Updated Uniform Wills Act Propositions

1. Who may make a will

Requirement:

- A person of full age
    - 18 years of age or older

Exceptions:

- Individuals under the age of 18 who are:
    - Active Service Personnel
    - Married (or in a common law relationship)
        - ***Recommendation: remove exception for individuals who are under the age of 18 who are married or in a common law relationship (12 June 2012)***

Outstanding issues:

A. AGE

- how to refer to age – 18 years of age or older (see AB's legislation & Sask's legislation), or age of majority (see the *Uniform Wills Act*)?
    - ***Recommendation: maintain "age of majority" wording to reflect that different provinces have different ages of majority; the commentary can instruct the provinces to insert their own age of majority (5 June 2012)***

B. MARRIAGE EXCEPTION

- *Note: recommendations on this point made during the meeting on June 5, 2012 have been removed to reflect the recommendation accepted on June 12, 2012 to remove an exception for individuals who are under the age of 18 who are married or in a common law relationship*

C. FORCES EXCEPTION

- how to refer to active service personnel
    - should the Act incorporate terms from the *National Defence Act*?

- regular force, active service incorporated under ss. 13 and 18 of AB's legislation; active service used in BC's legislation and in the *Uniform Wills Act*
- no reference to National Defence Act in Sask's legislation – instead refer to "actual service" in s. 6
- *Uniform Wills Act* also refers to active service of any other member of a navel, land or air force (s. 5)

- ***Recommendation: follow wording used in ss. 13 and 18 of AB's legislation used to define active service personnel (5 June 2012)***

- Should the Act incorporate any member of the naval, land or air force of any member of the British Commonwealth of Nations or any ally of Canada while on active service?
  - See s. 38 of BC's legislation (not yet in force)

D. OTHER EXCEPTIONS?

- Should we also include mariners or seamen?
  - Sailors incorporated in Saskatchewan's legislation – see s. 6
  - Uniform Wills Act incorporates mariners and seamen when at sea or in course of voyage

  - ***Recommendation: include this in square brackets in the Uniform Wills Act so provinces who wish to may adopt these provisions (5 June 2012)***

E. MAKE A WILL OR MORE?

- are we only referring to making a will, or will the wording be more broad?
  - make, alter, or revoke – wording used in Alberta's legislation, s. 13
  - also see the provision for minors revoking their will in the Uniform Will Act

  - ***Recommendation: follow wording of AB's legislation – refer to making, altering and revoking a will (5 June 2012)***

F. LEGISLATION SILENT REGARDING?

- (mental) capacity of testator
- Court authorized wills

- Wealthy minors
- Emancipation
    - ***Recommendations:***
        - ***Do not define testamentary capacity in the Uniform Wills Act (5 June 2012)***
        - ***Legislation silent regarding wealthy minors, emancipation (5 June 2012)***

2. Will formalities

Formalities

- Formal wills
    - Formal wills must be in writing
    - Formal wills must be signed by:
        - the testator OR someone authorized by the testator to sign on the testator's behalf, and
        - (at least) two witnesses
    - While in each others' presence, will signatories (witnesses and testator) must either:
        - sign the will; or
        - acknowledge own signature
- Holograph wills
    - Holograph wills must be in writing
    - Holograph wills must be entirely in the handwriting of the testator
    - Holograph wills must be signed by the testator
        - *Note: this section has been updated to reflect comments made during meeting on June 5, 2012*

Breach of formalities

- If formalities are not complied with:
    - Gifts to specific beneficiaries in the will become void
    - May apply to the Court to dispense with formalities

- ***Recommendation: do not refer to a will that fails to comply with formalities as a "will" in the Uniform Wills Act; document may be treated as a will if it is approved by the Court as a testamentary instrument (5 June 2012)***

Outstanding issues:

A. TESTATOR'S SURROGATE:

- Should a person be able to act as a testator's surrogate (sign the will on the testator's behalf) AND:
    - witness the testator's will?
        - See s. 20(2) of AB's legislation – surrogate is not eligible to witness the signature of the testator
    - be a beneficiary under the will?
        - See s. 21(1)(a) of AB's legislation – gift to surrogate is void

