Draft Uniform Wills Act

Interpretation and Application

Definitions
1 In this Act,

"beneficiary" means a person who receives or is entitled to receive a beneficial disposition of property under a will;

"Court" means the superior court of the Province;

"disposition" includes a bequest, a legacy, a devise and the conferral or exercise of a power of appointment;

[**"spouse"** means [insert here the appropriate definition of "spouse" for the jurisdiction];

"will" includes a writing that

(a) alters or revokes another will, or

(b) on the death of the testator, confers or exercises a power of appointment.

Introduction

The existing Uniform Wills Act is of considerable vintage and has been amended in specific areas from time to time. In addition, there has been patchwork implementation of various versions across the country. Since there was interest in modernizing and updating the legislation in several provinces, it appeared to the Conference to be an appropriate time to update this uniform legislation.

The Uniform Wills Act, as its title suggests, deals only with wills. It does not deal with intestate succession or family support claims. To the extent that a province wishes to have a more comprehensive succession act, the wills component can serve as a significant component of the broader legislation.

Making a Will

Age of majority
2 An individual who has reached the age of majority may make, alter or revoke a will if the individual has the mental capacity to do so.

Section 2

The act establishes the age of majority as the basis of legal capacity to make a will. This is combined with the common-law requirements that a testator must have an appropriate understanding of the document, its dispositive nature, and the persons being included or excluded as beneficiaries. The common-law requirements of testamentary capacity are not repeated or codified in the statute. Previous exceptions relating to married minors are not carried forward.

Formal requirements

3(1) A will is valid only if

(a) it is in writing,

(b) it contains the signature of the testator or of another individual who signed on the testator's behalf at the testator's direction and in the testator's presence, and

(c) the requirements of subsection (2) or (3), whichever is applicable, are met.

(2) If the testator signed the will, the signature must have been made or acknowledged by the testator in the presence of two or more witnesses who were present at the same time and at least two of the witnesses, in the presence of the testator, must have

(a) attested and signed the will, or

(b) acknowledged their signatures on the will.

(3) If another individual signed the will on behalf of the testator, the signature must have been made or acknowledged by that individual and acknowledged by the testator in the presence of two or more witnesses who were present at the same time and at least two of the witnesses, in the presence of that individual and the testator, must have

(a) attested and signed the will, or

(b) acknowledged their signatures on the will.

Section 3

This section sets out the basic requirements of formal validity: a written document, signed by the testator, witnessed by two witnesses. Subsection (2) modernizes the wording relating to witnesses to ensure that the signature or acknowledgment of the testator is in the presence of both witnesses at the same time. Subsection (3) requires that the formalities of subsection (2) also apply where a person signs on behalf of the testator.

Witnesses

4(1) An individual may sign a will as a witness to a signature of the testator if the individual

(a) has the mental capacity to do so, and

(b) has reached the age of majority.

(2) An individual who signs a will on behalf of a testator is not eligible to witness the signature of the testator.

(3) An individual who signs a will as a witness to a signature of a testator is not ineligible as a witness to prove the making of the will or its validity or invalidity only because the individual is

(a) a beneficiary under the will, or

(b) the spouse of a beneficiary.

Section 4

The act requires competent witnesses – those who have the mental capacity to understand what witnessing entails and have reached majority. An individual who signs for the testator cannot also act as a witness. A person who receives a benefit under a will is not disqualified as a witness, but their benefit is presumed to be set aside pursuant to section 13.

Signature

5(1) A will is not invalid because the testator's signature is not placed at the end of the will if it appears on the face of the will that the testator intended by the signature to give effect to the will.

(2) A testator is presumed not to have intended to give effect to any writing that appears below the testator's signature.

(3) The references in subsections (1) and (2) to a testator's signature include the signature of an individual who signed on behalf of the testator in accordance with section 3.

Section 5

Subsection (1) includes a general saving provision for the location of the signature. While a signature at the end would normally import finality and closure, a signature intended to give effect to the document and evident on the face of the document as doing so, will not be invalid. This saving provision could also rebut the presumptive invalidity in subsection (2).

Exception to witnessing requirements - holograph will

6 A will may be made without complying with section 3(1)(c) and (2) if it is made wholly in the testator's own writing and signed by the testator.

Section 6

This section continues the common practice in many provinces of providing for holographic wills– wills made wholly in the testator's hand writing and signed by him or her. There is no specific saving provision for partially written or typed documents. Those documents may be validated under section 10.

