Uniform Wills Act

Non-Compliance With Formalities Parts I and II

Alberta
Victoria, British Columbia

August 13-17, 2000

Explanatory Note

The materials submitted by the Alberta Commissioners consist of Report No. 84 of the Alberta Law Reform Institute - Wills: Non-compliance With Formalities. That Report contains three Parts.

Parts I and II are the Executive Summary of the Report and the List of Conclusions and Recommendations. As Parts I and II raise the issues in the most convenient fashion to facilitate consideration by the Section they constitute the Report of the Alberta Commissioners and will be available in both French and English language versions.

Part III consists of the body of the ALRI Report and is being distributed as background material.

Arthur L. Close, Q.C., Chair, Civil Law Section

UNIFORM WILLS ACT NON-COMPLIANCE WITH FORMALITIES Part I Executive Summary

In this report we recommend that Alberta courts be given power to admit to probate a will or an alteration, revocation or revival of a will which does not comply with the formalities prescribed by the *Wills Act*. This power is generally referred to as a "dispensing power". The power could be exercised only if a court is satisfied by clear and convincing evidence that the testator intended to adopt the document as a will, alteration, revocation or revival. In extreme cases, a court could even admit to probate a document which, for inadvertence or other good reason, a testator fails to sign. The only formal requirement that could not be dispensed with in a proper case would be writing. Electronic records could not be admitted to probate.

The *Wills Act* says that a will is not valid unless certain prescribed formalities are strictly complied with. A formal will is not valid unless the testator signs or acknowledges his or her signature in the presence of two witnesses who are present at the same time and who sign in the presence of the testator. A holograph will is not valid unless it is wholly in the handwriting of the testator, so that an unwitnessed will form the blanks of which are filled in by a testator is not valid unless the handwritten parts happen by chance to be enough to state testamentary intentions by themselves without reference to the printed words.

Testators sometimes fail to comply with these prescribed formalities because of ignorance or inadvertence. The number of such cases is small in comparison with the number of wills that comply with the formalities, but it is substantial in absolute terms. In the course of the shuffling of paper attendant on the execution of a will or a pair of wills, a witness, or even a testator, may fail to sign, or a husband and wife may inadvertently sign each other's wills. A testator who has already signed may fail to utter words of acknowledgment in the presence of both witnesses. A testator may be unable to raise his or her head to see the witnesses sign, so that the witnesses do not sign in the testator's "presence". The strict-compliance rule invalidates wills in such cases. The substance of the matter is that a testator has adopted a document as his or her will. That substance may be defeated because of a failure of form, that is, a failure to comply strictly with the statutory formalities.

The invalidation of wills because of failures to comply strictly with formalities has been seen in many places as unjust. Manitoba, Saskatchewan, Quebec, New Brunswick, and Prince Edward Island have given dispensing powers to their courts. So have five of the six Australian states (the sixth having adopted a more restricted remedy). In the United States, the *Restatement of the Law Third* and the *Uniform Probate Code* contain provisions to much the same effect as dispensing powers, though differently worded, and several of the American states have adopted the *Uniform Probate Code* provision. Some of the Canadian and Australian dispensing powers have been in force for 20 or 25 years, apparently with beneficial results.

Strict compliance with the formalities helps to show that a will is an authentic expression of a testator's testamentary wishes. It is not, however, the only way in which authenticity can be shown. Attempted compliance may be just as good evidence as strict compliance. Other expressions of a testator's intention to adopt a document as a will may be equally valid. A requirement of "clear and convincing evidence" will give at least as much assurance that a testator intended to adopt a document as a will as does apparent strict compliance with the formalities.

This report recommends the enactment of a dispensing power provision because the existence of such a power will enable courts to give effect to testators' wishes in cases in which they must now refuse to do so. The requirement of clear and convincing evidence will prevent the admission to probate of dubious documents.

A dispensing power will not cure all cases. A testator may have intended to adopt a document as a will, but there may be no clear and convincing evidence that he or she did so. However, the requirement of clear and convincing evidence for the exercise of the dispensing power is necessary to ensure that only authentic wills are admitted to probate.

