Dalhousie Law Journal

Volume 3 | Issue 1 Article 54

5-1-1976

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Recommended Citation
Paul Thomas, "A Uniform Law on the Form of an International Will", Comment, (1976-1977) 3:1 DLJ 295.

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Paul Thomas*

A Uniform Law on The Form of an International Will

1. The search for "the Applicable Law"

As a result of the Diplomatic Conference on Wills held at Washington D.C., October 16-26, 1973, the "Convention Providing A Uniform Law On The Form Of An International Will" was set down. "The Uniform Law On the Form Of An International Will" appears as an annex to the Convention. The preamble to the Convention enunciates the purpose of the Convention and Uniform Law as a desire "to provide to a greater extent for the respecting of last wills by establishing an additional form of will, hereinafter to be called an 'international will', which, if employed, would dispense to some extent with the search for the applicable law".

At present, the law in most provinces states that the court is to look, if necessary, to a number of law-areas to determine the formal validity of a will. The majority of provinces follow, in this respect, either verbatim or approximately, a scheme laid down in the proposed Uniform Wills Act, Part II (Conflict of Laws), adopted by the Conference of Commissioners on Uniformity of Legislation, and recommended for enactment in 1953.[1] This Act suggests that

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1. 35th Annual Meeting, Quebec City, 1st to 5th September 1953 (see Proceedings, Appendix E at 51-2). Part II of the Uniform Wills Act is adopted *verbatim* in British Columbia, Manitoba, Newfoundland and Ontario. Similar provisions regarding formalities are found in Alberta and New Brunswick. While in Saskatchewan (R.S.S. 1965, c. 127, Pt. II), the North West Territorities (R.O.N.W.T. 1956, c. 99) and the Yukon, (R.O.Y. 1958, c. 109), a distinction is drawn in questions relating to formal validity between wills made within and outside the jurisdiction; in practical effect the resultant choice of "the applicable law" open to the court is the same as that set down under the 1953 Uniform Act.

In Nova Scotia, section 14 of the Wills Act (R.S.N.S. 1967, c. 340), talks specifically of wills made outside the province as far as the disposition of 'personal property' is concerned. Under this section, resort may be had by the court to the law of Nova Scotia; or the law of the place of execution; or the *lex domicillii* of the testator at execution; or the law of the testator's domicile of origin.

In Quebec, the position is more complex. There are three recognized forms of wills in the province (C.C. Art 842). However, the formal validity of a will made outside Quebec seems to be governed by the principle *locus regit actum* (C.C. Art. 7). Article 7, however, has been held not to be imperative. In *Ross* v. *Ross* (1893), 25 S.C.R. 307, a Quebec domiciliary made a holograph will in New York. Such a

the court, in determining whether any will is formally valid, shall if necessary, refer to a number of legal systems. If the will is formally valid by any one of those systems, then it will be regarded as valid formally by the court. This is so even though the will may be formally invalid by the *lex fori*. Thus, where a question relating to the manner and formalities of making the will arises, and the property in question consistes of moveables, then (whether or not the will be made inside or outside the province), resort can be had to the following laws by the forum: The law of the place where the will was made; or the law of the place where the testator was domiciled when the will was made; or the law of the place where the testator had his domicile of origin; or the law of the place where the testator was domiciled at death. Formal validity by any one of these systems will be acceptable to the court and the will admitted to probate as far as the moveables are concerned. In the case of immoveables, it is, of course, only the *lex situs* that may be considered in determining the validity of manner and formalities in making the will.[2]

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will was unknown to New York law. However, New York law included a *renvoi* rule that such a will as was in question would be held valid in New York if it were valid by the *lex domicilii* of the testator. Holograph wills were recognized as valid by Quebec law. Such a reference back to Quebec, it was accepted, was to the internal law of Quebec. The majority of the Supreme Court of Canada, in holding the will valid, stated that the *locus regit actum* rule was permissive only. And in *Bellefleur* v. *Lavallee,* [1958] B.R. 53, a holograph will made in British Columbia by a Quebec domiciliary was held valid in Quebec though holograph wills were not recognized as valid by British Columbia law. Additionally here, there was no *renvoi* rule applicable under British Columbia law.

