UNIFORM LAW CONFERENCE OF CANADA

CIVIL LAW SECTION

REPORT OF THE WORKING GROUP ON CONFLICT OF LAW ISSUES IN SUCCESSION MATTERS

Halifax, Nova Scotia

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UNIFORM LAW CONFERENCE OF CANADA

BACKGROUND

[1] At its Annual Meeting in 2009, the ULCC received the Study Paper on Conflict of Law Issues in Succession Matters, prepared by Professor Gerald Robertson of the University of Alberta,[1] and resolved that a Working Group be established and directed to consider the Study Paper and report back to the Conference in 2010.

[2] This is the report of the Working Group. The members of the Working Group were Clark Dalton, Peter Lown, Averie McNary, Tyler Nyvall, Gerald Robertson, Lynn Romeo, Frédérique Sabourin, and Manon Dostie.

[3] The Study Paper made twelve recommendations. This report discusses each of them.

STUDY PAPER RECOMMENDATION #1

[4] Recommendation No. 1 in the Study Paper was as follows:[2]

> Those provinces and territories which have not implemented the choice of law rules contained in the 1966 revisions to the Uniform Wills Act should give active consideration to doing so, in order to avoid the significant problem of lack of uniformity which presently exists across Canada.

[5] The 1966 revisions to the Uniform Act[3] gave effect to the provisions of the 1961 Hague Convention on the Formal Validity of Wills and achieved two principal goals. The first was to expand even further the list of legal systems by which a will would be formally valid in respect of moveables (reflecting the underlying policy of upholding the validity of wills whenever possible, so as to give effect to the intention of the testator). To the 1953 list were added the law of the place where the testator was habitually resident, or was a national, at the time the will was made. The 1966 revisions also reduced the list by eliminating the testator's domicile of origin, because it was felt that

individuals often have little or no connection with the place that was their domicile of origin (particularly by the time they make a will), and hence this is no longer an appropriate connecting factor to use for formal validity.

[6] The other main feature of the 1966 revisions to the Uniform Act, once again reflecting the provisions of the 1961 Hague Convention, was that references to "foreign law" are interpreted as a reference only to the internal law of the foreign jurisdiction, thereby eliminating any application of the doctrine of "renvoi".

[7] As is discussed in the Study Paper (paragraphs 15 to 21 and 29 to 30), there is a lack of uniformity across Canada with respect to the adoption of the 1966 revisions. This creates the potential for a will to be valid in one province or territory and invalid in another.

[8] The Working Group agrees with the recommendation that those provinces and territories which have not implemented the choice of law rules contained in the 1966 revisions to the Uniform Wills Act should give active consideration to doing so.[4]

STUDY PAPER RECOMMENDATION #2

[9] Recommendation No. 2 in the Study Paper was as follows:[5]

> Consideration should be given to amending section 40 of the Uniform Wills Act to include the law of the testator's nationality and habitual residence at the time of death in the list of legal systems which determine the formal validity of a will in respect of moveables.

[10] The Working Group recommends that section 40 should be so amended.[6]

[11] Nationality and habitual residence as connecting factors for determining the formal validity of wills with respect to moveables are already contained in the Uniform Act, but only as at the time of making the will and not at the time of the testator's death. For the reasons set out in the Study Paper (paragraphs 32 to 35), it makes sense to extend this to the time of the testator's death.

[12] The current Uniform Act uses nationality as a connecting factor only where "there was in that place one body of law governing the wills of nationals". In other words, it does not apply where the testator was a national of a federal jurisdiction (such as Canada). The Working Group does not recommend any change in this respect. It would be difficult to develop a principled basis for applying this connecting factor to federal jurisdictions, and there does not seem to be any pressing need to do so given that the list of other applicable connecting factors is already quite long.

STUDY PAPER RECOMMENDATION #3

[13] Recommendation No. 3 in the Study Paper was as follows:[7]

> Should section 40 of the Uniform Wills Act be amended to include the law of the place where the property is situated in the list of legal systems which determine the formal validity of a will in respect of moveables?