Testators will still have good reason to comply strictly with the formalities. A failure to comply strictly will expose a testator's estate to substantial additional legal costs. A failure to comply strictly will also increase the risk that a will will be rejected.

This report deals with one additional subject. Under the *Wills Act*, a will is invalidated by the subsequent marriage of the testator unless there is a declaration in the will that it is made in contemplation of that marriage. The requirement that the declaration be in the will is another formal requirement which is likely to defeat the wishes of a testator who intends a will to have effect despite the marriage or even makes the will because of the expectation of marriage. The report recommends that the *Wills Act* be amended to provide that a will is not revoked by marriage if there is clear and convincing evidence that the testator made it in contemplation of the marriage.

Part II List of Conclusions and Recommendations

List of Conclusions

CONCLUSION No. 1

The policy of the law is to allow persons to give directions by will as to how their property is to be disposed of on death.

CONCLUSION No. 2

The primary purposes of the will formalities prescribed by the *Wills Act* are

(a) to ensure that documents that are authentic and intended to express the testamentary intention of testators are admitted to probate, and

(b) to ensure that documents that are not authentic or are not intended to express the testamentary intentions of testators are not admitted to probate.

CONCLUSION No. 3

Our conclusions are:

(1) that there are cases in which wills that are authentic and reflect the testamentary intentions of testators are excluded from probate because they do not strictly comply with formalities; and

(2) that the number of such documents so excluded is great enough to suggest that remedial action should be taken,

but only if appropriate remedial action can be devised and if the remedial action will not give rise to unacceptable new problems.

CONCLUSION No. 4

We conclude that, if

(a) a document which does not strictly comply with formalities is rebuttably presumed to be invalid (which presumption will be provided by s. 5 of

the *Wills Act* if it is left unamended), and

(b) the presumption can be rebutted only by clear and convincing evidence

that the document is authentic and that the deceased person intended to

adopt it as his or her will,

the risk that documents that are not authentic or have not been adopted by deceased persons as wills will be admitted to probate will be no greater than

if the formalities had been strictly complied with.

CONCLUSION No. 5

The adoption of a dispensing power is not likely to lead to significantly greater

use of wills kits or to a significantly greater incidence of sloppy practice in the preparation and execution of wills.

CONCLUSION No. 6

The adoption of a dispensing power will not impose undue burdens on personal representatives.

CONCLUSION No. 7

The adoption of a dispensing power will not lead to significantly increased litigation.

List of Recommendations

RECOMMENDATION No. 1

We recommend that the *Wills Act* be amended to give the court power to admit

to probate a document that does not comply with the formalities prescribed by

the Act but which a deceased person intended to adopt as his or her will.

RECOMMENDATION No. 2

In order to ensure that the proposed power does not result in the admission to probate of documents which deceased persons did not intended to adopt as their wills, we recommend:

(a) that there be a presumption that a document that does not strictly comply

with the formalities prescribed by the *Wills Act* is invalid (which

presumption will be provided by s. 5 of the *Wills Act* if that section is not amended), and

(b) that the presumption of invalidity can be rebutted only if the court is

satisfied by clear and convincing evidence that the testator intended to

adopt the document as a will, in which event the court may order the

will to be valid as a will of the deceased person

RECOMMENDATION No. 3

We recommend that the dispensing power extend to admitting a document to probate despite the lack of a signature.

RECOMMENDATION No. 4

We recommend that it should not be possible to dispense with the requirement

of writing.

RECOMMENDATION No. 5

The dispensing power should not extend to allowing electronic records to be admitted to probate.

RECOMMENDATION No. 6

We recommend that the dispensing power extend to the making of alterations

to wills, to documentary revocations of wills, and to documentary revivals of

wills.

RECOMMENDATION No. 7

We recommend that, if the Court is satisfied by clear and convincing evidence

that a will was made in contemplation of a marriage, the will is not revoked by

the marriage.

RECOMMENDATION No. 8

We recommend that the amendments to the *Wills Act* implementing the recommendations previously made in this report apply to the wills of all persons who die after the amendments come into force.