2. It is interesting to note that subsequent to the Hague Conference on Private International Law at which a Convention on the Conflict of Laws Relating to the Form of Testamentary Dispositions was concluded (5th October 1961), the Uniformity Commissioners again deliberated on the question of "the applicable law". The Commissioners took account of the Convention, their Uniform Act of 1953 and the Wills Act 1963, c. 44 (U.K.) in drafting a new Model Act, Part II, Conflict of Laws. The Model Act, in its current form was produced for the 1966 meeting of the Conference of Commissioners at Minaki, Ontario. The Model Act is to be found in Appendix U. at 137-40, Proceedings of the 48th Annual Meeting. The practical additions envisaged therein are that, in the case of movables, resort may also be had to the law of the testator's habitual residence at the time of making the will (s.41(1) (c.)); or the law of the place where the testator was a national at the time the will was made, if there was in that place one body of law governing the wills of nationals (s.41 (1) (d)). The Model Act of 1966 also allows the court, where moveables are involved, to look to a further law area in the case of wills made on board vessels and aircraft. These provisions read as follows:

> 41 (2) without prejudice to subsection (1), as regards the manner and formalities of making a will of an interest in moveables, the following are properly made:

The search for "the applicable law" refers here, of course, only to a question concerning the manner and formalities of making a will. Questions relating to the intrinsic validity of the various dispositions in a will are dealt with by an entirely separate set of rules. For example, the 1953 Uniform Wills Act, Part II, states that the intrinsic validity and effect of a will, so far as it relates to an interest in land, is to be governed by the internal law of the place where the land is situated;[3] the intrinsic validity and effect of an interest in moveables is governed by the *lex domicilii* of the testator at death.[4] And indeed, should later questions of succession arise, then the conflict of laws provides another set of rules to deal with these questions.

2. Application of the Uniform Law in Canada

The provisions of the Uniform Law, if adopted, will supplement present provincial rules regarding the manner and formalities of making a will. The preamble to the Convention speaks of an attempt to alleviate the search for "the applicable law". All that is meant by this statement is that if a testator makes an "international will" in conformity with the Uniform Law, then such a will can immediately be admitted to probate by the forum as far as formalities are concerned without the application of choice of law rules. All that is necessary is that the provisions of the Uniform Law have been followed and an "international will" produced. In essence, then, the forum, by adopting the Uniform Law would be recognizing an additional and distinct form of will. Further, no distinction would be made, in this respect, as to whether the will was made within or outside the forum. It should be noted at once that the Uniform Law concerns itself only with matters of formal validity. It does not purport to deal with questions of intrinsic validity and effect or indeed with any questions of succession. Thus present provincial rules regarding these latter questions will still apply to "international wills".

(a) a will made on board a vessel or aircraft of any description, if the making of the will conformed to the internal law in force in the place with which, having regard to its registration (if any) and other relevant circumstances, the vessel or aircraft may be taken to have been most closely connected.

Unfortunately, as yet, no province has adopted these provisions.

3. Section 40 (1)
4. Section 40 (2)

The distinctive nature of the "international will" can be seen in the Uniform Law, Article 1.1., as follows:

> A will shall be valid as regards form, irrespective particularly of the place where it is made, of the location of the assets and of the nationality, domicile or residence of the testator, if it is made in the form of an international will complying with the provisions set out in Articles 2 to 5 hereinafter.

Clearly this is a departure from the scheme set out by the Commissioners on Uniformity in their Uniform Act, Part II, in 1953. There, questions relating to the formal validity of a will disposing of land are always referred to the *lex situs*. Would the adoption of the Uniform Law thus impugns the status of the *lex situs*?