[14] The Working Group recommends that section 40 should be so amended.[8]

[15] As the Study Paper points out (paragraph 37), one of the potential problems with this recommendation is that the determination of the situs of moveable property is not always straightforward. However, although this may be true, the Working Group is of the view that it is important that there be consistency between the rules governing succession to moveable and immoveable property whenever possible, and for that reason it recommends that section 40 be amended to include the law of the place where the property is situated for both moveables and immoveables.

STUDY PAPER RECOMMENDATION #4

[16] Recommendation No. 4 in the Study Paper was as follows:[9]

> Consideration should be given to extending section 40 of the Uniform Wills Act to include wills relating to immoveable property.

[17] Section 40 significantly expands the list of connecting factors which govern the formal validity of a will. However, it applies only to moveable property. For the reasons set out in the Study Paper (paragraphs 38 to 40), the Working Group agrees that section 40 should be amended to include wills relating to immoveable property. The amendment is in keeping with the 1961 Hague Convention, and with the philosophy of upholding the validity of wills whenever possible, and (like Recommendation No. 3) it provides for consistency between moveable and immoveable property.[10]

STUDY PAPER RECOMMENDATION #5

[18] Recommendation No. 5 in the Study Paper was as follows:[11]

> Although many commentators are of the view that the doctrine of renvoi should be abolished, no change to the Uniform Act is necessary to give effect to this recommendation. What is needed is for more provinces to implement the current provisions of the Uniform Act, and in particular, the 1966 revisions.

[19] This is already dealt with in Recommendation No. 1 above.

STUDY PAPER RECOMMENDATION #6

[20] Recommendation No. 6 in the Study Paper was as follows:[12]

> Consideration should be given to amending the Uniform Wills Act to include a codification of the common law rules relating to capacity to make a will in respect of moveables, and also immoveables.

[21] For the reasons set out in the Study Paper (at paragraphs 49 to 50), the Working Group recommends that the Uniform Act should be amended to include a codification of the common law rules relating to capacity to make a will in respect of moveables, and also immoveables. The failure to include provisions dealing with capacity in the current Uniform Act appears to have been an oversight, and it should be corrected. The effect of this would to make it clear that capacity to make a will is governed by the law of the testator's domicile at the time of making the will (in respect of moveables) and by the *lex situs* (in respect of immoveables).

[22] We recognize that this proposed amendment, while merely codifying the common law, cannot be introduced in Quebec in respect of immoveables, because in Quebec capacity is governed by the law of the domicile regardless of whether the property is moveable or immoveable.[13]

STUDY PAPER RECOMMENDATION #7

[23] Recommendation No. 7 in the Study Paper was as follows:[14]

> Consideration should be given to amending the Uniform Wills Act to include a provision that the issue of whether a will is revoked by subsequent marriage, or by divorce or separation, is a matter of matrimonial law rather than succession law, and therefore is governed by the law of the testator's domicile at the time of the marriage (or divorce), both in relation to moveable and immoveable property.

[24] This is the first of three recommendations made in the Study Paper (the others are Recommendations 10 and 12, which are considered below) which raises the issue of whether the

Uniform Act should be amended to include provisions relating to "characterization". The term "characterization" refers to first the step in the choice of law process, whereby the court assigns the issue under consideration to a specific juridical category (for example, matrimonial law or succession law) so as to be able then to select the applicable choice of law rule. As is explained in the Study Paper, the outcome of the case may differ significantly depending on how the issue is characterized.

[25] Having discussed this at some length, the Working Group recommends that the Uniform Act should not be amended to include characterization provisions (this applies equally to Recommendations 10 and 12, discussed below).

[26] We believe that it should be left to the courts to determine the proper characterization in any given situation. It is very unusual to find legislation which contains provisions which characterize an issue for conflicts purposes,[15] and there does not appear to be any strong reason to support a departure from this in the present case.[16]

STUDY PAPER RECOMMENDATION #8

[27] Recommendation No. 8 in the Study Paper was as follows:[17]

> Despite the fact that the 1989 Hague Convention has not been signed or ratified by any common law jurisdiction, adoption of its underlying principle of a unitary approach to choice of law rules in succession (as recommended by the Manitoba Law Reform Commission) should not be lightly dismissed, and should be part of any continued consideration by a Working Group of reform in this area.