- In addition to being required to sign the will on behalf of the testator in the testator's presence and by the testator's direction (see the *Uniform Wills Act* (s. 4(1)(b)), AB legislation (s. 19(1)), Saskatchewan legislation (s. 7(1))), should the surrogate also be required to sign or acknowledge his or her signature on the testator's behalf in the presence of all of the witnesses?
    - Requirement not clearly imposed in legislation

- ***Surrogate recommendations:***
    - ***Surrogate may not witness the testator's signature (5 June 2012)***
    - ***Surrogate may not be a beneficiary under the will (5 June 2012)***
    - ***Surrogate should be required to sign the will or acknowledge his/her signature in the presence of witnesses to the will (5 June 2012)***

B. CONGRUENCE OF SIGNATORIES:

- Current Act requires witnesses to sign or acknowledge their signature on will before the testator, but not necessarily in the presence of each other (see s. 4(1)(c)(ii))

- Should legislation now require all will signatories to be present at the same time:
    - To see the testator either

        - sign the will, or
        - acknowledge his or her signature on the will
    - To see the witnesses either
        - Sign the will or
        - Acknowledge their signatures on the will
            - See Sask, s. 7
    - Or should witnesses be required to sign the will in the presence of the testator
        - See AB, s. 15 – witness not permitted to acknowledge signature
        - See BC, s. 37(1) (not yet in force) – witness may not acknowledge signature
        - See Uniform Law on the form of an international will, article 5. 3.
- If testator is using a surrogate, must the surrogate be present with the testator and all of the witnesses as well?
    - not addressed in other wills legislation
- If will is being translated, must translator be present with the testator and all of the witnesses as well?
    - not addressed in other wills legislation
- ***Congruence of signatories recommendations:***
    - ***follow Saskatchewan's s. 7(1) – testator and witnesses may either sign the will or acknowledge each other's signatures in each others' presence, as long as all signatories are present at the same time to sign or acknowledge their signatures on the will (5 June 2012)***
    - ***if a surrogate signs the will, the surrogate will be required to sign the will or acknowledge his/her signature in the presence of the witnesses (5 June 2012)***
        - **Issue: must the testator also be present when the surrogate signs the will or acknowledges his/her signature on the will?**

C. WITNESSES:

- SHOULD CERTAIN INDIVIDUALS NOT BE PERMITTED TO WITNESS A WILL?
    - currently the *Uniform Wills Act* does not indicate that anyone may not witness a will, although s. 12 provides that a gift to a beneficiary will be void if the beneficiary or the beneficiary's spouse witnesses the will
        - similar rule in s. 21 of AB's legislation
    - should the legislation indicate that certain people are ineligible to witness the will? If so, should those people include:
        - beneficiaries and the spouses of beneficiaries
        - surrogate who signs on the testator's behalf
            - See s. 20 (2) of AB's legislation
        - Translator of will
        - Persons under the age of majority?
            - See s. 40(1) of BC's legislation (not yet in force) (witness must be 19 years of age or older)

- WITNESS COMPETENCE /CAPACITY
    - S. 11 of the *Uniform Will Act* currently states that a will is not invalid if a witness is legally incapable/incompetent of proving the will
        - Also see s. 40(3) of BC's legislation (not yet in force)
        - Also see s. 20(4)(b) of AB's legislation
    - Should the Act also require witness to have capacity at the time s/he witnesses the will?
        - See s. 20(1) of AB's legislation

- WITNESS KNOWLEDGE
    - Should the Act specify that a will is not invalid because a witness does not know that s/he witnessed a will?
        - See s. 20(4)(a) of AB's legislation

- ***Witness Recommendations:***
    - ***a will must be witnessed by a competent adult (5 June 2012)***
    - ***the following individuals are ineligible to witness a will:***
        - ***Beneficiaries and their spouses (5 June 2012)***

