#L-608 2/22/82

First Supplement to Memorandum 82-23

Subject: Study L-608 - Probate Law (Notice of Existence of Will)

British Columbia has a system for filing a "Wills Notice" which specifies that a will has been executed and its location. The system is purely voluntary; the failure to file a Wills Notice does not affect the validity of the will.

The Wills Notice is filed with the Wills Registry. Only a notice, not the will itself, is filed. Wills Registry has a computerized indexing system under which the existence of a notice is recorded. After the death of a testator, the executor or administrator must check with the Wills Registry to determine whether a Wills Notice is recorded. A certificate as to whether a Wills Notice is recorded is required to be filed as a part of the probate proceeding. Using this system, wills have been located which otherwise might have gone unnoticed.

The British Columbia system and other similar systems are discussed in the attached abstract of a portion of the Report on The Making and Revocation of Wills by the Law Reform Commission of British Columbia.

The Law Reform Commission of British Columbia concludes that its system is desirable and working satisfactorily and recommends no change in the system.

In California, there already is a provision for registration of information regarding an international will in the office of the Secretary of State. See Section 295.100 on pages 5 and 6 of Exhibit 1 to Memorandum 82-24. This is a voluntary registration provision. Consideration should be given to establishing a similar voluntary system for recording notice of the execution and location of a California will. If such a system is established, a fee adequate to cover filings and searches of the record should be established.

Respectfully submitted,

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Executive Secretary

EXTRACT from Report on The Making and Revocation of Wills, Law Reform Commission of British Columbia (1981).

CHAPTER VIII SAFEKEEPING AND REGISTRATION

In the past decade, increased attention has been paid to the subject of the safekeeping and registration of wills. Some jurisdictions have adopted compulsory registration schemes requiring wills to be deposited for safekeeping. In fact, in Europe an international convention on a scheme of registration of wills was recently settled. In this chapter, we shall examine the present scheme in effect in British Columbia and compare it to other statutory models.

A. The Present System in British Columbia

The *Wills Act*[1] permits a testator to file a Wills Notice without charge in a central registry operated by the Provincial Government.[2] This scheme was instituted in 1945. Unlike some schemes, no provision is made for filing the will itself, and filing of a Wills Notice is not mandatory. The Wills Notice, a copy of which is reproduced Appendix A, merely specifies the current location of a will, or records a change in its status. Supplementary notices may be filed by testators respecting revocations[3] or changes in the location of the will.[4] Failure to file, or the filing of a notice does not affect the validity of the will.[5] A survey of a number of legal systems made by the English Law Commission in 1966 indicates that the British Columbia scheme for registering Wills Notices contains several unique features.[6]

The system operates quite simply. When a solicitor prepares a will, a notice specifying its location may be forwarded to the Wills Registry. The Registry has a computerized indexing system under which the existence of a notice is recorded. After the death of a testator an executor or administrator must institute a search for a notice. A certificate will be issued[7] certifying whether any Wills Notices have been filed with the Registry. This certificate is then filed by the executor or administrator with the District Registrar of the Supreme Court prior to any application for probate.[8] We are advised that since filing of this certificate on probate applications became compulsory, wills have been located which otherwise would have gone unnoticed.

The surprisingly high volume of registrations in the Wills Registry belies criticisms of voluntary systems. In 1971 there were 19,250 notices of wills filed. Four years later this figure had doubled to 37,275, and in 1978 46,217 notices were filed with the Registry. These figures are impressive in light of the relatively small population of the Province and the fact that the scheme is not advertised. Another significant statistic is the number of positive responses to searches. The Wills Registration Division of the Vital Statistics Branch has indicated that in 1971 there were four times as many negative as positive responses issued. In 1978 the office issued 12,450 negative certificates and 7,255 positive certificates. One expects that in the future the number of positive responses will continue to increase.

The *Wills Act* only permits registration of a Wills Notice. It does not permit a testator to file the will itself, as is the case in a number of other jurisdictions. The Wills Registry nevertheless receives a number of original wills each year from testators, which it returns by registered mail.