Perhaps there is a diminution of sovereingty on the comity level, but not on any other level. It must be remembered that in dealing with questions of intrinsic validity and effect of a will disposing of immoveables, the court will still refer to the *lex situs*. And indeed practical succession questions can only be dealt with by the *lex situs*. Clearly then an "international will" is a will to which a distinct status is to be assigned, distinct from other forms of wills which are to be governed by existing provincial legislation. However, a connection with present provincial concepts is sought by the Uniform Law in Article 1.2. Here it is stated that the fact that a will is rendered invalid as an "international will" shall not affect its validity as a will of another kind. Thus, the court, in dealing with an international will, should certainly seek to validate an attempted "international will" by the employment of its existing rules wherever possible.

The distinctive nature of the "international will" is again illustrated by the fact that distinct procedures will have to be developed for execution. For example, the Uniform Law envisages that execution shall be by the testator with witnesses and a person "authorized to act in connection with international wills". Article 11.1 indicates that the persons to be the "authorized persons" shall be designated by the contracting party, i.e. the signatory to the Convention. In the case of Canada as a contracting party, it would seem that who are to be "authorized persons" is a question for each province. Are we to presume that such persons will be legal practitioners in each province? (Quebec could assign the notaire to this position.) By Article III of the Convention, the capacity of the

"authorized person" shall be recognized in the territory of the other contracting parties.

3. Requirements of an International Will

The will must be in writing, but not neccessarily written by the testator himself.[5] It can be in any language, in handwritten or other form.[6] Detailed procedures are set down regarding execution of the will. The testator must declare in the presence of two witnesses and "a person authorized to act in connection with international wills", that this is his will and that he knows the contents.[7] The testator must sign the will, or if he has already done so, acknowledge his signature.[8] If the testator cannot sign, he must indicate the reason to the "authorized person" who must make a note of this on the will.[9] Additionally, it is stated that the testator may be authorized by the law under which the authorized person was designated to direct another person to sign on his behalf.[10] This provision is intended merely to allow rather than preclude a person to sign on behalf of the testator should the requisite law allow. Lastly, witnesses and the authorized person shall "there and then" attest the will by signing in the testator's presence.[11] Though not absolutely clear, it would appear that all persons signing must sign in the presence of all others.[12] It is also to be noted that the Uniform Law does not apply "to the form of testamentary dispositions made by two or more persons in one instrument".[13]

In his report on the Uniform Law, Mr Allan Leal, Chief of the Canadian Delegation, states that the other two articles dealing with the form of an international will (Articles 6 and 7) are not mandatory. He states:

> The compliance with these articles in not a condition precedent to the formal validity of an international will. They refer for the most part, to matters which are frequently followed in the engrossing and execution of wills in English form but are not required by law. The one exception is that contained in article 6.1

5. Articles 3.1 and 3.2
6. Article 3.3
7. Article 4.1
8. Article 5.1
9. Article 5.2
10. Article 5.2
11. Article 5.3
12. See Convention Articles V and VI
13. Article 2

referrable to the place of signature which is a condition precedent to validity in the common law provinces of Canada.[14]

This is also made clear in Article I, where it is expressly stated that there will be a valid "international will" if Articles 1 to 5 are complied with. Unfortunately, however, Articles 6 and 7 are couched in imperative form. The signatures shall be placed at the end of the will.[15] If there are several written sheets in the will, each sheet shall be signed by the testator, or if he cannot sign, then by the person signing on his behalf or if there is no such person, by the authorized person. In addition each sheet shall be numbered.[16] The date of the will shall be the date of its signature by the authorized person.[17] This date shall be noted at the end of the will by the authorized person.[18]

Apart from the foregoing formalities there is a requirement in Articles 9 and 10 that the "authorized person" attach to the will a detailed certificate establishing that the obligations of the Uniform Law have been complied with. Article 10 shows the form to which the Certificate must substantially conform, as follows:

CERTIFICATE

(Convention of October 26, 1973)

1. I, ...(name, address and capacity), a person authorized to act in connection with international wills
2. Certify that on .....(date at .....(place)
3. (testator.....(name, address, date and place of birth) in my presence and that of the witnesses
4. (a) .....(name, address, date and place of birth)
   (b) .....(name, address, date and place of birth)

has declared that the attached document is his will and that he knows the contents thereof.