Exceptions for military personnel and sailors

7(1) In this section, "Canadian Forces member" means an individual who is

(a) a member of a regular force as defined in the National Defence Act (Canada), or

(b) a member of another component of the Canadian Forces who is placed on active service under the National Defence Act (Canada).

(2) Despite section 2, an individual who is under the age of majority may make, alter or revoke a will if the individual has the mental capacity to do so and is, at the time of making the will, a Canadian Forces member [or a sailor in the course of a voyage].

(3) Despite section 3(1)(c), an individual who has the mental capacity to do so may make, alter or revoke a will without complying with section 3(2) or (3) if, at the time of making the will, the individual is a Canadian Forces member or a member of any other naval, land or air force on active service [or who is a sailor in the course of a voyage].

(4) For the purposes of this section,

(a) a certificate signed by or on behalf of an officer purporting to have custody of the records of the force in which a member was serving at the time the will was made setting out that the member was on active service at that time is sufficient proof of that fact, and

(b) if a certificate referred to in clause (a) is not available, a member of a naval, land or air force is deemed to be on active service after the member has taken steps under the orders of a superior officer preparatory to serving with or being attached to or seconded to a component of such a force that has been placed on active service.

Section 7

This section continues but clarifies exceptional provisions relating to military personnel. The requirements for majority in section 2 and two witnesses in sections 3(2) and (3) can be displaced if the individual is a member of the Canadian forces placed on active service. This wording, and the evidentiary process described in subsection 4, updates the provisions to dovetail with the *National Defense Act*.

Alterations

8 An alteration made on a will is valid only if

(a) in the case of a will made under section 3, the alteration is made in accordance with that section, or

(b) in the case of a will made under section 6, the alteration is made in accordance with that section.

Section 8

This area of the law has produced jurisprudence that might stretch the imagination – where a mere alteration has been found to be a will in itself and therefore capable of amending a prior document. Section 8 makes it clear that alterations to a will must follow the format of the will being altered. A section 3 will alteration requires the signature of the testator and witnesses. A section 6 will alteration must be in the handwriting of and signed by the testator. It is envisaged that these requirements will be strictly adhered to, so that acceptance of anything that falls short would require validation under section 10.

[Holograph alterations

8.1 Notwithstanding section 8(a), a will may be altered without complying with section 3(1)(c) if the alteration is wholly in the testator's own writing and signed by the testator.]

[Mentally incompetent individuals

8.2(1) The Court may, in its discretion, on application, make, amend or revoke a will on behalf of a mentally incompetent individual if the Court is satisfied on clear and convincing evidence that if it does not exercise its power to do so, a result will occur on the death of the mentally incompetent individual that the mentally incompetent individual, if competent and making a will at the time the Court exercises its power, would not have wanted.

(2) A will, amendment or revocation made under subsection (1) is deemed for all purposes, including subsequent revocation and amendment, to be the will of the individual on whose behalf the will, amendment or revocation is made.]

Section 8

Section 8.1 provides options for those provinces which wish to provide further discretion for holographic alterations.

Section 8.2 allows the court to intervene on behalf of a mentally incompetent person. The threshold however is very high, in that the court may only intervene to avoid a result that the person, if competent, would not have wanted.

Both are optional only.

Publication requirement abolished

9 There is no longer any requirement at law that a will must be published in order to be valid.

Section 9

While it is probable that there has not been a publication requirement for a very long period of time, this section finally and formally puts the issue to rest.

Giving Effect to a Will

Validation power for non-compliant wills

10 Where, on application, the Court is satisfied on clear and convincing evidence that a written document embodies the testamentary intention of a deceased individual, the Court may order that the written document is fully effective as the will of the deceased individual, despite that the document was not made in accordance with section 3(1)(b) or (c) or 6 or is in an electronic form.

Section 10

This section allows the court to accept as valid a document that is defectively signed or witnessed or is not a holograph, provided the court is satisfied on clear and convincing evidence, that the document embodies the testamentary intention of the deceased.

