

UNIFORM LAW CONFERENCE OF CANADA
CIVIL LAW SECTION

INTERNATIONAL WILLS

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INTERNATIONAL WILLS

[1] In our project on a new Uniform Wills Act, the Working Group concentrated on the topics of creation, revocation, meaning, and validation of wills. It did not deal with the topic of international wills. This memo therefore raises the question of how to incorporate our Convention obligations on international wills into our Uniform Act.

[2] The matter of the Convention on International Wills and how to implement the Convention was dealt with by the Conference in a report to the 1974 meeting. The report was submitted by Mr. Rae Tallin, and the Conference resolved to approve the draft legislation on international wills which was attached to the report.

[3] Since that time, most provinces have adopted the provisions of the Uniform Act on International Wills. The provisions have remained almost identical notwithstanding significant changes in reordering in the balance of wills and succession statutes. This was the case in Alberta when its wills legislation was subject to major renovation in 2012 and 2013. Typical of the adoption of the Uniform Act is the Saskatchewan *Wills Act* of 1996. (French and English versions of the Saskatchewan legislation are attached as Attachment 1.) Often legislation contains the Convention as well as a schedule to the act.

[4] There are two issues relating to the incorporation of our uniform provisions on International Wills into our Uniform Act. The first is that the uniform provisions predate our recent decisions on the protocol for implementing legislation for Conventions. If we are to promulgate the uniform provisions on International Wills then it would be appropriate to ensure that the new implementing provisions are consistent with our protocol. At the direction of the Conference, the provisions could be redrafted to comply with the new protocol. This would not involve any policy changes in the content.

[5] The second issue is one of policy and relates to the requirement in our implementing legislation that a registration system be created for the deposit of international wills. The current provisions impose on the appropriate minister the obligation to establish a system of registration or registration and safekeeping. The requirements go on to require a person who is authorized to act in connection with international wills to record in the appropriate form each monthly activity, and to register that form in the registry prior to the 10th day of the month following any activity with respect to international wills. The issue for the Conference is whether or not the registry system and consequent obligations should be retained.

[6] In the 1974 report the topics of International Wills and the System of Registration, while separate, were dealt with together. The only comment in the report with respect to a registration system is in the second paragraph which states: “because the Convention on International Wills contemplates, although does not require, a system for registration or safekeeping of wills, the two matters are related and may be dealt with at the same time.”

UNIFORM LAW CONFERENCE OF CANADA

[7] There is no other comment on the desirability or efficacy of a registration system. There are consequential provisions dealing with the obligations of lawyers to register, rules relating to the access to the register, and rules relating to the ability to register previously created international wills.

[8] In 1974 the question of safekeeping of wills was dealt with in two ways. It was not uncommon for lawyers to offer the service of safekeeping of original wills. By that time the volume of documents had not become a major issue for law firms, nor had the question of digitizing records for safekeeping become an issue. There was also the possibility of depositing the will of a living person with a public official, usually housed in the Ministry of the Attorney General. It is difficult to determine why it was thought necessary to create a registry system when such a system was not required by the Convention. Nor is it clear why it was thought that the Convention contemplated a registry system.

[9] Since 1974 the practice of deposit of the will of a living person has fallen into disuse. Anecdotal evidence suggests that this rarely occurs (even where it is still permitted), and suggests that the deposit of international wills is even more rare. Some provinces have got out of the practice of registering the deposit of wills of living persons, arguing that the province should not be providing a public service for the storage and safekeeping of documents, when private individuals are equally able and ought to be looking after their own documents.

[10] The question then is whether we should retain a requirement of registration for international wills when the current climate appears to be that we should not continue a system of registration for the deposit of wills of living persons. It may be that the argument in favour of registration of international wills was based on the fact that it was convenient to do so given the existence of the registry for deposit of wills of living persons. Given the demise of the registry for deposit of wills of living persons, does it make sense to continue a requirement that the Convention does not impose.