5. I furthermore certify that:
6. (a) in my presence and in that of the witnesses

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14. Report of the Ministry of Justice, Government of Canada, November 13th, 1973 at 13.
15. Article 6.1
16. Article 6.2
17. Article 7.1
18. Article 7.2

(1) the testator has signed the will or has acknowledged his signature previously affixed.

*(2) following a declaration of the testator stating that he was unable to sign his will for the following reason.....
— I have mentioned this declaration on the will
*— the signature has been affixed by ....(name, address)

7. (b) the witnesses and I have signed the will;
8. *(c) each page of the will has been signed by ..... and numbered;
9. (d) I have satisfied myself as to the identity of the testator and of the witnesses as designated above;
10. (e) the witnesses met the conditions requisite to act as such according to the law under which I am acting;
11. *(f) the testator has requested me to include the following statement concerning the safekeeping of his will:

.....

.....

12. PLACE
13. DATE
14. SIGNATURE and, if necessary, SEAL

*To be completed if appropriate.

The authorized person will keep one copy of the certificate and another is to be given to the testator.[19] If there is no evidence to the contrary, this certificate is conclusive of formal validity.[20] However, it is specifically laid down in Article 13 that the absence of or irregularity in the certificate does not affect the formal validity of the will under the Uniform Law. Revocation of an "international will" is dealt with in Article 14, which is somewhat obscure. It merely states that the international will shall be subject to the "ordinary rules of revocation of wills". Can this mean that the domestic rules of the forum will be applied to decide if there was revocation? But, if there is any foreign element involved in the case, surely, the forum will employ its conflict of laws rules to determine whether revocation has taken place.

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19. Article 11
20. Article 12. Note, that by Article VI.2, the competent authorities of any Contracting Party may, if necessary, satisfy themselves as to the authenticity of the signature of the authorized person.

The final Article (Article 15) exhorts courts, in interpreting the Uniform Law, to be mindful of the need for uniformity and the international origin of the legislation.

4. Coming into Force, Ratification, Denunciation, etc. of the Convention and Uniform Law

The Convention will come into force six months after the deposit of the fifth instrument of ratification or accession with the Depository Government.[21] The Depository Government for the purposes of the Convention is the United States,[22] and the Convention is open for signature at Washington D.C. from October 26th, 1973 until December 31st, 1974.[23] However, the Convention is open indefinitely for accession,[24] and instruments of accession are to be deposited with the Depository Government.[25] Article XII provides for denunciation of the Convention by written notification to the Depository Government and such denunciation will be effective twelve months from the date of receipt of such notification.[26] The duties of the Depository Government in giving notice to state signatories and to the International Institute for Unification of Private Law of, *inter alia,* ratification, accession and the date of the Convention entering into force are set down in Article XVI.2. Additionally, the Convention calls for the deposit of the originals of the present Convention in the English, French, Russian and Spanish languages; all being equally authentic; with the Government of the United States. That government will send certified copies of each to signatory and acceding States and to the International Institute for the Unification of Private Law.

Under Article I, a signatory to the Convention undertakes to introduce into its law, the rules regarding an international will set out in the annex to the Convention. This must be done not later than six months after the date of entry into force of the Convention as far as that party is concerned.[27] Special provisions are made for

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21. Article XI
22. Article IX.1
23. Article IX.1
24. Article X.1
25. Article X.2
26. Article XII.2
27. Article I.1. The Convention itself comes into force by Article XI.1, six months after the date of deposit of the fifth instrument of ratification or accession with the Depository Government. And by Article XI.2, in the case of each state which

adoption of the Convention and Uniform Law in the case of a federal union. Article XIV.1 stipulates that if a state has two or more territorial units in which different systems of law apply in relation to matters respecting the form of wills, that State may at the time of signature, ratification, or accession, declare that the Convention shall extend to all its territorial units, or only to one or more of them, and may modify its declaration by submitting another declaration at any time. Article XIV.2 makes it clear that any such declaration shall be notified to the Depository Government and shall state expressly the territorial units to which the Convention applies. Lastly, in the case of a federal Union where different systems of law apply in relation to matters respecting the form of wills, Article XV states that any reference to the internal law of the place where the will is made or to the law under which the authorized person has been appointed to act in connection with international wills, shall be construed in accordance with the constitutional system of the Party concerned.[28] The effect of these provisions in the Canadian context is that a Provincial Government may request the Government of Canada to ratify or accede to the Convention, as the case may be.