- ***Surrogate (of the testator) (5 June 2012)***

D. SIGNATURE LOCATION:

- Should the legislation have a broad provision indicating signatures should either:
    - be at end of the will, or
    - indicate that the testator intended to give effect to the will?
        - See AB's s. 19, Uniform Wills Act, s. 4(3)
- Or should the legislation specifically set out a variety of locations on the will where a signature will be valid
        - see BC's s. 39
        - see Man's s. 7

- TEXT AFTER SIGNATURE:
    - For text physically placed after signature, should legislation specify that the signature will not give effect to gifts in will that follow the testator's signature?
        - See BC's s. 39(2)(a) legislation
        - See AB's s. 19(3)
    - For text added after signature in time, should legislation specify that signature will not give effect to gifts or direction added to will after will is made?
        - See BC's s. 39(2)(b)
        - See AB's s. 19(4)

- ***Signature recommendations:***
    - ***follow wording of AB's legislation in terms of signature location and the relaxation provision (5 June 2012)***
    - ***signature will not give effect to gifts or directions added to will later in time, after the will was signed (5 June 2012)***
    - ***no longer necessary to include a provision regarding text physically placed after the signature (5 June 2012)***

E. VOID GIFTS:

- Circumstances under which a gift to a beneficiary under the will is currently void
    - When witness to will (and/or their spouse) is a beneficiary

- Should the same rule apply to gifts left to :
    - Surrogates (of testator)
        - See s. 21(1)(b) of AB's legislation – gift void
        - See s. 13(1) of Man's legislation – gift void to translator or translator's spouse
    - Translators of will
        - See s. 21(1)(c) of AB's legislation – gift void
    - Or should such gifts only be challengeable under the common law (e.g. undue influence)?
    - Should a provision be included allowing the court to validate a void gift to a witness?
        - See s. 43 of BC's legislation (not yet in force)
        - See ss. 21(2)(c), 40 of AB's legislation
- ***Void gift recommendations:***
    - ***Gifts to the following entities will be void***
        - ***Witnesses and their spouses (5 June 2012)***
        - ***Surrogate (5 June 2012)***
        - ***Translator (5 June 2012)***
    - ***Void gifts may be validated by the Court (5 June 2012)***

F. FORMALITIES THAT MAY BE DISPENSED WITH

- can any formality be dispensed with by the court?
    - For example, s. 37 of the AB legislation allows courts to validate wills that don't comply with formalities under ss. 15-17
        - Result: writing formality under s. 14 cannot be dispensed with
    - same with s. 23 of Manitoba's legislation, and s. 57 of BC's legislation (not yet in force) – all appear to permit wills that don't comply with legislation as long as they are in writing
- Formalities to be dispensed with through dispensing power only, or should there be specific statutory provisions to dispense with certain formalities?

- eg. placement of signature

- ***Formality dispensation recommendations:***
    - ***requirement that will must be in writing cannot be dispensed (5 June 2012)***
    - ***follow AB legislation regarding dispensing with other formalities (5 June 2012)***

G. LEGISLATION SILENT REGARDING?

- Oral wills
- Electronic wills
- Printed will forms
- A definition for the term "handwriting"
- A definition of "testamentary capacity," "competence"

    - ***Recommendation confirmed (5 June 2012)***

3. Requirement of publication abolished

Recommendation

- Address the removal of publication from the Act in the commentary

    - ***Recommendation confirmed (5 June 2012)***

4. Alterations must follow the form of the document being altered

General Requirement

- Alterations made to holograph wills must follow the format of the holograph will (handwritten, signed by testator)
- Alterations made to a formal will must comply with the formal will requirements (signed or initialed by witnesses and testator)

Outstanding Issue

- In the event that an alteration does not follow the form of the document being altered:
    a. Should a party have to resort to the Court's general dispensing power to dispense with formalities surrounding the alteration?