[11] Once this policy issue is determined then the provisions dealing with international wills can be redrafted in accordance with our new protocol. It would be helpful in advance of our Conference if provincial delegates could inquire of their surrogate or probate clerks or will registrars, what the volume of registration is, and what are the results of searches when a probate file is opened and a search is performed for wills deposited in the registry. This information will help us determine whether or not the registry should be continued or whether, as I suspect from inquiries and anecdotal evidence in Alberta, that searches reveal only documents that were registered some time ago, or that the number of international wills is negligible.

INTERNATIONAL WILLS

[12] The purpose of the Convention was to add a second layer of credibility to an international will. The Convention requires two witnesses and a third person who is authorized to deal with international wills who in turn provides a certificate that the requirements of the Convention have been satisfied. If that certificate and the underlying document, appropriately signed and witnessed, are present, the requirement of registration appears to add little value.

Attachment 1, Saskatchewan *Wills Act*,
Attachment 2, Convention on International Wills

UNIFORM LAW CONFERENCE OF CANADA

Attachment 1

The Wills Act, 1996

Chapter W-14.1 of the Statutes of Saskatchewan, 1996 (effective August 1, 1997) as amended by the Statutes of Saskatchewan, 2001, c.51.

INTERNATIONAL WILLS

Interpretation

41 In this section and sections 42 to 51:

“convention” means the Convention Providing a Uniform Law on The Form of an International Will set out in the Schedule; («convention»)

“international will” means a will that has been made in accordance with the rules regarding an international will set out in the Annex to the convention; («testament international»)

“minister” means the member of the Executive Council to whom for the time being the administration of this Act is assigned; («ministre»)

“registration system” means a system for the registration or the registration and safekeeping of international wills established pursuant to section 46 or pursuant to an agreement entered into pursuant to section 47; («système d’enregistrement»)

“registrar” means the person responsible for the operation and management of the registration system. («conservateur des testaments internationaux»)

1996, c.W-14.1, s.41.

Application of convention

42 On and from October 8, 1982, the convention is in force in Saskatchewan and applies to wills as the law of Saskatchewan.

1996, c.W-14.1, s.42.

Rules re international wills

43 On and from October 8, 1982, the rules regarding an international will set out in the Annex to the convention are law in Saskatchewan.

1996, c.W-14.1, s.43.

Validity under other laws

44 Nothing in sections 41 to 51 detracts from or affects the validity of a will that is valid pursuant to the laws in force in Saskatchewan other than sections 41 to 51.

1996, c.W-14.1, s.44.

Authorized persons

INTERNATIONAL WILLS

45 All lawyers are designated as persons authorized to act in connection with international wills.

1996, c.W-14.1, s.45.

Registration system

46 The minister shall establish a system of registration or registration and safekeeping of international wills.

1996, c.W-14.1, s.46.

Agreements re registration system

47 With the approval of the Lieutenant Governor in Council, the minister, for and on behalf of the Crown in right of Saskatchewan, may enter into an agreement with the government of another province or a minister or official of the government of another province:

- (a) relating to the establishment of a system of registration or registration and safekeeping of international wills for Saskatchewan and that other province, and for the joint operation of that system; or
- (b) relating to the exchange of information contained in a system established pursuant to section 46 and a similar system established for that other province.

1996, c.W-14.1, s.47.

Joint system in lieu of provincial system

48 Where a registration system is established pursuant to an agreement entered into pursuant to clause 47(a), the minister is relieved of his or her obligation pursuant to section 46.

1996, c.W-14.1, s.48.

Disclosure of information in system

49(1) No information contained in the registration system concerning the international will of a testator is to be released from the system except:

- (a) in accordance with an agreement made pursuant to section 47; or
- (b) to a person who satisfies the registrar that:
 - (i) he or she is the testator;
 - (ii) he or she is a person who is authorized by the testator to obtain the information; or
 - (iii) the testator is dead and the person is an appropriate person to have access to the information.