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ratifies the Convention, or accedes to it after the fifth instrument of ratification or accession has been deposited, the Convention will enter into force six months after the deposit of its own instrument of ratification or accession.

28. Mr. Allan Leal, in his Report to the Government of Canada, states that Article XIV is substantially in accord with Canadian proposals. Article XV, however, represents a compromise which permits the Australian federal authority to legislate in the matter of the form of an international will. It was argued by the Canadian delegation that, at least in the Canadian context, precision was called for in the drafting of the federal state clause. The Canadian Proposal reads as follows:

Article . . . The Federal State Clause

Experience gained at The Hague Conference, more particularly in 1972, with the type of Convention under discussion at this Diplomatic Conference has demonstrated that there is not merely one type of federal-state clause required but, in proper circumstances, at least three. A good illustration of this fact is found in the provisions of the Convention Concerning the International Administration of the Estates of Deceased Persons (The Hague Conference, 1972).

The first type of federal-state clause covers the situation where two or more systems of law pertain within the geographical boundaries of a single jurisdiction — the different systems arising from religious laws forming part of the civil law of the otherwise unitary state. The State of Israel affords us a good example of this. Consequently, Article 34 of the Convention provides as follows:

> In relation to a Contracting State having, in matters of estate administration, two or more legal systems applicable to different categories of persons, any reference to the law of that State shall be construed as referring to the legal system specified by the law of that State, as applicable to the particular category of persons.

The second type of federal-state clause is required to accommodate the situation where different systems of law apply as a result of the distribution of legislative powers amongst several territorial units. This is the situation in the United States and Canada. Article 35 of the Convention accommodates this politico-legal situation and provides;

> If a Contracting State has two or more territorial units in which different systems of law apply in relation to matters of estate administration, it may declare that this Convention shall extend to all its territorial units or only to one or more of them, and may modify its declaration by submitting another declaration at any time.
>
> These declarations shall state expressly the territorial units to which the Convention applies.
>
> Other Contracting States may decline to recognize a certificate if, at the date on which recognition is sought, the Convention is not applicable to the territorial unit in which the certificate was issued.

The third type of federal-state clause is ancillary to that contained in Article 35 *supra*. This special clause is directed towards the terminology used in the particular Convention rendering its applicability more precise with respect to the constituent units of federal states. Article 36 of the Convention Concerning International Administration reads, in part, as follows:

> In the application of this Convention to a Contracting State having two or more territorial units in which different systems of law apply, in relation to estate administration —
>
> 1. Any reference to the authority or law or procedure of the State which issues the certificate shall be construed as referring to the authority or law or procedure of the territorial unit in which the deceased had his habitual residence.
> 2. Etc.

Since the Subject matter of the proposed Uniform Law on The Form of The International Will, with us in Canada, at least, falls within the legislative competence of the provincial legislatures it is necessary to be very precise in the federal-state clause to be inserted in this Convention. The proposed federal-state clause appearing in Conf. Do. 1 at 21 is deficient in a number of respects by these standards and, accordingly, should be replaced by the following clauses:

> Article . . .
>
> If a Contracting State has two or more territorial units in which different systems of law apply in relation to matters respecting the form of wills, it may at the time of signature, ratification, approval or accession, declare that this Convention shall extend to all its territorial units or only to one or more of them, and may modify its declaration by submitting another declaration at any time.
>
> These declarations shall be notified to . . . and shall state expressly the territorial units to which the Convention applies.
>
> Article . . .
>
> In the application of this Convention to a Contracting State having two or more territorial units in which different systems of law apply in relation to matters respecting the form of wills . . .
>
> 1. any reference to the internal law of the place where the will is received to be construed as referring to the internal law of the particular territorial unit where the will is received: and

The Government of Canada will ratify the Convention or accede, stipulating that it is effective only in the named province.[29] Presumably, any province stipulated in the Government of Canada's notation with the Depository Government will enact provincial legislation reflecting the terms of the Convetion and Uniform Law.