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[1] Part II of the *Wills Act*, R.S.B.C. 1979, c. 434, ss. 33 to 40.
[2] The Director of Vital Statistics is designated as the office responsible for notices and certificates.
[3] *Supra* n. 1, s. 34.
[4] *Ibid.* s. 35.
[5] *Ibid.* s. 36.
[6] The Law Commission, Should English Wills be Registrable? (Working Paper No. 4, 1966).
[7] *Supra* n. 1, s. 38 (3).
[8] Reg. 121/61 (July 25, 1961).

B. Recent Developments in Other Jurisdictions

1. EUROPE

In Europe a number of countries have central filing systems to facilitate the location of wills after the death of the testator. In Denmark there is a central registry of all wills made before a notary public,[9] and in the Netherlands the registration of wills has been compulsory since 1918. Under Dutch law no will is valid unless it has been deposited with a notary in the presence of witnesses.[10]

In England, the Law Commission concluded in 1966 that a system of compulsory registration would be desirable:[11]

> While one cannot pretend that the present position in England is so unsatisfactory as to cry out for a remedy as a matter of urgency, we think that public dissatisfaction is unlikely to die away and public opinion may come sooner or later to accept the need for the setting up of some machinery to ensure that wills are not overlooked, to diminish the chances of their being suppressed and to do away with the time consuming and expensive searches and advertisements which solicitors now have to put in train.

In 1966 the Council of Europe, concerned about the increased mobility of testators since the advent of the Common Market, recommended that the Committee of Ministers instruct the European Committee on Legal Co-Operation to investigate the possibility of a registration system for wills. Six years later the Convention on the Establishment of a Scheme of Registration of Wills[12] was signed in Basel, Switzerland (the "Basel Convention").[13]

The purposes of the Basel Convention are concisely set out in its preamble:[14]

> Wishing to provide for a registration scheme enabling a testator to register his will in order to reduce the risk of the will remaining unknown or being found belatedly, and to facilitate the discovery of the existence of this will after the death of the testator;
>
> Convinced that such a system would facilitate in particular the finding of wills made abroad, . . .

The Convention requires registration in a signatory state of two types of wills. These can generally be classified as formal wills and, with the testator's consent, holograph wills.[15] There is a minimum level of information which must accompany a request for registration.[16] The Convention also provides for the establishment of a national body to receive requests for information and to arrange for registrations in other countries.[17]

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[9] *Supra* n. 6 at 7.

[10] *Ibid.* The Law Commission reports that apparently in practice no dispute ever arises about the authenticity of a will and that the system has won general approval.

[11] *Ibid.*

[12] May 19, 1972. *See* Council of Europe, European Treaty Series No. 77. We have been advised that the Convention came into force on March 20, 1976. To date it has been signed by Belgium, Cypress, France, The Netherlands, Turkey, Denmark, Germany, Italy, Luxembourg, Portugal, and the United Kingdom. Only the first five countries have ratified it to date.

[13] Information on the Treaty may be obtained from the Director of Information, Council of Europe, 67 Strasbourg, France.

[14] The Convention at 1.

[15] *See* Article 4 for specific wording of the requirements.

[16] *Ibid.* Article 7 which provides:

> The request for registration shall contain the following information at least:
> (a) Family name and first name(s) of testator or author of deed (and maiden name, where applicable);
> (b) Date and place (or, if this is not known, country) of birth;
> (c) Address or domicile, as declared;
> (d) Nature and date of deed of which registration is requested;
> (e) Name and address of the notary, public authority or person who received the deed or with whom it is deposited.

[17] *Ibid.* Article 3.