(2) An international will deposited in the registration system for safekeeping may only be released to a person who satisfies the registrar that:

- (a) he or she is the testator;

UNIFORM LAW CONFERENCE OF CANADA

(b) he or she is a person who is authorized by the testator to obtain the will; or

(c) the testator is dead and the person is an appropriate person to have custody of the will for the purposes of the administration of the estate of the testator or is the agent of that person.

1996, c.W-14.1, s.49.

Use of registration system

50(1) Where a lawyer has acted during any month respecting an international will in his or her capacity as a person authorized to act in connection with international wills, he or she, on or before the tenth day of the next month, shall file or cause to be filed with the registrar, in a sealed envelope, a list on a form prescribed in the regulations, certified by the lawyer or his or her agent, setting out:

(a) the name and address of the testator;

(b) a description of the testator; and

(c) the date of execution of each international will with respect to which he or she so acted.

(2) The registrar shall enter the information in the registration system.

(3) The failure of a lawyer to comply with subsection (1) does not affect the validity of the international will.

1996, c.W-14.1, s.50.

Regulations

51 The Lieutenant Governor in Council may make regulations respecting the operation, maintenance and use of the registration system, including:

(a) prescribing forms for use in the system; and

(b) prescribing fees for searches of the registration system.

1996, c.W-14.1, s.51.

INTERNATIONAL WILLS

Attachment 2

Convention providing a Uniform Law on the Form of an International Will (Washington, D.C., 1973)

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CONVENTION PROVIDING A UNIFORM LAW ON THE FORM OF AN INTERNATIONAL WILL

The States signatory to the present Convention,

DESIRING to provide to a greater extent for the respecting of last wills by establishing an additional form of will hereinafter to be called an "international will" which, if employed, would dispense to some extent with the search for the applicable law;

HAVE RESOLVED to conclude a Convention for this purpose and have agreed upon the following provisions:

Article I

1. Each Contracting Party undertakes that not later than six months after the date of entry into force of this Convention in respect of that Party it shall introduce into its law the rules regarding an international will set out in the Annex to this Convention.
2. Each Contracting Party may introduce the provisions of the Annex into its law either by reproducing the actual text, or by translating it into its official language or languages.
3. Each Contracting Party may introduce into its law such further provisions as are necessary to give the provisions of the Annex full effect in its territory.
4. Each Contracting Party shall submit to the Depositary Government the text of the rules introduced into its national law in order to implement the provisions of this Convention.

Article II

1. Each Contracting Party shall implement the provisions of the Annex in its law, within the period provided for in the preceding article, by designating the persons who, in its territory, shall be authorized to act in connection with international wills. It may also designate as a person authorized to act with regard to its nationals its diplomatic or consular agents abroad insofar as the local law does not prohibit it.
2. The Party shall notify such designation, as well as any modifications thereof, to the Depositary Government.

UNIFORM LAW CONFERENCE OF CANADA

Article III

The capacity of the authorized person to act in connection with an international will, if conferred in accordance with the law of a Contracting Party, shall be recognized in the territory of the other Contracting Parties.

Article IV

The effectiveness of the certificate provided for in Article 10 of the Annex shall be recognized in the territories of all Contracting Parties.

Article V

1. The conditions requisite to acting as a witness of an international will shall be governed by the law under which the authorized person was designated. The same rule shall apply as regards an interpreter who is called upon to act.

2. Nonetheless no one shall be disqualified to act as a witness of an international will solely because he is an alien.

Article VI

1. The signature of the testator, of the authorized person, and of the witnesses to an international will, whether on the will or on the certificate, shall be exempt from any legalization or like formality.

2. Nonetheless, the competent authorities of any Contracting Party may, if necessary, satisfy themselves as to the authenticity of the signature of the authorized person.