5. Safekeeping of International Wills and the Draft Resolution of the Drafting Committee of the Diplomatic Conference

Article 8 of the Uniform Law states that in the absence of any mandatory rule pertaining to the safekeeping of the will, the authorized person shall ask the testator whether the latter wishes to make a declaration concerning the safekeeping of the will. If so, and at the express request of the testator, the intended place of safekeeping shall be mentioned in the certificate that the authorized person draws up.

Apart from the provisions of Article 8, the Drafting Committee at the Diplomatic Conference saw fit to set down a Draft Resolution on the matter. The safekeeping of the will, it was felt, was an important question and there might be a particular problem in the case of an international will which might often be made by the testator when far from his home.

The Draft Resolution recommends the establishment of a system to facilitate "the safekeeping, search and discovery of international wills" using as a guide The Convention on the Establishment of a Scheme of Registration of Wills, set down at Basle on May 16, 1972.[30]

It is to be noted that an active system of registration of wills is operative in Canada in the Province of Quebec. Under the Notarial

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2. any reference to the authorized person to act in connection with the international will or to receive the will shall be construed as referring to the authorized person designated by the internal law of the particular territorial unit where the will is received.

29. The Conference of Commissioners on Uniformity of Legislation at its Annual Meeting in 1974 adopted an amendment to The Uniform Wills Act to facilitate the recognition of the Convention and Uniform Law. Also, as a result of the recommendation of the Manitoba Law Reform Commission, the Manitoba Legislature gave assent, on July 19th 1975, to an Act to amend The Wills Act of Manitoba so as to adopt the Uniform Law when the Convention comes into force. Further, the Ontario Law Reform Commission has recommended, on July 3rd 1974, that a) the Government of Ontario request ratification on behalf of Ontario by the Government of Canada of the Convention and b) that Ontario enact legislation to give effect to the Uniform Law.

30. See Miscellaneous No. 30 (1972; Cmnd. 5073).

Act of that Province, the Board of Notaries maintains a central register of wills.[31] In such a register, the following information is entered:

— the name of the testator in full;
— capacity and residence of testator;
— date of such will; and
— the name of the notary involved with the will.

The Draft Resolution also recommends that state signatories exchange information on such matters, and that each designate an authority or a service to handle such exchanges.

6. Significance of "The International Will"

State signatories to the Convention will recognize the form of will set down in The Uniform Law. The form of an "international will" is unique, and by signing the Convention, a signatory will accept that form as valid, despite its own domestic form. The Convention and Uniform Law apply only to questions of form, and thus the rules of the forum will apply to questions of essential validity and interpretation. Additionally, it would seem that an "international will" could not be made anywhere in the world. The need for utilization of specific procedures in execution such as the attachment of a "certificate" to the will, and the required duties of an "authorized person", suggests that an international will can be made only in a jurisdiction signatory to the Convention.

Though there is some obscurity in the Convention and Uniform Law, this would not seem to derogate from the overall design of the scheme. It is to be hoped that the Convention will be widely adopted, for it is clear that the benefit to be derived from the notion of the "international will" is dependent entirely on the number of jurisdictions ratifying or acceding to the Convention. If there is wide acceptance of the Convention then the scheme should provide a boon to Canadians living, travelling or having property abroad, and indeed to immigrants and emigrants. The required formalities for "international wills" are not too far removed from the requirements of "formal" domestic wills, and it could transpire that sometime in the future most Canadians would execute their wills in international form thus gaining immediate international formal validity.

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31. See S.Q. 1968, c. 70, ss. 138-141. Note, some provinces provide by statute for safe keeping of wills by deposit. These provisions seem infrequently used.