

WILLS AND SUCCESSION CONFLICT PROVISIONS – Report

Presenter: Professor Gerald B. Robertson, Q.C., Professor of Law, University of Alberta

Professor Robertson presented his paper on conflict of law issues in succession law, focusing on possible issues for reform of the choice of law rules directly relating to (1) testate succession, (2) intestate succession and (3) matrimonial property rights on death.

(1) Testate succession: The *Uniform Wills Act* (as amended in 1966) codifies the common law choice of rules with respect to testate succession. It adopts a policy of upholding the validity of wills wherever possible, so as to give effect to the intention of the testator. Currently, Canadian jurisdictions have implemented the choice of law provisions in the *Uniform Wills Act* to varying degrees. While the paper recommends that some changes be made to the *Uniform Wills Act*, it also urges those jurisdictions that have not implemented the uniform legislation to consider doing so.

(2) Intestate succession: The principle of scission, which requires different choice of law rules for moveable and immovable property, gives rise to a particular problem that occasionally results in the surviving spouse “double dipping” with respect to his or her preferred share on intestacy. Most commentators agree that double dipping is inequitable and is inconsistent with the underlying policy of giving effect to the presumed intention of the average deceased person. The paper sets out several possible approaches to a legislated solution. Another issue in intestacy relates to whose law determines entitlement to the preferred share. Does it rely on the existence of a valid marriage, or can those who are not legal spouses also be eligible? Whose definition of “common law spouse” would apply?

(3) Matrimonial property and succession: Whether a court characterizes something as a succession issue or a matrimonial property issue could have a significant effect on the determination of which jurisdiction’s law applies. Consideration should be given to including in uniform legislation choice of law provisions which would address how to characterize the division of matrimonial property upon death.

RESOLVED:

THAT the paper be received and a working group be established and directed to consider the paper and report back to the Conference in 2010.