Article VII

The safekeeping of an international will shall be governed by the law under which the authorized person was designated.

Article VIII

No reservation shall be admitted to this Convention or to its Annex.

Article IX

1. The present Convention shall be open for signature at Washington from October 26, 1973, until December 31, 1974.

2. The Convention shall be subject to ratification.

3. Instruments of ratification shall be deposited with the Government of the United States of America, which shall be the Depositary Government.

INTERNATIONAL WILLS

Article X

1. The Convention shall be open indefinitely for accession.
2. Instruments of accession shall be deposited with the Depositary Government.

Article XI

1. The present Convention shall enter into force six months after the date of deposit of the fifth instrument of ratification or accession with the Depositary Government.
2. In the case of each State which ratifies this Convention or accedes to it after the fifth instrument of ratification or accession has been deposited, this Convention shall enter into force six months after the deposit of its own instrument of ratification or accession.

Article XII

1. Any Contracting Party may denounce this Convention by written notification to the Depositary Government.
2. Such denunciation shall take effect twelve months from the date on which the Depositary Government has received the notification, but such denunciation shall not affect the validity of any will made during the period that the Convention was in effect for the denouncing State.

Article XIII

1. Any State may, when it deposits its instrument of ratification or accession or at any time thereafter, declare, by a notice addressed to the Depositary Government, that this Convention shall apply to all or part of the territories for the international relations of which it is responsible.
2. Such declaration shall have effect six months after the date on which the Depositary Government shall have received notice thereof or, if at the end of such period the Convention has not yet come into force, from the date of its entry into force.
3. Each Contracting Party which has made a declaration in accordance with paragraph 1 of this Article may, in accordance with Article XII, denounce this Convention in relation to all or part of the territories concerned.

Article XIV

1. If a State has two or more territorial units in which different systems of law apply in relation to matters respecting the form of wills, it may at the time of signature, ratification, or accession, declare that this Convention shall extend to all its territorial units or only to one or more of them, and may modify its declaration by submitting another declaration at any time.
2. These declarations shall be notified to the Depositary Government and shall state expressly the territorial units to which the Convention applies.

UNIFORM LAW CONFERENCE OF CANADA

Article XV

If a Contracting Party has two or more territorial units in which different systems of law apply in relation to matters respecting the form of wills, any reference to the internal law of the place where the will is made or to the law under which the authorized person has been appointed to act in connection with international wills shall be construed in accordance with the constitutional system of the Party concerned.

Article XVI

1. The original of the present Convention, in the English, French, Russian and Spanish languages, each version being equally authentic, shall be deposited with the Government of the United States of America, which shall transmit certified copies thereof to each of the signatory and acceding States and to the International Institute for the Unification of Private Law.

2. The Depositary Government shall give notice to the signatory and acceding States, and to the International Institute for the Unification of Private Law, of:

- (a) any signature;
- (b) the deposit of any instrument of ratification or accession;
- (c) any date on which this Convention enters into force in accordance with Article XI;
- (d) any communication received in accordance with Article I, paragraph 4;
- (e) any notice received in accordance with Article II, paragraph 2;
- (f) any declaration received in accordance with Article XIII, paragraph 2, and the date on which such declaration takes effect;
- (g) any denunciation received in accordance with Article XII, paragraph 1, or Article XIII, paragraph 3, and the date on which the denunciation takes effect;
- (h) any declaration received in accordance with Article XIV, paragraph 2, and the date on which the declaration takes effect.

IN WITNESS WHEREOF, the undersigned Plenipotentiaries, being duly authorized to that effect, have signed the present Convention.

INTERNATIONAL WILLS

DONE at Washington this twenty-sixth day of October, one thousand nine hundred and seventy-three.

ANNEX

UNIFORM LAW ON THE FORM OF AN INTERNATIONAL WILL

Article 1

1. A will shall be valid as regards form, irrespective particularly of the place where it is made, of the location of the assets and of the nationality, domicile or residence of the testator, if it is made in the form of an international will complying with the provisions set out in Articles 2 to 5 hereinafter.