- see s. 22(1)(b) and s. 38 of AB's legislation – court must make order validating an alteration that does not comply with formalities
- also see ss. 54 and 58 of BC's legislation (not yet in force)

Or

b. Should the *UWA* also have some specific provisions that allows some alterations that do not follow the form of the will being altered (rather than requiring court application)

- Some legislation permits holograph amendments to valid wills
  - See s. 11(3) of Sask's legislation – allows holograph amendments to formal wills
  - See s. 18(3) of the current *UWA* – appears that some holograph amendments are permitted

- ***Alteration recommendations:***
  - ***require alterations to wills to be in the same format as the will itself (formal or holograph)***
    - ***if alterations are not in the same format, parties may apply to the Court to dispense with formalities through the dispensing power***
  - ***include a provision like Saskatchewan's s. 11(3) in square brackets in the legislation for provinces who wish to permit holograph alterations to formal wills***

5. Obliterated text may be discovered by any means possible

Principle

- if text in a will is obliterated, but not through a valid amendment, the court may allow the original words in the will to be restored, as long as the original words can be determined

Outstanding Issue

- how to describe the means the court can use to discover the testator's original text
  - "the Court may allow the original words of the will to be… determined by any means the Court considers appropriate"
    - AB legislation, s. 22(2)
  - "the court may reinstate the original word or provision if there is evidence to establish what the original word or provision was."

- BC legislation, s. 58(4)
    - ***Recommendation: incorporate language used in s. 22(2) of AB's legislation for discovering text (12 June 2012)***

6. Dispensing Power

Principle

- in the event the testator's will does not comply with will formalities, the court can dispense with those formalities (with the exception of the requirement that the will be in writing)

Outstanding Issues

- TEST
    - Should the current requirements be retained:
        - Clear, convincing evidence that the deceased person intended the document to constitute a will of the deceased person
            - See AB s. 37 – test = clear and convincing evidence "that the writing sets out the testamentary intentions of the testator and was intended… to be his or her will…"
            - BC does not require clear and convincing evidence – instead court may determine if document, etc. represents "the testamentary intentions of [the] deceased person…" (s. 58(2)(a))
            - In Manitoba, the court must be "satisfied" that the document "embodies… the testamentary intentions of a deceased" (s. 23(a)) (clear and convincing evidence also not mentioned)
    - Should the language be updated and refer to writing that expresses the deceased's "testamentary intentions" (as per BC, AB, and Manitoba legislation)
        - Should the term "will" be retained in the Act? (see AB's s. 37)
    - ***Test recommendations:***
        - ***Incorporate test of court satisfaction used in Manitoba (12 June 2012)***
        - ***Test applies to document or writing that embodies the testamentary intentions of the deceased, rather than wills (see Manitoba's legislation) (12 June 2012)***
        - ***Include comment in Act indicating that the previous test (clear and convincing evidence) is no longer being used because of Supreme***

Court of Canada jurisprudence indicating that there are only two standards of proof, and that clear and convincing evidence is not an independent standard of proof (12 June 2012)

- FORMALITIES THAT CAN BE DISPENSED WITH
    - Should the Uniform Wills Act still require writing as a formality for testamentary instruments?
        - All other legislation with dispensing power requires the document/record/writing to be in writing (see under s. 2)

- ***Formalities recommendations:***
    - ***retain writing requirement (12 June 2012)***
    - ***Specify in Act that audio and visual wills are not permitted (12 June 2012)***
    - ***Include a written comment indicating that the traditional approach will be maintained until there is further evidence regarding audio and video wills (12 June 2012)***

7. Revocation

Principle

- Wills are revoked automatically by law in specific circumstances

Recommendations

- Continue with divorce provision that provides for gifts and appointments of ex-spouse in the testator's will being treated as failed gifts/appointments (s. 17(2) of the *Uniform Wills Act*)
    - Ex-spouse presumed to pre-decease the testator
    - Rule subject to testator expressing contrary intention
        - Continuing with this provision would be consistent with s. 25 of AB's legislation, s. 56 of BC's legislation, and s. 19 of Sask's legislation