Validation power for non-compliant alterations

11 Where, on application, the Court is satisfied on clear and convincing evidence that any writing or other marking or obliteration on a written document embodies the intention of a deceased individual to revoke, alter or revive a will of the deceased individual or the

testamentary intention of the deceased individual embodied in a written document other than a will, the Court may order that the writing, other marking or obliteration is fully effective as the revocation, alteration or revival of the will of the deceased individual or of the testamentary intention embodied in that other written document, despite that the writing, other marking or obliteration was not made in accordance with section 8(a) or (b), whichever is applicable, or is in an electronic form.

Section 11

This section extends the dispensing power of section 10 to alterations in a document.

12 For the purposes of sections 10 and 11, a document, writing or other marking or an obliteration is in an electronic form if it

(a) is recorded or stored on any medium in or by a computer system,

(b) can be read by an individual, and

(c) is capable of reproduction in a visible form.

Section 12

In both sections 10 and 11, the court may have regard to documents or alterations in electronic form. This section uses the wording of the previous section 19, the wording of which was a later addition to the provisions of the Uniform Wills Act.

Void dispositions

13(1) Subject to any order made under subsection (2), a beneficial disposition that is made by will to any of the following individuals is void as against the individual, the individual's spouse and any other individual claiming under either of them:

(a) a witness who signs the will under section 3(2) or (3),

(b) an individual referred to in section 3(1)(b) who signs the will on behalf of the testator,

(c) an interpreter who provided translation services in respect of the making of the will.

(2) The Court may, on application, order that a beneficial disposition referred to in subsection (1) is not void if the Court is satisfied that

(a) the testator intended to make the beneficial disposition to the individual despite knowing that the individual was an individual described in subsection (1), and

(b) neither the individual nor the individual's spouse exercised any improper or undue influence over the testator.

[**(3)** An application under subsection (2) may not be made more than 6 months after the date the grant of probate or administration is issued unless the Court orders an extension of that period.

(4) The Court may order an extension of the period on any terms the Court considers just.]

Section 13

This presumptively sets aside a benefit given by a will to a number of individuals, where the validity of the document would clearly be called into question by the self-interest of these individuals. The list includes witnesses, a person who signs on behalf of the testator or a person who translates the document for the testator.

However, such a disposition can be validated if the person takes an active step to do so, and can show that the testator clearly intended to benefit the person, despite their status as witness, signor or translator, and it is clear that no improper or undue influence was exercised over the testator by that person.

Effect of subsequent marriage or divorce (Option 1)
Option 1 provides that entry into a marriage or other spousal relationship does not revoke the will, but on divorce/termination any beneficial dispositions to the former spouse are deemed revoked unless the Court finds a contrary intention of the testator.

14A(1) No will or provision of a will is revoked by the testator marrying or entering into a spousal relationship.

(2) If a married testator makes a will and before the testator's death, the marriage is terminated by a divorce judgment or found to be void, or if a testator who is in a spousal relationship other than a marriage makes a will and before the testator's death, the spousal relationship terminates, then unless the Court, in interpreting the will, finds that the testator had a contrary intention, any provision in the will that

(a) gives a beneficial interest in property to the testator's former spouse, whether personally or as a member of a class of beneficiaries,

(b) gives a general or special power of appointment to the testator's former spouse, or

(c) appoints the testator's former spouse as an executor, a trustee or a guardian of a child

is deemed to have been revoked and, for the purposes of clauses (a) to (c), the will is to be interpreted as if the former spouse had predeceased the testator.

Effect of subsequent marriage or divorce (Option 2)
Option 2 deems a will to be revoked on the subsequent marriage/spousal relationship [or divorce/termination] of the testator except in circumstances described in clause (a) or (b) and where the Court orders otherwise under s.(2) [or (4)].

14B(1) If, after making a will, the testator enters into a marriage or other spousal relationship, the will is deemed to be revoked unless

(a) there is a declaration in the will that it is made in contemplation of the marriage or other spousal relationship;

(b) the will is made in the exercise of a power of appointment of real or personal property that, if the appointment were not made, would not pass to the heirs, executor or administrator of the testator or to the persons entitled to the estate of the testator if the testator died intestate, or

(c) the Court orders otherwise under subsection (2).

(2) The Court may, on application, order that subsection (1) does not apply to a will if the Court is satisfied on clear and convincing evidence that the testator made the will in contemplation of the marriage or other spousal relationship.