2. The invalidity of the will as an international will shall not affect its formal validity as a will of another kind.

Article 2

This law shall not apply to the form of testamentary dispositions made by two or more persons in one instrument.

Article 3

1. The will shall be made in writing.
2. It need not be written by the testator himself.
3. It may be written in any language, by hand or by any other means.

Article 4

1. The testator shall declare in the presence of two witnesses and of a person authorized to act in connection with international wills that the document is his will and that he knows the contents thereof.

2. The testator need not inform the witnesses, or the authorized person, of the contents of the will.

Article 5

1. In the presence of the witnesses and of the authorized person, the testator shall sign the will or, if he has previously signed it, shall acknowledge his signature.

2. When the testator is unable to sign, he shall indicate the reason therefor to the authorized person who shall make note of this on the will. Moreover, the testator may be authorized by the law under which the authorized person was designated to direct another person to sign on his behalf.

3. The witnesses and the authorized person shall there and then attest the will by signing in the presence of the testator.

UNIFORM LAW CONFERENCE OF CANADA

Article 6

1. The signatures shall be placed at the end of the will.
2. If the will consists of several sheets, each sheet shall be signed by the testator or, if he is unable to sign, by the person signing on his behalf or, if there is no such person, by the authorized person. In addition, each sheet shall be numbered.

Article 7

1. The date of the will shall be the date of its signature by the authorized person.
2. This date shall be noted at the end of the will by the authorized person.

Article 8

In the absence of any mandatory rule pertaining to the safekeeping of the will, the authorized person shall ask the testator whether he wishes to make a declaration concerning the safekeeping of his will. If so and at the express request of the testator the place where he intends to have his will kept shall be mentioned in the certificate provided for in Article 9.

Article 9

The authorized person shall attach to the will a certificate in the form prescribed in Article 10 establishing that the obligations of this law have been complied with.

Article 10

The certificate drawn up by the authorized person shall be in the following form or in a substantially similar form:

CERTIFICATE

(Convention of October 26, 1973)

1. I, (name, address and capacity), a person authorized to act in connection with international wills
2. Certify that on (date) at (place)
3. (testator) (name, address, date and place of birth) in my presence and that of the witnesses

INTERNATIONAL WILLS

4. (a) (name, address, date and place of birth)

(b). (name, address, date and place of birth)

has declared that the attached document is his will and that he knows the contents thereof.

5. I furthermore certify that:

6. (a) in my presence and in that of the witnesses

(1) the testator has signed the will or has acknowledged his signature previously affixed.

*(2) following a declaration of the testator stating that he was unable to sign his will for the following reason

– I have mentioned this declaration on the will

* – the signature has been affixed by (name, address)

7. (b) the witnesses and I have signed the will;

8. * (c) each page of the will has been signed by
and numbered;

9. (d) I have satisfied myself as to the identity of the testator and of the witnesses as designated above;

10. (e) the witnesses met the conditions requisite to act as such according to the law under which I am acting;

11. * (f) the testator has requested me to include the following statement concerning the safekeeping of his will:
.

12. PLACE

UNIFORM LAW CONFERENCE OF CANADA

13. DATE

14. SIGNATURE and, if necessary, SEAL

* To be completed if appropriate.

Article 11

The authorized person shall keep a copy of the certificate and deliver another to the testator.

Article 12

In the absence of evidence to the contrary, the certificate of the authorized person shall be conclusive of the formal validity of the instrument as a will under this Law.

Article 13

The absence or irregularity of a certificate shall not affect the formal validity of a will under this Law.

Article 14

The international will shall be subject to the ordinary rules of revocation of wills.

Article 15

In interpreting and applying the provisions of this law, regard shall be had to its international origin and to the need for uniformity in its interpretation.