.

The above issues can be effectively remediated by two simple amendments. First, we recommend that Rule 74.04(2) require applicants to redact the portion of Form 74A identifying the total value of assets owned by the deceased prior to serving the application on beneficiaries receiving specific gifts. Second, we recommend that the corresponding Affidavits of Service (Forms 74B and 74B.1) each include an additional section requiring the applicant (or their lawyer) to confirm that, in the case of a beneficiary only receiving a specified gift, the Form 74A application was served in its redacted form.

These changes would not hinder a beneficiary's right to access information related to the estate. However, it would require a reasonable effort on their part to obtain same. Pursuant to the Supreme Court of Canada's decision in *Sherman Estate*, *2021 SCC 25 (CanLII), [2021] 2 SCR 75*, there is no presumption that an estate matter is private. Resultantly, beneficiaries receiving specific gifts may still access the unredacted version of the Form 74A application from the Court provided they expend the time and effort to do so. Given that the value of the estate is irrelevant to beneficiaries who receive specific gifts, we believe it is reasonable to require these individuals to expend that effort in order to access information about the value of the deceased's assets.