

RENEWAL OF THE *UNIFORM WILLS ACT* – Report and Discussion

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The discussion took place over two sessions and centred on the issues outlined in the “Workbook for the Renewal of the *Uniform Wills Act*” provided to delegates before the meeting of the ULCC. The goal was to obtain drafting instructions for amendments to the *Uniform Wills Act*, to be presented at the 2012 meeting of the Conference, on the following issues. As a general comment, it was noted that one goal of this project should be to encourage the making of wills and enhance their effectiveness without the need to resort to court.

1. *Testamentary Capacity of Minors*: Differing opinions were expressed, with some favouring reducing the age of capacity to 16 years with no exceptions. It was noted that the Working Group may have to return with other options on this issue.
2. *Statutory (or ‘Court Approved’) Wills for Persons Without Testamentary Capacity*: The general consensus was that any role for the courts would need to be very limited and specific. It is preferable to have the will ‘speak for itself’ as to the testator’s intentions, even after incapacity.
3. *Oral Wills*: A few jurisdictions in Canada recognize oral wills made by sailors or fishers at sea, (Nova Scotia and Newfoundland and Labrador) or by military personnel on active military service (Nova Scotia). The consensus was that oral wills should not be permitted.
4. *Electronic Wills*: The general consensus was that the issue of electronic wills – recently considered by the ULCC and rejected – should not be revisited. As the issue is an evidentiary one (reliability, etc.), the court’s “dispensing power” should be adequate to address issues.
5. *Exempt Wills*: The consensus was to retain exempt wills for persons on active service, especially as the Judge Advocate General’s Office indicated support for this.
6. *Holograph Wills*: Eleven provinces and territories allow holograph wills. The legislation of the remaining two jurisdictions provides the courts with a general dispensing power. The consensus was to continue to recognize holograph wills as valid. But, issues respecting alterations to holograph wills need to be addressed.
7. *Printed Will Forms*: Possible options outlined were:
 - prohibit printed will forms;
 - delete the requirement that a holograph will be “wholly in the testator’s handwriting”;
 - enact a specific provision to address the problem;
 - rely on the general dispensing power conferred on the courts.

The consensus was to continue to recognize printed will forms only if they satisfy the formal requirements for a valid formal will or holograph will.

8. *Placement of testator's signature*: The general consensus was that the legislation should not require that the testator's signature be at the end of the will; rather it should require that the placement of the signature indicate a clear intention to validate the will. The court's general dispensing power should be relied on if more is required.
9. *Witnessing requirements*: The requirement for two witnesses should continue. It was also generally agreed that the witnesses should both be present at the time the testator signs or acknowledges the will.
10. *Publication of Wills*: Some non-Canadian jurisdictions state that a witness to a will does not need to know that the document is a will. The consensus was that publication should not be a requirement.
11. *Witnesses – competency issues*: The consensus was that a witness must be competent at the time he or she witnesses the will. A person who signs on behalf of the testator should be prohibited from also acting as a witness to the will. With respect to the witness/beneficiary rule – where the witness and his or her spouse cannot be a beneficiary under the will – the consensus was that a breach of this requirement should result in the loss of the benefit rather than the invalidation of the entire will.
12. *Changes that Alter or Revoke a Will*: With respect to changes to a will, the general consensus was that a change to a formal will or a holograph will should follow the same formalities as the will itself. The Working Group was requested to look closely at the Saskatchewan approach, which allows holographic alterations to a formal will.
13. *Revocation by Law*: It was agreed that the issue of whether a will should automatically be revoked upon marriage or divorce is a difficult one that requires further study. Consultation with the Continuing Committee of Senior Officials (Family Law) should be considered. It was noted that laws such as dependant's relief legislation, matrimonial property law, etc. "trump" a testator's intention.
14. *Failed Gifts – Beneficiary Issues*: A gift made in a will may fail for a number of reasons:
 - the beneficiary predeceases the testator (the "doctrine of lapse");
 - the beneficiary is disqualified;
 - forfeiture (e.g. the beneficiary commits a criminal wrongdoing);
 - the beneficiary refuses the gift; or
 - the beneficiary does not satisfy a condition imposed by the testator.

The general consensus was that the same rules should apply, regardless of the reason for the failed gift.

15. *Ademption by Conversion*: Where a will contains a "specific legacy", the rule of law is that if, at the testator's death, the specific property is not found among the testator's assets, the gift fails – that is, it is said to have "adeemed". This may, in some cases, lead to harsh results that frustrate the intent of the testator, so the courts have employed a number of judicial devices to avoid its application in particular cases.

Should the common law rule of ademption by conversion be retained? What form should legislative exceptions to the rule take? In Canada, there are a number of

different approaches. Differing opinions were expressed as to whether the ademption rule should be narrow or more permissive so as to enable specific gifts to be 'traced'.

16. *Admission of Extrinsic Evidence*: The case law has followed two different approaches to the interpretation of wills and the admission of extrinsic evidence:

- the literal, objective or strict constructionist approach – under which the court concentrates its attention on the ordinary meaning of the words used by the testator and tends to exclude extrinsic evidence – and
- the subjective or intentional approach – which concentrates on giving effect to the intentions of the testator and favours admission of extrinsic evidence.

The Supreme Court of Canada tends to take a traditional objective approach. But recent case law, particularly in western Canada, favours an intentional approach. Differing opinions were expressed.

RESOLVED:

That the Work Book of materials prepared by the Working Group be accepted;

That the Working Group consult with CCSO(Family) with respect to testamentary law and matrimonial property law; and

That having received the views and direction of the Civil Section, the Working Group continue to prepare a progress report containing policy decisions and drafting instructions for amendments to the *Uniform Wills Act* and commentaries for consideration at the 2012 meeting.