[28] The Working Group does not recommend a whole scale adoption of the unitary approach which underlies the 1989 Hague Convention. However, in light of some of our other

recommendations - in particular Recommendation #3 (which applies the *lex situs* governing formal validity to both moveables and immoveables) and Recommendation #4 (which extends section 40 of the Uniform Act to immoveables) - we are already recommending more uniformity between moveable and immoveable property.

STUDY PAPER RECOMMENDATION #9

[29] Recommendation No. 9 in the Study Paper was as follows:[18]

A. Should legislation be introduced to prevent a surviving spouse from claiming multiple preferred shares on intestacy (i.e., "double dipping")?

B. If so, should this achieved by:
   (i) limiting the spouse to the highest available preferred share; or
   (ii) adopting a single choice of law rule for intestate succession (such as the deceased's domicile or habitual residence at death), thereby creating only one preferred share; or
   (iii) some other approach?

C. If legislation is adopted as per (A), should it also contain provisions to deal with the possible lack of uniformity, along the lines of the New South Wales Succession Amendment (Intestacy) Bill 2009?

[30] For the reasons set out in the Study Paper, we recommend that the Uniform Intestate Succession Act should be amended to prevent a surviving spouse from claiming multiple preferred shares on intestacy.[19] In our view the most appropriate way of achieving this is by limiting the spouse of the highest preferred share, which is the approach which has recently been adopted in New South Wales.[20]

[31] We also recommend the adoption of a provision similar to that found in the New South Wales legislation,[21] in order to prevent the surviving spouse circumventing the restrictions on double dipping where one of the preferred shares is in a jurisdiction which does not have these restrictions. The proposed provision would require that the spouse's entitlement under the law of the jurisdiction which does not have restrictions must first be satisfied (or renounced) before any claim can be made in the other jurisdiction.[22]

STUDY PAPER RECOMMENDATION #10

[32] Recommendation No. 10 in the Study Paper was as follows:[23]

> Should intestate succession legislation be amended to include choice of law provisions to determine issues of status, particularly those akin to marriage, such as who is a "common law partner"?

[33] For the reasons discussed in paragraphs 23 to 26 above, in relation to Recommendation #7, the Working Group does not recommend that these amendments be made.

STUDY PAPER RECOMMENDATION #11

[34] Recommendation No. 11 in the Study Paper was as follows:[24]

> Those provinces and territories which have not implemented the Uniform Jurisdiction and Choice of Law Rules in Domestic Property Proceedings Act (1997) should give active consideration to doing so, in order to avoid the significant problem of lack of uniformity which presently exists across Canada in relation to matrimonial property.

[35] For the reasons given in the Study Paper (paragraphs 78 to 80), the Working Group agrees with this recommendation.

STUDY PAPER RECOMMENDATION #12

[36] Recommendation No. 12 in the Study Paper was as follows:[25]

> Consideration should be given to including in uniform legislation, provisions which address the issue of how the division of matrimonial property upon death should be characterized for choice of law purposes, to ensure that it is characterized as a matter of matrimonial property law rather than succession law.

[37] For the reasons discussed in paragraphs 23 to 26 above, in relation to Recommendation #7, the Working Group does not recommend that these amendments be made.

SUMMARY

[38] The Working Group's recommendations are as follows:

1. Those provinces and territories which have not implemented the choice of law rules contained in the 1966 revisions to the Uniform Wills Act should give active consideration to doing so, in order to avoid the significant problem of lack of uniformity which presently exists across Canada.

2. Section 40 of the Uniform Wills Act should be amended to include the law of the testator's nationality and habitual residence at the time of death in the list of legal systems which determine the formal validity of a will in respect of moveables.

3. Section 40 of the Uniform Wills Act should be amended to include the law of the place where the property is situated in the list of legal systems which determine the

formal validity of a will in respect of moveables.

4. Section 40 of the Uniform Wills Act should be amended to include wills relating to immoveable property.

5. No additional recommendation with respect to the doctrine of renvoi is necessary, because this is already covered by Recommendation No.1.

6. The Uniform Wills Act should be amended to include a codification of the common law rules relating to capacity to make a will in respect of moveables, and also immoveables.

