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UNIFORM LAW CONFERENCE OF CANADA

ELECTRONIC WILLS

PROGRESS REPORT

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[1] This is a progress report of the working group of the Uniform Law Conference of Canada (ULCC) working Group on Electronic-wills (E-wills) with some discussion of developments in the United States on this topic and a proposal for moving ahead on this project for Canada.

Background

[2] In Canada the first major meeting of the ULCC E-wills working group canvassed a large number of issues on the Wills and Estates radar. Several jurisdictions are looking at the probate process to determine whether it can be simplified, streamlined and whether that process should take place by way of online or electronic application processes.

[3] Other concerns related to the growth of self-help applications which provide a professional product but do not involve direct professional advice, and depend largely on the quality of information provided by the individual. Some other concerns related to the proliferation of digital assets and the different ways by which they may be disposed, some by will, others by declaration and still others by assignment.

[4] In this complex matrix of issues and jurisprudence there may be legitimate concerns that the advent of electronic wills would merely confuse matters even further. Many of the cases involving application by the court of a dispensing power have involved electronic communications or devices. However, it is vital to note that all of those cases arise because of the failure to meet the formalities for a will, therefore engage the dispensing power, and therefore engage the relaxed definition of writing for purposes of that determination only.

[5] The Conference has looked at the question of the electronic medium on a number of occasions. The Electronic Transactions Act determined that the electronic medium was sufficiently established, reliable and usable to be accepted for all business purposes. There were two elements to recognition of the electronic medium—that the data be permanently stored, and that the record be capable of being retrieved for subsequent use. At the time this legislation was adopted, it was conventional to except a number of documents which specifically required hardcopy writing, and an original. So, the documents such as wills, Powers of attorney and conveyances were the exception. Now, of course, much of the Registry system for land, motor vehicles and personal property is exclusively performed online. Many law offices will routinely digitize documents which are required to be in existing hardcopy form.

[6] Two major developments occurred over the last year are important for our decision-making process. The Uniform law commission in the United States has just approved a Uniform Electronic Wills Act. The Law Commission in the United Kingdom has temporarily parked its project so as to be able to concentrate on other projects. Other reform agencies have either approved projects or are considering them.

Electronic Medium

[7] The recent annual meeting of the Uniform Law Commission (ULC) in Alaska had an act and commentary presented to the Commissioners. Several edits and clarifications will be made as a result of the discussion and before the material becomes final. The

drafting committee worked assiduously to ensure that the explanatory materials were clear and comprehensive. A careful read will answer many questions.

<https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=42f30631-50cf-78d1-ed7f-0ae0165cfb70&forceDialog=0>

[8] For the ULCC the primary issue is whether to approve an electronic medium as an appropriate medium for wills, powers of attorney and health-care directions. The context in which this decision is to be made is important. We now have almost 15 years of experience of electronic commerce. We also now operate in an environment where much of our daily lives and arrangements are performed electronically—most of our banking, all of our healthcare records, most of our insurance and even our professional certification is all carried out electronically. In that context, what argument could be advanced that wills are so different and so exclusive that they could not be accommodated under our approach to electronic commerce. Other than “tradition” it is hard to identify any cogent argument to support the continued exception. An electronic record, once stored, is reliable, can be retrieved for future use and it’s “Custody and control” is probably more clearly tracked in electronic form than in hard copy.

[9] The recommendation therefore is that the exception from the electronic commerce legislation should be removed and that wills be capable of being prepared in electronic format. Using the definition that already exists is a logical extension in the case of wills.

Electronic Signatures

[10] Similarly, electronic signatures now operate in a context where they are fully recognized as indicating the consent of the signatory to certain action. An individual can transfer funds, designate a beneficiary, consent to treatment and transfer property by way of electronic signature. Why should that capability not be extended to wills?

[11] It is important to note that at this point, this recommendation merely endorse the recognition of the electronic medium. There are no other changes in the required formalities for the execution of a will. The document must still be signed by the testator in the presence of two witnesses who also sign.

Electronic Presence

[12] In the ULC uniform legislation there are also provisions relating to remote witnessing. To some extent this is driven by the existing legislation which allows for remote notarization. Since some wills may be notarized, remotely, the question was whether remote witnessing should also be authorized. To accommodate this capability, the legislation introduces the concept of “electronic presence” where the testator and witnesses are capable of communicating as if they were together in the same room. Some restrictions are introduced to ensure that International witness centers do not develop along the lines of remote call centers.

[13] The concept of remote witnessing is not essential to the recognition of the electronic medium, but it is a natural and logical extension of the technology. Feedback from the bar in the US indicates that it would be a useful tool in the estate planning process. The US uniform legislation makes an interesting connection between remote witnessing and self-proving wills by linking the affidavit of execution from one of the

witnesses to the circumstances of remote witnessing. While Canada does not have the specific concept of self-proving wills it does have an affidavit of execution by the witness which could be adapted to meet the circumstances of remote witnessing (and it is common for this affidavit to be signed at the same time as the will is executed).

[14] The recommendation is that electronic presence be defined in a way which will facilitate remote witnessing and the affidavit of execution be adapted if necessary.

Revocation by physical act

[15] There is a further ancillary issue with respect to revocation. Existing law requires one hardcopy to be designated as “the original.” Any physical act with respect to “the original” maybe seen as an act of revocation—provided it is accompanied by the requisite intent. In E-wills, there is no designated for original come so what becomes of revocation by physical act? In the ULC uniform legislation, the conclusion is that a physical act to any copy of the will, if accompanied by clear revocatory intent, will constitute revocation. That conclusion was reached after significant discussion over several meetings. It appears to be an appropriate and rational conclusion.

[16] Finally, it is again important to note that these changes do not remove any of the formalities nor affect the dispensing power. A formal will must still be signed and witnessed by two witnesses in the presence of the testator and of each other. Any document which does not meet the formalities can still be validated under the dispensing power, but that requires a court application in which clear and convincing evidence is adduced to show that the record in question is intended to be the last will and testament of the deceased.

Next Steps

[17] There are two basic issues: should it be possible for a Will to be prepared in electronic form; should it be possible for a witness to attest a will remotely? If the answer to these two questions is yes, the working group should be authorized to amend the Electronic Transactions Act, amend the wording of the dispensing power in uniform Wills Act and make the necessary consequential adjustments to the wording of the Uniform Wills Act.