2. The United States

Provision is made in many states for the safekeeping of a will during the testator's lifetime. Most of these schemes feature complex administrative procedures governing the confidentiality of the will, the form of receipts, and fees. In contrast, the Uniform Probate Code merely provides for the deposit of a will, and leaves questions of administration to the local Rules of Court.[18]

No specific provision is made in the Uniform Probate Code for the development of a central filing system for depositing wills or Wills Notices. The commentary contained therein, however, suggests that it may be desirable to develop a central index in the United States. The rationale put forward for such a system is that as citizens become more mobile the likelihood that a testator will not die in the jurisdiction where his will is deposited increases.[19]

In 1973 the Diplomatic Conference on Wills held in Washington, D.C.[20] (at which the terms of the International Will were decided upon) passed a resolution[21] recommending to the States which participated at the Conference,[22] that they establish a system to facilitate the safekeeping, search and discovery of an international will.[23]

In 1977 the National Conference of Commissioners on Uniform State Laws considered a will registration system and suggested that two factors would encourage the development of a system in the future.[24] General acceptance of the international will would mean that testators would come to rely on a single will to dispose of their property, wherever located. Secondly, the increasing mobility of individual testators would create a need for new methods of safekeeping and locating wills.[25]

The Conference promulgated an optional section of the Uniform Probate Code providing for international will information registration.[26] It is distinguishable on a number of points from the earlier section of the Code providing for the deposit of wills. In particular, the will itself is not deposited, only information respecting international wills is accepted, and the scheme is voluntary. We are not aware of any American jurisdiction which has adopted these new proposals as of this date.

3. Canada

Three of the four provinces which adopted the Convention providing a Uniform Law on the Form of an International Will enacted legislation requiring the establishment of a compulsory registration system.[27] In two of the provinces, the legislation is in force[28] and in one, it is awaiting proclamation.[29]

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[18] The Uniform Probate Code S2-901 which provides in part:

A will may be deposited by the testator or his agent with any Court for safekeeping, under rules of the Court. The will shall be kept confidential. During the testator's lifetime a deposited will shall be delivered only to him or to a person authorized in writing signed by him to receive the will.

[19] U.P.C. Comment to Sec. 2-901 at 67.

[20] *See* K. Nadelmann, *The Formal Validity of Wills and the Washington Convention 1973 providing the Form of an International Will* (1974) 22 Am. J. Comp. Law 365.

[21] For text *see* Nadelmann, *ibid.* at 383; *see also* Report on the International Convention Providing a Uniform Law on the Form of the International Will, Ontario Law Reform Commission (1974) at 29.

[22] Canada and the U.S.A. were participants.

[23] The resolution refers to the Registration Convention contained in Appendix H as an example to be followed.

[24] 1977 Proceedings of the 86th National Conference of Commissioners on Uniform States Laws at 358.

[25] *Ibid.* at 363.

[26] Section 2-1010, Uniform Probate Code which provides (in part):

The [Secretary of State] shall establish a registry system by which authorized persons may register in a central information center, information regarding the execution of international wills, keeping that information in strictest confidence until the death of the maker . . .

[27] Manitoba, Alberta and Newfoundland.

[28] Alberta and Newfoundland.

[29] Manitoba.

Only in Alberta, however, has such a scheme actually been implemented.[30] These statutes require that where a member of the law society has acted during any month in respect of an international will he must file certain information with a Registrar before the 10th day of the following month.[31] Although filing is compulsory, the failure to file does not affect the validity of the will.[32] The legislation enables the Attorney General to establish either a "registration" system or a "registration and safekeeping" system. In Alberta, the regulation provides for both safekeeping and registration.[33]

In Ontario, legislation does not specifically require registration of international wills. However a deposit system has been operative for some time.[34] A person may voluntarily deposit his will for safekeeping with the local Surrogate Court Registrar on payment of a nominal fee. Although this scheme has been in existence for some time, it is apparently rarely used.[35] Frequency of use may be increasing however, since we understand that some community clinics which prepare wills recommend their deposit as a matter of course.

A study of a similar system for the deposit of wills in England[36] noted that the system was being almost completely ignored.[37] This is surprising in view of the experience of the Wills Registry in this Province, where testators sometimes submit original wills although not encouraged to do so.