Outstanding Issues

- MARRIAGE
    - Should a will be automatically revoked by entry into marriage too?
    - Three possible approaches

1. Yes, a will should be automatically revoked by marriage
    - Spouse would then become the deceased's primary beneficiary through intestate succession legislation
        - See s. 17(1)(a) of Sask's legislation
        - See s. 17 of Man's legislation
    - would there be any exceptions?
        - eg. will states it was made in contemplation of the marriage
            - see s. 17(2)(a) in Sask
            - see s. 17(a), (a.1) in Man.
        - eg. will made in exercise of a power of appointment of real or personal property that would not pass to heir in default
            - see s. 17(2)(b) in Sask
            - see s. 17(b) in Man.
        - eg. if testator marries person s/he has been cohabitating with in a spousal relationship for 2+ years
            - see s. 17(3) of Sask's legislation

2. No, a will should not be automatically revoked by marriage
    - Spouse's interests will be cared for through matrimonial property legislation, dependent relief legislation, etc.
        - See s. 23(2) of AB's legislation ("no will or part of a will is revoked by the marriage of the testator")
        - See BC's legislation (not yet in force)
            - NOTE: these provisions would also be available to a spouse in the event a will was automatically revoked by marriage, followed by a successful application to reinstate the will

3. Hybrid – a will is suspended during the life of the spouse if the testator's will predates the marriage
    - practical ramifications – estate divided under intestate succession provisions, but beneficiaries under will can apply to court for effect to be given to devise or bequeath in will
        - see s. 15.1 of the *Wills Act*, RSNB 1973, c W-9

- ***Marriage recommendations:***
    - ***issue to be put to vote at conference (12 June 2012)***
    - ***if second option is adopted so that a will is not automatically revoked by marriage, commentary should be included in the Act indicating that dependents' relief legislation varies from province to province and that in provinces where dependents' relief legislation is not comparable to relief through intestate succession, it may be more appropriate to have a will automatically revoked by marriage (12 June 2012)***

  - if will is automatically revoked by marriage, should it be revoked by marriage-like relationships too?
    - eg. common law relationships
        - terminology used in s. 17 of Man.'s legislation
    - eg. adult interdependent partnership
    - eg. cohabitating in a spousal relationship
        - terminology used in Sask's legislation
        - ***No recommendation (12 June 2012)***

- DIVORCE:
  - language choice re: end of marriage
    - refer to spouses ceasing to be spouses (s. 56 in BC)
    - refer to termination of marriage by divorce or being found to void (currently in *Uniform Wills Act*; also in s. 25 in AB)
  - continue to apply to devises, bequests, and appointments under will?
    - See BC's legislation, s. 56
    - See AB's legislation, s. 25 – also applies to testator appointing former spouse as executor, trustee or guardian of child
  - Should divorce provision apply to marriage-like relationships too?
    - eg. common law relationships
        - terminology used in s. 17 of Man.'s legislation
    - eg. adult interdependent partnership

- see s. 25 of AB's legislation

- eg. cohabitating in a spousal relationship
  - terminology used in Sask's legislation

- Should exceptions be included in the legislation?
  - Eg. Former adult interdependent partner who is related to testator through blood or adoption (AB, s. 25(2)
  - Eg. former adult interdependent partner who is testator's spouse at time of death (AB, s. 25(2))
  - Also see BC's s. 56(3) – divorce provision is not affected by subsequent reconciliation between testator and spouse
    - ***No recommendations (12 June 2012)***

8. Failed gifts

Requirement

- Address failed gifts through two provisions:
  - One provision setting out consequences for all failed gifts (due to lapse, ademption, forfeiture, declension)
  - Second provision qualifying "failed" gifts (ademption)

Outstanding issues:

- FAILED GIFT PROVISION
  - What list of consequences should be adopted for consequences of failed gifts
    - See AB ss. 32, 33
      - 1st alternate beneficiary; 2nd beneficiary's descendent (if beneficiary was a descendent of the deceased); 3rd surviving residuary beneficiaries; 4th intestacy
    - See BC s. 46
      - 1st. alternate beneficiary; 2nd beneficiary's descendent (if beneficiary was brother, sister, or descendent of the deceased); 3rd surviving residuary beneficiaries