[**14B(3)** If a married testator makes a will and before the testator's death, the marriage is terminated by a divorce judgment or found to be void, or if a testator who is in a spousal relationship other than a marriage makes a will and before the testator's death, the spousal relationship terminates, the will is deemed to be revoked unless

(a) there is a declaration in the will that it is made in contemplation of the termination of the marriage or other spousal relationship,

(b) the will is made in the exercise of a power of appointment of real or personal property that, if the appointment were not made, would not pass to the heirs, executor or administrator of the testator or to the persons entitled to the estate of the testator if the testator died intestate, or

(c) the Court orders otherwise under subsection (4).

(4) The Court may, on application, order that subsection (3) does not apply to a will if the Court is satisfied on clear and convincing evidence that the testator made the will in contemplation of the termination of the marriage or other spousal relationship.]

Effect of subsequent marriage [or divorce] (Option 3)
Option 3 provides for deemed intestacy on a subsequent marriage/spousal relationship [or divorce/termination] if certain tests are met, unless the Court grants relief.

14C(1) An individual who makes a will, subsequently enters into a marriage or other spousal relationship and then dies is deemed to have died intestate if the death occurs

(a) during the marriage or other spousal relationship, or

(b) while any issue of the individual is still alive.

[**(1.1)** If a married individual makes a will and before the individual's death, the marriage is terminated by a divorce judgment or found to be void, or if an individual who is in a spousal relationship other than a marriage makes a will and before the individual's death, the spousal relationship terminates, the individual is deemed to have died intestate if the death occurs while any issue of the individual is still alive.]

(2) A person who is a beneficiary under the will of an individual referred to in subsection (1) [or (1.1)] but who will not be entitled to share in the individual's estate on the deemed intestacy may apply to the Court for an order giving effect to any beneficial disposition made in favour of that person by the will.

(3) The Court may, on application under subsection (2), order that effect be given to any beneficial disposition, or any part of the beneficial disposition, if the Court is satisfied that the order can be made without undue detriment to any other person who is entitled to share in the estate on the deemed intestacy.

(4) Without limiting the generality of subsection (3), the Court may consider that a detriment to a person who is entitled to share in the estate on the deemed intestacy and who is a beneficiary under the will is not an undue detriment if that person will receive, as a result of an order made under subsection (3), no less than the person would have been entitled to receive under the will.

(5) Notwithstanding subsection (2), the Court may, if the Court considers it just, allow an application to be made under that subsection in respect of any portion of the estate remaining undistributed at the date of the application.

Section 14

This section provides three options for how to deal with automatic revocation upon the happening of certain events. It is a common principle that a will is not invalidated by a change in

circumstances. Either the will may provide for that eventuality, or the rules relating to failed gifts will provide a solution. However, the law has long been that entry into a marriage is a sufficiently significant change in circumstances, involving the undertaking of new obligations, that any existing testamentary instruments should automatically be revoked.

Option number one in section 14(a) concludes that there are now sufficient protections in place, including matrimonial property and family support provisions, that the old law of automatic revocation is no longer necessary. It also concludes that the default position, after termination of the relationship, is that there is no longer an intention to benefit the former spouse or partner. The first option therefore leaves the will in place but surgically removes any benefit provided by the will to the former spouse or partner. This is the preferred option and does the least damage to the terms of the existing will.

The second option carries forward the provisions of automatic revocation on entry or exit from a relationship. This option would only be appropriate where other aspects of the law are not sufficient to protect the spouse or partner.

Both options 1 and 2 are subject to an expressed intension to the contrary.

The third option, which is modeled on the New Brunswick legislation, attempts to protect the children of the relationship by giving them rights under intestate succession. If, subsequent to the will, the testator enters into or exits from a relationship, and if there are issue of that relationship, the testator is deemed to die intestate. This would have the effect of ensuring that some part of the testator's estate is available for distribution to children. This option substitutes intestacy for the more surgical removal of the former partner under option one.

Failed gifts

15(1) If a beneficial disposition in a will cannot take effect because the intended beneficiary has predeceased the testator, whether before or after the will is made, then unless the Court, in interpreting the will, finds that the testator had a contrary intention, the property that is the subject of the beneficial disposition must be distributed

(a) to the alternate beneficiary, if any, of the beneficial disposition, regardless of whether the will provides for the alternate beneficiary to take in the specific circumstances,

(b) if clause (a) does not apply and the deceased beneficiary was a descendant of the testator, to the deceased beneficiary's descendants who survive the testator, in the same manner as if the deceased beneficiary had died intestate without leaving a surviving spouse,

(c) if neither clause (a) nor (b) applies, to the surviving residuary beneficiaries of the testator, if any, named in the will, in proportion to their interests, or

(d) if none of clauses (a), (b) or (c) applies, in the same manner as if the testator had died intestate.