7. The Uniform Wills Act should not be amended to include provisions dealing with how revocation of a will by subsequent marriage, or by divorce or separation, should be characterized for choice of law purposes.

8. No additional recommendation is made with respect to the 1989 Hague Convention.

9. The Uniform Intestate Succession Act should be amended to prevent a surviving spouse from claiming multiple preferred shares on intestacy (i.e., "double dipping"), by limiting the spouse to the highest available preferred share. The Uniform Intestate Succession Act should also contain provisions to deal with the possible lack of uniformity, along the lines of section 106(3)(b) of the New South Wales Succession Amendment (Intestacy) Act 2009.

10. Intestate succession legislation should not be amended to include choice of law provisions to determine issues of status, such as the definition of “spouse” and “common law partner".

11. Those provinces and territories which have not implemented the Uniform Jurisdiction and Choice of Law Rules in Domestic Property Proceedings Act (1997) should give active consideration to doing so, in order to avoid the significant problem of lack of uniformity which presently exists across Canada in relation to matrimonial property.

12. Uniform legislation should not be amended to include provisions which address the issue of how the division of matrimonial property upon death should be characterized for choice of law purposes.

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1 Gerald B. Robertson, *Study Paper on Conflict of Law Issues in Succession Matters* (ULCC, 2009) ["Study Paper"].

2 For the discussion underlying this recommendation see Study Paper paras. 29-30.

3 The Conflict of Law provisions of the Uniform Act are reproduced in Appendix A to the Study Paper.

4 Subsequent to last year's Annual Meeting, British Columbia enacted legislation which (amongst other things) gives effect to the 1966 revisions to the Uniform Wills Act: see *Wills, Estates and Succession Act*, S.B.C. 2009, c. 13, ss. 79(1), 80(1) [not yet proclaimed in force].

5 For the discussion underlying this recommendation see Study Paper paras. 32-35.

6 The B.C. legislation which was enacted after last year's Annual Meeting gives effect to this amendment: see note 4 above, ss. 80(1)(c), (d) [not yet proclaimed in force].

7 For the discussion underlying this recommendation see Study Paper paras. 38-40.

8 The B.C. legislation which was enacted after last year's Annual Meeting gives effect to this amendment: see note 4 above, s. 80(1)(f) [not yet proclaimed in force].

9 For the discussion underlying this recommendation see Study Paper paras. 38-40.

10 The B.C. legislation which was enacted after last year's Annual Meeting gives effect to this amendment: see note 4 above, s. 80(1) [not yet proclaimed in force].

11 For the discussion underlying this recommendation see Study Paper paras. 41-48.

12 For the discussion underlying this recommendation see Study Paper paras. 49-50.

[13] *Civil Code of Québec*, S.Q. 1991, c. 64, article 3083.

[14] For the discussion underlying this recommendation see Study Paper paras. 51-57.

[15] A relatively minor example of statutory characterization is found in the Uniform Wills Act, s. 44(1), which provides as follows:

> Where, whether in pursuance of this Part or not, a law in force outside this Province is to be applied in relation to a will, any requirement of that law that
> (a) special formalities are to be observed by testators answering a particular description; or
> (b) witnesses to the making of a will are to possess certain qualifications,
> shall be treated, notwithstanding any rule of that law to the contrary, as a formal requirement only.

[16] It should be noted that the B.C. legislation which was enacted after last year's Annual Meeting, note 4 above, does not contain any characterization provisions, other than in s. 79(2) which merely gives effect to section 44(1) of the Uniform Act, discussed in note 15 above.

[17] For the discussion underlying this recommendation see Study Paper para. 58.

[18] For the discussion underlying this recommendation see Study Paper paras. 60-72.

[19] Note that Quebec does not provide for a preferred spousal share on intestacy.

[20] *Succession Amendment (Intestacy) Act 2009*, No. 29, s. 106(3)(a).

[21] *Ibid.* s. 106(3)(b).

[22] This is discussed more fully in the Study Paper paras. 71-72.

[23] For the discussion underlying this recommendation see Study Paper paras. 73-76.

[24] For the discussion underlying this recommendation see Study Paper paras. 78-80.

[25] For the discussion underlying this recommendation see Study Paper paras. 81-86.