- ***Recommendation: incorporate consequences specified in ss. 32, 33 of AB's legislation (12 June 2012)***

- should the legislation include a list of examples as to why a gift would fail?
  - See BC's legislation (not yet in effect), s. 46

    - ***Recommendation: include examples of why a gift would fail in the commentary (12 June 2012)***

- Should legislation include an assumption that beneficiary of failed gifts pre-deceased the testator?
  - Used in AB, s. 33(2)

    - ***Recommendation: include an assumption for failed gifts that the beneficiary pre-deceased the testator (12 June 2012)***

- ADEMPTION PROVISION

  - Formatting – should the legislation take the form of a:
    - broad legislative provision (like s. 10 in AB) OR
    - enumerated list (like in Ont., s. 20(2))

      - ***Recommendation: use a broad legislative provision for ademption, and refer to the enumerated list in commentary***

9. Interpretation

Principle

- allow extrinsic evidence to be used to determine the testator's intent

Recommendation

- adopt provision similar to AB's s. 26(c), allowing Court to admit "evidence of the testator's intent with regard to the matters referred to in the will"
  - enables parties challenging the will to submit evidence of testator's intent
  - make the only requirement for reviewing extrinsic evidence be that the evidence must be relevant

- no longer require to confirm that testator's intent is not clear on the face of the will, etc.

Outstanding Issue

- should the requirement of relevant evidence be expressly set out in the Act? (not set out in AB's s. 26)
    - eg. evidence must be cogent

        - ***Recommendation: unnecessary to expressly require evidence to be relevant/cogent (12 June 2012)***

10. Conflict of laws

Recommendation

- update current conflicts provision (s. 40) by incorporating provisions similar to ss. 36-40 of NB's Wills Act
- particularly update provisions by including:
    - law of testator's nationality and habitual residence at the time of death in the list of legal systems that determine the formal validity of a will in respect of movables
    - law of place where property is situated in list of legal systems which determine the formal validity of a will in respect of movables
    - wills relating to immovable property

        - ***Recommendation accepted (12 June 2012)***

11. Court authorized wills

Principle

- permit Court-authorized wills for mentally incompetent persons
    - see NB's *Infirm Persons Act*, ss. 3, 11.1

Outstanding issues

- what circumstances?
    - Deceased was mentally incompetent before s/he passed away
    - Must person already have had a will in place?

- Other requirements?
    - Will in place has a result that the deceased would not have wanted, if s/he were competent and able to make will prior to passing away (s. 11.1(1) of NB's Infirm Persons Act)
        - Should the test be stated negatively (what the deceased would not have wanted), or should it refer to what the deceased would have wanted?
        - Should legislation set out criteria, etc. to determine what the deceased would not have wanted?

- Power
    - Create will that would meet the deceased's expectations?
    - Amend the deceased's will to reflect deceased's expectations?
    - Approve will created by another entity?
        - adding or deleting characters, words or provisions specified by the Court (see s. 39 of AB's wills legislation re: rectification)
    - Source of updated will content?
        - Intestacy provisions?

- Definition of mentally incompetent?
    - NB legislation defines mentally incompetent person as a person who requires care, supervision, and control due to "a condition of arrested or incomplete development of mind, whether arising from inherent causes or induced by disease or injury," or "who is suffering from such a disorder of the mind" (s. 1)
    - Should this also include a provision to confirm that mentally incompetent person lacks testamentary capacity?

- ***Court authorized wills recommendations:***
    - ***court authorized wills only permitted if:***
        - ***Individual created a will when he or she had testamentary capacity;***
        - ***individual has lost testamentary capacity; and***
        - ***it is clear that the will in place has a result the individual would not have wanted***

(12 June 2012)

- ***provision for court authorized wills should be included in wills legislation***