(2) If a beneficial disposition in a will cannot take effect by reason of the beneficial disposition to the intended beneficiary being void, contrary to law or disclaimed, or for any other reason, then unless the Court, in interpreting the will, finds that the testator had a contrary intention, the property that is the subject of the beneficial disposition must be distributed as if subsection (1)(a) to (d) applied and the intended beneficiary had predeceased the testator.

(3) Notwithstanding subsection (1), no share of the property that is the subject of the beneficial disposition shall be distributed to an individual described in section 13(1) unless section 13(2) applies.

Section 15

This section rationalizes and updates the whole area of the law relating to lapse, ademption and disqualification. It creates one hierarchical scheme to deal with gifts which fail for any reason. The hierarchy follows the expressed wishes of the testator, then the presumed wishes (including residue instructions) and finally relies on intestacy provisions.

Property disposed of before death

16 If a testator makes a will disposing of property to a beneficiary, and after the making of the will but before his or her death, disposes of an interest in the property, the beneficiary inherits any remaining interest the testator has in the property at the time of death unless the Court, in interpreting the will, finds that the testator had a contrary intention.

Section 16

This section provides a corollary for section 15, in that a beneficiary may still recover a "remaining interest" even if property was disposed of before death. The interpretation of "remaining interest" is left to the court.

Interpretation

17 A will must be interpreted in a manner that gives effect to the intent of the testator, and in determining the testator's intent the Court may admit the following evidence:

(a) evidence as to the meaning, in either an ordinary or a specialized sense, of the words or phrases used in the will,

(b) evidence as to the meaning of the provisions of the will in the context of the testator's circumstances at the time of the making of the will, and

(c) evidence of the testator's intent with regard to the matters referred to in the will.

Section 17

This section simplifies a number of difficult technical rules which were more often circumvented than followed. Old rules that required an error on the face of the document are replaced by the simple direction to give effect to the intention of the testator, by putting the court into the language or circumstances of the testator. There is no condition precedent to the court having access to parole evidence if it is appropriate to do so.

Restoration

18 If a writing, marking or obliteration renders part of a will illegible and is not made in accordance with section 8(a) or (b) [or 8.1], whichever applies, or validated by an order under section 11, the Court may allow the original words of the will to be restored or determined by any means the Court considers appropriate.

Section 18

This section replaces the old and uncertain approach of determining whether an obliteration was "apparent". The court may now restore by any means it finds appropriate, and presumably effective.

Conflict of laws

19(1) For the purposes of this section,

(a) an interest in land includes

(i) a leasehold estate, a freehold estate and any other estate or interest in land whether the estate or interest is real property or personal property, and

(ii) a movable whose value consists mainly or entirely in its use in connection with a particular parcel of land by the owner or occupier of the land,

and

(b) an interest in movables includes

(i) an interest in an intangible or tangible thing other than land, and

(ii) personal property other than an estate or interest in land.

(2) The intrinsic validity and effect of a will,

(a) as the will relates to an interest in land, are governed by the law of the place where the land is situated, and

(b) as the will relates to an interest in movables, are governed by the law of the place where the testator was domiciled or habitually resident at the time of the testator's death.

(3) As regards the manner of making a will, a will made either within or outside the Province is valid and admissible to probate if it is made in accordance with the law in force at the time of its making in the place where

(a) the will was made, or

(b) the testator was domiciled or had his or her habitual residence when the will was made.

(4) Nothing in this section precludes resort to the law of the place where the testator was domiciled or had his or her habitual residence at the time of making a will in aid of its construction as regards an interest in land or an interest in movables.

(5) A change of domicile or in the habitual residence of the testator occurring after a will is made does not render the will invalid as regards the manner of its making or affect its proper interpretation.

Section 19

This section updates the conflict of laws rules relating to succession by:

(i) clearly differentiating between land and movable property;
(ii) articulating clear rules for the validity and effect of a will – land is governed by lex situs and movables by the habitual residence (domicile) of the deceased;
(iii) articulating clear rules for formal validity, to be determined according to the place of making or habitual residence (domicile).