

APPENDIX O / ANNEXE O

[see page 70] / [voir la page 92]

UNIFORM WILLS ACT (AMENDMENT)

LOI UNIFORME LOI SUR LES TESTAMENTS (MODIFICATION)

Peter Lown, Q.C., Alberta

UNIFORM WILLS ACT (AMENDMENT)

RECOGNITION OF WILLS IN ELECTRONIC FORMAT

Background

[1] At the 2000 meeting, the Conference dealt with the general question of substantial compliance with formalities for wills (Section 19.1 *Uniform Wills Act*).

[2] At the 2001 meeting the Conference considered the proposal to accommodate electronic wills within the concept of substantial compliance.

[3] Finally, in 2002 the Conference was presented with three options to allow the consideration of e-wills within the area of substantial compliance. Option 1 would have allowed the courts to dispense with the requirement of writing completely – this option was rejected. Option 2 proposed to redefine writing only for the purpose of section 19.1, and gave the Conference a choice between the provisions of the *Electronic Evidence Act* and the *Electronic Commerce Act*.

Subsequent Activity

[4] I was charged with the responsibility of drafting the amendment. However, in doing so, I came to the conclusion that the proposed amendment might have the effect of allowing oral wills (recorded in digital form). This phenomenon was rejected by the Conference, and the reasoning was partly why e-wills were to be admitted, if at all, only by way of the dispensing power.

[5] In order to resolve this issue a different method of drafting was reviewed, one which is somewhat different from the original choices reviewed by the Conference in 2002. I therefore informed the Chairman of the section that I was not comfortable putting forward the new draft without the opportunity for the Conference to discuss the minor point of policy change.

Proposed Draft

[6] I have reviewed these issues with Mr. Earl Evaniew of the Legislative Counsel Office at Alberta Justice, and with Mr. W. H. Hurlburt, Q.C. (who prepared the original memo on e-wills for the Conference).

[7] We have added a new subsection to section 19.1 which reads as follows:

- 19.1(4) In this section, “electronic form” means, in respect of a document, data that
- (a) is recorded or stored on any medium in or by a computer system,
 - (b) can be read by a person, and
 - (c) is capable of reproduction in a visible form.

[8] This provision emphasizes:

- the medium of storage
- a document capable of being read by a person
- a document capable of being reproduced in visible form

[9] This definition is narrower than either of the definitions in the *Electronic Evidence Act* or the *Electronic Commerce Act*, and is more closely aligned with the documentary nature of wills. We think that the draft precludes examples such as videotaped or tape recorded wills.

[10] As a result, an e-will must meet the definition of “electronic document” and must still meet the threshold tests of subsection 2.

[11] We regard this draft as preferable to the previous options and recommend that the Conference approve it as an amendment to section 19.1 of the *Uniform Wills Act*.

[12] The draft of the full section as amended, and the definitions taken from the *Uniform Electronic Evidence Act* and the *Uniform Electronic Commerce Act* are attached.

PROPOSED AMENDMENT TO THE UNIFORM WILLS ACT

Section 19.1 is repealed and the following is substituted:

Court may dispense with formal requirements

19.1 (1) Despite the other provisions of this Act, but subject to this section, if a document was not made in accordance with any or all of the formalities referred to in subsection (3), or is in an electronic form, or both, a court may nevertheless order that the document is valid as

- (a) a will of a deceased person, or**
- (b) the revocation, alteration or revival of a will of a deceased person.**

(2) In order to exercise the authority under subsection (1), the court must be satisfied on clear and convincing evidence that the deceased person intended the document to constitute a will of the deceased person or the revocation, alteration or revival of a will of the deceased person.

(3) For the purposes of subsection (1), the formalities are those established by sections 4, 5, 6, 15(c), 18 and 19.

(4) In this section, “electronic form” means, in respect of a document, data that

- (a) is recorded or stored on any medium in or by a computer system,**
- (b) can be read by a person, and**
- (c) is capable of reproduction in a visible form.**

(5) This section applies [when: statement of intended application]

Comment on Paragraph (4):

Paragraph (3) defines the formalities which may be dispensed with – the requirement of writing in section 3 cannot be dispensed with. Paragraph (4) further defines, for the purpose of this section, a document in electronic form, i.e., a medium which produces a document that is visible and can be read by a person. This definition is narrower than other definitions of “electronic data” and is intended to preclude audio and video recorded wills or media that are machine readable only.

An e-will (a document in electronic form) must meet the definition of paragraph (4) and meet the threshold tests of paragraph (2).