

MINUTES OF THE CIVIL SECTION, 2020

ELECTRONIC WILLS Report and Uniform Act

Presenter: Peter J M Lown QC Alberta

Mr. Lown presented the final report of the working group. He began by acknowledging the working group. He also acknowledged the connections the working group has formed with STEP International, the Uniform Law Commission, the English Law Commission, and the New South Wales Law Commission, who are working on similar projects.

Mr. Lown noted that the project amends the 2015 Uniform Wills Act (UWA) to introduce equivalent provisions for electronic documents to those that currently exist for conventional documents and that the project does not deal with digital assets, digital vaults, or a complete digital identity. The project also cures an inadvertent omission to the UWA which did not contain a general provision on revocation of wills. He further observed that the proportion of the population that has a will is not as high as it ought to be and that it is hoped that the amendments would help enable more individuals to prepare a will. Finally, he noted that the proposed amendments would not require wills and estate practitioners to change their practice, but would enable different ways of providing services.

In addition to preparing amendments to the UWA, the working group decided that the exceptions for wills should remain in the *Uniform Electronic Commerce Act* and prepared amendments to the commentary of that Act to alert readers that provisions related to electronic wills are in the UWA.

The working group proposed to apply the same concepts as applied in the amendments to the UWA to the *Uniform Enduring Powers of Attorney Act*.

Mr. Lown observed that several jurisdictions adopted emergency legislation in the areas of remote witnessing and electronic documents to address issues linked with COVID-19 restrictions. He also noted that British Columbia recently amended its legislation to allow electronic wills and remote witnessing of wills without linking this to emergency measures. It was also noted that Saskatchewan recently made its remote witnessing provisions permanent.

Mr. Lown then led the delegates through a review of the proposed amendments to the UWA. Highlights of the review and discussion included:

- a comprehensive section dealing with the revocation of wills including electronic wills other than revocation by marriage which is already included in the UWA;
- definitions of:
 - “communication” which provides that the essential elements of communication are that it has to be two-way and that each person must see, hear, and speak to each other. The definition also refers to assistive technology that enables individuals to do those things or the equivalent. It was noted that adjustments

were needed to the French version to ensure concordance with the English version and appropriate civil law terminology;

- “electronic” which is identical to the definition in the *Uniform Electronic Commerce Act*;
 - “electronic signature” which is also identical to the definition in the *Uniform Electronic Commerce Act*. The working group considered the definition in the UNCITRAL Model Law on E-signatures but decided that although it has some advantages, these do not outweigh the value in retaining the law already in use. Mr. Lown noted that an electronic signature can be one of a number of things such as an electronic recording of the actual signature (like a pdf) inserted electronically into a document or a mark that is adopted to show approval of the document, like stylized initials. There are also apps and technologies that have a two-step authentication process to validate the identity of the individual approving the document. In that case, there may not be a signature placed in the document itself. Rather, there is something associated with the document to show that approval has occurred. The working group used the words “in, attached to, or associated with the document” to contemplate all these possibilities and to ensure that the Act is open to new technology and is technology neutral;
 - “Electronic form” to distinguish between conventional will and wills in electronic form. The essential elements are that the electronic will must be stored or recorded, capable of retrieval for future reference, and accessible for future reference and “readable as text”. It was noted that the definition thus precludes a will made by video but that this issue could be revised in the future. It was also noted by a delegate that the definition could eventually be expanded to include machine-readable wills;
 - “Electronic presence” which incorporates the definition of “communication” and specifies that individuals should be able to communicate to an extent similar to communication in physical presence. The working group considered speculative concerns about risks of duress and undue influence if individuals are not in physical presence of each other but did not address them in the amendments because practitioners already have procedures to guard against these risks.
- new section 3.1 on the electronic format of the will, electronic signatures, and other formalities similar to those set out in section 3, which deals with traditional wills;
 - new section 3.1(5.1) on signatories in counterpart which is a practice that developed over the past six months in response to situations when parties couldn’t be in the same location because of COVID-19 related restrictions. It involves each party signing their own document, so that the assembled documents would satisfy the formal requirements of the Act. The working group questioned whether the practice might be temporary in response to the pandemic or will become common practice. The working group added it to the draft amendments because British Columbia already adopted the process. It was noted that signing in counterpart is different from signing in electronic presence because in the latter case, all the parties are sharing the document so they are signing the same version rather than counterparts. It was suggested that adjustments may be needed to the French translation of “counterpart” and that « copie » and “exemplaire” may be more appropriate;
 - new section 3.1(6) on the place of execution of the will which is that of the location of the testator;

- the draft amendments do not allow for electronic holograph wills but these wills may be permitted under dispensing powers;
- no amendments were made to military wills;
- a delegate suggested that the project should address the issue of safeguards to ensure that an electronic will submitted for probate is authentic in that it was not altered after having been signed and witnessed. The delegate suggested that the act could allow for regulations setting standards to ensure security, reliability and authenticity of an electronic will. It was explained that the project did not address probate requirements and that authenticity could easily be addressed through an examination of the electronic will's metadata;
- section 9.2 on revocation of electronic wills. It was agreed that the drafter would ensure that an electronic revocation of a paper will would be valid and vice versa. It was also noted that section 9.2 may need to be amended to add a provision for electronic wills parallel to section 9.1(2) on conventional wills;
- in response to question as to whether a requirement of mandatory professional involvement should be included, it was noted that this has never been required by the common law and that moving in this direction would be an important change from present practice and would reduce access to justice. A delegate pointed out that under a COVID-19 related emergency order in a jurisdiction, lawyers are required for remote witnessing. Mr. Lown responded that the emergency context is quite different from the general electronic will context. The Conference did not provide any directions to the working group to consider this issue.
- a delegate emphasized that a review of the French language version was needed to allow for better harmonization with the concepts contained in the *Civil Code of Québec*, the *Code of Civil Procedure* and the *Notarial Act* of Québec. Another delegate noted that, as this was an act amending an existing uniform act, the French version was drafted to harmonize with the terminology of the existing uniform act and that this should be born in mind in the French language review.

RESOLVED:

THAT the report of the working group be accepted;

THAT the *Draft Amendments to the Uniform Wills Act (2015) Regarding Electronic Wills (2020 Amendments)* and commentaries be amended in accordance with the directions of the Civil Section as recorded in the minutes, and any commentaries made on the French language version with consequent adjustments to the English language version, and circulated to the Jurisdictional Representatives. Unless two or more objections are received by the Projects Coordinator of the Conference by November 30, 2020, the draft Act should be taken as adopted as a uniform Act and recommended to the jurisdictions for enactment;

THAT the commentary to the Uniform Electronic Commerce Act section 2 is modified by adding the following after the first paragraph:

As a result, the Uniform Wills Act and the Uniform Powers of Attorney Act provide for wills and powers of attorney in electronic form and provide detailed rules for the creation, alteration

or revocation of such documents. The exception in s. 2 is maintained specifically to ensure that the rules relating to wills and powers of attorney are exclusively and comprehensively set out in Wills or Powers of Attorney legislation;

AND THAT the working group continue its work and prepare amendments to the *Uniform Enduring Powers of Attorney Act (2015)* and circulate the proposed Act and Commentaries to the Jurisdictional Representatives by October 31, 2020. Unless two or more objections are received by the Projects Coordinator of the Conference by November 30, 2020, the draft Act amending the *Uniform Enduring Powers of Attorney Act (2015)* should be taken as adopted as a uniform Act and recommended to the jurisdictions for enactment.