The Board of Notaries of the Province of Quebec has established a sophisticated and comprehensive system for the registration of information concerning wills. Of the three forms of will permitted in Quebec,[38] the most common form, authentic wills, requires the presence of a notary.[39] Under the *Notaries Act* the Board of Notaries maintains a central register of wills[40] to which all notaries must file a report each month showing the number of wills executed *en minute*.[41] Failure to file a report is an offence for the notary who thereby becomes liable to pay a fine.[42] The failure to file the requested information does not affect the validity of a will. We are advised by the Board of Notaries that since 1961 they have registered 1.5 million wills and have made around 40,000 searches for wills. In the past year, for example, there were 114,292 registrations and 5,684 searches.[43] This compulsory registration service is operated and controlled by the profession and not directly by the provincial government.

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[30] In Alberta, as of March 1, 1979, the Public Trustee has been designated to maintain the register. In Newfoundland we are advised that a system is to become operational in the near future. In Manitoba, we are advised that it will be at least a year before implementation is considered.

[31] Manitoba: S.M. 1975, c. 6, s. 59 (1);
Alberta: S.A. 1976, c. 57, s. 55.
Newfoundland: S.N. 1975-76, c. 23, s. 41.

[32] *See, e.g.*, S.M. 1975, c. 6, s. 59 (2).

[33] Alberta O.C. 116/79, Feb. 6, 1975.

[34] *The Surrogate Court Act*, R.S.O. 1970, c. 451, s. 17 provides:
The office of the registrar is a depository for all wills of living persons given to him for safekeeping, and the registrar shall receive and keep the same upon payment of such fees and under such regulations as are prescribed by the surrogate court rules.

[35] At a 1953 symposium on Wills and the Administration of Estates a leading member of the Ontario Estate Bar commented that he had had never heard of anyone using the deposit provision. (1953) 31 Can. B. Rev. 353 at 366. This may be changing, however, with the advent of community legal clinics. In view of the transient natures of their clientele, clinic personnel are encouraged to deposit wills.

[36] Section 172 of the *Supreme Court of Judicature (Consolidation) Act 1925* provides that: "There shall, under the control and direction of the High Court, be provided safe and convenient depositories for the custody of the wills of living persons, and any person may deposit his will therein on payment of such fees and subject to such regulations as may from time to time be prescribed by the President of the Probate Division."

[37] The Law Commission, Should English Wills Be Registrable? (1966) Working Paper No. 4 at 6.

[38] The English (or formal) will, the holograph will and the authentic will. (*Civil Code*, Article 842).

[39] Wills in notarial or authentic form can be made either before two notaries or a notary and two witnesses. (*Civil Code*, Art. 843.).

[40] *The Notaries Act*, R.S.Q. 1964, c. 70, as amended, s. 138.

[41] *Ibid.* s. 141a; *see also* By-laws of the Chamber of Notaries, s. 2.01.

[42] *Ibid.* s. 141c.

[43] Letter from Secretary to Chambre des Notaires du Quebec to Law Reform Commission, March 13, 1979.

C. Conclusions

In any jurisdiction requiring compulsory registration, there exists some body with the power to control one of the participants in the execution process. In Alberta, lawyers assist in preparing international wills. In Quebec and Holland notaries prepare "authentic" wills. These groups are subject to control by their governing professional bodies, which ensure compliance with compulsory registration requirements.

Under the scheme in force in British Columbia, a person is free to make his will in private without the involvement of the legal profession. Thus, to impose a registration requirement as a condition of validity could be regarded as a serious inroad on this freedom. Compulsory registration also rouses the spectre of the citizens in the Province having to file in a central system personal and confidential information. For this reason, we cannot support a compulsory regime of will registration, and are of the opinion that the present system should be continued as a voluntary one. We are buttressed in our view by the comment we received respecting a similar conclusion in our Working Paper. It would appear to us that there is no need at this time for, or any interest in, a compulsory registration scheme.